

PRESENTED AT

40th Annual Page Keeton Civil Litigation Conference

October 27-28, 2016

Austin, TX

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

**Melanie Gray
Sarah T. Foss
Katherine A. Preston**

Melanie Gray
Winston & Strawn LLP
1111 Louisiana, 25th Floor
Houston, TX 77002

MGGray@winston.com

TABLE OF CONTENTS

Introduction	1
Tip 1: Know the Key Players in a Bankruptcy Case	1
Tip 2: Know the Extent of the Bankruptcy Court’s Jurisdiction	4
A. Bankruptcy Jurisdiction Is Broad, But Not Limitless	4
B. Removal of Litigation to the Bankruptcy Court	5
C. Remand and Abstention	6
Tip 3: Determine Whether the Bankruptcy Court Has the Constitutional Authority to Finally Adjudicate Your Client’s Claim	8
Tip 4: Know the Applicable Rules of Bankruptcy Procedure and the Differences Between a Contested Matter and an Adversary Proceeding	10
Tip 5: Understand the Effect and Consequences of Filing a Proof of Claim	11
A. Background: What is a Proof of Claim?	11
B. Objections to Proofs of Claim.....	13
C. Implications and Consequences of Filing a Proof of Claim Related to Pending Litigation.....	13
D. Liquidating a Claim Outside the Bankruptcy Court	15
Tip 6: Be Mindful of the Automatic Stay	17
A. Exceptions to the Automatic Stay Related to Pending Litigation.....	17
B. Relief from the Automatic Stay	19
Tip 7: Determine the Priority of the Creditor’s Claim	21
A. Secured Claims	21
B. Administrative Claims	21
C. Unsecured Claims	23
D. Equity Interests	23
Tip 8: Understand the Elements of and Defenses to a Preference and a Fraudulent Transfer Claim	23
A. Preference Basics	23
B. Defending a Preference Action	24
C. Fraudulent Transfer Basics	25
D. Defending a Fraudulent Transfer Claim	27
Tip 9: You May be Retained as “Special Counsel” or Ordinary Course Professional in a Bankruptcy Case	28

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>360 Electrical, LLC v. Gottrox, LLC</i> , No. 2:08–CV–00044–TJW, 2011 WL 3625579 (E.D. Tex. Aug. 17, 2011).....	18
<i>Arnold v. Garlock, Inc.</i> , 278 F.3d 426 (5th Cir. 2001)	17
<i>Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership</i> , 526 U.S. 434 (1999).....	4
<i>Beran v. World Telemetry, Inc.</i> , 747 F. Supp. 2d 719 (S.D. Tex. 2010)	17
<i>Carley Capital Grp. v. Firemen’s Fund Ins. Co.</i> , 889 F.2d 1126 (D.C. Cir. 1989) (per curiam)	16
<i>Carway v. Progressive Cnty. Mut. Ins. Co.</i> , 183 B.R. 769 (S.D. Tex. 1995)	17
<i>Century Indemnity Co. v. Nat’l Gypsum Co. Settlement Trust (In re National Gypsum Co.)</i> , 208 F.3d 498 (5th Cir.2000)	3
<i>Donnelly v. TRL, Inc.</i> , 420 F. App’x 126 (3d Cir. 2010)	16
<i>Everitt v. Pneumo Abex, LLC</i> , 703 F. Supp. 2d 630 (S.D. Miss. 2009), <i>rev’d on other grounds sub nom.</i> <i>Everitt v. Pneumo Abex, L.L.C.</i> , 411 F. App’x 726 (5th Cir. 2011)	17
<i>Executive Benefits Insurance Agency v. Arkison</i> , 134 S.Ct. 2165 (2014).....	8
<i>Feld v. Zale Corp.</i> , 62 F.3d 746 (5th Cir.1995)	5
<i>Germain v. Conn. Nat’l Bank</i> , 988 F.2d 1323 (2d Cir. 1993).....	14
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33 (1989).....	13

<i>In re Barnes</i> , 279 F. App'x 318 (5th Cir. 2008)	16
<i>In re Bavelis</i> , 773 F.3d 148 (6th Cir. 2014)	13
<i>In re Burger Boys, Inc.</i> , 183 B.R. 682 (S.D.N.Y. 1994).....	20
<i>In re Caton</i> , 157 F.3d 1026 (5th Cir. 1998)	6
<i>In re Cedar Funding, Inc.</i> , 419 B.R. 807 (B.A.P. 9th Cir. 2009).....	6
<i>In re Chemtura</i> , 448 B.R. 635 (S.D.N.Y. 2011).....	11
<i>In re Dant & Russell Inc.</i> , 853 F.2d 700 (9th Cir. 1988), <i>superseded by statute on other grounds</i> , <i>In re</i> <i>Ntl. Refractories & Minerals Corp.</i> , 297 B.R. 614 (N.D. Cal. 2003).....	21
<i>In re Denton Cty. Elec. Co-op., Inc.</i> , 281 B.R. 876 (Bankr. N.D. Tex. 2002).....	7
<i>In re DeSardi</i> , 340 B.R. 790 (Bankr. S.D. Tex. 2006)	21
<i>In re Eagle-Picher Indus., Inc.</i> , 447 F.3d 461 (6th Cir. 2006)	21
<i>In re Exide Techs.</i> , 544 F.3d. 196 (3rd Cir. 2008)	13
<i>In re Flintkote Co.</i> , 533 B.R. 887 (D. Del. 2015), <i>reconsideration denied</i> , No. BR 04-11300-JKF, 2015 WL 4269920 (D. Del. July 14, 2015), <i>aff'd</i> , No. 15-2886, 2016 WL 3997217 (3d Cir. July 26, 2016)	20
<i>In re Ford</i> , 967 F.2d 1047 (5th Cir. 1992)	11
<i>In re Fowler</i> , 259 B.R. 856 (Bankr. E.D. Tex. 2001)	19
<i>In re Gilbreath</i> , 409 B.R. 84 (S.D. Tex. 2009)	10

<i>In re Guerrero</i> , No. 12-35341, 2013 WL 6834642 (Bankr. S.D. Tex. Dec. 20, 2013).....	6
<i>In re Hidalgo Logistics, LLC</i> , No. 13-70239, 2014 WL 2003216 (Bankr. S.D. Tex. May 15, 2014).....	6
<i>In re Hook</i> , No. 07–cv–02372 BSJ, 2008 WL 4482247	12
<i>In re Hovis</i> , 356 F.3d 820 (7th Cir. 2004)	12
<i>In re Imaging3, Inc.</i> , 634 F. App'x 172 (9th Cir. 2015).....	13
<i>In re Jack/Wade Drilling, Inc.</i> , 258 F.3d 385 (5th Cir. 2001)	22
<i>In re Johnson</i> , 433 B.R. 626 (Bankr. S.D. Tex. 2010)	27
<i>In re Lorax Corp.</i> , 295 B.R. 83 (Bankr. N.D. Tex. 2003).....	7
<i>In re LTV Steel Co.</i> , 307 B.R. 37 (Bankr. N.D. Ohio 2004).....	10
<i>In re Midgard Corp.</i> , 204 B.R. 764 (B.A.P. 10th Cir. 1997)	7
<i>In re Mirant Corp.</i> , 197 F. App'x 285 (5th Cir. 2006)	15
<i>In re Nat'l Gypsum Co.</i> , 134 B.R. 188 (N.D. Tex. 1991).....	15
<i>In re Protected Vehicles, Inc.</i> 392 B.R. 633 (Bankr. D.S.C. 2008).....	12
<i>In re Quality Lease & Rental Holdings, LLC</i> , No. 14-60074, 2016 WL 416961 (Bankr. S.D. Tex. Feb. 1, 2016)	5
<i>In re Ralph Lauren Womenswear, Inc.</i> , 197 B.R. 771 (Bankr. S.D.N.Y. 1996).....	11
<i>In re Ramirez</i> , 413 B.R. 621 (Bankr. S.D. Tex. 2009)	6, 7

<i>In re Rogers</i> , 391 B.R. 317 (Bankr. M.D. La. 2008)	12
<i>In re S.I. Acquisition, Inc.</i> , 817 F.2d 1142 (5th Cir. 1987)	17
<i>In re Sahni</i> , 227 B.R. 748 (D. Kan. 1998)	16
<i>In re Soza</i> , 542 F.3d 1060 (5th Cir. 2008)	25
<i>In re Taylor</i> , No. 08–60242–13, 2008 WL 4723364 (Bankr. D. Mont. Oct. 23, 2008).....	12
<i>In re Texas State Optical, Inc.</i> , 188 B.R. 552 (Bankr. E.D. Tex. 1995)	19, 20
<i>In re TransAmerican Natural Gas Corp.</i> , 978 F.2d 1409 (5th Cir. 1992)	21, 22
<i>In re Treyson Dev., Inc.</i> , No. 14-70256, 2016 WL 1604347 (Bankr. S.D. Tex. Apr. 19, 2016).....	6
<i>In re Trust</i> , 526 B.R. 668 (Bankr. N.D. Tex. 2015).....	20
<i>In re U.S. Abatement Corp.</i> , 39 F.3d 562 (5th Cir. 1994)	16, 18
<i>In re Wilson</i> , 116 F.3d 87 (3d Cir. 1997).....	20
<i>In re Xenon Anesthesia of Texas, PLLC</i> , 510 B.R. 106 (Bankr. S.D. Tex. 2014)	19
<i>Katchen v. Landy</i> , 382 U.S. 323 (1966).....	13
<i>Langenkamp v. Culp</i> , 498 U.S. 42 (1990) (per curiam).....	13
<i>Levine v. M & A Custom Home Builder & Developer, LLC</i> , 400 B.R. 200 (S.D. Tex. 2008)	15
<i>Marcus, Stowell & Beye Gov’t Secs., Inc. v. Jefferson Inv. Corp.</i> , 797 F.2d 227 (5th Cir. 1986)	18

<i>Martin-Trigona v. Champion Fed. Sav. & Loan Ass’n</i> , 892 F.2d 575 (7th Cir. 1989)	16
<i>Matter of Gober</i> , 100 F.3d 1195 (5th Cir. 1996)	6
<i>Norton v. Encompass Servs. Corp.</i> , 301 B.R. 836 (S.D. Tex. 2003)	15
<i>Pereira v. Grecogas Ltd. (In re Saba Enters., Inc.)</i> , 421 B.R. 626 (Bankr. S.D.N.Y. 2009).....	25, 26
<i>Pioneer Inv. Servs. Co. v. Brunswick Assocs. P’ship</i> , 507 U.S. 380 (1993).....	12
<i>Queenie, Ltd. v. Nygard Int’l</i> , 321 F.3d 282 (2d Cir. 2003).....	18
<i>Reliant Energy Servs., Inc. v. Enron Canada Corp.</i> , 349 F.3d 816 (5th Cir. 2003)	16, 17
<i>ResCap Liquidating Trust v. RBC Mortgage Co.</i> , No. 14 CIV. 4457 AKH, 2014 WL 8103896 (S.D.N.Y. July 18, 2014).....	15
<i>Sonnax Industries, Inc.</i> , 907 F.2d 1280 (2nd Cir. 1990).....	19, 20
<i>Speiser, Krause & Madole P.C. v. Ortiz</i> , 271 F.3d 884 (9th Cir. 2001)	12
<i>Stern v. Marshall</i> , 564 U.S. 462 (2011).....	8
<i>The Singer Company N.V. v. Grox-Beckert KG</i> , 01 Civ. 165, 2002 WL 243779 (S.D.N.Y. Feb. 20, 2002).....	15
<i>Thompson v. E.I. DuPont de Nemours & Co.</i> , 76 F.3d 530 (4th Cir. 1996)	12
<i>Wedgeworth v. Fibreboard Corp.</i> , 706 F.2d 541 (5th Cir. 1983)	17
<i>Wellness Int’l Network, Ltd. v. Sharif</i> , 135 S.Ct. 1932 (2015).....	8

Statutes

11 U.S.C. § 327.....2, 4

11 U.S.C. § 327(e)27

11 U.S.C. § 330(a)(1).....27

11 U.S.C. § 341.....12

11 U.S.C. § 361.....3

11 U.S.C. § 362.....16, 17

11 U.S.C. § 362(a)(1).....16

11 U.S.C. § 362(b)(4)4

11 U.S.C. § 362(d)(1)19

11 U.S.C. § 362(k)(1)16

11 U.S.C. § 363.....3

11 U.S.C. § 364.....3

11 U.S.C. § 362(d).....19

11 U.S.C. § 364(d)(1)3, 21

11 U.S.C. § 365.....3

11 U.S.C. § 502(a)12

11 U.S.C. § 502(c)(1).....11

11 U.S.C. § 503.....20

11 U.S.C. § 503(b).....21

11 U.S.C. § 503(b)(9)21, 22

11 U.S.C. § 507.....4, 20

11 U.S.C. § 507(a)(4).....3, 21

11 U.S.C. § 541(a)(1).....1

11 U.S.C. § 544(b)	24
11 U.S.C. § 546(e)	26, 27
11 U.S.C. § 547	22
11 U.S.C. § 547(b)	23
11 U.S.C. § 547(c)	23
11 U.S.C. § 547(c)(4)(B)	23
11 U.S.C. § 548	24, 25
11 U.S.C. § 548(a)(1)	24
11 U.S.C. § 548(a)(1)(A)	24, 27
11 U.S.C. § 548(c)	26
11 U.S.C. § 701	2
11 U.S.C. § 1102	2
11 U.S.C. § 1102(a)(2)	2
11 U.S.C. § 1103	2
11 U.S.C. § 1104(a)	2
11 U.S.C. § 1107(a)	1
11 U.S.C. § 1108	1, 27
11 U.S.C. § 1129(b)	22
11 U.S.C. § 1334(a)	4
11 U.S.C. § 1334(b)	4, 5
11 U.S.C. § 1334(e)	4
11 U.S.C. § 1452	5
11 U.S.C. § 1452(a)	5
28 U.S.C. § 152	1

28 U.S.C. § 153.....	1
28 U.S.C. § 157.....	8
28 U.S.C. § 157(a)	4, 7, 14
28 U.S.C. § 157(b)(1)	7
28 U.S.C. § 157(b)(2)	7
28 U.S.C § 157(c)	7, 8
28 U.S.C. § 157(c)(2).....	8
28 U.S.C. § 157(d).....	14, 15
28 U.S.C. § 586.....	2
28 U.S.C. § 1334.....	4
28 U.S.C. § 1334(a)	7
28 U.S.C. § 1334(b)	7
28 U.S.C. § 1334(c)	6
28 U.S.C. § 1334(c)(2).....	7
28 U.S.C. § 1404(a)	15
28 U.S.C. § 1447(c)	6
28 U.S.C. § 1452(a)	6
28 U.S.C. §1452(b).....	6
CAL. CIV. CODE § 3439.09.....	24
TEX. BUS. & COM. CODE ANN. § 24.005(b).....	25, 26
TEX. BUS. & COM. CODE ANN. § 24.010(a)(1).....	24

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.¹ 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.

* The author acknowledges the incredible assistance of Sarah Foss and Katy Preston, both associates at Winston & Strawn LLP, in putting this paper together. Sarah is a 2002 graduate of Vanderbilt University Law School who focuses her practice on restructurings and reorganizations; Katy is a 2012 graduate of Harvard Law School who focuses her practice on complex commercial and bankruptcy litigations and internal investigations.

¹ 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

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: What Every Civil Litigator Needs to Know About Bankruptcy

Also available as part of the eCourse

[What Every Civil Litigator Needs to Know About Bankruptcy](#)

First appeared as part of the conference materials for the 40th Annual Page Keeton Civil Litigation Conference session "What Every Civil Litigator Needs to Know About Bankruptcy"