

JUN 30 2010

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	NV-09-1408-DHPa
	)		
ERIC MWANGI and PAULINE	)	Bk. No.	09-24057-BAM
MWICHARO,	)		
	)		
Debtors.	)		
_____	)		
	)		
ERIC MWANGI; PAULINE MWICHARO,	)		
	)		
Appellants,	)		
	)		
v.	)	<b>O P I N I O N</b>	
	)		
WELLS FARGO BANK, N.A.,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on June 16, 2010  
at Reno, Nevada

Filed - June 30, 2010

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Hon. Bruce A. Markell, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: DUNN, HOLLOWELL and PAPPAS, Bankruptcy Judges

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1 DUNN, Bankruptcy Judge:

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3 As part of its standard, national procedures, each night  
4 Wells Fargo Bank, N.A. ("Wells Fargo") runs a computerized  
5 comparison of all newly filed Chapter 7<sup>1</sup> bankruptcy cases against  
6 its list of account holders. Upon discovering that Appellants  
7 had filed a chapter 7 petition, Wells Fargo "froze" Appellants'  
8 accounts and sent a letter to the chapter 7 trustee, seeking  
9 instructions as to disbursement of the funds. No directions were  
10 forthcoming from the trustee. The debtors, claiming 75% of the  
11 funds in the accounts exempt, demanded that Wells Fargo release  
12 funds to them. When Wells Fargo refused, Appellants sought  
13 sanctions for willful violation of the automatic stay. The  
14 bankruptcy court held that the exempt funds in the accounts were  
15 not property of the bankruptcy estate. As a consequence, it  
16 determined that Wells Fargo's failure to release the funds did  
17 not constitute a violation of the automatic stay where the record  
18 did not establish that Wells Fargo was attempting to "collect,  
19 assess or recover" a prepetition claim it had against Appellants.

20 We REVERSE and REMAND for further proceedings.

21 **I. FACTS**

22 Appellants Eric Mwangi and Pauline Mwicharo filed a  
23 voluntary chapter 7 petition on August 3, 2009 ("Petition Date").  
24 On the Petition Date, Appellants held four accounts at Wells  
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26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 All "Rule" or "FRBP" references are to the Federal Rules of  
Bankruptcy Procedure, Rules 1001-9037.

1 Fargo with an aggregate balance of \$17,075.06. Nevertheless, in  
2 their schedule of personal property ("Schedule B") filed on the  
3 Petition Date, the Appellants listed only two accounts at Wells  
4 Fargo: a checking account with a stated value of \$500.00 and a  
5 savings account with a stated value of \$800.00. The Appellants  
6 did not claim the amounts on deposit in either of these accounts  
7 as exempt in their schedule of claimed exemptions ("Schedule C").

8 The Appellants included Wells Fargo as a creditor in the  
9 case for two debts. Wells Fargo was scheduled as an unsecured  
10 creditor owed \$50,000 for credit card debt incurred during the  
11 period 2006-2009. Wells Fargo also was listed as an unsecured  
12 creditor owed \$2,000 based on an equity line of credit incurred  
13 in 2004.

14 When it learned of Appellants' chapter 7 bankruptcy filing,  
15 Wells Fargo placed a "temporary administrative pledge" on their  
16 accounts.<sup>2</sup> Wells Fargo states that in doing so, it was following  
17 an internal standard procedure implemented when notified that one  
18 of its depositors has filed a bankruptcy petition. After  
19 freezing Appellants' accounts, Wells Fargo sent a letter dated  
20 August 6, 2009, to the chapter 7 trustee requesting instructions  
21 as to whom Wells Fargo should distribute the account funds. In  
22 the letter to the trustee, Wells Fargo states that on the  
23 Petition Date:

24 \$17,075.06 became property of the bankruptcy estate,  
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26 <sup>2</sup> Wells Fargo expressly disclaimed that the "freeze" was  
27 implemented to protect any right to set off it might have had as  
28 authorized by Citizens Bank of Maryland v. Strumpf, 516 U.S. 16  
(1995).

1 known as the "Estate Funds." The Estate Funds are now  
2 in bankruptcy status, which means the funds are payable  
3 only to you or upon your order. . . . The Estate Funds  
4 will remain in bankruptcy status until we receive  
direction from you regarding their disposition or on  
October 12, 2009, which is 31 days after the scheduled  
First Meeting of Creditors.

5 Also on August 6, 2009, Wells Fargo sent letters to  
6 Appellants' counsel, which stated that the aggregate funds in the  
7 total amount of \$17,075.06 became property of the bankruptcy  
8 estate on the Petition Date. In its letters to Appellants'  
9 counsel, Wells Fargo states that the account funds "are no longer  
10 available to your client(s)." The letters state further that  
11 Wells Fargo is required by Bankruptcy Code sections 541 and 542  
12 to preserve the Estate Funds and to follow the trustee's  
13 direction with regard to the Estate Funds. The letters disclose  
14 that Wells Fargo had requested instruction from the trustee with  
15 respect to the Estate Funds, but advised that the trustee had "30  
16 days from the First Meeting to object to a claim of exemption for  
17 the Estate Funds." Finally, the letters described what, in Wells  
18 Fargo's view, Appellants' rights were with respect to the Estate  
19 Funds:

20 Ownership of claimed exempt property remains with the  
21 bankruptcy estate until [the time for objecting to  
22 claimed exemptions] elapses or the trustee directs  
23 otherwise. Wells Fargo is prepared to immediately  
follow the trustee's direction regarding the Estate  
Funds, and you may be able to expedite the trustee's  
decision.

24 On August 11, 2009, Appellants filed an amended Schedule B  
25 in which they now included four accounts at Wells Fargo:  
26 checking account #7070 listed with a value of \$10,247.46; savings  
27 account #9955 listed with a value of \$839.42; checking account  
28 #8658 listed with a value of \$5,437.95, and savings account #0424

1 listed with a value of \$550.23. More importantly for purposes of  
2 this appeal, Appellants also filed on August 11, 2009, an amended  
3 Schedule C through which they claimed an exemption in 75% of the  
4 value of each of the Wells Fargo accounts, relying on Nev. Rev.  
5 Stat. § 21.090(1)(g).<sup>3</sup> Neither the trustee nor any other party,  
6

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7 <sup>3</sup> Nev. Rev. Stat. § 21.090(1)(g) provides:

8 The following property is exempt from execution, except  
9 as otherwise specifically provided in this section or  
10 required by federal law:

11 . . .  
12 (g) For any workweek, 75 percent of the disposable  
13 earnings of a judgment debtor during that week, or 50  
14 times the minimum hourly wage prescribed by section  
15 6(a)(1) of the federal Fair Labor Standards Act of  
16 1938, 29 U.S.C. § 206(a)(1), and in effect at the time  
17 the earnings are payable, whichever is greater. Except  
18 as otherwise provided in paragraphs (o), (s) and (t),  
19 the exemption provided in this paragraph does not apply  
20 in the case of any order of a court of competent  
21 jurisdiction for the support of any person, any order  
22 of a court of bankruptcy or of any debt due for any  
23 state or federal tax. As used in this paragraph:

24 (1) "Disposable earnings" means that part of  
25 the earnings of a judgment debtor remaining  
26 after the deduction from those earnings of  
27 any amounts required by law to be withheld.

28 (2) "Earnings" means compensation paid or  
payable for personal services performed by a  
judgment debtor in the regular course of  
business, including, without limitation,  
compensation designated as income, wages,  
tips, a salary, a commission or a bonus. The  
term includes compensation received by a  
judgment debtor that is in the possession of  
the judgment debtor, compensation held in  
accounts maintained in a bank or any other

(continued...)

1 including Wells Fargo, ever objected to the exemptions claimed by  
2 Appellants in the accounts.

3 On August 18, 2009, Appellants' counsel contacted Wells  
4 Fargo to request that the freeze be lifted on the basis that the  
5 Appellants claimed an exemption in a portion of the funds. Wells  
6 Fargo refused to lift the freeze without the trustee's agreement.  
7 On August 25, 2009, Appellants' counsel faxed a letter to Wells  
8 Fargo asserting that Appellants claimed an exemption in 75% of  
9 the account funds. The letter asserted the Appellants' position  
10 that failure to release the account funds to the Appellants was a  
11 violation of the automatic stay, and informed Wells Fargo of  
12 Appellants' intent to file a motion seeking attorney's fees,  
13 sanctions, and punitive damages for the violation.

14 On August 27, 2009, Appellants filed a motion ("Motion")  
15 seeking sanctions pursuant to § 362(k) against Wells Fargo based  
16 upon its alleged intentional violation of the automatic stay-  
17 specifically, §§ 362(a)(3) and (a)(6).

18 The bankruptcy court held a hearing on the Motion on  
19 September 15, 2009, took the matter under submission at that  
20 time, and issued its Memorandum decision on December 10, 2009,  
21 denying the Motion.

22 The bankruptcy court's ruling was premised on its holding  
23 that exempt property never becomes property of the bankruptcy  
24 estate but remains at all times a debtor's property.

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25  
26 <sup>3</sup>(...continued)

27 financial institution or, in the case of a  
28 receivable, compensation that is due the  
judgment debtor.

1 Accordingly, the bankruptcy court determined that no provision of  
2 § 362(a) covering property of the estate protected the account  
3 funds claimed exempt. Finally, the bankruptcy court determined  
4 that because Wells Fargo took no action to "collect, assess or  
5 recover" a prepetition claim it had against Appellants, it did  
6 not violate the automatic stay.

7 Appellants timely filed their notice of appeal on December  
8 18, 2009.

## 9 **II. JURISDICTION**

10 The bankruptcy court had jurisdiction under 28 U.S.C.  
11 §§ 1334 and 157(b) (2) (B). We have jurisdiction under 28 U.S.C.  
12 § 158.

## 13 **III. ISSUES**

14 1. Whether the bankruptcy court erred when it concluded  
15 that exempt property never becomes property of the bankruptcy  
16 estate but remains at all times a debtor's property.

17 2. Whether the Appellants had standing to file and  
18 prosecute the Motion.

## 19 **IV. STANDARDS OF REVIEW**

20 Whether property is property of the estate is a question of  
21 law reviewed de novo. White v. Brown (In re White), 389 B.R.  
22 693, 698 (9th Cir. BAP 2008). Similarly, "[w]e review de novo  
23 whether the automatic stay provision of § 362(a) has been  
24 violated." Cal. Employment Dev. Dep't v. Taxel (In re Del  
25 Mission Ltd.), 98 F.3d 1147, 1150 (9th Cir. 1996) (citation  
26 omitted); Benz v. Dtric Ins. Co. (In re Benz), 368 B.R. 861,  
27 864-65 (9th Cir. BAP 2007). De novo means review is  
28 independent, with no deference given to the trial court's

1 conclusion. See First Ave. W. Bldg., LLC v. James (In re Onecast  
2 Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006).

### 3 V. DISCUSSION

4 Resolution of this appeal requires that we examine the  
5 interplay among four separate provisions of the Bankruptcy Code:  
6 § 541, which defines property of the bankruptcy estate; § 542,  
7 which requires turnover of property of the estate; § 522, which  
8 authorizes debtors to exempt property from the bankruptcy estate;  
9 and § 362(k), which provides that individuals injured by a  
10 willful violation of the automatic stay may recover damages.

11 When a chapter 7 bankruptcy petition is filed, an estate  
12 automatically is created that comprises essentially all property  
13 owned by the debtor. § 541(a); Fitzsimmons v. Walsh (In re  
14 Fitzsimmons), 725 F.2d 1208, 1210 (9th Cir. 1984); Towers v. Wu  
15 (In re Wu), 173 B.R. 411, 413 (9th Cir. BAP 1994). "Deposits in  
16 the debtor's bank account become property of the estate under  
17 section 541(a)(1)." 5 COLLIER ON BANKRUPTCY ¶ 541.09, at p. 541-51  
18 (Alan N. Resnick & Henry J. Sommer, eds., 15th rev. ed. 2010).  
19 More specifically, funds belonging to a debtor held by a bank in  
20 a deposit account "consist[] of nothing more or less than a  
21 promise to pay, from the bank to the depositor . . . ," which the  
22 bank must "'pay' to the trustee (or on his order) . . . except to  
23 the extent that such debt may be offset under section 553 of this  
24 title against a claim against the debtor." Citizens Bank of  
25 Maryland v. Strumpf, 516 U.S. at 20, 21 (emphasis in the  
26 original); § 542(b).

#### 27 A. Strumpf and Wells Fargo's Administrative Hold

28 Despite the suggestions from Wells Fargo to the contrary,

1 and the determinations of some other courts that have considered  
2 Wells Fargo's national policy, the Supreme Court's decision in  
3 Strumpf, although instructive, does not authorize the type of  
4 administrative freeze on bank accounts imposed by Wells Fargo in  
5 the dispute before us.

6 In Strumpf, the Supreme Court was presented with a very  
7 narrow issue, which it was careful to state explicitly:

8 We must decide whether the creditor of a debtor in  
9 bankruptcy may, in order to protect its setoff rights,  
10 temporarily withhold payment of a debt that it owes to  
the debtor in bankruptcy without violating the  
automatic stay imposed by 11 U.S.C. § 362(a).

11 Strumpf, 516 U.S. at 17.

12 Notwithstanding the limited holding in Strumpf, one  
13 bankruptcy court has stated broadly:

14 The Supreme Court has held that an administrative  
15 freeze on an account, which is a promise to pay, does  
16 not violate § 362(a)(3) because the freeze constitutes  
neither a taking of property from the debtor nor an  
exercise of dominion over the debtor's property.

17 Calvin v. Wells Fargo Bank, N.A. (In re Calvin), 329 B.R. 589,  
18 603 (Bankr. S.D. Tex. 2005). A district court similarly found  
19 Strumpf controlling in the context before us:

20 The Court believes that the reasoning of Strumpf is  
21 applicable. The bank accounts at issue here  
22 constituted a promise to pay, from Bank to Debtor. The  
23 administrative freeze amounted to a refusal to perform  
that promise to the Debtor - not an exercise of control  
over Debtor's property.

24 Wells Fargo Bank, N.A. v. Jimenez, 406 B.R. 935, 946-47 (D.N.M.  
25 2008) ("Jimenez II").

26 We believe the Calvin and Jimenez II courts overlook the  
27 context and limited application intended by the Supreme Court in  
28 its decision in Strumpf. First, the Supreme Court emphasized

1 that the bank's temporary refusal to pay did not constitute  
2 exercising control over the funds at issue. Strumpf, 516 U.S. at  
3 21. In fact, the Supreme Court observed it would be an "odd  
4 construction of § 362(a)(7) that required a creditor with a right  
5 of setoff to do immediately that which § 542(b) specifically  
6 excuses it from doing as a general matter: pay a claim to which a  
7 defense of setoff applies." Id. at 20. In Strumpf, the Supreme  
8 Court emphasized and reiterated that "[a]ll that concerns us here  
9 is whether the refusal [to turnover funds on deposit] was a  
10 setoff" in violation of § 362(a)(7).<sup>4</sup> Id. at 19. Ultimately,  
11 the Strumpf court found the administrative hold did not  
12 constitute a setoff in violation of § 362(a)(7) both in light of  
13 § 553 and because the bank had moved for relief from stay to  
14 effectuate a setoff. Id.

15 Significantly, the Supreme Court did not state, as implied  
16 by Wells Fargo, that an administrative freeze could not violate  
17 § 362(a)(3) or § 362(a)(6). What it did say was

18 [W]e will not give § 362(a)(3) or § 362(a)(6) an  
19 interpretation that would proscribe what § 542(b)'s  
20 'except[ion]' and § 553(a)'s general rule were plainly  
21 intended to permit: the temporary refusal of a creditor  
to pay a debt that is subject to setoff against a debt  
owed by the bankrupt.

22 Id. at 21. In short, Strumpf authorizes a bank to impose a  
23 temporary administrative hold to preserve setoff rights.

24 Wells Fargo asserts that even prior to Strumpf, we  
25 recognized that an administrative pledge did not violate the

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26  
27 <sup>4</sup> Section 362(a)(7) stays "the setoff of any debt owing  
28 to the debtor that arose before the commencement of the case  
under this title against any claim against the debtor . . . ."

1 automatic stay, citing Bank of Am. Nat'l Trust and Sav. Ass'n v.  
2 Edgins (In re Edgins), 36 B.R. 480, 483 (9th Cir. BAP 1984).  
3 However, in Edgins, we determined only that the administrative  
4 hold at issue, like the one in Strumpf, did not violate the  
5 automatic stay because the bank was protecting its right to  
6 setoff under § 553. "In this type of situation, banks are not so  
7 much making a determination of ownership as giving notice to the  
8 debtor that they claim an interest in the funds and intend to  
9 prevent dissipation of the bank's claimed interest pending the  
10 court's determination of ownership." Id. at 484 (emphasis added).  
11 Accordingly, Edgins does not apply here.

12       Significantly, Wells Fargo concedes that the account funds  
13 are property of the estate. Wells Fargo also concedes that it  
14 has asserted no right of setoff against the Appellants in this  
15 case. In fact, Wells Fargo represents that its national policy  
16 is not motivated by any right to protect setoff rights generally,  
17 as demonstrated by the fact that the existing case law reflects  
18 that Wells Fargo places administrative freezes on debtors'  
19 accounts even in cases where it is not a creditor of the debtor.  
20 See Jimenez v. Wells Fargo Bank, N.A. (In re Jimenez), 335 B.R.  
21 450, 451 (Bankr. D.N.M. 2005) ("Jimenez I"), rev'd by, Jimenez  
22 II; Calvin, 329 B.R. at 593. Because Wells Fargo is not  
23 attempting to protect setoff rights, the "exception" to turnover  
24 of funds in a deposit account recognized by Strumpf does not  
25 apply in this case.

26 B. Property of the Estate and Exemption Rights

27       Section 522(b) allows an individual debtor to exempt  
28 specific property from liquidation as part of the estate. As

1 recently noted by the Supreme Court, "most assets become property  
2 of the estate upon commencement of a bankruptcy case, see 11  
3 U.S.C. § 541, and exemptions represent the debtor's attempt to  
4 reclaim those assets or, more often, certain interests in those  
5 assets, to the creditors' detriment." Schwab v. Reilly, 560 U.S.  
6 \_\_\_, No. 08-538, slip op. at 13 (June 17, 2010).

7 In order to make exemption claims under § 522(b), § 522(1)  
8 requires that the debtor "file a list of property that the debtor  
9 claims as exempt . . . ." Implementing this provision, Rule 4003  
10 required the Appellants to "list the property claimed as exempt  
11 under § 522 of the Code on the schedule of assets required to be  
12 filed by Rule 1007." Rule 1007(b)(1)(A) required the Appellants  
13 to file their schedules of assets and liabilities "prepared as  
14 prescribed by the appropriate Official Forms . . . ." Appellants  
15 filed their amended Official Form 6C (Schedule C - Property  
16 Claimed as Exempt) on August 11, 2009, claiming an exemption  
17 under Nevada law for 75% of the funds in the accounts.

18 Once a claim of exemption has been asserted, "[u]nless a  
19 party in interest objects, the property claimed as exempt on  
20 [Official Form 6C] is exempt." § 522(1); Taylor v. Freeland &  
21 Kronz, 503 U.S. 638, 643 (1992). Objections are timely if filed  
22 within 30 days after the § 341(a) meeting of creditors is  
23 concluded, or within 30 days after the schedule of property  
24 claimed exempt is amended by the debtor, whichever is later.<sup>5</sup>

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26 <sup>5</sup> Although the Appellants amended their Schedule C in  
27 this case, that amendment did not extend the deadline for  
28 objections where it was filed before the date the § 341(a)

(continued...)

1 See Bankruptcy Rule 4003(b). If the 30-day objection period  
2 mandated by Bankruptcy Rule 4003(b) runs without objection,  
3 “[p]roperty claimed as exempt leaves the estate and reverts in  
4 the debtor . . . .” Kretzer v. DFW Fed. Credit Union (In re  
5 Kretzer), 48 B.R. 585, 588 (Bankr. D. Nev. 1985).

6 When the revesting occurs is the operative question for  
7 purposes of this appeal. We noted in Hyman v. Plotkin (In re  
8 Hyman), 123 B.R. 342, 347 (9th Cir. BAP 1991):

9 [T]he 30-day period fixes the right to an exemption and  
10 the statute as a whole requires that the property  
11 somehow revert. The timing of the reversion, however,  
12 is not apparent by the interplay of these two rules; it  
13 is not necessarily prior to abandonment by the trustee  
14 or immediately following the 30-day period.

15 (Emphasis in original). As we see it, because exemption rights  
16 are determined as of the petition date, see Klein v. Chappell (In  
17 re Chappell), 373 B.R. 73, 77 (9th Cir. BAP 2007), until the  
18 property claimed exempt reverts, the debtor holds an inchoate  
19 interest in the property. An inchoate interest is one “that has  
20 not fully developed, matured, or vested.” Black’s Law Dictionary  
21 830 (9th ed. 2009).

22 Significantly for purposes of this appeal, the Supreme Court  
23 recently affirmed the principle that property does not lose its  
24 status as estate property simply because a claim to exemption  
25 ripens:

26 If an interested party does not object to the claimed  
27 interest by the time the Rule 4003 period expires,  
28 title to the asset will remain with the estate pursuant  
to § 541, and the debtor will be guaranteed a payment

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27 <sup>5</sup>(...continued)  
28 meeting of creditors was concluded.

1 in the dollar amount of the exemption.

2 Schwab v. Reilly, 560 U.S. \_\_\_, No. 08-538, slip op. at 20 (June  
3 17, 2010).

4 The bankruptcy court held:

5 Reading § 522 and § 541 as parts of the same code, it  
6 appears that all of the debtor's property goes into the  
7 estate upon filing, except for property that is  
8 excluded from § 541. Sections 541(b) and (c)(2) then  
9 enumerate some of these specific exclusions. By  
10 declaring that § 522 operates "notwithstanding section  
11 541," § 522 adds exempt property to that list of  
12 exclusions, preventing § 541(a) from sucking all exempt  
13 property into the estate. So property exempted under  
14 § 522 is treated the same as property listed in  
15 § 541(b) and (c)(2); it is not property of the estate,  
16 and it remains the debtor's.

17 Memorandum at 9:1-7. The bankruptcy court's reasoning is  
18 inconsistent with the above-cited authorities.

19 C. Standing

20 Wells Fargo does not dispute that under its national policy  
21 it routinely holds, and in this case held, property of the estate  
22 which is subject to the turnover provisions of § 542(b). It is  
23 undisputed that Wells Fargo did not turn over the account funds  
24 to the trustee. However, Wells Fargo asserts that § 542(b) only  
25 "obligated [it] to pay [the account funds] . . . to the trustee  
26 or his order." In light of the absence of the Strumpf setoff  
27 issue, we might expect Wells Fargo to address what other  
28 "exception" might apply to the requirement that Wells Fargo  
immediately turn over the account funds. But here, Wells Fargo  
appears to assert that no "exception" is required. It contends  
that its "administrative pledge" in this case, when coupled with  
its letter to the trustee seeking instructions, complies with the  
turnover provisions of § 542(b), because it stood willing and

1 able to pay the funds to the trustee "on his order." The trustee  
2 did not request turnover of the account funds. End of story,  
3 says Wells Fargo. What happened to the funds was up to the  
4 trustee, and therefore out of Wells Fargo's control.

5 Wells Fargo contends that because the account funds were  
6 property of the estate, Appellants have no right to compel  
7 turnover of the funds to them because § 542(b) lacks any  
8 reference to debtors or their exemption rights. Wells Fargo  
9 asserts therefore that Appellants lacked the right to demand that  
10 Wells Fargo release any of the account funds until the 31st day  
11 following the § 341(a) meeting of creditors, at which time 75% of  
12 the account funds would no longer be property of the estate.

13 Wells Fargo further contends that during the time the  
14 accounts funds are property of the estate, any action to assert  
15 rights involving these funds belong only to the chapter 7 trustee  
16 pursuant to § 323.<sup>6</sup> Thus, only the trustee, not the Appellants,  
17 could ever have standing to pursue stay violation sanctions under  
18 § 362(a)(3). In this regard, however, Wells Fargo fails to  
19 recognize that turnover issues are not coextensive with issues  
20 relating to application of the automatic stay. As we pointed out  
21 in the Abrams decision, "the failure to return property of the  
22 estate with knowledge of the bankruptcy is a violation of both  
23

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24 <sup>6</sup> Section 323 is entitled "Role and capacity of trustee,"  
25 and provides:

- 26 (a) The trustee in a case under this title is the  
27 representative of the estate.  
28 (b) The trustee in a case under this title has capacity  
to sue and be sued.

1 the automatic stay and of the turnover requirements of the  
2 Bankruptcy Code." Abrams v. Sw. Leasing & Rental, Inc. (In re  
3 Abrams), 127 B.R. 239, 242-43 (9th Cir. BAP 1991) (emphasis  
4 added), citing In re Carlsen, 63 B.R. 706, 711 (Bankr. C.D. Cal.  
5 1986). For that reason, we believe it is irrelevant whether  
6 Wells Fargo's national policy of holding the account funds until  
7 requested by the trustee to release them might have been in  
8 technical compliance with § 542(b), an issue which we do not  
9 decide.

10 Section 362(k)(1)<sup>7</sup> provides in relevant part:

11 [A]n individual injured by any willful violation of a  
12 stay provided by this section shall recover actual  
13 damages, including costs and attorneys' fees, and, in  
appropriate circumstances, may recover punitive  
damages.

14 Section 522's right to claim exemptions in property of the  
15 estate bestows standing on debtors for purposes of § 362(k)(1).<sup>8</sup>

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17 <sup>7</sup> The protections provided by § 362(k) previously were  
18 found at § 362(h). The section was renumbered under the  
19 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23.

20 <sup>8</sup> Indeed, in light of § 362(k)(1)'s provision of a remedy  
21 for "an individual" injured by any willful violation of the stay,  
22 it appears primarily to have been designed to protect the rights  
of individual debtors, since, while frequently they are  
23 individuals, trustees always represent the estate and may not be  
entitled to recover damages under § 362(k). See, e.g., Havelock  
24 v. Taxel (In re Pace), 67 F.3d 187, 192-93 (9th Cir. 1995)  
25 ("[W]hile a trustee can be an 'individual' if the trustee is a  
26 natural person (as opposed to, e.g., a corporate entity), the  
individual's status as trustee precludes any finding that the  
27 trustee suffered any damages as an individual, because any harm  
suffered in the form of costs and attorney's fees is actually  
28 incurred by a thing, viz., the bankruptcy estate, and not by the  
(continued...)

1 As parties with a claimed interest in estate property, the  
2 Appellants had standing to pursue sanctions for a stay violation.

3 D. Section 362(a)(3) and Ninth Circuit Case Law

4 The stay of § 362(a) arises automatically when a bankruptcy  
5 case is filed. Once the stay existed, Wells Fargo determined at  
6 its own risk whether to observe it.

7 Section 362(a)(3) expressly prohibits "any act . . . to  
8 exercise control over property of the estate." "The 'exercise  
9 control' clause of § 362(a)(3) was added by the Bankruptcy  
10 Amendments and Federal Judgeship Act of 1984. Pub. L. No. 98-  
11 353, 1984 U.S.C.C.A.N. (98 Stat.) 371. Congress did not provide  
12 an explanation of that amendment." In re Del Mission Ltd., 98  
13 F.3d at 1151. Nevertheless, the Ninth Circuit has developed a  
14 limited body of case law addressing the application of  
15 § 362(a)(3).

16 As early as 1991, we interpreted § 362(a)(3) to proscribe  
17 the mere knowing retention of estate property. See In re Abrams,  
18 127 B.R. at 241-43. The Ninth Circuit also has held that the  
19 knowing retention of estate property violates § 362(a)(3). See  
20 In re Del Mission Ltd., 98 F.3d at 1151. The Ninth Circuit has  
21 clarified that direct control over estate property is a  
22 prerequisite to a finding that § 362(a)(3) has been violated.

23 \_\_\_\_\_  
24 <sup>8</sup>(...continued)  
25 trustee as a natural person." (Citations omitted)). This  
26 interpretation is reinforced by the terms of § 362(k)(2), which  
27 provides: "If such violation is based on an action taken by an  
28 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."  
(Emphasis added).

1 Chugach Timber Corp. v. N. Stevedoring & Handling Corp. (In re  
2 Chugach Forest Products, Inc.), 23 F.3d 241, 244 (9th Cir. 1994).

3 In Del Mission Ltd., the Ninth Circuit held that the  
4 creditor violated § 362(a)(3) by refusing to turn property of the  
5 estate over to the chapter 7 trustee. The fundamental issue  
6 addressed in Del Mission Ltd. was whether the creditor exercised  
7 control over property of the estate by retaining possession of  
8 intangible estate property, i.e., where the trustee was coerced  
9 by the tax creditor to pay prepetition tax claims in order to  
10 obtain turnover of other estate property (a liquor license). In  
11 Del Mission Ltd., the Ninth Circuit clarified that to effectuate  
12 the purpose of the automatic stay, "the onus to return estate  
13 property is placed upon the possessor[.]" In re Del Mission  
14 Ltd., 98 F.3d at 1151, citing In re Abrams, 127 B.R. at 243. The  
15 Ninth Circuit rejected the argument made here by Wells Fargo that  
16 it had no obligation to relinquish possession of the deposit  
17 funds until the chapter 7 trustee specifically requested them.  
18 In re Del Mission Ltd., 98 F.3d at 1152.

19 It has long been the determination of this panel that the  
20 turnover provisions of the Bankruptcy Code are to be self-  
21 effectuating, subjecting to sanctions a party that willfully  
22 fails to comply. See In re Abrams, 127 B.R. at 242-43. We held  
23 in Abrams that a creditor's failure to turn over a repossessed  
24 car after receiving notice of a chapter 7 petition constituted a  
25 violation of the automatic stay.

26 Wells Fargo asserts it did not exercise control over  
27 property of the estate. We disagree. Wells Fargo could have  
28 paid the account funds to the trustee; it did not. Wells Fargo

1 could have released the account funds claimed exempt to the  
2 Appellants when demand was made; it did not. Wells Fargo could  
3 have sought direction from the bankruptcy court, by way of a  
4 motion for relief from stay or otherwise, regarding the account  
5 funds; it did not. Instead, it chose to hold the funds until a  
6 demand was made for payment that it alone deemed appropriate. If  
7 that is not "exercising control over" the funds, we don't know  
8 what is.

9 In order to force Wells Fargo to relinquish account funds  
10 Wells Fargo "froze" postpetition, the Appellants were not  
11 required to seek a determination from the bankruptcy court that  
12 they were eligible for the protection of the automatic stay, that  
13 the trustee had abandoned the account funds to them, or that  
14 their claim of exemption in a portion of the account funds was  
15 valid. The Appellants asserted an exemption in the account  
16 funds. In contravention of both Abrams and Del Mission Ltd., the  
17 effect of Wells Fargo's actions in this case was to place the  
18 burden on the Appellants to obtain the return of property of the  
19 estate in which they claimed an exemption.

20 In Del Mission Ltd., the Ninth Circuit, discussing the  
21 policy issues involved in evaluating the conduct of a creditor  
22 who exercises control over property of the estate, stated that  
23 "the underlying purpose of the automatic stay [is] to alleviate  
24 the financial strains on the debtor." In re Del Mission Ltd., 98  
25 F.3d at 1151.

26 [I]f persons who could make no substantial adverse  
27 claim to a debtor's property in their possession could,  
28 without cost to themselves, compel the debtor or his  
trustee to bring suit as a prerequisite to returning  
the property, the powers of a bankruptcy court and its

1 officers to collect the estate for the benefit of  
2 creditors would be vastly reduced.

3 Id., quoting Knaus v. Concordia Lumber Co. (In re Knaus), 889  
4 F.2d 773, 775 (8th Cir. 1989).

5 The impact of Wells Fargo's national policy is to turn on  
6 its head the balance between rights of parties legislatively  
7 created. As a result of the policy, every party, except Wells  
8 Fargo, whose rights are impacted by the administrative freeze  
9 will need to take action.

10 E. Issues on Remand

11 Whether Wells Fargo violated the automatic stay is a  
12 threshold question. A further material issue is whether any such  
13 violation was "willful" within the meaning of § 362(k).

14 A "willful violation" does not require a  
15 specific intent to violate the automatic  
16 stay. Rather, the statute provides for  
17 damages upon a finding that the defendant  
18 knew of the automatic stay and that the  
19 defendant's actions which violated the stay  
20 were intentional. Whether the party believes  
21 in good faith that it had a right to the  
22 property is not relevant to whether the act  
23 was "willful" or whether compensation must be  
24 awarded. [In re Bloom, 875 F.2d 224, 227  
25 (9th Cir. 1989).]

26 A violation of the stay is thus willful when a creditor  
27 acts intentionally with knowledge of the bankruptcy.  
28 [Knaus, 889 F.2d at 775].

29 In re Abrams, 127 B.R. at 243.

30 "The 'willfulness test' for automatic stay violations merely  
31 requires that: (1) the creditor know of the automatic stay; and  
32 (2) the actions that violate the stay be intentional." Ozenne v.  
33 Bendon (In re Ozenne), 337 B.R. 214, 220 (9th Cir. BAP 2006),  
34 quoting In re Peralta, 317 B.R. 381, 389 (9th Cir. BAP 2004).

1 See also In re Pinkstaff, 974 F.2d 113, 115 (9th Cir. 1992). We  
2 have held that the duty to relinquish property of the estate also  
3 has a reasonableness element. In re Abrams, 127 B.R. at 243  
4 (creditor must relinquish property of the estate within a  
5 reasonable time period after notice of the bankruptcy case).

6 When Wells Fargo took no action after receiving no  
7 instructions from the trustee as to how to disburse the account  
8 funds, which were indisputably estate property, Wells Fargo  
9 "exercised control" over those funds, and it violated the  
10 automatic stay. On remand, the bankruptcy court should determine  
11 whether Wells Fargo's continuation of the administrative freeze  
12 and retention of the account funds claimed exempt, in the absence  
13 of instructions from the trustee, was reasonable in light of the  
14 Appellants' demand that the subject account funds be released for  
15 their use. If the bankruptcy court determines that Wells Fargo's  
16 conduct entailed a willful violation of the stay under § 362(a),  
17 then the bankruptcy court will need to determine what, if any,  
18 damages the Appellants are entitled to under § 362(k)(1). We  
19 leave those determinations to the bankruptcy court.

## 20 **VI. CONCLUSION**

21 The bankruptcy court erred when it determined that Wells  
22 Fargo did not exercise control over property of the estate when  
23 it placed its administrative freeze on Appellants' account funds.  
24 Appellants have standing to seek sanctions against Wells Fargo  
25 pursuant to § 362(k) for willful violation of the stay with  
26 respect to their interest in estate property.

27 We REVERSE and REMAND to the bankruptcy court for further  
28 proceedings in light of our conclusions herein.