Understanding Your Bankruptcy Colleagues: 21st Century Generalists

BY CARL N. KUNZ III, ESQUIRE

I AM PLEASED TO ANNOUNCE that there will be a bankruptcy-focused article in the *Bar Journal* once per quarter. The first column, authored by my colleague, Chuck Kunz, is an introduction (or re-introduction) to the practice of bankruptcy to the rest of the Delaware Bar. Future columns will focus on cases and issues that primarily will be of interest to Delaware bankruptcy attorneys (although, hopefully, attorneys practicing in other areas of law will also find them of interest). If you have ideas for an article, please contact either of the new co-chairs of the Publications Committee of the Bankruptcy Section, Bruce Grohsgal or Craig Martin. Thank you.

– Jeffrey R. Waxman, Esquire, Chair of DSBA Bankruptcy Section

When I was "voluntold" to write this inaugural article for the DSBA Bankruptcy Section, I wondered how I would explain to the rest of the Bar what bankruptcy attorneys do. I envisioned readers' eyes glazing over as I attempted to explain the nuances of non-consensual third-party releases, the *Stern v. Marshall* doctrine, or "adversary proceedings." I then wondered whether an article might be better received if it explained that bankruptcy attorneys are not (only?) a special breed, subject to speaking in code, but rather are, at their core, consummate generalists. But first we have to build up the wall in order to take it down.

Yes, We Do Speak in Code

We will not apologize for it (at least not publicly). Bankruptcy is a code-based practice. This means that much of what we do is based (at least in part) in the United States Bankruptcy Code. Consequently, bankruptcy attorneys often talk to each other in Code sections, i.e. 363 sales, 341 meetings, 506(c) waivers, and 1111(b) elections. I am sure our annual conferences could be easily confused with a meeting of CPAs, and undoubtedly our odd language is seen by some as exclusionary (or perhaps just silly). In the personal bankruptcy context, we talk about exemptions, chapter 13 plans, discharges, and non-dischargeability complaints. We engage with the Office of the United States Trustee, which is part of the U.S. Department of Justice (and is different than a chapter 7 or chapter 11 trustee).

We also practice under the Federal Rules of Bankruptcy Procedure (which are derived in part from the Federal Rules of Civil Procedure) and various jurisdictions' local bankruptcy rules. As a result, we use phrases like adversary proceedings (a fancy name for a lawsuit that is commenced within the larger bankruptcy proceeding), and avoidance actions, first-day hearings and DIP motions. But, to steal a line from *Pirates of the Caribbean*: "Hang the Code, and hang the rules! They're more like guidelines anyway." And in many cases, they are. But, using the statutory structure of the Code and procedural rules provides us with the unique framework to guide a range of individuals, small businesses, and multinational corporations through myriad issues that must be resolved to conclude a bankruptcy case.

So Why Are We Generalists?

Even if ethical rules might constrain our use of the term "specialists," many of us in Delaware would likely think of our non-bankruptcy colleagues as specialists. Some of us are Court of Chancery litigators, others are IP lawyers, real estate lawyers, tort lawyers, or family lawyers. Rarely do we do it all. When we think of generalists, however, we probably envision a lawyer sitting in a non-descript office, in a non-descript town, negotiating loans, writing contracts or wills, handling a divorce, resolving a landlord/tenant issue, and litigating a criminal matter or car accident case — and often all at once. So why would a bankruptcy attorney be a generalist, you ask? Because we actually do it all. Let me explain.

We litigate (and yes, it is real litigation) — and it is almost always expedited as the future of a business or that business's

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employees require us to move quickly. Bankruptcy attorneys routinely litigate fiduciary duty issues, corporate valuation matters, and issues of lien validity, perfection, and priority for both corporate and personal assets. We contest claims, collection issues, property foreclosures, and fraudulent conveyances. We try jurisdictional and venue issues. We file TRO and PI complaints seeking injunctions. We take and respond to discovery (including the dreaded e-discovery) and we present evidence and question witnesses at trial. And yes, the Federal Rules of Evidence apply.

We handle transactional matters. Bankruptcy attorneys negotiate new loan documents or modify existing ones with a debtor or a lender. We negotiate terms of personal, retail and commercial leases. We draft asset purchase agreements for the sale of assets ranging from entire businesses to unneeded equipment and help clients navigate auctions and sale hearings. We help individuals navigate financial downturns and changes of life circumstances.

We might represent tort claimants who assert claims against a debtor. We may negotiate with insurance companies for access to policy proceeds or for access to funds to defend D&O litigation. We may represent insurance companies who are responsible for defending cases, and sureties who have bonded a project for which the debtor was responsible.

A bankruptcy attorney may be asked to handle matters associated with environmental liability, intellectual property licensing, lease assumption/assignment and Medicaid issues. Our clients may be bankrupt companies or individuals, directors and officers, banks, committees of creditors, construction companies, labor unions, utilities, medical providers, inventory suppliers, state and local governments or, occasionally, a professional sports team.

Additionally, because the Bankruptcy Code in many instances defers to applicable state law, bankruptcy attorneys are required to understand the particular state law that applies to each of the many different issues in the case.

The industries in which we operate are even more diverse. Delaware has been the forum of bankruptcies related to the asbestos industry, oil and gas production and refining industries, funeral homes, nursing homes, hospice companies and hospitals, professional sports franchises, sports apparel and equipment, name brand, big-box and e-retailers, automobile companies and suppliers, high rise buildings and trailer parks, food and beverage companies, and many, many others. Each of the industries have nuances or regulatory requirements with which bankruptcy attorneys must become conversant, keeping the practice both challenging and educational.

Finally, if things do not go our way (or even if they do), we become federal appellate lawyers. Generally, appeals are heard first in the U.S. District Court before heading to the U.S. Circuit Court. Some jurisdictions (but not Delaware) authorize appeals to be heard by a Bankruptcy Appellate Panel (B.A.P.) rather than by the District Court but only on consent of all parties.

Don't Be Afraid Of Us

Hopefully, this brief introduction has reduced the mystery of what we do. While our unique language and customs might peg us as "bankruptcy" attorneys, we are, in fact, general practitioners. So the next time you meet a bankruptcy attorney, ask them what they have been working on. It might surprise you. Just tell them to leave out the code sections.

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