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Views from the Bench: Dilemmas of an Official Committee

Hon. Janet S. Baer; U.S. Bankruptcy Court (N.D. Ill.)
Hon. Kevin R. Huennekens; U.S. Bankruptcy Court (E.D. Va.)
Laura Davis Jones; Pachulski Stang Ziehl & Jones
Shanti Katona; Polsinelli
Hon. Christopher S. Sontchi; U.S. Bankruptcy Court (D. Del.)

Educational Materials

VIEWS FROM THE BENCH 2020

-Virtual Conference-

Dilemmas of an Official Committee

Panelists:
Hon. Christopher S. Sontchi, U.S. Bankruptcy Judge (D. Del.)
Hon. Janet S. Baer, U.S. Bankruptcy Judge (N.D. Ill.)
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CHALLENGES FACING CREDITORS' COMMITTEES AND *AD HOC* AND OTHER COMMITTEES

Creditors' committees certainly face dilemmas and challenges in many large Chapter 11 cases, and such dilemmas and challenges may becoming more difficult as *ad hoc* or informal committees have become more prevalent, as secured lenders or other key creditors increasingly attempt to steer and control the case, and as pressures have grown for debtors to quickly improve and restructure operations or otherwise be forced to implement expedited sales processes. Committees are confronted with potential conflicts of interest, concerns over appropriate compensation and carveouts, investigation issues including when an examiner has been appointed in the case, plan exclusivity issues, and other complications affecting whether there will be a successful outcome for unsecured creditors.

I. Changing Nature of Chapter 11 Filings Affecting Committees' Agendas

Certainly, the goals, strategies, and results of creditors' committees in many cases have been significantly impacted by recent trends in the nature and outcome of larger Chapter 11 cases including, for example, the following:

- Over the last ten years, pre-negotiated bankruptcy filings have generally become more frequent. In an analysis conducted by FTI of over 300 confirmed plans in 2011-2017, nearly 66% of cases that emerged in 2016-2017 were prepackaged, prearranged or pre-negotiated filings, compared to approximately 40% over the previous five years. Further, the average duration of Chapter 11 reorganizations fell by nearly one-half in 2016-2017 compared to 2011-2015, to 235 days from 435 days.

- Generally, statistics are not on the side of successful retailer reorganizations. Between 2006 and the first half of 2015 (since the 2005 changes to the Bankruptcy Code (BAPCPA)), 55% of larger retail bankruptcies ultimately ended in liquidation, as opposed to a reorganization or going concern sale (AlixPartners Retail Bankruptcy Study).

- In the past several years, the substantial majority of retailer bankruptcy filings were "free fall" emergency filings or sale cases where a pre-filing sale process was undertaken or started (Debtwire, Restructuring Insights: Retail, p. 7). These scenarios are commonly expedited, bumpy, and especially challenging situations.

- In some cases, the Chapter 11 may start out hopefully, with a focus on different exit strategies, but end up as a liquidation. For example, Sports Authority's 2016 bankruptcy filing started with a plan to close less than half its stores and to sell the rest as a going concern, but the bankruptcy concluded with a liquidation and the closing of all 464 stores, and similarly in 2019, Shopko filed with the possibility of reorganization, but switched to a chain-wide liquidation of its 367 stores.

Such foregoing circumstances have raised and continue to raise various challenges, difficulties and uncertainties for many creditors' committees, which commonly must act expeditiously and

proactively to maximize the recoveries for unsecured creditors, and which at times must use leverage to slow down the debtor's or secured lenders' favored exit strategy in order to carve out some recovery for unsecured creditors.

II. Complications in Committees Acting in Unsecured Creditors' Best Interests

A. Official Creditors' Committees and Other Statutory Committees

1. In General

Section 1102(a) of the Bankruptcy Code provides that the U.S. Trustee may appoint additional committees of creditors or of equity security holders as the U.S. Trustee deems appropriate. Since the appointment of additional committees is discretionary, such appointment will normally be made on a request from parties in interest.

If different classes of creditors are affected by the Chapter 11 case, *e.g.,* subordinated versus senior unsecured creditors, priority versus nonpriority creditors, *etc*., the court may order the U.S. Trustee to appoint separate committees to protect the interests of each class of creditors whose rights are affected differently than the rights of other classes. The appointment of an additional committee of unsecured creditors will be ordered only if necessary to assure adequate representation of unsecured creditors.

The appointment of an additional committee is viewed by courts as an extraordinary remedy that they are reluctant to grant. Many courts considering the extraordinary appointment of an additional committee, have employed a two-step process. First, the court determines whether the appointment of an additional committee is needed to assure adequate representation. Next, if the answer to the first question is yes, the court considers whether it should exercise its discretion to appoint an additional committee. Courts have more specifically considered the following factors: (a) the cost associated with the appointment; (b) the timing of the application, whether early or late in the confirmation process; (c) the potential for added complexity; and (d) the presence of other avenues for creditor participation.

2. Equity Committees

Typically, courts treat the likelihood of a recovery to equityholders as the main factor in their analysis of whether to allow an official equity committee. If the debtor is or appears to be solvent, the concern is that a creditors' committee will negotiate a plan based on a conservative estimate of the debtor's value; however, the equityholders of an insolvent debtor have no economic interest in the case and thus, the estate should not have to bear the expenses of an equity committee over what would amount to a gift.[1]

[1] *See, e.g., In re SunEdison Inc*., 556 B.R. 94, 102-03 (Bankr. S.D.N.Y. 2016); *In re Williams Communications Grp. Inc*., 281 B.R. 216, 220 (Bankr. S.D.N.Y. 2002) (factors include (i) whether debtors are likely to prove solvency, (ii) whether equity is adequately represented by stakeholders already at the table, (iii) complexity of debtors' cases, and (iv) likely cost to estates of an equity committee); *In re Kalvar Microfilm Inc*., 195 B.R. 599 (Bankr. D. Del. 1996) (similar).

However, even if it is not entirely clear that equityholders will receive a recovery through a Chapter 11 plan, a bankruptcy court may choose to appoint an equity committee in order to ensure that value is preserved for such parties-in-interest and if an equity committee may add something to the case.

Notably, equity committees were appointed in the *Horsehead Holding* and *Energy XXI* cases where there were allegations of wrongdoing, misconduct, misrepresentation or other bad faith conduct by a debtor or its officers and directors – even though the courts ruled that they could not conclude that there was a substantial likelihood of solvency. *In re Horsehead Holding Corp.*, Case No. 16-10287 (Bankr. D. Del.); *In re Energy XXI Ltd.*, Case No. 16-31928 (Bankr. S.D. Tex.). Rather, both courts emphasized that public statements made by management regarding valuation immediately prior to bankruptcy were inconsistent with the valuation that the management advanced during the pendency of the bankruptcy. Both courts concluded that an equity committee could add value by challenging the debtors' valuations and determining whether management's pre-bankruptcy and post-bankruptcy remarks were intentionally misleading. In short, something just did not seem right to the courts and they exercised their discretion in requiring equity committees. Ultimately though, in both the *Horsehead Holding* and *Energy XXI* cases, equityholders received nothing under the confirmed plans.

Practically speaking, having status as an official committee likely improves equityholders' chances of extracting some value, even nuisance value, from a debtor. However, as the foregoing cases also demonstrate, the appointment of an equity committee does not guarantee recovery for equityholders.

B. *Ad Hoc* Committees

1. Prepetition Formation

In some situations, trade creditors, noteholders, and other creditors form themselves into informal committees to deal with the debtor before the filing of the petition. Such committees are self-appointed - and therefore unregulated. The potential benefits of acting as an unofficial committee include (i) sharing costs of counsel and other professionals, (ii) increased bargaining power, (iii) presenting a united front to the debtor and other stakeholders, and (iv) avoiding fiduciary obligations to other parties. On the other hand, *ad hoc* committee members may hold interests adverse to one another and they do not generally owe each other or any other stakeholder a fiduciary duty. Thus, there is the risk of members of an *ad hoc* committee trying to co-opt the process or act in a manner detrimental to the other members or other stakeholders.

A prepetition *ad hoc* committee often spends a great deal of time and energy with the debtor, learning about its financial problems. Notably, if a bankruptcy is thereafter filed, the prepetition committee may be converted to an official unsecured creditors' committee postpetition by the U.S. Trustee if the committee members fairly represent a reasonable cross-section of unsecured creditor claims against the debtor.

2. Postpetition Involvement

Ad hoc committees are an increasingly common feature of the Chapter 11 landscape. Based on Debtwire case data and certain assumptions, *ad hoc* committees participated or appeared in a substantial percentage of large Chapter 11 cases across the nation since 2016 (debtors with assets and liabilities over $100 million) – potentially in almost 12% or more of such recent chapter 11 cases.

An *ad hoc* committee formed postpetition can request the court to be recognized as an additional official committee under Code section 1102(a)(2); the standard for appointing additional official committees, however, is sufficiently high that such motions are not commonly granted. Not constituting an official committee, *ad hoc* committees do not have access to various statutory powers (including discovery and informational powers), and must also bear their own professional expenses, which can be burdensome relative to their often small recovery prospects. Consequently, an *ad hoc* committee presumably would carefully weigh the financial cost of advocating its interests compared to the chances of a favorable result.

It should be noted that, depending on the Chapter 11 case's circumstances, while its *de jure* powers are very limited, an *ad hoc* committee's *de facto* powers may be substantial. Without the cooperation of a key *ad hoc* committee, it is unlikely that the debtor will be able to effectively and efficiently restructure its debts. *Ad hoc* committees generally exert some influence in a Chapter 11 case because their members purport to speak for a large group of creditors and implicitly ask the court, the debtor and other parties to give their positions a higher level of credibility.

Potentially, however, there is opportunity for a member of an *ad hoc* committee to effectively take over the committee or act in a manner possibly disadvantageous to the other members and other key stakeholders in the case. Also, active involvement in the case by one or more *ad hoc* committees may incentivize more aggressive posturing or litigation among creditor groups, since an *ad hoc* committee represents only one group of claims.

C. Special Creditor/Committee Situations

1. Undersecured Creditors

An undersecured creditor holds a partially secured and partially unsecured claim. Undersecured creditors may wish to serve on a creditors' committee. An undersecured creditor may be more likely than unsecured creditors to advocate a quick liquidation of the debtor to protect its collateral. Such inclination might affect the prospects of reorganization, but it should not automatically preclude that creditor's participation on a committee. Certainly, if the subject undersecured creditor's lien or claim will be the primary issue facing the committee in the case, the creditor should not serve on the committee. The U.S. Trustee may also evaluate whether a potential dispute with such a creditor would dominate the case or undermine committee deliberations.

2. Other Official Committees

Courts have appointed additional creditors' committees to represent, among other groups, employees, priority creditors, tort claimants, subordinated note holders, retirees, and franchisees. Such committees, however, are rare and, when formed, often serve a narrow function. For example, in Enron's bankruptcy, an employee committee was formed for the limited purpose of investigating employee claims against Enron (Case No. 01-16034; Bankr. S.D.N.Y.), principally severance payments allegedly owed. Based on Debtwire data, in only about 1% of all large Chapter 11 cases (assets over $10 million) filed since 2016 was another statutory committee appointed.

D. Difficulties in Reaching Consensus and Compromise in the Chapter 11 Case

At times, creditors with competing goals and objectives will sit on the same official committee. Conceptually, this is beneficial to the Chapter 11 process because it encourages the resolution of intercreditor disputes through compromise and negotiation in lieu of litigation.

Frequently, a dynamic occurs at the outset of the Chapter 11 case, during the time of formation of the creditors' committee, when, for instance, the unsecured financial creditors may vie with the trade creditors for control of the committee. There will often be divisions within different categories of creditors represented by committees (trade creditors, senior bondholders, subordinated bondholders, tort claimants, employees, unions, *etc*.) – each category may have its own specific agenda that is inconsistent with the agenda of another group. If such agendas are not in serious conflict, the solution to a lack of representation may be to add new members to an existing committee. If, however, the creditor groups are in too vigorous opposition, adding members of different constituencies may simply make a committee unworkable.

Multiple committees in a Chapter 11 case may also lead to significant difficulties. Multiple committees will add substantially to costs -- counsel, experts, and other committee expenses. To ameliorate the expense issue, the committees can be put on budgets, and these committees should avoid duplication of the efforts of each. Further, to a great extent, all committees will have common interest in administrative or operating matters, but not all committees need be active on these matters.

Additionally, multiple committees will likely complicate decision making. An added committee presents one more party that will take positions in a case on operating, administrative and restructuring issues. This necessarily complicates the process of arriving at a consensus on these issues and may result in more complex litigation of such matters before the court. In addition, committees make demands on a debtor and its management. The more of them, the more burdens already overextended management and staff will face.

III. Compensation Concerns

A. In General

As with the debtor's case professionals, the professionals of a creditors' committee (and any other statutory committee) generally must apply to the bankruptcy court for allowance of fees and expenses pursuant to Code sections 330 and 331 and payment thereof from the bankruptcy estate. Further, the estate will reimburse the expenses of creditors' committee members (excluding said members' own legal or other advisor fees).

In contrast, the legal and other professional fees of an *ad hoc* committee are generally not subject to reimbursement by the bankruptcy estate, unless it can be demonstrated that the applicable *ad hoc* committee members and their professionals provided a "substantial contribution" to the Chapter 11 case – typically a very difficult showing to make.

B. Carve-Out Issues

To address the risk of nonpayment or partial payment, when there are insufficient unencumbered assets and/or where superpriority claims may be asserted, it is common for statutory committees and their professionals to negotiate a carve-out from the secured creditors' collateral.

However, in some cases, in the context of a cash collateral or postpetition financing stipulation with the debtor, a debtor's secured lender may resist providing for a reasonable carve-out. Because a carve-out is a charge against its collateral, the argument of the secured lender goes that it should have the sole right and discretion to determine who, if anyone, will benefit from the subject carve-out. On the other hand, creditors' committees have reasoned and argued that the absence of an adequate carve-out for committee professionals would greatly undermine the committee's roles and functions in the case, including as a watchdog of the debtor and secured lender and the bankruptcy process. Essentially as a matter of public policy, many courts appear wary of having the bankruptcy process unreasonably skewed in favor of the debtor's secured lenders, to the detriment of the debtor, its estate and creditors.[2]

The Delaware bankruptcy court in the *Molycorp* case[3] sided with the creditors' committee and its professionals, holding that a carve-out cap of $250,000 in the DIP financing order (with respect to fees that could be incurred by the committee in investigating the DIP lender's transactions with the debtors and the debtors' adequate protection obligations) did not preclude committee counsel from being paid substantially in excess of the cap where a Chapter

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[2] *See, e.g., In re Evanston Beauty Supply, Inc.,* 136 B.R. 171, 177 (Bankr. N.D. Ill. 1992) ("Negotiated 'carveouts' … are viewed as being necessary in order to preserve the balance of the adversary system in reorganization…. 'Carveouts' are used in order to avoid skewing the necessary balance of debtor and creditor protection needed to foster the reorganization process. Same is designed to accommodate all classes of creditors and equity interests, rather than one especially crafted for the benefit of the pre-petition lender having a perfected lien on all cash collateral ….") (emphasis added).

[3] *In re Molycorp*, 562 B.R. 67 (Bankr. D. Del. 2017).

11 plan was successfully confirmed. The *Molycorp* court acknowledged that "in the event that a plan was not confirmed and the estate had become insolvent, the dollar-amount cap would have resulted in … [committee counsel] not being compensated for all the work it has performed." Plan confirmation meant that counsel for the committee had to be paid regardless of the cap under the financing order, given section 1129(a)(9)(A)'s requirement that all administrative claims be paid upon plan effectiveness.

After obtaining standing, the creditors' committee brought claims against the DIP lender, alleging fraud and "loan-to-own" tactics by the DIP lender; the litigation culminated in a settlement agreement between the DIP lender and the creditors' committee. Rather than a complete bar on professional fees in excess of $ 250,000, the carve-out, according to Judge Sontchi, "capped [the DIP lender]'s exposure and liability to payment of certain administrative expenses *in case no reorganization plan had been executed*." Had a plan not been confirmed and had the debtors' estates become administratively insolvent, the $250,000 cap would have resulted in committee counsel not being compensated for the work it had performed. However, a plan was confirmed and thus, the fees incurred by the committee, to the extent such fees were allowed as administrative claims (which they were), had to be paid by the debtors pursuant to section 1129(a)(9)(A). According to the court, the operative documents "do[] not connote in any way that the dollar-amount cap would operate as a complete bar against the allowance of administrative claims following plan confirmation." The court's opinion did not provide any guidance on whether a *per se* disallowance of administrative claims in a financing order carve-out would be effective or proper under the Bankruptcy Code. *Molycorp* suggests that a standard carve-out provision (without further elaboration or explicit terms) may not necessarily deter or prohibit a creditors' committee from incurring significant professional fees. That said, it is usually in all parties' best interests to keep case professional fees within reasonable limits.

C. *Ad Hoc* Committee Fees & Expenses

1. Substantial Contribution

Ad hoc committees may seek reimbursement for their time and effort through a request for payment of an administrative expense. Section 503(b)(3)(D) provides that an *ad hoc committee* may seek reimbursement of fees and expenses if it made a "substantial contribution" to the case. Fee awards to *ad hoc* committees are unusual. Thus, parties banding together to form an unofficial committee likely do so at their own financial cost.

In determining whether an *ad hoc* committee made a "substantial contribution," courts will examine whether the committee contributed to the reorganization process, conferred a significant, direct benefit to the estate as a whole (not merely the individual committee members), and whether the committee's efforts were duplicative of services performed by others, including the creditors' committee. Providing an incidental benefit to the estate is not sufficient. Nor will the *ad hoc* committee's extensive participation in the case, without more, meet the standard.

Some of the factors courts have considered include (i) whether the services were undertaken solely for the benefit of the party itself or for the benefit of all parties in the case; (ii) whether the services were actions that would have been taken by the party on its own behalf, absent an expectation of reimbursement from the estate; (iii) whether the party can demonstrate that its actions provided a direct, significant and demonstrable benefit to the estate; (iv) whether the benefit conferred upon the estate exceeds the costs sought to obtain the benefit; and (v) whether the actions were duplicative of those being taken by other parties in the case. Demonstrating a "substantial benefit" is a high standard that *ad hoc* committees will only infrequently be able to meet.

Of note, there have been some cases of *ad hoc* committees satisfying such burden. *See, e.g., In re M&G USA Corp*., 599 B.R. 256 (Bankr. D. Del. 2019) (Judge Shannon) (*ad hoc* committee of construction lienholders provided substantial contribution by, among other things, facilitating sale and plan settlements); *see also In re Bayou Group, LLC*, 431 B.R. 549 (Bankr. S.D. N.Y. 2010) (*ad hoc* committee made substantial contribution through prepetition services and activities).

2. Payment Through a Plan

Largely because of the difficulty of demonstrating a "substantial benefit" to creditors as a whole, *ad hoc* committees have attempted alternative methods of securing reimbursement of fees. Most commonly, *ad hoc* committees have attempted to bypass the substantial contribution standard by, usually with the debtor's assent in connection with a consensual plan of reorganization, embedding the repayment of fees into the plan itself.

Initially, some courts approved of this strategy. For example, in *In re Adelphia Communs. Corp.*, 441 B. R. 6 (Bankr. S.D.N.Y. 2010), the court concluded that an *ad hoc* committee could properly recover fees without any showing that the committee substantially benefited all creditors where the payment provision was included in the plan, which itself is subject to creditor votes and the approval of the court. In reaching this conclusion, the *Adelphia* court noted that section 503(b) "does not provide, in words or substance, that it is the *only* way by which fees of this character may be absorbed by an estate." In addition, other provisions of the Bankruptcy Code appear to contemplate that some payments, which perhaps would technically not qualify as administrative claims, might nonetheless be permissible. Section 1129(a)(4), for instance, allows payments in connection with the plan if the amount is disclosed and the court determines the payment is reasonable. Moreover, section 1123(b)(6) provides that a plan may include "any other appropriate provision not inconsistent with the applicable provisions of this title."

However, in the *Lehman Brothers* case (*In re Lehman Bros. Holdings, Inc.*, 508 B.R. 283 (S.D.N.Y. 2014)), the District Court for the Southern District of New York reversed the bankruptcy court holding that a reorganization plan could provide for the reimbursement of fees expended by individual official committee members, although not technically covered by section 503(b). The District Court criticized the *Adelphia* court's reasoning and concluded that the sole authority for the allowance and payment of administrative expenses was set forth in section 503(b), which does not permit compensation to counsel for individual committee members except on a substantial contribution basis. According to the *Lehman Bros.* court, reorganization

plans exist to pay (i) prepetition claims and (ii) postpetition administrative claims. Inasmuch as fees incurred *after* the petition date cannot, by definition, be treated as prepetition "claims," it follows that they can only be administrative claims, which can be reimbursed, if at all, only under section 503(b). In short, the Bankruptcy Code provides no basis for a third category of payments under a plan (even if voluntarily offered by the debtor) that do not otherwise qualify as "claims" or "administrative expenses." Using a plan provision to accomplish payment would "be based on wordplay alone." The District Court remanded the matter for a determination whether the conventional substantial contribution standard under section 503(b) might, under a more expanded record, be satisfied.

The *Lehman Bros.* decision questions the viability of recovering *ad hoc* professional fees through a plan provision. On the other hand, some courts may decline to follow the *Lehman Bros*. decision on the grounds that the admittedly non-exclusive listing of administrative expenses under section 503(b) should be flexible enough to accommodate a debtor's voluntary recognition of an *ad hoc* committee's beneficial participation in a case. Nevertheless, professionals for an *ad hoc* committee should not readily expect to be able to sidestep section 503(b)'s substantial contribution requirement.

IV. Investigation Issues

Examiners appointed under the Bankruptcy Code and examinations ordered under Rule 2004 of the Federal Rules of Bankruptcy Procedure are two powerful tools available for parties, including creditors' committees, wishing to launch investigations in connection with a debtor's bankruptcy case. While examiners are exclusive to chapter 11 reorganizations and rarely invoked absent allegations of wrongdoing, Bankruptcy Rule 2004 examinations are broad in scope and applicability and regularly employed by parties in need of more information about a debtor's affairs.

A. Bankruptcy Rule 2004 Examinations

Bankruptcy Rule 2004 grants courts broad authority to order examinations relating to a debtor's bankruptcy case. Despite that broad authority, there are several limitations and local nuances that shape application of the rule in practice.

Statutory Authority:

In pertinent part, the Bankruptcy Rule 2004 provides as follows:

> (a) Examination on Motion. On motion of any party in interest, the court may order the examination of any entity.
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> (b) Scope of Examination. The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter

> 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.
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> (c) Compelling Attendance and Production of Documents. The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.
>
> (d) Time and Place of Examination of Debtor. The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.
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Fed. R. Bankr. P. 2004 (subparagraph (e) regarding mileage reimbursement omitted).

Case Law:

By its own terms, the Bankruptcy Rule 2004 is permissive in nature. *See* Fed. R. Bankr. P. 2004(a) ("the court *may* order the examination") (emphasis added). Courts permit examination under Bankruptcy Rule 2004 if the movant demonstrates "good cause." *ePlus, Inc. v. Katz (In re Metiom Inc.)*, 318 B.R. 263, 268 (S.D.N.Y. 2004); *In re Dinubilo*, 177 B.R. 932, 940 (E.D. Cal. 1993). Good cause is generally shown when the "examination is necessary to establish the claim of the party seeking the examination, or if denial of such request would cause the examiner under hardship or injustice." *Dinubilo*, 177 B.R. at 943; *see also Bank One, Columbus, N.A. v. Hammond) In re Hammond*, 140 B.R. 197, 201 (S.D. Ohio 1992) (requiring only that the requesting party only demonstrate that an examination is reasonably necessary to protect its legitimate interests); *In re Wilcher*, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985).

In determining good cause, some courts have applied a "sliding scale" or "balancing" test by weighing the movant's interest in the examination against the amount of intrusiveness involved. *See, e.g.*, *In re Countrywide Home Loans, Inc.*, 384 B.R. 373, 393 (Bankr. W.D. Pa. 2008); *In re Express One Int'l, Inc.*, 217 B.R. 215, 217 (Bankr. E.D. Tex.1998); *In re Eagle-Picher Indus., Inc.*, 169 B.R. 130, 134 (Bankr. S.D. Ohio 1994); *Hammond*, 140 B.R. at 201; *In*

re Fearn, 96 B.R. 135, 138 (Bankr. S.D. Ohio 1989); *In re Texaco, Inc.*, 79 B.R. 551, 556 (Bankr. S.D.N.Y. 1987).

It is well-settled that the scope of Bankruptcy Rule 2004 is "unfettered and broad." *In re Washington Mut., Inc.*, 408 B.R. 45, 49 (Bankr. D. Del. 2009) (citing *In re Bennett Funding Grp., Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996)); *In re N. Plaza LLC*, 395 B.R. 113, 122 n. 9 (S.D. Cal. 2008); *In re GHR Energy Corp.*, 33 B.R. 451, 452 (Bankr. D. Mass. 1983). The scope is so broad that courts often describe examinations under the rule as "fishing expedition." *See, e.g., Wilcher*, 56 B.R. at 433; *In re Johns-Manville Corp.*, 42 B.R. 362, 364 (S.D.N.Y. 1984). In practice, examinations under Bankruptcy Rule 2004 are similar in scope to that of a section 341 meeting of creditors. *See In re Muy Bueno Corp.*, 257 B.R. 843, 849-51 (Bankr. W.D. Tex. 2001) ("the scope of examination permitted at a meeting of creditors and at a Rule 2004 examination are essentially coterminous[,]" and the latter "acts as a 'supplement' to the § 341 meeting.") (citing *In re Carbone*, 254 B.R. 1, 4 (Bankr. D. Mass. 2000) (quotation omitted)).

Specifically, "[Bankruptcy] Rule 2004 affords a party in interest an opportunity to conduct a wide-ranging examination with respect to a debtor's financial affairs." *Texaco*, 79 B.R. at 553; *In re Roman Cath. Church of Diocese of Gallup*, Nos. 13-13676-t11, 13-13677-t11, 2014 WL 3339618, at *1 (Bankr. D. N.M. July 8, 2014) (noting that examinations are used to "ascertain the extent and location of the estate's assets"); *see also In re Drexel Burnham Lambert Grp. Inc.*, 123 B.R. 702, 708 (Bankr. S.D.N.Y. 1991). "[A]ny entity" is subject to examination under Bankruptcy Rule 2004. *See* Fed. R. Bankr. P. 2004(a). The rule's text provides for discovery relating "to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge." Fed. R. Bankr. P. 2004(b). The scope is expanded for chapter 11, 12, and 13 cases, in which "the examination may also related to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered thereof, and any other matter relevant to the case or to the formulation of a plan." *Id.*

Although Bankruptcy Rule 2004 examinations are well-recognized as being broad in nature, they are not without limitations. *In re Buccaneer Res. LLC*, No. 14-60041, 2015 WL 8527424, at *6 (Bankr. S.D. Tex. Dec. 10, 2015); *Eagle-Picher*, 169 B.R. at 134; *Texaco*, 79 B.R. at 553. Examinations cannot be used for purposes of abuse, harassment, or to investigate matters irrelevant to the debtor's bankruptcy. *Washington Mut.*, 408 B.R. at 50. Furthermore, the so-called "pending proceeding rule" prohibits Bankruptcy Rule 2004 discovery when adversary proceedings or other outside litigation is pending. *See, e.g., In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002); *Snyder v. Soc'y Bank*, 181 B.R. 40, 42 (S.D. Tex. 1994), *aff'd sub nom. In re Snyder*, 52 F.3d 1067 (5th Cir. 1995); *In re 2435 Plainfield Ave. Inc.*, 223 B.R. 440, 455-56 (Bankr. D. N.J. 1998) (collecting cases). Bankruptcy courts have prohibited the use of Bankruptcy Rule 2004 in such situations because it lacks many procedural safeguards afforded under the Federal Rules of Civil Procedure. *N. Plaza*, 395 B.R. at 122 n. 9. For example, a Bankruptcy Rule 2004 examinee has no general right to legal representation during an examination, and the ability to object to irrelevant or improper questions is limited. *Washington Mut.*, 408 B.R. at 50 (citing *Dinubilo*, 177 B.R. at 940).

Courts have also limited or outright prohibited Bankruptcy Rule 2004 examinations in other predictable situations. *See, e.g., In re French*, 145 B.R. 991, 993 (Bankr. D. S.D. 1992) (no examination of debtor's attorney); *In re Carmelo Bambace Inc.*, 134 B.R. 125, 130 (Bankr. S.D.N.Y. 1991) (post-confirmation; no assets remaining); *In re Fin. Corp. of Am.*, 119 B.R. 728, 733 (Bankr. C.D. Cal. 1990) (privilege asserted); *In re Kekahuna*, 35 B.R. 13, 14 (Bankr. D. Haw. 1983) (case closed); *Wilcher*, 56 B.R. at 440 (barred by *res judicata* and collateral estoppel).

In addition to the above substantive limitations on Bankruptcy Rule 2004 examinations, several jurisdictions impose local rules that require parties to meet and confer prior to seeking court relief with respect to an examination. *See, e.g.,* Del. Bankr. L.R. 2004-1; N.D. Tx. L.B.R. 2004.1; C.D. Cal. LBR 2004-1; N.D. Ga. BLR 2004-1. Other courts follow an alternative procedure under which no order for an examination is required, and instead parties are permitted to independently schedule examinations and move for protective orders if necessary. *See, e.g.*, Bankr. S.D. Fla. L.R. 2004-1; Bankr. D. Md. L.R. 2004-1(b). The majority of courts, however, do not impose any additional rules.

B. Examiners

Chapter 11 examiners are creatures of statute whose appointment, selection, approval, and duties are governed by Bankruptcy Code sections 1104 and 1106 and Bankruptcy Rule 2007.1. Although relatively rare, examiners have existed in one form or another since the Bankruptcy Act, and they have continued to play an important role in chapter 11 reorganizations under the Bankruptcy Code. In some cases, the appointment of a chapter 11 examiner, depending on the specific tasks and responsibilities given to him or her and the circumstances of the chapter 11 case, may result in a smaller investigative and monitoring role for creditors' committees. On the other hand, in some cases, an examiner's examination may ultimately result in further activity and participation by a creditors' committee, including the committee possibly pursuing claims and causes of action investigated by the examiner.

Statutory Authority:

The standards for whether an examiner should be appointed and how one may be selected are specifically set forth in paragraphs (c) and (d) of section 1104 of the Bankruptcy Code:

> (c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—
>
> > (1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

> (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.
>
> (d) If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case.

11 U.S.C. §§ 1104(c) & (d).

In turn, Bankruptcy Rule 2007.1(c) provides the procedure by which the appointment of an examiner may be approved by the court:

> (c) Approval of Appointment. An order approving the appointment of a trustee or an examiner under § 1104(d) of the Code shall be made on application of the United States trustee. The application shall state the name of the person appointed and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, or persons employed in the office of the United States trustee. The application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2007.1(c).

The scope of an examiner's statutory duties are established by Bankruptcy Code section 1106(b):

> (b) An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) [investigate debtor] and (4) [report on investigation] of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

11 U.S.C. § 1106(b).

History:

The chapter 11 examiner's roots can be found in chapter X of the former Bankruptcy Act,[4] which also provided for the position of an examiner. *See* Paula D. Hunt, *Bankruptcy Examiners Under Section 1104(b): Appointment and Role in Complex Chapter 11 Reorganizations of Failed LBOs*, 70 WASH. U. L. Q. 821, 825 (1992). Although the legislative history of the Bankruptcy Code sections governing examiners is relatively scarce, we at least know that the language of section 1104(c), which sets forth the standard for appointing an examiner, is the result of a compromise. *Id.* at 827. Specifically, the apparent mandate of section 1104(c)(2) that an examiner must be appointed in cases where certain debts exceed five million dollars stems from differing approaches of the House and Senate with respect to the reorganization of private and public companies. *Id*. Before the compromise, the House bill made the appointment of either a trustee or an examiner discretionary without regard to the amount of certain debt, and the Senate bill retained the Bankruptcy Act's mandatory appointment of a trustee in public companies' reorganization cases, while allowing the appointment of an examiner only upon a showing of "cause." *Id.* at 827-28 (citing H.R. 8200, 95th Cong., 2d Sess. (1978) and S. 2266, 95th Cong. 2d Sess. (1977)). Thus, the statute's current form, which grants the court discretion in appointing either a trustee or an examiner, yet apparently mandates an examiner's appointment in cases over certain debt limits, represents a compromise between the two approaches. Nevertheless, courts, academics, and practitioners alike disagree as to the import of the legislative history when interpreting and applying the examiner provisions of the Bankruptcy Code.

Case Law:

The standards for appointment of an examiner can be gleaned from the statute's text, which requires that: (a) no trustee has been appointed; (b) no plan has been confirmed; (c) a party in interest or the United States trustee has requested an examiner; and (d) either (i) such appointment is in the interests of the creditors, any equity security holders, and other interests of the estate, or (ii) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed five million dollars. *See* 11 U.S.C. § 1104(c). An examiner's role is to conduct an independent investigation and issue a report that helps interested parties make decisions with respect to the bankruptcy case. *See, e.g., In re FiberMark*, 339 B.R. 321, 325 (Bankr. D. Vt. 2006) (stating that examiners perform objective investigations, "thereby allowing the parties to make an informed determination as to their substantive rights").

Assuming that no trustee has been appointed, no plan has been confirmed, and a motion has been made by a party with standing, appointment under Bankruptcy Code section 1104(c)(1) has been considered to be "in the best interests of an estate" where "such appointment allows for a thorough, independent, and expeditious examination to be made into serious allegations." *See In re JNL Funding Corp.*, No. 10-73724, 2010 WL 3448221, at *3 (Bankr. E.D.N.Y. Aug. 26, 2010); *see e.g., In re Keene Corp.*, 164 B.R. 844, 856 (Bankr. S.D.N.Y. 1994) (stating that "a textbook case calling for the appointment of an examiner in the interest of creditors" existed where there were allegations of fraud and potential avoidance claims against an insider). If the

[4] Chandler Act, 52 Stat. 840 (1938).

Bankruptcy Code section 1104(c)(1) "best interests" standard is not met, then an examiner may still be appointed if the debt threshold of section 1104(c)(2) is met.

Some courts have held that, if either requirement is met, appointment of an examiner is mandatory. *See, e.g., Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 501 (6th Cir. 1990); *Walton v. Cornerstone Ministries Invs., Inc.*, 398 B.R. 77, 81-82 (N.D. Ga. 2008); *Loral S'holders Protective Comm. v. Loral Space & Commc'ns, Ltd.* (*In re Loral Space & Commc'ns, Ltd.)*, No. 04 C.V. 8645RPP, 2004 WL 2979785, at *5 (S.D.N.Y. Dec. 23, 2004); *In re Schepps Food Stores, Inc.*, 148 B.R. 27, 31 (S.D. Tex. 1992): *In re Erickson Retirement Cmtys., LLC*, 425 B.R. 309, 312 (Bankr. N.D. Tex. 2010); *In re UAL Corp.*, 307 B.R. 80, 84 (Bankr. N.D. Ill. 2004); *In re Enron Corp.*, No. 01-16034 (AJG), 2002 WL 32150478, at *4 (Bankr. S.D.N.Y. Feb. 13, 2002); *In re Rutenberg*, 158 B.R. 230, 232 (Bankr. M.D. Fla. 1993).

Other courts have held that appointment is not mandatory, even when the debt threshold is met in some cases, because the phrase "as is appropriate" in section 1104(c) grants discretion in determining whether to appoint an examiner on a case-by-case basis. *In re Dewey & LeBoeuf LLP*, 478 B.R. 627, 639 (Bankr. S.D.N.Y. 2012) (examiner appointment sought as improper litigation tactic); *In re Washington Mut. Inc.*, No. 08-12229, Dkt. No. 3699 (Bankr. D. Del. May 5, 2010) (debtor had already been "investigated to death"); *In re Spansion, Inc.*, 426 B.R. 114, 126 (Bankr. D. Del. 2010) (parties had already conducted extensive discovery); *cf. In re Magna Ent. Corp.*, No. 09-10720, Dkt. 2442, Tr. at 13:4-14:14 (Bankr. D. Del. Apr. 28, 2010) (declining to appoint examiner where a parallel investigation would render appointment a "futile act"); *IdleAire Techs. Corp.*, No. 08-10960, Tr. at 45-46 (Bankr. D. Del. June 13, 2008) (same). Courts refusing to appoint an examiner often do so out of concern for wasting precious estate assets.

Furthermore, some courts that recognize mandatory appointment still limit the role of the examiner by ordering that he or she has no duties by invoking their discretion to limit scope. *See, e.g., In re Cenveo, Inc.*, No. 18-22178, Dkt. No. 467, at 2-3 (Bankr. S.D.N.Y. June 6, 2018) (examiner's role limited where debtors and committee had already conducted their own investigations); *In re Erickson Ret. Cmtys., LLC*, 425 B.R. 309, 317 (Bankr. N.D. Tex. 2010) (noting that the court would, if it were not for other prevailing issues, appoint an examiner with "no duties" because it "would be hard pressed to find any useful purposes for an examiner."); *see also In re ACandS, Inc.*, No. 02-12687, Tr. at 130-32 (Bankr. D. Del. Nov. 18, 2002) (calling the appointment of a "stand-by examiner" an "utter and complete waste of money and well as time" in light of parallel investigations by other parties).

In any event, when a bankruptcy court determines that it is mandatory or appropriate to appoint an examiner, it is often to investigate prepetition transactions, conflicts, and potential estate causes of action. *See, e.g., In re Caesars Ent. Operating Co., Inc.*, Case No. 15-01145, Dkt. No. 675 (Bankr. N.D. Ill. 2015) (appointing examiner to investigate prepetition leveraged buyout transactions and potential conflicts arising therefrom); *In re Dynegy Holdings, LLC*, Case No. 11-38111, Dkt. No. 276 (Bankr. S.D.N.Y. 2011) (directing examiner appointment in connection with prepetition restructuring transactions and potential conflicts arising from debtor's professionals' representation of non-debtor parties to the transactions); *In re Residential Cap., Inc.*, Case No. 12-12020, Dkt. No. 454 (Bankr. S.D.N.Y. 2012) (investigation of prepetition transactions); *In re Dade Behring Holdings Inc.*, Case No. 02-29020, Dkt. No. 99 (Bankr. N.D. Ill. 2002) (same); *see also In re Tribune Co.*, Case No. 08-13141, Dkt. No. 4120

(Bankr. D. Del. 2008) (appointing examiner to investigate causes of action proposed to be released, conveyed, or settled under proposed plan); *In re Washington Mut. Inc.*, Case No. 08-12229, Dkt. No. 5120 (Bankr. D. Del. Jul. 22, 2010) (investigation of estate causes of action).

V. Exclusivity Issues

A. Debtor's Exclusivity Periods in General

Section 1121(b) of the Bankruptcy Code provides that only the debtor may file a chapter 11 plan through the first 120 days after the order for relief.[5] This "exclusivity period" serves "to provide a debtor, at the outset of a chapter 11 case, with 'the unqualified opportunity to negotiate a settlement and propose a plan of reorganization without interference from creditors and other interests.'" *U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 139-40 (Bankr. D. Del. 2010) (quoting *In re Texaco, Inc*., 81 B.R. 806, 809 (Bankr. S.D. N.Y. 1988)). This 120 day period may be reduced or extended "for cause" by order of the court on a motion filed within the exclusivity period. Section 1121(d)(2)(A) provides, however, that the court may not extend the 120 day exclusive period beyond a date that is 18 months after the date of the order for relief.

If the debtor files a plan within the 120 day exclusivity period, section 1121(c)(3) extends exclusivity to 180 days after the order for relief to permit the debtor to solicit acceptances of the plan in accordance with sections 1126 and 1129(a) without the interference of a competing plan. The 180 day period referenced in section 1121(c)(3) may itself be extended by the court for cause, but the extended period may not be enlarged by the court beyond a date that is 20 months after the date of the order for relief.

Subsection 1121(d) provides that upon the request of a party in interest made within the 120 day period for filing a plan or within the extended 180-day period (if a plan is filed), the court for cause may reduce or increase the 120 day period or the 180 day period. As observed by one bankruptcy court, it is typically very difficult for committees and other interested parties to prevail in terminating or shortening a debtor's exclusivity periods. *See In re Fansteel, Inc*., 2017 Bankr. LEXIS 551, at *9 (Bankr. S.D. Iowa Feb. 28, 2017) ("A survey of case law reveals that finding cause to reduce or terminate exclusivity is the exception, not the rule." (citations omitted)).

B. The Determination of Whether Cause Exists Is Fact Specific

The determination of whether cause exists to justify a reduction of the statutory time periods is fact specific. Cause to extend has been found where, for example, the debtor has continually proposed plans and attempted to negotiate with the creditors. Cause has been found not to exist, for instance, where the debtor's case is not complex, where there has been no

[5] This exclusive right is conditioned upon the debtor's status as debtor-in-possession, and thus, when a trustee is appointed, the debtor's exclusivity period terminates. Section § 1121(c) provides that appointment of a trustee, pursuant to standards set forth in 11 U.S.C. § 1104, will cause a debtor to lose the exclusive right to file a plan.

progress in arranging financing, or where an extension or continuation of the debtor's exclusivity period would be futile. Some courts have held or suggested that the creditors' loss of confidence in the capability of debtor's management and/or the key parties' acrimonious relationship are substantial factors to consider in determining cause. *See, e.g., In re All Seasons Indus., Inc.*, 121 B.R. 1002, 1006 (Bankr. N.D. Ind. 1990) (denying extension of exclusivity when "such an extension would have the result of continuing to hold creditors hostage to the Chapter 11 process and pressuring them to accept a plan they believe to be unsatisfactory"; "these creditors have lost faith in the capability and perhaps the integrity of debtor's management"); *In re Crescent Beach Inn, Inc.*, 22 B.R. 155, 160-61 (Bankr. D. Me. 1982) ("Shortening the debtor's exclusive period for filing a plan will permit any party in interest, including parties with perhaps a more objective view of the debtor's circumstances, to file a plan.").

Various courts have enumerated some or all of the following factors to be considered in determining whether cause exists for an extension or termination of the debtor's exclusivity period: (i) the size and complexity of the case; (ii) the necessity of adequate time to negotiate and prepare adequate information; (iii) good faith progress toward reorganization; (iv) whether the debtor is paying its debts as they come due; (v) whether the debtor has demonstrated reasonable prospects for filing a viable plan; (vi) whether the debtor has made progress in negotiating with creditors; (vii) the length of time the case has been pending; (viii) whether the debtor is seeking the extension to pressure creditors; and (ix) whether unresolved contingencies exist. *See, e.g., In re Adelphia Communications Corp*., 352 B.R. 578, 587-90 (Bankr. S.D. N.Y. 2006) (reviewing each of the nine factors as applied to the facts of the case and granting an extension); *In re Express One Int'l, Inc*., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996) (finding cause to extend exclusivity period where debtor had been diligent in its attempts to reorganize and extension was not sought for an indefinite period); *In re Fountain Powerboat Indus.*, 2009 Bankr. LEXIS 4015 (Bankr. E.D.N.C. Dec. 4, 2009) (analyzing all of the nine foregoing factors). One bankruptcy court has stated that the overriding factor is whether terminating the debtor's exclusivity would facilitate moving the case forward. *In re Dow Corning Corp*., 208 B.R. 661, 670 (Bankr. E.D. Mich. 1997).

C. Impact on Committees and Creditors in General

The debtor's exclusivity period is designed to give the debtor sufficient time to formulate a plan by negotiating with creditors and, if applicable, equity holders. This period allows the debtor to retain control over the reorganization and, in many cases, gives current management a significant role in shaping the debtor's post-confirmation future. These benefits to the debtor come at the expense of creditors whose actions are generally stayed during this time. In some cases, the duration of the exclusivity period can be a major factor in affecting the balance of debtor control and creditor control.[6]

[6] *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 232, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5963 ("The court is given the power, though, to increase or reduce the 120-day period depending on the circumstances of the case. For example, if an unusually large company were to seek reorganization under [C]hapter 11, the court would probably need to extend the time in order to allow the debtor to reach an agreement. If, on the other hand, a debtor delayed in arriving at an agreement, the court could shorten the period and permit creditors to formulate and propose a reorganization plan. Again, the bill allows the flexibility for individual cases that is unavailable today.").

Further, if the committee is successful in terminating, or opposing an extension of, the debtor's exclusivity period, subject to the terms of the court's order, the door may be opened for other parties in interest, including key creditors, to propose their own competing plans. As a result, the debtor's plan process may become unfocused, delayed, more costly, and disorderly, with multiple parties vying for control of the chapter 11 case. Moreover, an ineffective or mired plan process may interfere with or prejudice other important case developments such as sales and sale processes that must be expeditiously implemented for the benefit of the estate and its creditors.

Thus, in many cases, when the committee determines to attempt to terminate or shorten the debtor's exclusivity period, the committee should have its own plan and disclosure statement ready for filing immediately or shortly after the court's ruling or otherwise have another plan of action ready (including negotiations with the key players) to ensure that any termination of the debtor's exclusivity period will not result in chaos, as well as to demonstrate to the court that practical considerations support terminating the debtor's exclusivity period. *See, e.g., In re Borders Group, Inc*., 460 B.R. 818, 827-28 (Bankr. S.D.N.Y. 2011) ("[T]he Committee acknowledges that, at the present time, it does not intend to file its own proposed plan; it just wants to be able to do so without having first to make a motion to reduce Debtors' exclusivity period. Quite frankly, the Court finds it hard to take the Committee's position seriously in light of its stated intention not to file a plan at this time. Terminating exclusivity at this time would also create a situation where the estates could be saddled with multiple and competing plans.").

D. Committee's Efforts to Terminate Exclusivity

1. Use of Bankruptcy Rule 2004 Examinations

In connection with a committee's opposition to an extension of the debtor's exclusivity period or motion to terminate exclusivity, as well as a committee's efforts to formulate its own proposed plan, the creditors' committee will need information to (i) determine reorganization, liquidation and/or a combination thereof is the best alternative to maximize recoveries for unsecured creditors and (ii) negotiate with a debtor and other key players on an informed basis regarding the terms of a plan. A committee's role in the plan process is frequently cited as the committee's most important role in a chapter 11 case. *See, e.g., In re Structurlite Plastics Corp*., 91 B.R. 813, 819 (Bankr. S.D. Ohio 1989) ("participation in the formulation of a plan represents the foremost of committee's functions"); *Davis v. Elliot Management Corp. (In re Lehman Brothers Holdings Inc.)*, 508 B.R. 283, 287 (S.D.N.Y. 2014) (similar).

In the first instance, the committee will typically request relevant information from the debtor (Code section 1103(d) requires the debtor in possession to meet with the committee to discuss appropriate case matters). However, to the extent that a debtor is uncooperative, a committee may avail itself of Bankruptcy Rule 2004 and examine a debtor's management and principals, as well as other third parties. The subject of Rule 2004 examinations is discussed in depth in the preceding sections.

2. Considerations for the Committee

In preparation for or otherwise in connection with a committee's request to terminate exclusivity, creditors' committees should carefully consider their actions as to the submission and distribution of any competing committee plan. In most cases, plan related negotiations entered into by a committee and a secured lender or other key creditor should not implicate Code section 1125, which prohibits solicitation prior to the approval of a disclosure statement. *See, e.g., Century Glove, Inc. v. First American Bank*, 860 F.2d 94, 102-03 (3d Cir. 1988) (counsel for lender did not violate sections 1121 or 1125 by sending a draft alternative plan to committee for discussion purposes because he was not soliciting votes, but merely properly engaging in plan negotiations). However, it is unsettled whether it is permissible for a non-debtor party during the debtor's exclusivity period to file an alternative plan in some form without the intent of soliciting acceptances (for example, attaching the alternative plan as an exhibit to a motion to terminate exclusivity).

Some courts interpret "solicitation" for purposes of section 1125 in the broadest sense of the word, encompassing even the act of attaching a proposed competing plan or disclosure statement to a pleading. *See, e.g.*, *In re Charles Street African Methodist Episcopal Church of Boston*, 499 B.R. 126, 132 (Bankr. D. Mass. 2013) (creditor effectively filed competing plan in violation of debtor's exclusivity by attaching it to motion to terminate exclusivity); *In re Clamp-All Corp.*, 233 B.R. 198, 205-207 (Bankr. D. Mass. 1999) (attaching potential competing plan and disclosure statement to creditor's combined objection to debtor's disclosure statement and motion to terminate exclusivity violated sections 1121(b) and 1125(b) and Fed. Bankr. R. 3017(a)). Arguably, to allow a committee or other non-debtor party to file an alternative plan as an exhibit during the debtor's exclusivity period because, for instance, it is labeled as "draft" appears to elevate form over substance. *But see, e.g., In re Thrifty Oil Co*., 205 B.R. 1009, 1016 (Bankr. S.D. Cal. 1997) (committee attached alternative draft plan to its opposition to debtor's motion to extend exclusivity); *In re Deval Corp*., 592 B.R. 587, 592 (Bankr. E.D. Pa. 2018) (party in interest attached draft alternative plan to its objection to extension of debtor's exclusivity).

More recently, some creditors' committees have filed separate motions seeking authority to submit alternative plans in connection with a motion to terminate exclusivity, opposition to a debtor's motion to extend exclusivity, or other pleading. For example, the committee in the Neiman Marcus case (Case No. 20-32519 (DRJ)) (Bankr. S.D.Tex.)) filed a motion ("plan exhibit motion") in advance of its planned motion to terminate exclusivity ("exclusivity motion"), to attach a copy of the committee's alternative plan and disclosure statement to the exclusivity motion. *See In re Neiman Marcus Group Ltd. LLC*, Case No. 20-32519 (DRJ) (Bankr. S.D. Tex. June 21, 2020) (dkt. no. 954). The Neiman Marcus committee stated it filed the plan exhibit motion out of an abundance of caution, because it believed that attaching the committee plan to the exclusivity motion was permissible under the Bankruptcy Code. Ultimately the court denied the plan exhibit motion based on the circumstances of that case, but gave the committee the option to file its disclosure statement under seal, with the unsealed version provided to the judge, by a certain future date. Depending on the circumstances of the chapter 11 case and the committee's strategy, a committee may want to consider seeking "comfort orders" as to alternative plan related matters during the debtor's exclusivity period.

Faculty

Hon. Janet S. Baer is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed on March 5, 2012. She also acts on a regular basis as the presiding judge in the Northern District of Illinois for naturalization ceremonies. Previously, Judge Baer was a restructuring lawyer for more than 25 years and was involved in some of the most significant chapter 11 bankruptcy cases in the country. The majority of her practice focused on the representation of large, publicly held debtors in both restructuring and chapter 11 matters, and she also represented companies in commercial litigation matters, including lender liability, fraud, breach of contract and breach of fiduciary duty. Prior to forming her own firm in 2009, Judge Baer was a partner at Kirkland & Ellis LLP, Winston & Strawn and Schwartz, Cooper, Greenberger & Krauss. She is a member of the ABI and NCBJ Boards of Directors, the CARE Advisory Board and the Chicago IWIRC Network Board, as well as several committees. She also is a frequent speaker for ABI, the ABA, the Chicago Bar Association, IWIRC and NCBJ, and she regularly acts as the presiding judge for the Northern District of Illinois in naturalization ceremonies. Judge Baer earned her B.A. from the University of Wisconsin - Madison and her J.D. from DePaul College of Law.

Hon. Kevin R. Huennekens was appointed as a U.S. Bankruptcy Judge for the Eastern District of Virginia in Richmond on Sept. 11, 2006. Prior to his appointment, Judge Huennekens was a partner with the firm of Kutak Rock LLP. He also served as a panel trustee for the U.S. Bankruptcy Court for the Eastern District of Virginia (1988-2006) and is co-editor of the Virginia CLE publication *Bankruptcy Practice in Virginia* (2017). Judge Huennekens is a Fellow of the American College of Bankruptcy and a member of the National Conference of Bankruptcy Judges and ABI. He was also recognized in *Who's Who Legal USA* in Insolvency and Restructuring and *The International Who's Who of Insolvency and Restructuring* in 2006, and was listed in *The Best Lawyers in America* from 1995-2006. Judge Huennekens was an adjunct professor of law at the College of William & Mary Marshall Wythe School of Law from 1993-96, and he successfully argued the case of *Patterson v. Shumate*, 405 U.S. 253, 112 S. Ct. 2242 (1992), before the U.S. Supreme Court. He is a planning committee member of the annual Mid-Atlantic Institute on Bankruptcy and Reorganization Practice and has also been a speaker at Virginia CLE courses on basic and advanced bankruptcy. He is also a co-editor of the Virginia CLE Publication, *Bankruptcy Practice in Virginia* (2017). Judge Huennekens chaired the Advisory Committee on Executory Contracts and Leases of the ABI Commission to Study the Reform of Chapter 11. He received his B.A. from the College of William & Mary and his J.D. from the Marshall-Wythe School of Law at the College of William & Mary, where he was a member of the Order of the Coif and its law review.

Laura Davis Jones is a named partner and managing partner of Pachulski Stang Ziehl & Jones LLP in Wilmington, Del., and is a legal and strategic advisor to debtors, creditors' committees, bank groups, acquirers and other significant constituencies in national chapter 11 cases and workout proceedings. She is a Fellow of the American College of Bankruptcy and a *Chambers USA* "Star Individual," the highest honor a lawyer can receive. Ms. Jones started her career as a judicial law clerk in the U.S. Bankruptcy Court for the District of Delaware, and upon entering private practice quickly gained national recognition as debtors' counsel in the *Continental Airlines* bankruptcy case. She has gone on to counsel and co-counsel clients in national matters, including the recent bankruptcy filings

of True Religion, TK Holdings (Takata), Emerald Oil, Aquion Energy and M&G Corp. Ms. Jones has been named a "Deal Maker of the Year" by *The American Lawyer*, has been recognized as a top practitioner by *Lawdragon 500* and *K&A Restructuring Register*, and has been named one of the "Best Lawyers in Delaware" by *Best Lawyers*, as well as one of the top ten lawyers in Delaware by Thomson Reuters. Ms. Jones received her undergraduate degree from the University of Delaware and her J.D. from Dickinson School of Law, where she was on the board of editors and business manager for the *Dickinson Law Review*, and served on the Appellate Moot Court Board.

Shanti M. Katona is a shareholder with Polsinelli PC in Wilmington, Del., and vice chair of the firm's national Bankruptcy and Restructuring practice. She regularly represents debtors, creditors, purchasers, sellers and other interested parties in all capacities and stages. Ms. Katona has substantial litigation experience in both federal and state courts, including fiduciary duty and avoidance action litigation. She co-chairs ABI's Mid-Atlantic Bankruptcy Workshop and speaks frequently on various topics relating to bankruptcy and judgment enforcement, as well as women in the law. Ms. Katona was one of the primary drafters of the inaugural Polsinelli/TrBK Healthcare Distress Indices, which has been widely cited across industries. She also is a proud member of Polsinelli's Women's Empowerment Committee and co-wrote an article on bridging the gender gap in the restructuring industry for *The Wall Street Journal*. Ms. Katona is a member of the ABI's Diversity and Inclusion Working Group, and also serves on the executive boards for the Delaware Chapter for the International Women's Insolvency & Restructuring Confederation and the South Asian Bar Association of Delaware. For her efforts, she has been named a *Delaware Super Lawyers* "Rising Star" and was selected as one of the inaugural class of ABI's "40 Under 40" in 2017. Prior to becoming a lawyer, Ms. Katona was a social science research analyst with the Social Security Administration working on policy initiatives relating to the Supplemental Security Income program. She received her undergraduate degree from the University of Pennsylvania and her J.D. from Washington University in St. Louis.

Hon. Christopher S. Sontchi is Chief U.S. Bankruptcy Judge for the District of Delaware in Wilmington, initially appointed in 2006, and is a frequent speaker in the U.S. and abroad on issues relating to corporate reorganizations. He also is a Lecturer in Law at The University of Chicago Law School and teaches corporate bankruptcy to international judges through the auspices of the World Bank and INSOL International. Judge Sontchi is a member of the International Insolvency Institute, Judicial Insolvency Network, National Conference of Bankruptcy Judges, ABI and INSOL International. He was recently appointed to the International Advisory Council of the Singapore Global Restructuring Initiative and the Founders' Committee of The University of Chicago Law School's Center on Law and Finance. Judge Sontchi has published articles on creditors' committees, valuation, asset sales and safe harbors. Prior to his appointment, he was in private practice, representing a wide variety of nationally based enterprises with diverse interests in most of the larger chapter 11 reorganization proceedings filed in Delaware. Judge Sontchi served on the ABI Commission to Study the Reform of Chapter 11's Financial Contracts, Derivatives and Safe Harbors Committee and testified on safe harbors for financial contracts before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary. Following law school, Judge Sontchi clerked for Hon. Joseph T. Walsh in the Delaware Supreme Court. He received his B.A. Phi Beta Kappa with distinction in political science from the University of North Carolina at Chapel Hill and his J.D. from the University of Chicago Law School.