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EXPERT TESTIMONY IN BANKRUPTCY DISPUTES

Experts are frequently called to testify in bankruptcy disputes. The authors discuss key topics in their management, in particular the rules governing experts in adversary proceedings and contested matters, the use and ownership of the required expert report, strategy in depositions, and the dangers of incentive compensation. They conclude with trial tips and suggestions.

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Many disputes in bankruptcy proceedings turn on expert opinions — of value, of fairness, of feasibility, of other things. This article discusses some of what an expert can expect through the bankruptcy process, from the submission of the report through cross-examination, and in particular, the problem that arises from the tension that exists today between the original purpose of expert reports and their current use.

ADVERSARY PROCEEDINGS AND CONTESTED MATTERS

The Federal Rules of Evidence apply in Bankruptcy cases. A litigant may call to the stand an expert — defined as a witness qualified by “knowledge, skill, experience, training, or education,”¹ to offer an opinion as to a matter if (i) the expert’s specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue; (ii) the testimony is based on sufficient facts or data; (iii) the testimony is the product of reliable principles and methods; and (iv) the expert

has reliably applied the principles and methods to the facts of the case.²

Experts may be called in “contested matters” and “adversary proceedings.” When a dispute arises in a debtor’s reorganization (chapter 11) or liquidation (chapter 7) case, the dispute-resolution process is known as a “contested matter.”³ Contested matters arise frequently, and their subjects range from the quotidian (say, an objection to a fee application) to the pivotal (objections to confirmation of a plan of reorganization). They involve a less formal process than “adversary proceedings,” and for contested matters Rule 9014 imports some, but not all of the formal procedural rules that apply to adversary proceedings.

Adversary proceedings are discrete lawsuits within a bankruptcy case, adjudicated separately from the case,

¹ FED. R. EVID. 702.

² *Id.*

³ FED. R. BANKR. P. 9014. The same is true of cases arising under chapters 9, 12, 13, and 15.

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