

## COST-EFFECTIVE RESEARCH IN U.S. BANKRUPTCY LAW<sup>1</sup>

by Robert Richards<sup>2</sup>

Researching U.S. bankruptcy law and facts cost effectively can be challenging for those new to the field. Finding the law can be difficult for several reasons. First, relevant statutory provisions are often scattered throughout the Bankruptcy Code, Title 11 of the United States Code (the “Code”), or the Federal Rules of Bankruptcy Procedure. 11 U.S.C. app. (2006 & Current Suppl.), available at <http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=BROWSE&title=11uscApp> (the “Rules”). For example, many key terms used in the substantive provisions of the Code are defined in a separate definitions provision, Section 101. 11 U.S.C. § 101 (2006). Similarly, although debtor-in-possession (“DIP”) financing is a critical issue in a Chapter 11 corporate bankruptcy case, the DIP financing statute is located, not in Chapter 11 of the Code, but in Chapter 3. *See id.* § 364(d). Further, the term “adequate protection” as used in the DIP financing statute is defined neither in that statute, nor in Section 101, but rather in Section 361 of the Code. *See id.* § 361.

Second, the names of some key bankruptcy doctrines are not found in the text of the statutes. For instance, the statutory text omits to mention the names of the “absolute priority rule,” codified at 11 U.S.C. § 1129(b), which determines the payment hierarchy in a corporate bankruptcy, and of the rule of *Moore v. Bay*, 284 U.S. 4 (1931), which allows the trustee to avoid in their entirety certain fraudulent transfers, and is codified at 11 U.S.C. 544(b)(1). (Both rules are named in the “Historical and Revision Notes” appended to the official version of the statutes, however. *See* 11 U.S.C. § 1129 note; *id.* § 544 note.)

Third, some crucial provisions of bankruptcy law are found in whole or in part only in case law. Among these are:

- The “*Butner* Principle,” holding that unless the Code expressly provides otherwise, property rights in bankruptcy are defined by non-bankruptcy

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<sup>2</sup> J.D. (retired status), M.S.L.I.S., M.A., law librarian and legal information consultant based in Philadelphia, Pennsylvania. E-mail: [richards1000@comcast.net](mailto:richards1000@comcast.net); CV: <http://www.mendeley.com/profiles/robert-richards>; Blog: <http://legalinformatics.wordpress.com/>; Twitter: <http://twitter.com/richards1000>; Website: <http://home.comcast.net/%7Erichards1000/LegalInformationSystemsBibliography.htm>.  
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law, usually state law, *see* *Butner v. United States*, 440 U.S. 48, 55 (1979);

- The absence of an insolvency requirement for individual and corporate debtors filing under Chapter 7, a rule that is inferred from the silence of Section 109 respecting the insolvency of individuals and corporations, *see* 11 U.S.C. § 109; *Connell v. Coastal Cable T.V., Inc. (In re Coastal Cable T.V., Inc.)*, 709 F.2d 762, 764 (1st Cir. 1983); 2 COLLIER ON BANKRUPTCY § 109.03[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008);
- The “*Ahlers* Rule,” holding that the bankruptcy court may exercise its equitable powers under Section 105(a) of the Code only “within the confines of the Bankruptcy Code,” *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); and
- Equitable subordination, which is generally provided for in Section 510(c) of the Code, but the precise principles of which are set forth only in case law. *See United States v. Nolan*, 517 U.S. 535 (1996); 4 COLLIER ON BANKRUPTCY § 510.05.

Moreover, vital factual information about a case—such as information about the debtor’s history, management, creditors, corporate structure, capital structure, and other financial issues—is contained in sources with which researchers new to bankruptcy law may be unfamiliar. Here are suggestions for quick and inexpensive ways to locate relevant U.S. bankruptcy law and facts.

## 1. FINDING THE LAW

### a. Look for Ready-Made Research in Your Firm

Search your firm’s database of memos, briefs, and pleadings (sometimes called a “knowledge management system”) for work product on your topic. If relevant work product exists, use it to gain an understanding of the law and identify the relevant statutes, rules, and cases. Then use the steps below to verify and flesh out the information in the work product.

### b. Use a Treatise

A treatise gathers in one convenient source summaries and analysis of the law with citations to all relevant statutes and rules and major cases. Use a treatise’s index or table of statutes or cases to find the discussion of the issue you are researching. Excellent short bankruptcy treatises include:

- DOUGLAS G. BAIRD, *ELEMENTS OF BANKRUPTCY* (4th ed. 2006), available in print from Thomson West, <http://west.thomson.com/> (N.B.: notwithstanding the vendor’s term “casebook,” this is not a casebook, but a short treatise which can be used as a study aid.);

- DAVID G. EPSTEIN, BANKRUPTCY AND RELATED LAW IN A NUTSHELL (7th ed. 2005), available in print from Thomson West, <http://west.thomson.com/>, and on Westlaw, <http://www.westlaw.com>, database BKR-NS;
- JEFF FERRIELL & EDWARD J. JANGER, UNDERSTANDING BANKRUPTCY (2d ed. 2007), available in print from LexisNexis, <http://www.lexisnexus.com/store/us/>.

The leading in-depth treatises include:

- COLLIER ON BANKRUPTCY (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. currently updated), available from LexisNexis, <http://www.lexisnexus.com/store/us/>, in print and on CD-ROM, and on Lexis.com, <http://www.lexis.com>, filename COLBKR;
- WILLIAM L. NORTON, JR. & WILLIAM L. NORTON, III, NORTON BANKRUPTCY LAW & PRACTICE (3d ed. currently updated), available from Thomson West, <http://west.thomson.com/>, in print and on CD-ROM, and on Westlaw, <http://www.westlaw.com>, database NRTN-BLP;
- ROBERT E. GINSBERG ET AL., GINSBERG & MARTIN ON BANKRUPTCY (5th ed. currently updated), available in print from Aspen Publishers, <http://www.aspenpublishers.com/>, and on Westlaw, <http://www.westlaw.com>, database GMBKR.

For consumer cases, useful treatises include:

- THE HON. MICHAEL B. KAPLAN ET AL., CONSUMER BANKRUPTCY MANUAL (2d ed. currently updated), available in print from Thomson West, <http://west.thomson.com/>, and on Westlaw, <http://www.westlaw.com>, database CONSBKRML;
- HENRY J. SOMMER, CONSUMER BANKRUPTCY LAW & PRACTICE (8th ed. 2006 & Current Suppl.), available in print from National Consumer Law Center, <http://www.consumerlaw.org/publications/>;
- HENRY J. SOMMER & LAWRENCE P. KING, COLLIER CONSUMER BANKRUPTCY LAW PRACTICE GUIDE (currently updated), available from LexisNexis, <http://www.lexisnexus.com/store/us/>, in print and on CD-ROM, and on Lexis.com, <http://www.lexis.com>, filename CCBKPG.

### c. Read the Statutes or Rules in an Annotated Code

Annotated codes list citations to cases that have applied each statute or rule, and so ease case-finding. These codes also provide citations to legislative history, forms, treatises, and law review articles that may be of help. Annotated codes can be searched free of charge in print (your firm may own one or more codes in print), or for a charge online. The leading U.S. federal annotated codes are:

- UNITED STATES CODE ANNOTATED, available from Thomson West, <http://west.thomson.com/>, in print and on CD-ROM, and on Westlaw, <http://www.westlaw.com>, database USCA;

- UNITED STATES CODE SERVICE, available from LexisNexis, <http://www.lexisnexis.com/store/us/>, in print and on DVD-ROM, and on Lexis.com, <http://www.lexis.com>, filename USCS.

In addition, because state law often determines property rights in bankruptcy, *see Butner*, 440 U.S. at 55, one should use the applicable annotated state code to research the state law at issue and to identify relevant cases. Annotated state codes are available on Westlaw, <http://www.westlaw.com>, and Lexis.com, <http://www.lexis.com>, and in print from a number of publishers, most of which are listed on AALL CRIV'S LEGAL PUBLISHERS LIST, <http://www.aallnet.org/committee/criv/resources/tools/list/>.

#### d. Use Key Numbers, Headnotes, Citators, and Keyword Searching to Find More Cases

- In Lexis.com, <http://www.lexis.com>, or Westlaw, <http://www.westlaw.com>, pull an initial set of cases using the case citations from the treatises, annotated codes, and work product you've already used;
- Then, with the citations and Key Numbers or Headnotes from the initial set of cases, use LexisNexis Headnotes and Shepard's Citations, or Westlaw Key Numbers and KeyCite, to find additional relevant cases;
- Next, use keyword searching on Lexis.com, <http://www.lexis.com>, or Westlaw, <http://www.westlaw.com>, to find additional unreported cases;
- If it's appropriate to restrict your search to bankruptcy cases, limit your searches to a bankruptcy-specific case database, such as:
  - The Westlaw FBKR-CS database (containing bankruptcy cases from all U.S. federal courts) or a narrower bankruptcy case database listed in the Westlaw Database Directory, <http://directory.westlaw.com/> (under "Browse Databases," click on "Topical Materials by Area of Practice," then click on "Bankruptcy");
  - Or the Lexis.com files BANKR (containing cases from U.S. bankruptcy courts and Bankruptcy Appellate Panels) or COURTS (containing bankruptcy cases from the higher U.S. federal courts and the Court of Federal Claims).

## 2. FINDING FACTS

### a. Read the Schedules and Statements

A great deal of valuable factual information about the debtor and creditors in a case is available in the schedules and the "statement of financial affairs" ("SOFA") that the debtor is required to file with the bankruptcy petition. *See* Fed. R. Bankr. P. 1007(a), (b). (The list of required statements and schedules is Official Form B200, "Required Lists, Schedules, Statements and Fees," *available at* [http://www.uscourts.gov/bkforms/bankruptcy\\_forms.html](http://www.uscourts.gov/bkforms/bankruptcy_forms.html).) These include the following:

- Schedules of Assets and Liabilities:

- A “Global Notes” section, which sometimes contains useful references to key portions of the schedules;
  - A “Summary of Schedules,” which provides a quick overview of the debtor’s balance sheet;
  - Lists of creditors (secured, unsecured priority, and unsecured nonpriority), including those with intercompany claims;
  - Lists of executory contracts and leases;
  - Names of co-debtors;
  - And, for individual-debtor cases, the debtor’s current income and expenditures;
- SOFA:
    - A “Global Notes” section, identical to that in the schedules;
    - Lists of the debtor’s officers, directors, and 5% shareholders;
    - Names of the debtor’s outside accountants;
    - Names of the debtor’s pension funds;
    - If the debtor is a subsidiary, the name of the parent company;
    - Lists of the debtor’s recent and pending litigation matters.

To access the schedules and SOFA:

- Review the list of required statements and schedules on Official Form B200, “Required Lists, Schedules, Statements and Fees,” [http://www.uscourts.gov/bkforms/bankruptcy\\_forms.html](http://www.uscourts.gov/bkforms/bankruptcy_forms.html);
- Obtain digital (and preferably searchable) copies of the desired statements and schedules from the parties, other lawyers in your firm, the clerk of court, or free of charge from the claims agent’s Website (*see* below under “Use the Claims Agent’s Website”), or for a charge from PACER, <http://pacer.uscourts.gov/>; Westlaw, <http://www.westlaw.com>; database DOCK-INDEX-BKR; Westlaw CourtExpress, <http://courtexpress.westlaw.com>; or LexisNexis CourtLink, <https://litigator.lexisnexis.com/Courtlink/>.

#### b. Read the First-Day Motions

The motions filed by the debtor to commence the bankruptcy case (the “First-Day Motions”) contain crucial factual information about the case. Two particularly valuable information sources are the “Cash Management Motion” (often entitled in part the motion “Authorizing Use of Existing Cash Management System”) and the Debtor-in-Possession (“DIP”) Financing Motion (often entitled in part the motion “Authorizing Debtors to Obtain Postpetition Financing”). Here is a summary of the information contained in these motions:

- Cash Management Motion:
  - Explains the debtor’s cash management system;
  - Identifies cash flows and deposit accounts;

- And often contains attachments identifying the debtor’s depository banks and the particular debtor entities that use them;
- DIP Financing Motion:
  - Identifies the agents for, and certain members of, the DIP financing syndicate;
  - Almost always includes the DIP financing credit agreement as an attachment;
  - And usually includes a request for a “carve-out” provision granting priority for an amount designated for payment of the professionals in the case.

Here are suggestions for accessing the First-Day Motions:

- Get digital (and preferably searchable) copies of the motions, from the parties, other lawyers in your firm, the clerk of court, or free of charge from the claims agent’s Website (*see* below under “Use the Claims Agent’s Website”), or for a charge from PACER, <http://pacer.uscourts.gov/>; Westlaw, <http://www.westlaw.com>, database DOCK-INDEX-BKR; Westlaw CourtExpress, <http://courtexpress.westlaw.com>; or LexisNexis CourtLink, <https://litigator.lexisnexis.com/Courtlink/>.

### c. Read the Plan and Its Preliminaries

In a case in which a business debtor will be reorganized or a consumer debtor will repay creditors over time, the “plan of reorganization,” as it is called in a business bankruptcy, or simply the “plan,” as it is called in a consumer case (in either case, hereinafter referred to as the “Plan”), is the central document in the case. The Plan contains critical information about the treatment of the stakeholders, and, in a business bankruptcy, about the structure of the debtor, after the case.

- If the Plan was not finalized before the bankruptcy filing, try to obtain preliminary drafts or term sheets of the Plan (in digital format, preferably searchable), from the parties or other lawyers in your firm;
- If the Plan was filed with the First-Day Motions, get a digital (and preferably searchable) copy from the parties, other lawyers in your firm, the clerk of court, or free of charge from the claims agent’s Website (*see* below under “Use the Claims Agent’s Website”), or for a charge from PACER, <http://pacer.uscourts.gov/>; Westlaw, <http://www.westlaw.com>, database DOCK-INDEX-BKR; Westlaw CourtExpress, <http://courtexpress.westlaw.com>; or LexisNexis CourtLink, <https://litigator.lexisnexis.com/Courtlink/>.

### d. Use the Claims Agent’s Website

The claims agent engaged to receive and organize creditors’ claims in the case commonly hosts a Website providing direct access to claims and claim-related documents filed in a

case. Moreover, some claims agent's Websites, such as those made by Kurtzman Carson Consultants LLP, <http://www.kccllc.net/>, provide access free of charge not only to claims, but also to all court documents filed in the case (*i.e.*, the entire docket), including First-Day Motions, schedules, and statements.

- Find out the name of the claims agent in the case from the First-Day Motion appointing the claims agent (often entitled in part an “Application . . . for . . . Appointing . . . as Claims, Noticing, and Balloting Agent”);
- Locate the claims agent's Website; major claims agents are listed at <http://www.nysb.uscourts.gov/claimsagents.html>, and [http://www.deb.uscourts.gov/claims/sort\\_agents.htm](http://www.deb.uscourts.gov/claims/sort_agents.htm).

#### e. Monitor the Docket

One can learn valuable factual information about the stakeholders in the case by regularly checking the docket of the case for new filings.

- If the claims agent has established a Website (ordinarily accessible free of charge) listing all documents filed in the case, check that Website regularly for updates (*see* above under “Use the Claims Agent's Website”);
- Use Free Court Dockets, <http://www.freecourtdockets.com/> (access requires free registration and receipt of an “Invite Code”);<sup>3</sup>
- In the absence of a claims agent's Website or if Free Court Dockets does not include the case, check the docket for a charge on PACER, <http://pacer.uscourts.gov/>; Westlaw, <http://www.westlaw.com>, database DOCK-INDEX-BKR; Westlaw CourtExpress, <http://courtexpress.westlaw.com>; or LexisNexis CourtLink, <https://litigator.lexisnexis.com/Courtlink/>.

#### f. Search in the Financial Consultants' Presentations & Documents

In many business bankruptcies, presentations and documents prepared by the parties' financial consultants contain valuable analysis and data about the stakeholders and the Plan, as well as important dates and deadlines. In addition, the consultants' deliverables frequently contain references to key information sources about the case.

- Identify the financial consultants retained in the case, by reviewing the First-Day Motions and subsequent motions (*see* above under “Read the First-Day Motions” and “Monitor the Docket”);
- Determine which financial consultants' information about the case your firm has access to;
- Obtain digital (preferably searchable) copies of those financial consultants' presentations and documents.

#### g. Use SEC Filings

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<sup>3</sup> The author thanks Julie M. Jones and Bonnie Shucha for notifying him of this resource.

If the debtor is a publicly held corporation, valuable information about the debtor’s finances, history, management, creditors, and corporate structure, as well as vital full-text documents—including credit agreements, merger agreements, and employment-related documents such as change-in-control agreements and compensation policies—can be found in the documents the debtor has filed with the U.S. Securities and Exchange Commission (the “SEC”).

- A publicly held debtor’s SEC filings can be obtained free of charge from the SEC’s IDEA system, [http://edgar.sec.gov/idea/searchidea/companysearch\\_idea.html](http://edgar.sec.gov/idea/searchidea/companysearch_idea.html) (formerly called “EDGAR”);
- Analytical research on data contained in SEC filings may be available at no extra cost in the presentations and documents prepared by the financial consultants retained in the case (*see* above under “Search in the Financial Consultants’ Presentations & Documents”), and is available for a charge from a number of vendors, including WestlawBusiness, <http://business.westlaw.com/> (formerly LIVEDGAR), and Standard & Poor’s Compustat, <http://www.compustat.com/>.

Taking these steps when researching U.S. bankruptcy law and facts can expedite the search process, lower search costs, and thereby lead to improved service.