



Emotional Distress Damages: Should They Be Permitted Under the Bankruptcy Code for a Willful Violation of the Stay

Ralph C. McCullough II

Follow this and additional works at: <https://via.library.depaul.edu/bclj>

Recommended Citation

Ralph C. McCullough II, *Emotional Distress Damages: Should They Be Permitted Under the Bankruptcy Code for a Willful Violation of the Stay*, 1 DePaul Bus. & Com. L.J. 339 (2003)

Available at: <https://via.library.depaul.edu/bclj/vol1/iss3/3>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Business and Commercial Law Journal by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

Emotional Distress Damages: Should They Be Permitted Under the Bankruptcy Code for a Willful Violation of the Stay

*Ralph C. McCullough, II**

I. INTRODUCTION

An emerging topic in bankruptcy law is whether the term “actual damages” includes damages for emotional injury.¹ If such a recovery is possible, then it must come from 11 U.S.C. §362 which provides in pertinent part that: “[a]n 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 recover punitive damages.”² This article will explore how certain bankruptcy courts have dealt with the issue of emotional damages and compensation for willful violations of automatic stays, through a detailed examination of lower court decisions and the two appellate court decisions that have addressed these issues. It is becoming quite apparent that bankruptcy courts, district courts and appellate courts are willing to compensate a debtor, under appropriate circumstances, for emotional injury when a creditor willfully violates the automatic stay.

* Mr. McCullough was admitted to the Louisiana Bar in 1965 and the South Carolina Bar in 1974. Mr. McCullough was a member of the Tulane Law Review from 1964 to 1965. He was author of *State Law School Curriculum — The Future*, 23 J. LEGAL EDUC. 528 (1971); CIVIL TRIAL MANUAL, with Figg & Underwood in 1974, and supplements in 1976, 1977, 1978 and 1979. Mr. McCullough was co-author with: UNDERWOOD, CIVIL TRIAL MANUAL II (1981), supplemented in 1982, 1983, 1984, 1985, and 1986; FINKEL, SOUTH CAROLINA TORTS, (Palmetto Law Publishers 1981); FINKEL, SOUTH CAROLINA TORTS II AND SOUTH CAROLINA TORTS III. He is the author of numerous articles in Commercial Law and Bankruptcy. Mr. McCullough is currently a Distinguished Chair Professor of Law Emeritus at the University of South Carolina School of Law where he has served as a faculty member since 1968. Mr. McCullough held the American College of Trial Lawyers Chair for Advocacy and has served as a member of the United States Panel Trustees since 1975. He also has served as a Chapter 11 Trustee in numerous complex cases. Mr. McCullough was elected a Life Member of the American Law Institute in 1999. He serves as a member of the Fourth Circuit Advisory Committee on Rules and Procedures for the United States Court of Appeals. The author would like to thank Michael Brown for his assistance with this article.

1. See, e.g., *Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 878 (7th Cir. 2001).

2. 11 U.S.C. § 362(h) (2002).

II. WILLFUL VIOLATION OF THE AUTOMATION STAY

A debtor must prove that a creditor has *willfully* violated the automatic stay in order to recover damages pursuant to §362(h).³ All courts agree that the debtor bears the burden of proving that the violation was willful. However, the courts disagree as to what standard of proof the debtor must establish in order to prove a willful violation.⁴ Bankruptcy courts have also been divergent about the definition of what constitutes a willful violation of the automatic stay. The essential elements appear to be: 1) notice of the bankruptcy; and 2) a deliberate act that violates the stay.⁵ However, as noted in *In re Putnam*,⁶ an early court used a "more narrow definition [which] finds a willful violation when 'a deliberate and intentional act [is] done with the knowledge that the act is in violation of the stay.'"⁷ Most courts have rejected the narrow requirement that a creditor know the act is in violation of the stay, and only requires that the creditor's act is intentional and violates the stay.⁸ Most courts also agree that the creditor need not have the specific intent of violating the stay to commit a willful violation and that the creditor's good faith belief that they are entitled to the property is not relevant to the inquiry of whether the violation was willful.⁹

3. See *In re Bennett*, 135 B.R. 72 (Bankr. S.D. Ohio 1992).

4. See, e.g., *Boone v. Fed. Deposit Ins. Corp. (In re Boone)*, 235 B.R. 828, 833 (Bankr. D.S.C. 1998) (clear and convincing evidence); *Diviney v. Bank of Tex. (In re Diviney)*, 211 B.R. 951, 961 (Bankr. N.D. Okla. 1997) (clear and convincing evidence); *Meis-Nachtrab v. Griffin (In re Meis-Nachtrab)*, 190 B.R. 302, 305 (Bankr. N.D. Ohio 1995) (preponderance standard); *In re Sielaff*, 164 B.R. 560, 571 (Bankr. W.D. Mich. 1994) (preponderance standard); *In re Bennett*, 135 B.R. at 76 (clear and convincing evidence).

5. See, e.g., *Covington v. Internal Revenue Serv. (In re Covington)*, 256 B.R. 463, 466 (Bankr. D.S.C. 2000) ("In order to find a willful violation of the stay, all this 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." (citations omitted)); *In re Carrigan*, 109 B.R. 167, 171 (Bankr. W.D.N.C. 1989) ("'Willful' means intentional or deliberate conduct. A willful violation occurs when a creditor with notice of the bankruptcy case nevertheless performs one of the acts prohibited by § 362(a)." (citations omitted)).

6. 167 B.R. 737 (Bankr. D.N.H. 1994).

7. *Id.* at 740 (quoting *Forty-Eight Insulations, Inc. v. Lipke (In re Forty-Eight Insulations, Inc.)*, 54 B.R. 905, 909 (Bankr. N.D. Ill. 1985)).

8. See sources cited *supra* note 5.

9. See *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 268-69 (1st Cir. 1999); *In re Diviney*, 211 B.R. at 966; see also *United States v. Flynn (In re Flynn)*, 185 B.R. 89, 92 (S.D. Ga. 1995) (applying the same definition of willfulness to a government creditor).

III. EMOTIONAL DAMAGES FOR WILLFUL VIOLATIONS OF THE AUTOMATIC STAY

Although the topic of whether emotional damages should be compensable under § 362(h) as actual damages has only become a highly contested topic in the past few years, some bankruptcy courts have awarded damages for emotional injury as far back as the 1980s.¹⁰ This section will examine the decisions of bankruptcy and district courts on the topic, according to whether or not the court awarded damages for emotional distress.

A. *Emotional Damages Not Awarded*

*In re Brockington*¹¹ involved a debtor who filed for bankruptcy on March 16, 1990.¹² Six days later on March 22, the creditor repossessed the debtor's automobile.¹³ Even though the bankruptcy notice was not sent out until the day before the repossession, the court found that the debtor informed the creditor of the bankruptcy filing and had offered to substantiate the filing in time to stop the repossession, but the creditor was not interested.¹⁴ Ultimately, the car was returned on March 23, after the creditor confirmed the bankruptcy filing.¹⁵ The court awarded the debtor damages for lost wages and also awarded punitive damages, but refused to award the debtor emotional damages because he "failed to meet his burden of proof as to any causal connection between the repossession of his vehicle and any medical treatment resulting from an alleged aggravation of his pre-existing heart condition."¹⁶ The court also would not allow the debtor to recover payment of his hospital expenses, physician's bill, or radiological bill because of the lack of causal connection.¹⁷ Even though the court did not award actual damages for emotional distress, it did award punitive damages.¹⁸ Where the creditor's conduct is egregious, courts will usually find a way to punish the creditors' actions.

10. See *In re Shropshire*, 25 B.R. 128 (Bankr. W.D. Wash. 1982) (awarding \$2,500 in damages for humiliation, being demeaned, and for damage to his reputation in the community); *Lugo v. De Jesus (In re De Jesus Saez)*, 20 B.R. 19 (Bankr. D.P.R. 1982) (awarding \$2,500 in damages to a debtor for mental anguish); *In re Gibson*, 16 B.R. 682 (Bankr. S.D. Ohio 1981) (awarding \$100 in damages to a debtor for harassment and inconvenience based on civil contempt).

11. 129 B.R. 68 (Bankr. D.S.C. 1991).

12. *Id.* at 69.

13. *Id.*

14. *Id.*

15. *Brockington*, 129 B.R. at 69.

16. *Id.*

17. *Id.* at 71.

18. *Id.*

*In re Briggs*¹⁹ involved a debtor who owed a credit union on both a secured and unsecured loan.²⁰ The credit union froze the debtor's share account, made him sign reaffirmation agreements on both debts (the debtor only wanted to sign a reaffirmation agreement on one of the debts) without allowing the debtor to file the agreements with the court, and implied to the debtor that he was responsible for terminating automated payments of the secured loan from the share account.²¹ The court determined that the creditor willfully violated the stay, not by freezing the share account, but by having the debtor sign reaffirmation agreements and not allowing him to file them with the court and by implying that he had the affirmative duty to terminate the bank drafts.²² The court noted that if a debtor can prove that there is actual injury, then damages for mental anguish can be awarded.²³ However, the debtor in this case was unable to prove actual injury because "the only evidence submitted at the hearing in support of his contention that he experienced any kind of trauma as a result of the Credit Union's actions was the Debtor's own vague and conclusory testimony to that effect."²⁴ The court found that this type of testimony did not prove "specific and definite evidence" of emotional injury and therefore did not award the debtor any emotional damages.²⁵ Apparently, the lack of medical testimony precluded an award for emotional distress and although the court also refused to award punitive damages, it did award attorney's fees.²⁶ The court found that the creditors actions were deceptive, but were not so reprehensible as to justify an award of punitive damages.²⁷ *In re Putnam*²⁸ involved the debtors' purchase of a propane tank from the creditor, which they used for space heating, water heating, and cooking and on June 24, 1992, the debtors filed for bankruptcy.²⁹ On July 6, the creditor removed the propane tank from the debtor's residence.³⁰ Even though the debtor's attorney called the creditor and faxed them notice of the bankruptcy on July 7, the creditor did not return the tank until the court ordered it

19. 143 B.R. 438 (Bankr. E.D. Mich. 1992).

20. *Id.* at 441.

21. *Id.* at 441-43.

22. *Id.* at 464.

23. *In re Briggs*, 143 B.R. at 463.

24. *Id.*

25. *Id.*

26. *Id.* at 463-64.

27. *In re Briggs*, 143 B.R. at 464.

28. 167 B.R. 737 (Bankr. D.N.H. 1994).

29. *Id.* at 738.

30. *Id.*

to on July 9.³¹ The court determined that the creditor's refusal to return the tank after having knowledge of the automatic stay was a willful violation of the stay.³² However, the court examined the issue using the minority view of what constitutes "actual damages" under section 362(h). The court held that the debtor could not recover compensatory damages for humiliation and inconvenience as a result of the creditors' actions, "there is no evidence that this request is for actual damages as required by section 362(h)."³³ *In re Putnam* is unique among decisions denying recovery of emotional damages because it held that emotional damages were not actual damages.³⁴ The court also did not award punitive damages and only awarded a portion of the attorney's fees to the debtor's attorney.³⁵ The result in this case is a little surprising considering the creditor's refusal to return the tank, even though it knew that its actions were in violation of the automatic stay.

In re Diviney,³⁶ a case with a long and complicated history, involved a debtor who had filed for bankruptcy three times.³⁷ The third bankruptcy case had been dismissed, but was later reinstated.³⁸ The creditor repossessed the debtor's car after the third case had already been reinstated and refused to return the car unless arrangements were made to pay the debt and to assure the bank that the car was insured.³⁹ The court concluded that the actions of the bank were a willful violation of the stay⁴⁰ and awarded actual damages and attorney's fees.⁴¹ However, the court refused to award the debtors damages for "the humiliation, anguish and duress they suffered because of the Bank's intentional stay violations."⁴² The court noted that the debtors did not produce any medical testimony in support of their claim for emotional damages.⁴³ Here, the "only evidence of any emotional distress is found in testimony that conversations between the Bank and

31. *Id.* at 738-39.

32. *In re Putnam*, 167 B.R. at 740.

33. *Id.* at 741.

34. *See, e.g., Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 881 (7th Cir. 2001).

35. *In re Putnam*, 167 B.R. at 739, 741.

36. 211 B.R. 951 (Bankr. N.D. Okla. 1997).

37. *Id.* at 956.

38. *Id.* at 956-58.

39. *Id.* at 958-60.

40. *In re Diviney*, 211 B.R. at 966-67.

41. *Id.* at 967.

42. *Id.*

43. *Id.* The court also noted that even though the debtors cited two cases where emotional damages were awarded without medical testimony, those cases involved a "much clearer showing of emotional distress." *Id.* at 967-68. *See In re Flynn*, 169 B.R. 1007, 1023 (Bankr. S.D. Ga. 1994); *In re Carrigan*, 109 B.R. 167 (Bankr. W.D.N.C. 1989).

the Debtors became heated at times, and that profanity was used in at least one of those conversations.”⁴⁴ The court found that, without medical testimony, the debtors’ testimony did not support damages for emotional distress.⁴⁵ The court did find that the bank’s violation was egregious and awarded punitive damages of \$40,000 and cancelled any future payments the bank was to collect under the plan.⁴⁶

In re Skeen,⁴⁷ involved a debtor who claimed that the creditor had called her home two times, after she filed for Chapter 7 relief, threatening to repossess her china hutch if she did not make a payment.⁴⁸ The creditor claimed that they had only made one phone call, that the call was made before receiving notice of the bankruptcy, and that it was not harassing.⁴⁹ The court first determined that there was no willful violation of the stay.⁵⁰ However, the court still considered the debtors’ damage claim for the benefit of future litigants and noted that a damage award for a violation of the automatic stay must not be speculative.⁵¹ Mrs. Skeen had testified that she was torn-up, shaken and nervous for the rest of the day because of the phone calls, but the court found it significant that she had not sought medical help for her emotional distress.⁵² Mrs. Skeen also called her attorney and was assured that the china hutch would not be repossessed.⁵³ As a result, the court found “because the emotional distress suffered . . . was fleeting, inconsequential, and medically insignificant, . . . it is not compensable.”⁵⁴ Here, it was clear that if there was any damage done to the debtor, she was quickly reassured by her attorney that the creditor could not repossess the hutch, so any emotional distress was unjustified.

*In re Shade*⁵⁵ involved a debtor who was approached and harassed by an employee of her creditor in the hallway following her section 341 hearing.⁵⁶ The creditor demanded payment of the debt.⁵⁷ The

44. *In re Diviney*, 211 B.R. at 967.

45. *Id.*

46. *Id.* at 969-70.

47. 248 B.R. 312 (Bankr. E.D. Tenn. 2000).

48. *Id.* at 314.

49. *Id.*

50. *Id.* at 318.

51. *In re Skeen*, 248 B.R. at 318 (citing *Archer v. Macomb County Bank*, 853 F.2d 497, 500 (6th Cir. 1988)).

52. *Id.* at 318-19.

53. *Id.*

54. *Id.* at 319 (quoting *Crispell v. Landmark Bank (In re Crispell)*, 73 B.R. 375, 380 (Bankr. E.D. Mo. 1987)).

55. 261 B.R. 213 (Bankr. C.D. Ill. 2001).

56. *Id.* at 215.

57. *Id.*

debtor broke down into tears and went to her attorney, who then approached the creditor and demanded that he leave his client alone.⁵⁸ The attorney had to leave with the debtor because she was too shaken up to do so on her own.⁵⁹ The court did not allow recovery of the economic damages because it was bound by the decision in *Aiello v. Providian Financial Corp.*, which held that purely economic damages were not authorized by §362(h).⁶⁰ The debtor's only damages resulted from the Creditor's harassment and therefore, in the Seventh Circuit, she could not recover for her emotional damages. However, the court awarded the debtor both attorney's fees and punitive damages because of the creditor's egregious behavior.⁶¹

B. *Emotional Damages Awarded*

In re Mercer,⁶² involved one of the most flagrant abuses of the automatic stay. The debtor filed Chapter 13 bankruptcy on January 4, 1985.⁶³ The defendant creditor was Color Tyme T.V. Rental, which was a rent-to-own business.⁶⁴ On January 8, an employee of the creditor contacted Mrs. Mercer on the telephone.⁶⁵ She informed him of the bankruptcy, but the employee still demanded payment or return of the equipment.⁶⁶ On January 10, the employee called again with the same demands.⁶⁷ Then on January 11, two employees appeared at Mrs. Mercer's home, but they were told that Mrs. Mercer was not at home and left without incident.⁶⁸ Mrs. Mercer then contacted her attorney, who called the manager of Color Tyme and informed him that he could not repossess the stereo.⁶⁹ Nevertheless, the manager directed his employees to return to Mrs. Mercer's home, on the same day, and repossess the stereo.⁷⁰ The employees kicked and pounded on the door for approximately five to ten minutes.⁷¹ Finally, Mrs. Mercer's small children unlocked the door and the employees came in

58. *Id.*

59. *In re Shade*, 261 B.R. at 215.

60. *Id.*

61. *Id.* at 215-18.

62. 48 B.R. 562 (Bankr. D. Minn. 1985).

63. *Id.* at 563.

64. *Id.*

65. *Id.*

66. *In re Mercer*, 48 B.R. at 563.

67. *Id.*

68. *Id.* at 564.

69. *Id.*

70. *In re Mercer*, 48 B.R. at 564.

71. *Id.*

uninvited and repossessed the stereo.⁷² The court awarded Mrs. Mercer \$510.00 to replace her door, attorney's fees, and punitive damages.⁷³ In addition, the court awarded Mrs. Mercer \$1,000 for the "humiliation, embarrassment, anxiety and frustration she suffered in the incident."⁷⁴ An award of emotional damages was justified in these circumstances even without medical testimony. What debtor would not be intimidated and shaken up if all creditors resorted to this type of conduct?

*In re Carrigan*⁷⁵ also involved a flagrant abuse of the automatic stay. The debtor filed for Chapter 13 bankruptcy on January 10, 1989.⁷⁶ An individual creditor appeared at the debtor's home on March 12 and demanded the money that the debtor owed.⁷⁷ When the debtor instructed the creditor to contact his attorney, the creditor stated, "I don't want to talk to that son of a bitch; I want my money."⁷⁸ The creditor admitted going to the debtor's home, but claimed that he was a perfect gentleman throughout the entire encounter.⁷⁹ However, the court accepted the debtor's version of the events and rejected the creditor's version in its entirety.⁸⁰ The court first found that there was a willful violation of the stay.⁸¹ The court then reached the question of what damages should be awarded for the egregious violation of the stay.⁸² The court stated:

The debtor's actual injury here is somewhat imprecise, but it is real — and, it is certainly the result of the actions of [the creditor]. Assessing the value of this type of injury is not susceptible to a formula or precise measurement. However, the outrageous nature of [the creditor's] actions is sufficiently strong to produce the anxiety expressed by the debtor.⁸³

72. *Id.*

73. *Id.* at 565-66 (awarding \$1,907.99 for attorney's fees and \$5,000 for punitive damages resulting from the violation and contempt).

74. *In re Mercer*, 48 B.R. at 565.

75. 109 B.R. 167 (Bankr. W.D.N.C. 1989).

76. *Id.* at 168.

77. *Id.*

78. *Id.* (noting that throughout the entire confrontation the creditor was both abusive and loud).

79. *In re Carrigan*, 109 B.R. at 169.

80. *Id.* at 169-70 (stating that the creditor's testimony "was too well tailored, contrived and just not believable").

81. *Id.* at 170-71.

82. *Id.* at 170-72. This is one of the cases cited in *In re Diviney*, which allowed emotional damages without the need for medical testimony because it was obvious that injury occurred. 211 B.R. 951 (Bankr. N.D. Okla. 1997).

83. *In re Carrigan*, 109 B.R. at 171-72.

The court awarded the debtors \$1,000 in emotional damages.⁸⁴ Again, the violation in this case would obviously have an adverse affect on any debtor.

In *In re Jacobs*,⁸⁵ American Express continued to attempt to collect on an unsecured debt even after the debtor's attorney informed them that the debtor was in bankruptcy and that their actions were in violation of the stay. American Express subsequently hired two different collection agencies, who continued attempts to collect the debt.⁸⁶ The debtor's attorney also informed the collection agencies of the bankruptcy, but continued to attempt collection of the debt.⁸⁷ The court found that American Express had willfully violated the automatic stay.⁸⁸ The court stated that American Express "repeatedly harassed the Debtor in an attempt to collect its pre-petition debt."⁸⁹ The court also found that the two collection agencies hired by American Express to collect the debt used embarrassing and humiliating tactics in trying to recover the unsecured debt owed to American Express.⁹⁰ The court awarded the debtor \$200 for embarrassment and humiliation,⁹¹ despite the fact that the debtor presented no medical evidence of his emotional damages. Although the award for emotional distress was modest, the court also awarded the debtor's attorney fees and punitive damages.⁹²

In re Fisher,⁹³ involved another case of egregious conduct on the part of the creditors. After the debtor filed for bankruptcy on June 28, 1991, a man hired to repossess her car called a few days later and said that if she did not turn over the car, she would be committing a "criminal felony."⁹⁴ The debtor then contacted her attorney, who immediately called the reposessor and informed him that the car was protected under the automatic stay.⁹⁵ The court noted that "[n]otwithstanding [the attorney's] emphatic admonitions, Clemente [the reposessor] stated, inter alia that: *He didn't care if the Debtor*

84. *Id.* at 172.

85. 100 B.R. 357 (Bankr. S.D. Ohio 1989).

86. *Id.* at 358-59.

87. *Id.*

88. *Id.* at 360 (stating that "it is difficult to conceive of a more flagrant violation of the automatic stay than that committed by American Express in this case").

89. *In re Jacobs*, 100 B.R. at 360.

90. *Id.*

91. *Id.*

92. *Id.* (awarding attorney fees in the amount of \$500 and punitive damages in the amount of \$1,500).

93. 144 B.R. 237 (Bankr. D.R.I. 1992).

94. *Id.* at 237-38.

95. *Id.* at 238.

had filed bankruptcy; he wasn't satisfied that she had in fact filed . . . ; he had a repossession order that he intended to carry out; and basically, that was enough."⁹⁶ Clemente then attended the section 341 hearing, not for the sole purpose of questioning the debtor, but also to repossess the car.⁹⁷ After the meeting ended, the car was repossessed from the courthouse parking lot, despite warnings from the debtor's attorney, the trustee, and several others that the conduct was illegal.⁹⁸ The creditor argued that the trustee had consented to the repossession at the section 341 hearing, but the court rejected this contention.⁹⁹ The Court found that the Defendant's actions: "(1) contacting the Debtor post-bankruptcy for the express purpose of harassing and threatening her; and (2) in forcefully repossessing her vehicle despite clear and repeated warnings against such action" were a willful violation of the stay.¹⁰⁰ The court awarded \$1,000 compensatory damages for embarrassment and emotional distress based on the creditor's conduct.¹⁰¹ The court awarded the damages without any medical testimony regarding the debtor's emotional injury.¹⁰² The court also added an award of punitive damages and attorney fees.¹⁰³

In *In re Flynn*,¹⁰⁴ the IRS levied the debtor's checking account because of back taxes that she owed.¹⁰⁵ As a result, the account was subsequently frozen.¹⁰⁶ The debtor called the IRS office and a representative admitted that the account should not have been frozen and assured the debtor that they would remove by the end of the day.¹⁰⁷ However, the levy was not released until a week after the IRS admitted that the levy had been placed on the account improperly.¹⁰⁸ The debtor testified, that "she suffered extreme emotional distress after receiving the letter from Nationsbank. She was forced to cancel her

96. *Id.*

97. *In re Fisher*, 144 B.R. at 238.

98. *Id.*

99. *Id.* at 238-39 (accepting testimony of Trustee that he "'would never advise a creditor to do this' and that he advised Clemente and Jefferson that 'I don't think you have the right to take the car-but I'm not the Judge'").

100. *Id.* at 239.

101. *In re Fisher*, 144 B.R. at 239-40.

102. *Id.*

103. *Id.* at 240 (ordering Defendants are jointly and severally liable for reasonable legal fees acquired by Debtor and \$4,000 in punitive damages for Defendants' willful and malicious violation of automatic stay).

104. 185 B.R. 89 (S.D. Ga. 1995).

105. *Id.* at 91.

106. *Id.*

107. *Id.*

108. *In re Flynn*, 185 B.R. at 91 (noting that a copy of the release was not faxed until the next week even though the release was prepared that day and the original mailed to NationsBank).

eleven year old son's birthday party. She suffered embarrassment and humiliation when she was stopped in a check-out line at Kroger because a previous check had bounced."¹⁰⁹ Even though representatives of the IRS testified that the levy was placed on the debtor's account due to "internal procedure problems", the court held that the IRS's violation was willful.¹¹⁰ The IRS argued that the debtor could not recover for emotional distress because she did not introduce any medical testimony.¹¹¹ However, the court stated that medical testimony was not necessary in this case:

In this case, it is clear that appellee suffered emotional harm as a direct result of the violation of the automatic stay and the resulting freeze on her checking account. She was forced to cancel her son's birthday party, embarrassed in the check-out line at the supermarket and justifiably worried that her checks would bounce due to the freeze on her account. All of these events justify an award of damages for emotional distress regardless of whether medical testimony is provided.¹¹²

In cases involving egregious conduct by government agencies, courts may be more willing to award damages for emotional distress because punitive damages are barred under section 106(a)(3).¹¹³

In *In re Solfanelli*,¹¹⁴ the debtors owed the bank \$4.8 million dollars on a debt that was secured by shares of stock and real estate.¹¹⁵ The bank sought to lift the automatic stay and, in an effort to avoid this result, the debtors entered into a Stipulation and Security Agreement.¹¹⁶ The debtors later breached the Agreement, so the bank declared a default and garnished various pre-petition accounts, several of which contained post-petition funds.¹¹⁷ The bank's actions violated the automatic stay and the court determined that the violation was willful.¹¹⁸ The court then moved on to the issue of damages and stated:

Mrs. Solfanelli presented no evidence of monetary damages. Nevertheless, we find that her testimony was sufficient for this court to establish the existence of embarrassment, humiliation, and mental anguish. She had no reason to believe, even upon default, that her post-petition deposits would be at risk without notice to her. When

109. *Id.*

110. *Id.* at 92.

111. *Id.* at 92-93.

112. *In re Flynn*, 185 B.R. at 93.

113. *Id.*

114. 206 B.R. 699 (Bankr. M.D. Pa. 1996).

115. *Id.* at 702.

116. *Id.*

117. *Id.*

118. *In re Solfanelli*, 206 B.R. at 702-703.

those deposits did not support the checks written against them because the funds had been removed, she was understandably embarrassed. While we all suffer humiliation and embarrassment at various stages of our life, a finding that this was caused by the Bank's violation of the automatic stay is sufficient to support an award under 11 U.S.C. §362(h). [citations omitted]¹¹⁹

The court only awarded the debtors \$1.00 for emotional distress, but stated that the award would allow the debtor's to recover their attorney's fees.¹²⁰

*In re Holden*¹²¹ involved a debtor who owed \$184.92 in back taxes to the IRS, but was also entitled to a \$2,050 tax refund from the IRS.¹²² The IRS froze the tax refund after the debtors filed for bankruptcy because of the outstanding debt owed to the IRS.¹²³ The IRS offered to release the tax refund if the debtors would pay the \$184.92 they owed the IRS out of the tax refund, but the IRS never attempted to have the automatic stay lifted.¹²⁴ The debtors fell behind on their mortgage payments during this time because they were planning to make those payments with the tax refund;¹²⁵ "Debtors home was now in jeopardy and the mortgagee was a neighbor. Others on their neighbor's block would soon know the Holdens' precarious situation. Hence, the Debtors' claim for emotional distress."¹²⁶ The court looked at several other cases involving the IRS and claims for emotional distress.¹²⁷ The IRS argued that emotional damages should only be awarded where "there is intent to inflict emotional distress or physical contact or the threat of physical contact."¹²⁸ The court rejected the IRS's argument:

[B]ecause we believe §362 contemplates damages for emotional distress. Emotional distress is an actual injury. Our emotions can wreak havoc with our nervous system, often having physical side effects. Emotional distress is not an ethereal proposition or an in-

119. *Id.* at 703.

120. *Id.*

121. 226 B.R. 809 (Bankr. D. Vt. 1998).

122. *Id.* at 810.

123. *Id.*

124. *Id.*

125. *In re Holden*, 226 B.R. at 810-11.

126. *Id.* at 811.

127. *Id.* at 811-12. The cases included *In re Matthews*, 184 B.R. 594, 601 (Bankr. S.D. Ala. 1995) (allowing emotional damages to a debtor where the IRS had seized their tax refund post-petition because "[t]he court found the IRS' actions 'clearly inappropriate'"); *In re Flynn*, 169 B.R. 1007 (Bankr. S.D. Ga. 1994); *In re Washington*, 172 B.R. 415 (Bankr. S.D. Ga. 1994) (denying the debtor damages for emotional distress where the debtor's injury was "'fleeting and inconsequential'"); *In re Davis*, 201 B.R. 835 (Bankr. S.D. Ala. 1996) (allowing emotional damages where the IRS' willful violation of the stay caused debtors to bounce several checks).

128. *Id.* at 812.

tangible concept. The stress is felt not by the inanimate object, the check bouncing or the account freezing. Rather, the emotions belong to and are felt by the owner of the bounced check and the frozen account.¹²⁹

The court determined that they would allow medical testimony to determine the extent of the emotional distress and what damages, if any, the debtor was entitled to recover for the IRS's willful violation of the stay.¹³⁰ This case also involved a claim against a government agency and, therefore, no punitive damages could be recovered against the IRS for the willful violation.

In re Boone,¹³¹ was a case where the FDIC initiated foreclosure proceedings against the Boones, who then filed for Chapter 13 bankruptcy. The debtors paid FDIC under the plan until the debt was satisfied.¹³² After the debt was discharged, the FDIC transferred title to themselves by Marshal's deed.¹³³ The debtor's attorney contacted the FDIC about the violation of the stay, but the FDIC refused to reconvey title to the debtors.¹³⁴ The court determined that the FDIC's violation of the stay was willful.¹³⁵ The court awarded \$5,000 for emotional distress because "[t]hey have been unable to view their home as theirs, unable to refinance it to improve their lifestyle, unable to spend monies to repair or improve the home or otherwise on their children in fear of further action by the FDIC, all without a single effort by the FDIC to remedy the wrong that took place."¹³⁶ The FDIC's willful violation of the stay and egregious conduct in refusing to reconvey title back to the debtor caused these problems.¹³⁷ This case also involved a motion for sanctions against a government agency in which punitive damages were not available.

In *In re Covington*,¹³⁸ the IRS mailed a Notice of Intent to Levy to the debtors after they had already filed for Chapter 13 bankruptcy. The IRS stopped the collection efforts after the debtor's attorney called the IRS.¹³⁹ However, the IRS had already received notice that the debtor was in bankruptcy.¹⁴⁰ The court determined that the viola-

129. *In re Holden*, 226 B.R. at 812.

130. *Id.*

131. 235 B.R. 828 (Bankr. D.S.C. 1998).

132. *Id.* at 831.

133. *Id.* at 831-32.

134. *Id.* at 833.

135. *In re Boone*, 225 B.R. at 834.

136. *Id.* at 838.

137. *Id.*

138. 256 B.R. 463 (Bankr. D.S.C. 2000).

139. *Id.* at 465.

140. *Id.* at 464-65.

tion of the stay was willful because the IRS had received actual notice of the bankruptcy.¹⁴¹ The court then turned to the issue of whether the debtor could recover for emotional distress because of the IRS's willful violation of the stay.¹⁴² The court explained that several other courts have found emotional distress to be an actual damage under §362(h).¹⁴³ The court also explained that there is a split of authority over whether medical testimony is needed to prove emotional distress.¹⁴⁴ The *Covington* court allowed the debtor to recover for emotional distress without any medical testimony.¹⁴⁵ The South Carolina Department of Revenue had previously levied the debtors' account and the court determined that this was very important to their "state of mind."¹⁴⁶ The debtors knew what a levy was and "[t]his Court believes that the debtors did suffer emotional injury as a result of receiving the 'Notice of Intent to Levy'. This Court believes that peace of mind is invaluable and will award \$1000.00 to compensate the debtors for the trauma they endured during the period of time the IRS violated the stay."¹⁴⁷ The court also found the IRS's actions were egregious, but could not award punitive damages, so may therefore have been more inclined to award emotional damages.

In *In re Ocasio*,¹⁴⁸ the debtor owed an individual creditor \$425. The debtor and creditor coincidentally ran into each other.¹⁴⁹ The debtor testified that the creditor came up to him, asked him about the status of the case, and called him a "cuckhold".¹⁵⁰ The debtor also testified that the creditor told him that he had one day to come up with the money, or "otherwise I know where I can get it from. I'm going to get it from your face."¹⁵¹ The creditor testified that he merely asked the debtor about the status of the case and that he called the debtor lazy and irresponsible.¹⁵² The debtor claimed that he feared for his safety, became "hysterical," and was given medication for his nerves.¹⁵³ The

141. *Id.* at 466.

142. *In re Covington*, 256 B.R. at 467.

143. *Id.* (citing *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265 (1st Cir. 1999); *In re Holden*, 226 B.R. 809 (Bankr. D. Vt. 1998); *In re Davis*, 201 B.R. at 837; *In re Flynn*, 169 B.R. 1007 (Bankr. S.D. Ga. 1994)).

144. *Id.*

145. *Id.* This may have been because the debtor was a medical doctor.

146. *In re Covington*, 256 B.R. at 467.

147. *Id.*

148. 272 B.R. 815 (B.A.P. 1st Cir. 2002).

149. *Id.* at 820.

150. *Id.* Calling someone a "cuckhold" means your wife is cheating on you.

151. *Id.*

152. *In re Ocasio*, 272 B.R. at 821.

153. *Id.*

bankruptcy court awarded the debtor \$1,000 in actual damages.¹⁵⁴ The bankruptcy appellate panel for the First Circuit was bound by the earlier decision in *Fleet Mortgage Group, Inc. v. Kaneb*.¹⁵⁵ The court found that the creditor's actions were a willful violation of the stay.¹⁵⁶ The bankruptcy court awarded the actual damages based on the debtor and his spouse's testimony.¹⁵⁷ The court found that there was ample evidence of actual damages because of the embarrassment, threats, and the fact that the debtor was forced to seek medical treatment.¹⁵⁸ The court awarded the damages for emotional distress even though the only proof of the distress was the testimony that the debtor went to the doctor and was put on medication.¹⁵⁹ However, one must question why the court did not require some kind of verification (i.e., medical records or prescription forms). It was probably because the court got to view the witnesses and believed the debtor's assertion that he feared for his safety because of the threats.

IV. EMOTIONAL DAMAGES FOR WILLFUL VIOLATIONS OF THE AUTOMATIC STAY: TWO COURTS OF APPEAL LAY DOWN THE VERDICT

During the past twenty years, only bankruptcy courts and district courts had attempted to interpret whether § 362(h) authorized emotional damages for willful violations of the stay. In fact, until 1999, no court of appeals had interpreted whether § 362(h) authorized emotional damages. In the last three years, however, two court of appeals decisions have helped flesh out the law on the subject.¹⁶⁰ Although the two courts reached different results, it appears that both courts would award emotional damages to a debtor for a willful violation of the stay in the appropriate circumstances.

In *Fleet Mortgage Group, Inc. v. Kaneb*,¹⁶¹ the debtor (Kaneb), who filed Chapter 13 bankruptcy in 1993, maintained residences in both Florida and Massachusetts. The Massachusetts residence was sold to pay secured creditors and Kaneb converted his case to a Chapter 7 bankruptcy.¹⁶² In addition to the other residences, Kaneb also lived in

154. *Id.* at 821-22.

155. 196 F.3d 265 (1st Cir. 1999).

156. *In re Ocasio*, 272 B.R. at 824.

157. *Id.*

158. *Id.*

159. *Id.* at 824-25.

160. See *Aiello v. Providian Fin. Corp.*, 239 F.3d 876 (7th Cir. 2001); *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265 (1st Cir. 1999).

161. 196 F.3d 265 (1st Cir. 1999).

162. *Id.* at 267

a Florida condominium,, to which Shawmut Bank, N.A. held the original mortgage.¹⁶³ Shawmut then merged with Fleet in 1995.¹⁶⁴ Following unsuccessful negotiations between Shawmut and Kaneb, Shawmut forwarded the file for foreclosure.¹⁶⁵

The file contained both an order of discharge and an unsigned order granting relief from the automatic stay.¹⁶⁶ The attorney for the law firm representing Shawmut (which had now merged with Fleet) believed that the order of discharge allowed Fleet to proceed with the foreclosure.¹⁶⁷ After Fleet began foreclosure proceedings, Kaneb's attorney informed Fleet's counsel of the automatic stay.¹⁶⁸ They placed his file on hold status and did not dismiss the foreclosure suit until six weeks later.¹⁶⁹

Kaneb's neighbors learned of the foreclosure, based on a notice published in the newspaper and "a barrage of colorful mail offering legal and investment services" — some of which ended up in his neighbors boxes and some of which were discovered by his neighbors who were checking his mail for him while he was in Massachusetts — during the period when his file was on hold with Fleet.¹⁷⁰ His neighbors began to snub him after they learned that foreclosure proceedings had been initiated against his Florida condominium.¹⁷¹ Many within the community were affluent retirees who stopped inviting Kaneb to social gatherings after they learned he had filed for bankruptcy.¹⁷²

The court held that the standard for determining that a violation of the stay was willful is that the creditor has knowledge of the stay and that the creditor intended the actions that violated the stay.¹⁷³ Once the creditor has actual notice of the stay, as was the case here, the violation is presumed to be willful.¹⁷⁴ Shawmut and Fleet had actual notice of the automatic stay because they even attempted to obtain

163. *Id.* at 266-67.

164. *Id.* at 267.

165. *Fleet Mortgage Group, Inc.*, 196 F.3d at 267.

166. *Id.*

167. *Id.* This belief was, of course, incorrect as an order of discharge releases a debtor from personal liability on all debts dischargeable under § 523. The unsigned order also did not grant Fleet the requested relief, so that the attempted foreclosure was a violation of the stay. *Id.* at 267.

168. *Id.*

169. *Fleet Mortgage Group, Inc.*, 196 F.3d at 267.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Fleet Mortgage Group, Inc.*, 196 F.3d at 269.

174. *Id.*

relief from the stay.¹⁷⁵ Fleet did not dismiss the foreclosure proceedings until six weeks after Kaneb's attorney reminded them of the stay.¹⁷⁶ Therefore, the violation of the automatic stay was willful.¹⁷⁷

The lower court awarded Kaneb \$25,000 for mental anguish.¹⁷⁸ Fleet appealed the award arguing that there was insufficient evidence of harm and that there was no physical injury or corroborating testimony.¹⁷⁹ The court only considered Fleet's argument that the evidence was insufficient to award damages for emotional harm.¹⁸⁰ The court found that Kaneb provided "specific information" about the emotional harm that he suffered.¹⁸¹ This harm included a decline in the number of social outings he was invited to attend.¹⁸²

He then testified about the emotional distress he experienced because of these changes in his life: "[It]s very irritating. I don't sleep well. My eating habits have changed. I — I don't feel that ambitious about getting out and doing things and meeting people. It's — it's not a pleasant situation to be in I'm worried concerning where am I going to live."¹⁸³

The court held that the actual damages suffered by Kaneb must include damages for his emotional distress and allowed the \$25,000 award to stand.¹⁸⁴

The second case to reach a court of appeal was *Aiello v. Providian Financial Corp.*¹⁸⁵ In Judge Posner's opinion, the Seventh Circuit reached a contrary result to *Kaneb*. Aiello had filed for Chapter 7 bankruptcy and listed an unsecured debt of \$1,000 to the defendant credit card company.¹⁸⁶ The creditor asked her to reaffirm the debt when she filed for bankruptcy, or else they would charge her with fraud.¹⁸⁷ Aiello did not reaffirm, but instead brought a class action suit

175. *Id.*

176. *Id.*

177. *Fleet Mortgage Group, Inc.*, 196 F.3d at 269.

178. *Id.*

179. *Id.*

180. *Id.* The court stated: "In responding to Fleet's general challenge to the sufficiency of the damages evidence, we note that emotional damages qualify as 'actual damages' under § 362(h)" (citing *Holden v. IRS (In re Holden)*, 226 B.R. 809, 812 (Bankr. D. Vt. 1998) ('Emotional distress is an actual injury Legitimate human emotions are brought to bear when one's rights are trampled on.');

In re Carrigan, 109 B.R. 167, 170 (Bankr. W.D.N.C. 1989) ('The debtor's actual injury here is somewhat imprecise, but it is real-and, it is certainly the result of [the creditor's actions].')). *Id.*

181. *Fleet Mortgage Group, Inc.*, 196 F.3d at 269-70.

182. *Id.* at 269.

183. *Id.* at 270.

184. *Id.*

185. 239 F.3d 876 (7th Cir. 2001).

186. *Id.* at 878.

187. *Id.* The allegation of fraud is the willful violation of the stay.

on behalf of other “similarly situated victims of the defendant’s alleged harassment.”¹⁸⁸ The bankruptcy court dismissed the suit because her only evidence of injury was an affidavit which stated that she “‘cried, felt nauseous and scared and the letter caused her to quarrel with her husband . . . Even after her meeting with her attorney, Ms. Aiello was still frightened.’”¹⁸⁹ The bankruptcy court granted summary judgment for the creditor and denied the debtor’s request for damages for her emotional injury.¹⁹⁰

After Judge Posner acknowledged that purely emotional injury is a part of actual damages, he stated that “whether their award is authorized by the statute is a separate question, one not addressed in *Fleet Mortgage*, the defendant apparently having waived it.”¹⁹¹ The court operated under the assumption that the creditor had willfully violated the stay, because they had threatened to charge the debtor with fraud if she did not waive her right to discharge.¹⁹² Therefore, it turned to the question of whether purely emotional damages could be recovered under section 362(h).¹⁹³

The court emphasized that §362 provided for financial protection and “not protection of peace of mind.”¹⁹⁴ He noted:

The Bankruptcy Code was not drafted with reference to the emotional incidents of bankruptcy, however, and bankruptcy judges are not selected with reference to their likely ability to evaluate claims of emotional injury. That is not to suggest that victims of tortious infliction of emotional distress in the course of a bankruptcy proceeding are orphans of the law. A creditor who resorts to extortion or intimidation exposes himself to a suit under state tort law. The automatic stay is not an obstacle, because it does not apply to suits by the debtor. [citations omitted]¹⁹⁵

The court explained that if the creditor *had* convinced the debtor to give up her right to discharge that the court would have awarded *financial* damages necessary to put her back to her rightful position (i.e., before the violation).¹⁹⁶ However, in this case, the creditor only threatened her and she did not give up her right to discharge. There-

188. *Id.*

189. *Aiello*, 239 F.3d at 878. It is quite possible that this suit was dismissed because it was such a weak case of emotional distress. Everyone cannot be compensated every time they get upset. In addition, the meeting with her attorney makes it less likely that the debtor was scared because she should have been reassured that the creditor could not take the threatened actions lawfully.

190. *Id.*

191. *Id.*

192. *Id.* at 879.

193. *Aiello*, 239 F.3d at 879-82.

194. *Id.* at 879.

195. *Id.* at 879-80.

196. *Id.* at 880.

fore, the only damages that she suffered were *purely economic damages*. The court noted that if there had been financial loss, along with the economic injury, then the “clean-up doctrine” of equity “might allow the court to ‘top-off’ relief designed to redress any financial injury inflicted by the violation of the automatic stay with an award of damages for incidental harms,” including damages for emotional distress.¹⁹⁷ The court concluded that “[n]o financial injury is alleged in this case, and we do not think that emotional injury is compensable under section 362(h) when there is no financial loss to hitch it to by means of the clean-up doctrine.”¹⁹⁸ Finally, the court noted that the plaintiff still could gain redress for her emotional injury through traditional tort remedies.¹⁹⁹ Therefore, the debtor was not allowed to recover for her alleged emotional damages.²⁰⁰

V. EMOTIONAL DISTRESS DAMAGES IN NON-BANKRUPTCY CASES

With the emergence of damage awards compensating debtors for willful violations of the automatic stay in the last few years, it is useful to compare the standard for intentional infliction of emotional distress in non-bankruptcy cases.²⁰¹ Many of the emotional damage awards in the bankruptcy cases did not require medical testimony where the conduct was egregious or outrageous.²⁰² The question thus becomes: Do courts which are considering emotional damage awards in non-bankruptcy cases require medical testimony in order to substantiate a person’s alleged injuries? Or are the non-bankruptcy cases similar to cases where there has been a willful violation of the automatic stay and, in some cases, emotional damages may be presumed because of the outrageousness of a person’s conduct?

Section 312 of the Restatement (Second) of Torts explains liability for the intentional infliction of emotional distress:

If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness

197. *Aiello*, 239 F.3d at 880. The court noted that *Fleet Mortgage* may have been that type of case. *Id.*

198. *Id.* The court then noted that emotional injuries are easily feigned and that the plaintiff’s litigating strategy, a large class action designed to induce a quick settlement, in this case reinforced the common law’s concern about the abuse of claims for emotional damages. *Id.*

199. *Id.* at 881.

200. *Id.*

201. This section will be limited to discussion for damages for intentional infliction of emotional distress and will not discuss damages for negligent infliction of emotional distress, as the conduct is not typically outrageous and medical testimony is almost always required.

202. See, e.g., *In re Carrigan*, 109 B.R. 167 (Bankr. W.D.N.C. 1989); *In re Jacobs*, 100 B.R. 357 (Bankr. S.D. Ohio 1989); *Fisher v. Blackstone Fin. Servs., Inc. (In re Fisher)*, 144 B.R. 237 (Bankr. D.R.I. 1992).

or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause, (a) although the actor has no intention of inflicting such harm, and (b) irrespective of whether the act is directed against the other or a third person.²⁰³

Section 46 further explains that extreme and outrageous conduct is necessary in order to recover for intentional infliction of emotional distress.²⁰⁴ The elements of intentional infliction of emotional distress are fairly consistent in all states. In general, the elements of the tort are: (1) intentional or reckless conduct; (2) the conduct was outrageous or extreme; (3) a causal connection between the conduct and the emotional distress; and (4) the emotional distress was severe.²⁰⁵

Courts are split over whether medical testimony is required in order to prove that the emotional distress suffered was severe.²⁰⁶ However, as the conduct becomes more egregious or outrageous, courts are willing to assume that the emotional damages suffered are severe without

203. RESTATEMENT (SECOND) OF TORTS § 312 (1965).

204. RESTATEMENT (SECOND) OF TORTS § 46 (1965). Cmt. d states, “Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’ The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” *Id.* cmt. d.

205. *See, e.g.*, Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 819 (Cal. 1993) (finding the same requirements but consolidating them into a three-part test and holding that “[c]onduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. The defendant must have engaged in ‘conduct intended to inflict injury or engaged in with the realization that injury will result.’”); Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993) (adopting the Restatement formula and quoting from Comment d that “liability for outrageous conduct should be found ‘only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community’”); McSwain v. Shei, 402 S.E.2d 890, 891 (S.C. 1991) (finding same requirements and adding “the emotional distress suffered by the plaintiff was ‘severe’ so that ‘no reasonable man could be expected to endure it’”); Cohn-Frankel v. United Synagogue of Conservative Judaism, 667 N.Y.S.2d 360, 361 (App. Div. 1998) (same).

206. *See, e.g.*, Gordon v. City of Kansas City, Mo., 241 F.3d 997, 1001 (8th Cir. 2001) (holding that under Missouri law, a plaintiff must “produce evidence in the form of expert medical testimony that the emotional distress or mental injury was medically diagnosed and of sufficient severity as to be medically significant”); Maccenti v. Becker, 237 F.3d 1223, 1242-43 (10th Cir. 2001) (holding that under Oklahoma law, “[t]he extreme and outrageous character of the defendant’s conduct is in itself important evidence that the distress episodes took place. Expert medical testimony ordinarily is not required where damages for emotional distress are present. In most cases, jurors from their own experience are aware of the extent and character of the disagreeable emotions that may result from a defendant’s outrageous conduct”); Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1370 (S.D. W. Va. 1990) (finding that plaintiffs do not have to provide medical testimony in order to show that their emotional distress was severe but that medical testimony would certainly strengthen their claim).

the need for medical testimony.²⁰⁷ Therefore, emotional damages are often awarded without the need for medical testimony in non-bankruptcy cases where the conduct is extremely outrageous or egregious. This parallels the award of such damages in bankruptcy cases where the violation of the stay is willful and the conduct is egregious.²⁰⁸

VI. CONCLUSION

Many questions remain about when and to what extent emotional damages will be awarded in bankruptcy cases. It is clear that the debtor has the burden of proving a creditor's willful violation of the automatic stay in order to recover damages under § 362(h). However, it is not clear what standard debtors must use to show a willful violation; preponderance or clear and convincing evidence. This article has discussed cases in which emotional damages were and were not awarded for a willful violation. What seems to emerge is a pattern of punishing a creditor when the willful violation of the stay is especially egregious. Some courts would not allow emotional damages without accompanying medical testimony. However, if the creditor's conduct is deemed reprehensible, then most courts will award punitive damages in place of emotional damages, where medical testimony is not offered. Either way, the debtor is compensated for the creditor's willful violation and any embarrassment, humiliation, or anxiety that the creditor's conduct has caused. In other cases where emotional damages were awarded without medical testimony, two themes emerged: 1) the creditor's conduct was so outrageous that the court essentially took judicial notice that the creditor's actions caused emotional distress; and 2) the creditor was the government and their egregious conduct had to be punished. Since punitive damages are not available against the government, courts may be more willing to award damages for emotional distress as an element of actual damages when the debtor has clearly been harmed. The central theme of this article has been that courts are willing to award damages for emotional distress,

207. See, e.g., *Macsenti*, 237 F.3d at 1223-27, 1242-43 (holding that where a dentist was so intoxicated that he passed out several times during the procedure and severely overmedicated the plaintiff, medical testimony was not required to establish the severity of the emotional distress); *Motsenbocker v. Potts*, 863 S.W.2d 126, 134-36 (Tex. Ct. App. 1993) (holding in a civil rights case that the testimony of the plaintiff and his wife was sufficient to support a jury verdict for intentional infliction of emotional distress where the plaintiff's health insurance deductible was raised so high that he believed he effectively did not have insurance any longer).

208. See *Fisher v. Blackstone Fin. Servs., Inc. (In re Fisher)*, 144 B.R. 237 (Bankr. D.R.I. 1992) (awarding emotional damages without the need for medical testimony where a creditor repossessed the debtors vehicle at a § 341 hearing, even after being warned several times that his conduct was violating the automatic stay).

in both bankruptcy and non-bankruptcy cases, under the appropriate circumstances. Eventually, the questions left open by this article will begin to flesh themselves out as more courts of appeal consider the question and, hopefully, the Supreme Court will evaluate those decisions and lay out clearer rules.