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Ability of the EEOC to Litigate for Compensation on Behalf of a Specific Individual  
Despite Automatic Stay

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**Introduction**

Section 362 of title 11 of the United States Code (the “Bankruptcy Code”) provides for an automatic stay, i.e., a “statutory injunction against efforts outside [a] bankruptcy to collect debts from a debtor under the protections of the Bankruptcy Code.”<sup>1</sup> However, pursuant to section 362(b)(4) of the Bankruptcy Code, a governmental agency may commence or continue an action against a debtor to enforce the agency’s police or regulatory power despite the automatic stay (hereinafter, the “§362(b)(4) Exception”).<sup>2</sup> For the exception to apply, the action of the governmental agency must “protect the public health and safety” as opposed to “a pecuniary interest in property of the debtor.”<sup>3</sup> An agency’s attempt to enforce a money judgment is generally stayed and not subject to the §362(b)(4) Exception.<sup>4</sup> However, whether a governmental agency is permitted to litigate for entry of a money judgment on behalf of a specific individual, despite an automatic stay, remains unclear.

<sup>1</sup> *In re McArthur*, 391 B.R. 453, 459 (Bankr. D.Kan. 2008).

<sup>2</sup> 11 U.S.C. §362(b)(4) (2018).

<sup>3</sup> H.R. REP. NO. 95-595, at 549 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6445.

<sup>4</sup> Bloomberg Law: Bankruptcy Treatise, pt. 1, ch.45, at IV(f)(4), (Samir D. Parikh et al. eds., 2020).

Government agencies will often try to evoke the §362(b)(4) Exception in connection with achieving their ultimate objectives.<sup>5</sup> By way of illustration, the U.S. Equal Employment Opportunity Commission (“EEOC”) “is responsible for enforcing federal laws that make it illegal to discriminate against an . . . employee . . . because of the persons race, color, religion, sex . . . national origin, age . . . , disability or genetic information.”<sup>6</sup> The EEOC retains the ability to file suit against employers who discriminate against employees and remedies include both compensatory and punitive damages depending on the specific facts of the case.<sup>7</sup> To this end, the EEOC typically relies on the §362(b)(4) Exception.

This memorandum analyzes the issue in two parts. Part 1 addresses Congress’s intent when drafting the §362(b)(4) Exception as well as various court interpretations that followed. Part 2 contemplates the question of whether the EEOC acts within the scope of its regulatory power when litigating for monetary judgments on behalf of specific individuals.

## **I. In Order to Comply with the §362(b)(4) Exception, an Agency Action Must Serve an Overarching Public Interest.**

When Congress drafted §362(b)(4), they intended “[a] narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not . . . a pecuniary interest . . . .”<sup>8</sup> Congress provided an exception in §362(b)(4) when “a governmental unit [sues] a debtor to prevent or stop violation of fraud . . . , or similar police or regulatory laws, or [attempts] to fix damages for violation of such law . . . .”<sup>9</sup> In such cases, the automatic stay

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<sup>5</sup> See *NLRB v. E.D.P. Medical Computer Systems, Inc.*, 6 F.3d 951, 957 (2d Cir. 1993); see also *SEC v. Brennan*, 230 F.3d 65, 74 (2nd Cir. 2000).

<sup>6</sup> *Overview*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eoc.gov/overview>.

<sup>7</sup> *Remedies for Employment Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eoc.gov/remedies-employment-discrimination>.

<sup>8</sup> H.R. REP. NO. 95-595, at 549 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6445.

<sup>9</sup> *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986) (quoting H.R. REP. NO. 95-595, at 343 (1977), reprinted in 1978 U.S.Code Cong. & Ad.News 5963, 6299).

does not apply.<sup>10</sup> In providing the §362(b)(4) Exception, Congress signaled that protecting the debtor's interests is not the dominant goal.<sup>11</sup> Courts have devised two tests to determine if the agency action is covered by the §362(b)(4) Exception. For the §362(b)(4) exception to apply, the agency action must pass both the 'pecuniary purpose test' and the 'public policy test.'<sup>12</sup>

Under the pecuniary purpose test, the court contemplates "whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of public safety and welfare."<sup>13</sup> If the government agency attempts to advance a pecuniary interest, the stay will be upheld.<sup>14</sup> The public policy test "distinguishes between government actions that effectuate public policy and those that adjudicate private rights."<sup>15</sup>

#### ***A. What Actions Pass the Pecuniary Purpose Test?***

The conduct of a government agency is generally stayed when action is pursued solely to advance a pecuniary interest of the governmental unit.<sup>16</sup> However, laws often have dual purposes.<sup>17</sup> In *Safety-Kleen, Inc. (Pinewood) v. Wyche*, the court considered the law's primary purpose when determining if the §362(b)(4) Exception applied.<sup>18</sup> Similarly, in *In re Dingley*, the court held that "civil contempt proceedings are [excepted from] the automatic stay under the

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<sup>10</sup> *Id.*

<sup>11</sup> *Penn Terra Ltd. v. Department of Environmental Resources, Com. of Pa.*, 733 F.2d 267, 276–77 (3d Cir. 1984) (explaining that when overarching public policy concerns are involved, it may be proper for an agency to bypass the automatic stay and access the debtor's assets).

<sup>12</sup> *See NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 833 (9th Cir.1991).

<sup>13</sup> *In re First Alliance Mortg. Co.*, 264 B.R. 634, 646 (C.D. Cal.2001) (quoting *In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297 (9th Cir.1997)).

<sup>14</sup> *Thomassen v. Division of Med. Quality Assurance*, 15 B.R. 907, 909 (9th Cir. BAP 1981).

<sup>15</sup> Bloomberg Law: Bankruptcy Treatise, pt.1, ch.45, at IV(f)(4).

<sup>16</sup> *In re Universal Life Church, Inc.*, 128 F.3d at 1299.

<sup>17</sup> Bloomberg Law: Bankruptcy Treatise, pt.1, ch.45, at IV(f)(4) (illustrating that an agency may protect a pecuniary interest while also serving the overarching purpose of promoting public welfare).

<sup>18</sup> 274 F.3d 846, 866 (4th Cir. 2001) (stating that although the interests of the agency are pecuniary, "financial assurance regulations are within the [§362(b)(4)] exception because they serve the primary purpose of deterring environmental misconduct").

government [§362(b)(4)] exception when the proceedings are intended to effectuate the court's public policy interest in deterring litigation misconduct."<sup>19</sup> As such, multiple circuits recognize that an agency is permitted to enforce a pecuniary interest under §362(b)(4) so long as there is an overarching primary purpose relating to public interest.<sup>20</sup>

### ***B. What Actions Pass the Public Policy Test?***

Under the public policy test, an action qualifies for the §362(b)(4) exception if it advances public policy.<sup>21</sup> Thus, a court must consider whether a lawsuit commenced by a governmental entity will effectuate public policy as opposed to simply adjudicate private rights.<sup>22</sup> To complicate the issue, instances may arise where an agency acts on behalf of an individual yet simultaneously effectuates public policy.<sup>23</sup> When an action furthers both a private and a public interest, and the private interest does not significantly outweigh public interest, such would fall within the scope of the §362(b)(4) exception.<sup>24</sup> In contrast, if the action benefits a private interest substantially more than a public one, this should fall outside the realm of the §362(b)(4) exception.<sup>25</sup>

## **II. The EEOC Should be Permitted to Seek Entry of a Money Judgment on Behalf of a Specific Individual.**

### **A. The Pecuniary Purpose Test is Satisfied when the EEOC seeks Entry of a Money Judgment**

When the EEOC litigates on behalf of a specific individual, it often seeks entry of a

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<sup>19</sup> 852 F.3d 1143, 1148 (9th Cir. 2017) (maintaining that civil contempt proceedings may seem pecuniary on their face but are still permitted).

<sup>20</sup> *See, e.g., In re Universal Life Church, Inc.*, 128 F.3d 1294, 1299 (9th Cir.1997); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1108 (9th Cir. 2005); *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 385 (6th Cir. 2001); *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 488 F.3d 112, 112 (2nd Cir. 2007).

<sup>21</sup> Bloomberg Law: Bankruptcy Treatise, pt.1, ch.45, at IV(f)(4).

<sup>22</sup> *Chao*, 270 F.3d at 389.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 390.

<sup>25</sup> *Id.*

money judgment as a remedy.<sup>26</sup> Seeking monetary compensation, on its face, is clearly a pecuniary interest. However, courts have determined that such action nevertheless passes the pecuniary purpose test since there is an overarching purpose relating to public interest.<sup>27</sup>

Likewise, in *General Tel. Co. of the Northwest v. EEOC*, the Supreme Court recognized the role of the EEOC under the 1972 amendments to Title VII:

Although the EEOC can secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by ‘the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.’<sup>28</sup>

Since the overriding public interest in equal employment opportunity is the driving force of the EEOC, courts should allow the agency to enforce their pecuniary interests.<sup>29</sup> In other words, the automatic stay should not bar the EEOC when endeavoring to rectify employment discrimination in the form of monetary compensation.<sup>30</sup>

### **B. The Public Policy Test is Satisfied when the EEOC seeks Entry of a Money Judgment**

To pass the public policy test, public interest must not be significantly outweighed by any benefit received by a specific individual.<sup>31</sup> The EEOC enforces its regulatory laws by litigating on behalf of specific individuals.<sup>32</sup> Nevertheless, the Supreme Court in *General Tel. Co.* noted that “[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it

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<sup>26</sup> *Remedies for Employment Discrimination*, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/remedies-employment-discrimination>.

<sup>27</sup> *See* *EEOC v. Krystal Co.*, 615 B.R. 332, 333 (N.D. Ga. 2020) (explaining that the EEOC only litigated for a money judgment because it was necessary to remedy the violation of its anti-discrimination regulations); *EEOC v. Rath Packing Co.*, 797 F.2d 318, 325–26 (8th Cir. 1986) (“[e]ntry of judgment against debtor in employment discrimination action for injunctive relief and back pay was permitted under statute”).

<sup>28</sup> 100 S.Ct. 1698, 1704 (1980) (citation omitted).

<sup>29</sup> *Id.*

<sup>30</sup> *See id.*

<sup>31</sup> *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 389 (6th Cir. 2001).

<sup>32</sup> *Overview*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/overview>.

acts also to vindicate the public interest in preventing employment discrimination.”<sup>33</sup> In *EEOC v. Shepherd*, the EEOC clarified that it was litigating on behalf of the victim with the primary intention of preventing the defendant from engaging in discriminatory conduct.<sup>34</sup> When the EEOC acts to further the interests of specific individuals, they are primarily serving their purpose of deterring employment discrimination.<sup>35</sup> Therefore, when the EEOC seeks monetary compensation for a specific individual, such does not violate the public policy test since the benefit to the public interest is not significantly outweighed by the benefit to the specific individual.

## **Conclusion**

When the EEOC pursues a monetary judgment on behalf of a specific individual, it does so in a way that serves an overarching public policy interest.<sup>36</sup> Indeed, Congress did not intend to limit the scope of the EEOC's effectiveness by precluding the agency from seeking monetary judgments simply because such judgments are pecuniary and benefit a specific individual.<sup>37</sup> Since the EEOC action passes both the pecuniary purpose test and the public policy test, courts should recognize the act as permissible under the §362(b)(4) Exception and not apply the automatic stay.

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<sup>33</sup> 100 S.Ct. 1698, 1704 (1980).

<sup>34</sup> 2018 WL 4932484 66 Bankr.Ct.Dec. 78 (N.D. Tx. Oct. 11, 2018).

<sup>35</sup> *Id.*

<sup>36</sup> *See General Tel. Co.*, 100 S.Ct. at 1704.

<sup>37</sup> *See, e.g.,* Chao v. Hosp. Staffing Servs., Inc., 270 F.3d 374, 389 (6th Cir. 2001); *In re Dingley* 852 F.3d 1143, 1148 (9th Cir. 2017); *Safety-Kleen, Inc. (Pinewood)*, 274 F.3d 846, 866 (4th Cir. 2001); *In re MTBE Products Liability Litigation*, 488 F.3d 112, 112 (2nd Cir. 2007).