2 SOURCES
§ 2.1 ~ Three Jobs

In this chapter, we do three jobs. First, we outline the sources of bankruptcy law. Next, we offer some techniques for reading that law. Finally, we discuss some ways that you can find out about your case.

§ 2.2 ~ Sources of Law

The bankruptcy lawyer's primary statute is the Bankruptcy Code, Title 11 of the U.S. Code. But for matters of jurisdiction, she is governed by the bankruptcy provisions of the Judicial Code, Title 28. Additionally, bankruptcy crimes are addressed in the Criminal Code, Title 18, chapter 9, and bankruptcy tax matters are addressed in the Tax Code, Title 26. Procedure is governed primarily by the Federal Rules of Bankruptcy Procedure, but also by a wide array of "local rules" and "general orders," not to mention "local local" rules, as we explain more fully below.

But this is only the beginning. Bankruptcy often operates as a framework to implement other law, sometimes (inexactly) referred to as "state law." But this "other law" can be any applicable non-bankruptcy law — state or federal or foreign. At a minimum, the bankruptcy lawyer is likely going to need to know something about security interests under Article 9 of the Uniform Commercial Code and under state mortgage law. In addition, he will surely need to know something about tax law as it affects bankruptcy cases.

We deal with all of these matters in turn. But in the first instance, bankruptcy draws its authority from the Constitution, with which we begin.

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2 See infra §§ 12.5-6.
3 See, e.g., infra §§ 8.20-23, 12.10 and 13.37.
§ 2.3 ~ The U.S. Constitution

U.S. bankruptcy law starts with the Constitution — specifically, Article I, Section 8, Clause 4, which gives Congress the power to make “uniform” bankruptcy laws. Surprisingly little is known about the purpose of the framers in adopting the clause; the clause was added late in the Constitutional Convention with little explanation or fanfare. It is not entirely clear whether the drafters thought they were adopting a debtor protection, a creditor protection, or some combination of the two. What is clear is that the framers understood that, in a nation in which interstate commerce was expected and desired, laws regulating the restructuring of the debtor/creditor relationship and potentially discharging debt had to be uniform nationwide. The alternative was that states that were dominated by debtor businesses — think agricultural areas like the south — could be moved in times of populist discontent to enact laws benefiting their citizens by discharging debt at the expense of the creditor interests of the more financially oriented states — think northern states like New York and Pennsylvania. So the Constitution provides that if there are to be laws governing bankruptcies, they are to be uniform enactments of the federal government.

Perhaps the most important consequence of the adoption of the bankruptcy clause is negative — the sorts of things that have not happened because it is there. Specifically, because the bankruptcy clause is in the Constitution, it has never been necessary to wrestle with the limits of the commerce clause, as has been the history with so many other kinds of commercial legislation. Similarly, it has not been necessary to enact a uniform code, adopted by individual jurisdictions, as has been the path in commercial law.

One might expect that there would be disputes concerning the scope of congressional authority under the bankruptcy clause. Perhaps surprisingly, there is not much. There has only been a scattering of cases purporting to explore the nature and limits of bankruptcy power. But ironically, perhaps the most important case imposing a constitutional limit on a bankruptcy statute was decided on the authority not of the bankruptcy clause, but of the Fifth Amendment.

4 The Federalist Papers, No. 42 (James Madison).
5 See Charles J. Tabb, The History of the Bankruptcy Laws in the United States, 3 AM. BANKR. INST. L. REV. 5 (1995). See generally David A. Skeel, Jr., Debt’s Dominion: A History of Bankruptcy Law in America, 22-47 (2003); Charles Warren, Bankruptcy in United States History (1935). One of the authors was involved in litigating a claim that BAPCPA’s means test was an unconstitutional violation of the uniformity requirement because it used federally calculated income statistics on a state-by-state and county-by-county system, unlike the exemption provisions, which rely on applicable non-bankruptcy state law to afford different protection to debtors in different jurisdictions. The claim did not prevail. See Schultz v. United States, 529 F.3d 343 (6th Cir. 2008).
Merely authorizing Congress to adopt bankruptcy laws does not compel it to do so. And indeed, through most of the 19th century, there was no federal bankruptcy law at all. But Congress adopted a comprehensive Bankruptcy Act in 1898, and we have had federal bankruptcy law continuously ever since.

§ 2.4 ~ Statutes

The present Bankruptcy Code was adopted as part of a comprehensive reform in 1978, though it has been amended many times since then. It is still appropriate to cite pre-1978 cases on matters of basic principles, and the general rule is that unless Congress has indicated a clear intent to change pre-Code practice, those principles remain in effect.  

Important provisions governing jurisdiction are also codified in Title 28. Rules governing the taxation of debtors in bankruptcy, or of bankruptcy estates, are found mostly in the Internal Revenue Code, Title 26. Congress has also proscribed a number of crimes in connection with bankruptcy law, which are codified in Title 18.

§ 2.5 ~ Rules

Rules governing procedure in bankruptcy courts come from the structure set forth in the Rules Enabling Act. This is the same section that governs all other federal procedural rules systems, including the Federal Rules of Civil Procedure. Rules are proposed by an advisory committee and approved — or not — by the Supreme Court. Congress reserves — but does not often exercise — the right to override the decision of the Court on this matter if it wishes; in the event of a conflict between the Bankruptcy Code and a Rule of Bankruptcy Procedure, the Code controls, being a superior act of Congress.

§ 2.6 ~ Ten Rules You Need to Read

Few law students study the Bankruptcy Rules. Even in practice, people tend not to read the rules until they must. But here is a basic list of some of the most important rules to get you started.

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7 *Deveneyp v. Timm*, 502 U.S. 410, 419 (U.S. 1992) ("When Congress amends the bankruptcy laws, it does not write "on a clean slate." Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.") (citation omitted).


Rule 2002 is a catch-all notice rule that sets time limits for a variety of matters. There are plenty of other time rules.\textsuperscript{11}

Rule 9014 provides the general framework for contested matters — \textit{i.e.}, conflicts that are not governed by the adversary rules in the 7000 series.

Rule 4001 sets far more detailed standards for some specific contested matters including relief from stay, using cash collateral, and borrowing money, as well as settlements and compromises involving these matters.

Rule 7001 tells what matters require an adversary proceeding.\textsuperscript{12}

Rule 2004 is a broad, special bankruptcy discovery rule. Compare Rules 7026 through 7037 — incorporating Federal Rules of Civil Procedure 26 through 37 in bankruptcy adversary proceedings; they are also incorporated into contested matters under Rule 9014.

Rule 9011 is the “good faith pleading” rule.\textsuperscript{13}

Rule 6004 focuses on use, sale, or lease of property. Compare Rule 4001 above.

Rule 4007 governs dischargeability of a debt. Compare Rule 4004 on discharge.

Rule 3002 tells how to file a proof of claim. See the surrounding Rules — 3001 through 3008 — for other claims issues.

Rule 9027 governs the removal of non-bankruptcy cases to the bankruptcy court.

\section*{§ 2.7 ~ Local Rules}

Bankruptcy courts also generate local rules to flesh out the framework. These local rules have been a persistent source of complaint in the bar. The complaints are of three sorts: (1) the local rules are too diverse and particular; (2) they may sometimes tramp upon substantive law; and (3) they sometimes exist in “oral tradition,” so an outsider cannot even find out about them.

The first complaint is understandable: The harried lawyer practicing in multiple districts does not enjoy having to juggle half a dozen different systems in his head. On the other hand, there will always be some matters that are

\textsuperscript{11} See, \textit{e.g.}, Rule 9006 regarding computation of time and Rule 8002 setting the (short) time deadline for filing a notice of appeal.

\textsuperscript{12} For how to accomplish service in an adversary proceeding, \textit{see} Fed. R. Bankr. P. 7004.

\textsuperscript{13} Note the minor differences between this rule and Rule 11 of the Federal Rules of Civil Procedure.
not amenable to general resolution — surely the world would not be a better place if all stay-relief motions were heard on Thursdays. Moreover, it is surely better to have a set of local rules, printed — or perhaps better, posted on a website — and accessible, than to be blindsided by local procedures that are not set forth in rules at all.

This point gains force when you reflect on the reputation of bankruptcy court as an “insider’s court” where regulars enjoy a home court advantage. Set aside the question of whether or not its reputation is deserved. The point is that whatever their vices, rules clearly stated, if consistently enforced, have the virtue of making the same process available to all.

The second complaint — rules as substance — is more difficult to evaluate. The line between substance and procedure is at best shadowy. But some things cross it. For example, consider a rule purporting to grant a discharge to corporations in chapter 7. Such a rule could not be considered mere procedure by any measure. Of course, there are closer cases than this.

Driven by persistent complaints of this sort, the drafters of the bankruptcy rules have promulgated — and repeatedly amended — a federal rule to govern local rules. The federal rule provides that local rules must be “consistent with — but not duplicative of — Acts of Congress and these rules.” Also, they must “not prohibit or limit the use of the Official Forms.” A most intriguing provision provides: “A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.”

Another provides: “No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms or the local rules of the district unless the alleged violator has been furnished in the particular case with actual notice of the requirement.” The drafters seem to be trying to respond to the criticisms set forth above.

Beyond local rules, there are often “standing orders,” or “general orders,” governing various matters. In addition, “local local” rules emanate from individual judges. These are least likely to be written and thereby most likely to blindside the unwary. They may be the best argument of all for retaining local counsel on unfamiliar turf in any matter of consequence.

§ 2.8 — Official Forms

Just about everything that needs to be done to begin a bankruptcy case — and many things that need to be done thereafter — is carried out on official forms, promulgated as part of the rules. You can buy sets of forms on

16 Id. at 9029(a)(2).
17 Id. at 9029(b).
disk for computer processing, or you can download forms from the Internet. They are also available as part of various bankruptcy petition preparation software packages, which operate in a “TurboTax” sort of format, assembling the data entered in all the relevant places and performing the mathematical calculations for things such as the summary of schedules and the means test.

§ 2.9 ~ U.S. TRUSTEE GUIDELINES

The Office of the U.S. Trustee, a branch of the Justice Department, supervises a number of activities in bankruptcy courts and promulgates its own principles of behavior. Like them or not, counsel might as well treat them as rules unless she is willing to spend a lot of time and effort seeking to challenge their validity. For the most part, they deal with employment and compensation of professionals.

§ 2.10 ~ EVIDENCE (AND “TESTIMONY FROM THE PODIUM”)

The Federal Rules of Evidence apply in bankruptcy court. Bankruptcy court has a reputation, earned or not, for a certain flexibility with the rules of evidence.

Nearly any lawyer who has ever spent so much as a day in bankruptcy court will be able to tell you a story of a matter that would have taken a week of trial time in district court, but that breezed through bankruptcy court in half an hour. They joke about “testimony from the podium,” where counsel gets a judgment on his assertions of what he will prove, without ever troubling to prove anything at all.

It is easy to deride this kind of free-spirited indifference to form. But this casual style has its defenders. Proponents will argue that the bankruptcy court is best understood as an analog to the European commercial courts, or perhaps to panels of commercial arbitrators, closer to the practical exigencies of commercial practice, undistracted by the excesses of legalism.

§ 2.11 ~ FOR THE RECORD

Don’t let the casual style prevent you from protecting your record, particularly if you foresee the need for an appeal. Make evidentiary objections or important points on the record, even if you know the ruling will be

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19 For example, the “U.S. Trustee Guidelines” for the Central District of California can be found at www.justice.gov/ust/t16/.
20 See supra § 1.13 for more on the U.S. Trustee.
21 Fed. R. Bankr. P. 9017. By incorporating Fed. R. Civ. P. 43, the rule permits (inter alia) evidence on a motion to be presented by affidavit, although the court may direct otherwise. For text of the Federal Rules of Evidence, see www.law.cornell.edu/rules/frc/overview.html.
adverse. And if you need them, ask for findings of fact and conclusions of law under Federal Rule 52, which is incorporated into the Bankruptcy Rules.\textsuperscript{22} When the judge says she does not do that in her court, be prepared to say something tactful and firm like, "I know that, judge, but I need to have something on the record for others who are not familiar with the practices of this court."

Finally, lawyers should show up to court with admissible evidence sufficient to prove all salient points. Occasionally, we see lawyers who rely upon the "casual" attitude of bankruptcy courts toward formal evidentiary requirements, assuming they will be able to just argue their point, only to find that the judge will require evidence in admissible form before entering the requested order. And even if the bankruptcy judge will not insist upon an evidentiary record, you will want to have one if the matter is taken up on appeal.

\section*{\textsection 2.12 ~ Non-Bankruptcy Law}

It is sometimes said that bankruptcy is no more than a procedural framework within which to apply non-bankruptcy substantive law. Taken at face value, this is a distortion to the point of outright falsehood. But as a point of departure, it is a useful oversimplification. For example, what is "property" for purposes of bankruptcy administration is, with minor exceptions, whatever might be property independent of bankruptcy law. And the same is also true for "claims."

Bankruptcy seeks to divide up property when there is not enough to go around. In so doing, it frequently finds itself entangled with state law rules governing priority of competing claims. Perhaps the most important of these is the Uniform Commercial Code, particularly the UCC's Article 9, which governs security interests in personal property. State recording acts, governing priority in title to real estate, also play a big role. So will other kinds of state "priority" or "lien" law — or indeed, any non-bankruptcy law that may serve to govern or allocate property rights.

\section*{\textsection 2.13 ~ Bankruptcy Crimes}

Bankruptcy clients, and their lawyers, may be liable under any number of criminal laws, but Congress has also specifically proscribed a number of bankruptcy crimes. The so-called bankruptcy crimes statutes prohibit a broad range of activities that involve concealing assets, embezzling from the estate, and filing false documents.\textsuperscript{23} Some of these are, perhaps, intuitively obvious, but others are less so.

\begin{footnotesize}
\begin{enumerate}
\item Fed. R. Bankr. P. 7052.
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For example, § 152(6) makes it a crime to “knowingly and fraudulently” give or receive compensation “for acting or forbearing to act in any case under title 11.” Read aggressively, this could put a damper on all kinds of deal-making in chapter 11 cases, although the requirement that the conduct be “fraudulent” offers a measure of comfort. Section 3284 adds that concealment of assets in a bankruptcy case is a continuing offense, so the statute of limitations does not begin to run until the discharge is granted or denied.

Bankruptcy crime statutes may overlap with noncriminal provisions found in the Code. For example, § 152(1) of the criminal statute outlaws fraudulent concealment — an activity that could easily overlap with § 727(a)(2) of the Bankruptcy Code, which bars a discharge for one who made an intentional fraudulent transfer.

Attorneys sometimes find themselves participants in, or seeming instigators of, bankruptcy crimes. The cardinal statutes can easily pit lawyer and client against each other. For example, in United States v. Webster,24 the Seventh Circuit upheld the conviction of an attorney for aiding and abetting in a fraudulent concealment scheme. On the advice of the attorney, the debtor transferred his bar to a corporation in exchange for stock. He then filed for chapter 7 bankruptcy.

On his statement of financial affairs, the debtor said he voluntarily surrendered the bar for release of an unpaid contractual obligation. The debtor also failed to list his stock ownership on his schedules. He later testified that the attorney had orchestrated the scheme and had told him how to answer the trustee’s questions about it. The attorney got a 15-month prison sentence.

In another bankruptcy crime case, United States v. McIntosh,25 the debtor did what debtors sometimes do when they are in trouble: He tried to blame his lawyer. Convicted of concealing his business, he said he had told his attorney about it. The attorney admitted in testimony that he had been told, although he said he was left with the impression that the business was not of great value. The court held that the duty to disclose falls on the debtor, not the attorney, and that the debtor signed schedules over a warning that failure to disclose assets might lead to prosecution.

There is an additional level of complication: These bankruptcy crimes, except for § 157, are also “RICO predicates.” That is, violation of the bankruptcy crimes statute will constitute “racketeering activity” under the Racketeer Influenced and Corrupt Organizations Act (RICO).26 Title 18 also directs the judge or trustee to report any suspected bankruptcy crime to the U.S. Attorney.27 Somewhat more surprisingly, § 3057(b) requires the U.S. Attorney thereafter to “report thereon to the judge” on his investigation, as if the judge has some sort of prosecutorial role in the case — which he does not.

24 125 F.3d 1024, 1028 (7th Cir. 1997).
25 124 F.3d 1330 (10th Cir. 1997).
27 Id. § 3057(a).
Note that fraudulently filing an involuntary bankruptcy petition is a crime. Further, the U.S. Attorney’s Offices and the FBI have responsibility for criminal matters relating to materially false statements made in a debtor’s bankruptcy schedules, as well as for the filing of an abusive petition for reaffirmations of debt. Each bankruptcy court must establish procedures for referring matters relating to materially false bankruptcy schedules to the U.S. Attorneys or the FBI.

§ 2.14 ~ Threatening Prosecution

You won’t be around bankruptcy court very long before you will be tempted to use the threat of a criminal charge as leverage to settle civil litigation. You may be able to do it, but be careful. It may be a violation of the rules governing lawyer professional responsibility. The difficulty is that the law is in transition. The old ABA Model Code barred a lawyer from threatening criminal prosecution in connection with a civil case “solely to obtain an advantage in a civil matter.”

The revised Model Rules of Professional Conduct omits this provision. An ABA ethics opinion declares that the Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client’s civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. It is about a 50/50 split at the state level in terms of whether the blanket prohibition on threats under the Model Code remains in effect.

§ 2.15 ~ Bankruptcy Taxes

Bankruptcy tax law comes from a variety of sources. Some of it is in the Bankruptcy Code itself. For example, the Bankruptcy Code sets rules on the priority and dischargeability of tax claims. The Bankruptcy Code also provides fairly elaborate rules governing the treatment of tax attributes in bankruptcy. But apart from the Bankruptcy Code, there are important provisions governing bankruptcy tax attributes in the Internal Revenue Code.

28 Id. § 157(1).
29 Id. § 158.
30 See generally infra Chapter 16 of this book.
31 Model Code of Prof’l Responsibility DR 7-105(a) (1980).
33 Alex B. Long, Lawyers Intentionally Inflicting Emotional Distress, 42 SETON HALL L. REV. 55, 100 (2012).
34 See infra § 13.37.
§ 2.16 ~ How to Read and Interpret Bankruptcy Law

The following sections discuss a number of threshold principles of interpretation, not set forth explicitly in the statute but deeply rooted in bankruptcy folklore, which will help in reading the statute.

§ 2.17 ~ Notice and a Hearing

One reason the neophyte finds it hard to read the Bankruptcy Code is that it seems so abstract: The statute says a lot about what happens, but little about how it gets done. Rather, the Code repeatedly says that such-and-such will happen “after notice and a hearing,” as if everyone knew what sort of notice and what sort of hearing are appropriate. As if to aggravate matters, § 102 defines notice and a hearing to be such as is “appropriate in the particular the circumstances,” which does not help much.

What were the drafters up to here? The point is that they understood that the Code would be fleshed out with the Bankruptcy Rules. They made a conscious decision to provide a framework for the rulemakers but to otherwise not get in the way.

But take a second look at § 102: “such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the circumstances.” Note the italics (added). What do they mean? They mean that for many matters, no hearing is required so long as the matter is properly noticed and no one objects.

In practice, this means that many courts put things on a kind of “negative notice” to let the world know what you intend to do and to allow any party object that sees fit to do so. Failing objection, you can proceed and carry out your declared intention. In some districts, such as Delaware, you may file a “certificate of no objection” to advise the court that the time has run and nobody has objected. However, we must emphasize that the practices in this respect vary from court to court. When in doubt, ask the clerk’s office or local counsel.

An important example is the use, sale or lease of property other than in the ordinary course of business under § 363(b)(1). Rule 6004(a) specifies the rules governing notice. Rule 6004(b) sets the standard for objections.

Note that there is no specific requirement — or even authorization — for an order approving a sale. In a case where there is notice but no objection, one could infer that the judge has neither the obligation nor perhaps even the power to issue such an order. But most judges will enter a sale approval order if asked, and some require them, at least for sales over a certain dollar limit. To protect both the client and himself, counsel for the buyer will want to insist on an order in any case. Another reason buyers will often insist on a sale order, and the court will often accommodate

36 See supra § 2.5.
37 See infra § 10.5.
the request, is that many title companies will not give “clean” title opinions on real property purchased from a bankruptcy estate if there is no sale order.

Contrast the procedure for obtaining credit under § 364(b-d) with the procedure under § 363. These sections allow the court to authorize credit after notice and a hearing. Here, unlike § 363, the Code appears to require a court order. In any event, no prudent DIP lender would ever advance funds post-petition without a court order.38

§ 2.18 ~ When the Legislative History Is in Doubt, Read the Statute

Another background condition of Bankruptcy Code reading is the matter of legislative history. In fact, the Code has a lot of legislative history: There have been House and Senate committee reports and elaborate — if seemingly manufactured — “floor statements” since the time of the adoption of the 1978 law.39 These floor statements were intended to make up for the lack of time to prepare a conference report that reconciled the House and Senate bills. There are additional reports and such for some of the later amendments, including BAPCPA — although the BAPCPA record is not nearly as complete as the record for the 1978 Code.40 Particularly in the early years of the Code, lawyers tended to rely heavily on the legislative history — heavily enough to give rise to the quip that is the title of this section.

The utility of legislative history, however, has been diminished by the attitude of the Supreme Court, particularly of Justice Scalia. Put shortly, he has made it clear that he distrusts it, cleaving rather to a conception of “plain meaning” wherever possible. Justice Scalia’s attitude appears to be a general proposition of which bankruptcy offers no more than incidental examples. But he has expressed himself clearly in the context of bankruptcy opinions.41

§ 2.19 ~ Case Law

An additional background condition for reading the Bankruptcy Code is the role of judicial decisions. The bankruptcy judge in reaching a decision is bound by the controlling decision of any authoritative court (for example, her own court of appeals). Absent binding authority, she may be guided by decisions of other courts the judge finds persuasive.

38 See generally infra § 10.12.
But in bankruptcy, there is a veritable blizzard of opinions that are nonauthoritative. Bankruptcy judges got law clerks for the first time in the late 1970s. About the same time, West Publishing Company started publishing volumes of bankruptcy decisions. The combined result was to create a kind of “vanity press” in which the bankruptcy judge is able to publish virtually any opinion she thinks fit. Now there are other sources for “publishing” decisions. For example, many courts have started publishing their decisions on websites.

The best of these decisions are wonderfully enlightening insights into the law: Taken as a whole, the bankruptcy judges are, after all, perhaps the ablest corps of commercial judges in the country. But some bankruptcy opinions can be obtuse or impenetrable. Perhaps even worse, others amount to no more than findings of fact on well-documented principles. One consequence is that you can find a bankruptcy opinion supporting almost any proposition you want to advance, and many of these are not binding authority for anything at all.

§ 2.20 ~ The Bankruptcy Court Is a Court of Equity

No principle of bankruptcy jurisdiction is more familiar — and none easier to misunderstand — than the notion that the bankruptcy court is a “court of equity.” The trouble is that there are just too many and conflicting meanings to the notion of “equity.” It can refer to the historical fact that bankruptcy jurisdiction descends from the jurisdiction exercised by the equity courts in earlier times, or to a supposed general principle that the bankruptcy court ought to “do justice” in some general sense, or any number of other meanings in between.

In the narrow sense, it might refer to the power of the bankruptcy court — now codified in § 510(c) — to “equitably subordinate” a claim to a claim or an interest to an interest. In this sense, its principal sponsor was the architect of modern reorganization law: Justice William O. Douglas. More generally, it may refer to the bankruptcy court’s authority, under § 105, to enter orders that seem necessary to carry out the intent of the Code, as discussed in the next section of this book.

Given the ambiguity and the frequency with which bankruptcy courts repeat that they are “courts of equity,” one can hardly blame the desperate litigant from using the equity card as a last-ditch appeal. But we caution that too much emphasis by a litigant upon the need for the “court of equity” to “do the right thing” may focus the court upon the lack of legal authority for the stated proposition and then backfire.

42 A computer search reveals more than 501 published decisions stating that the “Bankruptcy Court is a court of equity.”

43 “The English language is overblessed with words which mean several unlike things at the same time. English poetry no doubt benefits from the possibility of shorthand multiple reference but legal analysis does not.” Grant Gilmore, Security Interests in Personal Property § 7.2, at 198 (1965) (undertaking to identify five different meanings of “equitable” in the sense of “equitable lien”).


§ 2.21 ~ Section 105

Close kin to the idea that the bankruptcy court is a court of equity is the residual power conferred by § 105, the "bankruptcy all writs" act, to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." Like the "court of equity" ploy, it is probably far more often pleaded than implemented, and counsel needs to beware that appeal to § 105 may be read as a sign that he has run out of respectable arguments.

Still, the courts have used the section to tease out the limits of the Bankruptcy Code, and the Supreme Court has held that bankruptcy courts have broad authority to take necessary action to prevent an abuse of process.46 Courts have also used § 105 in the realm of protecting nondebtor third parties as part of the bankruptcy case, either by extensions of the automatic stay to nondebtors or by implementing third-party releases under a plan.47

The task of teasing out the exact limits of § 105 is generating a jurisprudence all its own. Generalizations are hazardous, but it is probably fair to say that if a court finds itself confronted with an express rule either inside or outside the Bankruptcy Code, it will not permit the use of § 105 as a trump card.48 On the other hand, the courts have been able to take some remarkable steps to implement plans and effectuate other relief in the interstices of other law.49

§ 2.22 ~ Getting Information from the Bankruptcy System: Notice

Here is a nightmare. You know the debtor is in bankruptcy. You know he owes your client a lot of money. But you know that there are a lot of assets in the estate. So you trust that in good time, at least, you will hear about it.

Then one day on the street, an acquaintance tells you that the debtor’s property has been spirited out of the estate, the debtor has been discharged, and the case has been closed — all without your knowing about it. What prevents this nightmare from turning into reality? The answer is that the system itself makes elaborate provision for notice of many particular events. In getting familiar with bankruptcy procedure, you want to get familiar with the basic notice rules and the traps that may keep them from working.


47 Compare A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1008 (4th Cir. 1986) (holding that § 105 authorizes injunction against litigation that could threaten a reorganization), with Official Comm. of Equity Sec. Holders v. Massey, 832 F.2d 299, 302 (4th Cir. 1987) (holding in same case that § 105 does not authorize creation of an emergency fund for benefit of unsecured claimants prior to a plan of reorganization).

48 See, e.g., Law v. Siegel, 134 S. Ct. 1188; Cal. State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 849-50 (1988) (holding that a state may impose sales tax on a bankruptcy liquidation sale, notwithstanding § 105(a)).

§ 2.23 ~ Rule 2002

One consequence of § 102 — "on notice and a hearing" — is that you will have to be alert to look for notice rules in lots of places. The judge may declare that a particular form of notice is "appropriate for" a particular case or circumstance. Lots of courts have special notice provisions in their local rules.

Happily, many of the important notice provisions are collected together in one place: Bankruptcy Rule 2002. The rule includes three major categories, classified by the time limit required for notice:

► 21 days. 50 This is the one you will have to watch. It includes eight items, many of them items that come up in ordinary cases a lot.

► 28 days. 51 This category includes two items: approval of disclosure statements and confirmation of plans.

► No time specified, but notice required. 52 This is a residual catch-all category with eight items, but most of them are the sort of chores that are carried out routinely by the court.

Rule 2002 also includes subsections specifying when there shall be notice to the U.S. Trustee, the U.S. government and committees. 53 A particular subsection specifies when there shall be notice to equity security-holders. 54 This is interesting, because it gives some hint as to when the old equity-owners have standing in a case, and also because it implies that there are many matters on which they do not have a right to notice at all.

§ 2.24 ~ Notice Rules: A Few Examples

If you expect to be around bankruptcy court very much, it is probably worth your while to read Rule 2002 now to get a feel for it. But the practical fact is that there are a lot of internal inconsistencies that may rise to haunt you — or that may turn into weapons that you can use in your favor.

For example, while most of the time the Code just specifies "notice and a hearing" (see above), there are still a few cases where it is very specific. One such instance is the matter of dismissing an involuntary bankruptcy. Suppose a creditor begins an involuntary filing and then wants to compromise and dismiss the case. The Code (not the Rule)

51 Id. at (b).
52 Id. at (f).
53 Id. at (k) (U.S. Trustee); id. at (j) (U.S. government); id. at (i) (committees).
54 Id. at (d).
specifies that dismissal may occur only after notice to all creditors. This can make compromise on a pending involuntary case difficult.

For a different kind of example, consider the matter of disposing of an estate asset. The rule provides for 21-day notice to all creditors of the sale of an asset if it was outside the ordinary course of business. But rights under an executory contract may be just as valuable to the debtor as to the estate, yet there is no rule requiring notice to all creditors of a decision to reject an executory contract.

In the same vein, consider the motion for relief from the automatic stay. Nothing in the Code or Rules specifically requires that the motion for relief go to all creditors. Yet in a single-asset case, relief from stay can empty the coffers just as much as outright dismissal.

§ 2.25 ~ Other Means of Protecting Yourself

Even if the notice system works reasonably well, you won’t want to sit by and wait. In fact, there are a number of things you can do to make sure you learn about the case. You can request in writing that you be added to the notice list for all matters in the case. You can request electronic noticing through the courts’ electronic noticing system. You can take the initiative to consult the schedules and other papers that the debtor must file. You can check dockets on court websites or on a variety of computer systems, such as PACER. And you can protect yourself with a variety of discovery techniques.

§ 2.26 ~ Form: Demand for Notice

To make sure you get notice of pleadings, consider filing a “notice of appearance.” Here is a sample form.

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57 Apparently, some courts do require notice to all creditors by local rule. See, e.g., Bankr. M.D.N.C. R. 9013-1(d) (requiring service to be given to “all parties affected by [a motion”]. Additionally, a court has the power to order notice to all creditors if it sees fit.
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF UTOPIA

In Re:
INSOLVENT DISTRIBUTION
CORPORATION,
Debtor in Possession

Case No. 14-1416-BBL (Chapter 11)

NOTICE OF APPEARANCE AND DEMAND FOR NOTICES AND PAPERS

PLEASE TAKE NOTICE that Citistreet Construction, Inc. ("Citistreet"), a creditor and party in interest, hereby appears in the above-captioned case by its counsel, Smith & Jones, LLP; such counsel hereby enters its appearance pursuant to § 1109(b) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9010(b); and such counsel hereby requests, pursuant, inter alia, to Federal Rules of Bankruptcy Procedure 2002, 3017 and 9007 and §§ 342 and 1109(b) of the Bankruptcy Code, that copies of all notices and pleadings given or filed in this case and in any adversary proceeding or contested matter filed herein be given to and served upon the undersigned at the following address and telephone number:

Lawrence L. Lawyer, Esq.
Abigail A. Attorney, Esq.
SMITH & JONES, LLP
333 Twentieth Street
Sun City, Utopia 99899
(646) 394-5000

Please take further notice that, pursuant to § 1109(b) of the Bankruptcy Code, the foregoing demand includes not only the notices and papers referred to in the rules specified above but also includes, without limitation, any notice, application, complaint, demand, motion, petition, plan of reorganization, disclosure statement, pleading or request, whether formal or informal, written or oral, and whether transmitted or conveyed by mail, delivery, telephone, electronic mail, facsimile, or otherwise filed or made in or with regard to the referenced case and proceedings herein.

This notice of appearance and demand for notices and papers shall not be deemed or construed to be a waiver of any of Citistreet's rights (1) to have final orders in non-core matters entered only after De novo review by a United States District Judge; (2) to invoke the right to a trial by jury in any proceeding so triable in this case or any case, controversy, or proceeding related to this case; (3) to ask the United States District Court to withdraw the reference in any matter subject to mandatory or discretionary withdrawal; or (4) to contend that jurisdiction or venue in this Court over any matter is improper.

Respectfully submitted,

SMITH & JONES, LLP
/l/
By: Lawrence L. Lawyer, Esq. #987654321
333 Twentieth Street
Sun City, Utopia 99899
(646) 394-5000
Attorney for Citistreet Construction Inc.
§ 2.27 ~ Schedules and Statements of Affairs

Every debtor must file — or there must be filed on its behalf — a set of schedules and a statement of financial affairs.59 As a source of information, they aren’t perfect. They may not be available until 14 days or more into the case; they may be incomplete or inaccurate; and in the rare case they may even be impounded, out of public view. But they still constitute the first line of approach for the creditor trying to get information about the case.

§ 2.28 ~ Meeting of Creditors — § 341

Section 341 provides that “[w]ithin a reasonable time after the order for relief ... the [U.S.] Trustee shall convene and preside at a meeting of creditors,” commonly called the “341 meeting,” or the “first meeting of creditors.” Rule 2003 says that the meeting will take place between 21 and 40 days after entry of the order for relief. On the face of things, it would appear that this is the right place to go to interrogate the debtor.

Don’t be misled about the § 341 meeting. Traditionally, at least in chapter 7 cases, they have been pretty much assembly-line affairs, with the trustee processing 30, 40 or even 50 cases on a single docket. Questioning was often perfunctory, and the serious inquiry had to be left for another time. Creditors should expect that if they attend, they may listen to the trustee and the debtor and may be able to ask a couple of questions. If that is not sufficient, the trustee will likely suggest that the creditor arrange for its own discovery and move on to the next case. That said, if the creditor is inquiring about valuable assets that appear to have not been scheduled or were recently transferred and do not appear to have been disclosed, the trustee may be more inclined to let the questioning proceed. In corporate chapter 11 cases, the § 341 meetings are supervised by an attorney with the U.S. Trustee’s office and somewhat more time may be devoted. But even there, any extensive questions of the debtor’s representative will typically be left for a later date.

For serious discovery, plan on using Rule 2004, discussed below in § 2.30.

§ 2.29 ~ Monthly Operating Reports

A second source of information may be periodic operating reports filed with the U.S. Trustee. The Bankruptcy Rules mandate a quarterly report,60 although U.S. Trustee offices typically require monthly reports. Note that the monthly operating reports are not routinely served on creditors, so if you want a copy, you will need to get one from the clerk’s office, the online docket, or from debtor’s counsel.

§ 2.30 ~ Rule 2004 Exams

Rule 2004 examinations are general depositions taken in a bankruptcy case. This is the rule to use when a party wants to depose the debtor — or another party — and/or obtain documents, but does not have a particular adversary proceeding or contested matter in which to take the deposition. You need to file a motion and obtain an order authorizing you to take a Rule 2004 exam. After you obtain an order, you can compel attendance and/or production of documents by subpoena.\(^1\)

The thorniest question with reference to Rule 2004 is how it relates to the discovery framework of the Federal Rules of Civil Procedure, which is incorporated for adversary proceedings into the Bankruptcy Code. The majority of opinions addressing the issue hold that Rule 2004 is no longer available once an adversary proceeding has begun.\(^2\) But other courts disagree.\(^3\) Sometimes, a party will use a Rule 2004 examination for some discovery before filing an adversary complaint to determine whether to file the complaint or to allow for a more specific and well-informed complaint. Unlike its FRCP counterparts, there is a plethora of case law holding that the scope of Rule 2004 discovery is not limited to “information that could lead to the discovery of admissible evidence.” Rather, a 2004 inquiry has been compared to a fishing expedition, allowing questioning into almost any nonprivileged area.\(^4\)

§ 2.31 ~ Small Business Reporting

As part of BAPCPA, Congress imposed some additional reporting and similar requirements on small business debtors that may provide parties with additional sources of information. These requirements, found in §§ 308 and 1116, require a small business to:

- file periodic financial reports regarding the debtor’s profitability, projected cash receipts and disbursements, which should also include a comparison of actual results to projections, whether the debtor is complying with the Bankruptcy Rules and Code, whether the debtor has filed its tax returns and paid its taxes, and other administrative expenses — and if not, why, how and when these failures will be remedied;

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\(^1\) See Fed. R. Bankr. P. 2004(e), 9016. Note that a subpoena is not required to compel attendance by the debtor.


\(^4\) See, e.g., In re Gray, 447 B.R. 524, 532 (E.D. Mich. 2011) ("Rule 2004 examinations allow the court to gain a clear picture of the condition and whereabouts of the bankrupt's estate. Necessarily, the permissible scope encompasses the examination of witnesses having knowledge of the debtor's acts, conduct, liabilities, assets, etc., and the inquiry may cut a broad swath through the debtor's affairs, those associated with him, and those who might have had business dealings with him... Rule 2004 authorizes parties to engage in fishing expeditions.") (citations omitted) (internal quotation marks omitted).
file a balance sheet, statement of operations, cash-flow statement and federal tax return, or certify that the same do not exist;

file all schedules, statements and reports on time;

have senior management personnel attend the 341 meeting, the initial debtor interview and all scheduling conferences; and

permit the U.S. Trustee or its designated representative to inspect the debtor’s premises, books and records.  

§ 2.32 ~ Limitation: Protective Orders

On request of a party-in-interest, the bankruptcy court may issue orders as necessary to protect trade secrets and such, or to protect with respect to scandalous or defamatory matter. Protection is authorized by the Bankruptcy Code and, for adversary proceedings, the Federal Rules of Civil Procedure.

§ 2.33 ~ A Short List of Websites You Need to Know About

We have scattered references to websites throughout the footnotes, but in this section, we collect some of our favorites. In the next section, we add our second choices as well as the courts’ own websites. Remember that online information changes as fast as we can type, so some of it is bound to be outdated before you read it.

Some good general-information bankruptcy sites include:

- www.abi.org
- www.banko.com
- www.bankrupt.com
- www.bankruptcydata.com
- Links to all federal courts are consolidated at: www.uscourts.gov/FederalCourts.aspx
- For bankruptcy clerks, go to www.bankruptcydata.com/CourtDirectoryIndex.asp

65 For more about small business cases, see infra § 5.6.
67 All links in this section were visited Sept. 29, 2014.
This book is not primarily about consumer bankruptcy cases, but for those who do need quick information on consumer cases, we cite in the footnotes to a couple of books that we think offer reliable advice.  

§ 2.34 ~ More Websites

Links to other useful websites can be found at:

- www.washlaw.edu/bankrupt
- www.lawtrove.com/bankruptcy
- www.howardnations.com/practiceareas/bankruptcy.html
- www.bestcase.com/resource.htm
- www.law.cornell.edu/supremecourt/text/home
- www.creditslips.org

Bankruptcy Courts:

1st Circuit

1st Circuit Bankruptcy Appellate Panel: www.bap1.uscourts.gov
Maine: www.meb.uscourts.gov
Massachusetts: www.mab.uscourts.gov
New Hampshire: www.nhb.uscourts.gov
Rhode Island: www.rib.uscourts.gov
Puerto Rico: www.prb.uscourts.gov

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2nd Circuit

Connecticut: www.ctb.uscourts.gov
New York, Northern District: www.nynb.uscourts.gov
New York, Southern District: www.nysb.uscourts.gov
New York, Eastern District: www.nyeb.uscourts.gov
New York, Western District: www.nywb.uscourts.gov
Vermont: www.vtb.uscourts.gov
Virgin Islands: www.vib.uscourts.gov

3rd Circuit

Delaware: www.deb.uscourts.gov
New Jersey: www.njb.uscourts.gov
Pennsylvania, Middle District: www.pamb.uscourts.gov
Pennsylvania, Eastern District: www.paeb.uscourts.gov
Pennsylvania, Western District: www.pawb.uscourts.gov

4th Circuit

Maryland: www.mdb.uscourts.gov
North Carolina, Eastern District: www.nceb.uscourts.gov
North Carolina, Middle District: www.ncmb.uscourts.gov
North Carolina, Western District: www.ncwb.uscourts.gov
South Carolina: www.scb.uscourts.gov
Virginia, Eastern District: www.vaeb.uscourts.gov
Virginia, Western District: www.vawb.uscourts.gov
West Virginia Northern District: www.wvnb.uscourts.gov
West Virginia Southern District: www.wvsb.uscourts.gov

5th Circuit
Louisiana, Eastern District: www.laeb.uscourts.gov
Louisiana, Middle District: www.lamb.uscourts.gov
Louisiana, Western District: www.lawb.uscourts.gov
Mississippi, Northern District: msnb.uscourts.gov
Mississippi, Southern District: mssb.uscourts.gov
Texas, Northern District: www.txnb.uscourts.gov
Texas, Southern District: www.txsb.uscourts.gov
Texas, Eastern District: www.txeb.uscourts.gov
Texas, Western District: www.txwb.uscourts.gov

6th Circuit
Kentucky Eastern District: www.kyeb.uscourts.gov
Kentucky Western District: www.kywb.uscourts.gov
Michigan, Eastern District: www.mieb.uscourts.gov
Michigan, Western District: www.miwb.uscourts.gov
Ohio, Northern District: www.ohnb.uscourts.gov
Ohio, Southern District: www.ohsb.uscourts.gov
Tennessee, Eastern District: www.tneb.uscourts.gov
Tennessee, Middle District: www.tnmb.uscourts.gov
Tennessee, Western District: www.tnwb.uscourts.gov

7th Circuit
Illinois, Central District: www.ilcb.uscourts.gov
Illinois, Northern District: www.ilnb.uscourts.gov
Illinois, Southern District: www.ilsb.uscourts.gov
Indiana, Northern District: www.innb.uscourts.gov
Indiana, Southern District: www.insb.uscourts.gov
Wisconsin, Eastern District: www.wieb.uscourts.gov
Wisconsin, Western District: www.wiwb.uscourts.gov

8th Circuit
8th Circuit Bankruptcy Appellate Panel: www.ca8.uscourts.gov/bankruptcy-appellate-panel
Arkansas, Eastern and Western Districts: www.areb.uscourts.gov
Iowa, Northern District: www.ianb.uscourts.gov
Iowa, Southern District: www.iasb.uscourts.gov
Minnesota: www.mnb.uscourts.gov
Missouri, Eastern District: www.moeb.uscourts.gov
Missouri, Western District: www.mowb.uscourts.gov
Nebraska: www.neb.uscourts.gov
North Dakota: www.ndb.uscourts.gov
South Dakota: www.sdb.uscourts.gov
9th Circuit


Alaska: www.akb.uscourts.gov

Arizona: www.azb.uscourts.gov

California, Central District: www.caeb.uscourts.gov

California, Eastern District: www.caeb.uscourts.gov

California, Northern District: www.canb.uscourts.gov

California, Southern District: www.casb.uscourts.gov

Guam: www.gud.uscourts.gov69

Hawaii: www.hib.uscourts.gov

Idaho: www.idb.uscourts.gov

Montana: www.mtb.uscourts.gov

Nevada: www.nvb.uscourts.gov

Northern Mariana Islands: www.nmid.uscourts.gov70

Oregon: www.orb.uscourts.gov

Washington, Eastern District: www.waeb.uscourts.gov

Washington, Western District: www.wawb.uscourts.gov

10th Circuit

10th Circuit Bankruptcy Appellate Panel: www.bap10.uscourts.gov

Colorado: www.cob.uscourts.gov

Kansas: www.ksb.uscourts.gov

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69 Guam does not have its own bankruptcy court; rather, the district court includes a bankruptcy division.

70 Northern Mariana Islands does not have its own bankruptcy court; rather, the district court includes a bankruptcy division.
New Mexico: www.nmb.uscourts.gov
Oklahoma Eastern District: www.okeb.uscourts.gov
Oklahoma Northern District: www.oknb.uscourts.gov
Oklahoma Western District: www.okwb.uscourts.gov
Utah: www.utb.uscourts.gov
Wyoming: www.wyb.uscourts.gov

**11th Circuit**

Alabama, Middle District: www.almb.uscourts.gov
Alabama, Northern District: www.alnb.uscourts.gov
Alabama, Southern District: www.alsb.uscourts.gov
Florida, Middle District: www.flmb.uscourts.gov
Florida, Northern District: www.fnb.uscourts.gov
Florida, Southern District: www.fsb.uscourts.gov
Georgia, Middle District: www.gamb.uscourts.gov
Georgia, Northern District: www.ganb.uscourts.gov
Georgia, Southern District: www.gasb.uscourts.gov

**D.C. Circuit**

District of Columbia: www.dcb.uscourts.gov

**Organizations:**

American Bankruptcy Institute: www.abiworld.org
National Bankruptcy Conference: www.nationalbankruptcyconference.org
National Conference of Bankruptcy Judges: www.ncbj.org
National Conference of Bankruptcy Clerks: www.ncbcimpact.org
National Association of Bankruptcy Trustees: www.nabt.com
National Association of Chapter 13 Trustees: www.nactt.com
National Association of Consumer Bankruptcy Attorneys: www.nacba.org
Commercial Law League of America: www.clla.org
American Bar Association: www.abanet.org
INSOL International: www.insol.org
Turnaround Management Association: www.turnaround.org/Default.aspx

Other Bankruptcy/Financial Resources:
Professor LoPucki’s data set on major cases: www.lopucki.com
Bank Rate Monitor: www.bankrate.com
Collectors.com (for valuing stamps, coins, baseball cards, etc.): www.collectors.com
Currency Converter: www.oanda.com/converter/classic
EDGAR (free): www.freeedgar.com
Experian Credit Reports (fee required): www.experian.com
Kelly Blue Book: www.kbb.com
Mortgage Calculator: www.interest.com/hugh/calc/mort.html
Real Estate ValueService (free): www.homeagain.com
Real Estate Comparable Values: www.realestateabc.com/home-values

Reference:
Bluebook Online: www.cheapestrate.com/auto.html
Legal Dictionaries: dictionary.law.com
West’s Legal Directory: www.directory.findlaw.com

**Government Agency Sites:**
U.S. Trustee, Executive Office: www.usdoj.gov/ust
Department of Justice: www.usdoj.gov
Department of Labor: www.dol.gov
Federal Bureau of Investigation: www.fbi.gov
Federal Judiciary: www.uscourts.gov
Federal Trade Commission: www.ftc.gov
Internal Revenue Service: www.irs.ustreas.gov
HUD: www.hud.gov
Pension Benefit Guaranty Corp.: www.pbgc.gov
Small Business Administration: www.sba.gov
Social Security: www.ssa.gov
Treasury: www.ustreas.gov
Consumer Financial Protection Bureau: www.consumerfinance.gov