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**CROSS-COUNTRY REVIEW OF BANKRUPTCY SANCTIONS
CASES**

By

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Sanctions: Cross-Country Review of Sanctions Cases

I. Authority to Sanction

A bankruptcy court's power to sanction comes from three general sources: the inherent authority of federal courts, statutory authority granted by the Bankruptcy Code and Title 28 of the United States Code, and procedural authority granted by the Bankruptcy Rules.

a. Inherent Authority

All federal courts, including bankruptcy courts, have inherent authority to sanction the attorneys and parties that appear before it.¹ “These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”²

Before a court may flex its inherent authority, certain prerequisites must be fulfilled: (i) a court must make a finding of bad faith;³ and (ii) “[t]he court must afford the sanctioned party due process both in determining that the requisite bad faith exists and in assessing fees.”⁴

The requirement that there must be a finding of bad faith is met if there is sufficient evidence in the record to support that finding. In *In re Cochener*, the District Court for the Southern District of Texas affirmed in part and reversed in part a bankruptcy court's award of sanctions against the debtor's counsel.⁵ Cochener filed a Chapter 7 bankruptcy petition reflecting assets of \$403 and liabilities of \$111,000. The debtor subsequently hired counsel with more bankruptcy experience, who determined that bankruptcy would not achieve the debtor's objectives. David Barry, the debtor's bankruptcy attorney, filed a motion to dismiss on the grounds that, because the debtor's former spouse was the primary creditor, no creditor would suffer any legal prejudice by the dismissal and that the “interests of the creditors and the Debtor would be better served by the dismissal of [the] bankruptcy proceeding rather than its continuation and adjudication.”⁶

In several letters, Barry notified the trustee that the debtor would not participate in any creditors' meetings, and objected to certain discovery document requests pursuant to a section 2004 examination. The debtor never produced any documents, and failed to appear at any hearings.

¹ *In re Yorkshire, LLC*, 2008 WL 3306680, at *3 (5th Cir. Aug. 8, 2008) (“It is well-settled that a federal court, acting under its inherent authority, may impose sanctions against litigants or lawyers appearing before the court so long as the court makes a specific finding that they engaged in bad faith conduct.”); *In re Walker*, 532 F.3d 1304, 1309 (11th Cir. 2008), petition for cert. filed, (U.S. Nov. 26, 2008) (No. 08-860); see *Elliott v. Tilton*, 64 F.3d 213, 217 (5th Cir.1995) (citing *Resolution Trust Corp. v. Bright*, 6 F.3d 336, 340 (5th Cir.1993); *In re Thalheim*, 853 F.2d 383, 389 (5th Cir.1988)); see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765–66, (1980).

² *Hale v. U.S. Trustee*, 509 F.3d 1139, 1148 (9th Cir. 2007).

³ *In re Yorkshire, LLC*, 2008 WL 3306680, at *3 (5th Cir. Aug. 8, 2008); *In re Walker*, 532 F.3d 1304, 1309 (11th Cir. 2008), petition for cert. filed, (U.S. Nov. 26, 2008) (No. 08-860); but, c.f. *In re Cochener*, 2008 WL 4681579 (5th Cir. Oct. 23, 2008).

⁴ *In re Walker*, 532 F.3d at 1309 (11th Cir. 2008).

⁵ *In re Cochener*, 382 B.R. 311 (S.D. Tex. 2007).

⁶ *Id.* at 315–16.

Barry appeared only to inform the court that he had lost contact with the debtor, and filed a motion to withdraw. The trustee later filed a motion for sanctions against Barry under FED. R. BANKR. P. 9011 and 11 U.S.C. § 105. Denying Rule 9011 sanctions but approving sections 105 and 1927 sanctions, the bankruptcy court sanctioned Barry \$25,121.89 for attorney's fees and costs incurred by the trustee in defending the motion to dismiss and prosecuting the sanctions motion.⁷

On appeal, the District Court for the Southern District of Texas reiterated that there must be a finding of bad faith to impose sanctions under section 105 or a court's inherent authority.⁸ Furthermore, in awarding sanctions, a court should "make a detailed explanation for its legal reasons, and that the failure to lay out the grounds for . . . serious sanctions may itself be reversible error."⁹ Because the bankruptcy court's portion of the award relating to false statements made in the motion to dismiss were not supported by the record, that portion of the award was vacated.¹⁰

Nevertheless, the District Court found that Barry acted in bad faith in failing to cooperate with the trustee by refusing to appear and produce documents at the creditors' meeting.¹¹ Therefore, the court upheld the \$2,500 portion of the award for unnecessary causing delay and expense, but reversed the remaining \$22,621.89 award.¹²

The Fifth Circuit, however, disagreed with the District Court.¹³ The Fifth Circuit held that the bankruptcy court's findings were supported by the evidence, whether measured by a preponderance of the evidence or a clear and convincing standard.¹⁴ Therefore, the finding of sanctions against the Barry, the debtor's attorney, was appropriate.¹⁵ Based on this holding, a bankruptcy court in the Fifth Circuit need not expressly lay out the grounds for sanctions if sufficient evidence in the record supports a finding of bad faith.

b. Statutory Authority

Bankruptcy courts have broad equitable powers to sanction participants consistent with Congress' mandate. This general power is expressed in Bankruptcy Code Section 105(a), which states:

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

⁷ *Id.* at 316–21.

⁸ *Id.* at 330.

⁹ *Id.* at 339.

¹⁰ *Id.* at 339–40.

¹¹ *Id.* at 344.

¹² *Id.* at 354.

¹³ *In re Cochener*, 2008 WL 4681579 (5th Cir. Oct. 23, 2008).

¹⁴ *Id.* at *1.

¹⁵ *Id.*

determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.¹⁶

c. Rule-Based Authority

Bankruptcy Rules specifically address the sanction power, but of course the most important is contained in Rule 9011(c). That rule's sanction provision states,

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated.

(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction; limitations.

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

¹⁶ 11 U.S.C. § 105(a).

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).¹⁷

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.¹⁸

Rule 9011(c) makes violation of subsection (b) sanctionable. Subsection (b) reads,

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.¹⁹

Bankruptcy Rule 9011 is substantially identical to Federal Rule of Civil Procedure 11. Thus, many courts turn to jurisprudence interpreting Rule 11 when deciding cases under Rule 9011.

¹⁷ *In re Feige*, 252 Fed. Appx. 814, 815 (9th Cir. 2007) (“Monetary sanctions cannot be awarded based solely on a finding that a party’s legal arguments were not warranted by existing law.”) (citing FED. R. BANKR. P. 9011(c)(2)(A)).

¹⁸ BANKR. R. 9011(c).

¹⁹ BANKR. R. 9011(b).

II. Sanctions Claims

a. Bad Faith

All three enforcement mechanisms are available to bankruptcy courts to admonish bad faith: (1) inherent authority; (2) statutory authority under section 105 to prevent “an abuse of process;” and (3) rule-based authority under Rule 9011(b) for submissions to the court presented for an improper purpose.

i. *Definitions*

“Bad faith” is a formless and elusive concept, and its definition varies by jurisdiction. It has been defined as “knowingly or recklessly raising a frivolous argument,”²⁰ making a claim for an improper purpose,²¹ “delaying or disrupting the litigation,”²² “hampering enforcement of a court order,”²³ improper motive,²⁴ giving “no meaningful thought” to the purposes of bankruptcy,²⁵ and more.

The Fifth Circuit affirmed an award of sanctions where the bankruptcy court had found that bankruptcy petitions had been filed “with a bad motive and with no meaningful thought being given to the actual purposes of chapter 11 bankruptcy.”²⁶ In *In re Yorkshire*, Tracy Knight served as president and manager of Yorkshire, LLC. After a salary dispute led to a state lawsuit filed by Knight against Yorkshire, its members, managers, and affiliated entities, Knight and his attorney filed bankruptcy petitions on behalf of Yorkshire.²⁷ The bankruptcy court found that the petitions were prepared in secret, that neither Knight nor the attorney consulted or informed any other owner or officer of the petitions, and that the attorney conducted little diligence on Yorkshire’s financial status, and no diligence on its ownership and management.²⁸ The bankruptcy court concluded that Knight had filed the bankruptcy petitions with the motive of inflicting injury on the owners of the LLC and its affiliates.²⁹ The sanctions award included \$60,000 attorney’s fees, and an additional \$50,000 against Knight and \$40,000 against the attorney.³⁰ Knight and his attorney appealed, citing various arguments why one or the other, or neither, should bear the burden of the sanctions. The Fifth Circuit agreed with the bankruptcy court’s conclusions and affirmed the award, noting that despite the appellants’ arguments, they

²⁰ *In re Walker*, 532 F.3d at 1309.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *In re Yorkshire, LLC*, 2008 WL 3306680, at *2.

²⁵ *Id.*

²⁶ *Id.* at *4.

²⁷ *Id.* at *1. Although not fully discussed in the opinion, the *Yorkshire* case also illustrates specific ethical issues for attorneys representing corporate debtors. The Fifth Circuit noted that the attorney who filed Yorkshire’s bankruptcy petitions also represented Knight in the proceedings against Yorkshire, thus putting him in the position of suing his own client. *Id.* at *2.

²⁸ *Id.*

²⁹ *Id.* at *2.

³⁰ *Id.* at *4.

never asserted that the bankruptcy petitions were filed in the best interests of the debtor-company.³¹

Although not reaching the level of “no meaningful thought,” carelessness and inaccurate accounting can at least open the door to an inquiry into bad faith conduct. In *In re Parsley*, the Southern District of Texas Bankruptcy Court issued an “Order Requiring Countrywide Home Loans, Inc. to Appear and Show Cause Why It Should Not Be Sanctioned for Filing a Motion for Relief from Stay Containing Inaccurate Debt Figures and Inaccurate Allegations Concerning Payments Received From the Debtor” (“Order to Show Cause”) in February 2007.³²

In his Order to Show Cause, the judge referenced (i) the inaccurate application of the first post-petition payment to pre-petition arrears rather than the payment then due, and (ii) a payment not indicated on the payment history but appearing on Countrywide’s own transaction history. The court indicated concern that the debtor incurred unnecessary legal fees and expenses because of the motion to lift stay that was withdrawn “at the eleventh hour because it contained factual inaccuracies that Countrywide and its counsel should have discovered prior to the filing of the Motion if proper attention [had] been given to the Debtor’s mortgage payment history and appropriate procedures.”³³

Countrywide detailed the factual background regarding recording payments and indicated that a payment on its transaction history was not recorded on the manually kept bankruptcy ledger which resulted in the error. In addition, a payment was received after the analysis of whether payments were made timely.³⁴

In its brief following the hearing, Countrywide indicated that upon discovery of the inaccurate payment history, it withdrew the motion. Further, Countrywide compensated the debtor \$250 for attorneys fees incurred in responding to the motion to lift stay. Because no order existed which Countrywide could violate, Countrywide asserted it could not be sanctioned. Because the debtor had not moved for relief against Countrywide, there was no issue of compensating the debtor. Thus, according to Countrywide, the Order to Show Cause appears as an attempt to punish Countrywide and vindicate the court’s authority which is in the nature of a criminal contempt proceeding and outside the bankruptcy court’s jurisdiction.³⁵

The Order to Show Cause prompted extensive discovery propounded by the U.S. Trustee covering a wide range of topics not identified in the original Order to Show Cause resulting in over \$200,000 in attorneys’ fees borne by Countrywide over approximately one year.³⁶ In a thirty-nine page opinion, the court ultimately found that although the servicer’s conduct was not appropriate, it was not, except for the conduct of its attorney, in bad faith. No sanctions were

³¹ *Id.* at *3.

³² *In re Parsley*, Case No. 05-90374 Order to Show Cause [Docket No. 29] (Bankr. S.D. Tex. 2005).

³³ *Id.* at 1.

³⁴ *In re Parsley*, Case No. 05-90374, Countrywide Home Loans, Inc.’s Post-Hearing Brief Regarding the Court’s Order to Show Cause, ¶¶ 6–21 [Docket No. 231].

³⁵ *In re Parsley*, Case No. 05-90374, Countrywide Home Loans, Inc.’s Post-Hearing Brief Regarding the Court’s Order to Show Cause [Docket No. 231].

³⁶ *Id.* at ¶¶ 22–28.

issued; however, the court held the U.S. Trustee was well within its authority to investigate the loan servicer and its local and national counsel.³⁷

In the Seventh Circuit, Judge Posner attempted to shed some light on the definition of bad faith in his opinion in *Maxwell v. KPMG*.³⁸ In that case, the trustee sued KPMG for breach of duty of care related to the auditing services it provided the debtor during the debtor's acquisition of U.S. Web, an internet consulting company, just prior to the "dot.com" bust.³⁹ The trustee's allegation was that KPMG's negligent audit overstated the debtor's earnings, enticing U.S. Web into being acquired by the debtor.⁴⁰ The subsequent collapse in the internet market dragged the debtor into bankruptcy.⁴¹

Judge Posner quickly poked several holes in the allegations: (1) KPMG's audit, even if negligent, was not the cause of the merger; (2) the bankruptcy was not caused by the merger; rather, it was caused by the collapse in the internet market; and (3) if the suit were successful, the bulk of the surplus after paying creditors (57% of about \$500 million), would go to former shareholders of U.S. Web, the purported cause of the bankruptcy.⁴² "U.S. Web cannot be at once the cause of the bankruptcy and its principal beneficiary."⁴³

Judge Posner admonished the trustee for bringing a \$626 million suit against the debtor's former auditors by stating:

The filing of lawsuits by a going concern is properly inhibited by concern for future relations with suppliers, customers, creditors, and other persons with whom the firm deals (including government) and by the cost of litigation. The trustee of a defunct enterprise does not have the same inhibitions. A related point is that while the management of a going concern has many other duties besides bringing lawsuits, the trustee of a defunct business has little to do besides filing claims that if resisted he may decide to sue to enforce. Judges must therefore be vigilant in policing the litigation judgment exercised by trustees in bankruptcy, and in an appropriate case must give consideration to imposing sanctions for the filing of a frivolous suit.⁴⁴

According to Posner, "frivolousness must depend not on the net expected value of a suit in relation to the cost of suing, but on the probability of the suit's succeeding. If that probability is very low, the suit is frivolous; really, that is all that most courts, including ours, mean by the

³⁷ *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008).

³⁸ *Maxwell v. KPMG LLP*, 520 F.3d 713 (7th Cir. 2008).

³⁹ *Id.* at 714–15.

⁴⁰ *Id.* at 715.

⁴¹ *Id.*

⁴² *Id.* at 715–16.

⁴³ *Id.* at 716.

⁴⁴ *Id.* at 718.

word.”⁴⁵ *Maxwell* should serve as a warning to trustees that they also may be subject to bad faith sanctions, and, indeed, may be under greater scrutiny by the courts.

The Eleventh Circuit mentioned that frivolous claims would be subject to sanctions as bad faith conduct. In *In re Walker*, the court stated that “[a] finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order.”⁴⁶ In *Walker*, Gwynn, counsel for the creditor, filed a motion alleging that Rotella, counsel for the Debtor, made false representations to the court, committed fraud against the court, and planned to benefit personally at the expense of the creditors.⁴⁷ The Eleventh Circuit upheld the award of \$14,000 in sanctions against Gwynn, saying “the seriousness of the allegations combined with the lack of any evidentiary support or minimal investigation support a finding of bad faith.”⁴⁸

A frivolous appeal can also subject an appellant to sanctions. Under FED. R. BANKR. P. 8020,

If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.⁴⁹

In another recent Seventh Circuit case, the Court used a definition of “frivolous” similar to that in *Maxwell* to determine whether an appeal was frivolous, saying “[a]n appeal is frivolous if the result is obvious or the appellant’s argument is wholly without merit.”⁵⁰

However, it is important to remember that the motion for sanctions under Rule 8020 must be made separately. “A prerequisite to awarding sanctions under Bankruptcy Rule 8020 is that the procedural requirements of Bankruptcy Rule 8020 must be met.”⁵¹ “The requirement of a separately filed motion is strict and failure to comply results in the denial of the request for sanctions.”⁵²

ii. Damages

⁴⁵ *Id.* at 719. In contrast, what the Ninth Circuit has said it means is that a “filing is frivolous if it is both baseless and made without a reasonable and competent inquiry.” *In re Brooks-Hamilton*, 217 Fed. Appx. 654, 656 (9th Cir. 2008).

⁴⁶ *In re Walker*, 532 F.3d 1304, 1309 (11th Cir. 2008).

⁴⁷ *Id.* at 1307.

⁴⁸ *Id.* at 1310.

⁴⁹ FED. R. BANKR. P. 8020.

⁵⁰ *Wiese v. Community Bank of Central Wisconsin*, 552 F.3d 584, 591 (7th Cir. 2009).

⁵¹ *In re Kristan*, 378 B.R. 417, 2007 WL 2683015, at *3 (1st Cir. BAP Sept. 6, 2007).

⁵² *Id.*; see also *In re Pena*, 397 BR 566, 578–79 (1st Cir. BAP 2008); *In re Torres Martinez*, 397 B.R. 158, 168 (1st Cir. BAP 2008).

Another definition of bad faith, approved by the U.S. Supreme Court, is “delaying or disrupting the litigation, hampering enforcement of a court order, filing a complaint or motion to harass another party or to cause an unnecessary increase in the cost of the litigation.”⁵³ The court in *In re Shade, Inc.* used this definition to award attorney’s fees and costs in favor of the bankruptcy trustee.⁵⁴ The primary issue before the court, however, centered on the amount of damages to award based on the term “costs” in FED. R. CIV. P. 41. In *In re Shade, Inc.*, the Plaintiff had filed an adversary proceeding in the bankruptcy court against the trustee alleging conversion and damages arising from destruction of Plaintiff’s property. The trustee filed a motion to dismiss the case against him, and the Plaintiff voluntarily dismissed him.⁵⁵

Subsequently, Plaintiff brought the same action in state court. The trustee removed the state court action to bankruptcy court, and then filed a motion to dismiss. After the dismissal was granted, the trustee filed a motion to recover fees and costs.⁵⁶ FED. R. CIV. P. 41(d), made applicable through FED. R. BANKR. P. 7041, provides that

. . . a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.⁵⁷

Since there was no doubt that Plaintiff engaged in exactly the conduct sanctionable under FRCP 41, the issue the court addressed was whether attorney’s fees could be awarded. The court looked to other decisions and observed that courts are split as to whether the term “costs” includes an award of attorney’s fees.⁵⁸ The court also reviewed and summarized the conflicting decisions in the Eight Circuit.⁵⁹ Persuaded by those decisions, the court awarded fees and costs to the trustee for the previous action.⁶⁰

⁵³ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991).

⁵⁴ *In re Shade, Inc.*, 2008 WL 3876327 (Bankr. D. Neb. Aug. 18, 2008).

⁵⁵ *Id.* at *2.

⁵⁶ *Id.* at *2.

⁵⁷ FED. R. CIV. P. 41(d).

⁵⁸ *In re Shade*, 2008 WL 3876327, at *2; *Compare Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000) (holding that attorney fees are not available under Rule 41(d) because the rule does not explicitly provide for them) and *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000) (holding that attorney fees are recoverable under Rule 41(d) only when the underlying statute allows such fees as part of the costs) with *Cadle Co. v. Beury*, 242 F.R.D. 695, 697–98 (S.D. Ga. 2007) (holding that Rule 41(d) gives the court authority to award attorney fees because the rule drafters considered fees a part of costs) and *Wason Ranch Corp. v. Hecla Mining Co.*, 2008 WL 906110, at *17 (D. Colo. Mar. 31, 2008) (holding that unpublished authority in the Tenth Circuit permits attorney fees to be awarded under Rule 41(d)).

⁵⁹ *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980) (per curiam) (affirming an award of attorney fees under Rule 41(d) without discussion); *Behrle v. Olshanksy*, 139 F.R.D. 370, 374 (W.D. Ark. 1991) (“Surely, Congress intended that the provision of the federal rules have some ‘teeth’ . . . The court believes and finds that Congress must have intended when Rule 41(d) was adopted to give the court discretion to include reasonable attorney’s fees in the ‘costs’ that could be imposed.”); *Simeone v. First Bank Nat’l Ass’n*, 125 F.R.D. 150, 155 (D. Minn. 1989) (holding that attorney fees are not recoverable under Rule 41(d) because the language of the rule

Additionally, the court awarded fees and costs to the trustee for removing the state action to bankruptcy court, and for defending the action in bankruptcy court.⁶¹ These awards were based on the court's equitable authority under 11 U.S.C. § 105(a) and the court's inherent authority to enforce the *Barton* doctrine⁶² and sanction frivolous proceedings.⁶³

b. Contempt

A logical prerequisite to a contempt sanction is behavior violating a statute or court order. When a party seeks a contempt order, that party must “show by clear and convincing evidence that: (1) a court order was in effect; (2) the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the order.”⁶⁴

The purposes of civil contempt orders are to (1) enforce obedience of a court order; and (2) to compensate parties for losses resulting from a violation of a court order.⁶⁵ The following factors are considered in imposing contempt sanctions: (1) the harm from noncompliance; (2) the probably effectiveness of the sanction; (3) the financial resources of the contemnor and the burden the sanctions may impose; and (4) the willfulness of the contemnor in disregarding the court's order.⁶⁶

In *In re Nosek*, the bankruptcy court found that Ameriquest violated section 1322 by not correctly accounting for payments pursuant to the plan.⁶⁷ The court sanctioned Ameriquest Mortgage Company (“Ameriquest”) in the amount of \$750,000 (\$250,000 for actual damages and \$500,000 punitive damages) for failing to properly apply and credit payments and differentiate between pre- and post-petition payments.⁶⁸

On appeal, the First Circuit found “there was no violation of either the Bankruptcy Code or Nosek's plan” and vacated the judgment.⁶⁹ Ameriquest argued that section 1322 did not impose obligations on any party, including lenders. The First Circuit agreed. Therefore, there was “no basis for concluding that Ameriquest violated the text of § 1322(b).”⁷⁰

references only costs, not fees); *CIVCO Med. Instruments Co., Inc. v. Protek Med. Prods., Inc.*, 231 F.R.D. 555, 564 (S.D. Iowa 2005) (applying the general rule of attorney fees and holding that *Evans* is not controlling because it was not based specifically on the language of the rule).

⁶⁰ *In re Shade*, 2008 WL 3876327, at *2.

⁶¹ *Id.* at *3.

⁶² The *Barton* doctrine requires leave of the bankruptcy court before suit may be instituted against the trustee in another forum.

⁶³ *In re Shade*, 2008 WL 3876327, at *3.

⁶⁴ *In re MD Promenade, Inc.*, 2009 WL 80203, at *14 (Bankr. N.D. Tex. Jan. 8, 2009).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *In re Nosek*, 363 B.R. 643 (Bankr. D. Mass. 2007).

⁶⁸ *Id.*

⁶⁹ *Ameriquest Mortgage Co. v. Nosek (In re Nosek)*, 544 F.3d 34 (1st Cir. 2008).

⁷⁰ *Id.*

The First Circuit then considered the chapter 13 plan language as to any obligations it may have imposed on Ameriquest. The First Circuit found that the

language d[id] not place any specific obligations on Ameriquest, accounting or otherwise. ... The Plan language says nothing about how Ameriquest must account for pre- and post-petition payments during the course of the repayment period if payments are short, late, or not made at all. Simply put, the terms of the Plan itself do not provide the specificity required to invoke the enforcement authority of § 105(a).⁷¹

Further, the court found that “[a]lthough a debtor need not show proof of economic damages to establish that her cure rights have been violated, she must at least establish that her right to cure the pre-petition default provided by the Chapter 13 plan ha[d] been impaired or threatened by the creditor’s actions.”⁷² Because the confirmed third amended plan included the erroneous damage award, the court vacated the judgment affirming the plan and remanded.

Whether a creditor violates a bankruptcy court order when it continues to report debts to a credit reporting agency is an interesting issue. In *In re Luedtke*, the court addressed whether it was a violation of the confirmation order for a credit union to report the original balance due on the loan and timely bankruptcy payments as late.⁷³ The credit union held a claim of over \$10,000 secured by the debtor’s car, which was bifurcated into a \$8,433 secured claim and the remainder unsecured. Throughout the confirmation plan, the creditor reported to credit agencies the original balance owed rather than the bifurcated balance, and that payments were 120 days late. The debtor complained that this negative reporting prevented her from refinancing her mortgage in order to complete her plan.⁷⁴

The court pointed out the decision in *In re Dendy*,⁷⁵ one of the few other cases that address violation of a confirmation order through credit reporting.⁷⁶ In that case, the creditor did not remove a notation on the debtor’s credit report of a \$30,000 past due amount and did not remove the lien from the property records. However, since the confirmation plan did not specifically command the removal, and no other attempts were made to collect the debt, the court could not find contempt sanctions were appropriate.⁷⁷

The *Luedtke* court felt otherwise, saying “the confirmation order should not have to tell a creditor whose claim has been reduced or payment stream altered to report the correct amount and payment history to the CRAs.”⁷⁸ The court found that the credit union violated the confirmation

⁷¹ *Id.*

⁷² *Id.*

⁷³ *In re Luedtke*, 2008 WL 2952530 (Bankr. E.D. Wis. July 31, 2008).

⁷⁴ *Id.* at *1.

⁷⁵ *In re Dendy*, 2008 Bankr. LEXIS 1845 (Bankr. D.S.C. May 5, 2008).

⁷⁶ *In re Luedtke*, 2008 WL 2952530, at *3.

⁷⁷ *Id.*

⁷⁸ *Id.* at *6.

order by reporting based on the original loan terms, and ordered the credit union to remove the disputed information.⁷⁹

c. Vexatious Conduct

“[B]ankruptcy courts have the inherent power to sanction vexatious conduct presented before the court.”⁸⁰ In *Hale v. U.S. Trustee*, the Ninth Circuit upheld a bankruptcy court’s inherent authority to sanction an attorney for failing to sign bankruptcy petitions, failing to attend hearings, and giving little to no advance notice of his absences as well as other conduct generally considered evasive, confrontational, or impudent.⁸¹

In *In re Rollings*, the Debtor filed a Motion for Sanctions for (1) Filing and Maintaining an Adversary for a Party Without Standing, (2) Improper Discovery Request Making Litigation Unduly Burdensome and Expensive; and (3) Filing a Motion Without Basis or Support of Law.⁸²

The debtor was engaged in extensive state court litigation before filing bankruptcy. The court found that the offending party had “continuously bombarded” the debtor with discovery and heard extensive evidence regarding extensive written discovery and over 17 hours of depositions taken by the offending party against the debtor. The debtor had sought and received protective orders in the state court litigation and the bankruptcy court. For the last round of discovery served in the debtor’s main bankruptcy case, the court found that the discovery request was made “in bad faith and for the improper purpose of harassment, resulting in increasing costs and multiplying the litigation pending before” the court.⁸³ The court sanctioned two attorneys that had prepared the discovery a total of \$2,085.00, the amount of attorneys’ fees the debtor incurred in obtaining the protective order in bankruptcy court.

In addition to harassing discovery, the lawyers representing the parties in litigation against the debtor filed a motion after losing an adversary proceeding asserting newly discovered evidence. After reviewing the evidence, the court found that the motion was filed with “no factual evidentiary support or legal basis for the allegations made in the motion.”⁸⁴ The offending parties had continued to prosecute their motion despite receiving affidavits and photographs showing them that their assertions in the motion were false. The court awarded sanctions equally among the three attorneys involved totaling \$6,508.90, the amount of attorneys fees incurred related to this motion.

⁷⁹ *Id.*

⁸⁰ *Hale v. U.S. Trustee*, 509 F.3d 1139, 1148 (9th Cir. 2007).

⁸¹ *Id.*

⁸² *In re Rollings*, 2008 WL 899300 (Bankr. S.D. Tex. March 31, 2008).

⁸³ *Id.* at *5.

⁸⁴ *Id.* at *8.

In addition, the court awarded sanctions for the amount of fees and costs incurred in bringing the motion for sanctions. The court awarded sanctions equally among the three attorneys involved totaling \$9,900.00, the amount of attorneys fees incurred related to this motion.

In *Maloof v. Level Propane Gasses, Inc.*, creditors filed an involuntary chapter 7 proceeding for Level Propane Gasses, Inc.⁸⁵ Both Maloof (Level's former CEO) and the U.S. Trustee filed motions for an examiner, but Maloof's motion was denied as moot when the court granted the U.S. Trustee's motion and appointed an examiner. Maloof filed two more motions for a substitute examiner, both of which were denied.⁸⁶

Level filed a motion for sanctions, which the bankruptcy court considered and granted. The bankruptcy court found that "Maloof's 'attempted relitigation' of issues previously decided to be precisely the sort of conduct proscribed by 28 U.S.C. § 1927."⁸⁷ The test for such sanctions is reasonableness based on the circumstances at the time of the offending motion.⁸⁸ The Sixth Circuit affirmed the bankruptcy court's decision, noting that Maloof's requests "inundate[d] the court with new motions requesting the same form of relief that had already been denied."⁸⁹

Lender's counsel's actions have not escaped the court's scrutiny either. In *In re Osborne*, the court sanctioned the lender's counsel for misconduct and imposed debtor's attorney's fees on the lender and its counsel in connection with a motion for relief from the automatic stay.⁹⁰ Under the facts of *Osborne*, the creditor's counsel filed an affidavit, with the motion for relief from stay, stating that the debtor had breached a previous consent order. The affidavit recited that the attorney had personal knowledge of the facts it set forth. However, during testimony the attorney admitted she had no personal knowledge concerning the facts and all of her knowledge of the case had come from the creditor's file. Further, it was determined that the debtor was in fact current on her mortgage payments.

The court found that it had authority under 28 U.S.C. § 1927 to sanction lawyers who "unreasonably and vexatiously multiply court proceedings and assess the lawyers with the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."⁹¹ The court found that the attorney's conduct was reckless and such conduct was vexatious within 28 U.S.C. § 1927. Thus, the court found it had the authority to sanction lender's counsel for activity that she reasonably should have known had no factual support. Based on the findings the attorney willfully abused the bankruptcy process by filing a motion with incorrect figures. The lender and

⁸⁵ *Maloof v. Level Propane Gasses, Inc.*, 2008 WL 2952779 (6th Cir. July 30, 2008) (slip op.).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (citing *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987) ("[T]he standard for section 1927 determinations in this circuit is an *objective* one, entirely different from determinations under the bad faith rule. . . . There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.")).

⁸⁹ *Id.*

⁹⁰ *In re Osborne*, 375 B.R. 216 (Bankr. M.D. La. 2007).

⁹¹ *Id.* at 224.

its attorney were jointly sanctioned for \$5,000 in emotional damages and over \$40,000 in attorney's fees.

d. Improper Discovery

Sanctions for failure to make discovery is governed by FED. R. BANKR. P. 7037. That Rule provides that FED. R. CIV. P. 37 applies in adversary proceedings.⁹² In turn, FED. R. CIV. P. 37(b)(2) provides:

(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

⁹² FED. R. BANKR. P. 7037.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.⁹³

The Debtor in *In re Sprouse* faced the sanction of default judgment [FRCP 37(b)(2)(A)(vi)] for failing to properly respond to discovery requests.⁹⁴ Sprouse had agreed to construct a log cabin home for the Laughlins according to specifications provided by their architectural firm, in return for \$90,000. After construction had begun, Sprouse received the money. Not long thereafter, the Laughlins noticed numerous problems with the construction work, including defects in the foundation, unauthorized change of log suppliers, incorrectly notched logs, green logs that could not be used in the construction, and failure to secure certain subcontractors. When Sprouse did nothing to correct the defects, the dispute found its way to court, where the Laughlins obtained a default judgment against Sprouse for \$276,950, which included a treble damage award, for unfair and deceptive trade practices. Sprouse subsequently filed for Chapter 7.⁹⁵

The Laughlins filed an adversary complaint and requests for discovery seeking to establish that their claim was excepted from discharge under 11 U.S.C. § 523(a)(2)(A). Sprouse filed late and incomplete responses to the discovery requests. At a deposition, Sprouse referenced documents in his possession that he had not provided during discovery. Even after a motion to compel, Sprouse never fully responded to the discovery requests. By this time, two years had passed and the Laughlins filed a Rule 37 motion for sanctions.⁹⁶

The court began by noting that it has discretionary authority to award sanctions for failing to comply with discovery.⁹⁷ The Fifth Circuit requires two criteria to be met in order to award default judgment as a discovery sanction:

- (1) The discovery violation by the penalized party must be willful; and
- (2) A lesser sanction would not achieve the desired deterrent effect.⁹⁸

Additionally, the court observed it could also consider whether the discovery violations prejudiced the opposing party's trial preparation.⁹⁹ Taking into account Sprouse's repeated refusal to produce discovery over the last two years, even after court orders to do so, and the difficulty the Laughlins would have proving their case without the discovery, the court determined that a default judgment sanction was appropriate. Furthermore, the court determined that the entire amount of the judgment was non-dischargeable, including the treble damage

⁹³ FED. R. CIV. P. 37(b).

⁹⁴ *In re Sprouse*, 391 B.R. 367 (Bankr. N.D. Miss. 2008).

⁹⁵ *Id.* at 369.

⁹⁶ *Id.*

⁹⁷ *Id.* at 370 (citing *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) and *U.S. v. \$49,000.00 Currency*, 330 F.3d 371 (5th Cir. 2003)).

⁹⁸ *Id.*

⁹⁹ *Id.*

award.¹⁰⁰ Finally, the court added attorney's fees and costs to the final non-dischargeable debt.¹⁰¹

Improperly asserting a privilege may also subject a party to sanctions. In *In re Ginther*, the bankruptcy court determined that sanctions were appropriate against an attorney who filed several proofs of claim for legal services rendered to the debtor.¹⁰² Although the debtor admitted that the attorney represented him in some legal cases, the parties disputed the fee arrangement and the amount owed. The debtor filed an objection to the claims. After the Scheduling Order deadline had passed, the attorney had not filed a pre-trial statement as requested by the court. The debtor filed a Motion to Strike. The court found that the attorney's failure to file the pre-trial statement was not a "deliberate lack of regard of the court's deadline."¹⁰³

The court found, however, that the delay caused by the attorney warranted a strike of nine of the attorney's twenty-three witnesses.¹⁰⁴ Further, the attorney refused to produce documents such as any fee agreements between the attorney and the debtor and fee agreements between the attorney and other clients on the basis that it was privileged or confidential communications. The court cited numerous cases for the proposition that information such as the identity of a client, terms and conditions of employment, general purpose of the work performed, and amount of fee is not privileged or confidential.¹⁰⁵ Because the court found that the attorney's objections to the debtor's discovery had no merit and because of the attorney's delay in filing the pre-trial statement, sanctions were awarded.¹⁰⁶ The court held a separate hearing to determine the amount of sanctions.

e. Rule 9011

In *In re Nosek*, the bankruptcy court awarded \$650,000 sanctions under FED. R. BANKR. P. 9011 for misrepresenting the owner and holder of the note – Ameriquest (servicer) \$250,000; Norwest n/k/a Wells Fargo (owner) \$250,000; Buchalter Nemer Fields & Younger (national counsel for Ameriquest) \$100,000; Ablitt & Caruolo, PC (local counsel for Ameriquest) \$25,000; partner of local counsel \$25,000.¹⁰⁷

The representations included (i) filing a proof of claim with the note attached without reference to the assignment, (ii) statements in pleadings that Ameriquest was the holder of the note including a motion for stay relief and answer to adversary complaint, (iii) correspondence from Ameriquest to the debtor stating Ameriquest "holds" the note, and (iv) engaging in trial without notifying the court that Ameriquest was not the holder. The court admonished the various parties involved with the misrepresentations.

¹⁰⁰ *Id.* at 371 (citing *Cohen v. de la Cruz*, 523 U.S. 213 (1998)).

¹⁰¹ *Id.*

¹⁰² *In re Ginther*, 2008 WL 4107487 (Bankr. S.D. Tex. Aug. 29, 2008).

¹⁰³ *Id.* at *3.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *5.

¹⁰⁶ *Id.*

¹⁰⁷ *Nosek v. Ameriquest Mort. Co. et al. (In re Nosek)*, 386 B.R. 374, (Bankr. D. Mass. 2008).

Ameriquest (servicer) \$250,000:

Using these excuses, the parties' attitude appears to be that confusion as to a party's role is understandable against the current commercial climate. If the transfer of such negotiable instruments occurs at such a fast pace and without timely recorded evidence of the transfers, why should the Court and Debtor's counsel be expected to know the roles of the parties? The burden is clearly on the sophisticated, albeit careless, lenders and servicers.¹⁰⁸

Ablitt & Caruolo, PC (local counsel for Ameriquest) \$25,000:

At a time when . . . notes are bought and sold at a pace so swiftly that the assignor and assignee cannot keep up with the paperwork, had the attorneys at the Ablitt firm checked the firm's file, they would have seen that Norwest was perhaps the real party in interest, at least when prior actions were taken, and thus sought additional information. The firm cannot shield itself from its institutional knowledge.¹⁰⁹

Associates of local counsel \$0:

Nevertheless they had an independent obligation to the Court pursuant to Rule 9011. Yet the Court is mindful that young associates are often not in a position to question the assignments given to them. Because the affidavits are unclear as to what each associate was told when given the assignment, the Court will not impose monetary sanctions on Attorneys Haskell and Amann but will let this decision serve as a warning that in the future the Court expects associates will be cognizant of and fulfill their responsibilities under Rule 9011.

Partner of local counsel \$25,000:

The response begs the question; should he have known about Norwest. For the same reasons that the Ablitt firm knew of Norwest, so should Attorney Charlton.¹¹⁰

Buchalter Nemer Fields & Younger (national counsel for Ameriquest) \$100,000:

As national counsel to a [creditor], it has a responsibility to know its client's role in a case. It cannot rely on the representations of its

¹⁰⁸ *Id.* at * 6.

¹⁰⁹ *Id.* at * 7.

¹¹⁰ *Id.* at * 8.

client; it has a responsibility to question and probe to the extent necessary to ensure that it has elicited correct information.¹¹¹

Norwest n/k/a Wells Fargo (owner) \$250,000:

It has attempted to bifurcate the benefits of the note, namely its right to receive repayment of the loan, from all responsibilities associated with servicing and collecting payments. If Norwest/Wells Fargo wishes to engage servicers, as it is certainly free to do, it cannot turn a blind eye to the actions of the servicers. Had Norwest/Wells Fargo shown even a modicum of oversight or review of Ameriquest's behavior, it should have been able to correct the misrepresentations. The Court does not accept that one can simply by contract sever the benefits and burdens associated with . . . lending.

In the Sixth Circuit, the test for imposing sanctions under Rule 9011 is “whether the individual attorney’s conduct was reasonable under the circumstances.”¹¹² This is an objective test, not based on judicial hindsight, but on “what a reasonable attorney would have done at that time.”¹¹³

In *Triple S Restaurants*, the general counsel for the debtor filed a claim of intentional infliction of emotional distress against the trustee stemming from a threat of criminal charges over the proceeds of a life insurance policy.¹¹⁴ Rule 9011(b) requires that there be some factual or evidentiary support for allegations made in pleadings.¹¹⁵ The bankruptcy court found that there were no facts supporting the claim that the trustee’s actions even rose beyond the bounds of decency and morality.¹¹⁶ The appellate court noted that the general counsel failed to even allege emotional distress of *any* kind.¹¹⁷ As the court pointedly stated, “[t]his is a particularly remarkable omission given the name of the tort.”¹¹⁸ Therefore, the court affirmed the sanctions award.¹¹⁹

The silver lining of having bankruptcy rules for sanctions is their effect on the availability of state law remedies for actions during bankruptcy proceedings. In a Ninth Circuit Bankruptcy Appellate Panel opinion, the Court noted that “the availability of sanctions . . . in a bankruptcy proceeding, whether through the use of Rule 9011 or § 105(a), reflects Congress’ intent that the law relating to bad faith and willful misconduct in bankruptcy proceedings be developed case-by-case in the context of the federal bankruptcy law, not by application of state law.”¹²⁰

¹¹¹ *Id.* (footnote omitted).

¹¹² *In re Triple S Restaurants, Inc.*, 519 F.3d 575, 579 (6th Cir. 2008).

¹¹³ *Id.*

¹¹⁴ *Id.* at 578.

¹¹⁵ FED. R. BANKR. P. 9011(b)(3).

¹¹⁶ *In re Triple S Restaurants, Inc.*, 519 F.3d at 579.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *In re Chaussee*, 2008 WL 5474254, at *7 (9th Cir. BAP Dec. 18, 2008).

In *In re Chaussee* the Ninth Circuit BAP held that the remedy for filing an improper proof of claim came under Rule 9011 or § 105(a), rather than under Washington’s Consumer Protection Act or the Fair Debt Collection Practices Act.¹²¹ The Court expressed its confidence that the “intricate design” of the claims process was adequately protected by Rule 9011.¹²²

f. Automatic Stay Violations

Generally, a violation of the automatic stay creates a right to damages under section 362(k)(1). That section states, “[e]xcept as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.”¹²³

In brief, a “willful violation” simply means “the defendant knew of the automatic stay and that the defendant’s actions which violated the stay were intentional.”¹²⁴ A specific intent to violate the stay is not necessary for a violation. Furthermore, good faith is “not relevant to whether the act was ‘willful’ or whether compensation must be awarded.”¹²⁵ It should also be noted that after a defendant is informed of the violation, the failure to remedy the situation may itself a violation of the stay.¹²⁶

A bankruptcy court in the Eleventh Circuit *sua sponte* raised the issue that the corporate debtor was ineligible for section 362(k)(1) damages.¹²⁷ The Eleventh Circuit in *In re Jove Engineering* had previously interpreted “individual” to mean only natural persons — not artificial entities such as corporations.¹²⁸ Therefore, the bankruptcy court concluded, the debtor corporation was ineligible for stay damages under section 362(k)(1).¹²⁹

There is no violation of the automatic stay if the only act taken is the filing of a Proof of Claim asserting a right to payment of a pre-petition debt. As the Bankruptcy Court for the District of South Carolina succinctly put it,

[T]he automatic stay serves to protect the bankruptcy estate from actions taken by creditors outside the bankruptcy court forum, not legal actions taken within the bankruptcy court. The filing of a Proof of Claim before a bankruptcy court . . . is

¹²¹ In a concurring opinion, Judge Jury found that filing a proof of claim is not a violation of the Consumer Protection Act, nor an attempt to collect a debt under the FDCPA. *Id.* at *14.

¹²² *Id.* at *13.

¹²³ 11 U.S.C. § 362(k)(1); see *In re Castro*, 2008 WL 4820526 (Bankr. E.D.N.C. Nov. 5, 2008) (awarding \$5,000 in compensatory damages, \$5,000 in punitive damages, and \$2,500 in attorney’s fees for repeated attempts to collect mortgage payments after notice of bankruptcy).

¹²⁴ *In re Werner*, 2008 WL 5054345, at *2 (Bankr. E.D. Cal. Nov. 25, 2008) (citing *In re Bloom*, 875 F.2d 224, 227 (9th Cir. 1989)).

¹²⁵ *Id.*

¹²⁶ *In re Werner*, 2008 WL at *3 (citing *In re Del Mission*, 98 F.3d 1147, 1151, 1152 (9th Cir. 1996)).

¹²⁷ *In re 5th Avenue Real Estate Development, Inc.*, 2008 WL 4371336, at *2 (Bankr. S.D. Fla. Sept. 19, 2008).

¹²⁸ *Id.* (citing *In re Jove Engineering*, 92 F.3d 1539, 1550–53 (11th Cir. 1996)).

¹²⁹ *Id.*

the logical equivalent of a request for relief from the automatic stay, which cannot itself constitute a violation of the stay.¹³⁰

The Fifth Circuit had an opportunity to address the issue in *Campbell v. Countrywide*.¹³¹ In *In re Campbell*, the Bankruptcy Court found that Countrywide willfully violated the stay by requiring debtors' post-petition monthly mortgage escrow payment to include payment of pre-petition property taxes.¹³² Plaintiff filed for chapter 13 bankruptcy and Countrywide filed a proof of claim that included arrearages for pre-petition debts as well as post-petition attorneys' fees. The proof of claim listed the post-petition loan payments at \$1,047.35, but stated that the payments would increase to \$1,124.97.¹³³

The debtors brought an action for violation of the automatic stay, asserting that Countrywide was attempting to collect pre-petition property taxes by increasing post-petition mortgage payments. The court stated that the determining factor separating pre-petition debts from post-petitioned debts is the period when the debt accrues. Tax obligations in Texas accrue on January 1 of each year.¹³⁴ “[A] claim for property taxes for the year in which a debtor’s petition is filed arises on January 1 of that year and is therefore a pre-petition claim even if the assessment of such taxes occurs post-petition or payment of the taxes is not yet due.”¹³⁵

In *Campbell*, the debtors filed their bankruptcy petition on April 3, 2006. Although the 2006 property taxes had not yet been assessed, the debtors’ liability for such taxes accrued on January 1, 2006. Thus, the debtors’ liability for their 2006 property taxes was a pre-petition debt.

Although the taxes arose prior to the debtor filing for chapter 13 bankruptcy, Countrywide contended that because it paid the taxes post-petition, the debt between Countrywide and the debtor arose post-petition.¹³⁶ The court disagreed because: (1) Countrywide’s rights to repayment arise from its payment of debtors’ debt to a third party (the taxing authorities), and Countrywide can have no greater rights than that third party; and (2) Countrywide’s contractual right against the Debtors “arose pre-petition in accordance with the terms of the Security Instrument, not post-petition when the taxes became due.”¹³⁷

By increasing the escrow payments post-petition to recover advances for pre-petition taxes, the court determined that Countrywide violated the automatic stay. However, the court determined a trial was necessary to determine actual damages and whether punitive damages were warranted.¹³⁸

¹³⁰ *In re Sammon*, 253 B.R. 672, 681 (Bankr. D.S.C. 2000).

¹³¹ *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348 (5th Cir. 2008).

¹³² *Campbell v. Countrywide Home Loans, Inc. (In re Campbell)*, 361 B.R. 831, 836 (Bankr. S.D. Tex. 2007), *rev'd*, 545 F.3d 348 (5th Cir. 2008).

¹³³ *Id.*

¹³⁴ *Id.* at 837–39.

¹³⁵ *Id.* at 839.

¹³⁶ *Id.* at 838.

¹³⁷ *Id.* at 841.

¹³⁸ *Id.* at 853.

On interlocutory appeal, Countrywide reiterated its argument that the escrow payments for property taxes and insurance were not pre-petition claims because the obligation to pay would accrue only when the escrow expense was paid and there were insufficient funds in the account.¹³⁹ The Court of Appeals disagreed with Countrywide’s “imaginative argument”, saying, “[t]he touchstone of any claim is that there is an enforceable obligation of the debtor or an enforceable right to payment from the debtor.”¹⁴⁰ Since Countrywide had a contractual right to payment of the escrow amounts monthly, each pre-petition unpaid escrow payment was a pre-petition claim.¹⁴¹

The Court of Appeals reversed the bankruptcy court, however, because although the escrow payments were pre-petition claims, Countrywide properly asserted them in a proof of claim without taking any other action outside the bankruptcy proceeding to collect it.¹⁴² The Fifth Circuit found no precedent for the proposition that filing a Proof of Claim constitutes a violation of the automatic stay.¹⁴³ On the contrary, other courts have emphasized that an automatic stay has no effect on actions that are expressly allowed under the Bankruptcy Code, such as filing proof of claims.¹⁴⁴ Agreeing with those courts, and citing the Bankruptcy Court for the District of South Carolina, the Fifth Circuit held that Countrywide’s filing of a Proof of Claim could not violate the automatic stay, reversing that portion of the bankruptcy court’s holding.¹⁴⁵

III. Special Issues

a. Pre-filing Sanctions

In some cases, a court may decide that a party should be subject to review of their submissions before allowing them to be filed with the court. In a recent unpublished opinion, the Ninth Circuit discussed pre-filing sanctions.¹⁴⁶ The Court noted that bankruptcy courts have, as part of their inherent authority, the power to impose this type of sanction.¹⁴⁷ The order is not punitive in nature, but rather stems from the court’s inherent authority to sanction vexatious conduct before it.¹⁴⁸

“[P]re-filing orders are an extreme remedy that should rarely be used.”¹⁴⁹ Because they inhibit a litigant’s access to the courts, pre-filing sanctions must meet four criteria before being imposed:

¹³⁹ *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d at 353.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at *6–7.

¹⁴³ *Id.* at *7.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *7–8.

¹⁴⁶ *In re Upland Partners*, 2008 WL 59182 (9th Cir. Oct. 2, 2007), *cert. denied*, 76 U.S.L.W. 3645 (U.S. Jun. 09, 2008) (No. 07-10791).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*; see *In re Dyer*, 322 F.3d 1178, 1197 (9th Cir. 2003); *In re Rainbow Magazine*, 77 F.3d 278, 284 (9th Cir. 1996).

¹⁴⁹ *In re Upland Partners*, 2008 WL 59182 (9th Cir. Oct. 2, 2007).

- (i) The court must make a finding of bad faith;
- (ii) The litigant must have notice and an opportunity to be heard;
- (iii) The pre-filing order must be narrowly tailored; and
- (iv) The court must consider alternative sanctions.¹⁵⁰

In the Ninth Circuit, a pre-filing order is narrowly tailored when “it does not prevent filing but merely subjects pleadings to an initial screening review by a district judge.”¹⁵¹

In *Baum v. Blue Moon Ventures, LLC*, the Fifth Circuit partially affirmed an order from the United States District Court for the Southern District of Texas modifying a pre-filing injunction.¹⁵² In 2002, the Baums “injected themselves” into the bankruptcy case of *Clark v. Mortenson*, by making misrepresentations to investors in order to encourage the investors to sue a receiver, the receiver’s attorney and other investors and their attorneys.¹⁵³ The federal district court sanctioned the Baums for “wrongfully interfering in the case, wrongfully holding themselves out to be attorneys licensed to practice in Texas, lying to the parties and the court, and for generally abusing the judicial system.”¹⁵⁴ Brian Baum and his father were sanctioned to ten days in jail and \$100,000 in attorney’s fees to the defendant. The court also issued a pre-filing injunction (“December 2002 Injunction”), prohibiting the Baums from filing any claims in courts or agencies in the state of Texas without permission from Judge Lynn N. Hughes.¹⁵⁵

The Fifth Circuit upheld those sanctions in March 2004 but interpreted the December 2002 Injunction narrowly by limiting its scope to apply to the *Mortenson* defendants and related parties only (“March 2004 Injunction”).¹⁵⁶ Thus, the Fifth Circuit held that the injunction did not “act as a bar to all future filings unrelated to the *Mortenson* case.”¹⁵⁷ The court noted, however, that “[a] broader injunction, prohibiting any filings in any federal court without leave of that court may be appropriate if a litigant is engaging in a widespread practice of harassment of different people.”¹⁵⁸

In 2005, the Baums got involved in *In re Hilal*, another bankruptcy case. Sheldon Baum misrepresented that he was a secured creditor in the case. Brian Baum was holding himself out to be a licensed attorney. Douglas Baum posted a fake notice of federal lien on property related to the estate.¹⁵⁹

The judge in the *Hilal* case issued corrective sanctions against the Baums and ordered them not to interfere. The judge also forwarded the order to Judge Hughes. Judge Hughes issued an

¹⁵⁰ *Id.*

¹⁵¹ *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1061 (9th Cir. 2007), *cert. denied*, 77 U.S.L.W. 3295 (U.S. Nov. 17, 2008) (No. 08-38).

¹⁵² 513 F.3d 181 (5th Cir. 2008).

¹⁵³ *Id.* at 184–85.

¹⁵⁴ *Id.* at 185.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; *Clark v. Mortenson*, 93 Fed. Appx. 643, 655 (5th Cir. 2004).

¹⁵⁷ *Mortenson*, 93 Fed. Appx. at 655.

¹⁵⁸ *Id.*

¹⁵⁹ *Baum*, 513 F.3d at 185.

Order to Show Cause why the Baums should not be prohibited from entering the courthouse, filing papers, or representing that they were involved in any proceeding in his court.¹⁶⁰ After two hearings, Judge Hughes found that the Baums had continued their practice of harassment and modified the Fifth Circuit's March 2004 Injunction from *Mortenson* to include enjoining Douglas Baum from filing claims in any Texas courts or agencies without permission from Judge Hughes ("April 2006 Injunction").¹⁶¹

Douglas Baum appealed the modification of the injunction. Baum argued that the district court did not have jurisdiction to *sua sponte* modify the injunction.¹⁶² He argued, alternatively, that the modification was too broad and an abuse of discretion.¹⁶³ Specifically, Baum did not dispute that the district court lacked jurisdiction to issue the original injunction, only that the court lacked the power to *modify* the injunction without a motion from either party.¹⁶⁴

A court clearly has jurisdiction to issue pre-filing injunctions, pursuant to their inherent power to deter vexatious, abusive, and harassing conduct.¹⁶⁵ However, "[a] pre-filing injunction must be tailored to protect the courts and innocent parties, while preserving the legitimate rights of litigants."¹⁶⁶ Modification may be appropriate (i) where changed factual circumstances support the modification; or (ii) to effectuate the purpose of the original injunction.¹⁶⁷

The Fifth Circuit noted that Baum continued to engage in abusive litigation practices after the original injunction was issued. The court also noted that other circuits have allowed district courts to *sua sponte* impose pre-filing injunctions if the party is given notice and a hearing. The Court was particularly influenced by the Second Circuit's holding in *In re Martin-Trigona*, which held

where the jurisdiction of the federal courts is in need of protection, we need not await the arrival of a litigant able to show private relief . . . A history of litigation entailing vexation, harassment and needless expense to other parties and an unnecessary burden on the courts and their supporting personnel is enough.¹⁶⁸

The Fifth Circuit agreed and held that because the district court had jurisdiction to *sua sponte* impose a pre-filing injunction to deter vexatious filings, the district court also had jurisdiction to *sua sponte* modify an existing permanent injunction to accomplish the same goal.¹⁶⁹ However, the Fifth Circuit also mandated that a court weigh several factors before imposing or modifying a pre-filing injunction, including

¹⁶⁰ *Id.* at 185–86.

¹⁶¹ *Id.* at 186.

¹⁶² *Id.* at 187.

¹⁶³ *Id.* at 190.

¹⁶⁴ *Id.* at 187.

¹⁶⁵ *Id.* (citing *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 188 (citing *United States v. Swift & Co.*, 286 U.S. 106 (1932); *Exxon Corp. v. Texas Motor Exchange of Houston*, 628 F.2d 500 (5th Cir. 1980)).

¹⁶⁸ *Id.* (citing *In re Martin-Trigona*, 737 F.2d 1254 (2d Cir. 1984)).

¹⁶⁹ *Id.* at 189.

- (1) the party's history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits;
- (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass;
- (3) the extent of the burden on the courts and other parties resulting from the party's filings; and
- (4) the adequacy of alternative sanctions.¹⁷⁰

The court held that if the modification is preceded by notice and hearing, the district court may *sua sponte* modify an injunction in order to deter vexatious filings. The court, however, expressed no opinion on whether the rule would apply in the case of a permanent injunction that did not involve vexatious filings.¹⁷¹

Nevertheless, the Fifth Circuit again limited the scope of the district court's pre-filing injunction. The Fifth Circuit followed a recent Tenth Circuit case, where the court held that a district court's pre-filing injunction (i) can extend to filings in lower federal courts within the circuit; (ii) *may not* extend to filings in appellate courts; and (iii) *may not* extend to filings in any state court.¹⁷² The Fifth Circuit held that the district court in this case abused its discretion in extending the injunction to filings in state courts, state agencies and the Fifth Circuit. The court upheld only the provisions of the injunction that prohibited Baum from filing in federal bankruptcy courts, federal district courts, and federal agencies in the state of Texas without permission from Judge Hughes.¹⁷³

b. 28 U.S.C. § 1927

28 U.S.C. § 1927 poses an intellectually stimulating puzzle. In addition to their inherent powers to sanction vexatious conduct, courts *may* have statutory power under 28 U.S.C. § 1927. That provision states,

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.¹⁷⁴

The Third Circuit in *In re Schaefer Salt Recovery, Inc.* addressed in depth whether a bankruptcy court actually has authority to impose sanctions under 28 U.S.C. § 1927.¹⁷⁵ The issue turns on

¹⁷⁰ *Id.* (citing *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 818 (4th Cir. 2004)).

¹⁷¹ *Id.*

¹⁷² *Id.* at 191–92 (citing *Sieverding v. Colo. Bar Ass'n*, 469 F.3d 1340, 13440 (10th Cir. 2006)).

¹⁷³ *Id.* at 192.

¹⁷⁴ 28 U.S.C. § 1927.

¹⁷⁵ *In re Schaefer Salt Recovery, Inc.*, 2008 WL 4138409 (3d Cir. Sept. 9, 2008).

whether a bankruptcy court is considered a separate court of the United States, or whether it is merely a unit of the district court.

The Third Circuit laid out the arguments of both sides. On the one hand, the comments to section 1927 refer to the definitions in 28 U.S.C. § 451. That section does not expressly list bankruptcy courts in the definition of “court of the United States.”¹⁷⁶ Likewise, section 451’s reference to “any court created by Act of Congress the judges of which are entitled to hold office during good behavior” tracks the language of Article III, and therefore refers only to Article III courts. Article III judges hold lifetime tenure during “good behavior” and their compensation cannot be “diminished during their Continuance in Office.” Thus, bankruptcy courts are not Article III courts because bankruptcy court judges are appointed to fourteen year terms,¹⁷⁷ and their compensation is subject to Congressional discretion.¹⁷⁸

On the other hand, a bankruptcy court may be considered merely a unit of the district court, which is expressly a “court of the United States.” This conclusion is derived from the district court’s discretion to refer bankruptcy matters to the bankruptcy courts under 28 U.S.C. § 157(a).¹⁷⁹ Therefore, if a district court has the power to impose sanctions under section 1927, it may also refer such a motion to a bankruptcy court.¹⁸⁰

The issue certainly has not been explored in depth by every circuit, with many courts simply evading the question.¹⁸¹ This potentially leaves an opening for parties sanctioned under section 1927 to appeal.

c. Dismissal

In *In re Byrd*, the Fourth Circuit reminded the district court that “[d]ismissal is a harsh sanction which a district court must not impose lightly.”¹⁸² In *Byrd*, the Byrds appealed the bankruptcy court’s order compelling payment of allowed administrative expense claims but failed to timely file their appellate brief, and the district court dismissed their appeal.¹⁸³ On appeal to the Fourth Circuit, the Court found that the district court did not consider all four factors outlined in *In re Serra Builders, Inc.* Under the Fourth Circuit’s *Serra Builders* test, the court must “(1) make a finding of bad faith or negligence; (2) give the appellant notice and an opportunity to explain the delay; (3) consider whether the delay had any possible prejudicial effect on the other parties; and (4) indicate that it considered the impact of the sanction and available alternatives.”¹⁸⁴ Because

¹⁷⁶ See 28 U.S.C. § 451.

¹⁷⁷ 28 U.S.C. § 152(a)(1).

¹⁷⁸ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61 (1982).

¹⁷⁹ “Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.” 28 U.S.C. § 157(a).

¹⁸⁰ *In re Schaefer*, 2008 WL 4138409; *In re Volpert*, 177 B.R. 81, 90 (Bankr. N.D. Ill. 1995).

¹⁸¹ See, e.g., *In re Cochener*, 382 B.R. 311, 353 n.123 (“For purposes of this Memorandum Opinion and Order the court has assumed without deciding that a bankruptcy court is a ‘court of the United States.’”).

¹⁸² *In re Byrd*, 2007 WL 4103048 (4th Cir. Nov. 19, 2007).

¹⁸³ *Id.*

¹⁸⁴ *Id.* (citing *In re Serra Builders, Inc.*, 970 F.2d 1309 (4th Cir. 1992)).

the district court did not consider alternative sanctions, the Fourth Circuit remanded for further consideration.

In a dismissal for lack of prosecution, the Ninth Circuit also required the court to consider alternatives before dismissing a case.¹⁸⁵ While acknowledging that a trial court has the power to *sua sponte* dismiss a case for lack of prosecution under Rule 41(b),¹⁸⁶ the Bankruptcy Appellate Panel reiterated the Ninth Circuit factors for dismissal.¹⁸⁷ Those factors are:

- (1) the public's interest in expeditious resolution of litigation;
- (2) the court's need to manage its docket;
- (3) the risk of prejudice to the defendants;
- (4) the public policy favoring the disposition of cases on their merits; and
- (5) the availability of less drastic sanctions.¹⁸⁸

As to the fifth factor, “[t]he court need not exhaust every alternative short of dismissal before finally dismissing a case, but, it must explore possible and meaningful alternatives.”¹⁸⁹ In *In re Trutwein*, the parties had agreed to a default judgment, but due to several oversights, the motion on the docket was never addressed. The court dismissed the case; however on appeal to the Bankruptcy Appellate Panel, it was reversed and remanded because the trial court did not consider lesser sanctions, and the defendant would not be prejudiced.¹⁹⁰

IV. Defenses

a. 21-day Notice

Bankruptcy Rule 9011(c)(1)(A) requires a 21 day notice before a motion for sanctions may be filed with the court.¹⁹¹ Failure to follow this notice provision can result in a dismissal of the

¹⁸⁵ *In re Trutwein*, 381 B.R. 417, 2007 WL 4467569 (9th Cir. BAP Nov. 19, 2007).

¹⁸⁶ FED. R. BANKR. P. 7041 makes FED. R. CIV. P. 41 applicable to bankruptcy proceedings. FRCP 41(b) states, “If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.”

¹⁸⁷ *In re Trutwein*, 2007 WL 4467569, at *3, 5.

¹⁸⁸ *Id.* at *5.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ “The motion for sanctions may not be filed with or presented to the court *unless, within 21 days after service of the motion* (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.” BANKR. R. 9011(c)(1)(A) (emphasis added).

motion for sanctions. As a creditor in *In re Pratt* learned, there is no “substantial compliance” exception to Rule 9011(c)(1)(A).

In *Pratt*, a creditor filed a motion for Rule 9011 sanctions against a Chapter 7 debtor’s attorney.¹⁹² However, the creditor did not serve debtor’s counsel with a copy of the motion for sanctions twenty-one days prior to filing it with the bankruptcy court.¹⁹³ The bankruptcy court denied the motion and awarded the debtor attorney’s fees.¹⁹⁴ On appeal, the district court affirmed the denial of the motion but remanded on the issue of attorney’s fees on the ground that the bankruptcy court abused its discretion by awarding attorney’s fees without allowing the creditor the right to examine, question, or argue against the reasonableness of the fees.¹⁹⁵

The Fifth Circuit determined *sua sponte* that it lacked jurisdiction over the attorney’s fees because the district court’s remand required significant further proceedings in the bankruptcy court.¹⁹⁶ Thus, the issue of attorney’s fees was not final and not yet appealable. However, the Fifth Circuit, in a matter of first impression, considered whether informal notice was sufficient to comply with Rule 9011. The creditor argued that it satisfied Rule 9011 by sending two warning letters to the debtor more than twenty-one days prior to filing the motion.¹⁹⁷ The Court disagreed and held that, like FED. R. CIV. P. 11, “strict compliance with the service requirement is a mandatory prerequisite to an award of sanctions.” The Court noted that several circuits, interpreting the substantially identical FED. R. CIV. P. 11, required strict compliance for sanction motions.¹⁹⁸ The creditor failed to serve a copy of the motion on the debtor twenty-one days before filing the motion, therefore the motion was properly denied.¹⁹⁹

While the twenty-one day “safe harbor” rule generally provides a period for counsel to withdraw offending documents, this safe harbor does not apply to the filing of a bankruptcy petition.²⁰⁰ In *In re Gordon* the court chastised counsel for hastily filing a frivolous bankruptcy petition for the sole purpose of delaying foreclosure of her client’s home.²⁰¹ At the time, a creditor had a scheduled oral examination in a default judgment case pending against Debtor in the United States District Court for the District of Maryland. Debtor’s counsel failed to notify the creditor of the bankruptcy filing, as required by a local rule. Furthermore, the petition lacked the Certificate of Credit Counseling, and showed outstanding secured claims more than twice the statutory limit.

¹⁹² *In re Pratt*, 524 F.3d 580, 583 (5th Cir. 2008).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 583–84.

¹⁹⁶ *Id.* at 585.

¹⁹⁷ *Id.* at 586.

¹⁹⁸ *Id.* at 586–87 (citing *Roth v. Green*, 466 F.3d 1179 (10th Cir. 2006); *Brickwood Contractors, Inc. v. Datanet Eng’g, Inc.*, 369 F.3d 385 (4th Cir. 2004); *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772 (9th Cir. 2001); *Gordon v. Unifund CCR Partners*, 345 F.3d 1028 (8th Cir. 2003)).

¹⁹⁹ *Id.* at 588.

²⁰⁰ FED. R. BANKR. P. 9011(c)(1)(A).

²⁰¹ *In re Gordon*, 2008 WL 2901583 (Bankr. D. Md. July 22, 2008).

The court found that the schedules reflected “an absolute abandonment of duty.”²⁰² As to counsel’s defense that she had delegated the work to an associate, the court noted that she herself had signed the petition. “The rule is that an attorney cannot avoid the imposition of sanctions by asserting that she delegated a function as significant as the preparation and filing of a bankruptcy petition to a member of her office staff.”²⁰³

The only reason the court declined to order sanctions was counsel’s relative inexperience, having been in practice only four years. This case is perhaps a good example of ignorance being bliss.

b. Safe Harbor

A motion for sanctions cannot be filed if the court disposes of the offending motion during the twenty-one day safe harbor period.²⁰⁴ In *In re Walker*, Gwynn, counsel for one of Walker’s creditors, filed a motion to disqualify Rotella, Walker’s counsel.²⁰⁵ Rotella notified Gwynn that he would seek sanctions under Rule 9011. The court dismissed the motion to disqualify, but after twenty one days, Rotella filed the motion for sanctions, and the court granted it. The Eleventh Circuit held that “the service and filing of a motion for sanctions must occur prior to final judgment or judicial rejection of the offending motion.”²⁰⁶ Anything else, the court reasoned, would make the safe harbor provision a “mere formality.”²⁰⁷

V. Conclusion

Judges are very active in awarding both monetary and non-monetary sanctions in protecting the integrity of the court system and promoting professional conduct between participants. Indeed, these cases show the judicial system’s constant challenge to appropriately balance the enforcement of sanctions without constraining counsel’s ability to zealously represent clients before the court.

²⁰² *Id.* at *3.

²⁰³ *Id.*

²⁰⁴ See, e.g., *In re Walker*, 532 F.3d at 1309; *Ridder v. City of Springfield*, 109 F.3d 288, 295 (6th Cir. 1997); *Brickwood Contractors, Inc. v. Datanet Eng’g, Inc.*, 369 F.3d 385, 389–90 (4th Cir. 2004) (en banc); *In re Pennie & Edmonds LLP*, 323 F.3d 86, 89 & nn. 1–2 (2d Cir. 2003).

²⁰⁵ *In re Walker*, 532 F.3d at 1307 (11th Cir. 2008).

²⁰⁶ *Id.* at 1309.

²⁰⁷ *Id.*