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Q&A With Morgan Lewis' Neil Herman

Law360, New York (February 26, 2013, 4:52 PM ET) -- Neil E. Herman is a partner in Morgan Lewis & Bockius LLP's bankruptcy and financial restructuring practice in New York. For more than 27 years, he has represented debtors, financial institutions, trustees and creditors in out-of- court restructurings and bankruptcy matters. Additionally, Herman has experience representing private equity firms and their portfolio companies and shopping center owners in bankruptcy matters. A significant portion of his practice entails representing buyers of assets out of bankruptcy. He is the author of the Collier's treatise on Retail Bankruptcies.

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

A: If "challenging" is defined as a case in which a client faced a low probability of success and a seeming insurmountable burden to overcome, the best example would be my work on the second Jamesway Corp. bankruptcy case in 1995.

Morgan Lewis & Bockius LLP represented a large group of landlords whose leases were assumed as part of the reorganization plan in the first bankruptcy filing based on, among other things, the debtor's representations about their business plan, liquidity, projections, etc. — all of which turned out to be false within a few short weeks after the effective date of the plan. At the time that Jamesway needed to liquidate and abandon its plan, the first bankruptcy case was still open. However, instead of converting the first pending case into a Chapter 7 liquidation (or seeking to liquidate in the existing Chapter 11 case), Jamesway instead purported to file a "new" Chapter 11 case in the same court with the same judge.

The clear purpose of filing the new case was to reject the recently assumed leases, to treat the rejection claims as general unsecured claims and to cap the amounts under section 502(b)(6) (whereas if the liquidation was done in the first case or as a conversion to a Chapter 7, the rejection claims would have been uncapped in amount and would have had a priority of Chapter 11 administrative expenses). We sought to dismiss the second filing or, alternatively, to have an administrative priority for the rejection claims in the second case, however the case law was clearly to the contrary. While we ultimately settled, this stood out as the most challenging legal argument I have ever made.

Alternatively, if "challenging" refers to the complexity and difficulty of obtaining a successful result due to strict parameters established by the key parties compounded by contentious relationships between shareholders, I would point to my work on the Century/ML Cable Venture 363 sale in 2005. This entity was 50 percent owned by Adelphia Communications Corp. and 50 percent owned by a major Wall Street investment firm. We acted as counsel to the debtor and achieved a successful sale of the assets which exceeded all creditor claims by several hundred million dollars.

It would seem that a case involving a solvent estate with a sizeable cash sum to distribute to two shareholders would be easily executable. However, the shareholders appeared to have a contentious relationship and had faced each other in various litigation forums. Each had accused the other of breaching fiduciary duties, thus forfeiting rights to their share of the sales proceeds. The Bankruptcy Court appointed Morgan Lewis, under a novel protocol, to make final decisions amid board deadlocks (which happened with nearly every decision along the way) and we also acted as a neutral party designated to help mediate the ultimate resolution and allocation of the sales proceeds among the two shareholders.

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

A: I am not an advocate of the 210-day maximum cap for assuming or rejecting real property leases. Most debtor-in-possession loans in retail bankruptcy cases require that the DIP lender be given 45 - 60 days to liquidate its collateral if there is to be a liquidation, thus the DIP loan milestones require decisions on the assumption/rejection of leases to occur in 120 -150 days. In cases with a large number of leases, this is nearly impossible and I believe that it often results in a preordained liquidation rather than reorganization or 363 sales. This said, the rule designed to protect landlords is achieving the opposite effect, resulting in dark stores, no rent and prolonged vacancies.

I also question the current committee investigation scheme in which the debtor and committee devote substantial time and money investigating potential causes of action. On occasion, the process has been used as an excuse for committee counsel to incur high legal fees with no real benefit to the estate or unsecured creditors and/or an attempt to hold a viable sale hostage until a party agrees to pay a small sum to unsecured creditors. I have encountered situations in which we bypassed the investigation and reached the end game of the size of the "pot" quicker and less expensively, but it in many cases, it has been an uphill battle to avoid that cost and distraction.

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

A: The WARN ACT and ERISA issues have become increasingly significant in a number of cases that I have been involved with over the past decade. Since the 2008 financial crisis, there has been an uptick in Chapter 11 cases in which asset values have declined and the Chapter 11 case is merely a liquidation device or a vehicle to implement a quick 363 sale. However, because buyers almost always prefer to purchase assets free and clear of liabilities including pension obligations, ERISA issues are now crucial in most 363 sales. Similarly, the amount and priority of WARN claims has become a much larger issue in recent years as more cases result in liquidations rather than reorganizations.

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

A: While many practitioners have left lasting impressions on me in my 28 years practicing (including Morgan Lewis partner Richard Toder,), if I had to narrow it down , I would point to Weil Gotshal & Manges LLP partner Harvey Miller. He has handled many of the largest and most significant bankruptcy cases over a sustained period of time, while devoting time and effort to teach bankruptcy law, serve on educational panels, author bankruptcy law articles and books and immerse himself in charitable and pro bono matters.

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

A: I was a bit of a bankruptcy geek in law school. I enrolled in every available bankruptcy course and published a law review article on a bankruptcy topic. Furthermore, my faculty adviser was Alan Resnick, the preeminent authority in the bankruptcy arena in the early 1980s. So, when I embarked on my first year as a legal associate at a bankruptcy group, I assumed I was ready to conquer the industry.

As it turns out, the bankruptcy field is overflowing with not only experienced lawyers, but also armies of insolvency specialists and experts — and almost every client is also knowledgeable in bankruptcy law. It was a hard lesson to learn that our value as bankruptcy lawyers is rarely related to our knowledge of the substantive law. Instead, we bring value through our ability to come up with creative solutions to business and legal problems and/or to negotiate resolutions in which adverse sides feel strongly about their substantive legal rights. As a junior associate, I did not have much knowledge or expertise in those areas (none of which were taught in law school), and it was a humbling experience to discover that I had so much more learning left to do.

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