

# Covering Credit Bulletin

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## Serving on a Creditor's Committee

In the last twenty-five years, I have served on several creditors' committees, and I learned a great deal from each experience. There are advantages and disadvantages of agreeing to serve on a creditor's committee. I will list the items that I consider most important:

### Pro

You have the ability to impact the direction and the outcome of the bankruptcy filing

You have access to information about how the debtor got into trouble

You have a good idea about whether it is safe to sell the debtor on open account terms 'post petition'

If your post petition invoices are 'overlooked' and become past due a call by you to senior management usually results in the oversight being corrected quickly

### Con

Committee membership involves a significant time commitment over an extended period of time [In my case, the record was a seven year commitment]

It sometimes requires out of town or out of state travel

Your duty is to act in the best interest of all unsecured creditors.

Theoretically, this means that you might have to recommend action – such as pursuing preferences – that would be detrimental to your employer

Your employer receives the same rate of return whether you participate as a member of the official committee or not

You receive no compensation for your work – but usually you are reimbursed for travel expenses

Any time spent serving on the Committee is time away from your current responsibilities

Your employer may not view your participation as beneficial to it

### Questions and Answers

Q. Do you have any language suggesting venue for litigation that would be appropriate for the back of our invoice or as part of our credit application agreement?

A. Possibly. Please ask your attorney to evaluate this statement:

ANY AND ALL DISPUTES ARISING UNDER THIS CREDIT AGREEMENT OR ARISING UNDER OR RELATED TO ANY ACCOUNT(S) WITH *NAME OF DEBTOR* SHALL BE HEARD IN *NAME OF COUNTY, STATE*. DEBTOR HEREBY CONSENTS TO JURISDICTION AND VENUE IN THE STATE AND FEDERAL COURTS (AS APPROPRIATE) IN AND FOR *NAME OF COUNTY, STATE* AND FURTHER, WAIVES ANY OBJECTION TO VENUE AND JURISDICTION WITH RESPECT TO ANY ACTION BROUGHT BY CREDITOR NAME IN SUCH COURT OR COURTS.

Question: What is a Dip?

Answer: A DIP is an acronym for a Debtor in Possession. Under the U.S. Bankruptcy Code, it is a company that continues to operate while going through the bankruptcy process.

Q. Here is a follow on. I have a customer whose parent has filed bankruptcy. I assumed that if the parent filed bankruptcy that the subsidiaries would have to do so. Is that incorrect? Is it possible for the parent company to be in bankruptcy and subsidiary not to be?

A. A subsidiary does not have to file because the parent company has done so... but it is *very* unusual for a subsidiary to avoid bankruptcy and the parent to be in bankruptcy.

Q. Our first sale to a company we assumed was associated with a major car manufacturer did not make their first payment and has apparently gone out of business according to the collection agency we placed the account with. The strange part is that we assumed and were led to believe that this customer was a branch of "GM" and in fact it had "GM" (not the initials, the name itself) as part of the corporation name. Management has asked what went wrong and how we will prevent it in the future. Comments?

A, You *may* have been the victim of the Same Name scam; a popular form of credit fraud in which entities deliberately choose names similar to those of well known companies hoping that the confusion will result in orders being released. My advice is to purchase a credit report on any entity that has a similar name to a well known company. If the credit report is ambiguous, learning what you need to know may be as simple as calling the well known company's headquarters, providing the switchboard operator with the address, and asking for the telephone number. If they have never heard of the entity, use caution. If they confirm the number and/or the address, you may have all the information you need to make your credit decision.

Q. I have never worked for a company that used a team collection approach. Do you have any comments or suggestions about this concept?

A. I do not have enough information about your company's team based approach to comment. In general terms, I believe that there should be shared goals for the credit department as well as individual performance goals. I also think that creating teams of co-workers

that support and back each other up is a good idea that is rarely used because few credit professionals know how to organize it to make the idea successful.

Q. My best collector told me she wants and expects a raise or she will be looking for a job elsewhere. Any thoughts?

A. Several. I would encourage you to make sure that your compensation is competitive. Assuming this person is not a new hire, be sure that your company has not offered higher rates of pay to newly hired collectors. What I have seen as a consultant is that long term employees sometime make about the same amount as trainees. This occurs when the older employees were hired when wages were low, and when newer employees were hired when the labor market was red hot.

Q. I have a customer that is 90 days past due. The customer, which is one of our ten largest customers, claims they are unable to make payments because of a system upgrade that has their entire accounting system shut down. Rumor has it that the company is for sale. If it is true, my concern is that the company is hoarding cash and that the system upgrade is just an excuse. I don't want to hold orders except as a last resort. What would you do?

A. I agree that an order hold is a last option. Before you hold orders, I suggest that you ask your manager for confirmation / approval to do so. I would immediately call the debtor's CFO, tell her or him that at 90 days past due it doesn't really matter why the balance remains unpaid. Offer to send a statement of the balances due on the account. Insist on receiving an immediate wire transfer for 90 percent of the past due balance as a show of good faith.

Q. We are looking for language for mediation and arbitration. Any suggestions?

A. This may be a good starting point for your attorney to review:

Mediation Clause: The parties agree that any claim or dispute relating to this agreement, or any other matters, disputes, or claims between the parties shall be subject to non-binding mediation. Mediation shall

begin within 30 days of one party making a formal written request to the other for mediation. Any such mediation will be held in the federal judicial district in which the debtor company is located, and shall be conducted according to the mediation rules of the National Arbitration Association.

Arbitration Clause: The parties agree that any claim or dispute between them or against any agent, employee, successor, or assign of the other, shall be resolved by binding arbitration by the American Arbitration Association under the Code of Procedure then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective. Information may be obtained and claims may be filed at any office of the American Arbitration Association.

One note of caution: Many attorneys are disdainful of mediation and arbitration clauses, and in particular binding arbitration clauses that prevent one party from suing the other and the right to a trial by jury.

Q. I know there is a fee based service for searching bankruptcy filings in the U.S. Bankruptcy Court system. Are there any free websites or alternative search mechanisms?

A. Not that I am aware of. You already seem to be aware of the PACER system.

Q. This is a follow up. What is PACER?

A. PACER is the acronym for the Public Access to Court Electronic Records systems. This is an electronic access service that allows registered users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts for a fee.

Q. A customer offered to pay us with a joint check. I think I know what this is but I would like confirmation. What do I need to know about joint checks?





