

ONE SIZE DOES NOT FIT ALL: INFORMATION SHARING REQUIREMENTS FOR OFFICIAL COMMITTEES PURSUANT TO SECTION 1102(B)(3)

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I. INTRODUCTION

Over a year has passed since the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was enacted,¹ but unfortunately, courts and practitioners continue to grapple with ambiguities that bedevil certain sections of the newly revised Bankruptcy Code.² Section 1102(b)(3), which requires official creditor committees to provide creditors, who are not appointed as members of the committee, with access to information, has proven to be one of the more ambiguous amendments to the Bankruptcy Code.

Originally introduced in an effort to ensure small business creditors would receive enough information to meaningfully participate in a debtor's reorganization process,³ section 1102(b)(3), by its terms, requires a committee to give "information" to a much broader constituency of creditors than the drafters may have intended. Moreover, the plain language of section 1102(b)(3) fails to provide sufficient guidance or certainty with respect to, at a minimum:

- (1) whether other official committees, such as equity security holder committees, are required to provide access to information to their constituencies in the same manner creditors' committees are required to provide information to creditors;
- (2) what type of "access" is to be provided;
- (3) what type of "information" should be disclosed, and upon whose initiative;
- (4) whether confidential or privileged information must or may be disclosed;

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- (5) the penalties a committee will face for failing to adhere, in whole or in part, with its information-sharing requirements; and
- (6) how much and how frequently a committee should solicit comments from creditors.

This lack of clarity has forced debtors and committees to increasingly seek court approval of information sharing protocols or clarification orders which detail exactly what a committee must do to comply with the information sharing requirements of section 1102(b)(3). Indeed, reliance on such protocols and orders is becoming the new orthodoxy in large Chapter 11 cases.

However, while the cost and expense of negotiating and implementing information-sharing protocols and clarification orders can easily be justified in a large bankruptcy reorganization case, the same cannot be said of a small, and to a lesser extent, medium-sized Chapter 11 case.⁴ The financial realities of an estate plagued with limited funds will require that a committee, primarily charged with maximizing creditor recovery, resort to the use of protocols and clarification orders only when presented with an actual dispute with a creditor regarding the amount of information the committee, in its judgment, provides the creditor.

This article will: (1) analyze the plain language of section 1102(b)(3) and address the statutory ambiguity that has caused practitioners to seek information-sharing protocols or clarification orders; (2) analyze the issues that arise as a result of the ambiguity in section 1102(b)(3); (3) review the legislative history of section 1102(b)(3) to determine what guidance, if any, it provides; (4) discuss the only reported decision to date on section 1102(b)(3), *In re Refco*;⁵ (5) analyze the differences between a representative sample of information-sharing protocols and clarification orders entered since BAPCPA's implementation; and (6) provide practical recommendations for courts and practitioners on how to tailor the requirements of section 1102(b)(3) to fit the size or needs of a particular Chapter 11 case.

II. 11 U.S.C.A. § 1102(B)(3)

Section 1102(b)(3) of the Bankruptcy Code provides that: "A committee appointed under subsection (a) 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; (B) solicit and receive comments from the creditors described in subparagraph (A); and (C) be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A)."⁶

III. AMBIGUITY IN 11 U.S.C.A. § 1102(B)(3) RAISES MANY QUESTIONS

Typically, courts construing a statute will adhere to the “plain meaning rule” and look first to the meaning of the statute as drafted.⁷ However, because of the ambiguity in section 1102(b)(3), application of the plain meaning rule may yield either an overly broad or overly narrow interpretation.

An overly broad interpretation of the information-sharing requirements in section 1102(b)(3) will likely chill the flow of information between a debtor and its creditors’ committee. Debtors will understandably be reluctant to disclose confidential nonpublic information to the committee if doing so could lead to disclosure of such information to its competitors. Any reluctance on the part of debtors to provide such information to creditors’ committees will likely impede the committee’s ability to, among other things, investigate the debtor’s business and affairs and analyze the debtor’s proposed reorganization strategy. In addition, an overly broad interpretation of section 1102(b)(3) will likely increase the fees and costs generated by the committee in its effort to comply with the mandate of section 1102(b)(3).⁸

On the other hand, an overly narrow interpretation of section 1102(b)(3) exposes the committee to litigation from creditors unsatisfied with the amount, scope, and pace of information sharing. This in turn can lead to reluctance on the part of creditors in future bankruptcy cases to serve on creditors’ committees. Either approach can lead to reduced creditor recoveries in the long term.

Among other things, section 1102(b)(3) is unclear regarding:

- (1) whether other official committees, such as equity security holder committees, are required to provide their constituencies with access to information in the same manner creditors’ committees are required to provide information to creditors,
- (2) what type of “access” is to be provided,
- (3) what type of “information” should be disclosed, and upon whose initiative,
- (4) whether confidential or privileged information must or may be disclosed,
- (5) the penalties a committee will face for failing to adhere, in whole or in part, to its information sharing requirements, and
- (6) how much and how frequently a committee should solicit comments from creditors.

A. *Are Official Committees, Other Than Creditors' Committees, Required to Provide Their Constituencies With Access to Information in the Same Manner Creditors' Committees Provide Information to Creditors?*

On its face, section 1102(b)(3) applies to “a committee appointed under subsection (a)” and requires such a committee to provide information to “creditors” who hold claims “of the *kind* represented by *that committee*.”⁹ Section 1102(a), to which section 1102(b)(3) refers, provides, in pertinent part, that “the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or *of equity security holders* as the United States trustee deems appropriate.”¹⁰

Thus, it appears that the language of the statute applies to any official committee of creditors as well as equity security holder committees. This is a logical conclusion with respect to other official creditors' committees such as a separate noteholder or trade creditors' committee.¹¹ However, does this mean that an equity security holder committee is required to provide information to equity security holders that are not members of the equity security holder committee? Some commentators seem to think so,¹² but such a conclusion, while perhaps defensible by reference to the phrase “of the kind represented by that committee” found in section 1102(b)(3), places too little significance on the fact that the phrase relates only to “creditors.”¹³ The Bankruptcy Code separately defines “creditors” and “equity security holders;”¹⁴ therefore, there is no reason to presume that Congress forgot to include “equity security holders” when it described to whom information must be provided.¹⁵

The only reported decision analyzing section 1102(b)(3), *In re Refco Inc.*,¹⁶ never mentions whether equity committees are required to provide information to equity security holders that are not members of the equity security holder committee. Indeed, out of all the bankruptcy cases discussed in this article as having utilized information sharing protocols or clarification orders, not one case has involved either a debtor or an equity committee seeking such relief, nor has any case cited in this article involved an equity holder complaining about the lack of information provided.

B. *What Type of Access Is to Be Provided?*

Section 1102(b)(3) requires a creditors' committee to provide creditors with “access” to information, but does not reveal what type of access to information is to be provided to creditors. Committees are left wondering whether the statute requires them to proactively distribute information to creditors, whether through bulletins, mail, electronic mail, website, or

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otherwise, or whether the statute merely requires them to provide access upon the request of specific creditors. Moreover, section 1102(b)(3) is silent as to whether it is proper for a committee to delegate technical and administrative operations, such as the dissemination or solicitation of information on a website, to a third party vendor.

C. What Type of Information Should Be Disclosed, and Upon Whose Initiative?

On its face, section 1102(b)(3) provides no guidance as to what type of information should be disclosed and upon whose initiative. For example, should a creditor have access to all of the committee's information, no matter how obtained? Is the committee required to provide information to creditors even if creditors have not requested it, or should the committee await a request from a specific creditor before considering whether to provide the information? Moreover, what if the information requested is confidential nonpublic information?

D. Is a Noncommittee Creditor Entitled to See Information That is Confidential, Privileged or Protected by the Work Product Doctrine?

Section 1102(b)(3) is ambiguous with respect to how much and what type of protection should be afforded confidential nonpublic information provided to the committee by the debtor, or developed by the committee on its own. There are compelling reasons for protecting such information from indiscriminate dissemination to creditors. As noted above, a debtor concerned that confidential nonpublic information could be disseminated to its competitors via the committee will be unlikely to provide such information to the committee in the first instance.

Moreover, pursuant to section 107(a) of the Bankruptcy Code, upon the request of a party in interest, a bankruptcy court is required to protect an entity with respect to trade secrets, confidential research, development, or other confidential information.¹⁷ If debtors no longer believe the protections of section 107(a) apply in light of section 1102(b)(3), communication between debtors and committees may become strained. However, communication between a debtor and a committee is critical to the reorganization prospects of a debtor. The committee utilizes the confidential information provided to it by the debtor to analyze, among other things, the strengths and weaknesses of the debtor's organizational structure, production costs, distribution problems, compensation schemes, and union issues. In short, the committee uses the information provided by the debtor to analyze the debtor's business model from the ground up to fashion a strategy whereby the debtor can successfully exit

bankruptcy, if possible, and at the same time provide creditors with the highest distribution possible. As a result of the sensitive nature of information provided to a committee by a debtor, committees typically sign a confidentiality agreement binding individual members of the committee and its retained professionals.

Relatedly, a committee may form its own opinions about the debtor, its management and how best to reorganize the debtor in order to maximize creditor recovery. Such information is generally protected by the attorney-client privilege or by the work product doctrine. However, if committee members believe their privileged communications and work product must be shared generally with the creditor constituency the committee represents, committee members may become unwilling to speak candidly about issues arising in the case, either internally amongst committee members or externally with the debtor or other interested parties. Additionally, any release of privileged information or work product that relates to an analysis of the debtor could give a creditor an unfair business advantage over the debtor. Such an advantage could negatively impact the debtor's reorganization prospects, and in turn, negatively affect creditor recovery. Thus, the overarching goals of a Chapter 11 reorganization, to give a debtor a fresh start while maximizing creditor recovery, would be subverted by the indiscriminate release of privileged or work product material.¹⁸

Finally, any disclosure by a creditors' committee of material nonpublic information to creditors not covered by a confidentiality agreement raises regulatory issues with respect to public companies. For example, Regulation FD requires that when a company discloses material nonpublic information to certain persons, the company must disclose the same information (a) simultaneously for intentional disclosures, or (b) promptly for nonintentional disclosures.¹⁹ Regulation FD further requires dissemination of information to the public via two methods: (1) filing a current report on Form 8-K with the Securities and Exchange Commission (SEC), or (2) "through another method (or combination of methods) of disclosure that [are] designed to provide broad, non-exclusionary distribution of the information to the public."²⁰ However, the SEC has made exceptions to these disclosure requirements where the public company discloses such information pursuant to confidentiality agreements.²¹ Thus, creditors' committees have historically not run afoul of Regulation FD since they typically enter into confidentiality agreements with debtors in order to carry out their responsibilities.

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E. What Penalties Will a Committee Face for Failing to Adhere, In Whole or in Part, to the Information-Sharing Requirements of Section 1102(b)(3)?

While section 1102(b)(3) requires committees to share information with creditors, it does not describe what happens if a committee fails to provide creditors with enough information. For example, if a creditor requests information the committee deems confidential or privileged, does the committee risk sanctions if it fails to immediately turn over such information? Must the committee seek a protective order preventing disclosure of such information or perhaps an in camera review of the material prior to release? What if a creditor is unsatisfied with the amount of information provided? None of these questions is answered by reference to the plain language of section 1102(b)(3).

F. How Much and How Frequently Should a Committee Solicit Comments from Creditors?

Section 1102(b)(3)(B) requires a committee to “solicit and receive comments from the creditors,” but reveals nothing of what Congress intended by this directive. For example, what type of solicitation is contemplated? Is committee counsel required to contact each creditor by phone, mail, email, publication notice, or some other means of communication? If a committee puts information on a website creditors can access, is this sufficient? On what matters should the committee seek creditor comment? Once again, the statute is frustratingly short of guidance in this regard.

As shown above, the ambiguity of section 1102(b)(3) compels us to analyze the legislative history of section 1102(b)(3) to discern congressional intent.

IV. LEGISLATIVE HISTORY OF 11 U.S.C.A. § 1102(B)(3)

When the plain language of a statute reveals congressional intent, a court need not consider the statute’s legislative history.²² Such is not the case with section 1102(b)(3). Accordingly, reference to the legislative history of section 1102(b)(3) is required to determine two related but separate questions: (1) what compelled Congress to include the information-sharing requirements of section 1102(b)(3) in BAPCPA, and (2) what is the intended scope of section 1102(b)(3)?

A. Why Did Congress Include the Information-Sharing Requirements of Section 1102(b)(3) in BAPCPA?

BAPCPA endured a long and tortured path to enactment. First introduced in 1997, it was constantly amended up until its enactment in 2005, with a flurry of amendments being added in the 1999-2000 time-

frame.²³ One of the amendments introduced in 1999 eventually became section 1102(b)(3). There was some early confusion regarding the congressional intent behind the information-sharing requirements of section 1102(b)(3), because the House Report revealed scant evidence of a legislative history.²⁴ Indeed, the only background information on the information-sharing requirements found in the House Report is entirely unhelpful:

Section 405(b) 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.

H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 87 (2005).

Although the congressional intent behind section 1102(b)(3) is not found in the House Report, it can be found in the Congressional Record of May 5, 1999. On that day, Rep. Nydia Velázquez of New York offered House Amendment 57:

Mr. Chairman, while H.R. 833 provides a plan for overhauling our Nation's bankruptcy law, there is one issue that, while seemingly small, will have a great impact on this Nation's small businesses. That is the way that the bankruptcy process leaves small businesses who are creditors on the outside looking in.

To solve this problem, I am offering an amendment that will quickly and fairly address the issue by ensuring more small business involvement and greater communication in the bankruptcy process. My amendment will make two simple changes.

First, it would allow a small business involved as a creditor in a Chapter 11 bankruptcy case to be added to the creditor committee by the court. The court could make such an appointment by comparing the amount of the claim as a proportion of the business' gross annual revenue, thus showing that a business is disproportionately affected.

*Second, my 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.*²⁵

After this amendment was approved by voice vote on May 5, 1999, it was included in every version of bankruptcy reform considered by the 106th and subsequent Congresses, up to and including BAPCPA.²⁶ However, other than the widely acknowledged scant information in the various House Reports, including BAPCPA's, Congress never provided a satis-

factory explanation as to why the language ultimately adopted as section 1102(b)(3), on its face, sweeps within its ambit a much broader constituency than small business owners.²⁷

While it is clear the Velázquez amendment was intended to benefit small business creditors, the plain language of the statute reveals no such limitation. Thus, the fact that Congress intended to benefit small business creditors by requiring committees to share information with them is an interesting bit of trivia—nothing more. What is of greater concern to practitioners is the lack of legislative history regarding the intended scope of section 1102(b)(3).

B. What Is the Intended Scope of Section 1102(b)(3)?

Section 1102(b)(3) leaves certain of its key terms undefined. For example, it is impossible to discern from the language of section 1102(b)(3) exactly what type of “information” a committee is required to provide to creditors, or what type of “access” to information is contemplated by the drafters.

Since the plain language of the statute is patently ambiguous, courts and practitioners are forced to engage in an ultimately futile investigation of the legislative history in order to determine what Congress meant, but did not say, in section 1102(b)(3).²⁸ As courts and commentators have observed, the legislative history of section 1102(b)(3) provides no practical guidance for practitioners on how to comply with section 1102(b)(3).²⁹ For example, the *Refco* court noted:

The legislative history of section 1102(b)(3) does not provide meaningful guidance regarding the type of information to which access must be given, the manner in which it should be communicated or whether an official creditors’ committee faces any sanction, other than being subject to a court order compelling the provision of additional information, if the committee’s view of the proper scope and means of delivering access to information is too narrow.³⁰

The results that may obtain from the lack of clarity in either the statute or legislative history are troubling. For example, the ambiguity regarding what is meant by “information” and what type of “access” to information is to be provided to creditors could lead a committee to conclude that it must disclose confidential nonpublic debtor information to creditors that may also be competitors of the debtor. Indeed, some creditor competitors may be perfectly content for the debtor’s reorganization to fail. It takes no leap of imagination to envision such a creditor undermining the debtor’s business initiatives by obtaining access to confidential and proprietary information so that it can acquire the debtor’s customers as its own. While a creditor competitor, along with all other unsecured credi-

tors, may lose the value of whatever unsecured claim it may have against the estate if a reorganization plan is not confirmed, the creditor competitor may stand to gain far more by utilizing the debtor's confidential non-public information to undermine the debtor's reorganization efforts.

Not unsurprisingly, the lack of helpful legislative history in this regard has forced courts to determine the proper scope of section 1102(b)(3), while at the same time adhering to the overarching goal of the Bankruptcy Code, which is to provide a fresh start to debtors while maximizing creditor recovery.

V. *IN RE REFCO*

To date, only one court has published a decision regarding the information-sharing requirements of section 1102(b)(3). In *In re Refco*, the Bankruptcy Court for the Southern District of New York, after overcoming initial reservations about the court's subject matter jurisdiction,³¹ analyzed section 1102(b)(3) to determine the extent of a committee's information sharing obligation.

Refco, Inc. ("Refco") provided execution and clearing services for exchange-traded derivatives and premier brokerage services in the fixed income and foreign exchange markets.³² At one point, Refco was the largest provider of customer transaction volume to the Chicago Mercantile Exchange, the largest derivatives exchange in the United States.³³ One week prior to the filing of its bankruptcy petition, Refco disclosed that an entity owned by Refco's chief executive officer and chairman owed Refco entities approximately \$430 million.³⁴ Subsequently, Refco's chief executive officer was arrested for securities fraud in connection with Refco's initial public offering.³⁵ This news caused a crisis of consumer confidence that necessitated Refco's bankruptcy filing.³⁶ In its voluntary petition, Refco disclosed that, as of February 2005, Refco and its affiliates had approximately \$48 billion in assets and approximately \$48 billion in liabilities on a consolidated basis—a large bankruptcy case by any measure.³⁷

The official committee of unsecured creditors was appointed on October 28, 2005 and immediately began an intense analysis of a proposed sale of Refco's regulated futures business, which necessarily required the committee to have access to significant amounts of Refco's confidential nonpublic information related to: (1) the businesses to be sold, (2) strategies for negotiating with competing bidders, and (3) evaluation of competing bids.³⁸ The committee also analyzed creditor claims and the events leading up to the bankruptcy, which required a heightened amount of confidential information sharing from the debtor, as evidenced by the court's grant of discovery to the committee pursuant to

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Bankruptcy Rule 2004 only after the imposition of certain confidentiality requirements.³⁹

The committee believed that broad disclosure of information obtained during the course of its investigation could not only jeopardize its investigations, but might also violate Regulation FD or the court's confidentiality orders with respect to information obtained pursuant to Rule 2004 examinations.⁴⁰ Accordingly, three days after the committee's appointment, it moved for approval of a protocol outlining its information-sharing obligations and requirements pursuant to section 1102(b)(3). On an interim basis, the committee sought an order providing that "it was not required to divulge any (i) confidential, proprietary, non-public information concerning the debtors or (ii) any other information if the effect of such disclosure would constitute a waiver of the attorney-client privilege or other privilege of the Committee."⁴¹ The court entered the order on an interim basis with minor changes, such as one requiring the debtors to assist the committee in identifying the proprietary or nonpublic nature of any information given to the committee, pending a final hearing.⁴²

An ad hoc committee of noteholders objected to the proposed protocol based upon, among other things, the circumstances in which the committee could be forced to provide access to confidential information if the party requesting the information agreed to be bound by a confidentiality agreement.⁴³ The ad hoc noteholder committee argued that, since its interests were underrepresented on the official committee, the official committee might not use information obtained during the course of its investigation in an even-handed way.⁴⁴ However, these objections were resolved pursuant to the agreed and approved information-sharing protocol (the "*Refco* Protocol").

Acknowledging the lack of helpful legislative history, the *Refco* court relied upon an analogy between section 1102(b)(3) and section 704(7) of the Bankruptcy Code, which provides that "a trustee shall... unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest."⁴⁵ The court noted differences between section 704(7) and section 1102(b)(3), but found them to be immaterial. For example, section 704(7) provides that information is given to "parties in interest" only upon request, while section 1102(b)(3) may envision unsolicited dissemination of information to creditors, or a mechanism for allowing creditors to obtain the information.⁴⁶ The *Refco* court further analogized section 704(7) to section 1102(b)(3) by reference to three propositions espoused by caselaw analyzing section 704(7).

First, a trustee's duty pursuant to section 704(7) is fairly extensive, as a trustee cannot easily avoid an information request from a party in interest in the absence of a court order.⁴⁷ Second, the duty for a trustee to provide information pursuant to section 704(7) is not unlimited, because a trustee can obtain a protective order if disclosure of the requested information would violate the attorney-client privilege or result in the disclosure of confidential or proprietary information.⁴⁸ Finally, a trustee's right to a protective order is informed by the trustee's fiduciary duty to creditors and the estate. If the request for a protective order is designed to give the trustee an advantage over a party in interest, it should be denied. Accordingly, a trustee must point to a countervailing duty that would override the duty to disclose information, such as the duty to maximize recovery to creditors and prevent harm to the estate.⁴⁹ The same holds true for committees, by analogy.

However, there are problems with an analogy between section 704(7) and section 1102(b)(3). For example, section 1102(b)(3) does not include the language "unless the court orders otherwise" as does section 704(7). This could be interpreted as a congressional intent to mandate greater disclosure by a committee pursuant to section 1102(b)(3).⁵⁰

The court further observed that a committee has a fiduciary duty to all unsecured creditors, and, in some cases, the committee may have a fiduciary duty to the estate as well—such as when it pursues fraudulent transfer litigation for the benefit of the estate.⁵¹ This observation is important, because it informs the circumstances under which a committee should prevent access by creditors to certain debtor information.⁵² For example, a committee exercising its oversight and negotiation functions will be privy to certain confidential and proprietary information from the debtor and third parties in the context of settlement discussions. A committee's duty to the unsecured creditors who have no voice in such negotiations requires that such information be kept in confidence; otherwise, information-sharing between the debtor and the committee, third parties, and amongst the members themselves would be curtailed, leading inexorably to reduced creditor recoveries.⁵³ In addition, securities laws may preclude debtors holding public stock or debt from disseminating material nonpublic information absent a confidentiality agreement.⁵⁴

The court opined that maintaining confidentiality against the entire unsecured creditor constituency may be necessary to protect a committee's attorney-client privilege which is unquestionably enforceable against noncommittee creditors or others standing in an adversarial relationship to unsecured creditors as a group.⁵⁵ Accordingly, the *Refco* court cautioned committees to proceed cautiously with respect to disclosing

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confidential information that may waive the attorney-client privilege, notwithstanding the language of section 1102(b)(3).⁵⁶

After having analyzed the balance that must be struck between a creditor's right to access information and the need for a committee to protect certain types of information, the court found that the information sharing protocol agreed between the parties represented an appropriate balance between the competing interests of creditors, debtors, and committees.⁵⁷

The Refco Protocol

At base, the *Refco* Protocol answers the two most important questions posed by the ambiguity of section 1102(b)(3); namely, (1) what type of information may (or may not) be disclosed, and (2) what manner of access should be provided to creditors to discloseable information.

With respect to the type of information that must be provided, the *Refco* Protocol envisions that information should be liberally provided to creditors, regardless of whether they ask for it, except information (a) that could reasonably be determined to be confidential, nonpublic or proprietary, (b) the disclosure of which could reasonably be expected to result in the waiver of the attorney-client or other applicable privilege, or (c) whose disclosure could reasonably be determined to violate any agreement, court order or law, including applicable securities laws.⁵⁸ Presumably, invocation of the reasonable man standard provides a committee with a certain measure of latitude to exercise its business judgment when analyzing whether certain information should be provided to creditors. Notwithstanding the *Refco* Protocol does provide guidance regarding the specific types of information the committee may or must provide, and the extent and manner of access to be provided to unsecured creditors.

The *Refco* Protocol required the committee to establish and maintain a website to provide, without limitation:

- (1) general information concerning the bankruptcy case, including, case dockets, access to docket filings, and general information concerning parties in the case;
- (2) monthly committee reports summarizing recent proceedings, events, and public financial information;
- (3) highlights of significant events;
- (4) a calendar of upcoming significant events;
- (5) access to the claims docket;
- (6) a general overview of the Chapter 11 process;
- (7) press releases (if any) issued by the committee or debtors;

- (8) a nonpublic registration form for creditors to respond to real time “case-updates” via e-mail;
- (9) a nonpublic form to submit creditor questions, comments and requests for access to information;
- (10) responses to creditor questions, comments and requests for information;
- (11) answers to frequently asked questions; and
- (12) links to other relevant websites.

In addition, the *Refco* Protocol required the committee to distribute case updates via email for creditors who signed up for the service on the website, and to establish and maintain a telephone number and email address for creditors to submit questions and comments.⁵⁹

The *Refco* Protocol also anticipated the inevitable conflict that might arise if creditors and the committee disagree regarding the scope of, or access to, certain information. Specifically, the *Refco* Protocol envisioned a dispute resolution process under which creditors could seek protected information from the committee. After a creditor requests information, the committee has 20 days (shortened to 10 days after January 31, 2006) to respond by either (1) providing the information or (2) giving the reasons why the committee could not comply with the request, including any grounds for confidentiality. In addition, if the committee determined that any confidential information provided by the debtors to the committee should be disseminated to creditors, the committee was required to give notice to the debtor or any other entity, and the debtor or other entity would have 15 days to object to the disclosure. If the matter was not resolved by the parties themselves, then the *Refco* Protocol directed the requesting party to move for production.⁶⁰

While the *Refco* Protocol’s treatment of the dissemination of confidential information has application in any size bankruptcy case, other provisions of the *Refco* Protocol may be excessive in the case of a small or medium-sized bankruptcy. For example, not every bankruptcy case can absorb the cost of providing for the establishment and maintenance of the type of robust website as that required by the *Refco* Protocol. Clearly, the plain language of section 1102(b)(3) does not require the establishment of websites. Although a website would be helpful in keeping creditors apprised of information, and provide for a streamlined mechanism by which creditors could pose questions or provide comments to the committee, establishment of a website must be considered against the financial realities and specific needs of the particular case.

It is important to note that, just because *Refco* represents the only published decision detailing a protocol whereby a committee can be assured of its compliance with section 1102(b)(3), other courts around the coun-

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try, faced with bankruptcies of various sizes, have adopted their own protocols that are tailored to size or specific needs of the particular case. As will be further described below, the usefulness of a *Refco*-type protocol, with all of its onerous information-sharing requirements, is diminished in a manner inverse to the size of the case. Simply put, the more limited the assets in a particular case, the less likely it is that a court will require a debtor to fund the sums required to allow a committee to adhere to the requirements of a protocol modeled on the *Refco* Protocol. Having said that, the maxim that “one size does not fit all” applies even among large bankruptcy cases, because, as described below, some courts presiding over large bankruptcy cases have approved what can only be described as “bare-bones” protocols that do nothing more than clarify that committees do not have to share confidential or privileged information.

VI. INFORMATION PROTOCOLS AND CLARIFICATION ORDERS

As a result of its being the only published decision on the information sharing requirements of section 1102(b)(3), the *Refco* case and its protocol predominate the current development of caselaw and commentary on the nature and scope of a committee’s information-sharing requirements pursuant to section 1102(b)(3). Nonetheless, the *Refco* court was not the first court to address the information-sharing requirements of committees via information sharing protocols.

For example, shortly after BAPCPA’s enactment, the Bankruptcy Court for the District of Delaware addressed the information-sharing requirements of section 1102(b)(3) in *In re FLYi, Inc.*⁶¹ The debtors in this large bankruptcy case⁶² sought a first day order providing guidelines with respect to the dissemination of confidential information.⁶³

The debtors argued that they were in a competitive industry, and the dissemination of confidential information to parties not bound by a confidentiality agreement could prove disastrous. Specifically, the debtors argued that dissemination of its business strategies and intended initiatives to competitors would reduce or eliminate the value of those initiatives to the estate. In addition, dissemination of the debtors’ compensation levels or other employee information would cause morale problems and potentially violate federal and state privacy laws.⁶⁴

Moreover, as public companies, the debtors were bound by the terms of Regulation FD. The debtors argued that, if the committee was able to disseminate confidential information of the debtors, they would be required to continuously file Form 8-K’s with the SEC or risk violating federal securities laws.⁶⁵

Finally, the debtors argued that section 1102(b)(3) may require a committee to turn over privileged information to creditors, which would eviscerate the entire purpose of the privilege, and potentially leave the debtors and the committee unable to obtain independent and unfettered advice and consultation. Indeed, the debtors argued that, without protection of privileged information, the estate representation structure envisioned by the Bankruptcy Code would become dysfunctional.⁶⁶

The U.S. Trustee and creditors' committee expressed certain reservations in the form of a proposed order initially proposed by the debtors, but eventually, all parties were able to agree on the form of order which the court entered. It is clear from the black-lined version of the proposed order that the parties sought to balance the committee's duty to comply with section 1102(b)(3) with the specific needs of the case.

For example, a comparison of the first proposed order and the order ultimately approved by the court reveals two important changes. First, the approved order included a provision requiring the committee to respond to written and telephonic inquiries from creditors, and allowing, but not requiring, the committee to establish a website for the purpose of providing access to documents, pleadings and other materials the committee believed, in the exercise of its reasonable business judgment, to be relevant and informative.⁶⁷ Second, the approved order clarified that the committee did not have authority to disseminate confidential or privileged information.⁶⁸ The first version proposed by the debtors actually gave the committee discretion whether to provide such confidential information.

In *In re Amcast Automotive of Indiana, Inc.*,⁶⁹ the Bankruptcy Court for the Southern District of Indiana entered a protocol providing that: (1) the committee, through counsel, will share any nonconfidential or public information; (2) the committee is to maintain a copy of all pleadings and provide copies to any individual or entity making a written request; (3) committee counsel is to be available to parties requesting details regarding the status of the case via telephone calls from creditors; (4) the committee is not required to share any broadly defined confidential, privileged or nonpublic information.⁷⁰

Since the appearance of the *Refco* Protocol, other courts have adopted certain aspects of *Refco* and *FLYi, Inc.*, but they have tailored their information-sharing protocols or clarification orders based on the size or needs of the specific case. For example, in *In re Dana Corp.*,⁷¹ a particularly large bankruptcy case in which the debtors listed their total assets at \$7.9 billion and their total debts at \$6.8 billion,⁷² the Bankruptcy Court for the Southern District of New York was presented with a motion, purportedly based on motions filed in *FLYi, Inc.* and other similar cases,⁷³

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which sought an order clarifying that the committee was not required to disseminate either confidential or privileged information.⁷⁴

The creditors' committee filed an objection to the debtors' motion.⁷⁵ Although the committee expressed its support for the proposition that the committee should not disseminate confidential or privileged information to creditors in general, the committee argued that the debtors' motion was too draconian because it would (1) preclude committee members from having access to broad categories of information, (2) prohibit certain members from participating in any discussions related to the debtors' business dealings or proposed transactions, and (3) bar any member from receiving confidential information on any matter in which it allegedly had a conflict of interest, and no mechanism was provided for determining the basis for potential conflicts of interest.⁷⁶ The committee argued that *none* of the orders cited by the debtors as precedent contain such extraordinary or unwarranted provisions.⁷⁷

Nonetheless, the court did not establish a deadline for the committee to respond to creditor inquiries or require the committee to establish a website to provide access to creditors for information, even though the debtors' motion suggested that such a website would be one way for the committee to comply with the requirements of section 1102(b)(3). It is particularly interesting that the court did not require the establishment of a website, considering the size of the bankruptcy case. Clearly, even amongst large bankruptcy cases, the facts of each individual case will dictate the level of information-sharing required by the committee.⁷⁸

Many other courts have adopted similar provisions to those described above, but appear to tailor the relief requested based on the needs and size of the case.⁷⁹ For example, in *In re J.L. French Automotive Castings, Inc.*,⁸⁰ the court adopted similar procedures to those used in *Refco* but with some additions. Specifically, the court required the Committee:

- (a) by and through counsel to maintain a copy of all material pleadings and providing copies to creditors upon request;
- (b) by and through counsel to be available to unsecured creditors to respond to inquiries about the case, subject to confidentiality procedures;
- (c) by and through counsel to direct unsecured creditors to the debtors' noticing agent BMC Group, Inc. regarding information related to: (i) the claims bar date, (ii) notice of objections to claims, (iii) copies of all proofs of claim or interest; and (iv) access to other information related to the claims resolution process; and
- (d) to promptly respond to all other information requests of unsecured creditors subject to the confidentiality procedures.⁸¹

The court also permitted, but did not direct, the committee to establish a website to provide access to information to creditors.

Importantly, the court approved the protocol as satisfying the requirements of section 1102(b)(3) based, among other things, on the size of the size of the Chapter 11 case. “*Given the size of these chapter 11 cases, and the Debtors’ proposal to pay substantially all trade creditors in full pursuant to the Plan, the Creditor Information Procedures, coupled with the Confidentiality Procedures, satisfy the requirements set forth in section 1102(b)(3)(A) and (B) of the Bankruptcy Code.*”⁸²

Committees in small or medium-sized bankruptcy cases, to the extent they believe an information protocol is needed, seem to be focused on clarification that the committee does not have to provide confidential or privileged information to unsecured creditors. Indeed, some of the protocols seem to leave the entire question of the scope of access to the discretion of the committee. For example, in *In re Verlink Corp.*,⁸³ a bankruptcy case in which the debtor claimed assets of approximately \$14 million, the committee was only required to (1) share any nonprivileged, nonconfidential, or public information with creditors, and (2) maintain hard copies of all pleadings filed or orders entered, and provide copies of same to creditors when requested (by letter or email). The committee was prohibited from sharing confidential or privileged information, and if any creditor requested information, it was required to pay the costs and fees of providing the information in advance. With respect to solicitation of input from creditors, the court left that to the discretion of the committee.⁸⁴ Likewise, the court in *In re Rotec Indus., Inc.*,⁸⁵ a case in which the debtor claimed assets of approximately \$12 million, minimal requirements for information sharing were ordered by the court. Specifically, the committee was required to (1) respond to written and telephonic inquiries and requests for information from creditors, (2) send a letter to creditors inviting them to comment on any matters related to the bankruptcy and supplement its solicitation for comments 10 days after entry of a bar date. The committee was not required to provide creditors with access to confidential or privileged information. The court also ordered timeframes for the committee to respond to requests for information and provided a corresponding dispute resolution procedure. Finally, the order provided that it did not expand, restrict, affirm, or deny the right or obligation, if any, of the committee to provide access, or withhold access, to any of the debtor’s information, except as set forth in the order.⁸⁶

One particular case illustrates how a committee in a small bankruptcy case may handle its information-sharing requirements absent court order. In *In re The Quay Corp., Inc.*,⁸⁷ the committee did not seek a comfort order from the court; rather, it hammered out a protocol with input

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and approval from the U.S. Trustee.⁸⁸ The protocol was modeled from the protocols in *Refco* and *Amcast Automotive of Ind., Inc.*⁸⁹

The issue in *Quay Corp.* did not come before the court until an unsecured creditor filed a motion to compel the debtors and the committee to produce information pursuant to section 1102(b)(3), and further requested discovery pursuant to Bankruptcy Rule 2004.⁹⁰ The creditor had initially sent a letter to the committee requesting, pursuant to section 1102(b)(3), certain information considered confidential by the debtor.⁹¹ The committee forwarded the creditor's information request to the debtors, which responded by return letter that, because the requesting creditor was a competitor of the debtor and a contentious creditor,⁹² the debtor would object to any disclosure of information absent a binding confidentiality agreement.⁹³ The inability of the parties to agree on a form of confidentiality agreement led to the creditor's motion to compel. The committee, in its response, took the position that the matter could be resolved by the court directing that restrictions be placed on the creditor's use of the requested information, and attached a form of confidentiality order to its response.⁹⁴ From the perspective of the debtor, the creditor, who was locked in litigation with the debtor, was attempting to obtain information from the committee that it should have requested directly from the debtor via discovery requests.⁹⁵

The court, after numerous continuances of the hearing on the matter, issued an order in part and continued the matter in part. Specifically, the court required the debtor and committee to produce some of the requested documents subject to the terms of a confidentiality agreement.⁹⁶

VII. OBSERVATIONS AND RECOMMENDATIONS

While the cases discussed above comprise a representative sample of how courts have addressed the information sharing requirements of section 1102(b)(3), it is clear that information sharing protocols and clarification orders like those described in this article have become the standard against which committees are analyzing the extent of their obligation to share information with creditors. However, committees should not feel constrained to propose the entry of a *Refco* Protocol in every case for a number of reasons.

First, *Refco* was a very large bankruptcy case, and the estate was arguably much better able to absorb the fees and expenses of providing information in the manner required by the *Refco* Protocol, than a small or medium-sized debtor estate would be. The smaller the case, the more resistant a creditors' committee should be to the institution of aggressive information sharing protocols, because the fees and expenses attendant to adhering to a *Refco* Protocol would likely dissipate what may already

be a small pro rata distribution to creditors. Indeed, a committee may arguably violate its duty to creditors to maximize their recovery by attempting to fulfill its duty to provide them with information pursuant to section 1102(b)(3) in the manner prescribed by the *Refco* Protocol. In some smaller cases, instead of seeking entry of an information-sharing protocol, committees have merely transmitted letters to creditors advising them of general information about the case, how to request information and the procedure for obtaining information when a request for such information is denied by the committee, and notice that confidential and privileged information will not be disclosed.⁹⁷ This seems a more realistic and practical approach to the issue. Until faced with an actual dispute regarding the dissemination of information to creditors, such as the dispute in *Quay Corp.*, it is far more beneficial to the estate and its creditors to provide the minimum amount of information to creditors necessary to comply with the terms of section 1102(b)(3). Since the statute only speaks of providing “access” to information, it seems imprudent for a committee to proactively send anything more than general case information to creditors.

Second, information sharing protocols do not represent the only way for courts to bring clarity and predictability to the interpretation of section 1102(b)(3). Courts can adopt administrative orders or local rules to provide a basic guideline for committees to follow with respect to section 1102(b)(3). For example, the Bankruptcy Court for the District of Massachusetts has recently adopted Local Rule 2003-1 which establishes a procedure by which committees can satisfy their requirements pursuant to section 1102(b)(3). Massachusetts Local Rule 2003-1 provides general requirements for information-sharing and it also provides limitations on the disclosure of confidential or privileged information.⁹⁸

CONCLUSION

It is important to understand that, while *Refco* is the only published decision regarding the information-sharing requirements of section 1102(b)(3), it does not actually define what those requirements are—indeed, it is impossible for any lower court to propose a “one size fits all” checklist of duties a committee must perform to be assured of compliance with section 1102(b)(3). Instead, *Refco* simply holds that, in light of the resources available in the *Refco* estate, the proper balance between a committee’s duty to preserve access to sensitive information, protect the attorney-client privilege and comply with securities laws on the one hand, and the right of unsecured creditors to be informed of material developments in the case pursuant to section 1102(b)(3) on the other hand, was accomplished by way of the uncontested protocol approved in that case.⁹⁹ The *Refco* decision has clearly become influential and prece-

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dential; however, it appears to the authors that *Refco*'s precedential value is based more on the fact that it is the only published decision on the matter, and not because it provides satisfactory answers to all of the ambiguities inherent in section 1102(b)(3). Indeed, to expect so much of the first published decision on this thorny issue is unwarranted. *Refco* does provide committees with valuable guidance regarding the importance of protecting confidential and privileged information and contains helpful suggestions regarding the type of access that may be afforded unsecured creditors. However, courts and practitioners would do well to understand the limitations of *Refco*, and not blindly ape the *Refco* Protocol without considering the practical realities of the size and factual constraints of a particular bankruptcy estate.

Research References:

Norton Bankr. L. & Prac. 2d §§ 78:13 to 78:15, 78:19; 8 Norton Bankr. L. & Prac. 2d 11 U.S.C. § 1102; Bankruptcy Service, L Ed §§ 42:100, 42:101
West's Key Number Digest, Bankruptcy ↻ 3024

Notes

1. The Bankruptcy Abuse Prevention and Consumer Protection Act was enacted on April 20, 2005, and became effective on October 17, 2005.
2. 11 U.S.C.A. § 101 et seq. (2005).
3. See Catherine E. Vance, *The Origin of Information Sharing under New § 1102(b)(3)*, Development Specialists, Inc., 2006 citing 145 Cong. Rec. H2709-08 (daily ed. May 5, 1999) (Rep. Nydia Velázquez of New York offered House Amendment 57 to H.R. 833 to “ensure that those small businesses not included on the creditor committee will have access to critical information regarding the credit [sic] committee’s actions.”).
4. While not scientific, for the purposes of this article, a large bankruptcy reorganization case is one in which the debtor has more than \$100 million in scheduled assets. A small bankruptcy case may be considered one in which the debtor has up to \$10 million in scheduled assets, and a medium-sized bankruptcy case would be one in which the debtor has between \$10 million and \$100 million in scheduled assets.
5. In re Refco Inc., 336 B.R. 187, 45 Bankr. Ct. Dec. (CRR) 250, 56 Collier Bankr. Cas. 2d (MB) 100 (Bankr. S.D. N.Y. 2006).
6. 11 U.S.C.A. §1102(b)(3).
7. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694, 21 Env't. Rep. Cas. (BNA) 1049, 14 Envtl. L. Rep. 20507 (1984) (“If the intent of Congress is clear, that ends the matter.”). Determining a statute’s meaning “begins where all such inquiries must begin: with the language of the statute itself.” *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) P 72575, 89-1 U.S. Tax Cas. (CCH) P 9179, 63 A.F.T.R.2d 89-652 (1989). “In interpreting a statute we look first to the plain meaning of its words.” *U.S. v. Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006), cert. denied, 2007 WL 1110555 (U.S. 2007). The actual language used in the statute determines its meaning. *U.S. v. Williams*, 425 F.3d 987, 988-89 (11th Cir. 2005).
8. See Bankruptcy 2006: Views from the Bench, *Unsecured Trade creditors’ committee*, 061130 ABI-CLE 843 (Nov. 30, 2006–Dec. 2, 2006).

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9. 11 U.S.C.A. § 1102(b)(3)(A)(i) (emphasis added).

10. 11 U.S.C.A. § 1102(a)(1) (emphasis added).

11. The bankruptcy court has discretion to appoint separate creditor committees; however, such appointments are the exception rather than the rule. See *Mirant Americas Energy Marketing, L.P. v. Official Committee of Unsecured Creditors of Enron Corp.*, 51 Collier Bankr. Cas. 2d (MB) 903, 2003 WL 22327118 at * 7 (S.D. N.Y. 2003) (observing that creditors' committees typically have members with diverse and conflicting interests, and that it is rare to find a case with two separate creditor committees in the same case).

12. See John R. Kennel, et al., Powers and duties of committee, 8B C.J.S. Bankruptcy § 1130 at *1 (Aug. 2006) ("A creditors' or equity security holders' committee appointed pursuant to statute must provide access to information for creditors who hold claims of the kind represented by that committee and who are not appointed to that committee, and must solicit and receive comments from such creditors.") (emphasis added); Deborah L. Thorne, Creditors' Committees: The Fallout From BAPCA Changes to §1102, 25-APR Am. Bankr. Inst. J. 20 at *2 (April 2006) ("Section 1102(b)(3)(A) does not indicate how a creditors' or equity committee should provide access to such information, and more importantly does not indicate the nature, scope or extent of the "information" that a committee must provide to its constituency.").

13. See Hon. Pamela S. Hollis, et al., Section 1102(b)(3), its Requirements and Implications, 061506 ABI-CLE 431 at *1 (June 15-18, 2006). ("Section 1102(b)(3) does not apply to committees of equity security holders. The language of the statute makes it clear that it only applies to committees of creditors. It speaks of creditors and creditors who hold claims only, not interest holders.") (emphasis in the original).

14. See 11 U.S.C.A. § 101(10) defining "creditor" and subsection (17) defining "equity security holder." See also, subsection 11 U.S.C.A. § 101(14) in which "creditor" and "equity security holder" are separately referenced as different types of disinterested parties.

15. "It is well established that where Congress has included specific language in one section of the statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission." Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. U.S., 13 F.3d 398, 402, 15 Int'l Trade Rep. (BNA) 2131 (Fed. Cir. 1994).

16. In re Refco Inc., 336 B.R. 187, 45 Bankr. Ct. Dec. (CRR) 250, 56 Collier Bankr. Cas. 2d (MB) 100 (Bankr. S.D. N.Y. 2006).

17. See 11 U.S.C.A. § 107(b)(1); In re Orion Pictures Corp., 21 F.3d 24, 27, 25 Bankr. Ct. Dec. (CRR) 821, 30 Collier Bankr. Cas. 2d (MB) 1819, 22 Media L. Rep. (BNA) 1568, Bankr. L. Rep. (CCH) P 75826 (2d Cir. 1994) (holding that the provisions of section 107(a) are mandatory upon the request of a party in interest).

18. See *Educational Credit Management Corp. v. Polleys*, 356 F.3d 1302, 1308, 51 Collier Bankr. Cas. 2d (MB) 998, Bankr. L. Rep. (CCH) P 80044 (10th Cir. 2004) citing *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918) (holding that a main purpose of the former Bankruptcy Act was to "aid the unfortunate debtor by giving him a fresh start in life"); In re Maddigan, 312 F.3d 58, 5969, Bankr. L. Rep. (CCH) P 78761 (2d Cir. 2002) (accord); In re Peterson, 897 F.2d 935, 938, 22 Collier Bankr. Cas. 2d (MB) 1147, Bankr. L. Rep. (CCH) P 73253 (8th Cir. 1990). The two main goals of the Bankruptcy Code are (1) to "provide a collective forum for sorting out the rights of the various claimants against assets of a debtor where there are not enough assets to go around" and (2) to provide "for some sort of financial fresh start for certain debtors." In re Oak Park Calabasas Condominium Ass'n, 302 B.R. 665, 673, 42 Bankr. Ct. Dec. (CRR) 75 (Bankr. C.D. Cal. 2003) citing, David G. Epstein, et al., Bankruptcy Vol 1, § 1-2 (West 1992), citing Max Radin, *The Nature of Bankruptcy*, 89 U. Pa. L. Rev. 1, 3-4 (1940) and Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L.Rev. 775, 785 (1987).

19. See Regulation FD, 17 C.F.R. § 243.100 (a) (2001).

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20. See 17 C.F.R. § 243.101(e)(1),(2) (2001).

21. See 17 C.F.R. § 243.100 (b)(2)(ii) (2001).

22. See *Darby v. Cisneros*, 509 U.S. 137, 113 S. Ct. 2539, 125 L. Ed. 2d 113 (1993).

23. See Laura DiBiase, “*Fair and Efficient: Are They Really Talking About BAPCPA?*,” 25-NOV Am. Bankr. Inst. J. 44 (Nov. 2006).

24. See Catherine E. Vance, *The Origin of Information Sharing Under New § 1102(b)(3)*, Development Specialists, Inc. (2006) (“Citing the House Report accompanying BAPCPA, courts, parties and commentators have stated, in apparent unanimity, that § 1102(b)(3) has no real legislative history.”) citing John W. Mills, III et al., *Committee Confidentiality? New Act Raises Issues by Requiring Creditors’ Committees to Disclose Data to Noncommittee Members*, Nat’l L.J. (Nov. 21, 2005) (“[T]he legislative history of BAPCPA is silent as to why Congress determined that apparent broad disclosure of information by creditors’ committees should be required.”).

25. See Catherine E. Vance, *The Origin of Information Sharing Under New § 1102(b)(3)*, Development Specialists, Inc. (2006) citing 145 Cong. Rec. H2709-08 (daily ed. May 5, 1999) (emphasis added).

26. See Catherine E. Vance, *The Origin of Information Sharing Under New § 1102(b)(3)*, Development Specialists, Inc. (2006).

27. See Catherine E. Vance, *The Origin of Information Sharing Under New § 1102(b)(3)*, Development Specialists, Inc. (2006).

28. See Hon. Theodore C. Albert, et al., *Navigating the Minefields of Representing Chapter 11 Committees – Getting Employed, Managing Inter-committee Conflicts & Complying With BAPCPA*, 060907 ABI-CLE 189 at *6 (Sept. 7-9, 2006) (“On its face, section 1102(b)(3) is patently ambiguous as to the scope of these obligations, and as creditors’ committees and courts have pointed out, there is no informative legislative history on this particular provision.”).

29. See Hon. Margaret A. Mahoney et al., *Business Bankruptcy Developments Under BAPCPA*, 060726 ABI-CLE 323 at *4 (July 26-29, 2006) (“Remarkably, the legislative history provided no meaningful guidance as to the purpose or intent of the provision short of suggesting that such disclosure requirements were designed for small business debtor cases, a limitation that does not appear in the statute itself.”).

30. *In re Refco Inc.*, 336 B.R. 187, 190, n.1, 45 Bankr. Ct. Dec. (CRR) 250, 56 Collier Bankr. Cas. 2d (MB) 100 (Bankr. S.D. N.Y. 2006).

31. The court’s first inclination, given the review process contemplated by section 1102(b)(3)(C), the absences from the statute of any adverse consequences for an initial failure to comply, and the qualified immunity accorded official committees and their professionals, was to deny the motion as not raising a case or controversy. However, the court concluded, based on the issues raised by unsecured creditors and the lack of caselaw, to hear the case. Nonetheless, the court opined that, as the law develops, the need for comfort orders should end. See *In re Refco Inc.*, 336 B.R. at 190. It is unclear whether the court’s approach was the right one, considering that most courts do not enter comfort orders because they are prohibited advisory opinions. See *In re Ouelette*, 2005 BNH 20, 2005 WL 1563532 at *1 (Bankr. D. N.H. 2005) citing *Golden v. Zwicker*, 394 U.S. 103, 108 (1969) (federal courts do not render advisory opinions) and *American Postal Workers Union v. Frank*, 968 F.2d 1373 (1st Cir. 1992) (absent a case or controversy, plaintiff lacks standing).

32. *In re Refco Inc.*, 336 B.R. at 190-91.

33. *In re Refco Inc.*, 336 B.R. at 191.

34. *In re Refco Inc.*, 336 B.R. at 191.

35. *In re Refco Inc.*, 336 B.R. at 191.

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36. In re Refco Inc., 336 B.R. at 190.
37. See Exhibit A to Voluntary Petition, Case No. 05-60006 (Bankr. S.D. N.Y. 2005), Docket No. 1.
38. See In re Refco Inc., 336 B.R. at 191.
39. See In re Refco Inc., 336 B.R. at 191.
40. See In re Refco Inc., 336 B.R. at 191.
41. In re Refco Inc., 336 B.R. at 192.
42. See In re Refco Inc., 336 B.R. at 192.
43. See In re Refco Inc., 336 B.R. at 192.
44. See In re Refco Inc., 336 B.R. at 192.
45. See In re Refco Inc., 336 B.R. at 192., citing 11 U.S.C.A. § 704(7) (2006). Pursuant to sections 1106(a)(1) and 1107(a), section 704(7) applies to Chapter 11 trustees and debtors in possession, respectively.
46. See In re Refco Inc., 336 B.R. at 192.
47. See In re Refco Inc., 336 B.R. at 193.
48. See In re Refco Inc., 336 B.R. at 193.
49. See In re Refco Inc., 336 B.R. at 194.
50. See Craig M. Rankin and Christopher Alliotts, *The New Duty to Disclose*, 8/28/2006 Nat'l L.J. 12, (Col 1.) (August 28, 2006).
51. See In re Refco Inc., 336 B.R. at 199, citing *Commodore Int'l Ltd. v. Gould* (In re Commodore Int'l Ltd.), 262 F.3d 96, 100 (2d Cir. 2001) (authorizing committee to prosecute fraudulent transfer litigation for the benefit of the estate).
52. See In re Refco Inc., 336 B.R. at 196.
53. See In re Refco Inc., 336 B.R. at 196.
54. See In re Refco Inc., 336 B.R. at 196.
55. See In re Refco Inc., 336 B.R. at 197.
56. See In re Refco Inc., 336 B.R. at 197.
57. See In re Refco Inc., 336 B.R. at 198.
58. See In re Refco Inc., 336 B.R. at 198.
59. See In re Refco Inc., 336 B.R. at 200.
60. See In re Refco Inc., 336 B.R. at 201.
61. Case No. 05-20011 (Bankr.D.Del. 2005).
62. Pursuant to Exhibit A of FLYi, Inc.'s voluntary petition, debtors' total assets were listed at \$378.5 million and debts were listed at \$455.4 million.
63. See generally, Motion of the Debtors for an Order Providing That Creditors' Committees are Not Authorized or Required to Provide Access to Confidential Information of the Debtors or to Privileged Information, In re FLYi, Inc., Case No. 05-20011 (Bankr. D.Del. 2005), Docket No. 23.
64. Motion of the Debtors for an Order Providing That Creditors' Committees are Not Authorized or Required to Provide Access to Confidential Information of the Debtors or to Privileged Information, In re FLYi, Inc., Case No. 05-20011 (Bankr. D.Del. 2005), Docket No. 23at ¶7..
65. Motion of the Debtors for an Order Providing That Creditors' Committees are Not Authorized or Required to Provide Access to Confidential Information of the Debtors or to Privileged Information, In re FLYi, Inc., Case No. 05-20011 (Bankr. D.Del. 2005), Docket No. 23 at ¶ 12.

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66. Motion of the Debtors for an Order Providing That Creditors' Committees are Not Authorized or Required to Provide Access to Confidential Information of the Debtors or to Privileged Information, In re FLYi, Inc., Case No. 05-20011 (Bankr. D.Del. 2005), Docket No. 23 at ¶ 13.

67. See Order Providing that Creditors' Committees are Not Authorized or Required to Provide Access to Confidential Information of the Debtors or Privileged Information, blackline, In re FLYi, Inc., Case No. 50-20011 (Bankr. D.Del. 2005), Docket No. 133, Ex. B.

68. See Order Providing that Creditors' Committees are Not Authorized or Required to Provide Access to Confidential Information of the Debtors or Privileged Information, blackline, In re FLYi, Inc., Case No. 50-20011 (Bankr. D.Del. 2005), Docket No. 133, Ex. B.

69. Case No. 05-33322-FJO-11 (Bankr. S.D.Ind. 2006).

70. Views from the Bench Nov. 30, 2006–Dec. 2, 2006, *Unsecured Trade creditors' committee*, Bankruptcy 2006: 061130 ABI-CLE 843 at p. 3, (2006).

71. Case No. 06-10354 (Bankr. S.D.N.Y. 2006).

72. See Voluntary Petition, Exhibit A., In re Dana Corp., Case No. 06-10354 (Bankr. S.D.N.Y. 2006).

73. See also, In re G+G Retail, Inc., Case No. 06-10152 (Bankr. S.D.N.Y. Mar. 9, 2006); In re Calpine Corp., Case No. 60200 (Bankr. S.D.N.Y. Feb. 15, 2006) (information sharing protocols similar to that used in FLYi, Inc.).

74. See Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a), 107(b) and 1102(b)(3)(A) of the Bankruptcy Code, for an Order Confirming that Creditors' Committees are not Authorized or Required to Provide Access to (A) Confidential Information of the Debtors or (B) Privileged Information, In re Dana Corp., Case No. 06-10354 (Bankr. S.D.N.Y. 2006), Docket No. 331.

75. See Official Committee of Unsecured Creditors' Objection to Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a), 107(b) and 1102(b)(3)(A) of the Bankruptcy Code, for an Order Confirming that Official Committees Are Not Authorized or Required to Provide Access to (A) Confidential Information of the Debtors or (B) Privileged Information, In re Dana Corp., Case No. 06-10354 (Bankr. S.D.N.Y. Mar. 27, 2006), Docket No. 665; see also, Docket Nos. 613, 615 and 697 which are objections to the debtors' motion filed by three other creditors, arguing that confidentiality agreements already applied to them, or alternatively, that they would be willing to sign confidentiality agreements in order to obtain confidential information.

76. See In re Dana Corp., Case No. 06-10354 (Bankr. S.D.N.Y. 2006), Docket No. 665 at ¶ 1.

77. In re Dana Corp., Case No. 06-10354 (Bankr. S.D.N.Y. 2006) at ¶ 14, citing In re G+G Retail, Inc., 06-10152 (Bankr. S.D.N.Y. March 9, 2006); In re Calpine Corp., 05-60200 (Bankr. S.D.N.Y. Feb. 15, 2006); In re FLYi, Inc., 05-20011 (Bankr. D.Del. Nov. 7, 2005).

78. Even if not required, a committee may consider the retention of an "information agent" to establish and maintain websites, and relieve the committee of other various administrative tasks related to compliance with section 1102(b)(3). See Application to Employ Donlin, Recano & Company, Inc. as Information Agent to the Official Committee of Unsecured Creditors, In re Nellson Nutraceutical, Inc., Case No. 06-10072 (Bankr. D.Del. May 15, 2006), Docket No. 363, and Order Authorizing the Retention of Donlin, Recano & Company, Inc., as the Committee of Unsecured Creditors Information Agent, Nunc Pro Tunc to May 1, 2006, Docket No. 429. In this case, with assets listed at approximately \$312 million and debts of \$345 million, the court entered a clarification order holding that the committee did not have to provide creditors with access to confidential or privileged information, and with respect to access, simply provided that "nothing in this Order shall expand, restrict, affirm or deny the right or obligation, if any, of a creditors' committee to provide access or not provide access, to any information of the Debtors to any party except

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as explicitly provided herein.” Nonetheless, the committee retained an “information agent” to set up a website to comply with the requirements of section 1102(b)(3).

79. A number of committees in smaller and medium sized bankruptcy cases around the country have adopted attenuated information sharing protocols based on the needs and size of the particular case, including, but not limited to: *In re Rotec Indus., Inc.*, Case No. 06-10542 (Bankr. D.Del. Aug. 29, 2006), Docket No. 155 (assets of approximately \$12 million, minimal requirements, no website required); *In re Verlink Corp.*, Case No. 06-80566 (Bankr. N.D.Ala. May 4, 2006), Docket No. 198 (assets of approximately \$14 million, minimal procedures for information sharing); *In re Fibrex Cordage, LLC*, Case No. 05-38080 (Bankr. M.D.Ga. Mar. 1, 2006), Docket No. 174; *In re Nobex Corp.*, Case No. 05-20050 (Bankr. D.Del. Feb. 10, 2006), Docket No. 223 (assets of approximately \$412,000, order clarifies committee does not need to provide access to confidential or privileged information, but provides no direction on how to provide access to the information, leaving that to the discretion of the committee).

80. Case No. 06-10119 (Bankr. D.Del. Feb. 2, 2006).

81. See Order Approving Procedures For Providing Access to Information and for Handling: (I) Confidential Material and Restricted Confidential Material of the Debtors; and (II) Privileged Information, *In re J.L French Automotive Castings, Inc.*, Case No. 06-10119 (Bankr. D.Del. Feb. 2, 2006), Docket No. 441.

82. See Order Approving Procedures For Providing Access to Information and for Handling: (I) Confidential Material and Restricted Confidential Material of the Debtors; and (II) Privileged Information, *In re J.L French Automotive Castings, Inc.*, Case No. 06-10119 (Bankr. D.Del. Feb. 2, 2006), Docket No. 441 at ¶ 6.

83. Case No. 06-80566 (Bankr. N.D.Ala. 2006).

84. See Order Approving Motion by the Official Committee of Unsecured Creditors to Define Scope of, and Procedures For, Disclosure of Information to Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(s), 107(b)(1), and 1102(b)(3), *In re Verlink Corp.*, Case No. 06-80566 (Bankr. N.D.Ala. May 4, 2006), Docket No. 198.

85. Case No. 06-10542 (Bankr. D.Del. 2006).

86. See Order Clarifying Requirement to Provide Access To Information and Solicit Comments Pursuant to 1102(b)(3) and Establishing Related Procedures., *In re Rotec Indus., Inc.*, Case No. 06-10542 (Bankr. D.Del. Aug. 29, 2006), Docket No. 155.

87. Case No. 05-63146 (Bankr. N.D.Ill. 2005).

88. See The Official Unsecured Creditors’ Committee’s Response to Mexican Cheese Prods., Inc. and Distribuidora de Quesos Mexicanos, Inc.’s Motion to Compel, *In re The Quay Corp., Inc.*, Case No. 05-63146 (Bankr. N.D.Ill. Aug. 1, 2006), Docket No. 228, ¶ 3.

89. Case No. 05-33322-FJO-11 (Bankr. S.D.Ind. 2006).

90. See, Motion to Compel Debtor and Creditors’ Committee to Produce Documents, *In re The Quay Corp., Inc.*, Case No. 05-63146 (Bankr. N.D.Ill. July 27, 2006), Docket No. 227.

91. See, Motion to Compel Debtor and Creditors’ Committee to Produce Documents, *In re The Quay Corp., Inc.*, Case No. 05-63146 (Bankr. N.D.Ill. July 27, 2006), Docket No. 227, Exhibit A.

92. In addition, the creditor and the debtor had been locked in litigation in state court, as well as before the bankruptcy court, with respect to remaining counterclaims from the state court action. In light of the ongoing litigation, and the fact that the creditor was a competitor of the debtor attempting to force a sale of the debtor’s business and assets to itself, the debtors requested protection from the court. See Debtor’s Response to MCP’s Motion to Compel the Debtor and Creditors’ Committee to Produce Documents and for Leave to Conduct Discovery Pursuant to Rule 2004, *In re The Quay Corp., Inc.*, Case No. 05-63146 (Bankr. N.D.Ill. Aug. 7, 2006), Docket No. 232.

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93. See Debtor's Response to MCP's Motion to Compel the Debtor and Creditors' Committee to Produce Documents and for Leave to Conduct Discovery Pursuant to Rule 2004, In re The Quay Corp., Inc., Case No. 05-63146 (Bankr. N.D.Ill. Aug. 7, 2006), Docket No. 232, Exhibit B.

94. See The Official Unsecured Creditors' Committee's Response to Mexican Cheese Prods., Inc. and Distribuidora de Quesos Mexicanos, Inc.'s Motion to Compel, In re The Quay Corp., Inc. Case No. 05-63146 (Bankr. N.D.Ill. Aug. 1, 2006), Docket No. 228, at ¶ 7.

95. See Debtor's Response to MCP's Motion to Compel the Debtor and Creditors' Committee to Produce Documents and for Leave to Conduct Discovery Pursuant to Rule 2004, In re The Quay Corp., Inc., Case No. 05-63146 (Bankr. N.D.Ill. Aug. 7, 2006), Docket No. 232.

96. See Order, In re The Quay Corp., Inc., Case No. 05-63146 (Bankr. N.D.Ill. Aug. 7, 2006), Docket No.285.

97. Views from the Bench Nov. 30, 2006–Dec. 2, 2006, *Unsecured Trade creditors' committee*, Bankruptcy 2006: 061130 ABI-CLE 843 at p. 5, (2006).

98. See Mass. L.R. 2003-1. Confidential information is defined as “any nonpublic information subject to a confidentiality agreement with the debtor or another entity or other nonpublic information the committee “believes in its reasonable business judgment” should be confidential for the committee to perform its duties and (i) was furnished to the committee by the debtor or (ii) was developed by professionals employed by the committee and disclosure of which would impair performance of their duties.”

99. See In re Refco Inc., 336 B.R. at 197-198.