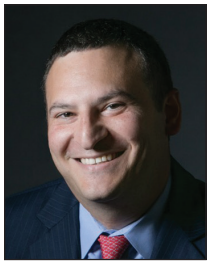
AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Feature

By Stephen Zide, P. Bradley O'Neill and Jennifer Sharret

A Committee of None: Section 1114 Relief When No Retirees Will Serve



Stephen Zide
Kramer Levin Naftalis & Frankel, LLP; New York

P. Bradley O'Neill
Kramer Levin Naftalis & Frankel, LLP; New York

Jennifer Sharret
Kramer Levin Naftalis & Frankel, LLP; New York

Stephen Zide and Bradley O'Neill are partners, and Jennifer Sharret is special counsel, with Kramer Levin Naftalis & Frankel LLP in New York.

Section 1114 of the Bankruptcy Code establishes a process through which companies in chapter 11 can modify retiree benefits. At the outset, the debtor must propose modifications to the "authorized representative of the retirees" that are necessary for the debtor's reorganization and treat all creditors fairly and equally. The debtor must also provide the representative with information to evaluate the proposal, then meet and confer with the representative in good faith. If no agreement is reached, the debtor can seek relief from the court.[1]

As can be seen, the § 1114 process requires the debtor to engage with a representative of the retirees. For retirees that are not members of a union, the bankruptcy court will order that a committee of retirees be appointed as the representative.[2] The Office of the U.S. Trustee (the "U.S. Trustee") appoints the members of the committee from retired employees of the debtor.[3]

But what happens when no retiree is willing to serve on the committee? The Bankruptcy Code does not say. At a minimum, the absence of retirees willing to serve will delay the modification of retiree benefits, because the debtor cannot even begin the process sketched out above without a representative.

This issue is not one of purely academic interest. Unanticipated problems with forming a retiree committee can upset the § 1114 process and unnecessarily jeopardize otherwise well-organized cases. The recent experiences in *Westmoreland* and *Murray Energy* highlight how important it is for debtors and interested parties to be prepared and flexible to keep their cases on track.

Westmoreland[4]

Westmoreland Coal Co. and certain of its affiliates (collectively, WCC) filed for chapter 11 in the Southern District of Texas in October 2018. The bankruptcy followed months of pre-petition negotiations with its secured lenders that produced a consensual debtor-in-possession (DIP) financing and restructuring support agreement (RSA) that provided for the lenders to credit bid for substantially all of the debtors' assets under a chapter 11 plan. Both the DIP and RSA required that WCC obtain material modifications to the extensive benefits it owed its retirees. Both also established strict case milestones, including one that required WCC to obtain § 1114 relief within approximately three months of filing.

Retiree members of the United Mine Workers of America (UMWA) were entitled to approximately $329 million of "Other Post-Employment Benefits" (OPEB) from WCC. Approximately $98 million of these OPEB liabilities were due to retirees entitled to benefits under the Coal Industry Retiree Benefit Act of 1992 (the "Coal Act").

The Coal Act is a federal statute that mandates that employers provide benefits for certain retirees who worked in the coal industry and retired on or before 1994. If an employer ceases to pay retiree benefits covered by the Coal Act, the retirees receive benefits from benefit plans backstopped by the federal government (the "Coal Act Funds"). While the UMWA represented most of its retirees in the OPEB negotiations, it would not represent retirees who were covered by the Coal Act.

Shortly after WCC filed for bankruptcy, the Coal Act Funds moved to establish a committee

1 11 U.S.C. § 1114(f).

2 For unionized retirees, the union is typically the representative unless the union elects not to serve or the bankruptcy court appoints a separate committee of retirees. 11 U.S.C. § 1114(b)-(c).

3 Retiree committees have all the powers of a regular creditors' committee (including payment of fees and expenses of counsel), although some courts have limited their role and imposed a budget.

4 *Westmoreland Coal Co., et al.*, Case No. 18-35672 (Bankr. S.D. Tex. 2018). The authors' firm represented the secured lenders of Westmoreland Coal Co.

to represent the Coal Act retirees and asked for the Coal Act Funds to be appointed to that committee. The debtors supported the creation of a retiree committee, but opposed the appointment of the Coal Act Funds to it, arguing that a retiree committee must be comprised of actual retirees, not the Coal Act Funds.[5] The debtors further argued that the Coal Act Funds were conflicted and could not adequately represent Coal Act retirees because the Coal Act Funds had already taken the position that Coal Act obligations could not be modified (showing their inability to negotiate).[6]

The bankruptcy court approved the appointment of a retiree committee for Coal Act retirees, but noted that it was the U.S. Trustee's job to pick committee members. Perhaps because the Coal Act applied to a dwindling pool of workers who had retired more than 25 years earlier or because those retirees were assured of receiving their benefits regardless of whether WCC or the Coal Act Funds paid them, the U.S. Trustee could not identify any retiree willing to sit on a committee. As a result, the debtor had no one to negotiate with and could not even start the § 1114 process. This delay would have caused the debtor to trip the milestones in the DIP and RSA that, if not extended, could have upended the carefully negotiated case structure.

A Novel Solution

Under milestone pressure to begin the § 1114 process, the debtor sought the appointment of a guardian *ad litem* to serve as the representative for the Coal Act retirees, asserting that the lack of a retiree willing to step up to the role as a representative cannot short-circuit the debtors' ability to restructure OPEB obligations. WCC acknowledged that there was no precedent for the request. The Coal Act Funds objected, arguing that the appointment of a guardian would deprive the U.S. Trustee of its statutory authority to appoint a retiree committee. The Coal Act Funds also encouraged the U.S. Trustee to include their representatives to the committee.

The bankruptcy court appointed a committee made up of three fiduciaries to represent the interests of the Coal Act retirees. The court expressly distinguished this committee from a "retiree committee" appointed under § 1114, since only the U.S. Trustee could appoint a retiree committee. Instead, it appointed the committee under § 105 of the Bankruptcy Code "to protect the interests of the retirees and to negotiate and do those things that a retiree committee would do under Section 1114."[7] The bankruptcy court did not add any Coal Act Funds representatives to the committee, noting their conflict.[8]

Once the fiduciary committee was in place, the debtor was able to begin the § 1114 process in January 2019. WCC subsequently filed its § 1113/1114 motion seeking, among other things, to eliminate the company's Coal Act retiree obligations. Ultimately, the fiduciary committee reached a settlement with the debtor that required WCC to pay OPEB benefits for Coal Act retirees for up to 90 days after the company's sale to the lenders while the retirees transitioned to the Coal Act Funds.

Contingency Planning: *Murray Energy*

Less than a year after the § 1114 process in WCC, Murray Energy Holdings and certain of its affiliates (collectively, "Murray") filed for bankruptcy in the Southern District of Ohio burdened by significant OPEB liabilities. As in *Westmoreland*, the UMWA agreed to serve as the authorized representative for the union retirees but not the statutory Coal Act retirees. Accordingly, a month into the case, Murray moved to appoint a committee to represent Coal Act retirees. To avoid delay, it also requested that if the U.S. Trustee was unable to find retirees to appoint a committee, the court should appoint a guardian *ad litem* (citing the *Westmoreland* case).

The Coal Act Funds objected, arguing that the UMWA had changed its position and was now willing to serve as the authorized representative of retirees but would delegate its duties to the Coal Act Funds.[9] The U.S. Trustee likewise filed a limited objection asserting that there was no authority to appoint a guardian *ad litem* under § 1114 and that the *Westmoreland* court had not done so, but had instead appointed a committee of fiduciaries to protect the interests of the Coal Act retirees under § 105.

The debtors, the U.S. Trustee and the Coal Act Funds resolved the dispute by negotiating an agreed order, which provided the U.S. Trustee with three weeks to form a retiree committee. If it was unable to do so, the debtors would consult with various parties and submit a request on shortened notice for "the appointment of committee members to serve on behalf of, and as the authorized representative of, the statutory retirees pursuant to Section 1114."[10] In the end, the U.S. Trustee found retirees to appoint to the retiree committee, so the contingent procedure was not triggered.

Conclusion

A key takeaway from these cases is that proactive planning is needed where a debtor will seek § 1114 relief. The statute requires that a proposal be made to the "authorized representative" prior to the filing of the § 1114 motion. Because there was no authorized representative in the initial stage of the *Westmoreland* case, the secured lenders were required to extend the deadline to file the § 1113/1114 motion multiple times.

A debtor (and any creditor constituency that is concerned about the timeline) should determine promptly whether there is an authorized representative for each seg-

5 *See In re Federated Dep't Stores Inc.*, 121 B.R. 332, 334 (Bankr. S.D. Ohio 1990) ("[I]t is clear that Congress intended § 1114 to provide for the appointment of qualified retirees to negotiate on behalf of their fellow retirees.").

6 The Coal Act Funds had separately filed an adversary proceeding seeking declaratory relief that statutory Coal Act liabilities are not modifiable under § 1114. The bankruptcy court entered a judgment in favor of Westmoreland Coal Co. *Trustees of the United Mine Workers of Am. 1992 Ben. Plan v. Westmoreland Coal Co. (In re Westmoreland Coal Co.)*, Adv. No. 18-3300, 2018 Bankr. LEXIS 4078 (Bankr. S.D. Tex. Dec. 28, 2018). The bankruptcy court has certified the judgment for direct appeal to the Fifth Circuit Court of Appeals pursuant to 28 U.S.C. § 158(d)(2)(A)(i) and (iii). *Id.* at 27.

7 *In re Westmoreland Coal Co.*, No. 18-35672, Hr'g Tr. (Bankr. S.D. Tex. Jan. 2, 2019), ECF No. 943.

8 *Id.* Before the hearing, the U.S. Trustee filed a notice of its inability to appoint a retiree committee. While not discussed at the hearing, the U.S. Trustee must have made an independent determination that the Coal Act Funds' representatives could not be members of a retiree committee.

9 The Coal Act Funds cited *In re Alpha Natural Res. Inc.*, 552 B.R. 314 (Bankr. E.D. Va. 2016), and *In re Horizon Natural Res. Co.*, 316 B.R. 268 (Bankr. E.D. Ky. 2004), for the proposition that the UMWA can serve the interests of the Coal Act retirees. However, in neither of these cases did the union delegate its authority to negotiate to the Coal Act Funds.

10 *In re Murray Energy Holdings Co. et al.*, No. 19-bk-56885 (Bankr. S.D. Ohio Dec. 11, 2019) [ECF No. 396]. The consensual order also reserved all rights of the U.S. Trustee and the Coal Act Funds regarding the appointment of a committee or authorized representative.

ment of its retirees affected by its contemplated § 1114 relief. If the union declines to represent all retirees or there is no union, the debtor should file a motion to appoint a retiree committee as soon as it knows it intends to modify retiree benefits, and prepare a list of affected retirees with their contact information. Whether a union can delegate its authority to a third party — like it attempted to do in *Murray Energy* — is a novel issue that might come up in future cases.

Finally, when seeking appointment of the committee, the debtor should seek alternative appointment of a fiduciary committee if no retirees are willing to serve. The U.S. Trustee will still require sufficient time to do the initial search for a retiree committee, making it advisable to file the retiree committee motion as early as possible. The two cases discussed teach that an alternative request for a fiduciary committee (as opposed to a guardian *ad litem*) will be less likely to draw an objection from the U.S. Trustee and more likely to be approved by the court. abi

Reprinted with permission from the ABI Journal, Vol. XXXIX, No. 4, April 2020.