



# Unsecured Trade Creditors Committee

## ABI Committee News

*In This Issue:*

Volume 8, Number 4 / November 2010

- [Getting Paid: Climbing the Claim Priority Ladder](#)
- [What's the Big Deal about Hiring a Liquidating Trustee?](#)
- [Do Hybrid Claims Qualify for § 503\(b\)\(9\) Administrative Expense Treatment?](#)

## What's the Big Deal about Hiring a Liquidating Trustee?

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If your company is a member of the official committee of unsecured creditors (committee) and the bankruptcy your company is involved with is nearing the time of the confirmation of a liquidation plan, this article may be of interest to you. By now, you have gotten some idea of where the bankruptcy is heading. The debtor may have already sold some of the assets and debtor's counsel may have identified major issues that need to be negotiated or litigated, and the debtor's financial adviser has probably developed a comprehensive list of the many claims against the estate. What you, as a representative of a committee member, might not have is a clear understanding of what will happen after the confirmation of the plan, how the process will come to a conclusion and who will direct it.

The financial adviser who will do the wind down and liquidation of a company after confirmation should have a highly specialized set of skills, which will differ significantly from those used to bring a company to the point of confirmation. It might seem a natural progression that a committee should support its current professionals to handle post-confirmation work. Post-confirmation work marks a beginning of a new process and the committee should not assume that the bankruptcy financial adviser will be the best party to go the distance. In the remaining part of this article, the process leading up to the selection of the firm or person who will be winding down and liquidating a company or trust will be discussed, and there will be some suggestions on how to choose the firm or person who will complete the process of serving the creditors.

The beginning of the end starts with the development of the plan, which should state, along with many other details, the liquidation strategy, a representation of the assets that will remain after confirmation and the structure of the post-confirmation entity. This entity might be a liquidating trust, a continuation of the debtor's company or some other newly formed company and the person in charge might have a title such as the liquidating trustee, sole surviving officer or a similar title. For the purpose of this article, the entity will be referred to

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as the liquidating trust and the person as the liquidating trustee. The measurement for success under any structure will be same, and that is the recovery or return to the unsecured creditors.

It is possible that the committee will play a part in the development of the plan, or the committee may see the plan for the first time as a completed document intended by the debtor to be in its final form. In any case, the committee will most often have a significant influence on whether the plan is confirmed, what happens post-confirmation and who will become the liquidating trustee. It is often the case that, unless the committee requests a selection process for the liquidating trustee, he or she will be chosen without much fanfare or input from the committee. There will usually be adequate time to interview potential candidates and determine who is best qualified to be the liquidating trustee.

Let's look at the goals of the trust. The primary goal is to provide the best return to the unsecured creditors, but many factors play into the outcome. A few of these factors include:

- securing the debtor's company books and records so that time and money are not wasted in hunting for old records;
- making sure that the trust is set up properly;
- making sure that the accounting records correctly reflect the trust's financial position;
- getting the highest value for the assets granted to the trust;
- performing the required tasks in an efficient manner;
- providing sufficient background information in support of legal matters;
- getting distributions to the creditors in a timely manner; and
- dealing with unforeseen costs or post-confirmation claims.

The common thread in getting the best results is engaging a liquidating trustee who has the experience to anticipate the needs of the trust and act preemptively to circumvent any problems. In addition, the liquidating trustee should have systems in place for rapid and efficient management of the affairs of the trust to avoid having to reinvent systems.

In moving from the general to the specific, the first big steps are securing critical company information and setting up the trust. Financial data is obviously necessary in setting up the trust, but not so obviously available. By the time of confirmation, licenses for accounting software might have expired, or the computer software may not function properly. The committee should make sure that the liquidating trustee has expert information-technology personnel who can extract and reassemble data. Depending on the nature of the former company and the type of remaining assets, there may be operational records that the liquidating trustee must capture. The absence of maintenance records can have a significant negative effect on the selling price of manufacturing equipment or even such assets as airplanes. Records to support litigation are obviously necessary. Environmental records play a

key part in validating the condition of real estate. The committee should make sure that the liquidating trustee is prepared to capture and secure information.

The beginning of the winddown and liquidation should not be the time that the liquidating trustee reinvents the wheel. The committee should take the opportunity during the interviewing process to question candidates regarding their respective systems to manage the affairs of the trust. There are several core post-confirmation tasks that must be performed. These generally include:

- reconciling claims;
- executing efficient and accurate distributions to creditors;
- performing the data analysis and exhibit preparation to support avoidance actions;
- terminating pension, 401K and defined benefit plans;
- performing accounting functions;
- selling assets;
- assuring the proper filing of tax returns and K1 preparation; and
- closing down the trust and making sure that the proper steps have been taken.

Candidates should respond to questions on these tasks with answers that relate to the systems in place and reflect knowledge based on having done the work in previous cases. If a candidate stumbles in their response to questions on any of these core tasks, the committee should be wary.

Questions regarding the candidates' references to previous work are the most important part of the interviewing process. Well-qualified candidates will provide a statement of qualifications (SOQ) to the committee. A good SOQ will have several case summaries and will have biographies of the individuals who will be working on the case. The committee should review this material in advance and query the candidates regarding successes and learning experiences.

In conclusion, committees can become plagued with bankruptcy fatigue. Bankruptcy is the stark reality of a company's failure and rarely do the creditors make a full recovery. Even the best settlements are something less than full satisfaction, and that is a tiring venture. At the time of the selection of the liquidating trustee, the bankruptcy, to quote a football analogy, is "in the red zone." Hiring a liquidating trustee is an important engagement and a final step in reaching the goal of creditor recovery.