Creditors' Rights & Bankruptcy Section Newsletter

Bruce W. Akerly leads the firm's Creditors' Rights & Bankruptcy Practice Group. He has extensive experience in commercial litigation, bankruptcy, financial restructuring, and creditors' rights.

Greetings:

Many of you may have noticed that we took June off for a little break. It is truly summer in Dallas! Hope you are enjoying your summer!

This month we continue with part three of our three part series on the use of Bankruptcy 2004 Discovery in hearings involving contested matters and trials involving adversary proceedings. We also revisit the impact of a maker's discharge in bankruptcy on a guaranty and shine some light on recent guidance provided by the Fed and agencies regarding deposit reconciliation practices.

As always, enjoy and let us know how we can assist you in your credit and collection needs, If you have any ideas for future article or questions that need addressing, give us a call.
Best regards.

Bruce W. Akerly
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Bankruptcy Litigation – Using The Fruits Of Bankruptcy Rule 2004 Discovery In Contested Matters And Adversary Proceedings (Part III)

Authored by Bruce W. Akerly, Partner
Bankruptcy Rule 2004 discovery should be admissible in merit proceedings involving contested matters and adversary actions – this includes dispositive motions (e.g., summary judgment), final hearings, and trials. In dispositive motion practice, as with hearings and trials on the merits, evidentiary submissions are premised on the Federal Rules of Civil Procedure. For example, Rule 56 of the Federal Rules of Civil Procedure, adopted for application in contested matters and adversary proceedings, provides that a fact can be established by

> citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials. (emphasis added) Fed. R. Civ. P. 56(c)(1)(A).

Dispositive motions equate effectively to trials on the merits. While the standards of review applied by a court in evaluating such motions may be different from those at a final hearing or trial – e.g., whether or to what extent claims have been well-pled and/or are plausible and whether there are genuine issues of material fact in dispute versus whether claims have been established by a preponderance of the evidence – the evidentiary analyzes are the essentially same. Read More Here.

Guarantor Liability Not Affected By Maker's Discharge

Authored by Bruce W. Akerly, Partner
A recent decision out of the Fifth Circuit Court of Appeal reminds us that a guarantor's liability which is not derivative of a note maker's liability and, therefore is not affected by the note maker's discharge of the debt in bankruptcy. This is particularly true when the guarantor's liablity is primary and direct and independent of the maker's obligation. These types of continuing and absolute guarantees have traditionally been held to pass through and are not affected by the maker entities bankruptcy. These guarantees are those in which guarantors waive any and all defenses to the enforcement of a note. In these situations, the unenforceability or invalidity of the underlying debt – notes or loans – as well as bankruptcy proceedings will not impact the liability of the guarantor on the guaranty. Guaranty agreements should be crafted with an eye toward the maker of the obligation not being able to pay the debt for whatever reason.

Fed and Agencies Issue Guidance Regarding Deposit Reconciliation Practices

Guest Authored by Jared Norton, SMU Law School

On May 18, 2016, The Fed and four other agencies—the CFPB, FDIC, NCUA and OCC—issued guidance to ensure financial institutions are aware of their supervisory expectations regarding customer account deposit reconciliation practices. These expectations, although inherently vague, attempt to provide guidance for financial institutions to adopt more efficient deposit reconciliation practices.

The agencies acknowledge that "technological and other processes exist," which provide financial institutions with the capabilities to wholly reconcile discrepancies within deposit accounts. However, the agencies understand some items, "under limited circumstances," are beyond the capabilities of a financial institution's reconciling technology or practice. The agencies consider an item "damaged to the point that its true amount cannot be determined" as an example of a limited circumstance.

Naturally, the laws that govern a financial institution's administration of care and diligence in reconciling credit discrepancies are more stick-focused rather than carrot-motivated. For example, Regulation CC imposes civil liability and other actions by the appropriate federal agency on the financial institution that fails to comply. Section 5 of FTC and Sections 1031 and 1036 of Dodd-Frank forbid any financial institution from practicing unfair or deceptive acts. Thus, a financial institution's deposit reconciliation practice that doesn't comply according to the agencies' expectations may be considered a deceptive practice, thus violating FTC or Dodd-Frank, resulting in penalties.

The Interagency Guidance establishes that financial institutions are expected to adopt deposit reconciliation policies and practices designed to avoid, reconcile or resolve discrepancies that would otherwise disadvantage customers. These expectations appear simple in substance, but might be difficult to practically implement, because despite describing their expectations, the agencies do not necessarily outline any recommended practices an institution may take in order to best comply with relevant laws.

For example, the report merely states that financial institutions are expected to "implement effective compliance management systems that include appropriate policies, procedures, internal controls, training, and oversight and review processes to ensure compliance with applicable laws and regulations." Furthermore, the report suggests the agencies expect financial institutions to adequately provide their customers with information regarding the financial institution's deposit reconciliation practices.

Understandably, this could lead some financial institutions to implement deposit reconciliation practices that are perceivably up to par with this report, but in reality do not match the expectations the agencies have in mind. Thus, various financial institutions may wind up in potentially harmful litigation as these vague expectations are ironed out.

Quote of the Month:

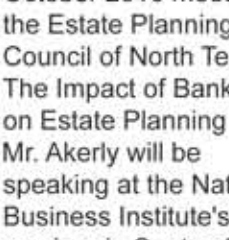
"Remember that this is a game of defense as well as offense and be prepared to protect the areas which you occupy." --- From the Instructions to the Board Game Risk

Latin Phrase of the Month:

"Persona non grata" – fake, thankless, unwelcome

Self-Deprecating Lawyer Joke of the Month:

A persistent job-seeker once appeared before President Lincoln and demanded an appointment to a judgeship. He was informed that there were no vacancies. The next day, while walking along the river, he saw a drowned man being pulled out, and recognized him as a federal judge. He ran back to the White House and demanded the position. "Sorry," said the President, "but the lawyer who saw that judge fall in beat you here by a good five minutes."



In the News:

- Bruce Akerly has been selected by his peers as a Super Lawyer for 2016
- Bruce Akerly has been asked to speak at the October 2016 meeting of the Estate Planning Council of North Texas on The Impact of Bankruptcy on Estate Planning
- Mr. Akerly will be speaking at the National Business Institute's seminar in September on *Increditor Agreements: NEW Case Law, Top Mistakes and Drafting Tips*

What's On Your Mind?

If you have an issue or question you would like addressed in a subsequent e-newsletter, please let us know and we will attempt to do so.

If you enjoyed this E-Newsletter or found the information helpful, please let us know and feel free to pass it along to your colleagues and friends.

If you would like a hard-copy of this E-Newsletter sent to you, please contact [redacted].

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