AMERICAN BANKRUPTCY INSTITUTE

2019 Rocky Mountain Bankruptcy Conference

Consumer Workshops I and II

My Cousin Vinny: Evidence and Trial Skills in Consumer Bankruptcy Cases, Including Challenges in Consumer Representation: Parts I and II

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24TH ANNUAL ROCKY MOUNTAIN BANKRUPTCY CONFERENCE

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January 25, 2019: 9:00-10:15 a.m.

My Cousin Vinny: Evidence and Trial Skills in Consumer Bankruptcy Cases including Challenges in Consumer Representation Part I

Hon. John P. Gustafson, U.S. Bankruptcy Court (N.D. Ohio); Toledo
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MATERIALS

Pretrial Considerations

Understanding the Distinction: Adversary Proceedings vs. Contested Matters

- Contested Matters - Fed. R. Bankr. P. 9014
  - FRBP 9014(c): The following rules under Party VII apply to contested matters unless the Court directs otherwise (7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7064, 7069, and 7071)
- Adversary Proceedings - Fed. R. Bankr. P. 7001 – Scope of Rules in Part VII

Jurisdiction

- History
  - *Bankruptcy Reform Act of 1978* → Bankruptcy courts are adjuncts of the District Court that have jurisdiction over all "civil proceedings arising under title 11 or arising in or related to cases under title 11" – 28 U.S.C. § 1471 (repealed)
  - Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) → Without the consent of the parties, Bankruptcy Courts can issue final judgments only on "core proceedings." For non-core related proceedings, a Bankruptcy Judge can only issue proposed findings of fact and conclusions of law, which are submitted to the District Court for *de novo* review.
  - *Bankruptcy Amendments and Federal Judgeship Act of 1984* → Added 28 U.S.C. § 157 that created core and non-core matters distinction.
- Current Landscape
  - Stern v. Marshall, 564 U.S. 462 (2011) → 28 U.S.C. § 157 violated Article III by allowing an Article I court to enter final judgment on a common law counterclaim

(tortious interference) that would not require concurrent resolution with the creditor's proof of claim.

- Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25 (2014) → This case set forth the procedure under which bankruptcy courts are to render proposed findings of fact and conclusions of law with regards to Stern claims that are then reviewed by the district court, even if said claims are "core" under the Bankruptcy Code. The holding in Wellness suggests that the Arkison procedure ought be used for Stern claims where parties have not consented to entry of final judgment by the bankruptcy court.
- Wellness Int'l Network, Ltd. v. Sharif, 135 S.Ct. 1932 (2015) → "Allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process." However, "a litigant's consent – whether express or implied – must still be knowing and voluntary."
- In re Renewable Energy Dev. Corp., 792 F.3d 1274 (10th Cir. 2015) → The Tenth Circuit interpreted Stern and Wellness and concluded that "cases properly in federal court but arising under state law and not necessarily resolvable in the claims allowance process trigger Article III's protections."

Drafting Complaints and Counterclaims

- *A Primer on Drafting Adversary Complaints, Counterclaims, Cross-Claims, and Third-Party Complaints* – Honorable Guy R. Humphrey
- *Complaints and Answers* – Honorable John P. Gustafson
- Using Forms – balancing act
- Pleading Standard
    - Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level,' and a complaint that merely offers 'labels and conclusions,' or a 'formulaic recitation of the elements of a cause of action,' is insufficient.")
    - Ashcroft v. Iqbal, 556 U.S. 662 (2009) ("Two working principles underlie our decision in Twombly. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . .Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . .But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).")

  - In re Expert South Tulsa, LLC, 522 B.R. 634 (10th Cir. BAP 2014) ("A number of courts have acknowledged that threadbare allegations regarding a debtor's insolvency are insufficient to satisfy *Iqbal* and *Twombly*. This holding is consistent with the purpose of *Iqbal* and *Twombly*, which is to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, and also to inform the defendants of the actual grounds of the claim against them.'")

- Prior State Court Judgments
  - Collateral estoppel/issue preclusion
    - Look to state law in which judgment was entered
      - State Farm Fire and Cas. Co. v. Edie, 314 B.R. 6, 12 (Bankr. D. Utah 2004) (quoting Cobb v. Lewis, 271 B.R. 877, 883 (10th Cir. B.A.P. 2002)) → "The Full Faith and Credit Statute directs a federal court to look to the preclusion law of the state in which the judgment was rendered."
    - Pending appeal does not bar effect of judgment for collateral estoppel
      - Icon Health & Fitness, Inc. v. Garmin Int'l, 2015 WL 5714248 (D. Utah 2015) → A final judgment retains preclusive effect pending an appeal.
  - *Rooker-Feldman* Doctrine
    - Exxon Mobile Corp. V. Saudi Basic Industries Corp., 125 S.Ct. 1517, 1522 (2005) → "The *Rooker–Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker–Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions."

Service

- Due Process Requirement
  - Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) → "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."
- Fed. R. Bankr. P. 7004
  - Government agencies: Fed. R. Bankr. P. 7004(b)(4)-(5)
    - First Class Mail

        - Civil Process Clerk for U.S. attorney for District action is brought AND
            - Attorney General of U.S. in Washington D.C.
            - If Agency is Corporation, also to officer, managing or general agent or agent authorized to receive service of process
        - PLUS addresses designated by Local Rules
    - Insured depository institutions: Fed. R. Bankr. P. 7004(h)
        - Certified Mail to an Officer UNLESS
            - Institution appears by attorney – to attorney by First Class Mail
            - Court Orders otherwise
            - Institution has waived in writing
                - (See FRCP 4(d) and accompanying form)
        - https://research.fdic.gov/bankfind/
    - Service on debtor's attorney: Fed. R. Bankr. P. 7004(g)
        - Refers to FRCP 5(b) – which includes electronic consent if agreed to in writing
        - REMEMBER: must still serve the debtor
    - Service on statutory agents – "or under state law": Fed. R. Bankr. P. 7004(b)(7)
        - Individual or corporation may serve entity upon whom service is prescribed by any statute of US or state in which service is made
    - Corporation, partnership, or association (i.e. "president" or "Jane Doe, president"): Fed. R. Bankr. P. 7004(b)(3)
            - First Class Mail
            - Attention of Officer, Managing or General Agent or Registered Agent
        - Specific officer must be named
            - In re Pittman Mechanical Contractors, Inc., 180 B.R. 453, 454–57 (Bankr. E.D. Va. 1995) (finding service upon the corporation, "ATTN: President or Corporate Officer", constituted service upon an office, rather than upon an individual officer and thus deeming service insufficient).
        - Service addressed to attention of an office is permissible
            - In re C.V.H. Transport, Inc., 254 B.R. 331, 333–34 (Bankr. M.D. Pa. 2000) (holding that service upon the corporation addressed to the 'officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process ...' for the corporation was sufficient).
    - *Notice: Pitfalls and Perils of Rule 7004(h)* – Academy Staff, The NACTT Academy for Consumer Bankruptcy Education, ConsiderChapter13.org
- Consequences of Failing to Properly Serve

- Balance service requirements with constitutional limits of due process. Wallace v. Shapiro (In re Shapiro), 265 B.R. 373, 378 (Bankr. E.D.N.Y. 2001).
- FRCP 12(b)(4) Motion to Dismiss
- Vacate any default judgment
- Quash service and require it be re-issued

Drafting Answers

- Defenses – Fed. R. Bankr. P. 7012
  - *List of Affirmative Defenses to Consider*
  - Waiver – Fed. R. Bankr. P. 7012(h)
    - A party waives the defenses listed in Rule 12(b)(2)-(5) (including lack of personal jurisdiction) by failing to assert defense in a responsive pleading or an earlier motion. American Fidelity Assurance Co. v. The Bank of New York Mellon, 810 F.3d 1234 (10th Cir. 2016).
    - Waiver limited to defenses "available to the party but omitted from its earlier motion." Fed. R. Bankr. P. 7012(g)(2).

Initial Disclosures and Discovery Plan

- Fed. R. Bankr. P. 7026 – initial disclosures
- Discovery disputes
  - Fed. R. Bankr. P. 7037 – motion to compel and the attempt to confer
- 2004 exams v. depositions – deciding which to use for evidence
- Duty to Preserve
  - *Example: Short Form Litigation Hold Notice*

Pretrial Motions

- Summary Judgment – Fed. R. Bankr. P. 7056
  - Standard: No genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law
    - Materiality is determined by substantive law and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).
    - Whether dispute is "genuine" turns on whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).
  - Burden: The burden is on the moving party to show it is entitled to summary judgment, including burden to support motion pursuant to Fed. R. Bankr. P. 7056(c).

- Look to Bankruptcy Court Local Rules for requirements - failure to comply may result in denial of motion
  - Bankr. D. Colo. L.B.R. 7056-1
  - Bankr. D. Utah L.B.R. 7056-1

Default – pleading standards

- Fed. R. Bankr. P. 9013 → A request for an order . . . shall be by written motion . . . . The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought.
  - "The granting of an uncontested motion is not an empty exercise but requires that the court find merit to the motion." In re Nunez, 196 B.R. 150, 156 (B.A.P. 9th Cir. 1996).
  - "Critical review of uncontested motions, moreover, is consistent with a basic legal principle—that courts are not required to grant a request for relief simply because the request is unopposed. Other applications of this principle, in the bankruptcy context, include the rule that bankruptcy courts should review uncontested fee applications, that bankruptcy courts may deny default judgments against nonappearing defendants, and that appellate tribunals may deny bankruptcy appeals even though no appellee participates." In re Franklin, 210 B.R. 560 (Bankr. N.D. Ill. Eastern Division 1997).
  - "'Factual allegations must be enough to raise a right to relief above the speculative level,' and a complaint that merely offers 'labels and conclusions,' or a 'formulaic recitation of the elements of a cause of action,' is insufficient." Bangerter v. Roach, 467 Fed. App'x. 787 (10th Cir. 2012) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).
- Relief in order must match relief in the motion

Pretrial Order

- Consent to jurisdiction of bankruptcy court – see "Jurisdiction" *supra*
  - *A Few Supreme Court Bankruptcy Decisions that May be Helpful to Know by Name* – Honorable John P. Gustafson
- Parties' Planning Meeting
- Requests for extensions of time

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January 25, 2019: 10:45 a.m.-12:00 p.m.

My Cousin Vinny: Evidence and Trial Skills in Consumer Bankruptcy Cases including Challenges in Consumer Representation Part II

Hon. John P. Gustafson, U.S. Bankruptcy Court (N.D. Ohio); Toledo
Tami Gadd-Willardson, Office of the Chapter 13 Trustee; Salt Lake City
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Trial

Evidence

- Rules to note
  - Foundation
  - Relevance
  - Judicial Notice
  - Lay person vs. expert testimony
  - Hearsay
  - Business Record
- Introducing evidence – Formula "MOWFO"[1]
  - Mark it, Other Side, Witness, Foundation, Offer
- *Pocket Guide to Common Evidentiary Issues in Bankruptcy*, Honorable Pamela Pepper, United States Bankruptcy Judge, Eastern District of Wisconsin

Common types of evidence in consumer cases

- Letter – Reply Letter Doctrine
  - If witness prepared initial letter and receives a reply from recipient means sufficient circumstantial inference that second letter is authentic.
  - Foundational elements:

1. Witness must have prepared first letter – placed it in envelope with adequate postage, addressed to author of reply letter, mailed the letter to the author of reply letter.

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[1] © Advanced Consumer Bankruptcy Practice Institute.

2. Witness must have received a reply letter in the due course of mail and the reply letter referred to the first letter or was responsive to it.
3. Reply letter must have name of the author.
4. Witness must recognize the exhibit as the reply letter

- Email
    - Reply letter doctrine can be applied
        1. Email address was obtained reliably
        2. Message was sent to the email address
        3. Reply to the message was received
    - Content doctrine can be applied
        1. Author was likely to know the information sent in the message
            a. Information may be known only to sender
            b. Used reply to respond and the new message includes the original message.
    - Action consistent with the message
        1. After receiving the email, the sender takes action consistent with statements in the message
    - Also, high technology e-mail server tracing, cyptography and digital signatures.
- Photograph
    - Witness does not necessarily have to be the photographer but must be familiar with the scene or object.
    - Foundational elements:
        1. Witness is familiar with the object or scene and explains how they are familiar
        2. Witness recognizes object or scene in the photograph
        3. The photograph is a "fair," "accurate," "true," or "good" depictions of the object or scene at the relevant time.
- Business writings
    - Witness must be sufficiently familiar with the business' filing system, obtained the record and recognizes the exhibit as a record removed from the filing system.
    - Foundational elements:

1. Witness has personal knowledge of the business' filing system
2. Witness removed a record from certain file
3. It was the right file
4. Witness recognizes exhibit as the record removed
5. Witness explains how they recognize the exhibit

- Business Record as Exception to Hearsay: FRE 803(6)
    - Foundational Elements

1. Record was prepared by person with relationship with the company (ideally, employee)
2. Record preparer had a business duty to report the information – test is existence of a business duty, not the person's relationship as employee
3. Record preparer had personal knowledge of the facts or events reported
4. Record was prepared contemporaneously with the facts or events
5. It is a routine practice to prepare the record
6. Record was reduced to written form
7. Record was made in regular course of business
8. Record is factual in nature

- Property tax records and other official records: FRE 803(8)
    - Foundational Elements

1. Live testimony not required
2. Proponent must establish the record was prepared in official capacity of public office, the record is open to the public, the record was property prepared, the official had duty to record the record and the record is factual in nature.

10 COMMANDMENTS OF CROSS EXAMINATION

The late Irving Younger was one of the great teachers of trial practice and promulgated the "*Ten Commandments of Cross Examination*." Summary of the commandments listed below with times when those rules should be broken:

I. **BE BRIEF**: Should never try to make more than 3 points on cross-examination.
   a. Be proportional is perhaps better line of thinking: If witness has not hurt your case, is examination necessary? If witness is expert who is the crux of opposing party case, be prepared for a not brief cross-examination

II. **USE PLAIN WORDS:** Try to drop the legalese and use plan words
   a. Instead of "directing your attention to…" use "let's talk about..."

III. **USE ONLY LEADING QUESTIONS**: Leading questions are not simply yes/no questions but one that suggests the answer – a declarative statement followed by a request to confirm it.
   a. BUT be wary of too many leading questions as questions for lawyers are not evidence; only answers to questions are evidence. Ask simple questions with narrow answers.

IV. **ONLY ASK QUESTIONS YOU ALREADY KNOW THE ANSWER**: Not a fishing expedition in which to uncover new facts.
   a. But how many times late in trial preparation has there been the thought "I wish I knew the answer to _____." Logic, common sense and history of the case generally leads to the answer. Instead only ask questions that you know the answer to, know what the answer should be, or know you can deal with the answer.

V. **LISTEN TO THE ANSWER**: Sometimes answers given in heat of the moment can provide new lines of questions or allow you to follow up on dodged answers

VI. **DON'T ARGUE WITH THE WITNESS**: Follow when it is witness who is inexperienced with courtroom matters. If examining a professional witness or expert, the white gloves can come off, but still be courteous.

VII. **DON'T PERMIT THE WITNESS TO REPEAT DIRECT TESTIMONY**: Stick with simple questions and narrow answers. The more times testimony is repeated, the more likely it is to be believed.

VIII. **DON'T PERMIT THE WITNESS TO EXPLAIN ANSWERS**: Stick with simple questions and narrow answers to avoid giving opportunity to explain; but if explanation is still given, point of the conflict between the explanation and common sense.

IX. **DON'T ASK THE "ONE QUESTION TOO MANY"**: Stop when you have made your point and make your argument in closing.

a. However, opposing counsel will likely ask it on re-direct.
b. You may not know it was one question too many until Monday morning quarterbacking.
c. Select what topics to question the witness one that one question will not blow up the entire testimony – only question on subjects the witness is most vulnerable, has no chippy reply and that cannot be cured on re-direct.

X. **SAVE YOUR ULTIMATE POINT FOR CLOSING:** <u>But the best time to convince the judge to discredit the testimony is while the witness is on the stand.</u>

Pretrial Considerations Supplemental Materials

1. *A Primer on Drafting Adversary Complaints, Counterclaims, Cross-Claims, and Third-Party Complaints*, Hon. Guy R. Humphrey, United States Bankruptcy Judge, Southern District of Ohio

2. *Complaints and Answers*, Hon. John P. Gustafson, United States Bankruptcy Judge, Northern District of Ohio

3. *Notice: Pitfalls and Perils of Rule 7004(h)* – Academy Staff, The NACTT Academy for Consumer Bankruptcy Education, ConsiderChapter13.org

4. List of Affirmative Defenses to Consider

5. Example: Short Form Litigation Hold Notice

6. *A Few Supreme Court Bankruptcy Decisions that May be Helpful to Know by Name* – Honorable John P. Gustafson

Trial Supplemental Materials

7. *Pocket Guide to Common Evidentiary Issues in Bankruptcy*, Honorable Pamela Pepper, United States Bankruptcy Judge, Eastern District of Wisconsin

How I Can Satisfy the Trustee So I Can Get Paid) »

A Primer on Drafting Adversary Complaints, Counterclaims, Cross-Claims, and Third-Party Complaints

BY CONSIDERCHAPTER13, ON JANUARY 7TH, 2018

By the Honorable Guy R. Humphrey, United States Bankruptcy Judge, Southern District of Ohio

Due to the fact that the bankruptcy process, particularly the consumer bankruptcy practice, is more akin to an administrative process than an adversarial litigation practice, consumer bankruptcy practitioners generally have little experience and training in drafting adversary complaints and other claims for relief. In light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), drafting complaints, counterclaims, cross-claims, and third-party complaints ("complaints") that will survive a motion to dismiss and that will obtain the relief that the claimant desires is even more critical. The following provides a framework for drafting complaints that will avoid unnecessary procedural motions and issues for the court and which will aid in the claimant's obtaining the relief which is sought.

1. There is No Substitute for Reading and Being Familiar With the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure Incorporated into the Bankruptcy Rules, and Applicable Local Rules. The nature of this article does not allow for a complete analysis and discussion of all of the rules that impact the drafting of a complaint. There simply is no substitute for familiarizing yourself with the rules and continually re-familiarizing yourself with them in the process of drafting complaints, other pleadings, and other filings with the court.

2. Find and develop a good template or templates for your complaints. You will not likely be the first person to have ever drafted a complaint of the nature you will need to draft, so try to find a good example of such a complaint which you can use as a template and develop templates for your complaints. Of course, you will need to carefully modify the template to meet the facts and claims of your particular case, but having a good template will give you a good start.

3. Bankruptcy Rule 7008(a) Requirements. Rule 7008(a) incorporates Federal Rule of Civil Procedure 8 and requires that complaints contain; a) a short and plain statement of the grounds for the court's jurisdiction, including a reference to the name, number, and chapter of the case under the Bankruptcy Code to which the adversary proceeding relates and to the district and division where the case is pending; and b) a statement as to whether the pleader consents to entry of final orders and judgment by the bankruptcy court.

4. Description of the Parties. Every complaint should succinctly describe each plaintiff, defendant, cross-claimant, or third-party, including their connection to the underlying bankruptcy case (e.g. debtor, creditor, trustee, etc.).

5. Pleading of Facts. Practitioners need to understand that following the rendering of the *Twombly* and *Iqbal* decisions, the days of simplified "notice" pleading in which a claimant might have been able to get by with bare legal conclusions are gone. The Supreme Court held that Rule 8(a) requires "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 667 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal* at 678 (citing *Twombly* at 570). Conclusions asserted as allegations "are not entitled to the assumption of truth." *Iqbal* at 679. "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements", "labels and conclusions", and "'naked assertion[s]' devoid of 'further factual enhancement...'" are insufficient. *Id.* at 678 (citation omitted). Thus, the claimant must plead sufficient facts in the complaint from which the court can conclude, assuming that the plead facts are true, that the claimant is entitled to the relief sought.

   Particular facts that should be plead include relevant dates, including the petition date for the underlying case and if transfers are the subject of the complaint, the dates of the events relating to the transfers, the amount of the transfers, and any other specific information which might identify the transfers. If you are alleging a fraud or misrepresentation, plead the facts which constitute the fraud, misrepresentation, concealment or the like. Similarly, if you are alleging an intentional or malicious injury or embezzlement or larceny, allege the facts relating to the wrongful act.

6. Plead a Separate Claim for Relief or Count for Each Remedy Sought or Basis for Relief, Including Each Prong of a Nondischargeability Provision. A well-drafted complaint will contain a separate claim for relief or count for each statutory or non-statutory basis for relief. Thus, if the trustee is seeking avoidance of a transfer as an unauthorized post-petition transfer of property under Code § 549 and turnover of that property under § 542, the complaint should contain separate enumerated counts for those two different forms of relief. Each exception to discharge being pursued by a plaintiff should be enumerated in a separate count, including each branch or prong of § 523(a)(2) and (4). The different grounds under § 548(a)(1)(A) and (B) for avoiding fraudulent conveyances and under state law should be plead in separately enumerated counts. Similarly, if the claimant is seeking declaratory, injunctive, or any other form of extraordinary relief, a well-drafted complaint will describe the bases for each of those remedies under separate enumerated counts or claims for relief.

7. Under Section 523(a), Plead the Debt and the Basis for It Being Nondischargeable.Frequently in pursuing a proceeding seeking a determination of the nondischargeability of an obligation, the pleader overlooks the fact that in order for there to be a nondischargeable debt,

there must be a debt in the first place. Thus, plead the basis for the existence of the debt, such as damages for breach of a contract, or damages based upon a specific tort, or an obligation due under a domestic relations order, in addition to pleading the § 523(a) basis for the nondischargeability of the debt. If the debt has been previously liquidated through another court action, your task will be easier. If the debt has not been liquidated, then in addition to the bankruptcy court's determination of the dischargeability of the debt, you may also need to plead and obtain the court's determination of the underlying indebtedness.

8. Application of Preclusion Principles. If facts relevant to your claims have been previously adjudicated in another court proceeding, describe what facts were determined by the other court and the judgment through which those facts were determined.

9. Pleading Special Matters. Rule 7009 incorporating Federal Rule of Civil Procedure 9 requires certain special matters to be plead, including particularity with respect to fraud and special damages. Attorney fees and punitive damages have sometimes been determined to constitute "special damages."

10. Jury Demand. Rarely are jury demands made or appropriate in adversary proceedings, but in the event the situation is present and a jury trial is desired, the complaint must contain an appropriate jury demand.

11. Prayer for Relief. The prayer for relief should specify the relief sought on each count or claim for relief sought in the complaint.

12. Redact Private Identifiers. Bankruptcy Rule 9037 provides that unless otherwise ordered by the court, references to a person's social security number, taxpayer identification number, date of birth, financial account number, or a minor's name in an electronic filing shall only include the last 4 digits of the social security number or taxpayer identification number, the year of the individual's birth, the minor's initials, and the last 4 digits of a financial account number. Be sure to redact such information not only in the text of your filing, but also in any attached exhibits or documents.

Conclusion. Drafting good complaints is a skill which any lawyer can learn. While that skill cannot be learned solely through reading an article, hopefully this article will serve as a framework for understanding some of the requirements of a well-drafted complaint.

The Honorable Guy R. Humphrey was appointed as a Judge of the United States Bankruptcy Court for the Southern District of Ohio, sitting in Dayton, in 2007. He is a graduate of Kent State University and The Ohio State University Moritz College of Law.

Prior to his appointment, Judge Humphrey practiced in the areas of debtor-creditor law, bankruptcy representation, receivership, and litigation, representing a broad spectrum of clients, including individual debtors, business debtors, secured creditors, unsecured creditors, committees, and purchasers of

assets from financial institutions and bankruptcy estates. That representation spanned many industries, including manufacturing, real estate, lodging, retail, construction, restaurant and food service, transportation, utilities, financial institutions, and equipment sales and leasing.

Judge Humphrey is a member of the National Conference of Bankruptcy Judges, the American Bankruptcy Institute, the Thomas F. Waldron American Bankruptcy Law Forum (Trustee), the Dayton Bar Association (Foundation Fellow), and the Federal Bar Association and served on the Bankruptcy Appellate Panel for the Sixth Circuit, 2013-2018.

Both as a practitioner and as a judge, Judge Humphrey has been a presenter at numerous legal education seminars and conferences. Since being appointed, he has enjoyed participating in the University of Dayton School of Law's externship program, as a presenter at the Law and Leadership Institute operated through the University of Dayton, and as a judge for the high school Robert N. Farquhar District Mock Trial Competition.

Judge Humphrey has served as a member of the Strategic Planning and Local Bankruptcy Rules Committees for the Bankruptcy Court for the Southern District of Ohio and has served as a member and chair of the Bankruptcy Bench-Bar Conference Committee for the District.

Complaints and Answers.

Supplementing Judge Humphrey's outline on drafting complaints. Note that this was originally prepared for Ohio attorneys, and includes primarily Ohio case law.

I. The Complaint:

1. Before the numbered paragraphs, there is usually an "introduction", which is fairly formulaic. It could read: "Now comes M. Y. Client, Debtor in Chapter 7 case number 18-90309, and hereby states the following in support of her complaint to recover a preferential transfer made to R. Steve Transfer ("Defendant"):" Or, "T. Rusty Seven ("Trustee"), as Trustee for the Chapter 7 estate of Dee Ebtor ("Defendant"), by and through Trustee's counsel, for his Complaint, states as follows:"

2. Usually, the next part of the Complaint would identify the parties, first the Plaintiff, then all of the defendants in separate numbered paragraphs. Or, sometimes the first paragraph states the nature of the action first – setting forth the Code sections and Rules upon which the Complaint is based – followed by the identification of the parties.

   In cases where a defendant is being sued in their representative capacity, it is VERY important, particularly in the caption of the Complaint, to make it clear you are not suing that defendant individually. Your litigation will get off to a unnecessarily contentious start if it looks – like to a credit reporting agency – that you are suing the party individually. Creditors should also keep this "representative capacity" issue in mind when they need to include, for example, a Trustee among the defendants in a foreclosure action. The representative capacity should also be stated in the caption if the Plaintiff is suing in a representative capacity.

3. Pleading Jurisdiction. After identifying the parties, the Complaint should then state the basis for the court's jurisdiction. If it wasn't done as the first paragraph, the statement of jurisdiction should identify the action and the statutory basis for the action – this is done very generally, usually in one paragraph. You would usually include the statutes and rules govern the action – like Section 523(a)(6) and Federal Rules of Bankruptcy Procedure 7001(6) as part of the description.

   a. This section of the Complaint is governed by Federal Rule of Bankruptcy Procedure 7008, which states:

      Rule 7008. General Rules of Pleading (a) Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court.

   b. Pleadings before a bankruptcy judge are either core, or non-core. 28 U.S.C. Section 157. Prior to 2016, there was a requirement that the Complaint state whether the proceeding was core, or non-court. The 2016 Bankruptcy Rules amendments changed the pleading

requirement. Now, Plaintiff is NOT required to assert that the proceeding is core or non-core. Instead, Plaintiff is required to state whether the Plaintiff does or does not consent to the entry of final orders or judgment by the bankruptcy court. Just because the requirement to plead "core or non-core" has been removed from the Bankruptcy Rules does not mean you can't state that a proceeding is a core (or a non-core) proceeding. It just isn't required. In contrast, stating that Plaintiff(s) consent, or do not consent, to the entry of a final order or judgment IS now **required**. This is emphasized because in some jurisdictions it is almost never pleaded correctly.

c. The Complaint should also state the basis for venue. Typically, this is done by stating something like: "Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409." Of course, if there is an actual venue issue lurking around your case, you will want to plead why venue is proper in more detail.

d. Sometime, in the "jurisdictional section", the Plaintiff may assert that the Complaint is timely filed. A denial of this allegation puts Plaintiff on notice, very early in the litigation, that the timeliness of the filing of the Complaint is in issue.

4. At this point, the Complaint usually transitions to "Facts" or "Facts Common To All Counts" or "Background and Procedural History" – doesn't matter what you call it, this is the meat of your Complaint.

While it is important to properly plead both the law and the facts – there is no question as to which is more important today: pleading the facts. As Judge Whipple has noted: "Plaintiff does not cite § 523(a)(2)(B) in his complaint. However,"[t]he failure in a complaint to cite a statute, or to cite the correct one, in no way affects the merits of a claim. Factual allegations alone are what matters." *Quinn-Hunt v. Bennett Enter., Inc*., 122 Fed. Appx. 205, 207 (6th Cir. 2005) (quoting *Albert v. Carovano*, 851 F.2d 561, 571, n. 3 (2d Cir.1988))." *Schachter v. Verbeek (In re Verbeek)*, 2018 WL 4907840 at *3 n. 1, 2018 Bankr. LEXIS 3154 at *8 n.1 (Bankr. N.D. Ohio Oct. 9, 2018).

Her discussion in *In re West* is makes the point even more strongly:

> So the amended complaint is a somewhat refined melange of statutory citations, which are technically not required in a complaint, case law citations, which are generally inappropriate in a complaint, and averments of fact, which is the point of the complaint. *Gean v. Hattaway*, 330 F.3d 758, 765 (6th Cir.2003)("[T]he form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim"). As the Sixth Circuit has stated, "[t]he failure in a complaint to cite a statute, or to cite the correct one, in no way affects the merits of a claim. Factual allegations alone are what matters." *Quinn–Hunt v. Bennett Enter., Inc*., 122 Fed. Appx. 205, 207 (6th Cir.2005) (quoting *Albert v. Carovano*, 851 F.2d 561, 571, n. 3 (2d Cir.1988)); *Topchian v. JPMorgan Chase Bank, N.A*., 760 F.3d 843, 848 (8th Cir.2014) ("The well-pleaded facts alleged in the complaint, not the legal theories of recovery or legal conclusions identified therein, must be

> viewed to determine whether the pleading party provided the necessary notice and thereby stated a claim in the manner contemplated by the federal rules.").

West v. Home Sav. & Loan (In re West), 2015 WL 3962569 at *4, 2015 Bankr. LEXIS 2116 at **10-11 (Bankr. N.D. Ohio June 29, 2015).

5. In transitioning to the "counts" in the Complaint – which should be under a separate heading for each statutory basis (or legal basis, like the common law) for relief – usually begins with a paragraph stating: "The allegations contained in paragraphs 1 – 20 are hereby incorporated by reference with the same force and effect as if fully restated herein." Or something like that. So, the heading might be: "Violation of 11 U.S.C. 727(a)(6)." followed by the formal "restatement" of the allegations.

6. The "prayer for relief" is required to be included in a pleading stating a claim for relief by Rule 8 of the Federal Rules of Civil Procedure, made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 7008. Note that the prayer for relief is under Civil Rule 8(a)(3), not part of Civil Rule 8(a)(2), which is where the requirement is found that the pleader set forth "a short and plain statement of the claim, showing the pleader is entitled to relief." The prayer for relief is most important in situation where a default judgment is sought, because "[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Federal Rule of Civil Procedure 54(c), made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 7054. *See*, *West v. Home Sav. & Loan (In re West)*, 2015 WL 3962569 at *6, 2015 Bankr. LEXIS 2116 at *15 (Bankr. N.D. Ohio June 29, 2015).

II. The Answer.

1. The Answer should respond to each numbered paragraph of the Complaint. At the most basic level, the Defendant can: 1) admit the allegation in full; 2) deny the allegation in full; 3) admit or denied specified parts of the allegation; 4) deny for want of knowledge; or 5) assert that no response is required, such as where the paragraph of the Complaint simple recites the text of a statute.

2. A denial for want of knowledge is typically phrased something to the effect that: "Defendant lacks knowledge or information to form an opinion as to the truth of the allegation in ¶12, and therefore denies same." Or, "Defendant is without knowledge or information sufficient to form a belief as the truth of the remaining averments in this paragraph and denies the same."

3. At the end of the Answer, Defendant should state all of the Affirmative Defenses that may apply to the allegations in the Complaint. It is not entirely clear whether the *Iqbal/Twombly* rules apply to assertions of affirmative defenses. While some attorneys list every affirmative defense they can think of – whether they apply or not – discovery usually includes a request for information that would support each affirmative defense that has been pled. You also have Rule 9011 lurking in the background as well. A list of Affirmative Defenses is attached.

4. The Answer usually concludes with a "WHEREFORE" paragraph, describing what the Defendant wants: usually dismissal with prejudice, with Plaintiff paying costs. The

boilerplate request "and such further relief as the court deems just and proper" (or "just and equitable") is often the last words of both the Complaint and Answer.

III. The Basics of *Iqbal* and *Twombly*.

The basics of current pleading standards were outlined in *In re Medcorp., Inc*., 2013 WL 5492533, 2013 Bankr. LEXIS 4155 (Bankr.. N.D. Ohio Oct. 1, 2013):

> The Supreme Court cases cited by the Bank, *Twombly* and *Iqbal*, have heightened the notice pleading requirement of the Federal Rules of Civil Procedure. Now, although a complaint need not contain "detailed factual allegations" to withstand a motion to dismiss brought under F.R.Civ.P. 12(b)(6), the complaint must go beyond mere "labels and conclusions" so that a "formulaic recitation of the elements of a cause of action" is no longer sufficient to maintain a viable complaint. *Twombly*, 550 U.S. at 555. What is now required under *Twombly* and *Iqbal* is that sufficient facts must be plead to show that a claim is plausible on its face. *Iqbal*, 556 U.S. at 678.
>
> For this purpose, plausible does not mean probable—probable being a more demanding standard. *Erie County, Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 868 (6th Cir.2012). In *Iqbal*, the Court held that a facially plausible claim exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. In short, the "allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (citations omitted).
>
> Following *Twombly* and Iqbal, the Sixth Circuit Court of Appeals observed:
>
> it is well settled that "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim is plausible on its face if the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Plausibility is not the same as probability, but rather asks for more than a sheer possibility that a defendant has acted unlawfully.
>
> *Center for Bio–Ethical Reform, Inc. v. Napolitano*, 648 F.3d 369 (6th Cir.2011).
>
> * * * * * *
>
> The holdings of the Supreme Court in *Twombly* and *Iqbal* do nothing to change the principle that when assessing a Motion to Dismiss under 12(b)(6), the court must accept all alleged facts as true, and view such facts in the light most favorable to the nonmovant. *Napolitano*, 648 F.3d at 369.

The bottom line is – it is now much easier for a Defendant to succeed in having a Complaint dismissed under Rule 12(b)(6).

Notice: Pitfalls and Perils of Rule 7004(h)

BY CONSIDERCHAPTER13, ON AUGUST 26TH, 2018

By Academy Staff

Rules 3012 and 3015.1 and the new National Form Plan (and its Local form progeny) introduced a number of new powers that Debtors can exercise through the Plan. Debtors can value secured claims and strip liens under § 506; determine the amount of priority claims (other than claims owed to governmental units); and avoid liens that impair exemptions under § 522 – all without filing Adversary Proceedings or separate Motions and without separate hearings absent creditor objections.

But with great power, comes great responsibility. The affected creditor must be "served" with a copy of the Plan. Service on most creditors is fairly easily accomplished, as Rule 7004 merely requires mailing of the Plan to the creditor via ordinary United States First Class mail.

Where the Plan proposes to strip or cram or avoid a lien held by an Insured Depository Institution, Rule 7004 contains much higher requirements for service. Rule 7004(h) requires service by Certified Mail addressed to a named* officer of the Institution unless the Institution has previously appeared in the case through an attorney.

The first question when dealing with service under Rule 7004(h) is – what is an "Insured Depository Institution"? Rule 7004(h) states that "insured depository institution" is any institution defined in Section 3 of the Federal Deposit Insurance Act, 12 USC § 1811 *et seq*, and includes any institution insured by the Federal Deposit Insurance Corporation (the "FDIC") – effectively, any federally chartered and many state chartered banks.

Credit unions are specifically not insured by the FDIC. Credit unions are chartered under and insured by the National Credit Union Administration as part of the Federal Credit Union Act, 12 USC § 1751 *et seq*. Rule 7004(h), on its face, allows service on credit unions by ordinary First Class Mail addressed to the attention of an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process (Rule 7004(b)(3)) or to any agent authorized to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business (Rule 7004(b)(8)).

The analysis, unfortunately, does not end there. Congress chose to define "insured depository institution" as any institution defined in Section 3 of the Federal Deposit Insurance Act and any insured credit union. *11 USC §§101(34) and (35)*. Arguably, the fact that Congress included a definition in

§ 101 that is at variance with Rule 7004 does not impact the analysis at all – Rule 7004 defines "insured depository institution" solely for the purposes of service of process. Had the members of the Rules Committee intended to include credit unions, it certainly knew how to do so, by merely parroting the language of § 101(35). Similarly, had Congress intended to limit "insured depository institutions" to only FDIC insured institutions, it could have done so. Instead, the drafters of the Code and those of the Rules chose different definitions, indicating that Congress and the Rules Committee intended different interpretations of "insured depository institutions". "Where Congress includes particular language in one section of a statute but omits in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." In *Meyers v. TooJay's Management Corp*, 640 F.3d 1278 (11th Cir. 2011); *Rae v. Federated Investors*, 627 F.3d 937, 941 (3d Cir. 2010)(Section 525(b), unlike § 525(a), does not prohibit a private employer from refusing to hire – Court "will not contravene congressional intent by implying statutory language that Congress omitted"). Using this interpretation, service on a credit union does not need to meet the higher standards of service on an Insured Depository Institution.

However, the only reported case, to date, reached the opposite conclusion. In *In re Drobney*, 2018 WL 1508556 (Bankr. W.D. Mi. 2018), the Honorable Scott Dales referenced §§ 101(34) and 101(35) to somewhat summarily conclude that a credit union is an insured depository institution. Judge Dales did not delve into the mysteries of whether the term defined in § 101 necessarily had to have the same definition as Rule 7004 of the effect of the apparently intentional omission in Rule 7004 to a credit union.

What happens if the credit union is served under Rule 7004(b) rather than 7004(h)? The Court in *In re Nicholaus*, 2018 WL 799152 (Bankr. N.D. Iowa 2018) discussed the consequence of improper service in the context of an Objection to a Proof of Claim filed by the Internal Revenue Service. Debtor filed an Objection to a Proof of Claim of the IRS and served the Objection on the IRS at the address listed on the Proof of Claim. The IRS did not respond and the Court granted Debtor's Objection by default. Sometime thereafter, the IRS moved to vacate the Order, asserting that the Court did not have jurisdiction over the IRS for purposes of adjudicating the Objection as a contested matter. The Court stated that proper service was essential to the validity of any Order. "Generally speaking, the service of process is prerequisite to personal jurisdiction applies in contested matters the same as it does in adversary proceedings. … Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." 2018 WL at *5. Although the Debtor served the Objection to Claim on the address listed on the Proof of Claim, and

service of the Objection on that address would suffice for most creditors, Rule 7004 requires service on the Internal Revenue Service by mail to the United States Attorney for the district in which the matter is pending and by mail on the Attorney General of the United States.

The Debtor's service only on the IRS at the address listed on the Proof of Claim was not sufficient for the Court to acquire personal jurisdiction over the IRS, even though the IRS admitted that it actually received the Objection. The Court granted the Motion of the IRS to set aside the Order sustaining the Objection under Rule 60(b), finding that the deficient service rendered the Order void for lack of jurisdiction.

Following this thinking, if a credit union is an "insured depository institution" and if the holding in *Nicholaus* is applied to credit unions that are not served in accordance with Rule 7004(h), then the Plan, and the Order Confirming that Plan are void as against the credit union. This would mean that the lien strip, cram down or avoidance of the credit union's mortgage or lien is of no force or effect, leaving the Debtor fully liable even if Debtor otherwise completes the Plan and receives a discharge. *See also In re Roby*, 2017 WL 112519 (Bankr. N.D. Ohio 2017) (Motion to reconsider order avoiding liens that impaired exemptions granted where motion to avoid liens was not properly served rendering order avoiding liens void for lack of jurisdiction).

Even this apparently logical conclusion – that if a credit union is an insured depository institution and is not properly served, the Order is void as to the credit union for lack of personal jurisdiction – may not be the end of the discussion.

In *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367 (2010), the Supreme Court discussed the concept of service in the context of a confirmed Plan. Debtor's Plan states that upon entry of a discharge, Debtor's remaining unpaid student loans would be discharged. The Plan contained this "discharge by declaration" provision even though it is absolutely clear that discharge of a student loan requires an adversary proceeding commenced with the service of a summons and complaint. United Student Aid Funds ("United") argued that because service was not properly effectuated, the Court lacked personal jurisdiction to enter an order declaring the student loans to be discharged, even though United admittedly received a copy of the Plan in the mail and had actual notice of the Plan provisions. The Supreme Court stated that the lack of proper service did not render the Confirmation Order void. "But this deprivation did not amount to a violation of United's constitutional right to due process. Due process requires notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. … Here, United received actual notice

of the filing and contents of Espinosa's plan. This more than satisfied United's due process rights." The Supreme Court concluded that the Confirmation Order was neither void nor voidable for lack of personal jurisdiction and held that the student loans were discharged by declaration.

If the credit union is an insured depository institution and is not served as required by Rule 7004(h), can the Confirmation Order nonetheless be binding if the Debtor can prove that the credit union had actual notice? The language in *Espinosa* seems to suggest that, although the Court in *Nicholaus* rejected that very argument in holding that defective service on the IRS rendered void the Order Sustaining Debtor's Objection to Claim.

With all the confusion and uncertainty, what is Debtor's counsel to do? If a credit union is an insured depository institution, it must be served by Certified Mail. If a credit union is not an insured depository institution, service by ordinary First Class mail is sufficient, but service by Certified Mail would also qualify. As a practical matter, the cost of a certified mailing is *far less*than the cost of responding to a grievance or malpractice action when the Debtor finds out, at the end of the case, that his lien strip or cram down or lien avoidance is "not worth the paper it is written on" and he still owes the entire balance (plus three to five years' interest, penalties and late fees).

***And** for all insured depository institutions (credit unions or federal banks), proper service requires more than certified mail. It must be addressed to a named officer of the institution. Merely addressing the mail to "president" or "chief executive officer" without naming the specific officer is probably insufficient, even if president or CEO actually receives it. *In re Miller*, Case No. 06-32425 (Bankr. S.D. Ohio 2010).

Rules 3012 and 3015.1 indeed greatly expand the powers of the Debtor and, if properly implemented, can significantly reduce the time and expense of dealing with routine matters such as valuation and lien avoidance. But those expanded powers and related benefits do not come without cost. Counsel should be particularly careful to achieve proper service or face the risk, potentially many years after completion of the case, that the attempted exercise of those powers was all for naught.

A LIST OF AFFIRMATIVE DEFENSES TO CONSIDER

1. failure to state a claim upon which relief may be granted (probably useless surplusage, but a must in every answer; it's a catch all)
2. Failure to comply with the Barton Doctrine.
3. Immunity (absolute quasi-judicial immunity and qualified immunity)
4. accord and satisfaction
5. arbitration and award
6. assumption of risk
7. contributory negligence
8. discharge in bankruptcy
9. duress
10. estoppel
11. failure of consideration
12. fraud
13. illegality
14. injury by fellow servant
15. laches
16. license
17. payment
18. release
19. res judicata
20. statute of frauds
21. statute of limitations
22. waiver
23. unclean hands
24. no adequate remedy at law
25. failure to mitigate damages
26. rejection of goods
27. revocation of acceptance of goods
28. conditions precedent
29. discharge
30. failing to plead fraud with particularity
31. no reliance
32. attorneys' fees award not permissible
33. punitive damages not permissible
34. lack of standing
35. sole negligence of co-defendant
36. offset
37. improper service
38. failure to serve
39. indemnity
40. lack of consent
41. mistake
42. undue influence
43. unconscionablity
44. adhesion

45. contrary to public policy
46. restraint of trade
47. novation
48. ratification
49. alteration of product
50. misuse of product
51. charitable immunity
52. misnomer of parties
53. failure to exhaust administrative remedies
54. frustration of purpose
55. impossibility
56. preemption
57. prior pending action
58. improper venue
59. failure to join an indispensable party
60. no private right of action
61. justification
62. breach by plaintiff
63. failure of condiction precendent
64. anticipatory repudiation
65. improper notice of breach
66. breach of express warranty
67. breach of implied warranty
68. parole evidence rule
69. unjust enrichment
70. prevention of performance
71. lack of privity
72. merger doctrine
73. Other Statutory Defenses/Prerequisites (these will vary from state to state depending on the claims).
74. If you wind up as a preference defendant, go through the defenses found in Section 547(c).

SHORT FORM LITIGATION HOLD NOTICE
[to Potential Debtor Client]

Privileged and Confidential
Attorney-Client Communication/Attorney Work Product

As we discussed, this email will confirm that [Client] should immediately take steps to institute a program and policy (the "Hold") to preserve all of its documents and electronically stored information, including but not limited to emails and data files. As part of this Hold, any regular or periodic discarding, deletion or over-writing of documents or electronically stored information should be suspended immediately. This Hold should be communicated in writing to your staff and employees. Someone should be designed as the lead person who can answer questions about this Hold and be responsible for periodically monitoring compliance with the Hold. We are prepared to assist the appropriate person(s) at [the Client] to implement this Hold and answer any questions. Please do not hesitate to contact us. Thank you for your immediate attention to this matter.

SHORT FORM LITIGATION HOLD NOTICE
[to Client re Potential or Actual Adversary Proceeding or Contested Matter]

Privileged and Confidential
Attorney-Client Communication/Attorney Work Product

As you know, a lawsuit has been filed [identify the lawsuit] [or alternatively, a lawsuit is contemplated or is reasonably anticipated being filed]. In view of this [potential] lawsuit, you have a duty to take reasonable steps to preserve information potentially relevant to the claims and/or defenses in the lawsuit. Accordingly, this email will confirm that you should immediately take steps to institute a program and policy (the "Hold") to preserve all of your documents and electronically stored information, including but not limited to emails and data files, potentially relevant to the lawsuit. [Add specificity as to the matters involved in or related to the lawsuit which need to be preserved.] As part of this Hold, any regular or periodic discarding, deletion or over-writing of documents or electronically stored information should be suspended immediately. This Hold should be communicated in writing to your staff and employees. Someone should be designated as the lead person who can answer questions about this Hold and be responsible for periodically monitoring compliance with the Hold. We are prepared to assist the appropriate person(s) at [the Client] to implement this Hold and answer any questions. Please do not hesitate to contact us. Thank you for your immediate attention to this matter.

A FEW SUPREME COURT BANKRUPTCY DECISIONS THAT MAY BE HELPFUL TO KNOW BY NAME.

By John P. Gustafson

Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011). "For a debtor whose income is above the median for his State, the means test identifies which expenses qualify as 'amounts reasonably necessary to be expended.' The test supplants the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations." The *Ransom* case holds that there is no Means Test deduction for vehicles that are owned free and clear of liens.

The case also contains the statement: "'Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act) to correct perceived abuses of the bankruptcy system.' *Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U.S. 229, 231-232, 130 S.Ct. 1324, 1329, 176 L.Ed.2d 79, 84 (2010)). In particular, Congress adopted the means test -- "[t]he heart of [BAPCPA's] consumer bankruptcy reforms," H. R. Rep. No. 109-31, pt. 1, p. 2 (2005) (hereinafter H. R. Rep.), and the home of the statutory language at issue here -- to help ensure that debtors who can pay creditors do pay them. *See*, *e.g.*, *ibid*. (under BAPCPA, "debtors [will] repay creditors the maximum they can afford")."

Milavetz, Gallop & Milavetz, P.A. v. U.S., 559 U.S. 229, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010). Attorneys who provide bankruptcy assistance are debt relief agencies within the meaning of BAPCPA. However, the court read the restrictions on attorneys giving advice to clients about incurring debt narrowly, thereby avoiding the Constitutional "free speech" issues. Disclosure requirements in advertising – i.e., the "debt relief agency" language – were reasonably related to the state's interest in preventing deception of consumers, and the disclosure requirement did not prevent debt relief agencies from conveying any additional information.

United Student Aid Funds, Inc. v. Espinosa, 559 U.S.260, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010). Order confirming plan discharging student loan debt without "undue hardship" finding, or adversary proceeding, was not void. Supports the binding effect of confirmation of Chapter 13 Plans, and the need for creditors to not sleep on their rights in seeking relief under Rule 60(b). There is also language in the majority opinion about the obligation of bankruptcy judges to review Chapter 13 Plan language and not confirm Plans that do not comply with the Code.

Taylor v. Freeland & Kronz, 503 U. S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992). A Chapter 7 trustee could not contest the validity of claimed exemption after the 30 day period for objections had expired, and no extension had been obtained, even though debtor had no colorable basis for claiming exemption. The Supreme Court clarified the *Taylor* rule in **Schwab v. Reilly**, 560 U.S. 770, 130 S.Ct. 2652, 177 L.Ed.2d 234 (2010). Where a Chapter 7 debtor claimed exemptions in business equipment that equaled the maximum allowed under 11 U.S.C.S. §522(d) and also equaled the debtor's estimated market value for the equipment, the trustee was not required to object under §522(l) in order to preserve the estate's right to retain any value beyond the claimed amount.

Law v. Siegel, 571 U.S. 415, 134 S.Ct. 1188, 1194, 188 L.Ed.2d 146 (2014). The holding was that bankruptcy courts have no power to equitably surcharge administrative expenses against a debtor's claimed exemptions on the grounds that the debtor had engaged in fraudulent conduct. The case also supports two important propositions: 1) equity/Section 105(a) cannot be used to take an action prohibited by another provision of the Bankruptcy Code; and 2) disallowance of exemptions is limited to federal statutory grounds, or state law limitations.

Hamilton v. Lanning, 560 U.S. 505, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010). "Forward looking" approach could be used in calculating "projected disposable income" under §1325(b)(1)(B) as courts had discretion to account for known or virtually certain changes in a debtor's income. The use of Chapter 13 debtor's current income, not an inflated figure due to a prior one-time employer buyout, was affirmed.

Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 918 59 L.Ed.2d 136, 141-142 (1979). "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Everything we do in bankruptcy is premised on due process based upon "notice and the opportunity for a hearing." *Mullane* is the case to know by name on the constitutional requirements for notice: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

United States v. Whiting Pools, Inc., 462 U.S. 198, 203, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). Stands for the proposition that the IRS is no better than any other creditor and has to follow the bankruptcy laws like everyone else. One of the IRS's arguments was that it was exempt from the Bankruptcy Code's provision that related to other secured creditors. *Whiting Pools* also held that a debtor's estate includes property that has already been seized by a creditor.

BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994). A non-collusive and regularly conducted nonjudicial foreclosure sale could not be challenged as a fraudulent conveyance because the consideration received in such a sale established reasonably equivalent value as a matter of law. This case set the old *Madrid* rule in stone.

Nobleman v. American Savings Bank, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). The protection of §1322(b)(2) prevents the use of 11 U.S.C. §506(a) to "strip down" the lien of a mortgage to the value of the mortgaged real estate when the creditor's claim is secured only by a lien on the debtor's principal residence. The holding in *Nobleman* is what courts must distinguish in allowing the stripping of wholly unsecured second and third mortgages in Chapter

13 cases – and until that issue gets to the U.S. Supreme Court, there is still some uncertainty, in some jurisdictions, surrounding the allowance of mortgage strips in Chapter 13.

Dewsnup v. Timm, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). A debtor's suit to "strip down" creditors' lien on the debtor's real property to equal the property's fair market value and declare the remainder void was dismissed because the creditors' claim had been "allowed" and was "secured." *Dewsnup* was followed in the recent "strip off" decision, **Bank of America, N.A. v. Caulkett**, ___ U.S. ___, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015).

Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d (1997). In determining the value of a creditor's secured claim in property subject to a debtor's "cramdown" under §1325, courts must use a replacement value standard that depends on the type of debtor and the nature of the property and it intended use.

Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007). There is no 'absolute right' to convert a Chapter 7 case to a Chapter 13. Where there is fraud, §706(d) provides adequate authority for the denial of conversion, where there has been fraud. Further, nothing in the text of either §706 or §1307(c) (or the legislative history of either provision) limited the authority of a court to take appropriate action in response to fraudulent conduct by the atypical litigant who had demonstrated that the litigant was not entitled to the relief available to the typical debtor. The broad authority granted to bankruptcy judges in §105(a) was adequate to authorize an immediate denial of a §706(a) motion to convert. The impact of this decision on the debtor's 'absolute right to dismiss' a Chapter 13 case is still a hot issue before the courts.

Till v. SCS Credit Corp., 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004). The controversy over the 4-4-1 split seems to have died down, and reductions in interest rates to "prime plus a risk factor" of 1% to 3% are being applied to all kinds of high interest rate loans (other than mortgages on the debtor's primary residence), reducing the amount of interest that Chapter 13 debtors have to pay. The majority of courts allow the "*Till*-ing of interest" on 910 vehicle loans, and "*Till*-ing up" very low interest rate motor vehicle loans under certain circumstances.

United Savings Association of Texas v. Timbers of Inwood Forest Associates, 484 U.S. 365, 370-371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). When a motion for relief from stay is filed, once the movant shows that the debtor has no equity in the property, the burden shifts to the debtor to establish that the property is "necessary to an effective reorganization" and that there is "a reasonable possibility of a successful reorganization within a reasonable time." And, *Timbers* also held that when secured collateral is declining in value, the secured creditor is entitled to cash payments or additional security in the amount of the decline.

Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 166 S.Ct. 286, 133 L.Ed.2d 258 (1995). The Supreme Court held that bank accounts may be frozen, by the bank, to preserve their right to set off

debts owed to them against the debtor's accounts. However, if the accounts are frozen, the creditor has move quickly to seek relief from stay to effectuate a setoff.

Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991), the Supreme Court stated: "Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'" *Grogan*'s endorsement of the lower "preponderance" standard in dischargeability proceedings means that state and federal court judgments are more likely to be given preclusive effect, because the judgment-issuing court will have either used the preponderance standard, or a higher one.

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). The law specifically allowed postpetition interest on a nonconsensual oversecured lien as well as on a consensual claim in light of the clear language of 11 U.S.C.S. §506(b). Congress intended that all oversecured claims be treated the same way for purposes of postpetition interest.

Johnson v. Homestate Bank, 501 U.S. 78, 111 S.Ct.2150, 115 L.Ed.2d 66 (1991). Held that the Code permits "Chapter 20" cases – a Chapter 13 following hard on the heels of a Chapter 7. Further, *Johnson* held that a creditor with an obligation secured by a lien on a debtor's property that the debtor has no personal liability, due to a prior bankruptcy discharge, still has a claim against the subsequent Chapter 13 estate and that claim can be dealt with in the Chapter 13 case.

Non-Article III Jurisdiction Cases

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). In addition to the important statutory changes made in response to *Marathon*, this decision set the boundaries of Bankruptcy Court authority. Without the consent of the parties, Bankruptcy Courts can issue final judgments only on "core proceedings". For non-core related proceedings, a Bankruptcy Judge can only issue proposed findings of fact and conclusions of law, which are submitted to the District Court, which reviews them *de novo*. Much of *Marathon*'s holding appears to have been altered or superseded by later Supreme Court decisions like *Stern*, *Arkison*, and *Wellness*

Exec. Benefits Ins. Agency v. Arkison, ___ U.S. ___, 134 S.Ct. 2165, 189 L.Ed.2d 83 (2014). This case set forth the procedure under which bankruptcy courts are to render proposed findings of fact and conclusions of law with regards to *Stern* claims that are then reviewed by the district court, even if said claims are "core" under the Bankruptcy Code. The holding in *Wellness* suggests that the *Arkison* procedure ought be used for *Stern* claims where parties have not consented to entry of final judgment by the bankruptcy court.

Wellness Intern. Network, Ltd. v. Sharif, ___U.S.___, 135 S.Ct. 1932, 191 L.Ed.2d 1932 (2015). Held that a bankruptcy court may constitutionally enter final judgment on a *Stern* claim

with the express or implied consent of the parties. This case, along with *Arkison*, appears to resolve many of the issues raised by the holding of **Stern v. Marshall**, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011).

POCKET GUIDE TO COMMON EVIDENTIARY ISSUES IN BANKRUPTCY

(If you have a BIG pocket)

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FOUNDATIONAL REQUIREMENTS

The "on-the-bench" thumbnail: Laying a foundation is all about providing enough background and context to give the evidence some meaning–to show that it is relevant. Proponents who offer evidence need to establish the "who, what, when, where" information about that evidence in order to demonstrate its relevance.

It is common to hear foundation objections when a party tries to admit photographs, conversations or recordings of some sort. You also hear foundation objections when the objecting party thinks the witness is testifying to something the witness knows nothing about.

There are also foundational issues involved with electronic evidence; these tend to be thorny. If a party attempts to admit an e-mail, or a web site, and the opposing party objects to foundation, the moving party might have to have some technical knowledge to be able to lay an appropriate foundation.

Great primer: Edward J. Imwinkelried, Evidentiary Foundations, published by LexisNexis. The book is older and out of print, but priceless–it contains actual scripts lawyers may use to lay foundations for just about everything one can imagine, including many types of electronic evidence.

The actual rules:

Fed. R. Evid. 104(a), *Preliminary Questions*
Fed. R. Evid. 401, *Definition of "Relevant Evidence"*
Fed. R. Evid. 402, *Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible*
Fed. R. Evid. 403, *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time*
Fed. R. Evid. 602, *Lack of Personal Knowledge*

JUDICIAL NOTICE

The "on-the-bench" thumbnail: In order for a judge to take judicial notice of a fact, it has to be a fact that is not subject to reasonable dispute, either because it is generally known within your territorial jurisdiction (such as the fact that a particular restaurant is located on a particular corner in the town where you sit) or because it is capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned (such as that the prime rate of interest today is 3.25%).

The rule has a discretionary component–you *may* take judicial notice of a fact if you think that fact fits the rule's requirements. It also has a mandatory component–you *must* take judicial notice of a fact if a party asks you to do so, and provides you with the appropriate supporting information, provided that you give any objecting party the opportunity to be heard on why such notice isn't appropriate.

Lawyers often ask the judge to take judicial notice of facts that are likely in dispute, such as the value of an asset or the existence (or absence) of a debtor's good faith. These are not the kinds of facts of which the rule allows us to take judicial notice.

Lawyers also ask judges to take judicial notice of "the schedules and statements in the debtor's court file." We may take judicial notice of the fact that on such-and-such a date, someone filed Schedules A-J bearing the debtor's name, and that those schedules contain certain representations. But when we take judicial notice of the fact that Schedule I indicates that the debtor earns $2,000 per month, this does not mean that the debtor has proven that he does, in fact, earn $2,000 a month. All it means is that we officially have observed what anyone else who wished to do so could observe–that there is a document on file that says so, and that the parties do not have to waste time litigating whether there is a document on file that says so.

The actual rule:

Fed. R. Evid. 201, *Judicial Notice of Adjudicative Facts*

CONTROLLING THE EXAMINATION OF WITNESSES

The "on-the-bench" thumbnail: You, as the judge, have the authority to exercise reasonable control over examination of witnesses, in order to avoid wasting time, protect witnesses from harassment, and make sure the lawyers are getting to the heart of the matter.

During direct examination, lawyers usually cannot use "leading" questions unless they are trying to set up the background for an issue. This is because a "leading" question is one that provides its own answer, and thus if the lawyer asks "leading" questions on direct, it is really the lawyer–not the witness–who is testifying. "Leading" questions are allowed on cross-examination.

It is a common misconception that a leading question is a question that is susceptible to a single-word, affirmative or negative answer–*not true*. A leading question is a question which contains, or strongly suggests, its own answer. "Are you hungry?," while susceptible of a yes or no answer, is not a leading question. "You're hungry, aren't you?" is a leading question, because it tells the witness what the answer ought to be. The issue gets sticky when a lawyer asks an open-ended question which is so packed with information that she practically has answered the question for the witness: "You've told us that you signed the schedules without reading them, and that you never told your lawyer that your house was worth $300,000, and that you believe that your house is worth only $150,000 but that you don't have an appraisal or any other professional estimate of value—is your house worth $150,000?" It's an open-ended question, but it's clear that the witness is to say "no." Leading?

Normally you should limit the scope of cross-examination to the topics that the witness discussed on direct examination.

The actual rule:

Fed. R. Evid. 611, *Mode and Order of Interrogation and Presentation*

IMPEACHMENT

The "on-the-bench" thumbnail: While it is counter-intuitive, a party may impeach his or her own witness.

A party may impeach with prior oral or written statements, and doesn't have to show the witness the statement unless opposing counsel demands it.

A party *cannot* introduce extrinsic evidence to prove that a prior statement was inconsistent *unless* the party gives the witness an opportunity to explain the evidence, or unless "the interests of justice" require it. (So if the witness says it didn't rain on June 5, the lawyer can't introduce a weather report for June 5 unless the lawyer has complied with the requirements of Fed. R. Evid. 613(b).)

Many lawyers aren't great at impeaching! Issues often arise around whether the prior statement really was inconsistent. If not, it doesn't impeach anything.

The actual rules:

Fed. R. Evid. 607, *Who May Impeach*
Fed. R. Evid. 613, *Prior Statements of a Witness*

REFRESHING RECOLLECTION

The "on-the-bench" thumbnail: The point of this rule is to allow a witness who *says he or she can't remember something* to refresh his or her memory. If the witness insists that he or she does remember something, but the lawyer thinks the witness is remembering wrong, the remedy is for the lawyer to impeach the witness, not to try to refresh recollection.

If a lawyer wants to use a document to refresh recollection, the opposing side is entitled to be able to see that document and cross-examine the witness on it, as well as to ask the court to excise any portions of the document that aren't relevant to the refreshing.

The document doesn't have to be admissible into evidence to serve as a refresher.

The actual rules:

Fed. R. Evid. 612, *Writing Used to Refresh Memory*
Fed. R. Evid. 802(5), *Recorded Recollection*

LAY AND EXPERT WITNESS TESTIMONY

I. Lay Witness Testimony

The "on-the-bench" thumbnail: Lay witnesses may give opinions on things (including the value of their own homes or businesses), as long as they testify from their own perceptions and experiences, and as long as they don't testify based on scientific or specialized knowledge. (Often lay witnesses–such as debtors testifying to the value of their houses–are not testifying from their own experiences. Bankruptcy judges, however, usually allow some leeway or flexibility here, because something seems wrong about refusing to allow a debtor to tell the court what she believes her own house is worth.)

The actual rule:

Fed. R. Evid. 701, *Opinion Testimony by Lay Witnesses*

II. Expert Witness Testimony

The "on-the-bench" thumbnail: If a party wants a witness to testify based on some sort of scientific, technical or specialized knowledge, the party first must disclose the person's identity, and the substance of the person's testimony, well in advance of the date the expert is scheduled to testify. The party must do so in a specific format, and within a specific time period.

Second, the party must get that person qualified as an expert. That means demonstrating specialized knowledge, skill, training or education.

Third, in order to get the expert's opinion admitted, the party must show that the testimony the proposed expert will give will be based on sufficient facts or data; that it is the product of reliable principles or methods; and that the witness has applied those principles or methods reliably to the facts in the case before you.

The expert, once qualified, may rely on hearsay or other inadmissible evidence in forming his or her opinion.

Many so-called "expert" witnesses in the bankruptcy world are hybrid witnesses. They may have specialized knowledge of some sort, but they also are fact witnesses in the case–the realtor who is trying to sell the debtor's home, for example. Also note that it is not unusual for bankruptcy litigants to try to qualify folks as experts who don't really need to be qualified–that realtor doesn't have to be qualified as an expert to testify to what steps she's taken to try to sell the house.

Finally, note that you have a lot of discretion regarding whether to qualify an expert, and what weight to give that expert's testimony once he or she has given it.

The actual rules:

Fed. R. Evid. 702, *Testimony by Experts*
Fed. R. Evid. 703, *Bases of Opinion Testimony by Experts*
Fed. R. Evid. 704, *Opinion on Ultimate Issue*
Fed. R. Evid. 705, *Disclosure of Facts or Data Underlying Expert Opinion*
Fed. R. Civ. P. 26(a)(2), *Disclosure of Expert Testimony*

The main cases:

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)
Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999) (applies *Daubert* standards to all experts, not just scientific experts)

HEARSAY IN GENERAL

The "on-the-bench" thumbnail: Anything that anyone says outside of the courtroom is hearsay–except a party-opponent's admission, which isn't hearsay (and doesn't have to be an "admission" in the sense of a confession of something the person would rather not have to confess). Hearsay isn't admissible, unless the proponent can convince you that the hearsay meets one of the exceptions found in Rules 803 (exception applies regardless of whether the declarant is unavailable) and 804 (exception applies only if the declarant is unavailable).

A common response to a hearsay objection is that the party isn't offering the alleged hearsay "to prove the truth of the matter asserted." If the statement is not being offered in order to prove the truth of the matter asserted in the statement, then it isn't hearsay.

This often begs the question, however–if the proponent isn't offering the statement for the truth, then why *is* he offering it? First look at what the statement asserts, then determine whether the proponent seems to be trying to get the statement in to prove that assertion. If so, the proponent *is* offering it for the truth, and it *is* hearsay unless there is an applicable exception.

The actual rules:

Fed. R. Evid. 801, *Definitions*
Fed. R. Evid. 802, *Hearsay Rule*

"HAIL, MARY" EXCEPTIONS–PRESENT-SENSE IMPRESSION AND EXCITED UTTERANCE

The "on-the-bench" thumbnail: Both of these exceptions may be used whether or not the declarant is available.

For "present-sense impression" to apply, the witness' statement must be a statement describing the event or condition, made "while the declarant was perceiving the event or condition, or immediately thereafter."

For "excited utterance" to apply, there has to have been a startling event or condition, and the witness' statement has to have kind of erupted out of him or her in pretty much immediate response to that event or condition. If the statement was made a week–or an hour, depending on the circumstances–later, this probably isn't an "excited utterance."

Lawyers often confuse these two exceptions, and mis-use them.

The actual rules:

Fed. R. Evid. 803(1), *Present sense impression*
Fed. R. Evid. 803(2), *Excited Utterance*

THE OFTEN-ABUSED "BUSINESS RECORDS" EXCEPTION

The "on-the-bench" thumbnail: This exception may be used whether the declarant is available or not.

There are five (5) requirements that hearsay must meet in order to be admitted under the "records of regularly conducted activities" exception–

–The record has to be made at or near the time of the activity to which it relates took place;

–It has to be made by a person with knowledge;

–It has to be kept in the course of a regularly-conducted business activity;

–It has to be the regular practice of that business activity to make the record; AND

–The person who has to prove all that must be the "custodian" of those records.

The fact that somebody at a business wrote a letter to someone, or made a notation, or created a document, or kept a letter in a business file, does not make that letter or notation or document a "business record" (record of a regularly-conducted activity).

The issue frequently comes up regarding appraisal reports. Generally, an appraisal report is not a "business record" for anyone but the appraiser. Usually what the proponent *really* wants to get in is the appraiser's opinion of the value of the property–and that ought to come in through the appraiser, testifying as an expert. The opposing party can't cross-examine the appraisal report. Same thing with valuation reports. Hearing from the appraiser is particularly critical when you have competing appraisals.

The actual rules: Fed. R. Evid. 803(6), *Records of regularly conducted activity*

Fed. R. Evid. 803(7), *Absence of entry in records kept in accordance with the provisions of paragraph (6)*

THE "PROPERTY RECORDS" EXCEPTION

The "on-the-bench" thumbnail: Again, this exception is available regardless of the declarant's availability.

This exception applies to recorded documents like mortgages and deeds, as well as to statements in those documents. It does *not* make exception for just any old documents that may reference property (like, for example, a letter that tells the debtor that the bank is about to foreclose). (A question to consider–does this exception cover the promissory note?)

The actual rules:

Fed. R. Evid. 803(14), *Records of documents affecting an interest in property*
Fed. R. Evid. 803(15), *Statements in documents affecting an interest in property*

THE "MISSING WITNESS" EXCEPTIONS

The "on-the-bench" thumbnail: If a witness is "unavailable," that witness' hearsay is admissible under certain circumstances.

The first question to answer is whether the witness is, in fact, "unavailable." The rule is very specific; witnesses are "unavailable" only if:

–they are exempt by court ruling due to privilege,
–they refuse to testify despite a court order,
–they claim lack of memory *of the subject matter of the declarant's statement*,
–they are dead, or are too physically or mentally ill to testify, OR
–the proponent has been unable to obtain their attendance "process or other reasonable means."

If the witness *is* unavailable, his or her testimony is admissible if it was:
–Former testimony given at another, similar kind of hearing where there was an opportunity for cross-exam;
–A statement under belief of impending death;
–A statement which was, at the time the declarant made it, so far contrary to the declarant's pecuniary,

proprietary, criminal or civil litigation interest that a reasonable person in that position wouldn't have made it unless it were true; or

–A statement regarding the declarant's own family history.

The actual rule:

Fed. R. Evid. 804, *Hearsay Exceptions; Declarant Unavailable*

THE MIS-NAMED AND MISUNDERSTOOD "CATCH-ALL" EXCEPTION

The "on-the-bench" thumbnail: It isn't a catch-all exception, and it rarely ever applies. In particular, the hearsay has to be more probative than any other evidence the proponent might offer on the particular point, AND the proponent has to disclose it–as well as the identity of the witness testifying to it–to opposing counsel well in advance of trial.

The actual rule:

Fed. R. Evid. 807, *Residual Exception*

THE DOCTRINE OF "INDEPENDENT LEGAL SIGNIFICANCE"

This is a somewhat confusing, judge-made "exception" to the hearsay rule that is not specifically articulated anywhere in the rule itself. As discussed above, Rule 801(c)(2) defines hearsay as an out of court statement offered to prove the truth of the matter asserted. The "independent legal significance" doctrine–also sometimes called the "verbal acts" doctrine–provides that "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." Advisory Committee Notes to subdivision (c) of Rule 801, 1972 proposed rules, citing Emich Motors Corp. V. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), rev'd on other grounds, 340 U.S. 558 (1951). The doctrine "exclude[s] from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstances bearing on conduct involving their rights." Id. *See also*, U.S. v. Stover, 329 F.3d 859, 870 (D.C. Cir. 2003); Weinstein's Federal Evidence §801.11[3] (2d ed. 1977). This notion that certain out-of-court statements, such as contractual promises, have a function so powerful that the issue of whether they are true and reliable is irrelevant, can be difficult to apply. Be aware that it is out there, and may be applicable in situations involving contracts or other legal documents.

AUTHENTICATING EVIDENCE

The "on-the-bench" thumbnail: "Authentication" is a particular foundational requirement that helps assure that the evidence is what it purports to be. The proponent of the evidence must offer sufficient proof to show that the item is genuine.

Some sorts of evidence are "self-authenticating;" Fed. R. Evid. 902 provides a list. For others, the proponent has to offer some evidence to show that the item is what it purports to be.

Even if the proponent succeeds in "authenticating" the evidence, that does not necessarily mean that the evidence is admissible. It still may face some other bar to admission, such as hearsay, lack of relevance or the fact that its probative value is substantially outweighed by the danger of unfair prejudice.

The actual rules:

Fed. R. Evid. 901(a), *Requirement of Authentication or Identification; General Provision*
Fed. R. Evid. 901(b), *Illustrations*
Fed. R. Evid. 902, *Self-authentication*

THE MYTHICAL "BEST EVIDENCE" RULE

The "on-the-bench" thumbnail: There isn't a rule that says that a party has to offer the "best," or most probative, evidence available to it to prove its point. Nor is there a rule that says a party always must offer the original, and never a copy, of a piece of evidence.

The "original writing" rule–Fed. R. Evid. 1002–says that if a party is trying to prove the *contents* of a writing, recording or photograph, the party has to provide the original. (There's an exception for the contents of "public" records, and a provision for the admission of summaries of voluminous writings, recordings or photos.)

In spite of this, Fed. R. Evid. 1003 specifically states that a duplicate is admissible to the same extent as an original, unless there's a "genuine" question as to whether the copy is authentic, or under the circumstances it would be "unfair" to admit the copy instead of the original.

Distinguishing between "authentication" and "original writing:" An "authentication" objection goes to whether this truly is a receipt for clothes the debtor purchased at Macy's. An "original writing" objection says that if you want to use that receipt to prove that it really shows that the debtor bought a $3,000 jacket, you need to produce the original receipt, not a copy.

As with authentication, the fact that the evidence meets the requirements of the Original Writing Rule does not ensure that it is admissible. The proponent still may need to clear the hurdles of hearsay, Rule 403, relevance, etc.

The actual rules:

Fed. R. Evid. 1002, *Requirement of Original*
Fed. R. Evid. 1003, *Admissibility of Duplicates*
Fed. R. Evid. 1005, *Public Records*
Fed. R. Evid. 1006, *Summaries*

FINAL FOOD FOR THOUGHT

– Few of us ever preside over jury trials. We are, therefore, often tempted to employ evidentiary shortcuts. From a judicial philosophy standpoint, it may be worth recalling that:

  * The Rules of Evidence are rules–just like the Federal Rules of Bankruptcy Procedure.

  * The rules are designed to try to ensure, to the extent possible, that the evidence upon which we (the fact finders) rely in making decisions is as accurate and reliable as possible.

  * Enforcing the rules of evidence helps to level the playing field.

  * District and court of appeals judges are used to these rules, and enforce them in their own cases.

– On the other hand, we are not parties. From a judicial philosophy standpoint, it is worth asking yourself: If no one objects, should I weigh in?

– Some handy resources to keep on the bench, should you choose to do so, are:

Instant Evidence: A Quick Guide to Federal Evidence and Objections, by Timothy E. Eble. This laminated, spiral-bound booklet is a nice quick reference to the rules, common objections, and common motions. You or your librarian may order the booklet from the National Consumer Law Center's web site, http://shop.consumerlaw.org/instantevidence.aspx.

Federal Rules of Evidence with Objections, Twelfth Edition, by Anthony J. Bocchino and David S. Sonneshein. This is a pocket-sized, spiral-bound NITA publication, organized by objection. Find it at www.lexis.nexis.com/nita, and click on "Publications."

Objections at Trial, Seventh Edition, by Myron H. Bright, Ronald L. Carlson and Edward J. Imwinkelried. Another pocket-sized, spiral-bound NITA publication. Find it the same place you find the previous resource.

Federal Trial Objections * Quick Reference Card * 2nd Edition. Yet another NITA publication, this one a laminated 8 ½ x 11 card dividing the rules into type of objection—form, relevance, response, type of question, etc. Again, you kind find it at the Lexis/Nexis NITA site.