AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
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Letter to the Editor

By Geoffrey L. Berman

Mr. Jamie Ellis and Ms. Emily Slater,

I appreciate the desire to have litigation funding become a more recognized tool for insolvency matters (fn.1) per your article in the *ABI Journal* (*see* "Litigation Finance in Bankruptcy: Unlocking Value for Creditors," XXXVI *ABI Journal* 3, 34-35, 43, March 2017, *available at* abi.org/abi-journal). However, I am concerned that you have painted an unrealistic picture of how many people who serve as post-confirmation trustees, including myself, go about the process of administering these estates.

You correctly note that many trusts are underfunded upon confirmation of the debtor's plan. This is usually not the trustee's fault; it is a function of how the debtor and the creditor constituencies negotiate the plan. I have been on both ends of the spectrum in this regard. One trust where I was the trustee was funded with $23 million; another with $250,000. In both instances, the trust functioned for a number of years and in one case continues to function. So while the lack of funding may hinder the ability to pursue causes of action, this is usually a situation the trustee inherits. It has also become almost a regular occurrence that creditors want complex litigation claims brought by litigation counsel who are asked to fund the cost of the litigation. Unless one can find a willing, well-financed boutique firm for this type of litigation, a trustee is left with a dwindling list of firms able and willing to handle such litigation.

You raise a concern about a trustee's conflict of interest (you use the term "potential misalignment of interests"). I'm disappointed that you believe this is a concern. Trustees have a fiduciary duty to maximize the value of their trust estate. Their duty runs to creditors generally and not to any one creditor (excluding, of course, cases where the secured creditor has a priority interest in the claim although those claims, in my experience, are separate from claims for general unsecured creditors). This duty always relies on the need for careful exercise of the trustee's business judgment and, in the case of such litigation, upon the advice of competent counsel. Of course, creditors would always prefer more money sooner, but they don't want the exposure to liability for the decisions that need to be made to properly litigate the claims while balancing the appropriate reserves for the administration of the trust and the litigation. It is the trustee's role and obligation to manage those risks and expectations, and rarely do I see a trustee ignore those obligations. Where they do, I would hope creditors hold the trustee accountable for breach of fiduciary duty.


Geoffrey L. Berman

I am very concerned about your comment that there is "little (if any) reporting required by the litigation trustee to the bankruptcy court." Maybe that is something you have run across, but that has been farthest from my experience in the trust cases I have administered for more than 20 years, especially where the bankruptcy court is the court involved in hearing the litigation claim. I, for one, do not "operate in the shadows"; I usually have an oversight board to report to in addition to the court. Yes, I have had litigation (and have one now) that has run for years; that usually is a function of the parties in the litigation and not as you imply, because the trustee can let the case(s) run on and on while taking fees for themselves and counsel. However, fees are not nor should be left "unchecked."

I don't believe that litigation funding can eliminate the need for funding of a post-confirmation trust. Such funding doesn't address the administrative costs of the trust. It certainly can make the financing of the litigation much more effective. Litigation funding is no doubt costly, knowing that as much as 30 percent of a recovery goes to the funder, plus reimbursement of the initial funding amount before application of the contingent fees of the funder and counsel. But the decision to fund any specific litigation is a time-consuming process that (in my experience) will not be done, and cannot be accomplished, before the trust is established. So the idea that litigation funding is a viable alternative to funding the totality of the costs of a litigation (or liquidation) trust from its establishment to me is very overstated.

I also wonder whether your suggestion that the litigation funder can also be the trustee is a workable alternative. The funder serving as trustee is immediately in a conflicted position. The upside to the funder is a good result; the downside is carrying litigation well past its point of meaningful return to the creditors. I think that conflict makes the litigation funder inherently disqualified for the trustee role.

Lest you think I am anti-litigation funding, I'm not. I have, through counsel, considered and used litigation funding in my cases. But the decision for such funding is case- and time-sensitive. Again, I for one don't see these decisions before a plan is confirmed and a trust established.

I would hope, as you try to expand the role of litigation funding and deal with the insolvency community, that you will recognize and respect the trustee's fiduciary obligations to creditors and not assume that funding solves the problems of a case or a less-than-forthright trustee.

— Geoffrey L. Berman
Development Specialists, Inc.; Los Angeles abi

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