

EXPERT WITNESSES IN BANKRUPTCY PROCEEDINGS: PRE-TRIAL DISCLOSURES AND PROTECTIONS

by Cathy Ta and Claire K. Wu

Using expert witnesses in bankruptcy cases is a common occurrence, when there is litigation over issues such as the valuation of a debtor's business, real property, or other assets; the debtor's financial projections and their feasibility; the solvency of the debtor at the time of certain transfers alleged to be fraudulent; and more generally, any aspect of the debtor's financial affairs before or after the bankruptcy case. While these issues can be bankruptcy case specific, they can also be issues found in any business litigation case.

Likewise, bankruptcy court litigation is procedurally similar to other federal court litigation, in that the Federal Rules of Civil Procedure (FRCP) largely apply in bankruptcy court litigation.¹ However, there are certain notable differences that all litigators should be aware of, particularly in the context of using expert witnesses. Specifically, bankruptcy court litigation, and the use of expert witnesses, occurs in two different contexts. The first is adversary proceedings and the second is in contested matters. However, the pretrial expert disclosure rules and protections in these proceedings are not identical.

The Difference Between Adversary Proceedings and Contested Matters

As an initial matter, an adversary proceeding is a lawsuit in the bankruptcy court, filed by at least one party plaintiff against another party defendant, in connection with, but separate from, the debtor's main bankruptcy case. An adversary proceeding has its own docket and case number. Generally, an adversary proceeding is commenced by the plaintiff filing a complaint. The defendant then faces a deadline by which to respond to the complaint; and, assuming the lawsuit is not dismissed at the outset, the lawsuit proceeds with status conferences, scheduling orders, pre-trial motion practice, and discovery, before the lawsuit heads to trial, unless of course the suit is resolved without the need for a trial.

Requests for relief in the debtor's main bankruptcy case are made by motion; and when contested, they are known as contested matters. Customarily, bankruptcy judges rule on contested matters at their initial hearings. To the extent the bankruptcy judge requires further evidence, the bankruptcy judge may set the contested matter

for an evidentiary hearing or a trial. Preceding the evidentiary hearing or trial, the parties may need to conduct discovery, typically pursuant to a scheduling order or other court order.

Pretrial Expert Disclosure Rules Governing Adversary Proceedings and Contested Matters

Procedurally, bankruptcy courts are governed by their own Federal Rules of Bankruptcy Procedure (FRBP), which largely make applicable the FRCP.

With respect to pretrial expert disclosures, in adversary proceedings, FRBP Rule 7026 makes applicable FRCP Rule 26, which are the general provisions governing discovery and the duty to disclose.²

Contested proceedings are governed by FRBP Rule 9014(c), which makes applicable, among other FRCP rules, FRCP Rule 7026 with certain exceptions. Specifically, FRBP Rule 9014(c) excepts from contested proceedings the following parts of FRCP Rule 7026: (a)(1), mandatory initial disclosures; (a)(2), pretrial expert testimony disclosures; (a)(3), pre-trial disclosures; and (f), meet and confer requirements prior to the initial scheduling conference.³ This means FRCP Rule 26(a)(2)'s pretrial expert testimony disclosure requirements do not apply in contested matters, unless the court directs otherwise.

As a result, in contested matters, counsel do not have the onus of making advance disclosures of expert testimony, including any written report required under FRCP Rule 26(a)(2). However, counsel may have to provide expert testimony-related information in response to discovery served by opposing counsel, including to document requests and interrogatories. Notwithstanding the foregoing, counsel may stipulate, or request that the bankruptcy court order, that FRCP Rule 26(a)(2)'s pretrial expert testimony disclosure requirements apply to the contested matter, especially if it is set for an evidentiary hearing or trial. Also, counsel should always check the bankruptcy court's local rules to see if this exception is otherwise addressed or modified.

² Fed. R. Bankr. p. 7026.

³ Fed. R. Bankr. p. 9014(c)

¹ Fed. R. Bankr. p. 7001 *et seq.*

What is the Effect of this Disclosure Exception on Trial Preparation Protections for Experts in Contested Matters?

Overall, FRCP Rule 26(a)(2)'s pretrial expert disclosure requirements apply in adversary proceedings, but not in contested matters. This difference is significant in how trial preparation protections regarding experts are set forth under FRCP Rule 26(b)(4). Specifically:

- FRCP Rule 26(b)(4)(B) provides that Rules 26(b)(3)(A) and (B), codifying the work-product doctrine, “*protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.*”⁴
- FRCP Rule 26(b)(4)(C) protects “communications between a party’s attorney and *any witness required to provide an expert witness report under Rule 26(a)(2)(B), regardless of the form of the communications, with certain exceptions.*”⁵

In short, both work-product and attorney-witness communication privileges are statutorily written in reference to pre-trial expert testimony disclosures required under FRCP Rule 26(a)(2), which does not apply in contested matters. Therefore, it is statutorily unclear that

⁴ Fed. R. Civ. p. 26(b)(4)(B) (emphasis provided).

⁵ Fed. R. Civ. p. 26(b)(4)(C) (emphasis provided).

these privileges apply in contested matters, since FRCP Rule 26(a)(2) does not apply in contested matters.

Protecting Expert Trial Preparations and Communications in Contested Matters

One statutory interpretation of FRCP Rule 26(b)(4)(B) and Rule 26(b)(4)(C) may lead to the conclusion that in contested matters, drafts of an expert’s report may not be entitled to work-product privilege, or attorney-expert communications may not be protected as privileged communications. To safeguard against any uncertainty, in contested matters, counsel can and should stipulate to, or request that the bankruptcy court enter, an order affirmatively delineating the scope of required pre-trial expert testimony disclosures under FRCP Rule 26(a)(2), if any, and otherwise making applicable the work-product privilege and the attorney-witness communication privilege under FRCP Rule 26(b)(4)(B) and Rule 26(b)(4)(C) respectively.

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