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## The Committee's Duty to Share, Post-BAPCPA

### A Review of the Cases

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Section 1102(b)(3) of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), provides in pertinent part that a creditors' committee, appointed under §1102(a) of the Code, shall (A) provide access to information to the debtor's unsecured creditors who are not members of the appointed committee, (B) solicit and receive comments from all unsecured creditors and (C) be subject to a court order that compels any additional report or disclosure to be made to unsecured creditors.<sup>1</sup> A review of cases and the legislative history illustrate that there are many possible interpretations of the proper way for a committee to meet this new duty.

#### The Legislative History of §1102(b)(3): Little Insight



Kristen Bowen Perry

On its face, the plain language of §1102(b)(3) is ambiguous and may be broadly construed. The legislative history of §1102(b)(3) does not provide much guidance on determining what type of "information" a committee must share with the unsecured creditors not appointed to the committee or the mode in which the committee must solicit and receive comments from such creditors. The House Report offers little help in interpreting the requirements of §1102(b)(3), but rather states that this

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section "requires the committee to give creditors having claims of the kind represented by the committee access to information. In addition, the committee must solicit and receive comments from these creditors and, pursuant to court order, make additional reports and disclosures available to them."<sup>2</sup>

## Legislative Update

Despite this, a review of provisions from the Bankruptcy Act of 1898 (the Act) and the legislative history of bills presented prior to the enactment of BAPCPA may offer some insight. The U.S. Bankruptcy Court for the Southern District of New York looked to §339(1) of the Act, and its accompanying Rule 11-29, to shed light on the scope of §1102(b)(3).<sup>3</sup> In interpreting §1102(b)(3), the court relied on the Act's provision that a creditors committee appointed under chapter 11 "report to the creditors from time to time concerning the progress of the proceeding," and Rule 11-29, which stated that the function of a committee was to "report to the creditors concerning the progress of the case."<sup>4</sup> The court relied on case law interpreting Rule 11-29, which held

that a committee should not have to "forward all of the raw data it receives and considers in the process of carrying out its duties," but rather, should provide creditors with "a fair presentation of the status of the debtor."<sup>5</sup>

Similarly, a recent article relies on the legislative history of House Amendment 57, offered on May 5, 1999, by Rep. Nydia Velazquez (D-N.Y.), to uncover the legislative intent of §1102(b)(3).<sup>6</sup> The intention of Rep. Velazquez's amendment was to ensure that small business creditors, who were not members of the official committee but would be affected by the outcome of the committee's actions, would have access to "critical information."<sup>7</sup>

#### The Traditional Role of a Committee vs. The New Requirement to Disseminate Information

The role of a committee is vital to the bankruptcy process. The committee is formed to ensure that the rights and interests of unsecured creditors are protected. It is well-settled that the members of an official committee of unsecured creditors owe a fiduciary duty

<sup>5</sup> *Id.* (quoting *In re Gilchrist Co.*, 410 F. Supp. 1070, 1078 (E.D. Pa. 1976)).

<sup>6</sup> Vance, Catherine E., "The Origin of Information Sharing Under New §1102(b)(3)," (2006), available at [www.bankruptcylitigationblog.com](http://www.bankruptcylitigationblog.com).

<sup>7</sup> *Id.* (quoting 145 Cong. Rec. H2709-08 (daily ed. May 5, 1999)). Specifically, the article relied on Rep. Velazquez's comments in support of her amendment:

[M]y amendment will ensure that those small businesses not included on the creditor committee will have access to critical information regarding the credit [sic] committee's actions. This could be achieved by simply making the committee open to comments from and required to provide additional information to those small businesses not included on the committee but who will nonetheless be affected by the outcome.

145 Cong. Rec. H2709-08 (daily ed. May 5, 1999).

<sup>2</sup> H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 87 (2005).

<sup>3</sup> See *In re Refco Inc.*, 336 B.R. 187, 194 (Bankr. S.D.N.Y. 2006).

<sup>4</sup> *Id.* (quoting Bankruptcy Act of 1898, §339(1); Bankruptcy Act Rule 11-29).

<sup>1</sup> 11 U.S.C. §1102(b)(3). This section applies to all cases filed after Oct. 17, 2005.

to all of the debtor's unsecured creditors.<sup>8</sup> Section §1103(c) of the Bankruptcy Code requires that a committee perform services which are in the interest of those represented, *i.e.*, all of the debtor's unsecured creditors.<sup>9</sup> These services may include consultation with a trustee or debtor-in-possession (DIP) regarding the administration of the case, investigation into the financial condition of the debtor, investigation regarding the conduct of the debtor and potential causes of action, and participation into the formation of a plan.<sup>10</sup> Further, upon court approval, a committee may act as a fiduciary on behalf of the debtor's estate.<sup>11</sup>

The committee must work with the debtor and/or trustee to obtain information necessary to carry out these duties. Often, the information received by the committee from the debtor is confidential, proprietary or privileged, and the parties may need to enter into a confidentiality agreement prior to disclosing such information. Many fear that the broad language of §1102(b)(3) may hinder a committee's ability to fulfill such duties and will hinder the free flow of information between the debtor and the committee.

## Committees Seek Preemptive Orders

As a result of such concerns, in some cases a committee and/or the debtor have sought and obtained court orders outlining the procedures regarding dissemination of information to all unsecured creditors and limiting the type of information that must

be disseminated.<sup>12</sup> Many of these preemptive orders clarify that the committee has no obligation to disseminate any confidential, privileged or nonpublic information to the unsecured creditors. Further, some courts have required that the debtor assist the committee in identifying confidential or privileged information.<sup>13</sup> Ultimately, the decision of what constitutes confidential information or whether to provide a requesting creditor information that may be deemed confidential or privileged is at the sole discretion of the committee.<sup>14</sup> Further, these preemptive orders often outline the mode in which the committee may circulate information to the unsecured creditors. In many cases, committees have sought approval to set up an Internet-accessed Web site to publish general information, such as docket filings, calendars noting upcoming events, press releases and links to other Web sites.<sup>15</sup> Other court orders dictate that the committee is only required to provide information to creditors upon written or telephonic requests.<sup>16</sup> At least one court has required that the requesting creditor must pay, in advance to the committee, the costs of receiving the requested information, including postage and cost of copying the information.<sup>17</sup>

A few courts have denied the request for such preemptive orders on the ground that a motion by the committee seeking clarification as to its duties under §1102(b)(3) raises no case or controversy and only seeks an advisory opinion.<sup>18</sup> Further, §1102(b)(3)(C) clearly states that if a committee refuses or fails to give a requesting creditor information, such creditor may seek a court order directing the production of same.<sup>19</sup> Regardless of

whether there is an order in place, the committee, together with its counsel, must determine how it is going to satisfy the requirements enumerated in §1102(b)(3).

## Tips for Committees and Their Counsel

While a review of the statute itself, its legislative history and various courts' interpretation of §1102(b)(3)'s requirements may be helpful, there are still many open issues for committees, and their counsel, to consider. A committee's counsel must notify the committee of the Code's requirement to disseminate information to all unsecured creditors and solicit comments and then advise the committee on how such requirement should be fulfilled in each particular case.<sup>20</sup>

A committee and its counsel must do its due diligence to determine which creditors should receive information. Logistically, this information must come from the debtor or from a claims register. Also, a committee and its counsel must discuss and determine the mode in which dissemination of information and solicitation of comments and concerns should be satisfied. This will likely depend on the size of the case, the number of unsecured creditors and the amount of information to be distributed. In a large case, it may be beneficial for the committee to set up a Web site, whereas in a smaller case, or one that lacks funds in the estate, it may be more appropriate to inform the unsecured creditors by notice or letter that they may request information from the committee, or its counsel, and give the creditors contact information to provide the committee with comments and concerns. Further, it may be appropriate to require that the committee send updates to the creditor body to keep them apprised of all major events in the chapter 11 case.

Regardless of how a committee determines it should disseminate information or seek comments, a committee is required to address written or oral requests from creditors promptly. Further, a committee must determine what information should be

<sup>8</sup> See, e.g., *In re SPM Manufacturing Corp.*, 984 F.2d 1305, 1315 (1st Cir. 1993); *In re Smart World Technologies LLC*, 423 F.3d 166, 175 n. 12 (2d Cir. 2005); *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000); *In re Advisory Committee of Major Funding Corp.*, 109 F.3d 219, 225 & n. 9 (5th Cir. 1997).

<sup>9</sup> 11 U.S.C. §1103(c).

<sup>10</sup> *Id.*

<sup>11</sup> Committees have initiated adversary proceedings in chapter 11 cases on behalf of estate to pursue various causes of action. See, e.g., *In re Louisiana World Exposition Inc.*, 832 F.2d 1391 (5th Cir. 1987) (committee filed adversary proceeding against debtor's officers and directors, charging them with malfeasance and mismanagement); *Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003) (the bankruptcy court could authorize a creditors' committee to sue derivatively to avoid fraudulent transfers for the benefit of the debtor's estate); *Official Committee of Unsecured Creditors of Hechinger Investment Co. of Delaware, Inc. v. Fleet Retail Financial Group Inc. (In re Freidman)*, 286 B.R. 505, 507 (S.D. N.Y. 2002) (committee initially brought adversary proceeding against the debtor's former directors for breach of fiduciary duties—a liquidation trust ultimately succeeded to the right to prosecute); *Citicorp Venture Capital Ltd. v. Committee of Creditors Holding Unsecured Claims*, 160 F.3d 982, 986 (3d Cir. 1998) (committee initiated adversary proceeding against creditor object to the allowance of the claims purchased by such creditor and for equitable subordination of those claims); *The Official Committee of Unsecured Creditors of Corell Steel v. Fishbein and Co.*, 1992 U.S. Dist. LEXIS 8834 (E.D. Pa. 1992) (committee filed an adversary proceeding against the debtor's accountants for malpractice alleging that the accountant's performance of audits for the debtor pre-petition led to the debtor's insolvency); *Committee of Unsecured Creditors of Specialty Plastic v. Doemling*, 127 B.R. 945 (W.D. Pa. 1991) (committee brought multiple adversary proceedings against the debtor's sole shareholder for usurpation of corporate opportunities of the debtor); *Crowthers McCall Pattern Inc. v. Lewis*, 114 B.R. 407 (S.D. N.Y. 1990) (committee, on behalf of the debtor's estate, filed an adversary proceeding against multiple corporate defendants with respect to various pre-petition transactions).

<sup>12</sup> See, e.g., *In re Refco, Inc.*, 336 B.R. 187 (Bankr. S.D. N.Y. 2006); *In re G+G Retail, Inc.*, Case No. 06-10152 (RDD) (Bankr. S.D.N.Y.); *In re Calpine Corp.*, Case No. 05-60200 (BRL) (Bankr. S.D.N.Y.); *In re Amcast Automotive of Indiana Inc.*, Case No. 05-33322 (FJO) (Bankr. S.D. Ind.); *In re FLYI Inc.*, Case No. 05-20011 (MFW) (Bankr. D. Del.); *In re Nobex Corp.*, Case No. 05-20050 (MFW) (Bankr. D. Del.); *In re Pliant Corp.*, Case No. 06-10001 (MFW) (Bankr. D. Del.); *In re Riverstone Networks Inc.*, Case No. 06-10166 (PJW) (Bankr. D. Del.); *In re Neilson Nutritional Inc.*, Case No. 06-10072 (PJW) (Bankr. D. Del.); *In re Fibrex Cordage LLC*, Case No. 05-38080 (RFH) (Bankr. M.D. Ga.); *In re The Consumers Trust*, Case No. 05-60155 (REG) (Bankr. S.D.N.Y.); *In re Airway Industries Inc.*, (JKF) (Bankr. W.D. Pa.); *In re Gooding's Supermarkets Inc.*, Case No. 05-17769 (Bankr. M.D. Fla.); *In re Hardwood P-G Inc.*, Case No. 06-50057 (LMC) (Bankr. W.D. Tex.); *In re OCA Inc.*, Case No. 06-10179 (JAB) (Bankr. E.D. La.); *In re Verilink Corp.*, Case No. 06-80566(JAC) (Bankr. N.D. Ala.); *In re Larry's Markets Inc.*, Case No. 06-11378 (PHB) (Bankr. W.D. Wash.); *In re Buffalo Coal Co. Inc.*, Case No. 06-00366 (PMF) (Bankr. N.D. W.Va.); *In re Best Manufacturing Group LLC*, Case No. 06-17415 (DHS) (Bankr. D. N.J.); *In re Complete Retreats LLC*, Case No. 06-50245 (AHWS) (Bankr. D. Conn.).

<sup>13</sup> See *In re Calpine Corp.*, Case No. 05-60200 (BRL) (Bankr. S.D.N.Y.); *In re Pliant Corp.*, Case No. 06-10001 (MFW) (Bankr. D. Del.).

<sup>14</sup> See *In re Amcast Automotive of Indiana Inc.*, Case No. 05-33322 (FJO) (Bankr. S.D. Ind.).

<sup>15</sup> See, e.g., *In re FLYI Inc.*, Case No. 05-20011 (MFW) (Bankr. D. Del.); *In re Pliant Corp.*, Case No. 06-10001 (MFW) (Bankr. D. Del.).

<sup>16</sup> See, e.g., *In re Amcast Automotive of Indiana Inc.*, Case No. 05-33322 (FJO) (Bankr. S.D. Ind.); *In re Fibrex Cordage LLC*, Case No. 05-38080 (RFH) (Bankr. M.D. Ga.).

<sup>17</sup> See *In re Fibrex Cordage LLC*, Case No. 05-38080 (RFH) (Bankr. M.D. Ga.).

<sup>18</sup> See *In re Large Scale Biology Corp.*, Case No. 06-20046 (MM), hearing held Feb. 27, 2006 (Bankr. E.D. Cal.) ("in the absence of an adversary and without the context of an actual controversy, to speculate in the abstract about the committee's duties under section 1102," entering such an order was inappropriate); *In re ProCare Automotive Service Solutions LLC*, Case No. 06-10605 (PMC) (Bankr. N.D. Ohio) (denying motion of committee seeking order confirming that it was not required to provide access to or share confidential or privileged information of the debtor). But see, *In re Refco, Inc.*, 336 B.R. at 190 (stating that the court's first inclination was to deny the committee's motion seeking an order outlining its obligation under §1102(b)(3) of the Code because it did not raise a case or controversy but then determined under the circumstances of the case and the fact that it was such a large case and moving so quickly, an order setting forth the parameters for the dissemination of information was appropriate).

<sup>19</sup> 11 U.S.C. §1102(b)(3)(C).

<sup>20</sup> See *In re Large Scale Biology Corp.*, Case No. 06-20046 (MM), hearing held Feb. 27, 2006 (Bankr. E.D. Cal.) ("The court has approved counsel for the committee to advise it in this case. It will receive its advice from that counsel and not from the court.").

disseminated. If a creditor seeks information that the committee deems inappropriate to circulate, the committee, or its counsel, should attempt to work out the situation with the creditor and advise the creditor that he or she has the right to seek court intervention to settle the dispute. While there is no statutorily imposed right or wrong way for a committee to disseminate information and seek comments and/or concerns from unsecured creditors, a review of the cases that have already dealt with this issue will help committees and their counsel to come up with a plan to fulfill the requirements of §1102(b)(3). ■

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