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Q&A With Hodgson Russ' Richard Weisz

Law360, New York (March 22, 2013, 1:03 PM ET) -- Richard L. Weisz is a partner in Hodgson Russ LLP's bankruptcy, restructuring and commercial litigation practice group in the firm's Albany, N.Y., office. He represents debtors, creditors and creditors' committees in Chapter 11 business reorganization proceedings. He conducts trials on business valuation, corporate dissolutions, contested foreclosure proceedings, trade secrets, unfair competition, wrongful eviction in commercial cases, and breach of contract. Weisz has argued appeals to the Second Circuit Court of Appeals and the Appellate Division of the New York State Supreme Court. He is a founding member and past president of the Capital District Bankruptcy Bar Association and past-president of the Guilderland School Board and Congregation Ohav Sholom.

Q: What is the most challenging case you have worked on and what made it challenging?

A: I was chosen to represent a not-for-profit housing agency in an upstate city after its executive director was arrested for suspicion of selling cocaine and cash appeared to be missing. Board members, some of whom were elected officials, found reasons to resign. Lenders and creditors were howling and occupants of the various properties were calling about their status. The local media took a great interest in every aspect of the case.

Fortunately, one employee and one board member stepped forward to work with me to run the case. We were able to develop a Chapter 11 plan, which ultimately provided for a series of ordinary sales of the debtor's property through public auctions conducted in the Bankruptcy Court under 11 U.S.C. §363. At one of a series of auctions, bidding became so spirited among a group of competing local landlords and developers in attendance that one bidder enthusiastically topped his own bid only to be gently reminded by the court that there had been no intervening bid.

The case involved drafting a disclosure statement and plan that was acceptable to all of the various constituencies and suitable to the court, explaining the bankruptcy sale process to numerous business people as well as the media, assuring employees that were providing critically needed maintenance services that they would be paid, negotiating cash collateral agreements and release of lien prices with the bank that was the primary lender and making sure monthly operating statements and other requirements of the bankruptcy process were met.

Although the agency did not survive, all of its administrative fees, taxes, employees and secured debt were paid, and, much to the surprise of many, a small dividend was generated for creditors. Therefore, I considered the case a success.

Q: What aspects of your practice area are in need of reform and why?

A: In upstate New York, many of the Chapter 11 bankruptcies involve family businesses,

even though structured as corporations or limited liability companies. Even though there may be millions of dollars at issue, the client is essentially one or two people. There is no real board of directors or sophisticated note holder or creditor group. Typically, no unsecured creditors' committee is appointed because of the practical limit on professional fees. I think there should be a less costly version of Chapter 11 available to these businesses that are not publicly traded, have less than $25,000,000 of assets and who have not issued bonds or other publicly traded debt instruments.

The court's small business process (11 U.S.C. §101(51)(D) and §1125(f)) is a step in the right direction but the 300-day maximum to file a disclosure statement and plan, and the need to justify an extension of the exclusive period by preponderance of evidence (§1121 (e)(3)) are a disincentive to seeking small business treatment. Many of these businesses have the same issues presented in the larger case. They may very well need a year or more to be able to come up with a workable and confirmable plan. The 300-day maximum is, in my opinion, too risky for these companies and should be eliminated so that small companies could avail themselves of the professional fees and other savings available under the small business procedure without jeopardizing exclusivity. In the alternative, the evidentiary standard required for an extension should be the same as for big cases.

Q: What is an important issue or case relevant to your practice area and why?

A: Stern v. Marshall, 131 S.Ct. 2594 (2011), which deals with the type of cases a Bankruptcy Court can fully and finally determine, is the most significant case because whole areas of practice previously conducted in the Bankruptcy Court may have to be done in the district court or in state court. This is impracticable for many types of what has traditionally been conducted as bankruptcy litigation.

In many cases, a Chapter 11 debtor needs to specifically resolve avoidance actions to generate cash and/or the tactical use in negotiations with creditors. But if final judgment can only be obtained from a district court or state court, the time frame and expense to resolve these matters increase substantially. And if fewer avoidance actions are pursued, there will be less available for creditors and in some cases reorganization will not be possible.

Typically, upstate the courts will not give secured lenders a lien on avoidance actions as part of adequate protection for use of cash collateral. This leaves the debtor a resource to pay professionals and unsecured creditors. Stern v. Marshall threatens this funding mechanism for a Chapter 11 case. The confusion in the court over Stern v. Marshall is becoming an impediment to orderly Chapter 11 case management and timely confirmation and I believe we need another Supreme Court decision to tell us what it meant in Stern v. Marshall.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: When I started as a young associate, the recognized Dean of the Debtor Bar in Albany, N.Y., was Mort Lynn, who also was a part-time city court judge. In those days, most of my work was representing creditors and I frequently was opposed to him. No matter how contentious the matter, he never lost his perspective or his temper. He would also try to come up with a solution that protected his client without offending the creditors. By approaching each disputed matter as a problem that had to be mutually overcome before parties became committed to litigation to resolve the dispute, he kept his cases moving.

I try to follow that example by using problem-solving strategies because I have found that the amount of effort and cost of litigating many of these matters cannot be justified by the incremental improvement in the parties after cost and delay of litigation. Of course, if a creditor is trying to close a case down and will not accept anything short of surrender,

litigation must be pursued fully and vigorously. I have found that if the Bankruptcy Court judge understands that the litigation is essentially for the survival of the case, he or she will (at least subconsciously) root for the reasonable debtor to prevail at trial over an unreasonable creditor. Similarly, if the debtor is overreaching in its demands to creditors, the debtor may have problems. Judge Lynn taught me the old adage is true in bankruptcy litigation as well as on Wall Street — "There is always room for bears and bulls but pigs get slaughtered."

Q: What is a mistake you made early in your career and what did you learn from it?

A: I let a client talk me into filing papers before I thought we should. As a result, the opponent saw my hand, so to speak, before we were ready and adjusted its strategy accordingly. As a result, my client wound up with less than he might have and it took longer. If I had been better able to explain to my client why we needed to wait, I might have withstood his pressure for a speedy resolution and not filed when he insisted. Now I am very deliberate in the timing of my filings, and often use this early case to explain to clients why we have to wait.

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