The Deal

DISCLOSURE EXPOSURE

CAN HOW MUCH INFORMATION MUST A CREDITORS' COMMITTEE SHARE UNDER THE NEW BANKRUPTCY CODE?

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If knowledge is power, then the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, or BAPCPA, appears to signal a significant power shift in favor of unsecured creditors that are not members of an official creditors' committee. By imposing mandatory reporting obligations on official creditors' committees, new section 1102(b)(3) of the Bankruptcy Code seems to have altered the relationship among a debtor, its official creditors' committee and the committee's constituents. But has it really?

Section 1102(b)(3) imposes new disclosure-related obligations on creditors' committees. An official committee must "provide access to information" to its nonmember constituents. It must also "solicit and receive comments" from nonmember constituents. And it may be ordered by the bankruptcy court to provide "additional reports or disclosures."

The new language is broad, and neither it nor its legislative history offers guidance as to how creditors' committees should implement its requirements. What "information" must nonmember constituents be given access to—all or just what is not privileged or confidential? How are committees to solicit comments? How actively must they do so? These and other questions are left to the courts to decide.

The only reported decision to date that interprets the new law is In re Refco Inc., 336 B.R. 187 (Bankr. S.D.N.Y. 2006). In that case, the Official Committee of Unsecured Creditors ("Committee") filed a motion to clarify its obligation under section 1102(b)(3) fearing that the statute might impose an obligation contrary to other applicable laws and the committee's fiduciary duties, thereby hampering the committee's effectiveness. Though initially inclined to deny the motion as not raising an actual case or controversy, the court concluded that the case warranted consideration of the committee's request for a "comfort order" establishing parameters for providing "access to information" under section 1102(b)(3).

Turning to the language of the statute, the court found that section 1102(b)(3) was not materially different from other similarly broad statutory provisions imposing reporting obligations on creditors' committees, trustees and debtors-in-possession. According to the court, the authorities interpreting those provisions recognized that the duty to provide information was not unlimited, and the court concluded that section 1102(b)(3) must also be read to accommodate limits on a committee's duty to disclose information to its creditor constituents.

The court borrowed from the limits imposed in these other contexts and decided that the new law does not require a creditors' committee to disclose information that could reasonably be determined to be confidential or proprietary, the disclosure of which could reasonably be determined to result in a general waiver of the attorney-client or other applicable privilege, or whose disclosure could reasonably be determined to violate an agreement, order or law, including applicable securities laws. The Refco case thus suggests that section 1102(b)(3) does not meaningfully expand a creditors' committee's previous disclosure obligations.

What section 1102(b)(3) does require is a more pro-active approach to disseminating information to creditors and soliciting creditor input. So while the court protected the committee from compelled disclosure of privileged and confidential information, it required the committee to establish a Web site that would provide creditors with (1) general information about the bankruptcy, including case and claims dockets, highlights of significant event and a calendar of upcoming events; (2) monthly committee reports summarizing recent proceedings and public financial information; (3) a general overview of the Chapter 11 process; (4) press releases issued by the debtor and committee; (5) a registration process for creditors to request updates via e-mail; (6) a nonpublic form to submit creditor questions, comments and requests; (7) responses to creditor inquiries, unless they involve confidential information, in which case the committee may respond privately as long as the creditor agrees to confidentiality and trading restraints; (8) answers to frequently asked questions; and (9) links to relevant Web sites. The court also ordered the committee to maintain a telephone number and e-mail address for creditor questions and gave it 20 days in which to respond to them.

Recognizing that the designation of information as "confidential" or "privileged" can be arbitrary, the court established a procedure by which a creditor that is denied information can bring a motion to compel its disclosure. Finally, the court required the committee to

consider a creditor's willingness to enter into a confidentiality arrangement or to establish a screening device in response to a creditor's demand for confidential, nonpublic information.

In the wake of Refco, other courts have adopted similar protocols for a creditors' committees' compliance with section 1102(b)(3). In at least two of the cases, creditors' committees have retained a professional "communications agent" to whom the committee outsourced many of the information-sharing activities.

In the end, Refco and the other cases instruct that section 1102(b)(3) does not meaningfully expand or otherwise alter a creditors' committee's pre-BAPCPA obligations to provide its constituents with information. The only wrinkle appears to be its requirement that creditors' committees be more pro-active in doing so. ■

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