

A GUIDE TO TRUSTEE ELECTIONS¹

By Richard C. Friedman
Attorney, Region 11 (Chicago)

I. Introduction

This guide addresses issues that arise in preparing for, conducting, and completing trustee elections in chapter 7 and chapter 11 cases. United States Trustee Program personnel should feel free to contact the writer for assistance in implementing this guide.

II. Preparing for the Election

A. Chapter 7 Preparation In the overwhelming majority of chapter 7 cases, there is no trustee election and the interim trustee appointed by the United States Trustee becomes the permanent trustee by operation of 11 U.S.C. § 702(d). Where there is an election, the United States Trustee must apply a complex set of statutes and rules and file an election report with the court. Adequate preparation greatly facilitates the successful completion of these tasks.

Pursuant to 11 U.S.C. § 341(b), the United States Trustee presides at the meeting of creditors. If no election is expected, the United States Trustee as a matter of course designates the interim trustee as the person to preside at and conduct the meeting. See Fed.R.Bank.P. 9001(11). Where, however, an election is anticipated, the presiding officer should not be the interim trustee, but an employee of the United States Trustee. While interim trustees are generally familiar with election procedures, the integrity of the bankruptcy system requires that someone without a financial stake in the outcome of the election preside and report to the court. Sometimes it is difficult for anyone from the United States Trustee's office to physically preside at the meeting due to the meeting's geographic location. In that event, the United States Trustee may conduct the meeting telephonically with the assistance of the interim trustee.

Because meaningful preparation takes time, it is important to have advance notice that an election will be requested. An interim trustee who knows that an election will

be called should immediately inform the United States Trustee so that United States Trustee personnel can preside at the meeting. Unfortunately, advance notice does not always occur and sometimes neither the interim trustee nor the United States Trustee knows that an election will be requested until the meeting of creditors is convened.

Because authority to preside at and conduct the meeting is routinely delegated to the interim trustee, the United States Trustee is seldom present at the meeting when the election is requested. The *Handbook for Chapter 7 Trustees* provides at p. 4-1 that "if the creditors move to elect a trustee during the § 341(a) meeting without prior notice, the interim trustee shall adjourn the meeting and notify the United States Trustee who shall preside over the election then or at a later date."

Adjournments are somewhat problematic because there is some authority that if the election is not held at the initial meeting, creditors lose their right to an election. See Vincent D. Abrunzo, Jr., *Trustee Election Procedures*, NABTALK (Winter 1988)(citing *Matter of Blanchard Management Corp.*, 10 B.R. 186, 189 (Bankr. S.D.N.Y. 1981). *Blanchard* has been criticized since arguably it could cause creditors to lose their right to an election through no fault of their own. *In re Michelex, Ltd.*, 195 B.R. 993, 1006-1007 (Bankr. W.D. Mich. 1996). Because Fed.R.Bank.P. 2003(e) explicitly authorizes adjournments, *Blanchard* has little basis as a matter of statutory construction. Nevertheless, the *Blanchard* case should be considered when adjourning the meeting of creditors to another date.

In order to ensure adequate preparation for an election, United States Trustee Program personnel should not only familiarize themselves with election procedures, but also convey to panel members and the bankruptcy community at large the value of notifying the United States Trustee in advance that an election will be requested. This may be done at continuing education programs where creditors' representatives are present. Consideration also should be given to posting an appropriate message on United States Trustee Program web sites.

Several documents should be reviewed in advance of an election. In order to know what types of documents to review,

it is necessary to understand the requirements for requesting and voting in an election.

Creditors are eligible to request and vote in an election under § 702 only if they hold general unsecured claims that are allowable, undisputed, fixed, and liquidated. In addition, a creditor cannot be an insider or hold an interest materially adverse to the estate and its other creditors. Only creditors holding general unsecured claims may request and vote in elections. Neither creditors holding secured claims nor creditors holding priority claims, such as wage claims, qualify to request an election and vote under § 702. It is important to note that one person can hold a claim that is partly secured or partly priority with the remainder being unsecured. For example, if a creditor is owed \$10,000 in wages, \$4,300 of which is a priority unsecured claim, the creditor may vote the remaining \$5,700 general unsecured claim in a trustee election.

Secondly, the claim must be *allowable* to be eligible for voting under § 702. The allowance of claims or interests is determined under § 502. Section 502(b) enumerates various conditions that render a claim not allowable. For example, a claim that is unenforceable under non-bankruptcy law is not allowable. Consequently, a personal injury claim for which the statute of limitations had expired would be unenforceable and, therefore, not allowable. If none of § 502(b)'s enumerated conditions apply to the particular claim, then the claim is allowable.

Section 702 requires that the general unsecured claim also be *undisputed, fixed, and liquidated*. A claim is disputed if the debtor has listed it as such on the bankruptcy schedules or a written objection to the claim has been filed by a party in interest and that objection has not been overruled or the claim temporarily allowed. Because claims are often not filed or presented until the meeting of creditors, a written objection may not be necessary for the claim to be deemed disputed, provided an oral objection is made to the claim at the meeting prior to voting. *See, e.g., In re Sforza*, 174 B.R. 656, 658 (Bankr. D. Mass 1994) (holding that debtor's attorney's statement at meeting of creditors that creditor's claim was subject to counterclaim in state court litigation rendered claim disputed for voting purposes).

For a claim to be fixed, it must not be subject to any contingency. "A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created." *In re All Media Properties, Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981). For example, a claim based on a guarantee where the non-debtor guarantor is not in default is not fixed.

A liquidated claim is one that is capable of being calculated or ascertained. Contract claims generally are liquidated, but tort claims that have not been reduced to judgment are not liquidated. "Merely because a debtor disputes a debt, or has defenses or counterclaims, that does not render that debt contingent or unliquidated." *In re Albano*, 55 B.R. 363, 368 (N.D. Ill. 1985), *aff'd*, 767 F.2d 924 (7th Cir.), *cert denied.*, 475 U.S. 1010 (1986).

Where the creditor holds a claim that is allowable, undisputed, fixed, and liquidated, the creditor still cannot legally request or vote in an election if the creditor is an insider or has an interest which is materially adverse to other creditors. The term "insider" is defined in 11 U.S.C. § 101(31). Although numerous examples are included in § 101(31), the definition is merely illustrative and not exhaustive. Conversely, the determination whether a creditor holds a "materially adverse interest" must be decided on a case by case basis. In *In re New York Produce American & Korean Auction Corp.*, 106 B.R. 42, 47 (Bankr. S.D.N.Y. 1989), *appeal denied*, 1990 WL 129197 (S.D.N.Y. 1990), the court found that creditors reserving their rights to assert separate "priority" claims under the Perishable Agricultural Commodities Act had a materially adverse interest. In *Matter of NNLC Corp.*, 96 B.R. 7, 10 (Bankr. D. Conn. 1989), the court found that a creditor with a partially secured claim and potential preference exposure possessed a materially adverse interest. And in *In re Jotan, Inc.*, 1999 WL 493253 (Bank.M.D. Fla. 1999), the court found that a bank group's secured and potential super-priority claims rendered its interest adverse to the other unsecured creditors and, therefore, disqualified its vote.

Even if the creditor holds an allowable general unsecured

claim that is undisputed, fixed, and liquidated, the creditor is not entitled to request an election and vote unless it has filed a proof of claim. Pursuant to Fed.R.Bank.P. 2003(b)(3), a creditor in chapter 7 "is entitled to vote at a meeting if, at or before the meeting, the creditor has filed a proof of claim or a writing setting forth facts evidencing a right to vote pursuant to § 702(a) of the Code unless objection is made to the claim or the proof of claim is insufficient on its face." One bankruptcy court has analogized this prerequisite to a registration requirement for voting in a public election. A person may be qualified to vote, but one who has not registered is not permitted to vote. Similarly, a creditor holding an allowable claim cannot vote at the meeting if it fails to present a proof of claim or other writing at the meeting of creditors. *Michalex*, 195 B.R. at 1005-1006.

Before a trustee election can be held at the meeting of creditors, § 702(b) requires that the election be requested by qualified creditors holding at least 20% in amount of the claims specified in § 702(a). If qualified creditors holding the requisite percentage of claims request an election, § 702(c)(1) then requires that qualified creditors holding at least 20% in amount of the claims specified in § 702(a) actually vote in the election in order for the election to be valid. See *Michalex*, 195 B.R. at 999. In determining whether the 20% requirement has been met, courts have adopted two opposing standards. One view is that the 20% requirement is determined simply by reference to the proofs of claims actually on file as of the § 341 meeting. *In re Lake States Commodities, Inc.*, 173 B.R. 642, 646-47 (Bankr. N.D. Ill. 1994). The other view is that the 20% requirement is determined by reference to the debtor's schedules, as well as the proofs of claims actually on file as of the § 341 meeting. *In re American Eagle Mfg., Inc.* 231 B.R. 320, 329 (9th Cir.BAP 1999); *Michalex*, 195 B.R. at 1006. The *Michalex* court illustrates the difference with the following hypothetical:

"Assume the debtor's schedules list multiple entities that hold \$100,000 in aggregate undisputed, fixed, liquidated, nonpriority, unsecured claims. None of the scheduled creditors is an insider or holds an interest that is materially adverse to other creditors. Only one creditor files a proof of claim at the time of the § 341 meeting. The claim is in the

amount of \$5,000 and is deemed allowed because no objection is lodged. The creditor appears, requests an election, and votes its claim for a prospective trustee. Utilizing the schedules results in no election of a trustee--only 5% of the § 702(a) claims requested an election and actually voted. Utilizing proofs of claim filed results in a valid election--100% of the § 702(a) claims requested the election and 100% of these claims actually voted."

Michalex, 195 B.R. at 999-1000, n. 13.

To determine whether a creditor is eligible to request and vote in an election, the United States Trustee should review the debtor's schedules and statement of financial affairs, the claims register, and proofs of claim filed with the court prior to the creditors' meeting. Pleadings filed in the bankruptcy case or any related adversary proceeding should also be reviewed prior to the meeting. These documents should provide sufficient information concerning the nature of the claims in the case, eligibility of creditors to request an election, and whether the 20% requirement for requesting and voting in an election has been met.

Finally, the solicitation and voting of any proxies should be analyzed before conducting the election. Pursuant to Fed.R.Bank.P. 2006(e), "at any time before the voting commences at any meeting of creditors pursuant to § 341 of the Code, or at any other time as the court may direct, a holder of two or more proxies shall file and transmit to the United States Trustee a verified list of the proxies to be voted and a verified statement of the pertinent facts and circumstances in connection with the execution and delivery of each proxy" The rule contains a number of explicit provisions governing the solicitation and voting of proxies. Because lack of compliance with these provisions may result in disqualification for voting purposes, the United States Trustee should carefully review proxies prior to the election to determine whether issues regarding the validity of proxies are likely to be raised at the election. See *In re Renfrow*, 198 B.R. 325, 326 (Bankr. E.D. Cal. 1996)(holding that the specific provisions of Fed.R.Bank.P. 2006 requiring a written proxy at a trustee election take precedence over the general provisions of Fed.R.Bank.P. 9010(a)).

B. Chapter 11 Preparation On the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee, the United States Trustee must convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. 11 U.S.C. § 1104(b). Fed.R.Bank.P. 2002(a)(1) requires the clerk or some other person as the court may direct to give 20 days notice by mail to the debtor, the trustee, all creditors and indenture trustees of the § 1104(b) meeting.

Unfortunately, there is no official form of notice for the clerk to use. Therefore, the United States Trustee generally will have to prepare the form of notice for the clerk to serve. Alternatively, the United States Trustee may request authority from the court to serve the notice instead of the clerk. Where there are few to serve, this may be the most practical solution. Where, however, there are hundreds or thousands of creditors, the United States Trustee generally should not serve the notice. Remember that the United States Trustee is not a "person" within the meaning of 11 U.S.C. § 101(41) and, therefore, cannot be required to serve notice under Fed.R.Bank.P. 2002(a)(1).

Section 1104(b) specifically provides that the election of a chapter 11 trustee shall be conducted in the manner provided for the election of chapter 7 trustees in § 702. The same general requirements for trustee elections in chapter 7 cases apply to chapter 11 cases, and the same kind of documents reviewed prior to an election in chapter 7 should be reviewed in advance of the chapter 11 trustee election.

Note, however, that while the 20% requirement applies in chapter 11 cases, it operates somewhat differently than in chapter 7. Creditors whose claims are not listed as disputed, contingent, or unliquidated are not required to file proofs of claims in a chapter 11 case. Fed.R.Bank.P. 3003(b)(1). Such claims are treated as "deemed filed" and should be considered in calculating whether the 20% requirement has been met. Furthermore, creditors holding such claims ought to be deemed "registered" for voting purposes whether or not they have filed a formal proof of claim. Because a deadline for filing claims may be fixed in a chapter 11 case before the election is held, proofs of claims filed after the deadline should not be considered for purposes of determining whether the 20% requirement has been met. Creditors attempting to vote such late claims should be considered "unregistered voters."

III. Conducting the Election

A. Chapter 7 Elections There are a number of steps to follow in conducting a chapter 7 trustee election. The trustee election is done in conjunction with the meeting of creditors, but it is not the only business to be conducted at the meeting. Use of the following procedure will allow the election and other matters to be accomplished in an orderly manner:

1. Call the meeting to order by identifying the case by name and number.
2. Identify yourself as the United States Trustee's representative and presiding officer.
3. Identify the interim trustee.
4. Identify the debtor and the debtor's attorney.
5. Swear in the debtor's representative and state that the meeting is being recorded, that everyone who speaks should do so loudly enough so that it can be recorded, and that prior to speaking the person should identify himself or herself for the record.
6. Request everyone present to sign in and receive business cards from those who have them.
7. State that the business of the meeting is to (a) examine the debtor regarding its financial affairs and (b) conduct a trustee election if one is requested.
8. State that if any party in interest requests an election, one will be conducted. State that, as the presiding officer, you will conduct the election and thereafter file a report with the court. Explain that the presiding officer does not have the authority to adjudicate any disputes regarding the election and that disputes will be decided by the bankruptcy judge. In addition, explain that creditors have 10 days after the election report is filed to request the bankruptcy court to resolve any election disputes pursuant to Fed.R.Bankr.P. 2003(d) and that the interim trustee will become the permanent trustee if no such request is filed.
9. Inquire whether anyone requests an election.
10. If anyone requests an election, identify who they are for the record and mark and receive any proofs of claims and proxies that they tender.
11. Inquire whether anyone objects to the election requests, proofs of claims, or proxies and, if so,

- note the identity of the objector and the basis for the objection. Mark and receive any written material in opposition to the election requests.
12. Identify who intends to vote in the election. Receive and mark each voter's proof of claim and proxies.
 13. Inquire whether anyone objects to any person's eligibility to vote. Note the identity of the objector and the basis for the objection. Mark and receive any written material in opposition to the voter.
 14. Receive nominations for trustee from any party who has requested the election. Be sure to receive the address of each candidate.
 15. Inquire whether anyone objects to any of the nominees' eligibility and, if so, note the identity of the objector and the basis for the objection. Mark and receive any written material in opposition to the nominee.
 16. Allow time for the parties to discuss the merits of the candidates.
 17. Distribute ballots and ask each voter to fill in the name of the creditor, the amount of the claim voted, and the candidate for which the ballot is cast.
 18. Tabulate the ballots and announce whether there is any dispute regarding the election. If there is a dispute, indicate the possible outcomes and reiterate that creditors have 10 days after the election report is filed to request the court to resolve the dispute. State that a report of disputed election will be promptly filed with the court by the United States Trustee. If there is no dispute, announce that the United States Trustee will file a report of undisputed election with the court identifying the name and address of the elected trustee. Further, state that the elected trustee has five days to qualify as trustee by filing his or her bond in accordance with 11 U.S.C. § 322(a).
 19. Proceed to examine the debtor or adjourn that examination to a date certain, depending upon the interests of the parties present.
 20. Thank everyone for their participation in the process.

B. Chapter 11 Elections Section 1104(b) of the Bankruptcy Code and Fed.R.Bankr.P. 2007.1 govern the election

of trustees in chapter 11 cases. Chapter 11 elections should be conducted like chapter 7 elections, with two exceptions. First, as noted above, a creditor does not necessarily have to file a proof of claim in order to have an allowable and voteable claim. The creditor's claim need only be listed in the schedules as not being disputed, contingent, or unliquidated. If creditors request or attempt to vote in the election based upon the schedules alone, this fact should be noted on the record and a copy of the schedules should be marked as part of the record of the meeting.

Secondly, unlike chapter 7, which permits a person who is not disinterested to be elected trustee, § 1104(b) specifically provides that only a "disinterested person" may be elected a chapter 11 trustee. "Disinterested person," as defined in § 101(14), means a person that -

- a. is not a creditor, an equity security holder, or an insider;
- b. is not and was not an investment banker for any outstanding security of the debtor;
- c. has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security for the debtor;
- d. is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in (b) and (c) above; and
- e. does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in (b) and (c) above, or for any other reason.

11 U.S.C. § 101(14). Where a chapter 11 election is disputed, the report of the disputed election must also contain verified statements by each "candidate elected under each alternative presented by the dispute, setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee." Fed.R.Bankr.P. 2007.1(b)(3)(B).

At the meeting, the presiding officer should request each candidate to promptly submit the verified statement to the United States Trustee so that the election report can be promptly filed. Finally, as in chapter 7, unless a request to resolve the dispute is filed within 10 days of the filing of the report, the previously appointed trustee will serve as case trustee. See Fed.R.Bank.P. 2007.1(b)(3)(B); *but see American Eagle*, 209 B.R. 320, 331-33 (finding time limits to request resolution of election disputes invalid because not consistent with § 702).

IV. Completing Elections

A. Completing the Chapter 7 Election The chapter 7 election process must be completed promptly after the election has been conducted. If the election is undisputed, the United States Trustee must file a report of undisputed election stating that the election is undisputed and giving the name and address of the elected trustee. See Fed.R.Bank.P. 2003(d)(1). The United States Trustee also must notify the elected trustee of his or her selection and how to qualify for office by posting the requisite bond. See Fed.R.Bank.P. 2008.

If the election is disputed, the United States Trustee must file a report with the court stating that the election is disputed. Fed.R.Bankr.P. 2003(d)(2) further requires the report to inform the court of the nature of the dispute and to list the name and address of any candidate elected under any alternative presented by the dispute. Fed.R.Bank.P. 2003(b)(3) also provides that "in the event of an objection to the amount or allowability of a claim for the purpose of voting, unless the court orders otherwise, the United States trustee shall tabulate the votes for each alternative presented by the dispute and, if resolution of such dispute is necessary to determine the result of the election, the tabulations for each alternative shall be reported to the court." The report of election should be impartial with all relevant documents received at the meeting attached as exhibits. In order to enhance the objectivity of the report, the United States Trustee should submit a separate pleading to the court where recommendations concerning any of the issues raised by the report are deemed appropriate. No later than the date the report is filed with the court, the United States Trustee must mail a copy of the report to any party in interest who requests it. See Fed.R.Bank.P. 2003(d)(2).

B. Completing the Chapter 11 Election The procedure for completing a chapter 11 trustee election differs from the procedure in chapter 7 in at least two ways. In chapter 7 the United States Trustee is not required to request court approval of a trustee elected in an undisputed election. In chapter 11, however, the United States Trustee must file an application for approval of the elected trustee's appointment even if the election is undisputed.

Fed.R.Bank.P. 2007.1(b)(3). The application must be accompanied by a verified statement of the candidate setting forth his or her "connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee."
Fed.R.Bankr.P. 2007.1(c).

Finally, in the case of a chapter 11 disputed election, service of the election report is somewhat broader than in the chapter 7 context. In addition to serving requesting parties in interest, the United States Trustee is required to mail a copy of the election report and "each verified statement to any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and to any committee appointed under § 1102 of the Code."
Fed.R.Bank.P. 2007.1(b)(3)(B).

1. The views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, the U.S. Department of Justice or the United States Trustee Program.

An earlier version of this article appeared in the 1999 Advanced Chapter 7 Training manual used in San Antonio, Tex., and Columbia, S.C. This updated and revised version reflects case law developments since those training sessions as well as amendments to the Federal Rules of Bankruptcy Procedure that became effective on December 1, 1999.

Of particular note is amended Rule 2003(d), which significantly alters chapter 7 practice. Prior to the amendment, parties in interest had 10 days from the date of the creditors' meeting to file a motion for the resolution of an election dispute. Pursuant to the amendment, parties in interest now have 10 days from the date the United States Trustee's election report is filed with the court to file a

motion for the resolution of an election dispute. This change in the rule makes the deadline for moving to resolve an election dispute the same in chapter 7 cases as in chapter 11 cases. See Rule 2007.1(b)(3)(B).