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abtl REPORT

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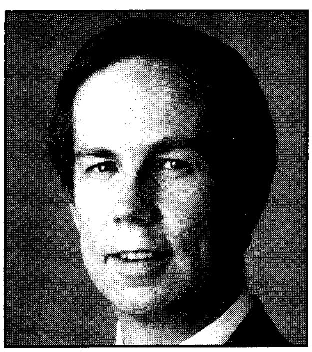
Drafting Settlement Agreements: Ten Pitfalls

NOTHING is so unsettling, so to speak, as seeing the applause and afterglow of a consummately-negotiated settlement turn into a nightmare because of glitches in the paperwork. In many cases, a "standard" settlement agreement is fine; in other situations, though, unforeseen events and a simple failure to think can combine to snatch defeat from the jaws of victory. This article will highlight ten pitfalls in drafting settlement agreements in business litigation cases – and ten specific questions to ask in order to avoid them.



Robert J. Stumpf, Jr.

First, what happens if a settling party does not fully perform its obligations under the settlement agreement? For example, assume that a defendant only makes one of four required settlement payments. Is the plaintiff's only remedy to bring a new action, this time for breach of contract (usually at an amount far less than the original claim)? Or may plaintiff essentially "revive" the old lawsuit and start over? Or may plaintiff move the court for summary enforcement of the settlement?

The general (and certainly better) rule on revival of claims is that a non-defaulting party may *not* rescind the settlement agreement and is limited to a contract claim for its breach. This limitation does not apply if the settlement agreement is void or voidable under general principles of contract law or if the settlement agreement itself provides some other remedy.

> The settlement contract has the attributes of a judgment in that it serves to bar reopening of the issues settled (citations omitted). Absent a fundamental defect in the agreement itself, the terms are binding on the parties. A party to a settlement

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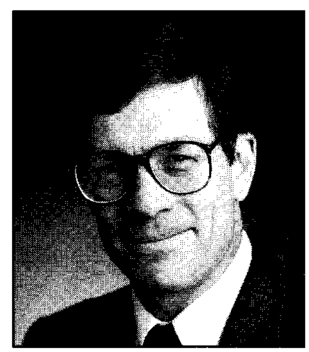
A Primer on Jury Trials in Bankruptcy Proceedings

AS a sitting bankruptcy judge, I see attorneys having difficulty understanding the right to jury trial in bankruptcy proceedings. This is especially true of attorneys who do not regularly practice before the bankruptcy court. Below is a primer on when a right to jury trial exists and what court may conduct such a trial. I have given special attention to proceedings involving claims against the debtor, actions to determine nondischargeability of debts, and preference and fraudulent conveyance actions, because those are the actions in which nonbankruptcy lawyers most frequently appear.



Hon. Thomas E. Carlson

Whether there is a right to jury trial in a proceeding before the bankruptcy court should not involve concepts foreign to the nonbankruptcy lawyer. The issue is governed by the traditional Seventh Amendment test that applies in other courts – whether the cause of action and relief sought are equitable or legal in character. The traditional test in bankruptcy proceedings, however, leads to results that can be surprising to non-bankruptcy lawyers.

Claims Against the Debtor

Claims against the bankruptcy estate are considered

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Jury Trial Primer in Bankruptcy

equitable in character. This is so even though a claim is in substance only a breach-of-contract or tort action against the debtor seeking money damages, and would therefore be triable by jury in a state court or federal district court. The Supreme Court decided long ago, however, that there is no right to jury trial in the adjudication of claims in bankruptcy court, because the bankruptcy estate is a trust, and the bankruptcy court sits in equity in administering and distributing the assets of that trust. "The Bankruptcy Act...converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*." This logic applies to all proceedings that are in substance actions against the bankruptcy estate, whether arising pre- or postpetition, and whether initiated by a formal proof of claim or by an adversary proceeding.

There are two exceptions to the general rule. First, there is a statutory right to jury trial in personal injury or wrongful death claims. This exception is not based on constitutional considerations. Congress granted a right to jury trial in such proceedings in response to demands by plaintiffs' lawyers in the wake of the *Johns Manville* bankruptcy. Second, claims are triable by jury if not tried in the bankruptcy court. Thus, if the bankruptcy court grants relief from the automatic stay to allow liquidation of a claim in state or federal court, the parties' right to jury trial is not lost, because the proceeding is not being tried as a matter in equity.

Suits by the Bankruptcy Estate

Unlike claims against the estate, damage actions by the bankruptcy estate do not become equitable merely because tried in the bankruptcy court. Such actions are not considered part of the administration and distribution of trust assets. A right to jury trial in such actions turns solely on whether the action is legal or equitable under the traditional test. This is so whether the action arises under the Bankruptcy Code, nonbankruptcy federal law, or state law. Thus, there would be a right to jury trial in a state-law breach-of-contract or tort action or a federal antitrust suit brought by the bankruptcy estate if the action sought money damages. Whether there is a right to jury trial is also unaffected by whether the proceeding is "core" or "noncore." Those categories are related to the powers that bankruptcy judges may properly exercise as non-Article III judicial officers. Thus, there is generally a right to jury trial in preference or fraudulent conveyance actions seeking money damages, even though those actions are core proceedings.

There is an important exception to the general rule stated above. Under *Katchen v. Landy*, 383 U.S. 323 (1966), there is no right to jury trial if the action is for recovery of a preference or fraudulent conveyance and the defendant has filed a claim in the bankruptcy case. Although the rationale of *Katchen* is difficult to explain briefly, it ultimately rests on the notion that the preference action has become part of the equitable claims allowance process.

Nondischargeability Actions

Certain types of debts are not discharged in bankruptcy. The most common examples are debts resulting from the debtor's fraud or intentional torts. In order to collect such a debt, however, the creditor must file a lawsuit in the bankruptcy court to have the debt determined to be nondischargeable. In some such cases the underlying debt has already been reduced to judgment, in some cases it has not.

There is no right to jury trial in the determination of whether a given debt is dischargeable. That issue is equitable in character, because it relates to the scope of the debtor's discharge, which is a permanent injunction against further collection of any discharged debt.

It is a closer question whether either party is entitled to a jury trial in determining the amount of the underlying debt, if that is being tried with the question of nondischargeability. Such an action would clearly be legal in character and triable by jury if tried outside a nondischargeability proceeding. Moreover, although the action is against the debtor, it is not an equitable claim against the bankruptcy estate *res*. A judgment of nondischargeability allows the creditor to pursue the debtor's postpetition assets, which are not part of the bankruptcy estate.

Although the cases remain split, the increasingly prevalent and better view is that there is no right to jury trial on the issue of damages when tried in a nondischargeability case. The determination of dischargeability and the liquidation of the underlying debt arise out of the same transaction and involve adjudication of the same facts. Bankruptcy courts may liquidate the debt without a jury in the course of determining dischargeability, under the doctrine that a court determining an equitable claim may resolve incidental issues of law.

Bankruptcy Court and Jury Trial

Whether a bankruptcy judge may conduct a jury trial depends on whether the proceeding is "core" or "noncore." The bankruptcy court cannot conduct a jury trial in noncore proceedings without the consent of the parties. The courts are divided as to whether the bankruptcy court may conduct a jury trial in a core proceeding without consent.

Noncore proceedings are those in which the bankruptcy judge's powers are limited to conform with Article III of the Constitution. In noncore proceedings a bankruptcy judge may not enter final judgment, unless the parties consent. Rather, the judge may enter only proposed findings of fact and conclusions of law that are reviewed *de novo* by the district court. A bankruptcy judge may enter final judgment in a noncore proceeding with the consent of the parties.

A bankruptcy judge may not conduct a jury trial in a noncore proceeding without the consent of the parties. This is so because the decision of the bankruptcy court in such a proceeding is subject to *de novo* review, and such review would violate the pro-vision of the Seventh Amendment that "no fact tried by a jury shall be other-

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MICHAEL A. JACOBS

On PATENTS

ONCE upon a time, a long, long time ago, patent rights were considerably less valuable than they are today. One side effect of this lower valuation was widespread, inexpensive patent licensing, particularly in the electronics industry. Since patents were often held invalid by the courts, vigorous enforcement made little economic sense. Licensing, however, could at least attract some revenues. Moreover, because electronics products usually require patent rights from a variety of sources, companies generally found it useful to enter into broad, long-term cross-licenses, which would obviate worry about infringing patents held by other industry players. As a result, patent licensing revenues were modest and were based on a rough overall assessment of relative patent portfolio values. This went on until the mid-'80s.

As any business trial lawyer in the Northern District of California knows, patents are now highly valued and heavily litigated. Patents that relate to computer industry standards have enormous potential for extracting licensing revenues or excluding competition from certain markets. Licensing policies have changed; licensors holding key patents seek substantial licensing revenues and sometimes won't license at all. Intel, for example, recently announced a patent cross-license with Toshiba that purportedly excludes patents related to its microprocessor architecture.

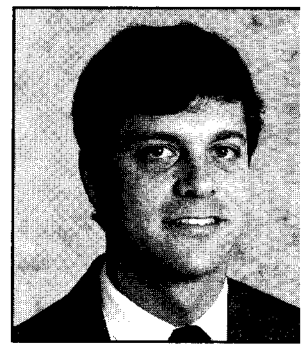
One significant result of this shift in the patent climate is that rights under existing long-term cross-licenses have become much more valuable. These rights may be analogized to long-term oil supply agreements whose price and terms were set prior to the rise of OPEC. Not surprisingly, the licensors wish to construe these arrangements narrowly, licensees broadly.

One license agreement construction issue that is closely watched in the electronics industry concerns third party rights. If, for whatever reason, a patent licensee can extend the shelter of its existing license to third parties without substantial additional royalty costs, it may be holding a legal right of considerable value.

This issue is arising now in connection with the so-called "foundry right" in semiconductor patent cross-licenses. A bit of background: A patent grants its owner the exclusive right to "make, use or sell" the patented invention and, of course, to license others to do so. Purchasers of products from a seller that has been licensed to make, use and sell are themselves immune from patent infringement suit. This "first sale" doctrine extinguishes patent infringement claims against purchasers of products from licensed sources.

What happens, then, when a "foundry" – a licensed semiconductor manufacturer – uses its license rights to manufacture products designed by third parties? If the manufacturer "makes" and "sells" a product back to the third party, who in fact designed it, does patent immunity still attach? If so, a licensed foundry can effectively shelter unlicensed third parties from infringement claims. An IBM licensee, for example, could manufacture products designed by a start-up venture that might not itself be able to afford IBM's license fees or to litigate infringement and validity issues.

The Court of Appeals for the Federal Circuit recently decided a case in this area and has another pending. In *Intel v. Atmel*, 946 F.2d 821 (1991), Atmel argued that its semiconductors were immune from infringement claims by Intel because they were manufactured by Sanyo, an Intel patent cross-licensee, and then sold to Atmel for resale to customers. The issue before the court was whether the Intel-Sanyo patent cross-license agreement could fairly be read as contemplating a "foundry" right permitting Sanyo to extend the shelter of its license agreement to products designed by third parties. The court found the answer in the text of the Intel-Sanyo license agreement: the agreement licensed Sanyo to make and sell "Sanyo products," and the court held that this meant products of Sanyo's design. Accordingly, Sanyo was not licensed to manufacture products of Atmel design, and Atmel, as the purchaser of those products, was not the beneficiary of the first-sale doctrine.


Michael A. Jacobs

Most recently, ULSI, which offers an Intel 80387-compatible math coprocessor, sought protection from suit by Intel under a patent cross-license agreement between Intel and Hewlett-Packard by having Hewlett-Packard manufacture its coprocessors. The Intel/Hewlett-Packard agreement contained no limitation analogous to the Sanyo products limitation in the Sanyo-Intel agreement. In a preliminary injunction motion, Intel argued, however, that Hewlett-Packard does not "sell" the semiconductors to ULSI, but rather merely offers a foundry "service" to ULSI. The district court agreed. It also held that the Intel-Hewlett-Packard agreement did not permit Hewlett-Packard to sublicense its patent rights to ULSI. In so doing, the court seems to have confused the issues in dispute, which appear to have nothing to do with extending sublicense rights and everything to do with the scope of the "make" and "sell" rights. The preliminary injunction is on appeal to the Federal Circuit, putting the foundry right once again before that court.

Nowadays, patent license drafters are keenly aware of the significance of the foundry rights issue and carefully craft license language to include or exclude the foundry right, depending on the deal. The intensity of the dispute over the foundry right illustrates the friction in the patent system arising out of the transition from a low value environment to an environment in which patents are highly valued. Because of the potential of patents to block some types of competition in the electronics industry, the dispute is also of great significance to the industry and to lawyers who advise electronics companies.

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Drafting Settlement Agreements

> agreement may not seek to rescind it by proving the merits of his original claim and then establishing that an erroneous assessment by him of that claim led to the settlement.

A. J. Industries, Inc. v. Ver Halen (1977) 75 Cal.App.3d 751, 759. In *MWS Wire Industries, Inc. v. California Fine Wire* (9th Cir. 1986) 797 F.2d 799, 802-03, the Ninth Circuit likewise held that in the absence of a showing of fraud or undue influence, a settlement "operates as a bar to the reopening of the original controversy." On the other hand, there is at least some authority that a non-defaulting party can choose between two remedies: (1) a separate action for breach of the settlement, or (2) a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure to vacate the prior dismissal and reinstate the case. *Stipelcovich v. Sand Dollar Marine, Inc.* (5th Cir. 1986) 805 F.2d 599, 605.

There is no clear rule as to whether the court may summarily enforce a settlement agreement without requiring a new action for breach of the agreement. *See* Note, *Federal Jurisdiction To Enforce A Settlement Agreement After Vacating A Dismissal Order Under Rule 60(b)(6)*, 10 Cardozo L. Rev. 2137, 2150 (1989) ("Courts are sharply divided as to whether a district court may enforce a settlement agreement where the agreement was neither approved by the court nor made a part of its dismissal order").

This kind of confusion can be avoided, or at least minimized, by including appropriate language in the settlement agreement itself. For example, you could include "status quo ante" language giving the non-defaulting party the right, in effect, to elect whether to rescind the settlement or sue to enforce it. Or you can provide that the court condition dismissal upon performance of, and retain jurisdiction to enforce, the settlement agreement. *See McCall-Bey v. Franzen* (7th cir. 1985) 777 F.2d 1178, 1188. If you want to attempt to leave the door open for a summary enforcement or revival of your claims if your settlement partner reneges, the settlement agreement should say so and, best case, also be formally approved by the court.

Second, who has to pay? If, for example, several defendants are obtaining a release and dismissal, is the payment obligation necessarily joint and several? The responsibility of one of the defendants? Or what? What happens, for example, if a corporate defendant and two of its officers receive a dismissal in return for a promise to pay certain sums in the future – and the corporation then goes bankrupt? Who is out of luck – the two officers, who surely had not expected to pay out of their own pocket, or the plaintiff, who arguably took that economic risk?

Third, how are disputes about the settlement agreement to be resolved? One common approach, of course, is to provide that disputes regarding enforceability or interpretation are to be resolved in arbitration. Another is to specify a particular judicial forum as a permissible (or even exclusive) tribunal. Or, as noted above, you could provide explicitly that the court approving the settlement retain jurisdiction to consider and resolve disputes about the agreement. In all events, consider including an attorneys' fees clause.

Fourth, who is being released? From a defendant's eye-view, broad is usually better, and it is the rare attorney whose word processor does not have standard language encompassing "affiliates, past, present, and future," and so forth. Even here, however, questions may arise under the "standard" form, *i.e.*, who is an "agent" of a specifically-named party who is being released? Could it, for example, include an accountant or lawyer or subcontractor – even one named as a defendant (and not otherwise part of the settlement)? You may also want to request (or deliberately *not* request) specific language that the settlement is not intended to have any effect on claims by or against any of the specifically-named parties.

Fifth, what is being released? Are the only issues to be resolved those set forth in *this* lawsuit? Or is there to be complete peace between the parties of all disputes, known and unknown? Obviously, regardless of how this question is resolved, it is crucial to make sure that you and the client are on the same wavelength. If there is even a hint of other disputes on the periphery, careful attention should be given to broadening the scope of the release accordingly. Or not – if one objective is to preserve your options regarding other possible disputes lurking.

Attention should also be given to whether a waiver of Civil Code section 1542 makes sense and, if so, what specific language should be used to maximize the intended effect of barring "unknown" claims. (This latter, of course, presumes that anyone actually understands what section 1542 means.) *See*, e.g., *Consolidated Capital Income v. Khaloghli* (1986) 227 Cal.Rptr. 879, which held that because of ambiguities in the settlement agreement, which included an express waiver of Section 1542, factual issues remained as to whether the release did or did not waive certain subrogation claims. Beware: a "mere recital...that the protection of Civil Code section 1542 is waived, or that the release covers unknown claims or unknown parties is not controlling. Whether the [releasor] intended to discharge such claims or parties is ultimately a question of fact." *Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 411.

Sixth, are extensive recitals a good idea? Yes or no, depending on the case. Many experienced practitioners try to avoid them because long recitations of fact are difficult to negotiate and often raise as many problems as they solve. In certain circumstances, though, expressions of intent and the "history" of a settlement may provide guidance and help avoid disputes later on. Recitals may also have some effect where third parties such as insurance companies, subrogation claimants, governmental agencies, or regulatory authorities are in the wings.

Seventh, is there any meaningful way to enforce confidentiality provisions? Absent unusual circumstances, a provision in the settlement agreement providing for

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STEPHEN OROZA

On CREDITORS' RIGHTS

ALL attorneys who practice bankruptcy law are confronted periodically with questions from business litigators concerning preferences, usually in the context of settlement payments. In the hope that the level of this discourse might be raised in approximately eight hundred words, the author poses and answers the following questions for the benefit of non-bankruptcy specialists:

Defining a Preference

What is a preference? Generally, a preference is a transfer of the debtor's property to a creditor (or for his benefit) to satisfy a pre-existing ("antecedent") debt. The transfer must generally be made within ninety days of the filing of the bankruptcy petition at a time when the debtor is insolvent. The transfer must also enable the creditor to receive more than it would have received as a distribution in a chapter 7 liquidation case. The debtor is presumed insolvent during the ninety-day period preceding the filing of the petition but the presumption affects only the burden of introducing evidence. *Practical litigation tip*: If you are sued for recovery of a preference, don't forget to litigate solvency; it is often a much closer factual question than the trustee thinks.

What's wrong with preferences? The draftsmen of the Bankruptcy Code believe that if they let you keep what you got by pressuring the debtor, it will encourage aggressive creditors to dismember troubled businesses and accelerate their decline. Therefore, if you get preferred treatment, they make you give back what you got and wait in line with the rest of the creditors.

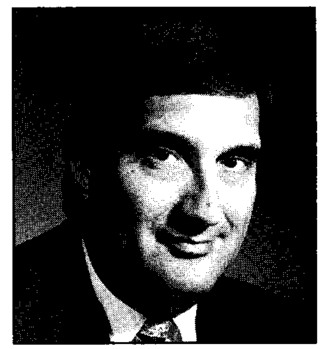
What is an insider preference? An insider preference is a transfer to an insider of the debtor which meets all of the above-stated criteria. Such a transfer may be recovered if made within one year before the filing of the petition. However, the debtor is not presumed to be insolvent for the one-year period. Insiders are persons or entities clearly related to the debtor or who can easily influence the debtor to make transfers to them. See Bankruptcy Code §101(31).

What do I need to know about preferences that is not obvious to a schoolchild? Everyone can count to ninety, virtually any payment made on a debt involved in litigation is going to be made on an "antecedent" debt and (mostly) your client will get paid in his capacity as a "creditor." So let's move on.

What do I need to know about "transfer"? Under Bankruptcy Code §101(54) a transfer is "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." Get the picture? If it got from the debtor to you, it was a transfer.

What do I need to know about "property of the debtor"? If someone other than the debtor pays you, you don't have a preference. *Caveat*: If the debtor's father (or company) paid you, and he (or it) was insolvent, you are likely to have a problem with his (or its) creditors, but that's another article.

When is a transfer made? (Careful, this is a trick question.) Generally, transfers are "made" when they are perfected against competing interests. A transfer of real estate is made when it is perfected as against a bona fide purchaser. A transfer of personalty is made when a simple contract creditor cannot obtain a superior judicial lien on the asset. *Exception*: If the transfer was perfected within ten days of the date it became effective between the parties, the transfer was "made" on the earlier date. *Practical tip:* Perfect the transfer immediately; don't let the debtor talk you into not recording the deed of trust because it "affects his credit."



Stephen Oroza

When is a transfer "for the benefit of a creditor?" When the transfer is made to one person but another person receives a benefit from the payment. The most common situation litigators miss is a payment made by the debtor to the principal creditor on a debt your client guaranteed. Obviously, this is a transfer to the party who got paid; not so obviously the transfer to the principal creditor is "for the benefit" of your client since it reduces his contingent obligation to the principal creditor.

Define Settlement Payment

Can I do anything to affect whether the settlement payment my client receives is a preference? This question absolutely cannot be addressed in the abstract; each situation has to be evaluated on its merits. *Post-disclaimer practical tips:* (1) One thing you commonly can do is structure the settlement so that the debtor is given enough breathing space that he does not file a bankruptcy petition in the next ninety days. For example, you might secure the debt but agree not to enforce the security interest for more than ninety days. (2) Even if the transfer is potentially a preference, take it. Trustees have been known to miss preferences or settle them for less than one hundred cents on the dollar.

Is this everything I need to know about preferences? Not even close, but it's a start.

Mr. Oroza is a partner in the firm of Lillick & Charles.

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Drafting Settlement Agreements

liquidated damages in the event that one party breaches confidentiality may not be enforceable. Such a clause may nonetheless have an in terrorem effect. Other approaches include giving the non-breaching party the express right to rescind the settlement and, at least in theory if the settlement is court-approved, seek a contempt citation. Some judges, however, refuse as a matter of policy to approve a settlement containing a confidentiality provision; and the prevailing judicial winds generally seem to be blowing against these clauses.

Eighth, are the releases to be mutual? This is often a standard request, but be careful. Or, be careful to *request* a mutual release (and perhaps negotiate something in return). If your client's primary objective is a very broad release scope, offering to make the release mutual may help by reducing the natural wariness of the other side. On the other hand, a "routine" mutual dismissal – particularly one which is not fully explained in detail to the client – can cause an extremely rude awakening one day.

Ninth, must a dismissal always be with prejudice? Obviously, from a defendant's eye-view, a dismissal with prejudice is better. Occasionally, however, the better part of valor may be to dismiss now, without prejudice, and hope for the best.

Finally, how can the "finality" of a settlement agreement be maximized? Rule 408 of the Federal Rules of Evidence, which generally blocks evidence of settlement negotiating to prove a civil or criminal wrong, does not prevent such evidence to prove that the settlement agreement itself was obtained through fraud. Accordingly, you may wish to include "no reliance on representations not set forth herein" language. *See Brae Transp. Inc. v. Coopers & Lybrand* (9th Cir. 1988) 790 F.2d 1439, 1445 [similar language precluded a sophisticated commercial entity from claiming a settlement was obtained through fraud]. Other key candidates for your finality checklist might include approvals by counsel as to form, notarization of the principals' signatures, merger or integration clauses, initials by particularly significant provisions, bold type, "entire agreement" and "no mistake" language, and if appropriate and subject to the foregoing caveats, court approval.

In unusual circumstances, you may even want to consider unconventional approaches such as videotaping the closing, or having the principals confirm the material terms of the agreement on the record in open court.

In summary, Winston Churchill, in describing a much-needed British victory in 1942, remarked, "Now, this is not the end. It is not even the beginning of the end. But it perhaps is the end of the beginning." A good settlement agreement, though, is in fact...

...THE END

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Jury Trial Primer in Bankruptcy

wise reexamined...than according to the rules of the common law." The bankruptcy court may conduct a jury trial in a noncore proceeding with the consent of the parties, because with such consent, the bankruptcy court may enter a judgment subject to traditional appellate review.

Most bankruptcy proceedings in which there is a right to jury trial are noncore. Actions brought by the bankruptcy estate are the only broad category of actions in which there is a right to a jury trial. Because such proceedings were not traditionally adjudicated by non-Article III judges, such proceedings are also noncore proceedings in which bankruptcy judges' powers are limited. The only actions commonly brought by the bankruptcy estate that are core proceedings are preference and fraudulent conveyance actions under sections 547 and 548 of the Bankruptcy Code. Although not traditionally adjudicated by non-Article III judges, those actions are classified as core proceedings because the substantive rights involved are established in the Bankruptcy Code. Personal injury and wrongful death claims are defined by statute as noncore proceedings, and the statute provides that they must be tried in the district court. As noted above, this classification is based on political and policy concerns and has no constitutional basis.

Core Proceedings

There is a split among the courts as to whether a bankruptcy judge may conduct a jury trial in a core proceeding without the consent of the parties. The courts concluding that bankruptcy judges have such power generally reason that bankruptcy judges' power to enter final judgment in core proceedings without a jury includes the related power to enter final judgment with the aid of a jury. The courts holding that bankruptcy judges may not conduct jury trials in core proceedings without the parties' consent generally reason that no statute expressly provides that a bankruptcy judge may conduct a jury trial and that no such power should be implied because there is a legitimate question whether it would be constitutional.

Conclusion

There is generally no right to jury trial in actions against the bankruptcy estate tried in the bankruptcy court. There generally is a right to jury trial in actions by the bankruptcy estate seeking money damages. In actions by the estate, other than preference and fraudulent conveyance actions, the bankruptcy court may conduct the jury trial only with the consent of the parties. Some courts allow bankruptcy courts to conduct jury trials in preference and fraudulent conveyance actions without the parties' consent.

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NICOLE A. CRITTENDEN

On ARBITRATION

THE preliminary hearing is one of the most underutilized tools for managing a complex arbitration. Many overlook its significance and fail to take full advantage of the opportunities it presents. Rule 10 of the Commercial Arbitration Rules of the American Arbitration Association (AAA) provides:

> In large or complex cases, at the request of any party or at the discretion of the arbitrator or the AAA, a preliminary hearing with the parties and/or their representatives and the arbitrator may be scheduled by the arbitrator to specify the issues to be resolved, to stipulate to uncontested facts, and to consider any other matters that will expedite the arbitration proceedings....

The AAA generally recommends that preliminary hearings be held in cases involving in excess of $200,000 and/or multiple hearing dates. However, the parties may request a preliminary hearing in any case deemed to be "complex" without regard to the amount in controversy. If your case could benefit from a preliminary hearing, do not be reluctant to request one.

Prepare for Hearing

Once the hearing is scheduled, take the time to prepare for it. Prior to the preliminary hearing, the arbitrators' sole exposure to the dispute is the claim and any answering statement. These documents rarely describe the nature of the dispute sufficiently. Your statement of the claims to the arbitrator at the preliminary hearing is, therefore, like an opening statement. It will create an important first impression in the mind of the trier of fact. More significantly, it will set the framework for deciding all of the substantive and procedural matters to be addressed at the preliminary hearing which will control the entire proceedings. You should consider each of the matters to be addressed at the Preliminary Hearing carefully *in advance* and be prepared to take control at the hearing and persuade the arbitrators to adopt your plan.

The matters which should be addressed at the preliminary hearing include: evaluation of the length of the case; schedule and location for hearings; stipulation to uncontested facts; advance marking and exchange of exhibits; exchange of witness lists, with outlines of testimony; exchange of other information, including any experts' reports; submission of prehearing briefs; provision of court reporter; form of the award; and potential site visits.

Reserve Sufficient Dates

Parties often underestimate the significance of correctly projecting the length of the hearings. If you do not reserve sufficient hearing days in advance, there is a real risk that you will be unable to add consecutive dates later. This can cause substantial delay in concluding the hearings and may create a serious disadvantage to one of the parties. In addition, consider requesting an order dividing the hearing dates between the parties so that you will know precisely how many days you will have to present your case.

Kind of Award

Look ahead to the conclusion of the case to consider what kind of award you will want the arbitrator to enter. The AAA generally recommends that the award should *not* reflect the arbitrators's reasoning. In a complex case, the parties may desire and expect a reasoned decision explaining the basis for the award. Resolving this issue at the Preliminary Hearing alerts the arbitrators in advance that you expect a reasoned award and resolves this issue early, when your adversary is less likely to resist it.

The schedule for the pre-hearing exchange of exhibits, witness lists (with outlines of testimony) and expert reports may be as close to discovery as you will get in an arbitration. Therefore, it is important to orchestrate it properly. Make sure you allow sufficient time prior to the hearing for these exchanges so that the materials can be used effectively in the preparation of your case and so that there is time to seek further guidance from the panel if your opposition neglects to produce the required information.


Nicole A. Crittenden

Consider Discovery

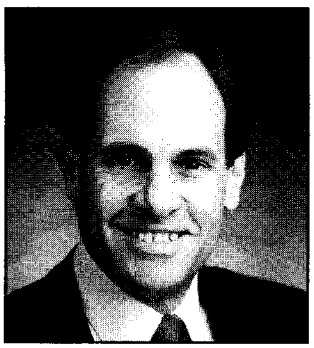
The preliminary hearing is the time to consider the possibility of stipulating to limited discovery. At the preliminary hearing, it may be possible to persuade the panel and utlimately your adversary that limited discovery could reduce the length and therefore cost of the hearing. In the absence of an agreement to allow discovery, if you intend to serve subpoenas for your adversary's records, this should be disclosed at the preliminary hearing. This is important because the subpoenas will be returnable on the first scheduled date of hearing. If time will be needed to review the records obtained by subpoena before the presentation of evidence is commenced, such time will have to be "built in" to the hearing schedule.

Having succeeded in resolving so many important matters at the preliminary hearing, do not neglect to properly record them. Consider having a court reporter present to record the proceeding. Alternatively, offer to prepare an order for signature by the panel reflecting the decisions made. In a complex case, it will be invaluable to have a clear, unequivocal record of the stipulations and orders entered.

Ms. Crittenden is a partner in the firm of Jackson, Tufts, Cole & Black.

Letter from the President

THIS October 23 through 27, the Association of Business Trial Lawyers of Northern California, in conjunction with the *ABTL* of Los Angeles, will present its Annual Seminar at the Four Seasons Hotel on Maui. The Annual Seminar will provide an ideal opportunity to see top quality continuing legal education programs, and renew acquaintances with and meet state and federal judges and active business trial lawyers from both Northern and Southern California. This year's Annual Seminar program will be directed by our Northern California Seminar Chair, Bob Gooding, of Howard, Rice, Nemerovski, Canady, Robertson & Falk, who is working with his counterpart in Los Angeles to bring together top lawyers and judges from throughout the state.



Arthur J. Shartsis

This year's Seminar program will feature planning strategies for the resolution of a multi-party dispute involving a failed leveraged buyout. Tentatively, the program will include preparation and conduct of a mini-trial before a three-judge panel and conclude with a settlement conference with an ADR judge. Participants will discuss strategies and techniques before the demonstrations and MCLE credit will be given.

Last year's Seminar at Pebble Beach featured a demonstration trial of a securities fraud claim involving a failed savings and loan. This highly topical trial featured some of the state's best plaintiff's and defense counsel. Federal District Court Judge Harry Hupp presided.

The 1990 Annual Seminar in Maui featured a varied program, including the latest in technology for demonstrative evidence, an interview with California Chief Justice Malcolm Lucas and U. S. Supreme Court Justice John Paul Stevens, trial demonstrations, and a panel on the judicial administration of settlements.

Our next *ABTL* dinner program in San Francisco on Monday, April 20, at the Sheraton Palace, will feature a program on criminal law for the civil practitioner. The panel will include Jim Brosnahan of Morrison & Foerster, Richard Held of the FBI and Central District Court Judge William M. Byrne Jr., with moderator John Keker. The panel will discuss invoking the Fifth Amendment, staying civil proceedings during criminal investigations, appearances before Grand Juries, and other matters of critical importance to civil lawyers where criminal action may be involved.

Our June program will present a review of the new Pilot Program of the Northern District of California pursuant to the Civil Justice Reform Act, under which some of our district court judges will be operating this July.

Finally, I want to renew my invitation for suggestions for programs or articles you would like to see.

Mr. Shartsis is a partner in the firm of Shartsis, Friese & Ginsburg.

COMING EVENTS

April 20, 1992 — MCLE Dinner: Criminal Law for Civil Practitioners

Cocktails at 6:00 p.m. — Dinner at 7:00 p.m.

Sheraton Palace Hotel.

Call Bridget Mullins (415) 421-6500 for tickets.