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Drafting Primer: How to Draft a Plan and Disclosure Statement

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Drafting Disclosure Statements and Plans: Overlooked Mistakes, Key Omissions, and Ways to Avoid Delays and Problems with Your Confirmation Process, or the Impermissible Impairment of Creditor Rights

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Drafting Disclosure Statements and Plans: Overlooked Mistakes, Key Omissions, and Ways to Avoid Delays and Problems with Your Confirmation Process, or the Impermissible Impairment of Creditor Rights

Introduction.

The following are a panoply of drafting considerations – some procedural, many of them substantive, that should be considered by any plan drafter (in this paper, a "***Plan Proponent***"). Moreover, from a creditor's perspective, there are any number of disclosure statement and plan provisions which may seem innocuous, but which impermissibly impair creditor's rights. We urge all readers to have a copy of this paper handy, whether drafting a plan and disclosure statement, or reading it to determine how the rights of your creditor client will be affected.

Part I: Matters Specific to Disclosure Statements.

1. Properly Determine the Time of Filing to Match Your Hearing.

Bankruptcy Rule 2002(b)(1) requires a Plan Proponent to provide **twenty-eight days' notice** of not only the hearing to consider a disclosure statement, but also the objection deadline with respect to the disclosure statement. Fed. R. Bankr. P. 2002(b)(1); *see also* Fed. R. Bankr. P. 3017(a) ("Except as provided in Rule 3017.1 [applicable to small business cases], after a disclosure statement is filed in accordance with Rule 3016(b), the court shall hold a hearing **on at least 28 days' notice** to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto.") (emphasis added).

In addition, where service of the notice of disclosure statement hearing is by mail, three days are added to any applicable deadlines. Fed. R. Bankr. P. 9006(f) ("When there is a right or requirement to act or undertake some proceedings within a prescribed period after service **and that service is by mail** or under Rule 5(b)(2)(D), (E), or (F) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).") (emphasis added). Thus, as most creditors and shareholders will be served by mail, the Plan Proponent must build in three additional days' notice.[1]

- ***Plan Proponent Takeaway***: Seek a hearing at least 35 days after the filing and service of your plan and disclosure statement and notice of disclosure statement hearing. This satisfies Bankruptcy Rules 2002(b) and 3017(a), and provides you with sufficient time to react to objections and revise language to satisfy disclosure objections.

[1] Note that Bankruptcy Rule 9006 was recently amended, however, so that any party served by electronic means no longer has the three additional days' notice of any deadline. *See* Laurie Dahl Rea, "*2015-2016 Federal Civil and Bankruptcy Rules Changes*," Northern District of Texas Bankruptcy Bench/Bar Conference, at pp. 6, 8 (2016) located at http://www.txnb.uscourts.gov/sites/txnb/files/basic/Rules_Changes.pdf.

- ***Creditor Takeaway***: If a Plan Proponent provides less than thirty-one days' notice of the deadline to file objections to a disclosure statement, include in your objection that the hearing was not properly noticed, and the disclosure statement hearing must be continued, or re-noticed to all creditors providing adequate time for parties to file objections.

2. Be Prepared to Disclose More About Liquidating Trustees, Plan Administrators, or the Like.

Liquidating plans can be a favorable way to wrap up a bankruptcy case, freeing the debtor from many of the filing, procedural, and disclosure burdens of the Bankruptcy Code, and simplifying the wind-down process. In *In re Affordable Med Scrubs, LLC*,[2] Judge Whipple of the U.S. Bankruptcy Court for the Northern District of Ohio provided some much needed guidance on needed disclosures on the murky ways in which liquidating trustees are selected, what claims liquidating trustees will pursue, and on what post-confirmation plan oversight committees will do.

Affordable Med Scrubs speaks a lot about required transparency in plans and disclosure statements,[3] but at a minimum, a Plan Proponent should strongly consider the following when first filing a disclosure statement:

- **There Should be a Full Disclosure under Bankruptcy Rules 2014 and 2016**. While a disclosure statement often states who the liquidating trustee / plan administrator will be, it rarely contains any disclosure as to how such parties were selected, nor such parties' "connections" to the debtor, the debtor's professionals, key creditors or creditors' committee counsel, or other parties in interest in the case. The *Affordable Med Scrubs* case rejected the disclosure statement on these grounds; we are in favor of requiring such disclosures about a proposed liquidating trustee or plan administrator, in order to add some transparency to the often murky process of how such critical post-confirmation roles were doled out.

- **The Same Disclosure Must be Made About any "Plan Oversight Committee":** See above – the same rules should apply to all of the members of any Plan Oversight Committees or other parties involved in supervising post-confirmation actions. It is common for the Creditors' Committee or a subset of the Creditors' Committee to be appointed as the Plan Oversight Committee.

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[2] Case No. 15-33448, Bankr. N.D. Ohio, Order Disapproving Disclosure Statement, Docket No. 267 (July 5, 2016).

[3] More about this case can be found at Mark Duedall, "*Some Much Needed Transparency Required on Liquidating Trustees, Liquidating Trusts, Plan Documents, and Other Post-Confirmation Matters*," The Bankruptcy Cave Blog (2016), located at http://bankruptcycave.com/some-much-needed-transparency-required-on-liquidating-trustees-liquidating-trusts-plan-documents-and-other-post-confirmation-matters.

- **The Liquidating Trust Agreement and Other Key Documents Should be Filed with the Disclosure Statement, Not on the Eve of Confirmation:** It is increasingly annoying to have a massive dump of "plan documents" filed 5-10 days before confirmation. (We are told that this is something the Office of the United States Trustee is increasingly objecting to, as well.) The *Affordable Med Scrubs* court was not pleased with the failure of the parties to file the proposed Liquidating Trust agreement with the disclosure statement. This is particularly important as such agreement often has key terms on the authority of the liquidating trustee, fees to be paid to the liquidating trustee and his or her professionals, and other items about which creditors should be aware (some or all of which, such as post-confirmation professional fees, may be shielded from future court or creditor scrutiny altogether, which is very dangerous).

3. Highlight in the Disclosure Statement any Plan Injunctions that Go Beyond the Code.

See Part III.1, *supra*, to ensure that the Plan Proponent includes in the disclosure statement the required highlighting of any plan injunctions (and the entities subject to those injunctions) that go beyond the terms of the Bankruptcy Code.

4. Timing of the Section 1111(b) Election.

If you represent a creditor which is considering making the election under 11 U.S.C. § 1111(b), remember that the deadline to do so is prior to the end of the hearing on the disclosure statement, unless the bankruptcy court sets a later time. Fed. R. Bankr. P. 3014.

- ***Creditor Takeaway***: As soon as a disclosure statement is filed, start getting your client to think seriously about the pros and cons of the Section 1111(b) election, so you can be ready to make it (or decide not to) by the conclusion of the disclosure statement hearing.[4] If that is not enough time – such as if discovery on plan issues may change your strategy – then get a motion on file to extend the time for you to make the Section 1111(b) election.

Part II: Matters Specific to Plans.

1. As with Disclosure Statements, Properly Determine the Time of Filing to Match Your Hearing

As with disclosure statements (*see* Part I.1, *supra*) Bankruptcy Rule 2002(b)(2) requires a Plan Proponent to provide **twenty-eight days' notice** of not only the hearing to consider confirmation

[4] For an outstanding (and readable) summary of the mind-numbingly dense Section 1111(b) election, plus the strategic considerations / pros and cons for both the debtor and the secured creditor, *see* Franklind Lea, Tactical Financial Consulting, LLC, "Quick Reference Sheet: Understanding the § 1111(b) Election," American Bankruptcy Institute (2013) located at http://nebula.wsimg.com/717e3c590c7578d339f90cd1117f2032?AccessKeyId=91A6443C7A367C57DF51&disposition=0&alloworigin=1.

of a plan, but also the objection deadline with respect to the plan. Fed. R. Bankr. P. 2002(b)(2); *see also* Fed. R. Bankr. P. 3017(d) ("In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders **in accordance with Rule 2002(b)** . . .) (emphasis added).

- ***Plan Proponent Takeaway***: As with the disclosure statement seek a hearing at least 35 days after the filing and service of your plan and disclosure statement and notice of disclosure statement hearing. This satisfies Bankruptcy Rules 2002(b) and 3017(a), and provides you with sufficient time to react to objections and revise language to satisfy disclosure objections.

- ***Creditor Takeaway***: If a Plan Proponent provides less than thirty-one days' notice of the deadline to file objections to a disclosure statement, include in your objection that the hearing was not properly noticed, and the disclosure statement hearing must be continued, or re-noticed to all creditors providing adequate time for parties to file objections.

2. Add Post-Petition Creditors to Your Notice List.

An operating Chapter 11 debtor is not static – it continues to do business, including with parties with which it may not have done business pre-petition. Yet there are many plan provisions (including, most importantly, the discharge) which will apply to all creditors as of the effective date of the plan, **not** just creditors that existed as of the petition date. *See, e.g.*, 11 U.S.C. § 1141(d)(1) ("Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan - (A) discharges the debtor from any debt that arose **before the date of such confirmation**, . . .) (emphasis added); 11 U.S.C. § 524(a) (describing operation of discharge, including by reference to Section 1141).

Likewise, a plan (or confirmation order) will often contain an administrative claims bar date or the Plan Proponent may file a separate motion to set an administrative claims bar date. If these documents are not served up on holders of administrative claims which were **not** on the list of creditors filed at the commencement of the case, then such administrative claimants will likely not be bound by the plan, or be subject to the administrative claims bar date.

This applies as well to preservation of claims in a disclosure statement or plan. It does not serve the Plan Proponent well to preserve claims against post-petition creditors (such as claims for voidable post-petition transfers under 11 U.S.C. § 549, or other causes of action) if such parties do not receive a copy of the plan and disclosure statement. *See* Part III.5, *supra*.

- ***Plan Proponent Takeaway***: It is not easy to determine which parties the debtor only started to do business with post-petition. Speak to the debtor's CFO. Consider having a paralegal or secretary go through the monthly operating reports and find creditors which were paid post-petition, but which are not on the creditor matrix filed at the start of the case. **Don't save this work for the end of the case**.

- ***Creditor Takeaway***: If you represent an administrative creditor, neither you nor your client may have gotten notice of the plan or the administrative claims bar date. Check the affidavits of service of the disclosure statement, the plan, the notice of hearing on both of them, and of the confirmation order and/or the order setting an administrative claims bar date. If neither you nor your client is on those lists, then be ready to argue that nothing in the plan or any related orders binds your client.

3. Add a Specific Provision in the Plan to the Effect That All Contract and Leases Not Assumed By the Plan are Rejected as of the Effective Date (or Vice-Versa).

It is very hard to schedule every executory contract and unexpired lease, and if the Plan Proponent tries to include a specific schedule of assumed contracts and leases, and then **also** a specific schedule of rejected contracts and leases, the chances will be good that something will be omitted from both of those schedules. Make sure the plan contains a "bucket" clause pertaining to executory contracts and unexpired leases, providing that all such contracts and leases not expressly scheduled for assumption (or rejection) are assumed (or rejected, if that is what the Debtor wants) as of the effective date of the plan.

4. Include Provisions relating to Minimum Distributions and the Result of Not Timely Negotiating Distribution Checks (But Creditors Should be Wary as to How it Works).

There are several technical takeaways here, all of which are quite simple to draft and include in a plan, and most of which, if the Plan Proponent leaves them out, will cause hassle and money to fix later.

- If a plan calls for periodic distributions, the Plan Proponent should provide a threshold amount for the issuance of a distribution. For example, the plan may provide that distributions do not have to be made if the amount is less than $25.00, unless the distribution represents the final distribution. The costs of issuing lots of small checks can be substantial, and the calls from creditors or accounting departments wondering why they received $2.80 will be annoying, to you and to them.

- In addition, the plan should contain a provision which provides that no future distributions need to be made if a payee fails to timely negotiate a distribution check. This will prevent accounting issues and the continual issuance of distribution checks that are not going to be cashed. However, fairness dictates that any distribution check above a certain amount that is not negotiated deserves a letter and other means of contact from the plan administrator or liquidating agent. It is not too much to ask for the plan administrator or liquidating agent to make a call or two in order to track down a better address or get ahold of someone, before all future distributions are forfeit.

- Be aware of what the plan provides about *de minimis* distributions which are not made, or future distributions that are forfeit due to non-negotiated checks. Do the funds revert to the reorganized debtor (unfair, and creates bad incentives on the part of the reorganized debtor) or the secured lender (even more unfair)? Absent compelling reasons, the plan

should specifically provide that any distributions which are *de minimis* or forfeited due to non-negotiation, must return to the pool for the next distribution.

- The Plan should also contain a provision for any final unclaimed property – such as final distributions checks that, for some reason, are not negotiated. New proposed local rules from the Bankruptcy Court for the Southern District of New York require such a plan provision.[5] These proposed local rules also state that any final remaining *de minimis* assets may be donated to a specified not-for-profit, non-religious charity, upon motion by the plan administrator (or similar appointee) and after notice and a hearing.[6]

5. Specifically List all Claims Reserved Under the Plan.

Section 1123(b)(3)(B) of the Code provides that:

> (b) *Subject to subsection (a) of this section, a plan may—*
>
> (1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
>
> (2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
>
> **(3) provide for—**
>
> (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
>
> **(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest.**

11 U.S.C. § 1123(b)(3)(B) (emphases added).

However, the plan must specifically identify and preserve such causes of action. *See, e.g.*, *Dynasty Oil & Gas, LLC v. Citizens Bank (In re United Operating, LLC)*, 540 F.3d 351, 355 (5th Cir. 2008) (standing to bring claims post-confirmation preserved only if the plan expressly provides for the "retention and enforcement [of claims]" and "the [p]lan expressly retains the right to pursue such actions.")

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[5] See Proposed Local Rule 3011-1, Bankr. S.D.N.Y, located at http://www.nysb.uscourts.gov/sites/default/files/LocalRules2016_ForPublicComment.pdf.

[6] As strong ABI proponent Chris Ward has reminded us, the ABI Endowment is an ideal charity for any leftover plan distributions or other assets that are unclaimed under a plan! *See* https://twitter.com/PolsinelliDE/status/780817353986699264.

The language in the plan must be "specific and unequivocal." *Dynasty Oil*, 540 F.3d at 355; *Harstad v. First Am. Bank*, 39 F.3d 898, 902–03 (8th Cir. 1994). A blanket reservation is inadequate to preserve causes of action that are not identified specifically. *Dynasty Oil*, 540 F.3d 351, 356 (5th Cir. 2008).[7] *See also Browning v. Levey*, 283 F.3d 761 (6th Cir. 2002); *D & K Properties Crystal Lake*, 112 F.3d 257 (7th Cir. 1997); *Harstad v. First American Bank*, 39 F.3d 898, 902 (8th Cir. 1994); *Kelley v. South Bay Bank (In re Kelley)*, 199 B.R. 698 (9th Cir. BAP 1996).[8]

However, if the plan only identifies the claims generally, specific disclosure in the disclosure statement may be sufficient. *Katz v. I.A. All. Corp. (In re I. Appel Corp.)*, 300 B.R. 564, 570 (S.D.N.Y. 2003), *aff'd*, 2004 WL 1496858, at *1 (2d Cir. 2004).

6. Post-Confirmation Jurisdiction.

Plan Proponents generally include a section that defines the post-confirmation jurisdiction of the bankruptcy court, *e.g.* to resolve disputes regarding the operation and interpretation of the Plan and Confirmation Order, to determine and enter order and judgments with respect to any claims, or causes of action held by the post-confirmation debtor or liquidating trustee and to determine and enter orders and judgments with such other matters and for such purposes as may be provided in the Plan and Confirmation Order. However, all Plan Proponents need to be aware of a generally more stringent (and stingy) approach to limited post-confirmation jurisdiction, even where a plan purports to preserve post-confirmation jurisdiction over matters that will arise after the plan is confirmed. Here are two examples, from opposite coasts:

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[7] For a very good discussion of the *Dynasty Oil* case and other courts' approach to the requirements for specific vs. general language reserving claims in a plan and disclosure statement, *see* Susan E. Trent, "*Plan Drafting Requirements Pursuant to § 1123 (b)(3)(B) Tackled*," February 2013 ABI Journal.

[8] It is still the law in some circuits that a general reservation of claims in the plan is sufficient. *See Kmart Corp. v. Intercraft Co. (In re Kmart Corp.),* 310 B.R. 107, 124 (Bankr. N.D. Ill 2004); *JPMorgan Trust Co. v. Mid-America Pipeline Co.,* 413 F. Supp. 2d 1244, 1249 (D. Kan. 2005); *Fleet National Bank v. Gray (In re Bankvest Capital Corp.)*, 375 F.3d 51 (1st Cir. 2004). However, even these cases are somewhat confusing in terms of how much "specificity" a "general reservation" should be (as these terms seem to be mutually exclusive). *See In re Ampace Corp.*, 279 B.R. 145, 160 (Bankr. D. Del. 2002) (finding that "a general reservation in a plan of reorganization indicating the type or category of claims to be preserved should be sufficiently specific to provide creditors with notice that their claims may be challenged post-confirmation"). Other courts have taken a more middle ground approach, based on the nuances of the language of the Plan and the procedural history of the bankruptcy case. *See Elk Horn Coal Co., LLC v. Conveyor Mfg. & Supply, Inc. (In re Pen Holdings)*, 316 B.R. 495, 504 (Bankr. M.D. Tenn. 1994).

- In *SCI Real Estate Investments, LLC*,[9] Judge Saltzman of the U.S. Bankruptcy Court for the Central District of California, citing among other cases *Hartford Underwriters Inc., Co. v. Union Planters Banks N.A.,* 530 U.S. 1,6, 8 (2000), held that the bankruptcy court had no post-confirmation jurisdiction to approve the sale of assets of a liquidating trust because the assets transferred into the liquidating trust pursuant to the Plan and were no longer property of the estate. **This ruling was despite that the Plan gave the liquidating trustee the right to sell assets post-confirmation and that the Plan provided that the court retained jurisdiction over the Plan.**

- In *Gavin/Solmonese, LLC v. Shyamsundar (In re AmCad Holdings, LLC)*,[10] a plan created a liquidation trust which was assigned certain estate assets, including causes of action. Five months after confirmation, the Liquidation Trustee brought an adversary proceeding against some prior managers and officers of the debtor, including three counts asserting defendants breaches of fiduciary duty. The defendants moved to dismiss the fiduciary claims for lack of subject matter jurisdiction. The Liquidation Trustee asserted the Court had jurisdiction over the breach of fiduciary claims under the plan's provisions for retention of post-confirmation jurisdiction over "Causes of Action", which were defined in a very broad and inclusive (but annoyingly general) manner. The plan had no specific retention of claims for breach of fiduciary duty. In dismissing the fiduciary claims, the Court noted that its post-confirmation jurisdiction over non-core but related matters was narrow, and limited to matters that had a close nexus to the plan. The Court reasoned that while a Chapter 11 plan that retains jurisdiction over a specific cause of action generally satisfies this nexus, a wholesale assignment of causes of action to the post-confirmation trust did not.[11]

In short, Plan Proponents need to be keenly aware of how they draft their post-confirmation jurisdiction clauses. And even a broad reservation of post-confirmation jurisdiction to the Bankruptcy Court may still be challenged. *See Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994) (the bankruptcy court cannot write its own "jurisdictional ticket.").

7. Think Hard About Satisfying § 1129(a)(9)(A).

Section 1129(a)(9)(A) of the Bankruptcy Code requires that administrative claimants receive "on the effective date of the plan . . . cash equal to the allowed amount of such claim." 11 U.S.C. §

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[9] Case No. 11-15975, Bankr. C.D. Cal., Tentative Ruling and Bench Ruling (June 18, 2014).

[10] Adv. Proc. No. 15-51979, Bankr. D. Del, Opinion and Order of Dismissal (June 15, 2016) (Walrath, J.).

[11] More about this case can be found at James Maloney, "*Losing Both Ways: Debtor Diligence in the Identification of Claims*," The Bankruptcy Cave Blog (2016), located at http://bankruptcycave.com/losing-both-ways-debtor-diligence-in-the-identification-of-claims/#1228494-v2-Blog_Jim_Maloney_on_GM_and_AmCad_Cases.docx.

1129(a)(9)(A). However, often certain administrative claims are not fully liquidated when confirmation is being pursued.

- ***Creditor Takeaway 1***: If your client holds an administrative claim that is not yet liquidated, or disputed, consider filing a plan objection requiring funds to be reserved for the full amount of your administrative claim.[12] *See In re Mcorp Fin., Inc.*, 160 B.R. 941, 963 (S.D. Tex. 1993) (confirming plan, but only after finding there would be sufficient funds in the administrative claims reserve for all likely administrative claims); *In re Wiston XXIV L.P.*, 153 B.R. 322, 328 (Bankr. D. Kan. 1993) (where the debtor did not establish an ability to pay an administrative claim that *may* arise for use of cash collateral under 507(b) and 361, the court held that the debtor's plan violated Section 1129(a)(9)(A) and Section 1129(a)(11) of the Bankruptcy Code); *In re Vermont Stove Co.*, 69 B.R. 87, 89-90 (Bankr. D. Vt. 1987) (emphasizing that Section 1129(a)(9) does not compel the holder of a priority claim to accept anything less than full cash payment); *In re Oak Partners, Ltd.*, Case No. 89-00948, 1992 Bankr. LEXIS 784, at *9 (Bankr. N. D. Ga. Mar. 6, 1992); *cf. In re ACE-Texas, Inc.*, 217 B.R. 719 (Bankr D. Del. 1998) (in a dispute as to whether the debtor would have to pay interest at the default rate to two oversecured creditors under Section 506(b) of the Bankruptcy Code, the plan established a claim reserve containing the **full amount** of default interest at issue, plus three years' worth of **additional** default interest on that interest, in the event the litigation took that long, **plus** attorney's fees for the oversecured creditors, in the event they were to succeed in their arguments on default interest).

- ***Creditor Takeaway 2***: Plan Proponents will often try to impose a "cap" on the total amount of administrative claims for which the post-confirmation debtor is liable. In our experience, this is often done to preclude professional fees, such as where the Plan Proponent is a creditor and it wishes to limit the fees of the debtor's counsel or its financial advisor. Such caps are impermissible. Whatever the allowed administrative claims are, the post-confirmation debtor must pay them in full. *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 174 (Bankr. D.N.J. 2010) ("The Code does not permit a plan to cap the amount to be paid toward administrative expenses without the consent of the claimants." (citing cases).

- ***Plan Proponent Takeaway***: If the debtor's exit financing shows ample liquidity to cover all unliquidated and disputed administrative claims, then you can likely successfully oppose this request for a specific reserve. *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944 (2d Cir. 1993). However, be ready to offer evidence of the estimated amount of the unliquidated and disputed administrative claims, so that the court can make specific findings that the exit financing will be sufficient in light of the expected amount of administrative claims. *See generally Bittner v. Borne Chemical Co.,* 691 F.2d 134, 136 & n.2 (3d Cir. 1982) (a lower court must show the method it used to estimate a claim, and make factual findings to support its estimation); *cf. In*

[12] A sample objection of this kind can be obtained by contacting Mark Duedall, one of the authors (contact information at the front of this article).

re Forty-Eight Insulations, Inc., 115 F.3d 1294 (7th Cir. 1997) (interpreting a confirmed plan to allow a liquidating trustee to establish reserves for disputed or estimated claims, but holding that the trustee must have a reasoned basis to support his decision on the proper reserve amount).

8. Be Careful About Any Provisions that Speak to the Termination of the Stay.

By operation of the Bankruptcy Code, the automatic stay ends when a plan becomes effective and the discharge is in place. 11 U.S.C. § 362(c)(2)(C) ("the stay of any other act under subsection (a) of this section continues until the earliest of . . . the time a discharge is granted"). In other words, be very careful about any plan provisions which speak to how the stay expires, or whether it will continue. The Code provides all the mechanism you need to bring the stay to an end. Monkeying around with this can have unintended effects.

That being said, if there are any special or specific injunctions that were entered during the case, think about whether you want them to remain in place. To that end, consider adding the following provision to your plan:

> **Term of Injunctions or Stays.** Unless otherwise expressly provided herein or in a Final Order, all injunctions or stays arising entered during the Chapter 11 Cases under section 105 or 362 of the Bankruptcy Code, or otherwise (other than the automatic stay of section 362 of the bankruptcy Code), shall remain in full force and effect until the closing of the Chapter 11 Cases.

9. Be Careful of the Definition of a "Final Order."

Many plans contain, inexplicably, a definition of a "final order" that requires an order to be no longer subject to appeal, reconsideration, or subject to a petition for *certiorari*. This is very dangerous.

- ***Plan Proponent Takeaway***: If the Plan Proponent expects that anyone will object to professional fees, this could be a real problem. If professional fees are allowed, resulting in the fees (or any holdback accrued during the case) being approved by court order, those fees still cannot be paid if the objecting party takes an appeal. That is, most plans provide that allowed claims or allowed professional fees can be paid upon entry of a "Final Order." **But if the definition of a "Final Order" requires that the subject order no longer be subject to appeal, then the claim or fees at issues may not be able to be paid for months or even years** – as long as the appeal or appeals remain pending.

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- ***Creditor Takeaway***: Likewise, if you think your client may have a claim to which there will be an objection, a restrictive definition of a "Final Order," requiring the order to no longer be subject to appeal, could delay payment to your client for an excessively long period of time, even after successful allowance of the claim by the Bankruptcy Court.

10. Know Your Jurisdiction.

With respect to every point in this paper, and every other point covered by the plan, know your jurisdiction. Courts vary widely on permissible plan provisions, and including provisions in your plan that do not pass muster under applicable local law will draw immediate objection, and will make the Court and other parties far more suspicious and critical of your drafting.

Part III: The Discharge and Plan Injunctions.

1. Providing Notice of (and Emphasizing) the Terms of Any Plan Injunctions, in the Disclosure Statement, the Plan, and in the Notice of Confirmation Hearing.

Bankruptcy Rule 3016(c) requires that any injunction against conduct not otherwise enjoined under the Code that is contained within a plan and disclosure statement must describe in specific and conspicuous language (bold, italic or underlined texts) any acts to be enjoined **and the entities subject to the injunction**. Fed. R. Bankr. P. 3016(c). Specifically:

- ***Plan Proponent Takeaway 1***: This does not just apply to third party injunctions, but also standard exculpation clauses. *See SE Property Holdings, LLC v. Seaside Engineering & Surveying, Inc. (In re Seaside Engineering & Surveying, Inc.)*, 2015 WL 1061718, at *4 (11th Cir. Mar. 12, 2015) (applying the Sixth Circuit's stringent *In re Dow Corning Corp.,* 280 F.3d, 648 (6th Cir. 2002) seven-factor test for determining whether to approve a standard plan exculpation clause that would enjoin a non-consenting creditor's claim against a non-debtor).

- ***Plan Proponent Takeaway 2***: Make sure both the **plan and the disclosure statement** use appropriate highlighting of any injunctions that extends beyond what the Bankruptcy Code specifically permits.

- ***Plan Proponent Takeaway 3***: Do not think that a Plan Proponent can comply with these rules simply by highlighting the specific plan discharge, injunction, and exculpation provisions. Instead the Plan Proponent must draft language that **describes** the injunctive provisions, and **identifies** the various entities that will be subject to the injunctions. Fed. R. Bankr. P. 2002(c)(3). Take a few minutes and draft additional language for your documents that describe how these provisions work, what they are intended to enjoin, and the types of parties that are to be enjoined.

- ***Plan Proponent Takeaway 4***: Make sure your **notice of confirmation hearing also** contains the requisite language and a description of any injunction that is not otherwise

provided for in the Bankruptcy Code, and **identifies** the entities subject to an injunction. Fed. R. Bankr. P. 2002(c)(3). Bankruptcy Rule 2002(c)(3) provides as follows:

> (3) *Notice of Hearing on Confirmation When Plan Provides for an Injunction*. If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the notice required under Rule 2002(b)(2) [that is, the notice of deadline to file objections and of the confirmation hearing] shall:
>
> (A) include in conspicuous language (bold, italic, or underlined text) a statement that the plan proposes an injunction;
>
> (B) describe briefly the nature of the injunction; and
>
> (C) identify the entities that would be subject to the injunction.

- ***Plan Proponent Takeaway 5***: Don't forget to provide that same notice to parties that are **not** creditors or equity security holders. Fed. R. Bankr. P. 3017(f). Bankruptcy Rule 3017(f) provides as follows:

> (f) NOTICE AND TRANSMISSION OF DOCUMENTS TO ENTITIES SUBJECT TO AN INJUNCTION UNDER A PLAN. If a plan provides for an injunction against conduct not otherwise enjoined under the Code **and an entity that would be subject to the injunction is not a creditor or equity security holder**, at the hearing held under Rule 3017(a), the court shall consider procedures for providing the entity with:
>
> (1) at least 28 days' notice of the time fixed for filing objections and the hearing on confirmation of the plan containing the information described in Rule 2002(c)(3); and
>
> (2) to the extent feasible, a copy of the plan and disclosure statement.

In short, stop and **seriously think about <u>every entity</u> that may wish to pursue a claim against any party that you wish to protect with a plan injunction** – government entities? Future claimants? Co-Defendants in litigation that have not yet asserted any cross claims? – and consider a way to provide them with notice of the plan, the objection deadline for the plan, and a copy of the plan and disclosure statement.

- ***Plan Proponent Takeaway 6***: As noted above (*see* Part II.6, *supra*), bankruptcy courts are becoming far more restrictive in their view of post-confirmation. For that reason as well, a Plan Proponent needs to think very seriously about the likelihood that another court, lacking the context or knowledge about the case, will be interpreting the terms of a plan injunction. For that reason, all Plan Proponents should draft any plan injunction very carefully, and consult one or more colleagues about the selected language, parties to include or exclude, and other matters that can help (or hurt) with scope and clarity.

- ***Creditor Takeaway***: If the Plan Proponent fails to comply with these provisions, consider whether it is strategically better to file a motion to continue the confirmation hearing (as creditors will not have received proper notice of the injunctions or their scope).

2. Using the Discharge to Eliminate Creditor Setoff Rights, Defenses, and the Like.

This one is a real trap for creditors. A plan's discharge provision, and the plan injunction, will almost always, **completely impermissibly**, seek to eliminate rights of setoff and recoupment. Setoff and recoupment rights survive bankruptcy. *See United States v. Continental Airlines (In re Continental Airlines)*, 134 F.3d 536, 541 (3d Cir. 1998) (where rights of setoff timely asserted by the creditor, such rights will be enforceable post-confirmation despite a debtor's discharge under plan); *Carolco Television Inc. v. National Broadcasting Co. (In re De Laurentiis Entertainment Group Inc.)*, 963 F.2d 1269, 1276, (9th Cir. 1992) ("We conclude that section 553 must take precedence over section 1141."); *see also Haizlett v. United States (In re Haizlett)*, 261 B.R. 393 (Bankr W.D. Pa. 2000) (citing cases); *cf. Folger Adam Security. Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 261 (3d. Cir. 2000) ("[W]e have likewise held that the right of recoupment is a defense, not a claim.").

Likewise, if your client has a counterclaim to a claim the debtor is asserting against your client (which is often the case if the debtor has sued your client, or has indicated that it may sue your client in the future), then this counterclaim can give rise to a right of setoff or recoupment.

- ***Creditor Takeaway 1***: If your client has any rights of setoff or recoupment, you must ensure the plan does not discharge or otherwise limit those rights, and if the plan contains such limits, then you need to file an objection to such plan provisions.[13]

- ***Creditor Takeaway 2***: Recall that **the discharge applies to all claims that arose <u>prior to confirmation</u>, not just pre-petition claims**. *See* 11 U.S.C. § 1141(d)(1)(A) ("Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—(A) discharges the debtor from any debt that arose **before the date of such confirmation** . . . ") (emphasis added). Thus, be particularly mindful of any post-confirmation setoff or recoupment rights that may have arisen.

- ***Creditor Takeaway 3***: Be aware of this especially if your client has an on-going business relationship with the debtor (such as a supplier or other vendor) that calls for periodic rebates, chargebacks, or other monetary rights that your client can assert against the debtor, or use to setoff amounts that it owes the debtor (such as when **your client is being supplied with goods or services by the debtor**). Often, your client will be entitled to a year-end rebate or reduction in the amount it owes to the debtor. But if the plan's discharge and injunction provisions preclude setoff or recoupment rights as of the

[13] A sample objection of this kind can be obtained by contacting Mark Duedall, one of the authors (contact information at the front of this article).

confirmation date, your client could be waiving those valuable monetary rights through improperly drafted discharge provisions.

3. Do Not Include a Discharge Provision in a Liquidating Plan.

A liquidating debtor does not obtain a discharge. 11 U.S.C. § 1141(d)(3) ("The confirmation of a plan does not discharge a debtor if — (A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under section 727(a) [that is, if the debtor is not an individual]."). The Plan Proponent should never include a discharge provision in a liquidating plan – the Office of the United States Trustee will likely object, and most bankruptcy judges will catch this error as well. Worse, the court may start to wonder what other improper provisions the Plan Proponent may have included, and the plan will obtain even more court scrutiny.

Part IV: General Matters of Drafting.

Most of the items below are matters of form and not essential, but these rules, if followed with make your documents better, and will save you substantial time (and save your clients substantial money) during the process. Other of these rules will prevent your document from looking sloppy. Finally, other of the rules below will prevent opposing counsel from learning things they should not learn (such as how many versions a document has gone through). Follow these rules, and learn the word processing techniques necessary to implement them (or train your secretary to do so).[14]

1. Do Not Use a Confirmed Plan from Another Case as Your Form or Starting Point, Unless You Were the Primary Drafter of that Document.

When a Plan Proponent starts drafting from another party's plan, **the following mistakes are virtually certain to occur**:

- The Plan Proponent has now implicitly adopted whatever language compromises were reached in order to resolve objections or issues in that prior plan. Most of those probably have nothing to do with the case at bar.

- Worse, the Plan Proponent that starts from another confirmed plan that contains language that may be far too beneficial to one creditor group or another.

- If the prior plan is from another jurisdiction, it likely contains provisions that will not pass muster in the jurisdiction of the existing case.

[14] Many of these rules apply to all types of documents, and can be used to improve drafting and appearance of anything else you may prepare in a bankruptcy case.

In short, start with a plan **you** have worked on before. Ideally, one in which you have played a substantial drafting role, but if not, it is still better to start with a plan that you are already familiar with. And go back to the originally filed version of that plan – the final one will have too much compromised language. After that, think critically about each plan provision, especially the defined terms which can include (or exclude) many effects of the substantive plan provisions.

2. Check Your Defined Terms Before Filing.

It is sloppy, and can give a hint to opposing counsel of prior structures or plan constructs, to include defined terms in a plan that are not used in the plan. Prior to filing a plan, use the word processing "search" function to look for each term you define in the Plan. If it is not used, remove the definition. Likewise, with your disclosure statement.

3. Leave the Version Number Off Your Documents.

Most law firm word processing systems will include a version number after your document number. **Never** include the version number on any document filed with the Court, or circulated to other counsel. Neither the public nor opposing counsel has any business knowing how many versions the document went through. However, if you are circulating an interim draft, either to your side or to opposing counsel, and a reference point is needed to distinguish the document from prior versions, then you should add a header, such as "***[Your Law Firm Name] Draft – 9/19/2016***."

4. Avoid MS Word's "Track Changes" Function, Except for Minor Changes.

MS Word's track changes function is very handy for small changes, but very risky for wholesale markups. It can be hard to tell who made the changes (someone on your side of the drafting table, or someone on the other side). Things become highly confusing when successive drafters make changes to the items that are tracked – very quickly, no one can figure out who made a revision, or who removed or altered that revision, and the integrity of the document will be very much in risk.

If making any more than a few changes, make them in a new version, in clean, and send the other side the clean and redline version.

5. Run Your Own Redline – You Cannot Trust the Other Side Not to Have Made Other Changes.

This one is unfortunate, but your authors assure you that is happens. Specifically, the other side can send you a new clean and redline. However, they may have made changes to the document in its current version, surreptitiously hoping that you will not notice those since they do not appear in the redline they send back to you.

In short, the other side can make changes to your document that you do not realize. The only way to protect against this is by taking the clean they send you, and running a redline of that against your last clean document. This should always be done – there is no other way to be sure of what changes are in the document.

6. Use Automatic Numbering and Automatic Cross-References.

Always use the automatic paragraph and section numbering features. Use of these features will avoid mistaken cross-references (which can create ambiguities, and can cause an embarrassing conversation with your client about typographical errors and their effect). Use of these features will also save you a great deal of time (and save the client a great deal of money) as your documents undergo changes – especially those critical, last minute changes that are made when everyone is in a rush. Likewise with automatic cross-references – most secretaries can do this quite easily given a few hours with the document, and once the automatic cross-references are done correctly, they rarely (if ever) require any further attention.

If for some reason you are not using automatic numbering and automatic cross-references, but you need to add (or remove) a section just before filing, take a tip from your corporate colleagues. Either (i) replace the language to be removed with "Reserved," leaving the section in place so that your cross-references do not need to be re-checked, or (ii) if adding a new section or numbered definition, call it Section 4.5A, or Definition 82A, such that you are not adding a new section that will through off your cross-references.

7. Clearly Mark Open Items in any Draft.

Help your reader (which is often a colleague, or a client) as he or she goes through drafts. [15] Any open items, blanks, sections that require attention, or the like should be by putting matters in [[**double** brackets and highlighted]]. For instance:

- At the time of default, the Debtor owed [[$17.34 million]] on the Note.
- [[Need to verify timeline with the client.]]

[15] "[T]he reader [is] in serious trouble most of the time, a man floundering in a swamp, and it [is] the duty of anyone attempting to write English to drain this swamp quickly and get his man up on dry ground, or at least throw him a rope." William Strunk Jr. and E.B. White, "*The Elements of Style*," at p. 7 (1979).

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8. Include "Notes to Draft."

When a reader is reviewing your draft, he or she cannot be inside your head, and will not know what your thinking was at the time of drafting. Likewise, don't count on your memory (or the post-it notes strewn around your desk) to recall how a section of the plan or disclosure statement may require further consideration, or how such provisions may interact with other sections of the document. Wherever necessary or in any way helpful, include, **in the body of the document**, notes such as this:

- [[Note to Draft from [Your Name]: this section may need to be re-worked depending on how we revise the plan injunctions.]]

- [[Note to Draft from [Your Name]: this section was taken from the 3Q 2015 10-Q, which various people have said may have been wrong.]]

MS Word has a feature in which you can add notes in the margin, which some believe is not as good, as it can be hard to print the document out actually showing those notes, and the feature can sometimes be unclear as to who has included that note.

9. Customize the Footer on Your Signature Pages.

Do not have a client (or any other party) sign a page for you to affix to the plan or disclosure statement (or any other document, for that matter). It is far too easy, when disaster later happens, for the signing party to state that s/he did not know what s/he was signing, or s/he did not know you were affixing it to a given document. A Plan Proponent can also get in serious trouble simply "taking" a signature page for a prior version of the document and affixing it to the next version. At a minimum, put a custom footer on your signature page (your secretary will know exactly how to do this) stating what it is, such as "Signature Page to Third Amended Plan of Reorganization."

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ABI EXCLUSIVE

SEPTEMBER 6, 2022

Judge Predicts Seventh Circuit Wouldn't Halt Earplug Lawsuits Against Nondebtor 3M

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> Judge Graham in Indianapolis sees the Seventh Circuit as interpreting 'related to' jurisdiction narrowly and not inclined to halt lawsuits against nondebtors without a direct effect on the bankrupt estate.

Betting that the Seventh Circuit would create a circuit split on the facts of the case before him, Bankruptcy Judge Jeffrey J. Graham of Indianapolis refused to expand the automatic stay to cover 3M Corp., the nondebtor parent of a company in chapter 11 dealing with the largest mass torts ever to hit the federal courts.

Judge Graham's August 26 opinion could be read to mean that he might have protected the nondebtor parent with an expanded stay had pre-filing financial arrangements been written differently.

Beginning in 2000, the debtor made earplugs for the military. 3M acquired the debtor in 2008. Two years later, the debtor's businesses were "upstreamed" to 3M in return for a $965 million payable to the debtor. Judge Graham said that 80% of the sales of the earplugs occurred before the upstreaming. He said it was "unclear" whether 3M assumed any liabilities as part of the upstreaming.

In settlement of a *qui tam* action, 3M paid $9.1 million to the government on account of allegedly defective earplugs.

Then, the lawsuits began. By the time the debtor filed a chapter 11 petition in late July, there were 290,000 claims covered by multidistrict litigation in Florida, where the debtor and 3M are co-defendants. In addition, Judge Graham said there are 2,000 more suits in state court in Minnesota, where 3M is headquartered.

The debtor, by the way, is also a Delaware corporation like 3M but is headquartered in Indianapolis.

Judge Graham said that the multidistrict litigation is the largest in history and represents 30% of all civil cases currently pending in federal courts.

There already have been several bellwether trials. 3M and the debtor won six of them, but the plaintiffs won 12, yielding verdicts ranging between $1.7 million and $77.5 million.

Before the subsidiary's chapter 11 filing, independent directors for the debtor negotiated a financial arrangement with 3M. The complex arrangement committed 3M to a $240 million fund for the chapter 11 process plus an uncapped commitment to fund a trust to cover claims.

The debtor is obligated to indemnify 3M for whatever it spends, but the debtor can cover its liability by drawing funds from 3M. Judge Graham said that the "net effect to [the debtor] is zero."

The P.I. Motion

On filing in chapter 11, the debtor began an adversary proceeding and sought a preliminary injunction. The debtor wanted Judge Graham to rule that the Section 362(a) automatic stay covered 3M or, alternatively, that the debtor wanted Judge Graham to protect 3M with an injunction made under Section 105(a).

Claimants objected to an expansion of the automatic stay. Judge Graham denied the initiative in a 37-page opinion.

Before delving into the merits, Judge Graham said the chapter 11 is not "the *only* avenue" for achieving a "global settlement." [Emphasis in original.] He also said that he was not deciding whether the chapter 11 filing was in good faith.

The debtor and 3M are also facing a separate spate of lawsuits alleging that respirators made by the debtor were defective. The respirator lawsuits are substantial but pale in comparison to the earplug suits. Judge Graham barely mentioned the respirators.

By the way, the 3M parent was not a party in the debtor's attempt at halting lawsuits against it.

Section 362(a)(1)

First, Judge Graham dealt with the debtor's contention that Section 362(a)(1) automatically stopped lawsuits against the parent. The section halts the commencement or continuation of actions against the debtor.

Working from the proposition that the automatic stay "generally protects only the debtor," Judge Graham said he was "reluctant to conclude that Section 362(a)(1), standing alone, offers sufficient statutory authority to conclude that the Pending Actions are stayed automatically as to 3M or to extend the protections of the stay to 3M."

Citing the Fourth Circuit's 1987 decision in *A.H. Robbins*, Judge Graham admitted "there is ample case law holding otherwise."

Bound by precedent from the Seventh Circuit, Judge Graham said that his court of appeals "has not, to date, expansively discussed or formally adopted *A.H. Robbins* in this regard.... Nor has the Circuit actually extended the stay to a non-debtor party under that reasoning."

"Without more guidance from the Seventh Circuit," Judge Graham declined to extend Section 362(a)(1) to cover 3M.

Section 362(a)(3)

Next, Judge Graham turned to Section 362(a)(3), which bars "any action" to obtain property of or from the estate. It is "broader than just the debtor," the judge said, and entails a two-step analysis. First, is property of the estate at issue, and, second, does the action threaten to obtain or exercise control over estate property?

Judge Graham assumed that insurance policies held by the debtor and 3M were estate property. On the question of obtaining property of or from the estate, he saw "no evidence" that the claimants were "proceeding directly against the insurance policies."

Judge Graham next analyzed whether the suits were an indirect attempt at glomming the insurance policies. He found no violation of Section 362(a)(3) because the funding agreement signed just before bankruptcy means that "3M will fully fund any liability incurred" by the debtor. Given the uncapped backstop by 3M, tapping insurance policies would not affect how much creditors receive or cause an inequitable distribution among creditors.

Section 105(a)

The debtor was left with arguing that Judge Graham should expand the stay to cover 3M under Section 105(a), which gives the court power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

Citing the Seventh Circuit, Judge Graham said that the court may stay actions that may affect the amount of property in the bankrupt estate. But first, he said, the court must have "related to" jurisdiction to stay lawsuits pending in state court and in the multidistrict litigation.

Regarding "related to" jurisdiction, Judge Graham said that the Seventh Circuit has taken a "more constrained approach" and said that it must be interpreted "narrowly." Again citing the Seventh Circuit, he said that "related to" jurisdiction requires "a direct effect" on either the estate or the distribution to creditors.

Looking for a direct effect on the estate, Judge Graham discounted the debtor's obligation to indemnify 3M because the funding agreement "provides for an uncapped, non-recourse commitment from 3M to fund all of the [debtor's] liabilities" and was not conditioned on obtaining a stay to protect 3M. He was therefore "unable to discern any financial impact to creditors."

"A number of other courts have extended the stay notwithstanding the existence of an uncapped funding agreement," Judge Graham said. "Respectfully, this Court cannot follow suit," because the Seventh Circuit instructed courts to focus "on the *actual* economic effect" that continuation of the suits would have on the estate. [Emphasis in original.]

Judge Graham gave short shrift to the idea that continuation of the suits would be a "'significant' distraction." He put "little stock on this claim."

In short, Judge Graham saw no "related to" jurisdiction that would enable him to issue an injunction under Section 105(a). Even if there were jurisdiction, he said he "would reach the same conclusion" because a stay under Section 105(a) "should issue only in extraordinary circumstances" necessary to carry out other provisions of the Bankruptcy Code.

At the end of his opinion, Judge Graham admitted that a stay might give 3M and the debtor "additional leverage" to "negotiate a global settlement."

"Alas," Judge Graham said, "those questions are not things to be considered" under Section 362 or in deciding whether there is jurisdiction under Section 105(a).

Judge Graham sustained the objections and denied the motion for a preliminary injunction.

Note: The debtor is pursuing a direct appeal to the Seventh Circuit.

Observations

The opinion reminds this writer of basketball: no harm, no foul.

Further trials absent an expanded stay may well deplete insurance coverage and result in a clear effect on the estate, but Judge Graham saw no harm given 3M's uncapped

commitment. If it were shown as a matter of fact that 3M won't be able to cover all damages, would Judge Graham have expanded the stay under Section 362(a)(3)?

Plaintiffs would not argue that 3M is insolvent and thereby open the door to a broader stay. To avoid damaging stockholders, 3M likewise would not claim insolvency.

So, 3M might have won an expanded stay were the commitment not uncapped, but uncapping the commitment would expose the debtor to a better argument about a bad faith filing. Thus, 3M was between a rock and a hard place.

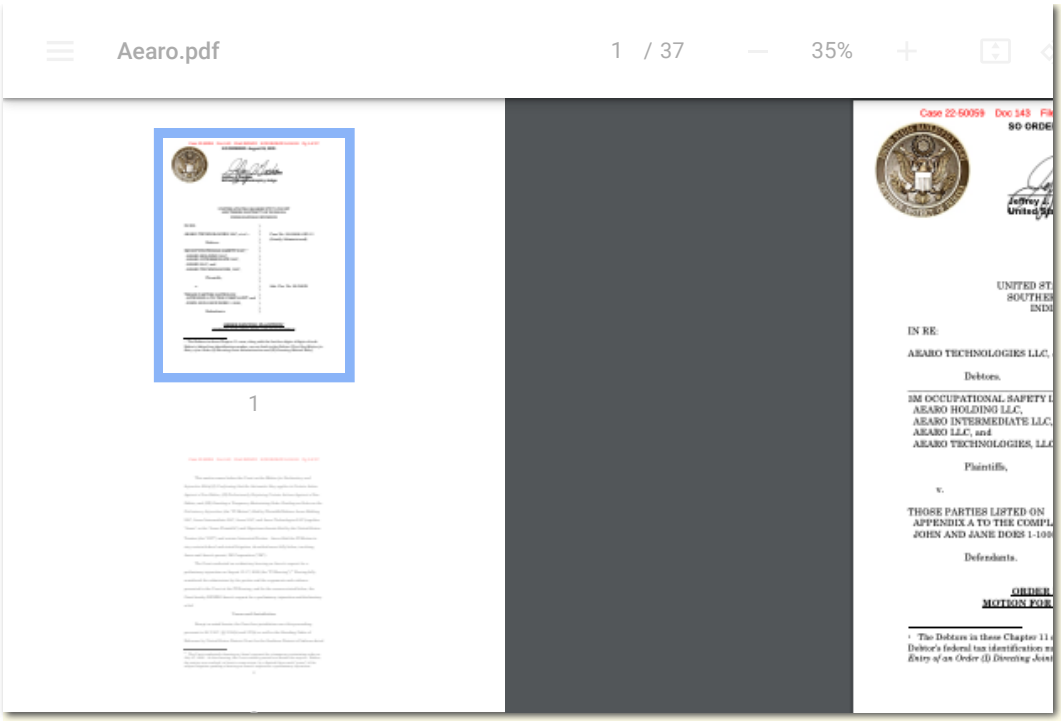
The case raises the question of whether the U.S. legal system as currently configured — be it the tort system or bankruptcy — is adequately designed for dealing with massive tort claims threatening to destroy an otherwise profitable company employing thousands of workers. Were Congress to begin drafting a solution, any legislation would inevitably favor one side or the other. Proposing legislative action seems like voluntarily stepping on the third rail.

The fact that 3M won't have an expanded stay at this juncture does not preclude the possibility of a settlement to be effected through a traditional class action. Perhaps we should sit back and wait to see whether companies like 3M can survive without an expanded stay.

The foregoing are this writer's thoughts and do not represent the opinions of ABI.

Opinion Link

PREVIEW



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Case Details

Case Citation	3M Occupational Safety LLC v. Those Parties Listed on Appendix to the Complaint (In re Aearo Technologies LLC), 22-50059 (Bankr. S.D. Ind. Aug. 26, 2022).
Case Name	3M Occupational Safety LLC v. Those Parties Listed on Appendix to the Complaint (In re Aearo Technologies LLC)
Case Type	Business

Court	7th Circuit Indiana Indiana Southern District
Bankruptcy Tags	Practice and Procedure Business Reorganization Mass Torts

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ABI EXCLUSIVE

JANUARY 4, 2023

It Wasn't a Good Idea for 3M Corp. to Call Its Multidistrict Litigation a 'Failure'

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> District judge remonstrates a solvent parent company for seeking the protections of bankruptcy without filing chapter 11 itself.

Perhaps it wasn't a good idea for 3M Corp. to say that its multidistrict litigation was a "failure," because the district judge might have an opportunity to get even.

And she did.

The December 22 opinion by District Judge M. Casey Rodgers of Pensacola, Fla., reflects a growing antipathy among some Article III judges regarding the use of chapter 11 by large, solvent companies as an alleged litigation tactic to

fend off mass tort liability without filing bankruptcy themselves. Judge Rodgers said that 3M, the nonbankrupt parent in her MDL case, intended to "reap all the benefits of bankruptcy with none of the attendant burdens."

The December 22 decision by Judge Rodgers is a treatise on the court's use of inherent powers "to fill the gaps left by other sanctioning mechanisms." As a sanction, she basically ruled that the 3M parent would be liable for whatever judgments there may be for defective earplugs manufactured by the subsidiary that's in chapter 11 in Indiana. She also barred the 3M parent from contending that the bankrupt subsidiary alone should be liable for judgments.

The Defective-Earplug Lawsuits

A company that is now a subsidiary of 3M Corp. manufactured earplugs sold to the miliary beginning in 2000. 3M acquired the company in 2008. 3M and the subsidiary were saddled with 290,000 claims alleging that the earplugs were defective. Lawsuits based on the claims were consolidated four years ago into a multidistrict litigation, or MDL, in Judge Rodgers' court in Florida.

The subsidiary filed a chapter 11 petition in Indiana in July. The newly minted debtor immediately filed a complaint asking the bankruptcy judge to enjoin the earplug lawsuits against the 3M parent, because 3M itself did not file for bankruptcy.

In August, the bankruptcy court refused to protect the 3M parent with a stay and certified a direct appeal to the Seventh Circuit. *See 3M Occupational Safety LLC v. Those Parties Listed on Appendix to the Complaint (In re Aearo Technologies LLC)*, 642 B.R. 891 (Bankr. S.D. Ind. Aug. 26, 2022). Briefing in the Seventh Circuit should be completed in the first quarter of 2023. To read ABI's report on the bankruptcy court decision, **click here**.

According to Judge Rodgers, 3M previously made "explicit statements" in which it conceded its liability for earplug claims. She wrote the December 22 opinion after 3M changed course and began contending that it has no liability whatsoever and that the subsidiary alone should be liable for earplug lawsuits.

Judge Rodgers described the tort plaintiffs in the MDL as responding to 3M's change in strategy by asking her to bar the 3M parent "from attempting to avoid any portion of its alleged liability for the [earplug] claims in this litigation by shifting blame to the" bankrupt subsidiary.

The Law on Inherent Powers

Judge Rodgers granted the tort claimants' motion based on the court's inherent powers, which, she said, "furnishes a legal and contextual framework that allows for consideration of the full range of litigation abuses alleged in this matter."

Judge Rodgers said that a court may exercise its inherent powers to fill in gaps left by other sanctioning mechanisms and may use inherent powers even when there are procedural rules that could sanction the same conduct.

However, Judge Rodgers said that the imposition of sanctions under a court's inherent powers requires conduct tantamount to bad faith. But when "the requirements of due process are met and a finding of bad faith has been made," she said that "a court has 'broad discretion' to fashion an appropriate sanction," citing the Eleventh Circuit.

The Resort to Bankruptcy Court

In the MDL, Judge Rodgers said that the parent litigated on "every theory of liability" but with "nary a whisper" that the subsidiary alone should be liable. "Then came the bellwether trials," where the tort plaintiffs won 16 judgments for almost $300 million in jury verdicts, she said. The defendants won in six bellwether trials.

"Suddenly," 3M began to say that the MDL was a "failure," and that it wanted "a new forum" and "no more of this MDL nonsense," Judge Rodgers said.

Judge Rodgers observed:

> 3M devised a scheme to oust the Congressionally-established system for resolving mass tort disputes in Article III courts and install its new favored forum (for the moment, anyway), an Article I court, at the helm. Not because any of the entities was facing a bona fide threat of financial

> distress, and not due to managerial or operational difficulties that were jeopardizing the entities' continued viability. No, this was good old-fashioned litigation forum shopping, solely — and admittedly — designed to evade dissatisfactory legal rulings and verdicts in the MDL, and to avoid potential future liability for a non-debtor, 3M, in the tort system.

Judge Rodgers wasn't through. She continued:

> And there's the catch. 3M itself was not willing to pay the price of admission to an Article I forum [by] submission to the oversight of a bankruptcy court . . . . [T]he company hatched a workaround. [The subsidiary] would file for Chapter 11 bankruptcy protection but seek an extension of the statutory automatic stay of litigation to 3M, who would never file a bankruptcy petition itself.

Judge Rodgers went on to describe how 3M devised a "funding and indemnity agreement" where the subsidiary would assume all liability for earplug claims, but 3M would fund all of the subsidiary's liabilities and costs for the bankruptcy case. 3M believed that the resulting identity of interests would justify the bankruptcy court's imposition of a stay of suits against the 3M parent.

Had the strategy been successful in bankruptcy court, Judge Rodgers said that 3M "would [have reaped] all the benefits of bankruptcy with none of the attendant burdens." However, the bankruptcy court declined to protect the 3M parent with a stay, subjecting the parent to continuing litigation in the MDL.

Having been rebuffed in bankruptcy court, Judge Rodgers said that 3M "returned to the MDL and sought to rewrite . . . history . . . by asserting *for the first time* that it has neither independent nor successor liability for any alleged [earplug]-related injuries." [Emphasis in original.] She called the parent's new theory "a brazen abuse of the litigation process after 3M's nearly four years of affirmatively asserting, advocating, and wielding . . . the precise opposite position in the MDL."

Judge Rodgers continued by recounting some of the instances in the MDL and in bellwether trials where the 3M parent declared its "exclusive responsibility for" earplug claims. The previous representations, she said, were "either knowingly false at the time or, instead, and much more likely the case, regrettable truths that became incompatible with their bankruptcy strategy."

"Either way," Judge Rodgers said, "3M's attempt to renege on those positions now, and its duplicitous motives and mode of doing so, are beyond the pale of acceptable litigation conduct and reflect a flagrant contempt for this Court and the MDL process." The parent's "machinations," she said, "have frustrated, manipulated, and delayed the fair, efficient, and effective resolution of hundreds of thousands of [earplug] claims." The "abuses," she said, "are the epitome of bad faith and deserve sanctions."

Judge Rogers found "[o]nly one sanction . . . commensurate with the seriousness of that assault on the integrity of the MDL and this Court." Reprimands and monetary sanctions, she said, "would fail to address the nature, purpose, and ramifications of 3M's abuses."

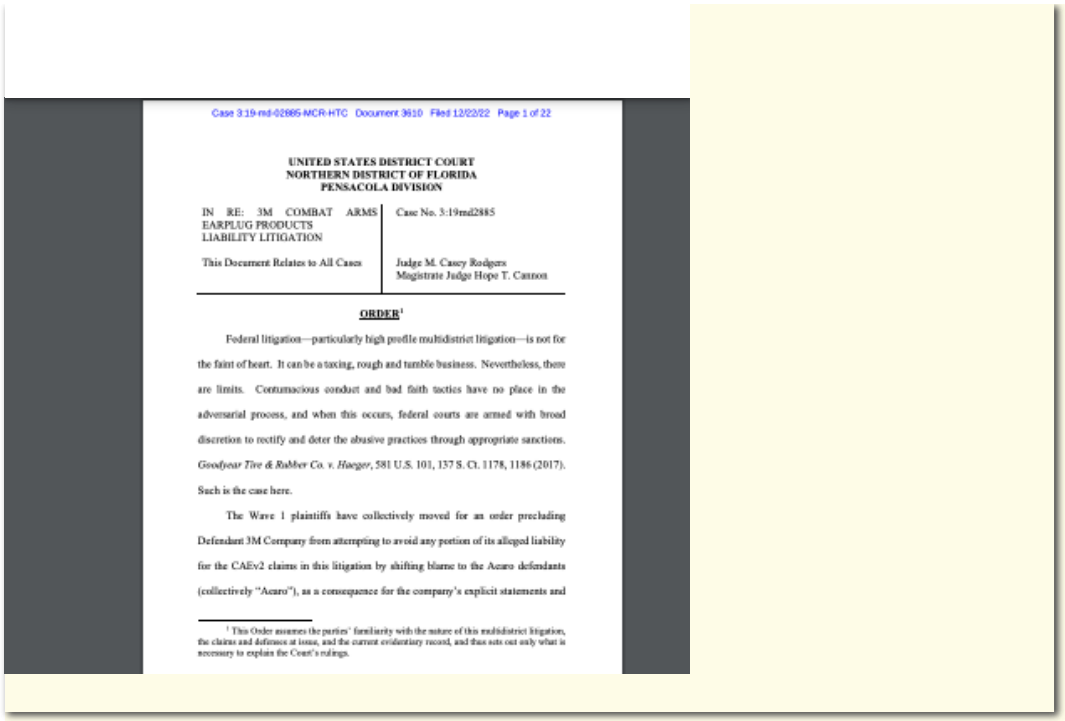
Rather than change strategy, Judge Rodgers said that the parent "had legitimate options." One of them was to "*[f]ile a petition for bankruptcy alongside its codefendants*." [Emphasis in original.]

As a sanction, Judge Rodgers precluded the parent from "attempting to avoid any portion of its alleged liability for the [earplug] claims" in any cases "currently filed in the MDL . . . and in all cases filed or transferred to the MDL in the future."

Judge Rodgers ended her opinion by certifying an interlocutory appeal to the Eleventh Circuit and staying proceedings in the MDL pending the appeal. She urged the appeals court "to hear any appeal from this Order as soon as possible."

Opinion Link

PREVIEW



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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: 3M COMBAT ARMS EARPLUG PRODUCTS LIABILITY LITIGATION
Case No. 3:19md2885

This Document Relates to All Cases
Judge M. Casey Rodgers
Magistrate Judge Hope T. Cannon

ORDER[1]

Federal litigation—particularly high profile multidistrict litigation—is not for the faint of heart. It can be a taxing, rough and tumble business. Nevertheless, there are limits. Contumacious conduct and bad faith tactics have no place in the adversarial process, and when this occurs, federal courts are armed with broad discretion to rectify and deter the abusive practices through appropriate sanctions. *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 137 S. Ct. 1178, 1186 (2017). Such is the case here.

The Wave 1 plaintiffs have collectively moved for an order precluding Defendant 3M Company from attempting to avoid any portion of its alleged liability for the CAEv2 claims in this litigation by shifting blame to the Aearo defendants (collectively "Aearo"), as a consequence for the company's explicit statements and

[1] This Order assumes the parties' familiarity with the nature of this multidistrict litigation, the claims and defenses at issue, and the current evidentiary record, and thus sets out only what is necessary to explain the Court's rulings.

https://abi-opinions.s3.amazonaws.com/3M+sanctions.pdf

Case Details

Case Citation	In re 3M Combat Arms Earplug Products Liability Litigation, 19-2885 (N.D. Fla. Dec. 22, 2022)
Case Name	In re 3M Combat Arms Earplug Products Liability Litigation
Case Type	Business
Court	11th Circuit Florida Florida Northern District
Bankruptcy Tags	Asset Sales Automatic Stay Ethics Practice and Procedure Business Reorganization

Mass Torts

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[+] FEEDBACK

On the Edge

By Vincent J. Roldan and Jeffrey M. Rosenthal

Seventh Circuit to Consider Direct Appeal of *3M/Aearo* Denying Extension of Stay to Nondebtors



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In August 2022, the court in the *Aearo Technologies* bankruptcy case denied the debtor's motion to extend the automatic stay to protect its nondebtor parent, 3M, from mounting mass tort litigation.[1] The Seventh Circuit Court of Appeals recently granted a petition by the debtor for a direct appeal. Interestingly, the Third Circuit will be considering a similar appeal in the *LTL Management* bankruptcy case, but in that case, the bankruptcy court stayed mass tort litigation against the nondebtor parent, Johnson & Johnson (J&J).[2] As pointed out by some commentators, "The very future of mass tort litigation may depend on what the Seventh and Third Circuits decide."[3]

Circuit courts may hear direct appeals if the bankruptcy court's decision, *inter alia*, "involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance," or "immediate appeal ... may materially advance the progress of the case."[4] Here, the bankruptcy court certified as such.[5] The underlying decision that shall be appealed directly to the Seventh Circuit is summarized herein.

Aearo's Bankruptcy Cases

Aearo Technologies and six affiliates (the "Aearo entities" or "Aearo") filed for chapter 11 protection in the U.S. Bankruptcy Court for the Southern District of Indiana.[6] Aearo manufactures and sells certain custom noise, vibration, thermal and shock-protection products. In the late 1990s, it designed a product called the Combat Arms earplug, and after testing, it sold the earplugs in 2000. It designed and manufactured an earplug sold to the U.S. military under the name Combat Arms Earplug Version 2 and to civilian consumers under the name Arc Plug (collectively, "CAEv2").

A large multinational technology and manufacturing company (3M) purchased the Aearo entities in 2008 for $1.2 billion. In 2010, Aearo transferred parts of its business, including the CAEv2 business, upstream to 3M (the "upstream"). After the upstream, 3M manufactured, marketed and sold the CAEv2 product until 2015.

Servicemembers began to file lawsuits against 3M and/or Aearo alleging defects and injuries relating to their use of CAEv2. On April 3, 2019, there were approximately 700 CAEv2 lawsuits consolidated into a multidistrict litigation (MDL). Aearo and 3M were co-defendants in the MDL and in approximately 2,000 lawsuits pending in the state courts of Minnesota (collectively, the "pending actions"). Most, if not all, of the claims filed in the pending actions assert that 3M and Aearo are jointly and severally liable. By July 12, 2022, the MDL had grown to include 290,000 claims.

In March 2022, 3M explored strategic alternatives to the MDL, including chapter 11 bankruptcy for the MDL entities. Thus, 3M appointed two disinterested directors to Aearo's board of directors (the "independent directors"), who negotiated the terms under which 3M would fund a chapter 11, as well as a claims trust for CAEv2 claims.[7]

The parties executed a final funding agreement on July 25, 2022.[8] Pursuant to the funding agreement recitals, 3M has committed to "satisfy[ing] all of the respective Aearo Entities' Liabilities specified herein on the terms set forth herein, such that each of the respective Aearo Entities will have assets with a value greater than its Liabilities and will have the financial capacity to satisfy its obligations as they become due in the ordinary course of its business." An initial $1 billion was committed to fund a trust to compensate allowed CAEv2 claims, as well as $240 million to fund the chapter 11 cases.

In exchange for this commitment, Aearo agreed to indemnify 3M and its nondebtor affiliates for liabilities relating to the CAEv2 claims. However, 3M's commitment under the funding agreement is on an uncapped basis. The funding agreement is not a loan and does not impose any repayment obligations on Aearo.[9]

1 *3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (In re Aearo Techs. LLC)*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).
2 *LTL Mgmt. LLC v. Those Parties Listed on Appendix A to Complaint (In re LTL Mgmt. LLC)*, 638 B.R. 291 (Bankr. D.N.J. 2022).
3 *See, e.g.*, Alison Frankel, "3M's Aearo Scores Quick Appeal of Bankruptcy Court's Ruling on Earplug MDL," Reuters (Oct. 13, 2022), *available at* reuters.com/legal/litigation/3ms-aearo-scores-quick-appeal-bankruptcy-courts-ruling-earplug-mdl-2022-10-13 (last visited Nov. 22, 2022).
4 28 U.S.C. § 158(d)(2)(A).
5 *See Aearo Techns.*, Adv. No. 22-50059, Doc. 181 (Sept. 13, 2022).
6 The foregoing facts are from *In re Aearo Techs. LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).
7 The parties also negotiated a claims trust for certain "respirator" claims that were also the subject of litigation involving both Aearo and 3M, but which are not part of the court's decision regarding extension of the automatic stay.
8 The court analyzed earlier versions of this agreement. As described herein, the agreement was central to the court's ultimate decision.

On July 26, 2022, the Aearo entities filed for chapter 11 protection. Simultaneously, they filed a complaint for a determination that the automatic stay applies to certain actions against the nondebtor 3M. The complaint was coupled with a motion for preliminary injunction against the named plaintiffs in the pending actions, as well as any party who may seek to hold Aearo and/or 3M liable for injury related to the CAEv2.

Aearo asserted that the automatic stay and § 105(a) of the Bankruptcy Code prohibit prosecution of the pending actions against both Aearo and the nondebtor 3M. Aearo made three arguments: (1) The plaintiffs in the pending actions have asserted claims of joint and several liability against 3M and Aearo, essentially treating them as one entity; (2) 3M and Aearo are co-insured under shared insurance policies, the proceeds of which may be depleted if the pending actions are not stayed as to 3M; and (3) Aearo is obligated to indemnify 3M for any losses related to the CAEv2 claims. Various firms that represent plaintiffs in the pending actions filed objections to the preliminary-injunction motion.

The Court's Decision

At the outset, the bankruptcy court made it clear that it was not opining on the merits of the MDL actions, nor was it opining on the relative merits of the MDL or bankruptcy process. Further, the court noted that no party filed a motion to dismiss the case as a bad-faith bankruptcy filing.

The court first analyzed the automatic stay provisions imposed by § 362(a)(1) and (a)(3) of the Bankruptcy Code, and concluded that they do not support Aearo's preliminary-injunction motion. The court first cited to § 362(a)(1)[10] and relevant case law, and found that the provision did not stay the pending actions as to 3M nor extend the protections of the stay to 3M.[11] The court acknowledged the Fourth Circuit's decision in *A.H. Robins*,[12] which found two exceptions to the general rule that § 362(a)(1) does not apply to nondebtor parties: (1) where there is such an identity between the debtor and a third-party defendant that a judgment against the third-party defendant will in effect be a judgment against the debtor; and (2) where the pending litigation, though not brought against the debtor, would cause the debtor irreparable harm. The court surveyed cases within the Seventh Circuit and concluded that the Seventh Circuit has not formally adopted the *A.H. Robins* decision.[13]

The court then turned to § 362(a)(3)[14] and considered the following: (1) whether property of the estate is at issue; and (2) whether the action in question is an action to obtain possession of or exercise control over the property in question. Here, the court assumed for purposes of the analyses that the property at issue was the Aearo insurance policies. However, it found no evidence that the plaintiffs in the pending actions are proceeding directly against the insurance policies.[15] In addition, 3M has taken no action against the insurance policies except to put insurers on notice of the pending actions.[16]

The court stopped short of analyzing whether there were any indirect actions against property of the estate. The main focus in the Seventh Circuit was "how much money will come into the debtor's coffers."[17] The court noted that through the funding agreement, 3M will fully fund any liability incurred by Aearo relating to the pending actions. There is no threat of inequitable distribution of insurance proceeds, because the funding agreement operates as a "complete, uncapped backstop to the insurance policies."[18]

Lastly, the court considered § 105(a)[19] of the Bankruptcy Code. The court first analyzed whether the matter sought to be enjoined (the pending actions) falls within the court's jurisdiction.[20] It acknowledged that at first blush, it would appear that the pending actions would fall within the court's "related to" jurisdiction,[21] but the court noted that the Seventh Circuit adopts a more "constrained" approach to jurisdiction, under which "[a] case is 'related' to a bankruptcy when the dispute 'affects the amount of property for distribution [*i.e.*, the debtor's estate] or the allocation of property among creditors."[22]

Here, the funding agreement — an uncapped, nonrecourse commitment from 3M to fund all of the Aearo entities' liabilities — again factored heavily into the court's decision. In particular, the funding agreement does not depend on the court enjoining the pending actions. The court concluded that whatever liability the pending actions generate, whether inside or outside of bankruptcy, with or without a stay, Aearo can satisfy such liability by making a payment request under the funding agreement.[23] Thus, the pending actions would have no financial impact to Aearo's creditors. Although courts in other jurisdictions have extended the stay notwithstanding the existence of an uncapped funding agreement, the bankruptcy court concluded that in the Seventh Circuit, it must focus on the actual economic effect that continuation of the pending actions would have on the debtor's estate.[24]

Thus, the court determined that it did not have jurisdiction to enjoin the pending actions under § 105(a). Even if the court had subject-matter jurisdiction over the pending actions, the court concluded that the funding agreement ensured that continuation of the pending actions would have no effect on the debtor's estate, and that there do not exist "extraordinary circumstances" to enjoin the pending actions under § 105(a).[25]

Recap of the *LTL* Decision

Aearo Technologies was the latest case in which a debtor sought to extend the automatic stay to protect a parent that

9 The funding agreement provides that Aearo must repay any indemnity obligation to 3M, but may do so by asking 3M for the money to do so. The net effect to Aearo is zero. *Aearo Techs.*, 642 B.R. at 899.

10 Section 362(a)(1) operates as a stay of:

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1).

11 *Aearo Techs.*, 642 B.R. at 904.

12 *A.H. Robins Co. Inc. v Aetna (In re A.H. Robins Co. Inc.)*, 828 F.2d 1023-24 (4th Cir. 1987).

13 *Aearo Techs.*, 642 B.R. at 904-05.

14 Section 362(a)(3) operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

15 *Aearo Techs.*, 642 B.R. at 906.

16 *Id.*

17 *Id.* at 907 (citing *Nat'l Tax Credit Partners v. Havlik*, 20 F.3d 705 (7th Cir. 1994)).

18 *Id.*

19 Section 105(a) provides: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105 *Id* (a).

20 *Aearo Techs.*, 642 B.R. at 908.

21 "[D]istrict courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b) (cited by *Aearo Techs.*, 642 B.R. at 908).

22 *Aearo Techs.*, 642 B.R. at 909 (citations omitted).

23 *Id.* at 910.

24 *Id.*

25 *Id.* at 911-12.

continued on page 99

On the Edge: Seventh Circuit to Consider Direct Appeal of 3M/Aearo

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was involved in mass tort litigation. Earlier this year, the court in *LTL Management LLC* analyzed a similar issue.[26] There, the chapter 11 debtor was a subsidiary of Johnson & Johnson Consumer Inc. ("Old JJCI"), which is itself a subsidiary of J&J. These entities were facing 38,000 lawsuits from individuals alleging that J&J talcum powder products were tainted with asbestos and caused cancer. Old JJCI used a Texas divisive-merger statute to form the debtor two days before the bankruptcy case and transferred its talc liabilities to the debtor, a restructuring strategy dubbed the "Texas Two-Step."

The *LTL Management* debtor sought similar declaratory and injunctive relief pursuant to §§ 362(a)(1) and (a)(3) and 105(a) of the Bankruptcy Code. However, the bankruptcy court in that case found "unusual circumstances" to justify extension of the automatic stay to talc-related claims against nondebtors, and a preliminary injunction was appropriate. The primary argument of the objecting parties related to their "distaste" for the Texas Two-Step undertaken shortly before the *LTL Management* bankruptcy and their assertion that the bankruptcy was just a "charade."[27] The court reiterated its decision denying those objecting parties' efforts to dismiss the case, found no impropriety in the Texas Two-Step, and found no "absurd or unjust result" if the automatic stay was extended to the nondebtors.[28]

Conclusion

There are now two "dance cards" set with respect to a parent's efforts to use the automatic stay provisions of a subsidiary's bankruptcy to enjoin mass tort litigation: one in the Third Circuit and one in the Seventh Circuit. It remains to be seen whether the two circuits will produce differing opinions, just as the respective bankruptcy courts have done. abi

26 *LTL Mgmt. LLC v. Those Parties Listed on Appendix A to Complaint (In re LTL Mgmt. LLC)*, 638 B.R. 291 (Bankr. D.N.J. 2022).

27 *Id.* at 304, 305.

28 *Id.*

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ABI Announces Subchapter V Task Force to Examine Small Business Reorganizations Since Subchapter's Enactment

Alexandria, Va.— The American Bankruptcy Institute today announced the creation of a Subchapter V Task Force to study and evaluate small business reorganizations under subchapter V of chapter 11 of the Bankruptcy Code, which went into effect on February 19, 2020. The nine-member expert panel will examine case law and statistical data under subchapter V since its enactment through the present. This study will consider, among other things, how the subchapter is working in practice and whether it is achieving certain underlying objectives, such as assisting debtors and creditors in resolving the reorganization cases of small- and medium-sized businesses more effectively and efficiently, and what improvements it might need. The Task Force intends to solicit input about subchapter V from the public via hearings and its forthcoming website, culminating in a final report to be delivered in early April 2024.

The concept of subchapter V started as one of the centerpiece recommendations of **ABI's Commission to Study the Reform of Chapter 11**, which published its final report and recommendations in 2014. It was formalized in the Code by the enactment of "The Small Business Reorganization Act of 2019" (SBRA), **which went into effect on February 19, 2020**, to provide Main Street business debtors with a more streamlined path for restructuring their debts. The eligibility limit for small businesses looking to elect to file under SBRA's subchapter V was originally $2,725,625 of debt, but the threshold was increased to $7,500,000 with the enactment of the "Coronavirus Aid, Relief, and Economic Security Act" (CARES Act; P.L. 116-136) on March 27, 2020, in response to the economic distress caused by the COVID-19 coronavirus pandemic. The increased debt limit received two subsequent extensions that were signed into law, but the last extension is due to sunset on June 21, 2024.

In the first three years that subchapter V was available (through February 18, 2023), there have been 4,571 subchapter V cases filed, according to an initial analysis by the Task Force. Small business and subchapter V cases have comprised nearly one-third of chapter 11 filings during this period (5,689 out of 17,493). Since the debt-eligibility limits were increased by the CARES Act in March 2020, about 30 percent of the subchapter V cases filed have been over the original debt limit. Based on the cases completed so far, the higher-liability subchapter V cases are more likely to result in confirmation or conversion (as opposed to dismissal) than the lower-liability cases.

The Task Force is co-chaired by Hon. **Michelle M. Harner** of the U.S. Bankruptcy Court for the District of Maryland (Baltimore) and **Megan W. Murray** of Underwood Murray, PA (Tampa, Fla.). Other members of the Task Force include Hon. **Paul W. Bonapfel** of the U.S. Bankruptcy Court for the Northern District of Georgia (Atlanta), Past ABI President **Robert J. Keach** of Bernstein Shur (Portland, Maine), **Jolene E. Wee** of JW Infinity Consulting, LLC (New York), **Donald L. Swanson** of Koley Jessen (Omaha, Neb.) and **Elizabeth M. Lally** of Spencer Fane LLP (Omaha, Neb.). Prof. **Alexandra Everhart Sickler** of the University of North Dakota School of Law (Grand Forks, N.D.) will serve as the official reporter for the Task Force. In addition, **Daniel J. Casamatta** of the Office of the U.S. Trustee (Kansas City, Mo.) will be the U.S. Trustee *ex officio* member.

The first organizing meeting of the Subchapter V Task Force took place immediately prior to ABI's Annual Spring Meeting, held in Washington, D.C., April 20-22. Announcements of future meetings, the forthcoming launch of the Task Force website, and other activities and information will be provided by ABI. Later this month, the Task Force will make active its website and social media account, so that interested persons can learn more about the Commission's work. The final report of the Subchapter V Task Force will be released at ABI's 2024 Annual Spring Meeting in April 2024 in Washington, D.C.

###

ABI is the largest multi-disciplinary, nonpartisan organization dedicated to research and education on matters related to insolvency. ABI was founded in 1982 to provide Congress and the public with unbiased analysis of bankruptcy issues. The ABI membership includes more than 10,000 attorneys, accountants, bankers, judges, professors, lenders, turnaround specialists and other bankruptcy professionals, providing a forum for the exchange of ideas

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Monday, May 8, 2023

Article Tags: Business Reorganization Small Business

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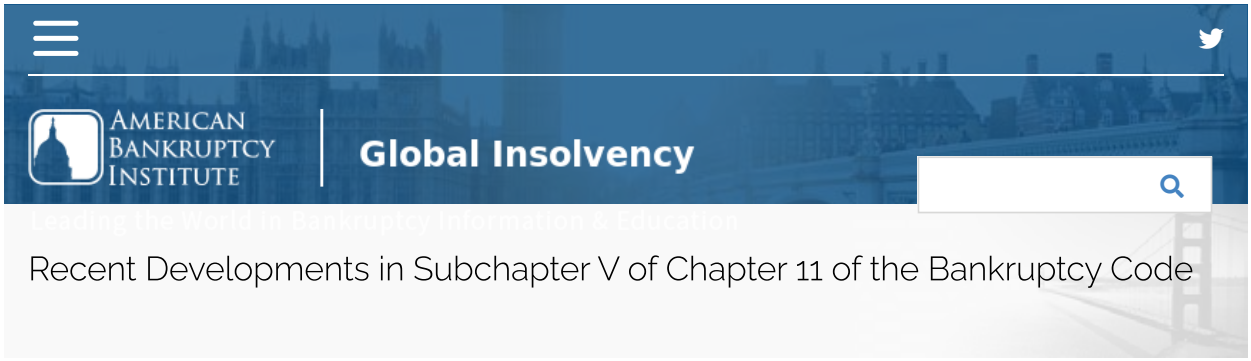

17 May 2023

Subchapter V of chapter 11 of the United States Bankruptcy Code, which took effect in 2020, has undergone significant developments since its enactment, as courts continue to interpret its provisions, intended to streamline the chapter 11 process for smaller debtors in bankruptcy. Recent data and judicial decisions have given greater context to not only the popularity of Subchapter V, but also its substantive boundaries, with some of these key developments discussed below.

Subchapter V Filings Increase 81% Year-Over-Year in April

Small business bankruptcy filings under Subchapter V increased 81% year-over-year from April 2022 to April 2023, according to Epiq Global. The increase is due in part to the increased debt limits that Congress extended in June 2022, bringing the debt limit back up to where it was under the CARES Act at $7.5 million, making Subchapter V available to a far greater number of debtors. The CARES Act of 2020 had previously increased the debt limit from approx. $2.7 million to $7.5 million, and the CARES Act

sunset in March 2022. The June 2022 increase restored the debt limit of $7.5 million. All chapter 11 filings are up 32% year-over-year from April

2022 to April 2023, and the share of those filings that have proceeded under Subchapter V is a strong indicator of its popularity for debtors eligible to take advantage of its provisions.

InfoWars Parent Free Speech Systems, LLC Allowed to Proceed Under Subchapter V

On March 31, 2023, the United States Bankruptcy Court for the Southern District of Texas held in In *re Free Speech Sys., LLC*, 649 B.R. 729 (Bankr. S.D. Tex. 2023) that founder Alex Jones's personal bankruptcy filing did not affect the eligibility of his company Free Speech Systems, LLC, to proceed under Subchapter V of the Bankruptcy Code when it filed chapter 11. In July 2022, Free Speech Systems, LLC, the parent company of far-right website InfoWars, filed for bankruptcy and elected to proceed under Subchapter V. In December 2022, Alex Jones, the owner of Free Speech Systems, filed his own chapter 11 bankruptcy case, not electing to proceed under Subchapter V. A group of plaintiffs in defamation lawsuits against Jones filed a motion asking the court to revoke the Subchapter V election of Free Speech Systems, arguing that its debts should be combined with those of Jones as an affiliate, putting Free Speech Systems above the Subchapter V debt limit.

Section 1182(1)(B)(i) provides that in order to proceed under Subchapter V, the debts of all affiliated debtors must be less than or equal to $7.5 million. The court denied the plaintiff's motion to revoke the Subchapter V election, holding that eligibility is measured as of the debtor's petition date only.

Circuit Split Brewing Over Section 523(a) Non-Dischargeability

The Fourth Circuit Court of Appeals held in June 2022 that the non-dischargeability provision of section 523(a) of the Bankruptcy Code applies to the debts of a Subchapter V corporate debtor. Four

bankruptcy courts and one district court have now held the opposite, and the Fifth Circuit is set to hear the issue soon.

Section 523 exempts the debts of "an individual debtor" from being discharged in a bankruptcy if the debts were incurred by fraud; certain tax debts; fines or penalties payable to a governmental unit; or for willful and malicious injury, among other things. Section 1192(2), applicable to Subchapter V cases, exempts from dischargeability debts "of the kind specified in section 523(a) of this title." Individuals and businesses can file under Subchapter V, and section 1192(2) does not specify whether it applies to individuals only or all Subchapter V debtors.

The Fourth Circuit is the only court that has held that section 1192(2) makes section 523(a) applicable to all Subchapter V debtors. The other courts to rule on the issue have held that section 1192(2) makes section 523(a) applicable to only individual Subchapter V debtors, not corporate Subchapter V debtors.

Courts Holding That 523(a) Does Apply to Corporate Subchapter V Debtors:

- Fourth Circuit: In *re Cleary Packaging*, LLC, 36 F.4th 509 (4th Cir. 2022)

Courts Holding That 523(a) Does Not Apply to Corporate Subchapter V Debtors:

- Western District of Texas (currently on appeal in the Fifth Circuit): In *re GFS Indus*., LLC, 647 B.R. 337 (Bankr. W.D. Tex. 2022), motion to certify appeal granted, No. 22-50403-CAG, 2023 WL 1768414 (Bankr. W.D. Tex. Feb. 3, 2023)
- Middle District of Florida Bankruptcy Court (two separate cases): In *re Hall*, No. 3:22-AP-00062-BAJ, 2023 WL 2927164 (Bankr. M.D.

Fla. Apr. 13, 2023); In *re 2 Monkey Trading*, LLC, No. 6:22-BK-04099-TPG, 2023 WL 3145124 (Bankr. M.D. Fla. Apr. 28, 2023) ()

- Eastern District of Michigan Bankruptcy Court: In *re Lapeer Aviation, Inc.*, No. 21-31500-JDA, 2022 WL 1110072, at *2 (Bankr. E.D. Mich. Apr. 13, 2022)
- District of Idaho Bankruptcy Court: In *re Rtech Fabrications, LLC*, 635 B.R. 559, 564 (Bankr. D. Idaho 2021)
- District of Maryland Bankruptcy Court: In *re Satellite Restaurants Inc. Crabcake Factory USA*, 626 B.R. 871, 876 (Bankr. D. Md. 2021)

Location: USA

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Dicta

By Hon. Cecelia G. Morris[1]

Expectations of a Veteran Judge



Hon. Cecelia G. Morris
U.S. Bankruptcy Court (S.D.N.Y.); Manhattan, Poughkeepsie and White Plains

Hon. Cecelia Morris began her official tour of duty as U.S. bankruptcy judge for the Southern District of New York on July 1, 2000, and served as chief judge from March 1, 2012, until March 1, 2022.

This article's purpose is simple:[2] to remind lawyers, regardless of the dollar amount or significance of the case, of the basic decorum and expectations for presentations to be heard by the court, whether in person, by video or by telephone. By its very nature, presentation requires thinking ahead. Beginning with client intake, you need to be thinking about options for the filing and form a plan for how to handle any issues on the horizon. No matter how large or small the case, a skilled lawyer, no matter the party you are representing, will assess the needs of judicial opinion and the potential for litigation, trial and appeals — even at this early point.

The Commencement of the Case

Filing a bankruptcy petition always requires an initial choice. While most bankruptcy attorneys know about the choice between filing under chapters 7 and 13, when representing an entrepreneurial debtor, you should also consider using subchapter V of chapter 11. This provision has expanded the choice for debtors with personal commercial and business debt.

Where you file may be as important as how you file. In larger cases, it is necessary to inquire where the debtor has commercial contacts and which choice of venue would meet the needs of your client. Once the option of filing in different bankruptcy courts is ascertained, consider how the district and circuit courts within that venue handle issues that may arise once the case is filed.[3]

While a consumer debtor is limited in their choice of venue, the debtor's attorney would be wise to educate themselves on how the bankruptcy, district and circuit courts handle issues related to any potential contested matters. Having that knowledge gives you more control during negotiations and empowers you to insist that the client keep you informed throughout the bankruptcy case.

Contested Matters

Litigation requires expert use of evidence. This does not mean only abiding by evidentiary requirements; quickly gathering facts and carefully drafting pleadings is of utmost importance. What is more significant is that favorable rulings depend on the evidence you present, not on wishful thinking about what "justice" is. Banging on the table or making grand statements does not help the judge rule in your favor. Further, judges expect you to be familiar with the larger picture of the issue you are arguing. Contending that something is "black-letter law" when there is a circuit split on the issue is wasteful of your (and the court's) time and efforts. Remind yourself and your clients that we are a court. The judge must rule based on the facts presented.

When contested matters become contentious, you must plan on the possibility of appeal. A prepared and skillful attorney will help the bankruptcy judge help the attorney and their client. It is the attorney's job to give the bankruptcy judge the tools needed to explain his/her decision, including establishing a sufficient record of admissible evidence. The better and more robust the evidence, argument and reasoning, the better prepared any attorney will be for appeal. In addition to swaying the bankruptcy judge, it is essential to have a good basis on which to defend or ask for reversal at the appellate level.

Whether you are arguing for or against a motion, in addition to citing the law and rules, include the standard that must be met. Some lawyers like to say a decision is within the discretion of the judge. This by itself is insensitive to reversals and remands based on "abuse of discretion."[4] Judicial discretion does not stand alone; it must be considered in accordance with the principles of law and the standard mandated to meet the burden of proof for the relief requested.[5]

It is wise to become familiar with the bankruptcy judge's rulings and expectations, no matter to what court the case has been assigned. Judges expect attorneys to lead with the strongest argument in their case. Actively emphasizing the most significant points helps to focus the judge's attention on the issues considered most noteworthy to the litigants.

Preparation for Trial

Discovery is imperative and should be a cooperative endeavor. Collecting and sharing information and documents (written and electronic, in a format with metadata included) is necessary for trial preparation and aids possible settlement. The key term

1 Bankruptcy Judge **Elizabeth Gunn**, Senior Law Clerk **Brenda Robie**, and Law Clerks Francis O'Rourke and Dorie Arthur were helpful with ideas and editing my ramblings! I thank them.

2 The thoughts herein are my own. Hopefully, these tips will benefit your practice in any bankruptcy court!

3 *Compare In re Royal Bistro*, 26 F.4th 326 (5th Cir. 2022), *with Precision Indus. v. Qualitech Steel SBQ LLC*, 327 F3d 537 (7th Cir. 2003), and *Pinnacle Rest. at Big Sky LLC v. CH SP Acquisitions (In re Spanish Peaks Holdings II LLC)*, 872 F.3d 892 (9th Cir. 2017) (Fifth Circuit opined § 363(f) free-and-clear standard cannot force tenant out who is complying with lease obligations under § 365(h) unlike in Seventh and Ninth Circuits).

4 *Gen. Electric v. Joiner*, 522 U.S. 136 (1997).

5 *McHale v. Boulder Capital LLC (In re 1031 Tax Grp. LLC)*, 439 B.R. 84 (Bankr. S.D.N.Y. 2010) (explaining that although prejudgment interest is within court's discretion, court must explain and articulate its reasoning).

here is *cooperative*; rarely does a judge relish a discovery dispute. It is my expectation that those who appear in my court are professionals and must act as such.

In contested matters and adversary proceedings, simply follow the Federal Rules of Civil Procedure. It is good practice to be familiar with all rules of procedure, but a wise and prepared attorney will also read the Advisory Committee notes to each rule. For example, I should not have to remind attorneys of the requirements of Rule 26. It is often forgotten that Rule 26 outlines the *duty* to complete important initial disclosures without a formal request.[6] Inform the client(s) of their duty to you and that compliance is mandated by the Federal Rules.

If negotiations and mediations do not result in an agreement, all the work up to that point is important, and your "file" will be ready to compose the final pre-trial order and present it to the court at a conference. The pretrial is the court's "playbill." Careful thought is essential for a workable trial. The judge will prepare for the trial based on the order and will follow the course of actions as set out in the order. The pretrial outlines both sides of the case, what evidence will be presented, names of witnesses to be called and what their testimony will encompass. Seldom do "gotcha" moments occur during testimony — and never is testimony as shocking as on "Law and Order."

During Trial

Practice points in preparation for and carrying out the course of the trial is dependent on the attorney, who is charged with creating clarity at trial.[7] The attorney's responsibility to the client is to know the facts, law and standards required to prevail in the litigation. Remember trial practice in law school? Your representation of the facts must be achieved using the basic rules of courtroom advocacy.

For example, lawyers don't seem to know how to trust their own witnesses on direct examination. If you don't trust your witness, you have not prepared them sufficiently. The witness should be prepared to be the center of attention and answer questions in an unfamiliar setting. Being asked questions on direct can confuse even an experienced witness. No matter how many times a witness has testified, they need to be reminded about what they are being asked for and why it is important before they get on the stand.

This also applies to expert witnesses. Don't assume that a judge will neglect their role as gatekeeper. Written expert testimony should be presented along with the witness's *curriculum vitae*. Prior to trial, if there is opposition to the witness, a party can request the court to *voir dire* the testimony and the credentials of the expert.[8] Be prepared to meet the *Daubert* standard[9] — and know what is necessary for admission of expert testimony in a federal court.

Lawyers tend to try to ask leading questions on direct. Remember that it is the witness's story, not yours. Your expertise is necessary in helping the witnesses prepare and tell their story with credibility. Preparation of a witness is not to memorize a script or use legal language. Preparation is to refresh your client's memory with the facts, to guide them in describing the who, what, where, how and why, and to focus on the essential elements to make their case.

On the other side of the coin, many lawyers forget that leading questions are acceptable during cross-examination. Leading questions should be short and to the point of the case. The judge is watching and waiting for your or the cross-examiner's question, and it is possible that the judge has already spotted a hole in the direct testimony but needs help via questions that address the credibility of the witness and make a record for the opinion.

Cross-examination is not a game of retaliation; its purpose is to make sure the witness's testimony comports with sworn statements and the pleadings. Cross-examination begins with being familiar with the disposition testimony and listening carefully to the direct testimony for any inconsistencies. The first question to remember should be, "Does the courtroom testimony support or contradict the disposition testimony of the witness?"

While the dramatics of Hollywood may have inspired you to become a lawyer, this is not a television show. There is no reason to be hostile to the witness. The purpose of the trial is to sway the judge, not to demean or berate a witness. The cross-examination should allow the questioning attorney to show the judge the problems with the witness's testimony.

By and large, expert witnesses aside, the most common objections to examination questions are relevance and hearsay. All objections must be based on the Rules of Evidence. Know those objections and the exclusions. When standing to objection, give the judge the basis for the objection. Once, an attorney made as an objection, "I don't like what the witness is saying!" This is obviously not sufficient and damages your credibility.

Trials may sometimes be the continuation of stalemated negotiations between parties. Other times, they are the result of competent attorneys not being able to bring the parties to settlement. Trials can occur because the parties dislike each other, feel aggrieved, "want their day in court," or there is truly a question of fact or law that only a judge may decide. Keep in mind what the parties' reasons are for having the trial.

Whatever the reason for the trial, the judge often requires assistance with making the correct determination when issuing a written ruling by requesting post-trial briefs. To be effective, a good post-trial brief requires a succinct, clearly written memo presenting the law and evidence. Detailing the trial record by the page and line of the transcript is crucial, along with reference to the evidence introduced at trial, using the exhibit number and citing the relevant page(s). You want to point out what was said and why the witness testimony either boosts your client's position or is detrimental to the opposition's. They are a powerful tool for the lawyer to make their final argument to the judge before a decision is issued. It is wise to ask whether you can file a post-trial brief at the close of evidence regardless of the judge's intention to ask for one.

My colleagues throughout the nation could add to these main points, but these are the pet peeves I've garnered throughout my service on the bench. I am confident that following these simple "helpful hints" will make the judge's work more effective. abi

6 Fed. R. Civ. P. 26.
7 *See* Walter W. Bates, R. Todd Huntley & William S. Starnes, Jr., "Ten Tips for Direct Examination and Cross-Examination," *Am. J. Trial Advoc.* (2015).
8 Fed. R. Evid. 702, 703, 704, 705.
9 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

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Faculty

Hon. James W. Boyd is a U.S. Bankruptcy Judge for the Western District of Michigan in Grand Rapids, appointed in May 2014, and presides over bankruptcy matters in Grand Rapids and Traverse City. Prior to his appointment, he was a partner in the law firm of Kuhn, Darling, Boyd and Quandt PLC in Traverse City, Mich., where he practiced in the areas of bankruptcy law and commercial litigation. From 1988-2014, he served as a chapter 7 panel trustee and as a chapter 11 operating and liquidation trustee in many cases. While a trustee, he served on the board of directors of the National Association of Bankruptcy Trustees from 1999-2013 and was its president in 2010. He has also served as an operating and liquidating receiver under Michigan law for numerous entities. Judge Boyd is a contributing author to ICLE's *Handling Consumer and Small Business Bankruptcies* and is a member of the Federal Bar Association and ABI, as well as a frequent speaker. He received his J.D. from the Thomas M. Cooley Law School**.**

Hon. David D. Cleary is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed in December 2019. Previously, he chaired Greenberg Traurig LLP's Business Reorganization & Financial Restructuring Practice in Phoenix, where he focused his practice on business restructuring and reorganizations, distressed-asset dispositions and financings, debt restructurings and workouts, and litigation. He regularly represented distressed companies, financial institutions, secured and significant creditors, noteholders and bondholders, hotel/resort owner/operators, boards of directors, debtors, official and ad hoc committees, and insurance and surety portfolios. Judge Cleary is a Master with the Arizona Inns of Court, past co-chair of the American Bar Association's Litigation Section of its Bankruptcy and Insolvency Committee, past chair of the Chicago Bar Association's Rules Sub-Committee of its Bankruptcy Committee, and past co-chair of ABI's Asset Sales and Health Care Committees. He was listed in *The Best Lawyers in America* and in *Southwest Super Lawyers*, and he was a member of the winning team for The M&A Advisor's "Restructuring of the Year (Over $500mm to $1 Billion)" award in 2015 for the restructuring of FriendFinder Networks. He is also rated AV-Preeminent by Martindale-Hubbell. Judge Cleary was admitted to practice in Arizona and Illinois, before the U.S. Courts of Appeals for the Ninth and Seventh Circuits, and before the U.S. District Courts for the District of Arizona and the Northern District of Illinois. He received his B.A. *cum laude* from Arizona State University in 1984 and his J.D. with honors from DePaul University College of Law in 1987, where he was an article and note editor for the *DePaul Law Review*.

Hon. Lisa S. Gretchko is a U.S. Bankruptcy Judge for the Eastern District of Michigan in Detroit, sworn in on April 5, 2021. Prior to her judicial appointment, she spent more than four decades as a bankruptcy/creditors' rights attorney and represented nearly every constituency in bankruptcy courts around the country, including secured creditors, unsecured creditors' committees, landlords, licensors of intellectual property, customers, suppliers, business debtors and trustees. Judge Gretchko has written and lectured extensively for various organizations on numerous bankruptcy and creditors' rights issues. From April 2018-April 2022, she served as ABI's Vice President-Publications, as a member of ABI's Executive Committee and Board of Directors, and as ABI's Publications Committee chair. Judge Gretchko is a former Executive Editor of the *ABI Journal* and a former co-chair of the ABI's Unsecured Trade Creditors Committee, which named her 2014 Committee Person of the Year. She also has been named in *Michigan Super Lawyers* and *The Best Lawyers in America*, and she was

honored as a Woman in the Law by *Michigan Lawyer's Weekly* in 2011. Judge Gretchko received her B.A. with honors in 1976 from the University of Michigan, where she was elected Phi Beta Kappa, and her J.D. with honors in 1978 from the University of Detroit.

Hon. Beth E. Hanan is a U.S. Bankruptcy Judge for the Eastern District of Wisconsin in Milwaukee and Green Bay, appointed in May 2015. Previously, she was an appellate lawyer and litigator in Wisconsin, and served several terms as managing member of a trial practice boutique, Gass Weber Mullins. Judge Hanan was chair of the Wisconsin Judicial Council and president of the Milwaukee Bar Association, and she remains a Fellow in the American Academy of Appellate Lawyers. Since joining the bench, she has been the judicial co-chair of ABI's annual Wedoff Consumer Conference (in 2020 renamed the Consumer Practice Extravaganza) and has served as the bankruptcy representative to the Seventh Circuit Judicial Council (2019-21). She also chaired the Public Outreach committee of the National Conference of Bankruptcy Judges (NCBJ) from 2020-22 and is a member of NCBJ's Ethics and International Judicial Relations committees. Judge Hanan received her undergraduate degree from Marquette University and her J.D. in 1996 from the University of Wisconsin Law School.

Hon. Robyn L. Moberly is a U.S. Bankruptcy Judge for the Southern District of Indiana in Indianapolis and served a seven-year term as Chief Judge. She served on the superior court bench in Indianapolis from January 1997 until her appointment to the bankruptcy court. In state court, she presided over major felony court for four years and civil court for 12 years. Prior to her judicial service, Judge Moberly was a general practitioner for 17 years. She served as president of the IU McKinney School of Law Alumni Association and of the Indiana Judges Association, as president and board member of the Indianapolis Bar Association, as board member of the Indiana Judicial Conference, and as associate presiding judge of the Marion Superior Court. Judge Moberly has been recognized for her contributions to our community by receiving the Indianapolis Bar Association's President's Award, the Board of Directors Award and the Indianapolis Bar Association's *Pro Bono* Award. She also received the 2016 *Indianapolis Business Journal*'s Women of Influence award, the Distinguished Barrister award by the *Indiana Lawyer* newspaper, the Woman of Achievement award by Ball State University, and the Woman for All Seasons by the St. Thomas Moore Society. She also received the Silver Gavel in 2022. Judge Moberly received her J.D. *cum laude* in 1978 from the Indiana University McKinney School of Law.

Hon. Mina Nami Khorrami is a U.S. Bankruptcy Judge for the Southern District of Ohio in Columbus and was appointed on Sept. 10, 2021, by the U.S. Court of Appeals for the Sixth Circuit. She began her career in St. Louis, Mo., where she practiced bankruptcy law and litigation as an associate with the firms of Vogler & Associates and then with Compton, Wells & Hamburg. While she practiced in St. Louis, she successfully argued a case before the U.S. Court of Appeals for the Eighth Circuit. In 1991, Judge Nami Khorrami relocated to Columbus to open her own firm. Her practice focused on more complex chapter 7 and 13 bankruptcies, including arguing before the Bankruptcy Appellate Panel of the U.S. Court of Appeals for the Sixth Circuit. She also handled general civil litigation, foreclosure defense, and issues relevant to small businesses. Prior to her appointment to the bench, she also served as a chapter 7 panel trustee. Judge Nami Khorrami has served on numerous committees of the Columbus Bankruptcy Bar and was a frequent speaker at CLE programs. She has long been committed to bankruptcy *pro bono* service in the Columbus community, and in 2013 she received the Columbus Bar Association and Foundation Award for her involvement in the imple-

mentation of the chapter 7 bankruptcy *pro bono* project in Columbus. Judge Nami Khorrami also served as vice-chair of the court's Attorney Advisory Committee and as co-chair of its Consumer/Small Business subcommittee. She is a past co-chair of the Columbus chapter of the International Women's Insolvency & Restructuring Confederation (IWIRC) and a past co-chair of the Bankruptcy Law Institute's (BLI's) Planning Committee. She also served on the board of trustees for the Credit Education Coalition (CEC) and was a member of the Chapter 13 Liaison Committee. Judge Nami Khorrami received her B.S. in business administration from the University of Missouri-St. Louis and her J.D. from Valparaiso University School of Law.

Hon. Christopher P. Yates joined the Michigan Court of Appeals on April 18, 2022, after serving for 14 years as a trial judge on the Kent County Circuit Court in Grand Rapids. As an attorney, he clerked for Chief Judge James P. Churchill of the U.S. District Court for the Eastern District of Michigan and for Judge Ralph B. Guy, Jr., of the U.S. Court of Appeals for the Sixth Circuit. Judge Yates also worked as a federal prosecutor in Detroit, as an attorney-advisor in the Office of Legal Counsel at the U.S. Department of Justice in Washington, D.C., as Chief Federal Public Defender for the Western District of Michigan, and as a partner in two private law firms in Grand Rapids. Judge Yates is a past president of the Michigan Judges Association, the Grand Rapids Bar Association and the Gerald Ford American Inns of Court chapter. He is the 2019 recipient of the Hilda Gage Judicial Excellence Award from the Michigan Judges Association, the 2020 recipient of the Judicial Excellence Award from the Michigan Defense Trial Counsel and the 2022 recipient of the Judicial Lifetime Achievement Award from the American Board of Trial Advocates, and he is a member of the Michigan Supreme Court Committee on Model Civil Jury Instructions, as well as a four-time inductee into the Kalamazoo College Athletic Hall of Fame as a tennis player. Judge Yates received his B.A. from Kalamazoo College in 1983 and his M.B.A. and J.D. from the University of Illinois in 1987.