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# BANKRUPTCY FOR BANKERS

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HOWARD SEIFE

## CREDITORS' COMMITTEES SHARING INFORMATION: HOW MUCH IS ENOUGH?

Section 1102(b)(3)(A) of the Bankruptcy Code, recently enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,<sup>1</sup> (“BAPCPA”), requires that every official unsecured creditors’ committee provide unsecured creditors who are not members of the committee with “access to information.” In particular, Section 1102(b)(3) states:

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; and (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).<sup>2</sup>

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BAPCPA does not define the “information” that Section 1102(b)(3)(A) requires an official creditors’ committee to make available to its constituency (for example, whether it includes information obtained in confidence) or state how it is to be delivered (for example, whether to all unsecured creditors at once, or upon an individual creditor’s demand). Moreover, 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. The House Report issued in connection with BAPCPA merely states, “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>3</sup>

The statute’s language permits a broad construction, and it has been suggested that this new section of the Bankruptcy Code might be interpreted to impose an obligation that conflicts with other applicable laws and a committee’s fiduciary duties, which could hamper a committee’s performance.

Recently, the U.S. Bankruptcy Court for the Southern District of New York issued an important decision analyzing an unsecured creditors’ committee’s obligations pursuant to Section 1102(b)(3)(A). In *In re Refco Inc.*,<sup>4</sup> the bankruptcy court created a roadmap that other creditors’ committees might well be advised to follow when faced with this disclosure obligation. Indeed, if followed, the bankruptcy court’s decision in *Refco* should go far toward avoiding litigation over the new requirement.

## **The Refco Chapter 11**

The bankruptcy court’s decision arose in the Chapter 11 case of Refco, Inc., and various of its direct and indirect subsidiaries, which were providers of execution and clearing services for exchange-traded derivatives and prime brokerage services in the fixed income and foreign exchange markets. In 2004, they were the largest providers of customer transaction volume to the

Chicago Mercantile Exchange, the largest derivatives exchange in the United States.

On October 10, 2005, Refco disclosed that an entity owned by Refco's chief executive officer and chairman, Phillip R. Bennett, owed Refco entities approximately \$430 million. Mr. Bennett was arrested and charged with various crimes, including securities fraud in connection with Refco's initial public offering, which had occurred only two months earlier. This news precipitated a crisis of customer confidence in Refco and its various subsidiaries, which in turn led Refco to impose a moratorium on withdrawals from its largest unregulated subsidiary, Refco Capital Management, Inc. ("RCM"), and the filing of voluntary Chapter 11 petitions on October 17, 2005 by Refco, RCM, and 22 related entities.

Under a new CEO, Refco immediately sought to sell its largest asset, its regulated futures business, on an expedited basis to prevent further erosion of value and satisfy regulators. At the same time, Refco pursued the sale of other substantial assets and attempted to address the demands of numerous RCM customers to the immediate return of money and securities in which they claimed an interest, while other parties in interest contended that such property was, instead, property of RCM's Chapter 11 estate, available to pay all unsecured creditors.

After an official committee of unsecured creditors was appointed, it turned its attention to various issues. It particularly focused on the proposed sales of the regulated futures business and other assets, which involved the exchange of significant confidential information regarding the businesses proposed to be sold, strategies for negotiating with competing bidders, and the evaluation of competing bids; in fact, the regulated futures business was successfully sold. On its own, but with information provided by the debtors, the committee also analyzed the issues raised by RCM's customers' claims to money and securities. It also began to investigate the events that precipitated the Chapter 11 filings.

Thus, in the early days of the Chapter 11 cases the committee was engaged in tasks that required it to exchange confidential information with the debtors and other parties, develop factual and legal analyses of significant inter-creditor issues, and pursue an investigation on a confidential basis. The committee believed that the premature, unguarded, or selective disclosure of

information obtained in performing these tasks not only could jeopardize the committee's desired result in each instance, but also might violate the securities laws (given Refco's public stock and debt). The committee then filed a motion with the bankruptcy court seeking to clarify the committee's obligations under Section 1102(b)(3)(A).

## The Bankruptcy Court's Decision

In its decision, the bankruptcy court observed that, notwithstanding the statute's ambiguity and unhelpful legislative history, there were sources for construing the committee's obligation to provide "access to information" under Section 1102(b)(3)(A).

First, it noted that the Bankruptcy Code contains a similar requirement for bankruptcy trustees. Bankruptcy Code Section 704(a)(7), which applies under 11 U.S.C. §§ 1106(a)(1) and 1107(a) to Chapter 11 trustees and debtors in possession, respectively, 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."

The bankruptcy court stated that there did not seem to be material differences between Bankruptcy Code Sections 704(a)(7) and 1102(b)(3). It recognized that under Section 704(a)(7), information is to be furnished only upon a party's request whereas Section 1102(b)(3)(A) apparently envisions a committee's volunteering information or at least establishing a mechanism for unsecured creditors to obtain it. In addition, the bankruptcy court continued, the right to court review arguably is more explicit in Section 704(a)(7) than in Section 1102(b)(3)(C). On the other hand, the bankruptcy court declared, both sections contemplate that the bankruptcy court is to resolve disputes over whether information should be shared. Given that, the bankruptcy court found, the two provisions did not differ in practical terms, so long as court resolution was sought on a timely basis. Moreover, the information to be provided under Section 704(a)(7) is limited to "information concerning the estate and the estate's administration," while Section 1102(b)(3)(A) refers only to "information." However, the bankruptcy court ruled, the Bankruptcy Code's definition of "estate"<sup>5</sup> is itself so broad that "it is hard to see how Section 704(a)(7)'s requirement generally would be any

more limited in practical terms that Section 1102(b)(3)(A)'s reference to 'information.'" The bankruptcy court then discussed court decisions that have construed Section 704(7).

## Case Law

As the bankruptcy court explained, cases interpreting Bankruptcy Code Section 704(a)(7) stand for three propositions relevant to the scope of a committee's obligation under Section 1102(b)(3).

First, it stated, a trustee's duty under Section 704(a)(7) is fairly extensive, as that section places the burden of providing requested information on the trustee and reflects the overriding duty to keep parties in interest informed. Courts have interpreted the trustee's responsibilities broadly, making a request for information difficult for the trustee to avoid, in the absence of a court order to the contrary.<sup>6</sup>

Second, the bankruptcy court noted, the duty to provide information under Section 704(a)(7) is not unlimited, as is made clear by the section's introductory clause. In particular, it stated, a trustee may obtain a protective order against disclosure of information under Section 704(a)(7) if disclosure would result in waiver of the attorney-client privilege<sup>7</sup> or of information that is proprietary and confidential.<sup>8</sup>

Third, a trustee's right to a protective order under Section 704(a)(7) is limited by the trustee's fiduciary duties, because the requirement to disclose information under Section 704(a)(7) derives from a trustee's fiduciary duty to creditors and the estate.<sup>9</sup> As courts have suggested, if the request for such an order is not also in furtherance of those duties, but is, rather, designed to obtain an undue advantage over a party in interest, it should be denied.<sup>10</sup> To override the duty to disclose, a trustee should point to a countervailing fiduciary duty, such as to protect creditors and the estate from a particular harm, whose performance is more important than avoiding the harm resulting from withholding the information in question.<sup>11</sup>

The bankruptcy court then declared that each of these aspects of Section 704(a)(7) also should apply to a creditors' committee's analogous obligation to provide access to information under Bankruptcy Code Section 1102(b)(3)(A).

## Bankruptcy Act Corollary

As the bankruptcy court noted, there also were provisions similar to Section 1102(b)(3)(A) under the Bankruptcy Act of 1898. Section 339(1) of the Act listed the functions that a creditors' committee appointed under Chapter XI could perform, including "(d) to report to the creditors from time to time concerning the progress of the proceeding;" and under Bankruptcy Act Rule 11-29, which was derived from Section 339(1) of the Act,<sup>12</sup> one of the functions of an official committee was to "advise the creditors of its recommendations with respect to the proposed plan [and] report to the creditors concerning the progress of the case."<sup>13</sup>

One court decision, *In re Gilchrist Co.*, analyzing this information-provision role construed Bankruptcy Act Rule 11-29(a) in affirming a bankruptcy court's confirmation of a Chapter XI plan over the objection that acceptances of the plan were not solicited in good faith.<sup>14</sup> The appellants contended that although the committee had circulated a letter recommending the plan, it had improperly kept creditors in the dark about several material facts, such as the debtor's receipt of a tax abatement and rent reduction, the existence of additional proofs of claim and potential fraudulent transfer recoveries, and the opposition of four members of the creditors' committee to the plan followed by two members' resignation. The court determined, however, expressly notwithstanding Rule 11-29(a), that it was clear that the creditors' committee was "not required to forward to each creditor all of the raw data it receives and considers in the process of carrying out its duties." Instead, the committee had to provide "a fair presentation of the status of the Debtor." Finding no support for the appellants' argument that the committee had made material omissions or otherwise acted improperly, such as acting collusively with the debtor, the court found that the plan was solicited and accepted in good faith.

In the *Refco* bankruptcy court's opinion, the *Gilchrist* court's statement that a committee should not have to "forward all of the raw data it receives and considers," as if it were a virtual information bank for its constituents, could be applied to Bankruptcy Code Section 1102(b)(3)(A), although it conceded that courts may differ about what constitutes a material development in a case and, therefore, a material disclosure omission in the context of a committee solicitation letter or otherwise.

## Duties and Functions

The bankruptcy court continued its analysis by stating that the proper scope of Section 1102(b)(3)(A) could be analyzed in the light of the duties and functions of a creditors' committee under the Bankruptcy Code and by analogy to several pre-BAPCPA decisions that considered committee confidentiality restrictions in the context of such duties and functions.

As the bankruptcy court observed, an official committee of creditors plays a pivotal role in the bankruptcy process. The function of an official creditors' committee is to "aid, assist, and monitor the debtor to ensure that the unsecured creditors' views are heard and their interests promoted and protected."<sup>15</sup> Official committees have diverse duties: they are the primary negotiating bodies for a Chapter 11 plan; they also provide supervision of the debtor and execute an oversight function; they may investigate the debtor's assets and affairs; and they may perform such other services as are in the interest of the unsecured creditor body.<sup>16</sup> Broadly speaking,

The creditors' committee is not merely a conduit through whom the debtor speaks to and negotiates with creditors generally. On the contrary, it is purposely intended to represent the necessarily different interests and concerns of the creditors it represents. It must necessarily be adversarial in a sense, though its relation with the debtor may be supportive and friendly. There is simply no other entity established by the Code to guard those interests. The committee as the sum of its members is not intended to be merely an arbiter but a partisan which will aid, assist, and monitor the debtor pursuant to its own self-interest.<sup>17</sup>

The bankruptcy court continued by observing that, to fulfill these roles, the members of an official creditors' committee owe a fiduciary duty to their constituents: all of the debtor's unsecured creditors.<sup>18</sup>

In addition, it pointed out, under certain circumstances, an official creditors' committee may be authorized by the bankruptcy court to act not only on behalf of the unsecured creditor body but also as a fiduciary on behalf of the debtor's estate.<sup>19</sup>

The bankruptcy court stated that it was important to keep these func-

tions in mind when sorting out the circumstances under which a creditors' committee should not be required to make information available to its constituents. For example, it stated, in performing its oversight and negotiation function, a committee acts as the voice of all of the unsecured creditors, many of whom lack the resources to speak for themselves and all of whom benefit from the representative role played by the committee. As the bankruptcy court pointed out, committee members therefore should and will receive commercially sensitive or proprietary information from the debtor and other parties (including each other, because plan negotiations are as often conducted between unsecured creditor groups as between the unsecured creditors and the debtor), often in the context of settlement discussions. Significantly, it noted, it has frequently been held that committee members' fiduciary duties of loyalty and care to the unsecured creditor body require such information to be held in confidence. Otherwise, communications between the committee and third parties and among committee members themselves would be improperly curtailed, or the debtor might be harmed with a resulting decline in the creditors' recovery.<sup>20</sup>

The bankruptcy court also said that when the debtor has public stock or debt, the securities laws may preclude the debtor from disclosing material non-public information on a selective basis to committee members absent a binding confidentiality agreement.<sup>21</sup> In addition, the bankruptcy court noted, a committee's selective disclosure of material non-public information that it has developed on its own (including the results of inter-creditor negotiations and its own investigations) may raise similar issues. Nonetheless, the court said, the underlying concern would not be a breach of the securities laws as much as a breach of members' fiduciary duties of loyalty and care to all unsecured creditors by profiting from, or enabling selected creditors to profit from, non-public information obtained as a result of committee membership.<sup>22</sup> The selective possession of material information can equate to very large swings in value and, the bankruptcy court noted, creditors may seek such information not for legitimate purposes related to their position in the case but, rather, to obtain an unfair trading edge.

The bankruptcy court pointed out that maintaining the parties' reasonable expectations of confidentiality is often critical to a committee's performance of its oversight and negotiation functions, compliance with applicable

securities laws, and the proper exercise of committee members' fiduciary duties. Indeed, it said, maintaining confidentiality against unsecured creditors generally also may be necessary to preserve a committee's attorney-client privilege. That privilege clearly can be enforced against those who are not represented by the committee or who are standing in an adversarial relationship to the unsecured creditors as a group.<sup>23</sup> Thus, the bankruptcy court concluded, one should proceed cautiously concerning the disclosure of information that could reasonably have the effect of waiving the attorney-client or other privilege (for example when the committee has been given standing to pursue a claim on behalf of the debtor's estate, including against an unsecured creditor, or is conducting an investigation that might give rise to such a claim, or the information relates to ongoing negotiations with a third party), notwithstanding Bankruptcy Code Section 1102(b)(3).

On the other hand, the bankruptcy court stated, although a committee's assent to a plan or a transaction does not bind its members, let alone its constituents,<sup>24</sup> the importance of a committee's recommendations should require a committee to remain in touch with its constituents to determine their reasonable views.

### The Balancing Test

The issue came down to how to balance this tension — that is, the committee's need to preserve access to sensitive information (which usually is the only information of any value to unsecured creditors, whether for legitimate or illegitimate purposes), to protect the attorney-client privilege, and to comply with the securities laws, on the one hand, against the right of unsecured creditors to be informed of material developments in the case before they are presented with what in practical terms may be a *fait accompli*, on the other. The bankruptcy court stated that the balance was achieved in Refco's case by not requiring in the first instance — that is, without further court order — the committee's disclosure of information:

- (a) that could reasonably be determined to be confidential and non-public or proprietary,
- (b) the disclosure of which could reasonably be determined to result in a general waiver of the attorney-client or other applicable privilege, or

- 
- (c) whose disclosure could reasonably be determined to violate an agreement, order or law, including applicable securities laws.

As the bankruptcy court then explained, many, if not all, of the adverse consequences of releasing such information may be acceptably reduced or eliminated by the requesting party's agreement to be bound by confidentiality and/or trading constraints. Accordingly, it found that the committee should take into account the requesting party's willingness to agree to such constraints when the committee determined whether to release otherwise protected information.

### **Web Site Disclosure**

The bankruptcy court added that except with respect to the foregoing protected information, the committee in this case should proactively provide information on a Web site including:

- (1) general information concerning the Chapter 11 cases of the debtors including case dockets, access to docket filings, and general information concerning significant parties in the cases;
- (2) monthly committee written reports summarizing recent proceedings, events and public financial information;
- (3) highlights of significant events in the cases;
- (4) a calendar with upcoming significant events in the cases;
- (5) access to the claims docket as and when established by the debtors or any claim agent retained in the cases;
- (6) a general overview of the Chapter 11 process;
- (7) press releases (if any) issued by the committee and the debtors;
- (8) a non-public registration form for creditors to request "realtime" case updates via electronic mail;
- (9) a non-public form to submit creditor questions, comments and requests for access to information;

- (10) responses to creditor questions, comments and requests for access to information; provided that the Committee may privately give such responses in the exercise of its reasonable discretion, including in the light of the nature of the information request and the creditor's agreements to appropriate confidentiality and trading constraints;
- (11) answers to frequently asked questions; and
- (12) links to other relevant Web sites.

In addition, the bankruptcy court ruled that the committee was obligated to distribute case updates via electronic mail for creditors that register for this service on the committee Web site, as well as establish and maintain a telephone number and electronic mail address for creditors to submit questions and comments.

### **Privileged and Confidential Information**

The bankruptcy court also ruled that the committee was not required to disseminate to any entity, without a further order of the bankruptcy court, confidential, proprietary, or other non-public information concerning the debtors or the committee, including with respect to the acts, conduct, assets, liabilities and financial condition of the debtors, the operation of the debtors' business and the desirability of the continuance of such business, or any other matter relevant to the debtors' cases or to the formulation of one or more Chapter 11 plans (including any and all confidential, proprietary, or other nonpublic materials of the Committee) whether provided voluntarily or involuntarily by or on behalf of the debtors or by any third party or prepared by or for the committee, or any other information if the effect of such disclosure would constitute a general waiver of the attorney-client, work-product, or other applicable privilege possessed by the committee.

### **Creditor Information Requests**

The bankruptcy court added that, if a creditor submitted a written request (including on the committee Web site or by electronic mail) for the

committee to disclose information, the committee had to provide a response as soon as practicable, but no more than 20 days after receipt of the request. The response must either provide access to the information requested or the reasons it could not comply with the request. If the response was to deny the request because the committee believed the request implicated confidential information that did not have to be disclosed, or that the request was unduly burdensome, the bankruptcy court stated that the requesting creditor could, after a good faith effort to meet and confer with an authorized representative of the committee regarding the request and the response, seek to compel such disclosure for cause pursuant to a motion.

The bankruptcy court also said that, in responding to a request for access to confidential information, the committee should consider whether the creditor was willing to agree to reasonable confidentiality and trading restrictions with respect to such confidential information and whether such agreement and any information-screening process that it implemented would reasonably protect the confidentiality of such information. Significantly, the bankruptcy court added that if the committee elected to provide access to confidential information on the basis of such confidentiality and trading restrictions, the committee would have no responsibility for the creditor's compliance with, or liability for violation of, applicable securities or other laws.

## Conclusion

As more creditors and counsel become familiar with the provisions of Section 1102(b)(3)(A), more creditors' committees are likely to face requests for the turnover of information. The statute does not provide for any adverse consequences for an initial failure to comply and, indeed, the law accords qualified immunity to official committees and their professionals.<sup>25</sup> Still, the bankruptcy court's decision in *Refco* provides a roadmap for creditors' committees to follow in order to comply with the new information disclosure obligations imposed by BAPCPA.

## Notes

<sup>1</sup> Pub. L. No. 109-08, 119 Stat. 23 (2005).

- <sup>2</sup> 11 U.S.C. § 1102(b)(3).
- <sup>3</sup> H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 87 (2005).
- <sup>4</sup> No. 05-60006 (RDD) (Bankr. S.D.N.Y. Dec. 23, 2005).
- <sup>5</sup> See 11 U.S.C. § 541(a).
- <sup>6</sup> See, e.g., *Pineiro v. Pension Benefit Guaranty Corporation*, 318 F. Supp. 2d 67 (S.D.N.Y. 2003); *In re Robert Landau Assocs. Inc.*, 50 B.R. 670, 677 (Bankr. S.D.N.Y. 1985) (policy of open inspection, established in the Code itself through Section 704(7) and F.R.B.P. 5005 and 5007, “is fundamental to the operation of the bankruptcy system and is the best means of avoiding any suggestion of impropriety that might or could be raised.”) (internal citation and quotation omitted); *In re Sports Accessories, Inc.*, 34 B.R. 80 (Bankr. D. Md. 1983) (discussing importance of trustee’s duty to disclose).
- <sup>7</sup> See, e.g., *In re Lee Way Holding Co.*, 120 B.R. 881 (Bankr. S.D. Ohio 1990).
- <sup>8</sup> See, e.g., *In re Grabill Corp.*, 109 B.R. 329 (N.D. Ill. 1989).
- <sup>9</sup> See, e.g., *In re Scott*, 172 F.3d 959, 967 (7th Cir. 1999); *In re Modern Office Supply, Inc.*, 28 B.R. 943 (Bankr. W.D. Okla. 1983).
- <sup>10</sup> See, e.g., *Robert Landau, supra*.
- <sup>11</sup> See generally *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971) (attorney-client privilege may be asserted by corporation against those for whom it acts as fiduciary, subject to right of such beneficiaries to show cause why it should not be invoked in the particular instance).
- <sup>12</sup> 14 *Collier on Bankruptcy* ¶ 11-29.02 (14th ed. 1982) at 11-29-3.
- <sup>13</sup> Bankruptcy Act Rule 11-29(a).
- <sup>14</sup> 410 F. Supp. 1070 (E.D. Pa. 1976).
- <sup>15</sup> See, e.g., *Pan Am Corp. v. Delta Airlines, Inc.*, 175 B.R. 438 (S.D.N.Y. 1994).
- <sup>16</sup> See, e.g., *Johns-Manville Sales Corp. v. Doan (In re Johns-Manville Corp.)*, 26 B.R. 919 (Bankr. S.D.N.Y. 1983); see also 11 U.S.C. §§ 1103(c) (stating tasks an official committee may undertake) and 1109(b) (stating that an official creditors’ committee “may raise and may appear and be heard on any issue” in a Chapter 11 case). Because any transaction not in the ordinary course of the debtor’s business requires notice and the opportunity for a hearing, 11 U.S.C. § 363(b), an official committee may consider and challenge virtually everything important that a debtor undertakes. Under Section 1109(b), official committees have the right to intervene in adversary proceedings. *Term Loan Holder Comm. v. Ozer Group, L.L.C. (In re Caldor Corp.)*, 303 F.3d 161 (2d Cir. 2002); *Adelphia Communications Corp. v. Rigis (In re Adelphia Communications Corp.)*, 285 B.R. 848 (Bankr. S.D.N.Y. 2002).
- <sup>17</sup> *In re Daig Corp.*, 17 B.R. 41 (Bankr. D. Minn. 1981).
- <sup>18</sup> See, e.g., *The Bohack Corp. v. Gulf & Western Indus., Inc. (In re Bohack Corp.)*, 607 F.2d 258 (2d Cir. 1979); *Rickel & Associates, Inc. v. Smith (In re Rickel & Associates)*,

272 B.R. 74 (Bankr. S.D.N.Y. 2002).

<sup>19</sup> See, e.g., *Commodore Int'l Ltd. v Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96 (2d Cir. 2001) (authorizing official committee to pursue fraudulent transfer avoidance litigation for the benefit of the Chapter 11 estate).

<sup>20</sup> See, e.g., *In re Swolksy*, 55 B.R. 144 (Bankr. N.D. Ohio 1985).

<sup>21</sup> See, e.g., SEC Regulation FD (17 C.F.R. § 243.100).

<sup>22</sup> See, e.g., *In re Federated Dep't Stores*, 1991 WL 79143 (Bankr. S.D. Ohio 1991) (recognizing ability of creditors' committee members to trade in the debtor's securities, subject to applicable securities laws, *provided* that such members institute procedures for screening personnel engaged in trading from personnel involved in committee work); see also *In re Spiegel*, 292 B.R. 748 (Bankr. S.D.N.Y. 2003), in which the court discussed its concerns regarding committee members' trading in the debtor's securities even if information blocking procedures were to be adopted.

<sup>23</sup> See, e.g., *In re Subpoenas Duces Tecum*, 978 F.2d 1159 (9th Cir. 1992); *In re Baldwin-United Corp.*, 38 B.R. 802 (Bankr. S.D. Ohio 1984).

<sup>24</sup> See, e.g., *In re Armstrong World Indus., Inc.*, 2005 U.S. App. LEXIS 28897 (3d Cir. 2005).

<sup>25</sup> See, e.g., *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000); *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438 (S.D.N.Y. 1994).