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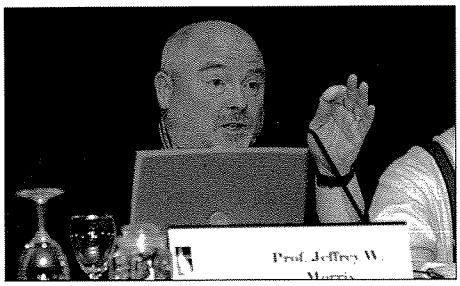
Annual Meeting Attendance Breaks 1,200

A record crowd of more than 1,200 professionals from 45 states and three foreign countries attended ABI's 23rd Annual Spring Meeting in Washington, D.C., April 28-May 1. The event included 16 plenary and concurrent sessions, 20 committee CLE programs and three "Great Debates" on current issues in bankruptcy. Several sessions—including a special judges' roundtable—integrated insights into the new bankruptcy law, signed just eight days before the start of the event. A fundamentals program for new and young professionals attracted another 100 practitioners to the conference.



ABI Resident Scholar Prof. Jeffrey Morris discussed the impact of the new bankruptcy law during the plenary session on legislative developments.

Former ABI President Andy Caine (Pachulski, Stang, et al.; Los Angeles) presented newly-elected board member Becky Roof (AlixPartners LLP; New York) (see p. 71) with ABI's first-ever Outstanding Service Award for her groundbreaking work in developing ABI's Corporate Restructuring Competition.

Syndicated columnist and television commentator George F. Will provided the luncheon keynote address on current

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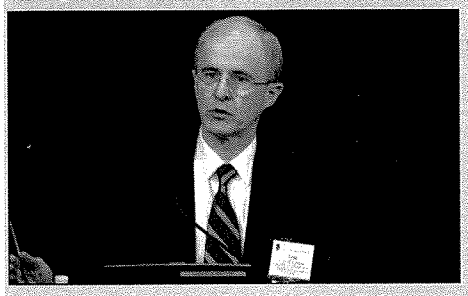
NYC Conference Features Venue Debate

A record crowd of more than 500 professionals attended the Seventh Annual New York City Bankruptcy Conference on May 9. In addition to a judges' panel with the bankruptcy judges of the Southern and Eastern Districts of New York, concurrent sessions covered avoidance actions, pension liabilities, valuation questions, developments in distressed M&A, new precedents in the Second and Third Circuits and hedge fund players, among other hot topics.



Prof. Lynn LoPucki defended his book, Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts.

Ken Pasquale (Stroock & Stroock & Lavan LLP), Alan D. Holtz (Guiliani Capital Advisors LLC), Michael E. Foreman (Proskauer Rose LLP) and Marshall Huebner (Davis, Polk & Wardwell) (l-r) led a panel, "Hey, That's My Property!" that addressed recent developments in substantive consolidation.

A special feature was a very lively debate on venue choice featuring Prof. **Lynn LoPucki** (UCLA School of Law) and a panel of **Michael P. Richman** (Mayer,

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Bankruptcy 2005: New Landscape for Preference Proceedings

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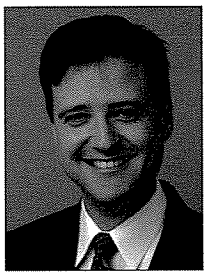
Though largely noted for its reform of consumer bankruptcy law, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (New Code) makes notable changes to non-consumer bankruptcy law. Among these are three substantial changes to preference law. The ordinary-course defense becomes more defendant friendly, and a *de minimis* threshold acts as a defense to certain small cases and creates defense-favorable venue requirements in other small cases. Finally, the right of a trustee to use the one-year "reach-back" to sue non-insider creditors for payments on obligations guaranteed by insiders has been further curtailed. Though potential issues may arise when preference actions become governed by the New Code, the altered landscape of preference law is certainly more defendant-oriented.



Kevin C. Driscoll Jr.

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On the Inside

Meet ABI's Newest Directors and Officers!

Service of Process on a Defendant's Counsel in an Adversary Proceeding

Written by:
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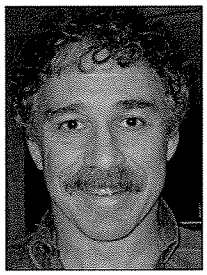
While similar in many respects, there are significant differences between the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Bankruptcy Procedure regarding service of process. Under the FRCP, an individual defendant can be served with process under the law of the state in which the court is located or the state in which the defendant is served.[2] Service of process upon an individual is achieved by delivery of the summons and complaint to the individual, by leaving the documents at the individual's dwelling house or usual place of abode with a person of suitable age and discretion, or by delivering the documents to an agent authorized by appointment or by law.[3]


Michael J. Lichtenstein

The Bankruptcy Rules are somewhat more forgiving. First, the Bankruptcy Rules provide for nationwide service of process and nationwide personal jurisdiction, regardless of the state in which the bankruptcy case has been filed.[4] Additionally, the Bankruptcy Rules specifically provide for service by first-class mail[5] and upon agents.[6] These changes from the FRCP reflect the wide-reaching effect of bankruptcy court jurisdiction and Congress's determination to make service of process less burdensome for debtors.[7] The Tenth Circuit Bankruptcy Appellate Panel (BAP) has suggested that the abbreviated notice procedure is necessitated by the comparatively short time periods and large numbers of people to be noticed in various bankruptcy proceedings.[8] In that case, the Tenth Circuit BAP concluded that notice sent to the address the creditor had designated and had requested for service was sufficient for purposes of service of process.[9]

Defendant's Counsel as Agent

One particular issue that has arisen in connection with service of process under the Bankruptcy Rules is whether a defendant's counsel is an agent upon whom a debtor can serve a summons and complaint in an adversary proceeding.[10] The short answer is that many bankruptcy courts, as well as the U.S. Court of Appeals for the Ninth Circuit,[11] have found that an attorney's implied authority to accept service is permissible as long as due process is served.

In an early case dealing with this issue,[12] the debtor sued a corporate creditor to avoid a judicial lien as a preference and served only the creditor's counsel with a summons and a copy of the complaint.[13] The attorney filed an answer for the creditor, asserting lack of personal jurisdiction because of ineffective service as an affirmative defense.[14] The *Reisman* court dismissed the action, but on reconsideration reinstated the action.[15] Although finding that the attorney was not expressly authorized to accept service, the court nonetheless concluded that the attorney had been implicitly authorized to accept service on the creditor's behalf.[16]

In reaching this conclusion, the *Reisman* court took into consideration the attorney's request for notices, including pleadings, and his active role in the chapter 11 proceeding.[17] Under those circumstances, the court was confident that the creditor defendant would receive actual knowledge of the pending preference action from its counsel.[18]

Similarly, in *In re Ms. Interpret,*[19] the defendant moved to dismiss the debtor's complaint to recover a preferential payment on the grounds of improper service. The creditor, a German limited liability company, was not authorized to do business in the state of New York and had never maintained an office, bank account or other assets in the state.[20] In the adversary proceeding, the debtor served the creditor in care of the creditor's counsel in New York City.[21] After some discovery, at a hearing the evidence demonstrated that the law firm that was served with process had attended four creditors' committee meetings and had participated in one conference call.[22] The attorney was described as a quiet but active committee member.[23]

The debtor alleged that service of process was proper because the creditor had expressly appointed the law firm as its authorized agent by listing the law firm as the party to receive notices in the creditor's proof of claim.[24] Alternatively, the debtor argued that the creditor had impliedly authorized the law firm to accept service because the creditor was active in the bankruptcy through the law firm.[25] The bankruptcy court agreed that the creditor expressly authorized the law firm as its agent for service of process by signing its proof of claim through its counsel.[26] Citing to several previous decisions, the court concluded that due process was satisfied because the creditor received notice that allowed it to defend its position.[27]

The bankruptcy court went further and held that even if the court was wrong about express authority, the record established plainly that the law firm was implicitly appointed as agent for service of process.[28] To find implied agency, courts review all of the circumstances under which the creditor appointed the attorney to measure the extent of authority the client intended to confer.[29] If the purported agent's activities are substantial, service on that agent is valid, even absent express authorization to accept process.[30] The court concluded that if a creditor is active in a bankruptcy case through its counsel, the counsel is implicitly authorized to accept service.[31]

Mass Tort Cases

In re Moralo Co. Inc.[32] involved a debtor and its affiliate, which purportedly filed chapter 11 petitions because of thousands of asbestos-related lawsuits filed in state courts across the country. The debtors moved to permit service of the summons and complaint upon certain counsel as implied or court-designated agents of more than 60,000 asbestos

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2 Fed. R. Civ. P. 4(e)(1).
3 Fed. R. Civ. P. 4(e)(2).
4 Fed. R. Bankr. P. 7004(f).
5 Fed. R. Bankr. P. 7004(b)(1).
6 Fed. R. Bankr. P. 7004(b)(8).
7 *In re Muralo Co. Inc.*, 295 B.R. 512, 520 (Bankr. D. N.J. 2003) (describing important differences between federal and bankruptcy rules, especially pertaining to personal jurisdiction).
8 *In re Karbel*, 22 B.R. 108 (10th Cir. BAP 1998).
9 *Id.* at 112.
10 Fed. R. Bankr. P. 7001 identifies the kind of actions that constitute adversary proceedings governed by the Bankruptcy Rules.
11 In a non-bankruptcy context, the U.S. Court of Appeals for the Federal Circuit has acknowledged that an agent's authority to accept service may be implied in fact. *United States v. Ziegler Bolt and Parts Co.*, 111 F.3d 878 881 (Fed. Cir. 1997).
12 *In re Reisman*, 139 B.R. 797, 799 (Bankr. S.D.N.Y. 1992).
13 The attorney had filed a notice of entry of appearance and a request for notices and had participated actively in the bankruptcy proceeding. *Id.*
14 *Id.*
15 *Id.* at 802.
16 *Id.* at 801.
17 *Id.*
18 *Id., citing United States v. Davis*, 38 F.R.D. 424, 425-26 (N.D.N.Y. 1965) (no fear that service of complaint and summons upon counsel would not be brought home to each principal).
19 222 B.R. 409, 411 (Bankr. S.D.N.Y. 1998).
20 *Id.*
21 *Id.*
22 *Id.* at 412.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.* at 415.
27 *Id., citing to In re Village Craftsman Inc.*, 160 B.R. 740, 745 (Bankr. D. N.J. 1993), and *Green Tree Financial Servicing Corp. v. Karbel*, 22 B.R. 108 (10th Cir. BAP 1998).
28 *Id.* at 416.
29 *Id.*
30 *Id.*
31 *Id. See, also, Luedke v. Delta Airlines Inc.*, 159 B.R. 385, 395 (S.D.N.Y 1993) (denying motion to dismiss for insufficiency of process because Swiss entity implicitly authorized counsel to accept service of process through counsel's active participation on committee and throughout the bankruptcy case).
32 295 B.R. 512 (Bankr. D. N.J. 2003).

plaintiffs who were defendants in an adversary proceeding.[33] The debtors identified 76 law firms that represented the defendants, with approximately 40,000 of the defendants represented by three law firms.[34] Even at an early stage, some of the counsel had been active in the bankruptcy proceedings by appearing at a hearing on first-day orders or related hearings and by allegedly seeking the appointment of an official committee of asbestos claimants.[35]

The court agreed with the debtors that under certain circumstances, a court may find implied authority in an attorney to accept service of process.[36] The court considered the fact that most of the defendants were represented by one of the 76 counsel who had filed notices of appearance in the chapter 11 proceedings and noted that the substance of the adversary proceeding was linked to the state court actions.[37] The court also did not believe there would be any burden on the defendants if the counsel were served as agents.[38] In fact, the court concluded that, in mass tort cases like *Muralo,* service on counsel might actually be better than simply mailing documents that could put actual notice in question.[39] The court concluded that due process would be served through service of process on counsel, considering the bankruptcy court's nationwide jurisdiction and the presence of the thousands of asbestos claimants as defendants in the adversary proceeding.[40]

Citing to the many similar bankruptcy and district court decisions, and adopting the conclusion of these courts, the Ninth Circuit recently held that "the basic concept that a party's bankruptcy attorney can be authorized impliedly to accept service of process on the client's behalf in a related adversary proceeding is neither novel nor inconsistent with general principles of agency law."[41] After an involuntary petition was filed, the trustee sued the debtor's sole shareholder, seeking to set aside fraudulent conveyances in excess of $20 million and seeking to freeze the defendant's assets.[42] The trustee served only the defendant's counsel with the pleadings and the summons.[43] The bankruptcy court found that the defendant's lawyer in the underlying bankruptcy proceeding was impliedly authorized to accept service in the adversary proceeding.[44]

The Ninth Circuit upheld this finding, agreeing that in an adversary proceeding a lawyer can be deemed to be an implied agent to receive service of process when the lawyer has repeatedly represented the client in the underlying bankruptcy case and where the totality of circumstances demonstrates the client's intent to convey such authority.[45] In *Focus Media,* the Ninth Circuit noted that the attorney had appeared extensively in the underlying bankruptcy case and had repeatedly informed the judge and other parties that he was appearing as the defendant's personal lawyer[46] (even though he also represented the debtor corporation). Also, there was evidence that the defendant had previously been served with pleadings in

33 *Id.* at 513-14.
34 *Id.* at 515.
35 *Id.*
36 *Id.* at 519.
37 *Id.* at 520-521.
38 *Id.* at 525.
39 *Id.*
40 *Id.* at 526-27.
41 *In re Focus Media,* 387 F.2d 1077, 1082 (9th Cir. 2004), *cert. denied, sub nom, Rubin v. Pringle,* 125 S.Ct. 1674 (2005). *See, also, In re Baltimore Emergency Services II LLC, et al.,* Case No. 02-6-7576-SD, *Sterling Healthcare Inc. v. AISLIC,* Adv. No. 04-2322-SD (Bankr. D. Md., March 24, 2005, Derby, J.) (denying motion to dismiss for improper service and holding that service on bankruptcy counsel or medical malpractice counsel was sufficient to provide actual notice of adversary proceeding to each movant).
42 *Id.* at 1080.
43 *Id.*
44 *Id.*
45 *Id.* at 1079.
46 *Id.* at 1084.

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and circumstances relevant to the subject business/security valuation. Based on the unique facts of a specific analysis, there are times when the restricted stock DLOM studies may be more relevant, and there are times when the pre-IPO DLOM studies may be more relevant. This is because marketability and lack of marketability are relative (and not absolute) terms.

The concept of marketability of a closely held security is often intertwined with the concept of ownership control of a closely held security. However, these two investment valuation concepts (while generally related) are distinct in both theory and practice. Consideration of how marketability and ownership control (or the lack of either of these two investment attributes) can affect value is an integral procedure in the estimation of business/security valuation discounts or premiums. The investment attributes of marketability and ownership control are fundamental considerations in valuations performed for bankruptcy purposes. However, these investment attributes should also be considered in valuations performed for other purposes. ■

Service of Process

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the bankruptcy case care of the attorney and had not objected.[47] Finally, the defendant had signed a declaration in state court declaring that the attorney was the defendant's general counsel and had been consulted on a variety of issues and had assisted the defendant in connection with the corporation's bankruptcy.[48]

Conclusion

There is a significant body of case law suggesting that in an adversary proceeding, one can serve counsel with process based on implicit authority if two criteria can be met. Counsel must be an active participant in the underlying bankruptcy case. In many instances, this has taken the form of appearing at hearings and participating on the committee of unsecured creditors. Additionally, courts will seek some indication of the client's intent to convey authority to the attorney. ■

[47] *Id.*

[48] *Id.* While other courts focused on the attorney's actions, the Ninth Circuit added an additional requirement that the circumstances demonstrate the client's intent to convey authority.