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## ABC Update

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### ABC-Certified Attorneys Score Big



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Generally, an unsecured creditors' committee in a chapter 11 filing provides a collective voice to similarly situated unsecured creditors that may now otherwise have the necessary leverage to negotiate with the debtor, secured creditors and other interested holders. This committee has the power to police a case on behalf of its constituents.

Section 1103 provides that a committee may investigate a debtor's acts, conduct, assets, liabilities and financial condition, including the operation of a business and the desirability of the continuance of such business, and any other matter deemed relevant to the case or plan formation.<sup>1</sup> The Code also gives a committee the catch-all power to perform other services that are of interest to those being represented.<sup>2</sup> Recently, the board-certified attorneys of Bernstein-Burkley, PC<sup>3</sup> were able to utilize these aforementioned powers to represent the official committee of unsecured creditors in order to maximize recovery for all creditors in a local chapter 11 case.

The Lemington Home for the Aged in Pittsburgh entered chapter 11 in April 2005. It was the oldest nonprofit unaffiliated nursing home in the U.S. dedicated to the care of African-American seniors. Lemington had been in operation since 1883.

Despite its rich history, the officers and directors seemed determined to close Lemington without affording the bankruptcy process much time to take hold and run its course.<sup>4</sup> Once in bankruptcy, Lemington told residents that its doors were closing and issued a press release advising of the same before even seeking bankruptcy court approval for a closure.

The unsecured creditors' committee began to exercise its investigatory powers to take a closer

look at Lemington's management in the months leading up to and during the bankruptcy filing. This led the unsecured creditors' committee to believe that the closure of Lemington was the result of mismanagement<sup>5</sup> by its officers and directors. The unsecured creditors' committee's investigation turned up signs that the officers and directors may have been, *inter alia*, (1) refusing to explore options with third parties interested in acquiring Lemington's business; (2) making misleading statements to the press, employees, creditors and the court regarding its operating intentions and financial condition; (3) failing to implement basic policies and procedures that would have collected revenue to possibly avoid bankruptcy; and (4) committing financial neglect. It was time for the unsecured creditors' committee to take action.

The unsecured creditors' committee obtained derivative standing from the court to file a lawsuit on Lemington's behalf against its officers and directors. The purpose was to recover from its directors and officers' insurance policy, and maximize a distribution of assets to creditors. In May 2006, a complaint was filed against the officers and directors for breach of their duties of care and loyalty to Lemington, as well as a claim for deepening insolvency.

The case had a great deal of intrigue. There were broken and disappearing computer hard drives that, when reconstructed, contained damaging evidence. There was a group of powerful and politically connected directors fighting the unsecured creditors' committee, and one of the officers even refused to leave his office and hid from a valuation expert in order to avoid questions regarding his performance.

After years of pretrial wrangling and discovery, plus two trips to the Third Circuit Court of Appeals,<sup>6</sup> a jury trial was held in early 2013 in the

<sup>1</sup> 11 U.S.C. § 1103(c)(2).

<sup>2</sup> 11 U.S.C. § 1103(c)(5).

<sup>3</sup> Bernstein-Burkley, PC has more board certified creditors' rights specialists than any other law firm in Pennsylvania.

<sup>4</sup> It was revealed during litigation that the board of directors had voted to close Lemington in January 2005, roughly four months before the chapter 11 petition was filed.

<sup>5</sup> This mismanagement may have resulted in the tragic death of a resident at the end of 2004.

<sup>6</sup> Including an interlocutory appeal and petition for *writ of mandamus* on the basis of the time limits for trial set by the district court, which were filed in 2011 on the eve of the original trial date.

U.S. District Court for the Western District of Pennsylvania. The jury's verdict against 15 of the 17 defendants awarded the creditors \$5.75 million against the officers and directors, which included punitive damages of \$3.5 million. However, the unsecured creditors' committee's work was not done. For a third and final time, the litigation went to the Third Circuit Court of Appeals after an appeal by the defendants. After written briefs, oral argument, a precedential opinion<sup>7</sup> and the denial of a request for a hearing *en banc*, the unsecured creditors' committee collected a reduced verdict of \$4 million for the estate. The unsecured creditors' committee had stood up to this group of people that ruined the oldest African-American nursing home in the nation and destroyed Lemington's value, without a care about the many people and companies who kept Lemington in business by extending credit.

While eight years of litigation is an extreme example, the aggressive and persistent actions taken by the unsecured creditors' committee produced an extraordinary result. We like to think that the experience and training from board certification created the result — the kind of result that should be considered by unsecured creditors and their counsel when deciding whether to play an active role in the bankruptcy filing of one of their debtors. **abi**

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<sup>7</sup> *In re Lemington Home for the Aged*, 777 F.3d 620 (3d Cir. 2015).