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**ROGUE COMMITTEES OR ROGUE JUDGES: THE LIMITS OF
A BANKRUPTCY JUDGE'S AUTHORITY TO DISBAND
CHAPTER 11 COMMITTEES**

ABSTRACT

When confronted with a misbehaving chapter 11 committee, bankruptcy courts have a limited list of remedies available to preserve equity. Universally, courts may address committee misbehavior through the disallowance of the committee's attorneys' fees, or through a modification of the committee's membership. The collective acceptance of these remedies was the result of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. However, when these lesser remedies fail, the question of court authority becomes much more divisive. Recently, a split has emerged amongst the courts as to whether bankruptcy judges have the authority to use the "judicial hammer" of disbanding a misbehaving committee.

This Comment argues that when a committee is engaged in severe misfeasance or malfeasance, bankruptcy judges must have the power to disband the committee. If a court determines that a less severe equitable remedy is insufficient to correct the misbehavior, only then should the bankruptcy judge proceed to disbanding the committee. Employing this Comment's three-factor test, bankruptcy courts can assure that this last resort remedy remains the exception, not the rule.

INTRODUCTION

Bankruptcy courts are split on judicial authority to disband chapter 11 committees under the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”).¹ The issue, although litigated rarely, constitutes a fundamental dispute over the actual authority of judges to control the conduct of litigious parties. In this debate some courts take the position that judges may eliminate committees,² while others ardently argue that Congress has delegated no such authority.³ Yet, the dominant position taken by courts that have mentioned the split is to take no side and to decide their specific cases on other grounds.⁴ As a result, the question of judicial committee disbandment has proven divisive enough to generate a circuit split, important enough to implicate a judge’s authority, and daunting enough to force a slew of courts to punt on the issue.

This Comment argues that bankruptcy judges must have the authority to disband rogue committees for misfeasance or malfeasance. The reasons for this are twofold. First, rogue creditor committee misfeasance and malfeasance can unjustifiably harm the debtor-in-possession and the committee’s constituent creditors. When a committee breaches its fiduciary duties, it creates an opportunity for the financial abuse of the debtor-in-possession and negatively impacts the return to creditors. Second, the court’s 11 U.S.C. § 105(a) equitable powers should extend to disbanding a committee to allow the court to resolve inequities caused by rogue committees. This is evidenced by analogous exercises of § 105(a) court authority and parallels other court issued equitable remedies for party misbehavior. This Comment concludes by offering a three-step factor test to aid bankruptcy judges in determining when a committee ought to be disbanded.

¹ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005); *In re City of Detroit*, Mich., 519 B.R. 673, 680 (Bankr. E.D. Mich. 2014); *In re Pac. Ave., LLC*, 467 B.R. 868, 870 (Bankr. W.D.N.C. 2012); *In re Dow Corning Corp.*, 194 B.R. 121, 131 (Bankr. E.D. Mich. 1996), rev’d, 212 B.R. 258 (E.D. Mich. 1997); *In re Caesars Entm’t Operating Co., Inc.*, 526 B.R. 265 (Bankr. N.D. Ill. 2015); *In re New Life Fellowship, Inc.*, 202 B.R. 994, 997 (Bankr. W.D. Okla. 1996); *In re JNL Funding Corp.*, 438 B.R. 356, 361 (Bankr. E.D.N.Y. 2010); *In re Dewey & Leboeuf LLP*, No. 12-12321 MG, 2012 WL 5985325, at *5 (Bankr. S.D.N.Y. Nov. 29, 2012); *In re Hearthstone Homes, Inc.*, No. BK12-80348-TLS, 2012 WL 4027296, at *3 (Bankr. D. Neb. Sept. 12, 2012).

² *In re City of Detroit*, Mich., 519 B.R. at 680; *In re Pac. Ave., LLC*, 467 B.R. at 870; *In re Dow Corning Corp.*, 194 B.R. at 131.

³ *In re Caesars Entm’t Operating Co., Inc.*, 526 B.R. 265; *In re New Life Fellowship, Inc.*, 202 B.R. at 997.

⁴ *In re JNL Funding Corp.*, 438 B.R. at 361; *In re Dewey & Leboeuf LLP*, 2012 WL 5985325, at *5; *In re Hearthstone Homes, Inc.*, 2012 WL 4027296, at *3.

This Comment begins with a discussion of the history of chapter 11 creditor committees. Such a discussion highlights the goals of Congress in creating creditor committees and demonstrates Congress's thought process in balancing the equities between the debtor-in-possession and the creditors. Then the Comment defines a committee's duties and discusses what effect an abdication of those duties can have on the debtor and on the committee's co-creditors. Next, the Comment briefly describes the old circuit split regarding a judge's authority to modify a committee prior to the passage of BAPCPA which settled that debate in 2005. This is followed by a discussion of the current circuit split concerning the disbandment of a committee. The Comment then clarifies the debate, presents real world examples of rogue committee abuses, offers analogous areas of court authority, and answers the procedural question implicated by judicial disbandment. Finally, the Comment proposes a factor test to resolve the circuit split and provide guidance to the courts moving forward.

I. BACKGROUND

Before deciding the question of a bankruptcy judge's authority to disband a committee, it is necessary to understand the context surrounding the existence of committees and the responsibilities they have been assigned by Congress and the courts. This Section (1) describes the historical origins of chapter 11 committees, (2) discusses the legislative history surrounding modern committees, and (3) precisely defines the duties assigned to chapter 11 committees. This background reveals why Congress allowed committees to emerge, and contextualizes the misbehavior of committees that courts have disbanded.

A. *Origins of Chapter 11 Committees*

In a typical bankruptcy proceeding there are three represented parties. These parties are the debtor, the creditors, and the U.S. Trustee.⁵ Each of these parties play a unique and independently essential role in a bankruptcy proceeding. Typically, creditors solely bear the responsibility of advocating for their own financial interest.⁶ In doing so, creditors' duties are wide ranging, including objecting to property being classified as exempt from the estate.⁷ On the other

⁵ See *Bankruptcy Basics*, BANKRUPTCY JUDGES DIVISION ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 6 (3d. ed. Nov. 2011), <http://www.uscourts.gov/sites/default/files/bankbasics-post10172005.pdf>.

⁶ See DAVID G. EPSTEIN ET AL., *BANKRUPTCY: DEALING WITH FINANCIAL FAILURE FOR INDIVIDUALS AND BUSINESSES* 28 (4th ed. 2015).

⁷ *In re Banke*, 267 B.R. 852, 854 (Bankr. N.D. Iowa 2001).

hand, debtors must cooperate with the U.S. Trustee as is necessary for the trustee to perform his or her statutory duties.⁸

These “typical” bankruptcy proceedings are either chapter 7 or chapter 13 filings. In 2016, of the 833,407 total bankruptcy filings, 825,587 were either chapter 7 or chapter 13 filings.⁹ As such, 99.06 percent of bankruptcy petitions filed in 2016 were under chapter 7 or chapter 13. In these cases, the creditors, debtor, and U.S. Trustee each play their usual roles and have their normal responsibilities.

Statistically, chapter 11 filings are rare, accounting for only 0.88 percent of all bankruptcy filings.¹⁰ Importantly, in a chapter 11 case, the interested parties to the litigation are different, and their roles are unique, from that of the typical bankruptcy. These parties to a chapter 11 proceeding are the debtor-in-possession and the creditor committees.¹¹ Unlike in a chapter 7, a chapter 11 debtor remains in possession of his/her/its property. The debtor-in-possession steps into the shoes of the trustee by administering the property of the estate.¹² While there are still creditors in a chapter 11, these creditors uniquely have the opportunity to form committees.¹³

Creditor committees are created by the U.S. Trustee and normally consist of seven of the debtor’s largest creditors.¹⁴ The responsibilities of the creditor committee are varied, but generally require acting in the interests of the constituent creditors represented by the committee.¹⁵ To fulfill these duties, creditor committees may hire attorneys, accountants, or any other agents who would aid the committee in performing these aforementioned duties.¹⁶ Importantly, the cost of hiring these professionals is considered an

⁸ *In re Marve*, 43 F. App’x 943, 945 (6th Cir. 2002).

⁹ *March 2017 Bankruptcy Filings Down 4.7 Percent*, UNITED STATES COURTS (Published April 19, 2017) <http://www.uscourts.gov/news/2017/04/19/march-2017-bankruptcy-filings-down-47-percent>.

¹⁰ *See id.* Accounting for the year of 2017 only. This number is a decrease from the amount of chapter 11’s filed in 2016.

¹¹ *See* 11 U.S.C. § 1109(b).

¹² *Id.* § 1107 (Rights, powers, and duties of debtor in possession).

¹³ *Id.* § 1102(a)(1).

¹⁴ *Id.* § 1102.

¹⁵ *Id.* § 1103(c) (These duties generally include consulting with the debtor-in-possession, investigating the acts, conduct, financial liability, and operations of the debtor and his or her business, participating in the formulation of a plan, collecting creditor acceptances or rejections of a plan, in rare instances requesting the appointment of a chapter 11 trustee).

¹⁶ *Id.* § 1103(a).

“Administrative Expense” and, to the extent allowed, must be paid in full by the debtor-in-possession prior to confirmation of the plan.¹⁷

Creditor committees began to see regular use in 1934 after Congress passed § 77B of the Bankruptcy Act. This allowed a two-thirds majority consensus of each creditor class to force the adoption of a repayment plan that scaled down the debtor’s obligations.¹⁸ This provision created a wave of gamesmanship between creditors that precipitated the advent of “insider” committees of creditors.¹⁹ These “insider” committees worked with debtors to create coalitions of creditors that could force “insider favorable” plans through to confirmation.²⁰ In response to these “insider” committees, “protective” committees formed to negotiate with, and act as a check on, the “insider” committees.²¹

This remained the case until the Chandler Act of 1938. The Chandler Act created chapter X and chapter XI as two separate forms of business reorganization.²² Chapter X was intended for large businesses and, in response to the gamesmanship of § 77B, eliminated “insider” creditor control by the appointment of a disinterested trustee.²³ Chapter XI, on the other hand, was intended for small businesses, allowed for the debtor to remain in possession, and provided for the creditors to jointly elect a committee to represent their interests.²⁴

The creation of protective committees for non-insider unsecured creditors was a necessary maneuver due to the realities of bankruptcy disbursements. According to the Administrative Agency of U.S. Courts, between 1965 and 1968 creditors received sixteen percent of the total amount of claims on debtor assets in liquidation bankruptcies.²⁵ Of this, secured creditors received sixty-six cents on the dollar despite accounting for only eleven percent of allowed claims.²⁶ Priority unsecured creditors, accounting for only nine percent of claims,

¹⁷ *In re Lehman Bros. Holdings Inc.*, 508 B.R. 283, 287 (S.D.N.Y. 2014).

¹⁸ *See* 73 P.L. 296, 48 Stat. 911, 73 Cong. Ch. 424 § 77B (1934).

¹⁹ Daniel J. Bussel, *Coalition-Building Through Bankruptcy Creditors’ Committees*, 43 UCLA L. REV. 1547, 1556 (1996).

²⁰ *Id.*

²¹ *Id.* at 1557.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 1558.

²⁵ BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, *RESCUING BUSINESS* 314 (Oxford University Press 1998). Between 1965 and 1968 the total monetary amount of claims on a debtor’s estate assets totaled on average \$431,000,000 per year. Of this total, only \$70,000,000 were received by creditors.

²⁶ *Id.*

recovered thirty-five cents on the dollar.²⁷ Yet, unsecured creditors, who accounted for eighty percent of all claims on estate assets, received only seven cents on the dollar.²⁸

This dramatic discrepancy was not unique to liquidation bankruptcies, and indeed was similarly present in corporate reorganizations. According to a Brookings Institute report, in chapter XI reorganizations roughly sixty percent of an average corporation's debt was issued by unsecured creditors.²⁹ Despite this, secured creditors were paid eighty percent of the time and recovered thirty-one cents on the dollar.³⁰ Priority creditors recovered thirty-six percent of their claims, yet non-priority unsecured creditors only managed to get forty-four percent of their claims categorized as allowed claims.³¹ Of these, unsecured creditors only received a meager eight cents on the dollar.³² Given these historic realities, it is not surprising that committees emerged as a means of protecting creditor interests.

Additionally, while the Chandler Act created official creditor committees, it offered little respite from the expenses associated with committee operation. As Justice Douglas noted in *Dickinson Indus. Site v. Cowan*,³³ the Chandler Act allowed for the compensation of committee members, but made similar compensation difficult for committee professionals.³⁴ Under the Chandler Act, if a professional wanted compensation he or she would receive it only at the rate that the "economy of administration" required.³⁵ The "economy of administration" standard dictated that professionals could only be paid if creditors were first paid in full, which had the effect of forcing bankruptcy attorney rates to be below what they could earn in a different practice area.³⁶ This restriction created an incentive for qualified professionals to avoid representing creditor committees.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ CARRUTHERS & HALLIDAY, *supra* note 25 at 314.

³¹ *Id.*

³² *Id.*

³³ 309 U.S. 382 (1940).

³⁴ *Dickinson Indus. Site v. Cowan*, 309 U.S. 382, 388–89 (1940) (*quoting* Chandler Act. Sec. 249, 11 U.S.C. § 649).

³⁵ Albert Togut & Lauren L. Peacock, *The Growth of Modern Practice Evolution of Bankruptcy Practice Before the Code to Today*, 35 AM. BANKR. INST. J. 24 (Oct. 2016).

³⁶ *Id.*

B. *Legislative History of the Modern Bankruptcy Code*

The bifurcated chapter X and chapter XI approach to business reorganization endured until Congress decided to more broadly balance the equities of corporate bankruptcies in the Bankruptcy Reform Act of 1978. The Bankruptcy Reform Act of 1978 melded together chapter X and chapter XI into chapter 11.³⁷ The legislative history of the Bankruptcy Reform Act demonstrated a knowledge of the bifurcated past of business reorganization, and noticeably used language indicating a preference for the approach taken in chapter XI.³⁸ Reflecting this preference, Congress created chapter 11 to permit debtors to remain in possession of their assets.³⁹ Congress also adopted, and expanded on, the idea of committee involvement in chapter XI by expressly permitting multiple committees in chapter 11 filings.⁴⁰ Moreover, Congress chose to more generally describe a committee's role in the administration of a case, stating:

The supervisory functions of the committees will be diminished, due to the existence of the United States Trustee. They will primarily be negotiating bodies for the classes of creditors that they represent. As such, it is important that they be representative of their respective classes, and not chosen by attorneys for creditors that seek the position of counsel to the committee.⁴¹

Thus, in 1978 Congress took the initiative to loosely define the intended role of the creditor committee in chapter 11 filings.

In 1978 the House version of the Bankruptcy Reform Act, H.R. 8200, was introduced to the House of Representatives.⁴² H.R. 8200 empowered the court to appoint one or more committees to represent unsecured creditors in business reorganizations.⁴³ It also switched attorney compensation from the old "economy of administration" standard to a "cost of comparable services" standard.⁴⁴ H.R. 8200 received a warm reception and was passed by the House.⁴⁵

The Senate's version was S. 2266, and reflected the Senate's choice to protect creditors in a different way than H.R. 8200 proposed. Notably, unlike the

³⁷ Bussel, *supra* note 19 at 1559.

³⁸ H.R. Rep. 95-595, 91, 1978 U.S.C.C.A.N. 5963, 6052.

³⁹ H.R. Rep. 95-595, 104, 1978 U.S.C.C.A.N. 5963, 6065.

⁴⁰ H.R. Rep. 95-595, 104, 1978 U.S.C.C.A.N. 5963, 6065.

⁴¹ H.R. Rep. 95-595, 104, 1978 U.S.C.C.A.N. 5963, 6065.

⁴² CARRUTHERS & HALLIDAY, *supra* note 25 at 324.

⁴³ *Id.*

⁴⁴ Matter of Hamilton Hardware Co., Inc., 11 B.R. 326, 328 (Bankr. E.D. Mich. 1981), *aff'd sub nom. In re Hamilton Hardware Co., Inc.*, 8 Bankr. Ct. Dec. 667 (E.D. Mich. Dec. 11, 1981).

⁴⁵ CARRUTHERS & HALLIDAY, *supra* note 25 at 325.

House bill, the Senate bill sought to maintain the Chandler Act's "economy of administration" standard of attorney compensation.⁴⁶ On July 14, 1978, S. 2266 was reported out of the Senate Judiciary committee, and a modified version of the bill was later enacted as the final Bankruptcy Reform Act of 1978.⁴⁷

One of the important modifications to the Senate bill was the adoption of H.R. 8200's switch from compensating creditor committee attorneys at the "economy of administration" to compensation at the "cost of comparable services."⁴⁸ This meant that for the first time, bankruptcy attorneys could be paid at 100 percent the cost of their rate; making such a practice comparable in profitability to corporate work.⁴⁹ This aspect of the Bankruptcy Reform Act therefore served to attract qualified professionals to committee representation.

The Bankruptcy Reform Act of 1978 also produced the first version of the modern Bankruptcy Code,⁵⁰ and the Code concretely established the right of creditors to committee representation.⁵¹ Section 503 of the Bankruptcy Code created specified allowances for certain costs to be classified as "Administrative Expenses."⁵² One of those costs that the debtor was mandated to pay was the "actual, necessary services" rendered by professionals employed to represent a party in a bankruptcy proceeding.⁵³ The purpose of this was to eliminate the arbitrary limit on the fees that the committee's attorney could demand.⁵⁴ After 1978, not only were committee attorneys being paid at competitive rates, but additionally, the debtor was wholly responsible for footing the bill. Consequently, Congress ended the debate over how creditors could be represented in a corporate reformation, but left open the discussion over how courts ought to police committees once they are formed.

C. *Defining a Committee's Duties*

Discussing the appropriate remedial measures for committee misfeasance and malfeasance requires an understanding of what a committee's duties are in a chapter 11 case. Committees have express duties to their creditor constituency

⁴⁶ Matter of Hamilton Hardware Co., Inc., 11 B.R. 326, 328 (Bankr. E.D. Mich. 1981) ("The Senate did not intend to change existing law.")

⁴⁷ CARRUTHERS & HALLIDAY, *supra* note 25 at 327.

⁴⁸ Togut & Peacock, *supra* note 35.

⁴⁹ *Id.*

⁵⁰ Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 32 (1995).

⁵¹ 11 U.S.C. § 1102.

⁵² *Id.* § 503.

⁵³ *Id.* § 330(a)(1).

⁵⁴ Matter of Hamilton Hardware Co., Inc., 11 B.R. 326, 329 (Bankr. E.D. Mich. 1981).

and implied duties to the debtor. The committee's duties to their co-creditors arise from their judicially established fiduciary duties and out of § 1103 of the Bankruptcy Code; the committee's implicit duties to the debtor arise out of Rule 9011(b)(1) of the Federal Rules of Bankruptcy Procedure. These duties help to contextualize what is meant by committee misfeasance and malfeasance.

The fiduciary duty a committee has to its constituent creditors is fundamental and defined by undivided loyalty and impartial service to all creditors represented.⁵⁵ The committee's fiduciary duties differ from that of the corporate fiduciary, because the committee is bound not only to serving its co-creditors, but also to safeguarding the bankruptcy process.⁵⁶ This stems from the fact that membership on a committee is not intended to grant financial advantages to any one creditor over his or her co-creditors.⁵⁷ Importantly, a breach of a committee's fiduciary duty can even extend to the committee's mishandling of non-estate property.⁵⁸

Additionally, § 1103 of the Bankruptcy Code imposes a statutory duty upon committees to protect the interests of their co-creditors.⁵⁹ Despite its use of the permissive "may," § 1103 has been read to establish a non-exhaustive list of duties a committee is bound to with respect to its co-creditors.⁶⁰ Because of this, § 1103 establishes that a committee has a duty to act as a "watchdog" for the interests of its co-creditors.⁶¹ If a § 1103 power is needed to protect the creditors' interests, the committee must exercise that power.⁶² This means that if a committee's actions harm the interests of co-creditors, the committee has abdicated its duty and has committed an act of either misfeasance or malfeasance.

Conversely, while a committee bears no express duties to the debtor,⁶³ a committee does have duties with respect to the Court.⁶⁴ Rule 9011(b)(1) states, in pertinent part:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper,

⁵⁵ *In re Fas Mart Convenience Stores, Inc.*, 265 B.R. 427, 432 (Bankr. E.D. Va. 2001).

⁵⁶ *Westmoreland Human Opportunities, Inc. v. Walsh*, 327 B.R. 561, 573 (W.D. Pa. 2005).

⁵⁷ *Id.*

⁵⁸ *Id.* at 570.

⁵⁹ *See* 11 U.S.C. § 1103.

⁶⁰ *Matter of Advisory Comm. of Major Funding Corp.*, 109 F.3d 219, 224 (5th Cir. 1997).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *In re Seascapes Cruises, Ltd.*, 131 B.R. 241, 243 (Bankr. S.D. Fla. 1991).

⁶⁴ *In re Mesta Mach. Co.*, 67 B.R. 151, 158 (Bankr. W.D. Pa. 1986).

an attorney or unrepresented party is certifying that . . . it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay *or needless increase in the cost of litigation*.⁶⁵

Because committees are directly funded by the debtor, their malicious stalling may needlessly increase the costs of litigation.⁶⁶ In view of this, committees possess an implicit duty to not waste the debtor's resources. Put another way, committees have an obligation to the court to not abuse the bankruptcy process in any way that would unjustly prejudice the debtor. Notably, the express authority of the bankruptcy court to sanction a party for violating its Rule 9011 duties does not establish the outer bounds of judicial remedies available to judges in addressing the abdication of those duties.⁶⁷ Thus, once a duty has been established, the court may use its broad equitable powers to punish a party's abdication of said duty.⁶⁸ Here, this means that the court has broad equitable authority to correct committee misbehavior with respect to the debtor.

When a committee has breached either its duties to constituent creditors or to the debtor, that committee is "rogue". A rogue committee is defined by the misfeasance and malfeasance that the committee may engage in. A rogue committee's abandonment of its duties can be grave, and unjustifiably harm the interests of the debtor and co-creditors.

II. HARMS CAUSED BY ROGUE COMMITTEES

The issue of committee misfeasance or malfeasance is not a legal question without practical significance. On the contrary, committee misbehavior can severely damage the interests of all parties to the bankruptcy, and can cause sizeable inequities. In this Section, the Comment first discusses the harms rogue committees can do to the debtor. Second, this Section discusses the damage rogue committees can do to the creditors. The purpose of this Section is to illustrate the severity of rogue committee misfeasance or malfeasance, and to provide context for litigants' motions for judicial committee disbandment.

⁶⁵ FED. R. BANKR. P. 9011(b)(1) (emphasis added).

⁶⁶ See 11 U.S.C. § 330 (a)(1).

⁶⁷ See *Leist v. Simplot*, 638 F.2d 283, 324 (2d Cir. 1980) (J. Mansfield, Dissenting), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) ("Congress is not under any duty to state that the various remedies provided by it are exclusive, much less to disavow or disassociate itself from prior lower court decisions as if they were statutes enacted by it.")

⁶⁸ *In re Xpedior Inc.*, 354 B.R. 210, 238 (Bankr. N.D. Ill. 2006) ("[T]he equitable tools found under 11 U.S.C. § 105(a) can be exercised to carry out bankruptcy duties and jurisdiction.")

A. *How Rogue Committees Harm the Debtor*

Rogue creditor committees can unjustifiably harm debtors by weaponizing their professional's fees as administrative expenses. The term "Administrative Expenses" is not defined in § 503 of the Bankruptcy Code; however, an "Administrative Expense" is commonly understood to refer to such expenses that are (1) generated after the start of the bankruptcy case, and (2) incurred in an effort to benefit the estate.⁶⁹ Those expenses which are categorized as "Administrative Expenses" are given second priority under § 507(a), and as such must be paid in full on the effective date of the plan.⁷⁰

In chapter 11 proceedings, creditor committees are permitted to hire professionals to represent the committee and advance the creditors' interests.⁷¹ Section 330(a)(1) of the Bankruptcy Code provides for reasonable compensation for the services of professionals employed to represent a party in a bankruptcy proceeding.⁷² These fees and expenses of professionals are considered "Administrative Expenses" under § 503 of the Bankruptcy Code.⁷³ As such, all of the expenses the creditor committee incurs, as well as all the fees and expenses charged by the committee's professionals, are paid with money from the chapter 11 debtor's estate.⁷⁴

The professionals that serve a committee answer, and report exclusively, to the committee itself.⁷⁵ Attorneys representing a committee and the creditor committee operate under attorney-client privilege.⁷⁶ This privilege bars the U.S. Trustee and the court from directing or otherwise involving themselves with the committee's attorney.⁷⁷ To the extent that the court may police committee professionals, it is largely via the court's authority to determine the reasonableness of committee professional fees.⁷⁸ Yet, even this limited power is reduced in effect by § 330, which only requires that attorney's fees reflect

⁶⁹ *In re Midway Airlines Corp.*, 406 F.3d 229, 237 (4th Cir. 2005).

⁷⁰ *In re Sanders*, 341 B.R. 47, 50 (Bankr. N.D. Ala.), *aff'd*, 347 B.R. 776 (N.D. Ala. 2006); 11 U.S.C. § 1129(a)(9)(A).

⁷¹ *Matter of UNR Indus., Inc.*, 736 F.2d 1136, 1139 (7th Cir. 1984); *see also* *Matter of Advisory Comm. of Major Funding Corp.*, 109 F.3d 219, 224 (5th Cir. 1997) (*quoting In re AKF Foods, Inc.*, 36 B.R. 288, 289 (Bankr. E.D.N.Y. 1984)); 11 U.S.C. § 1103(a).

⁷² 11 U.S.C. § 330(a)(1).

⁷³ *First Merchants Acceptance Corp. v. J.C. Bradford & Co.*, 198 F.3d 394, 398 (3d Cir. 1999).

⁷⁴ *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 739 (7th Cir.), *cert. dismissed*, 136 S. Ct. 581, 193 L. Ed. 2d 464 (2015).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *In re Tribeca Mkt., LLC*, 516 B.R. 254, 270 (S.D.N.Y. 2014).

decisions made by the attorney which were reasonable at the time, expressly rejecting an “actual benefit” test.⁷⁹ What’s more, using the “loadstar method,” many courts have adopted a “strong presumption” that an attorney’s fee is reasonable insofar as it is calculated by merely multiplying the hours reasonably worked by the attorney’s hourly rate.⁸⁰

In retaining these professionals, committees often put a great financial strain on a debtor-in-possession’s ability to create a viable plan of reorganization. On average, bankruptcy attorneys account for almost half of the total cost of chapter 11 cases.⁸¹ Much of these costs arise because of the length of time that a chapter 11 case normally takes. Empirical studies show that the mean chapter 11 case lasts for 437 days,⁸² with a shorter case typically lasting 136 days and a longer case typically lasting 672 days.⁸³ Empirical studies have indicated that debtors’ lead counsel alone can bill an average of 1,725.5 hours per case.⁸⁴ In these cases, the mean hourly rate charged by the debtor’s counsel was \$290.54.⁸⁵ Consequently, the average chapter 11 lead counsel alone billed their client \$501,326.77 per case, at an average cost of roughly \$1,147.20 per day.⁸⁶

The mean chapter 11 debtor has only \$4,300,000 in total assets.⁸⁷ Of these assets, the median debtor in Boston and Atlanta entered bankruptcy with only

⁷⁹ *In re Woerner*, 783 F.3d 266, 274 (5th Cir. 2015). The “actual benefit” test only permitted bankruptcy attorneys to be compensated for the “actual, necessary services” rendered by the attorney and would force the court to independently determine the actual value of the work done.

⁸⁰ *In re Drexel Burnham Lambert Grp., Inc.*, 133 B.R. 13, 22 (Bankr. S.D.N.Y. 1991) (quoting *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 564 (1986), *supplemented*, 483 U.S. 711 (1987)).

⁸¹ Stephen J. Lubben, *The Chapter 11 Attorneys*, 86 AM. BANKR. L.J. 447, 471 (2012).

⁸² Stephen P. Ferris & Robert M. Lawless, *The Expenses of Financial Distress: The Direct Costs of Chapter 11*, 61 U. PITT. L. REV. 629, 637 (2000).

⁸³ Lynn M. LoPuckie & Joseph W. Doherty, *Professional Overcharging in large Bankruptcy Reorganization Cases*, 5 J. EMPIRICAL LEGAL STUD. 983, 1003 (2008). The lower limit for shorter cases and higher limit for longer cases being determined by measuring one standard deviation from the mean case length.

⁸⁴ Stephen J. Lubben, *Corporate Reorganization & Professional Fees*, 82 AM. BANKR. L.J. 77, 95 (2008) [hereinafter Lubben, *Corporate Reorganization*]. This study also indicated that, within its sample of 1,026 chapter 11 cases filed in 2004, the average number of billable hours spent for “big cases” by the lead debtor’s counsel increased to 5,026.7 hours per case.

⁸⁵ Lubben, *Corporate Reorganization*, *supra* note 84 at 98.

⁸⁶ These costs only account for the costs of the lead debtors counsel and are the product of a mathematical calculation, multiplying the average number of hours billed and the average billing rate indicated in Lubben’s 2004 study. This number was divided by the mean number of days a chapter 11 case lasts to arrive at the aforementioned average daily cost. As a special note, the mean number of days was taken from a separate study conducted by Stephen Ferris. See Ferris & Lawless, *supra* note 82. It is also worth noting that this calculation does not account for the \$98,000 average monthly expense that “big cases” were authorized to pay for other debtor professionals. See Lubben, *Corporate Reorganization*, *supra* note 84 at 96.

⁸⁷ Ferris & Lawless, *supra* note 82, at 640 (Noting that the median chapter 11 debtor had even less, at only \$700,000 in total assets, thus suggesting a wide variation in the wealth of chapter 11 debtors.).

one percent of their total assets classifiable as liquid.⁸⁸ This money had to be used, in part, to pay creditor committee professionals' fees as well as the debtor's own professional expenses. According to a study of twelve chapter 11 cases from 2000, the mean cost of a creditor committee's professionals was \$393,689.61 over the life of the case.⁸⁹ Moreover, professional fees and expenses have risen at a rate of roughly 10.4 percent per year, outpacing increases in consumer prices by fifty-seven percent.⁹⁰ As such, it is unsurprising that only seventeen percent of chapter 11 debtors can afford to make it to confirmation.⁹¹

Cases with multiple creditor committees, however, are relatively rare. A 2004 study of 1,050 chapter 11 cases showed that creditor committees were used in roughly sixty-seven percent of "big cases."⁹² Of these, ten percent of "big cases" utilized multiple creditor committees.⁹³ Within all cases where a creditor committee was used, seventy-eight percent of the committees elected to hire professionals.⁹⁴ As a result, increases in debtor size did not insulate debtors from the effect of increased committee professional expenses.

Making the reasonable assumption that creditor committee attorney's bill similarly to their debtor counterparts, it is easy to see how a rogue committee can weaponize their professionals. Doubling the daily cost of an attorney (to account for there being one debtor's counsel and one committee's counsel) would result in a total cost to the debtor of \$2,294.40 per day. For the average chapter 11 debtor this is manageable; however, if there is a third "rogue" committee, retaining one attorney, the daily expenses increase to \$3,441.60. Using these averages, it would take 1,874 days to burn through all of the average debtor's assets with one committee, but only 1,249 days to do so with two committees. While in most cases multiple committees are justified and necessary to represent varied creditors, the extreme cost of committee representation demands that judges take the risk of fee weaponization seriously.

⁸⁸ *Id.* at 641.

⁸⁹ Stephen J. Lubben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases*, 74 AM. BANKR. L.J. 509, 530 (2000).

⁹⁰ LoPuckie & Doherty, *supra* note 83, at 985.

⁹¹ Susan Jensen-Conklin, *Financial Reporting by Chapter 11 Debtors: An Introduction to Statement of Position 90-7*, 66 AM. BANKR. L.J. 1, 35 (1992).

⁹² Lubben, *Corporate Reorganization*, *supra* note 84 at 94.

⁹³ *Id.*

⁹⁴ Lubben, *Corporate Reorganization*, *supra* note 84 at 97.

B. *How Rogue Committees Can Harm the Creditors*

Rogue committees can harm debtors and the creditors which they purport to protect. First, rogue committees, through resignations and removals, can harm creditors by changing their membership such that they no longer adequately represent creditors. Second, rogue committees can harm creditors by reducing the value of the estate to their co-creditors.

1. *Rogue Creditor Committees May Fail to Represent Creditors*

Creditor committees may become unrepresentative of the creditor classes for which they purport to advocate, thus necessitating committee disbandment. While at their inception creditor committees may be appropriately representative, as time goes on, they can become unrepresentative. This is often due to creditor fatigue or due to certain creditors believing they can get a better deal outside of bankruptcy. At times, these vacancies on committees cannot be filled in such a way that will preserve the representative nature of the committee. Where an unfillable vacancy exists, calling into question the adequacy of the committee's representation, justice requires that the judge have the discretion to disband the broken committee.

One of the most obvious ways that a vacancy could emerge on a committee is if a creditor resigns. Creditors are entitled, by statute, to resign from creditor committees that they no longer wish to serve. Section 1102 specifically provides that creditor committees will consist of "the persons, *willing to serve . . .*"⁹⁵ Courts have interpreted this language to mean that creditors cannot be forced to serve, or remain, on a committee.⁹⁶ As such, it is possible that a creditor may resign from a committee, leaving no other creditors who are willing to fill the void.

This situation may seem odd on its face; however, evidence indicates that the longer a chapter 11 bankruptcy goes on, the more "creditor fatigue" sets in.⁹⁷ "Creditor fatigue" means that the creditor has lost interest in the proceeding or that the case has become too resource intensive for the creditor to continue to play an active role.⁹⁸ This creditor fatigue can result in cases in which no creditor

⁹⁵ 11 U.S.C. § 1102(b)(1) (emphasis added).

⁹⁶ *In re Schatz Fed. Bearings Co., Inc.*, 11 B.R. 363, 365 (Bankr. S.D.N.Y. 1981).

⁹⁷ Peter C. Blain, *The Increase in Prepackaged Chapter 11s: An Immediate Look at the Legal, Governmental, and Economic Ramifications of the Resurgence of Prepackaged Bankruptcy Plans*, 2008 ASPATORE SPECIAL REP. 7 (2008).

⁹⁸ James M. Lloyd, UK/CLE DEBTOR/CREDITOR RELATIONS IN KENTUCKY § 3.33(c) (2011).

is willing to fill a committee vacancy because, in short, the creditor has more important things to do.⁹⁹

Additionally, committee vacancies may be created by the U.S. Trustee removing a creditor from a committee.¹⁰⁰ One cause for such a removal may be a determination by the U.S. Trustee that the creditor's claim was no longer properly representative of the classes he or she represented.¹⁰¹ Alternatively, the U.S. Trustee may discover a creditor's breach of his or her fiduciary duty, which mandates removal of the creditor from the committee.¹⁰² In fact, courts have previously held that the U.S. Trustee is required to remove a creditor from a committee if there is merely the appearance of a breach of the committee member's fiduciary duties.¹⁰³

When the class of creditors being represented is small, this may leave the U.S. Trustee with no viable replacements.¹⁰⁴ Whether it is caused by a resignation or a removal, vacancies often emerge in creditor committees. Evidence indicates that roughly one in four creditor committees will experience either a creditor resignation or removal.¹⁰⁵ In these situations, it is not enough that there exists a creditor who is willing to serve on the committee to fill the vacancy. Vacancies on committees may not be filled by significant business competitors of the debtor,¹⁰⁶ nor may they be filled by converting the committee into a "blended committee" of equity holders and creditors.¹⁰⁷

2. *Rogue Creditor Committees Reduce the Value of the Estate to Other Creditors*

Rogue committees further threaten creditors by harming the value of the debtor's estate, thereby reducing the funds available to co-creditors. While

⁹⁹ See generally *id.*

¹⁰⁰ *In re Am. W. Airlines*, 142 B.R. 901, 902 (Bankr. D. Ariz. 1992).

¹⁰¹ *Id.* at 903.

¹⁰² *In re Fas Mart Convenience Stores, Inc.*, 265 B.R. 427, 432 (Bankr. E.D. Va. 2001).

¹⁰³ *In re Venturelink Holdings, Inc.*, 299 B.R. 420, 423 (Bankr. N.D. Tex. 2003) ("The court adds that the appearance of a breach of that fiduciary duty should likewise mandate the removal [of a creditor from a committee]. The bankruptcy process must both be fair and appear fair.").

¹⁰⁴ See, e.g., Brief of Appellant, Nos. C03-1272L, C03-1273L, 2003 WL 23952673 n.9 (W.D. Wash. Sept. 22, 2003) (arguing that the appointment of a committee containing only one legitimate creditor indicated that the committee should be disbanded).

¹⁰⁵ Michelle M. Harner, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 VAND. L. REV. 749, 798 (2011).

¹⁰⁶ *In re Wilson Foods Corp.*, 31 B.R. 272, 272 (Bankr. W.D. Okla. 1983).

¹⁰⁷ *In re Mercury Fin. Co.*, 224 B.R. 380, 387 (Bankr. N.D. Ill. 1998), *opinion supplemented on denial of reconsideration* (Aug. 28, 1998), *aff'd*, 240 B.R. 270 (N.D. Ill. 1999).

committees bear a fiduciary duty to their co-creditors, such a fiduciary duty becomes meaningless if committee members are few and the replacement of bad members is impossible. Consequently, if a committee is harming the value of the estate for its co-creditors, and member replacement is not possible, then the bankruptcy judge must have the authority to disband the rogue committee.

On the most basic level, excessive committee professional fees reduce the available return general unsecured creditors can receive in the bankruptcy.¹⁰⁸ By increasing their fees, committee professionals are empowered by § 330 to drain the available assets of the debtor-in-possession, which naturally causes the distribution to unsecured creditors to disintegrate.¹⁰⁹ This harm to unsecured creditors is evidenced by the fees incurred in *In re Texaco, Inc.*,¹¹⁰ in which the industry committee incurred professional's fees of roughly \$125,000 per month, thus potentially reducing the assets available for the unsecured creditors by \$7,000,000 over the life of the bankruptcy.¹¹¹ Another case study in the destructive potential of committees to unsecured creditors is *In re Zale Corp.*,¹¹² where five separate committees incurred over \$500,000 per week.¹¹³ Such excessive fees drained directly from the debtor company and threatened any return to unsecured creditors by increasing the likelihood of conversion to chapter 7.

Moreover, rogue committees can deal serious harm to the debtor's secured creditors. This is because, often, committee professionals are paid out of the cash collateral of a secured creditor.¹¹⁴ In these instances, the longer the committee operates, and the more fees the committee bills, the more harm is done to secured creditors. What is more, such use of cash collateral may be ordered by the court over the specific objection of the secured creditor, whose interest in the estate is being jeopardized.¹¹⁵ While using cash collateral requires adequate protection of the secured creditor's interest, adequate protection is not a guarantee of payment, which means the use of cash collateral potentially reduces the secured creditor's

¹⁰⁸ Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 461 (1995).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; *In re Texaco Inc.*, 79 B.R. 560 (Bankr. S.D.N.Y. 1987).

¹¹¹ Miller, *supra* note 108; 79 B.R. 560.

¹¹² Jewel Recovery, L.P. v. Skadden, Arps, Slate, Meagher & Flom (*In re Zale Corp.*), NO. 392-30001-SAF-11, 1996 Bankr. LEXIS 1933 (Bankr. N.D. Tex. 1996).

¹¹³ Miller, *supra* note 108, at 462; 1996 Bankr. LEXIS 1933.

¹¹⁴ See *In re Las Torres Dev., L.L.C.*, 413 B.R. 687, 699 (Bankr. S.D. Tex. 2009).

¹¹⁵ See *In re Proalert, LLC*, 314 B.R. 436, 438 (B.A.P. 9th Cir. 2004).

security interest.¹¹⁶ Thus, runaway fees incurred by runaway committees not only harm the interests of the unsecured creditors, but also those creditors who are ostensibly protected by a security interest.

III. COURTS AND THE COMMITTEES

The split over a bankruptcy judge's authority to disband a committee did not emerge overnight. Rather, the legal dispute is the product of an often unclear Bankruptcy Code and a long history of court uncertainty pertaining to committees. This Section begins by first describing the pre-BAPCPA circuit split over a bankruptcy judge's authority to modify committee membership. Second, this Section describes how the modern split was foreshadowed in the old split. Third, this Section details the modern split over a bankruptcy judge's ability to disband a committee. The goal of this Section is not to merely describe the current split in case-law, but instead it is to contextualize the debate as an evolution of old arguments adapted to fit within the new, post-BAPCPA, Bankruptcy Code.

A. *History of Courts Defining Their Powers to Alter Committees*

Historically, courts have had trouble defining their powers to alter, or otherwise affect, chapter 11 creditor committees. Prior to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005, there was a circuit split concerning the authority of a bankruptcy judge to alter the membership of an existing creditor committee. In this split, many districts held that § 1102 of the Bankruptcy Code did not confer to the court any authority to review committee decisions made by the U.S. Trustee as it pertains to committee membership.¹¹⁷ Other districts, however, held that the court did have the authority to alter the membership of a committee.¹¹⁸

Courts that believed that a bankruptcy judge was able to affect the membership of a committee did not share a uniform line of the reasoning. Some

¹¹⁶ See *In re Elliott Leases Cars, Inc.*, 20 B.R. 893, 896 (Bankr. D.R.I. 1982).

¹¹⁷ See *In re Wheeler Tech., Inc.*, 139 B.R. 235, 239 (B.A.P. 9th Cir. 1992); *In re Dow Corning Corp.*, 212 B.R. 258, 264 (E.D. Mich. 1997); *In re Victory Markets, Inc.*, 196 B.R. 1, 5 (Bankr. N.D.N.Y. 1995); *In re Drexel Burnham Lambert Grp., Inc.*, 118 B.R. 209, 210 (Bankr. S.D.N.Y. 1990); *Matter of Gates Eng'g Co., Inc.*, 104 B.R. 653, 654 (Bankr. D. Del. 1989); *In re Hills Stores Co.*, 137 B.R. 4, 8 (Bankr. S.D.N.Y. 1992).

¹¹⁸ See *In re Mercury Fin. Co.*, 224 B.R. 380, 385 (Bankr. N.D. Ill. 1998), *opinion supplemented on denial of reconsideration* (Aug. 28, 1998), *aff'd*, 240 B.R. 270 (N.D. Ill. 1999); *In re Fas Mart Convenience Stores, Inc.*, 265 B.R. 427, 431 (Bankr. E.D. Va. 2001); *In re Voluntary Purchasing Groups, Inc.*, No. 4:96CV396, 1997 WL 155407, at *2 (E.D. Tex. Mar. 21, 1997); *In re Lykes Bros. S.S. Co., Inc.*, 200 B.R. 933, 940 (M.D. Fla. 1996).

courts held that Rule 2020 of the Federal Rules of Bankruptcy Procedure gave judges the inherent authority to affect the membership of a committee.¹¹⁹ Others believed that the equitable powers conveyed to the court by § 105(a) implied judicial review of committee membership.¹²⁰ Still others maintained that the absence of an express prohibition against judicial review in the legislative history, in conjunction with § 1102(b)(1), gave bankruptcy judges the authority to alter committee membership.¹²¹ Some courts even went so far as to hold that this authority grew primarily from a common law presumption of judicial reviewability.¹²² While fragmented in their reasoning, these courts were uniform in their belief that such authority was not only present but obvious and inherent as a power of the bankruptcy judge.

The reasoning adopted by the courts on the other side of the spilt, which held that the bankruptcy judge had no power to alter committee membership, was more uniform. These courts universally believed that the statutory silence of § 1102 should be read to mean that Congress never contemplated allowing bankruptcy judges to alter committee membership.¹²³ Additionally, these courts reasoned that the repeal of § 1102(c) in 1986 was an express statement by Congress that bankruptcy judges were barred from altering committee membership.¹²⁴ The courts which denied bankruptcy judges the power to affect committees were nearly unanimous in the reasons why they did so.

However, despite the uniform reasoning of the courts denying jurisdiction, and the highly fragmented reasoning in support of granting judges such authority, in 2005 Congress settled the dispute in favor of judicial review.¹²⁵ In the Bankruptcy Abuse Prevention and Consumer Protection Act, Congress expressly provided that:

On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of

¹¹⁹ See *In re Mercury Fin. Co.*, 224 B.R. at 384, *opinion supplemented on denial of reconsideration* (Aug. 28, 1998), *aff'd*, 240 B.R. 270 (N.D. Ill. 1999).

¹²⁰ See *In re Fas Mart Convenience Stores, Inc.*, 265 B.R. at 431.

¹²¹ See *In re Voluntary Purchasing Groups, Inc.*, No. 4:96CV396, 1997 WL 155407, at *2 (E.D. Tex. Mar. 21, 1997).

¹²² See *In re Lykes Bros. S.S. Co., Inc.*, 200 B.R. 933, 939 (M.D. Fla. 1996) (“There is a strong presumption that Congress intends judicial review of administrative action.”).

¹²³ See *In re Dow Corning Corp.*, 212 B.R. at 264.

¹²⁴ See *In re Wheeler Tech., Inc.*, 139 B.R. 235, 238–39 (B.A.P. 9th Cir. 1992); see also *In re Victory Markets, Inc.*, 196 B.R. 1, 5 (Bankr. N.D.N.Y. 1995).

¹²⁵ See *In re ShoreBank Corp.*, 467 B.R. 156, 160 (Bankr. N.D. Ill. 2012).

creditors or equity security holders. The court may order the United States trustee to increase the number of members of a committee to include a creditor that is a small business concern.¹²⁶

The language used by Congress in § 1102(a)(4) was intentionally clear and expressly addressed the confusion created by the prior circuit split.

B. *Foreshadowing the Debate*

Prior to the passage of BAPCPA, the split over disbanding a committee was argued within the context of this old debate about a judge's power to modify committees. The cases of *In re Dow Corning Corp.* and *In re New Life Fellowship* are emblematic of the peripheral manner in which the debate was foreshadowed.

The decision of *In re Dow Corning Corp.* was issued in 1996.¹²⁷ The central issue litigated in *Dow Corning* was whether the court could issue an order modifying the composition of various creditor committees involved in the case.¹²⁸ Multiple creditors filed motions to the court to modify the composition of the committee due to fears that they would not be adequately represented otherwise.¹²⁹ On this issue, the court determined that it did have the authority to modify the composition of the committee.¹³⁰ The court reasoned that, because the U.S. Trustee had no express power to modify committees, this statutory void in power had to be filled by the court's § 105(a) equitable powers.¹³¹

However, in dicta, the *Dow Corning* court went further and determined that, if necessary, the court could also disband a committee.¹³² To support this conclusion, the court argued that FRBP Rule 2007 empowered the court to disband committees.¹³³ The court argued that, because Rule 2007 permitted the court to vacate the appointment of a committee if it failed to satisfy § 1102(b)(1)'s requirements, the court had the authority to disband that committee.¹³⁴ The court reasoned that because (1) the U.S. Trustee was fallible and could make mistakes in creating a committee, and (2) the Advisory

¹²⁶ 11 U.S.C. § 1102(a)(4).

¹²⁷ See generally *In re Dow Corning Corp.*, 194 B.R. 121 (Bankr. E.D. Mich. 1996), *rev'd*, 212 B.R. 258 (E.D. Mich. 1997).

¹²⁸ *In re Dow Corning Corp.*, 194 B.R. at 126.

¹²⁹ *Id.* at 127–28.

¹³⁰ *Id.* at 131.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

Committee notes on Rule 2007 from the 1991 version of the rule left the door open for more judicial involvement in committee creation, the court could disband a committee if it saw fit to do so.¹³⁵ Although dicta, this portion of the opinion was a forceful foreshadowing of courts asserting the ability to disband committees.

Conversely, *In re New Life Fellowship* foretold the opposite side of the modern split by suggesting that courts could never have the authority to disband a creditor committee.¹³⁶ *New Life Fellowship* was decided in the Western District of Oklahoma in 1996 and concerned the issue of whether the court could vacate the appointment of a bondholder's committee upon a motion from the unsecured creditors committee, the case trustee, and the bondholders' trustee.¹³⁷ Rather than narrowly tailoring the opinion to the specific facts in dispute, the court answered the broader question of whether a court could ever disband a committee.¹³⁸ Here, the court determined that bankruptcy judges are never empowered to disband a committee.¹³⁹ The court supported this conclusion by reasoning that the text of § 1102 did not provide for the abolition of a committee under any circumstances.¹⁴⁰ The court then attempted to avoid creating a circuit split by distinguishing the question from the contrary authority of *In re Dow Corning Corp.* and other similar cases.¹⁴¹ Consequently, *New Life Fellowship* not only foreshadowed the post BAPCPA debate, but also staked an early and strong position in the discussion.

C. *The New Circuit Split: A Judge's Authority to Disband a Committee*

The debate over a bankruptcy judge's authority over a committee has evolved since the passage of the BAPCPA in 2005. Instead of being a broad question of whether a judge can alter the membership of a committee, the dispute has narrowed to determining whether a judge can eliminate a creditor committee. In this dispute, there is little case law which directly addresses the question. In

¹³⁵ This was due to the court's view that the U.S. Trustee was an administrative agency within the meaning of the Administrative Agency Procedure Act, and thus subject to court "arbitrary and capricious" review. *In re Dow Corning Corp.*, 194 B.R. at 131–32 (Bankr. E.D. Mich. 1996).

¹³⁶ *In re New Life Fellowship, Inc.*, 202 B.R. 994 (Bankr. W.D. Okla. 1996).

¹³⁷ *Id.* at 995.

¹³⁸ *Id.* The case could have been decided merely on the fact that, in lieu of the bondholder's committee, the bondholders had no committee representation; despite § 1102(a)(2) permitting the court to order the appointment of such a committee to "assure adequate representation". It is clear that the court could have decided to resolve the case on that narrower basis. The court, however, did not elect to take such a narrow approach. *See* 11 U.S.C. 1102(a)(2).

¹³⁹ *In re New Life Fellowship, Inc.*, 202 B.R. at 995.

¹⁴⁰ *Id.*

¹⁴¹ *See id.* at 996; *see also In re Texaco Inc.*, 79 B.R. 560, 562 (Bankr. S.D.N.Y. 1987).

fact, the universe of cases which are directly on point is populated by only eight decisions: three of these cases concluding that a bankruptcy judge has the authority to disband a committee;¹⁴² two cases arriving at the opposite conclusion, holding that the Bankruptcy Code imparts no such authority to bankruptcy judges;¹⁴³ and three other cases addressing the issue but, despite having taken notice of the split, declining to decide the question.¹⁴⁴ Consequently, there is no majority rule on the question, which has left the courts to engage in the unique practice of arguing canons of interpretation and trying to divine the policy goals of Congress.

1. *Post-BAPCPA Case Law*

Since the 2005 passage of BAPCP, the courts which hold that judges do have the authority to disband a committee have each adopted varied, but related, reasoning which is worth discussing in some detail. The first post-BAPCPA court to assert the court's authority to disband a creditor committee was the Bankruptcy Court of the Western District of North Carolina in *In re Pacific Avenue, LLC*.¹⁴⁵ The court in *Pacific Avenue* reasoned that § 105(d) of the Bankruptcy Code authorizes the judge to disband a creditor committee.¹⁴⁶ Quoting the portion of § 105(d)(2) which permits the court to issue an order so as to “ensure that the case is handled expeditiously and economically . . . ;” the court maintained that the committee in question was due to be disbanded because its continued existence was redundant and counterproductive.¹⁴⁷ According to the court, the trustee could protect the interests of the class of creditors to the same extent that the committee could, rendering the committee redundant.¹⁴⁸ Additionally, the court believed that the actions of the creditor's committee had actively harmed all parties involved in the litigation, rendering the committee counterproductive.¹⁴⁹ Consequently, the court felt comfortable issuing an order

¹⁴² *In re City of Detroit*, Mich., 519 B.R. 673, 680 (Bankr. E.D. Mich. 2014); *In re Pac. Ave., LLC*, 467 B.R. 868, 870 (Bankr. W.D.N.C. 2012); *In re Dow Corning Corp.*, 194 B.R. 121, 131 (Bankr. E.D. Mich. 1996), *rev'd*, 212 B.R. 258 (E.D. Mich. 1997).

¹⁴³ *In re Caesars Entm't Operating Co., Inc.*, 526 B.R. 265 (Bankr. N.D. Ill. 2015); *In re New Life Fellowship, Inc.*, 202 B.R. 994, 997 (Bankr. W.D. Okla. 1996).

¹⁴⁴ *In re JNL Funding Corp.*, 438 B.R. 356, 361 (Bankr. E.D.N.Y. 2010); *In re Dewey & Leboeuf LLP*, No. 12-12321 MG, 2012 WL 5985325, at *5 (Bankr. S.D.N.Y. Nov. 29, 2012); *In re Hearthstone Homes, Inc.*, No. BK12-80348-TLS, 2012 WL 4027296, at *3 (Bankr. D. Neb. Sept. 12, 2012).

¹⁴⁵ *In re Pac. Ave., LLC*, 467 B.R. 868 (Bankr. W.D.N.C. 2012).

¹⁴⁶ *Id.* at 870.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (“Although the Committee insists that it is working to promote and protect its unique interests, the court is not aware of any way in which that has actually occurred.”).

granting the U.S. Trustee's motion to disband the unsecured creditors committee.¹⁵⁰

The second post-BAPCPA case to affirm the courts authority to disband a committee was *In re City of Detroit, Mich.*,¹⁵¹ and came out of the Bankruptcy Court of the Eastern District of Michigan. Similar to *Pacific Avenue*, *City of Detroit* read § 105 to confer to the court an authority to disband a creditor committee.¹⁵² However, rather than looking to § 105(d), the *City of Detroit* court instead relied on § 105(a).¹⁵³ The court read § 105(a) to be a grant of broad equitable powers to the court, insofar as the court's exercise of discretion was not inconsistent with the Bankruptcy Code.¹⁵⁴ Additionally, in response to the U.S. Trustee's claim that the express delegation of the power to modify committees in § 1102 defined the outer bounds of a judge's authority, the *City of Detroit* court noted that the Code did not expressly prohibit a judge from disbanding a committee.¹⁵⁵ Thus, because the court did not view such authority to be contradictory to any section of the Bankruptcy Code, the court saw the power to disband creditor committees to be inherent in the court's § 105(a) equitable powers.¹⁵⁶

The reasoning of the *City of Detroit* is diametrically opposed to that of the court in *In re Caesars Entm't Operating Co., Inc.*,¹⁵⁷ a case out of the Bankruptcy Court of the Northern District of Illinois. The court in *Caesars* argued that judges lacked sufficient authority to disband a committee due to the specific language used in § 1102.¹⁵⁸ To arrive this conclusion, the court employed the canon of statutory interpretation *expressio unius est exclusio alterius* to say that § 1102(a)'s express delegation of authority to alter committee membership must be read to exclude any unstated power to disband committees.¹⁵⁹

¹⁵⁰ Order Granting Trustee's Motion to Disband Unsecured Creditors' Committee, No. 10-32093 Doc. 744 (Filed Jan. 26, 2012). See generally *In re Pac. Ave., LLC*, 467 B.R. 868 (Bankr. W.D.N.C. 2012).

¹⁵¹ *In re City of Detroit, Mich.*, 519 B.R. 673.

¹⁵² *In re City of Detroit, Mich.*, 519 B.R. at 680. This conclusion was reached after the court initially held that § 1102 was inapplicable to chapter 9 cases. The discussion concerning § 105 was conducted in the alternative, assuming that § 1102 was applicable to chapter 9 bankruptcies.

¹⁵³ *Id.*

¹⁵⁴ *In re City of Detroit, Mich.*, 519 B.R. at 679–80.

¹⁵⁵ *Id.* at 680.

¹⁵⁶ *Id.*

¹⁵⁷ *In re Caesars Entm't Operating Co., Inc.*, 526 B.R. 265 (Bankr. N.D. Ill. 2015).

¹⁵⁸ *Id.* at 268.

¹⁵⁹ *Id.* at 268–69.

The *Caesars* court then addressed the § 105 reasoning adopted by *Pacific Avenue* and *City of Detroit*.¹⁶⁰ According to the *Caesars* court, § 105 solely empowers courts to implement existing Bankruptcy Code provisions.¹⁶¹ This means that § 105 cannot be used to find equity where the Code does not provide for it and cannot be the basis creating an “independent source of rights.”¹⁶² The court reasoned that if Congress had intended bankruptcy judges to have the power to disband committees, then it would have written such an allowance explicitly into § 1102(a).¹⁶³ The fact that Congress did not do so was an indication, to the *Caesars* court, that such a power was not given to bankruptcy judges.¹⁶⁴

It is much easier to understand the reasoning adopted in *Caesars* when viewed in the context of the court’s prior decision *In re ShoreBank Corp.*¹⁶⁵ *ShoreBank* concerned an emergency motion made by three unsecured creditors to direct the U.S. Trustee to reconstitute the unsecured creditor’s committee.¹⁶⁶ The court denied the creditor’s motion, holding that § 1102(a)(4) does not authorize the court to review any decision made by the U.S. Trustee.¹⁶⁷ Harkening back to the old circuit split concerning a judge’s ability to alter the membership of a committee, the *ShoreBank* court noted that when Congress restored a judge’s ability to alter committee membership in BAPCPA, it did not define “adequate representation.”¹⁶⁸ Because of this, the court placed the heavy burden of proving a breach of fiduciary duty on the movants.¹⁶⁹

¹⁶⁰ *Id.* at 269.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* (“Had Congress wanted to give bankruptcy courts the power to abolish committees appointed under section 1102(a)(1), it could have done so. It chose not to. That choice must be respected.”).

¹⁶⁴ Similarly, the court was not convinced by the ad hoc committee’s argument that the second official committee was no longer necessary to for adequate representation. The ad hoc committee was an unofficial and uncompensated committee constituting 12.75% of the debtor’s Second Priority Secured Noteholders with notes coming due in 2018. This ad hoc committee filed a brief joining the debtor’s motion to disbanding the official committee; arguing that the second official committee ought to be eliminated because the official committee had become redundant, the official committee could effectively operate in an ad hoc capacity, and because the intercreditor agreement obviated the need for the official committee. The Court disregarded these arguments in the course of rejecting the debtor’s original motion. See Joinder of the Ad Hoc Committee of First Lien Bank Lenders to, and Response in Support of, Debtor’s Motion for Entry of an Order Disbanding the Official Committee of Second Priority Noteholders, Reconstituting it With the Creditor’s Committee or, Alternatively, Limiting its Scope, Fees, and Expenses, No. 15-01145 Doc. 463 (Filed Feb. 25, 2015). See generally *In re Caesars Entm’t Operating Co., Inc.*, 526 B.R. 265.

¹⁶⁵ *In re ShoreBank Corp.*, 467 B.R. 156 (Bankr. N.D. Ill. 2012).

¹⁶⁶ *Id.* at 157.

¹⁶⁷ *Id.* at 161.

¹⁶⁸ *Id.* at 160.

¹⁶⁹ *Id.* at 161.

ShoreBank made the unique argument that the bankruptcy court could not review the actions of the U.S. Trustee.¹⁷⁰ It reasoned that § 1102(a)(4), rather than permitting a judge to review the decision of the Trustee, required the bankruptcy judge to make an independent determination of whether committee membership ought to be altered.¹⁷¹ This was rooted in the principle that court administrative review of an action would require the court to review the records of the Trustee, records that the Trustee was not statutorily required to generate.¹⁷² Because the Trustee was not required to produce a record there was nothing for the court to review, and thus no administrative court review of any action of the Trustee could take place.¹⁷³

Thus, *ShoreBank* served as the foundation for the court's later decision in *Caesars*. The debtor in *Caesars* argued that the Trustee had inappropriately permitted the second lien holders to form an official committee.¹⁷⁴ Despite the debtor's arguments, this was a request to have the court administratively review a decision of the Trustee. Based on *ShoreBank*, it was clear that the court in *Caesars* would not engage in such a review. *Caesars* was a natural outgrowth of *ShoreBank*'s prior unwillingness to treat the U.S. Trustee as a reviewable entity. Consequently, the court's unwillingness to "look behind the curtain" to review the decision-making of the Trustee meant that the court was also unwilling to disband a committee for its misbehavior in *Caesars*.

2. Courts That Dodged the Question

While there are two diametrically opposed bodies of case law, the majority of the post-BAPCPA cases addressing the issue have declined to take a side. The earliest of the cases to acknowledge the question was *In re JNL Funding Corp.*,¹⁷⁵ decided in 2010 by the Bankruptcy Court of the Eastern District of New York. This opinion preceded *Pacific Avenue* and was thus the first court to acknowledge the question. *JNL Funding* concerned a secured creditor who

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 162.

¹⁷² *Id.*

¹⁷³ *Id.* ("Because the U.S. Trustee supplies neither a rationale nor a record, there is nothing for a court to review—other than the bare decision itself, that is—and without a rationale or a record no meaningful review can take place").

¹⁷⁴ Exhibit C: Notice of Debtors' Motion for Entry of an Order Disbanding The Official Committee of Second Priority Noteholders, Reconstituting it With the Creditors' Committee or, Alternatively, Limiting its Scope, Fees and Expenses, No. 15-01145 Doc. 384 (Bankr. N.D. Ill. February 19, 2015). See generally *In re Caesars Entm't Operating Co., Inc.*, 526 B.R. 265 (Bankr. N.D. Ill. 2015).

¹⁷⁵ *In re JNL Funding Corp.*, 438 B.R. 356 (Bankr. E.D.N.Y. 2010).

claimed that no creditor held an allowable claim against the debtor.¹⁷⁶ As such, the secured creditor filed a motion to have the creditor's committee disbanded.¹⁷⁷ The court denied the motion on the basis that the Trustee had acted reasonably in appointing the committee.¹⁷⁸ In reaching this decision, the court addressed the question of committee disbandment by merely stating, "[n]otably, however, Section 1102 is silent as to this Court having power to order a committee to be disbanded, rather than reconstituted to ensure adequate representation."¹⁷⁹ That sentence was the extent of the court's discussion of judicial disbandment of a committee.

Nonetheless, *JNL Funding* discussed at length the vitally important question of the appropriate standard of review of the U.S. Trustee. On this point, the court maintained that the U.S. Trustee ought to be subject only to an arbitrary and capricious standard of court review.¹⁸⁰ The court reasoned that Congress had delegated the administrative tasks of bankruptcy to the U.S. Trustee with the passage of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986.¹⁸¹ Because of this express delegation, the court held that Congress had intentionally limited the court's role in committee formation.¹⁸² As such, a de novo review of U.S. Trustee committee formation would be inconsistent with its congressionally delegated administrative responsibilities.¹⁸³ The U.S. Trustee's decision with respect to § 1102 committee appointment could only be set aside if it was demonstrated that the U.S. Trustee relied on impermissible facts to arrive at that decision.¹⁸⁴

The next case to consider the question of committee disbandment, but avoid the issue, was *In re Hearthstone Homes, Inc.*, which concerned objections to the unsecured creditor committee's application for fees.¹⁸⁵ According to the objecting parties, the appointment of a chapter 11 trustee negated the need for the committee and the committee's continued existence needlessly created a financial impediment to confirmation.¹⁸⁶ Here, the chapter 11 trustee had made

¹⁷⁶ *Id.* at 359 ("TFC asserts that no Committee Member holds an allowable claim against Debtor, but, instead, may hold a claim only in the [CEO's] Individual Case.").

¹⁷⁷ *Id.* at 359–60.

¹⁷⁸ *Id.* at 360.

¹⁷⁹ *Id.* at 361.

¹⁸⁰ *In re JNL Funding Corp.*, 438 B.R. at 360.

¹⁸¹ *Id.*

¹⁸² *Id.* at 361.

¹⁸³ *Id.* at 362.

¹⁸⁴ *Id.* at 363.

¹⁸⁵ *In re Hearthstone Homes, Inc.*, No. BK12-80348-TLS, 2012 WL 4027296, at *1 (Bankr. D. Neb. Sept. 12, 2012).

¹⁸⁶ *Id.* at *3.

a clear effort to have the unsecured creditor committee disbanded.¹⁸⁷ Despite this, the court dodged the issue by merely reducing the committee's approved fees from \$85,681.50 to \$53,048.00.¹⁸⁸

Nonetheless, *Hearthstone Homes* meaningfully discussed the court's roll in monitoring committees. It held that bankruptcy courts cannot approve committee fees if such fees are the result of duplicative work or disproportionately reduce the chance of the reorganization succeeding.¹⁸⁹ As a result, the *Hearthstone Homes* decision implied that courts must play an active role in protecting the estate and the debtor-in-possession from committee misbehavior.

Two months after *Hearthstone Homes*, *In re Dewey & Leboeuf LLP* was decided in the Bankruptcy Court of the Southern District of New York.¹⁹⁰ The central issue in *Dewey* was whether the court could disband the Official Committee of Former Partners.¹⁹¹ The debtor and unsecured creditor committee moved for disbanding the former partner committee on the belief that the committee of former partners was counterproductive, too expensive, and no longer necessary for adequate representation.¹⁹² The moving parties argued that disbandment was an implicit court power that necessarily accompanied its power to order the appointment of new committees.¹⁹³ The court dodged this question by deciding that the committee still served an important purpose.¹⁹⁴ It was clear that the *Dewey* court was aware of the open question of court authority to disband, but felt as though it did not need to take a side in the split.

¹⁸⁷ *Id.* at *11.

¹⁸⁸ *Id.* at *10.

¹⁸⁹ *Id.* at *5-7; *see also In re Agriprocessors, Inc.*, No. 08-02751, 2009 WL 2578950, at *2 (Bankr. N.D. Iowa Aug. 19, 2009).

¹⁹⁰ *In re Dewey & Leboeuf LLP*, No. 12-12321 MG, 2012 WL 5985325 (Bankr. S.D.N.Y. Nov. 29, 2012).

¹⁹¹ *Id.* at *1.

¹⁹² *Id.*

¹⁹³ *Id.* at *2.

¹⁹⁴ "Under the circumstances here the Court need not reach the issue whether section 1102 implicitly confers on the Court the authority to order an official committee appointed by the UST to be disbanded based on subsequent changed circumstances, or whether sections 105 and 1102 when applied together provide such authority, because even if the Court has such authority, the Court concludes that the FPC [Former Partner's Committee] continues to serve an important purpose, the most obvious function being to prosecute the appeal the FPC filed from this Court's decision denying the examiner motion and approving the PCP." Memorandum Opinion and Order Denying Debtor's Application for an Order Directing the United States Trustee to Disband the Official Committee of Former Partners, 1:12-bk-12321, *In re Dewey & Leboeuf LLP*, No. 12-12321 MG, 2012 WL 5985325, at *5 (Bankr. S.D.N.Y. Nov. 29, 2012) (Doc. 674).

Yet, *Dewey* analogized committee disbandment with § 1102(a)(2)'s empowerment of the court to appoint an additional committee.¹⁹⁵ It went on to say that if the court did have the authority to disband a committee, such a power could only derive from a showing that the committee in question no longer adequately represented its constituency.¹⁹⁶ Despite the court's unwillingness to make such a finding, *Dewey* warned the former partners committee against driving the case into administrative insolvency through its fee applications.¹⁹⁷ Accordingly, *Dewey* was aware of the circuit split and proposed a framework for determining if a committee ought to be disbanded, but did not go so far as to expressly take a side.¹⁹⁸

IV. ANALYSIS

The debate over a judge's authority to disband a committee has not yielded a consistent answer as to the legal question, nor has it provided any sort of guidance to courts moving forward. This Section contains this Comment's six-part analysis of the debate over committee disbandment. First, this Section describes why bankruptcy courts have confused the debate over committee disbandment. Second, the real-world effects of committees magnifying administrative claims are articulated. Third, this Section argues that judge's must have the "judicial hammer" of committee disbandment. Fourth, analogous areas of court authority are presented. Fifth, the procedural question of how disbandment ought to occur is addressed. Sixth, this Section proposes a three-step factor test to guide courts in determining if they ought to disband a committee.

A. *Bankruptcy Courts Have Confused the Debate*

While the modern split is an outgrowth of the pre-BAPCPA split, unlike the prior split, the current circuit dispute appears to conflate two separate questions of law. These two questions are whether a bankruptcy judge may second guess the U.S. Trustee in its decision to create the committee and whether a bankruptcy judge may remedy the misfeasance or malfeasance of an already existent committee. As it currently stands, all reported cases on the authority of a bankruptcy judge to disband a committee mistakenly conflate these two

¹⁹⁵ *Id.* at *3.

¹⁹⁶ *Id.* at *5.

¹⁹⁷ *Id.*

¹⁹⁸ Despite this unwillingness to take a side. It seems clear from the language used in the opinion that the *Dewey* court thought that it could disband a committee if the need to truly arose. *See generally In re Dewey & Leboeuf LLP*, No. 12-12321 MG, 2012 WL 5985325 (Bankr. S.D.N.Y. Nov. 29, 2012).

questions and, as a result, these courts have arrived at incomplete legal conclusions. When viewed in context, *Caesars* was correct to answer in the negative to the former inquiry, yet, at the same time, *Pacific Avenue* and *City of Detroit* were correct to answer in the affirmative to the latter.

It is clear that a bankruptcy judge may not substitute his or her own judgement for that of the Trustee. Courts have routinely held that the judge should not second guess the discretionary decisions of the Trustee.¹⁹⁹ It has been suggested that this is due to the belief that judicial second guessing would harm the administration of bankruptcy proceedings by causing the U.S. Trustee to act in an overly conservative manner.²⁰⁰ As such, courts have generally held that they will only review the U.S. Trustee's decisions pertaining to committee membership on a de novo basis, so as to ensure that the decisions are facially reasonable.²⁰¹

Here, both *ShoreBank* and *Caesars* were correct. In *ShoreBank*, the court accurately stated that the bankruptcy judge was not entitled to administratively review the discretionary decisions of the U.S. Trustee.²⁰² To this limited extent, *Caesars* appropriately held that § 105(a) did not create a substantive authority for the court to second guess the U.S. Trustee.²⁰³ Similarly, it appropriately held that § 1102(a) did not license the court to substitute its judgment for the U.S. Trustee's with respect to deciding which creditors should serve on the committee.²⁰⁴

Nonetheless, it is equally clear that the bankruptcy court may employ its equitable powers to resolve inequities caused by litigating parties.²⁰⁵ Particularly, bankruptcy courts have the authority to police the conduct of creditors to ensure that the actions of some creditors do not harm the financial interests of others.²⁰⁶ This is because “[f]ederal courts have inherent equitable power to sanction a litigant’s malfeasance.”²⁰⁷ In bankruptcy, the source of this

¹⁹⁹ *Seafarers Pension Plan v. Sturgis*, 630 F.2d 218, 221 (4th Cir. 1980) (“We may not second guess the Trustees’ discretionary judgments.”).

²⁰⁰ *In re Melenzyer*, 140 B.R. 143, 155 (Bankr. W.D. Tex. 1992).

²⁰¹ *See In re Value Merchants, Inc.*, 202 B.R. 280, 287 (E.D. Wis. 1996).

²⁰² *See In re ShoreBank Corp.*, 467 B.R. 156, 162 (Bankr. N.D. Ill. 2012).

²⁰³ *In re Caesars Entm’t Operating Co., Inc.*, 526 B.R. 265, 269 (Bankr. N.D. Ill. 2015).

²⁰⁴ *Id.*

²⁰⁵ *See Matter of W. T. Grant Co.*, 4 B.R. 53, 74 (Bankr. S.D.N.Y. 1980) (“A fundamental characteristic of the bankruptcy court is its expansive equitable powers”).

²⁰⁶ *See In re Kansas City Journal-Post Co.*, 144 F.2d 791, 800 (8th Cir. 1944) (*citing* *Prudence Realization Corp. v. Geist*, 316 U.S. 89, 94, 62 S. Ct. 978, 982, 86 L. Ed. 1293 (1942)) (“[S]ubordination is usually said to be aimed at leveling off, as practicably as possible, the effects of ‘the inequitable conduct of a claimant . . .’”).

²⁰⁷ *In re Phillips Grp., Inc.*, 382 B.R. 876, 888 (Bankr. W.D. Pa. 2008).

inherent equitable power is § 105(a) of the Bankruptcy Code.²⁰⁸ While the courts' § 105(a) equitable powers are broad, they are limited to effectuating provisions of the Bankruptcy Code.²⁰⁹

In this equally narrow respect, both *Pacific Avenue* and *City of Detroit* were decided correctly. *Pacific Avenue* appropriately employed its equitable powers to disband a committee which it saw to be counterproductive and thus engaged in the misfeasance of harming secured creditors by unnecessarily reducing the cash collateral available to the secured creditor.²¹⁰ Similarly, *City of Detroit* correctly determined that it was empowered to disband a committee which had committed the misfeasance of refusing to participate in, and actually disavowed, the mediation process.²¹¹ In both of these cases, the courts did not look behind the reasoning of the U.S. Trustee in appointing the committee, but instead disbanded the committee as an equitable remedy to the inequity caused by the misfeasance of that committee.

Nonetheless, in as much as *Caesars*, *Pacific Avenue*, and *City of Detroit* were decided correctly, each of these opinions also over-applied their reasoning and arrived at partially incorrect conclusions. *Caesars* overextended the entirely accurate prohibition against second guessing the discretion of the U.S. Trustee to incorrectly claim that the court could never disband a committee.²¹² Similarly, *Pacific Avenue* and *City of Detroit* overextended their correct inclinations to remedy inequity in the bankruptcy proceedings by inappropriately “looking behind the curtain” of the U.S. Trustee’s reasoning for preserving or appointing the committee in the first place.²¹³ As such, by failing to narrowly frame the question, all courts may have produced incomplete and partially incorrect conclusions of law.

²⁰⁸ *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 91 (2d Cir. 2003).

²⁰⁹ *In re Middleton Arms, Ltd. P’ship*, 934 F.2d 723, 724 (6th Cir. 1991).

²¹⁰ See Order Granting Trustee’s Motion to Disband Unsecured Creditors’ Committee, No. 10-32093 Doc. 744 at 4 (Filed Jan. 26, 2012).

²¹¹ See *In re City of Detroit, Mich.*, 519 B.R. 673, 680 (Bankr. E.D. Mich. 2014).

²¹² *In re Caesars Entm’t Operating Co., Inc.*, 526 B.R. at 269. When the court held that “Section 105(a) thus is not a vehicle for reading into section 1102(a)(1) a power to do away with statutory committees when section 1102(a)(1) itself grants no such power . . .”, it read the equitable powers of § 105 out of the Bankruptcy Code. Section 105 may not be a vehicle to read a power into § 1102, but that does not mean it is not a vehicle to administer equitable remedies when such remedies are necessary to achieve the purposes of the Bankruptcy Code.

²¹³ See *In re Pac. Ave., LLC*, 467 B.R. 868, 870 (Bankr. W.D.N.C. 2012) (“The Trustee is capable of and required to adequately represent the interests of unsecured creditors in these cases. Consequently, the Committee’s representation is duplicative and unnecessary.”); *In re City of Detroit, Mich.*, 519 B.R. 673, 681 (Bankr. E.D. Mich. 2014) (“[T]he Court remains wholly unconvinced that the Committee would play the useful or valuable role contemplated by § 1102.”).

B. *The Real Effects of Committee Magnification of Administrative Claims*

While the issue of committee disbandment has only arisen in the courts eight times, the real-world harm of committees unduly forcing conversion to chapter 7 occurs on a more commonplace basis. “[E]ach administrative or priority creditor may hold the future of the case in its hands. ‘In bankruptcy, everyone’s fate—the debtors, its employees and its creditors—is often intertwined and dependent on the success of the plan.’”²¹⁴ Despite the fact that the legalistic question of court authority is rarely brought to the court’s attention, committees can force conversion where such conversion might have otherwise been unnecessary and might be attributable to committee abuses.

The inability of courts to disband committees can force judges to adopt the role of fortuneteller. In *In re SunEdison, Inc.*, the court was required to consider potential committee professional expenses before a committee had been formed.²¹⁵ In this frontloaded analysis, the court had to determine whether or not equity holders in an insolvent company could form an official committee.²¹⁶ The court held that the a committee could not be formed because, “[t]he fees and expenses incurred by the Equity Committee’s professionals, if allowed by the Court, . . . are administrative claims . . . [and] [p]ayments to [committee] professionals generally reduce the amount available for distribution.”²¹⁷ Without the power to disband the committee at a later date, the *SunEdison* court and others are often forced to engage in this type forward thinking analysis.

When a court fails to act as a fortuneteller, committees have room to create significant inequities. An illustrative case of is *In re BH S & B Holdings, LLC*.²¹⁸ At the onset of the bankruptcy, the debtor had \$2,704,976 of unrestricted cash on hand to administer the chapter 11 case.²¹⁹ However, despite this sizeable cash reserve, the creditor committee incurred professional fees totaling \$2,188,902, an amount that forced the debtor’s case into administrative insolvency.²²⁰ By the court’s own admission, these committee expenses were excessive in view of the fact that “the Committee’s efforts have yielded relatively small returns at very

²¹⁴ *In re Molycorp, Inc.*, 562 B.R. 67, 78 (Bankr. D. Del. 2017) (quoting Douglas G. Baird, *Elements of Bankruptcy* 240–41 (6th ed. 2014)).

²¹⁵ *See In re SunEdison, Inc.*, 556 B.R. 94, 102 (Bankr. S.D.N.Y. 2016).

²¹⁶ *See id.*

²¹⁷ *Id.*

²¹⁸ *See In re BH S & B Holdings, LLC*, 439 B.R. 342, 2010 BL 273757 (Bankr. S.D.N.Y. 2010).

²¹⁹ *Id.*

²²⁰ *Id.*

substantial expense”²²¹ and that the quality of committee representation “raises serious questions”²²² about the litigation tactics adopted by the committee.

What is more, the debtor in *BH S & B* attempted to mitigate the damage of the committee’s excessive fee applications by filing a turnover motion to have much of the money inappropriately paid out to the committee reclaimed by the debtor.²²³ The debtor sought an order declaring that the committee was not entitled to \$1,130,000 in compensation for fees and expenses, disgorging \$379,033 in committee attorney’s fees, and declaring that the committee’s financial advisors were not entitled to \$272,092 in fees.²²⁴ Moreover, this motion was accompanied by an affidavit attesting to the debtor’s potential administrative solvency if the funds paid to the committee were not returned.²²⁵ However, given the nature of the motion, the fact that there were other issues with the bankruptcy,²²⁶ and the expense of litigating the calculation of appropriate fees in view of prior debtor-creditor fee stipulations, the court determined that the turnover motion was most appropriately decided post-conversion.²²⁷ Consequently, despite the debtor’s best efforts, the *BH S & B* bankruptcy was forced to convert to chapter 7, and the committee’s incurrence of objectionable professional fees was a reason for said conversion.

C. *The Need For a Judicial Hammer*

Justice requires that courts of equity use the lightest touch possible to resolve inequities;²²⁸ however, sometimes the lightest appropriate touch is the full force of the judicial “hammer.” In the context of committee misbehavior, this “hammer” is the judicial disbandment of the rogue committee. Because the court has the clear statutory authority to remove the debtor-in-possession from governing his or her estate, it is eminently reasonable to assert that a parallel

²²¹ *Id.*

²²² *Id.*

²²³ Debtors’ Emergency Motion For Turnover of Funds Improperly Paid to Committee Professionals and Related Relief, 1:08-bk-14604, *In re BH S & B Holdings, LLC*, 439 B.R. 342, 2010 BL 273757 (Bankr. S.D.N.Y. Nov. 10, 2010) (Doc. 869).

²²⁴ *In re BH S & B Holdings, LLC*, 439 B.R. at 350.

²²⁵ Declaration of Robert Tetreault in Support of Debtors’ Emergency Motion For Turnover of Funds Improperly Paid to Committee Professionals and Related Relief, 1:08-bk-14604, *In re BH S & B Holdings, LLC*, 439 B.R. 342, 2010 BL 273757 (Bankr. S.D.N.Y. Nov. 10, 2010) (Doc. 870).

²²⁶ *BH S & B’s* bankruptcy was plagued by numerous issues which all contributed to the case’s conversion to chapter 7. One such issue was the debtor’s failure to propose a plan. *See generally In re BH S & B Holdings, LLC*, 439 B.R. 342.

²²⁷ 439 B.R. at 350-51.

²²⁸ *Devitt v. Potter*, 234 F. Supp. 2d 1034, 1039 (D.N.D. 2002), *aff’d sub nom. Carriere v. Potter*, 83 F. App’x 139 (8th Cir. 2003) (“A court must grant equitable relief sparingly.”).

power exists with respect to creditor committees. Such a “hammer” is a necessary item in the bankruptcy judge’s toolbox so that the court can fully police the misconduct of the litigating parties.

For the debtor-in-possession, the “hammer” is the judicial appointment of a trustee to manage the chapter 11 debtor’s estate.²²⁹ Under § 1104(a), the court may remove a debtor from possession and appoint a chapter 11 trustee if the court finds that the debtor was engaged in fraud, grossly mismanaged the estate, or needed to be removed from possession to preserve the interests of creditors.²³⁰ In fact, it has been established that the court can appoint a chapter 11 trustee sua sponte as a product of the court’s § 105 equitable powers.²³¹

A parallel “hammer” must exist to correct the misfeasance or malfeasance of a committee. This need is bolstered by the fact that the U.S. Trustee is mandated to remove committee members who may even appear to have breached their fiduciary duty:

A creditor on a committee who exudes the appearance of a breach of fiduciary duty undermines that basic bankruptcy tenet, thereby corrupting the process. The United States Trustee would act arbitrarily and capriciously if he refused to remove a committee member who held a conflict of interest amounting to a breach of the fiduciary duty owed by the creditor to the creditors represented by the committee or who appeared to hold such a conflict.²³²

If allowing a creditor who appears to have breached his or her fiduciary duty to remain on a committee is enough to corrupt the bankruptcy process, then certainly a committee that has breached its fiduciary duty would similarly corrupt the bankruptcy process. In such an instance of committee misfeasance or malfeasance, it would be arbitrary and capricious for the U.S. Trustee to not disband the committee.²³³ Yet, without the hammer of judicial disbandment, such an arbitrary and capricious derogation of the bankruptcy process could flourish.

²²⁹ 11 U.S.C. § 1104 (a).

²³⁰ 11 U.S.C. § 1104(a)(1)–(2).

²³¹ *In re* U.S. Mineral Prod. Co., 105 F. App’x 428, 431 (3d Cir. 2004).

²³² *In re* Venturelink Holdings, Inc., 299 B.R. 420, 423 (Bankr. N.D. Tex. 2003).

²³³ *Id.*

D. The “Hammer” of the Court’s Section 105(a) Equitable Powers

Prior to the creation of a committee, membership issues can be resolved by the U.S. Trustee declining to form the committee.²³⁴ Post formation, bankruptcy judges can only exercise the authority granted to them by the Code to police litigating parties. Section 105(a) of the Bankruptcy Code provides that a court may issue all necessary orders to carry out the provisions of title 11:

*The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.*²³⁵

The equitable powers § 105(a) gives the court are, as a result, broad and leave much to the discretion of the bankruptcy judge.

While the Supreme Court has held that § 105(a) does “not [authorize the judge] in the name of equity to make wholesale substitution of underlying law,” it does permit the judge to find equity where the Bankruptcy Code itself already provides.²³⁶ Because the Bankruptcy Code already provides for the adequate representation of creditors vis-à-vis the formation of committees, courts logically have § 105(a) equitable powers to preserve the quality of that representation.²³⁷ Since the U.S. Trustee was not expressly granted authority to disband creditor committees, it is imperative that the court fill this void.²³⁸

The Supreme Court has established that every federal court has the inherent power to sanction or otherwise control abusive litigation practices.²³⁹ In a bankruptcy case, this inherent power is expressed by § 105 of the Bankruptcy Code. More specifically, § 105(a) empowers the bankruptcy judge to take any action deemed necessary to prevent abuses of the bankruptcy process, stating “[o]n the contrary, the broad authority granted to bankruptcy judges to take *any action that is necessary or appropriate ‘to prevent an abuse of process’* described in § 105(a) of the Code”²⁴⁰ Due to this, § 105 has been broadly

²³⁴ SALLY S. NEELY, *Official Committees in Chapter 11*, in ALI-ABA COURSE OF STUDY: CHAPTER 11 BUSINESS REORGANIZATION 33, 55–56 (2001).

²³⁵ 11 U.S.C. § 105(a) (emphasis added).

²³⁶ *Raleigh v. Illinois Dep’t of Revenue*, 530 U.S. 15, 24–25 (2000).

²³⁷ *See generally In re City of Detroit*, Mich., 519 B.R. 673, 680 (Bankr. E.D. Mich. 2014).

²³⁸ *In re Dow Corning Corp.*, 194 B.R. 121, 131 (Bankr. E.D. Mich. 1996), *rev’d*, 212 B.R. 258 (E.D. Mich. 1997).

²³⁹ *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 376 (2007).

²⁴⁰ *Id.* at 375 (emphasis added).

understood to be the bankruptcy court's primary source of statutory authority to preserve the proper administration of the debtor's case.²⁴¹

Additionally, there are similar situations where the bankruptcy courts' § 105 powers are broadly agreed to extend to police the conduct of parties. It is well established that § 105 permits the court to force the debtor to turn over all of his or her property to the trustee.²⁴² Nowhere does the Bankruptcy Code give the court the power to issue such a turnover order; however, the inherent powers of the court and § 105 have been widely accepted as the legitimate source of such authority.²⁴³ Section 105 has similarly been accepted as the source of the courts' authority to issue various procedural orders enforcing the stay.²⁴⁴ Consequently, the inherent power of the court and § 105 powers are not confined to a narrow set of circumstances. Such bankruptcy court powers often permeate other related areas of the common law surrounding court authority and give judges powers not otherwise expressly delegated in the Bankruptcy Code.

E. Analogous Rule 2007 Exercises of Court Authority

Despite the novelty of the question of committee disbandment, Rule 2007 of the Federal Rules of Bankruptcy Procedure exists as an instructive analogy. When added to the legal landscape and context of the debate, Rule 2007 makes clear that the court must have the authority to disband a committee.

Rule 2007 of the Federal Rules of Bankruptcy Procedure, entitled "Review of Appointment of Creditors' Committee Organized Before Commencement of the Case," permits the court to vacate the appointment of a committee in very limited circumstances.²⁴⁵ In pertinent part, Rule 2007 states:

(a) Motion to review appointment

If a committee appointed by the United States trustee pursuant to § 1102(a) of the Code consists of the members of a committee organized by creditors before the commencement of a chapter 9 or chapter 11 case, on motion of a party in interest and after a hearing on notice to the United States trustee and other entities as the court may direct, the court may determine whether the appointment of the committee satisfies the requirements of § 1102(b)(1) of the Code.

²⁴¹ Law v. Siegel, Brief for Bankruptcy Law Scholars as Amici Curiae Supporting Petitioner, 2013 WL 4769424 (U.S.), 23 (2013).

²⁴² *Id.* at 21; *see also* 11 U.S.C. § 521(a)(4).

²⁴³ Law v. Siegel, Brief for Bankruptcy Law Scholars as Amici Curiae Supporting Petitioner, 2013 WL 4769424 (U.S.), 22 (2013).

²⁴⁴ *Id.* at 24.

²⁴⁵ *See* FED. R. BANKR. P. 2007.

...

(c) Failure to comply with requirements for appointment

After a hearing on notice pursuant to subdivision (a) of this rule, the court shall direct the United States trustee to vacate the appointment of the committee and may order other appropriate action if the court finds that such appointment failed to satisfy the requirements of § 1102(b)(1) of the Code.²⁴⁶

By its text, Rule 2007 only applies to situations in which the U.S. Trustee has given official standing to a pre-existing ad hoc committee, without regard to § 1102(b)(1) of the Bankruptcy Code.²⁴⁷ The case law surrounding Rule 2007 is thin; however, its use demonstrates a broader power of the court than what Rule 2007 narrowly prescribes.²⁴⁸

At the most basic level, Rule 2007 empowers the bankruptcy court to review the delegation of official status to an ad hoc committee so as to ensure that committee membership was fairly decided.²⁴⁹ To decide if it was reasonable for the U.S. Trustee to give the ad hoc committee official status, Rule 2020 comes into play, and the court may then review the decision of the U.S. Trustee in forming the committee as a contested matter.²⁵⁰ This matter is decided in the narrow context of the ad hoc committee's ability to satisfy Bankruptcy Code § 1102(b)(1).²⁵¹ If it is determined that the committee was improperly given official status, the court may then alter the committee's membership to remediate the inequity.²⁵²

Despite the narrow intention and actual application of Rule 2007, a handful of courts have read the delegation of power in Rule 2007 to signal the broad nature of court review.²⁵³ Significantly, this broad interpretation finds support in the Advisory Committee notes to Rule 2020.²⁵⁴ Those advisory notes state,

²⁴⁶ FED. R. BANKR. P. 2007(a), (c).

²⁴⁷ See *In re Bayou Grp., LLC*, 431 B.R. 549, 555 n.4 (Bankr. S.D.N.Y. 2010); see also *In re A.H. Robins Co.*, 65 B.R. 160, 165 (E.D. Va. 1986), *aff'd sub nom.* *Van Arsdale v. Clemo*, 825 F.2d 794 (4th Cir. 1987).

²⁴⁸ A quick search of Westlaw citations to Rule 2007 reveal only fourteen cases. Furthermore, only six of these fourteen cases actually refer to Rule 2007 (rather than Rule 2007.1 or Rule 2007.2) and deal with the appointment of a committee.

²⁴⁹ *In re A.H. Robins Co.*, 65 B.R. 160, 165 (E.D. Va. 1986), *aff'd sub nom.* *Van Arsdale v. Clemo*, 825 F.2d 794 (4th Cir. 1987).

²⁵⁰ *In re Victory Markets, Inc.*, 196 B.R. 1, 5 (Bankr. N.D.N.Y. 1995); see also FED. R. BANKR. P. 2020, 9014.

²⁵¹ *In re Bayou Grp., LLC*, 431 B.R. at 555 n.4.

²⁵² *In re Dow Corning Corp.*, 194 B.R. 121, 132 (Bankr. E.D. Mich. 1996), *rev'd*, 212 B.R. 258 (E.D. Mich. 1997).

²⁵³ See generally *In re Pierce*, 237 B.R. 748, 753 (Bankr. E.D. Cal. 1999); *In re Dow Corning Corp.*, 194 B.R. at 131; *In re Victory Markets, Inc.*, 196 B.R. at 5.

²⁵⁴ 194 B.R. at 131.

“[a]lthough this rule deals only with judicial review of the appointment of prepetition committees, it does not preclude judicial review under Rule 2020 regarding the appointment of other committees.”²⁵⁵ From this language it can be easily extrapolated that the bankruptcy court has the authority to act with respect to committees when the U.S. Trustee is either unwilling or unable to do so.²⁵⁶

Additionally, Rule 2007 demonstrates that the U.S. Trustee does not have unfettered discretion with respect to committees and that committees are not immune from judicial supervision.²⁵⁷ Logically, if the court is to review committee action, the source of this supervisory power must come from § 105 of the Bankruptcy Code.²⁵⁸ This is because § 105 conveys equitable powers to the bankruptcy judge, and Rule 2007 is only applicable if there is an issue of inequity or unfairness.²⁵⁹ Such logic is easily analogous to that of disbanding rogue committees, whose continued existence may generate inequity within the case’s proceedings.

Importantly, however, this analogous nature of Rule 2007 did not escape the court’s attention in *Caesar’s*.²⁶⁰ In Footnote 2, the court accurately noted the narrow applicability of Rule 2007 and observed that no such ad-hoc-turned-official committee existed in that case.²⁶¹ In so observing, the court was correct. Rule 2007 certainly does not prescribe a general power to disband committees to judges, and it does not allow judges to second guess or look behind the reasoning of the U.S. Trustee.²⁶² However, this does not defeat the logic of Rule 2007, nor does it lessen the broad and permissive language used in Rule 2007’s Advisory Committee Notes. Furthermore, Rule 2007 does expressly authorize the court to “vacate the appointment of the committee.”²⁶³ The word “vacate” means “to nullify,” to “invalidate,” or, in other words, to “disband.”²⁶⁴ Yet, the Federal Rules of Bankruptcy Procedure cannot override the substantive

²⁵⁵ *Id.* at 132 (quoting Advisory Committee Note to Rule 2007 (1991)).

²⁵⁶ *In re Pierce*, 237 B.R. at 753.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 754.

²⁶⁰ *In re Caesars Entm’t Operating Co., Inc.*, 526 B.R. 265, 268 n.2 (Bankr. N.D. Ill. 2015).

²⁶¹ *Id.*

²⁶² It is important to note what the court is doing when it is reviewing a Rule 2007 motion. When the court is reviewing a Rule 2007 motion it is deciding if the moving party has made a sufficient showing to demonstrate unfairness and U.S. Trustee indifference. It is emphatically not an administrative review of the non-existent record of the U.S. Trustee’s decision-making process in forming the committee. Similar types of judicial reviews are conducted to determine the trustee’s bad faith, or lack thereof, and do not constitute peaking behind the curtain. *See c.f. In re Dow Corning Corp.*, 194 B.R. at 132.

²⁶³ FED. R. BANKR. P. 2007(c).

²⁶⁴ *Vacate*, BLACK’S LAW DICTIONARY (10th ed. 2014).

provisions of the Bankruptcy Code, and any conflict between the Code and the Rules must be settled in favor of the Code.²⁶⁵ As such, if the Bankruptcy Code completely precluded disbandment of a committee, then Rule 2007 could not allow the vacation of its appointment. Consequentially, committee disbandment is, on its face, consistent with the Bankruptcy Code.

F. The Procedural Question

Nonetheless, even with the knowledge that the Bankruptcy Court must have the authority to disband a committee, there is the accompanying procedural question of how such a disbandment ought to occur. Within the cases in which courts have disbanded creditor committees, there is some inconsistency as to how the judge decided to procedurally do so. Some courts did so by directing the Trustee to dissolve the committee.²⁶⁶ Other courts circumvented the Trustee and disbanded the committee via the court's order.²⁶⁷ The most reasonable and proper procedure is for the bankruptcy court to direct the U.S. Trustee to dissolve the committee.

The procedural question may be answered by looking to analogous court orders pertaining to § 1102(a)(4). Section 1102(a)(4) mandates that the court order the U.S. Trustee to alter the membership of a committee when such change is necessary for the adequate representation of creditors:

On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders.²⁶⁸

When a court alters the membership of a committee, the appropriate means of doing so is via an order to the Trustee. Because of this, it follows that the disbandment of a committee ought to occur via an order directing the Trustee to eliminate the committee.

²⁶⁵ *In re Barnes*, 308 B.R. 77, 81 (Bankr. D. Colo. 2004).

²⁶⁶ Order Directing United States Trustee to Disband Official Committee of Equity Security Holders, No. 05-44481 (RDD) Doc. 16576 (Bankr. S.D.N.Y. April 23, 2009).

²⁶⁷ Order Granting Trustee's Motion to Disband Unsecured Creditors' Committee, No. 10-32093 Doc. 744 (Filed Jan. 26, 2012) ("The Official Committee of Unsecured Creditors is hereby disbanded and shall have no further standing in connection with these cases, effective upon the entry of this order.").

²⁶⁸ 11 U.S.C. § 1102(a)(4).

G. *The New Factor Test*

If a bankruptcy court receives a motion to disband a creditor committee, it should employ a three-factor analysis to determine if disbandment is justified. “Abuse of Discretion” standards are undesirable because they offer no actual guidance to the lower courts who seek precedential authority to guide their decision-making.²⁶⁹ Instead, factor tests give lower courts guidance and promote horizontal uniformity among the circuits, thus creating an air of predictability and reducing forum shopping.²⁷⁰ When a court receives a motion to disband a committee, the court should conduct three inquiries: (1) did the committee engage in malfeasance or misfeasance, (2) would a “lighter touch” fix the problem, and (3) is the committee necessary for adequate representation.

1. *Did the Committee Engage in Malfeasance or Misfeasance?*

First, the court should determine whether the committee has acted in a way that unjustifiably harms the debtor-in-possession or co-creditor’s interests. This may be determined by measuring the average monthly professional fees requested by the committee, by determining if the committee is acting in a purely self-interested manner, or by determining if the committee has acted in bad faith. If the court determines that such misfeasance or malfeasance has occurred, then the court should use its § 105 equitable powers to remediate the inequity.

This first step is similar to what courts already do in considering whether to appoint a chapter 11 trustee. When considering whether the court ought to remove the debtor-in-possession, the court determines whether the appointment of a chapter 11 trustee is in “the interests of creditors, any equity security holders, and other interests of the estate.”²⁷¹ In practice, this analysis means that the court must look to see if the debtor-in-possession has engaged in any type of misfeasance or malfeasance.²⁷² In the case of the appointment of a chapter 11 trustee, the court assumes that removal is “the exception, rather than the rule.”²⁷³ Similarly, determining if the committee has engaged in any significant misfeasance or malfeasance will allow disbandment to remain an exceptional remedy.

²⁶⁹ Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 659 (1971).

²⁷⁰ Shannon M. Raley, *Tweaking Tinker: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773, 798 (2011) (“Factor tests ensure that courts . . . are not left to decipher the meaning of ambiguous words on their own and thus reach contradictory conclusions.”).

²⁷¹ *In re Eurospark Indus., Inc.*, 424 B.R. 621, 627 (Bankr. E.D.N.Y. 2010) (quoting 11 U.S.C. 1104(a)(2)).

²⁷² *See generally In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 169 (Bankr. S.D.N.Y. 1990).

²⁷³ *In re Sharon Steel Corp.*, 871 F.2d 1217, 1225 (3d Cir. 1989).

Properly evaluating the harm caused to co-creditors was also paramount in the old circuit split concerning a judge's authority to remove an individual committee member from the committee.²⁷⁴ In this analysis, courts were forced to determine whether a creditor had acted in such a way as to have violated their fiduciary duty to their co-creditors.²⁷⁵ Courts determine whether there was a conflict of interest and other misbehavior which could potentially jeopardize the creditor's ability to effectively serve on the committee.²⁷⁶ Removal of a creditor was the exception and acted as a vanguard against judicial overreach. Consequently, a similar first step—identifying unjustified committee-caused harm to the debtor-in-possession or co-creditors—will make sure that committee disbandment remains an extreme remedy.

2. *Does a Lighter Touch Work?*

Second, the court must decide if a remedy exists which allows the court to preserve the committee while resolving the inequity. If denying the requested fees of the committee's professionals or reconstituting the committee with other creditors is sufficient, then the judge should stop his or her analysis and go with the lighter touch. If it does not, then the court has the § 105 equitable power to disband the committee.

Such a cautious approach to courts employing the remedy of judicial committee disbandment is mirrored in other areas of the law. One example is the use of judicial estoppel in bankruptcy cases. Here courts have held that “judicial estoppel is a powerful weapon to employ against a party seeking to vindicate its rights, and there are often lesser weapons that can keep alleged inconsistent statements in check”²⁷⁷ Because often a lighter touch will suffice, courts are to exhaust lesser remedies—such as allowing a party to impeach the debtor in court—before they resort to judicial estoppel.²⁷⁸ Similarly, courts often look to lesser remedies when considering whether to remove the debtor-in-possession from a bankruptcy with the appointment of a chapter 11 trustee.²⁷⁹

²⁷⁴ *In re First RepublicBank Corp.*, 95 B.R. 58, 61 (Bankr. N.D. Tex. 1988).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc.*, 767 F.3d 987, 993 (10th Cir. 2014).

²⁷⁸ *Id.*

²⁷⁹ See *In re Esco Elevators, Inc.*, No. 494-44339-MT-11, 1995 WL 605982, at *5 (Bankr. N.D. Tex. Jan. 31, 1995) (“The Court has considered whether lesser remedies would suffice, and in the context of this Case they would not.”).

Similarly, Rule 41(b)²⁸⁰ dismissals with prejudice require the court to determine that “(1) a party [has] engage[d] in a clear pattern of delay or willful contempt (contumacious conduct); and (2) *the district court specifically finds that lesser sanctions would not suffice.*”²⁸¹ This exhaustion of lesser remedies is built into the trial court’s analysis for every Rule 41(b) dismissal, and the failure to consider lesser remedies has even been held to be an abuse of the trial judge’s discretion.²⁸²

For all of these remedies—including committee disbandment—it is difficult, if not impossible, to “unscramble the egg” and undo court action. Because of this, it is necessary to bake-in a requirement that the bankruptcy judge has considered all lighter touches prior to disbandment. Moreover, such a requirement forces the bankruptcy court to fire “warning shot” lesser remedies, and restrains the court’s discretion in disbanding a committee. As such, due to the serious nature of committee disbandment, bankruptcy courts must be careful to exhaust lesser remedies before deciding to disband a committee.

3. *Is That Committee Necessary for Adequate Representation?*

Finally, the court needs to determine if the committee is necessary for the adequate representation of the class of creditors. If the court determines that the committee is not adequately representing the class of creditors, or if an ad hoc committee would provide functionally equivalent services to what the official committee rendered, then the committee may be redundant. This step of the analysis is vitally important, because the court’s § 105 equitable powers cannot be used to contradict express provision in the Bankruptcy Code. Because § 1102 provides for the “adequate representation” of creditors via the creation of a committee, if a committee is necessary to “adequately represent” a class of creditors then the judge may not ever disband the committee.²⁸³ As such, this analysis requires the court to determine if the committee in question has overlapping responsibilities with another official or ad hoc committee. If

²⁸⁰ FED. R. CIV. P. 41(b).

²⁸¹ *Kammona v. Onteco Corp.*, 587 F. App’x 575, 582 (11th Cir. 2014) (quoting *Betty K Agencies, Ltd. v. M/V Monada*, 432 F.3d 1333, 1337 (11th Cir. 2005)) (emphasis added).

²⁸² *Kammona*, 587 F. App’x at 583.

²⁸³ It is not difficult, however, to imagine a situation in which a committee is contingently disbanded insofar as another committee can be created to represent the creditors at the time of the disbandment of the misbehaving committee. Hypothetically, such an order disbanding a committee would, within the same order, create another committee (pulling its members from a broader pool of creditors to avoid the replacement problem) to immediately step into the shoes of the disbanded committee. The creation of such a new committee is no longer controversial and is expressly provided for under 11 U.S.C. § 1102 (a)(2).

substantially all of the committee's responsibilities are duplicative, then the committee may be considered redundant.

Relatedly, the Bankruptcy Code specifically requires the bankruptcy court to consider the adequate representation of creditors when modifying a committee.²⁸⁴ Judicial modification of a committee is generally viewed as an “extraordinary remedy” that courts should grant with reluctance.²⁸⁵ This requirement has been translated into a burden placed on the moving party to show that the adequate representation of creditors will not be harmed by the court's actions with respect to the committee.²⁸⁶

The Bankruptcy Code does not provide a framework for determining what “adequate representation” of creditors means.²⁸⁷ Nonetheless, courts have created an independent seven-step test to aid in determining adequate representation when considering whether to order the creation of an additional committee:

- (1) the ability of the existing committee to function;
- (2) the nature of the case;
- (3) the standing and desires of the various constituencies;
- (4) the ability of creditors to participate in a case without an additional committee;
- (5) the delay and additional cost that would result if the court grants the motion;
- (6) the tasks which a separate committee is to perform; and
- (7) other factors relevant to the adequate representation issue.²⁸⁸

This seven-step adequate representation sub-test is easy to incorporate into the broader calculus of whether a committee ought to be judicially disbanded. Because courts are already familiar with looking to the creditors' adequate representation prior to modifying—or ordering the creation of new—committees, it would not be difficult for the bankruptcy judge to engage in a similar seven-step analysis before deciding to disband a committee. Consequently, because the Bankruptcy Code requires the adequate

²⁸⁴ *Id.* § 1102(a)(2), (4).

²⁸⁵ *In re Residential Capital, LLC*, 480 B.R. 550, 557 (Bankr. S.D.N.Y. 2012).

²⁸⁶ *Id.* at 558.

²⁸⁷ *Id.*

²⁸⁸ *Id.* (citing *In re Dana Corp.*, 344 B.R. 35, 38 (Bankr. S.D.N.Y. 2006)).

representation of creditors, and because bankruptcy judges are already familiar with looking to the adequacy of creditors' representation, judges must safeguard adequate representation of creditors before a decision can be made to disband a committee.

A judge may fairly disband a committee if he or she conducts all three inquiries, but not if only one of these factors is analyzed by the court. Requiring the court to look at all three factors will ensure adequate representation because it will create an inherent bias towards preserving the committee. Thus, a redundant committee may not be disbanded if the inequity may be resolved by a lighter touch. Nor may a committee whose misfeasance or malfeasance cannot be resolved by a lighter touch be disbanded if the services it renders are not duplicative. This baked-in presumption of committee preservation will ensure no violence is done to § 1102, and at the same time will give bankruptcy judges an avenue to exercise their § 105(a) equitable powers. Additionally, on appeal, non-specialty district judges will be able to more easily and uniformly review committee disbandment orders, thus avoiding the messy inquiry into the discretion of the bankruptcy judge. Consequently, a three-factor test should be adopted to determine if a committee ought to be disbanded.

CONCLUSION

Bankruptcy judges must have the authority to disband creditor committees. While the case law concerning a judge's authority to strike a committee is split and sparsely populated, a broader understanding of § 105 and analogous areas of court authority make clear that a bankruptcy judge has the equitable authority to disband a committee for that committee's misfeasance or malfeasance. We know this because of the history of committee formation, because of the prior circuit split, and because of the case law on the modern split.

Although the question of disbandment seems simple on its face, no existing court opinion has addressed the issue with complete accuracy. This is because courts have inappropriately combined two distinct legal questions. These legal questions are whether a bankruptcy judge can second guess the discretion of the U.S. Trustee and whether a bankruptcy judge can disband a committee to remedy the committee's misfeasance or malfeasance. From this Comment's analysis, it is clear that § 105 empowers the court to do only the latter and not the former.

A clear understanding of what question is being asked allows us to analogize the more precise issue to similar areas of the law. Doing so reveals that bankruptcy judges already have the authority to alter the rights of parties to a

bankruptcy if failing to do so would result in some sort of inequity. The wellspring for this and many similar equitable court powers is § 105 of the Bankruptcy Code. Reading § 105 to delegate the authority to disband a misbehaving committee to a bankruptcy judge makes the most sense of Supreme Court precedent and avoids throwing into question other similar, but more broadly accepted, exercises of court power.

Finally, a clear answer to a clarified question is not particularly useful to the courts unless there is some framework surrounding the use of that authority. As such, this Comment proposes a three-factor test to permit bankruptcy judges and reviewing courts to determine if a bankruptcy judge has overstepped his or her § 105 equitable authority. In view of this, this Comment has answered the procedural question and determined that the court must disband via issuing a directive to do so to the U.S. Trustee.

Ultimately, a bankruptcy court is a court of equity. As such, when a court disbands a misbehaving committee, it is the committee that has gone rogue and not the judge.

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