



To Serve or Not to Serve? The Creditors' Committee Conundrum

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Due to the increase in bankruptcy filings during the recent economic downturn, a number of our clients have received a "Creditors' Committee Solicitation Form" from the Office of the United States Trustee. These forms bear the seal of the United States Department of Justice and urgently request the "signature of a nominating party" with little other explanation. This article provides some background on creditors' committees to help you make an informed decision about whether or not to serve on one.

Perhaps the most succinct description of the role of a creditors' committee is contained in the legislative history to §1102 of the bankruptcy code: "[creditors committees] will be the primary negotiating body for the formulation of the plan or reorganization...they will represent the classes of creditors from which they are selected [and] will provide supervision of the debtor [and] will protect their constituents interests." Creditors' committees generally consist of persons who affirmatively respond to the solicitation form and hold the largest claims against the debtor.

If you or your company is listed among the twenty largest creditors of a chapter 11 debtor, your response to the solicitation from the United States Trustee will determine whether you will ultimately be among the pool of creditors from which the creditors' committee is selected. The appropriate response to the solicitation requires the consideration of a number of factors.

Committee members are not paid for their time, but can be reimbursed for actual expenses incurred in the performance of their duties. They are fiduciaries for the entire class they represent and are required by the bankruptcy code to provide information to their constituents. Nevertheless they must often sign a non disclosure agreement regarding information they obtain while serving on the committee.

Despite the lack of financial remuneration for what can be a time-consuming role, the risk of fiduciary liability and the potential for being whipsawed by disclosure issues, many of our clients still opt to serve on creditors' committees. The reasons for that decision vary, but are most often based upon one or more of the following factors:

Desire to be heard. Many creditors understand that the likelihood of having a voice in the reorganization process is greatly enhanced by serving on a committee. Since bankruptcy courts are courts of equity, the vast majority of judges pay

particular attention to positions espoused by committees in order to counterbalance the arguments of the debtor or other parties adverse to the interests of unsecured creditors. Thus, effective communicators can use their ability to create a consensus among committee members to insure that their issues can be heard.

Networking/gathering of industry-specific expertise. Creditors don't often have the opportunity to get a glimpse of the inner-workings of industry peers. The potential for fixing what went wrong while working with committee members involved in the same business niche can be a challenge that is hard to resist, particularly when a successful reorganization could enhance future business opportunities with the debtor.

Cost-sharing. Creditors' committees hire counsel and often other professionals at the cost of the bankruptcy estate. While this arrangement does affect the ultimate distribution to creditors, it also permits a pooling of resources that saves individual creditors from bearing the cost of hiring an attorney to become educated about complex cases that are often large and difficult to comprehend without historical perspective.

Since a client's decision whether to serve on a committee is often best made with reference to the results of other cases in a similar industry, here is a quick look at some recent cases in which this Firm has represented the unsecured creditors' committee:

Retail Cases. Buchalter Nemer represented the unsecured creditors' committee in the following four cases, each in a slightly different retail sector:

- **In re Active Wallace Group, Inc.:** The committee of this skate shop and ski products retailer included Nike USA, Sole Technology, One Distribution and Hurley International. The committee assisted in the streamlining of business operations while the debtor was being marketed for sale, participated in the ultimate sale of a substantial portion of the assets to a third party, and is continuing to monitor the liquidation of remaining assets.
- **Home Organizers, Inc. (Closet World):** The committee of this retailer of home organization products consisted of various construction and advertising-related companies, including Contractors Wardrobe and Money Mailer. The committee negotiated the dismissal of the bankruptcy cases will full payment to all unsecured creditors.
- **Banner Bedding:** The committee of this mattress and bedding retailer included Simmons Company, Tempur-



Pedic, Inc. and Color Ad, Inc. The committee monitored the streamlining of business operations and ultimately negotiated the terms of a consensual plan of reorganization that resulted in enhanced business opportunities between creditors and the surviving business entity.

- **In re 944 Media, LLC:** The committee of this entertainment and lifestyle publisher consisted of printing and advertising-related creditors, including Trend Offset Printing. The committee participated in the negotiation of the sale of a substantial portion of the debtor's assets to a third party and is currently involved in the liquidation of remaining assets.

Medical Industry. The Firm represented the unsecured creditors' committee of these hospitals:

- **In re Brotman Medical Center:** The committee of this hospital consisted of various suppliers, including Professional Hospital Supply, Sodexo, Inc. and Medtronic Xomed/USA. The committee was co-proponent of a plan of reorganization that will result in a substantial payment of unsecured claims and was also instrumental in reducing the secured claim held by Prime Healthcare Services Los Angeles, LLC from approximately \$18 million to \$10 million.
- **In re Karykeion:** The committee of this community hospital consisted of various medical suppliers and service providers, including Advanced Medical Analysis, LLC and Pharmacy Healthcare Solutions, Ltd. The committee assisted in the streamlining of business operations while the debtor was being marketed for sale and participated in the ultimate sale of a substantial portion of the estate's assets.

Real Estate Cases. The Firm represented the unsecured creditors' committee (or, the equity committee) in the following cases:

- **In re Benjamin and Gail Catlin:** The committee of creditors in this individual bankruptcy case of one of Sacramento's most prominent real estate developers consisted of creditors holding guaranty claims against the debtor, including US Bank National Association, Mechanics Bank and SWD Land Company. The committee participated in the streamlining of debtor's business operations and negotiated the terms of a plan of reorganization that created a liquidating trust that will operate the estate's most valuable assets until they can be liquidated. The committee also selected the liquidating trustee and a number of committee members are now members of the liquidating trust's oversight committee.
- **In re Real Estate Partners, Inc.:** The committee consisted of equity holders that invested in various real estate entities in this consolidated case concerning an fraudulent investment scheme. The committee investigated various causes of action, obtained the recovery of certain properties for the

benefit of the estate and was the proponent of a plan of reorganization that will permit the proceeds of litigation claims and other assets to be distributed to unsecured creditors.

Ultimately, the decision whether to serve on a creditors' committee will require an analysis of a number of factors, including those described in this article. Since many of our attorneys are regularly involved in these issues, don't hesitate to call one of us to assist you with this decision.



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