

Case Note Prepared and Submitted By,

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JURISDICTION:

What is the scope of available remedies for violation of the automatic stay under 11 U.S.C. § 362(k)?

In re Repine, No. 06-20807, 2008 WL 2801898 (5th Cir. July 22, 2008).

In an important bankruptcy case for lawyers, the Fifth Circuit, in *In re Repine*, held that the automatic stay applied to a judgment creditor's actions in attempting to collect her attorney's fees during the pendency of the bankruptcy case. Further, the court found the attorney's actions were a willful violation of the automatic stay, which properly resulted in damages being awarded under 11 U.S.C. § 362(k).

Appellant Patsy Young ("Young") represented Elizabeth Pollard-Repine ("Pollard") in connection with a child support enforcement action against Appellee Ronald Eugene Repine ("Repine"), in which Young accumulated attorney's fees in the amount of \$2,027 in her successful prosecution of Repine.¹ The Family Court ordered Repine to pay this amount to Young in a money judgment. Later, on July 1, 2003, Repine filed for bankruptcy under Chapter 13 through his bankruptcy attorney ("Mills"). Mills specifically informed Young that Repine's filing of a Chapter 13 bankruptcy petition automatically stayed all actions against Repine, including Pollard's child support judgment and Young's corresponding judgment for attorney's fees. At this time, Young was also warned that any effort to collect her attorney's fees from Repine would violate the stay.

Notwithstanding the automatic stay imposed by the bankruptcy petition, Pollard and Repine negotiated a deal for the settling the child support enforcement action. On September 11, the Bankruptcy Court entered an agreed order ("Order") to lift the stay to allow Pollard to exercise her state court rights and enforce the child support action. This Order was specific to Pollard, and did not lift the stay as to any other party. On September 23, Young violated the stay when she threatened Repine regarding payment of her attorney's fees. The Bankruptcy Court, on September 25, ordered Young to appear and show cause why she should not be held in contempt for violation of the stay – despite being personally served, Young failed to appear and a warrant was issued for her arrest. Upon her arrest, the Bankruptcy Court admonished Young for her efforts to collect fees in violation of the stay, and subsequently released her. Nevertheless, Young continued her collection efforts.

¹ As part of the family court judgment, Repine was ordered incarcerated for 180 days, and to be held there past that until all child support arrears of \$22,859 were paid.

On January 2004, Repine then filed this action against Young pursuant to 11 U.S.C. § 362(h), seeking damages and attorney's fees, for Young's willful violation of the automatic stay.² Following trial, the Bankruptcy Court ruled in favor of Repine, awarding \$27,280 in actual damages; \$5,000 in punitive damages; and \$33,720 in attorney's fees. The District Court affirmed, and Young appealed to the Fifth Circuit.

On appeal, Young raised five arguments: (1) Young contends that the automatic stay did not apply to her actions; (2) Young contends that her actions did not cause any damage to Repine; (3) Young contends that there is no evidence to support an award of damages; (4) Young contends that emotional damages are not actual damages and therefore cannot be recovered; and (5) Young contends that Repine was not entitled to attorney's fees.

Addressing the arguments in order, the Court found Young's actions violated the stay, following the test laid out in *In re Chestnut*, 422 F.3d 298, 302 (5th Cir. 2005), and affirmed the District Court's findings.³ The Court held that the range of remedies available for an automatic stay violation can include attorney's fees, actual and punitive damages, including lost wages. Further regarding damages, the Court found that there was no "clear error" in the Bankruptcy Court's determination of damages, and as such affirmation was appropriate. To recover punitive damages, however, "egregious conduct" must be shown on the violator's part.⁴ Here, agreeing with the Bankruptcy Court, the Court found Young's conduct egregious, and again affirmed that part of the damage award.

Turning to the issue of damages for emotional injury, the Court held that in some cases emotional injury damages can be recovered for a willful stay violation if the debtor can set forth, at a minimum, "specific information" concerning the damages caused. In this context, the Court noted that the debtor is required to set forth "specific information" concerning the damages caused by his emotional distress rather than relying only on "generalized assertions." In the case at bar, this was a burden Repine could not show, and the Court vacated the corresponding damage award.

Finally, in upholding the Bankruptcy Court's award of attorney fees to Repine as proper, the Court adopted the position taken by the lower courts in the Fifth Circuit, and held that it is proper to award attorney's fees that were incurred in prosecuting a § 362(k) claim. *See Mitchell v. BankIllinois*, 316 B.R. 891, 901-04 (S.D. Tex. 2004); *see also In re Still*, 117 B.R. 251, 254-55 (Bankr. E.D. Tex. 1990).

Accordingly, the Court vacated the award for emotional injury damages and affirmed the District Court order affirming the Bankruptcy Court in all other respects.

² Section 362(h) was re-codified into § 362(k) per the Bankruptcy Abuse Prevention Consumer Protection Act of 2005, which post-dates Repine's Chapter 13 petition. Accordingly, the Court referred to the current section, § 362(k), as did the District Court.

³ There are three elements for a claim under § 362(k): (1) Young must have known of the existence of the stay; (2) Young's acts must have been intentional; and (3) Young's acts must have violated the stay. *In re Chestnut*, 422 F.3d at 302.

⁴ The Fifth Circuit adopted the definition of egregious conduct as conduct which requires "egregious, intentional misconduct on the violator's part." *In re Repine*, 2008 WL 2801898, at *5.