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Expert Analysis

Does a Bankruptcy Court Have the Authority To Disband an Official Committee?

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In most Chapter 11 cases, official committees serve an important and critical role and their appointment and tenure is uncontested. At times, however, a debtor or other party-in-interest may question the need for a committee, the efficacy of a particular committee, or the appropriateness of appointing multiple committees, leading in the latter case in particular to concerns about the costs and potential burdens that may arise from being required to cooperate and negotiate with more than one committee. Such circumstances may lead a debtor or other party-in-interest to ask the bankruptcy court to disband or vacate a committee appointment.

Section 1102(a)(1) of the Bankruptcy Code provides, in pertinent part, that "as soon as practicable after the order for relief under Chapter 11 of this title, the United States trustee *shall appoint* a committee of creditors holding unsecured claims and *may appoint* additional committees of creditors or of equity security holders *as the United States trustee deems appropriate*."[1] Thus, at least in Chapter 11 cases, the U.S. Trustee (UST) must appoint a committee of unsecured creditors and may appoint additional committees in his or her discretion. However, the Bankruptcy Code is silent regarding whether a court has the authority to disband or vacate a committee appointed by the UST if the situation so warrants.

In two recent high-profile bankruptcy cases, *In re City of Detroit, Michigan*, 519 B.R. 673 (Bankr. E.D. Mich. 2014) and *In re Caesars Entertainment*, 526 B.R. 265 (2015), bankruptcy courts reached opposite and conflicting conclusions regarding whether a court has the authority to disband or vacate the appointment of an official committee of creditors appointed by the UST. This article analyzes these opposite rulings.[2]

In two cases, bankruptcy courts reached conflicting conclusions regarding whether a court has authority to vacate the appointment of an official committee of creditors appointed by the U.S. Trustee.

'City of Detroit'

In *City of Detroit*, the Chapter 9 municipal debtor City of Detroit filed a motion for entry of an order pursuant to Section 105 of the Bankruptcy Code vacating the UST's appointment of an official committee of unsecured creditors, arguing that the committee was unnecessary and duplicative of the previously appointed official committee of retirees.[3] The UST and the committee objected and argued that because the bankruptcy code explicitly grants (i) the UST discretion to appoint additional committees under Section 1102(a)(1) of the Bankruptcy Code, and (ii) the bankruptcy court authority to order that a committee of creditors not be appointed in certain cases involving a small business debtor (11 U.S.C. §1102(a)(3)) and to review the composition of the committee (11 U.S.C. §1102(a)(4)), these provisions evidence the outer bounds of a bankruptcy court's authority in this regard. Accordingly, the UST and the committee argued that the bankruptcy court could not go beyond such powers by disbanding an official committee.

The bankruptcy court rejected these arguments, and instead noted its "broad equitable power" under Section 105(a) of the Bankruptcy Code to take action or reach determinations not inconsistent with the Bankruptcy Code. The court first noted that "nowhere does the bankruptcy code explicitly prohibit the bankruptcy court from disbanding an unsecured creditors' committee."[4] Based on the foregoing, as well as the facts and circumstances of the case, including (i) the committee's apparent disavowal of the mediation process established by the bankruptcy court; and (ii) the anticipated costs for the professional fees of the second committee (which the court viewed as likely duplicative of the already functioning retiree committee), the bankruptcy court granted the motion to vacate and ordered the committee disbanded.[5]

'Caesars'

In *Caesars* (which was decided after *City of Detroit*), following the appointment by the UST of both an official committee of unsecured creditors and an official committee of second-priority noteholders (the noteholders' committee), the debtors moved to disband the noteholders' committee, arguing, in part, that the noteholders were sophisticated business entities who did not need a committee to represent their interests and a second commit-

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tee in the case would "dramatically increase administrative costs with no corresponding benefit to the estates."[6] The debtors argued that the bankruptcy court had the authority to disband the committee under Section 105(a) of the Bankruptcy Code.

The Bankruptcy Court in *Caesars* denied the debtors' motion, finding that nothing in Section 1102(a)(1) of the Bankruptcy Code "confers on the court the power to disband a committee the U.S. Trustee has appointed under Section 1102(a)(1)…Because Section 1102(a) grants specific powers, and because the power to disband a committee is not one of them, the only fair reading of the statute is that there is no such power. As the U.S. Trustee observed, this is a straightforward application of the interpretive doctrine ex pressio unius est exclusio alterius—the expression of one thing is the exclusion of another."[7]

The Caesars court then went on to analyze why Section 105(a) of the Bankruptcy Code does not confer sufficient power on the court to disband a committee appointed by the UST and cited to the Supreme Court's recent holding in *Law v. Siegel*, _U.S._, 134 S.Ct. 1188, 1194 (2014), which explained that Section 105(a) does not allow bankruptcy courts to contradict the Bankruptcy Code. The Caesars court explained (in rejecting the approach taken in *City of Detroit*) that "[h]ad Congress wanted to give bankruptcy courts the power to abolish committees appointed under Section 1102(a)(1), it could have done so. It chose not to. That choice must be respected."

Comparing Holdings

Interestingly, both *City of Detroit* and *Caesars* each applied Section 105(a) of the Bankruptcy Code to reach exactly opposite conclusions, with significant ramifications to the respective cases (i.e. having to interact, be responsive to and negotiate with another major constituency in the case, or not).

It is noteworthy that unlike the City of Detroit opinion, the Caesars decision was handed down after (and indeed cited to) the Supreme Court's holding in *Siegel* that "[a] bankruptcy court has statutory authority to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of' the Bankruptcy Code…And it may also possess 'inherent power…to sanction 'abusive litigation practices.'' …But in exercising those statutory and inherent powers, *a bankruptcy court may not contravene specific statutory provisions*."[8]

Some may argue (including the UST in its brief filed in *Caesars* in opposition to the debtors' motion to disband the noteholders' committee) that the City of Detroit decision is no longer "good law," as the U.S. Supreme Court subsequently clarified the scope of the bankruptcy courts' equitable powers under Section 105. However, at least one commentator has recently noted generally that "the uncertainties about when actual equitable practices contradict statutes will continue [even after *Siegel*]. In cases of clear contradiction, the interpretive result will be easy. But cases where it is unclear whether a conflict truly exists will continue to invite negotiation between and among the parties because of the cost and uncertainty of litigation. Despite the Supreme Court's best efforts, consideration of the equities will likely remain a part of our bankruptcy system."[9]

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Both the Caesars and City of Detroit courts recognized that the equitable powers granted to bankruptcy courts under Section 105(a) cannot be exercised to take action inconsistent with the Bankruptcy Code. The question arguably left unresolved following the Supreme Court's decision in *Siegel*, however, is: Does the fact that the Bankruptcy Code addresses certain aspects regarding committee appointments necessarily mean that a bankruptcy court is powerless to vacate the UST's appointment? Unless and until the Supreme Court specifically addresses the issue following its consideration by the appellate courts, parties will undoubtedly continue to litigate over this important question.

1. 11 U.S.C. §1102 (emphasis added).

2. Other than these two recent decisions, the authors are aware of only a handful of other published decisions on this issue. See, e.g., *In re Pacific Ave,* 467 B.R. 868, 870 (Bankr. W.D.N.C. 2012) (Bankruptcy Court granted motion to disband official creditors' committee pursuant to Section 105 of the Bankruptcy Code) (case may be distinguishable as the UST system—which is an arm of the U.S. Department of Justice—does not operate in North Carolina); *In re New Life Fellowship,* 202 B.R. 994, 997 (Bankr. W.D. Okla. 1996) (denying motion to disband official committee, explaining that "Section 1102(a)(1)… is absolute in its language and deprives the court of any discretion concerning appointment or abolition of committees, leaving no room for application of Section 105(a) to override the act of the United States trustee."); see also *In re Dewey & LeBoeuf*, No. 12-12321 (MG), 2012 WL 5985325, at *3 (Bankr. S.D.N.Y. Nov. 29, 2012) (court explained in dicta that "the language of Section 1102(a)(1)…would seem to leave little or no role for any court to review that decision [by the UST to appoint an official committee]," but ultimately decided not to reach the issue). Additionally, in *In re Delphi Corp.*, Case No. 05-44481 (RDD) (Bankr. S.D.N.Y. April 23, 2009) (available at http://www.dphholdingsdocket.com/documents/0544481/054448109042300000000001.pdf), the court entered an unpublished order disbanding pursuant to Section 105 of the Bankruptcy Code, an official equity committee appointed by the UST.

Finally, in a Chapter 11 case currently pending before the Southern District of New York Bankruptcy Court, *In re SIGA Technologies,* Case No. 14-12623 (SHL), the debtor recently filed a motion (Docket No. 384) for entry of an order disbanding a committee of unsecured creditors appointed in the case. The UST opposed the motion (Docket No. 403), arguing that under Section 1102, "the court's authority does not extend to reviewing a United States Trustee's [committee] appointment decision, under any standard. Rather, the bankruptcy court simply determines adequate representation." The debtor argued in reply (Docket No. 412) that there is "no provision in the Bankruptcy Code that prohibits a Bankruptcy Court from disbanding an official committee," but ultimately, the bankruptcy court denied the motion to disband.

3. The debtor sought the vacating of the committee's appointment pursuant to Section 105(d) of the Bankruptcy Code, though the bankruptcy court concluded that the analysis of the issue was more appropriate under Section 105(a) of the Bankruptcy Code, which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

4. *City of Detroit*, 519 B.R. at 679-80.

5. The Bankruptcy Court also determined, alternatively, that the committee should be disbanded because there was no basis in the Bankruptcy Code for appointing any committee of creditors in a Chapter 9 municipal bankruptcy case.

6. *Caesars*, 526 B.R. at 267.

7. *Caesars*, 526 B.R. at 268-69.

8. *Law v. Siegel*, 134 S.Ct. at 1194 (emphasis added).

9. Adam J. Levitin, Reports of Equity's Death Have Been Greatly Exaggerated, available at http://blogs.law.harvard.edu/bankruptcyroundtable/2014/06/09/reports-of-equitys-death-have-been-greatly-exaggerated/.