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by David S. Kupetz

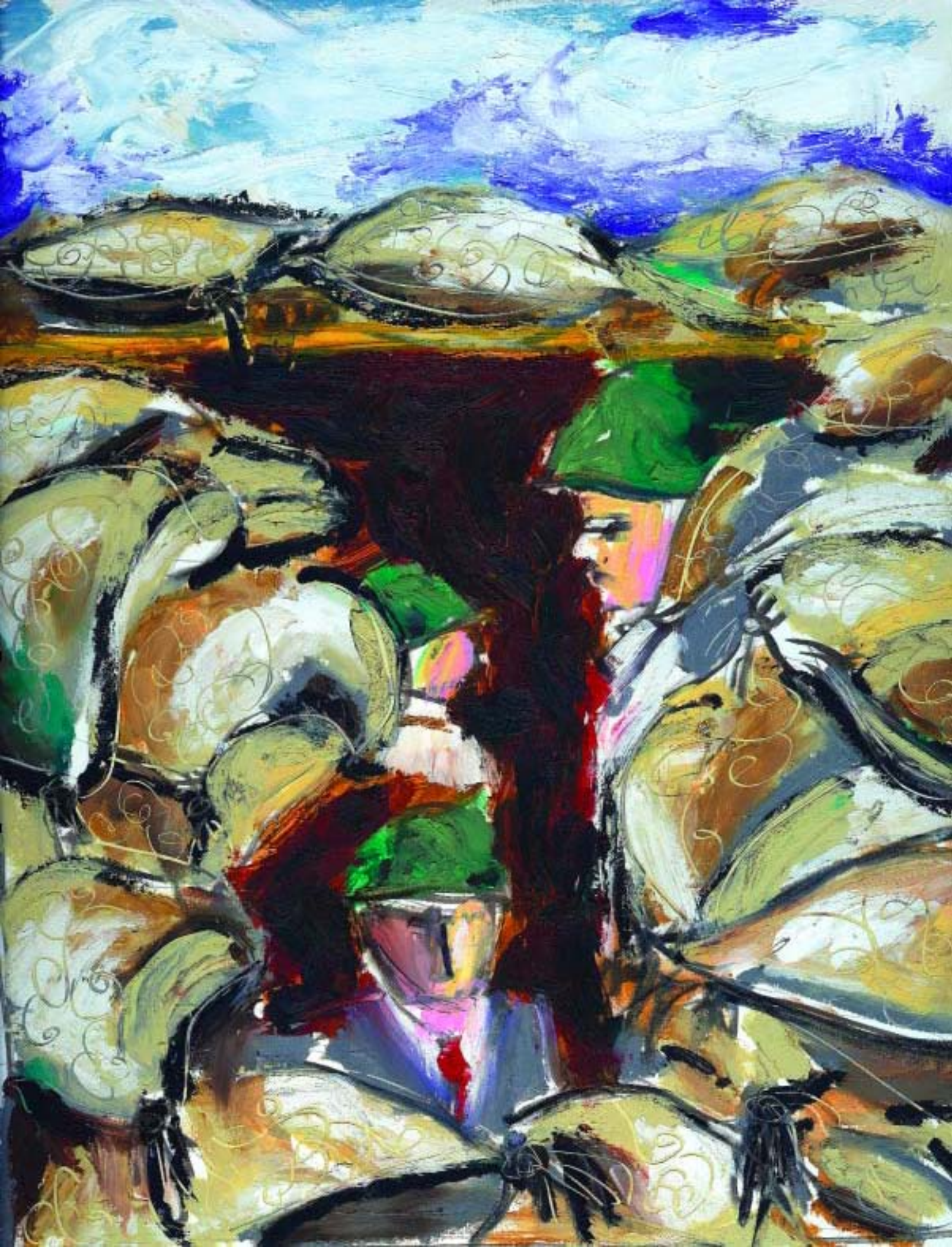
COMFORT ZONE

Creditors' committees are more frequently seeking comfort orders since recent bankruptcy law changes increased their disclosure duties

A member of a chapter 11 committee of creditors or equity security holders who is selected to represent the class has a fiduciary responsibility to protect the interests of all members of the committee. Indeed, because of the fiduciary nature of committee membership, members must not be subject to conflicting interests. Committee members are required to serve in good faith and with honesty and loyalty.¹ They must avoid self-dealing and may not use their position or the information gained as a result of membership to advance their own interests as a creditor or an equity security holder.² Even before any controversy arises, a committee may seek to protect its members by requesting a court order—known as a comfort order—authorizing a course of action and insulating committee members from liability as long as that course is followed.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)³ added Section 1102(b)(3) to the Bankruptcy Code. The section—effective in cases filed on or after October 17, 2005—mandates that appointed committees provide “access to information” to creditors holding claims of the kind represented by the committee but who do not serve on the committee and that the appointed committee “solicit and receive comments” from its constituents who are not members of the committee. This provision creates discomfort for committee members by failing to specify, among other things: 1) the type of information that must be made available, 2) whether creditors are entitled to nonpublic, confidential, and privileged information received by the committee and, if so, under what terms, 3) whether the

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committee must actually provide the information as opposed to merely providing access to information, 4) the extent of the detailed information required to be provided, 5) whether certain creditors may be excluded from the disclosure requirement, 6) the consequences of a committee's failure to provide information, 7) the impact of securities law and Securities and Exchange Commission rules on the duty under Section 1102(b)(3) to provide access to information, 8) the kind of matters for which the committee must solicit and receive comments, 9) the manner for soliciting and receiving comments, 10) how often comments are to be solicited, and 11) how the requirement to solicit comments works in accordance with Bankruptcy Code Section 1125, which prohibits solicitation of acceptances and rejections of a chapter 11 plan prior to the bankruptcy court's approval of a disclosure statement.

Not surprisingly, in various large chapter 11 cases filed since the enactment of Section 1102(b)(3), committees have sought protective orders defining and limiting the scope of their duty to provide access to information and to solicit comments from their constituents. In order to avoid violating the prohibition against self-dealing, it might seem that chapter 11 committee members should refrain from trading the securities of, or claims against, the debtor. However, especially in certain larger cases, this type of trading may be desired by certain committee members and has been authorized by courts, subject to the implementation of appropriate information-blocking procedures.

The comfort orders now being requested from and issued by some courts are in response to the tensions created by a chapter 11 committee's necessary receipt of confidential, proprietary, privileged, and material nonpublic information and BAPCPA's explicit obligation to provide constituents with "access to information" and to "solicit and receive comments." These orders seem patterned after and descended from the information-blocking procedures and protocol orders issued by courts prior to the 2005 amendments to the Bankruptcy Code. These pre-2005 procedures and protocol orders allowed committee members to trade claims against or securities in a debtor.

Protective Orders in Response to Section 1102(b)(3)

The "access to information" requirement codified in Section 1102(b)(3) allows creditors to receive meaningful information during the reorganization process while preserving the ability of the debtor to provide confidential and nonpublic information to the creditors' committee without prejudicing the debtor's business and diminishing the value of the estate. In the initial months following the enactment of Section 1102(b)(3), debtors and creditors' committees have sought orders from bankruptcy courts designed to protect the confidentiality of information and preserve privilege rights while satisfying the section's requirements. Some courts have been hesitant to provide comfort orders, but it appears that they have generally been inclined in large cases to issue orders based on precautionary motions submitted prior to any creditor actually contending that the committee had failed to provide adequate access to information.⁴

In re Refco, Inc. is the first published opinion addressing a committee's duties under Section 1102(b)(3). The creditors' committee in *Refco* took prompt action to establish a protocol for complying with Section 1102(b)(3). Indeed, in the initial days of the case, the committee was involved in exchanging information with the debtor and other interested parties, developing factual and legal analyses of significant inter-creditor issues, and pursuing a confidential investigation. The committee expressed the concern that the premature, unguarded, or selective disclosure of information connected with these matters could undermine the committee's goals and possibly violate securities laws or an order of the court. Within three days of its appointment, the committee filed a motion for approval of a protocol for complying with Section 1102(b)(3). Addressing the ripeness of the relief

requested at the inception of the case and its discomfort with providing a comfort order, the court stated:

[T]he Court's first inclination, particularly given the review process contemplated by section 1102(b)(3)(C), the absence 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. Until a creditor contended that the Committee was being too stingy with information, the Committee could be left to make reasonable efforts to provide access to relevant information consistent with its resources and any conflicting duties.

This is, however, a large and rapidly moving case, and meaningful information may become stale before the completion of litigation over whether and how it should be provided. Moreover, it appears that the Committee's motion did not arise in a vacuum; unsecured creditors apparently were pressing for information in ways that raised issues neither expressly addressed by the statute nor, given the section's recent enactment, the case law. Under the circumstances, therefore, the Committee's request to establish parameters for the provision of information under section 1102(b)(3)(A) of the Bankruptcy Code was appropriate, although, as the law develops, the need for comfort orders should end.⁵

With minimum deviation from the relief requested by the committee, the *Refco* court entered an interim order providing that the committee was not required to divulge any confidential, proprietary, nonpublic information concerning the debtor or any other information if the affect of the disclosure would constitute a waiver of the attorney-client or other privilege of the committee. The court's interim order also required the debtor to assist the committee by identifying the proprietary or nonpublic nature of any information provided to the committee, pending a final hearing.⁶

Less than two months following entry of the interim order, the *Refco* court issued a final order establishing detailed information-sharing protections and procedures. The final order required that the committee provide creditors with access to information by 1) establishing and maintaining a Web site with detailed information regarding the chapter 11 case, including, among other things, monthly reports, highlights of significant events, a calendar of upcoming events, responses to creditors' requests, and answers to frequently asked questions, 2) distributing case updates by e-mail to creditors who registered for this service on the committee Web site, and 3) establishing and maintaining a telephone number and e-mail address for creditors to submit questions and comments.⁷

The final order in *Refco* further provided that the committee would not be required to disseminate, without further order of the court, confidential, proprietary, or other nonpublic information concerning the debtor or the committee, or any other information if the effect of the disclosure would constitute a general waiver of attorney-client, work product, or any other applicable privilege or protection that the committee had. Like the interim order, the final order required the debtor to assist the committee in identifying confidential information. The final order also provided a procedure for creditors to request information. If the committee determined that a request was seeking confidential or privileged information, the committee could 1) deny the request (and the order established a procedure for the creditor to seek to compel the information it desired), or 2) indicate that it would comply with the request (and the order allowed the debtor an opportunity to prevent the information from being disclosed). The final order further required the committee to consider whether the creditor requesting confidential information was willing to agree to reasonable confidentiality, trading restrictions, and information-screening protections. Finally, the order contained an exculpation provision

protecting the debtor, the committee, their representatives, and attorneys from liability for any act taken or not taken in connection with the preparation, dissemination, and implementation of the protocol, the committee Web site, and other information provided pursuant to Section 1102(b)(3). Acts involving breach of fiduciary duty, gross negligence, or willful misconduct were excluded from this protection.⁸

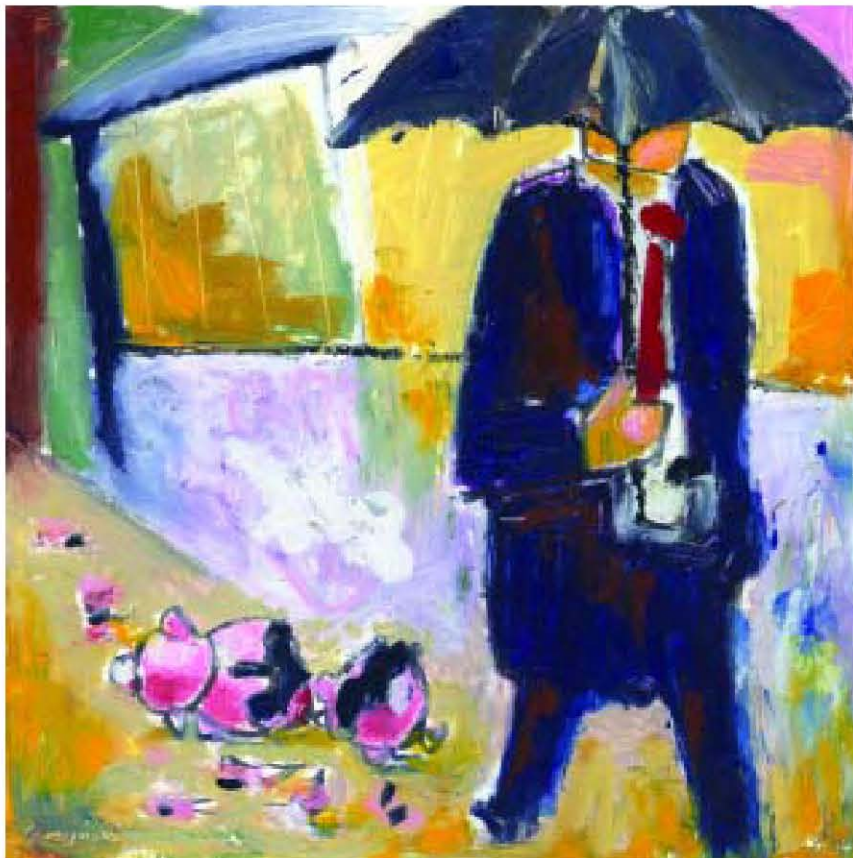
In the months following the effective date of Section 1102(b)(3), a number of courts have entered information-sharing, confidentiality, and privilege preservation orders very similar to the order in *Refco*.⁹ In *In re Riverstone Networks, Inc.*,¹⁰ the court followed the approach

in *Refco* and imposed additional restrictions on competitors and claims traders. Under the order in *Riverstone*, if the creditor requesting information was a competitor or potential competitor of the debtor and the release of the requested information might negatively impact the debtor, the committee was precluded from disclosing the requested information without a court order. Additionally, the order required any creditor who was involved in trading claims against, or equity interests in, the debtor and who requested information to file with the court and complete service on the committee, the debtor, and the U.S. Trustee of all documentation showing that the creditor had erected an information-screening wall so that no confidential information would be revealed to traders of claims or equity interests.¹¹ Some courts have issued, at the behest of committees, protective orders providing that the committees are not authorized or required to provide their creditor constituents access to any confidential or privileged information of the debtor and that the committee is permitted, but not required, to provide access to privileged information when the information is not confidential information and the privilege is held and controlled only by the committee.¹²

The limitation on soliciting an acceptance or rejection of a plan of reorganization under Bankruptcy Code Section 1125 without providing a written disclosure statement approved by the court should be taken into account by a committee attempting to comply with the literal meaning of Section 1102(b)(3)(B). A cautious approach would be for the committee to obtain court approval of its solicitation documents (or any communications that might be considered to be in the nature of a plan solicitation) regarding a plan of reorganization prior to the dissemination of the materials to ensure the avoidance of a Section 1125 violation.

Information-Blocking Procedures and Protocols

Prior to the 2005 amendments, courts had approved information-blocking procedures to allow committee members to trade in securities of and claims against the debtor. In *In re Federated Department*



Stores, Inc.,¹³ the motion of Fidelity Management & Research Company, a member of the Official Bondholders' Committee of Allied Stores Corporation, requested an order determining that Fidelity would not be violating its duties as a committee member (and, accordingly, would not be subjecting its claims to possible disallowance, subordination, or other adverse treatment) by trading in securities of Allied, codebtor Federated Department Stores, Inc., and Ralphs Grocery Company, a nondebtor, during the pendency of the *Allied* and *Federated* cases, if Fidelity established and effectively implemented policies and procedures to prevent the misuse of nonpublic information

that it obtained through its activities as a committee member.

The order issued in the *Federated* case provided that Fidelity would not be in violation of its fiduciary duties as a committee member and would, therefore, avoid subjecting its claims to possible disallowance, subordination, or other adverse treatment, as a result of trading in securities of Allied, Federated, and Ralphs during the chapter 11 cases, provided that Fidelity employed an appropriate information-blocking procedure that was reasonably designed to prevent Fidelity's trading personnel from receiving any nonpublic committee information through Fidelity's committee personnel and to prevent Fidelity's committee personnel from receiving information regarding Fidelity's trading in securities in advance of the trades.

The order spelled out the procedures to be employed by Fidelity if it wished to trade in securities of Allied, Federated, and Ralphs and remain on the committee: 1) Fidelity's committee personnel who would have access to nonpublic information in the bankruptcy proceeding were required to execute a letter acknowledging that they might receive nonpublic information and that they were aware of the information-blocking procedures, 2) Fidelity's committee personnel were prohibited from sharing nonpublic committee information with other Fidelity employees, with the exception of Fidelity's general counsel for the purpose of rendering legal advice to committee personnel and who was precluded from sharing this nonpublic committee information with other Fidelity employees, 3) Fidelity's committee personnel were required to maintain all files containing nonpublic information in a manner inaccessible to other employees, 4) Fidelity's committee personnel were precluded from receiving any information regarding Fidelity's current security trades in advance of those trades, except that committee personnel were allowed to receive monthly reports on Fidelity's ownership of the securities represented by the committee, and 5) Fidelity's compliance department personnel were required to review Fidelity's trades in securities of Allied, Federated, and Ralphs to confirm that the trades were made in compliance with the information-blocking procedures and to keep and maintain

records of their review. The *Federated* court's order explicitly provided that the court was not precluded from taking any action it deemed appropriate in the event that it was determined that an actual breach of fiduciary duty had occurred.¹⁴

The court in *In re House of Fabrics, Inc.*¹⁵ issued an order involving information-blocking procedures that was similar to the order issued by the *Federated* court. In doing so, the *House of Fabrics* court emphasized that the order would not insulate a member of the committee trading nonpublic information or engaged in any other improper use or improper disclosure of information. Indeed, the court stated that such activities were illegal and would constitute a violation of a committee member's fiduciary duties to constituents and to the bankruptcy estate.¹⁶

In *In re Pacific Gas & Electric Company*,¹⁷ the creditors' committee filed a motion for an order authorizing members to trade in securities of the debtor and declaring that members of the committee would not be violating their fiduciary duties—and that they and their affiliates would not suffer adverse consequences—by trading in and preparing and publishing research in gas, power, coal and other commodities, including physical, financial, derivative, and other transactions and products, involving or related to PG&E and its affiliates, or in the markets in which PG&E and its affiliates conduct the same or similar operations or in other markets (collectively referred to as the affected commodities) upon establishment of certain information-blocking procedures.¹⁸

The court in *PG&E* bifurcated the securities and commodities trading aspects of the motion and granted, subject to the imposition of additional "ethical wall procedures," the securities trading order. At that point, the court deferred consideration of the request for a commodities trading order and set the matter for further hearing. The creditors' committee consisted of 11 members, five of whom were engaged in a wide variety of trading, preparing, and publishing research in the affected commodities and desired the commodities order. These members said that they would seriously consider resigning from the committee if the commodities order was not entered. However, no member said it would resign and no member had actually resigned.¹⁹

The court determined that although the proposed commodities order was nearly identical to the previously issued securities order—including the fact that both contained ethical wall procedures—the court would not issue the commodities order for a number of reasons. First, the court found a fundamental difference between trading in securities issued by PG&E and engaging in commodities trading at the same time that PG&E did so as part of its fundamental business. The court found that securities abuse tends to primarily hurt the parties who trade in the securities and generally has little or no impact on the issuer. In contrast, the court found a potentially direct and immediate adverse impact on PG&E could arise from trading in commodities affecting the price at which PG&E purchases those commodities or enhancing a trader's competitive position over PG&E.²⁰ The court further found a significant difference in the market for securities and commodities and that this difference could create an enormous incentive to misuse confidential information to make large profits (or avoid large losses) in the commodities trading arena. Further, the court found that the committee in the *PG&E* case failed to cite any authority supporting the motion regarding commodities. At the same time, in connection with the securities trading issue, the committee had cited favorable commentators, submitted a brief that had been filed by the SEC in the *Federated* case, and the SEC appeared in the *PG&E* case and provided useful information regarding securities.²¹

The court determined that the *PG&E* case was very different from *Dow v. Official Committee of Equity Security Holders of Criimi Mae, Inc. (In re Criimi Mae, Inc.)*,²² in which members of an official committee were afforded some protection from lawsuits in the form of

insurance paid for by the bankruptcy estate. There was evidence that three of the committee's seven members had already resigned and three more would resign or consider resigning. There was no evidence that anyone could replace those members despite the bankruptcy court's invitation for evidence.²³ In *PG&E*, by contrast, even after the committee had been constituted and functioning for more than three months, it had presented evidence no more serious or threatening than that five of its 11 members would "consider" resigning. Moreover, the U.S. trustee (the agency responsible for appointing committee members) stated that it had 75 prospective creditors available to replace any members who resigned or were removed from the committee.²⁴

The *PG&E* court further distinguished the *Criimi Mae* case, in which the committee members had legitimate fears about nuisance suits and the legal fees necessary to defend them. In *Criimi Mae*, the bankruptcy court found that the committee was beneficial to the estate and could not function without the requested insurance—which was limited to \$2 million of coverage at a reasonable cost to the estate. The committee members in *PG&E* sought unlimited protection (admittedly for a limited range of conduct), and there was no reason to believe that the committee could not function without the members. The *PG&E* court concluded that the committee had shown no threat to the reorganization requiring entry of the commodities order.²⁵

Finally, the court found an inadequate basis for the issuance of the protection requested for commodities traders when the benefits of the order were uncertain. Members want a comfort order that insulates them as long as certain procedures are in place, yet the corresponding benefit to *PG&E* and its estate was speculative and vague at best. While the relief the commodities order would grant was relatively narrow in scope, the risk that members would have court authority to compete in the same business arena as PG&E while they obtain sensitive and confidential information as fiduciaries to the estate was simply too great.²⁶

In *In re Speigel*,²⁷ the creditors' committee requested an order approving information-blocking procedures and permitting trading of the debtor's securities in certain situations. The committee consisted of nine members, including bank lenders, trade creditors, and a landlord. Additionally, JPMorgan Chase was a nonvoting ex-officio member of the committee. The committee sought an order determining that committee members, including ex-officio members, acting in any capacity and engaged in the trading of securities for others or on their account as a regular part of their business would not violate their duties as committee members by trading in the debtor's debt or equity securities or other claims or interests during the debtor's chapter 11 cases, provided that they effectively implemented and strictly adhered to the information-blocking policies and procedures that had been approved by the court in another case (*In re Iridium Operating LLC*) in an unpublished opinion.²⁸ The court in the *Speigel* case denied the requested relief and rejected a procedure providing for general court approval in advance with specific affidavits to follow.²⁹ Unlike the other case, the *Speigel* court was not presented with a factual record detailing the specific circumstances surrounding the request for at least one particular committee member.

The *Speigel* court proceeded to conclude that even if it had been presented with an adequate factual record, it would not have been inclined to grant the relief requested by the creditors' committee and intended to hold the committee to full and strict compliance with its fiduciary obligations. The court provided the following example to highlight its concern regarding the committee's request:

For example, if members of the Committee are allowed to trade in the securities of the Debtor, regardless of how the creditor internally divides its office, there is an appearance of impropriety—to the extent such trading information is made public, the trades of a creditor-company which sits on an official

committee of unsecured creditors could influence non-members in the marketplace who may not be aware that the creditor has a screening wall or other such device in place.³⁰

Accordingly, in *Spiegel*, while the decision was based on a failure to provide an adequate factual record, it appears that the court was moving toward adopting a more restrictive view under which trading in securities by members of a committee would be per se impermissible. This is in contrast with BAPCPA and *Refco*. BAPCPA did not address the implementation of information-blocking procedures or the issuance of comfort orders protective of committee members.³¹ In *Refco*, the post-BAPCPA decision, the order required the committee, in responding to a request for access to confidential information, to consider whether the requesting creditor was willing to agree to reasonable confidentiality and trading restrictions.³²

Availability and Strength of Comfort Orders

The *Refco* court may have been engaging in wishful thinking when it speculated that the need for comfort orders in connection with Section 1102(b)(3) would end as case law develops in this area. While the need for such orders may ultimately be reduced, the desire of committee counsel and committee members for the additional protection that these orders may provide is unlikely to subside. Undoubtedly, it will be difficult to wean those accustomed to receiving comfort orders from the practice. Some orders are commonly referred to as comfort orders because they do nothing more than confirm a state of affairs that already exists.³³ When faced with what appears to be a request for a comfort order, some courts simply decline to enter advisory opinions.³⁴ Other courts take a middle ground and, while declining to enter the requested comfort order, include language in the order denying the requested order that itself provides comfort.³⁵ Other courts, such as the *Refco* court, may grant the requested comfort order reluctantly.³⁶

In the bankruptcy context, some may have thought that comfort orders were largely a thing of the past. Under the old Bankruptcy Act, bankruptcy courts were involved in virtually every decision made by the bankruptcy trustee. This resulted in comfort orders being the norm. But the post-BAPCPA era has fostered a different reality: “[T]he Bankruptcy Code radically changed the relationship between the bankruptcy court and the trustee by removing the bankruptcy judge from the day-to-day administration of the bankruptcy estate.”³⁷ Some courts hold that bankruptcy court intervention is now limited to those situations in which the Bankruptcy Code

actually authorizes court involvement.³⁸ Even under the Bankruptcy Code, other courts reject the standard application of the “cases or controversies” requirement to bankruptcy cases and take a broader view of justiciability in bankruptcy.³⁹ Nevertheless, there is nothing in the Bankruptcy Code in general, or Section 1102(b)(3) specifically, that precludes a court from issuing an order providing committees and their members and counsel with some level of comfort. Moreover, the fact that such orders may be procured on a consensual, nonadversarial basis does not mean that the orders are any less valid determinations of the court. This is particularly true when the orders are made after deliberation and examination of the issues, and when the orders do not purport to authorize conduct expressly prohibited by the Bankruptcy Code.⁴⁰ Orders designed to provide comfort and protection to committee members will continue to be sought regarding the uncertain requirements of Section 1102(b)(3) and the delicate question of trading in claims against and securities of the debtor by committee members.

Committees may request protective court orders to reconcile their obligation to provide access to information to constituents and the desire of certain committee members to trade in securities of or claims against the debtor with the need for protection and preservation of confidential, nonpublic, and privileged information required by the committee in order to fulfill its responsibility to investigate, monitor, and negotiate with the debtor. With recently enacted information-sharing obligations under the Bankruptcy Code, which raise more questions than they answer, orders implementing procedures for information sharing and blocking can provide committee members with the comfort that, assuming they follow the designated protocol, their risk of being penalized for breaching their fiduciary duty as committee members is minimized. However, as determined by the courts in *Spiegel* and *PG&E*, courts should be provided with factual evidence demonstrating that comfort orders are necessary in order for committees to adequately fulfill their duties. Finally, the *Spiegel* court laments having opened a Pandora’s box by having approved a trading protection order in a prior case, and the *Refco* court states that as the law develops in response to the new information-sharing duties of the committee under Section 1102(b)(3), the need for comfort orders should end. Both views seem unrealistic, at least in the foreseeable future. Committee members and counsel will want to ensure that they maximize the protection available in their cases. ■

¹ In re *Johns-Manville Corp.*, 26 B.R. 919, 925 (Bankr.

S.D. N.Y. 1983).

² *Id.*

³ The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, §405(b) (2005).

⁴ See *In re Refco, Inc.*, 336 B.R. 187, 190 (Bankr. S.D. N.Y. 2006).

⁵ *Id.*

⁶ *Id.* at 191-92.

⁷ *Id.* at 200.

⁸ *Id.* at 200-203.

⁹ See *Calpine Corp.*, Case No. 05-60200 (Bankr. S.D. N.Y. 2006, Lifland, J.), Order to Show Cause Regarding Motion of the Official Committee of Unsecured Creditors, Pursuant to 11 U.S.C. §§105(a), 102(b)(3)(A), and 1103(c), for nunc pro tunc Order Clarifying Requirement to Provide Access to Information, dated Jan. 18, 2006 (Dkt. No. 495), and Stipulation and Agreed Order Between the Debtors and the Official Committee of Unsecured Creditors Regarding Creditor Access to Information Pursuant to 11 U.S.C. §§105(a), 1102(b)(3), and 1103(c), dated Feb. 23, 2006 (Dkt. No. 869); *In re Musicland Holdings Corp.*, Case No. 06-10064 (Bankr. S.D. N.Y. 2006, Bernstein, J.) (filed Jan. 12, 2006).

¹⁰ *In re Riverstone Networks, Inc.*, Case No. 06-10110 (Bankr. D. Del., Sontchi, J.) (filed Feb. 7, 2006).

¹¹ *Id.*, Order Regarding Creditor Access to Information and Setting and Fixing Creditors Information Sharing Procedures and Protocols Under 11 U.S.C. §§105(a), 1102(b)(3), and 1103(c), dated Apr. 11, 2006 (Dkt. No. 264).

¹² See *In re Independence Air (FLYi Inc.)*, Case No. 05-2011 (Bankr. Del., Walrath, J.) (filed Nov. 7, 2005), Order Setting Forth Procedures for Sharing of Information by Creditors' Committee Pursuant to Section 1102(b)(3)(A) of the Bankruptcy Code, dated

Nov. 17, 2005 (Dkt. No. 145); *In re Dana Corp.*, Case No. 06-10354 (Bankr. S.D. N.Y., Lifland, J.) (filed Mar. 3, 2006), Order Pursuant to Sections 105(a), 107(b), and 1102(b)(3)(A) of the Bankruptcy Code, Confirming that Official Committees are not Authorized or Required to Provide Access to (A) Confidential Information of the Debtors or (B) Privileged Information, dated Mar. 29, 2006 (Dkt. No. 737).

¹³ *In re Federated Dep't Stores, Inc.*, 1991 Bankr. LEXIS 288 (Bankr. S.D. Ohio 1991).

¹⁴ *Id.* at *2-*4.

¹⁵ *In re House of Fabrics, Inc.*, 1995 Bankr. LEXIS 1380 (Bankr. C.D. Cal. 1995).

¹⁶ *Id.* at *2-*3.

¹⁷ *In re Pacific Gas & Elec. Co.*, 2001 Bankr. LEXIS 2195 (Bankr. N.D. Cal. 2001).

¹⁸ *Id.* at *1-*2.

¹⁹ *Id.* at *2-*4.

²⁰ *Id.* at *4-*6.

²¹ *Id.* at *17-*24.

²² *Dow v. Official Comm. of Equity Sec. Holders of Criimi Mae, Inc.* (*In re Criimi Mae, Inc.*), 247 B.R. 146 (D.C. Md. 1999).

²³ *Id.* at 153.

²⁴ PG&E, 2001 Bankr. LEXIS 2195, at *21.

²⁵ *Id.* at *23.

²⁶ *Id.*

²⁷ *In re Speigel*, 292 B.R. 748 (Bankr. S.D. N.Y. 2003).

²⁸ *Id.* at 749-50.

²⁹ *Id.*

³⁰ *Id.* at 751.

³¹ BAPCPA did add a provision, §362(j), which provides for the use of comfort orders, in certain circumstances, confirming that the automatic stay has been terminated. See *In re Ermi*, 2006 Bankr. LEXIS 1998 (Bankr. N.D. Ohio 2006); *In re Conley*, 2006 Bankr. LEXIS 3277 (Bankr. N.D. Ohio 2006).

³² *In re Refco, Inc.*, 336 B.R. 187, 201-02 (Bankr. S.D. N.Y. 2006).

³³ See *In re Dienberg*, 348 B.R. 482, 483 (Bankr. N.D. Ind. 2006).

³⁴ See *In re Ouellette*, 2005 Bankr. LEXIS 1260, at *4 (Bankr. D. N.H. 2005) ("In essence the Motion is a request for an advisory opinion in the nature of a 'comfort order' for the benefit of a title insurance underwriter. This Court does not render advisory opinions.") (citing *Golden v. Zwickler*, 394 U.S. 103, 108, 22 L. Ed. 2d 113, 89 S. Ct. 956 (1969) (The 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, the plaintiff lacks standing.); See also *In re Ring*, 341 B.R. 387, 391 (Bankr. D. Mass. 2006) ("Ruling on what are essentially affirmative defenses before motions are filed may comfort potential respondents, but is not a wise devotion of court resources and likely would run afoul. A jurisdictional essential: that a 'case or controversy' exist.").

³⁵ See *In re Green*, 2005 Bankr. LEXIS 3048, at *7 (Bankr. D. S.C. 2005) (The court denied the debtor the requested order, but stated that the order was unnecessary, thereby providing the debtor comfort needed to assist the debtor in its refinancing attempt by clarifying that court approval of the refinancing was not required.).

³⁶ See *In re Refco, Inc.*, 336 B.R. 187, 190 (Bankr. S.D. N.Y. 2006).

³⁷ *In re Shaffner*, 320 B.R. 870, 878-79 (Bankr. W.D. Mich. 2005).

³⁸ See *id.* at 878-79.

³⁹ See *In re Pacific Gas & Elec. Co.*, 2001 Bankr. LEXIS 2195, at *9-*17 (Bankr. N.D. Cal. 2001).

⁴⁰ See *In re Henry*, 272 B.R. 266, 277 (C.D. Cal. 2002).