

www.kmksc.com

Washington Building
Barnabas Business Center
4650 N. Port Washington Road
Milwaukee, WI 53212
Telephone: 414-962-5110
Facsimile: 414-962-8725

CREDITORS' COMMITTEES IN BANKRUPTCY CASES

Consider the following scenario: The debtor filed a Chapter 11 reorganization case a couple of weeks ago and you just received an invitation from the Office of the United States Trustee to volunteer to be a member of the Official Committee of Unsecured Creditors of the debtor. Should you seek to join the committee? Is it worth the trouble? Hard questions to answer so soon into the bankruptcy case. It is difficult for anyone to ascertain with certainty during the first few weeks of a bankruptcy, whether the debtor can make a worthwhile go of it—even with all of the protections afforded it by the U.S. Bankruptcy Code and a post-petition line of credit which the debtor is certain will solve all of its problems. The statistics suggest that the odds are against a successful reorganization. One study indicated that only 17% of all Chapter 11 filings result in a confirmed reorganization plan and fewer than 7% of all Chapter 11 filings make it to consummation of the plan (meaning that the debtor actually paid out on the plan).

So why be a member of the creditors' committee? The simplest answer is that the opportunity to be on the committee may be the best, and perhaps last, opportunity to see for yourself that every reasonable alternative is explored to develop the best distribution possible for unsecured creditors. Regardless of the most heartfelt assurances from the debtor and its representatives that the debtor is doing all that it can for creditors, only creditors can and will look out for the best interests of creditors. And, in this regard, the creditors' committee is the best vehicle to protect the interests of unsecured creditors.

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Depending upon the size of the bankruptcy case and the number of interested creditors, the creditors' committee generally consists of three to seven members who are drawn from the twenty largest unsecured creditors. With bankruptcy court approval, the committee may retain counsel to act on its behalf (counsel for the committee looks to the debtor's estate for payment of fees; the creditors' committee is not directly responsible for the payment of its counsel's fees). The Bankruptcy Code specifically empowers the committee to, among other things, consult with the debtor concerning the administration of the case; to investigate the acts, conduct, assets, liabilities and financial condition of the debtor and the operation of the debtor's business; and to participate in the formulation of a plan of reorganization and to perform such other services as are in the interests of the represented creditors.

The combined credit experience of the committee members can be effective in assisting the debtor to develop a consensual plan that is both feasible and worthwhile for unsecured creditors. At the same time, a determined committee can be equally effective in going to the mat for in appropriate circumstances to fight for better payment terms. As a committee member, you will have access to the debtor's financial information and documentation to assess whether the debtor is paying all that

it can. An active creditors' committee can make the difference between a debtor's plan that attempts to slip by with a token payment to creditors and a plan scrutinized by the committee that requires the debtor to make a fair payment to unsecured creditors.

The reorganization case may ultimately be a "bust". As with any collection effort, there will be situations where the matter may have to be closed as uncollectible. However, participating in a committee will give you the opportunity to maximize the return in those cases where a distribution can be available to unsecured creditors. Nonetheless, this result is only possible if the committee ensures that it is represented by an experienced commercial law firm that has the reputation of understanding and keeping the best interests of creditors of paramount importance.

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About Kohner, Mann & Kailas, S.C.

Founded in 1937, KMKSC is a business and commercial law firm listed in Martindale-Hubbell's Bar Register of Preeminent Lawyers. KMKSC provides quality legal expertise across the areas of law encountered by businesses in the normal course of their operations and growth. Our services range from high-profile appellate representation and international business issues to ensuring that critical everyday needs, such as debt recovery, are fulfilled efficiently and expertly. Our purpose is to deliver excellent results for our clients, whether the issue is advice on the avoidance of legal disputes, closing a deal, protecting assets or winning in court. KMKSC is continually advancing the interests of its clients in negotiations, transactions, litigation and alternative dispute forums across North American and beyond. We help U.S. companies address the legal issues raised by trading across international borders and provide legal support and advice to foreign companies operating in American markets.

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