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CONNECTING *KAWAAUHAU V. GEIGER* TO 11 U.S.C. § 362(K): CONSIDERING THE "WILLFUL" REQUIREMENT FOR AUTOMATIC STAY ENFORCEMENT THROUGH *IRS V. MURPHY*

MATTHEW R. GASKE*

This Article uses the recent First Circuit decision, IRS v. Murphy,[1] *as an entry point for examining the judicial interpretation and statutory evolution of the "willful" requirement under then-11 U.S.C. § 362(h) for compensatory and punitive remedies against parties that violate bankruptcy's automatic stay. The Article first shows that many circuits' adoption of that context's definition is mostly based on a common case origin referring to section 523(a)(6); however, courts have rejected the more stringent interpretation of "willful" for section 523(a)(6) provided by the United States Supreme Court in Kawaauhau v. Geiger.*[2] *The courts' rejection occurred despite the lack of clarity regarding the relationship between common law contempt and the 1984 addition of section 362(h) to the Bankruptcy Code. The Article then considers contemporary support for using the heightened Geiger standard and proposes a procedural process that adopts a de facto "carve-out" from the more prevalent, but much easier to satisfy, "willful" standard used when applying the modern version of section 362(h), 11 U.S.C. § 362(k).*

 J.D., 2016, Vanderbilt University Law School. This Article represents the opinions of the author and not necessarily those of the Office of the Tennessee Attorney General and Reporter.

1. IRS v. Murphy, 892 F.3d 29 (1st Cir. 2018).
2. Kawaauhau v. Geiger, 523 U.S. 57 (1998).

INTRODUCTION

In June 2018, the United States Court of Appeals for the First Circuit, in a split decision, rendered its opinion in *IRS v. Murphy*. The panel majority held that if an employee of the Internal Revenue Service "willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to ef-

fect of discharge) of title 11, United States Code," authorization under 26 U.S.C. § 7433(e) for a taxpayer to request a bankruptcy court to impose damages merely requires that the employee "knows of the discharge order and takes an intentional action that violates the order."[3] The majority opinion defined "willful" by examining the context of that term's use within the Bankruptcy Code.[4] Accordingly, the majority heavily relied on various circuits' definition of "willful" in the context of 11 U.S.C. § 362(h)—now 11 U.S.C. § 362(k)[5]—which provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."[6] The panel majority recognized the dearth of precedents construing 11 U.S.C. § 524 but held that when Congress enacted section 7433, it sought to apply the same standard of willful violations of the automatic stay and the discharge injunctions.[7] Similarly, this Article's scope will be restricted to the question of "willful" in section 362(h) and the subsequent section 362(k).

But Circuit Judge Lynch dissented, arguing *inter alia* that Congress would have been aware of the plain meaning interpretation of the "willful" requirement under 11 U.S.C. § 523(a)(6) in *Kawaauhau v. Geiger*.[8] Her dissent asserted that the Supreme Court instead interpreted section 523(a)(6) in *Geiger* to hold that "'willful [and malicious] injury' included

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3. *Murphy*, 892 F.3d at 32, 35. Section 7433(e)(1) provides in full:

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

26 U.S.C. § 7433(e)(1) (2012).

4. *See Murphy*, 892 F.3d at 35.

5. *See, e.g.*, Calderon v. Bank of Am. Corp. (*In re* Calderon), 497 B.R. 558, 562 n.3 (Bankr. E.D. Ark. 2013).

6. *Murphy*, 892 F.3d at 36 (citing a 1998 version of 11 U.S.C. § 362(h)).

7. *Murphy*, 892 F.3d at 39–40.

8. *Id.* at 45–46. Section 523(a)(6) allows an exception to the bankruptcy discharge "for willful and malicious injury by the debtor to another entity or to the property of another entity." This is the same language as the section 523(a)(6) modern provision. 11 U.S.C. § 523(a)(6) (2018).

only acts that were specifically intended to cause injury, not all intentional acts that resulted in injury."[9] Further, the dissent highlighted the particular relationship between section 523(a)(6) and section 524, born of the creation of exceptions in section 523 to the enforcement of the discharge provided in section 524.[10] Considering the contrasting opinions in *Murphy*, a question reasserts itself in the contemporary era: how does *Geiger*'s interpretation of "willful" under section 523(a)(6) apply in the context of then-section 362(h) and present-section 362(k)?[11] Indeed, the modern consideration of "willful" under section 362(k) has not adopted this Supreme Court plain-meaning interpretation of the same word in a different but related section of the Bankruptcy Code.

The majority opinion of *Murphy* cites eight circuit court cases in support of its definition of "willful" under section 362(h). However, these cases are, to an extent, circuitously referential to one another. Upon a closer look, their treatment of the "willful" standard generally has a common-law origin that lacks the plain-meaning interpretation of that term in then-section 362(h), which is exacerbated by the lack of legislative history to find its intended definition.[12] Meanwhile, that case-law genesis stems from the "willful" requirement under section 523(a)(6)—the same definition used in *Geiger*. As modern statutory interpretation begins, and can end, with the plain meaning of a contested term, contemporary case-law progeny that do not address the plain meaning of "willful" in a relevant

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9. *Murphy*, 892 F.3d at 45–46 (quoting Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998)).

10. *See Murphy*, 892 F.3d at 45.

11. Relevantly, the Ninth Circuit held on different grounds in *Lorenzen v. Taggart (In re Taggart)*, 888 F.3d 438, 444 (9th Cir. 2018), that a "good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 444 n.4 (appearing to apply 11 U.S.C. § 105(a)).

12. Representative Rodino explained as follows:

> The bill would state that an individual injured by any willful violation of a stay provided by section 362 of the Bankruptcy Code shall recover actual damages including costs and attorneys' fees, and, in appropriate circumstances may recover punitive damages.
>
> This private right of action is an additional right of individual debtors, and is not intended to foreclose recovery under already existing remedies.

130 CONG. REC. H1942 (daily ed. Mar. 26, 1984) (statement of Rep. Rodino).

Bankruptcy Code section depend on earlier cases that do.[13] As the Supreme Court explained when examining the Bankruptcy Code in *United States v. Ron Pair Enterprises*[14]: "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"[15] To this end, this Article considers this line of precedent, contempt law in bankruptcy, the *Geiger* decision and its progeny, a possible wrinkle in the "willful" standard for automatic-stay-violation sanctions that survives the 2005 code amendments, and a procedural adjustment that accommodates the same.

Part I of this Article focuses on the cases cited in adoption of *Murphy*'s "willful" standard that requires both mere knowledge of a bankruptcy injunction and intent to perform an act that violates the injunction as a guiding road to explore how the term "willful" has been understood in pre-amendment section 362(h) case law. The modern interpretation of "willful" in present-day section 362(k) arguably lacks a textual touchstone upon which to begin—or end—a definitional analysis. Supreme Court precedent has instructed interpretation to begin with plain meaning. However, contemporary case law lacks textual analysis of section 362(h) after the Bankruptcy Amendments and Federal Judgeship Act of 1984, despite a relatively linear precedential history.[16] More importantly, however, the case-law genesis of this approach is born from a definition of "willful" that is at odds with that term's differentiated meaning in section 362(h) and then section 362(k).

Part II discusses the appearance of inconsistencies in bankruptcy precedents regarding the role of civil contempt to establish the low threshold of "intent" for compensatory damages, then-section 362(h)'s authorization for a bankruptcy

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13. *See, e.g.*, Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1946 (2016) ("The plain text of the Bankruptcy Code begins and ends our analysis.").

14. United States v. Ron Pair Enters., 489 U.S. 235 (1989)

15. *Id.* at 242 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

16. *See, e.g.*, America's Servicing Co. v. Schwartz-Tallard (*In re* Schwartz-Tallard), 803 F.3d 1095, 1098 (9th Cir. 2015) ("Congress re-designated the statute § 362(k) in 2005 and added the exception now found in paragraph (2), but its text has otherwise remained unchanged.").

court to impose not only compensatory damages but also punitive damages, and how courts have articulated the relationship between section 362 and a court's contempt powers. Part III considers the reasoning and law-of-the-case circumstances of the Supreme Court's opinion in *Geiger*, why its interpretation is not superfluous today, and subsequent hostile treatment in the sections 362(h) and 362(k) contexts. Part IV discusses the impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and describes why the new inclusion of a limited "good faith" defense in section 362(k)(2) might not render *Geiger*'s interpretation of "willful" inapplicable today. Part V describes a procedural addition that could address post-*Geiger* precedent's suggestion that a *de facto* exception to section 362(k) may exist if substantial case law and statutory authority provide a legitimate legal question regarding application of the automatic stay. Finally, this Article concludes and contextualizes the analysis of the law that—regardless of the resolution—will benefit bankruptcy stakeholders.

I.
The General Common Origin of the Section 362(h) "Willful" Precedent Asserted in *Murphy*

A. *The* Murphy *Majority's Assertions*

This Part now considers the specific assertions and citations provided in *Murphy* in support of its "willful" standard. Although the majority cites a variety of cases from various circuits to support its definition, the great jurisdictional breadth of the adopted circuit decisions becomes less impressive (and persuasive) upon close examination. Specifically, these circuit cases are highly cross-referential and generally have a common origin from a small number of post-1984 bankruptcy cases interpreting the then-newly enacted section 362(h) "willful" standard.

To contextualize, the *Murphy* majority opinion considers an array of circuit cases decided before the 1998 enactment of 26 U.S.C. § 7433 in support of its assertion that "[p]rior to the enactment of section 7433(e), nearly all courts, and a majority of the circuits, had held that a willful violation of an automatic stay under [section] 362(h) occurs when an individual knows of the automatic stay and takes an intentional action that vio-

lates the automatic stay."[17] The panel majority further elucidated that "[t]hese courts refused to incorporate a bad faith or maliciousness requirement, and in fact many specifically rejected good faith defenses."[18] In this manner, the portion of the majority opinion considering relevant case precedent, specifically addressing this low-threshold definition of "willful," offers eight different circuit cases in support of its reasoning. This Part considers the case law cited in each of these decisions to establish the precedential source of each of these opinions' applicable legal basis. By identifying the "core" originating cases of this line of reasoning, this Part seeks to determine whether a plain-meaning assessment of "willful" as provided in then-section 362(h) had been established before *Geiger* or, alternatively, what cases formed the basis for the idea that several circuits later adopted. Ultimately, identifying the cases at the foundation of this reasoning suggests that courts' adoption of this interpretation of "willful" in sections 362(h) and, later, 362(k) should not be so ironclad.

B. *The Interrelation and Origin of the Eight Cases Asserted by the* Murphy *Majority Opinion*

This section now proceeds to individually consider the eight circuit cases cited by the *Murphy* majority with respect to its adoption of a "willful" definition in section 362(h) that is satisfied by mere knowledge of the automatic stay and the intent to perform an action that violates the automatic stay.

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17. IRS v. Murphy, 892 F.3d 29, 36 (1st Cir. 2018) (citing Jove Eng'g, Inc. v. IRS (*In re* Jove Eng'g, Inc.), 92 F.3d 1539, 1555 (11th Cir. 1996); Price v. United States (*In re* Price), 42 F.3d 1068, 1071 (7th Cir. 1994); *In re* Crysen/Montenay Energy Co., 902 F.2d 1098, 1104 (2d Cir. 1990); Cuffee v. Atl. Bus & Cmty. Corp. (*In re* Atl. Bus. & Cmty. Corp.), 901 F.2d 325, 329 (3d Cir. 1990); Knaus v. Concordia Lumber Co. (*In re* Knaus), 889 F.2d 773, 775 (8th Cir. 1989); *In re* Bloom, 875 F.2d 224, 227 (9th Cir. 1989); Budget Serv. Co. v. Better Homes of Am., 804 F.2d 289, 292–93 (4th Cir. 1986)).

18. *Murphy*, 892 F.3d at 36 (citing *In re* Pinkstaff, 974 F.2d 113, 115 (9th Cir. 1992) ("As it is undisputed that the IRS acted with knowledge of the bankruptcy filing, it necessarily follows that the government willfully violated the automatic stay." (internal quotation marks and citations omitted)); *Crysen/Montenay*, 902 F.2d at 1104–05; *Atl. Bus.*, 901 F.2d at 329).

1. *Goichman v. Bloom (In re Bloom)*[19]

Upon exploring the citation chains in the authority presented by the circuit decisions offered by the *Murphy* majority, it is apparent that a root circuit case offered in justification of the "willful" standard adopted by the *Murphy* majority is *In re Bloom*. Accordingly, this Article confronts this case and its offered authority first, for ease of subsequent discussion of the other circuit cases offered by *Murphy*. Moreover, the *In re Bloom* standard is not necessarily rooted in a textual analysis of then-section 362(h); in fact, that standard borrows from section 523(a)(6) by its reference to lower-court and pre-amendment decisions in support of its reasoning.

To start, the section 362(h) definition of "willful" was a question of first impression for the Ninth Circuit in *In re Bloom*.[20] It decided to adopt the definition provided by *INSLAW, Inc. v. United States* (*In re INSLAW, Inc.*),[21] which provided the majority rule that specific intent to violate a bankruptcy injunction is not necessary for that action to be "willful."[22] In particular, *INSLAW* held 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."[23]

Notably, that *INSLAW* opinion was thereafter reversed and later vacated on jurisdictional grounds.[24] To the extent the rationale in *INSLAW* would be valid, it is worthwhile to examine the cases *INSLAW* cited in support of its "willful" defini-

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19. Goichman v. Bloom (*In re* Bloom), 875 F.2d 224 (9th Cir. 1989).

20. *Id.* at 227 (citing *In re* INSLAW, Inc., 83 B.R. 89, 165 (Bankr. D.D.C. 1988), *aff'd sub nom.* United States v. INSLAW, Inc., 113 B.R. 802 (D.D.C. 1989), *subsequent mandamus proceeding sub nom.* INSLAW, Inc. v. Thornburgh, 753 F. Supp. 1 (D.D.C. 1990), *rev'd*, 932 F.2d 1467 (D.C. Cir. 1991), *and vacated sub nom.* United States v. INSLAW, Inc., 132 B.R. 808 (D.D.C. 1991)).

21. *In re INSLAW, Inc.*, 83 Bankr. 89.

22. *Bloom*, 875 F.2d at 227; *INSLAW, Inc.*, 83 B.R. at 165.

23. *INSLAW, Inc.*, 83 B.R. at 165.

24. *See* United States v. INSLAW, Inc., 932 F.2d 1467, 1475 (D.C. Cir. 1991) ("As the bankruptcy court had no jurisdiction to hear the claims asserted under § 362(a), we reverse the district court and remand the case with directions to vacate all orders concerning the Department's alleged violations of the automatic stay and to dismiss INSLAW's complaint against the Department."); *see also* United States v. INSLAW, Inc., 1991 U.S. Dist. LEXIS 16763, *1, 132 B.R. 808 (Oct. 1, 1991).

tion that *In re Bloom* later adopted: *In re Johnson-Allen*,[25] *In re Mewes*,[26] and *In re Tel-A-Communications Consultants, Inc.*[27]

First, the *In re Johnson-Allen* court held that damages under section 362(h) were not appropriate against a state entity "although possibly in violation of the automatic stay," likely because of an application of *Younger v. Harris*,[28] and because contempt was not warranted for a lack of evidence of bad faith.[29] This holding appears to be in contrast with the definition created in *INSLAW* because *In re Johnson-Allen*'s suggestion that lack of bad faith avoided a "willful" violation of the automatic stay contravenes *INSLAW*'s statement that specific intent was not relevant for section 362(h) liability.[30]

Next, *In re Mewes* followed *Mercer v. D.E.F., Inc.*[31] and *In re Tel-A-Communications Consultants, Inc.* to define "willful" as "either deliberate or intentional," and framed the question as "whether [a bank] intentionally or deliberately offset the debtors' account after it knew that the debtors had filed for volun-

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25. *In re* Johnson-Allen, 69 B.R. 461 (Bankr. E.D. Pa. 1987).

26. *In re* Mewes, 58 B.R. 124 (Bankr. D.S.D. 1986).

27. *In re* Tel-A-Communications Consultants, Inc., 50 B.R. 250 (Bankr. D. Conn. 1985). Notably, the *INSLAW* decision did not provide pincite citations for those offered cases. *See generally INSLAW, Inc.*, 83 B.R. 89. That case also cites *In re AM International, Inc.*, but this decision can easily be distinguished because *In re AM International, Inc.* awarded costs and attorney's fees under bankruptcy rules, instead of § 362(h). *See In re* AM Int'l, Inc., 46 B.R. 566, 578 (Bankr. M.D. Tenn. 1985).

28. *Younger v. Harris*, 401 U.S. 37 (1971).

29. *In re* Johnson-Allen, 69 B.R. 461, 471 (Bankr. E.D. Pa. 1987), *rev'd sub nom.* Com. of Pa. Dep't of Pub. Welfare v. Johnson-Allen, 88 B.R. 659 (E.D. Pa. 1988), *rev'd sub nom. In re* Johnson-Allen, 871 F.2d 421 (3d Cir. 1989), *aff'd sub nom.* Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990) ("Upon advice from the Probation Department that it did not accept the reasoning of her or her Counsel and advice that she would 'get in trouble' if she ceased making payments, the said Debtor, upon advice of Counsel, resumed payments pending disposition of this proceeding . . . ."). It is difficult to know exactly what reasoning led to the bankruptcy court's ruling because the relevant holding regarding section 362(h) was based on "foregoing reasons." *Id.*

30. *Johnson-Allen*, 69 B.R. at 471 ("For the foregoing reasons, we also decline to find DPW's conduct, although possibly in violation of the automatic stay, characterized by the element of willfulness, which is required to impose damages under 11 U.S.C. § 362(h).").

31. Mercer v. D.E.F., Inc., 48 B.R. 562 (Bankr. D. Minn. 1985).

tary relief under Chapter 11 of the Bankruptcy Code."[32] Adopting this definition and transposing it into the text of section 362(h) would read: "An individual injured by any *either deliberate or intentional 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."[33]

Yet *INSLAW* provides no explanation for the missing logical leap that "violation" meant an act that had a result of violating the stay instead of an act coinciding with an intent to violate the stay itself.[34] In contrast, the *In re Mewes* court held, before stating its above-quoted formulation of the question, that the offset at issue was a violation.[35] Therefore, *In re Mewes* was not considering whether a party had "intentionally or deliberately" committed an act; instead, it was considering whether that party had "intentionally or deliberately" violated the automatic stay.[36] Such analysis does not comport with the legal standard articulated in *INSLAW*.

Before proceeding to *Tel-A-Communications Consultants, Inc.*, it is important to note that *In re Mewes*'s understanding of an "intentional" act sufficient to be "willful" appears to be also born out of *Mercer*'s understanding that section 362(h) authorizes punitive damages if "[t]he offending party . . . committed an intentional wrong without any legal justification." To that end, *Mercer* cites to the contract damages discussion in *Johnson v. Radde*,[37] which borrows the language quoted here from the "malice" requirement for the imposition of punitive damages.[38]

Interestingly, the *Johnson* court explicitly noted that "justification" would be a defense to punitive damages in a contract-related tort context because "the reasonableness of the defendant's conduct under all the circumstances of the case" would

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32. *In re* Mewes, 58 B.R. 124, 128 (Bankr. D.S.D. 1986) (citing *Mercer*, 48 B.R. at 565, and *In re Tel-A-Communications Consultants, Inc.*, 50 B.R. at 253–54).

33. *Mewes*, 58 B.R. at 128 (emphasis added) (citing 11 U.S.C. § 362(h)).

34. *INSLAW, Inc.*, 83 B.R. at 165.

35. *Mewes*, 58 B.R. at 127–28.

36. *Id.*

37. Johnson v. Radde, 196 N.W.2d 478 (Minn. 1972).

38. *Id.* at 480.

show that no intentional tort had occurred.[39] Thus, *Mercer*'s application of *Johnson*'s standard may suggest that—possibly with respect to punitive damages—liability under section 362(k) could be avoided if the alleged violator of the injunction was reasonable in committing the act that violated the stay. Thus, the case law underpinning the much-adopted definition of the section 362(h) "willful" standard at the time may have contained the seed for a "reasonableness" defense, at least as to punitive damages.[40] Alternatively, as will be discussed below, the *Geiger* court interpreted "willful" to have a specific-intent meaning even though section 523(a)(6) required a "willful and malicious injury."[41] Therefore, *Geiger*'s holding may override an argument that *Mercer*'s reference to *Johnson* would limit a reasonableness defense to the punitive damages portion of section 362(h). While this argument may be moot in light of the 2005 amendments to the Code, considered below, it does illustrate the unsettled nature of the law and the seemingly misplaced confidence in the *INSLAW* articulation of the section 362(h) "willful" standard.

Pulling back from this particular wing of case-law genealogy, *INSLAW* and *In re Mewes* both rely on *In re Tel-A-Communications Consultants, Inc.* for their adopted understanding of the "willful" requirement.[42] As shown partly here and expanded in following subsections, the *Murphy* majority's cited case precedent ultimately rests almost fully upon *In re Tel-A-Communications Consultants, Inc.* That case describes and applies section 362(h) as follows:

> The fact remains that the automatic stay intervenes upon the filing of the plaintiff's bankruptcy petition and all that is necessary to trigger the subsection (h) sanctions is (1) that the defendant's action violated the stay and (2) that such action was willful.
> . . . .

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39. *Id.*

40. See *infra* Part IV for discussion of how the 2005 amendments to the Bankruptcy Code may have implicitly overruled any "good faith" defense to compensatory damages under the post-amendment section 362(k).

41. Kawaauhau v. Geiger, 523 U.S. 57, 61–62 (1998).

42. *In re Tel-A-Communications Consultants, Inc.* involves the post-petition repossession of a vehicle because, despite the automatic stay, a lessor thought seizure was an appropriate response to the debtor's failure to abide by the contract between them. 50 B.R. 250, 252 (Bankr. D. Conn. 1985).

> In determining whether the defendant's conduct was willful, reference is made to similar language in the Code which has been the subject of judicial construction. *In the context of Code § 523(a)(6), which relates to the nondischargeability of debts caused by the willful and malicious injury by the debtor to the person or property of another entity, courts have construed willful to mean intentional or deliberate.*
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> Notwithstanding the defendant's claim that it acted in the good faith belief that post petition repossession was justified, the facts here clearly demonstrate that the defendant's agents *not only acted intentionally but also with arrogant defiance of federal law.* Sanctions under Code § 362(h) are therefore mandatory, and in this instance, punitive damages are appropriate.[43]

Accordingly, a pursuit of the precedential root of the "willful" definition adopted by *In re Bloom* reveals that the basis for the *Murphy* majority's understanding of that term in section 362(h) is actually heavily based upon that term's meaning in section 523(a)(6)—a provision interpreted by Supreme Court later in *Geiger*.

Indeed, the reasoning in *Tel-A-Communications Consultants, Inc.* suggests that the *Murphy* dissent is correct that the section 523(a)(6) understanding of the term "willful" should be considered in this analysis. However, the dissent did not articulate that the section 523(a)(6) definition of "willful" is actually the root of case law interpreting the meaning of "willful" in section 362(h). Consequently, in the absence of other factors, the *Geiger* definition should control the meaning of "willful' in section 362(h). Although Congress later relabeled section 362(h) as 362(k) in the 2005 amendments and added a "good faith" provision that did not permit punitive damages in certain

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43. *Id.* at 254–55 (emphasis added) (citations omitted) (citing *In re* Glazer, 25 B.R. 329, 330 (B.A.P. 9th Cir. 1982); Matter of Langer, 12 B.R. 957, 959 (D.N.D. 1981), *overruled by In re* Clark, 50 B.R. 122 (Bankr. D.N.D. 1985); *In re* Stanfield, 14 B.R. 180 (Bankr. N.D. Ohio 1981); S. Rep. No. 95-989, at 79 (1978); H.R. Rep. No. 95-595, at 365 (1977)) (asserting that "willful" means "deliberate or intentional").

cases,[44] this interpretation may still be applicable to the modern section 362(k) statute.

Having considered the case-law foundation of the seminal *In re Bloom* case, this section now moves to examine the law underpinning the other circuit decisions the *Murphy* majority cited for its "willful" definition to illustrate their circuitous cross-references and general dependence on *In re Bloom, IN-SLAW,* or *In re Tel-A-Communications Consultants, Inc.*

2. *Jove Engineering, Inc. v. IRS (In re Jove Engineering, Inc.)*[45]

Jove adopted the "willful" standard from other circuit cases cited by *Murphy*: *Price v. United States (In re Price)* and *Budget Service Co. v. Better Homes of Virginia, Inc.*[46] To the extent that those two cases are based on sound precedent and reasoning regarding the meaning of section 362(h), discussed below, so too is *Jove*.

3. *Price v. United States (In re Price)*[47]

In *In re Price*, the IRS conceded that a notice sent by computer error was a "willful" violation of the automatic stay.[48] But this case is an ineffective aide for finding case law analysis of the "willful" statutory text of the Bankruptcy Code; instead, that decision recites the same standard as that used by the other courts mentioned in this Part, without citation to earlier authority.[49] Thus, citation to this case is not exceptionally persuasive for lack of clear connection to the greater body of case law, except to the extent another circuit has joined this perspective.

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44. Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, 79 AM. BANKR. L.J. 749, 777 (2005).

45. Jove Eng'g, Inc. v. IRS, 92 F.3d 1539 (11th Cir. 1996).

46. *Id.* at 1555 (citing Price v. United States (*In re* Price), 42 F.3d 1068, 1071 (7th Cir. 1994); Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 292–93 (4th Cir. 1986)).

47. *In re* Price, 42 F.3d 1068 (7th Cir. 1994).

48. *Id.* at 1071.

49. *Id.* ("The violation is also considered willful because the government was aware of the pending bankruptcy proceeding and, despite the several pleas to halt further collection actions, the government declined to intervene. A 'willful violation' does not require a specific intent to violate the automatic stay.").

Although the Seventh Circuit cited to earlier authority[50] in another part of that opinion's discussion of section 362(h), that precedent similarly does not analyze that statute's understanding of "willful." In fact, *Price v. Rochford* emphasized the lack of clarity provided by Congress regarding the application of section 362(h):

> In the process of passing the 1984 amendments, not much was said about the new sanction. In fact, no one seems to have thought much about it at all. Congress did not enact a statute of limitations, nor did it clarify what *kinds* of "actual damages" may be recovered, whether a corporate debtor counts as "an individual" and whether willfulness requires mere knowledge of the automatic stay or knowledge that one's actions will violate the stay.[51]

Therefore, *Price* provides little support for *Murphy*'s understanding of section 362(k) "willfulness," and its cited precedent illustrates the lack of congressional guidance for the same.

4. *In re Crysen/Montenay Energy Co.*[52]

The panel in *In re Crysen/Montenay Energy Co.* confronted the Second Circuit's first consideration of the "willful" standard under section 362(h). That court was persuaded by *In re Atlantic Business and Community Corp.*,[53] *In re Taylor*,[54] and *In re Bloom* and adopted a definition of "willful" that did not require specific intent to violate the automatic stay.[55]

In re Atlantic Business is another circuit decision cited in *Murphy*, so it will be discussed in its own right in the next subsection. Further, *In re Bloom* was discussed above. Moreover, *In*

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50. *See* Price v. Rochford, 947 F.2d 829, 831 (7th Cir. 1991) (citing Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n, 892 F.2d 575, 577 (7th Cir. 1989)).

51. *Id.* (emphasis in original).

52. *In re* Crysen/Montenay Energy Co., 902 F.2d 1098 (2d Cir. 1990).

53. Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (*In re* Atl. Bus. & Cmty. Corp.), 901 F.2d 325 (3d Cir. 1990).

54. *In re* Taylor, 884 F.2d 478, 482–83 (9th Cir. 1989).

55. The *In re Crysen/Montenay Energy Co.* court did recognize that pre-1984 precedent allowed for a bona fide dispute defense to contempt for violation of the automatic stay. 902 F.2d at 1104 (citing *In re* Comtek Elecs., 28 B.R. 829, 832 (Bankr. S.D.N.Y. 1983)).

re Taylor approved of *In re Bloom*'s adoption of the *INSLAW* standard and further reasoned that, in pre-section 362(h) cases, one acting upon the advice of counsel in good faith would still be liable under contempt for "willful" violations of the stay, citing both *Fidelity Mortgage Investors v. Camelia Builders, Inc.* (*In re Fidelity Mortgage Investors*)[56] and *In re Bloom*.[57]

Marching forward here, *In re Fidelity Mortgage Investors* involved standard civil contempt with compensatory damages for the pre-1984 violation of a bankruptcy rule, not a bankruptcy statute.[58] Therefore, this reasoning would be subject to the limitations of civil contempt, such as additional requirements for punitive damages, discussed below in Part II. Illuminatingly, the seminal *Tel-A-Communications Consultants, Inc.* cited to *In re Fidelity Mortgage Investors*'s description of civil contempt when distinguishing between civil contempt and sanctions for "willful" behavior under section 362(h).[59] Accordingly, the notion that the "willful" standard should be used with respect to civil contempt powers was certainly not settled at the time section 362(h) came into effect. In sum, *In re Crysen/Montenay Energy Co.* continues the highly interrelated case-law churn re-

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56. Fid. Mortg. Inv'rs v. Camelia Builders, Inc. (*In re* Fid. Mortg. Inv'rs), 550 F.2d 47, 57–58 (2d Cir. 1976).

57. *Taylor*, 884 F.2d at 483 (citing *Fid. Mortg. Inv'rs*, 550 F.2d at 57–58 *cert. denied*, 429 U.S. 1093 (1977); *In re Bloom*, 875 F.2d 224, 227 (9th Cir. 1989)).

58. *Fid. Mortg. Inv'rs*, 550 F.2d at 57. There is a divide between the "good faith" context stemming from holdings that a party's action following counsel's opinion in good faith is sufficiently "willful" so to violate 11 U.S.C. § 362(h). *See, e.g.*, *Taylor*, 884 F.2d at 483. However, this logic relies on pre-section 362(h) law regarding the "willfulness" of actions taken by advice of counsel. *Fid. Mortg. Inv'rs*, 550 F.2d at 57. In *In re Fidelity Mortgage Investors*, the court developed this reasoning when considering a contempt ruling against parties who had violated the text of then-Bankruptcy Rule 11-44, which barred "the commencement or the continuation of any court or other proceeding against the debtor" without permission from the bankruptcy court. 550 F.2d at 50–51. The instant circumstances are materially different than those in *In re Fidelity Mortgage Investors* because the "violation" language of section 362(h) may provide an "out" seemingly unavailable against the unambiguous Rule 11-44 and because the *Murphy* panel itself indicated that the legal question did not involve a matter of seeking *ex ante* authorization to pursue nondischargeable debts. IRS v. Murphy, 892 F.3d 29, 36 (1st Cir. 2018) ("Nothing in our decision today forces the IRS to obtain a pre-enforcement determination before seeking to collect on tax obligations like Murphy's.").

59. *In re* Tel-A-Communications Consultants, Inc., 50 B.R. 250, 253 (Bankr. D. Conn. 1985).

garding the meaning of "willful" in the Bankruptcy Code, wherein earlier precedent illustrates inconsistencies between rulings.

5. *Cuffee v. Atlantic Business and Community Development Corp. (In re Atlantic Business and Community Corp.)*[60]

In *In re Atlantic Business*, the Third Circuit also adopted the *In re Bloom* definition of "willful violation" and peripherally cited *Budget Service Co. v. Better Homes of Virginia, Inc.*,[61] which will be discussed below.[62] Notably, *In re Atlantic Business* cited *Forty-Eight Insulations, Inc. v. Lipke*[63] and *In re Tel-A-Communications Consultants, Inc.* for the proposition that "[t]he bankruptcy courts have construed 'willful' as used in the code to mean an intentional or deliberate act done with knowledge that the act is in violation of the stay."[64]

In re Tel-A-Communications Consultants, Inc. was discussed previously alongside *In re Bloom*, but *In re Forty-Eight Insulations, Inc.* makes little attempt to provide a rationale for its reasoning that "this Court reads subsection (h) as requiring conduct which flaunts the jurisdiction and integrity of the Court, reading 'willful violation' to mean a deliberate and intentional act done with the knowledge that the act is in violation of the stay."[65] While this language appears to mirror civil contempt concerns, as introduced above and elaborated in Part II, the lack of plain-meaning analysis in that decision's cursory interpretation suggests that *In re Forty-Eight Insulations, Inc.* may be unpersuasive in light of articulated standards for statutory interpretation and *Geiger*.[66] Moreover, this portion of the *In re Forty-Eight Insulations, Inc.* decision cites no authority in sup-

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60. *In re* Atl. Bus. & Cmty. Corp., 901 F.2d 325 (3d Cir. 1990).

61. Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 290 (4th Cir. 1986).

62. *Atl. Bus. & Cmty. Corp.*, 901 F.2d at 329.

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

64. *Atl. Bus. & Cmty. Corp.*, 901 F.2d at 329 (citing *In re Tel-A-Communications Consultants, Inc.*, 50 Bankr. at 254).

65. *Forty-Eight Insulations, Inc.*, 54 B.R. at 909.

66. United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (alteration in original) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

port of its reasoning except section 362(h). Therefore, *Atlantic Business* shares the same "willful" issue as the other circuit cases considered here because its meaning of "willful" is either based on unclear authority or is implicitly based upon a reading of section 523(a)(6).

6. *Knaus v. Concordia Lumber Co. (In re Knaus)*[67]

In re Knaus briefly considered the "willful" standard under then-section 362(h) by citing to *Aponte v. Aungst* (*In re Aponte*),[68] which in turn quoted *Wagner v. Ivory* (*In re Wagner*)[69] in support of the principle that "[a] willful violation of the automatic stay occurs when the creditor acts deliberately with knowledge of the bankruptcy petition."[70]

First, in *In re Aponte*, that bankruptcy court embraced the holding of the *In re Wagner* court that "the willfulness requirement refers to the deliberateness of the conduct and the knowledge of the bankruptcy filing, not to a specific intent to violate a court order."[71] In turn, *In re Wagner* provided a deep assessment of the "willful" standard used for then-section 362(h), ultimately adopting the civil contempt scienter requirement, provided here at length:

> Some courts have construed the term "willful" in section 362(h) to mean "deliberate" or "intentional." *In re Mewes*, 58 B.R. 124 (Bankr. D.S.D. 1986); *In re Tel-A-Communications Consultants, Inc.*, 50 B.R. 250 (Bankr. D. Conn. 1985). At first blush, the use of the term willful might be read to imply a higher degree of scienter than that required in civil contempt proceedings. However, I conclude that Congress intended that the state of mind requirement for the recovery of actual damages, attorney's fees and costs should be the same in the two types of proceedings. *But see In re Forty-Eight Insulations, Inc.*, 54 B.R. 905 (Bankr. N.D. Ill. 1985). In effect, *the willfulness requirement refers to*

67. Knaus v. Concordia Lumber Co. (*In re* Knaus), 889 F.2d 773 (8th Cir. 1989).

68. Aponte v. Aungst (*In re* Aponte), 82 Bankr. 738, 742 (Bankr. E.D. Pa. 1988).

69. Wagner v. Ivory (*In re* Wagner), 74 Bankr. 898, 903 (Bankr. E.D. Pa. 1987).

70. *Knaus*, 889 F.2d at 775.

71. *Aponte*, 82 B.R. at 742 (quoting *Wagner*, 74 B.R. at 903).

the deliberateness of the conduct and the knowledge of the bankruptcy filing, not to a specific intent to violate a court order.

I reach this conclusion based upon the apparent purpose behind the enactment of section 362(h) and its interrelationship with the contempt remedy. Given the important interests implicated by the violation of the automatic stay, I must presume that Congress did not intend to abrogate the right to seek civil contempt, the remedy traditionally available to aggrieved debtors for violations of the automatic stay. *See Midatlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986); *In re Kenval Marketing Corp.*, 69 B.R. 922, 931 (Bankr. E.D. Pa. 1987). Indeed, the legislative history suggests the contrary. *If section 362(h) were intended to impose a more stringent "state of mind" standard before relief may be granted, section 362(h) would be superfluous; an aggrieved debtor would always seek civil contempt rather than invoke section 362(h).* It appears more likely to me that, in enacting section 362(h), Congress intended to clarify the bankruptcy court's authority to award punitive damages in an appropriate case for a violation of the automatic stay. *To the extent the use of the term willful connotes a higher state of mind standard, I conclude that the higher standard is relevant only in determining the propriety of awarding punitive damages under section 362(h).*

Since the debtor seeks an award of punitive damages, I must also briefly address the circumstances in which such an award is appropriate. I find guidance on this question in *Cochetti v. Desmond*, 572 F.2d 102 (3d Cir. 1978), a case decided under 42 U.S.C. § 1983. In *Cochetti*, the Third Circuit observed that punitive damages are awarded in response to particularly egregious conduct for both punitive and deterrent purposes. Such awards are "reserved . . . . for cases in which the defendant's conduct amounts to something more than a bare violation justifying compensatory damages or injunctive relief." *Id.* at 106. To recover punitive damages, the defendant must have acted with *actual knowledge that he was violating the*

> *federally protected right or with reckless disregard of whether he was doing so. Id.*[72]

The *In re Wagner* opinion is intriguing because it takes a different approach than *In re Tel-A-Communications Consultants, Inc.* and *In re Forty-Eight Insulations, Inc.* by emphasizing superfluity and abrogation as well as implying that *Geiger*'s "willful" definition would apply only to punitive damages.[73] Notably, *In re Wagner* cites to *Midatlantic National Bank*, which provided that:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt."[74]

However, contemporary decisions supported the notion that "[c]ivil contempt sanctions may be imposed even in the absence of willfulness. Accidental, inadvertent, or negligent conduct can be grounds for imposing civil contempt sanctions, and those sanctions may include attorney fees."[75] Thus, there was a disagreement or a lack of clarity as to the relation-

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72. *Wagner*, 74 B.R. at 903–04 (citations omitted) (emphasis added). Note also how this reasoning contrasts with the Seventh Circuit's description of Congress's guidance for courts applying section 362(h). *See* Price v. Rochford, 947 F.2d 829, 831 (7th Cir. 1991). Also, *Midatlantic National Bank* and *In re Kenval Marketing Corp.* address a different section of the Bankruptcy Code, though the former is otherwise a highly relevant case. *See* Midatlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494 (1986); *In re Kenval Mktg. Corp.*, 69 B.R. 922, 931 (Bankr. E.D. Pa. 1987).

73. *Wagner*, 74 B.R. at 903–04.

74. *Midatlantic Nat'l Bank*, 474 U.S. at 501 (citation omitted).

75. *In re* Shafer, 63 B.R. 194, 198 (Bankr. D. Kan. 1986) (citing Perry v. O'Donnell, 759 F.2d 702 (9th Cir. 1985); TWM Mfg. Co. v. Dura Corp., 722 F.2d 1261 (6th Cir. 1983); Commodity Futures Trading Comm'n. v. Premex, Inc., 655 F.2d 779 (7th Cir. 1981); Vuitton et Fils, S.A. v. Carousel Handbags, 592 F.2d 126 (2d Cir. 1979); *In re* Burrow, 36 B.R. 960 (Bankr. D. Utah 1984); *In re* Petro, 18 B.R. 566 (Bankr. E.D. Pa. 1982); *In re* Sandmar Corp., 12 B.R. 910 (Bankr. D. N.M. 1981)).

ship between civil contempt and section 362(h), discussed more in Part II, such that other courts did not share the *In re Wagner* court's concern regarding abrogation of the civil contempt remedy.

Additionally, *In re Wagner* itself identified how the statute broke from earlier understandings of contempt law, yet it applied a higher intent standard for punitive damages to force the grammar of the statute, "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," to give the word "willful" different meanings within the same sentence without substantive grammatical differences.[76] Rather, the "appropriate circumstances" language appears to be the best way, textually, to distinguish between behavior meriting compensatory damages and that deserving punitive damages. At the least, it is a superior option than compelling the word "willful" to possess two incompatible definitions at once.

In addition, the more recent decision, *Law v. Siegel*,[77] stated both that: 1) "[the Court] ha[s] long held that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"; and 2) "Courts' inherent sanctioning powers are likewise subordinate to valid statutory directives and prohibitions."[78] Accordingly, a bankruptcy remedy statute should be considered with respect to its terms and not simply the general civil contempt power. Indeed, *In re Wagner* made no assessment of that statute's plain meaning before considering other tools of interpretation and the purpose of section 362(h).[79]

In light of these counterarguments, it seems a bankruptcy court's inherent powers to award financial remedies to debtors in light of a party's violation of an automatic stay would have been limited to the text of section 362(h) and the "willful" limitation language. In this manner and despite the *In re Wagner* court's concern, civil contempt would not be superfluous to section 362(h) because the latter authority's terms would de-

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76. 11 U.S.C. § 362(h) (1998).
77. Law v. Siegel, 571 U.S. 415 (2014).
78. *Id.* at 421 (internal quotation marks omitted).
79. *See generally In re* Wagner, 74 Bankr. 898 (Bankr. E.D. Pa. 1987).

fine and thus circumscribe the pecuniary remedies available to debtors for violation of the automatic stay.[80]

7. *Budget Service Co. v. Better Homes of Virginia, Inc.*[81]

Budget Service is among the cases ultimately adopting the *In re Tel-A-Communications Consultants, Inc.* standard for "willful" section 362(h) sanctions. Although *Budget Service* appeared primarily concerned with the definition of "individual" under section 362 and cited *In re Tel-A-Communications Consultants, Inc.* to that end, it similarly did not consider a plain-text reading of the meaning of "willful."[82]

8. *Pinkstaff v. United States (In re Pinkstaff)*[83]

Murphy cited *Pinkstaff* when, on top of defining "willful," it ruled out the possibility of a good-faith defense or an additional malice requirement. Upon closer examination, though, *Pinkstaff* cites *In re Bloom* and *Carroll v. Tri-Growth Centre City, Ltd.*[84]—which itself cites *In re Bloom* (again) and *In re Sansone*[85] for this understanding of "willfulness."[86] In turn, *In re Sansone*, analyzing then-section 362(h), quoted *In re Stucka*[87] to state that "[a] willful violation of the automatic stay provision is . . . committed when a party acts in violation of the stay with knowledge or notice of sufficient facts to cause a reasonably prudent person to make additional inquiry to determine whether a bankruptcy petition has been filed."[88]

Continuing down this trail, *In re Stucka* concluded that "the legislative history of section 362(h) is not instructive as to Congress' specific intent in enacting this section," and that court also recognized that "willful" for purposes of section

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80. *Siegel* is a modern case; for argument regarding the applicability of *Geiger* to the amended 11 U.S.C. § 362(k) text, see *infra* Part IV.

81. Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289 (4th Cir. 1986).

82. *See id.* at 292–93.

83. *In re* Pinkstaff, 974 F.2d 113 (9th Cir. 1992).

84. Carroll v. Tri-Growth Centre City, Ltd. (*In re* Carroll), 903 F.2d 1266, 1272 (9th Cir. 1990).

85. *In re* Sansone, 99 B.R. 981, 985 (Bankr. C.D. Cal. 1989).

86. *Pinkstaff*, 974 F.2d at 115 (citing *In re* Bloom, 875 F.2d 224, 227 (9th Cir. 1989)).

87. *In re* Stucka, 77 B.R. 777 (Bankr. C.D. Cal. 1987).

88. *Sansone*, 99 B.R. at 984 (quoting *Stucka*, 77 B.R. at 783).

362(h) "cover[s] any intentional and deliberate act done with knowledge that the act is in violation of the automatic stay."[89] The court additionally recited the notion that constructive notice was sufficient for section 362(h) to apply to a party under that standard, reinforcing its adoption of this "willfulness" definition.[90] The cases *In re Stucka* cites for this definition are *In re Davis*, *In re Mewes*, and *In re Bragg*.[91]

First, *In re Davis* provided that "[t]he term 'willful violation' has been construed by the courts as 'a deliberate and intentional act done with the knowledge that the act is in violation of the stay.'"[92] Although the *In re Davis* court referred to "courts," it cites only one case, quoting *In re Forty-Eight Insulations, Inc.* in support of its conclusion.[93] As previously discussed, *In re Forty-Eight Insulations, Inc.*'s analysis would likely fall short of modern statutory analysis. As also analyzed before, *In re Mewes* made an unsubstantiated logical leap when framing a non-contextual section 362(h) legal standard.

Like other cases discussed in this Part, *In re Bragg* similarly appears to base its understanding of the "willful" requirement

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89. *Stucka*, 77 B.R. at 783 (involving an IRS tax overpayment interception). In a different portion of *In re Stucka* that advanced this "willful" approach, the court cited *In re Shafer*. 63 B.R. 194 (Bankr. D. Kan. 1986). However, *In re Shafer* seems to have incorporated a pre-section 362(h) application of civil contempt because it held the IRS in contempt while stating that "[c]ivil contempt sanctions may be imposed even in the absence of willfulness." *Id.* at 198. Moreover, the *Shafer* court supported its holding by referencing *In re Meinke, Peterson & Damer, P.C.*, which asserted that a stay violation is willful "when the contemnor acts with knowledge of the filing of the bankruptcy petition." 44 B.R. 105, 108 (Bankr. N.D. Tex. 1984). Yet *In re Meinke* distilled that observation through a reference to pre-1984 cases based in civil contempt. *Id.* This approach is problematic, as discussed *supra* in Section I.B.6.

90. *Stucka*, 77 B.R. at 781 (citing *In re* Bragg, 56 B.R. 46 (Bankr. M.D. Ala. 1985)).

91. *See id.* (citing *In re* Davis, 74 B.R. 406, 410 (Bankr. N.D. Ohio 1987); *In re* Mewes, 58 B.R. 124, 128 (Bankr. D.S.D. 1986); and *In re Bragg*, 56 B.R. at 49).

92. *Davis*, 74 B.R. at 410 (quoting solely *In re* Forty-Eight Insulations, Inc., 54 B.R. 905, 909 (Bankr. N.D. Ill. 1985) (reasoning with only a surface-level textual analysis that "[t]his Court reads subsection (h) as requiring conduct which flaunts the jurisdiction and integrity of the Court, reading 'willful violation' to mean a deliberate and intentional act done with the knowledge that the act is in violation of the stay.")).

93. *Id.* (quoting *Forty-Eight Insulations, Inc.*, 54 B.R. at 909).

from *In re Tel-A-Communications Consultants, Inc.*[94] Thus, *In re Bragg* falls into the section 362(h) issues present in the *Tele-A-Communications, Inc.* line of cases regarding *Geiger*'s interpretation of the plain meaning of "willful" in section 523(a)(6). Accordingly, *Pinkstaff* shares the same precedential question as nearly all of the circuit cases cited by *Murphy*.

To summarize, the circuit cases cited by *Murphy*, with the exception of *Knaus*, rely on precedents that do not acknowledge the relationship between section 523(a)(6) and their case-law origin. Similarly, *Knaus*'s chosen authority does not contain a plain-meaning analysis of section 362(h) before proceeding to alternative modes of statutory interpretation, instead relying upon a contested view of the relationship between civil contempt and the Bankruptcy Code. Accordingly, the *Murphy* majority's understanding of the meaning of "willful" in section 362(h) does not appear to acknowledge the fault lines underneath its cited case-law foundation and the possible applicability of *Geiger* to section 362(h)—and therefore the modern section 362(k). Thus, *Murphy* is an excellent entry point into the case-law origin of statutory remedies for violation of the automatic stay, and the authority provided therein helps show that the foundation for the understanding of section 362(k)'s "willful" requirement is weaker than acknowledged.

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94. *Bragg* relevantly reasons as follows:

> The court concludes that the conversation about the Chapter 13 petition between Bowen, who was acting as agent for AmSouth Bank, and debtor's counsel following the repossession of the first car was sufficient notice to the bank of the possible filing of a petition. Considering this conversation along with the offer of the debtor to show a copy of the petition to the agent convinces the court that the bank clearly had sufficient facts to be on notice of a possible bankruptcy filing and became obligated to make further inquiry before repossessing the second car. A simple telephone call to the clerk's office would have revealed the filing. The bank failed to so inquire. Therefore, the repossession of the car from the daughter at the high school, the 1978 Monte Carlo, was intentionally and deliberately done. An act deliberately or intentionally done is willful. *Tel-A-Communications, Inc. v. Auto-Use*, 50 B.R. 250 (B.C. Conn. 1985). Therefore, this second repossession was a willful violation of § 362(a).

56 B.R. at 49.

II.
The Relationship Between Then-Section 362(h) and Civil Contempt Powers

The impact of the 1984 codification of section 362(h) on a bankruptcy court's civil contempt power to impose compensatory and punitive relief for a violation of the automatic stay is contested, as alluded to in the prior discussion of *In re Knaus* and *In re Wagner*. Indeed, the section 362(h) case law was inconsistent as to the relationship between the applicable "willful" standard and the use of civil contempt standards.[95] The question becomes murkier when considering the dearth of evidence of congressional intent towards section 362(h).[96] The Supreme Court acknowledged in *United States v. Castleman*[97] that "a common-law term of art should be given its established common-law meaning, except where that meaning does not fit."[98] Indeed, "[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses."[99] Therefore, an argument in favor of the plain-meaning definition of "willful" in § 362(h) should consider disparate views regarding that term's importation of its common-law meaning.

This consideration has particular relevance in light of the *Jove* panel's reference to *McComb v. Jacksonville Paper Co.*,[100] which asserted: "The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act."[101] Indeed, *Jove* also relied upon *Howard Johnson Co. v.*

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95. *See supra* Section I.B.6.

96. *See, e.g.*, *In re* Sharon, 200 B.R. 181, 200 (Bankr. S.D. Ohio 1996) (citing Collier on Bankruptcy ¶ 362.12, at 362–90 (15th ed. 1987)).

97. United States v. Castleman, 572 U.S. 157 (2014).

98. *Id.* at 163 (quoting Johnson v. United States, 559 U.S. 133, 139 (2010)) (internal quotation marks omitted).

99. Sekhar v. United States, 570 U.S. 729, 732 (2013) (internal quotation marks omitted) (citing Neder v. United States, 527 U.S. 1, 23 (1999)). See Part III for another understanding of "willful" based in common law.

100. McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949).

101. *Id.* at 191.

Khimani,[102] which described how civil contempt merely considers whether or not "[a contemnor's] conduct complied with the order at issue."[103] Consequently, understanding section 362(h) as purely adopting the common law civil contempt remedy supports a reading of section 362(h)'s "willful" requirement such that a specific intent to violate the stay would not be necessary for liability.[104]

But the seminal *In re Tel-A-Communications Consultants, Inc.* cleaved a separation between the civil contempt powers and section 362(h), based upon the statute's inclusion of "willful" at all, asserting that "[u]nlike sanctions for civil contempt which merely require, as a condition precedent, that a specific and definite court order be violated by a party that has knowledge of the court's order, sanctions under section 362(h) require the conduct of the offending party to be willful."[105]

Moreover, the existence of both compensatory and punitive damages in the statute casts shade on the *Jove* panel's application of *McComb*. As discussed with *In re Wagner*, this remedial-focused reasoning does not seem to comport with the structure of section 362(h), particularly in light of its language that "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."[106] Indeed, that statute could be read as essentially stating that "willful" violations, when facts are appropriate, may elicit punitive damages. Accordingly, the structure of that statute suggests that the meaning of "willful" does not change when punitive damages are authorized, so *In re Wagner* did not seem persuasive when that court addressed a conflict between the text of section 362(h) and civil contempt by suggesting that the intent requirement applies only to punitive damages.

Further, the *McComb* rationale might be limited because that case dealt with highly specific statutory instructions while, generally speaking, a vague standard cannot be the basis for

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102. Howard Johnson Co. v. Khimani, 892 F.2d 1512 (11th Cir. 1990).

103. Jove Eng'g, Inc. v. IRS, 92 F.3d 1539, 1555 (11th Cir. 1996) (quoting *Howard Johnson Co.*, 892 F.2d at 1516).

104. *See Castleman*, 134 S. Ct. at 1407; *see also McComb*, 336 U.S. at 191.

105. *In re* Tel-A-Communications Consultants, Inc., 50 B.R. 250, 253 (Bankr. D. Conn. 1985).

106. 11 U.S.C. § 362(h) (1998).

contempt.[107] That reasoning suggests a paradox: if the meaning of "willing" under the Bankruptcy Code is vague enough to consider context and general meaning from other areas of law as well as similarly opaque legislative history over a statute's plain-language meaning, then is that term's meaning sufficiently specific such that the lower-threshold civil contempt context of "willing" is used when holding parties in contempt for good-faith actions that debatably fall within exceptions to the automatic stay? While the standard may be made clear by subsequent case law interpretation, this consideration is another reason why *Geiger*'s section 523(a)(6) jurisprudence is important to understand the meaning of "willful" in bankruptcy-order enforcement issues. Indeed, the vagueness of an injunction's parameters is also a function of the vagueness of exceptions to that injunction.

The issue is further complicated by *Jove*'s holding "that [11 U.S.C.] section 105 creates a statutory contempt power in bankruptcy proceedings, distinct from the court's inherent contempt powers."[108] Yet section 362(h)'s specificity would suggest that it governs to the exclusion of section 105 when it

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107. *See* Schmidt v. Lessard, 414 U.S. 473, 476 (1974) ("Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed."); Int'l Longshoremen's Ass'n v. Phila. Marine Trade Ass'n, 389 U.S. 64, 76 (1967) (concluding upon review of a thoroughly vague injunction order that "[t]he most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension."); TiVo Inc. v. EchoStar Corp., 646 F.3d 869, 888 (Fed. Cir. 2011) (citing cases supporting the proposition that only special circumstances allow for vagueness as defense to contempt); Fla. Nursing Home Ass'n v. Paige, 596 F. Supp. 1152, 1157 (S.D. Fla. 1984) ("[I]t has been held that an order of contempt cannot issue unless the order claimed to have been violated is sufficiently specific and definite." (citing UFI Razor Blades v. Dist. 65, Wholesale, Retail, Off. & Processing Union, 610 F.2d 1018 (2d Cir. 1979)); *but see* AMF, Inc. v. Jewett, 711 F.2d 1096, 1102 (1st Cir. 1983) ("An order, however, need not spell out the components of a term whose boundaries are understood by common parlance. Nor is a decree unenforceably vague simply because a dispute later arises over the meaning of some of its terms." (internal quotation marks and citation omitted)). Although *AMF, Inc.* makes the reasonable point that not all words in an injunction have to be perfectly defined for that order to be enforceable, the debate regarding the meaning of "willful" in an authorizing statute existing before an injunction is imposed relevantly suggests party confusion *ab initio*.

108. *Jove Eng'g, Inc.*, 92 F.3d at 1553.

pertains to sanctions for willful violations of the automatic stay.[109] In parallel, *Budget Service* states:

> We are also of opinion that a finding of civil contempt is not a necessary predicate in order to impose the sanctions of § 362(h). Proof that a debtor has been injured by a willful violation of the automatic stay is sufficient to invoke the sanctions under that section, of actual and punitive damages, costs and attorneys' fees. The fact that the bankruptcy court held Budget Services in civil contempt is nothing more than surplusage, and we treat it as such.[110]

Therefore, the *Budget Service* panel understood the low-threshold "willful" standard as sufficient for providing for punitive damages. This reasoning clashes with an understanding of "willful" borrowed from bankruptcy court's civil contempt authority because, as discussed above, section 362(h) provided for punitive damages as the result of "willful violation," the same terms that govern sanctions for compensatory, remedial damages such as those considered in *McComb*. Indeed, section 362(h) indicates that "willful violation" of the automatic stay is a necessary condition for a finding of punitive damages under that statute.[111]

Another approach was the view that section 362(h) supplemented contempt powers, because the compensatory remedies were made compulsory instead of discretionary.[112] Despite congressional intent showing, without much clarity, that this statute is another shield to defend individual debtors, "[i]t is hornbook law that [section]105(a) 'does not allow the

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109. *See also* Lara-Aguilar v. Sessions, 889 F.3d 134, 142 (4th Cir. 2018) ("As this court has explained, '[i]t is a basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision.'" (quoting Sigmon Coal Co. v. Apfel, 226 F.3d 291, 302 (4th Cir. 2000), *aff'd*, Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002))).

110. Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 293 (4th Cir. 1986).

111. *See* Knaus v. Concordia Lumber Co., 889 F.2d 773, 776 (quoting United States v. Ketelsen, 880 F.2d 990, 993 (8th Cir. 1989)).

112. *See In re* Sharon, 200 B.R. 181, 200 (Bankr. S.D. Ohio 1996) (citing 130 Cong. Rec. H1942 (daily ed. Mar. 26, 1984)) (considering Rep. Rodino's statement indicating that § 362(h) "is an additional right of individual debtors, and is not intended to foreclose recovery under already existing remedies"); *see also* Wagner v. Ivory, 74 B.R. 898, 902 (Bankr. E.D. Pa. 1987).

bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.'"[113] Because a provision exists that explicitly provided for mandatory compensatory damages and the discretionary imposition of punitive damages, it does not seem like the general section 105(a) authority would control court pecuniary remedies for violation of the automatic stay over the specific terms of section 362(h) and, later, section 362(k)(1).[114] Indeed, at least one court has ruled in that manner.[115]

In sum, this Part assessed the relationship between section 362(h), section 105(a), and civil contempt as those authorities may show the intended meaning of "willful" in section 362(h) and later section 362(k). At best, those relationships—hence the "hints" of the intended meaning—are unsettled. At worst, the low-threshold civil contempt approach is inapplicable because of the specificity of codification and section 362's contextualized authorization of punitive damages.

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113. Law v. Siegel, 571 U.S. 415, 421 (2014) (quoting 2 COLLIER ON BANKRUPTCY ¶105.01[2], at 105–06 (16th ed. 2013)); *see also* Yadidi v. Herzlich (*In re* Yadidi), 274 B.R. 843, 848 (B.A.P. 9th Cir. 2002) ("Regardless of the outcome of the debate about the nature of § 105 and the ultimate demarcation of the true perimeter of legitimate exercise of whatever authority it recognizes, it is generally agreed that § 105 is not a roving commission to do equity or to do anything inconsistent with the Bankruptcy Code.")

114. *See In re* Kutumian, No. KDG-2, 2014 Bankr. LEXIS 2209 (Bankr. E.D. Cal. May 15, 2014). Considering the relationship between section 105(a) and section 362(k), the *Kutumian* court held that:

> Although § 362(k)(1) and § 105(a) may appear to offer two distinct remedies, the limitations of § 362(k)(1) must nevertheless guide what can be awarded under [section] 105(a). This is because the language of [section] 105(a) authorizes only those remedies "necessary" to enforce the Bankruptcy Code. Yet, allowing an individual to circumvent [section] 362(k)(1) and recover more than he or she can otherwise recover under that statute can hardly be considered a "necessary" exercise of [section] 105(a). As the Ninth Circuit has stated, "[I]t is not up to [the courts] to read other remedies into the carefully articulated set of rights and remedies set out in the Bankruptcy Code."

Id. at *32 (internal quotation marks and citations omitted) (last two alterations in original); *see also* Knupfer v. Lindblade (*In re* Dyer), 322 F.3d 1178, 1193 (9th Cir. 2003); Ballard v. Thoennes (*In re* Thoennes), 536 B.R. 680, 689 n.31 (Bankr. D.S.C. 2015).

115. *Kutumian*, 2014 Bankr. LEXIS 2209, at *32.

III.
Geiger's Analysis of 11 U.S.C. § 523(a)(6)'s "Willful and Malicious Injury" Requirement and Later Case Treatment

A. *The Opinion and Connection to* In re Tel-A-Communications Consultants, Inc.

The dissent in *Murphy* referred to the Supreme Court's plain-meaning interpretation of 11 U.S.C. § 523(a)(6)'s use of "willful" in *Geiger*.[116] Section 523(a)(6) relevantly "provide[d] that a debt 'for willful and malicious injury by the debtor to another' is not dischargeable."[117] In *Geiger*, the Supreme Court immediately took a plain-meaning approach to interpreting "willful" to mean "intentional" even in light of precedent alluded to by the *Murphy* majority that "willful is a word of many meanings, its construction often being influenced by its context."[118] The Court held:

> The word "willful" in [section 326](a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, i.e., "reckless" or "negligent," to modify "injury."[119]

Next, the Court provided that:

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116. IRS v. Murphy, 892 F.3d 29, 45–46 (1st Cir. 2018).

117. Kawaauhau v. Geiger, 523 U.S. 57, 59 (1998) (quoting 11 U.S.C. § 523(a)(6)).

118. Screws v. United States, 325 U.S. 91, 101 (1945) (citing United States v. Murdock, 290 U.S. 389, 394 (1933)) (describing different contexts for interpreting the word "willful"); *see Geiger*, 523 U.S. at 59, 61 (internal quotation marks omitted) ("Section 523(a)(6) of the Bankruptcy Code provides that a debt for willful and malicious injury by the debtor to another is not dischargeable."); *Murphy*, 892 F.3d at 35.

119. *Geiger*, 523 U.S. at 61. In footnote 3 of the case, the Court noted that the 1979 edition of *Black's Law Dictionary* defined "willful" as "voluntary or intentional," while the Court acknowledged the Bankruptcy Reform Act legislative reports "consistently" suggested "that the word 'willful' in [section] 523(a)(6) means 'deliberate or intentional.'" *Id.* at 61 n.3. Although the Court used the "deliberate or intentional" construction in its analysis, *id.* at 62, it did not overrule the lower court's discussion of the meaning of "willful" in a vacuum, discussed *infra*. *Id.*; *see also* Geiger v. Kawaauhau (*In re* Geiger), 113 F.3d 848, 852 (8th Cir. 1997).

> [A]s the Eighth Circuit observed, the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the consequences of an act," not simply "the act itself."[120]

Finally, the Court rejected the argument that "intentional" actions with unintended injury were contained in section 523(a)(6)'s definition of "willful," citing precedent for "the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'"[121] As discussed below, subsequent decisions have seized on this language to limit this definition of "willful" to section 523(a)(6) and away from section 362(h) and, later, section 362(k).

However, in approving the reference to the Eighth Circuit's perspective on the issue of "willful" and injury, the Court suggested that considering the en banc majority opinion's view on the subject would help produce a more complete understanding of what the Supreme Court meant when discussing "intentional torts" in *Geiger*.[122] The Eight Circuit en banc decision relevantly provided as follows:

> Do the words "deliberate or intentional," contained in the legislative reports referred to above, require an "intentional act that results in injury" or "an act with intent to cause injury" before a judgment debt can be exempt from discharge? Posed this way, we think that the question virtually answers itself. We do not hesitate to adopt the latter construction, because we believe that it is the more natural way to interpret the relevant words. For one thing, the word "intentional," *by itself*, will, almost as a matter of natural reflex, cause a lawyer's mind to turn to that category of wrongs known as intentional torts, a category that excludes injuries caused by acts that are merely negligent, grossly negligent, or even reckless. We presume that when Congress uses a word that has a *fixed, technical meaning*, it has used it as a term of art. Second, the word "willful" in the statute (which Congress has

120. *Geiger*, 523 U.S. at 61–62.
121. *Id.* (quoting Gleason v. Thaw, 236 U.S. 558, 562 (1915)).
122. *Id.*

> said means "deliberate or intentional") modifies the word "injury," so that what is required for nondischargeability is *a deliberate or intentional injury, not merely a deliberate or intentional act*. We think it fair to conclude that this means a deliberate or intentional invasion of the *legal rights of another*, because the word "injury" usually connotes legal injury (injuria) in the technical sense, not simply harm to a person.[123]

Two points arise from this excerpt of the Eighth Circuit opinion affirmed by the *Geiger* Court. First, the lower court plainly stated that the word "intentional" alone and without context already suggests a mental standard higher than even recklessness.[124] Therefore, this assessment of the term fits within the ambit of the Court's blessing of the Eighth Circuit's understanding of the word "intentional." Importantly, since some of the earliest opinions interpreting section 362(h), courts understood "willful" to also mean "intentional" in that context too.[125] While sections 362(h) and 362(k) lack particularly helpful legislative history defining "willful," the generally common precedential origin of *In re Tel-A-Communications Consultants, Inc.* again imported the "intentional" definition from section 523(a)(6).[126] Finally, pulling back and looking again at *Murphy* and the majority opinion's asserted case law there, the dissent in that case points out that the *Geiger* Court established the plain meaning of an identical word in a statute that is highly relevant to section 362 to declare its meaning to be directly in opposition to those decisions.[127] Therefore, the case-law origin and the Eighth Circuit's understanding of "intentional" when that word is placed in a vacuum both encourage the application of the section 523(a)(6) "willful" definition to that of section 362(h).

Second, the en banc decision, like that of the Supreme Court, implied that the particular noun modified by "willful" is

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123. *Geiger*, 113 F.3d at 852 (citations omitted) (emphasis added).

124. *Id.*

125. *See* Mercer v. D.E.F., Inc., 48 B.R. 562, 565 (Bankr. D. Minn. 1985); *In re* Tel-A-Communications Consultants, Inc., 50 B.R. 250, 253–254 (Bankr. D. Conn. 1985).

126. *Tel-A-Communications Consultants, Inc.*, 50 B.R. at 255.

127. IRS v. Murphy, 892 F.3d 29, 45–46 (1st Cir. 2018) (Lynch, J., dissenting).

probative as to that modifier's value.[128] As "willful" could have been written expressly to mean a violative "action" or "inaction," the fact that Congress instead jumped to the result-oriented, second-order term "violation" suggests that a mere "action" or "inaction" would be insufficient for liability here.[129] Rather, the statute addresses the nature of a party's injury to another's rights conveyed under the automatic stay. To the extent that a violation of the automatic stay is a legal injury—like that discussed in the en banc opinion—*Geiger*'s support for the en banc opinion is similarly applicable to the section 362(h), and later section 362(k), context.[130]

As discussed previously, much of the foundation for understanding the "willful" requirement in then-section 362(h) and now-section 362(k) is generally based upon little-distinguished citations to *In re Tel-A-Communication Consultants, Inc.*'s attention to section 523(a)(6) or to cases that look to the same. Therefore, it is reasonable to think that *Geiger*'s interpretation would have some import—or require some clarification—with respect to *In re Tel-A-Communication Consultants, Inc.* because the root of the jurisprudence surveyed by the *Murphy* court is ultimately sourced from an interpretation of section 523(a)(6). Indeed, the presumption of consistent usage, which is a "rule of thumb that a term generally means the same thing each time it is used" may apply here, particularly because this presumption is all the more relevant when compared statutes have interrelated purposes.[131]

However, the Supreme Court stated in *Environmental Defense v. Duke Energy Corp.* that:

> [T]he natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to war-

128. *Geiger*, 523 U.S. at 61; *Geiger*, 113 F.3d at 852.

129. *Geiger*, 523 U.S. at 61.

130. *Geiger*, 113 F.3d at 852.

131. United States v. Castleman, 572 U.S. 157, 159 (2014) (Scalia, J., concurring) (citing Smith v. City of Jackson, 544 U. S. 228, 233 (2005) (plurality opinion); Northcross v. Board of Ed. of Memphis City Schools, 412 U.S. 427, 428 (1973) (per curiam)). Certainly, reasonable minds could differ over the question of the applicable scope of the analysis such that these statutes would have interrelated purposes.

> rant the conclusion that they were employed in different parts of the act with different intent. A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.[132]

The major differences between the context of the two provisions, which will be treated in depth at the end of this Part, include on one hand that section 523(a)(6) provides for an exception to the discharge, a category generally meriting narrow interpretation,[133] and on the other hand that the automatic stay was meant to be applied broadly in favor of a debtor.[134]

But again, there are major similarities not only in structure but also interpretative history between the two provisions. First, both uses of "willful" in section 523(a)(6) and section 362(h) modify a word denoting a legal result and, despite interpretation otherwise, not an intermediate step of an action or inaction.[135] Furthermore, although section 362(h) lacks useful legislative history to interpret "willful," the legislative history of section 523(a)(6) calling for an "intentional" definition has been imported in part through the *In re Tel-A-Communications Consultants, Inc.* case adopting at least the word "intentional" for the definition of "willful."[136] Moreover, at least one court has observed that "[section 362(h)] was added to the code after the rest of the section was enacted . . . . Therefore, legislative history and construction which support broad coverage for the automatic stay imposed by [section] 362(a) do not necessarily apply to subsection (h), which deals only with sanctions for violating the stay."[137] Accordingly, there is a viable argument that the presumption of consistent usage

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132. Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007) (internal quotation marks and citations omitted).

133. *Geiger*, 523 U.S. at 62.

134. *See, e.g.*, *In re* Robinson, 228 B.R. 75, 80 n.5 (Bankr. E.D.N.Y. 1998).

135. *Compare* 11 U.S.C. § 523(a)(6) (2012), *with* 11 U.S.C. § 362(h) (1998), *and* 11 U.S.C. § 362(k) (2012).

136. *See In re* Tel-A-Communications Consultants, Inc., 50 B.R. 250, 254 (Bankr. D. Conn. 1985).

137. Jove Eng'g, Inc. v. IRS (*In re* Jove Eng'g, Inc.), 92 F.3d 1539, 1552 (11th Cir. 1996) (alteration in original) (citing Mar. Asbestosis Legal Clinic v. LTV Steel Co. (*In re* Chateaugay Corp.), 920 F.2d 183, 186 (2d Cir. 1990)), *superseded by statute*, 26 U.S.C. § 7433(e) (2012).

could apply between the two instances of "willful" in section 523(a)(6) and section 362(h). Thus, *Geiger* may apply to section 362(h) as considered by *Murphy* and possibly now-section 362(k), as discussed in the next section.

B. *Superfluity*

The superfluity difficulty arises when imputing the meaning of "willful" from *Geiger*'s analysis of section 523(a)(6): While that statute involves "willful and malicious injury," section 362(k) merely addresses a "willful violation."[138] Thus, to import *Geiger*'s definition of "willful" to a statute where there is no additional conjunctive requirement may suggest a reading of "willful" that renders "malicious" as mere surplusage, which is a deeply disfavored construction.[139]

Indeed, courts have split on how to reconcile *Geiger*'s treatment of "willful" in light of the case's explicit limitation of the "malice" holding in *Tinker v. Colwell*[140] and the silence regarding the impact of the corresponding statutory "malice" requirement on the *Geiger* decision.[141] In apparent conformity with *Geiger*, subsequent courts have declined to use the "just cause or excuse" definition for malice provided by *Tinker*.[142] However, *Geiger*'s restriction of *Tinker*'s holding should not be viewed as dispositively uprooting a "malice" consideration in the context of its specific identification and treatment of the arguments before it, its reference to *McIntyre v. Kavanaugh*,[143] and the scope of the question before the Court.

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138. *Compare* 11 U.S.C. § 523(a)(6) (2012), *with* 11 U.S.C. § 362(k) (2012).

139. Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

140. Tinker v. Colwell, 193 U.S. 473 (1904).

141. Kawaauhau v. Geiger, 523 U.S. 57, 63 (1998); *see, e.g.*, Miller v. J.D. Abrams Inc. (*In re* Miller), 156 F.3d 598, 605 (5th Cir. 1998).

142. *See, e.g.*, *Miller*, 156 F.3d at 605–06; Stewart Tilghman Fox & Bianchi, P.A. v. Kane (*In re* Kane), 470 B.R. 902, 940–41 (Bankr. S.D. Fla. 2012), *aff'd sub nom.* Kane v. Stewart Tilghman Fox & Bianchi, P.A., 485 B.R. 460 (S.D. Fla. 2013), *aff'd sub nom. In re Kane*, 755 F.3d 1285 (11th Cir. 2014); *see generally* Theresa J. Pulley Radwan, *With Malice Toward One?—Defining Nondischargeability of Debts for Willful and Malicious Injury Under Section 523(A)(6) of the Bankruptcy Code*, 7 WM. & MARY BUS. L. REV. 151, 182 (2016).

143. McIntyre v. Kavanaugh, 242 U.S. 138 (1916).

To begin, *Geiger*'s treatment of *Tinker* does not necessarily mean that the "without just cause" definition of "malice," which removes an act from tort if it is the product of good faith, is absolutely excised from the section 523(a)(6) analysis. The *Geiger* court considered the interaction of "the portions [of *Tinker*] the Kawaauhaus *emphasize*" to conclude that the "tort in question [in *Tinker*] qualified in the common law as trespassory."[144] Relatedly, the Court stated prior to that conclusion that "[t]he Kawaauhaus *feature* certain statements in the *Tinker* opinion, *in particular*: '[An] act is willful . . . in the sense that it is intentional and voluntary' even if performed 'without any particular malice'; an act that 'necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the [bankruptcy discharge] exception . . . .'"[145] Thus, it is reasonable that the Court was discussing specifically those statements "feature[d]" to reach its result about the classification of the action at issue in *Tinker*.[146]

Relevantly, what the court did not clarify in its "particular[ized]" list of arguments it highlighted was language associated with "malice."[147] Indeed, one of its parenthetical citations in that section of the opinion quoted as follows: "the statute exempts from discharge liability for 'a wrongful act, done intentionally, without just cause or excuse.'"[148] Thus, the opinion's subsequent paragraph discussing *Tinker*'s "[c]ounterbalancing" of the Kawaauhaus' points might not engage with this definition of "malice" because the Court's discussion in *Geiger* dealt largely with those arguments the Court identified as stressed by the Kawaauhaus.[149] Indeed, the court turned away from the Kawaauhaus' reference to *Tinker* to embrace the plain meaning of section 523(a)(6), thus preserving the "malice" prong as separate from "willful."[150]

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144. *Geiger*, 523 U.S. at 63 (alteration in original) (emphasis added).

145. *Id.* (alteration in original) (emphasis added) (citations omitted).

146. *Id.*

147. *Id.*

148. *Id.* (quoting Tinker v. Colwell, 193 U.S. 473, 485 (1904) (quoting the definition of malice from Bromage v. Prosser, 4 Barn. & Cress. 247, 107 Eng. Rep. 1051 (K. B. 1825))).

149. *Id.*

150. *Id.* ("[Tinker], we clarify, provides no warrant for departure from the current statutory instruction that, to be nondischargeable, the judgment

A reading of *Geiger* as reinforcing a distinction between "willful" and "malice" is similarly supported by the Court's reference to *McIntyre* immediately subsequent to its limitation of the *Tinker* holding.[151] There the Court asserted that "[s]ubsequent decisions of this Court are in accord with our construction" and then quoted *McIntyre* to describe that case's treatment of "a broker [that] deprived another of his property forever by deliberately disposing of it *without semblance of authority*."[152] This express usage of the language in *McIntyre* is probative that the Court intended the malice prong to survive that case's restriction by suggesting that the broker in *McIntyre* had no "just cause or excuse" for the "willful and malicious" sale of stocks without authority.[153] The Court could have explicitly rejected this full line of reasoning due to *Tinker*'s unclear language, but it instead restricted that holding alone. Thus, the scope of *Geiger*'s specific consideration of the Kawaauhaus' references to *Tinker* as well as the text and circumstances in *McIntyre* suggest that the *Geiger* Court might not have necessarily intended for the definition of "malice" relating to a lack of authority expressed in *Tinker* to disappear. Rather, section 362(h)'s text requiring a "willful violation" incorporates the question of legal authority separate from section 523(a)(6)'s "malice" requirement because a "violation" suggests the breaking of a rule or norm.

In summary, exporting the plain-text meaning of "willful" in section 523(a)(6), as articulated in *Geiger*, to other bank-

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debt must be 'for willful and malicious *injury*.'" (emphasis in original)); *see also* Carillo v. Su (*In re* Su), 290 F.3d 1140, 1146–47 (9th Cir. 2002) (remanding because the bankruptcy court "conflicted the 'willful' and 'malicious' prongs in its [section] 523(a)(6) analysis.").

151. *Geiger*, 523 U.S. at 63. To the extent that courts have focused on *Geiger*'s discussion of the Eighth Circuit's suggestion that section 523(a)(6)'s language was similar to an intentional tort, *see* Trustmark Nat'l Bank v. Tegeler (*In re* Tegeler), 586 B.R. 598, 692 (Bankr. S.D. Tex. 2018). The reasoning could also be read as merely supplementing the Court's first analysis of plain-text reading. *See also* Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1946 (2016); Taylor v. Snyder (*In re* Snyder), 542 B.R. 429, 441 (Bankr. N.D. Ill. 2015) ("[B]oth *Tinker* and *Geiger* recognize that malice is a separate requirement from intent, and one which generally requires a tortious act.").

152. *Geiger*, 523 U.S. at 63 (emphasis added) (internal quotation marks omitted).

153. *See id.* (considering McIntyre v. Kavanaugh, 242 U.S. 138, 141 (1916)).

ruptcy statutes would not necessarily render section 523(a)(6)'s "malicious" prong superfluous.

C. *Later Hostile Case Treatment of* Geiger*'s Application to Section 362(h) and Its Successor Provision, Section 362(k)*

Narrowing the scope of *Geiger* citations first to those cases containing references to section 362(h) produces nineteen results besides *Murphy*.[154] These cases can be grouped first into those that do not explicitly consider the integration of *Geiger* with section 362(h),[155] then one adopting *Geiger* for section 362(h),[156] and finally those that have explicitly considered and rejected that adoption.[157] Similarly, narrowing the scope of

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154. The search results discussed in this subsection are as of the time of writing in July 2018.

155. Menk v. Lapaglia (*In re* Menk), 241 B.R. 896, 918 (B.A.P. 9th Cir. 1999) (considering *Geiger*'s superfluity discussion); *In re Tegeler*, 586 B.R. at 692 (considering *Geiger* and that it "also noted" the intentional tort definition); Meeks v. James (*In re* James), No. 05-16247, 2007 Bankr. LEXIS 1787, at *2–3 (Bankr. E.D. Tenn. May 18, 2007) (applying *Geiger* to § 523(a)(6)); DCFS Tr. v. Goldstein (*In re* Goldstein), 345 B.R. 412, 423 (Bankr. D. Mass. 2006) (applying *Geiger* to § 523(a)(6)); *In re* Pawlowicz, 337 B.R. 640, 645 n.2 (Bankr. N.D. Ohio 2005) (included in a comparative footnote); Solomon v. Barman (*In re* Barman), 237 B.R. 342, 351 (Bankr. E.D. Mich. 1999) (comparing *Geiger*'s analysis of § 523(a)(6) to 11 U.S.C. § 727(a)(7)); *In re* Maxey, No. 98-12594, 1998 Bankr. LEXIS 1697, at *10 (Bankr. N.D. Ohio Sep. 22, 1998) (citing to a *Geiger* footnote quoting *Black's Law Dictionary*).

156. Jardine's Prof'l Collision Repair, Inc. v. Gamble, 232 B.R. 799, 803 (D. Utah 1999).

157. Johnson v. Smith (*In re* Johnson), 501 F.3d 1163, 1171 (10th Cir. 2007) (without explanation, declining to adopt *Geiger* and citing to the circuit cases discussed in this Article or citing cases such as Brown v. Chesnut (*In re* Chesnut), 422 F.3d 298 (5th Cir. 2005), and Tsafaroff v. Taylor (*In re* Taylor), 884 F.2d 478, 483 (9th Cir. 1989), that do the same and criticizing *Jardine's* because exceptions to protection are narrowly construed); Associated Credit Servs. v. Campion (*In re* Campion), 294 B.R. 313, 316 n.4 (B.A.P. 9th Cir. 2003) (declining to apply *Geiger*'s willful definition, citing the *Geiger* court's counterfactual example of "willful acts that cause injury" and reasoning that the syntaxes of that phrase and "injured by any willful violation" of §362(h) were "consistent"); Transouth Fin. Corp. v. Sharon (*In re* Sharon), 234 B.R. 676, 688 (B.A.P. 6th Cir. 1999); Diviney v. Nationsbank of Texas, N.A., (*In re* Diviney), 225 B.R. 762, 774 (B.A.P. 10th Cir. 1998); Thomason v. Chestatee Cmty. Ass'n (*In re* Thomason), 493 B.R. 890, 900–01 (Bankr. N.D. Ga. 2013); Galmore v. Dykstra (*In re* Galmore), 390 B.R. 901, 907 (Bankr. N.D. Ind. 2008); Radcliffe v. Int'l Painters & Allied Trades Ind. Pension Fund (*In re* Radcliffe), 372 B.R. 401, 419 (Bankr. N.D. Ind. 2007); Radcliffe

Geiger citations to those cases containing references to its post-2005 amendment form of section 362(k) produces, with some overlap with the previous catalogue, eleven decisions aside from *Murphy*. As before, some of those cases do not really engage with the *Geiger* analysis,[158] but others are actively hostile to *Geiger*'s application to section 362(k).[159] This subsection will engage with the case law hostile to *Geiger*'s adoption and compare its reasoning to that presented in this Article.

The primary arguments against applying *Geiger* to section 362(h) and section 362(k) offered by those courts involve a contextual reading of those statutes with respect to the goals of bankruptcy.[160] Namely, courts have seized upon *Geiger*'s lan-

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v. Int'l Painters & Allied Trades Indus. Pension Fund (*In re* Radcliffe), No. 05-67516 JPK, 2007 Bankr. LEXIS 831, at *41 (Bankr. N.D. Ind. Mar. 14, 2007); *In re* Robinson, 228 B.R. 75, 80 n.5 (Bankr. E.D.N.Y. 1998); *In re* Hill, 222 B.R. 119 (Bankr. N.D. Ohio 1998); Isom v. Won Tae Yoon (*In re* Isom), BKY 97-45212, ADV 97-4179, 1998 Bankr. LEXIS 437, at *7 n.5 (Bankr. D. Minn. Apr. 8, 1998).

158. Buckeye Check Cashing, Inc. v. Meadows (*In re* Meadows), 396 B.R. 485, 494 (B.A.P. 6th Cir. 2008) (citing *Geiger* as to superfluity); *In re Tegeler*, 586 B.R. at 692 (considering *Geiger* in a § 523(a)(6) context); Anketell v. Smith (*In re* Anketell), 565 B.R. 11, 24 (Bankr. D. Mass. 2017) (applying *Geiger* only to § 523(a)(6)); Ballard v. Thoennes (*In re* Thoennes), 536 B.R. 680, 694 (Bankr. D. S.C. 2015) (using *Geiger*'s citation that an exception to discharge should be interpreted narrowly); Rentrak Corp. v. Ladieu (*In re* Ladieu), No. 07-10868, 2011 Bankr. LEXIS 4450, at *9 (Bankr. D. Vt. Nov. 4, 2011) (addressing § 523(a)(6)); *In re* Brown, 342 B.R. 248, 253–54 (Bankr. D. Md. 2006) (citing *Geiger*'s view on superfluity); Knowles v. McGuckin (*In re* McGuckin), 418 B.R. 251, 256 (Bankr. N.D. Ohio 2009) (applying *Geiger* to § 523(a)(6)); *In re* Pawlowicz, 337 B.R. 640, 645 n.2 (Bankr. N.D. Ohio 2005) (footnote with *compare* citation to *Geiger* placed in discussion with § 362(h)).

159. *Galmore*, 390 B.R. at 907; *Johnson*, 501 F.3d at 1171–72; Thomason v. Chestatee Cmty. Ass'n (*In re* Thomason), 493 B.R. 890, 900–01 (Bankr. N.D. Ga. 2013).

160. *E.g.*, Grogan v. Garner, 498 U.S. 279 (1991). Considering evidentiary standards, the court offered that:

> This Court has certainly acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. But in the same breath that we have invoked this fresh start policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor.

guage that exceptions to discharge should be interpreted narrowly, recognizing as a practical matter that:

> [A] party who willfully violates the automatic stay had the opportunity to seek permission from the bankruptcy court before taking actions . . . while determinations of 'willful and malicious injury' under § 523(a)(6) are made only after the debtor has acted without the opportunity to obtain a protective ruling from a court before acting.[161]

In re Robinson[162] provided one the most comprehensive analyses for rejecting *Geiger*'s application to section 362(h) and section 362(k).[163] Although recognizing that "one could read *Geiger* to require a finding of actual intent to violate the automatic stay," that court did not adopt that standard, considering instead the context of "willful" in section 362(h) because context can allow disparate meanings of the word in similar statutes based upon the circumstances and purpose of those statutes.[164]

In particular, that case seized onto the distinction regarding the "intentional tort" circumstances of addressing an actor's desire to create an end result as driving the "willful" defi-

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Id. at 286–87 (internal quotation marks and citation omitted), *superseded by statute*, 11 U.S.C. § 523(a)(19).

161. *Diviney*, 225 B.R. at 774.

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

163. Associated Credit Servs. v. Campion (*In re* Campion), 294 B.R. 313, 316 n.4 (B.A.P. 9th Cir. 2003) (describing a unique rationale for rejecting the *Geiger* definition that is not accounted for in *Robinson*, 228 B.R. 75). There, the panel reasoned that the syntaxes of *Geiger*'s counterfactual example that "willful acts that cause injury" and the phrase "injured by any willful violation" in §362(h) were "consistent." *Id.* As a matter of logical progress between act, violation, and injury, as represented here by an arrow equivalent to the modifying effect of the word preceding it, the disapproved counterfactual phrase proceeds as: Willful → "Act" → Injury. The construction of § 362(h), however, proceeds as: Willful → "Violation" → Injury. The panel's reasoning on this point is unpersuasive because the thrust of the *Geiger* Court's plain-meaning statutory analysis emphasized how "willful" addressed an "injury"—not an "act." Kawaauhau v. Geiger, 523 U.S. 57, 61–62 (1998). As § 362(h) similarly required a word that is not "act," the *Geiger* Court's point continues even under the *In re Campion* panel's comparison. *See* 11 U.S.C. § 362(h) (1998); *Geiger*, 523 U.S. at 61–62; *In re* Campion, 294 B.R. 313, 316 n.4 (B.A.P. 9th Cir. 2003).

164. *Robinson*, 228 B.R. at 80 n.5.

nition articulated in *Geiger*, citing *Diviney v. Nationsbank of Texas*,[165] *In re Hill*,[166] and *In re Isom*.[167]

To start, *In re Diviney* rejected the application of *Geiger*'s "willful" definition, adopting instead the *INSLAW* definition of "willful," despite the above discussion regarding the origin of that court's reasoning stemming from *In re Tel-A-Communications Consultants, Inc.*'s consideration of section 523(a)(6).[168] Second, that court considered the practical circumstances of judicial review of a violation of the automatic stay versus the violation of the discharge injunction, reasoning that "a party who willfully violates the automatic stay had the opportunity to seek permission from the bankruptcy court before taking actions that might violate the automatic stay, while determinations of 'willful and malicious injury' under section 523(a)(6) are made only after the debtor has acted without the opportunity to obtain a protective ruling from a court before acting."[169] The purpose behind this reasoning is not explicit, but suggests that the threshold for liability under section 362(h) should be low because the violating creditor could have simply petitioned the court for relief. This view is certainly defensible in light of the interests of case management and developing the debtor's estate for the orderly distribution of assets.

The latter portion of this comparison is less persuasive, however. There, the *Diviney* court seems to suggest that the creditor's inability to obtain protection before a debtor vio-

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165. *Diviney*, 225 B.R. 762.

166. *In re* Hill, 222 B.R. 119 (Bankr. N.D. Ohio 1998).

167. Isom v. Won Tae Yoon (*In re* Isom), 1998 Bankr. LEXIS 437 (Bankr. D. Minn. April 8, 1998). *In re Robinson*, 228 B.R. at 80 n.5. There are issues too with the intersection of the case law that *In re* Robinson cites to emphasize the contextual malleability of the definition of "willful" and the text at issue in section 362(h). For example, *In re Robinson* cites to Justice Scalia's concurrence in *Cheek v. United States*, 498 U.S. 192, 208–09 (1991), that "willful" could mean "consciousness of the act but not . . . consciousness that the act is unlawful." 228 B.R. at 80 n.5. The wording at issue in *Cheek*, however, was willful "attempt" and willful "fail[ure] to . . . make such [a tax] return." Critically, the wording at issue here is "willful violation." As discussed, "violaton" is a different term such that a "good faith" defense necessitating authorizing law may be more available in this context than the one that Justice Scalia contemplated. Indeed, the cited *United States v. Murdock*, 290 U.S. 389, 395 (1933), despite involving criminal law, looked to the words in the same statutory sentence as the "willful" term at issue for guidance.

168. *Diviney*, 225 B.R. at 774.

169. *Id.*

lates the condition of relief from the discharge justifies the different application of intent. Alternatively, the court may mean that a legal preference in favor of the debtor has not yet been applied by a court reviewing a creditor's petition for relief, so the version of the "willful" standard that is less difficult to prove is applied to inject that policy preference for the debtor. The former understanding of the second half of the *Diviney* court's comparison makes little sense because the Bankruptcy Code—and law generally—does not usually encourage the compounding of parties' difficulties when seeking justifiable relief. Furthermore, the latter understanding of that language is somewhat confusing because *Geiger* interpreted "willful" to mean a more burdensome standard in section 523(a)(6) with reference to a policy preference in favor of the debtor supported by clear expression of the text of a statute while declining to adopt a policy preference that found no basis in the same.[170] Additionally, that court could have clarified its reasoning with further exposition but did not do so. Therefore, although the *In re Diviney* reasoning has some persuasive force, adoption of the same without further analysis or consideration of the interpretative question does not seem like a plainly dispositive resolution to the *Geiger* adoption issue.

Next, *In re Hill* rejected the *Geiger* definition, reasoning that "[i]f a court under section 362(h) or 524(a)(2) were to demand proof that the creditor intended to violate the stay or the discharge injunction, these debtor protection provisions would be rendered largely ineffective, especially when applied to creditors such as BP, which employ professional staffs to press consumers for payment of delinquent accounts."[171] Instead, that court elucidated, the onus was on the creditor to create internal practices to comply with the automatic stay.[172] This is a reasonable point regarding a preemptive effect of dissuading creditors from violating the automatic stay. To that court's point, however, debtors could quickly obtain various forms of evidence of intent from large-scale entities such as training manuals or policies suggesting reckless pursuit of debt

170. Kawaauhau v. Geiger, 523 U.S. 57, 62, 64 (1998) (reading the text of section 523(a)(6) closely because case law instructed that exceptions to discharge be "plainly expressed" while rejecting a suggested discharge exemption regarding malpractice insurance).

171. *Hill*, 222 B.R. at 123.

172. *Id.*

collection or from themselves in the form of records of frequency of contact and the content of the communication. Furthermore, not all interactions with debtors are equal.

As discussed below regarding the 2005 amendments and the implications of Congress's inclusion of section 362(k)(2)'s "good faith" limited defense to punitive damages, there is some reluctance in the case law to impose liability under now-section 362(k) when a creditor's position has clear support in both statutory and case law.[173] It is one thing for a creditor to call an individual debtor at all hours of the day and night, harass that person, and produce fact patterns for cases considering emotional damages liability under section 362(h) and section 362(k).[174] It would be another thing for a creditor to mail a potential debtor, *pro se* debtor, or a debtor's attorney a legal statement describing the statutory and case-law bases for why intended or projected noncompliance with the automatic stay would not be a "violation," as well as a statement of why that circumstance provides a novel legal question. Couched in adequate reminders of debtor rights, such a statement of authority would give those parties and the court forewarning as to exactly what the imminent issues are in a particular case. Moreover, a court could expeditiously consider the justifiability of a creditor's position and assess punitive damages for frivolous legal assessments, especially if a bankruptcy court exercises its authority under 11 U.S.C. § 105 to hold that any such statement-of-authority letter must notify the debtor of the availability of the bankruptcy courts for relief and the section 362(k) sanction.

Coming back to the cases asserted by *In re Robinson* in favor of rejecting *Geiger*'s definition of "willful," *In re Isom* has interestingly, and possibly inaccurately, viewed the lower-threshold intent-to-act definition of "willful" as consistent with *Geiger*, referring to a 1990 edition of *Black's Law Dictionary*, citing *Geiger* without an explanatory parenthetical, and yet considering the Bankruptcy Reform Act's legislative history that

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173. *See* Stancil v. Bradley Invs., LLC (*In re* Stancil), 487 B.R. 331, 344 (Bankr. D.D.C. 2013).

174. *See, e.g.*, Ojiegbe v. Walter (*In re* Ojiegbe), 539 B.R. 474, 480 (Bankr. D. Md. 2015); 11 U.S.C. § 362(a) (2010) (listing actions that constitute a violation of the automatic stay).

suggests "willful" means "deliberate or intentional."[175] First, the use of plain-text analysis in *In re Isom* flips one argument presented in this Article and is therefore different than pre-section 362(h) precedent because that decision refers to plain-text interpretation based upon *Black's Law Dictionary* when another court holding that "willful" in section 362(h) means "intentional or deliberate" also looked to the legislative history of section 523(a)(6).[176] However, the *Geiger* court, reaching a different result than the *In re Isom* court, similarly consulted a 1979 edition of *Black's Law Dictionary*'s definition of "willful" and found that entry to also include "intentional."[177] Accordingly, *In re Isom* does not seem particularly supportive of *In re Robinson*'s rejection of *Geiger* because of counterbalancing definitional authority provided in a Supreme Court case.

Next, *In re Robinson* honed in on the high "intentional" threshold to meet section 523(a)(6)'s "willful" standard as advancing that section's role as an exception to discharge, which *Geiger* noted "should be confined to those plainly expressed."[178] That court then contrasted this backdrop to the broad protections of the automatic stay.[179] Specifically, it reasoned that "[i]f section 362(h) were limited to violators who had specific intent to violate the stay, the deterrent effect of the damages remedy, and the relief it affords wronged debtors, would be compromised inappropriately."[180] Although the good-faith provision of section 362(k)(2) has not yet been discussed in this Article, the reference to the deterrence issue is important in light of the authority-letter procedural solution introduced and elaborated on in Part V. Indeed, clear expressions of law are favorable to deterrence interests because they close legal loopholes and make the operation of law predict-

175. Isom v. Won Tae Yoon (*In re* Isom), 1998 Bankr. LEXIS 437, at *7 n.5 (Bankr. D. Minn. 1998).

176. *Compare id.*, *with In re* Tel-A-Communications Consultants, Inc., 50 B.R. 250, 254 (Bankr. D. Conn. 1985).

177. *Compare* Kawaauhau v. Geiger, 523 U.S. 57, at 61 n.3 (1998), *with In re* Isom, 1998 Bankr. LEXIS 437, at *7 n.5.

178. *Geiger*, 523 U.S. at 62 (quoting Gleason v. Thaw, 236 U.S. 558, 562 (1915)); *see also In re* Robinson, 228 B.R. 75, 80 n.5 (Bankr. E.D.N.Y. 1998).

179. *In re* Robinson, 228 B.R. 75, 80 n.5 (Bankr. E.D.N.Y. 1998) (citing A & J Auto Sales, Inc. v. United States (*In re* A & J Auto Sales, Inc.), 223 B.R. 839, 843 (D.N.H. 1998) (recognizing too that "the appropriate standard for willfulness under section 362(h) is somewhat unsettled")).

180. *Robinson*, 228 B.R. at 80 n.5.

able. In light of the large scale of bankruptcy filings, it seems reasonable to think that most challenges to the stay are reproducible; therefore, clear expressions of law would particularly advance the deterrence interest here. However, this improvement would require bringing these legal issues to the attention of the court. The desirability of this plan in light of the busy dockets of federal courts may be weighed, but it is not without its benefits.

In sum, it is possible that *In re Robinson*'s deference to bankruptcy policy favoring the debtor may be an agreeable interpretation of applicable law. However, as asserted in this subsection, the legal reasoning supporting this view is not impervious to counterarguments. This Article now proceeds to consider what the 2005 adoption of a limited statutory "good faith" defense to section 362(h)—relabeled section 362(k)(1) after the amendments—means for the application of the *Geiger* "willful" standard to section 362(k).

IV.

Bringing the Argument to the Present: The 2005 Amendments Converting 11 U.S.C. § 362(h) to § 362(k)(1) and Inserting § 362(k)(2)

BAPCPA converted section 362(h) to section 362(k)(1) without substantive changes to its text and added section 362(k)(2).[181] The updated section 362(k) provides in full:

> (1) Except as provided in paragraph (2), 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.
> (2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.[182]

Yet the legacy of the decisions discussed in *Murphy* for the definition of "willful" under then-section 362(h) continue

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181. Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or against an Individual Debtor*, 79 Am. Bankr. L.J. 749, 777–78 (2005).

182. 11 U.S.C. § 362(k) (2006).

even after the 2005 amendments.[183] This is not necessarily surprising because of the lack of change in the text in the transition from section 362(h) to section 362(k)(1). But section 362(k)(2) is new. The question thus arises: what does the addition of section 362(k)(2)'s limited statutory "good faith" defense to punitive damage liability mean for a modern understanding of "willful" in section 362(k)(1)?

Like with the prior version of section 362(h), congressional intent regarding section 362(k) is murky.[184] First, such as described in *Murphy*, Congress is generally "presumed to know how the law has been interpreted by the courts, and then to legislate against that backdrop."[185] Additionally, the canon "*expressio unis est exclusio alterius* instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded."[186] Accordingly, Congress's inclusion of a limited statutory defense for "good faith" could suggest that a "good faith" defense would then never apply to actions that would fall under section 362(k)(1) liability.

Indeed, courts have turned to the new provision's text and assumptions relating to Congress's actions and knowledge of court decisions to hold that earlier decisions suggesting that legitimate legal questions took a party outside of section 362(k) liability, such as in *In re University Medical Center*,[187] to be legislatively overruled by the 2005 code amendments.[188]

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183. *See, e.g.*, *In re* Gray, 567 B.R. 841, 846 (Bankr. W.D. Wash. 2017) (citing *In re* Bloom, 875 F.2d 224 (9th Cir. 1989)); *In re* Wozny-McCullough, 2011 Bankr. LEXIS 4391, at *8–12 (Bankr. D. Mont. 2011) (citing *In re Bloom* and *In re Pinkstaff*); *In re* Nixon, 419 B.R. 281, 288 (Bankr. E.D. Pa. 2009) (citing *In re* Atl. Bus. & Cmty. Corp., 901 F.2d 325 (3d Cir. 1990)).

184. *In re* Schwartz-Tallard, 803 F.3d 1095, 1100 (9th Cir. 2015) (discussing attorney fees due under § 362(k) for prosecuting an appeal).

185. IRS v. Murphy, 892 F.3d 29, 45 (1st Cir. 2018) (citing Miss. *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161, 169 (2014); Bragdon v. Abbott, 524 U.S. 624, 644–45 (1998)).

186. Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861, 865 (4th Cir. 2001).

187. *In re* Univ. Med. Ctr., 973 F.2d 1065 (3d Cir. 1992).

188. *See, e.g.*, *In re* Mu'min, 374 B.R. 149, 168 (Bankr. E.D. Pa. 2007); *see also Murphy*, 892 F.3d at 35 ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts. This presumption is particularly appropriate when the new legislation invokes and builds off an existing statutory framework." (internal quotation marks and citations omitted)).

The *In re Mu'min* case explains this legal reasoning as follows:

> In enacting BAPCPA, Congress modified the Code provision addressed in [*In re University Medical Center*] and expressly addressed the issue of good faith. In doing so, Congress provided for only a limited, statutory good faith exception to the §362(k) damage remedy. The express, statutory good faith exception is more limited than the one expressed in [*In re University Medical Center*] in two distinct ways: (1) the limitation applies only to good faith violations of §362(h), which relates only to action taken in the good faith belief that the automatic stay has terminated because a debtor fails to perform his or her obligations under §521(a)(2) in a timely manner; and (2) it precludes only the imposition of punitive damages and in no situation restricts the imposition of "actual damages" for willful violations of the automatic stay.
>
> With Congress having addressed the issue of a good faith exception to §362(k) liability expressly through the BAPCPA, the plain language of §362(k)'s exception does not encompass other types of arguably good faith conduct that Congress could have chosen to exempt from liability. Given this carefully constructed exception drawn by Congress, I conclude that [*In re Univ. Med. Cntr.*] is inconsistent with §362(k), insofar as the case held that a party is not subject to actual damages for voluntary acts taken with knowledge of the bankruptcy case in violation of the automatic stay when a party relies upon "persuasive legal authority" and the law on the issue is sufficiently unsettled.[189]

189. *Mu'min*, 374 B.R. at 168 ("I am cognizant that there is no legislative history establishing conclusively that Congress intended to circumscribe the good faith exception under § 362(k) in the BAPCPA or, if so, the particular reasons it chose to do so."); *see also In re* Seymoure, 2008 U.S. Dist. LEXIS 18968, at *7–10 (D. N.J. Mar. 12, 2008) (adopting *Mu'min's* view that *In re Univ. Med. Ctr.*, 973 F.2d 1065 (3d Cir. 1992), was implicitly overruled by section 362(k)(2)).

Probably not surprisingly, this question of section 362(k)(2) is unsettled. The reasoning in *In re Mu'min* has been criticized for misreading the applicable holding in *In re University Medical Center* that expressly stated that "good faith" does not avoid sanctions, leaving the door open for well-founded arguments of unclear law to avoid section 362(k).[190] Indeed, the *Murphy* majority appears to have adopted this criticized reading without recognizing the distinction suggested by the *In re University Medical Center* court.[191]

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190. Stancil v. Bradley Invs., LLC (*In re* Stancil), 487 B.R. 331, 343 (Bankr. D.D.C. 2013).

191. The majority opinion in *IRS v. Murphy* offered that:

> It is true that, if read broadly, *In re University Medical Center* could allow a creditor to raise a good faith defense in any situation where existing law leads a creditor to reasonably believe "its actions to be in accord with the stay." However, pre-1998 decisions from within the Third Circuit demonstrate that courts did not read *In re University Medical Center* so broadly. In a decision issued only eight months after *In re University Medical Center*, the Third Circuit itself reaffirmed that "[w]illfulness does not require that the creditor intend to violate the automatic stay provision" and that "a creditor's 'good faith' belief that he is not violating the automatic stay provision is not determinative of willfulness under § 362(h)." *Lansdale Family Rests., Inc. v. Weis Food Serv. (In re Lansdale Family Rests., Inc.)*, 977 F.2d 826, 829 (3d Cir. 1992) (citing *In re Univ. Med. Ctr.*, 973 F.2d at 1087–88). And, in a case involving a taxpayer's suit against the IRS, the Bankruptcy Court for the Middle District of Pennsylvania rejected the IRS's argument that it relied in good faith on existing procedure set out in the IRS manual, concluding that "[e]ven a good faith belief that a party is not violating a stay is insufficient to escape liability." *Weisberger v. United States (In re Weisberger)*, 205 B.R. 727, 731 (Bankr. M.D. Pa. 1997) (citing *In re Univ. Med. Ctr.*, 973 F.2d at 1088).

892 F.3d 29, 37–38 (1st Cir. 2018) (citation and footnote omitted) (alterations in original). However, the only issue on appeal in *In re Lansdale Family Rests., Inc.* was a finding of fact, not a question of law with persuasive authority behind the defendant's position. 977 F.2d 826, 828 (3d Cir. 1992). Additionally, the defendant in *In re Weisberger* offered cases characterized as "contain[ing] no authority" or "without support" for the defendant's asserted argument. 205 B.R. 727, 730 (Bankr. M.D. Pa. 1997). Indeed, the *In re Weisberger* court characterized its instant legal questions as not "conceptually difficult." *Id.* at 729. These cases are thus a far cry from *In re University Medical Center* and its "delineat[ion of] the appropriate relationship between a Medicare provider and the Department of Health and Human Services . . . from the time of the provider's bankruptcy petition filing until its cessation of business—a relationship shaped by the

For example, *Stancil v. Bradley Investments, LLC*[192] disagreed with the *In re Mu'min* court because the former read *In re University Medical Center* as specifically separating the offering of a legitimate legal question from a "good faith" violation of the automatic stay. In particular, *In re Stancil* compared having a substantiated legal disagreement to "the unsettled law result[ing] in there not being fair notice of a statutory command that the act was prohibited."[193] Similarly, this view of "willfulness" and "good faith" expressed in *In re University Medical Center* removes it from implicit overruling under the above-stated canon that Congress is aware of the applicable case law when it legislates because that case explicitly indicated that "good faith" was not the basis of its holding.

Accordingly, even if courts adopted an easily surmountable standard for "willful" under section 362(k)(1) because of that term's possible origin under common law civil contempt procedures, then those courts would also be pushed into the direction of recognizing this *de facto* notice carve-out to section 362(k)(1).[194] Indeed, it bears reminding of the *Siegel* reaffirmation that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."[195] From this approach, section 362(k)(2)'s inclusion of a "good faith" defense in limited circumstances might not block the possible viability of an argument of well-grounded law that a party did not violate the automatic stay.[196]

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intersection of the Medicare Act and the Bankruptcy Code." 973 F.2d 1065, 1069 (3d Cir. 1992).

192. Stancil v. Bradley Invs., LLC (*In re* Stancil), 487 B.R. 331 (Bankr. D.D.C. 2013).

193. *Id.* at 344; *see also In re* Gagliardi, 290 B.R. 808, 819 (Bankr. D. Colo. 2003) ("Even an innocent stay violation (one committed without knowledge of the stay) becomes willful, if the creditor fails to remedy the violation after receiving notice of the stay."). This reasoning appears to echo the requirement that a party must have notice of the risk of contempt before a court applies its civil contempt power. *See* Remington Rand Corp.-Del. v. Bus. Sys., 830 F.2d 1256, 1258 (3d Cir. 1987) (citing *In re* Oliver, 333 U.S. 257, 275 (1948)).

194. *See generally supra* Part II.

195. Law v. Siegel, 571 U.S. 415, 421 (2014) (internal quotation marks omitted).

196. Note also that this may also be defensible in light of the "justification" discussion in Part III and the reference to *McIntyre v. Kavanaugh* in *Kawaauhau v. Geiger*. 523 U.S. 57, 63–64 (1998).

V.
Assessment Overview and Proposed Procedural Change

This Article has argued that the *Geiger* opinion's definition of "willful" in section 523(a)(6) is not obviously separated from the definition of "willful" used in section 362(h) and later section 362(k)(1)—even in light of the "fresh start" goal of the Bankruptcy Code. Additionally, the 2005 amendments and subsequent case law have similarly showed that the door has been left open to a *de facto* carve-out for an exception to the low-threshold "willful" standard based upon highly justified reliance upon both statute and case law authority that actions would not be in violation of the automatic stay. As alluded to in the previous section, the possibly surviving reasoning from *In re University Medical Center* suggests that substantial justification for a creditor's position within the context of definitively unsettled law does not provide that creditor adequate notice that it would run afoul of section 362(k)(1).[197] If future courts accepted this line of argument, a notice-based procedure could be implemented that would expedite review of these questions for parties to benefit from efficiently seeking court consideration of an issue that likely would have been litigated further along into the bankruptcy, the efficient use of assets, and the resolution of unaddressed legal questions that provide advance guidance to future parties and their advisors.

Title 28 U.S.C. § 2075 authorizes the Supreme Court "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11" as long as "[s]uch rules shall not abridge, enlarge, or modify any substantive right."[198] Under that authority, the Court could provide, within Federal Rule of Bankruptcy Procedure 4001 or another similar rule, that a creditor could avoid liability under section 362(k) for violation of the automatic stay if it sent a notice of authority letter to the debtor that explicitly stated the statutory and case law analysis

197. *Stancil*, 487 B.R. at 344.

198. 28 U.S.C. § 2075 (2018). To the extent that the proposed new procedure would arguably alter parties' rights, then legislation for this purpose, or better yet, to clarify the meaning of "willful" in section 362(k)(1), would be helpful.

presenting that it had a supported approach to an open question of law.[199]

That document should itemize the explicit legal questions at issue as well as the supportive and adverse authority to the creditor's position in easily readable font such that the court and any opposing counsel could quickly understand the issue split.[200] In particular, there should be a conspicuously set-apart field describing the form of legal obscurity. For example, a box could be checked that says "question unaddressed by this court or the court of appeals circuit wherein it sits" or "conflicting authority between court of appeals circuits that has not been resolved." In such a manner, the form could specifically identify the legal blur that, according to *In re University Medical Center* and its progeny, prevents the violation of the automatic stay from being "willful." This form's structure would also help the court identify abusive, frivolous uses of the notice of authority letter, which could result in culpable behavior such that authorization under section 362(k)(1) for punitive damages could be exercised by the court. Thus, the deterrence effect of section 362(k) would still be largely in force even in this system.

Critically, the standard court form provided as a letter template should require prominent, plain, and obvious language provided in layman's terms that the receipt of such a letter in no manner impedes that debtor's ability to seek bankruptcy relief. Additionally, the form should state that if the debtor has any questions about the legal statements asserted in the letter, the debtor should contact an attorney. The letter form should always be constructed with the intent and effect of relieving any fright or similar reactions that might prevent a debtor from exercising the right to file a bankruptcy petition if that debtor so chooses.

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199. The discussion throughout this Article suggests that this rule might not impact or alter any particular substantive rights.

200. While a creditor's attorney may dislike essentially briefing the debtor's attorney or the trustee's side of the case, some ethical rules may require similar candor generally, and a creditor would certainly have the option of not pursuing this proposed procedural remedy that highlights immediacy and assists the creditor in retaining assets that may be essential to operations or new projects. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 1983).

Practically, this solution would likely be used only in limited situations where turnover of the assets to the estate, trustee, or otherwise would particularly harm the entity that possesses the assets.[201] For example, what if payment from a debtor within 90 days of the petition-filing date that would have to be returned to the estate under 11 U.S.C. § 547(b) has been reinvested or allocated in an illiquid manner?[202] Moreover, while this procedure would most likely benefit wealthy creditors who can deploy resources to investigate the law, it would also benefit debtors because they would be aware that there is a legitimate legal question present (not just the purely creditor-friendly analysis of the law) and that the document is not simply another iteration of coercive debt-collection efforts.

Next, any such notice of authority letter sent by certified mail and received by the debtor before filing the petition should ideally be filed as an attachment to the petition. This requirement would give the court, trustee, and debtor notice that this question is already set up for objection and resolution. Additionally, the creditor could place a bond with the court, similar to a supersedeas bond, to assure parties in the case that if the creditor is not successful, a proper pecuniary sum will be placed in the estate and the section 362(k) sanctions would be covered. Again, court vigilance regarding frivolous claims and punitive damages would be essential to avoid creditors "buying" pressure against debtors or providing disingenuous representations of law.

Because accelerating the resolution of a question that would probably arise in the case anyways would help preserve estate assets to the benefit of the creditors and debtors, this proposed letter-of-authority-procedure would assist the bankruptcy process if the approach to the section 362(k) "willful" definition in *In re University Medical Center* is applied, in light of the arguments offered in this Article. While this issue would likely arise only in certain circumstances, this procedural proposal offers a starting point for how to streamline this process to the benefit of all stakeholders in a bankruptcy case.

201. *See* 11 U.S.C. § 362(d) (2012).
202. *See* 11 U.S.C. § 547(b)(4) (2017).

Conclusion

This Article has highlighted certain shortcomings in the legal reasoning offered in support of defining the term "willful" in section 362(h) and later section 362(k)(1) in such a broad manner by: 1) examining the circuit precedents canvassed by the *Murphy* majority opinion to illustrate a mostly common origin of the reference to section 523(a)(6), as in *In re Tel-A-Communications Consultants, Inc.*, when considering their much-adopted interpretation of "willful" for section 362(h); 2) assessing the general relationship between a bankruptcy court's contempt powers and section 362(h); 3) considering the *Geiger* holding, reasoning, and subsequent treatment; 4) evaluating the impact of the 2005 addition of a limited good faith defense under section 362(k)(2) to punitive damages; and 5) explaining why an interpretation allowing a minor exception to "willful" would help advance bankruptcy law and debtor interests. In sum, this discussion suggests that the legal foundation for the present understanding of section 362(k)'s "willful" standard as merely requiring an intentional act and notice of the automatic stay is not impervious.

Even if practitioners, professors, judges, policymakers, or other bankruptcy stakeholders are not persuaded by the arguments and discussion presented in this Article, then the law is made all the more transparent and predictable by the resolution of its wrinkles. Because legal clarity benefits both debtors and creditors alike, resolution of the definition of "willful" in then-section 362(h) and present-section 362(k)(1) in light of this Article's arguments—either in favor of the majority low-threshold view or the proposed limited carve-out—may help improve the efficiency and efficacy of the bankruptcy system.