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Let's Ask for Sanctions! (But What Kind?)

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Courts might issue sanctions pursuant to statute, rule of procedure or inherent power, but keep in mind the American Rule: Each party bears its own attorneys' fees and litigation expenses, and attorneys' fees are not ordinarily among the costs that a prevailing party might recover. Courts employ narrow exceptions when imposing sanctions, which might properly have a punitive aspect and compensatory effect.[1] This article will review 28 U.S.C. § 1927, Rule 9011 of the Federal Rules of Bankruptcy Procedure, the inherent-power doctrine and 11 U.S.C. § 105.

Section 1927

Section 1927 provides that "[a]ny attorney or person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[2] The language of the statute is brief and not specific, but the conduct that it targets is broad. It aims to discourage dilatory litigation practices and advocacy designed to burden the opponent without chilling aggressive litigation and good-faith assertions of colorable claims.[3]

Courts are divided on whether bankruptcy courts have jurisdiction to award sanctions under 28 U.S.C. § 1927.[4] The Ninth,[5] Tenth[6] and Eleventh[7] Circuits have held that bankruptcy courts are not "courts" under 28 U.S.C. § 451 and have no authority to sanction or grant other relief under title 28. The Second,[8] Third,[9] Sixth[10] and Seventh[11] Circuits have found that bankruptcy courts have the authority to issue sanctions under § 1927. The Second and Seventh Circuit holdings have implicitly found that a bankruptcy court is a "court of the United States."[12] In an unpublished decision, the Fourth Circuit affirmed a bankruptcy court's imposition of sanctions under § 1927.[13]

The Third Circuit reasons that bankruptcy courts are units of the district court and thus are "courts of the United States" that derive their jurisdiction from 28 U.S.C. § 157(a): the section that grants a district court permission to refer bankruptcy matters to bankruptcy courts. A further division exists over whether a court may impose liability on law firms as a whole, in addition to an individual attorney within the firm under § 1927.[14] The First,[15] Second,[16] Third,[17] Eighth,[18] Eleventh[19] and District of Columbia[20] Circuits authorize the imposition of sanctions against a law firm.[21] Meanwhile, the Ninth,[22] Seventh[23] and Sixth[24] Circuits do not sanction law firms pursuant to § 1927 for the conduct of the firms' attorneys. The Fourth Circuit has not taken a definite position, but has expressed that it was "doubtful" that the sanction theory would "support sanctions against an entire firm rather than against the individual lawyer who acted improperly."[25]

Rule 9011

Bankruptcy Rule 9011 provides for the imposition of sanctions against persons who present a pleading for an "improper purpose, such as to harass or to

1 *See Chambers v. NASCO Inc.*, 501 U.S. 32, 45, 53 (1991).
2 28 U.S.C. § 1927.
3 *Matter of Capitol-York Constr. Corp.*, 52 B.R. 317, 321 (S.D.N.Y. 1985) (citing *Piljan v. Michigan Dep't of Soc. Servs.*, 585 F. Supp. 1579, 1583 (E.D. Mich. 1984); *Lipsig v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 180-81 (D.C. Cir. 1980)).
4 *MJS Las Croabas Props. Inc.*, 545 B.R. 401, 418 (B.A.P. 1st Cir. 2016) (recognizing division among courts).
5 *Perroton v. Gray (In re Perroton)*, 958 F.2d 889, 893-96 (9th Cir. 1992).
6 *Jones v. Bank of Santa Fe (In re Courtesy Inns Ltd. Inc.)*, 40 F.3d 1084, 1086 (10th Cir. 1994).
7 *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1139-40 (11th Cir. 1990).
8 *Baker v. Latham Sparrowbush Assoc. (In re Cohoes Indus. Terminal Inc.)*, 931 F.2d 222, 230 (2d Cir. 1991).
9 *In re Schaefer Salt Recovery Inc.*, 542 F.3d 90, 105 (3d Cir. 2008).
10 *Maloof v. Level Propane Gasses Inc.*, 316 Fed. App'x. 373, 376 (6th Cir. 2008).
11 *In re Volpert*, 110 F.3d 494, 501 (7th Cir. 1997).
12 *See In re Cohoes Indus. Terminal Inc.*, 931 F.2d at 230 (affirming bankruptcy court's imposition of § 1927 sanctions with no discussion of jurisdiction); *Adair v. Sherman*, 230 F.3d 890, 895, n.8 (7th Cir. 2000) (stating that bankruptcy courts have authority to sanction attorneys without discussing jurisdiction).
13 *Mitchell v. Sonies*, 56 F.3d 61, at *1 (4th Cir. 1995) (citing *U.S. v. Guariglia*, 96 F.2d 160, 163 (2d Cir. 1992) (for proposition that bankruptcy court is unit of district court)).
14 *Castellanos Grp. Law Firm LLC v. FDIC (MJS Las Croabas Props. Inc.)*, 545 B.R. 401, 420 (B.A.P. 1st Cir. 2016) (recognizing division among courts).
15 *Id.*
16 *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 147 (2d Cir. 2012).
17 *Baker Indus. Inc. v. Cerberus Ltd.*, 764 F.2d 204, 212 (3d Cir. 1985).
18 *Lee v. First Lenders Ins. Servs. Inc.*, 236 F.3d 443, 445 (8th Cir. 2001).
19 *Smith v. Grand Bank & Trust of Fla.*, 193 Fed. App'x. 833, 838 (11th Cir. 2006).
20 *LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 907 (D.C. Cir. 1998).
21 *See Brignoli v. Balch Hardy & Scheinman Inc.*, 735 F. Supp. 100, 101-02 (S.D.N.Y. 1990) (explaining that statutory provision's reference to any attorney "or other person admitted to conduct cases" reflects legislative intent to regulate entities that "conduct cases" (a category into which law firms "naturally fall")).
22 *Kaass Law v. Wells Fargo Bank NA*, 799 F.3d 1290, 1295 (9th Cir. 2015) (explaining that if Congress had intended to permit federal courts to impose sanctions against law firms under § 1927, it would have included express authorization to do so).
23 *FM Indus. Inc. v. Citicorp Credit Servs. Inc.*, 614 F.3d 335, 340 (7th Cir. 2010) (emphasizing that liability under § 1927 is direct, not vicarious); *Claiborne v. Wisdom*, 414 F.3d 715, 723 (7th Cir. 2005) (iterating that only individual lawyers are admitted to practice, not law firms, and therefore declining to impose § 1927 liability on law firms).
24 *Rentz v. Dynasty Apparel Indus. Inc.*, 556 F.3d 389, 396, n.6 (6th Cir. 2009) (finding that § 1927 does not authorize imposition of sanctions on represented party, nor does it authorize imposition of sanctions on a law firm).
25 *Blue v. U.S. Dept. of Army*, 914 F.2d 525, 549 (4th Cir. 1990) (reversing order that required law firm to pay sanctions under § 1927, but declining to answer definitively whether law firms could be sanctioned under this power). *But see In re Ulmer*, 363 B.R. 777, 784 (Bankr. D.S.C. 2007) (finding that routine failure of individual attorney to appear for matters before court violated § 1927 and subjected her employer, a law firm, to sanctions, not discussing any case law regarding law firm liability under § 1927).

cause unnecessary delay or needless increase in the cost of litigation."[26] Its provisions are fairly lengthy and specific, and its scope is narrow: limited to pleadings, including petitions, pleadings, motions and other papers served or filed in a bankruptcy case for an improper purpose such as delay or harassment.[27] A bankruptcy court might impose sanctions on its own initiative, enter an order that describes the specific conduct that appears sanctionable, then direct the attorney, law firm or party to show cause why it has not violated the rule.[28]

Bankruptcy Rule 9011 imposes an objective standard of reasonable inquiry, which does not require a finding of bad faith as a prerequisite.[29] A court could sanction any attorney, law firm, or party that violates Rule 9011(b) or is responsible for the violation after providing notice and a reasonable opportunity to respond.[30]

Rule 9011 sets forth a two-pronged objective test for determining whether sanctions should be imposed.[31] First, the "frivolous" prong of the test requires that a paper be filed or served only after a reasonable inquiry into the facts and existing law.[32] Before filing a document, the party or attorney doing the filing must make a reasonable investigation into the facts and law to determine whether there is a basis for filing the particular document.[33] A reviewing court will resolve any ambiguity in favor of the filing party when examining whether a filing is frivolous.[34]

Second, under the "improper-purpose" prong, a court reviews whether a document has been filed or served for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of the litigation or administration of the case.[35] An improper purpose might be inferred when the effect of a pleading or motion is to delay the proceedings.[36] Similarly, an improper purpose might be found when a pleading, motion or other paper has been filed in the context of a persistent pattern of clearly abusive litigation.[37]

A court might award the prevailing party reasonable expenses and attorneys' fees that have been incurred in making or opposing the Rule 9011 motion for sanctions. However, the award of fees and expenses is not automatic; the court "may" make such an award if warranted.[38] The sanction must be limited to what is sufficient in order to deter the repetition of such conduct by others similarly situated.[39]

Before imposing sanctions, the parties and attorneys must receive proper notice and a reasonable opportunity to respond.[40] A court will consider the sanctionable conduct and the offending party's ability to pay.[41] Monetary sanctions ordinarily consist of an order to pay a penalty into court.[42] Rule 9011 also includes safe-harbor provisions, which explicitly restrict the imposition of sanctions; a party cannot file or submit a motion for sanctions if the challenged paper, claim, defense, contention or denial is withdrawn or corrected within 21 days after service of the motion for sanctions on the offending party.[43]

Inherent Powers and § 105

The inherent powers of federal courts are those "necessary to the exercise of all others."[44] Courts are universally acknowledged to be vested by their very creation with the power to impose silence, respect and decorum in their presence, and submission to their lawful mandates.[45] These powers are governed not by rule or statute but by the control that has been necessarily vested in the courts to manage their own affairs in order to achieve the orderly and expeditious disposition of cases.[46]

The most prominent of these inherent powers — the contempt sanction, which "a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court"[47] — is a power that reaches both conduct before the court and conduct beyond the court's confines because the court's underlying concern includes not only the disruption of court proceedings but also disobedience to judicial orders, regardless of whether the disobedience interfered with the conduct of trial.[48] Inherent powers must be exercised with restraint and discretion because they are shielded from direct democratic controls.[49] In narrowly defined circumstances, federal courts have an inherent power to assess attorneys' fees against counsel.[50]

Section 105 of the Bankruptcy Code provides that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the [Bankruptcy Code]," and the court may "*sua sponte* tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."[51] The U.S. Bankruptcy Court for the District of Delaware recently imposed sanctions against a liquidating trust for its failure to comply with a final fee order related to the compensation of an estate tax services professional.[52] In so holding, it emphasized that civil sanctions serve two fundamental purposes — "to coerce the

26 Fed. R. Bankr. P. 9011(b)(1). In most respects, Rule 9011 is a twin of Rule 11 of the Federal Rules of Civil Procedure, tweaked for the bankruptcy setting, and acts as the equivalent sanctions rule under the Bankruptcy Code. *In re Schaefer Salt Recovery Inc.*, 542 F.3d 90, 99 (3d Cir. 2008) (citing *Stuebben v. Gioioso (In re Gioioso)*, 979 F.2d 956, 960 (3d Cir. 1992)).
27 *See* Fed. R. Bankr. P. 9011(a); *In re Cohoes Indus. Terminal Inc.*, 931 F.2d at 227.
28 *See* Fed. R. Bankr. P. 9011(c)(1)(B); *In re Sanford*, 403 B.R. 831, 839 (Bankr. D. Nev. 2009).
29 *Bus. Guides Inc. v. Chromatic Commc'n Enters. Inc.*, 498 U.S. 533, 549 (1991) (interpreting Rule 11).
30 Fed. R. Bankr. P. 9011(c).
31 *Bus. Guides Inc.*, 498 U.S. at 549; *Smyth v. City of Oakland (In re Ralbert Rallington Brooks-Hamilton)*, 329 B.R. 270, 283 (B.A.P. 9th Cir. 2005) ("In considering sanctions under Rule 9011, the court measures the attorney's conduct 'objectively against a reasonableness standard, which consists of a competent attorney admitted to practice before the involved court.'").
32 *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 829 (2d Cir. 1992); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1991); *Cruz v. Savage*, 896 F.2d 626, 630 (1st Cir. 1990); *In re Ralbert Rallington Brooks-Hamilton*, 329 B.R. at 283.
33 *In re Taylor*, 655 F.3d 274, 283-84 (3d Cir. 2011) (defining "reasonableness" as objective knowledge or belief at time of filing of challenged paper that claim was well grounded in law and fact).
34 *See Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986).
35 *Smith v. Nat'l Health Care Servs.*, 934 F.2d 95, 96, 98-99 (7th Cir. 1991).
36 *See Lieb v. Topston Indus. Inc.*, 788 F.2d 151, 157 (3d Cir. 1986); *Zaldivar v. Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986); *In re Dental Profile Inc.*, 446 B.R. 885, 900 (Bankr. N.D. Ill. 2011).
37 *Aetna Life Ins. Co. v. Alla Med. Servs. Inc.*, 855 F.2d 1470, 1476 (9th Cir. 1988).
38 10 *Collier on Bankruptcy* ¶ 9011.08[3], 9011-22-3 (Alan N. Resnick and Henry J. Sommer eds, 16th ed. 2017).
39 Fed. R. Bankr. P. 9011(c)(2).
40 *See* Fed. R. Bankr. P. 9011(c).
41 *Krim v. First City Bancorporation of Tex. Inc. (In re First City Bancorporation of Tex. Inc.)*, 282 F.3d 864, 866-67 (5th Cir. 2002); *Runfola & Assocs. Inc. v. Spectrum Reporting II Inc.*, 88 F.3d 368, 375 (6th Cir. 1996).
42 10 *Collier on Bankruptcy* at ¶ 9011.08 [2].
43 Fed. R. Civ. P. 11(c)(2); Fed. R. Bankr. P. 2011(c)(1).
44 *Roadway Exp. Inc. v. Piper*, 447 U.S. 752, 764 (1980) (quoting *U.S. v. Hudson*, 11 U.S. 32 (1812)).
45 *Chambers v. NASCO Inc.*, 501 U.S. 32, 43 (1991) (citing *Anderson v. Dunn*, 19 U.S. 204 (1821)).
46 *Chambers*, 501 U.S. at 43 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)).
47 *Roadway*, 447 U.S. at 764 (quoting *Cook v. U.S.*, 267 U.S. 517, 539 (1925)).
48 *Chambers*, 501 U.S. at 44 (citing *Young v. U.S.*, 481 U.S. 787, 798 (1987)).
49 *Roadway*, 447 U.S. at 764 (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450-51 (1911); *Green v. U.S.*, 356 U.S. 165, 193-94 (1958)).
50 *See Roadway*, 447 U.S. at 765.
51 11 U.S.C. § 105(a).
52 *See In re Washington Mut. Inc.*, No. 08-12229 (MFW), 2018 WL 704361, at *8 (Bankr. D. Del. Feb. 2, 2018).

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defendant into compliance with the court's order, and to compensate"[53] — and reminded that "[c]ivil sanctions are appropriate when (1) a valid order of the court exists, (2) the defendant has knowledge of the order, and (3) the defendant disobeys the order."[54]

Sanctions issued under the bankruptcy court's inherent powers require a finding of bad faith[55] and are appropriate when a party "shows bad faith by delaying or disrupting the litigation."[56] Bankruptcy courts, too, are imbued with inherent powers.[57] abi

53 *Id.* at *7 (quoting *U.S. v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947)); *see also Burtch v. Masiz (In re Vaso Active Pharm. Inc.)*, 514 B.R. 416, 422 (Bankr. D. Del. 2014).
54 *Id.* at *8 (citing *Marshak v. Treadwell*, 595 F.3d 478, 485 (3d Cir. 2009)).
55 *Runfola & Assoc. v. Spectrum Reporting II*, 88 F.3d 368, 375 (6th Cir. 1996).
56 *Chambers*, 501 U.S. at 46 (citing *Hutto v. Finney*, 437 U.S. 678, 689, n.14 (1978)).
57 *Mapother & Maphother PSC v. Cooper (In re Downs)*, 103 F.3d 472, 477 (6th Cir. 1996).