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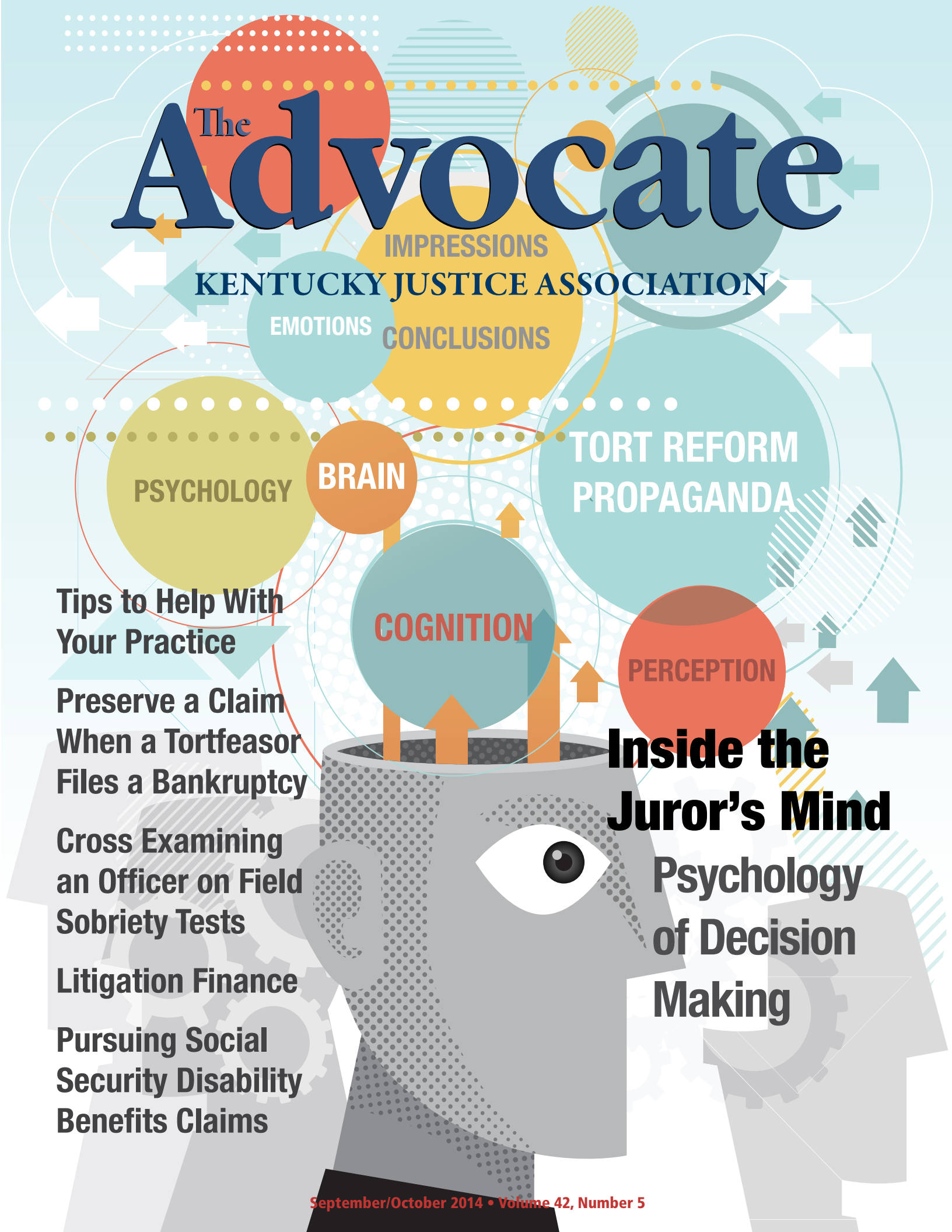

Inside the Juror's Mind

Psychology of Decision Making

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By Justin Lawrence

Two Steps to Preserve a Claim When a Tortfeasor Files a Bankruptcy

You are one of the Kentucky Justice Association's finest attorneys and are in the process of litigating an excellent truck wreck case. You have the damages to justify a verdict above the tortfeasor's policy limits, and discovery uncovered facts that might justify punitive damages. You are working a horrific case, and then… the tortfeasor files for bankruptcy protection.

Far too many plaintiff's attorneys view a bankruptcy filing as a dirty trick by the tortfeasor; just one more way to escape justice for the tortfeasor's bad acts. However, courts view a bankruptcy filing as anything but a trick and the court will throw out your client's right to recover if you don't follow a few simple steps to preserve your client's claim. The following steps are necessary every time you litigate to recover assets held by a tortfeasor in bankruptcy, and are—at the very least—a wise, safe course of conduct when litigating solely for a bankrupt tortfeasor's insurance policy.

Step One: File Your Proof of Claim

The proof of claim is a simple form provided for you at www.kyeb.uscourts.gov/creditors. Choose form B 10, which gives you the form you need to file and the instructions for that form. The proof of claim should be for the full amount of foreseeable damages, so don't be afraid to list the damages you might see on your best day in court.[1] You'll also have to list the basis of your claim, including the court case number if you have one. Personal injury or wrongful death claims are recognized basis, as are contractual disputes.[2] Finally, be sure to attach some kind of documentation to show a foundation for your claim. If you do not yet have a judgment, then attach your complaint setting out the allegations against the defendant tortfeasor. If you have not filed a complaint, you may want to attach the accident report or an expert report setting forth the basics of liability, causation and damages. You are not required to prove your client's claim in this forum, but there must be some evidence of its merit.

If your client's claim is pending a final judgment, it is an unsecured claim. As an unsecured creditor, your client gets a low priority—essentially getting the left over dregs after secured creditors are paid in full. However, in a bankruptcy where the debtor has assets or significant income, even unsecured creditors sometimes are paid in full. If your client received a final judgment, some states consider that a lien by law that may raise you to secured creditor status. Kentucky does not, however, and you must take appropriate steps to place a judgment lien on the tortfeasor's property *and* perfect the lien before your client is a secured creditor.[3]

For Chapter 7s or Chapter 13s, the proof of claim is due ninety days from the first scheduled date of the 341 meeting, regardless of whether the meeting is rescheduled.[4] The 341 meeting is set at the same time notice is sent to creditors, so your client should receive that notice from the bankruptcy court. The court has the authority to extend this deadline based upon a showing of extenuating circumstances or excusable neglect, and often your client is asked to show that the late filing does not unduly prejudice the tortfeasor.[5]

Don't forget to monitor your proof of claim! Typically, the court and trustee accepts a proof of claim, but the debtor/tortfeasor may file a written objection.[6] If the tortfeasor files an objection, the court accepts it and grants the requested relief unless you file a response to the objection. When you file a response to an objection, you set a hearing date for the court to hear the dispute at a regular motion docket.[7] Factual disputes are often set for an evidentiary hearing at some time following the motion docket. Your client has a limited time in which to file a response to the tortfeasor's objection, so you have to monitor PACER to ensure an objection doesn't slip by you.[8]

Filing a proof of claim is inappropriate in a few situations. For example, if the tortfeasor has already been granted a discharge in bankruptcy, your client's opportunity to file a proof of claim will have expired. In that instance, it is appropriate to file a motion to modify the discharge injunction to pursue any insurance proceeds that apply to the injury.[9] If

the tortfeasor filed a no-asset Chapter 7, filing a Proof of Claim is often pointless, although it can be done.

Step Two: File Your Motion for Relief from Stay

The proof of claim will not allow you to continue litigating your client's case or even continue engaging in pre-litigation discovery. The tortfeasor is protected by the automatic stay while in bankruptcy, and you must ask the bankruptcy court to allow your client to pursue the tortfeasor despite the bankruptcy. In layman's terms, the automatic stay is the "do not touch" sign the bankruptcy court hangs around the neck of every bankruptcy filer at the moment of filing. It applies to every form of creditor, and violating it carries severe penalties. It is not acceptable to continue litigation or pre-litigation discovery against other potential tortfeasors and then return to the bankrupt tortfeasor later. Failure to file a Motion for Relief from Stay in a timely fashion can cause your client to miss the proof of claim deadline, lose the right to collect from the tortfeasor, and even get you sanctioned.

However, relief from the automatic stay may be granted to a party in interest "for cause."[10] The bankruptcy court has the discretion to determine whether permitting a civil action to go forward constitutes cause, but case law suggests that permitting a collateral matter to proceed in another forum should constitute cause for granting relief from stay.[11] The bankruptcy court is tasked with balancing the prejudice to the bankruptcy debtor's estate with the hardship of the plaintiff-creditor should relief be denied, and a three part test assists the court.[12] If relief is granted, it permits your client's case to proceed in the appropriate court. Even if relief is not granted, some courts suggest that the diligence shown by the creditor in asking for relief be taken as a factor in the creditor's favor should the creditor need to re-open the bankruptcy post-discharge.[13]

There is no court-provided form for a Motion for Relief from Stay, but KJA members may find a sample of one in the Document Bank on the KJA website. A properly filed Motion for Relief from Stay is granted automatically unless the tortfeasor files a response[14] at which point the court hears the matter at the next regular motion docket.

Preserving your client's claims is relatively straightforward, but requires affirmative action on your part. Don't let unfamiliarity with the bankruptcy court's rules stifle your response and muddle your client's rights. Following these steps ensures your client a shot at the day in court he or she deserves.

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1 See, e.g., *Hendrix v. Page* (*In re of Hendrix*), 986 F.2d 195, 199 (7th Cir. 1993).

2 See Form B 10's instructions for Section 2.

3 See e.g. *In re Weaver*, 69 B.R. 554, 555-556 (Bankr.W.D.Ky.1987), which discusses the necessity of following Kentucky's UCC laws when perfecting an interest in fixtures.

4 FRBP Rule 3002(c). In Chapter 11s, a proof of claim only needs to be filed if your client disagrees with the amount of the debt listed by the tortfeasor. Since your client is in a dispute with the tortfeasor, it is highly likely that the amount will be disputed and your best practice is probably to file a proof of claim no later than the 90-day deadline used in other types of bankruptcy.

5 *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 389 (1993).

6 FRBP 3007(a)

7 FRBP 3002(c)

8 FRBP 3007 and Eastern District of Kentucky Local Rule 9013-4. Often objections will assert that a response must be given within 30 to 90 days at the time the objection is electronically filed. The system prompts the filing party to enter this deadline. FRBP 9014(a) defines which issues can be objected to and which require motions.

9 *In re Smith*, 334 B.R. 233, 235 (Bankr. W.D. Ky. 2005); *In re HNRC Dissolution Co.*, 2005 Bankr. LEXIS 1451, 54 Collier Bankr. Cas. 2d (MB) 1002 (Bankr. E.D. Ky. July 29, 2005). *See also In re Patterson* case, 297 B.R. 110 (Bankr. E.D. Tenn. 2003) and In re Harrison, 206 B.R. 910, 1997 Bankr. LEXIS 329 (Bankr. E.D.Tenn. 1997) (internal citations omitted)

10 11 U.S.C. § 362(d)(1).

11 *Ohio Valley Carpenters District Council, Local No. 415 v. Valley Kitchens, Inc. (In re Valley Kitchens, Inc.)*, 58 B.R. 6 (Bankr. S.D. Ohio 1985).

12 *Peterson v. Cundy (In re Peterson)*, 116 B.R. 247, 249 (Bankr. D. Colo. 1990). *Robbins v. Robbins (In re Robbins)*, 964 F.2d 342, 345 (4th Cir. 1992).

13 In re Shondel, 950 F.2d 1301, 1305 (7th Cir. 1991)

14 KYEB LBR 9013-1(a) states that a motion or request for relief may include a notice and opportunity for hearing setting forth the time within which objections must be filed and noticed for hearing. Generally, responses should be filed within 30 days.