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OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)
MAPLE-WHITWORTH, INC.,)
Alleged Debtor.)
_____)
MICHAEL N. SOFRIS, APC,)
Appellant.)
v.)
MAPLE-WHITWORTH, INC.; UNITED)
STATES TRUSTEE; ROXANNE KAMEL;)
LARRY WEINSTOCK; EMANUEL)
PEREZ; MICA BINTU-BROWN,)
Appellees.)
_____)

BAP No. CC-06-1098-KNB
Bk. No. LA 04-32868 AA

O P I N I O N

Argued and Submitted on March 21, 2007
at Pasadena, California

Filed - September 4, 2007

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding.

Before: KLEIN, NIELSEN¹ and BRANDT, Bankruptcy Judges.

¹ George B. Nielsen, Jr., Bankruptcy Judge for the District
of Arizona, sitting by designation.

1 KLEIN, Bankruptcy Judge:

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3 The procedure to obtain attorney's fees and costs under 11
4 U.S.C. § 303(i) in a dismissed involuntary bankruptcy is in issue.

5 The question is whether one may seek such an award from fewer
6 than all petitioners, the answer to which necessitates determining
7 the nature of the liability. We conclude that § 303(i) liability
8 is joint and several, that a debtor need not join all petitioners
9 in a request for a § 303(i) award, and that, unless the court
10 makes a specific apportionment, a petitioner is entitled seek
11 contribution from other jointly and severally liable petitioners
12 who were not joined in the debtor's motion. Hence, we AFFIRM the
13 award of \$42,257 against fewer than all of the petitioning
14 creditors.

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FACTS

17 The former involuntary alleged debtor, Maple-Whitworth, Inc.,
18 owns an apartment building in Beverly Hills, California, as to
19 which two competing factions claimed corporate ownership and
20 control: the Marlowe-Shlush Faction and the Mayman-Nathan Faction.

21 While the details, the skullduggery, and the dramatis
22 personae are fascinating, all that matters for our purposes is
23 that the involuntary bankruptcy case was an intermission in state-
24 court litigation between the two factions over corporate control.

25 In the midst of that state-court litigation, appellant Sofris
26 (Michael Sofris, APC, a professional law corporation owned by
27 attorney Michael Sofris, which for convenience we refer to as an
28 individual), who is aligned with the Mayman-Nathan Faction, joined

1 by four individuals, filed an involuntary chapter 7 petition
2 against Maple-Whitworth on October 28, 2004. Seven other
3 petitioners holding small claims eventually, and in two phases,
4 joined the petition pursuant to § 303(c).

5 The bankruptcy court recognized the Marlowe-Shlush Faction as
6 being in control of the debtor corporation for purposes of the
7 bankruptcy and dismissed the involuntary petition on October 11,
8 2005, making it explicit that the final determination of corporate
9 ownership and control eventually would be made in the on-going
10 litigation in state court.

11 After dismissal, the Marlowe-Shlush Faction moved on behalf
12 of Maple-Whitworth for an award of costs and fees of \$42,257, and
13 punitive damages of \$100,000 against appellant Sofris but, viewing
14 Sofris as a ringleader who should bear primary responsibility, did
15 not name the other eleven petitioners in the motion.

16 Sofris objected that the motion was procedurally and
17 substantively defective. Without asserting any claims for
18 contribution, he contended that the phrase "the petitioners" in
19 § 303(i) requires all petitioners to be served before the court
20 can consider an award and that a court cannot pick and choose
21 among petitioning creditors when making an award.

22 In addition, based on a release executed on the corporation's
23 behalf by a member of the Mayman-Nathan Faction, Sofris contended
24 that Maple-Whitworth had waived its § 303(i) rights.

25 After continuing the initial hearing to permit service on all
26 petitioners, the court awarded the requested \$42,257 in fees and
27 costs but, ruling that the petition was not filed in bad faith,
28 rejected § 303(i)(2) damages. The court noted that the release

1 executed by the Mayman-Nathan Faction would be effective if that
2 faction later prevailed in the state-court litigation but did not
3 at that time make further detailed findings regarding why it had
4 previously recognized the Marlowe-Shlush Faction.² Thus, in an
5 order entered February 27, 2006, with accompanying findings that
6 described the liability as "joint and several," the court awarded
7 \$42,257 against all of the petitioners who were served with the
8 motion, without naming them. Sofris timely appealed.

9 On reconsideration, the court twice amended the order. The
10 first amendment named the ten of the twelve petitioners against
11 whom the award was made. The second amendment deleted five of
12 those ten petitioners because notice to them was defective. In
13 the end, the \$42,257 order was against only the five initial
14 petitioners, each of whom was listed by name.

15 Neither of the amended orders was appealed.
16

17 ISSUES

18 1. Whether it was error to consider a § 303(i)(1) award
19 without all petitioners having been named and served.

20 2. Whether it was error to award fees and costs under
21 § 303(i)(1) against fewer than all the petitioners.

22 3. Whether the amount awarded under § 303(i) was correct.
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26 ²The state court later ruled in favor of the Marlowe-Shlush
27 Faction. Judgment After Bench Trial, Mayman v. Marlowe, No.
28 BC310024 (Super. Ct., Los Angeles County, July 31, 2006). Sofris
objected to inclusion of the judgment in Appellee's Appendix but
does not contest its authenticity. As the state court's public
docket reflects entry of the judgment, we take judicial notice.

1 only be made against all petitioning creditors.

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A

4 As all statutory analysis begins with the language of the
5 statute, we look to § 303(i) and note that, where there is a
6 dismissal without the debtor having waived compensation, the court
7 "may" award attorney's fees and costs against "the petitioners"
8 and, as against any petitioner that filed the petition in bad
9 faith, may also award "damages proximately caused by such filing"
10 and "punitive damages." 11 U.S.C. § 303(i).³

11 This creates a compensation scheme that, in the precise words
12 of the statute, provides for awards of an "attorney's fee,"
13 "costs," "damages proximately caused," and "punitive damages."
14 Fees and costs "may" be awarded against "the petitioners."

15 The Supreme Court requires that statutes "be read as a
16 whole," especially when dealing with adjacent subparagraphs that
17 were constructed together. United States v. Atl. Research Corp.,

18

19 ³The precise language of § 303(i), which has not been amended
20 since 1986, is:

21 (i) If the court dismisses a petition under this section
22 other than on consent of all petitioners and the debtor, and
23 if the debtor does not waive the right to judgment under this
24 subsection, the court may grant judgment -

25 (1) against the petitioners and in favor of the debtor for -

26 (A) costs; or

27 (B) a reasonable attorney's fee; or

28 (2) against any petitioner that filed the petition in bad
faith, for -

(A) any damages proximately caused by such filing; or

(B) punitive damages.

11 U.S.C. § 303(i). In 1986, a damages provision ("(C) any
damages proximately caused by the taking of possession of the
debtor's property by a trustee ...") was deleted from § 303(i)(1).
Pub. L. 99-554, § 204, 100 Stat. 3088, 3097 (Oct. 27, 1986).

1 127 S. Ct. 2331, 2336 (2007) ("Atl. Research"); King v. St.
2 Vincent's Hospital, 502 U.S. 215, 221 (1991).

3 The § 303(i) scheme, then, is construed as an integrated
4 whole in which each of its facets is assessed in the context of
5 the remaining facets. Atl. Research, 127 S. Ct. at 2336; Wechsler
6 v. Macke Int'l Trade, Inc. (In re Macke Int'l Trade, Inc.), 370
7 B.R. 236, 252 (9th Cir. BAP 2007). Hence, § 303(i)(2) informs
8 analysis of the meaning of § 303(i)(1).

9 The Atlantic Research rule is consistent with Supreme Court
10 precedent that the construction of the Bankruptcy Code is a
11 "holistic endeavor" in which "a provision that may seem ambiguous
12 in isolation is often clarified by the remainder of the statutory
13 scheme." United Sav. Ass'n v. Timbers of Inwood Forest Assocs.,
14 Ltd., 484 U.S. 365, 371 (1988); 2A NORMAN J. SINGER, SUTHERLAND
15 STATUTORY CONSTRUCTION § 46:5 (5th ed. 1992) ("a subsection may not be
16 considered in a vacuum").

17
18 B

19 Three glosses from case law further inform our analysis of
20 § 303(i). First, the verb "may" ("the court may grant judgment")
21 connotes the existence of discretion in the court's decision
22 whether to make an award based on the "totality of the
23 circumstances." Vortex Fishing II, 379 F.3d at 706-07; accord,
24 Susman v. Schmid (In re Reid), 854 F.2d 156, 159 (7th Cir. 1988).

25 Second, in exercising this discretion, the court begins with
26 a rebuttable presumption that reasonable fees and costs are
27 authorized. Vortex Fishing II, 379 F.3d at 707. In other words,
28 any petitioning creditor in an involuntary case "should expect to

1 pay the debtor's attorney's fees and costs if the petition is
2 dismissed." Id., 379 F.3d at 707 (quoting In re Kidwell, 158 B.R.
3 203, 217 (Bankr. E.D. Cal. 1993)).

4 Third, § 303(i), as a comprehensive compensation scheme,
5 preempts state-law causes of action (e.g., malicious prosecution)
6 and provides an exclusive federal source of recompense predicated
7 upon the filing of an involuntary bankruptcy petition. Miles v.
8 Okun (In re Miles), 430 F.3d 1083, 1091 (9th Cir. 2005).

9
10 C

11 Although Congress did not detail how to apply the multiple
12 liability feature of the § 303(i) scheme, its decision to couch
13 the remedies in terms of tort concepts of "damages proximately
14 caused" and "punitive damages" is significant for purposes of
15 divining the nature of the liability.

16
17 1

18 In addition to award of an "attorney's fee" and "costs"
19 against "the petitioners," Congress authorized award of "damages
20 proximately caused" and "punitive damages" as to any petitioner
21 filing in bad faith. 11 U.S.C. § 303(i). As noted, we view the
22 scheme as an integrated whole and do not consider the terms in
23 § 303(i)(1) in isolation from § 303(i)(2).

24 Proximate causation and punitive damages are both familiar
25 concepts in the common law of tort. Since Congress based its
26 scheme of remedies on these general tort concepts, it follows that
27 Congress expected the remedies to be applied under the same
28 common-law principles that apply when more than one person is

1 liable for the same harm. See Atl. Research, 127 S. Ct. at 2339.

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a

4 The idea that multiple parties may be liable for the same
5 harm arises often in tort situations, and it is in tort that the
6 basic doctrine regarding multiple liability has been forged. Tort
7 doctrine is particularly apt because it is modulated by
8 consideration of the effect of the precise conduct of different
9 actors who have varying degrees of involvement in, and
10 responsibility for, the operative facts.

11 The traditional tort solution is joint and several liability.
12 Here, the bankruptcy court held, without analysis, that the
13 § 303(i)(1) liability of the petitioners is joint and several. As
14 noted above, Sofris agrees that § 303(i)(1) liability is joint and
15 several, does not contend that he is only severally liable, and
16 does not contend that initial apportionment is mandatory.

17 Courts that have touched on the question likewise agree that,
18 at the first level of analysis, the basic § 303(i)(1) liability is
19 joint and several. In re Johnston Hawks Ltd., 72 B.R. 361, 366-68
20 (Bankr. D. Haw. 1987), aff'd, (D. Haw. 1988), aff'd mem., 885 F.2d
21 875 (9th Cir. 1989). Likewise, we have, by implication, treated
22 such awards as joint and several. Jaffe v. Wavelength, Inc. (In
23 re Wavelength, Inc.), 61 B.R. 614, 621-22 (9th Cir. BAP 1986).

24 Since this appeal presents only a question of joint and
25 several liability in circumstances in which the court made an
26 award against fewer than all petitioners and did not purport to
27 apportion the award, we deal only with the consequences of joint

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1 and several liability in that setting.⁴ Thus, we treat § 303(i)
2 liability as presumptively joint and several at each of its two
3 tiers, i.e., joint and several among § 303(i)(1) awards and joint
4 and several among § 303(i)(2) awards.

5
6 b

7 Under the settled doctrines of joint and several liability
8 and contribution, we reject Sofris' argument that he cannot be
9 responsible for more than his pro rata share of liability and that
10 all potentially liable parties must be joined.

11 Since we are dealing with federal law, we begin by confirming
12 that the standard rule regarding torts over which federal law has
13 cognizance – the Federal Employers' Liability Act ("FELA") and
14 admiralty – is one of joint and several liability. Norfolk & W.
15 Ry. Co. v. Ayers, 538 U.S. 135, 162-64 (2003) ("Ayers").

16 As a statement of the nature of the federal common law of
17 joint and several liability in the tort context, we look to the
18 Restatements, principally the Restatement (Second) of Torts and,
19 to the extent relevant, the Restatement (Third) of Torts. See
20 Atl. Research, 127 S. Ct. at 2339.

21 As hammered out in the tort arena, joint and several
22 liability and its correlative doctrine of contribution permit
23 adjustments for the purpose of taking into account the equities of
24 a particular situation. There are two distinct concepts: who is
25 liable; and who actually pays.

26
27 ⁴Although Sofris did not appeal the amended orders that
28 resulted in an award being made against only five of the twelve
petitioners, the original order was against fewer than all
petitioners. As that has not changed, this appeal is not moot.

1 The basic rule of joint and several liability is that each
2 such person is responsible for the entire award and, unlike
3 several liability,⁵ bears the risk of uncollectability from co-
4 obligors. RESTATEMENT (THIRD) OF TORTS § 10.⁶ Moreover, one may sue
5 and collect from "any" of the jointly liable persons, leaving
6 adjustments to the doctrine of contribution. Id.⁷ In other

7 _____
8 ⁵The Restatement (Third) provides:

9 § 11. Effect of Several Liability. When, under applicable
10 law, a person is severally liable to an injured person for an
11 indivisible injury, the injured person may recover only the
severally liable person's comparative-responsibility share of
the injured person's damages.

12 RESTATEMENT (THIRD) OF TORTS § 11.

13 Historically, several liability was employed where a harm was
14 divisible, but eventually came to be applied to include
15 comparative liability for an indivisible injury. It has the
effect of placing the risk of insolvency or uncollectability on
claimants because recovery is limited and contribution is not
available. Id. § 11 comments a - b & Reporter's Note.

16 ⁶The Restatement (Third) provides:

17 § 10. Effect of Joint and Several Liability. When, under
18 applicable law, some persons are jointly and severally liable
19 to an injured person, the injured person may sue for and
20 recover the full amount of recoverable damages from any
jointly and severally liable person.

21 RESTATEMENT (THIRD) OF TORTS § 10.

22 The description in the Restatement (Second) was:

23 § 878. Persons Subject to a Common Duty. If two or more
24 persons are under a common duty and failure to perform it
amounts to tortious conduct, each is subject to liability for
the entire harm resulting from failure to perform the duty.

25 RESTATEMENT (SECOND) OF TORTS § 878.

26 ⁷The Restatement (Second) used the phrase "one, some, or all"
27 to describe which parties to sue:

28 § 882. Joinder of Parties. If each of two or more persons
(continued...)

1 words, the risk of uncollectability among co-obligors is on the
2 jointly liable persons rather than the plaintiff, who bears the
3 risk only of total uncollectability.

4 In short, every jointly and severally liable person is
5 presumed to be liable for the full amount even though there is no
6 requirement that all potentially liable entities be joined as
7 parties in a joint and several liability situation. Judgment can
8 be obtained against one, or any number, of the jointly-liable
9 parties for the full amount, and can be collected in full from any
10 one of them, it being understood that there cannot be more than
11 one satisfaction of the total award.⁸

12 _____
13 ⁷(...continued)
14 is subject to liability for the full amount of damages
15 allowed for a single harm resulting from their tortious
16 conduct, the injured person can properly maintain a single
17 action against one, some or all of them.

18 RESTATEMENT (SECOND) OF TORTS § 882.

19 The Restatement (Third), in describing the so-called "A
20 Track" (pure joint and several liability) for §§ 18-21 regarding
21 methods of apportionment explains the traditional rationale:

22 Joint and several liability has two important
23 consequences. First, a plaintiff may sue and recover all
24 damages from any defendant found liable. This puts the
25 burden of joining and asserting a contribution claim against
26 other potentially responsible persons on the defendant.
27 Second, the risk that one or more legally responsible parties
28 will be insolvent or otherwise unavailable to pay for the
29 plaintiff's injury is placed on each jointly and severally
30 liable defendant – the plaintiff does not bear this risk.

31 RESTATEMENT (THIRD) OF TORTS § A18 comment a.

32 ⁸The Restatement (Second) commentary to § 879 puts it thus:

33 In situations in which all of the tortfeasors are liable for
34 the entire harm, the injured person is entitled to maintain
35 an action against one or any number of the tortfeasors and to
36 obtain judgment against any one or any number for the full
37 (continued...)

1
2 Applying these rules to joint liability under § 303(i), there
3 is no merit to Sofris' contention that all petitioners must be
4 made party to a motion for a § 303(i) award. Such a position runs
5 counter to fundamental rules regarding joint and several liability
6 that permit suing fewer than all the obligors. Ayers, 538 U.S. at
7 163 ("Nothing is more clear than the right of a plaintiff, having
8 suffered ... a loss, to sue in a common-law action all the wrong-
9 doers, or any one of them, at his election;") (quoting The
10 "Atlas", 93 U.S. 302, 315 (1876) (ellipsis in original)). While
11 the bankruptcy court had discretion to decline to proceed without
12 joinder of all petitioners, it was not required to do so and was
13 entitled to proceed without such joinder.

14 In context, the provision in § 303(i) that "the court may
15 grant judgment against the petitioners" is merely a permissive
16 designation of the universe of persons who may be liable. If
17 suing all jointly-liable parties is not required in tort, there is
18 no reason to think that § 303(i) is any different.

19 In short, it was permissible for the motion for a § 303(i)

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21 ⁸(...continued)
22 amount of the harm, although no more than one satisfaction
can be obtained for the harm.

23 RESTATEMENT (SECOND) OF TORTS § 879 comment b (cross-references
24 omitted).

25 This comment retains validity under "Track A" (pure joint and
several liability) of the Restatement (Third):

26 While this Section [§ A18] supersedes § 879 of the
27 Restatement Second, Torts, it effects no change in the rule
stated therein.

28 RESTATEMENT (THIRD) OF TORTS § A18 comment a.

1 award to have been directed solely against Sofris. Moreover, even
2 if it had been directed against all petitioners, the entire
3 \$42,257 award could be collected from Sofris.

4
5 2

6 The potential harshness of permitting collection of all of a
7 joint and several liability debt from only one of the obligors is
8 ameliorated by the contribution and indemnity doctrines.

9
10 a

11 Contribution is an equitable remedy that protects the
12 jointly-liable party who pays an inequitably disproportionate
13 share of the liability by requiring others who are also liable to
14 reimburse the party who paid. It is founded on principles of
15 equity, assists in fair and just division of losses, and prevents
16 unfairness and injustice. 18 AM. JUR. 2D Contribution § 1 (1985);
17 RESTATEMENT OF RESTITUTION § 81 (1937); accord, Atl. Research, 127 S.
18 Ct. at 2339.

19 Contribution is also an independent right that is contingent
20 and does not become enforceable until the one seeking contribution
21 has paid a disproportionate share of the liability. Asdar Group
22 v. Pillsbury, Madison & Sutro, 99 F.3d 289, 295 (9th Cir. 1996)
23 (citing 18 AM. JUR. 2D Contribution § 11, and RESTATEMENT (SECOND) OF
24 TORTS § 886A(2), and RESTATEMENT OF RESTITUTION § 82(1)).

25 In addition, contribution is a personal right that may be
26 assigned. Even though the common liability is joint, the
27 liability of each joint obligor to contribute a proportionate
28 share is several. 18 AM. JUR. 2D Contribution §§ 3 & 11.

1 As an equitable remedy, contribution is governed by equitable
2 principles and is not apodictic. Rather, it may be applied only
3 in a manner that comports with equity and notions of fairness.⁹

4 The underlying premise is that the person entitled to payment
5 (be it a debtor under § 303(i) or a tort victim) does not bear the
6 credit risk of not being able to collect against any particular
7 joint obligor (an unsuccessful petitioner under § 303(i) or a
8 tortfeasor). Thus, the full amount of a judgment can be collected
9 against any one joint obligor, who then can then equilibrate the
10 loss among the other joint obligors by using the muscle of
11 contribution.

12 Two threshold rules are that there is no right of
13 contribution until one has paid more than one's equitable share of
14 a common liability and that contribution cannot exceed the amount
15 paid by that party in excess of that party's equitable share.

17 ⁹The equitable nature of the remedy is explained in the
18 commentary to the Restatement (Second) of Torts:

19 c. Equitable nature of contribution. Contribution is a
20 remedy that developed in equity and there is a considerable
21 body of case law dealing with the equity rules governing it,
22 for example in the cases of contribution between joint
23 contract debtors. The rule stated in Subsection (1) is
24 intended to take over and apply these rules of equity so far
25 as they are pertinent. The "right of contribution" stated is
26 not intended to be an absolute right in all cases; and in any
27 case in which contribution would be inequitable it is still
28 intended that a court will deny it. Likewise, when there are
three tortfeasors and one of them is clearly insolvent or is
beyond the jurisdiction, the amount of contribution fairly
allowable between the other two may reasonably be affected
and the court may be expected to do what is fair and
equitable under the circumstances.

27 RESTATEMENT (SECOND) OF TORTS § 886A, comment c. The equitable
28 underpinnings of contribution in joint and several liability
situations has become obscured in the Restatement (Third) of Torts
by the emphasis on the now-dominant comparative liability regimes.

1 Although the entire judgment may be collected from one obligor, no
2 co-obligor can be required to make a contribution in excess of his
3 own equitable share of the liability. Atl. Research, 127 S. Ct.
4 at 2339 (quoting RESTATEMENT (SECOND) OF TORTS, § 886A(2); Compare
5 RESTATEMENT (THIRD) OF TORTS § 23(a)-(b), with RESTATEMENT (SECOND) OF
6 TORTS § 886A(2)).¹⁰

7 Determining what constitutes the equitable share is not
8 always easy. While the maxim that "equality is equity" provides
9 the presumptive starting point, adjustments are permitted.
10 Problems arise when a joint obligor is insolvent or beyond the
11 jurisdiction of the court. The classic solution has been to
12 divide the loss only among the solvent joint obligors against whom
13 contribution awards may be expected to be effective. Thus, when

14
15 ¹⁰The provisions from the second and third Restatements can
16 profitably be compared. The version before there was an attempt
to accommodate comparative liability regimes was:

17 (2) The right of contribution exists only in favor of a
18 tortfeasor who has discharged the entire claim for the harm
19 by paying more than his equitable share of the common
20 liability, and is limited to the amount paid by him in excess
of his share. No tortfeasor can be required to make
contribution beyond his own equitable share of the liability.

21 RESTATEMENT (SECOND) OF TORTS § 886A(2).

22 The version that reflects comparative liability regimes and
also subsumes pure joint and several liability regimes is:

23 (a) When two or more persons are or may be liable for the
24 same harm and one of them discharges the liability of another
25 by settlement or discharge of judgment, the person
discharging the liability is entitled to recover contribution
26 from the other, unless the other previously had a valid
settlement and release from the plaintiff.

27 (b) A person entitled to recover contribution may recover
no more than the amount paid to the plaintiff in excess of
the person's comparative share of responsibility.

28 RESTATEMENT (THIRD) OF TORTS § 23(a)-(b).

1 there are three joint obligors, one of whom is insolvent or beyond
2 the jurisdiction, "the amount of contribution fairly allowable
3 between the other two may reasonably be affected and the court may
4 be expected to do what is fair and equitable under the
5 circumstances." RESTATEMENT (SECOND) OF TORTS § 886A comment c;
6 accord, RESTATEMENT (THIRD) OF TORTS § 23 comment g.

7 Unequal allocations that reflect comparative degrees of
8 culpability are also permitted. Under the traditional view,
9 unequal apportionment is permitted to avoid inequity, which
10 entails a finding that equal allocation would be inequitable; the
11 modern trend toward comparative fault does not require a focus on
12 whether equal division would be inequitable. Compare RESTATEMENT
13 (SECOND) OF TORTS § 886A comment c, with RESTATEMENT (THIRD) OF TORTS
14 § 23(b) comments e & g; cf. United States v. Reliable Transfer
15 Co., 421 U.S. 397, 410-11 (1975) (adopting comparative negligence
16 in admiralty).¹¹ Thus, in either a traditional joint and several
17 liability regime or a modern comparative liability regime, the
18 court has authority to make adjustments based on the circumstances
19 in order to assure that contribution does not work an injustice.

20 Since in this appeal we are merely noting the general

21
22 ¹¹These authorities reflect on-going developments in
23 allocating liability among multiple persons. In 1999, the
24 American Law Institute adopted the Restatement (Third) of Torts:
25 Apportionment of Liability to address various facets of the
26 problem. Our focus is on Topic 2 ("Liability of Multiple
27 Tortfeasors for Indivisible Harm") and Topic 3 ("Contribution and
28 Indemnity"). RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY
§§ 10-E21. By 1999, only 15 states retained pure joint and
several liability in tort. Id. § A18 comment a. Although the
Supreme Court adopted comparative liability for admiralty actions
in Reliable Transfer, it has ruled that the language of the FELA
was too specific to warrant departure from a settled regime of
joint and several liability, with contribution rights, in FELA
actions. Ayers, 538 U.S. at 161-65.

1 availability of contribution, we are not presented with any issue
2 of whether there should be an unequal allocation in this instance
3 or which method (traditional or comparative responsibility¹²)
4 should be employed if unequal allocation is later determined to be
5 appropriate. Those are questions better left to the future.

6
7 b

8 The indemnity doctrine applies in § 303(i) situations when a
9 petitioning creditor has been promised, typically as an inducement
10 to sign the petition, that all expense or liability of the
11 involuntary petition will be borne by another person. Such
12 promises are enforceable. Oakview Treatment Ctrs. of Kansas, Inc.
13 v. Garrett, 53 F. Supp. 2d 1184, 1191-92 (D. Kan. 1999) (indemnity
14 on § 303(i) liability); RESTATEMENT (THIRD) OF TORTS § 22.¹³

15
16 ¹²While there are cogent decisions that allocate § 303(i)
17 awards unequally at the time of making the awards, their
18 underlying theory of allocation is ambiguous because their facts
19 appear to support both traditional "avoiding inequity" analysis in
20 which the court is announcing how it would allocate contribution
21 claims to avoid inequity and modern comparative contribution
22 analysis in which allocation may freely be made. In re Val
23 Poterek & Sons, Inc., 169 B.R. 896, 905-06 (Bankr. N.D. Ill. 1994)
(zero percent of award allocated to relatively innocent
petitioner); In re Oakley Custom Homes, Inc., 168 B.R. 232, 242
(Bankr. D. Colo. 1994) (apportioning § 303(i)(1) award unequally).
It is settled as a matter of federal common law that it is
permissible to make the contribution allocation at the time of
making the initial award. See Cooper Stevedoring Co. v. Fritz
Kopke, Inc., 417 U.S. 106, 108-10 (1974).

24 ¹³The indemnity provision is:

25 (a) When two or more persons are or may be liable for the
26 same harm and one of them discharges the liability of another
27 in whole or in part by settlement or discharge of judgment,
28 the person discharging the liability is entitled to recover
indemnity in the amount paid to the plaintiff, plus
reasonable legal expenses, if:

(continued...)

1 Since indemnity and contribution are mutually exclusive, one
2 with a right of indemnity has no right of contribution against the
3 indemnitor. RESTATEMENT (THIRD) OF TORTS § 23(c).¹⁴

4 There could be indemnity issues here if Sofris or someone
5 else used promises of indemnity to induce the various individual
6 creditors holding small claims who joined as petitioners in two
7 phases after the petition was filed.

8

9

II

10 The procedures to implement joint and several liability,
11 contribution, and indemnity all oblige a defendant who is being
12 singled out to take action. Sofris' contention that the debtor
13 should, at the threshold, bear the risk of procedural difficulties
14 in naming, locating, and serving all of the petitioners and that
15 an award cannot be made against him unless the debtor does so

16

17

¹³(...continued)

18

(1) the indemnitor has agreed by contract to indemnify
the indemnitee, or

19

(2) the indemnitee

20

(i) was not liable except vicariously for the tort of
the indemnitor, or

21

(ii) was not liable except as a seller of a product
supplied to the indemnitee by the indemnitor and the
indemnitee was not independently culpable.

22

(b) A person who is otherwise entitled to recover indemnity
pursuant to contract may do so even if the party against whom
indemnity is sought would not be liable to the plaintiff.

23

RESTATEMENT (THIRD) OF TORTS § 22.

24

25

¹⁴That provision is:

26

(c) A person who has a right of indemnity against another
person under § 22 does not have a right of contribution
against that person and is not subject to liability for
contribution to that person.

27

28

RESTATEMENT (THIRD) OF TORTS § 23(c).

1 turns the theory of joint liability on its head.

2

3

A

4

Procedures through which Sofris may protect himself from
5 disproportionate liability are available both before and after a
6 § 303(i) award is made.

7

8

1

9 First, Sofris could have made a motion within the contested
10 matter to join the other petitioners as parties to the § 303(i)
11 motion.¹⁵ Federal Rule of Civil Procedure 21, which permits
12 joinder of additional parties on motion of a party, applies in
13 bankruptcy "contested matters." Fed. R. Civ. P. 21, incorporated
14 by Fed. R. Bankr. P. 7021 & 9014.¹⁶

15 Although Rule 21 permits the court to add parties on its own
16 authority, the burden to make such a motion was on Sofris. That
17 he elected to forego this procedural opportunity should not be

18

19 ¹⁵Although the award was made against Sofris and nine other
20 petitioners, the motion was never amended or, even deemed amended,
21 to include those other petitioners as parties. The award was
22 amended to delete the five petitioners who later asked to be
23 deleted from the \$42,257 award because the notice to them did not
24 indicate that they were parties to the motion. Four other
25 petitioners appear to be similarly situated but did not appeal.
26 We express no view about whether they still can obtain relief.

23

24

¹⁶Rule 21 provides:

25

Misjoinder of parties is not ground for dismissal. Parties
26 may be dropped or added by order of the court on motion of
27 any party or of its own initiative at any stage of the action
and on such terms as are just. Any claim against a party may
be severed and proceeded with separately.

27

28

Fed. R. Civ. P. 21, incorporated by Fed. R. Bankr. P. 7021 & 9014
(emphasis supplied).

1 held against the debtor. Having sat on his rights, he is in no
2 position to complain on appeal about his own litigation choice.

3
4 2

5 Sofris could also have commenced a third-party action against
6 other petitioners to obtain judgments against them in the event
7 that a judgment was rendered against him.¹⁷ This could have been
8 accomplished as of right by way of an adversary proceeding
9 separate from the § 303(i) motion. Fed. R. Bankr. P. 7001. Or,
10 if the court had been persuaded to exercise its authority under
11 Rule 9014(b) to direct that Rule 7014 apply to the § 303(i)
12 "contested matter" motion (which Sofris could have requested by
13 motion), it could have been done under the third-party procedure
14 of Civil Rule 14. Compare Fed. R. Bankr. P. 9014(b), with id.
15 7014, incorporating Fed. R. Civ. P. 14.

16
17 3

18 Finally, if Sofris pays a disproportionate share of the
19 \$42,257, the independent equitable action in the bankruptcy court
20 for contribution that we have described becomes available. This
21 vestigial remnant of the old distinction between law and equity is
22 still the traditional method of obtaining the equitable remedy of
23 contribution. The action requires, as an essential element for
24 relief, that the party requesting contribution has paid more than
25 its equitable share of the judgment.

26
27 ¹⁷The order resolving a motion that is a "contested matter"
28 under Rule 9014 has the status of a judgment under Civil Rule 58,
even if it is denominated as an order. Fed. R. Bankr. P. 9021,
incorporating Fed. R. Civ. P. 58.

1 As a matter of federal common law, independent contribution
2 actions continue to be available in FELA actions. Ayers, 538 U.S.
3 at 162-63. Similarly, contribution actions are permitted among
4 joint tortfeasors who cause injury to longshoremen. Cooper
5 Stevedoring Co., 417 U.S. at 113.

6 To the extent that the remedial scheme created by § 303(i)
7 does not implicate “uniquely federal interests” of the kind that
8 oblige court to formulate federal common law, the question is
9 whether Congress expressly or by clear implication envisioned a
10 contribution right to accompany the § 303(i) remedies or whether
11 Congress intended that the court could supplement the remedies
12 enacted. Musick, Peeler & Garrett v. Employers Ins. of Wausau,
13 508 U.S. 286, 290-92 (1993); Texas Indus., Inc. v. Radcliff
14 Materials, Inc., 451 U.S. 630, 638-45 (1981).

15 As we have already explained, the choice by Congress to
16 employ traditional tort remedies in the § 303(i) award scheme
17 warrants the conclusion that Congress by clear implication either
18 envisioned a contribution right to accompany § 303(i) remedies or
19 intended that the courts could supplement the remedies with a
20 right of contribution.

21 There are, to be sure, practical disadvantages to a separate
22 action for contribution. In addition to the obvious
23 inefficiencies of redundant litigation, if the joint and several
24 obligors were not parties to the action in which the judgment was
25 rendered, then that judgment’s claim and issue preclusive effect
26 on the unnamed parties may be clouded and could complicate
27 subsequent contribution litigation by permitting them to litigate
28 underlying liability. RESTATEMENT (SECOND) OF JUDGMENTS § 50.

1 Sofris could, however, have averted these inconveniences by
2 taking direct action when confronted with the motion that was not
3 directed at all petitioners. His earlier inaction now constrains
4 his alternatives.

5
6 B

7 This appeal illustrates the latitude a bankruptcy court has
8 when dealing with multiple petitioners under § 303(i). In the
9 end, a fee and cost award was made against only five of the twelve
10 petitioners.

11 Such an award against fewer than all petitioners is
12 consistent with other § 303(i) decisions. For example, a close
13 examination of the facts in Vortex Fishing reflects that Ninth
14 Circuit affirmed an award that was made against only some of the
15 petitioners. Compare Liberty Tool & Mfg., Inc. v. Vortex Fishing
16 Sys. Inc. (In re Vortex Fishing Sys., Inc.), 277 F.3d 1057, 1063
17 (9th Cir. 2002) (more than four petitioners), with Vortex Fishing
18 II (award against four petitioners); cf. Val Poterek & Sons, Inc.,
19 169 B.R. at 905-06 (zero percent allocation to one petitioner).

20 We conclude that it neither was error for the court to have
21 made a § 303(i) award without joining all potentially liable
22 petitioners, nor was it error for the award to have been against
23 fewer than all petitioners.

24
25 III

26 Sofris also challenges the merits of the award of attorney
27 fees and costs as being unreasonable.

28 As noted, the amount of an award of an attorney's fee and

1 costs under § 303(i)(1) is a matter of discretion to be assessed
2 on the "totality of the circumstances" in a context in which the
3 debtor has the burden to demonstrate that the amount requested is
4 reasonable, subject to a rebuttable presumption in favor of
5 entitlement to an award. Vortex Fishing II, 379 F.3d at 707.¹⁸

6 The "totality of circumstances" approach under § 303(i)(1) is
7 different from the analysis of requests for compensation under 11
8 U.S.C. § 330 because the language of the two sections differs.
9 All § 303(i)(1) requires is that the fee be "reasonable." In
10 contrast, § 330 speaks of "reasonable compensation for actual,
11 necessary services" subject to an elaborate set of statutory
12 criteria. 11 U.S.C. §§ 330(a)(3)-(6). In effect, a § 303(i)(1)
13 attorney's fee is an element of damages. Wavelength, Inc., 61
14 B.R. at 622-22; accord, Val Poterek & Sons, Inc., 169 B.R. at 907;
15 In re Better Care, Ltd., 97 B.R. 405, 413 (Bankr. N.D. Ill. 1989);
16 2 COLLIER ON BANKRUPTCY ¶ 303.15[4] (Henry J. Sommer & Alan N. Resnick
17 eds. 15th ed. rev. 2006).

18 The debtor's evidence in support of the amount requested

19
20 ¹⁸The Vortex Fishing II court explained:

21 [O]nce the debtor has satisfied the burden of demonstrating
22 the reasonableness of the fees requested, "[i]t is then the
23 petitioning creditors' burden to establish, under the
24 totality of the circumstances, that factors exist which
25 overcome the presumption, and support the disallowance of
26 fees." However, this does not give the petitioning creditor
27 license to conduct additional discovery and present evidence
28 on an issue that has already been decided. The rebuttable
presumption framework allows the court, which by this point
in the process has heard all the evidence surrounding
dismissal, to make 'an informed examination of the entire
situation' without the burden of conducting another
mini-trial.

Vortex Fishing II, 379 F.3d at 707 (citations omitted).

1 demonstrated attorney fees of \$40,250 based on records of 161
2 hours billed at a rate of \$250 per hour, \$2,007 in documented
3 costs, and the declaration of counsel. The court was persuaded
4 that the debtor had carried its burden to demonstrate, over
5 Sofris' objection in which he presented no counter-evidence, that
6 \$42,257 was a "reasonable" amount to award.

7 Nor was the court persuaded that Sofris carried his burden to
8 establish that the totality of the circumstances rebut the
9 presumption in favor of the award. Pertinent circumstances
10 include: (1) the merits of the petition; (2) the conduct of the
11 alleged debtor; (3) reasonableness of the actions by petitioning
12 creditors; (4) the motivation and objectives behind filing the
13 petition; and (5) other case-specific matters. Vortex Fishing II,
14 379 F.3d at 707-08. Sofris made no such showing.

15 We cannot say that the court abused its discretion as to the
16 amount of the award or the appropriateness of making an award in
17 light of the totality of the circumstances.

18

19

IV

20 Nor do we perceive material error in the court's treatment of
21 the putative § 303(i) release that was executed by Robert Nathan
22 posing as president of the debtor. Although it would have been
23 better if there had been precise findings, the court's reason for
24 disregarding the putative release was not ambiguous. In the
25 procedural posture of the case in which the court had recognized
26 the Marlowe-Shlush Faction as being in control of the debtor, Mr.
27 Nathan was an imposter. The court had recognized the Marlow-
28 Shlush Faction as legitimate. The court correctly noted that the

1 agreement would be effective only if it later was determined by
2 state court that the Mayman-Nathan Faction controlled the debtor.

3 As a matter of procedure, the court's recognition of the
4 contingency that the Mayman-Nathan Faction might ultimately
5 prevail in its quest for control of Maple-Whitworth constitutes a
6 recognition that relief could become appropriate under Federal
7 Rule of Civil Procedure 60(b)(5) or (6) on the basis that the
8 release was validly executed. Fed. R. Civ. P. 60(b)(5)-(6),
9 incorporated by Fed. R. Bankr. P. 9024. A motion under Rule
10 60(b)(5) or (6) need only be made "within a reasonable time,"
11 which necessarily depends upon the factual context. Id. On such
12 a motion, the prospect of which appears increasingly remote
13 because the state court judgment appears to be final, the \$42,257
14 judgment could be vacated and any sums collected could be
15 recovered on a theory of money had and received.

16 17 CONCLUSION

18 We conclude that the § 303(i) liability of petitioners in a
19 dismissed involuntary bankruptcy case is joint and several. There
20 is no requirement that all petitioners be named in, and served
21 with, a § 303(i) motion. Among other procedures, equitable rights
22 of contribution and indemnity are available to protect a
23 petitioner who is unfairly singled out in such a motion. There
24 having been no abuse of discretion in the award, it is AFFIRMED.

25
26 NIELSEN, Bankruptcy Judge, dissenting in part and concurring in
27 part:

28 As I am troubled by my able colleagues' application of an

1 important bankruptcy statute, I respectfully dissent from sections
2 I-C and II of the majority opinion. Specifically, the plain
3 language of § 303(i)(1) requires that all petitioning creditors be
4 served with an award motion. I must also dissent from a disregard
5 of the error in the trial court's refusal to determine whether the
6 alleged debtor had previously waived the fee award it sought. I
7 gladly join in affirming the bankruptcy court's exercise of
8 discretion to award fees and costs against appellant Sofris.

9 I

10 This appeal rests on a correct reading of § 303 (i), which
11 provides:

12 If the court dismisses a petition under this
13 section other than on consent of all petitioners and the
14 debtor, and if the debtor does not waive the right to
judgment-

15 (1) against the petitioners and in favor of the
debtor for-

16 (A) costs; or

17 (B) a reasonable attorney's fee; or

18 (2) against any petitioner that filed the petition
in bad faith, for-

19 (A) any damages proximately caused by
such filing; or

20 (B) punitive damages.

21 11 U.S.C. § 303(i) (emphasis supplied).

22 A

23 We know that § 303(i) is the exclusive source for damages
24 predicated upon the filing of an involuntary bankruptcy petition.
25 Miles v. Okun (In re Miles), 430 F.3d 1083, 1089-92 (9th Cir.
26 2005) (state tort law action by non-debtors for damages from an
involuntary bankruptcy is completely preempted by § 303).

27 The facts of this case involve conflicting claims regarding
28 ownership and control of the alleged debtor. When the involuntary

1 petition was dismissed, the alleged debtor failed to comply with
2 an express court order to serve all petitioning creditors with its
3 fee award request. The bankruptcy court nonetheless awarded fees
4 and costs against some, but not all of the petitioning creditors.
5 The question before us is how § 303(i) should be applied in this
6 situation. The majority concludes that service on all petitioners
7 is not required and imposes possible contribution liability on all
8 of the petitioning creditors, whether they were served with the
9 fee request or not.

10 The majority begins correctly. I join section I-A as it
11 instructs that our statutory analysis starts with the language of
12 the statute, that the § 303(i) scheme is construed as an
13 integrated whole and that the Bankruptcy Code's construction is an
14 endeavor where a provision appearing possibly ambiguous in
15 isolation can be clarified by consideration of the remainder of
16 the statutory scheme.

17 I would add that where, as here, the statute's language is
18 plain, our sole function is to enforce it according to its terms.
19 United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 109 S.
20 Ct. 1026, 103 L. Ed. 2d 290 (1989) (citation omitted). We give
21 each word its common usage. Id.; see also Pioneer Investment
22 Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 388,
23 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) (looking to the clear
24 meaning of the word "neglect" by citing a dictionary definition).
25 We must give meaning and import to every word in a statute.
26 Negonsott v. Samuels, 507 U.S. 99, 106, 113 S. Ct. 1119, 122 L.
27 Ed. 2d 457 (1993). We presume that ``Congress acts intentionally
28 and purposely when it includes particular language in one section

1 of a statute but omits it in another.'" BFP v. Resolution Trust
2 Corp., 511 U.S. 531, 537, 114 S. Ct. 1757, 128 L. Ed.2d 556 (1994)
3 (citation omitted).

4 Applying these rules, Congress expressly stated "against the
5 petitioners" in identifying those potentially liable for attorney
6 fees and costs. § 303(i)(1). Simultaneously, it omitted this
7 language in providing that a court may award punitive damages
8 against "any petitioner that filed the petition in bad faith."
9 § 303(i)(2) (emphasis supplied). Thus, liability for a bad faith
10 petition expressly need not be considered against all petitioners.
11 Presuming that Congress has acted intentionally and purposefully
12 in choosing different language for two adjacent subsections, the
13 common meaning would be that all petitioning creditors must be
14 considered for potential § 303(i)(1) liability.

15 It is difficult to perceive how § 303(i)(1) -- authorizing an
16 award against "the petitioners" -- can be read as "some" or a
17 "few" of them. Such a reading is particularly suspect when
18 Congress, in the same statute, provides express verbiage to
19 identify less than all petitioners for bad faith awards in
20 § 303(i)(2): "against any petitioner". It is difficult to
21 appreciate why the drafters would use both "the petitioners" and
22 "against any petitioner" to mean exactly the same thing in
23 adjacent subsections of the same statute. A natural reading of
24 § 303(i) is that, absent bad faith, a fee and cost award is to be
25 considered against all petitioners. "When the words of a statute
26 are clear, 'judicial inquiry is complete.'" Security Leasing
27 Partners, LP v. ProAlert, LLC (In re ProAlert, LLC), 314 B.R. 436,
28 441 (9th Cir. BAP 2004) (citation omitted).

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B

At least initially, the trial judge agreed with this construction of the statute. Upon discovering that the alleged debtor had not served all petitioning creditors, the court ordered service on all such parties:

Another reason I think I should continue this is, I think this motion should be served on all the petitioners and they should be given notice to the fact that they might be liable for costs, attorney's fees and damages. It is a pretty serious matter. I think they should be--I want to be sure that they know what is going on.

Counsel replied:

Sure, your Honor. Well, fees were not requested against them because Michael Sofris was the spearhead and he was the main named petitioning creditor on the involuntary petition and there would be joint and separate liability. But in any event, notice can be served on them, even though fees were not requested against them.

The court responded:

Okay. Well, I think--I think--well there is an issue, too, as to whether you can pick and choose.

Hrg. Tr. 2, January 4, 2006 (emphasis supplied).

At a subsequent hearing the court indicated:

However, I do think it is appropriate to impose attorney's fees and costs on the petitioning creditors here. I think that essentially a presumption in the law, [sic] I have discretion whether to award those or not. I think given this case, given the lack of evidence to show that the--that there wasn't a bona fide dispute regarding the petitioning creditors' claims, I am going to make the award.

So I am going to grant the attorney's fees and costs as against all of the petitioning creditors, which I think I have to do under the statute. So, to that extent I am granting the motion and the total of that sum of course would be the \$42,257.

Hrg. Tr. 9, February 1, 2006 (emphasis supplied).

But it was not to be. Although the court clearly stated its

1 intent to sanction all petitioners, two of them (Sinclair and
2 Zeff) were excluded from the award because they were not served as
3 directed. This change in the intent to sanction all petitioners
4 occurred in open court. Upon discovery of the service failure,
5 the court summarily resolved the matter:

6 All right. Whoever they--whoever of the petitioning
7 creditors got served--I thought that was all of them, at
8 least initially, but maybe it wasn't.

9 MR. FAITH: Initially that is correct, your Honor, but
10 there were two more, I believed, that supplemented.

11 THE COURT: All right. Whoever got served, whoever had
12 notice. I think that is clear, isn't it?

13 Mr. Kaplan: Yes.

14 Id. at 10-11.

15 While it is clear that bankruptcy courts have authority to
16 sanction less than all petitioning creditors under § 303(i), I
17 doubt that discretion on such a serious matter can be exercised
18 "on the fly" as occurred here. More importantly, movants cannot,
19 deliberately or through error, bring less than all petitioning
20 creditors before the court under the clear meaning of
21 § 303(i)(1).¹⁹

22 C

23 I also join the majority regarding the bankruptcy court's
24 broad discretion in § 303(i) awards. First, the statute's use of
25 the permissive "may," rather than the mandatory "shall,"
26 contemplates that fees and costs will not always be awarded.

27 ¹⁹The majority reports that their close examination of Vortex
28 Fishing reveals that our circuit affirmed an award made against
only some petitioners. I've already indicated my belief that
bankruptcy courts can do this, under procedurally proper
circumstances. My reading of Vortex fails however, to discern that
this precise issue was either raised or decided in that case.

1 Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701, 705-06 (9th
2 Cir. 2004). A court exercises discretion in the award. Id. at
3 706.

4 Higgins adopted the "totality of the circumstances" as the
5 appropriate award standard. Id. at 707. However, the panel
6 cautioned it did not abandon the premise that any petitioning
7 creditor should expect to pay debtor's attorney's fees and costs,
8 if the petition is dismissed. An alleged debtor's motion for fees
9 and costs raises a rebuttable presumption that reasonable fees and
10 costs are authorized. This presumption reinforces the principle
11 that filing an involuntary petition is not lightly undertaken. It
12 discourages inappropriate, frivolous filings. An involuntary
13 petition should be a measure of last resort, since even if filed
14 in good-faith, it can chill credit and supply sources and scare
15 away customers. Id. at 707.

16 Higgins noted that:

17 [O]nce the debtor has satisfied the burden of
18 demonstrating the reasonableness of the fees requested,
19 '[i]t is then the petitioning creditors' burden to
20 establish, under the totality of the circumstances, that
21 factors exist which overcome the presumption, and
22 support the disallowance of fees.' However, this does
23 not give the petitioning creditor license to conduct
24 additional discovery and present evidence on an issue
25 that has already been decided. The rebuttable
26 presumption framework allows the court, which by this
27 point in the process has heard all the evidence
28 surrounding dismissal, to make 'an informed examination
of the entire situation' without the burden of
conducting another mini-trial.

25 Id., (citations omitted).

26 Finally, bankruptcy courts consider additional relevant
27 factors before awarding attorney's fees and costs: (1) the merits
28 of the involuntary petition; (2) any improper conduct of the

1 alleged debtor; (3) reasonableness of the actions by petitioning
2 creditors and (4) the motivation and objectives behind filing the
3 petition. This list is not exhaustive. Id. at 707-708.

4 Here the bankruptcy court, possibly dealing with a demanding
5 docket and well aware that it could not enter judgment against
6 unserved petitioners, elected to conclude the matter by an award
7 against those whom the alleged debtor managed to serve, rather
8 than granting a second continuance due to service issues. This
9 practical resolution nevertheless allowed the alleged debtor to
10 elude the clear requirement of § 303(i)(1) that all petitioners
11 are to be brought before the court.

12 D

13 I detect no undue procedural obstacle from a clear statutory
14 reading that requires naming and serving all petitioners when
15 seeking a § 303(i)(1) award. Judicial discretion and flexibility
16 are preserved. Individual petitioners are free to make their case
17 to the judge as to why the rebuttable presumption of a reasonable
18 fee award should not be imposed against them. Indeed, I question
19 how a bankruptcy court could engage in the broad "totality of the
20 circumstances" review mandated by Higgins, when robbed of the
21 opportunity to have all petitioners appear and potentially explain
22 their individual roles in prosecuting the petition.²⁰

23 II

24 The majority evades the requirement of presenting all
25 petitioners to the court by a remarkable wholesale importation of

26 ²⁰If service on all petitioners could be established as
27 impossible, I would presume the court could still act against
28 those capable of being served. That is certainly not the
circumstances of this case.

1 common law tort remedies into a federal cause of action that is
2 exclusively statutory. We are instructed that state tort lawsuits
3 are not to be used for such damages. Miles, 430 F.3d at 1091. It
4 is unclear what perceived ambiguity in § 303(i) drives this
5 incorporation. But there must be something. Otherwise, we are to
6 stop our work and simply enforce the statute according to its
7 terms. Ron Pair Enters., 489 U.S. at 241.

8 A

9 The majority states that § 303(i)(2) (the subsection not
10 applicable to this case) mentions "damages proximately caused" and
11 "punitive damages" and these terms are ". . . both familiar
12 concepts in the common law of tort."²¹ From this, it follows for
13 them that Congress based its scheme of § 303(i) remedies on
14 general common law tort principles, which traditionally result in
15 joint and several liability.

16 It is important to first note that the statute does not
17 mention joint and several liability. Accordingly, this liability
18 concept cannot itself cause an ambiguity that prevents application
19 of the statute as written. Nor is there a need, in my view, for
20 the extensive discussion of this liability theory that the
21 majority provides. As they recognize, the error assigned by
22 appellant is not that the sanction imposed involved joint and
23 several liability. As they further recognize, we have yet to
24 expressly read this liability concept into the award statute,
25

26 ²¹As no authority is cited for this proposition, I'm allowed
27 to quibble that my government dictionary advises proximate cause
28 is also a criminal term and that punitive damages are sometimes
available in breach of contract actions. Black's Law Dictionary
234, 418 (8th ed. 2004).

1 treating it to date only by implication. I would leave a
2 definitive discussion and possible incorporation of joint and
3 several liability in some form, if at all, for another day and
4 case, when it is clearly raised.²²

5 B

6 The majority's thorough discussion of joint and several
7 liability, contribution and indemnity highlights the mischief that
8 can occur by the wholesale application of common law tort concepts
9 into an exclusively bankruptcy statutory cause of action. Under
10 the majority's analysis, there is no need to name or even notice
11 all petitioners when a § 303(i)(1) award is sought against fewer
12 than all. Unnamed and unserved petitioners do not escape
13 liability, however. They can be brought to account, possibly long
14 after the award was entered in their absence, when the named party
15 decides it has paid a disproportionate and inequitable share of
16 the liability. The named party can even assign this contribution
17 right to others. While the unnamed parties might mount an
18 indemnity defense, we are not told if they may ask the bankruptcy
19 judge to reopen the original award itself. Vehicles to mount this
20 satellite litigation might include a joinder motion,²³ a third-
21 party complaint in a separately filed adversary, third-party
22 practice in the contested matter itself, (if the court so permits)

23
24 ²²Since the statute neither includes nor excludes this
25 concept, I see no reason to prohibit bankruptcy courts from
26 entering multiple party liability on a basis other than joint and
several in an appropriate case.

27 ²³If I am correct that the statute requires the movant to
28 bring all petitioners before the court, then to require the
respondent to do, by a Civil Rule 21 motion, that which the movant
should have done is hardly equitable.

1 or an independent contribution action.

2 The majority admits to "practical disadvantages" and "obvious
3 inefficiencies of redundant litigation" arising under this
4 incorporation. They correctly raise the possibility that issue or
5 claim preclusion of the award "may be clouded" as to unserved
6 petitioners. However salutary this tort scheme works in non-
7 bankruptcy courts, in bankruptcy it is far better to establish a
8 single forum granting all potentially liable parties the
9 opportunity to appear when adjudicating a § 303(i)(1) matter in
10 the first instance. More than an efficient procedure, it is, I
11 believe, statutorily required.²⁴

12 In sum, the remedial scheme of § 303(i) is comprehensive,
13 specifically addressing the full range of remedies from costs and
14 fees to compensatory and punitive damages. It is for Congress to
15 decide what penalties are appropriate, when they are to be
16 utilized and who benefits from them. Those unsatisfied with the
17 remedies provided in the Bankruptcy Code should look to Congress
18 for supplementation. Miles, 430 F.3d at 1092 (citing cases). For
19 the purposes of this particular case, we need only apply the
20 statute as written. We should close our tort books.

21 III

22 Appellant argues that the court erred in not enforcing an
23 alleged settlement and release, executed on December 12, 2005. The
24 petitioning creditors and alleged debtor purportedly agreed that,

25
26 ²⁴The majority's holding regarding unserved petitioners'
27 contribution liability creates due process concerns. See, e.g.,
28 Miller v. Cardinale (In re DeVille), 361 F.3d 539, 548-49 (9th
Cir. 2004) (discussing particularized notice requirements for
sanctions).

1 in exchange for payment of \$1,000, the award motion would be
2 withdrawn. The agreement was signed by Robert Nathan, identified
3 as the alleged debtor's president.

4 Appellee disputed the release's validity as a "bogus
5 settlement" at the award hearing. The bankruptcy court entered
6 the award without deciding the waiver's validity, apparently
7 believing that state court proceedings would eventually resolve
8 the matter:

9 . . .if that is a valid settlement, that would sort of
10 supersede what I do here anyway, if in fact that is a --
11 you are talking about the point release, right? . . .
[i]f it turns out that that is a valid release, then it
is a valid release.

12 Hrg. Tr. 1-2, February 1, 2006.

13 The majority affirms this procedure, concluding that (1) Mr.
14 Nathan was found to be posing as the debtor's president and was an
15 imposter and (2) regardless, if a state court subsequently ruled
16 that Mr. Nathan's faction was in control, then the waiver would be
17 effective and sums paid could be collected in a subsequent suit.
18 This affirmance allows abdication of bankruptcy court jurisdiction
19 over this matter without a definitive ruling.

20 Since I lack the majority's information on the unmasking of
21 Mr. Nathan as an imposter²⁵, I can only comment that if the
22 bankruptcy court believed his agreement was unauthorized, it

23
24 ²⁵The majority reports an inquiry outside this record reveals
25 a subsequent superior court ruling in favor of one faction. Since
26 there is no indication this was presented to the bankruptcy court,
27 I see no relevance. I would grant appellant's request to strike
28 certain exhibits, including a state court judgment never presented
to the bankruptcy court and keep our investigators home. See
Dorothy W. Nelson, et al., Ninth Circuit Civil Appellate Practice,
¶ 4:16 at 4-3 (2001) (citing United States v. Walker, 601 F.2d
1051, 1054-55 (9th Cir. 1979)); Morrison v. Hall, 261 F.3d 896,
900 (9th Cir. 2001).

1 should have so ruled and rejected the waiver. It was
2 inappropriate to leave the matter for subsequent resolution by our
3 state colleagues.

4 We recently noted that a waiver by the debtor of the right to
5 judgment is one of only two charted safe harbors from § 303(i)
6 remedies. Wechsler v. Macke International Trade, Inc. (In re
7 Macke International Trade, Inc., 370 B.R. 236, 256-57 (9th Cir.
8 BAP 2007). Concordantly, our circuit characterizes the absence of
9 a waiver as being one of "only two prerequisites" for an award
10 under § 303(i)(1). Higgins, 379 F.3d at 705. It is an important
11 matter. When clearly raised, as it was here, it must be disposed
12 of prior to making an award.²⁶ It cannot be left for subsequent
13 resolution by another court.

14 IV

15 In conclusion, I perceive no error in the bankruptcy court's
16 award of attorney's fees and costs against appellant and concur
17 with the affirmance of that award. However, as the bankruptcy
18 court was not permitted to consider an award against all
19 petitioning creditors, solely because of a service failure and
20 given the lack of an express finding that the alleged release was
21 invalid as a waiver of such fees, I respectfully dissent from the
22 majority's disposition and would reverse and remand, on those
23 issues.

24

25

26 ²⁶It may not be necessary to conduct a full evidentiary
27 hearing. The majority believes that a court ruling has been
28 entered between the parties or their privies regarding the alleged
debtor's ownership and control. If a binding, final judgment has
been entered, it would constitute the basis for a summary
preclusion ruling by the bankruptcy court.