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## **What Every Civil Litigator Needs to Know About Bankruptcy**

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# **What Every Civil Litigator Needs to Know About Bankruptcy**

**Melanie Gray\***

## **Introduction**

This paper outlines some of the fundamental basics that every civil litigator should know about bankruptcy, including tips for handling common issues that arise in bankruptcy litigation and in other civil litigation that may be affected by a bankruptcy case.

This paper contains a high-level overview of the topics covered.<sup>1</sup> For more detailed information, consult an experienced bankruptcy attorney or a reliable bankruptcy treatise, such as *Collier on Bankruptcy*.

## **Tip 1: Know the Key Players in a Bankruptcy Case**

The key players in a bankruptcy case include:

- The bankruptcy judge

A bankruptcy judge is an Article I judge under the Constitution and, therefore, has more limited judicial power than an Article III district judge. *See* Tip 3, *infra*. Bankruptcy judges lack the constitutional protections of life tenure and salary protection. *Compare* U.S. Const. art. I, § 8, *with* U.S. Const. art. III, §1. Instead, bankruptcy judges serve 14-year terms, subject to removal for cause, and Congress sets their salaries. *See* 28 U.S.C. §§ 152, 153.

- The debtor

The debtor is the person or entity that files a petition seeking relief under the Bankruptcy Code. Individuals usually file under chapters 7 or 13 of the Bankruptcy Code. Chapter 11 generally involves the reorganization of a company. In a chapter 11 case, the debtor's management usually remains in control of the company and the debtor is often referred to as the "debtor-in-possession" or "DIP." 11 U.S.C. §§ 1107(a), 1108.

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<sup>1</sup> By their very nature, this paper and the corresponding CLE presentation at the conference do not purport or attempt to provide a comprehensive overview of the subject matters covered, do not purport to provide legal advice, and should not be relied upon in connection with providing legal advice.

- The debtor's estate

When a person or entity files for bankruptcy, a bankruptcy "estate" is created that includes all of the person's or entity's ownership interests in property. Section 541(a)(1) of the Bankruptcy Code defines "property of the estate" and determines the extent to which property interests will be subject to the authority of the bankruptcy court upon filing a bankruptcy petition.

- The chapter 7 trustee

In a chapter 7 case under which the debtor is liquidated, a chapter 7 trustee is appointed to oversee the liquidation of the debtor's assets and distribution of value, if any, to creditors. 11 U.S.C. § 701.

- A chapter 11 trustee

Under certain circumstances, generally involving fraud, dishonesty, or gross mismanagement by the debtor's management, a chapter 11 trustee may be appointed by the bankruptcy court, in which event there is no longer is a "debtor-in-possession." 11 U.S.C. § 1104(a).

- The U.S. trustee

The U.S. trustee, which is a part of the Department of Justice, is responsible for overseeing the administration of bankruptcy cases under 28 U.S.C. § 586. A U.S. trustee is not to be confused with a chapter 7 or chapter 11 trustee.

- The unsecured creditors' committee

In most chapter 11 cases, a committee of unsecured creditors will be formed, with membership appointed by the U.S. trustee. 11 U.S.C. § 1102. The purpose of the unsecured creditors' committee is to represent the interests of all unsecured creditors. *See* 11 U.S.C. § 1103. The fees and expenses of the unsecured creditors' committee, as approved by the bankruptcy court, are paid by the debtor. *Id.*

- An equity committee

In some chapter 11 cases, and generally those in which it can be demonstrated that sufficient value may exist to pay all creditors in full, the bankruptcy court may appoint an equity committee to represent the interests of all equity holders. 11 U.S.C. § 1102(a)(2). As with the unsecured creditors' committee, the fees and expenses of the equity committee, as approved by the bankruptcy court, are paid by the debtor. 11 U.S.C. § 1103.

- The debtor's and committees' legal and financial advisors

The debtor and court-approved committees generally seek to retain legal and financial advisors. Retention of the debtor's and the committees' legal and financial advisors must be approved by the bankruptcy court. 11 U.S.C. § 327. If approved, payment of their

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