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Privilege and Expert Discovery in Bankruptcy Adversary Proceedings

The practices of counsel specializing in financial reorganization overlap with issues that must be resolved in federal bankruptcy court on a regular basis. Whether it's a client in financial difficulty or pursuing the collection of assets or debts owed, insolvency issues play a prominent role for federal practitioners with commercial and general litigation practices. This becomes even more pertinent when considering the recent historic fiscal crisis in places such as Detroit, Michigan; Stockton, California and Puerto Rico.

What is surprising to many is how similar the litigation of adversary proceedings in bankruptcy can be to federal practice. Below I provide a general summary of how mechanisms available under Federal Rule of Civil Procedure 26(a)(2) and (b)(3)(4)(5) in regards to Privilege and Expert Discovery come in handy in bankruptcy litigation.

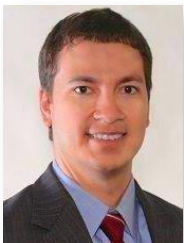
Rule 26 Discovery Available in Adversary Proceedings

An adversary proceeding in bankruptcy court is a lawsuit filed within a bankruptcy case.¹ While it remains a part of the bankruptcy case, it has its own separate case number, and may involve a different attorney than the one handling the bankruptcy itself. Any party can file an adversary proceeding in a bankruptcy – the trustee, a creditor or the debtor. The purpose of an adversary proceeding is to obtain some form of relief that requires a judge's attention and cannot be accomplished through a court motion. Adversary proceedings are resolved by the presiding bankruptcy judge, and juries are not selected, only bench trials are held, when necessary.

An adversary proceeding starts when the plaintiff files a complaint with the bankruptcy court. The complaint lists the facts that pertain to the lawsuit and asks the court to enter a judgment based on the facts and the law. When the plaintiff files, the court will issue a summons,

which the plaintiff must serve upon the defendant, along with a copy of the complaint. Once the defendant receives the complaint, he or she generally has 30 days to respond, depending on the local rules of the bankruptcy court. To respond, the defendant must file an answer, which responds to the allegations in the complaint. If the defendant does not file an answer on or before the deadline, the court will enter a default, and the plaintiff can obtain a default judgment. The most common types of adversary proceedings are fraudulent transfers, preferential transfers, lien stripping, a proceeding to obtain an injunction or other equitable relief and objections to discharge.²

Disputes between or among parties arise often in adversary proceedings, and vary from simple, relatively straightforward matters to those involving complex, protracted litigation. The nature of a proceeding and the degree of its complexity cannot always be determined simply. Occasionally,



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adversary proceedings may be required. Further, these types of disputes may often exist simultaneously in a single bankruptcy case or, if not simultaneous, may occur one after the other without much time in between. These realities of bankruptcy practice necessitate cooperation of counsel, realistic discovery requests and earnest attempts to compromise. Notwithstanding these unique aspects of bankruptcy litigation, Bankruptcy Rules 7026 through 7037 make Civil Rule 26 applicable in adversary proceedings.

Expert Witness Discovery

Rule 26(a) (2) requires a party to disclose the identity of any witness who will provide expert testimony. Absent a stipulation or court order to the contrary, these disclosures must occur 90 days before trial. Parties to adversary proceedings should consider whether to adjust the default disclosure schedule – and obtain a stipulation or order from the court, accordingly. Another feature of the rule is that it distinguishes between witnesses who must provide a full expert report and witnesses for whom a party must merely disclose the subject matter of the testimony and a summary of the facts and opinions that will be the subject of the testimony. The rule provides that a full report is required

only from witnesses retained specifically to provide expert testimony, or witnesses who are employed by the party and whose duties as an employee regularly involve giving expert testimony. Expert testimony from other witnesses is subject only to the abbreviated disclosures required by this rule.

Federal Rule of Civil Procedure 26(b) (4) governs the disclosure of, and discovery related to, expert witness testimony in adversary proceedings. This rule sets forth certain rules and procedures regarding discovery related to expert witness testimony. First, the rule provides that a party may depose any person identified as testifying expert – and if the witness is required to supply a report, the deposition must occur only after that report is issued. Second, the rule protects against disclosure of (1) drafts of any expert report and (2) most communications between a party's attorney and any witness required to provide a report.

Asserting and Protecting the Privilege in Response to Discovery Requests

Federal Rule of Civil Procedure 26(b) (3) protects documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including

the other party's attorney, consultant, surety, indemnitor, insurer or agent). Federal Rules of Civil Procedure 26(b) (5) requires the submission of a privilege log where a person served with a document request or subpoena objects to the production of requested documents on the ground of privilege. However, a document-by-document privilege log is not always necessary when a party has, in good faith, asserted other non-privilege objections to the discoverability of a whole range of materials. Rule 26(b) (5) does not expressly state a deadline for submitting the privilege log. A party asserting a privilege or attorney work product must describe in detail the documents or information sought to be protected and provide precise reasons for the objection to discovery.

Conclusion

Federal Rule of Civil Procedure 26(a) (2) and 26(b)(3)(4)(5) play a role in adversary proceedings in regards to Privilege and Expert Discovery. As such, litigators must take this into consideration when they step into the bankruptcy forum.¹²

1 See generally Rule 7001 of the Federal Rules of Bankruptcy Procedure.

2 See generally Rule 7001(4) of the Federal Rules of Bankruptcy Procedure.