

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 unfamiliar rules and need practical assistance and support so they can effectively act on behalf of thousands of retirees, spouses and dependents.

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.

► **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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