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CAN A LONE CREDITOR WITH A STATE COURT REMEDY PROSECUTE AN INVOLUNTARY CHAPTER 7 CASE?

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INTRODUCTION

The United States Court of Appeals for the Second Circuit in *Wilk Auslander LLP v. Murray (In re Murray)*,[1] recently became the first court of appeals to decide whether an involuntary Chapter 7 filed by a debtor's lone creditor could be dismissed for "cause" not listed in Bankruptcy Code § 707(a).[2] *Murray* upheld dismissal[3] of an involuntary Chapter 7 petition, when the creditor could not show it would be prejudiced by relying on state court remedies, and dismissal would better advance the interest of the debtor and the bankruptcy system as a whole.[4] The bankruptcy court dismissed the case even though it found that all of the prerequisites for filing an involuntary petition under § 303[5] were satisfied,[6] and there was no finding of bad faith by the petitioning creditor.[7]

In *Murray*, the Second Circuit affirmed what some lower courts have already decided—that a lone creditor cannot file an involuntary petition if it has a state court remedy. But in those other cases additional reasons were identified for dismissal under § 303.[8] Since creditors almost always have an

IN THIS ISSUE:

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available state court remedy, does *Murray* signal that a lone creditor has no right to file an involuntary petition in the Second Circuit? Before tackling that question, it is necessary to understand *Murray*'s unique facts.

WILK AUSLANDER LLP V. MURRAY (IN RE MURRAY)

In *Murray*, the petitioning creditor, Wilk Auslander (the "Law Firm"), held a $19 million judgment against the debtor, Raymond Murray. The judgment arose from Mr. Murray's disclosure to the U.S. Senate of what he believed to be his employer's[9] improper business activity.[10] Mr. Murray had no income and his only material asset was a $4.6 million family home/apartment,[11] which he owned together with his wife, as tenants by the entireties.[12]

The Law Firm filed the involuntary petition because it believed bankruptcy law could provide relief unavailable in state court.[13] In a bankruptcy case, the Law Firm could execute upon the entireties interest in the entire apartment through § 363(h), and could realize approximately $2.3 million after allowing Mr. Murray's wife her share of the sale proceeds. In contrast, under state law, the Law Firm could not execute upon the entire apartment. Instead, only Mr. Murray's "interest in the apartment" could be sold. Since Mr. Murray's interest in the apartment was merely his survivorship right—which may be worth as little as $230,000—state law remedies were not nearly as attractive to the Law Firm.[14]

The bankruptcy court characterized the Law Firm's filing of the involuntary petition as a variation of the common practice of filing "a case under the Bankruptcy Code as a tactic in a two-party dispute—though much more commonly in such situations the abuser is the debtor and not a creditor."[15] It then described the issue presented by this tactic as "whether an involuntary case, with only a single creditor, appropriately can be used simply as a judgment enforcement mechanism: here to enable a judgment creditor to exploit mechanisms to monetize a spousal interest in property jointly held with a debtor that are available only in a bankruptcy case."[16]

The bankruptcy court stated that the Law Firm filed the involuntary petition solely to achieve a result it could not achieve in state court, rather than to protect any other creditor's interest or to achieve any recognized bankruptcy system goal.[17] This belief supported its holding that the involuntary petition was an inappropriate use of bankruptcy because "bankruptcy was created as a collective remedy, to achieve *pari passu* distribution amongst creditors—not as a single creditor's judgment enforcement device."[18] The Second Circuit agreed, holding "Wilk Auslander's [the Law Firm's] preference for bankruptcy reme-

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dies to solve a two-party dispute cannot outweigh the lack of any other bankruptcy related purpose."[19]

The Second Circuit then supported its affirmation of the lower court's decision by considering for the first time the interests of third parties. It did so by examining the other factors that would control whether to allow a § 363 sale of the family home.[20] First, it compared the economic impact of the sale of the family home in bankruptcy court versus the sale in state court. From that comparison, the Second Circuit held that even if the involuntary case were allowed to proceed it was not at all certain that the Law Firm could sell the family home because "(1) the detriment to Murray's wife may be deemed to outweigh the value to the estate . . . ; and (2) it is unclear that any sale under § 363 would value Murray's interest any higher than would a sale under New York law."[21]

Perhaps an additional factor—consideration of third parties—is necessary to dismissal for cause of an involuntary case filed in good faith in a 2-party dispute when all of § 303's other criteria are satisfied. To try to answer that question and to better understand when involuntary petitions by a lone creditor can or cannot proceed, *Murray* is compared below to three other lone-creditor cases. In the first case, the involuntary is dismissed. In the second, the involuntary is allowed but the creditor has no state court remedy. In the third, the involuntary is allowed even though the creditor has a state court remedy.

DISCUSSION

1. IN RE SELECTRON MGMT. CORP.[22]

Selectron is an example of a dismissed involuntary filed by a lone creditor with a state court remedy. While *Selectron* does not answer whether a lone creditor with a state court remedy can ever file an involuntary, it identifies ample reasons to dismiss similar cases.

In *Selectron*, the creditor obtained a $762,000 judgment against the debtor in 2007. By 2010, after the judgment with interest grew to $956,000, the creditor filed an involuntary petition against Selectron. The record was unclear whether collection actions were taken by the creditor between the judgment and petition dates.[23]

The creditor gave two reasons for filing the involuntary. First, to appoint a Chapter 7 trustee to investigate and avoid the debtor's transfers to Synergy International, a related company already in bankruptcy pending in the same court. Second, pursuing both the debtor and Synergy in the same court would be more economical and efficient.

The creditor, however, could not provide any reason why investigation and avoidance could not be accomplished under state law, or why it could not collect its judgment under state law. Nor could it point to any facts showing the debtor took any steps to evade paying on the judgment.

The debtor argued the involuntary should be dismissed under § 305(a) because it was a two-party dispute, and the judgment could be pursued in state court.[24] Significantly, the debtor further argued that the creditor's real reason for filing the involuntary was an inappropriate attempt to combine collection of its judgment with issues in Synergy's related bankruptcy case.[25]

To decide the dismissal motion under § 305, the court listed seven factors to consider, including: (i) the economy and efficiency of administration, (ii) whether another forum was available to protect both parties, (iii) whether federal proceedings are necessary to reach a just and equitable solution, and (iv) the purpose for seeking bankruptcy jurisdiction.[26] The court concluded that involuntary bankruptcy would not help either the creditor or the debtor. The court noted that if

the creditor really wanted to pursue the transfers in bankruptcy court it could do so by simply filing an adversary proceeding in Synergy's separate bankruptcy case. For those reasons and because it was a 2-party dispute that could be resolved by state court, the court dismissed the case under § 305(a).[27]

The similarities in *Selectron* and *Murray* are: (i) both were filed after entry of a judgment, (ii) both were 2-party cases, and (iii) the transfers in both could be investigated and avoided on a motion to dismiss under § 305 or a motion to dismiss under § 707. Second, the creditor's real reason for the involuntary filing in *Selectron* was to obtain access to a third party, Synergy; while in *Murray*, the creditor was trying to maximize the proceeds of collection on its judgment against the debtor. In *Selectron*, the involuntary was not filed to satisfy any acceptable bankruptcy purpose, but instead as a litigation tactic—a practice disliked by bankruptcy courts.[28]

By explicitly articulating a litigation tactic as the reason for filing, the creditor in *Selectron* made it easier for the court to dismiss under § 305. It is hard to tell how much the existence of a state court remedy contributed to the court's decision to dismiss.

2. IN RE MIKKELSON[29]

The involuntary in *Mikkelson* was not dismissed. *Mikkelson* is an example of an involuntary filed by a lone creditor without a state court remedy. *Mikkelson* demonstrates that an involuntary case against a bad actor can proceed, but it does not answer the question whether a lone creditor with a state court remedy can maintain an involuntary.

The debtor in *Mikkelson* intentionally crashed his truck into his ex-wife's car and went to prison.[30] His ex-wife sued to recover damages for the injuries she sustained and obtained a $5 million judgment. After unsuccessfully trying to collect on the judgment in state court, she filed an involuntary petition. Prior to the bankruptcy filing, and during post-judgment collection proceedings, the debtor failed to disclose assets, dissipated some of his assets and transferred away other assets.[31] The debtor had a few other very small creditors for recurring bills that he regularly paid in full.[32]

The debtor argued "that he is generally paying his debts as they become due, that he has very few creditors and that his creditors will derive no benefit from the entry of an order for relief because there are no nonexempt assets available to liquidate . . . ."[33] The debtor then asked the court to abstain under § 305 because "granting an order for relief was inappropriate because the involuntary petition is a continuation of a two-party debt collection dispute that state law already addressed."[34]

The *Mikkelson* court rejected these arguments and allowed the involuntary petition to proceed. First, the debtor's failure to pay anything on the judgment, which comprised 99.8%[35] of his debts, established that he was not generally paying his debts as they became due.[36] Second, the debtor's management of his financial affairs might permit recovery of certain assets which were not recoverable under state law.[37] But *Mikkelson* did not address one of *Murray*'s primary concerns—whether a lone creditor's use of an involuntary petition as a judgment collection device is an improper use of the bankruptcy system.

The facts in *Mikkelson* are distinguishable from those in *Murray*. In *Mikkelson*: (i) the debtor took the active steps of transferring and dissipating his assets to defeat collection by the creditor and did not fully disclose those transfers; (ii) the debtor asked the court to abstain from exercising jurisdiction under § 305; and (iii) the creditor was unable to recover anything in state court. In *Murray*: (i) the debtor made some transfers but fully disclosed them;[38] (ii) the debtor's only asset was his

home—owned as tenants by the entireties with his wife long before entry of the judgment against him; (iii) the debtor asked the court to dismiss for "cause" under § 707(a); and (iv) the creditor potentially could recover something in state court. The first difference makes Mr. Murray much more likable than Mr. Mikkelson, a bad actor. This may, in part, explain the opposite results reached in these two cases.[39]

The different Bankruptcy Code sections under which dismissal was requested may have contributed to the different outcomes. The debtor in *Mikkelson* requested dismissal under § 305, which considers both the creditor's and the debtor's interests. Under § 305, the *Mikkelson* court balanced both parties' interests to make its decision.

In contrast, in *Murray* the debtor moved for a dismissal "for cause" under § 707. Dismissal for cause invokes a broader standard that looks beyond the interests of the debtor and petitioning creditor. *Murray* did just that by adding a completely new factor—the interests of the bankruptcy system as a whole—to assess dismissal of an involuntary under § 707. Then the Second Circuit added yet another factor—the interests of Mr. Murray's wife as a third party—when examining what the sale of the home would look like in state court as opposed to the bankruptcy court.

There are two primary takeaways from this comparison of *Murray* and *Mikkelson*. First, under § 707 the court was not constrained to conduct a pure balancing of the debtor's and creditor's interests when deciding whether to dismiss an involuntary. Second, the ability to recover something in state court in *Murray* and the inability to do so in *Mikkelson* supports the principle that if a creditor has an available state court remedy, its involuntary case should be dismissed.

3. IN RE FMB BANCSHARES[40]

FMB Bancshares is a rare example of an involuntary filed in good faith by a lone creditor that is not dismissed even though it has a state court remedy. Trapeza, the sole creditor of FMB Bancshares, Inc. ("FMB"), owned $12 million of TruPS[41] issued by FMB.[42] The TruPS were issued under an indenture agreement giving FMB the contractual right to defer payments for up to five years, which it exercised because its capital reserves were too low under FDIC regulations.[43] After the initial deferral period expired, and despite having no contractual right to another deferral, FMB requested another five-year deferral because its capital reserves were still too low to make payments on the TruPS.[44]

Having already waited five years without receiving payment, Trapeza had enough and filed an involuntary Chapter 7 against FMB. FMB moved for dismissal under § 305, claiming that: (i) if the case proceeded it would cause excessive interference/entanglement with bank regulators; (ii) bankruptcy was not in the best interests of the debtor and creditors; and (iii) this was a 2-party case better resolved in a court of general jurisdiction.[45]

As a preliminary matter, the bankruptcy court noted that dismissal under § 305 is an extraordinary measure that should only be exercised in unusual situations, and that the burden of proof rests on the party seeking dismissal.[46] The court then addressed each of FMB's arguments.

First, the court determined that no regulatory entanglements existed.[47] It also differentiated *In re First Financial Enterprises, Inc.*,[48] a case FMB cited to support its entanglements argument.[49] In *First Financial*, an involuntary was filed to halt an existing state court receivership—which was hotly contested in state court before becoming effective. The *FMB Bancshares* court explained that the petition-

ing creditor in *First Financial* was much different from Trapeza because Trapeza was not "attempting to accomplish through . . . bankruptcy what it could not accomplish through litigation in another court."[50]

Next, the *FMB Bancshares* court rejected the "not in the best interests of the debtor and creditors" argument by reminding us that dismissal under § 305 must be in the best interests of both the debtor and creditors. The court then reasoned that dismissal was only in the debtor's best interests—and not the creditor's—because Trapeza: (i) had not been paid for over five years; (ii) was a sophisticated party and had considered its options carefully; and (iii) had chosen an involuntary filing because it believed that to be the proper forum to enforce its rights, and the court would not second guess the creditor's business judgment.[51]

Finally, the *FMB Bancshares* court rejected the "2-party dispute" argument as a basis for dismissal because § 303 specifically allows an involuntary case to be filed in a 2-party dispute depending on the facts of the case.[52] While the dispute in *FMB Bancshares* could be resolved in state court, that resolution would likely result in long and protracted litigation and force Trapeza to wait even longer for any recovery after already standing down during the five-year deferral period it agreed to by indenture.[53]

In both *Murray* and *FMB Bancshares*, the creditor had a state court remedy to collect its debt. Yet *Murray* dismissed the involuntary while *FMB Bancshares* did not. The *FMB Bancshares* result gives a lone creditor with a state court remedy a ray of hope that it can successfully prosecute an involuntary. Perhaps comparison of the facts in these two cases helps explain their different outcomes.

The facts in *FMB Bancshares* are distinguishable from *Murray*'s. In *FMB Bancshares*: (i) the debtor argued that the debt was subject to a bona fide dispute and the case should be dismissed under § 303(b)(1); (ii) the debtor requested abstention under § 305; and (iii) the creditor never commenced collection proceedings in a nonbankruptcy forum.

In contrast, in *Murray*: (i) the debtor never argued or even suggested that the debt was subject to a bona fide dispute; (ii) the debtor requested dismissal "for cause" only under § 707(a); and (iii) the creditor already sought and obtained a judgment in state court prior to filing the involuntary petition.

By itself, the first difference appears insignificant. Of course, there is nothing wrong with the debtor making a weak argument so long as it is made in good faith. But making that argument forced the court to look under a rock that the debtor would have been better off left undisturbed. The debtor in *FMB Bancshares* attempted to transform its inability to pay into a dispute about the validity of the debt by arguing that payment would violate FDIC regulations on a bank's minimum capital requirements. The court analyzed this argument and concluded that the debt was not at all in dispute. Forcing the court to conduct this analysis may have made it easier for the court to decide in the creditor's favor when balancing the debtor's and creditor's interests under § 305.

The second difference is the Code section under which the debtor moved to dismiss the case. In *FMB Bancshares*, the debtor moved to dismiss the involuntary under § 305. If the debtor instead moved to dismiss "for cause" under § 707 it could have avoided a balancing analysis under § 305 altogether, and it could have argued that bankruptcy court is an improper venue for pure collection matters. Since many bankruptcy judges agree that bankruptcy courts should not be used solely for collection,[54] the *FMB Bancshares* court may have relied on that reason alone to dismiss the involuntary.

The third difference was the stage of the collection process when the creditor filed the involuntary petition. In *FMB Bancshares*, the creditor never made any collection efforts in state court, so the involuntary was its first bite at the apple. While in *Murray*, the involuntary was a second bite that reeked of forum shopping—a practice most courts abhor. So, if a lone creditor with a state court remedy wants to file an involuntary, *FMB Bancshares* could also signal that an involuntary should be filed before rather than after the creditor commences collection proceedings in state court.

ANALYSIS AND CONCLUSION

Murray is an unusual case of an involuntary petition filed in good faith by a lone creditor with a state court remedy that satisfied all of § 303's criteria yet was dismissed by the Second Circuit. While it did not say so explicitly, *Murray* could stand for the proposition that filing an involuntary is not an option for a lone creditor having a state court remedy. That said, *FMB Bancshares*, another unusual case, suggests a narrow exception to that proposition. In *FMB Bancshares*, despite the creditor having a state court remedy, the involuntary was allowed to proceed. The key difference between these cases seems to be that the creditor in *FMB Bancshares* never commenced state court litigation before it filed the involuntary petition.

FMB Bancshares provides creditors with an argument against the dismissal of involuntary petitions. *FMB Bancshares* also offers a glimmer of hope that other unusual situations exist which could allow an involuntary to survive dismissal notwithstanding the availability of state court remedies.

Stretching to provide petitioning creditors with more than the glimmer of hope provided by *FMB Banchares*, *Murray* can be read from another angle—how the Second Circuit subtly shifted the focus of the bankruptcy court's decision. In *Murray*, the bankruptcy court's decision turned on whether the involuntary case served some recognized goal of the bankruptcy system. By dismissing the case for failing to meet this requirement, the bankruptcy court arguably added a new, non-statutory criterion for a lone creditor to maintain an involuntary. This raises the specter that a lone creditor meeting all of § 303's criteria could nonetheless be liable for the debtor's costs, attorney fees, damages and punitive damages for not satisfying a condition Congress never considered when drafting § 303.[55] This would undoubtedly dull a lone creditor's appetite to file an involuntary.

On appeal, the Second Circuit could have justified this "new criterion" under § 105.[56] However, deciding the case that way would not address the bankruptcy court's new non-statutory criterion, and would have done little to blunt its chilling effect. Perhaps the Second Circuit intentionally avoided these concerns by considering something the lower court never addressed—the impact on third parties. By deciding *Murray* on this alternative basis, the Second Circuit affirmed the bankruptcy court's outcome yet avoided condoning the addition of a new non-statutory criterion to § 303, with its related chilling effect.

Until other courts of appeals decide cases like *Murray*, lone creditors should carefully stage any involuntary petition, considering the various ways *Murray* may raise the risks in this area of bankruptcy practice.

ENDNOTES:

[1]*Wilk Auslander LLP v. Murray (In re Murray),* 900 F.3d 53 (2d Cir. 2018).

[2]Unless otherwise stated, all statutory references herein are to the Bankruptcy Code. Section 707(a) provides that the court may dismiss a Chapter 7 case for cause, where cause includes: (i) unreasonable delay that is prejudicial to creditors, (ii) non-payment of fees, and (iii) failure to timely file bankruptcy

schedules.

[3]*In re Murray*, 543 B.R. 484 (Bankr. S.D.N.Y. 2016).

[4]*In re Murray*, 900 F.3d at 61.

[5]Section 303 provides that an involuntary petition may be commenced against a debtor having 12 or fewer creditors, by only one of its creditors if it holds an undisputed and liquidated claim for at least $15,775, and if the debtor is generally not paying its debts as they become due. *See* 11 U.S.C.A. §§ 303(b)(1) & 303(h)(1).

[6]*In re Murray*, 900 F.3d at 60 (noting, "[t]he bankruptcy court . . . assumed that Wilk Auslander's petition met the Section 303 requirements. . .").

[7]*In re Murray*, 900 F.3d at 58 ("The bankruptcy court . . . declined to reach the question of whether Wilk Auslander filed the petition in bad faith . . . .").

[8]*See, e.g.*, *Remex Indus., Inc. v. AXL Indus., Inc. (In re AXL Indus., Inc.)*, 127 B.R. 482, 483 & 486 (S.D. Fla. 1991) (dismissed involuntary in part due to creditor having state court remedies); *see also In re R&S St. Rose, LLC*, Case No. 11-14974-MKN, 2010 Bankr. LEXIS 6574, at *22 (Bankr. D. Nev. Oct. 29, 2010) (same).

[9]The Law Firm represented Rodman & Renshaw, LLC, Mr. Murray's employer, in the employer's litigation against Mr. Murray. Rodman & Renshaw assigned 70% of its judgment against Mr. Murray to the Law Firm to pay its legal fees. *See In re Murray*, 900 F.3d at 56.

[10]*In re Murray*, 543 B.R. at 487.

[11]It was appraised for approximately $4.6 million. *See In re Murray*, 900 F.3d at 57.

[12]*In re Murray*, 543 B.R. at 487.

[13]*In re Murray*, 543 B.R. at 488 n.17.

[14]*In re Murray*, 900 F.3d at 62 ("[B]ecause Murray's wife maintains her right of survivorship in the apartment, she would own the apartment free and clear of any third party's interest if Murray predeceases her. Because of these complications, most courts conclude that a debtor's interest in a tenancy by the entirety is essentially the debtor's own survivorship right, which could be as low as 5 percent of the total value of the property, especially when factoring in the non-debtor spouse's age, gender, and other actuarial data.") (citing *Community Nat'l Bank & Trust Co. of N.Y. v. Persky (In re Persky)*, 893 F.2d 15, 19 (2d Cir. 1989)). Five percent of $4.6 million = $230,000.

[15]*In re Murray*, 543 B.R. at 486.

[16]*In re Murray*, 543 B.R. at 486 (footnote omitted).

[17]*In re Murray*, 543 B.R. at 486.

[18]*In re Murray*, 543 B.R. at 486.

[19]*In re Murray*, 900 F.3d at 62.

[20]Sale of estate property that is co-owned by another requires: (1) partition to be impracticable, (2) sale of the estate's undivided interest would yield significantly less than the sale of the entire property free of the co-owner's interest, and (3) the benefit to the estate of a sale free of the co-owner's rights outweighs the detriment to the co-owner. *See* 11 U.S.C.A. § 363(h).

[21]*In re Murray*, 900 F.3d at 62.

[22]*In re Selectron Mgmt. Corp.*, No. 10-75320-dte, 2010 WL 3811863 (Bankr E.D.N.Y. Sept. 27, 2010).

[23]*In re Selectron Mgmt. Corp.*, 2010 WL 3811863, at *2-*3.

[24]*In re Selectron Mgmt. Corp.*, 2010 WL 3811863, at *2-*3.

[25]*In re Selectron Mgmt. Corp.*, 2010 WL 3811863, at *3.

[26]*In re Selectron Mgmt. Corp.*, 2010 WL 3811863, at *5.

[27]*In re Selectron Mgmt. Corp.*, 2010 WL 3811863, at *5-*7.

[28]*See, e.g.*, *In re Forever Green Athletic Fields, Inc.*, 500 B.R. 413, 427 (Bankr. E.D. Pa. 2013) (filing an involuntary petition to gain a tactical advantage in pending litigation is not a valid bankruptcy purpose), *aff'd*, 514 B.R. 768 (E.D. Pa. 2014*), aff'd*, 804 F.3d 328 (3d Cir. 2015); *In re Skyworks Ventures, Inc.,* 431 B.R. 573, 579 (Bankr. D.N.J. 2010) (dismissing involuntary filed as a litigation tactic designed to shortcut pending litigation and force a settlement); *In re WLB-RSK Venture,* 296 B.R. 509, 514 (Bankr. C.D. Cal. 2003) (dismissing involuntary filed as part of a forum shopping litigation tactic); *Profutures Special Equity Fund, L.P. v. Spade (In re Spade)*, 269 B.R. 225, 228 (D. Colo. 2001) (dismissing involuntary which was not filed as means to ensure fair distribution of the debtor's assets to all creditors, but instead as a self-serving litigation tactic to control the forum and to get a trustee to conduct and pay for discovery of the debtor's affairs).

[29]*In re Mikkelson*, 499 B.R. 683 (Bankr. D.N.D. 2013).

[30]*In re Mikkelson*, 499 B.R. 683 at 686.

[31]*In re Mikkelson*, 499 B.R. at 687-91 & 697 (one of the transferred assets was real property the debtor quit claimed to his sons, that could not be reached under state law, but could be liquidated in bankruptcy).

[32]*In re Mikkelson*, 499 B.R. at 688.

[33]*In re Mikkelson*, 499 B.R. at 686.

[34]*In re Mikkelson*, 499 B.R. at 686.

[35]*In re Mikkelson*, 499 B.R. at 693.

[36]*In re Mikkelson*, 499 B.R. at 693 (citing *Crown Heights Jewish Cmty. Council, Inc. v. Fischer (In re Fischer)*, 202 B.R. 341, 351 (E.D.N.Y. 1996)); s*ee also In re Century/ML Cable Venture*, 294 B.R. 9, 31 n.37 (Bankr. S.D.N.Y. 2005) (Holding "[w]here a debtor fails to pay even one debt that makes up a substantial portion of its overall liability, a court may find that he is generally not paying his debts.").

[37]*In re Mikkelson*, 499 B.R. at 694.

[38]However, the record was not sufficiently developed to determine whether they were fraudulent or otherwise inappropriate. *See In re Murray*, 543 B.R. at 487 n.15; *In re* Murray, 900 F.3d at 56.

[39]One more difference worth noting is that the judgment against Mr. Murray arose because of his disclosure to the U.S. Senate of what he thought were his employer's improper business practices. In contrast, Mr. Mikkelson's judgment arose from his attempted murder of his wife. While it is impossible to know if these differences had any impact on the outcomes, they certainly are stark.

[40]*FMB Bancshares, Inc. v. Trapeza CDO XII, Ltd. (In re FMB Bancshares, Inc.)*, 517 B.R. 361 (Bankr. M.D. GA. 2014).

[41]TruPS are a preferred equity security. *See In re FMB Bancshares*, 517 B.R. at 364-65 & n.1. *See also* Investopedia at www.investopedia.com, accessed on December 14, 2018 ("They are securities issued by large banks and holding companies. The bank opens a trust which is then funded with debt. The bank then carves up shares of the trust and sell them to investors. The resulting share is called a trust preferred security, or TruPS. It is an important distinction that when an investor buys a trust preferred security they are buying a portion of the trust and its underlying holdings, not a piece of ownership in the bank itself. The trust preferred security is considered to be preferred stock and even pays dividends on a set schedule like preferred stock. However, since the trust holds the bank's debt as the funding vehicle, the payments the investors receive are actually interest payments and are taxed as such by the IRS.").

[42]This is a simplification of a complicated debt structure. However, since the debt structure's granular details do not impact this article's primary focus—dismissal of an involuntary bankruptcy in a 2-party case—those details do not require discussion.

[43]These regulations were put in place because of the near collapse of the banking systems in 2008. *See In re FMB Bancshares*, 517 B.R. at 366.

[44]*See In re FMB Bancshares*, 517 B.R. at 366-67.

[45]FMB also asked the court to dismiss under § 303(h)(1) arguing Trapeza's claim was contingent. The court rejected this argument too, noting inability to pay does not make the legal obligation to pay contingent. *In re FMB Bancshares*, 517 B.R. at 371.

[46]*In re FMB Bancshares*, 517 B.R. at 371 (citing *In re Kennedy*, 504 B.R. 815, 828 (Bankr. S.D. Miss. 2014)).

[47]Since the technical banking reasons why no entanglements existed is not relevant to this article they are not addressed.

[48]*In re First Fin. Enters., Inc*., 99 B.R. 751 (Bankr. W.D. Tex. 1989).

[49]*In re FMB Bancshares*, 517 B.R. at 372.

[50]*In re FMB Bancshares*, 517 B.R. at 373.

[51]*In re FMB Bancshares*, 517 B.R. at 373-74.

[52]*In re FMB Bancshares*, 517 B.R. at 374. *See also* 11 U.S.C.A. § 303(b)(2).

[53]*In re FMB Bancshares*, 517 B.R. at 374.

[54]*See, e.g.*, *In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328, 336 (3d Cir. 2015) (debt collection is not a proper purpose of bankruptcy); *Atlas Machine & Iron Works, Inc. v. Bethlehem Steel Corp.*, 986 F.2d 709, 716 & n.11 (4th Cir. 1993) (same).

[55]*See* 11 U.S.C.A. § 303(i).

[56]*See* 11 U.S.C.A. § 105(a), which provides, in part, that "[t]he court may issue any order, process or judgment that is necessary or ap-

propriate to carry out the provisions of this title."