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LITIGATION TRUST CLAIMS: CONFIRMATION AND INVESTIGATION PITFALLS

Post-confirmation liquidating trusts are a popular tool to allow claims to be pursued for the benefit of a debtor's creditors. In this article, the authors discuss various pitfalls for such trusts, in particular: (1) preserving post-confirmation causes of action; (2) protection of privileges; (3) avoidance of standing issues; (4) preservation of rights under prepetition indentures; and (5) proper drafting of certain plan provisions.

By David M. Posner and Kelly E. Moynihan *

Litigation and liquidating trusts¹ are an increasingly popular tool in chapter 11 cases that allow claims and related potential recoveries to be preserved and transferred to a trust for the benefit of a debtor's creditors, most typically unsecured creditors, following the effective date of a chapter 11 plan. Various pitfalls and issues related to litigation trusts should be at the forefront of parties' minds, particularly creditors' committees' counsel who often will represent the future post-confirmation trust beneficiaries, at both the outset of the case and during plan negotiations and drafting. Without properly documenting the trust's ability to pursue certain causes of action pre-confirmation, a trustee may find himself or herself without the necessary investigatory tools, claims to pursue, or the standing to

do so, despite the best intentions of the debtors, creditors' committees, and other parties that negotiated the plan. This article examines five pitfalls to be avoided in a case involving the creation of a post-confirmation trust tasked with pursuing causes of action: (1) preservation of post-confirmation causes of action; (2) protection of privileges for the trust; (3) avoidance of standing issues, particularly involving Delaware limited liability company and limited partnership debtors; (4) preservation of rights under prepetition indentures; and (5) proper drafting of certain plan provisions to ensure that the trust is equipped to pursue causes of action.

LITIGATION TRUSTS GENERALLY

Section 1123(b)(3)(B) of the Bankruptcy Code authorizes the preservation of claims post-confirmation by allowing a plan to provide for "the retention and enforcement by the debtor, by the trustee, or by a

¹ Unless otherwise delineated, "litigation trust," "liquidating trust," and "post-confirmation trust" are used interchangeably herein.

*DAVID M. POSNER is a partner in Kilpatrick Townsend & Stockton LLP's New York office. KELLY E. MOYNIHAN is an associate in the firm's same office. This article is provided for educational purposes and does not constitute legal advice. The views and opinions expressed in this article are solely those of the authors and not necessarily the views of Kilpatrick Townsend & Stockton LLP. Their e-mail addresses are dposner@kilpatricktownsend.com and kmoynihan@kilpatricktownsend.com.