Pre-Trial Best Practices

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The Beginning of an Adversary Proceeding

1) Jurisdiction

- a) Article 1 of the US Constitution creates US Bankruptcy Courts
- b) 28 USC §§151-159 sets out framework for the bankruptcy judges, as "units" of the district courts
- c) Title 11 is the jurisdiction of bankruptcy judges
- d) Core vs. non-core claims
 - i) Non-core means that it's not technically related to bankruptcy
 - ii) A bankruptcy judge may hear and make decisions on non-core proceedings, but only when the issue at hand relates directly to the bankruptcy case
 - iii) Parties must consent to jurisdiction for non-core proceedings to become a final judgment
 - iv) If the parties don't consent, the bankruptcy judge submits proposed findings of fact and conclusions to the district court
 - v) Core proceedings are listed in 28 USC 157(b)
 - vi) Stern v. Marshall

2) Case filing

- a) Part seven of the FRBP contains the applicable procedural law
- b) Many of the FRBP mirror the FRCP
- c) Rule 7001 lists 10 types of adversary proceedings
 - i) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;
 - ii) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);
 - iii) a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;
 - iv) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§727(a)(8), 1 (a)(9), or 1328(f);
 - v) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;
 - vi) a proceeding to determine the dischargeability of a debt;
 - vii) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
 - viii) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;
 - ix) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or
 - x) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452.

3) Summons

a) Clerk will issue summons

- b) 7004(e) summons must be served within 14 days after the summons is issued
- c) If you are serving the summons via mail, then you must put it in the mail within 14 days after the summons is issued
- d) The defendant is given thirty days from the date of the issuance of the summons, except that the United States and its officers and agencies have 35 days

4) Service

- a) By first class mail, postage fully prepaid US Mail
- b) But if it is an FDIC Institution, then it must be served via certified mail, return receipt requested

Discovery Tools

1) Depositions

- a) Definition: Sworn, out of court testimony, by a witness, that is used to gain information related to the case or controversy.
- b) While information gained in a deposition is usually deemed hearsay, there are some ways that it can still be admitted:
 - i) Statement against interest
 - ii) Contradict testimony at trial
 - iii) Deponent unavailable
 - (1) Procedural Issues
- c) Governed by Bankruptcy Rule 7030
 - i) Incorporates FRCP 30
 - ii) (1) Without Leave. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.
 - iii) Docketed with court
 - iv) List Date and Time
 - v) Scope of Deposition
- d) Duces Tecum
 - i) List documents with specificity
 - ii) Be prepared to have a method of copying/reproducing documents
 - iii) Protective Orders
- e) Location Related Issues
 - i) Parties have to travel
 - ii) 100 mile limit for all other individuals
 - iii) Mileage and witness fee
 - iv) Note: Must issue from the court where the deposition is to take place, and are signed by the attorney who is operating as an officer of the court
 - v) Have your court reporter lined up
 - vi) Make sure you notice what methods of recordation you will be using: video, court reporter, audio.

2) Requests to Admit

- a) Governed by Bankruptcy Rule 7036
- b) Incorporates FRCP 36
- c) (1) Scope. A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: A) facts, the application of law to fact, or opinions about either; and B) the genuineness of any described documents.
- d) (3) *Time to Respond; Effect of Not Responding*. A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

3) Interrogatories

- a) Governed by Bankruptcy Rule 7033
- b) Incorporates FRCP 33
- c) (2) *Scope*. An interrogatory may relate to any matter that may be inquired into underRule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.
 - i) Limited to 25 per party
 - ii) Objections, objections...
 - iii) 30 days to respond

4) Production of Documents

- a) Governed by Bankruptcy Rule 7034
 - i) Incorporates FRCP 34
 - ii) (a) IN GENERAL. A party may serve on any other party a request within the scope of Rule 26(b):
 - (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
 - (a) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or
 - (b) any designated tangible things; or
 - (2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

5) Rule 2004 Examination

- a) Often referred to as a "fishing expedition" because of the broad scope of inquiry available to a party seeking information. *See, e.g., In re Handy Andy Home Improvement Ctrs.*, 199 B.R. 376, 379 (Bankr. N.D. Ill. 1996).
- b) Begin by filing a motion with the court for authority to conduct a Rule 2004 examination. Explain why such inquiry is appropriate in your motion.
- c) Motion may request deposition testimony and/or production of documents. *See* Rule 2004(c). Attorney may issue a subpoena to compel attendance and production of documents. *See* Rule 2004(c).
- d) Subsection (a) states that "any party in interest" may file a motion for "the examination of any party." (Emphasis added).
- e) As to scope, subsection (b) states that examination under Rule 2004 "may relate to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge." For most plans of reorganization under Chapters 11, 12 or 13, the examination may also relate to the operation of any business, the source of any money or property used by the debtor to complete such a plan and "any other matter relevant to the case or to the formulation of a plan."
- f) The general purpose of Rule 2004 is to "assist a party in interest in determining the nature and extent of the bankruptcy estate, revealing assets, examining transaction and assessing whether wrongdoing has occurred." *In re Symington*, 209 B.R. 678, 755 (Bankr. D. Md. 1997).
- g) This type of examination is generally used as a prelitigation device to determine whether grounds exist to commence an action. *In re Handy Andy Home Improvement Ctrs.*, 199 at 380.
- h) Civil discovery rules are not available with 2004 examinations unless there is pending an adversary proceeding or contested matter (contested matters include objections to confirmation, motions to dismiss/convert and requests for relief from the stay). Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4th § 66.4 at ¶ 2, Sec. Rev. Apr. 30, 2004, www.ch13online.com.

<u>Pretrial Motions - Motions asking for a ruling on a particular matter that could terminate litigation and end a dispute before trial.</u>

1) Motion for Summary Judgment

- a) Appropriate only if there are no material facts in dispute.
- b) The party that believes that the undisputed facts compel a ruling in its favor files the motion with the court.
- c) The opposing party must respond and explain what facts are disputed and what needs to be determined at trial.

2) Motion for Default Judgment

a) When a defendant is in default, the plaintiff can ask the court for a default judgment. For example, a defendant may not answer a complaint within the timeframe specified in the summons.

- b) If a defaulting party acts timely and has a sufficient excuse, the court may vacate the entry of default.
- 3) Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)
 - a) Brought by a defendant when it believes that the complaint is somehow legally deficient.
 - b) Some reasons to bring a motion to dismiss:
 - i) Insufficient service of process;
 - ii) Lack of subject matter jurisdiction;
 - iii) Lack of personal jurisdiction; or
 - iv) Improper venue.
- 4) Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c)
 - a) Pleadings include the complaint, the answer and any written instruments attached as exhibits. *See, e.g., Northern Ind. Gun & Outdoor Shows v. City of S. Bend*, 163 F.3d 449, 452 (7th Cir. 1998).
 - b) A party may file move for this relief after the parties have filed an answer and complaint.
- 5) Motion in Limine

Relevant Local Rules

- 1) 5005: Electronic Filing
- 2) 5005.1: Retention of Electronically Filed Documents
- 3) 5005.2: Facsimile Filing
- 4) 7005: Proof of Service
- 5) 9004: Form and Number of Documents
- 6) 9006: Motions for Extension of Time
- 7) 9006.1: Paper filing after office hours
- 8) 9010.1 Disclosure of Attorney Who Drafts Petition, Pleading, Proposed Order, Trial-Related Document, Schedule, or Statement of Affairs; Prohibition Against Ghostwriting
- 9) 9010.2 Appearance by Attorney Pro Hac Vice
- 10) 9013 Form of Motions, Notices and Orders.
- 11) 9013.1 Proof of Service.
- 12) 9013.2 Motion Practice.
- 13) 9013.3 Motion Practice; Briefs.
- 14) 9014 Notice of Motion; Notice of Hearing; Time Periods for Objections; Form of Objections.
- 15) 9014.1 Affidavit of No Objection.
- 16) 9014.2 Obtaining a Hearing Date on a Matter.
- 17) 9014.3 Hearings; Duty to Confer. Hearings on Motion.
- 18) 9014.4 Teleconference Hearings; Telephonic Appearances.
- 19) 9014.5 Orders; 7 Day Rule. LR 9029 Adoption of Rules.
- 20) 9036 Authorization of Use of Court's Transmission Facilities
- 21) LR 9010 Withdrawal and Substitution of Attorneys of Record. An Attorney who has appeared as the attorney of record for the debtor, trustee creditors' committee, or party in a

case, adversary proceeding, or contested matter may not withdraw, be relieved or displaced except by notice to the party represented and any adversaries and by leave of the court.

- 22) LR 7004 Adversary Filing Procedures.
 - a) Procedures. Procedures relating to the number of copies, Form B 104 Cover Sheet and issuance of Adversary Summons are set forth in the Appendix.
 - b) Copies of Summons and Complaint to be Provided to U.S. Trustee. A copy of the Summons and Complaint and Adversary Proceeding Cover Sheet shall be transmitted by the plaintiff to the U.S. Trustee. No other pleadings shall be transmitted to the U.S. Trustee unless specifically requested by that office.
- 23) Note: Each Judge has his or her general procedures also available on the website.