Evidence Issues for Bankruptcy Lawyers

with

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HYPOTHETICAL #1

On March 1, 2013 Friendly Grocer, Inc. ("Debtor"), which owned and operated a grocery store, filed a chapter 11 case. On June 1, 2013 a Chapter 11 trustee was appointed. Trustee closed the business.

Grocery Supply Company (Vendor) supplied product to Debtor on credit. Vendor also made a $100,000 loan to Debtor, payable interest-only for the first year, secured by a vacant parcel of real estate known as Blackacre. The Blackacre mortgage secured only the loan, not the trade credit.

Debtor scheduled Blackacre as having a value of $75,000. Debtor's schedules show that on the petition date, the value of Debtor's assets exceeded Debtor's liabilities by $200,000. Debtor's statement of financial affairs show ten payments to Vendor in payment of trade debt, totaling $200,000, in the 90-days before the petition date.

Vendor filed a proof of claim for $110,000, asserting a $100,000 claim secured by its mortgage on Blackacre and a $10,000 unsecured claim based on trade debt.

The Chapter 11 Trustee:

1) Filed a preference action against Vendor, seeking to recover Debtor's $200,000 in trade payments to Vendor during the preference period;

2) Filed a motion to value Blackacre and to bifurcate Vendor's secured claim to the extent the loan amount exceeds Blackacre's value; and

3) Objected to Vendor's unsecured claim on the grounds that Vendor had not properly credited all ten payments reflected in Debtor's statement of financial affairs.

The parties dispute Blackacre's value, Debtor's solvency on the dates of the alleged preferential transfers and whether Debtor made all of the payments shown in the statement of financial affairs. Vendor also asserts the subsequent new value defense to the preference action (i.e., that Vendor gave new value to Debtor after an alleged preferential transfer was made in the form of additional deliveries of goods for which the Vendor was not paid).

Evidence issues:

1. Should the Court take judicial notice of:
   (a) Debtor's schedules to establish the value of Blackacre;
   (b) the schedules to establish Debtor's insolvency; or
   (c) the statement of financial affairs to establish payments by Debtor to Vendor during the preference period?

2. Vendor offers in evidence an appraisal of Blackacre from Vendor's file, to establish the value of Blackacre. It was a regular practice of Vender to make loans secured by

real estate to help customers, to have the real estate appraised, and to keep the appraisal in Vendor's files. Is the appraisal admissible?

3. Vendor calls Debtor's president to testify that he received a letter offering to buy Blackacre for $150,000. Trustee objects to the testimony under the best evidence rule. Should the objection be sustained? Vendor then offers the letter in evidence. Should the letter be admitted in evidence over a hearsay objection?

4. Assume the same facts as question 3, except the offer was accepted but the sale fell through because the buyer could not get financing. Now the letter cannot be located. Is testimony as to the contents of the letter admissible over objections based on hearsay and the best evidence rule?

5. Trustee offers in evidence a copy of the County assessor's tax notice printed from the County's website. The notice contains an assessed value for tax purposes to establish the value of Blackacre. Is it admissible under the Public Records (FRE 803(8)) exception or over an authentication objection? Is it relevant?

6. Trustee calls an appraiser to give an expert opinion as to the value of Blackacre. The appraiser prepared a written appraisal that includes a discussion of market conditions and an analysis of comparables. Is the written appraisal admissible?

7. Trustee prepared a summary of all sales of goods by Vendor to Debtor, and payments for goods by Debtor to Vendor, during the preference period. The summary includes the date of each invoice, the date of delivery of the invoiced goods, the amount of the invoice, the date of each payment, and to which invoice Vendor applied each payment. The summary is based on Vendor's records, which are admissible but have not been offered into evidence. Is the summary admissible over Vendor's objection? If Vendor's records were admitted in evidence, would the summary be admissible?

8. To show insolvency, Trustee proffers a year-end financial statement prepared by Debtor's outside CPA. Trustee proffers an affidavit of Debtor's former bookkeeper to lay a foundation for the business records exception to the hearsay rule. Is the financial statement admissible over Debtor's hearsay objection?

9. Vendor offers in evidence a copy Debtor's payment history and an affidavit of its bookkeeper to authenticate the payment history. Is it admissible over Debtor's hearsay objection?

HYPOTHETICAL #2

On April 5, 2013, Ben Miller filed a Chapter 13 case. Ben earns $35,000 a year as a post-doctoral student. In February 15, 2009, he purchased a new Honda Accord from Mountain View Honda and granted Mountain View a purchase money lien to secure the loan. The loan balance is $20,000.

In January, 2010, Ben decided to build a new house. To obtain financing, Ben submitted a written financial statement to First National Bank of Second City (the "Bank"). The financial statement purported to include a complete list of his assets and liabilities but did not disclose a $100,000 loan from his brother. Ben also told the Bank he received monthly bonus checks worth "thousands" and that he had a good deal of "family money," neither of which was true. The Bank agreed to loan Ben $400,000.

Throughout the spring of 2010, Ben called the Bank to obtain loan advances for construction materials and labor. Instead of purchasing the materials and labor, he used the money to gamble. By June, 2010, Ben had lost most of the loan proceeds at the casino, but the house was only 25% complete. The Bank obtained a state court judgment against Ben for $300,000.

Ben wants to keep his vehicle and discharge the Bank's judgment debt. Ben filed a motion to value the Honda Accord. The Bank filed a nondischargeability action against Ben under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(2)(B).

Evidence issues:

1. Ben testifies that his car is worth around $14,500. Mountain View objects on the grounds that Ben is not qualified as an expert. Should the objection be sustained? If Ben is allowed to opine about his car's value, should he be permitted to testify that his opinion is based on a number of *craigslist* ads he read?

2. Ben offers in evidence a printout he obtained from the official website of Kelley Blue Book to show that the private party value of a 2009 Honda Accord in excellent condition is $14,464. Mountain View objects on the grounds of hearsay. Should the objection be sustained? Would it make a difference if Ben's mother, who is not present in the courtroom, obtained the printout?

3. Before he arrived at the valuation hearing, Ben wrote the mileage of his car on a post-it note. After his attorney began questioning him, he couldn't recall the exact mileage. Ben's attorney wants to show him the post-it note and offer it into evidence. Can Ben's attorney show him the note? Can Ben offer it as a substantive exhibit? Can Mountain View offer it as a substantive exhibit?

4. During the nondischargeability trial, Ben offers in evidence a letter written by the Bank's loan officer. The letter, which was placed in Ben's loan file, states that the loan officer

suspected Ben's financial statement contained some errors. The loan officer doesn't typically prepare letters of this sort, but Ben's case was complicated. Is the letter admissible over the Bank's objection?

5. The Bank offers in evidence a summary it prepared of Ben's assets and liabilities at the time it approved the loan. The summary is based on various bank records and financial statements, all of which have been admitted into evidence. Is the summary admissible as evidence of Ben's assets and liabilities? Is the summary admissible as a demonstrative exhibit?

6. The Bank offers in evidence the deposition of a loan officer who is ill and cannot appear at the hearing. At the deposition, the loan officer testified that Ben made a number of false statements about alternative sources of income. Ben's counsel, who was present at the deposition, objects. Should the deposition be admitted? Would it make a difference if the loan officer was present in the courtroom?

7. The Bank offers in evidence an affidavit of the Bank's president, whom neither party deposed prior to the trial. Is the affidavit admissible over Ben's objection? What if Ben sought to introduce the affidavit?

8. In an effort to establish the accuracy of his financial statement, Ben offers in evidence a statement contained in a quitclaim deed which eliminated his interest in a rental home he owned with his ex-wife. The deed states that "Ben Miller releases to Elizabeth Smith the real property located at 425 Date St. NW." The Bank objects on grounds of hearsay. Should the objection be sustained?

9. The Bank offers in evidence a loan document that contains a signed statement from Ben's employer about Ben's salary. The loan document was prepared by the loan officer and placed in the loan file in the ordinary course of business. Ben objects on grounds of hearsay. Should the objection be sustained?

10. The Bank offers in evidence copies of the promissory note, loan agreement, and mortgage signed by Ben. Ben objects on the basis of the best evidence rule. Should the objection be sustained? Ben also objects on the basis of hearsay. Should the objection be sustained?

I. JUDICIAL NOTICE

A. Fed.R.Evid. 201: Judicial Notice of Adjudicative Facts.

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

B. Common Issues

- Items subject to judicial notice include docket entries such as pleadings, schedules, and operating reports.
- When the Court takes judicial notice of a docket entry, the document is not automatically admitted for the truth of the matter asserted therein. For example, if the Court takes judicial notice of the fact that Creditor A filed a claim for $5,000, this does not prove that Creditor A has an allowed claim for $5,000.
- Judicial notice is not a substitute for offering sufficient substantive evidence. If information contained in the docket entries is crucial to a party's case, the evidence should be offered as a separate exhibit or, if appropriate, in summary form.

II. HEARSAY

Definition: An out of court statement offered to prove the truth of the matter asserted.

STATEMENTS THAT ARE NOT HEARSAY

1. Fed.R.Evid. 801: Statements That Are Not Hearsay.

(d) A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

2. Common issues

a. Prior statements:

- Deposition transcripts can be offered under Rule 801(d)(1) where the witness' trial testimony conflicts with their deposition testimony.
- A party who testifies at trial may not offer their own deposition transcript as evidence except to rebut a claim of recent fabrication.
- Don't confuse Rule 613 with Rule 801(d)(1). Under Rule 613, prior inconsistent statements are admitted for the limited purpose of impeaching the witness' credibility. Under Rule 801(d)(1), such statements may be admitted as substantive evidence.

b. Statements by opposing parties:

- Deposition transcripts and affidavits are generally admissible against party opponents.
- A statement by an opposing party also includes letters, records, or other written documents prepared by the opposing party. For example, a debtor's schedules are admissible against the debtor.
- Statements by opposing parties do not have to be admissions or concessions.

c. Other

- Documents with or acts of independent legal significance are not hearsay. Examples of documents include checks, contracts, wills, and promissory notes.
- A statement that would normally constitute hearsay can be offered to prove something other than the truth of the matter asserted. For example, an out of court statement can be offered to show the effect such statement had on the listener, not that the statement is in fact true.

HEARSAY EXCEPTIONS-DECLARANT AVAILABILITY IRRELEVANT

1. Fed.R.Evid. 803: Hearsay Exceptions - Availability of Declarant Immaterial. The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;
(B) the record is kept in a public office; and
(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

2. Common Issues.

a. Business records

- Examples of business records include bank statements and certain types of invoices.
- The record must be kept in the ordinary course of a regularly conducted business activity. The fact that a document is kept in the business file does not automatically make it a business record.
- Pursuant to Rule 902(11), an affidavit can be used to authenticate business records.
- The custodian used to authenticate a business record need not be the same person who created it.
- Appraisals are not business records.

b. Other

- There is some overlap between recorded recollections (Rule 803(5)) and refreshed recollections (Rule 612). A recorded recollection can serve as substantive evidence while a writing used to refresh memory cannot.
- Rules 803(14) and (15) (documents affecting an interest in property) are directed at recorded instruments such as mortgages and deeds. Those rules do not address documents that merely refer to a party's property rights.
- When a statement involves hearsay within hearsay, each level of hearsay must be cured.

HEARSAY EXCEPTIONS-DECLARANT UNAVAILABLE

1. Fed.R.Evid. 804: Hearsay Exceptions – Declarant Must Be Unavailable

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

2. Common issues

- Former testimony can only be offered under Rule 804 when the witness is unavailable.
- If the witness is present, think about whether the testimony is admissible as a prior inconsistent statement or a statement by a party opponent under Rule 801.
- Deposition transcripts can typically be offered under Rule 804 when opposing counsel was present at the deposition and/or had an opportunity to depose the witness. However, be sure to look at Fed.R.Civ.P. 32, which governs the use of deposition testimony at trial.
- Affidavits are not admissible under Rule 804.

III. LAY TESTIMONY

A. Fed.R.Evid. 701: Lay Testimony. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

B. Common issues

- A debtor may opine about the value of something he or she owns, including a business. However, a debtor may not testify about the basis for the opinion if it is based on inadmissible hearsay.
- Lay testimony must be based on personal knowledge. Resist the urge to ask questions that call for speculation.

IV. EXPERT TESTIMONY

A. Rules

Fed.R.Evid. 702. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed.R.Evid. 703. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Fed.R.Evid. 704.

(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

B. Common issues

- An expert's qualifications should be assessed liberally. However, courts have broad discretion to determine how much weight, if any, to give the opinion.
- Expert reports are not automatically admissible as substantive evidence by virtue of Rules 702 and 703, but they can generally be admitted to show how the expert arrived at his or her conclusion.
- Failure to timely file an expert report pursuant to Fed.R.Civ.P. 26(a)(2) or the applicable scheduling order will likely result in the exclusion of the expert testimony.

V. SUMMARIES

A. Fed.R.Evid. 1006. The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

B. Common issues

- The materials upon which the summary is based must be *admissible*. However, if the underlying materials have been *admitted*, the summary should be offered as a demonstrative exhibit.
- A Rule 1006 summary serves as independent substantive evidence, while a demonstrative exhibit is comparable to argument by counsel.

- The party offering the summary must allow opposing counsel to inspect the underlying documents.

VI. THE BEST EVIDENCE RULE(S)

A. RULES

Fed.R.Evid. 1002: Requirement of the Original. An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Fed.R.Evid. 1003: Admissibility of Duplicates. A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Fed.R.Evid. 1004: Admissibility of Other Evidence of Content. An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

B. Common issues

- In most situations, a copy is admissible to the same extent as the original.
- A witness may provide *context* for a document, but they may not testify about its *contents*.