

VIEWPOINT

Disclosure Rules - A Step In The Right Direction*By Michael R. Nestor & Ian S. Fredericks**Michael R. Nestor**Ian S. Fredericks*

One of a series of opinion columns by bankruptcy industry participants.

On October 17, 2005, the Bankruptcy Abuse Prevention & Consumer Protection Act of 2005 went into effect, including controversial provisions regarding the obligations of official creditors committees.

Section 1102(b)(3) of the Bankruptcy Code obligates a committee to "provide access to information." In the months and years ahead, courts and practitioners will spend countless hours working through the amendment. But already, courts in the District of Delaware and the Southern District of New York have provided significant guidance to other courts and practitioners regarding the scope of that obligation.

The amendment, enacted as part of BAPCPA, applies to all cases filed on or after October 17, 2005. It provides, in pertinent part, that: "[a] committee appointed under subsection (a) [of 1102] shall- (A) provide access to information for creditors who- (i) hold claims of the kind represented by that committee; and (ii) are not appointed to the committee; [and] (B) solicit and receive comments from the creditors described in subparagraph (A)[.]"

On January 20, 2006, one court helped clarify the scope of a committee's obligations pursuant to section 1102(b)(3) through implantation of a detailed protocol. In the Refco Inc. Chapter 11, within days of its appointment, the official creditors committee filed a motion to clarify its obligations under section 1102(b)(3) of the Bankruptcy Code.

Guided by courts' analyses interpreting a trustee's duty to "furnish information concerning the estate..." pursuant to sections 704(7) and the duties and functions of a creditors' committee, the U.S. Bankruptcy Court for the Southern District of New York tried to balance the "committee's need to preserve access to sensitive information (which usually is the only information of any value to unsecured creditors, whether for legitimate or illegitimate purposes), to protect the attorney-client privilege, and to comply with the securities laws, [with] the right of unsecured creditors to be informed of material developments"

The court held that a committee is not required, without further order of court, to disclose (i) confidential and non-public or proprietary information, (ii) information that could waive the attorney-client privilege, or (iii) information that could violate an agreement, order or law, including applicable securities laws. Non-disclosure of such information is not absolute, however, as a committee must take into account a constituent's willingness to enter into a confidentiality agreement in determining whether to disclose any of the aforementioned information. If a dispute arises, the court promised to consider the dispute "promptly."

In so holding, the court articulated a detailed protocol with respect to a committee's obligation to "provide access to information" with the hope that, "as the law develops, the need for comfort orders [will] end." In effect, the protocol divides a committee's obligation according to two types of information- general information and confidential information- and sets forth distinct requirements pertaining to each.

With respect to general information, a committee shall establish and maintain a Web site, which shall include case dockets, docket filings, general case information,

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summaries of recent proceedings, events and public financial information, case highlights, a case calendar, access to the claims docket, an overview of chapter 11, press releases, a registration form for "real-time" electronic mail case updates, a form to submit questions, comments and information requests, responses thereto, answers to FAQs, and links to other relevant websites.

When faced with a request for confidential, proprietary or other non-public information concerning the debtors or the committee, or information subject to an attorney-client, work-product, or other applicable privilege, the committee shall not be required to disclose such information absent further order of court. Nevertheless, a creditor may request such information, and thereafter the committee may either turnover the information requested, if the creditor agrees to execute a reasonable confidentiality agreement, or deny the request.

In the event a committee denies a creditor's request, the protocol provides for expedited hearing procedures to resolve the dispute. Finally, the protocol exculpates the debtors, the committee and any third parties related thereto, including attorneys, advisors, officers, directors, etc., for any liability on account of any act or omission related to the disclosure of information, other than acts or omissions constituting a breach of a fiduciary duty, gross negligence or willful misconduct.

Other courts presented with the issues implicating section 1102(b)(3) have entered orders consistent in principle with the holding in Refco. For example, in the Flyi Chapter 11, conducted in Delaware, the debtors filed a motion to define the committee's obligations pursuant to section 1102(b)(3), which was later joined by the committee. In that case, the court entered an order providing that the committee was not obligated to disclose confidential information, but, with respect to general information, provided discretion as to the means through which such information would be disseminated, including whether to establish and maintain a website.

Similarly, in the Calpine Chapter 11, like Refco hosted in the Southern District of New York, the official creditors committee filed a motion for an order clarifying its obligation to provide access to information, and the court entered an order to show cause pending a final hearing on the motion. The order to show cause, as well as the final order if ultimately approved, provided that the committee was not obligated to disseminate confidential information, and required the debtors and the committee to establish an information sharing protocol to be approved by the court. The order was silent concerning the committee's obligation with respect to general information.

In the short-term, orders clarifying a committee's obligation to provide access to information entered to date, in effect, maintain the status quo as it existed prior to October 17, 2005. The question going forward is whether such orders will be necessary on a case-by-case basis or whether the case law or local rules will establish well-defined parameters with respect to a committee's obligations.

(Opinions expressed are those of the author or authors, not of Dow Jones Newsletters.)

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