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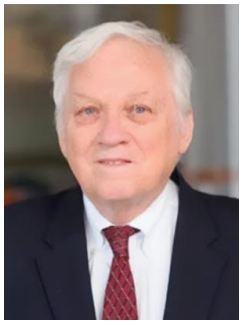
How Two Non-Bankruptcy Attys Won A Rare Ch. 7 Jury Trial

By **Chris Villani**

Law360 (August 2, 2024, 8:58 PM EDT) -- A pair of Boston-based attorneys from Davis Malm scored a victory in a rare bankruptcy-related jury trial despite not being bankruptcy practitioners themselves, after a Delaware panel rejected a trustee's bid to recoup $44 million from a former grocery store magnate.


Christopher Marino

Christopher Marino, a business and trial lawyer, and Gary Matsko, who specializes in civil litigation and appearing before regulatory agencies like the U.S. Securities and Exchange Commission, admitted to having to do a lot of learning on the fly when they represented Arthur S. Demoulas, whose family formerly co-owned the Market Basket chain of supermarkets.


Gary Matsko

The firm had been representing Demoulas and his family members since the 1990s, most notably in a shareholder derivative action involving the supermarket chain that involved more than two decades of litigation. Longtime Davis Malm partner Tom Fitzpatrick was Arthur Demoulas' attorney until Fitzpatrick's passing in 2022. The bankruptcy case was already well underway at that point, and Matsko and Marino took it over.

Demoulas was a majority shareholder in W.J. Bradley Mortgage Capital LLC, and sold his stake in the company in December 2015 for $25 million. Four months later, the residential mortgage banking firm filed for Chapter 7 protection, and W.J. Bradley's bankruptcy trustee sued to recover the funds, claiming the transfer was fraudulent and sunk the struggling firm.

The discovery played out in Delaware bankruptcy court, but the trustee pushed for a trial before a jury. When Marino and Matsko became involved in the case, they said they saw the issues and had no problem with having to make their case to jurors, even though it's a highly unusual step in a bankruptcy case.

"Everybody knew it could be done, but nobody had ever seen or heard of it being done," Marino said. "So it was kind of a new process to get the bankruptcy court to agree to the removal and get it placed on the federal court docket."

While the process is unusual, Matsko said it was fairly simple and just involved filing a motion to withdraw the reference and remove the case to a federal district court. The attorneys for both sides

took that step in the spring, and it sailed through.

"The case was in the district court, and we got a notice we were going to trial July 8," Matsko said. "We had eight weeks to get ready."

An Unusual Move

To have a case start as a Chapter 7 proceeding and end up before a jury is very unusual, according to Ed Neiger of ASK LLP.

"Withdrawal of reference is rare in and of itself, but it happens," said Neiger, who was not involved in the W.J. Bradley case. "The withdrawal of reference for the purpose of having a jury trial is rarer. And the withdrawal of reference for a jury trial in a Chapter 7 case is the rarest."

Neiger said he has never had a jury trial in a bankruptcy matter, and came close just once during his involvement in PG&E Corp.'s Chapter 11 proceedings.

"The reason people file for bankruptcy is to avoid jury trials," Neiger said.

He was surprised that a trustee would agree with a withdrawal of reference for a jury trial, since trustees are legal entities and typically do not make the most sympathetic of plaintiffs.

An attorney representing the trustee did not respond to a request for comment.

Matsko noted that in most instances, a bankruptcy trustee makes various claims and then goes around to the parties involved and settles them. When W.J. Bradley sought Chapter 7 protection, Matsko said, a number of settlements were reached, but Demoulas had no interest in resolving his matter.

"In our case, the sums involved were significant, and our client was adamant that he had done nothing wrong that should cause him to forfeit the money he received," Matsko said. "Which was essentially equal to the money he had put into the company."

"We had that perfect storm where we had a client who felt very good about his case, and we felt good about it too," he added. "Because of those dynamics, it didn't go the usual path to settlement."

Bruce Markell, a professor at Northwestern University Pritzker School of Law and former bankruptcy judge, said that though jury trials generally are relatively rare, most bankruptcy cases that do end up before a jury move to district court. Even more unusual would have been a jury trial that actually took place before a bankruptcy judge. Markell said he never had one in his nine years on the bench.

"My courtroom had a jury box with screens for the jurors, but no one ever sat there," he said.

Marino, whose practice focuses on business litigation, including breach of contract, securities laws and shareholder and partnership disputes, said the "convoluted, complex and dense" bankruptcy laws can make putting a case before jurors a tall task.

"If you're going to try it, and you're going to try it to a jury on questions of solvency and valuation and the things that arise in a bankruptcy case, [lawyers] don't want to be in front of a jury or even a federal judge — they want someone who specializes in this area of law," he said.

Markell agreed, saying that "sometimes people think, 'I would rather be before someone who knows something about bankruptcy.'"

Since both sides have to agree to withdraw the reference, Markell said that "if one side thinks that way, chances are the other side doesn't."

On More Familiar Turf

Both Matsko and Marino are veterans when it comes to trying cases in federal courts. Matsko said that once the case was before U.S. District Judge Maryellen Noreika, things seemed more along the lines of what they are accustomed to.

"Getting up to speed on the law is no big deal," Matsko said. "You get into a forum, you find out what the complaint said and you get up to speed on the law."

In this instance, however, they were tasked with trying to refute what Matsko said seemed like an "obvious conclusion" that his client's $25 million redemption is what caused trouble for W.J. Bradley.

Through discovery, the Davis Malm team said it unearthed several important facts to show the company was not on its deathbed when Demoulas withdrew his money: At the same time the $25 million was being paid out, W.J. Bradley reeled in $44 million through the company's recapitalization.

W.J. Bradley was also harmed by the loss of branches that accounted for about 30% to 40% of its revenue, as well as by new industry regulations that kicked in in October 2015 and slowed the process for the company to sell its repackaged loans, the defense argued.

Marino said it was a "challenge" to build the factual record, especially since there were few people left to question after the company hit Chapter 7.

"When a company files for bankruptcy, all the employees leave," he noted. "Typically, when you're dealing with litigation, you can talk to people and ask, 'What happened here?'"

But Demoulas had recused himself from any votes over the redemption and recapitalization transactions, and Marino said the officers and directors had all disappeared. So the lawyers turned to the paper trail.

"We had to dig through mountains and mountains of documents to find the records and say, 'If it's not the $25 million going out of the company, why did this company fail?'" Marino said. "We realized that we have to explain why so it would be a much more understandable story for a jury."

At trial, the lawyers said they looked for jurors who they thought would be able to follow a complicated story and evaluate numerous factors before reaching a conclusion.

"We were looking for people who are not necessarily going to believe the first story they hear," Marino said. "We wanted them to look a little bit deeper."

The trial lasted four days. Less than an hour after the jurors left the courtroom to deliberate, they returned with a verdict for the defense.

"It was a pretty quick deliberation," Marino said. "And during that time they were having lunch."

In the wake of the verdict, Matsko said, an agreement was reached in which the defense would not seek attorney fees, and the trustee agreed to drop any appeal. A judge signed off on the deal, and the case is officially over.

Marino said he might be open to wading into bankruptcy law again, though he joked that he would not be starting up his own bankruptcy practice anytime soon.

Matsko said he prefers to go out on top.

"I like the idea of retiring undefeated," he said with a chuckle. "It's a strange practice."

--Editing by Alanna Weissman and Covey Son.
