



AMERICAN
BANKRUPTCY
INSTITUTE

2019 Alexander L. Paskay Memorial Bankruptcy Seminar

Business Session

Dealing with Government Agencies in Chapter 11 (SEC, IRS, PBGC, FCC and UST)

Hon. Cynthia C. Jackson, Moderator

U.S. Bankruptcy Court (M.D. Fla.); Orlando

Stephen D. Busey

Smith Hulsey & Busey; Jacksonville

Suzanne Kelly

EisnerAmper LLP; New York

Margaret M. Newell

U.S. Department of Justice; Washington, D.C.

T. Patrick Tinker

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ABI Paskay Panel: Dealing with Government Agencies in Chapter 11

I. Introduction by Judge Jackson

A. Panelists

1. T. Patrick Tinker, Office of the U.S. Trustee; Wilmington, Delaware.
2. Margaret M. Newell, Assistant Director, United States Department of Justice; Washington, D.C.
3. Suzanne Kelly, EisnerAmper; New York
4. Stephen D. Busey, Smith Hulsey & Busey; Jacksonville, Florida

B. Purpose of Panel and Discussion.

1. Provide insight about why government agencies appear and monitor Chapter 11 cases.
2. Provide practice pointers for dealing with government agencies in Chapter 11 cases.

II. EMC's Problems by Judge Jackson

Leon Musky is the CEO and former chairman of Edison Motor Company ("EMC") -- a publicly traded company that designs, develops and sells electric vehicles and energy storage systems. A couple of years ago, EMC acquired two factories and the unionized employees that worked there. In total, EMC operates three factories and has offices and showrooms throughout the U.S., including one in Jacksonville, FL.

EMC employs approximately 25,000 individuals in the U.S., of which 20,000 belong to the United Automobile Workers Union. EMC provides benefits to all of its employees -- including a pension. EMC's assets total about \$15 billion. EMC's debts exceed \$20 billion and around \$500m of that debt is due at the end of next month.

Leon is worried about EMC. The factories took longer than anticipated to start production of EMC's new Model C vehicle and as a result, EMC did not meet its year end production target. Because Leon and other EMC executives ignored the severity of the Model C production delays, EMC significantly overreported the expected Model C production to its investors.

Leon believes that he can quickly resolve EMC's problems if he takes the company private. So, about six months ago, he announced on Twitter that "he is considering taking EMC private and that funding is secured." A few weeks later Leon recants the tweet; but the damage is done. The SEC starts an investigation of Leon's tweet and sues Leon and EMC alleging securities fraud. Leon and EMC quickly settle with the SEC. Leon and EMC are fined \$30m each and Leon agrees to step down as chairman; but Leon remains on the board as CEO of EMC.

The SEC and DOJ (not a good sign) are now investigating EMC's overreporting of the Model C production to investors. Currently, EMC is in the process of responding to the SEC's subpoenas.

While visiting the Jacksonville office, EMC's general counsel decides to visit his pal Steve Busey. Although Leon previously joked about EMC going bankrupt last year -- it now appears to him and his general counsel that a Chapter 11 might help. Leon is contemplating:

- obtaining enough funding to pay the \$500m due next month and take EMC private through a plan of reorganization
- laying off about 5,000 employees due to advancements in technology
- eliminating or revising the terms of the employee pensions
- resolving the SEC and USDOJ investigation (because they will find something).

Of course, Steve wants a retainer before getting involved. Leon wires the funds from his own private account and the board agrees to the filing (because they are Leon's pals too).

III. Panel Discussion

A. Dealing with the Office of the United States Trustee ("UST")

1. Initial Contact with the UST
 - a. When to Contact the UST
 - b. Contacting the UST with Publicly Traded Companies

2. Chapter 11 First Day Motions
 - a. Employee's Prepetition Wages
 - b. Compensating Insiders
 - c. Cash Collateral and DIP Financing
 3. Avoiding Objections to Employment of Counsel
 - a. Application of Debtor's Counsel
 - b. Application of Special Counsel
 - c. Retainers
 - d. Conflicts of Interest
 4. Initial Debtor Interview and Section 341 Meeting of Creditors
 - a. Pointers for Having a Successful Interview or Meeting
 - b. Suggestions for an Interview and Meeting with Publicly Traded Companies
 5. Committees
 - a. Appointment of Committees
 - b. Types of Committees
 - c. Role of UST and Committees
 6. UST and Other Government Agencies
 - a. Role of UST
 - b. Interaction of UST and other Government Agencies
 7. Practice Pointers for Dealing with the UST
- B. Dealing with the United States Department of Justice ("USDOJ")
1. Role of USDOJ in a Chapter 11 Case
 - a. Government Interest or Involvement
 - b. Representing the Government
 2. Contacting the USDOJ
 - a. How to Contact the USDOJ
 - b. When to Contact the USDOJ
 - c. Maintaining Lines of Communication
 3. Settlement Negotiations with the USDOJ
 - a. Timeframes and Procedures within the Government
 - b. Required Internal Governmental Approvals
 - c. Mediations

4. Practice Pointers for Dealing with the USDOJ

C. Dealing with the Pension Benefit Guaranty Corporation (“PBGC”)

1. Role of the PBGC in a Chapter 11 Case

a. What is the PBGC

2. Pension Plans

a. How the Debtor May Acquire a Plan

b. Termination of a Plan

c. Effect of Union Requests

3. PBGC and Creditor Committee

a. PBGC’s Involvement on a Committee

b. Communications with the Debtor

4. PBGC Liens

a. Imposition of Liens

b. Why the PBGC Imposes Liens

5. Practice Pointers for Dealing with the PBGC

D. Debtor’s Counsel Perspective

1. Contacting Government Agencies

a. Gathering Information

b. Professionalism

IV. Conclusion/ Questions:

UST Information

United States Trustee Program Policy and Practices Manual:

<https://www.justice.gov/ust/united-states-trustee-program-policy-and-practices-manual>

Professional Compensation & Guidelines – Fee Guidelines:

<https://www.justice.gov/ust/fee-guidelines>

United States Trustee Region 21 Website:

<https://www.justice.gov/ust-regions-r21>

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USDOJ Information

Website:

<https://www.justice.gov/>

Component Contact Information (All Divisions, Offices, Administration etc.)

<https://www.justice.gov/component-contact-information>

Contacts:

Correspondence to the Department, including the Attorney General, may be sent to:

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Department may be contacted by phone at the following:

- Department Comment Line: 202-353-1555
- Department of Justice Main Switchboard: 202-514-2000
- TTY/ASCII/TDD: 800-877-8339 (or Federal IP Relay Service)

PBGC Information

Filing Requirements for Companies in Bankruptcy – Bankruptcy Filing & Missed Contributions:

<https://www.pbgc.gov/prac/reporting-and-disclosure/reportable-events>

Other Guidance – Links to PBGC Legal Filings, Decisions & PBGC’s Litigation Outline:

<https://www.pbgc.gov/prac/other-guidance>

Contacts:

Bankruptcy Reporting

Pension Benefit Guaranty Corporation
Office of the Chief Counsel
1200 K Street NW
Washington, DC 20005-4026

Full Contact List

<https://www.pbgc.gov/about/pg/contact/contact-prac>

SEC Information

Securities and Exchange Commission Division of Enforcement – Enforcement Manual:

<https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

Securities and Exchange Commission Division of Enforcement Website:

<https://www.sec.gov/page/enforcement-section-landing>

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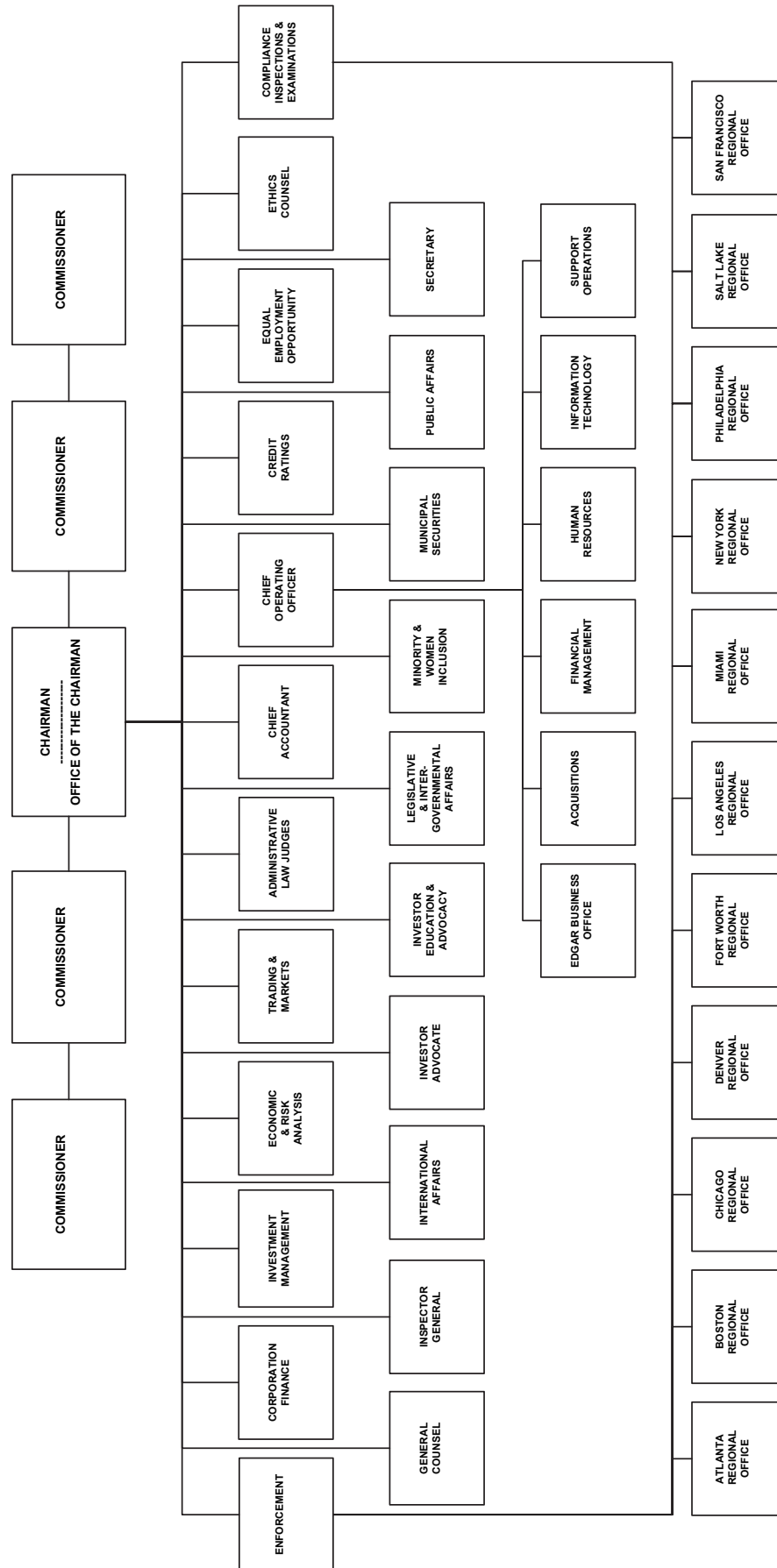
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Federal Communications Commission Enforcement Website:

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As of 8/1/2018

