



Litigation Claims by Trustees

Avoiding Pitfalls in Litigation
and Recurring Legal Issues
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PROVINCE

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Meet the Panelists



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TOPIC #1:

Investigating Claims Upon Appointment of a Trustee

Where to start as the Trustee, plaintiff's counsel, and defense counsel?

Trustees often face significant hurdles and time pressures upon their appointment:

- Identifying claims without the benefit of institutional knowledge.
- Lacking access to documents or being inundated with them.
- Investigating claims on a limited budget.
- Post-confirmation investigation may reveal new claims .

Overview of potential first steps for the Trustee and defense counsel



TRUSTEE

- Consider all possible claims and litigation targets.
- Evaluate budget and most efficient uses.
- Review general counsel's emails.
- Consider § 108 window and need for tolling agreements.

DEFENSE COUNSEL

- Consider where your client fits in the overall puzzle.
- Understand insurance coverage.
- Consider informational advantages.
- Evaluate potential ways to avoid litigation.

TOPIC #2:

Threshold Issues: Jurisdiction and Venue

Where can a Trustee file claims, and how can Defendants influence that choice of forum?

Considerations for Trustees:

- Subject matter jurisdiction in bankruptcy court?
- Personal jurisdiction over Defendants outside of bankruptcy court?
- Motion to dismiss practice.
- Time to trial.

Considerations for Defendants:

- Motion to withdraw the reference?
- Core proceeding or not a core proceeding?
- Venue/inconvenient forum

Jurisdiction and Venue:

Key statutes/rules/provisions



SUBJECT MATTER JURISDICTION

- 28 U.S.C. § 157(b)(2) (core and non-core proceedings)
- 28 U.S.C. § 157(d) (withdrawal of reference)
- 28 U.S.C. § 1332(a) (diversity jurisdiction)
- 28 U.S.C. § 1334(b) (“related to” jurisdiction and abstention)
- 28 U.S.C. § 1441(b)(1) (forum defendant rule for removal)

PERSONAL JURISDICTION

- Bankruptcy Rule 7004(d)
- State long-arm statutes and due process analysis

VENUE

- *E.g.*, 28 U.S.C. § 1412 (change of venue of adversary proceeding)

TOPIC #3:

Choice of Forum and Recurring Defenses Applicable to Trustee Claims

Where should a Trustee file claims:
how do recurring defenses impact the
Trustee's choice of forum?

- Statutes of limitation and tolling doctrines.
- *In pari delicto* and exceptions.
- Comparative fault and contributory negligence.

Key statutes/cases



STATUTE OF LIMITATIONS

- 11 U.S.C. § 108(a)

IN PARI DELICTO

- *E.g., Kirschner v. KPMG, LLP*, 938 N.E.2d 941 (N.Y. 2010)

COMPARATIVE FAULT

- Varies by state: contributory negligence, modified comparative fault, pure comparative fault

TOPIC #4:

Other Recurring Defenses

Special circumstances often applicable to Trustee claims include:

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- Releases.
 - Pleading standard post-Rule 2004 discovery.

TOPIC #5:

Balancing Competing Claims

Which targets and claims should a Trustee pursue?

Typical targets in Trustee litigation:

- Directors and officers.
- Accounting firms, law firms, and other professionals.
- Insurance policies.
- Other fraudulent transfer targets.

Recurring Considerations



TIMING

- Which claims are likely to move quickest towards trial/discovery?
- Which claims are likely to be resolved through early settlement?
- Does proving one claim require cooperation or information from defendant in another claim?

LIKELIHOOD OF RECOVERY

- Which targets lack an ability to pay a judgment?
- Which claims are covered by an insurance policy?

TOPIC #6:

Unique Issues that Arise During Discovery and at Trial

Litigating and trying claims on behalf of a Trustee can present unique evidentiary challenges

Common issues in discovery:

- Access to documents and witnesses.
- Privilege issues.
- Rule 30(b)(6) depositions.

TOPIC #6:

Unique Issues that Arise During Discovery and at Trial

Litigating and trying claims on behalf of a Trustee can present unique evidentiary challenges

Common issues at trial:

- Authentication of evidence.
- Business records predicate for hearsay exception.
- Access to former employees and insiders; limits on subpoena power.
- Jury trials: Lack of compelling “victim.”

Faculty: Litigating Claims by Trustees: Avoiding Pitfalls in Litigation and Recurring Legal Issues

Keith Y. Cohan is a partner in the Austin, Texas, office of Reid Collins & Tsai LLP, where his practice focuses on complex commercial litigation, including cases involving financial fraud, professional negligence, fiduciary liability and other business torts. He has litigated cases before state and federal courts and arbitration tribunals across the country. Mr. Cohan devotes much of his practice to pursuing legal malpractice and related claims arising in both transactional and litigation contexts. He has pursued numerous claims against *AmLaw 100* firms involving a wide range of alleged misconduct that includes providing conflicted legal advice, failing to file a client's nine-figure claims within the statute of limitations, mismanaging internal investigations, misreporting information to governmental bodies, failing to report fraud and illegal conduct to a company's board of directors, and aiding and abetting corporate misconduct. He is also committed to social justice and has partnered with the ACLU of Louisiana in its Justice Lab project to combat discriminatory policing. Prior to joining the firm, Mr. Cohan worked as a litigation associate at the New York office of Paul, Weiss, Rifkind, Wharton & Garrison LLP and served as the first judicial law clerk to Hon. Gregg J. Costa of the U.S. District Court for the Southern District of Texas. He received his B.A. *magna cum laude* from the University of Pennsylvania and his J.D. with honors from the University of Texas School of Law, where he was a member of the *Texas Law Review* and co-head of the mentor program for first-year law students. He also was named a member of Chancellors, the Law School's most prestigious honor society, and was elected to the Order of the Coif.

Ryan M. Goldstein is a partner in the Austin, Texas, office of Reid Collins & Tsai LLP. His practice focuses on complex commercial litigation, including cases involving business torts, professional malpractice and complex financial transactions. Mr. Goldstein has litigated and tried cases before state courts, federal courts and arbitration tribunals across the country. He also maintains an active *pro bono* practice, including through the firm's partnership with the ACLU on the Justice Lab initiative. Prior to joining the firm, Mr. Goldstein completed a judicial clerkship for Hon. Nicholas G. Garaufis in the U.S. District Court for the Eastern District of New York. Prior to that, he was a litigation associate at the New York office of Paul, Weiss, Rifkind, Wharton & Garrison LLP. Mr. Goldstein is admitted to practice in both Texas and New York, and is a member of the Texas Bar Foundation. Upon graduation from law school, he was elected Clerk of the Chancellors. Mr. Goldstein received his B.A. *summa cum laude* from Georgetown University and his J.D. with highest honors from the University of Texas School of Law in 2012, where he was a member and an associate editor of the *Texas Law Review*.

Peter Kravitz is a principal with Province, LLC in Henderson, Nev., and serves as CRO, advisor to and member of bankruptcy oversight and creditor committees, chapter 11 liquidating trustee and plan administrator, disbursing agent and member of boards of directors. He is listed in

American Lawyer as a Top 100 law firm partner and is rated AV-Preeminent by Martindale-Hubbell. In addition, he was selected as a 2013 and 2014 *Southern California Super Lawyer* for Bankruptcy, Litigation and Trusts. Mr. Kravitz previously served as executive VP of business affairs to the largest privately held RV dealership group (\$475+ million in annual revenues), undertaking a prominent role within the industry by reshaping manufacturer/dealer agreements and manufacturer indemnification obligations, forcing repurchases of entire aging inventories, ensuring financial compliance practices, and managing the industry-wide restructuring crash by chairing numerous unsecured creditors' committees. In addition, as president of a winding-down insurance company, he personally managed the resolution of billions of dollars of personal-injury, workers' compensation and environmental claims, returning more than \$20 million in previously unaccounted-for returns to the related bankruptcy estate and its beneficiaries. Mr. Kravitz received his B.A. in 1992 from Lehigh University and his J.D. in 1995 from Rutgers University Law School, where he served on the editorial board of the *Rutgers Law Journal*.

Erica S. Weisgerber is a partner in Debevoise & Plimpton LLP's Litigation Department in New York, where her practice focuses on bankruptcy litigation and antitrust matters. Her experience includes a range of debtor and creditor representations, adversary proceedings and contested matters in cases under chapters 11 and 15 and cross-border insolvency proceedings, including extensive experience litigating clawback claims arising out of domestic and international insolvencies. Ms. Weisgerber has advised clients on restructuring- and litigation-related issues arising in bankruptcy cases, out-of-court restructurings and other distressed situations across a diverse range of industries. She also regularly represents investment banks in their retentions by major constituencies in chapter 11 proceedings. Ms. Weisgerber was recognized in 2020 by *Turnarounds & Workouts* in its annual list of 12 Outstanding Young Restructuring Lawyers in the United States. She also was selected as a member of the 2020 Class of ABI's "40 Under 40" and was awarded The M&A Advisor's 2021 Chapter 11 Reorganization of the Year (over \$1B) for her role as counsel to Canada Pension Plan Investment Board as co-sponsor of Neiman Marcus in its chapter 11 restructuring. In addition, she also was recommended in *The Legal 500 US* in 2021 for her bankruptcy litigation work. Ms. Weisgerber's antitrust practice encompasses a wide range of complex civil antitrust litigation, including representing plaintiffs and defendants in civil litigation, as well as representing clients before antitrust agencies in government reviews of proposed transactions, and counseling clients with respect to antitrust issues associated with mergers and acquisitions, joint ventures and competitors' exchange of information. She is ranked as a leading Antitrust lawyer by *Chambers USA* (2021) and *The Legal 500 US* (2021). Ms. Weisgerber also maintains an active *pro bono* practice and is a 2012 and 2013 recipient of The Legal Aid Society's *Pro Bono Publico* Award for outstanding service to The Legal Aid Society and its clients. She is a member of the Bar of New York and is admitted to appear before the U.S. District Courts for the Southern and Eastern Districts of New York; the U.S. Courts of Appeals for the Second, Third and Tenth Circuits; and the U.S. Supreme Court. She also is a member of the New York State Bar Association, for which she serves on the executive committee of its Antitrust Section. Ms. Weisgerber is a member of ABI and the International Women's Insolvency & Restructuring Confederation, for which she serves on the membership and programming committees. She is a speaker and author on issues relating to restructuring and bankruptcy litigation and antitrust, and she is an active member of the American Bar Association's Antitrust

Section and Litigation Section. In addition, she serves as an editor of the *Antitrust Law Journal* and is vice chair of the Antitrust Section's Legislation Committee. She also is a member of the National Association of Women Lawyers, for which she has co-chaired its Membership Committee. Ms. Weisgerber serves as editor-in-chief of the *Debevoise Women's Review* and is a co-editor of the ABA Antitrust Section's *State Action Practice Manual*. She received her A.B. *magna cum laude* from Georgetown University in 2005 and her J.D. *magna cum laude* from Georgetown University Law Center in 2008, where she was a member of the Order of the Coif and managing editor of the *Georgetown Law Journal*.