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**Can You Join My Team?: Retention of
Professionals in Chapter 11 Cases**

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Can You Join My Team?: Retention of Professionals in Chapter 11 Cases

“The way a team plays as a whole determines its success. You may have the greatest bunch of individual stars in the world, but if they don’t play together, the [plan of reorganization] won’t be worth a dime.” – Babe Ruth

By: Charles A. Beckham, Jr., Kelli S. Norfleet, and Martha Wyrick

I. Introduction

When an individual or company commences a bankruptcy case by filing a voluntary petition under title 11 the United States Code (the “Bankruptcy Code”), the playing field to which that individual or company has grown accustomed immediately changes. For example, upon the filing, debtor-company is immediately subject to new terms that may be completely foreign, such as the creation of a bankruptcy “estate,” the implications of the “automatic stay,” the treatment of “claims,” or the requirement to propose a “plan.” There are many rules and reporting requirements with which a debtor and creditors must comply to successfully exit a bankruptcy.

To navigate this new playing field, debtors and creditors often require a team of new players (in the form of hired professionals), particularly in a complex chapter 11 case. The focus of this paper is to review the various professionals that are implicated in a complex chapter 11 process, recent issues that have arisen in connection with retention applications, and to provide guidance on how such professionals can join the debtor’s or creditor’s team without a penalty.

II. Overview of Types of Professionals and Relevant Authority

A. Types of Professionals

Upon a chapter 11 bankruptcy filing, there may be several teams of professionals, including: one led by the debtor-in-possession, one led by unsecured creditors, and one by secured creditors. The bankruptcy judge, in turn, acts as a referee to supervise the entire bankruptcy proceeding. In a chapter 11 bankruptcy case, the debtor automatically becomes a “debtor-in-possession” (or, commonly referred to as a “DIP”). A debtor-in-possession operates its own business and remains in possession of its assets and property.¹ The United States Trustee appoints committees, such as an unsecured creditors’ committee, equity committee, or a committee of tort claimants. The most common—an unsecured creditors’ committee—represents the interests of all unsecured creditors. The debtor’s secured creditors also often play major roles in chapter 11 cases. Sometimes, they fund the case through a DIP loan or purchase the debtor’s company through a sale process, among other things.

¹ 11 U.S.C. § 1101.

Each of these teams typically includes various professionals. The debtor-in-possession's team may include: (i) bankruptcy counsel, (ii) ordinary course professionals;² (iii) a financial advisor, (iv) an investment banker, (v) restructuring officers, and (vi) a claims agent. Bankruptcy counsel includes the lawyers that work closely with the debtor to commence the chapter 11 case, prepare and file bankruptcy filings, appear in the bankruptcy court, and coordinate with the rest of the debtor's team. Almost all debtors with significant liabilities retain outside financial advisors to prepare financial materials required in preparation for and during a chapter 11 case. In some cases, a debtor will also hire an investment banker to evaluate investment opportunities, such as marketing a DIP loan or the company's assets for purposes of a sale. Restructuring officers may be appointed by the debtor's board of directors to provide "turnaround" services, such as to assess the distressed situation, help formulate a plan, and assist in correcting course. Claims agents are hired to serve notice of documents filed in the case, receive claims filed in the case, tabulate votes solicited on a Chapter 11 plan, and maintain a free case website. To work with each of these professionals and for the professionals to obtain compensation, the debtor must file a retention application, subject to approval from the bankruptcy court.

A committee's team and a secured creditor's team may also include legal counsel, a financial advisor, and an investment banker. While, like a debtor, a committee must obtain bankruptcy court approval of the retention of its professionals (as explained herein), secured creditors are not required to seek such approval.³ See 11 U.S.C. § 1103(b). Committees have certain duties to the estate to maximize estate value, and while committee professionals must meet the adverse interest test, they are not required to meet the disinterestedness requirement (as discussed herein).

B. Applicable Standards for Retention Applications

To join the team, each debtor and committee professional must comply with the relevant authority under the Bankruptcy Code, the Bankruptcy Rules, the U.S. Trustee Guidelines, and local bankruptcy rules. If a professional fails to follow these standards, their fees and expenses during the case may not be paid.

² While not addressed herein, debtors often seek to retain ordinary course professionals by a motion under section 327 of the Bankruptcy Code. Ordinary course professionals typically include professionals used by the debtor in the ordinary course of business prior to the bankruptcy, such as attorneys with certain specialties, tax advisors, and auditors. Ordinary course professionals do not have to satisfy the disinterestedness requirements but do have to meet disclosure requirements and adhere to procedures relevant to the bankruptcy case.

³ Secured creditors that receive compensation from the bankruptcy estate may be required to submit their invoices for review to the U.S. Trustee, the debtor, and the committee prior to payment. This process is not as comprehensive as the complex fee applications that a debtor or committee professional must file in compliance with sections 328, 330, 331 of the Bankruptcy Code.

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