
Litigation Claims by Trustees

Avoiding Pitfalls at Plan Confirmation and
the Investigation Phase
February 10, 2022

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Pitfall #1:

Properly Preserving Post- Confirmation Causes of Action

§ 1123(b)(3)(B) provides authority to preserve post-confirmation claims.

Disputes may later arise over whether specific claims were adequately preserved in the Plan:

- Claims may have been overlooked or not fully investigated.
- Plan may identify litigation claims too generally.
- Potential litigation targets may not have been identified.
- Post-confirmation investigation may reveal new claims .

What steps can help ensure maximum preservation of potential claims?

CLAIM ASSESSMENT

- Consider all possible claims and litigation targets.
- Describe claims investigation efforts in disclosure statement.
- Identify potential claims as specifically as possible
- Utilize plan supplement

APPOINTMENT OF ESTATE REPRESENTATIVE

- Plan/ disclosure statement should describe appointment process in detail.
- Ensure trust agreement works in concert with the confirmation order.

Pitfall #2:

Anticipating Privilege Issues

Debtor's privilege may not automatically transfer to the post-confirmation trustee.

Plan structure may affect of privilege ownership:

- If debtor remains in existence separately from the litigation trust, not all privileges may be afforded to the litigation trust.
- Post-effective date litigation funding can pose privilege issues if not properly addressed at the plan stage.

Privilege issues should be addressed in the plan



CLARITY OF PRIVILEGES

- If multiple post-ED entities, consider which hold privileges
- Trustee should be afforded all privileges relevant to preserved causes of action
- Consider Trustee's ability to obtain documents produced during the case (UCC work product, confidential documents)
- Ensure consistency between Plan and Trust Agreement

LITIGATION FUNDING

- If litigation funders will finance the cost of post-ED litigation, consider extending work product protections to such funders

Pitfall #3:

Beware of Standing

Trustee standing issues involving Delaware LLCs can be a trap for the unwary.

Delaware LLCs face unique standing pitfalls (*CML V v. Bax*):

- Creditors of Delaware LLC lack standing to pursue derivative breach-of-fiduciary-duty claims, even if the LLC is insolvent or near insolvent.
- Litigation Trustees: Delaware LLC Act limits derivative standing to members of the LLC or assignees of LLC interest.
- Dissolution of Debtor: If debtor no longer exists, could cause standing issue for Trustee.

Preserve and protect standing in the Plan!

AVOID STANDING PITFALLS IN THE PLAN

- Does plan provide that Debtor interests will be cancelled? Consider assigning interests to trust.
- Does plan state that CoA will be transferred? Consider using the term “assigned.”
- Consider avoiding plan provisions that automatically dissolve each debtor. Instead, grant the Trustee authority to dissolve or terminate any of the debtors following the effective date.

Pitfall #4:

Preserve Rights Under Indenture

Plans typically cancel existing securities, including notes, bonds, and indentures.

But canceling an indenture can affect post-confirmation litigation claims:

- Plan might extinguish rights of Indenture trustee.
- If rights are not adequately preserved, post-confirmation Trustee may not be able to bring those claims.

Preserve indenture rights for litigation

INCLUDE VERY SPECIFIC PRESERVATION LANGUAGE

- Cancellation of securities provision expressly stating that notes and indenture shall continue in effect to, among other things, preserve all rights of the Indenture Trustee and holders of the notes to pursue all of the retained causes of action to the extent necessary for the litigation/liquidation trust to pursue those causes of action.
- Provision providing that Indenture and notes are continued to, among other things, (i) allow holders to receive distributions under the plan; (ii) allow the Indenture Trustee to make distributions pursuant to the plan; (iii) preserve the Indenture Trustee's right to compensation and indemnification; (iv) preserve all rights, including rights of enforcement, of the Indenture Trustee against any non-released parties, including with respect to indemnification and contribution; (v) permit the Indenture Trustee to appear in the bankruptcy proceeding or any other court; and (vi) permit the Indenture Trustee to enforce any obligation owed to it under the Plan.

Pitfall #5:

*Consider How
Other Plan
Provisions
Might Affect
Litigation
Claims*

Many Plan provisions can impact litigation

Some other common pitfalls.

- Ambiguous or overly broad release provisions
- Insufficient Trustee access to materials
- Proper retention of jurisdiction

Examine Plan as a Whole for Litigation Pitfalls

- Construct plan with an eye towards litigation pitfalls.
- Terms are often defined for purposes aside from litigation. Consider utilizing specialized defined terms for preservation and release provisions.
- Avoid ambiguous or overly broad release provisions that may cause later disputes or unwittingly release potential litigation targets.
- Set up the litigation trustee to easily access necessary materials:
 - Set up access to debtor books and records.
 - Provide for access to knowledgeable employees and potential company witnesses
 - Consider chain of custody of documentary evidence

Faculty: Litigating Claims by Trustees: Avoiding Pitfalls at Plan Confirmation and the Investigation Phase

Michael M. Eidelman is a shareholder with Vedder Price in Chicago and chairs the firm's Corporate Reorganization, Bankruptcy and Insolvency Group. He also is a member of the firm's board of directors. Mr. Eidelman concentrates his practice in bankruptcy and insolvency matters and has acted as lead counsel for debtors, secured and unsecured creditors, chapter 7 and 11 trustees, landlords, asset-purchasers, and creditors' and bondholders' committees. In addition, he represents companies, creditors, court-appointed receivers and assignees for the benefit of creditors in out-of-court restructurings and liquidations. He also represents officers and directors of financially distressed companies. Mr. Eidelman has litigation experience in all aspects of creditors' rights, in both U.S. state and federal jurisdictions and in cross-border transactions in Canada and Mexico. He was appointed by the U.S. District Court for the Northern District of Illinois as receiver in U.S. Commodity Futures Trading Commission v. Peregrine Financial Group, Inc. and Russell R. Wasendorf, Sr. (Case No. 1:12-cv-05383), and as the "Information Agent" by the U.S. Government in United States of America v. All Business Assets of the Viceroy L'Ermitage Beverly Hills, et al., pending in the U.S. District Court for the Central District of California (Case No. CV 16-5369-DSF-PLA). Mr. Eidelman is a member of the Turnaround Management Association and the Chicago, Illinois and American Bar Associations. He served as a member and co-chair of the Bankruptcy Court Liaison Committee, which was established to address issues concerning bankruptcy judges and lawyers in the Northern District of Illinois. He is also a frequent speaker and author on numerous bankruptcy-related issues. Mr. Eidelman was selected for inclusion from 2005-21 in Illinois Super Lawyers, and since 2010, he has been ranked in Chambers USA in the Illinois Bankruptcy/Restructuring category. Mr. Eidelman is rated AV-Preeminent by Martindale-Hubbell and was selected as a Leading Lawyer in Bankruptcy & Workout: Commercial Law. In addition he has been listed in The Best Lawyers in America in the field of Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law since 2013. Mr. Eidelman received his B.G.S. in 1984 from the University of Michigan and his J.D. in 1987 from DePaul University College of Law.

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Jeremy W. Ryan is a member of Potter Anderson & Corroon LLP's Executive Committee in Wilmington, Del., and is the practice group leader for the firm's General Litigation Group. He focuses his practice on complex bankruptcy issues, including the sale and acquisition of companies in bankruptcy, financing and litigation, as well as general bankruptcy issues. Mr. Ryan primarily concentrates his practice on the representation of debtors but also is involved in committee and creditor representations. He works with clients in a variety of industries, including telecommunications, manufacturing and retail, and guides them through the

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