

# Labor and Employment

## An ABI Committee Newsletter



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Is It Good for Unions to Be on Creditors' Committees?

## Is It Good for Unions to Be on Creditors' Committees?



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An unsecured creditors' committee is supposed to be representative of the interests of a diverse group of unsecured creditors with an interest in the outcome of a debtor's reorganization or "fresh start." Landlords with lease-rejection claims, parties to rejected equipment leases, trade creditors, unsecured bondholders and the Pension Benefit Guaranty Corporation are a few examples.

Each constituency represented on a committee has a unique perspective, as does each committee member. That is partly because each of them has access to different information — typically from different sources within debtor's management or from different debtor professionals. Some persons may deal with Human Resources, others with the chief financial officer, and some with the debtor's investment banker or legal counsel. On top of that, each constituency has its own network for accessing information. These networks

include the debtor's competitors, other vendors to the debtor, trade associations and the debtor's employees, to name a few.

A "recovery" in a bankruptcy case comes in many different forms. For some creditors, it is all about retaining an ongoing customer. For others, it is avoiding the clawback provisions of chapter 5 of the Bankruptcy Code. Lessors may not want to regain leased premises or personalty. Trade creditors may be anxious for the liquidity boost of a large dividend. Bondholders may want to be equitized, or they may want cash that can readily be reinvested.

The more representative the committee, the better it should function, theoretically. The more information had by the committee, the better that the committee should be able to do its job — which is to maximize the recovery for all unsecured creditors.

It is the rare debtor that does not suffer from “debtor syndrome.” This malady is inescapable. Given more time and more money, every debtor will turn around its business. If you think that I am wrong, just ask any debtor’s chief restructuring officer, investment banker or chief executive officer.

The syndrome manifests itself in the following ways: (a) demands for additional post-bankruptcy trade credit; (b) requests for extensions of the exclusive time within which only the debtor can file a plan of reorganization; (c) hard-headed negotiations with the debtor’s secured lender over a budget; and (d) in negotiations over the terms of a plan of reorganization, including valuation debate.

Chapter 11 has become very expensive. Investment bankers, chief restructuring officers, financial advisers, attorneys and claims agents for the committee, debtor and lender can eat up a lot of the pie. For the creditors’ committee, that consumption is largely in the form of monitoring the debtor’s post-petition performance, in assessing the likelihood of a successful turnaround and in valuing the debtor’s business and assets. A well-functioning creditors’ committee gives a debtor *reasonable* time to prove that a fresh start can be accomplished and that continued patience is warranted, but not so much time that the likely recovery reduces to zero.

The key to the process is having reliable information — information that is not varnished with “spin” employed by the provider to accomplish a goal. Of course, the goal of having reliable information can be anything from convincing a party in interest that the plan of reorganization is feasible, that a stream of promised future payments will actually be received, that there is value being provided to justify releases, that the going-concern valuation (and therefore, the equity split upon emergence from chapter 11) is fair or that the exit lender should feel confident that new trade credit terms are safe.

Who has access to real information about how the debtor is doing? We often find that the answer is “the employees.” The debtor’s senior management may say that it is receiving an adequate supply of raw materials, that sales are holding up and that customers are happy. But the people on the factory or warehouse floor have a sense of smell that is invaluable. For example, they know (intuitively and by eyesight) when stockpiles are low, when shipments have slowed, when customer returns are increasing, when employee morale is taking a toll and when backorders are thinning.

This is not to say that employees should be the primary or sole source of decision-making information. But it is fair to say that employees and the union that represents them do have something valuable to contribute to the deliberations of a creditors’ committee. There is value to the entire bankruptcy process when a committee has a more global perspective. The committee is able to make better-informed decisions, and make them sooner rather than later.

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