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Q&A With Loeb & Loeb's Walter Curchack

Law360, New York (March 11, 2013, 1:40 PM ET) -- Walter H. Curchack is a partner in Loeb & Loeb LLP's New York office. He chairs the firm's bankruptcy, restructuring and creditors' rights department. His practice covers a spectrum of complex bankruptcy and corporate transactions, with a particular emphasis on the representation of creditors, indenture trustees and agents for bank syndicates in Chapter 11 cases, and the buyers and sellers of distressed assets. Curchack also has experience with cross-border bankruptcy and insolvency issues, as well as in nondistressed finance and corporate trust matters. Among the major recent cases in which he has represented clients are Washington Mutual, Borders, Lehman Brothers and Residential Capital. He is a frequent lecturer and author on current topics of interest in bankruptcy.

Q: What is the most challenging case you have worked on what made it challenging?

A: Because of its duration and contentiousness, and the extreme swings in claim value which resulted from that, I would have to say Washington Mutual. When the debtor first filed for Chapter 11 at the height of the financial meltdown, the most junior bonds were trading in the pennies. Then, thanks to the (no doubt) unintentional generosity of Congress, likely recoveries ballooned because of an anticipated additional tax refund amounting to billions of dollars which resulted from the extension of the NOL carry back period.

Unfortunately, this newfound value encouraged the commencement of a multiyear litigation morass. We were, frustratingly, caught in the middle. Senior bondholders were in no great rush to settle, because, as a result of contractual subordination, their above market interest continued to accrue post-petition and was going to be paid out of any junior creditors' recoveries. Likewise, the equity committee had nothing to lose by relentlessly pursuing litigation, because their expenses — including counsel — were being funded out of the estate. By the time the case was settled through mediation, the once significant recovery on the junior bonds had been largely eaten up by the materially increased administrative expenses and the additional interest due on the senior bonds.

Q: What aspects of your practice area are in need of reform and why?

A: I think there has been a noticeable shift in recent years in the way Chapter 11 cases play out. Both debtors and creditors too often seem to view the process more as a winner-take-all blood sport, rather than a collective attempt to restructure a business. There are undoubtedly a number of reasons, including the shortened timetable and increased administrative burdens imposed on debtors by the BAPCPA amendments, but also the willingness of parties to turn to litigation (rather than negotiation) as a first, rather than last, resort. Once litigation gets rolling, it can be difficult to stop, and the forward

progress of a case, once derailed, can be very hard to get back on track.

Q: What is an important issue or case relevant to your practice area and why?

A: The Supreme Court's decision in Stern v. Marshall may prove limit the ultimate effectiveness of the bankruptcy process even more than initially feared. Besides introducing a whole new jurisdictional arena in which bankruptcy litigation will be fought, it threatens to restrict the ability of bankruptcy judges to make certain fundamental decisions on issues which, while they might appear to be limited, could actually affect the entire outcome of a case. Bankruptcy is supposed to be an equitable process. An overly legalistic approach, which may result in a "constitutionally correct" answer, may not result in the best outcome for the debtor and its creditors.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Tom Mayer of Kramer Levin. I have served on a number of difficult committees represented by Tom. He combines an extremely scholarly appreciation of the law with a down to earth practical sense of how to get a deal done. Tom can be a dogged advocate for his clients, but when representing a committee, he never loses sight of the ultimate goals: achieving consensus and a speedy resolution of the case. When caught up in litigation, we too often come to believe there is only one side to the story. Tom has always struck me as being able to advise objectively on both the strengths and the weaknesses of any argument.

Q: What is a mistake you made early in your career and what did you learn from it?

A: The first motion I argued was in front of a bankruptcy judge known for being irascible. But since I was representing a Chapter 11 trustee whom the judge always seemed to support, and no party had filed papers opposing the relief I sought, I fully expected to get everything I asked for. So I went to court without completely thinking through all the potential counter-arguments to my position. Unfortunately, the fact that no other lawyer stood up in opposition didn't stop the judge from asking me to cite some authority for the relief I was seeking, and when I couldn't readily come up with the answer, I got taken on the proverbial trip to the woodshed. Even now, I cringe when recalling the experience. But I have never forgotten the lesson and have never again made the mistake of assuming that no filed opposition meant a free ride.

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