



Navigating the Bankruptcy Bubble: A War Story for Creditors

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The virtually unprecedented current economic climate is generating a wave of new bankruptcy cases. Along with the tremendous increase in legitimate bankruptcy cases there will no doubt be a corresponding increase in abusive or bad faith bankruptcy filings. Those cases will take many twists and turns as debtors improperly manipulate the system to hamper the legitimate rights of creditors. Since delay is usually the goal of these cases, they can be frustrating and time consuming as debtors post roadblock after roadblock. Fortunately, the Bankruptcy Code provides tools that experienced counsel can use to defeat the abuse. Recently, this Firm successfully navigated through just such a bankruptcy maze, constructed to interfere with its client's rights.

Dongjin Semichem Co., Ltd., a large South Korean manufacturing company, invested in a California start-up company called Emailfund, Inc. According to its principal, Sangmun Kim, Emailfund was developing encryption software for use in portable personal data devices—in other words, early Bluetooth technology. To convince Dongjin to invest, Emailfund and Kim made a number of representations regarding the software and the company's ability to produce it. After Dongjin made an initial investment in Emailfund, it learned that the representations were false and that Emailfund did not and could not produce the software. Dongjin sued Emailfund and Kim, seeking damages to compensate for its lost investment and rescission of the agreement. Under the terms of the parties' contract, the suit proceeded to arbitration.

Kim did everything he could to delay and side-track the arbitration, such as changing counsel several times so that the arbitrator would grant him continuances to get new counsel up to speed. When he exhausted all of his tricks in the arbitration, he commenced bankruptcy proceedings in Los Angeles for himself and Emailfund, to prevent Dongjin from getting its case heard. While venue for Emailfund's bankruptcy case was proper in Los Angeles, Kim had no basis for commencing a personal case here. On his voluntary petition, Kim listed his place of residence as Seoul, South Korea. He also disclosed that his primary occupation was as a professor of mathematics at Yonsei University in Seoul, South Korea, and that he owned an apartment and other assets there. How could he file bankruptcy in Los Angeles? Kim's tenuous allegation of venue was based on an address in Malibu, purportedly the home of a mathematics manuscript he wrote. Nice try, but would this tactic work?

On Dongjin's behalf, the Firm sought dismissal of Kim's bankruptcy case on the ground that it was filed in bad faith. The filing of a bankruptcy case requires an honest, good faith intent to reorganize. Bankruptcy courts may dismiss cases if they are filed for improper purposes and without the requisite good faith. The Firm argued that the only objective of the filing was to prevent conclusion of the arbitration, and that Kim had no good faith intention to reorganize his financial affairs.

The Firm also argued that Kim's doubtful venue here was additional evidence of his bad faith motive. His extensive ties to South Korea demonstrated that he had next to no connection with this district, necessary for the filing in Los Angeles. Testimony at the hearing adduced evidence that the Malibu address listed by Kim as the "location" of his manuscript was actually a bikini shop owned by some of Kim's friends! The bankruptcy court agreed that the petition was filed in bad faith, dismissed the case and ordered a 180-day bar to refiling another bankruptcy case (the maximum permitted by law). The bankruptcy court also granted Dongjin's motion for relief from the automatic stay in Emailfund's case so the arbitration could proceed. And, to our client's relief, the arbitration did proceed.

But before the arbitration could conclude, the 180-day bar to another bankruptcy filing by Kim expired, and guess what? Kim filed another personal bankruptcy case, this time in Boston, Massachusetts. Now, Kim alleged venue in Boston based on a claim of residence there, even though he still lived and worked in South Korea. The Firm investigated Kim's claim that he resided in Boston. We found that the residence listed on Kim's bankruptcy petition was that of a relative of his. On Dongjin's behalf, and moving quickly, the Firm obtained relief from the automatic stay in Kim's Boston bankruptcy case, returning the case to its arbitration in under two weeks.

The arbitration was completed, with a total victory for Dongjin, including a damage award just shy of \$1 million. The arbitrator found that Kim was the alter ego of Emailfund so both defendants were liable for the damages suffered by Dongjin. Was Kim finished this time? No, not yet. After the judgment was issued, Kim transferred his bankruptcy case from Boston to the Northern District of California, now claiming that he lived in Palo Alto, California. The firm investigated again, and found that the address he gave to the bankruptcy court for this round was the address of the Department of Philosophy at Stanford University.



When challenged, Kim filed a notice stating that he no longer lived at that address, but gave no new address. Count them up. Three venuebased delay tactics: filing bankruptcy petitions in Los Angeles, Boston, and San Francisco, based on the location of a manuscript, a relative's residence, and the Stanford Philosophy Department, respectively. Did we say manipulation?

But we weren't finished either. On behalf of Dongjin, we found a way to make the winning judgment effective against Kim, even in the face of his manipulation of the bankruptcy rules.

Armed with the arbitration judgment and the evidence of fraud by Emailfund and Kim, the Firm filed a complaint seeking to deny Kim a discharge of his obligations to Dongjin. Under the Bankruptcy Code, an obligation of an individual debtor may be exempt from discharge if it was based on fraud or other wrongdoing. In addition, an individual debtor may be denied discharge of all of his obligations if he abuses the bankruptcy process.

After substantial briefing, the bankruptcy court agreed with the Firm's arguments, ruling that Kim's fraud in inducing Dongjin to enter into the agreement merited denial of discharge of Dongjin's claim against Kim. In addition, Kim's failure to comply fairly with certain bankruptcy requirements warranted a denial of discharge of all of his obligations. Dongjin may enforce its judgment against both Kim and Emailfund. All of Kim's bankruptcy ruses had failed in the end.

This case illustrates the difficulties of dealing with a debtor intent on manipulating the bankruptcy system for improper purposes. Nonetheless, those difficulties can be overcome with the assistance of experienced and creative counsel.

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