

Creditor Information Disclosure Chaos

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Of the great ambiguities present in BAPCPA, none is more glaring than the one in §1102(b)(3), which requires that committees appointed under subsection (a) “shall provide access to information for creditors who (1) hold claims of the kind represented by that committee, and (2) are not appointed to that 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 be made to the creditors described in subparagraph (a).”



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What has emerged from the lack of legislative history regarding implementation of this section is the first-day order, which assures that confidential information does not have to be shared with general creditors.

However, there is no such clarity on how to address access to nonconfidential information. So while the issue of access to confidential information appears to be relatively settled in many courts as between debtors and unsecured creditors' committees, access to nonconfidential information is anything but settled.

Two cases from the Southern District of New York illustrate the different approaches to affording creditors access to nonconfidential information. The first is *Musicland Holding Corp.* and the second is *Oneida, Ltd.* Both of these cases approach compliance with Code §1102 quite differently.

Yet another case from the Southern District of New York, *Refco Inc.*, first shaped the type of nonconfidential information that should be made available to creditors. The court in the *Refco, Inc.* case adopted a protocol that has become universally accepted as the standard for access to nonconfidential information. Its implementation, however, is quite another issue.

The *Refco* protocol called for the establishment of a Web site to provide creditors with general case information, committee reports, highlights of case

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events, a case calendar, access to the debtor's claims docket, a general chapter 11 overview, press releases (if any), real-time case updates via e-mail, creditor question-and-answer submission capability, responses to questions, answers to frequently asked questions and access to other relevant Web sites. While most cases since have mimicked the *Refco* protocol, several have altered the level of detail required to be provided.

In *Musicland*, the protocol was addressed by the unsecured creditors' committee, having an order entered under §327, retaining an outsourced provider to establish a committee site containing each of the elements of the *Refco* protocol (www.musiclandcreditors.com). Notwithstanding that a claims agent is selected by a debtor and retained as an

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agent of the clerk of the court, there now exist several orders similar to the *Oneida* order allowing the creditor information protocol to be deemed satisfied by merging the interests of the general creditor body with that of the debtor. The issue of presumed neutrality aside, the question becomes: Can two divergent interests be served by one master?

In the *Oneida* case, a completely opposite approach was adopted whereby the unsecured creditors' committee chose to rely on the debtor's claims agent to provide access to information to creditors. Herein lies a divide and potential conflict.

Mark Indelicato of Hahn and Hessen, one of the leading firms in committee representation, states: “Creating an independent outsourced site to address the protocol, controlled exclusively by the committee and made for the benefit of general unsecured creditors, saves counsel and case professionals time and expense associated with having to address creditor inquiries. As committee counsel in the *Musicland Holding Company, Inc.* case, we found the use of an outsourced site, where we controlled the information

that went into it, a way to maintain our independence from the debtor yet comply with the protocol at the highest levels.”

The interests of a debtor and creditors' committee are rarely harmonious. Thus, merging the manner in which information is made available to creditors in a debtor-controlled environment seems to run contrary to the goals of the protocol. Would a debtor and committee share a financial advisor? Should both have the ability to use the services of the same accounting firm to prepare and review operating reports to save the estate money? As for cost, if in fact a Web site created for and controlled by a committee has a cost, it is well worth exploring if the cost savings resulting from information being made available this way (as opposed to the time and expense incurred by committee counsel who would otherwise have to field inquiries) creates a cost benefit. If it does, then the cost issue becomes a red herring.

Simply stated, creditors' committees should not be forced to merge their interests on any level with a debtor. What the *Oneida*

case does is something very dangerous and potentially precedent-setting, not just for this aspect of statutory compliance, but in other areas, such as professional retentions, where a similar argument can be made. What *Oneida* really highlights, however, is that until the dissemination of nonconfidential information is afforded a heightened level of importance, this issue will remain unresolved.

The lack of importance afforded the implementation of the protocol with respect to dissemination of nonconfidential information has not only created the type of schism referenced, but a total lack of consistency as to how the protocol should be implemented from case to case and from jurisdiction to jurisdiction. In fact, a sampling of recent motions and orders demonstrates where committees deem compliance important and where they clearly do not.

In the *ITG Vegas Inc.* case filed in the Southern District of Florida, the committee has asked that adherence to information requests be deemed satisfied if a creditor makes a written request to the committee chair with a copy of the

request to committee counsel, after which a 14-day response period is given. In the Delaware case of *Advanced Marketing Services Inc.*, the committee proposes that it *may* establish a Web site to satisfy the protocol, while in the New Jersey case of *Kara Homes Inc.*, the committee *will* establish such a Web site. Finally, in the Central District of California case of *Naturade Inc.*, while the committee will establish a Web site, creditors who wish to view pleadings not contained on the committee-maintained Web site will be required to establish their own PACER account to do so. As one can conclude, implementation of the protocol has become an inexact science wrought with subjectivity as to what constitutes acceptable compliance.

Consequently, consistency in form is a good place to start when addressing dissemination of nonconfidential information—in other words, create a site form that has all the elements of the *Refco* protocol that can be scaled up or scaled down based on the needs of a particular case. This is exactly what Donlin Recano created when it launched its site for the mega-case *Musicland Holding Corp.* This basic site form has been used in several subsequent cases, including *Falcon Air Express* (Southern District of Florida), *Nellson Neutraceutical Inc.* (District of Delaware), *MR Wind Down Co. Inc.* (District New Jersey) and *The Belden Locker Co.* (Northern District Ohio). A review of these sites reveals that information can be disseminated in a uniform manner yet specific to the size and needs of a particular case, obviating issues of cost, and in larger cases, the need to consider merging creditor information with information provided by a debtor's claims agent, largely for different purposes.

Another overlooked matter is the issue of equity committees and what, if any, requirements they have to share information under §1102. This has been largely overlooked possibly because of a drafting ambiguity in the statute. Section 1102(a)(1) indicates that the U.S. Trustee “shall appoint a committee of creditors holding unsecured claims and *may* appoint additional committees of creditors of any equity securityholders....” Section 1102(b)(3) indicates that “a committee appointed under subsection (a) shall (A) provide access of information for creditors....” Did the drafters of this section really mean to use the word “creditors” to distinguish general unsecured creditors from equity

securityholders in terms of the right to receive information under the protocol? Is the virtual silence on the issue a way for equity committees to avoid potential compliance issues? Are there issues of compliance at all? Here again, legislative history provides no guidance. Unlike unsecured creditors' committees, however, pressed into the issue as a byproduct of having to address a distinction between shared confidential vs. nonconfidential information, no like issue has emerged in the equity-committee sector.

The one point that cannot be disputed is that under BAPCPA, information must be made available to creditors. The mechanism to do so in a way that makes economical as well as logistical sense is still under construction. It would seem, however, that the future of implementing the provisions of §1102 will at some point fall into the hands of judicial interpretation at a level higher than the bankruptcy court. While the doors are now open with respect to having to make information available, several unanswered questions remain. Some of those questions include: Will access to nonconfidential information be made uniform or vary from case to case? Does the size of a case matter? Is there a point where compliance can be scaled down?

Who should provide information? Is the cost of outsourcing a Web site more economical than a law firm hosting its own site? Can a debtor's claims agent retained under 18 U.S.C. §156(c) and retained as an agent of the clerk of the court, also be retained as a committee's information agent? Finally, where does liability lie for improperly disseminating information? These and other unresolved questions must be addressed for information access under BAPCPA to make any sense whatsoever.

In a word, how to address the availability of nonconfidential information is a mess. While Web-based dissemination of information seems to be how most parties are addressing compliance with §1102, there is no consensus on any relatively uniform implementation of a Code section that is as ambiguous in what it requires as it is in implementing those requirements. Add to this a movement to merge availability of information to general creditors with a debtor's claims agent site, and what exists is a state of chaos that needs to be addressed, probably at the appellate level. Perhaps, where our legislators failed, our courts can remedy. ■