ORIGINAL

IN THE SUPREME COURT OF OHIO

PNH, INC. and RONALD CREATORE	)	**APPEAL NO.: 10-1430**
	)	
Appellants,	)	
	)	**ON APPEAL FROM THE**
vs.	)	**MAHONING COUNTY COURT,**
	)	**SEVENTH APPELLATE DISTRICT**
ALFA LAVAL FLOW, INC.	)	
	)	
Appellee.	)	

MERIT BRIEF OF APPELLANTS, PNH, INC. AND RONALD M. CREATORE

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STATEMENT OF FACTS

This case arises from Appellants, Ronald M. Creatore ("Creatore") and PNH, Inc. ("PNH") filing of a civil complaint against Appellee, Alfa Laval Flow, Inc. ("Alfa Laval") in the Mahoning County Court of Common Pleas for, inter alia, abuse of process and unfair business competition, which occurred in, and tortious interference, which occurred before the bankruptcy case of *In re: Girton, Oakes & Burger, Inc.*, Case No. 03-41957 in the U.S. Bankruptcy Court for the Northern District of Ohio. Alfa Laval moved to dismiss the civil claims pursuant to Ohio Civ. R. 12(b)(1) for lack of subject matter jurisdiction arguing that the Bankruptcy Reform Act of 1978, as amended (the "Bankruptcy Code") preempted such state law claims. (Supp. 16) The parties briefed the issue and the trial court held an oral argument on the matter. (Supp. 227-58) Considering the issue solely a legal one, no testimony or other evidence was presented at the hearing. The facts set forth in this brief are based on the allegations of Creatore and PNH made in the case.

The trial court granted Alfa Laval's motion and dismissed Creatore and PNH's claims for lack of subject matter jurisdiction based on federal law preemption of state law. (Appx. 27) The Seventh District Court of Appeals affirmed the dismissal and Creatore and PNH now appeal the Seventh District's decision. (Appx. 4)

Alfa Laval manufactured and sold food and beverage processing equipment. (Supp. 25) Girton, Oakes & Burger, Inc. ("GO&B") was the primary distributor of Alfa Laval's products in Ohio, New York and Pennsylvania. (Supp. 25) The distribution arrangement between GO&B and Alfa Laval was not exclusive however, and GO&B quietly manufactured and sold its own products under its private label, BuyPEP. (Supp. 25)

In early 2003, Creatore, president of GO&B, learned that his fellow GO&B shareholders and

officers, William Sayavich ("Sayavich") and David Barnitt ("Barnitt"), committed financial malfeasance with respect to GO&B's secured lender, Provident Bank ("Provident"). (Supp. 25) As a result, Creatore terminated the employment of both Sayavich and Barnitt and placed others in the industry, including Alfa Laval, on notice of the confidentiality and non-compete provisions of the Close Corporation Agreement ("CCA") entered into by GO&B, Creatore, Sayavich and Barnitt. (Supp. 25-26)

Meanwhile, Alfa Laval had carried an account receivable of approximately one million dollars dating back prior to 2001 (a million dollars of which was incurred before Creatore became an owner) but wanted to address this balance and the problems that GO&B was having with Provident. (Supp. 3 and Oct. 24, 2007 Response to Summary Judgment Motion) This prompted executives of Alfa Laval to meet with Creatore to discuss GO&B's delinquent invoices. (Supp. 26) At the meeting, Alfa Laval presented a plan to minimize the impact on Alfa Laval if Provident called GO&B's loan and foreclosed. (Supp. 26) Alfa Laval's proposal required Creatore to agree not to compete. (Supp. 26) Creatore refused to accept Alfa Laval's proposal. (Supp. 26) Instead, Creatore decided to purchase the Provident loans through PNH, an entity he incorporated solely for that transaction. (Supp. 26) At the same time, Barnitt and Sayavich contacted Alfa Laval and, at its behest, and in violation of confidentiality provisions in the CCA, disclosed confidential information to Alfa Laval including the existence of GO&B's competing product line (BuyPep) and Creatore's intended loan purchase. (Supp. 26)

Despite Alfa Laval's non-exclusive arrangement with GO&B, Alfa Laval became very upset about GO&B's competing product line. (Supp. 26) At that time, Barnitt and Sayavich learned Creatore was purchasing the Provident Loan and that the sale was scheduled to close on April 23,

2003. (Supp. 26-27) Again, in violation of the confidentiality provisions of the CCA, Barnitt's attorney informed Alfa Laval's attorney of the closing date. (Supp. 27) Less than one hour after PNH closed on the loan purchase, Alfa Laval filed a Chapter 7 (liquidation) involuntary bankruptcy petition against GO&B in the U.S. Bankruptcy Court for the Northern District of Ohio, Case No. 03-41957. (the "GO&B bankruptcy court") (Supp. 27) Creatore and PNH argue that the timing of Alfa Laval's filing of the involuntary petition in relation to the closing of the Provident loan persuasively established that Barnitt and Sayavich provided confidential information to Alfa Laval in violation of the CCA.

Alfa Laval, as a creditor of GO&B holding a delinquent account, had the legal right to initiate the involuntary bankruptcy proceeding and did so with two other GO&B creditors under 11 USC § 303 which requires three petitioning creditors to bring an involuntary bankruptcy petition. The two other petitioning creditors are not a part of this litigation because they did not later abuse the bankruptcy process for ulterior purposes. However, Alfa Laval ultimately abused the bankruptcy process to further its unlawful ulterior purposes -- namely to eliminate Creatore as a competitor.

Alfa Laval immediately sought and had appointed a Gap Interim Trustee, Mark Beatrice ("Beatrice"), and immediately thereafter Creatore was terminated as an employee and officer of GO&B. (Supp. 27) Creatore then began competing on his own. (Supp. 5) Inside of the bankruptcy case, Alfa Laval sought to enjoin Creatore's competition. (Supp. 27) Alfa Laval attempted to misappropriate from GO&B and use against Creatore the non-competition provisions GO&B and Creatore entered into in the CCA. Alfa Laval did this by filing a motion for injunctive relief against Creatore claiming the covenant not to compete as its own. (Supp. 27) The Bankruptcy Court refused to entertain the motion, indicating to Alfa Laval that only Beatrice as Trustee of GO&B,

could seek such relief on behalf of GO&B and then, only through the filing of a properly authorized adversarial complaint. (Supp. 27)

Nevertheless, the next day, Alfa Laval defiantly filed the adversarial complaint, but this time it named Beatrice on behalf of GO&B, as a co-plaintiff alongside itself. (Supp. 1) While the adversarial complaint was purportedly brought by Beatrice as the Trustee, in reality it was brought at the insistence of Alfa Laval, written by Alfa Laval, and executed only by Alfa Laval's attorney. (Supp. 28) Neither Beatrice nor any attorney on his behalf executed the adversarial complaint. (Supp. 13) With the adversarial complaint filed, Alfa Laval, again without Beatrice's signature, filed a second improper motion seeking to enjoin Creatore from competing. (Supp. 28) In essence, Alfa Laval, a **non-debtor** to the bankruptcy, improperly used a bankruptcy adversarial proceeding to attempt to eliminate another **non-debtor**, Creatore, from competing against it. Beatrice eventually declined to pursue Alfa Laval's request to enjoin Creatore from competing and Beatrice settled the adversarial complaint. (Supp. 28) Alfa Laval refused to participate in the settlement and ultimately dismissed its complaint "without prejudice." (Supp. 263) Ironically, in its dismissal Alfa Laval specifically **reserved its right to "assert in other jurisdictions or venues any claims**, allegations or defenses related to or asserted in this matter against..." Creatore and PNH. (Supp. 263)

On May 11, 2005, Creatore and PNH filed the complaint at issue herein against Alfa Laval in the Mahoning County Court of Common Pleas, asserting claims for abuse of process and tortious interference. After three years of litigation, Alfa Laval moved to dismiss the complaint for lack of subject matter jurisdiction. (Supp. 16) At the hearing on Alfa Laval's motion, the trial court repeatedly expressed concern that its exercise of jurisdiction over the instant case required permission from the GO&B Bankruptcy Court to avoid violating the automatic stay under 11 U.S.C.

§ 362. (Supp. 248-9) Creatore and PNH maintained that no permission was required because they were not suing GO&B or any other bankruptcy debtor. (Supp. 248-9)

On February 2, 2009, the trial court granted the motion to dismiss, finding Creatore's claims were preempted by the Bankruptcy Code. (Appx. 27)

On February 27, 2009, Creatore and PNH filed their appeal of the trial court's dismissal. Simultaneously, although maintaining no such permission was required, Creatore and PNH brought the trial court's concerns to the Bankruptcy Court by filing a motion for relief from the automatic stay to determine if "permission from the Bankruptcy Court" or relief from stay was necessary and, if so, to obtain such relief. On March 19, 2009, the Bankruptcy Court held an oral hearing and on March 20, 2009 issued an order denying the motion for relief as moot because relief from stay was not necessary to bring the state court action. (Supp. 260 and Appx. 28) While the legal issue of preemption was not before the bankruptcy court, the testimony of Beatrice at the hearing and the findings of the court establish state court jurisdiction and strongly militates against preemption. Specifically, Beatrice as trustee testified in the hearing and the court made findings all establishing that the instant litigation has no affect on the assets or administration of the GO&B bankruptcy estate. (Supp. 260 and Appx. 28) Based on the GO&B bankruptcy court's order, Creatore and PNH had the appeal remanded back to the trial court to consider a motion to vacate the dismissal order. Despite the trustee's testimony and the court's findings, the trial court denied the motion to vacate. (Appx. 30) Creatore and PNH appealed the denial of the motion to vacate and prosecuted the same along with the previously filed appeal.

On June 29, 2010, the Seventh District Court of Appeals affirmed the trial court's decision regarding subject matter jurisdiction. (Appx. 4) It held moot the remaining appealed issues

concerning the production of allegedly attorney-client privileged documents and a motion to amend the complaint. (Appx. 25) Creatore and PNH now appeal to this Court to hear and resolve the subject matter jurisdiction issue.

ARGUMENT

Proposition of Law

State law torts between non-debtors arising from the abuse of adversarial proceedings in Federal Bankruptcy Court and which do not concern a substantive or "core" matter under the Bankruptcy Code are not preempted by the Bankruptcy Code.

A. Standard of Review.

Issues regarding subject-matter jurisdiction are reviewed by this Court de novo which "requires an independent review of the lower court's decision without deference to that court's decision." *In re Protest Against Jerome Twp. Zoning Referendum Petition on New California Woods*, 162 Ohio App.3d 712, 2005-Ohio-4189, at ¶8, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711.

B. The Standard for Applying Preemption.

The Supremacy Clause states in relevant part: "this Constitution, and the laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. When there is a conflict between state and federal law and the Supremacy Clause is invoked, state laws are left "without effect" and are preempted with federal law. *Maryland v. Louisiana* (1981), 451 U.S. 725, 746, 101 S.Ct. 2114. Preempton is an affirmative defenses for which the defendant, here Alfa Laval, bears the burden of proof. *Brown v. Earthboard Sports USA, Inc.* (C.A. 6, 2007),

481 F.3d 901, 912. Generally, preemption occurs in one of the following ways: express preemption, field preemption or conflict preemption. *Talik v. Fed. Marine Terminals, Inc.* (2008), 117 Ohio St.3d 496, 885 N.E. 2d 204, at ¶21-23. "Field" or "implied" preemption occurs where congressional intent to preempt is "impliedly contained in [a statute's] structure and purpose." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n* (1992), 505 U.S. 88, 98, 112 S.Ct. 2374. The question of whether federal law impliedly preempts state law turns on Congress' intent. *Cippollone v. Liggett Group, Inc.* (1992), 505 U.S. 504, 516, 112 S. Ct. 2608.

Here the court of appeals correctly recognized that the "Bankruptcy Code does not explicitly prohibit state law tort claims that arise from bankruptcy proceedings," but incorrectly found that the state tort claims were impliedly preempted using field preemption. (Appx. 13) No matter which category of preemption is applied, the U.S. Supreme Court has provided a comprehensive baseline standard for determining when state laws are preempted. The United States Supreme Court calls for a narrow interpretation of congressional intent concerning preemption because such a narrow interpretation is consistent with both federalism concerns and the historic primacy of areas of traditional state regulation. See *Medronic, Inc. v. Lohr*, in which the U.S. Supreme Court held:

> First, because the States are independent sovereigns in our federal system, we have long presumed that **Congress does not cavalierly pre-empt state-law causes of action. In <u>all</u> pre-emption cases, <u>and particularly in those in which Congress has "legislated ... in a field which the States have traditionally occupied</u>,"** *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947), we **"start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."** *Ibid.; Hillsborough Cty.,* 471 U.S., at 715-716, 105 S.Ct., at 2376; cf. *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 22, 107 S.Ct. 2211, 2223, 96 L.Ed.2d 1 (1987). Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the *scope* of its intended invalidation of state law, see *Cipollone,* 505 U.S., at 545-546, 112 S.Ct., at 2632-2633 (Scalia, J., concurring in judgment in part and dissenting in part), **we used a**

> **"presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express [preemption] command** in *Cipollone. Id.,* at 518, 523, 112 S.Ct., at 2618, 2621. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.
>
> Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103, 84 S.Ct. 219, 222, [11 L.Ed.2d 179] (1963), that **"[t]he purpose of Congress is the ultimate touchstone" in <u>every</u> pre-emption case.** See, *e.g., Cipollone,* 505 U.S., at 516, 112 S.Ct., at 2617; *Gade,* 505 U.S., at 96, 112 S.Ct., at 2381-2382; *Malone v. White Motor Corp.,* 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978). As a result, **any understanding of the scope of a pre-emption statute must rest primarily on "a fair understanding of *congressional purpose.* "** *Cipollone,* 505 U.S., at 530, n. 27, 112 S.Ct., at 2624, n. 27 (opinion of Stevens, J.). Congress' intent, of course, primarily is discerned from the language of the pre-emption statute **and the "statutory framework" surrounding it.** *Gade*, 505 U.S., at 111, 112 S. Ct., at 2390 (Kennedy, J., concurring in part and concurring in judgment). **Also relevant, however, is the "structure and purpose of the statute as a whole,"** *id.,* at 98, 112 S.Ct., at 2383 (opinion of O'Connor, J.), as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law. (1996), 518 U.S. 470, 485-6, 116 S.Ct. 2240. [Bracketed, underlined and bold language added]

The standard set forth in *Medtronic* was recently repeated by the U.S. Supreme Court in *Bates v. Dow Agrosciences, LLC,* (2005), 544 U.S. 431, 449, 125 S.Ct. 1788, wherein it held:

> Because the States are independent sovereigns in our federal system, we have long presumed that **Congress does not cavalierly pre-empt state-law causes of action. In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention <u>clear</u> <u>and</u> <u>manifest</u>.** *Id.* [Internal quotations and citations removed, bold and underlined language added.]

In *Bates* the U.S. Supreme Court also added an instruction that courts have a duty when considering alternative readings of federal statutes "to accept the reading disfavoring pre-emption." Id. at 432. It also generally expressed the "Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of **implied** pre-emption." Id. at 459. [Emphasis added].

The Seventh District's decision here challenges, and indeed, flies in the face of the U.S. Supreme Court's direction disfavoring preemption in general and especially when preemption is implied. The Seventh District defiantly dismissed as inapplicable the U.S. Supreme Court's instructions finding *Bates* not applicable to its preemption analysis only because it dealt with preemption by a different federal statute, the Federal Insecticide, Rodenticide and Fungicide Act. (Appx. 21) This rejection of the U.S. Supreme Court's preemption standard is plain error. As stated in *Medtronic*, the above cited standards apply to "all" preemption cases (whether express or implied) where federal law might preempt state law in areas of traditional state law coverage. *Medtronic,* 518 U.S. at 485. Laws concerning the abuse of legal proceedings have, of course, long been a traditional area of state law coverage. In *Trussell v. Gen. Motors Corp.* (1990), 53 Ohio St.3d 142, 144, 559 N.E.2d 732, this Court held: "Ohio law, like the English common law before it, has long recognized a right to recover in tort for the misuse of civil and criminal actions as a means of causing harm." *Trussell* citing *Pope v. Pollock* (1889), 46 Ohio St. 367, 368-371, 21 N.E. 356. Furthermore, as later explained, state courts in Ohio and elsewhere routinely hear and decide state law claims for misuse and abuse of both state and federal court proceedings.

As required by *Bates* and *Medtronic*, this Court's preemption analysis must begin by assuming that the state law claims asserted here are *not* preempted. It must then determine if there is a "clear and manifest" congressional intent in the Bankruptcy Code to rebut that presumption. *Bates* and *Medtronic*. In other words, it must determine whether the Bankruptcy Code clearly and manifestly preempts state tort causes of action arising in a civil litigation adversary proceeding where: (1) the litigants are not debtors; (2) the outcome of the subsequent litigation neither affects the administration of the debtor's estate nor the debtor's property; and (3) the subject of the litigation

does not concern a substantive or "core" bankruptcy law or proceeding thereon. The Bankruptcy Code does not so preempt.

C. Congress Has Not Expressed a Clear and Manifest Intent for the Bankruptcy Code to Preempt the Instant State Tort Claims.

1. The scope of the Bankruptcy Code's preemptive effect is limited by its central purposes and the instant claims fall outside that narrowed field.

The very purpose of the Bankruptcy Code is to provide honest debtors with a fresh start. *Marrama v. Citizens Bank of Mass.* (2007), 549 U.S. 365, 367, 127 S.Ct. 1105. More specifically, its central purposes include the expeditious and equitable distribution of the assets of the debtor's estate and the "centralized resolution of **purely** bankruptcy issues." *In re Gandy* (C.A. 5, 2002), 299 F.3d 489, 495 and 498. [Emphasis Added]. Because the Bankruptcy Code does not expressly preempt the claims here, these central purposes help define the "field" Congress intends to occupy within the Bankruptcy Code and thus the scope of its preemption is narrowly limited by these purposes.

Recently, two legal scholars analyzed the scope of preemption within the context of the Bankruptcy Code. Their analysis provides particular guidance here:

> In cases when the [Bankruptcy] Code does not supply a clear answer, the bankruptcy courts are "bound by the holding of the U.S. Supreme Court in *Erie Railroad Co. v. Tomkins* that '[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State*** There is no general federal common law.'" This rule reflects the absolute limit on federal judicial power. Thus, **complete preemption of state law by the Bankruptcy Code is not reconcilable with the structure and purpose of the Code itself.** Oleksandra Johnson, *The Bankruptcy Code as Complete Preemption: The Ulitmate Trump?*, 81 Am. Bankr. L.J. 31, 63,64 (2007), quoting Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 Notre Dame L. Rev. 633, 635 (2004). [Bracketed language supplied.]

The claims at issue here have no effect on the Bankruptcy Code's goal of providing the debtor with a fresh start and have no effect on the distribution or administration of the debtor's

estate. Nor do the claims involve "purely bankruptcy issues" (i.e., substantive or "core" matters). Rather, the case at bar involves claims brought by non-debtors, Creatore and PNH against another non-debtor, Alfa Laval. The claims themselves are for abuse of process and unfair competition – both purely state law tort claims that just happened to arise within the context of GO&B's bankruptcy proceeding. Moreover, the state tort claims Creatore and PNH assert against Alfa Laval in the instant case have **no effect** on the debtor or the administration of its estate. If Creatore and PNH won a judgment against Alfa Laval, the judgment would in no way impact the GO&B estate. In other words, no part of any sum won by Creatore and PNH would go to the debtor or its creditors.

The fact that these claims have no effect on the debtor was at the forefront in the March 19, 2009 bankruptcy court hearing. During that hearing, the following testimony and comments were made which conclusively prove that the instant litigation has no effect on the debtor GO&B:

1. U.S. Bankruptcy Court Trustee Mark Beatrice, assigned to the GO&B case, stated:

   > I don't rise to oppose or support the Motion [the Motion for Relief from stay] necessarily, I just thought I would make a comment or two on the record that I do agree that **the claims that are asserted in the State Court action do not include or affect the bankruptcy debtor or the debtor's estate**, and in fact, if there is , as a result of what's happened in the State Court action, an adversary filed in this Court asserting those same claims, **I would probably still attempt to proceed with the final administration of the case because I don't believe the administration would be affected by that adversary action**. (Supp. 260) [Emphasis and bracketed text added].

2. The GO&B bankruptcy court stated:

   > I'm going to actually deny the Motion for Relief from Stay as moot, does not appear to effect, well the stay doesn't appear to be in effect with respect to this lawsuit. The **debtor is not a party to the suit. It does not appear to effect (sic) the property of the estate**, and to the extent that the lawsuit has been dismissed, there's simply no relief that this Court can give. (Supp. 261) [Emphasis added].

Finally, The GO&B bankruptcy court held in the order filed from the hearing:

> Debtor Girton, Oakes & Burger ("Debtor") is not a party to the State Court Case, **and the State Court Case does not affect any property of the estate.** (Appx. 26) [Emphasis added].

The Seventh District noted that the GO&B bankruptcy court commented that "the allegations in the State Court case that the Court has read appear to go to the good faith of the filing [of the involuntary bankruptcy petition] by Alfa Laval, which... is not something that another creditor can assert..." (Appx. 24) It is important to note that the legal issue of preemption was not before the GO&B bankruptcy court and therefore the preemption issue was not briefed or argued before it. The only issue before the GO&B bankruptcy court was the motion for relief from the automatic stay. The only issue relevant to that inquiry was the effect of this litigation on the debtor. Because this litigation has absolutely no impact on the debtor (the claims are brought against Alfa Laval not the debtor) the motion was properly discarded as moot. (Appx. 29) Furthermore, contrary to the GO&B bankruptcy court's comment, Creatore and PNH have repeatedly alleged that the involuntary petition was filed against GO&B in good faith. Indeed, one of the essential elements of an abuse of process claim is "that a legal proceeding has been set in motion in proper form and with probable cause." *Robb v. Chagrin Lagoons Yacht Club* (1996) 75 Ohio St.3d 265, 270, 662 N.E.2d 9.[1] Therefore, if Creatore and PNH allege a bad faith filing of the petition, their claim for abuse of process would be immediately defeated.

The above cited testimonial evidence and written rulings conclusively establish that Creatore and PNH's claims will not frustrate or interfere with any central purposes of the Bankruptcy Code.

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1 The three elements for an abuse of process claim are (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. *Robb,* 75 Ohio St.3d at 270.

Because the central goals of the Bankruptcy Code are not implicated by the claims asserted here, such claims fall outside the narrow "field" Congress intended to occupy with the Bankruptcy Code, to wit: the expeditious and equitable distribution of the assets of the debtor's estate and the "centralized resolution of **purely** bankruptcy issues." *Gandy*, 299 F.3d at 495. [Emphasis Added]

2. Congress intended for state courts to adjudicate civil claims, such as those at bar, that are not "related to" a bankruptcy proceeding or that are "non-core" in that they merely "arise in" or are only "related to" bankruptcy proceedings.

In 28 U.S.C. § 1334, Congress clearly evidenced its design and intent to permit state tort remedies for those harmed by tortious conduct not "related to" or merely "related to" or "arising in" a bankruptcy case. 28 U.S.C. § 1334 establishes and determines the parameters of jurisdiction of federal courts and state courts over bankruptcy matters. It states in pertinent part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts **shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.** [Emphasis and Underlining Added].

Exclusive jurisdiction under 28 U.S.C. § 1334(a) is narrowly reserved for matters "under title 11." These matters are specifically central or "core" to the bankruptcy process because each "invokes a substantive right provided by title 11 or a proceeding that by its nature could only arise in the context of a bankruptcy case." *In re: Willcox & Gibbs, Inc.,* 314 B.R. 541, 544 (Bankr. D. Del., 2004). "Core" bankruptcy proceedings are those which arise only in bankruptcy or that involve a right created by federal bankruptcy law. *In re: Wood* (C.A. 5, 1987), 825 F. 2d 90, 97. In other words, these "core" matters provide the mechanisms to accomplish the central purposes of the Bankruptcy Code, to provide honest debtors with a fresh start and the expeditious and equitable

distribution of the debtor's estate. A bankruptcy court has "**original and exclusive** jurisdiction" over these "core" proceedings. 28 U.S.C. § 1334 (a). [Emphasis Added]. Such matters include: who may be a debtor (11 U.S.C. § 109), involuntary petitions (11 U.S.C. § 303), notice of the bankruptcy to creditors and others (11 U.S.C. § 342), the automatic stay of proceedings against the debtor and estate property (11 U.S.C. § 362), the use, sale and lease of estate property (11 U.S.C. § 363), the handling of executory contracts and unexpired leases (11 U.S.C. § 365), the filing and allowance of claims and expenses (11 U.S.C. § 501 - 503), the priority of creditors and claims (11 U.S.C. § 507), exemptions (11 U.S.C. § 522), the effect of a discharge (11 U.S.C. § 524), determining property of the estate (11 U.S.C. § 541), turnover of property of the estate (11 U.S.C. §§ 542 - 543), liens on property of the estate (11 U.S.C. §§ 544 - 546) and, preferences, fraudulent transfers, and post-petition transactions (11 U.S.C. §§ 547 - 549).[2]

Conversely, bankruptcy courts have **limited power** to hear proceedings that are not "core." 28 U.S.C. § 157(c)(1). In the event that a bankruptcy court, under the concurrent jurisdiction of 28 U.S.C. § 1334(b), hears a matter that is not "core" but is otherwise "related to" a bankruptcy case, the bankruptcy court must submit its proposed findings to the district court and the district court will then enter a final judgment on the matter. 28 U.S.C. § 157(c)(1) "Non-core" proceedings are those proceedings, "otherwise **related to** a case under title 11." 28 U.S.C. § 157(c)(1). [Emphasis added]. The standard test for determining "related to" jurisdiction under 28 U.S.C. § 1334(b) "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Robinson v. Michigan Consol. Gas Co. Inc.* (C.A. 6, 1990), 918 F.2d 579, 583. If a case fails to meet the minimum requirement of "related to" jurisdiction, the bankruptcy court does

2 A full listing of "core proceedings" can be found in 28 U.S.C. §157(2).

not even have concurrent jurisdiction, it has no jurisdiction. Accordingly, bankruptcy courts have, "original, **but not exclusive**" jurisdiction over "non-core" proceedings, but only if the proceedings are "related to" a bankruptcy proceeding. 28 U.S.C. § 1334(b). [Emphasis Added].

The Northern District of Illinois Bankruptcy Court used this very analysis when it remanded to an Illinois state court a claim of malicious prosecution arising out of an adversarial proceeding over which it presided. *In re: Tan,* No. 95B 25570, 1999 WL 253108 (Bankr.N.D.Ill., Apr. 26, 1999). The *Tan* Court held:

> Forest Partners is not a debtor. Forest Partners has never filed a petition in bankruptcy and therefore cannot have suffered false claims against its bankruptcy estate... Thus, the malicious prosecution suit is not an administrative matter that can exist only in the context of a bankruptcy case; it is not a proceeding arising in a case under title 11.
>
> In most Circuits, a **proceeding is "related to" a case under title 11 if its outcome conceivably could have any effect on the bankruptcy estate**. The Third Circuit first enunciated this test: ...An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate...
>
> **Forest Partners' state law malicious prosecution claim against the Defendants is not related to the Debtor's bankruptcy. Overlap between the bankrupt's affairs and another dispute is insufficient unless its resolution also affects the bankrupt's estate or the allocation of its assets among creditors...**
>
> Even should Forest Partners prevail in this suit and obtain a judgment for more than $30 million, not one penny of its judgment would go to the Debtor's bankruptcy estate. **Therefore, even under the more lenient "conceivable effect" test of other circuits, Forest Partners' suit is not "related to" a proceeding under title 11**. *Id.* at 4. [Emphasis added, internal citations and quotations removed].

As described in detail above, although Alfa Laval and the bankruptcy trustee, at the behest of Alfa Laval, violated numerous procedural laws of the Bankruptcy Code, the instant case contains no claims arising under substantive bankruptcy law. Therefore, even if the claims raised in the instant

case meet the "related to" test, they are at best "non-core" bankruptcy matters over which a bankruptcy court shares jurisdiction with the state courts pursuant to 28 U.S.C. § 1334(b). Alternatively, and more likely, as the *Tan* court found, the claims asserted here completely fail the "related to" test and the bankruptcy court has no jurisdiction at all. Under either alternative, Congress' design expressly grants state courts jurisdiction over these claims. It is unlikely that at the same time Congress granted jurisdiction to the state courts for these types of claims it held the inconsistent intent to preempt the law upon which such claims would be based.

In fact, Congress encouraged bankruptcy courts to respect state law by abstaining from hearing certain matters involving state law and interests. 28 U.S.C. § 1334(c)(1) states that:

> Nothing in this section prevents a district court... in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

If a bankruptcy court is asked to apply state law, it should, and sometimes must, defer to the state court. *Matter of Bradey, Texas Mun. Gas Corp.* (C.A. 5, 1991), 936 F.2d 212, 218. "Bankruptcy Courts should be reluctant to entertain questions which may be equally well resolved elsewhere." *First State Bank and Trust Co. v. Sand Springs State Bank* (C.A. 10, 1976), 528 F.2d 350, 354. Congress' instruction to bankruptcy courts to defer to state courts further evidences its intent **not** to preempt state claims that are not "core" to the bankruptcy process.

As the U.S. Supreme Court explained in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, where Congress has indicated its awareness of the involvement of state law in an area of federal legislation, yet has remained silent regarding preemption of state law in that field, a court should be even more reluctant to find preemption. (1989), 489 U.S. 141, 166-167, 109 S.Ct. 971. Justice O'Conner writing for a unanimous U.S. Supreme Court stated:

> Its [Congress'] silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness. **The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them.** Id. [Bracketed language and emphasis added].

The Bankruptcy Code provides clear evidence of Congress' strong awareness of state law. Indeed, the Bankruptcy Code demonstrates more than an intention to simply tolerate the tension between state and federal law, it actually encourages the use of state law and state court jurisdiction for all but the narrow "core" matters central to the bankruptcy process.

Congress clearly did not intend preemption here. Instead, it narrowly confined exclusive bankruptcy jurisdiction to the bankruptcy courts only for matters that are "core." Further, it provided non-exclusive bankruptcy court jurisdiction concurrent with state or district court jurisdiction over those matters that are "related to" a bankruptcy proceeding, and even then, pursuant to 28 U.S.C. § 157(c)(1) only gave them the power to make recommendations to the district court which holds the power to issue a final order. Lastly, for proceedings that do not affect the assets of or the administration of the bankruptcy estate and are thus not "related to" bankruptcy, such as the instant case, Congress gave the bankruptcy court no jurisdiction.

Congress could not have intended federal bankruptcy law preemption over matters which it did not grant bankruptcy court jurisdiction to consider. This notion is particularly persuasive given Congress' acute awareness of the role of state law in bankruptcy proceedings and its obvious bend towards the application of state law and state court jurisdiction in all but "core" bankruptcy matters.

3. <u>Recent case law properly considering congressional intent has held that preemption does not apply to claims nearly identical to those in the instant case.</u>

While the question presented here is a matter of first impression for this Court, other courts

have recently examined the issue. Most notably, in *Graber v. Fuqua*, 279 S.W.3d 608 (Tex. 2009), the Texas Supreme Court found:

> The question in this case is whether a state malicious prosecution claim is preempted by the federal bankruptcy regime simply **because the claim arose out of the filing of an adversary action** in a bankruptcy proceeding. **We hold that under the facts of this case, Congress did not intend for such a claim to be preempted**. Id. at 609-10. [Emphasis Added].

In *Graber*, Richard Fuqua ("Fuqua") filed for bankruptcy. Id. at 610. In his bankruptcy, Thomas Graber ("Graber") and his law firm, Hopkins & Sutter, filed an adversary proceeding on behalf of their client, Sunbelt Savings, FSB ("Sunbelt"), alleging that Fuqua defrauded Sunbelt in a real estate transaction. Id. During the course of the adversary proceeding, Graber obtained additional information pertaining to the fraud and reported Fuqua to the Justice Department. Id. Fuqua was subsequently indicted for bank fraud and tax fraud. Id. However, Fuqua was found not guilty on the bank fraud and tax fraud claims and also won a dismissal of the claims brought in the adversary proceeding. *Graber,* 279 S.W.3d at 610. Following the favorable rulings, Fuqua sued for malicious prosecution in Texas State court. Id. There, the Texas state court dismissed the malicious prosecution claim finding the claim was preempted by the Bankruptcy Code. Id. The court of appeals reversed the trial court and the Texas Supreme Court accepted the case to determine whether preemption applied. Id.

As directed by the U.S. Supreme Court, the *Graber* court began its preemption analysis "with the presumption that Congress did not preempt state law." *Id.* at 611, citing *Great Dane Trailers, Inc.v. Estate of Wells*, 52 S.W.3d 737, 743 and *Medtronic,* 518 U.S. at 485. From this starting point, the *Graber* court narrowed in on the precise preemption issue now before this Court. The Texas Supreme Court stated:

> The relevant inquiry is not whether Congress contemplated remedies for abuses of the bankruptcy process generally, for that kind of blanket analysis ignores relevant distinctions between various bankruptcy processes, and it undervalues the presumption against preemption. Instead, we must determine the **extent to which Congress contemplated remedies for abuse of a bankruptcy adversary proceeding***** *Graber,* 279 S.W.3d at 612. [Emphasis Added].

The *Graber* Court then separated Bankruptcy Code provisions into two categories, the first it labeled as "custom-built" and the second it labeled as "imported." The *Graber* court explained the differences and how each applies to the preemption analysis, stating:

> Bankruptcy Code remedial provisions must be interpreted with reference to their source because Congress enacted the bankruptcy statutes according to two very different methods: some parts were essentially custom-built, others were not. In some places, Congress envisioned the need for unique processes without analogs in general federal litigation. For those areas, Congress created new processes for the specific purpose of bankruptcy. *See, e.g.,* 11 U.S.C. § 362 (2000) (automatic stay); *id.* § 301 (voluntary petitions); *id.* § 303 (involuntary petitions). But in many other places, Congress saw no need to treat bankruptcy any differently from general federal litigation. For those areas, Congress either imported existing federal rules or enacted almost identical provisions. *See, e.g.,* FED. R. BANKR.P. 7001-7087 (adversary proceeding rules). Bankruptcy remedies for abuse of process reflect this same dichotomy. **When Congress created unique procedures, it simultaneously created unique remedial provisions.** *See, e.g.,* 11 U.S.C. § 362(k) (debtor's remedies for violation of automatic stay); *id.* § 303(i) (debtor's remedies for dismissed involuntary petitions). **And when Congress merely imported general federal procedures, it simultaneously imported federal law's existing remedial schemes.** *See* FED. R. BANKR.P. 9011 (mirroring Federal Rule of Civil Procedure 11); 1 COWANS, *supra,* § 3.15 ("The Bankruptcy Rules covering litigation were not made up specially for bankruptcy. They lean heavily upon the Federal Rules of Civil Procedure.").
>
> Therefore, the question of whether Congress intended to produce an exceptional preemption result when it enacted the Bankruptcy Code produces two answers. In the areas where Congress **custom-built bankruptcy law, preemption is more likely** because when Congress crafted new, **unique provisions, it probably contemplated whether or not to exclude overlapping state law remedial schemes**. But in the areas where Congress merely **imported existing federal law without any significant change, preemption is improbable** because such borrowing **does not evidence an intent to change well-settled preemption law**. *Id.* at 612-3. [Emphasis Added].

In essence the *Graber* Court analysis is the "core" "non-core" analysis from a slightly different perspective. The "custom built" areas align with "core" matters and the "imported" provisions align with "non-core" matters.

The *Graber* Court then reviewed the two provisions of the Bankruptcy Code which arguably concern abuses of an adversary proceeding: Federal Rule of Bankruptcy Procedure 9011 and 11 U.S.C. § 105(a). Alfa Laval has also relied upon these two provisions. Starting with Rule 9011 the *Graber* court found:

> Bankruptcy Rule 9011, like Federal Rule of Civil Procedure 11, addresses the signing of papers and representations to bankruptcy courts and provides standards for the imposition of sanctions upon both attorneys and parties. *See* FED. R. BANKR.P. 9011; FED.R.CIV.P. 11. **Because Rule 9011 is almost identical to Rule 11, courts often merge their substantive analysis of the rules.** *See, e.g., Citizens Bank & Trust Co. v. Case (In re Case),* 937 F.2d 1014, 1022-23 (5th Cir.1991); *In re Commonwealth Sec. Corp.,* No. 06-30746-SGJ-7, 2007 WL 309942 (Bankr.N.D.Tex. Jan. 25, 2007). **It is well settled that the Federal Rules of Civil Procedure, including Rule 11, do not preempt malicious prosecution claims predicated on federal civil actions.** *See, e.g., U.S. Express Lines,* 281 F.3d at 393; *Cohen v. Lupo,* 927 F.2d 363, 365 (8th Cir.1991); *Tarkowski v. County of Lake,* 775 F.2d 173, 175 (7th Cir.1985); *McShares, Inc. v. Barry,* 266 Kan. 479, 970 P.2d 1005, 1014 (1998) (" Rule 11 can not abridge the substantive state law of malicious prosecution, nor was it adopted to serve as a surrogate for an action based upon a claim of malicious prosecution resulting from frivolous, harassing, or vexatious litigation."); *Del Rio v. Jetton,* 55 Cal.App.4th 30, 63 Cal.Rptr.2d 712, 716-17 (1997) ("**Nothing in [R]ule 11 indicates an intent to occupy the entire field of groundless suits brought for malicious purpose, nor is there any conflict between Rule 11 and a damages action for such malicious prosecution.**"). As the Rule 11 advisory committee observed, " Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions.... *Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.* " FED.R.CIV.P. 11 advisory committee's note (emphasis added). **Thus, the United States Supreme Court is "confident that district courts will resist the temptation to use [Rule 11] sanctions as substitutes for tort damages."** *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.,* 498 U.S. 533, 553, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991).

> Despite the fact that Rule 9011 mirrors Rule 11, and that Rule 11 does not preempt malicious prosecutions in normal federal civil actions, Graber still argues that Rule 9011 is evidence of Congress's intent to preempt malicious prosecutions in bankruptcy. **The argument must assume that by taking Rule 11-a generic rule of civil procedure that Congress did not intend to have preemptive power, and which the cases hold does not-and placing it in the bankruptcy context, Congress somehow clearly evidenced its intent to give an old rule new preemptive status. This cannot be the case when neither Rule 9011 nor the bankruptcy rules as a whole bear evidence of such a changed intent.** Congress did not custom-build this part of bankruptcy law. Instead, the opposite is true-it intended to import the federal rules framework at large. As the Advisory Committee itself said:
>
> These [Adversary Proceedings] rules are based on the premise that **to the extent possible practice before the bankruptcy courts and the district courts should be the same**. These rules either incorporate or are adaptations of most of the Federal Rules of Civil Procedure. FED. R. BANKR.P. 7001 advisory committee's note. *Id.* at 613-14. [Emphasis Added, Italic Original].

The *Graber* court proceeded with a similar analysis for 11 U.S.C. § 105(a):

> Section 105(a) is another example of where, instead of custom-building a bankruptcy rule, Congress imported general federal law that does not preempt, and said nothing to change that result. Section 105(a) is located in the "General Provisions" chapter of the current Bankruptcy Code. U.S.C., tit. 11, ch. 1. The substance of this section has existed since at least 1898. *See* Laura B. Bartell, *Contempt of the Bankruptcy Court-A New Look,* 1996 U. Ill. L.Rev.. 1, 3-4 & n.15 (1996). The section gives bankruptcy courts broad, general police powers...
>
> **The United States Supreme Court recognized in *Chambers v. NASCO, Inc.* that federal courts hearing general civil actions possess this same power inherently**. 501 U.S. 32, 43-46, 11 S.Ct. 2123, 115 L.Ed.2d 27 (1991). And like Bankruptcy Rule 9011, which Congress imported from federal procedural law at large, section 105(a) is also a direct import. *See Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd., Inc.),* 40 F.3d 1084, 1089 (10th Cir.1994) **("We believe, and hold, that § 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in *Chambers*.")** (citation omitted). **The broad *Chambers* power does not preempt malicious prosecution claims in normal litigation, and the mere fact that Congress codified that power for bankruptcy cases did nothing to change its preemptive effect. For the same reasons that merely importing Rule 11 does not evidence Congress's intent to create an exceptional preemption result, importing the power recognized by *Chambers* does not either.** [Emphasis Added]. *Graber,* 279 S.W.3d at 614, 615.

In summary, *Graber* points out those abuses of process occurring in standard civil litigation in a federal district court are historically and uniformly remedied by state law claims of abuse of process and malicious prosecution in state court. Congress imported this structure into the bankruptcy process which is evidence of Congress' intent that abuse of process claims occurring in an adversarial proceeding be remedied the same way – with state law claims.

In its young life *Graber* has already been adopted as "persuasive authority" on the exact issue in the instant case by the Texas District Court in *Shead v. Kelley* (S.D. Texas, Dec. 4, 2009), No. H-08-497, 2009 WL 4730398 and by a New Jersey Bankruptcy Court. The New Jersey Bankruptcy Court, citing portions of *Graber,* held:

> Based on **persuasive** authority, the Court believes that Ms. Fornaro's counterclaim for malicious prosecution is not preempted by the Bankruptcy Code. The Court agrees with a recent Texas Supreme Court case decision, holding that malicious prosecution suits are not preempted, even though the claim arose in a bankruptcy action. *See Graber v. Fuqua,* [ ]. In a 5-4 decision, the *Graber* court found no evidence of congressional intent in the Bankruptcy Code or Rules to preempt malicious prosecution claims based on conduct in an adversary proceeding. [ ]. The majority held: "**[T]he only broad provisions that apply to adversary proceedings-Rule 9011 and section 105(a)-evidence not an intent to preempt, but rather an intent to preserve the existing framework of federal procedure that does not preempt state malicious prosecution claims. In light of the well-established general rule that federal law does not preempt malicious prosecution claims predicated on conduct in federal court, we are unable to find the requisite evidence of an intent to preempt these same claims in bankruptcy.**" [ ]. The court continued, "**Because Congress was silent on the matter, we see no reason to discontinue state law's historic function of providing common law remedies for misconduct in federal court.**" [ ]. Ms. Fornaro's counterclaim for malicious prosecution, therefore, is not preempted by federal law. *In re: Fornaro,* 402 B.R. 104, 110 (Bkrtcy D.N.J., 2009). [Emphasis Added, Internal Citations Removed].

The *Graber/Fornaro* analysis fits the instant case with precision and its well reasoned and detailed analysis should be followed as persuasive authority.

The *Graber* case also addresses the often repeated argument that state tort actions would have

a chilling effect on a debtor's use of bankruptcy law. The Seventh District Court of Appeals voiced this concern in opining that with the decision at issue here "parties could be deterred from exercising their rights in bankruptcy if, by filing a bankruptcy action, they risk being faced with a state-court lawsuit and liability for substantial damages." (Appx. 18) The Texas Supreme Court in *Graber* found such an argument unpersuasive, explaining that all litigants must "balance incentives and penalties for participation in general federal litigation, and malicious prosecution claims in that context present the same potential to alter litigants' decision-calculus." *Id.* at 617. Stated another way, an adversarial complaint filed in a bankruptcy court is no different than filing a complaint in a federal district court. If you abuse the process, you are subject to penalties and a judgment for an injured party's damages. There is no concern that litigants may be deterred by these remedial schemes in any other court, so there should be no concern in the bankruptcy courts. If left to stand, the Seventh District's decision will actually have the opposite effect providing precedent, even protection, for litigants to misuse bankruptcy proceedings. Litigants would only be deterred by sanctions and not the more substantial damages associated with the responsibility of compensating those harmed by their wrongful conduct.

Finally, the Fifth District Court of Appeals recently favored similar claims not being preempted. In *Dever v. Lucas*, the majority accepted jurisdiction of the plaintiff's claims for malicious prosecution and abuse of process arising from filings in a Chapter 11 bankruptcy. 174 Ohio App.3d 725, 2008–Ohio-332, 884 N.E.2d 1014. The *Dever* majority relying on *Specialty Mills, Inc. v. Citizens State Bank* (1997), 558 N.W.2d 617, 621 held that, "under proper circumstances, a person may be subjected to liability for malicious prosecution for having instituted earlier unsuccessful bankruptcy proceedings..." *Id.* at ¶ 23. The dissenting opinion disagreed and

sua sponte raised the issue of preemption. *Id.* at ¶ 46-7. A majority of the judges on the court ruled on the substance of the abuse of process case despite the dissent.

4. Preemption is strongly disfavored when federal law provides no adequate remedy.

The absence of a corresponding federal remedy indicates Congress' intent not to preempt a state law remedy. The U.S. Supreme Court has held: "the lack of evidence of congressional intent to bar state common-law remedies takes on added significance in light of Congress' failure to provide any federal remedy for persons harmed by such conduct." *Silkwood v. Kerr McGee Corp.* (1984), 464 U.S. 238, 251, 104 S.Ct. 615. Given this, "Congress must demonstrate its intent to preempt such remedies in clear and certain terms." *Maryland,* 451 U.S. at 746. In other words, where Congress has neither expressly preempted state remedies nor provided alternative federal remedies, it must have intended the preservation of state law remedies.

Alfa Laval and the Seventh District Court rely on two sections of the Bankruptcy Code, 11 U.S.C. § 105 and Rule 9011 of the Federal Rules of Bankruptcy Procedure, for the proposition that there are adequate federal remedies available to the injured parties here. However, an examination of these provisions reveals that neither is remedial in nature.

11 U.S.C. § 105(a) grants a bankruptcy court broad equitable powers, stating in relevant part: "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." While this section gives bankruptcy courts the power to impose sanctions to prevent abuses of the bankruptcy proceedings, the sanctions must be "necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." *Id.* Such powers do not include the ability to pass judgment on the torts at issue here or the ability to compensate a party for the damages caused thereby. In essence the powers provided a bankruptcy court under 11 U.S.C. §

105(a) are equitable in nature, not remedial in nature. *Matter of Saybrook Mfg. Co., Inc.* (C.A. 11, 1992), 963 F. 2d 1490, 1495.

Similarly, FRBP 9011 addresses frivolous or groundless claims, but again provides no remedy to the aggrieved party. Specifically, FRBP 9011 says that by presenting a paper to the court, the attorney is representing that the claims are not frivolous, are supported by fact, and are not being brought for an improper purpose. Section (c)(2) of FRBP 9011 states in relevant part that a "sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct." Courts have likewise limited awards to the "**minimal sanction** that will probably deter an attorney's wrongful conduct." *Keiter v. Stracka*, 192 B.R. 150, 157 (S.D. Tex. 1996). [Emphasis Added].

The 1997 amendment to FRBP 9011 incorporates FRCP 11's advisory notes. These notes reiterate that the purpose of FRCP 11, and thus FRBP 9011, is to deter rather than compensate. The notes also limit the available award to expenses and attorney's fees directly and unavoidably caused by the violation.

Furthermore, when Congress incorporated the Federal Rules of Civil Procedure into the Bankruptcy Code it brought with the rules, the case law interpreting the civil rules. Two holdings on FRCP 11 are particularly relevant here. First, courts have found that sanctions under FRCP 11 are "**not a complete substitute for an abuse of process type cause of action**." *Ideal Instruments, Inc. v. Rivard Instruments, Inc.* (N.D. Iowa, 2007), 245 F.R.D. 381, 388, quoting *Kirk Capital Corp. v. Bailey* (C.A. 8, 1994), 16 F.3d 1485, 1491. Second, courts have uniformly held that FRCP 11 does not preempt state law abuse of process claims and similar torts. *U.S. Express Lines, Ltd. v. Higgins* (C.A. 3, 2002), 281 F.3d 383, 393 (stating that "the Federal Rules of Civil Procedure do not preempt

claims for abuse of process and similar torts providing relief for misconduct in federal litigation").

Taking 11 U.S.C. § 105 and FRBP 9011 either individually or together, they occupy only the narrow field of providing sanctions - not damages - to deter future abuses of the bankruptcy process and to ensure a fair, equitable and uniform administration of the bankruptcy estate and payment to creditors. In fact, any sanctions ordered may be payable solely to the court, and not to the party subjected to the frivolous or groundless claim. FRBP 9011(c)(2). Ohio's abuse of process cause of action and unfair business competition claims fall squarely outside the "field" Congress intended to occupy through 11 U.S.C. § 105 and FRBP 9011.

In contrast to these provisions, Ohio's abuse of process and unfair business competition causes of action were created to redress and compensate a party harmed by such torts. A plaintiff prevailing in an Ohio abuse of process lawsuit may recover extensive damages, including compensatory damages, mental and/or physical suffering, loss of earnings and expense, medical expense, embarrassment, humiliation, loss of personal property and freedom and loss of consortium. *Donohoe v. Burd* (1989, S.D. Ohio), 722 F. Supp. 1507, 1522, judgment aff'd (C.A. 6, 1991), 923 F. 2d 854, *Zimmer v. Yant* (Dec. 3, 1987), Franklin App. No. 87AP-170, 1987 WL 26298 at ¶2. A plaintiff may even recover punitive damages in addition to actual damages. *Donohoe*, 722 F. Supp. at 1522. While the express purpose of FRBP 9011 is to deter, a punitive damage award for the tort of abuse of process is made to both "deter **<u>and</u> punish**" the offender. Id. at 1523. [Emphasis and underlining added]. Therefore, the sanctions recoverable under 11 U.S.C. § 105 and FRBP 9011 are wholly inadequate to compensate a plaintiff for the extensive and very personal damages suffered as the result of an abuse of process.

The standards for granting the awards also differ. Under Ohio law, a plaintiff is entitled to

damages **as a matter of law** in an abuse of process lawsuit if he proves: (1) the defendant used legal process for an ulterior purpose; (2) the defendant intentionally committed some further act in the use of the process not proper in the regular conduct of the initiated proceeding; and (3) the plaintiff was directly injured by the wrongful use of process for the ulterior purpose. *Clermont Envtl. Reclamation v. Hancock* (1984), 16 Ohio App.3d 9, 11, 474 N.E.2d 357. In contrast, under the Bankruptcy Code, the court may, **at its discretion**, impose sanctions to deter attorney wrongful conduct. *Keiter*, 192 B.R. at 157.

Furthermore, while the bankruptcy court has the inherent power to order sanctions for wrongful conduct, the Supreme Court has warned: "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44. No such discretionary restraint is imposed upon a jury deciding a state law claim for abuse of process.

Finally, the U.S. Supreme Court has noted in preemption cases the lack of congressional intent to preempt state law remedies when there is no federal remedy and the state law remedies "parallel federal requirements." *Medtronic,* 518 U.S. at 495. This is true even where the applicable federal law **expressly** preempts any state requirement "that is different from or in addition to any requirement" imposed by the federal law. Id. at 486-7. The Supreme Court addressed this scenario in *Medtronic,* wherein it held:

> Moreover, **because there is no explicit private cause of action against manufacturers contained in the MDA** [the federal statute at issue in *Medtronic*], **and no suggestion that the Act created an implied private right of action, Congress would have barred most, if not all, relief for persons injured by defective medical devises.** Medtronics's construction of Section 360k would therefore have the perverse effect of granting complete immunity from design defect liability*** It is, to say the least, "**difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct**," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 104 S.Ct. 615, 623, 78 L. Ed.2d 443 (1984), and it would take language much plainer than the text of

> Section 360k [the express preemption provision] to convince us that Congress intended that result. Id. at 487. [Emphasis and Bracketed Text Added].

In a separate opinion concurring in part and dissenting in part, Justice O'Conner stated that a state cause of action that seeks to enforce a federal requirement:

> does not impose a requirement that is "different from, or in addition to," requirements under federal law. To be sure, **the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ**. Section 360k [the express preemption provision] **does not preclude States from imposing different or additional *remedies*, but only different or additional *requirements***. *Citations omitted*. Id. at 513. [Italics Original, Emphasis and Bracketed Text Added].

Similarly in *Bates* the U.S. Supreme Court stated:

> Accordingly, although FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in Section 136v(b) [the express preemption provision] precludes states from providing such a remedy. *Bates*, 544 U.S. at 433. [Bracketed Text Added]

Both decisions further explained:

> Even if it may be necessary as a matter of *** law to prove that those violations were the result of negligent conduct, or that they created an unreasonable hazard for users of the product, **such additional elements of the state cause of action would make the state requirements narrower, not broader, than the federal requirement. While such a narrower requirement might be "different from" the federal rules in a literal sense, such a difference would surely provide a strange reason for finding pre-emption of a state rule** insofar as it duplicates the federal rule. Id. at 448, (footnote 23), quoting *Medtronic,* 518 U.S. at 495. [Emphasis Added].

The U.S. Supreme Court expounded upon this reasoning by stating that, "[i]f Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Bates,* 544 U.S. at 449.

It is important to remember that both *Medtronic* and *Bates* found no preemption in the face of **express** preemption provisions. The proclivity against preemption is, no doubt, even more

pronounced where preemption is implied as in the case of field preemption. Here Alfa Laval argues that Congress, without comment, impliedly eliminated a litigant's common law rights to seek redress for damages suffered by another party's misuse of civil proceedings based upon Bankruptcy Code field preemption. Because there is no equivalent bankruptcy rule, law, or remedy for the state causes of action sought in the instant litigation and, further, because there is no evidence of congressional intent to preempt the state remedies, Congress must have intended the state law remedies to prevail.

It would be illogical that Congress would, without comment, remove all remedies for those injured by misuse of the bankruptcy process. The state law causes of action Creatore and PNH seek simply provide traditional remedies to parties injured by violations of common law duties when those duties "parallel" the "federal requirements" of FRBR 9011 and 11 U.S.C. § 105. The fact that FRBR 9011 and 11 U.S.C. § 105 only provide sanctions, not remedies, does not make them different or conflicting with the state common law torts Creatore and PNH seek. Rather, the fact that entitlement to common law damages requires proof of additional elements makes the state law requirements narrower, not broader. The state law causes of action for misuse of process simply support the federal law, by providing **remedies** or "additional causes to comply" with FRBP 9011 and 11 U.S.C. § 105, not additional requirements. *Medtronic,* 518 U.S. at 513.

5. Damages from Creatore and PNH's claim for tortious interference were incurred when Alfa Laval used "non-core" matters and procedures in the bankruptcy to prevent them from competing.

A claim for tortious interference requires the following elements: 1) the existence of a contract; 2) the wrongdoer's knowledge of the contract; 3) the wrongdoer's intentional procurement of the contract's breach; 4) lack of justification; and 5) resulting damages. *Fred Siegel Co., LPA v. Arter & Hadden* (1999), 85 Ohio St. 3d 171, ¶1 of syllabus, 707 N.E.2d 853. Here, the first four

elements of the tortious interference claim occurred prior to the filing of the GO&B involuntary bankruptcy petition. While Alfa Laval wrongfully obtained confidential information before the filing, damages from the interference did not occur until Creatore and PNH were pulled into the GO&B bankruptcy through Alfa Laval's filing of the adversarial complaint.

The court of appeals concluded that under such circumstances the claim is preempted, stating that "any damage from the alleged tortious interference did not occur until Alfa Laval filed the involuntary bankruptcy petition." (Appx. 20-21) In support, the court of appeals cited *Casden v. Burns* (N.D. Ohio, 2007), 504 F.Supp.2d 272. In *Casden*, a shareholder of Dana Corporation ("Dana"), Roberta Casden, filed a derivative suit against officers and directors of the company. Id. at 275. Ms. Casden's complaint alleged that the officers and directors' decision to file for voluntary Chapter 11 was a breach of fiduciary duty. Id. at 274-5. *Casden* first held that Ms. Casden's claim was not ripe for adjudication because she would have no damages until an adverse plan of reorganization was approved in Dana's bankruptcy. Id. at 279. In other words, Ms. Casden may not be damaged at all by Dana's bankruptcy if a favorable reorganization plan is approved. The *Casden* court went on to find that the claim was preempted because the Bankruptcy Code provides sanctions for the filing of frivolous bankruptcy petitions. Id. at 281.

Casden is not persuasive. At issue in *Casden* was a claim based on the filing of a petition and possible damages from the confirmation of a plan. Like the cases analyzed below, these are "core" bankruptcy matters under 28 U.S.C. § 157. For such "core" matters, Congress likely intended preemption. In this case however, Creatore and PNH's claim for tortious interference did not accrue and no damages incurred upon the filing of GO&B's involuntary petition or from any other "core" matter. Neither Creatore nor PNH were the debtors. The mere filing of the GO&B involuntary

petition, whether done in good or bad faith, had little to do with them. Instead, the tortious interference claim is based on Alfa Laval's pre-petition solicitation of confidential information from Barnitt and Sayavich regarding the competing BuyPep product line and Creatore's post-petition decision to compete against Alfa Laval. Creatore and PNH were damaged when Alfa Laval attempted to use the ill-gotten information to prevent them from competing by pulling them into the bankruptcy through the adversarial complaint.

While the damages incurred by Creatore and PNH ultimately occur after the filing of the GO&B bankruptcy case, the damages were incurred through Alfa Laval's manipulations of "non-core" bankruptcy matters and proceedings. A claim for tortious interference for such damages is not preempted by the Bankruptcy Code.

D. All of the case law offered in support of preemption concern "core" matters "custom built" for bankruptcy and therefore do not apply to the particular area of state tort remedies engaged in the instant case.

Here, the appellate court heavily relied upon the reasoning set forth in *MSR Exploration, Ltd. v. Meridian Oil, Inc.* (C.A. 9, 1996), 74 F.3d 910, and its progeny to support its finding that Creatore and PNH's claims were preempted. In *MSR Exploration*, the Ninth Circuit Court of Appeals found that state tort claims for malicious prosecution arising from the creditor's filing of claims in the MSR Exploration, Ltd. bankruptcy case were preempted by the Bankruptcy Code. Id. at 916. The *MSR Exploration* court reasoned that "Congress has expressed its intent that bankruptcy matters be handled in a federal forum by placing bankruptcy jurisdiction **exclusively** in the district courts as an initial matter." Id. at 913. [Emphasis Added]. The Ninth Circuit there also found that the Bankruptcy Code "demonstrates Congress' intent to create a **whole system under federal control**..." and "[b]ankruptcy law does require **uniformity**..." Id. at 914. [Emphasis Added].

The issue before *MSR Exploration*, the filing and allowance of claims and expenses, is unquestionably a "core" proceeding under 11 U.S.C. § 501 – 503 and its reasoning was meant to only apply to "core"/"custom built" proceedings such as claims allowance proceeding at issue in that case. For such "core"/"custom built" matters, a majority of courts have found that Congress granted bankruptcy courts exclusive jurisdiction under 28 U.S.C. § 1334(a) and have provided preemptive effect to those "core"/"custom built" portions of the Bankruptcy Code. This grant of exclusive jurisdiction and preemption naturally creates uniformity and a system exclusively under federal control for those "purely" bankruptcy issues.

However, the reasoning set forth in *MSR Exploration* does not apply to "non-core"/"custom built" provisions of the Bankruptcy Code, such as those at issue here. This is a key distinction that the Seventh District failed to recognize. Congress clearly did not grant bankruptcy courts exclusive jurisdiction over "non-core" matters and provided no jurisdiction for matters that do not affect the property or administration of the estate and are thus not "related to" the bankruptcy. Rather, Congress expressly gave **concurrent** jurisdiction to the state courts for "related to" "non-core" matters. 28 U.S.C. 1334(b). Logically, if these "non-core" civil proceedings can be tried in state courts, then Congress did not intend: 1.) bankruptcy courts to have exclusive jurisdiction; 2.) to create an entire system under federal control; 3.) or for absolute uniformity on all matters "**related to**" bankruptcy, let alone matters, such as those in the instant case, not "related to" bankruptcy. Granting state courts jurisdiction to hear these "non-core" claims guarantees a lack of uniformity from state to state, a condition with which Congress was obviously content.

The appellate court and Alfa Laval relied on a number of other cases which follow the reasoning set forth in *MSR Exploration* and preempt other claims based on "core"/"custom built"

matters. These cases are similarly inapplicable to the within matter. In the Sixth Circuit's decision in *Pertuso v. Ford Motor Credit Co.* (C.A. 6, 2000), 233 F.3d 417, a group of debtors brought a civil action against their creditor, Ford Motor Credit Co. Ford Motor Credit Co. had contacted each debtor during their bankruptcy cases to obtain reaffirmation agreements for the debtors' auto loans. Id. at 420. The *Pertuso* court summarized the debtor's claims stemming from the contact as follows: "The gravamen of the plaintiffs' complaint was that the defendant violated the automatic stay provision codified in 11 U.S.C. § 362, as well as violating 11 U.S.C. § 524, a section of the bankruptcy code that governs the validity of reaffirmation agreements." Id. at 419.

Unlike the instant suit, the Pertusos were **bankruptcy debtors**, whose claims did not arise from an adversary proceeding. Additionally and most importantly, the issues raised by the Pertusos related to "core" provisions "custom built" into the Bankruptcy Code, to wit: the automatic stay under 11 U.S.C. § 362 and the reaffirmation agreement under 11 U.S.C. § 524 (defining the effect of a bankruptcy discharge). Such claims fall clearly within the exclusive jurisdiction of the bankruptcy courts pursuant to 28 U.S.C. § 1334(a) and would likely be preempted by the Bankruptcy Code. Considering that *Pertuso*, like *MSR Exploration*, centers on claims arising from "core" matters "custom built" into the Bankruptcy Code, the case is neither applicable nor instructive with respect to the "un-related" or, at best, "non-core" matters before this Court.

Alfa Laval and the Seventh District cite several cases holding that abuse of process and malicious prosecution claims **related to the bad faith filing of a bankruptcy petition** are preempted by the Bankruptcy Code. (Appx. 14-16) These cases, like *MSR Exploration*, follow the majority position that the Bankruptcy Code preempts state law in those areas concerning "core"/"custom built" bankruptcy matters. The filing of a bankruptcy petition is a "core" matter with

its own remedial framework for bad faith filings found in 11 U.S.C. § 303(i). Consistent with this is the legislative mandate of exclusive bankruptcy court jurisdiction pursuant to 28 U.S.C. § 1334(a). Significantly, this line of case law provides little, if any, guidance for the "non-core" or even "unrelated" issues now before this Court.

The Seventh District also placed special reliance on *In re Miles* (C.A. 9, 2005), 430 F.3d 1083. *Miles* is also readily distinguishable from the within matter. In *Miles*, involuntary bankruptcy petitions were filed against Rodney Miles, Ann Miles and their related businesses. Id. at 1086. The bankruptcy court dismissed the involuntary petitions finding that they were filed in bad faith because, among other reasons, the debts were being paid as they became due. Id. Relatives of the debtors, in turn, filed civil lawsuits based on the filing of the involuntary petitions against their family members. Id. The court found that 11 U.S.C. 303(i) "provides the exclusive cause of action for the claims asserted and also sets forth procedures and remedies governing that cause of action. Therefore, complete preemption is appropriate here..." Id. at 1091.

However, the *Miles* court cautioned:

> "We do **not** hold that all state actions related to bankruptcy proceedings are subject to the complete preemption doctrine. We recognize that 'because the common law of the various states provides much of the legal framework for the operation of the bankruptcy system, it cannot be said that Congress has completely preempted all state regulation which may affect the actions of parties in bankruptcy court.'" *Miles,* 430 F.3d at 1092 quoting *Koffman v. Osteoimplant Tech. Inc.*, 182 B.R. 115, 124 (D.Md. 1995). [Emphasis added].

Therefore, it is likely the *Miles* court would not find preemption under the facts of the instant case.

The Seventh District cited *Miles* for the proposition that it involved a case between two non-debtors and despite this fact the court still found the claims preempted. (Appx. 19) However, *Miles,* like *MSR Exploration* provides little if any instruction for this case. *Miles* involved claims not by a

debtor, but by family members of debtors, seeking emotional distress, embarrassment damages, etc., for the bad faith filing of the involuntary petition against other family members. Id. at 1086. The *Miles* court only ruled on the narrow issue of damages arising out of a bad faith filing of an involuntary petition. The court found the same was governed exclusively by 11 U.S.C. § 303(i). Id. at 1091. Section 303(i) provides the remedies, including attorney fees and punitive damages for a bad faith involuntary filing. Consequently, it is logical that this section would prevail over any state claim brought for the wrongful filing of a petition. In *Miles*, the court held that because the plaintiffs were not debtors, they would have no legal remedy under Section 303(i) as its remedies are only available to a debtor. Creatore and PNH, both non-debtors, seek no such damages.

Likewise, other courts have found that claims arising from the filing of the petition or arising from other "core"/"custom built" matters are preempted: *Casden*, 504 F. Supp.2d 272 (shareholder's claim that corporate officers' breached fiduciary duty by deciding to file bankruptcy petition preempted); *Glannon v. Garrett & Assoc., Inc.* (D. Kan. 2001), 261 B.R. 259 (state law claims based on filing of involuntary bankruptcy petition and violation of automatic stay preempted); *Raymark Indus, Inc. v. Baron* (E.D.Pa. June 23, 1997), No. 96-7625, unreported (debtor's state law tort claims against creditors arising from creditors' filing of an involuntary bankruptcy petition preempted); *Mason v. Smith* (1996), 140 N.H. 696, 672 A.2d 705 (state tort action against creditors who instituted involuntary bankruptcy proceeding preempted); *Koffman v. Osteoimplant Technology., Inc.* (D. Md. 1995), 182 B.R. 115 (debtor's claims of abuse of process and malicious prosecution against creditors who instituted involuntary bankruptcy proceeding preempted); *Smith v. Terry's Tractor, Inc.* (1989), 209 Cal.App.3d 951, 257 Cal.Rptr. 598 (debtor's claims of abuse of process and malicious prosecution against creditors who instituted involuntary bankruptcy proceeding were preempted by

federal law); *Gonzales v. Parks* (C.A. 9, 1987), 830 F.2d 1033 (abuse of process claim regarding filing of a bankruptcy petition preempted). (Appx. 15)

The court of appeals made special note of another case involving a "core"/"custom built" matter, *Stone Crushed Partnership v. Kassab Archbold Jackson & O'Brien*, 589 Pa. 296 (2006). In *Stone Crushed*, Robert Jackson, William Archbold and Joseph O'Brien were partners in Granite Partners I, Ltd. ("Granite"). Id. at 300. Granite purchased real property and all three partners personally guaranteed the loan. Id. Granite defaulted on the loan. Id. Rather than have the property foreclosed on, Jackson formed Stone Crushed Partnership ("Stone") and purchased the note and mortgage. Id. The other partners, Archbold and O'Brien, put Granite in Chapter 11 bankruptcy. Id. Stone filed an adversarial proceeding asking that the debt Granite owed Stone not be discharged. Id. Granite counterclaimed, alleging that Stone, as an alter ego of Jackson, could not profit at the expense of the other partners. *Stone Crushed*, 589 Pa. at 301. The bankruptcy court ruled in favor of Stone, finding that the debt would not be discharged, and dismissed the counterclaims. Id. Stone and Jackson then filed a state action against Archbold and O'Brien alleging a claim under Pennsylvania's Dragonetti Act which is similar to a claim for abuse of process. Id. at 302. The *Stone Crushed* court held that the Bankruptcy Code preempted Pennsylvania's Dragonetti Act reasoning that the Bankruptcy Code provided sufficient remedies for the abuse. Id. at 315.

Stone Crushed involves the discharge of a debt which is a "core"/ "custom built" matter for bankruptcy courts to decide. Considering that *Stone Crushed*, like *MSR Exploration*, centers on claims arising from a "core"/"custom built" matter; the case is not persuasive to the "non-core" or more likely unrelated matter before this Court.

Interestingly, in deciding *Stone Crushed*, the Pennsylvania Supreme Court disregarded cases

from its own Third Circuit. Most notably, in *U.S. Express*, 281 F.3d at 393, the Third Circuit found "that the Federal Rules of Civil Procedure do not preempt claims for abuse of process and similar torts providing relief from misconduct in federal litigation. Therefore, victims of such misconduct may, in appropriate circumstances, bring suit to recover damages under state causes of action." In support, the *U.S. Express* court cited to *Paradise Hotel Corp. v. Bank of Nova Scotia* for the proposition that, "Despite the broad scope of remedies available in the Code and the general exclusivity of the federal courts in bankruptcy, we have held that a state claim for malicious abuse of process was not preempted. We concluded that Congress did not intend preemption to extend to the point of barring a debtor from the use of a state remedy." *Id.,* citing *Paradise Hotel Corp.* (C.A. 3, 1988), 842 F.2d 47, 51-52. In effect, the Third Circuit permits an even more expansive use of state remedies than Creatore and PNH have argued for here.

A review of the Seventh District's decision in this matter reflects that the court failed to adequately analyze the cases it relied on to support its decision. Instead the court broadly pronounced Alfa Laval's position as the "majority" and Creatore and PNH's the "minority". The court then relied on such classifications in its analysis. (Appx. 13-15, 17) The U.S. Supreme Court recently cautioned against just this kind of "free-form judicial policymaking." In *Wyeth v. Levine* (2009), 129 S. Ct. 1187, 1208, the U.S. Supreme Court stated: "Preemption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking." In other words, preemption, must be determined on a case-by-case basis. *Pennsylvania R.R. Co. v. Public Service Comm'n* (1919), 250 U.S. 566, 569, 40 S.Ct. 36; *People of State of California v. Zook* (1949), 336 U.S. 725, 69 S.Ct. 841. Therefore, the Seventh District should have, but did not, look to evidence of Congress' intent for the specific "non-core" or

more likely "unrelated" (as defined by the Sixth Circuit's "related to" definition in *Robinson*) matter before it, instead of following an overly broad "majority" view which entailed in every case consideration of a "core"/"custom built" bankruptcy matter.

Finally, the Seventh District noted that absent from these opinions was any analysis concerning the "core" versus "non-core" nature of the matter before them. (Appx. 19) However, this is not surprising because all of these cases involved "core" matters. Therefore, there would have been no reason for any of those courts to differentiate between the preemptive effect of "core" versus "non-core" or "unrelated" matters.

CONCLUSION

Preemption, as applied by the Seventh District Court of Appeals here, deprives Ohio non-debtor participants involved in the bankruptcy process of their opportunity to seek redress for tortious conduct arising in the bankruptcy case. More importantly, preemption of these claims does not just deprive Ohio courts of jurisdiction; it bars the injured party from asserting these state law claims in any forum leaving these injured parties with no remedy, federal or state. Where preemption is sought in areas traditionally occupied by state tort law, the U.S. Supreme Court has repeatedly held that the standard for applying preemption is a high one. Under this heightened standard, it is presumed that federal law does not preempt state law unless Congress' intent to do so is "clear and manifest." *Medtronic*, 518 U.S. at 485; *Bates*, 544 U.S. at 449. Where implied preemption is sought and where such potential preemption results in citizens being deprived of a state tort remedy without the displacing federal law providing a parallel remedy, preemption is even more disfavored.

The Constitution provides Congress with the power to establish uniform laws on the subject

of bankruptcies. U.S. Const. art. I, § 8, cl. 4. Congress exercised this power by creating a dual system under which federal bankruptcy courts and state courts share jurisdiction for matters related to bankruptcy. In addition, Congress incorporated into bankruptcy procedure FRCP 11, which historically did not preempt state law abuse of process claims for abuses in federal courts. Congress also imported from standard federal court law, 11 U.S.C. § 105 which provides a bankruptcy court its general inherent powers traditionally exercised by standard federal courts. Neither FRCP 11 nor a standard federal court's general inherent powers prevents a party from asserting an abuse of proceedings in standard federal courts. There is no evidence Congress intended to strip a litigant of these state remedies just because the violations occurred before a bankruptcy court instead of a standard federal court. In light of the fact that Congress left in place state tort remedies when it imported these "non-core" procedural rules into the Bankruptcy Code, there is no "clear and manifest" intent from Congress to preempt the state causes of action asserted by Creatore and PNH here.

In 28 U.S.C. § 1334, Congress stated its intention that state courts entertain civil claims such as the instant state tort claims that are neither "related to" a bankruptcy proceeding nor constitute "core" matters. The instant case involves no claims arising under substantive or "core" bankruptcy law. Consequently, even if the claims raised in this case meet the "related to" test, they are at best "non-core" bankruptcy matters over which a bankruptcy court shares jurisdiction with state courts pursuant to 28 U.S.C. § 1334(b). It is unlikely Congress provided state court jurisdiction for such claims on the one hand, but intended to preempt them on the other.

The Seventh District's decision in this matter blatantly contravenes both congressional intent regarding preemption and the U.S. Supreme Court's standard for analyzing and applying preemption.

Creatore and PNH have cited numerous cases on point from across the country wherein courts have found that preemption does not apply to nearly identical claims. A review of the Seventh District's decision reflects that the court erroneously failed to consider congressional intent as it relates to the facts of this case. Instead, the appellate court relied on cases with substantially dissimilar facts to support its finding of preemption. Creatore and PNH have readily distinguished these cases, none of which address preemption of claims involving "non-core" matters or matters not "related to" the bankruptcy case.

As demonstrated herein, state law torts between non-debtors arising from the abuse of adversarial proceedings in Federal Bankruptcy court and which do not concern a substantive "core" matter (characterized by the *Graber* Court as "custom built" provisions) under the Bankruptcy Code are not preempted by the Bankruptcy Code. The analysis of congressional intent, the arguments, and the case law (relevant to the "non-core" or more likely "unrelated" claims of this case) set forth in this brief clearly establish state court jurisdiction and the use of state tort law over this matter. Accordingly, the decision of the Seventh District Court of Appeals must be reversed and this cause remanded thereto for a ruling on the issues it previously found moot.

Respectfully submitted,

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I hereby certify that a copy of this Merit Brief has been served by regular U.S. mail this 7th day of January, 2011 upon:

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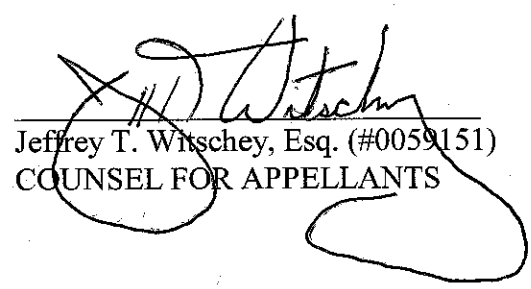

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IN THE SUPREME COURT OF OHIO

10-1430

PNH, INC. and RONALD CREATORE	)	APPEAL NO.: _____
	)	
Appellants,	)	
	)	ON APPEAL FROM THE
vs.	)	MAHONING COUNTY COURT,
	)	SEVENTH APPELLATE DISTRICT
ALFA LAVAL FLOW, INC.	)	
	)	
Appellee.	)	

NOTICE OF APPEAL OF APPELLANTS, PNH, INC. AND RONALD M. CREATORE

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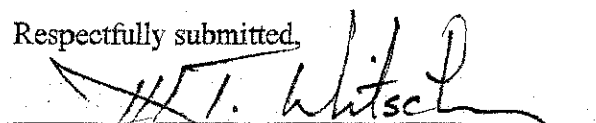
FILED
AUG 13 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellants, PNH, Inc. and Ronald M. Creatore

Appellants, PNH, Inc. and Ronald M. Creatore hereby give notice of appeal to the Supreme Court of Ohio the judgment of the Mahoning County Court of Appeals, Seventh Appellate District, entered in the case *PNH, Inc. et al v. Alfa Laval Flow, Inc.*, Case Number 2009 MA 00041 on June 29, 2010.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



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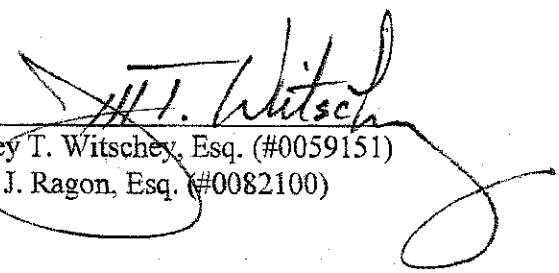

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cli.creatore.alfa.supcrt.notice of appeal-1

STATE OF OHIO	)	IN THE COURT OF APPEALS OF OHIO
	)	
MAHONING COUNTY	) SS:	SEVENTH DISTRICT

PNH, et al.,	)	
	)	CASE NO. 09 MA 41
PLAINTIFFS-APPELLANTS/, CROSS-APPELLEES,	)	
	)	
- VS -	)	JUDGMENT ENTRY
	)	
ALFA LAVAL FLOW, INC.,	)	
	)	
DEFENDANT-APPELLEE/ CROSS-APPELLANT.	)	

For the reasons stated in the opinion rendered herein, Appellants' assignments of error are meritless. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Mahoning County, Ohio is affirmed. Costs taxed against Appellants.

Mary DeGenaro

JUDGES.

CLERK OF COURTS
MAHONING COUNTY, OHIO
JUN 29 2010
FILED
ANTHONY VIVO, CLERK

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

PNH, et al.,	)	
	)	CASE NO. 09 MA 41
PLAINTIFFS-APPELLANTS/ CROSS-APPELLEES,	)	
	)	
- VS -	)	OPINION
	)	
ALFA LAVAL FLOW, INC.,	)	
	)	
DEFENDANT-APPELLEE/ CROSS-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 05 CV 1695.

JUDGMENT: Affirmed.

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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

CLERK OF COURTS
MAHONING COUNTY, OHIO
JUN 29 2010
FILED
ANTHONY VIVO, CLERK

Dated: June 29, 2009

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs and their oral arguments before this court. Plaintiff-Appellants/Cross-Appellees, PNH, Inc. and Ronald Creatore appeal the judgment of the Mahoning County Court of Common Pleas that dismissed their claims against Defendant-Appellee/Cross-Appellant Alfa Laval, Inc. (incorrectly identified as Alfa Laval Flow, Inc.) for lack of subject matter jurisdiction. Appellants also appeal the trial court's subsequent decision, issued during a limited remand from this court, which denied their Civ.R. 60(B) motion to vacate the dismissal order. Finally, Appellants challenge the trial court's denial of their motions to amend the complaint and to compel discovery.

{¶2} Upon review, Appellants' arguments are meritless. The trial court properly dismissed the case for lack of subject matter jurisdiction because Appellants' abuse of process and tortious interference claims are preempted by federal bankruptcy law. The trial court did not abuse its discretion by denying Appellants' subsequent Civ.R. 60(B) motion. Appellants' arguments regarding the trial court's denial of their motion to amend and motion to compel discovery are moot based upon our conclusion that their claims were properly dismissed.

{¶3} Alfa Laval filed a cross-appeal in this matter, in which it challenges the trial court's January 8, 2008 denial of its motion for summary judgment regarding Appellants' tortious interference and abuse of process claims. The cross-appeal is also moot based upon our resolution of this appeal in Alfa Laval's favor. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶4} In 2000, Appellant Ronald Creatore, William Sayavich, and David Barnitt formed a holding company called U.S. Sanitary Corporation for the sole purpose of purchasing all the stock of a fitting/valves distribution company called Girton, Oakes and Burger. Creatore through a Living Trust, Sayavich and Barnitt entered into a Close Corporation Agreement (CCA) with USSC, which among other things, contained confidentiality and non-compete provisions. Creatore, Barnitt and Sayavich were the sole

shareholders of USSC, with Creatore having a 49% ownership interest, Sayavich a 33% interest, and Barnitt an 18% interest.

{¶5} The purchase of GO&B was financed by a loan from Provident Bank to GO&B and USSC. The sale became final in 2001 and the three became employees of GO&B: Creatore as President, Barnitt as CFO and Sayavich as the head of sales and marketing. Subsequently, pursuant to the authority granted to him by the CCA, Creatore terminated Barnitt and Sayavich, alleging the two had committed financial malfeasance with regard to the Provident loan.

{¶6} Appellee Alfa Laval's business includes the manufacture and sale of components and parts to the food and beverage sanitary processing industry. Prior to the incidents which gave rise to this lawsuit, GO&B was a distributor for Alfa Laval's products in the Ohio, New York and Western Pennsylvania areas. GO&B was not bound by any exclusive distribution arrangement with Alfa Laval and thus GO&B began quietly producing a competing private-label line of products called "BuyPep."

{¶7} By 2003, GO&B owed Alfa Laval in excess of $1,000,000. Provident Bank was threatening foreclosure on the Provident loan. Alfa Laval executives met with Creatore to discuss their concerns. Alfa Laval presented Creatore a plan to minimize the impact on Alfa Laval if Provident Bank were to call its loan and foreclose on GO&B. Alfa Laval proposed that it: (1) assume GO&B's customer base; (2) establish preference over GO&B's assets; (3) transfer GO&B's market share to another of Alfa Laval's distributors; and, (4) obtain a non-compete covenant against Creatore preventing his competition against Alfa Laval and its distributors. Ultimately, Creatore did not accept those options and instead decided to purchase the Provident loan through a company he created for that sole purpose, PNH, Inc., the other Appellant in this action. PNH is an acronym for Provident Note Holder.

{¶8} According to Appellants, a disgruntled Barnitt and Sayavich contacted Alfa Laval and at Alfa Laval's behest and in violation of the confidentiality provisions of the CCA of which Alfa Laval was purportedly aware, disclosed confidential information about GO&B, including information about the competing BuyPep line, and Creatore's plan to

purchase the Provident loan. Appellants also allege that Barnitt's attorney told Alfa Laval's attorney about the closing date of the loan sale, and that Barnitt and Sayavich began covertly helping Alfa Laval plan an involuntary bankruptcy filing against GO&B.

{¶9} Just hours after PNH closed on the Provident loan purchase, Alfa Laval, along with two other GO&B creditors, filed an involuntary bankruptcy petition against GO&B in The United States Bankruptcy Court for the Northern District of Ohio (Case No. 03-41957). Once in the bankruptcy court, pursuant to a motion by Alfa Laval, a Gap Interim Trustee was appointed and took over management of GO&B, thereby forcing Creatore to relinquish any operational control he had over the company. As the bankruptcy proceeded, Creatore formed another company called Diversified Process Components, Inc., which produced a product line that competed with Alfa Laval's.

{¶10} Alfa Laval subsequently motioned the bankruptcy court to enjoin Creatore and Diversified Process Components from competing with Alfa Laval. The bankruptcy court refused to entertain the motion, finding that only the Trustee could seek such relief on behalf of GO&B and only after filing an adversary complaint.

{¶11} On May 29, 2003, Alfa Laval filed an adversary complaint in the bankruptcy court, naming itself and the Trustee as co-plaintiffs and PNH, Creatore, and several other Creatore-affiliated companies as co-defendants. The adversary complaint listed numerous alternative claims including diversion of corporate assets and opportunities, and preferential and fraudulent transfers, and requested a temporary restraining order. It also sought equitable subordination of the secured interests of PNH purchased from Provident Bank. The Trustee did not initially sign the adversary complaint, but later ratified it. Appellants claim that Alfa Laval, through its attorneys, hounded and bullied the "malleable" Trustee to pursue the adversary complaint, and that Alfa Laval wrongfully used the adversary proceeding for an improper purpose, i.e., to eliminate Creatore and his new company from competing with Alfa Laval. Further, Appellants allege that Alfa Laval improperly misappropriated the name, power and authority of the Trustee and committed other violations of bankruptcy law and procedure during the adversary proceeding.

{¶12} The Trustee eventually entered into a compromise settlement agreement with Appellants with regard to the adversary proceeding. After a hearing, the bankruptcy court, in an order dated July 3, 2003, approved the compromise settlement agreement. The bankruptcy court weighed various criteria in deciding the settlement agreement was fair and equitable. Among other things, the court ruled that "[b]ased upon [ ] prior testimony, the allegations contained in the complaint, and the arguments of counsel at the hearing on the Motion, the Court found that the adversary complaint presents colorable claims which are the exclusive right of the Trustee herein to assert, with some chance of success as to many of these claims." Alfa Laval refused to sign the compromise settlement agreement.

{¶13} On May 11, 2005, Appellants filed the complaint giving rise to this appeal against Alfa Laval in the Mahoning County Court of Common Pleas, alleging defamation, tortious interference and abuse of process. Appellant Creatore had previously brought the defamation and tortious interference claims against Alfa Laval and several Alfa Laval executives in a previous action: *Sayavich v. Creatore v. Girton Oakes & Burger, Inc., et. al,* Mahoning County Court of Common Pleas No. 03-CV-1081. However, Creatore voluntarily dismissed the claims against Alfa Laval, without prejudice on May 25, 2004.[1]

{¶14} In the present case, Alfa Laval filed a motion to dismiss Appellants' claims, or alternatively, a motion for more definite statement on September 9, 2005, which was overruled by the trial court. Alfa Laval then filed an answer with affirmative defenses. On December 18, 2006, Alfa Laval filed a motion for summary judgment on all Appellants' claims, or alternatively a motion in limine. Appellants responded. Both sides sought the

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1 Case No. 03-CV-1081 eventually went to trial on two remaining claims: Creatore's defamation and breach of contract claims against Barnitt. The breach of contract claim alleged that Barnitt shared information with Alfa Laval regarding Creatore's competing BuyPep line, in violations of the non-disclosure provisions of the CCA. At the close of evidence, the trial court granted a directed verdict on the breach of contract claim. The defamation claim, which concerned Creatore's allegations that Barnitt fabricated a story that Creatore had planned a bankruptcy "bust-out" of GO&B and had set up a competing company as a plan to leave Alfa Laval with a $1,000,000 uncollectable account, went to the jury. The jury found in favor of Creatore on the defamation claim, initially awarded zero damages, but after being ordered by the trial court to further deliberate on damages, the jury awarded Creatore $25,000. Barnitt appealed and Creatore cross-appealed. In an opinion styled *Sayavich v. Creatore*, 7th Dist. No. 07 MA 217, 2009-Ohio-5270, this court affirmed the judgment of the trial court. (DeGenaro, J., dissented in part).

assistance of bankruptcy experts who provided opinions about whether violations of bankruptcy law and procedure had occurred during the GO&B bankruptcy case. On January 7, 2008, the trial court issued a judgment entry granting Alfa Laval's motion for summary judgment on the defamation claim and denying it on the abuse of process and tortious interference claims.

{¶15} The case was muddled by discovery disputes. Several motions to compel and motions for protective orders were filed by both sides. Appellants sought leave to file an amended complaint, which was overruled.

{¶16} On October 29, 2008, Alfa Laval filed a motion to dismiss Appellants' remaining claims for lack of subject matter jurisdiction. The trial court held a hearing on that and other motions on January 13, 2009 and both filed post-hearing briefs. On February 2, 2009, the trial court granted Alfa Laval's motion to dismiss, agreeing that Appellants' claims were preempted by federal bankruptcy law.

{¶17} Appellants filed a notice of appeal on February 27, 2009. Alfa Laval filed a notice of cross-appeal on March 5, 2009. This court granted Appellants' motion for a limited remand to pursue a Civ.R. 60(B) motion in the trial court. Appellants filed the 60(B) motion on April 28, 2009, which the trial court overruled on May 8, 2009. Appellants filed a supplemental notice of appeal from that judgment entry on June 2, 2009.

Bankruptcy Law Preemption

{¶18} In their first of three assignments of error, Appellants assert:

{¶19} "The trial court erred in finding it did not have jurisdiction over Plaintiffs' state law claims of tortuous [sic] interference, abuse of process and unfair business competition on the basis of federal bankruptcy law preemption."

{¶20} Appellants challenge both the trial court's initial dismissal of their claims, and the trial court's subsequent denial of their motion to vacate the court's judgment of dismissal. Although Appellants inter-mingle arguments regarding the initial dismissal and the denial of the Civ.R. 60(B) motion, for ease of analysis, we will address these rulings separately.

Initial Dismissal

{¶21} Appellate review on a dismissal for lack of subject matter jurisdiction is de novo. *Crestmont Cleveland Partnership v. Ohio Dept. of Health* (2000), 139 Ohio App.3d 928, 936, 746 N.E.2d 222. Further, in determining whether the trial court properly dismissed the case for lack of subject matter jurisdiction, the trial court, and hence a reviewing court are not limited to an examination of the allegations in the complaint, but rather have the authority to consider any pertinent evidentiary material in the record. *McGuffey v. LensCrafters, Inc.* (2001), 141 Ohio App.3d 44, 50, 749 N.E.2d 825.

{¶22} As indicated, at the time of dismissal two of Appellants claims remained: tortious interference with a contract and abuse of process. With regard to the tortious interference claim, Appellants alleged that Alfa Laval had knowledge of the terms of the Close Corporation Agreement (CCA) between Creatore, Sayavich, Barnitt and USSC, and interfered with the CCA by soliciting Sayavich and Barnitt to reveal confidential information protected thereby. Appellants further alleged that the information Alfa Laval wrongly procured from Sayavich and Barnitt caused Alfa Laval to file the involuntary bankruptcy petition against GO&B, which in turn caused Appellants damages.

{¶23} More specifically, Appellants alleged in their answers to interrogatories:

{¶24} "Defendant was in possession of the CCA at the time Defendant solicited Sayavich and Barnitt to violate the clear terms of that contract. Defendant used the information unlawfully solicited in violation of this contract and as a pretence and excuse to then force GO&B into Bankruptcy immediately after Plaintiffs purchased approximately 1.5 million dollars of GO&B debt. All of these actions were done under false pretenses and were intended to financially ruin Plaintiffs."

{¶25} The abuse of process claim concerned Alfa Laval's conduct in filing and pursuing the adversary complaint against Appellants during the GO&B bankruptcy proceedings. More specifically, Appellants alleged that the adversary complaint was wrongfully used to obtain an improper objective, i.e., to prevent Appellant Creatore from operating a separate business in competition with Alfa Laval. In their answers to interrogatories, Appellants more specifically alleged that: "[i]n an effort to preclude

Creatore and GO&B from lawfully competing against Alfa Laval, [Alfa Laval] filed an involuntary bankruptcy petition against GO&B and subsequently perverted this process by fabricating allegations against GO&B and Creatore and prepared an adversarial complaint for filing in the Bankruptcy Court to eliminate GO&B and Creatore as competitors. [Alfa Laval] then intentionally misrepresented information about Creatore's character to the Trustee to get the Truustee [sic] to pursue such false allegations."

{¶26} Alfa Laval filed a motion to dismiss both claims based on lack of subject matter jurisdiction, arguing the claims were preempted by federal bankruptcy law. The trial court granted the motion in a February 2, 2009 judgment entry which stated in its entirety:

{¶27} "Because this court lacks subject matter jurisdiction, regarding the claims of the Plaintiff, the Motion to Dismiss of the Defendant, Alfa Laval Flow, Inc. is hereby granted. This court finds that the remedies available to the Plaintiffs are exclusive to those provided by bankruptcy law and procedure. This court finds that the state law claims, such as those herein and presented, have been preempted. The complaint is therefore dismissed."

{¶28} State law is preempted under the Supremacy Clause of the United States Constitution in three circumstances. Clause 2, Article VI, United States Constitution. The first circumstance, often termed "express preemption," means that "Congress can define explicitly the extent to which its enactments preempt state law." *English v. General Electric Co* (1990), 496 U.S. 72, 78, 110 S.Ct. 2270, 110 L.Ed.2d 65. The other two circumstances encompass forms of implied preemption, i.e., "field preemption" and "conflict preemption." Field preemption means "in absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." Id. at 79. Conflict preemption is where "state law is preempted to the extent that it actually conflicts with federal law." Id. Congressional intent is paramount in determining whether federal law preempts state law. *California Fed. Sav. & Loan Assn. v. Guerra* (1987) 479 U.S. 272, 280, 107 S.Ct. 683, 93 L.Ed.2d 613.

{¶29} The Bankruptcy Code does not explicitly prohibit state law tort claims that arise from bankruptcy proceedings. Thus, the question to be resolved in this appeal is whether Congress impliedly preempted such claims. This is an issue of first impression for this court. Neither this district, nor the Ohio Supreme Court, has addressed this question. Courts across the country—both state and federal—are divided on this issue. The majority position holds that such claims are preempted under a field preemption theory, and Alfa Laval urges this court to follow this line of decisions. The seminal case, often cited by other courts, is the Ninth Circuit's *MSR Exploration, Ltd. v. Meridian Oil, Inc.* (C.A.9, 1996), 74 F.3d 910. In *MSR Exploration*, debtor-plaintiffs brought a state law claim of malicious prosecution against creditor-defendants for filing creditor's claims during bankruptcy proceedings. The federal district court dismissed the claims on the basis that the court lacked subject matter jurisdiction because the action was preempted by bankruptcy law. On appeal, the Ninth Circuit affirmed the dismissal. Id. at 916.

{¶30} The court provided several reasons for its determination that the cause of action was preempted. First, the court opined that Congress' intent to preempt the field is demonstrated by the fact that bankruptcy matters fall under the exclusive jurisdiction of federal courts. Id. at 913.

{¶31} Second, the court noted that "a mere browse through the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code, 11 U.S.C. Sec. 101 et seq., demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike. While it is true that bankruptcy law makes reference to state law at many points, the adjustment of rights and duties within the bankruptcy process itself is uniquely and exclusively federal. It is very unlikely that Congress intended to permit the superimposition of state remedies on the many activities that might be undertaken in the management of the bankruptcy process.

{¶32} "Debtors' petitions, creditors' claims, disputes over reorganization plans, disputes over discharge, and innumerable other proceedings, would all lend themselves to claims of malicious prosecution. Those possibilities might gravely affect the already

complicated processes of the bankruptcy court. * * * Of course, the opportunities for asserting malicious prosecution claims would only be limited by the fertility of the pleader's mind and by the laws of the state in which the proceeding took place." Id. at 914.

{¶33} Third, the court noted that need for uniformity in bankruptcy proceedings was so important historically that the framers of the United States Constitution were persuaded to expressly grant Congress the power "to establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." Id., quoting Clause 4, Section 8, Article I, United States Constitution.

{¶34} Finally, the court expounded upon the fact that the Congress has created specific remedies to prevent misuse of the bankruptcy process, including Fed.R.Bankr.P. 9011 (frivolous and harassing filings); Section 105(a), Title 11, U.S.Code (authority to prevent abuse of process); Section 303(i)(2), Title 11, U.S.Code (bad faith filing of involuntary petitions); Section 362(h), Title 11, U.S.Code (willful violation of stays); Section 707(b), Title 11, U.S.Code (dismissal for substantial abuse); Section 930, Title 11, U.S.Code (dismissal under Chapter 9); and Section 1112, Title 11, U.S.Code (dismissal under Chapter 11). This suggested to the court that "Congress has considered the need to deter misuse of the process and has not merely overlooked the creation of additional deterrents." *MSR Exploration* at 915, citing *Mertens v. Hewitt Assoc.* (1993), 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (enforcement scheme in ERISA indicates Congress did not forget other remedies); *Pilot Life Ins. Co. v. Dedeaux* (1987), 481 U.S. 41, 54, 107 S.Ct. 1549, 1556-57, 95 L.Ed.2d 39 (ERISA remedies preempt others, even if some possible remedies are left out); and *Gibson v. Prudential Ins. Co.* (C.A.9, 1990), 915 F.2d 414, 418.

{¶35} Most jurisdictions have adopted the position as set forth in *MSR Exploration*. See, e.g., *Casden v. Burns* (N.D.Ohio 2007), 504 F.Supp.2d 272 (shareholder's claim that corporate officers' breached fiduciary duty by deciding to file bankruptcy petition preempted); *In re Miles* (C.A.9, 2005), 430 F.3d 1083 (claims by debtor and debtor's relatives against creditors, their attorneys and legal staff for alleged bad faith conduct in

filing involuntary bankruptcy petitions preempted); *Lewis v. Chelsea G.C.A. Realty Partnership, L.P.* (2004), 86 Conn.App. 596, 862 A.2d 368 (federal preemption in field of bankruptcy deprives Connecticut courts of jurisdiction to hear state law unfair trade practices claim which asserted that an action brought in federal bankruptcy court was improper); *Glannon v. Garrett & Assoc., Inc.* (D.Kan.2001), 261 B.R. 259 (state law claims based on filing of involuntary bankruptcy petition, adversary proceeding and violation of automatic stay preempted); *Shiner v. Moriarty* (Pa.Super.Ct.1998), 706 A.2d 1228 (state law tort claim against creditors, their attorneys, and law firm for filing various improper bankruptcy papers preempted); *Raymark Industries, Inc. v. Baron* (E.D.Pa. June 23, 1997), No. 96-7625, unreported (debtor's state law tort claims against creditors arising from creditors' filing of an involuntary bankruptcy petition preempted); *Mason v. Smith* (1996), 140 N.H. 696, 672 A.2d 705 (state tort action against creditors who instituted involuntary bankruptcy proceeding preempted); *Koffman v. Osteoimplant Technology., Inc.* (D.Md.1995), 182 B.R. 115 (debtor's claims of abuse of process and malicious prosecution against creditors who instituted involuntary bankruptcy proceeding preempted); *Edmonds v. Lawrence Natl. Bank & Trust Co.* (1991), 16 Kan.App.2d 331, 823 P.2d 219 (abuse of process and malicious prosecution claims arising from defendant's filing of complaint to revoke plaintiffs' discharge granted by bankruptcy court preempted); *Idell v. Goodman* (1990), 224 Cal.App.3d 262, 273 Cal.Rptr. 605 (malicious prosecution action by a debtor against a creditor for "improperly" objecting to the discharge of the debtor's fiscal obligations preempted); *Smith v. Terry's Tractor, Inc.* (1989), 209 Cal.App.3d 951, 257 Cal.Rptr. 598 (debtor's claims of abuse of process and malicious prosecution against creditors who instituted involuntary bankruptcy proceeding were preempted by federal law); *Gonzales v. Parks* (C.A.9, 1987), 830 F.2d 1033 (abuse of process claim regarding filing of a bankruptcy petition preempted).

{¶36} Notably, the Sixth Circuit Court of Appeals also favors preemption. See *Pertuso v. Ford Motor Credit Co.* (C.A.6, 2000), 233 F.3d 417. In *Pertuso*, bankruptcy debtors brought a purported class-action suit against their secured creditor in federal court asserting Ohio common-law claims for unjust enrichment and an accounting. More

specifically, the debtor-plaintiffs challenged the creditor's conduct in the bankruptcy court with regard to a reaffirmation agreement. The Sixth Circuit, citing *MSR Exploration*, held those claims were preempted by bankruptcy law as Congress had preempted the field. Id. at 425-426. The court continued:

{¶37} "As [the defendant] correctly points out, the [the plaintiffs'] state law claims presuppose a violation of the Bankruptcy Code. Permitting assertion of a host of state law causes of action to redress wrongs under the Bankruptcy Code would undermine the uniformity the Code endeavors to preserve and would 'stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. at 426, quoting *Bibbo v. Dean Witter Reynolds, Inc.* (C.A.6, 1998), 151 F.3d 559, 562-563.

{¶38} A recent Pennsylvania Supreme Court case, *Stone Crushed Partnership v. Kassab Archbold Jackson & O'Brien* (2006), 589 Pa. 296, 908 A.2d 875, follows the majority rule as well. In *Stone Crushed Partnership,* one of the plaintiffs, James Jackson, had partnered with several of the defendants to form Granite Partners One, Ltd. In a situation similar to that in the case at bar, Granite defaulted on its loan obligations and Jackson, seeking to avoid foreclosure, formed a separate partnership called Stone Crushed Partnership (Stone) to assume Granite's debt. Stone was essentially Jackson acting in accordance with the protection afforded to a limited partnership entity. Granite's remaining partners, defendants Archbold and O'Brien put Granite into bankruptcy by instituting Chapter 11 bankruptcy proceedings. While in bankruptcy, Stone instituted an adversary action against the debtor Granite and the non-debtors Archbold and O'Brien. Granite, Archbold and O'Brien in turn filed counterclaims against Stone and Jackson, which were dismissed by the bankruptcy court.

{¶39} Stone and Jackson then brought suit in Pennsylvania state court alleging state law claims of abuse of process and wrongful use of civil proceedings arising from the counterclaims filed in the adversary proceeding. Summary judgment was granted in favor of Archbold and O'Brien and the Pennsylvania Supreme Court affirmed, following the majority of courts and holding that the state law claims were preempted by federal bankruptcy law. The court noted that even though a state law action would have provided

greater remedies than those available in the Bankruptcy Code, the plaintiffs' claims were nonetheless preempted. *Stone Crushed Partnership* at 314-315. *Stone Crushed Partnership* is factually very similar to the present case, and we find it telling that Appellants did not attempt to distinguish it.

{¶40} Instead, Appellants urge us to adopt the minority position and to conclude that state law tort claims are not preempted. However, the overwhelming weight of authority is against that position, and moreover, decisions favoring the minority view are often fractured.

{¶41} For instance, in a recent 5-4 Texas Supreme Court decision, *Graber v. Fuqua* (Tex.2009), 279 S.W.3d 608, a slim majority of the court held that a state law malicious prosecution claim concerning an adversary complaint filed during the course of a Chapter 7 bankruptcy proceeding was not preempted by federal law. Id. at 610. A strong dissent concluded the opposite, stating that "Debtors have adequate recourse for abuse of the bankruptcy process in the Bankruptcy Code and Rules." Id. at 621 (Wainwright, J., dissenting). The dissent expressed its concern that the majority's holding "undermines the uniformity mandated for bankruptcy law in the United States Constitution, as under the [majority's] rationale all fifty states could overlay their state remedies on the bankruptcy proceedings and multiply the controversy for years beyond the controlled confines of the federal bankruptcy process." Id. (Wainwright, J., dissenting).

{¶42} Although a divided panel from the Fifth District implicitly favored the minority rule in *Dever v. Lucas*, 174 Ohio App.3d 725, 2008-Ohio-332, 884 N.E.2d 641, there was a dissent in that case as well. *Dever* involved malicious prosecution and abuse of process claims which arose from a bankruptcy proceeding. The trial court granted defendants' Civ.R. 12(B)(6) motion and dismissed both claims. Plaintiffs appealed the majority's analysis centered on whether the plaintiffs' complaint stated claims for malicious prosecution and abuse of process. Id. at ¶29, 42. The majority did not directly address preemption, apparently because the issue had not been raised.

{¶43} The dissent concluded the claims should have been dismissed for lack of

subject matter jurisdiction, noting that subject-matter jurisdiction may be raised sua sponte by the court at any stage of the proceedings, including for the first time on appeal. Id. at ¶46-47 (Delaney, J., dissenting). The dissent continued:

{¶44} "I agree with other jurisdictions that have determined that the Bankruptcy Code and Federal Rules of Civil Procedure, specifically Section 105, Title 11, U.S.Code and Fed.R.Civ.P. 11, preempt state-law claims of malicious prosecution and abuse of process for conduct that occurred in bankruptcy proceedings.

{¶45} "As recently recognized by the Supreme Court of Pennsylvania in *Stone Crushed Partnership v. Kassab Archbold Jackson & O'Brien* (2006), 589 Pa. 296, 908 A.2d 875, parties could be deterred from exercising their rights in bankruptcy if, by filing a bankruptcy action, they risk being faced with a state-court lawsuit and liability for substantial damages, citing *Gonzales v. Parks* (C.A.9, 1987), 830 F.2d 1033, 1036. It is for Congress and the federal courts, not the state courts, to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized. Id. at 308, 908 A.2d 875. * * * Accordingly, I would affirm the trial court's dismissal of the complaint, albeit on different grounds." *Dever* at ¶48-51 (Delaney, J., dissenting).

{¶46} This analysis is persuasive. We share the concerns of many other courts that state tort actions which presuppose bankruptcy law violations could undermine the uniformity of the bankruptcy process. In addition, parties could be deterred from exercising their rights in bankruptcy if, by filing a bankruptcy action, they risk being faced with a state-court lawsuit and liability for substantial damages. Moreover, the Bankruptcy Code contains many remedies for improper conduct during a bankruptcy proceeding. Section 303(i), Title 11, U.S.Code authorizes sanctions for involuntary bankruptcy petitions filed in bad faith which includes costs, reasonable attorney fees, damages proximately caused by the filing and punitive damages. Section 105(a), Title 11, U.S.Code provides that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate * * * *to prevent an abuse of process.*" (Emphasis added.) Rule 9011 of the Federal Rules of Bankruptcy Procedure provides sanctions for frivolous

and harassing filings. The fact that Congress provided remedies for bad faith conduct and abuse of process in a bankruptcy proceeding evinces its intent that state law tort claims arising from misuse of those proceedings are preempted.

{¶47} Appellants argue that even if we side with the majority of courts on the overarching preemption issue, that their claims are somehow unique and therefore factually distinguishable from the above cases, thus making preemption unwarranted. First, with respect to their abuse of process claim, which centers on the adversary complaint, Appellants contend the adversary proceeding was not a "core proceeding" under Section 1334(a) and that therefore the bankruptcy court had only concurrent jurisdiction over the claim, which according to Appellants, makes preemption unwarranted. Appellants cite *In re Wolverine Radio Co.* (C.A.6, 1991), 930 F.2d 1132, in support of this argument. However, *Wolverine* is not on point. There the Sixth Circuit held that a proceeding brought by a Chapter 11 debtor to determine the Michigan Employment Security Commission's authority to transfer the debtor's experience rating to an assignee of purchaser of the debtor's assets and to determine assignee's liability under the Michigan Employment Security Act was a "core proceeding," over which the district court had exclusive jurisdiction. Id. at 1143-1144.

{¶48} Moreover, as Alfa Laval points out, *MSR Exploration* and its progeny turned on the detailed, highly complex laws governing bankruptcy in concluding preemption, not on whether the claims of abuse during the bankruptcy process concern a "core proceeding." In other words, conspicuously absent from the analyses of those courts is any discussion of whether or not the proceedings were "core." *Stone Crushed Partnership* involved an adversary dispute between non-debtors, something Appellants would characterize as "non-core," yet the Pennsylvania Supreme Court nonetheless found preemption.

{¶49} Second, Appellants argue that because none of the parties to the state court litigation in the instant case were debtors in the bankruptcy court action that preemption is improper. However, several of the cases favoring preemption concerned state court suits involving non-debtors. See, e.g., *Stone Crushed Partnership*, and *In re*

Miles, supra. For instance, *In re Miles* involved a suit brought in California state court against a creditor by the relatives of several bankruptcy debtors for alleged bad faith filing of a bankruptcy petition. None of the relatives sought damages for involuntary bankruptcy petitions filed against them personally. Despite the fact that the case involved purely non-debtors, the Ninth Circuit found the state law claims preempted by federal bankruptcy law. Id. at 1091.

{¶50} Third, Appellants make a timing argument with respect to their tortious interference claim. Namely, they argue that this claim arose prior to Alfa Laval filing the involuntary bankruptcy petition against GO&B and that the claim cannot be preempted for this reason. However, an analogous argument was raised and rejected in *Casden*, 504 F.Supp.2d 272, supra. *Casden* involved a shareholder suit where one of the claims alleged that the corporate officers' decision to file a voluntary Chapter 11 bankruptcy petition constituted a breach of fiduciary duty. Among other things, the shareholder-plaintiff argued that the claims should not be preempted by federal bankruptcy law because the alleged breach of fiduciary duty occurred *prior* to any filing in the bankruptcy court. The federal district court rejected this argument. The court reasoned that the claim for breach of fiduciary duty could not accrue until such time as damages occurred, and that any alleged damages could not have occurred until the Chapter 11 bankruptcy petition was filed. Id. at 281, citing, inter alia, *Kunz v. Buckeye Union Ins. Co.*, 1 Ohio St.3d 79, 81-82, 437 N.E.2d 1194 (finding tort cause of action accrued as of date that damages were incurred, and not earlier date when duty was breached.)

{¶51} The federal district court continued:

{¶52} "When, as here, injury to shareholders might never occur, and thus plaintiff's claim would not accrue, if at all, until after the company files its bankruptcy petition, and accrual of the claim depends on what happens in the Bankruptcy Court, the potential future claim would interfere sufficiently with the bankruptcy process to trigger preemption." *Casden* at 282, citing *Pertuso* and *MSR Exploration.*

{¶53} This logic can be applied here. Appellants argue that the tortious interference occurred prior to the bankruptcy filing and therefore should not be

preempted. However, any damage from the alleged tortious interference did not occur until Alfa Laval filed the involuntary bankruptcy petition. In order to succeed on their tortious interference claim, Appellants would necessarily have to prove that the bankruptcy was filed in bad faith. Cf. *Casden* at 280. Numerous courts have held that state law claims based on the bad faith filing of an involuntary bankruptcy petition are preempted. See, e.g., *In re Miles*, *Glannon*, *Raymark Industries*, *Mason*, *Koffman*, *Smith*, supra. Even the majority in *Graber*, which concluded there was no preemption of a state law claim arising from an adversary proceeding, signaled in dicta that a state law claim based upon the bad faith filing of an involuntary petition would be preempted. *Graber* at 65 ("it is more likely that Congress considered the need to deter misuse of the unique involuntary petition process it created, and more likely that it intended section 303(i) to be the exclusive remedy.")

{¶54} Finally, Appellants argue in their Reply Brief that a 2005 United States Supreme Court case, *Bates v. Dow Agrosciences, LLC* (2005), 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687, supports their argument against preemption. In their view, *Bates* narrowed federal law preemption to situations where Congress's intent to preempt is "clear and manifest." In *Bates*, the United States Supreme Court held that certain state law claims were not preempted by the Federal Insecticide, Rodenticide and Fungicide Act (FIRFA). The Court further ruled that "in areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" Id. at 449, quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995), 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d, quoting *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447.

{¶55} *Bates* is not entirely on point because it does not deal with preemption under the Bankruptcy Code, but rather under FIRFA. Further, bankruptcy law is far from an area of "traditional state regulation." Moreover, even applying the clear and manifest standard to the case at hand, Congress's intent to preempt the entire field of bankruptcy law meets that standard.

{¶56} Thus, based on the foregoing, we conclude the trial court properly dismissed Appellants' claims for lack of subject matter jurisdiction as they were preempted by federal bankruptcy law. The first part of Appellants' first assignment of error is meritless.

Ruling on the Civ.R. 60(B) Motion

{¶57} Appellants also appeal the trial court's ruling on the Civ.R. 60(B) motion, which denied their motion to vacate the court's judgment of dismissal. As aforementioned, following the trial court's dismissal of this case for lack of subject matter jurisdiction, Appellants filed a motion for relief from the automatic stay in the bankruptcy court. After a hearing, the bankruptcy court denied the motion for relief from stay as moot since the state trial court action had already been dismissed. In the body of the opinion, the bankruptcy court did state "The Court finds that the automatic stay is not applicable to the State Court Case. Debtor Girton, Oakes & Burger ("Debtor") is not a party to the State Court Case, and the State Court case does not affect any property of the estate."

{¶58} Upon motion of Appellants, we granted a limited remand so that Appellants could pursue a Civ.R. 60(B) motion in the trial court, in light of the bankruptcy court decision. In that motion, Appellants claimed the bankruptcy court's ruling warranted the trial court to vacate its judgment of dismissal. The trial court denied the motion and Appellants filed a supplemental notice of appeal from that judgment.

{¶59} In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must demonstrate that: "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150-151, 1 O.O.3d 86, 351 N.E.2d 113.

{¶60} The five listed grounds in Civ.R. 60(B) are as follows: "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule

59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment." Civ.R 60(B).

{¶61} A trial court's ruling on a Civ.R. 60(B) motion is reviewed for an abuse of discretion. *Riesbeck v. Indus. Paint and Strip*, 7th Dist. No. 08 MO 11, 2009-Ohio-6250, at ¶17, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

{¶62} Here the trial court did not abuse its discretion by denying the motion. The bankruptcy court's decision does not justify vacating the dismissal order and reinstating the case for several reasons. First, the bankruptcy court's ruling on Appellants motion for relief from the automatic stay is not dispositive of the preemption issue. Federal bankruptcy law preemption and violations of the automatic stay are two separate and distinct legal concepts. With regard to the automatic stay, the Bankruptcy Code mandates a stay in further judicial proceedings against the debtor until a bankruptcy dispute is resolved. Section 362(a)(1), Title 11, U.S.Code, provides that, unless the action falls under one of the exceptions listed in subsection (b), the filing of a bankruptcy petition operates as a stay of "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." (Emphasis added.)

{¶63} Thus, the automatic stay protects bankruptcy debtors from most types of suits filed against them during the course of the bankruptcy proceeding. By contrast, preemption relates to certain types of state law *claims*, which may or may not involve the debtor as a defendant, that conflict with federal law, either implicitly or explicitly. See

English, 496 U.S. at 78, supra.

{¶64} Appellants focus on the bankruptcy court's declaration that "the State Court Case does not affect any property of the estate," to justify their position that preemption of their claims was unwarranted. However, Appellants take that statement out of context; it was made by the bankruptcy court pursuant to its ruling on Appellants' motion for relief from the automatic stay. The bankruptcy court's full statement on this topic in its judgment entry was as follows: "The Court finds that *the automatic stay is not applicable to the State Court Case*. Debtor Girton, Oakes & Burger ("Debtor") is not a party to the State Court Case, and the State Court case does not affect any property of the estate." (Emphasis added.)

{¶65} Moreover, the bankruptcy court stated during the hearing on the motion for relief from stay that it believed the trial court was correct in dismissing the present case for lack of subject matter jurisdiction:

{¶66} "[J]ust to make sure that it is very clear, the allegations in the State Court case that the Court has read appear to go to the good faith of the filing [of the involuntary bankruptcy petition] by Alfa Laval, which I think has long passed and is not something that another creditor can assert to begin with, and I think the allegations with respect to the filing of the adversary proceeding are also not for this creditor to assert, and to the extent that the Trustee had any of those concerns, I think those concerns have been waived or ratified.

{¶67} "So I think that *the State Court was correct that the State Court does not have jurisdiction* over *at least most of the allegations that are, that have been asserted in the State Court suit.*" (Emphasis added.)

{¶68} The bankruptcy court then ruled that the automatic stay does not apply to the present suit and denied Appellants' motion for relief as moot because this case had already been dismissed by the trial court. Thus, the bankruptcy court's ruling does not support Appellants' motion to vacate the dismissal. If anything, it actually supports the trial court's decision to dismiss the case for lack of subject matter jurisdiction.

{¶69} Finally, as Alfa Laval notes, Appellants failed to argue precisely how they

were entitled to relief from judgment under any of the listed grounds in Civ.R. 60(B). They cited to sections (1), (2) and (5) in their motion, but offered no explanation as to how or why they were entitled to relief under those sections. For all of these reasons, the trial court properly denied Appellants' Civ.R. 60(B) motion.

{¶70} Based on the foregoing, the trial court properly dismissed Appellants' claims for lack of subject matter jurisdiction, and the court did not abuse its discretion in denying the subsequent Civ.R. 60(B) motion. Accordingly, Appellants' first assignment of error is meritless.

Appellants' Remaining Assignments of Error

{¶71} In their second and third assignments of error, Appellants assert, respectively:

{¶72} "The state trial court erred in denying plaintiff's motion to amend their complaint to add a claim for unfair competition and unfair trade practices."

{¶73} "The trial court erred in denying Plaintiff's motion to compel the production of documents withheld by the Defendant under a claim of attorney-client privilege and work product."

{¶74} Based upon our resolution of Appellants' first assignment of error, which concludes the trial court correctly dismissed all of Appellants' claims, these assignments of error are moot and we decline to address them.

Alfa Laval's Cross-Appeal

{¶75} Alfa Laval filed a cross-appeal in this matter, in which it assigns two errors:

{¶76} "The trial court erred when it failed to grant summary judgment in favor of Alfa Laval concerning the tortious interference claim."

{¶77} "The trial court erred when it failed to grant summary judgment in favor of Alfa Laval concerning the abuse of process claim."

{¶78} Here, Alfa Laval attempts to challenge the trial court's January 8, 2008 denial of Alfa Laval's motion for summary judgment on Appellants' tortious interference and abuse of process claims. Because we have resolved this appeal in Alfa Laval's favor, we decline to discuss the merits of Alfa Laval's cross-assignments of error; these

issues are moot.

Conclusion

{¶79} All of Appellants' arguments are meritless. The trial court properly dismissed the case for lack of subject matter jurisdiction because Appellants' abuse of process and tortious interference claims are preempted by federal bankruptcy law. The trial court did not abuse its discretion by denying Appellants' subsequent Civ.R. 60(B) motion. Appellants' arguments regarding the trial court's denial of their motion to amend and motion to compel discovery are moot based upon our conclusion that their claims were properly dismissed. Alfa Laval's cross-appeal is also moot based upon our resolution of this appeal in Alfa Laval's favor. Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., *concurs.*

Donofrio, J., *concurs.*

APPROVED:

Mary DeGenaro

JUDGE MARY DeGENARO

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

CLERK OF COURTS
MAHONING COUNTY, OHIO
FEB - 2 2009
FILED
ANTHONY VICI, CLERK

PNH

Plaintiff

Vs.

ALFA LAVAL FLOW, INC.

Defendant

2005 CV 1695

JUDGE THOMAS P. CURRAN
On Assignment, Art. IV, Section 6
Ohio Constitution

February 2, 2009

JUDGMENT ENTRY OF DISMISSAL

Because this court lacks subject matter jurisdiction, regarding the claims of the Plaintiff, the Motion to Dismiss of the Defendant, Alfa Laval Flow, Inc. is hereby granted.

This court finds that the remedies available to the Plaintiffs are exclusive to those provided by bankruptcy law and procedure This court finds that state law claims, such as those herein and presented, have been preempted. The complaint is therefore dismissed. Final.

IT IS SO ORDERED.

JUDGE THOMAS P. CURRAN
SITTING ON ASSIGNMENT
ARTICLE IV, SECTION 6
OHIO CONSTITUTION

COPIES TO: ATTY. ANDREW SUHAR
ATTY. FRANK MAZGAI
ATTY. DAVID NICHOL

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FILED
U.S. BANKRUPTCY
2009 MAR 20 AM 10: 02
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	CASE NUMBER 03-41957
GIRTON, OAKES & BURGER,	*	CHAPTER 7
Debtor.	*	HONORABLE KAY WOODS

****
ORDER DENYING AMENDED MOTION FOR RELIEF FROM STAY AS MOOT
****

This cause is before the Court on Amended Motion for Relief From Stay ("Motion for Relief") (Doc. # 269) filed by Ronald Creatore, PNH, Inc., HEVUN Diversified Corporation, and Diversified Process Components, Inc. ("Movants") on February 20, 2009. Movants request relief from stay to further prosecute a state court case in the Mahoning County Common Pleas Court (Case No. 05-CV-1695) ("State Court Case") against Alfa Laval Flow, Inc. ("Alfa Laval").

On February 25, 2009, Alfa Laval filed Alfa Laval's Brief Concerning Relief From Stay ("Alfa Laval's Brief") (Doc. # 273). Alfa Lava's Brief argues that the State Court Case was dismissed because the state court lacked subject matter jurisdiction and not as a result of the automatic stay in the instant case.

The Court held a hearing on the Motion for Relief on March 19, 2009. The Court finds that the automatic stay is not applicable to the State Court Case. Debtor Girton, Oakes & Burger ("Debtor") is not a party to the State Court Case, and the State Court Case does not affect any property of the estate. Moreover, to the extent that

the State Court Case has been dismissed, there is no relief this Court can grant. As a result, the Motion for Relief is denied as moot.

IT IS SO ORDERED.

Kay Woods

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

CLERK OF COURTS
MAHONING COUNTY, OHIO
MAY - 8 2009
FILED
ANTHONY VUCI, CLERK

PNH INC. et al

Plaintiff

Vs.

ALFA LAVAL FLOW, INC.

Defendant

2005 CV 1695

JUDGE THOMAS P. CURRAN
On Assignment, Art. IV, Section 6
Ohio Constitution

May 7, 2009

JUDGMENT ENTRY DENYING PLAINTIFFS' 60B MOTION

After carefully reviewing Plaintiffs' Motion for Relief from Judgment, this Court concludes that the motion is not well taken. Accordingly, the motion of PNH Inc. for Relief from Judgment under Rule 60B is hereby denied. Final

IT IS SO ORDERED.

Thom P. Curran

JUDGE THOMAS P. CURRAN
SITTING ON ASSIGNMENT
ARTICLE IV, SECTION 6
OHIO CONSTITUTION

COPIES TO: ATTY. ANDREW SUHAR
ATTY. FRANK MAZGAI
ATTY. DAVID NICHOL

United States Code Annotated

Constitution of the United States

Annotated

Article VI. Debts Validated--Supreme Law of Land--Oath of Office (Refs & Annos)

U.S.C.A. Const. Art. VI cl. 2

Clause 2. Supreme Law of Land

Currentness

Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Notes of Decisions (1700)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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United States Code Annotated

Constitution of the United States

Annotated

Article I. The Congress (Refs & Annos)

U.S.C.A. Const. Art. I § 8, cl. 4

Section 8, Clause 4. Naturalization and Bankruptcy

Currentness

Naturalization and Bankruptcy

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Notes of Decisions (262)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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Bankruptcy Code | 105
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 1. General Provisions (Refs & Annos)

11 U.S.C.A. § 105

§ 105. Power of court

Currentness

Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest--

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that--

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title--

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

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Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2555; Pub.L. 98-353, Title I, § 118, July 10, 1984, 98 Stat. 344; Pub.L. 99-554, Title II, § 203, Oct. 27, 1986, 100 Stat. 3097; Pub.L. 103-394, Title I, § 104(a), Oct. 22, 1994, 108 Stat. 4108; Pub.L. 109-8, Title IV, § 440, Apr. 20, 2005, 119 Stat. 114.)

Notes of Decisions (1388)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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Bankruptcy Code | 109
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 1. General Provisions (Refs & Annos)

11 U.S.C.A. § 109

§ 109. Who may be a debtor

Effective: April 1, 2010
Currentness

Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not--

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or

(3)(A) a foreign insurance company, engaged in such business in the United States; or

(B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978 [1] in the United States.

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity--

(1) is a municipality;

(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

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(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

(d) Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $360,475 [2] and noncontingent, liquidated, secured debts of less than $1,081,400 [2], or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $360,475 [2] and noncontingent, liquidated, secured debts of less than $1,081,400 [2] may be a debtor under chapter 13 of this title.

(f) Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title.

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

(2)(A) Paragraph (1) shall not apply with respect to a debtor who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies by reason of the requirements of paragraph (1).

(B) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in subparagraph (A) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter. Notwithstanding the preceding sentence, a nonprofit budget and credit counseling agency may be disapproved by the United States trustee (or the bankruptcy administrator, if any) at any time.

(3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that--

(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);

(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 7-day period beginning on the date on which the debtor made that request; and

(iii) is satisfactory to the court.

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(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2557; Pub.L. 97-320, Title VII, § 703(d), Oct. 15, 1982, 96 Stat. 1539; Pub.L. 98-353, Title III, §§ 301, 425, July 10, 1984, 98 Stat. 352, 369; Pub.L. 99-554, Title II, § 253, Oct. 27, 1986, 100 Stat. 3105; Pub.L. 100-597, § 2, Nov. 3, 1988, 102 Stat. 3028; Pub.L. 103-394, Title I, § 108(a), Title II, § 220, Title IV, § 402, Title V, § 501(d)(2), Oct. 22, 1994, 108 Stat. 4111, 4129, 4141, 4143; Pub.L. 106-554, § 1(a)(5) [Title I, § 112(c)(1), (2)], (8) [§ 1(e)], Dec. 21, 2000, 114 Stat. 2763, 2763A-393, 2763A-665; Pub.L. 109-8, Title I, § 106(a), Title VIII, § 802(d)(1), Title X, § 1007(b), Title XII, § 1204(1), Apr. 20, 2005, 119 Stat. 37, 146, 188, 193; Pub.L. 111-16, § 2(1), May 7, 2009, 123 Stat. 1607.)

1 So in original. Probably should be followed by a closing parenthesis.

2 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

Notes of Decisions (730)

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United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 3. Case Administration (Refs & Annos)

Subchapter I. Commencement of a Case

11 U.S.C.A. § 303

§ 303. Involuntary cases

Effective: April 1, 2010
Currentness

Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title--

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $14,425 [1] more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $14,425 [1] of such claims;

(3) if such person is a partnership--

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

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(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if--

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment--

(1) against the petitioners and in favor of the debtor for--

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for--

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section--

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) [Repealed. Pub.L. 109-8, Title VIII, § 802(d)(2), Apr. 20, 2005, 119 Stat. 146]

(l)(1) If--

(A) the petition under this section is false or contains any materially false, fictitious, or fraudulent statement;

(B) the debtor is an individual; and

(C) the court dismisses such petition,
the court, upon the motion of the debtor, shall seal all the records of the court relating to such petition, and all references to such petition.

(2) If the debtor is an individual and the court dismisses a petition under this section, the court may enter an order prohibiting all consumer reporting agencies (as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))) from making any consumer report (as defined in section 603(d) of that Act) that contains any information relating to such petition or to the case commenced by the filing of such petition.

(3) Upon the expiration of the statute of limitations described in section 3282 of title 18, for a violation of section 152 or 157 of such title, the court, upon the motion of the debtor and for good cause, may expunge any records relating to a petition filed under this section.

Credits
(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2559; Pub. L. 98-353, Title III, §§ 426, 427, July 10, 1984, 98 Stat. 369; Pub.L. 99-554, Title II, §§ 204, 254, 283(b), Oct. 27, 1986, 100 Stat. 3097, 3105, 3116; Pub.L. 103-394, Title I, § 108(b), Oct. 22, 1994, 108 Stat. 4112; Pub.L. 109-8, Title III, § 332(b), Title VIII, § 802(d)(2), Title XII, § 1234(a), Apr. 20, 2005, 119 Stat. 103, 146, 204.)

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

Notes of Decisions (962)

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United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 3. Case Administration (Refs & Annos)

Subchapter III. Administration

11 U.S.C.A. § 342

§ 342. Notice

Effective: December 1, 2009
Currentness

Notice

(a) There shall be given such notice as is appropriate, including notice to any holder of a community claim, of an order for relief in a case under this title.

(b) Before the commencement of a case under this title by an individual whose debts are primarily consumer debts, the clerk shall give to such individual written notice containing--

(1) a brief description of--

(A) chapters 7, 11, 12, and 13 and the general purpose, benefits, and costs of proceeding under each of those chapters; and

(B) the types of services available from credit counseling agencies; and

(2) statements specifying that--

(A) a person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury in connection with a case under this title shall be subject to fine, imprisonment, or both; and

(B) all information supplied by a debtor in connection with a case under this title is subject to examination by the Attorney General.

(c)(1) If notice is required to be given by the debtor to a creditor under this title, any rule, any applicable law, or any order of the court, such notice shall contain the name, address, and last 4 digits of the taxpayer identification number of the debtor. If the notice concerns an amendment that adds a creditor to the schedules of assets and liabilities, the debtor shall include the full taxpayer identification number in the notice sent to that creditor, but the debtor shall include only the last 4 digits of the taxpayer identification number in the copy of the notice filed with the court.

(2)(A) If, within the 90 days before the commencement of a voluntary case, a creditor supplies the debtor in at least 2 communications sent to the debtor with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.

(B) If a creditor would be in violation of applicable nonbankruptcy law by sending any such communication within such 90-day period and if such creditor supplies the debtor in the last 2 communications with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.

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(d) In a case under chapter 7 of this title in which the debtor is an individual and in which the presumption of abuse arises under section 707(b), the clerk shall give written notice to all creditors not later than 10 days after the date of the filing of the petition that the presumption of abuse has arisen.

(e)(1) In a case under chapter 7 or 13 of this title of a debtor who is an individual, a creditor at any time may both file with the court and serve on the debtor a notice of address to be used to provide notice in such case to such creditor.

(2) Any notice in such case required to be provided to such creditor by the debtor or the court later than 7 days after the court and the debtor receive such creditor's notice of address, shall be provided to such address.

(f)(1) An entity may file with any bankruptcy court a notice of address to be used by all the bankruptcy courts or by particular bankruptcy courts, as so specified by such entity at the time such notice is filed, to provide notice to such entity in all cases under chapters 7 and 13 pending in the courts with respect to which such notice is filed, in which such entity is a creditor.

(2) In any case filed under chapter 7 or 13, any notice required to be provided by a court with respect to which a notice is filed under paragraph (1), to such entity later than 30 days after the filing of such notice under paragraph (1) shall be provided to such address unless with respect to a particular case a different address is specified in a notice filed and served in accordance with subsection (e).

(3) A notice filed under paragraph (1) may be withdrawn by such entity.

(g)(1) Notice provided to a creditor by the debtor or the court other than in accordance with this section (excluding this subsection) shall not be effective notice until such notice is brought to the attention of such creditor. If such creditor designates a person or an organizational subdivision of such creditor to be responsible for receiving notices under this title and establishes reasonable procedures so that such notices receivable by such creditor are to be delivered to such person or such subdivision, then a notice provided to such creditor other than in accordance with this section (excluding this subsection) shall not be considered to have been brought to the attention of such creditor until such notice is received by such person or such subdivision.

(2) A monetary penalty may not be imposed on a creditor for a violation of a stay in effect under section 362(a) (including a monetary penalty imposed under section 362(k)) or for failure to comply with section 542 or 543 unless the conduct that is the basis of such violation or of such failure occurs after such creditor receives notice effective under this section of the order for relief.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2565; Pub.L. 98-353, Title III, §§ 302, 435, July 10, 1984, 98 Stat. 352, 370; Pub.L. 103-394, Title II, § 225, Oct. 22, 1994, 108 Stat. 4131; Pub.L. 109-8, Title I, §§ 102(d), 104, Title II, § 234(b), Title III, § 315(a), Apr. 20, 2005, 119 Stat. 33, 35, 75, 88; Pub.L. 111-16, § 2(4), May 7, 2009, 123 Stat. 1607.)

Notes of Decisions (38)

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Bankruptcy Code | 362
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 3. Case Administration (Refs & Annos)

Subchapter IV. Administrative Powers

11 U.S.C.A. § 362

§ 362. Automatic stay

Effective: December 12, 2006
Currentness

Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) 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;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) 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;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)--

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(A) of the commencement or continuation of a civil action or proceeding--

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[**(5) Repealed.** Pub.L. 105-277, Div. I, Title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-886]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value,

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payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of--

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or

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related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer--

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;
but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property--

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of--

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

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(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).
The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section--

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)--

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

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(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors, if--

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to--

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded--

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors if--

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the

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negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that--

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either--

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.
If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

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(e)(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless--

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended--

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)--

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the

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debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)(1) 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.

(2) If such violation is based on an action taken by an 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.

(l)(1) Except as otherwise provided in this subsection, subsection (b) (22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that--

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankrupcty [1] law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)--

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)--

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

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(5)(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify--

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)(1) Except as otherwise provided in this subsection, subsection (b) (23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied--

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)--

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor--

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(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply--

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if--

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2570; Pub.L. 97-222, § 3, July 27, 1982, 96 Stat. 235; Pub.L. 98-353, Title III, §§ 304, 363(b), 392, 441, July 10, 1984, 98 Stat. 352, 363, 365, 371; Pub.L. 99-509, Title V, § 5001(a), Oct. 21, 1986, 100 Stat. 1911; Pub.L. 99-554, Title II, §§ 257(j), 283(d), Oct. 27, 1986, 100 Stat. 3115, 3116; Pub.L. 101-311, Title I, § 102, Title II, § 202, June 25, 1990, 104 Stat. 267, 269; Pub.L. 101-508, Title III, § 3007(a)(1), Nov. 5, 1990, 104 Stat. 1388-28; Pub.L. 103-394, Title I, §§ 101, 116, Title II, §§ 204(a), 218(b), Title III, § 304(b), Title IV, § 401, Title V, § 501(b)(2), (d)(7), Oct. 22, 1994, 108 Stat. 4107, 4119, 4122, 4128, 4132, 4141, 4142, 4144; Pub.L. 105-277, Div. I, Title VI, § 603, Oct. 21, 1998, 112 Stat. 2681-886; Pub.L. 109-8, Title I, § 106(f), Title II, §§ 214, 224(b), Title III, §§ 302, 303, 305(1), 311, 320, Title IV, §§ 401(b), 441, 444, Title VII, §§ 709, 718, Title IX, § 907(d), (o)(1), (2), Title XI, § 1106, Title XII, § 1225, Apr. 20, 2005, 119 Stat. 41, 54, 64, 75, 77, 79, 84, 94, 104, 114, 117, 127, 131, 176, 181, 182, 192, 199; Pub.L. 109-304, § 17(b)(1), Oct. 6, 2006, 120 Stat. 1706; Pub.L. 109-390, § 5(a)(2), Dec. 12, 2006, 120 Stat. 2696.)

1 So in original. Probably should be "nonbankruptcy".

Notes of Decisions (5508)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

End of Document

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Bankruptcy Code | 363
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 3. Case Administration (Refs & Annos)

Subchapter IV. Administrative Powers

11 U.S.C.A. § 363

§ 363. Use, sale, or lease of property

Currentness

Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then--

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended--

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

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(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only--

(1) in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust; and

(2) to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--

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(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(*l*) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section--

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(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2572; Pub.L. 98-353, Title III, § 442, July 10, 1984, 98 Stat. 371; Pub.L. 99-554, Title II, § 257(k), Oct. 27, 1986, 100 Stat. 3115; Pub.L. 103-394, Title I, § 109, Title II, §§ 214(b), 219(c), Title V, § 501(d)(8), Oct. 22, 1994, 108 Stat. 4113, 4126, 4129, 4144; Pub.L. 109-8, Title II, §§ 204, 231(a), Title XII, § 1221(a), Apr. 20, 2005, 119 Stat. 49, 72, 195.)

Notes of Decisions (1320)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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Bankruptcy Code | 365
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 3. Case Administration (Refs & Annos)

Subchapter IV. Administrative Powers

11 U.S.C.A. § 365

§ 365. Executory contracts and unexpired leases

Currentness

Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance--

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

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(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

[**(4)** Repealed. Pub.L. 109-8, Title III, § 328(a)(2)(C), Apr. 20, 2005, 119 Stat. 100]

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of--

(i) the date that is 120 days after the date of the order for relief; or

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(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

[**(6) to (9)** Repealed. Pub.L. 109-8, Title III, § 328(a)(3)(A), Apr. 20, 2005, 119 Stat. 100]

[**(10)** Redesignated (5)]

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

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(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease--

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title--

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title--

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and--

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and--

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

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(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession--

(A) such purchaser shall continue to make all payments due under such contract, but may, [1] offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(*l*) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect--

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for--

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract--

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive--

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract or any agreement supplementary to such contract--

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(*o*) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

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(C) The stay under section 362 and the injunction under section 524(a) (2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2574; Pub.L. 98-353, Title III, §§ 362, 402-404, July 10, 1984, 98 Stat. 361, 367; Pub.L. 99-554, Title II, §§ 257(j), (m), 283(e), Oct. 27, 1986, 100 Stat. 3115, 3117; Pub.L. 100-506, § 1(b), Oct. 18, 1988, 102 Stat. 2538; Pub.L. 101-647, Title XXV, § 2522(c), Nov. 29, 1990, 104 Stat. 4866; Pub.L. 102-365, § 19(b)-(e), Sept. 3, 1992, 106 Stat. 982-984; Pub.L. 103-394, Title II, §§ 205(a), 219(a), (b), Title V, § 501(d)(10), Oct. 22, 1994, 108 Stat. 4122, 4128, 4145; Pub.L. 103-429, § 1, Oct. 31, 1994, 108 Stat. 4377; Pub.L. 109-8, Title III, §§ 309(b), 328(a), Title IV, § 404, Apr. 20, 2005, 119 Stat. 82, 100, 104.)

1 So in original. The comma probably should not appear.

Notes of Decisions (2212)

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Bankruptcy Code | 501
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter I. Creditors and Claims

11 U.S.C.A. § 501

§ 501. Filing of proofs of claims or interests

Currentness

Filing of proofs of claims or interests

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

(b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

(d) A claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition.

(e) A claim arising from the liability of a debtor for fuel use tax assessed consistent with the requirements of section 31705 of title 49 may be filed by the base jurisdiction designated pursuant to the International Fuel Tax Agreement (as defined in section 31701 of title 49) and, if so filed, shall be allowed as a single claim.

Credits
(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2578; Pub.L. 98-353, Title III, § 444, July 10, 1984, 98 Stat. 373; Pub.L. 109-8, Title VII, § 702, Apr. 20, 2005, 119 Stat. 125.)

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Bankruptcy Code | 502
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter I. Creditors and Claims

11 U.S.C.A. § 502

§ 502. Allowance of claims or interests

Currentness

Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that--

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds--

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of--

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds--

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of--

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(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide, and except that in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required.

(c) There shall be estimated for purpose of allowance under this section--

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that--

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g)(1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

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(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

(k)(1) The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if--

(A) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budget and credit counseling agency described in section 111;

(B) the offer of the debtor under subparagraph (A)--

(i) was made at least 60 days before the date of the filing of the petition; and

(ii) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and

(C) no part of the debt under the alternative repayment schedule is nondischargeable.

(2) The debtor shall have the burden of proving, by clear and convincing evidence, that--

(A) the creditor unreasonably refused to consider the debtor's proposal; and

(B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i).

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2579; Pub.L. 98-353, Title III, § 445, July 10, 1984, 98 Stat. 373; Pub.L. 99-554, Title II, §§ 257(j), 283(f), Oct. 27, 1986, 100 Stat. 3115, 3117; Pub.L. 103-394, Title II, § 213(a), Title III, § 304(h)(1), Oct. 22, 1994, 108 Stat. 4125, 4134; Pub.L. 109-8, Title II, § 201(a), Title VII, § 716(d), Title IX, § 910(b), Apr. 20, 2005, 119 Stat. 42, 130. 184.)

Notes of Decisions (1271)

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Bankruptcy Code | 503
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter I. Creditors and Claims

11 U.S.C.A. § 503

§ 503. Allowance of administrative expenses

Currentness

Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1)(A) the actual, necessary costs and expenses of preserving the estate including--

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax--

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by--

(A) a creditor that files a petition under section 303 of this title;

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(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of title 28;

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred--

(A) in disposing of patient records in accordance with section 351; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid--

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that--

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

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(C) either--

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless--

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2581; Pub.L. 98-353, Title III, § 446, July 10, 1984, 98 Stat. 374; Pub.L. 99-554, Title II, § 283(g), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 103-394, Title I, § 110, Title II, § 213(c), Title III, § 304(h)(2), Oct. 22, 1994, 108 Stat. 4113, 4126, 4134; Pub.L. 109-8, Title III, §§ 329, 331, Title IV, § 445, Title VII, § 712(b), (c), Title XI, § 1103, Title XII, §§ 1208, 1227(b), Apr. 20, 2005, 119 Stat. 101, 102, 117, 128, 190, 194, 200.)

Notes of Decisions (1410)

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Bankruptcy Code | 507
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter I. Creditors and Claims

11 U.S.C.A. § 507

§ 507. Priorities

Effective: April 1, 2010
Currentness

Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

(4) Fourth, allowed unsecured claims, but only to the extent of $11,725 [1] for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for--

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

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(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan--

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of--

(i) the number of employees covered by each such plan multiplied by $11,725 [1] ; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons--

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility--

but only to the extent of $5,775 [1] for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $2,600 [1] for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition--

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of--

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days.

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

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(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on--

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise--

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.
An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2583; Pub.L. 98-353, Title III, §§ 350, 449, July 10, 1984, 98 Stat. 358, 374; Pub.L. 101-647, Title XXV, § 2522(d), Nov. 29, 1990, 104 Stat. 4867; Pub.L. 103-394, Title I, § 108(c), Title II, § 207, Title III, §

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304(c), Title V, § 501(b)(3), (d)(11), Oct. 22, 1994, 108 Stat. 4112, 4123, 4132, 4142, 4145; Pub.L. 109-8, Title II, §§ 212, 223, Title VII, §§ 705, 706, Title XIV, § 1401, Title XV, § 1502(a)(1), Apr. 20, 2005, 119 Stat. 51, 62, 126, 214, 216.)

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

Notes of Decisions (1116)

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Bankruptcy Code | 522
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter II. Debtor's Duties and Benefits

11 U.S.C.A. § 522

§ 522. Exemptions

Effective: April 1, 2010
Currentness

Exemptions

(a) In this section--

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

(3) Property listed in this paragraph is--

(A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and

(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.
If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).

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(4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:

(A) If the retirement funds are in a retirement fund that has received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.

(B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805, those funds are exempt from the estate if the debtor demonstrates that--

(i) no prior determination to the contrary has been made by a court or the Internal Revenue Service; and

(ii)(I) the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986; or

(II) the retirement fund fails to be in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 and the debtor is not materially responsible for that failure.

(C) A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.

(D)(i) Any distribution that qualifies as an eligible rollover distribution within the meaning of section 402(c) of the Internal Revenue Code of 1986 or that is described in clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution.

(ii) A distribution described in this clause is an amount that--

(I) has been distributed from a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986; and

(II) to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except--

(1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5));

(2) a debt secured by a lien that is--

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed;

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution; or

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(4) a debt in connection with fraud in the obtaining or providing of any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing an education at an institution of higher education (as that term is defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)).

(d) The following property may be exempted under subsection (b)(2) of this section:

(1) The debtor's aggregate interest, not to exceed $21,625 [1] in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $3,450 [1] in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $550 [1] in value in any particular item or $11,525 [1] in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $1,450 [1] in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $1,150 [1] plus up to $10,825 [1] of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $2,175 [1] in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $11,525 [1] less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive--

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

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(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(11) The debtor's right to receive, or property that is traceable to--

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $21,625, [1] on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

(e) A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title.

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

(A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); or

(B) a nonpossessory, nonpurchase-money security interest in any--

(i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of--

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
exceeds the value that the debtor's interest in the property would have in the absence of any liens.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

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(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

(3) In a case in which State law that is applicable to the debtor--

(A) permits a person to voluntarily waive a right to claim exemptions under subsection (d) or prohibits a debtor from claiming exemptions under subsection (d); and

(B) either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property;
the debtor may not avoid the fixing of a lien on an interest of the debtor or a dependent of the debtor in property if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade of the debtor or a dependent of the debtor or farm animals or crops of the debtor or a dependent of the debtor to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds $5,850 [1].

(4)(A) Subject to subparagraph (B), for purposes of paragraph (1)(B), the term "household goods" means--

(i) clothing;

(ii) furniture;

(iii) appliances;

(iv) 1 radio;

(v) 1 television;

(vi) 1 VCR;

(vii) linens;

(viii) china;

(ix) crockery;

(x) kitchenware;

(xi) educational materials and educational equipment primarily for the use of minor dependent children of the debtor;

(xii) medical equipment and supplies;

(xiii) furniture exclusively for the use of minor children, or elderly or disabled dependents of the debtor;

(xiv) personal effects (including the toys and hobby equipment of minor dependent children and wedding rings) of the debtor and the dependents of the debtor; and

(xv) 1 personal computer and related equipment.

(B) The term "household goods" does not include--

(i) works of art (unless by or of the debtor, or any relative of the debtor);

(ii) electronic entertainment equipment with a fair market value of more than $600 [1] in the aggregate (except 1 television, 1 radio, and 1 VCR);

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(iii) items acquired as antiques with a fair market value of more than $600 [1] in the aggregate;

(iv) jewelry with a fair market value of more than $600 [1] in the aggregate (except wedding rings); and

(v) a computer (except as otherwise provided for in this section), motor vehicle (including a tractor or lawn tractor), boat, or a motorized recreational device, conveyance, vehicle, watercraft, or aircraft.

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) the debtor could have avoided such transfer under subsection (f)(1)(B) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

(i)(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.

(j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsections (g) and (i) of this section only to the extent that the debtor has exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.

(k) Property that the debtor exempts under this section is not liable for payment of any administrative expense except--

(1) the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered; and

(2) any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of recovery of property under subsection (i)(1) of this section, that the debtor has not paid.

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case.

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(n) For assets in individual retirement accounts described in section 408 or 408A of the Internal Revenue Code of 1986, other than a simplified employee pension under section 408(k) of such Code or a simple retirement account under section 408(p) of such Code, the aggregate value of such assets exempted under this section, without regard to amounts attributable to rollover contributions under section 402(c), 402(e)(6), 403(a)(4), 403(a) (5), and 403(b)(8) of the Internal Revenue Code of 1986, and earnings thereon, shall not exceed $1,171,650 [1] in a case filed by a debtor who is an individual, except that such amount may be increased if the interests of justice so require.

(o) For purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in--

(1) real or personal property that the debtor or a dependent of the debtor uses as a residence;

(2) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;

(3) a burial plot for the debtor or a dependent of the debtor; or

(4) real or personal property that the debtor or a dependent of the debtor claims as a homestead;
shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of.

(p)(1) Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $146,450 [1] in value in--

(A) real or personal property that the debtor or a dependent of the debtor uses as a residence;

(B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;

(C) a burial plot for the debtor or a dependent of the debtor; or

(D) real or personal property that the debtor or dependent of the debtor claims as a homestead.

(2)(A) The limitation under paragraph (1) shall not apply to an exemption claimed under subsection (b)(3)(A) by a family farmer for the principal residence of such farmer.

(B) For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State.

(q)(1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate $146,450 [1] if--

(A) the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; or

(B) the debtor owes a debt arising from--

(i) any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;

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(ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 or under section 6 of the Securities Act of 1933;

(iii) any civil remedy under section 1964 of title 18; or

(iv) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.

(2) Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2586; Pub.L. 98-353, Title III, §§ 306, 453, July 10, 1984, 98 Stat. 353, 375; Pub.L. 99-554, Title II, § 283(i), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 101-647, Title XXV, § 2522(b), Nov. 29, 1990, 104 Stat. 4866; Pub.L. 103-394, Title I, § 108(d), Title III, §§ 303, 304(d), 310, Title V, § 501(d)(12), Oct. 22, 1994, 108 Stat. 4112, 4132, 4133, 4137, 4145; Pub.L. 106-420, § 4, Nov. 1, 2000, 114 Stat. 1868; Pub.L. 109-8, Title II, §§ 216, 224(a), (e)(1), Title III, §§ 307, 308, 313(a), 322(a), Apr. 20, 2005, 119 Stat. 55, 62, 65, 81, 87, 96.)

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

Notes of Decisions (2924)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

End of Document

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Bankruptcy Code | 524
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter II. Debtor's Duties and Benefits

11 U.S.C.A. § 524

§ 524. Effect of discharge

Currentness

Effect of discharge

(a) A discharge in a case under this title--

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if--

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

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(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that--

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of--

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as--

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall--

(1) inform the debtor--

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of--

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

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(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that--

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization--

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of--

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that--

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan--

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

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(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan--

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to--

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of--

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to--

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(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means--

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in--

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if--

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that--

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) Application to existing injunctions.--For purposes of subsection (g)--

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if--

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(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims--

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if--

(1) such creditor retains a security interest in real property that is the principal residence of the debtor;

(2) such act is in the ordinary course of business between the creditor and the debtor; and

(3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

(k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.

(2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases "Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed" and "Annual Percentage Rate" must be used where indicated.

(3) The disclosure statement required under this paragraph shall consist of the following:

(A) The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:";

(B) Under the heading "Summary of Reaffirmation Agreement", the statement: "This Summary is made pursuant to the requirements of the Bankruptcy Code";

(C) The "Amount Reaffirmed", using that term, which shall be--

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(i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

(D) In conjunction with the disclosure of the "Amount Reaffirmed", the statements--

(i) "The amount of debt you have agreed to reaffirm"; and

(ii) "Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your "'credit agreement.".

(E) The "Annual Percentage Rate", using that term, which shall be disclosed as--

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then--

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then--

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject

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to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following--

(i) by making the statement: "Your first payment in the amount of $___ is due on ___ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.", and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: "Your payment schedule will be:", and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: "Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.".

(J)(i) The following additional statements:
"Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

"1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

"2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

"3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

"4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

"5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

"7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date

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your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

"What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

"Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

"What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.".

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:
"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.".

(4) The form of such agreement required under this paragraph shall consist of the following:
"Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below.

"Brief description of credit agreement:

"Description of any changes to the credit agreement made as part of this reaffirmation agreement:

"Signature: Date:

"Borrower:

"Co-borrower, if also reaffirming these debts:

"Accepted by creditor:

"Date of creditor acceptance:".

(5) The declaration shall consist of the following:

(A) The following certification:
"Part C: Certification by Debtor's Attorney (If Any).

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:".

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(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:
"Part D: Debtor's Statement in Support of Reaffirmation Agreement.

"1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $___, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $___, leaving $___ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: ___.

"2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.".

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.".

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:
"Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

"I am not represented by an attorney in connection with this reaffirmation agreement.

"I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

"Therefore, I ask the court for an order approving this reaffirmation agreement."

(8) The court order, which may be used to approve such agreement, shall consist of the following:

"Court Order: The court grants the debtor's motion and approves the reaffirmation agreement described above.".

(l) Notwithstanding any other provision of this title the following shall apply:

(1) A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.

(2) A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.

(3) The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

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(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2592; Pub.L. 98-353, Title III, §§ 308, 455, July 10, 1984, 98 Stat. 354, 376; Pub.L. 99-554, Title II, §§ 257(o), 282, 283(k), Oct. 27, 1986, 100 Stat. 3115-3117; Pub.L. 103-394, Title I, §§ 103, 111(a), Title V, § 501(d)(14), Oct. 22, 1994, 108 Stat. 4108, 4113, 4145; Pub.L. 109-8, Title II, §§ 202, 203(a), Title XII, § 1210, Apr. 20, 2005, 119 Stat. 43, 194.)

Notes of Decisions (1014)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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Bankruptcy Code | 541
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 541

§ 541. Property of the estate

Effective: April 1, 2010
Currentness

Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

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(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that--

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds--

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,850 [1];

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(7) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,850 [1];

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(7) any amount--

(A) withheld by an employer from the wages of employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where--

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made--

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition. Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

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(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2594; Pub.L. 98-353, Title III, §§ 363(a), 456, July 10, 1984, 98 Stat. 363, 376; Pub.L. 101-508, Title III, § 3007(a)(2), Nov. 5, 1990, 104 Stat. 1388-28; Pub.L. 102-486, Title XXX, § 3017(b), Oct. 24, 1992, 106 Stat. 3130; Pub.L. 103-394, Title II, §§ 208(b), 223, Oct. 22, 1994, 108 Stat. 4124, 4129; Pub.L. 109-8, Title II, § 225(a), Title III, § 323, Title XII, §§ 1212, 1221(c), 1230, Apr. 20, 2005, 119 Stat. 65, 97, 194, 196, 201.)

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

Notes of Decisions (2546)

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Bankruptcy Code | 542
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 542

§ 542. Turnover of property to the estate

Currentness

Turnover of property to the estate

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

Credits
(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2595; Pub.L. 98-353, Title III, § 457, July 10, 1984, 98 Stat. 376; Pub.L. 103-394, Title V, § 501(d)(16), Oct. 22, 1994, 108 Stat. 4146.)

Notes of Decisions (448)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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Bankruptcy Code | 543
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 543

§ 543. Turnover of property by a custodian

Currentness

Turnover of property by a custodian

(a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall--

(1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.

(c) The court, after notice and a hearing, shall--

(1) protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property;

(2) provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian; and

(3) surcharge such custodian, other than an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, for any improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law or that has been approved, after notice and a hearing, by a court of competent jurisdiction before the commencement of the case under this title.

(d) After notice and hearing, the bankruptcy court--

(1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property, and

(2) shall excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.

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Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2595; Pub.L. 98-353, Title III, § 458, July 10, 1984, 98 Stat. 376; Pub.L. 103-394, Title V, § 501(d)(17), Oct. 22, 1994, 108 Stat. 4146.)

Notes of Decisions (98)

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Bankruptcy Code | 544
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 544

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

Effective: June 19, 1998
Currentness

Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

Credits
(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2596; Pub.L. 98-353, Title III, § 459, July 10, 1984, 98 Stat. 377; Pub.L. 105-183, § 3(b), June 19, 1998, 112 Stat. 518.)

Notes of Decisions (1672)

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Bankruptcy Code | 545
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 545

§ 545. Statutory liens

Currentness

Statutory liens

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien--

(1) first becomes effective against the debtor--

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

(C) when a custodian is appointed or authorized to take or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or

(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law;

(3) is for rent; or

(4) is a lien of distress for rent.

Credits
(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2597; Pub.L. 98-353, Title III, § 460, July 10, 1984, 98 Stat. 377; Pub.L. 109-8, Title VII, § 711, Apr. 20, 2005, 119 Stat. 127.)

Notes of Decisions (224)

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Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 546

§ 546. Limitations on avoiding powers

Effective: December 12, 2006
Currentness

Limitations on avoiding powers

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--

(1) the later of--

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

(b)(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that--

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

(2) If--

(A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and

(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition; such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

(c)(1) Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods--

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(A) not later than 45 days after the date of receipt of such goods by the debtor; or

(B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

(2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9).

(d) In the case of a seller who is a producer of grain sold to a grain storage facility, owned or operated by the debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title) or in the case of a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common law right of such producer or fisherman to reclaim such grain or fish if the debtor has received such grain or fish while insolvent, but--

(1) such producer or fisherman may not reclaim any grain or fish unless such producer or fisherman demands, in writing, reclamation of such grain or fish before ten days after receipt thereof by the debtor; and

(2) the court may deny reclamation to such a producer or fisherman with a right of reclamation that has made such a demand only if the court secures such claim by a lien.

(e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(f) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer made by or to (or for the benefit of) a repo participant or financial participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(g) Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may not avoid a transfer, made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(h) Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor and subject to the prior rights of holders of security interests in such goods or the proceeds of such goods, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

(i)(1) Notwithstanding paragraphs (2) and (3) of section 545, the trustee may not avoid a warehouseman's lien for storage, transportation, or other costs incidental to the storage and handling of goods.

(2) The prohibition under paragraph (1) shall be applied in a manner consistent with any State statute applicable to such lien that is similar to section 7-209 of the Uniform Commercial Code, as in effect on the date of enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, or any successor to such section 7-209.

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(j) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) the trustee may not avoid a transfer made by or to (or for the benefit of) a master netting agreement participant under or in connection with any master netting agreement or any individual contract covered thereby that is made before the commencement of the case, except under section 548(a)(1)(A) and except to the extent that the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2597; Pub.L. 97-222, § 4, July 27, 1982, 96 Stat. 236; Pub.L. 98-353, Title III, §§ 351, 393, 461, July 10, 1984, 98 Stat. 358, 365, 377; Pub.L. 99-554, Title II, §§ 257(d), 283*(l)*, Oct. 27, 1986, 100 Stat. 3114, 3117; Pub.L. 101-311, Title I, § 103, Title II, § 203, June 25, 1990, 104 Stat. 268, 269; Pub.L. 103-394, Title II, §§ 204(b), 209, 216, 222(a), Title V, § 501(b)(4), Oct. 22, 1994, 108 Stat. 4122, 4125, 4126, 4129, 4142; Pub.L. 105-183, § 3(c), June 19, 1998, 112 Stat. 518; Pub.L. 109-8, Title IV, § 406, Title IX, §§ 907(e), (o)(2), (3), Title XII, § 1227(a), Apr. 20, 2005, 119 Stat. 105, 177, 182, 199; Pub.L. 109-390, § 5(b), Dec. 12, 2006, 120 Stat. 2697.)

Notes of Decisions (687)

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Bankruptcy Code | 547
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 547

§ 547. Preferences

Effective: April 1, 2010
Currentness

Preferences

(a) In this section--

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

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(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was--

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was--

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor--

(A) to the extent such security interest secures new value that was--

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of--

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

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(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $5,850 [1].

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section--

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made--

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of--

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

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Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2597; Pub.L. 98-353, Title III, §§ 310, 462, July 10, 1984, 98 Stat. 355, 377; Pub.L. 99-554, Title II, § 283(m), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 103-394, Title II, § 203, Title III, § 304(f), Oct. 22, 1994, 108 Stat. 4121, 4133; Pub.L. 109-8, Title II, §§ 201(b), 217, Title IV, §§ 403, 409, Title XII, § 1213(a), 1222, Apr. 20, 2005, 119 Stat. 42, 55, 104, 106, 194, 196.)

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

Notes of Decisions (3469)

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Bankruptcy Code | 548
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Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 548

§ 548. Fraudulent transfers and obligations

Currentness

Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

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(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

(A) is made by a natural person; and

(B) consists of--

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means--

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if--

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by--

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l and 78o(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2600; Pub.L. 97-222, § 5, July 27, 1982, 96 Stat. 236; Pub.L. 98-353, Title III, §§ 394, 463, July 10, 1984, 98 Stat. 365, 378; Pub.L. 99-554, Title II, § 283(n), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 101-311, Title I, § 104, Title II, § 204, June 25, 1990, 104 Stat. 268, 269; Pub.L. 103-394, Title V, § 501(b)(5), Oct. 22, 1994, 108 Stat. 4142; Pub.L. 105-183, §§ 2, 3(a), June 19, 1998, 112 Stat. 517; Pub.L. 109-8, Title IX, § 907(f), (o)(4) to (6), Title XIV, § 1402, Apr. 20, 2005, 119 Stat. 177, 182, 214.)

Notes of Decisions (1626)

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Bankruptcy Code | 549
United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 549

§ 549. Postpetition transactions

Currentness

Postpetition transactions

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

(b) In an involuntary case, the trustee may not avoid under subsection (a) of this section a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

(c) The trustee may not avoid under subsection (a) of this section a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of an interest in such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such real property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to such interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

(d) An action or proceeding under this section may not be commenced after the earlier of--

(1) two years after the date of the transfer sought to be avoided; or

(2) the time the case is closed or dismissed.

Credits
(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2601; Pub.L. 98-353, Title III, § 464, July 10, 1984, 98 Stat. 379; Pub.L. 99-554, Title II, § 283(*o*), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 103-394, Title V, § 501(d)(18), Oct. 22, 1994, 108 Stat. 4146; Pub.L. 109-8, Title XII, § 1214, Apr. 20, 2005, 119 Stat. 195.)

Notes of Decisions (483)

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United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part I. Organization of Courts (Refs & Annos)

Chapter 6. Bankruptcy Judges (Refs & Annos)

28 U.S.C.A. § 157

§ 157. Procedures

Currentness

Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

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(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

Credits
(Added Pub.L. 98-353, Title I, § 104(a), July 10, 1984, 98 Stat. 340, and amended Pub.L. 99-554, Title I, §§ 143, 144(b), Oct. 27, 1986, 100 Stat. 3096; Pub.L. 103-394, Title I, § 112, Oct. 22, 1994, 108 Stat. 4117; Pub.L. 109-8, Title VIII, § 802(c)(1), Apr. 20, 2005, 119 Stat. 145.)

Notes of Decisions (1754)

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United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part IV. Jurisdiction and Venue (Refs & Annos)

Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1334

§ 1334. Bankruptcy cases and proceedings

Currentness

Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

Credits

(June 25, 1948, c. 646, 62 Stat. 931; Nov. 6, 1978, Pub.L. 95-598, Title II, § 238(a), 92 Stat. 2667; July 10, 1984, Pub.L. 98-353, Title I, § 101(a), 98 Stat. 333; Oct. 27, 1986, Pub.L. 99-554, Title I, § 144(e), 100 Stat. 3096; Dec. 1, 1990, Pub.L. 101-650, Title III, § 309(b), 104 Stat. 5113; Oct. 22, 1994, Pub.L. 103-394, Title I, § 104(b), 108 Stat. 4109; Apr. 20, 2005, Pub.L. 109-8, Title III, § 324(a), Title VIII, § 802(c)(2), Title XII, § 1219, 119 Stat. 98, 145, 195.)

Notes of Decisions (1195)

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United States Code Annotated

Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)

Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

Currentness

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty

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into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions.*** The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Credits
(Amended April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

Editors' Notes

ADVISORY COMMITTEE NOTES
1937 Adoption

This is substantially the content of [former] Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin*, L.R. 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as: U.S.C., Title 28:

§ 381 [former] (Preliminary injunctions and temporary restraining orders)

§ 762 [now 1402] (Suit against the United States)

U.S.C., Title 28, § 829 [now 1927] (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of former rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see 12 P.S.Pa. § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal*, C.C.A.3, 1934, 69 F.2d 294.

1983 Amendment

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

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Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 64-65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, *Federal Practice* ¶ 7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, e.g., *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir.1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. See, e.g., *Heart Disease Research Foundation v. General Motors Corp.*, 15 Fed.R.Serv.2d 1517, 1519 (S.D.N.Y.1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D.Pa.1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir.1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations. See *Haines v. Kerner*, 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed.R.Civ.P. 11*, 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. See *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y.1961); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

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The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The references in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. See *North American Trading Corp. v. Zale Corp.*, 73 F.R.D. 293 (S.D.N.Y.1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969); 2A Moore, *Federal Practice* ¶ 11.02, at 2104 n. 8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See *Browning Debenture Holders' Committee v. DASA Corp.*, supra. This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to "other papers" in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

1987 Amendment

The amendments are technical. No substantive change is intended.

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1993 Amendments

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, *e.g.*, New York State Bar Committee on Federal Courts, *Sanctions and Attorneys' Fees* (1987); T. Willging, *The Rule 11 Sanctioning Process* (1989); American Judicature Society, *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, *Report on Rule 11* (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1989); J. Solovy, *The Federal Law of Sanctions* (1991); G. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the

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obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. *See Manual for Complex Litigation, Second,* § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule

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authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. *Cf. Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for causing a violation of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See *Willy v. Coastal Corp.*, 503 U.S. 131 (1992); *Business Guides, Inc. v. Chromatic Communications Enter. Inc.*, 498 U.S. 533 (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe

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harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, *i.e.*, not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what--if any--sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not

inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. *See Chambers v. NASCO*, 501 U.S. 32 (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

2007 Amendment

The language of Rule 11 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Providing an e-mail address is useful, but does not of itself signify consent to filing or service by e-mail.

Notes of Decisions (2701)

Amendments received to 7-15-2010.

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United States Code Annotated

Bankruptcy Rules (Refs & Annos)

Part IX. General Provisions

Federal Rules of Bankruptcy Procedure, Rule 9011

Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

Currentness

(a) Signing of papers
Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the court
By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-- [1]

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions
If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated

(A) By motion
A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

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(B) On court's initiative
On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction; limitations
A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order
When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery
Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

(e) Verification
Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

(f) Copies of signed or verified papers
When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

Credits
(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991; Apr. 11, 1997, eff. Dec. 1, 1997.)

1 So in original. The comma probably should not appear.

Editors' Notes

ADVISORY COMMITTEE NOTES
Subdivision (a). Excepted from the papers which an attorney for a debtor must sign are lists, schedules, statements of financial affairs, statements of executory contracts, Chapter 13 Statements and amendments thereto. Rule 1008 requires that these documents be verified by the debtor. Although the petition must also be verified, counsel for the debtor must sign the petition. See Official Form No. 1. An unrepresented party must sign all papers.

The last sentence of this subdivision authorizes a broad range of sanctions.

The word "document" is used in this subdivision to refer to all papers which the attorney or party is required to sign.

Subdivision (b) extends to all papers filed in cases under the Code the policy of minimizing reliance on the formalities of verification which is reflected in the third sentence of Rule 11 F.R.Civ.P. The second sentence of subdivision (b) permits the

substitution of an unsworn declaration for the verification. See 28 U.S.C. § 1746. Rules requiring verification or an affidavit are as follows: Rule 1008, petitions, schedules, statements of financial affairs, Chapter 13 Statements and amendments; Rule 2006(c), list of multiple proxies and statement of facts and circumstances regarding their acquisition; Rule 4001(c), motion for ex parte relief from stay; Rule 7065, incorporating Rule 65(b) F.R.Civ.P. governing issuance of temporary restraining order; Rule 8011(d), affidavit in support of emergency motion on appeal.

1987 Amendment

The statement of intention of the debtor under § 521(2) of the Code is added to the documents which counsel is not required to sign.

1991 Amendment

Subdivision (a) is amended to conform to Rule 11 F.R.Civ.P. where appropriate, but also to clarify that it applies to the unnecessary delay or needless increase in the cost of the administration of the case. Deletion of the references to specific statements that are excluded from the scope of this subdivision is stylistic. As used in subdivision (a) of this rule, "statement" is limited to the statement of financial affairs and the statement of intention required to be filed under Rule 1007. Deletion of the reference to the Chapter 13 Statement is consistent with the amendment to Rule 1007(b).

1997 Amendment

This rule is amended to conform to the 1993 changes to F.R.Civ.P. 11. For an explanation of these amendments, see the advisory committee note to the 1993 amendments to F.R.Civ.P. 11.

The "safe harbor" provision contained in subdivision (c)(1)(A), which prohibits the filing of a motion for sanctions unless the challenged paper is not withdrawn or corrected within a prescribed time after service of the motion, does not apply if the challenged paper is a petition. The filing of a petition has immediate serious consequences, including the imposition of the automatic stay under § 362 of the Code, which may not be avoided by the subsequent withdrawal of the petition. In addition, a petition for relief under chapter 7 or chapter 11 may not be withdrawn unless the court orders dismissal of the case for cause after notice and a hearing.

GAP Report on Rule 9011. The proposed amendments to subdivision (a) were revised to clarify that a party not represented by an attorney must sign lists, schedules, and statements, as well as other papers that are filed.

Notes of Decisions (707)

Amendments received to 7-15-2010.

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United States Bankruptcy Court, N.D. Illinois, Eastern Division.

In re Galo L. TAN and Mardona Tan, Debtors.
FOREST PARTNERS II LIMITED PARTNERSHIP and Galo M. Tan, Plaintiffs,
v.
FOREST GROUP, INC., Robert Lane, Randall Pittman, Laurence Lenz, Jr., and Katten, Muchin & Zavis, a law firm partnership, Defendants.

No. 95 B 25570. April 26, 1999.

No. 98 A 02049.

Attorneys and Law Firms

Paula Friedman, Attorney for Movant or Plaintiff.

Thomas Labuda, Attorney for Respondent or Defendant.
Office of U.S. Trustee, Trustee or Other Attorneys.

Opinion

MEMORANDUM OPINION

KATZ.

*1 This matter is before the Court on the motion of Forest Partners II Limited Partnership and Galo M. Tan (collectively, the "Tan Group") for remand of their malicious prosecution case to the Circuit Court of Cook County, Illinois. The Tan Group moves for abstention and remand following removal of the case to this Court by Laurence Lenz, Jr. ("Lenz") and Katten, Muchin & Zavis ("KMZ"). For the reasons that follow, the Court grants the Tan Group's motion for remand.

BACKGROUND

On December 1, 1995, Galo M. Tan ("Tan") and Mardona Tan (collectively, the "Debtors") filed a petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et. seq.* The Debtors have yet to file a confirmable plan of reorganization.

Tan is the general partner of Forest Partners II Limited Partnership ("Forest Partners"). Forest Group, Inc. ("Forest Group") was also a general partner of Forest Partners until February 6, 1992. Robert Lane ("Lane") and Randall Pittman ("Pittman") are the sole shareholders, officers, and directors of Forest Group.

KMZ is a law firm headquartered in Chicago. Lenz is a partner in KMZ.

On October 6, 1998, the Tan Group filed a one-count complaint for the tort of malicious prosecution against Forest Group, Lane, Pittman, Lenz, and KMZ (collectively, the "Defendants") in the Circuit Court of Cook County, Illinois. The Tan Group seeks damages of not less than $30 million. Although the complaint has only one count, it alleges a series of actions which commenced in 1990 and run through the present time.

The Tan Group alleges that in 1992, KMZ filed a false and malicious lawsuit on behalf of Forest Group, Lane, and Pittman against Tan, Forest Partners, and the individual limited partners of Forest Partners seeking $20 million in special damages, $8 million in compensatory damages, and at least $15 million in punitive damages. The Tan Group alleges that in August 1995,

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KMZ filed a false and malicious lawsuit on behalf of Lane and Pittman against Forest Partners and Tan seeking an award of $400,000. The Circuit Court of Cook County, Illinois entered judgment in favor of the Tan Group in both cases. The Tan Group alleges that as a result of the Defendants' prosecution of these two lawsuits, Tan was forced to file his bankruptcy petition before this Court.

The Tan Group further alleges that KMZ, on behalf of Forest Group, Lane, and Pittman, filed false bankruptcy claims totaling $24 million against Tan. The Tan Group claims that the Defendants filed these claims to: (1) force Tan out of Chapter 11 and into Chapter 7 of the Bankruptcy Code; (2) to impair Tan's rights to proceed with his defense and counterclaim against Forest Group, Lane, and Pittman; (3) and to impede a lawsuit Tan had filed against KMZ. Tan also alleges that KMZ instigated Victory Memorial Hospital, for which KMZ was general counsel, to file suit against Summitcare, a corporation of which Tan is the sole shareholder.

*2 Lenz and KMZ timely filed a Notice of Removal and removed the malicious prosecution case to this Court. The Tan Group timely filed an Answer and the present Motion for Remand.

DISCUSSION

The Defendants argue that the Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. Section 1334 provides in pertinent part:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334. Section 157 provides in pertinent part:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 157. The District Court for the Northern District of Illinois has referred any and all proceedings arising under title 11, or arising in or related to any case under title 11 to the bankruptcy judges of the District. Local Rule 2.33 (N.D.Ill.).

Thus, only if this matter arises under title 11 or arises in or is related to any case under title 11 does this Court have jurisdiction. Bankruptcy jurisdiction should be interpreted narrowly. *In re Fedpak Systems, Inc.*, 80 F.3d 207, 211 (7th Cir.1996).

A matter "arising under" title 11 involves a cause of action created or determined by a statutory provision of title 11. *Barnett v. Stern*, 909 F.2d 973, 981 (7th Cir.1990); *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96 (5th Cir.1987). A proceeding "arising in" a case under title 11 involves those administrative matters that arise only in bankruptcy cases. *Diamond Mtg. Corp. of Illinois v. Sugar*, 913 F.2d 1233, 1239 (7th Cir.1990); *Wood*, 825 F.2d at 97. " '[A]rising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy." *Wood*, 825 F.2d at 97.

The Tan Group's state law malicious prosecution claim is not and cannot be a cause of action created or determined by a statutory provision of title 11. Title 11 makes no provisions for malicious prosecutions. The instant proceeding does not arise under title 11.

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*3 Nor is an action for malicious prosecution, arising under state law, ordinarily a proceeding involving administrative matters that arise only in bankruptcy cases. A malicious prosecution action can arise in any type of case. Indeed, the two lawsuits out of which the Tan Group's Complaint arose were not bankruptcy cases, but state law claims for fraud and breach of fiduciary duty commenced before the Debtor sought relief in bankruptcy.

However, the Defendants argue, when a state law malicious prosecution complaint is based upon allegations that the defendant filed false claims against the bankruptcy estate, federal bankruptcy law may preempt the case. *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 916 (9th Cir.1996). The expansive reach of the Code preempts virtually all claims relating to alleged misconduct in the bankruptcy courts. *Holloway v. Household Automotive Finance Corp.*, 227 B.R. 501, 507 (N.D.Ill.1998); *Cox v. Zale Delaware, Inc.*, 1998 WL 397841 (N.D.Ill.); *see also, In re Shape, Inc.*, 135 B.R. 707, 708 (Bankr.D.Me.1992) (holding bankruptcy law preempted a state law unfair business practices claim, based entirely upon violations of the automatic stay, that was dependent for its existence upon the Bankruptcy Code and was "intimately tied" to the debtor's bankruptcy). We agree with the Defendants that an allegation of false claims against a bankruptcy estate can arise only within the context of a bankruptcy. However, the situation presently before us is factually distinguishable from that in *MSR*.

In *MSR*, upon which the Defendants heavily rely, the sole basis for the malicious prosecution action was claims filed against the bankruptcy estate which the bankruptcy court subsequently disallowed. In *Cox*, the plaintiff's unfair debt collection claims were based entirely upon violations of 11 U.S.C. §§ 362 and 524. In *Holloway*, the plaintiff asserted that the defendant violated the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et. seq.*, by fraudulently valuing a secured claim against the estate in violation of 11 U.S.C. § 506. The unfair business practices complaint in *Shape* alleged only violations of the automatic stay provisions of the Code.

In the matter now before the Court, the Tan Group alleges a series of actions, most of which happened outside the bankruptcy and before Tan filed his petition for relief. The Tan Group's allegations that the Defendants filed false claims against the bankruptcy estate form a relatively small, and likely insignificant, portion of the complaint.

In Illinois, the elements of a claim for malicious prosecution are: (1) that the defendant brought the underlying lawsuit maliciously; (2) that the defendant brought the suit without probable cause; (3) that the lawsuit terminated in the plaintiff's favor; and (4) that the plaintiff suffered special damages in defending the suit. *Spiegel v. Zurich Ins. Co.*, 293 Ill.App.3d 129, 132, 687 N.E.2d 1099, 227 Ill.Dec. 617 (Ill.App.Ct.1997). The major allegations of the complaint are that the Defendants filed two false and malicious lawsuits against the Tan Group; that the lawsuits terminated in the Tan Group's favor; and that the Tan Group suffered special damages because of the false and malicious lawsuits.

*4 In addition, Forest Partners is not a debtor. Forest Partners has never filed a petition in bankruptcy and therefore cannot have suffered false claims against its bankruptcy estate. Forest Partners' claim of malicious prosecution can rest only on the state court lawsuits. Thus, the malicious prosecution suit is not an administrative matter that can exist only in the context of a bankruptcy case; it is not a proceeding arising in a case under title 11.

Having concluded that this matter is not a proceeding "arising under" or "arising in" a case under title 11, it remains to determine whether this matter is "related to" a case under title 11.

In most Circuits, a proceeding is "related to" a case under title 11 if its outcome conceivably could have any effect on the bankruptcy estate. *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir.1991); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002, n. 11 (4th Cir.), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986); *Wood*, 825 F.2d at 93); *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 583-584 (6th Cir.1990); *In re Dogpatch U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir.1987); *In re Fietz*, 852 F.2d 455, 457 (C.A.9 1988); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir.1990); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788, and n. 19 (11th Cir.1990). The Third Circuit first enunciated this test: "the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir.1984). The Supreme Court has

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commented that proceedings "related to" a case under title 11 include: (1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541 and (2) suits between third parties which have an effect on the bankruptcy estate. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n. 5, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995).

Nevertheless, in the Seventh Circuit, a proceeding is "related to" a case under title 11 only when it affects the amount of property available for distribution among the creditors or the allocation of property among the creditors. *Fedpak*, 80 F.3d at 214-15; *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir.1987). In *Fedpak*, the court remarked that while the Supreme Court appears to favor the broader, majority approach, it has not mandated such a definition of the term "related to." 80 F.3d at 213 n. 8.

*5 Forest Partners' state law malicious prosecution claim against the Defendants is not related to the Debtor's bankruptcy. *See, e.g., Mediterranean Assocs., L.P. v. Krupp Mtg. Co. (In re Baltic Assocs.)*, 149 B.R. 93, 95 (Bankr.E.D.Pa.1993) (concluding that the outcome of a state law contract dispute between a non-debtor, a co-plaintiff with the debtor, and the defendant could not possibly affect the bankruptcy estate). "Overlap between the bankrupt's affairs and another dispute is insufficient unless its resolution also affects the bankrupt's estate or the allocation of its assets among creditors." *Home Insurance Company v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir.1989).

Although Tan's part in the lawsuit arguably meets the Seventh Circuit standard and might affect the amount of property in the estate, Tan is not the only plaintiff in the action against the Defendants. Even should Forest Partners prevail in this suit and obtain a judgment for more than $30 million, not one penny of its judgment would go to the Debtor's bankruptcy estate. Therefore, even under the more lenient "conceivable effect" test of other circuits, Forest Partners' suit is not "related to" a proceeding under title 11.

As the Defendants point out in their argument in favor of "arising under" jurisdiction, the complaint is comprised of a single count of malicious prosecution. They state that "Plaintiffs cannot ignore or back away from their allegations of malicious prosecution within the bankruptcy in order to remand the case." Memorandum in Opposition to Motion for Remand, p. 4. No more can the Defendants ignore or back away from the presence of Forest Partners in this case. The Defendants must take the Complaint as they find it. The Tan Group has chosen to complain jointly and the Court lacks subject matter jurisdiction over Forest Partners' claim against the Defendants. Thus, this matter is not related to a proceeding under title 11.

CONCLUSION

For the foregoing reasons, the Court grants the Tan Group's Motion for Remand.

ORDER

IT IS HEREBY ORDERED that for the reasons set forth in the accompanying Memorandum Opinion, this adversary proceeding is remanded to the Circuit Court of Cook County, Illinois.

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United States District Court, E.D. Pennsylvania.

RAYMARK INDUSTRIES, INC., Plaintiff,

v.

Frederick M. BARON, et al.

No. CIV. 96-7625. June 23, 1997.

Opinion

INTRODUCTION

CAHN.

*1 In 1988 and 1989, Defendants in this case petitioned the Bankruptcy Court for the Eastern District of Pennsylvania to initiate involuntary bankruptcy proceedings against Raymark Industries, Inc. ("Raymark"). In 1996, the bankruptcy court found for Raymark and dismissed the involuntary petitions. Raymark now sues Defendants in this court, alleging that the involuntary petitions were wrongfully filed. Raymark requests damages pursuant to 11 U.S.C. § 303(i), Bankruptcy Rule 9011, 28 U.S.C. § 1927, and Pennsylvania state law counts for Wrongful Use of Civil Proceedings, Abuse of Process, Tortious Interference with Contractual Business Relations, Civil Conspiracy, and attorneys' fees.

Defendants have filed motions to dismiss Raymark's complaint. This opinion and order dismisses one Defendant for lack of personal jurisdiction, holds that the § 303(i), § 1927, and Rule 9011 claims are not independent causes of action, dismisses the request for fees, and holds that Raymark's other state law claims are preempted by the Bankruptcy Code.

BACKGROUND

Raymark, the Plaintiff in this case, has been a named as a defendant in asbestos cases across the country. In 1988 and 1989, a number of individuals who had been plaintiffs in asbestos cases, and who had claims against Raymark through settlement or judgment of those cases ("the claimants"), filed petitions in involuntary bankruptcy against Raymark. Many of these claimants had the same counsel in both the asbestos and bankruptcy proceedings. In this case, Raymark, now the Plaintiff, alleges that those claimants and their formers attorneys conspired to file wrongfully the involuntary petitions in bankruptcy against Raymark.

The first involuntary petition was filed on September 9, 1988, in the Bankruptcy Court for the Eastern District of Pennsylvania. Raymark promptly filed a counterclaim pursuant to § 303(i) of the Bankruptcy Code, which provides for damages to an involuntary debtor if the petition against it was wrongfully filed. On September 22, 1988, the involuntary petition was dismissed by the Honorable Thomas M. Twardowski, and Raymark's rights under § 303(i) were reserved. The parties later stipulated to a withdrawal of Raymark's § 303(i) counterclaim with prejudice as to the claimants, but without prejudice as to the claimants' attorneys.

On February 10, 1989, following the dismissal of the first petition, a second involuntary petition was filed against Raymark by different claimants, many of whom had the same counsel as those in the first involuntary petition. Raymark again counterclaimed for § 303(i) damages. A trial on the merits of the involuntary petition was held in April and May, 1996, and Judge Twardowski ordered the petition dismissed on August 9, 1996. The Order of Dismissal makes no reference to Raymark's § 303(i) counterclaim. The bankruptcy case was closed on November 8, 1996.

Following the closure of the bankruptcy case, Raymark filed a complaint in this court against counsel from the first involuntary petition, and against claimants and their counsel from the second involuntary petition.[1] The complaint alleges that the

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involuntary petitions were the result of a conspiracy among counsel for the claimants to remove Raymark as leader of the defense in asbestos cases across the country. Am. Cmplnt. ¶ 84, 87, 89. Once asbestos litigation against Raymark was stayed because of the ongoing bankruptcy proceeding, there was no longer a need for Raymark to defend itself or maintain its national trial team. Am. Cmplnt. ¶ 87, 88, 117, Raymark alleges that its removal from this defense position was the object of the conspiracy, and that the conspiracy caused it significant financial harm.

1 The law firm Defendants are Baron & Budd; Jacobs & Crumplar; Robles & Gonzales; Carpenter & Chavez; Middlebrooks & Fleming; Levy, Phillips & Konigsberg; and Wolf, Block, Schorr & Solis-Cohen. Raymark also names attorneys Mr. Baron, Mr. Jacobs, Mr. Levy and Mr. Temin (of Wolf, Block). Finally, Raymark names approximately 66 of the claimants who were petitioners in the second involuntary proceeding.

*2 According to the Amended Complaint, the Defendants played different roles in the conspiracy. Mr. Baron and Baron & Budd, a Texas firm, are alleged to have initiated the conspiracy and procured 68 claimants to be petitioners in the second involuntary petition. Am. Cmplnt. ¶ 122. Four of these claimants were former Baron & Budd clients, and the rest came to Baron & Budd from other Defendants (three from Jacobs & Crumplar, two from Levy, Phillips and Konigsberg, one from Carpenter & Chavez, six from Robles & Gonzalez, and fifty-two from Middlebrooks & Fleming.) *Id.*

Raymark makes certain allegations designed to support its claim that Defendants had a personal interest in the bankruptcy proceedings beyond representation of their clients' interests. Mr. Baron and Baron & Budd, it is alleged, had a contingency fee interest in their own clients' claims, and in the claims of the Robles & Gonzales, Carpenter & Chavez, and Middlebrooks & Fleming clients. [2] *Id.* at ¶ 123, 124. In addition, Mr. Baron signed 58 of the claimants' verifications in the bankruptcy proceeding as their "attorney-in-fact." *Id.* at ¶ 126. Mr. Levy and Levy, Phillips & Konigsberg had a contingency fee interest in their clients' claims, and participated as counsel in the involuntary proceedings. [3] Raymark's Supp. Brief in Opp. to Mot. to Dismiss, p. 10. Likewise, Mr. Jacobs of Jacobs & Crumplar signed his three clients' verifications in the bankruptcy court as "attorney-in-fact," and had a contingency fee interest in their claims, though Jacobs did not appear in the bankruptcy proceedings. *Id.* at p. 8.

2 This means that Baron had a contingency fee interest in 63 of the 68 total petitioners. Baron had no contingency interest in the claims of the five claimants from Jacobs & Crumplar and Levy, Phillips & Konigsberg. The amount of these five claimants' claims appears to be more substantial than the ones in which Baron had a contingency interest. Raymark's Supp. Brief in Opp. to Mot. to Dismiss, p. 7.

3 The true extent of Levy, Phillips' involvement in the bankruptcy proceeding is disputed. That dispute, however, is not relevant for the purposes of deciding these motions.

Middlebrooks & Fleming is alleged to have participated in the conspiracy by serving as local counsel for Baron & Budd in a number of Alabama asbestos cases from which Baron & Budd later procured petitioners for the bankruptcy proceedings in Pennsylvania. Similarly, Robles & Gonzales and Carpenter & Chavez served as local counsel for Baron & Budd in Florida and New Mexico asbestos cases, respectively. Middlebrooks & Fleming, Robles & Gonzales, and Carpenter & Chavez are not alleged to have appeared in the bankruptcy proceedings, nor are they alleged to have signed any pleadings for the claimants.

Finally, Raymark alleges that Mr. Temin and Wolf, Block, Schorr and Solis-Cohen, a Pennsylvania firm, were members of the conspiracy, filed the second petition against Raymark without conducting discovery, and signed all papers, except for the verifications, on behalf of all claimants without determining where the claimants lived or whether they were living or dead. Raymark's Supp. Brief in Opp. to Mot. to Dismiss, p. 11. Wolf, Block represented the law firms, not the claimants, in the bankruptcy proceedings. *Id.*

All Defendants have filed motions to dismiss. The court has heard oral argument on two different occasions, and now addresses the parties' arguments.

DISCUSSION

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I. 12(b)(2) MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

*3 Law firm Defendants Middlebrooks & Fleming, Robles & Gonzales, Carpenter & Chavez, Jacobs & Crumplar, and Levy, Phillips & Konigsberg, attorney Defendants Robert Jacobs and Stanley Levy, and claimant Defendants Michael Leroy, John Zaslow, George Bradley, Edward Wright, Claude Wicker, James Burkett, and Roland Avant argue that this court lacks personal jurisdiction over them.

"In deciding a motion to dismiss for lack of personal jurisdiction, we take the allegations of the complaint as true. But once a defendant has raised a jurisdictional defense, a plaintiff bears the burden of proving by affidavits or other competent evidence that jurisdiction is proper." *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir.) (citations omitted), *cert. denied*, 519 U.S. 1028, 117 S.Ct. 583, 136 L.Ed.2d 513 (1996). "Once the motion is made, plaintiff must respond with actual proofs, not mere allegations." *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 66-67 n. 9 (3d Cir.1984).

The court's jurisdiction over non-resident defendants is controlled by the laws of the forum state. In Pennsylvania, jurisdiction may be specific, if the defendant had sufficient contacts arising out of the defendant's forum-related activity to justify the assertion of jurisdiction, or general, if the defendant has maintained "continuous and substantial" forum affiliations. 42 Pa.C.S.A. § 5322, 5301; *Reliance Steel Products Co. v. Watson, Ess, Marshall & Enggas*, 675 F.2d 587, 588 (3d Cir.1982).

In addition, courts in Pennsylvania have recognized jurisdiction over non-resident defendants based upon the contacts of alleged resident co-conspirators. Co-conspirator jurisdiction is not separate from general or specific jurisdiction. Rather, "[t]he difference is that a court looks not only at the defendant's forum contacts, but at those of the defendant's 'resident' co-conspirators. The court imputes the contacts of the 'resident' co-conspirator over whom it has jurisdiction to the 'foreign' co-conspirator to see if there are sufficient contacts to exercise jurisdiction over the latter." *Mass. School of Law at Andover, Inc. v. American Bar Assoc.*, 846 F.Supp. 374, 379 (E.D.Pa.1994), *aff'd* 107 F.3d 1026 (3d Cir.1997) (citations omitted). "Merely belonging to a civil conspiracy does not make a member subject to the jurisdiction of every other member's forum.... [T]here must also be substantial acts in furtherance of the conspiracy within the forum, of which the out-of-state co-conspirator was or should have been aware." *Id.* at 379-80. A proponent of co-conspirator jurisdiction must continue to meet the evidentiary burden described in *Time Share* for a 12(b)(2) motion, i.e., mere allegations of conspiracy, without some actual proof, are insufficient. *Stranahan Gear Co., Inc. v. NL Industries, Inc.*, 800 F.2d 53, 58 (3d Cir.1986) (citation omitted).

A. Personal Jurisdiction over Middlebrooks & Fleming

*4 Middlebrooks & Fleming ("Middlebrooks") is an Alabama personal injury firm. Baron & Budd, the Texas firm, referred 52 plaintiffs to Middlebrooks for trial in Alabama, but Baron & Budd was lead counsel and Middlebrooks served only as local counsel. These 52 plaintiffs later became petitioners in the second involuntary proceeding.[4] The only services performed by Middlebrooks were in Alabama, and Middlebrooks' role ended upon settlement of the asbestos cases. Middlebrooks affirms that it was never advised of the involuntary bankruptcy petition, and all legal action to collect settlement proceeds on behalf of the 52 claimants was performed by Baron & Budd. Middlebrooks never appeared in the Pennsylvania bankruptcy proceeding and none of its attorneys have appeared in any court in Pennsylvania.

4 Middlebrooks had, in the past, referred asbestos clients to Baron & Budd, and many of these cases ended up in Pennsylvania due to the mandatory transfer order consolidating the multidistrict litigation asbestos cases. None of the these claimants were involved in the bankruptcy proceeding at issue, however, and Middlebrooks was not involved in any of the Eastern District of Pennsylvania litigation.

The court finds that there is no personal jurisdiction over Middlebrooks. Specific jurisdiction is not appropriate, as Middlebrooks has done nothing within the forum related to this case of the underlying bankruptcy case. Nor is general jurisdiction available, as Raymark's allegations are insufficient to meet the "continuous and substantial" showing required for general jurisdiction. These deficiencies are not overcome by Raymark's allegations of conspiracy. Pennsylvania law requires proof that the co-conspirator was or should have been aware of the conspiratorial acts within the forum state, and Raymark has provided nothing to refute or

call into question Middlebrooks' statement that it was unaware of the filing of the involuntary bankruptcy petitions. Therefore, co-conspirator jurisdiction is unavailable, and Middlebrooks & Fleming is dismissed.

B. Personal Jurisdiction over Robles & Gonzales and Carpenter & Chavez

Robles & Gonzales and Carpenter & Chavez, like Middlebrooks, were local counsel for Baron & Budd and contend that they are not subject to Pennsylvania's personal jurisdiction. Robles & Gonzales is a nine-lawyer firm with one office located in Miami, Florida. The firm does not regularly conduct business in Pennsylvania, and no one associated with the firm was involved in the bankruptcy proceedings which form the basis of the matter at hand. Carpenter & Chavez is a three-lawyer law firm with one office in Albuquerque, New Mexico. Neither the law firm nor anyone associated with the firm practices law in Pennsylvania, conducts business in Pennsylvania, and or was involved in the bankruptcy proceedings at issue in this case. Raymark responds that both Robles & Gonzales and Carpenter & Chavez were co-conspirators, and that jurisdiction is therefore appropriate.

Initially, the court notes that Raymark's allegations are insufficient to establish general or specific jurisdiction, as there are no "continuous and substantial" contacts with Pennsylvania, and neither firm was involved in the bankruptcy proceedings. Therefore, the only basis for jurisdiction would be co-conspirator jurisdiction. However, at this stage of the proceedings, the extent of Robles & Gonzales or Carpenter & Chavez' role in the conspiracy is unclear. "Our rule is generally that jurisdictional discovery should be allowed unless the plaintiff's claim is 'clearly frivolous.' " *Mass. School of Law at Andover, Inc. v. American Bar Ass'n,* 107 F.3d 1026, 1042 (3d Cir.1997) (citations omitted). If Raymark can show that either firm was or could have been aware of the filing of the petitions, and that the firms were participants in a conspiracy to file those petitions, jurisdiction would be appropriate. Therefore, this court will defer ruling on these Defendants' motions to dismiss for lack of personal jurisdiction in order to allow the parties to conduct discovery. [5]

5 Whether the parties proceed with this discovery will of course depend whether Judge Twardowski allows the case to proceed.

C. Personal Jurisdiction over Robert Jacobs, Jacobs & Crumplar, Stanley Levy, and Levy, Phillips & Konigsberg

*5 Robert Jacobs and his firm, Jacobs & Crumplar, and Stanley Levy and his firm, Levy, Phillips & Konigsberg, were also local counsel for asbestos claimants who later became petitioners in the bankruptcy court. Jacobs & Crumplar is a Delaware firm that does business in Delaware and New Jersey. The firm does not transact any business in Pennsylvania and did not enter an appearance or file any pleadings in the involuntary bankruptcy proceedings. Mr. Jacobs did, however, sign three Joinder in Involuntary Petition forms on behalf of his clients as "attorney-in-fact," and forward the Joinders to Mr. Temin, counsel for creditors in the involuntary bankruptcy action in Pennsylvania. Levy, Phillips & Konigsberg is a New York firm. Mr. Levy and Levy, Phillips & Konigsberg provided two claimants for the involuntary proceedings, had a contingency fee interest in their claims, and filed pleadings in the bankruptcy proceeding.

Again, Raymark's allegations are insufficient for either general or specific jurisdiction without looking to the allegations of conspiracy. As with Robles & Gonzales and Carpenter & Chavez, however, these Defendants' role in the alleged conspiracy is unclear. Proof that these Defendants participated in a conspiracy, and that the involuntary bankruptcy petitions were filed as part of that conspiracy with Defendants' knowledge, would be sufficient grounds on which to base jurisdiction. At this stage in the proceedings, therefore, the court will defer ruling on these Motions to Dismiss in order to allow the parties to complete discovery.

D. Personal Jurisdiction Over Defendants George Bradley, Edward Wright, John Zaslow, Michael Leroy, Claude Wicker, James Burkett, and Roland Avant

These seven Defendants were claimants in the involuntary proceeding against Raymark. They now move to dismiss the complaint against them because they are non-residents of Pennsylvania and their contact with the forum was limited to appearing as petitioners in the second involuntary bankruptcy proceeding. Assuming that Raymark's allegations that the second involuntary petition was wrongfully filed are true, and given that that proceeding led to the case at issue, these Defendants' involvement

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with the forum is sufficient for specific jurisdiction. Therefore, these Defendants' Motions to Dismiss for lack of personal jurisdiction are denied.

II. 12(b)(6) MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM [6]

6 There are twenty-one separate motions to dismiss in this case. With the exception of claims based on lack of personal jurisdiction, the grounds for dismissal in the motions are essentially identical. Therefore, unless noted otherwise, this portion of the opinion treats the twenty-one motions as one motion.

A. Standard of Review

In reviewing a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 273 (3d Cir.1985) (citation omitted). The court should then dismiss the complaint if the facts pled and reasonable inferences therefrom are legally insufficient to support the relief requested. *See Commonwealth ex. rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 175 (3d Cir.1988) (citation omitted).

B. § 303(i) Claim

*6 Raymark's first cause of action is pursuant to § 303(i) of the United States Bankruptcy Code. Section 303(i) provides that, if the court dismisses an involuntary petition for any reason other than consent of the parties, the court may grant costs and attorneys' fees against the petitioner and for the debtor, or, if the petition was filed in bad faith, the court may grant proximately caused or punitive damages. 11 U.S.C. § 303(i). Section 303(i) allows the court to award the full panoply of relief, including attorneys' fees, compensatory, and punitive damages. *In re Fox Island Square Partnership,* 106 B.R. 962, 966 (Bankr.N.D.Ill.1989) (citations omitted).

After reviewing the multiple subsections of § 303 and numerous cases imposing sanctions pursuant to § 303(i), I find that there is no independent cause of action under § 303(i), and that Raymark must make its § 303(i) request in connection with the underlying proceeding in the bankruptcy court. Therefore, I will dismiss this cause of action and allow Judge Twardowski of the United States Bankruptcy Court to decide whether or not Raymark's request for sanctions is procedurally correct and timely, and, if so, whether Raymark's claim has merit. [7]

7 Because the bankruptcy case is now closed, Raymark may be required to file a motion to reopen pursuant to 11 U.S.C. § 350, which allows for reopening of closed cases for cause. Such a reopening is within the discretion of the bankruptcy judge. The court notes, however, that "[i]f and when the bankruptcy court becomes aware of facts that suggest that a petition for relief in bankruptcy has been filed in violation of Rule 9011 ... the court's duty ... to investigate such facts and the appropriateness of imposing Rule 9011 sanctions may constitute 'cause' within the meaning of § 350(b) for reopening a filing." *In re Narod,* 138 B.R. 478, 482 (E.D.Pa.1992). Should Judge Twardowski decide to reopen the underlying case, it will be his decision whether to order Defendants to pay damages pursuant to § 303(i); this court takes no position on that issue.

Section 303 of the Bankruptcy Code is entitled "Involuntary Cases." This is in contrast to §§ 301 and 302, which are entitled "Voluntary Cases" and "Joint Cases," respectively. Thus, everything in § 303 relates to the filing and managing of an involuntary petition. Subsection (d), for example, deals with the debtor's right to file an answer. Subsection (h) describes how the adjudicating court may order relief against the debtor. Subsection (j) addresses the bankruptcy court's ability to dismiss the petition. The only logical reading of subsection (i), therefore, is that it regulates the adjudicating bankruptcy judge's ability to impose sanctions for the wrongful filing of the involuntary petition. Section 303(i) states that "[i]f *the court* dismisses a petition under this section ... *the court* may grant judgment" in favor of the involuntary debtor for costs, attorneys' fees, and, if the court finds bad faith, for proximate and punitive damages. 11 U.S.C. § 303(i) (emphasis added). The subsection clearly contemplates that the same court that dismisses the petition is the court that can award damages. Subsection (i) was not meant to be utilized by any other judge.

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Neither this court nor the parties were able to locate any case where, as here, § 303(i) sanctions were requested as a separate cause of action in a proceeding separate and apart from the underlying bankruptcy proceeding. [8] While the fact that no court has previously imposed such sanctions is certainly not determinative, it does support this court's holding that § 303(i) sanctions are designed to be imposed in the pending bankruptcy proceeding.

8 Raymark cites *Sjostedt v. Salmon*, 128 B.R. 313 (Bankr.M.D.Fl.1991) to support its claim that § 303(i) sanctions can be awarded by a court separate from the adjudicating bankruptcy court. In *Sjostedt*, a bankruptcy court imposed § 303(i) sanctions that were related to a separately filed involuntary bankruptcy case. However, the judge adjudicating the involuntary bankruptcy had already determined that the petitioner had filed in bad faith and that § 303(i) sanctions were warranted. Before that judge could determine the amount of the sanctions, however, the petitioner from the involuntary proceeding filed his own bankruptcy case. That filing stayed the involuntary proceeding and divested the initial judge of power to impose the § 303(i) sanctions that he had previously determined were warranted. Thus, the second bankruptcy judge was the only judge with the power to determine the amount of and impose the § 303(i) sanctions. This case is distinguishable from the case at hand. First, in *Sjostedt* the bankruptcy judge had already determined that the involuntary petition had been filed in bad faith. Second, in the bankruptcy case at issue here there was nothing preventing Raymark or Judge Twardowski from following through with the § 303(i) request. Finally, the two cases in *Sjostedt* involved the same parties and conduct. Here, the case at issue is independent of the underlying involuntary bankruptcy. Thus, I do not find *Sjostedt* applicable.

In addition, this holding makes sense in light of the fact that this opinion also holds that § 1927 and Rule 9011 sanctions are similarly designed to be imposed by the judge in front of whom the wrongful conduct occurred. Allowing litigants to file completely collateral cases requesting relief that could and should have been requested in the original proceeding is tantamount to allowing litigants to "judge shop" until they find a judge willing to impose sanctions. This would be an inappropriate intrusion into the respect due each judge to manage his or her cases. Except on appeal, it is not the role of a district judge to examine the decisions of a bankruptcy judge or to review the conduct of attorneys before that judge.

*7 The appropriateness of a § 303(i) award must be determined by the bankruptcy judge presiding over the involuntary petition. In this case, that is Judge Twardowski. Therefore, I am dismissing Count I of Raymark's Amended Complaint without prejudice, subject to Raymark bringing its claim in front of Judge Twardowski. He can decide whether he will consider the claim, and, if so, whether the claim has merit. [9]

9 The court recognizes that its initial predilection, expressed to the parties at oral argument, was to allow the § 303(i) claim to stand as an independent cause of action. On further reflection, however, and given that neither the parties nor the court found convincing precedent on either side, the court has decided that the most logical interpretation of § 303(i) is that damages pursuant to the statute can be imposed only by the bankruptcy judge who presides over the involuntary proceeding. This does not mean that § 303(i) claims must be brought before the dismissal of the involuntary petition. *In re Cooper School of Art, Inc.*, 709 F.2d 1104, 1105 (10th Cir.1983) (dismissal of bankruptcy proceeding does not divest court of jurisdiction to consider damages pursuant to § 303(i)); *In re Godroy Wholesale Co., Inc.*, 37 B.R. 496, 498 (D.Mass.1984) (same).

C. § 1927 Claim

The second count of Raymark's Amended Complaint is for damages pursuant to 28 U.S.C. § 1927, which provides for costs and attorneys' fees from any attorney who "multiplies the proceedings in any case unreasonably and vexatiously." Defendants argue that Raymark has not stated a claim for relief, as § 1927 does not provide an independent cause of action.

This court agrees with Defendants. "[T]he principal purpose of imposing sanctions under 28 U.S.C. § 1927 is 'the deterrence of intentional and unnecessary delay in the proceedings.' " *Zuk v. Eastern Pa. Psychiatric Inst.*, 103 F.3d 294, 297 (3d Cir.1996), *quoting Beatrice Foods v. New England Printing*, 899 F.2d 1171, 1177 (Fed.Cir.1990). This purpose is accomplished by confronting such delay when it occurs, not by allowing a separate lawsuit after the fact. Therefore, I agree with the Second, Fifth, and Ninth Circuit Courts of Appeals that a judge cannot impose sanctions pursuant to § 1927 for conduct that did not occur as part of the proceedings in front of that judge. *See GRiD Systems Corp. v. John Fluke Mfg.*, 41 F.3d 1318, 1319 (9th Cir.1994) ("Section 1927 cannot reach conduct of a party who is not involved in an action before the sanctioning court at the

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time of the conduct."); *Matter of Case*, 937 F.2d 1014, 1023 (5th Cir.1991) ("The language of § 1927 limits the court's sanction power to attorney's actions which multiply the proceedings in the case before the court."); *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 69-70 (2d Cir.1990) ("we have seen no basis for concluding that § 1927 was intended to permit a litigant to institute a new lawsuit to collect excess costs and fees incurred in a prior litigation."). [10]

10 Raymark argues that the district court and the bankruptcy court are not separate courts, and that therefore the district court may impose § 1927 sanctions for conduct occurring in the bankruptcy court. Raymark's argument fails. The purpose of § 1927 is frustrated by the imposition of sanctions in two distinct cases, not in two different courts. In addition, Raymark cites *GRiD Systems*, which relied on *In re Peoro*, 793 F.2d 1048 (9th Cir.1986), to support its point. In *Peoro*, the Ninth Circuit Court of Appeals affirmed the imposition of sanctions by two district court judges upon a bankruptcy litigant for actions that occurred in the bankruptcy court. However, those sanctions had originally been imposed or recommended by the bankruptcy judges. That is not the case here. In any event, insofar as the Ninth Circuit Court of Appeals held that district courts and bankruptcy courts are not separate courts for the purposes of the imposition of sanctions, this court respectfully disagrees.

Although not mentioned by the parties, the court finds necessary some discussion of *Chambers v. Nacso, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). In *Chambers*, the Supreme Court held that a district court's imposition of sanctions for a party's conduct before other tribunals was appropriate, as long as the party received a hearing. *Id.* at 57. However, in that case the Court was discussing the imposition of sanctions pursuant to the district court's inherent power. The inherent power of the court to sanction is distinct from the power to sanction granted by statute or rule. *Id.* at 46. In addition, all of the conduct cited by the Court to support its assertion that the district court could impose sanctions for abuses occurring beyond the courtroom was in some way related to the case before the district court. In other words, the conduct in *Chambers* that formed the basis of the sanctions award, though it did not occur as part of the proceedings in front of the district court, still caused delay in the district court. Such is not the case here.

*8 Raymark cites *Gordon v. Heimann*, 715 F.2d 531, 538-39 (11th Cir.1983) for the proposition that "[f]ee requests also ... may be made, in appropriate cases, ... in a separate subsequent action." However, the cases cited in *Gordon* all involved attorneys' fees for conduct that was related to the case in which the court awarded fees. In addition, the court of appeals in *Gordon* limited its statement to "appropriate cases." In the case at bar, the conduct complained of is completely unrelated to the proceedings before me. This is not an appropriate case in which to request sanctions in a separate action. Therefore, I agree with the only other judge to have thoroughly examined this portion of *Gordon* that the language of the court of appeals "only relates to a party's filing a statutorily authorized motion for attorney's fees for expenses incurred in the earlier action before the same court in which the party was successful." *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 142 F.R.D. 648, 655 (W.D.Tx.1992) (citation omitted), *rev'd on other grounds*, 989 F.2d 791 (5th Cir.1993).

The actions complained of by Raymark did not in any way delay or interfere with the proceedings in this court. If Defendants engaged in improper conduct, the court in which that conduct occurred is the proper forum to request sanctions. Therefore, Count Two of Raymark's Amended Complaint cannot stand as an independent cause of action and is dismissed. [11]

11 If, as discussed above, Raymark chooses to file a motion to reopen the underlying bankruptcy proceeding and Judge Twardowski allows such a reopening, it may be possible for Raymark to request § 1927 sanctions at that time. Raymark complains that the bankruptcy court may not have the power to impose sanctions pursuant to § 1927. *See Regensteiner Printing Co. v. Graphic Color Corp.*, 142 B.R. 815, 818 (Bankr.N.D.Ill.1992). However, that is an issue for Judge Twardowski to decide if and when it is before him. In any event, Judge Twardowski has the power to impose sanctions pursuant to Rule 9011, even if § 1927 sanctions are unavailable. *Id.* at 819.

D. Rule 9011

The third count of Raymark's Amended Complaint is for violation of Federal Rule of Bankruptcy Procedure 9011. Bankruptcy Rule 9011, like Federal Rule of Civil Procedure 11, is a procedural rule designed to deter improper attorney conduct by allowing a court to sanction attorneys. Like Raymark's § 1927 count, however, the Rule 9011 claim cannot stand as an independent cause of action.

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If a procedural rule "provided an independent cause of action[,] it would by inference provide an independent basis for jurisdiction; i.e., violation of a federal rule. It is clear, however, that the Federal Rules of Civil Procedure provide no independent basis for subject matter jurisdiction." *National Risk Management, Inc. v. Bramwell,* Civ. A. No. 92-4366, 1992 WL 368370, at *5 (E.D.Pa. Dec.3, 1992), *citing, Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 370, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). The Supreme Court in *Owen Equipment* cited Federal Rule of Civil Procedure 82 to support its holding that procedural rules provide no independent basis for subject matter jurisdiction, as Rule 82 states that procedural rules "shall not be construed to extend or limit the jurisdiction of the United States district courts[.]" Fed.R.Civ.P. 82. The same rationale applies here, as Bankruptcy Rule 9030 provides that the bankruptcy rules "shall not be construed to extend or limit the jurisdiction of the courts[.]" Therefore, since Rule 9011 cannot create federal jurisdiction, it cannot stand as an independent count in Raymark's complaint.

*9 In addition, Raymark's request for Rule 9011 sanctions comes too late. Although the Third Circuit Court of Appeals has yet to rule on this exact issue, the court has held that "certain distinguishing features bear on the desirability of a more restrictive approach to timeliness in resolving sanction disputes." *Mary Ann Pensiero, Inc. v. Lingle,* 847 F.2d 90, 98 (3d Cir.1988). This more restrictive approach led the court to hold that all Rule 11 motions must be filed "before the entry of a final judgment." *Id.* at 100. Though *Pensiero* concerned timeliness of filing for Rule 11 motions, not Rule 9011 motions, the rationale are the same. First, there is no "good reason to wait until the lawsuit has been concluded" before filing a Rule 9011 motion. *Id.* at 98. Second, with both Rule 11 and Rule 9011, "[s]wift disposition of [the] motion is essential so that any ensuing challenge to it might be included with the appeal on the merits. This approach serves the interest of judicial economy without risking a significant waste of district court efforts." *Id.* at 99. In this case, three months elapsed between the dismissal of the second involuntary petition and final closure of the case. Raymark had sufficient time in which to request Rule 9011 sanctions, and instead waited to make its request in front of a new judge. [12]

12 Again, as with the § 1927 claim, if the underlying case is reopened it may not be too late for Judge Twardowski to impose sanctions pursuant to Rule 9011. This, however, is an issue for Judge Twardowski.

E. Preemption of Raymark's State Law Claims

Defendants next contend that Counts IV through VII of Raymark's Amended Complaint are preempted by the Bankruptcy Code. [13] Federal preemption of state law causes of action is appropriate if Congress expressly legislates such preemption, or if Congressional intent can be implied from the federal legislation. If Congress has legislated comprehensively and occupied an entire field of regulation, leaving no room for supplemental state regulation, preemption is implied. *International Paper Co. v. Ouellette,* 479 U.S. 481, 491, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987). Preemption is also implied if state law interferes with the accomplishment and execution of Congressional objectives. *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U.S. 190, 204, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983).

13 Count IV is for Wrongful Use of Civil Proceedings pursuant to 42 Pa.C.S.A. §§ 8351-8354; Count V is for Abuse of Process; Count VI is for Tortious Interference with Contractual Business Relations; Count VII is for Civil Conspiracy.

In the instant case, Congress has not expressly preempted state claims such as Raymark's in the Bankruptcy Code. However, Congressional intent can be implied by looking to the remedies available in the Code. As noted by the District Court of Maryland, "[r]emedies and sanctions for improper behavior and filings in the bankruptcy court ... are matters on which the Bankruptcy Code is far from silent[.]" *Koffman v. Osteoimplant Tech., Inc.,* 182 B.R. 115, 124 (D.Md.1995). Debtors injured by the filing of an involuntary petition have both § 303(i) and Rule 9011 at their disposal, and these remedies can fully compensate such debtors. However, the existence of a comprehensive legislative scheme, by itself, is insufficient to support preemption without some other "special features" that warrant preemption. *English v. General Electric Co.,* 496 U.S. 72, 87, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

*10 I find that the bankruptcy scheme has sufficient "special features" to justify preemption. First, "Congress has expressed its intent that bankruptcy matters be handled in a federal forum by placing bankruptcy jurisdiction exclusively in the district courts

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as an initial matter." *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 913 (9th Cir.1996). Second, "the adjustment of rights and duties within the bankruptcy process itself is uniquely and exclusively federal.... [T]he highly complex laws needed to constitute the bankruptcy courts and regulate the rights of debtors and creditors also underscore the need to jealously guard the bankruptcy process from even slight incursions and disruptions brought about by state malicious prosecution actions." *Id.* at 914. Third, "the unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of parties before the bankruptcy court in the hands of the federal courts alone." *Id.* at 915. I agree with the Ninth Circuit Court of Appeals that not to find the state claims preempted would lead to "a world where the specter of additional litigation must haunt virtually every actor in a bankruptcy proceeding." *Id.* at 916.

Several other state courts, citing *MSR Exploration* and an earlier Ninth Circuit Court of Appeals case, *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir.1987), have also held that state law claims such as Raymark's are preempted by the Bankruptcy Code. *See Koffman*, 182 B.R. at 125 ("Allowing state tort actions based on allegedly bad faith bankruptcy fillings ... to go forward ultimately would have the effect of permitting state law standards to modify the incentive structure of the Bankruptcy Code and its remedial scheme"); *Sarno v. Thermen*, 239 Ill.App.3d 1034, 180 Ill.Dec. 889, 608 N.E.2d 11, 18 (Ill.App.1992); *Edmonds v. Lawrence Nat'l Bank & Trust Co.*, 16 Kan.App.2d 331, 823 P.2d 219, 222 (Kan.App.1991); *Mason v. Smith*, 140 N.H. 696, 672 A.2d 705, 708 (N.H.1996); *Idell v. Goodman*, 224 Cal.App.3d 262, 273 Cal.Rptr. 605 (1990). In fact, only one court has held that state law claims are not preempted by the remedies in the Bankruptcy Code. The District Court of Appeal of Florida, writing before *MSR Exploration*, stated that "it is not immediately apparent how the prospect of state courts doing what the bankruptcy courts already can do [i.e., penalize bad faith filings] might deter good faith filers.... [And, w]e have already considered any supposed need for interpretive uniformity and found it unlikely." *R.L. LaRoche, Inc. v. Barnett Bank of South Florida, N.A.*, 661 So.2d 855, 862, 864 (Ct.App. 4th Dist.1995). I find the need for uniformity compelling, and am not persuaded by *LaRoche*. In addition, because the purpose of our bankruptcy scheme is to give debtors a fresh start while concurrently protecting creditors, any interference with this scheme as envisioned by Congress would be inappropriate.

*11 Raymark points to the Third Circuit Court of Appeals' opinion in *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47 (3d Cir.1988), to support its argument that preemption is not warranted.[14] In *Paradise Hotel*, the court of appeals held that, upon completion of Chapter 11 proceedings in the bankruptcy court, the debtor in that case could maintain a district court lawsuit alleging malicious prosecution and abuse of process by the creditor. However, the court did not discuss jurisdiction, preemption, or *Gonzales*, focusing instead on whether § 303(i)(2) should be an exclusive remedy in that case. In fact, that court explicitly limited its holding to claims "like those of Paradise" in "situation[s] of this kind." *Paradise Hotel*, 842 F.2d at 52. In *Paradise Hotel*, the debtor had exercised his right to convert his Chapter 7 proceeding to a Chapter 11 proceeding, which forced a release of his § 303(i) claim. To hold that § 303(i) was exclusive, the court argued, would require the debtor

14 Raymark also argues that the Ninth Circuit Court of Appeals' opinions, and *Gonzales* in particular, dealt with the problem of state *court* interference in the bankruptcy process, not with state law interference. Thus, they argue, though the Ninth Circuit Court of Appeals held that state courts cannot impose their rulings on the bankruptcy process, federal courts should not be similarly barred. This argument is not compelling. I am unable to discern any reason why state courts should be completely barred from entertaining state law claims relating to a bankruptcy filing, but federal district courts sitting in diversity or exercising supplemental jurisdiction should not be similarly barred.

to choose between two unattractive alternatives. One alternative would be to pay the price of indefinitely postponing the conversion in order to litigate the legal sufficiency of the petition, the bad faith of the petition, and the amount of its damages in the Chapter 7 case. The other alternative would be to convert immediately in order to secure the Chapter 11 advantages the debtor was intended to have but thereby release its claims against the petitioner who allegedly petitioned in bad faith. We think Congress did not intend that a debtor should have to pay this kind of a penalty for exercising its statutory right to convert promptly."
Id. at 52.

Paradise Hotel is inapplicable here. Not only is that opinion explicitly restricted to its facts, but the rationale of the opinion is inapposite, as, unlike the debtor in *Paradise*, Raymark had the opportunity-and indeed, utilized that opportunity by filing § 303(i)

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counterclaims-to litigate the filing of the involuntary petitions. Raymark was never faced with "two unattractive alternatives," and I see no reason why preempting Raymark's state law claims would be unfair.

The purpose of § 303(i) and Rule 9011 is to address exactly the misuse of the bankruptcy system that Raymark seeks to litigate through its state law claims. To allow such claims based upon exclusively federal conduct such as the filing of a bankruptcy petition, when Congress has created a comprehensive Bankruptcy Code to address any misuse, would unnecessarily interfere with the scheme created by Congress. I do not believe that such a result was intended. Therefore, I find that Raymark's claims are preempted.

F. Attorneys' Fees Claim

Count VIII of Raymark's Amended Complaint requests attorneys' fees pursuant to 42 Pa.C.S.A. § 2503. Though Raymark does not specify under which subsection of § 2503 it is requesting fees, the court assumes that Raymark requests fees pursuant to § 2503(7) and § 2503(9). [15] Section 2503(7) allows for fees to any participant "as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter," and § 2503(9) allows for fees to any participant "because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith." Defendants claim that fees pursuant to § 2503 are available only during the matter in which the improper conduct has occurred. Since the alleged improper conduct occurred before the commencement of the litigation before me, Defendants argue, Raymark is not entitled to attorneys' fees under § 2503. This court agrees.

15 The court makes this assumption due to the apparent inapplicability of the other subsections. Raymark is, of course, welcome to clarify the matter.

*12 It is clear that Raymark is not entitled to fees for conduct that occurred before the commencement of the case in court. *CherRob, Inc. v. Art Monument Co.*, 406 Pa.Super. 330, 594 A.2d 362, 364 (Pa.Super.1991); *Commonwealth Dept. of Transportation v. Smith*, 145 Pa.Cmwlth. 164, 602 A.2d 499, 501 (Pa.Cmwlth.), *app. denied*, 531 Pa. 657, 613 A.2d 561 (Pa.1992). Indeed, the statute itself provides for fees for conduct that occurred "during the pendency of a matter" and "in commencing the matter." 42 Pa.C.S.A. § 2503(7) and (9). Raymark argues, however, that the conduct at issue did occur during the matter, but the matter was before a different court and judge. However, in *Smith*, the Commonwealth Court of Pennsylvania held that "matter" within the meaning of § 2503(7) and (9) applies "only to those matters pending or commencing in a court of the unified judicial system of this Commonwealth." *Smith*, 602 A.2d at 503. Therefore, § 2503 fees are not available for matters pending in the bankruptcy court or the federal district court. *See also, Reitz v. Dieter*, 840 F.Supp. 353, 355 (E.D.Pa.1993) (§ 2503(9) fees not available unless the case was litigated before a Pennsylvania state court or before a federal court sitting in diversity and applying Pennsylvania law; § 2503(9) has no force in federal court where the Federal Rules of Civil Procedure apply). Raymark's claim for attorneys' fees is dismissed.

CONCLUSION

The parties to this proceeding have presented a myriad of motions, amended motions, supplemental motions, letter briefs, and memoranda. After sorting through the motions and examining the facts and law, I have held that (1) Defendant Middlebrooks & Fleming is not subject to this court's personal jurisdiction, (2) the § 303(i), § 1927, and Bankruptcy Rule 9011 counts cannot stand as independent causes of action, [16] (3) Raymark's state law claims are preempted by the Bankruptcy Code, and (4) the § 2503 attorneys' fees count is dismissed. An appropriate Order is attached.

16 Contrary to Defendants' assertions, the fact that Counts I, II, and III of Raymark's Amended Complaint are not independent causes of actions does not mean I have no subject matter jurisdiction over the Complaint. Federal district courts have subject matter jurisdiction over all matters involving a federal question. 28 U.S.C. § 1331. This includes all cases under Title 11. 28 U.S.C. § 1334. Therefore, I have subject matter jurisdiction and am able to adjudicate the personal jurisdiction and preemption issues raised by Defendants.

ORDER

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AND NOW, this _____ day of June, 1997, upon consideration of all Defendants' Motions to Dismiss and Plaintiff's Responses thereto, it is hereby ORDERED that Defendants' Motions are GRANTED, as follows:

(1) Defendant Middlebrooks & Fleming is DISMISSED for lack of personal jurisdiction,

(2) Counts I, II and III of Raymark's Amended Complaint relate to United States Bankruptcy Court for the Eastern District of Pennsylvania Cases No. 89-20233T and No. 88-21315T, and are DISMISSED without prejudice subject to Plaintiff's proceeding with these claims in those cases, and

(3) Counts IV, V, VI, VII and VIII of Raymark's Amended Complaint are DISMISSED.

This Order applies to all Motions to Dismiss filed by all Defendants in this case. The clerk is directed to close the docket for statistical purposes.

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This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. Texas.

George Martin SHEAD, Plaintiff,
v.
Francis J. KELLEY, Defendant.

Civil Action No. H-08-497. Dec. 4, 2009.

Attorneys and Law Firms

George Martin Shead, pro se.

Leonard H. Simon, Pendergraft & Simon LLP, Houston, TX, for Plaintiff.
Daniel Joseph Shea, Attorney at Law, Houston, TX, for Defendant.

Opinion

Opinion on Dismissal

LYNN N. HUGHES, District Judge.

1. Introduction.

*1 In October of 2007, an adversary proceeding was filed in the bankruptcy court because debtor George M. Shead had committed fraud in filing a Chapter 13 bankruptcy petition. In April of 2008, the core bankruptcy proceeding was withdrawn to this court; it was dismissed in May. The three remaining issues are: (a) a malicious prosecution claim stemming from Shead's bankruptcy filing, (b) Shead's misapplication of partnership funds, and (c) attorney fees from the original bankruptcy claim.

Because this court does not have exclusive jurisdiction over the matters arising from the original bankruptcy proceeding and because uniformity of bankruptcy law will not be disrupted, the malicious prosecution and misapplication of partnership funds issues are dismissed with prejudice unless the claims are re-filed in state court by January 8, 2010. Because the attorney fee payment violated only a bankruptcy rule, the issue will be decided at a hearing in this court.

2. Malicious Prosecution.

A state malicious prosecution claim is not preempted by federal bankruptcy just because the claim arose out of the filing of an adversary action in a bankruptcy proceeding. ***Graber v. Fuqua,*** 279 S.W.3d 608 (Tex.2009).

Here, the original bankruptcy action was followed by an adversary proceeding because the debtor failed to disclose a partnership. A final decree was entered in the bankruptcy case in January of 2009. The parties now disagree about whether a malicious prosecution claim stemming from the bankruptcy action must be brought in federal court. Because the state law claim for wrongful conduct in pursuing the federal bankruptcy case is not necessarily preempted by the earlier federal bankruptcy, this action is dismissed.

3. Misapplication of Funds.

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The second issue in this case is the misapplication of partnership funds by Shead. Although federal district courts have original, exclusive jurisdiction over all cases arising under Title 11 of the United States Code, they do not have exclusive jurisdiction of all civil proceedings related to cases under Title 11. 28 U.S.C. 1334(a)-(b).

Shead has been accused of using partnership assets for personal reasons, as well as failing to collect rents and distribute them to Kelley. In addition, Kelley has claimed that Shead was unable to show how loan proceeds were allocated to properties that serve as collateral for loans.

Kelley argues that a federal district court can exercise jurisdiction over pendent claims, pendent parties, and ancillary claims when they are so related to the claims in the suit that they are part of the same case or controversy. That is not the case here. The original federal claim has been disposed of and the remaining matters are merely related to the original bankruptcy. For that reason, this court does not have exclusive jurisdiction and the misapplication of funds matter will be dismissed.

4. Attorney Fees.

The final issue is the fact that Shead paid his attorney $ 5,000 from partnership funds, violating the Federal Rules of Bankruptcy Procedure. An attorney for a debtor must file a statement that includes whether she shared compensation with an entity. FED. R. BANKR. P.2016(b). The court may determine whether a payment of funds by the debtor to the attorney after the entry of an order for relief is excessive. FED. R. BANKR. P.2017(b).

*2 District courts have original jurisdiction of all cases under Title 11. 28 U.S.C. 1334(a). The only reason Shead could not have paid his attorney from the partnership funds was because of the pending bankruptcy. Because the payment violated only a bankruptcy rule, the state court cannot hear the attorney fee issue. Attorney fees will be determined at a hearing in this court.

5. Conclusion.

The court may direct the entry of final judgment as to one or more claims in a multiple-claim suit when there is no just reason for delay. FED. R. CIV. P. 54(b). The abuse of process and misapplication of funds issues related to the original bankruptcy proceeding are not preempted by arising out of the federal bankruptcy claim. They are dismissed with prejudice unless Kelley re-files the claims in state court by January 8, 2010.

The partnership funds will be held in the registry of this court pending the outcome of the hearing.

Signed on December 7, 2009, at Houston, Texas.

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CHECK OHIO SUPREME COURT RULES FOR REPORTING
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Court of Appeals of Ohio, Tenth District, Franklin County.

Sharron ZIMMER and R. Henry Zimmer, Plaintiffs-Appellants,
v.
Martin D. YANT and Jack E. McCormick, Defendants-Appellees.

No. 87AP-170. Dec. 3, 1987.

Appeal from the Franklin County Common Pleas Court.

Attorneys and Law Firms

Richard L. Young, for appellants.

McCormick, Silver & Silver, and Jack E. McCormick, for appellees.

Opinion

DECISION

BRYANT, Judge.

*1 Plaintiffs-appellants, Sharron and R. Henry Zimmer, appeal from a judgment of the Franklin County Common Pleas Court dismissing plaintiffs' complaint pursuant to Civ.R. 12(B)(6). Plaintiffs' single assignment of error asserts that the trial court erred in dismissing their complaint "on the ground that it did not state a claim upon which relief could be granted."

On October 24, 1986, plaintiffs filed a complaint in the Franklin County Common Pleas Court alleging, in pertinent part:

"1. On September 21, 1984 defendants commenced or caused to be commenced an action in the Common Pleas Court of Franklin County, Ohio against plaintiff Sharron Zimmer. A copy of the complant is attached hereto.

"2. As a direct result of the commencement of this action, process was issued against Sharron Zimmer.

"3. Defendants improperly used said process after it was issued in a manner not contemplated by law.

"4. Defendants illegally, willfully and improperly used said process in an attempt to obtain a result not intended by law.

"5. Defendants illegally, willfully and improperly perverted the use of process to accomplish a result outside its lawful scope.

"6. The actions of the defendants were performed knowingly, intentionally and maliciously.

"7. As a direct result of defendants [*sic*] conduct, plaintiff Sharron Zimmer has suffered mental, physical and emotional pain and distress; was subjected to great indignity and humiliation; and, was prevented from continuing her employment."

In response thereto, defendants filed their motion to dismiss, asserting that the plaintiffs' complaint failed to state a claim. More particularly, defendants asserted that inasmuch as no process had issued in the case and no taking of person or property had occurred, plaintiffs' complaint should be dismissed pursuant to Civ.R. 12(B)(6). The trial court granted defendants' motion, and plaintiffs appealed that decision to this court.

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In assessing the merits of a Civ.R. 12(B)(6) motion to dismiss, the Ohio Supreme Court has stated:

" * * * [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 245, citing *Conley v. Gibson* (1957), 355 U.S. 41, 45.

The Civil Rules simply require a short, plain statement of the claim which is sufficient to give the defendant fair notice of the plaintiff's claim and the grounds upon which that claim is based. *Slife v. Kundtz Properties* (1974), 40 Ohio App.2d 179. As such, few complaints fail to meet the liberal pleadings standard of Civ.R. 8; and, as a result, motions to dismiss are seldom granted. Moreover, whether a plaintiff will ultimately prevail upon the merits of the complaint is a matter to be determined at trial, and not on the pleadings. Accordingly, a court should not dismiss a complaint simply because it doubts that the plaintiffs will ultimately prevail. *Id.*

*2 Defendants contend that plaintiffs' complaint fails to meet the foregoing standard in that it fails to set forth all of the elements of abuse of process. While the better practice undoubtedly is to set forth the elements of a cause of action in the complaint, under the standard set forth in *O'Brien, supra,* plaintiffs' complaint need not set forth each and every element of a cause of action to meet the requirements of Civ.R. 8.

Apart from the allegations of the complaint, defendants further assert that because no process issued in this case and no seizure of person or property occurred, the complaint must be dismissed. However, even if that be both true and a proper consideration regarding the merits of plaintiffs' complaint, defendants' argument raises matters not apparent from the face of plaintiffs' complaint. On a Civ.R. 12(B)(6) motion, the court is to assess the merit of plaintiffs' complaint on the basis of the allegations contained therein, and not from matters extraneous to the record. See, *e.g., Scheer v. Air-Shields, Inc.* (1979), 61 Ohio App.2d 205. While defendants could have supplied any additional factual information through affidavit or any other means specified by Civ.R. 56, and converted their motion to one for summary judgment, they did not do so. Accordingly, defendants' factual contentions are not well-taken with respect to a motion to dismiss under Civ.R. 12(B)(6).

Based on the foregoing, we must conclude that, albeit rather sketchy, plaintiffs' complaint is sufficient to withstand a motion to dismiss under Civ.R. 12(B)(6). Whether plaintiffs will ultimately prevail at trial, we need not, and indeed cannot determine at this point. However, we are unable to say that plaintiffs may prove no set of facts in support of their claim which would entitle them to relief. Due to the rather conclusory nature of the allegations of the complaint, defendants might have chosen to file a motion for more definite statement pursuant to Civ.R. 12. However, under the rules set forth in *O'Brien, supra,* plaintiffs' complaint is sufficient, and the trial court erred in granting defendants' motion to dismiss pursuant to Civ.R. 12(B)(6) as to the first claim of plaintiffs' complaint. See *Clermont Environmental Reclamation Co. v. Hancock* (1984), 16 Ohio App.3d 9.

In the second claim of their complaint, plaintiff, R. Henry Zimmer, seeks to recover for legal expenses and loss of services and consortium. Defendants apparently contend that, irrespective of whether the first claim survives a Civ.R. 12(B)(6) motion, the second claim should be dismissed.

Essentially, defendants' argument reduces to an assertion that under no set of facts would Mr. Zimmer be entitled to recover for legal fees or loss of consortium. We disagree. In Mrs. Zimmer's main action for abuse of process, attorney fees may be recovered as an item of damage. See Prosser & Keeton, Law of Torts (5 Ed.1984) 900, Section 121. While that principle alone does not support Mr. Zimmer's claim for attorney fees, facts peculiar to this case may show that it is Mr. Zimmer who is entitled to recover any attorney fees paid as a result of defendants' alleged abuse of process. Although the Zimmers may not recover attorney fees twice, we cannot say that Mr. Zimmer can prove no set of facts entitling him to recover attorney fees herein. Hence, it is premature to dismiss Mr. Zimmer's claim.

*3 Moreover, loss of consortium may be recovered for a wrongful act, intentional or negligent, which causes a spouse to lose the society, services, sexual relations, or conjugal affection of his or her mate. See *Clouston v. Remlinger Oldsmobile Cadillac, Inc.* (1970), 22 Ohio St. 65. Inasmuch as, depending on the facts herein, plaintiffs' claim of abuse of process may fall

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within that category of facts supporting a claim for loss of consortium, Mr. Zimmer's claim therefor was improperly dismissed. Accordingly, the second claim of plaintiffs' complaint is sufficient to withstand defendants' motion.

Given the foregoing, plaintiffs' assignment of error is sustained, the judgment of the trial court is reversed, and this matter is remanded for further proceedings.

Judgment reversed and cause remanded.

WHITESIDE and BOWMAN, JJ., concur.

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