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The Limits of Good Faith Analyses: Unraveling and Redefining Bad Faith in Involuntary Bankruptcy Proceedings

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I. INTRODUCTION

Involuntary bankruptcy, at one time a tautology,[1] languished during the eighty years or so when bankruptcy law in the United States was governed by the National Bankruptcy Act of 1898.[2] Specifically targeted for reform in the project that culminated in the promulgation of the current Bankruptcy Code,[3] the slumbering remedy of involun-

1. Under the earliest bankruptcy law in the United States (Bankruptcy Act of 1800, 2 Stat. 19, *repealed*, 2 Stat. 2248 (1803)), bankruptcy was exclusively a creditor's remedy; it provided no mechanism for voluntary filing or discharge of debts. This followed the English practice prevailing at the time which also provided only for involuntary petitions. *See* Vern A. Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226 (1976); Stephen A. Riesenfeld, *The Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401 (1947). In fact, voluntary filings did not become a part of bankruptcy law until 1841 in the United States and 1844 in England. *See* STEPHAN A. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 456-457 (1986). The relatively recent origins of voluntary bankruptcy, and the historical circumstances which gave rise to its adoption in 19th Century bankruptcy legislation, are insightfully chronicled in John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 BANKR. DEV. J. 361 (1988). *See also* Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325 (1991). For a more in-depth study of the development of federal bankruptcy law in the last century the leading work is undoubtedly CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935).
2. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 [hereinafter the Bankruptcy Act or Act]. The Act was amended on several occasions before its repeal in 1979, including, most importantly, the Chandler Act, ch. 575, 52 Stat. 840 (1938) which, among other new provisions providing for debtor rehabilitation, introduced the modern concept of corporate reorganizations into the bankruptcy law by revising and incorporating into a new Chapter X various provisions of former section 77B, itself enacted as an amendment to the Bankruptcy Act by Act of June 7, 1934, 48 Stat. 911.
3. In 1970, Congress established the Commission on Bankruptcy Laws of the United States [hereinafter the Bankruptcy Commission] to "study, analyze, evaluate and

tary bankruptcy was infused with new life and vitality upon the enactment of the Bankruptcy Reform Act of 1978.[4] Eligibility to file was expanded,[5] procedures were streamlined,[6] and standards governing entitlement to relief were relaxed.[7] All in all, the prospects for rehabilitation, preservation of assets, and maximization of value—the attributes typically regarded as favorably distinguishing federal

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recommend changes to [existing bankruptcy law]." Act of July 29, 1970, Pub. L. No. 91-354, 84 Stat. 468. The work of the Bankruptcy Commission, set forth in its 1973 report, became the foundation for several reform bills including the bill (H.R. 8200) that was eventually enacted into law. *See* COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. 1 (1973). The Report was issued in two parts: Part I contained findings and recommendations, and Part II was an actual reform bill [Part I of this report is hereinafter referred to as the BANKRUPTCY COMMISSION REPORT]. For review of the legislative process culminating in the enactment of the current Bankruptcy Code, see 1 COLLIER ON BANKRUPTCY (15th ed.), ¶ 1.03 (1991); RIESENFELD, *supra* note 1, at 459-460. *See also* J. Ronald Trost & Lawrence P. King, *Congress and Bankruptcy Reform Circa 1977*, 33 BUS. LAW. 489, 489-95 (1978)(published approximately nine months before a final bill was passed).

4. Act of November 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 [hereinafter the Reform Act]. Title I of the Reform Act was codified as 11 U.S.C. §§ 101-1330 (1988 & Supp. II 1990). All references in this Article to the "Bankruptcy Code" or the "Code" are to Title 11 of the United States Code as amended through January 1, 1991 unless otherwise indicated.
5. Under § 59b of the Bankruptcy Act, only creditors holding "provable," non-contingent, and unliquidated claims against the debtor were eligible to initiate an involuntary case. The concept of provability of claims under the Act determined whether a creditor was entitled to participate at all in the bankruptcy case. A claim was regarded as provable if it fell within one of the nine specified categories of debts enumerated in Bankruptcy Act § 63a. The Reform Act abandoned the concept of provable claims and eliminated all restrictions on the ability of the holders of unliquidated claims to effectively join in an involuntary petition. However, the aggregate amount of unsecured claims required to be held by the petitioning creditors was increased from the $500 level set forth in § 59b to $5,000. 11 U.S.C. § 303(b)(1982). Section 303(b) was amended in 1984 to exclude disputed claims.
6. FED. R. BANKR. P. 1013(a), for example, provides that "[t]he court shall determine the issues of a contested [involuntary] petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter other appropriate orders." The procedure governing the disposition of involuntary petitions under the Code is detailed in STEPHEN SNYDER & LAWRENCE PONOROFF, COMMERCIAL BANKRUPTCY LITIGATION §§ 5.12-5.13 (1991).
7. Of primary import, the Reform Act eliminated the much-criticized provision of the Bankruptcy Act which required that the petition be filed within four months after the commission of an "act of bankruptcy". *See* Bankruptcy Act § 3b. Not only did this requirement impose what was effectively a lightning-quick statute of limitations, but the six acts of bankruptcy, enumerated in § 3a, were often difficult to detect and arduous to prove. For more detailed discussion of the reasons for the general dissatisfaction with the Act's standards pertaining to involuntary bankruptcy, see JAMES A. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY 56-56 (1956). *See also* Bankruptcy Commission Report, *supra* note 3, at 187-88 (describing the deficiencies in the then-current rules governing involuntary bankruptcy).

bankruptcy from its less efficient state law analogue[8]—were greatly enhanced, or so it seemed, as creditors were handed a powerful tool to prevent the wasteful dissolution of valuable earning capacity.

And yet the drafters of the Code, looking down on all they had wrought that was good, also saw a dark side to what they had conceived. A new concern arose now that involuntary bankruptcy was no longer burdened by technical and difficult requirements of proof. The concern was that unprincipled creditors would use or threaten use of involuntary bankruptcy, not when its invocation would increase value for the benefit of the common weal, but to serve a purpose or end unrelated to (or even at odds with) core bankruptcy policy.[9] For example, an unscrupulous creditor intoxicated by the easy availability of involuntary bankruptcy might seek its seductive company to lever payment of a legitimately disputed obligation, satisfy a personal grudge, or secure a business advantage by eliminating competition.[10] Therefore, to deter those who might otherwise seek to take advantage of the Reform Act's liberalized rules governing access to involuntary relief, the drafters incorporated into section 303 a provision that had

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8. Although there is a growing division in bankruptcy scholarship over the breadth and scope of bankruptcy policy, *see infra* text accompanying notes 156-193, nobody seriously questions that the federal bankruptcy system exists as a more effective and efficient alternative to state debt collection schemes for liquidating the debtor's assets and, when appropriate, preserving going concern value. By contrast, state collection law, often referred to as "grab law" because of its first-come-first-served orientation, makes no provision for rehabilitation of a financially beleaguered business. *See generally* LYNN M. LOPUCKI, STRATEGIES FOR REPRESENTING CREDITORS IN BANKRUPTCY PROCEEDINGS 10-21 (1985 & Supp. 1990). *See also* BANKRUPTCY COMMISSION REPORT, *supra* note 3, at 61-83 (setting forth a "Philosophical Basis for a Federal Bankruptcy Act").

9. The Bankruptcy Commission observed that the only substantial arguments against changing the standards for involuntary relief so as to permit creditors easier and earlier access were: "(1) possible misuse or abuse by a creditor, *i.e.*, the filing of an involuntary petition for an improper purpose, such as to embarrass competition or harass an enemy, and (2) the possibility that temporary financial embarrassment might result in an expensive and unnecessary federal proceeding." BANKRUPTCY COMMISSION REPORT, *supra* note 3, at 189.

10. The concern was particularly acute for commercial debtors whose businesses might be effectively destroyed before the proper steps could be taken to have the petition adjudicated as without merit and dismissed. Under the Act, the filing of the petition itself was enough to cause the debtor's business to grind to a halt because of the lack of meaningful protection for those parties who might otherwise have elected to continue to deal with the debtor unless and until an adjudication of bankruptcy. *See* Bankruptcy Act §§ 21g, 71a, and 71d. The Reform Act effected major changes in these practices by explicitly permitting the debtor to operate its business during the gap period between filing of the petition and entry of an order for relief, 11 U.S.C. § 303 (f)(1982), and affording substantial protection and comfort for customer, suppliers, lenders, and others willing to transact business with the debtor in the gap period. 11 U.S.C. §§ 502(f), 507(a)(2), 549(a)(2) and (b). For additional discussion of special issues arising during the gap period, see generally, SNYDER & PONOROFF, *supra* note 6, at § 5.11.

no direct counterpart under the former Bankruptcy Act.[11] Specifically, the drafters called upon that old war-horse of the legal lexicon: bad faith. They provided in what became codified as section 303(i)(2) that the bankruptcy court might assess both actual and punitive damages against any petitioning creditor found to have filed in bad faith.[12] Moreover, even in the absence of bad faith, section 303(i)(1) was drafted to allow the court discretion to award the alleged debtor both costs and a reasonable attorney's fee upon dismissal of a petition other than on consent of all the parties.[13]

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11. *See In re* All Media Properties, Inc., 5 B.R. 126, 135 (Bankr. S.D. Tex. 1980), *aff'd* 646 F.2d 193 (5th Cir. 1981). In reviewing the Reform Act's more relaxed attitude to involuntary bankruptcy, the court observed that the drafters of the Code adopted the new provisions of § 303(i), which did not appear in the Bankruptcy Act, in order to discourage the bringing of frivolous petitions.

12. Section 303(i)(2) reads in its entirety as follows:

> (i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment . . . (2) against any petitioner that filed the petition in bad faith, for—(A) any damages proximately caused by such filing; or (B) punitive damages.

The legislative history makes clear that under this provision damages may include, without limitation, items such as loss of business during and after the pendency of the case. Also, the "or" connecting subparagraphs (A) and (B) is not exclusive. H. REP. NO. 595, 95th Cong., 1st Sess. 324, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS, 5963, 6280; S. REP. NO. 989, 95th Cong. 2d Sess. 35, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS, 5787, 5820.

Ordinarily, proof of actual damages will not be a prerequisite to an award of punitive damages in an appropriate case. *See In re* Advance Press & Litho, Inc., 46 B.R. 700, 706 (D. Colo. 1984); *In re* Laclede Cab Co., 76 B.R. 687, 694 (Bankr. E.D. Mo. 1987)(the amount of punitive damages is not limited by or necessarily even related to actual damages), *citing*, American Business Interiors, Inc. v. Haworth, Inc., 798 F.2d 1135 (8th Cir. 1986). *But see* Sjostedt v. Salmon (*In re* Salmon), 128 B.R. 313, 318 (Bankr. M.D. Fla. 1991). However, given the deliberate use of the permissive term "may" in the prefatory language to § 303(i)(2), it is also clear that an award of any damages under this provision is discretionary with the court. *See, e.g.*, Bankers Trust Co. BT Serv. Co. v. Nordbrock (*In re* Nordbrock), 772 F.2d 397 (8th Cir. 1985); *In re* Johnston Hawks, Ltd., 72 B.R. 361 (Bankr. D. Haw. 1987). *See also* authorities cited *infra* note 92.

Actually, § 303(i)(2) was not entirely new. Section 69b Bankruptcy Act also made provision for an award of damages upon dismissal or withdrawal of an involuntary petition for an adjudication of bankruptcy. However, compensable damages under this provision were generally regarded as limited to those losses resulting from the seizure, taking or detention of the debtor's property. *See* Finklestein v. Keith Fabrics, Inc., 278 F.2d 635 (5th Cir. 1960). Such damages, along with counsel fees and other expenses, were to be paid by the obligor on the surety bond posted by the petitioners, and their award was mandatory. Bankruptcy Act § 69a,d.

13. As originally drafted, § 303(i)(1) also conferred discretion on the court to enter judgment for "any damages proximately caused by the taking of the possession of the debtor's property by a trustee appointed under subsection (g) of this section . . . ." 11 U.S.C. § 303 (i)(1)(C)(1982). That provision was struck by § 204 of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act

Congress, however, was apparently not satisfied with the original balance struck in 1978 for facilitating access to involuntary bankruptcy on the one hand, while discouraging improper and abusive uses on the other. Therefore, in 1984 Congress amended section 303 as part of the revisions to the Code accomplished by the Bankruptcy Amendments and Federal Judgeship Act of 1984.[14] Of principal significance, debts subject to "bona fide dispute" were explicitly excluded from the deter-

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of 1986, Pub. L. No. 99-554, 100 Stat. 3088 [hereinafter the 1986 Act]. However, the effectiveness of this amendment was delayed by § 302(d)(3) of the 1986 Act to coincide with the gradual phase-in of the nationwide U.S. trustee system, with two states, Alabama and North Carolina, having until 1992 to opt into the system. The deadline for these two states was subsequently extended until 2002, thereby potentially delaying the effectiveness of the amendment to § 303(i)(1) in those jurisdictions until that date. Federal Courts Study Committee Implementation Act of 1990, § 317, Pub. L. No. 101-650, 104 Stat. 5104, 5113, 5115. The effective repeal of former § 303(i)(1)(C) suggests that damages occasioned by the seizure of the debtor's property may now only be recovered under § 303(i)(2) upon a showing of bad faith. Nevertheless, FED. R. BANKR. P. 2001(b), separate from the provisions of section 303(e), continues to require the posting of a bond as a condition to appointment of a trustee under § 303(g).

The term "or," each time it is used in § 303(i)(1), is also to be construed as nonexclusive. *See supra* note 12 for citation to pertinent legislative history. Therefore, when bad faith is determined to exist, the remedies set forth within subsections (1) and (2) may be awarded alternatively, cumulatively, and in any combination. *See, e.g., In re* Fox Island Square Partnership, 106 B.R. 962, 966 (Bankr. N.D. Ill. 1989); *In re* Johnston Hawks, Ltd., 72 B.R. 361, 366 (Bankr. D. Haw. 1987); *In re* Camelot, Inc., 25 B.R. 861 (Bankr. E.D. Tenn. 1982), *aff'd*, Camelot, Inc. v. Hayden, 30 B.R. 409 (E.D. Tenn. 1983); *In re* Ramsden, 17 B.R. 59 (Bankr. N.D. Ga. 1981). However, an award of fees and costs is not automatic upon dismissal of an involuntary petition. Like the decision whether to award damages upon a determination of bad faith under section 303(i)(2), the decision regarding entry of judgment under section 303(i)(1) is within the discretion of the bankruptcy court. *See In re* Kearney, 121 B.R. 642, 644 (Bankr. M.D. Fla. 1990)(award of costs and attorneys' fees, even if involuntary petition is dismissed, is not mandatory); *In re* Allen Rogers and Co., 34 B.R. 631 (Bankr. S.D.N.Y. 1983); *In re* Camelot, 25 B.R. 861 (Bankr. E.D. Tenn. 1982). *Cf. infra* note 92 for discussion of the view that, although not technically required, a showing of bad faith is ordinarily a prerequisite to an award of costs and fees under section 303(i)(1).

14. Act of July 10, 1984, Pub. L. No. 98-353, 98 Stat. 333 [hereinafter the 1984 Act]. That the rationale for the amendment of section 303 was to protect debtors from abusive filings is made quite clear in a brief floor statement from the sponsor of the amendment who, in conclusion, observed:

> I believe this amendment, although a simply [sic] one, is necessary to protect the rights of debtors and to prevent a misuse of the bankruptcy system as a tool of coercion. I also believe it corrects a judicial misinterpretation of existing law and congressional intent as to the proper basis for granting involuntary relief.

130 CONG. REC. S7618 (daily ed. June 19, 1984)(statement of Sen. Baucus). This sentiment, which represents the only extant piece of legislative history to the 1984 Act's amendment of § 303, is open to some question given the absence of any study or other corroborating evidence to show that the abuses which formed the justification for the amendment actually existed. In fact, from all appearances, the reformed scheme for involuntary bankruptcy put in place in 1979 seemed to

mination of both who has standing to be a petitioner in an involuntary case[15] and whether grounds for relief exist with respect to a petition filed by parties with proper standing.[16]

Unquestionably, these amendments signaled a retreat from the bold initiative undertaken in 1978 to breathe new life into involuntary bankruptcy relief.[17] At the same time, section 303(i), originally crafted to serve as a counterweight to the more liberal rules on involuntary bankruptcy, remained unaltered by the 1984 Act.[18] Hence, the requirements for involuntary bankruptcy were stiffened, but the penalties that might be suffered for an unsuccessful attempt stayed the same. The net effect, as I have suggested in another context,[19] has been to undermine the effort to reform involuntary bankruptcy and, in the process, to make the remedy a less important tool within the overall framework of debtor/creditor relations.

Whether one regards that as a good thing or a bad thing depends on one's perspective and perhaps one's normative judgment about the role of bankruptcy. However, it is not the purpose of this Article to plead my case for legislative reform in the area. Instead, I would like to draw attention to a construction and application of the statute as

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be working precisely in the manner that the drafters of the Reform Act had hoped that it would.

15. *See* 11 U.S.C. § 303(b)(1988), amended by § 426(b) of the 1984 Act. Prior to the amendment, courts had generally held that holders of disputed claims had standing to join in an involuntary petition. *E.g., In re* All Media Properties, Inc., 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd* 646 F.2d 193 (5th Cir. 1981)(a claim is not rendered contingent for purposes of § 303(b) because a dispute as to liability arises after it is incurred). *See also In re* Dill, 30 B.R. 546, 549 (Bankr. 9th Cir. 1983), *aff'd*, Semel v. Dill (*In re* Dill), 731 F.2d 629 (7th Cir. 1984)(following *All Media*).

16. *See* 11 U.S.C. § 303(h)(1)(1988), *amended by* § 426(b) of the 1984 Act. In contrast to the consensus that had developed regarding the treatment of disputed debts for jurisdictional purposes under § 303(b), there was a split in the pre-1984 case law as to whether disputed debts should be included in the § 303(h)(1) analysis of whether, at the time of filing the debtor had generally been paying its current obligations as they came due. *Compare In re* All Media, 5 B.R. 126, 144 (Bankr. S.D. Tex. 1980) *aff'd* 646 F.2d 193 (5th Cir. 1981)(debts subject to legitimate dispute should not be considered a debt which has not been paid as it became due) *with In re* Covey, 650 F.2d 877, 883-84 (7th Cir. 1981)(wholesale exclusion of disputed debts would undermine an important goal of the new Code, namely to allow creditors a prompt determination of the involuntary petition).

17. Recall that the primary objective in overhauling the law of involuntary bankruptcy as it had existed under the Act had been to free the system of the "complex, litigation-producing constraints" which had accounted for widespread "creditor dissatisfaction and lack of interest in the bankruptcy system." BANKRUPTCY COMMISSION REPORT, *supra* note 3, at 186-88. *See also In re* Covey, 650 F.2d 877, 882 (7th Cir. 1981).

18. As discussed *supra* note 13, § 303(i) was, however, amended two years later by deleting subparagraph (C) from § 303(i)(1).

19. Lawrence Ponoroff, *Involuntary Bankruptcy and the Bona Fides of a Bona Fide Dispute*, 65 IND. L.J. 315 (1990).

written which I believe is not only erroneous, but which has unnecessarily contributed to the decline of involuntary bankruptcy from a lesser but still significant counterpart of voluntary bankruptcy to, at least statistically speaking, an afterthought.[20] Specifically, I believe that the bankruptcy courts, probably distracted by the recent emphasis placed on controlling frivolous filings in federal litigation practice,[21] have subsumed into a single inquiry what are really two separate and discrete questions: should the petition be dismissed, and if so, was the petition filed in bad faith for section 303(i)(2) purposes? In turn, I think this confusion stems from a fundamental misunderstanding of the purposes served by good faith requirements and bad faith penalties not only in this context, but throughout the Code and, even more generally, throughout the fabric of the law.

In this Article, I begin by tracing the development of "bad faith" analysis in involuntary bankruptcy under the Code. I suggest reasons for its present state of evolution based on broader concerns over abusive litigation tactics and related applications of a good faith doctrine in any bankruptcy filing.[22] This requires consideration of the different conceptualizations of the good faith doctrine in modern commercial law that have been developed in the commentary to date. I conclude this survey by observing that, when invoked, the good faith obligation entails an expected level of performance which exceeds the more general obligation to comply with positive law duty, and that, therefore, there may well be conduct which does not satisfy the minimum requirements for good faith but which nevertheless will pass in

20. According to statistics maintained and made available through the Administrative Office of the United States Courts, of the 679,980 bankruptcy petitions filed during calendar year 1989 only 1,585 (0.23%) were involuntary petitions. ADMIN. OFF. U.S. CTS., TABLES OF BANKR. STATISTICS DURING THE TWELVE MONTH PERIOD ENDED DEC. 31, 1989 (Table F2B). For the two prior fiscal years the number and percent of involuntary cases were equally low: 1,620 (0.29%) and 1,409 (0.23%), respectively. *Id.* Table F2B for the years ended June 30, 1987 and 1988. Prior to the 1984 Act, involuntary filings had consistently averaged between 0.35% and 0.45% of total filings. *See* Tables F2A and F2B 1981-1986; U.S. CTS. DIRECTOR OF ADMIN. ANN. REP. 1981 at 548; *id* 1982, at 396.

21. *See infra* notes 71-84 and accompanying text.

22. The Code expressly requires good faith in a variety of instances, including plan confirmation under Chapters 11, 12, and 13. 11 U.S.C. §§ 1129(a)(3), 1225(a)(3), and 1325(a)(3)(1988). Additionally, courts have treated lack of good faith as "cause" under: i) 11 U.S.C. § 362(d) for granting relief from the automatic stay; and ii) 11 U.S.C. § 1112(b) for converting or dismissing a Chapter 11 case. *See generally* Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (*In re* Little Creek Dev. Co.), 779 F.2d 1068, 1071-73 (5th Cir. 1986); Robert L. Ordin, *The "Good Faith" Principle in the Bankruptcy Code: A Case Study*, 38 BUS. LAW. 1795 (1983). Finally, as discussed in more detail *infra* notes 140-47 and accompanying text, several courts have implied a good faith requirement as a condition to the filing of all bankruptcy petitions.

the trade. That is to say, conduct which does not reach the depths of bad faith.

If bad faith cannot be explained as merely the absence of good faith, its meaning in this context must be sought by reference to other goals and ideals. It has been suggested that the relevant goals can be found in the essential purposes of the bankruptcy system itself. Therefore, in an attempt to locate and assign a role for section 303(i)(2) distinct from the objectives served by other bankruptcy rules requiring good faith, I turn next to an examination of the emerging scholarly discourse on the theoretical foundations of bankruptcy, and endorse the view that regards bankruptcy purposes to be several and dynamic. This perspective on the role of bankruptcy suggests intriguing possibilities for expanding the availability of involuntary bankruptcy relief to members of non-creditor groups. However, I conclude it does not alone provide an acceptable, independent standard for ascertaining the existence of bad faith in involuntary filings.

From the notion of modern bankruptcy as a more eclectic institution than the leading scholarship in the field has given it credit for being, I proffer an approach for considering the bad faith question in involuntary bankruptcy that involves a different type of purposive analysis than has traditionally been put forth. Specifically, I propose a perspective which abandons as unwise the attempt to create a unitary standard of bad faith measured either by the laudable but lofty aspirations of a good faith requirement, or by any single object theory of bankruptcy. Instead, I argue that the focus should be shifted to the more pointed question of whether the filing was undertaken with a willful intent to harm the alleged debtor and, only in the process, the system at large. I contend that this approach, borne of the conviction that there is an essential linkage between bad faith under section 303(i)(2) and the existing common law elements of the tort of malicious prosecution, is consistent with the broader good faith principle in bankruptcy. I also believe that this approach to the bad faith question restores involuntary bankruptcy, if not to its "rightful" role in the scheme of the federal bankruptcy law,[23] then at least to a role conso-

23. Since it is impossible of course to define a truly "rightful" role — involuntary bankruptcy inevitably conforming to the role assigned it under the prevailing statutory scheme — this statement admittedly reflects a personal bias that involuntary bankruptcy should loom as a more important factor in commercial debtor-creditor relations than it has been in recent years. Certainly, the benefits to be derived from an effective system of involuntary bankruptcy were recognized in studies which preceded adoption of the Code. *See* BANKRUPTCY COMMISSION REPORT, *supra* note 3, at 186-87 (citing to SOLICITOR GENERAL THATCHER'S REPORT TO THE PRESIDENT ON THE BANKRUPTCY ACT AND ITS ADMINISTRATION IN THE COURTS OF THE UNITED STATES (1932)). *See also* MACLACHLAN, *supra* note 7, at 57 ("The main effect of the present array of acts of bankruptcy [under the 1898 Act] is a weakening of the bankruptcy law in relation to its important function of doing equity between creditors."). I appreciate, however, that the question of the

nant with the basic policy aims long recognized as best achieved through the mechanism of an involuntary proceeding.[24]

II. THE CONNECTION TO BANKRUPTCY RULE 9011

There has always existed an almost irresistible nexus between section 303(i)(2) and Bankruptcy Rule 9011.[25] Rule 9011 invests the bankruptcy court with authority to sanction those persons who sign and submit pleadings, motions, and other court papers (including specifically, petitions) which either constitute frivolous filings (*i.e.*, are without a reasonable basis in fact) or involve use of judicial procedures for an improper purpose (*e.g.*, to delay, harass, or increase the cost of litigation).[26] Bankruptcy Rule 9011 was adapted from Rule 11 of the Federal Rules of Civil Procedure,[27] and in construing Rule 9011 bank-

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proper scope of involuntary bankruptcy (and, for that matter, voluntary bankruptcy as well) must ultimately be resolved in the give and take of the political arena. I can accept, therefore, that a contrary opinion about how difficult it should be to force a debtor into bankruptcy might be legitimately taken. I simply believe that, as a matter of preferred policy, credit and the availability of credit are facilitated by a vigorous system of involuntary bankruptcy.

24. The objectives traditionally regarded as being achieved through involuntary bankruptcy are reviewed in SNYDER & PONOROFF, *supra* note 6, at § 5.06. *See also* John C. McCoid, *The Occasion for Involuntary Bankruptcy*, 61 Am. Bankr. L.J. 195 (1987).
25. FED. R. BANKR. P. 9011. Actually, section 303(i) predates the promulgation of Rule 9011 by almost four years. However, the Reform Act provided that upon enactment of the new Code, the then-present Bankruptcy Rules of Procedure (11 U.S.C. app. (1978)) would continue in effect to the extent not inconsistent with the changes made by the Reform Act until such time as new Rules were adopted. *See* Reform Act, Title IV, § 405(d). Among the existing Bankruptcy Rules was Rule 911 regarding the Signing and Verification of Pleadings and Other Papers. The precursor to Rule 9011, Rule 911 basically tracked FED. R. CIV. P. 11 as then formulated. The new Bankruptcy Rules of Procedure, including Rule 9011, were promulgated in 1983. Numerous amendments to the Rules, including minor amendments to Rule 9011, became effective on August 1, 1987, and again on August 1, 1991. The differences between old rule 911 and Rule 9011 basically reflect the changes to Federal Rule 11 which became effective on the same date in 1983 as the new Bankruptcy Rules. The amendment of Rule 11 is discussed *infra* text accompanying notes 77-84. *See also* Thomas M. Byrne, *Sanctions for Wrongful Bankruptcy Litigation*, 62 AM. BANKR. L.J. 109 (1988).
26. *See generally* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2454 (1990)("the central purpose of [Federal] Rule 11 is to deter baseless filings . . ." and thereby streamline the administration of cases in the federal courts). For further elaboration on the distinction between the "two prongs" which comprise Federal Rule 11 and, therefore, Bankruptcy Rule 9011, see *In re* TCI Limited, 769 F.2d 441 (7th Cir. 1985); *infra* note 266.
27. *See* Cinema Serv. Corp. v. Edbee Corp., 774 F.2d 584, 585 (3d Cir. 1985)(Bankruptcy Rule 9011 tracks Federal Rule 11 with only such modifications as are appropriate for bankruptcy matters); Chicago Bank of Commerce v. Amalgamated Trust and Sav. Bank (*In re* Memorial Estates, Inc.), 116 B.R. 108, 111 (N.D. Ill. 1990)(Rule 9011 is the bankruptcy equivalent of Federal Rule 11). *See also* Brown v. Mitchell (*In re* Arkansas Communities, Inc.), 827 F.2d 1219, 121-22 (8th Cir.

ruptcy courts routinely look to case law under Federal Rule 11.[28]

In *Business Guides v. Chromatic Communications Enterprises, Inc.*,[29] the Supreme Court held that Rule 11 prescribes the same standard both for the attorney who files the offending document and, if also a signatory, the represented party.[30] The case involved the "frivolous filing" branch of Rule 11 since the accuracy of representations contained in the plaintiff's application for a temporary restraining order triggered the inquiry into whether Rule 11 sanctions were appropriate.[31] Holding that the standard of conduct under Rule 11 is one of objective reasonableness,[32] the district court had awarded the defend-

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1987), wherein the court rejected the appellant's argument that only Article III courts, not bankruptcy courts, have jurisdiction to assess attorneys' fees as a sanction for violation of Rule 9011.

28. *See, e.g.*, Featherston v. Goldman (*In re* D.C. Sullivan Co.), 843 F.2d 596, 598 (1st Cir. 1988)(the jurisprudence of Rule 11 is "largely transferable" to bankruptcy cases in which sanctions are sought under Rule 9011); *In re* the Grand Hotel Ltd. Partnership, 121 B.R. 657, 659 (Bankr. S.D. Fla. 1990)(case law under Rule 11 equally applicable to Rule 9011); Wolf v. Kupetz (*In re* Wolf & Vine, Inc.), 118 B.R. 761, 767 (bankruptcy courts look to authorities under Federal Rule 11 in applying Bankruptcy Rule 9011).

29. 111 S. Ct. 922 (1991).

30. *Id.* at 929-33. The Court rejected drawing a dichotomy between represented and unrepresented parties on the basis suggested by Justice Kennedy's dissent, that a represented party has delegated to counsel responsibility for ascertaining the veracity of matters contained in court papers. *See id.* at 935, 936 (Kennedy, J., dissenting). The majority observed that it is often the client who is in the better position to investigate the facts supporting a pleading. *Id.* at 932. The majority also claimed its holding in this case, involving the sanctioning of a corporate party based on the signature of its employee-agent, was not inconsistent with the Court's earlier holding in Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 124 (1989), that the person signing the pleading for Rule 11 purposes was the individual attorney, not the law firm. *Id.* at 931.

31. The plaintiff charged that the defendant copied listings from the plaintiff's published directories in violation of, *inter alia*, the copyright laws. In its application for a temporary restraining order, the plaintiff cited as examples ten listings it maintained had been copied by the defendant. In nine of those cases, the claim was without foundation even though, in the opinion of the magistrate who heard the evidence, a proper inquiry would have revealed the lack of substance. *Id.* at 925-26.

32. The issue of the appropriate standard of conduct to be applied under Rule 11 has been a subject of great interest and some disagreement since 1983. *See generally* Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499 (1986); Christopher A. Considine, Note, *Rule 11: Conflicting Appellate Standards of Review and a Proposed Uniform Approach*, 75 CORNELL L. REV. 727 (1990); Kim M. Rubin, Note, *Has a Kafkaesque Dream Come True? Federal Rule Of Civil Procedure 11: Time for Another Amendment?*, 67 B.U.L. REV. 1019 (1987). The amendment of Rule 11 in 1983 which purportedly shifted the standard from one of subjective bad faith to one of objective reasonableness is discussed *infra* notes 77-84 and accompanying text. For further background, see also Robert L. Carter & John F. Cannon, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 4 (1985); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniver-*

ant $13,865 in sanctions.[33] The court based the award on its finding that the plaintiff and its counsel had failed to conduct reasonable inquiry into the truth of matters contained in the TRO application, particularly after they had been made aware of several inaccuracies.[34]

Both the Ninth Circuit[35] and the Supreme Court affirmed the lower court's holding that the plaintiff was subject to an objective standard of reasonable inquiry as to the factual basis for all allegations contained in papers submitted to the court, even though the plaintiff

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sary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure, 67 N.C.L. REV. 1023 (1989).

33. This amount represented the defendant's legal expenses and out-of-pocket costs in defending the plaintiff's lawsuit. Business Guides, Inc. v. Chromatic Communications Enterprises, 111 S. Ct. 922, 927 (1991). Although Rule 11 grants the district courts broad discretion in fashioning an appropriate sanction, it is clear that in amending the Rule in 1983 increased emphasis was given to some cost-shifting as a basis for effectively controlling abusive litigation practices. *See* FED. R. CIV. P. 11, Advisory Committee Note, H.R. DOC. NO. 54, 98th Cong., 1st Sess. (1983), *reprinted in*, 97 F.R.D. 165, 198 (1983)[hereinafter *Advisory Committee Note*]. The Supreme Court is on record that Rule 11 is not a "fee-shifting statute," Cooter & Gell v. Hartmax Corp., 110 S. Ct. 2247, 2462 (1990). However, one study undertaken just two years after the amendment of Rule 11 showed that in 96% of the cases reviewed in which sanctions were imposed the courts awarded costs and attorneys' fees to the party opposing the sanctioned pleading. Melissa A. Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1333 (1986). *See also* SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 32 (Federal Judicial Center 1985)(suggesting that a judge's view of whether the primary purpose of Rule 11 is compensation or punishment tends to influence the judge's willingness to impose sanctions).

    In *Business Guides* the Court noted approvingly the district court's refusal to include consequential damages as part of the sanctions awarded on the basis that such compensation is not within the purview of Rule 11. 111 S. Ct. 922, 934 (1991). The Court also deflected the criticism that the sanction imposed constituted impermissible fee-shifting by pointing out that Rule 11 sanctions only shift the cost of a "discrete event," not the entire cost of litigation. *Id.* at 924. The dissent found this explanation of little comfort, observing that the majority's "discrete event" distinction breaks down when the "event" is the filing of the lawsuit. Thus, Justice Kennedy criticized the majority for effectively authorizing the redistribution of litigation costs when the sanctioned party is guilty only of negligence, not bad faith. *Id.* at 940-41. *Cf.* Louis, *supra* note 32, at 1052-61 (arguing for greater use of attorney fee shifting under Rule 11).

34. Business Guides, Inc. v. Chromatic Communications Enters., 119 F.R.D. 685, 688-89 (N.D. Cal. 1988). Ultimately, sanctions were assessed only against the plaintiff. The defendant's motion against plaintiff's counsel, Finley, Kumble, Wagner, Heine, Unterberg, Manley, Meyerson, and Casey, was later withdrawn without prejudice because of that firm's intervening and much-publicized bankruptcy filing. *See* Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 927 (1991).

35. 892 F.2d 802 (1989), reviewed in Peter Ramels, Note, *Factual Frivolity: Sanctioning Clients Under Rule 11—Business Guides, Inc. v. Chromatic Communications Enterprises, 892 F.2d 802 (9th Cir. 1989), cert. granted, 110 S. Ct. 3235 (1990)*, 65 WASH. L. REV. 939 (1990).

was represented by counsel.[36] In other words, the Court refused to draw a distinction between represented and unrepresented parties in terms of the level of care that must be taken by any party who signs papers to be filed with the court.[37] Pointing to the concerns which precipitated amendment of Rule 11 in 1983,[38] the Court also brushed aside as misdirected the plaintiff's contention that subjective bad faith, not the failure to act with reasonable care, should be the predominant consideration in imposing sanctions on represented parties.[39] In so doing, the Court at least implicitly acquiesced in the district court's view that a failure to act with objective reasonableness is not itself tantamount to bad faith; put another way, that Rule 11 is more than simply a good faith directive.[40]

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36. Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 933 (1991)(Rule 11 imposes an "affirmative duty to conduct a reasonable inquiry into the facts and law before filing, and . . . the applicable standard is one of reasonableness under the circumstances.").
37. *Id.* at 929-931 (to construe the term "party" as used in Rule 11 to mean "unrepresented party" flies in the face of both the plain language of the Rule and the commentary contained in the Advisory Committee Note).
38. *Id.* at 932. The amendment of Rule 11 in 1983 was a response to what at the time was perceived to be an unprecedented increase in the volume of frivolous lawsuits and exploitive litigation practices, coupled with the general consensus that Rule 11 as originally drafted had been ineffective in curbing litigation abuses. For example, in Lepuki v. Van Wormer, 765 F.2d 86, 87 (7th Cir. 1985), the court described how easy access to the courthouse had accounted for a "deluge of frivolous and vexatious claims" which was slowly causing the machinery of justice to come to a grinding halt. *See also* Arthur R. Miller, *The Adversary System, Dinosour or Phoenix*, 69 MINN. L. REV. 1, 17-19 (1984)(pointing out the social cost of society's preoccupation with private litigation as the solution of choice for an increasing range of life's problems); David J. Webster, Note, *Rule 11: Has the Objective Standard Transgressed the Adversary System?*, 38 CASE W. RES. L. REV. 279, 280 ("The impetus for this amendment was a heightened societal concern that frivolous lawsuits, discovery abuse, and unfair litigation tactics were exploiting and manipulating the adversary system to the point where the basic tenets that the system once rested upon had become paralyzed."); Nelken, *supra* note 33, at 1317 (the 1983 amendments to the Federal Rules were designed to make lawyers more accountable for their actions and to give judges greater control in managing their caseloads and dockets).
39. Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 932-33 (1991). The plaintiff also contended that imposing sanctions against a represented party violated the Rules Enabling Act, 28 U.S.C. § 2072, which provides that Court prescribed rules may not "abridge, enlarge, or modify any substantive right." The majority observed, however, that an incidental interference of a litigant's substantive right would be tolerated under the Rules Enabling Act "if reasonably necessary to maintain the integrity of the system of federal practice and procedure . . . ." *Id.* at 933-34.
40. In its decision, the district court found only that the plaintiff and its counsel had acted unreasonably in not conducting further inquiry into the factual allegations contained in the application for a temporary restraining order. The court made no finding that either of these parties had acted with intent to deceive the court or otherwise with knowledge of the falsity of the matters contained in the application, rejecting the view that amended Rule 11 had anything to do any longer

III. THE INFLUENCE OF BANKRUPTCY RULE 9011 ON THE BAD FAITH QUESTION IN INVOLUNTARY CASES

Early on in the development of standards to measure bad faith under section 303(i)(2) two approaches emerged. Under the first, or so-called "objective," approach, bad faith was found to exist if the court concluded that a reasonable person in the position of the petitioning creditor would not have initiated the involuntary proceeding.[41] This lack of reasonable care or failure to make reasonable inquiry approach shares obvious similarities with the "frivolous filing" prong of Bankruptcy Rule 9011. It also exemplifies the tendency to confuse the question of whether the petition should be dismissed because proper grounds for relief do not exist with the question of whether the petition was filed in bad faith—inquiries which are best treated separately since they examine different phenomena.[42] However, under an objective approach the two questions become blurred; the differences between them being only differences of degree.[43]

The second approach, as opposed to focusing on the petitioners' conduct in filing, emphasized their subjective, underlying purpose. Under this method for defining bad faith, the alleged debtor was required to demonstrate that the filing of the petition was motivated by spite, malice, vengeance, or a desire to harass or embarrass the debtor.[44] Of course, this type of conduct is also proscribed by the sec-

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with subjective bad faith. 119 F.R.D. 685, 688-89. For discussion of the standards which emerged under the pre-amended version of the Rule, see *infra* text accompanying notes 72-76.

41. *See, e.g., In re* McDonald Trucking Co., 74 B.R. 474, 478 (Bankr. W.D. Pa. 1987)(measuring bad faith by an objective standard); *In re* Grecian Heights Owners' Ass'n., 27 B.R. 172, 173-72 (Bankr. D. Or. 1982)(determining bad faith on the basis of whether a reasonable person in the position of the petitioning creditor would have filed the involuntary petition). *See also* Jaffe v. Wavelength, Inc. (*In re* Wavelength, Inc.), 61 B.R. 614, 620 (Bankr. 9th Cir. 1986)(measuring bad faith by an "objective" standard); *In re* Alta Title Co., 55 B.R. 133, 140-41 (Bankr. D. Utah 1985)(failing to make inquiry into either facts or law could support a finding of bad faith); *In re* Godroy Wholesale Co., 37 Bankr. 496, 500 (Bankr. D. Mass. 1984)(creditor who failed to take "affirmative steps" to insure that its suspicions were true acted in bad faith).
42. *See infra* text accompanying notes 92-100, 256-259. There are numerous examples in the case law where § 303(i)(1) and Rule 9011 also have been applied interchangeably. *See, e.g.,* Stock v. Exchange Network Corp. (*In re* Exchange Network Corp.), 92 B.R. 479, 480-81 (D. Colo. 1988)(attorneys' fees might be awarded against counsel for petitioners under either § 303(i)(1) or Rule 9011); *In re* Tarasi & Tighe, 88 B.R. 706, 711-12 (Bankr. W.D. Pa. 1988)(alleged debtors entitled to an award of costs and attorneys' fees under either § 303(i)(1) or Rule 9011).
43. For an example of a case where the two questions seemingly have been merged into a single inquiry, see *In re* Kearney, 121 B.R. 642 (Bankr. M.D. Fla. 1990). *See also* authorities cited *infra* note 61.
44. *See In re* Camelot, Inc., 25 B.R. 861 (Bankr. E.D. Tenn. 1982), *aff'd*, Camelot, Inc. v. Hayden, 30 B.R. 409 (E.D. Tenn. 1983); *In re* Howard, Neilsen & Rush, Inc., 2 Bankr. 451 (Bankr. M.D. Tenn. 1979). Although many decisions speak in terms of

ond branch of Rule 9011. Therefore, this attention to improper purpose under section 303(i)(2) might likewise seem redundant, perhaps raising serious doubt whether either of the early approaches for defining bad faith under section 303(i)(2) established any field of operation beyond the existing strictures of Bankruptcy Rule 9011. However, as will be shown, that view ignores key differences between the two provisions, the existence of which make the question of improper purpose relevant to, but not alone dispositive of, the issue of bad faith in involuntary bankruptcy filings.[45]

The district court's decision in *Basin Electric Power Cooperative v. Midwest Processing Co.*[46] arguably represented the first attempt to carefully analyze the bad faith question in involuntary bankruptcy; however, its legacy is not by any means an altogether happy one.[47] In that case, the court accepted an expanded improper purpose approach

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a sharp distinction between the objective and subjective approaches for measuring bad faith (*e.g.*, *In re* Molen Drilling Co., 68 B.R. 840, 843-44 (Bankr. D. Mont. 1987), in reality the dichotomy was far less pronounced since, as a practical matter, ordinarily the only way to prove bad motive is by inferences drawn from objective conduct. Under either test, courts have agreed that bad faith in an involuntary proceeding is a factual issue. *See In re* Advance Press & Litho, Inc., 46 B.R. 700, 704 (D. Colo. 1984); *In re* Caucus Distribs., Inc., 106 B.R. 890, 923 (Bankr. E.D. Va. 1989); *In re* Molen Drilling Co., 68 B.R. 840, 843 (Bankr. D. Mont. 1987).

45. It is ultimately my contention that subjective bad faith, not the failure to observe reasonable standards of conduct, is at the heart of § 303(i)(2). *See infra* text accompanying notes 257-263 and 286-293. Although the second prong of Bankruptcy Rule 9011 is phrased in similar terms, it would be a mistake to conceptualize bad faith for § 303(i) purposes according to the same standard. As will be discussed, this derives principally from the fact that interpretations governing application of the improper purpose branch of Rule 9011 reflect the particular role and function of the Rule within the overall scheme of the federal bankruptcy law. It will be argued that this role and function differ qualitatively from the role and function of the bad faith injunction in § 303(i)(2). *See infra* notes 71-109 and accompanying text. Courts which have simply demurred to the standards developed under Rule 9011 overlook this point in their analysis. *See In re* Kearney, 121 B.R. at 642, 645-46 (Bankr. M.D. Fla. 1990), wherein the court states that in defining bad faith in involuntary filings it is necessary to apply the standards for imposing sanctions under Rule 9011, but then refuses to award punitive damages absent proof of actual knowledge by the petitioners that the debtor had more than twelve creditors.

46. 47 B.R. 903 (D.N.D. 1984), *aff'd*, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986).

47. This is not necessarily to fault the court in *Basin Electric*. The confusion stems from the fact that subsequent decisions have routinely cited *Basin Electric* as offering a view of bad faith for § 303(i)(2) purposes. *See* authorities cited *infra* notes 64 & 236. In point of fact, *Basin Electric* was not a § 303(i) case at all; rather it involved the issue of whether the petition was subject to dismissal for failure to comply with the implied good faith filing requirement. *See infra* text accompanying notes 231-239. At worst, therefore, the *Basin Electric* court can be faulted for failing to overtly distinguish the dual uses of the term "bad faith." In the final analysis the real blame lies with inexact subsequent readings and interpretations of the holding in the case.

for defining bad faith. It reversed the bankruptcy court's determination that the single petitioning creditor[48] was not guilty of bad faith because a reasonable person in the position of such creditor might have sought relief under section 303.[49] Specifically, the district court ruled that the bankruptcy court had erred by not considering the petitioning creditor's subjective motives for filing as well as its conduct.[50] However, in describing what it considered improper subjective motive, the court departed from the thrust of earlier authority under section 303(i)(2). Specifically, the court included within the scope of inquiry the relationship between the petitioning creditor's underlying purpose in filing the petition and the objectives of the Bankruptcy Code.[51] In other words, the court focused on not just the acceptability of the petitioner's purpose as an absolute matter, but also on whether the petitioner's desired end for the involuntary bankruptcy case was the proper subject of and occasion for a bankruptcy proceeding.[52]

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48. Under § 303(b), a single creditor may invoke the bankruptcy court's jurisdiction if the debtor has less than eleven other creditors who would be eligible to join in an involuntary petition, excluding certain categories of "friendly" creditors. 11 U.S.C. § 303(b)(2)(1988). Otherwise, the petition must be signed by at least three qualified creditors. 11 U.S.C. § 303(b)(1)(1988). *See also* FED. R. BANKR. P. 1003(b) which directs the court to allow a reasonable opportunity for joinder of additional creditors when, based on the debtor's answer to the petition, it appears that there are more than twelve creditors.
49. Basin Elec. Power Coop. v. Midwest Processing Co., 47 B.R. 908-09 (D.N.D. 1984), *aff'd*, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986). In evaluating the petitioning creditor's conduct, the bankruptcy court has applied a purely objective standard.
50. *Id.* at 909. ("This Court is convinced that the Bankruptcy Court should have considered Basin's subjective motivations together with its conduct in reaching a determination on the question of bad faith.").
51. *Id. Basin Electric* was not the first case in analyzing bad faith in an involuntary filing to focus on whether the petitioning creditors' purpose in filing, although perhaps not itself unlawful or improper, was consistent with the perceived purposes of the Bankruptcy Code. *See In re* Allen Rogers & Co., 34 B.R. 631, 633 (Bankr. S.D.N.Y. 1983)(debtor could not recover damages where the petitioning creditors did not make inappropriate use of the bankruptcy process as a substitute for customary collection procedures); *In re* SBA Factors of Miami, Inc., 13 B.R. 99, 100 (Bankr. S.D. Fla. 1981)(petitioners who used "involuntary proceeding as a substitute for customary collection procedures" acted in bad faith). However, *Basin Electric* was the first decision to put the discussion of consistency with bankruptcy purposes into the context of the objective-subjective approaches to bad faith which had evolved under § 303(i)(2). Thus, equally if not more so than earlier case law, *Basin Electric* has come to be viewed as the authority for the proposition that "improper use" as well as "improper purpose" may form the basis for a judgment under § 303(i)(2). *See, e.g.*, *In re* Better Care, Ltd., 97 B.R. 405, 410 (Bankr. N.D. Ill. 1989). This in itself is ironic indeed when it is recalled that the court in *Basin Electric* was not faced with an application of § 303(i). *See infra* text accompanying note 237.
52. The first of these two questions can be analogized to a malicious prosecution — initiation of legal process without probable cause motivated by an improper purpose — whereas the latter is more akin to the traditional elements of the tort of

Applying its newly-ordained test of bad faith, the district court in *Basin Electric* concluded that the petitioning creditor had acted in bad faith since its motive for filing was to secure an advantage in a pending contract dispute with the alleged debtor.[53] The petition was thus adjudged defective, and the petitioning creditor denied the opportunity to cure the defect, not because the petitioning creditor's purpose was itself unlawful or improper, but because that purpose did not justify using the involuntary bankruptcy remedy.[54] In essence, the court regarded the matter as involving a private, two-party dispute and, as such, inconsistent with the basic objectives of an involuntary bankruptcy proceeding.[55]

The district court's decision in *Basin Electric* did not address di-

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abuse of process — lawful invocation of the process for a purpose other than a purpose for which the process was intended. While I believe that the first analogy may be profitably pursued in analyzing bad faith in involuntary proceedings, the presence of an abuse of process, although certainly relevant to whether the case should go forward, should not alone be enough to establish bad faith. *See infra* text accompanying notes 282 - 286.

53. Basin Elec. Power Coop. v. Midwest Processing Co., 47 B.R. 903, 909-10 (D.N.D. 1984), *aff'd*, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986). However, the authority cited by the court in reaching that conclusion consisted of cases involving the implied good faith filing requirement (*e.g.*, *In re* Nancant, Inc., 8 B.R. 1005 (Bankr. D. Mass. 1981)), not cases applying the terms of § 303.

54. This distinction between "improper purpose" and "improper use" was made express by the court in *In re* Better Care, Ltd., 97 B.R. 405, 410 (Bankr. N.D. Ill. 1989). *See infra* note 94. Thus, to the extent that subsequent cases have interpreted the holding in *Basin Electric* as applying to § 303(i)(2)(*see infra* notes 236-37 and accompanying text), it would not be unfair to treat *Basin Electric* as postulating a third approach for defining bad faith conduct.

55. Basin Elec. Power Coop. v. Midwest Processing Co., 47 B.R. 903, 908-09 (D.N.D. 1984), *aff'd*, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986). While the court made clear that favorably affecting the outcome in a private contract dispute is not consistent with the objectives of the Bankruptcy Code, it never actually articulated the proper uses of the bankruptcy process. Presumably, the court had in mind traditional notions of collectivized debt collection procedure, but never reached the question of whether proper grounds for relief were presented since it concluded that the petition should have been dismissed for failure to satisfy the three-creditor requirement of § 303(b). Nevertheless, the court exhibited some skepticism that the debtor in fact had not been paying its current obligations as they became due. *Id.* at 908 (involuntary bankruptcy did not appear to be in the best interests of the debtor or the other creditors).

It also bears mentioning that since the court found that the petitioner clearly knew that the debtor had in excess of twelve creditors, *id.*, the finding of bad faith easily could have been justified on grounds of improper motive rather than improper use of the bankruptcy process; both elements were obviously present. Had the court done so, an unnecessary expansion of the definition of bad faith and a great deal of subsequent confusion might have been avoided. Again, however, to be fair to the court in *Basin Electric*, the issue as framed by the court was whether to dismiss the petition for want of good faith, not whether entry of judgment under § 303(i)(2) was appropriate. Therefore, perhaps the true blame lies in the failure of later cases to properly identify the scope of the holding in *Basin Electric* and limit its precedential effect accordingly.

rectly the issue of damages or other relief under section 303(i). However, its holding, to the effect that both conduct and motive were relevant in the inquiry into "bad faith" in involuntary cases, led to the adoption by some courts of a dual subjective/objective standard for defining bad faith under section 303(i)(2).[56] This practice, it was maintained, permitted the bankruptcy courts to ensure that their jurisdiction had not been invoked to further non-bankruptcy purposes.[57] To these courts, then, evidence of both unreasonable conduct in the filing of the petition and improper motivation would be required to overcome the presumption of good faith in favor of the petitioning creditors,[58] thereby establishing grounds for dismissal and, potentially, an award of damages under section 303(i)(2).[59] Moreover,

56. See United States Fidelity & Guaranty Co. v. DJF Realty & Suppliers, Inc., 58 B.R. 1008, 1011 (N.D.N.Y. 1986)("This court agrees [with *Basin Electric*] that the better practice is for bankruptcy courts to inquire into *both* the creditor's conduct as well as into its motives for filing the petition."); *In re* Molen Drilling Co., 68 B.R. 840, 843 (Bankr. D. Mont. 1897)(agreeing with *United States Fidelity* and *Basin Electric* that the court should apply a dual objective/subjective test in measuring the existence of bad faith). *See also In re* Laclede Cab Co., 76 B.R. 687, 693 (Bankr. E.D. Mo. 1987)(bad faith found where the filing was ill-advised, for a non-bankruptcy purpose, and perhaps based on a contrivance).

57. United States Fidelity & Guaranty Co. v. DJF Realty & Suppliers, Inc., 58 B.R. 1008, 1011 (N.D.N.Y. 1986). This follows logically from the holding in *Basin Electric* since it is the function of the implied good faith filing requirement to protect the integrity of bankruptcy jurisdiction. *See infra* notes 140-42 and accompanying text. As will be argued later, however, this is not the function of the bad faith injunction in § 303(i)(2). *Infra* text accompanying notes 147, 220-25.

58. Although the courts never made the precise relationship between the objective and subjective standards entirely clear, it is apparent from the flow and structure of the court's argument in *USF&G* that the court considered *both* aspects of the test must be satisfied in order to establish bad faith. United States Fidelity & Guaranty Co. v. DJF Realty & Suppliers, Inc., 58 B.R. 1008, 1012 (N.D.N.Y. 1986)("[T]he proper way for a bankruptcy court to make a determination of bad faith is to consider both an objective and a subjective standard."). The bankruptcy court's failure to examine the petitioning creditor's motive for filing constituted reversible error even though the bankruptcy court had concluded bad faith existed using an objective standard. However, the court equivocated even on this point when, as an alternative argument, it stated: "[E]ven if the objective standard alone was sufficient, the Bankruptcy Court did not properly apply that standard."). *Id.* at 1013. *See also In re* Caucus Distribs., 106 B.R. 890, 923-28 (Bankr. E.D. Va. 1989)(although on an objective level debtors established bad faith, the petitioner's decision to file would not be condemned as constituting bad faith where the motivation for filing was a belief that bankruptcy was the appropriate forum within which to resolve the debtor's problems).

It is "axiomatic" that a presumption of good faith attends the filing of an involuntary proceeding and that the debtor has the burden of establishing bad faith by a preponderance of the evidence. *See In re* Kearney, 121 B.R. 642, 645 (Bankr. M.D. Fla. 1990); *In re* Amburgey, 68 B.R. 768, 774 (Bankr. S.D. Ind. 1987); *In re* CLE Corp., 59 B.R. 579, 583 (Bankr. N.D. Ga. 1986). *Cf.* United States Fidelity & Guaranty Co. v. DJF Realty & Suppliers, Inc., 58 Bankr. 1008, 1012 (N.D.N.Y. 1986)(debtor has a "heavy" burden of proof on the issue of bad faith).

59. Recall that, even when the petitioners are found to have acted in bad faith, the

in one of the leading cases decided at this point in the development of standards under section 303(i)(2), the court held that a showing of "nearly unconscionable behavior" would be required before finding bad faith.[60]

After the two early approaches for determining bad faith were brought together into a single test, the analogy to Bankruptcy Rule 9011 became too great for most courts to resist. Beginning around 1987, reported decisions involving section 303(i)(2) began to explicitly look to and follow the same standards developed and applied under Rule 9011 and, concomitantly, Federal Rule 11.[61] In *In re Fox Island Square Partnership*,[62] for example, the court expressed its conviction that "bad faith, pursuant to Section 303(i)(2) should be measured by the objective and subjective standards required under Bankruptcy Rule 9011."[63] In analyzing the question of subjective motive, however, these courts have failed to observe any meaningful distinction be-

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decision to award damages under § 303(i)(2) remains discretionary with the court. *In re* Advance Press & Litho, Inc., 46 B.R. 700, 705 (D. Colo. 1984)(award of proximate or punitive damages does not follow automatically from a finding of bad faith; it is discretionary with the court); *In re* Better Care , Ltd., 97 B.R. 405, 410 (Bankr. N.D. Ill. 1989)(the award of damages is committed to the sound discretion of the court). *See also supra* note 12. This is an important difference from Bankruptcy Rule 9011 where sanctions are mandatory once a violation is deemed to have occurred. *See infra* note 88 and accompanying text.

60. United States Fidelity & Guaranty Co. v. DJF Realty & Suppliers, Inc., 58 B.R. 1008, 1011 (N.D.N.Y. 1986), *citing In re* Trans High Corp., 3 B.R. 1, 4 (Bankr. S.D.N.Y. 1980).

61. *In re* Kearney, 121 B.R. 642, 645 (Bankr. M.D. Fla. 1990)(to determine whether petition was filed in bad faith court must apply the standard for imposing sanctions under Rule 9011); *In re* K.P. Enter., 135 B.R. 174, 197-80 (Bankr. D. Me. 1992)(Rule 9011's model provides the most comprehensive guide for assessing bad faith under § 303(i)(2)); *In re* Turner, 80 B.R. 618, 623 (Bankr. D. Mass. 1987)(bad faith under § 303(i)(2) should be measured by the same standards contained in Bankruptcy Rule 9011); *In re* McDonald Trucking Co., 76 B.R. 513, 516 (Bankr. W.D. Pa. 1987). *See also In re* Petralex Stainless, Ltd., 78 B.R. 738, 743 (Bankr. E.D. Pa. 1987)(petitioning creditors in an involuntary case should be held to the standard created by Bankruptcy Rule 9011); *In re* Alta Title Co., 55 B.R. 131, 140 (Bankr. D. Utah 1985)(suggesting that the good faith test for purposes of a single creditor petition is analogous to the duty imposed by Rule 9011). Although neither court acknowledged any distinction, note that the latter two cases involved the question of whether the petition should be dismissed because of the lack of good faith, not whether damages should be awarded under § 303(i)(2). *See infra* notes 64 & 236 for further elaboration on this point.

62. 106 B.R. 962 (Bankr. N.D. Ill. 1989).

63. *Id.* at 968. The court then concluded that the petition had been filed in subjective and objective bad faith, leaving unclear the issue of whether the petitioning creditors, who in this instance were less than all of the general partners of the partnership debtor, might have been exculpated from liability in the absence of one or the other. Ultimately, the court assessed $500 in punitive damages against the petitioning creditors under § 303(i)(2) and $28,650.54 for attorneys' fees and costs against the petitioners and their counsel under § 303(i)(1), Bankruptcy Rule 9011 and 28 U.S.C. § 1927 (1988).

tween an improper purpose and a proper purpose pursued in an improper manner. In turn, this failure has created by implication the impression that in this context either of these are sufficient to satisfy the second prong of Rule 9011.[64] Put another way, although a filing motivated by a non-bankruptcy but otherwise lawful purpose would not constitute a violation of Rule 9011, *Basin Electric* remains alive and well as authority for the proposition that a filing involving an improper use of the Bankruptcy Code may lead to a judgment under section 303(i)(2).[65]

The problem, moreover, is not limited just to this anomalous expansion of improper subjective motive as it relates to when judgment may be authorized under section 303(i)(2). In addition, because Rule 9011 requires *both* a reasonable pre-filing investigation and a proper purpose, several courts that have adopted the Rule 9011 standards have assumed that the absence of *either* is sufficient to establish bad faith.[66] By doing so, they have abandoned entirely the original pur-

64. In *Fox Island*, for example, the court cited *Basin Electric* for applying a subjective standard for ascertaining bad faith pursuant to § 303(i)(2). *Id.* at 967. *See also In re* McDonald Trucking, 76 B.R. 513, 516 (Bankr. W.D. Pa. 1987)(the court must consider both the level of pre-filing inquiry and the purpose of the filing). In *In re* Laclede Cab Co., 76 B.R. 687, 693 (Bankr. E.D. Mo. 1987), the court cited the Eighth Circuit's decision on appeal in *Basin Electric* in connection with the analysis of bad faith under § 303(i) *after* dismissal of the petition, rather than in the context of whether in fact the petition should be dismissed. *Compare In re* Centennial Ins. Assocs., 119 B.R. 543, 545-46 (Bankr. W.D. Mich. 1990) and *In re* Caucus Distribs., 106 B.R. 890. 924 (Bankr. E.D. Va. 1989)(both relying on *Basin Electric* in the context of a motion to dismiss the involuntary petition) *with Fox Island* and *Laclede*. *See also infra* note 106 (dismissal is a condition precedent to a bad faith action under § 303(i)(2)). Certainly it is possible, even likely, that an involuntary petition might be dismissed under a *Basin Electric*-type analysis for lack of good faith and that judgment might also later enter under § 303(i)(2); analytically, however, the issues are distinct and there is no necessary connection between the two. *See, e.g., In re* Eberhardt Moving and Storage, Ltd., 120 B.R. 121 (Bankr. D.N.D. 1990)(dismissing the petition for having been filed in bad faith, and reserving for subsequent hearing the debtor's request for damages under § 303(i)).

65. *See, e.g., In re* Tarasi & Tighe, 88 B.R. 706, 712 (Bankr. W.D. Pa. 1988)(judgment entered under § 303(i)(2) where petitioner determined to have used involuntary proceeding as a substitute for customary collection procedures)(citing *In re* SBA Factors of Miami, Inc., 13 B.R. 99 (Bankr. S.D. Fla. 1981)). *See also In re* Better Care, Ltd., 97 B.R. 405, 410-11 (Bankr. N.D. Ill. 1989), wherein the court endorsed the view that use of the involuntary bankruptcy remedy for a non-bankruptcy purpose might form a basis for an award of damages under § 303(i)(2) even though recognizing that the so-called subjective standard of *Basin Electric* is broader than the conduct proscribed under the second prong of rule 9011.

66. *See, e.g., In re* Kearney, 121 B.R. 642, 645 (Bankr. M.D. Fla. 1990)(finding of bad faith could be supported by applying either the subjective or objective standard of Bankruptcy Rule 9011); *In re* Turner, 80 B.R. 618, 623 (Bankr. D. Mass. 1987)(bad faith may be established by the objective test or the absence of a proper purpose); *In re* Petralex Stainless, Ltd., 78 B.R. 738, 743 (Bankr. E.D. Pa. 1987)(petitioning creditors who sign an involuntary petition should be held to the same standard

pose for joining the objective and subjective approaches into a single test.[67] The net effect, then, of these various interpretive leaps of faith is plain to see. It means that courts, their rhetoric to the contrary notwithstanding, have in reality come to impose what amounts to considerably stricter standards of bad faith in involuntary cases than the standards for measuring compliance with Bankruptcy Rule 9011.

Putting aside momentarily the lack of consistency in the actual application of standards under the two provisions, it is important not to lose sight of the equally troubling fact that the apparent unity between Rule 9011 and section 303(i)(2) has become complete with virtually no appreciation for the fact that the two provisions might address somewhat different concerns and that, consequently, the required standards of compliance might not be wholly coincident.[68] If true, this means that the bankruptcy courts that have deferred to Rule 9011 have not only inaccurately described the standard they are applying under section 303(i)(2), they have abdicated as well their responsibility for faithfully executing the commands of the legislature or articulating some principled justification for their failure to do so. In the process, and more to the point, they have provided alleged debtors in involuntary cases, already well-armed by the Code to do battle,[69] with

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created by Rule 9011). Even in *In re* Tarasi & Tighe, 88 B.R. 706, 712 (Bankr. W.D. Pa. 1988) the court observed, in connection with its analysis under § 303(i)(2), that the petitioning creditor had a duty to investigate and research the facts and law.

67. Recall that in *United States Fidelity* the district court concluded that the bankruptcy court had erred by finding bad faith using only an objective test and failing to consider the petitioning creditor's subjective motivation for filing. *See supra* note 58 and accompanying text.

68. In fairness, there are a few exceptions to this charge. Certainly, the court in *In re* Better Care, Ltd., 97 B.R. 405, 410-11 (Bankr. N.D. Ill. 1989), appreciated a difference in the scope of the two provisions. *See supra* note 65. Similarly, in *In re* K.P. Enter., 135 B.R. 174, 180 (Bankr. D. Me. 1992), the court recognized that "[e]mploying Rule 9011 in this context neither restricts nor expands the statutory remedy." Finally, *In re* International Mobile Advertising Corp., 117 B.R. 154, 158-59 n. 1 (Bankr. E.D. Pa. 1990), the court observed that sanctions assessed under Rule 9011 might be different and of a lesser financial impact than damages awarded under § 303(i), *aff'd*, No. 90-634a, 1991 U.S. Dist LEXIS 11294 (E.D. Pa. 1991). *See also infra* note 94 and accompanying text.

69. While not trying to gloss over or make light of the potential damage and disruption to a debtor which might well be caused simply by the filing of a frivolous petition, in the original drafting of the Bankruptcy Code a thoughtful and sincere attempt was made to fairly balance the interests of debtors (in being free of groundless petitions) and the interests of creditors in an efficient and effective system of involuntary bankruptcy. In addition to the provisions of § 303(i) and former Bankruptcy Rule 911 (later 9011), § 303(f) leaves the debtor in complete and sole control of its business and financial affairs unless and until an order for relief enters or cause for appointment of an interim trustee can be established. 11 U.S.C. § 303(f)(1988). Moreover, to encourage suppliers, customers, and other creditors to continue to deal with the debtor in the gap period, the Code provides that any gap claims arising in the ordinary course of the debtor's business and

yet another weapon that might be used to avoid (or, often just as effective, delay)[70] having their property administered through a court-supervised bankruptcy proceeding.

What then should the test of liability be under section 303(i)(2), how does it differ from the Rule 9011 standards, and what is the purposive basis for such a distinction which, to this point, has been so roundly ignored by the courts? I believe answers to these questions begin to reveal themselves upon identifying and contrasting the purposes behind the respective provisions in question; therefore, it is to that endeavor that attention is directed next.

IV. BANKRUPTCY RULE 9011 AND SECTION 303(i)(2): A PURPOSIVE ANALYSIS

A. Rule 9011

As earlier noted, Bankruptcy Rule 9011 is patterned on Federal Rule 11, as amended.[71] Originally promulgated in 1938, Rule 11 conferred authority on the district courts to strike pleadings that were baseless or were interposed merely for purposes of delay.[72] However, under this earlier version of the Rule, courts could not sanction an attorney for violation of the Rule unless the violation was found to be willful.[73] In addition, sanctions were almost never imposed against

financial affairs are to be allowed as if they had risen prior to the filing of the petition and are to be accorded a second overall priority in a bankruptcy administration should it ensue. 11 U.S.C. §§ 502(f), 507(a)(2)(1988). Section 303(e) makes provision for the posting of a bond to secure amounts later determined to be due the debtor under § 303(i) upon a showing of cause. Also, posting of bond is a mandatory condition to the appointment of an interim trustee. FED. R. BANKR. P. 2001(b). Finally, as a consequence of the amendments made under the 1984 Act, creditors no longer have standing to bring an involuntary case when their claims are disputed in good faith. All such legitimately disputed debts are to be excluded from the analysis under § 303(h)(1) of whether the debtor had generally failed to pay its current debts when due at the time the petition was filed. *See supra* notes 15-19.

70. It bears reiterating that one of the principal criticisms of involuntary bankruptcy under the former Bankruptcy Act was the inability of creditors to compel the administration of the debtor's assets in a bankruptcy proceeding before the debtor's financial situation had deteriorated beyond the point of no return. *See supra* note 7.
71. *See supra* text accompanying note 27.
72. *See* Freeman v. Kirby, 27 F.R.D. 395, 397 (S.D.N.Y. 1961), for a rare example of a case where the district court struck the plaintiff's complaint as a sham under pre-amended Rule 11.
73. In pertinent part, Rule 11 as originally drafted provided: "For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action." Fed. R. Civ. P. 11, 28 U.S.C. app. (1982). Although not expressly defined, an "appropriate disciplinary action" was generally construed to empower the court to shift the cost of suit to the offending party. Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980); Cavanagh, *supra* note 32, at 504-05. However, sanctions were rarely im-

the client.[74] Finally, to establish a violation of the Rule, the challenging party was required to prove subjective bad faith.[75] In this context, the test for subjective bad faith was generally formulated with reference to the litigant's motive for filing, not its expectation in terms of actual outcome. Thus, for the most part, bad faith was equated with claims entirely devoid of any colorable basis, or claims asserted solely to harass, delay, or attrite the other side into submission.[76]

Because, at least in part,[77] of the complexities and difficulties associated with establishing a litigant's state of mind, pre-amended Rule 11 was infrequently invoked and, even when invoked, infrequently used as a basis for imposing sanctions against attorneys who filed false or groundless pleadings.[78] This malaise caused many commentators to

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posed under former Rule 11. *See* D. Michael Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems With Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-37 (1976), indicating that between 1938 and 1976 Rule 11 motions had only been filed in nineteen reported decisions, and that among those cases violations had been found in eleven instances with sanctions imposed against the violating attorneys in only three cases. *See also* KASSIN *supra* note 33, at 2 (suggesting that three years later the number of cases where counsel was disciplined under Rule 11 had only gone up by one). Of course, then as now, an attorney who is found to have multiplied "the proceedings in any case unreasonably and vexatiously" might also be required to absorb the costs of suit, including attorneys fees, attributable to such conduct. 28 U.S.C. § 1927 (1988).

74. On the other hand, as Nelken, *supra* note 33, at 1315, has pointed out, since the sanction most frequently invoked for violating Rule 11 was to strike the pleading as a sham, paradoxically it was the client who effectively would be penalized for the excessiveness or perfidy of counsel.

75. *See* Nemeroff v. Abelson, 620 F.2d 339, 348-50 (2d Cir. 1980)(to support sanctions under Rule 11, subjective bad faith must be shown); Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1167 (7th Cir. 1983)(sanctions denied because of the "lack of any showing of *subjective* bad faith"). Generally, subjective bad faith has also been required before sanctions will be imposed under 28 U.S.C. § 1927 as well. *See* United States v. Nesglo, Inc., 744 F.2d 887, 891 (1st Cir. 1984).

76. *See, e.g.*, Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977)(the test of bad faith is whether there is clear evidence that the claims in question are "entirely without color, . . . asserted wantonly, for purposes of harassment or delay, or for other improper reasons").

77. Clearly another part of the problem was the reluctance of courts to impose sanctions on other members of the Bar even when faced with a patent violation of the Rule. *See* KASSIN, *supra* note 33, at 3-4 (judges' general reluctance to impose sanctions coupled with confusion over the standard of inquiry lawyers were expected to satisfy both contributed to the ineffectiveness of original Rule 11); William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183-84 (1985)(detailing four reasons why judges might be chary about imposing sanctions against lawyers).

78. *See supra* note 20 for statistics pointing up the relative paucity of Rule 11 cases before 1983. *See also* Nelken, *supra* note 33, at 1315-16 (discussing reasons behind former Rule 11's "relative invisibility and disuse"); *Advisory Committee Note*, *supra* note 33, at 198 (confusion over the proper standard of conduct expected of attorneys together with concern over striking legitimate claims accounted for the ineffectiveness of original Rule 11 in deterring abuses) (citing 6 CHARLES ALAN

complain that Rule 11 was not even feebly serving its intended functions of deterring abusive litigation practices and protecting the integrity of pleadings filed in the federal courts.[79] Recognition of the ineffectiveness of the original rule in curbing misuses of the judicial process, coupled with a growing societal concern over frivolous and vexatious lawsuits,[80] resulted in the 1983 amendment of Rule 11. The thrust of the amendment was to substitute the objective standard of reasonableness discussed by the Supreme Court in *Business Guides*[81] for the subjective bad faith standard that had prevailed under the Rule as originally enacted.[82]

The Advisory Committee Note to amended Rule 11 specifically states that Rule 11 is intended to discourage dilatory and abusive litigation tactics, and that the mechanism for accomplishing that end is greater attention by the district courts to pleading and motion abuses and a willingness to impose sanctions anytime such conduct is deter-

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WRIGHT & ARTHUR RAPHAEL MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 1334 (1971)).

79. *See, e.g.*, Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Arthur R. Miller & Diana G. Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, NAT'L L.J. Nov. 28, 1983, at 24, col. 1; Risinger, *supra* note 73; Schwarzer, *supra* note 77; Debbie A. Wilson, Note, *The Intended Application of Federal Rule of Civil Procedure 11: An End to the "Empty Head, Pure Heart" Defense and Reinforcement of Ethical Standards*, 41 VAND. L. REV. 343 (1982). *See generally Advisory Committee Note*, *supra* note 33, at 198; Georgine M. Vairo, *Rule 11: A Critical Analysis*, 70 F.R.D. 189, 190-91 (1988).

80. One of the principal spokesman in the fight to control the volume of frivolous litigation in the federal courts was Chief Justice Warren E. Burger. *See* Address by Justice Burger, *Agenda for 2000 A.D.—Need for Systematic Anticipation*, NAT'L CONF. ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE (April 7-9, 1976)(Conference commemorating Roscoe Pound's address to the American Bar Association 1906 annual meeting), *reprinted in*, 70 F.R.D. 83 (1976). *See also* ARTHUR RAPHAEL MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (Federal Judicial Center 1984). Assertion of baseless claims and defenses, discovery abuses, and other forms of harassment were all viewed as contributing to already overcrowded dockets and obstructing justice. *See generally supra* note 38; Miller, *supra* note 38, at 2-12 (citing the changes in the legal profession and in the legal and social order which he believed accounted for the breakdown in the machinery of justice). While these concerns may or may not have been well-founded (for example, one observer focused on the positive attributes of, and offered neutral explanations for, the perceived litigation explosion, LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 76 (1985)) they were unquestionably very real.

81. *See supra* note 36. *See also Advisory Committee Note*, *supra* note 33, at 198 ("The new language stresses the need for some prefiling inquiry into both the facts and the law. . . .The standard is one of reasonableness under the circumstances.").

82. *See* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253-54 (2d Cir. 1985)("[A] showing of subjective bad faith is no longer required to trigger the sanctions imposed by the rule.").

mined to have occurred.[83] The drafters of the amendments to Rule 11 further indicated that they intended the newly-adopted objective standard to be "more stringent than the original good-faith formula" such that "a greater range of circumstances will trigger its violation," presumably resulting in more frequent and more effective invocation of the Rule.[84]

How well the amendment of Rule 11 has operated to overcome the deficiencies perceived to exist under the original rule, and whether other important interests may have been compromised in the process, are questions that have been the subject of lively and interesting debate.[85] However, it would be beyond the scope of this Article to enter into that fray. Instead, it is only germane for present purposes to ob-

83. *Advisory Committee Note*, *supra* note 33, at 198. To overcome the natural reluctance of judges to impose sanctions even when a violation of the Rule has occurred, the amendment makes sanctions for failure to comply with the strictures of Rule 11 mandatory. *See infra* note 88.

84. *See generally* Nelken, *supra* note 33, at 1314-1318; *Advisory Committee Note supra* note 33, at 198.

85. Amended Rule 11 has been criticized as, among other things, undermining the tradition of the adversary system and the sacred principle of open access to the courts. *See* Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987); David J. Webster, Note, *Rule 11: Has the Objective Standard Transgressed the Adversary System?*, *supra note* 38; Judy L. Woods, Note, *Reasonable Inquiry Under Rule 11— Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751 (1985). *See also* Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383 (1990) [hereinafter Nelken, *Looking for a Middle Ground*], arguing that the chilling effect that Rule 11 has had since its amendment in 1983 threatens to permanently alter the character of civil litigation unless the Rule can be refocused on its original aim of deterrence. Another commentator has complained that Rule 11 has impacted disproportionately on public interest litigation. *See* Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331 (1988). Also, because of the sheer volume of decisions involving Rule 11 (over 1,000 in just the first five years since the 1983 amendment, see Gregory P. Joseph, *The Trouble with Rule 11*, 73 A.B.A. J. 87 (1987)), concern has been expressed that "satellite" litigation over Rule 11 has actually increased, rather than streamlined, the overall volume of federal civil litigation. *See* Nelken, *Looking for a Middle Ground*, *supra*, at 387-88; Vairo, *supra* note 79, at 195.

For more favorable assessment of amended Rule 11, see Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1947-54 (1989)(defending Rule 11 from the charge that it has stifled adversarial zeal or legitimate assertion of doctrine challenging claims); A. Leo Levin & Sylvan A. Sobel, *Achieving Balance on the Developing Law of Sanctions*, 36 CATH. L. REV. 587, 590-91 (1987)(the new Rule has worked well in deterring frivolous suits); Louis, *supra* note 32, at 1053-61 (Rule 11 sanctions primarily have been imposed on meritless cases); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017 (1988) [hereinafter Schwarzer, *Rule 11*] (although critical of the amended Rule on other grounds, noting that there is no evidence that legitimate advocacy has been chilled by Rule 11). *See also* Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 471 (9th Cir. 1990)(filing of complaint would not give rise to sanctions under Bankruptcy Rule 9011 even when relief sought serve a few key details about the current state of the law under Rule 11, as amended, and, ergo, under its bankruptcy counterpart, Rule 9011: 1) pleadings filed without an adequate basis in fact or law are vulnerable to attack;[86] 2) Rule 11 applies to litigants and counsel alike;[87] 3) sanctions under Rule 11 are mandatory once the court determines that a violation has occurred;[88] 4) Rule 11 sanctions are generally calculated by reference to the costs entailed in responding to an improper filing;[89] and, perhaps most importantly for the discussion to follow, 5) Rule 11 is no longer primarily concerned with state of mind or intended to serve merely as a so-called "good faith formula."[90]

B. Section 303(i)(2)

Section 303(i) and Bankruptcy Rule 9011 are not without common purpose. In the broadest sense, certainly both are intended to regulate abusive uses of the federal judicial process. If, however, there was a complete coincidence of purpose there would be no need for a special "mini no-abuse" directive in section 303. Moreover, the questions of what conduct is considered to be abusive and what standards are to be applied in determining whether such conduct occurred may be an-

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was clearly not warranted under existing law since claim was susceptible to good faith argument for a change of existing law).

86. *Advisory Committee Note, supra* note 33, at 198.
87. Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922 (1991). *See supra* note 30 and accompanying text.
88. *See, e.g.*, Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987); *Advisory Committee Note, supra* note 33, at 200 (the limit on judicial discretion is intended to "focus the court's attention" on dealing with misuse of the process). Sanctions are also considered mandatory under Bankruptcy Rule 9011. Mortgage Mart, Inc., v. Rechnitze (*In re* Chisum), 847 F.2d 597, 599 (9th Cir. 1988). Under both 11 U.S.C. § 303(i)(1) and, for that matter, 28 U.S.C. § 1927, the court has discretion to award sanctions in the form of costs and fees. *See infra* authorities cited in note 92. Of course, the general reluctance of judges to use sanctions at their disposal prompted the inclusion of a mandatory directive as part of the 1983 amendments to Rule 11.
89. Although the Supreme Court has expressly held that Rule 11 is not a fee-shifting statute (Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2462 (1990)), in most instances the sanction imposed has been calculated with a view toward the costs and reasonable fees incurred by the other party in responding to the sanctionable behavior. *See supra* note 33. *See also* Alan E. Untereiner, Note, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 917-919 (recommending a series of factors or indicia which courts should apply calculating a proper sanction).
90. *See Advisory Committee Note, supra* note 33, at 198-99 (standard under amended rule is more stringent than the original good faith formula); Vairo, *supra* note 79, at 195 (sanctions provision of Rule 11 is intended to be broader than the "bad faith" doctrine). It will be recalled that one of the principal goals achieved by the 1983 amendment of Rule 11 was to replace the requirement that the party seeking to establish a violation prove subjective bad faith with a stricter and more precise standard of objective reasonableness. *See* Robert L. Carter, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 4, 6-7 (1985); supra note 32.

swered very differently depending on the context in which they arise.[91]

Obviously, section 303(i) is broader than Bankruptcy Rule 9011 in the sense that it allows for the awarding of costs and attorneys fees under subsection (i)(1) without any showing of either bad judgment or bad purpose.[92] Also, as pointed out earlier,[93] subsection (i)(2) itself may be broader than Rule 9011 since decisions interpreting bad faith

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91. This is merely to restate the point made earlier that the process of statutory interpretation cannot proceed in a vacuum, devoid of attention to the purposes sought to be accomplished through adoption of a particular provision of positive law. The classic formulation of an intentionalist or purposive approach to statutory interpretation is H. HART & A. SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958). Taking the view that the meaning of a statute must be determined by reference to intended purpose derived from the context in which the statute was adopted is not necessarily inconsistent with the view that, as time passes between enactment and application, the judiciary must take an increasingly active role in assigning meaning in light of current circumstances. *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988)(distinguishing between "archeological" and "nautical" approaches to statutory interpretation); *See also* William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987)(statute should be interpreted in terms of present goals and needs, and not necessarily on the basis of original or historic intent); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 79 (1987)(the task of the judiciary, like the task of the military field commander implementing battle orders, is to determine which outcome will best advance the enterprise launched upon enactment of the statute in question). As will be discussed presently, *infra* notes 92-108 and accompanying text, the objectives, and therefore the type of conduct proscribed, by Bankruptcy Rule 9011 and § 303(i)(2) are quite different. It is for this reason, as well as because of key differences between the explicit language used in the two provisions that I contend that they should be governed by different standards.

92. *See, e.g.*, Susman v. Schmid (*In re* Reid), 854 F.2d 156, 159 (7th Cir. 1988)(use of the term "may" in § 303(i)(1) indicates that fees and costs do not have to be awarded in all cases); *In re* Kearney, 121 B.R. 642, 644 (Bankr. M.D. Fla. 1990); *In re* Anderson, 95 B.R. 703, 704 (Bankr. W.D. Mo. 1989); *In re* Tarasi & Tighe, 88 B.R. 706, 711 (Bankr. W.D. Pa. 1988); *In re* Laclede Cab Co., 76 B.R. 687, 693 (Bankr. E.D. Mo. 1987); *In re* Amburgey, 68 B.R. 768, 774 (Bankr. S.D. Ind. 1987). In *In re* Kearney, 121 B.R. 642, 644 (Bankr. M.D. Fla. 1990), the court noted that some courts consider an award of costs and attorneys fees as mandatory if a petition is dismissed other than on consent of all parties, but that the authority cited for that proposition is dubious. *But see In re* K.P. Enter., 135 B.R. 174, 177 (Bankr. D. Me. 1992)(unsuccessful petitioners should generally expect that fees and costs will be awarded to the debtor); *In re* Leach, 102 B.R. 805, 808 (Bankr. D. Kan. 1989)(although the award of costs and fees is discretionary, § 303(i)(1) routinely contemplates their award to the debtor); *In re* Johnston Hawks Limited, 72 B.R. 361, 365 (Bankr. D. Haw. 1987)(costs and fees routinely awarded). On the other hand, some courts have suggested that while not technically required, bad faith will ordinarily be a prerequisite to an award of costs and fees under § 303(i)(1). *See In re* Advance Press & Litho, Inc., 46 B.R. 700, 702 (D. Colo. 1984); *In re* Fox Island Square Partnership, 106 B.R. 962, 967 (Bankr. N.D. Ill. 1989); *In re* Allen Rogers & Co., 34 B.R. 631, 633 (Bankr. S.D.N.Y. 1983).

93. *See supra* notes 65-67 and accompanying text.

have defined that concept in terms of what one court has labelled "improper use" as well as "improper purpose."[94] Of course, one could also make the point (as in due course I intend to) that subsection (i)(2) is at the same time narrower than Rule 9011 because it does not impose the affirmative duty to conduct a reasonable pre-filing inquiry into both the facts and the law.[95]

Ultimately, however, my contention is neither that section 303(i)(2) is broader in scope than Bankruptcy Rule 9011 nor that it is narrower; my contention is simply that they are different. Furthermore, these differences manifest themselves in different ways. Some differences are obvious. For example, the court must act under Rule 9011 if a violation occurs; it is not obliged to do so under section 303(i)(2) even when bad faith is found.[96] Likewise, there is a rather significant difference in the consequences that may flow from a violation of Rule 9011 versus a finding of bad faith in an involuntary filing: in the former instance imposition of sanctions[97] and in the latter an affirmative award of actual damages (presumably subject to proof) and punitive damages.[98] Finally, Rule 9011 is directed principally at

94. *In re* Better Care, Ltd., 97 B.R. 405, 410-11 (Bankr. N.D. Ill. 1989)("improper purpose" exists where filing of the petition was motivated by ill-will, malice, or a desire to harass the debtor, whereas an "improper use" test involves using the Bankruptcy Code as a "substitute for customary collection procedures"). Other courts have described the different approaches taken to defining bad faith under § 303(i)(2) in similar terms. *See In re* Johnston Hawks Limited, 72 B.R. 361, 366 (Bankr. D. Haw. 1987). However, in citing authority for the "improper use" test, these courts ignore that, with the exception of *In re* SBA Factors of Miami, Inc., 13 B.R. 99 (Bankr. S.D. Fla. 1981), all of these cases were decided in the posture of a motion to dismiss the petition for lack of good faith, not a motion or counterclaim for sanctions or damages under § 303(i). *See supra* note 51 and *infra* note 253.

95. *See infra* notes 242-263 and accompanying text.

96. *See In re* Cedar Falls Hotel Limited Partnership, 102 B.R. 1009, 1018 (Bankr. N.D. Iowa 1989)(while the court has great discretion in deciding what sanction to impose, upon a determination that Bankruptcy Rule 9011 has been violated the court must impose some sanction against the offending party). *See also supra* notes 88 and 92.

97. The district court is granted broad discretion in fashioning an appropriate sanction, but, ordinarily, sanctions are measured at least partly by reference to the costs incurred by the opposing party. *See* Alan E. Untereiner, Note, *A Uniform Approach to Rule 11 Sanctions*, *supra* note 89, at 920 (the vast majority of Rule 11 sanctions contain some element of cost-shifting). *See also supra* note 33.

98. Damages which are either speculative or remote are not recoverable, even though a finding of bad faith has been made. *See In re* Tarasi & Tighe, 88 B.R. 706, 712 (Bankr. W.D. Pa. 1988)(evidence insufficient to sustain award of compensatory damages); *In re* McDonald Trucking Co., 74 B.R. 474, 479 (Bankr. W.D. Pa. 1987); *In re* Camelot, Inc., 25 B.R. 861, 868 (Bankr. E.D. Tenn. 1982), *aff'd*, Camelot, Inc. v. Hayden, 30 B.R. 409 (E.D. Tenn. 1983). *See also In re* International Mobile Advertising Corp., 117 B.R. 154, 158-59 n. 1 (Bankr. E.D. Pa. 1990)(pointing out that courts have frequently found only nominal damages were proven under § 303(i)(2)), *aff'd*, 1991 U.S. Dist. LEXIS 11294 (E.D. Pa. 1991). *Cf.* Sjostedt v.

counsel,[99] whereas damages under section 303(i)(2) may only be assessed against the parties to the petition.[100] On the basis of these differences alone it might be fairly questioned whether it is rational to apply the same standards and definitions under both provisions.[101] However, it becomes utter nonsense to do so when an even more basic and elemental difference between the two enactments is exposed.

Unlike Rule 9011,[102] section 303(i)(2) is not primarily about pro-

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Salmon (*In re* Salmon), 128 B.R. 313, 316-18 (Bankr. M.D. Fla. 1991)(awarding $100,000 in actual damages, but rejecting most of the debtor's eight million dollar damage claim as too speculative to permit recovery). Although the purpose for the provision for actual damages in subparagraph (A) of § 303(i)(2) is obviously to compensate debtors victimized economically by bad faith filings, the provision in subparagraph (B) for the award of punitive damages is intended both to deter similar acts in the future and to punish creditors for affirmative wrongdoing. *See In re* Advance Press & Litho, Inc. 46 B.R. 700, 706 (D. Colo. 1984); *In re* Johnston Hawks, 72 B.R. 361, 367 (Bankr. D. Haw. 1987). There has been some confusion and an illuminating debate over whether the principal function of Rule 11 (and, therefore, Bankruptcy Rule 9011) is compensation or deterrence and punishment. *See generally* Nelken, *supra* note 33, at 1323-25; Schwarzer, *supra* note 77, at 201; Vairo, *supra* note 79, at 203-04. However, courts and commentators have gradually come to the conclusion that the deterrent role of the Rule is preeminent. *See* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2454 (1990)(the Rule's central goal is deterrence); KASSIN, *supra* note 33, at 29-30 (majority of judges surveyed indicated that deterrence was the most important function of Rule 11); Alan E. Untereiner, Note, *A Uniform Approach to Rule 11 Sanctions*, *supra* note 89, at 907 ("[M]ost judges and commentators agree that deterrence is the Rule's primary goal.")(citations omitted). Thus, only in a very limited sense is there a direct overlap between the thrust of the two provisions.

99. Unquestionably, Federal Rule 11 and Bankruptcy Rule 9011 apply to counsel and litigants alike. *See Advisory Committee Note*, *supra* note 33, at 200 (it may be appropriate under the circumstances of the case to impose sanctions on the attorney, the client, or both); Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 929-31 (1991)(there is no distinction between represented and unrepresented parties for purposes of Rule 11). However, the amendment of Rule 11 in 1983 was clearly precipitated by a concern over attorney misconduct. *See id.* at 935-36 (Kennedy, J., dissenting)(purpose of Rule is to control the conduct of attorneys and those who practice before the courts). Moreover, except in cases involving *pro se* litigants, pleadings and other court papers most often will be signed only by counsel. In this respect, involuntary petitions are the exception to the rule. *See* FED. R. BANKR. P. 1008 (petitions must be verified by filers).

100. *In re* International Mobile, 117 B.R. 154, 158 (Bankr. E.D. Penn. 1990)(section 303(i) provides for claims only against petitioners, not against their counsel); *In re* Fox Island Square Partnership, 106 B.R. 962, 967 (Bankr. N.D. Ill. 1989)(section 303(i) does not provide for an award against the petitioners' attorney); *In re* Ramsden, 17 B.R. 59, 61 (Bankr. N.D. Ga. 1981)(judgment authorized by § 303(i)(2) is directed only against offending petitioners). *But see* Stock v. Exchange Network Corp. (*In re* Exchange Network Corp.), 92 B.R. 479, 480 (D. Colo. 1988)(suggesting that § 303(i)(1) implicitly permits the court to award attorneys fees against counsel).

101. Of course, this is precisely what the trend in the recent case law has been. *See supra* notes 56-65 and accompanying text.

102. The primary focus of Rule 11 is deterrence. *See supra* note 26.

tecting the integrity of court pleadings and papers. Rather, it is primarily about compensating parties who have been financially harmed by a bad faith filing.[103] The perception that there is a heightened danger that a mechanism for involuntary bankruptcy will be the object of mischievous and unintended uses may or may not be accurate.[104] Nevertheless, the purely discretionary provision for redistribution of the costs of suit in section 303(i)(1), operating in addition to the duty imposed by Bankruptcy Rule 9011, provides a powerful disincentive for creditors considering the undertaking of a filing that does not serve bankruptcy purposes.[105] On the other hand, even though demonstrable damages are suffered by a debtor who successfully defends against an involuntary petition, there should be no remedy under section 303(i)(2) just because the petition was without merit. More is required. Bad faith is required, and, as will be explained, for this purpose bad faith entails malice as well as lack of a colorable basis.[106] Correspondingly, since bankruptcy is a collective remedy, if the peti-

103. Doubtless, the provision in § 303(i)(2) providing for the award of punitive damages is intended to serve as a penalty for wrongful conduct and a deterrent to future recurrences. *See infra* note 262. However, the main thrust of § 303(i)(2) is to reimburse the debtor for past and future economic loss caused by the malicious filing of an involuntary bankruptcy petition. *See* H. REP. NO. 595, 95th Cong., 1st Sess. 324, *reprinted in* 1978 U.S.C.C.A.N., 5963, 6280-81; Sjostedt v. Salmon (*In re* Salmon), 128 B.R. 313, 315 (Bankr. M.D. Fla. 1991). Congress clearly intended to create a remedy for malicious prosecution in the form of a bad faith filing when it adopted § 303(i)(2). Also, the provision for punitive damages in subparagraph (B) of § 303(i)(2) may operate to give the bankruptcy court some flexibility to compensate a debtor for intangible losses that cannot be proved with sufficient certainty (as to cause or amount) to be included in an award of actual damages under subparagraph (A).

104. That the perception exists, however, would seem to be beyond contention. For example, see the statement of Senator Baucus, *supra* note 14, made in support of the 1984 Act amendment to § 303.

105. Section 303(i)(1) is broader in scope than Bankruptcy Rule 9011 in two important respects. First, it explicitly allows the court to redistribute the entire costs of suit. Recall that sanctions under Rule 11 shift only the cost of a discrete event, not the entire cost of litigation. Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 934 (1991). *See also* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. at 2447 (Rule 11 is not a fee-shifting statute). Second, there is no requirement under § 303(i)(1) that the court first find a breach of duty before awarding costs and fees. On the other hand, unlike the situation under Rule 9011 (see *supra* note 88), an award of costs and fees is not mandatory upon the dismissal of an involuntary petition. *See supra* note 92.

106. *See, e.g.*, Eric Peterson Constr. Co. v. Quintek, Inc. (*In re* Eric Peterson Constr. Co.), 951 F.2d 1175, 1179 (10th Cir. 1991)(the court must have dismissed the petition before a damage award may be considered under § 303(i)); Miyao v. Kuntz (*In re* Sweet Transfer & Storage, Inc.), 896 F.2d 1189, 1191 (9th Cir. 1990)(by its terms, an action under § 303(i) does not arise until the petition has been dismissed by the court); Glinka v. Dartmouth Banking Co. (*In re* Kelton Motors, Inc.), 121 B.R. 166, 185 (Bankr. D. Vermont 1990)(dismissal of involuntary petition is a condition precedent to a bad faith action for damages under § 303(i)(2)). *See also infra* notes 227 & 268.

tion has legal merit the question of liability under section 303(i)(2) should be foreclosed without regard to the petitioning creditors motivations for filing.[107]

Granting it anthropomorphic qualities for the moment, it is not as if section 303 is indifferent to the harm caused to the system by frivolous filings alone, or, for that matter, colorable filings undertaken with an improper motive; it is simply that those concerns are addressed separately from the statutory provision that incorporates the substantive law of involuntary bankruptcy. Stated another way, within the overall structure of the bankruptcy law, section 303(i)(2) is concerned with what no longer is the dominant consideration under Bankruptcy Rule 9011; that is, section 303(i)(2) is concerned with subjective bad faith.[108] This is not to suggest that petitioning creditors are or should be immune from good faith filing requirements originating from other sources. Quite the contrary. Good faith is clearly expected from everyone who files a bankruptcy petition, creditor and debtor alike.[109] However, by its terms, section 303(i)(2) provides the alleged debtor with a remedy only in instances of bad faith. Does not lack of

107. Contrast this conclusion with the operation of Rule 11 where the issue of the legal merits of a party's claim is separate from the question of whether that party has breached a duty giving rise to sanctions under the Rule. Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 934 (1991)("Rule 11 sanctions are not tied to the outcome of litigation."); Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2456 (1990)(imposition of Rule 11 sanctions does not signify district court's assessment of the legal merits of the sanctioned party's claims or defenses).

108. That the subjective standard no longer governs Rule 11 is abundantly clear. *See* Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 932 (1991); *supra* note 32. For a period of time from the effective date of the Bankruptcy Code on October 1, 1979, until the adoption of the new Bankruptcy Rules on August 1, 1983 (*see supra* note 25), the standards under § 303(i)(2) and former Bankruptcy Rule 911 may have had more in common. However, while the amendment of Rule 11 (which formed the basis for Bankruptcy Rule 9011) may have been intended to substitute a more workable "reasonableness" standard for the subjective bad faith standard which had evolved under the Rule as originally promulgated, the language in § 303(i)(2) has stayed the same. *See* Carter, *supra* note 70, at 6-7. The condition to entry of judgment is and has always been bad faith. Despite efforts by some courts to gauge bad faith by reference to objective considerations, the more sensible construction (particularly given the courts ability to award costs and fees under § 303(i)(1) free of the bad faith prerequisite) is to require a showing of deliberate or malicious intent to cause the losses for which recovery is sought. For example, in the emerging area of lender liability, courts have recognized that breach of a duty of good faith does not always mean bad faith is present. At a minimum, bad faith requires arbitrary or malicious behavior; conduct committed with specific knowledge that it presents a substantial risk of harm to others. *See, e.g.*, Noonan v. First Bank Butte, 740 P.2d 631, 635 (Mont. 1987); Rawlings v. Apodaca, 726 P.2d 565, 578 (Ariz. 1986). *See also* text accompanying *infra* notes 135-139 for elaboration on the idea that bad faith does not mean simply the lack of good faith.

109. *See infra* notes 140-141 and accompanying text.

good faith automatically entail bad faith? I do not believe so, and that judgment may have significant consequences in terms of when a petitioning creditor may be assessed damages under section 303(i)(2). However, to explain why there is an "in-between" that is neither good faith nor bad requires a brief excursus into the concept of good faith as it has developed in the larger commercial law arena where bankruptcy rules operate.

V. DIVERGING CONCEPTUALIZATIONS OF GOOD FAITH

A. Excluder Analysis

There is a rich and provocative literature examining the theoretical foundations and practical implications of the obligation to act in good faith, most of it in the general context of contract law and contractual relations.[110] Probably the leading conceptualization of good faith is still found in Professor Summers' "excluder analysis," which was first put forward in a 1968 article[111] and was later adopted by the drafters of the *Restatement (Second) of Contracts*.[112] According to Summers, any attempt to define good faith as an independent, freestanding concept is not only misguided, but doomed to failure. This is because, Summers maintains, good faith has no general meaning of its

110. *See* Eric G. Anderson, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299 (1988)(drawing a distinction between good faith performance and good faith enforcement of a contract); Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984) [hereinafter Burton, *More on Good Faith*]; Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980) [hereinafter Burton, *Breach of Contract*]; E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963)(distinguishing good faith purchase from good faith performance); Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605 (1981); Phillip Girard, *"Good Faith" in Contract Performance: Principle or Placebo?*, 5 SUP. CT. L. REV. 309 (1983)(exploring whether good faith exists as a necessary or desirable part of Canadian common law); Mark Snyderman, Comment, *What's so Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 U. CHI. L. REV. 1335 (1988).

111. Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1954) [hereinafter Summers, *Good Faith*]. Summers refreshed and updated his analysis in light of intervening developments some sixteen years later. *See* Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982) [hereinafter Summers, *The General Duty of Good Faith*].

112. *See* Burton, *More on Good faith*, *supra* note 110, at 497-99 (the RESTATEMENT (SECOND) largely follows Professor Summers' approach to good faith). Section 205 of the RESTATEMENT (SECOND) OF CONTRACTS (1981) provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

own; it is a term without substantive content.[113] Instead, good faith is given meaning only in relation to the various forms of conduct which courts have identified as constituting bad faith and, in so doing, implicitly ruled out of the realm of good faith.[114] Thus, to use Summers' term, good faith is an excluder. It can be given specific meaning, if one insists on doing so, only by identifying an applicable form of conduct ruled out as bad faith and then formulating its "opposite."[115] In turn, instances of bad faith conduct are determined by criteria that vary from one context to the next,[116] and, although Summers never explicitly says so, presumably in the same context over time. Therefore, so far as Summers is concerned, it is no more possible to assign a positive definition to bad faith than it is to good faith. The constant and inevitable reconfiguring of circumstances renders meaningless any attempt to list the factual conditions necessary and sufficient to establish good faith or bad faith in every case.[117]

Logically, Summers, whose methodology for defining good faith is to posit the opposite from various forms of bad faith, would reject the notion of conduct that falls short of membership in either class. By

113. Summers, *Good Faith*, *supra* note 111, at 201 ("It [good faith] is a phrase without general meaning (or meanings) of its own. . .").

114. *Id.* at 200-04. Summers contends: "Good faith, then, takes on specific and variant meanings by way of contrast with the specific and variant forms of bad faith which judges decide to prohibit." *Id.* at 202. Summers derives support for his excluder analysis from the work of the English linguistic philosopher J. L. Austin. *Id.*

115. *Id.* at 200 nn.28-29. Summers uses the example of a judge who, applying the directive that a public authority must act in good faith in letting bids, concludes that the defendant acted in bad faith because of a concealed purpose of awarding bids to a favored bidder. (These are apparently the facts of Heyer Prods. Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). It can now be said, Summers continues, that acting in good faith means letting bids without a preconceived design of who will be the recipient, but obviously that definition derived from formulating the opposite of the opprobrious conduct. Summers, *Good Faith*, *supra* note 111, at 200-01.

116. Summers dismisses as impossible the idea that the "necessary and sufficient" factual conditions of good faith or bad in every case can be stated or identified in advance. *Id.* at 204-06. *See also* Summers, *The General Duty of Good Faith*, *supra* note 111, at 819.

117. Summers, *Good Faith*, *supra* note 111, at 206. ("Nor has there been any attempt to catalog all the varieties of contractual bad faith, were this possible."). On this point, Burton is in accord with Summers. *See generally* Steven J. Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rule*, 91 YALE L.J. 1136 (1982). It might also be added that even if such a list of criteria could be composed, its utility would be of transitory value. Inevitable changes over time in societal values and attitudes would almost certainly affect at the edges the determination of whether particular conduct is or is not deemed to conflict with the general duty of good faith and fair dealing. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981)(suggesting that community standards of decency, fairness, and reasonableness all play a role in deciding what type of conduct will be characterized as involving "bad faith").

definition, excluder analysis assumes that what is not bad faith must be, by default, good faith.[118] In this respect, the failure to assign a positive meaning or purpose to good faith (even one concededly subject to recurrent adaptation and modulation at the hands of the courts faced with the task of deciding actual cases) exposes a flaw in excluder analysis. On the other hand, while Summers allows that it is possible to classify the decided bad faith performance cases into several general categories,[119] his conclusion that it is ultimately impossible to state the factual conditions that would guarantee membership every time in one class or another seems right on point.[120] Any such knowable, preordained definition of bad faith, regardless of how well-grounded its theoretical justification, would be of limited explanatory value to begin with, and even less useful over time.[121]

B. Giving a Positive Twist to Good Faith

Summers' excluder analysis has been subjected to some criticism,[122] but only recently has that criticism gone to the central premise of Summers' argument; namely, that good faith itself has no independent meaning.[123] That challenge has come from Professor

118. Of course, the converse must be true as well—what is not good faith must be bad — causing Burton to question whether, when put to the test, excluder analysis excludes anything at all. Burton, *More on Good Faith*, *supra* note 110, at 508 n. 47. For another example of "reverse" excluder analysis, see *infra* text accompanying note 151.
119. In his initial "good faith" article, Summers provided a partial, non-exclusive list of cases involving various forms of bad faith conduct. Summers, *Good Faith*, *supra* note 111, at 203. In his later work, he suggests that it is possible under his analysis to develop a list of factors relevant to good faith performance which can be used in a number of different performance contexts to rule out forms of bad faith. Summers, *The General Duty of Good Faith*, *supra* note 111, at 833.
120. *See supra* note 116.
121. *Id.* *See also supra* note 117.
122. Principally, this criticism has come from Professor Burton. *See* Burton, *Breach of Contract* and *More on Good Faith*, *supra* note 110. *See also* Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981); Russell A. Eisenberg, *Good Faith Under the Uniform Commercial Code—A New look at an Old Problem*, 54 MARQ. L. REV. 1 (1971). In fact Summers spends considerable time in his second good faith article responding to Burton's approach to good faith. *See* Summers. *The General Duty of Good Faith*, *supra* note 111, at 825-831.

    In contrast to Summers' excluder analysis, Burton employs a cost perspective analysis to define good faith. He maintains that a party acts in bad faith when that party uses the discretion reserved to him under the contract to obtain advantages "foregone upon entering into the contract." Burton, *Breach of Contract*, *supra* note 110, at 398, 402. Thus, a party who (based on events occurring after formation of the contract and the risk of which are allocated under the contract) determines that there is more to gain through breach than performance acts in bad faith by failing to fulfill his obligations under the contract. *Id.* at 378-86.
123. *See* Burton, *More on Good Faith*, *supra* note 110, at 508 ("Preliminarily, let it be

Patterson who, like Summers, draws on linguistic theory to support an alternative construction of the good faith principle in the commercial law.[124]

First and foremost, Patterson maintains that, as the normative first principle of commercial relations, good faith must be afforded substantive meaning and content of its own. In this way, courts and lawyers can reason about good faith more broadly than simply in terms of the narrow category of behavior previously identified in reported decisions from their jurisdictions as rising to the level of bad faith conduct.[125] Patterson's approach proceeds from the notion that the meaning of good faith can be best gleaned by considering the purposes the doctrine serves in legal discourse. Patterson emphasizes the importance of institutional history that can be observed in both judicial decisions and expressions of legislative intent. Ultimately, however, he maintains that institutional history must derive from a purposive rationale of the concept under consideration.[126] Thus, contrary to much that has been offered in the way of legal scholarship in recent years,[127] Patterson rejects any externally-imposed normative view of

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clear that both of us fully agree that one cannot state a 'positive definition' of good faith or bad faith performance.").

124. Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335 (1988).

125. *Id.* at 350-51, 378-79. *See also* Dennis M. Patterson, *A Fable From the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 Iowa L. Rev. 503, 525-29 (1991).

126. Patterson, *supra* note 124, at 390. In describing the theoretical implications of his approach from an interpretive point of view, Patterson observes that institutional history goes beyond legislative intent since it includes purposes not apparent to the drafters of the statute as well as the changing demands placed on doctrine over time. Patterson is, understandably, particularly at ease with this approach under the U.C.C. given the drafters explicit admonition that the Code should be construed and applied as a "living" document. U.C.C. § 1-102, cmt. 1 (1990). For an approach to statutory interpretation that goes a step beyond the post-foundationalist, purposive theory of legislative interpretation offered by Patterson, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

127. Some scholars have gone even further by rejecting all forms of normative argument. *See generally* Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991)(discussing the domination of normative analysis in legal scholarship over the past few decades, and questioning whether grand, unified normative theories really accomplish anything in terms of either meaningfully explaining the law or sharpening the focus of legal discourse on important issues of social and public policy). The law and economics explanation and critique of bankruptcy law, *supra* note 160-171 and accompanying text, offers a working example of this type of analysis, although the adherents of that school have no corner on the market. For instance, the thesis developed in this Article about bad faith ultimately reflects a normative judgment about bankruptcy law and policy, although it eschews as inconsistent with the mosaic quality of bankruptcy the preeminence of any single, overriding norm. Thus, I believe Delgado's critique of all forms of normativite argument goes to an unwarranted extreme. One is led to ask, what's left? More-

the law (which may serve as a basis for critiquing the law but which he observes can never explain it)[128] in favor of a normative view that is immanent in the actual legal material and discourse under scrutiny.[129] However, since prevailing commercial norms, practices, and expectations can and do change, Patterson acknowledges that the purposive analysis he uses to reconstruct a theory of good faith can never reveal an enduring, immutable paradigmatic.[130]

The recognition that a purposive approach to legal interpretation must allow for the eventuality of evolution, particularly when dealing with a doctrine as ubiquitous and dynamic as good faith, does not prevent Patterson from assigning a positive meaning to the concept of good faith against which particular applications can then be measured. For purposes of illustration he brings the doctrine of good faith, as reconceptualized by him, to bear in the context of secured transactions under Article 9 of the Uniform Commercial Code.[131] Ultimately, however, Patterson draws his purposive meaning of good faith from existing textual sources. Principally, he relies on section 205 of the *Restatement (Second) of Contracts*,[132] which equates good faith in the performance and enforcement of contractual obligations with "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."[133] Thus, Patterson can now do what he claims could not be done under Summers' analysis; he can speculate in advance and with some measure of certainty as to

over, are not those who urge us to refrain from making normative arguments advancing a normative position themselves? On the other hand, Patterson's approach to derive rather than divine the normative seems sound, although the point is not beyond contention. *See, e.g.*, Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 817 (1987) [hereinafter Baird, *Loss Distribution*] ("[O]ne cannot derive the normative from the positive.").

128. Patterson, *supra* note 124, at 379. *See also* Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 N.W. U.L. REV. 919, 964 n. 148 (1991)(questioning the explanatory prowess of the economic model of bankruptcy law).

129. Patterson, *supra* note 124, at 379 (the key question to be answered is not does the theory make sense, but "[d]oes the theory make sense of the data?").

130. *Id.* at 378 ("The meaning of good faith can never be exhausted in any one of its instances, nor is any particular instance uniquely illustrative or paradigmatic.")(citations omitted). This is not by any means to say, as Summers would, that it is impossible to assign a positive meaning to good faith. *See supra* note 113 and accompanying text. It is simply to recognize that the process of ascribing meaning cannot occur divorced from the contextual circumstances in which that meaning is relevant, and the contexts in which the question arises are several and varied. Any allusion at this point to the legal realist tradition is probably not accidental.

131. Specifically, Patterson considers the problem of anti-waiver clauses in security agreements. Patterson, *supra* note 124, at 394-419.

132. *Id.* at 384-85. *See also infra* note 139.

133. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

whether or not, among other questions, particular provisions in a security agreement should be barred under the U.C.C's general requirement of good faith in the enforcement of contract rights.[134]

C. Good Faith Reconsidered

One of Patterson's most basic criticisms of excluder analysis is that it leads to the conclusion that only cases with extremely similar fact patterns (presumably those involving conduct earlier "ruled out" as bad faith) have precedential value.[135] This precludes courts from being able to know in advance whether or not a party has comported itself in good faith, except in those limited situations where the identical conduct was characterized in an earlier case as constituting bad faith.[136] This leads Patterson to develop his positive conception of good faith—one that is tied to the reasonable expectations of the parties, and, I suspect, concomitantly, to their exigent commercial needs. By assigning a positive meaning to good faith, and in particular a meaning which derives from actual experience, Patterson's conceptualization of good faith allows a possibility for which Summers' analysis cannot account; namely, conduct which does not sink to the level of bad faith (ruled out by the judge's use of the term good faith) but which also does not rise to the standard of good faith (because it fails to comply with reasonable expectations and prevailing commercial practices).

Whether one agrees or disagrees with Patterson's general approach to legal interpretation,[137] the value of any conceptualization of good faith which, like Patterson's, attributes a specific role to the concept

134. Patterson, *supra* note 124, at 419-425.

135. *Id.* at 350.

136. *Id.*: "But how can courts reason about good faith when good faith cannot be identified outside the narrow designation provided by case law?"

137. For a sampling of alternative approaches to statutory interpretation, a subject which has received renewed scholarly attention in recent years, see Eskridge & Frickey, *supra* note 126 (proposing a practical reasoning model of statutory interpretation); Frank H. Easterbrook, *The Role of Original intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988)(suggesting that the search for legislative purpose or intent has become a device used by judges to re-write statutes as they please); Jonathon R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986)(proposing that the process of statutory interpretation be used to cleanse legislation of the taint resulting from the influence of special interest motivations in the legislative process); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*), 37 CASE W. RES. L. REV. 179 (1987)(the task of the judiciary is not dissimilar to the task of the field commander implementing vague military orders; the exercise is to determine which outcome will best advance the enterprise launched upon enactment of the statute in question); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407 (1989)(emphasizing the primacy of statutory text in the interpretation process, and calling for adoption of a new set of

of good faith is that it implicitly carries with it an ideal that the actor's behavior must conform to a higher standard than the minimum requirement imposed by positive law. Regardless of whether that higher standard is envisioned in terms of general market expectations, industry practice and custom, or predominating community values at large, the point remains the same: good faith entails the exercise of a right tempered by considerations external to the strict statutory or contractual provision that confers the right in the first instance.[138]

Admittedly, there are a growing number of occasions in the law where the minimum standard under the applicable enabling provision has been explicitly raised and brought into conformity with the good faith standard. For example, it is now widely accepted that every contractual relationship is infused with mutual duties of good faith and fair dealing in performance and enforcement.[139] Doubtless, these sweeping admonitions have very real implications for the persons held

interpretive norms or canons of construction that promote the goals of the contemporary regulatory state).

138. Patterson suggests that good faith entails conformity with the reasonable standards of the community, but observes that the relevant "community" may differ depending on the context; in a commercial transaction, for instance, community might well be considered to refer to the financial community. Patterson, *supra* note 124, at 385-87. In other contexts, the community might be much larger. For example, to the extent good faith has been used as one of several devices designed to limit the scope of the employment at will doctrine, the relevant community might extend to the community at large. *See, e.g.*, Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1977)(employers' interest in running his business must be balanced against the employees' interest in maintaining his employment and the public's interest in maintaining a balance between the two). *Cf.* Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (Wis. 1983)(imposing a duty to terminate in good faith would unduly restrict an employer's discretion in managing the work force). The court in *Brockmeyer* did, however, adopt a narrow public policy exception to the employment at will doctrine. *Id.* at 840.

139. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). Interestingly, the U.C.C. adopts a subjective test of good faith, "honesty in fact." U.C.C. § 1-203 (1989). However, it adds an objective component for merchants involved in contracts for the sale of goods. U.C.C. § 1-203(1)(b)(1989). By its terms, however, the duty of good faith attendant to the performance and enforcement of contracts does not extend to the pre-contract negotiation stage of the relationship. This points to greater tolerance for insincere motive and deviation from reasonable expectations in the contract formation process than after the parties cross the threshold of contractual liability, even though the harm resulting from such behavior may be no less real than the harm flowing from the actual breach of an express or implied contractual obligation. Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965), is the classic example of such a case. This has led some courts to recognize an obligation to negotiate in good faith. *See, e.g.*, Channel Home Centers, Division of Grace Retail Corp. v. Grossman, 795 F.2d 291 (3d Cir. 1986). *See also* Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U.L. REV. 673 (1969)(offering a variation on the duty to bargain in good faith theme). Although the Bankruptcy Code contains no general duty of good faith similar to the U.C.C., for citation to various provisions of the Code which incorporate a good faith requirement, see *supra* note 22.

to these standards in actual transactions. They do not, however, alter or diminish in any way the point that a necessary corollary of enriching the good faith concept with positive meaning is the creation of a gulf between ordinary and good faith performances.

D. The Good Faith Filing Requirement

By judicially-imposed mandate, bankruptcy filings also must be undertaken in good faith.[140] Failure to do so can result in dismissal. This implied good faith filing requirement applies equally to involuntary as well as voluntary cases.[141] I fully endorse the view that good faith in this context means consistency with prevailing bankruptcy policy.[142] However, if, as I have argued, bad faith is not always the mirror opposite of good faith, then neither can the converse proposition be true in every instance. Further, even if the term "bad faith" inevitably is used to refer to conduct which falls short of the implied good faith filing requirement,[143] it does not automatically follow that

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140. *See* Carolin Corp. v. Miller, 886 F.2d 693 (4th Cir. 1989); Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (*In re* Little Creek Dev. Co.), 779 F.2d 1068 (5th Cir. 1986). *See generally* Ponoroff & Knippenberg, *supra* note 128. While the impetus for implying a good faith filing requirement originated in the context of reorganization cases, courts have recognized lack of good faith as a valid basis for dismissal of Chapter 7 cases as well. *See* Industrial Ins. Servs. v. Zick (*In re* Zick), 931 F.2d 1124, 1129 (6th Cir. 1991).

141. As pointed out earlier, Basin Elec. Power Coop. v. Midwest Processing Co., 47 B.R. 903 (D.N.D. 1984), *aff'd*, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986), was actually such a case. *See supra* note 47. Other examples include: *In re* Eberhardt Moving & Storage, Ltd. 120 B.R. 121 (Bankr. N.D. 1990); *In re* Kass, 114 B.R. 308 (Bankr. S.D. Fla. 1990); *In re* Winn, 49 B.R. 237 (Bankr. M.D. Fla. 1985)(sole purpose of filing was to circumvent state court ruling). *Cf. In re* 1020 Warburton Avenue Realty Corp., 127 B.R. 333 (Bankr. S.D.N.Y. 1991)(debtor's challenge on bad faith grounds refused); *In re* Caucus Distribs., 106 B.R. 890, 922-24 (Bankr. E.D. Va. 1989)(concluding that the petitioner did not act with ulterior subjective motive sufficient to constitute bad faith).

In some cases the "bad faith" purporting to justify dismissal may be on the part of the debtor or one of its equity participants rather than on the part of a creditor. *See In re* Petralex Stainless, Ltd., 78 B.R. 738 (Bankr. E.D. Pa. 1987)(involuntary filing against a joint venture by a joint venture partner challenged by lessor, claiming that the filing was motivated solely by the desire to avoid the effect of a state court order terminating the lease); *In re* G-2 Realty Trust, 6 B.R. 549 (Bankr. D. Mass. 1980)(filing collusively arranged by the debtor).

142. To say that good faith is the instrumentality used by the courts to advance the goals of the bankruptcy process is not to suggest that bankruptcy policy is static or immutable. Quite the contrary, in fact. *See* Ponoroff & Knippenberg, *supra* note 128, at 962-66.

143. In the English language "bad" is regarded as the antonym of "good." Therefore, it is understandable, if not inevitable, that judges in their decisions, perhaps eventually tiring of saying "lack of good faith," will refer to the filing as having been undertaken in "bad faith." *See infra* note 237 and accompanying text. In a sense the usage is perfectly correct. After all, "bad" is the opposite of "good," so it is hard to be altogether critical. Moreover, in some cases the filing will have been in

the same term, when used and applied in a different context, must have the same meaning.[144]

While some courts have pointed to Bankruptcy Rule 9011 as forming a basis for implying a good faith filing requirement,[145] several bankruptcy courts have held that the findings which may support dismissal for failure to satisfy the implied good faith filing requirement do not *a fortiori* compel the conclusion that sanctions are called for under Bankruptcy Rule 9011.[146] This reinforces the notion that Bank-

subjective bad faith as well as inappropriate for bankruptcy relief. It is unfortunate, nevertheless, that there is not another immediately obvious term to describe the opposite of good faith ("without faith" or "no faith" which come to mind only demonstrate the difficulty and perhaps hopelessness of the task). Thus, forced to work within the limits of language, we must concede the point and accept that a filing which fails to conform to the implied good faith filing command is a "bad faith filing." However, just because bad faith as used in this context may connote one meaning, i.e., lack of conformity with bankruptcy purpose, nothing prevents it from having a narrower meaning in a different context when policy considerations dictate. *See infra* note 147.

144. The rejection of a purely unitary theory of doctrine dates back to the Realist Movement and the works of Karl Llewellyn. *See* Karl N. Llewellyn, *Some Realism About Realists—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237, 1240-41 (1931)(describing as a common trait among realist legal thinkers "[t]he belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past."). *See also* GRANT GILMORE, THE AGES OF AMERICAN LAW 82-83 (1977)(referring to the technique of treating the same term or concept differently in different contexts as "narrow issue thinking"); WILLIAM L. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 97, 137 (1973)(discussing Llewellyn's distrust of abstract legal concepts and his technique of narrow issue thinking to recognize different functions performed by the same general concept in different contexts). It also bears noting that the good faith filing requirement does not directly flow from the body of the Code itself. Thus, to assign "bad faith" a different meaning under § 303(i)(2) than the meaning ascribed to the same term when it is casually used to refer to filings not complying with the implied good faith standard produces no inconsistency in the application of Code terms; not that I believe consistency is absolutely mandated intra-code any more than it is inter-code. *See* Ponoroff, *supra* note 19, at 353-64 (suggesting alternative constructions of the term "bona fide dispute" in § 303(b) and (h)(1)). *See also* Dewsnup v. Timm, 112 S.Ct. 773 (1992)(ascribing different meaning to the same phrase when used in different subsections of § 506 of the code).

145. *See, e.g.*, Carolin Corp. v. Miller, 886 F.2d 693, 700 (4th Cir. 1989)("Rule 9011 necessarily implies that all bankruptcy pleadings, including Chapter 11 petitions, must be filed in good faith.").

146. *See, e.g.*, *In re* HBA East, Inc., 101 B.R. 411, 417-18 (Bankr. E.D.N.Y. 1989)(rejecting the contention that the court's finding of bad faith in filing *a fortiori* compels the conclusion that Rule 9011 has been violated); *In re* Park Place Assocs., 118 B.R. 613, 618 (Bankr. N.D. Ill. 1990)(dismissal on bad faith grounds does not in itself compel imposition of sanctions under Bankruptcy Rule 9011). *See also In re* Cedar Falls Hotel Properties Ltd. Partnership, 102 Bankr. 1009, 1017 (Bankr. N.D. Iowa 1989)(rejecting as inappropriate a *per se* rule imposing sanctions pursuant to Bankruptcy Rule 9011 on the ground that the petition was filed in bad faith).

ruptcy Rule 9011 addresses itself to concerns other than filings wanting in good faith or purely bad faith filings.[147]

Given the concurrent existence of an implied good faith filing requirement and mandatory sanctions under Bankruptcy Rule 9011 for filings undertaken without reasonable inquiry into the facts and law, the question can squarely be raised, what discrete role is left for section 303(i)(2)? One view would be that if the involuntary petition is dismissed for *either* want of good faith or lack of colorable grounds, section 303(i)(2) compounds the petitioning creditors' misery by exposing them to the possibility of further chastisement in the form of actual and even punitive damages. This is in addition, of course, to the award of costs and fees.[148] This is the view which, by incorporating the standards developed under Bankruptcy Rule 9011, several bankruptcy courts have effectively adopted.[149] Moreover, to the extent that improper motive is expanded to encompass uses not sanctioned by the Bankruptcy Code,[150] it is also a view that tacitly adopts a perverse form of reverse excluder analysis, defining bad faith as conduct which does not satisfy the standard of good faith required as a condition to file.[151]

The principal shortcoming of this view is that it results in a definition of bad faith which encapsulates conduct undertaken without either an intent to harm or an objectionable ulterior motive. Such a scopic interpretation goes beyond even the ambitious aims of the statute, which are first and foremost to protect debtors from consciously

147. For example, in *In re* Southern Calif. Sound Sys., Inc. 69 B.R. 893, 901 n.2 (Bankr. S.D. Cal. 1987), the court observed that the appellation "bad faith filing" when used in reference to Bankruptcy Rule 9011 is probably a "misnomer" since it implies malice, whereas, in most instances, the basis of the violation will have been invocation of the bankruptcy process for a non-sanctioned purpose.

148. Costs and fees might be imposed under Bankruptcy Rule 9011, § 303(i)(1), or both.

149. *See* authorities cited *supra* note 61.

150. *See supra* notes 48-52 and accompanying text.

151. Bad faith conduct becomes, by inference, conduct which has been ruled out as not good faith. Of course, this is little different than applying excluder analysis and saying that it is the bad faith which singles the case out for early termination, and, thus, good faith is simply not bad faith. It is this potential for endless circularity of argument that perhaps leads Burton to question: "doesn't the point become a hot potato that each concept passes to its opposite *ad infinitum*?" Burton, *More on Good Faith*, *supra* note 110, at 508 n.47. Burton, however, eventually falls prey to the same assumption that "not-good faith" means bad faith, questioning only whether bad faith might have meaning in a way that good faith does not. *Id.* The point, I believe, is that "not-good faith" has meaning in a way that bad faith does not; it is a broader concept, not a synonymous concept. If necessary because of the limitations of language and grammar, I also see no particular fault in using the term "bad faith" to refer to the absence of good faith in some contexts, provided that one is careful to distinguish from one case to the next and from one context to another. *See supra* note 143.

overreaching creditors[152] and, only secondarily, to preserve the integrity of the bankruptcy courts' jurisdiction.[153] In either instance, creditor conduct calling for consideration of damages under section 303(i)(2) should be limited to conduct determined to have been undertaken with the deliberate and malicious intention of harming the debtor.[154] Moreover, this determination occurs, if at all, *after* dismissal of the petition on the merits. Any more expansive application of the bad faith rule in section 303(i)(2) can only serve to deter creditors from seeking relief in bankruptcy. While this may cause no harm to the individual debtor qua debtor, it potentially frustrates the general bankruptcy objective of equality of distribution among similarly positioned creditors. Further, in the case of a business debtor, the *in ter-*

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152. The legislative history emphasizes the harm to the debtor which just the filing of an involuntary bankruptcy petition can cause, and, therefore, the need to provide compensation through section 303(i) in appropriate circumstances.

> Subsection 303(i) provides for costs, attorneys fees, and damages in certain circumstances. The bonding requirement [of § 303(e)] will discourage frivolous petitions as well as spiteful petitions based on a desire to embarrass the debtor (who may be a competitor of a petitioning creditor) or to put the debtor out of business without good cause. An involuntary petition may put a debtor out of business even if it is without foundation and is later dismissed.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 324, *reprinted in* 1978 U.S.C.C.A.N., 5963, 6279; S. Rep. No. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5819. *See also* Camelot, Inc. v. Hayden, 30 B.R. 409, 411 (Bankr. E.D. Tenn. 1983)(subject to proper proof as to causation, debtor could recover operational losses as well as expenses upon a showing of bad faith); Salmon v. Sjostedt (*In re* Salmon), 128 B.R. 313, 315 (Bankr. M.D. Fla. 1991)(by adopting § 303(i) Congress clearly created a remedy for malicious prosecution in the form of a bad faith filing of an involuntary petition). Of course, the provision in § 303(i)(2)(B) for punitive damages is aimed at accomplishing other objectives. *See* Camelot, Inc. v. Hayden, 30 B.R. 409 (E.D. Tenn. 1983)(punitive damages serve to deter repetitive conduct, punish the wrongdoer, and deter similar conduct by others).

153. Unquestionably, the two issues are related. A filing undertaken primarily for the purpose of harassing or putting the debtor out of business is an abuse of the judicial process. However, there is a difference in emphasis and focus. The implied good faith filing requirement is directed at testing the consistency of the filer's motivations with bankruptcy purposes. The concern is for misuse of process and harm to the system at large. Section 303(i)(2), by comparison, is intended to retard the temptation to make malicious use of the involuntary bankruptcy remedy, the mere invocation of which alone holds the potential to cause the debtor enormous harm. *See supra* note 152.

154. A filing undertaken with ulterior intent to cause harm to the debtor may well constitute an abuse of process also, if the claim for relief is colorable on its face. If, however, the petition is without cause as well, the integrity of the process is preserved by the system's rejection of the claim for relief on its merits. In that event, the only interest left to be vindicated is the debtor's interest in being compensated for the direct and consequential losses caused by the petitioner's wrongful conduct. Because dismissal of the petition is a condition precedent to an action for damages under § 303(i)(2), I submit that it is in this second mode that § 303(i)(2) is relevant and that, therefore, bad faith should be conceptualized accordingly. *See infra* text accompanying notes 293-295.

rorem effect of an overly-broad definition of bad faith may be harmful not only to those creditors who arrive late to the feeding frenzy that characterizes state grab law, but equally to all the other parties with an interest in the debtor as a going concern. This may include, among others, customers, employees, retirees, and the community at large.[155]

VI. BAD FAITH AND BANKRUPTCY POLICY: A QUIXOTIC QUEST FOR GUIDANCE

A. Overview

As earlier discussed, the problems with the current understandings and applications of the bad faith provision in section 303(i)(2) stem not

155. Philosophically, I subscribe to the view that bankruptcy law, at least in its modern incarnation, has come to affect a broader range of societal interests than debtors and creditors in the traditional sense. *See generally* Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987). Post-Reform Act amendments to the Code to protect the interests of union employees and retirees under Chapter 11 exemplifies this trend. *See* 11 U.S.C. § 1113 (1988)(added to the Code by § 541(a) of the 1984 Act to require debtors-in-possession to negotiate modifications of their labor contracts in good faith before petitioning the court for rejection); 11 U.S.C. § 1114 (1988)(added to the Code by § 2 of the Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610). Once reorganization through the bankruptcy forum became an acceptable alternative for large, publicly-held companies (if not the alternative of choice) it became impossible to relegate the impact of bankruptcy rules and the scope of bankruptcy policy to creditors alone. For an illuminating empirical study of large company filings under the Code, see Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125 (1990). The failure of a large commercial enterprise means loss of jobs on a mass scale, elimination of support for charitable and civic organizations, and loss of revenue from property and other taxes assessed at the local or regional level. While the initial negative impact of a Chapter 11 filing on the community may be no less catastrophic, the prospects for rehabilitation and eventual return to financial viability through the reorganization process offer hope to the community. If reorganization is appropriate, but current management of the debtor is unwilling for personal, political, or other reasons to seek relief while the chances for a successful reorganization remain high, it is more than loss of value for creditors that is threatened. *See* Susan Rose-Ackerman, *Risk Taking and Ruin: Bankruptcy and Investment Choice*, 20 J. LEGAL STUD. 277, 279 (1991)(for most corporate managers Chapter 11 is something to be avoided). This reveals, in part, why there is reason to consider expanding standing to initiate an involuntary case to parties other than claimholders. *See infra* notes 201-204 and accompanying text. Nevertheless, even if the line remains drawn at creditors, it is important that at least some group be empowered with the ability to seize the initiative away from the debtor and its management, and that the meaningful exercise of this power not be negated by making the cost of filing too high. Yet, by raising the stakes for prospective petitioning creditors beyond the level where most players are willing to enter the game, this is precisely what the courts have done. Thus, there is a price to be paid for a broad definition of bad faith in involuntary bankruptcy, and the return may not be anywhere near equivalent.

only from the ready propensity of courts to copy the analysis under Bankruptcy Rule 9011, but also from the expanded definition accorded to the improper motive aspect of the analysis. That is to say, some courts, including the district court in *Basin Electric*,[156] have found bad faith to exist by reference to both an improper purpose and the pursuit of a proper purpose in an improper forum.[157] From this definition, other courts have suggested that entry of judgment under section 303(i)(2) may be appropriate if it is determined that the petitioning creditors are using the involuntary bankruptcy process as a "substitute for customary collection procedures."[158]

Although I generally support purposive interpretation of positive legal rules, including in this context, I doubt whether it is sound to analyze the bad faith question in involuntary cases in relation to the most basal goals of the bankruptcy system. A more prosaic but equally important perspective for analysis might focus instead on the purposes for a bad faith rule in the specific context of involuntary filings.[159] To show why this is so, and to be able to distinguish between appropriate and inappropriate uses of involuntary bankruptcy should one accept the broad construction of bad faith, it becomes necessary at this point to examine briefly the purposes of the bankruptcy process.

B. Bankruptcy Policy: Competing Theories

1. *Economic Theory*

Of late, there has been a renewed scholarly interest in bankruptcy theory and policy. This has generated an interesting and increasingly spirited debate about bankruptcy purposes.[160] Writing from a mainly

156. Basin Elec. Power Coop. v. Midwest Processing Co., 47 B.R. 903 (Bankr. D.N.D. 1984), *aff'd*, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986).
157. *See supra* notes 51-55 and accompanying text.
158. *See, e.g.*, *In re* Better Care, Ltd., 97 B.R. 405, 410 (Bankr. N.D. Ill. 1989); *In re* Tarasi & Tighe, 88 B.R. 706, 712 (Bankr. W.D. Pa. 1988); *In re* Johnston Hawks Limited, 72 B.R. 361, 366 (Bankr. D. Haw. 1987).
159. One of the reasons for this is that courts have come to rely on their own good faith filing requirement to test particular filings against evolving bankruptcy purposes. *See generally* Ponoroff & Knippenberg, *supra* note 128, *infra* notes 181-183 and accompanying text. Therefore, it is not necessary to call on the bad faith proscription in § 303(i)(2) to pull double duty: determining both the appropriateness of the case for bankruptcy relief, and the propriety of the petitioning creditors' motives for filing. The proliferation of various tests of bad faith is, I believe, a product of the failure to make this critical distinction. The effect has been to confuse the question of whether the case should go forward with the very different question of whether petitioners in an action previously dismissed should be held accountable in damages for having improperly invoked the legal process. *See infra* notes 226-228 and accompanying text.
160. The most lively, and perhaps most pointed, example of this on-going discourse can still be found in Professors Warren and Baird's version of "duelling articles". Warren, *supra* note 155; Baird, *supra* note 127. For an earlier exchange of related

economics-based perspective on the law, a group of scholars, ably led by Professor Baird and Dean Jackson, have developed perhaps the first truly systematic, comprehensive theory of bankruptcy.[161] Baird and Jackson argue that bankruptcy law exists solely to serve a single function: to solve the "common pool" problem that occurs when a debtor's assets are insufficient to satisfy the collective demands of the creditors who must seek to satisfy their claims from that pool of as-

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views directed to the law of secured financing, see Homer Kripke, *Law and Economics, Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929 (1983); Thomas H. Jackson & Alan Schwartz, *Vacuum of Fact or Vacuous Theory: A Reply to Professor Kripke*, 133 U. PA. L. REV. 987 (1983).

161. Throughout, I refer to Baird and Jackson in a single breath, perhaps unfairly ignoring their individual contributions and (particularly of late) even minor points of difference in emphasis or approach. Still, much of their work has been collaborative and each acknowledges his general agreement with the other on major assumptions and views regarding the nature and scope of bankruptcy policy. *See, e.g.*, Baird, *Loss Distribution*, *supra* note 127, at 815-16 (wherein Baird refers to the theory of bankruptcy developed jointly by Jackson and him); Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 826 (1985)(describing the views of Baird as not "substantially dissimilar from those of Jackson). Their collaborative works include: Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule (In Honor of Walter J. Blum)*, 55 U. CHI L. REV. 738 (1988); Douglas Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and its Proper Domain*, 38 VAND. L. REV. 829 (1985); Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97 (1984) [hereinafter Baird & Jackson, *Diverse Ownership Interests*]; Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199 (1984). Also deserving of mention for his contributions to the field is Professor Eisenberg. *See* Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 U.C.L.A. L. REV. 953 (1981).

Jackson's thinking about bankruptcy policy is reflected in his book THE LOGIC AND LIMITS OF BANKRUPTCY POLICY (1989) [hereinafter JACKSON, LOGIC AND LIMITS] which is a distillation of much of his earlier work on bankruptcy. For an even more recent work, and a slight deviation from course, see Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155 (1989)[hereinafter Jackson & Scott, *On the Nature of Bankruptcy*], expanding on the creditors' bargain model developed earlier by Jackson as a heuristic device for allegorizing the bankruptcy process in its idealized form and criticizing provisions of current bankruptcy law which fail to conform to the model. *See generally* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982) [hereinafter Jackson, *Creditors' Bargain*]. *See also infra* note 195 and accompanying text. Baird develops a similar bargain metaphor of bankruptcy in Douglas G. Baird, *A World Without bankruptcy*, 50 LAW & CONTEMP. PROBS. 173 (1987). Baird's other individual works include: Douglas G. Baird, *Fraudulent Conveyances, Agency Costs, and Leveraged Buyouts*, 20 J. LEGAL STUD. 1 (1991); Douglas G. Baird, *The Uneasy Case for Corporate Reorganization*, 15 J. LEGAL STUD. 127 (1986) [hereinafter Baird, *Corporate Reorganization*].

sets.[162] For Baird and Jackson, the business of the bankruptcy system is limited to efficient debt collection in the face of a common pool problem and it is against this distinct purpose that the current provisions of substantive bankruptcy law are to be judged.[163] They view bankruptcy as creating the conditions under which the self-interested impulses of individual creditors, which if left uncontrolled would place them in costly competition with one another for limited resources, can be forcibly channeled into a coordinated and orderly liquidation of the debtor's assets.[164] Of course, such a liquidation can usually be counted on to also bring the highest and best price for those assets.[165] Thus, when operating properly, the bankruptcy system functions to maximize asset values. As a consequence, bankruptcy increases overall economic outcomes for the pool claimants as a group.

As can be seen, for Baird and Jackson, bankruptcy can be explained as a mechanism for collectivizing the decisions regarding the deployment of the debtor's assets so that it can be said, in contrast to

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162. The common pool problem is described in JACKSON, LOGIC AND LIMITS, *supra* note 161, at 10-19. *See also* Jackson, *Creditors' Bargain*, *supra* note 161, at 864 n. 34, wherein Jackson analogizes the bankruptcy process to a form of statutory unitization arrangement among numerous owners with drilling rights in the same oil reservoir.

163. The "first principle" of bankruptcy, Jackson informs us, is to serve as a debt collection device targeted to the common pool problem. JACKSON, LOGIC AND LIMITS, *supra* note 161, at 2. Judged by this single-minded explanation of proper bankruptcy purpose, Baird and Jackson find lacking much of the bankruptcy law as now codified. For example, Jackson's normative view of bankruptcy law has caused him to question whether there is any independent justification for the corporate reorganization provisions of the Bankruptcy Code now embodied in Chapter 11. *Id.* at 209-224. *See also* Baird, *Corporate Reorganization*, *supra* note 161, at 138-47. Baird suggests that the premise underlying Chapter 11 may be unsound and that going concern sales of assets can be accomplished under the existing structure of Chapter 7. The principal benefit of reorganization proceedings can thereby be obtained without suffering the concomitant delay, expense, and possibilities for error in valuation inherent in Chapter 11. *Id.* In a more recent work, however, Baird appears to recognize that in the case of closely held firms bankruptcy does not solve a collective action problem as much as enforce the condition for negotiation between the debtor and its principal senior lender. Douglas G. Baird & Randal C. Picker, *A Simple Noncooperative Bargaining Model of Corporate Reorganizations*, 20 J. LEGAL STUD. 311 (1991).

164. *See id.* at 131 ("Bankruptcy law prevents a costly and destructive race to the firm's assets according to the priority scheme that the parties agreed would be used in the event that such a day of reckoning should come about.")(citation omitted). *See also* DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 39-43 (2d ed. 1990)(describing the need to solve the common pool problem as the justification for bankruptcy).

165. *See* JACKSON, LOGIC AND LIMITS, *supra* note 161, at 22-23 (explaining how by forcing multiple claimants to behave in the same manner as a sole owner of assets, Bankruptcy ensures that those assets will be put to the use or uses which maximizes economic return). *See also* Baird & Jackson, *Diverse Ownership Interests*, *supra* note 161, at 104-09 (bankruptcy creates the conditions under which the best use of the common pool can be identified and exploited).

the wasteful results produced by the first-come-first-served approach of state collection schemes, that the assets of the common pool were deployed with optimal efficiency.[166] The goal is to increase the wealth of the creditor body by increasing the aggregate value of the pool available for distribution.[167] It is not as if nothing else matters necessarily, it is just that those other things are not the concern of the bankruptcy law.[168] This requires that bankruptcy rules be relegated to the realm of procedure. Any reordering of substantive state law entitlements would create incentives for those parties advantaged by a different distributional rule in bankruptcy to make strategic use of the bankruptcy process and sub-optimal deployment decisions.[169]

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166. This is, according to Jackson, the principal role of bankruptcy law. JACKSON, LOGIC AND LIMITS, *supra* note 161, at 3, 13. *See also* Thomas H. Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum*, 14 J. LEGAL STUD. 73, 74-75 (1985)(bankruptcy law exists to forestall the suboptimal outcomes likely to occur whenever insolvency coexists with diverse ownership); Jackson & Scott, *supra* note 161, at 158-60 (bankruptcy law implements the general objective of maximizing group welfare by regulating the conflicts among different groups having separate claims against the debtor's assets and income).

167. In almost utilitarian fashion, the good of the one is subsumed to the interests of the group as a whole. Yet, the increase in value derived from the optimal deployment of the aggregate pool of assets should mean an increase in the wealth of the group without a corresponding decrease in the wealth of individual members. In actuality this is not true, of course, since the diligent (or just lucky) creditors who would have been first to arrive at the state law feeding trough are likely to fare worse in bankruptcy than if left to their own devices. However, if one envisions an *ex ante* bargain among creditors where a value must be placed on the risk of arriving late, then theoretically all creditors are better off. This is the basic premise of Jackson's creditors' bargain model. *See supra* note 161.

168. *See e.g.*, Baird, *Loss Distribution*, *supra* note 127, at 824. ("I would reject as grotesque any set of rules that used heartless notions of economic efficiency as the sole standard by which to measure the rights of these people [retirees]. But I do not think any of this has much to do with a normative discussion about bankruptcy policy").

169. The notion that bankruptcy law should concern itself with the asset deployment question and not the distributional question is central to Baird and Jackson's theory of bankruptcy as originally developed. They insist that priorities and entitlements in bankruptcy must parallel priorities and entitlements under state law. This follows from the belief that maximization of asset values delimits the scope of bankruptcy policy. Were bankruptcy law to reorder state law entitlements the process would become the target of strategic filings aimed at capitalizing on redistributive advantages in bankruptcy. This interferes with bankruptcy's historic function as a superior and more efficient debt collection device, since there is no guarantee that a filing initiated by a creditor interested only in maximizing his own "take" is in the interest of the creditor group as a whole. Thus, Baird and Jackson maintain that bankruptcy law should alter substantive non-bankruptcy rules of entitlement only when to do so preserves value in the aggregate pool of assets for the benefit of all persons who have rights in those assets. *See* Baird & Jackson, *Diverse Ownership Interests*, *supra* note 161, at 100-01. *See also*, JACKSON, LOGIC AND LIMITS, *supra* note 161, at 21-27 (establishment of new entitlements conflicts with the collectivization goal); Jackson & Scott, *On the Nature of Bankruptcy*, *supra* note 161, at 156 n.2, wherein the authors, in describing the

In sum, according to the economic explanation, the sole function of bankruptcy law is debt collection; the object is to do so in a manner designed to maximize the value of the pool of assets from which collection may be had; value is increased by reducing the costs of collection; and costs are reduced and efficient deployment is achieved by collectivizing the deployment decision. If all of this occurs, Jackson's hypothetical creditors' bargain is implemented in fact.[170] It is against the backdrop of this normative account of bankruptcy purpose that

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basic premise of Jackson's original model, state that to ensure that distributional concerns do not interfere with the central goal of collectivizing the deployment of assets, distinctions in the treatment of individual claimants under state and federal law must be minimized. However, because he was influenced by Scott's "common disaster" explanation for some business failures, Jackson temporizes the rigidity of his view that optimal deployment of assets demands preservation of pre-bankruptcy entitlements in most instances. See *infra* note 170. Baird, in turn, emphasizes the costs associated with the forum shopping, which results from the availability of multiple avenues of enforcement in which different substantive rules apply. Baird, *Loss Distribution*, *supra* note 127, at 824-28.

170. An amalgam of finance and game theories, the creditors' bargain model was originally developed by Jackson in *Creditors' Bargain*, *supra* note 161. Jackson uses the concept of a hypothetical agreement among creditors for two purposes. First, to explain how a properly constructed law of bankruptcy implements the central normative function of optimizing group welfare, and also as a paradigmatic ideal against which existing bankruptcy law rules can be tested to determine the degree to which they emulate the bargain and, therefore, advance Jacksons "first principle" of bankruptcy. *See supra* note 163. By assuming an agreement among creditors in advance of any default, insolvency or individual action against the debtor, the creditors' bargain model purports to explain how rational, self-interested creditors might agree to act in concert to ensure the largest aggregate recovery from the common pool. Naturally, it depends on leaving existing state law rights and priorities undisturbed. Otherwise, the incentive to enter into a collectivizing agreement could be undermined by creditors' reluctance to subject themselves to a system where their existing state law entitlement might be accorded a lesser status. Of course, the model can only exist in hypothesis since it is unlikely that circumstances might ever align themselves to provide the occasion for creditors to bargain in fact over liquidation of the common pool. *See* JACKSON, LOGIC AND LIMITS, *supra* note 161, at 15. Moreover, the model assumes that creditors are by and large fungible insofar as temperament, disposition to bargain, collection effectiveness, and risk assessment are concerned. Professor Carlson has pointed out with some conviction the unrealistic nature of this assumption. David Gray Carlson, *Philosophy in Bankruptcy*, 85 MICH L. REV. 1341, 1349 (1987)(reviewing JACKSON, LOGIC AND LIMITS, *supra* note 161).

In Jackson & Scott, *On the Nature of Bankruptcy*, *supra* note 161, Jackson softens his view somewhat as to whether it is appropriate for bankruptcy to have separate distributional goals. He does so apparently in the face of persistent and undeniable redistributional impulses at work in bankruptcy. *Id.* at 163. Drawing on Scott's conceptual model of business failures caused by common risks, as contrasted with risks that can be controlled by individual creditors, the authors expand the original bargain model by including distributional as well as maximization goals within its ambit. Specifically, they suggest that all participants would agree in the *ex ante* bargain to share the risks of business failure attributable to certain "common disasters" in order to minimize the overall risk of actual insolvency. By adding a common disaster element to the bargain model, the economic theorists would interpret and apply existing bankruptcy doctrine.[171]

2. *Alternative Explanations for the Role of Bankruptcy*

Baird and Jackson's economic theory has its share of critics. Some commentators have challenged Baird and Jackson's economic analysis on its own terms.[172] The more serious criticism, however, takes exception to the core assumption of economic theory that the sole purpose of bankruptcy is efficient debt collection in response to a common pool problem.[173] For example, in direct rejoinder to the economic ex-

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the authors conclude that the model better explains the various distributional effects commonly observed in bankruptcy. *Id.* at 157, 173-74.

171. As a heuristic model for modern bankruptcy law, the creditors' bargain explanation would seem to leave something to be desired. *See infra* note 195 and accompanying text. In fairness, however, the economic account of bankruptcy clearly started out as a strictly normative theory of bankruptcy. *See* Baird & Jackson, *Diverse Ownership Interests, supra* note 161, at 99-100 ("[W]e suggest that bankruptcy law at its core should be designed to keep individual actions against assets . . . from interfering with the use of those assets favored by investors as a group."). Nevertheless, more recently, Jackson seems to have shifted gears from the prescriptive to the descriptive. In Jackson & Scott, *On the Nature of Bankruptcy, supra* note 161, at 158 n.5, the authors state that their objective is to "enhance the explanatory power of the original model," albeit for the purpose of a providing a richer normative theory. This apparent contradiction is discussed in Ponoroff & Knippenberg, *supra* note 128, at 964 n. 148. *See also* Theodore Eisenberg, *Commentary on "On the Nature of Bankruptcy": Bankruptcy and Bargaining*, 75 VA. L. REV. 205, 206-08 (1989)(generally praising Jackson's and Scott's contribution to difficult questions of bankruptcy theory, but also pointing out that, ultimately, "hypothetical bargains struck by hypothetical actors cannot hope to capture the full range of human interaction").

172. *See, e.g.*, James W. Bowers, *Groping and Coping in the Shadow of Murphy's Law: Bankruptcy Theory and the Elementary Economics of failure*, 88 MICH. L. REV. 2097, 2108-13, 2143-45 (1990), wherein the author questions certain basic assumptions underlying Baird and Jackson's justification for a collective debt collection process, and suggests that leaving control of the distribution of the debtor's assets to the debtor may, in fact, be more likely to produce more efficient distribution than collectivized debt collection. *See also* Theodore Eisenberg, *supra* note 161; Theodore Eisenberg, *A Bankruptcy Machine That Would Go of Itself*, 39 STAN. L. REV. 1519 (1987)(reviewing JACKSON, LOGIC AND LIMITS *supra* note 161)(generally praising the contribution to the field made by Jackson's theory, but cautioning of a possible overemphasis on preserving state law rights and a corresponding failure to adequately place bankruptcy law within the larger social and commercial contexts). For an example of a important study which examines one aspect of bankruptcy law — preferences — from the larger perspective of the historical development of the commercial law, see Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 1 (1986).

173. *See, e.g.*, Carlson, *supra* note 170 (questioning Jackson's philosophical and methodological assumptions); Countryman, *supra* note 161, at 823-27 (describing the law and economics approach to preference law as "unhelpful"); LoPucki & Whitford, *supra* note 155, at 179-82 (Baird's view of strict adherence to the absolute priority rule in bankruptcy does not accurately describe the distibutional patterns

planation of bankruptcy, Professor Warren, in her now-famous debate with Baird,[174] describes her initial point of departure as stemming from a fundamentally different view of the purpose served by the bankruptcy law.[175] While ultimately advancing an alternative policy justification for a bankruptcy law and system, Warren acknowledges that debt collectivizing is a useful way of examining some bankruptcy problems.[176] She argues, however, that at its core, bankruptcy operates to sift through and parcel out the consequences of multiple defaults occasioned by the debtor's imminent financial collapse.[177] Thus, unlike the drama played out in individual debtor-creditor disputes under state law, bankruptcy law addresses the wide range of interests that are likely to be affected by the economic desiccation of a debtor enterprise, including those not cognizable under state law such as future tort claimants.[178] To fairly allocate the losses resulting from firm failure among the many victims of that failure, bankruptcy cannot, according to Warren, be indifferent to distributional considerations.[179]

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in actual cases); Donald R. Korobkin, *Rehabilitating Bankruptcy Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717 (1991)(discussed *infra* notes 185-193 and accompanying text); Ray Warner, Book Review, 20 URB. LAWYER 489, 493 (1988)(reviewing JACKSON, LOGIC AND LIMITS, *supra* note 161)(accusing Jackson of internal inconsistencies); Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 251 n. 14 (1989)(criticizing Jackson's preoccupation with state law results for interfering with his analysis of the problem of executory contracts in bankruptcy).

174. Warren, *supra* note 155; Baird, *Loss Distribution*, *supra* note 127. Just as much of Baird's work has been co-authored with Jackson, Warren's view of Bankruptcy is the product of collaborative work done with Professor Westbrook, a fact Warren readily acknowledges. Warren, *supra* note 155, at 776 n.2.

175. Warren contends that while Baird "has developed a coherent, unified view of bankruptcy that revolves around a single economic construct," her own view of bankruptcy encompasses a number of competing and sometimes conflicting values no one of which is dominant by definition. Warren, *supra* note 155, at 777.

176. *Id.* at 800. Warren specifically acknowledges the utility of collectivism in explaining why, upon the debtor's financial collapse, the bankruptcy system is a superior, lower-cost alternative to individual state law collection actions.

177. *Id.* at 781, 785-89. In direct contrast with Baird, Warren emphasizes the distributional goals of the bankruptcy system separate and distinct from state law. Baird refers to Warren's approach to bankruptcy policy as a "traditional view". Baird, *Loss Distribution*, *supra* note 127, at 816. Use of that term is somewhat ironic given Baird and Jackson's elevation of bankruptcy's historic or so-called "original function" — collectivized debt collection — to the dominant if not sole concern of the bankruptcy law. JACKSON, LOGIC AND LIMITS *supra* note 161, at 5.

178. *See* Warren, *supra* note 155, at 786 (contrasting the distributional design of the Bankruptcy Code with the more simple distributional scheme imposed under state law). Warren continues that "the state law system is not well-suited to . . . [the] circumstances [of a debtor's collapse] . . . because it necessarily must consider too broad a range of possible debtor-creditor relationships and follow collection principles inconsistent with those raised in the circumstances of complete collapse." *Id.* at 783.

179. See *id.* at 790-93, for a partial list of features which Warren offers as useful in establishing distributional priorities in bankruptcy.

This necessarily causes Warren to reject on normative grounds any explanation of bankruptcy that is driven exclusively by pursuit of a single value, be it economic rationality or, presumably, anything else.[180]

Building on this notion of bankruptcy as an integrated system for distributing the consequences of firm failure among a diverse group of actors, Professor Knippenberg and I have urged the traditional view a step further by suggesting that the purposes of bankruptcy are not only several and varied, but that they are also in a continuous state of change.[181] This perspective rejects as unrealistic the presence of a "formally elegant, unified system" of bankruptcy. Instead, it postulates that the contours of bankruptcy policy, particularly in relation to bankruptcy reorganizations, are defined and evolve functionally in measured response to the open-ended purposes which the bankruptcy process must answer to at any given time.[182] Thus, we describe the modern role of bankruptcy as entailing more than debt collection in the narrow sense. We see bankruptcy as having developed into a problem-solving institution; one to which large commercial interests are increasingly turning to seek solutions to social and economic problems that are not adequately addressed elsewhere.[183]

Also owing a debt to Warren and perhaps the realist tradition as well,[184] Professor Korobkin has offered a thought-provoking response to Baird's challenge[185] to provide an alternative account of why a distinct bankruptcy law exists at all.[186] After detailing what he perceives to be the failings of the economic account of the distinctness of bank-

180. *Id.* at 778. While Warren accuses Baird of inconsistency in his theoretical position (*id.* at 803), she admits the absence of any single, unified theory to explain her own views of bankruptcy. *Id.* at 811-12.

181. Ponoroff & Knippenberg, *supra* note 128, at 962-966.

182. *Id.* at 961-62.

183. *Id.* at 963, 968.

184. *See infra* note 190.

185. Baird's challenge is contained in Baird, *Loss Distribution*, *supra* note 127, at 824: "The challenge facing anyone who wants to write about bankruptcy policy is to explain why a distinct bankruptcy law exists at all."

186. Korobkin, *supra* note 173. In this work, the author notes that Baird's challenge can be read as invoking two questions: what values should bankruptcy law promote and why should there be a distinct system of bankruptcy at all? After distinguishing between the two questions, Korobkin concludes that it is the second question to which a response is in order. *Id.* at 720 n. 11. He perceives Warren's work, and the work of most others who have quibbled with economic theory, as addressing only the first question. *Id.* While it is not entirely clear to me that the two issues are truly separable from one another, recognition that the search for bankruptcy purposes may proceed apart from the development of a justification for bankruptcy as a distinct legal institution is an important insight. That such a justification must be advanced and defended by anyone who wants to write about the subject, however, is another thing altogether.

ruptcy,[187] Korobkin holds out in its stead what he terms a "value-based account" of bankruptcy. Unlike the economic account, this explanation ambitiously attempts to address the moral, political, personal, and social aspects and consequences of financial distress.[188] Korobkin maintains that the debtor, particularly in the reorganization context, should not be considered as merely a pool of assets to be managed with a view toward obtaining the highest net return.[189] Rather, he sees the bankruptcy estate "as an evolving and dynamic enterprise, capable of having diverse aims."[190] The bankruptcy system is unique among legal systems by providing the forum where these diverse aims and values of the participants in financial distress can be debated and eventually synthesized into a coherent view of what it is that the rehabilitated enterprise shall exist to do in the future.[191] In contrast to

187. *Id.* at 732-39. In particular, Korobkin is dismayed by the economic account's rejection of the Code's provisions for corporate reorganizations (11 U.S.C. §§ 1101-1174 (1988)) as inconsistent with the normative central principle of maximizing the overall economic return from the common pool. *Id.* at 740-44. He concludes that: "In reality, the economic account demonstrates only that its own economic model is incapable of recognizing noneconomic values essential to a vindicating explanation of corporate reorganization." *Id.* at 740. For Korobkin, a "vindicating explanation" is one that contributes to justifying what it explains, as contrasted with an "undermining explanation" which, as the name suggests, does just the opposite. *Id.* at 722.

188. *Id.* at 761-772. Korobkin's conceptualization of bankruptcy as facilitating expression and recognition of diverse values bears some striking similarities to Warren who earlier stated: "I see bankruptcy as an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors." Warren, *supra* note 155, at 777. On the other hand, Korobkin distinguishes his views from Warren's based upon differing concepts of the bankruptcy estate. *See infra* note 190.

189. Korobkin, *supra* note 173, at 769 ("Viewing the estate solely as an economic object excludes the dynamic character of the estate as it functions in bankruptcy discourse.").

190. *Id.* at 722, 768-74. Korobkin claims that once the estate is viewed as a dynamic and evolving enterprise, the fundamental question for bankruptcy discourse shifts from "what to do with the estate," to "what the estate shall exist to do," a much more complex and involved inquiry. *Id.* at 772. Of course, this view has relevance primarily in the context of reorganization proceedings, and it is over the concept of rehabilitation in bankruptcy that Korobkin has his sharpest disagreement with the economic account. *Id.* at 772-74. Korobkin views bankruptcy rules as being addressed to the array of choices faced by the participants of the debtor enterprise in attempting to ameliorate the chaos of financial distress. This suggests a jurisprudence of bankruptcy that shares many of the common assumptions underlying realist legal thought. *See* KARL NICKERSON LLEWELLYN, JURISPRUDENCE; REALISM IN THEORY AND PRACTICE; 55-60 (1962).

191. Korobkin, *supra* note 173, at 774. One is tempted to say that perhaps the difference between this view and that of the economic theorists is that in the former case negotiation and agreement occurs *ex post* financial collapse, whereas in the latter the bargain is struck *ex ante*. Of course, the effect of that seemingly minor distinction has enormous consequence for the substance of bankruptcy rules, as does the determination of who is extended an invitation to the bargaining table.

Jackson, who analogizes a bankruptcy reorganization to a "sale" of assets not particularly different in method or purpose than a liquidation,[192] Korobkin points to the development of the law of corporate reorganizations in modern bankruptcy as a basis for arguing that the better metaphor is one that recognizes the dynamic potential of the troubled but still viable debtor enterprise.[193]

C. The Relationship Between Bankruptcy Policy, Involuntary Bankruptcy and Bad Faith

1. *The Limits of Economic Analysis*

The role of bankruptcy as a mandatory system for coordinating the collection efforts of multiple creditors where the well is simply not deep enough to quench the thirst of all who are entitled to draw a drink from it can hardly be questioned. Along with the "fresh start" policy, most routine consumer bankruptcies are wholly explicable in these terms.[194] However, that debt collectivizing to maximize efficient asset deployment is the oldest and perhaps still most frequently invoked function of bankruptcy does not automatically justify raising it to the level of a normative central premise. Moreover, if intended as a descriptive model, the explanatory prowess of the model is rather limited.[195]

Notwithstanding these perceived limitations, if one accepts the eco-

192. JACKSON, LOGIC AND LIMITS, *supra* note 161, at 210-13.

193. Korobkin, *supra* note 173, at 755 ("The central metaphor is not the sale of the pool, but the reinvention of the enterprise.").

194. Make no mistake, this includes a goodly number of cases. For the fiscal year ended June 30, 1990, only 64,688 (8.92%) of the 725,484 total bankruptcy filings were business cases. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS, Table F2, 240 (1990). On the other hand, the increased role and importance of bankruptcy law since 1979 as a tool of business planning and a tactic in business litigation can hardly be denied or ignored. *See generally* Frank R. Kennedy, *Creative Bankruptcy? Use and Abuse of the Bankruptcy Law—Reflections on Some Recent Cases*, 71 IOWA L. REV. 199 (1985). For a revealing empirical study of the experience of large publicly held companies under Chapter 11 of the Code, see LoPucki and Whitford, *supra* note 155.

195. The debt collectivizing explanation of bankruptcy cannot, for example, easily justify the provisions for corporate reorganization under Chapter 11 of the Code or the extraordinary powers given to the trustee in bankruptcy to upset various prebankruptcy transfers. Equally, the Supreme Court's decision in United Sav. Assoc. of Tx. v. Timbers of Inwood Forest Assocs., 484 U.S. 365 (1987), is an explicit rejection of Baird and Jackson's position that bankruptcy policy demands that secured creditors not be denied lost opportunity costs. Jackson has seemingly come to recognize these limitations in the explanatory power of the model and, in collaboration with Professor Scott, has responded by expanding the original creditors' bargain model in order to incorporate those redistributional concerns in bankruptcy law which seem to be here to stay. Jackson & Scott, *supra* note 161. *See also supra* note 169.

nomic explanation of bankruptcy policy and desires to interpret the bad faith injunction of section 303(i)(2) according to its precepts, the equation becomes an alluringly easy one. If the court determines that the petitioning creditors invoked the bankruptcy court's jurisdiction in response to a problem other than a common pool problem, they have acted in bad faith. Does such a construction make sense? I do not believe even Baird and Jackson would go so far, although they presumably would agree that the filing was not undertaken in good faith.[196] First, to define bad faith for section 303(i)(2) purposes in terms of whether a common pool problem existed at the time of filing would belie the language of the statute as written.[197] Second, and equally troubling, the inability to force a proceeding in advance of balance sheet insolvency would effectively mark a return to the unhappy state of affairs that existed under the Bankruptcy Act.[198] Third, this approach arguably would divorce bad faith almost entirely from considerations of subjective motivation.[199] Although the difficulties associated with proving subjective motive are perhaps no less formidable than the burden of establishing the existence of a common pool problem,[200] to allow a definition of bad faith broad enough to capture even

196. *See* JACKSON, LOGIC AND LIMITS, *supra* note 161, at 196 ("Good faith is simply a label for those cases in which a bankruptcy proceeding is appropriate."). *See also* Daniel J. Tyukody, Jr., Note, *Good Faith Inquiries Under the Bankruptcy Code: Treating the Symptom, Not the Cause*, 52 U. CHI L. REV. 795 (1985)(contending that full recognition of state law entitlements would eliminate many good faith challenges).

197. 11 U.S.C. § 303(h)(1)(1988) adopts an equity insolvency test for determining when an order for relief may enter involuntarily. Thus, under the statute, a debtor that is balance sheet solvent (*i.e.*, no common pool), may still be forced into bankruptcy. *See generally* SNYDER & PONOROFF, *supra* note 6, at § 5.07[2][a].

198. *See* BANKRUPTCY COMMISSION REPORT, *supra* note 3, at 188-89 (describing the necessity under the Act of having to prove insolvency in the bankruptcy (balance sheet) sense as one of the stumbling blocks to an effective process of involuntary bankruptcy); MACLACHLAN, *supra* note 7, at 55 (People commonly lose their credit standing by failure to pay their debts. The commercial world has little time or inclination to argue about valuations shown on a balance sheet and, in most instances, the sort of evidence adduced upon the trial of an issue of insolvency when a debtor resists adjudication in bankruptcy is not available.)(citation omitted).

199. I believe bad faith naturally connotes bad motive or malicious intent. *See infra* note 252. Of course, it does not necessarily follow that linking bad faith to a common pool problem eliminates motive as a consideration in the analysis. Nevertheless, when bad faith is conceived in terms of lack of conformity with fundamental bankruptcy purpose, which most of us seem to agree is the test of good faith in filing, there is a natural tendency to let the appropriateness of the case for bankruptcy relief resolve definitively the question of bad faith. This is dangerous, I submit, because whether or not a case is proper for bankruptcy is only casually and fortuitously related to whether or not the case was filed in subjective bad faith. *See infra* text accompanying notes 216-230.

200. For discussion of the difficulties associated with proving subjective intention, and the necessity of reasoning by inference from objective conduct, see Carolin Corp.

the fellow who acts with a good heart and an empty head seems intuitively unjust.

2. *The Consequences and Limits of the Alternative Explanations*

Greater appreciation for what has been offered as an expanded role of bankruptcy in modern commercial life could have significant implications for the law of involuntary bankruptcy generally, as well as for the particular question of when petitioning creditors might be regarded as having acted in bad faith. For example, under present law, an involuntary petition can only be filed by creditors of the alleged debtor who meet the standing requirements set forth in section 303(b).[201] In the case of an involuntary liquidation this seems a sensible place to draw the line. It is also quite reasonable to limit standing to creditors if one accepts Jackson's view of a bankruptcy reorganization as simply a hybrid form of sale.[202] However, if bankruptcy purposes, particularly in the context of large reorganizations, are more numerous and multifaceted than efficient debt collection, then there is no more logical reason to restrict access to the machinery of involuntary bankruptcy to creditors than there is to restrict bankruptcy to the common pool problem.[203] Theoretically, anyone with a direct and

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v. Miller, 886 F.2d 693, 701 (4th Cir. 1989). The practical and technical difficulties of proving balance sheet insolvency have already been mentioned. *See supra* note 198. *See also* Ponoroff & Knippenberg, *supra* note 128, at 935 n.53. In addition to complex issues of valuation, often the relevant information necessary to establish insolvency is uniquely known to the party whose conduct is in question. Measuring bad faith under § 303(i)(2) by reference to the existence of a common pool problem would, therefore, give the debtor a decided advantage.

201. Specifically, the petitioning creditors must be the holders of non-contingent claims against the debtor which are not the subject of bona fide dispute and the aggregate value of which is $5,000 more than the value of any property given to secure such claims. 11 U.S.C. § 303(b)(1)-(2)(1988). An involuntary petition may also be filed by one, more, but less than all of the partners of a general partnership, as well as by the foreign representative of the estate in a foreign proceeding regarding the alleged debtor. 11 U.S.C. § 303(b)(3)-(4)(1988).

202. Jackson imagines that the only difference between a reorganization and a liquidation is that in a reorganization the firm's assets are sold to the creditors themselves rather than to a third party. JACKSON, LOGIC AND LIMITS, *supra* note 161, at 211. If this is correct, and bankruptcy has no role in solving the broader consequences of business failure, then there is no reason to extend standing beyond the traditional definition of a creditor. *See* 11 U.S.C. § 101(5),(10)(Supp. II 1990). For a more complex view of the role of Chapter 11 from the law and economics perspective, see Baird & Picker, *supra* note 163 (proposing that in the case of the closely held firm, bankruptcy rules function to enforce the bargain between the debtor and usually one dominant senior lender, and to ensure that this agreement does not compromise the rights of third parties).

203. There are any number of practical reasons for limiting standing to initiate an involuntary case to creditors, ranging from bankruptcy's historic role as a debt collection process to concerns over opening the floodgates to a rash of disruptive and costly lawsuits over whether sufficient grounds for involuntary relief exist.

continuing interest in the future of the debtor enterprise might rationally be granted standing to file an involuntary case when the viability of the debtor enterprise is threatened.[204]

While acceptance of the alternative explanations or accounts of bankruptcy could thus signal profound changes in the substantive law of involuntary bankruptcy, regrettably they offer no more workable foundation for analyzing and developing standards to judge bad faith under section 303(i)(2) than does economic theory.[205] If one continues

Similar concerns have been offered for limiting, for example, the scope of shareholder rights to inspect corporate records. *See* ROBERT CHARLES CLARK, CORPORATE LAW, 96-105 (1986). Moreover, according the holders of equity interests in a corporate entity the power to compel a bankruptcy proceeding would run contrary to the basic principle of separation of ownership and management central to the operation of the corporation under state law.

On the other hand, it is particularly in the case of corporate debtors that an expansion of the standing rules is most easily justified. It is more than just creditors that are prejudiced by an existing management's reluctance, often for personal reasons, to seek shelter in Chapter 11 while there is still hope to save the debtor. *See* Rose-Ackerman, *supra* note 155 for an economic analysis of the effectiveness of corporate managers as representatives of owners in a bankruptcy scenario. Arguably, the rule of absolute priority in Chapter 11 makes it more imperative to equity interest holders than creditors that a proceeding be initiated earlier rather than later or not at all. It is also difficult to justify a principled distinction for § 303(b) purposes between debenture holders and preferred stock interests. In the final analysis, any reconsideration of the standing limitations for involuntary bankruptcy must take the form of a careful, detailed proposal for statutory reform, taking into account the impact of any such proposals on both the operation of other Code provisions and the administration of the bankruptcy system. All in all, a daunting but intriguing task, and one clearly beyond the scope of the present work.

204. *See supra* note 203. At least one commentator has recognized that the circumstances warranting involuntary bankruptcy may be different when reorganization would yield more than liquidation. McCoid, *supra* note 24. Likewise, the rules regarding standing might differ depending on whether the petitioners sought relief under Chapter 7 or 11. However, because of the natural tendency such a distinction would create for non-creditor petitioners to file under Chapter 11 regardless of the prospects for rehabilitation, coupled with the complexities of a reorganization as contrasted with liquidation, any such proposal might also have to include a threshold requirement that the petitioners make some showing of the debtor's ability to successfully reorganize as an additional condition to entry of an order for relief. *Cf. In re* Amburgey, 68 B.R. 768, 773 (Bankr. S.D. Ind. 1987)("The Court has difficulty coercing compliance with the provisions of Chapter 11 from debtors who have sought relief . . . voluntarily. This Court shudders to contemplate the difficulty it would encounter with a reluctant Chapter 11 debtor.").

205. Conversely, the acceptance of one theory of bankruptcy over another carries enormous implications for defining the contours of a good faith filing requirement. *Compare* JACKSON, LOGIC AND LIMITS, *supra* note 161, at 195 (good faith is an indirect means of screening cases which were filed for purposes other than solving a common pool problem) *with* Ponoroff and Knippenberg, *supra* note 128, at 971-73 (good faith serves as the instrumentality which bankruptcy courts have adopted to control the evolution of bankruptcy purposes and policy).

to subscribe to the theory that a bad faith filing for section 303(i)(2) purposes is a filing that is inconsistent with bankruptcy purposes, the fact that those purposes are manifold and changeable, rather than amenable to a simple litmus paper test, certainly makes it no easier to detect and describe bad faith. Furthermore, even a case irrefutably out of place in the bankruptcy forum, for example, a case involving only a single, minor default adequately addressed by state collection procedures, does not inescapably establish the presence of bad faith.[206] This is due to the fact that the appropriateness of a case for bankruptcy relief is relevant only circumstantially to the question of bad faith. Accordingly, such cases may serve as examples of bad faith, but they can offer no comprehensive explanation for the proper role played by a bad faith interdiction in the law of involuntary bankruptcy. That is to say, having an unclouded view of bankruptcy policy is a necessary but not alone sufficient basis for formulating effective standards for applying the bad faith provision in involuntary cases. This point, which is pivotal in the argument to follow, is best illustrated by calling attention directly to the conditions and events that create the justification for involuntary bankruptcy.

VII. THE OCCASION FOR INVOLUNTARY BANKRUPTCY

Recognizing a more complex and elaborate role for bankruptcy than debt collection alone admittedly entails increased risk of imprudent or spurious filings, voluntary as well as involuntary. It is tempting but ultimately fallacious, however, to presuppose that the bad faith provision in section 303(i) is the primary vehicle to control that risk in involuntary cases. In the final analysis, control must be established by carefully circumscribing the conditions justifying a bankruptcy proceeding, particularly when the proceeding is initiated without the debtor's assent. Mindful of, but plainly not resistant to peering beyond, the orthodox debt collection function of bankruptcy, Professor McCoid has attempted to do just that by examining what he terms the occasion for involuntary bankruptcy.[207] His analysis, pre-

206. This is not to suggest by any means that all single-default situations are inappropriate for bankruptcy. *See, e.g., In re* Cordova, 34 B.R. 70, 71-72 (Bankr. D.N.M. 1983)(where business could be sold more efficiently in bankruptcy, single creditor involuntary case was not improper); *In re* 7H Land & Cattle Co., 6 B.R. 29, 32-33 (Bankr. D. Nev. 1980)(a single creditor may get relief if a special need for bankruptcy can be shown).

207. McCoid, *supra* note 24. In determining when involuntary bankruptcy is appropriate, McCoid begins with the proposition that "from a theoretical perspective, it is well to consider the essence of bankruptcy." *Id.* at 213. He then refers to Professor Radin's classic description of bankruptcy as a " 'method by which *all* the creditors were compelled to accept some arrangement or some disposition of their claims against the bankrupt's property, whether they all agreed to it or not'." *Id.* (citing Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1, 3-4 (1940)).

cisely because of its insightfulness, provides a useful opportunity to illustrate what I consider to be the inexpedience of an approach that conceives of the bad faith proscription as performing this function.

After a thorough review of the history of involuntary bankruptcy in the United States, McCoid decides that the time for involuntary bankruptcy occurs when bankruptcy's essential purpose, settlement of claims between debtor and creditor and among creditors, requires the mandatory joinder of all parties in a single proceeding.[208] Reasoning by analogy, he observes that mandatory joinder is required when the conditions enumerated in Rule 19 of the Federal Rules of Civil Procedure are satisfied.[209] McCoid concludes that those conditions are satisfied when the debtor is balance sheet insolvent, since that is the point at which a fair and ratable distribution of the debtor's assets is threatened.[210]

Under section 303, however, petitioning creditors are entitled to an order for relief when the debtor is shown to be insolvent in the equity sense of generally not paying current obligations as they become due.[211] Since the path from equity insolvency to balance sheet insolvency is neither inexorable nor inevitable, McCoid concludes that a demonstration of balance sheet solvency ought to be a defense for a consumer debtor faced with an involuntary Chapter 7 petition.[212]

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208. McCoid, *supra* note 24, at 214.

209. Joinder is required under FED. R. CIV. P. 19 when: 1) the court is unable to provide complete relief to those already parties; 2) the interests of an absentee may be prejudiced by the proceeding; or 3) the interest of the absent party creates a risk of a double or multiple liability to a party. *Id.*

210. McCoid, *supra* note 24, at 215-16. McCoid observes that "[t]he case of a limited fund inadequate to satisfy fully all claims against it is a paradigm of a mandatory joinder situation which encompasses bankruptcy." *Id.* at 215 (citation omitted) Quite obviously this describes the common pool problem, which no one would deny is an archetype bankruptcy problem. The real point of contention is whether it is the *only* problem with which bankruptcy as an institution is or should be concerned. *See supra* notes 175-183 and accompanying text. McCoid apparently thinks not. *See infra* note 213.

211. The Code adopts a modified equity insolvency test for involuntary bankruptcy. It focuses on whether the debtor is actually satisfying current obligations as they become due, regardless of ability to do so. 11 U.S.C. § 303(h)(1)(1988). The original House version of § 303(h)(1) had specified "inability" to pay as the crucial factor, while the Senate version of this section contemplated that either inability or actual failure of the debtor to pay a major portion of its debts as they came due might serve as grounds for relief. The language of § 303(h)(1) as enacted represents a compromise between the two. *See* 124 CONG. REC. 33,992-93 (1978)(statement of Sen. DeConcini) *reprinted in* 1978 U.S.C.C.A.N. 6505, 6510. *See generally* Comment, *The Generally Not Paying Standard*, 33 MERCER L. REV. 903, 904-06 (1982).

212. McCoid, *supra* note 24, at 215. To use McCoid's terms, if a debtor is balance sheet solvent there is no need for mandatory joinder since the threat to creditors which presents the occasion for bankruptcy is interference with a ratable distribution of assets. *Id.* at 217-18.

On the other hand, when considering a business debtor for whom reorganization is available as an alternative to liquidation, McCoid parts company with the dogma of recent economic theory by suggesting that the different policy considerations underlying reorganization may dictate a different analysis.[213] Specifically, where reorganization of the debtor as a going concern would ultimately yield more for creditors than liquidation, the threat which presents the occasion for involuntary bankruptcy is the piecemeal dismemberment of the debtor. This is so because individual creditor collection activities run the risk of depriving the debtor of essential assets necessary to continuation of its business and, therefore, a successful reorganization.[214] Obviously, this threat arises as soon as individual collection efforts are undertaken by unpaid creditors, regardless of the solvency of the debtor on a balance sheet basis. Thus, McCoid's analysis indicates that where reorganization is the preferred outcome, equity insolvency alone can be the occasion for initiation of an involuntary proceeding.[215]

VIII. TOWARD A NEW STANDARD FOR DETERMINING BAD FAITH

A. The Broad Purposive Approach: Promises Unfulfilled

If we are to identify bad faith in involuntary filings in terms of compatibility with the ultimate objectives of involuntary bankruptcy, then McCoid's analysis offers some very workable guidelines for ascertaining when an involuntary petition constitutes an improper use of bankruptcy process and, therefore, bad faith.[216] The obvious problem with doing so, which is reflective of the problem more generally

213. *Id.* at 216-17. An involuntary petition may be filed under Chapter 7 or 11. 11 U.S.C. § 303(a)(1988). McCoid observes that, unlike a liquidation case, a successful reorganization is likely to benefit the debtor or its shareholders as well as creditors. McCoid, *supra* note 24, at 216-17.

214. *Id.*

215. *Id.* at 217-18. By contrast, McCoid argues that where liquidation is the appropriate outcome, the test for business debtors should be no different than for consumer debtors since the threat which calls for the onset of involuntary bankruptcy is interference with ratable distribution of the debtor's assets. Thus, in any case where liquidation would be preferred over reorganization, McCoid proposes that equity insolvency should be viewed merely as creating a rebuttable presumption of balance sheet insolvency, thereby obviating difficult issues of proof for the petitioners, but leaving the door open to the debtor to avoid bankruptcy by establishing the existence of net assets in excess of liabilities.

216. In many respects, the test would be the same as the test suggested by economic theory: an involuntary filing is only appropriate to solve a common pool problem. *See, e.g., supra* notes 161-171 and accompanying text. On the other hand, McCoid parts company with Baird and Jackson in recognizing uses and rehabilitative goals of the reorganization provisions of the Code other than to effect a different kind of sale but a sale nonetheless of the debtor's assets.

with an overarching purposive interpretation of the bad faith prohibition in section 303, is that the answer to the bad faith inquiry becomes dictated automatically by the determination of the merits of the petition. For example, if the purpose for involuntary bankruptcy filings is to ensure the ratable distribution of limited assets, then a filing against a solvent debtor would constitute an improper use of the process almost without regard to motive or intent. In other words, if bad faith is determined with reference to whether the case presents a proper occasion for bankruptcy, the resolution of the merits of the petitioners' entitlement to relief disposes simultaneously of the no longer separate question of bad faith.[217] Yet, the consequence of a finding of bad faith is not merely dismissal, as would be the result of a determination that the filing was not undertaken in good faith,[218] but a judgment for actual and punitive damages. Thus, if unsanctioned use of process is alone the bellwether of bad faith under section 303(i)(2), creditors contemplating the filing of a bankruptcy petition truly face a daunting "all or nothing" proposition.

Often overlooked in the discussion of bad faith in the context of involuntary cases is that, unlike voluntary filings where the order for relief is automatic and there are virtually no eligibility standards regulating who is able to seek and obtain relief,[219] section 303 contains detailed rules governing the circumstances under which a petition may be granted.[220] Moreover, if controverted, the question of whether adequate grounds for relief have been presented by creditors with standing to invoke the bankruptcy court's jurisdiction is established by

217. This point is not unique to McCoid's analysis of the circumstances warranting bankruptcy. Rather, it is a necessary concomitant of tying the question of bad faith under § 303(i)(2) to the broader question of sanctioned bankruptcy purposes. Thus, the redundancy cannot be avoided regardless of the theory of bankruptcy to which one subscribes. The answer, then, lies in developing a new theory of bad faith; one that is limited in formulation to the concerns underlying § 303(i)(2) and is neatly tailored to respond to those concerns alone.
218. *See supra* notes 140-142 and accompanying text.
219. The Bankruptcy Code's eligibility standards for voluntary bankruptcy relief are contained in 11 U.S.C. § 109 (1988). Any person, with the exception of railroads, foreign and domestic banking institutions, insurance companies and credit unions are eligible to be a debtor under Chapter 7. 11 U.S.C. § 109(b)(1988). Eligibility to file under Chapter 11 is the same as under Chapter 7 except for the inclusion of railroads and the exclusion of stock and commodity brokers. 11 U.S.C. § 109(d)(1988). Conspicuous by its absence from the Bankruptcy Code is any requirement that the debtor be insolvent in either the equity or the balance sheet sense as a condition to the right to seek voluntary relief. *See generally In re* The Bible Speaks, 65 B.R. 415, 424-26 (Bankr. D. Mass. 1986). The commencement of a case for voluntary relief constitutes the order for relief; unlike involuntary bankruptcy proceedings, there is no provision for an adversary adjudication of whether proper grounds for relief exist. 11 U.S.C. § 301 (1988).
220. Not only does § 303(h) require proof at trial of specific grounds for relief before an order for relief may enter, but the persons who may invoke the bankruptcy court's jurisdiction is tightly restricted by § 303(b). *See supra* note 15.

means of a full-blown adversary confrontation.[221] Accordingly, there is an ample basis and a suitable mechanism for disposing straight away of petitions that do not meet the conditions delineated in the statute.

In the case of contested petitions, then, protection against misuse of process is already controlled mainly by limiting access to relief to those situations that, at least from an objective perspective, are consonant with designed purpose. It is the absence of similar statutory standards disciplining voluntary proceedings[222] that has impelled the judiciary to call upon good faith as a means of striking off those filings which are either inappropriate for bankruptcy or entail misuse of the system.[223] Correspondingly, since the judicially-created good faith filing requirement applies equally to involuntary cases,[224] there is even less reason to think of bad faith in the same terms, particularly when the effect of doing so is to expose the petitioning creditors to open-ended liability for consequential losses resulting from what might amount to nothing more than lack of objective good faith.[225]

The structure of section 303 itself also negates an approach that defines bad faith solely in relation to an objective assessment of the

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221. *See, e.g.*, 11 U.S.C. § 303(d)(1988); FED. R. BANKR. P. 1011(b)-(c), 1013, 1018, 7012(a). *See generally* SNYDER & PONOROFF, *supra* note 6, § 5.12.

222. *See supra* note 219.

223. *See supra* notes 140-142 and accompanying text. Stated another way, "good faith" has been pressed into service by the courts as a mechanism for testing the appropriateness of individual bankruptcy filings, particularly in Chapter 11 where the stakes for interested parties, the potential for misuse, and the commitment of judicial resources which must be devoted to the proceeding are all far greater than under Chapter 7. In involuntary cases, while the good faith requirement still pertains, this function is largely performed by the inquiry into the petitioning creditors' ability to establish the existence of the conditions which, according to the statute, must co-exist before an order for relief can enter. 11 U.S.C. § 303(h)(1988).

224. *See supra* note 141. However, that an involuntary filing was dismissed for failure to satisfy the threshold good faith requirement does not conclusively establish bad faith under § 303(i)(2). This postulate, which at first blush seems to defy logic, is not immediately obvious, or at least to me at one point in time it was not so obvious. *See infra* note 225.

225. This statement is in partial response to my own earlier, and in retrospect all too casual, statement that there would seem to be no reason to interpret bad faith under § 303(i)(2) differently from the threshold good faith filing requirement. *See* Ponoroff & Knippenberg, *supra* note 128, at 942 n.68. Not only are the implied good faith filing requirement and the bad faith provision of § 303(i)(2) measured at different times, see *infra* note 227, they measure different things. It is the latter distinction which I neglected to make in my earlier discussion, and I attribute that failure to having succumbed to the intuitive assumption that "not-good faith" means bad faith, and to an oversight by not more narrowly categorizing discrete legal questions and the corresponding cases addressing those questions. *See supra* notes 143-44. For an example of a case implying that the good faith in filing and bad faith under § 303(i)(2) should not be measured using different standards, see *In re* K.P. Enter., 135 B.R. 174, 181 (Bankr. D. Me. 1992).

appropriateness of the case for bankruptcy relief.[226] The prefatory language to section 303(i)(2) provides that it is upon dismissal (other than on consent of all parties) of the involuntary petition that the court may consider the entry of judgment against any petitioner that filed in bad faith. This phrasing clearly denotes that consideration of the issue of damages for bad faith in filing occurs only *after* the merits of the petition have been adjudicated favorably to the alleged debtor.[227] Thus, the question of whether the case involves a proper invocation of bankruptcy jurisdiction and should go forward, to which the implied good faith filing requirement is directed,[228] is separate from and prior to the question of bad faith under section 303(i)(2). Moreover, as stressed earlier, a finding of lack of good faith sufficient

226. As I have stated — although the point cannot be too often made — it is not that the inappropriateness of a case for bankruptcy can never be an indication of bad faith or that the two do not frequently co-exist; it is that something more than inappropriateness is needed to establish bad faith and that additional constituent is misuse undertaken with intent to harm the debtor. If an improper use of the bankruptcy process does not alone establish an improper purpose, see *supra* notes 52 & 54, then the converse must be true as well. *See also In re* Trina Assocs., 128 B.R. 858, 868, 873 (Bankr. E.D.N.Y. 1991)(even though petitioner's purpose for invoking bankruptcy was not an appropriate one, judgment would not be entered under § 303(i) where it appeared that the petitioner acted with an honest intent to effectuate a reorganization of the debtor).

227. *See, e.g.*, Eric Peterson Constr. Co. v. Quintek, Inc. (*In re* Eric Peterson Constr. Co.), 951 F.2d 1175, 1179 (10th Cir. 1991)(damage award under § 303(i)(2) is contingent on prior dismissal of the petition); Miyao v. Kuntz (*In re* Sweet Transfer & Storage, Inc.), 896 F. 2d 1189, 1191 (9th Cir. 1990)(any claim for damages under § 303(i)(2) is premature until dismissal of the petition); Susman v. Schmid (*In re* Reid), 854 F.2d 156, 159 (7th Cir. 1988)(district court may only award fees if it dismisses the involuntary petition); Glinka v. Dartmouth Banking Co. (*In re* Kelton Motors, Inc.), 121 B.R. 166, 185-86 (Bankr. D. Vt. 1990)(citing the "plain meaning" of the statute). In this sense there is a definite connection between § 303(i) and a common law claim for malicious prosecution. This relationship is explored in more depth *infra* text accompanying notes 273-307.

Ordinarily, the bankruptcy court will retain jurisdiction after dismissal of the petition in order to hear and rule on the debtor's application for judgment under § 303(i). *See, e.g., In re* Kearney, 121 B.R. 642, 643 (Bankr. M.D. Fla. 1990); *In re* Anderson, 95 B.R. 703, 704 (Bankr. W.D. Mo. 1989). *See also infra* note 302. Under appropriate circumstances, the court may even reopen the case to consider the question of relief under § 303(i). *Cf.* Carp v. Inbar (*In re* Carp), No. 91-11212-z, 1991 U.S. Dist. LEXIS 7558 (D. Mass. 1991)(court would refuse to reopen when the alleged debtor's request for costs, fees, and damages was not timely made). Of course, § 303(i) does not apply if the dismissal was with the consent of all parties, including the debtor. *See In re* International Mobile Advertising Corp., 117 B.R. 154, 157 (Bankr. E.D. Pa. 1990), *aff'd*, No. 90-6349, 1991 U.S. Dist. LEXIS 11294 (E.D. Pa. 1991).

228. *E.g.*, Carolin Corp. v. Miller, 886 F.2d 693, 698 (4th Cir. 1989)(an implied good faith filing requirement is necessary to protect the jurisdictional integrity of the bankruptcy courts). There appears to be general agreement on the relationship between the good faith filing standard and fundamental bankruptcy purposes, even though the question of what are bankruptcy purposes is far from settled. *See supra* notes 196 & 205.

to justify dismissal does not alone establish the presence of bad faith, although it may be relevant to the determination of bad faith.

Finally, the language of section 303(i)(2) plainly contemplates that one or more, but less than all, the signatories to the same petition may be determined to have acted in bad faith.[229] It is difficult to see how this might be so if bad faith is imagined in terms of discordance between the debtor's circumstances and the basic policy aims of the bankruptcy system. This is because such a vision of bad faith ignores the petitioning creditors' state of mind; it focuses instead on what are essentially objectively determined attributes relating to the state of the debtor's business and financial affairs, such as solvency, need for rehabilitation, and ability to manage novel business problems through use of conventional, non-bankruptcy legal institutions. Those attributes, however, do not vacillate from creditor to creditor. Thus, in this respect as well, a definition of bad faith expressed in terms of improper use as opposed to improper purpose runs counter to the explicit directives of the statute.[230]

B. Implications for the Bad Faith Cases

Elimination of proper purpose cases from the definition of bad faith would have significant consequences for existing decisional law in the area. For example, recall that in *Basin Electric*[231] the district court concluded that the petitioning creditor's only purpose in filing the case was to put itself in a more advantageous position with respect to a private contract dispute with the debtor, and that this purpose was inconsistent with the objectives of the Bankruptcy Code.[232] On the basis of this conclusion, the court ordered the petition dismissed. Plainly the outcome of the case can be explained in terms of the petitioner's failure to satisfy an implied good faith filing requirement.[233]

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229. *See In re* Advance Press & Litho, Inc., 46 B.R. 700, 704 (D. Colo. 1984)

230. It also adds nothing to the analysis, (as the threshold good faith filing requirement already regulates the access portal into bankruptcy) other than to expose creditors to liability for potentially large damage awards. This in and of itself is quite extraordinary in a legal system which goes to some pains not to punish parties who seek redress under its regime even when those claims are rejected for lack of merit. *See infra* notes 308-09 and accompanying text.

231. Basin Elec. Power Coop. v. Midwest Processing Co., 47 B.R. 903 (Bankr. D.N.D. 1984), *aff'd*, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986).

232. *See supra* notes 53-55 and accompanying text.

233. The case was before the district court on appeal from the bankruptcy court's denial of the debtor's motion to dismiss made after the close of the petitioner's presentation of its evidence at trial. Basin Elec. Power Coop. v. Midwest Processing Co., 97 B.R. 903, 906 (Bankr. D.N.D. 1984). Thus, the question of bad faith under § 303(i)(2) was neither before the district court nor could it have been since it was not yet ripe. *See supra* note 227 and accompanying text. In effect, bad faith, or more accurately put, lack of good faith in filing, was the basis on which the court determined that the single petitioning creditor's case should be dismissed without

Because I agree that the good faith requirement serves as the vehicle which courts use to test and advance the basic purposes of the bankruptcy process,[234] it would be difficult to criticize the court in *Basin Electric* in terms of its application of the good faith filing concept. However, the case has had certain unfortunate consequences for the law of involuntary bankruptcy. As discussed earlier,[235] the decision has served as authority on which other courts have relied in analyzing entitlement to relief under section 303(i). Doubtlessly operating on the premise that a lack of good faith sufficient to justify dismissal conclusively establishes the presence of bad faith, these courts have ruled that judgment may be entered under section 303(i)(2) when the creditors' actions entail use of the bankruptcy process for non-bankruptcy purposes.[236]

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giving the creditor an opportunity to obtain the joinder of additional creditors as otherwise allowed under FED. R. BANKR. P. 1003(b). Basin Elec. Power Coop. v. Midwest Processing Co., 47 B.R. 903, 908 (Bankr. D.N.D. 1984). Had the question of damages under § 303(i)(2) been before the court, it might well have found for the debtor as well since the court had found that the petitioning creditor knew that the debtor had twelve or more creditors and apparently filed with the ulterior motive of preserving its right to retain funds improperly drawn on a letter of credit supplied by the debtor. *Id.* at 905-06. There is nothing, however, in the court's holding that demands a showing of intent or malice as a requirement of dismissal on "bad faith" grounds. This is quite normal and correct since examination of good faith in filing tests the circumstances of the filing against the "legislative purposes of the Bankruptcy Code," and those purposes may be exceeded innocently as easily as they may be deliberately circumvented, and certainly without intent to harm the debtor. *Id.* at 909.

Notably, since the court in *Basin Electric* concluded that a bankruptcy administration would not be in the best interests of the debtor or the debtor's other creditors, *id.* at 908, the court might also have justified dismissal of the petition on the basis of the abstention doctrine codified in 11 U.S.C. § 305(a)(1). *See, e.g., In re* Trina Assocs., 128 B.R. 858 (Bankr. E.D.N.Y. 1991); *In re* Sky Group Int'l, Inc., 108 B.R. 86, 90-92 (Bankr. W.D. Pa. 1989). In that event, damages under § 303(i)(2) would not be awardable to the alleged debtor regardless of the petitioner's lack of good faith. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 324, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6820 (dismissal under § 305(a)(1) does not give rise to a damage claim under § 303(i)).

234. *See supra* note 225.

235. *See supra* note 64 and accompanying text.

236. *See, e.g., In re* Fox Island Square Partnership, 106 B.R. 962, 967 (Bankr. N.D. Ill. 1989); *In re* McDonald Trucking Co., 76 B.R. 513, 516 (Bankr. W.D. Pa. 1987). *See also In re* Johnston Hawks Limited, 72 B.R. 361, 366 (Bankr. D. Haw. 1987)("bad faith" exists for purposes of § 303(i)(2) when the creditors' actions constitute an improper use of the Bankruptcy Code as a substitute for customary collection procedures). Other courts have relegated the holding in *Basin Electric* — that "bad faith" in filing may form the basis for immediate dismissal in a single creditor case — to cases involving like circumstances. *See, e.g., In re* LaRoche, 131 B.R. 253 (D.R.I. 1991); *In re* Centennial Ins. Assocs., 119 B.R. 543 (Bankr. W.D. Mich. 1990); *In re* Eberhardt Moving & Storage, Ltd., 120 B.R. 121 (Bankr. D.N.D. 1990); *In re* Kass, 114 B.R. 308 (Bankr. S.D. Fla. 1990); *In re* Elsub Corp, 70 B.R. 797 (Bankr. D.N.J. 1987).

These courts have generally failed to discern, however, that the court in *Basin Electric* was *not* applying the provisions of section 303(i). Rather, the district court in *Basin Electric* used the term "bad faith" to refer to conduct which failed to comply with the implied good faith filing directive. That "bad faith" as used in section 303(i)(2) has a rather different meaning altogether should be clear by this point.[237] Therefore, the present disorder in the case law over the bad faith issue can be perhaps most reasonably explained as the product of a semantical misunderstanding. Although *Basin Electric* can be read on its face as standing for the proposition that the use of involuntary bankruptcy as a substitute for customary collection procedures constitutes an improper use of involuntary bankruptcy, it is only by the most attenuated reasoning that it also can be considered authority for the view that the same conduct necessarily constitutes bad faith for section 303(i)(2) purposes.[238] Regrettably, subsequent cases have not always made or appreciated the subtle but important distinction between the meaning of "bad faith" when used to express the antithesis of good faith, and "bad faith" as incorporated expressly into the body of sec-

237. As I see it, the problem is largely terminological in origin. *See supra* note 225. I am also aware of the general maxim of statutory interpretation that the same words used in the same statute should be taken to have the same meaning. *See, e.g.*, Washington Metro Area Transit Auth. v. Johnson, 467 U.S. 925, 935-36 (1984), *cited in* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1183 n.17. However, there is no express statutory provision enjoining "bad faith" filings; the requirement has been supplied by the courts. Moreover, if one also accepts the postulate that good faith and bad faith are not always two hemispheres of the same moon, then furnishing a differing interpretation to the implied good faith filing command does not run afoul of the basic canon of construction. *But see* Camelot, Inc. v. Hayden, 30 B.R. 409, 411 (E.D. Tenn. 1983)(subscribing to the bankruptcy court's definition of bad faith as being the opposite of good faith).

238. *See supra* note 47 and accompanying text. For that matter, neither do the other authorities sometimes cited for the same proposition provide any greater support. *See, e.g.*, Bankers Trust Co. BT Serv. Co. v. Nordbrock (*In re* Nordbrock), 772 F.2d 397, 399-400 (8th Cir. 1985)(use of bankruptcy as a forum for the trial and collection of an isolated disputed claim is grounds for dismissal, but the district court did not abuse its discretion in refusing to award attorneys fees); *In re* Allen Rogers & Co., 34 B.R. 631, 632 (Bankr. S.D.N.Y. 1983)(debtor abandoned claim for damages under § 303(i)(2)). In fact, perhaps the only authority aptly cited for the proposition that an improper use of bankruptcy may form the basis for a damage claim under § 303(i)(2) is *In re* SBA Factors of Miami, Inc., 13 B.R. 99, 100 (Bankr. S.D. Fla. 1981), a brief memorandum opinion devoid of either any precedential or purposive rationale for its holding. By contrast, in *In re* Caucus Distribs., Inc. 106 B.R. 890, 928-30 (Bankr. E.D. Va. 1989), the court dismissed the involuntary petition because, as in *Basin Electric*, it had been filed by a single petitioning creditor with knowledge that the debtor had in excess of twelve creditors. However, the court also concluded that no bad faith was involved because the petitioner's only motivation for filing was its belief that bankruptcy represented the best forum in which to resolve the debtor's legal and financial difficulties. *Id.*

tion 303(i).[239]

Defining bad faith in terms of the proper scope or function of the bankruptcy process unrelated to the lawfulness of the petitioning creditors' underlying purpose for filing is troublesome on several counts. Principally, however, it is unrealistic and unreasonable in the sense that it holds creditors answerable in damages for acting precisely in the manner that one would fully expect a creditor to behave. The fact that creditors, in lieu of resort to state collection procedures, sometimes file an involuntary bankruptcy petition motivated by the desire to see their debts paid should hardly come as a surprise to anyone. What other healthy impulses realistically could be expected to motivate creditors to spend the time and incur the expense of an involuntary proceeding?[240] While equitable distribution and efficient deployment of assets may be aims of the system, it is nonsense to

239. For example, in *In re* TCI Limited, 769 F.2d 441 (7th Cir. 1985), Judge Easterbrook, faced with an appeal of an award of fees under Federal Rule 11 and 28 U.S.C. § 1927, stated that although " 'bad faith' sounds like a subjective inquiry . . . [it] has an objective meaning as well as a subjective one." *Id.* at 445. I disagree. Judge Easterbrook goes on to say that "[s]ubjective bad faith or malice is important only when the suit is objectively colorable." *Id.* Quite so; this is an abuse of process in the classical sense. *See infra* notes 282-286 and accompanying text. But, what then is "objective bad faith"? The answer can only be that so-called objective bad faith exists in the case of a filing which, judged by objective standards and criteria, was not reasonably undertaken: presumably, the product of a failure to make an adequate pre-filing inquiry into the facts and law. But why is that "bad faith" in any flavor? The answer is, it is not. That is why in reformulating Rule 11 in 1983, the drafters of the amendment explicitly elected to abandon the bad faith test in favor of a standard of objective reasonableness. *See supra* note 81. The failure to make a reasonable investigation into the facts and law does not presumptively indicate bad faith. *See In re* Crown Sportswear, Inc., 575 F.2d 991, 993-94 (1st Cir. 1978); *In re* Godroy Wholesale Co., 37 B.R. 496, 500 (Bankr. D. Mass. 1984).

The term "bad faith" manifestly implies some malevolent or sinister motive. Camelot, Inc. v. Hayden, 30 B.R. 409, 411 (E.D. Tenn. 1983); *see infra* note 252. Thus, the use of the term objective bad faith is not only internally contradictory, but it unfortunately perpetuates the confusion over the differing uses of the good faith concept in bankruptcy and throughout the legal lexicon. The disorderliness is partly a product of broader applications of the good faith doctrine to circumstances where conduct is measured by reference to objective factors; the implied good faith filing requirement offering the most obvious example. *See, e.g., In re* Park Place Assoc., 115 B.R. 940, 946-47 (Bankr. N.D. Ill. 1989); *see infra* note 251. This fact, coupled with the instinctive tendency to refer to filings failing the good faith test as "bad faith filings," *see supra* notes 143 & 247 underscores the importance of both narrower groupings of cases and issues, and recognizing a distinction in fact between "not-good faith" and bad faith. *See supra* notes 138 & 151 and accompanying text.

240. There are, of course, other impulses besides a desire to put the debtor out of business or satisfy a personal grudge that might account for a filing, such as to pressure the debtor into payment of a legitimately disputed debt, but that could hardly be called a healthy or constructive motive either. Moreover, the addition of the "subject to bona fide dispute" language in § 303(b) & (h)(1), *see supra* notes

suppose that the individual creditor who must sign and file the petition would ever be motivated by those considerations except to the extent they happened to have an impact on recovery of that creditor's personal claim. For example, the creditor who files an involuntary petition after learning of a large preferential transfer of the debtor's assets may be described as caring about distributional equality among similar situated creditors; but that creditor cares only because its personal net recovery has been suddenly threatened. The creditor who receives the preference never cares about equality of distribution; nor, in fairness, can we criticize that creditor for failing to care. In sum, creditors care about getting paid, everything else is secondary.

Because of this reality, to state that a creditor has brought an involuntary case as a substitute for customary collection procedures, or has filed in order to secure an advantage in an individual dispute with the debtor, is to do little more than restate the obvious. In some instances the statutory grounds for relief will be present and the case will go forward and in others not, but none of that has much to do with bad faith. That question arises, if at all, only after it is determined that the debtor's situation did not present a proper occasion for involuntary bankruptcy. In fact, the case law is devoid of a single example of a meritorious petition being dismissed because, although the debtor was generally not paying its debts as they came due, the petitioning creditors were motivated by an improper desire to have their individual claims paid.[241] Similiarly, the fact that a petition is dismissed because of inadequate grounds to support it does not mean the petition was filed in bad faith. In short, whether the creditors' actions constitute an inappropriate use of bankruptcy process is relevant to the question of whether an order for relief will enter and, because the statute requires no additional showing, perhaps the question of sanctions under section 303(i)(1) as well. By contrast, bad faith sufficient to support a judgment under section 303(i)(2) requires something more. Misuse of the process may begin but it does not end the analysis. Since the additional considerations involved in measuring bad faith coincide in part with certain conduct also proscribed by Bankruptcy Rule 9011, it is

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15 & 16, protects the debtor in such circumstances providing that the debtor is otherwise meeting its current obligations on a timely basis.

241. Basin Elec. Power Coop. v. Midwest Processing Co., 47 B.R. 903 (D.N.D. 1984), *aff'd*, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986), may be as close to an example of such a case as exists. However, in that decision, the district court, having concluded that the jurisdictional prerequisites for involuntary bankruptcy had not been satisfied, never reached the issue of the merits of the petition. *Id.* at 911. Under Federal Rule 11, by contrast, the question of the merits of the pleading is distinct from the question of whether a violation of the rule has occurred. *See* Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 934 (1991)(imposition of Rule 11 sanctions does not depend on the outcome of litigation); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989); *infra* note 244.

timely now to revisit the relationship between those two provisions to formulate a new definition of bad faith.

C. Rule 11 Standards Revisited

1. The Duty to Make Reasonable Inquiry

Recall that the major impetus behind the 1983 amendment of Rule 11 was to fashion a more effective tool for controlling abusive litigation tactics by "objectivizing" the test for determining when a violation of Rule 11 (and its bankruptcy counterpart in the form of Rule 9011) would be deemed to occur.[242] The signatories to all court documents, counsel and litigants alike, are required to form a reasonable belief that the pleading or other paper is well-grounded in fact and that it is warranted by existing law or a good faith argument to change the law. By all accounts, the amendment has succeeded beyond even the dreams of its most optimistic supporters. The number of Rule 11 cases is legion and most of those cases involve the reasonableness of counsel's conduct in filing the challenged pleading.[243]

It is most often when a claim is plausible or the suit has objective merit that the second branch of Rule 11 becomes operative.[244] Malicious intent or subjective bad faith in filing, if proven, may establish a violation of Rule 11 and constitute the basis for sanctions even when

242. *See supra* notes 77-84 and accompanying text.

243. One commentator reported that as of December 1987, the district and circuit courts had already reported nearly 700 Rule 11 cases. *See* Vairo, *supra* note 79, at 199. Another commentator noted that in 1988 alone, just four circuits accounted for yet another 75 decisions. Nelken, *Looking for a Middle Ground*, *supra* note 85, at 383. *See also* Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986)(the large number of reported Rule 11 decisions can only represent a fraction of the number of actual instances in which sanctions have been imposed under the authority of the recent Rule amendments). Nelken observes, however, that the improper purpose prong of Rule 11 is rarely invoked, and she recommends its repeal. Nelken, *Looking for a Middle Ground*, *supra* Note 85 at 406-07. While comparable empirical data has not been collected for Bankruptcy Rule 9011, an even casual review of an assortment of bankruptcy cases indicates that litigation under Rule 9011 is proportionately no less frequent nor materially different in focus than under Rule 11. *See, e.g.*, Valley Nat'l Bank of Az. v. Needler (*In re* Grantham Bros.), 922 F.2d 1438 (9th Cir. 1991). Of course, some observers believe that amended rule 11, and perhaps its bankruptcy counterpart as well, may be working too well in terms of generating an enormous volume of satellite litigation and deterring the bringing of honest as well as "marginal yet potentially meritorious claims or defenses." *See* Schwarzer, *Rule 11*, *supra* note 85, at 1015.

244. If the claim is factually or legally frivolous, it separately violates the first prong of Rule 11. *See infra* notes 265-66 and accompanying text. *Cf. In re* TCI, Ltd., 769 F.2d 441, 445 (7th Cir. 1985)("Subjective bad faith or malice is important only when the suit is objectively colorable."). *But see* Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990)(a non-frivolous complaint initiating an action, as opposed to other pleadings and court papers, cannot be filed for an improper purpose).

the paper is supported by the facts and warranted by existing law.[245] This scenario reflects a classic formulation of the tort of abuse of process, entailing the application of process justified in itself for an end other than that it was designed to accomplish.[246] Thus, the same conduct may lead to both sanctions under Rule 11 and independently form the basis as well for substantive liability in tort.[247] In any event, whether the violation of Rule 11 occurs in the mode of a frivolous filing or an improperly motivated filing, the harm to the system is the same; both types of behavior, albeit in different ways, contribute to the clog of spurious federal litigation that has bottlenecked the system.

Plainly, creditors who file an involuntary petition that fails to satisfy either tributary of Bankruptcy Rule 9011 are subject to sanctions under the Rule.[248] In fact, examples abound.[249] It is quite another thing, however, to conclude that all such filings involve bad faith. As noted, several courts have acknowledged, for example, that the standards for dismissing a case pursuant to the implied good faith filing requirement are different from the standards for imposing sanctions under the improper purpose prong of Rule 9011.[250] This is because "good faith" has come to be judged by reference to objective standards and objective considerations,[251] whereas an improper purpose con-

245. *See supra* note 244. On the other hand, some courts and commentators have taken the position that the improper purpose prong of Rule 11 should also be judged under an objective standard. *See infra* note 270 and accompanying text.

246. *In re* TCI, Ltd., 769 F.2d 441, 445 (7th Cir. 1985); Wolf v. Kupetz (*In re* Wolf & Vine, Inc.), 118 Bankr. 761, 770 (Bankr. C.D. Cal. 1990); *infra* note 282 and accompanying text.

247. In an involuntary case, this does not necessarily establish bad faith for § 303(i)(2) purposes, particularly if the duty breached was a duty owed to the legal system rather than a duty owed to one's adversary. That the same conduct may often constitute a simultaneous violation of both obligations does not dictate that the breach of the one constitutes inevitably a breach of the other. *See infra* notes 255-259 and accompanying text.

248. *See, e.g., In re* Cedar Falls Hotel Limited Partnership, 102 B.R. 1009 (Bankr. N.D. Iowa 1989). Unlike most pleadings in ordinary civil litigation, an involuntary petition must be individually signed by the petitioners. *See* Official Form No. 5, 11 U.S.C. app. (1988). The effect of those signatures under Bankruptcy Rule 9011 is now clear. Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922 (1991), discussed *supra* note 29-40 and accompanying text.

249. *See, e.g., In re* Omega Trust, 110 B.R. 665 (Bankr. S.D.N.Y. 1990), and authorities cited therein; Byrne, *supra* note 25; *see also supra* notes 27 & 28 and accompanying text. Of course, most of these examples involve cases in which the sanctioned party failed to act with reasonable care as required by the first part of Rule 9011 and a creditor's failure to conduct a proper investigation in advance of filing an involuntary petition does not as a matter of law signify bad faith under § 303(i)(2). *See In re* Godroy Wholesale Co., 37 B.R. 496, 499 (Bankr. D. Mass. 1984).

250. *See supra* note 146.

251. This is true in spite of the ordinary sense of good faith as implying honest intention. In the context of the good faith filing requirement, "good faith" has come to be equated, for the most part, with adherence to sanctioned uses of the Bank-

notes the existence of ill will or malice; i.e., subjective bad faith.[252]

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ruptcy Code. *See, e.g.*, Carteret Sav. Bank v. Nastasi-White, Inc. (*In re* East-West Assocs.), 106 B.R. 767, 772 (S.D.N.Y. 1989)(good faith evidenced by objective assessment of debtor's reasonable prospects for a successful reorganization); *In re* Park Place Assocs., 115 B.R. 940, 945 (Bankr. N.D. Ill. 1989)("Good faith or the lack thereof is determined by objective standards and not the subjective intent of the debtor."); *In re* HBA East, Inc., 87 B.R. 248, 259 (Bankr. E.D.N.Y. 1988)(debtor's purpose for filing was not appropriate for bankruptcy). Of course, an objective approach to good faith is not without precedent. *See* U.C.C. § 2-103(1)(b)(1990)(in contracts for the sale of goods, as between merchants, good faith means observance of reasonable commercial standards as well as honesty in fact).

To be certain, discussions about and concerns over subjective motive have not been ignored in many courts' analysis of the implied good faith filing requirement. *See, e.g.*, Carolin Corp. v. Miller, 886 F.2d 693, 701 n. 3 (4th Cir. 1989)(dismissal for lack of good faith in filing requires a showing of both objective futility and subjective bad faith; however, bad faith may be established by inference from evidence of objective futility). Still, just as good faith has been rejected as the basis for determining whether purposes of Rule 11 have impinged upon (see *supra* text accompanying note 84), a good heart but empty head typically will not shield a bankruptcy filing from dismissal if it is objectively hopeless. While improperly motivated filings may (and often do) also run afoul of the good faith filing requirement, it is critical not to lose sight of the primary function which such a requirement serves and the operative facts which trigger its application. These concerns, I contend, are fundamentally different from the considerations which define the role of the bad faith restriction in involuntary bankruptcy cases. *See infra* note 252.

252. *See, e.g.*, Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986)(suggesting that in the context of the inherent equitable power of the court to award attorneys fees, "bad faith" be restrictively interpreted to refer to actions entirely without color and taken for plainly improper purposes). Speaking in reference to the courts power to dismiss Chapter 11 filings for cause, including a lack of good faith under 11 U.S.C. § 1112(b)(1988), the court in *In re* Southern Calif. Sound Sys, Inc., 69 B.R. 893, 901 n. 2 (Bankr. S.D. Cal. 1987), observed that the appellation "bad faith filing" is arguably a misnomer because in most instances where a case is dismissed on that basis it will be because the filing was undertaken for a purpose other than one sanctioned by the Bankruptcy Code. Similarly, the gradual development over the past decade of a bad faith tort for willful breach of contract or as an analogue to the implied covenant of good faith and fair dealing has been predicated on the realization that existing contract law remedies were not adequate to compensate victims of certain kinds of misconduct in the contractual relationship. *See generally* Sandra Chutorian, Note, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing Into the Commercial Realm*, 86 COLUM. L. REV. 377 (1986); John Monaghan, Note, *Extending the Bad Faith Tort Doctrine to General Commercial Contracts*, 65 B.U.L. REV. 355 (1985). By definition, tort remedies are designed to protect the interests in being free from various forms of harm. W. PAGE KEETON ET AL. PROSSER AND KEETON ON THE LAW OF TORTS § 92, 665-67 (1984) [hereinafter PROSSER & KEETON]. Thus, tort damages are likely to be more generous since, unlike contract damages, they are not limited to the actual or tacit agreement of the parties. *Id.* This has led one court, in a cogent decision by Judge Kozinski, to express serious reservations over the "tortification" of contract law. OKI America, Inc. v. Microtech Int'l, Inc., 872 F.2d 312, 315-16 (9th Cir. 1989).

While the tort-contract distinction in this area has been criticized as unduly

This is the distinction which is lost in casually referring to filings dismissed for want of good faith as "bad faith filings."[253]

Notwithstanding a corresponding lack of similarity in standards and purposes,[254] most courts still agree that bad faith under section 303(i)(2) should be measured, at least in part, by the same "objective and subjective" standards that have developed under Bankruptcy Rule 9011.[255] Because of the Rule's strong emphasis on the objective component (itself traceable to the unsatisfactory experience under the pre-1983 version of Federal Rule 11) this deference to Rule 9011 means that a creditor may be convicted of bad faith simply for failing

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formalistic, see Patricia H. Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 ARIZ. L. REV. 733 (1982), extension of tort remedies for bad faith performance of a contract reflects the unspoken but persistent reality of a gulf between good faith and bad faith, such that the absence of the former cannot under the same theory and reasoning serve to irrebuttably establish the presence of the other. The key additional ingredient in bad faith being malice, willfulness or intent. Of course, it is always possible to define that ingredient out of bad faith and make it mean something entirely different by just saying so. *See supra* note 239. This is why terms like good faith and bad faith have no absolute, definitive meaning in the abstract. Nevertheless, while each concept takes on a specific color when brought to bear in a particular legal situation or relationship, there are certain shared referents which each term calls to mind. In the case of "bad faith" that commonly understood imperative is some form of malicious intention.

253. *See* International Mobile Advertising Corp., No. 90-6349, 1991 U.S. Dist. LEXIS 11294 (E.D. Pa. 1991)(bankruptcy court reasonably concluded that, although perhaps hastily undertaken, filing was not made improperly or in bad faith); *In re* Southern Calif. Sound Sys., 69 B.R. 893, 901 n.2 (B.R. S.D. Cal. 1987)(discussed *supra* note 252). As pointed out earlier, the problem is a semantical one which, because of its unavoidability in light of the limitations of language, is most effectively controlled by grouping cases narrowly so that the context aspect of the analysis is not lost. *See supra* notes 143, 225-226 & 237 and accompanying text.

254. For another perspective on the different linguistic Shadings inherent in the term bad faith, see KASSIN, *supra* note 33, at 22-23. *See also supra* notes 96-103 and accompanying text.

255. *See supra* notes 61-64 and accompanying text. At times, courts applying the standard to be applied under § 303(i)(2) seem to imply that it is only the second part of the "improper purpose" prong of Rule 9011 being incorporated into the analysis. *See, e.g., In re* Kearney, 121 B.R. 642, 645 (Bankr. M.D. Fla. 1990). However, this distinction has either been ignored by other courts or, in practice, belied by the courts' actual application of the borrowed standard. *See In re* Fox Island Square Partnership, 106 B.R. 962, 968 (Bankr. N.D. Ill. 1989)(bad faith should be measured by the objective and subjective standards required under Bankruptcy Rule 9011), (citing *In re* Turner, 80 Bankr. 618, 623 (Bankr. D. Mass. 1987)). *See also In re* K.P. Enter., 135 B.R. 174, 179-80 (Bankr. D. Me. 1992)(applying a "combined" test that considers both motivation for, an objective reasonableness in, filing). *In re* Better Care, Ltd., 97 B.R. 405, 411 (Bankr. N.D. Ill. 1989)(Rule 9011 also requires a reasonable pre-filing investigation); *In re* McDonald Trucking Co., 76 B.R. 513, 516 (Bankr. W.D. Pa. 1987)(test for bad faith under § 303(i)(2) is analogous to the obligations imposed under Bankruptcy Rule 9011, including both the level of pre-filing inquiry and the creditor's purpose in filing).

to exercise due care in bringing an involuntary case. No additional proof of malice or other improper ulterior motive is required.

The logic and wisdom of holding petitioning creditors to a duty of reasonable inquiry under section 303(i)(2) are open to serious question. To begin with, the bankruptcy courts can hardly be described as bending under the weight of frivolously filed involuntary petitions. More to the point, however, arrogation for section 303(i)(2) purposes of the Rule 9011 standards effectively creates an affirmative cause of action against a party who, even with the most benign intentions, fails to make what the court later considers to have been a "reasonable" pre-filing investigation.[256] Moreover, even as to parties represented by counsel, the duty to form a reasonable belief before filing extends to the justification for the petition under existing law as well as on the facts.

To criticize the imposition of a duty of reasonable inquiry under section 303(i)(2) is not to condone either a creditor's recklessness or negligence in asserting entitlement to a particular remedy. Unquestionably, such disregard for the truth and accuracy of facts asserted or the existence of proper legal grounds for relief is a factor that will influence the exercise of the court's discretion under section 303(i)(1), although the need for such protection in the statute itself was far more clamorous before promulgation of Rule 9011.[257] It is also quite conceivable that the debtor will, in addition to the expense of defending the petition, experience some consequential losses attributable to the pendency of the petition; this in spite of the provisions of the Code

256. What constitutes a "reasonable" inquiry under Rule 11 was addressed by the court in Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989). Cases measuring bad faith for § 303(i) purposes by an objective test include *In re* McDonald Trucking Co., 76 B.R. 513, 516 (Bankr. W.D. Pa. 1987). This view, which is widely shared in recent decisions under § 303(i)(see *supra* notes 61, 64 & 255), represents an enormous expansion of the bad faith filing doctrine compared with earlier decisions. *See, e.g., In re* Godroy Wholesale, Inc., 37 B.R. 496, 500 (Bankr. D. Mass. 1984).

257. At the time § 303(i) was originally enacted, abusive filings were controlled by former Bankruptcy Rule 911, which, in large measure, paralleled pre-amended Rule 11. *See supra* note 25. Thus, "good faith" was available as a defense against sanctions under the Rule. *See supra* note 75 and accompanying text. Section 303(i)(1), then, served as the exclusive basis until August 1, 1983 upon which costs and attorneys fees might be awarded for a frivolous or careless filing made without reasonable prior inquiry into the facts and law. Adoption of Rule 9011 did not render § 303(i)(1) entirely redundant, however, since a bankruptcy court is still able to do under the statute what cannot at least directly be done under the Rule: shift the entire cost of the litigation to the petitioning creditors. *See* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2462-62 (1990); *supra* notes 89 & 105. Of course, the court is not obligated to award costs and fees under § 303(i)(1) under any circumstances. *See supra* note 92 and accompanying text. Consequently, the two provisions maintain some independence of one another.

designed to diminish that possibility.[258] Nevertheless, it represents an enormous policy statement, and an equally momentous reorientation of normative values, to shift the risk of such losses to the petitioning creditors absent some showing of intent to deliberately harm the debtor, or cause those losses.[259] The ostensible claim that Congress

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258. That damages under § 303(i)(2) may include loss of profits and other consequential damages flowing from business disruption or interruption is quite clear, even though proof of loss or of a sufficiently certain casual connection between such losses and the filing can be difficult. *See supra* notes 12 & 98. *Cf. In re* K.P. Enter. 135 B.R. 174, 183 (Bankr. D. Me. 1992)(awarding $ 22,810 in quantifiable damages flowing directly from filing to debtor whose value as a going concern had not been wounded). The Code's attempt to ameliorate the harmful effects of a non-meritorious petition are reviewed *supra* note 69.

259. U.C.C. § 9-507(1)(1990) provides an interesting analogy. That section sets forth remedies for the debtor in the event of a creditor's violation of the provisions of part 5 of article 9 of the U.C.C. governing default, repossession and foreclosure of security interests in personal property. It specifies that if the secured party does not proceed "in accordance with the provisions of this Part," disposition of the collateral may be enjoined or, if the collateral has already been disposed, the debtor may recover any loss caused by the failure to comply with Part Five. In interpreting and applying this provision most courts have limited aggrieved debtors to the direct damages attributable to the creditor's failure to act in a commercially reasonable manner; *e.g.*, the difference between the amount received on disposition of the collateral and the amount which would have been obtained had the creditor acted in conformity with the requirements of Part Five. *See* 2 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 27-18, 622 (3d ed. 1988); II GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.2, 1256 (1965)(damages should be measured by value of the collateral at the time of violation, or in a tort action, measured in the nature of conversion). Even when the collateral is not consumer goods, some courts go further and deny the secured creditor any deficiency claim, although the trend is to treat the violation as creating only a rebuttable presumption that the value of the collateral was at least equal to the amount owing in the underlying indebtedness at the time of disposition. *See* BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, § 4.12[4], n. 708 (2d ed. 1988 & Supp No. 2 1991). A few cases have gone even further and awarded consequential damages in the form of lost profits, but the leading commentators on the subject express considerable skepticism as to the wisdom of such an expansive interpretation of the statutory language. WHITE & SUMMERS, *supra*, at 623.

Plainly, U.C.C. 9-507(1) does not require any showing of bad faith or intent in order to trigger application of the statutory remedy. The fact that § 303(i)(2) expressly limits the court's discretion to award damages absent a prior finding of bad faith provides ample justification for its more tort-like formulation of damages recoverable for a violation than is generally true under U.C.C. 9-507(1). However, that justification begins to evaporate when courts apply the Bankruptcy Rule 9011 standards to test bad faith under § 303(i)(2). Suddenly, petitioning creditors become liable for the full range of compensatory damages merely upon a showing of negligence, an approach rejected for the most part in an analogous state law collection setting. Moreover, since breach of the implied good faith filing requirement is likewise not dependent on any showing of intent to harm, cases which use the tests developed in that context engage in an equally unwarranted expansion of the scope of liability. The net effect can only be to drive all but the boldest creditors out of the bankruptcy business, a result unwarranted made this choice when it elected to use the term "bad faith" in section 303(i)(2), years before the amendment to Federal Rule 11 and adoption of Bankruptcy Rule 9011, is highly implausible. It is not only at odds with the legislative history of section 303,[260] but, as a matter of interpretive technique, it cannot be squared with one of the more basic principles of statutory construction; namely, that words used by the legislature be accorded their ordinary, common senses unless expressly stated otherwise.[261] Also, the fact that punitive damages are authorized under section 303(i)(2), which courts acknowledge are intended to punish opprobrious conduct as well as deter future occurrences,[262] is further evidence that bad faith means intentional bad acting, not carelessness. In these circumstances, the sop that judgment is discretionary with the court is of precious little consolation.[263]

2. *The Improper Purpose Prong*

It might seem considerably more rational to formulate a test of bad faith under section 303(i) by borrowing only the standards that govern

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not only doctrinally, but on the same policy grounds justifying imposing some limits on the liability of secured creditors under state law as well.

260. *See supra* notes 12 & 25 and accompanying text; Sjostedt v. Salmon (*In re* Salmon), 128 B.R. 313, 315-16 (Bankr. M.D. Fla. 1991).

261. *See* Miller, *supra* note 227, at 1221 n.131, and authorities therein cited. In recent years, the Supreme Court has been particularly insistent in its bankruptcy decisions that the language of the Code be adhered to when clear and unambiguous. *See, e.g.*, Union Bank v. Wolas, 112 S.Ct. 527 (1991); Toibb v. Radloff, 111 S.Ct. 2197, 2200 (1991)(where the resolution of a question of federal law turns on a statute, the Court will look first to the statutory language and, only if that language is unclear, to legislative history); United States v. Ron Pair Enters. (*In re* Ron Pair Enters.), 489 U.S. 235, 242 (1989)(plain meaning of legislation should be conclusive). *But see* Dewsnup v. Timm, 112 S.Ct. 773 (1992)(giving the phrase "allowed secured claim" a different meaning in different provisions of the same statute). As earlier discussed, notwithstanding attempts to objectivize the test for some purposes, the ordinary, common sense meaning of "bad faith" entails bad motive and intent. *See supra* note 252.

262. *See, e.g., In re* K.D. Enter., 135 B.R. 174, 183 (Bankr. D. Me. 1992)(the purposes for awarding punitive damages are to punish the wrongdoer, and to deter similar conduct by both the wrongdoer and others); *In re* Laclede Cab Co., 76 B.R. 687, 694 (Bankr. E.D. Mo. 1987)(punitive damages are generally awarded when there is proof that the wrongful act was intentionally done); *In re* McDonald Trucking Co., 74 B.R. 474, 482 (Bankr. W.D. Pa. 1987)(section 303(i) allows for punitive damages to deter repeat conduct and punish the wrongdoer); *In re* Johnston Hawks Limited, 72 B.R. 361, 367 (Bankr. D. Haw. 1987)(purpose for punitive damages is to deter similar acts and punish the petitioning creditors for filing in bad faith).

263. The problem is that as the number of tests or definitions of bad faith multiplies, the exercise of judicial discretion becomes increasingly less predictable. Thus, creditors considering an involuntary filing, including those only seeking to maximize return on debts legitimately incurred and owing, have no "safe harbor" to protect them from an *ex post facto* determination that the filing was in bad faith.

the second prong of Rules 11 and 9011.[264] However, even that more tempered strategy is encumbered by difficulties that can become unmanageable in developing a consistent definition of bad faith for involuntary cases. Although the 1983 amendment was intended largely to supersede the subjective bad faith standard that had previously prevailed, it did not totally denude Rule 11 of all its subjective constituents. The signature of an attorney or a party continues to constitute a certification that the pleading has not been "interposed for any improper purpose." Reasonably, one would expect that this language would be construed as a limited continuation of the prior subjective bad faith standard and, for the most part, it has been so regarded.[265] However, the equation is not quite that simple and its complexities demonstrate the unprofitability of even this more limited linking of Rule 9011 and section 303(i)(2).

First, because the dual prohibitions of Rule 11 are joined by a conjunctive connector, the Rule must be interpreted to allow only lack of objective reasonableness, or only improper purpose, to separately constitute a violation.[266] If this understanding is applied by analogy to

264. In fact, some courts have intimated that it is only the improper purpose element of Bankruptcy Rule 9011 which should be used to measure bad faith for § 303(i)(2) purposes, but there has been no consistency in imposing such a limitation on the definition of bad faith. *See supra* note 255.

265. *See* Nelken, *supra* note 33, at 1320, 1331 (the amended rule adds an "objective layer to the subjective core of traditionally sanctionable bad faith conduct").

266. Rule 11 sanctions are used to punish parties who file pleadings and other court papers that *either*; 1) constitute frivolous filings, or 2) use the judicial process as a tool of harassment. Valley Nat'l Bank of Az. v. Needler (*In re* Grantham Bros.), 922 F.2d 1438 (9th Cir 1991); Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990)(sanctions may be imposed either if the paper is frivolous or the paper is filed for an improper motive); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 931-32 (7th Cir. 1989)(a paper interposed for an improper purpose is sanctionable whether or not it is supported by the facts and the law, and without regard to how careful a pre-filing investigation was conducted); (*In re* Ronco, 105 F.R.D. 493, 495 (N.D. Ill. 1985)(an attorney is deemed to certify *both* her knowledge and belief following reasonable inquiry — and objective standard — and the absence of an improper motive — a subjective test akin to the pre-1983 bad faith requirement); *In re* Cedar Falls Hotel Properties Limited Partnership, 102 Bankr. 1009 1016 (Bankr. N.D. Iowa 1989)(even objectively reasonable filing may give rise to sanctions if the pleading was interposed for an improper purpose). *See also supra* note 106. In Townsend v. Holmon Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990), the court carved out an exception for complaints, noting that for policy reasons a non-frivolous pleading initiating an action cannot be filed for an improper purpose. This followed from the court's reasoning that the standard governing both inquiries is an objective one. *Infra* note 270. While the proposition of an "objective" bad faith standard is a dubious one (*supra* note 239), Nelken, *supra* note 239, at 1331, has observed that the improper purpose standard, although unquestionably connoting bad faith, has primarily served to increase sanctions in a case already found to be without objective factual or legal merit.

section 303(i)(2),[267] it means that a petitioning creditor could be exposed to a judgment for damages even though an order for relief against the debtor has been entered on the petition. This presents the anomaly that a creditor, ostensibly acting on behalf of all creditors, might be required to pay reputational, loss of business, and even punitive damages (all post-petition, presumably) for initiating a bankruptcy proceeding against an entity whose situation has been deemed appropriate for bankruptcy relief.[268] Perhaps less troubling philosophically, but of even greater practical moment, is that the occurrence of this scenario would directly contravene the terms of the statute itself, a statute which, it will be recalled, makes the question of damages apposite only after dismissal of the petition.[269] For both of these reasons, and contrary to the prevailing attitude regarding the operation of Bankruptcy Rule 9011, the analysis of bad faith under

267. As earlier discussed, *supra* notes 61-63 and accompanying text, this is precisely the understanding which most courts have recently embraced, although the path to arrive there entailed certain highly questionable interpretive leaps of faith. *See supra* text accompanying note 67.

268. The interpretation of Rule 11 adopted by the court in *Townsend*, would avoid this result since presumably a determination that the petition had a colorable basis would preclude a finding of improper purpose under the second prong of Bankruptcy Rule 9011 irrespective of the petitioners' privately-held intentions. *See supra* note 266. The Ninth Circuit in *Townsend* reached that conclusion, however, by applying an objective test to both components of Rule 11. In addition to the fact that this view is not universally shared (see *infra* note 271) its acceptance in the context of § 303(i)(2) entails a different kind of pitfall. Although the incongruity of having a judgment entered against a petitioning creditor who files a meritorious petition is side-stepped, it means that bad faith would come to be defined wholly in terms of whether a reasonable person in the position of the petitioning creditor would have decided to seek relief under the Code. Therein lies the rub. While a good heart and an empty head might not be enough to avoid sanctions under Rule 11, *see, e.g.*, Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir. 1986), it should be sufficient to negate a finding of bad faith. *See supra* note 251-252 and accompanying text.

269. *See, e.g.*, *In re* International Mobile Advertising Corp., No. 90-6349, 1991 U.S. Dist. LEXIS 11294 (E.D. Pa. 1991)("The statute very clearly provides that a necessary precondition for recovery of damages pursuant to § 303 is that the petition be dismissed 'other than on consent of all petitioners and the debtor' "). *See also supra* note 227. However, in Eric Peterson Constr. Co. v. Quintek, Inc. (*In re* Eric Peterson Constr. Co.), 951 F.2d 1175, 1180-81 (10th Cir. 1991), the court held that the debtor need not actively oppose dimsissal of the petition in order to preserve its claim for damages under § 303(i).

It is possible that the dismissal itself might be based on a determination that the filing was not undertaken in good faith. Hence, one could theoretically envisage a petition that, although satisfying the statutory requirements for relief, was dismissed because of bad motive. As a practical matter, however, unlike the situation prevailing in the case of voluntary filings, there are no such cases reported and the existence of an adversary contest for establishing the right to an order for involuntary relief renders remote the likelihood that such a case might ever arise. *See supra* notes 219-225 and accompanying text.

section 303(i)(2) cannot proceed in isolation from the merits of the petition.

The other complication involved in borrowing the standards developed under just the second branch of Federal Rule 11 is that, even though the Rule continues to speak in terms of "improper purpose," some courts and commentators have advocated use of an objective test of "bad faith" for determining when a violation on this basis has occurred.[270] That approach to bad faith, while seemingly at odds with the natural inferences connoted by the term,[271] may have merit as

270. *See, e.g.*, Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990)(standard governing both the "improper purpose" and "frivolousness" inquiries is an objective one); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1436 (7th Cir. 1987)(improper purpose determined under an objective standard); Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986)(suggesting that amended Rule 11 picks up where 28 U.S.C. § 1927 leaves off). Judge Schwarzer has also advocated for an objective standard to determine improper purpose under Rule 11. *See* Schwarzer, *supra* note 77, at 195-96 (courts should not inquire into subjective intent in order to determine if pleadings were interposed for an improper purpose). *See also* Schwarzer, *Rule 11*, *supra* note 85, at 1018-20, 1024 (proposing that the focus of Rule 11 should shift from the merits of the pleading to the process attendant to its assertion in order to eliminate some of the deleterious byproducts spawned by the 1983 amendments); Vairo, *supra* note 79, at 195 (bad faith terminology has no place in Rule 11). Other commentators recognize that "improper purpose" necessarily implies subjective bad faith. *See* Nelken, *supra* note 33, at 1320; Nelken, *Looking for a Middle Ground*, *supra* note 85, at 406-07 (arguing that because it entails an inquiry into subjective motivation, the improper purpose aspect of Rule 11 should be repealed); Rubin, Note, *A "Kafkaesque" Dream*, *supra* note 32, at 1040 (the improper purpose clause is independent of the reasonable inquiry clause and connotes intention and willfulness; thus, it cannot, without further amendment, be subsumed under an objective standard); Webster, Note, *Rule 11: Has the Objective Standard Transgressed the Adversary System? supra* note 38, at 314-16 (proposing that an attorney's legal conclusions under the first prong of Rule 11 should also be measured by a subjective standard).

271. In the abstract, the terms "good faith" and bad faith" evoke notions of subjective intention. *See* KASSIN, *supra* note 33, at 22 (good/bad faith terms imply a search for improper motives); *supra* note 252. The drafters of the 1983 amendments to Rule 11 fully understood this connection and, therefore, abandoned a good faith standard in favor of an objective assessment of counsel's conduct in filing pleadings, motions and other court papers. *See* Carter, *supra* note 90, at 6-7. Although the vestigial remnants of a subjective test were retained in the "improper purpose" element of the Rule, some courts have objectivized both inquiries anyway. *Supra* note 270 and cases cited therein. The issue is further confused by the fact that the analysis of bad faith under § 303(i)(2) has become indirectly intertwined with the issue of the good faith filing prerequisite as well. Contrary to the construction of "good faith," entailing subjective honesty, generally afforded to the term in connection with Rule 11 analysis, "good faith" in filing has come to be measured by conformity with objective criteria and evolving bankruptcy purpose. Relegated to their respective spheres of operation this difference in approach presents no particular problem; broad admonitions like good faith, while not without essential signification, take on specific meaning only in their particularized and varied applications. However, when two variant approaches intersect in

part of the analysis of whether Rule 11, considering its distinct function in federal civil practice, has been violated. Clearly, however, the price for achieving this result is perpetuation of the confusion stemming from the temptation to always conceive of bad faith as the evil twin of good faith.[272]

A scheme that attributes no separate or independent meaning to the concept of bad faith runs the risk of producing harmful results when simply incorporated without modification into a different context. This is particularly so where the consequences flowing from a finding of bad faith may entail repercussions far more serious than reimbursing the cost of resisting an ill-conceived lawsuit. When, as is the case under section 303(i)(2), the entire risk of business failure may be shifted to the petitioning creditors, nebulous, unthoughtful definitions of bad faith create the danger of keeping all but the most thrill-seeking creditors away. With the potential cost this high, no prudent lawyer can be expected to counsel his or her client to consider involuntary bankruptcy as a serious remedial alternative. Simply knowing that the client's judgment might later, and in the harsh glare of hindsight, be tested against a standard of objective reasonableness is enough to commend discretion over valor.

In the final analysis, therefore, any approach for defining bad faith for purposes of section 303(i)(2) that simply borrows the law and lore developed under Bankruptcy Rule 9011 is unsatisfactory. The standards of conduct applied under Rule 9011 carry with them certain baggage unique to the purposes, values, and history of Federal Rule 11. These concerns are fundamentally different from the considerations relevant to the bad faith analysis in involuntary bankruptcy. Under these circumstances, it is easy to understand why, in spite of the laudable reform efforts undertaken in drafting the Code, involuntary bankruptcy has had such little impact in the overall scheme of debtor-

a third setting, which is precisely what has occurred in the case of § 303(i)(2), some confusion inevitably results leading to the kind of inconsistency from one case to the next which has marked the treatment of bad faith in involuntary cases. This fact underscores the importance of approaching the bad faith inquiry in involuntary bankruptcy cases discrete from usages of the same and related terms in other contexts.

272. *See supra* notes 118 & 138-139 and accompanying text. On the other hand, it is possible to treat the two concepts as opposites so long as the discussion is limited to a particular application of one concept or the other. *See supra* note 271. In a manner of speaking, albeit in modified form, this is reminiscent of Summers' excluder analysis. Summers, *supra* notes 111-117 and accompanying text. Summers runs into problems, however, when he abandons entirely the effort to assign each term a general meaning of its own. Once established, these norms serve as a yardstick for tracking, comparing and keeping distinct the non-uniform standards that may develop for different purposes to assess whether or not a party's conduct has satisfied or transgressed, as the case may be, the mandated level of performance.

creditor relations and such nominal effect in implementing broader bankruptcy policy.

Assuming the analysis is to proceed by analogy, Rule 9011 is, for all the reasons shown, the wrong analogy. In its stead I would suggest that, because of a greater coincidence in underlying purposes and values, a better analogical application is found in the common law of malicious prosecution. That relationship, and the attempt to build from it an alternative standard of bad faith under section 303(i)(2), occupy the final part of this Article.

IX. BAD FAITH IN INVOLUNTARY BANKRUPTCY FILINGS RECONSIDERED AND REDEFINED

Although something of a misnomer when used in a non-criminal setting, American courts gradually have come to recognize the applicability of the tort of malicious prosecution in connection with wrongful civil cases.[273] Traditionally, malicious prosecution had been restricted to unjustified criminal proceedings. The elements required to be pleaded and proven were that the action complained of was: 1) commenced by or at the direction of the defendant; 2) terminated in favor of the plaintiff;[274] 3) brought without probable cause; and 4) initiated with malice.[275]

The elements which must be established to support a claim of malicious prosecution in a civil case are generally the same as those required in the case of a criminal proceeding,[276] except in a minority of

273. *See* Prosser & Keeton, *supra* note 252, at 889 (referring to such actions when civil in nature as "wrongful civil proceedings").

274. It is the existence of this element that traditionally has prevented a malicious prosecution claim from being asserted as a counterclaim in the main action. *Id.* at 892-93.

275. *See, e.g.*, Weiszmann v. Kirkland & Ellis, 732 F. Supp. 1540, 1547 (D. Colo. 1990); Sheldon Appel Co. v, Albert & Oliker, 765 P.2d 498, (Cal. 1989). Proof of "malice" is generally regarded as requiring a showing not only that the act was deliberate, but that the defendant intended the harmful result. 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 4.6 at 443 (2d ed. 1986)("Any feeling of hatred, animosity, or ill will toward the plaintiff, of course, amounts to malice.")(citation omitted); Seven Elves, Incorporated v. Eskenazi, 704 F.2d 241, 245 (5th Cir. 1983)("willful," within the meaning of Code § 523(a)(6), means intentional, and "malice" adds the absence of just cause). For a strict view of the definition of "malicious" in the context of the dischargeability exception in § 523(a)(6) for debts arising out of "willful and malicious" injury, see John Deere Credit Serv. v. McLaughlin (*In re* McClaughlin), 109 B.R. 14, 16-17 (Bankr. D.N.H. 1989). *See also* PROSSER & KEETON, *supra* note 252, at 882-83, defining malice in terms of "improper purpose," an approach which brings into question the wisdom of attempts to define "improper purpose" under Rule 11 by reference to reasonableness under the circumstances. *See supra* note 270.

276. *See* HARPER, *supra* note 275, at 457; RESTATEMENT (SECOND) OF TORTS § 674 (1977). There is, however, a minor difference between criminal and civil proceedings relating to the "lack of probable cause" element of the claim for relief. Spe-

jurisdictions that have imposed one additional element of proof.[277] In these states, the plaintiff must also show some "special damage," in the form of interference with the plaintiff's person or property, beyond the damages that ordinarily would be expected to result from such litigation.[278] Commentators have complained that this additional requirement renders malicious prosecution virtually useless as a remedy for wrongful civil litigation,[279] and it has been rejected by the *Restatement (Second) of Torts*.[280] Nevertheless, even in jurisdictions continuing to adhere to the special damage rule, initiation of an involuntary bankruptcy case has been generally recognized as the kind of interference with business and property sufficient to satisfy the special injury requirement. Therefore, in virtually all instances, a debtor who successfully fends off an involuntary petition would be in position to bring an action in state court for compensatory and punitive damages on the ground that the involuntary case had been prosecuted maliciously.[281]

The tort of malicious prosecution is frequently confused with an action for abuse of process. An action for abuse of process is appropriate when lawful process is invoked to attain an end that the process

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cifically, something less in the way of a reasonable belief in the merits of the claim is required in bringing a civil rather than a criminal suit. PROSSER & KEETON, *supra* note 252, at 893. *See* ALSO Restatement (Second) of Torts § 675 (1977), which sets forth either a reasonable belief in the validity of the claim or good faith reliance on counsel as alternative ways of establishing the existence of probable cause. *See also infra* note 298 and accompanying text regarding reliance on the advice of counsel as a defense to liability for malicious prosecution.

277. The number is reputed to be about a third of the states. HARPER, *supra* note 275, at 464-65.

278. PROSSER & KEETON, *supra* note 252, at 889-92. *See generally* Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1219-20 (1979)(referring to the special damage rule as the "English Rule"). The so-called English Rule is justified by the need to encourage honest litigants to seek redress from the judicial system without fear of reprisal. *Id.* at 1220.

279. *See, e.g.*, HARPER, *supra* note 275, at 467-68, 474-75.

280. The same elements necessary to establish liability for unjustified criminal proceedings will support a claim for wrongful initiation of a civil case. *Compare* RESTATEMENT (SECOND) OF TORTS § 674 (1977)(elements of a claim for wrongful use of civil proceeding) *with* RESTATEMENT (SECOND) OF TORTS § 653 (elements of cause of action for malicious prosecution).

281. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 678)(1977)("Proceedings Alleging Insanity or Insolvency"); PROSSER & KEETON, *supra* note 252, at 890 n. 19 (special injury has been found to exisit in actions which involve interference with business or property, or damages differing in kind from the ordinary hardships associated with defending a lawsuit, including actions for involuntary bankruptcy proceedings). *See also infra* note 300.

Under either approach, once the elements of liability have been satisfied, damages include all costs, expenses, and other losses incurred by reason of the wrongful litigation, including punitive damages. Note, *Groundless Litigation*, *supra* note 278, at 1220 n. 15 & 16; RESTATEMENT (SECOND) OF TORTS § 681 cmt. a (1977).

was not meant to allow.[282] Quite different in proof than malicious prosecution, abuse of process does not require the plaintiff to establish that the action was terminated adversely to the defendant, that it was brought without probable cause, or that the defendant acted with malice.[283] On the other hand, clearly the two actions are related. In fact, the tort of abuse of process has been described as providing a remedy for a limited category of cases where, although the defendant's conduct is equally unsavory, malicious prosecution fails to provide a remedy.[284] Moreover, in some cases both actions might lie.[285] Nevertheless, there is a subtle but fundamental difference in emphasis

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282. *See* Captran Creditors Trust v. North Am. Title Ins. Agency, Inc. (*In re* Captran Creditors Trust), 116 B.R. 845, 853 (Bankr. M.D. Fla. 1990)("Abuse of process requires use of legal process against another, primarily to accomplish a purpose for which it was not designed."). An abuse of process fairly can be described as conduct which involves an "improper use" of legal process. *See, e.g., In re* TCI, Ltd., 769 F.2d 441, 445 (7th Cir. 1985)(pursuit of a plausible claim strictly to impose costs on the other side, instead of because of potential recovery on the claim, is an abuse of process).

283. *See* PROSSER & KEETON, *supra* note 252, at 897: "Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action . . . without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. *See also* Coleman v. Gulf Ins. Group, 718 P.2d 77, 85 (Cal. 1986). To the extent the "improper purpose" component of Rule 11 is alone the basis for imposition of sanctions in a case involving assertion of non-frivolous claims, it is similarly an illegitimate, as opposed to necessarily a malicious or objectively unwarranted, use of process which justifies the finding the the Rule has been violated. *See supra* note 247. Thus, the concepts of improper use and improper purpose, while sometimes distinguished as such (see *supra* note 94), are not strictly exclusive of one another. For example, Prosser and Keeton note that "the two torts have the common element of an improper purpose in the use of legal process." PROSSER & KEETON, *supra* note 252, at 898.

284. PROSSER & KEETON, *supra* note 252 at 897, citing Grainger v. Hill, 4 Bing. N.C. 212, 132 Eng. Rep. 769 (1838), as the leading English case. *See also* HARPER, *supra* note 275, at 499 (noting that the tort of abuse of process was developed to provide a remedy where the tort of malicious prosecution failed to do so, but cautioning against an overly-formalistic differentiation between the two actions).

285. The fact that an abuse of process is generally regarded as regulating circumstances where the claim asserted is not facially specious or implausible does mean that an action for abuse of process will not also lie in a case where the claim is without probable cause. The gravaman of an abuse of process claim is the use of legitimate process to serve an illegitimate motive. PROSSER & KEETON, *supra* note 252, at 897. Such a misuse of process may well be present in circumstances which also satisfy the essential elements of malicious prosecution; it is simply that those elements are not necessary to support an action for abuse of process. In a similar fashion, an involuntary petition may be assailable under the implied good faith filing requirement (inappropriate for bankruptcy relief) and also run afoul of the bad faith restriction in § 303(i)(2)(subjective intention to harm the debtor). However, the point to be stressed is that the latter does not necessarily or inescapably follow from the former, even though the two be amiable if not frequent companions.

between the two actions in tort which informs the present discourse on bad faith in involuntary bankruptcy cases.

The crux of the difference between malicious prosecution and abuse of process involves the existence of proper grounds for justifying the proceeding at issue apart from the question of improper ulterior motive. As the term itself connotes, an abuse of process involves the misuse of the judicial process. Although the other party may be and often is harmed as well, the real victim is the system that has been improperly manipulated to carry out the defendant's corrupt designs. Thus, in fashioning a remedial response, it is the system that must be vindicated. Compensation of the adverse party, although frequently accomplished, is incidental to the basic remedial objective. By contrast, in the case of a malicious prosecution, the harm is directly and intentionally to the other party. Again, the legal process is the instrumentality being used to inflict injury on the other party, but this misuse of process is incidental to the wrongful end to be attained. Even more to the point, since the action is, by definition, without probable cause, the claim will be disposed of in the ordinary course. Therefore, the concern that forms the *raison d'etre* for the tort of abuse of process, *i.e.*, that the system would unwittingly provide the means by which the defendant's illicit scheme might be accomplished, simply does not exist in the paradigmatic malicious prosecution situation.

Bringing this distinction to bear on the present discussion, it can be said that both Bankruptcy Rule 9011 and the judicially-implied good faith filing requirement are intended to regulate and control "abuses" of the bankruptcy process. The history of each is deeply tinged by a profound concern for the damage done to the integrity of judicial process by the wrongful initiation of bankruptcy cases and associated misuses of the process.[286] It is no accident, therefore, that each has come to be judged primarily by reference to objective standards and criteria. This also explains why the fact that the offending claim may be colorable on its face does not end the analysis under either Rule 9011 or the good faith filing requirement.

The condition that a bankruptcy filing be undertaken in good faith has been imposed by courts to test individual filings against bankruptcy purposes, quite unrelated to subjective motive.[287] Federal Rule

286. *See, e.g.*, Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2454 (1990)(central purpose of Rule 11 is to deter baseless filings); Carolin Corp. v. Miller, 886 F.2d 693, 698 (4th Cir. 1989)(an implied good faith filing requirement is necessary to protect the jurisdictional integrity of the bankruptcy courts). *See also* Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989 (Rule 11 creates a duty to the legal system as well as to one's adversary, and allows judges to "husband their scarce energy for the claims of litigants with serious disputes needing resolution"); Schwarzer, *Rule 11, supra* note 85, 1020 (proper role of Rule 11 is to deter litigation abuses, not compensate parties for unnecessary costs incurred).

287. This is true even though, in the abstract, "good faith" and "bad faith" connote

11 and its bankruptcy counterpart were promulgated to control the proliferation of groundless filings by requiring reasonable inquiry into the facts and law.[288] Even the vestigial remnant of a subjective element in Rule 9011,[289] while certainly closer in focus and formulation to the components of a malicious prosecution claim, has been interpreted as operating only in those circumstances where a misuse of the bankruptcy process is manifest.[290] So long as, judged by objective standards, the case is groundless, the improper purpose prong is inoperative or, at best, redundant. On the whole, therefore, the two aspects of the Rule operate in the alternative rather than in tandem, with the first branch the most dominant by far.[291]

Doubtless, the distinction between malicious prosecution and abuse of process can be carried to artificial extremes.[292] Nevertheless, the essential points of divergence are informative for the discussion of bad faith under section 303(i)(2). I wish to suggest that the concept of bad faith, at least in the context of section 303, should be relegated to circumstances that would, by and large, independently support a substantive claim for malicious prosecution. That is, to instances in which 1) there were no reasonable grounds to support the involuntary petition, thereby resulting in its dismissal; and 2) it is proven by a fair preponderance of the evidence that a petitioning creditor acted with

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issues of subjective motive and intention. *See supra* notes 251-252. However, when applied as a prerequisite to the filing of a bankruptcy petition, there seems to be general agreement that compliance with the standard is judged by objective criteria. *See, e.g.*, *In re* Park Place Assocs., 115 B.R. 940, 946 (Bankr. N.D. Ill. 1989); *supra* notes 239 & 251.

288. *See supra* notes 72-84 and accompanying text.

289. *See* Nelken, *supra* note 33, at 1320 (the "improper purpose" language of Rule 11 should be interpreted as retaining a subjective core to the objective certification requirement of amended Rule 11). *But see* authorities cited *supra* note 270 (suggesting that even the improper purpose provision of the Rule should be construed and enforced by an objective standard).

290. *See In re* TCI, Ltd., 769 F.2d 441, 445 (7th Cir. 1985)(subjective motive becomes relevant only when the suit is objectively colorable). Nelken, *supra* note 33, at 1331, observes: "[t]he requirement that a paper not be filed for 'any improper purpose' applies regardless of the objective factual or legal basis for the claim." However, Nelken also notes that, as an empirical matter, the improper purpose standard, though connoting bad faith, "has primarily served to enhance sanctions for conduct that also failed to meet the objective standard of having a reasonable basis in fact and law." *Id.*

291. It is unquestionably the reasonable inquiry clause of Rule 11, and Bankruptcy Rule 9011, which have garnered the lion's share of the courts' attention. *See supra* note 243. This is not surprising in light of the relative dormancy of Rule 11 prior to 1983 when establishing a violation required proof of willfulness. *See supra* note 73 & 77-79 and accompanying text.

292. *See* HARPER, *supra* note 275, at 499-500 (the objectives of the torts of malicious prosecution and abuse of process may be frustrated by an artificial exaggeration of the difference between the two).

malice toward the debtor in bringing the action.[293]

From a purely practical perspective, there are several aspects of this "new" test that are noteworthy.[294] First, it limits an analysis of bad faith to only those occasions where the petition has earlier been adjudicated to be without merit. Second, it allows for judgment on bad faith grounds against one, more, but less than all the petitioning creditors depending on subjective state of mind. In both respects, this comports with the phrasing and the structure of section 303. Finally, by breaking the connection with Bankruptcy Rule 9011, this proposal makes it clear that neither lack of reasonable conduct nor improper motive is alone enough to support a judgment under section 303(i)(2). Both must be present.

293. Paradoxically, this test bears a much closer resemblance to pre-amended Rule 11 than it does to the current version. For example, in Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 934 (1991), the Court asserted with some conviction that the main objective of Rule 11 is to deter groundless filings, not to create a federal common law of malicious prosecution or reward parties victimized by litigation. This objective, while certainly important in its own right, is totally at variance with the objectives of a rule the applicability of which is explicitly subject to a threshold finding of bad faith. *See* Sjostedt v. Salmon (*In re* Salmon), 128 B.R. 313, 315 (Bankr. M.D. Fla. 1991)(in adopting § 303(i)(2) "Congress clearly created a remedy for malicious prosecution in the form of a bad faith filing of an involuntary petition in bankruptcy").

294. I use the term "new" somewhat loosely here since I fully appreciate that there is nothing particularly novel or unique in the idea that bad faith implies an inquiry into subjective motivation and intention. *See supra* note 252. What is perhaps new is the introduction of a subjective test into the analysis of bad faith under § 303(i)(2), but even that approach is not without some precedent. *See supra* note 44 and accompanying text. Still, while the bouquet may be hauntingly familiar, I do not believe this is entirely a case of old wine in new bottles. No decision to date has clearly and completely made the link between the elements of malicious prosecution and § 303(i)(2), including, in particular, the requirement that the petition be found to have been filed both without probable cause to believe that proper grounds for relief exist and with malevolent intent. *See* RESTATEMENT (SECOND) OF TORTS §§ 674, 675 (1977). If anything, the case law in recent years has moved further and further away from the point in seemingly relentless pursuit of the ill-advised marriage between the bad faith question in involuntary cases and Bankruptcy Rule 9011. *See supra* notes 61-64, & 255 and accompanying text. In *In re* K.P. Enter., 135 B.R. 174, 183-84 (Bankr. D. Me. 1992), the court adopted the position that bad faith under § 303(i)(2) for the purpose of award and compensatory damages can be established solely on the basis that the petition was not well-grounded in fact, but that an award of punitive damages requires a further showing of vengeful and malicious conduct. While there is some appeal to drawing such a distinction based on the language of § 303(i)(2), I do not believe such construction is required. Moreover, given the structure of the overall statutory scheme and relevant policy considerations, I think one better view is to insist upon malice as a condition to recovery of *any* damages. This leaves the decision of whether punitive damages are called for to turn on the bankruptcy court's separate assessment of the need for further relief based on the overall equities of the situation. The situations of the parties, the need to send a deterrence message, and the amount of other damages and fees awarded all must be taken into account.

From a policy standpoint, I would submit that this approach is also sensible in that it only makes a creditor's ulterior motive relevant when the process has been misapplied.[295] Thus, the spiteful initiation of an involuntary bankruptcy proceeding would not constitute bad faith for purposes of section 303(i)(2), even though the petitioning creditors' motives were somewhat less than pure, provided the petition was filed with meticulous regard for all procedural niceties and against a debtor that had generally not been paying its current obligations.[296] Correspondingly, absent further proof of malevolent intent, dismissal of a petition filed without an adequate pre-filing inquiry, or merely as a substitute for alternative collection procedures, would not presumptively establish bad faith for section 303(i)(2) purposes.

On the other hand, when the claim for involuntary relief is without foundation and a petitioning creditor is determined to have acted with a premeditated design to inflict economic injury on the alleged debtor, the court might well exercise its discretion to enter judgment under section 303(i)(2). The burden of proving that the petition was filed to accomplish an unlawful ulterior consequential objective would remain on the debtor.[297] Of course, the absence of probable cause to support

295. This is quite the opposite of Rule 11 where the improper purpose question is, for the most part, judged independently from the factual or legal merits of the challenged pleading. *See supra* note 290.

296. In this respect, I concur with the logic of the view expressed by the Ninth Circuit in Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990), that it would be "counterproductive" to penalize the assertion of non-frivolous substantive claims under the improper purpose component of Rule 11. Similarly, if the conditions justifying an involuntary bankruptcy are present, the petitioners' motives for filing should be of no moment. Entry of an order for relief benefits other creditors and parties with an interest in the debtor to the same extent as the petitioning creditors once the case in chief is commenced. The claims of the petitioners receive no special treatment or favored status in the ensuing bankruptcy administration. There is a difference, however, between *Townsend* and the approach to § 303(i)(2) I advocate here. In *Townsend* the court directed that insofar as complaints initiating lawsuits are concerned the inquiry into "improper purpose" is subsumed in the "frivolousness" inquiry. By contrast, in involuntary bankruptcy cases the question of damages for bad faith in filing does not arise unless and until the petition is adjudicated on the merits in the alleged debtor's favor. In other words, it must have been filed without proper grounds or cause, but need not have been "frivolous" as a condition to entry of judgment under § 303(i). Another problem is that, to date, few courts have even recognized a distinction between complaints and other pleadings and paper for Rule 11 purposes, let alone acquiesced in the relationship between the two parts of the Rule suggested by *Townsend* when the pleading in question involves a complaint.

297. It is clear that the plaintiff in a malicious prosecution suit bears the burden of proving the essential elements of the claim for relief. *See* RESTATEMENT (SECOND) OF TORTS § 681A (1977); Weiszman v. Kirkland & Ellis, 732 F. Supp. 1540, 1547 (D. Colo. 1990)(in a malicious prosecution action the burden of proof is on the plaintiff). In determining whether or not an involuntary petition was filed in bad faith, courts have always, regardless of the standard used to measure bad faith, required the debtor to overcome the presumption of good faith which at-

the petition would effectively be established by the prior dismissal of the petition before the question of damages under section 303(i)(2) even arises. However, since the culminating question of bad faith conduct would turn on proof of the presence of malicious intention to cause harm to the debtor beyond the ordinary hardship associated with routine debt collection activities, reliance on advice of counsel would not automatically serve as a defense to liability.[298] Moreover,

tends the filing. *See supra* authorities cited at note 58. This contrasts, for example, with the applicable procedure involving preliminary motions to dismiss reorganization petitions allegedly filed in bad faith where the courts have taken the view that once a prima facie showing of lack of good faith has been made, the burden shifts to the filing party to show that continuation of the proceeding would not constitute an abuse of the bankruptcy court's jurisdiction. *See, e.g., In re* Meyers Way Dev., 116 B.R. 239, 244-45 (Bankr. W.D. Wash. 1990); *In re* N.R. Guaranteed Retirement, Inc., 112 B.R. 263, 276 (Bankr. N.D. Ill. 1990), *aff'd*, 119 B.R. 149 (Bankr. N.D. Ill. 1990). Moreover, both proceedings for sanctions under Rule 11 and the good faith filing issue may be raised on the court's own initiative as well as on motion of the opposing party. *See, e.g., Advisory Committee Note, supra* note 33, at 200 ("[T]he detection and punishment of a violation of [Rule 11's] signing requirement . . . is part of the court's responsibility for securing the system's effective operation."); Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (*In re* Little Creek Dev. Co.), 779 F.2d 1068, 1071 n. 1 (5th Cir. 1986)(court may raise good faith filing issue *sua sponte*).

298. The authorities agree that in a malicious prosecution action, the advice of counsel, sought and received in good faith, should negate a finding of malice based on lack of probable cause to maintain the earlier suit. *See, e.g.,* PROSSER & KEETON, *supra* note 252, at 894; HARPER ET AL., *supra* note 275, at 449-51; RESTATEMENT (SECOND) OF TORTS § 675 (1977). However, where the proceedings are inspired solely by the desire to cause harm to the other party, advice of counsel is no defense. RESTATEMENT (SECOND) OF TORTS § 669 cmt. h (1977). Correspondingly, where the client's motive is unknown to counsel, courts have uniformly shielded counsel from joint liability for malicious prosecution. *See* David W. Pollack, Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process,* 44 U. CHI. L. REV. 619, 637 n. 96 (1977).

In its review of varying approaches employed by the courts in defining bad faith under § 303(i)(2), the court in *In re* Better Care, Ltd., 97 B.R. 405 (Bankr. N.D. Ill. 1989) recognized this distinction. *Id.* at 412: "[A]dvice of counsel can excuse an improper-use bad faith but it cannot excuse improper-purpose bad faith." Although the terms "improper use" and "improper purpose" are not quite as bipartite as the court in *Better Care* suggests (*supra* note 94), neither would it be inaccurate in the main to equate and improper use bad faith with a misuse or misapplication of judicial process, and an improper purpose bad faith with a malicious prosecution. The more basic problem with the decision in *Better Care,* however, is that by denying the availability of this defense to petitioners in an "improper-purpose" case the court implies that colorable as well as non-colorable petitions may form the basis of a damage award under § 303(i)(2), a result I consider antithetical to both the letter and the spirit of the statute.

Reliance on counsel has also been rejected as a basis for relieving a party who fails to conduct a reasonable pre-filing inquiry into the facts and law from exposure to sanctions under Rule 11. Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 930-32 (1991); *supra* note 30 and accompanying text. Thus, cases which evaluate bad faith under § 303(i)(2) using the standards developed under Bankruptcy Rule 9011 have held that the petitioners cannot avoid bad just as the desire to secure payment of a debt legitimately due and owing could itself never be an unlawful objective, without regard to the appropriateness of the case for bankruptcy, neither should the desire to obtain satisfaction of what turns out to be a validly disputed claim constitute bad faith if it cannot also be proven that the petitioning creditor acted with an improper ulterior motive.[299]

It is well-established that the remedies set forth in section 303(i)(2) do not preempt a subsequent state court action for malicious prosecution.[300] The continued availability of traditional forms of relief for wrongful civil litigation does not, however, obviate either the need or the desirability of having a "federal" law of malicious prosecution in the limited context of involuntary bankruptcy filings.[301] Incorporation into section 303(i) of specific remedial responses to malicious filings overcomes several impediments faced by an aggrieved debtor relegated to its rights under state law. To begin with, even though a determination of bad faith must await dismissal of the petition, section 303(i)(2) allows the debtor's charge of malicious prosecution to be raised, tried, and adjudicated in the same action.[302] Also, because of

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faith liability based on the allegation that they acted with the advice of counsel *See, e.g., In re* Turner, 80 B.R. 618, 624 (Bankr. D. Mass 1987). *See also In re* Ramsden. 17 B.R. 59 (Bankr. N.D. Ga. 1981)(awarding damages under § 303(i)(2) even though counsel admitted his failure to consult the Bankruptcy Code before filing). These decisions, while likely correct on the weight to be accorded to reliance on counsel, ignore the effect that legal advice might have on the basic issue of whether the petitioning creditors' purpose for filing was proper. *See* RESTATEMENT (SECOND) OF TORTS § 676 cmt. c (1977)(suggesting that belief in the suitability of a particular case for modification of existing precedent might be sufficient to negate a finding of improper purpose).

299. This would not in any way relieve the petitioning creditors from imposition of sanctions under Bankruptcy Rule 9011 or judgments for fees and costs under § 303(i)(1) if it turned out that the petition was patently without substance.

300. *See* Paradise Hotel Corp. v. Bank of Nova Scotia, 842 F.2d 47, 51-52 (3d Cir. 1988)(it would be inconsistent with the overall scheme of the Code to find that § 303(i)(2) was an exclusive remedy for claims based on wrongful initiation of an involuntary petition); *In re* Better Care, Ltd., 97 B.R. 405, 416 n.5 (Bankr. N.D. Ill. 1989). However, from a practical perspective, a state court action might not be the most efficacious way of obtaining satisfactory relief. *See infra* note 302-303 and accompanying text. *See also* Susman v. Schmid (*In re* Reid), 854 F.2d 156, 162 (7th Cir. 1988) (suggesting that § 303(i) has preempted the judiciaries equitable power to redistribute attorneys fees in involuntary cases).

301. It is clear that Bankruptcy Rule 9011 offers no realistic alternative. *See* Business Guides, Inc. v. Chromatic Communications Enters., 111 S.Ct. 922, 934 (1991)(Rule 11 does not create a federal law of malicious prosecution). *But see* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2463 (1990)(Stevens, J., dissenting)(accusing the majority, by its holding that Rule 11 sanctions may be imposed against a party who voluntarily withdraws its pleading, of creating a federal law of malicious prosecution in violation of the limitations established by the Rules Enabling Act).

302. Ordinarily, a claim for judgment under § 303(i) is raised by motion or application of the debtor and the court will retain jurisdiction over the case following dismissal of the petition in order to rule on the debtor's request. *See, e.g.*, Miyao v.

the provisions of section 303(i)(1), it permits the bankruptcy court to effectively reimburse the debtor's cost of establishing bad faith in addition to the cost of defending the petition. Ordinarily, the costs of a malicious prosecution action itself, as opposed to the costs incurred in defending the earlier action, are not compensable as part of the judgment in favor of a successful plaintiff.[303]

Another justification for conceptualizing of section 303(i)(2) as a federal cause of action for malicious prosecution is that, in those jurisdictions that still adhere to the "special damage" requirement,[304] it eliminates any limitations that might otherwise be imposed on recovery of reputational and other forms of damage not directly attributable to the loss or detention of the debtor's property.[305] Further, because the petitioning creditors are already present and have consented to the bankruptcy court's jurisdiction over them, section 303(i)(2) circumvents the potential service or joinder problems that might be encountered in a state court action.[306]

Kuntz (*In re* Sweet Transfer & Storage, Inc.), 896 F.2d 1189, 1190 (9th Cir. 1990); *In re* Fox Island Square Partnership, 106 B.R. 962, 965 (Bankr. N.D. Ill. 1989); *In re* McDonald Trucking Co., 74 B.R. 474, 476-77 (Bankr. W.D. Pa. 1987); *supra* note 227. Technically, a prayer for damages under § 303(i) cannot be raised by counterclaim in the debtor's answer since FED. R. BANKR. P. 1011(d) limits the allegations that may be raised in the debtor's answer to matters asserted for the purpose of defeating the petition. Nonetheless, as a practical matter, courts have been lenient in permitting a claim under § 303(i) to be asserted by any reasonable means. *E.g.*, *In re* Advance Press & Litho, Inc., 46 B.R. 700, 701 (Bankr. D. Colo. 1984)(prayer for damages raised by counterclaim); *In re* Laclede Cab Co., 76 B.R. 687 (Bankr. E.D. Mo. 1987)(answer requested dismissal of petition together with an award of actual and punitive damages and attorneys fees and costs under § 303(i)).

303. *See* PROSSER & KEETON, *supra* note 252, at 888; Note, *Groundless Litigation*, *supra* note 278, at 1220 n. 15 ("No case has held that the expense of the malicious prosecution action itself is recoverable.").
304. *See supra* text accompanying note 278.
305. One of the problems under the former Bankruptcy Act was that damages recoverable upon the dismissal of an involuntary petition were limited to losses attributable to the seizure or detention of the debtor's property. Bankruptcy Act § 69b, discussed *supra* note 12.
306. The bankruptcy court's decision in Emerald City Records, Inc. v. First Media Corp. (*In re* Emerald City records, Inc.), 9 B.R. 319 (Bankr. N.D. Ga. 1981) illustrates the problem in reverse. In that case, the petitioning creditors removed a state court action for malicious use of process to the bankruptcy court which had earlier dismissed their petition but retained jurisdiction to hear and decide the debtor's motion for damages under § 303(i). The debtor sought remand to the state court of its common law claim on jurisdictional grounds. Although the bankruptcy court concluded that it had concurrent subject matter jurisdiction to determine the debtor's claim, it nevertheless remanded the matter because the state court action involved at least four parties who had not been parties to the trial on the involuntary bankruptcy petition. *Id.* at 321. Citing equitable considerations, the court reasoned that the rights of the non-parties should not be tied to the determination of a bankruptcy remedy in which such parties had no part. *Id.*

On a more intangible but still very real level, there is an additional factor that augurs in favor of this formulation of the bad faith provision. The relatively easy availability of a self-contained remedy for malicious prosecution may be sufficiently appealing so as to overcome the psychological inertia that, deprived of such an alternative, might be enough to discourage an aggrieved debtor from going to the trouble to file a subsequent action in state court for the improper prosecution of an involuntary bankruptcy case.[307] Correspondingly, because the bad faith claim is heard by the same judge who heard the merits of the petition, the delay, expense, and related inefficiencies associated with a new action in a different court are all eliminated. Particularly in a complicated case, this may translate into dramatic savings in terms of cost and time.

As can be seen, adoption of this proposal for defining the nature and scope of the bad faith proscription in section 303(i)(2) would not operate to obstruct the path to relief for the debtor victimized by an ill-founded and hostile bankruptcy filing. Because of the potentially devastating consequences that the filing of the petition alone can have on the debtor's business and financial affairs, the reasons for doing so are clear and just. On the other hand, when the petition is supported by proper grounds as detailed in the statute, or the petitioning creditors cannot be shown to have acted other than for the purpose of compelling payment of their debts, no issue of liability for damages under section 303(i)(2) should arise. The risk of having to endure a suit that turns out to be without merit is a natural incident of a system which not only permits but affirmatively prizes free and open access to justice under law. This policy applies no less to bankruptcy than any other form of relief for which the machinery of justice might be invoked. Thus, this proposal to conceive of bad faith under section

307. While concerns over the increasing misuse and overuse of the litigation process by our "litigation-crazed" society are regularly, earnestly, and sometimes even loudly voiced (see *supra* note 79 and accompanying text), in reality, the prospect of becoming a party to a lawsuit remains a daunting and intimidating one for most people. Enough so, in fact, as to dissuade individuals in many instances to "turn the other cheek" on plainly meritorious claims. Even business parties, perhaps less cowed at the prospect of litigation in general, still have to consider the cost, dislocations, and preoccupation of executive time as well as the risk of an adverse result in deciding whether to pursue or abandon a claim. Whatever the reason, I think it is less likely that a claim will be brought, irrespective of its merits, if to do so entails summoning the economic resources and mental energy involved in starting from scratch as opposed to filing a simple application in an existing proceeding in which the debtor is not only already embroiled but has already proved successful. I acknowledge that this is largely an impression on my part and that there is no empirical evidence, at least of which I am aware, to support this proposition. However, based on my own experience and common sense observations about human nature, I am nevertheless convinced it is true.

303(i)(2) as a remedy for the malicious misuse of process is also a proposal to limit its application commensurately.

To suggest, as I have, that a logical corollary of a democratic legal system must be that recourse to judicial process, even when unwarranted, cannot itself become the basis for a cognizable cause of action is not to belittle or underplay very real concerns that have been expressed from time to time over the assertion of frivolous claims and employment of objectionable litigation practices. I simply wish to point out that those concerns are either already adequately addressed through existing cost-distribution mechanisms such as Rule 11,[308] or, if not adequately addressed, must be controlled by the development of new deterrents designed to respond to the particular exigencies at issue.[309] In the case of involuntary bankruptcy in particular, the provi-

308. Other examples include 28 U.S.C. § 1927 (1988)(*supra* note 73); FED. R. APP. P. 38 (authorizing the award of just damages and up to double costs for a frivolous appeal); and the inherent equitable power of the courts to require a non-prevailing party to pay its adversary's costs of defense when the losing party has acted vexatiously or in bad faith. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975). *See also* "Equal Access to Justice Act," Pub. L. No. 96-481, 94 Stat. 2325 (1980), (codified as amended at 5 U.S.C. § 504 and 28 U.S.C. § 68 (1988))(permitting prevailing parties to obtain award of attorneys fees and other expenses against the United States in certain administrative proceedings and judicial actions).

309. As a matter of documented fact, much of the development of the law in the twentieth century has been in response to perceived inequities in access to the legal system and the ability of parties with vastly superior information and resources to exploit their advantage at the expense of others less able to protect and fend for themselves. Post-World War II enactment of major civil rights, consumer protection, and other regulatory and social legislation represents perhaps the most vivid examples of this trend. Closer, however, to a purer commercial law setting, certainly the basic precepts of contract law, as formulated during the halcyon days of classical liberalism in the mid-nineteenth century, have been radically altered and transformed as the social and economic assumptions upon which they were based became more and more strained by the growing complexity and interdependence of twentieth century society. *See generally* GRANT GILMORE, THE DEATH OF CONTRACT 95-96 (1974); KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT, 217-326 (1990). For discussion of the pressures of modern society which have spawned more egalitarian theories of social justice, see Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L REV. 877 (1976).

While regulation of the assertion of spurious and abusive claims is an important goal which, justifiably, receives considerable attention from courts, legislatures, commentators, and the popular press, there is another side to the coin. Any remedy designed to deter improper litigation practices, no matter how carefully crafted, will inevitably have some spillover effect on claims which, if filed, would do no violence to the principles sought to be preserved by the deterrent measure. It is against the backdrop of a need to ensure that honest claimants will not fear to seek legal redress from the courts that the adoption and interpretation of rules aimed at controlling busy dockets or abusive practices must be considered. *See generally* Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 935, 943 (1991)(Steven, J., dissenting); Dow Chemical Pacific Ltd. v.

sion in section 303(i)(1) for a wholly discretionary award of costs and attorneys fees without any showing of bad faith provides considerable protection against creditors who otherwise might haphazardly or heedlessly gamble on bankruptcy relief.[310] However, unless the debtor can go the next step and show a misuse of the system undertaken for the specific purpose of causing the debtor direct pecuniary injury or personal humiliation (be it in the form of loss of business advantage or opportunity, interference with contractual relationship, denial of credit, reputational damage, etc.), the mere unsuccessful attempt to use the bankruptcy process for one's own advantage should not alone be enough to subject the creditor to affirmative liability for such damages.

The standards of bad faith that have evolved under section 303(i)(2) have raised the stakes too high for honest as well as dishonest creditors in most cases to run the risk of an involuntary filing; possibly even more so for the former than the latter who, as a group, may be more risk averse. Whether acting out of solicitude for potential victims of ill-founded filings or a concern for protecting the integrity of the system, courts have exhibited an unwise tendency to think of the bad faith provision in section 303 as a broad prophylactic remedy for cleansing the system of all forms of unwanted behavior. Necessarily, this has contributed to the devitalization of involuntary proceedings as a meaningful part of the federal bankruptcy system.[311] This has happened in spite of the long history and persistent inclusion in every American bankruptcy statute of a provision for involuntary filings,[312]

Rascator Maritime S.A., 782 F.2d 329, 344 (2d Cir. 1986)("To ensure . . . that fear of an award of attorneys' fees against them will not deter persons with colorable claims from pursuing those claims," the courts have interpreted the bad faith exception to the "American Rule" on attorneys fees restrictively); *supra* notes 252 & 308.

310. Although Bankruptcy Rule 9011 is not purely a fee shifting statute in the sense that the non-prevailing party must pay all costs of suit, no such limitation constrains the bankruptcy court's exercise of discretion under § 303(i)(1) following dismissal of an involuntary petition. *See supra* note 92 and accompanying text. The only apparent limitation on an award of attorneys fees in an involuntary case is a requirement of reasonableness. *See, e.g., In re* Fox Island Square Partnership, 106 B.R. 962, 970 (Bankr. N.D. Ill. 1989).

311. Also raising the stakes for creditors contemplating an involuntary filing was the 1984 Act's amendment of § 303(b) & (h) to exclude the holders of debts subject to bona fide dispute from, respectively, the pool of creditors eligible to invoke the bankruptcy court's jurisdiction and the calculous of whether the debtor was generally paying its debts at the time of the filing. *See supra* notes 15-19 and accompanying text. Since the bona fides of a dispute, and sometimes even the existence of a dispute, cannot always be predicted with certainty in advance of filing, these changes, particularly when considered in light of the prospect for damages under § 303(i) should the petition fail, could be expected to make any prudent creditor far less than sanguine about seeking relief in bankruptcy, and, in fact, that appears to be exactly what has happened since 1984. *See supra* note 20.

312. *See supra* note 1. *See also* Ponoroff, *supra* note 19, at 318 n. 16-19.

as well as the specific efforts made as part of the adoption of the Reform Act to free involuntary bankruptcy from the complexities and constraints that had accounted for the general lack of interest under the earlier Bankruptcy Act.[313]

Contrary to popular perception, bankruptcy law and policy are concerned with more than basic questions of debtor relief and protection. Bankruptcy is also a creditors' remedy, serving as an alternative system for debt adjustment and repayment, and as an instrument for overcoming economic uncertainty and disorder. Furthermore, particularly in the context of larger business debtors where there is no single individual to protect, bankruptcy provides the stage and the script for a drama in which a myriad of actors, each with a slightly different interest in the debtor-enterprise and each with a slightly different view for its future, can at least momentarily take center stage in order to be heard.[314] It is through the process of a bankruptcy administration that all of these interests are ordered eventually, compromised if necessary, and, when the system works, accommodated.[315]

In light of these considerations and the important role federal bankruptcy law plays in the commercial economy, it would be short-sighted to suppose that the administration of the debtor's assets in a bankruptcy proceeding should only occur when the debtor voluntarily elects to initiate the proceeding. Therefore, strained constructions of the involuntary bankruptcy statute that, by focusing on other goals of the system, throw the baby out with the bath water are detrimental not only to the persons who sign the petition and are directly affected by unnecessarily expansive interpretations of bad faith, but in the long run they are harmful as well to the larger social, political, and economic order. These concerns underscore why I believe that "bad faith," as that term is used in section 303(i)(2), should be defined by reference to the central tenets of malicious prosecution, and its appli-

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313. *See supra* notes 5-7 and accompanying text.

314. For discussion of a similar view about the nature of business reorganizations, see Korobkin, *supra* note 173, at 766 ("Bankruptcy law provides a forum in which the competing and various interests and values accompanying financial distress may be expressed and sometimes recognized."); Warren, *supra* note 155, at 777 ("I see bankruptcy as an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors.").

315. *See* Ponoroff & Knippenberg, *supra* note 128, at 966-67, describing the bankruptcy system as providing a forum in which a "broad range of competing concerns and interests can be factored into specific solutions which are unattainable (or attainable only at the cost of unacceptable delay) under applicable non-bankruptcy law and procedure." Empirical research likewise suggests that the actual pattern of distributions in large company cases does not follow the doctrinal rule of absolute priority to which creditors are entitled. *See* LoPucki & Whitford, *supra* note 155, at 179-83 (the authors attribute this dissonance to actual post-filing bargaining resulting in settlement agreements that deviate from the strict rule of absolute priority).

cation limited accordingly, rather than by the more generalized standards developed in other contexts to control systemic abuses or misuses of the process.

X. CONCLUSION

In this Article I have attempted to reformulate the test of bad faith in involuntary bankruptcy along lines analogous to those delineating the common law tort of malicious prosecution. There is, therefore, nothing particularly novel or unique in this reconceptualization of bad faith; in fact, the effort was surely more an exercise in retrenchment than one of bold, provocative advancement. Was the effort nevertheless worthwhile? I think so, for a couple of reasons. For one thing, the proposal I have put forward in this Article would, if adopted, serve to clarify the present ambiguity and confusion in the decisional law by replacing the current array of differing tests of bad faith with a single, coherent standard.

The need for such a standard is apparent, and not simply as a normative prescription. Courts have failed to take on with any precision of thought or analysis the question of what "bad faith" entails within the structure of Bankruptcy Code section 303, electing instead to defer to rules and standards developed in other contexts to serve other needs. For another thing, the narrow definition of bad faith I have offered for purposes of section 303(i)(2) achieves section 303(i)'s primary objective—protecting innocent debtors who are paying their debts from being bludgeoned to death by deliberate manipulation of the involuntary bankruptcy statute—without compromising other important interests in the process.

Principal among the positive attributes which flow from explicating the bad faith issue on its own terms, rather than in terms of the concerns regulating frivolous filings and the broader good faith doctrine in bankruptcy, is the maintenance of some semblance of balance between the risks and benefits which are the ineluctable components of any vigorous and vital system for involuntary bankruptcy. The ability to compel the debtor into bankruptcy is heady stuff. The potential for unintended consequences and misuse is unquestionably present. Yet, if the benefits of an alternative federal system of debt collection exist, they are produced equally whether the filing is voluntary or involuntary.

While the existence of the bankruptcy discharge can be relied upon to incent the individual, and particularly the consumer, debtor to consider the bankruptcy alternative when circumstances warrant, the same cannot be said for corporate and other business debtors.[316] It is

316. Corporations and other non-natural debtors do not receive a discharge in Chapter 7. 11 U.S.C. § 727(a)(1)(1988). Although the successful confirmation of a Chapter

especially in these circumstances that involuntary bankruptcy takes on added importance. It does so, moreover, whether one imagines bankruptcy solely as a more efficient method of debt collection or as a system designed to manage and distribute the broader consequences of business failure.

I have suggested that the bad faith injunction in section 303(i)(2) should be analyzed on its own terms and considering its own purposes. To support that conclusion, I have attempted to point out the inherent limitations and the illogic in either adopting the Bankruptcy Rule 9011 standard or applying the same method of analysis used to determine good faith in filing. Along the way, I have been led to ruminate whether other restrictions on the ability to initiate and sustain an involuntary bankruptcy proceeding make sense. In particular, it is not at all clear that bankruptcy policy requires restricting standing in involuntary cases to creditors alone. Ultimately, however, the answer to that question, must wait for another day. It calls for far more careful study than it has been given here and, in fairness, should be put forward in the form of a detailed proposal for amendment of the statute. Thus, there is still much work to be done.

As perhaps only an initial step, then, I have tried to make the case in this Article that the current approaches for defining bad faith under the statute as presently drafted are misdirected. As such, they have had an unfortunate chilling effect on an important instrument of debtor/creditor relations. The solution I have offered would not only eliminate this problem, but would do so by restoring the original balance that the drafters of the Bankruptcy Code, blissfully ignorant of a Bankruptcy Rule 9011 or an implied good faith filing requirement, had in mind when they swept away the dust of disuse that had settled upon the involuntary bankruptcy remedy. However, consistency with original intent is not the sole criterion in the process, nor is it the only objective of statutory interpretation. Therefore, I have also tried to

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11 plan does result in a broad discharge of all preconfirmation obligations, including those categories of debts listed in § 523(a). 11 U.S.C. § 1141(d)(1)(1988). Nevertheless, although reorganization in bankruptcy has unquestionably become more mainstream and acceptable for business debtors since the adoption of the Reform Act than had been the case under the Act, it is wise not to forget that any kind of bankruptcy still carries with it a stigma which most corporate managers would prefer to avoid if at all possible. *See* Rose-Ackerman, *supra* note 155, at 278-80. In their study of large corporate bankruptcies, LoPucki and Whitford found that forty of forty-three CEOs had lost their jobs by the time the reorganization plan was confirmed and that of the companies that sought relief under Chapter 11 over half ended up liquidating at least in part. *See id.* at 278 n. 3, 280 n. 9, citing from LYNN M. LOPUCKI & WILLIAM C. WHITFORD, PATTERNS IN THE BANKRUPTCY REORGANIZATION OF LARGE PUBLICLY HELD COMPANIES (AUGUST 1990)(materials presented for the Federal Judicial Center Seminar for Bankruptcy Judges). *See also* LoPucki & Whitford, *supra* note 155 (presenting findings and conclusions from the same study).

point out why the effort to restore this balance is justified and important based on compatibility with present and evolving bankruptcy policy. Neither concern for controlling the excesses occasionally encountered in employment of the involuntary bankruptcy remedy, nor the failure to carefully distinguish among the multiple meanings of good faith and bad faith, should be allowed to spoil that effort.