WHAT YOU NEED TO KNOW ABOUT BANKRUPTCY
(BUT THEY DON'T NECESSARILY TELL YOU IN THE BOOKS)

An Introduction to Bankruptcy Law
for the Governmental Practitioner

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THROUGH THE LOOKING GLASS:

WHY BANKRUPTCY LAW SEEMS SO STRANGE

Governmental attorneys confronting bankruptcy law for the first time often feel like they have been dropped into a variety of law more akin to that practiced in Wonderland, than the norm in the rest of the world. And most articles written about bankruptcy law, even those supposedly directed at bankruptcy novices, don't spend much time talking about the policy judgments, and the factual and legal assumptions that underlie the structure of the current Bankruptcy Code.¹

The frustration is heightened for government lawyers who generally go into litigation with the feeling that they are on the side of the angels -- or at least the public interest. This is particularly true in areas such as environmental or consumer protection law where there is strong support for the principles being enforced by the government. Such a lawyer's first experience with the bankruptcy system is generally the legal equivalent of being doused with a bucket of cold water. For most governmental practitioners, the bankruptcy judge's actions in the case seem to be whimsical at best, and diabolically prejudiced at worst. Certainly, there seems to be no recognition of the particularly important and meritorious nature of your claim. The question then, is whether this perception is correct, and, if not, what can the government lawyer do to protect his or her client's interests in this unique forum, called bankruptcy law?²

Obviously, the most important thing government lawyers can do is to become reasonably knowledgeable about bankruptcy law and its guiding principles so that they can make their arguments in a way that the judge will understand and, hopefully, be forced to accept. Accordingly, this outline is meant to give a feel for bankruptcy law, with particular emphasis on the provisions uniquely applicable to the governmental practitioner. In addition, the outline will also attempt to give you a sense of the flavor

¹ Moreover, most such authors fail to realize how much information about the Code and the bankruptcy system they assume everyone already knows. The result is that they often fail to explain or even mention many absolutely fundamental concepts in bankruptcy law. For instance, the Code never states, in so many words, that secured claims are paid before unsecured claims -- nor do most authors ever describe how or why this happens, or describe the exact order of payment priorities. As a result, newcomers to the field who try to understand bankruptcy law, merely by reading the Code or the standard texts, can find the experience to be extremely frustrating. This short paper will hopefully be a more useful introduction to bankruptcy law for the governmental attorney who is confronting it for the first time.

² This is not to say that there isn't some truth to this perception. I have concluded that there is a Law of Reverse Deference, by which the higher the court, the more deference it will grant to decisions by lower courts and by governmental agencies. As you will see below, most people deeply involved in bankruptcy (including at least a fair number of judges) believe its primary (and sometimes only) mission is to rehabilitate debtors. While that view sometimes appears to be too one-sided, the fact is that, most of the time, bankruptcy judges are doing what Congress told them to do. One goal of this paper will be to try to explain why the system is set up the way that it is and why it establishes the policies that it does.
of bankruptcy practice. Because, the truth is, bankruptcy law really is different from any other area of the law. And, without an appreciation for that difference, and the reasons for it, you truly will believe you have fallen down the rabbit hole the first time you walk into bankruptcy court.

YOUR FIRST VISIT TO BANKRUPTCY COURT

- THE AWFUL TRUTH -

Let us assume that, as a government lawyer, you have been pursuing an individual who has engaged in blatant violations of your state’s consumer protection laws, and you have finally, by dint of much effort, gotten a sizable judgment against him, and an order directing him to take affirmative actions to remedy his violations of the law. Indeed, you may have finally managed to execute on his bank account to satisfy your judgment. The situation, until now, has been very clear -- you’re the good guy and he's the bad guy. You have the full weight of the state’s authority behind you, you're in state court applying state law, you can use contempt sanctions to force him to comply, and every other court in the land must give full faith and credit to your judgment. Then, overnight your scofflaw files bankruptcy. What is the result?

Miraculously, your wrongdoer has suddenly become "THE DEBTOR" and he is now the favored object of the bankruptcy court's attention. (After all, without debtors, they wouldn't exist.) Merely by filing his petition, and without any notice or hearing, he automatically obtains a stay of virtually all litigation and collection activity directed against him (although perhaps not your litigation).³ Before the petition was filed, you were enforcing a law that you were familiar with and, pursuant to which, the state agency's expertise was given great deference. Now, you have been catapulted into a federal arena, and must instantaneously become competent in bankruptcy law. Even worse, the debtor has filed a motion asking that you be ordered to return the money you obtained from his account to satisfy your judgment – and the judge is taking the motion seriously! Worst of all, the other side has been able to hire experienced bankruptcy counsel, who does know the law, who receives payment for his fees out of the debtor's meager assets in preference to your hard-won judgment,⁴ and who is probably on a first name basis with the bankruptcy judge, not to mention the judge’s clerk. You, on the other hand, probably have never heard of the judge, or his clerk, and have no idea what papers to file in the case, much less where to file them.

³ See Section III (A), infra, for information about governmental exceptions to the automatic stay provisions of the Code (11 U.S.C. 362).

⁴ See Sections 503(b)(1)(A), and Section 507(a)(2) of the Code, which provides that payments for services rendered to the debtor after its petition is filed receive priority for payment from the debtor's assets, second only to claims for domestic support obligations in an individual debtor’s case. Unless otherwise noted, these and other sections are all contained in Title 11 of the U.S. Code.
This difference in access and knowledge between you and the debtor's counsel puts you at a serious disadvantage in trying to protect the public interest. Among the changes the 1978 Bankruptcy Code sought to make was to break up the sometimes unhealthy interplay between the bankruptcy judges, and debtors' counsel who regularly practiced before them. But even when there are no improper relationships between the two groups, it is still unavoidable that the debtors and their counsel, who are constantly before the court, will tend to build up a rapport with the judge. Moreover, since rehabilitation of debtors is the *sine qua non* for the existence of the bankruptcy Court, it is simple human nature for the judge to tend to give the debtor the benefit of the doubt, if it argues that a particular action is necessary for its rehabilitation. The only way to cope with these facts of life is to become even more expert than debtors' counsel with respect to your own little niche of bankruptcy law. Better yet, try to stay out of bankruptcy court in the first place! (More about this later.)

The next problem you will notice is that you are no longer in the friendly confines of your state court, but, instead, your claim is now being dealt with under federal supervision. Not only may the bankruptcy judge undertake to estimate the value of your claim before you feel ready to quantify it, but he may require that the trial of your case be held in his court, even though you may feel he knows nothing (and cares less) about the subject matter or your state's laws. Moreover, if you file a claim in the bankruptcy case, you may waive the state's sovereign immunity with respect to any counterclaims arising out of the same transaction.

The net result is that you will find that you may have not only lost control of your case, but that you have stopped being the good guy and have, unwittingly, turned into a greedy "CREDITOR" who is only intent on delaying, and interfering with, the poor, but honest, DEBTOR'S recovery and fresh start. Your attempts to protect the citizens of

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5 The House report which accompanied passage of the 1978 Bankruptcy Code noted that "[t]here is an unusually close relationship between the bankruptcy judges and the bankruptcy bar, especially the debtors' and trustees' bar. They are usually in frequent contact with the judge as a result of the necessity for the judge's review of the administrative actions of the trustee or debtor in possession. . . . Debtors' attorneys make frequent appearances in the same court representing numerous different debtors. All of these contacts and relationships have led to a feeling among non-bankruptcy practitioners that there is a bankruptcy ring that has an inside track on all bankruptcy matters, including the judges' favoritism." 1978 U.S. Code Cong. and Admin. News 5787, 6056.

6 See 28 U.S.C. Sec. 157 for the jurisdiction of the bankruptcy court. Under the authority granted the bankruptcy courts to handle all "proceedings . . . arising in or related to a case under Title 11," numerous issues concerning purely state law matters have been brought into and adjudicated in bankruptcy proceedings. Since deciding the validity of a claim against the debtor often turns on the merits of the cause of action under substantive state law, that state law issue can obviously be viewed as being "related" to the Chapter 11 case. (See discussion of this issue by Senator Hatch during consideration of the 1984 amendments, at 130 Cong. Rec. S6088-6090 (daily ed. May 21, 1984.) The various provisions on jurisdiction, remand, reversal, and abstention are extremely complex, and a discussion in detail is beyond the scope of this outline. They are outlined below in Section II.B.2; see also Chapter 4 of the NAAG Bankruptcy Manual for a more in-depth discussion. You will need to review them, if you are confronted with a situation where the debtor seeks to remove your case from state court into the bankruptcy proceeding.
your state from criminals, deadbeats, and law violators have been subordinated to the efforts of those same criminals, deadbeats and law violators to stay in business. You may find this disconcerting, but it is the situation you face -- and, there are reasons (if not always completely convincing ones) for this situation. To understand the reasons, you must first understand the assumptions which underlie the Bankruptcy Code.

**BANKRUPTCY ASSUMPTIONS**

There are, in fact, just a few basic principles guiding all of bankruptcy law. The first is that we have abolished debtors' prisons and no one should have their life devastated for the sin of going broke. The second principle is that an ongoing business will produce more value for the creditors than the forced liquidation of the assets of that business. This is particularly true in the case of service companies such as painting contractors, or cleaning companies. The payment capacity of such firms, if it exists at all, is in their income stream; their actual assets may be nothing more than a few paint brushes or dust mops, and some ancient vehicles. However, even for large companies with substantial capital assets, it is still generally true that the liquidation value of those assets is much less than the value of the operating profits the company can produce as a continuing business, or the value which can be obtained for the sale of the company as an ongoing entity, with an established name, and customer base.

Thus, all of bankruptcy law is geared to keeping the debtor going, because it is believed that a functioning debtor will be able to generate more money to pay off creditors than a debtor which is simply being liquidated. Put another way, even though the reorganized debtor may only be able to pay a few cents on the dollar to unsecured creditors, the odds are that a liquidation proceeding would afford those same creditors absolutely nothing. Thus, this basic premise (coupled with the other well-known legal maxim about the difficulty of getting blood from a stone) is why the bankruptcy laws, at first glance, seem to be tilted outrageously in the debtor's favor. The answer is that they are – but it is because, in the long run, it is hoped this tilt will benefit everyone.\(^7\)

There is one other fundamental principle in bankruptcy law which must be taken into account. That is, that neither the debtor nor any particular creditor should be able
to manipulate the debtor's affairs -- either during or just prior to bankruptcy -- to allow one creditor to be favored other others with claims of a similar nature if there is not going to be enough money to pay everyone in full.

When you start with these three basic assumptions, the provisions that seem so unbelievable at first glance begin to make sense. The preference for the debtor's interests is based on the notion that its continued existence is in the best interests of all. The automatic stay is justified for two reasons; first, it allows a breathing space for the reorganization process by holding off the press of litigation which may be drowning the debtor. Second, it ensures that no one is able to grab a bigger piece of the debtor's assets just because they are farther along in the litigation process. Instead, all of the debtor's meager assets are brought into the bankruptcy court's jurisdiction and parceled out according to the priorities set by the statute, not by the debtor's preferences, or the aggressiveness of one creditor's counsel.

It is for similar reasons that the statute provides that transfers just prior to the petition date from the debtor to any creditor – whether made voluntarily or under court order – are voidable as “preferences.” It is easy to see that the debtor should not be able to pay its favored creditors and then file bankruptcy, leaving nothing for disfavored creditors. But, even where the money is obtained involuntarily by, for instance, an execution on the debtor's bank account, the law still requires that, in most instances, such payments received during the 90-day "preference period" before the filing of the petition be returned to the estate for pro rata distribution among all creditors.

The reason for this is, again, apparent upon closer examination. If the debtor knew you planned to execute on its bank account and filed its petition before you did so, you would have to proceed in the bankruptcy and share equally with other creditors, even if it was clear that the sole reason for the debtor's filing was your impending execution. That being the case, should the other creditors lose out simply because you were slightly more efficient and grabbed your money one day before the debtor was able to file its petition? The law says no – at least for the period within ninety days of the filing of the bankruptcy petition. In those circumstances, creditors generally have to put their recovery back in the pot and take their share with everyone else.

On the other hand, the value placed on keeping the debtor in operation is the reason for the high priority given to post-petition expenditures of the debtor (including those paid to its counsel). For, unless the debtor can assure its suppliers and its employees that they will be paid on a timely basis, they will refuse to do business with it. If no one will do business with it, the debtor cannot remain in operation – and, as we have seen, keeping the debtor in business is the number one priority in bankruptcy law. Thus, ipso facto, post-petition expenses (including the fees of debtor's bankruptcy counsel who orchestrates the process) are more important than your prepetition judgment for environmental clean-up costs. Sad, but true.
The expanded scope of the bankruptcy court's jurisdiction and its right to estimate the values of your claim are both thought to be necessary to allow one court to review all matters which will impact upon the debtor's liability, and arrive at a determination of the total amount of those liabilities. Moreover, by centralizing the determination of liabilities, the bankruptcy court can ensure that the estimation process will be completed in a timely fashion so that the debtor can prepare a plan of reorganization. Thus, it is thought to be more important for the debtor to have some approximate figure for what it will owe you (whether or not that figure is objectively "correct") than it may be for you to have the freedom to litigate your claim to determine absolutely its proper value, under non-bankruptcy law.\(^8\)

In short, whenever you try to figure out what the Bankruptcy Code provides, think about these three basic propositions: debtors are entitled to a fresh start; a reorganized debtor is better than a liquidated debtor; and similar claims should be treated alike. Taken together, they account for the great bulk of the Code's provisions. Some portions of the Code do protect particularly meritorious creditors, such as tax agencies, employees, and consumers by giving priority to their claims. Other provisions try to prohibit debtors from eliminating certain particularly meritorious debts, such as for certain taxes, student loans, criminal penalties, and the like, by excepting those debts from being discharged at the end of the case. But, other than those specific provisions, the underlying presumption of equal treatment generally governs. Since, however, some creditors and some debts are more equal than others, one of your jobs will be to try to fit yourself into one of those "more equal" categories, if at all possible.

In sum, you may be a regulator or a general lawyer for a city or locality, but your job is to figure out how to deal with bankruptcy law when it intrudes on your litigation. This means you will need to learn how to protect your claims before your defendant goes bankrupt, as well as how to ensure that they are properly classified during the bankruptcy, that the debtor complies with the law during bankruptcy, and, that you can retain your claim post-bankruptcy, if possible. This is no small order – and this outline will only give you a brief introduction to what you need to know to meet those goals. However, it will at least alert you to the areas of concern, and give you a start in understanding the brave new world of bankruptcy law.

\(^8\) This does not necessarily mean that you will be barred from litigating your claim in state court, but it may mean that the bankruptcy case will take steps based on the "estimate" of your claim, and the court will not wait for you to have a final "correct" determination of the amount by your state agency or court.
# INTRODUCTORY BANKRUPTCY OUTLINE

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I. TYPES OF BANKRUPTCY PETITIONS

The first thing a non-bankruptcy lawyer needs to understand is the different types of bankruptcy petitions. There are three primary types of petitions, which are described in Chapters 7, 11, and 13 of the Code.\(^9\) There are restrictions on which debtors can utilize which chapters, and each chapter has particular characteristics which the debtor must weigh in determining which to file under. (In addition, the debtor may convert from one form to another during the pendency of the bankruptcy.) The choice made by the debtor can give you an idea of how likely you are to obtain a meaningful recovery -- and, accordingly, the level of effort you may wish to devote to the case.

A. Chapter 7

Chapter 7 bankruptcies are straight liquidations where the debtor wants to walk away from its situation. Anyone (other than a governmental unit, a railroad, a bank, or an insurance company) can file a Chapter 7 petition.\(^{10}\) The debtor turns its assets over to a Trustee along with a list of its debts.\(^{11}\) The Trustee marshals the debtor's assets, sells them for the best possible price, and turns the proceeds over to the creditors in accordance with statutory priorities. If the debtor is a business, the Trustee may continue to operate it for a period of time during the bankruptcy to facilitate an orderly sale, but it is always recognized that the ultimate end of the procedure will be the termination of the existence of the filing business. In these circumstances, it is unlikely that the debtor will be able to make significant payments on its debts, since it will not have any ongoing income. Similarly, individual debtors must only make payments from their existing assets, and need not contribute any of their future income. Indeed, although Chapter 7 cases constitute about 70 percent of all individual filings, the vast majority of them have no assets to distribute and are referred to as "no-asset cases." (Note, however, that this only refers to assets which the debtor has not previously pledged as collateral to another creditor and which are not covered by state or federal exemptions.) Such cases are processed in an exceedingly summary fashion.\(^{12}\)

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9. There are three additional, rarely encountered chapters -- Chapter 9 for municipalities, Chapter 12 for family farmers, and Chapter 15 for multinational cases. The outline does not deal with them.

10. Since 2005, however, a "means test" based on IRS standard allowances has been applied to limit the ability of a party to remain in Chapter 7 if the party has sufficient income so that it would be an abuse to allow the party a Chapter 7 discharge, rather than requiring him to try to pay his creditors in a Chapter 11 or 13 case.

11. There is an appointed official known as the U.S. Trustee. That official can appoint a trustee from a panel of private persons who have been designated to serve as trustees, or can serve himself. In addition, in certain circumstances, creditors with liquidated, undisputed claims can vote to appoint a trustee. The most common situation is for the U.S. Trustee to serve as the trustee in Chapter 7 cases, particularly in no-asset cases.

12. On the other hand, precisely because such cases are handled summarily, you need to be alert to see if the debtor is fraudulently concealing assets. Obviously, if you are aware that the debtor has non-exempt assets that it has not reported, bring this to the Trustee's attention. Some reports estimate that as many as 25-30% of
All debts of a business which is liquidated through Chapter 7 remain effective against the debtor; however, since the business no longer exists, the right to pursue the debtor is essentially meaningless. However, should the liquidation be merely a ploy (a not infrequent occurrence) and should the debtor attempt to resume operations under its own or a new name, the new operation will retain liability for the old company's debts. Since an individual obviously cannot cease his existence (at least not by simply filing a bankruptcy petition), the Code does allow a person who has turned over his non-exempt assets to the Trustee to be relieved of or "discharged" from most, but not all, of his debts. The debts which the individual continues to be liable for are said to be "non-dischargeable." (See Section II(E), below for further information on discharges.)

B. Chapter 11

Generally, anyone who can file a Chapter 7 petition also may file a Chapter 11 petition. The primary difference is that, in the latter case, the debtor, not the trustee, remains in control of its property and directs the course of the bankruptcy. The debtor may choose either to try to reorganize its affairs, or it may choose to liquidate itself. In either event, it is referred to as a debtor-in-possession and, absent misconduct on its part, will be allowed to conduct the normal day-to-day operations of its business without a trustee. Many debtors prefer to file a Chapter 11 petition because of the flexibility this offers. On the other hand, since Chapter 11 leaves the bankruptcy process in the hands of the debtor, this raise serious concerns if it is felt that the debtor is incompetent to run its business, or likely to engage in fraudulent conduct. In those circumstances, the very flexibility of Chapter 11 gives the debtor a great deal of leeway to continue the behavior which led to the bankruptcy. Moreover, there are numerous ways for the debtor to manipulate the progress of the case in order to pressure the creditors into agreeing to the debtor's terms for its plan or reorganization. Thus, as a creditor, you must be aware of these possibilities and monitor the course of the bankruptcy to ensure that the debtor does not, by intent or negligence, dissipate the assets to which you wish to lay claim.

The end result of a Chapter 11 differs, based on whether the debtor is liquidated or reorganized. If the debtor is liquidated, its debts are treated just as they are in Chapter 7; i.e., an individual receives a discharge of all but specified debts, but other entities remain fully liable for all debts. On the other hand, if a non-individual debtor successfully proposes a plan of reorganization and secures confirmation of that plan, in any case filed prior to October 2005, it would receive a discharge from all of its prepetition debts of whatever nature, including those which would not be discharged under a liquidation. The amendments to the Bankruptcy Code enacted in 2005 did make all bankruptcies involve some form of fraud, with concealment of assets being the most common form of fraud. Thus, you should be on the lookout for this type of activity. If the state is, for instance, pursuing someone who has defrauded its consumers of substantial sums, the debtor should be required to clearly establish where the money went, before its alleged lack of assets is accepted. Indeed, the Code allows you to object to a discharge on the basis that the debtor has not satisfactorily accounted for the disappearance of its assets. See Section 727(a)(5).
certain limited exceptions – namely for fraud debts owed to a governmental unit or to a private party bringing a *qui tam* action on the government’s behalf; or for taxes where the debtor filed a fraudulent return or willfully attempted to avoid the tax. Other than those debts, all other corporate debts remain dischargeable. The rationale for this is that the plan itself must provide a treatment for each of those debts, consistent with their priority in the payment scheme, and, if the plan is approved, its terms will govern the payment of all of the debtor's obligations. Moreover, since the ownership of the corporation is typically turned over to the creditors, there is no continuing separate entity to be liable for those debts. An individual, though continues to be liable for the non-dischargeable portions of his or her debts, even after a reorganization.  

**C. Chapter 13**

Chapter 13, unlike the other chapters, is limited to *individuals* with regular income. This includes individuals operating as a sole proprietorship, but excludes partnerships, corporations, unincorporated associations, and the like. In addition, at the time the petition is filed, the debtor must owe no more than $336,900 in liquidated unsecured debt and $1,010,650 in liquidated secured debt. Individuals with debts higher than those levels, or who have no regular income, must choose between Chapter 7 and Chapter 11.

Chapter 13 is often referred to as the "wage earner" chapter, and is meant to provide a means for "poor but honest" individuals who has become overwhelmed by debt to propose a plan for making installment payments on those debts over a three to five year period. Debtors are expected to devote all of their disposable income to those installment payments after first providing for their ongoing day to day expenses. If the debtors complete their plan, they will then be relieved of most of their prior obligations. Because a Chapter 13 plan bears some resemblance to a Chapter 11 reorganization, and because the debtors' payments during the three to five year period normally provides more than in a straight Chapter 7 liquidation, completion of a Chapter 13 payment plan provides the debtor with a significantly broader discharge than would be

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13 While the rationales stated above are the best one can come up with for the differences in treatment between the various discharge provisions, they really are not completely satisfactory, and there is nothing in the House or Senate reports that directly explains why an individual should be treated differently from a corporation, with respect to continued liability for discharged debts.

14 These amounts are adjusted for inflation (which is why the amounts are somewhat unusual). They began at $250,000 and $750,000 in 1994.

15 Prior to the 2005 amendments, there was no set method for determining disposable income; the courts simply reviewed the debtor’s budget to determine if the expenses claimed were necessary and reasonable for a person in the debtor’s personal situation and income level. After 2005, that remains true for those with less than the state median income, but those above that amount are evaluated based on the Chapter 7 "means test." That test was meant to be more stringent, but often causes distortions compared to the debtor’s actual expenses.
received by the same debtor under a Chapter 7 or 11 liquidation plan. This expanded discharge is meant to be an incentive to debtor to choose a Chapter 13 plan, but it may be of great significance to the continuing validity of your claim, so you should carefully examine the debtor's petition to determine whether he or she actually qualifies for a Chapter 13 petition. This is particularly crucial if your claim would not be dischargeable in a Chapter 7 case, but is subject to discharge in a Chapter 13 case.

II. THE BANKRUPTCY PROCESS

The next section of these materials will give you a brief overview of what goes on in the bankruptcy process in a normal Chapter 11 reorganization bankruptcy case. After the filing of the petition, the debtor is allowed to operate its business during the time necessary to complete its plan of reorganization. This process essentially involves five steps – determining the claims pending against the debtor and marshaling the debtor's assets; reviewing the claims to determine their validity and amount; deciding how valid claims should be classified for payment; devising a reorganization plan that allocates the debtor's assets, including its stock and future earnings, to satisfaction of the allowed claims; and securing the acceptance of the creditors of the proposed plan. Each of these steps will be treated briefly below.

A. Determining Claims and Marshaling Assets

The first step – determining the universe of claims – is normally accomplished by use of a "bar date." The debtor is expected to list all claims about which it knows; in addition, a date is established by which all creditors must file any other unlisted claims or else they will be "barred" from asserting those claims. During this same period, when the claims are being collected, the debtor or the trustee is expected to gather all of the debtor's assets. This would include reclaiming all preferential and fraudulent transfers and obtaining the turnover of any funds of the debtor that are being held by other parties. It also includes collection of the debtor's accounts receivable and the pursuit of any lawsuits in which the debtor might be entitled to a recovery. Those

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16 Chapter 7 and 11 liquidations are usually less complicated and drawn-out and there are more clear-cut pay-out provisions. Chapter 13 proceedings are usually fairly small scale with few assets available. Accordingly, your major litigation concern is likely to be with Chapter 11 reorganizations.

17 In general, if the debtor lists your claim and does not refer to it as being disputed, contingent, or unliquidated, you need not file your own proof of claim. If it does dispute your claim though, you will need to file your proof of claim in a Chapter 11 case; it is probably wise to do so, in any case, though, even if the debtor does list your claim. Filing your own claim during the Chapter 11 case will ensure that it is properly listed and will eliminate the need to file a claim if the case is subsequently converted to a Chapter 7 case. In Chapter 11 cases (but not in Chapters 7 or 13 cases), the Rules also allow for late claims to be allowed if "excusable neglect" is shown. In the 1994 amendments, Section 502(b)(9) was added to provide that governments must receive an absolute minimum of 180 days in which to file a claim in any chapter; the time may be longer in Chapter 11 cases, but cannot be reduced below that minimum.
asset recovery provisions are set forth in Chapter 5 of the Code, and contain numerous sections dealing with claims by the debtor against other parties.

The first step that a creditor must take is to determine whether it has a "claim" that will be disposed of by the bankruptcy case. The definition of a "claim" under the Bankruptcy Code (Sec. 101(5)) is, by design, extremely broad. The reason for this goes back to the underlying bankruptcy principles; the Code seeks to draw in all persons who may seek compensation from the debtor so that the debtor may deal with all of their claims simultaneously and equitably, and, thereafter, receive its fresh start.18

Thus, a claim is defined to include any right to payment, whether or not it is matured, liquidated, disputed, or contingent, and any right to an equitable remedy for breach of performance "if such breach gives rise to a right of payment." The Code, by design, intends to deal even with fairly speculative liabilities, since unless they are considered to be "claims," the debtor will not be able to discharge them and the claimant will have no basis for being included in the distribution of the debtor's assets. However, there are two basic limits to that broad definition. The first is the exclusion of injunctive relief that cannot be satisfied by payments of money damages; i.e., where specific performance can be insisted upon by the creditor. The second limit is the requirement of constitutional due process; at some point a potential claim becomes so speculative, and the possibility of determining the holders of such claims and giving them adequate notice becomes so impossible, that the Constitution will not allow the matter to be disposed of in the pending bankruptcy case.

The Chateaugay court posed the example, for instance, of the bridge builder who knows, statistically, that one of his bridges will eventually fall down and kill a dozen people. Could it be said that every person who used every bridge the builder ever put up has a "contingent" "speculative" "unliquidated" claim against the bridge builder, based on the possibility that they might be among the dozen who will be killed "someday"? That court thought the answer was clearly no. A real-life situation occurred in the Piper Aircraft bankruptcy in which the debtor, at one point, argued that anyone who might ever be injured by a crash in one of the planes that it manufactured pre-petition should be deemed to hold a present "claim" in its case that could be dealt with by the plan. The bankruptcy court disagreed, ruling that only where a person suffered some injury by the date of confirmation could a claim be established. The lower court's rulings have since been upheld by the Eleventh Circuit. Epstein v. Official Committee of Unsecured Creditors of the Estate of Piper Aircraft Corp., 58 F.3d 1573 (11th Cir. 1995). The decisions in the Piper cases provide as good a discussion as there is of the constitutional limits that must be imposed on the Code's broad language.

It is important to keep these due process considerations in mind, since they are external to the provisions of the Code itself, but may come up in a variety of contexts from environmental to consumer protection and other areas.

The other limitation – injunctive relief – is of great interest to the states, as well. While some aspects of an equitable order might be satisfied with payment of money, in general, injunctive relief which forces a debtor to obey the law cannot be satisfied with a payment and, hence, does not constitute a claim. Put another way, no one can buy their way out of their obligation to comply with the law. Again, see *Chateaugay*, which also discusses this issue and comes down on the side of non-dischargeability for most injunctive orders issued by the state.

B. Reviewing and Liquidating Claims

1. In general

When the debtor has obtained the full list of the claims against it, it must review those claims against its own records. It will have no dispute with many of the claims, such as most of those with whom it does business. In other cases, though, the debtor will believe that the claim has already been paid, the listed amount is incorrect, or the claim is duplicative or otherwise defective. If so, it will object to the claims and those objections must be resolved during the course of the bankruptcy proceeding. Any claim which was in litigation at the time that the debtor files for bankruptcy will undoubtedly be objected to by the debtor. Resolution of the validity and the amount of those claims in their original forum, however, is stayed automatically upon the filing of the bankruptcy petition, unless the governmental exception is involved.

2. Abstention, Removal, and Remand

Once the bankruptcy is underway, the bankruptcy court must decide how those disputed issues will be resolved. It can lift the stay and allow existing litigation to proceed in other courts. On the other hand, it may conclude that it should try matters "related to" the bankruptcy proceeding. Finally, certain proceedings are required to be tried before the federal district court, rather than the bankruptcy court.

Sections 28 U.S.C. 157 and 1334 deal with whether and when creditors can remove their cases from the jurisdiction of the bankruptcy court. The provisions are fairly complex and it is clear that there is ample leeway for lawyers to argue about where and when a case should be tried. As noted above, a case involving purely state law must be remanded to state court only if the bankruptcy court determines that it can be "timely adjudicated" without interfering with the reorganization. On the other hand, a case which requires consideration of both Title 11 and another federal law that regulates interstate commerce (i.e., most federal regulatory legislation) theoretically must be transferred from the bankruptcy court to the federal district court, if any party
so requests. (Section 157(d)).\textsuperscript{19} Thus, if a case is brought by the state in state court, there will be one set of arguments for retaining it there; if the state, on the other hand, is proceeding under a federal statute in federal district court, it will use different arguments if it wishes to retain the case in that forum.

One additional relevant section is 28 U.S.C. 1452, which provides that claims pending in other courts may be removed to district court (and thence to the bankruptcy court), if the bankruptcy court has authority, under Section 1334, to exercise jurisdiction over such cases. However, this removal authority does not extend to an action by a governmental unit to exercise its police and regulatory power. Such a case should not be removed in the first place, and, if the defendant does so in violation of this section, the court should promptly remand the case on your motion under Section 1452(b). However, some bankruptcy courts do not seem to understand this, or are reluctant to relinquish jurisdiction, once a matter is before them. Thus, an unscrupulous defendant may "remove" your case to the bankruptcy court, without any justification whatsoever, simply as a delaying tactic. Unfortunately, you cannot ignore this removal action, because the removal is absolutely effective, simply upon the filing of notice thereof. Any actions you take after the notice of removal is filed are void, even if the removal itself is totally improper. See, e.g., \textit{In re Wellington Resources Corp.}, 20 B.R. 64, 71-72 (Bankr. N.D. Tex 1982). There really is nothing you can do about this, short of moving promptly to have the case remanded; and possibly seeking sanctions, including attorneys fees, against debtors' counsel for filing a frivolous removal notice. If your reaction is sufficiently swift, and is supported by the court, you may discourage such activities in the future.

3. Estimating Claims

In view of the well-known propensity for drawn-out litigation in the American system, the question then arises of what to do with claims whose amount cannot be finally litigated – no matter in which forum the trial would be held – by the time the debtor is ready to seek confirmation of a plan. The solution arrived at in the Code is, again, based largely on the primary need to assist the debtor's rehabilitation. Section 502(c) provides that the bankruptcy court may \textit{estimate} the value of a claim for purposes of deciding how much to set aside for that claim in the plan. This process is essentially a mini-trial during which the bankruptcy court attempts to determine the likelihood of the plaintiff's success, and the probable magnitude of recovery in the pending litigation.

The amount arrived at is then listed as an "allowed" claim and must be dealt with in the plan. In some cases, particularly with governmental units, the estimation process is not actually used to determine the final amount of the claim. Rather, the government

\textsuperscript{19} That said, most courts interpret the mandatory withdrawal section very narrowly, so that its usefulness to the government is not nearly as clear as would first appear.
agency must be allowed to use its own expertise to liquidate the claim, and that later determined amount may be used as the basis for a motion to reconsider the estimated allowed claim, if necessary.\(^\text{20}\) However, this right of reconsideration may be largely meaningless, if the debtor has already distributed all available funds under its plan before the liquidation of the debt is completed. Thus, the estimation proceeding may well be the dispositive hearing for determining how the government's claim, despite any provisions of the substantive law reserving determination of damages to the agency's discretion. *Chateaugay*, *supra*, 944 F.2d at 1006. Accordingly, you may well find that you are being forced to, in essence, proceed with a mini-trial of your case at a time when you are still in the process of investigating the situation.

### C. Classifying Allowed Claims

Once a determination is made of which claims are valid and the amounts of those obligations, these "allowed claims" must be handled in the debtor's plan of reorganization. Claims may be allowed, based on the debtor's stipulation as to their validity, agreement, on liquidated judgments, or on determinations made by the bankruptcy court during the estimation hearings. Once the debtor knows all of its allowed claims and their amounts, it must then classify those claims in order to determine the order in which they will be paid (or not paid, if there are insufficient assets.) There are two major dividing lines which must be taken into account in reviewing allowed claims. First, are they for pre-petition or post-petition expenses; and second, are they secured or unsecured claims?

1. Prepetition Claims vs. Postpetition Administrative Expenses

The Code draws a clear divide between debts incurred prior to the filing of the petition, and those incurred thereafter. As noted above, in order to allow the debtor to function during the reorganization process, most debts incurred after the petition is filed are considered to be expenses of administering the estate and are paid first. In many cases, these "administrative expense" payments, for items like goods and services, are made during the course of the bankruptcy as normal operating expenses of the business. Even if they are not paid in due course, however, a valid reorganization plan must provide for satisfaction in full, in cash, of any unpaid administrative expenses at the time the plan is confirmed, unless the claimant agrees otherwise. The exact same kinds of debt, however, when incurred before the filing of the petition, receive no such priority, and only receive whatever payment the plan specifies. Obviously, a post-petition administrative expense claim is a much better type of debt to have!

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For the normal type of debt, the classification is simple; either the sale was made or the service performed before the petition or it was not. Similarly, if a person slips and falls, the injury occurred on a particular date, and it can easily be determined whether this occurred pre- or postpetition. By the same token, fines and penalties based on conduct occurring before the bankruptcy will clearly be a prepetition claim. If, however, the debtor continues to affirmatively violate the law after the petition is filed, the state may assert an administrative expense for additional fines and penalties which it assesses for that post-petition conduct. The more difficult question arises where there is a question as to when the claim arises – namely if there is pre-petition misconduct that results in continuing postpetition harm. A full discussion of this topic is beyond the scope of this outline, but this is a major issue in many environmental cases, such as where a landfill continues to leak postpetition.

2. Secured vs. Unsecured Claims

Once it is determined whether claims are prepetition or postpetition, the other important dividing line is whether they are secured or unsecured. A creditor has a secured claim when it has a lien against some property of the debtor to "secure payment of a debt or performance of an obligation." To the extent that the creditor's claim exceeds the value of the collateral, the remainder of the claim is an unsecured claim. (11 U.S.C. 506). There are three types of lien – statutory, judicial, and security interest.21 UCC security agreements, mortgages, and similar provisions are all examples of security interests. Statutory liens arise solely by force of a statute, such as tax liens. Finally, judicial liens are those "obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." (See 11 U.S.C. 101(36), (37), (50), (51), and (53)). It is important to note that, while a judgment may be a means of obtaining a lien, a judgment is not a lien, unless applicable federal or state law so provides. In other words, upon receiving a judgment one may be entitled to levy upon a piece of property and thereby establish a lien; having the judgment, itself, makes one a secured creditor only if there is a law that automatically provides such a lien. A judgment does give one a liquidated claim, but the claim itself is still unsecured.

If, in any case, you do have a secured interest of some sort, that interest is recognized in the bankruptcy case and must be provided for in the debtor's plan. There are a number of other special provisions in the Code dealing with secured interests, such as the right to have the automatic stay lifted in certain circumstances, and the right to receive interest, attorneys' fees, and other expenses, on one's claim if there is sufficient collateral to cover those costs. The creditor must either receive its collateral or the full value thereof before any payment can be made to satisfy unsecured claims, no matter how meritorious those claims are. In addition, each holder of a secured claim normally constitutes its own class of claims, and, thus, its vote on confirming the plan will not be drowned out by other creditors with similar claims. Accordingly, it is readily

21 In addition, a right to setoff is essentially treated as if it constituted a security interest for the creditor.
apparent that obtaining a secured status for one’s claim is highly desirable and should be a goal for any party during litigation and settlement negotiations.

D. Preparation of the Plan and Confirmation

After determining the priority of the claims, the debtor must next prepare a plan that incorporates all of the claims against it, and all of its assets. The debtor may not have enough assets to make payments to all claimants, but the plan must explicitly recognize and deal with all such claims, as the *quid pro quo* for the debtor receiving its discharge. The plan may provide for the sale of assets, the rejection of executory contracts, the borrowing of funds, and the transfer of stock from the shareholders to the creditors, as a means of satisfying the claims. The plan may or may not be to the creditors’ liking; if not, their recourse is to vote against the plan when it is presented to them for confirmation. There are provisions, however, for approving the plan over the objections of some, or even most, creditors; in such a case, at least one class of impaired claims must vote for the plan for it to be approved. In addition, the plan must ensure that each creditor receives at least as much as it would have had the debtor simply been liquidated. If so, the court may approve the plan over the creditors’ objections. Thus, despite the bias toward assisting the debtor with a successful reorganization, the debtor may not reallocate assets to assist its reorganization where this would disadvantage the creditors compared to a straight liquidation.

Part of the process of completing the plan is to divide claims into various classes of similar debts, that vote as a group on the debtor’s plan. Secured claims, as noted above, normally each receive their own class. Unsecured claims may be treated as one class, or separated in various ways. For instance, the Code allows very small claims to be treated separately and paid in full in order to eliminate them from the case. Trade claims may be placed in one class, personal injury claims in another, bond debt in one or more other classes, and fines and penalties in yet other classes.

Equity interests (i.e., stockholders) are normally placed in their own, separate class, since they will always be paid last, after all claims have been satisfied. If, as is usually the case, there is no remaining equity, they will be wiped out. Section 507 of the Code also provides for a number of limited priorities for such items as employee wage and benefit claims, security deposits, tax claims, and claims by the FDIC and similar institutions. The debtor may also choose to put each priority in a separate class.

One should always examine the class structure and the treatment of the difference classes carefully. There is ample room under the Code for the debtor to try to manipulate the claims structure to favor one group of unsecured creditors over another. You should be sure that your claims are not being improperly separated or combined with other claims to justify paying a lower percentage than you would otherwise be entitled to, or as a way to submerge your negative vote in a larger class that will vote to confirm the plan over your objections. Finally, in creating its plan, the
debtor must rank classes in the order in the Code, and must then allocate its assets to those classes in priority order. Each class must normally be paid in full before lower priority class receive payment, unless it voluntarily agrees to allow some consideration to go to the lower classes. If, at some level of priorities, there are insufficient funds to pay all claims, then all creditors at that level will share the remaining assets pro rata.

Once the plan is completed, a "disclosure statement" is prepared and circulated, along with the plan, to all creditors. The disclosure statement serves much the same purpose as a prospectus for a stock purchase, in that it must supply "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor . . . to make an informed judgment about the plan." (Section 1125(a)(1)). Once the statement and plan are circulated, the debtor may solicit acceptances of the plan from its creditors. If sufficient numbers of each class (50%+ of the creditors and 67%+ of the dollar amount of the claims) vote in favor of the plan, it will be confirmed. If they do not, the plan may be "crammed down" over their objections, if it meets statutory standards of "fairness and equity." Those standards are set forth in Section 1129. As noted, chief among those requirements is that the plan must provide at least as much as a liquidation would to each creditor.

E. Discharge

1. In general

As should be obvious by now, the real goal of a bankruptcy proceeding is to arrive at a plan that will be accepted by creditors, and that will allow the debtor to operate profitably in the future. If this occurs, the debtor, if other than an individual, will be discharged from "any debt that arose before the date of confirmation . . . whether or not - (i) a proof of the claims based on such debt is filed . . .; (ii) such claim is allowed . . .; or (iii) the holder of such claim has accepted the plan." (Section 1141(d)(1)).

It is important to note that only pre-confirmation debts are discharged. Any claims that arise after the confirmation order become the responsibility of the reorganized debtor. Often, a creditor with a contingent or speculative claim who believes that the reorganized debtor will be able to operate at a profit, will seek to avoid having that potential liability be recognized as a "claim" during the bankruptcy. If there is no pre-confirmation "claim," then the creditor will be able to pursue the reorganized debtor after the bankruptcy to seek compensation for the liability, and to recover payment at 100

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22 This is another area where the Code is surprisingly obscure. There is a priority section in the Code (Section 507), but it does not mention secured claims at all. Moreover, that section contains references within references, which must be tracked down throughout the remainder of the Code. Finally, there are several other places where priorities are provided for in the Code, such as Section 364 "super-priorities" for parties providing operating cash to a debtor, which are not specifically mentioned in Section 507. Thus, deciding the order of payment for creditors in a bankruptcy case is no easy task.
cents on the dollar. The debtor, on the other hand, of course, wants to bring as many of its still contingent liabilities into the bankruptcy as possible, in order to protect itself against having new claims in the future. This battle of wits between debtors and creditors is a never-ending feature of bankruptcy law. On the other hand, of course, a creditor does not always want to have a non-claim; if the debtor is going into liquidation, the only way the creditor will recover anything is if it can share in the present distribution of the debtor's existing assets. In short, this issue is one that can cut both ways.

2. Exceptions to Discharge

If the debtor is an individual, there are exceptions to discharge provided for in Section 523. Several exceptions applicable in governmental cases are subsections 1 (taxes), 2 (false pretenses, false representations, fraud), 4 (fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny), 5 (domestic support obligations) 6 (willful and malicious injury), 7 (fines, penalties and forfeitures), and 8 (student loans). It should be noted that exceptions 2, 4, and 6 require that the creditor affirmatively request the bankruptcy court, within 30 or 60 days after the first date set for the meeting of creditors, to determine that the debt will not be discharged; the others do not require any affirmative action by the creditor. (See 11 U.S.C. 523(c)(1) and Bankruptcy Rule 4007.) Thus, you will need to quickly analyze your claim to determine whether you need to assert a non-dischargeability argument, and, if so, file the necessary motion with the court.

If the debtor has filed a Chapter 13 wage-earner plan, he will receive a discharge upon completion of the plan. The exceptions to discharge are more limited in a Chapter 13 than in a Chapter 7 case or Chapter 11 plan. The exceptions are set out in Section 1328(a), which includes, many, but by no means all, of the Section 523 exceptions. On completion of the plan, the other debt will be discharged, even if that plan results in little or no actual payment to the government. If the plan is not completed, the debtor receives only the standard Chapter 7 discharge.
III. SPECIAL GOVERNMENTAL CONSIDERATIONS

The next thing the governmental practitioner needs to be familiar with are several provisions which are unique to claims of state, federal, and municipal entities. The 1978 Bankruptcy Code eliminated any general priority for governmental claims but there are still many provisions which are of particular applicability to governmental entities. These include certain limited priorities, the exceptions to the automatic stay, sovereign immunity, and the composition of creditors' committees.

A. Priorities

There are several priorities under Section 507 of interest to the government. Section 507(a)(1) provides priority to "domestic support obligations" (i.e., payments for child support, alimony, and maintenance) and the 2005 amendments gave protection to such amounts when they were owed directly to the government, not just when it was collecting them on behalf of a spouse or child. Section 507(a)(4) and (5) apply to employees wages and benefits which the government may be pursuing under wage and hour or other labor laws. Section 507(a)(7) provides a priority for consumer deposits which is often applicable to consumer protection violations and Section 507(a)(8) protects most taxes, subject to certain time limits. All of these, if applicable, give the government a much greater chance to have its claim satisfied.

B. The Automatic Stay

1. In general

As noted above, the first, and often the most important, consequence of filing a bankruptcy petition for the debtor is that it is automatically granted a stay of all litigation. This stay occurs without any action by the debtor or the court and there is no right of any party to be heard prior to its imposition. Violation of the stay by a party that knows, or has reason to know, of the filing of the petition is contumacious conduct and can result in sanctions if the party proceeds with its litigation.23 Even if you do not know of the stay, any actions which you take that violate the stay will generally be found to be void ab initio. As previously stated, the purposes of this are two-fold: to protect the debtor from conflicting and expensive litigation and to ensure that no one creditor achieves an advantage over others with equal claims to the debtor's assets.24

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23 The sanctions for contumacious conduct normally include injunctive relief to correct the violation, compensatory damages, and attorneys fees and costs for the injured party. Under current Supreme Court law, sovereign immunity will not protect the government from those sanctions, as set forth in Section 106(a)(1). However, as discussed below, those damages are limited by the new amendments.

24 The House Committee noted, H.R. Rep. 95-595, 95th Cong., 2d Sess., 1978, U.S. Code Cong. and Admin. News. 6135, that "[t]he stay is an important aspect of bankruptcy protection, and is an element of the debtor's fresh start. For the consumer, the stay ceases all harassment by bill collectors; for the ailing business the stay gives
The definition of the stay is set forth in 11 U.S.C. 362(a). It prohibits, in as many ways as possible, litigation against the debtor with respect to prepetition claims, and any collection activities against the debtor's estate, regardless of when the claim arose. In addition, the stay prohibits actions against property of the debtor not falling within the bankruptcy estate (i.e., exempt property) for prepetition claims. While such an automatic and all-inclusive provision has clear advantages in terms of clarity and simplicity of operation, it obviously would allow an unscrupulous debtor to escape into bankruptcy to avoid the consequences of its prepetition violations of the law.

Clearly, this is not a tolerable state of affairs. The mere fact that a business has been able to go broke surely is not grounds for retroactively exempting it from all laws and regulations – especially if it is the penalty for violation of those laws which has caused the insolvency. There are certain businesses, perhaps, which simply should not be allowed to operate, if they cannot do so within the existing legal framework. Certainly, other businesses that do obey the law cannot continue to do so, if they are undercut by companies that ignore their obligation to comply with costly regulations and then obtain protected in bankruptcy when the government's enforcers gets too close. Indeed, the adverse effect on law-abiding businesses may be one of your strongest weapons to convince a judge not to overextend the impact of the stay.

The Code takes care of this in two ways. First, the debtor must obey the law during the course of the bankruptcy and may be sued for its failure to do so. 28 U.S.C. 959(a) provides that "Trustees, receivers or managers of any property, including debtors in possession, may be sued without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. . . . 29 U.S.C. 959(b) further provides that "[A] trustee, receiver, or manager, . . . including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver, or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." Second, the Code exempts certain governmental actions from the operation of the stay.

2. Governmental Exceptions to the Stay

The governmental exceptions are set out in Section 362(b) of the Code. Section 362(b)(1) totally exempts from the stay the commencement or continuation of any criminal action against the debtor. The petition also does not act as a stay, "under subsection (a)(1), (2), (3), or (6) . . . of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police or regulatory power, including the enforcement of a money judgment, obtained in an action or proceeding by the governmental unit . . . to enforce such governmental unit's
... police or regulatory power" (Section 362(b)(4)). Finally, Section 362(b)(9) allows for the determination and assessment of taxes but not the creation of a lien by virtue of the assessment.

Those three provisions are the primary sections that keep governmental agencies in business, notwithstanding the filing of a bankruptcy petition. Without them, any company that you are pursuing under your state's environmental laws, for instance, could stop your litigation dead, simply by filing its petition – and many debtors think they can do so. With those sections, however, you are able to politely but firmly give those defendants the bad news – that you are not stayed, and that you intend to continue the litigation without any let-up. In addition, these sections reinforce your right to proceed against a debtor-in-possession under 28 U.S.C. 959.

There are several points of note about exceptions to the automatic stay. First, these provisions should not be interpreted in an overly narrow fashion, nor should your continuation of litigation be taken as contrary to the Congressional intent. In the House report on the 1978 revisions, the House Report specifically noted that:

Under present law, there has been some overuse of the stay in the area of governmental regulations. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's environmental protection laws. . . . The bill excepts these kinds of actions from the automatic stay. The States will be able to enforce their police and regulatory powers free from the automatic stay. (1978 U.S. Code Cong. and Admin. News 6135).

Similarly, the Senate report also made clear that the drafters were concerned with protecting the right of government regulators to proceed with their litigation.

Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such laws, the action or proceeding is not stayed under the automatic stay. (1978 U.S. Code Cong. and Admin. News 5787).

Moreover, not only are you not subject to the stay, you do not have need to have the Bankruptcy Court recognize the exemption, nor need you ask the court to lift the

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stay and give you permission to proceed. The fact is that you have never been covered by the stay, and, thus, there is nothing for the court to lift. Finally, and perhaps what is equally crucial for your purposes, the court you are operating in has jurisdiction to decide that you are not bound by the stay. In other words, if you are correct in proceeding, you do not have to go back to the bankruptcy court to ratify your actions.

3. Limitation on Governmental Actions

Not surprisingly, this authorization to the government to proceed with its cases is not unlimited. First, you should note the distinction between the exemption from the stay granted to criminal proceedings – none of the provisions of subsection 362(a) applies to criminal proceedings – with the more limited exemptions granted to civil proceedings, i.e., only the provisions of subsections 362(a)(1), (2), (3), and (6) are overridden by the governmental exemption. The remaining portions of subsection 362(a), from which the government is not exempt, are essentially other ways of stating the limitation contained in Section 362(b)(4), against the unilateral enforcement of a money judgment during bankruptcy. Section 362(b)(9) does contain an exemption to all of Section 362(a) but has its own exceptions relating to creating liens.

In other words, Section 362(a) and (b) taken together, allow the government to continue with its civil litigation to the point of fully determining and liquidating its claim and of enforcing its non-money judgments. However, the government may not enforce – i.e., collect on – a money judgment, nor may it take any other actions to obtain to create or perfect a lien, or to unilaterally set off a debt owed to the debtor against its own claim. Instead, once you have obtained a money judgment against the debtor, you must return with that judgment to the bankruptcy court and submit your claim, along with everyone else, for payment in accordance with the statutory bankruptcy priorities. Thus, the government is allowed to carry out its statutory obligations and apply its expertise in determining what the debtor owes for its violations of the law. When the time comes to collect on those debts, however, the government enjoys no preferred

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27 See also Board of Governors of the Federal Reserve v. MCorp Financial, 502 U.S. 32 (1991). (Bankruptcy Court had no jurisdiction to review the validity of the regulatory authority under which the agency was exercising its police or regulatory authority. Court could not use purported invalidity of the regulation as a basis for applying the automatic stay.)

28 It is important to remember that the government does have authority to determine the amount of damages and to enter a money judgment against the government. (Look again at the second quote from the legislative history, noted above.) It is simply enforcement, i.e., collection, of the judgment that is barred by the automatic stay.
status and must allow the bankruptcy court to determine how available funds will be divided among the creditors.

4. The Discretionary Stay

The other caveat is that the automatic stay is not the only weapon at the bankruptcy court's disposal to bring your case within its control. The court also may issue a discretionary stay under 11 U.S.C. 105, which allows the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." The House report, cited above, went on to state that the bankruptcy court is to use its power under Section 105 to determine, on a case-by-case basis whether a governmental action will damage the debtor's estate. "By exempting these State actions from the scope of the automatic stay, the court will be required to examine the State actions more carefully, and with a view to protecting the legitimate interests of the State as well as of the estate, before it may enjoin actions against the debtor or the estate." (1978 U.S. Code Cong. and Ad. News 6135) Thus, while the government is not to be automatically stayed, it does not have a guaranteed right to proceed, despite any other countervailing considerations in the bankruptcy.

In countering a Section 105 motion, you will need to meet not only arguments that the substantive action itself will harm the debtor and destroy the estate, but also that the very act of litigating your case will be so burdensome to the debtor that it will not be able to continue. As to the first point, it is clear that the debtor may not argue that its right to reorganize supersedes the law. As to the second issue, there is substantial case law to the effect that the cost of litigation does not constitute an enjoinable threat to the assets of the estate. However, despite the case law, you

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29 See Midlantic, supra. See also, for instance, Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988); In the Matter of Fesco Plastics Corp., Inc., 996 F.2d 152, 154 (7th Cir. 1993) (court may use equity only as a means of implementing a specific Code provision); In re Commonwealth Oil Refining Co., 805 F.2d 1175, 1188 fn. 16 (Section 105 "does not authorize the bankruptcy court to create substantive rights that are otherwise unavailable under applicable law or constitute a roving commission to do equity"); Wilner Wood Products Co. v. State of Maine, Dept. of Envir. Prot., 128 B.R. 1 (Bankr. D. Me. 1991); In re University Medical Center, 82 B.R. 754, 757-758 (Bankr. E.D. Pa. 1988) (Section 105 is "not to be employed as a loose cannon"); Sewanee Land, Coal and Cable, Inc, 34 B.R. 696, 702 (N.D. Ala. E.D. 1983) ("The rehabilitation of the debtor must be done without contravening the law.").

30 See, e.g., In re Davis, 691 F. 2d. 176, 178 (3d. Cir. 1982), quoting Younger v. Harris, 401 U.S. 37, 46 (1971); In re Nicholas, Inc., 55 B.R. 212, (Bankr. D. N.J. 1985); In re Brada Miller Freight Systems, Inc., 16 B.R. 1002, 1012-1013 (N.D. Ala. S.D. 1981); In re General Highway Express, 118 LRRM 3402, 3406-7 (Bankr. N.D. Ok. 185); In re Kawano, Inc., 27 B.R. 55, 856-857 (Bankr. S.D. Ca. 1983); In re Rath Packing Co., 38 B.R. 552, 559 fn. 6 (Bankr. N.D. La. 1984). Cf. Myers v. Bethlehem Corp., 303 U.S. 41, 51-52 (1938); Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1 (1974); and FTC v. Standard Oil of Cal., 449 U.S. 231, 244 (1980) (In a non-bankruptcy context, incurrence of litigation expenses does not constitute "irreparable injury" that would justify issuance of injunction.) The only area in which an exception has been fairly well recognized is with respect to mass tort litigation where the sheer numbers of cases can be so overwhelming that reorganization would be impossible while they are proceeding.
should not be surprised if you face a bankruptcy judge who finds an argument that the cost of litigation threatens the debtor’s ability to reorganize to be very persuasive. You will need to be prepared to argue both the lack of burdensomeness in your particular case, the likelihood that the same costs would be incurred in the bankruptcy court in any event, as well as the general policy position that allowing a stay on the basis of the cost of litigation would make the stay almost automatic, which is clearly antithetical to the intent of Congress.

5. Enjoining Enforcement Activity

The most difficult issues arise when the State is trying to take affirmative action during the pendency of the debtor's bankruptcy proceeding, either to enjoin ongoing unlawful activities, or to attempt to force the debtor to take action to remediate existing violations, such as by cleaning up its property. Clearly, the debtor must obey the law and you may bring suit against it for failing to do so. Yet, under either scenario, there may be substantive expenses incurred by the debtor, or the limitations placed on its actions may interfere with its reorganization. Take, for instance, the question of whether the state may order the debtor to undertake remediation activities or face the prospect of a permit revocation for ongoing statutory violations. Does the requirement that the debtor incur those costs, or risk one of its primary assets convert injunctive relief into a "money judgment" or an attempt to avoid the effects of the stay? Does the impact on the debtor's reorganization justify the court in imposing a discretionary stay? In general, the answer is probably not, but you should not be surprised if you are forced to litigate over these issues in order to establish that position. This issue, and others dealing with the stay are covered in much greater depth in Chapter 10 of the Bankruptcy Manual.

B. Sovereign Immunity

1. In general

The next area of relevance solely to governmental claims is the issue of sovereign immunity. The primacy of federal control over bankruptcy filings is set forth in the Constitution.\textsuperscript{31} Under that authority, Congress enacted Section 106 of the Code as a partial abrogation of for both itself and the states. That section was substantially rewritten in the recent amendments, which were explicitly made retroactive, unlike the remaining amendments. Thus, some of the previously raging issues have been resolved. Beginning in 1996, the Supreme Court announced a series of cases clearly limiting Congress’ ability to use its Article I powers to enact legislation allowing suits against the States. The Court initially appeared to assume this also applied to the bankruptcy power, and the lower courts virtually unanimously

\textsuperscript{31} "Congress shall have Power To establish . . . uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. 1, Sec. 8, cl. 4.
agreed. Later, though, in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), the Court made an abrupt about-face and basically concluded (*albeit* with very little evidence) that bankruptcy was “special,” its general immunity case law did not apply and that Congress *did* have power to control state actions in bankruptcy in ways that it could not as regards any other Article I power. That said, though, the limits in Section 106 have generally been found to still apply in determining the extent to which Congress decided to impose its will on the States. Sovereign immunity, in this regard, is purely a state issue, localities do not enjoy its protections. However, most of Section 106 is written in terms of effect on “governmental units” (which do include localities), not sovereign immunity as such, so its limitations should still apply to localities.

In any event, as currently written, the new section expressly states that it is abrogating governmental immunity with respect to a list of provisions that, in general, deal with bankruptcy-created causes of action. The list of sections does not include, however, the section providing that the debtor's property includes all causes of action which it possessed prepetition. Thus, the government will retain immunity with respect to non-bankruptcy related causes of action. Section 106(a)(1). Section 106(a)(3) provides that the court may issue judgments against governmental units, including money judgments, in matters arising out of those sections, but bars the imposition of punitive damages against the government and limits the dollar amounts recoverable to those available under the Federal Equal Access to Justice Act; i.e., a base rate of no more than $75/hour (although various increases do apply). The main effect of these changes is to make the government subject to preferential and fraudulent transfer actions from which the Supreme Court had previously held governments retained sovereign immunity, under the old Code sections. *Hoffman v. Connecticut*, 492 U.S. 96 (1989); *U.S. v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

Section 106 also contains two other sections which provide for waivers of government immunity in certain situations where the government takes affirmative action in the bankruptcy case. Any governmental unit that files a claim in bankruptcy court waives its immunity as to any counterclaim against the government arising out of the same transaction (Section 106(b)), and the debtor may setoff any claim it has against that governmental unit up to the limit of its claim (Section 106(c)). As included in the original Code, subsection (b) did not refer to the government having "filed" its claim and there was a substantial amount of litigation about whether this allowed debtors to assert claims against the government whether or not the government filed a claim in the case. This issue has, hopefully, now been laid to

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32 Thus, subsection (b) allows for unlimited relief – i.e., the debtor can recover more from the government than the government is claiming for itself, but only for a limited universe of transactions, while subsection (c) provides limited relief but for a much wider group of claims.
rest by the 1994 amendments which now explicitly require that there be a filed claim in order to invoke this right of setoff.

2. Preferences, Fraudulent Transfers and Turnover Orders

As noted, probably the greatest impact of the changes in the sovereign immunity provisions was with respect to preference and fraudulent transfer actions and turnover orders. The Supreme Court had held that governments were not bound by those avoidance sections under the pre-1994 version of Section 106 but now they do apply. Thus, governments need to be familiar with the effect of those provisions, and the defenses and exceptions thereto.

The three Code sections dealing with preferential and fraudulent transfers and turnover orders are meant to further the purpose of providing equal treatment of creditors. Section 542 of the Code requires any entity having custody or control of property of the debtor's estate to turn over that property to the debtor or the trustee. Similarly, Section 547 defines certain transfers as being "preferential", and allows the debtor or trustee to rescind or "avoid" those transfers in order to bring the property back into the debtor's estate for distribution. Finally, Section 548 defines certain other transfers as being "fraudulent" and similarly allows the trustee to avoid these transfers.

In general, payments made 1) on an existing debt during the ninety days preceding the bankruptcy filing, 2) while the debtor was insolvent and 3) that allow the recipient to receive more than it would otherwise receive under a Chapter 7 liquidation, are preferential and may be avoided under Section 547. There is a presumption of insolvency during the 90 day prepetition period and it is up to the creditor to prove that the debtor was not actually insolvent during that time period. Because a "transfer" is defined (Section 101(54)) to include every mode of parting with property, whether voluntary or involuntary, it is clear that a "preferential" transfer may occur without the debtor's assistance, and, indeed, against its wishes. For instance, execution on a bank account is a transfer and, if that execution pushes the debtor into bankruptcy, it may be avoidable upon the filing of the petition. Where the transfer is deemed to be fraudulent under Section 548, the avoidance period is extended from 90 days to two years.  

These provisions obviously are of serious concern to a creditor. It is hardly desirable to make all of the effort to obtain and collect upon a judgment, only to have that collection effort nullified and the funds swept back into the estate, to be distributed to other claimants who have not been as diligent in their efforts. Moreover, all unsecured claimants will be treated equally in the bankruptcy, even if in the diligent

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33 A fraudulent transfer can generally be described as one which was made with "actual intent to hinder, delay, or defraud any entity to which the debtor [is] indebted;" or for which the debtor received less than a reasonably equivalent value in exchange and which occurred at a time when the debtor was either insolvent, or was undercapitalized, or intended to incur debts that it would not be able to repay.
creditor's eyes, its claim is plainly more meritorious than those of other parties. There several exceptions to these provisions, such as for payments in the ordinary course of business. In addition, the payment must allow the government to receive more than it otherwise would; if the payment was for a tax that would be given priority and paid in any event, then there will be no preference. Moreover, a tax, under Section 547(a)(4) is not deemed to be due (for purposes of determining whether a debt is “antecedent” to the payment) until the last date the tax can be paid without penalty. Further, a preference only applies to a transfer of the debtor's property; if it turns over trust fund taxes which are not its own funds, than this too is not a preference. Finally, securing a claim, even one that is antecedent, is considered to provide “value,” for purposes of the fraudulent transfer section (see Section 548(d)(2)(A)), so obtaining a lien to secure a settlement, even if done after the original deal was reached, may be preferential but it will not be fraudulent. Thus, while these provisions will cause some problems for the government, they are not necessarily insurmountable.

C. Creditors’ Committees

While a trustee is not normally appointed in a Chapter 11 case, the U.S. Trustee does continue to play a monitoring role in the case. In addition, the Chapter 11 case involves other bodies which play very important roles in reviewing and challenging the debtor's actions during the case. Those bodies are the claimants' committees, which are provided for in Section 1102. The U.S. Trustee is directed to appoint various committees of creditors and/or equity security holders. At a minimum, the Trustee is instructed to attempt to find sufficient willing creditors to appoint the unsecured creditors’ committees. Other committees are formed at the Trustee's discretion, and may include separate committees for equity holders, bondholders, and, on occasion, specialized groups of unsecured creditors, whose interests differ from the ordinary trade creditors. This has frequently occurred, for instance, in the mass tort cases, where committees of personal injury or property damage claimants have been created by U.S. Trustees.

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34 That section provides as follows:

(a)(1) As soon as practicable . . . the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.

(b)(1) A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of the case members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.
If a governmental unit is interested in being named to such a committee in a Chapter 11 case, it must also take into account the definition of "person," which appears at Section 101(41). That provision defines a "person" as an "individual, partnership, and corporation, but does not include governmental unit . . . ." 35

By its terms, Section 1102 only requires that all members of the committee be creditors, although, "ordinarily" the members of the committee are to be the "persons . . . that hold the seven largest claims". Thus, one reading of the statute is that the trustee has discretion to appoint governmental creditors if they hold one of the seven largest claims, although this would not be "ordinary" or a matter of course.

The House Report, however, states that "The court is restricted to the appointment of persons in order to exclude governmental holders of claims or interests." H.R. No. 595, 95th Cong., 1st Session 401 (1977), U.S. Code Cong. & Admin. News 5787 (1978). There is no explanation for the statement, nor is any reason given for the desire to exclude governmental creditors completely from creditors' committees. One reason may have been an overreaction to the predecessor to the Bankruptcy Code, under which governmental entities had enjoyed a general payment priority for all of their claims, regardless of their nature. When the drafters of the Code decided that the preference was overgenerous, they may have gone on to include the limitation on creditor committee membership as part of a general attempt to limit governmental priorities, although there is no clear evidence that this was the reasoning behind this provision. (Nor, of course, does exclusion from a creditors' committee serve to downgrade the priority of any governmental claim.)

In any event, the combination of the wording of the statute and the committee report leaves the situation somewhat ambiguous. A few U.S. trustees have relied on the literal wording of the statute and used their discretion to appoint governmental creditors, where warranted (such as in the Orange County, CA bankruptcy). Most, though, look to the committee report and refuse to appoint any governmental unit to a creditors' committee.

There are two main reasons to be on a creditors' committee. The first is if your claims are substantially similar to those of other claimants, or if the debtor appears to be ignoring you and dealing only with the creditors' committee. To the extent that your claims are different in kind from those of the other unsecured creditors, it might not be necessary to be on the committee, so long as you can ensure that the debtor is dealing with you on a "separate but equal" basis, with respect to how the plan is being formulated. But if it does not do so, or, especially, if your claims are very similar to those of other claimants, so that a common treatment will be applied to all such claims,

35 There is an exception for governmental units which have acquired assets as the result of a loan guarantee agreement or as a receiver or liquidating agent for a person, and in 1994, the definition of person was expanded to include pension benefit guarantee agencies and similar bodies, but still excluded all other governmental units.
it can be critical to ensure that you are on the committee. Committee members are required to exercise a fiduciary responsibility to all creditors whose interests are represented by the committee -- but the reality is that there are always alternative ways to structure a plan and its implementation. Committee members will inevitably tend to favor the alternative that best protects the interests of their own clients in making those choices. If your client's interests differ from theirs, you can reasonably assume that the committee members will find plausible reasons why the proper outcome is the one that benefits their clients, not yours. Allowing yourself to be shut out of the negotiating process could, thus, prove to be extremely costly to your clients. The second reason for seeking a presence on the creditors' committees is that its members get their expenses (but not salaries) paid for participating in the conduct of the case. This right to compensation is clearly of substantial importance where travel budgets are extremely limited and where such reimbursement may mean the difference between whether you can participate in a meaningful fashion or not in determining the contours of the plan of reorganization.

Accordingly, if you have a substantial claim and feel that it would be useful to be on the committee, by all means pursue this with the U.S. Trustee. Certainly, if you are one of the largest creditors, you can make a strong equitable argument that it is unfair to leave you out of the process, while other smaller claimants are making decisions that affect you. But, if you can't persuade her, you are probably out of luck -- at least, until changes can be made in the Code, since the present case law provides little if any support for inclusion of governmental representatives. See, In re VTN, Inc., 65 B.R. 278, 279 (Bankr. S.D. Fla. 1986); Mansfield Tire & Rubber Co., 39 B.R. 974, 976 (N.D. Ohio 1983); In re Baldwin-United Corp., 38 B.R. 802, 806 (Bankr. S.D. Ohio 1984); In re Atomics Corp., 2 B.R. 526 (Bankr. D. Ariz. 1980), all of which disallowed governmental participation. See also In re Lion Capital Group, 44 B.R. 684 (Bankr. S.D.N.Y. 1984) which gave the government a seat under special circumstances.

One other possible tactic, if you can't get appointed to the main creditors' committee would be to seek to have an ancillary creditors' committee appointed, consisting only of the states, if there are a large number of them with a particular type of claim, which differs from that of other parties. This would not only allow the committee members to be compensated for expenses, but could also allow the committee to retain counsel at the debtor's expense. Moreover, that counsel could even be the counsel for one of the states. See Section 1103(b). This could be a very useful tactic where there is a need for extensive involvement by the states and where they have a joint position to present on the issues. While this was not exactly what occurred in the Circle K Corp. bankruptcy, the final result was very close to this situation, since the debtor agreed to pick up travel expenses for states attending settlement meetings, and NAAG was allowed to receive its fees and expenses, essentially for serving as a counsel to a de facto creditors' committee.
After the committee is selected, it may retain counsel and other professional persons, such as accountants, investment brokers, etc. Section 1103(a). Those retentions must be approved by the court which has the right to review and approve the compensation proposed for the professional persons. Section 328(a) and Rules 2014 and 2016. The committee may consult with the debtor concerning the administration of the case; investigate the same matters that an examiner may look into; participate in the formulation of a plan, advise the constituency of the committee of their views on the plan and collect the votes of the group thereon; request the appointment of a trustee or examiner, or perform any other services in the interest of their constituency. Section 1103(c). The committee is a party in interest, separate from any of its constituent claimants, which may, in its own name, "raise and be heard on any issue in a case under this chapter." Section 1109(b). Thus, the creditors' committee has both broad authority, and the funding from the debtor, to act as a roughly equal partner with the debtor in formulating a plan that its constituents would be prepared to accept. In short, bankruptcy law provides for Chapter 11 cases to operate as an exercise in participatory democracy, through the mechanism of creditors' committees.

IV. PROTECTING YOUR CLAIM BEFORE THE BANKRUPTCY PETITION GETS FILED

Those representing governmental agencies generally aren't in the habit of thinking of themselves as bankruptcy lawyers or collection attorneys. The fact is, however, that anyone who litigates for damage awards must, perforce, be at least a bit of a creditors' rights lawyer. There are simply far too many occasions where your defendant will file for bankruptcy, or threaten to do so, in order to avoid satisfying your claims. You must know enough about bankruptcy to know how valid the threat is and how to litigate before the petition is filed, in order to maximize your recovery if you find yourself in bankruptcy court.

The first strategy, of course, is to avoid having the debtor go into bankruptcy at all. There is almost no chance that having your claim go through a bankruptcy case will be better than staying completely out of the bankruptcy courts. Use your ingenuity in working out feasible payment schedules for the debtor – after all, an operating entity with an incentive to stay out of bankruptcy is a lot more likely to be able to pay your judgment than one that is wasting its money on non-productive bankruptcy expenses. Moreover, if you are persistent enough, you will find that the defendant puts you at the top of its payment priorities -- whether or not, you would be at the top of any bankruptcy priority list. Certainly, in view of the way most bankruptcy judges will probably view your claims and the substantial additional litigation you may face if a petition is filed, your best hope is almost always to stay out of bankruptcy. If certain accommodations must be made to accomplish that goal, they should be carefully considered.

Next, as you are dealing with the defendant, concentrate on getting your claims liquidated as soon as possible. A liquidated claim keeps you out of the estimation
process in front of a court that knows little or nothing about your statute – and may care even less. If you get a settlement, be sure that an order enforcing the settlement is entered, registered as a judgment, and any other necessary steps taken to create a perfected lien. It can be vitally important to turn your judgment order into a lien on some meaningful collateral of the debtor so you won’t be left in an unsecured status. Don’t rely on having a judgment; in most cases, that will not afford you any priority in a bankruptcy proceeding. If your state has an automatic lien provision which arises after entry of a judgment or payment of response costs by the state, fine; otherwise, you will need to take some affirmative action to protect your hard-won judgment.

Regardless of whether you do have such a state statute, you need to check out your defendant’s credit, and the assets to which a lien can attach, as early in the case as possible. A lien against a piece of real property which is already mortgaged to the hilt is worthless. Ideally, you want to be substantially overcollateralized, since only in that way will you be able to ensure that you can collect the full amount of your judgment, plus interest and costs. Have the defendant provide a piece of property with available equity, and get a mortgage or other security agreement to cover that property. If the business has no available property, make the owner give you a personal guarantee, or get a co-signer, or have him obtain a letter of credit, post a bond, or obtain insurance. Any of those options may be effective in your particular situation, and any of them will put you miles ahead in a bankruptcy case compared to being a general unsecured creditor.

Next, if it appears clear that the defendant is likely to go into bankruptcy, or take some fraudulent actions to secrete its assets, you need to strongly consider taking actions such as immediately executing on any known assets, or seeking pre-judgment attachment or other sequestration of assets if you don’t have a judgment yet. This will give you the benefit of an earlier priority date for your claim, so you will be paid first, even if other liens attach to the same property at a later date. Possession is nine-tenths of the law, and, while you may now have some exposure to preference actions, there are numerous defenses to such actions and applicable time periods. If the debtor does not act during those period, you will be able to retain the property. You must judge for yourself whether you wish to take this action, particularly if it appears likely to precipitate a bankruptcy filing, but the possibility of such actions should not be ignored. Finally, consider using civil and criminal contempt sanctions and criminal charges as enforcement mechanisms. Criminal fines and restitution are not subject to discharge under any chapters and have a broad stay exception.

CONCLUSION

This outline barely scratches the surface. However, I hope these materials will give you a sense of what some of the issues are, and the basic analytical tools to use in approaching them. NAAG has published a much more extensive manual on bankruptcy law for governmental practitioners entitled Bankruptcy Law and the
Governmental Regulatory Process that covers these and many other topics in detail.