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Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP

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P R E S E N T S

The COUNSELOR

JOINING A CREDITORS' COMMITTEE – AN OPPORTUNITY OR MORE PAIN FOR NO GAIN?



Gerard R. Luckman

Although total bankruptcy filings are down, it does not seem that way. This is due primarily to the increase in retail bankruptcy filings. Long-standing companies which had the financial wherewithal to weather short-term cash-flow issues now find themselves falling deeper into insolvency. Business bankruptcy filings may be attributable to a poor business plan, mismanagement or, as with many retailers, simply be the result of greater competition from online sellers. Consequently, it is imperative that management not only understand their own business, but also understand the businesses of their customers.

This article provides general information regarding the committee formation process in a chapter 11 bankruptcy and addresses two scenarios in which you may want to consider joining an official creditors' committee. In order to make an informed decision to participate as a member of a committee, it is helpful to understand the solicitation process and the role of a committee in a typical chapter 11 bankruptcy case.

Within the initial days following a debtor's filing of a petition for reorganization under

the Bankruptcy Code, the Office of the United States Trustee will try to form an unsecured creditors' committee by sending a solicitation package to the debtor's creditors holding the largest claims. Solicitation letters may designate a date, time and place for an organizational meeting during which interested creditors attend and hear a presentation from the debtor, or simply ask for return of the executed form. The committee, formed from those people who respond to the solicitation, typically consists of five to seven members, but can be as few as three.

The committee has significant authority and responsibility to do the following: consult with the debtor concerning the administration of the case; investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, and the desirability of the continuance of such business, recommending appropriate action; participate in the formulation of a plan; and perform such other services as are in the interest of unsecured creditors.

The committee, at the expense of the debtor's estate, may retain its own professionals, including attorneys, accountants or other financial advisors. Committee members choose such professionals and direct the professionals in the performance of their duties. Our seasoned attorneys are capable of counseling the committee on its role and its fiduciary obligations to the unsecured creditor constituency and can make recommendations to the committee as to positions to be taken in the bankruptcy case.

As a former credit manager for two major companies, I had many opportunities to join a creditors' committee. The following discussion of two different customers, each of which filed for bankruptcy protection, is drawn from that experience.

Client One increased its level of purchases and repeatedly failed to deliver on promises of payment. Today you received a notice that Client One filed for bankruptcy protection. You now believe that management had no intention of honoring its commitments and was funding its operating losses on the backs of its trade suppliers. Initially, you may feel that you worked hard enough on this account and, now that it is part of a bankruptcy, you will just let the process work its way out. In your experience, you do not expect to recover much in a bankruptcy anyway. That decision may be wrong. Here you know that you are dealing with management that has already proven that it does not honor its commitments. You may want to be on the creditors' committee so that you have a material say in whether the company reorganizes and, if it does, what the reorganization plan must provide. Other creditors may have a better relationship with this debtor. Will they push as hard as you for the fair treatment of creditors? A committee gets to weigh in on what creditors will receive and whether selling the business or assets will result in a higher recovery rather than letting the current equity group reorganize.

Client Two has also filed for chapter 11 protection. Client Two, a long standing customer of the firm, started as a family business. The sales volume with your company increased as their business and your business grew hand-in-hand throughout the



Congratulations to Long Island Business News ICON Award Honorees *Managing Partner Jeffrey Forchelli* (r); & News 12 *Carol Silva* (c) also in this photo Senator *John Flanagan* (l).

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Awards and Events

years. This company has maintained open communication with your company but they had a temporary economic hiccup that forced it into bankruptcy. In this case, while you are aware that your company may sustain some loss as a result of the bankruptcy filing, you may want this management group to continue this business and reorganize this company. You may believe, based on your history with the company, that if you support this process, you will preserve a long-standing customer relationship with an entity that may be more financially stable as a result of its financial restructuring through bankruptcy. In this case you decide to join the committee because you believe that what is right for all creditors is to support the company's reorganization.

Your participation may also help ensure that this debtor's estate is not unduly burdened by an overaggressive committee or counsel.

Serving on the committee requires a time commitment. Committees can meet by telephone, especially if their members are in a diverse geographic area. This provides scheduling flexibility and reduces the time commitment. Although there is no compensation for serving as a committee member, members do get reimbursed for out-of-pocket expenses incurred in connection with their participation on the committee.

In determining whether to serve, you must balance the time commitment with the benefit of having the ability to have a material say in what goes on in the debtor's reorganization.

Committee members serve on behalf of all unsecured creditors. The Bankruptcy Court typically gives great weight to the view of the creditor's committee's on the debtor's reorganization and matters that arise in the case. Another benefit is that the debtor's estate bears the cost of the committees' retained professionals.

Each creditor's experience with bankruptcy may vary. Many view the debtor's account as lost and will choose to wait to see if there is any recovery. Being a member of a committee is an opportunity to exert control over the process where previously there may have been none. You, however, in consultation with counsel, should consider committee participation as a means to maximize potential recoveries for your firm.

Awards and Media Mentions

The Firm and its attorneys have been recognized in several leading publications recently, including:

Long Island Business News:

The Firm's Veterinary practice was profiled and **Mary Mongioi** and **Daniel Dornfeld** interviewed for the article, "The Vet Whisperers." **Kathleen Deegan Dickson** was interviewed for the Who's Who in Women in Professional Services special section. **Raymond Castronovo** was spotlighted in Ones to Watch: Law.

New York Law Journal:

Peter Skelos' co-authored article, "The Digital Footprint After Death: Who Wears the Shoes?," was published.

New York Real Estate Journal:

Andrew Curto's article, "Renewable Energy & Law," was published. **Judy Simoncic, Mary Mongioi, Andrea Tsoukalas** and **Nicole Forchelli** were interviewed for the annual Women in Real Estate special section.

Newsday:

Frank Brennan was interviewed for the article, "OSHA Electronic Filing Rule Delayed." **Peter Skelos** was mentioned in Winners section citing his 2017 Alternative Dispute Resolution Champion award by the National Law Journal and Legal Times. **Dan Deegan** was quoted for his representation of client Dell Transportation Inc. in the article "Bus Firm Tax Breaks." **Allison Rosenzweig** was mentioned in the Winners section for her Long Island Center for Business and Professional Women recognition.

BOARD APPOINTMENTS

- **Gregory Lisi** appointed Secretary to the Nassau County Bar Association
- **John Bues** appointed to the Board of The Cleary House
- **Dan Deegan** appointed to the Hofstra University Entrepreneurship Advisory Board
- **Lisa Casa** appointed Treasurer to the Nassau County Women's Bar Foundation

Sixteen partners from the Firm have been chosen by their peers as 2017 *New York Super Lawyers*®:

Jeffrey D. Forchelli; Daniel P. Deegan; John V. Terrana; Joseph P. Asselta; Frank W. Brennan; Joseph V. Cuomo; Kathleen Deegan Dickson; Gregory S. Lisi; Alexander Leong; Gerard R. Luckman; Mary E. Mongioi; Peter R. Mineo; Judy L. Simoncic; Peter B. Skelos; Jeffrey G. Stark and Russell G. Tisman.

Seven attorneys named *New York Rising Stars*® SuperLawyers list:

Douglas W. Atkins; Stephanie M. Alberts; Nathan R. Jones; Danielle B. Gatto; Robert L. Renda and Allison Rosenzweig.



The Firm hosted a reception to officially rename the conference area as the Donald Jay Schwartz Conference Center



Steven G. Gaebler was honored by Schneps Communications with a Top Businessman award.



Judy L. Simoncic was honored as one of Long Island's Top 50 Most Influential Women in Business by the Long Island Business News.

Banking and Finance

Steve Gaebler and **Lindsay Mesh** represented HSBC Bank USA, National Association in the negotiation and closing of a \$12,000,000 mortgage loan and \$7,500,000 construction loan covering property owned by the Gabrielli Hutchinson LLC. A new 36,180 square foot truck service and repair facility will be constructed on the site and will be leased to its affiliate, Gabrieli Truck Leasing LLC. The negotiations involved the New York City Industrial Development Agency which provided certain tax incentives.

James C. Ricca negotiated and closed on behalf of New York Community Bank a \$16,275,000 first mortgage loan secured by five office and industrial buildings, located in Nassau County, NY.

James C. Ricca negotiated and closed on behalf of New York Community Bank an \$11,000,000 first mortgage loan secured by a commercial building on West 34th Street, New York, NY.

Lindsay E. Mesh negotiated and closed on behalf of New York Community Bank a \$2,040,000 first mortgage loan secured by an apartment building located in Hudson County, N.J.

John P. Bues negotiated and closed a \$1.3 million loan on behalf of owners of four distressed commercial lots in Farmingdale, NY.

James C. Ricca negotiated and closed on behalf of New York Community Bank a \$5,000,000 construction loan for a 408,000 square foot, two-story building, consisting of office and industrial units located in Suffolk County, NY.

Steve Gaebler and **Lindsay Mesh** successfully represented HSBC Bank USA, National

Association in the negotiation and closing of a \$19,390,000 mortgage loan in favor of Beige New Berlin Realty LLC for the purchase of commercial property in New Berlin, WI to be leased to its affiliate, Rubie's Costume Company, Inc.

Litigation

William Bonesso, **Richard Blumberg**, and **Danielle Tricolla** obtained an additional favorable decision from the Appellate Division, Second Department in connection with the firm's representation of the City of Long Beach in a multi-year litigation filed by the Aqua Condominium, in which Aqua challenged the City's installation of comfort stations along the Long Beach Boardwalk following Super Storm Sandy. In another "win" for the City, the Appellate Division not only affirmed the Supreme Court's 2015 decision which rejected Aqua's application, but the Appellate Division also amended the Supreme Court's decision to add an express finding in favor of the City of Long Beach, making it that much harder for Aqua to prevail in other pending appeals, and awarded costs to the City.

Land Use & Zoning

Managing Partner Jeffrey D. Forchelli, who obtained approval for a cemetery in Old Westbury for the Diocese of Rockville Centre late last year, announced that the Village of Old Westbury Board of Trustees has now approved the property's entry piers and gates. Responding to complaints by local residents, particularly about traffic, Mr. Forchelli said that a current entrance/exit will be closed and that a left-only exit will be placed about 800 feet south. A mountable curb will be placed on the right of the driveway, forcing traffic to the left and onto Jericho Turnpike instead of through the village.

Peter R. Mineo and **Andrea Tsoukalas** obtained approvals for a new single-family residence on a three acre waterfront parcel in the Village of Sands Point. This was a challenging application due to neighbor opposition and existing drainage conditions in the area. To facilitate the project the client agreed to provide for an eight inch rainfall event which will not only improve the drainage at the existing site, but also for the adjacent home owners.

On July 25th, the Town Board of the Town of Oyster Bay issued a special use permit for a client to build a 48-unit structure which will serve as an assisted living facility and nursing home. **Jeffrey Forchelli** and **Hal Mayer** represented the client and presented the case. The required variance application is presently pending before the Zoning Board of Appeals.

Tax Certiorari

John V. Terrana and **Nicole Forchelli** represented a triple net tenant for a retailer in Oceanside, regarding property tax refunds and reductions. At issue was a novel theory of above-market, long term leases. John and Nicole were able to secure refunds and savings of approximately \$450,000.

Douglas W. Atkins and **Warren Arthur** prosecuted a tax certiorari matter for a self-storage facility in Westchester County. At pre-trial conferences in Supreme Court, they demonstrated that the self storage financial statements were not appropriate for property tax use. The settlement reached for the client was \$150,000 in tax refunds.



Dan Deegan and **Kathleen Deegan Dickson** attended the ribbon cutting of client DealerTrack in East Hills. Dealertrack delivers integrated digital solutions designed to enhance the efficiency and profitability for all major segments of the automotive retail industry.

Douglas W. Atkins and **Robert L. Renda** attended a pre-trial negotiation for a regional bank and class A office building in the Town of Islip. After comparing appraisal methodologies, the firm secured a settlement offer of approximately \$400,000.

John V. Terrana and **Robert L. Renda** handled a tax certiorari matter for a large industrial building in Port Washington. John and Robert attended conferences at both the County Review Commission and County Attorney's office. After consultation with potential expert trial witnesses, John and Robert resolved the case for approximately \$230,000 to the client.

Nicole Forchelli resolved several tax certiorari matters for a national retailer with properties throughout New York State, resulting in refunds and savings in excess of \$100,000.



A beautiful evening and a great time was had by 50+ attendees at the Firm's fall networking event hosted jointly with the Association of Corporate Counsel at the Arizona Ice Tea rooftop.

(l) **Daniel Dornfeld** partner, **Allison Rosenzweig**, associate and co-director of the Long Island General Counsel Network (LIGCN), (r) **Joseph Cuomo**, partner and co-director of the LIGCN

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AWARDS AND EVENTS



Staff at the Firm took part in the 2017 Marcum Workplace Challenge at Jones Beach. The annual event was host to over 200 Long Island companies and over 8,000 participants with proceeds going to local charities.



Associate **Danielle Tricolla** has been selected by the Long Island Business News for the 30 under 30 Award Class of 2017. She was recognized for her contributions to the Long Island community through public service and her business accomplishments.
(L-R: Richard Blumberg, Robert Renda, Danielle Gatto, Allison Rosenzweig, Honoree Danielle Tricolla, Judy Simoncic, William Bonesso, Andrew Curto and John Terrana).