



KEN PAXTON
ATTORNEY GENERAL *of* TEXAS

Call Me Maybe: Communicating with State Attorney General Offices on Hot-Button Bankruptcy Case Issues



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Alternative Title: How to Avoid Getting a Call From A State Assistant Attorney General

Texas OAG

The Bankruptcy & Collections Division

The Bankruptcy and Collections Division is the collection unit for the state, charged with the responsibility to recover debts, judgements, taxes, fees, fines, penalties, loans, and other obligations. The division employs investigators to locate and identify parties responsible for debt and attorneys to pursue collections in court. The division also represents the state in bankruptcy cases in federal courts to protect the state's monetary and regulatory interests in bankruptcy cases.



The Bankruptcy & Collections Division

Who We Are, What We Do

Division Chief: Rachel Obaldo

Deputy Chief: Sean O'Neil

Teams:

- Investigatory
- Student Loans
- Bankruptcy Regulatory
- Bankruptcy Tax
- Collections



Who Are the Regulators?



TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY



TEXAS
Health and Human Services



Who Are the Regulators?

More Regulators:

- Comptroller's Office
- Texas General Land Office
- University Lands
- Higher Education Board
- Education Agency
- Real Estate Commission
- Department of Agriculture
- Board of Dental Examiners
- Medical Board
- Workforce Commission



Who Regulates What – Some Examples

Matter	Regulator
Hospitals, PCOs	HHSC
Gift Card Issues	AG's Consumer Protection Division
Nonprofits	AG's Charitable Trusts Division
Offshore Wells	GLO
CCRCs	TDI
Well Plugging	Railroad Commission
Personally Identifiable Information	AG's Consumer Protection Division
Unclaimed Property	Texas Comptroller
Environmental Issues	TCEQ



Communication is Key

- Yes, this can all be confusing. Have a Question? **Reach out – communication is key.**
- This especially includes pre-petition communications. Don't leave the OAG's Office out when coordinating with important parties.
- A few proactive phone calls made by you to the OAG's Office is likely to save your client money vs. calls (and/or objections) from the OAG's Office during your case.



Hot Button Issues: Example One

My client operates a manufacturing plant and has been cited by state and federal regulators a number of times in the recent past for discharging environmental contaminations into a creek behind the plant.

It turns out the client does not have anywhere near the funds required to stop the contamination, which is currently ongoing.

We put the client into Chapter 11 yesterday and we are giving you a courtesy call to advise of the automatic stay. We'll be in touch on how we plan to proceed in the case.



Hot Button Issues: Example One

11 U.S.C. 362(b)(4)

THE POLICE & REGULATORY EXCEPTION

“The filing of a [bankruptcy] petition . . . does not operate as a[n] [injunctive] stay . . . of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s or organization’s police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit’s or organization’s police or regulatory power.”



Hot Button Issues: Example One

- A bankruptcy filing will not stop regulatory matters relating to ongoing issues of safety, health, or wellness
- A bankruptcy filing will generally not stop ongoing litigation by a State regulator seeking to enforce its laws in State court.
- State courts can assess fines and penalties attendant to an enforcement action. However, the collection of fines and penalties is barred by the stay.



Hot Button Issues: Example One

- A State court has concurrent jurisdiction to determine whether the stay applies.
 - *In re Gandy*, 327 B.R. 796 (Bankr. S.D. Tex. 2005).
- Two tests to determine if a proceeding falls within the exception:
 - Pecuniary Purpose Test: Does the governmental unit seek to protect a pecuniary interest instead of the public's safety and health?
 - Public Policy Test: Is the governmental unit effectuating public policy rather than adjudicating its private rights?
 - *In re Halo Wireless*, 684 F.3d 581, 588 (5th Cir. 2012).



Hot Button Issues: Example One

28 U.S.C.A. § 959(b)

“[A] trustee . . . including a debtor in possession, shall manage and operate the property in his possession . . . 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.”

State Agencies may also bring regulatory actions against Chapter 7 Trustees and may modify ongoing litigation to add a Chapter 7 Trustee.

Just as a Debtor-in-Possession, Trustees must also abide by State laws.



Hot Button Issues: Example Two

My client has a long history of working in the Texas oil patch. She has had some run-ins with the Texas Railroad Commission based on her service as an officer of E&P company operating in Texas, but that was maybe four or five years ago. She mentioned something about being “639’d” by the Commission. I pretended to understand what she meant by that, intending to look it up later.

She has formed a new entity and is interested in submitting a bid in a bankruptcy going-concern sale. The new entity does not have a P-5 license to operate, but she told me that should be no issue because the debtor has a P-5 and is in good standing with the Railroad Commission.

I have advised my client that a 363 sale is perfect for her because it allows the debtor to transfer all of its assets and also provides one of the cleanest titles available under the law. Specifically, a 363 sale order and the “free and clear” language in section 363 essentially makes her bulletproof from the standpoint of not assuming debtor obligations and liabilities.



Hot Button Issues: Example Two

The “Halan” Language

No Effect on Governmental Regulatory Authority:

Nothing in this Order or the Plan or related documents discharges, releases, precludes, or enjoins: (i) any liability to any governmental unit as defined in 11 U.S.C. § 101(27) (“Governmental Unit”) that is not a “claim” as defined in 11 U.S.C. § 101(5) (“Claim”); (ii) any Claim of a Governmental Unit arising on or after the Confirmation Date; (iii) any liability to a Governmental Unit under police and regulatory statutes or regulations that any entity would be subject to as the owner or operator of property after the Confirmation Date; or (iv) any liability to a Governmental Unit on the part of any Person other than the Debtors or Reorganized Debtors. Nor shall anything in this Order or the Plan enjoin or otherwise bar a Governmental Unit from asserting or enforcing, outside this Court, any liability described in the preceding sentence.

Further, nothing in this Order or the Plan or related documents authorizes the transfer or assignment of any governmental (a) license, (b) permit, (c) registration, (d) authorization or (e) approval, or the discontinuation of any obligation thereunder, without compliance with all applicable legal requirements and approvals under police or regulatory law. Nothing in this Order or the Plan shall relieve any entity from any obligation to address or comply with information requests or inquiries from any Governmental Unit. Nothing in this Order or the Plan shall affect any setoff or recoupment rights of any Governmental Unit. Nothing in this Order divests any tribunal of any jurisdiction it may have under police or regulatory law to interpret this Order or the Plan or to adjudicate any defense asserted under this Order or the Plan.



Hot Button Issues: Example Two

- Asset transfer and successor-in-interest issues related to a regulated debtor are complicated.
- It is uncommon for all the issues to be addressed simply by adding the Halan language to a sale order or a plan.
- So, what should you do? **Reach out to the OAG.** The earlier you start working with us and with the regulator, the better.



Hot Button Issues: Example Three

My client is that guy who is running the polluting manufacturing plant that is now in Chapter 11. We argued in the bankruptcy court that regulators were stayed and we lost. The client has had very recent visits to the site by both the TCEQ and the EPA.

Despite being very tight on funds, the debtor took every effort it could to stop the ongoing pollution. He believes that the problem has been addressed, but state and federal regulators believe that his efforts, at best, will operate as only a temporary solution. Worse, even if operations at the plant completely cease, it remains likely that the contaminated material on site will find its way into the creek. My client is looking for a way out.

I advised him that it certainly sounds like this asset is “burdensome” and that section 554(a) of the Bankruptcy Code will allow him to abandon it. Alternatively, he could convert the case to Chapter 7 and let the trustee take care of abandoning the property.



Hot Button Issues: Example Three

Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection 474 U.S. 494, 507 n. 9 (1986).

- Property cannot be abandoned in contravention of state laws that are reasonably calculated to protect the public health or safety from imminent and identifiable harm.
- What can a debtor do?
 - Fix the problem
 - Sell the property and have the buyer fix the problem
 - Dismiss the bankruptcy case
- What else can a debtor do....?



Hot Button Issues: Example Three

Contact the OAG.

- The relevant regulators are likely already involved and aware of the issue.
- The OAG can work with the parties to determine if there is a solution within the Midlantic framework.
- A 9019 settlement may be a tool for getting to and good – and enforceable – resolution



Hot Button Issues: Lightning Round

Additional Hot-Button Bankruptcy Issues

- Personally identifiable information
- Customer lists
- Gift cards
- Patient Care Ombudsman
- Liquor licenses
- Medicaid recoupment
- CCRC issues
- License revocations



Faculty: The Interests of State Governments in Commercial Bankruptcy Cases

Jason B. Binford is an Assistant Attorney General with the Bankruptcy & Collections Division of the Texas Attorney General's Office in Austin, Texas. He manages its Bankruptcy Regulatory Team, which represents Texas state agencies, and the people of Texas, in bankruptcy cases across the country. Mr. Binford is Board Certified in Business Bankruptcy Law by both the Texas Board of Legal Specialization and the American Board of Certification and is a frequent author and speaker on a wide range of bankruptcy issues. He was listed as a Texas Super Lawyer from 2016-17 and as a Texas Rising Star by Thomson Reuters from 2011-15, and he received the Outstanding Committee Chair Award in 2008 from the Dallas Bar Association. He also was named an "Up and Coming Attorney in 2017 in Chambers USA. Mr. Binford received his B.B.A. in management in 1998 from Texas A&M University, his M.A. in 2004 in international relations from St. Mary's University, and his J.D. in 2004 from St. Mary's University School of Law, where he served as editor-in-chief of the St. Mary's Law Journal.

Jeffrey K. Garfinkle is a shareholder with Buchalter, PC in Irvine, Calif., where his primary practice involves the representation of secured and unsecured creditors, creditors' committees, trustees, equity receivers, debtors, and other parties in interest in a variety of bankruptcy, restructuring cases and collection matters, including out-of-court workouts. He also specializes in matters pertaining to Articles 2 and 9 of the Uniform Commercial Code and in representing purchasers of assets from bankrupt companies and financially troubled companies. Mr. Garfinkle is regarded as one of the nation's leading health care and pharmaceutical insolvency attorneys. For more than 20 years, he has served as primary U.S. insolvency, bankruptcy and collections counsel to the world's largest health care corporation. In this capacity, he has handled hundreds of health care and pharmaceutical-related bankruptcy and restructuring matters. Mr. Garfinkle also has represented committees, debtors, creditors and other parties in dozens of other health care bankruptcy cases. Mr. Garfinkle has been recognized The

Best Lawyers in America for 2021 and 2022 in the areas of Bankruptcy and Creditor/Debtor Rights and Insolvency and Reorganization Law. He is a member of the Board of Governors of the Financial Lawyers Conference and co-chairs ABI's Commercial and Regulatory Law Committee. Mr. Garfinkle worked pro bono on the successful chapter 11 reorganization of the San Diego Symphony, during which he devoted 1,000 hours and was awarded an honorary lifetime membership in the American Federation of Musicians. For the last decade, he has served as an advisor to the law student-run Emory Bankruptcy Developments Journal. Mr. Buchalter previously spent 12 years with an international law firm and a one-year clerkship with Hon. Louise DeCarl Adler in the U.S. Bankruptcy Court for the Southern District of California. In addition to practicing before the U.S. Supreme Court, he has argued appeals in five Federal Courts of Appeals and handled bankruptcy matters in dozens of districts throughout the U.S. Mr. Garfinkle received his B.A. in 1987 from the University of Florida and his J.D. in 1990 from Emory University School of Law.

Alan R. Rosenberg is partner with Markowitz Ringel Trusty + Hartog in Fort Lauderdale, Fla., where he represents bankruptcy trustees, creditors, debtors and other parties-in-interest in all aspects of insolvency proceedings and bankruptcy-related litigation, including, but not limited to, the sale of bankruptcy estate assets and the pursuit and defense of avoidance actions and other litigation claims. In addition to his bankruptcy practice, he also represents individual and corporate clients in a wide variety of commercial litigation claims and real estate transactions. In his free time, Mr. Rosenberg enjoys learning about cryptocurrency and blockchain technology, and has been published several times on the subject. He is listed as a Florida Super Lawyer "Rising Star" for 2017-21 and a Florida Legal Elite "Up and Comer" from 2018-20, and in 2020 was honored as one of ABI's "40 Under 40." Mr. Rosenberg received his B.S.B.A. in finance in 2008 from the University of Florida and his J.D. cum laude from the University of Miami in 2011.

Caryn Wang is an associate in the Bankruptcy and Restructuring group at Polsinelli in Atlanta, where she focuses on corporate restructuring, distressed-asset sales, bankruptcy litigation and other insolvency matters. She represents

debtors, trustees, lenders and other parties-in-interest in chapter 11 reorganizations. She also represents various parties-in-interest in chapter 7 liquidations, chapter 9 debt-adjustments and state court receiverships. Prior to joining Polsinelli, Ms. Wang served as a legal extern to Hon. Mary Grace Diehl in the U.S. Bankruptcy Court for the Northern District of Georgia. She received her B.S. magna cum laude in 2009 from Vanderbilt University and her J.D. with high honors from Emory University School of Law in 2017, where she was admitted to the Order of the Coif and served as executive notes and comments editor for the Emory Law Journal.