

Retiree Committee Representation

Spearheaded by partners Jon Cohen and Trent Cornell, Stahl Cowen Crowley has gained a national reputation for the results it has achieved representing Retiree Committees in large bankruptcy cases, primarily in the automotive and steel industries. We understand that effectively representing Retiree Committees means not only being a strong legal advocate, but also guiding Committee Members as they move through the labyrinth that is large scale bankruptcy. Retiree Committees are quickly exposed to a new set of rules and need practical assistance and support so they can effectively act on behalf of thousands of retirees, spouses and dependents. In the past year alone we have helped Retiree Committees in disputes to protect well over \$150 million dollars in healthcare benefits that had been cut or that were slated to be terminated by companies in Chapter 11 bankruptcies. Retiree work is an area we are passionate about, and our efforts have received recognition from Judges, Trustees and even opposing attorneys. This brief memorandum was written to give you a better idea of what Retiree Committees are, what they do, who we are and what we do. It is only a general overview and is not intended to convey legal advice, so please contact us with any questions you may have about the process or about our firm. Additionally, Retiree Committee Members that we have represented in past cases have offered to speak with others who find themselves on Retiree Committees and who are evaluating counsel.

► What is Section 1114 of the Bankruptcy Code?

Section 1114 of the Bankruptcy Code was enacted by Congress in the wake of several high-profile bankruptcies where courts had allowed companies (notably LTV Steel) to summarily cut the healthcare benefits of hundreds of thousands of retirees and their dependents. Section 1114 requires that a Retiree Committee be formed before a company in Chapter 11 reduces or eliminates retiree benefits. It further sets forth a process requiring the company to engage in

“good faith” settlement discussions with the Retiree Committee, to whom it is supposed to demonstrate that the benefit reductions are absolutely necessary to enable the company to emerge from bankruptcy. To put the Retiree Committee on an equal footing with the company and its creditors, Section 1114 provides that Retiree Committees are entitled to legal representation and other professional assistance (i.e. financial advisors) to represent and counsel its Members. The attorney and other professional fees arising from representing the Retiree Committee are paid entirely by the company.

The Retiree Committee and its attorneys then evaluate the company’s asserted need to reduce or eliminate retiree benefits through a careful examination of the company’s finances, review of the underlying benefits and tax implications, efforts engaged in by the company to obtain cost savings through other means, and other relevant information. If the company and the Retiree Committee reach a compromise, then a revised benefit package is presented to the bankruptcy court for approval—although any continuing benefit package will almost certainly be opposed by the company’s other creditors. If the company and the Retiree Committee cannot agree on a particular level of reduced retiree benefits, then the company’s highest and best offer previously made to the Retiree Committee during negotiations is presented to the Court by the company. The company then has the burden of establishing that it cannot emerge from bankruptcy unless the specific benefit reduction it seeks is approved. At that point, the Court traditionally takes one of two straightforward paths: (a) accept the company’s proposed benefit package or (b) reject it entirely. Statutorily, in no event can the Court reduce benefits to a level below the highest and best offer made by the company during prior negotiations. If the Court rejects a company’s assertion that it must reduce the retiree benefits to the degree requested by the company, then the company can start another round of

negotiations with the Retiree Committee. However, subsequent negotiations will necessarily start with a more generous retiree benefit package. This dynamic compels companies in Chapter 11 to negotiate in good faith lest the court wholly reject their efforts.

► **How are Committees formed and why was I selected?**

Simply put, someone has to speak for the retirees. In the case of union retirees, their union is initially presumed to represent them in the bankruptcy proceedings. Of course, this is not always feasible because a union can find itself in a position of conflict between its retired and active members. In such a case, the union retirees may request separate representation. More often, Retiree Committees are made up solely of non-union retirees who lack a formal structure or organization to act on their behalf. Sometimes, Retiree Committees will have both union and non-union members and the Committee speaks for the “Retirees” as a whole. The United States Trustee’s Office has responsibility for assembling Retiree Committees, although the company will usually help in the process. Sometimes questionnaires will be sent out to find interested retirees. Other times, persons who were known to be active or in leadership roles when they were employees or as retirees will be asked if they would serve on the Retiree Committee. Retirees may also come forward early in a bankruptcy process to informally notify the Trustee assigned to a case that they would be interested in serving on any Retiree Committee subsequently formed. Whatever the mechanism, the task Retiree Committees face is great, but positive results are achievable with the help of counsel who are intimately familiar with Section 1114 and who care about the results.

► **What can we expect as Committee Members?**

Things will move fast, at least initially. Prior to filing bankruptcy, companies spend hundreds of thousands of dollars to secure legal and financial advice. Make no mistake; companies enter bankruptcy with a definite plan of what they hope to do and what costs they hope to cut. Increasingly, “legacy” or retiree benefit costs are at the top of the list. Because of the protections of Section 1114, however, companies cannot simply cut the benefits they previously promised their retirees. Nevertheless, the company has an initial leg up in timing because it controls when it asks the Court for a

benefit modification. Because the company has this advantage, it is imperative for the retirees to secure the right counsel immediately. We understand that this is one of the most stressful and confusing periods for Retiree Committees. To help alleviate this uncertainty, we immediately meet with the Committee Members to provide them with a crash course on the bankruptcy process and distill the court filings to quickly get the Retiree Committee up to speed so we can start to formulate a game plan and begin to execute it. The goal is to move proactively as quickly as possible instead of reacting to the company’s strategies. Part of these efforts will include the retention of a specialized financial advisor for the Retiree Committee; a trusted partner to evaluate the forecasts and other financial information provided by the company. Financial advisors, who specialize in financially distressed companies, also assist us as we craft alternatives to the benefit reductions sought by the company. We have relationships with several nationally known financial advisors who not only provide the best analysis possible, but who also understand retiree concerns and the industries in which we focus and who have worked closely with us in the past to protect retiree benefits.

► **Who pays the bills for the Committee?**

The company, or, as it is known in bankruptcy terms, the “Debtor in Possession” is responsible for paying the Retiree Committee’s legal and other professional fees, as well as any expenses the Committee Members themselves incur in the performance of their duties. The process works like this: the Retiree Committee selects the attorneys that will advise it in the bankruptcy and a petition is filed with the court for formal approval of the Committee’s selection. Once these professionals are approved by the Bankruptcy Court, all professional fees (including those of the financial advisor) and expenses are approved by the Court and then paid by the company.

► **Who are the Unsecured Creditors?**

This is a name you will become very familiar with, if you are not already. The unsecured creditors, as the name implies, are all creditors of a bankrupt company that do not hold priority positions in accounts receivable, real estate or otherwise possess securitization of the money the company owes them. The largest unsecured creditors are eligible to become members of the Unsecured Creditors Committee, the

body that will act on behalf of the unsecured creditors in the bankruptcy. Unsecured Creditors Committees usually oppose the Retirees at most every stage of the proceedings because they view every dollar allocated to toward retiree benefits as a reduction in their eventual recovery.

► **Who represents the company and the Unsecured Creditors Committee?**

In representing Retiree Committees, we have had cases against many large law firms, including Kirkland & Ellis; Foley & Lardner; Jenner & Block; Milbank Tweed; Skadden Arps, Greenberg Traurig and others. Some of these large firms play both sides of the fence; representing Debtors in one case and representing retirees or other creditors in another. Other times large law firms will represent Unsecured Creditors Committees, taking openly hostile positions against retirees in one case, and then they act or hope to act as retiree counsel in another. We do not. We believe that a law firm cannot fully represent retirees if the firm is worried about its perception when they are on the other side of the fence, especially in the relatively small world of large scale Chapter 11 bankruptcy work. We also believe there is no substitute for passion, and we passionately represent the retirees we serve. In fact, we have stayed on to make sure retiree benefits were properly implemented, long after the cases had ended and after we had received the final fees for our work. It is simply a matter of following through and doing what is right for the people we represent. As such, we do not take cases adverse to retirees' interests in any case. For these reasons, we are not concerned about taking aggressive or sometimes even unpopular positions to defend retirees' benefits. Our clients are the retirees and their families.

► **What is your reputation in this area of law?**

The results we have achieved for retirees and their families have been lauded by Judges, U.S. Trustees and opposing attorneys. Jon and Trent, along with others on the Stahl Cowen Crowley team, came from large law firms with national practices and reputations. As such, we understand the tactics, methods and the strategies that will be employed by the opposing attorneys and their financial advisors. Our size gives us the freedom and flexibility to act quickly and decisively. In the same vein, we have more than sufficient resources to tackle any task put before us.

Additionally, we pride ourselves on being accessible and responsive to the Retiree Committees we represent. This is an understandably unnerving process for the Committee Members and we will be there to guide you when you need us. No exceptions.

► **Can you describe some of the results you have achieved?**

In 2004, we were selected to represent the retirees of a large steel company. The retiree benefits had already been cut by a bankruptcy court on an interim basis and the company was seeking to make the cuts permanent. Within one week after we were retained by the Retiree Committee, the company presented us with an "offer" to terminate all retiree benefits except for a small contribution to Medicare. The company claimed that retiree benefits needed to be eliminated almost entirely if it was going to emerge from bankruptcy. We looked behind the rhetoric, behind the financial analysis prepared by the company's experts and made our own independent conclusions that: (1) the company's assertions were wrong, and (2) that we could prove it. As such, the Retiree Committee rejected the company's offer and a negotiation process began in earnest. As an initial priority, we successfully restored benefit payments to the retirees. Next, after months of negotiations we were able to successfully reach a compromise settlement with the company. The next step was an intense battle with the Unsecured Creditors Committee, who felt that the retirees had received too good of a deal. We did not yield and in August 2005, the company emerged from bankruptcy with a restructured benefit package that enabled the retirees and their families to maintain paid access to needed healthcare for the rest of their lives.

In 2005, we represented the retirees of one of the first large bankruptcies of an automobile part manufacturer (and its subsidiaries). In a carefully calculated move, the company waited until late in the bankruptcy process and announced that it wanted to eliminate almost all of the retiree healthcare benefits. We used this timing against the company by aggressively moving forward and filing motions with the court utilizing a rarely used legal strategy that ultimately threatened to upend the company's plan to emerge from bankruptcy. This maneuver, along with finding creative methods for the company to finance continuing benefits, was an unbridled success for the retirees. Far from losing their benefits, the company emerged from Chapter 11 and

the retirees now receive monthly payments in an amount sufficient to obtain excellent healthcare benefits. In this case, creativity and aggressiveness was key.

Additionally, in every bankruptcy matter we work with the Retiree Committees to better utilize the healthcare resources that we are able to secure. As a result, the retirees are able to enjoy comparable benefits for a reduced cost, which benefits the retirees and also helps the companies come out of bankruptcy and remain solvent.

► **How did you achieve these results?**

Hard work and creativity. Rather than just “fighting for dollars,” we carefully analyze the benefits that the retirees have historically received and focus on how those benefits can be provided at a lower cost. Removing inefficient, outdated and costly overlap in programs can save millions of dollars with no effect on benefits. Next, we take apart the company’s business and its business plan, often with the help of our financial advisors. The goal is to find ways for the

company to run more smoothly and to pay continued benefits in a way that will not cause harm to the company after it emerges from bankruptcy. Cutting a deal that will just force a company back into bankruptcy in a year or two is not a victory, a viable plan reflecting continued benefits is a victory. Of course, we can only negotiate in a position of strength if we are ready to litigate in court. We are. The other attorneys we encounter know and respect this.

► **How do we reach you with questions?**

Please contact us at any time. We are more than happy to share information and insight regarding the bankruptcy process and will endeavor to help you in every way possible. Thank you.

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