AMERICAN BANKRUPTCY INSTITUTE

Mid-Atlantic Bankruptcy Workshop

Skills: Involuntary Bankruptcy Cases

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CONCURRENT SESSION

2022

AMERICAN BANKRUPTCY INSTITUTE

2022 Mid-Atlantic Bankruptcy Workshop
August 4-6 | Cambridge, Maryland

THE 411 ON SECTION 303: WHAT YOU NEED TO KNOW ABOUT INVOLUNTARY BANKRUPTCY CASES (PLACEHOLDER NAME)

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Involuntary Bankruptcy

- Involuntary vs. Voluntary
  - General Purpose of involuntary cases
- Historical Prevalence

Source: Richard M. Hynes & Steven D. Walt, Revitalizing Involuntary Bankruptcy, 105 Iowa L. Rev. 1127, 1138 (2020)

Involuntary Bankruptcy

- Modern Prevalence

Table III.1. All Filings from October 1, 2007 to September 30, 2017

	Involuntary Petitions	Total Petitions	Percent Involuntary
All	5,512	11,244,521	0.05%
Entity	3,156	137,076	2.30%
Corporate	2,942	132,729	2.22%
Partnership	214	4,347	4.92%
Individual	2,211	11,103,314	0.02%
Business Debts	1,016	238,906	0.43%
Non-Business Debts	1,195	10,861,275	0.01%

Source: Richard M. Hynes & Steven D. Walt, Revitalizing Involuntary Bankruptcy, 105 Iowa L. Rev. 1127, 1152 (2020)

Involuntary Bankruptcy

- Question: If Involuntary Bankruptcy filings only make up .05% of filings, why are they important?

Topic 1

Requirements for Commencing an Involuntary Bankruptcy Case

Scenario

Small Co. is a vendor of goods and Buyer is a long-term client. Buyer refuses to pay invoices claiming defective goods and contesting amounts due. Small Co. instituted breach of contract suit in state court for $20,000 which has been pending 3 years. Small Co. believes Buyer is delaying litigation and in the interim depleting assets. Small Co.'s preliminary investigation into Buyer's finances reveals that Buyer has no more than ten (10) creditors (including Small Co.)

Would you advise Small Co. to file an involuntary petition against Buyer under this scenario?

Creditor & Claim Threshold

- 11 U.S.C. § 303
  - Chapters 7 or 11 of Title 11
  - Number of Petitioning Creditors
    - 3 or more (if total 12 or more creditors)
    - 1 (if less than 12 total creditors)
      - Claims not contingent or subject to *bona fide dispute*
  - Aggregate amount: $18,800
    - Unsecured?

Who is a Creditor?

- Bona Fide Dispute
  - Dispute of all vs. a portion of a claim
- *De Minimus* Rule?
  - Should small, recurring claims be counted towards the total creditors
    - Compare In re Fox, 162 B.R. 729 (Bankr. E.D. Va. 1993) (holders of small or recurring claims must be included in calculating total creditors to determine if involuntary may be commenced by single creditor), with In re Bates, 545 B.R. 183, 188 (Bankr. W.D. Tex. 2016) ("bankruptcy courts throughout this circuit do not consider small recurring creditors in determining the number of creditors").

Scenario

Would your analysis change if Small Co. first obtained a final state-court judgment?

Continuing with the scenario in which Small Co. has obtained a final $20,000 state-court judgment

- On behalf of Small Co. you file an involuntary petition against Buyer
- After filing, three more creditors (bringing the total to 13) are discovered

- ***Does Buyer have grounds to contest the involuntary bankruptcy? What if two of the other creditors asserting claims of $25 and $1,000 respectively would like to join as petitioners?***

Joining of Creditors

- 11 U.S.C. § 303(c) permits eligible unsecured creditors to join petition "with the same effect" as if petitioning creditor

- But see Basin Electric Power Cooperative v. Midwest Processing Co., 769 F.2d 483 (8th Cir. 1985)(bar to joinder if original petitioning creditor knew number of creditors exceeded threshold for requiring three versus one petitioning creditor)

Topic 2

Debtor Eligibility for Involuntary Bankruptcy Case

Scenario

Assume that the requisite number of eligible creditors and the threshold amount has been met for commencing an involuntary case.

After filing the involuntary petition, you, as counsel to Small Co., drive by Buyer's place of business and observe fields containing barns, cows, horses, chickens, pigs, etc. Upon further investigation you discover that Buyer does not produce agricultural products, but is an animal sanctuary organized under 501(c) of the Internal Revenue Code.

Scenario

Could this observation have an effect on the viability of the involuntary case? If yes, are there any ramifications to you (as counsel) or Small Co.?

Debtor Eligibility

- 11 U.S.C. § 303(a): involuntary case may not be commenced against "farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation"
- 11 U.S.C. § 303(e): court may require indemnification bond
- 11 U.S.C. § 303(i): judgment against petitioners after non-consensual dismissal

Topic 3

Considerations for & Alternatives to Commencing an Involuntary Bankruptcy Case

Scenario

Assume that the number of creditors and claims threshold are met and that Buyer is an eligible debtor for an involuntary case

What considerations should Small Co. take into account when deciding whether to file an involuntary case?

Involuntary Bankruptcy Outcomes

- Distribution of Outcomes for Involuntary Cases Commenced Oct. 2007-Dec. 2016

	All	Individuals	Entities
Discharge	7.4%	7.6%	7.5%
Discharge Denied, Revoked, Withheld or N/A	21.8%	6.5%	32.7%
Dismissed	55.7%	76.2%	41.0%
Transfer or filed or closed in error	1.3%	1.1%	1.3%
Blank	13.8%	8.6%	17.5%
Total	5,302	2,125	3,040

Source: Richard M. Hynes & Steven D. Walt, Revitalizing Involuntary Bankruptcy, 105 Iowa L. Rev. 1127, 1152 (2020)

To File or Not To File . . . That is the Question

- Bankruptcy Alternatives
  - Advantages/Disadvantages
- Receivership
  - How does it differ?
  - Who does it benefit?
  - Can it effect future relief?
    - i.e. bar subsequent bankruptcy filing

Scenario

Prior to filing the involuntary case, you are notified that a receivership order has been entered against Buyer. The receivership order has a provision barring the Buyer from filing bankruptcy and also barring Buyer's creditors from filing an involuntary petition against Buyer.

Will this affect Small Co.'s ability to commence the involuntary against Buyer?

Scenario

Receivership Order Language

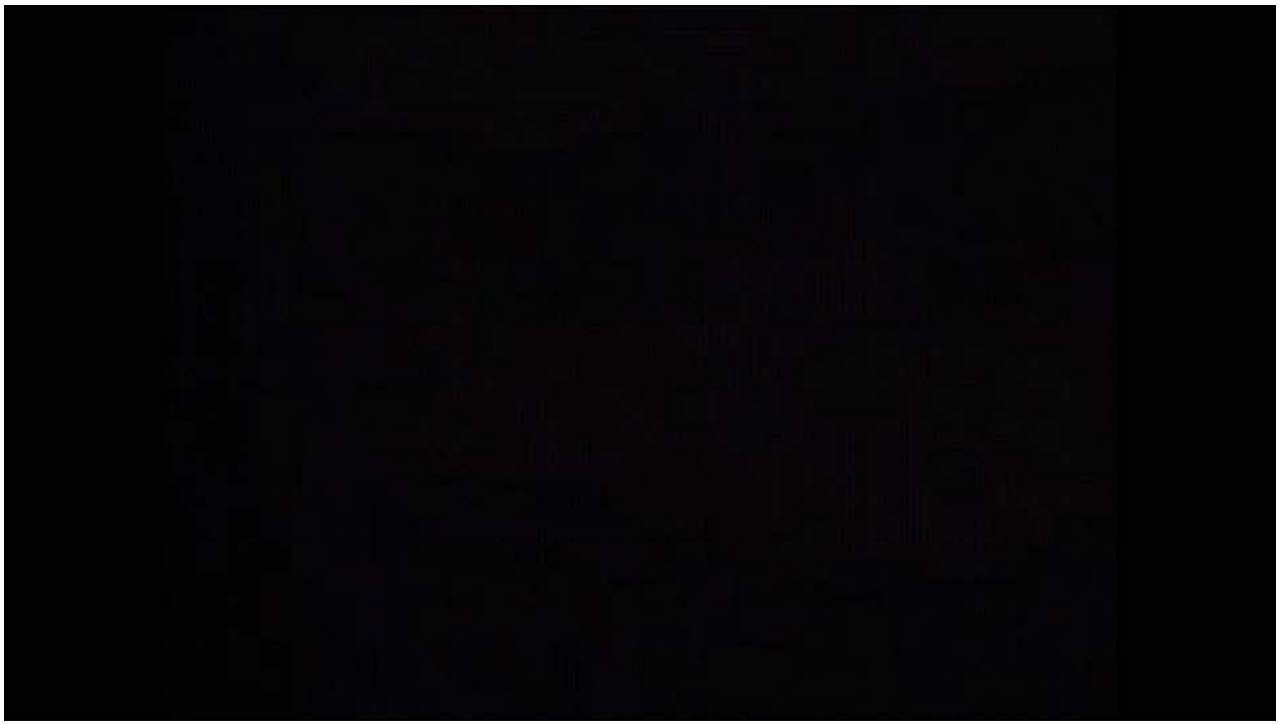
- Receiver shall have the sole authority and power to petition for relief under 11 U.S.C. § 101 *et seq*.
- Creditors and all other persons (including Defendant, its agents, officers, employees, and all persons acting in concert with them) are hereby restrained and enjoined, without prior approval of the Court, from filing any case, complaint, or motion under the United States Bankruptcy Code (including, without limitation, the filing of an involuntary bankruptcy case under Chapter 7 or 11 of the Bankruptcy Code).

Validity of Receivership Order Injunction Against Bankruptcy

- State versus Federal Court Receiver Order
- Considerations:
  - Due Process
  - Right to Access Courts
  - Supremacy Clause
  - Public Policy

Topic 4

the gap period



Scenario

SWITCHING GEARS

You now represent Buyer

Scenario

The Involuntary Petition has been filed against Buyer. Buyer has prior bankruptcy experience and is familiar with the concept of the bankruptcy estate and court authorization to continue certain business practices (ex. use of cash collateral, use of DIP account). Buyer intends to seek dismissal of involuntary bankruptcy case.

What do you advise Buyer with respect to continuation of business practices?

Gap Period Operations

- 11 U.S.C. § 303(f): until entry of order for relief, debtor may
  - "continue to operate" and may "continue to use, acquire, or dispose of property" as if no case had been filed

Does this mean that until the Order for Relief is filed there is proverbially "nothing to see here?"

Point of Discussion

Does 11 U.S.C. § 303(f) permit Buyer free to act in any manner of its choosing without Court oversight?

Appointment of Trustee

- But § 303(f) is not an excuse to say "anything goes"
- 11 U.S.C. § 303(g): permits appointment of an interim trustee
- Appointment pursuant to 11 U.S.C. § 701
  - Considerations for appointment
    - Likelihood Order for Relief will be entered
    - "necessary to preserve the property of the estate or to prevent loss to the estate" 11 U.S.C. § 303(g)
    - Standard:
      - "request for an interim trustee should be denied in 'the absence of an exceptionally strong need for doing so' or 'where no facts are alleged showing a necessity for the appointment.' In order to appoint a trustee, a movant must show 'a substantial risk of loss to the estate.' " In re Diamondhead Casino Corp., 540 B.R. 499, 505 (Bankr. D. Del. 2015)
    - See also In re Centre for Mgmt & Tech., Inc., No. 07-19486-NVA, 2007 WL 3197221 (Bankr. D. Md. Oct. 26, 2007)

Appointment of Trustee (Cont.)

- Difference between appointment of a trustee under 11 U.S.C. § 303(g) and 11 U.S.C. § 1104
- Can an interim trustee be appointed in an involuntary chapter 11?
  - 11 U.S.C. § § 1104 and 105
  - See In re Beaucrest Realty Assocs., 4 B.R. 164 (Bankr. E.D.N.Y. 1980); but see In re Prof. Accountants Referral Servs., Inc., 142 B.R. 424 (Bankr. D. Colo. 1992).

Scenario

SWITCHING GEARS (AGAIN!)

Scenario

You represent Clean Co., which provides janitorial services to Buyer. The involuntary has been filed. Buyer would like Clean Co. to continue providing services and has informed Clean "not to worry" because Buyer intends to seek dismissal. Clean Co. has traditionally billed Buyer on a bi-weekly basis.

Should Clean Co. be worried about being paid for services rendered while Buyer challenges the involuntary petition? Should Clean Co. make any changes to its practice of billing Buyer bi-weekly?

Gap Period Claims

- 11 U.S.C. § 502(f): gap period claim determined as of the date of incurrence and is allowed or disallowed the same as if it had arisen pre-petition)1
- 1 U.S.C. § 507(a)(3): ranking § 502(f) claims as third in list of priorities
- 11 U.S.C. § 549: prohibiting avoidance of gap period transfers (other than those for satisfaction or securing of antecedent debt)

Topic 5

Entry of the Order for Relief

The owner of Small Co. is so impressed with your work, he gives you the ultimate compliment for a lawyer

A referral to a high-value, moneyed client which pays its bills on time!!!

Scenario

Your new client, Innovative Tech Co., made three loans to Cool StartUp totaling $75 million which fell into default in August 2021. Innovative and Cool entered into one-year forbearance agreements, set to mature August 31, 2022, for each loan. Today, August 5, 2022, Cool informed Innovative that it cannot satisfy the loans and seeks further forbearance. Innovative is aware that Cool is one-to-two months behind on its gas an electric bills, but current with other creditors

Do you believe that a court would enter an Order for Relief in this scenario?

Entry of Order for Relief

- 11 U.S.C. § 303(h)
  - Petition timely contested?
    - If yes, then is:
      - 1. Debtor generally not paying debts as they become due; or
        - Debts not subject to bona fide dispute as to liability or amount
      - 2. Custodian took possession within 120 days prior to petition
        - Other than trustee, receiver, or authorized agent taking charge of "less than substantially all" of debtor's property to enforce lien

Entry of Order for Relief (Cont.)

- When is a debtor generally not paying debts as they become due?
  - See In re Rookery Bay, Ltd., 190 B.R. 949 (Bankr. M.D.Fla. 1995)(moratorium on collecting debt does not support denial of order for relief as debt is still due and owing)

Topic 6

Other Avenues Out of Bankruptcy Court (or well… this particular Bankruptcy Court)

Scenario

Assume the involuntary petition against Cool StartUp is sufficiently supported. Cool StartUp thinks is rather "uncool" that you filed the case in Maryland. Cool had actually been working with its own counsel to file a voluntary petition in Texas. Cool is headquartered in California and has distribution warehouses for its products in Maryland, Georgia, Iowa, Nevada, and Texas.

What actions can Cool take to pursue bankruptcy in Texas? Can Cool just file a voluntary petition in Texas?

Get Me Out of This Court!

- Dueling petitions
- Change of venue
  - 28 U.S.C. §§ 1401 & 1412
- Abstention
  - Standing to request
  - 11 U.S.C. § 305
    - Best interests of creditors

Crafty Crabs is a storied establishment located on the Eastern Shore of Maryland known for its simple but satisfying offerings. It's a restaurant that serves steamed blue crabs doused in Chesapeake Bay Seasoning, National Nonconformist beer ("Natty Noh"), fresh corn on the cob, and Chesapeake Bay Fries. The business earns its revenue between Memorial Day and Labor Day. Fifty percent of revenue comes from restaurant sales and fifty percent comes from selling Crafty Crabs merchandise (t-shirts, hats, mallets, beer mugs, and bibs).

Crafty Crabs has indoor and outdoor long picnic tables set up where diners sit together family style. The pandemic hit Crafty Crabs very hard. Customers are slowly trickling back in, but numbers haven't returned to pre-2020 figures. Its suppliers are all beating down its doors and demanding payment. They've been threatening to cease making deliveries, but so far Crafty Crabs has been able to convince them to continue delivering goods on credit by explaining it cannot earn any revenue unless it's fully supplied. Tabitha's Tablecloths supplies red and white checkered tablecloths. Molly's Mallets supplies the mallets and nutcrackers. Nancy's Napkins supplies the napkins. The Brew Crew is the Natty Noh beer supplier. Ideally Idaho supplies the potatoes. Crafty Crabs has fallen behind on paying its live musical act, a cover band called The Great Pretenders. Finally, Crafty Crabs owes money to the blue crab supplier, Big Blue, and to Chesapeake Bay Seasoning.

In 2019, the two founders Fred and Fannie agreed that Crafty Crabs would buy out, Fannie, by paying three large annual installments. Crafty Crabs failed to pay the first two installments. Fannie threatened to sue; Crafty Crabs and Fannie entered a stipulated judgement that provided if it did not pay Fannie in full by Labor Day 2022, Fannie would hold an enforceable judgment against Crafty Crabs under Maryland law.

Crafty Crabs also owes money to Wendy's Warehouse, located in Virginia, who houses all of the Crafty Crab merchandise.

An affiliate of Crafty Crabs, Crafty Corn, supplies the fresh corn. Crafty Corn is also a guarantor of Crafty Crabs' obligations and it too is experiencing financial distress. Its creditors include Sandy's Seed, the seed supplier, Fergie's Fertilizer, the fertilizer supplier, Corporate Farmland, the landowner who leases the farmland where the corn fields are located to Crafty Corn, and John Stag, the tractor lessor.

Crafty Crabs is a limited liability company organized under Delaware law whose corporate headquarters are in Wilmington and whose principal place of business is on the Eastern Shore of Maryland. It's wholly owned subsidiary, Crafty Corn, is a limited liability company organized under Delaware law with headquarters in Wilmington and whose principal place of business is a farm located in South Jersey.

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I. Involuntary Bankruptcy Basics

a. Bankruptcy Code Section 303 requirements and who may file

i. Required number of creditors

1. If putative debtor has 12+ eligible creditors, Section 303(b)(1) requires three or more petitioning creditors to file an involuntary petition. If putative debtor has fewer than 12 creditors, Section 303(b)(2) requires only one petitioning creditor. *See* 11 U.S.C. §303(b)(1), *see also* 11 U.S.C. §303(b)(2).

ii. Claim eligibility – claims must be non-contingent and undisputed (contingent claims; claims in bona fide dispute; non-recourse claims; wholly or partially secured claims; burdens of proof)

1. Holder of a Claim: Each eligible creditor must be the holder of a claim against the debtor that is not contingent as to liability or amount, or the subject of a bona fide dispute or an indenture trustee representing such holder so long as such claims aggregate at least $18,600 more than the value of any lien on property of the debtor securing such claims. *See* 11 U.S.C. §303(b).
2. Contingent Claims: A contingent claim is "one where liability of the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created." *See In re All Media Properties, Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980).

3. Claims in bona fide dispute: A claim may be deemed subject to a bona fide dispute if "there is a genuine issue of material fact that bears upon the debtor's liability or a meritorious contention as to the application of law to undisputed facts." *See In re BDC 56 LLC*, 330 F.3d 111, 117 (2d Cir., 2003).
4. Non-recourse claims: While the interpretation of Section 1111(b) of the Bankruptcy Code "eliminates the distinction between any recourse and non-recourse debt…when determining whether a petitioning creditor holds a claim against the entity that is the subject of an involuntary petition as required under 303(b), non-recourse creditors must be treated as holding recourse claims." *See In re Taberna Preferred Funding IV, LTD*, 594 B.R. 576, 590 (Bankr. S.D.N.Y. 2018). By its terms, Section 1111 applies only once a Chapter 11 Case exists; it cannot be used to validate an otherwise ineligible Chapter 11 involuntary petition. *Id*.
5. Wholly or partially secured claims: A party bringing an involuntary petition may be eligible to waive its security by failing to mention the security in its petition. *In re All Media Properties, Inc.*, 5 B.R. 126, 141 (Bankr. S.D. Tex. 1980) citing *Missco Homestead Association Inc. v. United States*, 185 F.2d 280, 283 (8th Cir. 1950), *In re Central Illinois Oil & Refining Co.*, 133 F.2d 657, 659 (7th Cir. 1943). If the involuntary petition fails to mention any security, it is presumed that such security is waived. *See id.* Further, to overcome the presumption of waiver, the debtor must sufficiently establish that the debt is fully secured. *See id.*
6. Burdens of proof: The petitioning creditor or creditors have the burden of establishing a prima facie case that no bona fide dispute exist and then the burden shifts to the debtor to refute this claim. *See In re BDC 56 LLC*, 330 F.3d 111, 118 (2d Cir. 2003).

iii. Joinder of creditors (claims can be aggregated to meet statutory minimum)

1. Statutory minimum: $18,600 (*see* Federal Register: Adjustment of Certain Dollar Amounts in the Bankruptcy Code)
2. Joinder of Creditors: Bankruptcy Code section 303(c) provides that, "after the filing of [an involuntary petition], but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent...may join in the petition with the same effect as if such joining creditor were a petitioning

creditor under subsection (b) of this section." 11 U.S.C. 303(c). Courts generally interpret this provision to provide for joinder of additional creditors as a matter of right. *See In re FKF Madison Park Group Owner, LLC*, 435 B.R. 906, 908 (Bankr. D. Del. 2010) citing *IBM Credit Corp. v. Compuhouse Sys., Inc.*, 179 B.R. 474, 477 (W.D. Pa. 1995).

iv. Claim numerosity issues (single creditor cases; treatment of small/de-minimis claims; jointly held claims; splitting of claims)
    1. Petitioning creditor numerosity: Is there still a "bar to joinder" rule in instances where the petitioning creditor knew or should have known that the debtor had 12 or more creditors?
        a. Petitioning Creditor Numerosity: Section 303 of the Bankruptcy Code, which governs involuntary cases under Chapter 7 or 11 requires three or more petitioning creditors to file an involuntary petition in instances where the debtor has 12 or more creditors. *See In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328, 333 (3d Cir. 2015).
            i. Single Creditor Cases: An involuntary petition may be filed by a single creditor in instances where the debtor has less than 12 creditors so long as such creditor holds a claim aggregating at least $18,600 more than the value of any lien on property of the debtor securing such claims held by the holder of such claims. 11 U.S.C. §303(b)(1), 11 U.S.C. §303(b)(2).
            ii. Small/de-minimis claims: When determining the qualified number of creditors, the Court must exclude de minimis claims. *See In re CorrLine International, LLC*, 516 B.R. 106, 152 (Bankr. S.D. Tex. 2014); *see also Denham v. Shellman Grain Elevator, Inc.*, 444 F.2d 1376, 1378 (5th Cir. 1971).
                1. "Small insignificant debts" of less than $25.00 are to be considered de minimis and should be excluded from the court's determination of the number of creditors. *Id.*
            iii. Jointly held claims: If a judgment can be easily divided between the claimants who hold it jointly,

it should be so divided for purposes of counting petitioning creditors under Bankruptcy Code §303(b). *In re Edwards*, 501 B.R. 666, 678 (Bankr. N.D. Tex. 2013).

iv. Splitting of claims: A bona fide dispute as to the amount of a creditor's claim does not divest that petitioning creditor of standing to file an involuntary petition if there is an undisputed portion of the creditor's claim in excess of the statutory threshold in §303(b). *In re Williams*, 616 B.R. 690, 695 (Bankr. N.D. Tex. 2020).

b. "Bar to Joinder Rule": There is a circuit split surrounding the "bar to joinder" rule. While the text of §303(c) allows creditors to join a petition filed in bad faith, a majority of courts have found this type of curing impermissible, a minority of courts find this bar unjustified. *See In re Forever Green Athletic Fields, Inc.,* 804 F.3d 328, 337-338 (3d Cir. 2015).

v. An involuntary case can only be filed under Chapters 7 or 11 of the Bankruptcy Code.
   1. An involuntary case may be commenced only under chapter 7 or 11 of this title. 11 U.S.C. §303(a).

vi. The debtor is generally not paying its debts as they become due
   1. Bankruptcy Code §303(h)(1) states: "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…only if 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." 11 U.S.C. §303(h)(1).

b. Bankruptcy Rule 1003

i. Bankruptcy Rule 1003(a) Transferor or transferee of claim: A transferor or transferee of a claim shall annex to the original and each copy of the petition a copy of all documents evidencing the transfer, whether transferred unconditionally, for security, or otherwise, and a signed statement that the claim was not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer. An entity that has transferred or acquired a claim for the

purpose of commencing a case for liquidation under chapter 7 or for reorganization under chapter 11 shall not be a qualified petitioner.

ii. 1003(b) Joinder of petitioners after filing: If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

II. What Makes an Involuntary Case Different From a Voluntary Case?

a. Until an order for relief is entered, the company may continue to operate its business and use, acquire, or dispose of its property as if an involuntary bankruptcy case had not been filed.
b. Very few limitations on company.
c. The involuntary petition is akin to a complaint, where the court will issue a summons and require the debtor to appear and answer the involuntary petition.
d. Involuntary cases are very rare.

III. Client Counseling:

a. Creditors who want to file an involuntary petition should consider the following factors:
    i. How do you solve the collective action problem/overcome the benefits of winning the race to the courthouse
    ii. Risks – 11 U.S.C. § 303(e), (i)
        1. Punitive damages can be ordered if petition was filed in bad faith
            a. Bad faith is not defined in Section 303. *See In re Walsh*, 306 B.R. 738, 742 (Bankr. W.D.N.Y. 2004).
            b. A party cannot acquire a debt from someone else for the sole purpose of putting the debtor into bankruptcy
            c. Punitive damages can be awarded if the petitioning creditors behaved recklessly or with intent to injure the debtor. *See U.S. Bank, N.A. v. Rosenberg*, 741 Fed. Appx. 887 (3d Cir. 2018) ("Punitive damages are only warranted when the evidence shows that a defendant acted with intentional malice or that its conduct was particularly egregious").

d. Range of punitive damages can include lost profits, loss of earning capacity, harm to reputation, and interest on funds borrowed to maintain business operations.
e. There are several tests to determine whether the petitioning creditor filed an involuntary petition in bad faith:
    i. Improper use test, which focuses on whether the petitioning creditor's conduct takes disproportionate advantage of other creditors
        1. *See In re K.P. Enter.*, 135 B.R. 174, 179 n.14 (Bankr. D. Me. 1992).
    ii. Improper purpose test, which analyzes whether the filing of the petition was motivated by ill will, malice, or a desire to embarrass or harass the alleged debtor
        1. *See In re Camelot, Inc.*, 25 B.R. 861, 864 (Bankr. E.D. Tenn. 1982).
    iii. Reasonable person inquiry, which employs an objective test for bad faith based on what a reasonable person would have believed
        1. *See In re Wavelength, Inc*., 61 B.R. 614, 620 (B.A.P. 9th Cir. 1986).
    iv. Bankruptcy Rule 9011 Inquiry, which looks at:
        1. An objective requirement bearing on the legal justification of a claim or defense: a reasonable inquiry into the facts of the law –and-
        2. A subjective inquiry: the bankruptcy proceeding cannot have been interposed for an improper purpose, such as to harass, to cause delay, or to increase the cost of litigation.
        3. The Third Circuit has adopted a "Totality of the Circumstances" test for determining bad faith.
            a. In conducting this fact-intensive review courts may consider a number of factors, including, but not

limited to, whether: the creditors satisfied the statutory criteria for filing the petition; the involuntary petition was meritorious; the creditors made a reasonable inquiry into the relevant facts and pertinent law before filing; there was evidence of preferential payments to certain creditors or dissipation of the debtor's assets; the filing was motivated by ill will or a desire to harass; the petitioning creditors used the filing to obtain a disproportionate advantage for themselves rather than to protect against other creditors doing the same; the filing was used as a tactical advantage in pending actions; the filing was used as a substitute for customary debt-collection procedures; and the filing had suspicious timing.

4. *See In re Forever Green Athletic Fields, Inc*., 804 F.3d 328 (3d Cir. 2015).
5. The Second Circuit also has adopted a totality of the circumstances test. *See In re TPG Troy LLC*, 793 F.3d 228 (2d Cir. 2015).

v. *See Lubow Mach. Co. v. Bayshore Wire Prods.* (*In re Bayshore Wire Prods*.), 209 F.3d 100, 105-106 (2d Cir. 2000) (listing the four tests).

iii. Rewards – Chapter 7 or 11; 11 U.S.C. § 303(g)

iv. Impact of bankruptcy bars in receivership orders. Can they be circumvented by involuntary filings? Does it matter if the receivership order/injunction is entered in state court versus the United States District Court?

v. Creditors employ this bankruptcy mechanism to investigate the alleged debtor's financial affairs, prevent the depletion of the debtor's assets, recover transferred assets, ensure the fair and orderly distribution of the alleged debtor's property among similarly positioned creditors, and effectuate economical administration.

vi. Situations where a creditor should consider filing an involuntary bankruptcy:

1. The debtor is regularly squandering its assets.
2. The debtor's business needs to be terminated in order to avoid increasing losses.
3. The debtor is about to sell its business without a viable plan for paying its general unsecured creditors.
4. The debtor's ability to repay its debts outside of a bankruptcy case is unlikely.
5. The debtor recently transferred or is seemingly about to transfer assets to a third party for less than reasonably equivalent value that will decrease the chances of unsecured creditors getting paid.
6. The debtor transfers assets to one creditor as debt forgiveness, thus leaving insufficient funds to pay other creditors.
7. The debtor transfers assets to an affiliate or otherwise related company.
8. The debtor begins to pay only the debts of its guarantors or insiders.
9. The debtor has other claims against it (such as from its secured lenders or insiders) that are best addressed within the context of the bankruptcy court.
10. The debtor has made a substantial number of preferential payments to creditors (excluding the petitioning creditors) within the past 90 days.
11. The debtor's secured lenders seek additional collateral to secure their loans, thus leaving less value available for the payment of unsecured claims.
12. The debtor's secured lenders are about to foreclose on all of the debtor's assets securing the lenders' assets.
13. The debtor's financial and business decisions require court supervision.
14. The debtor declines to provide sufficient information that would enable the creditors to determine any of the above circumstances.

b. Options for the Debtor

i. 11 U.S.C. § 303(d)

1. Debtor may file an answer to an involuntary petition; non-petitioning general partner of a partnership may file an answer (even a partner who denies the allegation of membership in the partnership) under Bankruptcy Rule 1011(a).

2. Answer must be filed within twenty-one (21) days after service of the summons under Rule 1011(b) – unless otherwise prescribed by the Court. *See* § 303(h).

3. Claim against a petitioning creditor may only be asserted in the answer for the purpose of defeating the petition under Bankruptcy Rule 1011(d)

4. Defenses and objections must comply with Rule 12 of the Federal Rules of Civil Procedure. *See* FRCP Rule 7012

5. Who may file an answer: 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 § 303.

6. Disputes to raise in an answer: Bankruptcy Rule 1018:

    a. Alleged debtor cannot be a debtor – is a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation; municipality/governmental unit. *See* § 303(a); § 109(g).

        i. Chapter 7: railroad, domestic insurance company, savings and loan associations, building and loan associations, certain small business investment companies; New Markets Venture Capital companies; foreign insurance companies, banks, savings banks, cooperative banks, homestead associations, and credit unions.

        ii. Chapter 11: same disqualified debtors as Chapter 7; also disqualifies stockbrokers and commodity brokers; railroad can be an involuntary Chapter 11 debtor. *See* § 109(d).

    b. Numerosity: too few petitioning creditors; there is a reason to exclude one of the petitioning creditors. *See* § 303(b)(1).

c. Dollar amount threshold: the noncontingent, undisputed, unsecured indebtedness of petitioning creditors does not aggregate $18,600. *See* § 303(b)(1).
d. Contingent: a claim is contingent as to liability where the debtor's obligation to pay does not come into being until the happening of some future event and that event was within the contemplation of the parties at the time their relationship originated.
    i. *See Chicago Title Ins. Co. v. Seko Invs., Inc. (In re Seko Invs., Inc.)*, 156 F.3d 1005, 1008 (9th Cir. 1998)
e. Bona Fide Dispute as to liability or amount – unclear, heavily litigated
    i. Petitioners must show by a preponderance of the evidence that the alleged debtor is equitably insolvent. *See In re Food Gallery at Valleybrook*, 222 B.R. 480 (Bankr. W.D. Pa. Jul. 22, 1998).
    ii. Courts generally review factors and perform a "totality of the circumstances" analysis. *See In re Knoth*, 168 B.R. 311 (Bankr. D.S.C. 1994):
        1. Timeliness of payments on past due obligations;
        2. Length of time during which alleged debtor as not been meeting its obligations on large-dollar debts;
        3. Total dollar amount of debts long overdue; and
        4. Reduction in dollar amount of debtor's assets.
        5. Debtor's deficit situation
    iii. 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, and 10th Circuits: objective standard – if there are substantial factual or legal questions raised by the debtor, then the creditor will not be an eligible petitioning creditor
    iv. Where a judgement was entered by a trial court and appealed by the debtor and the judgment was not stayed – then, the judgment is not the subject of a bona fide dispute as to liability or amount. *See In AMC Investors, Inc.*, 406 B.R. 478, 484 (Bankr. D. Del. 2009); *In re Euro-American Lodging Corp.*, 357 B.R. 700, 712 (Bankr. S.D.N.Y. 2007).

v. The 4th Circuit – the existence of an unstayed final judgment does not necessarily end the bona fide dispute inquiry. *See Platinum Fin. Servs. Corp. v. Byrd (In re Byrd)*, 357 F.3d 433, 438 (4th Cir. 2004).

vi. 2005 Amendments added the "as to liability or amount" language

1. Prior to the amendments, a dispute as to the entire amount of the claim (hence liability) was enough to eliminate a creditor as a petitioning creditor.

2. Some Courts conclude even a dispute as to part of the claim disqualifies the creditor. *See Regional Anesthesia Assocs. PC v. PHN Physician Servs. (In re Regional Anesthesia Assocs. PC)*, 360 B.R. 4466, 470 (Bankr. W.D. Pa. 2007); *In re Tobacco Road Assocs., LP,* 2007 WL 966507 (E.D. Pa. Mar. 30, 2007).

3. Other courts find the 2005 Amendments do not change the analysis as they do not presume Congress added the phrase with the intent that the claims of involuntary petitioners must now be fully liquidated either by agreement or judgment so that no dispute exists as to any portion of such claims. *See In re DemirCo Holdings Inc.*, 2006 WL 1663237 (Bank. C.D. Ill. June 8, 2006); *In re 3 Man Corp.*, 2014 WL 4346747 (Bankr. M.D. Pa. Apr. 19, 2016).

f. Counterclaims can affect whether the:
   i. $16,750 aggregation requirement is satisfied; and
   ii. the claim is subject to bona fide dispute as to liability or amount.

g. If a debtor has more than 12 creditors, therefore, an involuntary petition must be commenced by three or more creditors. *See* § 303(b)(2).

h. Even if debtor has 12 or fewer creditors, debtor can argue a two-party dispute does not belong in bankruptcy court. *See In re Concrete Pumping Serv., Inc.*, 943 F.2d 627, 630 (6th Cir. 1991); *In re E.S. Prof'l Servs., Inc.*, 355 B.R. 221 (Bankr. S.D. Fla. 2005).

i. The Debtor is generally not paying debtor's debts as such debts become due. *See* § 303(h)(2).

i. Burden is on the petitioning creditors to establish by a preponderance of evidence that debtor is not generally paying its debts as they become due on the date the petition was filed. *See In re Bates*, 545 B.R. 183, 186 (Bankr. W.D. Tex. 2016); *In re Caucus Distribs., Inc.*, 106 B.R. 890, 914 (Bankr. E.D. Va. 1989).
    1. The burden then shifts to the debtor to show that debts in question are subject to a bona fide dispute as to liability or amount. *See Rothery v. Cunningham (In re Rothery)*, 211 B.R. 929, 935 (B.A.P. 9th Cir. 1997), *rev'd on other grounds,* 143 F.3d 546 (9th Cir. 1998).

ii. Totality of the circumstances/multifactor test is used to decide whether alleged debtor is generally not paying its debts as they become due – *In re Focus Media, Inc.*, 378 F.3d 916 (9th Cir. 2004); courts look at common factors. *See Colliers*, ¶ 303.31[2]:

    1. The number of debts.
    2. The amount of delinquency.
    3. The materiality of the nonpayment.
    4. The nature and conduct of debtor's business
    5. The debtor's ability to satisfy only small periodic payments, not long term obligations
    6. The debtor's making regular payment only on small, recurring obligations not larger debts.
    7. Rapid decline in value of debtor's assets resulting from asset sales rather than profit generating activity.
    8. Amount of debtor's debts compared to debtor's yearly income.
    9. The debtor's voluntary shutdown of operations.
    10. Deferred payments to insiders on account of loans payable to them.
    11. The debtor's liquidation of its assets.
    12. Payments made by third parties or waiver of claims by a third party.
    13. The debtor's defaults are only on extraordinary debts.

14. Due and unpaid debts are made up of claims of petitioning creditors, while all other non-petitioning creditors are all paid.

iii. Significant exception: for debts that are subject to bona fide disputes as to liability or amount; these are excluded from consideration of "generally not paying."

iv. Nonpayment of a single debt to the debtor's only creditor. *See In re Arlumsa Dev. Corp.*, 33 B.R. 981, (Bankr. S.D.N.Y. 1983) (with certain exceptions, failure to satisfy the liability of a single creditor does not warrant granting relief under § 303(h)(1); *see Matter of 7H Land & Cattle Co.*, 6 B.R. 29 (Bankr. D. Nev. 1980).

1. Almost a per se rule that a single-creditor proceeding cannot meet the generality requirement of § 303(h)(1). *See In re Feinberg*, 238 B.R. 781 (B.A.P. 8th Cir. 1999).

2. Inconsistent with statutory language. *See In re Fischer*, 202 B.R. 341, 347-48 (E.D.N.Y. 1996).

v. Similar to an insolvency test, but it is not the same as Bankruptcy Code's definition of insolvency in § 101(32).

j. Bad Faith: creditors commenced the case in bad faith

i. Presumption in favor of good faith filings, the burden is on the debtor to show by a preponderance of the evidence that the filing is in bad faith. *See In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328 (3d Cir. 2015).

ii. Dizzying array of standards applied to determine bad faith. *See Colliers*, ¶ 3.03.16[1].

1. Subjective test: looks at what petitioning creditor in question believed.

2. Improper purpose test: assesses why the creditor sought to file the involuntary case in the first place.

3. Objective test: assess what a reasonable person in the creditor's position would have done.

4. Improper use test: looks at whether creditor's conduct takes disproportionate advantage of other creditors.

5. Combined objective and subjective test – the "Rule 9011" test: (A) did petitioning creditors make a reasonable inquiry into relevant facts and pertinent law before commencing; (B) was the involuntary filing well grounded in fact; (C) was it warranted by existing law or by good faith argument for a change in current law; (D) was it undertaken for an improper purpose, such as harassment, delay or an effort to increase cots to obtain an advantage. *See Atlas Mach. & Iron Works Inc. v. Bethlehem Steel Corp.*, 986 F.2d 709, 716 (4th Cir. 1993).

iii. Totality of the circumstances: looks like all of the tests above; if it looks like bad faith, it can be squeezed into one of the categories. *See In re Forever Green Athletic Fields, Inc.* 804 F.3d 328, 335 (3d Cir.

ii. Motion to Dismiss The Involuntary Case – Supporting Arguments

1. Standing: the number of petitioning creditors is deficient.

2. Bad faith filing: provides a basis for dismissing an involuntary bankruptcy petition even where statutory criteria for commencing an involuntary are satisfied and where debtor is not paying its debts as they become due. *See In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328 (3d Cir. 2015); *In re VitaminSpice*, 472 B.R. 282 (Bankr. E.D. Pa. 2012).

3. Improper Venue.

4. Defective service: Bankruptcy Rules 1010, 1004(b), 7004; if raised this must be done through a motion to dismiss under Rule 7012 before any other pleading.

5. § 303(j): for an involuntary petition to be dismissed, there must be written notice to all creditors and then a hearing.

    a. Minimum 21-day notice to creditors is required. *See* Rule 2002(a)(4).

    b. Debtor is required to supply a list of its creditors. *See* Rule 1017(a)

iii. Motion to Convert – the debtor can move to convert the case to a voluntary case under another chapter of the Bankruptcy Code

1. Conversion does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief. *See* § 348.

2. § 348(a) preserves avoidance actions that exist on date involuntary petition was filed, but might become protected by passage of time by the time a motion to convert/order for relief is entered.

3. § 706(a) governs moving to convert a 7 to an 11.

4. § 1112(a) governs moving to convert an 11 to a 7.

iv. Filing a Voluntary Petition and a Motion to Dismiss the Involuntary Petition

1. Courts treat the voluntary petition filing as the functional equivalent of a motion to convert the involuntary case to a voluntary case under the chapter selected by the debtor.

2. A debtor can consolidate the two cases into a single case, with the first filed case and case number controlling.

3. This approach affords the debtor the opportunity on a motion and hearing to seek dismissal of the involuntary petition for cause, with burden of proof placed on the debtor.

See In re Premier General Holdings, Ltd., 427 B.R. 592, 602 (Bankr. W.D.Tex. 2010).

v. Motion for Dismissal or Transfer for Improper Venue

1. The involuntary case must be field in the district where venue would be proper if debtor were initiating a voluntary case. *See* 28 U.S.C. § 1408; Bankruptcy Rule 1014(a).

2. When the venue relationship in any one district becomes tenuous, most courts hold transfer to a more related district is proper even if the doctrine of forum non conveniens would apply. *See In re Gurley*, 215 B.R. 703 (Bankr. W.D. Tenn. 1997) – 28 U.S.C. § 1404; Bankruptcy Rule 1014(b).

c. Options for Non-Petitioning Creditors
   i. Creditors cannot answer a petition directly. *See In re Dilley*, 339 B.R. 1 (B.A.P. 1st Cir. 2006); *In re MarketXT Holdings Corp*., 347 B.R. 156 (Bankr. S.D.N.Y. 2006);
   ii. There are policy justifications for this based on fear some creditors might contest an involuntary petition to:
      1. Protect a voidable interest acquired from the debtor or
      2. Conceal certain dealings with debtor.

      See In re Earl's Tire Serv., Inc., 6 B.R. 1019 (D. Del. 1980).
   iii. Creditors can seek dismissal of the involuntary petition under §§ 305, 707(a) or 1112(b).
      1. *See In re Council of Unit Owners*, 552 B.R. 84 (Bankr. D. Md. 2016).

d. Custodians – Assignees/Receivers
   i. § 101(11) defines "custodian" – a custodian is not permitted to administer property of the debtor, except to the extent necessary to preserve it. *See* § 543.

   ii. If the custodian is an assignee for the benefit of creditors and the assignment occurred more than 120 days before the filing of the involuntary petition, then the assignee is authorized to retain possession, absent fraud. *See* § 543(d)(2)
      1. Assignee for the benefit of creditors can answer an involuntary petition (assuming debtor hasn't answered) or file a motion to dismiss

      2. Receiver can answer an involuntary petition (assuming debtor hasn't answered) or file a motion to dismiss

   See In re Starlite Houseboats, Inc., 426 B.R. 375 (Bankr. D. Kan. 2010); *In re A & B Liquidating, Inc.*, 18 B.R. 922 (Bankr. E.D. Va. 1982); *In re Sun World Broadcasters, Inc.*, 5 B.R. 719 (Bankr. M.D. Fla. 1980).

iii. Custodian can seek to intervene under Rule 1018(a); it could be argued it is protecting assets for all creditors and that this can be accomplished outside of the bankruptcy system in a state court proceeding.

iv. §§ 707(a) and 1112(b) seem to suggest any party interest may bring a motion to dismiss an involuntary case.

e. Equity Holders
   i. General rule: equity holders cannot answer the involuntary petition (assuming no fraud or other misconduct by involuntary debtor).

   ii. They should first demand that the directors act before responding to an involuntary petition.

      1. Intervention may be permitted where equity holders show directors' unwillingness to defend is intended as scheme to defraud the corporate debtor.

      2. *See Kukuda v. Westport Ins. Corp. (In re Michael Angelo Corry Inn, Inc.)*, 2002 WL 400780 (Bankr. W.D. Pa. Jan. 8, 2002), *overruled on other grounds* 53 Fed. Appx. 205 (3d Cir. 2002); *In re Synergistic Techs.*, 2007 WL 2264700 (Bankr. N.D. Tex. Aug. 6, 2007).

f. U.S. Trustee
   i. 11 U.S.C. § 307 – the United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to 1121(c) of this title.

   ii. No case law exists on whether U.S. Trustee may file an answer to an involuntary petition; not specifically listed in § 303(d).

IV. Contested Involuntary Petitions
   a. If there is no objection to the involuntary petition filing, the court will usually enter an order for relief against the debtor.
   b. Timing
   c. Litigation, discovery
   d. Trial/evidentiary hearing
   e. Defenses
      i. The claim is subject to a bona-fide dispute. Courts will consider
         1. the objective basis for a factual or legal dispute as to validity of claim; the court need not resolve the dispute, it must simply ascertain there is a dispute;
         2. the debtor's previous recognition of the debt (on balance sheet/accounts payable records);

3. judgments by default;
4. existing litigation and filing of a counterclaim or answer alone will not establish the existence of a dispute; and
5. burdens of proof.

ii. The debtor disputes that it is "generally not paying" its debts as they become due. Courts will consider:

1. pending state court liquidation process/custodian
2. the number and amount unpaid claims
3. the materiality of nonpayment
4. whether creditors have commenced lawsuits against the debtor
5. the debtor's conduct:
    a. is the debtor paying preferred creditors/insiders
    b. is the debtor in default under applicable loan and other agreements
    c. is the debtor liquidating its assets / winding down
    d. the debtor's overall conduct of its financial affairs

V. Gap Period Issues

a. § 303(f) provides: Notwithstanding § 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.
b. Thus, unless the bankruptcy court imposes restrictions, the debtor may operate its business during the "gap" period between the filing of an involuntary petition and entry of an order for relief, as though the petition had not been filed.
c. <u>Issues for Consideration:</u>
    i. Appointment of a trustee…is it a viable strategy?

VI. Dismissal, Abstention and Remedies

a. Involuntary petition cannot be dismissed (even if all parties agree) without notice and a hearing
    i. § 303(j) provides: 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.

ii. § 303(j) provides that a petition may be dismissed "only" after notice and a hearing, indicating that a hearing must be held, notwithstanding section 102(1) which affords discretion in other circumstances on whether a hearing is required. Creditors must be given 21-days' notice under Bankruptcy Rule 2002(a)(4). The debtor is required to provide a list of all creditors under Bankruptcy Rule 1017(a).

iii. Dismissal under §303(j)(2) precludes the debtor from seeking a judgment against petitioners under §303(i). Can the lack of opposition to a motion to dismiss be deemed consent?

b. Consequences of Dismissal

i. § 303(i) provides: 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.

ii. Because § 303(i) permits a debtor in certain circumstances to obtain a money judgment against petitioning creditors, an involuntary petition should be filed only after careful consideration and investigation. Section 303(i) raises a raft of issues and questions and has given rise to substantial caselaw.

iii. Among those issues are:

1. What constitutes debtor's "consent" to dismissal which would obviate the debtor's entitlement to relief under 303(i)? Does a debtor nonetheless consent if it agrees to dismissal but reserves its right to a possible claim under § 303(i)? What if a debtor consents to a motion to dismiss, but the order of dismissal says § 303(i) rights are preserved? Can consent be implied from a debtor's failure to oppose a motion of petitioners for dismissal?
2. Is §303(i) the exclusive remedy available to a debtor such that it cannot also pursue state law remedies, including malicious prosecution?
3. Section 303(i) is limited to awards against the petitioners, but may a debtor independently seek relief against petitioner(s)' counsel under Bankruptcy Rule 9011? May a debtor obtain a judgment

against the individuals signing a petition as agents of the petitioners?

4. Under § 303(i) the court "may" grant judgment. Is there a presumption in favor of a debtor for award of attorney's fees and costs? What standards should the court apply in deciding whether to grant judgment?
5. In determining an amount of attorney's fees to award, should a court apply a state law consequential damages standard or the standards for allowance of attorney's fees under § 330?
6. Are attorney's fees beyond those directly related to obtaining dismissal of a petition covered, such as the fees incurred in defending a petitioner's appeal of the dismissal order?
7. Is advice of counsel a defense to bad faith under § 303(i)(2)?
8. Is the filing of a petition to coerce a settlement or collection "bad faith"?
9. Damages awarded for a bad faith petition must be "proximate." Does that include difficult to quantify damages for injury to reputation and goodwill?
10. While punitive damages are authorized for bad faith, when should they actually be awarded and how should the amount of punitive damages be calculated?
11. Section 303(i)(2) refers to "any petitioner" suggesting each may be treated separately. How and when should damages be allocated among the petitioners?
12. Can a debtor recover a judgment under § 303(i) if the petition is dismissed as a result of the court's decision to abstain under § 305 or are the sections mutually exclusive?

c. Presumption of costs and fees for the debtor based on the totality of circumstances test:
    i. The merits of the involuntary petition
    ii. The role of any improper conduct on the part of the debtor
    iii. The reasonableness of the petitioning creditors' actions
    iv. The motivation and the objectives behind the filing
d. Damages upon case dismissal
    i. It is generally recognized that an award of any damages, fees,. And costs is entirely within the court's discretion. The court has the discretion to award the debtor attorney's fees, costs, and compensatory damages even absent a finding of bad faith on the part of the petitioning creditors. The bankruptcy court may also opt to award punitive damages to the

debtor if it finds that the petition was filed in bad faith. *See In re Mundo Custom Homes*, 179 B.R. 566 (Bankr. N.D. Ill. 1995)

ii. Punitive damages are only available when the filing was made in bad faith.

VII. Best Practices

a. Petitioning creditor(s) must conduct reasonable investigation into the debtor prior to filing an involuntary petition (operations, transactions with other creditors) so they can properly defend the petition.
b. If the debtor is engaging in fraud/asset transfers, creditor(s) will need to act quickly.
c. Petition creditor(s) should know about other creditors to assess potential recovery estimates.
d. Consideration of alternatives – out of court payment plan.
e. Consideration of benefits and costs and risks:
    i. Benefits: preservation of assets, stay protection, recovery of fraudulent transfers, transparency, centralized bankruptcy proceeding with court/trustee supervision
    ii. Costs and Risks: time, costs, uncertainty

Faculty

Hon. Jeffery A. Deller is a U.S. Bankruptcy Judge for the Western District of Pennsylvania in Pittsburgh, appointed in 2005. Prior to his appointment, he was a shareholder in the bankruptcy and insolvency practice group at Klett Rooney Lieber & Schorling, P.C. While in private practice, some of his representations included representing the University of Pittsburgh Medical Center Health System (UPMC) in connection with its $100 million acquisition of the assets of St. Francis Hospital, serving as counsel to the unsecured creditors' committees of various chapter 11 cases (including the cases filed by National Record Mart and Arcadia Energy Corp.), and serving as advisor to most of the Pittsburgh region's banks and financial institutions with respect to bankruptcy and loan workout matters. Judge Deller is a prior recipient of the Allegheny County Bar Association's Young Lawyer of the Year Award. He authored *Looking Before You Leap Into an Involuntary Bankruptcy Case*, 171 N.J. L. J. 446 (2003), and *Examining the Examiner: Waiver Of the Attorney-Client Privilege and the Outer Limits of an Examiner's Powers in Bankruptcy*, 43 Duq. L. Rev. 187 (2005), and co-authored "Putting Order to the Madness: BAPCPA and the Contours of the New Pre bankruptcy Credit Counseling Requirements," 16 J. *Bankr. L. & Prac.* 1 Art. 5 (2007). He is also a contributing author to West's *Pennsylvania Forms: Debtor-Creditor*, a forms guide and treatise for practitioners. Judge Deller received hs B.A. in economics and political science from the University of Pittsburgh and his J.D. *cum laude* from Duquesne University School of Law, where he served as a member of *The Duquesne Law Review* and was the recipient of the *American Bankruptcy Law Journal* Prize awarded by the National Conference of Bankruptcy Judges and the Gerald K. Gibson Memorial Award granted by the Bankruptcy and Commercial Law Section of the Allegheny County Bar Association.

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Stephen E. Leach is a partner with Hirschler Fleischer, PC in Tysons, Va. For more than 40 years, he has advised and represented creditors, debtors, trustees and committees in bankruptcy reorganizations and liquidations, out-of-court workouts and business dissolutions. Mr. Leach regularly appears before the bankruptcy and other federal and state courts of Maryland, Virginia and the District of Columbia. In addition, he was an adjunct professor of bankruptcy law for 22 years at American University's law school in Washington, D.C., and taught creditors' and debtors' rights as a member of the adjunct faculty of The Catholic University of America's law school. Mr. Leach is a former chapter 7 bankruptcy trustee and a past chair of the District of Columbia Bar's Business Bankruptcy Committee. He serves on the panel of mediators of the U.S. Bankruptcy Court for the District of Columbia, and has acted as both a court-appointed and private mediator and examiner in numerous bankruptcy cases in the Washington, D.C., area. Prior to joining Hirschler Fleischer PC, Mr. Leach was a partner with Leach Travell, Venable LLP, Tucker Flyer, P.C. and Zuckerman Spaeder LLP. Before entering private practice, he served as a trial attorney with the U.S. Department of Justice and a trade regulation attorney with the Federal Trade Commission. Mr. Leach is Board Certified in Business Bankruptcy Law by the American Board of Certification. He received his B.A. *magna cum laude* from Yale University and his J.D. from Stanford University Law School.