

Litigating Over the Automatic Stay and Discharge Injunction Violations

Presented by:
The Hon. Paul Baisier
Robert Furr, Esq.

Written by:
Darren Hensley
Kimberly Miller
Law Clerks to The Hon. Paul Baisier

Procedural Options for Redressing Violations of the Automatic Stay and the Discharge Injunction

Two of the most fundamental debtor protections offered by the Bankruptcy Code are the automatic stay of 11 U.S.C. § 362(a) and the discharge injunction of 11 U.S.C. § 524(a). Upon the filing of the petition, the automatic stay of Section 362(a) arises to prohibit nearly all actions taken against the debtor or property of the bankruptcy estate. *See* 11 U.S.C. § 362(a)(1) – (8).¹ The scope of the automatic stay is broad—subject to some exceptions in Section 362(b)—and remains in place throughout the pendency of the case unless a creditor obtains relief from the stay prior to its expiration under 11 U.S.C. § 362(d), or the stay expires or terminates under 11 U.S.C. § 362(c). The stay of an act against property of the estate expires when the property is no longer property of the bankruptcy estate. 11 U.S.C. § 362(c)(1). The stay of other actions under Section 362(a) expires upon the earlier of: (1) the closing of the case; (2) the dismissal of the case; or (3) the entry of the discharge order. 11 U.S.C. § 362(c)(2).

Once the discharge is granted, certain protections that were afforded by Section 362(a) to prohibit collections against the debtor personally are replaced by the discharge injunction of 11 U.S.C. § 524(a). *See Beiter v. Chase Home Finance, LLC (In re Beiter)*, 554 B.R. 433, 437 (Bankr. S.D. Ohio 2016). In a way, the discharge injunction of Section 524(a) operates as a “permanent

¹ The legislative history of Section 362 illustrates the integral role the automatic stay plays for both debtors and creditors in the bankruptcy process:

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

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R.Rep. No. 95–595, at 340 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97.

extension” of the stay of Section 362(a) to prohibit a wide range of collection activities, including “letters, phone calls, threats of criminal proceedings or other adverse actions brought about with the purpose of debt repayment.” *Navarro v. Banco Popular de P.R. (In re McConnie Navarro)*, 563 B.R. 127, 141 (Bankr. D. P.R. 2017) (internal citation and quotation omitted).

Although the overall effects of both the automatic stay and discharge injunction are largely the same—to protect the debtor from collection efforts—the methods by which parties may redress violations of the automatic stay and discharge injunction differ.

I. The Automatic Stay

As noted *supra*, the automatic stay of Section 362(a) prohibits various activities against the debtor and property of the bankruptcy estate.²

² Such actions include:

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- (4) any act to create, perfect, or enforce any lien against property of the estate;
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
- (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
- (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
- (0) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

¹¹ U.S.C. § 362(a)(1)-(8).

An act taken in violation of the automatic stay can be addressed either through the statutory remedy of 11 U.S.C. § 362(k) or through a civil contempt action under 11 U.S.C. § 105(a).

A. Statutory Remedy for Stay Violation

Section 362(k)(1) of the Bankruptcy Code³ provides a statutory cause of action for willful violations of the automatic stay, and provides that “an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.” 11 U.S.C. § 362(k)(1). The number of elements required to make a showing of a willful violation under Section 362(k) run the gamut but are substantively the same. *Compare Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1555 (11th Cir. 1996) (finding a willful violation where the creditor “(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay”), *with In re Slabicki*, 466 B.R. 572, 577-78 (B.A.P. 1st Cir. 2012) (stating that a willful stay violation under Section 362(k)(1) requires proof of three elements: “(1) that a violation of the automatic stay occurred; (2) that the violation was willfully committed; and (3) that the debtor suffered damages as a result of the violation.”), *and Bertuccio v. Cal. State Contractors Lic. Board, (In re Bertuccio)*, 414 B.R. 604, 611 (Bankr. N.D. Cal. 2008), *aff'd*, 2011 WL 1158022 (N.D. Cal. Mar. 28, 2011) (noting that four elements must be demonstrated Section 362(k): “(1) a bankruptcy petition was filed; (2) the debtor is an individual; (3) the creditor received notice of the petition; (4) the creditor's actions were in willful violation of the stay; and (5) the debtor suffered damages”).

Generally, a stay violation may be pursued under 11 U.S.C. § 362(k)(1) where the debtor can show that the offending party had notice of the automatic stay and intended to commit the act that violated the stay. *See, e.g., Houck v. Substitute Trustee Services, Inc.*, 791 F.3d 473, 484 (4th

³ Prior to the 2005 BAPCPA, Section 362(k)(1) was designated as Section 362(h).

Cir. 2015). To demonstrate notice of the automatic stay, the debtor need only prove that the creditor had actual notice of the bankruptcy filing. *In re Swindle*, 584 B.R. 259, 264 (Bankr. N.D. Ill. 2018).⁴

In *In re Lienhard*, 498 B.R. 443 (Bankr. M.D. Pa. 2013), a creditor had mailed various invoices to the debtor post-petition using the “Mailbox Rule” that mailing was service. The creditor argued that it had never received notice of the bankruptcy, despite the debtor’s assertions that she had mailed a copy of the notice of her Section 341 meeting to the creditor. 498 B.R. at 448-50. At trial, the creditor presented evidence demonstrating that the address listed on the bankruptcy notice contained an incorrect zip code and only the partial name of the creditor.⁵ *Id.* at 448. Additionally, the only employees of the creditor who handle its mail testified that they had not learned of the bankruptcy until after the invoices were sent, upon contact by the debtor’s counsel. *Id.* at 448-50. Moreover, the employees testified that through the creditor’s mail-handling policies, they never received the bankruptcy notice. *Id.* at 449. These facts rebutted the presumption of receipt.

Moreover, a party with notice of the bankruptcy is also charged with notice of the existence and implication of the automatic stay; in other words, “knowledge” of the bankruptcy equates with “knowledge” of the automatic stay and its legal implications. *See In re Martinez*, 561 B.R. 132, 157 (Bankr. D. Nev. 2016). Knowledge of the existence of the bankruptcy case, and thereby knowledge of the automatic stay, is also considered by courts in determining the willfulness of the

⁴ Either unofficial oral notice or written notice of the bankruptcy can constitute legally sufficient notice for the purposes of a willful stay violation analysis under 11 U.S.C. § 362(k). *In re Will*, 303 B.R. 357, 364 (Bankr. N.D. Ill. 2003) (citing cases). In the case of *In re Warren*, 532 B.R. 655, 662 (Bankr. D. S.C. 2015), the court found that a telephone call to the creditor by the debtor’s roommate, as well as an email from debtor’s attorney, both regarding the bankruptcy, constituted actual notice to the creditor.

⁵ The name of the creditor is “Lehighton Ambulance Association” but the mailing notice only said “Lehighton Ambulance.” *Lienhard*, 498 B.R. at 448.

stay violation. *In re Traversa*, 585 B.R. 215, 220 (Bankr. E.D. Pa. 2018). As to willfulness under Section 362(k), an act rises to the level of “willful” when the creditor intends the act that violates the stay. *In re Highsmith*, 542 B.R. 738, 747-48 (Bankr. M.D. N.C. 2015) (concluding that a willful violation occurs when the creditor intentionally commits the act that violates the stay). Hence, a creditor need not act with a specific intent to violate the stay to be found liable under Section 362(k); rather, the proper question is whether the creditor acted intentionally when it took the act that violates the automatic stay. *In re Young*, 497 B.R. 904, 918 (Bankr. W.D. Ark. 2013). Moreover, inaction can constitute a willful stay violation under Section 362(k). *Robb v. Nat'l Tree Co. (In re Robb)*, 399 B.R. 171, 175-76 (Bankr. N.D. W. Va. 2008) (noting that inactions that can constitute willful violations, including: failure to return repossessed vehicle; failure to update credit report; failure to release garnished funds; and withholding privileges until payment of an obligation); *see also In re Banks*, 253 B.R. 25, 31 (Bankr. E.D. Mich. 2000) (explaining that an omission can constitute a willful violation of the stay “when a creditor fails to cure a previous violation of the stay or otherwise restore the status quo.”).

Not only can creditors be found in willful violation of the stay, but attorneys can as well. For example, in *In re Grey*, 567 B.R. 841 (Bankr. W.D. Wash. 2017), the creditor and creditor’s counsel were found jointly and severally liable for willfully violating the automatic stay when, after being noticed with the debtors’ bankruptcy petition, they failed to affirmatively quash warrants for the debtors’ arrest based on the debtors’ failure to appear at a hearing regarding a judgment held by the creditor. The court in *Grey* found the creditor and its attorney “had an affirmative duty, upon learning of [the debtors’] bankruptcy filing, to contact the [sheriff] and inform [it] of the bankruptcy filing and ensure the orders issuing bench warrants and the bench warrants themselves were quashed.” *Id.* at 846.

In a case where creditor's actions were found not to constitute willful stay violations, the court in *Malloy v. J & V Developers, Inc. (In re Malloy)* 572 B.R. 551 (Bankr. E.D. Pa. 2017) found that harassing communications allegedly sent by the judgment creditor to the debtor did not rise to the level of willful violations of the stay. Central to the court's finding that no willful violations occurred were: (1) the fact that some communications never solicited or expressed a request for payment of a debt, but rather only reference discipline proceedings involving the debtor's husband and his suspension from the practice of law; (2) the debtor failed to demonstrate that the communications came from the creditor; and (3) other vulgar communications, though vulgar, were sent to the debtor's husband and failed to reference a debt or request a payment. *Id.* at 556-560.

When litigating a willful stay violation under 11 U.S.C. § 362(k)(1), it is important to remember the shifting burdens in the analysis. First, the debtor bears the burden of providing the creditor with notice of the bankruptcy. *In re Lopez*, 492 B.R. 595, 607 (Bankr. D. P.R. 2013). Once the creditor has received actual notice, the burden shifts to the creditor to halt, prevent, or discontinue violations of the automatic stay. *In re Rielly*, 545 B.R. 435, 443 (Bankr. D. Mass. 2016).

B. Civil Contempt Remedy for Stay Violation

In addition to the statutory cause of action under Section 362(k) for pursuing a stay violation, debtors may also seek redress for such actions through civil contempt pursuant to 11 U.S.C. § 105. The availability of civil contempt as a method for redressing stay violations outside of Section 362(k) arises from the notion that the automatic stay itself is “essentially a court-ordered injunction, [such that] any person or entity who violates the stay may be found in contempt of court.” *Jove, supra*, 92 F.3d at 1546 (citing *Carver v. Carver*, 954 F.2d 1573, 1578 (11th Cir.),

cert. denied, 506 U.S. 986, 113 S.Ct. 496, 121 L.Ed.2d 434 (1992)).

This idea, coupled with the language of Section 105(a), which permits the bankruptcy court to “issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this Title”,⁶ permits the award of damages for automatic stay violations under the bankruptcy court’s powers of civil contempt. *Id.* at 1554 (explaining that Section 105 “grants courts independent statutory powers to award monetary and other forms of relief for automatic stay violations to the extent such awards are necessary and appropriate to carry out the provisions of the Bankruptcy Code.”) (internal quotations omitted). Thus, bankruptcy courts have an independent statutory basis under 11 U.S.C. § 105(a) to award sanctions for violations of the automatic stay where such an award is “‘necessary or appropriate’ to carry out the provisions of the Bankruptcy Code.” *In re Allied Holdings, Inc.*, 355 B.R. 372, 378 (Bankr. N.D. Ga. 2006) (quoting *Jove*, 92 F.3d at 1554).⁷

The elements necessary to find a party in civil contempt for a stay violation under Section 105 are nearly identical for finding a willful violation under Section 362(k). The aggrieved party must show: “(i) the alleged contemnor committed an act that violated the automatic stay with general intent to commit the act and (ii) with knowledge of the automatic stay.” *In re Sayeh*, 445 B.R. 19, 28 (Bankr. D. Mass. 2011). Thus, a sufficient showing for willful stay violation under Section 362(k) will also likely be found sufficient under Section 105.

Two fundamental purposes are served by the imposition of sanctions for a willful stay violation under the court’s civil contempt powers: “(1) [to] compensate the complainant for losses

⁶ 11 U.S.C. § 105(a).

⁷ There are some courts that have found that Section 105 and contempt proceedings are unavailable for pursuing stay violations. *See In re Rimsat*, 208 B.R. 910, 912-13 (Bankr. N.D. Ind. 1997) (explaining that civil contempt requires a violation of a court order, and because the automatic stay of 11 U.S.C. § 362 is not a court order, there is no basis for civil contempt).

and expenses it incurred because of the contemptuous act, and (2) [to] coerce the contemnor into complying with the court order.” *Jove*, 92 F.3d at 1557; *see also In re Tanner*, 2017 WL 3641575, at *8 (Bankr. N.D. Iowa, Aug. 23, 2017) (“It is well-settled that the purpose of a civil contempt sanction is either to coerce the contemnor into future compliance with the court's order or to compensate the complainant for losses resulting from the contemnor's past noncompliance.”) (citation omitted).

There are instances, however, where a court will not impose civil contempt sanctions under Section 105, even where the creditor is found to have violated the automatic stay. In *In re PM Cross, LLC*, 494 B.R. 607 (Bankr. D. N.H. 2013), the creditor completed its foreclosure sale after the filing of the petition and with knowledge of the bankruptcy case. *Id.* at 612-14. However, prior to addressing the stay violation, the court first found that the corporate Chapter 11 debtor filed the case in bad faith and therefore found a sufficient basis to dismiss the case under 11 U.S.C. § 1112(b). *Id.* at 620-21. In its contempt analysis for the stay violation, the court explained that because the instant case was found to be filed in bad faith, it was unwilling to hold the creditor in contempt and assess damages against it for the stay violation. *Id.* at 622. Rather, the court explained that its civil contempt powers are discretionary in nature, such that it was not obligated to hold the creditor in contempt even for a willful violation of the automatic stay. *Id.* Thus, the court declined to hold the creditor in civil contempt for its willful stay violation. *Id.*

Some distinctions exist between the civil contempt method of redressing stay violations under 11 U.S.C. § 105(a) and the statutory cause of action under 11 U.S.C. § 362(k). One such distinction is the types of parties who may seek relief under each theory. As discussed in more detail *infra*, not all parties may pursue willful stay violations under Section 362(k), as many courts have interpreted the word “individual” in 11 U.S.C. § 362(k) to mean only natural persons. Thus,

parties like trustees and corporate debtors must utilize Section 105 to address stay violations.

Additionally, the extent to which a court has discretion to award damages for a willful violation of the stay may differ between Section 105 and Section 362(k). This difference in the mandatory versus permissive nature of damages stems from the language of the two statutes. Section 105 contains permissive language: “[t]he court *may* issue any order . . . that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a) (emphasis added). Conversely, Section 362(k) contains mandatory language: “an individual injured. . . *shall* recover actual damages. . .” 11 U.S.C. § 362(k)(1) (emphasis added). Courts have noted this divergence in the mandatory language of Section 362(k) and the permissive language of Section 105(a) as one of the most significant differences between the two theories of relief. *See In re Roman*, 283 B.R. 1, 14, fn.11 (B.A.P. 9th Cir. 2002); *Jove, supra*, 92 F.3d at 1559; *Johnston Envtl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 620 (9th Cir. 1993).

II. Discharge Injunction

Under 11 U.S.C. § 524, creditors are enjoined from taking any actions to collect debts that have been discharged in a bankruptcy case to protect the “fresh start” concept embodied in the Bankruptcy Code. *See Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1388-89 (11th Cir. 1996). The Section 524 injunction is broad and protects debtors from any efforts that seek to apply pressure as a means for extracting repayment of a discharged obligation. *See Gray v. McCormick (In re Gray)*, 2017 WL 5125537, *3 (Bankr. N.D. Ga. Nov. 3, 2017), quoting *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1321 (11th Cir. 2015); *see also Henriquez v. Green Tree Svcing, LLC (In re Henriquez)*, 536 B.R. 341, 345 (Bankr. N.D. Ga. 2015).⁸

⁸ Section 524(a)(2) provides as follows:

(a) A discharge in a case under this title—

A willful violation of the discharge injunction under Section 524 occurs when it is shown that: (1) the creditor knew the injunction was invoked, *i.e.* the debtor had received a discharge on the obligation at issue, and (2) the creditor intended the acts that violated the injunction. *Gray, supra*, 2017 WL 5125537, at *3, citing *Hardy, supra*, 97 F.3d at 1390, and *McLean, supra*, 794 F.3d at 1323.⁹ Once a willful violation is established, the bankruptcy court may impose sanctions under the statutory contempt powers of Section 105.¹⁰ *Gray, supra*, *3, citing *McLean, supra*, 794 F.3d at 1319; *Jove, supra*, 92 F.3d at 1554; *see also Ginsberg v. Evergreen Security, Ltd. (In re Evergreen Security, Ltd.)*, 570 F.3d 1257, 1273 (11th Cir. 2009).

A debtor is required to file a motion to reopen his or her bankruptcy case before seeking an adjudication based on an alleged willful violation of the discharge injunction, although the bankruptcy court may reopen the case *sua sponte* when a debtor files a motion seeking such adjudication. Compare *Gray, supra*, 2017 WL 5125537, at *3 (treating motion requesting damages as requesting reopening of case).¹¹ The filing of an adversary proceeding is not necessary to seek

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived....

¹¹ 11 U.S.C. § 524(a)(2).

⁹ The test for determining willful violations of the discharge injunction is substantially similar to the test used in analyzing violations of the automatic stay. *See Hardy, supra*, 97 F.3d at 1390 (citing *Jove, supra*, 92 F.3d at 1555, and finding in a contempt proceeding under Section 105 that the test for determining willfulness for violations of the automatic stay is applicable for determining willfulness of violations of the discharge injunction).

¹⁰ Unlike Section 362, Section 524 does not have an express provision allowing damages for violations of the discharge injunction. *See Hardy, supra*, 97 F.3d at 1389; *In re Nassoko*, 405 B.R. 515, 520 (Bankr. S.D. N.Y. 2009). Although Section 524 does not provide a private right of action to redress injury as Section 362(h)(now Section 362(k)) has been described (*see In re Meyers*, 344 B.R. 61, 64 (Bankr. E.D. Pa. 2006)), recognizing their inherent power to award damages for willful stay violations as part of their civil contempt power, courts have invoked their statutory contempt power in Section 105 as a source of authority for enforcing the discharge injunction. *See In re Wallace*, 2011 WL 1335822, *5 (Bankr. M.D. Fla. April 5, 2011); *In re Wynne*, 422 B.R. 763, 768 (Bankr. M.D. Fla. 2010), citing *Hardy, supra*, 97 F.3d at 1389; *In re WVF Acquisitions, LLC*, 420 B.R. 902, 912 (Bankr. S.D. Fla. 2009); *In re Singleton*, 269 B.R. 270, 275 (Bankr. D. R.I. 2001). *See also Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000).

¹¹ *See* 11 U.S.C. § 350(b); Fed.R.Bankr.P. 5010. The reopening fee is waived for pursuit of discharge violations. *See* 28 U.S.C. § 1930(b) and Bankruptcy Court Miscellaneous Fee Schedule.

damages for willful violation of the discharge injunction and such relief may be pursued by motion. *See Wallace, supra*, 2011 WL 1335822, at *5. Motions for contempt are governed by Federal Rule of Bankruptcy Procedure 9020, which provides for application of F.R.B.P. 9014 practice as a contested matter. It may be necessary to commence an adversary proceeding, however, if injunctive relief is sought. *See generally Kilbourne v. CitiMortgage Inc. (In re Kilbourne)*, 507 B.R. 219, 222-23 (Bankr. S.D. Ohio 2014)(denying motion to dismiss because debtors brought adversary proceeding instead of filing motion); *In re Motichko*, 395 B.R. 25, 32 (Bankr. N.D. Ohio 2008)(court denied motion to dismiss complaint finding debtors asserted sufficient claim for relief and a dismissal to require refiling would not be appropriate); *In re Bock*, 297 B.R. 22, 32 (Bankr. W.D. N.C. 2002)(contempt for violation of stay or discharge injunction pursued by motion). *See also Green Point Credit, supra*, 794 F.3d 1313, 1326.

Availability of Contempt Sanctions for Intentional but “Good Faith” Violations

I. Violation of the Automatic Stay

As mentioned above, the automatic stay of Section 362 protects debtors and creditors, and its effect is immediate upon the filing of a petition on all persons and entities irrespective of notice.¹² Acts taken subsequent to such filing to enforce collection of a prepetition debt or other acts as specified in the Bankruptcy Code constitute a violation of the automatic stay and are void *ab initio* and of no effect. *See Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982). Due to the stay’s automatic imposition, a party may take an action that violates the stay without even knowing the stay is in effect. In other situations, knowing violations may occur through the mistaken belief that such actions are permitted. Finally, in still other situations, a party may take an intentional act against a debtor or property of the bankruptcy estate after a case has been filed and with knowledge of such filing, disregarding the stay.

The automatic stay has been likened to an order of the court (*Hubbard v. Fleet Mortg. Co.*, 810 F.2d 778 (8th Cir. 1987)), and a knowing and willful act taken in violation of the stay may thus be punishable as contempt of court, subjecting the party to sanctions such as “actual damages, including costs and attorney’s fees.” *See generally Carver v. Carver*, 954 F.2d 1573, 1578 (11th Cir.), *cert. denied*, 506 U.S. 986, 113 S.Ct. 496, 121 L.Ed.2d 434 (1992)(referring to former Section 362(h)); *see also Jove Eng'g, Inc. v. Internal Revenue Service*, 92 F.3d 1539, 1555 (11th Cir. 1996); *In re Adams*, 516 B.R. 361, 369 (Bankr. S.D.

¹² “When a bankruptcy petition is filed, an automatic stay operates as a self-executing injunction. The stay prevents creditors from taking any collection actions against the debtor or the property of the debtor's estate for pre-petition debts.” [*Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 354–55 \(5th Cir. 2008\)](#).

Miss. 2014)(stating that because “the automatic stay is essentially a court-ordered injunction, any creditor who violates the stay may be held in contempt of court”).¹³

“Congress has provided a debtor with a private right of action for any ‘willful violation’” of the automatic stay. *Adams, supra*, 516 B.R. at 368, quoting [Campbell, supra, 545 F.3d at 355](#). The Bankruptcy Code provides that “an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.” [11 U.S.C. § 362\(k\)\(1\)](#). To recover statutory damages, “(1) the defendant must have known of the existence of the stay; (2) the defendant's acts must have been intentional; and (3) these acts must have violated the stay.” [Brown v. Chesnut \(In re Chesnut\), 422 F.3d 298, 302 \(5th Cir. 2005\)](#).¹⁴

Prior to the 2005 amendments, Section 362(k) was designated as Section 362(h).¹⁵ Because these subsections only provide relief to “individuals,” which has been held not to include corporations, corporate debtors may seek relief using Section 105(a). *See In re Allied Holdings, Inc.*, 355 B.R. 372, 378 (Bankr. N.D. Ga. 2006), citing *Jove Eng’g, supra*, 92 F.2d at 1554.¹⁶

¹³ The power of a bankruptcy court “to conduct civil contempt proceedings and issue orders in accordance with the outcome of those proceedings lies in [11 U.S.C. § 105](#).” [Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. \(In re Terrebonne Fuel & Lube, Inc.\)](#), 108 F.3d 609, 613 (5th Cir. 1997). Bankruptcy courts have the power to hold entities in civil contempt under [Section 105\(a\)](#), but not in criminal contempt. [Sanchez v. Ameriquest Mortg. Co. \(In re Sanchez\)](#), 372 B.R. 289, 309 (Bankr. S.D. Tex. 2007).

¹⁴ *Chesnut* discusses the elements of a stay violation under [Section 362\(h\)](#), but this section “was re-codified into [section 362\(k\)](#) per the Bankruptcy Abuse Prevention Consumer Protection Act of 2005....” [Young v. Repine \(In re Repine\)](#), 536 F.3d 512, 517 n.4 (5th Cir. 2008).

¹⁵ Before enactment of former Section 362(h) in 1984, sanctions could be imposed for a willful stay violation under the authority of the bankruptcy court to hold parties in contempt. Under the standard governing contempt actions, a party could mount a successful defense by showing that it had acted in the absence of malice and had a good faith argument and belief that the actions in question did not constitute a stay violation. *See In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1104 (2d Cir. 1990), citing *In re Comtek Elecs.*, 28 B.R. 829, 832 (Bankr. S.D. N.Y. 1983).

¹⁶ As observed by the court in the recent decision of *Unlimited Homes, Inc. v. The Bank of New York Mellon (In re Unlimited Homes, Inc.)*, 2018 WL 1054095, *2 (Bankr. N.D. Ga. Feb. 23, 2018), *Jove, supra*, explained that Section 105 grants a statutory contempt power, as distinguished from a court’s inherent contempt power, and unlike Section 362(h)(now Section 362(k)), relief through damages is permissive, not mandatory, and Section 105(a) does not provide

Under *Jove*, a willful violation is shown if the party “(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay.” 92 F.2d at 1554. Absence of evidence tending to prove either that the creditor intended to violate the stay or that it acted with malice would not preclude a finding of contempt or assessment of appropriate sanctions in the circumstances. Damages for stay violations can be awarded to corporate debtors to compensate for actual losses and to coerce compliance with the stay. *Allied Holdings, supra*, 355 B.R. at 378.

Addressing the scope of contempt power under Section 105, the court in *In re WVF Acquisitions, LLC*, 420 B.R. 902, 912 (Bankr. S.D. Fla. 2009), first noted that in *Jove, supra*, 92 F.3d at 1553 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)), the Eleventh Circuit stated that a court’s inherent contempt power “is concurrent with, and not displaced by” statutory provisions dealing with such conduct. In other words, Section 105 is not the sole authority for deciding contempt matters in a bankruptcy case. In *WVF, supra*, 420 B.R. at 913-15, the court went on to hold that although it did not have a constitutional basis to entertain criminal contempt, it did have authority under Section 105 to award punitive damages to address the egregious conduct of a party in violating the automatic stay. *Contra Unlimited Homes, supra*, 2018 WL 1054095, at *2; *In re Lickman*, 288 B.R. 291, 292 (Bankr. M.D. Fla. 2003).

The advice of counsel does not insulate willful conduct from sanction. *See Homer Nat’l Bank v. Namie*, 96 B.R. 652, 654 (W.D. La. 1989). Moreover, creditors remain obligated not only to cease actions that violate the stay, but must also redress or undo them (*In re Wright*, 75 B.R. 414 (M.D. Fla. 1987)), especially so that they do not otherwise become willful violations. *See In re Braught*, 307 B.R. 399 (Bankr. S.D.N.Y. 2004)(creditor had affirmative

authority to impose punitive damages. An award should be entered to the extent “necessary or appropriate” to effectuate the terms of the Bankruptcy Code in the court’s discretion. The court also concluded that an absence of malice does not prohibit a finding of contempt. *Unlimited Homes, supra*, at *2-*3.

duty to move for vacating of default judgment); *In re Keen*, 301 B.R. 749 (Bankr. S.D. Fla. 2003)(filing for entry of default judgment absent notice of case violated stay, but was not a willful violation; however, subsequent failure to vacate same did constitute such a violation); *In re Taylor*, 190 B.R. 459 (Bankr. S.D. Fla. 1995); *Mitchell Constr. Co. v. Smith (In re Smith)*, 180 B.R. 311 (Bankr. N.D. Ga. 1995); *see also In re Burbano*, 2017 WL 1058219, at *5-*6 (Bankr. N.D. Ga. Mar. 20, 2017), *rev'd on procedural grounds, Grange Mut. Ins. Co. v. Burbano*, Civil Action No. 1:17-CV-1194-ODE (N.D. Ga. Aug. 30, 2017)(creditor had affirmative duty to provide amended release to lift suspension of debtor's drivers' license)(citations omitted).¹⁷ Discussing the scope of the duty to remedy a stay violation, the court in *In re Kline*, 472 B.R. 98, 104 (B.A.P. 10th Cir. 2012) found that although service of a foreclosure complaint was void, the creditors were not liable for a willful stay violation since they ceased all action after learning of the bankruptcy filing and only resumed once stay relief had been obtained. *See also In re Houchens*, 85 B.R. 152 (Bankr. N.D. Fla. 1988) (unintentional violation by including prayer for deficiency judgment in foreclosure complaint that was immediately corrected, not subject to contempt remedy).¹⁸

An understanding of the “good faith” defense to sanctions for alleged violations of the automatic stay benefits from an appreciation of the developments in the law regarding

¹⁷ The court also noted by analogy that in some circumstances, a garnishing creditor cannot be held responsible if “it has made a good faith effort to ensure the garnishment stops.” 2017 WL 1058219, *6, n. 4, citing *Buchanan v. First Family Fin. Servs. (In re Buchanan)*, 273 B.R. 749, 751 (Bankr. M.D. Ga. 2002).

¹⁸ As discussed below, creditors may also file a motion to annul the stay. To avoid potential liability, however, they should first take measures to stop active prosecution of such a complaint so that its filing is not seen as an attempt to collect on their debt or judgment. Similarly, in cases where a bad faith filing is suspected, the cautious creditor should seek dismissal of the case or relief from stay on those grounds as opposed to acting first and seeking an adjudication later. *See generally Mutual Ben. Life Ins. v. Pinetree, Ltd.*, 876 F.2d 34, 38 (5th Cir. 1989)(warning that in cases where issue exists as to whether property is property of the estate, creditor who chooses to proceed with foreclosure and to litigate title issue afterward runs serious risk of incurring liability).

remedies for such violations.¹⁹ As noted above, before enactment of former Section 362(h) in 1984, sanctions could be imposed for a willful violation of the stay under the bankruptcy court's authority to hold parties in contempt. A party defending a contempt action could present a viable defense by showing that it had acted without malice and had a good faith argument and belief that its actions did not violate the automatic stay. *See Crysen/Montenay Energy, supra*, 902 F.2d at 1104 (2d Cir. 1990), citing *Comtek Elecs., supra*, 28 B.R. 829, 832.²⁰

Under Section 362(h), however, bankruptcy courts were granted an independent basis, separate from their contempt power, to impose sanctions for stay violations.²¹ As a result, some circuit courts held that a willful violation is established using a less stringent test than maliciousness or bad faith, as when the evidence supports a finding that the creditor had knowledge of the stay and intended the actions in dispute—thus, it is not necessary to show that the creditor specifically intended to violate the stay to establish willfulness. *Crysen/Montenay, supra*, 902 F.2d at 1104 (discussing cases).²² Actual damages could be awarded for such violations, and

¹⁹ *See Internal Revenue Service v. Murphy*, 892 F.3d 29, 36-38 (1st Cir. 2018)(containing an excellent review of the law's development regarding the meaning of willful violation).

²⁰ Although acts taken in violation of the stay are void, it had been held that the actor's liability or "willfulness" must still be addressed because stay violations are not analogous to strict liability torts. *Vahlsing v. Commercial Union Ins.*, 928 F.2d 486, 489-90 (1st Cir. 1991). In *Vahlsing*, the court noted that Section 362(h) was not yet available as a remedy to the debtor, and so willfulness was reviewed under other theories. *See also Nelson v. Taglienti (In re Nelson)*, 994 F.2d 42, 45 (1st Cir. 1993)(finding no willful stay violation because creditor's belief that property at issue was not property of the estate was reasonable).

²¹ As reasoned in *McLaughlin v. Fireman's Trust Mortg. Corp. (In re McLaughlin)*, 96 B.R. 554, 558 (Bankr. E.D. Pa. 1989), although enactment of Section 362(h) did not totally alter the receptivity of bankruptcy courts to a "good faith" defense, the rationale in *Comtek, supra*, was no longer applicable under Section 362(h).

²² *See e.g. Cuffee v. Atlantic Bus. and Cmty. Corp. (In re Atlantic Bus. and Cmty. Corp.)*, 901 F.2d 325, 329 (3d Cir. 1990)(good faith belief that defendant possessed a right to the property at issue was irrelevant to willfulness determination regarding violation of stay), quoting *In re Bloom*, 875 F.2d 224, 227 (9th Cir. 1989)(finding of "willful" violation *not* dependent on specific intent to violate stay); *see also In re Taylor*, 884 F.2d 478, 482-83 (9th Cir. 1989)(court rejected asserted good faith reliance on advice of counsel that stay was no longer in effect). *See also Hampton v. Yam's Choice Plus Autos, Inc., (In re Hampton)*, 319 B.R. 163, 170-71 (Bankr.E.D.Ark.2005)(to recover damages for a stay violation under former Section 362(h), party must show that: "(1) a violation occurred; (2) the

further, upon a showing of maliciousness or bad faith, punitive damages could also be awarded. *Id.* at 1105.²³ With regard to attorney’s fees, as observed in *McLaughlin*, *supra*, 96 B.R. at 55859, some courts will not impose fees for conduct that is “merely erroneous” versus “maliciously willful.”²⁴ Attorney’s fees awards for stay violations under Section 362(h) in the face of a “good faith” defense were not always robust in amount, thus indicating courts used their discretion to address the particularities in the situation presented.²⁵ As such, presentation of a “good faith” defense can remain an important and viable option in seeking to limit potential damages.²⁶

Assertion of this defense now occurs under the governing legal standard of Section 362(k)²⁷, where willfulness itself still does not require an intention to violate the stay and a

violation was committed willfully; (3) the violation caused actual damages.”)(citations omitted); and *see IRS v. Murphy*, *supra*, 892 F.3d at 38 (good faith belief not relevant to willfulness under Section 362 or Section 524).

²³ *See In re Crawford*, 476 B.R. 83 (S.D. N.Y. 2012)(mortgage lender who conducted foreclosure sale had effective notice of bankruptcy petition and willfully violated stay, case remanded for determination of whether creditor acted with malice or bad faith as to support award of punitive damages); *see also In re Wallace*, 2011 W.L. 1335822 (Bankr. M.D. Fla. April 5, 2011)(discussing standards for awarding punitive damages for violation of discharge injunction); compare *In re Holley*, 473 B.R. 212 (Bankr. E.D. Mich. 2012)(court lacks authority to award punitive damages for violation of discharge injunction).

²⁴ *See In re Bain*, 64 B.R. 581, 584 (W.D. Va. 1986); *In re Zurich*, 88 B.R. 721, 725-26 (W.D. Pa. 1988); *In re Ross*, 83 B.R. 673 (Bankr. E.D. Mo. 1988).

²⁵ *See e.g. In re DeLay*, 48 B.R. 282, 287 (W.D. Mo. 1984)(fee reduced from \$1,000.00 to \$250.00); *In re Houchens*, 85 B.R. 152, 154-55 (Bankr. N.D. Fla. 1988)(in addition to awarding debtor’s counsel \$50.00, court awarded creditor’s attorney \$350.00 under Fed.R.Bankr.P. 9011 because debtor’s counsel did not first ask creditor to desist before filing suit). The court in *McLaughlin*, *supra*, did not deny the fee request, but awarded less than the amount requested (96 B.R. at 563-64), thus reiterating the principle that the amount of fees awarded must be reasonable. *See In re Dawson*, 346 B.R. 503, 516 (Bankr. N.D. Cal. 2006); *see also In re Parker*, 515 B.R. 337, 346 (Bankr. M.D. Ala. 2014) (discussing *Dawson* for proposition that fee award under Section 362(k) still properly includes consideration of prosecution of legal action and is not limited to fees incurred in stopping the violation at issue). Damages are awarded under Section 362(k) based on the occurrence of injury—not just because the stay was violated. *Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263, 1268 n. 8 (11th Cir. 2014); *In re Morris*, 514 B.R. 658, 667-68 (Bankr. N.D. Ala. 2014) (granting summary judgment in favor of creditor).

²⁶ As further cautioned in *McLaughlin*, *supra*, 96 B.R. at 560, though “good faith” may serve as a defense to monetary penalties, parties should seek declaratory relief prior to acting in such situations, especially if the facts present a close call. Ignorance of the law cannot be encouraged or tolerated in the guise of an appropriate defense. *See also In re AM Int’l*, 53 B.R. 744, 746-47 (Bankr. M.D. Tenn. 1985).

²⁷ Enacted in 2005, Section 362(k) provides that “an individual *injured* by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney’s fees, and, in appropriate circumstances, may

“creditor’s “good faith” belief that he is not violating the automatic stay provision is not determinative of willfulness....” *Lansaw v. Zokaite* (*In re Lansaw*), 853 F.3d 657, 664 n. 4 (3d Cir. 2017), quoting *Lansdale Family Rests., Inc. v. Weis Food Serv. (In re Lansdale Family Rests., Inc.)*, 977 F.2d 826, 829 (3d Cir. 1992).²⁸ As noted, under Section 362(k), after proving that a stay violation occurred, a plaintiff must establish willfulness under two prongs as follows: that the creditor ““(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay.”” *Burbano, supra*, 2017 WL 1058219, at *2, quoting *Jove Eng'g, Inc. v. I.R.S., supra*, 92 F.3d 1539, 1555. Importantly, here the plaintiff need only show the creditor had knowledge that the stay was in place and intended the action in question—again, it is *not necessary* to show the creditor *intended* that such action violate the stay. *Id.* (citations omitted). Once the test is met and evidence of injury is shown, the plaintiff “shall recover actual damages.” Yet, as seen in *Burbano*, examining the request for damages, the court still found relevant the creditor’s cooperation with the debtor in providing the needed release. 2017 WL 1058219, at *8.²⁹

recover punitive damages.” 11 U.S.C. § 362(k)(previously codified at 11 U.S.C. § 362(h))(emphasis added). Through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub.L. No. 109–8, Stat. 119 Stat. 23 (2005), subsection (2) was added to § 362(h) and the provision was recodified as Section 362(k).

²⁸ In *Lansdale, supra*, the court found the creditor’s argument that it did not violate the stay because it did not actually pressure the debtor insufficient since it did intentionally apply delivery payments to pre-petition debt as shown on the monthly statements it prepared. 977 F.2d at 829. See also *In re Pawlowicz*, 337 B.R. 640 (Bankr. N.D. Ohio 2005)(“good faith” belief of pawnbroker does not insulate it from finding of willfulness, citing *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 191 (9th Cir. 1995)). In *Cox v. Billy Pounds Motors, Inc. (In re Cox)*, 214 B.R. 635, 641 (Bankr. N.D. Ala. 1997), the defendant argued that its employee mistakenly believed that the debtor’s case had been dismissed and that the stay had terminated by operation of law. The court ruled, however, that an asserted defense of good faith would not absolve the creditor of liability in repossessing the debtor’s car in a civil contempt matter and that the creditor could have verified the status of the case with the court before acting against the property.

²⁹ In *Gordon v. Wilson (In re Wilson)*, 454 B.R. 546, 551 (Bankr. N.D. Ga. 2011), the court stated that once a showing is made that a willful violation occurred, the creditor may show difficulties it encountered complying with the stay, “including evidence of substantial, if not complete, compliance with a court order made as part of a *good faith effort* to comply with the stay.” Citing, *Jove, supra*, 92 F.3d at 1556-57; *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990)(emphasis supplied). In *Wilson*, the trustee also relied on the alternate avenue of recovery under Section 105(a) seeking damages and fees as sanctions for civil contempt. The court did not delineate whether evidence of compliance was confined to an analysis of willfulness, damages, or both.

Although the statutory remedy of Section 362(k) supplements the civil contempt remedy, it does not displace it. As the latter is intended to enforce compliance and compensate an injured party, when applied it is a remedial measure and imposition of sanctions is not dependent on whether the offending party “acted in good faith or without willfulness or a specific intent to violate a court order.” *In re Odom*, 570 B.R. 718, 722 (Bankr. E.D. Pa. 2017),³⁰ citing *University Med. Ctr. v. Sullivan*, 122 B.R. 919, 932 (E.D. Pa. 1990), *aff’d sub nom.*, *In re University Med. Ctr.*, 973 F.2d 1065 (3d Cir. 1992);³¹ *see also In re Littke*, 105 B.R. 905, 910 (Bankr. N.D. Ind. 1989)(citations omitted)(good discussion of willfulness standard).³²

The following decisions illustrate other situations in which courts have addressed presentation of the good faith defense. In *In re Nicole Gas Prod., Ltd.*, 502 B.R. 508 (Bankr. S.D. Ohio 2013) rejected an asserted defense that the parties’ good faith belief in the propriety of their actions shielded them from liability.³³ First, the court noted it did not need to address whether a chapter 7 trustee qualified as an “individual” under Section 362(k), because it could

³⁰ In *Odom*, a debtor sought relief against a city agency for actions taken regarding prepetition parking tickets. The court noted that the debtor had chosen to proceed under Section 105, instead of Section 362(k), but found no real difference between the two avenues for relief. 570 B.R. at 722 n. 13.

³¹ Because good faith is *not* a defense under this provision, a determination that a claimant's acts amount to a willful violation of the stay is not altered by a claimant's good faith, but erroneous, belief that his acts were not stayed. *See Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th Cir.1989)(construing willfulness in Section 362(h)); *see also University Med. Ctr., supra*, 973 F.2d at 1088 (citations omitted), cited in *Weisberger v. United States (In re Weisberger)*, 205 B.R. 727, 731 (Bankr. M.D. Pa. 1997). Judge Frank, the author of the *Odom* decision, however, did recognize a limited exception in Section 362(k) in the case of *In re Mu’min*, 374 B.R. 149, 167-68 (Bankr. E.D.Pa. 2007)(*see discussion below*).

³² Again, the court noted that once a finding of civil contempt is entered, there is broad discretion in crafting a suitable remedy as needed to make reparation and restore the parties to their positions prior to the violation of the injunction. *Odom, supra*, 570 B.R. at 723.

³³ In this case, the court entered an order to show cause on motion of the chapter 7 trustee directing certain parties to appear and show cause why they should not be held in contempt and sanctioned for an alleged stay violation.

rely on its power under Section 105(a). The court then held that filing a state court complaint regarding a cause of action that belonged to the estate violated the stay despite the parties' argument that they had carefully considered whether such action was permitted. 502 B.R. at 515, citing *Gnesys, Inc. v. Greene*, 437 F.3d 482, 493 (6th Cir. 2005).³⁴

The effect of Section 362(k) was considered in *In re Mu'Min*, 374 B.R. 149 (Bankr. E.D. Pa. 2007), where the debtor alleged a university willfully violated the stay by withholding a copy of her certified transcript due to nonpayment of fees entitling her to damages. Discussing the good faith defense, the court observed that when Congress enacted BAPCPA, it modified Section 362(h)(now Section 362(k)) such that this defense was narrowed and the limited good faith exception articulated by the Third Circuit in *University Med. Ctr., supra*, 973 F.2d at 1088 (no willful violation when ambiguity in the law does not provide fair warning that subject act is not allowed) superseded. 374 B.R. at 167-69.

In *Mu'min, supra*, the court concluded that under Section 362(k)(2), Congress intended to clarify the good faith question and specifically limited the scope of this defense. As a result, there is only one statutory exception to the damage remedy, which applies "if the violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor," such that "the automatic stay has terminated because a debtor fails to perform his or her

³⁴ As stated by the Sixth Circuit in *Gnesys*, "[g]ood faith is not a defense [to a finding of liability] in civil contempt proceedings." 437 F.3d at 493, citing *Glover v. Johnson*, 934 F.2d 703, 708 (6th Cir. 1991). In addition, "willfulness is not an element of civil contempt, but the state of mind of the contemnor is relevant only in the consideration of sanctions." *Gnesys, supra*, citing *Rogers v. Webster*, 776 F.2d 607, 612 (6th Cir. 1985). In a subsequent decision in the Nicole Gas bankruptcy case, the court stated, however, that "[g]ood faith is not a defense to a finding of civil contempt, but it may in certain circumstances serve to mitigate the sanctions imposed for the contempt." See *In re Nicole Gas Prod., Ltd.*, 519 B.R. 723, 735 (Bankr. S.D. Ohio 2014), *aff'd*, 581 B.R. 843 (B.A.P. 6th Cir. 2018), *appeal filed*, No. 18-3301(6th Cir. Apr. 4, 2018). The court noted a split of authority regarding whether a trustee qualifies as an individual entitled to bring suit under Section 362(k), but that it did not need to decide this question since the trustee was proceeding under Section 105 and the court's authority to impose sanctions for contempt. 519 B.R. at 736.

obligations under § 521(a)(2) in a timely manner,” and further limits any recovery to “actual damages” for willful violation of the automatic stay. 374 B.R. at 168-69. On this basis, the court found that the university did not state sufficient grounds for using this defense.³⁵ See also *In re Douglas Young Builder, Inc.*, 2009 WL 2827959 (Bankr. E.D. Pa. Sept. 1, 2009) (quoting *Mu'min, supra*, extensively, Judge Fehling awarded actual damages, but not punitive damages, after considering landlord’s statements in connection with changing locks, citing *Cuffee, supra*, 901 F.2d at 329 (good faith defense not relevant)); cited in *Cox, supra*, 214 B.R. at 641 n. 6.³⁶

Similarly, in the case of *In re Stringer*, 586 B.R. 435 (Bankr. S.D. Ohio 2018), the court, finding that a judgment creditor and his attorney willfully violated the stay in filing a garnishment action, reiterated that a good faith belief in its claim against an asset is not relevant to willfulness. Good faith belief that an asset is not part of a bankruptcy estate does not overcome the substantive protections afforded by the automatic stay and creditor’s duty to seek relief before taking action against such property. 586 B.R. at 443-44, citing *Johnson v. Smith (In re Johnson)*, 501 F.3d 1163, 1173 (10th Cir. 2007), citing *Brown v. Chesnut, supra*, 422 F.3d at 302, quoting *Taylor, supra*, 884 F.2d at 482; *Bloom, supra*, 875 F.2d at 227. See also *In re House*, 2017 WL 2579026, at *2 (Bankr. S.D. Miss. June 14, 2017).

³⁵ This conclusion regarding the scope of a good faith defense was criticized in *In re Stancil*, 487 B.R. 331, 343-44 (Bankr. D. D.C. 2013), where the court drew a distinction between a defense of lack of willfulness, which it construed to be at issue in *University Med. Ctr., supra*, and a defense of good faith. The court reasoned that reliance upon unsettled law in connection with acts that violate the stay goes to the former, *i.e.*, a lack of willfulness, and not the latter. Thus, the court concluded, *University Med. Ctr.* was not legislatively overruled.

³⁶ In *In re Theokary*, 444 B.R. 306, 323 n. 30 (Bankr. E.D. Pa. 2011), Judge Frank repeated his previous conclusion from *Mu'min, supra*, that the codification of a good faith defense in Section 362(k)(2) acted to overrule the exception as stated in *University Med. Ctr., supra*, but even if it survived it was not met in that case because the legal principles upon which the defendants relied were not sufficiently unsettled to support such a defense. (This opinion was modified on other grounds. See 460 B.R. 418 (Bankr. E.D. Pa. 2011) and 2013 WL 5823849 (E.D. Pa. Oct. 29, 2013)).

In *Stancil*, *supra*, 487 B.R. at 342-44, the court reasoned that because “[Section 362\(k\)](#) is a parallel remedy to civil contempt, with the added ability to recover punitive damages in appropriate circumstances,” such a comparison bolsters the notion that “lack of a specific intent to violate the stay is not a defense to § 362(k) liability.” Moreover, “[j]ust as good faith is not a defense to civil contempt (*see* [McComb v. Jacksonville Paper Co.](#), 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1949)), good faith is not a defense to a [§ 362\(k\)](#) claim.” 487 B.R. at 342-43. *See also* [Univ. Med. Ctr.](#), *supra*, 973 F.2d at 1088 (interpreting [Section 362\(h\)](#)). Although the court disagreed with *Mu’min*, *supra*, regarding the continued viability of the defense discussed in *University Med. Ctr.*, the court stated that when Congress added a good faith defense in [Section 362\(k\)\(2\)](#), this change made it more certain that good faith is not otherwise a defense under Section 362(k). 487 B.R. at 343. *See also* *In re Warren*, 532 B.R. 655, 662-63 (Bankr. D. S.C. 2015) (citing *Stancil*, *supra*, that creditor’s belief not material for stay violation). Similarly, in *In re McCool*, 446 B.R. 819, 823 (Bankr. N.D. Ohio 2010), the court held that a finding of willfulness for a stay violation is not defeated by allegations of good faith that the creditor’s actions were in fact lawful. *See also* *In re Cherry*, 247 B.R. 176, 187 (Bankr. E.D. Va. 2000)(state of mind not relevant in connection with contemnor’s violation of a court order, in that case the discharge injunction), citing *McComb*, *supra*, 336 U.S. at 191.

In *In re Zurich*, 88 B.R. 721, 725 (Bankr. W.D. Pa. 1988), however, the court, in construing former Section 362(h), stated that sanctions for contempt may not be warranted when a litigant has acted in good faith. (Creditor attempted to execute on judgment by retaining funds received post-petition under prepetition garnishment). *See also* *In re Himes*, 2014 WL 2442062 (Bankr. C.D. Ill. May 29, 2014)(citing *Zunich*, *supra*); *In re Ring*, 178

B.R. 570, 577 n. 12 (Bankr. S.D. Ga. 1995)(case involving corporate entity seeking relief, court noted higher burden of proof for civil contempt (requiring maliciousness or bad faith) as compared to willfulness under Section 362(h) and availability of good faith defense for the former citing *In re Chateaugay Corp.*, 920 F.2d 183, 184-87 (2d Cir. 1990)).

II. Violation of the Discharge Injunction

As stated above, a willful violation of the discharge injunction under Section 524 is established when it is shown that: (1) the creditor knew the injunction was invoked, *i.e.* the debtor had received a discharge on the obligation at issue, and (2) the creditor intended the acts that violated the injunction. *Gray, supra*, 2017 WL 5125537, at *3, citing *Hardy, supra*, 97 F.3d at 1390, and *McLean, supra*, 794 F.3d at 1323.³⁷ Once a willful violation is proven, the bankruptcy court has authority to impose sanctions under the statutory contempt powers of Section 105.³⁸ *Gray, supra*, *3, citing *McLean, supra*, 794 F.3d at 1319; *Jove, supra*, 92 F.3d at 1554; *see also Ginsberg v. Evergreen Security, Ltd. (In re Evergreen Security, Ltd.)*, 570 F.3d 1257, 1273 (11th Cir. 2009). Violations are highly fact specific. For instance, in *Gray, supra*, the court assessed damages due to the hardship imposed on a debtor and his family obtaining a new lease because of erroneous information reported to the credit reporting agencies despite the creditor's awareness of the discharge.³⁹

³⁷ The test for determining a willful violation of the discharge injunction is substantially similar to the test used for examining violations of the automatic stay. *See Hardy, supra*, 97 F.3d at 1390 (citing *Jove, supra*, 92 F.3d at 1555)(contempt proceeding under Section 105).

³⁸ Unlike Section 362, Section 524 does not include an express provision allowing an award of damages for violations of the discharge injunction. *See Hardy, supra*, 97 F.3d at 1389; *Nassoko, supra*, 405 B.R. at 520. Further, even though Section 524 does not provide a private right of action to redress injury as does Section 362(k), courts invoke their statutory contempt power rooted in Section 105 to enforce the discharge injunction. *See Wallace, supra*, 2011 WL 1335822 at *5; *Wynne, supra*, 422 B.R. at 768 (Bankr. M.D. Fla. 2010), citing *Hardy, supra*, 97 F.3d at 1389.

³⁹ If the court finds the creditor received notice of the discharge, the debtor will only have to prove that the creditor intended the actions that violated the injunction. *Gray, supra*, 2017 WL 5125537, at *3.

By comparison, in *Giles v. James B. Nutter & Co. (In re Giles)*, 502 B.R. 892 (Bankr. N.D. Ga. 2013), the court entered judgment for the creditor finding that certain phone calls and statements to credit reporting agencies did not constitute violations under Section 524(a)(2). Focusing on the exception provided in Section 524(j), the court stated that the discharge injunction only applies to acts seeking “to collect or recover a discharged debt as a ‘personal liability’ of the debtor.” 502 B.R. at 902.⁴⁰ In *Giles*, the creditor established the following: (1) that it continued to hold a security interest in the underlying real property; (2) that it routinely made phone calls informing the debtor of late payments and inspected the property as part of its ordinary business practices; and (3) that it confined its actions to recovery of late payments. 502 B.R. at 902-03.⁴¹ The court emphasized that although a discharge releases a debtor’s personal liability on a debt, the debt itself is not extinguished, and so the reporting of same does not violate the discharge injunction. 502 B.R. at 904, citing *In re Mahoney*, 368 B.R. 579, 584 (Bankr. W.D. Tex. 2007); *In re Irby*, 337 B.R. 293, 295 (Bankr. N.D. Ohio 2005); *In re Vogt*, 257 B.R. 65, 70 (Bankr. D. Colo. 2000). See also *In re Jones*, 367 B.R. 564, 569-70 (Bankr. E.D. Va. 2007)(courts must distinguish between acts seeking to collect a debt *and* acts that may have some other lawful

⁴⁰ Section 524(j) provides as follows:

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—

(1) such creditor retains a security interest in real property that is the principal residence of the debtor;

(2) such act is in the ordinary course of business between the creditor and the debtor; and

(3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

11 U.S.C. § 524(j).

⁴¹ In *Giles*, the court noted that the focus in Section 524(j) lies on “the normal or usual practices between the creditor and the debtor occurring after the entry of the discharge order [and] the salient factors include the timing of the contacts, the purpose of the contacts, and variations in the overall pattern of contacts....” 502 B.R. at 902.

purpose). The court in *Giles, supra*, further noted that, unlike Section 362(k), Section 524(a)(2) does not grant a private cause of action for damages and alleged violations must be addressed through the court's contempt powers. 502 B.R. at 905, citing *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002); *Cox v. Zale Delaware, Inc.*, 239 F.3d 910, 917 (7th Cir. 2001); and *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422 (6th Cir. 2000). See also *Joubert v. ABN AMRO Mortgage Group, Inc. (In re Joubert)*, 411 F.3d 452, 456 (3d Cir. 2005).

As noted, the discharge injunction under Section 524 differs from the stay under Section 362 in that it does not create a private right of action, and one court has stated that because relief for an alleged violation is considered using the court's contempt powers, a defendant is not precluded from offering a "good faith" defense on substantive grounds. See *In re Mariner Post-Acute Network*, 329 B.R. 481, 487 (Bankr. D. Del. 2005), distinguishing *Lansdale, supra*, 977 F.2d at 829.⁴² In *Mariner*, the court was receptive to the defendants' argument that they held a "good faith belief in the validity of [their] actions" believing them to be supported by sound legal authority. More specifically, reliance on their legal conclusion was not held to have been asserted in bad faith and their stated concern that they had to assert the counterclaims for fear of waiver was justified under the law. 329 B.R. at 487-88.⁴³ As

⁴² The court cited *Hardy, supra*, 97 F.3d 1384, 1389, as authority for the rule that under Section 524, courts must look to Section 105(a) and its contempt powers. 329 B.R. at 487. *Hardy* is often cited in answering the question of what "willfulness" means when considering an alleged discharge injunction violation. See e.g. *In re Almond*, 2007 WL 1345224, *5 (Bankr. M.D. N.C. May 7, 2007)(adopting *Hardy* test of knowledge of the injunction and intending the action in question (97 F.3d at 1390)). In *Almond*, the court observed that although state of mind is generally not relevant to a finding of civil contempt (since it serves a remedial purpose), an examination into willfulness as defined in *Hardy* is relevant in the discharge injunction violation context. 2007 WL 1345224, at *5. In *In re Malone*, 2012 WL 162374, *6-*7 (Bankr. W.D. N.C. Jan. 19, 2012), the court cited *Almond, supra*, in concluding that an allegation of good faith or that a defendant lacked specific intent to violate the discharge injunction are not viable defenses.

⁴³ Citing *Langton v. Johnston*, 928 F.2d 1206, 1220 (1st Cir. 1991), the defendants had argued that their conduct could not be sanctioned as contempt because they did not act in bad faith and further, any analogy to the standard for willfulness under Section 362(h) must fail since a cause of action under Section 524 requires an analysis under Section 105 and the court's contempt powers. 329 B.R. at 486-87, citing *Joubert, supra*, 411 F.3d at 456 (concluding Section

contrasted with Section 362(k), recovery of damages is discretionary in contempt proceedings for discharge injunction violations. In this case, although the defendants were found in contempt, the court used this discretion to consider the good faith of the defendants and found no award of sanctions was warranted. *Id.* at 488-89.

In the case of *Henriquez, supra*, the court concluded, similar to *Giles, supra*, that not every post-discharge communication between a creditor and debtor is prohibited, drawing on the fact that a discharge does not eliminate a secured creditor's lien. 536 B.R. at 345, citing *Mele v. Bank of America Home Loans (In re Mele)*, 486 B.R. 546, 555 (Bankr. N.D. Ga. 2013)(debtor's distress arising from receipt of correspondence from lender was due to debtor's misunderstanding of effect of her discharge and its impact on obligation secured by her home, and not due to any violation of the discharge injunction); *In re Gill*, 529 B.R. 31, 37 (Bankr. W.D. N.Y. 2015) (prohibited communications extend only those designed to recover or offset debt as personal liability).⁴⁴ *Henriquez* also contains a helpful discussion of *Hardy, supra*, 97 F.3d at 1390, and the test for willfulness in terms of civil contempt. 536 B.R. at 345.

In the case of *Golden v. Carrington Mortg. Serv. LLC (In re Golden)*, 568 B.R. 838 (Bankr. M.D. Ala. 2017), the court also held that the mortgage servicer did not violate the discharge injunction by sending mortgage delinquency notices and notice of intent to foreclose. The court noted considerable authority for the proposition that acts "reasonably taken to service a mortgage or to foreclose a mortgage" may not always be construed as violations of the discharge injunction. 568 B.R. at 841, citing *Thomas v. Seterus, Inc. (In re Thomas)*, 554 B.R. 512 (Bankr. M.D. Ala.

524, by itself or joined with [section 105\(a\)](#), does not suggest a private right of action for damages for discharge injunction violations); [Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 422-23 \(6th Cir. 2000\)](#)(distinguishing Section 524 from private right of action as expressly granted by Section 362(h)); *Hardy, supra*, 97 F.3d at 1389 (Section 105 and its contempt powers must be used to award damages).

⁴⁴ In *Gill, supra*, 529 B.R. at 37-38, the court also discusses the safe harbor provision in Section 524(j).

2016); *see also Morris v. Wells Fargo, N.A. (In re Morris)*, 514 B.R. 658 (Bankr. N.D. Ala. 2014) (holding such acts did not violate automatic stay). Because the creditor retained the right to foreclose, sending notices did not otherwise violate the injunction. *Golden, supra*, 568 B.R. at 841-42. The court further observed, however, that actions taken outside its routine mortgage servicing practices may be sufficient to establish a willful violation. *See Nibbelink v. Wells Fargo Bank, N.A. (In re Nibbelink)*, 403 B.R. 113 (Bankr. M.D. Fla. 2009)(egregious actions prevented mortgagor from refinancing); *Collins v. Wealthbridge Mortg. Corp. (In re Collins)*, 474 B.R. 317 (Bankr. D. Me. 2012)(sending collection letters following foreclosure sale caused violation).

In *In re Ritchey*, 512 B.R. 847 (Bankr. S.D. Tex. 2014), however, the court held that an omitted creditor violated the discharge injunction in filing a state court action to collect a debt. Testimony that the creditor did not intend to harm debtor was irrelevant since the intention to file the lawsuit is determinative. 512 B.R. at 859, citing *In re Garcia*, 2013 WL 414177, at *6 (Bankr. W.D. Tex. Feb. 1, 2013)(subjective beliefs of creditor not relevant); *In re Thompson*, 456 B.R. 121, 137 (Bankr. M.D. Fla. 2010); *In re Pague*, 2010 WL 1416120, at *3 (Bankr. N.D. W.Va. Apr. 5, 2010)(state of mind not relevant to finding of contempt).

The *Ritchey* court stated, “there is no affirmative defense of bona fide error for violation of discharge injunction actions.” *Ritchey, supra*, 512 B.R. at 859, citing *Garcia, supra* 2013 WL 414177, at *6, *McCool v. Beneficial (In re McCool)*, 446 B.R. 819, 823 (Bankr. N.D. Ohio 2010) (finding of willfulness for stay violation not defeated by allegations that creditor acted in good faith belief that its actions were lawful). The court also cited *In re Cherry*, 247 B.R. 176, 187 (Bankr. E.D. Va. 2000), where a chapter 7 debtor brought a contempt action for violation of the discharge injunction. Addressing the meaning of a “willful” violation under Section 524, the court in *Cherry* agreed with the holding in *Hardy, supra*, 97 F.3d at 1390, that use of the

standard employed for determining whether a stay violation was willful pursuant to Section 362 was appropriate since a defendant's subjective beliefs were not the focus in either situation. The court then stated that "[i]n a civil contempt proceeding [such as a discharge injunction action under Section 105], the state of mind with which the contemnor violated a court order is irrelevant and therefore good faith, or the absence of an intent to violate the order, is no defense." 247 B.R. at 187 citing *McComb v. Jacksonville Paper, supra*, 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed.2d 599. Thus, the court applied precedent from the stay violation context.

Discussing the willfulness standard, the court in *In re Tucker*, 526 B.R. 616, 621 (Bankr. W.D. Va. 2015) quoted *Cherry, supra*, 247 B.R. at 188, stating that "[i]n a civil contempt proceeding, the state of mind with which the contemnor violated a court order is irrelevant and therefore good faith, or the absence of an intent to violate the order, is no defense." *See also Bradley v. Fina (In re Fina)*, 550 Fed.App'x. 150, 154 (4th Cir. 2014)(citations omitted) (*Fina* was also cited in *In re Gecy*, 510 B.R. 510, 523 (Bankr. D. S.C. 2014)). But, as stated in *In re Lang*, 398 B.R. 1, 4 (Bankr. N.D. Iowa 2008), "as long as a creditor has a good faith basis for believing that its debt was excepted from discharge or ... had no knowledge of any such discharge, the creditor is not subject to sanctions for violating the discharge injunction when it proceeds in state court." *In re Everly*, 346 B.R. 791, 797–98 (8th Cir. B.A.P. 2006)(cites legislative history).

Although the authority of the court to impose punitive damages as a sanction for civil contempt has been questioned under Section 105 (*see e.g. In re Riser*, 298 B.R. 469 (Bankr. M.D. Fla. 2003)), courts address state of mind in connection with their determination of the justification for an award of such damages. For instance, in *In re Kirby*, 2003 WL 21251993 (Bankr. S.D. Ill. May 28, 2003), the court denied a debtor's request for punitive damages for willful violation of the discharge injunction, holding that although the conduct of the creditor was clearly deliberate, there

was no evidence of a malevolent intent or a clear disregard and disrespect of the bankruptcy laws. Likewise, the court in [*In re Vazquez*, 221 B.R. 222 \(Bankr. N.D. Ill. 1998\)](#), held punitive damages would not be assessed against a law firm that represented a creditor in its post-discharge collection activity, since the attorneys took reasonably prompt action to dismiss the collection action once they verified the debtor had received a discharge.

In [*In re James*, 285 B.R. 114 \(Bankr. W.D. N.Y. 2002\)](#), the court was not willing to assess punitive damages against a creditor for a willful violation of the discharge injunction, because no evidence of a persistent pattern of misconduct had been presented. Similarly, the court in [*In re Bock*, 297 B.R. 22 \(Bankr. W.D. N.C. 2002\)](#), held that punitive damages would not be assessed against defendants who willfully violated the discharge injunction, but whose conduct did not otherwise suggest an egregious or malevolent nature based on the evidence. *Compare Cherry, supra*, 247 B.R. 176 (observing some courts appear to employ a finding of conduct beyond willfulness or deliberation, and more closely resembling a specific intent to violate the discharge injunction, as a basis for awarding punitive damages).

A definitive answer to the viability of the good faith defense in this context may soon be forthcoming as the United States Supreme Court has granted *certiorari* to hear *Lorenzen v. Taggart* (*In re Taggart*), 888 F.3d 438 (9th Cir. 2018), *cert. granted*, 2019 WL 98543, No. 18-489 (Jan. 4, 2019). There, the circuit court held that creditors' good faith belief that they could pursue an award of attorney's fees incurred post-discharge without violating the discharge injunction was sufficient to preclude a finding of contempt. The Ninth Circuit employed the *Hardy* test crafting a strict standard under its first prong regarding an alleged violator's actual knowledge of the injunction and applicability to its claim, so that subjective good faith belief may prevent a finding of willfulness. *See Taggart*, 888 F.3d at 443-44, citing *Zilog, Inc. v. Corning (In re Zilog, Inc.)*, 450

F.3d 996, 1007-08, 1009 n. 14 (9th Cir. 2006).⁴⁵ In *Taggart*, the court upheld the appellate panel's decision reversing a bankruptcy court's entry of an order awarding contempt sanctions.

Section 524 also addresses violations in Section 524(i) and states as follows:

The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

See 11 U.S.C. § 524(i). Again, two relevant inquiries are presented: (1) whether the creditor *willfully* failed to credit payments received under a plan; and (2) whether the act of the creditor to collect and failure to credit payments caused *material injury* to the debtor. As to the first inquiry:

[a]s in section 362(k)(1), willfulness should be interpreted to mean simply that the creditor intended to commit the act, i.e., credit the payment in the manner it did; the debtor should not need to prove that the creditor intended to violate the Code or the plan provisions. Absent a creditor's proof that the improper crediting was a mistake in conflict with the creditor's normal procedures, the creditor should be presumed to have intended its acts.

4 *Collier on Bankruptcy* ¶ 524.08, at 524-64.7 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2018). Regarding material injury, "the failure to properly credit payments will almost always result in a higher payoff balance for the debtor and therefore a larger lien on the debtor's property than if the payments were credited properly." *Collier* ¶ 524.08, at 524-64.8.

Although Section 524(i) explains how the discharge injunction can be violated, it does not explain how to address such a violation. Once a court has found that a discharge violation has occurred, similar to a violation under Section 524(a)(2), it has authority to award damages under Section 105(a). *See generally Hardy, supra*, 97 F.3d at 1389. Such an award can include in proper

⁴⁵ In *In re Torres*, 2018 WL 6729615, *6 (Bankr. C.D. Cal. Dec. 21, 2018), a bankruptcy court followed *Taggart* in holding that contempt sanctions were prohibited since the defendant credibly testified that he did not know the discharge injunction applied to his actions in state court.

instances compensatory damages, damages for emotional distress, and attorney's fees. *Hardy, supra*, 97 F.3d at 1389; *see also Gray, supra*, 2017 WL 5125537, at *4 (court awarded damages based on difficulty obtaining lease due to erroneous information on credit reports requiring debtor's family to live in a hotel, and to compensate for time taken off work to attend related court hearing, emotional distress, and time in prosecuting the motion); *McLean, supra*, 794 F.3d at 1325.

The court found the reasoning set forth in *Collier* persuasive in *Scott v. Caliber Home Loans, Inc. (In re Scott)*, 2015 WL 9986691 (Bankr. N.D. Okla. July 28, 2015). In *Scott*, a creditor acknowledged in its Notice of Final Cure Payment that its claims had been paid the amount needed to cure the default on its claim and that the debtors were current under 11 U.S.C. § 1322(b)(5). After the debtors received their discharge, the creditor informed them they were still delinquent including late charges. Summary judgment was granted for debtors based on a willful violation.

In another case following such reasoning, *Ridley v. M&T Bank (In re Ridley)*, 572 B.R. 352 (Bankr. E.D. Okla. 2017), a creditor acknowledged in its Notice of Final Cure Payment that the debtor was current with all prepetition and post-petition default payments. The debtor received his discharge and continued paying his mortgage payments. Two months later, the creditor sent notices that the account was deficient. The debtor argued that the creditor violated the discharge injunction by continuing to show him in default when it attempted to collect late fees and other charges after the completion of the chapter 13 plan and the creditor had acknowledged debtor was current. The debtor sought relief under the court's civil contempt powers and Section 105(a).

The court found the willfulness requirement had been met because the creditor's employees followed procedures to show the debtor's account was in default, and the creditor had intended its actions. Since the debtor had been forced to bring the action so the payments would be properly applied to his account, the court awarded punitive damages and lost wages.

**Evidentiary Standards & Damages
for Automatic Stay and Discharge Injunction Violations**

I. Stay Violation

Willful violations of the automatic stay can be addressed under 11 U.S.C. § 362(k) or 11 U.S.C. § 105(a). Depending upon which route is utilized by the aggrieved party, the evidentiary standards required to prove a willful violation, as well as the types of damages available, may differ.

A. Evidentiary Standards

When pursuing an automatic stay violation under Section 362(k), most courts require the debtor to prove the willful violation by a preponderance of the evidence. *See, e.g., In re Slabicki, supra*, 466 B.R. at 577-78 (noting a preponderance of the evidence standard when debtor seeks willful violation of the stay under Section 362(k)); *In re Johnson*, 501 F.3d 1163, 1171 (10th Cir. 2007) (holding that willful stay violations under 362(k) must be shown by a preponderance of the evidence); *In re Witham*, 579 B.R. 787, 792-93 (Bankr. E.D. Ky. 2017) (articulating a preponderance of the evidence standard for willful stay violation under Section 362(k)); *In re Gilford*, 567 B.R. 412, 416 (Bankr. D. Mass. 2017) (burden of proof under a Section 362(k) claim is preponderance of the evidence).

Some courts, however, have found that a clear and convincing evidentiary standard applies to actions under 11 U.S.C. § 362(k). *See In re Warren*, 532 B.R. 655, 660-61 (Bankr. D. S.C. 2015) (citing cases and noting the split in authority regarding the evidentiary standards for a stay violation under Section 362(k)); *see also In re Morgan*, 547 B.R. 185, 188 (Bankr. W.D. Va. 2016) (explaining that a willful violation under Section 362(k) must be proved by clear and convincing evidence); *In re Weatherford*, 413 B.R. 273, 284 (Bankr. D. S.C. 2009) (under the former version of Section 362(k), the standard of proof is clear and convincing evidence).

If, however, a party pursues a stay violation under the civil contempt theory of Section 105, then the burden of proof is generally clear and convincing evidence. *See, e.g., In re H Granados Commc'ns, Inc.*, 503 B.R. 726, 733 (B.A.P. 9th Cir. 2013)(under a civil contempt theory for a willful stay violation, the moving party must show the violation by clear and convincing evidence); *Jove, supra*, 92 F.3d at 1545 (explaining that “[a] finding of civil contempt must be based on clear and convincing evidence that a court order was violated.”)(internal citation and quotation omitted); *In re Achterberg*, 573 B.R. 819, 833 (Bankr. E.D. Ca. 2017)(noting that a party seeking to hold a creditor in civil contempt for violating the automatic stay must prove the violation by clear and convincing evidence). The higher evidentiary burden for finding a party in civil contempt for a willful violation as opposed to finding a willful violation under Section 362(k) is because “Section 362(k). . . is less stringent than the standard for holding a person in civil contempt.” *In re Ampal-American Israel Corp.*, 502 B.R. 361, 370 (Bankr. S.D. N.Y. 2013).

B. Damages

In addition to the differing burdens of proof between the two theories for pursuing automatic stay violations under Section 362(k) and Section 105(a), there are also differences in the types of damages to which a party may be entitled under the two theories.

i. Statutory Damages Under 11 U.S.C. § 362(k)

Under 11 U.S.C. § 362(k), the statutory language itself explicitly outlines the forms of damages a party may seek under the provision: “[the injured party] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.” 11 U.S.C. § 362(k)(1). Actual damages under Section 362(k)(1) can encompass many forms of relief, and have been defined as “the amount of economic loss the debtor has suffered as the proximate result of the defendant's violation.” *Achterberg, supra*, 573 B.R. at 833. Examples

of actual damages awarded under Section 362(k) include lost time damages, out-of-pocket expenses, and other forms of financial loss. *In re Ojiegbe*, 539 B.R. 474, 479 (Bankr. D. Md. 2015). Actual damages under Section 362(k) “must be proven with reasonable certainty and may not be speculative or based on conjecture.” *In re Johnson*, 478 B.R. 235, 248 (Bankr. S.D. Miss. 2012) (quoting *Clayton v. Old Kent Mortg. Co. (In re Clayton)*, 2010 WL 4482810, *2 (Bankr. S.D. Tex. Oct. 29, 2010)).

In addition to the traditional forms of compensatory damages available under Section 362(k), emotional distress damages have also been allowed as actual damages under Section 362(k). *Lodge v. Kondaur Capital Corp.* 750 F.3d 1263, 1269-71 (11th Cir. 2014)(noting the various circuits that have found actual damages to encompass emotional distress damages); *see e.g., In re Swindle*, 584 B.R. 259, 266 (Bankr. E.D. Ill. 2018); *In re Martinez*, 561 B.R. 132, 156 (Bankr. D. Nev. 2016). To establish a claim for emotional distress due to a willful violation of the stay, the party must: “(1) suffer significant emotional distress, (2) clearly establish the significant emotional distress, and (3) demonstrate a causal connection between that significant emotional distress and the violation of the automatic stay. *Lodge*, 750 F.3d at 1271. Many courts have found it appropriate to award emotional distress damages even in the absence of financial or economic damages. *See Swindle, supra*, 584 B.R. at 266-67 (explaining the split of authority between the Ninth and Seventh circuits as to whether emotional damages can be awarded without a finding of financial loss); *Martinez, supra*, 561 B.R. at 156 (pecuniary loss not required for award of emotional damages).

Though emotional distress damages are generally found to be available as actual damages under 11 U.S.C. § 362(k), the evidence required to recover such damages must be shown by clear and convincing evidence. *In re L'Heureux*, 322 B.R. 407, 411 (B.A.P. 8th Cir. 2005). In the

L'Heureux case, the foreclosing creditors, after receiving notice of the bankruptcy case, failed to remove the notice of foreclosure on the debtor's residence from the wall of the county courthouse for six (6) days. *Id.* Though the foreclosure sale was cancelled prior to the scheduled sale date, the debtor stated that several individuals came to her home to view the property on the sale date because of the creditor's failure to remove the foreclosure notice. *Id.* at 409. The debtor testified and presented evidence regarding the emotional distress caused by the creditor's failure to remove the notice, as well as medical records related to the illness caused by such emotional distress. *Id.* The Eighth Circuit Bankruptcy Appellate Panel found that, despite the "voluminous" evidence concerning the alleged emotional distress and resulting illness suffered by the debtor, the bankruptcy court's finding that such emotional distress was not related to the delay in removing the foreclosure notice was not clearly erroneous. *Id.* at 411.

Attorney's fees and costs are also available as actual damages under 11 U.S.C. § 362(k)(1). In determining whether to award attorney's fees under Section 362(k), courts will consider the reasonableness of the fees sought and the extent to which they were incurred to address the stay violation at issue. *See In re Erbesfield*, 2016 WL 7388516, at *1 (Bankr. N.D. Ga. Sept. 22, 2016). The reasonableness of attorney's fees can be analyzed under two methods. The first is the lodestar approach in which the court will: "(1) determine the nature and extent of the services rendered; (2) determine the value of those services; and (3) consider the factors in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) and explain how they affect the award." *In re Horne*, 876 F.3d 1076, 1084 (11th Cir. 2017) (quoting *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874, 877-78 (11th Cir. 1990)). Courts may also assess the reasonableness of attorney's fees under other provisions of the Bankruptcy Code governing professional fees, such as 11 U.S.C. § 330. *See In re Russell*, 441 B.R. 859, 863 (Bankr. N.D. Ohio 2010).

The scope of attorney's fees that can be awarded under Section 362(k) is broad and can include not only fees incurred to stop the stay violation, but also fees incurred in "prosecuting a damages action and defending those judgments on appeal." *Horne, supra*, 876 F.3d at 1081 (alteration from original); *see also In re Schwartz-Tallard*, 803 F.3d 1095, 1101 (9th Cir. 2015)(*en banc*) (reading Section 362(k) as permitting award of attorney's fees for prosecuting stay violation).

Section 362(k) also permits the imposition of punitive damages under appropriate circumstances. Unlike the mandatory nature of actual damages under Section 362(k), courts have wide discretion in determining whether to award punitive damages for a willful stay violation. *Achterberg, supra*, 573 B.R. at 834. Generally, punitive damages are found to be appropriate "when the violator has engaged in egregious, intentional misconduct." *In re Stephens*, 495 B.R. 608, 615 (Bankr. N.D. Ga. 2013); *see also In re Foster*, 574 B.R. 19, 31 (Bankr. D. Me. 2017)(noting that the purpose of punitive damages is "to cause change in a creditor who is found to have acted in arrogant defiance of the Code.")(internal quotations omitted) .

Factors considered in determining whether punitive damages are appropriate under Section 362(k) include: "(1) the nature of the defendant's conduct; (2) the nature and extent of the harm to the plaintiff; (3) the defendant's ability to pay; (4) the motives of the defendant; and (5) any provocation by the debtor." *In re Campbell*, 553 B.R. 448, 456 (Bankr. M.D. Ala. 2016) (quoting *Vaughn v. Cent. Miss. Credit Corp. (In re Vaughn)*, 542 B.R. 589, 602-03 (Bankr. M.D. Ala. 2015)). Because courts are afforded significant latitude in determining whether an award of punitive damages is appropriate, and relatedly, the fashioning of such an award, the punitive damages inquiry is a highly fact-specific analysis. *See In re Silk*, 549 B.R. 297, 301 (Bankr. D. Mass. 2016).

ii. Civil Contempt Damages Under 11 U.S.C. § 105(a)

A party may also pursue a stay violation under 11 U.S.C. § 105(a) on the basis of civil contempt.⁴⁶ Unlike Section 362(k), Section 105(a) does not contain an explicit statutory directive for the types of damages available upon a finding of civil contempt. 11 U.S.C. § 105(a), *passim*; see *In re Roman*, 283 B.R. 1, 14, fn.11 (B.A.P. 9th Cir. 2002)(explaining that the main difference between proceeding under Section 362(k) and Section 105(a) is the mandatory nature of damages under the former and permissive award of damages under the latter). Moreover, courts have discretion in determining whether to award damages for a stay violation under Section 105, whereas Section 362(k) imposes a mandatory award of actual damages where a willful violation occurs. Compare 11 U.S.C. § 362(k)(1)(“an individual injured by any willful violation of a stay provided by this section *shall* recover actual damages. . .”)(emphasis added), with 11 U.S.C. § 105(a)(“[t]he court *may* issue any order. . .”)(emphasis added); see also *Knight supra*, 991 F.2d at 620.

When sanctioning a party under the civil contempt powers of Section 105(a) for a willful violation of the automatic stay, the court may award monetary damages, including attorney’s fees and costs, against the contemnor “to the extent such awards are ‘necessary or appropriate’ to carry out the provisions of the Bankruptcy Code.” *In re Unlimited Homes, Inc.*, 2018 WL 1054095, at *2 (Bankr. N.D. Ga. Feb 23, 2018) (citing *Jove, supra*, 92 F.3d at 1554).

Given the latitude courts have in awarding sanctions under Section 105, courts may also

⁴⁶ As discussed more fully in “Use of 11 U.S.C. § 105 by Corporate Debtors to Pursue Willful Violations of the Automatic Stay,” *infra*, the circumstance under which a party would redress a willful stay violation under the civil contempt theory of 11 U.S.C. § 105(a) as opposed to 11 U.S.C. § 362(k) would arise where the party does not qualify as an “individual” under Section 362(k)(1), i.e., a corporate debtor. Additionally, some courts have found that trustees who do not qualify as individuals under Section 362(k) may nonetheless pursue stay violations under Section 105. See *In re Sayeh*, 445 B.R. 19, 27-28 (Bankr. D. Mass. 2011) (finding that a trustee could not pursue stay violation under Section 362(k) because she was not an “individual” under the statute, but permitted the trustee to pursue the violation under Section 105(a) since it was the only theory of relief available); see e.g., *Cal. Emp’t Dev. Dep’t v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1152 (9th Cir. 1996)(permitting Section 105(a) recovery by a trustee).

“liberally allow discretionary sanctions under [Section 105(a)].” *Unlimited Homes, Inc.*, 2018 WL 1054095, at *3. Such an award may also include attorney’s fees “reasonably incurred in connection with [bringing the contempt action].” *In re Allied Holdings Inc.*, 355 B.R. 372, 379 (Bankr. N.D. Ga. 2006). Damages awarded pursuant to the bankruptcy court’s statutory contempt powers are “to compensate the complainant for actual losses or to coerce compliance with the automatic stay.” *Id.* at 378; *see also In re WVF Acquisition, LLC*, 420 B.R. 902, 913 (Bankr. S.D. Fla. 2009)(explaining that under the bankruptcy court’s civil contempt power it may award compensatory damages for willful stay violations).

In addition to general compensatory damages, some courts have found that parties may recover emotional distress damages under 11 U.S.C. § 105(a). *See In re Nibbelink*, 403 B.R. 113, 120 (Bankr. M.D. Fla. 2009); *In re Feldmeier*, 335 B.R. 807, 813–15 (Bankr. D. Or. 2005). Similar to the showing required to award emotional distress damages under Section 362(k), courts that permit emotional distress damages under Section 105(a) required the aggrieved party to show egregious conduct sufficient to cause significant emotional harm and a causal connection between the stay violation and the emotional distress. *Nibbelink*, 403 B.R. at 120-21.

Courts are divided as to whether punitive damages are available under 11 U.S.C. § 105(a). *See In re Dyer*, 322 F.3d 1178, 1193, fn.15 (9th Cir. 2003)(noting circuit split as to the bankruptcy court’s authority to impose punitive damages and citing cases). Although the broad text of 11 U.S.C. § 105(a) seems to suggest that court may impose punitive damages that are “necessary and appropriate” enforce the Bankruptcy Code (“[t]he court may issue *any* order, process, or judgment . . .”), many courts have suggested that punitive damages cannot be imposed under Section 105(a). *Griffith v. Oles (In re Hipp, Inc.)*, 895 F.2d 1503, 1521 (5th Cir. 1990)(bankruptcy courts lack authority to impose criminal sanctions under Section 105(a)); *In re Just Brakes Corp. Sys., Inc.*,

108 F.3d 881, 885 (8th Cir. 1997)(Section 105(a) does not give bankruptcy courts “the power to punish”); *Dyer*, 322 F.3d at 1193 (“Although ‘relatively mild’ non-compensatory fines may be necessary under some circumstances. . . the language of § 105(a) simply does not allow for the serious punitive penalties. . .”).

Conversely, several courts have suggested that bankruptcy courts may impose punitive damages in the Section 105(a) context. *See, e.g., In re John Richards Homes Bldg. Co.*, 552 Fed. App’x. 401, 415 (6th Cir. 2013)(bankruptcy courts can award mild, noncompensatory punitive damages); *Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439, 445 (5th Cir. 2000)(“bankruptcy courts across the country have appropriately used their statutory contempt power to order monetary relief, in the form of actual damages, attorney fees, and *punitive damages*”)(emphasis added).

In the Eleventh Circuit, it is unclear whether bankruptcy courts can impose punitive damages under 11 U.S.C. § 105(a). In *Jove, supra*, and *Hardy v. U.S. (In re Hardy)*, 97 F.3d 1384 (11th Cir. 1996), the Eleventh Circuit addressed the availability of punitive damages under Section 105(a).⁴⁷ In both cases, however, the party against whom punitive damages were sought was the federal government. And as outlined *infra*, 11 U.S.C. § 106 explicitly prohibits the imposition of punitive damages brought under Section 105(a) against the federal government. 11 U.S.C. § 106(a)(3). Accordingly, the context of punitive damages discussed by the Eleventh Circuit in those two cases was limited by the issue of sovereign immunity and the lack of availability of punitive damages against the government. Thus, the applicability of those cases to situations in which punitive damages are sought against non-governmental entities is unclear.

⁴⁷ In *Jove*, the discussion centered around a willful violation of the automatic stay, whereas in *Hardy*, the discussion centered around a willful violation of the discharge injunction of Section 524(a); however, as noted *supra*, both can be addressed under Section 105(a).

Bankruptcy courts in the Eleventh Circuit have gone both ways with regard to the availability of punitive damages under 11 U.S.C. § 105(a). *See Nebbelink, surpa*, 403 B.R. at 121 (narrowly reading *Hardy* to find that the contempt powers of Section 105(a) permit the imposition of punitive damages); *In re Wasson*, 2007 WL 4322444, at *3 (Bankr. M.D. Fla. April 13, 2007)(awarding punitive damages under Section § 105(a)); *In re Dynamic Tours & Transp., Inc.*, 359 B.R. 336, 343-44 (Bankr. M.D. Fla. 2006)(finding punitive damages available under Section 105(a)); *cf. Unlimited Homes, Inc., supra*, 2018 WL 1054095, at *2 (citing to *Jove* for the proposition that Section 105(a) does not authorize punitive damages for willful stay violations); *In re Riser*, 298 B.R. 469, 474 (Bankr. M.D. Fla. 2003)(citing to *Jove* and *Hardy* to find that the court does not have the authority under Section 105 to impose punitive damages); *In re Lickman*, 297 B.R. 162, 195 (Bankr. M.D. Fla 2003) (citing to *Jove* to support a finding that Section 105(a) “provides no authority for the imposition of punitive damages for violations of the automatic stay.”).

II. Discharge Injunction Violation

Violation of the discharge injunction, unlike a willful violation of the automatic stay, does not have an explicit statutory cause of action in Section 524. Instead, a discharge injunction violation is addressed through the imposition of civil contempt sanctions under 11 U.S.C. § 105(a).

A. Evidentiary Standard

As with seeking civil contempt sanctions under Section 105(a) for a willful stay violation, a party seeking to pursue a discharge injunction violation under Section 105(a) must prove the violation by clear and convincing evidence. *E.g., Rosado v. Banco Popular de P.R.*, 561 B.R. 598, 605 (B.A.P. 1st Cir. 2017) (noting clear and convincing evidence standard for establishing a discharge injunction violation); *In re Davies*, 577 B.R. 352, 361 (Bankr. D. Idaho 2017)(same).

Once the aggrieved party meets that burden, the burden shifts to the offending party to establish “why it was unable to comply with the discharge injunction.” *In re Moreno*, 479 B.R. 553, 569 (Bankr. E.D. Cal. 2012). The higher evidentiary burden in the Section 105 context is attributable to the fact that courts are hesitant “to hold an unwitting creditor in contempt.” *In re Marino*, 577 B.R. 772, 783 (9th Cir. B.A.P. 2017)(internal quotation omitted).

B. Types of Damages Available

Because a party seeking to redress a discharge injunction violation under 11 U.S.C. § 524(a) must proceed under Section 105(a), the sanctions imposed for a discharge violation are grounded in civil contempt. *See Best v. Nationstar Mortgage LLC*, 540 B.R. 1, 8 (B.A.P. 1st Cir. 2015) (citing *Canning v. Beneficial Me., Inc. (In re Canning)*, 706 F.3d 64, 69 (1st Cir. 2013)). Moreover, because the violations are addressed under Section 105(a), courts have broad discretion in determining the forms of sanctions to be imposed for a violation of the discharge injunction. *In re Chambers*, 324 B.R. 326, 329 (Bankr. N.D. Ohio 2005)(in the context civil contempt, the bankruptcy court has “broad discretion” in determining “an appropriate sanction”). This broad sanctioning power is attributable to the broad statutory language of 11 U.S.C. § 105(a), which authorizes the court to issue any order that is “necessary or appropriate” to enforce the provisions of the Bankruptcy Code, including the discharge injunction of Section 524(a). *See* 11 U.S.C. § 105(a).

The civil contempt sanctions awarded under Section 105(a) can “serve either to coerce the contemnor into future compliance with the court's order or to compensate the complainant for losses resulting from the contemnor's past noncompliance.” *In re Covelli*, 550 B.R. 256, 269 (Bankr. S.D. N.Y. 2016). As such, traditional compensatory damages, such a damages for economic loss (including lost wages and business income) are typically encompassed in the form

of sanctions imposed under Section 105(a) for a discharge injunction violation. *Id.*; *see e.g., Moreno, supra*, 479 B.R. at 569 (noting that civil sanctions for a violation of the discharge injunction should “either be compensatory or designed to coerce compliance”).

Compensatory or actual damages awarded for a discharge injunction violation are designed to compensate the debtor for actual losses suffered as a result of the violation. *See In re McLean*, 794 F.3d 1313, 1325 (11th Cir. 2015)(noting the purpose of actual damages awarded under Section 105 for a discharge injunction violation). However, prior to obtaining actual damages for a discharge injunction violation, the debtor must demonstrate a causal connection between the damages suffered and the harm alleged. *See In re Miles*, 357 B.R. 446, 450 (Bankr. W.D. Ky. 2006)(explaining that “at a minimum [the debtor must show] that the [d]efendant's conduct was a substantial factor in causing her damages”).

Attorney’s fees are also available as a civil contempt sanction for a violation of the discharge injunction. The context in which attorney’s fees may be awarded for a discharge violation differs among various courts. For instance, some courts award attorney’s fees under 11 U.S.C. § 105(a) for a discharge injunction violation without any additional finding beyond the elements of proving the violation itself. *See In re Todt*, 567 B.R. 667, 682 (Bankr. D. N.H. 2017)(awarding attorney’s fees where the violating party has been found in contempt of the discharge injunction violation); *see also In re Mitchell*, 545 B.R. 209, 226 (Bankr. N.D. Ohio 2016)(stating that attorney’s fees are available where the debtor is “injured by a contemptible violation of the discharge injunction”)(citation omitted).

Other courts, however, require an additional finding of maliciousness or bad faith—beyond evidence of the discharge violation itself—as a predicate for awarding attorney’s fees for a violation of Section 524(a). *In re Nassoko*, 405 B.R. 515, 520 (Bankr. S.D. N.Y. 2009)(“Attorney's

fees may also be awarded, if in addition to willfully disobeying the court order, the party acts in bad faith, vexatiously, wantonly or for oppressive reasons.”)(internal citation and quotation omitted); *see also In re Haemmerle*, 529 B.R. 17, 29 (Bankr. E.D. N.Y. 2015)(requiring, as a predicate for awarding attorney’s fees for a discharge violation, a finding that the party acted in a malicious and egregious manner in addition to willfully violating the discharge injunction).

In determining the reasonableness of the attorney’s fees sought, bankruptcy courts utilize the lodestar method by multiplying the number of hours worked with the hourly rates of the participating lawyers, in addition to considering the *Johnson* factors⁴⁸ traditionally applied to professionals’ fees in the bankruptcy context. *Todt, supra*, 567 B.R. at 682. Moreover, courts will also consider: “(1) what expenses or costs resulted from the violation and (2) what portion of those costs was reasonable, as opposed to costs that could have been mitigated.” *Moreno, supra*, 479 B.R. at 570 (quoting *In re Roman*, 283 B.R. 1, 12 (9th Cir. B.A.P. 2002)).

In addition to actual damages and attorney’s fees, some courts have also found that emotional distress damages are available as a compensatory sanction where a discharge injunction violation has occurred.⁴⁹ *In re Nordlund*, 494 B.R. 507, 523 (Bankr. E.D. Ca. 2011)(recognizing the availability of emotional distress damages for a discharge violation); *see also In re Marino, supra*, 577 B.R. at 787 (applying standard for obtaining emotional distress damages for an automatic stay violation to a discharge injunction violation). In the Eleventh Circuit, bankruptcy

⁴⁸ *Johnson* factors include: (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the “undesirability” of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

⁴⁹ Not all courts permit an award of emotional distress damages under the civil contempt basis of 11 U.S.C. § 105(a). *See, e.g., In re Gecy*, 510 B.R. 510, 524 (Bankr. D. S.C. 2014)(citing cases and explaining that the Fourth Circuit does not permit emotional distress damages for civil contempt).

courts have the authority to award emotional distress damages for a violation of the discharge injunction pursuant to the statutory contempt sanction powers encompassed in Section 105(a). *See McLean, supra*, 794 F.3d at 1325-26 (noting the availability of emotional distress damages for a discharge injunction violation). In *McLean*, the Eleventh Circuit applied a three-factor test for recovering emotional distress damages for a stay violation to the discharge injunction context. *Id.* Accordingly, the debtor must: “(1) suffer significant emotional distress, (2) clearly establish the significant emotional distress, and (3) demonstrate a causal connection between that significant emotional distress and the violation of the [discharge injunction].” *Id.* (quoting *Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263, 1271 (11th Cir. 2014))(alterations included).

The availability of punitive damages for violating the discharge injunction under 11 U.S.C. § 105(a) is subject to the same variation as the availability of punitive damages in the willful stay violation context under Section 105. *See* discussion in Part I, Section B, Subsection ii, *supra*. The variation in the award of punitive damages for the discharge injunction violation stems from interpreting the scope of 11 U.S.C. § 105(a) and whether it permits an award of punitive damages for civil contempt. Some courts interpret Section 105(a) as only granting bankruptcy courts the power to impose sanctions that are civil in nature, and not those designed to punish the violating party in the nature of criminal contempt, such as punitive damages. *In re Mitchell*, 545 B.R. 209, 228 (Bankr. N.D. Ohio 2016)(“An award of punitive damages for contempt of a discharge injunction sounds in the nature of criminal contempt and therefore lies beyond the authority of a bankruptcy judge.”)(citing cases); *see also In re Feagins*, 439 B.R. 165, 178 (Bankr. D. Haw. 2010)(noting that the bankruptcy court lacks the power to award punitive damages under Section 105(a) for a discharge injunction violation).

Other courts, however, interpret Section 105(a) as permitting the imposition of punitive damages for discharge injunction violations. *In re Fauser*, 545 B.R. 907, 914 (Bankr. S.D. Tex. 2016)(“Though punitive damages are not explicitly authorized by the Code, they are justified under the assumption that Congress did not enact § 524 and then fail to give courts recourse to dissuade recalcitrant creditors from conduct violative of its clear prohibition.”); *see also Nibbelink, supra*, 403 B.R. at 121 (holding that a bankruptcy court may impose punitive damages for a discharge injunction violation under the statutory contempt powers of Section 105).

A recent case in which the Third Circuit found an award of punitive damages under 11 U.S.C. § 362(k) appropriate, *In re Lansaw*, 853 F.3d 657 (3d Cir. 2017), illustrates the level of egregious behavior that warrants punitive damages. In *Lansaw*, the debtors’ commercial landlord engaged in multiple stay violations, including backing the debtor-wife up against wall at her daycare business and attempting to physically intimidate her; chaining the front door of leased premises to prevent the daycare business from operating; locking the debtors inside the leased premises as they attempted prevent the landlord from chaining the doors the premises a second time; and attempting to have the debtors’ lease agreement with a different lessor terminated. *Id.* at 661-62. The Third Circuit affirmed the bankruptcy court’s imposition of \$40,000 in punitive damages against the landlord based upon the landlord’s extreme and reprehensible behavior, despite the landlord’s assertions that he had not contacted the debtors for several years since the stay violations occurred. *Id.* at 670-71. As part of its punitive damages analysis, the Third Circuit examined “(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded ... and the civil penalties authorized or

imposed in comparable cases.” *Id.* at 671 (quoting *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 189 (3d Cir. 2007)).

In awarding punitive damages for a discharge injunction violation, courts require a showing of particular egregious or bad faith behavior, which can resemble a specific intent to violate the discharge injunction. *In re Cherry*, 247 B.R. 176, 190 (Bankr. E.D. Va. 2000). Courts also look to various factors to determine whether punitive damages are appropriate under the relevant facts and circumstances of the case, including: “(1) the creditor's conduct, (2) the creditor's ability to pay damages; (3) the creditor's level of sophistication; (4) the creditor's motives; and (5) any provocation by the debtor.” *In re Ridley*, 572 B.R. 352, 365 (Bankr. E.D. Okla. 2017).

As a sort of middle ground, some courts have held that, under Section 105(a), “mild, noncompensatory fines may be acceptable in some circumstances.” *In re Larsen*, 580 B.R. 901, 915 (Bankr. D. Idaho 2017)(internal quotation and citation omitted); *see also Marino, supra*, 577 B.R. at 788 (explaining that, in the Ninth Circuit, a court cannot award punitive damages for a discharge injunction violation, but may award “relatively mild noncompensatory fines” under some circumstances).

Sovereign Immunity and Other Hurdles Facing the Debtor in Challenging Actions by Governmental Entities

The automatic stay and discharge injunction apply to governmental entities, but such entities are generally immune from suit unless a specific waiver is established. In certain instances, Sections 105 and [106](#)⁵⁰ of the Bankruptcy Code abrogate the sovereign immunity of the United States and its agencies, such as the Internal Revenue Service, with respect to bankruptcy court orders sanctioning contempt. *See Jove Eng'g., supra*, [92 F.3d 1539, 1549, 1555](#). As discussed below, however, *Jove* does not stand for the principle that Congress can abrogate a *state's*

⁵⁰ Section 106 provides in pertinent part as follows:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) [Sections 105, 106, ... 362, ... 524](#) ... of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of [section 2412\(d\)\(2\)\(A\) of title 28](#).

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

11 U.S.C. § 106. This version of Section 106 is effective from December 22, 2010 and because Congress amended Section 106 several times before this latest iteration, case law should be reviewed with attention to the particular version of Section 106 being referenced.

sovereign immunity regarding such a bankruptcy order as directed to a *state* or *state official*. See [*Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016 \(11th Cir.1994\)](#), *aff'd*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), cited in *Skandalakis v. Geeslin*, 303 B.R. 533, 538 n. 6 (M.D. Ga. 2004). In *Hardy*, *supra*, 97 F.3d at 1389-90, the Eleventh Circuit held that the IRS could be held liable for contempt for an alleged violation of the discharge injunction based on the statutory contempt powers provided in Section 105. Further, the court noted that revised Section 106 expressly and unequivocally waives sovereign immunity under Section 105. *Id.*, citing *Jove*, *supra*, 92 F.3d at 1554.⁵¹ Turning to the test for analyzing willfulness for a stay violation as set forth in *Jove* (92 F.3d at 1555), which the court found likewise applicable in discharge injunction violation context, the court remanded the matter for a factual inquiry along those lines. 92 F.3d at 1390.⁵²

The scope of the waiver, however, must be carefully considered.⁵³ For instance, in *King v. United States (In re King)*, 396 B.R. 242 (Bankr. D. Mass. 2008), the court found that the filing of a nominee tax lien constituted willful violation of automatic stay under 11 U.S.C. § 362(k)(1), but that the waiver provisions in Section 106 did not extend to all types of relief and granted the

⁵¹ In *Kovacs v. United States*, 614 F.3d 666, 673 (7th Cir. 2010), the court noted *Jove* was decided prior to the 1998 amendments to Section 7433(e) of the Internal Revenue Code (26 U.S.C. § 7433) and did not address its exclusivity provision. In *Kovacs*, the court held that a debtor's claims were subject to its two-year statute of limitations.

⁵² Violations of the discharge injunction, like violations of the automatic stay imposed by Section 362, may entitle debtors to actual damages incurred as a result of the violation. See [*Duby v. United States \(In re Duby\)*, 451 B.R. 664, 674 \(B.A.P. 1st Cir. 2011\)](#)(suit versus U.S. Department of Agriculture). Thus, cases involving damages awards for stay violations are relevant to an analysis of appropriate damages for a violation of the discharge injunction. *In re McCarthy*, 577 B.R. 436, 440 (Bankr. D. Mass. 2017)(suit against Massachusetts Department of Revenue).

⁵³ See e.g. *United States v. Rivera Torres (In re Rivera Torres)*, 432 F.3d 20, 27-28 (1st Cir. 2005)(finding waiver under Section 106 far narrower than the Eleventh Circuit holding in *Hardy* in regard to awarding damages). In *Rivera Torres*, the IRS sought a dismissal of the debtors' action for contempt, conceding that its collection activities violated the discharge injunction but arguing that Section 524 did not authorize an award of damages. The IRS later agreed it could be held liable for compensatory damages, but opposed any award for emotional distress damages, punitive damages, attorneys' fees, and costs. The IRS only appealed the award of emotional distress damages, which the circuit court reversed on grounds of sovereign immunity.

debtors leave to amend their claim for damages.⁵⁴ In *In re Moore*, 2013 WL 4017936, at *5 (Bankr. M.D. Ga. Aug. 6, 2013), a debtor argued that certain unpaid federal income taxes had been discharged and that the IRS had violated the automatic stay in sending her a notice of intent to levy. The IRS responded that the court could not consider the merits of this argument, which actually concerned an alleged violation of the discharge injunction, since the debtor had not exhausted her administrative remedies under 26 U.S.C. § 7433. Stating that the debtor was not seeking damages but injunctive relief, and that it had authority to decide whether its own orders were being violated, the court concluded that 11 U.S.C. § 106 granted it authority to hear issues concerning application of the Bankruptcy Code to governmental units.

Addressing a motion for contempt for an alleged discharge violation under Section 524(a)(2), the court in *In re Thal*, 2018 WL 2182304 (Bankr. S.D. Fla. May 9, 2018), held that a violation occurred when the IRS intercepted federal benefit payments on account of priority tax debt that had been discharged in a completed chapter 13 case. The court noted that under Section 106(a)(1), the United States had waived its sovereign immunity regarding claims under Section 524. Next, the court cited Section 106(a)(3) and *Moore, supra*, in concluding that it had authority to compel the IRS to cease all collection activities and return the monies taken from the debtor. The court further held, however, that it did not have authority to award punitive damages. In addition, construing the holding in *Jove, supra*, 92 F.3d at 1559, and the interplay of 11 U.S.C. §§ 105, 106, and 524 and 26 U.S.C. §§ 7430 and 7433, the court held that it could not award damages, attorney's fees, or costs absent a showing that the debtors had first exhausted their

⁵⁴ Compare *In re Griffin*, 415 B.R. 64 (Bankr. N.D. N.Y. 2009)(awarding damages for emotional distress for stay violation by Social Security Administration). The court found significant the difference in statutory remedies available for a stay violation pursuant to Section 362(k) and for a violation of the discharge injunction pursuant to Section 524. 415 B.R. at 71. But see *Duby v. United States, supra*, 451 B.R. at 670-72 (noting unsettled nature of the law on this issue, court stated that according to binding precedent, waiver under Section 106 is not absolute).

administrative remedies under applicable IRS regulations. 2018 WL 2182304, at *5-*8. Such a prerequisite, however, is not necessary when asserting a claim under 11 U.S.C. § 362(k).⁵⁵

In the recent case of *Internal Revenue Service v. Murphy*, *supra*, 892 F.3d 29, 39, the First Circuit affirmed judgment against the IRS holding that the term “willfully violates” as used in 26 U.S.C. § 7433(e) has the same meaning as the standard used for determining a willful violation of the automatic stay and discharge orders.⁵⁶ In that case, the IRS had sought to collect a debt it believed was excepted from discharge, and appealed a bankruptcy court’s decision on the debtor’s complaint under Section 7433(e), arguing that such definition includes reference to a reasonable belief regarding the nondischargeable status of the debt in question.⁵⁷

In *Covington v. Internal Revenue Service (In re Covington)*, 256 B.R. 463 (Bankr. D. S.C. 2000), the court held that mailing notices of intent to levy willfully violated the stay under former 11 U.S.C. § 362(h) and supported an award of actual damages. *See also Taylor v. United States (In re Taylor)*, 148 B.R. 361 (S.D. Ga. 1992)(finding that IRS’ withholding of portion of tax refund was a claim and triggered waiver of sovereign immunity even if no formal proof of claim was filed); *In re Boldman*, 157 B.R. 412 (C.D. Ill. 1992)(affirming bankruptcy court decision

⁵⁵ Compare *In re Lowthorp*, 332 B.R. 656 (Bankr. M.D. Fla. 2005)(IRS “willfully” violated discharge injunction by attempting to collect on prepetition tax debt with knowledge that discharge injunction had been invoked; but chapter 13 debtor-taxpayers’ failure to exhaust administrative remedies barred any recovery of damages), cited in *In re Consolidated Health Services, Inc.*, 2013 WL 4409695, *3 (Bankr. E.D. N.C. Aug. 14, 2013). *Accord Nicholson v. IRS*, 2015 WL 6152922 (N.D. Fla. Sept. 15, 2015)(discussing exhaustion requirement as precondition to allow IRS opportunity to correct its error prior to defending itself in court).

⁵⁶ Section 7433(e) provides as follows:

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States.

26 U.S.C. § 7433(e).

⁵⁷ The court also recognized that the debtor had properly exhausted his administrative remedies under Section 7433. 892 F.3d at 33 n. 1.

construing former Section 362(h) that found IRS willfully violated stay through inadvertent issue of levy notice and that waiver of sovereign immunity was applicable); *In re Solis*, 137 B.R. 121 (Bankr. S.D. N.Y. 1992)(IRS willfully violated stay through actions to collect delinquent taxes levying on debtor's bank account even though violation due to a computer error); *Davis v. IRS (In re Davis)*, 136 B.R. 414 (E.D. Va. 1992)(upholding finding of stay violation due to initiation of garnishment action and attaching tax refund). By comparison, in *In re Dinatale*, 235 B.R. 569, 573 (Bankr. D. Md. 1999), the court held that as a creditor holding a valid pre-petition lien, the IRS did not violate the discharge injunction by filing a renewal to prevent the lapse of its lien. *See also In re O'Callaghan*, 342 B.R. 364, 368 (Bankr. M.D. Fla. 2006)(IRS did not violate the stay by re-filing notices of federal tax lien during pendency of bankruptcy case even though debtor would ultimately be discharged of his *in personam* liability for the taxes).

As mentioned above, questions have been raised regarding whether contempt is an available remedy against *states* for stay violations. For instance, the United States Supreme Court previously held that, absent a waiver of sovereign immunity, a clearly stated legislative intent to abrogate same was needed by Congress through a valid exercise of its authority. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Congress added an express waiver of immunity to the Code by the 1994 amendments to Section 106, but concerns were voiced that such a waiver was not constitutional. In *Central Virginia Comm. College v. Katz*, 546 U.S. 356, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006),⁵⁸ however, the Supreme Court held that an abrogation is not necessary because in agreeing to the Bankruptcy Clause of the Constitution, states effectively surrendered any claims to immunity.

⁵⁸ In *Katz*, a bankruptcy trustee initiated an *in personam* action against state institutions of higher learning to avoid and recover alleged preferential transfers.

The Eleventh Circuit considered the effect of *Katz, supra*, in connection with a chapter 13 debtor's motion for contempt and sanctions against various state agencies in *Florida Dep't of Revenue v. Diaz (In re Diaz)*, 647 F.3d 1073 (11th Cir. 2011).⁵⁹ First, the court recognized that under the doctrine of state sovereign immunity, federal courts could not hear a private litigant's suit against a state, though there are certain acknowledged exceptions. 647 F.3d at 1082, citing *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 131 S.Ct. 1632, 179 L.Ed.2d 675 (2011). Next, it concluded that contempt motions alleging a creditor has violated the automatic stay do fall within the qualification set forth in *Katz, supra*, such that the "consent by ratification" inquiry as recognized by the Court permits bankruptcy courts to exercise jurisdiction over a state in such setting. 647 F.3d at 1085-86.⁶⁰ The circuit court noted such actions serve the function of facilitating *in rem* proceedings that are the foundation of bankruptcy administration. See [*In re Omine*, 485 F.3d 1305, 1313 \(11th Cir. 2007\)](#), *withdrawn pursuant to settlement*, [No. 06-11655-II, 2007 WL 6813797 \(11th Cir. June 26, 2007\)](#)(unpublished);⁶¹ see also [*In re Burke*, 146 F.3d 1313, 1319 \(11th Cir. 1998\)](#)(characterizing debtors' action commenced before entry of the discharge as an action to enforce the automatic stay).⁶² Finally, the court noted that the

⁵⁹ In *Diaz*, the assistance of the Florida DOR had been requested in connection with enforcement of a support obligation ordered by a Virginia state court.

⁶⁰ The court stated *Katz* made clear it "did not directly address the constitutionality of Section 106(a) or the viability of the 'congressional abrogation' theory," and that the source of any "'subordination' of state sovereign immunity in bankruptcy proceedings" is the Bankruptcy Clause in the Constitution and not Section 106(a). 647 F.3d at 1084. See also *In re Institute of Cardiovascular Excellence, PLLC*, 589 B.R. 204, 208 (Bankr. M.D. Fla. 2018).

⁶¹ The court noted that, although its prior decision in *Omine* has been withdrawn and is not binding precedent, reliance on statements in that opinion for their persuasive value is permissible. See [*Friends of Everglades v. South Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1218 \(11th Cir. 2009\)](#).

⁶² In *Burke*, the court held that in filing a proof of claim, the state waived its sovereign immunity with respect to the adjudication of the claim as well as the enforcement of the discharge injunction and the automatic stay by the bankruptcy court. 146 F.3d at 1319. In *Florida Dep't of Revenue v. Rodriguez (In re Rodriguez)*, 367 Fed.App'x 25, 29-30 (11th Cir. 2010), the court held that although Section 106(a) has been ruled unconstitutional, in that case the finding of waiver would be upheld because it was based instead on Section 106(b), which relates to the filing of a proof of claim by a governmental unit.

bankruptcy court lacked jurisdiction to entertain alleged violations of the automatic stay due to the fact four years had elapsed between the time of the alleged violation and the filing of the debtor's motion for contempt, and a discharge had already been entered. The bankruptcy court did have jurisdiction, however, to decide the discharge injunction violation notwithstanding a claim of sovereign immunity. *Diaz, supra*, 647 F.3d at 1087-88.⁶³

⁶³ In the recent decision of *In re Paloma Generating Co.*, 588 B.R. 695, 727 (Bankr. D. Del. 2018), the court, citing *Katz* and *Diaz, supra*, concluded that it would not rely on Section 106(a), and that an action regarding entitlement to a property tax refund was not the type of action to which a state tax board would be deemed to have waived immunity.

**Use of 11 U.S.C. § 105 by Corporate
Debtors to Pursue Willful Violations of the Automatic Stay**

There are two avenues of relief for parties seeking to pursue a willful violation of the automatic stay: the statutory cause of action found in 11 U.S.C. § 362(k) and the civil contempt theory found in 11 U.S.C. § 105(a). However, standing to pursue stay violations under the statutory remedy of Section 362(k) has been limited by a majority of courts to only natural persons.⁶⁴ *In re Rafter Seven Ranches L.P.*, 414 B.R. 722, 732-33 (10th Cir. B.A.P. 2009)(noting that the majority of circuits hold that Section 362(h) [now Section 362(k)] is limited to natural persons); *but see Budget Service Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289 (4th Cir. 1986); *In re Atlantic Business and Community Corp.*, 901 F.2d 325 (3d Cir. 1990)(the minority circuits that allow corporate debtors to move under 362(k) for willful stay violation).

Accordingly, corporate debtors are generally limited to pursuing stay violations under the civil contempt theory of Section 105(a). *Spookyworld v. Town of Berlin (In re Spookyworld, Inc.)*, 346 F.3d 1, 8 (1st Cir. 2003)(concluding that corporations, although they cannot sue under Section 362(h) [now Section 362(k)], are free to sue for willful stay violations under Section 105(a)); *Jove, supra*, 92 F.3d 1552-54 (finding that a corporate debtor may utilize Section 105(a) as a basis for pursuing a stay violation where Section 362(h) [now Section 362(k)] is otherwise unavailable); *Maritime Asbestosis Legal Clinic v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 920 F.2d 183, 186-87 (2d Cir. 1990)(holding that debtors who are not natural persons may only redress stay violations under contempt proceedings).

Because corporate debtors are foreclosed from pursuing stay violations under Section 362(k), they face more difficulties and limitations in redressing willful stay violations under

⁶⁴ Section 362(k)(1) provides that “an *individual* injured by a willful violation” may recover under that code section. 11 U.S.C. § 362(k)(1) (emphasis added).

Section 105(a) than their individual debtor counterparts who can move under Section 362(k). First, the evidentiary burden of proving a stay violation under Section 105(a) is higher than the burden of proof in a Section 362(k) claim, as holding a party in civil contempt is more stringent than the standard for finding a willful stay violation under Section 362(k). *See In re Ampal-American Israel Corp.*, *supra*, 502 B.R. at 370 (Bankr. S.D. N.Y. 2013).

Most courts only require that the debtor prove a willful violation of the stay under 11 U.S.C. § 362(k) by a preponderance of the evidence. *See In re Slabicki*, *supra*, 466 B.R. at 57778 (noting a preponderance of the evidence standard when debtor seeks willful violation of the stay under Section 362(k)). However, courts require a showing of civil contempt under 11 U.S.C. § 105(a) by clear and convincing evidence. *In re Achterberg*, *supra*, 573 B.R. at 833 (explaining that civil contempt theory of willful stay violations requires clear and convincing evidence).

Moreover, corporate debtors are somewhat less protected in the Section 105 context as compared to the Section 362(k) context because the 105 relief is discretionary while the 362 relief is mandatory. *Compare* 11 U.S.C. § 362(k)(1) (“an individual injured . . . *shall* recover actual damages. . . .”) (emphasis added) *with* 11 U.S.C. § 105(a) (“[t]he court *may* issue any order . . . that is necessary or appropriate to carry out the provisions of this title.”) (emphasis added). Unlike assessing damages under Section 362(k), bankruptcy courts can exercise discretion under Section 105(a) in determining whether to award damages upon the finding of a willful violation of the automatic stay. *Knight*, *supra*, 991 F.2d at 620 (explaining that under the civil contempt theory, damages are discretionary). Accordingly, corporate debtors who successfully demonstrate a willful violation of the automatic stay may nonetheless find themselves before a bankruptcy court unwilling to impose sanctions for such violation under 11 U.S.C. § 105(a).

In addition, corporate debtors are also limited in the types of damages available for a stay

violation under Section 105(a) as compared to Section 362(k)—specifically, the availability of punitive damages under Section 105(a) for willful stay violations. As with any other party moving for punitive damages for a stay violation under 11 U.S.C. § 105(a), courts in various jurisdictions differ as to whether a bankruptcy court has the power to award punitive damages under Section 105(a). *See In re Dyer, supra*, 322 F.3d at 1193, fn.15 (noting circuit split as a bankruptcy court’s authority to impose punitive damages under 11 U.S.C. § 105(a) and citing cases).⁶⁵ Thus, the availability of punitive damages for a corporate debtor under Section 105(a) will depend on the jurisdiction in which the action is brought.

However, similar to an individual debtor pursuing a stay violation under 11 U.S.C. § 362(k), corporate debtors seeking to hold a party in civil contempt under Section 105(a) for a willful stay violation are generally entitled to reasonable attorney’s fees. *Allied Holdings, Inc., supra*, 355 B.R. at 379. Typically, courts find attorney’s fees to be “an appropriate component of a civil contempt award.” *Dyer, supra*, 322 F.3d at 1195; *see also In re Parker*, 515 B.R. 337, 350 (Bankr. M.D. Ala. 2014)(noting that, under their inherent authority and Section 105, courts can award attorney’s fees for a willful stay violation). In determining the amount of attorney’s fees to award for a willful stay violation under 11 U.S.C. § 105(a), courts may examine: “(1) what expenses or costs resulted from the violation and (2) what portion of those costs was reasonable, as opposed to costs that could have been mitigated.” *In re GeneSys, Inc.*, 273 B.R. 290, 296 (Bankr. D. D.C. 2001).

⁶⁵ For more discussion regarding the availability of punitive damages under 11 U.S.C. § 105(a), *see* “Evidentiary Standards & Damages for Automatic Stay and Discharge Injunction Violations,” Part B, Subsection ii, *supra*.

**Judicial Estoppel and Other Relief Available
to Creditors, Including Annulment and *Nunc Pro Tunc* Modification**

Section 362(d) expressly authorizes bankruptcy courts to fashion appropriate relief from the automatic stay, which includes retroactively annulling the stay. *See Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 675 (11th Cir. 1984); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982). Different tests for determining the appropriateness of such relief have been proposed. Under one test, courts hold that a movant must show “extreme or exceptional circumstances to warrant the extraordinary relief of retroactive annulment of the stay.” *BKGD, LLC v. Townsend (In re Smith)*, 2018 WL 1737616, *8 (Bankr. N.D. Ga. April 9, 2018), citing *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969 (1st Cir. 1997). As cautioned in *Soares*, such relief “should be the long-odds exception, not the general rule.” 107 F.3d at 977 (listing various examples from the case law including a creditor’s lack of notice or a debtor’s bad faith).⁶⁶

Another standard for ordering retroactive relief from the stay and revitalizing an otherwise void action is described as the “balancing of the equities” test. *See In re Howard*, 391 B.R. 511, 518 (Bankr. N.D. Ga. 2008), citing *In re Myers*, 491 F.3d 120 (3d Cir. 2007) and *In re National Envtl. Waste Corp.*, 129 F.3d 1052 (9th Cir. 1997); *see also In re Adeluola*, 2015 WL 5436696 (Bankr. N.D. Ga. July 31, 2015).⁶⁷ Here, a creditor’s awareness of a bankruptcy case and a debtor’s conduct are also considerations for such relief, but they are not dispositive.⁶⁸ Courts also

⁶⁶ In the case of *In re Dupuy*, 308 B.R. 843, 848-49 (Bankr. E.D. Tenn. 2004), the court focused on factors including the debtor’s motivation in filing and granted a motion for annulment of the stay to retroactively validate a foreclosure sale that had occurred only minutes after the debtor filed his sixth *pro se* chapter 13 bankruptcy case.

⁶⁷ In *Adeluola*, the court annulled the stay, finding among other things that the chapter 13 debtor had filed three other cases in which no action was taken against the landlord at issue to stay the eviction of her business, which she did not fully disclose, and so she was guilty of laches.

⁶⁸ In *Howard*, a secured lender sought to have a tax sale declared void as violating the stay, while the purchaser asked that the stay be annulled. Examining both tests, the court concluded that its analysis should focus on the conduct of

examine other factors such as equity in the debtor's property, its necessity for an effective reorganization, the likelihood of relief if more timely sought, any unnecessary expense incurred by the creditor if relief is denied, and if the creditor has changed its position to its detriment. *Howard, supra*, 391 B.R. at 518, citing *In re Anderson*, 341 B.R. 365, 369-70 (Bankr. D.D.C. 2006)(citations omitted).⁶⁹ In the case of *In re 1278 Village Run Trust*, 577 B.R. 830 (Bankr. N.D. Ga. 2017), the court used the test in *Howard* to find that annulment of the stay *nunc pro tunc* to the filing date was appropriate based on a balancing of the equities, which included a lack of equity in the property to be protected and the debtor's history of failing to make any payments on the underlying loan.⁷⁰

In the case of *Richardson v. Trustees of Indiana Univ. (In re Richardson)*, 497 B.R. 546 (Bankr. S.D. Ind. 2013), the court addressed an argument that a debtor was barred from bringing a suit for damages under Section 362(k)(1) on grounds of judicial estoppel. Under this doctrine, which is intended to protect the integrity of the judicial system, a debtor who denies owning an asset cannot assert an inconsistent position in a later attempt to recover on the asset after the bankruptcy has ended. *See Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006); *see also In re Parker*, 351 B.R. 790, 798 (Bankr. N.D. Ga. 2006). In *Richardson*, the court held that a debtor's failure to schedule a cause of action based on an alleged violation of stay in previous case, based on a mistaken assumption that the creditor's judgment had been set aside upon his motion to the state court, was still sufficient to estop him from pursuing a stay violation regarding the

the affected parties before it since the debtor was not a party to the motion. 391 B.R. at 519.

⁶⁹ In *Stancil, supra*, the court cited the factors from *Anderson* and particularly focused on the knowledge of the creditor in denying annulment relief. 487 B.R. at 338-41. *Compare In re Kline*, 2010 WL 760733 (Bankr. D. N.M. Mar. 4, 2010)(court denied relief finding sole purpose of motion to annul was to defeat debtor's willful stay violation claim); *but see In re Schumann*, 546 B.R. 223 (Bankr. D. N.M. 2016)(granting relief after reviewing relevant factors).

⁷⁰ In *1278 Village Run*, 577 B.R. at 832, the court noted other factors as listed in *In re Cruz*, 516 B.R. 594, 603-04 (B.A.P. 9th Cir. 2014), citing *Fjeldsted v. Lien (In re Lien)*, 293 B.R. 12, 24 (B.A.P. 9th Cir. 2003).

creditor's subsequent motion for writ of attachment. The debtor's assertion of inadvertence was found unavailing, and he could not prosecute the stay violation claim. 497 B.R. at 557-58.

Finally, the case of *In re Enyedi*, 371 B.R. 327 (Bankr. N.D. Ill. 2007), presents another legal dimension to this situation of which prudent counsel should be aware. There, the court held that the defendants' pursuit of a motion to dismiss certain personal injury litigation due to the debtor's failure to list it did not negate the fact that they had still violated the automatic stay. Just because an argument could be presented that the debtor is judicially estopped from prosecuting the claim because it was not scheduled in the bankruptcy, the asset was never abandoned by the chapter 7 trustee and remained property of the bankruptcy estate. Thus, any action taken against the claim without proper stay relief, regardless of whether the bankruptcy case is open or closed, constitutes a violation of the automatic stay. The court further found that the circumstances of the case did not support entry of an order of contempt or an award of damages. 371 B.R. at 335-36. *See also In re Muhlig*, 494 B.R. 755, 768-69 (Bankr. S.D. Fla. 2013)(automatic stay protected unscheduled prepetition cause of action).