LITIGATING FINANCIAL COLLAPSE CASES

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I. INTRODUCTION

This first sections of this paper discusses methods for obtaining insurance payments during bankruptcy. Specifically, it addresses obtaining insurance payments in bankruptcy under property insurance, director and officer liability insurance, business interruption policies, and key man policies. It also discusses obtaining insurance payments during bankruptcy on personal injury claims and life insurance.

The latter sections of the paper focus on Trustee representation and litigation. It is meant to give an overview of both logistical and substantive considerations.

II. PROPERTY INSURANCE

A. Generally

A majority of courts have determined liability insurance policies are property of the bankruptcy estate. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1998); *Tringali v. Hathaway Mach. Co.*, 796 F.2d 553 (4th Cir. 1986); *In re Davis*, 730 F.2d 176 (5th Cir. 1984); *In re Minoco Group of Cos., Ltd.*, 799 F.2d 517 (9th Cir. 1986). An insurance policy and proceeds deemed part of the bankruptcy estate are subject to the protection of the automatic stay.

In *Lexington Ins. Co. v. Buckingham Gate, Ltd., Inc.*, 993 S.W.2d 185 (Tex.App.—Corpus Christi 1999, pet. denied), the insured brought an action against their property insurer and broker claiming misrepresentation of coverage on docks under an all-risk policy. The insurer claimed the statute of limitations barred the DTPA action because the insured served the insurer nine months after limitations expired. The insured's counsel explained the delay was in part due to the insured's creditors putting it into involuntary bankruptcy, and that he moved diligently as soon as the trustee gave him permission to proceed. The court of appeals held because the suit was filed prior to the statute of limitations, 11 U.S.C. § 108(a) tolled the limitations period and the insurer was timely served.

B. Policy Exclusions

In any suit to recover under a contract of insurance, the insurer has the burden of proof as to any avoidance or affirmative defense that must be affirmatively pleaded under the Texas Rules of Civil Procedure. Any language of exclusion in the policy and any exception to coverage claimed by the insurer constitutes an avoidance or an affirmative defense. TEX. INS. CODE § 554.002. Thus, defendant insurers bear a separate, statutorily-imposed burden of proving the applicability of any claimed exclusion that permits it to deny coverage under Texas law. *Venture Encoding Service, Inc. v. Atlantic Mut. Ins. Co.*, 107 S.W.3d 729 (Tex.App.—Fort Worth 2003 pet. denied); *Sentry Ins. v. R.J. Weber Co., Inc.*, 2 F.3d 554 (5th Cir. 1993).

1. Entrustment Exclusions

Entrustment in an exclusionary provision has been defined as "the idea of the delivery or surrender of possession of property by one to another with certain confidence regarding the others care, use or disposal of the property." *Imperial Insurance Co. v. Ellington*, 498 S.W.2d 368, 372 (Tex.Civ.App—San Antonio, 1973, no writ). Entrustment "clearly suggests the existence of a consensual bailment situation where the person to whom possession is delivered to use the property for the purpose intended by the owner and stated by the recipient." *Id*. The controlling element is the intent of the owner of the property. *Balogh v. Pennsylvania Millers Mutual Fire Ins. Co.*, 307 F.2d 894 (5th Cir. 1962).

In *Lone Star Heat Treating Co., Ltd. v. Liberty Mut. Fire Ins. Co.*, 233 S.W.3d 524 (Tex.App.-Houston [14th Dist.] 2007, no pet.), a company in the business of heat treating metal was ripped off by a man who claimed to be picking up steel for a customer. The employee on duty at the time gave the man the steel, and as a result steel belonging to two customers was lost. The company's insurance policy covered the property of others in the insured's possession or control. The insurer denied the company's claim based on a dishonesty exclusion which provided the insurer would not cover dishonest or criminal acts by the insured, its agents/employees, or those it entrusted with property. The trial court granted summary judgment and the court of appeals reversed and rendered in favor of the insured. It reasoned the employee's entrustment to the thief could only be imputed to the company if the employee had actual authority, which he did not have.

In *Nat'l Am. Ins. Co. v. Columbia Packing Co., Inc.*, No. 3-02-CV-0909-BD, 2003 WL 21516586 (N.D. Tex. 2003) (mem. opinion), National American argued that a security guard who had stolen over $200,000 worth of meat from a warehouse that he was supposed to be guarding at night had been "entrusted" with the stolen meat, and thus coverage under the insurance policy for the theft was excluded. The court, considering the plain meaning of the word "entrusted" and several other Texas cases that have defined that word, found that it could not grant National American summary judgment on the submitted entrustment issue because it was unclear as to how much control the guard actually exercised over the meat. Whether or not the guard had permission to (1) enter the locked warehouse; (2) handle any of the meat inventory; and/or (3) remove meat from the premises were all fact questions that had to be considered, precluding the granting of summary judgment.

In *Glick v. Excess Ins. Co.*, 198 N.E.2d 595 (N.Y. 1964), there was a fact issue as to whether a jewelry store operator had entrusted jewelry to a thieving employee. The employee had reentered the store at night to steal the jewelry from the safe. But, although the employee had a key to the store and the combination of the safe, he did not have authorization to open the store or the safe outside the operator's presence. Thus, whether or not entrustment had occurred was a question for the jury, which had evidence to support its finding that the wholesale jewelry dealer could recover against the insurance company for refusal to cover the theft.

2. What Qualifies as Property Damage?

In re ML & Assoc., 302 B.R. 857 (Bkrtcy. N.D. Tex. 2003), involved a general contractor which filed for bankruptcy after being sued by a city for damages in connection with its construction of a municipal complex. The debtor's insurer brought an adversary proceeding to declare its obligations, if any, to defend and indemnify the debtor. The insurer contended the city's complaint did not assert property damage covered by its policy. The policy stated it would cover "damages because of bodily injury or property damage." It defined "property damage" as "physical injury to tangible property, including all resulting loss of use . . . or [l]oss of use of tangible property that is not physically injured." The city alleged that it lost the use of the building at issue because of the damage to the building. Consequently, the court found the property damage asserted was covered.

3. Impaired Property Exclusion

In *In re ML & Assoc.*, 302 B.R. 857 (Bkrtcy. N.D. Tex. 2003), the debtor's insurer also tried to escape the duty to defend by claiming an impaired property exclusion which excluded coverage for property damages to impaired property arising out of a defect, deficiency, inadequacy or dangers condition in the insured's product or insured's work. The city's petition stated damages to the municipal complex building were caused by MLA or its subcontractors. The court found that the policy's definition of impaired property did not include the insured's work, and therefore, the exclusion did not apply.

4. Inventory Exclusion

In *Betco Scaffolds Co., Inc. v. Houston United Cas. Ins. Co.*, 29 S.W.3d 341 (Tex.App.—Houston 2000, no pet.), Betco brought suit against its property insurer for breach of contract after the insurer refused to cover losses from burglaries. Prior to bringing the claim, Betco was burglarized twice. It reported both burglaries to the police, but failed to notify the insurer until discovering an additional shortage in its annual inventory. The insurer denied the claim under the inventory exclusion provision and for failure to provide a sworn proof-of-loss statement within ninety-one days of the original burglaries. The inventory exclusion at issue provided the policy did not cover losses or shortages disclosed upon taking inventory. The trial court granted the insurer's motion for summary judgment. On appeal Betco argued the exclusion only meant a loss reflected on the insured's books instead of an actual shortage of goods based on the Fourth Circuit case of *Betty v. Liverpool & London & Globe Ins. Co.*, 310 F.2d 308 (4th Cir. 1962). It contended that the "paper loss" interpretation was a reasonable interpretation to be construed in its favor as the insured because another court had accepted the interpretation. The court of appeals disagreed with this approach, but stated: "[w]e recognize that a regularly scheduled inventory could coincide with the investigation of a casualty in such a way that the inventory is *intended* by the insured as a means to quantify the loss. In that event, the inventory exclusion provision would not" apply. *Betco Scaffolds Co., Inc.*, 29 S.W.3d. at 347.

5. Unattended Vehicle Exclusion

Am. Stone Diamond, Inc. v. Lloyd's of London, 934 F.Supp. 839 (S.D. Tex. 1996), involved a loss sustained when the rental car of a wholesale jewelry salesman was robbed. Several pieces of jewelry were stolen from the trunk of an unattended rental car while the salesman went into pay for gas at a service station. The property insurer denied the claim because the man was not actually in the car when the theft occurred. It argued on summary judgment that the language excluding losses from vehicles when there is not "actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle" was unambiguous. The court agreed, and also rejected the plaintiff's argument that the policy exclusion was unconscionable on the facts of the case.

C. Pleading

Words matter. It is possible to plead your case into a policy exclusion. Careful pleading can also keep your case alive.

In *In re ML & Assoc.*, 302 B.R. 857 (Bkrtcy. N.D. Tex. 2003), a general contractor filed for bankruptcy after being sued by a city for damages in connection with its construction of a municipal complex. The debtor's insurer brought an adversary proceeding to declare its obligations, if any, to defend and indemnify the debtor. As to the duty to defend, the court explained the duty to defend was "'triggered if at least one of the several claims in the [city's] complaint *potentially* falls within the scope of coverage, even if other claims do not.'" *Id.* at 862 (citing *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720, 726 (5th Cir. 1999)) (emphasis in original). The court found the duty to defend existed because the city's pleadings that negligent performance (a covered claim). It further stated: "The complaint does not allege that MLA intended not to perform [under the contract] or MLA intended to cause damage to the building. Rather, the court infers from the complaint that the city alleges that MLA's negligence in performance caused the damage. . . ." *Id.*

III. Director and Officers' Liability Insurance

A. Generally

Director and officer liability insurance ("D&O insurance") is often used by corporations to induce talented individuals to accept positions of authority by providing them with a shield from personal liability against potential claims arising out of their duties in the corporation. *See In re La. World Expo., Inc.*, 832 F.2d 1391, 1398 (5th Cir. 1987).

There are three basic types of D&O insurance—corporate indemnification coverage, individual liability coverage, and entity coverage. Corporate indemnification coverage provides reimbursement to a corporation for the expenses it incurs as a result of indemnifying officers and directors for wrongful acts. Individual liability coverage is paid to the officers and directors when a corporation does not indemnify them. Finally, entity coverage provides insurance against claims brought against the corporation which are not covered in any other way.

Additionally, while the automatic stay may prevent litigation against a corporate debtor from proceeding, it does not necessarily protect officers and directors from claims asserting their contribution to the corporate debtor's failure. *See Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987). Whether proceeds of a D&O policy are considered property of the bankruptcy estate is a key determination. Executives attempting to draw from the policy for protection are considered creditors, and thus subject to the automatic stay, if the policy and its proceeds are deemed to be part of the estate. 11 U.S.C. §362. However, if proceeds are not considered part of the estate, they are not subject to the bankruptcy priority rules, and will be available for corporate executives to fund their individual defense costs.

In re La. World Expo., Inc., 832 F.2d 1391, 1398 (5th Cir. 1987), involved a corporate debtor which purchased D&O insurance proceeds pre-petition in order to protect its officers and directors against potential liability. The policy had both indemnification and liability coverage subject to a single coverage limit. The corporate-debtor's creditors filed suit against the officers and directors for mismanagement, and the executives filed a claim with the insurer for legal expenses. The creditors sought to prevent the reimbursement of legal fees by asking the bankruptcy court to deem the proceeds property of the estate subject to the stay. On appeal, the Fifth Circuit held the proceeds of the liability portion were not property of the corporate debtor's estate. It did not address whether the indemnification proceeds of the policy were part of the estate.

In *In re Edgeworth*, 993 F.2d 51 (5th Cir. 1993), the Fifth Circuit further expanded its jurisprudence on the subject of insurance proceeds and the bankruptcy estate. It explained, " whether the debtor would have a right to receive and keep [] proceeds when the insurer paid the claim" is the operative question in determining whether insurance proceeds are property of the estate. *Id.* at 55. Following that reasoning, it would seem indemnification proceeds would not be property of the estate. However, answering the *Edgeworth* question in regards to indemnification proceeds is often fact-intensive and not as simple as it seems.

In *In re Vitek*, 51 F.3d 530 (5th Cir. 1995), a prostheses manufacturer filed for bankruptcy after several products liability claims were filed. The trustee gained permission from the bankruptcy court to enter compromises with the corporate-debtor's liability insurers to protect the carriers from third-party suits. Executives from the corporate debtor objected to the court approved settlements because it left them exposed to litigation and denied them liability coverage under the policy. The Fifth Circuit recognized the analysis presented in *Louisiana World Exposition* and *Edgeworth* was incomplete. Namely, it did not address the question of how to treat proceeds when the policy- owning debtor is not the only insured, the rights of the other insured are not derivative of the primary insured, and the potential liability exceeds the aggregate limits of insurance coverage. However, the court declined to address the open question. Instead, it hung its hat on the fact the insurance coverage at issue was entity coverage to protect the corporation itself, and declined to recognize the executive's property interest in the D&O proceeds.

In *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), parties filed a motion with the bankruptcy court to approve a settlement agreement between the debtor and the debtor's D&O insurer. The bankruptcy court approved the settlement and entered an order enjoining third-party claims against the insurer. The court of appeals reversed. It held the bankruptcy court did not have jurisdiction to enjoin the third-party tort claims not to be paid out of D&O policy proceeds. However, it found there was authority to enjoin third party contract claims, but such an injunction was in excess of the court's authority because it effectively discharged the debts of a non-debtor.

B. Exclusions

D&O policies were meant to cover acts of negligent mismanagement on the part of corporate executives, and often contain exclusionary provisions for claims arising out of fraudulent, dishonest, or criminal acts. D&O policies also excuse claims arising from intentional bad acts, self dealing, and claims between two insureds.

1. Regulatory Exclusion

In *Fidelity & Deposit Co. of Md. v. Connor,* 973 F.2d 1236 (5th Cir. 1992), a bank's D&O liability insurer petitioned for a declaratory judgment that it did not owe a duty to cover claims FDIC claims against the bank's former directors. In the underlying action, the bank was declared insolvent and the FDIC filed suit against several former directors. One defendant former director then filed a third party action against the other former directors who had not been sued by the FDIC. The district court granted the insurer's summary judgement in the declaratory action based on the "insured v. insured" and regulatory policy exclusions. The court affirmed, holding: (1) the policy's regulatory exclusion applied even though the FDIC could statutorily stand in the shoes of the bank, its stockholders, depositors, and directors; and (2) the exclusions did not violate public policy.

In *Bartley v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 824 F.Supp. 624 (N.D. Tex. 1992), former officers and directors of a bank petitioned for declaratory judgment regarding an insurer's coverage obligations under a D&O liability policy and superseding binder. The court granted the Defendants' Rule 12(b)(6) failure to state a claim motion. It found the binder incorporated an unambiguous regulatory exclusion which did not violate public policy and was not unconscionable. The court also rejected the plaintiffs' arguments that the reasonable expectation doctrine or the doctrine of implied warranty of fitness provided a basis for plaintiffs' claims.

2. Contract Exclusion

In *Admiral Ins. Co., Inc. v. Briggs*, 264 F.Supp.2d 460 (N.D. Tex. 2003), the D&O insurer sought a declaratory judgment that it did not have a duty to defend a corporation and its executives due to a coverage exclusion for cases arising out of contracts. The court applied the "eight corners" rule— only looking to the four corners of the most recent petition in the underlying manner and the four corners of the insurance policy at issue. The underlying action asserted the corporation made misrepresentations in order to induce the plaintiff to lease property in return for payments of stock rather than cash. The court noted that the underlying claim was based in securities fraud, not contract, and that the contract only provided the context in which the stock fraud took place. Accordingly, it denied the insurer's motion for summary judgment on the contract exclusion.

3. Insured v. Insured Exclusion

In *Fed. Ins. Co. v. Infoglide Corp*., No. A-05-CA-189-AWA, 2006 WL 2050694 (W.D. Tex. July, 18, 2006), Infoglide's current directors and officers sought coverage for a state court lawsuit filed against them by former Infoglide directors and officers. The insurer moved for summary judgment in the coverage action based on the "insured v. insured" exclusion provided in the policy. It argued the plaintiffs in the underlying suit were "insured persons". The current officers and directors argued the presence of one insured among multiple plaintiffs in the underlying suit should not be used to bar coverage of all plaintiffs. The court agreed and concluded that the inclusion of one "insured" as a plaintiff did not bar coverage when there are also plaintiffs who are not "insureds".

In *Fidelity & Deposit Co. of Md. v. Connor*, 973 F.2d 1236 (5th Cir. 1992), a bank's D&O liability insurer petitioned for a declaratory judgment that it did not owe a duty to cover claims FDIC claims against the bank's former directors. In the underlying action, the bank was declared insolvent and the FDIC filed suit against several former directors. One defendant former director then filed a third party action against the other former directors who had not been sued by the FDIC. The court of appeals found the "insured v. insured" exclusion applied to the third-party action. It noted, "although a number of courts have recognized that, when both are suing the bank's officers and directors, an insured bank and its receiver share equivalent status under an insured v. insured exclusion, we do not reach this issue in the case before us." *Id.* at 1244.

In *Voluntary Hosp. of Am., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 859 F.Supp. 260 (N.D. Tex. 1993), insured brought suit against employer to determine coverage under D&O policy. The underlying suit involved a shareholder derivative action which was prosecuted with active assistance of a former officer and director. The insurer argued indemnification coverage was barred based on the insured v. insured exclusion. The exclusion stated there was no coverage for actions against the company brought with the active participation of any insured. It defined "insured" as past, present, or future directors and officers. The company argued that definition of the word "insured" was ambiguous in the way that the insurer sought to employ it. The trial court agreed with the insurer's interpretation and granted summary judgment.

4. Failure to Comply with Notice Provision

In *Fed. Ins. Co. v. CompUSA, Inc.*, 319 F.3d 746 (5th Cir. 2003), insurer moved for declaratory judgment that it did not have to indemnify CompUSA and its chief executive officer. CompUSA intentionally failed to notify the insurer of the underlying lawsuit based on the evaluation that it was without merit. CompUSA proceeded defending itself through the three week jury trial which resulted in a multimillion dollar verdict. It then sought indemnification. The court of appeals held the policy qualified as a "claims made" policy even though it included an extended reporting period, and thus, the denial of coverage could be based on the insured's failure to comply with the notice provision in a timely manner.

C. Pleading

Beware when drafting your pleadings. It is possible to plead yourself into a policy exclusion. "In general, a coverage determination does not consider matters outside the policy and the pleadings." *Chapman v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 171 S.W.3d 222, 226 (Tex.App.—Houston [1st Dist.] 2005, reh'g overr.) (citing *Capital Bank v. Commonwealth Land Title Ins. Co.*, 861 S.W2d 84, 88 (Tex.App.—Houston [1st Dist.] 1993, no writ)). Courts focus on the facts asserted to show the origin of the damages, not the legal theories, and "indulge a liberal interpretation of those allegations." *Fed. Ins. Co. v. Infoglide Corp*., No. A-05-CA-189-AWA, 2006 WL 2050694

(W.D. Tex. July, 18, 2006) (citing *Cullen/Frost Bank v. Commonwealth Lloyd's*, 852 S.W.2d In *Chapman v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 171 S.W.3d 222, 226 (Tex.App.—Houston [1st Dist.] 2005, reh'g overr.), a management consulting corporation and one of its officers and directors filed suit against their D&O insurer for reimbursement for the defense and settlement of a prior lawsuit involving the executive. The prior lawsuit at issue was brought against the executive by his ex-wife, who was seeking to enforce the amounts awarded to her in their divorce decree ("enforcement suit"). The insurer refused to defend on several grounds, and the trial court granted its motion for summary judgment. Applying the eight corners rule, the court of appeals examined the pleadings in the enforcement suit and the policy to uphold the underlying decision because the facts in the underlying petition fell outside the scope of coverage.

IV. BUSINESS INTERRUPTION POLICY

South Tex. Med. Clinics, P.A. v. CNA Fin. Corp., No. H-06-4041, 2008 WL 450012, slip op. (S.D. Tex. February 15, 2008), involved civil authority coverage for business interruption losses occurred as a result of a civil authority ordering the evacuation of Wharton County, Texas because Hurricane Rita was projected to land there. The insured owned and operated three medical clinics in the county and a four in adjoining counties which were closed while the evacuation order was in effect. The clinics and other nearby property did not suffer physical damages because the storm took a different path. The insured sought business interruption coverage and the insurer denied the claim. The policy stated it would cover losses sustained due to civil authority prohibiting access due to direct physical damage or loss to property other than the insured's premises. Whether the interruption that was "due to" property damage which occurred in Florida satisfied the policy's coverage provision was at issue. The court In *Finger Furniture Co. Inc. v. Commonwealth*

252, 255 (Tex.App.—Dallas 1993, writ denied)).

found: "When, as here, the only relevance of prior damage to other property in deciding whether to issue a civil authority order that would preclude access to the insured's property is to provide a basis for fearing future damage to the area where the insured property is located, the causal link between the damage and the civil authority order is missing." *Id.* at 10.

In *Tex. Indus., Inc. v. Factory Mut. Ins. Co.*, 486 F.3d 844 (5th Cir. 2007), an insured cement plant sued its business interruption insurer for coverage after fire damaged one of its kilns. The kiln did not operate for a total of twenty three days, ten of which were part of a pre-planned outage, and partially operated for four days. The parties stipulated to the actual loss of $3,916,905 minus the TXI's deductible of "15 Day's Value Time Element of the Objects Experiencing the Loss or Damage." The defendant's deductible calculation came to an amount more than the actual loss, and the TXI's deductible calculation came to an amount substantially less than the actual loss. Both filed for summary judgment and the trial court found in favor of TXI. The court of appeals examined each party's calculation of the deductible and found both interpretations reasonable. It affirmed the trial court, noting that insurance contracts subject to more than one reasonable interpretation must be construed in favor of the insured.

In *Bexar County Hosp. Dist. v. Factory Mut. Ins. Co.*, 475 F.3d 274 (5th Cir. 2007), the insured hospital brought a breach of contract action against its business interruption insurer asserting the insurer miscalculated the deductible for interruption caused by damaged and leaking pipes in the air conditioning system. The court of appeals affirmed the trial court, holding the insurer reasonably calculated the deductible as one day's worth of the insured's total projected operating revenue rather than as a pro rata share of insured's replacement rental expense.

Ins. Co., 404 F.3d 312 (5th Cir. 2005), the insured furniture company brought a declaratory judgment action against its business interruption insurer to recover sales losses from when the store was closed due to flooding. Specifically, the flooding prevented the insured's employees from accessing the store that contained the central computer system. As a result, none of the stores located in Houston could open. Both parties stipulated to a gross-earnings loss of $325,402.86, but the insured also sought $16,626.46 in expenses incurred to determine its claim. Both parties moved for summary judgment and the trial court granted the insured's motion including an award of attorney's fees. The insurer argued it should be entitled to consider post-storm profits (caused by the company slashing prices the following week) to determine the business interruption losses. The court of appeals rejected this argument because the policy specifically stated that business interruption losses would be calculated based on historical sales. It also sustained the award of attorney's fees.

In *Lambrecht & Assoc., Inc. v. State Farm Lloyds*, 119 S.W.3d 16 (Tex.App.—Tyler 2003, reh'g overr.), a staffing agency sought damages from the interruption of its business caused by a computer virus infecting its server. The agency was required to acquire a new server, new software, a new operating system, and manually re-enter much of its data. It also suffered a loss in income because its employees could not connect with customers through electronic communications. The insurer denied the claim on the grounds the occurrence was not accidental and the damage was not physical. The trial court granted the insurer's motion for summary judgment, and the court of appeals reversed. It explained that whether or not an act is intentional versus accidental should be determined by looking at the events from the insured's perspective. The court further found the software, server, operating system, and business income loss were damages covered by the plain language of the policy.

V. KEY MAN POLICIES

In *Allen v. United of Omaha Life Ins. Co.*, 236 S.W.3d 315 (Tex.App.—Fort Worth 2007, pet. denied), Fred Allen of Stoneleigh Financial L.L.C. purchased a $1 million key man policy. He named Stoneleigh as the applicant/owner of the policy and CreditWatch Services L.P. (a related entity) as the sole beneficiary. The beneficiary merged with another company and took the new company's name (CreditWatch Services, Ltd.). The merged company changed its name to CreditWatch Services, LLC. The beneficiary on the key man policy was never changed, and Mr. Allen died on Christmas day 2002. After investigating the death, the insurance company issued a check payable to "CreditWatch Services" and CreditWatch Services, LLC deposited the check in one of its accounts. Mr. Allen's widow and surviving children then filed suit against the insurer and others for paying the proceeds, negligence, and tortious interference with an inheritance and conspiracy to commit fraud. The trial court granted all defendants' summary judgment. The appellate court found the right to benefits under the policy was effectively transferred at the merger without further action, and upheld the trial court's decision.

In *Shaw v. Maddox Metal Works, Inc.*, 73 S.W.3d 472 (Tex.App.—Dallas 2002, reh'g overr.), Ray Shaw's widow sought recovery from his employer Maddox Metal Works and its owner Maddox for breach of oral contract for a lifetime annuity after the Ray's death. Ray had worked for Maddox Metal for over twenty years when he was diagnosed with cancer. His widow asserted she, Ray, Maddox Metal, and its owner Maddox entered into an oral contract to provide her with a lifetime annuity equal to six percent of the proceeds of a key man policy plus a payment of $100 per mill stone sold by Maddox Metal. Maddox Metal made payments equal to the six percent and mill stone proceeds for approximately two years before discontinuing the payments. The trial court granted Maddox Metal's motion for summary judgment on the grounds the contract was unenforceable due to indefiniteness, lack of consideration, and the statute of frauds.

The summary judgment evidence included both deposition and affidavit testimony of Ray's widow regarding consideration. The affidavit stated the agreement was not solely supported by Ray's past performance, but also his agreement to continue working until he died. It was struck by the trial court on the grounds it contradicted earlier deposition testimony that Ray's past performance was the consideration for the agreement. The court of appeals found the trial court abused its discretion by striking the affidavit and found a fact issue existed on the issue of consideration. Relying on the evidence of the oral agreement and the two years of payments, the court of appeals also found a fact issue existed regarding whether the terms were indefinite. Finally, the court of appeals found the oral agreement for the lifetime annuity was capable of being performed in one year and did not violate the statute of frauds.

Seymore v. Am. Engine & Grinding Co., 956 S.W.2d 49 (Tex.App.—Houston [14th Dist.] 1996, no writ), involved a key man policy purchased to insure the life of Jack Seymore, who worked his way from the ground up to president in a small motor manufacturing and rebuilding company. Jack owned a significant portion of the company's stock. He and the board of directors for the company were concerned about the corporation's ability to purchase his shares in the event of his death. It was decided that Jack would purchase a key man policy to provide funds for the stock purchase. The policy Jack purchased named his family trust as the beneficiary and an agreement between the trust and Jack (as president of the corporation) provided benefits would be paid to the trust after reimbursing the company for premium payments. The board of directors rejected this arrangement, and the trust assigned its rights to the company. Jack, his wife, and the company then entered an agreement for purchase of his shares with the proceeds upon his death. Upon Jack's death, the company notified his widow it would purchase his shares at their current value— which was about $300,000 less than the policy proceeds. She refused to honor the agreement, and the company sought declaratory relief. The trial court the company's request for directed verdict, and the widow's cross/counter claims were overruled. The court of appeals affirmed, finding (among other things) assignment of the policy was supported by consideration and the trustee of the family trust was authorized to execute the assignment.

In *Scaling v. Old Republic Life Ins. Co.*, 50 F.3d 1033 (5th Cir. 1995)(not designated for publication), the president of BPI sold Jack Blake of Blake Publishing his company's right to publish community directories (similar to the Yellow Pages). The agreement included ten year a royalty payment to BPI. BPI's president was concerned about what would happen in the event of Blake's death because Blake Publishing was just getting underway. The two agreed to get a life insurance policy on Blake's life, payable to BPI. A ten year term policy was purchased, and indicated that it was a key-man policy. Later, BPI's president, Scaling, personally purchased the contract from BPI and notified the insurer but not Blake. Texas law requires a change in beneficiary to be made by the insured in writing. When Blake died Scaling applied for and received the policy proceeds. One year later, Scaling sued Blake Publishing for breach of contract and the Blake Publishing asked for an offset for the insurance proceeds.

The state trial court held Scalding could recover on the contract claims and that Blake Publishing was entitled to an offset. The Texas appellate court affirmed in part and reversed in part, finding: Scalding and Blake had a key man relationship at the time the policy was issued, but the relationship ended prior to Blake's death because Blake withdrew from running Blake Publishing due to illness. However, the court held Scaling retained an insurable interest in Blake's life because he was a creditor. Scaling then issued the above cited federal action to recover from the insurance company and broker for misrepresentation, and the trial court granted defendants' motion for summary judgment. The court of appeals affirmed, noting the only way Scaling could assert a cause of action against the insurer and broker was based on the representations made to him about the legal effect of the change in beneficiary from BPI to In *In re Edgeworth*, 993 F.2d 51 (5th Cir. 1993), a third party sought relief to bring a medical malpractice action against the debtor-doctor after the bankruptcy discharge. The potential plaintiff conceded she only wanted to bring suit in order to secure a liability judgment and collect from the debtor-doctor's malpractice insurance. The court explained that a discharge injunction does not affect the liability of liability insurers. It reasoned: "it makes no sense to allow an insurer to escape coverage for injuries caused by its insured merely because the insured receives a bankruptcy discharge." *Id.* at 54. The court held the potential plaintiff's failure to file a claim in the bankruptcy proceeding only discharged the liability claim as to the individual debtor-doctor, and did not "impair the right to file suit against any other party who may be liable on the debt." *Id.* at 55 (citations omitted).

In re Sfuzzi, Inc., 191 B.R. 664 (Bankr. N.D. Tex. 1996), involved a personal injury plaintiff who brought a pre-petition action for damages caused by a patron driving drunk after leaving the debtor-restaurant's place of business. The debtor-restaurant was covered by both a general liability insurance policy, as well as an umbrella policy. The debtor's insurer and plaintiffs reached a settlement after the bankruptcy court granted plaintiffs relief from the stay. The bankruptcy court then considered whether the proceeds to pay the settlement were property of the bankruptcy estate. It concluded that insurance polices are property of the bankruptcy estate, and the determination of whether insurance proceeds are part of the estate depended on the individual facts. The court explained: "the question to be answered is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on the claim." *Id.* at 668. If yes, the proceeds are property of the estate. If no, the proceeds are not property of the estate.

Scaling, but found this argument waived because it was not briefed.

VI. PERSONAL INJURY CLAIMS

In *The Philadelphia Indemnity Ins. Co. v. Stebbins Five Co.*, No. 302-CV-1279M, 2004 WL 210636 (N.D. Tex. 2004) (mem. opinion), plaintiffs in the underlying litigation were awarded punitive damages after the insured long term care facility negligently injured their relative. The insurer sought a declaration that it did not have to indemnify its insured for the punitive damages award. The insurer argued punitive damages did not fall under the policy because they were awarded to punish the insured, not "because of the injury." The court rejected this argument and further found that "malice" finding which justified the punitive damages award could not be used by the insurer to argue the claim fell under the expected or intended exclusion. It also held the plaintiffs in the underlying action could directly recover the judgment from the insurer under the policy's "no action" clause.

VII. LIFE INSURANCE

"The interest of the debtor as beneficiary of [a life insurance] policy is distinct from his ownership interest: each interest has certain rights and privileges. It is entirely within the contemplation of the statutory language that differing interests in the same property will accrue to an individual at different points in time." *In re Poynor*, 68 B.R. 919, 923 (Bankr.N.D.Tex.1987) (citation omitted).

In *In re McLain*, No. 06-10874, 2008 WL 274403 (5th Cir. Feb. 1, 2008), a Chapter 7 trustee asserted an interest in proceeds of a life insurance policy acquired by an individual debtor post-petition with allegedly undisclosed cash on hand. The Court of Appeals held, if the undisclosed funds were used to make the first premium payment on the life insurance policy, the trustee may have a property interest in some portion of the proceeds. It reasoned, the purchasing funds would have been subject to the trustee's control as part of the bankruptcy estate if properly disclosed.

In re Trautman, 469 F.3d 366 (5th Cir. 2007), involved a debtor-owner who filed under Chapter 7 and sought to exempt the surrender value of his whole life insurance policy tendered to him by check pre-petition. The court explained, Texas law clearly exempts money paid to a debtor-beneficiary of a term life policy as long as it can be traced to that source. It found, In *Tamez v. Certain Underwriters at Lloyd's, London, Int'l Acc. Facilities, Inc.*, 999 S.W.2d 12 (Tex.App.—Houston [14th Dist.] 1998, pet. denied), the families of two convenience store employees who died on the job brought an action against the employer, accidental death insurer, and broker to recover proceeds. The trial court entered summary judgment for the defendants. The court of appeals reversed in part and affirmed in part. It found the family members had standing to challenge the employer's insurable interest in the employees' lives and that the employer lacked an insurable interest in the lives of its employees. Accordingly, the court of appeals held the employer could not designate itself as the beneficiary of the accidental death policy or receive the proceeds. Finally, it held a fact issue existed regarding whether the employer held the proceeds in constructive trust for the families because it had not insurable interest in its employees, and remanded the issue back to the trial court.

VIII. RECOVERING WHERE THERE ARE NO ASSETS

A. First Steps

As a Trustee or a Trustee's representative, your first step will be to preserve all business and financial records, including all e-mails, documents, and other data. Be very careful to examine all contracts to determine if they should be assumed in order to remain an assert of the estate or to become an asset of the estate or to maintain a cause of action, and check the contracts for any breaches by other parties. Also

however, the surrender value check paid to the debtor-owner of the policy did not constitute a "benefit" or a "cash value" pursuant to Tex. Ins. Code § 1108.051. It further concluded: "Exempting all money traceable to a surrendered whole-life policy would allow people to use such policies merely to avoid creditors." *Id.* at 370. Thus, it concluded money from a surrendered whole life policy is not exempt under Texas law.

ensure that all insurance policies are current and that deadlines for any upcoming premiums are paid and file any claims necessary. Ensure that all procedures, particularly time deadlines, are followed for any claims filed under the insurance policies.

Next, organize and preserve all this information so it can be legally and factually analyzed. Try to have professionals capable of such analysis review the information for potential causes of action as early as possible.

B. Small Business Bankruptcies

Many of the individuals who filed for bankruptcy had to because they were the sole proprietor of an unsuccessful business. Here, the Trustee should not only look for potential causes of action that the business owner may have had, but also any causes of action that the business would have had. If the individual conducted business through a corporation, the Trustee may be able to employ an alter ego or reverse veil piercing.

1. Look At Parent Companies

When dealing with a subsidiary, look to the parent company. It does not matter what the legal form of the debtor is, if someone or something owns the controlling majority, that owner can be a "parent" for the Trustee's purpose.

Carefully examine all transfers or transactions from the debtor that might be "upstreaming" assets or value to the parent and the debtor's detriment prior to the petition date. An upstream transfer can take the form of a complex financial restructuring of an entire corporate family or something as simple as the parent making withdrawals from the debtor's bank account.

Also examine transactions for "downstreaming." As upstream transfers of assets, downstreaming is a transfer of debt from the parent to the debtor. This too can take complex forms, like an intra Note that if the parent is the sole owner of the debtor and is the guarantor of debtor's debt, the parent does not face liability for upstreaming or downstreaming transactions because to the creditors the assets are essentially in the same pocket. *Trenwick American Litigation Trust v. Ernst & Young*, 906 A.2d 168 (Del. Ch. 2006). If, however, a creditor would be in a higher class on the debtor than on the parent or if there are different shareholders in the debtor, then the creditor could be negatively impacted by such transactions and the parent would face liability for such transactions.

If the upstreaming or downstreaming transactions occurred in a substantial amount over a long period of time, the Trustee can bring a cause of action against the parent. If the cause of action is successful and the parent is solvent, a creditor could recovery 100% of its claim instead of the amount associated with an isolated transaction. This could turn an estate with no assets into a case with 100% recovery, just by looking up.

2. Look Inside the Company Itself

Trustees are familiar with setting aside transfers to insiders, but these insiders may also be labile for breaching their duties to the debtor, even if they did not receive a transfer. Insiders, or officers, directors, and other controlling persons, are the people who were supposed to be managing the debtor's business. Therefore, they likely owed fiduciary duties to the debtor and these duties can then run to the creditors after the debtor enters insolvency.

Fiduciary Duties include:
1. The duty to use due care (i.e. a duty to not be negligent)

company restructure of debt, or simple forms, like the debtor paying the parent's bills.

How do you spot upstreaming or downstreaming? Ask: Was the debtor worth more before the transaction with the parent? If it was, the parent owes the estate money.

2. The duty of loyalty (i.e. don't intentionally do harm or have a conflict of interest)
3. The duty to manage the affairs and assets of the debtor such that the assets are the same or better at the time bankruptcy is filed than when management became aware that the company was insolvent.

Fiduciary duties will almost always be breached in the time between when the debtor becomes insolvent and when bankruptcy is filed. These duties continue for management in Chapter 11 cases and the Bankruptcy Code imposes them on management in a Chapter 7 case during the debtor in possession phase of Chapter 11. These fiduciary duties are owed to the debtor just as they were owed to the corporation and its shareholders before insolvency, except after insolvency the creditors become the enforcement agents instead of the shareholders.

The conduct of insiders, managers, directors, and officers both before and after the petition date should be examined. Remember that they should be considered the guarantors of any payroll taxes, 401(k) contributions, and health benefits that were unpaid immediately before the bankruptcy. Management can impede a Trustee's effectiveness and should not be allowed to stay without close supervision.

3. Look at Outsiders

Chances are that a competitor is either the reason for or a beneficiary of the debtor's bankruptcy filing - particularly if it was an aggressive competitor. As a company becomes insolvent, it has a harder and harder time paying salaries and benefits, which may drive employees to leave and go to work for a competitor. Ask:

1. Did any of the debtor's employees take trade secrets or any of the debtor's property with them to the competitor?
2. Were the debtor's employees subject to any covenants, such as covenants not to compete, covenants not to disclose confidential information, or covenants not to hire other company employees?

If they were, the competitor may be liable to the estate. Possible causes of action include:
1. Tortious Interference with Contract
2. Unjust Enrichment
3. Tortious Interference with business relationships
4. Unfair Competition
5. Inducement to Breach Fiduciary Duty

Additionally, if it was an insider, officer or director, or other control person that left for the competitor, they may have also breached their fiduciary duty of loyalty to the debtor. The competitor may be held liable for inducing this breach.

C. Getting to the Bottom Line

If a business was conducting fairly profitable business before its bankruptcy, creditors may still be able to recover even if there are no tangible assets by pursuing parents, insiders, or competitors.

IX. HINTS AND CAUTION FOR LITIGATION

A. Damage Control

As a Trustee or a Trustee's representative, there are three steps that you need to take a soon as possible:
1. Preserve the Litigation Options
2. Preserve the Evidence
3. Preserve Insurance Coverage

1. Preserving the Litigation Options

To do this, identify potential claims in the Bankruptcy Plan and confirm the Trustee's standing to pursue litigation.

2. Preserving the Evidence

You should make every effort to preserve all electronic and paper records of the business. This obviously becomes more challenging with larger companies, but emails and other business and financials documents are the best sources for analyzing and proving what went wrong in the company and why.

3. Preserving Insurance Coverage

The first thing you want to look for in the business records are the insurance files. There you will hopefully find Director and Officer Liability insurance or other insurance coverage that can be pursued. You must review the documents promptly to ensure that all payments are current and to find out notice requirements. You want to do everything possible to avoid a lapse in coverage.

B. Important Considerations

Before moving forward, consider logistics. This includes issues of the necessary workforce, time, and money involved in pursuing a claim of this nature.

1. A Workforce

How many people the Trustee will need will depend on the degree of anticipated opposition to any planned litigation and how much of a mess the debtor is in. The team will obviously have a mix of skills. When selecting the team, the Trustee should consider factors such as experience in complex litigation, advocacy skills, and expertise in areas of law relevant to the case.

2. Time

It is crucial to determine how much time remains before litigation must be initiated. There may only be months, or perhaps even weeks, to prepare pleadings and conduct pre-suit due diligence.

Getting the team organized, making assignments, and establishing how the team will communicate must all be considered. The most efficient plan is to establish a leadership structure for the team and institute a manner of keeping records of projects, assignments, and deadlines.

There will be a short period of time and much to accomplish in it, so the sooner all team members get on the same page and work together, the better.

3. Money for Expenses

Litigation is expensive. Large, complex commercial litigation is particularly expensive due to the cost of expert witnesses and the extensive discovery necessary. The cost goes up the more parties there are involved.

The Trustee must decide how much of the expenses the estate can bear and how much can be shifted into a contingent fee arrangement. However the costs are ultimately split, the agreement should be reduced to writing and, if necessary, approved by the bankruptcy court.

C. Pre-Suit Due Diligence is Essential

This should be an organized an analytical process - bring as many people as it takes to do the work in the allotted time. Consider the time and expense, weigh your options, and treat each decision with the bottom line of the estate's budget in mind.

1. Records Have to Go Somewhere

Consider creating a records repository and using a secure facility to store all the corporate records. For reviewing records, make sure that the facility has a workable environment: at least a portion of it should be climate controlled, there should be ample electricity for the computers, scanners, and copiers that should be onsite.

Keep the debtor's IT staff on board as long as possible because they will be the key to being able to find, preserve, and use the estate's electronic records. Additionally, it is less expensive to use their assistance than to get computer forensics experts.

At least one team member should learn how the debtor's network is set up and how data is stored and archived before the system is disassembled.

Don't forget about PDAs and laptops. These can be an excellent source for useful and interesting evidence.

2. Keep the Goals in Mind

It would be easy to feel overwhelmed by the amount of data that must be reviewed and analyzed in a bankruptcy case. Create a plan that targets and prioritizes the records that need to be reviewed. A starting plan may look like the following: corporate records, financial records and reports, government filings, insurance records, meeting minutes and other related records from the board of directors, legal documents, any evidence of interaction with competitors, and the e-mail and computer records of the directors, officer, and managers.

3. Develop a Theory of Liability

When there are many causes of action and remedies, it is helpful to have the team members create and update a law template for each cause of action and remedy. These templates should outline the proof requirements and key case holdings. This outline can then be used to develop pleadings, discovery, and responses to motions.

4. Look For Evidence First, Not Last

Most of the documents located and reviewed will not be helpful in advancing the case. Have people review the documents that can review, code, and rate the documents so that the team members can reduce the number of documents entered into the case database.

Keep track of what you find. It will speed things up later. Databases provide benefits for document storage, searching, organizing, and managing.

A good database can be a powerful tool because it can allow you to:
a) Simultaneously search all elements and data of the case;

b) Manage, review, and annotate transcripts;
c) View and annotate deposition transcripts;
d) Build chronologies of facts and events;
e) Create outlines for briefs, arguments, and witnesses;
f) Manage OCR/full text documents;
g) Organize electronic documents and emails;
h) Manage information about people and events;
i) Track productions made to and received from others;
j) Organize summaries and images;
k) Access remote and companion data sets; and
l) Store document images, transcripts, embedded digital video, electronic files, e-mail and attachments, and other data.

C. Litigating the Claim

Attention to detail throughout litigation is extremely important. These types of claims have a tendency to grow complicated quickly, and it is important to have a good foundation in your pleadings.

1. Again, Words Matter- Pleading Pitfalls

The Original Complaint provides the first opportunity to frame your case, to begin telling your story, and to shoot yourself in the foot. Pleadings for complex commercial cases can be tricky. Pleading a case on behalf of a Trustee where there are multiple bankruptcy issues, parties, and causes of action requires care.

Regardless of how solid your complaint is, virtually every defendant will file either a Rule 12(b)(6) motion to dismiss and/or a Rule 12(e) motion for more definite statement. These provide a first line of defense and allow defendants to knock out claims if possible or at least slow down the case so the lawyers can catch up.

2. Bell Atlantic Corp. v. Twombly

What qualifies as a knockout punch under Rule 12(b)(6) after *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007)?

In May 2007, the U.S. Supreme Court changed the standard that was used since 1957 to decide Rule 12(b)(6) motions. The old analysis began with the notice pleading standard of Rule 8(a)(2), which onl required a complain to include a "short and plain statement of the claim showing that the pleader is entitled to relief." *Conley v. Gibson* used to govern the application of that standard, which required that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief." 355 U.S. 41, 45-46 (1957).

Twombly appears to have replaced the *Conley* "no set of facts in support" rule with a "plausibility" standard. The new Rule 12(b)(6) standard appears to be "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." The Court explains that where a plaintiff "ha[s] no nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed."

The Fifth Circuit followed form and said that a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *In re Katrina Cana Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007). Other federal circuits are adopting new 12(b)(6) frameworks in the aftermath of *Twombly*. The Second Circuit has stated that a "flexible 'plausibility standard' which obligates a pleader to amplicy a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *See, e.g., Igbal v. Hasty,* 490 F.3d 143, 158 (2d Cir. 2007).

Where does this leave the plaintiff? How can a plaintiff plead "plausible"? This is not clear, but it appears that a plaintiff needs to plead enough facts to persuade the judge a colorable claim exists.

3. Aftermath of Twombly: No General Heightened Pleading Requirement

It has been contended that *Twombly* changed the Rule 8(a)(2) notice pleading standard by imposing a heightened pleading requirement similar to the pleading requirements imposed by Rule 9(b). Those contentions appear to be in error as the Court clearly stated "we do not apply any 'heightened' pleading standard, nor do we seek to broaden the Scope of Federal Rule of Civil Procedure 9 . . . ."

But, confusing things further, a month later the Supreme Court assured litigants that for compliance with Rule 8(a)(2)'s notice pleading requirements "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007). Does this statement neutralize the effect of *Twombly*?

It remains to be seen how courts will interpret *Twombly* and *Erickson*. Include plausible facts in your pleadings and hope for the best.

4. The Strategic Game of Discovery

The discovery stage of litigation is the phase that most represents a chess game. Strategy and timing can greatly impact how a case develops, but the real key to discovery is to know what evidence you need.

After your pre-suit diligence, you should have a good idea of what evidence you have and what you still need to prove your case. The main goals of discovery are to prove up the things you know and develop the evidence you need to complete your case.

5. Be Ready for Summary Judgement

You can count on having a series of summary judgment motions in a complex commercial case. Knowing that this is essentially inevitable, start preparing responses during the pre-suit due diligence phase of your case. The extra effort of having built the case by connecting the evidence to your order of proof pays off here. You should be in a position to respond quickly regardless of what the other side claims.

Anticipate the Motions- You know the elements of your claims, and you need to have those elements in mind as you go through depositions and written discovery. Have a plan about where you are going to get evidence of each element at issue and look at that plan each time you go to a deposition or serve discovery.

Break Down the Opposing Side's Motion- You must understand what the motion(s) are trying to say in order to adequately respond. Avoid rabbit trails and just respond to the issues raised. Also, do not be afraid to reorganize the points raised in a way that is more beneficial to your position. Remember, if your case is in federal court, most decisions are made on the briefing.
Check Local Rules and Confirm Deadlines- Always check the local rules and the applicable scheduling order as soon as the case is filed and every time you get a motion on your desk. Big problems can be caused by small details. Get this information sooner rather than later and then keep it handy for reference.

Understand the Importance of Your Response- The trial court will only see or consider the motion and the written record of your response in determining the summary judgement motion. It is also all the appellate court will have if there is a challenge.

Your response is the only opportunity you will have to present and preserve your arguments and evidence. You must respond to all relevant challenges raised in order to avoid problems later.

6. Keep Your Case Simple

Complexity kills persuasion at trial. Unfortunately, few cases with significant bankruptcy issues are simple or straightforward. The difficulty in untangling these complex business transactions is matched only by the difficulty in trying to explain the bankruptcy causes of action to anyone not a bankruptcy judge.

Your goal for trial is to transform the complex into the understandable.

How do you know if you will be able to communicate your case clearly and precisely so that you can persuade a fact finder that your position is the correct one? Ask someone. Focus groups and mock trials are extremely helpful in preparing a complex case for trial.