

**RECENT DEVELOPMENTS IN THE ROLE
OF EQUITY COMMITTEES IN CHAPTER 11 CASES**

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PANEL

*Absolute vs. Relative Priority:
What Creates Equity Value*

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Introduction

The appointment of an official committee of equity security holders (an "Equity Committee") in a chapter 11 case remains the exception rather than the rule.¹ Nevertheless, Equity Committees have played an increasingly important role in chapter 11 cases in recent years.² The growing impact of Equity Committees in chapter 11 has been reflected by, among other things, (i) the rising number of Equity Committee appointments in several recent "mega" chapter 11 cases³ and (ii) the increasingly common efforts by debtors and other constituencies to disband Equity Committees if they are able to formulate an argument that shareholders are out of the money.⁴

This article discusses recent developments relating to the appointment, function and occasional disbandment of Equity Committees in chapter 11 cases. This article sets forth: (1) a short introduction to the statutory basis, purpose and procedures for the appointment of Equity Committees and the duties of their members; (2) an analysis of the evolving standards for the

¹ See 7 COLLIER ON BANKRUPTCY ¶ 1102.03[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) [hereinafter *Collier*].

² See Heather Lennox, Dennis J. Connolly, Alan W. Kornberg, Jonathan M. Landers, Richard G. Mason, James L. Patton, Jr. & Daniel W. Sklar, *Best Practices Report: Formation, Function & Obligations of Equity Committees in Chapter 11*, AM. COLL. OF BANKR. 2-3, 2 n.8 (2011).

³ See, e.g., *In re Genco Shipping and Trading Ltd.*, No. 14-11108-SHL (Bankr. S.D.N.Y. May 9, 2014) (Docket No. 139) (notice of appointment of equity committee); *In re The Dolan Company*, No. 14-10614-BLS (Bankr. D. Del. Apr. 23, 2014) (Docket No. 195) (same); *In re Overseas Shipholding Group, Inc.*, No. 12-20000-PJW (Bankr. D. Del. Mar. 17, 2014) (Docket No. 2641) (same); *In re Tuscany Int'l Holdings (U.S.A.) Ltd.*, No. 14-10193-KG (Bankr. D. Del. Mar. 13, 2014) (Docket No. 147) (same); *In re AgFeed USA, LLC*, No. 13-11761-BLS (Bankr. D. Del. Aug. 23, 2013) (Docket No. 195) (same); *In re Rotech Healthcare Inc.*, No. 13-10741-PJW (Bankr. D. Del. April 24, 2013) (Docket No. 124) (same); *In re Trident Microsystems, Inc.*, No. 12-10069-CSS (Bankr. D. Del. Feb. 14, 2012) (Docket No. 190) (same).

⁴ See, e.g., *Dolan*, No. 14-10614 (Docket No. 210) (debtor's motion requesting order disbanding Equity Committee); *Rotech*, No. 13-10741-PJW (Docket No. 142) (same); *In re Dewey & LeBoeuf LLP*, No. 12-12321-MG, 2012 WL 5985325 (Bankr. S.D.N.Y. Oct. 30, 2012) (Docket No. 589) (debtor's reply in support of order directing the U.S. Trustee to disband an official committee of former partners); *In re Filene's Basement, LLC*, No. 11-13511-KJC (Bankr. D. Del. Nov. 23, 2011) (Docket No. 264) (motion of the creditors' committee requesting order disbanding the Equity Committee); *In re Dana Corp.*, No. 06-10354-BRL (Bankr. S.D.N.Y. Feb. 9, 2007) (Docket No. 4735) (notice of disbandment of Equity Committee); *In re Gadzooks, Inc.*, No. 04-31486-HDH-11, 2005 BL 104487, at *2 (Bankr. N.D. Tex. Jan. 13, 2005) (Docket No. 1191) (same).

appointment of Equity Committees, focusing, in particular, on the key issues of solvency and adequate representation, as addressed by bankruptcy courts in recent chapter 11 cases; and (3) a discussion of recent developments relating to the disbandment of Equity Committees and the standards for judicial review of decisions by the Office of the United States Trustee (the "U.S. Trustee") relating to Equity Committees. Despite developments in each of these areas, the standards remain ambiguous with many open questions that courts have yet to fully address.

Background Regarding the Appointment and Duties of Equity Committees

Authority for the Appointment of an Equity Committee

Equity Committees may be appointed in chapter 11 cases at the discretion of the U.S. Trustee or by order of the bankruptcy court. Although section 1102(a)(1) of title 11 of the United States Code (the "Bankruptcy Code") mandates that the U.S. Trustee appoint – or at least attempt to appoint – an official committee of unsecured creditors (a "Creditors' Committee") in every large chapter 11 case,⁵ the U.S. Trustee may appoint additional official committees, including Equity Committees, as it deems appropriate.⁶ Pursuant to this straightforward authorization, the U.S. Trustee has appointed an Equity Committee in a number of recent cases.⁷

Additionally, the Bankruptcy Code authorizes the bankruptcy court, upon motion by a party in interest, to order the U.S. Trustee to appoint an Equity Committee "if necessary to assure

⁵ See 11 U.S.C. § 1102(a)(1) (providing in relevant part that "[e]xcept as provided in paragraph (3) [relating to small business debtors], 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").

⁶ See *id.* (providing that the U.S. Trustee "may appoint additional committees of creditors or of equity security holders as [it] deems appropriate").

⁷ See, e.g., *Genco*, No. 14-11108-SHL (Docket No. 139) (notice of appointment of an Equity Committee of three equity holders less than a month after the petition date); *Dolan*, No. 14-10614 (Docket No. 195) (notice of appointment of an Equity Committee of five equity holders about a month after the petition date); *Overseas Shipholding Group*, No. 12-20000-PJW (Docket No. 2641) (notice of appointment of an Equity Committee of three equity security holders nearly two years after the petition date); *Tuscany Int'l Holdings*, No. 14-10193-KG (Docket No. 147) (notice of appointment of an Equity Committee of three equity holders about a month after the petition date); *AgFeed*, No. 13-11761-BLS (Docket No. 195) (same); *Rotech*, No. 13-10741-PJW (Docket No. 124) (same); *Trident Microsystems*, No. 12-10069-CSS (Docket No. 190) (same).

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