No. 09-1525

AUG 16 2010

In The Supreme Court of the United States

LOGAN T. JOHNSTON, III,

Cross-Petitioner,

v.

MELVIN STERNBERG,
STERNBERG & SINGER, LTD.,

Respondents.

On Cross-Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Cross-petitioner incurred thousands of dollars in attorneys' fees when prosecuting a damages action under 11 U.S.C. § 362(h), now § 362(k)(1), for an automatic stay violation. Nearly all of the fees were incurred after cross-respondent had ceased violating the stay. Does 11 U.S.C. § 362(h)[1] abrogate the American Rule by permitting an award of attorneys' fees charged for litigating a damages claim, when the statute provides only for "actual damages" resulting from a stay violation?

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[1] Section 362(h) of the Bankruptcy Code was renumbered as Section 362(k)(1) but otherwise unchanged in 2005. Pub. L. 109-8 § 305(1)(B), (C). The actions at issue took place before the amendment. To avoid confusion, Section 362(h) is used for all section references in this brief in opposition to the cross-petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Bankruptcy Code Section 362(h) provides that "an individual injured by any willful violation of [the automatic stay] shall recover actual damages, including costs and attorneys' fees." It does not provide for a recovery of damages "and" attorneys' fees. Debtors commonly need attorneys to communicate with creditors and sometimes even sue to stop creditor stay violations, and their damages "include" attorneys' fees incurred in that effort. In the opinion below, the Ninth Circuit appropriately held that Section 362(h) covers only fees charged for correcting a stay violation, and does not authorize attorneys' fees that are incurred in prosecuting a damages action after the automatic stay violation has stopped. *See* Pet. App. at 22-23.

The Ninth Circuit remanded for the bankruptcy court to determine the amount of attorneys' fees payable. The fee portion of the Ninth Circuit's decision is therefore unripe because it is not final, unlike the emotional distress damages award at issue in the petition for certiorari. Information about the amount of attorneys' fees is important to the Court's understanding of how Section 362(h) operates as a practical matter. The record in this case on the fee award issue is not sufficiently developed to enable the Court to render a fully considered opinion on the fee issue.

Not only is the case itself not ready for review, the circuit split over this issue identified in the cross-petition is overstated and certiorari would be

premature. Two of the three circuit-level cases that the cross-petition cites do not even mention the issue, and the third merely adopted two lower court opinions without analysis. The Ninth Circuit's opinion below provides the only comprehensive discussion of the meaning of Section 362(h)'s reference to attorneys' fees, and it applies the American Rule in accord with this Court's cases distinguishing attorneys' fees as sanctions or damages from true fee-shifting statutes. Contrary to the assertions made by cross-petitioner, the jurisprudence and commentary on the question presented are still in their infancy. This issue is best left to percolate in the lower courts.

REASONS TO DENY THE WRIT

1. The Issue Presented In The Cross-Petition Is Not Final And Not Ripe For Review.

A "final decision" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). The Ninth Circuit's ruling on attorneys' fees is not final because it leaves unanswered the amount of attorneys' fees to be awarded. *See Riley v. Kennedy*, 553 U.S. 406, ___, 128 S. Ct. 1970, 1981 (2008) ("[A]n order resolving liability without addressing a plaintiff's requests for relief is not final."); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-43 (1976). It is thus difficult to assess consequences for the parties of the Ninth Circuit's fee

ruling in terms of fees allowed and fees denied. If it takes review now, the Court will undertake to review the question presented in the abstract, disembodied from its application to the facts of the case. *See Wrotten v. New York*, ___ U.S. ___, ___, 130 S. Ct. 2520, 2521 (2010) (statement of Sotomayor, J., respecting the denial of certiorari) (noting that if the Court reviewed case that had been remanded for further factual determination, the Court would lose the benefit of the full consideration of the lower courts).

The bankruptcy court's assessment of how much of its $69,000 attorneys' fee award is attributable to correcting the stay violation and how much relates to litigation of the damages action will inform this court's understanding of how Section 362(h) functions in practice. If, as expected, the pre-correction portion is small, it will highlight the potential for abuse if the Court accepted cross-petitioner's argument. *See In re Still*, 117 B.R. 251, 254 (Bankr. E.D. Tex. 2000) (noting vast disparity between amount of attorneys' fees requested and alleged actual damages, and stating that "Debtor's prosecution of a *de minimis* violation of the stay should not be ennobled by [an] award of attorney's fees"); *In re Roman*, 283 B.R. 1, 11 (B.A.P. 9th Cir. 2002) (same). Without this information, the Court must speculate as to how Section 362(h) fees motivate attorneys and debtors. The Court cannot look to other cases for guidance, because, as explained below, the case law is as barren as the record is here.

These kinds of concerns form the backdrop for this Court's long-standing rule that petitions for certiorari are not ripe for review when further proceedings on remand lie ahead. *See, e.g.*, *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari, and noting that where the court of appeals had remanded the case for determination of an appropriate remedy, certiorari was not yet appropriate, and that the petitioner could raise the same issues in a later petition after final judgment had been rendered); *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979) (granting certiorari on issue after previously denying certiorari, and noting that previous denial "came at an interlocutory stage in the proceedings" because the district court had retained enforcement jurisdiction over the case); *Cal. Nat'l Bank v. Stateler*, 171 U.S. 447, 449 (1898) ("[I]f a superior court makes a decree fixing the liability and rights of the parties, and refers the case to a . . . subordinate court for a judicial purpose, such, for instance, as a statement of account upon which a further decree is to be entered, the decree is not final."); *Am. Constr. Co. v. Jacksonville, T. & K. Ry. Co.*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

The Ninth Circuit's decision is final with respect to the emotional distress damages award at issue in the petition for certiorari, which was fixed at a sum certain and is subject to review by this Court now. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) ("[A]n unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final."). However, the attorneys' fees part of the decision is subject to bifurcation, not final, and can be considered later, after the fee record is fully developed. *See id.* at 201-02; *Hughes Tool Co. v. Trans-World Airlines, Inc.*, 409 U.S. 363, 365-66 n.1 (1973); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488 n.6 (1968). Appellate courts may hear the merits portion of an appeal, and decline to hear the attorneys' fees portion when the attorneys' fees are not quantified. *See Am. Society for Testing & Materials v. Corrpro Cos.*, 478 F.3d 557, 580 (3d Cir. 2007) (noting that this is the "inescapable" conclusion to be drawn from *Budinich*); *cf. McCarter v. Ret. Plan for the Dist. Mgrs. of the Am. Family Ins. Group*, 540 F.3d 649, 652-53 (7th Cir. 2008) (addressing merits and dismissing portion of appeal relating to attorneys' fees because fees were unquantified); *Cooper v. Salamon Bros.*, 1 F.3d 82, 85 (2d Cir. 1993) (same).

Budinich's holding – that an unresolved attorneys' fee issue does not render the decision non-final – involved application of 28 U.S.C. § 1291, which governs only appeals to the courts of appeal, but the Court recognized that it had applied the same

principle to its own cases. 486 U.S. at 201-02 (noting this Court's willingness to "split the 'merits'"). This makes good sense, because the rationale for the rule is that claims for attorneys' fees are "collateral" to the merits because they "do[] not remedy the injury giving rise to the action." *Id.* 200. Importantly, for purposes of this case, the fact that attorneys' fees are statutorily authorized does not convert the action into one on the merits. *Id.* at 201 (noting that for purposes of finality, "an unresolved issue of attorney's fees for the litigation at hand should not turn upon the characterization of those fees by the statute or decisional law that authorizes them").

Thus, the Court should deny the cross-petition because the development of the record on attorneys' fees is important for the Court to make a fully informed decision. This does not impede review of the petition for certiorari, because the attorneys' fees portion of the case is severable from the emotional distress issue raised in the petition.

2. The Split In The Circuits Involves Only One Other Circuit, Which Did Not Even Analyze The Question Presented.

Cross-petitioner cites three cases as evidence of a circuit split, *In re Johnson*, 575 F.3d 1079 (10th Cir. 2009); *In re Repine*, 536 F.3d 512 (5th Cir. 2008); and *In re Price*, 42 F.3d 1068 (7th Cir. 1994).

Cross-petitioner is correct that the Fifth Circuit held in *Repine* that attorneys' fees for prosecuting

a Section 362(h) damages action are available. But *Repine* simply adopted, without explanation, the reading of Section 362(h) by two lower courts: *Mitchell v. BankIllinois*, 316 B.R. 891 (S.D. Tex. 2003), and *In re Still*, 117 B.R. 251 (Bankr. E.D. Tex. 2000). *See Repine*, 536 F.3d at 522. *Repine* cited *Still* only for the proposition that "a debtor could collect attorneys' fees incurred in prosecuting a stay violation." *Repine*, 536 F.3d at 522. *Still* is in accord with the Ninth Circuit's fee ruling because the *Still* court declined to award *any* attorney's fees given the absence of actual damages. *Still*, 117 B.R. at 254. *Still* noted that awarding attorneys' fees for prosecuting damages actions can be the equivalent of "killing an ant with an elephant gun" when other damages are small. *Id.* The bankruptcy court in *Mitchell* awarded attorneys' fees as part of the same judgment that corrected a stay violation by ordering turnover of the debtor's wrongfully retained property. 316 B.R. at 895. This is consistent with the Ninth Circuit's fee ruling in the decision below because the stay violation had not stopped at the time the judgment was entered. *See* Pet. App. at 20 (noting that "actual damages" only cease accruing "[o]nce the violation has ended"). *Mitchell* also approved attorneys' fees for work done in resisting a creditor's appeal, but without analysis. 316 B.R. at 904.

Thus, *Repine* rests on a dubious, unexamined foundation. Even though *Repine* ruled on the question presented in this case, it may well prove unpersuasive to other courts of appeals for that reason. *See,*

e.g., *McLean v. United States*, 566 F.3d 391, 398 (4th Cir. 2009) (rejecting Tenth Circuit opinion that performed no analysis to support its holding); *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1195 (9th Cir. 2000) (rejecting Eleventh Circuit opinion that performed no analysis and merely adopted an unpublished First Circuit opinion); *see also* Pet. App. at 23 (lack of legal analysis warranted not following *Repine*).

Neither *Price* nor *Johnson* address the question presented, even implicitly, and a point of law that is not discussed in an opinion is not authoritative. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 & n.29 (1984); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *Webster v. Fall*, 266 U.S. 507, 511 (1925); *Cf. Budinich*, 486 U.S. at 201 (acknowledging that a previous decision of this Court implicitly supported Petitioner's argument, but rejecting that argument when it was "squarely presented").

In *Price*, the Internal Revenue Service had violated the automatic stay. 42 F.3d at 1069-70. The Seventh Circuit analyzed whether the United States had waived sovereign immunity under 11 U.S.C. § 106(a). *Id.* at 1071. The cross-petition here quotes a passage from *Price* stating that if there had been no stay violation, there "would have been no need to expend the attorneys' fees and costs." Cross-pet. at 9 (quoting *Price*, 42 F.3d at 1074). But *Price* did not address whether attorneys' fees were "actual damages" under Section 362(h). The context of that

statement was an evaluation of whether the debtor's claim against the government for violation of the stay "arose out of the same transaction or occurrence" as the IRS' claim against the debtor for unpaid taxes. 42 F.3d at 1072-73.

Johnson concerned whether dismissal of the underlying bankruptcy case divested the court of jurisdiction over a stay violation adversary proceeding. 575 F.3d at 1081. The Tenth Circuit expressly declined to review the method used for determining the amount of the fees because the issue had been waived. *Id.* at 1085-86.

The lower court decisions cited by cross-petitioner suffer from the same lack of analysis. Three of those cases do not even cite Section 362(h). *See In re Newlin*, 29 B.R. 781, 787 (Bankr. E.D. Pa. 1983); *In re Conti*, 42 B.R. 122 (Bankr. E.D. Va. 1984); *In re Gray*, 41 B.R. 759 (Bankr. S.D. Ohio 1984). Instead, *Newlin* and *Conti* applied the Equal Access to Justice Act, 28 U.S.C § 2412, and *Gray* relied on "contempt" powers. *See Newlin*, 29 B.R. at 787; *Conti*, 42 B.R. at 128-29; *Gray*, 41 B.R. at 763. Moreover, the stay violation in *Gray* appears to have continued until the entry of the court's order awarding attorneys' fees because the creditor apparently did nothing to rectify the entry of the contempt order in state court that violated the stay. 41 B.R. at 761-62. Thus, *Gray* does not conflict with the decision below.

The rest of the lower court cases cited by cross-petitioner do cite Section 362(h), but do not discuss,

much less decide, the question presented in this case. And in several of these cases, the award of attorneys' fees was part of the same order that mandated correction of the automatic stay violation. *See In re Carrigg*, 216 B.R. 303, 306 (B.A.P. 1st Cir. 1998); *In re Sharon*, 234 B.R. 676, 688 (B.A.P. 6th Cir. 1999); *In re Freigo*, 149 B.R. 224, 284 (Bankr. M.D. Va. 1992). Thus, the stay violations had not ceased at the time the attorneys' fees were awarded. The fees were incurred in remedying the stay violations, and would be included as damages under the decision below.

The only cases cited by cross-petitioner providing a hint of consideration that could bear on the question presented are *In re Roman*, 283 B.R. 1 (B.A.P. 9th Cir. 2002), and *In re Walsh*, 219 B.R. 873 (B.A.P. 9th Cir. 1998). These lower court cases are no longer good law, since they arose within the Ninth Circuit and reflect the development of the law there, which has culminated in the decision now before this Court.

Cross-petitioner cites sundry treatises and other authorities for the proposition that there is a "consensus" among scholars and commentators supporting his position. Cross-pet. at 10. All of the authorities cited, save one, suffer from the same problem as the case law – there is no examination of the issue. Cross-petitioner recognizes as much, stating that "the leading bankruptcy treatises make no distinction between fees incurred to enforce the stay and fees incurred to recover damages resulting from a stay violation." *Id.* There is no distinction because the issue is not addressed. The Conte treatise is the only

scholarly work cited by cross-petitioner that analyzes Section 362(h), and it addresses a point only tangentially relevant here – whether attorneys' fees incurred in defending against an appeal of a judgment finding liability under Section 362(h) are available. *See* 3 Alba Conte, *Attorney Fee Awards* § 22:3 n.73 (3d ed. 2010). This is no consensus.

While the cross-petition cites many cases, to borrow from Gertrude Stein, there is no there there. Cross-petitioner finds support in implications from its authorities, not from any reasoned analysis. In the vast majority of the cases, the issue was not even brought to the courts' attention. Given the lack of a fully developed division in the case law, this Court should deny the cross-petition, as it is likely that this issue will resolve itself in the lower courts over time.

3. The Ninth Circuit Was Correct On This Issue And Other Circuits Need The Opportunity To Fully Consider It.

The opinion below is in accord with this Court's case law. The Court has repeatedly approached potential fee-shifting statutes by beginning with the "bedrock principle" of the American Rule, which requires each side to bear its own attorneys' fees. *See Hardt v. Reliance Std. Life Ins. Co.*, ___ U.S. ___, ___, 130 S. Ct. 2149, 2156-57 (2010); *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975). The Ninth Circuit began there as well. *See* Pet. App. at 16 (applying American Rule). Deviations from the

American Rule must be clearly shown from the text of the statute. *Hardt*, 130 S. Ct. at 2156-57; *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533-34 (1994) (departures from the American Rule should draw "explicit statutory language and legislative comment"); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 720 (1967) ("When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied."), *superseded by statute on other grounds*, 15 U.S.C. § 1117(a). The decision below makes clear that the only thing that is explicit in Section 362(h) is that debtors may recover attorneys' fees incurred in stopping a violation of the automatic stay. Beyond that, there is nothing in the statutory language, and the legislative history is silent on the issue of attorneys' fees.

The root of cross-petitioner's argument on the merits is that debtors will not be "made whole" if Section 362(h) is not construed to include attorneys' fees incurred in prosecuting a damages action. Cross-pet. at 15. But this is merely a criticism of the American Rule. *See Summit Valley Indus. v. Local 112, United Brotherhood of Carpenters & Joiners*, 456 U.S. 717, 725 (1982); *F.D. Rich Co. v. U.S. for the Use of Indus. Lumber Co.*, 417 U.S. 116, 128-31 (1974), *superseded by statute on other grounds*, 31 U.S.C. § 3905(j). An award of compensatory damages is generally sufficient to protect the rights of an aggrieved party. *See Summit Valley*, 456 U.S. at 724.

The Ninth Circuit's understanding of Section 362(h) is also consistent with this Court's holdings in *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1990), and *Business Guides, Inc. v. Chromatic Communs. Enters., Inc.*, 498 U.S. 533 (1991), which distinguish "sanctions" or "damages" fee statutes from fee-shifting statutes. In *Cooter & Gell*, the Court rejected the argument that Federal Rule of Civil Procedure 11 provided for attorneys' fees on appeal because the Rule provided for all "expenses incurred because of the filing of the" offending paper.[1] 496 U.S. at 406. Rather, Rule 11 does not extend liability indefinitely, and provides only for those expenses "directly caused" by the filing. *Id.* at 406. Fees incurred on appeal are not directly caused by the filing, but rather are caused by "the district court's sanction and the appeal of that sanction." *Id.* at 407. In *Business Guides*, the Court noted that Rule 11 was not a fee-shifting statute, but a sanctions statute. 498 U.S. at 553. Sanctions statutes "do not shift the entire cost of litigation; they shift only the cost of a discrete event." *Id.* Courts routinely refer to Section 362(h) as providing for "sanctions." *See, e.g.*, *In re Johnson*, 575 F.3d at 1081 n.2 (10th Cir. 2009); *Mann v. Chase Manhattan Mortg. Corp.*, 316 F.3d 1, 3 (1st Cir. 2003); *see also In re S. Cal. Sunbelt Dev., Inc.*, 608 F.3d 456, 464 (9th Cir. 2010) (noting that the decision below is premised on the fact that Section 362(h) is a "damages" statute,

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[1] The text of Rule 11 has changed since the Court decided *Cooter & Gell*, but the reasoning in that case is still apt.

not a fee-shifting statute, and stating: "The distinction here is between those statutes which permit recovery of attorney's fees as damages, and which are therefore consistent with the American Rule, and those which permit the recovery of attorney's fees *qua* attorney's fees and therefore create an exception to the American Rule." (internal quotation marks and citations omitted)).

Cross-petitioner makes the same argument as the unsuccessful petitioner in *Cooter & Gell*, – *i.e.* any attorneys' fees that result from a violation of the automatic stay are compensable, no matter how attenuated from the violation. But attorneys' fees incurred in litigation to recover damages are a direct result of the bankruptcy court's decision to award sanctions, not a direct result of the violation itself, because the "discrete event" of the violation has ended. *See Budinich*, 486 U.S. at 200 (attorneys' fees are typically "collateral" to the merits and "do[ ]not remedy the injury giving rise to the action"); Pet. App. at 22 (noting that prosecution of a Section 362(h) damages action is "attenuated from the actual bankruptcy"); *Lockary v. Kayfetz*, 974 F.2d 1166, 1177-78 (9th Cir. 1992) (holding that under *Cooter & Gell* a party is not entitled to attorneys' fees for preparing and supporting a motion for sanctions under Rule 11 because those fees are not "direct" costs). Had Congress intended the result that Cross-Petitioner advocates, it would have provided for "actual damages *and* attorneys' fees," not "actual damages, *including* attorneys' fees."

Debtors often involve attorneys in correcting stay violations. Creditors may refuse to turn over property of the estate or continue collection activities such as making telephone calls or sending dunning letters. Congress recognized that attorneys' fees incurred in stopping such creditor may be part of a debtor's damages and authorized damages awards that include fees in Section 362(h). That does not undercut the applicability of the American Rule to attorneys' fees incurred while prosecuting a Section 362(h) damages action. Other circuit courts are likely to agree with the Ninth Circuit's fee ruling when they fully analyze the issue. The Court should not review attorneys' fees under Section 362(h) until and unless a meaningful circuit split arises after courts consider and adopt or criticize and alter the Ninth Circuit's analysis.

CONCLUSION

While the petition for certiorari should be granted, the contingent cross-petition should be denied.

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