Northeast Bankruptcy Conference and Consumer Forum

So, You Think You're an Expert on Evidentiary Issues?

Hon. Frank J. Bailey
U.S. Bankruptcy Court (D. Mass.) | Boston

Christopher L. Carter
Morgan, Lewis & Bockius LLP | Boston

Elisabeth O. da Silva
DGC | Boston

Jay S. Geller
Law Office of Jay S. Geller | Falmouth, Maine

Timothy J. Martin
Huron Consulting Group Inc. | Boston

PLENARY SESSION

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FEDERAL RULE OF CIVIL PROCEDURE 15

Federal Rule of Civil Procedure 15 applies in adversary proceedings by virtue of Federal Rule of Bankruptcy Procedure 7015. The philosophy of the rulemakers in Rule 15 is to encourage that all disputes between the parties be determined in the current pending action. Rule 15(b) addresses situations where, through inadvertence or otherwise, the parties have failed to fully plead a claim or defense, but actually litigated that claim or defense. In fairness (and a bit out of necessity), the court may determine that the claim or defense was included in the matters tried.

Rule 15(b) of the Federal Rules of Civil Procedure provides as follows:

- (1) *Based on an Objection at Trial*. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.
- (2) *For issues tried by consent*. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Rule 15(b)(1): Based on an Objection at Trial

- The majority of cases interpreting Rule 15(b)(1) find it to be inapplicable because of the requirement of an objection.
- *Vital Parms., Inc. v. Monster Energy Co.*, 553 F. Supp.3d 1180 (S.D. Fl. 2021).
    - This case contains a discussion of what triggers this rule. Here, the defendant's opening statement triggered the request. The Court found that did not qualify as an objection and thus this rule was inapplicable. The decision also cites to several other cases dealing with the same issue.
    - Also discussed is how the amendment would prejudice the party – seems related to a Rule 9 issue but specifically regarding trade dress litigation
- When considering prejudice, courts focus on the burden to the non-moving party if the amendment is allowed: "Specifically, [courts] have considered whether allowing an amendment would result in additional discovery, cost, and preparation to defend against new facts or new theories." *Mortgage Lenders Networks USA, Inc. v. Wells Fargo Nat'l Assoc.*, 395 B.R. 871, 878 (Bankr. D. Del. 2008) (citing *Cureton v. NCAA*, 252 F.3d 267, 273 (3d Cir. 2001).

Rule 15(b)(2): Issues tried by consent

- Generally:
    - Rule 15(b) is to be interpreted liberally to promote the objective of deciding cases on their merits.

- Rule 15(b)(2) allows an amendment upon a finding that the opposing party consented, either expressly or impliedly, to the issue being tried.

- Implied consent can be found when the party has actively engaged in or silently acquiesced to the trial of the amended claim. This can include when opposing counsel fails to object to the presentation of issues raised outside of the pleadings.

    - Evidence that is relevant to a pleaded issue cannot be the basis for a founded claim that the opposing party should have realized a new issue was infiltrating the case.

    - "For purposes of Rule 15(b), implied consent to the litigation of an unpleaded claim may arise from one of two generic sets of circumstances. First, the claim may actually be introduced outside the complaint – say, by means of a sufficiently pointed interrogatory answer or in a pretrial memorandum – and then treated by the opposing party as having been pleaded either through his effective engagement of the claim or through his silent acquiescence. . . [s]econd, and more conventionally, [c]onsent to the trial of an issue may be implied if, during the trial, a party acquiesces in the introduction of evidence which is relevant only to that issue." *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995).

- Although the court has discretion to allow an amendment, it may do so only if the non-moving party will not suffer undue prejudice.

    - A defendant must be afforded adequate notice of any claims asserted against him and a meaningful opportunity to mount a defense.
    - "Substantial prejudice may exist where, as here, "it is not clear that the opposing party had the opportunity to defend against the new claim and where that party might have offered additional evidence had it known of the claim." *Girouard v. Cestaro (In re Cestaro)*, 598 B.R. 520, 533 (Bankr. D. Ct. 2019).

- Recent Cases in District of Massachusetts (Bankr.)

    - ***Lassman v. DeVoe***, AP No. 18-1192 (FJB) was an action by a chapter 7 trustee to recover on alleged business torts committed against the joint debtors by a commercial landlord

        - Facts:
            - The joint debtors operated a convenience store in Canton, Massachusetts. The defendant was the trustee of the landlord trust at relevant times. By 2017 the debtors were operating at a loss, behind on base rent, and not paying any "additional rent." This led to the debtors to seek to sell the store. The defendant explained that any new lease would include a provision that restricted the transfer of the beer and wine license as that was an important part

of the value of the real estate. This was an issue for the first potential buyer. A second buyer, who signed a letter of intent, but later lost interest based on the defendant's failure to attend a meeting. Neither buyer ended up purchasing the store.
- The complaint filed by the Chapter 7 trustee alleged that the defendants were liable to the estate for breach of contract, business tort of interference with advantageous relations, and violation of chapter 93A (unfair and deceptive acts). At trial the Trustee abandoned the breach of contract count.
- The trustee sought, after trial, to amend his pleadings to reflect a count that the defendant interfered with the Debtor's efforts to sell their convenience store business as the sale required a new lease between prospective buyers and the Defendants. The trustee also sought to include a count for unjust enrichment.

- When evaluating whether to allow a post-trial amendment, the court must ensure that the due process rights of the opposing party are protected.
- Court determined that the defendant had impliedly consented to the amendment regarding the interference with the Debtor's efforts to sell the store. This was based on defendant receiving notice at a pretrial conference and including mention of the assignment during defendant's own opening statement.
- Court denied the amendment to include a count for unjust enrichment. There was insufficient mention of an unjust enrichment demand in the complaint, pretrial memorandum, pretrial proceedings, or opening statement. Further, no evidence was adduced at trial on whether the defendants benefitted from the operation of the store.

- ***Weiss v. Fautz***, AP No. 16-1093 (FJB), a non-dischargeability action under 523(a)(2)(A) by an investor in a New York restaurant co-owned by the debtor.

  - Facts:
    - The parties met in 2006 when the plaintiff sought to invest in a bar/restaurant owned by the debtor in the lower east side of Manhattan. The plaintiff invested $150,000 in two tranches: $100,000 in the first and $50,000 in the second. The restaurant ultimately failed.
    - After trial, the plaintiff moved to amend the complaint to "conform to the evidence adduced at trial." The complaint sought to allege that the plaintiff made the second tranche investment of $50,000 in justifiable reliance on the defendant's representation that the liquor license had been placed in the plaintiff's name, an allegation never mentioned in the complaint.

  - Rulings:
    - The Court determined that while the defendant did not expressly consent to the trial of the newly alleged theory, he failed to object to questions concerning ownership of the liquor license (otherwise

irrelevant). The defendant in fact answered the questions and the plaintiff clearly testified on his reliance of those representations. The Court allowed the amendment.

- Additional First Circuit cases (considered in recent Bankr. D. MA decisions):
  - *Brandon v. Holt*, 469 U.S. 464, 471 & n. 19 (1985).
  - *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 319 (1st Cir. 2012).
  - *Fustolo v. Patriot Grp., LLC (In re Fustolo)*, 896 F.3d 76, 84 (1st Cir. 2018).
  - *Premier Cap., LLC v. Crawford (In re Crawford)*, 841 F.3d 1, 1-9 (1st Cir. 2016).
  - *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995).

- Summary Judgment and Rule 15(b)

  - Recently addressed in the 1st Circuit: *Katz v. Belveron Real Estate Partners, LLC*, 28 F.4th 300 (1st Cir. 2022).
    - Cited the 7th Circuit with approval
    - "While this Court has not expressly done so, the Seventh Circuit has held that, in the 'spirit of Rule 15(b),' constructive amendments to the complaint can be effected at the summary judgment stage, rather than at trial, when the parties have provided express or implied consent. Walton v. Jennings Comm. Hosp., Inc., 875 F.2d 1317, 1320 n.3 (7th Cir. 1989)." The test for implied consent at summary judgment is "whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment." Hutchins v. Clarke, 661 F.3d 947, 957 (7th Cir. 2011) (quotation omitted). "Even if we were to follow the Seventh Circuit's lead and recognize a district court's discretionary authority to allow 'constructive amendments' to pleadings at the summary judgment stage, as extrapolated from Rule 15(b), see, e.g., Torry v. Northrop Grumman Corp., 399 F.3d 876, 877-78 (7th Cir. 2005), here, the district court acted within its discretion in determining that unpled claims were not properly before it."
  - The Sixth Circuit disagrees – *McColman v. St. Clair County*, 479 Fed. Appx. 1 (2012) ("By its plain terms, Rule 15(b)(2) only applies to claims that are tried, and this case was disposed of on summary judgment."); *Silver v. Webber*, 443 F.App'x 50, 58 (6th Cir. 2011) (holding that an issue cannot be tried by the parties' consent pursuant to Rule 15(b)(2) where one of the parties opposes trial by moving for summary judgment).

- Rule 15(b) in the context of the particularity requirements of Fed. R. Civ. P. 9

  - *Katz v. Belveron Real Estate Partners*, *LLC*, 28 F.4th 300 (1st Cir. 2022): the court noted that Rule 9(b)'s particularity requirement had not been met.
  - This issue was also raised by the defendant in *Weiss v. Fautz*.

PREFERENCE ACTIONS AND THE "ORDINARY COURSE OF BUSINESS"

In 2005, Congress amended[1] § 547(c)(2) to clarify that:

> (c) The trustee may not avoid under this section a transfer—
>
> (2) to the extent that such transfer was in payment of a debt incurred by the debtor in the *ordinary course of business* or financial affairs of the debtor and the transferee, and such transfer was—
>
> (A) made in the *ordinary course of business* or financial affairs of the debtor and the transferee; or
>
> (B) made according to *ordinary business* terms

(Emphasis added).

What is the purpose of this section?

- Although the language of this section was amended in 2005, the legislative history of § 547 is still relevant. According to the legislative history, the purpose § 547(c)(2) "is to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy." S. Rep. No. 989, 95th Cong., 2d Sess. 88, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5874.
- In *In re Midway Airlines*, 69 F.3d 792, 797 (7th Cir. 1995), the Seventh Circuit looked at the legislative history and explained that:

> "The purpose of the preference statute is to prevent the debtor during his slide toward bankruptcy from trying to stave off the evil day by giving preferential treatment to his most importunate creditors, who may sometimes be those who have been waiting longest to be paid." *In re Tolona Pizza,* 3 F.3d, [1029,] 1032. The exception carved out by section 547(c)(2), however, is designed to "protect[] 'recurring customary credit transactions that are received and paid in the ordinary course of the business of the debtor and the debtor's transferee.'" *Energy Coop., Inc. v. Scoop Int'l, Ltd.,* 832 F.2d 997, 1004 (7th Cir. 1987) (quoting 4 L. King, *Collier on Bankruptcy,* P 547.10, at 547-42 (15th ed., 1987)).

[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, § 409 (2005).

How did BAPCPA change subsection (c)(2)?[2]

- Prior to BAPCPA, the recipient of a preferential transfer was required to established that the transfer was made "in the ordinary course of business" *and* "according to ordinary business terms." The new wording of § 547(c)(2) allows a transferee to sustain a defense to a preferential transfer proceeding if either of the two subsections are established, i.e., the transfer was made "in the ordinary course of business" *or* "according to ordinary business terms."
- BAPCPA, however, did not change the first prong of the test. A trustee seeking to avoid a preferential transfer must establish that the underlying debt was incurred in the ordinary course of business of each party. *See FBI Wind Down, Inc. Liquidating Tr. v. Careers USA, Inc. (In re FBI Wind Down, Inc.)*, 614 B.R. 460, 486 (Bankr. D. Del. 2020) ("Courts examine the underlying debt for "the normality of such occurrences in each party's business operations generally. If the transaction from which the debt arose was not ordinary for the debtor or the transferee, then the defense will fail.") (Internal citations and quotation mark omitted).

Who carries the burden of proof?

- Subsection (g) clarifies that while the trustee has the burden of proving that the transfer is avoidable, the transferee has the burden of establishing a defense under subsection (c). *See* 11 U.S.C. § 547(g).

How have courts interpreted subsections (A) and (B)?

- Since 2005, § 547(c)(2)(A) has been known as the "subjective" test while § 547(c)(2)(B) has been called the "objective" test. *See In re Waterford Wedgwood USA, Inc.*, 508 B.R. 821, 827 (Bankr. S.D.N.Y. 2014).

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[2] For reference, the original language of § 547(c)(2) provided that:

> (c) The trustee may not avoid under this section a transfer—
>
> ***
>
> (2) to the extent that such transfer was--
>
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; *and*
>
> (C) made according to ordinary business terms;

(Emphasis added).

The subjective test under § 547(c)(2)(A): Was the transfer consistent with the history of dealing between the parties?

- To determine whether a transfer was made in the ordinary course of business, courts "must engage in a subjective 'peculiar factual' analysis." *Lovett v. St. Johnsbury Trucking*, 931 F.2d 494, 497 (8th Cir. 1991) (citing *In Re Fulghum Construction Corp.*, 872 F.2d 739, 743 (6th Cir. 1989)).
- Courts consider the following factors: "(i) the prior course of dealing between the parties, (ii) the amount of the payment, (iii) the timing of the payment, (iv) the circumstances of the payment, (v) the presence of unusual debt collection practices, and (vi) changes in the means of payment." *In re Quebecor World (USA), Inc.*, 491 B.R. 379, 386 (Bankr. S.D.N.Y. 2013).
- To compare the payment practices during the preference period with the prior course of dealing, the transferee must establish a "baseline of dealing' between the parties over a historical period which should be well before the preference period." *Wiscovitch-Rentas v. Villa Blanca VB Plaza LLC (In re PMC Mktg. Corp.).*, (B.A.P. 1st Cir. 2016).
- A transferee may rebut the presumption that late payments are outside of the ordinary course of business by establishing that late payments were not out of the ordinary. *See In re Quebecor World (USA), Inc.*, 491 B.R. at 386 ("To determine whether a late payment may still be considered ordinary between the parties, a court will normally compare the degree of lateness of each of the alleged preferences with the pattern of payments before the preference period to see if the alleged preferences fall within that pattern.")

The objective standard under § 547(c)(2)(B): What is the standard in the industry?

- The term "'ordinary business terms' refers to the range of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C." *In re Molded Acoustical Prod., Inc.*, 18 F.3d 217, 220 (3d Cir. 1994). In other words, the question under the objective test is not whether the transfer was normal between the parties.
- A transferee must provide evidence that the transaction comports with practices in the relevant industry. *Kaye v. Agripool, SRL (In re Murray, Inc.)*, 392 B.R. 288, 298 (B.A.P. 6th Cir. 2008).

- However, "courts should not impose a single norm for credit transactions within the industry; the inquiry is whether 'a particular arrangement is so out of line with what others do' that it cannot be said to have been made in the ordinary course." *In re Waterford Wedgwood USA, Inc.*, 508 B.R. at 829 (citing *G.G. Leidenheimer Baking Co., Ltd. v. Sharp (Matter of SGSM Acquisition Co.),* 439 F.3d 233, 239 (5th Cir.2006)).
- Whose industry is the relevant industry? Most Courts have not answered that question. The Fourth Circuit has explained that "[d]efining the relevant industry is appropriately left to the bankruptcy courts to determine as questions of fact heavily dependent upon the circumstances of each individual case." *Lawson v. Ford Motor Co. (In re Roblin Indus., Inc.)*, 78 F.3d 30, 40 (2d Cir. 1996); *see generally Nat'l Gas Distribs. v. Branch Banking & Tr. Co. (In re Nat'l Gas Distribs.)*, 346 B.R. 394, 404 (Bankr. E.D.N.C. 2006) ("If the 'ordinary business terms' defense only requires examination of the industry standards of the creditor, there would be no review or check on the debtor's conduct.") According to the Eight Circuit Bankruptcy Appellate Panel, courts are required to look at the debtor's industry, not the creditor's. *See Shodeen v. Airline Software, Inc. (In re Accessair, Inc.)*, 314 B.R. 386, 394 (B.A.P. 8th Cir. 2004) ("Section 547(c)(2)(C) requires the transferee to demonstrate that the debtor made the preferential transfer according to the ordinary business terms prevailing within the debtor's industry.")
- How do you prove that the transaction was made according to "ordinary business terms" in the industry?
    - Offer objective definitive evidence supported by specific data. And avoid offering evidence of an industry standard that is too general. *See In re Conex Holdings, LLC*, 518 B.R. 269, 286 (Bankr. D. Del. 2014).
    - Offer credible testimony of employees that have worked in the company and the relevant industry. *See id.*
    - Offer statistical analysis such as a weighted average analysis. *See In re Quebecor World (USA), Inc.*, 491 B.R. at 387.
    - Offer admissible expert testimony. *See generally G.H. Leidenheimer Baking Co., v. Sharp (In re SGSM Acquisition Co., LLC)*, 439 F.3d 233, 240 (5th Cir. 2006).

REASONABLY EQUIVALENT VALUE BASED ON A CONTRACT

- **Fraudulent Transfer Basics**

    - Section 548(a)(1)(B) provides that a trustee may avoid transfers by (or obligations incurred by) a debtor if the debtor, among other things, received less than reasonably equivalent value in exchange for such transfer or obligation.

    - "Reasonably equivalent value" is not defined under the Bankruptcy Code, but "value" is defined as "property, or satisfaction or securing of a present or antecedent debt of the debtor." *See* 11 U.S.C. § 548(d)(2)(A).

- **Does satisfaction of a contractual obligation necessarily imply reasonably equivalent value? Maybe…**

    - The definition of "value" has led to many courts finding that "the satisfaction or partial satisfaction of a debt constitutes reasonably equivalent value for purposes of determining whether a transfer was constructively fraudulent." *In re Villamont-Oxford Assoc. Ltd. P'ship*, 236 B.R. 467, 481 (Bankr. M.D. Fla. 1999); *see also Cox v. Nostaw, Inc. (In re Central Illinois Energy Cooperative)*, 526 B.R. 786, 791 (Bankr. C.D. Ill. 2015) (The payments of obligations under a contract discharge the obligations under the contract and therefore "are, by definition, for reasonably equivalent value.").

    - However, "[w]hether a transfer is made pursuant to the terms of a contact is not necessarily dispositive of the issue. If that were the case then any payment that is otherwise constructively or actually fraudulent would be insulated by the existence of a contract." *In re Grandparents.com, Inc.* 614 B.R. 625, 632 (Bankr. S.D. Fla. 2020) (determining that the existence of a binding contract between the debtor and a company that provided consulting services to the debtor did not bar the liquidating trustee's claim for avoidance of a transfer based upon constructive fraud). "A transfer made pursuant to a contract may still be avoidable as a fraudulent transfer if the evidence demonstrates the exchange is not for reasonably equivalent value." *Id*.

    - For example, in *Kipperman v. Onex Corp.*, 411 B.R. 805, 853 (N.D. Ga. 2009), the court denied a motion for summary judgment and ruled that whether defendants provided reasonably equivalent value to the debtor with respect to payments made for services to be provided under the terms of a management agreement created material issues of fact – the court determined that the trustee was not barred as a matter of law from bringing the claim. *See also Mellon Bank, N.A. v. Official Comm. Of Unsecured Creditors of R.M.L. (In re R.M.L.)*, 92 F.3d 139, 142 (3d Cir. 1996); *EBC 1, Inc. v. Am. Online, Inc. (In re EBC 1, Inc.)*, 356

B.R. 631, 638 (Bankr. D. Del. 2006) ("[T]here is nothing in section 548 to suggest that executory contracts or terminated contracts are not subject to its provisions.").

- At least one court has determined that the "value" definition and the existence of a contract are not "mutually exclusive. In general, satisfaction of a contract obligation in accordance with the terms of the contract will constitute reasonably equivalent value. But just like payment for services under a contract do not always bar a claim for breach of contract, neither does it necessarily bar a claim for constructive fraud, *if* the plaintiff proves the elements of *that* cause of action." *In re Grandparents.com*, 614 B.R. at 632.

- **Does plaintiff have to seek to avoid the incurrence of the contractual obligation in order to avoid a transfer that is made in connection with such contract? Maybe…**

  - In some jurisdictions, yes – *see Cox v. Nostaw, Inc. (In re Central Illinois Energy Cooperative)*, 526 B.R. 786, 791 (Bankr. C.D. Ill. 2015) ("It is widely recognized by courts that where a debtor makes prepetition payments on a contractual debt, in order for those payments to be avoidable as constructively fraudulent, it is necessary for the trustee to first avoid the underlying contract as a fraudulently incurred obligation. Absent avoidance of the underlying contract, the payments discharge the obligation and are, by definition, for reasonably equivalent value.").

  - In other jurisdictions, no – *see In re Grandparents.com, Inc.*, 614 B.R. 626 (Bankr. S.D. Fla 2020) (overruling motion to dismiss fraudulent transfer claims for payments made in connection with binding contract that was not itself a target of the fraudulent transfer action).

- **If the underlying contractual obligation has to be avoided, what are the implications?**

  - In jurisdictions where the underlying contract must be avoided (or avoidable), the contract itself must be avoided within the applicable statute of limitations – whether by fraudulent transfer law or general unenforceability arguments under applicable state or federal law. *See Cox v. Nostaw, Inc. (In re Central Illinois Energy Cooperative)*, 526 B.R. 786, 791 (Bankr. C.D. Ill. 2015) (dismissing trustee's fraudulent transfer action because the contract was outside the fraudulent transfer look-back period and was not otherwise unenforceable under other legal theories seeking to render the underlying contract unenforceable).

  - Proof of insolvency and other necessary factors necessarily become more difficult with the passage of time, so having to avoid the underlying obligations (and not just the more recent payment) increases the level of difficulty.

CROSS-EXAMINATION OF EXPERT WITNESS BASED ON CRITICISM OR ADVERSE *DAUBERT* RULING BY COURT IN ANOTHER CASE

1. Hearsay

   a. "Judicial findings in other cases proffered as evidence are generally characterized as inadmissible hearsay." *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 141 F. Supp. 2d 320, 323 (E.D.N.Y. 2001).

2. Relevance

   a. Opinion in separate case based on different facts is not relevant. *Official Committee of Unsecured Creditors v. CalPERS Corporate Partners LLC* (D. Me., 7-30-21).

3. Prejudice

   a. "[E]ven if it were relevant, the likelihood that discussion of the [prior] court's assessment of [the expert's] other opinion would confuse the issues and mislead the jury substantially outweighs whatever probative value this evidence might have. *See* Fed. R. Evid. 403." *Official Committee of Unsecured Creditors v. CalPERS Corporate Partners LLC* (D. Me., 7-30-21).

   b. "[E]xpert testimony is admissible under ER 702 where (1) the witness qualifies as an expert and (2) the expert's testimony would be helpful to the trier of fact. *State v. Riker,* 123 Wn.2d 351, 364, 869 P.2d 43 (1994). 'Judges do not have the expertise required to decide whether a challenged scientific theory is correct.' *State v. Wilbur-Bobb,* 134 Wn.App. 627, 632, 141 P.3d 665 (2006)."

   c. "The proposed evidence is inadmissible. It is also unfair. When a judge attacks a witness there is no effective defense. Peer review of such witnesses is different; if an expert does not act properly that expert ought to be attacked in the normal course of scientific debate—or in the case of a trial, with the opportunity for rehabilitation and explanation. To appropriately meet the evaluations of another judge would require the jury to delve deeply into the case that judge was trying. This enterprise is not appropriate under Rule 403." *Blue Cross and Blue Shield of New Jersey, Inc. v. Phillip Morris, Inc.,* 141 F. Supp. 2d 320, 323 (E.D.N.Y. 2001)

   d. Allowing defense to introduce prior judicial criticisms "would result in confusion to the jury and be unfair and prejudicial. It would be particularly confusing to the jury to have to dig into the facts of the earlier cases and try to compare the methodology used by [the expert] in those cases with the methodology used in the instant case." *Junger v. Singh*, No. 1:16-CV-00564 EAW, 2021 WL 218689, at *10 (W.D.N.Y. Jan. 22, 2021).

4. Efficiency

    a. "[D]elving into another judge's analysis of an entirely separate opinion would also necessitate a trial within a trial." *Official Committee of Unsecured Creditors v. CalPERS Corporate Partners LLC* (D. Me., 7-30-21).

5. Motion *in limine* to preclude examination?

6. How address on direct and/or re-direct if not excluded?

7. Can expert list voluminous experience in report to buttress credibility, yet avoid examination about that experience?

    a. Can examination proceed without getting into details of *Daubert* ruling or criticism by other court?

    b. Cross-Examination Vignette

Premise of Value: Going Concern vs. Liquidation Basis

Introduction

- Premise of value identifies the context in which a business or an asset is sold. Namely, it is an "assumption regarding the most likely set of transactional circumstances that may be applicable to the subject valuation."[1]
- Determining the appropriate premise of value is one of the first steps in preparing a solvency analysis. The following factors may inform the practitioner's decision: [2]
    - Analysis of future cash flow – if the likelihood of generating future operating cash flow is remote then liquidation of assets may be the highest and best use; if deploying assets would yield highest value then going concern premise may apply.
- Premise of value in the context of a solvency study is not a legal determination, but rather an assessment of the valuation analyst based on current and future factors, such as the company's financial condition and industry and economic factors on the transfer date.
- Naturally, the selected valuation method(s) used to value a business (assets) will depend on the determined premise of value.
    - Going concern basis assumes that the company will continue as an ongoing business ("indefinite continuance").
        - Accordingly, under a going concern premise, assets are valued taking into account the additional value "which flows from the combinations of the various assets into an economic unit." [3]
    - Liquidation basis assumes that the company will be discontinued, and its assets will be sold and used to settle its obligations.
        - There are 2 main sub-categories under Liquidation basis:
            - Orderly liquidation - Assets are sold over a longer period of time. An orderly liquidation seeks to maximize proceeds by marketing the assets and making potential buyers aware of the sale/auction.
            - Forced liquidation - Assets are sold as quickly as possible. The decision for a forced liquidation is usually made by external parties (e.g.: creditors, bankruptcy court).

      Assembled group of assets – can fall under orderly or forced liquidation depending on the circumstances including marketing period.

Questions to Address

- What are the **defining criteria** in determining whether a business "will be discontinued" and thus liquidation basis is the correct premise of value?
    - Timeframe: How far out from discontinuation does a business have to be to necessitate adoption of the liquidation premise of value (e.g.: company will be "dead" in 3 months but is currently "alive")?

[1] National Association of Certified Valuators and Analysts ("NACVA"), glossary definition.
[2] *See* AICPA Forensic & Valuation Services Practice Aid, *Providing Bankruptcy and Reorganization Services*, 2nd Edition, Volume 2 – *Valuation in Bankruptcy,* Chapter 6, pg. 85-87.
[3] Ibid, pg. 369.

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  - Extent of failure: Must a company be totally defunct / not operating? Should a company which is on the brink of bankruptcy adopt liquidation premise? What about a company that is already in bankruptcy but is fully operating and re-capitalized through DIP financing or otherwise?

- Highest and best use – The going concern premise of value will typically yield a higher conclusion of value than would a liquidation premise of value. However, which premise of value should be used in the event that the assets are of higher value under a liquidation premise than under a going concern premise?
  - Simply put, does the highest and best use principle dictate the applied premise of value even when the highest and best use does not conform to generally held perceptions?

Relevant Case Law

- Recent case law clarifies that going concern is presumed to be the proper premise of value unless the business is on its "deathbed."
  - "If an entity is not on its deathbed, then… it cannot be valued using a liquidation premise, but must be valued as a going concern."[4]
  - *In re CXM, Inc.*, 336 B.R. 757, 760–61 (Bankr. N.D. Ill. 2006 ("'Fair valuation' for purposes of § 101(32) is generally defined as the going concern or fair market price '[u]nless a business is on its deathbed.
  - *In re Bellanca Aircraft Corp.*, 56 B.R. 339, 386–87 (Bankr. D. Minn. 1985): "Only where a business is wholly inoperative, defunct, or dead on its feet, will going concern valuation be abandoned in favor of an item by item fair market valuation."[5]
  - *In re Vadnais Lumber Supply, Inc., 100 B.R. 127, 131 (Bankr.D.Mass.1989)*: "Liquidation value is appropriate, however, if at the time in question the business is so close to shutting its doors that a going concern standard is unrealistic."
- Even more, "the fact that bankruptcy counsel had been consulted, a restructuring was necessary, or the business was struggling will not necessarily demonstrate lack of a going concern."[6]
  - *In re Lids Corp.*, 281 B.R. 535, 541 (Bankr. D. Del. 2002): "As long as liquidation in bankruptcy is not clearly imminent on the Valuation Date, the company must be valued as a going concern."[7]
- Despite the penchant to assume a going concern premise of value, the appropriate premise of value will often depend on the highest and best use of the subject assets. Thus, "while a company's value is often maximized as a going-concern, this is not always the case."[8]
  - If, for example, "creditors value a debtor company for the purpose of deciding whether to support a plan of reorganization or (alternatively) to pressure for a corporate liquidation, valuations based on both a liquidation premise of value and a going-concern premise of value may be appropriate."[9] (emphasis added).

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[4] *See Bradley D. Sharp, Trustee of the CFS Liquidating Trust v. Chase Manhattan Bank USA, et al. (In re Commercial Financial Services, Inc, Inc.)*, 350. B.R. 520 (10th Cir. 2005)
[5] Robert J. Stearn, "Proving Solvency," pg. 369. *See also In re American Classic Voyages Co.,* 367 B.R. 500 (Bankr. D. Del. 2007).
[6] Steam, Robert J. "Proving Solvency: Defending Preference and Fraudulent Transfer Litigation." *The Business Lawyer*, vol. 62, no. 2, 2007, pp. 359–95 at p. 371
[7] Ibid
[8] Dr. Israel Shaked and Robert F. Reilly, "A Practical Guide to Valuation" (Second Edition], pg. 547.)
[9] Shaked, pg. 78.

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- In certain circumstances, such as a valuation performed in the context of a best interest of creditors test, the appropriate premise of value is defined.[10]

Factors that the Valuation Analyst May Consider When Selecting Premise of Value[11]

- Facts and circumstances of the debtor's operations
  - debtor's financial condition
  - anticipated operating circumstances
  - intended users of the valuation
  - debtor's intention to use or dispose of an individual asset or group of assets
- Market conditions at the applicable valuation date, (e.g., aircraft or hotels during the pandemic)
- Marketing period expected, (e.g., truncated marketing may indicate liquidation)
- Applicable statutes and case law

[10] *See* AICPA Forensic & Valuation Services Practice Aid, *Providing Bankruptcy and Reorganization Services*, 2nd Edition, Volume 2 – *Valuation in Bankruptcy,* Chapter 6, pg. 21.
[11] *See* AICPA Forensic & Valuation Services Practice Aid, *Providing Bankruptcy and Reorganization Services*, 2nd Edition, Volume 2 – *Valuation in Bankruptcy,* Chapters 5 and 6.

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Faculty

Hon. Frank J. Bailey was appointed as a U.S. Bankruptcy Judge for the District of Massachusetts in Boston on Jan. 30, 2009, and served as Chief Judge from December 2010 until December 2014. He also serves on the First Circuit Bankruptcy Appellate Panel. Previously, Judge Bailey clerked for Hon. Herbert P. Wilkins of the Massachusetts Supreme Judicial Court from 1980-81 and was an associate at the Boston office of Sullivan & Worcester LLP until 1987, where he practiced in its litigation and bankruptcy departments. He spent the next 22 years as a partner at Sherin and Lodgen LLP, where he chaired its litigation department and was a member of its management committee. His practice focused on complex business litigation and creditors' rights, and he often represented clients in medical device, pharmaceutical and high-technology businesses. Judge Bailey served as the consul for the Republic of Bulgaria in Boston before his appointment to the bench, and he has participated in many international judicial programs. In 2013, he taught at the Astrakhan State University School of Law in south central Russia, and he has also taught courses in Sofia, Bulgaria and Tashkent, Uzbekistan. In addition, he taught legal writing and research at Boston University School of Law from 1981-93 and currently teaches a business bankruptcy course at Suffolk University School of Law in Boston. Judge Bailey was appointed by the First Circuit to oversee the financial restructuring of the City of Central Falls, R.I. He has served on the Board of Governors of the National Conference of Bankruptcy Judges and was its Education Committee Chair in 2017. Judge Bailey served as the president of the National Conference of Bankruptcy Judges from 2020-21 and as the chair of the National Conference of Federal Trial Judges of the American Bar Association from 2016-17. He also served as the Judicial Member at Large of the ABA Board of Governors, a member of the ABA Executive Committee, a member of the ABA House of Delegates, and recently as the chair of the board Committee on the Profession, Public Service and Diversity. Judge Bailey received his B.S.F.S. from Georgetown University's School of Foreign Service and his J.D. from Suffolk University School of Law.

Christopher L. Carter is a partner with Morgan, Lewis & Bockius LLP in Boston and focuses his practice on cross-border insolvency matters, bankruptcy, complex litigation, and distressed-debt claims-trading matters. He has experience representing investors and lenders throughout the capital structure such as secured lenders, debtor-in-possession lenders and bondholder groups in all aspects of restructuring, including post-petition financing, claim and plan negotiations, adversary proceedings and settlements. Mr. Carter represents shareholders, bondholders, secured creditors, vendors and other participants in bankruptcy and workout matters. His work includes advising a group of holders of untendered Argentine sovereign bonds in connection with their *pari passu* rights and advising creditors in restructurings in Brazil, Mexico and Spain. Mr. Carter is a member of the American, Massachusetts and Boston Bar Associations. He received his B.A. in 2006 from Boston College and his J.D. in 2010 from Villanova University School of Law.

Elisabeth O. da Silva, CPA, CFF is a partner in the Business Advisory practice of DGC in Boston and has nearly 30 years of experience conducting white-collar investigations and providing litigation consulting and expert-witness services in the context of complex commercial litigation for a wide variety of companies, ranging from small, privately owned businesses to large, multinational publicly traded entities. Ms. da Silva has directed numerous international high-profile investiga-

tions involving complex accounting rules, alleged accounting malfeasance, asset misappropriation/concealment, and a variety of other accounting, auditing and financial matters. She frequently assists companies and their counsel with the analysis/quantification of alleged white-collar crimes, as well as presentations to regulatory and prosecutorial offices. Ms. da Silva has served as the financial advisor for both debtors' and creditors' committees in unprecedented bankruptcy matters, including municipalities and energy businesses. She has performed extensive and complex analysis of solvency as well avoidance actions and preference claims. Ms. da Silva has testified as an accounting or damages expert at trial, arbitration and deposition for privately owned and publicly traded entities, as well as on behalf of the Securities and Exchange Commission. She also serves as an arbitrator in commercial disputes and is an active member of the American Arbitration Association's roster of arbitrators. Ms. da Silva advises legal counsel, management, shareholders and boards of directors on accounting and auditing, financial, valuation and internal control matters in the context of internal investigations, shareholder disputes, post-acquisition and net working capital disputes, business and contract disputes, accountants' liability, bankruptcy and restructuring, and enforcement or regulatory issues. Prior to joining DGC, she co-founded and operated a boutique litigation consulting firm after 14 years at EY, where her career began. Ms. da Silva has published numerous articles and participated in webinars on a variety of topics. She serves on the Joint Trial Board of the American Institute of Certified Public Accountants, is co-chair of the Litigation Support and Business Valuation Committee of the Massachusetts Society of Certified Public Accountants, a public member of the Massachusetts Board of Bar Overseers, and a member of ABI, the Women in White Collar Defense Association and the Turnaround Management Association. She also serves on the Roster of Arbitrators of the American Arbitration Association. Ms. da Silva received her B.B.A. from the University of Massachusetts at Amherst.

Jay S. Geller is a sole practitioner in the Law Office of Jay S. Geller in Portland, Maine, where he focuses his practice on complex bankruptcy and commercial litigation and mediation, corporate reorganizations, workouts and chapter 11 bankruptcies. He has represented creditors' committees, debtors, trustees, secured creditors and unsecured creditors in cases of regional and national significance. Mr. Geller has served for many years as a faculty member at the National Institute of Trial Advocacy and ABI's Litigation Skills Symposium, teaching trial advocacy skills to commercial and bankruptcy attorneys. He frequently speaks to bar and other professional associations on bankruptcy litigation and general bankruptcy topics. Mr. Geller is certified as a business bankruptcy specialist by the American Board of Certification, is AV-rated by Martindale Hubbell, is recognized by *Chambers USA* and *The Best Lawyers in America* for his work in bankruptcy law, and is a Fellow of the American College of Bankruptcy. He previously was a partner in the Commercial Law Department of Jenner & Block in Chicago until he relocated to Maine in 2000. From 2009-11, he co-chaired the Business Restructuring and Insolvency Practice Group of Bernstein Shur in Portland. Mr. Geller received his A.B. *magna cum laude* and Phi Beta Kappa from Dartmouth College in 1982, and his J.D. *cum laude* from Boston University School of Law in 1985.

Timothy J. Martin, CIRA, CFE, CTP, CCFI is a managing director at Huron Consulting Group in Boston and leads its Corporate Dispute Advisory practice. He focuses on providing forensic, investigative and financial advisory consulting services, primarily related to distressed situations. Mr. Martin advises on insolvency, restructuring, asset-tracing and recovery, Ponzi and pyramid schemes, financial statement and reporting issues, director and officer claims and other causes of actions. He has advised secured lenders, creditors' committees, debtors, shareholders, trustees, receivers and

examiners in cases throughout the U.S. Mr. Martin previously held positions with KPMG, LLP and Arthur Andersen, LLP. He received his B.A. in accounting in 1997 from the Isenberg School of Management at the University of Massachusetts at Amherst.