

What Rules of Procedure Apply When Withdrawing the Reference of a Bankruptcy Core Matter?

By Carlos E. Sardi, Esq.



When the reference of a core matter is withdrawn from a bankruptcy court to a district court, practitioners must be aware of the continued application of the Federal Rules of Bankruptcy Procedure in the new forum.¹

District courts have original jurisdiction over “all civil proceedings arising under . . . or arising in or related to cases under title 11 of the United States Code” or the Bankruptcy Code.² District courts may refer matters arising under bankruptcy jurisdiction to bankruptcy courts pursuant to 28 U.S.C. § 157(a).³ When referring such matters, a district court, however, has the discretion of withdrawing the reference from the bankruptcy court for cause.⁴ So, when practitioners are in front of a district court judge in a bankruptcy related matter, the question is: what rules of court apply? This article gives you the answer.

ABOUT THE AUTHOR

Carlos E. Sardi, Esq. is the founding partner at Sardi Law, PLLC, practicing in the areas of bankruptcy, commercial litigation, creditors’ rights, insolvency, reorganization and restructuring.

“Notably, counsel’s failure to know the Rules, and worse yet, *which* of the Rules should apply to a bankruptcy matter once the reference is withdrawn, does not constitute the type of neglect that could reverse a bad timing decision.”

Rule 1001 of the Federal Rules of Bankruptcy Procedure provides that the “Bankruptcy Rules and Forms govern procedure in cases under [the Bankruptcy Code].”⁵ Notably, Rule 1001 provides that the Bankruptcy Rules govern in “cases under title 11” — but the rule does *not* limit the application of the Bankruptcy Rules only to cases pending in bankruptcy court or before a bankruptcy judge. To the contrary, Rule 1001 was amended in 1987 specifically to “make clear that the Bankruptcy Rules, *not* the Federal Rules of Civil Procedure, apply when the district court hears an adversary proceeding.”⁶

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A Recent Primer on the Law of Contempt

By Lewis M. Killian, Jr. and Ashley Dillman Bruce

ABOUT THE AUTHOR

Lewis M. Killian, Jr. served for 26 years as the Bankruptcy Judge for the Northern District of Florida until his retirement in 2012. Following his retirement, Judge Killian joined the Tallahassee office of Berger Singerman, LLP where he practices bankruptcy law and serves as a mediator for bankruptcy and other complex commercial disputes.

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Ashley Dillman Bruce is an attorney that practices on Berger Singerman’s Business Reorganization and Dispute Resolution Teams out of the firm’s South Florida offices. Ashley concentrates her practice in corporate bankruptcy and trustee representation, but she also incorporates a variety of complex commercial litigation and appeals before federal and state courts.



Lewis M. Killian, Jr. Ashley Dillman Bruce

court makes this case particularly noteworthy.

The Facts of McLean

In *McLean*, the debt owed to Green Tree was discharged in a chapter 7 bankruptcy case. Several years later, the debtors filed a chapter 13 petition and did not list Green Tree as a creditor. Green Tree filed a proof of claim in the second case for the same debt that Green Tree had previously sought to recover in the first case. The debtors objected to Green Tree’s proof of claim and filed an adversary proceeding for violation of the discharge injunction. Green Tree promptly withdrew its proof of claim and acknowledged that the filing was in error.

The case of *Green Point Credit, LLC v. McLean*,¹ made clear that creditors may face serious consequences if they file a proof of claim in a bankruptcy case for an unenforceable claim. There, the court held that the filing of a proof of claim for a debt that

had been discharged in a previous bankruptcy case was a violation of the discharge injunction subjecting the creditor to contempt sanctions. While this holding is itself significant, the court’s extensive discussion of various procedural aspects of contempt proceedings in bankruptcy

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Dear Readers,

On behalf of the Board of Directors of the Bankruptcy Bar Association of the Southern District of Florida, I am pleased to present you with this year's BBA Journal. Thank you to everyone involved in its production, especially its Editor-in-Chief, Ashley Dillman Bruce.

The BBA has had a very busy and exciting year so far, and we are looking forward to our premier event – the 32nd Annual Weekend Retreat, which will take May 13-15, 2016, at the Marco Island Marriott Beach Resort, Golf Club & Spa, in Marco Island, Florida.

I encourage you to join us at the Retreat (which is taking place the weekend after Mother's Day this year). Eight distinguished Bankruptcy Judges from across the United States will serve as group leaders to discuss a broad array of hypotheticals designed to generate thoughtful discussion of relevant and timely issues related to our insolvency practices. Our Sunday morning program will feature Dr. Arin Reeves of Nextions, who will present an interactive discussion on Generational Diversity.

Thanks to generous sponsorships, the BBA has continued to provide extensive and diverse programming throughout all three counties, including pro bono clinics, Brown Bag CLE lunch programs, happy hours, dinner meetings, and various other educational and social events. We also continue to host other major events throughout the year, including the annual View From the Bench Seminar and View From the Bench Judge's Dinner, Table of 8 dinners (where our younger members dine with and learn from some of the Bar's senior practitioners and judges), courthouse staff appreciation lunches, and our annual Holiday Party. This year we also put on, for the first time, a full-day evidence seminar titled – "Evidence for Bankruptcy Lawyers – Taught by Real Trial Lawyers" – where we had some of the most distinguished South Florida trial attorneys help us brush up on our command of the Federal Rules of Evidence.

We are extremely proud of the diversity of programming, networking and educational opportunities that we were able to provide to our members this year. I encourage you to take advantage of these opportunities, and provide feedback on how we can improve.

Finally, I would like to thank all of our Bankruptcy Judges, led by Chief Judge Paul G. Hyman, for their continued enthusiastic support of the BBA. We are extremely fortunate to have judges who care so much about our community, the bankruptcy system and the BBA. In closing, I want to thank everyone who has contributed to the BBA's success over the past year, especially the BBA's Executive Director Laura Silverman, and the BBA's Officers, Directors, and Committee Chairs, for their tireless work to continue to make the BBA a world-class association. It has been my honor to serve as your President and I thank you for the opportunity.

Sincerely,
Scott M. Grossman, President





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VIEW FROM THE CHIEF JUDGE

Eleventh Circuit Weighs in on Plan Interest Rate

By The Honorable Paul G. Hyman



ABOUT THE AUTHOR

The Honorable Paul G. Hyman is Chief Judge of the United States Bankruptcy Court for the Southern District of Florida.

Courts are often called upon to answer complex legal questions involving the enforcement of contractual provisions that require payment of default interest and any reasonable attorney's fees, costs, or charges.¹ Recently, in *JPMCC 2006-LDP7 Miami Beach v. Sagamore Partners, Ltd. (In re Sagamore Partners, Ltd.)*,² the Eleventh Circuit answered the question of whether a debtor must provide the contractual default interest rate, which complied with non-bankruptcy law, even if the secured loan has been "cured." The answer to this question involved varying interpretations of 11 U.S.C. § 1123(d) and § 1124(2).

Sagamore Partners, Ltd. ("Sagamore") was the operator of a hotel located in Miami Beach, Florida.³ JPMCC 2006-LDP7 Miami Beach Lodging, LLC and several other parties (the "Plaintiffs") provided Sagamore with a \$31.5 million secured loan.⁴ In August 2009, Sagamore stopped making all payments to the Plaintiffs.⁵ On October 6, 2011, Sagamore filed for bankruptcy.⁶ In its attempt to cure, Sagamore proposed to pay all accrued interest payments at the non-default interest rate of 6.54% as opposed to the default interest rate of 11.54% to the Plaintiffs in its Chapter 11 reorganization plan.⁷ Sagamore's main argument was that under 11 U.S.C. § 1124(2) a debtor may "cure" a default and avoid "all consequences of default, including avoidance of default penalties such as higher interest."⁸ This approach was adopted by the Ninth Circuit in *In re Entz-White Lumber & Supply, Inc.*⁹ Following this decision in 1988, the Ninth Circuit along with lower federal courts in the Ninth Circuit have continued to follow the holding in *Entz-White*.¹⁰

However, the Eleventh Circuit rejected Sagamore's argument and the Ninth Circuit approach in *Entz-White*. Instead, relying on the enactment of 11 U.S.C. § 1123(d) in 1994, the Eleventh Circuit ruled that Congress required contractual default interest payments in order to cure a loan.¹¹ In so holding, the Eleventh Circuit emphasized the plain language of § 1123(d):

Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default

the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

According to the Eleventh Circuit, if the contractual default interest rate complies with the "underlying agreement" and "applicable nonbankruptcy law," a secured creditor is mandated to pay the default interest rate.¹² Although other courts have relied on legislative history to reach a different conclusion and only require payment of the non-default interest rate,¹³ the Eleventh Circuit determined that the "straightforward statutory command" of § 1123(d) requires such a result.¹⁴

This ruling will clearly make it more difficult to confirm a Chapter 11 plan and unfortunately may reduce distributions to unsecured creditors within the Eleventh Circuit. However, it will reduce litigation in the plan confirmation process. ■

NOTES

¹ See, e.g., 11 U.S.C. § 506; *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (default interest rates do not need to satisfy a reasonableness inquiry); *Welzel v. Advocate Realty Investments, LLC (In re Welzel)*, 275 F.3d 1308, 1319 (11th Cir. 2001); (holders of unreasonable attorney's fees, costs, or charges under 11 U.S.C. § 506(b) may file general unsecured claims under 11 U.S.C. § 502) (11th Cir. 2001); *UPS Capital Business Credit v. Gencarelli (In re Gencarelli)*, 501 F.3d 1, 7 (1st Cir. 2007) (same); *Sanson Investment Co. v. 268 Limited (In re 268 Limited)*, 78 F.2d 674, 678 (9th Cir. 1986) (same).

² 620 Fed. Appx. 864 (11th Cir. Aug. 31, 2015).

³ *Id.* at 866-67; *In re Sagamore Partners, Ltd.*, 512 B.R. 296, 301 (S.D. Fla. Feb. 26, 2014).

⁴ 620 Fed. Appx. at 867.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See *In re Entz-White Lumber & Supply, Inc.*, 850 F.2d 1138, 1340 n.3 (9th Cir. 1988).

⁹ *Id.*

¹⁰ See, e.g., *In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1075 (9th Cir. 2002); *In re Udhush*, 218 B.R. 513, 518 (B.A.P. 9th Cir. 1998); *In re Phoenix Business Park Ltd. Partnership*, 257 B.R. 517, 521-22 (Bankr. D. Ariz. 2001).

¹¹ 620 Fed. Appx. at 869 ("Accordingly, where, as here, 'the underlying agreement' calls for default-rate interest and the

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Dealing with a Difficult Party in a Contested Bankruptcy Matter: Using Your Full Arsenal (and Getting Paid for It)



By David W. Langley

Most contested bankruptcy cases are rather civil compared to other forms of litigation, such as family law or personal injury. However, if you handle many contested cases you will eventually run into an adversarial, litigious party. It is often difficult for a debtor to defend against the claims of a well-funded creditor, but there are remedies that help to balance the scales. The recent case of *In re Tree Garden Condominium Association*,¹ provides some examples.

I. Contempt, Sanctions, and Damages

In re Tree Garden Condominium Association, a Chapter 11 case filed in Broward County, involved a number of combative parties. A roofing company had obtained a judgment against the Debtor and garnished its bank account, which prompted the initial filing and the first adversary proceeding. The Debtor was able to avoid the garnishment lien pursuant to § 547 and successfully demand the return of the garnished funds. When the funds were not returned as ordered, the roofing company's claim was stricken in its entirety.

The most combative creditor in the case was the former management company for the Debtor. Although it had been overpaid, the management company filed a proof of claim for over \$100,000. The Debtor felt that the claim was not justified and objected. This started a year-long fight with the management company and its principals involving claims of violation of the automatic stay, witness tampering and the blatant disregard of court orders.

Initially, the management company attempted to intimidate board members by filing complaints with the DPR, the U.S. Trustee's Office, and other agencies. The Debtor responded by filing a motion for contempt. Although this did not constitute a typical stay violation, the actions of the management company were intended to hinder the actions

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of the Debtor. The Debtor relied on the case of *In re Markos Gurnee Partnership*,² in which the Court held that "[a]ctions against trustees in their official capacity are core proceedings as to which a bankruptcy judge may enter final judgment, pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(B), and the automatic stay would operate to prevent litigation of these actions outside of the bankruptcy court without that court's consent, pursuant to 11 U.S.C. § 362(a)(3) (stay operates against any act to obtain property from

"The Debtor ultimately obtained a ruling finding the management company and its principals in contempt and a judgment for \$96,639 in compensatory damages, \$96,639 in punitive damages and \$45,185 in attorney's fees."

the estate)".³ Since this Debtor was acting as a debtor-in-possession, it had the same rights as a trustee. After the management company filed the various complaints mentioned above, it attempted to recall the existing board members. The Debtor was able to convince the Court that this was not a reasonable exercise of a unit owner's rights, but an attempt to interfere with the operations of the Debtor.

The court scheduled several hearings on the Debtor's motions for contempt and injunctive relief. A key witness to the intimidation and witness tampering refused to appear, despite

being served with a subpoena and later an order requiring his appearance. In a deposition, the witness recanted the testimony he had previously given by affidavit and supported the position of the management company. After he repeatedly failed to appear for hearings, the court ordered the U.S. Marshal's Office to apprehend the witness and bring him to the next hearing.

The Debtor anticipated that the witness would be uncooperative. The Debtor first put on several witnesses that testified regarding the drafting and execution of the disputed affidavit. Then the Debtor introduced testimony of the witness' godmother, who was present when the witness called Debtor's counsel complaining of witness tampering. After listening to this testimony while still in shackles, the witness was finally put on the witness stand at which time he confirmed the testimony in his affidavit and admitted that he had been bribed. When asked by the Court why he had not attended the previous hearing he replied that someone from the management company had called to tell him that the hearing had been cancelled and that he did not need to attend.

The Debtor ultimately obtained a ruling finding the management company and its principals in contempt and a judgment for \$96,639 in compensatory damages, \$96,639 in punitive damages and \$45,185 in attorney's fees.⁴ The Court also referred the matter to the U.S. Attorney's Office for prosecution, finding that the principals of the management company had violated the Federal Witness Tampering Act, 18 U.S.C. § 1512.

Surprisingly, that was not enough to stop the management company from interfering with the operations of the Debtor. The principals of the management company continued with their recall efforts, resulting in the issuance of an Order to Show Cause. When they failed to appear at the

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Worth the Risk? Eleventh Circuit Holds Petitioning Creditors Liable for Broad Categories of Fees if Involuntary Petition is Dismissed¹

By Michael Friedman and Clay Roberts

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Roberts

Section 303(i) of the U.S. Bankruptcy Code provides a powerful remedy to alleged debtors subjected to an improper involuntary bankruptcy petition.² If the bankruptcy court dismisses an involuntary petition “other than on consent of all [petitioning creditors] and the debtor, and if the debtor does not waive the right to judgment” under § 303(i), the court may award the debtor attorney’s fees, costs, and, if the petition was filed in bad faith, damages—including punitive damages.³

In *DVI Receivables XIV, LLC v. Rosenberg (In re Rosenberg)*,⁴ the Eleventh Circuit affirmed U.S. Bankruptcy Judge A. Jay Cristol’s decision that, in addition to attorney’s fees incurred obtaining dismissal of an involuntary petition, a debtor improperly forced into bankruptcy may recover fees incurred to sustain the dismissal on appeal, “fees on fees” (fees incurred to prove entitlement and amount of the fees sought), and fees incurred to prosecute a bad faith claim for damages under § 303(i)(2). The ruling, which resolved matters of first impression in the Eleventh Circuit, expressly disagreed with a Ninth Circuit case that construed narrowly a bankruptcy court’s authority to award appellate fees to an alleged debtor under § 303(i).⁵ The Eleventh Circuit is the second court of appeals to adopt a broad interpretation of the fee-shifting provision of § 303(i), after the Sixth Circuit made a similar ruling two years earlier in an unpublished opinion.⁶ On January 11, 2016, the Supreme Court denied a petition for certiorari review of the Eleventh Circuit’s decision.

Rosenberg v. DVI Receivables XIV, LLC⁷

In August 2009, Maury Rosenberg (“Rosenberg”) successfully obtained dismissal with prejudice of an involuntary bankruptcy petition that certain “Petitioning Creditors”

had filed against him.⁸ Rosenberg then filed an adversary proceeding in bankruptcy court against the Petitioning Creditors for costs, attorney’s fees and damages under § 303(i). Rosenberg also sued Lyon Financial Services, Inc. (“Lyon”), a subsidiary of U.S. Bank, N.A. (“U.S. Bank”). Lyon’s director of operations signed the involuntary petition against Rosenberg on behalf of the Petitioning Creditors. The Petitioning

“[T]he Eleventh Circuit affirmed U.S. Bankruptcy Judge A. Jay Cristol’s decision that, in addition to attorney’s fees incurred obtaining dismissal of an involuntary petition, a debtor improperly forced into bankruptcy may recover fees incurred to sustain the dismissal on appeal...”

Creditors themselves were special purpose entities created solely to facilitate a complex securitization transaction that Rosenberg had guaranteed and in which U.S. Bank served as trustee. Judge Cristol dismissed the involuntary case after finding, *inter alia*, that Rosenberg’s guaranty ran in favor of Lyon, and not the Petitioning Creditors, which were merely “pass-through” entities.⁹

After a bench trial, the bankruptcy court found that Lyon had acted as the Petitioning Creditors’ agent in filing the involuntary petition, and that Lyon could therefore be

held liable under § 303(i) even though it was not named as a petitioning creditor on the involuntary petition.¹⁰ The bankruptcy court held the Petitioning Creditors and Lyon jointly and severally liable for over \$1 million in attorney’s fees and costs, including: (1) fees to obtain dismissal of the involuntary petition, (2) appellate fees to sustain the dismissal on appeals to district court and then to the Eleventh Circuit, (3) “fees on fees” incurred in the adversary proceeding to recover the first two categories of fees, and (4) fees that Rosenberg incurred prosecuting his separate “bad faith” claim for damages against the Petition Creditors and Lyon under § 303(i)(2).¹¹ The bankruptcy court also reserved jurisdiction to award additional fees after resolution of Rosenberg’s bad-faith claims, which were then still pending in district court after the district court withdrew the reference to permit a jury trial.¹²

The Eleventh Circuit’s Decision

U.S. Bank, as Lyon’s successor-in-interest,¹³ appealed the bankruptcy court’s § 303(i) ruling and fee award to the district court, which affirmed the bankruptcy court in all respects. U.S. Bank then appealed to the Eleventh Circuit. The appeal presented two issues of first impression in the Eleventh Circuit: (1) whether § 303(i)(1) authorizes a bankruptcy court to award appellate fees, and (2) whether the statute authorizes an alleged debtor to recover fees and costs incurred to prosecute a bad-faith claim for damages under § 303(i)(2).¹⁴ U.S. Bank also appealed the district court’s decision that Lyon could be held liable under § 303(i) despite not having been listed as a petitioning creditor.

The Eleventh Circuit rejected U.S. Bank’s argument that § 303(i)(1) does not authorize an award of appellate fees, as well as U.S. Bank’s

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Summary of the 2015 Amendments to the Local Rules

By Patrick S. Scott



ABOUT THE AUTHOR

Patrick S. Scott is a shareholder in GrayRobinson's Fort Lauderdale office. He was chair of the local rules committee in 2014-15, assisting Judge Kimball with local rules revision.

Most of the revisions to the local rules that became effective on December 1, 2015 merely update the rules to be consistent with Federal Rules of Bankruptcy Procedure, correct the references to local and national forms, or make stylistic changes for clarity. Others describe adjustments in the clerk's internal operating procedures. However, some of them effect changes in practice or procedure that every attorney should know. Only a few of these important changes were previously adopted as interim local rules. Thanks to Judge Kimball and the local rules committee for their hard work.

Elimination of forms: Two common forms have been eliminated: the old LF-11 which accompanied the petition, and the Certificate of No Response, which was filed to obtain an order without hearing after a negative notice procedure had been invoked in a motion. Negative notice orders now must incorporate certain findings in the preamble.

Negative notice motions: A combined motion to reopen case and to avoid judicial lien on exempt property is added to the list in LR 9013-1(D) of motions for which the negative notice procedure may be used.

Automatic Stay: Local Rule 4001-1 bars negative notice motions for stay relief before the commencement of the Meeting of Creditors; and adds a requirement that the negative notice movant represent in the preamble to the order that either the order was attached to the motion or the relief being granted is identical to that requested in the motion. LR 4001-1(C). And it clarifies that, in chapter 11 cases with no creditors' committee, the service of motions for relief from stay on the seven largest creditors is mandatory. LR 4001-1(A).

Schedules: The debtor must file a certificate of compliance with the requirement that all creditors named in any amendment of the schedules have been served with the Section 341 notice and informed of the debtor's full Social Security Number. LR 1009-1(D)(2).

Omitted creditors: Changes the procedure by which a debtor reopens a case to add a previously omitted creditor for the purpose of extending the discharge to the debt owed to that creditor, so that the burden is on the creditor who did not know of the case in time to file an adversary complaint objecting to dischargeability, to file such a complaint under Section 523(c) within 60 days after the debtor amends the schedules and serves the local form order. LR 5010-1(B). The rule previously required the *debtor* to file the adversary proceeding and to obtain a finding of dischargeability.

Appearance of counsel: Applications for approval of employment of attorneys under Bankruptcy Rule 2014 must attach as an exhibit the engagement letter or retention agreement. LR 2014-1(A). Provides that motions to permit *pro hac vice* appearance are to be filed by the local counsel, not the visiting counsel. LR 2090-1(B)(2). Incorporates a 2014 administrative order that authorizes attorneys who have not appeared generally for the debtor to appear solely for the Meeting of Creditors under limited circumstances, authorizes other attorneys in the same law firm to cover hearings for the counsel of record, and permits appearance counsel to attend hearings under very limited circumstances. LR 2090-1(C). Permits an attorney in a law firm to give notice that he or she is substituting for a departing attorney, typically one who has left the law firm, and clarifies when a court order is required. LR 2092-1.

Limiting service lists: Trustees may, after the claims bar date, *and without obtaining an order*, limit their service of most notices— notices of proposed use, sale or lease of property, proposed settlements, and certain motions to dismiss or convert—so that the notices don't go to all creditors on the matrix but rather only to those creditors who filed claims or may still file claims. LR 2002-1(I).

Trial exhibits: Exhibits submitted for use at hearing or trial may now be submitted to the court on electronic storage media, and served on opposing parties (but not *pro se* parties) by email, unless the court orders otherwise.

Awards of fees and costs: Revises the procedure and deadlines for clerk taxation of costs and the opportunity to object; such costs are taxable only when the court awards costs in the judgment. Also incorporates the provision in Civil Rules 54(d)(2)(A) and (B) for a 14-day deadline for the prevailing party to seek a court award of nontaxable costs and to seek an attorney's fee award. That deadline does not apply where the fees are sanctions under the Civil Rules or under 28 U.S.C. §1927. See Fed. R. Civ. P. 54(d)(2)(E).

Chapter 13 cases: Clarifies that motions to reconsider or vacate orders dismissing chapter 13 cases need not be accompanied by proof of cure of the plan payments if the motion request immediate conversion to chapter 7

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Summary of the 2015 Amendments to the Local Rules

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upon vacating the dismissal. LR 9013-1(E). The confirmation order forms have been reduced in number and broadened somewhat in scope. The confirmation process adopts interim rules, and sets a deadline for objections to confirmation: 14 days prior to the date of the first hearing on the plan. LR 3015-3(B)(1). Resolves how funds in the trustee's possession are to be divided upon conversion to chapter 7. LR 1019-1 (eff. March 11, 2016).

Mediation: Makes it mandatory for the mediator to report to the court (a) a complete failure of a party to attend and (b) a failure of a party to participate in good faith. LR 9019-2(C)(4). The old rule read "willful failure to attend..." and the local form order for mediation had implied that the reporting was optional. Also broadens the scope of who may serve as mediators. LR 9019-2(A)(1) and (2).

Mortgage modification mediation:

Provides that a chapter 7 debtor who participates in MMM consents to the deferral of entry of the debtor's discharge until the MMM process is completed. LR 4004-3(A)

Other changes:

- Sealing and redacting records (LRs 5003-1, -2, and 50051-1).
- Rule 2004 examinations (LR 2004-1, clarifying that 2004 examination notices must be filed with the court).
- Filing fees for indigent debtors (LR 1006-1(A)).
- Notices of payment change (LR 3070-1(B)).
- Signature blocks (LR 9011-4(A)(1), now requires email address but not fax number).
- Notice of Hearing (LR 9073-1(B)).
- Subpoenas issued in other districts (LR 9016-1; LR 9004-2(A)).
- Orders (LR 5005-1(G)(2), must be served, and certificate of service filed, within 3 days).
- Garnishment (LR 7069-1(D)(2)).
- Appeals (many changes in the 8000 series as well as in the district court local rule 87.4).

The index to the local rules is very thorough, and referring to the rules before preparing or filing a court paper of any kind may save you the inconvenience of having your paper rejected or motion denied. Many local forms have also been revised in the past year, so you should not rely on forms you've used before unless you compare them first to the revised forms and update the revision date in the footer accordingly. ■

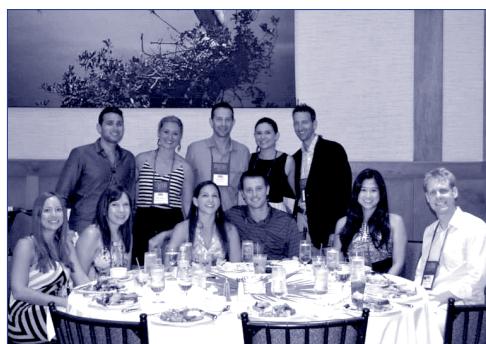
Eleventh Circuit Weighs in on Plan Interest Rate *Continued from page 3*

'applicable nonbankruptcy law' permits it, a party cannot cure its default without paying the agreed-upon default-rate interest.".

¹² *Id.* ("[B]ecause Sagamore's loan documents require the payment of default-rate interest and those provisions comply with Florida law, Sagamore must pay default-rate interest to cure its default").

¹³ *In re Phoenix Business Park Ltd. Partnership*, 257 B.R. at 521–22.

¹⁴ 620 Fed. Appx. at 869 (quoting *United States v. Gonzales*, 520 U.S. 1, 2 (1997)).



CLERK'S CORNER

By Joseph Falzone

Bankruptcy Case Filing Statistics

For the sixth consecutive year, bankruptcy case filings in the Southern District of Florida continued their downward trend to 23,372, a 20.3% decrease below 2014 bankruptcy case filing levels of 29,313. Nonetheless, Florida Southern continues to rank amongst the top 10 bankruptcy courts in the nation: 7th in total filings, 5th in chapter 13 filings, 8th in chapter 11 filings, 10th in chapter 7 filings, and 9th in percentage of *Pro Se* filings.

Nationally, bankruptcy filings in the federal courts fell nearly 10% (844,495) according to data published by the Administrative Office of the U.S. Courts. This represents is the lowest number of bankruptcy filings for any 12-month period since 2007, and the fifth consecutive calendar year that national filings have fallen. For more information on national bankruptcy filing statistics, visit the Administrative Office of the U.S. Courts statistics web page.

Enactment of Full-Year Fiscal Year 2016 Judiciary Appropriations

On December 18, 2015, the House and Senate passed, and the President signed, H.R. 2029, the "Consolidated Appropriations Act of 2016," a 12-bill omnibus spending measure that provides final fiscal year 2016 funding for the federal government. The Judiciary fared very well, as final funding levels reflect the hard work of the Judicial Conference's Budget Committee, judges throughout the country who have been involved in congressional outreach efforts, and staff at the Administrative Office of the U.S. Courts. It is clear that, post-sequestration, Congress treated the Judiciary as a top funding priority and that cost-containment initiatives by the bankruptcy courts across the nation were appreciated in Congress.

Amendments to Official Bankruptcy Forms and Director's Procedural Forms

On December 1, 2015, most Official Bankruptcy Forms were replaced with substantially revised, reformatted and renumbered versions. These revised forms were part of a forms modernization project that began in 2008 by the Advisory Committee on Bankruptcy Rules. The primary goal of this project was to simplify the

ABOUT THE AUTHOR

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language to make it more understandable to both the legal community and debtors filing pro se. Among other things, the new forms include five different versions of the bankruptcy petition for individual and non-individual debtors. Also, all Meeting of Creditor Notices have been revised to make them easier to read and understand.

Director's Procedural Forms are issued under Rule 9009 of the Federal Rules of Bankruptcy Procedure by the director of the Administrative Office of the U.S. Courts. The use of the director's forms may be required by local court rules or general orders, but otherwise they exist for the convenience of the parties. Since virtually all of the director's forms have

Nationally, bankruptcy filings in the federal courts fell nearly 10% (844,495) according to data published by the Administrative Office of the U.S. Courts.

been revised and all have been renumbered, practitioners are urged to download the updated forms as necessary for use.

All of the revised, reformatted, and renumbered forms are designed to work with the federal courts' case opening and electronic case management system (CM/ECF) and should prove easier for debtors to understand and complete.

Details about the newly revised forms can be found on the Judiciary's bankruptcy forms website at: <http://www.uscourts.gov/forms/bankruptcy-forms>.

Amendments to Local Rules,

Forms, Guidelines, and Instructions

The court's local rules were amended effective December 1, 2015. (See Administrative Order 15-0 4 "Adoptio n o f Ame nded L o cal R ule s and Clarification of Status of Local Forms, Court Guidelines, Clerk's Instructions and Ad min istra tive O rde rs"). In conjunction with the amended local rules, all local forms, instructions and guidelines were reviewed and, where necessary, revised to conform to the amended local rules and to reflect stylistic changes agreed to by the court.

The following local forms have been abrogated:

- Certificate of No Response or Settlement and Request for Entry of Order (LF48)
- Declaration Under Penalty of Perjury to Accompany Petitions, Schedules, Filing Fee Applications and Statements Filed Electronically (LF11)
- Order Confirming Uncontested Chapter 13 Plan (LF68A)
- Order Confirming Uncontested Amended Chapter 13 Plan and Notice of Opportunity to Object to Amended Plan (LF68B)
- Summons in Foreign Nonmain Proceeding Under Chapter 15 (LF56).

This form was replaced by Director's Procedural Form 2500F.

The amended local rules, revised local forms, clerk's instructions and guideline are posted and available on the court website at: www.flsb.uscourts.gov.

Next Generation of CM/ECF

Case Management/Electronic Case Files (CM/ECF) is a judiciary-developed case management program offering Internet access to official case records in the federal courts. This program enables participating attorneys and litigants to file pleadings and allows courts to file, maintain, and retrieve case file information using electronic format. Today, CM/ECF is LIVE in every federal court in the country.

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CLERK'S CORNER

The first release of CM/ECF NextGen includes central sign-on [CSO] functionality, which allows users of CM/ECF and PACER to maintain one account across ALL CM/ECF NextGen courts. Users will sign in one time to access multiple courts. This release will also include Electronic Self-Representation [eSR]. The eSR module will allow a pro se debtor to prepare and submit (NOT FILE) to the court either a partial, or fully complete, Chapter 7 or Chapter 13 individual petition. Debtors will be able to work on their petition packages over time by using their self-selected login and password.

Currently, eight pilot courts are LIVE on CM/ECF NextGen; the ninth pilot court will go live at the end of February:

Appellate: Second and Ninth Circuits

Bankruptcy: Alaska, California Southern, New Jersey, and Oregon

District: Florida Northern, Kansas, and Minnesota

The Administrative Office of the U.S. Courts anticipates releasing the program to all

bankruptcy and district courts in the late 2016, with full implementation to occur over the next two years.

The clerk's office will keep you posted as more CM/ECF NextGen information becomes available.

Space and Facilities

- **Bankruptcy Court —** West Palm Beach Division — In January 2017, the 10-year lease for the bankruptcy court located at the Flagler Waterview Building, 1515 Flagler North Flagler Drive, West Palm Beach, will expire. This divisional office houses two bankruptcy judges' chambers and courtrooms along with the clerk's support staff. The court is actively working with the Administrative Office of the U.S. Courts, leasing division of General Services Administration (GSA), and with a local broker to either renew the existing lease or find an alternate location to house the bankruptcy court.

- **Fort Lauderdale U.S. Courthouse —** General Services Administration (GSA) is

conducting a feasibility study, the results of which will be used to determine all options and potential costs in building a new federal courthouse in Fort Lauderdale. The current 37-year old, 4-story federal courthouse located at 299 E. Broward Blvd. in Fort Lauderdale is in need of significant repairs and lacks basic security safeguards, particularly in this post-911 era. Once the GSA feasibility study is complete, it will be transmitted to Congress and to The Judicial Conference of the United States with the hopes of making its way onto the list of courthouse construction priorities.

In Closing

I hope you find the information contained in this article helpful and informative, as we welcome your comments and/or suggestions on how we can better assist and serve you. As always, my staff and I are extremely grateful for your continued support and confidence throughout the years. Thank you. ■

Worth the Risk? Eleventh Circuit Holds Petitioning Creditors Liable for Broad Categories of Fees if Involuntary Petition is Dismissed¹

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alternative argument that, if appellate fees are available, only an appellate court may award them. The court of appeals observed that, "while the bankruptcy court is the court deciding what is a reasonable attorney's fee, nothing in § 303(i) indicates that a court may award only those fees incurred at the trial level" or "precludes appellate fees or limits fees to only those incurred before the date of dismissal."¹⁵ The court explained that § 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."¹⁶

The Eleventh Circuit rejected U.S. Bank's argument that only an appellate court has authority to award appellate fees under Federal Rule of Appellate Procedure 38 because "unlike Rule 38, the statutory award of fees in § 303(i)(1) has no frivolity requirement."¹⁷ The court acknowledged that its ruling conflicted with the Ninth Circuit's ruling in *Higgins v. Vortex Fishing System Inc.*, which held that Rule 38 is the sole vehicle to recover appellate fees.¹⁸ The Eleventh Circuit disagreed with *Higgins*, explaining that, in its view, the sole precondition to an award

of fees under § 303(i)(1) is a dismissal of the involuntary bankruptcy petition. The Eleventh Circuit also noted that *Higgins* was in tension with another Ninth Circuit decision, *Southern California Sunbelt Developers, Inc. v. IBT International, Inc. (In re Southern California Sunbelt Developers, Inc.)*, which held that a fee award under § 303(i) "presumptively encompasses all aspects of the § 303 action, including proceedings on claims under § 303(i)(2)."¹⁹

The Eleventh Circuit found additional support for its broad interpretation of § 303(i) in the distinction that the Supreme Court has drawn between fee-shifting and sanctions provisions. The Eleventh Circuit characterized § 303(i) as a fee-shifting statute because it is tied to the outcome of the involuntary bankruptcy case and shifts litigation costs "as a whole from the alleged debtor to the creditors that improperly filed the bankruptcy petition."²⁰ By contrast, sanction provisions are intended to shift only a "discrete portion of the litigation."²¹ The Eleventh Circuit cited the Supreme Court's decision in *Cooter & Gell v. Hartmarx Corp.*,

where the Supreme Court stated that because "Rule 11 is not a fee-shifting statute, the policies for allowing district courts to require the losing party to pay appellate, as well as district court attorney's fees, are not applicable."²² The Eleventh Circuit observed that *Cooter & Gell* "suggests that the policies for awarding appellate fees are applicable to cases involving fee-shifting statutes such as § 303(i)(1)."²³

As a fee-shifting statute, § 303(i)(1) permits an award of fee on fees notwithstanding the Supreme Court's decision in *Baker Botts LLP v. ASARCO LLC*.²⁴ Baker Botts held that estate professionals are not entitled to recover fees incurred defending a fee application under 11 U.S.C. § 330(a) because it is *not* a fee shifting statute.²⁵ The Supreme Court in *Baker Botts* explained that fee-shifting is permitted only if a statute "specifically [or] explicitly authorizes courts to shift the cost of adversarial litigation from one side to the other"—as § 303(i) does.²⁶

The Eleventh Circuit in *Rosenberg* also determined that a bankruptcy court is authorized to award fees that the alleged

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BBA Journal

What Rules of Procedure Apply When Withdrawing the Reference of a Bankruptcy Core Matter?

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Prior to 1987, Rule 1001 provided that the Bankruptcy Rules governed procedures only in "United States Bankruptcy Courts." In 1987, however, Rule 1001 was changed to delete this reference and replaced with its current language. Because of this change, cases and proceedings arising under, arising in, or related to the Bankruptcy Code are now exclusively governed by the Bankruptcy Rules, "whether before the district judges or the bankruptcy judges of the district."¹⁵

Similarly, as part of the 1987 amendments, Bankruptcy Rule 9001 "was altered to delete the definition of 'Bankruptcy Court' and replace it with a definition of 'court or judge' [.]"¹⁶ The corresponding Advisory Committee Note for that Rule states that: "*[S]ince a case or proceeding may be before a bankruptcy judge or a judge of the district court, 'court or judge' is defined to mean the judicial officer before whom the case or proceeding is pending.*"¹⁷

Consistent with changes made to Rule 1001 and 9001, Rule 81 of the Federal Rules of Civil Procedure provides that the Civil Rules "apply to bankruptcy proceedings *to the extent provided by the Federal Rules of Bankruptcy Procedure.*"¹⁸ By its plain language, Rule 81 confirms that the Civil Rules apply to bankruptcy proceedings only to the extent they are incorporated by reference into the Bankruptcy Rules.¹⁹

Case law also confirms the above reasoning.²⁰ For example, after a final judgment is obtained in a jury trial of a bankruptcy matter, a post-trial motion under Civil Rule 59(e) (to alter or amend a judgment) is permitted under the 14-day timeframe established in Bankruptcy Rule 9023.²¹ The 14-day deadline for filing a Rule 59 motion is jurisdictional in nature, and a court may not enlarge the time for taking action under Bankruptcy Rule 9023.²² While the "timely" filing of the post-trial motions would stay the deadline

to file a notice of appeal pursuant to Fed. R. App. P. 4(a)(4)(A), the filing of a belated Rule 59(e) motion under the Civil Rules (28 days after judgment) would not stay that deadline.²³

In one case, the defendant moved to strike plaintiff's motion for a new trial and to alter and amend the court's findings and judgment as untimely.²⁴ In so doing, the defendant argued that

"Rule 1001 was amended in 1987 specifically to 'make clear that the Bankruptcy Rules, *not* the Federal Rules of Civil Procedure, apply when the district court hears an adversary proceeding.'"

Bankruptcy Rule 9006 (under which the motion was untimely) controlled the computation of time, as opposed to Civil Rule 6 (under which the motion would have been timely). There, the district court observed that the matter was before it based on its original bankruptcy jurisdiction pursuant to 28 U.S.C. § 1334(b). The district court explained that the Bankruptcy Rules governed the procedures in that case because the case was a proceeding "arising in or related to a case under" the Bankruptcy Code.²⁵ Based on that reasoning, the district court struck the motion as untimely under Bankruptcy Rules.

The above scenario clearly demonstrates how easily the unwary practitioner can commit malpractice for failing to observe the different time periods provided in the Bankruptcy Rules compared to the Civil Rules.

Notably, counsel's failure to know the Rules, and worse yet, *which* of the Rules should apply to a bankruptcy matter once the reference is withdrawn, does not constitute the type of neglect that could reverse a bad timing decision. The Eleventh Circuit has long applied the "ancient legal maxim" that "ignorance of fact may excuse; ignorance of law does not excuse."²⁶ The Supreme Court created a multi-factor test for establishing excusable neglect in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*.²⁷ "[I]t is first the movant's burden to demonstrate to the trial court that excusable neglect exists."²⁸ After *Pioneer*, courts have observed that a movant bears a "heavy burden" in showing excusable neglect.²⁹

"Soon after *Pioneer*, it was established in [the Eleventh Circuit] that attorney error based on a misunderstanding of the law was an insufficient basis for excusing a failure to comply with a deadline."³⁰ Indeed, the Eleventh Circuit has observed that "no circuit that has considered the issue after *Pioneer* has held that an attorney's failure to grasp the relevant procedural law is 'excusable neglect.'"³¹ The Eleventh Circuit concluded, as other circuits have done elsewhere, that "counsel's misunderstanding of the law cannot constitute excusable neglect."³²

Numerous courts have applied this same rule – that a mistake of law cannot, as a matter of law, constitute excusable neglect – to deny motions under similar circumstances. For example, in *In re Lykes Bros. Steamship Co., Inc.*, the movant filed a notice of appeal only 7 days after the deadline prescribed by Bankruptcy Rule 8002(a) expired.³³ The movant sought a retroactive extension pursuant to Bankruptcy Rule 8002(c)(2), asserting excusable neglect on the basis

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What Rules of Procedure Apply When Withdrawing the Reference of a Bankruptcy Core Matter?

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that the movant “inadvertently” calendared the deadline using Civil Rule 6, rather than Bankruptcy Rule 9006.²⁶ The bankruptcy court denied the motion, concluding that “ignorance of the procedural rules could not excuse the timely filing of the notice of appeal.”²⁷ On appeal, the district court affirmed, noting that “[e]xtensive decisional precedent – both in th[e] [Eleventh] circuit and elsewhere” – supported the conclusion that ignorance of the law cannot form a basis for excusable neglect.²⁸

As one court observed, to limit application of the Bankruptcy Rules to adversary proceedings heard in bankruptcy court—contrary to the express dictates of the Bankruptcy Rules—would cause these rights to “hinge upon whether the district court has withdrawn its reference to the bankruptcy court.”²⁹ As a result, to require litigants and courts to determine in each instance whether and to what extent the Bankruptcy Rules

apply to bankruptcy proceedings heard in district court would inject unwarranted uncertainty into bankruptcy litigation.³⁰

Because there are numerous distinctions between the Federal Civil Rules and Bankruptcy Rules that can seriously impact litigants’ substantive rights, a huge risk exists for the practitioner who does not know or cannot distinguish the different application of the Rules in a bankruptcy context, irrespective of whether the bankruptcy matter is pending in bankruptcy court or district court.

A good practitioner must get acquainted with and be aware of the differences with the applicable Rules of Court, particularly the different time limits for similar procedural matters under the Federal Civil Rules as opposed to the Bankruptcy Rules.

It is important to note that a practitioner’s application of the “incorrect rule” cannot and

will not constitute excusable neglect under the *Pioneer* standard.³¹ So, it is important to get it right, and not run any risks.

In conclusion, this article is meant to be a word of caution to the unwary practitioner when seeking to withdraw the reference of core matters from bankruptcy court to district court in an attempt to perhaps gain a more sympathetic *forum* for a client or to enforce a client’s absolute constitutional right to have a matter only decided in a trial by jury before an Article III court and life-long appointed federal judge – in such cases, however, beware, wake up, and smell the *Bankruptcy Rules* in a bankruptcy core matter to be prosecuted and tried in district court under its original bankruptcy jurisdiction. Or you may, sadly, end up calling your malpractice insurance carrier to cover a claim for damages from a very unhappy and disappointed client. ■

NOTES

¹ Core proceedings are those any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11. Section 157(b) of title 28 provides a non-exhaustive list of such core proceedings.

² 28 U.S.C. § 1334(b).

³ Some districts have an automatic referral to bankruptcy courts. See, e.g., S.D. Fla. L.R. 87.4 (automatically referring all bankruptcy cases and proceedings arising in or related to cases under the Bankruptcy Code to the bankruptcy judges for the Southern District of Florida and requiring all to be commenced in the U.S. Bankruptcy Court for the Southern District of Florida pursuant to its Local Bankruptcy Rules).

⁴ See 28 U.S.C. § 157(d). In addition, a district court may withdraw the reference from a bankruptcy court in order to conduct a trial by jury, which a bankruptcy judge may not conduct absent the parties’ consent. See 28 U.S.C. 157(d) and (e); Fed. R. Bankr. P. 7008 (“[i]n an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge”); *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015) (holding that bankruptcy courts have authority to adjudicate claims designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding as a constitutional matter under Article III of the U.S. Constitution, so long as the parties knowingly and voluntarily consent).

⁵ Fed. R. Bankr. P. 1001.

⁶ *In re Merritt Logan, Inc.*, 109 B.R. 140, 145 (Bankr. E.D. Penn. 1990).

⁷ *Id.* (quoting Advisory Committee Note to Rule 1001 (1987)).

⁸ *Merritt Logan*, 109 B.R. at 145.

⁹ *Id.* (citing Advisory Committee Note to Rule 9001 (1987)) (emphasis added).

¹⁰ Fed. R. Civ. P. 81(a)(2) (emphasis added).

¹¹ See Advisory Committee Note to Fed. R. Bankr. P. 1001 (1987) (stating that Rule 81 “provides that the civil rules do not apply to proceedings in bankruptcy, except as they may be made applicable by rules promulgated by the Supreme Court”).

¹² *VFB LLC v. Campbell Soup Co.*, 336 B.R. 81, 84 (D. Del. 2005) (confirming application of the Bankruptcy Rules to bankruptcy proceedings pending in district court); *Owens-Illinois Inc. v. Rapid Am. Corp. (In re Celotex Corp.)*, 124 F.3d 619, 624, 629-30 (4th Cir. 1997) (“this case is properly in federal district court on ‘related to’ jurisdiction under § 1334(b) . . . [and] the entire body of Bankruptcy Rules, therefore, applies to this action”) (emphasis added); *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1235-38 (3d Cir. 1994) (“the Bankruptcy Rules govern non-core, ‘related to’ proceedings before a district court”; concluding Bankruptcy Rule 7001(10) properly applied to determine whether case was an “adversary proceeding for purposes of removal statute”); *Diamond Mortgage Co. v. Sugar*, 913 F.2d 1233, 1240-43 (7th Cir. 1990) (Bankruptcy Rules “apply to all adversary proceedings, whether they transpire in bankruptcy court or in district court”) (emphasis added); *Lentz v. Trinchard*, 730 F. Supp. 2d 567, 577 n.33 (E.D. La. 2010) (“Because the Court has ‘related to’ bankruptcy jurisdiction pursuant to § 1334(b), the entire body of the Federal Rules of Bankruptcy Procedure, therefore, applies”); *McDow v. Mayton*, 379 B.R. 601, 603 (E.D. Va. 2007) (in district court after withdrawal of reference, explaining that the Bankruptcy Rules apply to bankruptcy proceeding); *In re Olsen Indus., Inc.*, No. 98-140, 2000 WL 376398, *11 (D. Del. Mar. 28, 2000) (“This case is properly in this [district] court pursuant to 28 U.S.C. § 1334(b), ‘related to’ jurisdiction . . . [and] [Bankruptcy Rule] 7056 supplies the applicable standard of review”); *In re Johnson*, No. 06-A-00712, 2006 WL 2136042, *2 (Bankr. N.D. Ill. June 20, 2006) (“Bankruptcy Rule 7013 exception applies where the action against the creditor is pending in bankruptcy court or the district court”); *In re Merritt*

Logan, 109 B.R. at 144-46 (finding that Bankruptcy Rule 7013, not Civil Rule 13, applied in jury trial conducted in district court after withdrawal of reference).

¹³ See Fed. R. Bankr. P. 9023 (“Rule 59 F.R.Civ.P. applies . . . [and] [a] motion for a new trial or to alter or amend a judgment shall be filed . . . no later than 14 days after entry of judgment”).

¹⁴ See Fed. R. Bankr. P. 9006(b)(2); *Campbell Soup*, 336 B.R. at 84-87.

¹⁵ Bankruptcy Rule 8001 provides that Part VIII of the Bankruptcy Rules “govern the procedure in a United States district court and a bankruptcy appellate panel on appeal from a judgment, order, or decree of a bankruptcy court.” Fed. R. Bankr. P. 8001(1)(a). However, “[a]n appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under” the Federal Rules of Appellate Procedure. See Fed. R. App. P. 6(a). In this regard, the Supreme Court knows when to treat differently a judgment entered by a bankruptcy court or a district court, and says so expressly when it draws that distinction. Compare Fed. R. Bankr. P. 8002(a) (providing 14 days to appeal a final judgment entered by a bankruptcy court) to Fed. R. App. P. 4(a) (providing 30 days to appeal a final judgment entered by a district court).

¹⁶ *Campbell Soup*, 336 B.R. at 84.

¹⁷ *Id.* at 84-87.

¹⁸ *Adv. Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 999 (11th Cir. 1997).

¹⁹ 507 U.S. 380 (1993).

²⁰ *In re Food Barn Stores, Inc.*, 214 B.R. 197, 200 (BAP 8th Cir. 1997).

²¹ *Provident Life & Acc. Ins. Co. v. Clarke*, No. 06CV792, 2008 WL 619289, *3 (E.D. Va. Mar. 4, Mar. 4, 2008) aff’d, 284 F. Appx. 54 (4th Cir. 2008); *In re Gehl*, 324 B.R. 756, 759 (Bankr. N.D. Iowa 2005) (“the burden of establishing excusable neglect is quite onerous”).

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Dealing with a Difficult Party in a Contested Bankruptcy Matter: Using Your Full Arsenal (and Getting Paid for It)

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show cause hearing, they were apprehended by the U.S. Marshal's Office and brought into the courtroom in shackles. They each spent ten days in custody before being released. Since that time the Debtor has levied on nine properties owned by the parties, which have been sold at an asset sale conducted by the U.S. Marshal's Office. All of the attorney's fees incurred in dealing with the management company were paid out of the proceeds of sale.

II. The Discharge Injunction Violations

A motion for contempt is a powerful tool to combat creditor interference. Contempt is not limited to violations of § 362. Once a discharge is entered, the stay terminates and § 524 provides the debtor with a discharge injunction. A bankruptcy court may enforce a discharge injunction by way of its statutory contempt powers under § 105(a) of the Bankruptcy Code.⁵ Section 362(h) of the Bankruptcy Code provides "for recovery of actual damages, attorney's fees, costs, and punitive damages, where appropriate, for a willful violation of the automatic stay."⁶ The test of § 362(h) also applies in "determining willfulness for violations of the discharge injunction of Section 524."⁷

In the Broward case of *In re Lopez*,⁸ Liberty Mutual Insurance Company levied on the furniture and furnishings of a Debtor after she had received a discharge. The Company received notice of the bankruptcy and appeared by counsel at the 341 meeting. It also knew that the Debtor had a special needs child. At trial on the issue of liability, the Debtor uncovered that Liberty had incurred a large expense in conducting a levy on household items. As a result, the court not only found a violation of the discharge injunction, but also that, "[t]he levy and execution was indeed planned in a fashion similar to a consolidated military operation". The Court specifically concluded that "[i]t is unlikely that Liberty would spend hundreds, if not thousands, of dollars to arrange and carry out the Execution simply to obtain custody of used furniture and clothing. The Court thus finds that Liberty executed the Break Order with the specific intent to impose as much psychological damage as possible".⁹ The matter was settled after two mediations for \$275,000.

III. Punitive Damages

The threat of punitive damages can be effective in deterring an overly zealous creditor. Some courts have interpreted *Jove Eng'g, Inc. v. IRS*,¹⁰ as holding that § 105 does not authorize a

"The threat of a contempt award is not always sufficient to deter the wrongful actions of a determined creditor. In certain cases injunctive relief may be necessary."

bankruptcy court to award punitive damages.¹¹ However, most courts now limit the holding in *Jove* to cases involving a governmental entity.¹² The threat or imposition of punitive damages is a powerful and persuasive tool as exemplified in the *Tree Garden* and *Lopez* cases.

IV. Injunctive Relief by way of Adversary Complaint

The threat of a contempt award is not always sufficient to deter the wrongful actions of a determined creditor. In certain cases injunctive relief may be necessary. In the case of *In re Griffith*,¹³ a former service provider and creditor of the discharged debtor threatened to go to the annual corporate event of the debtor's largest customer and disparage the new business, claiming that the debtor's new company was a continuation of her former business (also a debtor in a Chapter 7). The threatened interference would have harmed the debtor's business reputation and likely cost the debtor the loss of her biggest customer and potentially her entire business. The debtor sought emergency injunctive relief from the court and was able to establish a sufficient nexus between the threatened action against the debtor's new

company and the discharged debtor in order to obtain an injunction that prevented the creditor from perpetrating the threatened actions and attending the corporate event.

Filing an adversary proceeding complaint is generally necessary to obtain injunctive relief.¹⁴ Filing an adversary proceeding is a time-consuming delay when time is of the essence. One strategy a debtor can employ is to file a motion for contempt in the main case, an adversary complaint and an emergency motion for injunctive relief in the adversary proceeding all at one time. Then the debtor can serve all of these pleadings on the offending party at once. It is much easier to obtain an expedited hearing in an existing case where the parties involved are represented.

V. Last – and to be used the Least – Federal Rule 11 and Bankruptcy Rule 9011

Federal Rule 11 and Bankruptcy Rule 9011 provide one of the strongest tools for dealing with inappropriate conduct. However, the use of Rule 11 is rarely justified in any litigation and should be used cautiously and sparingly, particularly in bankruptcy matters, where the amicable nature of bankruptcy practice is strongly encouraged.

Sanctions under Rule 11 are designed to discourage dilatory or abusive tactics, thus streamlining litigation by decreasing frivolous claims and defenses.¹⁵ Rule 11 sanctions are given for deterrence, compensation, and punishment; they are mandatory when a violation is found.¹⁶ Three types of conduct warrant Rule 11 sanctions: "(1) when a party filed a pleading that has no reasonable factual basis; (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; and (3) when the party files a pleading in bad faith for an improper purpose."¹⁷

The Rule requires the moving party to serve the motion for sanctions on opposing counsel at least twenty-one days prior to filing it with the court. "This process provides a 'safe harbor' in which the offending party can avoid sanctions by withdrawing or correcting the

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A Recent Primer on the Law of Contempt

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Nevertheless, the debtors pursued the adversary proceeding and sought damages for emotional distress and for sanctions.

After trial, the bankruptcy court ruled that Green Tree had violated the discharge injunction, and awarded the debtors compensatory sanctions for their emotional distress. It also entered a non-compensatory award of \$50,000 that it labeled “coercive sanctions,” to encourage Green Tree to correct any defects in its automated computer systems that could cause another such violation. Green Tree appealed to the district court, which affirmed the bankruptcy court’s judgment, and appealed the affirmance to the Eleventh Circuit.

Law of Contempt

The Eleventh Circuit’s analysis of the law of civil versus criminal contempt is notable. Sanctions in civil contempt proceedings may be employed for either or both of two purposes: (1) to coerce compliance with an order; and (2) to compensate for losses sustained by the other party. With respect to the use of coercive sanctions for civil contempt, a contemnor holds the keys to his prison cell because he is the one who can purge himself of the contempt by simply complying with the order. In regards to criminal contempt, punitive sanctions take the form of a fixed fine and are geared toward punishment. In this instance, due process requires more stringent protections, such as a higher level of proof and possibly the appointment of criminal counsel.

Interestingly, the Eleventh Circuit did not suggest that bankruptcy courts cannot entertain criminal contempt proceedings. While the court mentioned that “[t]here is no indication in the record that the bankruptcy court employed the procedural protections owed to an alleged criminal contemnor,” the Eleventh Circuit failed to address whether a bankruptcy court can impose criminal contempt sanctions in the first place.² The court vacated the bankruptcy court’s award of what it concluded were punitive sanctions. In so doing, the court held that the record failed to reflect that the bankruptcy court “employed the procedural protections owed to an alleged criminal contemnor,”³ and further found that since the bankruptcy court did not characterize the sanctions as punitive, it failed to apply the proper supporting standard and analysis. That applicable standard is having a “reckless or callous disregard for the law or rights

of others.”⁴

In remanding with instructions to apply the proper standard should the bankruptcy court decide to impose punitive sanctions, the Eleventh Circuit tantalizingly dangled, but did not answer the question of whether a

“The court held that the filing of a proof of claim for a debt that had been discharged in a previous bankruptcy case was a violation of the discharge injunction, subjecting the creditor to contempt sanctions,”

bankruptcy court has the authority to impose punitive sanctions for contempt.

While the Eleventh Circuit has not ruled directly on this issue, in *Jove Engineering Inc. v. IRS*,⁵ it made clear that under the § 105(a) contempt powers, courts may impose punitive sanctions. Following the Eleventh Circuit’s ruling in *Jove*, several bankruptcy courts in Florida have held that they have the power to impose punitive sanctions in appropriate circumstances.

In *In re Dynamic Tours and Transportation Inc.*,⁶ Judge Briskman awarded damages to the debtor which included \$50,000 in punitive damages. Subsequently, Judge Briskman awarded punitive sanctions of \$25,000 in *In re Diaz*,⁷ \$20,000 in *In re Wassem*,⁸ and \$12,000 in *In re Thompson*.⁹

In *In re Nibbelink*,¹⁰ Judge Funk receded from his prior ruling in *In re Riser*¹¹ where he previously held that the bankruptcy court lacked the authority to impose punitive damages under § 105 for a violation of the discharge injunction. Judge Funk held in *Nibbelink* that the bankruptcy court does have such authority and accordingly imposed an award of punitive sanctions in the amount of \$15,000 based on the party’s contemptuous violation of the discharge injunction.

Finally, in *In re WVF Acquisition, LLC*,¹² Judge Kimball, following an in-depth analysis of the case law, expressed concern over whether he had constitutional authority to address criminal contempt absent statutory authority. He then held that “§ 105 constitutes express authority to award punitive damages for contempt to the extent necessary or appropriate to carry out the provisions of the Bankruptcy Code. Section 105 creates a statutory contempt power distinct from the court’s inherent contempt powers.”¹³

While there are reported cases from bankruptcy courts outside of the Eleventh Circuit holding that bankruptcy courts have the power to punish for criminal contempt, the Courts of Appeals that have addressed the issue have gone both ways.¹⁴

Although not directly addressed by the Eleventh Circuit, the implication from the remand directions in *McLean* is that bankruptcy courts may impose punitive sanctions, as they have been doing. However, in light of the weight of authority holding that they do not have such power, litigants and courts should proceed with caution.¹⁵

Conclusion

The Eleventh Circuit has made clear in *McLean* that creditors need to pay attention to the proofs of claim that they file in bankruptcy cases. They may now face contempt sanctions initiated under a streamlined motion practice under Bankruptcy Rule 9014 and, if their conduct is sufficiently egregious, can be subjected to punitive sanctions. The unsettled issue is how and when a bankruptcy court may impose punitive sanctions, which the Eleventh Circuit rightfully characterizes as criminal in nature. ■

NOTES

A similar article first appeared in the ABI Journal.

¹ 794 F.3d 1313 (11th Cir. 2015).

² *McLean*, 794 F.3d at 1324.

³ *Id.*

⁴ *Id.* at 1325.

⁵ 92 F.3d 1539 (11th Cir 1996).

⁶ 359 B.R. 336 (Bankr. M.D. Fla. 2006).

⁷ 452 B.R. 257 (Bankr. M.D. Fla. 2009).

⁸ 456 B.R. 566 (Bankr. M.D. Fla. 2009).

⁹ 456 B.R. 121 (Bankr. M.D. Fla. 2010).

¹⁰ 403 B.R. 113 (Bankr. M.D. Fla. 2009).

¹¹ 298 B.R. 469 (Bankr. M.D. Fla. 2003).

¹² 420 B.R. 902 (Bankr. S.D. Fla. 2009).

¹³ *Id.* at 914 (quotations and citation omitted).

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Dealing with a Difficult Party in a Contested Bankruptcy Matter: Using Your Full Arsenal (and Getting Paid for It)

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challenged document or position after receiving notice of the alleged violation.”¹⁸ “The purpose of Rule 11(c)(2)’s safe harbor provision is to allow an attorney who violates Rule 11 to correct the alleged violation within twenty-one days without being subject to sanctions.”¹⁹ “In that way, the ‘safe harbor’ provision works in conjunction with the duty of candor, giving the proponent of a questionable claim an opportunity to assess the claim’s validity without immediate repercussion.”²⁰ The Rule requires service of the proposed motion 21 days before filing but a letter detailing the claimed violations and the intent to seek Rule 11 sanctions has been held to be sufficient.²¹ An imposition of sanctions by party

motion without adhering to this twenty-one day safe harbor provision is an abuse of discretion.²²

Note that the Court has inherent power to impose sanctions for wrongful conduct.²³ This form of deterrence may be available when proper notice under Rule 11 has not been given. Also be aware that an improper Rule 11 motion can provide the basis for Rule 11 sanctions. The 21 day safe harbor notice is not required.

VI. Conclusion

Do not capitulate just because the opposition is aggressive. It is often difficult to oppose a committed creditor if the party is well-funded and represented by competent

counsel. A debtor is generally not in a financial position to take on an extended fight. However, do not give in without exploring all possible options. A finding of contempt opens the door to the recovery of attorney’s fees and costs. Also, explore whether there is an underlying contract or statute that might provide for the recovery of attorney’s fees. Is the party taking such an untenable position that Federal Rule 11 and Bankruptcy Rule 9011 are appropriate? Is there sufficient evidentiary support for your position? If so, can the client afford the fight? It is important to know the available tools before you and your client decide how to proceed. ■

NOTES

¹ Case No. 13-16044-BKC-JKO.

² 182 B.R. 211 (Bankr. N.D. Ill. 1995).

³ *Id.* at 221.

⁴ See Case No. 13-16044-BKC-JKO at ECF No. 245 and 281.

⁵ See *In re Hardy*, 97 F.3d 1384, 1389 (11th Cir. 1996); see also *In re Manzanares*, 345 B.R. 773, 790 (Bankr. S.D. Fla. 2006).

⁶ See *In re Dynamic Tours*, 359 B.R. 336, 342 (Bankr. M.D. Fla. 2006).

⁷ *Id.* (citing *Hardy*, 97 F.3d at 1390).

⁸ Case No. 08-25512-BKC-RBR.

⁹ See *id.* at ECF No. 56.

¹⁰ 92 F.3d 1539 (11th Cir. 1996).

¹¹ See e.g., *Kapila v. Clark* (*In re Trafford Distrib. Ctr., Inc.*), 414

B.R. 849, 857 (Bankr. S.D. Fla. 2009); *Henkel v. Lickman* (*In re Lickman*), 288 B.R. 291, 293 (Bankr. M.D. Fla. 2003).

¹² See *In re WVF Acquisition, LLC*, 420 B.R. 902 (Bankr. S.D. Fla. 2009) (disagreeing with both *Trafford* and *Lickman*).

¹³ Case No. 10-48915-BKC-RBR.

¹⁴ See Fed. R. Bankr. P. 7001(7); but cf. *In re Briggs*, 143 B.R. 438 (E.D. Mich. 1992) (stating that “[w]hen the parties try an issue without objection on procedural grounds, courts generally disregard the irregularity”).

¹⁵ See *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *In re Miller*, 414 Fed. Appx. 214 (11th Cir. 2011) (citing

Gwynn v. Walker (*In re Walker*), 532 F.3d 1304, 1308 (11th Cir. 2008) (per curiam)).

¹⁹ *Peer v. Lewis*, 606 F.3d 1306, 1315 (11th Cir. 2010) (citing Fed. R. Civ. P. 11, advisory committee note of 1993).

²⁰ See *Ridder v. City of Springfield*, 109 F.3d 288, 294 (6th Cir. 1997).

²¹ See *In re Raymond Prof. Gp., Inc.*, 420 B.R. 448 (N.D. Ill. 2009).

²² *Id.*

²³ See *Chambers v. Nasco*, 501 U.S. 32 (1991).

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¹⁴ See *Knupfer v. Lindblade* (*In re Dyer*), 322 F.3d 1178 (9th Cir. 2003) (holding that punitive sanctions are not available under § 105(a)); *Brown v. Ramsay* (*In re Ragar*), 3 F.3d 1174 (8th Cir. 1993) (holding that § 105(a) authorized the imposition of criminal sanctions by the bankruptcy court because proposed findings of fact and conclusions of law are reviewable *de novo* by the district court under Bankruptcy Rule 9033); *Griffith v. Oles* (*In re Hipp*), 895 F.2d 1503 (5th Cir. 1990) (holding that a criminal contempt proceeding must be a separate proceeding initiated in the district court and prosecuted by an independent prosecutor); see also *Bessette v. Avco Fin. Servs.* 230 F.3d 439, 445 (1st Cir. 2000) (suggesting in dicta that “bankruptcy courts across the country have appropriately used their statutory contempt power to

order monetary relief in the form of actual damages, attorney fees and punitive damages, when creditors have engaged in conduct which violates § 524”).

¹⁵ At the minimum, they must follow the guidance in *McLean*, both substantively and procedurally. Any order to show cause should clearly reflect that the court will consider criminal contempt sanctions and identify supporting allegations. In its findings, the court must clearly apply the proper standards for criminal contempt and find such facts beyond a reasonable doubt. Finally, the court may provide in the order that, should an appellate court determine that the bankruptcy judge lacks such authority, the order will constitute proposed findings of fact and conclusions of law subject to *de novo* review by the district court.



Worth the Risk? Eleventh Circuit Holds Petitioning Creditors Liable for Broad Categories of Fees if Involuntary Petition is Dismissed¹

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debtor incurs pursuing bad-faith claims under § 303(i)(2).²⁷ And, the court of appeals ruled that the bankruptcy court properly held Lyon liable for filing the involuntary petition even though it was not listed as a petitioning creditor, explaining that Lyon's role as a "de facto" petitioning creditor was sufficient to hold Lyon liable under § 303(i).²⁸ That ruling closes what could have been a tempting loophole for creditors looking for a way to push a debtor into involuntary bankruptcy while avoiding the serious consequences—and the significant protections afforded to alleged debtors—under § 303(i).

U.S. Bank filed a petition for a writ of certiorari in the Supreme Court seeking review of the Eleventh Circuit's *Rosenberg* opinion. U.S. Bank argued that the Supreme Court should examine the Eleventh Circuit's ruling on § 303(i) in light of the Supreme Court's ruling in *Baker Botts* and the conflict with the Ninth Circuit's holding in *Higgins*. The Supreme Court denied certiorari.²⁹

Conclusion

Petitioning creditors must consider the potentially expensive downside to filing an involuntary bankruptcy which lacks the proper statutory footing. Dismissal of an involuntary

bankruptcy opens the door for an alleged debtor to recover legal fees and costs from the petitioning creditor(s), not to mention punitive damages. Creditors' counsel should take care to understand the requirements and risks under § 303 and advise their clients accordingly. ■

NOTES

¹ A similar article appeared first in the April 2016 ABI Journal.

² 11 U.S.C. § 303(i).

³ *Id.*

⁴ 779 F.3d 1254 (11th Cir. 2015) *cert. denied sub nom. U.S. Bank, N.A. v. Rosenberg*, 136 S. Ct. 805 (2016).

⁵ *Id.* at 1265 (noting disagreement with *Higgins v. Vortex Fishing Systems, Inc.*, 379 F.3d 701 (9th Cir. 2004) on whether Fed. R. App. P. 38 is "the exclusive vehicle for awarding attorney's fees incurred to defend an appeal from the dismissal of an involuntary bankruptcy petition.")

⁶ See *Adell v. John Richards Homes Bldg. Co., LLC (In re John Richards Homes Bldg. Co.)*, 552 Fed. Appx. 401, 411 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 2136 (2014).

⁷ *Rosenberg v. DVI Receivables XIV, LLC (In re Rosenberg)*, 2012 WL 3990725, at *8 (Bankr. S.D. Fla. Sept. 11, 2012) *aff'd sub nom. DVI Receivables XIV, LLC v. Rosenberg*, 500 B.R. 174 (S.D. Fla. 2013) *aff'd in part, vacated in part, remanded sub nom. In re Rosenberg*, 779 F.3d 1254 (11th Cir. 2015).

⁸ *Rosenberg*, 779 F.3d at 1261-62.

⁹ A thorough explanation of the facts underlying the filing and dismissal of the involuntary petition is available in the Eleventh Circuit's opinion. *Rosenberg*, 779 F.3d at 1256-64.

¹⁰ To initiate an involuntary bankruptcy, a petitioning creditor must hold a non-contingent claim, not subject

to bona fide dispute as to liability or amount, and in an amount over \$15,325. If a debtor has 12 or more creditors, there must be three petitioning creditors meeting the above-criteria. If there are less than 12 creditors, only a single petitioning creditor with a non-contingent and undisputed claim is necessary. See 11 U.S.C. § 303.

¹¹ *No. 10-3812-AJC*, 2012 WL 3990725, at *8 (Bankr. S.D. Fla. Sept. 11, 2012).

¹² *Rosenberg*, 779 F.3d at 1261-62.

¹³ *Rosenberg*, 779 F.3d at 1262-63.

¹⁴ *Id.* at 1264.

¹⁵ *Id.* at 1265.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 379 F.3d 701, 709 (9th Cir. 2004).

¹⁹ 608 F.3d 456, 463-64 (9th Cir. 2010).

²⁰ *Id.* at 1266.

²¹ *Id.*

²² 496 U.S. 384, 409 (1990).

²³ 779 F.3d at 1266.

²⁴ 135 S. Ct. 2158 (2015).

²⁵ *Id.* at 2165-66 ("Had Congress wished to shift the burdens of fee-defense litigation under § 330(a)(1) in a similar manner [to a fee-shifting statute], it easily could have done so.").

²⁶ *Id.* at 2165.

²⁷ *Rosenberg*, 779 F.3d at 1267; see also *In re Landmark Distribrs., Inc.*, 195 B.R. 837, 845 (Bankr. D.N.J. 1996) (same).

²⁸ *Id.* at 1269.

²⁹ *U.S. Bank, N.A. v. Rosenberg*, 136 S. Ct. 805 (2016).

What Rules of Procedure Apply When Withdrawing the Reference of a Bankruptcy Core Matter?

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²² *Adv. Estimating Sys., Inc.*, 130 F.3d at 998 (citing *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111 (11th Cir. 1993)).

²³ *Id.* (collecting case law from the Ninth, Seventh, Second and Fifth Circuit Courts of Appeals).

²⁴ *Id.* at 999.

²⁵ *In re Lykes Bros. Steamship Co., Inc.*, No. 09-cv-1044, 2009 WL 3157630 *1 (M.D. Fla. Sept. 28, 2009).

²⁶ *Id.* at *2.

²⁷ *Id.*

²⁸ *Id.* (collecting case law).

²⁹ *Diamond Mortg.*, 913 F.2d at 1242 (if the nationwide service available under the Bankruptcy Rules did not apply in district court, a plaintiff in bankruptcy court would have an "anomalous" and "unjustifiable" advantage *vis-à-vis* a plaintiff in an identical proceeding in district court).

³⁰ See *Windsor Commc'n Group v. Grant*, 75 B.R. 713, 732 (E.D. Pa. 1985) (adopting report and recommendation ("the establishment of a dual procedural system [would]

undoubtedly [be] in conflict with the intent of Congress to concentrate jurisdiction over all bankruptcy cases and all proceedings in a single court, as evidenced by the grant of pervasive [bankruptcy] jurisdiction to the district courts").

³¹ See, e.g., *In re Williams*, 216 F.3d 1295, 1298 (11th Cir. 2000) (rejecting *pro se* debtor's excusable neglect argument which relied, in part, upon Civil Rule 6, and noting that the Bankruptcy Rules, not Civil Rules, governed).



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