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Bankruptcy Practice in Virginia: A Multifaceted Experience

by Veryl Victoria Miles

Not too long ago, bankruptcy law was viewed as an area of practice that was often regarded as the "unmentionable" specialized practice, an area of practice that the traditional law firms did not serve. In some legal communities the practice of bankruptcy law was limited to "boutique" law firms, firms that specialized primarily in bankruptcy law. In small legal communities the practice might be interspersed among a few lawyers who had developed an interest and willingness to practice a bit of bankruptcy law along with the rest of their practice. For this small group of bankruptcy practitioners, their cases often came by referrals from the traditional law firms that elected not to serve the special needs of clients requiring bankruptcy counsel, either because of potential conflicts of interest, or because of a pragmatic decision on the part of such firms not to be in the business of bankruptcy practice. Accordingly, the practice of bankruptcy law was something that most firms chose not to offer, as they considered it undesirable.

However, with the enactment of the Bankruptcy Reform Act of 1978¹ (the "Bankruptcy Code"), the general sentiments regarding bankruptcy law practice changed dramatically. Some of the reasons for the change had to do with the way that the new law elevated the practice. Under the Code, bankruptcy practice became more sophisticated; it even elevated the bankruptcy referee, who once served as case administrator and trier of fact and law, to a "judge," taking the practice out of an office room into a court room. Perhaps the more practical reason for the change in views regarding the practice had to do with a dramatic increase in the number of individuals and businesses seeking or being eligible for bankruptcy services or expertise.² As a result, law firms were prompted to reconsider the prior practice of referring the growing volume of bankruptcy work out to the bankruptcy specialists in their communities. Instead, many firms elected to bring bankruptcy specialists into their firms to handle such matters for clients. In fact, today there are very few large or mid-sized firms that do not have either an in-house bankruptcy section or specialist to address bankruptcy and creditor-debtor issues for firm clients.

The Diverse Nature of the Bankruptcy Practice

Aside from the overwhelming increase in demand for bankruptcy counsel that has occurred over the last fifteen years, many bankruptcy practitioners find the most attractive feature of the practice to be the multifaceted nature of it. In a bankruptcy case the bankruptcy practitioner is presented with the task of having to resolve the many pre-bankruptcy obligations of a debtor; obligations and liabilities that involve a variety of substantive areas of law, including contract law, corporate law, commercial law, real estate law, lien law, tort law, criminal law,

tax law, domestic relations law, and labor law to name a few. As a result, legal and intellectual dexterity is demanded of the bankruptcy lawyer. This demand is compounded by the fact that the bankruptcy laws are constantly being subject to interpretive challenges in the courts and are frequently the subject of revision by Congress.³

The practice of bankruptcy law is also considered appealing because many of the cases handled by a bankruptcy lawyer are anything but routine. On the surface one might expect a certain degree of sameness in bankruptcy practice by virtue of the fact that all of the cases involve a debtor in financial distress. In reality, however, the causes and circumstances giving rise to and the issues raised by that financial distress often vary considerably from case to case. Finally, because bankruptcy courts are courts of equity, the results and the process are often unpredictable.

Although there is certainly a great deal of financial information and documentation that permeates a bankruptcy case, bankruptcy practice should never be viewed as simply being a paper practice. If anything, it is more precisely described as a "people practice", which is one of the reasons so many practitioners find it personally satisfying.

"The Diverse Roles of the Bankruptcy Lawyer"

There are many roles that a bankruptcy lawyer may assume in any one bankruptcy case. These roles include serving as a bankruptcy trustee, as counsel for a creditor of the debtor, as counsel for an official committee, or as counsel for the debtor. In fact, it is not uncommon for bankruptcy practitioners to serve in all of these capacities at sometime during their careers. This diversity in roles contributes to the vibrancy many bankruptcy lawyers associate with the high quality of practice they find in bankruptcy law.

a. The Bankruptcy Trustee.

Bankruptcy trustees are private citizens who serve as members of the panel of trustees for a judicial district. The role of trustee is often assumed by a lawyer. Trustees are appointed to administer bankruptcy cases by the United States trustee of the judicial district where the bankruptcy petition is filed.⁴ The requirements for eligibility to serve on the panel of trustees are that the individual be capable of performing the duties of the trustee.⁵ Because the bankruptcy trustee serves as a fiduciary to the bankruptcy estate,⁶ the duties and the powers attributed to the trustee are centered around the ability of the trustee to collect, preserve and defend the assets that constitute the bankruptcy estate.

As the fiduciary of the bankruptcy estate, the trustee is responsible for preserving, collecting and defending the assets that constitute the bankruptcy estate. In order to fulfill this responsibility, the trustee may be required to bring actions on behalf of the estate and to defend actions by others against the estate.⁷ To carry out these duties as a fiduciary, the trustee is empowered with the authority to investigate the debtor's financial affairs so as to ascertain whether all assets qualifying as property of the bankruptcy estate have been accounted for; to challenge improper claims of creditors; or to raise objections to a debtor's discharge from debts where such relief is inappropriate due to debtor misconduct.⁸ In addition to the responsibility of liquidating the estate, and distributing the proceeds of the estate among the debtor's creditors, the trustee is also accountable to the court and parties in interest regarding the trustee's administration of the case.⁹

Although trustees are also automatically appointed in bankruptcy cases filed under chapter 12 and chapter 13, there is no liquidation of bankruptcy estate for the benefit of creditors. In these cases the debtor is permitted to retain the property of the estate in exchange for the repayment of the debtor's obligations pursuant to a payment plan approved by the bankruptcy court. The trustee still serves as fiduciary of the bankruptcy estate under these chapters, and has the same duties of the chapter 7 trustee to preserve and defend the estate. However, the primary activity of the trustee under these chapters is to make sure that the debtor makes the payments for distribution to creditors as stipulated under the court approved plan.¹⁰

Trustees are rarely appointed in chapter 11 cases. The appointment of a trustee in these cases occurs only if the bankruptcy court finds that "cause" exists, including fraud, dishonesty, gross mismanagement or incompetence.¹¹ If a trustee is appointed under these circumstances, he will be required to take over the business and operate it, or liquidate it if it is the opinion of the trustee that the business cannot be saved through a reorganization.

Whether serving as a trustee or as counsel to a trustee, the bankruptcy lawyer faces many legal, financial and operational challenges.

b. Representing Creditors and Official Committees.

Creditors serve an important role in every bankruptcy case by participating in the process of reviewing, investigating and monitoring the debtor's finances and operations or liquidation.¹² Accordingly, the creditor's counsel has the duty to investigate and raise questions regarding the debtor's assets and liabilities, and operations or liquidation. In performing this duty, creditors' counsel may be required to challenge the claims of other creditors, including their secured status, whether the debtor's assets are being administered in accordance with the provisions of the Bankruptcy Code, and whether a trustee is performing his duties under the Bankruptcy Code. Furthermore, creditors' counsel may analyze and pursue meritorious objections to the debtor's discharge or seek any other affirmative relief that may advance the recovery of his client's claim against the debtor or his property.

In chapter 11 reorganizations, the creditors' role is greatest. Creditors serve as overseers of the debtor's operations, thereby protecting creditors' interests in the assets of the debtor, as well as his possible financial reorganization. Furthermore, creditors are involved in negotiating and sometimes proposing the terms of the plan of reorganization of the debtor's finances. As a result, creditors' counsel plays a major role in a debtor's Chapter 11 reorganization.

Official creditors' committees -- or committees representing other significant groups such as bondholders and shareholders -- may be formed and appointed by the United States Trustee. These committees not only provide oversight of the debtor's operations while in Chapter 11 reorganization, but serve to protect the interests of a designated constituency who have essentially like interests in the case. Counsel to an official committee has the additional challenge of representing the often diverse and diffuse group of individuals and businesses that compose that constituency.

c. Representing the Debtor.

The task of the debtor's counsel in a bankruptcy case will vary considerably depending on the nature of the case, the size and nature of the assets involved, the types of liabilities and claims outstanding against the debtor, and nature of the debtor. Counsel for the debtor is not merely charged with filing bankruptcy forms and making appearances in bankruptcy court on behalf of his

client. He must also advise and counsel the debtor concerning his financial and operational options. This role of financial advisor/educator is one counsel for the debtor must assume if he is to provide meaningful assistance to the debtor seeking to cure his financial distress.

Counsel for the business debtor must be prepared to help the debtor make a sound decision regarding the best course of action to take in seeking bankruptcy relief. Is the condition of the business such that it can be saved through a reorganization; or is it such that a liquidation and termination of the business is the only reasonable course to take? If a business is going to go through a bankruptcy reorganization, counsel for the debtor must be prepared to learn not only the nature of debtor's business, but also become knowledgeable about the industry in which the business operates. This knowledge is essential if counsel for the debtor is going to assist in making the best prognosis for the course of the debtor's future.

In order to provide proper assistance, counsel for the business debtor is required to wear many hats, including litigator, financial analyst, mergers and acquisitions lawyer, real estate lawyer, securities lawyer, tax lawyer and more. This is necessary if he is going to offer constructive and creative solutions in helping the debtor solve its financial problems. With good counsel, the reorganization of a business debtor under the Bankruptcy Code can be a very good solution for a business that needs to turn a bad situation around and survive as a productive and profitable business.

Conclusion

Bankruptcy practitioners appreciate bankruptcy law for both the stimulating legal challenges it provides and for the personal fulfillment one can find in helping the distraught debtor needing financial relief or the concerned creditor seeking repayment. Bankruptcy law is appropriately no longer an "unmentionable" area of specialized practice. Like the bankruptcy practitioner, bankruptcy law merits an "honorable mention" in law and society.



ABOUT THE AUTHOR

Ms. Miles is a member of the Virginia and District of Columbia Bars. She is also a member of the law school faculty at The Catholic University of America, The Columbus School of Law, in Washington, D.C., where she teaches courses in bankruptcy and commercial law. She would like to give special thanks to attorneys Ms. Donna Hall and Mr. Harry Shaia and Mr. Stanley Samorajczyk for their invaluable insights on bankruptcy law practice in Virginia.

