

## **The Origin of Information Sharing Under New § 1102(b)(3)©**

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A new “first day” order has emerged in Chapter 11 bankruptcy since October 17, 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). These orders are in response to BAPCPA’s “information sharing” provision, codified at § 1102(b)(3), which mandates:

- 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 paragraph (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).

The courts overseeing the Dana Corp., Refco, Calpine, FLYi, G+G Retail and other bankruptcies have all entered orders restricting the reach of this new information sharing statute, defining what is “confidential” and “privileged” information and prohibiting, with certain exceptions, the dissemination of that confidential or privileged information to any creditor who is not a member of the official committee.

These orders are not in response to disputes over creditors’ specific requests for information that, for whatever reason, the committee believes is not, or should not be, within the reach of § 1102(b)(3). Rather, they are preemptive orders, entered based on the committees’, or, in some cases, debtors’ speculation that § 1102(b)(3) might reach information considered to be confidential or privileged.

Although they are worthy of discussion, the point of this article is not to examine the legal problems with these § 1102(b)(3) orders and the motions that underlie them – most notably the absence of a case or controversy<sup>1</sup> and insufficient notice<sup>2</sup> – but rather to

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<sup>1</sup> The court in the Refco acknowledged that its “first inclination ... was to deny the motion as not raising a controversy.” *In re Refco*, 336 B.R. 189, 190 (Bankr. S.D.N.Y. 2006).

<sup>2</sup> See, e.g., *In re Spiegel*, 292 B.R. 748, 751 (Bankr. S.D.N.Y. 2003). In *Spiegel*, counsel for the creditors’ committee sought an order declaring that committee members would not be in violation of their fiduciary duty to their constituents by trading in the debtor’s debt and equity securities so long as the trading member established and followed “screening wall” policies and procedures. The court was troubled that notice of this motion was served on the committee in its representative capacity:

dispel a myth that permeates them all: that we know nothing about the origin or purpose of § 1102(b)(3).

Citing the House Report accompanying BAPCPA, courts, parties and commentators have stated, in apparent unanimity, that § 1102(b)(3) has no real legislative history. “[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,” conclude the authors of a November 21, 2005, article in the *National Law Journal*.<sup>3</sup> Requests for orders in specific cases similarly cite Congress’s lack of guidance, suggesting that without court-ordered restrictions, access to confidential information would be unfettered, causing havoc for reorganizing debtors. And a New York bankruptcy court recently observed:

The House Report states merely, “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 or disclosures available to them.”<sup>4</sup>

True enough, but this observation is incomplete. It is a correct statement with respect to the bill that Congress actually *enacted*, but it obscures the fact that BAPCPA’s legislative history does not begin and end with a single House Report released in 2005. Discovering the intent behind § 1102(b)(3), or any number of BAPCPA’s provisions for that matter, requires some digging into the new law’s historical record.

The push to reform the bankruptcy laws began in earnest in 1998, and, until about 2003, the substance of the bills changed in almost every go-around. The most tumultuous period during this legislative effort was the 106<sup>th</sup> Congress. In 1999 and 2000, all sorts of amendments were made to the bankruptcy bills then pending. (At one point, the Senate version raised the minimum wage, overhauled pension laws and dealt with the abuse of and trafficking in methamphetamines).

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Generally, this Court allows service on a committee of unsecured creditors, in lieu of service on the unsecured creditors themselves, because a creditors’ committee will represent the interests of all class members in reviewing proposed orders and applications. In this case, however, the relief sought is for the Committee members themselves – to be excused from their fiduciary duty – and therefore the Application must be served on every member of the affected class. This court would be very interested in any comments the affected class members may have about the relief requested in the Application.

*Id.* at 751.

<sup>3</sup> John W. Mills, III, Colin M. Bernardino and Danial A. Fliman, *Committee Confidentiality? New Act Raises Issues by Requiring Creditors’ Committees to Disclose Data to Noncommittee Members*, *National Law Journal*, Nov. 21, 2005.

<sup>4</sup> *In re Refco, Inc.*, 336 B.R. 189 (Bankr. S.D.N.Y. 2006).

It was during this period that the information sharing provision became a part of the overall bankruptcy reform package. On May 5, 1999, Rep. Nydia Velázquez of New York offered House Amendment 57, making her intention clear: Velázquez had small business creditors on her mind, especially those whose claims are large from the creditor's perspective, but small from the debtor's.

In support of her amendment, Velázquez stated:

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.<sup>5</sup>*

The amendment was agreed to by a voice vote and was a part of H.R. 833, the version of bankruptcy reform that passed the House in the 106<sup>th</sup> Congress. Before the voice vote, the far reaches of the ideological spectrum rose in support of the amendment, in the form of Representatives Talent (R-MO) and Conyers (D-MI).

From then on, the Velázquez amendment was included in the bankruptcy reform bill that the 106<sup>th</sup> Congress eventually passed (which President Clinton pocket vetoed) and every version of bankruptcy reform considered in subsequent Congresses, including the one that finally became law, BAPCPA. But after the House agreed to the amendment on May 5, 1999, Congress said nothing more about it, save for the unhelpful information included in the various House Reports, including BAPCPA's.

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<sup>5</sup> 145 Cong. Rec. H2709-08 (daily ed. May 5, 1999). (Emphasis added.)

Had the drafting been better, the information sharing amendment might not have become divorced from its intended beneficiaries, small business creditors. The companion to the information sharing amendment, a provision that permits the court to add small business creditors to the official committee, is much more clear; it speaks specifically to small business creditors whose claims are disproportionately large when compared to the creditor's annual gross revenue.

The § 1102(b)(3) amendment, however, is much less precise, and even with an understanding of its origin, there will still be problems applying the new mandate. The absence of any language limiting the information sharing amendment to small business creditors could force a broader interpretation than Rep. Velázquez intended because of the prevailing “plain language” rule. The language of the statute is not restricted to small business creditors, the reasoning would go, and the courts have no authority to add that restriction, irrespective of what Rep. Velázquez intended.

On the other hand, when one knows its history, the intent of the Velázquez amendment is clear. Thus, the courts could interpret § 1102(b)(3)'s reference to “creditors” as limited to small business creditors because the literal application of the provision would produce a result demonstrably at odds with the intent of its drafters.<sup>6</sup>

Before courts grant further first day orders limiting the reach of § 1102(b)(3), an analysis of this provision's language and intent ought to be undertaken. Such an analysis will enable the bench and bar to better manage the consequences of the information sharing provision, as motions, responses and, ultimately, court order will reflect an understanding of where § 1102(b)(3) comes from, what it is supposed to mean and how its language should be applied in light of its history.

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<sup>6</sup> See, e.g., *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).