



AMERICAN  
BANKRUPTCY  
INSTITUTE

# Northeast Bankruptcy Conference and Consumer Forum

## Litigation Panel

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## LITIGATION PANEL

JULY 15-16, 2025

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## TEN TIPS FOR BEST PRACTICES



### TEN TIPS FOR BEST PRACTICES

1. Know the Goal,  
the Judge, & the  
Rules





## 2. Communicate and Manage Expectations



## 3. Be Prepared





## 4. Be Trusted



## 5. Be a Good Team Player





## 6. Maintain Your Reputation



## 7. Own Your Development



## 8. Seek Feedback



## 9. Ask for Help





## 10. Practice Self-Care



## CREDITOR COMMITTEE LITIGATION ISSUES





## ROLE OF A COMMITTEE

“investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor’s business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan . . . and perform such other services as are in the interest of those represented.”

11 U.S.C. § 1103(c)(2), (5).



## DERIVATIVE STANDING

- Debtor’s legal and equitable claims are assets of the estate. 11 U.S.C. § 541(a)(1).
- Typical derivative standing claims:
  - Avoidance actions
  - Fraudulent transfer actions
  - Breach of fiduciary duty
- Possibility of pre-bankruptcy planning: appointment of independent directors—often with bankruptcy experience



## DERIVATIVE STANDING: KEY POINTS

- **Judicial basis; not in Code**
  - Generally viewed as the exception rather than the rule
- **Elements:**
  - Colorable claim
  - Debtor unjustifiably refused to pursue the claim (or showing that demand upon debtor would be futile)
  - Permission of Bankruptcy Court to initiate the action
    - 7 Collier on Bankruptcy ¶ 1103.05[6][1] (16th ed. 2009).
- **Certain courts permit consensual derivative standing**



## DERIVATIVE STANDING: PRACTICAL CONSIDERATIONS

- **Know your jurisdiction's specific requirements**
- **Preserve causes of action**
  - DIP financing terms
  - Statutes of limitation
  - Sale process
  - Plan process
- **Avoid duplication of efforts with other fiduciaries (e.g., examiner)**



## DERIVATIVE STANDING: OTHER APPROACHES?

- **Greater use of examiners and/or chapter 11 trustees**
  - **Prior proposed Legislation would add new language to § 1107:**
    - (c) Notwithstanding subsection (a), if a debtor in possession is serving in a case under this title, a committee of creditors appointed under section 1102 of this title shall have the exclusive right of a trustee serving in a case under this chapter to bring or settle on behalf of the estate—
      - (1) an action under section 544, 547, 548, or 553 to avoid a transfer made or obligation incurred by the debtor in connection with a change of control transaction, as defined in section 3 of the Stop Wall Street Looting Act; or
      - (2) an action against an insider, a former insider, or an agent or aider and abettor of an insider or former insider
- Stop Wall Street Looting Act, H.R. 998, 118th Cong. (2024).



## ADDITIONAL COMMITTEE PROFESSIONALS

- **Committees may employ “one or more attorneys, accountants, or other agents, to represent or perform services for such committee.” 11 U.S.C. § 1103(a); see also 11 U.S.C. §§ 328, 363.**
  - Non-enumerated professionals include real estate professionals, financial advisors, and a wide range of experts depending on specific circumstances
  - Some cases may require employment of multiple counsel
- **Process for employing professionals tracks attorney retention, including application of Rule 2014.**
  - Necessity of employment
  - Disclosure of connections via verified statement
- **Committee professionals owe fiduciary duty to committee and only the committee**
  - Committee represents the class of constituents; professionals represent the committee



## COMMITTEE PRIVILEGE

- **Attorney-client privilege, work product doctrine apply to committees**
  - Balance requirement to inform constituency with risk of waiver of privilege
- **Limited scope in derivative standing suit**
  - Privilege among committee and counsel remains, but committee not entitled to privileged information from debtor
  - Distinctions from role and duties of DIP or chapter 11 trustee
  - “Fiduciary exception”
- **Common-interest privilege *with* debtor in certain circumstances**



## COMMITTEE PRIVILEGE: POST-DISSOLUTION

- **Analogy to business entity privilege**
- **Considerations**
  - Practical: who can assert/waive privilege for a business entity?
  - Reputational: business entities do not have remaining family or relatives
  - Litigation: no ability to sue post-dissolution, absent an estate or successor-in-interest
- **But ultimate determination depends on underlying state law**
- **Potential approaches to preserve privilege:**
  - Plan language
  - Committee bylaws (not yet tested in the courts)





## FINANCIAL EXPERTS IN BANKRUPTCY LITIGATION



## ROLE OF EXPERTS IN LITIGATION

- **Offer subject matter expertise**
  - Defined scope
- **Expert engagement process**
  - Initial analyses
  - Consulting
  - Expert report
  - Expert deposition and trial testimony
- **Independence**



## USE OF VALUATION EXPERTS IN BANKRUPTCY LITIGATION

- **Fraudulent Conveyance:** Solvency; Reasonably equivalent value
- **Adequate Protection / Diminution in Value**
- **Liability Management**
- **Claim Estimation**
- **Best Interests Test**
- **Plan Feasibility**
- **Damages**



## COMPLEXITY OF VALUATION IN BANKRUPTCY

- **Availability and Reliability of information**
  - Lack of reasonable projections
  - Lack of comparable companies/transactions
  - Suspected fraud
- **Unusual macroeconomic conditions/market dislocations**
  - Point in time vs normalization
- **Complex securities/forms of interest**
- **Intercompany claims**
- **Contentious nature**



## BEST PRACTICES FOR EXPERT DEPOSITION

- **Preparation**

- Key opinions
- Rebuttal
- Anticipation
- Mock Q&A



## BEST PRACTICES FOR EXPERT DEPOSITION

**“It’s not a memory test”**

**VS**

**“The devil is in the details”**



## BEST PRACTICES FOR EXPERT DEPOSITION

**"It's in my report"**

**And what to do when it's not**



## BEST PRACTICES FOR EXPERT DEPOSITION

- **Hypotheticals**
- **Yes or No**
- **Concessions**





## EVIDENTIARY CHALLENGES IN BANKRUPTCY LITIGATION: RECENT DEVELOPMENTS AND CASE LAW TRENDS



### HEARSAY

- **Rule 801 of the Federal Rules of Evidence**
  - (c) **Hearsay.** “Hearsay” means a statement that:
    - (1) the declarant does not make while testifying at the current trial or hearing; and
    - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.
- **The Federal Rules of Evidence provide several categories of out of court statements that are not hearsay.**
- **The Rules also provide several exceptions to the rule against hearsay**



## EXCLUSIONS AND EXCEPTIONS TO THE RULE AGAINST HEARSAY

- **Exclusions to Rule Against Hearsay**
  - Rule 801(d) of the Federal Rules of Evidence
  - Declarant-Witness's Prior Statement
  - Opposing Party's Statement
- **Exceptions to the Rule Against Hearsay**
  - Rule 803 of the Federal Rules of Evidence
  - Out of court statements that are not excluded by the rule against hearsay.



## MARKET REPORTS AND SIMILAR COMMERCIAL PUBLICATIONS

- Rule 803(17) of the Federal Rules of Evidence
- Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.
- **Standard:** Publications that deal with compilations of relatively straightforward objective facts not requiring a subject analysis of other facts
- The basis of trustworthiness is the general reliance by the public, or a particular segment of it, and the motivation of the compiler to foster reliance by being accurate



## MARKET REPORTS AND SIMILAR COMMERCIAL PUBLICATIONS IN PRACTICE

- **Valuation of Vehicles**
  - Kelly Blue Book, Edmunds, Black Book, etc.
- **Objective Ordinary Course of Business Defense**
  - 11 U.S.C. 547(c)(2)(B) – “made according to ordinary business terms.”
  - Compilations of “days to pay” data.
  - Center City Healthcare, LLC v. Medline Indus., Inc. (In re Center City Healthcare, LLC), 664 B.R. 208 (Bankr. D. Del. 2024).



## PUBLIC RECORDS

- **Rule 803(8) of the Federal Rules of Evidence**

**(8) Public Records.** A record or statement of a public office if:

  - (A) it sets out:
    - (i) the office's activities;
    - (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
    - (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
  - (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.



## PUBLIC RECORDS IN PRACTICE

- Birth Certificates
- Marriage Licenses
- Records of Routine Government Activities
- In the bankruptcy context: IRS transcripts
  - Determination of debtor's tax liability for purposes of avoidance of fraudulent transfers
  - *In re Kossoff PLLC*, 667 B.R. 405 (Bankr. S.D.N.Y. 2025).



## PRELIMINARY INJUNCTIONS

- Hearsay evidence may be considered in determining whether to grant a preliminary injunction.
- The admissibility of hearsay goes to weight, not preclusion, at the preliminary injunction stage.
- At an evidentiary hearing on a motion for preliminary injunction, the evidence must still be authenticated for purposes of admissibility.
  - Rule 901(a) of the Federal Rules of Evidence – The proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
- Sufficiently reliable and inherently trustworthy





## SUMMARIES OF VOLUMINOUS MATERIALS

- Rule 1006(a) of the Federal Rules of Evidence
- The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.
- The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.
- Admitted as substantive evidence.



## SUMMARIES OF VOLUMINOUS MATERIALS (CONT.)

- Admission of the underlying voluminous documents is not required.
- Summary must satisfy requirements of Rule 403.
  - Is it accurate?
  - Is it argumentative?
  - Probative value may be outweighed the risk of prejudice or confusion.
- Voluminous documents must be made available to other parties at a reasonable time and place.
- Trial judge has discretion in determining the reasonableness of the production



## DERIVATIVE INTEREST STATEMENTS

- **2024 Amendment to Rule 801(d)(2) of the Federal Rules of Evidence.**
  - “If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.”
  - When a party stands in the shoes of a declarant or the declarant's principal, hearsay statements made by the declarant or principal are admissible against the party.
- **A debtor's statements are likely admissible against a trustee when the trustee is pursuing the debtor's claims.**
- **Statements of assignor likely admissible against assignee**
- **Rationale: If the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or the principal would have been.**



## EXTRINSIC EVIDENCE OF A PRIOR INCONSISTENT STATEMENT

- **2024 Amendment to Rule 801(d)(2) of the Federal Rules of Evidence.**
- **Rule 613(b) of the Federal Rules of Evidence: “Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it.”**
- **Two prongs: (i) the witness has an opportunity to explain or deny the statement; AND (ii) the adverse party has an opportunity to examine the witness about the prior inconsistent statement.**
- **Reversion to common law approach to impeachment with prior inconsistent statements.**
- **But the court maintains the discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence or to dispense with the requirement altogether.**
- **Does not apply to an opposing party's statements under Rule 801(d)(2).**



## THANK YOU

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## TEN TIPS FOR BEST PRACTICES

### 1. Know the Goal, the Judge & the Rules

- Focus on your goal
- Achieving results for your client within the bounds of law and ethics
- Identify what must be proven or disproven.
  
- Understand procedural rules, local rules, and your judge's preferences
- Review Rules of Civility and Professional Conduct

### 2. Communicate and Manage Expectations

- Communicate proactively with clients, court staff, and stakeholders to avoid surprises
- Pick up the phone when necessary
- Follow up on emails; use CC/BCC when appropriate
- Build rapport with Trustees and others

### 3. Be Prepared

- Monitor deadlines and your plan
- Create a trial notebook
  - Use digital and paper copies
  - Contents: index, tabs, checklists for proof/defense, timelines
  - Reduce anxiety, improve confidence, and communicate clearly with your team
- Opening Statement/Closing Argument
  - Be Clear, Concise, Credible
  - Write it out or use bullet points
  - Avoid overpromising in the Opening. Revise the Closing
  - Engage the trier of fact
  - Clearly state the relief you are seeking
- Witnesses
  - Maintain a witness list with contact info and testimony summary
  - Sequence and rationale for calling witnesses. Alphabetize witnesses if the order is uncertain
  - Prepare witnesses for courtroom decorum and bad facts
  - Subpoena as needed



- Key witnesses, their testimony, and admissibility issues
- Write out direct and cross-examinations
- Cite depositions and exhibits precisely
- Documentary Evidence
  - Evidentiary foundations
    - Raise evidentiary issues early (e.g., motions in limine)
    - Entry strategy for each piece of evidence
    - Be ready with admissibility, foundation, and authentication.
    - Prepare challenges and evidentiary objections
    - Steps: submit, show to counsel, admit, publish
    - Anticipate breaks and coordinate with courtroom staff

#### **4. Be Trusted**

- Know the facts, status, and anticipate questions
- Competence, Confidentiality, Communication, Supervision, Candor

#### **5. Be a Good Teammate**

- Be accountable
- Respectful

#### **6. Maintain Your Reputation**

- Solve problems, be timely, and be ethical
- Be persuasive, not aggressive
- Avoid personal attacks and inflammatory remarks
- Avoid profanity, slurs, or name-calling
- Never misstate facts, law, or the record
- Acknowledge and deal with unfavorable facts or cases directly
- Avoid unsupported or judgmental statements
- Be prepared, respectful, and professional

#### **7. Own Your Development**

- Get a Mentor
- Be a volunteer
- Be a speaker
- Get involved

## 8. Seek Feedback

- Don't fear redlines
- Stay open to feedback

## 9. Ask for Help

- Collaborate
- Learn

## 10. Practice Self-Care

- Rest
- Exercise
- Affirm yourself

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## Sources

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# Faculty

**John Cesaroni** is a partner at Zeisler & Zeisler, P.C. in Bridgeport, Conn., where he focuses his practice on the representation of individuals and businesses with complex financial and litigation needs, including bankruptcy litigation, creditor/debtor litigation and workouts, commercial litigation and foreclosure matters. He is the current vice-chair of the CBA's Commercial Law and Bankruptcy Section and a co-chair of the organizing committee for the annual Connecticut Bankruptcy Conference. He also is a member of the Advisory Board for ABI's Northeast Bankruptcy Conference and Consumer Forum. Mr. Cesaroni received his B.S. in psychology from the University of Connecticut in 2002 and his J.D. *magna cum laude* in 2012 from Quinnipiac University School of Law, where he was a publication editor of the *Quinnipiac Law Review*. Prior to attending law school, he taught college-preparatory-level biology and chemistry in Connecticut.

**Hon. Mildred Cabán Flores** is Chief Bankruptcy Judge for the District of Puerto Rico in San Juan, initially sworn in on March 19, 2010, and appointed Chief Judge in 2018. She serves on the District Examination Committee for the U.S. District Court for the District of Puerto Rico, the First Circuit Judicial Council as the Bankruptcy Observer, and the First Circuit Judicial Council Civics and Education Committee. She also completed her term as a member of the Federal Judicial Center Board and Education Committee. Judge Cabán Flores is a member of ABI and the American Bar Association, Commercial Law League of America, Hispanic National Bar Association (HNBA), International Women's Insolvency & Restructuring Confederation, National Conference of Bankruptcy Judges (NCBJ), Phi Alpha Delta Law Fraternity and the Puerto Rico Bankruptcy Bar Association. For NCBJ, she serves on its Public Outreach Committee. In the past, Judge Cabán Flores chaired various NCBJ committees, such as the Public Outreach Committee, Diversity, Security, and the Liaison of the HNBA, as well as First Circuit Governor. Following law school, she clerked for Hon. Héctor M. Lafitte of the U.S. District Court for the District of Puerto Rico. She subsequently practiced bankruptcy at Brown Newsom & Córdova and then as a partner at Goldman Antonetti & Córdova, P.S.C., where she focused on representing creditors in commercial and consumer bankruptcy cases. Judge Cabán Flores has been a speaker for various organizations on bankruptcy and consumer law topics. She also is an advisory board member of CARE (Credit Abuse Resistance Education) and speaks on financial literacy matters to students of all age groups. She received ABI's 2014 CARE Volunteer of the Year Award. Judge Cabán Flores received her B.A. from Barnard College in 1983 and her J.D. from New York University School of Law in 1986.

**Zachary J. Gregoricus** is an associate in Harris Beach Murtha Cullina PLLC's Boston office and has experience representing clients in complex business litigation and insolvency matters in federal and state courts throughout Massachusetts. He also routinely serves as counsel to chapter 7 trustees and creditors in a wide variety of complex adversary proceedings and contested matters, including fraudulent conveyance, preference and dischargeability litigation. Mr. Gregoricus regularly represents commercial and residential landlords in all aspects of litigation, from the pre-suit stage to trial, and routinely provides counsel concerning their compliance with the ever-changing legal landscape. He also specializes in fraud investigations and litigation and has experience litigating recovery and judgment-enforcement actions. Mr. Gregoricus received his B.S. *cum laude* from Bentley Col-

lege and his J.D. *cum laude* from New England School of Law, where he served as symposium editor of the *New England Law Review*.

**Annecca H. Smith** is an associate with Robinson & Cole LLP in Hartford, Conn., where she concentrates her practice on bankruptcy and corporate restructuring matters. Her work involves the representation of debtors, creditors and committees in chapter 11 reorganizations and out-of-court workouts. Ms. Smith's experience in bankruptcy litigation includes adversary proceedings concerning fraudulent-transfer disputes, injunctive relief and nondischargeability actions. She has represented mass tort creditor committees in multiple chapter 11 proceedings involving adversary proceedings and contested estimations concerning § 524(g) channeling injunctions, served as debtor's co-counsel in a successful chapter 11 reorganization in Connecticut bankruptcy court, and represented both secured and unsecured creditors in successful dismissals of chapter 11 cases. In state court, Ms. Smith represented a distressed investment company client in strict foreclosure proceedings, obtaining a six-figure deficiency judgment. In addition, her *pro bono* work includes representing clients seeking domestic violence restraining orders. Ms. Smith serves on the board of the Connecticut chapter of IWIRC, the executive committee of the Commercial Law and Bankruptcy section of the Connecticut Bar Association, and the planning committee for the Connecticut Bankruptcy Conference. She received her Bachelor's degree *cum laude* in comparative literature from Smith College and her J.D. *cum laude* from Washington University in St. Louis School of Law, where she served on its law review.