

VIEWPOINT

Until Courts Set Boundaries, Arbitrariness Will Define New Information-Sharing Rules

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Of all the hot areas of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 that have sparked debate since the law took effect last Oct. 17, none has brought more consistent discussion than the application of information-access requirements under Section 1102 of the U.S. Bankruptcy Code.

While it has become common, especially in larger cases, to address the issue of access to confidential information as a first-day order, how creditors access nonconfidential information has been addressed with far less urgency and far greater inconsistency. Combine this with what some have cited as a statutory ambiguity regarding whether Section 1102(b)(3) requires information-sharing with equity-security holders, and the law, although more evolved thanks to the advent of Section 1102 clarification motions, has a long way to go before it becomes clear and systematic in its application.

A recent Viewpoint columnist was of the opinion that additional time and expense would be a pressing issue when addressing compliance with the law's information-access provisions. While it is true there is a cost associated with the change in the law, the real challenge is how to maximize the availability of nonconfidential information while at the same time minimizing additional cost.

The answer to that question may lie in outsourcing this task to a site provider with systems and bankruptcy-law knowledge that can establish and maintain an easily accessible and organized nonconfidential-information Web site. While many are resisting the law and find this section of the Bankruptcy Code poorly drafted and theoretically burdensome, others have focused on the value of making nonconfidential but nevertheless helpful information available to credit managers, bondholders and consumer creditors.

This is exactly what the counsel to the committee of unsecured creditors did in the Musicland Inc. case. In that case, a Web-based information site and e-mail-communication exchange has been established, tailored after the categories of information enumerated in the cases of Refco Inc. and Calpine Corp. Moreover, as information-sharing becomes better-defined and more universally standardized, early concerns regarding costs should be alleviated.

Despite such progress, many committees have tried to minimize obligations under Section 1102 (b)(3) with respect to providing access to nonconfidential information through the emergence of the limiting order. In such instances, the committee will move for, and the court will enter, an order that makes the accessibility of information more difficult in what could be argued as an effort to negate the Section 1102 amendments. As an example, in the Texas case of Gold Coast Holdings, the unsecured-creditors committee's counsel argued that "consideration must be given to establishing a process that is supported by the size and type of the case and the number and type of constituent creditors, including the financial capabilities and liquidity of the debtor," limitations not

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addressed in the new bankruptcy law. Partially using an expense argument and then invoking the court's powers under section 105 (a), counsel sought a protocol to address the issue by establishing and maintaining an e-mail address and geographical address as the exclusive means to providing creditors with access to nonconfidential information, which the committee sought to implement "in its reasonable discretion."

Information may be power, but the power to make information available to creditors, and their right to receive it, is not being imparted equally. In the Pennsylvania case of Airways Industries, for example, although access to nonconfidential information has been outsourced, as it was in the Musicland case, unsecured creditors of Airways cannot access docket information from a creditor information site without an added burden. They must subscribe to Pacer, an electronic database of federal court records that was designed long before the 2005 bankruptcy law.

In the New York case of Oneida Ltd., compliance with section 1102 (b)(3) is deemed satisfied by allowing the debtor's claims agent to be the provider of information to creditors, in contrast to the Musicland case, in which the provider is a Section 327 retained "information agent" hired as a committee professional just for this task.

Even vaguer is how official committees of equity-security holders and other committees will be required to act under the information requirements. Section 1102 (b)(3) does not clarify the distinction between unsecured-creditors committees and other committees, thus setting the stage for a showdown between information having to be provided to unsecured creditors, but not holders of equity securities.

While there is no congressional intent to guide practitioners on the issue, it seems doubtful there was intent to create information inequality between different types of official committee constituents. That said, until the courts set some boundaries on how to address access to nonconfidential information, arbitrariness and jurisdictional subjectivity will rule the day.

While the issue of sharing of confidential information is being uniformly addressed in first-day orders, the issue of access to nonconfidential information runs the spectrum from completely available to difficult-to-obtain. Despite inexact statutory drafting, the future of information equality now rests in the hands of the professionals and the courts, which have yet to come to grips with how much or how little information, and on what terms, needs to be made available to committee constituencies. It remains to be seen how they will rise to the occasion in an area of law that, while inconvenient, has much to offer to thousands still left in the dark during the life of a Chapter 11 bankruptcy case.

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