

Bankruptcy Litigation Services

Providing sophisticated
support for complex
bankruptcy litigation matters



Bankruptcy-related litigation presents complex challenges and issues that require specialized knowledge and diverse skill sets. Deloitte's team of seasoned bankruptcy, forensic accounting, and litigation and dispute professionals help clients address bankruptcy litigation matters through a broad and integrated approach.

Our professionals play a central role in pre-litigation investigations. We are also often engaged once litigation commences to provide expert witness testimony and litigation consulting services. Clients dealing with the complexities of bankruptcy related litigation can engage our professionals to help counsel in evaluating litigation alternatives. We assist in the analysis of large fact sets and complex business issues that draw upon our experience.

Meeting your needs

Cram down interest rate

Establishing the interest rate to be applied to a Chapter 11 plan distribution payable to a secured creditor over time has been the subject of extensive litigation in which the supreme court provided some guidance in the *Till v. SCS Credit Corporation* case (the “Till Ruling”). The Till Ruling and its progeny established that, in the absence of an “efficient market,” the courts may apply a “formula approach” utilizing the national prime rate plus a risk factor dependent on the credit worthiness of the debtor upon emergence from Chapter 11. Expert testimony includes an analysis of the credit markets, the circumstances of the estate, the value of the collateral and feasibility analysis of the plan. Expert evidence offered at a contested plan confirmation hearing can be quite controversial, particularly since the lender likely will not agree with the interest rate that a court may “cram down” on an obligation to pay out over time, stopping the lender from taking control of its collateral and disposing as it deems appropriate to satisfy the secured obligation.

Substantive consolidation,veil-Piercing and equitable subordination

Generally, companies are obligated to satisfy the debt they incur; however, in certain cases in which the debtor and its affiliated entities have entangled affairs, the bankruptcy court may approve substantive consolidation which provides for the “consolidation” of multiple entities’ assets and liabilities. The resulting plan establishes a common pool of “value realized from multiple entities” to satisfy “liabilities of multiple entities.” Intercompany loans are extinguished. (Veil piercing litigation has also been alleged where fraud or illegal actions have occurred or situations where a controlling shareholder acted to control an entity to the detriment of creditors). The courts have not yet uniformly agreed as to the approach and test for the application of substantive consolidation. This type of litigation is fact-intensive and can be highly contested by any creditor who could receive less of a recovery if the entities are consolidated. Bankruptcy courts have the power and authority to subordinate prior claims on the assets of a bankrupt debtor to the claims of junior claimants based on principles of equity. This is a remedy called “equitable subordination.” The basis for subordination is usually the inequitable conduct of the prior claimant with respect to junior claimants. Equitable subordination can be used to subordinate both secured

and unsecured claims. Pursuing an equitable subordination action is usually a fact-intensive endeavor where expert services and testimony are critical.

Feasibility of a plan of reorganization

Section 1129 (a) (11) of the Bankruptcy Code (“Code”) requires that a plan of reorganization must be “feasible” to be confirmed, meaning that liquidation or further reorganization are not likely unless provided for by the plan. Feasibility is analyzed by focusing on the following: the debtor’s past performance, adequacy of its capital structure, earning power of its business, economic conditions, and other matters affecting the success of the plan. Testimony on valuation and capital structure are elements of the court’s evaluation in terms of access and cost of capital. Cash flow projections, including capital expenditures and debt repayment, are provided to the court in order to understanding debtor(s)’ ability to satisfy the obligations of the plan the court is contemplating confirming. The evidence must be submitted to the court for confirmation of a plan. Elements of creditor recovery, ownership of the post-confirmation debtor and control are all elements that contribute to potentially hostile litigation in which strong experts are critical to the success of the process.

Fraudulent transfers

Fraudulent transfer litigation has become increasingly common in bankruptcy proceedings. Section 548(a) (1) (B) of the Bankruptcy Code says that a transfer may be avoided as fraudulent or “unwound” if the transfer was made within two years of the petition date, the debtor received less than reasonably equivalent value in exchange for the transfer and the debtor was insolvent or left with unreasonably small capital, as a result of the transfer made.¹ Fraudulent transfer litigation requires a variety of investigative and financial evidence, including: business valuation, solvency analysis, business planning, financial modeling and economic analysis. Fraudulent transfer litigation is complex, challenging and requires significant financial analytical experience and persuasive testimony.

¹ Fraudulent transfer actions in bankruptcy can also be initiated under various state laws, which vary from state to state, and can include look-back periods of four years or longer.

Preferential payments

Section 547 of the Code permits the trustee or debtor in possession to avoid certain preferential payments made prior to the filing of a bankruptcy petition. There are certain criteria that must be met in order for a transfer to be preferential including: the transfer must relate to an antecedent debt owed before the transfer, the transfer must have been made while the debtor was insolvent, and the transfer must have provided a benefit to the creditor in excess of what the creditor would have received in a Chapter 7 liquidation if the transfer had not been made. There are defenses that can be asserted by transferees; the most common known as the “new value” and “ordinary course of business” exceptions. In certain circumstances, recoveries of preferential payments can be a significant source of recovery for a Chapter 11 estate. The identification of potential preferential payments and corresponding evaluation of potential defenses can be complex and data intensive, requiring strong accounting and analytical skills.

Other bankruptcy litigation

Other bankruptcy-related litigation typically stems from creditors evaluating actions taken by various parties prior to filing which potentially have caused creditor recoveries to be less than 100%. Typical examples of these types of causes of action include: establishing the value of a secured claim, use of cash collateral, predatory lending, professional malpractice (i.e., third-party auditor accounting malpractice²), and officers and directors breaching their fiduciary duties. Each of these causes or the related defense requires investigative capabilities and financial professionals to pursue. In certain situations there may be allegations of fraud. In these circumstances, financial advisors are often asked to reconstruct financial histories and records or to trace movements of cash or other assets and to provide expert testimony on their findings.

Mass tort liability estimation and/or Future Claimants Representative

Occasionally a debtor will be forced into bankruptcy due to an overwhelming number of known and/or unknown future tort liability suits. Examples include: AH Robins — Dalkon Shield IUD, Johns Manville — Asbestos, Society of Jesus — estimate of unliquidated claims arising due to alleged claims, etc. When there is the likelihood that not all claims have yet been filed, the court or interested parties may motion to appoint a Future Claimant Representative. The Future Claimant Representative will be responsible for acting as the future tort claimants’ representative in negotiating treatment under any plan of reorganization. One of the primary functions of the Future Claimant Representative is to perform sufficient due diligence regarding the nature, scope and potential damages arising from future claimants. The Future Claimants Representative will rely on the expert advice of internal and/or external experts regarding the estimation of the future number of claimants and their potential damages.

² Generally, we will not serve as plaintiff expert in litigations against accounting firms.

Our team

Deloitte Corporate Restructuring Group (Deloitte CRG)

Deloitte CRG is a leading provider of financial and operational restructuring services, turnaround and performance management, fiduciary services and bankruptcy administrative services to underperforming companies and their advisors, lenders, investors, courts, and other stakeholders.

We specialize in helping both large global organizations and mid-market companies overcome challenges — from enhancing the performance of healthy companies to complex bankruptcy reorganizations. Our talent, global reach, and commitment to driving results set us apart and enable us to help create value in the most challenging and complex restructuring matters.

Deloitte Forensic

Deloitte Forensic professionals can help you react efficiently and confidently in a crisis, investigation, or dispute. Relying on specialized skills, sophisticated tools, and in-depth experience in a variety of investigation, litigation, and dispute types, we provide detailed analyses of accounting and business records to uncover essential facts and insights to support your case.

We can provide financial insight and clarity to counsel during the various stages of an investigation or business dispute, from case theory development and discovery to expert witness testimony. We can also proactively advise you on ways to help reduce the risk of future problems.

If you have questions or comments, please do not hesitate to contact us:

Lisa Poulin

Deloitte CRG, Principal
Email: lpoulin@deloitte.com
Office: +1 202 370 2222
Mobile: +1 214 912 8508

Louis Robichaux

Deloitte CRG, Principal
Email: robichaux@deloitte.com
Office: +1 214 840 7769
Mobile: +1 214 924 1575

Michael C. Sullivan

Deloitte CRG, Director
Email: michsullivan@deloitte.com
Office: +1 212 436 4265
Mobile: +1 347 899 6036

www.deloitte.com/us/crg

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