



Emergent Topics Facing Indenture Trustees and Bondholders

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The Concentric Circles Of Distressed Debt



Distressed Investor Priorities

Distressed investing community of concentric circles:

- Investors (buy-sell)
- Advisors (law firms, FA and IB firms, Indenture Trustees)
- Management teams/restructuring officers

Relationships and interaction get things done.

Communications between holders and trustees are underutilized.

Current Issues in Distressed Situations

- *Ad hoc* groups and restructuring support agreements: are they still effective or are they becoming obsolete?
- Bankruptcy and litigation: minimizing cost and maximizing results
- Conflicts and successorship: resignation and replacement
- Compensation challenges post-*Lehman*

Challenges Confronting Debt Security Holders and Indenture Trustees In Enforcing Rights And Remedies Against A Defaulting Issuer

- The limitation on suits (the “no-action”) clause precludes holders from directly and immediately taking legal action, e.g., from filing suit without threshold amount (typically 25-35%) and demand to the trustee. The trustee has 60 days to take action before holders may file suit in their own name
- Waterfall does not include holders’ professional fees
- Trustees usually need direction and indemnification, especially the filing of an involuntary petition or fraudulent conveyance actions
- Trustees have internal procedures that can affect response time to holders or taking action

Direction/Indemnification

- Must the trustee follow a direction?
 - Is the direction prejudicial to other holders?
 - Does the direction comply with law?
 - Does the direction violate the indenture?
- Scope of indemnification
- Language of Indenture is instructive:
 - “satisfactory to the trustee”
 - “reasonably satisfactory to the trustee” or
 - “reasonable”
- Will the trustee require prefunding of indemnity?
- Joint and several, or joint but not several?

Conflicts: When Resignation Or Replacement Of The Trustee Becomes Necessary

- When holders should anticipate a resignation and appointment of successor
- Selection of a successor trustee:
 - How are successors identified and selected?
 - Can holders influence selection?
 - What role does the issuer play?

Implications Of Default/Bankruptcy

- The trustee can retain counsel, including special counsel and financial advisors at the direction of holders. The costs are borne not by any individual holder or holders, but by the entire body of holders, as a priority in the default waterfall.
- Historically, fees have often been paid outright by the debtor in a plan (not deducted from the distribution), but this treatment depends on the circumstances of the case and requires skillful and aggressive negotiation. The payment of fees by a debtor has become more difficult and controversial than ever before because of challenges brought by the United States Trustee.

Implications Of Default/Bankruptcy *(continuation)*

- The trustee has standing to represent all holders in court (and is the only party who can speak for all holders in a court proceeding). This can benefit holders strategically by lending more weight/support to arguments and positions taken in court.
- The trustee can serve on official or unofficial committees and obtain restricted or confidential information.

Implications Of Default/Bankruptcy *(continued)*

- When settlement negotiations ensue, holders may need to become restricted in order to participate in economic discussions (or can retain advisors to do so).
- The trustee can provide input in negotiations, but cannot bind or agree to terms on behalf of holders.



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