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The Fox vs. the Hedgehog: Why Purely Emotional Damages Should Be Recoverable Under 11 U.S.C. § 362(h)

Michelle Laena Miller*

I. INTRODUCTION

Among the fragments of Greek poet Archilochus, there is a line which says: “The fox knows many things, but the hedgehog knows one big thing.”[1] Essayist, Isaiah Berlin interpreted this cryptic phrase to divide the world into two kinds of thinkers: pluralists—those who relate things to many ideas; and monists—those who relate everything to one central vision.[2] The pluralists are the foxes and the monists are the hedgehogs.[3] While foxes and hedgehogs may seem ill suited to judicial robes, the metaphorical clash between these two different ways of thinking is illustrated in the current circuit split over whether § 362(h) of the Bankruptcy Code should allow redress for purely emotional harms. The Seventh Circuit’s position embodies the hedgehog’s monist approach because it advocates a purely financial analysis of § 362(h)’s intent and purpose. Following that financial monist approach,[5] the Seventh Circuit advocates that emotional damages are only available when there is an accompanying financial

* J.D. from DePaul University College of Law expected 2006; University of Chicago, B.A., 2003.
2. Id.
3. Id. Isaiah Berlin noted that, “[b]ut, taken figuratively, the words can be made to yield a sense in which they mark one of the deepest differences which divide writers and thinkers, and, it may be, human beings in general.” Id.
4. 11 U.S.C. §362(h) (2000) was amended in 2005. Section 362(h) was amended by Pub. L. No. 109-7, § 362, 109 Stat. 23, 79-80 (2005) and is now codified as 11 U.S.C. §362(k)(1-2)(2006). This article will refer to §362(k) as it was formerly identified and is still commonly referred, § 362(h).
Embodying the fox's pluralist approach, the Ninth Circuit advocates an analysis that incorporates both financial and non-financial considerations. Following this pluralist approach, the Ninth Circuit reached an opposite conclusion: that emotional damages are available under § 362(h), even absent any financial harm. Courts should not follow the analysis of the Seventh Circuit because its monist financial approach is unfaithful to the two-fold purpose of the automatic stay. The automatic stay does not have a singular financial purpose, but rather has a heterogeneous dual purpose that incorporates non-financial considerations. Because the automatic stay is pluralistic, a financial monist analysis is incorrect. Instead, courts should follow the Ninth Circuit's pluralist analysis because it accurately reflects the two-fold purpose of the automatic stay.

This article will evaluate the split between the Seventh Circuit and the Ninth Circuit regarding the ability to recover for purely emotional damages under § 362(h). Part II will define and discuss the bankruptcy automatic stay generally and § 362(h)'s specific remedies for willful violations of the automatic stay. Part II will also outline the opposite positions taken by Seventh Circuit and Ninth Circuit decisions that illustrate the circuit split. Then, Part III will argue that victims of willful violations of the automatic stay should be able to recover for purely emotional damages under § 362(h). Part III will argue that the Seventh Circuit's conclusions are incorrect because they ignore the two-fold protections of the automatic stay by applying a purely financial analysis. Part III will then argue that the Ninth Circuit's pluralist analysis should be adopted because it reflects the two-fold purpose of the automatic stay by remaining faithful to § 362(h)'s plain language and legislative history. Based on that analysis, Part III will argue that the Ninth Circuit's analysis provides a functional standard for evaluating emotional distress claims under § 362(h). Finally, Part IV will present the negative impact of following the Seventh Circuit's reasoning and show that the Ninth Circuit's test adequately protects against § 362(h)'s abuse.

6. See Aiello, 239 F.3d 876 at 880.
II. Background

A. The Bankruptcy Automatic Stay

The filing of a bankruptcy petition creates an “automatic stay” that operates as a statutory injunction. This injunction prohibits the commencement or continuation of any action against the bankruptcy debtor, his property, or the property of the bankruptcy estate. In effect, the automatic stay is a ban on the efforts of creditors to collect debts outside the formal bankruptcy proceedings. The automatic stay prohibits formal actions as well as informal actions. Even indirect efforts inducing the debtor to pay debts are prohibited.

The automatic stay is one of the most fundamental protections provided by the bankruptcy laws. The automatic stay’s protection is two-fold: it protects the debtor and the creditors. The stay protects the debtor by halting all collection efforts, thus creating “breathing spell” from his debts. This “breathing spell” offers the debtor a respite from the financial burdens that led him into bankruptcy. It allows the debtor to attempt reorganization, repayment, or to be relieved from his financial burdens. In effect, the stay creates a sanctuary protecting the debtor from the often harassing efforts of creditors to recover debts. The stay protects the creditors by forcing creditors to

8. 11 U.S.C. § 362 (2000), amended by Pub. L. No. 109-7, § 362, 109 Stat. 23, 79-80 (2005). See Aiello, 239 F.3d at 878 (stating that “[t]he ‘automatic stay’ is a statutory injunction against efforts outside bankruptcy to collect debts from a debtor who is under the protection of bankruptcy court); See generally In re Hunters Run Ltd. P’ship, 875 F.2d 1425, 1427 (9th Cir. 1989) (noting that the automatic stay is an automatic injunction that stops the creditor collection efforts).
11. Id.
12. See Andrews Univ. v. Merchant, 958 F.2d 738, 742 (6th Cir. 1992) (holding that it is a violation of the automatic stay for a private university to refuse to issue a bankrupt student with a copy of his transcript unless he pays his outstanding debts).
14. H.R.REP. NO. 95-595, at 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97. This “breathing spell” aids in the debtor in starting his new financial life through the bankruptcy process. Id. Some courts have suggested that this term “breathing spell” suggests a more human side to the meticulous bankruptcy process. Dawson, 390 F.3d at 1147.

Frequently, a consumer debtor is severely harassed by his creditors when he falls behind in payments on loans. The harassment takes the form of abusive phone calls at all hours, including at work, threats of court action, attacks on the debtor’s reputation, and
adhere to the bankruptcy code's orderly liquidation or reorganization processes. These processes are designed to treat all creditors equally. Without the stay's protection, various creditors would be able to pursue alternative methods of collecting their debts. Creditors who acted with alacrity would receive preferential payment of their claims to the detriment of other creditors whose collection efforts were not as swift. In essence, the stay prevents creditors from "racing to devour the debtor's estate at the expense of fellow creditors." 

B. Willful Violations of the Automatic Stay under § 362(h)

Before the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the contempt power of the bankruptcy court was the only remedy available to a debtor when a party willfully violated the automatic stay provisions. With the enactment of 11 U.S.C. § 362(h), individual debtors were offered an additional avenue of recourse against a party that violated the automatic stay. Section 362(h) states: "An individual injured by any willful violation of [the automatic stay] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive..."
damages." The terms of § 362(h) have been broadly construed, thus creating a powerful tool protecting the benefits of the automatic stay and discouraging its violation by creditors. An aggrieved debtor bears the burden of proving that creditors willfully violated the stay. A willful act is an intentional and deliberate act done with knowledge of the bankruptcy filing itself or of the automatic stay. The plain language of § 362(h) requires that debtor must suffer "actual damages" in order to recover.

C. Circuit Split over Awarding of Emotional Distress Damages

Generally, courts have been willing to allow emotional distress damages under § 362(h). However, the circuits are currently split as


27. Thurmond & Fleming, supra note 10, at 2 (concluding that most courts include emotional distress damages in actual damages awarded under § 362(h)). The authors suggest that § 362(h) leaves little room for forgiveness for violations of the automatic stay—"[a]s one Texas Jurist has often cautioned—ask for permission and not for forgiveness after the stay is violated." Id.


29. Surette, supra note 24. The willfulness requirement goes to the deliberateness of the act that violates the automatic stay rather than the intent to violate the automatic stay. Id. In Covington v. I.R.S. (In re Covington), the court held that "[i]n order to find a willful violation of the bankruptcy stay, all the court needs to find is that the entity engaged in a deliberate act to violate the stay with the knowledge that the debtor has filed for bankruptcy. Where actual notice of the bankruptcy case is proven, a violation of the stay is presumed. Once it is shown that the creditor received actual notice of the bankruptcy, the violation is willful." Covington v. I.R.S., 256 B.R. 463, 466 (Bankr. D.S.C. 2000), Also, in Gullett v. Continental Cas. Co. (In re Gullett), the court defined the term willfulness as a "deliberate act" and that specific intent to violate the stay was not necessary for it to be a violation. Gullett v. Continental Cas. Co., 230 B.R. 321, 331 (Bankr. D. Tex. 1999). Similarly, in In re Daniels, the court found that "[a] violation of the automatic stay is willful when a creditor acts intentionally with knowledge of the stay or, more generally, the bankruptcy." In re Daniels, 206 B.R. 444, 445-46 (Bankr. D. Mich. 1997). Additionally, the court found that "specific intent to violate the stay is not required." Id. at 445.


to whether emotional damages alone, absent any financial harm, may be compensable as actual damages under § 362(h). Two cases, Aiello v. Providian Financial Corporation, in the Seventh Circuit, and Dawson v. Washington Mutual National Bank, F.A., in the Ninth Circuit, illustrate the split.

1. Aiello v. Providian Financial Corporation

Judge Richard A. Posner, writing for the Seventh Circuit, held that, absent financial injury inflicted by the violation of the automatic stay, emotional injury alone is not compensable under § 362(h). In Aiello, the debtor had filed a petition for Chapter 7 bankruptcy. One of the debtor’s listed debts showed that she owed $1,000 to the defendant credit card company. That creditor asked the debtor to reaffirm her debt and threatened to charge her with fraud if she did not comply. The debtor refused, and the defendant did not file the threatened fraud charges. Instead, the debtor filed a class action suit on behalf of herself and “similarly situated victim’s of the defendant’s alleged harassment.” The bankruptcy court dismissed the debtor’s claim because the only evidence that the debtor offered was a weak affidavit that asserted that she “cried, felt nauseous and scared and the letter caused her to quarrel with her husband,” and that “[e]ven after her meeting with her attorney [she] was still frightened.” The bankruptcy court granted summary judgment in favor of the defendant.

33. 239 F.3d 876 (7th Cir. 2001).
34. 390 F.3d 1139 (9th Cir. 2004).
35. 239 F.3d 876 (7th Cir. 2001).
36. Aiello, 239 F.3d at 880.
37. Id. at 878.
38. Id.
39. The Bankruptcy code allows a creditor to ask the debtor to “reaffirm” the creditor’s debt so that the debt will not be discharged with the debtor's other debts at the end of the bankruptcy proceeding. Id. See also 11 U.S.C. § 524(c) (2000). A reaffirmation agreement can be beneficial to the debtor because it avoids having his property repossessed. Aiello, 239 F.3d at 879 ( citing In re Penrod, 50 F.3d 459, 461 (7th Cir. 1995). The right to seek reaffirmation is an exception to the automatic stay. Id. However, if the reaffirmation agreement is reached through extortion, the creditor has violated the automatic stay and the remedy provisions of § 362(h) come into play. Id.
40. Id. at 878.
41. Aiello, 239 F.3d at 878.
42. Id.
43. Id.
44. Id. at 878-89.
The Seventh Circuit acknowledged that the term "actual damages" included emotional injury and considered whether purely emotional damages are recoverable under § 362(h). The court acknowledged that the automatic stay protects both the unsecured creditors as well as the debtor. However, the court emphasized that the automatic stay's primary purpose is to protect the unsecured creditors as a group. This primary purpose is "financial in character; it is not protection of peace of mind." The court went on to explain that bankruptcy judges are not chosen because of their ability to evaluate emotional injury claims and that was the Bankruptcy Code was not enacted with emotional incidents in mind. The court further suggested that debtors who suffer emotional distress from willful violations of the automatic stay are not "orphans of the law." It reasoned that debtors could file suit under state tort law because the automatic stay does not apply to suits filed by the debtor.

The court clarified that § 362(h)'s purpose was not to redress tort violations but to protect the rights given by the automatic stay. The court explained that if a defendant intimidated the debtor into giving up his right of discharge, the bankruptcy court would order financial damages necessary to put the debtor in his rightful place—the debtor's position before the violation of the automatic stay. In this case, while the creditor did threaten Aiello, she did not surrender to the threats and give up her right to a discharge. Therefore, her damages were purely emotional damages and, thus, not compensable under § 362(h). However, the court went on to note that had there been financial damages, in addition to her emotional damages, then the "clean up" doctrine of equity would allow the court to "top off"

45. Id. at 878.
46. Aiello, 239 F.3d at 879. "The stay prevents (without need to ask for a court for an injunction) a race by creditors to seize the debtor's assets, a race that by thwarting the orderly liquidation of those assets would yield the creditors as a group less than if they are restrained." Id.
47. Id. Posner noted that "bankruptcy is a harrowing experience," not only for the debtor, but for creditor's as well. Id.
48. Id.
49. Aiello, 239 F.3d at 879-80.
50. Id. at 880. Posner expressed that a creditor who uses intimidation or harassment subjects himself to a suit under state tort law. Id.
51. Id. "The automatic stay is not an obstacle, because it does not apply to suits by the debtor." Id. (citing Alpern v. Lieb, 11 F.3d 689, 690 (7th Cir. 1993)).
52. Id. "If one creditor muscled out the others in violation of the stay, the bankruptcy court would impose monetary sanctions under subsection (h)." Id.
53. Aiello, 239 F.3d at 880.
54. Id. at 878.
55. Id. at 879-80.
relief for financial damages. The "clean up" doctrine would allow an award for incidental harms, including adequately proved emotional distress claims. This would spare the debtor from having to bring two separate actions. The court concluded that because Aiello alleged "no financial loss to hitch [her emotional injury] to," her emotional injury was not compensable under § 362(h). Accordingly, Aiello was not allowed to recover for her emotional distress.

Additionally, the court remarked that the law has been "wary" of emotional distress claims and that in order to recover damages for such claims the plaintiff had to prove some other injury. The court cautioned that there is a great potential for abuse if § 362(h) allows redress for purely emotional injuries because such claims are so easily manufactured. Finally, the court noted that § 362(h) of the Bankruptcy Code is recent, having only been added in 1984. Its newness suggests that § 362(h) is but "a footnote to the power, now more than a century and a half old, to stay creditors' collection efforts in order to preserve the debtor's estate." The court further concluded that Congress gave no indication that it meant change the "fundamental character of bankruptcy remedies" by adding § 362(h).


Dawson, in the Ninth Circuit, reconsidered its findings in a previously withdrawn opinion and held that a debtor may recover dam-

56. Id. at 880.
57. Id.
58. Aiello, 239 F.3d at 880.
59. Id.
60. Id. at 880-81.
61. Id.
62. Id. The court notes that courts have a history of beings suspicious of emotional distress claims. Aiello, 239 F.3d at 880. The court goes on to stress that "suspicion lingers" regarding claims of emotional distress claims. Id.
63. Id. (citing Mueller v. Nugent, 184 U.S. 1, 14 (1902)).
64. Id. at 880-81.
65. Id. at 881.
66. 390 F.3d 1139 (9th Cir. 2004).
67. Dawson v. Washington Mut. Bank, F.A., 367 F.3d 1174 (9th Cir. 2004), withdrawn, 390 F.3d 1139 (9th Cir. 2004). The withdrawn opinion followed the Seventh Circuit reasoning in Aiello but went a step further. Dawson, 367 F.3d at 1180-81. The court held that damages for emotional injury could not be awarded under § 362(h). Id. at 1178. Citing the text of § 362(h), the court found that the section's plain language is aimed at purely economic damages. Id. at 1179. The court likened this interpretation to its prior decisions in copyright and securities litigation that awarded damages for only actual monetary loss. Id. The court reasoned that because the other statutes with similar language did not offer remedies for emotional injury, that § 362(h) should not offer this remedy either. Id. The court reviewed and endorsed a substantial portion
ages for purely emotional injury, pursuant to § 362(h). In Dawson, the plaintiff bought a home in 1987, and when he acquired the property, he obtained a loan secured by a first deed of trust from the predecessor of the defendant bank. The plaintiff began to experience difficulty in paying their monthly mortgage, and filed for Chapter 13 Bankruptcy in May of 1993. Eventually, the plaintiff was in default of their payments, and the bank recorded a notice of the foreclosure sale, to take place February 8, 1996. Just before the sale, the plaintiff, George Dawson, filed for Chapter 7 bankruptcy. In violation of the chapter 7 bankruptcy's automatic stay, the bank served plaintiff notice to quit their premises. Shortly after, the bank instituted an unlawful detainer action against the plaintiffs. The plaintiff filed a claim for emotional distress damages resulting from the violation of the automatic stay in the chapter 7 proceeding. The bankruptcy court denied the plaintiff's claim for emotional distress on the grounds that the bank's violation of the automatic stay was not egregious and that there was no evidence offered in support of the emotional distress claim.

The court considered the question of whether the text of the statute provides a definition for “actual damages.” The court discussed Congress’s choice to use the term “individual” to describe who may assert damages under § 362(h). The court reasoned that by limiting § 362(h) to individuals that Congress “signaled its special interest in redressing harms that are unique to human beings”—such as the emotional distress. The court found the rest of the text ambiguous and looked to the legislative history to determine Congress’s intent. Cit-
ing extensively from the House Report for the Bankruptcy Reform Act of 1978 (the House Report), the court suggested that the automatic stay furthered a bifurcated goal. The Court reasoned that the automatic stay's purpose is not merely for debtors and creditors but that "[it is meant] to achieve financial and non financial goals." Looking at the legislative history as a whole, the court concluded that Congress was concerned with not only financial loss, but also "with the emotional and psychological toll that a violation of the stay can exact." The court declined to follow the Seventh Circuit's reasoning because the Bankruptcy Code does not suggest that one form of damages is dependent on the existence of another form of damages. The court concluded that in order to be entitled to damages for emotional distress under § 362(h), the individual must:

1. suffer significant harm,
2. clearly establish the significant harm, and
3. demonstrate a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process).

III. Analysis

This note argues that purely emotional damages should be compensable under § 362(h). First, the Seventh's Circuit's reasoning and decision in Aiello were incorrect because the court ignored the two-fold protection of the automatic stay by applying a monist financial approach. A monist financial approach is unfaithful to both the legislative history and the plain language of § 362(h). Attempting to make

81. Id.
82. Id. (emphasis in original). The court continued that:
Plainly one aim of the automatic stay is financial: the stay gives the debtor time to put finances back in order, offers the debtor an opportunity to reorganize so that creditors can be satisfied to the greatest extent possible, and prevents creditors from racing to devour the debtor's estate at the expense of fellow creditors. But another purpose is to create a 'breathing spell,' a phrase suggesting a human side to the bankruptcy process. Id. at 1146-47.
83. Id. at 1148. "Because Congress meant for the automatic stay to protect more than financial interests, it makes sense to conclude that harm done to those non-financial interests by a violation are cognizable as 'actual damages.'” Id. The court then went on to conclude that "the 'actual damages' that may be recovered by an individual who is injured by a willful violation of the automatic stay... include damages for emotional distress.” Id. The court's holding followed the "emerging consensus recognizing the availability of damages for emotional distress that results specifically from a willful violation of the automatic stay.” Id.
84. Dawson, 390 F.3d at 1149.
85. Id.
the statute fit a purely financial mold, the Seventh Circuit’s reasoning is unsupported and conflicted. Second, courts should follow the Ninth Circuit’s reasoning in Dawson, because the court’s pluralist analysis is true to the two-fold protection of the automatic stay.\textsuperscript{87} The Ninth Circuit’s reasoning accurately reflects the plain language and legislative history of § 362(h).\textsuperscript{88} Finally, the Ninth Circuit proposes a workable test to evaluate and protect against false claims of emotional distress under § 362(h).\textsuperscript{89}

A. Seventh Circuit’s Monist Financial Approach Ignores the Two-Fold Protections of the Automatic Stay

The Seventh Circuit’s reasoning is not a persuasive or well founded lead that the courts should follow. The opinion, authored by the famous economic monist, Judge Posner, attempts to reduce § 362(h)’s scope to a purely financial central vision. However, this reasoning, while coherent on its face, is unpersuasive because it is unfaithful to § 362(h)’s legislative history and plain language. As a consequence of the court’s forced monist financial interpretation of § 362(h), the opinion is internally conflicted.

1. A Purely Financial Analysis Misrepresents the Legislative History Behind § 362(h)

The Seventh Circuit’s analysis circumvents the legislative history of § 362(h) and eviscerates the automatic stay’s non-financial protections. First, Judge Posner set the stage for his monist financial analysis, by mischaracterizing the general protections of the automatic stay. His opinion describes the automatic stay as a provision that is “primarily for the protection of the unsecured creditors... [but] it is also for the debtor’s protection.”\textsuperscript{90} While both of these statements are separately true, the Seventh Circuit downplayed the importance of the automatic stay’s protection of the debtor.\textsuperscript{91} In the Seventh Circuit’s opinion, the automatic stay’s debtor protection would seem merely a Shakespearian aside. This order of importance is misleading. The legislative history clearly expresses that the automatic stay is one of the

\textsuperscript{88} Dawson, 390 F.3d at 1149. See Wachter v. Lezdey, 34 Fed. App’x. 699, 701, 2002 WL 553734, at *2 (Fed. Cir. 2002) (noting that the purpose of section 362 is two-fold: (1) to give the debtor a “breathing spell” from collection efforts and permit a repayment or reorganization plan, and (2) to provide creditors protection against other creditors’ actions or collection attempts).
\textsuperscript{89} Dawson, 390 F.3d at 1149.
\textsuperscript{90} Aiello v. Providian Fin. Corp., 239 F.3d 876, 879-80 (7th Cir. 2001)
\textsuperscript{91} Id.
"fundamental debtor protections." The legislative history, as well as the majority of case law, stresses that the automatic stay protects the debtor first and the creditors second. Directing the focus of the automatic stay's protections on the creditors, the Seventh Circuit was able to analyze § 362(h) though a purely financial lens.

While the Seventh Circuit asserts that the protection of the automatic stay is primarily "financial in character," this assertion is unsupported. Case law and the legislative history of § 362(h) clearly express that the automatic stay's protection advances both financial and non-financial goals. However, in the entire opinion, the legislative history was never analyzed or even mentioned. Ignoring the legislative history is the only way that a solely financial interpretation of the automatic stay's protections can stand. The Bankruptcy Code, while it


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.

Id.

The House Report continues and further discusses why the debtor is afforded such protections:

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


93. Supra note 83 and accompanying text.

94. United States v. Dos Cabez Corp., 995 F.2d 1486, 1491 (9th Cir. 1993). The court noted that the automatic stay's protections are "two fold": the stay achieves financial and non-financial goals. Id. See also Bronson v. United States, 46 F.3d 1573, 1578-79 (Fed. Cir. 1995) (suggesting that the Bankruptcy Code has a two fold purpose); Wachter v. Lezdey, 34 Fed. Appx. 699, 701 (Fed. Cir., 2002) (noting that the purpose of section 362 is two-fold: (1) to give the debtor a "breathing spell" from collection efforts and permit a repayment or reorganization plan, and (2) to provide creditors protection against other creditors' actions or collection attempts); Johnson v. First Nat'l Bank, 719 F.2d 270, 276 (8th Cir. 1983) (finding that the fundamental purposes of the automatic stay imposed by § 362(a) against such actions are two-fold: to provide the debtor with a breathing spell from the collection efforts of creditors, and to protect creditors by insuring that the assets of the estate will not be dissipated in a number of different proceedings). The two-fold protection described by all of these cases reflects the language contained in the legislative history of § 362(h). See H.R.REP. NO. 95-595, at 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97. The House Report provides, in pertinent part: "The automatic stay is one of the fundamental debtor protections provided by bankruptcy laws." Id. The automatic stay gives the debtor a "breathing spell" from his creditors and additionally provides creditor protection. Id.

95. See generally Aiello v. Providian Fin. Corp., 239 F.3d 876 (7th Cir. 2001).
may have an overall financial aim, was drafted with reference to the emotional incidents of bankruptcy that the Seventh Circuit rejects.\(^9\) Contrary to the Seventh Circuit’s analysis, one important purpose of the automatic stay is unambiguously non-financial.\(^9\) The language of the House Report expressly points to “social” concerns that are more psychological than financial.\(^9\) Similarly, the House Report further explains the psychological tactics used by creditors when they take a security interest in all of the debtor’s personal, family belongings that have little financial value but significant emotional value.\(^9\) The legislative history’s detailed and lengthy explanation of the debtor's emotional and psychological experiences in bankruptcy should shed substantial light on the non-financial concerns of § 362(h). The legislative history, taken as a whole, specifically details various non-financial harms, yet the Seventh Circuit provided only thin arguments as to why the court disregarded these specific concerns.\(^1\) The court’s assertion that the automatic stay’s provisions are “financial in character” fails to consider the legislative history as a whole and, thus, mischaracterizes the two-fold purpose of the automatic stay.\(^1\)

Judge Posner weakly supports his position that the Bankruptcy Code was not drafted with reference to emotional incidents by charac-

\(^{96}\) Id. at 880-81 (discussing that the automatic stay is primarily for the protection of unsecured creditors).


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

\(^{98}\) Id.

\(^{99}\) Id. Creditors often take out security interests in family possessions that have high emotional value, like a beloved family pet or family photographs, but have little or no resale value. Creditors do this because the threat of repossession becomes more effective because of the threat of emotional loss. H.REP. No. 95-595, at 125-27, reprinted in 1978 U.S.C.C.A.N. 5963, 6134.

If the debtor encounters financial difficulty, creditors often use threats of repossession of all of the debtor’s household goods as a means of obtaining payment. In fact, were the creditor to carry through on his threat and foreclose on the property, he would receive little, for household goods have little resale value. They are far more valuable to the creditor in the debtor’s hands, for they provide a credible basis for the threat, because replacements costs of the goods are generally high .... Such security interests have too often been used by over-reaching creditors.

\(^{100}\) Aiello, 239 F.3d at 879-880.

\(^{101}\) Id.
terizing bankruptcy judges as unfit to evaluate claims of emotional injury. While bankruptcy judges' specialized expertise may not be in evaluating tort claims, they still possess a more general expertise in analyzing legal arguments and questions. Bankruptcy judges may primarily be seen as interpreters of the Bankruptcy Code, but they do not work in a bankruptcy vacuum. A bankruptcy judge is still a trier of fact on § 362(h) matters and could appropriately discern whether emotional damages were appropriate. Even if the Seventh Circuit's fear of potential abuse in awarding damages for emotional distress would materialize, the appellate process could correct these abuses or mistakes.

2. A Purely Financial Analysis Is Contrary to the Plain Language of the Statute

Judge Posner's focus on purely financial harm is contrary to the plain language of § 362(h). The Seventh Circuit argued that redressing tort violations is outside the scope of § 362(h) and stressed that its purpose is to protect the rights conferred by the automatic stay. The later part of this assertion is true: § 362(h) protects the rights conferred on the "individual" harmed by the violation of the automatic stay. However, Judge Posner overlooked that the rights of the automatic stay are conferred on individuals, or in other words, on human beings who have feelings. The court ignored the signifi-
cance of Congress's choice to limit § 362(h)'s remedies to individuals. This limitation signals Congress's intent to redress violations that are unique to human beings and cannot be suffered by organizations.\(^\text{109}\)

Emotional distress falls neatly into this category of harm.\(^\text{110}\)

Instead of allowing redress for purely emotional harm, the Seventh Circuit begrudgingly accepted that emotional damages are only covered under § 362(h) when there is a financial harm to "hitch it to by means of the clean-up doctrine" of equity.\(^\text{111}\) To support this, the court does not look to the plain language of the statute or to the legislative history behind it, but instead, the Seventh Circuit turns to three non-bankruptcy cases to advance the use of the "clean up" doctrine of equity under § 362(h).\(^\text{112}\) In essence, the court advocated that recovery for one kind of damages—emotional—is contingent upon another kind of damages—financial. This contingency awarding of damages is unsupported by the Bankruptcy Code. Neither the plain language of § 362(h) nor the legislative history behind it suggests that recovering

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\(^{109}\) Dawson, 390 F.3d at 1146.

\(^{110}\) Id. See also Stinson v. Bi-Rite Rest. Supply Inc. (In re Stinson), 295 B.R. 109, 127 (Bankr. Fed. App., 2003) (Klein, J., dissenting). The court discussed:

...individuals in bankruptcy are overwhelmingly persons of limited financial sophistication who have reached a last resort where Congress has assured them that the automatic stay will protect them for a while from the depredations of creditors. Those individuals are correspondingly vulnerable to a profound sense of betrayal and upset by invasions of the protection Congress has promised them.

\(^{111}\) Id.

\(^{112}\) Aiello v. Providian Fin. Corp., 239 F.3d 876, 880 (7th Cir. 2001). The "clean-up" doctrine of equity allows the court to add an award of damages for incidental harms resulting from a financial injury. Id. See generally Wal-Mart Stores, Inc. Health & Welfare Plan v. Wells, 213 F.3d 398, 400-01 (7th Cir. 2000) (referencing the doctrine of equitable "clean-up"); Medtronic, Inc. v. Intermedics, Inc., 725 F.2d 440, 442 (7th Cir. 1984) (stating that a plaintiff in equity can seek legal as well as equitable relief from an equity court under the equity clean-up doctrine); Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 795 F.2d 1111, 1114 (1st Cir. 1986) (noting the existence of the doctrine of equitable clean-up). This doctrine is aimed at judicial economy and spares the debtor the expense of having to bring two suits. Id., 239 F.3d at 880.

\(^{113}\) Wal-Mart Stores v. Wells, 213 F.3d 398 (7th Cir. 2000), involves a suit by an administrator of welfare plan under ERISA, for reimbursement of funds paid for medical expenses she incurred in automobile accident. Id. Medtronic, Inc. v. Intermedics, Inc., 725 F.2d 440 (7th Cir. 1984), involved a suit which alleged that a company's competitors had improperly hired away several of the company's sales representatives. Id. Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 795 F.2d 1111 (1st Cir. 1986), involved a suit alleging excessive trading in investors' accounts and fraudulent misrepresentation regarding investment recommendations. Id.
any one type of damages is contingent upon recovering another type of damages.\textsuperscript{113}

3. A Purely Financial Analysis Mistakenly Fragments the Question of Whether Emotional Damages as Actual Damages Are Compensable under § 362(h)

The Seventh Circuit asserts that the award of emotional damages under § 362(h) is a separate question from whether emotional damages are actual damages under § 362(h).\textsuperscript{114} These two questions cannot be stated in isolation. They must be read interdependently; otherwise the answers yield conflicting results.\textsuperscript{115} However, to fit into a monist financial approach to § 362(h), the court must awkwardly fragment these interdependent questions. The Seventh Circuit expressly acknowledges that emotional damages are actual damages, yet questions whether the award of emotional damages is “authorized” under the § 362(h).\textsuperscript{116} This assertion conflicts well established statutory interpretation as well as the Seventh Circuit’s own opinion.\textsuperscript{117} Section 362(h) asserts that “[a]n individual by any willful violation... shall recover actual damages.”\textsuperscript{118} It is well established that emotional damages are considered actual damages.\textsuperscript{119} The Seventh Circuit, in its own opinion, confidently asserts that there is “[n]o doubt that [emo-

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\item \textsuperscript{114} Aiello, 239 F.3d at 878.
\item \textsuperscript{116} Aiello, 239 F.3d at 878. The court notes that other courts have held that emotional damages fall under the scope of the statutory term “actual damages,” and are thus qualified under § 362(h). Id. The court goes on to say that there is “no doubt [that emotional damages] are” actual damages. Id.
\item \textsuperscript{117} Courts have held that emotional distress damages are one type of actual damages under § 362(h). See Fisher v. Blackstone Fin. Servs., Inc. (\textit{In re Fisher}), 144 B.R. 237, 239-40 (Bankr. D.R.I. 1992). In Fisher, the bankruptcy court ordered a creditor to pay emotional distress damages because of a willful violation of the automatic stay. Id. See also Fleet Mortgage Group, Inc. v. Kaneb, 196 F.3d 265, 269-70 (1st Cir. 1999). The First Circuit was the first court of appeals to address whether § 362(h) authorized compensation for emotional damages. Id. That court expressly held that emotional injury is an actual damage when it is caused by a willful violation of the automatic stay. Id.
\item \textsuperscript{119} Aiello, 239 F.3d at 878. Various court have uniformly held that emotional damages qualify as “actual damages” under § 362(h). See Fleet Mortgage Group, Inc. v. Kanaeb, 196 F.3d 265, 269 (1st Cir. 1999). Additionally, courts have noted that emotional distress is an actual injury because “[l]egitimate human emotions are brought to bear when one’s rights are trampled on.” Holden v. IRS (\textit{In re Holden}), 226 B.R. 809, 812 (Bankr. D. Vt. 1998). Courts are reluctant to disregard the significance and impact of emotional distress. Some courts have gone so far as to suggest that even though emotional distress claims are often imprecise, are real. \textit{In re Carri-}
\item \textsuperscript{119} 109 B.R. 167, 170 (W.D.N.C. 1989).
\end{itemize}
tional damages] are” actual damages. Logically, if emotional damages are actual damages and actual damages “shall” be recovered under § 362(h), then there should be no reason to question their statutory authorization. Consequently, emotional damages as actual damages are compensable under § 362(h).

Nowhere is the language of § 362(h) does it suggest that one kind of damages, emotional or otherwise, are contingent upon another kind of damages. As one court suggested, “[t]he hurdle for awarding emotional distress damages is not statutory authorization, but, rather proof that the emotional distress in fact existed.”

B. Ninth Circuit’s Pluralist Analysis Rightly Reflects the Two-Fold Protections of the Automatic Stay

The Ninth Circuit correctly interprets § 362(h), because it bases its interpretation of the plain language of § 362(h) on well established precedent. Further, the court buttresses its reasoning by finding support in § 362(h)’s legislative history. Using both legislative history and plain language interpretation, the court presents a functional and straightforward test to value emotional distress claims. This test also serves as a realistic way to prevent against abuse of § 362(h)’s provisions.

1. Section 362(h)’s Plain Language, as Defined by Precedent, Supports Recovery for Purely Emotional Damages

The Ninth Circuit’s analysis correctly addresses Congress’s textual choices of the plain language in § 362(h). Beginning with the text of § 362(h), the court noted that the plain language is ambiguous. Instead of using this ambiguity to make unfounded conclusions, the court analyzed Congress’s specific word choice in § 362(h) to unlock its scope and meaning. The Court suggested that Congress’s choice to use the term “individual” provided the first contextual clue that supports the awarding of damages for emotional distress claims.

120. Aiello, 239 F.3d at 878.
121. See Bishop v. U.S. Bank/Firstar Bank, N.A., 296 B.R. 890, 897 (Bankr. S.D. Ga. 2003). In Bishop, the court respectfully disagreed with the Seventh Circuit’s reasoning in Aiello. Id. That court held that emotional distress is an actual harm that qualifies under § 362(h) for an award of actual damages even absent other damages. Id.
122. Id.
123. Id. at 896-97.
124. Id. at 897.
126. Id.
127. Id.
Because the term "individual" is not explicitly defined anywhere in the Bankruptcy Code, the court looked to precedent to determine its definition. Following the majority approach, the court restricted the term "individual" to actual individuals and excluded corporations and entities from § 362(h)'s purview.

Building upon that sound foundation, the court logically used the definition of "individual" to direct its interpretation of § 362(h)'s scope. Suggesting that by limiting § 362(h)'s reach to individuals and not organizations, Congress "signaled its special interest in redressing harms that are unique to human beings," such as emotional distress. Unlike, corporations, individuals have feelings and emotions. Restricting § 362(h)'s remedy to "individual" human beings allows it to encompass harms made to the human psyche, even absent a financial harm. As individual humans are not solely financially-motivated creatures, it logically follows that they can suffer emotional harms worthy of compensation, even absent a specific financial harm. Section 362(h) stands to broadly protect the victims of willful

128. Id. While the Bankruptcy Code offers explicit and detailed definitions of many other of its terms, nowhere in the Code is "individual" explicitly defined. Consolidated Rail Corp. v. Gallatin State Bank, 173 B.R. 146, 147 (N.D. Ill. 1992). It has been held that a debtor who is not an individual, but rather a corporation or an entity, is unable to recover damages under § 362(h). Id.
129. Dawson, 390 F.3d at 1146. The Court cites to two cases that explain that individuals typically do not mean corporations or entities. See Johnston Envtl. Corp. v. Knight (In re Goodman), 991 F.2d 613, 618-20 (9th Cir. 1993) (noting that corporations are not "individuals" for the purposes of the statute and that "[i]ndividual" means individual, and not a corporation or other artificial entity); United States v. Arkison (In re Cascade Roads, Inc.), 34 F.3d 756, 766 (9th Cir. 1994) (stating that corporations may not recover sanctions under § 362(h) because the statute refers only to individuals). These two cases are true to the majority definition of "individual."
130. Dawson, 390 F.3d at 1146.
131. Id.
132. Id.
134. Id.
135. Some economists would rebut this assertion and argue that people are merely economically self motivated. As Adam Smith opined in one of the most famous economic works of all time, The Wealth of Nations: "It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest." ADAM SMITH, THE WEALTH OF NATIONS ii, 15 (Edwin Cannan ed., Modern Library 1994) (1776). In his book Smith provided theoretical support to the policy of laisser-faire by introducing a concept called "the invisible hand." Id. This term refers to all the social good incidentally caused by individuals seeking their own personal rewards. Id. For example, a baker does his job only to receive a paycheck, but in the course of doing his job, he bakes bread for hundreds of people. Id. Performing this greater good for society may not have been part of his original intention, but the market's "invisible hand" has led him to do so. Id.
136. Stinson, 295 B.R. at 127 (Klein, J., dissenting).
violations of the automatic stay. It should not limit the compensation to mere financial technicalities.

2. A Pluralist Analysis Incorporating Both Non-Financial and Financial Goals Is True to the Legislative Intent Behind § 362(h)

The Ninth Circuit gives proper weight to the extensive legislative history of § 362(h) and successfully incorporates both its financial and non-financial goals. Although the Ninth Circuit relied heavily on the text of the House Reports, the court’s reliance is justified. Unrelated statutes passed at different times give little, if any, insight as to the meaning of § 362(h). Because the legislative history of § 362(h) speaks at such length about non-financial concerns, failing to mention the non-financial goals would mischaracterize the meaning of the statute. Even despite the voluminous discussion of the emotional and social harms that befall the debtor, the Ninth Circuit does not extend its analysis too far. The court does not attempt to mischaracterize the Bankruptcy Code’s focus as a solely humanitarian effort. The court candidly agrees that § 362(h) focuses on the financial effects

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137. Id. at 128.
138. In re Torres, 309 B.R. 643, 650 (B.A.P. 1st Cir. 2004). The court in Torres noted that often a debtor’s actual out of pocket economic loss may be so small and insignificant in comparison to the emotional trauma suffered. Id. at 649. It would be a travesty of justice to deny redress to these significant emotional injuries. Id. Additionally, an “honest accounting of actual damages under § 362(h) must include . . . psychological suffering.” Id. at 650.
139. The court turned to precedent in deciding that examination of legislative history is the next appropriate step to clarify the language and meaning of § 362(h). Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1080 (9th Cir. 1999) (noting that recourse to legislative history is an appropriate tool to determine Congressional intent). Turning to the legislative history of § 362(h) is an appropriate step because the question is what Congress’s intent was in enacting the particular statute at issue. Dawson, 390 F.3d at 1146 n.3. The Court even candidly admitted that in its withdrawn opinion that it mistakenly did not take this logical step. Dawson, 390 F.3d at 1143 (noting that “[u]pon reconsideration, however, we are persuaded that we erred . . .”). In its withdrawn opinion, which reached an opposite conclusion, the court instead relied on analogy to other kinds of statutes that did not allow for emotional distress damages. Id.
140. Dawson, 390 F.3d at 1146-48.
141. Id. at 1146 n.3.
142. Id. at 1147, The Court notes that:
Plainly one aim of the automatic stay is financial: the stay gives the debtor time to put finances back in order, offers the debtor an opportunity to reorganize so that creditors can be satisfied to the greatest extent possible, and prevents creditors from racing to devour the debtor’s estate at the expense of fellow creditors. But another purpose is to create a “breathing spell,” a phrase suggesting a human side to the bankruptcy process.
143. Supra notes 98, 107, and 109 and accompanying text.
144. Dawson, 390 F.3d at 1147.
of violations of the automatic stay. However, the court does not ignore the Bankruptcy Code's two-fold character. The Ninth Circuit analysis correctly interprets § 362(h) because it balances the financial and non-financial concerns of § 362(h).

2. Standard for Awarding Damages Effectively Protects Against Abuse of § 362(h)

The Ninth Circuit directly addresses the Seventh Circuit's fear that allowing purely emotional harm under § 362(h) would offer too much potential for abuse. Emotional damages are not available until the victim of the violation of the stay has demonstrated that there is § 362(h) liability for the willful violation of the automatic stay. Safeguarding against an automatic award of emotional distress damages, the Ninth Circuit offered a three part test to aid the trier of fact in assessing the liability for the willful violation of the automatic stay.

In order for an individual to recover for purely emotional damages an individual must: (1) suffer significant harm, (2) clearly establish that significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay. This test works as a sieve to sift the meritorious emotional distress claims from the mere normal anxiety and stress inherent in the bankruptcy process. The test advocated is a sound test because it drawn from bankruptcy cases throughout the circuit, but it is also sup-

145. Id. at 1146.
146. Supra note 93 and accompanying text.
147. Additionally, the Ninth Circuit's analysis reflects the emerging consensus that recognizes emotional damages as a part of § 362(h). See Ralph C. McCullough, Emotional Distress Damages: Should They be Permitted under the Bankruptcy Code for a Willful Violation of the Stay, 1 DEPAUL BUS. & COM. L. J. 339 (2003) (discussing emotional damages for willful violations of the automatic stay); Thurmond & Fleming, supra note 10, at 1.
148. The Court noted that it was concerned with limiting frivolous claims for emotional distress and suggested that, "[a]lthough pecuniary loss is not required in order to claim emotional distress damages, not every willful violation merits compensation for emotional distress." Dawson, 390 F.3d at 1149.
150. Dawson, 390 F.3d at 1149.
151. Id.
152. Id.
153. The majority of bankruptcy courts follow this rule. See, e.g., In re Skeen, 248 B.R. 312, 319 (Bankr. E.D. Tenn. 2000) (holding that when emotional distress suffered is inconsequential, fleeting, or medically insignificant, it is not compensable); Crispell v. Landmark Bank, (In re Crispell), 73 B.R. 375, 380 (Bankr. E.D. Mo. 1987) (noting that because the emotional distress suffered by Debtors was fleeting, inconsequential, and medically insignificant, it is not compensable).
ported by tort law. The court effectively incorporates the precedent of a number of courts that have adopted similar standards for emotional distress. The first part of the court's test precludes recovery for fleeting or trivial anxiety or distress does not suffice to support an award. The second part of the test allows for various standards of proof to establish the significance of the emotional harm. While divergent standards of proof to establish the emotional harm's significance may be criticized for being too inclusive, allowing a wide spectrum of proof is faithful to tort law. The wide spectrum of proof available to the victim of a violation of the automatic stay is not likely to increase the number of § 362(h) matters that are filed. That number is dependant on the acts of the creditors and others who choose to violate the automatic stay. Quite the contrary, if there is the possibility of liability for purely emotional damages; creditors may be more hesitant to violate the sanctity of the automatic stay's provisions.

154. Dawson, 390 F.3d at 1149.
155. A wide spectrum of proof is recognized. Corroborating medical evidence may be offered. See, e.g., In re Briggs, 143 B.R. 438, 462 (Bankr. E.D. Mich. 1992) (requiring specific and definite evidence to establish an emotional distress claim arising from violation of the automatic stay); Non-experts, such as family members, friends, or coworkers, may testify to manifestations of mental anguish and clearly establish that significant emotional harm occurred. See, e.g., Varela v. Ocasio (In re Ocasio), 272 B.R. 815, 821-22 (B.A.P. 1st Cir. 2002). In some cases significant emotional distress may be readily apparent even without corroborative evidence. For instance, the violator may have engaged in egregious conduct. See, e.g., Wagner v. Ivory (In re Wagner), 74 B.R. 898, 905 (Bankr. E.D. Pa. 1987). Some courts have found that even if the violation of the automatic stay was not egregious, the circumstances may make it obvious that a reasonable person would suffer significant emotional harm. See, e.g., United States v. Flynn (In re Flynn), 185 B.R. 89, 92 (S.D. Ga. 1995).
156. The Restatement of Torts admits that “when it comes to emotional distress, certainty is impossible.” RESTATEMENT (SECOND) OF TORTS § 912 cmt. b. (1971). The comment explains that there “is no direct correspondence between money and harm to the body, feelings or reputation.” Id. Because there is not a “market price” for such losses that they should not be measured “by the amount for which one would be willing to suffer the harm.” Id. The comment further explains that because the factors in considering emotional distress are all indefinite that “it is impossible to require anything approximating certainty of amount even as to past harm.” Id.
158. In order to recover, the individual must be “injured by” the violation of the automatic stay in order to be eligible to claim emotional distress damages under § 362(h). See e.g., Bishop v. U.S. Bank/Firstar Bank, N.A. (In re Bishop), 296 B.R. 890, 897 (Bankr. S.D. Ga. 2003) (noting that there must be a clearly established or readily apparent causal link between the violator’s acts and the emotional harm).
IV. IMPACT

Courts should not follow the Seventh Circuit's reasoning because its holding only has negative impacts. First, if § 362(h) limited to a purely financial scope, victims of violations of the automatic stay are left without practical recourse for resulting emotional distress claims. Second, limiting § 362(h)'s power to punish only when there is financial harm suffered curtails the automatic stay's broad protective power. Third, adopting the Seventh Circuit's reasoning would be contrary to the Bankruptcy Code's altruistic purpose. Finally, the potential for abuse of § 362(h) is an exaggerated fear. The test to evaluate emotional distress claims, set out by the Ninth Circuit, effectively safeguards against abuse of § 362(h).

A. Without Recourse for Purely Emotional Harms Victims of a Willful Violation of the Automatic Stay Are "Orphans of the Law"

Should the courts follow the Seventh Circuit and restrict 362(h)'s redress to only emotional harms that are hitched to financial harms, the victims of the automatic stay will be "orphans of the law." While Judge Posner suggests that emotional distress claims can be brought in courts outside the bankruptcy proceedings, his suggestion is ill informed. While theoretically the opportunity to file a tort suit is always possible, it is not practically possible for most debtors. While a creditor may expose himself to a suit under state law when he

159. Stinson, 259 B.R. at 127-28 (Klein J., dissenting).
160. Id. at 128.
161. Id.
162. Id. at 127-28.
164. Aiello v. Providian Fin. Corp., 239 F.3d 876, 880 (7th Cir. 2001). “That is not to suggest tat victims of tortious infliction of emotional distress in the course of a bankruptcy proceeding are orphans of the law.” Id.
165. Id. at 880. Judge Posner suggests that victims of purely emotional harm from violations of the automatic stay should instead take their claims into state court to be covered under tort law. Id. He notes that the automatic stay is not an obstacle to the debtor because he may file a suit against a creditor outside of bankruptcy. Id.
166. Stinson, 259 B.R. at 128.
167. Bankruptcy is not always a swift process. As many of the bankruptcy survival self-help books suggest, filing a bankruptcy petition does not end your financial problems. See generally Peggy Palms, THE BANKRUPTCY SOLUTION: HOW TO ELIMINATE DEBT AND REBUILD YOUR LIFE (James P. Caher ed., Wiley Publications 2003). Even these basic guidebooks address that filing the petition is just the beginning of the bankruptcy process—there is a long road of financial planning ahead. Id. Even the star of the frequent legal advertisements, Peter Francis Geraci, admits that bankruptcy is a difficult time. See http://www.infotapes.com/.
uses extortion or intimidation to coax a debtor to pay, the chances of that suit materializing are thin. The automatic stay may not be a technical obstacle for the debtor to overcome, but the reasons for the automatic stay are a great obstacle. The debtor is only protected by the automatic stay, because he has filed bankruptcy. As debtor, he has reached the last resort. Expecting a debtor in bankruptcy to be capable of paying for costly tort litigation is an unlikely extrapolation. In many States, the statute of limitations for intentional infliction of emotional distress is one year. It is an optimistic view to think that the debtor will be solvent and financially set in his new life to bear the burden of expensive litigation. Additionally, in outside suits the debtor may not be able to secure superior representation to go against his often powerful creditors. Allowing § 362(h) as redress for purely emotional harm gives the debtor a fair chance of recovering for his emotional distress because he has the full weight and power of the Bankruptcy Code behind him.

B. Section 362(h)’s Deterrence Powers Should Not Be Limited

Limiting § 362(h)’s power to punish willful violations for only when there is financial harm suffered curtails the automatic stay’s power. Creating unfounded threshold requirements for recovering under § 362(h) operate to truncate the broad power encompassed in the automatic stay. Bankruptcy judges should be empowered to award emotional damages when § 362(h) is violated. Limiting the power of § 362(h) could “embolden cynical creditors to terrorize debtors by way of stay violations in circumstances where they are confident that

168. Aiello, 239 F.3d at 880.
169. Id. at 878.
171. Stinson, 259 B.R. at 127. The court notes that individuals in bankruptcy are often persons of limited financial sophistication and means. Id. As with most services, the old adage is true that “you get what you pay for.” Individuals in bankruptcy may not be able to get superior legal service because of their lack of funds. Id. Additionally, they may face the prejudice of looking like and undesirable client because they are currently in bankruptcy. Id. Individual’s with little financial sophistication and legal savvy are no match for the large corporations or entities that they need to sue to recover. Id. While the corporations may have a deep pocket to pay tort damage awards, those corporations have an equally deep pocket to pay their lawyer’s fees.
173. Id.
174. In re Torres, 309 B.R. 643, 649-50 (B.A.P. 1st Cir. 2004. The court noted that the Bankruptcy Code firmly authorizes judges to exercise their statutory and inherit powers to ameliorate claims with full remedial relief. Id.
their victims will not be able to show financial or significant economic loss.\textsuperscript{175} Section 362(h) should act as a deterrent to those who desire to violate the sanctity of the automatic stay, it should not be an enticement. Following the standard advocated by the Seventh Circuit, would weaken the automatic stays protections, and as one court noted that “[w]e should be reluctant to pull § 362(h)’s teeth.”\textsuperscript{176}

\section{The Bankruptcy Code Is Not a Vacuum Vacant of Humanity}

Although at first glance the meticulous Bankruptcy Code seems acutely concerned with the new financial life of the debtor, it also has an altruistic purpose as well.\textsuperscript{177} Looking at the legislative history, as a whole, it is clear that Congress intended for the Bankruptcy Code to embody not just a financial purpose, but also a humanitarian purpose.\textsuperscript{178} At its most basic level of abstraction, bankruptcy provides the debtor forgiveness for their financial sins.\textsuperscript{179} Debts are wiped away, and the debtor gets a fresh start.\textsuperscript{180} Following the Seventh Circuit’s analysis would create a confusing contradiction in the Bankruptcy Code: the entire Code has the two-fold purpose, yet § 362(h) would be limited to redressing purely financial harms.

\section{The Ninth Circuit’s Test for Evaluating Emotional Distress Claims Adequately Guards Against Abuse of § 362(h)}

Because emotional distress claims are easily manufactured, the Seventh Circuit warned that interpreting § 362(h) to redress purely emotional harms would create a great potential for abuse.\textsuperscript{181} However, this fear of abuse is exaggerated and unfounded. Pointing to historical suspicion, the Seventh Circuit suggested that although courts have grown more receptive to and adept at evaluating meritorious emotional distress claims, that the court should still be suspicious of these tort claims.\textsuperscript{182} Most modern courts have abandoned the former idea that emotional distress claims cannot not stand alone, yet the Seventh

\textsuperscript{175} Stinson, 259 B.R. at 128.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Dawson v. Washington Mut. Bank, F.A. (\textit{In re Dawson}), 390 F.3d 1139, 1147-49 (9th Cir. 2004).
\textsuperscript{179} Thurmond & Fleming, \textit{supra} note 10. The author’s noted that while forgiveness is not contemplated for the violator of § 362(h), it is for the victim. \textit{Id.}
\textsuperscript{180} One of the main public policy goals behind the Bankruptcy Code is to allow debtors a fresh start through a discharge of debts or a plan for reorganization. \textit{William L. Norton, Jr., Norton Bankruptcy Law & Practice (Second) \textsection{} 75:3 (2005).}
\textsuperscript{181} Aiello v. Providian Fin. Corp., 239 F.3d 876, 880 (7th Cir. 2001).
\textsuperscript{182} \textit{Id.} at 880-81.
Circuit argued that the courts should heed old law, even though it has radically changed.\(^{183}\) While historical arguments are common in judicial opinions, asserting that history should be followed simply because it is old is unpersuasive. Despite the Seventh Circuit's assertion that there is no indication of Congress's desire to change the character of bankruptcy remedies, the legislative history suggests the opposite conclusion.\(^{184}\)

As for the assertion that emotional distress claims are easy to manufacture, "it is one thing to assert emotional distress, but it is quite another to persuade a bankruptcy judge to find emotional distress existed."\(^{185}\) The mere assertion of a claim of emotional distress is not the talisman in whose presence all requirements for proof of that claim fade away and disappear.\(^{186}\) The debtor still has the burden of proof to show the validity of the claim.\(^{187}\) As the Ninth Circuit addressed, the harm suffered must be clearly proven to establish a significant harm.\(^{188}\) Courts have routinely rejected claims for emotional distress that are merely fleeting or trivial.\(^{189}\) As an additional hurdle that the claims must clear, the debtor must demonstrate a causal connection between the emotional distress claimed and the violation of the automatic stay.\(^{190}\) Courts also have routinely rejected claims for emotional distress where the casual link between the violator's acts and the harm were not clearly established or readily apparent.\(^{191}\) These hurdles provide a significant safeguard against fabricated emotional distress claims.\(^{192}\)

\(^{183}\) Id. at 880. Judge Posner notes that "courts have grown more confident in their ability to sift and value claims of emotional distress, and the old limitations have largely been abandoned; but suspicion lingers." Id.

\(^{184}\) The House reports go on at length discussing the non-financial considerations and effects of bankruptcy on a debtor. Dawson, 390 F. 3d at 1147-48.


\(^{186}\) In Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971), the Supreme Court stated, "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Id. The author pays homage to Justice Stewart's eloquent phase.

\(^{187}\) Dawson, 390 F.3d at 1149.

\(^{188}\) Id.

\(^{189}\) See generally McCullough, supra note 146, at 344; see also In re Skeen, 248 B.R. 312, 319 (Bankr. E.D. Tenn. 2000) (holding that since the emotional distress suffered was inconsequential, fleeting, and medically insignificant, it was not compensable) (citing Crispell v. Landmark Bank (In re Crispell), 73 B.R. 375, 280 (Bank E.D. Mo. 1987).

\(^{190}\) Dawson, 390 F.3d at 1149.

\(^{191}\) See In re Briggs, 143 B.R. 438, 463 (Bankr. E.D. Mich. 1992) (holding that the debtor was unable to recover emotional damages because he could not prove that the trauma he suffered was the result of the creditor's actions).

V. Conclusion

The financial monist approach is ill suited to analyzing the purpose and intent of § 362(h). Consequently, courts should not adopt the Seventh Circuit's monist approach because it misrepresents the legislative intent and plain language of § 362(h). Instead, based on the above analysis, the court should resolve the split by adopting the Ninth Circuit's pluralistic analysis which authorizes recovery for purely emotional harms under § 362(h). The court should adopt this pluralist approach because it correctly interprets § 362(h) and remains faithful to the legislative intent and plain language of the statute. Following the Ninth Circuit's analysis provides victims of willful violations of the automatic stay a practical avenue of redress for emotional distress claims. It does so without compromising the deterrent power of § 362(h) or neglecting to protect against potential abuse. All of the Ninth Circuit reasoning accurately reflects both the financial and non-financial purposes of the automatic stay. Therefore, § 362(h) should allow victims of willful violations of the automatic stay to recover for purely emotional harms, even absent any financial injury.\footnote{193 While some suggest that the fox for all his cunning is defeated by the hedgehog's one defense, here the pluralist foxes of the Ninth Circuit should be victorious over the hedgehogs in the Seventh Circuit and their monist financial approach.}