

News & Alerts

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New Guidance on Committee Professionals in the Eastern District of Virginia: Top 5 Takeaways from Toys “R” Us

While the Delaware bankruptcy bar has long-standing rules on who may (and may not) pitch services to an official committee appointed in a bankruptcy case, professionals looking to be hired in bankruptcies filed in the Eastern District of Virginia have not had similar guidance. Based on the increasing number of large Chapter 11 cases being filed in Richmond and a recent pleading filed by the United States Trustee in Toys “R” Us, here are five things committee professionals should know before pitching in Richmond:

- Professionals seeking to be retained by the Committee may attend formation meetings in any one of three capacities: (1) solely to pitch; (2) representing a creditor seeking to be appointed to the Committee; or (3) holding the proxy of a creditor seeking to be appointed to the Committee. Different rules apply, however, based on the capacity in which the professional appears.
- If attending solely to pitch, a professional must comply with the Virginia Rules of Professional Conduct and any other applicable ethical rules.
- Professionals representing a creditor seeking to be appointed to – and then selected for – the Committee must comply with the ethical rules and may not participate in a meeting at which the professional’s candidacy is discussed or, unsurprisingly, engage in any quid pro quo arrangement or undue influence over the creditor client’s decisions.
- If a professional is holding the proxy of a creditor seeking to be appointed to the Committee and the creditor actually gets on the Committee, in addition to complying with the ethical rules, the professional may either participate in interviews and retention decisions or pitch services – but not both. Section 3-4.5.3 of the United States Trustee Manual provides that “If the proxy holder seeks to be retained by the committee and its creditor has been selected for committee membership, then the proxy holder should not participate in the interviews of professionals and any retention decisions.” (citing In re ABC Automotive Prods. Corp., 210 B.R. 437 (Bankr. E.D. Pa. 1997)).
- Notably, if the professional is a proxy holder, he/she may not be able to pitch services to the Committee regardless of abstaining from employment discussions and decisions. Though not explicitly prohibited by the United States Trustee Manual, the recent pleading

states that “USTP policy . . . is that professionals holding proxies cannot ‘pitch’ the committee for representation.”

Unfortunately, unanswered questions remain about what happens if a professional attends a formation meeting with a creditor or as a proxy holder but the creditor is not selected for the Committee. Bottom line: Professionals looking to be hired for the Committee may want to think twice about going to the formation meeting with a creditor or holding a proxy.

For more information, please refer to In re Toys “R” Us, Inc., Case No. 17-34665-KLP, Docket No. 1140 (Dec. 4, 2017).

Contacts

Kristen E. Burgers
703.584.8364
kburgers@hf-law.com

Lawrence A. Katz
703.584.8362
lkatz@hf-law.com

Rachel A. Greenleaf
804.771.9548
rgreenleaf@hf-law.com

Stephen E. Leach
703.584.8902
sleach@hf-law.com

Robert S. Westermann
804.771.5610
rwestermann@hf-law.com

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