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Robbing Your Rival's Piggybank: The Third Circuit Affirms Bad Faith Dismissals in Involuntary Bankruptcies After In re Forever Green Athletic Fields, Inc.

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ROBBING YOUR RIVAL'S PIGGYBANK: THE THIRD CIRCUIT AFFIRMS BAD FAITH DISMISSALS IN INVOLUNTARY BANKRUPTCIES AFTER *IN RE FOREVER GREEN ATHLETIC FIELDS, INC.*

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"[T]he filing of an involuntary petition is an extreme remedy with serious consequences to the alleged debtor, such as loss of credit standing, inability to transfer assets and carry on business affairs, and public embarrassment."[1]

I. CASHING IN A BAD DEBT: AN INTRODUCTION TO INVOLUNTARY BANKRUPTCY

In September 2008, America experienced "[t]he most important week in American financial history since the Great Depression . . . ."[2] As a result, anxiety levels were at an all-time high on Wall Street.[3] However, the economic crisis led to more than just an increase in anxiety; it also led to an increase in involuntary bankruptcy petitions filed in the United States.[4] The amount of involuntary petitions filed rose because economic hardship increased the risk of dissipating assets, and, consequently, people

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1. *In re* Reid, 773 F.2d 945, 946 (7th Cir. 1985) (citing *In re* First Energy Leasing Corp., 38 B.R. 577, 585 (Bankr. E.D.N.Y. 1984); *In re* McMeekin, 18 B.R. 177, 177–78 (Bankr. D. Mass. 1982)) (providing reason for careful scrutiny of creditors' filing of involuntary petition).

2. *See* James B. Stewart, *Eight Days: The Battle to Save the American Financial System*, NEW YORKER, Sept. 21, 2009, at 1, *available at* http://www.newyorker.com/magazine/2009/09/21/eight-days [https://perma.cc/T9BC-STLV] (discussing seriousness of 2008 financial crisis).

3. *See* Michelle Castillo, *Report: 2008 Financial Crisis Increased Suicide Rates in U.S., Europe*, CBS NEWS (Sept. 18, 2013, 12:33 PM), http://www.cbsnews.com/news/report-2008-financial-crisis-increased-suicide-rates-in-us-europe/ [https://perma.cc/RKC6-LYMW] (detailing research measuring "increased risk of depression and anxiety" during Great Recession).

4. *Compare* James C. Duff, JUDICIAL FACTS AND FIGURES: MULTI-YEAR STATISTICAL COMPILATIONS ON THE FEDERAL JUDICIARY'S CASELOAD THROUGH FISCAL YEAR 2008, ADMIN. OFFICE OF THE U. S. COURTS 49 tbl.7.2 (Sept. 2009), *available at* www.uscourts.gov/file/document/judicial-facts-and-figures-tables-2008 [https://perma.cc/J3VM-9HJV] (finding 541 involuntary petitions filed in 2007), *with* U.S. COURTS, *Judicial Facts and Figures 2014* (Sept. 30, 2014), http://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2014 [https://perma.cc/Y5C6-FZUR] (finding 1,054 involuntary petitions filed in 2010).

began to utilize the bankruptcy system, which has the "primary purpose" of ensuring that a debtor's assets are fairly utilized "for the collective benefit of creditors."[5]

Bankruptcy is often a beneficial avenue for debtors; however, debtors often delay or are unwilling to file for bankruptcy voluntarily.[6] Due to this reluctance to file, the Bankruptcy Code allows creditors to "force" debtors into bankruptcy in certain situations such as involuntary bankruptcies.[7] Unlike voluntary bankruptcies, where the debtor files for bankruptcy, the creditors file the petition in involuntary bankruptcies.[8]

Involuntary bankruptcies allow creditors who are able to meet certain requirements a greater chance at procuring a favorable dissolution of the debtor's assets.[9] Creditors who meet all of the requirements set forth in 11 U.S.C. § 303(b) can bring an involuntary bankruptcy petition only under Chapter 7 or 11 of the Bankruptcy Code.[10] The requirements out-

5. *See* Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 TEX. L. REV. 1381, 1419 (2003) (stating purpose of bankruptcy system). Feibelman goes on to explain that "[b]ankruptcy law should generally protect the value of creditors' claims, not their entitlement to particular assets." *See id.*

6. *See* Adam Feibelman, *Involuntary Bankruptcy for American States*, 7 DUKE J. CONST. L. & PUB. POL'Y 81, 84–85 (2012) (recognizing resistance against voluntary bankruptcy despite benefits to debtors). Under certain bankruptcy scenarios, debtors could successfully reorganize if the debtor files for bankruptcy early; however, a debtor's delay in filing often enhances the debtor's financial distress and makes reorganization impossible. *See id.* at 85 (describing problems when debtors delay filing for bankruptcy). However, debtors are often unwilling to declare bankruptcy voluntarily for numerous reasons including "overly optimistic" attitudes about their financial future or concerns about the stigma related to bankruptcy. *See id.* (addressing reasons debtors delay seeking debt relief).

7. *See id.* ("Because the inclination of debtors to delay or avoid seeking debt relief can frustrate the primary goals of bankruptcy, most bankruptcy regimes . . . provide that debtors can be forced into bankruptcy involuntarily in at least some circumstances.").

8. *Compare* J. Kate Stickles & Patrick J. Reilley, *The Nuts & Bolts of Involuntary Bankruptcy*, 27-JUN AM. BANKR. INST. J. 30, 30 (2008) (stating creditor commences involuntary bankruptcy), *with* 11 U.S.C. § 301(a) (2012) (noting debtors file voluntary bankruptcy petitions).

9. *See* 2 BANKR. SERV. L. ED. § 13:109 ("Central policy behind involuntary bankruptcy is to protect threatened depletion of assets or to ensure equal distribution of assets among creditors."); *see also* Feibelman, *Involuntary Bankruptcy for American States*, *supra* note 6, at 83–84 (discussing benefits of bankruptcy). An involuntary bankruptcy "can help preserve" the assets of a failing debtor and ensure equitable allocation of those assets to all creditors. *See id.* (describing how involuntary bankruptcy can benefit creditors).

10. *See* 11 U.S.C. §§ 303(b)(1)–(2) (providing requirements for involuntary bankruptcy). Creditors can commence an involuntary bankruptcy case under the following circumstances:

> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $15,775 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

lined in § 303(b) do not require a creditor to act in good faith; however, in order to deter malfeasance, there is a bad faith provision that allows the debtor to receive damages if the petition is dismissed and the creditor acted in bad faith.[11] Typically, courts have only addressed the bad faith provision when a case is dismissed for a creditor's failure to meet the requirements of § 303(b).[12] Recently, however, courts have been faced with the issue of whether the bad faith provision applies only post-dismissal, or whether a creditor's petition may be dismissed solely for bad faith.[13]

In *In re Forever Green Athletic Fields, Inc.*,[14] the Third Circuit addressed this gray area in the Bankruptcy Code.[15] The decision clarifies the Bankruptcy Code and establishes that creditors must act in good faith when filing an involuntary bankruptcy petition.[16] Additionally, the decision institutes a "totality of the circumstances" test for determining bad faith in the Third Circuit.[17] The decision also serves as a warning to creditors to weigh their options before filing an involuntary bankruptcy petition.[18]

> (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $10,000 of such claims.

Id. (footnotes omitted).

11. *See* 11 U.S.C. § 303(i)(2) (detailing bad faith provision). The provision states:

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

Id.

12. *See In re* Forever Green Athletic Fields, Inc., 804 F.3d 328, 333 (3d Cir. 2015) (discussing typical litigation surrounding bad faith provision in involuntary bankruptcies).

13. *See id.* ("Less often litigated is the issue here, namely, whether bad faith may serve as a basis for dismissal even where the criteria for commencing a suit are satisfied and where the debtor is admittedly not paying its debts as they become due.").

14. 804 F.3d 328 (3d Cir. 2015).

15. *See id.* at 332–37 (detailing court's precedential analysis involving bad faith and involuntary bankruptcy proceedings); *see also* John Gotaskie, *Ever Considered Filing an Involuntary Bankruptcy Petition? Then You Need to Review This Case*, FRANCHISE L. UPDATE (Fox Rothschild, Phila., Pa) (Nov. 4, 2015), http://franchiselaw.foxrothschild.com/2015/11/articles/legal-decisions/ever-considered-filing-an-involuntary-bankruptcy-petition-then-you-need-to-review-this-case/?utm_source=mondaq&utm_medium=syndication&utm_campaign=view-Original [https://perma.cc/RRP9-N82E] (discussing Third Circuit's decision).

16. *See Forever Green*, 804 F.3d at 333–35 (finding bankruptcy code contains bad faith requirement).

17. *See id.* at 336 (detailing totality of circumstances test for evaluating bad faith as adopted by Third Circuit).

18. *See* Gotaskie, *supra* note 15 (urging future involuntary petition filers to "carefully review the facts of their case" before filing).

This Casebrief examines why the *Forever Green* decision represents a victory for debtors and will impact future creditors' decisions to file involuntary bankruptcy petitions.[19] Part II discusses the role bad faith has played throughout the history of involuntary bankruptcy before *Forever Green*.[20] Further, Part II summarizes the legal standards courts have used to evaluate bad faith before *Forever Green*.[21] Part III analyzes *Forever Green*, details the facts and procedure of *Forever Green*, and describes the court's reasoning.[22] Part IV examines the court's acceptance of bad faith dismissals for involuntary bankruptcies and analyzes the totality of the circumstances standard chosen by the court.[23] Part V provides advice for future bankruptcy practitioners in light of *Forever Green*.[24] Finally, Part VI concludes by addressing the impact *Forever Green* will have on future bankruptcy litigation.[25]

II. BANKRUPTCY CODE GIVES COURTS BLANK CHECK TO DEAL WITH GOOD FAITH PROVISION

In an attempt to encourage creditors to file involuntary bankruptcy petitions before a debtor's assets are depleted, Congress revamped bankruptcy law with the Bankruptcy Reform Act of 1978.[26] The Bankruptcy Reform Act of 1978 provides the standards and requirements relating to involuntary bankruptcy that govern modern bankruptcy law and is commonly referred to as the "Bankruptcy Code" or "the Code."[27] Congress provided little guidance on how, or if it is even necessary, to apply a good faith requirement to involuntary bankruptcy petitions, so courts have in-

19. For a further discussion of the reasons *Forever Green* represents a victory for debtors and should impact practitioners, see *infra* notes 140–45 and accompanying text.

20. For a further discussion of the role of bad faith in involuntary bankruptcy, see *infra* notes 30–53 and accompanying text.

21. For a further discussion of the standards used to evaluate bad faith prior to *Forever Green*, see *infra* notes 54–69 and accompanying text.

22. For a further analysis of the facts, procedural history, and holding in *Forever Green*, see *infra* notes 73–106 and accompanying text.

23. For further analysis of the court's decision to uphold bad faith dismissals and use the totality of the circumstances standard of bad faith, see *infra* notes 107–27 and accompanying text.

24. For a further discussion of advice for future practitioners, see *infra* notes 128–45 and accompanying text.

25. For a further discussion of the impact of *Forever Green*, see *infra* notes 146–50 and accompanying text.

26. *See* Susan Block-Lieb, *Why Creditors File So Few Involuntary Petitions and Why the Number Is Not Too Small*, 57 BROOK. L. REV. 803, 815–18 (1991) (discussing reformation of Bankruptcy Code in 1978). Per the suggestion of the Commission on Bankruptcy Laws, Congress "adopted the current 'general failure to pay' standard in an effort to ease [ ] problems of proof" for creditors. *See id.* at 805 (describing reason Congress "open[ed] up the standard for commencement of an involuntary case so drastically").

27. *See id.* at 803 n.2 (describing transformation of bankruptcy law into modern Bankruptcy Code).

terpreted this requirement differently.[28] Additionally, circuit courts have differed regarding what standard to use when evaluating bad faith in involuntary bankruptcy petitions.[29]

A. *Circuit Courts Try to Balance Their "Case Books" with Good Faith*

Since the adoption of the Code in 1978, involuntary bankruptcies have been governed by 11 U.S.C. § 303 and are available only in Chapter 7 or Chapter 11 cases.[30] In order to file a petition, a creditor must satisfy the requirements of one of the four subsections found in § 303(b).[31] As evidenced by § 303(b), Congress did not include the specific requirement of good faith in any of the four subsections.[32] The first two subsections of § 303(b) require creditors' claims to aggregate at least $15,325 and establish limitations for how many creditors must file the petition, dependent on how many creditors exist.[33] The final two subsections of § 303(b) provide the requirements for partnerships and foreign entities.[34] However, Congress did include one reference to bad faith in § 303(i)(2), stating "[i]f the court dismisses an involuntary petition, it may award damages against any creditor 'that filed the petition in bad faith.'"[35] To add to the

28. For a further discussion of bad faith in involuntary bankruptcies, see *infra* notes 30–53 and accompanying text.

29. For a further discussion of the standards used to evaluate bad faith in involuntary bankruptcies, see *infra* notes 55–66 and accompanying text.

30. *See In re* Forever Green Athletic Fields, Inc., 804 F.3d 328, 333 (3d Cir. 2015) (stating involuntary bankruptcies "under Chapter 7 and 11" are governed by § 303); *see also* Nicholas Gebelt, *Involuntary Bankruptcy: What Is It, and Why Would Anyone File One?*, S. CAL. BANKR. L. BLOG (Jan. 13, 2012), http://www.southerncaliforniabankruptcylawblog.com/2012/01/13/involuntary-bankruptcy-what-is-it-and-why-would-anyone-file-one/ [https://perma.cc/CR4A-Z4MT] (detailing reasons involuntary bankruptcies may be brought only under Chapter 7 and 11). The Thirteenth Amendment bars involuntary bankruptcies from being filed under Chapters 12 or 13 because "no individual . . . can be forced into a multi-year repayment plan" using post-petitioned earnings. *See id.* An individual is allowed to bring an involuntary petition under Chapters 7 or 11 because these chapters of the Bankruptcy Code are able to force liquidation, but not the repayment plans, which can be considered violations of the Thirteenth Amendment. *See id.* (describing proceedings under which involuntary petitions are allowed). If a creditor is not able to state a claim under Chapters 7 or 11, that creditor still has the option of pursuing the claim outside of bankruptcy court. *See* Bankers Trust Co. BT Serv. Co. v. Nordbrock (*In re* Nordbrock), 772 F.2d 397, 400 (8th Cir. 1985) (citing cases where bankruptcy courts held creditors with no "special need for bankruptcy relief can go to state court to collect a debt").

31. *See* 11 U.S.C. §§ 303(b)(1)–(4) (2012) (listing four sets of requirements—only one of which must be met—for filing involuntary petition).

32. *See id.* (omitting requirement of good faith).

33. *See* 11 U.S.C. §§ 303(b)(1)–(2) (establishing if debtor has greater than twelve creditors, three or more creditors must file petition; whereas, if debtor has fewer than twelve creditors, only one debtor is required to file petition).

34. *See* 11 U.S.C. §§ 303(b)(3)(A)–(B), (b)(4) (creating guidelines for partnerships and foreign representatives in involuntary petitions).

35. *See Forever Green*, 804 F.3d at 333 (quoting 11 U.S.C. § 303(i)(2)) (noting only one reference to bad faith appears in § 303).

confusion regarding how courts are to incorporate bad faith into involuntary petitions, Congress did not define what constitutes bad faith; consequently, bankruptcy and circuit "courts have developed different tests to determine" what equates to bad faith.[36] However, courts note that a good faith requirement has "strong roots in equity" and aids in preventing abuse of the bankruptcy process.[37] Moreover, courts have agreed there is a presumption of good faith in involuntary bankruptcies.[38]

Due to § 303(b)'s lack of reference to bad faith, most litigation related to bad faith in involuntary bankruptcy occurs when "the creditors do not satisfy the § 303(b) requirements for filing the petition."[39] For example, in *In re Bayshore Wire Products Corp.*,[40] multiple creditors filed an involuntary petition against Bayshore Corporation under § 303(b)(1).[41] However, the Second Circuit upheld the bankruptcy court's dismissal of the case for failure to meet the requirements of § 303(b)(1) because only two creditors were "holder[s] of a claim . . . that is not contingent as to liability or the subject of a bona fide dispute . . . ."[42] Because the creditors failed to meet the requirements of § 303(b)(1), the Second Circuit then analyzed whether the creditors acted in bad faith, ultimately concluding the creditors did not.[43]

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36. *See* Stickles & Reilley, *supra* note 8, at 56 (stating bad faith is not defined in Bankruptcy Code and lack of definition leads to different judicial tests for bad faith); *see also In re* Wavelength, Inc., 61 B.R. 614, 619 (B.A.P. 9th Cir. 1986) (acknowledging neither Bankruptcy Code nor court opinions provide definition for bad faith).

37. *See In re* SGL Carbon Corp., 200 F.3d 154, 161 (3d Cir. 1999) ("The 'good faith' requirement for Chapter 11 petitioners has strong roots in equity.").

38. *See id.* at 169 (finding voluntary petition could be dismissed for lack of good faith); *see also In re* Smith, 243 B.R. 169, 194 (Bankr. N.D. Ga. 1999) (finding "presumption that petitioning creditors act in good faith" and that debtor "must prove by a preponderance of the evidence that [creditor] filed . . . in bad faith" (citing *In re* CLE Corp., 59 B.R. 579, 583 (Bankr. N.D. Ga. 1986))). In *Smith*, one creditor filed an involuntary petition against a debtor, but the court found the creditor did not meet the requirements of § 303(b) because the creditor failed to establish that Smith had less than twelve creditors. *See id.* at 189 (determining creditor "failed to satisfy its burden of establishing that the number of . . . creditors in this case was less than twelve"). Because the creditor did not meet the requirements of § 303(b), the court evaluated whether the creditor acted in good or bad faith and ultimately held the creditor acted in bad faith. *See id.* at 202 (describing court's holding).

39. *See Forever Green*, 804 F.3d at 333 (finding debtors often "file motions for damages" due to bad faith under § 303(i)(2) after dismissal under § 303(b)).

40. 209 F.3d 100 (2d Cir. 2000).

41. *See id.* at 102–03 (detailing facts of case).

42. *See id.* at 103 (alteration in original) (explaining Second Circuit's upholding of bankruptcy petition dismissal). While the Second Circuit found the creditors met the requirement of having more than three petitioners, the court determined that only two of the creditor's debts were not "the subject of a bona fide dispute," meaning the petition failed to meet all the requirements of § 303(b)(1). *See id.* 103–05 (providing court's reasoning).

43. *See id.* at 105–07 (finding petitioners did not act in bad faith). The Second Circuit found that the creditors were not reckless and did not act in bad faith

Circuit courts have reached different conclusions on how, or even if, to apply a good faith requirement in involuntary bankruptcies.[44] For example, in *In re WLB-RSK Venture*,[45] the Ninth Circuit found that "[i]f the grounds for relief exist under Section 303, the good or bad faith of the petitioning creditor appears irrelevant."[46] In *WLB-RSK Venture*, the court determined the petition was properly dismissed because the requirements of § 303(h)(1) were not met.[47] However, the court noted that if the requirements of § 303 were met, then the petition could not be dismissed because any good or bad faith on the part of the creditor becomes "irrelevant."[48]

Conversely, the Eighth Circuit in *In re Bock Transportation, Inc.*[49] found that there is a good faith requirement for involuntary petitions and stated that bad faith is reasonable grounds for dismissal.[50] In *Bock Transportation*, a sole petitioner filed an involuntary petition under § 303(b)(2) even though the creditor did not meet those requirements.[51] The Eighth Circuit granted the petition because the court found the creditor did not file the petition in bad faith.[52] Similarly, the Fourth Circuit and other bank-

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when filing the petition because the creditor's actions were insufficient to rebut the presumption of good faith. *See id.* at 106 ("[W]e conclude that there is no basis for a finding of bad faith under any of the tests currently in usage."). For a discussion of the presumption of good faith, see *supra* notes 36–38 and accompanying text.

44. *See Forever Green*, 804 F.3d at 334 (noting majority, but not all, courts agree that "general 'good faith' filing requirement in the context of involuntary petitions for bankruptcy[ ]" is necessary). For a discussion on how other circuit courts, specifically the Fourth, Eighth, and Ninth Circuit Courts, have dealt with good faith in involuntary bankruptcy, see *infra* notes 45–53 and accompanying text.

45. 320 B.R. 221 (B.A.P. 9th Cir. 2004).

46. *See id.* at *6 n.13 (discussing court's rationale on bad faith inquiry).

47. *See id.* at *6 (explaining dismissal of petition). The court found that the requirements of § 303 were not met because the creditor did not show evidence of the debtor's failure to pay undisputed debts as they came due as required by § 303(h)(1). *See id.* ("Even assuming that this de minimus debt is undisputed, it is not material enough under the totality of circumstances test to demonstrate that [the appellant's business] is not paying its undisputed debts as they become due, particularly where [the appellant's business] has no ongoing regular expenses." (citing *In re* Vortex Fishing Sys., Inc., 277 F.3d 1057, 1064 (9th Cir. 2001))).

48. *See WLB-RSK Venture*, 320 B.R. at *6 n.13.

49. 327 B.R. 378 (B.A.P. 8th Cir. 2005).

50. *See id.* at 382 (noting implicit good faith requirement in involuntary bankruptcy).

51. *See id.* at 379–80 (discussing factual history of case). The debtor filed a motion to dismiss the involuntary petition because in order for one sole creditor to file under § 303(b)(2), the debtor must "ha[ve] fewer than twelve creditors"; however, here, the debtor had "more than twelve creditors." *See id.* at 380–82 (describing court's findings).

52. *See id.* at 382 (agreeing with Bankruptcy Court that "involuntary petition was not filed for an improper purpose"). The court did not find that the Bankruptcy Court was "clearly erroneous or abused its discretion" when it held that the creditor did not act in bad faith because the debtor promised to give a list of all creditors to the petitioner but never fulfilled the promise. *See id.* at 381 ("[E]ven

ruptcy courts have also determined a good faith requirement exists in involuntary bankruptcies.[53]

B. *Accounting for Bad Faith Requirements*

Due to a lack of guidance from Congress, courts have been granted broad latitude to interpret what constitutes bad faith.[54] Consequently, numerous standards to evaluate bad faith have arisen.[55] These standards vary in application; however, all of the standards are fact-intensive and leave the evaluation of bad faith up to the bankruptcy court.[56]

Courts have traditionally utilized one of four standards to evaluate bad faith.[57] The first standard, the "improper use" test, seeks to determine whether "a petitioning creditor uses [the involuntary petition] in an attempt to obtain 'a disproportionate advantage.'"[58] Bad faith exists under this test when a creditor uses an involuntary petition as a collection device instead of utilizing it "to protect against other creditors obtaining

though [the debtor] was under no obligation to provide a list of creditors, since it had promised to do so, that promise should have been fulfilled.").

53. *See* U.S. Optical, Inc. v. Corning Inc. (*In re* U.S. Optical, Inc.), No. 92-1496, 1993 WL 93931, at *3 (4th Cir. Apr. 1, 1993) (citing *In re* Winn, 49 B.R. 237, 239 (Bankr. M.D. Fla. 1985)) (stating courts must determine if petition "has been filed in good faith"); *see also In re* Tichy Elec. Co., 332 B.R. 364, 373 (Bankr. N.D. Iowa 2005) (agreeing with Eighth Circuit that Bankruptcy Code "contains an implicit good faith requirement"); *In re* Manhattan Indus., Inc., 224 B.R. 195, 201 (Bankr. M.D. Fla. 1997) (citing 2 COLLIER ON BANKRUPTCY ¶ 303.06, 303–38 (1997)) (noting involuntary petitions "must be made in good faith" and petitions may be dismissed if filed in bad faith).

54. *See In re* Forever Green Athletic Fields, Inc., 804 F.3d 328, 335 (3d Cir. 2015) ("[W]e must decide on the standard for evaluating bad faith, which is not defined in the Code."); *see also* Lubow Machine Co. v. Bayshore Wire Prods. Corp. (*In re* Bayshore Wire Prods. Corp.), 209 F.3d 100, 105 (2d Cir. 2000) ("[B]ad faith is not defined in the bankruptcy code." (quoting Gen. Trading Inc. v. Yale Materials Handling Corp., 119 F.3d 1485, 1501 (11th Cir. 1997) (internal quotation marks omitted))); *In re* K.P. Enter., 135 B.R. 174, 179 ("[N]either the Code nor its legislative history provides guidance regarding the content of the bad faith standard.").

55. *See Forever Green*, 804 F.3d at 335 (noting "courts have applied a dizzying array of standards" to evaluate bad faith).

56. *See In re* Lilley, 91 F.3d 491, 496 (3d Cir. 1996) ("[W]e believe that 'the good faith inquiry is a fact intensive determination better left to the discretion of the bankruptcy court.'" (quoting *In re* Love, 957 F.2d 1350, 1355 (B.A.P. 7th Cir. 1992))).

57. *See Forever Green*, 804 F.3d at 335–36 (naming four types of tests utilized by courts). Courts choose between utilizing one of the following tests: an "improper use" test, an "improper purpose" test, an "objective test," and a "totality of the circumstances" test. *See id.* (describing tests).

58. *See* K.P. Enter., 135 B.R. at 179 n.14 (detailing improper use test); *see also* Jaffe v. Wavelength, Inc. (*In re* Wavelength, Inc.), 61 B.R. 614, 619 (B.A.P. 9th Cir. 1986) (noting improper use test seeks to determine "whether the creditor's actions were an improper use of the Bankruptcy Code as 'a substitute for customary collection procedures'" (quoting *In re* Advance Press & Litho, Inc., 46 B.R. 700, 703 (Bankr. D. Colo. 1984))).

disproportionate advantages."[59] Similarly, the second standard, the "improper purpose" test, also evaluates the subjective intent of the creditor when the creditor files an involuntary petition.[60] In this test, the court will find bad faith exists if the creditor is motivated by "ill will, malice, or a desire to embarrass or harass the alleged debtor."[61]

Some courts opt to consider objective factors in their determination and utilize either the "objective test" or the totality of the circumstances test.[62] The objective test measures bad faith by "assess[ing] what a reasonable person would have believed and what a reasonable person would have done in the creditor's position."[63] The objective test also enables courts to find bad faith where purely subjective tests such as the improper purpose or improper use tests would not find bad faith.[64]

Finally, the totality of the circumstances test "effectively combines all the tests and looks to both subjective and objective evidence of bad faith."[65] The court determines bad faith under this test by weighing a variety of factors, including "the reasonableness of petitioners' actions, petitioners' motives and objectives, and the merits of petitioners' view that filing was appropriate."[66]

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59. *See K.P. Enter.*, 135 B.R. at 179 n.14 (explaining bad faith exists under improper use test when creditor "could have advanced its own interests in a different forum" because creditor is seeking "disproportionate advantage" (internal quotation marks omitted)).

60. *See* Lubow Machine Co. v. Bayshore Wire Prods. Corp. (*In re* Bayshore Wire Prods. Corp.), 209 F.3d 100, 105 (2d Cir. 2000) (noting intent of creditor in filing involuntary petition is determinative factor under improper purpose test).

61. *See id.* (citing *In re* Camelot, Inc., 25 B.R. 861, 864 (Bankr. E.D. Tenn. 1982)) (stating some courts have found bad faith through creditor's intentions); *see also In re* Camelot, Inc., 25 B.R. at 864 (finding bad faith where involuntary petition was filed for purpose of "spitefully forestall[ing] [ ] dissolution . . . and frustrat[ing]" debtor).

62. *See Forever Green*, 804 F.3d at 336 (describing four tests that exist to evaluate bad faith).

63. *See id.* at 336 (citing *In re* Wavelength, Inc., 61 B.R. at 620) (detailing assessment used by court during objective test). The objective test does not focus on the creditor's personal intentions; however, the test focuses on "what a reasonable person would have done in the creditor's position." *See id.*

64. *See In re* Grecian Heights Owners' Ass'n, 27 B.R. 172, 173–74 (Bankr. D. Or. 1982) (determining "purely subjective test" would find no bad faith exists in case, but objective test concludes creditor acted in bad faith). In *Grecian Heights*, the court found the creditor did not act reasonably because the creditor disregarded the advice from twenty-five lawyers, who said not to file an involuntary petition, and instead decided to utilize the advice from one non-lawyer and filed an involuntary petition. *See id.* at 174 (stating reasonable person would not act on legal advice of person who is "not competent to give legal advice").

65. *See Forever Green*, 804 F.3d at 336 (citing Adell v. John Richards Homes Bldg. Co. (*In re* John Richards Homes Bldg. Co.), 439 F.3d 248, 255 n.2 (B.A.P. 6th Cir. 2006)) (describing totality of the circumstances test and detailing use of both subjective and objective factors, such as what individual creditor actually believed and what reasonable creditor would believe, in determination of bad faith).

66. *See In re* Cadillac by DeLorean & DeLorean Cadillac, Inc., 265 B.R. 574, 581 (Bankr. N.D. Ohio 2001) (citing *In re* K.P. Enter., 135 B.R. 174, 177 (Bankr. D.

Before *Forever Green*, the Third Circuit Court of Appeals had never addressed which test to use to evaluate bad faith in involuntary bankruptcies.[67] However, in voluntary bankruptcy proceedings, the court previously adopted the totality of the circumstances test for determining bad faith.[68] As this might suggest, the jurisprudence in voluntary proceedings affected how the court dealt with the bad faith element in *Forever Green*, an involuntary bankruptcy proceeding.[69]

III. THIRD CIRCUIT PUTS ITS MONEY WHERE ITS MOUTH IS BY UPHOLDING BAD FAITH DISMISSALS

In *Forever Green*, the Third Circuit first tackled the question of whether bad faith is an appropriate ground for dismissal in involuntary bankruptcies, finding creditors must act in good faith when filing bankruptcy petitions.[70] The creditor argued its "subjective motivations" for filing were "irrelevant" as long as the objective criteria of § 303(b) were met.[71] However, the Third Circuit affirmed the district court's decision to dismiss the involuntary petition due to bad faith.[72]

A. *Breaking the Bank: Facts and Background of* Forever Green

In 2005, Forever Green Athletic Fields, Inc. (Forever Green), founded by Keith Day, sued ProGreen, owned by Charles Dawson, "for diversion of corporate assets" (Pennsylvania litigation).[73] Later in 2005,

Me. 1992)) (listing factors courts weigh to determine if bad faith exists); *see also Forever Green*, 804 F.3d at 336 (noting totality of the circumstances test involves "fact-intensive review").

67. *See Forever Green*, 804 F.3d at 335 ("At the outset, we must decide on the standard for evaluating bad faith, which is not defined in the Code.").

68. *See In re* Myers, 491 F.3d 120, 125 (3d Cir. 2007) (using totality of the circumstances test in voluntary bankruptcy proceedings to determine if "Bankruptcy Court's decision to dismiss the bankruptcy case as a bad faith filing" was abuse of discretion (citing *In re* SGL Carbon Corp., 200 F.3d 154, 159 (3d Cir. 1999))).

69. *See Forever Green*, 804 F.3d at 336 (acknowledging court took into consideration jurisprudence of voluntary bankruptcies in Third Circuit).

70. *See id.* at 332–37 (discussing whether claim may be dismissed due to bad faith filing).

71. *See id.* at 333 (detailing creditor's argument that § 303 does not contain good faith requirement). The creditor in *Forever Green* argued the court should order relief to be granted in the creditor's favor regardless of the subjective motivation of the creditor. *See id.* ("[The petitioning creditor claimed] a creditor's subjective motivations are irrelevant because § 303(b)(1) contains objective criteria for who may file an involuntary petition, and if they are satisfied, § 303(h)(1) provides that the court 'shall order relief' against a debtor who is not paying its debts.").

72. *See id.* at 338 (affirming district court's holding).

73. *See id.* at 330 (providing background to case). Forever Green sued ProGreen for $5,000,000. *See id.* (discussing amount sought in Pennsylvania litigation). Additionally, Charles Dawson was a former employee of Forever Green, and he "would be liable if damages [were] awarded in [Forever Green's] lawsuit"

Charles and Kelli Dawson, Charles' wife, "sued Forever Green for unpaid commissions and wages in Louisiana" and the court referred to this litigation as the "Louisiana litigation."[74] In 2011, the Louisiana litigation resulted in a "judgment in favor of the Dawsons" worth approximately $300,000.[75] Prior to the Louisiana litigation judgment, both Dawson and Day "agreed to arbitrate the[ ] claim" in the Pennsylvania litigation.[76] However, upon obtaining a judgment in the Louisiana litigation, "ProGreen filed a motion to terminate the arbitration" in the Pennsylvania litigation.[77]

After ProGreen filed its motion to terminate arbitration, Dawson transferred the Louisiana litigation judgment to Pennsylvania, and the Pennsylvania arbitrator subsequently suspended arbitration.[78] Consequently, Forever Green brought suit in state court "to reinstate [ ] arbitration," in what was referred to as the "Philadelphia action," and the judge in the Philadelphia action required briefing on the issues.[79] Instead of submitting a brief, "the Dawsons and the law firm . . . which was owed $206,000 from Forever Green, filed an involuntary Chapter 7 bankruptcy petition against Forever Green."[80] In response, Forever Green filed a mo-

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against ProGreen because he was "an owner of ProGreen." *See id.* (describing factual background).

74. *See id.* (describing second action brought in 2005 between Dawson and Forever Green).

75. *See id.* at 331 (discussing outcome of Louisiana litigation). The Louisiana court entered a judgment that included "interest and other costs" that "total[ed] more than $300,000," and as of 2015, Forever Green had not paid any part of the judgment. *See id.* (describing circumstances leading up to *Forever Green* case).

76. *See id.* ("While the Louisiana [litigation] was still running its course, the parties to the [Pennsylvania litigation] agreed to arbitrate their claims.").

77. *See id.* (explaining that in ProGreen's motion to terminate arbitration, ProGreen stated "it has become clear that [Forever Green] is insolvent and that Keith Day does not have the ability or desire to pay the Arbitrator's fees and expenses" (internal quotation marks omitted)).

78. *See id.* (detailing transfer of judgment to Louisiana). Along with the transfer of the Louisiana litigation judgment to Pennsylvania, ProGreen also obtained a writ of execution against the arbitrator and the arbitrator's law firm, but, because the arbitrator's fees were in danger, the arbitrator decided it was best to "suspend[ ] arbitration until the fee issue was resolved." *See id.* (providing factual background information).

79. *See id.* (detailing litigation brought by Forever Green in Philadelphia). Day testified he filed the Philadelphia action "because Charles Dawson and his counsel were determined to derail the arbitration" in the Pennsylvania litigation. *See id.* (internal quotation marks omitted) (providing Day's reasoning for filing Philadelphia action). Day also stated Dawson " 'threatened to put [Forever Green] into bankruptcy' " unless Forever Green "agree[d] to terminate the arbitration." *See id.* (alteration in original).

80. *See id.* (detailing Chapter 7 involuntary bankruptcy petition filed against Forever Green). Charles Dawson, Kelli Dawson, and the law firm Cohen Seglias Pallas Greenhall & Furman filed the involuntary petition and satisfied the criteria for commencing a suit under § 303(b) because "(1) they are three creditors, (2) they each hold an uncontested claim against Forever Green, and (3) their claims aggregate at least $15,325 more than the value of liens on Forever Green's

tion to dismiss the petition for bad faith, claiming the petition was an abuse of the bankruptcy process and was "initiated . . . to frustrate the prosecution of the Forever Green's claims against Mr. Dawson."[81]

During the bankruptcy proceeding, the court determined that Forever Green had over fifty creditors, Day was slowly paying off debts on behalf of Forever Green, and there were creditors "ahead of [the Dawsons] in the [financial] pecking order."[82] Ultimately, the Bankruptcy Court granted the motion to dismiss for bad faith and determined Dawson filed the petition "in furtherance of an improper bankruptcy purpose."[83] The Bankruptcy Court determined Dawson acted in bad faith because he filed the "petition for two improper purposes: (1) to frustrate [Forever Green's] efforts to litigate its claims against the ProGreen Parties; and (2) to force Mr. Day to pay on behalf of [Forever Green] the amounts due to the Dawsons pursuant to the Consent Judgment."[84] Subsequently, the district court affirmed the dismissal, and the Dawsons appealed the case to the Third Circuit.[85]

B. *Regulating the Market: The Third Circuit's Analysis in* Forever Green

The Third Circuit affirmed the district court's opinion, holding that bad faith is a sufficient ground for dismissal in involuntary bankruptcies.[86]

property." *See id.* at 331–32 (describing three statutory criteria creditors met in order to "commenc[e] an involuntary bankruptcy case"). Charles Dawson justified the decision to file the involuntary bankruptcy petition because the petition was the best way to get Forever Green's assets. *See id.* at 331 (providing Dawson's reason for filing involuntary bankruptcy petition).

81. *See In re* Forever Green Athletic Fields, Inc. (*Forever Green Bankruptcy I*), 500 B.R. 413, 416 (Bankr. E.D. Pa. 2013) (providing Forever Green's rationale for filing motion to dismiss), *aff'd*, 514 B.R. 768 (E.D. Pa. 2014), *aff'd*, 804 F.3d 328 (3d Cir. 2015).

82. *See Forever Green*, 804 F.3d at 332 (referencing factual findings during *Forever Green Bankruptcy I*). The bankruptcy court determined that, since 2012, Forever Green had been winding down its operations and "its operating account had no activity." *See id.* ("[I]n 2012, its operating account had no activity and its balance never exceeded $30."); *see also Forever Green Bankruptcy I*, 500 B.R. at 427 (detailing extensive list of Forever Green's creditors).

83. *See id.* at 430 (stating Bankruptcy Court's holding in *Forever Green Bankruptcy I*). The Third Circuit Court of Appeals provided several scenarios where bad faith would be present, including the filing of a petition "to collect on a personal debt, to gain an advantage in pending litigation, or to harass the debtor." *See Forever Green*, 804 F.3d at 332 (providing examples of creditors acting in bad faith).

84. *See Forever Green Bankruptcy I*, 500 B.R. at 426–27 (noting Bankruptcy Court utilized totality of the circumstances test but focused on improper purposes of Dawson). The Bankruptcy Court found that, even though the § 303(b) criteria were met, the motion to dismiss could still be granted because of Dawson's bad faith. *See id.* at 430.

85. *See* Forever Green Athletic Fields, Inc. v. Dawson, 514 B.R. 768, 790 (E.D. Pa. 2014) (providing procedural history of case). The Dawsons appealed the case without the law firm. *See Forever Green*, 804 F.3d at 332 (explaining which parties appealed).

86. *See id.* at 338 ("[T]he record supports the Bankruptcy Court's decision to dismiss the petition as a bad-faith filing.").

The court acknowledged the four possible standards to evaluate bad faith and ultimately chose the totality of the circumstances test as the proper standard for involuntary bankruptcies going forward.[87]

1. *Approving Bad Faith Dismissals*

Addressing bad faith dismissals, the court acknowledged that § 303 contains only one reference to bad faith—in § 303(i)(2).[88] With this in mind, the principal issue posed to the court was "whether bad faith may serve as a basis for dismissal even where the criteria for commencing a suit are satisfied and where the debtor is admittedly not paying its debts as they become due."[89] The Third Circuit found that bad faith was not limited to "assessing damages after a petition has been dismissed" for not meeting the objective criteria of § 303.[90] The court reasoned that complying with § 303 is only the "first hurdle" in an involuntary bankruptcy.[91] The court also stated that Congress's express reference to bad faith in § 303(i)(2) showed intent "for bad faith to serve as a basis for both dismissal and damages."[92] Furthermore, the court concluded that Congress's use of the words "only if" in § 303(h)(1) implied that the objective criteria were "necessary but not sufficient" factors in involuntary bankruptcy petitions.[93]

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87. *See id.* at 335–36 (describing four standards courts use to evaluate bad faith and "adopt[ing] the 'totality of the circumstances' standard for determining bad faith under § 303"). See *supra* notes 57–66 and accompanying text for a description of all four tests and factors that influenced the Third Circuit's choice of standard.

88. *See id.* at 333 ("[T]he only mention of bad faith is in § 303(i)(2) . . . .").

89. *See id.* (acknowledging requirements of § 303 were met and issue presented to court was whether bad faith as referred to in § 303(i) was grounds for dismissal). For a further discussion of the sole reference to bad faith in § 303, found in § 303(i)(2), see *supra* notes 32–35 and accompanying text.

90. *See id.* 333–34 (rejecting argument that bad faith cannot serve "as a basis for dismissal"). The court rejected the argument that satisfying the requirements of § 303(b) "forecloses bad faith dismissals." *See id.* at 334.

91. *See id.* (expanding upon requirements of involuntary bankruptcies). The court compared satisfying § 303(b)(1) to "pleading a prima facie case in many actions." *See id.* (noting that "if the three requirements [of 303(b)(1)] are satisfied, that doesn't mean the bankruptcy court can't dismiss the case").

92. *See id.* (discussing legislative intent behind § 303). In contrast to the Dawsons' reading of § 303, that a court may analyze bad faith only after dismissal for not complying with § 303, the court found "no reason why the Code would permit the imposition of damages . . . for bad-faith filings but not allow the same conduct—such as using involuntary bankruptcy as a litigation tactic in pending proceedings—to provide a basis for dismissing the petition." *See id.*

93. *See id.* (explaining statutory language does not support Dawsons' claims). Section 303(h)(1) states:

> (h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if . . . .

The Third Circuit continued its analysis, explaining that excluding a bad faith analysis in involuntary bankruptcy would "overlook[ ] the equitable nature of bankruptcy."[94] The court reiterated that "bankruptcy courts are equipped with the doctrine of good faith" in order to ensure integrity and "patrol the border between good- and bad-faith filings."[95] The court acknowledged the "majority of courts agree" on a general good faith requirement in involuntary bankruptcies.[96] Moreover, the court found allowing dismissals for bad faith reinforced the principle that involuntary bankruptcies should be brought for the proper reasons and not simply to punish the debtor.[97]

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(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount.

11 U.S.C. § 303(h)(1) (2012). The Third Circuit implied that Congress would have used "if" or "if and only if" instead of "only if" had it intended for the objective criteria of § 303 to be the sole requirements that petitioners must meet to bring an involuntary bankruptcy petition successfully. *See Forever Green*, 804 F.3d at 334 ("An 'if' or 'if and only if' clause would have been more favorable to the [creditors].").

94. *See Forever Green*, 804 F.3d at 334. According to the court, the good faith requirement "ensures that the Bankruptcy Code's careful balancing of interests is not undermined by petitioners whose aims are antithetical to the basic purposes of bankruptcy." *See id.* (quoting *In re* Integrated Telecom Express, Inc., 384 F.3d 108, 119 (3d Cir. 2004)) (internal quotation marks omitted).

95. *See id.* (finding equitable power of bankruptcy court should be "available only to those debtors and creditors with 'clean hands'" (quoting *In re* Little Creek Dev. Co., 779 F.2d 1068, 1072 (5th Cir. 1986))).

96. *See id.* at 334 & n.5 (providing examples of other courts that agree with use of good faith doctrine in involuntary bankruptcy petition cases); *see also In re* Bock Transp., Inc., 327 B.R. 378, 381 (B.A.P. 8th Cir. 2005) (citing Basic Elec. Power Coop. v. Midwest Processing Co., 769 F.2d 483, 486 (8th Cir. 1985)) (explaining bad faith may be "cause for the dismissal of a petition"); U.S. Optical, Inc. v. Corning Inc. (*In re* U.S. Optical, Inc.), No. 92-1496, 1993 WL 93931, at *3 (4th Cir. Apr. 1, 1993) (citing *In re* Winn, 49 B.R. 237, 239 (Bankr. M.D. Fla. 1985)) (stating "[c]ourts are duty bound . . . to determine whether an involuntary petition has been filed in good faith . . . . [b]ad faith filings are to be dismissed"); *In re* Manhattan Indus., Inc., 224 B.R. 195, 201 (Bankr. M.D. Fla. 1997) (stating "[d]ismissal is one possible consequence" for filing petition in bad faith).

97. *See Forever Green*, 804 F.3d at 335 (stating "[p]olicy considerations lend further support" to bad faith dismissals). The court reiterated that "'involuntary petition[s] [are] [ ] extreme remed[ies] with serious consequences to the alleged debtor, such as loss of credit standing, inability to transfer assets and carry on business affairs, and public embarrassment.'" *See id.* (quoting *In re* Reid, 773 F.2d 945, 946 (7th Cir. 1985)). Further, requiring petitions to be filed in good faith would "encourage creditors to file petitions for proper reasons such as to protect against the preferential treatment of other creditors or the dissipation of the debtor's assets[,]" thus limiting the improper imposition of "serious consequences" of involuntary bankruptcies on debtors. *See id.* (citing *In re* Silverman, 230 B.R. 46, 53 (Bankr. D.N.J. 1998)) (providing further support for imposing good faith filing requirement).

2. *Determining Proper Standard to Evaluate Bad Faith*

The court in *In re Forever Green* accepted the totality of the circumstances test as the appropriate standard for evaluating bad faith in involuntary bankruptcies.[98] Following the Sixth Circuit's guidance, the Third Circuit determined the totality of the circumstances standard "effectively combines all the tests" used by courts to determine bad faith.[99] Additionally, the court offered a non-exhaustive list of factors to examine in meeting the totality of the circumstances standard.[100]

Utilizing this newly adopted standard, the Third Circuit upheld the bankruptcy court's dismissal for bad faith.[101] The court determined that Dawson used the involuntary petition as a "weapon for stopping the arbitration and cashing in on the consent judgment."[102] Emphasizing the eq-

98. *See id.* at 336 (adopting totality of the circumstances standard for bad faith). The court stated the totality of the circumstances standard is the "most suitable for evaluating the myriad ways in which creditors filing an involuntary petition could act in bad faith." *See id.* (explaining benefits of totality of the circumstances standard). The court also noted the Third Circuit applies "the same standard" when evaluating voluntary bankruptcy petitions. *See id.* (identifying other supportive factors for choosing totality of the circumstances test).

99. *See Forever Green*, 804 F.3d at 336 (citing Adell v. John Richards Homes Bldg. Co. (*In re* John Richards Homes Bldg. Co.), 439 F.3d 248, 255 n.2 (6th Cir. 2006)) (recognizing Sixth Circuit's use of totality of the circumstances standard). The Sixth Circuit explained that courts may consider an "improper use," an "improper purpose," and the applicable Bankruptcy Code standards when employing the totality of the circumstances test. *See In re John Richards Home Bldg. Co.*, 439 F.3d at 255 n.2.

100. *See Forever Green*, 804 F.3d at 336 (identifying potential factors to consider). The court provided several relevant factors:

> [W]hether[ ] the creditors satisfied the statutory criteria for filing the petition; the involuntary petition was meritorious; the creditors made a reasonable inquiry into the relevant facts and pertinent law before filing; there was evidence of preferential payments to certain creditors or of dissipation of the debtor's assets; the filing was motivated by ill will or a desire to harass; the petitioning creditors used the filing to obtain a disproportionate advantage for themselves rather than to protect against other creditors doing the same; the filing was used as a tactical advantage in pending actions; the filing was used as a substitute for customary debt-collection procedures; and the filing had suspicious timing.

Id.

101. *See id.* ("[T]he Bankruptcy Court did not abuse its discretion in finding that Charles Dawson filed the involuntary petition in bad faith."). According to the Third Circuit, the Bankruptcy Court was justified in this conclusion because it determined that "Dawson's prepetition conduct indicates that his litigation strategy was to use any means necessary to force the payment of the Consent Judgment and the abandonment of Forever Green's claims against [ProGreen]." *See id.* (alteration in original) (quoting *Forever Green Bankruptcy I*, 500 B.R. 413, 427 (Bankr. E.D. Pa. 2013), *aff'd*, 514 B.R. 768 (E.D. Pa. 2014), *aff'd*, 804 F.3d 328 (3d Cir. 2015)).

102. *See Forever Green*, 804 F.3d at 337 (discussing Dawson's improper motives for filing involuntary petition). The court found that "Dawson and his counsel said they would keep the arbitration suspended until Forever Green paid on the consent judgment. They also threatened to file an involuntary petition unless Forever Green agreed to stop the proceedings[,]" a threat on which Dawson followed

uitable nature of involuntary bankruptcy, the court explained "Dawson's actions ran counter to the spirit of collective creditor action that should animate an involuntary filing."[103] Additionally, the court found Dawson did not properly "engage[ ] in the type of due diligence and sober decision-making process that should precede any involuntary filing."[104] According to the court, if he had, he would have learned Forever Green was not dissipating assets and therefore, would not have brought the action.[105] Thus, taking into consideration all of these circumstantial factors, the court found Dawson's actions constituted bad faith.[106]

IV. PENNY FOR YOUR THOUGHTS: ANALYZING BAD FAITH IN INVOLUNTARY BANKRUPTCIES IN THE THIRD CIRCUIT AFTER *FOREVER GREEN*

In a case of first impression, the Third Circuit tackled the issue of whether to allow bad faith dismissals in involuntary bankruptcies, and in the process, increased the burden on involuntary petitioners to file in good faith.[107] Overall, this new precedent is appropriate for involuntary bankruptcy for two reasons.[108] First, by allowing bad faith dismissals, the

through. *See id.* at 336 (describing Dawson's tactics behind filing involuntary petition).

103. *See id.* (providing rationale of Third Circuit's finding of bad faith). The court found that Dawson put his interests before those of other creditors when he filed the petition and halted arbitration in the Pennsylvania litigation. *See id.* ("By trying to end the arbitration, Dawson was obstructing Forever Green from pursuing its largest asset, the potential proceeds of which Forever Green could have used to pay its creditors."). Moreover, Dawson attempted to use the bankruptcy process to leapfrog "other [higher-priority] creditors" in order to be paid first by Forever Green. *See id.* 336–37 ("Courts routinely find it improper for creditors to use the bankruptcy courts to gain a personal advantage in other pending actions or as a debt-collection device.").

104. *See id.* at 337 (detailing court's conclusion that Dawson did not participate in "sober decision-making process").

105. *See id.* (describing Dawson's decision making process). The court concluded that if Dawson had actually "done an investigation prior to filing" the involuntary petition, "he would have learned that Forever Green was not making preferential payments to its creditors" and there was no "evidence of Forever Green's assets depleting." *See id.* (explaining steps Dawson should have taken before filing petition).

106. *See id.* at 336–37 (explaining how Dawson acted in bad faith). After reviewing the facts, the court determined that Dawson acted in bad faith due to his lack of due diligence, improper motive for filing the involuntary petition, and improper use of the bankruptcy process. *See id.* at 337 ("Accordingly, the record supports the Bankruptcy Court's decision to dismiss the petition as a bad-faith filing.").

107. *See* James H. Haithcock III & Robert C. Goodrich, Jr., *Bad News, Will Travel Fast: Third Circuit Imposes "Good Faith" Condition on Involuntary Bankruptcy Petitioners*, 2015 NO. 12 NORTON BANKR. L. ADVISER NL 1, Dec. 2015, at 1, 1 (noting Third Circuit characterized as matter of first impression its decision that "'bad faith' justifies dismissing an involuntary petition . . . and that bad faith is determined by a 'totality of the circumstances'").

108. For a further discussion of the two reasons the new precedent is appropriate for involuntary bankruptcies, see *infra* text of notes 108–10.

Third Circuit appropriately adhered to the primary purpose and policy considerations of the bankruptcy process.[109] Second, adopting the totality of the circumstances standard for evaluating bad faith provides the Third Circuit with the most comprehensive test for bad faith.[110]

A. *Void for Lack of Good Faith: Examining the Third Circuit's Allowance of Bad Faith Dismissals in Involuntary Bankruptcies*

By allowing bad faith dismissals, the Third Circuit aligned itself with the majority of courts dealing with bad faith dismissals in involuntary bankruptcies.[111] The first hurdle the Third Circuit faced was overcoming the limited reference to bad faith in § 303.[112] While the Code does not explicitly require that petitioners act in good faith, the court interpreted an inherent good faith requirement.[113]

First, the court's non-limiting interpretation of § 303—to view Congress's "express reference" to bad faith in § 303 as an indication that "Congress intended for bad faith to serve as a basis for both dismissal and damages"—fits properly with the all-encompassing language of § 303.[114] Second, aside from the textual interpretation of § 303, the primary goal of involuntary bankruptcy—"equitable distribution of the assets of the alleged debtor among all his creditors"—supports an allowance of dismissals for bad faith.[115] If the Third Circuit had disallowed bad faith dismissals,

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109. For a further discussion of the purposes and policy considerations of the bankruptcy process, see *supra* notes 94–95 and accompanying text.

110. *See Forever Green*, 804 F.3d at 336 (noting totality of the circumstances standard "effectively combines all [other] tests and looks to both subjective and objective evidence of bad faith"). For a further discussion of the benefits of the approach set forth in Forever Green, see *infra* notes 119–27 and accompanying text.

111. For a further discussion of the circuit split relating to bad faith dismissals in involuntary bankruptcies, see *supra* notes 44–53 and accompanying text.

112. *See Forever Green*, 804 F.3d at 333 (discussing limited reference to bad faith in § 303). The court noted § 303 has one reference to bad faith that seems to relate to damages awarded post-dismissal. *See id.* ("[B]ecause the only mention of bad faith is in § 303(i)(2) and deals with post-dismissal damages, the vast majority of litigation concerning bad faith centers on that provision."). Additionally, Congress did not explicitly state a specific requirement of good faith in § 303. *See generally* 11 U.S.C. § 303 (2012) (omitting requirement of good or bad faith other than bad faith in regards to post-dismissal damages).

113. *See Forever Green*, 804 F.3d at 334 (finding petitioners must file involuntary petitions in good faith).

114. *See id.* at 333 (noting Congress could have limited § 303's scope by using terms "if" or "if and only if," rather than "only if"); *see also* Block-Lieb *supra* note 26, at 815–17 (explaining Congress followed incorporated suggestions from "the Commission on Bankruptcy Laws" when it drafted Bankruptcy Code and "the Commission viewed a liberal standard for bringing an involuntary case as good policy"). For a further discussion of Congress's word choice, see *supra* note 92–93 and accompanying text.

115. *See In re* Arker, 6 B.R. 632, 636 (Bankr. E.D.N.Y. 1980) (citing *In re* Blount, 142 F. 263 (Bankr. E.D. Ark. 1906); Pirie v. Chicago Title & Trust Co., 182 U.S. 438 (1901)) (stating objective of involuntary bankruptcy); *see also In re* Central

the court would have effectively disregarded this objective by prioritizing a bad faith creditor's claim above those of all other creditors.[116] Furthermore, given the "serious consequences" of bankruptcy, the court convincingly demonstrated the need for a good faith requirement to ensure bankruptcy petitions are brought for the proper reasons.[117] Thus, by prohibiting bad faith dismissals, the court prevented creditors from simply filing petitions in retaliation or for the purpose of gaining an unfair advantage.[118]

Hobron Assocs., 41 B.R. 444, 452 (D. Haw. 1984) (discussing "fresh start" for debtors and "orderly ranking of creditors' claims" as policy considerations behind bankruptcy system); Scott E. Blakely, *A Proper Purpose for Commencing an Involuntary Bankruptcy Petition: Preserving a Preference Action*, CURRENT DEVELOPMENTS IN INVOLUNTARY BANKRUPTCY FILINGS (Blakeley, LLP, L.A., Cal.) (May 2, 2011), http://www.blakeleyllp.com/content/2011/05/02/a-proper-purpose-for-commencing-an-involuntary-bankruptcy-petition-preserving-a-preference-action/ [https://perma.cc/M264-GDD3] ("The historic purpose of involuntary bankruptcy is to provide vendors with a means of assuring equal distribution of the debtor's assets.").

116. *See Forever Green*, 804 F.3d at 334 (noting good faith requirement promotes "equitable nature of bankruptcy"). The court emphasized that the good faith requirement allows for the interest of one improperly motivated creditor not to be advanced to the detriment of the other creditors. *See id.* ("At its most fundamental level, the good faith requirement ensures that the Bankruptcy Code's careful balancing of interests is not undermined by petitioners whose aims are antithetical to the basic purposes of bankruptcy." (quoting *In re* Integrated Telecom Express, Inc., 384 F.3d 108, 119 (3d Cir. 2004) (internal quotation marks omitted))); *see also* Gotaskie, *supra* note 15 (emphasizing need for "collective factors that benefit all creditors" if petition is brought to serve individual creditor's collection efforts).

117. *See Forever Green*, 804 F.3d at 335 (noting "serious consequences" of involuntary bankruptcy petitions and potential harms caused by petitions filed for improper reasons); *see also In re* SGL Carbon Corp., 200 F.3d 154, 161 (3d Cir. 1999) ("[A] good faith standard protects the jurisdictional integrity of the bankruptcy courts by rendering their equitable weapons . . . available only to those debtors and creditors with clean hands." (quoting Little Creek Dev. Co. v. Commonwealth Mort. Corp., 779 F.2d 1068, 1072 (5th Cir. 1986) (internal quotation marks omitted))); *see also* Brad E. Godshall & Peter M. Giluhy, *The Involuntary Bankruptcy Petition: The World's Worst Debt Collection Device?*, 53 BUS. LAW. 1315, 1317–18 (1998) (detailing good faith requirement in involuntary petitions and noting involuntary petitions are "extreme remed[ies] with serious consequences"). For a further discussion of potential consequences of involuntary bankruptcies, see *supra* note 1 and accompanying text.

118. *See Forever Green*, 804 F.3d at 335 (noting proper purposes for involuntary bankruptcies). The court acknowledged that the prevention "against the preferential treatment of other creditors or the dissipation of the debtor's assets" constituted proper motivations for filing involuntary petitions. *See id.* (citing *In re* Silverman, 230 B.R. 46, 53 (Bankr. D.N.J. 1998)) (identifying proper reasons to file involuntary bankruptcy petitions); *see also* Blakely *supra* note 115 (explaining bad faith filings may be dismissed for improper purposes such as "to gain settlement leverage" or "as a substitute for customary collection proceedings").

B. *Checking All the Boxes: Analyzing the Third Circuit's Adoption of a Totality of the Circumstances Standard*

After allowing for bad faith dismissals, the Third Circuit faced the challenge of evaluating bad faith without statutory guidance.[119] The court appropriately adopted the totality of the circumstances test as the proper standard because it "combines all the other tests and looks to both subjective and objective evidence of bad faith."[120] The "objective prong of [the test] requires the debtor to prove that the [petitioner] conducted a reasonable inquiry into the law and the facts surrounding the case prior to filing the involuntary petition."[121] Conversely, the subjective prong seeks to determine whether the petitioner filed a petition "to achieve an improper purpose."[122] Consequently, utilizing both subjective and objective factors enables the Third Circuit to assess a creditor's motivation—a key aspect in determining whether someone acted in bad faith—but also other equitable factors to ensure no malfeasance is committed.[123]

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119. *See* Lubow Machine Co. v. Bayshore Wire Prods. Corp. (*In re* Bayshore Wire Prods. Corp.), 209 F.3d 100, 105 (2d Cir. 2000) (acknowledging "'bad faith' is not defined in bankruptcy code, and [ ] there is no legislative history addressing the intended meaning of this language"); *see also In re* Camelot, Inc., 25 B.R. 861, 864 (Bankr. E.D. Tenn. 1982) ("Bad faith is a term of art undefined in the Bankruptcy Code.").

120. *See Forever Green*, 804 F.3d at 336 (citing *In R*e John Richards Bldg. Homes Co. (*In re* John Richards Bldg. Homes Co.), 439 F.3d 248, 255 n.2 (6th Cir. 2006)) (finding "[totality of the circumstances test] is most suitable" for assessing bad faith); *see also* Bruce Nathan & Eric Chafetz, *Petitioning Creditors Beware: A Bad Faith Filing Can Sink an Involuntary Bankruptcy Petition*, BUS. CREDIT (Lowenstein, N.Y.C., NY) 2–3 (Feb. 2016), https://www.lowenstein.com/files/Publication/5062de1c-e131-4f02-8639-40cfbf3cc6db/Presentation/PublicationAttachment/84be7235-3ef4-443d-9b97-436d312d176d/BC-Feb16_NathanChafetz.pdf [https://perma.cc/8EYJ-QZLU] (detailing future creditors need to ensure all petitioners in involuntary filing analyze their filing under totality of the circumstances test); *see also* Gotaskie, *supra* note 15 (acknowledging creditors filing involuntary petition should ensure that "considering the totality of the circumstances, there are at worst neutral reasons for the filing").

121. Godshall & Giluhy, *supra* note 117, at 1330 (describing objective prong of bad faith review in involuntary bankruptcy). The authors note that the "objective requirement of good faith is typically discussed by the courts in conjunction with an analysis of whether an originally defective involuntary petition can be amended." *See id.* (citing 11 U.S.C. § 303 (2012) and cases interpreting the statute's good faith requirement) (describing courts' use of objective prong in involuntary petitions).

122. *See id.* (citing case law demonstrating subjective aspect of bad faith review in involuntary bankruptcy). Godshall and Giluhy also note that an example of an improper purpose that would fail the subjective bad faith test would be a creditor's filing of an involuntary petition for the sole purpose of "injur[ing] a competitor." *See id.* (providing example of improper purpose that would fail subjective part of bad faith inquiry).

123. *See Forever Green*, 804 F.3d at 336 (noting suitability of totality of the circumstances test); *see also In re* K.P. Enter., 135 B.R. 174, 180 (Bankr. D. Me. 1992) (finding that "objective and subjective factors should be considered" when determining whether bad faith exists).

While the court adopted the "most suitable" standard for evaluating bad faith, the totality of the circumstances test does not create a bright-line rule for what constitutes bad faith.[124] The standard combines many different factors in a "fact-intensive review" and creates a gray area regarding whether a court will find the existence of bad faith.[125] Still, this standard is the only one that fairly weighs all of the creditor and debtor's interests.[126] While other standards may offer more of a bright-line approach, the totality of the circumstances test remains more effective because it provides the court with the most flexibility in crafting its decisions.[127]

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124. *See Forever Green*, 804 F.3d at 336 (stating "courts may consider a number of factors" when evaluating bad faith); *see also* Haithcock & Goodrich, *supra* note 107 (observing totality of the circumstances approach is difficult test on which to rely because "creditors rarely know . . . whether [individuals] will later determine that they are motivated by malice or ill will"); Nathan & Chafetz, *supra* note 120, at 3 ("The court's adoption of a 'totality of the circumstances' test when analyzing bad faith will make it very difficult for a petitioning creditor to know in advance whether its conduct rises to the level of bad faith."). For a further discussion of the factors the court will consider during its review, see *supra* note 98 and accompanying text.

125. *See Forever Green*, 804 F.3d at 336 (detailing "fact-intensive review" conducted by court under totality of the circumstances standard); *see also* Debra McElligott, *No Bad Blood in the Bankruptcy Court: Third Circuit Holds That Bad Faith Is a Basis for Dismissing Involuntary Petitions*, BANKR. BLOG, (Weil, New York, NY) (Oct. 23, 2015), https://business-finance-restructuring.weil.com/involuntary-petitions/no-bad-blood-in-the-bankruptcy-court-third-circuit-holds-that-bad-faith-is-a-basis-for-dismissing-involuntary-petitions/ [https://perma.cc/Y669-G8F8] (explaining gray area in bankruptcy law still exists because "the fact-based nature of the bad faith inquiry makes the reach of the ruling unclear").

126. *See* Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1546 (10th Cir. 1988) ("[T]he bankruptcy court should examine the totality of the circumstances, balancing the interests of the debtor with those of the creditors."); *see also In re Smith*, 243 B.R. 169, 190 (Bankr. N.D. Ga. 1999) (recognizing need for flexible approach that weighs variety of factors).

127. *See Forever Green*, 804 F.3d at 335–36 (describing standards other courts have used to evaluate bad faith). The improper use standard sets forth a test that has less ambiguity than the totality of the circumstances standard because it simply asks whether "a petitioning creditor uses involuntary bankruptcy procedures in an attempt to obtain a disproportionate advantage for itself . . . ." *See id.* at 335 (quoting *K.P. Enter.*, 135 B.R. at 179 n.14) (internal quotation marks omitted). The improper purpose standard is also clearer than the totality of the circumstances standard because it simply looks to see if the creditor was "'motivated by ill will, malice,'" or retribution. *See id.* (quoting Lubow Machine Co. v. Bayshore Wire Prods. Corp. (*In re* Bayshore Wire Prods. Corp.), 209 F.3d 100, 105 (2d Cir. 2000)) (explaining improper purpose test); *see also In re* Smith, 243 B.R. at 190 (noting totality of the circumstances standard "gives the [c]ourt considerable discretion and leeway"). Further, Congress intended the standard adopted by courts to decide whether bad faith exists "to be applied with flexibility so as not to limit or restrict the involuntary process." *See In re* Better Care, Ltd., 97 B.R. 405, 407–08 (Bankr. N.D. Ill. 1989) (adopting "generally not paying" test and acknowledging that Congress intended test chosen by courts to be flexible). The totality of the circumstances approach causes courts to weigh and analyze the most factors because it is an "amalgam of tests used by other courts." *See In re* Diamondhead Casino, 2016 WL 3284674, at *16 (Bankr. D. Del. 2016).

V. BANKING ON MEETING THE GOOD FAITH STANDARD: PRACTICAL RECOMMENDATIONS FOR INVOLUNTARY BANKRUPTCY PRACTITIONERS

Involuntary bankruptcies are closely analyzed by courts and present an enormous challenge for practitioners.[128] After *Forever Green*, Third Circuit creditors not only bear the burden of proving the requirements of §§ 303 (b) and (h) are met, but must also prove the petition was filed in good faith under the totality of the circumstances standard.[129] Conversely, the decision arms debtors with an alternative basis for dismissal if they can show a petition was filed in bad faith.[130]

A. *Caution to Creditors*

Forever Green imposes a significant additional burden on creditors trying to recover their money, as well as a heavy penalty if a petition is filed for improper reasons.[131] With a higher burden, creditors' lawyers should now scrutinize all the facts and motivations surrounding the involuntary petition even if the statutory requirements of §§ 303(b) and (h) are met.[132] If there are factors present that suggest the petition was filed pri-

128. *See In re* Reid, 773 F.2d 945, 946 (7th Cir. 1985) (noting court chose to "scrutinize carefully the creditor's filing" because of serious potential consequences involuntary petitions have on debtors); *see also* Godshall & Giluhy, *supra* note 117, at 1317–18 (warning of heavy court scrutiny of involuntary bankruptcy). Even though the requirements of involuntary bankruptcies are clearly laid out in § 303, "[c]ompliance with the requirements . . . is absolutely critical as the bankruptcy court has broad discretion to compensate an alleged debtor and punish a petitioning creditor if the court determines that the involuntary petition was improperly filed." *See id.* at 1317 (citing 11 U.S.C. § 303(i) (2012)) (discussing importance filing involuntary bankruptcy petition in good faith); *see also* Nathan & Chafetz *supra* note 120, at 3 (acknowledging challenges faced during involuntary bankruptcy by creditors due to "need to conduct appropriate due diligence").

129. *See* Stickles & Reilley, *supra* note 8, at *30 (noting burden of proof to establish requirements is on creditor); *see also* Gotaskie, *supra* note 15 (recognizing Third Circuit's acceptance of totality of the circumstances standard to review bad faith with *Forever Green*).

130. *See Forever Green*, 804 F.3d at 334–35 (permitting dismissal of involuntary petition for bad faith); *see also* Nathan & Chafetz, *supra* note 120 (noting Third Circuit's dismissal due to bad faith exacerbates challenges faced by creditors in involuntary bankruptcies); *see also* Barry M. Klayman, *Third Circuit Affirms Bad Faith Involuntary Bankruptcy Dismissal, Increasing Risk of Punitive Damages*, BANKR., INSOLVENCY & RESTRUCTURING ALERT (Cozen O'Connor, Wilmington, Del.) (Oct. 20, 2015), https://www.cozen.com/news-resources/publications/2015/3rd-circuit-affirms-bad-faith-involuntary-bankruptcy-dismissal-increasing-risk-of-punitive-damages [https://perma.cc/4Q6B-YG2K] (detailing additional way for debtors to challenge involuntary petition due to *Forever Green* decision).

131. *See* Gotaskie, *supra* note 15 (acknowledging "substantial" evidence is required under totality of the circumstances test); *see also* Block-Lieb *supra* note 26, at 846 (detailing collection challenges faced by creditors by explaining "the filing of a petition is a particularly ineffective means of coercing repayment of an individual debtor's obligations").

132. *See Forever Green*, 804 F.3d at 333–35 (allowing bad faith dismissal even though creditor met statutory requirements); *see also* Klayman *supra* note 130 ("It is

marily to serve as an individual's debt-collection device, practitioners should "ensure there are counterbalancing collective factors that benefit all creditors," such as the debtor making preferential payments to another creditor or the debtor willfully not paying certain debts.[133] Additionally, if a creditor's motivations point to bad faith, practitioners need to engage in "appropriate due diligence" by analyzing all creditors' motivations for filing before filing the petition.[134] The determination of bad faith is ultimately up to the bankruptcy court; however, *Forever Green* provides factors the court will review in making its decision that practitioners can consider before filing a petition.[135]

Forever Green also presents the possibility of punitive damages against both creditors and their counselors if a petition is dismissed for bad faith.[136] If a variety of bad faith factors are present, practitioners should utilize other collection avenues.[137] For example, instead of bankruptcy

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no longer sufficient to merely determine that a fellow petitioning creditor holds a claim against a debtor that is not contingent as to liability or subject to a bona fide dispute.").

133. *See* Gotaskie, *supra* note 15 (detailing creditor's need for good faith purpose for filing involuntary petitions). When considering filing a bad faith petition, the creditor's practitioner needs to review the facts and motivations "to ensure . . . there are . . . at worst[,] neutral reasons for the filing." *See id.* (describing precautions creditors should take when filing involuntary bankruptcy petitions in Third Circuit in wake of *Forever Green*); Klayman *supra* note 130 (explaining pressuring debtor to prioritize lower creditor's claim inappropriately over other creditors' claims serves as factor for bad faith filing); *see also* Mark A. Salzberg, *Creditors Be Forewarned: Involuntary Petitions Carry Substantial Risk*, SQUIRE PATTON BOGGS (Dec. 7, 2015), http://www.lexology.com/library/detail.aspx?g=CD606c74-3a10-43f8-885e-86a488ef2755 [https://perma.cc/C2Q9-8K7U] (explaining "[p]reventing preferential payments" can serve as legitimate basis for filing involuntary petition).

134. *See* Nathan & Chafetz, *supra* note 120 (noting challenge faced by creditors to perform due diligence in an attempt to ensure no creditors' "conduct rises to the level of bad faith"); *see also* Klayman *supra* note 130 (explaining creditors "now must concern themselves with determining the subjective motivation of their fellow creditors").

135. *See Forever Green*, 804 F.3d at 336; *see also In re* Lilley, 91 F.3d 491, 496 (3d Cir. 1996) (remanding case to bankruptcy court to determine existence of bad faith). See *supra* note 98 and accompanying text for factors court will review in determining whether bad faith exists under the totality of the circumstances standard.

136. *See* Gotaskie, *supra* note 15 (discussing possibility of punitive damages awarded against debtors and debtors' counsel); *see also* Block-Lieb *infra* note 26, at 829 (noting debtors can be awarded actual and punitive damages resulting from filing if bad faith is proven); Stickles & Reilley, *supra* note 8, at 31 (highlighting that attorneys' fees can be awarded in addition to damages).

137. *See* Michael L. Cook, *Third Circuit Affirms Dismissal of Good Involuntary Petition for Bad Faith*, SCHULTE ROTH & ZABEL LLP (Oct. 29, 2015), http://www.srz.com/Third_Circuit_Affirms_Dismissal_of_Good_Involuntary_Petition_for_Bad_Faith/ [https://perma.cc/7LAK-88WS] (acknowledging other collection avenues using non-bankruptcy courts "may be more effective"); *see also* Gebelt, *supra* note 30 ("[A]bsent exigent circumstances it is probably safer to use to use some other approach to debt collection.").

court, practitioners can pursue debt collection in state court.[138] Additionally, because state court collection alternatives are not a collective creditor remedy, successful creditors can collect their debt without "shar[ing] [the recovery] with other creditors."[139]

B. *Defense for Debtors*

While *Forever Green* created extra hurdles for creditors in recovering their money, the court also interpreted § 303 in a way that provides a strong defense strategy for debtors' attorneys in the Third Circuit.[140] Practitioners should fully consider the creditor's motivations behind filing and should petition for a bad faith dismissal when possible.[141] Furthermore, *Forever Green* showed that the Third Circuit will heavily scrutinize a creditor's motivations to ensure good faith exists.[142] The presumption of good faith in involuntary bankruptcies remains; however, the totality of the circumstances standard provides practitioners with a large arsenal of possible challenges to this presumption.[143] Additionally, because *Forever Green* emphasized the importance of "due diligence and sober decision-making," debtors' practitioners can use this added requirement as leverage to settle, prevent creditors from filing involuntary petitions, or as potential grounds for dismissal.[144] Debtors' counselors should carefully use

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138. *See* Bankers Trust Co. BT Serv. Co. v. Nordbrock (*In re* Nordbrock), 772 F.2d 397, 400 (8th Cir. 1985) (characterizing state court as alternative collection avenue).

139. *See* Cook, *supra* note 137 (explaining that non-bankruptcy alternatives to debt collection may be more effective option for creditor). All bankruptcy court collections are shared equally among creditors, but state-court collections enable a creditor to collect a debt without "shar[ing] [the collection] with other creditors." *See id.*

140. *See In re* Forever Green Athletic Fields, Inc., 804 F.3d 328, 335 (3d Cir. 2015) (affirming dismissal of involuntary petition filed in bad faith).

141. *See id.* at 336 (noting totality of the circumstances standard takes into account both objective and subjective evidence of bad faith); *see also* Klayman *supra* note 130 (highlighting importance of evaluating subjective motivations of all creditors filing involuntary petition).

142. *See Forever Green*, 804 F.3d at 334–35 (detailing court's deference to proper purposes and policy considerations for involuntary bankruptcy petitions).

143. *See In re* Smith, 243 B.R. 169, 194 (Bankr. N.D. Ga. 1999) (citing *In re* CLE Corp., 59 B.R. 579, 583 (Bankr. N.D. Ga. 1986)) (acknowledging "presumption that petitioning creditors act in good faith"); *see also Forever Green*, 804 F.3d at 336 (providing potential factors to prove bad faith exists); *see also* Gotaskie, *supra* note 15 (highlighting that any challenge suggesting bad faith made by debtor is troubling for creditor because "evidence needed to prove the new totality of the circumstances test appears to be quite substantial"); Salzberg, *supra* note 133 (explaining debtor may be able to challenge petition for bad faith if debtor can prove petition was filed "to leverage a creditor's position in ongoing litigation").

144. *See Forever Green*, 804 F.3d at 337 (emphasizing "due diligence and sober decision-making"); *see also* Klayman, *supra* note 130 ("For debtors, it provides . . . a strong argument to forestall the filing of such a petition in the elaborate dance that often proceeds a filing.").

the flexibility provided by the totality of the circumstances standard to the fullest.[145]

VI. CONCLUSION

Forever Green showcases the Third Circuit's precedential stance on bad faith in involuntary bankruptcy petitions due to the ramifications of such petitions.[146] The court heightened the implicit requirements of involuntary bankruptcies and articulated the standard for determining bad faith.[147] The Third Circuit's decision to utilize the totality of the circumstances standard also highlighted the court's desire to defend against all potential bad faith filings.[148] Ultimately, the Third Circuit may experience a drop in involuntary petitions filed because even creditors who meet the explicit statutory requirements stated in § 303 may now be hesitant to file.[149] However, despite this higher protection for debtors and the new defenses debtors can assert in involuntary bankruptcy proceedings, debtors in the Third Circuit need to keep a watchful eye on creditors, as creditors are sure to develop new strategies to evade the totality of the circumstances standard and get their hands into a debtor's piggybank.[150]

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145. *See In re* Smith, 243 B.R. at 190 (discussing flexibility of totality of the circumstances standard). Because the totality of the circumstances test contains both objective and subjective factors, this standard provides practitioners with the ability to petition for dismissal even if one of the factors is missing. *See Forever Green*, 804 F.3d at 336 (describing totality of the circumstances test as consisting of both subjective and objective factors); *see also* Klayman, *supra* note 130 (finding subjective motivation of any one individual creditor may cause finding of bad faith); Salzberg, *supra* note 133 (explaining subjective factors of creditors may constitute "a basis for dismissal even if § 303(b)'s objective criteria are met").

146. *See Forever Green*, 804 F.3d at 335 (noting "serious consequences" of involuntary petitions).

147. *See In re* Diamondhead Casino Corp., 540 B.R. 499, 507 (Bankr. D. Del. 2015) (referring to *Forever Green* decision when stating "totality of the circumstances" standard is used to evaluate bad faith).

148. *See Forever Green*, 804 F.3d at 336 (characterizing totality of the circumstances standard as "most suitable for evaluating the myriad ways in which creditors filing an involuntary petition could act in bad faith").

149. *See* Gotaskie, *supra* note 15 (noting potential deterring effect of *Forever Green*). Gotaskie notes that in the wake of *Forever Green*, creditors may be "very nervous about actually filing an involuntary petition." *See id.*

150. *See id.* (acknowledging new defense to involuntary bankruptcy); *see also* Cook, *supra* note 137 (noting creditors may evade totality of the circumstances inquiry entirely by pursuing claims that normally would be litigated in bankruptcy court in venues other than bankruptcy court).