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Defining “Individual” in § 362(k)

A Creditor’s Standing to Seek Damages and Fees for a Willful Violation of the Automatic Stay

The automatic stay is designed to halt creditors’ collection efforts and provide a debtor with breathing room in order to reorganize or liquidate. More often than not, a debtor is the injured party seeking court intervention and damages when there is a violation of the automatic stay. However, a debtor is not the only party in a bankruptcy case that can be harmed by a violation of the automatic stay. Secured creditors — particularly under-secured creditors — have an equal interest in ensuring that collateral is protected during the pendency of a bankruptcy case.

Section 362(k) protects these competing interests by creating a private right of action for an “individual” that has sustained damages from a willful violation of the automatic stay. Whether a creditor qualifies as an “individual” and can utilize § 362(k) will depend on several factors and will vary by jurisdiction.

Section 362(k)

Section 362(k) provides that “an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages,”¹ and that

[a] “willful violation” does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant’s actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was ‘willful’ or whether compensation must be awarded.²

Knowledge of the automatic stay can be imputed if the party intentionally carried out the prohibited act with knowledge of the debtor’s bankruptcy case.³ The purpose of § 362(k) is to discourage willful violations of the automatic stay and provide compensation for any injuries that might be sustained, including reasonable and necessary attorneys’ fees.⁴ Courts universally agree that debtors have standing to pursue damages under § 362(k). However,

although this section has remained unchanged since its addition to the Bankruptcy Code in 1984,⁵ courts vary greatly over who has standing to bring a claim and whether a corporate entity or trustee qualifies as an “individual” under § 362(k).

Is a Creditor an “Individual” Under § 362(k)?

Parties seeking damages under § 362(k) must satisfy the traditional test for entry into federal court, which requires both Article III and prudential standing.⁶ Article III standing enforces the Constitution’s case or controversy requirement; prudential standing embodies self-imposed limits on the exercise of federal jurisdiction by the judiciary.⁷ To satisfy Article III standing, “[t]he plaintiff must show that the conduct of which he complains has caused him to suffer an ‘injury in fact’ that a favorable judgment will redress.”⁸ The injury “must be ... distinct and palpable ... and not abstract or conjectural or hypothetical.”⁹ On the other hand, prudential standing refers to “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interest protected by the law invoked.”¹⁰

Courts generally conclude that a party has Article III standing where a willful violation of the automatic stay results in a “distinct and palpable” injury. However, prudential standing is the point at which most courts diverge and reach differing conclusions. The majority and prevailing view is that debtors, trustees and pre-petition creditors generally have prudential standing to pursue damages under § 362(k).¹¹

5 This section was originally enacted as § 362(h), but was re-designated in 2005 as § 362(k). See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, Title III, § 304, 98 Stat. 333, 352; Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

6 *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 538-39 (5th Cir. 2009).

7 *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

8 *Id.* at 12 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

9 *United Transp. Union v. Interstate Commerce Comm’n*, 891 F.2d 908, 911 (D.C. Cir. 1989).

10 *Elk Grove*, 542 U.S. at 12 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

11 See *In re Ampal-Am. Israel Corp.*, 502 B.R. 361, 370 (Bankr. S.D.N.Y. 2013) (collecting cases on debtor and creditor standing); *High Steel Strength Steel Inc. v. Lozinski (In re High Strength Steel Inc.)*, 269 B.R. 560, 573-74 (Bankr. D. Del. 2001) (collecting cases on trustee standing). Courts uniformly decline to extend prudential standing to parties other than the debtor, trustee or pre-petition creditors. See *In re Prairie Trunk Ry.*, 112 B.R. 924 (N.D. Ill. 1990) (declining to extend standing to purchaser of estate property); *Metro. Life Ins. Co. v. Alside Supply Ctr. of Knoxville (In re Clemmer)*, 178 B.R. 160, 167 (Bankr. E.D. Tenn. 1995) (declining to extend standing to nondebtor, noncreditor third parties); *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1197 (6th Cir. 1983).

1 11 U.S.C. § 362(k)(1).

2 *Tsafiroff v. Taylor (In re Taylor)*, 884 F.2d 478, 482 (9th Cir. 1989).

3 See *Walker v. Midland Mortg. Co. (In re Medlin)*, 201 B.R. 188, 194 (Bankr. E.D. Tenn. 1996).

4 *In re Robinson*, 228 B.R. 75, 85 (Bankr. E.D.N.Y. 1998).



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The Ninth Circuit is in the minority and “has held that creditors and owners, other than the debtor, of the property at issue in a bankruptcy action do not have standing to challenge a judgment regarding violation of an automatic stay granted under § 362.”¹² It has declined to extend prudential standing to creditors and owners because § 362 “is intended solely to benefit the debtor estate.”¹³ In its opinion, allowing creditors to pursue claims the trustee abandons could undermine the trustee’s powers,¹⁴ and “when the trustee fails to pursue enforcement of the automatic stay, no other party, including creditors, may challenge conduct or acts which violate the automatic stay.”¹⁵

Is a Corporation an “Individual” Under § 362(k)?

Congress’s use of the word “individual” has led to great confusion among courts faced with the question of whether a corporate entity has standing to pursue a claim under § 362(k). Seven circuit courts have weighed in on the issue.

Although the Ninth Circuit is in the minority with respect to creditor standing under § 362(k), it is part of the majority of circuit courts — including the First, Second, Eighth, Ninth and Eleventh Circuits — that have held that the term “individual” does not include a corporate entity, including corporate debtors.¹⁶ The Third and Fourth Circuits disagree and have held that the term “individual” does include a corporate entity.¹⁷ Both sides cite to congressional intent and legislative history to support their positions.

Courts that have denied standing do so based on the Bankruptcy Code’s use of the undefined term “individual” in other sections, which indicate that the term was not meant to include corporations. For example, “[t]he term ‘person’ includes [an] *individual*, partnership, and corporation, but does not include [a] governmental unit.”¹⁸ In addition, “[t]he term ‘corporation’ includes [an] association having a power or privilege that a private corporation, *but not an individual* or a partnership, possesses.”¹⁹ Other Code sections also indicate that Congress might have used the term “individual,” rather than “person,” to mean a natural person.²⁰

As noted by the First Circuit, “It [might] at first be surprising that Congress would want to withhold the benefits of [§ 362(k)] from corporations, but this decision is not ‘demonstrably at odds’ with legislative intent.”²¹ Section 362(k) was enacted as part of the Consumer Credit Amendments to the Bankruptcy Amendments and Federal Judgeship Act of 1984, “which contain[ed] numerous additions to the [C]ode

relating only to ‘individuals.’”²² It continued, “The inclusion of [§ 362(k)] within this subtitle makes it entirely plausible that the use of the word ‘individual’ was intentional, and that Congress was enacting a series of measures meant to benefit only natural persons.”²³ Thus, “Congress may well have thought that individual debtors were particularly vulnerable to violations of the stay by debt-collection agencies and others who [might] be tempted to believe that individuals are less likely than corporations to be aware of their rights under the automatic stay.”²⁴

Courts that deny standing under § 362(k) further justify the decision by citing to a corporation’s ability to petition the bankruptcy court for an award of damages under § 105(a) or the court’s inherent sanction authority.²⁵ However, as conceded, a discretionary remedy under § 105(a) is not as favorable as a mandatory award under § 362(k).²⁶ While early cases suggested that remedies are available under § 105(a) that are nearly identical to those available under § 362(k), subsequent cases have identified a significant distinction regarding the availability of punitive damages: “[T]he power to punish for a statutory violation is a criminal law power. It must be expressly conferred by Congress, and its exercise is often subject to the procedural safeguards that protect the criminally accused.... [Courts have] conclude[d] that Congress has conferred no power to punish for a violation of § 362(a) other than the punitive damage authority in [§ 362(k)].”²⁷ Moreover, sanctions under the court’s inherent authority are analyzed under a heightened “bad faith” or “willful misconduct” standard, which is more stringent than § 362(k)’s “willful violation” standard.²⁸

By contrast, courts that have held that a corporation is an “individual” under § 362(k) do so based on the legislative intent underlying § 362 as a whole, which states, in part, that the “automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor’s property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally.”²⁹ The Fourth Circuit concluded “that it seems unlikely that Congress meant to give a remedy only to individual debtors against those who willfully violate the automatic stay provisions of the Code as opposed to debtors [that] are corporations or other like entities. Such a narrow construction of the term would defeat much of the purpose of the section.”³⁰ Some lower courts have also reached similar a conclusion: “It does not seem logical that Congress would intend to protect creditors under the automatic stay provisions, yet deny them relief under section [362(k)]. Moreover, assuming Congress did intend for creditors to have a right of action under section [362(k)], it

¹² *Marin v. Midland Loan Servs. Inc. (In re Marinkovic)*, 158 Fed. App’x. 885, 887 (9th Cir. 2005) (citing *Tilley v. Vucurevich (In re Pecan Groves of Ariz.)*, 951 F.2d 242, 245-46 (9th Cir. 1991)).

¹³ *Id.* at 245.

¹⁴ *Id.*

¹⁵ *Little Pat Inc. v. Conter (In re Soll)*, 181 B.R. 433, 443 (Bankr. D. Ariz. 1995). See also *Darby v. Zimmerman (In re Popp)*, 323 B.R. 260, 267 (B.A.P. 9th Cir. 2005).

¹⁶ See *Spookyworld Inc. v. Town of Berlin (In re Spookyworld Inc.)*, 346 F.3d 1, 8 (1st Cir. 2003); *Mar. Asbestosis Legal Clinic v. LTV Steel Co. Inc. (In re Chateaugay Corp.)*, 920 F.2d 183, 185-86 (2d Cir. 1990); *Sosne v. Reinert & Duree PC (In re Just Brakes Corp. Sys.)*, 108 F.3d 881, 884-85 (8th Cir. 1997); *Goodman v. Knight (In re Goodman)*, 991 F.2d 613, 619 (9th Cir. 1993); *Jove Eng’g Inc. v. Internal Revenue Serv. (In re Jove Eng’g Inc.)*, 92 F.3d 1539, 1549-53 (11th Cir. 1996).

¹⁷ See *Atl. Bus. & Cmty. Corp. v. Atl. Bus. & Cmty. Dev. Corp. (In re Atl. Bus. & Cmty. Corp.)*, 901 F.2d 325, 328-29 (3d Cir. 1990); *Budget Serv. Co. v. Better Homes of Va. Inc.*, 804 F.2d 289, 292 (4th Cir. 1986). The Fifth Circuit has noted in *dicta* its approval of lower court opinions holding that corporate creditors have standing to pursue claims under § 362(k). See *Labuzan*, 579 F.3d at 540-41.

¹⁸ 11 U.S.C. § 101(41) (emphasis added).

¹⁹ 11 U.S.C. § 101(9)(A)(i) (emphasis added).

²⁰ See *In re Georgia Scale Co.*, 134 B.R. 69, 70 (S.D. Ga. 1991).

²¹ *In re Spookyworld*, 346 F.3d at 7.

²² *In re Chateaugay*, 920 F.2d at 186.

²³ *Id.*

²⁴ *Id.*

²⁵ See *id.* at 186-87; *In re Spookyworld*, 346 F.3d at 8.

²⁶ *In re Spookyworld*, 346 F.3d at 8.

²⁷ *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1195 (9th Cir. 2003) (quoting *In re Just Brakes*, 108 F.3d at 885).

²⁸ *Id.* at 1196.

²⁹ H.R. Rep. No. 595, 95th Cong., 2d Sess. 340 (1977), as reprinted in 1978 U.S.C.A.N. 6296.

³⁰ *Budget Serv. Co.*, 804 F.2d at 292.

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would not seem logical to afford such right only to creditors that are natural persons, and not corporations.”³¹

Conclusion

Although § 362(k) has been around since 1984, the definition of “individual” still remains largely unsettled. Whether

§ 362(k)'s generous remedies are available will depend on whether the injured party is bringing the claim as a debtor, trustee, pre-petition creditor or other third party. It will also depend on whether the injured party is a natural person or corporate entity. For jurisdictions where a corporate creditor is considered an “individual,” § 362(k) offers an unrivaled avenue to rectify a willful violation of the automatic stay that results in damages and attorneys' fees for the creditor. **abi**

31 *Paradise Towing Inc. v. CIT Grp./Sales Fin. Inc.*, 368 B.R. 569, 572 (W.D. Tex. 2005).

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