AMERICAN BANKRUPTCY INSTITUTE

2020 Alexander L. Paskay Memorial Bankruptcy Seminar

PLENARY SESSION

Everything You Need to Know About Attorneys' Fees and Sanctions in Bankruptcy

Hon. Karen K. Specie, Moderator
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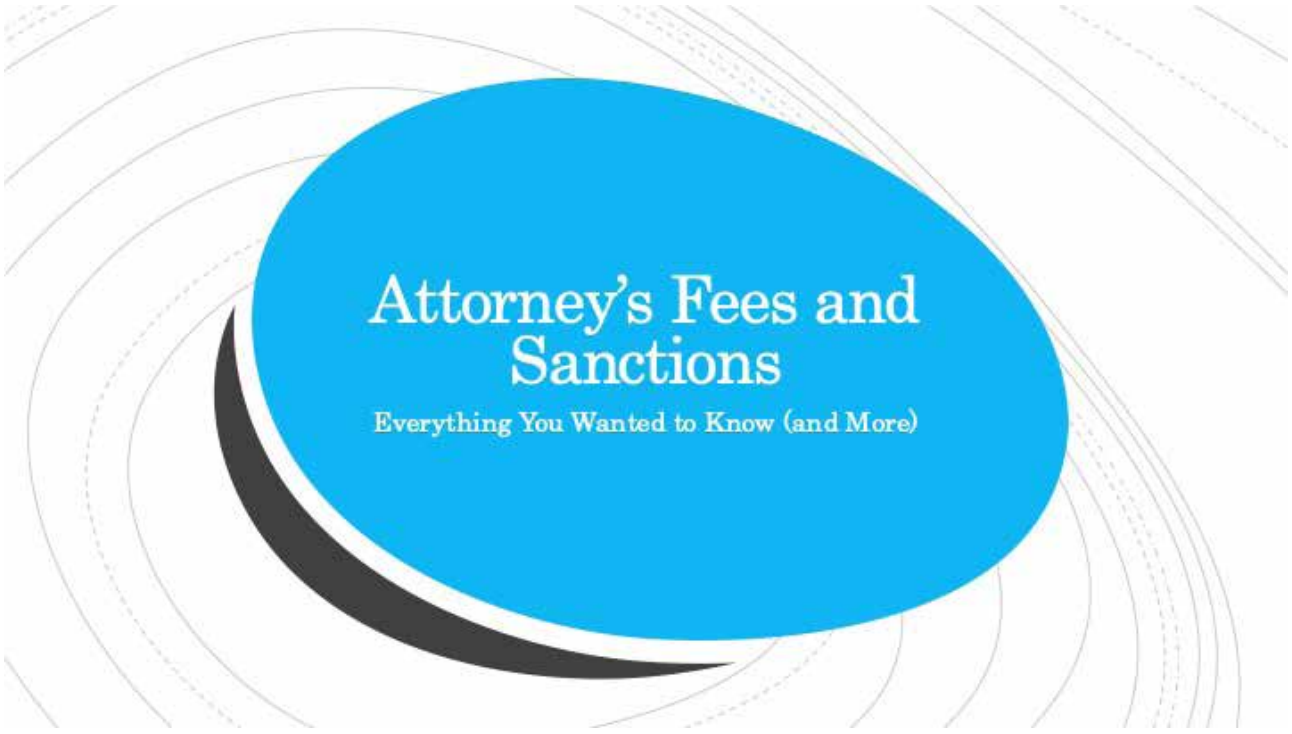
2020


Attorney's Fees and Sanctions
Everything You Wanted to Know (and More)


Panelists
The Honorable Karen K. Specie, Chief Judge of the U.S. Bankruptcy Court for the Northern District of Florida
R. Scott Shuker, Esq., Shuker & Dorris, P.A.
Vincent F. Alexander, Esq., Lewis Brisbois Bisgaard & Smith, LLP
David S. Jennis, Esq., Jennis Law Firm
Douglas A. Bates, Esq., Clark Partington Hart Larry Bond & Stackhouse, P.A.

THE BANKRUPTCY ESTATE IS NOT A "CASH COW"

The bankruptcy estate is distinct from all other nonbankruptcy clients. It is finite, rarely expands over time, possesses limited cash and usually has diminishing prospects despite high expectations. The estate is not a cash cow to be milked to death by professionals seeking compensation.

Judge John H. Squires, *In re Chas. A. Stevens & Co.*, 105 B.R. 866, 871 (Bankr. N.D. Ill. 1989).

WHO'S IN THE MONEY?

- PROFESSIONALS
  - LAWYERS
  - CPA'S
  - TURNAROUND PROFESSIONALS
- CREDITORS
- DEBTOR

FEE APPLICATIONS

A fee request is not the opening salvo in a back and forth negotiation with the court. The request is not the sticker price on a used car that all parties understand is the starting point for spirited dickering.

Judge Robert B. Kugler, *M.G. v. Eastern Regional High School Dist.*, 2009 WL 3489358, at *11 (D.N.J. 2009), *vacated and remanded on other grounds*, 386 Fed.Appx. 186 (3d Cir. 2010).

HOW DO COURTS MEASURE FEES?

Money, it's a crime. Share it fairly, but don't take a slice of my pie.

PINK FLOYD, *Money*, *on* THE DARK SIDE OF THE MOON (Harvest Records 1973).

DO UNSECURED OR UNDERSECURED CREDITORS GET FEES?

Opportunities come infrequently. When it rains gold, put out the bucket, not the thimble.

Warren Buffet

Dan Dzombak, *25 Best Warren Buffet Quotes*, THE MOTLEY FOOL (Sept. 28, 2018), https://www.fool.com/investing/general/2014/09/28/25-best-warren-buffett-quotes.aspx.

"Why did the Bank need three law firms in a bankruptcy rapidly confirmed with no major problems? Perhaps the Bank's attorneys saw a 'golden ticket' in a rare case where the Chapter 11 creditor was oversecured by millions."

Bankruptcy Judge Karen S. Jennemann, *In re Unnerstall*, No. 6:17-BK-00336-KSJ, 2018 WL 1989936, at *7 (Bankr. M.D. Fla. 2018).

HOW AND WHEN DO SECURED CREDITORS GET FEES?

ARE FEES FOR ALL PARTIES SCRUTINIZED THE SAME WAY?

- WHAT ARE THE STANDARDS?
  - *Unnerstall*
  - *Britt*
  - *Matter of Evangeline Refining Co.*

WHEN CAN DEBTORS GET FEES?

SANCTIONS Who Gets Popped?

The vast majority of Ms. Pollick's entries are larded with excreta unbecoming of any attorney in this District (and certainly unbillable to a client under any stretch of the imagination).

Judge Matthew W. Brann, *Young v. Smith*, 269 F. Supp. 3d 251, 259 (M.D. Pa. 2017), *aff'd*, 905 F.3d 229 (3d Cir. 2018).

You never know what worse luck your bad luck has saved you from.

Uncle Ellis, No Country for Old Men

CORMAC MCCARTHY, NO COUNTRY FOR OLD MEN 310 (Alfred A. Knopf 2005).


YOU HAVE A FEE AWARD –
HOW DO YOU GET PAID?
CHARGING LIEN
RETAINING LIEN
OTHER SUGGESTIONS


PRACTICE POINTERS
AND
TAKEAWAYS

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Everything You Wanted to Know About Attorneys' Fees and Sanctions[1]

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I. HOW TO GET PAID

A. Where to begin? File an application

1. **Start with the rule!** Fed. R. Bankr. P. 2016 provides the procedure for properly filing an application for payment and disclosing compensation paid or promised for services rendered or to be rendered "in any capacity whatsoever in connection with the case." Rule 2016 is comprised of three subsections: a) sets forth the requirements for any entity seeking

[1] This outline is meant to be a primer on bankruptcy attorneys' fees and is no way an exhaustive review of each court or Circuit in the country.

compensation from the bankruptcy estate; b) sets forth the disclosure requirements for debtors' attorneys; and c) sets forth the disclosure requirements for compensation of bankruptcy petition preparers.[2] To ensure your fee application is approved, the Rules are the place to start.

2. **Requirements for an entity seeking compensation under Rule 2016(a).**

   a. "Any entity seeking compensation or reimbursement from the estate must submit to the court an application conforming to the requirements of Bankruptcy Rule 2016(a)."[3] "Any entity" applies to a creditor, committee, or other entity that files an application for payment by the estate.[4]

   b. Practitioners should ensure that their applications for compensation conform to the requirements of 11 U.S.C. § 330.[5] Subsection 330(a)(3) provides a non-exhaustive list of relevant factors courts consider when determining reasonable compensation to be awarded.

   c. Certain factors may result in a reduced award, including but not limited to: lumping of services; block billing; insufficient detail in the description of services; and failure to identify the individual who worked on the matter.

   d. Case study: *Matter of Evangeline Refining Co.*, 890 F.2d 1312 (5th Cir. 1989): The bankruptcy court appointed a Chapter 11 Trustee whose law firm was the attorney for the Trustee; both served until the case was

[2] Fed. R. Bankr. P. 2016.
[3] Alan N. Resnick & Henry J. Sommer, 9 *Collier on Bankruptcy* ¶ 2016.03 (16th Ed. 2019).
[4] *Id.* at ¶ 2016.03.
[5] *Id* at ¶ 2016.09[1].

converted to a Chapter 7. During the Chapter 11 the Trustee and his firm filed three interim fee applications and a final fee application which were approved in part by the bankruptcy court with no record as to the logic behind the approvals: no findings of fact or conclusions of law; tapes of proceedings were destroyed per clerk's procedure; and no transcript of the hearing was requested.[6] The fourth and final fee applications came before a different bankruptcy judge who denied the final applications and reduced the awards on the interim applications, calling them "essentially estimates of time spent" that had "less than full probative value."[7] The district court affirmed, but further reduced the interim fees.[8] On appeal, the Fifth Circuit Court of Appeals stated, "an application must be sufficiently detailed and accurate that, in conjunction with any proceeding in connection therewith and the record in the case, a court can make an independent evaluation as to what level fees are actual, necessary, and reasonable."[9] The Fifth Circuit ultimately vacated the award and remanded to the bankruptcy court, finding that it was "wholly unable to make an assessment of the propriety of a fee award based on a number alone, devoid of any explanation of the method for its derivation."[10]

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[6] *Matter of Evangeline Refining Co.*, 890 F.2d 1312, 1317 (5th Cir. 1989).
[7] *Id.* at 1318-19.
[8] *Id.* at 1319.
[9] *Id.* at 1326.
[10] *Id.* The Fifth Circuit required the bankruptcy court to provide a clear explanation of any award granted on remand.

3. **Disclosure is Key!** Debtors' attorneys must be mindful of the disclosure requirements under 11 U.S.C. § 329 and Fed. R. Bankr. P. 2016(b).
   a. 11 U.S.C. § 329(a) and Fed. R. Bankr. P. 2016(b) provide the requirements for debtors' attorneys to disclose compensation, or agreements for compensation, within one year before filing the bankruptcy case. Disclosure under this Code section and rule is vital to ensure getting paid.
   b. Case Study: *In re Bonilla*, 573, B.R. 368 (Bankr. D.P.R. 2017): U.S. Trustee filed motion for sanctions against Chapter 7 debtor's attorney for, among other things, failure to properly disclose fees paid pursuant to 11 U.S.C. § 329(a) and Rule 2016(b).[11] Debtor's attorney filed first disclosure of compensation stating no money had been received prior to filing the disclosure, while debtor's statement of financial affairs indicated he had paid $95 pre-petition and debtor testified at the § 341 meeting that he had paid $1,600 to his attorney.[12] Debtor's attorney filed an amended disclosure of compensation, indicating that she had received $1,000 prior to filing the statement.[13] The court found that debtor's attorney "failed to comply with the disclosure requirements of Section 329 and Fed. R. Bankr. P. 2016(b)," and that to date, the court could not ascertain how much debtor's attorney had received due to the inconsistencies in her

[11] *In re Bonilla*, 573, B.R. 368, 369 (Bankr. D.P.R. 2017).
[12] *Id.*
[13] *Id.* at 371. Debtor's attorney blamed the inconsistencies between her initial disclosure and debtor's testimony on being out of the office and unaware that her secretary had accepted payment against her direction. *Id.*

disclosures and the debtor's testimony. The court ordered debtor's attorney to disgorge all attorneys' fees collected in the case.[14] The court noted the importance of the disclosure requirements stating "the Rule 2016(b) statement is an attorney's certification on which the Debtor, the Court, the Trustee, and the creditors rely. It is not a meaningless paper that attorneys can ignore or blithely treat as insignificant."[15]

4. **Bankruptcy Petition Preparers must also disclose.** Fees paid to petition preparers are also subject to disclosure under Fed. R. Bankr. P. 2016(c), and 11 U.S.C. § 110(h)(2). "The purpose of the declaration is to assist the court in making a determination whether the bankruptcy petition preparer's fees exceeded the value of the services performed."[16]

5. **Know thy local rules! Your court may have a local rule that corresponds with Fed. R. Bankr. P. 2016.[17]**

B. <u>You filed your application for compensation, now what?</u>

1. **Two methods of calculating the "reasonable fee" developed in the 1970's by Circuit courts: the "Lodestar" analysis and "Johnson" method.**

   a. The "Lodestar method" or "Lindy method" (hereinafter referred to as "Lodestar analysis") was developed by the Third Circuit Court of Appeals in *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973).

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[14] *Id.* at 383-84.
[15] *Id.* at 378 (citing *In re Kowalski*, 402 B.R. 843, 848 (Bankr. N.D. Ill. 2009)).
[16] Alan N. Resnick & Henry J. Sommer, *supra* note 2, at ¶ 2016.21.
[17] *See, e.g.,* N.D. Fla. LBR 2016-1; FLMB Local Rule 2016-1; FLSB Local Rule 2016-1.

b. The *Johnson* method, developed by the Fifth Circuit Court of Appeals *in Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) provided twelve factors ("*Johnson* factors") to consider in establishing a reasonable fee.[18]

2. **What's the difference between the two methods?**

a. The original Lodestar analysis involved fewer factors than the *Johnson* method, but courts tended to blend both methods in their analysis of "reasonable fees."

b. The difference turned on *when* each method should be considered. The Lodestar analysis required a court to consider case-specific factors *after* it had already determined the Lodestar amount. In contrast, under the *Johnson* factors, a court would consider the "time and labor required" and "the attorney's customary hourly rate" at the *same time* that it evaluated the other *Johnson* factors in determining the reasonableness of professional fees sought.

c. Since the establishment of the Lodestar analysis and the *Johnson* factors, the Supreme Court has issued decisions regarding statutory fee awards which include the *Johnson* factors as part of the Lodestar analysis.[19]

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[18] *Johnson v. Georgia Highway Exp., Inc.,* 488 F.2d 714, 717–19 (5th Cir. 1974), *abrogated in part by Blanchard v. Bergeron*, 489 U.S. 87 (1989).

[19] *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 772 (11th Cir. 1991) (citing *Riverside v. Rivera*, 477 U.S. 561 (1986)); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

3. **The Lodestar Analysis:** The Lodestar analysis was articulated as:

   hours spent on various general activities billed × value of services based on applicant's normal billing rate = Lodestar amount[20]

   Two factors to be included when computing the value of attorneys' services after determining the Lodestar amount:

   a. the contingent nature of success on the merits; and

   b. the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing the amount the Court calculated as reasonable under the Lodestar analysis.[21]

4. **Know thy Circuit's Lodestar analysis – three (3) modern approaches:**

   a. Common Lodestar analysis: Reasonable number of hours expended × reasonable hourly rate = allowed compensation.[22] A bankruptcy court may determine whether an enhancement or reduction of the fee is warranted by looking to the twelve *Johnson* factors:[23] (1) time and labor required; (2) novelty and difficulty of the questions presented by the case; (3) skill requisite to perform the legal service properly; (4) preclusion of other employment by the attorney due to acceptance of a case; (5) customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the

[20] *Lindy Bros. Builders, Inc.*, 487 F.2d at 167-68 (stating the Lodestar of the court's fee is (1) an inquiry into the hours spent on various general activities of the professional seeking compensation and (2) the value the services rendered based on the professionals normal billing rate).
[21] *Id.* at 168-69.
[22] Alan N. Resnick & Henry J. Sommer, 3 Collier on Bankruptcy ¶ 330.03 (16th Ed. 2019).
[23] *In re Sundale, Ltd.*, 483 B.R. 23, 29 (Bankr. S.D. Fla. 2012).

circumstances; (8) amount involved and results obtained as a result of the attorneys' services; (9) experience, reputation and ability of the attorneys; (10) undesirability of the case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases.[24] The applicant has the burden of proof to show his/her entitlement to an award of attorneys' fees under the *Johnson* factors.

b. Condensed Lodestar analysis: This analysis does not utilize *Johnson* factors but uses only the formula of the common Lodestar analysis, *supra*.[25]

c. Hybrid Lodestar analysis: The common Lodestar analysis including *Johnson* factors, *supra,* plus the factors enumerated in Section 330 of the Code.[26]

5. **Some instances where Lodestar analysis does not apply:**

a. In the Eleventh Circuit, Lodestar analysis does not apply to fee awards in common fund cases but applies in fee-shifting cases.[27]

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[24] *Johnson,* 488 F.2d at 717–19.

[25] *In re Cena's Fine Furniture, Inc.,* 109 B.R. 575 (E.D.N.Y. 1990); *In re Great Sweats of Va., Inc.*, 109 B.R. 696 (E.D. Va. 1989); *In re E. Peoria Hotel Corp.*, 145 B.R. 956 (Bankr. C.D. Ill. 1991). *See Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1352 (11th Cir. 2008) (stating that the Johnson factors are to be considered in determining the Lodestar amount; "they should not be reconsidered in making either an upward or downward adjustment to the lodestar—doing so amounts to double-counting.").

[26] *In re Pilgrim's Pride Corp.,* 690 F.3d 650, 656 (5th Cir. 2012) (citing *In re Cahill*, 428 F.3d 536, 539–40 (5th Cir. 2005)); *Mkt. Ctr. E. Retail Prop. v. Lurie* (*In re Mkt. Ctr. E. Retail Prop.*), 730 F.3d 1239, 1248–49 (10th Cir. 2013).

[27] *Camden I Condo. Ass'n*, 946 F.2d at 773; *see Ne. Eng'rs Fed. Credit Union v. Home Depot, Inc.* (*In re Home Depot, Inc., Customer Data Sec. Breach Litig.*), 931 F.3d 1065, 1079 (11th Cir. 2019) (stating that "[a] common-fund case is when 'a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's

b. "No look fees" – Some courts have established a presumptively reasonable amount allowed for attorney fees without the need to file an application for compensation.

c. Some Courts have held that in routine Chapter 13 cases they need not use the Lodestar analysis, but instead apply a standard rate or flat fee based on the circumstances of the case, unless the Trustee is seeking additional compensation.[28]

6. **How do some courts apply the Lodestar analysis to applications for compensation filed under 11 U.S.C. § 330?** 11 U.S.C. § 330 governs compensation of professional fees for officers of the estate.

a. The Sixth Circuit applies common Lodestar analysis in computing reasonableness of professional fees sought under 11 U.S.C. § 330 and 331. In *In re Boddy*, the Sixth Circuit stated that the establishment of a fixed fee for certain "normal and customary" services is directly contrary to the plain "actual, necessary services rendered" language of 11 U.S.C. § 330.[29]

b. In the Eleventh Circuit, it is "appropriate, though not required," for a bankruptcy court to use the Lodestar analysis in assessing professional

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fee from the fund as a whole.'"). *In re Home Depot Inc.* was a fee shifting case and the Lodestar analysis was used but a multiplier was determined to be inappropriate.

[28] *E.g.*, *Howell*, 226 B.R. 279, 281 (Bankr. M.D. Fla. 1998) ("Chapter 13 cases are standardized and systematized, and much of the work is capable of performance by paralegals. These cases are typically handled in high volume practices. Although counsel may lose a few dollars on one case when a standard, fixed fee is approved in a routine case, counsel will make up those dollars in another case.").

[29] *In re Boddy*, 950 F.2d 334, 337 (6th Cir. 1991).

fees of a debtor's investment and restructuring advisor under 11 U.S.C. § 330.[30]

7. **Fee awards under 11 U.S.C. § 362(k).** Eleventh Circuit: awards of attorneys' fees and costs incurred by debtors in successfully pursuing an action for damages resulting from the violation of the automatic stay and in defending the damages award on appeal are governed by a reasonableness standard analyzed under the common Lodestar analysis.[31]

8. **Applications for compensation under 11 U.S.C. § 506(b).** 11 U.S.C. § 506 (b) authorizes a creditor to recover fees, costs, and other expenses if the creditor holds an over-secured claim. While competent debtor and trustee's counsel are keenly aware that the award of attorneys' fees under 11 U.S.C. § 327 must meet a threshold of reasonableness and benefit to the estate, fee awards in a bankruptcy case for creditors are also subject to a reasonableness threshold. Often, a secured creditor will simply presume that its attorneys' fees incurred during a case (in the rare case with an over secured claim), will be added to the claim and paid pursuant to plan terms.

   a. Case Study: *In re Unnerstall*, 6:17-BK-00336-KSJ, 2018 WL 1989936 (Bankr. M.D. Fla. Apr. 25, 2018): the Bankruptcy court for the Middle District of Florida issued an instructive and thorough opinion on the

[30] *Miller Buckfire & Co. v. Citation Corp. (In re Citation Corp.),* 493 F.3d 1313 (11th Cir. 2007).
[31] *Mantiply v. Horne* (*In re Horne*), 876 F.3d 1076 (11th Cir. 2017).

reasonableness of fees sought by several creditor's counsel.[32] Judge Jennemann stated that, "[d]ebtors/borrowers, however, are not responsible for ***un****reasonable* fees incurred by a creditor in collecting the debt. Creditors can hire as many and as expensive lawyers as they choose but they then can shift no unreasonable fees onto the debtor/borrower."[33]

b. Practice Pointers: A principal lesson of the *Unnerstall* opinion is that all attorneys in a bankruptcy case who intend to seek fees should be vigilant from the start and cognizant of several key concepts of reasonableness. First, be on the lookout for duplication. Not every hearing or meeting requires at least two attorneys and counsel should able to articulate the need for multiple attorneys. Second, lead counsel should seek to "push work down" to those capable of effectively completing the task with a lower billable rate. Finally, do not "lump bill" as it is "universally disapproved by bankruptcy courts."[34]

Most professionals do not intend to bill in an unreasonable fashion and may overlook the guidelines applicable to fee allowance at the end of a matter. Careful consideration of staffing, bill preparation, and case

[32] *Id.;* Creditor, Bank of Washington sought fees for: (i) its in-house counsel "Eckelkamp" located in Missouri; (ii) "Hurd" a firm it hired to pursue foreclosure proceedings; (iii) "Armstrong" a firm it hired to commence a receivership action; and (iv)"Carmody" and "Fassett" two firms employed as bankruptcy counsel for creditor. This case was unusual in the sense that Creditor, Bank of Washington held a claim over secured by millions of dollars.
[33] *In re Unnerstall*, 2018 WL 1989936, at *2 (emphasis in original).
[34] *Id.* at *6.

management at the start of a matter will save potential headaches and "haircuts" at the end of the case.

c. The Bankruptcy court for the Northern District of Florida applied the *Johnson* factors in determining the reasonableness of fees sought in a Section 506(b) application, consistent with a ruling out of the Bankruptcy Court for the Southern District of Florida.[35]

d. The Bankruptcy courts for the Middle and Southern District of Florida have applied the common lodestar analysis in assessing the reasonableness of fees sought under Section 506(b).[36]

9. **Making it Rain - Fee enhancements:** The applicant has the burden of proving that a fee enhancement is appropriate.[37]

a. Case Study: *Perdue v. Kenny A.*, 559 U.S. 542 (2010): the U.S. Supreme Court held that an enhancement under the Lodestar analysis is permitted in extraordinary circumstances.[38] The Court stated that there is a strong presumption that the Lodestar analysis is sufficient as the factors subsumed in the Lodestar analysis cannot be used as a ground for increasing an award above the Lodestar amount. Under this ruling, a party seeking fees has the burden of identifying a factor that the Lodestar analysis does not adequately take into account and proving with

[35] *In re Britt*, 551 B.R. 522, 524 (Bankr. N.D. Fla. 2016) (citing *In re Villaverde*, No. 11-37442-BKC-LMI, 2016 WL 1179343, at *2 n.5 (Bankr. S.D. Fla. Mar. 25, 2016)).
[36] *In re Sundale, Ltd.*, 483 B.R. at 29; *In re Unnerstall*, 2018 WL 1989936.
[37] *Perdue v. Kenny A.*, 559 U.S. 542, 553 (2010).
[38] *Id.* at 542.

specificity that an enhanced fee is justified.[39] In *Purdue*, the Court reversed as "arbitrary" a 75% fee enhancement awarded by the District Court for the Northern District of Georgia in a civil rights case where, in that court's opinion, the respondents' attorneys had exhibited "a higher degree of skill, commitment, dedication, and professionalism . . . than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench."[40]

b. Case Study: *In re UNR Industries, Inc.*, 986 F.2d 207 (7th Cir. 1993): the Seventh Circuit Court of Appeals held that under the standards set forth by the Supreme Court in *Blum v. Stenson*, fee enhancements are appropriate only in rare and exceptional circumstances.[41] Even though the attorney whose fees were at issue had performed "downright ingenious" work, the Court held that fee enhancement is not appropriate when the attorney is awarded reasonable compensation under 11 U.S.C. § 330.[42]

c. Case Study: In *In re Home Depot Inc.*, 931 F.3d 1065 (11th Cir. 2019): the Eleventh Circuit Court of Appeals stated that "risk" is not an appropriate basis to increase an award under the Lodestar analysis by a multiplier in statutory fee-shifting cases.[43] The Court explained that the "risk of loss .

[39] *Id.* at 546.
[40] *Id.* at 548, 557.
[41] *In re UNR Industries, Inc.*, 986 F.2d 207 (7th Cir. 1993).
[42] *Id.* at 208, 211.
[43] *In re Home Depot Inc.*, 931 F.3d 1065, 1083 (11th Cir. 2019).

. . is the product of two [inputs]: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits."[44] While the first input is not reflected in the Lodestar analysis, "there are good reasons" not to enhance fees for the risk presented by meritless claims."[45] The second input is subsumed in the Lodestar analysis "either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so."[46]

C. <u>What if you've properly applied for reasonable fees, but your client can't or won't pay them?</u>

1. **Charging lien basics – Know your right to payment.**

   a. A charging lien is an attorney's right to "encumber money payable to the client . . . until the attorney's fees have been properly determined and paid."[47] In a bankruptcy, a charging lien may entitle counsel for debtor or creditor to a priority interest in awards arising from the representation in favor of their client, including in awards of sanctions or attorney's fees.[48]

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[44] *Id.* at 1083-84.
[45] *Id.* at 1084.
[46] *Id.*
[47] *Lien*, Black's Law Dictionary (11th ed. 2019). *See also In re Hanson Dredging, Inc.*, 15 B.R. 79, 82 (Bankr. S.D. Fla. 1981); *Vencill v. Spain* (*In re Spain*), 7-11-10112 JA, Adversary No. 11-1069 J, 2012 WL 1899234, at *2 (Bankr. D.N.M. May 24, 2012).
[48] *MacNeal v. Equinamics Corp.* (*In re MacNeal*), 393 B.R. 805, 811 (Bankr. S.D. Fla. 2008); *In re Rothstein Rosenfeldt Adler, PA*, 500 B.R. 811, 815 (Bankr. S.D. Fla. 2013); *see Broach v. Michell* (*In re Bouzas*), 294 B.R. 318, 325 (Bankr. N.D. Cal. 2003); *In re PDQ Copy Center, Inc.*, 27 B.R. 123, 126 (Bankr. S.D.N.Y. 1983); *see Armando Gerstel, Inc.*, 43 B.R. 925, 930 (Bankr. S.D. Fla. 1984), *aff'd in part, rev'd in part*, 65 B.R. 602 (S.D. Fla. 1986); *In re Studebaker's of Ft. Lauderdale, Inc.*, 104 B.R. 411, 413 (Bankr. N.D. Fla. 1989); *In re Hanson Dredging, Inc.*, 15 B.R. at 82.

b. Know the difference: Charging lien vs. Retaining lien. Though sometimes mistakenly conflated, charging and retaining liens are distinct.[49]

i. A charging lien attaches to proceeds derived for the benefit of the client through efforts of the attorney, whether or not the attorney has possession of those proceeds.[50]

ii. A retaining lien attaches to any property of the client, usually papers or documents (client file), of which the lawyer maintains possession for purposes of carrying out the representation, whether or not such property was earned by the efforts of the attorney.[51]

2. **Using Charging Liens to get paid – Show me the money!** In bankruptcy, the validity and effect of charging liens are governed by applicable state law.[52] A charging lien must be (1) valid; and (2) perfected.[53]

a. Validity

i. Under many states' laws, a charging lien is valid only to the extent provided for by the language or implied nature of the attorney-client agreement.[54] Florida law requires "(1) an express or implied contract

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[49] *Dymarkowski v. Savage* (*In re Hadley*), 541 B.R. 829, 837-40 (Bankr. N.D. Ohio 2015); Restatement (Third) of The Law Governing Lawyers § 43 (2000).
[50] Restatement (Third) of The Law Governing Lawyers § 43(2) (Am. Law Inst. 2000).
[51] *Daniel Mones, P.A. v. Smith*, 486 So. 2d 559, 561 (Fla. 1986) (citing *Conroy v. Conroy*, 392 So.2d 934 (Fla. 2d DCA 1980)); *Katz v. Image Innovations Holdings, Inc.*, No. 06 Civ. 3707 (JGK), 2009 WL 1505174, at *1 (S.D.N.Y. May 27, 2009); *Id.* at cmt. b.
[52] *See Butner v. United States*, 440 U.S. 48, 55-56 (1979). *MacNeal*, 393 B.R. at 811; *Armando Gerstel, Inc.*, 43 B.R. at 929; *In re Hanson Dredging, Inc.*, 15 B.R. at 82.
[53] *E.g.*, *In re Studebaker's of Ft. Lauderdale, Inc.*, 104 B.R. at 412.
[54] *In re Miami Beverly, LLC*, No. 18-14506-LMI, 2019 WL 5291364, at *3 (Bankr. S.D. Fla. Oct. 17, 2019); *In re Spain*, No. 7-11-10112 JA, 2012 WL 1899234, at *2 (Bankr. D.N.M. May 24, 2012); *In re Bouzas*, 294 B.R. 318, 321 (Bankr. N.D. Cal. 2003).

between attorney and client; (2) an express or implied understanding for payment of attorney's fees out of the recovery; and (3) either an avoidance of payment or a dispute as to the amount of fees."[55]

ii. Unless state law provides otherwise, an attorney seeking to enforce a charging lien on an award of sanctions or attorneys' fees should clearly provide for the attachment of a charging lien in the attorney-client agreement.[56]

b. Perfection

i. Typically, perfection will relate back to the date the attorney commenced services on behalf of the client under the applicable agreement.[57]

ii. Some states provide for the automatic perfection of a charging lien upon the occurrence of the award, settlement, or other financial gain contemplated by the charging lien language of the attorney-client agreement.[58]

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[55] *MacNeal*, 393 B.R. at 811.

[56] *Daniel Mones, P.A. v. Smith*, 486 So. 2d 559, 561 (Fla. 1986*); MacNeal*, 393 B.R. 805. *See Flynn v. Sarasota Cty. Pub. Hosp. Bd.*, 169 F. Supp. 2d 1363, 1368-70 (M.D. Fla. 2001); *In re Bouzas*, 294 B.R. 318, 322 (Bankr. N.D. Cal. 2003); *Murphy v. Perry, Johnson, Anderson, Miller & Moskowitz L.L.P.* (I*n re Colman)*, 525 B.R. 549, 557 (Bankr. D. Mass. 2014); *Clinton v. Adams*, 2014 WL 6896021, at *4 (C.D. Cal. Dec. 5, 2014); *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So. 2d 1383, 1385 (Fla. 1983). *But see* N.Y. Jud. Ct. Acts Law § 475 (McKinney) (2019) (conferring a charging lien automatically in agreements to provide legal representation).

[57] *Matter of TLC of Lake Wales, Inc.*, 13 B.R. 593, 595 (Bankr. M.D. Fla. 1981); *In re PDQ Copy Center, Inc.*, 27 B.R. at 125; *Miles v. Katz*, 405 So. 2d 750, 752 (Fla. Dist. Ct. App. 1981).

[58] *See In re Bouzas*, 294 B.R. 318, 324 (Bankr. N.D. Cal. 2003); *Kipperman v. Sutherland* (*In re Bush*), 356 B.R. 28, 35 (Bankr. S.D. Cal. 2006); *In re Kleer-Span Truss Co.*, 76 B.R. 30, 32 (Bankr. N.D.N.Y. 1985); *In re PDQ Copy Center, Inc.*, 27 B.R. at 125.

iii. Under Florida Law, perfection requires that the attorney provide timely notice to the client after an applicable award is entered.[59] This may be accomplished by filing notice or otherwise pursuing enforcement of the charging lien prior to the termination of the action in which the fees or sanctions were awarded.[60] Defining the termination of an action is "more complicated in a bankruptcy context . . . because a single bankruptcy case may have many different contested matters and adversary proceedings."[61]

Generally, adversary proceedings and contested matters are treated as separate actions for notice purposes.[62] In a Chapter 11, notice as to the attachment of a charging lien to payments under the chapter 11 plan must be made prior to confirmation.[63] Notice as to awards entered in adversary proceedings or contested matters must generally be provided before the termination of such adversary proceeding or contested matter, whether before or after confirmation.[64]

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[59] *MacNeal*, 393 B.R. at 812; *Flynn*, 169 F. Supp. 2d at 1368; *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A.*, 428 So. 2d at 1385. *See United States v. Transocean Air Lines, Inc.*, 356 F.2d 702, 705 (5th Cir. 1966) (finding that attorneys' assertion of the charging lien the day after the relevant action was settled and dismissed was sufficient notice to perfect the charging lien in the settlement proceeds).

[60] *Bruton v. Carnival Corp.*, 916 F. Supp. 2d 1262, 1269 (S.D. Fla. 2012); *Daniel Mones, P.A.*, 486 So. 2d at 561; *Hannah v. Elder*, 545 So. 2d 503, 504 (Fla. 4th DCA 1989); *Flynn*, 169 F. Supp. 2d at 1369.

[61] *In re Terminal Cash Sols., L.L.C.*, No. 05-22440-BKC-RBR, Chapter 11, 2007 WL 2774258, at *1 (Bankr. S.D. Fla. Sept. 23, 2007).

[62] *Thaddeus Freeman, P.L.L.C. v. Summit View, L.L.C.* (*In re Summit View, L.L.C.*), No. 8:11-cv-724-T-24, 2011 WL 3268367, at *5 (M.D. Fla. Aug. 1, 2011), *aff'd*, 472 F. App'x 900 (11th Cir. 2012). *See MacNeal*, 393 B.R. at 812.

[63] *In re Summit View,* at *4; *In re Rothstein Rosenfeldt Adler, PA*, 500 B.R. at 815.

[64] *In re Terminal Cash Sols., L.L.C.*, 2007 WL 2774258, at *2. *See In re Summit View,* at *4.

However, Courts may extend notice deadlines in the interest of equity, given the interrelationship between the adversary proceeding or contested matter and the main bankruptcy proceeding.[65]

c. Priority – who wins?

   i. For creditor's counsel or pre-petition debtor's counsel, a valid, perfected charging lien can convert a general unsecured claim to the equivalent of a secured claim.[66]

   ii. For debtor's counsel retained for purposes of filing and completing a bankruptcy case or proceeding, a charging lien will confer no more priority than what is afforded by 11 U.S.C. § 507.[67]

d. *MacNeal*, 393 B.R. 805[68]**:** In an adversary proceeding, the creditor plaintiff, represented by an attorney, was awarded attorneys' fees as sanctions entered against the defendant debtor. The representation agreement between creditor and its attorney provided for a charging lien "against any property or judgment that [creditor] recover in a matter for which [attorney] provided [creditor] with legal representation."[69] After settling the adversary proceeding for $17,510 in favor of creditor, but before confirmation of a plan in the main case, debtor was awarded a judgment in an unrelated state court action against creditor for $82,150.

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[65] *See MacNeal*, 393 B.R. at 812. See the case study below for more detail.
[66] *In re Bouzas*, 294 B.R. 318, 322 (Bankr. N.D. Cal. 2003); *Matter of Pac. Far E. Line, Inc.*, 654 F.2d 664, 670 (9th Cir. 1981).
[67] *In re Studebaker's of Ft. Lauderdale, Inc.*, 104 B.R. at 413.
[68] *Id.*.
[69] *Id.* at 811.

The debtor attempted to set off the judgment against the settlement amount when creditor became insolvent. Creditor's attorney claimed the contractual charging lien conferred priority over the debtor with respect to the $17,510.

The court held that the attorney had a valid, perfected charging lien on the $17,510 because (1) the fee agreement clearly extended to awards of sanctions for attorneys' fees; (2) the creditor's inability to pay due to insolvency constituted an avoidance of payment of fees due attorney; and (3) asserting the charging lien after settlement of the adversary proceeding but before confirmation constituted sufficient notice for perfection of the lien, given the significant interconnection between the adversary proceeding and main bankruptcy case.[70] The Court further held that the valid, perfected charging lien gave the attorney priority over debtor's setoff because the setoff arose in a different case than the charging lien.[71]

e. Jurisdiction & Enforcement – Protect your Rights: once valid and perfected, a charging lien may be enforced outside the bankruptcy case in state or federal court, but the federal court standard for subject matter jurisdiction becomes more stringent post-confirmation.[72]

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[70] *Id.* at 812.
[71] *Id.* at 812-13; *Dunkin v. Vandenbergh*, 1829 WL 2198 (N.Y. Ch. 1829); *Cole v. Grant*, 1804 WL 799 (N.Y. Sup. Ct. 1804); *Devoy v. Boyer*, 1808 WL 1283 (N.Y. Sup. Ct. 1808).
[72] *Keefe, Anchors & Gordon PA v. ASI Holding Co.*, 598 B.R. 20 (N.D. Fla. 2018).

i. Pre-confirmation, subject matter jurisdiction is subject to the "related to" test. Enforcement may be brought in federal court if its outcome could "conceivably have any effect on the estate being administered in bankruptcy."[73]

ii. Post-confirmation, subject matter jurisdiction is subject to the "close nexus" test. Enforcement in federal court is proper provided the claim affects "an integral aspect of the bankruptcy process," i.e. the "interpretation, implementation, consummation, execution, or administration of a confirmed plan."[74]

II. TYPES OF FEE AWARDS AND SANCTIONS

A. Oversecured Creditors

As a general rule, interest does not continue to accrue on pre-petition claims after a bankruptcy case is filed.[75] The disallowance of post-petition interest is specifically mandated under Section 502(b)(2) of the Bankruptcy Rule.

[73] *Id.* at 23.
[74] *Id.*
[75] Section 506(b) of the Bankruptcy Code is an exception to this general rule as it provides that oversecured creditors may recover (i) post-petition interest on their claims and (ii) the reasonable fees, including attorney's fees, costs, or charges provided for in the contract. Section 506(b) has long been interpreted as prohibiting the accrual of post-petition attorney's fees except to the extent a secured creditor is oversecured.

In addition to post-petition interest, a secured creditor is entitled to be paid the reasonable fees, including attorney's fees, and the costs or charges provided for in the underlying agreement or state law under which its claim arose "[t]o the extent that an altered secured claim is served by property the value of which is greater than the amount of such claim." 11 U.S.C. § 506(b). In order for fees, costs, or charges to be recoverable under § 506(b), three requirements must be met: (1) the creditor must be oversecured; (2) the charges must be provided for under the agreement or statute under which such claim arose; and (3) the fees, costs, or charges must be reasonable. In the unlikely event the underlying contract or statute giving rise to the claim does not provide for entitlement to fees, costs, or charges, an oversecured creditor would only be entitled to post-petition interest and not fees, costs, or charges.[76]

Thus, a secured creditor is entitled to attorney's fees under § 506(b) only if the creditor is oversecured, the fees are reasonable, and the fees are provided for under the agreement or applicable state law that created the claim. A majority of courts have determined that federal law governs the determination of reasonableness for awarding attorney's fees under § 506(b). A minority of courts has determined that state law controls or precludes attorney's fees awards. Courts must consider factors similar to the inquiry under § 330, in determining the reasonableness of a secured creditor's attorney's fees, including: the time and labor involved, whether a non-attorney could perform some of the tasks, whether there were any novel or difficult questions involved, what amount of skill was necessary to perform the services, whether acceptance of the

[76] For example, where a secured creditor has foreclosed on its collateral, it is no longer entitled to attorney's fees.

case precluded other employment on the part of the attorney, the amount customarily charged in the community, whether the rate was a flat fee or based on expected hourly work, whether extraordinary results were obtained, whether the relationship between the attorney and the client is ongoing or limited, whether the case is undesirable, and the amount awarded in similar cases in the division.

Oversecured creditors that seek fees and costs under § 506(b) have the burden of proof on each of the requirements for recovery and "must provide supporting documentation that describes the nature of the services in sufficient detail to permit the court to determine that they are authorized by agreement, necessary and reasonable." Oversecured creditors seeking reimbursement have the burden to support their claim as § 506(b) does not establish a procedure to allow them to do so.

Some courts have ruled that a creditor seeking attorney's fees under § 506(b) must file an application for fees that complies with Bankruptcy Rule 2016. Courts that require the filing of a Rule 2016 fee application reason that fees, costs, or charges cannot be deemed reasonable without notice to creditors and court approval. Other courts have ruled that the filing of a proof of claim specifically claiming the attorney's fees is sufficient to satisfy the due process requirements of notice and an opportunity to present objections. As procedures vary depending on the jurisdiction, counsel representing a secured creditor is advised to research practice in the jurisdiction where the claim is being made.

B. Undersecured and Unsecured Creditors

In light of Section 506(b)'s clear expression that creditors are entitled to post-petition interest costs and attorney's fees "to the extent" that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim" a majority of courts long concluded that unsecured and undersecured creditors are not entitled to recover post-petition attorney's fees and similar costs. See, *In re Electric Machinery Enterprises, Inc.*, 371 BR 549 (Bankr. M.D. Fla. 2007) (Williamson, Judge) (referred to as "*EME*"). In *EME*, Judge Williamson adopted the majority view notwithstanding the Supreme Court's then recent decision in *Travelers Cas. & Sur. Co. of Am. v. PG&E*, 127 S. Ct. 1199 (2007) (referred to as "Travelers"). In fact, noting that the Supreme Court in *Travelers* "declined to express an opinion on whether unsecured creditors are entitled to post-petition attorney's fees in a case under the Bankruptcy Code," Judge Williamson concluded that "existing Supreme Court precedent under pre-Code law supports the majority view" that undersecured and unsecured creditors are not entitled to post-petition attorney's fees and costs.[77]

Judge Williamson outlined a clear statement of the majority view among bankruptcy courts in *EME*.[78] In *EME*, Judge Williamson held that "an unsecured creditor is not entitled to include attorneys' fees, costs or similar charges incurred after

[77] 371 B.R. at 552.

[78] *Bronze Grp., Ltd. v. Sender* (*In re Hedged-Invs. Assocs.*), 293 B.R. 523 (D. Colo. 2003); *In re Loewen Grp. Int'l, Inc.*, 274 B.R. 427 (Bankr. D. Del. 2002); *In re Pride Cos. L.P.*, 285 B.R. 366 (Bankr. N.D. Tex. 2002); *In re Saunders*, 130 B.R. 208 (Bankr. W.D. Va. 1991); *In re Sakowitz, Inc.*, 110 B.R. 268 (Bankr. S.D. Tex. 1989); *In re Canaveral Seafoods, Inc.*, 79 B.R. 57 (Bankr. M.D. Fla. 1987); and *In re Marietta Farms, Inc.*, 2004 WL 3109360 (Bankr. D. Kan. Nov. 16, 2004).

the commencement of a bankruptcy case as part of an allowed unsecured claim."[79] *Electric Machinery*, 371 B.R. at 554. In so holding, Judge Williamson identified "four primary reasons," each of which is listed below. *Electric Machinery*, 371 B.R. at 550-551.

A. The plain language of Section 506(b) and the "*expressio unius*" legal maxim. *Id.*

B. Reliance on the *Timbers* case, and the logical extension from *Timbers* that "requires the conclusion that unsecured creditors are not entitled to collect attorneys' fees and costs." *Id.*

C. The plain language of Section 502(b) of the Bankruptcy Code provides that "if any objection to a claim is filed, the court 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." *Id.*

D. Due concern for "equitable considerations" and "policy of providing equality of distribution among similarly situated creditors according to the priorities set out in the Bankruptcy Code." *Id.* (noting that "a prime policy of the bankruptcy law, established long ago, is 'to secure equality among the creditors of a bankrupt.'") (quoting *Boese v. King*, 108 U.S. 379, 385-86 (1883)).

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[79] Currently, the Third Circuit Court of Appeal has the identical issue under review in the case of *Tribune Media Co. v. Wilmington Trust Co. (In re Tribune Media Co.)*, No. 18-3793 (3rd Cir.). In *Tribune*, the Bankruptcy Court disallowed the post-petition attorneys' fees sought by the unsecured creditor, but the District Court reversed the decision of the Bankruptcy Court. It is left to be seen whether the Third Circuit will side with the recent opinion of the Fourth Circuit (as well as those of the Second and Ninth).

In *EME*, Judge Williamson disagreed with the argument that "the Eleventh Circuit implicitly recognized an unsecured creditor's entitlement to attorneys' fees in *Welzel v. Advoc. Realty Invs., L.L.C.* (*In re Welzel*), 275 F.3d 1308 (11th Cir. 2001)." *Id.* at 553. As Judge Williamson pointed out, the *Welzel* decision addressed the issue of "whether an oversecured creditor would be entitled to attorneys' fees and costs pursuant to an underlying loan agreement and state statute where the amount of fees and costs were not reasonable." *Id.* Ultimately, Judge Williamson stated that "[n]othing in *Welzel* implies that the Eleventh Circuit would allow post-petition fees to an unsecured creditor in an insolvent estate." *Id.*

In *Welzel*, the Eleventh Circuit did focus on the connection between Sections 502 and 506, stating that "[w]e first note that § 506(b) does not state that attorney's fees deemed unreasonable are to be disallowed. In fact, the subsection is completely silent with regard to the allowance/disallowance issue. This silence suggests that § 506(b) is meant not to displace the general instructions laid down in § 502, but to be read together with § 502 in a complementary manner." *Welzel*, 275 F.3d at 1317. Thus, while *Welzel* might not be controlling with respect to the issue presented, as arguments continue to develop at the bankruptcy court level, we might expect to see continued reliance upon language found in *Welzel* as unsecured creditors work to increase their allowed claims.

Lastly, Judge Williamson pointed out the practical impact of allowance of post-petition attorneys' fees to unsecured creditors, likening such an application to the daily ringing of the "cash registers" as "attorneys for unsecured creditors that were active in the case would continually be filing new claims or seeking to reconsider previously

allowed claims in order to add post-petition attorneys' fees and costs." *Id.* at 553. This sentiment was not lost on Judge Brooks in *In re Fast*, 318 B.R. 183 (Bankr. D. Colo. 2004). The Fast decision was cited by Judge Williamson in *EME* as the "minority position." *Id.*

Indeed, a review of the decisional law indicates that *Fast* falls within the minority of bankruptcy court opinions that allow for post-petition attorneys' fees to unsecured creditors. However, as Judge Williamson pointed out in *EME*, Judge Brooks issued his opinion "with some trepidation" which was apparent from the following language quoted in its entirety by Judge Williamson:

"So as not to create an unsecured – or under secured – creditor feeding frenzy, the facts and circumstances of this case are extremely unusual, perhaps unprecedented. During this Judge's time on the bench, only a bare handful of Chapter 7 cases have resulted in distribution to all creditors and a distribution to the debtor…It is the confluence of the various features of this case that result in the conclusions reached by the court with respect to interest and attorneys' fees." *Id.* (quoting *Fast*, 318 B.R. at 194 n. 9 (emphasis in original)).

For those attorneys who represent debtors, creditors' committees, and trustees, *EME* is and should be the final statement of the law. Otherwise, as Judge Williamson put it, the "cash registers would ring on a daily basis," as attorneys for unsecured creditors would continually be filing new claims to add post-petition attorney's fees and costs. Unfortunately, some Courts have interpreted *Travelers* as mandating a different

result, creating some confusion depending on the Court or Circuit addressing the issue. *See SNTL Corp. v. Ctr. Ins. Co.* (*In re SNTL Corp.*), 571 F.3d 826 (9th Cir. 2009).

As with most bankruptcy related questions, we suggest that the analysis should begin with a review of the applicable sections of the Bankruptcy Code.

The two code sections most often discussed are Sections 502(b) and 506(b). As noted by the Courts that interpret *Travelers* as allowing post-petition attorney's fees as part of an allowed unsecured claim, Section 502(b)(2) does not expressly exclude attorneys' fees from allowed claim amounts. *See* 11 U.S.C. § 502(b)(2) ("Except as provided … the court, … shall determine the amount of such claim in … shall allow such claim in such amount except to the extent that – (2) such claim is for unmatured interest."). Conversely, Section 506(b) expressly provides for the allowance of post-petition attorneys' fees for oversecured creditors but does not provide for the allowance of attorneys' fees for unsecured creditors. As such, by applying the plain language of Section 506(b) to the Latin maxim of *expressio unius est exclusio alterius*, one may assume that the legislature did not intend to allow post-petition attorneys' fees. Of course, such straightforward scenarios are rarely confronted in the claim objection context.

After review of the applicable sections of the Bankruptcy Code, the next logical step is an analysis of applicable United States Supreme Court opinions. Most often, decisional law addressing the issue presented in these materials begins with, or at least includes, citation to *Travelers Cas. & Sur. Co. of Am. v. PG&E*, 549 U.S. 443 (2007). In Travelers, the Supreme Court rejected the long-standing "Fobian rule," which rule

emanated from the Ninth Circuit's opinion in *Fobian v. Western Farm Credit Bank* (*In re Fobian*), 951 F.2d 1149 (9th Cir. 1991), noting that such rule finds no support in Section 502 of the Bankruptcy Code, or elsewhere. *Travelers*, 549 U.S. at 452. The so-called *Fobian* rule provides that claims for attorneys' fees against a bankruptcy estate which were incurred in the context of litigating issues "peculiar to federal bankruptcy law" should be disallowed. *Fobian*, 951 F.2d at 1153 (providing an exception for instances of bad faith or harassment).

In its rejection of the *Fobian* rule, the Supreme Court stated that "[t]he absence of textual support is fatal" and went on to identify the presumption that "claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed." *Travelers*, 549 U.S. at 452. However, the *Travelers* Court stopped short of addressing whether unsecured creditors are entitled to post-petition attorneys' fees and did not address whether Section 506(b) disallows contractual attorneys' fees for unsecured or under secured creditors.

After reviewing *Travelers*, the natural inclination might be to leap forward in the analysis to the various circuit level opinions addressing the issue presented; however, we think it appropriate to first review and consider *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988). In *Timbers*, the Supreme Court held that Section 506(b) of the Bankruptcy Code permits the recovery of post-petition interest for holders of over secured claims and regarded that right as one held exclusively by over secured creditors (to the exclusion of unsecured creditors). *Timbers*, 484 U.S. at 373-374 (stating that "[s]ection 506(b)'s denial of post-petition interest to under secured

creditors merely codified pre-Code bankruptcy law, in which that denial was part of the conscious allocation of reorganization benefits and losses between under secured and unsecured creditors"). Should the Section 506(b) analysis regarding post-petition interest in *Timbers* be extended and thus apply equally to unsecured creditors in the context of claims for post-petition attorneys' fees? What happens if we combine Timbers analysis along with the *expressio unius* maxim and the plain language of Section 506(b)? Are we any closer to the answer? Let's dig further.

After a review of *Travelers* and *Timbers*, along with the historical perspective relied upon in each opinion, we next turn to the circuit courts of appeal for guidance. In that regard, a collection of three circuit level opinions, and their respective holdings, are included below:

A. *In re SNTL Corp.*, 571 F.3d 826 (9th Cir. 2009) (after identifying the historical split of authority and collecting cases, the Ninth Circuit ultimately held that unsecured creditors may claim attorneys' fees incurred post-petition based on a pre-petition contract with the debtor).

B. *Ogle v. Fidelity & Deposit Co. of Md.*, 586 F.3d 143 (2nd Cir. 2009) (stating "section 506(b) does not implicate unsecured claims for post-petition attorneys' fees, and it therefore interposes no bar to recovery").

C. *Summitbridge Nat'l Invs. III, L.L.C. v. Faison*, 915 F.3d 288 (4th Cir. 2019) (holding that an unsecured or under secured creditor may include post-petition attorneys' fees and costs as part of its allowed claim if those fees were guaranteed under a pre-petition contract).

Each of the three circuit opinions identified above support the proposition that unsecured creditors should be entitled to claim post-petition attorneys' fees and costs as part of such creditor's allowed claim. But, as we know, not all cases make it to the circuit court level. In fact, it is a rare occasion that the issue presented here goes beyond the bankruptcy court. As such, it is important that we next consider how the majority of bankruptcy courts have ruled when considering post-petition attorneys' fees for unsecured or under secured creditors.

Overall, the issue presented provides us with a split of authority between the majority of bankruptcy courts on the one hand, and at least three circuit courts of appeal on the other. More decisions will most certainly lead to additional analysis and factors for consideration. Ultimately, without a clear pronouncement from the United States Supreme Court, bankruptcy courts outside of circuits with controlling circuit level decisions will be left to apply common sense and practicality while striving to hold fast to the long-standing policy goal of equitable distribution as similarly situated creditors continue to compete for a larger piece of the pie.

C. When Can Debtors Get Fees

While it may seem like the debtor is always liable for or paying the fees and costs of other interested parties, the Bankruptcy Code contains several provisions authorizing the debtor to recover attorneys' fees and other costs incurred in connection with the bankruptcy case. Two specific sections are 11 U.S.C. §§ 362(k) and 303(i)(1), which authorize the debtor to recover attorneys' fees and costs for stay violations and dismissal of involuntary bankruptcy proceedings, respectively.

1. 11 U.S.C. § 362(k)[80]

The Bankruptcy Code authorizes debtors to recover damages for violations of the automatic stay. Indeed, § 362(k) mandates an award of actual damages, including costs and attorneys' fees, for willful violations of the automatic stay. § 362(k)(1) states, in relevant part, that "[e]xcept 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***…." (emphasis added).

In the Eleventh Circuit, a willful automatic stay violation occurs "if the violator (1) knew of the automatic stay and (2) intentionally committed the violative act, regardless of whether the violator specifically intended to violate the stay."[81] The Eleventh Circuit has also taken a broad reading of § 362(k) when awarding costs and attorneys' fees. In *In re Horne*, 876 F.3d 1076 (11th Cir. 2017), the Eleventh Circuit held that § 362(k)(1) specifically departs from the American Rule and authorizes costs and attorneys' fees incurred by the debtor in ending a willful violation of an automatic stay, prosecuting a damages violation, and defending those judgments on appeal. The Eleventh Circuit held

[80] On its face, § 362(k) only applies to "individuals," but there is a split as to whether individuals is interpreted narrowly to only include natural persons (*see, e.g.,* J*ove Eng'g, Inc. v. IRS,* 92 F.3d 1539, 1549-53 (11th Cir. 1996); *Spookyworld, Inc. v. Town of Berlin* (*In re Spookyworld, Inc.)*, 346 F.3d 1, 7-8 (1st Cir. 2003); *Mar. Asbestosis Legal Clinic v. LTV Steel Co.* (*In re Chateaugay Corp.*), 920 F.2d 183, 184-86 (2d Cir. 1990)) or if it is interpreted broadly to also include corporate debtors (*see, e.g.,* B*udget Serv. Co. v. Better Homes,* 804 F.2d 289, 292 (4th Cir. 1986); *Cuffee v. Atl. Bus. & Cmty. Dev. Corp.* (I*n re Atl. Bus. & Cmty. Corp.)*, 901 F.2d 325, 329 (3d Cir. 1990)), with the majority of courts holding that it only applies to natural persons.

[81] *See Jove Eng'g, Inc.*, 92 F.3d at 1555.

that nothing in the text of § 362(k)(1) limits the scope of attorneys' fees to solely ending the stay violation. Upon the finding of a willful violation of the automatic stay, courts in the Eleventh Circuit do not hesitate to enter an award of reasonable attorneys' fees and costs.[82]

2. 11 U.S.C § 303(i)(1)

Under the appropriate circumstances, the filing of an involuntary bankruptcy petition may be a useful and powerful tool to aid a creditor in collecting from a debtor. However, petitioning creditors should be aware of the potential risks associated with an unsuccessful petition and the ultimate non-consensual dismissal of the involuntary petition. One of those risks is liability for the debtor's attorneys' fees and costs, which can be substantial. One purpose in allowing a debtor to recover its attorneys' fees and costs is to deter imprudent and frivolous involuntary bankruptcy petition filings which can have serious consequences to the putative debtor. § 303(i)(1) states:

> (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

[82] *See In re Horne*, 876 F.3d 1076 (11th Cir. 2017) (awarding attorneys' fees and costs in excess of $100,000 for ending a stay violation, pursuing an action for damages resulting from an automatic stay violation, and in defending the damages award on appeal); *In re Goodson*, 2018 Bankr. LEXIS 301 (Bankr. N.D. Ala. Feb. 5, 2018) (finding debtor entitled to an award of attorneys' fees, but requiring debtor to file an application pursuant to Fed. R. Bankr. P. 2016 and the court's local rules itemizing their fees and expenses incurred in connection with the stay violation); *In re Moreno*, Case No. 19-17620-BKC-RAM (Bankr. S.D. Fla. Oct. 1, 2019) (awarding debtor attorneys' fees and costs in the amount of $9,320.35 for a violation of § 362(k) by repossessing the debtor's truck with prior knowledge of the debtor's bankruptcy and failing to return the truck upon demand by debtor's attorneys).

(B) a ***reasonable attorney's fees***; or

Therefore, it is clear that once a bankruptcy court dismisses an involuntary petition, then the Bankruptcy Code permits the bankruptcy court to enter judgment against the petitioning creditors for the debtor's reasonable attorneys' fees and costs in defending against the involuntary petition unless (i) all of the petitioning creditors and the debtor consent to the dismissal, and (ii) the debtor has not waived its right to obtain a judgment under § 303. What is less clear based on the express language of § 303 is the scope of attorneys' fees and costs that may be awarded, *i.e.*, whether the debtor's attorneys' fees and costs are limited to those incurred at the bankruptcy court level. In *DVI Receivables XIV, L.L.C. v. Rosenberg* (*In re Rosenberg*), 779 F.3d 1254 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 805 (2016),[83] the Eleventh Circuit answered this question by holding that nothing in § 303(i)(1) limits fees to those incurred in initially obtaining dismissal of the petition by the bankruptcy court and § 303(i)(1) compensates debtors who obtain a dismissal and successfully defend against involuntary bankruptcy litigation, which may or may not end at the trial level. In *In re Rosenberg*, the debtor was awarded attorneys' fees in excess of $1 million demonstrating just how substantial an award of attorneys' fees may be.

[83] The Ninth Circuit reached a contrary conclusion in *Higgins v. Vortex Fishing Sys.* (*In re Vortex Fishing Sys.*), 379 F.3d 701 (9th Cir. 2004), where the court held that § 303(i)(1) did not authorize attorneys' fees for appellate proceedings and the only authority for awarding discretionary appellate fees in bankruptcy appeals is Rule 38.

It is also worth noting that the law is unsettled as to whether the fees and costs awarded to a debtor for an involuntary petition are subject to being set off by the underlying debts of petitioning creditors. However, there is authority in the Eleventh Circuit that setoff may be inappropriate where there is a bona fide dispute as to whether the debtor owes a debt to the petitioning creditor. In *In re Brewer*, No. 6:11-bk-04174-KSJ, Chapter 7, 2012 Bankr. LEXIS 2600, 2012 WL 2076421 (Bankr. M.D. Fla. June 8, 2012), Judge Jenneman denied a petitioning creditor's request for setoff of a judgment the petitioning creditor had against the debtor, noting that a bona fide dispute existed as to the amount remaining, if any, of the underlying judgment and the debtor was not required to wait until this dispute was resolved to recover the costs he incurred in defending the involuntary petition. Thus, in situations where set off is not available, it could end up costing the petitioning creditor out-of-pocket money.

The filing of an involuntary petition could expose a petitioning creditor to high costs and attorneys' fees and any petitioning creditor analyzing whether to file an involuntary petition should do their homework to ensure that all of the statutory requirements are satisfied before proceeding. The filing of an ill-advised involuntary bankruptcy petition could be costly, and a petitioning creditor could end up paying the debtor's attorneys' fees.

D. Prevailing Party in Litigation

Typically, issues relating to attorneys' fees in bankruptcy matters arise in the claims objection context or in deterring sanctions. The issues generally arise when a

creditor seeks to recover attorney's fees as part of its claim pursuant to a contractual "boilerplate" provision that provides that the creditor is entitled to its costs of collection which will typically include attorneys' fees. However, those fee provisions can go both ways under many state statutes or other applicable law.

For example, Florida Statue Section 57.105(7) provides that "If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract." Similarly, California's civil code section 1717 provides that: "In any action on a contract where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing in the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." Thus, while the contractual provisions are often unilateral in favor of the creditor, state statue considers them reciprocal, apply in favor of the debtor if the debtor is the "prevailing party".

On this subject, the cases of *Antaramian Properties, LLC v. Basil Street Partners, LLC (In re Basil Street Partners, LLC)*, 2013 WL 446156 (Bankr. M.D. Fla. 2013) and *Menco Pac., Inc. v. Int'l Fid. Ins. Co.* (*In re Menco Pac., Inc.*), No. LA CV17-07830 JAK, 2019 WL 653086 (C.D. Cal. Feb. 15, 2019) are particularly instructive. In *Basil* Street, Chief Judge Delano applied Florida Statute 57.105 to award substantial

attorneys' fees to a prevailing party in a hotly contested adversary proceeding in the U.S. Bankruptcy Court for the Middle District of Florida. In determining that the Defendants were entitled to prevailing party attorney's fees, Judge Delano first had to decide who was the prevailing party since neither side was successful on all of their claims. The plaintiff argued that it was the prevailing party because it was successful in its efforts to enforce its loan documents and received a $53 million judgment against the debtor. Conversely, the defendants, who had guaranteed the debtor's obligations, argued that they were the prevailing party because they had avoided liability under their guarantees, which they considered the most significant issues in the litigation.[84]

Judge Delano ultimately determined that the Defendants were the prevailing party as they were successful on defeating their liability in the guarantees. The court did not believe the loss on the counterclaims was of impact since "those claims were not the main focus of the trial." Initially, the court ruled that while the defendants were the prevailing party, they could not recover fees in connection with the unsuccessful counterclaims unless those claims were "inextricably intertwined" with claims where the defendants were successful. However, after trial on the amount of fees to be awarded, Judge Delano awarded the defendant all of their fees, not because the claims were "inextricably intertwined" but because they all involved a common defense strategy. The *Basil Street* case underscored the risk a creditor faces when litigating contractual claims against a debtor and its principles in bankruptcy court.

[84] Complicating the issues was the fact that the plaintiff actually was successful in defeating certain of the defendants' counterclaims.

Cases coming out of the Ninth Circuit have taken the prevailing party analysis of *Basil Street* a step further, going so far as to actually award the Debtor prevailing party attorney's fees in bankruptcy related litigation under California Statute 1717. *See Menco Pac., Inc.*, 2019 WL 653086. In *Menco*, the district court denied a debtor's motion for attorney's fees in opposing a motion for relief from the automatic stay. The debtor sought fees asserting that the creditor's motion for stay relief was an "action on the contract" under California Statute 1717. In support, the debtor relied in part on the Ninth Circuit's decision in *Penrod v. AmeriCredit Fin. Servs.* (*In re Penrod*), 802 F.3d 1084 (9th Cir. 2015), which considered "whether a debtor who prevails in a contract dispute on the basis of federal bankruptcy law may recover reasonable attorney's fees under California Civil Code § 1717."

In *Penrod*, a creditor objected to a chapter 13 debtor's proposed plan asserting that its claim should be treated as fully secured in reliance on the "hanging paragraph" that Congress inserted after Section 1325(a)(9). A "lengthy and hard-fought battle over the applicability of the provision ensued." The debtor ultimately prevailed, and after several appeals, the debtor sought all of the fees she incurred in opposing the creditor's objection to confirmation, relying on the fee provision in the contract and the reciprocity of California Statute 1717. The bankruptcy court denied the debtor's motion on the grounds that the debtor's success in the litigation 'turned on a question of federal bankruptcy law" and was therefore not an "action on the contract under California Statute 1717." The district court affirmed, but the Ninth Circuit reversed, determining that the debtor's objection to confirmation of the Chapter 13 plan was an action "on the

contract" where the debtor prevailed in "defeat[ing] enforcement of one of the contract's terms. The Ninth Circuit relied on the bankruptcy court's "erroneous" interpretation that California Statute 1717 only applied if enforcement of the contract was defeated under non-bankruptcy law. Relying on *Travelers*, the Ninth Circuit concluded that nothing in California Statute 1717 limited its application to matters determined only under state non-bankruptcy law. Instead, the court concluded that the "hanging paragraph" litigation was an "action on a contract" in which the debtor prevailed, such that the debtor was entitled to its fees in defeating the objection to confirmation.

After considering the facts of *Penrod*, the district court in *Menco* affirmed the bankruptcy court's ruling that a debtor could not obtain attorney's fees for prevailing on a motion for relief from the automatic stay because the motion "did not require a determination as to the enforceability of the [underlying contract]." Notwithstanding the restraint exhibited by the *Menco* courts, the Ninth Circuit may have opened a "pandora's jar" (or debtor's panacea) in determining that a debtor was entitled to its attorney's fees under a state law reciprocal fee shifting statute, even where the issue involved solely a matter of interpretation of bankruptcy law (the "hanging paragraph") in a purely bankruptcy context (an objection to confirmation of a chapter 13 plan). Perhaps recognizing the potential for debtors to expound upon its ruling in *Penrod*, the Ninth Circuit appeared to retreat from its holding somewhat in *Bos v. Board of Trustees*, 818 F.3d 486 (9th Cir. 2016). In *Bos*, the court determined that a nondischargeability proceeding under Section 523(a)(4) was not an "action on a contract" notwithstanding that the fiduciary obligation that formed the basis of the

claims under Section 523(a)(4) arose under an express written contract – a Trust Agreement. The court distinguished *Penrod* by stating that the "relevant action did not raise any question about the enforceability of the Trust Agreement or the Note."

Ultimately, as *Nemco* demonstrates, bankruptcy courts (at least in California) will continue to struggle with requests by debtors for attorney's fees on bankruptcy issues such as stay relief or objections to confirmation. Until there is a definite answer, debtors and their counsel should rely on *Penrod* and *Bos* to support an award of attorney's fees where the debtor is the prevailing party on purely bankruptcy matters as long as the enforcement of the underlying contract (or the Bankruptcy Code's impact on enforcement) is the basis of the litigation.

III. WHO GETS POPPED?

A. Basis for Sanctions

1. 11 U.S.C. § 362(k) Stay Violations

In addition to awarding a debtor actual damages for stay violations, including attorneys' fees and costs, a bankruptcy court has the discretion to award to a debtor punitive damages for a willful stay violation. § 362(k)(1) states that "[e]xcept 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 the appropriate circumstances, may recover punitive damages***." (emphasis added). Courts in the Eleventh Circuit typically determine that "[p]unitive damages are appropriate when the violator acts in an egregious intentional matter." *In re White*, 410 B.R. 322,

326-27 (Bankr. M.D. Fla. 2009) (internal citations and quotations omitted). The courts have looked at the following five factors when determining the propriety of punitive damages for a willful violation of the automatic stay: (1) the nature of the defendant's conduct; (2) the nature and extent of the harm to the plaintiff; (3) the defendant's ability to pay; (4) the motives of the defendant; and (5) any provocation by the debtor. *Id.*

One recent case that addressed the imposition of punitive damages in the context of an automatic stay violation is *In re Harrison*, 599 B.R. 173 (Bankr. N.D. Fla. 2019). In *In re Harrison*, Judge Specie began her opinion by stating that "[b]efore the Court is an egregious example of deliberate and continuing stay violations by a creditor and its counsel." The conduct giving rise to the ultimate imposition of punitive damages included the creditor proceeding with a foreclosure sale of the debtor's home despite knowledge of the debtor's bankruptcy case, the creditor and its counsel not advising the state court clerk of court of the debtor's bankruptcy, the creditor's attorney ignoring legitimate complaints by the debtor that the creditor violated the automatic stay, the creditor's counsel making false and misleading statements to the bankruptcy court regarding the status of the foreclosure sale, the creditor's counsel advocating positions unsubstantiated by the law, and the creditor being motivated by winning at all costs, with no regard for the Bankruptcy Code. Judge Specie ultimately awarded the debtor punitive damages against the creditor pursuant to § 362(k) in the amount of

$35,100.00 (a multiple of 3.375 of actual damages caused by creditor) and punitive damages against the creditor's counsel in the amount of $10,000 (a multiple of 2 of the actual damages caused by the creditor's counsel). Judge Specie also entered an order to show cause as to why additional sanctions should not be entered against the creditor's counsel pursuant to Rule 9011.

Several other cases in the Eleventh Circuit demonstrate that creditors should think twice before willfully violating the automatic stay because such violations may expose them to punitive damages.

***In re Brogden*, 588 B.R. 625 (Bankr. M.D. Ala. 2018):** In *In re Brogden*, a creditor, a car leasing company, with knowledge of the debtor's chapter 13 bankruptcy filing, called the debtor more than 100 times and sent her text messages demanding payment, sent representatives to the debtor's place of employment, and unlawfully repossessed the debtor's vehicle and held it until the debtor paid the company the $703 that they claimed the debtor owed. The bankruptcy court held that the creditor's behavior was willful and egregious and warranted an award of punitive damages under § 362(k) in the amount of $23,289.20, hoping to deter any future automatic stay violations by the creditor who was a stay violation recidivist. The award of punitive damages was in addition to the $703 that the creditor was required to reimburse the debtor, an award of $941.60 in lost wages, $10,000 in damages for emotional distress, and the bankruptcy court reserved ruling on an award of attorneys' fees.

In re Moreno, Case No. 19-17620-RAM (Bankr. S.D. Fla. Oct. 1, 2019): The bankruptcy court found that the creditor, a motor vehicle finance company, committed a willful violation of the automatic stay because, with full knowledge of the debtor's bankruptcy, the creditor continued with the repossession of the debtor's vehicle and refused to return the vehicle to the debtor despite repeated demands by the debtor's attorney. The court found that the creditor's conduct was sufficiently egregious to warrant punitive damages in an amount twice that of the reasonable attorneys' fees and costs for $18,640.70 to deter the creditor's behavior (the total final judgment entered against the creditor was for $27,961.05).

In re Goodson, 2018 Bankr. LEXIS 301 (Bankr. N.D. Ala. Feb. 5, 2018): The court awarded the debtor $15,000 in punitive damages from his ex-wife and her attorney for a willful stay violation that resulted in a state court order incarcerating the debtor for his failure to comply with a divorce property settlement agreement.

Willful stay violations can be very costly for the violating creditor (***and their counsel!!!***) and under the appropriate circumstances bankruptcy courts will award punitive damages to deter future violations. Creditors are cautioned to think twice before violating the automatic stay.

2. Involuntary Proceedings – Petitioning Creditors Beware

A putative debtor is not limited to recovering just attorneys' fees and costs from the petitioning creditors upon the dismissal of an involuntary

bankruptcy petition. The Bankruptcy Code also expressly authorizes an award of punitive damages. § 303(i)(2) states:

> (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—
>
> (2) against any petitioner that filed the petition in bad faith, for—
>
> (A) any damages proximately caused by such filing; or
>
> (B) ***punitive damages***. (emphasis added).

As demonstrated by the express language of § 303(i)(2), an award of punitive damages for a dismissed involuntary bankruptcy proceeding requires a finding of bad faith. The Bankruptcy Code does not define the term bad faith, but courts in the Eleventh Circuit have identified 5 different tests for determining whether an involuntary petition has been commenced in bad faith: (1) the subjective test; (2) the improper purpose test; (3) the objective test; (4) the improper use test; and the combined test. *See In re Antonini*, 2012 Bankr. LEXIS 133 (Bankr. S.D. Fla. Jan. 10, 2012) (awarding punitive damages in the amount of $50,000); *In re Schloss*, 262 B.R. 111 (Bankr. M.D. Fla. 2000).

Punitive damages in the context of involuntary bankruptcies can be substantial, as illustrated by *Rosenberg v. DVI Receivables XIV, LLC*, 818 F.3d 1283 (11th Cir. 2016). In *Rosenberg*, the Eleventh Circuit reversed a district court order that vacated a jury award that found that the defendants acted in bad faith when they filed an involuntary bankruptcy petition and awarded the debtor $1,120,000 in compensatory damages (for emotional distress, loss of reputation, and loss of wages) and $5,000,000 in punitive

damages.[85] The Eleventh Circuit remanded the case to the district court to reinstate the jury's award in full.[86]

The potential for punitive damages is another reason why creditors and their counsel should fully vet the filing of an involuntary petition to make sure that in the event of dismissal there will be no finding of bad faith. On the other hand, debtors should not hesitate in pursuing punitive damages if they believe that an involuntary petition was filed in bad faith, especially if the involuntary petition caused substantial harm to the debtor.

3. **Discovery Disputes – Fed. R. Bankr. P. 7037**

   a. If motion to compel granted – Fed. R. Bankr. P. 7037(5)(A)

   b. If motion to compel denied/protective order – Fed. R. Bankr. P. 7037(5)(B)

4. **Sanctions!** The use of the word can be inflammatory, destructive, and, often, is threatened without basis. Overuse of the concept, and constant threats of sanctions, can lead to animus in litigation and take meaning out of the statutory rights to relief. Sanctions are a tool of last resort but are necessary in the appropriate circumstances.

Fed. R. Bankr. P. 9011 and 11 U.S.C. § 105 are tools to levy sanctions for improper conduct or frivolous pleadings. The statutory basis, and factual requirements,

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[85] The district court had amended the final judgment holding the defendants liable only for $360,000 in compensatory damages for emotional distress.

[86] In a related case, the Third Circuit, in an unpublished opinion, held that 303(i) "plays a key role in deterring bad faith filing and remedying the negative effects of improperly-filed petitions" and that punitive damages for involuntary bankruptcy petitions are ineligible for setoff because of the equitable principles of § 303. *U.S. Bank, Nat'l Ass'n v. Rosenberg*, 2018 U.S. App. LEXIS 21145 (3d Cir. July 31, 2018).

are discussed in *Ginsberg v. Evergreen Sec., Ltd.* (*In re Evergreen Sec., Ltd.*), 570 F.3d 1257 (11th Cir. 2009). The opinion is an excellent review by the 11th Circuit of the various avenues for relief and it yields several practice pointers:

a. FRBP 9011 has a statutory prerequisite. It is not uncommon for a lawyer to send an email demanding an act with a threat of sanctions for failure to comply. However, to seek relief under FRBP 9011, the movant has to first send the proposed sanctions motion to the opposing side and allow 21 days for the offensive pleading to be withdrawn. If you are not prepared to send the proposed motion, don't make the threat.

b. When in doubt, don't forget your old friend 11 U.S.C. § 105. Under § 105, "the court may take any action necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." *See Evergreen*, 570 at 1273. In the *Evergreen* case, the opposing side argued the motion under FRBP 9011 was filed one day before expiration of the safe harbor. The 11th Circuit concluded that it need not determine the safe harbor issue because the Bankruptcy Court had inherent authority under Section 105 to control the courtroom and fashion appropriate relief.

Faculty

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Hon. Karen K. Specie is the Chief U.S. Bankruptcy Judge for the Northern District of Florida in Tallahassee, also presiding over cases in Gainesville, Panama City and Pensacola. She was initially appointed on July 25, 2012. Judge Specie began her legal career with a Manhattan law firm, representing creditors in commercial litigation and bankruptcy. She then practiced with Fowler, White, Boggs, *et al.* in Tampa and has practiced solo and as a shareholder with firms in Gainesville; just prior to taking the bench, Judge Specie was Of Counsel to Akerman LLP as part of its Bankruptcy and Reorganization practice group in Jacksonville, Fla. While in private practice,she focused on commercial litigation and commercial and consumer bankruptcy cases throughout Florida and the Southeast. Judge Specie has taught bankruptcy and secured transactions as an adjunct professor of law at the University of Florida Levin College of Law, where she still teaches advanced bankruptcy. She has served as a chapter 7 panel trustee for the Northern District of Florida, is a founder of the Federal Bar Association for North Central Florida, and has been a member of the Bankruptcy/UCC Committee of the Business Law Section of The Florida Bar since the early 1990s. Judge Specie currently serves on the Executive Council of the Florida Bar Business Law Section, is a Fellow of the American College of Bankruptcy, and is a member of ABI, INSOL, IWIRC and NCBJ. In 2018, she chaired the committee that organized and presented the Bankruptcy Roundtable at the Eleventh Circuit Judicial Conference. In addition to traveling throughout the Northern District to perform her judicial duties, Judge Specie routinely speaks at CLE programs for various organizations such as The Florida Bar, the Alabama Bar Association, the Jacksonville Bankruptcy Bar Association and the Northern District of Florida Bankruptcy Bar Association. She received her B.A. from the University of South Florida and her J.D. from Florida State University College of Law.