

USA

Appointment

An insolvency practitioner (IP) is appointed only in respect of some types of insolvency proceedings. In out-of-court and Chapter 11 bankruptcy matters, the company's management with the assistance of insolvency counsel and financial professionals administer the case. Similarly in Chapter 7 bankruptcy matters, a court-appointed trustee administers the case.

In some legal proceedings, including state court actions and Chapter 11 bankruptcy matters, the court may appoint professionals tasked as Examiners or Special Masters to investigate a specific issue and report directly to the court.

In state court receiverships a court-appointed receiver administers the receivership. The same types of IPs may be appointed for the various types of insolvency proceedings including insolvency of insurance companies. There is no specific rule or notion that would say different types of IPs would deal with insurance companies.

Qualifications

11 U.S.C. Section 321 of the Bankruptcy Code establishes the conditions for the eligibility to serve as a trustee. These include competence to perform the duties of the trustees as well as satisfying various resident requirements. A person who has served as an examiner in the case may not then serve as the trustee. 11 U.S.C. Section 327 of the Bankruptcy Code also provides for the appointment of professionals to assist with the bankruptcy case provided the professionals do not hold or represent an interest adverse to the estate and are disinterested persons. In Chapter 11 cases, committees

established pursuant to 11 U.S.C. Section 1102 of the US Bankruptcy Code may also engage professionals to assist the committee in carrying out its duties.

In state court receiver matters, qualification requirements, if any, are established on a state-by-state basis and vary accordingly. In addition, custom and practice, reputation, experience and licensing requirements have an influence. Specific industry organisations such as the American Bankruptcy Institute (ABI) and the Association of Insolvency and Restructuring Advisors (AIRA) have established and monitor programmes of professional competence in the areas of legal (ABI) and financial (AIRA – CIRA, CDBV) advisory in the troubled company area of practice.

Selection

The determination of selection is dependent upon whom the IP is representing. In a Chapter 11 case, the official committee(s) generally conducts interviews of interested professionals to choose a firm or firms to represent the committee. The committee selection is then placed before the court for approval. The debtor will likewise choose the firm or firms to assist in the restructuring. Outside of a court proceeding, no court approval is required. Once a bankruptcy case is commenced, the debtor must have its selection of professionals approved by the court.

In Chapter 7 bankruptcy cases the Office of the United States Trustee, an office of the US Department of Justice (OUST), will appoint an interim trustee for the case. The creditors have the option of electing another trustee of their choosing as provided under the US Bankruptcy Code.

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Supervision

Depending on the parties for whom the IP is working, the IP may be answerable to the committee, lender, or debtor who hired the IP. Additionally, in all retentions pursuant to court order in Chapter 11 and other bankruptcy matters, the performance of the IP is subject to scrutiny by the court, particularly in connection with the approval of fee requests.

Remuneration

Under the Bankruptcy Code, compensation to Chapter 7 and Chapter 11 trustees is specified in 11 U.S.C. Section 326. The court may allow reasonable compensation for the trustees services not to exceed 25 per cent on the first \$5,000 of distributions or funds turned over to parties-in-interest, 10 per cent on any amount greater than \$5,000 but not in excess of \$50,000, five per cent on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed three per cent in excess of \$1,000,000.

According to 11 U.S.C. Section 328 of the Bankruptcy Code, professionals may be employed on reasonable terms and conditions including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the bankruptcy court has the power to allow compensation different from the compensation provided under such terms if the outcome of the case should warrant.

In out-of-court restructurings, the debtor company generally pays the professionals for all parties including any unofficial committees and

any secured lender. In a bankruptcy proceeding the debtor pays for the professionals of any official committees and its own professionals. Generally, secured lenders in bankruptcy proceedings are responsible for the cost of their own professionals, reimbursement being dependent on the level of security.

Out of court, the remuneration of the IPs is approved by the respective client. For the debtor company, it may be the board of directors or a committee of the board. In a bankruptcy court proceeding, fees are generally subject to a fee application process where detailed fee statements are filed with the court and available to all parties-in-interest. Any party-in-interest may raise an objection to the fees. OUST also has it in their mandate to review fee applications and comment on them to the court. OUST has used computer-based fee analysis to review fees in large cases.

Regulation

Both attorneys and accountants are subject to state licensing requirements. Investment bankers may also be subject to securities regulation depending on the scope of the practice. Specifically as it relates to restructuring work, practitioners who are members of organisations such as ABI and AIRA are expected to maintain high levels of professional proficiency. However, there is no single regulatory body that regulates the practice of IPs. Market perception is the ultimate check on the work performed.

The bankruptcy judge is also a powerful check on the quality of a professional's work by virtue of the judge's oversight of the compensation process.