2022 Bankruptcy at the Beach
Commercial Law Panel – Judge Henderson

Making Your Case: Tips for Effective Advocacy[1]

The legal research process involves both locating legal authorities and determining their importance. Legal authorities may be primary (mandatory) or secondary (persuasive). The Bankruptcy Code will govern many of the issues that arise in connection with a bankruptcy case, and when a Bankruptcy Code provision applies, it is appropriate to begin your legal analysis with the statute itself. Of course, case law construing the applicable statute will also be important, particularly if the court construing the statute has capacity to issue or clarify rules for its jurisdiction. That said, not all statements in a judicial decision are precedential, and it is important to consider the weight of the authorities that you rely on in making your case. Both overstating the weight of persuasive authority and understating the weight of (or ignoring) binding authority can undermine the effectiveness of your legal arguments. Also important, whether bringing a motion, application, objection, or complaint, as the party requesting relief, the filer must make a prima facie case and meet its burden of proof . With these considerations in mind, this paper offers some basic tips (and refreshers) with the aim of helping you make an effective case in bankruptcy.

Remember Canons of Statutory Construction

- When a statute applies, begin your analysis with the plain language of the statute. *See* Klee & Holt, BANKRUPTCY AND THE SUPREME COURT at 15-16, n.52 (2008).
    - The plain language of the statute governs, without regard to legislative history and despite prior practice, unless literal application of the statute produces a result that is at odds with the drafters' intent. *Id.* at 15-16, nn.53-55.
    - Courts must, however, consider legislative history and issues of policy and practice to determine congressional intent, taking care not to "erode a past bankruptcy practice absent a clear indication…that Congress intended such a departure." *Id.* at 17-18, nn.56-57.
    - When Congress employs different language in a successor statute, the bankruptcy court presumes that Congress changed its intent. *Id.* at 18, n.58.
    - "If literal interpretation of the statute produces an unfair result, it is up to Congress to amend the statute to remedy the problem." *Id.* at 20, n.65.
- Bankruptcy Code provisions must be construed to give effect to the entire statutory scheme. *See id.* at 19-20, 26-27, n.106 (internal citations omitted).
- Further, the canon against surplusage dictates that, if possible, every word and every provision is to be given effect, and courts should not interpret a statutory provision in such a way as to cause it to have no consequence. *See id.* at 19-20, n.61 (collecting cases).
    - But "[r]edundancy is not the same as surplusage." *Id.* at 20, n.62.
    - There may be two laws that address the same question, and the court should endeavor to give effect to both. *Id.* (internal citation omitted).
- "A word is presumed to have the same meaning in all parts of the same statute." *Id.* at 21, n.68.
- A statute is not ambiguous simply because it is "awkward and ungrammatical." *Id.* at 20, n.63.

[1] Presentation materials prepared with the assistance of Tiffany Colburn and Kristen Hawley, Law Clerks to Judge Henderson.

Consider the Weight that Cited Judicial Decisions Carry

- "Not all text within a judicial decision serves as precedent. That's a role generally reserved only for holdings: the parts of a decision that focus on the legal questions actually presented to and decided by the court." Bryan A. Garner, et al., THE LAW OF JUDICIAL PRECEDENT § 4, at 44 (2016).
- "The distinction between a holding and a dictum doesn't depend on whether the point was argued by counsel and deliberately considered by the court . . . , but instead on whether the solution of the particular point was more or less necessary to determining the issues involved in the case." *Id.* at 51.
- "Judicial opinions are always premised on a series of assumptions about what the law is. Yet those assumptions—whether implicit or explicit—aren't generally considered precedential. A decision's authority as precedent is limited to the points of law raised by the record, considered by the court, and determined by the outcome. The assumptions a court uses to reach a particular result do not themselves create new precedent or strengthen existing precedent." *Id.* § 6, at 84. Only "if tacitly assumed rules or principles are so essentially involved in the decision that the particular judgment couldn't logically have been given without recognizing and applying them," do they become authoritative. *Id.* at 86.
- Bankruptcy courts are bound by holdings from prior decisions of the United States Supreme Court and published opinions of the Eleventh Circuit Court of Appeals.
    - Unpublished opinions of the Eleventh Circuit are not afforded the weight of binding precedent. *See* 11th Cir. R. 36-2 (2022).
    - Once a vertical authority "has decided an issue of statutory construction, the decision is final and binding in future cases, even if the plain meaning of the text is to the contrary." *See* Klee & Holt, BANKRUPTCY AND THE SUPREME COURT at 19, n.60.
    - It is an open question as to whether decisions of individual district judges in multi-judge districts are binding on bankruptcy courts. *See, e.g.*, *In re Hillsborough Holdings Corp.*, 127 F.3d 1398, 1403 n.3 (11th Cir. 1997) (stating that "since the standard of review would not change either way, we see no reason to decide whether district court decisions may constitute binding precedent for bankruptcy courts.").
    - The decisions of other bankruptcy courts are not binding upon a fellow bankruptcy court. *See* 18 James W. Moore, et al., MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.").
    - Alabama bankruptcy courts routinely give special consideration to decisions of other Alabama district and bankruptcy courts, even if not binding, particularly within a given district.
- Plurality opinions of the Alabama appellate courts are not binding on questions of state law. *See Entrekin v. Internal Med. Assocs. of Dothan, P.A.*, 689 F.3d 1248, 1257-58 (11th Cir. 2012) ("The Alabama Supreme Court has held that '[a]s a 'hornbook' principle of practice and procedure, no appellate pronouncement becomes binding on inferior courts unless it has the concurrence of a majority of the Judges or Justices qualified to decide the cause' . . . . A court's right to pronounce the law includes the right to decide which pronouncements of its judges are law.") (internal citations omitted).

Know Your Burden (Common Examples)

- **Relief from the Automatic Stay**:
    - Section 362(g) sets forth burdens of proof in hearings under Sections 362(d) and (e).
    - However, as Judge Mitchell has explained: "Under subsection § 362(d)(1), the court shall grant relief from the stay upon a showing of 'cause' including the lack of adequate protection of an interest in property. Under subsection § 362(d)(2), the court shall grant relief from the stay of an act against property of the debtor or of the estate if the debtor has no equity in the property and the property is not necessary to an effective reorganization. The movant must carry the initial burden of establishing a prima facie case for relief under § 362(d)(1) and/or (2) before the burden of proof shifts to the debtor. . . . Once the movant establishes sufficient evidence of its prima facie case for relief, the debtor has the burden of proof on all issues other than his equity in the collateral under § 362(d)(2)." *In re Powell*, 223 B.R. 225, 232 (Bankr. N.D. Ala. 1998) (internal citations omitted).
- **Objections to Claim:**
    - A proof of claim "executed and filed in accordance with" the Bankruptcy Rules constitutes "prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f).
    - An objecting party bears the burden of coming forward with "enough substantiations to overcome the claimant's prima face case." *Benjamin v. Diamond* (*Matter of Mobile Steel Co.*), 563 F.2d 692, 701 (5th Cir.1977) (quoting 3A COLLIER ON BANKRUPTCY ¶ 63.06, at 1785 (J. Moore & L. King, 14th ed. 1976)).
    - As Judge Sawyer has explained: "[T]he objecting party has the burden of producing evidence sufficient to meet the evidentiary weight accorded to the claim under the Rules. Although there is a shifting burden of proof . . . the ultimate burden of persuasion rests upon the creditor." *In re Barron*, 325 B.R. 17, 20 (Bankr. M.D. Ala. 2005) (internal citation omitted).
- **Nondischargeability Proceedings:**
    - To obtain a nondischargeability determination, a plaintiff must establish that it has a valid claim—i.e., that the debtor is liable to the plaintiff for a debt—which is governed by state law. *Grogan v. Garner*, 498 U.S. 279, 283 (1991). A creditor who has established a valid claim must then establish its entitlement to except the debt from discharge, which is "a matter of federal law governed by the terms of the Bankruptcy Code." *Id.* at 283-84.
    - The burden of proof in a nondischargeability action is on the party seeking to except the debt from the debtor's discharge, typically the creditor. *See In re Hosey*, 355 B.R. 311, 317 (Bankr. N.D. Ala. 2006) (citing *Grogan*, 498 U.S. at 283-84).
    - The moving party bears the burden of proof on each element of the claim. *In re Fancher*, 802 Fed. App'x 538, 544 (11th Cir. 2020) ("If any one of the elements of the non-dischargeable test are not met, 'the debt is dischargeable.'") (internal citation omitted).
    - Each element of the claim must be proven by a preponderance of the evidence. *Grogan,* 498 U.S. at 291 (1991) ("[T]he standard of proof for the dischargeability exceptions in 11 U.S.C. § 523(a) is the ordinary preponderance-of-the-evidence standard.").