INSIDE THE MINDS

Bankruptcy Litigation and Dispute Resolution

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Life in the Fire House: Representing Creditors in Bankruptcy Cases

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The Value of the Attorney

As is true for most bankruptcy and insolvency lawyers, what I do on any given day is driven by the needs of my clients and the particular predicaments confronting them at that time—the "crisis du jour." Bankruptcy practice often and accurately is described as "life in the fire house,"[1] because when a crisis arises for a client (e.g., a bankruptcy filing by a major supplier, customer, or borrower), the lawyer may need to take immediate steps to protect the client's rights. Because of this, and despite today's world of "business casual," most bankruptcy lawyers keep an "emergency suit" in their offices so they are ready to appear in court on a moment's notice if so required. Bankruptcy practice is fast-paced, exciting, sometimes nerve-wracking, but never dull. I like it.

The major bankruptcy and financial restructuring issues with which I most often help clients are (1) negotiating on behalf of senior secured lenders the terms of cash collateral and financing orders with debtors in possession in Chapter 11 cases, (2) litigating and negotiating motions seeking relief from the automatic stay and abandonment of assets, (3) litigating and negotiating Chapter 11 plans of reorganization and liquidation, as well as motions to convert or dismiss Chapter 11 cases, (4) negotiating and litigating asset acquisition matters in Chapter 11 cases, and (5) pursuing mortgage foreclosures and receiverships for lenders involved in distressed single-asset real estate ventures.

Without question, I add the most value for clients when my services are used on the preventative side, helping clients plan future actions in anticipation of what may happen (or, when an insolvency of a major supplier, customer, or borrower already has occurred, helping clients plan how best to react to the case that is now in progress). My father was a periodontist, and from him I learned that the least expensive way to use a dentist is by trying to prevent (or minimize) dental problems through regular check-ups, rather than attempting to fix them after the fact. Subject to certain practical limitations, this same principle often applies to bankruptcy and insolvency situations.

[1] I am indebted to Pat Murphy of Winston & Strawn LLP for this description.

In trying to attain a successful outcome for a client, I always focus on the client's goals: first, by asking the client to identify its goals (its best possible outcome for the problem or situation at hand), second, by reviewing these goals with the client to determine whether they are realistic in light of the situation confronting the client and the client's resources, and third, by agreeing upon the most efficient and effective plan for trying to achieve them.

Keeping a Professional Edge

To keep current in my chosen area of practice, I regularly review various bankruptcy advance sheets, newsletters and journals to which my firm subscribes, attend and speak at local and national bankruptcy continuing legal education seminars, and maintain membership in my local and state bankruptcy bar organizations, as well as in the American Bankruptcy Institute. I also am Board Certified in Business Bankruptcy by the American Board of Certification of Bankruptcy and Creditors' Rights Attorneys (www.abcworld.org), and I keep this certification active.

Understanding the Client's Goals

Key to developing a productive client/attorney relationship is getting the client to focus on and articulate its goals. Understanding the client's chief motivation is of critical importance to effective representation. For example, if—as usually is the case—the client's goal simply is to maximize its recovery as a creditor as efficiently as possible, pursuing this goal will affect every aspect of how the case is handled, such as case strategy, staffing, whether to try forms of alternative dispute resolution (mediation or arbitration) and choice of forum (federal versus state court, bankruptcy versus non-bankruptcy court, etc.). Where the client is focused on the goal of maximizing its recovery, the lawyer will understand that economic and commercial considerations will dictate the course of the case, as well as any negotiations that may lead to its resolution. In other words, cost/benefit considerations will govern almost every tactical decision made in the case, so the lawyer constantly should be consulting with the client as to whether a given course of action is desirable to achieve the client's goals.

However, when a client identifies its primary goal as to make a point regardless of recovery (i.e., to vindicate the client's sense of honor or justice in circumstances where the debtor party has abused the client's trust to the client's detriment), it is likely that economic and commercial considerations will not be the main determinants of the course of the case. The challenge for the lawyer and client in such a situation is to agree at the outset about at what point—short of complete victory—enough is enough in terms of the amount of time and effort to spend pursuing the client's goals. Lawyers often are wary of clients who proclaim at the outset of an engagement that "cost is no object" for them on the road to justice, because experience dictates that as the costs of "victory or death" litigation mount, with no clear end in sight and the chances of recovery diminishing and/or nonexistent, the client's resolve may weaken as the client experiences buyer's remorse over the cost of the course chosen. Once this unhappy milestone is reached, fee disputes and other falling-outs between lawyer and client are not uncommon. At the end of the day, no one may be happy with the final result of litigation pursued "just to make a point."

For this reason, having a candid discussion with the client at the outset of a case about its goals and expectations, and the anticipated costs attendant thereto, is of paramount importance. A lawyer representing a creditor in an insolvency-related dispute must recognize that even the most sophisticated client may be upset about the economic fallout from the debtor's failure to honor its financial obligations. The lawyer's challenge is to guide the client to make good choices designed to make the best of a bad situation. Thus, in the infrequent event that a client announces its primary goal is to get revenge or make the debtor's life difficult, it is best to remind the client of the ethical constraints on a lawyer's ability to use the bankruptcy process for "punishment."[2] In addition, this discussion should be recognized as an opportunity to encourage a client to consider whether its goal makes sense. Many clients, following sober reflection, will agree that the costs attendant a strategy focused on retribution are too great, and that instead the only rational approach is to chart a course designed to achieve a meaningful recovery in as cost-efficient a manner as possible.

[2] See, e.g., "Standards for Professional Conduct within the Seventh Federal Judicial Circuit."

A useful question for a lawyer to ask a client in this regard often is "Which goal is more important to you, to try for a meaningful recovery or to get revenge? It is unlikely you will attain both." In most instances, the client will decide it wants to recover the maximum amount possible, rather than extract the "pound of flesh" from the other party. However, and as discussed above, some clients may want to make an example of the other party as a matter of principle, in the perhaps misguided belief that such action will send a message to the marketplace that "you can run, but you can't hide, if you cross us." Fortunately, most financial institutions and creditors do not approach bankruptcy and insolvency disputes in this way because they know they must be prepared to show their owners and regulatory oversight agencies (e.g., the Federal Deposit Insurance Corporation) how and why their litigation strategy is furthering their institution's economic interests. Engaging in a legal battle simply to salve the wounded pride of a financial institution's workout officer usually is not seen as being consistent with the goal of maximizing profits for shareholders.

Educating the Client: Setting Realistic Expectations

The process of helping the client establish realistic goals in a bankruptcy case often depends upon the client and its experience in bankruptcy and insolvency matters. If a lawyer is working with a client that has had little experience with the bankruptcy process, it is very important for the lawyer to help the client understand its rights in the case, whether as a secured creditor (a creditor holding some manner of lien or security interest in assets of the debtor), an unsecured creditor (a creditor without a lien on any of the debtor's assets), or a priority creditor (a creditor granted priority of payment pursuant to 11 U.S.C. §507 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101, *et seq*.). No one can make intelligent decisions without knowledge of the available options, strategies and tactics, and this is no less true in a bankruptcy case than in a football game.

Once the client's role in the case is established, the lawyer should discuss with the client the best strategy to implement the goals previously identified, and how much time or expense pursuing that strategy may entail.

If the lawyer is representing a financial institution with workout officers who previously have been involved in many bankruptcies and insolvency-related disputes, they can be expected to have a good idea of what enforcing the financial institution's rights may entail. Conversely, a client new to bankruptcy likely will not know what to expect, and the lawyer will have to provide more basic instruction regarding the rules, processes, and procedures involved. The lawyer also should help the client understand how to use legal counsel efficiently (i.e., to be a wise consumer of legal services). If a client is allowed to "fire every gun" in a bankruptcy case without regard for the need for—or cost of—doing so, both lawyer and client may be unpleasantly surprised when the bill for such work arrives.

This is especially true when representing unsecured "trade creditors" (those creditors that have supplied goods and services to the debtor on credit prior to the bankruptcy) in a bankruptcy case. A trade creditor's role in a case often depends on the size of its claim relative to those of the other unsecured claims in the case, as well as the likelihood that a meaningful distribution will be realized by unsecured creditors. The U.S. Trustee (an officer of the U.S. Department of Justice, appointed by the President, who acts as a federal watchdog over bankruptcy cases) has the power under the Bankruptcy Code to appoint an official committee of unsecured creditors (the "creditors committee"). See 11 U.S.C. §1102. Typically, the U.S. Trustee solicits interest from those unsecured creditors holding the twenty largest unsecured claims in the case, and then selects from among those willing to serve the seven creditors holding the largest claims. 11 U.S.C. §1102(b)(1). However, where an unsecured creditor that is a "small business concern" within the meaning of the federal Small Business Act can show that its claim in the case is "disproportionately large" in comparison to its annual gross revenue, it can try to force its way onto the creditors committee, despite the relative size of its claim within the context of the larger case. See 11 U.S.C. §1102(a)(4).

The creditors committee's role is to act as the voice of the unsecured creditors in the bankruptcy case, and to this end members of a creditors committee have a fiduciary duty to the other unsecured creditors to act in their best interests (11 U.S.C. §1102(b)(3)), and the creditors committee has the power to retain its own counsel, who will be paid out of the assets of the estate (11 U.S.C. §1103(a)). For this reason, where a client's unsecured claim is not large enough to qualify it for a seat on the creditors committee (as is often the case in large Chapter 11 cases), and where a creditors committee has been appointed and has retained competent counsel, the lawyer's role in the case often will be limited to monitoring developments while allowing the heavy lifting—in terms of battling through the myriad issues of interest to unsecured creditors—to be done by counsel for the creditors committee. This analysis remains valid notwithstanding the U.S. Supreme Court's recent decision in *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. ___, 2007 WL 816795 (March 20, 2007), wherein the court left open for future decision the question of whether unsecured creditors can recover their post-bankruptcy attorneys' fees incurred during the course of the bankruptcy case as part of their unsecured claims. This is because even if such attorneys' fees may be recovered, a creditor practically may only be able to recover a fraction of such fees spent as part of its eventual dividend in the case (e.g., if unsecured creditors only receive ten cents for each dollar of their claim in the case). Thus, the old saw about avoiding throwing good money after bad remains a good rule of thumb for unsecured creditors in Chapter 11.

Nondischargeability Complaints

Having realistic expectations is especially important for clients when pursuing litigation of nondischargeability complaints. As the Supreme Court recently reaffirmed, "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank of Massachusetts*, 549 U.S.___, 127 S.Ct. 1105 (2007) (citations omitted). As the Court observed:

> Both Chapter 7 and Chapter 13 of the Code permit an insolvent individual to discharge certain unpaid debts toward that end. Chapter 7 authorizes a discharge of pre-petition debts following the liquidation of the debtor's assets by a bankruptcy trustee, who then distributes the proceeds to creditors. Chapter 13 authorizes an individual with regular income to obtain a discharge after the successful completion of a payment plan approved by the bankruptcy court. Under Chapter 7 the debtor's non-exempt assets are controlled by the bankruptcy trustee;

under Chapter 13 the debtor retains possession of his property. *Id.*

Thus, obtaining the discharge of debts is the primary reason an individual will seek bankruptcy. The converse of this rule, however, is that where a debtor has defrauded creditors, or has "willfully and maliciously" injured other people – i.e., the debtor is a "bad actor" – the debtor's discharge can be denied. The Bankruptcy Code gives those who have been harmed by such fraudulent or intentional bad acts the opportunity to file a complaint with the bankruptcy court asking that the individual debtor's debt to the creditor not be discharged as part of the debtor's general discharge. See, e.g., 11 U.S.C. §§ 523(a)(2), (4), (6), and (c). Such complaints typically are called "nondischargeability complaints." Where a creditor wins a nondischargeability complaint, the debts that were the subject of the complaint are not discharged, and the creditor may continue to pursue the debtor on such claims notwithstanding the debtor's general discharge. 11 U.S.C. §523(c).

Whenever nondischargeability litigation is contemplated, it is important to remind the client that such litigation can be time-consuming and expensive. For this reason, generally there are two main reasons why creditors will consider pursuing nondischargeability litigation. The first reason is that the "bad actor" debtor is someone with the capacity for significant future earnings (e.g., a professional or someone who already is a person of means or who may inherit wealth). In such circumstances, the reasonable likelihood of a future recovery against the bad actor debtor may justify the time and expense of pursuing the nondischargeability litigation. The second reason is that while the bad actor debtor may be unlikely ever to have sufficient future resources to justify the time and cost of the nondischargeability litigation, what this debtor has done is so outrageous that the client wants to make an example of the debtor either to "send a message to the marketplace," or just to salve the client's sense of indignation and injustice.

In either case, while the client may be willing to chase the debtor to the ends of the earth just to make a point, it is important for the client to understand that even if a significant judgment is obtained against this bad actor debtor, the client may never collect on the judgment, let alone recover any of the costs of obtaining it. Moreover, if the creditor pursues nondischargeability of a "consumer debt" (i.e., "debt incurred by an individual primarily for a personal, family, or household purpose," 11 U.S.C. § 101(8)) and loses, the debtor may recover his or her attorneys' fees and costs from the creditor if the bankruptcy court "finds that the position of the creditor was not substantially justified," unless the court finds that "special circumstances" would make the award of such attorneys' fees and costs against the creditor "unjust." 11 U.S.C. §523(d).

As an illustration of the above points, within the recent past my firm obtained a multimillion-dollar judgment against a bad actor debtor who probably never will have the wherewithal to begin to pay that judgment, but whose actions were so flagrantly outrageous that our client wanted to obtain the judgment as an example and deterrent to others. In cases such as this, it often occurs that the bad actor debtor is left so hopelessly in debt as to be deprived of any incentive to work his or her way out of their financial hole, because this person will be unable to keep any significant portion of what they may earn in the future. In such circumstances, successful nondischargeability litigation may produce the civil financial equivalent for the bad actor debtor of life in prison without the possibility of parole.

Mistakes to Avoid

Experience dictates that clients most often get themselves into trouble in bankruptcy cases by failing to pay attention to the details in their relationships with their debtors during the days, months, and years preceding the filing of the bankruptcy case. Specifically, this includes failing to (1) sign contracts and other important documents, (2) properly perfect and record mortgages and security interests, (3) memorialize in writing understandings and agreements, (4) monitor their accounts receivable ledgers, (5) monitor whether their borrowers are current on their tax payments to federal, state, and local governments, (6) monitor their borrowers' compliance with loan covenants and borrowing base formulae, and (7) make periodic visits to their borrowers' places of business to inspect collateral and verify compliance with reporting requirements.

When a bankruptcy petition is filed, the automatic stay goes into effect pursuant to 11 U.S.C. 362(a). This is a statutory injunction preventing continued collection activity against the debtor or its assets. Obtaining the benefit of this stay is one of the principal reasons individuals and entities file bankruptcy, namely to "get the creditors off my back" by stopping a foreclosure, an eviction, a garnishment proceeding, or an action seeking the appointment of a receiver. Unfortunately, creditors sometimes ignore the automatic stay or figure it does not apply to them. As a result, they run the risk of being held in contempt of court, incurring damages, and having whatever actions they have taken in derogation of the automatic stay being set aside. See 11 U.S.C. § 549.

A creditor usually first learns a debtor has filed a bankruptcy petition by receiving express notification from the bankruptcy court, usually contained in a single-spaced preprinted form entitled "Notice of Commencement of Case Under Chapter ___ of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates." Unfortunately, many creditors do not know what to do with such a bankruptcy notice when it arrives, and it is set aside to be reviewed at a later, more convenient time. This frequently is a major mistake, because the bankruptcy notice contains many important deadlines (e.g., the date of the first meeting of creditors, the bar date for filing proofs of claim, and the deadlines for objecting to the debtor's exemptions and discharge, and for filing nondischargeability complaints). Bankruptcy is intensively deadline-driven, and many of these deadlines can sneak up on a creditor very quickly. All too often, a client will seek assistance of counsel months after receiving a bankruptcy notice, only to learn that most—or all—of the deadlines already have long passed, and with them their ability to preserve their claim. Therefore, creditors who ignore bankruptcy notices do so at their peril.

Therefore, it is ideal if a client approaches counsel within a few days after receiving a bankruptcy notice, but sometimes even that short of a period can be too long. For example, I recently represented one of the larger unsecured creditors in a significant case filed in Wilmington, Delaware (one of the most popular venues for large commercial cases), and—as often occurs in such cases—many of the principal battles were decided within the first forty-eight hours of the case, thereby determining the course of the case. By the time we appeared in the case (about seventy-two hours post-filing), the bankruptcy court had already set a hearing less than a month from the filing date to consider the sale of substantially all the debtor's assets. While this still gave enough time for our client to scrap over the proposed terms of the sale, the fundamental direction for the case had been set in those first few hours. Using this case as an example, if our client had waited five to six weeks to start thinking about what to do in reaction to the filing, our ability to protect its interests at such a late date may have been compromised. Fortunately, this client was sophisticated enough to realize this case required its (and its counsel's) immediate attention, and we were able to help the client react in a timely fashion.

Unique Aspects of Bankruptcy Litigation

Bankruptcy litigation tends to move more quickly, involve a shorter discovery process, get to trial or hearing faster, and be more prone to resolution by a negotiated settlement than other forms of litigation. Bankruptcy litigation typically is high-stakes litigation. Frequently the price of complete victory or defeat for either side is so devastating (often involving the specter of financial ruin for at least one, if not both, of the parties) that there are powerful incentives to reach a commercially reasonable resolution.

Most bankruptcy litigation involves either (1) efforts by creditors to recover assets from the bankruptcy estate or to end contractual relationships with the debtor, or (2) efforts by debtors to recover funds or assets from parties with whom they had pre-bankruptcy relationships and/or who are alleged to be responsible (in whole or in part) for the debtor's financial straits.

Bankruptcy is a zero-sum game. Because there rarely is enough money to satisfy all the creditors, all parties tend to scramble to maximize their advantage and the size of their recovery (something like a high-stakes version of musical chairs). Much of the litigation—especially litigation to recover preferential transfers and/or fraudulent transfers—is almost certain to occur because of the nature of the process. For defendants in preference actions, timing is everything. If the alleged preferential transfer occurred within the ninety days preceding the bankruptcy filing, it is a safe bet that the recipient of the transfer will find itself a defendant in a preference adversary proceeding at some point in the bankruptcy case.

As noted earlier, the most important information any lawyer seeks from a client in any bankruptcy case is what its goal is. This helps the lawyer discuss with the client whether this goal is realistic in light of the circumstances of the case, including the state of insolvency of the debtor and the state of the client's credit and collateral position. The need to resolve the dispute efficiently and on a commercially reasonable basis remains constant across all types of bankruptcy contested matters and adversary proceedings. A positive result occurs when the client is able to achieve the bulk of its realistic goals at a cost that is commensurate with the recovery.

Key Players

The key players in bankruptcy litigation typically include (1) recipients of alleged preferential transfers and/or fraudulent transfers, (2) secured creditors seeking to recover assets from the bankruptcy estate, (3) secured creditors seeking to protect their rights in post-bankruptcy accounts receivable (cash collateral), (4) creditors and debtors litigating the terms of proposed disclosure statements and plans of reorganization, and (5) parties to executory contracts and unexpired leases. Each party typically is trying either to recover that which they assert is theirs or protect from recovery that which they already have.

Stages of a Bankruptcy Litigation Case

Typically there are six main stages in a litigated bankruptcy contested matter or adversary proceeding. Usually the first stage is seeing if litigation can be avoided altogether. This involves negotiation between the adversaries and the exchange of position-paper letters and other documents in an effort by each side to convince the other of the correctness of its position, and to negotiate a compromise that is mutually acceptable (or one with which neither side is entirely happy, which often is the sign of a reasonable compromise).

The second stage occurs after the parties have negotiated to impasse, and it involves the filing of whatever complaints, motions, and so on the parties feel compelled to file to present their respective cases to best advantage before the trier of fact (typically, the bankruptcy court).

The third stage is the preliminary hearing, initial hearing, status conference, or pre-trial conference conducted by the court. It is at this stage that the court, formally or informally, often gives the parties some hints as to how it views the relative merits of the parties' dispute. The court usually encourages the parties to renew their efforts at negotiation.

The fourth stage is where the parties (a) refine their arguments (through further motions and/or pleadings filed with the court) in reaction to the court's comments made at the preliminary hearing, initial hearing, status conference, or pre-trial conference, and (b) engage in more earnest "last ditch" settlement negotiations in an effort to avoid a showdown at which there may be one clear winner and loser. Often, it is at this stage that a matter may settle if it is going to settle prior to forcing a ruling from the court.

The fifth stage is the "go for broke" stage where the parties have determined that settlement is impossible and they each will try their chances before the court. This stage may be prolonged, and it usually culminates in a final trial or hearing that results in a definitive decision from the court.

The sixth stage is the post-judgment or post-hearing stage, where the court has ruled and the winner and loser resume negotiations in an effort to head off an appeal. Often these negotiations will continue throughout the appeal process. Obviously, the ruling of the court—whether it is right or wrong on the law—has a tremendous influence over the course of these negotiations.

Of these stages, the first is the most important, because if you can achieve your client's realistic goals without the expense of litigation—typically by persuading the opponent as to the correctness of your position—you have accomplished much. To paraphrase the Chinese warrior philosopher Sun Tzu, "Supreme excellence consists in breaking the enemy's resistance without fighting."

Unfortunately, adversaries make most of their mistakes at the first stage, due to (1) failure to accurately assess the strengths and weaknesses of their position, both factually and legally, (2) failure to gauge the most effective approach to persuade an opponent as to the merits of their position, and/or (3) failure to separate emotion and personal animus from an analysis of what is in their financial best interests.

To Settle or to Litigate

Preference litigation (where a bankruptcy estate seeks to recover certain payments made to creditors shortly before the filing of the bankruptcy petition, typically payments made within ninety days preceding bankruptcy) and fraudulent transfer litigation (where a bankruptcy estate seeks to recover assets for which inadequate payment allegedly was made during certain periods preceding bankruptcy) often lend themselves to dispute resolution, because there frequently is no real dispute as to the facts or applicable law, with the only variables being the uncertainties as to how a particular court might rule and/or the costs involved in bringing the case to trial.

However, in a case where one party has little to lose by defeat or compromise but everything to gain by victory, a settlement is unlikely to occur short of trial. A classic example of this is if a battle for corporate control occurs within a bankruptcy setting. During my career, I have seen such battles play out in three different scenarios: (1) where a minority shareholder who had filed bankruptcy was seeking to recover shares sold pre-bankruptcy to a majority shareholder in order to recover control of the corporation (and the increased value accorded to "control shares" by the marketplace), (2) where one group of shareholders, who allegedly had drained the corporation of resources prior to its bankruptcy filing, were seeking to gain control of the corporation in bankruptcy in order to prevent the debtor corporation from continuing litigation against them to recover these resources, and (3) where an internal corporate deadlock led one group of shareholders to file a bankruptcy petition on behalf of the corporation, which filing was being challenged by the other shareholders. Since there is no middle ground for control—one either has it or does not—bankruptcy litigation involving issues of corporate control often is lengthy, bitter, and expensive, and usually "fought to the death."

The Importance of Documentation

Whatever the client can do in terms of assembling documents and obtaining information in an organized fashion ultimately will save significant expense in bankruptcy litigation, and may help make the litigation proceed more efficiently. Unfortunately, some clients prefer to dump their disorganized records into the lap of their counsel, leaving the lawyer to decipher what that information means and which of it is important, and this can cause the litigation process to drag out longer than it should. Fortunately, more sophisticated clients try to provide their lawyer with everything he or she needs to hit the ground running in terms of knowing the exact amount of the debt that is owed to the client and the nature of the claim.

When beginning a new engagement, it is typical to ask the client to provide all credit and collateral documents, as well as copies of all salient communications between the client and the debtor. These documents are important because they establish the legal framework of the client's relationship with the debtor. It is always helpful to have all the client's salient documents at the ready, without having to search among multiple offices or make multiple phone calls or e-mails because you suddenly have discovered you have only three of the five documents you need to make your case in court. Most clients are good at timely providing whatever documentation is needed. A few, however, make the lawyer chase down their documentation—which all too often is stored in the proverbial shoebox—and then force their counsel to dig for the relevant evidence (thereby needlessly increasing the cost of the litigation).

Laws Governing Bankruptcy Litigation and Dispute Resolution

The main laws governing bankruptcy litigation include the U.S. Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Evidence, the local district court and bankruptcy rules of court, and the law of the state in which the bankruptcy case is pending (and/or that is applicable to the dispute). See *Butner v. United States*, 440 U.S. 48 (1979) (state law governs property rights of parties in bankruptcy).

Bankruptcy litigation is unique among other types of litigation in that bankruptcy fights almost always take place in specialized federal courts, U.S. bankruptcy courts dedicated solely to consideration of bankruptcy cases, contested matters, and adversary proceedings. Because of this, the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Evidence, and the local district court and bankruptcy rules of court have the greatest influence over the course of bankruptcy litigation and dispute resolution.

Of the rules governing bankruptcy cases, clients most often are confused by (a) the rules governing the recovery of preferential and fraudulent transfers (as discussed briefly above), (b) the automatic stay in bankruptcy (regarding what is and is not permitted, especially as regards negotiation of treatment as a beneficiary under a so-called "critical vendor" motion), and (c) understanding the priority scheme in bankruptcy (i.e., who gets paid when and in what order).

Financial Repercussions of Bankruptcy Litigation

The legal fees incurred with respect to any particular bankruptcy contested matter and/or adversary proceeding will depend entirely upon the specific facts and circumstances of the dispute at hand. The same is true with respect to the apportionment of fees for any particular matter. It depends on where the matter is located, the involvement of local counsel, and the duration and complexity of the matter.

The potential financial repercussions of a loss in a bankruptcy litigation matter for a party can vary from a minor dent in performance for a quarter or a year, to complete financial ruin. Such losses typically are taken out of profits (if any).

Overcoming Challenges in Bankruptcy Litigation

Lack of preparation is the biggest mistake a lawyer can make in bankruptcy litigation. Good preparation involves knowing the law, knowing your facts, knowing your client (and being on the same page tactically and strategically), knowing the strengths and weaknesses of your case, knowing the judge and his or her judicial philosophy, and knowing the opponent and opposing counsel.

The biggest hurdle in representing a client in a bankruptcy matter that is being litigated or negotiated is managing client expectations. Critical to this is understanding the goals to be achieved and the means by which to obtain them (and the costs attendant thereto).

Bankruptcy court is frequently described as the "court of commerce," and the expectation on the part of most bankruptcy judges, as well as most members of the bankruptcy bar, is that commercial considerations rule when the parties are pursuing their interests in disputes. The aggressive pursuit of rational commercial goals is the assumed norm on the part of counsel. Lawyers who are used to litigating in non-bankruptcy courts, but who have little understanding of the underlying business or commercial factors at play in a bankruptcy case, sometimes have difficulty achieving their clients' goals in bankruptcy litigation.

The best piece of advice to give an attorney and/or client embroiled in bankruptcy litigation or dispute resolution is to try to understand what goals realistically can be achieved under the facts and law applicable to the case. This is important, because having this understanding can save wasted time, money and effort, and avoids client disappointment.

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