NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. EP 16-058

Bankruptcy Case No. 14-20859-PGC
Adversary Proceeding No. 15-02031-PGC

INGA OLSEN,
Debtor.

INGA OLSEN,
Plaintiff-Appellant,

v.

FINANCE AUTHORITY OF MAINE,
Defendant-Appellee.

Appeal from the United States Bankruptcy Court
for the District of Maine
(Hon. Peter G. Cary, U.S. Bankruptcy Judge)

Before
Bailey, Godoy, and Panos,
United States Bankruptcy Appellate Panel Judges.

J. Scott Logan, Esq., on brief for Plaintiff-Appellant.
Daniel R. Felkel, Esq., on brief for Defendant-Appellee.

July 19, 2017

Bailey, U.S. Bankruptcy Appellate Panel Judge.

Inga Olsen (the "Debtor") appeals from the bankruptcy court's October 26, 2016 judgment in favor of creditor Finance Authority of Maine ("FAME"), determining that: (1) her student loan obligations to FAME are excepted from discharge; and (2) by its post-petition garnishment of the Debtor's benefits, FAME did not willfully violate the automatic stay. For the reasons discussed below, we **AFFIRM** the judgment **in PART**, both in its determination that the Debtor's student loan obligations to FAME are not dischargeable in bankruptcy and in its determination that FAME's act of garnishment was not a willful violation of the automatic stay. However, to the extent that the bankruptcy court held that FAME's retention of the garnished monies did not constitute a violation of the stay for which relief was warranted under § 362(k)(1),[1] we **REVERSE in PART** and **REMAND** to the bankruptcy court with instructions to enter findings and rulings as to injury and, if appropriate, to quantify damages.

BACKGROUND

I. The Bankruptcy Filing

On October 29, 2014, the Debtor filed a petition for relief under chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Maine. At the time, she was indebted to FAME on three student loans she had obtained between November 2005 and September 2007 to advance her career as a certified nursing assistant. With her petition, the Debtor filed schedules of her assets, creditors, income, and expenses, and a statement of financial affairs ("SOFA"). In the schedule of unsecured creditors, the Debtor quantified her total debt to

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq.

FAME at $8,863.00. The Debtor received her chapter 7 discharge in February 2015. The chapter 7 trustee then filed a report of no distribution, and on March 9, 2015, the bankruptcy court closed the case. Six months later, the Debtor moved to reopen the case, and the court granted that motion.

II. The Adversary Proceeding

A. The Complaint and FAME's Answer

Shortly thereafter, on October 1, 2015, the Debtor commenced an adversary proceeding against FAME by filing a two-count complaint that she later amended (as amended, the "Complaint"). In Count I, the Debtor requested an order discharging her student loans pursuant to § 523(a)(8), stating that she could not afford to repay her student loans, that she was unlikely to become able to do so in the future, and that any repayment terms would impose on her an undue hardship. In Count II, the Debtor alleged that FAME had violated § 362's automatic stay by continuing to garnish her social security income after receiving notice of her bankruptcy filing, and requested actual and punitive damages under § 362(k) for that violation. In its answer, FAME responded that it lacked information sufficient to form a belief regarding the Debtor's allegations and asserted as an affirmative defense, simply, "[i]neffective [s]ervice of [p]rocess."

B. Pretrial Disclosures

Nearly two weeks before trial, the Debtor filed an Amended Witness and Exhibit List in which she identified as potential witnesses her boyfriend, Charles Craig ("Mr. Craig"), and herself. She indicated that they both would testify regarding her disability, prognosis, income, expenses, and current and future inability to repay student loans, and regarding the harm she

suffered due to FAME's alleged post-petition garnishment of funds and failure to return the garnished funds. FAME did not object to the Debtor's disclosure that she intended to offer evidence regarding the effect of its retention of those funds.

III. The Trial

The bankruptcy court conducted a trial on October 26, 2016. At the commencement of the trial, Debtor's counsel moved to admit certain documents, and the bankruptcy court admitted them without objection. These included the Debtor's schedules of personal property, nonpriority unsecured creditors, income, and expenses, the SOFA, and a "Social Security award letter," which was the Social Security Administration's determination of the Debtor's disability. Issued in February 2010, the Social Security award letter stated, in pertinent part:

> I found you disabled as of January 1, 2008, the amended onset date set forth at the hearing through counsel, because of postural orthostatic tachycardia syndrome [("POTS")], and depression with anxiety so severe that you are unable to perform any work existing in significant numbers in the national economy. A medical review is recommended in 1-2 years from the date of this Notice. In addition, due to decreased memory and confusion, it is recommended that payment of benefits be made through a representative payee.

The Debtor's schedule of unsecured creditors showed that her debt to FAME was in addition to other unsecured debt for unpaid credit card balances, medical bills, and utilities. In total, the Debtor reported approximately $24,000.00 in unsecured debt.

On her schedule of income, which instructed the debtor to estimate monthly income as of the date she filed the schedule, the Debtor indicated she was disabled, reported no income from employment, and disclosed total monthly income of $3,060.14. This was comprised of a $1,495.00 monthly contribution from her live-in boyfriend, $428.00 in Supplemental Security

income ("SSI") for her two children, $886.00 in Social Security Disability Income ("SSDI"), and $251.14 in "family support payments."

On her schedule of current expenses, the Debtor indicated that she had two dependents, both minor children, and that the listed expenses did not include expenses of people other than herself and her dependents. She listed monthly expenses totaling $3,047.00. These included the following: $712.00 for rent; $40.00 for home maintenance; $250.00 for electricity, heat, and natural gas; $285.00 for phone, internet, and cable services; $650.00 for food and housekeeping supplies; $100.00 for childcare and education costs; $110.00 for clothing, laundry, and dry cleaning; $50.00 for personal care products and services; $75.00 for medical and dental expenses; $80.00 for entertainment, including newspapers, magazines, and books; $95.00 for vehicle insurance; and, most notably, $600.00 for transportation (excluding car payments). This schedule did not reflect the Debtor's monthly payment through garnishment to FAME—a monthly expense that, unless her student loans were discharged in the adversary proceeding in which this appeal arises, would continue after bankruptcy.

In her SOFA, the Debtor disclosed that she was subject to a "Sallie Mae garnishment," but did not indicate its amount. In her schedule of personal property, she indicated that she owned a 2003 Hyundai Santa Fe, valued at $2,019.00. After taking into account all her listed income and expenses, the Debtor indicated on her schedule of expenses that she had a small "monthly net income," or surplus, of $13.14.

The Debtor was the sole witness at trial. When asked the amount of her rent, she said she was unsure and that she does not handle her rent and finances. Rather, she stated, "[Mr. Craig] deals with any paperwork and bills, pays everything and deals with checking. I'm just unable to do that right now." She also testified that, by her own designation, her mother

receives her SSDI payments and statements, and then gives her the payments and shows her the statements. Notwithstanding this testimony and her earlier indication that she might call Mr. Craig as a witness, she did not call him or anyone who might be more conversant regarding the details of her finances.

On direct examination, the Debtor testified that she was fully disabled and unemployed. With respect to her medical condition, she explained:

> I have postural orthostatic tachycardia syndrome, which is an umbrella to many other things. I have peripheral neuropathy, fibromyalgia, sleep apnea, a bunch of other things. It affects the autonomic part of the brain, which basically runs everything. [I] have problems with digestion, body temperature, a host of other things.
> . . . .
> I am in constant pain. I have what POTS people have, they're called the crashes, which the body just kind of shuts down for periods of time where you just sleep. It's a chronic fatigue, where you just are so tired, you're unable to really do anything. I have pain, pain in my extremities.

She testified that her condition affected her memory and ability to focus:

> [T]hat [pain] and the memory problems is another big issue, and that's one of the real major issues right now is confusion and pain. That goes along with the POTS and also the medications that I have to take and probably will for the rest of my life.
> . . . .
> I have problems with focusing on what people are saying. During conversations, I can't remember what they've said to me. I have problems remembering when I go into a room what I was in there for. And things like, I'll lay something down, forget where I put that object, and recalling vocabulary, things like that.

She also testified that, over time, her condition seemed to be worsening and, as she was in her early thirties when the condition first affected her, was likely to stay with her for life.

The Debtor then testified that she had not earned income from employment since 2008 and did not expect to earn any in the future. She testified that as of the petition date, her SSDI

was about $886.00 per month, which was consistent with her schedule of income. She further testified that she received only $116.00 in SSI for each child, a total of $232.00 per month, not the total of $428.00 she listed on her schedules. The Debtor offered no explanation for the discrepancy. She explained that prior to her bankruptcy filing, she paid her student loan obligations through the $132.90 monthly garnishment of her SSDI income, consisting of a $117.90 payment on the student loan debt and a $15.00 garnishment fee. The Debtor stated that she rented a home with Mr. Craig. When her attorney asked whether paying her student loans would prevent her from maintaining a minimal standard of living, she replied: "Yes, it would interfere with that." She elaborated: "We're just barely getting by, and that's the way it's going to be. Nothing about that is going to change."

Her attorney then questioned her regarding the challenged garnishment. When he asked whether FAME had offset her SSDI between October 29, 2014 (the petition date) and March 1, 2015, the Debtor responded in the affirmative, indicating that a total of four garnishments had occurred. She produced no documentary evidence, however, to substantiate this claim. Although she testified that FAME subsequently returned the garnished funds to her, she could not recall the date or the amount of the refund.

During FAME's cross-examination of the Debtor, it became clear that only a single garnishment had occurred before the case was closed, that the amount of that garnishment was $117.90 plus a small fee, and that it had occurred on November 3, 2014, five days after the Debtor's bankruptcy filing and just two days after notice of the case was mailed to FAME.

The Debtor also acknowledged that the refund had been made by a check dated January 5, 2016, in the amount of $132.90, including $117.90 for the loan payment and $15.00 for the related fee.

The focus of cross-examination then shifted to the dischargeability count. In response to questioning from FAME's attorney, the Debtor testified that she had not pursued any nonbankruptcy avenues for student loan relief since the petition date. Additionally, she reiterated that she had budgeted $600.00 per month for transportation (excluding car payments and car insurance). She explained that this amount covered the gas and registration expense associated with Mr. Craig's vehicle and his commute. This was contrary to the representation, on her schedule of expenses, that the listed expenses did not include expenses of people other than herself and her dependents. She added that the $600.00 per month for transportation included $200.00 "annually" on vehicle maintenance. She also initially stated that the $600.00 figure included automobile insurance, but then conceded that automobile insurance—$95.00 per month—was on a separate line. She produced no documentation to substantiate the $600.00 figure and was uncertain of the make or model of Mr. Craig's vehicle.

On re-direct examination, the Debtor stated that she had made good faith efforts to repay her student loans and to resolve those loans outside of bankruptcy. When pressed for details concerning those efforts, she responded that she "chatted with people on the phone and tried to work things out."

After the close of all the evidence, the bankruptcy court rejected the Debtor's attorney's request to submit post-trial briefs, instead choosing to rely on the parties' closing arguments. FAME's counsel then moved to dismiss the Debtor's stay violation claim, based on the amount of the garnishment, the refund of the garnishment to the Debtor, and the likelihood that FAME

had not received notice of the Debtor's bankruptcy filing before the garnishment occurred. He argued:

> I don't think we should be here on any case for $117. I don't think we especially should be here on any case where the $117 is paid back by the creditor.
> . . . .
> So we had the one instance. . . . [T]here's been no evidence to say there was any intentional conduct by FAME. And it seems almost physically impossible that it would have been, given that the garnishment occurred on November 3rd, and I don't think they could have even gotten the notice by November 3rd.

With respect to the Debtor's § 523(a)(8) claim, FAME's attorney argued that the Debtor had not satisfied her burden of proof. He noted that, notwithstanding her health issues, the Debtor "was making the payments through the garnishment." He added: "And [the Debtor] and her family are still here and they're still surviving . . . ." Additionally, he challenged certain of the Debtor's budgeted expenses, including the $600.00 monthly transportation expense.

Debtor's counsel countered: "[T]he fact that [the Debtor]'s here is not an indication that she can maintain a minimal standard of living if her $900[.00] a month social security continues to be garnished to the extent of about 15 percent." He also argued that the Debtor's "choice of [an] adversary proceeding, rather than a government forgiveness or income contingent repayment plan[, wa]s based on the tax implications of those programs." Moreover, he insisted that his client was unable to "maintain a minimal standard of living if forced to repay" her student loans and concluded by asserting that the Debtor had "met all three prongs" of the undue hardship test set forth in Brunner v. N.Y. State Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987). He did not identify those prongs or explain how the Debtor had satisfied them.

With respect to the count for violation of the automatic stay, the Debtor's attorney emphasized that FAME had refunded the challenged garnishment only in December 2015,

fourteen months after the Debtor's bankruptcy filing, notwithstanding that it had received notice of the bankruptcy filing. He conceded that there had been only a single garnishment, very early in the case, and that FAME "may not have had notice at that point." He argued that it was FAME's retention of the garnished funds for more than a year, and not the garnishment itself, that constituted the stay violation.

After a short recess, the bankruptcy court ruled from the bench on both counts. As a preliminary matter, the court found the Debtor's testimony "to be credible and heartfelt."

With respect to Count I, concerning the dischargeability of her student loans, the court ruled that the Debtor had not met her burden under § 523(a)(8) as to undue hardship. The Debtor's inability to justify the magnitude of her $600.00 monthly transportation expense figured prominently in the court's decision. The court explained:

> [O]ne of the things that I struggled with was the uncertain testimony of what the $600 per month was for transportation. Upon question[ing], [the Debtor] could remember that there were repairs of $200 per year, maintenance costs of $200 per year for the vehicles. . . . [t]hat number [($600.00)] is a large one and I didn't quite understand it. I didn't find that [ ] on that point [the Debtor] met her burden.

The court concluded the Debtor had not satisfied her burden of proving she was unable to maintain a "reasonable minimal standard of living" while still paying her student loans, as required in Bronsdon v. Education Credit Management Corp., 435 B.R. 791 (B.A.P. 1st Cir. 2010).

With respect to Count II, concerning the alleged stay violation, the court found that: FAME had garnished the Debtor's SSDI benefits once, and only once, between the date of her bankruptcy filing and her receipt of a discharge; the garnishment occurred on November 3, 2014; and the bankruptcy noticing center had issued notice of the Debtor's bankruptcy filing only on

Saturday, November 1, 2014. The court ruled that FAME had not violated the automatic stay, either by the garnishment itself or by the retention of the garnished funds. In reaching this conclusion, the court found that the Debtor had not met her burden of proving "that FAME knew of the garnishment being a violation or . . . having occurred post-bankruptcy filing." The court further noted that the parties agreed that FAME had returned the garnished funds. Lastly, the bankruptcy court observed that even if FAME's retention of the garnished funds somehow amounted to a violation of the automatic stay, "it was *de minimis*."

Consistent with its bench rulings, the bankruptcy court entered judgment in favor of FAME on both counts the same day. The Debtor timely appealed.

POSITIONS OF THE PARTIES[2]

I. The Debtor

In her brief, the Debtor identified two issues on appeal: (1) whether the bankruptcy court erred in concluding that excepting the Debtor's student loans from her bankruptcy discharge would not impose an undue hardship on her within the meaning of § 523(a)(8); and (2) whether the bankruptcy court erred in concluding that FAME's post-petition garnishment and subsequent

[2] The arguments presented in the parties' appellate briefs undoubtedly are more developed than their closing arguments at trial. Nonetheless, given the parties' references during trial to the prevailing tests for determining undue hardship under § 523(a)(8), their arguments were sufficient to apprise the court and each other of their positions. See Lorenz v. Am. Educ. Servs./Pa. Higher Educ. Assistance Agency (In re Lorenz), 337 B.R. 423, 431–32 (B.A.P. 1st Cir. 2006) (concluding that appellee's "minimalist approach was marginally sufficient to apprise the court and [appellant] of its position"). Therefore, we conclude that neither the Debtor nor FAME has run afoul of the First Circuit's frequently-stated admonition that arguments raised for the first time on appeal are waived. See, e.g., Abdallah v. Bain Capital LLC, 752 F.3d 114, 120 (1st Cir. 2014).

retention of the garnished funds for more than fourteen months either did not violate the automatic stay or "fell within a *de minimis* exception to stay liability."

A. Dischargeability Under § 523(a)(8)

The Debtor acknowledges that there are two tests for determining the dischargeability of student loans, the test established by the Second Circuit in Brunner, and the "totality of the circumstances" test, previously adopted by the Panel in Bronsdon. She maintains that the bankruptcy court correctly chose the latter but applied that test incorrectly. The Debtor complains that the bankruptcy court improperly focused on the transportation expense instead of considering all of the relevant factors under the totality of the circumstances test. She further complains that the bankruptcy court made no findings of fact regarding any of these factors.

The Debtor asserts that her past, present, and reasonably reliable future financial resources are insufficient to enable her to pay her student loans while maintaining a minimal standard of living. She defends her $600.00 monthly transportation expense on the basis of her medical appointments and Mr. Craig's employment. The Debtor argues, for the first time on appeal, that she lives frugally, noting that her "household expenses [are] far below the applicable Bankruptcy Allowable Living Expenses listed on the [U.S.] Trustee['s] website." She worries that "the next medical emergency or cold snap may pose an extreme threat" to her family's well-being, and, if forced to repay her student loans, she will never be able to get ahead.

Alternatively, the Debtor argues that even under the Brunner test, the bankruptcy court should have discharged her student loans, as she is unable to satisfy those obligations while still

maintaining a minimal standard of living. Accordingly, she asks the Panel to reverse the bankruptcy court's determination that her student loans are nondischargeable.

B. Stay Violation Under § 362

The Debtor argues that the absence of any further offsets beyond the first post-petition garnishment is proof that FAME received notice of her bankruptcy filing. In that way, she maintains, she satisfied her burden of establishing that FAME's violation of the automatic stay by retention of the garnished funds was done with knowledge of the bankruptcy filing and therefore willful under § 362(k)(1). The Debtor further argues that there is no *de minimis* exception to the automatic stay. Accordingly, the Debtor asks the Panel to reverse the bankruptcy court's determination that FAME did not violate the stay in § 362(a).

II. FAME

A. Dischargeability Under § 523(a)(8)

FAME counters that the bankruptcy court properly concluded that the Debtor failed to establish undue hardship under § 523(a)(8). FAME disputes the notion, advanced by the Debtor, that the bankruptcy court "equate[d] undue hardship with death." Rather, FAME asserts, the bankruptcy court correctly found that the Debtor had been making payments on the FAME loans, through garnishments, and had not established that these payments had prevented her from maintaining a reasonable, minimal standard of living.

FAME claims that the Debtor's reported monthly expenses were excessive and/or unsupported, especially the line items for transportation, two smart phones, and internet access. Indeed, FAME goes so far as to state that the Debtor has been paying her student loans with little or no impact on her above-minimal standard of living. FAME remains critical of the Debtor's failure to pursue available nonjudicial remedies, such as "income driven plans" that are available

to borrowers of federally insured loans. For these reasons, FAME concludes, the Debtor failed to satisfy her burden of demonstrating that excepting her student loan debt from discharge would impose an undue hardship upon herself and her dependents.

B. Stay Violation Under § 362

FAME argues that the Debtor did not prove that it knew of her bankruptcy filing at the time of the challenged garnishment. According to FAME, it was likely impossible for it to have had this knowledge, given the proximity of the date of the bankruptcy notice (Saturday, November 1, 2014) to the date of the garnishment (Monday, November 3, 2014).

FAME says little on appeal about its retention of the subject funds. FAME implicitly acknowledges the retention, however, stating in its brief: "The Debtor filed her Complaint on October 1, 2015, almost a year after filing bankruptcy and shortly thereafter, the Debtor was issued a check in the amount of $132.90, representing the subject garnishment." FAME maintains simply that the Debtor's retention argument lacks legal support.

JURISDICTION

Before addressing the merits of an appeal, we must determine the threshold issue of whether we have jurisdiction, even if the litigants have not raised the issue. Rivera Siaca v. DCC Operating, Inc. (In re Olympic Mills Corp.), 333 B.R. 540, 546–47 (B.A.P. 1st Cir. 2005) (citing Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998)). We may hear appeals from final judgments, orders, and decrees. See 28 U.S.C. § 158(a)–(c); see also Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." In re Bank of New Eng. Corp., 218 B.R. at 646 (citations omitted); see also

Stalnaker v. Gratton (In re Rosen Auto Leasing, Inc.), 346 B.R. 798, 800 (B.A.P. 8th Cir. 2006) (considering appeal of final judgment disposing of all counts of a complaint). "Generally, a bankruptcy court's order regarding the dischargeability of a debtor's student loans is a final order." In re Bronsdon, 435 B.R. at 796 (citing Educ. Credit Mgmt. Corp. v. Kelly (In re Kelly), 312 B.R. 200, 204 (B.A.P. 1st Cir. 2004)). So, too, is a bankruptcy court order determining whether there was a violation of the automatic stay. In re DeSouza, 493 B.R. 669, 671–72 (B.A.P. 1st Cir. 2013) (citing Slabicki v. Gleason (In re Slabicki), 466 B.R. 572, 577 (B.A.P. 1st Cir. 2012); Milliren v. Milliren (In re Milliren), 387 B.R. 72, 74 (B.A.P. 1st Cir. 2008); Lomagno v. Salomon Bros. Realty Corp. (In re Lomagno), 429 F.3d 16 (1st Cir. 2005)). As the bankruptcy court's determinations regarding dischargeability and violation of the automatic stay are both final and together dispose of all counts of the Complaint, we have jurisdiction over this appeal.

STANDARD OF REVIEW

"Appellate courts apply the clearly erroneous standard to findings of fact and [*de novo*] review to conclusions of law." Belser v. Nationstar Mortg., LLC (In re Belser), 534 B.R. 228, 233 (B.A.P. 1st Cir. 2015) (citing Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 269 (1st Cir. 2010)). "[A] reversal on clearly erroneous grounds is in order 'when . . . the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" United States v. Candelaria-Silva, 714 F.3d 651, 656 (1st Cir. 2013) (citation omitted). *De novo* review means that a "court should make an independent

determination of the issues." United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 368 (1967).

Generally, a bankruptcy court's undue hardship determination involves the application of a legal standard to the facts of a particular case and therefore poses a mixed question of law and fact. In re Bronsdon, 435 B.R. at 796 (citing Nash v. Conn. Student Loan Found. (In re Nash), 446 F.3d 188, 191 (1st Cir. 2006); TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); In re Lorenz, 337 B.R. at 429). Thus, as the First Circuit has instructed, the bankruptcy court's findings of fact after trial "must stand if reasonably supported." In re Nash, 446 F.3d at 191 (citation omitted). "The ultimate question of law—whether [the Debtor] proved 'undue hardship"—is subject to *de novo* review." Id. (citing Tirch v. Penn Higher Educ. Assistance Agency (In re Tirch), 409 F.3d 677, 680 (6th Cir. 2005); Martin v. Bajgar (In re Bajgar), 104 F.3d 495, 497 (1st Cir. 1997)).

A bankruptcy court's determination as to whether the automatic stay has been violated involves a question of law that is subject to *de novo* review. In re DeSouza, 493 B.R. at 672 (citation omitted). "The determination as to whether a violation of the automatic stay was 'willful,' as defined in [§] 362([k]), poses a factual issue, which we review only for clear error." McMullen v. Sevigny (In re McMullen), 386 F.3d 320, 330 (1st Cir. 2004) (citation omitted).

DISCUSSION

I. The Appropriate Legal Standard for Determining Student Loan Dischargeability

A. Section 523(a)(8) and the Burden of Proof

"Under § 523(a)(8), debtors are not permitted to discharge educational loans 'unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the

debtor's dependents.'" In re Bronsdon, 435 B.R. at 796 (quoting 11 U.S.C. § 523(a)(8)). "The creditor bears the initial burden of establishing that the debt is of the type excepted from discharge under § 523(a)(8)." Id. (citation omitted); accord Ablavsky v. U.S. Dep't of Educ. (In re Ablavsky), 504 B.R. 709, 719 (Bankr. D. Mass. 2014) (citations omitted). "Once the showing is made, the burden shifts to the debtor to prove that excepting the student loan debt from discharge will cause the debtor and her dependents 'undue hardship.'" In re Bronsdon, 435 at 796 (citations omitted). "The debtor bears the ultimate burden of proving undue hardship by a preponderance of the evidence." Id. (citing Grogan v. Garner, 498 U.S. 279, 287 (1991); Burkhead v. United States (In re Burkhead), 304 B.R. 560, 564 (Bankr. D. Mass. 2004)) (footnote omitted).

The First Circuit has observed that the debtor's burden under § 523(a)(8) is "formidable," as "Congress has made the judgment that the general purpose of the Bankruptcy Code to give honest debtors a fresh start does not automatically apply to student loan debtors. Rather, the interest in ensuring the continued viability of the student loan program takes precedence." In re Nash, 446 F.3d at 191 (citing TI Fed. Credit Union, 72 F.3d at 937); see also Murphy v. Educ. Credit Mgmt. Corp. (In re Murphy), 511 B.R. 1, 4 (D. Mass. 2014) (noting that student loan debtor had a "steep hill to climb" when invoking § 523(a)(8)); In re Ablavsky, 504 B.R. at 720 (stating "proof of undue hardship is a heavy burden").

B. The Prevailing Tests for Determining Undue Hardship

The Bankruptcy Code does not define "undue hardship." In re Bronsdon, 435 B.R. at 797. Lacking guidance from the Bankruptcy Code, "courts differ on the proper test to apply." In re Ablavsky, 504 B.R. at 719 (citation omitted). Two primary tests emerge from the case

law, "the so-called Brunner test and the 'totality of the circumstances' test." In re Bronsdon, 435 B.R. at 797. As the First Circuit explained:

> [N]ine circuit courts of appeal [ ] have followed the Second Circuit's test set forth in Brunner . . . . This is a tripartite test, requiring that the debtor show inability, at her current level of income and expenses, to maintain a "minimal" standard of living; the likelihood that this inability will persist for a significant portion of the repayment period; and the existence of good faith efforts to repay the loans. [Brunner, 831 F.2d] at 396.
>
> A facially different test is the Eighth Circuit's totality-of-circumstances test, which would have courts consider the debtor's reasonably reliable future financial resources, his reasonably necessary living expenses, and "any other relevant facts." See Long v. Educ. Credit Mgmt. Corp. (In re Long), 322 F.3d 549, 554 (8th Cir. 2003).

In re Nash, 446 F.3d at 190.

Although the First Circuit has declined to adopt either test for determining undue hardship, see In re Ablavsky, 504 B.R. at 719, it has held that the "hardship alleged . . . must be undue and attributable to truly exceptional circumstances, such as illness or the existence of an unusually large number of dependents." TI Fed. Credit Union, 72 F.3d at 927 (footnote omitted). Additionally, the First Circuit has observed that both tests "require the debtor to demonstrate that her disability will prevent her from working for the foreseeable future." In re Nash, 446 F.3d at 190–91.

C. The Panel's Choice: the Totality of the Circumstances Test

Seven years ago, in Bronsdon, the Panel unequivocally adopted the totality of the circumstances test, concluding that this test "best effectuates the determination of undue hardship while adhering to the plain text of § 523(a)(8)." 435 B.R. at 800 (footnote omitted) (citation omitted). The Bronsdon Panel criticized the Brunner test as "test[ing] too much." Id. at 799 (quoting Hicks v. Educ. Credit Mgmt. Corp. (In re Hicks), 331 B.R. 18, 27 (Bankr. D. Mass.

2005)); see also Kopf v. U.S. Dep't of Educ. (In re Kopf), 245 B.R. 731, 741 (Bankr. D. Me. 2000). In particular, the Panel noted that Brunner's "good faith" requirement was "without textual foundation." In re Bronsdon, 435 B.R. at 800 (citation omitted) (internal quotations omitted). Additionally, the Panel rejected as similarly unsupported the notion, inherent in the Brunner test, that the Debtor must demonstrate a "certainty of hopelessness." Id. at 799. Post-Bronsdon, bankruptcy courts within the First Circuit have continued to apply Bronsdon's reasoning in adopting the totality of the circumstances test. See, e.g., Abdinoor v. Navient Solutions, Inc. (In re Abdinoor), Adv. No. 14-1048, 2015 WL 5178364, at *5-6 (Bankr. D.N.H. Sept. 3, 2015); Ayele v. Educ. Credit Mgmt. Corp. (In re Ayele), 468 B.R. 24, 31 (Bankr. D. Mass. 2012), aff'd, 490 B.R. 460 (D. Mass. 2013); Stevenson v. Educ. Credit Mgmt. Corp. (In re Stevenson), 463 B.R. 586, 595 (Bankr. D. Mass. 2011), aff'd, 475 B.R. 286 (D. Mass. 2012).

D. Considerations When Applying the Totality of the Circumstances Test

Bronsdon provided the following guidance regarding the "undue hardship" determination:

> Undue hardship is measured as of the trial date, In re Kelly, 312 B.R. at 204, and is a forward-looking concept. In re Kopf, 245 B.R. at 744. . . . [D]istilled to its essence, the finding of undue hardship under § 523(a)(8) following the totality of the circumstances test rests on one basic question: "Can the debtor now, and in the foreseeable near future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?" In re Hicks, 331 B.R. at 31. Answering said question leads the bankruptcy court to discharge its task of making a "principled

> determination of the requirement's meaning and a careful review of the debtor's circumstances." In re Kopf, 245 B.R. at 741.

435 B.R. at 800 (footnotes omitted).

Additionally, when applying the totality of the circumstances test, the Panel has instructed courts to:

> "consider all relevant evidence—the debtor's income and expenses, the debtor's health, age, education, number of dependents and other personal or family circumstances, the amount of the monthly payment required, the impact of the general discharge under chapter 7 and the debtor's ability to find a higher-paying job, move or cut living expenses."

In re Lorenz, 337 B.R. 431 (quoting In re Hicks, 331 B.R. at 31) (other citations omitted).

Consistent with Bronsdon, we examine the dischargeability of the Debtor's student loans exclusively within the framework of the totality of the circumstances test.

II. Applying the Totality of the Circumstances Test to the Debtor's Circumstances

The undue hardship determination involves a fact-intensive analysis. See Craig v. Educ. Credit Mgmt. Corp. (In re Craig), 579 F.3d 1040, 1046 (9th Cir. 2009). Under the totality of the circumstances test, as previously explained, we must "examine the Debtor's past, present, and future financial resources and necessary living expenses and whether, taken together with other factors, the Debtor has the ability to repay the loans at issue while maintaining a minimal standard of living." Blanchard v. N.H. Higher Educ. Assistance Found. (In re Blanchard), Adv. No. 13-1038, 2014 WL 4071119, at *9 (Bankr. D.N.H. Aug. 14, 2014) (citing In re Bronsdon, 435 B.R. at 798).

The Debtor testified that, unemployed since 2008, she had no prospect of future employment in her field of nursing or in any other occupation. She testified that her medical condition, characterized by neuropathy, cognitive deficits (including confusion and memory

loss), fibromyalgia, sleep apnea, and chronic fatigue, will persist and worsen with age. Although the Debtor did not offer corroborating expert medical testimony, FAME never disputed that the Debtor's employment prospects were grim or that her condition was deteriorating, and the court found no fault in this portion of the Debtor's proof. Rather, the court's sole and dispositive finding was that she had failed to prove that her circumstances prevent her from paying the student loans in question while maintaining a minimal standard of living. We review this finding for clear error and find none.

First, the bankruptcy court was well justified in its finding that the Debtor had not persuasively explained the $600.00 transportation expense in her monthly budget; indeed, this item was of sufficient size in relation to the balance of her budget that, by itself, it could make the difference between her having the ability to pay her student loans while maintaining a minimal standard of living, and her not having that ability. To establish her level of income, the Debtor relied on her schedule of income, which showed total monthly income of $3,060.14, including $428.00 in SSI for her children. She then testified, without explanation of the discrepancy, that in fact the SSI she received for her children was only $232.00 per month, reducing her total income to $2,864.14. For expenses, she relied on her schedule of expenses, which showed a monthly total of $3,047.00, including $600.00 per month for "transportation expense," but not including the monthly payment on her student loan debt to FAME: $117.90 for the loan payment and $15.00 for a related fee, or $132.90 per month. By her own numbers, the Debtor was thus attempting to prove that she faced a monthly deficit of $182.86 without the FAME payment and of $315.76 with the payment. In reviewing these amounts, the bankruptcy court correctly noted that the $600.00 monthly transportation expense was "a large one." It was $284.00 larger than the deficit on which the Debtor was relying to establish undue hardship.

However, when asked about this item and what it consisted of, the Debtor could account, with hard numbers, for only $200.00 *per year* of what amounted to an annual expense of $7,200.00. She testified only that the $600.00 per month covered the gas and registration expense associated with Mr. Craig's vehicle and commute and included $200.00 "annually" for vehicle maintenance. She offered no details about Mr. Craig's commute and gas and registration expenses. Nor did she address, or even seem aware, of the discrepancy between her testimony and the representation in her schedule of expenses that the listed expenses did not include expenses of people other than herself and her dependents.

Regarding the $600.00 figure, the bankruptcy court found simply: "that number is a large one, and I didn't quite understand it. I didn't find that on that point Miss Olsen met her burden." Though understated, this simple finding indicated that the Debtor had not carried her burden as to the $600.00 item. We see no clear error in this finding; it was certainly justified by the record. In view of the magnitude of that item in relation to the deficit on which the Debtor's whole case for undue hardship was predicated, the Debtor's failure of proof on this item was also dispositive as to the § 523(a)(8) count as a whole.

Second, the Debtor's inability to support or explain the $600.00 transportation expense underscores the unreliability of the schedules as a whole. Though the bankruptcy court found the Debtor credible, he also noted her failure to explain the $600.00 item. Credibility and adequacy to the task are two different things. The record would more than support a finding that, by virtue of her condition, the Debtor herself did not have the memory of and familiarity with the details of her financial life necessary to establish the accuracy and reliability of her schedules of income and expenses—her case was largely built on these—and, more generally, to establish that her income and expenses left her unable to repay her student loans while

maintaining a minimal standard of living. The Debtor herself testified that she suffered from difficulties with memory and confusion. Asked the amount of her rent, she said she was unsure and that she did not handle her rent and finances but left all the paperwork and bill paying to Mr. Craig. She testified, "I'm just unable to do that right now." She did not explain the discrepancy between the quantification of her children's SSI income as stated in her schedule of income and the quantification of the same income in her testimony at trial. She was unable to explain with any adequacy the large transportation expense. And, insofar as she did explain it, by saying it consisted largely of gas and registration expenses of Mr. Craig, she thereby placed in question the reliability of her schedule of expenses, which expressly stated that the expenses identified therein were solely those of herself and her dependents (that is, her minor children). The record amply supported a conclusion that, at a very basic level, the trial court did not have a reliable picture of the Debtor's income and expenses, in any of their particulars.

The Debtor further argues that the bankruptcy court erred by failing to make fuller findings about many of the factors courts normally consider in applying the totality of the circumstances test. We discern no error. Given the bankruptcy court's determination that the Debtor had failed to satisfy her burden of proof by providing reliable evidence regarding a single large and dispositive item (the large transportation expense), more detailed findings by the bankruptcy court were unnecessary.

The Debtor also argues that it was error for the bankruptcy court to apply the "still alive" standard asserted by FAME: that because the Debtor has been making the student loan payments and yet is "still here," she cannot establish undue hardship. We see no indication that the

bankruptcy court adopted this argument or applied such a standard. Moreover, where the record reflects that the Debtor was "getting by"—even if "barely"—there is no clear error in the bankruptcy court's finding that the Debtor had the ability to repay the loans at issue while maintaining a minimal standard of living.

For these reasons, we affirm the judgment as to the count under § 523(a)(8).

III. Standards Governing Determinations Regarding Relief under § 362(k)(1)

On appeal, the Debtor does not dispute the bankruptcy court's determination that she had not established that FAME's single post-petition act of garnishment was committed with knowledge of her bankruptcy filing, and therefore that she was not entitled under § 362(k)(1) to damages for that act.[3] Rather, she argues that notwithstanding the innocence of the initial violation of the stay: (1) FAME further violated the stay in § 362(a)(6) (staying any act to recover a pre-petition claim) by retaining the garnished funds for some fourteen months; (2) this violation was not *de minimis;* (3) in any event, there is no *de minimis* exception to § 362(k)(1); (4) FAME's retention of the funds was committed with knowledge of the Debtor's bankruptcy filing and, at least for the last three months of that duration and by virtue of the complaint in this adversary proceeding, with actual knowledge of its post-petition garnishment and of her demand

[3] Although certain section headings and statements in the Debtor's appellate brief indicate that she is challenging this part of the judgment below, in substance, she does not in fact challenge it, and she affirmatively indicates that the evidence did not compel a finding that the initial act of garnishment was willful or made with knowledge of the case. Moreover, in closing arguments at trial, the Debtor's counsel stated that the violation on which the Debtor was relying was not the garnishment itself but the retention of garnished funds after FAME learned of the case.

for redress; and (5) she was therefore entitled to damages under § 362(k)(1) for the retention of funds.

The bankruptcy court denied damages under § 362(k)(1) for FAME's retention of funds. Its findings and rulings on this matter were brief and limited, stating: (1) post-petition and pre-discharge, there was one garnishment; it was in the amount of $117.90 and took place on or about November 3, 2014; (2) "I don't think that the burden was met to prove that FAME knew of the garnishment being a violation or being—having occurred post-bankruptcy filing"; (3) "the facts are uncontroverted that there was a return check . . . 130 some odd dollars . . . in January of, I believe, 2015"; (4) "I don't find that there's a violation of automatic stay, and I don't find that the retention of the money for that period of time constitutes a violation of the automatic stay"; and (5) "if the retention of the funds is somehow a violation of the automatic stay, I find that it was *de minimis*."[4]

"The automatic stay, provided under § 362(a) of the Bankruptcy Code, is 'one of the fundamental debtor protections provided by the bankruptcy laws.'" In re Panek, 402 B.R. 71, 75 (Bankr. D. Mass. 2009) (quoting S. Rep. No. 95-989, at 54 (1978); H.R. No. 95-595, at 340 (1977), U.S.C.C.A.N. at 5787, 5840, 5963, 6296 (1978)). "The automatic stay 'enables debtors to resolve their debts in a more orderly fashion, and at the same time safeguards their creditors

[4] The bankruptcy court further noted that "the [C]omplaint doesn't say" that "it wasn't just the garnishment that violates the automatic stay . . . but it was also the holding onto the money for some period of time." The bankruptcy court does not appear to have relied on this observation in making its rulings regarding the retention of funds, and in fact it addressed the retention issue on its merits. It did not indicate, and FAME does not now and did not below contend, that the issue was not fairly raised or tried. We are satisfied that the retention issue was properly tried, even if not separately pled. The Debtor made it plain during the course of the trial that she was complaining not only of the garnishment but also of the retention of the garnished funds, and FAME did not object.

by preventing different creditors from bringing different proceedings in different courts.'" Id. (quoting Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 975 (1st Cir. 1997)).

"However, the protections afforded by the automatic stay are meaningless if they are not enforced." Id. at 76 (citing In re Rosa, 313 B.R. 1, 6 (Bankr. D. Mass. 2004)). Subsection 362(k)(1), which prior to the 2005 amendments to the Bankruptcy Code was codified at § 362(h), "was enacted as a tool to enforce the automatic stay and provide individual debtors with a recourse from violations." Id. It provides: "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."[5] 11 U.S.C. § 362(k)(1). A simple parsing of subsection (k)(1) shows that, in order to recover damages thereunder, a debtor must show: (1) that the respondent violated the automatic stay; (2) willfully; and (3) thereby injured the debtor. In re Panek, 402 B.R. at 76 (citing In re Steenstra, 280 B.R. 560, 566 (Bankr. D. Mass. 2002; In re Dunn, 202 B.R. 530, 531 (Bankr. D.N.H. 1996). The standard of proof is a preponderance of the evidence. In re Panek, 402 B.R. at 76. We address the three requirements of § 362(k)(1) in turn.

A. Violation of the Automatic Stay

The first requirement of § 362(k)(1) is "a violation of a stay provided by this section." 11 U.S.C. § 362(k)(1). The stay provided by § 362, the so-called "automatic stay," is in fact a collection of stays, all set forth in the eight enumerated paragraphs of subsection (a).

The Debtor did not identify in the Complaint which stay she claims FAME violated or precisely how FAME violated it. From our scrutiny of the record, it appears that Debtor's

[5] FAME has not suggested that the exception in subsection (2) has any application here.

counsel answered this for the first time only in closing arguments: "Section 362(a) prohibits the continuance of an administrative proceeding to recover a claim against the Debtor that arose before the commencement of the case. It also prohibits holding onto property of the Debtor after the commencement of the case that was taken post-petition." The bankruptcy court ruled that FAME had not violated the automatic stay at all; however, the court did not indicate or discuss the specific stay or stays whose alleged violation it was ruling upon. On appeal, the Debtor only states that: "[t]he stay operates to prevent creditors from, inter alia, taking actions to obtain possession of, or to exercise control over, property of the estate, as well as to collect, assess, or recover claims against the debtor that arose prior to the filing of the case."

It was clear enough, at all relevant times and to all concerned, that the Debtor was complaining at least that by the post-petition garnishment of her SSDI benefits, FAME committed an act to collect or recover a claim against her that arose prior to the filing of the petition, and that this act constituted a violation of the stay set forth in § 362(a)(6).[6] The stay in subsection (a)(6) stays "any act to collect . . . or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6).

There is no *de minimis* exception to the automatic stay. There is no reported case within the First Circuit indicating that the amount of money retained is controlling in determining

[6] Garnishment being a form of process, the Debtor may well also have been complaining of a violation of subsection (a)(1), which stays "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(1). On appeal, the Debtor has also cited language from subsection (a)(3), which prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," but she has not argued that FAME violated this subsection and has not alleged—nor is it at all evident—that the monies in question, the garnished funds, were property "of the estate" or "from the estate."

whether a creditor's retention of funds violated the automatic stay. As one bankruptcy court outside this circuit aptly stated, "*no amounts* should be seized or withheld . . . after the filing of a bankruptcy petition." In re Briskey, 258 B.R. 473, 477 (Bankr. M.D. Ala. 2001) (emphasis added).

The bankruptcy court found that, on one occasion, FAME garnished the Debtor's SSDI benefits while the stay was in effect—that is, after the filing of the petition and before entry of discharge—but nonetheless ruled, without explanation, that there had been no violation of the automatic stay.[7] This was error. FAME's garnishment of the Debtor's benefits was an act to collect or recover a claim against the Debtor that arose before the commencement of the case and, as such, was a violation of the stay in subsection (a)(6).[8] In re Manuel, 212 B.R. 517, 518 (Bankr. E.D. Va. 1997) ("There can be little question that the continuation post[-]petition of a garnishment proceeding against a debtor is a violation of the automatic stay, notably as provided in . . . § 362(a)(1), (2), (3), (4) and (6).") (citations omitted).

B. Willfulness

To give rise to a right to damages under § 362(k)(1), the violation of the stay must have been "willful." In re McMullen, 386 F.3d at 330.

1. Willfulness Standard

In the First Circuit, as elsewhere, "willfulness" requires both intent and scienter. "Generally speaking, a violation will be found 'willful' if the creditor's conduct was intentional

[7] We think it likely that the court meant that there had been no *willful* violation within the meaning of § 362(k)(1), but we must address the ruling as articulated.

[8] We need not determine whether the same act was also a violation of subsection (a)(1).

(as distinguished from inadvertent), and committed with knowledge of the pendency of the bankruptcy case." Id. (citation omitted); see also Vázquez Laboy v. Doral Mortg. Corp. (In re Vázquez Laboy), 647 F.3d 367, 374 (1st Cir. 2011) (quoting In re McMullen, 386 F.3d at 330). The intent required is simple intent to do the actions that constituted the violation, see Fleet Mortg. Grp., Inc. v. Kaneb, 196 F.3d 265, 269 (1st Cir. 1999) and In re McMullen, 386 F.3d at 330, not specific intent to violate the automatic stay. Kaneb, 196 F.3d at 269. The scienter required is "knowledge of the pendency of the bankruptcy case." In re McMullen, 386 F.3d at 330 (citing Kaneb, 196 F.3d at 268–69); In re Vázquez Laboy, 647 F.3d at 374.[9]

"In cases where the creditor received actual notice of the automatic stay, courts must presume that the violation was deliberate." Kaneb, 196 F.3d at 269 (citing Homer Nat'l Bank v. Namie, 96 B.R. 652, 654 (W.D. La. 1989)). "The debtor has the burden of providing the creditor with actual notice." Id. "Once the creditor receives actual notice, the burden shifts to the creditor to prevent violations of the automatic stay." Id. (citation omitted). Absent knowledge on the part of a creditor of the pendency of the bankruptcy case, however, "the violation is merely 'technical,' and no damages are to be awarded." In re McMullen, 386 F.3d at 330 (citing Will v. Ford Motor Credit Co. (In re Will), 303 B.R. 357, 364 (Bankr. N.D. Ill. 2003); Shadduck v. Rodolakis, 221 B.R. 573, 585 (D. Mass. 1998)); see also Clayton v. King (In re Clayton), 235 B.R. 801, 807 (Bankr. M.D.N.C. 1998) ("[A] technical violation occurs when a

[9] In Kaneb, decided only six years before McMullen, the First Circuit articulated the scienter requirement as "knowledge of the stay." Kaneb, 196 F.3d at 269. Though McMullen cited Kaneb, the First Circuit has not, in McMullen or elsewhere, noted or explained the discrepancy. The present appeal does not require that we address it.

creditor violates the provisions of § 362(a) without knowledge that an active bankruptcy case is pending.").

The label "technical" means only that a particular act in violation of the stay was not willful and therefore does not itself trigger damages under § 362(k)(1). It does not mean that the violation is not real or consequential. See, e.g., In re Soares, 107 F.3d at 976 (holding that action taken in derogation of the automatic stay is not merely "voidable" but "void," a "semantic difference" that "places the burden of validating the action after the fact squarely on the shoulders of the offending creditor").

One consequence of the violation is pertinent here. As the First Circuit has held, "[n]ormally . . . a creditor that commits a technical violation of the automatic stay, due to lack of notice, has an affirmative duty to remedy the violation as soon as practicable after acquiring actual notice of the stay." In re McMullen, 386 F.3d at 330 (citing In re Will, 303 B.R. at 364). In McMullen, where a creditor had violated the stay by suing to recover a pre-petition deposit from the debtor, the First Circuit held that the violation had not been willful because the creditor did not have notice of the continued pendency of the bankruptcy case when it commenced its action and, as soon as it received notice of the stay, the creditor dismissed the action. Id. at 330-31. It follows from the holding in McMullen, and we hold, that a creditor's failure, upon learning of the debtor's bankruptcy filing, to act with reasonable dispatch to remedy a violation of the automatic stay that at its inception was unknowing and therefore not willful satisfies the

willfulness requirement, albeit only as to the conduct occurring from and after the creditor's receiving notice.[10]

This holding is consistent with long-established precedent in this circuit and elsewhere. In Putnam v. Rymes Heating Oils, Inc. (In re Putnam), 167 B.R. 737, 740-41 (Bankr. D.N.H. 1994), a creditor, for nonpayment and without knowledge of the debtors' bankruptcy filing, had repossessed a propane tank from the debtors. For lack of knowledge, this violation of the stay was not willful. However, upon learning of the filing, the creditor did not return the tank. The court ruled that the creditor's failure to return the tank after receiving notice of the bankruptcy filing was a willful violation of the stay. Id. Likewise, in Will, cited in McMullen in support of the affirmative obligation to abate an unwillful violation, an automobile lender repossessed the debtor's vehicle post-petition without knowledge of the bankruptcy filing, a technical violation of the stay, but then refused to return it after receiving notice of the filing and demand for return. The court ruled:

> What began as a technical violation of the automatic stay . . . turned into a willful one because a creditor has an affirmative duty to remedy an automatic stay violation without court order when it learns of the existence of a debtor's

[10] In so holding, we do not rely on or opine about those cases in which the only alleged violation of the stay is a creditor's post-petition failure to turn over property seized before the commencement of the case, when no stay was yet in effect. Those cases raise the question of whether and when a creditor's mere inaction can constitute a violation of a particular part of the stay, usually § 362(a)(3). See, e.g., Stmima Corp. v. Carrigg (In re Carrigg), 216 B.R. 303, 304–05 (B.A.P. 1st Cir. 1998) ("[A] violation of the automatic stay, § 362(a)(3), occurs when a creditor continues to hold property of the estate post-petition, even where the initial pre-petition retention was lawful.") (citations omitted) (footnote omitted); Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773, 774 (8th Cir. 1989) (holding post-petition failure to turnover property seized lawfully pre-petition was a prohibited attempt to exercise control over the property of the estate in violation of the automatic stay, and violation became willful upon creditor's receiving notice of the bankruptcy petition); see also WD Equip., LLC v. Cowen (In re Cowen), 849 F.3d 943, 949 (10th Cir. 2017) (rejecting majority rule that the act of passively holding onto an asset constitutes exercising control over it in violation of § 362(a)(3)). In the case before us, the alleged violation of the stay was active, a garnishment occurring post-petition.

> bankruptcy case and receives a request to return estate property repossessed post-petition.

In re Will, 303 B.R. at 364 (citations omitted).

On similar facts, another bankruptcy court, applying § 362(h) (where the language now in § 362(k)(1) was then codified), held that "the creditor has an affirmative duty to undo any post-petition repossession immediately upon being notified of the pendency of the bankruptcy case even in the absence of any court order, and failure to do so will subject the creditor to damages." Brown v. Joe Addison, Inc. (In re Brown), 210 B.R. 878, 881 (Bankr. S.D. Ga. 1997) (citations omitted); see also Franchise Tax Bd. v. Roberts (In re Roberts), 175 B.R. 339, 343 (B.A.P. 9th Cir. 1994) ("The stay requires the creditor to maintain the status quo ante and to remediate acts taken in ignorance of the stay.") (citation omitted).

2. The Willful Stay Violation Standard Applied

On appeal, the Debtor concedes that she "was unable to prove" that the act of garnishment itself was committed with knowledge of the bankruptcy filing. She argues, however, that FAME retained the garnished funds with knowledge of the bankruptcy stay and is therefore liable for a willful violation of the stay.

The bankruptcy court found that the Debtor did not meet her burden of "prov[ing] that FAME knew of the garnishment . . . having occurred post-bankruptcy filing." Absent such knowledge, the continuing violation would not have been willful, and for lack of willfulness, there would be no right to damages under § 362(k)(1).

The record reflects that FAME received notice of the bankruptcy filing sometime shortly after its sole act of garnishment. Moreover, the Debtor argued—and FAME did not dispute—that the bankruptcy court's noticing system issued notice to FAME of the Debtor's bankruptcy

filing on November 1, 2014.[11] FAME's only argument is that it had not received notice in time to avert the November 3, 2014 garnishment.

We are satisfied that the evidence required a finding that FAME acquired knowledge of the bankruptcy case in time to avert a December 2014 garnishment. Upon receiving this notice, FAME became obligated to determine whether it had garnished the Debtor's benefits post-petition and, if so, to remedy this violation of the stay, all as soon as practicable. In re McMullen, 386 F.3d at 330; In re Kaneb, 196 F.3d at 269 ("Once the creditor receives actual notice, the burden shifts to the creditor to prevent violations of the automatic stay."); In re Will, 303 B.R. at 365 (holding that notice of case gives rise to "affirmative duty" to remedy stay violation "without unreasonable delay"). It failed to do so until January 2016, and this failure constituted a violation of the stay. To be willful, however, the violation needed to have been committed intentionally and with knowledge of the bankruptcy filing. We have already indicated that the record establishes that FAME had by this time received such notice. We must now consider whether it also establishes that the violation was intentional.

The record suggests that the bankruptcy court found that it was not: "I don't think that the burden was met to prove that FAME knew of the garnishment . . . having occurred post-bankruptcy filing." It thus effectively placed on the Debtor the burden of proving that FAME

[11] On appeal, FAME acknowledges as much, stating in its brief: "After receiving notice of the filing, [FAME] did what a lender in its position should do, it stopped the garnishment." The evidence also showed that, upon the Debtor's receipt of a discharge, the bankruptcy court, through its noticing system, sent notice to FAME of the discharge, and that FAME received further notice of the bankruptcy when it received service of the complaint herein, in November 2015.

knew that it had garnished the Debtor's benefits post-petition, that it had committed a violation in need of remediation.

The assignment of the burden of proof is a ruling of law, which we review *de novo*. The burden of proving willfulness in § 362(k)(1) does indeed fall on the debtor, In re Panek, 402 B.R. at 76, and that burden extends to the intent component of willfulness. However, the law in this circuit is clear that, "[i]n cases where the creditor received actual notice of the automatic stay, courts must presume that the violation was deliberate." Kaneb, 196 F.3d at 269 (citation omitted). As used in Kaneb, "deliberate" clearly means intentional in the sense required for willfulness. A presumption can be rebutted, and rebuttal returns the ultimate burden to the debtor, but until the presumption is rebutted, the debtor is entitled to the benefit of it. See Fed. R. Evid. 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.")

Here, the record established that FAME had received notice of the bankruptcy case, and from that notice it clearly knew of the automatic stay—the stay is precisely why it discontinued its monthly garnishment of the Debtor's benefits. Yet the bankruptcy court did not find that the presumption had been rebutted. Nor could it have. FAME adduced no evidence of what it knew and when it knew it, of what steps, if any, it undertook to ascertain whether it had garnished the Debtor's benefits in violation of the stay and to remedy the violation. FAME presented no evidence that its failure to remedy that violation of the stay was not willful.

Notwithstanding its notice of the case, FAME did what a lender in its position should *not* do: it retained the garnished funds for an extended period. Thus, what began as a technical violation of the automatic stay became a willful one. See In re McMullen, 386 F.3d at 330; In re Will, 303 B.R. at 364 (ruling technical violation turned into a willful one when creditor ignored its "affirmative duty to remedy an automatic stay violation without court order" upon learning "of the existence of a debtor's bankruptcy case . . . ."); Sucre v. MIC Leasing Corp. (In re Sucre), 226 B.R. 340, 348 (Bankr. S.D.N.Y. 1998) (stating creditor has affirmative duty to return promptly amounts garnished from chapter 13 debtor's pre-petition wages).

Moreover, FAME offered no explanation for its delay, reasonable or otherwise. In its brief, FAME suggests that errors in or disconnects with its computerized or automated systems may have been to blame, but there is nothing in the record to support these suggestions, and therefore we need not address how and whether reliance on them might rebut a presumption of willfulness. Further, not only does FAME's suggestion come too late, see Abdallah, 752 F.3d at 120, but ascription of blame to one's automated system is no talisman.

We conclude that the bankruptcy court erred in not according to the Debtor the benefit of the presumption required by Kaneb. And we further conclude that the bankruptcy court committed clear error in finding that the violation of the stay—FAME's failure to remedy its single act of post-petition garnishment for some fourteen months—was not willful.

C. Injury

We have determined that the Debtor established the first two of three requirements of § 362(k)(1): a violation of the stay, committed willfully. In addition to these, she was required to prove that she was injured by the willful violation. 11 U.S.C. §362(k)(1) ("[A]n individual

injured by any willful violation of a stay provided by this section shall recover . . . .") (emphasis added). If she did, then she "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." Id. The bankruptcy court made no finding as to whether, and to what extent, the Debtor was injured by the violation.[12] Nor did it fashion an award of damages.

The record below reflects that the Debtor incurred at least some injury, at least by being deprived of the use of $117.30 for some period of time and possibly the cost of pursuing recovery. It is for the bankruptcy court, in the first instance, to make findings on injury (and we make none). We therefore remand for such findings and rulings as to injury and quantification of damages as may be appropriate.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the portion of the bankruptcy court's judgment determining the Debtor's student loan debt to FAME is not dischargeable under § 523(a)(8), and we **REVERSE** the portion of the judgment determining the Debtor had not established a willful violation within the meaning of § 362(k)(1) and **REMAND** the § 362(k)(1) count for findings and rulings as to injury and, if appropriate, quantification of damages.

[12] The bankruptcy court found that the retention of funds was "*de minimis*," but not that the resulting injury was *de minimis*. The bankruptcy court made no finding at all about injury to the Debtor.