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Issues and Information for the Insolvency Professional

## The Motion *in Limine* in Bankruptcy Litigation

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The motion *in limine*, considered standard procedure in jury practice, is becoming prevalent in non-jury bankruptcy trials and hearings. In jury trials, the motion is used to exclude relevant, but prejudicial, evidence. In bankruptcy cases, the motion is being used to eliminate evidence and arguments—thereby shaping the presentation of evidence for the best use of the court's time. Litigation counsel should consider whether such a motion can properly aid in the disposition of the trial of a bankruptcy case.

### Traditional Purpose of Motion



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The term "*in limine*" has been defined as "[on] or at the threshold; at the very beginning; preliminarily."<sup>2</sup> The U.S. Supreme Court in *Luce v. United States* wrote that "[a]lthough the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials," citing Fed. R. Evid. 103(c) and Fed. Crim. Proc. 12(e).<sup>3</sup> The Court in *Luce* used the term "*in limine*" to refer to *any* motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered. When evidence is offered at trial a party must object or they do not preserve the issue

on appeal.<sup>4</sup> This is because the motion *in limine* and the ruling itself is not the final word on the subject, as the ruling could change as the case unfolds.<sup>5</sup>

Motions *in limine* in bankruptcy cases have been used in a variety of ways: (a) to challenge expert testimony, (b) to exclude evidence on various grounds, (c) to exclude evidence as a sanction remedy, (d) to eliminate substantive remedies, (e) to request essential rulings and (f) to request other kinds of relief.

### Expert Testimony

In *Daubert v. Merrell Dow Pharmaceuticals Inc.*,<sup>6</sup> the U.S. Supreme Court held that when expert testimony is proffered, the trial court is to establish under Federal Rule 702 whether the evidence has "a reliable foundation and is relevant to the task at hand."<sup>7</sup> The trial court's duty under Federal Rule of Evidence 104(a) is to determine "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue."<sup>8</sup> In *Kumbo Tire Co. Ltd. v. Carmichael*,<sup>9</sup> the Court applied the *Daubert* standard to all expert witness testimony.<sup>10</sup> Litigation counsel should expect a *Daubert* challenge in bankruptcy practice if they intend to offer expert testimony.

Expert testimony was found to be proper under *Daubert* in *Roberds Inc. v. Broyhill Furniture (In re Roberds Inc.)*,<sup>11</sup> a preference case where the expert was attacked as to his qualifications to testify under the "objective prong" of §547(c)(2)(C). Expert testimony was also proper in *Dalen v. Chang (In re Joy Recovery Tech Corp.)*,<sup>12</sup> under a *Daubert* challenge that solvency testimony contained improper legal conclusions, lacked credibility because the witness was a *de*

*facto* contingent witness, and that the testimony was "not consistent" with business valuation techniques employed by professionals in his field.

However, in *Henderson v. Andrews (In re Perry County Foods Inc.)*,<sup>13</sup> the expert and his report did not survive the *Daubert* challenge in a fraudulent-transfer case. The court found that the expert's use of "indirect evidence" to arrive at a "consumption theory" and "ascribed value theory" was irrelevant due to the fact that the indirect evidence contained spurious generalizations that were empirically unsound because they relied on unreliable bookkeeping.<sup>14</sup>

The exclusion of a report based on *Daubert* may not be the end of the litigation. In *Henderson*, the court gave the trustee time to produce other evidence or a summary judgment would be granted. Courts have deferred ruling on *Daubert* motions until after hearing the testimony.<sup>15</sup> If a *Daubert* motion *in limine* is sustained, other evidence is not available and the case depends on expert testimony, then a motion *in limine* can effectively adjudicate the outcome of the entire trial.

Efforts to prohibit expert testimony on the grounds of relevancy can be more difficult as courts have considered that expert testimony should be freely given.<sup>16</sup>

### Excluding Evidence

Case law is full of examples of motions *in limine* being successfully argued to preclude the introduction of evidence as being improper due to various reasons, such as (1) privilege,<sup>17</sup> (2) settlement discussions,<sup>18</sup> (3) proof of inadmissible character evidence,<sup>19</sup> (4) pleadings in court regarding estimated future claims,<sup>20</sup> (5) extrinsic evidence of unambiguous document,<sup>21</sup> (6)

<sup>13</sup> 313 B.R. 875 (Bankr. N.D. Ala. 2004).

<sup>14</sup> *Id.* at 892.

<sup>15</sup> See *In re Pacific Gas & Electric Co.*, 295 B.R. 635 (Bankr. N.D. Cal. 2003) (PG&E filed a motion *in limine* to exclude testimony of a damages expert under *Daubert*. The court deferred the ruling until after hearing the testimony because the matter was a non-jury trial).

<sup>16</sup> *United Jersey Bank v. CS Assocs. (In re CS Associates)*, 121 B.R. 942 (Bankr. E.D. Pa. 1990).

<sup>17</sup> *In re Spring Ford Industries*, 2004 Bankr. LEXIS 788 (Bankr. E.D. Pa. May 20, 2004) (motion granted to preclude creditor from introducing evidence of or reference to privileged e-mails).

<sup>18</sup> *In re Peter Thompson Assocs. Inc.*, 155 B.R. 20 (Bankr. D. N.H. 1993).

<sup>19</sup> *Mishkin v. Ensminger (In re Adler, Coleman Clearing Corp.)*, 1998 Bankr. LEXIS 406 (Bankr. S.D.N.Y. April 3, 1998).

<sup>20</sup> *In re Hoffinger*, 307 B.R. 112 (Bankr. E.D. Ark. 2004) (court found the supplement to be factually flawed and granted an opportunity to amend).

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<sup>2</sup> *Luce v. United States*, 469 U.S. 38, 41 105 S. Ct. 460, 83 L.Ed.2d 443 (1984), citing *Black's Law Dictionary*, 708 (5th ed. 1979).

<sup>3</sup> *Id.*; Fed. R. Evid. 103(c); cf. Fed. R. Crim. P. 12(e).

<sup>4</sup> *Peerless Corp. v. United States*, 185 F. 3d 922, 925 (8th Cir. 1999) (evidence offered at trial without objection after motion *in limine* overruled, error is not preserved); Fenner, G. Michael, "The Forced Use of Inadmissible Hearsay in Bankruptcy Court," 8 Am. Bankr. Inst. L. Rev. 453 (2000).

<sup>5</sup> *Luce*, 469 U.S. at 41.

<sup>6</sup> 509 U.S. 579, 125 L. Ed. 469, 113 S.Ct. 2786 (1993).

<sup>7</sup> *Id.* at 597, 125 L.Ed. at 485, 113 S.Ct. at 2799.

<sup>8</sup> *Id.* at 592-93 125 L.Ed. at 482, 113 S.Ct. at 2796.

<sup>9</sup> 526 U.S. 137, 143 L. Ed. 2d 238, 119 S.Ct. 1167, (1999).

<sup>10</sup> 526 U.S. at 149, 143 L.Ed. 2d at 251, 119 S.Ct. at 1175.

<sup>11</sup> 315 B.R. 443 (Bankr. S.D. Ohio 2004).

<sup>12</sup> 286 B.R. 54 (Bankr. N.D. Ill. 2002).

use of depositions from another proceeding,<sup>22</sup> (7) use of a transcript from a prior proceeding,<sup>23</sup> (8) exclusion of expert testimony on divorce law,<sup>24</sup> (9) limiting the use of hearsay evidence,<sup>25</sup> (10) affidavits,<sup>26</sup> (11) exculpatory clauses contained in service orders and work tickets,<sup>27</sup> (12) new damage theories,<sup>28</sup> (13) evidence of state of mind of a civil contemnor<sup>29</sup> and (14) limiting evidence and arguments under §523(a)(7) because no facts had been pled to warrant consideration.<sup>30</sup>

## As Remedy for Sanction

The motion is frequently used as a remedy to exclude evidence because of discovery violations or other procedural errors. It seems much more professional to request the court to limit the use of evidence by pre-trial ruling rather than moving for sanctions against your opponent. Excluded evidence has been due to (1) failing to properly plead affirmative defenses,<sup>31</sup> (2) failure to respond to discovery requests,<sup>32</sup> (3) failure to comply with a court order,<sup>33</sup> (4) striking an amended complaint,<sup>34</sup> (5) exhibits not produced until after discovery was completed,<sup>35</sup> (6) expert testimony failure to produce an expert report under Fed. R. Civ. P. 26(a)(2)(B),<sup>36</sup> (7) failing to file findings of fact and conclusions of law,<sup>37</sup> (8) unanswered deposition questions,<sup>38</sup> (9) valuation testimony<sup>39</sup> and (10) objecting to admission of appraisal report without expert testimony.<sup>40</sup> It also must be noted that in *Grochocinski v Allstate Ins. Co.*,<sup>41</sup> the court granted sanctions of \$371.25 under Fed. R. Bank. P. 7016(f) and 7037(b) for preparation of a motion *in limine*.

## To Eliminate Substantive Claims

In the case of *In re Blais*,<sup>42</sup> the bankruptcy court granted the trustee's motion *in limine* that attached additional evidence that was necessary for the court to determine whether the debtor's pension plans qualified for exemption under Florida law and the Internal Revenue Code. By offering the motion *in limine* and attached documents, the court could decide the issues presented "without further evidence or argument being presented." This case shows how the motion can aid in the presentation and determination of the case.

In *Cayuga Indian Nation v. Cuomo*,<sup>43</sup> the bankruptcy court granted a motion *in limine* that precluded a claim of ejectment from being pursued. *Cayuga* was an extraordinary circumstance where the Cayuga Indian Nation sought to eject tenants from lands occupied by the state of New York. The court precluded ejectment as an inappropriate legal remedy. The *Cayuga* case was criticized in *Powe v. Chrysler Fin. Corp.*,<sup>44</sup> where the court held that a motion *in limine* is to deal with *evidentiary issues* and is not used as a way to preclude a substantive remedy.<sup>45</sup> The court in *Powe* denied the use of a motion *in limine* to challenge the reasonableness of attorney's fees at trial. However, in the case of *In re Blazo Corp.*,<sup>46</sup> the court barred the use of evidence that the court found to be of no value as a defense to a fraudulent transfer suit.<sup>47</sup>

## To Request Essential Rulings

Besides using the motion to eliminate substantive claims, the motion can be used to advise the court of potential issues and to ask for a ruling prior to trial. These include (1) requests for the appropriate burdens of proof,<sup>48</sup> (2) determining whether a party can invoke attorney-client privilege,<sup>49</sup> (3) whether defenses such as judicial estoppel,<sup>50</sup> discharge in bankruptcy,<sup>51</sup> statute of limitations,<sup>52</sup> the doctrine of *D'Oench Duhme*<sup>53</sup> and collateral estoppel apply,<sup>54</sup> and (4) to determine the proper measure of damages.<sup>55</sup>

Some interesting requests have included (1) requesting retroactive effect of substantive consolidation to extend back 90 days before the petition date in a preference case,<sup>56</sup> (2) determining whether a claim arose post-petition and was non-dischargeable,<sup>57</sup> (3) deciding the issue of marshalling of assets,<sup>58</sup> (4) determining whether a creditor became a petitioning creditor in an involuntary proceeding<sup>59</sup> and (5) determining the extent of the debtor's avoiding powers under §544 (a).<sup>60</sup> The motion has been used by agreement to expand the scope of injunctive relief filed on an emergency basis.<sup>61</sup>

## Unsuccessful Attempted Uses of the Motion

Counsel should be discriminate in the use of the motion; they are not always granted. If you are on the receiving end of a motion *in limine*, you could use some of these cases in your favor because, as noted earlier, some of these arguments have been successful. This shows how the decision on a motion *in limine* depends on the facts of the case. These include (1) motion to limit damages at trial,<sup>62</sup> (2) striking an exhibit,<sup>63</sup> (3) precluding the admission of invocation of the Fifth Amendment privilege for the purpose of drawing adverse inferences,<sup>64</sup> (4) excluding evidence of emotional distress caused by violation of the automatic stay,<sup>65</sup> (5) allowing extrinsic evidence of mailing,<sup>66</sup> (6) barring evidence of mailing without corroborating evidence,<sup>67</sup> (7) excluding use of settlement letters for another purpose under Fed. R. Evid. 408,<sup>68</sup> (8) excluding evidence based on an alleged oral agreement when the parol evidence rule did not apply,<sup>69</sup> (9) determining whether agreements were ambiguous,<sup>70</sup> (10) excluding introduction of evidence of a pre-petition claim that varies

<sup>21</sup> *In re Einstein/Noah Bagel Corp.*, 257 B.R. 499 (Bankr. D. Ariz. 2000).  
<sup>22</sup> *Woodard v. Branch (In re Paramount Payphones Inc.)*, 256 B.R. 341 (Bankr. M.D. Fla. 2000).  
<sup>23</sup> *In re McQueen*, 102 B.R. 120 (Bankr. S.D. Ohio 1989).  
<sup>24</sup> *Askenazer v. Dunham (In re Dunham)*, 2000 Bankr. LEXIS 1815 (Bankr. D.N.H. 2000).  
<sup>25</sup> *In re A.H. Robins*, 223 B.R. 492 (Bankr. E.D. Va. 1998).  
<sup>26</sup> *In re EWI Inc.*, 1997 Bankr. LEXIS 2119 (Bankr. N.D. Ohio 1997) (court found that affidavits would impede right of cross examination).  
<sup>27</sup> *In re Jones*, 18 B.R. 161 (Bankr. W.D. Okla. 1982).  
<sup>28</sup> *In re Landmark Distributors Inc.*, 189 B.R. 290 (Bankr. D. N.J. 1995) (to preclude evidence of a new damage theory termed "cash shortfall" when compensatory damages would make the alleged debtor whole in dismissal of chapter 7 involuntary case.).  
<sup>29</sup> *In re Galleria Enterprises of Maryland Ltd.*, 102 B.R. 472 (Bankr. D. Md. 1989).  
<sup>30</sup> *In re Riley*, 202 B.R. 169 (Bankr. M.D. Fla. 1996).  
<sup>31</sup> *Horvut v. Sheldon*, 153 B.R. 661 (Bankr. S.D.N.Y. 1993).  
<sup>32</sup> *In re Stark*, 311 B.R. 750 (Bankr. N.D. Ill. 2004).  
<sup>33</sup> *Headline Promotions Inc. v. Trupiano (Headline Promotions Inc.)*, 2001 Bankr. LEXIS 918 (Bankr. N.D. Ill. 2001).  
<sup>34</sup> *Jacoway v. Mathis*, 258 B.R. 726 (Bankr. W.D. Ark. 2000).  
<sup>35</sup> *Mishkin v. Ensminger (In re Adle, Coleman Clearing Corp.)*, 1998 Bankr. LEXIS 404 (Bankr. S.D.N.Y. 1998) (customers did not have a fair opportunity to meet the evidence contained in the exhibits as required by Fed. R. Evid. 807).  
<sup>36</sup> *Connolly v. NEC Am. Inc. (In re Tess Communs. Inc.)*, 291 B.R. 535 (Bankr. D. Colo. 2003) (court noted there is no requirement for an expert to produce a report if the expert's knowledge is based on personal knowledge as actors or viewers of the facts of a particular case).  
<sup>37</sup> *Grochocinski v. Allstate Ins. Co. (In re Lyckberg)*, 310 B.R. 881 (Bankr. N.D. Ill. 2004) (court granted sanctions of \$371.25 under Fed.R. Bank. P. 7016(f) and 7037(b) for preparation of motion *in limine*).  
<sup>38</sup> *In re King*, 305 B.R. 152 (Bankr. S.D.N.Y. 2004).  
<sup>39</sup> *Id.*  
<sup>40</sup> *Id.*  
<sup>41</sup> 310 B.R. 881 (N.D. Ill. 2004).

<sup>42</sup> 2004 Bankr. LEXIS 508 (Bankr. S.D. Fla. 2004).  
<sup>43</sup> 1999 U.S. Dist. LEXIS 10579 (Bankr. N.D.N.Y. 1999).  
<sup>44</sup> *Powe v. Chrysler Fin. Corp. L.L.C. (In re Powe)*, 278 B.R. 539 (Bankr. S.D. Ala. 2002).  
<sup>45</sup> *Id.*  
<sup>46</sup> 1994 Bankr. LEXIS 1242 (Bankr. N.D. Ohio 1994).  
<sup>47</sup> *In re Blazo Corp.*, 1994 Bankr. LEXIS 1242 (Bankr. N.D. Ohio 1994).  
<sup>48</sup> *In re Armstrong*, 238 B.R. 438 (Bankr. E.D. Ark. 1999); *Bakst v. United States (In re Katz)*, 168 B.R. 781 (Bankr. S.D. Fla. 1994); *Lewis v. United States, IRS (In re Lewis)*, 151 B.R. 140 (Bankr. W.D. Tenn. 1992).  
<sup>49</sup> *Gordon v. Friedman Inc. (In re Gordon)*, 209 B.R. 414 (Bankr. N.D. Miss. 1997); *In re Oakley Custom Homes Inc.*, 168 B.R. 232 (Bankr. D. Colo. 1994).  
<sup>50</sup> *Dunes Hotel Assoc. v. Hyatt Corp. (In re Dunes Hotel Associates)*, 212 B.R. 110 (Bankr. D. S.C. 1997).  
<sup>51</sup> *In re Watson*, 192 B.R. 739 (B. A. P. 9th Cir. Cal. 1996).  
<sup>52</sup> *Morse Operations Inc. v. Goodway Graphics of Va. Inc. (In re Lease-A-Fleet Inc.)*, 155 B.R. 666 (Bankr. E.D. Pa. 1993).  
<sup>53</sup> *In re New Valley Corp.*, 168 B.R. 82 (Bankr. D. N.J. 1994).  
<sup>54</sup> *In re Tripodi*, 313 B.R. 358 (Bankr. D. Conn. 2004); *Ormond Beach Assoc. Ltd. Pshp. v. Citation Mortg. (In re Ormond Beach Associates Limited Partnership)*, 204 B.R. 336 (Bankr. D. Conn. 1996).

<sup>55</sup> *In re Bicoastal Corp.*, 124 B.R. 598 (Bankr. M.D. Fla. 1991).  
<sup>56</sup> *Nickless v. Avnet Inc. (In re Century Elecs. Mfg.)*, 310 B.R. 485 (Bankr. D. Mass. 2004).  
<sup>57</sup> *Buglione v. Berlingeri (In re Berlingeri)*, 246 B.R. 196 (Bankr. D. N.J. 2000).  
<sup>58</sup> *In re King*, 305 B.R. 152 (Bankr. S.D.N.Y. 2004).  
<sup>59</sup> *Booher Enters. v. Eastown Auto Co. (In re Eastown Auto Co.)*, 215 B.R. 960 (BAP 6th Cir. 1998).  
<sup>60</sup> *Official Comm. of Unsecured Creditors of St. Johnsbury Trucking Co. v. Bankers Trust Co. (In re St. Johnsbury Trucking Co. Inc.)*, 174 B.R. 186 (Bankr. D. Vt. 1994).  
<sup>61</sup> *Commercial Financial Services v. Brady (In re Commercial Financial Services Inc.)*, 239 B.R. 586 (Bankr. N.D. Okla. 1999).  
<sup>62</sup> *In re Highland Fin. Corp.*, 216 B.R. 109 (Bankr. S.D.N.Y. 1997).  
<sup>63</sup> *Grov v. United States (In re Grov)*, 1997 Bankr. LEXIS 1472 (Bankr. S.D. Ala. 1997).  
<sup>64</sup> *Mishkin v. Ensminger (In re Adler, Coleman Clearing Corp.)*, 1998 Bankr. LEXIS 1925 (Bankr. S.D.N.Y. 1998).  
<sup>65</sup> *Holden v. United States (In re Holden)*, 226 B.R. 809 (Bankr. D. Vt. 1998).  
<sup>66</sup> *In re Beautiful Plants by Charlie*, 1996 Bankr. LEXIS 349 (Bankr. M.D. Fla. 1996) (while the debtor's motion *in limine* was overruled, in essence it was a grant of exclusion of the evidence).  
<sup>67</sup> *In re Flanary and Sons Trucking Inc.*, 2004 Bankr. LEXIS 258 (Bankr. E.D. Tenn. 2004).  
<sup>68</sup> *Wortman v. Donahoe (In re Donahoe)*, 180 B.R. 491 (Bankr. N.D. Ohio 1995).  
<sup>69</sup> *LTV Steel Co. v. Ferrrous Metal Processing Co. (In re LTV Steel Co.)*, 297 B.R. 509 (Bankr. N.D. Ohio 2003) (court overruled because the oral statements were made after written agreement and the parol evidence did not apply).  
<sup>70</sup> *Astell v. The Equipment Leasing Co. (In re Walnut Equipment Leasing Co. Inc.)*, 2003 Bankr. LEXIS 509 (Bankr. E.D. Pa. 2003).

from the schedule amount,<sup>71</sup> (11) excluding evidence of physical and emotional abuse by husband in a dischargeability case,<sup>72</sup> (12) barring evidence of aircraft lease rates other than that contained in the lease agreement,<sup>73</sup> (13) precluding deposition testimony<sup>74</sup> and (14) certifying a question of law to a state supreme court.<sup>75</sup>

### Questioning the Use of the Motion

Some courts have questioned the use of a motion *in limine* when it was being used to obtain relief when other more appropriate procedures were available. Some examples include the motion being used as (1) a motion to dismiss,<sup>76</sup> (2) a motion for reconsideration or motion to strike,<sup>77</sup> (3) a motion to reconsider a summary judgment ruling,<sup>78</sup> (4) to quash a Rule 2004 examination<sup>79</sup> and (5) to disqualify counsel by oral motion made in chambers.<sup>80</sup> Finally, one court refused to grant attorney's fees to the creditors' committee for preparing the motion *in limine*, finding that it was not granted and provided no benefit to the estate.<sup>81</sup>

### Conclusion

The motion *in limine* is an effective way to position the court to rule on essential issues, to eliminate certain evidence and sometimes substantive claims or defenses, and to raise important questions to the court. It can frame the presentation of the case or in some instances adjudicate the case entirely. It should be considered an integral part of a litigant's arsenal in bankruptcy litigation. ■

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<sup>71</sup> *In re National/Northway Limited Partnership*, 2002 Bankr. LEXIS 1482, 50 Collier Bankr. Cas. 2d (MB) 1252 (Bankr. D. Mass. 2002).

<sup>72</sup> *In re Nogatani*, 118 B.R. 846 (Bankr. M.D. Fla. 1990).

<sup>73</sup> *In re Continental Airlines*, 146 B.R. 520 (Bankr. D. Del. 1992).

<sup>74</sup> *In re Rogers*, 131 B.R. 847 (Bankr. E.D. Mo. 1991); *In re First Republicbank Corp.*, 1990 Bankr. LEXIS 2840 (Bankr. N.D. Texas 1990).

<sup>75</sup> *In re Jones*, 18 B.R. 161 (Bankr. W.D. Okla. 1982).

<sup>76</sup> *In re Granite Partners I*, 1997 Bankr. LEXIS 2219 (Bankr. E.D. Pa. 1997); *Matterhorn Group Inc. v. SMH (U.S.) Inc.* (*In re The Matterhorn Group Inc.*), 2002 Bankr. LEXIS 1275 (Bankr. S.D.N.Y. 2002); *In re Glenn*, 108 B.R. 70 (Bankr. W.D. Pa. 1989).

<sup>77</sup> *Bozich v. IRS* (*In re Bozich*), 1996 Bankr. LEXIS 1677 (Bankr. D. Ariz. 1996).

<sup>78</sup> *Krommenhoek v. Natural Resources Recovery* (*In re Treasure Valley Opportunities Inc.*), 166 B.R. 701 (Bankr. D. Idaho 1994); *Matterhorn Group Inc. v. SMH (U.S.) Inc.* (*In re The Matterhorn Group Inc.*), 2002 Bankr. LEXIS 1275 (Bankr. S.D.N.Y. 2002).

<sup>79</sup> *Buckner v. Okla. Tax Comm'n.* (*In re Buckner*), 2001 Bankr. LEXIS 1053 (B.A.P. 10th Cir. 2001).

<sup>80</sup> *In re Gold*, 2002 Bankr. LEXIS 578 (Bankr. E.D.N.Y. 2002).

<sup>81</sup> *In re Spanjer Brothers Inc.*, 191 B.R. 738 (Bankr. N.D. Ill. 1996).