

Sprint Session A

2:40 - 3:10 p.m.

Salon 3

Bankruptcy 101

Panelists:

Ryan J. Richmond

Attorney at Law

Baton Rouge

Lacey E. Rochester

Baker Donelson

New Orleans

Ryan J. Richmond

Ryan is a 2006 graduate of the LSU Law Center. From 2006-07 he clerked for the Hon. Douglas D. Dodd at the U.S. Bankruptcy Court, Middle District of Louisiana. Ryan's practice has focused on general business matters as well as bankruptcy reorganizations and liquidations. He recently earned an MBA from LSU, and then founded his own law firm in Baton Rouge – the Richmond Law Firm.



Lacey Rochester

Associate

New Orleans | T: 504.566.5292 | E: lrochester@bakerdonelson.com

Lacey Rochester focuses her practice on creditors' rights and regularly represents financial institutions, oil and gas companies, and other secured and unsecured creditors in federal, state and bankruptcy court.



Overview

Ms. Rochester is an associate attorney in the New Orleans office. In bankruptcy court, she has represented clients with respect to claim objections, adversary proceedings, preference and fraudulent conveyance actions, stay relief, cash collateral issues, 363 sales, assumption or rejection of executory contracts and unexpired leases, DIP financing and confirmation disputes.

Ms. Rochester's prior experience includes serving as a law clerk to the honorable Judge Wendy Hagenau with the United States Bankruptcy Court for the Northern District of Georgia.



Professional Honors & Activities

- Listed in *Louisiana Super Lawyers* as a Rising Star in Creditor Debtor Rights (2019)
- Member – American Bankruptcy Institute
- Member – American Bar Association
- Member – Turnaround Management Association, New Orleans Chapter
- Member – International Women in Insolvency and Restructuring Confederation (IWIRC), New Orleans Chapter
- 2011 American College of Bankruptcy Distinguished Law Student for the Fifth Circuit



Publications

- "Baker's Dozen – 13 of the Best Places to Visit in the Big Easy," *Women's Initiative Newsletter* (December 2017)
- "Defending Preference Actions: Understanding Your Rights as a Creditor," *Liskow & Lewis E-News Letter* (July 2014)
- "Stern Does Not Preclude Bankruptcy Court's Resolution of Certain Claims," *Professional Liability Litigation Newsletter*, Vol. 10 No. 2 (Spring 2014)



Speaking Engagements

Lacey Rochester

New Orleans | T: 504.566.5292 | E: lrochester@bakerdonelson.com

- Panelist – "Oil and Gas Creditor's Issues Update: Issues That May Arise in an Energy Bankruptcy," Liskow & Lewis Energy Law Seminar: Current Texas, Louisiana, and Offshore Oil and Gas Topics for Lawyers and Landmen (November 2015)
- "Model Rule 1.13: Ethics and Organizational Representations: A Glimpse of Where We are Heading," Louisiana State Bar Association CLE (December 2014/June 2015)



Education

- Loyola University New Orleans College of Law, J.D., 2012, magna cum laude
- Louisiana State University, B.S., 2009; summa cum laude



Admissions

- Louisiana

BANKRUPTCY 101

Lacey E. Rochester

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC

Ryan J. Richmond

RICHMOND LAW FIRM, LLC

2019 LSBA Young Lawyers Conference

January 19, 2019, Baton Rouge, LA

Federal v. State Law

- Bankruptcy is a federal law
 - The U.S. Constitution (Art. I, § 8, Clause 4) authorizes Congress to enact “uniform Laws on the subject of Bankruptcies throughout the United States.”
 - Supremacy Clause (Art. IV, ¶2)
- Bankruptcy Code is codified at Title 11, U.S. Code
- But...
 - State law applies unless a bankruptcy purpose requires a different result. *Butner v. U.S.*

Modifications of State Law

- Section 365 – executory contracts and unexpired leases
 - Ipso facto provision may not be enforceable.
- Section 362 – automatic stay
 - Stops most races to the courthouse
- Chapter 11 plans
 - May alter payment terms and interest rates

Federal Rules

- Again, bankruptcy is a federal law.
- A bankruptcy court is a federal court.
 - Although state court may sometimes decide matters that affect bankruptcy cases.
- The Federal Rules of Civil Procedure generally apply in bankruptcy proceedings.
 - Contest matters and adversary proceedings.
 - *See* FRBP 7002 and Part IX of the FRBP

The Automatic Stay

- Section 362(a).
- A statutory injunction that stops the race to the courthouse.
- Automatic – arises upon the entry of the order for relief.
- With or without notice to effected parties.



What is Stayed Automatically?

- The commencement or continuation of actions against the debtor or property of the bankruptcy estate.
- Acts to obtain possession property of the estate.
- Acts to perfects liens.
- Enforcement of judgments.



Relief from the Automatic Stay

- Under Section 362(d), a creditor may seek relief from the automatic stay for “cause.”
- Cause includes, among other things, the liquidation of a debt in state court.
 - But whether the claim is allowed is a matter for the bankruptcy court to decide.

Who Files Bankruptcy?



Who Files Bankruptcy?

- Consumers
 - Chapter 7, Chapter 13, Chapter 11
- Businesses
 - Chapter 7, Chapter 11
- Municipalities
 - Chapter 9 (e.g. Detroit)
- Farmers and Fishermen
 - Chapter 12
- International Insolvencies
 - Chapter 15

*This presentation focuses on Chapters 7, 11 and 13

Different Types of Cases

Chapter 7, Chapter 11 and
Chapter 13

Chapter 7



- Liquidation
 - Usually individuals, but businesses too
 - Exceptions: railroads, insurance companies, banks, credit unions
 - The debtor surrenders *non-exempt* assets to chapter 7 trustee; in return, the debtor receives a "fresh start" through the discharge of most pre-petition debts
 - The trustee liquidates *non-exempt* assets and pays unsecured claims in order of priority
 - Typically, debtor has zero non-exempt assets (no asset cases)
 - 2005 Amendments introduced "means test" – see 11 U.S.C. § 707(b)

Chapter 13

- Payment Plan/Pay-out Cases
 - Chapter 13 plan to repay creditors within 5 years
 - Secured claims paid in full
 - Unsecured creditors receive whatever is left
- Most often filed so borrower can keep home
 - Borrowers often use the plan to cure pre-petition arrearages
 - Borrower must maintain monthly payments
- If borrower completes the plan: Chapter 13 discharge

Chapter 11



"This is Hannah, she does lemonade stand restructurings."

- Primarily businesses trying to reorganize as going concern (1) by extending or reducing debts, and/or (2) by lowering operating costs
 - Businesses can liquidate through chapter 11 in lieu of chapter 7
 - Individuals and partnerships can also file chapter 11

Chapter 11 Continued

- Payment Plan/Pay-out Cases
 - Generally, secured claims are paid in full
 - Unsecured claims may or may not be paid subject to treatment in Chapter 11 plan
- Debtor-in-Possession (or "DIP") instead of Trustee
- Subject to cash collateral restraints, DIP can continue operations “in the ordinary course of business” without court approval
- Confirmed plan binds the debtor and creditors. 11 U.S.C. § 1141(a).
 - Chapter 11 plan, once confirmed by the court, can modify the contractual terms of loan documents and/or contracts
 - While corporate entities do not receive discharge, confirmed plan has same practical effect because it binds all creditors

Avoidable Transfers

- The Bankruptcy Code enables a Trustee (or Debtor in Possession) to avoid certain transfers made by the Debtor prior to its bankruptcy filing and recover this property for the estate
- Underlying concept is equal treatment of similarly situated creditors
- Two common types of avoidable transfers are preferences (11 U.S.C. § 547) and fraudulent conveyances (11 U.S.C. § 548)

Preferences

– What's a Preference?

- Payment on an “antecedent” debt;
- Made while the debtor was insolvent;
- To a non insider creditor, within 90 days of the bankruptcy;
- That allows the creditor to receive more on its claim than it would have, had the payment not been made and the claim paid through the bankruptcy proceeding.

Available Defenses

Under 11 U.S.C. § 547(c)

- Ordinary course of business defense (look at payment terms)
 - Designed to protect the debtor's routine payments of recurring debt
 - Intended to encourage creditors to continue doing business with financially distressed companies
 - Subjective test - Ordinary between the debtor and creditor?
 - » Courts compare the relationship between the parties inside and outside the preference period
 - » Coercive collection efforts to force payment will result in taking the relationship outside the ordinary course of their normal dealings
 - » Comparisons of the timing of payments from the debtor both prior to, and during the preference period
 - Objective test - Ordinary within the industry?

Available Preference Defenses

Continued

- Contemporaneous exchange for “new value”
 - “New Value” defined in §547(a)(2) as money or money’s worth in goods, services, new credit or release of an unavoidable prior transfer of property. new goods or services
 - Common with COD payments
- New Value
 - Allows the creditor to apply subsequent credit or consideration extended to the debtor as a set off for a prior preferential transfer
 - Additional credit advances to the debtor must be on an unsecured basis and remain unpaid as of bankruptcy filing

Fraudulent Transfers - 11 U.S.C. § 548

- The Trustee may avoid any transfer of an interest of the debtor in property that was made or incurred on or within 2 years before the petition date, if the debtor voluntarily or involuntarily –
 - Made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted; or
 - Received less than reasonably equivalent value in exchange for such transfer or obligation; and
 - Was insolvent on the date of such transfer or became insolvent as a result of the transfer;
 - Was engaged in business or a transaction for which any property remaining with the debtor was an unreasonably small capital;
 - Intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
 - Made such transfer to or for the benefit of an insider

For the Tort Lawyers in the Audience...

- What happens if your client files bankruptcy after you have performed services or incurred expenses that remain unpaid?
 - Can you just send your client a nasty-gram demanding payment?
 - Answer: **ABSOLUTELY NOT** (Automatic stay precludes acts to collect pre-petition debts)
 - Get in line with the general unsecured creditors...

Alternative Solution?

- Bankruptcy Code provides mechanism for the employment of professionals (other than the debtor's bankruptcy attorney)
- If the legal claim is property of a the debtor's bankruptcy estate, then plaintiff's attorney may discuss employment and coordinate future action with the Chapter 7 or 13 trustee (or debtor in possession in Chapters 11 or 13)
- Debtor/Trustee not required to keep you as outside counsel but it makes sense to keep counsel who is already familiar with the ongoing litigation

What Happens When a Trustee or a Debtor Hires You?

- Application to Employ Required
- Bankruptcy Court Approval of employment is Necessary
- The Bankruptcy Estate Funds the Engagement
- 11 U.S.C. § 327 (Employment of Professionals)
- Rule 2014 of the Federal Rules of Bankruptcy Procedure (Employment of Professionals)

Distinction between 327(a) and (e)

- 327(e) addresses the employment of “special” counsel for specified purpose when counsel does not “represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.”
- Important distinction from employment as debtor’s bankruptcy counsel in bankruptcy case under 327(a), which requires attorney to “not hold or represent an interest adverse to the estate” and that is “disinterested”
 - “Disinterested” requirement for employment under 327(a) would prevent an attorney who is owed fees as of the petition date from representing the debtor

Getting paid – 11 U.S.C. § 330

- Compensation may be fixed or contingent
 - 328(a) of the Bankruptcy Code provides that the trustee may, with court approval, employ professionals “on any reasonable terms and conditions of employment”
- Under 330(a)(1) can recover “reasonable compensation for actual, necessary services” and “actual necessary expenses”
 - Must file fee application, set for hearing, and give creditors opportunity to object
 - Loadstar
 - If hourly, need hourly breakdown of fees
 - Narratives of work performed (even if on contingency basis)

Questions?

