

How to Get the Most Out of Serving On the Creditors Committee

By Scott N. Schreiber

When it comes to serving on a creditors committee in a Chapter 11 case, the credit professional is akin to a registered voter who has a civic duty to sit on juries. Hardly anyone wants to do it, but to protect your company, it is a necessary evil.

Over almost 20 years of practice, I have represented many creditors committees. Recently, I've had the opportunity to "go over to the dark side" and represent a number of debtors in Chapter 11 cases. As debtor's counsel, I have seen some of the mistakes that committees make and opportunities to maximize the preserve value, or find value,

there's the "let's try to reorganize" case and the "sale of assets under Section 363" case. Regardless of the direction the case initially takes, your committee's first goal should be to help ensure

to "blow-up the case" – a posture often advocated by counsel for committees who have little negotiating skill or power. A better tact is to work with the debtor to facilitate a cost efficient administration of the estate and maximize the benefits to the unsecured creditors.

If it's a "sale of assets under Section 363" case, committee members who are familiar with the industry can provide substantial insight about likely bidders. Although the creditors committee will not usually negotiate the sale of assets, having the input of an industry member to convey industry



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minimizing the need for any party to consider filing costly time-consuming lawsuits to recover preferential transfers.

Consider any peace offerings made by the secured lender who may be willing to throw the committee a bone so that they will go along with the contemplated sale of assets. If the bone is less than you were expecting, is there another avenue for recovering your loss? Is there a claim under the D&O Policy that the committee can trade for letting the sale proceed? Or if it's a case where the sale proceeds will not fully satisfy the secured creditor, the committee should negotiate control of the avoidance actions – and maybe decide not to pursue them. After all, why should the creditors finance a case through preferential transfer litigation?

Committee members who know the dark and hidden secrets about the debtor – secrets that may lead to undisclosed assets, such as claims against accountants or directors and officers – are gems. To that end, you should be aware of the attorney-client privilege that exists between committee counsel and the committee members – as well as the limitations of the privilege. Will the privilege shield your communications with committee members that might otherwise give rise to antitrust violations?

Committee members have a fiduciary obligation to all creditors. How is that obligation defined? What happens if you breach the obligation? Is your liability limited to denial of your claim? Is there insurance to protect you from the cost of a claim made against you, frivolous or not? Knowledgeable committee members need to know this information.

Disagreements can easily arise when the committee consists of bond holders, or bank groups holding unsecured claims, and trade vendors. For instance, the banks and the bond holders might want to sell the debtor's assets and recoup their deficiency claims through the pursuit of preferential transfers. The trade

vendors may be more interested in having a continuing customer who reorganizes. How the committee deals with this disagreement will determine whether your committee is a success or a failure.

Committee members also need to have a sense of what constitutes a conflict of interest as well as an idea of how to deal with one. Maybe it's an industry member on the committee who acquires and disseminates industry information; or uses the confidential information to benefit their company at the expense of the debtor. When should a committee member resign from the committee because of a conflict? Are there alternatives to resignation?

After the assets are sold and before a Plan of Reorganization is confirmed, the committee should decide whether or not to pursue preferential transfers or other avoidance actions. If the committee cannot make this decision because of internal conflicts should the committee move to appoint a Chapter 11 Trustee? Or an Examiner? When is one more appropriate than the other?

Committee members are not potted plants to be placed and moved by other players. But in order to be most active, inquisitive and helpful, you need to know the buttons you can push to get results and then, how to best push those buttons.

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