

A creditor's game plan in Chapter 11: Five things to consider

June 3, 2020

1. Stay informed

Make sure you are correctly listed on the master mailing matrix or hire counsel to make a formal appearance to make sure you get notices of what's happening in the case. Check to see if a Claims and Noticing Agent has been engaged in the case and go on its website to see what has been filed on the Court's docket (which usually includes the ability to download and print pleadings filed in the case) and what deadlines have been set.

2. Read the "first-day declaration"

Ordinarily, one of the first pleadings filed in a Chapter 11 case after the voluntary petition is filed, is a declaration in support of various "first-day motions" that seek relief designed to facilitate the smooth transition of the debtor into Chapter 11. While the number of first-day motions can vary from a handful to more than a dozen, the relief sought in each of those motions is ordinarily summarized in the first-day declaration, which also usually provides a description of the business of the debtor, its capital structure, and the Debtor's view of the precipitating causes of its Chapter 11 filing.

Bankruptcy judges try to limit the relief granted on first day motions tailoring it to the debtor's immediate needs, and such requests for relief are usually revisited for more long-term treatment several weeks into the case, when more parties have notice of the relief being requested and by which time an official creditors' committee will have been formed that can weigh in on the relief being requested. There remains, however, a significant potential for the rights of creditors to be impacted by the orders entered on first day motions, so attention must be paid. It is at this point that coordination with counsel is important to receive restructuring advice and, in some cases, early consultation with litigators is useful if the relief being sought by the debtors substantially impacts a creditor's rights.

While the possibilities are numerous, some of the more common issues that arise on first day motions are:

- i. lien priorities may be fixed, including the possibility of the priming of (i.e., jumping the line in priority with respect to) pre-petition liens in connection with DIP Financing;
- ii. property sales and/or related sale procedures may be approved that may impact or include a creditor's property interest (such as IP embedded in the debtor's hardware);

- iii. conditions for eligibility to be a "critical vendor" – whose pre-petition claims can be immediately paid in full – may be set; and
- iv. procedures may be set for asserting reclamation claims under section 546(c) of the Bankruptcy Code or for asserting administrative claim status under section 503(b)(9) of the Bankruptcy Code for goods received by the debtor within 20 days before the petition date and sold to the debtor in the ordinary course of the debtor's business.

3. Be aware of and respect the automatic stay under section 362 of the Bankruptcy Code

Subject to certain exceptions, the Bankruptcy Code provides that a voluntary petition commencing a Chapter 11 case operates as a stay, applicable to all entities, of:

- i. the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the Chapter 11 case, or to recover a claim against the debtor that arose before the commencement of the Chapter 11 case;
- ii. the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the Chapter 11 case;
- iii. any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- iv. any act to create, perfect, or enforce any lien against property of the estate;
- v. any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the chapter 11 case;
- vi. any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the Chapter 11 case;
- vii. the setoff of any debt owing to the debtor that arose before the commencement of the Chapter 11 case against any claim against the debtor; and
- viii. the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the commencement of the case.

Consult with counsel regarding whether proposed actions you may wish to take or any demand you may make is a violation of the automatic stay, and whether it makes sense to seek formal relief from the automatic stay under the Bankruptcy Code provisions setting forth the grounds for such relief. You should be prepared to litigate these issues in the Bankruptcy Court - even if prior proceedings are pending elsewhere - as it is likely that the debtor will oppose relief from the automatic stay.

4. Timely file your Proof of Claim

Collect all documentation supporting your claim. Be on the alert for a notice of the deadline – often referred to as a "bar date" – for filing your formal "Proof of Claim." Pay careful attention to the instructions in the notice relating to where, when, and how to get your Proof of Claim on file, and carefully follow the instructions for filling out and signing the Proof of Claim form.

5. Decide if you want to serve on the official creditors' committee

Determine whether you are eligible to serve on the official creditors' committee and, if so, whether you are interested in serving and what you must do to get appointed to the committee.

Steps to official committee formation

- Bankruptcy Code section 1102 provides authority for the appointment of an official committee of unsecured creditors as soon as practicable after a Chapter 11 case is commenced.
- An official committee ordinarily consists of the creditors, willing to serve, that hold the largest claims against the debtor of the kinds represented on such committee.
- The members of an official committee are selected by the Office of the U.S. Trustee, which is an arm of the U.S. Department of Justice that has designated responsibilities under the U.S. bankruptcy laws.
- Members are selected either by telephone or at a meeting held in-person usually one to three weeks after the commencement of a Chapter 11 case.
- The U.S. Trustee typically asks interested creditors to fill out a questionnaire and then has a representative of the creditor meet with the U.S. Trustee for an interview, either in person or by telephone, in a vetting process.

Advantages of official committees

- Fees and expenses of committee legal and financial advisors paid by the Chapter 11 debtor pursuant to the Bankruptcy Code.
- Powers granted pursuant to the Bankruptcy Code, including, but not limited to: (i) consult with the debtor concerning the administration of the case; (ii) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan; (iii) participate in the formulation of a plan; and (iv) request the appoint of a chapter 11 trustee or examiner.
- Influence over the Chapter 11 cases.
- Access to information.
- Facilitates restructuring efforts.

Disadvantages of official committees

- Fiduciary obligations (including confidentiality/use of information received).
- Restrictions on trading securities of/claims against the Chapter 11 debtor.
- Potential for conflicts between committee members, who may have different interests in case (bondholders vs. trade creditors vs. pension agencies vs. landlords).

For more information, visit our [COVID-19 Topic Center](#) at and our [Crisis Leadership Team portal](#).

For the latest developments in Business Restructuring and Insolvency Law and COVID-19, follow our blog "[Five Minute Workout](#)".

Contacts



Bennett L. Spiegel
Partner, Los Angeles
T +1 310 785 4603
bennett.spiegel@hoganlovells.com



Kevin Carey
Partner, Philadelphia
T +1 267 675 4614
kevin.carey@hoganlovells.com



Ronald Silverman
Partner, New York
T +1 212 918 3880
ronald.silverman@hoganlovells.com



Michael Hefter
Partner, New York
T +1 212 918 3032
michael.hefter@hoganlovells.com

www.hoganlovells.com

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