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Did you Attend the 2018 ABA YLD Midyear Meeting in Vancouver? What are you most looking forward to at the 2018 Spring Conference in Louisville?

Although there was no shortage of rain, fog, and general dampness, Vancouver absolutely made up for it with the city’s general hospitality, friendliness, and incredible vistas of the mountains surrounding the city. Not to mention all the outstanding networking opportunities at the conference. What did you find most helpful? What do you want from our committee at the 2018 Spring Conference in Louisville or at the 2018 ABA Chicago Annual Meeting? Start a dialogue and let us know!

YLD Spring Conference

The YLD Spring Conference is fast approaching! Join us in Louisville, May 10-12, 2018.

Register HERE to:

- Earn CLE credit and meet practice-area experts.
- Get effective skills and techniques to make you a better lawyer and a more effective leader.
- Share perspectives, stories, and best practices on ways to advance our practice.


A complex and wide-ranging area of law, insolvency incorporates both federal law (bankruptcy) and state laws (assignments, bulk sales, receiverships, workouts, and probates), as well as other aspects that involve both federal and state law. Join a distinguished panel as they take a look at the basic issues involved and how to handle these situations.

Panelists will provide a step-by-step overview and provide a more in-depth look at insolvency as they discuss: (1) assignment for the benefit of creditors; (2) adjustments and workouts; and (3)

Submit Articles for the Bankruptcy Law Quarterly Newsletter.

The ABA YLD Bankruptcy Law Committee invites you to submit articles for possible publication in future issues. The articles do not need to be long or in-depth, and it is a great way to get involved in the Bankruptcy Law Committee. Articles can survey the law nationally or locally, discuss particular business or consumer bankruptcy issues, or examine a specific case. If you are interested in submitting an article, please contact Content Editor, James P. Roberts at jroberts@burr.com.

Mark Your Calendars for the 2018 ABA Chicago Annual Meeting

Celebrate the end of the 2017-2018 bar year and ring in the 2018-2019 bar year at the 2018 ABA Annual Meeting.

Dates: August 2-4, 2018
Location: Chicago Marriott Magnificent Mile, Chicago, IL

The YLD will be hosting events at the Annual Meeting – engage with your fellow ABA members and explore Chicago. More Information is available here: http://bit.ly/2HDYfEd.

Job Opportunities

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LIMITATIONS ON 11 U.S.C. § 362(k) DON'T APPEAL TO THE ELEVENTH CIRCUIT IN MANTIPLY V. HORNE (IN RE HORNE)

BY: WESLEY R. BULGARELLA

Late last year, in Mantiply v. Horne (In re Horne), the Eleventh Circuit—answering an open question—held that section 362(k)(1) of the United States Bankruptcy Code (the "Code") authorizes payment of attorneys' fees and costs incurred by debtors in successfully pursuing an action for damages resulting from an automatic stay violation and in defending the damages award on appeal.2

BACKGROUND

Richard and Patricia Horne (the "Hornes") filed for bankruptcy under chapter 7 in 2011.3 As is the case with all cases filed under chapter 7, 11, or 13, the filing triggered the automatic stay of any litigation, pending or forthcoming.4 Despite knowing the automatic stay was in place, Mary Mantiply ("Mantiply") filed a civil action against the Hornes in state court.5 The Hornes defended themselves before that action, which the court ultimately dismissed.6

The Hornes then filed a motion under section 362(k)(1) seeking damages for Mantiply's violation of the automatic stay.7 The bankruptcy court awarded the Hornes $81,714.31 in damages, including $41,714.31 in attorneys' fees.8 Mantiply appealed that decision to the district court, which affirmed and also awarded the Hornes an additional $34,551.28 in attorneys' fees incurred in the appeal of the damages award.9 After a multitude of appeals,10 the Eleventh Circuit affirmed the courts below.

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2 In re Horne, 876 F.3d 1076, 1078 (11th Cir. 2017).
3 Id.
5 See Horne, 876 F.3d at 1078.
6 Id. at 1079.
7 Id.
8 Id.
9 Id.
10 Horne, 876 F.3d at 1079. The procedural history leading toward the appeal is somewhat tortured. After the district court affirmed the award of damages, Mantiply then filed two identical motions in the bankruptcy court and the district court seeking the bankruptcy judge's recusal. See id. The bankruptcy court denied Mantiply's recusal motion. Id. Mantiply appealed that decision to the district court, which affirmed but denied the Hornes' motion for attorneys' fees incurred in defending the appeal of the recusal order. Id.

Mantiply appealed the district court's affirmance of her denied recusal motion, and the Hornes cross-appealed the district court's denial of their motion for attorneys' fees incurred defending the recusal order. Id.

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The Rationale

The narrow question presented to the Eleventh Circuit required the court to examine the relationship between section 362(k)(1), the "American Rule," and other provisions of the Code.

Mantiply argued that section 362(k)(1), which provides for mandatory damages, including costs and attorneys' fees, for willful violations of the automatic stay, is limited to damages, costs, and fees incurred in ending a stay violation.\(^{11}\) As support for this argument, Mantiply relied on \textit{Baker Botts v. ASARCO}.\(^{12}\) which analyzed the language of section 330(a)(1) of the Code before admonishing courts from easily departing from the American Rule—"the rule that each side must pay its own attorney's fees"—absent explicit statutory authority.\(^{13}\) Section 330(a)(1) states that a bankruptcy court "may award . . . reasonable compensation for actual, necessary services rendered by” certain types of professionals. The Supreme Court limited the scope of this statute, recognizing that while an attorney could receive payment for fees incurred in service to the bankruptcy estate, the statute was not explicit enough to cover fees incurred litigating a fee application.\(^{14}\) However, with respect to section 362(k)(1), the Eleventh Circuit found that the statute is much more explicit.

order on appeal to the district court. \textit{Id.} The Eleventh Circuit affirmed in part and remanded. \textit{Id.} First, the Eleventh Circuit affirmed the district court's conclusion that the bankruptcy judge's recusal was not required in this case. \textit{Id.} Second, the remanded for the district court to either award the Hornes attorneys' fees under the mandatory fees provision of Section 362(k), or explain why the recusal motion did not involve litigation over the stay violation and thus did not entitle the Hornes to attorneys' fees. \textit{Id.} On remand, the district court found that the Hornes' requested attorneys' fees were indeed mandatory and awarded an additional $14,918.60 to the Hornes.

While these motions were being briefed and decided, Mantiply petitioned for a \textit{writ of certiorari} with the Supreme Court to review the Eleventh Circuit's decision affirming the denial of her recusal motion. The Supreme Court denied Mantiply's petition on June 27, 2016.

The Hornes then filed motions with the Eleventh Circuit for attorneys' fees incurred in defending against Mantiply's appeal to the Eleventh Circuit as well as her petition for \textit{certiorari} (collectively, the "appellate fees"). \textit{Id.} The Eleventh Circuit, \textit{sua sponte}, transferred those motions to the district court to consider in the first instance whether the Hornes were legally entitled to their requested appellate fees and, if so, whether they were reasonable. \textit{Id.} The district court found that the Hornes were entitled to the appellate fees and that they were reasonable. \textit{Id.} In determining that the requested appellate fees were reasonable, the district court pointed out that the amount of fees and costs, while large, was reasonable given the time and labor required to defend Mantiply's many appeals. \textit{Id.} The district court also found that the skill and experience required of counsel in defending the appeals, the favorable results obtained, and the undesirability of the case—which required undertaking legal action against a fellow lawyer—supported finding the requested attorneys' fees to be reasonable as well. \textit{Id.} Based on these findings, the district court awarded the Hornes appellate fees and costs of $92,495.86. \textit{Id.} At that point, Mantiply appealed, giving the Eleventh Circuit the opportunity to squarely address the question presented. \textit{Id.}

\(^{11}\) \textit{Horne}, 876 F.3d at 1080.
\(^{13}\) ASARCO, 135 S.Ct. at 2163-64.
\(^{14}\) \textit{Id.} at 2164-65.
Applying precedent and persuasive case law from inside and outside of the Eleventh Circuit,\textsuperscript{15} the court found that the explicit, specific, and broad language of section 362(k)(1) "permits the recovery of attorneys' fees incurred in stopping the stay violation, prosecuting a damages action, and defending those judgments on appeal."\textsuperscript{16}

Beyond the Eleventh Circuit's plain language rationale, the court also found that its decision best effectuated the policy of the Code, as the majority of the damages in stay violation litigation consist of attorneys' fees.\textsuperscript{17} The court found that debtors in bankruptcy cases are not typically in the position to bankroll both an action to prosecute damages and the expensive litigation that follows.\textsuperscript{18} Further, this interpretation protects the debtor from the harmful activities precluded under section 362 without jeopardizing creditors' recoveries, and placing the financial burden of the litigation on the allegedly violating party.

It appears that the Eleventh Circuit now joins the Fifth and Ninth Circuits as being the only circuit level federal courts to opine on this issue. The extent of the impact of the ruling remains to be seen and will depend in part on the manner in which a court interprets section 362(k), which at first blush only applies to "individuals." Whether courts construe this as "natural persons" or corporate debtors will have a large impact on the import, reach, and extent of this ruling.

\begin{flushright}
\textsuperscript{15} \textit{In re Schwartz-Tallard}, 803 F.3d 1095, 1101 (9th Cir. 2015) (en banc) (holding that nothing in the language of section 362(k)(1) supports imposing a limitation on the remedy for which the fees were incurred); \textit{In re Rosenberg}, 779 F.3d 1254 (11th Cir. 2015) (holding that nothing in the text of section 330(i)(1) precludes a party wrongfully forced into an involuntary bankruptcy from recovering appellate fees or fees otherwise incurred after the date of dismissal of a wrongfully filed involuntary bankruptcy); \textit{In re Repine}, 536 F.3d 512, 522 (5th Cir. 2008) (holding, without much explanation, that "[t]he lower courts in our Circuit have concluded that it is proper to award attorney's fees that were incurred prosecuting a section 362(k) claim. We adopt the same reading of section 362(k) and therefore agree.")

\textsuperscript{16} \textit{Horne}, 876 F.3d at 1081.

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.}
\end{flushright}
OUT-OF-MONEY AND OUT-OF-LUCK? "GIFT" PLANS IN THE WAKE OF IN RE NUVERRA ENVIRON. SOLUTIONS, INC.

BY: JAMES P. ROBERTS

On July 24, 2017, the Delaware Bankruptcy Court (the "Court") presiding over the Nuverra Environmental Solutions, Inc. (the "Debtors") case confirmed a "gift plan" in the context of a chapter 11 reorganization. Although it can take many forms, "gifting" in restructuring parlance often refers to a mechanism by which a class of senior creditors agree to share a portion of their recovery under a plan of reorganization with a class of junior creditors or shareholders, while bypassing an intermediate class that remains unpaid in full. The viability of the practice has been uncertain after the Second Circuit eliminated the use of chapter 11 gift plans in that jurisdiction in In re DBSD North America, Inc. However, as seen by the bankruptcy court's decision in Nuverra, the courts within the Third Circuit do not see eye-to-eye with the Second Circuit on this issue.

The Nitty Gritty

Nuverra was a "prepack,"—a type of bankruptcy where solicitation and acceptance of a plan of reorganization occur prior to filing the chapter 11 case, rather than where solicitation occurs during the pendency of a bankruptcy case.

The Debtors entered bankruptcy with approximately $500 million in secured debt and a value of approximately $302.5 million. The terms of the Debtors plan (the "Plan"), which was filed contemporaneously with their petition for relief, reflected negotiations that had taken place in the days and months preceding the commencement of the Debtors case.

The central term or terms at issue involved concessions made by senior creditors that agreed to convert their debt to equity at a discount, and to allow a gift to be distributed from the proceeds the senior creditors were otherwise entitled to receive to trade creditors and other creditors related to the Debtors' business and operations (the "Trade and Business Creditors"). By operation of the gift, the Trade and Business Creditors were unimpaired by the Plan. Those with claims relating to the purchase of the Debtor's unsecured senior notes due in 2018 (the "2018 Notes") received a combination of stock and cash—David Hargreaves ("Hargreaves") the sole objector was a member of this class.

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21 In re DBSD N. Am., Inc., 634 F.3d 79, 93 (2d Cir. 2011).

22 An unsecured creditors' committee (the "Committee") was formed during the Debtor's case, which consisted, in part, of two holders of the 2018 Notes, Hargraves and the indenture trustee for the 2018 Notes. While the Committee initially opposed the Plan, following productive negotiations with the Debtor, the Committee later came to support the Plan, leaving Hargraves as the sole objecting party.
With the value of the Debtors business being worth roughly $200 million less than the secured debt at issue, it is evident that Hargreaves along with the remaining unsecured creditors were out-of-the-money.\(^{23}\) Hargreaves opposed confirmation arguing that: (1) his recovery, as a holder of unsecured 2018 Notes, would be less under the Plan than certain other unsecured creditors with unsecured claims; and (2) the classification scheme in the Plan was improper.\(^{24}\)

**The Bankruptcy Court Decision**

After quickly disposing of Hargreaves' objection to the classification scheme of the Plan,\(^{25}\) the Court discussed the central issue—gifting.

The Court first applied the Markell test, adopted and applied in *Tribune* as a basis for determining whether unfair discrimination exists in the proposed distributions of a chapter 11 plan.\(^{26}\) Under this approach, the rebuttable presumption of unfair discrimination arises when there is (1) a dissenting class, (2) another class of the same priority and (3) a difference in the plan's treatment of the two classes that results in either: (a) a materially lower percentage recovery for the dissenting class measured in terms of the net present value of all payments; or (b) regardless of a percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution.\(^{27}\)

Where Hargreaves argued that the Plan was unconfirmable based on the presence of these factors, the Court concluded that those factors merely created a rebuttable presumption of unfair discrimination.\(^{28}\) The Court determined that the Debtors had rebutted the presumption as: (1) Hargreaves and his class of creditors were "indisputably out of the money and not . . . entitled to any distribution[,]"\(^{29}\); and (2) the proposed classification and treatment of other unsecured creditors fostered a reorganization of the Debtors.\(^{30}\)

Over Hargreaves' objections, the Court found the gift at issue in *Nuverra* to be consistent with Third Circuit precedent, discussing *In re Armstrong World Industries*, 432 F.3d 507 (3rd Cir. 2005), and *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001).

\(^{23}\) Transcript of Hearing on Unsec. Bondholder's Obj. to Conf. of the Debtors' Am. Prepackaged Plans of Reorganization, at 4:04-10 (July 24, 2017) (hereafter "Tr. at ________").

\(^{24}\) *Id.* at 4:20-25.

\(^{25}\) While the separate classification of creditors with similar claims is outside the scope of this article, the Court roundly rejected Hargreaves' opposition, finding that "separate classification of unsecured noteholders and trade creditors was reasonable because each group represented a voting interest that was sufficiently distinct from one another to merit a separate voice in the reorganization." Tr. at 6:06-17 (citing *In re Tribune Co.*, 476 B.R. 843 (Bankr. D. Del. 2012), aff'd as modified, No. 12-CV-1072 GMS, 2014 WL 2797042 (D. Del. June 18, 2014), aff'd in part, rev'd in part sub nom. *In re Tribune Media Co.*, 799 F.3d 272 (3d Cir. 2015) and *In re Coram Healthcare Corp.*, 315 B.R. 321 (Bankr. D. Del. 2004)).

\(^{26}\) Tr. at 8:04-08.

\(^{27}\) *Id.* at 8:09-19.

\(^{28}\) *Id.* at 9:12-17.

\(^{29}\) *Id.* at 8:24-25.

\(^{30}\) *Id.* at 9:02-03.
In *In re Armstrong*, the Third Circuit rejected, as a violation of the absolute priority rule, a gifting plan that provided that an unsecured creditor class would receive and automatically transfer warrants to the holder of equity interest in the event that its co-equal class rejected the reorganization plan.\(^31\) However, within *Armstrong*, the Third Circuit favorably viewed the gifting plan at issue in *Genesis*, where the debtors classified putative damage claims in a separate class from other general unsecured claims.\(^32\) In that case, the senior lenders agreed to share the distribution that they would have, otherwise, been entitled to only with certain classes and chose to omit putative damage claimants from the agreement.\(^33\) In that case, the court found that the classification and treatment of the putative damage claims was proper because the distribution to general unsecured creditors was attributable to the agreement by the senior lenders to give up a portion of value they would otherwise receive to unsecured creditors.\(^34\) The Court in *Nuverra* found the gifting plan to be similar to that at issue in *Genesis*, in part, because both plans involved distributions to a junior class involving a debtor's property that was subject to a senior lender's liens, which, as applied, did not violate the absolute priority rule.\(^35\)

The Court also addressed the Supreme Court's recent holding in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), finding only that the issues were distinct. Under the *Nuverra* Court's holding, the issues in that case did not implicate *Jevic* because that case involved a "structured dismissal," not a chapter 11 plan that had received overwhelming creditor support and which supported the reorganization of an ongoing business.

**The Importance of the Decision**

Without creating a *per se* rule outright blessing gifting plans, *Nuverra* is a check in the win column for debtors seeking for creative solutions towards confirmation with a creditor base that lends itself to reasonably separate classifications and treatment. Although the decision is currently pending appeal,\(^36\) if upheld it will be interesting to see how the neighboring Second

\(^{31}\) 432 F.3d at 518.

\(^{32}\) *Id.* at 514.

\(^{33}\) 266 B.R. at 602, 617-618.

\(^{34}\) *Id.* at 600. Unlike the *Nuverra* Court, no explanation was offered by the *Genesis* Court for why the gift was necessary for the reorganization of the debtor in that case. Although a rationale for this brief analysis is unclear, it is possible that the *Genesis* Court was influenced by *In re SPM Mfg. Corp.*, 984 F.2d 1305, 1313 (1st Cir. 1993) (holding that "creditors are generally free to do whatever they wish with the bankruptcy dividends they receive, including to share them with other creditors"), as the Second Circuit had yet to severely restrict the gifting doctrine with *In re DBSD North America, Inc.*, 634 F.3d 79 (2nd Cir. 2011) (striking down plan or reorganization with gifting provisions in which a senior class shares its distribution with an out-of-the-money junior class as violating the absolute priority rule) and *In re Iridium Operating LLC*, 478 F.3d 452 (2nd Cir. 2007) (rejecting a *per se* rule prohibiting pre-plan settlements that do not comply with the absolute priority rule, but holding that whether a particular settlement's distribution scheme complies with the Bankruptcy Code's priority scheme "must be the most important factor for the bankruptcy court to consider when determining whether a settlement is 'fair and equitable' under [Bankruptcy] Rule 9019. The court must be certain that parties to a settlement have not employed a settlement as a means to avoid the priority strictures of the Bankruptcy Code.").

\(^{35}\) Tr. at 12:06-12.

\(^{36}\) Although the appeal is pending, the Delaware District Court, in denying Hargreaves a stay of the confirmation order, found, in part, that he was not likely to succeed on the merits as he failed to

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and Third Circuits respond to each other's opposite approaches to gifting plans, and whether the Supreme Court will weigh in.

Memorandum Order Denying David Hargeaves Emergency Motion for Stay of Order Confirming the Amended Prepackaged Plans of Reorganization of Nuverra Environmental Solutions, Inc. and its Affiliated Debtors Pending Appeal, Case No. 17-10949-KJC, at 4-7 [Dkt. No. 3].