

5 Ways For Bankruptcy Attys To Nail Their First-Day Motions

By **Matt Chiappardi**

Law360, Wilmington (July 18, 2016, 5:20 PM ET) -- Setting the tone and direction of a Chapter 11 can be one of the most important hearings of a bankruptcy case. But while well-executed first-day hearings look like a breeze, getting that crucial best foot forward is anything but easy. Here, veteran bankruptcy attorneys offer their tips on how to make that initial appearance a success rather than a disaster.

Tell a Story

Bankruptcies are more than numbers on a balance sheet. They're integral parts of the narratives of companies, their histories and the people who bring them alive.

Judges need to know these stories just as much as they need to get a handle on the priority of the creditors and whose liens might be primed, so they can have a better idea of the shape the case might take in the weeks and months to come.

"It's really important to know how a company ticks," said Ryan Preston Dahl of Kirkland & Ellis LLP. "Really give the judge a thorough picture of where you see a Chapter 11 case going. This is an opportunity to tell a judge about the direction of a case you might not have later on."

Giving the complete tapestry of a case also extends to how the papers associated with the requested relief and the evidence backing it up are put together. That means an attorney needs to be as prepared as possible before even setting foot in the courtroom, according to Jay R. Indyke of Cooley LLP.

That goes for the crucial first-day declaration, a witness declaration often from a key employee of the company that provides information about the case, as well as any other top-priority pleadings such as a request for post-petition financing. And witnesses need to be readied even if the chances of them taking the stand seem remote, Indyke said.

"Your first-day declaration should be clear and give the whole history of the case," he said. "Make sure your witness is prepared to testify in support of the declaration or ready for cross-examination or questions from the court."

The story also must extend beyond just a simple presentation, and attorneys need to be ready to continue the narrative once a judge comes back with inevitable questions.

"Treat each and every first-day motion as if you have to get into the nuts and bolts of every corner," said

Seth H. Lieberman of Pryor Cashman LLP. "If the judge says move on, all the better."

Don't Get Greedy

It's important to keep in mind that the core purpose of a first-day hearing is to get vital and urgent relief to keep a company afloat at the start of Chapter 11 before a judge.

That means keeping your requests narrow and tailored only to a debtor's survival in those crucial first few days, according to Lara Roeske Fernandez of Trenam Law.

"You want to ask for only what you need immediately and not reach for the stars," Fernandez said.

The idea goes not only to the nature of the relief being sought, but also its details. While in the end, attorneys might be seeking wider relief in the same motion — such as details on how a debtor-in-possession financing request might ultimately affect the capital structure — for the first day, the ask must be focused only on the short term, said Brian L. Shaw of Shaw Fishman Glantz & Towbin LLC.

Shaw said that attorneys should also resist the temptation to go overboard by requesting relief that may seem necessary right out of the gate, but that most judges will consider to be items that can be dealt with at a later date.

That includes motions to sell assets, deal with the claims process or bonuses for company executives — all of which can wait, Shaw said.

"If you do a really effective job of tailoring your requests — and the contents of your requests — to specifically just deal with your immediate needs, you will be much better received by the judge," he said.

Know the Local Rules

Even though bankruptcy is governed by federal statute, each district has its own particular way of doing things. But these rules are not merely procedural — they can deal with deadlines, pro hac vice applications and how to manage important motions such as DIP loan requests, cash collateral use and bid procedures.

An attorney who either ignores or fails to brush up on these rules is in for an embarrassing day before a judge.

"The last thing you want to be is the carpetbagger coming in who doesn't have the proper respect for the jurisdiction you're going to be prosecuting the rest of the case in," Dahl said.

Local rules go beyond just protocol, and failure to master them before walking into court can mean a real difference for a client when it comes to what is allowed for more substantial relief.

"The various courts have what they're looking for in, say, a DIP motion, and without knowing that, you'll run into trouble," said Brian L. Davidoff of Greenberg Glusker Fields Claman & Machtinger LLP. "In Delaware and the Southern District of New York, judges have a tolerance for a broader range of motions than in California."

And by no means is a first-day hearing the correct venue to debate which local rules are better than others — it's a surefire way to annoy the judge.

"Under no circumstances should you ever tell a judge, either directly or through implication, that this is how they do it in another court," Shaw said.

Know Your Judge

Attorneys might be able to pick the venues for their cases, but they won't be able to pick their judges. Knowing how judges like to run their courtrooms and cases is crucial to avoid getting off on the wrong foot.

"Take the time to learn about your judge," Shaw said. "Every judge has their peculiarities. Tailor your relief as to not get them riled up with regard to their own pet peeves."

Getting to know how judges operate will not only help attorneys avoid sinking clients' requests, but can save attorneys headaches and potential heartaches by preparing them for judges' courtroom demeanor and how they deal with motions some lawyers might mistakenly think are pro forma.

"Some judges have reputations for being more debtor-friendly than others, but the worst you can do is assume," Lieberman said. "I've seen judges put debtors' counsel through the paces on joint administration motions. I've seen utility motions dismissed."

Get Your Adversaries Onboard

Of course, an attorney can't be expected to solve all of the potential conflicts that are going to arise in a bankruptcy case on the first day. But at least for the purposes of getting that crucial immediate relief past the gate, the effort must be made to make as many temporary alliances as possible.

"It will help to avoid disruptions, or at least to minimize them," said David S. Kupetz of SulmeyerKupetz APC.

Part of that effort is making sure all of the relevant parties received proper notice of the filing, which can help avoid both a judge's immediate irritation and conflict later on.

"If you don't give adequate notice, the judge might not consider any of your relief and that could cause tremendous harm," Indyke said.

Indyke added that a good way to ensure the first-day relief is going to come to a judge's desk largely consensual is to reach out to the U.S. Trustee's Office beforehand to get the bankruptcy watchdog's comments, showing it's not part of the opposition.

With other parties in a case, reaching out to keep them in the loop may lead to a surprising consensus — or at least limit costly fights going forward.

"It's very important to reach out to your adversaries," Fernandez said. "It shows your character and that you're cooperating even in an illiquidity instance."

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