Consumer Workshop

The Wet Mountains:
Avoiding the Slippery Slopes of Bankruptcy Litigation

Stephen E. Berken, Moderator
Berken & Associates; Denver

Duncan E. Barber
Bieging Shapiro & Barber LLP; Denver

Hon. Thomas R. Cornish
U.S. Bankruptcy Court (E.D. Okla.); Okmulgee

Maria J. Flora
Maria J. Flora, PC; Denver

Matthew D. Skeen
Skeen & Skeen, PC; Georgetown, Colo.

BANKRUPTCY LITIGATION

By Stephen E. Berken, Esq.

Law Offices of Stephen E. Berken

Denver, Colorado

LITIGATION

Litigation is governed by either Bankruptcy Rule 9014 or Bankruptcy Rules 7001 through 7087. An "adversary proceeding" is the common nomenclature for a lawsuit within a bankruptcy case. The rules closely mirror the Federal Rules of Civil Procedure.

Adversary proceedings typically involve matters requesting that the court:

- Exclude (or except) a particular debt from the order of discharge (§523)
- Revoke a discharge order (§727)
- Determine the validity, extent and priority of a lien (Bankruptcy Rule 7001)
- Determine the value of property, although this is somewhat rare (§506)

Most litigation in bankruptcy court involves filing a motion and is considered a "contested matter" under bankruptcy rule 9014.

ADVANTAGES OF THE BANKRUPTCY COURT AS A FORUM FOR LITIGATION

1. With some exceptions, bankruptcy judges may be more sympathetic to a consumer's case than judges within the state courts.

2. Federal Rules of Bankruptcy Procedure allow for extensive and liberal uses of discovery as opposed to state rules.

3. Service of process is accomplished by first class mail.

4. A trial in bankruptcy court may be had within one year, typically.

5. Litigators accustomed to the state court forum are often overwhelmed when dragged into the unknown waters of the bankruptcy system.

6. There is no filing fee for the debtor in an adversary case.

7. Propounding discovery is cheap and easy to do, and burdensome upon the creditor.

8. To the chagrin of many judges, adversary cases are a good way for the young attorney to gain litigation experience.

PLAYING THE ODDS – COMPLAINTS TO DETERMINE DISCHARGEBILITY OF A DEBT (SECTION 523)

§523. Exceptions to discharge

No deadline

(a) **(1)** Taxes,

(3) unlisted debts

(5) for a domestic support obligation

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit

(8) student loans

(9) death or personal injury caused by the debtor's operation of a motor vehicle while debtor was intoxicated,

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727 (a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915 (h) of title 28 (or a similar non-Federal law);

(18) pension, profit-sharing, stock bonus, or other plan established under section here's what I did 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414 (d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) for violation of any of the Federal securities laws

60 day Deadline

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit; (Chapter 7 only)

Attorney's Fees

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

SECTION 523(a) PLAYING THE ODDS—WHO SUES?

The "X Factor"—Ex-wives, Ex-business associates

How to Avoid the Problem

Ex-partners know where the bodies are buried—the padded expenses, the inflated credit applications, the goodies realized from the failed venture that made their way into the garage of the budding entrepreneur. The failed business may be more than having lost an investment—it could be personal. In other words, these are dangerous creditors.

Possible ways to avoid problems—the worst claims, for the most part, are still not dischargeable in Chapter 13; however, fewer adversary actions are filed in chapter 13 than in chapter 7. Keep in mind, the automatic stay still exists for the duration of the 13.

Hell Hath No Fury, et cetera, et cetera.

Perhaps the most dangerous creditor is the ex-wife! Already knowing where the "bodies are buried," she also knows where the toys are, when they were purchased, how the debtor promised to repay the credit card for the purchase of the toys, and in whose garage they still remain. Additionally, we have the "emotional factor," which lends irrationality to the equation. Do not file a case in which the debtor/former spouse has a decree of dissolution without reading the court's order. If there is an obligation to pay jointly incurred debts, consider filing a chapter 13 case.

Credit Card Companies: How to Avoid Problems

If it's a credit card—more distance from the last charge the better! Have your staff know what kind of credit card usage occurred prior to meeting with you. If the credit card was recently used, consider having the client make some small token payments for a few months.

COUNTER-SUE BY INVOKING SECTION 523(d).
SEND DISCOVERY TO THE OBJECTING CREDITOR.

Pay Day Lenders

How to avoid problems, possible defenses: An undated check, or a check that is post-dated, may not be a "check" for purposes of "check by fraud" under Colorado law. The issue will be the proximity between obtaining the pay day loan and the filing of the case. As with most consumer transactions, the more distance from the loan to the filing of the case, the better. Keep in mind—debtors often receive no additional consideration when extending the pay day debt.

Order a stop payment as to the uncashed checks, or close the account.

Failed General Contractors

523(a)(4) does not discharge obligations owed by a fiduciary. See In re: Regan.

Possible solutions: Chapter 13? (against the General Contractor Debtor, former sub-contractors/material suppliers/ laborers—with or without a lien.) Client is less likely to get sued in a chapter 13. The more distance from the debt, the better. As to defenses—was there a bona fide dispute as to the work done? Did the general contractor simply run out of money? If so, did he ever take a paycheck? If so, that's a problem.

GROUNDS FOR OBJECTING TO DISCHARGE (SECTION 727)

Short of criminal prosecution (USC Title 18), a revocation of discharge per section 727 is the "granddaddy" of the bankruptcy code. A revocation of discharge is for conduct that strikes at the very heart of a fresh start.

727(a)(1)—neither corporations nor partnerships receive discharges

727(a)(2)—intentional concealment, transfer or destruction of property

Common issues:

1. failure to list transfers of property under Statement of Financial Affairs question 10

2. aggressive pre-bankruptcy planning
    a. asset transfers with the actual intent to hinder, delay or defraud creditor
    b. suspicious transfers to relatives

Ways to avoid problems:

1. Full disclosure of all asset transfers within the two year period of time before the bankruptcy filing on Statement of Financial Affairs question 10.
2. Non-aggressive pre-bankruptcy planning
3. Avoid non-arms length transactions, or sales to insiders—particularly family members.

727(a)(3)—failure to keep books and records as to finances

Common issues:

Concealment of records, or failure to keep and preserve accurate records of financial information. This paragraph is often invoked when a substantial amount of assets have "dissipated" prior to the filing of the bankruptcy petition—usually related to a business.

Ways to avoid problems:

Forensically recreate what happened in the demise of the business or the dissipation of the assets prior to the filing of the bankruptcy petition. Consider hiring an accountant or bookkeeper. Look for receipts, bills, canceled checks and other loan documents.

727(a)(4)—dishonesty in connection with a bankruptcy case

The catchall:

Giving a false oath (i.e., perjury, presenting false claims). It also must be in connection with a material matter related to the bankruptcy proceedings and may have a real effect on the creditors or the estate. Not commonly invoked.

727(a)(5)—failure to explain loss or deficiency of assets

Common issues:

1. Assets owned, lost or dissipated within one year of filing present a problem

for the chapter 7 trustee.

2. Failure to explain the loss of a substantial amount of property or money prior to filing.

Solution:

Similar to 727(a)(3)—consider hiring an accountant to forensically recreate what happened to the debtor's assets.

727(a)(8)—A prior discharge and chapter 7

There is an eight year bar against successive bankruptcy discharges for chapter 7. This rule applies only when the discharge was granted in the prior case. Dismissed cases do not count. The eight year period runs from the petition date of the earlier discharged case, not from the date of the discharge.

727(a)(9)—Prior discharge under chapter 13

Code bars a chapter 7 discharge where the debtor has received a discharge in chapter 13 within six years, unless the chapter 13 repaid all of the unsecured debts (rare). Or if the debtor repaid 70% of allowed unsecured claims and the court finds that the chapter 13 plan was proposed by the debtor in good faith and was the debtor's best effort, a subsequent chapter 7 discharge within six years is not barred. Rare.

727(a)(10)—court may deny discharge with a stipulation waiving discharge

Advantages:

Sometimes the writing is on the wall that the debtor is not going to prevail. A stipulation regarding the waiver of discharge is freely misunderstood by creditors. By the time they receive the odd looking order, the account may have been closed.

727(a)(11)—failure to complete the course in personal financial management per Bankruptcy Rule 1007(c)

§727: The difference between chapter 7 and chapter 13:

Section 727 does not apply to chapter 13 proceedings. This is a common reason for preferring chapter 13 if the debtor's financial circumstances are a bit sketchy.

Debts excepted from discharge between chapter 7 and chapter 13 are identical with very few exceptions:

1. Willful and malicious acts causing injury to property not yet reduced to judgment or a restitution award
2. Marital property settlement debts are not in the nature of child support or alimony
3. Certain types of restitution obligations
4. Debts with respect to which a previous bankruptcy discharge was denied or waived

STRATEGIES FOR LITIGATION

Read the statute, read the statute, read the statute!

Figure out where you need to end up and work backwards

Do not go down the "rabbit hole" offered by opposing counsel.

Misdirection is particularly common in bankruptcy court:

Example: objection to confirmation filed by the chapter 13 trustee citing particular lines within form 22. At the confirmation hearing, trustee brings up expenses not referred to in the objection.

Example: creditor files objection to dischargability pursuant to fraud under §523, §82A or B. During the trial creditor tries to introduce evidence regarding the duties imposed upon a fiduciary.

PRE-BANKRUPTCY PLANNING

Exemption analysis

- Section 522 (b)(3)(A) of the code provides the timeline for claiming exemptions.

- In order to claim the exemptions of a single state the debtor's domicile must be located within that state during the 730 days immediately preceding the date of filing.
- If the debtor has not been located in a single state for that 730 day period, you must look at the state of domicile during the 180 days prior to the 730 day period (730-910 days prior to filing).

- Some states allow nonresidents to claim state exemptions, others do not.
  - www.exemptionsexpress.com is an excellent resource for determining whether a state exemptions apply or not.
  - Section 522(b)(3) also indicates that if the domiciliary requirements render the debtor ineligible for any exemptions, the debtor may elect to use the federal exemptions.

Car Purchases

- Purchase of a vehicle prior to the filing of a Chapter 13 filing can be beneficial to the debtor in several ways.
  - Unlike a Chapter 7 Trustee, the Chapter 13 Trustee is unlikely to bring an adversary for preferential transfer under §547 if the lender fails to perfect within the statutory period of 30 days (see §547(c)(3)(B)).
    - A new vehicle loan may be obtained on more favorable terms prior to the filing of the case than after a case is filed
    - Debtor can avail themselves of the ownership expense for the vehicle on Form 22C and avoid a plan step-up depending on length of contract
  - It is not recommended that counsel attempt to cram down a vehicle purchased immediately prior to filing under a theory of non-PSMI under 1325's hanging paragraph! Instead, advise the debtor not to trade in an upside-down vehicle.
- It may still be advisable to wait until perfection or 90 days have elapsed between purchase and filing of the bankruptcy case.

Fraudulent conveyances

- Section 548 allows the trustee to avoid any transfers made within the two years before the filing, if the debtor voluntarily or involuntarily made the transfer with actual intent to hinder delay or defraud; or when less than equivalent value was received.

- While disclosure of these transfers is required, generally the chapter 13 trustee does not pursue fraudulent transfers. Instead these are often reconciled through the chapter 13 plan.

Preferences

- Unlike many Chapter 7 Trustees, the Chapter 13 Trustee generally does not pursue pre-petition preferences. Instead, these preferences should be reconciled through the plan, or require the Trustee to pursue recovery.
- The debtor can use the Trustee's avoidance powers to pull more funds into the estate. Only the Trustee has standing to pursue preferences, but debtor's counsel can be employed by the Trustee. This can be helpful when the debtor has been garnished pre-petition and can use the monies to fund the plan. This section applies to significant credit card payments, payments on criminal restitution, levies, or setoffs for dischargeable taxes made in the 90 days prior to filing.
- Be sure to list these payments, levies or setoffs on the Statement of Financial Affairs!
- General advice:
  - It is best to wait at least 91 days for filing after a preferential payment is made that the debtor does not want avoided.
  - It is best to wait one year from the payment to an insider.
  - It is best to put some distance between recently incurred debt and the filing of the case.
  - It is best to sell assets prior to the filing of the petition, spend those monies, and then file the case**.**
- Statutory Basis
  - The debtor can use the Trustee's avoiding powers under §547 through §522(h) to avoid preferences including levies and executions, including wage garnishments within 90 days prior to filing. Also, applies for significant credit card payments made in the 90 days prior to filing. Be sure to list these on the Statement of Financial Affairs, as well.
  - In order for debtor to pursue preferences, the Chapter 13 Trustee would have to hire debtor's counsel.
  - An alternative to reconciling or pursuing is to include plan language that provides:

- "Chapter 13 Trustee ***may*** proceed to recover voidable transfers (name of parties here) at her discretion. Any amounts recovered will be in addition to regular monthly plan payments."

- Requirements (§547(b) & (c)(7))
  - "Transfer of debtor's property to or for the benefit of a creditor;
  - For or on account of an antecedent debt owed by the debtor before such transfer was made;
  - Made while the debtor was insolvent;
  - Made –
    - On or within 90 days before the date of the filing of the petition; or
    - Between 90 days and one year before the date of the filing of the petition, if such creditor at the time if such transfer was an insider; and
  - That enables such creditor to receive more than such creditor would receive if :
    - The case were a case under Chapter 7 . . . ;
    - The transfer had not been made; and
    - Such creditor received payment of such debt to the extent provided by the provisions of this title."
  - In a case where the debts are primarily consumer in nature, the amount of the preference must exceed $600.

- Procedure
  - A preference recovery action must be brought as an adversary proceeding (see FRBP 7001(1))
  - See Complaint and demand letter, forms 47 and 48, Appendix.

Preparing for a Second Mortgage Strip Off

- When is a Strip Off Available?
  - Payoff balance on 1st or other senior mortgages is more than current fair market value of the property
  - All owners (individuals on title) of the property are filing – Can't strip off a mortgage as to non-filing owners.
  - Clients have solid and feasible Chapter 13 case

** This is not something to try when client's budget is very tight and there is not a reasonable expectation he will be able to complete the plan.**

- Documents
  - **Payoff Statements** – a payoff statement is the most accurate method for determining the balance due to the senior mortgage holders.
  - **Mortgage Statements –** statements are not the best source of information about balances owed, but can be sufficient if value is not a close call. Statements for all loans can also be a helpful source of notice addresses.
  - **Original Notes & Deeds of Trust –** for all outstanding loans on the property. Will have the legal description for the property and can aid in determining potential pitfalls with senior obligations.
  - **Property Tax Statement –** if client can't produce the last bill, obtain a copy from the county assessor.
  - **Title Search or County Property Ownership records** – need to ensure anyone on title is filing.
  - **Credit Reports** – will show outstanding principal balance, but usually arrears, pre-payment penalties, legal fees and charges will not be included.
  - **Past Due Home Owners Association Dues and Assessments –** at least a portion of these are super-priority and will increase the amount of senior liens against the property.

- Valuation – There are various methods for obtaining values of the property. Some are better than others. A CMA is recommended.
  - **Website Values – www.zillow.com** – Can be used as a starting point, but never recommended as the only value when attempting to strip the 2nd.
  - **County Tax Value –** Another decent starting point, but keep in mind these are often old values. Not to be used as a sole value.
  - **Comparative Market Analysis -** Have a local real estate professional puts together a CMA for the property. This will show recent sales, length of time on the market, etc. In most cases, this is sufficient evidence for a Motion to Determine Secured Status.

    **Recommendation – find a Realtor who has extensive experience in the area who you can obtain reliable CMAs from for a small fee. Linda Spray is an excellent resource and performs CMAs for my office.
  - **Appraisal –** An appraisal is the most reliable source of valuation information. However, they can also be costly. If CMA valuation is close, consider an appraisal. It may also be necessary if the lender challenges the Motion to Determine Secured Status.

- Strategy
  - **Non-Payment of 1st Mortgage –** If the value of the property is very close to balance due on the first, consider having debtor stop payment on mortgage temporarily to increase the balance due on 1st mortgage.
  - **Pre-payment penalties –** Review the note and deed of trust to determine whether there are any pre-payment penalties on the 1st mortgage. These pre-payment penalties will be reflected on payoffs, but not on statements or credit reports.
  - **Past Due Property Taxes or Home Owners' Association Dues –** These obligations often have super-priority status, that is they step in front of consensual liens, including first and second mortgages.

Tax Analysis

- Accurate Withholding
  - Review the debtor's paychecks and prior year's tax returns to determine whether there is a significant over- or under-withholding issue.
    - Over-withholding will likely draw an objection from the Chapter 13 trustee, for failure to commit all disposable income to the plan.
    - Under-withholding will set your client up for post petition tax liability which could compromise the feasibility of plan completion.
  - Other factors
    - Surrender of a home may require higher withholding due to the loss of interest and property tax deductions
    - Strip-off of a second mortgage will similarly result in higher tax obligations due to loss of interest deductions
  - How to analyze?
    - Use the IRS Withholding Calculator to determine the appropriate withholding and have debtors submit revised W-4 to employer to effect a change prior to filing.
    - You may need to consider whether additional funds will need to be set aside to pay tax obligations that may result due to the incorrect withholding.
    - An excellent, in-depth explanation of how to use the calculator was prepared and presented by Robin K. Hunt. He has graciously

allowed us to republish his instructions on the website for this program.

- Correctly reflecting tax obligations on Form 22C and Schedules I & J
  - Once you have determined the appropriate amounts that should be withheld, you should adjust the taxes on both Form 22C and I & J.
  - Form 22C
    a. Under-withholding – add an amount of tax sufficient to make up the difference between current withholding and needed withholding.
    b. Over-withholding - if debtor is over-withholding, the amount of the excess can be input on Line 9 of 22C, "Income from all other sources."
  - Schedule I & J
    a. Under-withholding – increase the amount being taken from future checks on Schedule I. If the under-withholding will likely result in a tax deficiency, determine the amount and include a "make-up" amount on Schedule J.
    b. Over-withholding – correct the amount of withholding, this will result in more disposable income on Schedule I.

- <u>Past Due Tax Obligations</u>
  - Be sure you have requested and received the necessary tax documents.
    - Returns/Transcripts for the past 4 years
    - Any documentation regarding past due amounts owed
  - Unless you feel very comfortable with analyzing tax issues, send your client to a specialist for determination of the amounts that are due, what can be discharged, etc.
    - Sources of information about analyzing taxes:
      a. Morgan D. King's "Discharging Taxes Under The Bankruptcy Reform Act of 2005" $179.95 www.bankruptcybooks.com
  - **What has to be paid through the plan??**
    - **Priority taxes:**
      a. Pursuant to section 507(a)(8), in order to receive priority treatment a tax must be:
         i. On or measured by income;

ii. For a taxable year ending on or before the date of the petition;
iii. Return was due (including extensions) more than 3 years prior to the bankruptcy filing date
    1. April 15 is generally the due date, but check the calendar!
    2. If an extension was filed, due date could be later.
iv. Assessed within 240 days before the filing, which is extended by:
    1. any time during which OIC is pending, plus 30 days;
    2. any time a stay of collections was in effect in a prior BK, plus 90 days.
v. 507(d) also includes claims resulting from erroneous refunds or credits if the priority elements above are met
vi. Also includes trust fund obligations (commonly called "941" taxes), excise taxes, and some property taxes.

b. Payment in the plan: Priority taxes must be paid in full through the Chapter 13 plan, unless the creditor agrees to different treatment (1322(a)(2)) - **taxing agency will not agree to different treatment**

- **Secured taxes:**
    a. **Tax liens on property**
        i. Check that real property liens are filed in the appropriate county
        ii. Personal property liens can be filed with Secretary of State
    b. Cramdown may be possible if secured debt exceeds assets.

o **What will not be discharged:**

- Generally, non-priority taxes are discharged, HOWEVER, some important limitations should be noted.
- <u>See 1328(a)(2), referencing 523(a)(1)(B) and (C)</u>
- Priority claims
- Any tax for which a return as not filed;

a. Generally servicer filed returns do not qualify as returns
b. But a return filed under IRC Section 6020(a) – servicer filed return – filed with assistance from the debtor are considered returns pursuant to 523(a)(hanging paragraph below sub-para 19)

- For which a fraudulent return, report or notice was filed; or
- Which the debtor willfully attempted to evade.

- **Strategies for dealing with non-priority, non-dischargeable taxes**
  - Refer these cases to a tax professional, tax attorney, or bankruptcy tax specialist for help!
  - "If a tax is more than 3 years old, and the return was not filed more than 2 years ago, you have a nondischargeable, nonpriority tax.
    a. File the returns and file the C13 during the first 240 days after the assessment.
    b. Effectively, this creates a 240 window in which the tax is "once again" a priority. There is one scenario in which this will not work. If the government has done a substitute filing, the 240 day assessment period may have run long ago."
    (**Special Thanks to Charles Parnell for this strategy**)
  - File the returns and wait 2 years before filing the bankruptcy. Make suret he IRS stamps the returns as received.

DSO investigation

- Again, proper documentation is critical to determining which support obligations have to be paid as priority claims and which do not.
- Domestic Support Obligations:
  - Section 1328(a)(2) – excepts domestic support obligations from discharge as provided in Section 523(a)(5)
  - Past due domestic support obligations are priority claims (507(a)(1)(A)) whether owed to the parent or governmental support unit, that must be paid in a Chapter 13 plan, unless alternative treatment can be agreed to.

- Many CSEU will negotiate or work with a debtor in treatment of their claim outside of bankruptcy as outlined in 1322(a)(2).
- Get a letter or other information to provide to the trustee or court if agreement re: different treatment is reached.

- Property Settlements
  - Section 1328 (a)(2) - does not include property settlements under section 523(a)(15) – property settlements are dischargeable in Chapter 13 cases.
  - Cases have found that the following are property settlements and therefore dischargeable:
    - "Equitable Division" award – *In re Rhodes*, Case no. 08-03606-HB (Bankr. D. S.C., October 31, 2008)
    - Payment of debts from proceeds of sale of real estate – *In re Harris*, 2008 WL 4020608 (Bankr. D. Neb., August 26, 2008)
    - Division of retirement account - *In re Bornemann*, 2008 WL 818314 (S.D. Ill., March 21, 2008).
  - What to look for:
    - "Waiver of support" language in agreement or order
    - Section headers with labels such as "Division of Property"
    - "Is awarded to [the wife] in lieu of maintenance as under the court's inherent authority to make a just and equitable division of property and debt." *In re Blad*, 2008 WL 3979468 (Bankr. D. Kan., August 22, 2008).
    - Agreements to pay mortgage debt, auto loans, and other debts have mixed results.
      a. Debtor's agreement to pay mortgage debt held DSO – *In re Johnson*, 2008 WL 553221 (Bankr. M.D. N.C., Feb. 27, 2008).
      b. Debtor's agreement to pay mortgage debt held property settlement – *In re Sewell*, Case No. 07-00777-5-ATS (Bankr. E.D. N.C., Jan 3, 2008).
      c. Debtor's obligation to make car payments held property settlement – *In re Forgette*, 379 B.R. 623 (Bankr. W.D. Va., Nov. 30, 2007).

d. Allocation to pay credit card debt help property settlement – *In re Poole*, Case No. 07-03093-HB (Bankr. D. S.C., October 9, 2007).
e. While not dealing directly with the distinction between DSO and property settlement, *In re Burckhalter*, 389 B.R. 185 (Bankr. D. Colo., June 23, 2008) (HRT) does address obligations to pay credit card debts under 523(a)(15), where no indemnity clause is included.

- Attorney Fees – In the nature of support?
  - Courts are split as to whether attorneys' fees owed a law firm are in the nature of a DSO.
    - *In re Brooks,* 371 B. R. 761 (Bankr. N.D. Tex. July 19, 2007), finds that these fees were not a DSO under section 101(14A).
      a. Additionally, the court found that because only a debt "to his spouse, former spouse, or child of the debtor" is nondischargeable under section 523(a)(15), attorneys' fees the debtor owed a law firm did not come within that section, although the fees were awarded in the debtor's state court divorce action.
    - *In re Rhodes,* Case no. 08-03606-HB (Bankr. D. S.C., October 31, 2008), finds that attorneys' fees that the family court ordered the debtor to pay his former wife's lawyer were clearly intended as support, based on the language of the court's order, which referred to a disparity in income of the parties and the wife's inability to pay these fees.
    - *In re Golio*, 393 B. R. 56 (Bankr. E.D. N.Y., August 14, 2008), finding that the portion of a judgment to enforce an earlier divorce decree representing the former wife's attorneys' fees was dischargeable even if, under state law, such awards are to be made directly to the parties attorneys', as, here, the state court specifically awarded the attorneys' fees directly to the former wife.
    - *In re Forlenza,* Case No. 08-01499 HRT – Recent decision in which the Court finds that an attorneys' fee award is in the nature of a DSO. HRT relied on *In re Jones*, 9 F.3d 878 (10th Cir. 1993) which held that attorneys' fees awarded in custody proceedings are

deemed to be in the nature of support, absent unusual circumstances.

a. The case is currently on appeal.

Collapsing the business

A Debtor is entitled to claim an exemption as to his own personal property. There are no exemptions available to limited liability companies, corporations, partnerships, nor for a debtor whose corporation owns the property.

As is often the case, the debtor is a co-obligor of debts owed by his corporation or LLC. **Often times, however, the debtor is not the owner of the equipment - the business is the proper owner.** Thus, in the context of a bankruptcy filing, the corporation may be the proper owner of the equipment, or significant debt, and for many reasons is not eligible to file its own bankruptcy. Further, the debtor needs the equipment to "reorganize" his affairs in a Chapter 13 filing. What to do?

Consider collapsing the business. The debtor may "assume" the obligations of the business - usually a redundant act inasmuch as the debtor is a co-obligor with the business - and in consideration of assuming those debts, take possession of the assets.

Although some creditors may cry foul, as the assets of the company have been eviscerated, it is difficult for a creditor to establish that the debtor, as the transferee, is guilty of a fraudulent conveyance. Typically, a creditor's recourse would be to file an involuntary Chapter 7 for the insolvent company, and convince the trustee to bring a fraudulent conveyance to bring the equipment back into the estate. Such an event is unlikely inasmuch as the company itself probably owes significant debts. Thus, there is little benefit to the angered creditor.

**Take care in using this strategy. Recently, HRT has expressed concerns about potential problems that could arise when counsel uses this method to avail a debtor of the protections of Chapter 13, when a small Chapter 11 may be better suited.

Form 22C is your friend!! Getting insurance for your client's health, life, disability and other Form 22C deductions.

Form 22C allows deductions for the actual amount necessary to pay for a variety expenses. These don't necessarily have to be expenses paid over the 6 months prior to filing. At the initial consultation, check with your client regarding the following expenses

- health insurance
- disability insurance
- life insurance (only amount payable for term coverage is deductible on Form 22C)
- 401(k) contributions (see *In re Jones*, 2008 WL 4447041 (Bankr. D. Kan. 2008)(holding that debtor's commencement of retirement plan contributions after filing petition did not establish lack of good faith).

Dealing with the "X" Factor

The "X" Factor -- nothing will derail the confirmation of the case faster than the disgruntled former spouse, former business associate, or estranged spouse, etc.

Is there anyone more intimately involved with the debtor than the former spouse? What about a former business associate, partner, or disgruntled "insider" creditor? These are the people who know where the bodies are buried, what specific and detailed assets the debtor owns, what transactions occurred for the debtor to incur his debts, when he transferred assets, what security interests were taken by his parents, etc.

The importance of filing accurate schedules cannot be understated when any of the individuals listed above are creditors of the case, or are simply waiting in the wings for the debtor to file some form of bankruptcy. It is imperative to spend time with the debtor to confirm the accuracy of the Petition and Schedules prior to the filing, particularly assets listed in Schedules A and B.

Have the debtor obtain valuation of his equipment, tools of trade, and find an independent appraiser. Additionally, confirm the value of the debtor's real

property using a real estate agent (per market analysis), www.Zillow.com, tax statements, or the like.

Ask the debtor when signing the schedules and statements "what assets did you receive in connection with your divorce/dissolute of the company/closing of your sole proprietorship, which your former spouse, ex-business partner, are well aware of?" Are any of those assets still in the possession of the debtor? Were they transferred? If transferred, are they listed on statement of financial affairs question 10?

TIPS FOR BEING AN EFFECTIVE ADVOCATE IN COURT

BY
TOM R. CORNISH
U.S. BANKRUPTCY JUDGE
EASTERN DISTRICT OF OKLAHOMA

Most lawyers are under the assumption that they normally do everything right when they stand up in the courtroom and argue motions or examine witnesses. During my 16 years as a bankruptcy trial judge, I have noted the best and the worst of the trial advocacy skills among attorneys who appear in my court. I am offering a few of my suggestions for those things that are effective and those things that are not.

I. BE FAMILIAR WITH THE COURT'S RULES AND PROCEDURES.

Most judges and courts have their own way of doing things. The most effective lawyers are those who are familiar with and follow the judge's procedures and those of the clerk's office. There are several easy, relatively painless ways of gaining this essential information, and one difficult and embarrassing way. The easy ways are to attend and observe a docket or hearing conducted by the judge, read the court's Local Rules, CM/ECF procedures, motion practice procedures, and pre-trial procedures, and use the court's Local Forms. Many judges have helpful information posted on their court's website. The difficult way is to appear in court with your client and have the judge tell you what mistakes have been made in your case.

II. THINK BEFORE YOU UTTER THESE PHRASES:[1]

A. "TO BE PERFECTLY HONEST WITH YOU"

Judges expect honesty and candor from every lawyer who appears before them. This phrase raises my curiosity about what important information you have misrepresented or neglected to tell me.

B. "WITH ALL DUE RESPECT, YOUR HONOR"

[1]For a scholarly and humourous essay on this subject, see Hon. Janice Miller Karlin, "A Judge's Most Dreaded Words, Phrases to Hear," XXX AM. BANKR. INST. J. 5, 38-39, 53, June 2011.

When I hear this, I think you don't respect me or my decision. Judges know that lawyers don't agree with every decision they make. Why not avoid this phrase and tell me you disagree with my analysis, then proceed to make your argument. And, you should always treat a judge with respect.

C. "WE WILL ABIDE BY YOUR DECISION, YOUR HONOR"

If you regularly entertain the idea that you can choose the decisions you will follow, then you should not be practicing law. I assume lawyers know that failure to abide by the judge's decision may result in a contempt citation, and you are not going to get paid for time spent dealing with that. A lawyer who is held in contempt is unlikely to be effective or helpful to his client.

However, if what this really means is that your client will find the decision difficult to comply with, then you should have planned ahead. If you suspect that your client may not react well to an unfavorable decision, prepare him for it ahead of time or instruct him to wait until you are outside of the courtroom and out of the judge's hearing and sight before reacting to the decision.

D. "IT'S YOUR DECISION, YOUR HONOR; OF COURSE, YOU ARE THE JUDGE"

I'm never sure if this is supposed to be a compliment or whether it's just another way of telling me you disagree with me. If you do not want me to make a decision, you should settle the matter before you come to court.

E. AFTER THE COURT ANNOUNCES ITS RULING FROM THE BENCH, COUNSEL SOMETIMES ASKS: "MAY I RESPOND?"

Unless you are unsure of the terms or application of the decision, you should not say anything else. I will listen to questions if they are legitimate attempts to clarify the ruling.

Otherwise, you should never try to reassert or reargue your position or otherwise voice your disagreement with the decision. Instead, file a motion for rehearing or an appeal.

III. COURTROOM ETIQUETTE

Judges have differing opinions about what dress they think is appropriate for non-lawyers in their courtrooms. Certainly, courtroom attire has become much more casual than it was when I first started my tenure on the bench. Judges are unlikely to have a dress code for non-lawyers or to comment on their attire. Lawyers can assist judges by advising clients regarding what to wear and NOT to wear to court. Please tell your clients that tube tops and flip flops are not appropriate for court.

Most judges do agree that lawyers should dress in business professional attire, which means suits and ties for men, and suits or dresses for women. Do not chew gum. Do not whisper to your client or other counsel while court is in session. The object here is to promote respect for the court.

IV. EXAMINATION OF WITNESSES/REVIEW OF EXHIBITS

Much time is wasted waiting on lawyers who cannot find an extra copy of an exhibit to provide to a witness who is being asked to review and explain that exhibit. Be prepared by having all exhibits marked, extra copies and sets of exhibits made before you come to court. Consider providing a binder with tabbed exhibits that are easily handled on the witness stand. And, don't forget to provide copies to the judge and his law clerk. Allow the judge time to find the exhibit you are reviewing before proceeding to question the witness about the exhibit. If the trial is held in a courtroom with an electronic evidence presentation system, make sure you know how to operate the equipment. Courts will usually allow you to preview the system and instruct you on its use.

Some judges like to interject questions of their own to a witness. This is your opportunity to learn what the judge may be interested in, or what you may have missed in your examination of the witness. You should listen to these questions and try to tailor your questions to provide information the judge is looking for. Do not, however, become so distracted by the questions that you lose track of the elements you must prove.

V. COMMUNICATIONS WITH COURT CHAMBERS AND COURT PERSONNEL

Before you ever set foot in the courtroom, you likely have had contact with chambers staff or the court clerk's office. While most lawyers are on their best behavior before the judge, that is not always true regarding their treatment of other court staff members. You and your staff should treat all court personnel with courtesy and respect. Court personnel DO advise the judge when an attorney and his staff are rude to them. Your effectiveness as counsel for your client is enhanced by a good working relationship with the clerk's office and chambers staff.

Bankruptcy Rule 9003(a) prohibits ex parte contacts between attorneys and the court. Therefore, you should not contact a judge's judicial assistant or law clerk if that contact could be construed or perceived as an attempt to ask the judge something outside the presence of opposing counsel. Court personnel are prohibited from giving you or anyone else legal advice. Consult the court's website for answers to questions regarding proper form of motions, notices, certificates of mailing, and orders. Find out who the judge's scheduling clerk is and contact that person for hearing dates. Most questions can be answered by clerk's office personnel without the need for involving chambers and risking a violation of Rule 9003. We are happy to answer your questions, but we ask that you consult the Local Rules and procedures first.

Avoid sending a friend request or business networking invitation to a judge or any chambers' personnel. While there are conflicting opinions as to whether it is an ethical violation for judges and court personnel to be friends or contacts on social media sites, my approach is to avoid anything that might be considered an ex parte contact with the court or compromises my duty to avoid the appearance of impropriety in my activities. If you automatically transfer your contacts list to the networking site, you may be communicating with a judge or court personnel without knowing it.

VII. EFFECTIVE WRITING

Volumes have been written about this subject. What I can tell you is that I know a well-written brief or motion when I read it. If you are not a good writer, consider hiring an attorney who is. Here are a few suggestions for what I would do in preparing an effective and persuasive brief.

I would search for cases where the judge who will rule on my case has previously entered an order on the same issue. Other excellent research resources are the Tenth Circuit's website, which includes a search option of opinions by keyword, and the Bankruptcy Appellate Panel's website. The BAP website includes a list of BAP decisions indexed by Code section, rules and specific doctrines. My brief would be organized by the elements necessary to prove in order to prevail. (You would be surprised by how many briefs and motions do not include that essential information.) And, I would clearly set forth the relief I was seeking. Too many complaints, motions and briefs fail to ask for specific relief. Instead, the stock phrase — "and such further relief as this Court deems equitable and proper" — is tacked on under the theory that the court will figure it out for you.

In fact, this is often the approach taken not only in briefs, but also in trials. Lawyers

mistakenly believe that they just need to present some cases, exhibits, and argument, and the court will fill in the missing parts and figure it all out. However, judges depend upon counsel to provide them the means to the end desired. Counsel will be most effective if dispositive motions, trial briefs, pre-trial orders, and trial presentations are based upon the road map set out by the statute and rules applicable to the case.

VIII. MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

Motions to dismiss filed in most courts are often the result of some error made by plaintiff in filing the adversary complaint, usually because the plaintiff's lawyer does not regularly practice bankruptcy law and is unfamiliar with the Bankruptcy Code. Generally, if there is a way to salvage the plaintiff's case, I allow plaintiff to amend the complaint and correct the mistake. I rely upon Fed. R. Civ. P. 15(a)(2), made applicable by Fed. R. Bank. P. 7015, regarding Amended and Supplemental Pleadings: "The court should freely give leave [to amend] when justice so requires." I also take advantage of Fed. R. Civ. P. 8, applicable by Fed. R. Bankr. P. 7008, which allows me to correct a mistaken designation of a defense as a counterclaim, or a counterclaim as a defense without dismissing the counterclaim or waiving a defense.

Opinions vary widely among judges regarding the effectiveness of motions for summary judgment. Since most adversary cases in my court are fact intensive, summary judgment motions are rarely granted. The standard for summary judgment is high: the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, must show that there is *no* genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c), made applicable by Fed. R. Bank. P. 7056. The purpose of summary judgment motions is to accomplish an early

resolution of litigation by avoiding trial or by paring the issues that are presented at trial. In bankruptcy court, however, where trial briefs are often not required and trials are usually concluded in a day, this purpose may not be present. From my unscientific review of the summary judgment motions filed in my court, the purpose appears to be an educational one. I am not opposed to lawyers filing summary judgment motions for this reason. I welcome the opportunity to learn about the case. However, if there is any hint that there may be a factual dispute, summary judgment will be denied.

IX. SETTLEMENT CONFERENCES

I strongly encourage counsel to explore settlement options in the early stages of adversaries and contested motions. I have a list of attorneys and judges from other districts who I call upon to serve as settlement judges. I also serve as a settlement judge in other districts. My experience with settlement conferences is that the parties are often more pleased with the results because they believe they have a more prominent role in the outcome than they do in court. They appreciate the opportunity to be directly involved in the resolution of their case and in molding a settlement agreement. And, they save valuable time and money by resolving the dispute before trial.

Representing Chapter 7 Trustees in Avoidance Actions

Matthew D. Skeen
Skeen & Skeen P. C.
Georgetown, Colorado

The purpose of this paper is to provide some basic, and what I hope will be practical, guidance for attorneys seeking to expand their litigation practice to represent chapter 7 bankruptcy trustees in avoidance actions. I have represented chapter 7 trustees in the Bankruptcy Court for the District of Colorado for many years, and so much of what is contained in the paper is based on my experience and the local rules and lore that apply to practice in Colorado. I assume and hope that much of what is contained in this paper will be applicable and helpful to attorneys practicing in other jurisdictions.

Getting Hired

The first step, of course, is to find a trustee client. In the present environment, given the number of chapter 7 cases being filed, trustees are swamped with cases, and they are in need of legal counsel to represent and assist them. Typically, trustees are looking for litigation attorneys who have extensive experience representing trustees in bankruptcy court. They generally have a short list of attorneys that they have successfully worked with in the past, and they tend to hire counsel that they trust and are comfortable with based on past work done for the trustee.

From time to time, trustees have cases that their regular counsel would rather not take, for example, a small preference case against a member of the debtor's family. There may be no other assets in the estate, and it may be likely that the family member will defend the case, *pro se.* Collection of any judgment is speculative, but, nevertheless, for whatever reason, the trustee feels that she needs to bring an adversary proceeding to recover the transfer. This is, to say the least, not an attractive case for any attorney, but if you are seeking to represent a trustee on a regular basis, it is this type of case which might

give you an opportunity to get on that trustee's short list of counsel to which the trustee refers cases.

Employment of professionals by a trustee is governed by 11 U.S.C. § 327 which provides that a trustee, with the court's approval, may employ an attorney or other professionals. This requires that an application to employ be prepared and filed with the court. Typically, the attorney prepares the application for the trustee's signature, and the trustee then reviews and files the application with the court. I have attached a sample trustee's application to employ an attorney, a declaration of disinterestedness, and a proposed form of order as Attachment A. The application should be mailed to the debtor's counsel, the United States Trustee, and interested persons who have requested notice in the case. It is not necessary to mail a notice to all creditors unless the application seeks authority to pay a retainer to the attorney, which is very rarely done in chapter 7 cases.

Generally, no compensation will be allowed to an attorney for services provided by the attorney prior to the entry of the order approving the employment application. If the trustee needs the attorney to begin providing services immediately, the application can request that the order become effective as of the date the application was filed by the trustee, and in most cases the court will approve that request. This still leaves a gap period from the time the trustee approaches counsel with a new case and the time that the application is filed. Considerable attorney time can be spent investigating the facts and law to determine whether counsel is willing or able to take on the new case, and the time spent prior to the filing of the application is generally not compensable.

Most fees awarded to trustee's counsel are based upon the traditional standard of

time spent by the attorney multiplied by a reasonable hourly rate. There is a lot of talk in legal circles about alternative billing practices, but not much of that talk takes place in bankruptcy courts. We seem to be stuck for the time being in the hours-times-hourly-rate paradigm, no matter that this system sometimes rewards inefficiency. In special cases, a trustee and a bankruptcy court may approve a contingent fee. As a practical matter, in most cases, compensation for a trustee's attorney is contingent upon the successful completion of an adversary proceeding and collection of any judgment obtained. Like most litigation, most adversary proceedings are settled.

Conflicts of Interests

In Colorado, it is rare that a trustee is allowed to hire counsel employed by the trustee's own law firm. In other jurisdictions, it is my understanding that this is a more common, not to say general, practice. It seems obvious, that a trustee, as a fiduciary for the estate, might have a conflict when supervising the work of an attorney in the trustee's own firm, or hiring the trustee's brother-in-law as counsel for the estate. In our firm, we represent our trustee only in cases where there is almost no chance of an attorney getting paid, and yet the trustee has a duty to bring an adversary proceeding. Typically, this would be a proceeding to revoke a discharge from a debtor who has run off with estate assets that have been dissipated (typically a tax refund).

Sometimes a creditor's attorney discovers a fraudulent conveyance or preference and proposes to represent the trustee and the estate to recover the voidable transfer. This is generally allowed, but the attorney is required to withdraw from representing the creditor and to provide full disclosure of the prior representation.

There are other, more subtle conflicts which may or may not create a bar to representing a trustee. Many attorneys who regularly represent trustees, also regularly represent debtors, creditors, or another trustee. Some ask how can an attorney regularly represent debtors and chapter 7 trustees? Isn't there a conflict of interest?

I believe that conflicts should be determined on a case-by-case basis. Therefore, I represent debtors in cases in which the trustee in my debtor's case is coincidently my client in another unrelated case. Other attorneys and some trustees disagree, and see that practice as presenting too great a potential for a conflict. If you are expecting to get employment from a trustee, can you adequately represent a debtor or creditor in an unrelated case before that trustee? Or, will you be tempted to be less zealous in the representation of a debtor client so as not to offend the trustee/potential client?

I believe that the best practice is to do the very best job you can for each client every time, guided by the highest ethical principles. I think that trustees respect attorneys who are zealous advocates for their clients, no matter what the issue is or whether the attorney is representing a debtor, a creditor, or another trustee.

Investigation and Fact Gathering

The starting place for gathering information and facts, of course, is the debtor's schedules and statement of affairs. Oftentimes, however, the schedules filed by the debtor are less than perfect and are missing critical information. The trustee can request documents and additional information from the debtor. Sometimes it becomes necessary to file a motion for turnover to obtain documents and needed information. An attorney, accountant, or other person holding books or records of the debtor is required to turn them

over to the trustee after notice and a hearing. 11 U.S.C. § 542(e). If property of the estate is held by a third person, turnover is only accomplished through an adversary proceeding. Rule 7001(1).

Rule 2004 is available to all parties in bankruptcy cases, and is often used by attorneys for trustees to gather information and perform due diligence prior to filing an adversary proceeding. Rule 2004 can be used to obtain documents as well as take depositions of persons with knowledge of facts who may not be willing to speak with the trustee's attorney voluntarily. I have found that Rule 2004 is most useful when a "fishing expedition" is required, i.e., when the trustee really doesn't know what the relevant facts are. An examination under Rule 2004 adds costs and time to a case, and is probably unnecessary in many cases where the facts which would support an avoidance action are clear and can be alleged in sufficient detail to meet the *Twombly* and *Iqbol* requirments (see discussion below). Discovery can, of course, be done after the proceeding is filed. I have attached a sample motion under Rule 2004 as Attachment B.

It is important that a trustee take possession of that portion of the debtor's books and records that will be required as evidence in an adversary proceeding. Unfortunately, debtors rarely turn over just the relevant evidence, and the trustee, and often, the trustee's attorney, will end up with many boxes of business records, along with a few old computers, cluttering up their offices or storage facilities. Getting rid of those records at the end of a case is another story.

Should an Avoidance Action be Filed?

Once an attorney has been employed by a trustee and asked to pursue an avoidance

action, and once that attorney has devoted time and expense investigating the facts and the law, there is a great pressure to just go ahead and file the adversary proceeding. At this point an attorney needs to stop, reconsider the case, and use his or her best judgment in advising the trustee as to whether to go forward with the adversary proceeding or to drop the matter and pursue more promising cases.

The questions which the attorney should consider are at least the following: What are the prospects of prevailing in the adversary proceeding? What are the prospects of being able to collect a judgment if one is obtained? What are the expected complexities of the case and what expenses might be incurred? Is pursuing this adversary going to ultimately benefit the unsecured creditors? Is there something about this case that needs to be pursued to safeguard the integrity of the bankruptcy system?

There are other consideration that come into play. A trustee cannot avoid a preference in a business case for less than $5,475. The limit in a consumer case is $600, but it is the very rare case which would justify filing an adversary proceeding to recover $601 for an estate. An attorney must consider the venue limitation contained in 28 U.S.C. § 1409(b) which imposes limits on bringing an action to recover a transfer to the jurisdiction where the defendant resides.

I believe that possible ethical questions may arise when a decision is made that an adversary proceeding would not be justified in a particular case, but the Trustee asks the attorney to write a demand letter to "see what happens". An attorney has a duty to insure that his statements made to others are truthful. Rule 4.1, Colorado Rules of Professional Conduct. The very fact that an attorney is making a demand, can imply that a lawsuit may

be immanent. If this implication is false, it is false, and the demand letter should not be sent. I think that a demand letter coming directly from a trustee may appropriate because the implied threat of litigation may not be present.

Drafting the Complaint

Two recent Supreme Court cases have changed, to some extent, the art of drafting avoidance complaints for trustees. Both *Bell Atlantic v. Twomley*[1] and *Ashcroft v. Iqbol*[2] have changed our understanding of Rule 8 of the Federal Rules of Civil Procedure and what "notice pleading" means. Rule 8 provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief". *Twomley* and *Iqbol* now require that, in order to survive a motion to dismiss for failure to state a claim, a complaint must establish a "plausible" claim for relief. What this means as a practical matter is that a complaint needs to not only set out the legal basis for the claim, but also needs to allege sufficient facts to support the legal claim. The trustee's complaint must "put some meat on the bones" of the legal allegations by presenting sufficient factual allegations to explain the basis for the claim. It is not sufficient to simply allege the legal elements of a preference claim or of a fraudulent conveyance claim. The complaint must allege facts that show that the trustee is entitled to relief.

For a preference claim, for example, it is a good idea, and might be a requirement, for the trustee to allege facts which show the relationship between the parties and the basis of the antecedent debt. Obviously, it would also be helpful to allege the dates and check

[1]Bell Atlantic v. Twombly, 550 U.S. 544 (2007)

[2]Ashcroft v. Iqbol, 556 U.S. 662 (2009)

numbers, for example, of the transfers involved. The problem for trustee's counsel is that, often, the trustee knows that property of the debtor was transferred to some third party, but that is all the information that the trustee has. The transferee may have been doing business with the debtor and the transfer may have been on account of an antecedent debt, or it may have been a fraudulent transfer to some insider or friend of management and not be a preference at all. Under *Twomley* and *Iqbol* it is probably insufficient for a complaint to simply allege the elements of a fraudulent conveyance and, alternatively, the elements of a preference and then hope sort out the facts in later discovery.

What this means is the trustee and trustee's counsel should not wait until the last month before the statute of limitations runs to start investigating possible avoidance claims. The days when a trustee could file a bare-bones complaint alleging the elements of a preference and the elements of a fraudulent conveyance are probably over. See, e.g. *Miller v. Mitsubishi Digital Electronics America, Inc.,* 457 B.R. 150 (Bankr. D. Del. 2011).

Getting Paid

In order to receive compensation from a bankruptcy estate, the Code requires that trustee's attorney file a fee application. There is no escape from the requirement that an attorney keep detailed, contemporaneous time records. The only realistic way to do this is to purchase some kind of time and billing software and use it every day. The time slips must provide sufficient information so that a the trustee, the U.S. Trustee, or the court, can actually determine what the attorney did and what was accomplished.

The time records must reflect the time spent on each individual task that the attorney performs. An attorney needs to avoid "lumping", which is what results when an

attorney spends all day working on an adversary proceeding for a trustee and prepares a time slip which describes in exquisite detail all the various tasks that were accomplished during the day, but puts down a lump sum of twelve hours for the day without breaking out what time was spent on each task.

Although there is no requirement that monthly statements be sent by an attorney to the attorney's trustee client, I do. I think it is a good practice. It allows the trustee to keep track of what is going on in the trustee's cases and avoids surprises. If one of my trustee clients does not get a monthly statement, the trustee can fairly assume that I have done nothing that month on the trustee's case. Maybe that is okay, maybe it is not. But at least the trustee knows what is going on.

A sample fee application accompanies this paper as Attachment C.

Conclusion

There are pluses and minuses in representing chapter 7 trustees. The work is intellectually challenging. It provides an opportunity to get into court on a regular basis, and to try cases which are relatively compact – cases that you can get your arms and mind around fairly easily. The downside is that most litigation done for trustees is contingent. You can't get paid for your services unless you win the adversary proceeding and collect the judgment. But you are generally compensated on the basis of an hourly fee.

But beyond these pluses and minuses there is another reason I enjoy representing chapter 7 trustees. How often have you thought to yourself: Wouldn't the practice of law be pleasant, if only I didn't have to constantly deal with these pesky clients? Do you get tired of the hand holding and explaining how the system works over and over again to

clients who have a huge personal stake in the outcome of the case?

When you represent a chapter 7 trustee, you are assigned a case to work on by your client, and, at the end of the day, the trustee would like to know how the proceeding came out. The trustee client is sophisticated and knows how the bankruptcy system and the judicial system work. It can, therefore, be a privilege and a pleasure to work with and for a professional chapter 7 trustee.

Attachment A

Sample Application to Employ Counsel

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re: JOSEPH DEBTOR and MARY DEBTOR Debtors.	 Case No. 12-11122 SBB Chapter 7

TRUSTEE'S APPLICATION TO EMPLOY ATTORNEYS

The Application of Sandra Q. Diligent, Trustee, respectfully alleges:

1. Applicant is the duly qualified and acting trustee in this case.

2. To perform his duties as Trustee, the Applicant requires the services of attorneys for the purpose of assisting and representing the Trustee in connection with the investigation of the Debtors' interest in real property located in Broomfield, Colorado, the current state of the title to the property, transfers related to the property, and the liquidation of the Estate's interest in the property.

3. For the foregoing and all other necessary and proper purposes connected therewith, the Trustee desires to retain the law firm of Smith & Jones, P.C. as counsel for the Trustee.

4. Because of the considerable experience Smith & Jones, P.C. has in representing bankruptcy trustees in matters of this kind, the Trustee feels that Smith & Jones, P.C. is well qualified to render the above described services.

5. To the best of the Applicant's knowledge, Smith & Jones, P.C., has no connection with the creditors of this estate or with any other party in interest, or their respective attorneys, accountants, the United States Trustee, or any person employed in the office of the United States Trustee. As set forth on the Declaration of William D. Smith, the firm presently represents Sandra Q. Diligent in her capacity as a chapter 7 trustee in other bankruptcy cases and has represented her in the past as a trustee.

6. Based on the declaration attached hereto of William D. Smith, the Trustee believes that Smith & Jones, P.C. and its members do not hold or represent any interest adverse to that of the Trustee or the estate and that Smith & Jones, P.C. is a disinterested person within the meaning of § 101(14) of the Bankruptcy Code.

7. Applicant proposes to pay Smith & Jones, P.C. at its usual hourly rates. Presently, the rates of Smith & Jones, P.C.'s attorneys are $250 per hour for William D. Smith and $200 per hour for Susan P. Jones, and $175 per hour for associate attorneys.

8. Applicant has requested that Smith & Jones, P.C. immediately begin providing services to Applicant. Accordingly, Applicant requests that the Court approve the employment of Smith & Jones, P.C. effective as of the date this application is filed with the Court.

WHEREFORE, the Trustee requests that he be authorized to employ Smith & Jones, P.C. as his attorneys to render services in the areas described above with compensation to be paid as an administrative expense in such amounts as this Court may hereinafter determine and allow.

Respectfully submitted this ____ day of May, 2012.

_____

Sandra Q. Diligent, Trustee
203 Main Street, Suite 101
Nowhere, Colorado 80207
Telephone: (303) 555-2525
FAX: (303) 555-2526

CERTIFICATE OF MAILING

The undersigned hereby certifies that on May _____, 2012, (s)he mailed a true and correct copy of the foregoing **TRUSTEE'S APPLICATION TO EMPLOY ATTORNEYS**, by depositing same in the U.S. Mail, postage prepaid, and addressed to the following:

United States Trustee
999 18th Street, Suite 1551
Denver, Colorado 80202

John L. Counsel
Attorney for Debtor
1551 South Broadway
Denver, CO 80209

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re: JOSEPH DEBTOR and MARY DEBTOR Debtors.	 Case No. 12-11122 SBB Chapter 7

ORDER AUTHORIZING EMPLOYMENT OF COUNSEL

Upon the Trustee's Application to Employ Attorneys and the Declaration of William D. Smith, and it appearing that the law firm of Smith & Jones, P.C. and its members are disinterested persons and that the employment of the law firm by the Trustee is in the best interest of the estates, it is

ORDERED that Sandra Q. Diligent, the Trustee herein, is authorized to employ the law firm of Smith & Jones, P.C. as attorneys for the Trustee and the estate, with compensation to be paid in such amounts as may be allowed by the Court upon proper application or applications therefor. The Court's approval of the employment of Smith & Jones, P.C. shall be effective as of the date the Trustee filed his application to employ Smith & Jones, P.C.

DATED: _____

BY THE COURT:

_____
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re: JOSEPH DEBTOR and MARY DEBTOR Debtors.	 Case No. 12-11122 SBB Chapter 7

DECLARATION OF WILLIAM D. SMITH

I, William D. Smith, declare:

1. I am an attorney duly admitted to practice before all courts of the State of Colorado, as well as this Court, and the Court of Appeals for the Tenth Circuit.

2. I am a member of Smith & Jones, P.C., the law firm that the Trustee is seeking to employ by the Application which accompanies this Declaration. All members of the firm of Smith & Jones, P.C., are similarly duly admitted to practice in this state and before this Court.

3. The law firm of Smith & Jones, P.C. has extensive experience in bankruptcy matters, in the pursuit of turnover claims, avoidance claims, and other claims on behalf of bankruptcy estates and trustees, and the particular matters which are present in this case. The firm is well qualified to represent the Trustee generally herein, and is willing to accept employment on the basis set forth in the Application.

4. The law firm of Smith & Jones, P.C. and its members do not hold any interest adverse to the estate, and Smith & Jones, P.C. and its members are disinterested persons as defined in Section 101(14) of the Bankruptcy Code.

5. To the best knowledge, information, and belief of the undersigned, Smith & Jones, P.C. has the following connections with the persons and entities listed below:

a. The debtors: None.

b. The creditors: None.

c. Any other party in interest, their respective attorneys and accountants: none

d. The United States Trustee: William D. Smith has previously served as a member of the panel of Chapter 7 trustees in this district and has been a Chapter 7 trustee on many occasions. At this time, Mr. Smith is not serving as a Chapter 7 trustee. Mr. Smith has also served as a Chapter 11 trustee on occasion in the past. Mr. Smith is not presently an active panel member. Susan P. Jones is an active member of the panel of Chapter 7 trustees and presently serves as chapter 7 trustee in many open cases.

e. Any person employed in the office of the U.S. Trustee: None.

f. The Trustee: Smith & Jones, P.C. currently represents, and has previously represented, Ms. Diligent in other cases in her capacity as a chapter 7 trustee.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of May, 2012, at Denver, Colorado.

_____

William D. Smith, #6811
1521 12th Street, Suite 102
Denver, CO 80202
Telephone: (303) 569-1000

STATE OF COLORADO)
) ss
CITY AND COUNTY OF DENVER)

Subscribed and sworn to before me this 4th day of May, 2012, by William D. Smith.

Witness my official hand and seal.

_____

Notary Public

My commission expires:_____

Attachment B

Sample Rule 2004 Motion and Proposed Order

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re: EASY COME EASY GO, LLC EIN: 81-000000 Debtor.	 Case No. 11-99999 SBB Chapter 7

MOTION FOR EXAMINATION OF FORMER PRESIDENT OF DEBTOR UNDER RULE 2004

Rupert J. Ready, Trustee, by his undersigned counsel states:

1. On February 1, 2011, Easy Come Easy Go, LLC. filed a voluntary petition under chapter 7 of the Bankruptcy Code.

2. Rupert J. Ready is the duly appointed and acting chapter 7 trustee for this case.

3. The Trustee has learned that, in 2010, shortly before the bankruptcy of the Debtor was filed, Fred Slick, the president and 99% shareholder of the Debtor, incorporated a company named Slick Enterprises, Inc., in Colorado. The Trustee has a duty to investigate the financial affairs of the debtor. 11 U.S.C. § 704(a)(4). The Trustee believes that it would be appropriate to investigate and determine whether assets of Easy Come Easy Go, LLC, were transferred to Slick Enterprises, Inc.

4. The Trustee also believes that it is possible that accounts receivable that were property of Easy Come Easy Go, LLC, were used to fund Slick Enterprises, Inc, or that accounts receivable from Easy Come Easy Go were transferred to Slick Enterprises.

5. An examination of Fred Slick is necessary to enable the Trustee to complete his investigation of the above described concerns.

For the reasons stated above, the Trustee requests that this Court enter and order under Rule 2004 of the Federal Rules of Bankruptcy Procedure, authorizing the Trustee's examination of Fred Slick, concerning possible transfers of property from Easy Come Easy Go, LLC to Slick Enterprises, Inc., and to subpoena documents which may be relevant to the administration of this case.

Respectfully submitted this 17th day of September, 2011

William D. Smith, #13333
Attorney for the Trustee
Smith & Jones, P.C.
1521 12th Street, Suite 102
Denver, CO 80202
Telephone: (303) 569-1000
FAX: (303) 569-1001
e-mail: wsmith@S&JLaw.com

CERTIFICATE OF MAILING

The undersigned certifies that on the 17th day of September, 2010, he mailed a copy of the foregoing Motion for Examination of Former President of Debtor Under Rule 2004 and a proposed form of order to the following at the addresses listed:

J. Forthright Blowhard, Esq.
1521 Apple Street
Denver, CO 80202

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re: EASY COME EASY GO, LLC EIN: 81-000000 Debtor.	 Case No. 11-99999 SBB Chapter 7

ORDER AUTHORIZING EXAMINATIONS UNDER RULE 2004

Upon consideration of the Motion of Rupert J. Ready, Trustee, for examination of Fred Slick, the former president of the Debtor, and sufficient cause appearing therefor, it is

ORDERED that:

1. The Motion is granted;

2. The Trustee is authorized to conduct Rule 2004 examinations of Fred Slick,

3. The examinations shall be pursuant to subpoena, issued in accordance with Local Rule 2004-1;

4. The subpoenas may require the production of documents and other things; and

5. The Trustee is authorized to issue "documents only" subpoena separately from "oral examination" subpoena.

DATED:_____

BY THE COURT:

_____
UNITED STATES BANKRUPTCY JUDGE

Attachment C

Sample Fee Application

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re: JOSEPH DEBTOR and MARY DEBTOR Debtors.	 Case No. 08-11122 SBB Chapter 7

APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF COSTS FOR SMITH & JONES, P.C.

Smith & Jones, P.C., (the "Applicant") states as follows:

1. This case was filed on September 10, 2008, as a voluntary case under chapter 7 of the Bankruptcy Code. Sandra Q. Diligent was appointed the chapter 7 trustee. On October 28, 2008, the Trustee filed her application to employ Smith & Jones, P.C. as counsel to the Trustee (Docket #10). By order dated October 29, 2008, the Court authorized the employment of the Applicant as attorneys for the Trustee (Docket #11). The Order provided that its would be effective as of the date the trustee filed his application to employ the Applicant.

2. Pursuant to its appointment, the Applicant performed professional services in connection with the representation of the Trustee in this case.

3. In connection with its representation, the Applicant necessarily incurred costs and expenses, and by this application Applicant seeks compensation pursuant to 11 U.S.C. § 330 and reimbursement of costs advanced.

4. The Applicant has not previously applied for or been awarded any compensation in this case.

5. The Applicant hereby seeks allowance of compensation of $5,300 on account of professional services rendered from October 30, 2008, through July 13, 2009. The Applicant seeks reimbursement for costs of $34.76. The Applicant seeks the entry of an order authorizing the Trustee to disburse to the Applicant the sum of $5,334.76.

6. The Applicant's services and disbursements are summarized in detail in this application and the accompanying exhibits.

ATTORNEYS PERFORMING SERVICES

Primary responsibility for the performance of the professional services by Applicant was held by William D. Smith. Some professional services were also provided by Susan R. Jones. A description of the qualifications of the attorneys is set forth in Exhibit 1, which is attached hereto.

DESCRIPTION OF SERVICES

A narrative description of the services provided to the Trustee by the Applicant is set forth below. Detailed summaries of the time spent and the services performed by the Applicant are attached as Exhibit 2. The summaries were compiled directly from the Applicant's billing statements and other records, copies of which are attached as Exhibit 3.

In her administration of the estate, the Trustee discovered that the Debtors had sold real estate that they owned in New York and used part of the proceeds from the sale of that property to make a payment to Local Bank on account of amounts owed on her credit card with the Bank.

The Applicant prepared and filed a complaint seeking to avoid the transfer of $36,484.75 to the Bank as a preference. The Applicant discussed the matter with a in-house paralegal for the Bank. An answer was filed by the Bank. An investigation was conducted by the Applicant to establish where the Debtor obtained the funds to make the payment to the Bank. Documents regarding the closing of the sale of the real estate and the payment on the credit card bill were obtained from the Debtor through her counsel. After negotiations with opposing counsel, the matter was settled. The Trustee received $33,118.46 from Local Bank.

The Applicant spent 26.71 hours on these matters during its representation of the Trustee.

DESCRIPTION OF COSTS INCURRED

Attached hereto as Exhibit 4 is a description of the costs incurred which totaled $34.76 for photocopying charges and postage.

BENEFIT TO THE ESTATE

The Applicant’s services resulted in the Estate receiving $33,118.46.

REMAINING ISSUES

The Applicant believes that it has completed all services to the Trustee in this case.

STATEMENT REGARDING REVIEW BY TRUSTEE

Applicant has sent a copy of this fee application to the chapter 7 Trustee. Applicant believes and has been informed by the Trustee that he has reviewed this application and has expressed no objection to the fees requested.

VALUATION OF PROFESSIONAL SERVICES

In connection with the valuation of the Applicant's professional services, the Applicant has considered the following:

1. The experience of the attorney performing the services, as summarized on Exhibit 1;

2. The time actually spent on legal services, as set forth in Exhibits 2 and 3, and the benefit of such services to the estate;

3. The hourly rates normally billed by the Applicant during the time covered by this application which have been $225 per hour for William D. Smith and $175 per hour for Susan R. Jones;

4. The cost of professional services involving comparable difficulties and complexities in non-bankruptcy cases; and

5. The likelihood that acceptance of employment for purposes of this proceeding would preclude other employment by the Applicant.

REQUEST FOR RELIEF

WHEREFORE, the Applicant respectfully requests an allowance of compensation, pursuant to Section 330, in the amount of $5,300 for professional services rendered and $34.76 in reimbursement for costs advanced, and for entry of an order authorizing the Trustee to disburse to Smith & Jones, P.C. the sum of $5,334.76.

Respectfully submitted this 22nd day of July, 2009.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	
JOSEPH DEBTOR and MARY DEBTOR	Case No. 08-11122 SBB Chapter 7
Debtors.	

COVER SHEET TO APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FOR SMITH & JONES, P.C.

Name of Applicant	:	Smith & Jones, P.C.
Authorized to Provide Professional Services to	:	Sandra Q. Diligent Chapter 7 Trustee
Date of Order Authorizing Employment	:	October 29, 2008, effective October 28, 2008
Period for Which Compensation is Sought	:	October 30, 2008 through July 13, 2009
Amount of Fees Sought	:	$5,300.00
Amount of Expense Reimbursement Sought	:	$34.76

This is a final application. No previous applications have been filed and no previous amounts have been received.

July 22, 2009

SMITH & JONES, P.C.

By_____
William D. Smith, #53333
1521 12th Street, Suite 102
Denver, CO 80202
Telephone: (303) 569-1000
FAX: (303) 569-1001
e-mail: wsmith@S&JLaw.com

American Bankruptcy Institute
Winter Conference
January 2012

Denver, Colorado

Dispositive Motions in Bankruptcy Cases:

(1) New Standards for Rule 12(b)(6) Motions to Dismiss: Pleading in light of *Twombly* and *Iqbal*

And

(2) Essential Legal Principles Applicable to Rule 56 Motions for Summary Judgment

By: Duncan E. Barber
Bieging Shapiro & Barber LLP

Part 1: New Standards for Rule 12(b)(6) Motions to Dismiss: Pleading in light of *Twombly* and *Iqbal*.

1. **The Applicable Federal Rules of Civil Procedure and *Conley*'s "Any Set of Facts" Standard**.

a. Rule 8(a)(2) provides that a pleading seeking relief must contain "a short plain statement showing that the pleader is entitled to relief . . ."

b. Rule 9(b) requires fraud to be alleged "with particularity . . ."

c. Rule 12(b)(6) provides that a defendant may defend via motion showing that the pleading fails "to state a claim upon which relief can be granted."

d. These Rules are applicable to adversary proceedings in bankruptcy cases, but only Rule 9 is applicable to contested matters unless the court directs otherwise. Fed. R. Bankr. P. 7008, 7009, 7012 and 9014.

e. The Rule 8(a)(2) requirement was long interpreted as satisfied if the pleading gave "the defendant fair notice of what the claim is and the grounds upon which it rests," *Conley v. Gibson,* 355 U.S. 41, 47(1957), to the effect that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*, at 45-46.

f. Under the *Conley* standard, "conclusory allegations" could withstand a Rule 12(b)(6) motion to dismiss. *See, e.g., Robbins v. Oklahoma*, 519 F.3^{d} 1242, 1246-47 (10th Cir. 2008).

g. Pleadings presenting merely *possible* grounds for relief could withstand a motion to dismiss under Rule 12(b)(6).

2. ***Twombly* and *Iqbal***.

a. *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007).

i. **The Standard**: To withstand a motion to dismiss, a complaint must contain enough allegations of fact "to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570.

ii. **Not merely *fair notice* but factual allegations showing *grounds* showing entitlement relief**: "While a complaint attacked by a Rule 12 (b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of this 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic

recitation of the elements of a cause of action will not do . . ." *Twombly,* 550 U.S. at 555 (internal quotations omitted); *see also* fn. 3, p. 555.

iii. ***Conley*'s "no set of facts" retired**: "On such a focused and literal reading of *Conley's* 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery . . . But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly,* 550 U.S. at 561-63 (internal quotations omitted).

iv. **Possible, Plausible, Probable**.

1. Prior to *Twombly*, a complaint that *possibly* established entitlement to relief could survive a Rule 12(b)(6) motion to dismiss.

2. After *Twombly*, a complaint must establish that entitlement *plausibly*: "Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly,* 550 U.S. at 570.

3. But the allegations need not establish the requested relief with "probability." *Twombly,* 550 U.S. at 556.

v. **Weed out *interrorem* settlement claims**: "We alluded to the practical significance of the rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with "'a largely groundless claim' be allowed to 'take up the time of a number of other people with the right to do so representing an *interrorem* increment of the settlement value.'" *Id.,* at 347, 125 S.Ct. 1627, *quoting Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 741, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). *Twombly,* 550 U.S. at 587-88.

b. ***Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009)**.

i. **Sufficiency of Allegations: Facts versus Labels and Conclusions**.

1. "A pleading that offers 'labels and conclusions' or 'formulaic recitation of the elements of the cause of action will not do.'" *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

2. "Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id*.

3. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.,* at 570, 127 S.Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.,* at 556, 127 S.Ct. 1955. The plausibility standard is not akin to a "probability requirement," but is asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 557, 127 S.Ct. 1955 (brackets omitted)." *Id*.

ii. **Fact Allegations versus Legal Conclusions**.

1. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice . . . (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation' (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." 129 S.Ct. at 1949-50.

2. "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss . . . Determining

whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.' Fed. Rule Civ. Proc. 8(a)(2)." *Id*.

3. "In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." 129 S.Ct. at 1950.

3. **Bankruptcy Context**.

a. **Preference Actions. *Valley Media*'s "heightened" pleading debate before and after *Twombly* and *Iqbal***.

i. Before.

1. *Valley Media, Inc.*, 288 B.R. 189, 192 (Bankr.D.Del.2003), which set out the particular facts that must be alleged to overcome a Rule 12(b)(6) motion to dismiss in a Section 547 preference action ((a) an identification of the nature and amount of each antecedent debt and (b) an identification of each alleged preference transfer by (i) date, (ii) name of debtor/transferee, (iii) name of transferee and (iv) the amount of the transfer). *See also OHC Liquidation Trust v. Credit Suisse First Boston (In re Oakwood Homes Corp.)*, 340 B.R. 510 (Bankr.D.Del.2006).

2. Declining to follow *Valley Media, The IT Group, Inc.,* 313 B.R. 370, 373 (Bankr.D.Del.2006) (specificity required under *Valley Media* "inappropriate and unnecessarily harsh").

ii. After.

1. Declining to follow *Valley Media*:

a. *In re C.R. Stone Concrete Contractors, Inc.,* 434 B.R. 208, 221 (Bankr.D.Mass.2010) (*Twombly* and *Iqbal* do not require application of the *Valley Media* standards; such standards are "inappropriate and unnecessarily harsh").

b. *Gold v. Winget (In re NM Holdings Co., LLC)*, 407 B.R. 232, 256-57 (Bankr.E.D.Mich.2009).

c. *Tousa Homes, Inc. v. Palm Beach Newspapers, Inc. (In re TOUSA, Inc.)*, 4412 B.R. 852 (Bankr.S.D.Fla.2010) (while the "amorphous payor problem" does not exist in most cases, in the case at hand agreed that failing to identify the source of a preferential transfer as fatal under *Twombly* and *Iqbal* but otherwise not following *Valley Media*).

2. Following *Valley Media:*

a. *Angell v. BER Care, Inc. (In re Ceramerican, Inc.)*, 409 B.R. 737, 753 n. 2 (Bankr.E.D.N.C.2009) (*Twombly* and *Iqbal* "breathe new life into the pleadings requirements implemented in Valley Media for § 547 preference claims").

b. *Feldman v. Chase Home Fin. (In re Image Masters, Inc.),* 421 B.R. 164, 179-80 (Bankr.E.D.Pa.2009).

b. **Fraudulent conveyance cases after *Twombly* and *Iqbal***.

i. Alleging less than reasonably equivalent value: *Marwil v. Oncale (In re Life Fund 5.1 LLC)*, 2010 WL 2650024 (Bankr.N.D.Ill.2010) ("[A]fter *Twombly* and *Iqbal* a complaint will not survive a motion to dismiss if it pleads that a transfer was made for 'less than reasonably equivalent value' without any supporting facts").

ii. Alleging insolvency: "a complaint alleging a constructive fraud claim based on insolvency . . . must plead facts from which an inference of insolvency can be drawn." *Id.* (citations omitted).

c. **Other contexts**.

i. *In Re Hartmann*, 2011 WL 3423791 (Bankr.D.Colo.2011) (§§ 523(a)(4) and (6)) court "must accept all the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff, and must examine the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief") (citations omitted).

ii. *Official Committee of Unsecured Creditors of Hydrogen, L.L.C. v. Blomen (In re Hydrogen, L.L.C.),* 431 B.R. 337, 347 (Bankr.S.D.N.Y.2010) (among other things, claim against officer and director for breach of fiduciary duty dismissed where the "duty" element of claim was based the erroneous legally proposition that officers and directors of a parent company do owe fiduciary duties to a wholly-owned subsidiary).

d. **Fed. R. Civ. P. 9(b)**.

i. "'Particularity' means 'the who, what, when, where and how: the first paragraph of any newspaper story.'" *See Katz v. Household Int'l, Inc.*, 91 F.3d 1036, 1040 (7th Cir. 1996).

ii. Does Rule 9 apply in a *constructive* fraud context? *Compare Air Cargo, Inc. Litig. Trust v. i2 Techs, Inc. (In re Air Cargo, Inc.),* 401 B.R. 178, 192 n. 7 (Bankr.D.Md.2008) (no & collectively cases) *with General Electric Capital Corp. v. Lease Resolution Corp.,* 128 F.3d 1074, 1079 (7th Cir. 1997); *Marwil v. Oncale (In re Life Fund 5.1 LLC)*, 2010 WL 2650024 (Bankr.N.D.Ill.2010); *Walker v. Sonafi Pasteur (In re Aphton Corp.)*, 423 B.R. 76, 85 n. 12 (Bankr.D.Del.2010).

4. **Practical Considerations**.

a. Draft the complaint by first listing the elements of the cause of action. Then, write out those legal elements in the specific facts of your case. *See, e.g., Hydrogen,* 431 B.R. at 344 (in context of Rule 12(b)(6), legal conclusions are to be excluded "to the extent they are not intertwined with the relevant facts").

b. "A trustee is generally afforded greater liberality in pleading fraud, since he is a third-party outsider to the debtor's transactions*." See, e.g., Walker v. Sonafi Pasteur (In re Aphton Corp.)*, 423 B.R. 76, 85 (Bankr.D.Del. 2010); *see also Picard v. Estate of Stanley Chais (In re Madoff)*, 445 B.R. 206, 219 (Bankr.S.D.N.Y. 2011).

c. Discussion of evidence that supports insolvency and hypothetical chapter 7 distribution allegation under § 547(b)(5). *In re Prebul Jeep, Inc.,* 2010 WL 3304608 (Bankr.E.D.Tenn.2010).

d. Distinguish between sufficiency of the allegations of a complaint rather than the merits of the case. *Gluth Bros. Construction, Inc. v. American Community Bank & Trust (In re Gluth Bros. Construction, Inc.)*, 424 B.R. 379 (Bankr.N.D.Ill.2009).

e. Amendments should be freely given. Fed. R. Bankr. P. 15(a).

f. Always strong presumption to resolve cases on their merits.

Part II: Essential Legal Principles Applicable to Rule 56 Motions for Summary Judgment

1. Rule 56(a).

a. **General**.

i. Rule 56 F.R.Civ.P. applies in adversary proceedings and in contested matters. Fed. R. Bankr. P. 7056 and 9014.

ii. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. Fed. R. Civ. P. 56(a).

iii. *Beard v. Banks*, 548 U.S. 521, 529 (2006) (the record must be examined to see whether the depositions, answers to interrogatories, admissions, affidavits and the like, has demonstrated "the absence of a genuine issue of material fact," entitling the movant to judgment as a matter of law) (citing *Celotex Corp. v. Catrett,* 447 U.S. 317, 323 (1986)).

b. **Genuine "Dispute" Rather Than Merely an "Issue."**

i. In 2010, the phrase "genuine issue" was changed to "genuine dispute" because "dispute" better reflects the focus of a summary-judgment determination. Fed. R. Civ. P. 56, advisory committee notes to 2010 amendments.

ii. A genuine dispute exists when a rational trier of fact, viewing the facts in the light most favorable to the non-moving party, could find in favor of the non-moving party. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (citing *Scott v. Harris,* 550 U.S. 372, 380 (2007) and *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986)).

iii. By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

iv. To defeat a motion for summary judgment, the evidence offered by the adverse party cannot be "merely colorable" or speculative. *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 175 (1st Cir. 2008). A party opposing summary judgment must do more than simply show that there is some metaphysical doubt as to the material facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007) (when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury

could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment); *see also Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011). In the summary judgment context, "appeals courts should not accept 'visible fiction' that is 'so utterly discredited by the record that no reasonable jury could have believed' it." *Coble v. City of White House*, 634 F.3d 865, 868 (6th Cir. 2011) (citing *United States v. Hughes,* 606 F.3d 311, 319 (6th Cir. 2010) (quoting *Scott,* 550 U.S. at 379–81).

v. The burden of proof that applies to a given claim or defense is the burden of proof that applies to a motion for summary judgment. Thus, if the burden of proof is clear and convincing evidence, a movant seeking summary judgment must show by clear and convincing evidence that it is entitled to summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254.

c. Material Fact.

i. To be "material," the facts must be such that they might affect the outcome of the suit, and to be "genuine," the dispute must concern evidence upon which the jury could *reasonably* return a verdict for the non-moving party. *DeMerrell v. City of Cheboygan*, 206 F. App'x 418, 422 (6th Cir. 2006).

ii. A fact is "'material' if under the substantive law it is essential to the proper disposition of the claim." *Wright ex rel. Trust Co. of Kansas v. Abbott Laboratories, Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001) (quoting *Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 670 (10th Cir.1998).

iii. Factual disputes that are irrelevant or unnecessary will not be counted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes. *Id.*

d. **Entitled to Judgment as a Matter of a Law**.

i. A movant is entitled to summary judgment as a matter of law if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a

sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Celotex Corp.*, 477 U.S. at 322-23; *see below*.

e. The Court's Discretion and the Evidence: Shall Verses Should.

i. If the moving party has demonstrated a lack of any genuine issue for trial and the non-moving party has failed to *set forth specific facts showing that there is a genuine issue for trial,* the law requires entry of judgment in the movant's favor. *See Beard v. Banks*, 548 U.S. at 529. The word "shall" was restored in 2010 replacing "should" that was adopted in 2008. Fed. R. Civ. P. 56, advisory committee notes to the 2010 amendments.

ii. But, even if a motion for summary judgment is unopposed, the court may grant summary judgment against the non-moving party only if appropriate. *Torres-Rosado v. Rotger-Sabat*, 335 F.3d 1, 8-9 (1st Cir. 2003) (citations omitted). Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. *Id.*

iii. Denial of summary judgment is appropriate where factual records are "disturbingly thin," "contain gaps," and require judgment calls which depend on evidence not in the record but readily obtainable. *Spratt v. Rhode Island Dept. Of Corr.*, 482 F.3d 33, 43 (1st Cir. 2007) (citing *Mandel v. The Boston Phoenix, Inc.,* 456 F.3d 198, 205-07 (1st Cir. 2006)).

iv. An appellate court may, in the interests of sound judicial administration, vacate a summary judgment without reaching the merits of the issue presented if the record has not been sufficiently developed to allow for a fully informed decision. *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1278 (9th Cir. 1993) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948)) (summary judgment may not be appropriate if it is concluded that a more complete development of the facts is necessary).

v. A court reviewing a summary judgment motion must not weigh the evidence or evaluate the credibility of witnesses. *Johnson v. Diversicare Afton Oaks, LLC*, 597 F.3d 673, 676 (5th Cir. 2010). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. *Anderson*, 477 U.S. at 255.

vi. In a non-jury case, a district court has somewhat greater discretion to consider what weight it will accord the evidence. *Johnson v. Diversicare*, 597 F.3d at 676.

vii. In ruling on a motion for summary judgment, the nonmoving party's evidence "is to be believed, and all justifiable inferences are to be drawn in [that party's] favor." *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255).

viii. Unsupported allegations and speculation do not demonstrate either entitlement to summary judgment or the existence of a genuine issue of material fact sufficient to defeat summary judgment. *Rivera-Colon v. Mills*, 635 F.3d 9, 12 (1st Cir. 2011).

ix. "Evidence, not contentions, avoids summary judgment." *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1036 (8th Cir. 2005) (citations omitted).

x. In 2010, a provision was added that provides that the court should state on the record the reasons for granting or denying the motion. Most courts recognized this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion. Fed. R. Civ. P. 56, advisory committee notes to the 2010 amendments.

2. Rule 56(b): Time to File.

a. Any time until 30 days after the close of discovery.

b. Unless different time provided in local rules or court order.

3. Rule 56(c): Procedures.

a. **General**.

i. Subsection (c) was added by the 2010 amendments to Rule 56. Former subsection (c) referred to the time schedule for filing a motion for summary judgment, which has now been moved to subsection (b). *See* Rule 56 advisory committee note to 2010 amendments.

ii. Subsection (c) establishes a common procedure for several aspects of summary judgment motions which had developed in the cases or found in local rules. Rule 56 advisory committee note to 2010 amendments.

b. **Supporting Factual Positions in Summary Judgment Motions**.

i. ***Materials Relied Upon to Support Claim***.

1. Summary judgment motions must be supported by factual evidence from the record. *Al- Zubaidy*, 406 F.3d at 1036 ("evidence, not contentions, avoids summary judgment").

2. Subsection (c)(1)(A) describes the materials from the record which are commonly relied upon in summary judgment motions, such as depositions, documents, electronically stored information, affidavits, declarations, stipulations, admissions, interrogatories and similar materials. Fed.R.Civ.P.

56(c)(1)(A); *Seng-Tiong v. Taflove*, 648 F.3d 489, 496 (7th Cir. 2011); Rule 56 advisory committee note to 2010 amendments.

3. The moving party must cite the particular parts of the materials that support its fact positions. Fed.R.Civ.P. 56(c)(1)(A); *Thomas v. Wichita Coca-Cola Bottling Co.,* 968 F.2d 1022, 1024 (10th Cir.), *cert. denied,* 506 U.S. 1013 (1992) (facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein).

4. Alternatively, a party may respond or reply that the materials cited by the moving party do not dispute or support a fact or do not establish the absence or presence of a genuine dispute. Fed.R.Civ.P. 56(c)(1)(A); Rule 56 advisory committee note to 2010 amendments; *Seng-Tiong*, 648 F.3d at496; *Celotex* 477 U.S. 317 (there is no requirement that the moving party support its motion with affidavits or materials negating the opponents claim).

ii. ***Burden of Proof***.

1. The moving party, as always, bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine disputes of material fact. *Evans Cabinet Corp. v. Kitchen In'l, Inc*., 593 F.3d 135, 140 (1st Cir. 2010); *Celotex Corp.*, 477 U.S. 317.

2. Once the moving party submits a properly supported motion for summary judgment, the nonmoving party bears the burden to set forth specific facts showing that there is a genuine disputes for trial. *Beard v. Banks*, 548 U.S. at 529; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 250.

iii. ***Disputed Fact Must be Material***.

1. The requirement for summary judgment is that there be no *genuine* disputes of *material* fact. *Beard v. Banks*, 548 U.S. at 529; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 247–248.

2. A disputed fact is 'material' if it would affect the outcome of the suit as determined by the substantive law." *J.S. ex re. Snyder v. Blue Mountain Sch. Dist*., 650 F.3d 915, 925 (3rd Cir. 2011); *Mauerhan v. Wagner Corp*., 649 F.3d 1180, 1185 (10th Cir. 2011).

3. An issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248.

iv. ***Refer to Local Rules***.

1. Subsection (c) does not address the form for providing required support along with the motion. *See* Rule 56 advisory committee note to 2010 amendments.

2. Local rules will determine how support should be provided with the motion. For example, courts may require a separate statement of facts or require that the support be included in the body of a memorandum.

c. **Objection to Summary Judgment Motion: Facts Not Supported by Admissible Evidence**.

i. ***Evidence Must be Admissible***.

1. A party may object to a summary judgment motion on the basis that materials cited to support or dispute a fact cannot be presented in a form that would be admissible evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. Fed.R.Civ.P. 56(c)(2); *Cooper v. Allied Barton Sec. Servs*., 422 Fed.Appx. 33, 34 (2nd Cir. 2011); Rule 56 advisory committee note to 2010 amendments.

2. If the evidence is not currently admissible, a party may explain the admissible form that is anticipated. Rule 56 advisory committee note to 2010 amendments.

ii. ***Form of Evidence Need not be Admissible***.

1. The form of evidence produced by a party at summary judgment may not need to be admissible at trial; however, the content or substance of the evidence must be admissible. *Johnson v. Weld County*, 594 F.3d 1202, 1210 (10th Cir. 2010); *Alexander v. CareSource*, 576 F.3d 551, 558-59 (6th Cir. 1990).

2. A party at summary judgment may produce its evidence by means of affidavit, a form of evidence that is usually inadmissible at trial given the adversarial system's preference for live testimony. *Johnson v. Weld County*, 594 F.3d at 1210; *Bryant v. Farmers Ins. Exch.,* 432 F.3d 1114, 1122 (10th Cir. 2005).

d. **Court Obligated to Consider Cited Materials**.

i. The court may decide a motion for summary judgment without undertaking an independent search of the record. Fed.R.Civ.P. 56(c)(3); *Send-Tiong Ho*, 648 F.3d at 497 (7th Cir. 2011) (the court need only consider cited materials); *Celotex,* 477 U.S. at 323; *Barge v. Anheuser-Busch, Inc.,* 87 F.3d 256, 260 (8th Cir. 1996); *Thomas,* 968 F.2d at 1024-25; *Downes v. Beach,* 587 F.2d 469, 472 (10th Cir. 1978).

ii. The court is also permitted to consider record materials not called to its attention by the parties. Fed.R.Civ.P. 56(c)(3); Rule 56 advisory committee note to 2010 amendments.

e. **Affidavits or Declarations: Fed.R.Civ.P. 56(c)(4)**.

i. ***Requirements of an Affidavit***:

1. Sworn or subscribed to be true under risk of perjury;

2. Made on personal knowledge;

3. Set out facts that would be admissible in evidence; and

4. Show that the maker is competent to testify on the matters expressed.

ii. A summary judgment affidavit must be made on personal knowledge, set forth facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. Fed.R.Civ.P. 56(c)(4); *Johnson v. Weld County*, 594 F.3d at 1210; *Board of Regents of University of Wisconsin System*, 276 F.3d 906, 9012 (7th Cir. 2002).

f. **Formal Affidavit not Required**.

i. A formal affidavit is no longer required.

ii. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

4. Fed. R. Civ. P. 56(d).

a. "**When Facts Are Unavailable to the Non-movant**. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d).

b. A general discussion of discovery problems in the affidavit/declaration is insufficient. "[T]he requirements for relief under Rule 56(d) are rather strict. Not only must the nonmovant produce an affidavit . . . but that affidavit must also 'explain why facts precluding summary judgment cannot be presented. This includes identifying the probable facts not available and what steps have been taken to obtain these facts.'" *Ag New Mexico, FC, et al. v. Borges, et al. (In re Borges)*, 2011 WL 4101096, p. 2 (Bkrtcy. D.N.M., September 6, 2011), *quoting Trask v. Franco*, 446 F.3d 1036, 1042 (10th Cir. 2006). *Quorint Comm. For the First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992). "[T]he nonmovant must also explain how additional time will enable him to rebut the movant's allegations of no genuine issue of material fact." *Id.*

c. Accordingly, practitioners should specify the probable, but unavailable, facts that would create a genuine issue of material fact **and** inform the court as to how the additional material will rebut the summary judgment motion.

5. Fed.R.Civ.P. 56(e).

a. "**Failing to Properly Support or Address a Fact**. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it; or (4) issue any other appropriate order." Fed.R.Civ.P. 56(e).

b. Rule 56(e) gives courts broad discretion in dealing with the situation where a party fails to support or address an assertion of fact. The commentary to Rule 56(e) states that "summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements." Subdivision (e)(1) allows a court to ensure that there is a proper response. The remaining subdivisions allows a court to assess facts it has chosen to consider undisputed for lack of a proper response and any that cannot be genuinely disputed despite a procedurally proper response and the legal consequences of those facts.

c. Practitioners should ensure that each and every averment is addressed or, if not addressed, why such averment is irrelevant.

6. Fed.R.Civ.P. 56(f).

a. "**Judgment Independent of the Motion**. After giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." Fed.R.Civ.P. 56(f).

b. The comment to Rule 56(f) states that "[s]ubdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice." Rule 56(f) provides for a

sua sponte summary judgment ruling, provided that the parties are given adequate notice and time to respond.

c. This subsection is directed at judges; however, practitioners should be aware that inadequate summary judgment motions could result in summary judgment for the nonmoving party, or rulings (potentially adverse) on issues not raised in the pleadings.

7. Fed.R.Civ.P. 56(g).

a. "**Failing to Grant All the Requested Relief**. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact – including an item of damages or other relief – that is not genuinely in dispute and treating the fact as established in the case." Fed.R.Civ.P. 56(g).

b. Rule 56(g) allows the court to dispose of a material fact that is not genuinely in dispute, even if all of the requested relief is not granted.

c. Again, this subsection is directed primarily at judges. Nonetheless, practitioners should be aware that courts can grant less than all requested relief and should consider requesting, in the alternative, that specific facts be considered as undisputed, even if all the requested relief is not granted.

8. Fed.R.Civ.P. 56(h).

a. "**Affidavit or Declaration Submitted in Bad Faith**. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court – after notice and a reasonable time to respond – may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions." Fed.R.Civ.P. 56(h).

b. According to the comment, Rule 56(h) (former subdivision (g)) makes the sanctions applicable for submitting an affidavit in bad faith "***discretionary, not mandatory***, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions." Nonetheless, despite changing the sanction provision from mandatory to discretionary, only four bankruptcy courts have even addressed the discretionary sanctions allowed by Rule 56(h) since January 1, 2010. *See In re Hixson*, 2011 WL 4625374 (Bankr.N.D.W.Va. September 30, 2011) (separate hearing set to determine bad faith filing of affidavit); *In re Wilson*, 2011 WL 2215145 (Bankr.D.Kan. May 27, 2011) (court to determine appropriate sanctions following trial); *In re Russell*, 2011 WL 1356709 (Bankr.N.D. Iowa, April 8, 2011) (request for sanctions denied on other grounds); *In re Long*, 2011 WL 976460 (Bnkr.D.Kan., March 1, 2011) (comparing "corrected" deposition transcript to "sham" affidavit prohibited by Rule 56(h)).

c. The new 56(h) also recognizes the need to provide notice a time to respond.