

# Table of Contents

|                    |   |
|--------------------|---|
| Introduction ..... | 1 |
|--------------------|---|

## Chapter I

|                                              |          |
|----------------------------------------------|----------|
| <b>Role of the Committee Generally .....</b> | <b>5</b> |
|----------------------------------------------|----------|

|                                                                                |    |
|--------------------------------------------------------------------------------|----|
| A. Advocating for Unsecured Creditors as a Fiduciary.....                      | 6  |
| B. Communication with Unsecured Creditors.....                                 | 8  |
| 1. Duty to Share Information under<br>§ 1102(b)(3) of the Bankruptcy Code..... | 8  |
| 2. Section 1102(b)(3) Orders.....                                              | 9  |
| 3. The <i>Refco</i> Model § 1102(b)(3) Protocol.....                           | 9  |
| C. Monitoring the Case.....                                                    | 14 |
| D. Investigation and Case Participation .....                                  | 15 |
| 1. Review of Indebtedness and Liens .....                                      | 15 |
| 2. Potential Actions Against Insiders .....                                    | 16 |
| 3. Possible Consolidation of Multiple Debtors .....                            | 17 |
| 4. Plan Negotiation .....                                                      | 18 |
| 5. Appointment of a Trustee or Examiner .....                                  | 20 |
| 6. Conversion or Dismissal of a Case.....                                      | 22 |

## Chapter II

|                                                                                           |           |
|-------------------------------------------------------------------------------------------|-----------|
| <b>Appointment of the Committee and<br/>Retention/Compensation of Professionals .....</b> | <b>25</b> |
|-------------------------------------------------------------------------------------------|-----------|

|                                              |    |
|----------------------------------------------|----|
| A. Formation of the Committee .....          | 26 |
| 1. Organizational Meeting.....               | 26 |
| 2. Proxies.....                              | 27 |
| 3. U.S. Trustee's Appointment .....          | 29 |
| 4. Selection of the Chair.....               | 30 |
| B. Governance.....                           | 31 |
| 1. Bylaws.....                               | 32 |
| 2. Prerequisites for Meetings and Votes..... | 32 |
| 3. Confidentiality .....                     | 34 |
| 4. Meeting Agendas and Minutes .....         | 34 |
| C. Recusal .....                             | 35 |

## American Bankruptcy Institute

|                                                                |    |
|----------------------------------------------------------------|----|
| D. Employment of Professionals.....                            | 35 |
| 1. Legal Counsel.....                                          | 35 |
| 2. Investment Bankers (Financial Advisors) .....               | 39 |
| 3. Accountants.....                                            | 40 |
| 4. Brokers .....                                               | 41 |
| E. Compensation of Committee .....                             | 41 |
| 1. Reimbursement of Expenses of Committee Members .....        | 41 |
| 2. Professionals' Fees and Expenses.....                       | 42 |
| 3. Payment of Secured Creditor's Counsel Fees (§ 506(b)) ..... | 44 |

## Chapter III

|                                                                  |           |
|------------------------------------------------------------------|-----------|
| <b>Investigation .....</b>                                       | <b>45</b> |
| A. Basic Areas of Investigation .....                            | 46        |
| B. Tools for Investigation.....                                  | 50        |
| 1. Information from the Debtor.....                              | 50        |
| 2. Analysis of Debtor's Schedules and Other Filings.....         | 52        |
| 3. § 341(a) Meeting of Creditors.....                            | 52        |
| 4. Bankruptcy Rule 2004 Examinations and<br>Other Discovery..... | 53        |
| C. Committee Professionals.....                                  | 54        |
| D. Examples of Specific Inquiries and Documents .....            | 55        |

## Chapter IV

|                                                                          |           |
|--------------------------------------------------------------------------|-----------|
| <b>Negotiation of Financing with Lenders.....</b>                        | <b>59</b> |
| A. Cash Collateral.....                                                  | 60        |
| 1. Debtor's Request for Authority to Use Cash Collateral .....           | 61        |
| 2. Frequently Contested Issues.....                                      | 62        |
| B. Adequate Protection .....                                             | 63        |
| C. Lien Affirmations and Waivers .....                                   | 66        |
| D. Waiver of § 506(c) Surcharge .....                                    | 68        |
| E. Carve-Outs for Professional Fees.....                                 | 69        |
| F. DIP Financing.....                                                    | 73        |
| 1. Financing Need, Availability of<br>Less-Burdensome Alternatives ..... | 73        |
| 2. Events of Default.....                                                | 75        |
| 3. Cross-Collateralization and Roll-Ups.....                             | 78        |
| 4. Preservation of Causes of Action and                                  |           |

## Representing the Creditors' Committee

|                                                                             |    |
|-----------------------------------------------------------------------------|----|
| Challenge Rights Against Lenders.....                                       | 78 |
| 5. Specific Court Rules Regarding Disclosure of<br>Key Financing Terms..... | 80 |

## Chapter V

### **General Case Administration ..... 81**

|                                                           |    |
|-----------------------------------------------------------|----|
| A. Exploring and Determining the Goals for the Case ..... | 82 |
| B. Executory Contracts and Unexpired Leases.....          | 83 |

## Chapter VI

### **Role of the Committee in 363 Sale Cases ..... 87**

|                                                       |     |
|-------------------------------------------------------|-----|
| A. The Need for a Sale.....                           | 88  |
| B. Vetting a Stalking Horse.....                      | 92  |
| C. Negotiations/Objections to Bidding Procedures..... | 94  |
| D. Solicitation of Higher and Better Offers.....      | 99  |
| E. Sale Hearing Objections and Issues.....            | 102 |

## Chapter VII

### **Plan Negotiations ..... 105**

|                                                       |     |
|-------------------------------------------------------|-----|
| A. Negotiating Plan Organization with a Debtor .....  | 106 |
| B. Plan Contents and Alternative Plan Structures..... | 109 |
| 1. Plan Contents .....                                | 109 |
| 2. Alternative Plan Structures .....                  | 122 |
| C. Disclosure Statement: Adequate Information.....    | 123 |
| D. Solicitation.....                                  | 129 |
| E. Confirmation .....                                 | 132 |
| 1. Consensual Confirmation .....                      | 134 |
| 2. Confirmation by Cramdown.....                      | 134 |
| F. Satisfaction of Plan Confirmation Standards.....   | 135 |
| 1. Consensual Confirmation .....                      | 135 |
| 2. Confirmation by Cramdown.....                      | 146 |
| 3. Secured Claims .....                               | 149 |
| 4. Unsecured Claims.....                              | 150 |
| 5. Equity Interests .....                             | 151 |
| G. Assumption/Rejection of Remaining Contracts .....  | 151 |

Chapter VIII

**Post-Confirmation Issues..... 153**

- A. Liquidating Trusts, Claims-Allowance Process..... 154
- B. Claims Objections..... 155
- C. Litigation..... 160
  - 1. Considerations with Regard to All Causes of Action ..... 160
  - 2. Nonbankruptcy Causes of Action ..... 164
  - 3. Bankruptcy Causes of Action..... 169
- D. Post-Confirmation Jurisdiction..... 188