



**Bad Faith Bankruptcy Filings
(ECB230914-3B)**

**Thursday, September 14, 2023
2:55 p.m. – 3:55 p.m.**

**St. Clements Castle & Marina
Portland, CT**

CT Bar Institute, Inc.

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Table of Contents

Lawyers’ Principles of Professionalism..... 3

Faculty Biographies 6

Agenda..... 7

Bad Faith Bankruptcy Filings Presentation Materials 8

LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer's conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

Faculty Biographies

Eric Henzy

Eric Henzy is a shareholder and partner at Zeisler & Zeisler. He has extensive experience representing debtors, creditors' committees, secured and unsecured creditors and other parties in bankruptcy cases and out-of-court workouts.

Eric has appeared in bankruptcy courts around the country and has represented parties in a number of the first hedge fund insolvencies in the country. He has first-chair tried more than thirty contested matters and adversary proceedings to judgment.

Prior to joining Z&Z, Eric practiced in the bankruptcy group at Reid and Riege, P.C. in Hartford; and previously, at the New York firm Milbank, Tweed, Hadley and McCloy. He also served as law clerk to The Honorable Alan H. W. Shiff, United States Bankruptcy Judge for the District of Connecticut.

In 2018, Eric accepted an invitation to become a James T. Cooper Lifetime Fellow. The Fellows is a collection of the State's most outstanding lawyers, judges and teachers who devote their time and talent to sponsoring programs that address matters concerning the legal profession, the administration of justice, and the rule of law in society.

Kevin J. McEleney

Kevin McEleney is a shareholder at Updike, Kelly & Spellacy, P.C. and is Chair of the firm's Bankruptcy and Creditor's Rights Group. Mr. McEleney regularly represents secured and unsecured creditors in bankruptcy, workouts, foreclosures and replevins. Mr. McEleney also devotes a significant portion of his practice to representing commercial landlords and real estate developers regarding leasing issues, evictions and real estate disputes. Mr. McEleney is the current Vice Chair of the Connecticut Bar Association's Commercial Law and Bankruptcy Section and is the immediate Past President of the Hartford County Bar Association. Mr. McEleney attended the Loomis Chaffee School, obtained his B.S. in Economics from Boston College and graduated with high honors from the University of Connecticut School of Law.

Annecca Smith

Annecca Smith is an associate in Robinson+Cole LLP's Bankruptcy + Reorganizations Group. She concentrates her practice on bankruptcy and corporate restructuring matters. Annecca's work involves representation of debtors, creditors, and committees in Chapter 11 reorganizations and out-of-court workouts. Her experience in bankruptcy litigation includes the representation of personal injury claimant committees in mass tort bankruptcies seeking section 524(g) channeling injunctions. Annecca received her B.A. in Comparative Literature from Smith College and her J.D. from Washington University in St. Louis, where she was an Executive Editor on the *Washington University Law Review*.

Bad Faith Bankruptcy Filings (ECB230914-3B)

**2023 Connecticut Bankruptcy Conference
Saint Clements Castle and Marina
September 14, 2023
2:55 p.m. to 3:55 p.m.
Agenda**

Presenters:

Eric A. Henzy, Zeisler & Zeisler PC, Bridgeport

Kevin J. McEleney, Updike Kelly & Spellacy PC, Hartford

Annecca H. Smith, Robinson + Cole, Hartford

2:55 p.m. – 3:00 p.m.: Welcome and Introductions

3:00 p.m. – 3:15 p.m.: LTL Background and Overview – Annecca Smith

3:15 p.m. – 3:30 p.m.: Why Bad Faith Doesn't Exist – Eric Henzy

3:30 p.m. – 3:45 p.m.: The Importance of Bad Faith Dismissals – Kevin McEleney

3:45 p.m. – 3:55 p.m.: Q&A



BAD FAITH BANKRUPTCY FILINGS

6TH ANNUAL CONNECTICUT BANKRUPTCY CONFERENCE

SEPTEMBER 14, 2023

Eric A. Henzy, Zeisler & Zeisler PC

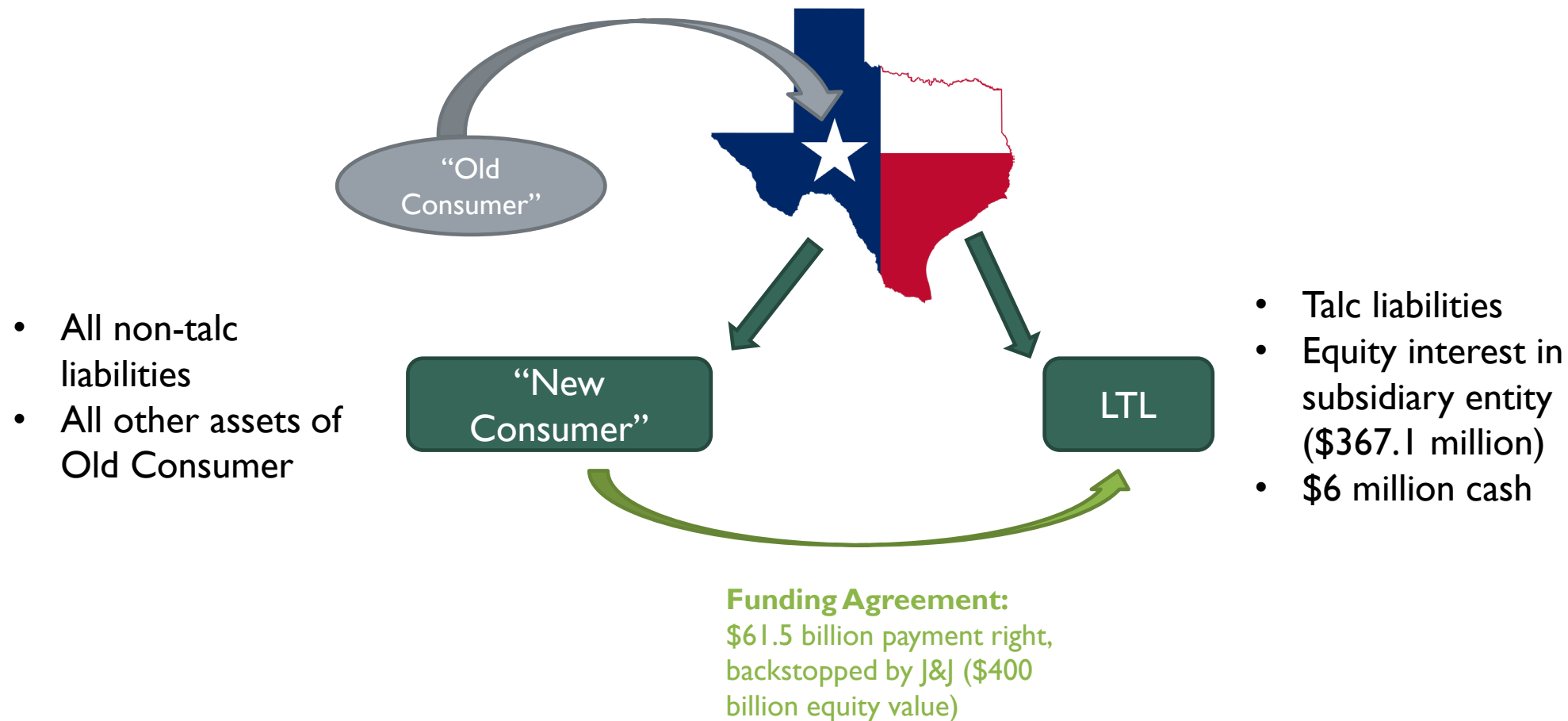
Kevin J. McEleney, Updike Kelly & Spellacy PC

Annecca H. Smith, Robinson+Cole LLP

LTL MANAGEMENT: AN OVERVIEW

- Johnson & Johnson Consumer Inc.—products include Band-Aid, Tylenol, Listerine, and Johnson’s Baby Powder
- 2010s: growing litigation based on ovarian cancer, mesothelioma, and other asbestos-linked diseases
- 2020: *Ingham* case and verdict
- June 2021: proposed settlement in *Imerys* bankruptcy for talc indemnification falls through
- October 12, 2021: Corporate Restructuring and “Texas Two-Step” Divisional Merger
- October 14, 2021: LTL bankruptcy petition filed (Western District of North Carolina)
- Subsequent preliminary injunction & transfer to New Jersey

ANATOMY OF A TWO-STEP



In re LTL Mgmt., LLC, 64 F.4th 84 (3d Cir. 2023) (“LTL 1.0”)

- Third Circuit requires “financial distress” to evidence “good faith.” *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 121 (3d Cir. 2004).
- Which entity’s financial state matters—LTL, Old Consumer, or both?
 - Legal error by Bankruptcy Court
- Projections of existing claims liability
 - Clear error by Bankruptcy Court
- Is *Ingham* an “anomaly” or a “harbinger”?
- No “unusual circumstances”

In re LTL Mgmt., LLC, No. 23-12825, 2023 WL 4851759 (Bankr. D.N.J. July 28, 2023) (“LTL 2.0”)

- Second filing: \$8.9 billion settlement supported by 17 law firms representing approximately 58,000 claimants
- Change in funding structure for LTL
 - HoldCo (formerly New Consumer) obligated for funding
 - J&J backstop applies **only to funding bankruptcy trust/plan consistent with term sheet**
- Central analysis: How “immediate” must financial distress be?
 - Debtor’s expert forecasts “wave of litigation” rebutted by Movants’ expert
 - “Freeze in litigation” presents “nearly the same record with respect to verdicts and costs as in LTL 1.0”

DISMISSAL FOR BAD FAITH

- **LTL at 100:**“Chapter 11 bankruptcy petitions are ‘subject to dismissal under 11 U.S.C. § 1112(b) unless filed in good faith.’ Section § 1112(b) provides for dismissal for ‘cause.’ A lack of good faith constitutes ‘cause,’ though it does not fall into one of the examples of cause specifically listed in the statute. Because the Code neither sets nor bars explicitly a good faith requirement, we have grounded it in the ‘equitable nature of bankruptcy’ and the ‘purposes underlying Chapter 11.’”
- **Dismissal for bad faith is a judge-made doctrine.** *In re General Growth Properties*, 409 B.R. 43, 55-56 (Bankr. S.D.N.Y. 2009) (“The principle that a Chapter 11 reorganization case can be dismissed as a bad faith filing is a judge-made doctrine.”); *1633 Broadway Mars Restaurant Corp. v. Paramount Group, Inc. (In re 1633 Broadway Mars Restaurant Corp.)*, 388 B.R. 490, 498 (Bankr. S.D.N.Y. 2008) (quoting *Carolin Corp. v. Miller*, 886 F.2d 693, 700 (4th Cir. 1989)) (“Neither in § 1112 nor in any other part of the Code is there a specific requirement that a filing be in ‘good faith.’ The doctrine has been developed by judges to ensure that the extraordinary powers and rights given to Chapter 11 debtors are not abused.”).

DISMISSAL FOR BAD FAITH

- **Basic principle of statutory construction that courts should not substitute their view for that of Congress by, among other things, adding to statutes.** *Bostock v. Clayton County*, 140 S.Ct. 1731, 1738 (2020) (“This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people’s representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.”); *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008) (“[I]t is not for us to substitute our view of ... policy for the legislation which has been passed by Congress.”); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (“We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.”); *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 188 (1994) (“Policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result so bizarre that Congress could not have intended it.”).

DISMISSAL FOR BAD FAITH

- **Second basic principle of statutory construction that omission in one section of statute of language found in another is intentional and purposeful.** *Hamdan v. Rumsfeld*, 548 U.S. 557, 577 (2006) (“A familiar principle of statutory construction ... is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (same); *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).
 - “Bad faith” appears in, among other Code provisions, 303(i), 348(f)(2), 707(b)(3)(A).
 - Requirement of good faith appears in, among other provisions of the Code, 109(c)(5)(B), 362(c)(3)(B), 363(m), 364(e), 1129(a)(3).
 - 921(c) expressly provides that a Chapter 9 petition may be dismissed “if the debtor did not file the petition in good faith.”

DISMISSAL FOR BAD FAITH

- **At the very least, dismissal based on bad faith grounds should be used with great caution and care.** *Carolin Corp. v. Miller*, 886 F.2d 693, 700 (4th Cir. 1989) (power to dismiss based on bad faith “to be exercised with great care and caution. Decisions denying access at the very portals of bankruptcy, before an ongoing proceeding has even begun to develop the total shape of the debtor’s situation, are inherently drastic and not lightly to be made. Considering dismissal at this point, a court must keep in mind that creditors who become entangled in hopeless Chapter 11 cases ... have remedies of relief from stay, adequate protection, and dismissal or conversion based on the enumerated grounds in 11 U.S.C. § 1112(b). Dismissal on grounds of bad faith should not be judicially employed as an easy alternative to other post-petition creditor remedies, thereby subverting the reorganization and confirmation scheme of the Code.”); *In re General Growth Properties*, 409 B.R. at 56 (“Case law recognizes that a bankruptcy petition should be dismissed for lack of good faith only sparingly and with great caution.”); *In re 1633 Broadway Mars Restaurant Corp.*, 388 B.R. 490, 498 (“There is no question that the power to dismiss on bad faith grounds should be used with great care and caution.”).

DEFINING BAD FAITH

- **LTL at 100-01:**“Though a debtor’s subjective intent may be relevant, good faith falls more on an objective analysis of whether the debtor has sought to step outside the equitable limitations of Chapter 11. Two inquiries ... are particularly relevant [in determining good faith]: (1) whether the petition serves a valid bankruptcy purpose; and (2) whether [it] is filed merely to obtain a tactical litigation advantage. Valid bankruptcy purposes include preserving a going concern or maximiz[ing] the value of the debtor’s estate. Further, a valid bankruptcy purpose assumes a debtor in financial distress. ... The theme is clear: absent financial distress, there is no reason for Chapter 11 and no valid bankruptcy purpose.” (quotation marks and citations omitted).
- **Supreme Court has rejected notion that Chapter 11 has a single purpose.** *Piccadilly Cafeterias, Inc.*, 554 U.S. at 51 (“This Court has rejected the notion that Congress had a single purpose in enacting Chapter 11.”); *Toibb v. Radloff*, 501 U.S. 157, 163 (1991) (“[I]t is said that bringing a consumer debtor within the scope of Chapter 11 does not serve Congress’ purpose of permitting business debtors to reorganize and restructure their debts in order to revive the debtors’ businesses and thereby preserve jobs and protect investors. This argument assumes that Congress had a single purpose in enacting Chapter 11. Petitioner suggests, however, and we agree, that Chapter 11 also embodies the general Code policy of maximizing the value of the bankruptcy estate.”).
- **Basic definition of “bad faith.”**
 - Black’s Law Dictionary:“The opposite of ‘good faith,’ generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.”

DEFINING BAD FAITH

- *Marrama v. Citizens Bank*, 549 U.S. 365, 373-74 (2007) (“[A] ruling that an individual’s Chapter 13 case should be dismissed or converted because of pre-petition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 case, is tantamount to a ruling that individual does not qualify as a debtor under Chapter 13.”).
- **“Financial distress” does not appear in § 109(d) or Code.** See basic principle of statutory construction #1 above.
- **“Insolvent” is defined at § 101(32) and appears in a number of places in the Code, does not appear in 109(d).** See basic principle of statutory construction #2 above.
 - § 109(c)—municipality must be insolvent.

DEFINING BAD FAITH

- 4th Circuit test: complaining party must show both “subjective bad faith” and the “objective futility of any possible reorganization.” *Carolin Corp. v. Miller*, 886 F.2d 693, 694 (4th Cir. 1989).
- 2nd Circuit cases establish objective *and* subjective tests:
 - *In re General Growth Properties*, 409 B.R. at 56.
 - “The standard in this Circuit is that a bankruptcy petition will be dismissed if *both* objective futility of the reorganization process *and* subjective bad faith in the filing are found.” *In re Kingston Square Associates*, 214 B.R. 713, 725 (Bankr. S.D.N.Y. 1997) (emphasis in original).

TOIBB V. RADLOFF, 501 U.S. 157 (1991)

- 8th Circuit held that an individual nonbusiness debtor may not reorganize under Chapter 11.
- “In our view, the plain language of the Bankruptcy Code disposes of the question before us. ... The Code contains no ongoing business requirement for reorganization under Chapter 11, and we are loath to infer the exclusion of certain classes of debtors from the protection of Chapter 11, because Congress took care in § 109 to specify who qualifies—and who does not qualify—as a debtor under various chapters of the Code. ... Congress knew how to restrict recourse to the avenues of bankruptcy relief; it did not place Chapter 11 reorganization beyond the reach of a nonbusiness individual debtor.”
- “The amicus curiae in support of the Court of Appeals’ judgment acknowledges that Chapter 11 does not expressly exclude an individual nonbusiness debtor from its reach. He echoes the reasoning of those courts that have engrafted an ongoing-business requirement onto the plain language of § 109(d) and argues that the legislative history and structure make clear that Chapter 11 was intended for business debtors alone. ... We find these arguments unpersuasive for several reasons. First, this Court has repeated with some frequency: ‘Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.’ The language of § 109 is not unclear.”
- “Although the foregoing analysis is dispositive of the question presented, we deal briefly with amicus’ contention that policy considerations underlying the Code support inferring a congressional intent to preclude a nonbusiness debtor from reorganizing under Chapter 11. First, it is said that bringing a consumer debtor within the scope of Chapter 11 does not serve Congress’ purpose of permitting business debtors to reorganize and restructure their debts in order to revive the debtors’ businesses and thereby preserve jobs and protect investors. This argument assumes that Congress has a single purpose in enacting Chapter 11. Petitioner suggests, however, and we agree, that Chapter 11 also embodies the general Code policy of maximizing the value of the bankruptcy estate.

CONCERNS

- Motions to dismiss as tactics.
- Amorphous standard—must be apparent and “immediate enough” to justify filing—no specific test, bankruptcy courts will know it when they see it.
- Chill filings based on damage from failed filing.
- Concern re D&O liability.
- “Too broke to file bankruptcy.”

1112(b) DOES NOT LIMIT DEFINITION OF “CAUSE”

- While 1112(b) lists numerous examples of “cause”, “[i]t is well established that this list is not exhaustive. *In re Aearo Techs. LLC*, No. 22-02890, 2023 WL 3938436, at *9 (Bankr. S.D. Ind. June 9, 2023).
- The term “cause” is intentionally broad in the Bankruptcy Code. While examples of cause may be enumerated, nowhere does the Code define cause, necessarily implying a broad and flexible use as this term applies to a wide variety of circumstances. See, e.g., 11 U.S.C. §§ 107, 109, 303, 324, 341, 345, 348, 349, 350, 362, 363, 365, 502, 503, 505, 521, 524, 557, 930, 1102, 1104, 1121, 1141, 1202, 1204, 1208, 1221, 1224, 1307, 1322.

WHAT DOES “BAD FAITH” MEAN UNDER 1112(b)?

- 1112(b) does not explicitly define a “good faith” requirement, but it may be helpful to think of that term as a short-hand summary for a category of “cause” where there is no possibility of reorganization or there is some other improper objective for the filing.
- “The use of the term ‘bad faith’ in many cases is unfortunate. It carries with it a connotation that someone had a sinister purpose and has subjectively attempted to abuse the bankruptcy process...” A finding of malevolent intent or other similar subjective conduct are not required to establish a lack of good faith. Rather, the determination rests on whether a debtor’s filing is an effort to “*unreasonably deter* [or attempts to] harass creditors... [rather than] an attempt to effect a speedy, efficient reorganization on a feasible basis.” *Matter of Obstetric & Gynecologic Assoc. of Iowa City & Coralville, P.C.*, 365 B.R. 1, 5-6 (Bankr. S.D. Iowa 2023) (internal cites omitted).

GOOD FAITH REQUIREMENT HAS LONG BEEN RECOGNIZED

- Good faith requirement has been generally recognized across the country for decades:
 - *In re C-TC 9th Avenue P'ship*, 113 F.3d 1304 (2d Cir. 1997).
 - *In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999).
 - *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989).
 - *Mater of Little Creek Dev. Co.*, 779 F.2d 1068 (5th Cir. 1986).
 - *In re Trident Assocs. Ltd. P'ship*, 52 F.3d 127 (6th Cir. 1995).
 - *In re Cedar Shore Resort, Inc.*, 235 F.3d 375 (8th Cir. 2000).
 - *In re Marsch*, 36 F.3d 825 (9th Cir. 1994).
 - *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393 (11th Cir. 1988).

SECOND CIRCUIT FACTORS FROM *IN RE C-TC*

- Second Circuit factors outlined in *In re C-TC 9th Ave. P'ship*, 113 F.3d 1304 (2d Cir 1997).
 - (1) The Debtor has only one asset;
 - (2) The Debtor has few unsecured creditors whose claims are small in relation to those of the secured creditors;
 - (3) The Debtor's one asset is the subject of a foreclosure action as a result of arrearages or default on the debt;
 - (4) The Debtor's financial condition is, in essence, a two party dispute between the debtor and secured creditors which can be resolved in the pending state foreclosure action;
 - (5) The timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights;
 - (6) The Debtor has little or no cash flow;
 - (7) The Debtor can't meet current expenses including payment of personal property and real estate taxes; and
 - (8) The Debtor has no employees.

EXAMPLES OF BAD FAITH

- Filing to delay inevitable foreclosure sale. *In re Bendig*, 74 B.R. Bankr. D. Conn 1987) (Krechevsky, J.).
- Insurance company paid Debtor's legal fees to file Chapter 11 without a feasible path to reorganization primarily to argue that automatic stay prevented insurer from turning over insurance policy proceeds to tort plaintiff w/ judgment. *Matter of Obstetric Gynecologic Assoc. of Iowa City & Coralville, P.C.*, NO. 22-01174-als11, 651 B.R. 1 (Bankr. S.D. Iowa 2023).
- Filing to prevent ejectment after Debtor lost title in foreclosure?
- SPE Filing without any bona fide creditors day before expiration of Purchase and Sale Agreement?

RECENT EXAMPLES IN MASS TORTS

- *In re LTL Mgmt., LLC*, 64 4th Cir. 84 (3rd Cir. 2023).
 - Underlying Bankruptcy Court reasoned that bankruptcy courts offer a unique ability to manage mass tort claims.
 - Third Circuit rejected the conclusion that potential benefits of bankruptcy outweigh good faith requirements.
- Recent similar case in *In re Aearo Tech. LLC*, No. 22-02890-JJG-11, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023).
 - Aearo faced mass torts for ineffective earplugs.
 - Parent company 3M explored bankruptcy for Aearo, making a commitment to fund up to \$1.24 billion for claims and expenses.
 - Court found while Aearo was a “real” company with “real” debts (not a Texas two-step), Aearo was financially healthy considering 3M financial commitment – case dismissed.
- **But see** - *In re Bestwall LLC*, 71 F.4th 168 (4th Cir. 2023).
 - Georgia Pacific did a Texas two-step to avoid asbestos liability.
 - Fourth Circuit upheld entry of an injunction preventing asbestos claims from proceeding against Georgia Pacific (no bad faith).
- **And** - *In re AIG Financial Products Corp*, 651 B.R. 463 (Bankr. D. Del 2023).
 - AIG entered into general guarantee agreement with Debtor subsidiary.
 - Court denied MTD for bad faith because Debtor was insolvent and guarantee did not apply to specific plaintiffs’ claims

POLICY AND STRATEGY CONSIDERATIONS

- Details of a Texas Two-Step are critical.
 - How is indemnification structured?
 - Where will bankruptcy be filed?
- Bad faith standards in divisive mergers will continue to evolve.
- Availability of a bad faith MTD as a tool for creditors does not dictate outcome of the case, it simply allows for these issues to be addressed early without delay (particularly when bad faith reason for filing is delay).
- There seems to be a substantial overlap with “cause” to dismiss a case under 1112(b) and “cause” to obtain relief from stay under 362(d)(1), often these motions overlap.