

Washington University Journal of Law & Policy

Volume 55 *Judge Barry S. Schermer Symposium*

2017

How Not to Use the Involuntary Bankruptcy Process

Michael A. Friedman Esq.

Allison R. Day

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Bankruptcy Law Commons](#), and the [Judges Commons](#)

Recommended Citation

Michael A. Friedman Esq. and Allison R. Day, *How Not to Use the Involuntary Bankruptcy Process*, 55 WASH. U. J. L. & POL'Y 075 (2017), https://openscholarship.wustl.edu/law_journal_law_policy/vol55/iss1/14

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

How Not to Use the Involuntary Bankruptcy Process

Michael A. Friedman, Esq. and Allison R. Day*

In November 2008, Lyon Financial Services, Inc., a subsidiary of U.S. Bank, N.A., filed an involuntary Chapter 7 bankruptcy petition against Maury Rosenberg and his affiliated medical-imaging businesses.¹ The involuntary bankruptcy filing was part of a larger dispute between Rosenberg, U.S. Bank, and their respective affiliates that, by mid-2016, had “produced 27 written opinions at almost every level of the federal judiciary.”² Several of those written opinions addressed issues of first impression under 11 U.S.C. § 303, the section of the Bankruptcy Code that governs involuntary bankruptcies. This Article provides an overview of issues that may arise when an involuntary bankruptcy petition is wrongfully filed and dismissed, using the facts and decisions in the *Rosenberg* case as a cautionary tale for would-be petitioning creditors.

I. THE ELIGIBILITY REQUIREMENTS FOR FILING AN INVOLUNTARY BANKRUPTCY

Section 303 of the Bankruptcy Code contains three requirements for commencing an involuntary bankruptcy case: (1) there must be three or more petitioning creditors; (2) each petitioning creditor must hold a claim against the debtor that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount; and (3) the claims must aggregate at least \$15,775 more than the value of liens on the debtor’s property.³ Each eligibility requirement is critical because if any is missing then “the petitioning creditors lack standing, the bankruptcy court lacks jurisdiction over the case, and thus the involuntary case must be

* Michael A. Friedman, Esq. and Allison R. Day are partners at Genovese, Joblove & Battista, P.A., in Miami, Florida. Ms. Day focuses her practice on representing debtors, creditors and trustees in Chapter 7 and Chapter 11 cases as well as representing receivers in both federal and state court and both assignor and assignees in assignment for the benefit of creditors proceedings. Mr. Friedman focuses his practice on litigation stemming from all types of insolvency scenarios.

1. See *In re Rosenberg*, 414 B.R. 826 (Bankr. S.D. Fla. 2009), *aff’d*, 472 F. App’x 890 (11th Cir. 2012).

2. *Rosenberg v. DVI Receivable XVII, LLC*, 835 F.3d 414, 416 (3d Cir. 2016).

3. 11 U.S.C. § 303(b)(1) (2006) (these numbers have been adjusted for inflation per 11 U.S.C. § 104). If the debtor has fewer than twelve eligible creditors, then only one unsecured creditor with a qualifying claim is needed. *Id.* Assuming that the involuntary petition satisfies these requirements, the petitioning creditors still must prove that “the debtor is generally not paying such debtor’s debts as such debts become due,” a fact-sensitive issue. *Id.* § 303(h)(1).

dismissed.”⁴

In *Rosenberg*, the bankruptcy court determined that the petitioning creditors failed to satisfy the eligibility requirements in several ways. The facts in *Rosenberg* were complex, so a little background is necessary. Prior to the bankruptcy filing, certain limited partnerships, the NMI LPs, entered into leases to finance the purchase of business equipment. Rosenberg, who was affiliated with the NMI LPs, executed a personal guaranty to secure payment of the lease obligations. The leases were then assigned to five special purpose entities, the DVI Entities, which were created to engage in a securitization transaction that financed the purchase of the equipment by issuing notes.⁵ Those special purpose entities assigned their rights in the leases to U.S. Bank, as trustee for the noteholders.⁶ Lyon Financial Services, Inc. (Lyon), a subsidiary of U.S. Bank, was the servicer for the leases.⁷

In 2005, as part of a settlement that resolved a dispute concerning the leases, Rosenberg executed a limited personal guaranty in favor of Lyon that superseded his prior guaranty, and also signed a confession of judgment in favor of Lyon.⁸ The DVI Entities were not parties to the settlement; Rosenberg’s obligations under the limited guaranty ran solely to Lyon, and only Lyon could demand performance of those obligations.⁹ The director of operations of Lyon signed the settlement agreement for Lyon as servicer for the DVI Entities and agent for U.S. Bank.¹⁰

In July 2008, Lyon (not the DVI Entities) sued Rosenberg in state court to enforce the limited guaranty based on the NMI LPs’ alleged breaches under the leases, and filed the confessed judgment.¹¹ In August 2008, Lyon obtained a judgment against Rosenberg, but the state court stayed

4. *Rosenberg*, 414 B.R. at 840; *In re Charon*, 94 B.R. 403, 405–06 (Bankr. E.D. Va. 1988) (petitioner has “burden of proving that it satisfied the jurisdictional requirements of [section] 303(b)”); 2 COLLIER ON BANKRUPTCY ¶¶ 303.11[3], 303.14[9] (Resnick & Sommer eds., 16th ed.) (“The burden is on the petitioning creditor to establish a prima facie case that there is no bona fide dispute as to both liability and amount” and “the burden is on the petitioning creditor to prove they are qualified to file an involuntary petition.”).

5. *Rosenberg*, 414 B.R. at 833–37.

6. *Id.* at 833.

7. *Id.* at 834.

8. *Id.* at 834–35.

9. *Id.* at 835–36.

10. *Id.* at 835.

11. *Id.* at 836.

2017] How Not to Use the Involuntary Bankruptcy Process 77

execution on the judgment at Rosenberg's request pending resolution of a dispute concerning the amount owed under the limited guaranty.¹² Then, in November 2008, Lyon's director of operations filed an involuntary Chapter 7 petition against Rosenberg on behalf of the DVI Entities based on the limited guaranty.¹³ Lyon was not listed as a petitioning creditor; instead, Lyon's director of operations signed the petition individually on behalf of each DVI Entity.¹⁴ Lyon's director of operations was not an officer, director or employee of any DVI Entity at the time, and five of the six DVI Entities had been administratively dissolved.¹⁵

In August 2009, the U.S. Bankruptcy Court for the Southern District of Florida dismissed the involuntary case with prejudice.¹⁶ First, the court determined that the DVI Entities were not "real parties in interest" under Federal Rule of Civil Procedure 17 and section 1109(b) of the Bankruptcy Code because they were "just pass through vehicles" that were "created solely for purposes of the securitization transactions described above."¹⁷ The bankruptcy court found that the DVI Entities had no real economic interest in the outcome of the case because there was no value in the collateralized assets beyond what was owed to the noteholders, citing case law indicating that, in a securitization case, the real party in interest is the trustee or its servicer.¹⁸

Notably, the bankruptcy court's "real party in interest" ground for dismissal is not founded in the explicit requirements of section 303(b); instead the court applied general principles of standing under the Bankruptcy Code and Federal Rules of Civil Procedure.¹⁹ The Third Circuit has similarly found that even if all of section 303(b)'s statutory elements are met, a bankruptcy court can dismiss an involuntary case if it was filed in "bad faith" based on the "equitable nature of bankruptcy,"

12. *Id.* at 836–37.

13. The involuntary bankruptcy was filed in the U.S. Bankruptcy Court for the Eastern District of Pennsylvania and transferred to the Southern District of Florida.

14. *Rosenberg*, 414 B.R. at 837–38.

15. *Id.* at 837.

16. *Id.* at 848–49.

17. *Id.* at 841.

18. *Id.* at 841–42 (citing *In re Kang Jin Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008); *LaSalle Bank N.A. v. Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618, 631–34 (D. Md. 2002); and *Greer v. O'Dell*, 305 F.3d 1297 (11th Cir. 2002)).

19. *Id.*

reasoning that the “general ‘good faith’ filing requirement” that is generally recognized in the voluntary bankruptcy context also applies in the involuntary setting.²⁰ Thus, counsel for a creditor contemplating an involuntary filing would be well-advised to look beyond the statutory language of section 303 to confirm that their filing will be consistent with other applicable bankruptcy law.

Next, the *Rosenberg* court turned to section 303(b). The bankruptcy court found that the petitioning creditors did not hold “separate claims” as required by the statute.²¹ Instead, there was only one claim under the guaranty because Lyon was the only entity with rights under the guaranty and the only entity with the power to enforce the guaranty obligations.²² Those facts rendered the petition defective because section 303(b)(1) “requires not only that there be three creditors, but also that each of such creditors hold a separate claim against the alleged debtor.”²³ The court also found that the claims were both contingent and subject to a bona fide dispute.²⁴ The claim to enforce Rosenberg’s guaranty obligation was “at best, inchoate” because no demand for payment had been made and no opportunity to cure was provided to Rosenberg, both prerequisites to enforcement of the guaranty.²⁵ In addition, there was a bona fide dispute as to liability and amount based on inconsistencies between the amount claimed to be due under the guaranty in the state court confession of judgment case and the amount claimed on the involuntary petition; the petitioning creditors actually filed two amended petitions that changed the amount allegedly owed based on claimed errors in the prior calculations.²⁶ The bankruptcy court also noted a dispute as to whether Rosenberg had any liability on certain categories of expenses included in the guaranty claim calculation.²⁷ The dismissal was affirmed by the district court and the Eleventh Circuit.²⁸

20. *In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328, 334 (3d Cir. 2015).

21. *Rosenberg*, 414 B.R. at 843–44.

22. *Id.* at 844.

23. *Rosenberg*, 414 B.R. at 843.

24. *Id.* at 844–846.

25. *Id.* at 844.

26. *Id.* at 846–848.

27. *Id.* at 846–47.

28. *DVI Receivables XIV, LLC v. Rosenberg (In re Rosenberg)*, No. 10–24347 (S.D. Fla. Sept. 27, 2011), *aff’d*, 472 Fed. App’x 890 (11th Cir. 2012).

II. THE FALLOUT: POST-DISMISSAL LITIGATION UNDER SECTION 303(I)

Involuntary bankruptcy is a high-stakes venture because serious consequences can flow from an order of dismissal. If an involuntary case is dismissed without the petitioning creditors' consent, the bankruptcy court has discretion to award the alleged debtor attorney's fees and costs under section 303(i)(1). If the petition was filed in "bad faith," the bankruptcy court may also award damages under section 303(i)(2), which includes punitive damages.²⁹

The post-dismissal litigation in *Rosenberg* produced a host of interesting issues. Rosenberg sued the DVI Entities, Lyon and others in bankruptcy court for costs, attorney's fees and damages under section 303(i), and brought claims of malicious prosecution and abuse of process under state law.³⁰ Early in the case, the bankruptcy court dismissed Rosenberg's state law claims based on constitutional preemption, agreeing with the "overwhelming weight of authority" that section 303(i) creates the exclusive remedy "to compensate the alleged debtor for all fees, costs and damages arising from the filing of the involuntary petition."³¹ The statute does not preempt state law remedies of non-debtors, though; the statute "is silent as to potential remedies for non-debtors harmed by an involuntary bankruptcy petition," which means that "when Congress passed the provision it either did not intend to disturb the existing framework of state law remedies for non-debtors or (more likely) was not thinking about non-debtor remedies at all."³² In either case, "federal preemption does not apply" to preempt state law remedies of non-debtors damaged by an improper involuntary petition.³³

29. 11 U.S.C. § 303(i)(1) (2006).

30. See *In re Rosenberg*, 779 F.3d 1254, 1259 (11th Cir. 2015), cert. denied sub nom. U.S. Bank, N.A. v. Rosenberg, 136 S. Ct. 805 (2016). The bankruptcy court required Rosenberg to file an adversary proceeding, rather than proceed under a motion filed in the bankruptcy case, to protect the due process rights of parties that were not parties to the bankruptcy case and against whom Rosenberg sought fees, costs and damages under 11 U.S.C. § 303(i).

31. *In re Rosenberg*, No. 09-13196-BKC-AJC, 2012 WL 1021724, at *7 (Bankr. S.D. Fla. Mar. 26, 2012) (citing *In re Miles*, 430 F.3d 1083 (9th Cir. 2005)).

32. *Rosenberg v. DVI Receivables XVII, LLC*, 835 F.3d 414, 419 (3d Cir. 2016).

33. *Id.*

In another noteworthy decision from the *Rosenberg* post-dismissal litigation, the U.S. District Court for the Southern District of Florida determined that a petitioning creditor is entitled to a jury trial in a section 303(i)(2) case seeking damages based on the creditor's alleged "bad faith," reasoning that a damages case under section 303(i)(2) is analogous to a malicious prosecution case in which the defendant would be entitled to a jury trial.³⁴ The district court found that the petitioning creditors were *not* entitled to a jury trial on the section 303(i)(1) fee claim, however, and as a result, the district court withdrew the bankruptcy reference from the bankruptcy court to conduct a jury trial in district court on the damages claim while the parties continued to litigate the fee issues in bankruptcy court.³⁵ That decision would have important procedural implications later in the case.³⁶

III. FEE AND COST CLAIMS UNDER 11 U.S.C. § 303(I)(1)

There is a "rebuttable presumption" that a prevailing involuntary debtor is entitled to an award of attorney's fees; the burden is on the petitioning creditors to demonstrate that an award of fees and costs is *inappropriate* under the "totality of circumstances."³⁷ According to the Ninth Circuit, "any petitioning creditor in an involuntary case should expect to pay the debtor's attorney's fees and costs if the petition is dismissed."³⁸ Assuming that fees are awarded, the bankruptcy court will determine a reasonable fee

34. *Rosenberg v. DVI Receivables XIV, LLC*, Case No. 12-22275-SEITZ, ECF No. 10 (S.D. Fla. Aug. 10, 2012).

35. *Id.*; see 28 U.S.C. § 157(b), (d) (2005).

36. See discussion of Bankruptcy Rule 50(b) *infra* Section IV.

37. *Higgins v. Vortex Fishing Sys., Inc.*, 379 F.3d 701, 706 (9th Cir. 2004); *In re Ross*, 135 B.R. 230 (Bankr. E.D. Pa. 1991). The "totality of the circumstances" could include the merits of the involuntary petition, the conduct of the debtor, and any other relevant factor. *Higgins*, 379 F.3d at 704-08.

38. *Higgins*, 379 F.3d at 707. Other courts have likewise observed that awarding attorney's fees is generally appropriate in all cases where a debtor successfully defends against an involuntary petition. *In re Lee*, 252 B.R. 565, 566 (Bankr. M.D. Fla. 2000) (citing *In re K.P. Enterprise*, 135 B.R. 174 (Bankr. D. Me. 1992)). Courts have indicated that fees should be awarded even if the evidence shows that the petition was filed in good faith. *In re John Richards Homes Bldg. Co., L.L.C.*, 405 B.R. 192, 214-17 (E.D. Mich. 2009). That is consistent with the plain language of section 303(i), which makes a finding of bad faith a precondition to an award of compensatory or punitive damages, but not an award of attorney's fees and costs.

2017] How Not to Use the Involuntary Bankruptcy Process 81

by taking into account factors such as the time and labor required, the novelty or difficulty of the legal issues presented, and other factors.³⁹

In *Rosenberg*, after a bench trial, the bankruptcy court rejected Lyon's argument that only the defunct shell-DVI Entities could be held liable under section 303(i) because they were the only entities listed on the involuntary petition; the bankruptcy court found that Lyon had acted as the DVI Entities' "agent" in filing the involuntary petition and was therefore liable for the filing under general agency principles.⁴⁰ The bankruptcy court held the DVI Entities and Lyon jointly and severally liable for over \$1 million in fees and costs for the following categories of work: (1) fees incurred to obtain the dismissal of the involuntary petition, (2) fees to sustain the dismissal on appeal, (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 under section 303(i)(2) in district court.⁴¹

U.S. Bank appealed the bankruptcy court's fee award to the district court and then to the Eleventh Circuit.⁴² The appeal presented two issues of first impression in the Eleventh Circuit: whether section 303(i)(1) authorizes a bankruptcy court to award appellate fees, and whether the statute authorizes an alleged debtor to recover fees and costs incurred to prosecute a bad-faith claim for damages under section 303(i)(2).⁴³ The bank also challenged the decision to hold Lyon liable under section 303(i) on an agency theory even though Lyon was not listed as a petitioning creditor.⁴⁴

The Eleventh Circuit determined that Lyon was properly held liable under section 303(i) irrespective of agency principles because the evidence showed that Lyon was the "de facto" petitioning creditor under the unique

39. See *Am. Benefit Life Ins. Co. v. Baddock (In re First Colonial Corp.)*, 544 F.2d 1291 (5th Cir. 1977), cert. denied, 431 U.S. 904 (1977) (articulating twelve-factor test for evaluating attorney's fees awards).

40. *In re Rosenberg*, 2012 WL 3990725, at *8 (Bankr. S.D. Fla. Sept. 11, 2012).

41. *In re Rosenberg*, 779 F.3d 1254, 1261-62 (11th Cir. 2015).

42. See *DVI Receivables XIV, LLC v. Rosenberg*, 500 B.R. 174, 177 (S.D. Fla. 2013) (district court appeal); *In re Rosenberg*, 779 F.3d 1254 (circuit court appeal). U.S. Bank became Lyon's successor by merger during the litigation.

43. *Rosenberg*, 779 F.3d at 1264.

44. *Id.* at 1268.

facts of the case.⁴⁵ The court also determined that both challenged fee categories — appellate fees and fees incurred prosecuting a claim for damages — were recoverable, rejecting the bank’s argument that section 303(i)(1) only provides for recovery of fees incurred obtaining dismissal of the involuntary petition. The court of appeals observed, “while the bankruptcy court is the court deciding what is a reasonable attorney’s fee, nothing in section 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.”⁴⁶ The court further reasoned with respect to appellate fees that the statute’s legislative purpose is to “compensate debtors who obtain a dismissal and successfully defend against involuntary bankruptcy litigation, which may or may not end at the trial level.”⁴⁷

The Eleventh Circuit also rejected the bank’s alternative argument that appellate fees had to be requested under Rule 38, because “unlike Rule 38, the statutory award of fees in section 303(i)(1) has no frivolity requirement.”⁴⁸ On this point, the Eleventh Circuit expressly disagreed 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 incurred after dismissal of an involuntary petition.⁴⁹ The Eleventh Circuit noted that *Higgins* was in tension with another Ninth Circuit decision, *In re Southern California Sunbelt Developers, Inc.*, which held that a fee award under section 303(i) “presumptively encompasses all aspects of the [section] 303 action, including proceedings on claims under [section] 303(i)(2).”⁵⁰ The Sixth Circuit also disagreed with *Higgins* in its unpublished decision *In re John Richards Homes Building Co.*, which

45. *Id.* at 1268-69.

46. *Id.* at 1265.

47. *Id.* While the court determined that the debtor was entitled to fees incurred in pursuit of his bad-faith claims under section 303(i)(2), it also found that the bankruptcy court in *Rosenberg* had awarded those fees prematurely as the bad faith litigation had not yet concluded. The court of appeals described this as “an issue of timing” because the “bankruptcy court may grant only ‘reasonable’ attorney’s fees under section 303(i)(1). And determining reasonableness necessarily requires consideration of the litigation as a whole and the total number of hours reasonably expended.” *Id.* at 1267.

48. *Id.* at 1265.

49. 379 F.3d 701, 709 (holding that an alleged debtor “remains exposed to appellate attorney’s fees unless it can be demonstrated that the appeal was frivolous under Rule 38”).

50. 608 F.3d 456, 463–64 (9th Cir. 2010).

2017] How Not to Use the Involuntary Bankruptcy Process 83

concluded that appellate fees can be awarded under section 303(i)(1) since the purpose of the statute is to make the debtor completely whole.⁵¹

Consistent with *Rosenberg*, courts have allowed all sorts of fees and costs under section 303(i)(1), including fees incurred obtaining dismissal of the involuntary petition, “fees on fees” incurred enforcing a fee award under section 303(i)(1), and fees incurred litigating a claim for damages under section 303(i)(2).⁵² A good example of the statute’s impressive reach is the Sixth Circuit’s decision in *John Richards Homes*.⁵³ There, the bankruptcy court entered a substantial fee award in favor of the prevailing debtor under section 303(i)(1) and later awarded nearly \$2 million in *additional* “fees on fees” that the alleged debtor incurred prosecuting the first fee award for years after the involuntary petition was dismissed.⁵⁴ The additional fee award included fees incurred participating in the petitioning creditor’s own subsequent bankruptcy case, which sought to discharge the prior fee award.⁵⁵

IV. DAMAGE CLAIMS UNDER 11 U.S.C. § 303(I)(2)

In a case seeking damages under section 303(i)(2), the fact-finder presumes that the petitioning creditor acted in good faith and the debtor has the burden of proving “bad faith,” which is the prerequisite to awarding damages under the statute.⁵⁶ This requires the bankruptcy court — or the jury, as was the case in *Rosenberg* — to analyze the “totality of

51. *In re John Richards Homes Bldg. Co.*, 552 Fed. App’x 401, 407–408 (6th Cir. 2013).

52. *See In re John Richards Homes Building Co.*, 405 B.R. 192, 198–200 (E.D. Mich. 2009) (collecting case law); *In re S. Ca. Sunbelt Devs., Inc.*, 608 F. 3d 456, 463–64 (9th Cir. 2010) (“If the court finds that the debtor is eligible for an award of fees, then . . . the fee award presumptively encompasses all aspects of the [section] 303 action, including proceedings on claims under [section] 303(i)(2)”; *In re Advance Press & Litho., Inc.*, 46 B.R. 700, 703 (Bankr. D. Colo. 1984) (“I find nothing in the Code or case authority limiting an award to the date of dismissal”); *Adell v. John Richards Homes Bldg. Co.*, 552 F. App’x 401, 411 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 2136 (2014) (“[Section] 303(i) authorizes bankruptcy courts to award fees for services rendered in direct appeals and in collateral proceedings enforcing a judgment after the dismissal of an involuntary petition.”); *In re Landmark Distribs., Inc.*, 195 B.R. 837, 846 (Bankr. D. N.J. 1996); *In re Glannon*, 245 B.R. 882, 894 (D. Kan. 2000).

53. 552 F. App’x 401 (6th Cir. 2013).

54. *Id.*

55. *Id.*

56. *In re John Richards Homes Bldg. Co., LLC*, 439 F.3d 248, 254 (6th Cir. 2006).

the circumstances” surrounding the filing of the involuntary petition, for example, whether the petitioning creditors filed the involuntary petition in order to exert pressure or otherwise gain an improper advantage in a dispute with the debtor, and whether the decision to file the involuntary petition was motivated by personal ill-will or malice.⁵⁷

The specter of punitive damages is probably the most dangerous arrow in the alleged debtor’s quiver, especially in a jury trial setting. “Section 303(i)(2) expressly authorizes a stand alone award of punitive damages” even in the absence of actual damages because it authorizes the court to award “any damages proximately caused” by a bad faith filing *or* punitive damages.⁵⁸ In other words, “the sole precondition” to awarding punitive damages “is a showing of bad faith.”⁵⁹ Still, courts generally require something beyond bad faith, such as malicious or “outrageous” conduct, before they will assess punitive damages or permit a jury to do so.⁶⁰

A creditor considering the extraordinary step of filing an involuntary bankruptcy usually (hopefully) will consult with bankruptcy counsel, so the creditor’s liability under section 303(i)(2) may turn on their ability to prove up an advice of counsel defense. That defense is not available if the debtor proves that the involuntary petition was filed for an “improper purpose,” *e.g.*, out of personal ill-will or to exert undue pressure over the debtor.⁶¹ Courts reason that such a creditor would have come to the attorney with their improper purpose already in mind, and thus cannot

57. *Id.* at 255 (collecting cases and affirming finding of bad faith where, among other things, the petitioning creditor was motivated to coerce the debtor into a settlement or destroy its business).

58. *Sunbelt Devs.*, 608 F.3d at 465; 11 U.S.C. § 303(i)(2) (emphasis added).

59. *Id.*

60. *See, e.g., In re Schloss*, 262 B.R. 111, 116–17 (Bankr. M.D. Fla. 2000) (“unless there is a showing that it [the bankruptcy filing] was done with malice, [a] punitive damages award is not appropriate”); *compare K.P. Enter.*, 135 B.R. at 184 (declining to award punitive damages where creditor’s “conduct, although misguided and recalcitrant, was not malicious or vengeful”) with *John Richards Homes*, 439 F.3d at 258–62 (affirming punitive damages where the petitioning creditor “outrageously threatened [the alleged debtor with] criminal prosecution,” contacted other creditors, “used improper threats and flaunted his wealth” to cajole them into joining the involuntary filing, and even engaged a public relations firm to publicize the bankruptcy).

61. By contrast, an “improper use” of the involuntary process occurs when a creditor improperly uses the bankruptcy system to obtain an otherwise *legitimate* goal; for example, filing an involuntary bankruptcy as an alternative to traditional state court debt collection remedies. *See In re Better Care, Ltd.*, 97 B.R. 405, 412–13 (Bankr. N.D. Ill. 1989); *see also Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1501 (11th Cir. 1997) (citing *Better Care* and distinguishing improper use from improper purpose).

claim to have relied on their counsel's advice in pursuing the improper course of action.⁶² In addition, the creditor must prove that it made a reasonable inquiry into the debtor's financial circumstances and fully disclosed that information to its attorney in order to claim good faith reliance on the attorney's advice; courts have rejected the advice of counsel defense when material information was withheld from counsel.⁶³

In *Rosenberg*, the district court conducted a two-phase unprecedented jury trial: first a liability phase to determine whether the bank had filed the involuntary petition in bad faith; and second, a damages phase in which the jury could consider various categories of compensatory damages as well as punitive damages.⁶⁴ After an eleven-day trial, the jury found that the bank had acted in bad faith and awarded Rosenberg \$1.12 million in compensatory damages for lost wages, loss of reputation and "garden variety" emotional distress, together with \$5 million in punitive damages. The district court reduced that award to \$360,000 in post-verdict motion practice, granting the bank's requested motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), which the bank filed twenty-eight days after the entry of the damages judgment on the jury's verdict.⁶⁵

On cross-appeal from the district court's order granting the bank's Rule 50(b) motion, the Eleventh Circuit reversed and ordered the district court to reinstate the jury's verdict.⁶⁶ The court of appeals never addressed the merits of the district court's Rule 50(b) order. Instead, in yet another decision of first impression in the Eleventh Circuit, the court determined that the bank's post-judgment motion, while timely under the Federal Rules of Civil Procedure, was *untimely* and therefore should have been denied under Federal Rule of Bankruptcy Procedure Rule 9015(c).⁶⁷ Bankruptcy Rule 9015(c) incorporates and makes Rule 50(b) applicable in

62. *Better Care*, 97 B.R. at 412 ("Where, however, the purpose is improper, the client will usually come into the attorney's office with that purpose already formed. It is the purpose which constitutes bad faith in such a case and it is the client who is responsible for the purpose.")

63. *In re Landmark Distributions, Inc.*, 189 B.R. 290, 317-18 (Bankr. D. N.J. 1995).

64. *Rosenberg v. DVI Receivables, XIV, LLC*, Case No. 12-22275-CIV, 2014 WL 4810348, at *1 (S.D. Fla. Sept. 29, 2014), *aff'd in part, vacated in part, rev'd in part*, 818 F.3d 1283 (11th Cir. 2016).

65. *Rosenberg v. DVI Receivables XIV, LLC*, 818 F.3d 1283, 1286-87 (11th Cir. 2016).

66. *Id.*

67. *Id.* at 1287-92.

bankruptcy cases but with a shorter, fourteen-day deadline.⁶⁸ The bank argued that the Federal Rules of Civil Procedure (FRCP) applied because the damages case was tried in district court, and the district court had agreed with that position.⁶⁹ But the Eleventh Circuit applied the plain language of both sets of rules, Civil and Bankruptcy, as well as a host of persuasive authority from other circuits to conclude that the Bankruptcy Rules apply in *all* bankruptcy cases, even cases tried in district court.⁷⁰ Because the bank's post-trial motion was late, the court of appeals concluded that it "need not (and, indeed, cannot) address whether the motion was correctly decided by the district court on the merits."⁷¹ The court vacated the district court order that had incorrectly found the post-judgment motion to be timely under the FRCP and ordered the district court to reinstate the jury's verdict: an inglorious end to an improvident involuntary bankruptcy case.⁷²

CONCLUSION

As of publication, the *Rosenberg* battles continue in Florida and elsewhere. The decisions entered to date illustrate that section 303 is a landmine where a misstep can cause serious blowback: as of March 2017, Rosenberg had obtained fee and cost awards in excess of \$1,589,081 and his request for an additional award of \$2,604,623 in fees and costs was pending in bankruptcy court, all in addition to the \$6,120,000 bad-faith damages judgment.⁷³ Creditors need to carefully consider before putting a debtor into an involuntary bankruptcy, and creditors' counsel needs to be sure to understand the requirements and risks under section 303 and advise clients accordingly.

68. *Id.* at 1287–92.

69. Omnibus Order, *Rosenberg v. DVI Receivables, XIV, LLC*, Case No. 12-22275-CIV, ECF No. 259 (S.D. Fla. Dec. 12, 2013), *rev'd*, *Rosenberg*, 818 F.3d 1287.

70. *Rosenberg*, 818 F.3d at 1287. The court of appeals readily concluded that the damages case was a "bankruptcy case" because the claim at issue was created by the Bankruptcy Code itself. *Id.* ("we think it is beyond debate that a case arises under title 11 when it involves a cause of action created or determined by the statutory provisions found in title 11.")

71. *Id.* at 1292.

72. *Id.* at 1293.

73. *Rosenberg v. DVI Receivables XIV, LLC*, Adv. No. 10-3812-AJC, ECF Nos. 698, 711, 722 (Bankr. S.D. Fla.).