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**Statutory Construction under BAPCPA<sup>1</sup>:**  
***Living with Ambiguity, Rediscovering Judicial Discretion***

**Committee Information Provisions under § 1102(b)(3) and**  
**Executory Contract and Lease Provisions under §§ 365 and 503(b)(7)**

*Pamela Smith Holleman, Esq.*  
*Sullivan & Worcester LLP*

**Introduction**

Today we, the bankruptcy bench and bar, find ourselves midway through the first calendar year following enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). As we all know, BAPCPA revised title 11 of the United States Code (the “Code”) in sometimes-dramatic ways, most famously with respect to its consumer provisions, but in ways significantly affecting business bankruptcies as well.<sup>2</sup> To some – particularly landlords – the changes introduced by BAPCPA were long awaited; to others – including many bankruptcy judges, practitioners and academics – long-resisted. Now, however, we all face the challenge of interpreting the provisions of a law that, however one feels about its goals and objectives, is scarcely an archetype of skilled legal drafting. In short, the language and style of the Code, as revised by BAPCPA, range from the imperious to the opaque.

As we, the bankruptcy community, search for clarity within the contours of the revised statute, we turn for guidance to canons of construction handed down by the courts. We find an array of maxims and approaches such as “plain-meaning”;<sup>3</sup> contextual features,<sup>4</sup> previous court interpretations of a term and common understandings of its ordinary meaning;<sup>5</sup> and the notion

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<sup>1</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Public Law 109-8, 119 Stat. 23.

<sup>2</sup> One commentator has noted that BAPCPA “makes the most substantial changes to the Bankruptcy Code since its enactment in 1978”. 2005 Bankruptcy Reform Legislation with Analysis 2d, Hon. William Houston Brown and Lawrence R. Ahern III, Thomson/West (2006), at 1.

<sup>3</sup> See, e.g., United States v. Ron Pair Enters., 489 U.S. 235 (1989).

<sup>4</sup> “Viewing the words of Congress in light of their contextual features, with an aim to preserving the ultimate coherence of the Code, can make a difference ... Though we may all be textualists now, that approach demands great attention to the context of an intricate statutory scheme such as the Bankruptcy Code, and due respect to the will of the legislature.” “2003—a Year of Discovery: Cybergenics and Plain Meaning in Bankruptcy Cases”, Hon. Marjorie O. Rendell, 49 Vill. L. Rev. 887, 904-05 (2004); see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 2 (2000).

<sup>5</sup> See Rousey v. Jacoway, 544 U.S. 320, 326 (2005).

that the legislature must be presumed to act with knowledge of existing case law.<sup>6</sup> A wealth of treatises and other materials are available to aid us in the interpretive task: for example, a nine-volume treatise on the topic of Statutes and Statutory Construction contains a chapter specifically devoted to maxims useful in the “Construction of amendatory acts”, which provides that –

The criteria and principles applicable in the interpretation of other legislation in general, including original acts, apply as well in the interpretation of amendatory acts. Certain interpretive aids have special relevance in the case of amendatory acts, and in addition there is one principle of construction, the presumption of change, which has unique application to an act which *purports* to change an existing statute. There are numerous judicial recitals that the object in construing an amendatory act is to determine the legislative intent. To do so, the court will read the amendment as a whole. Words of common use will be construed in their natural, plain and ordinary meaning. If possible, effect must be given to every word. The amendment will be given a reasonable construction; a literal construction which would lead to absurd consequences will be avoided; amendments to the same statute are to be harmonized if possible to give effect to each. When the intent of the legislature is not clear from its language, the court will consider surrounding circumstances. When the statute is amended and words are omitted, the general rule of construction is to presume that the legislature intended the statute to have a different meaning than it had before the amendment.

In ascertaining the meaning of amendatory language, a court must look to prior law, matters deemed to require correction, and the remedy enacted.

The amended statute should be interpreted in light of the court decisions that may have prompted the amendment. The court will examine the title of the amendment. It will consider records of legislative proceedings and reports of legislative committees concerning the amendment; also previous judicial and executive construction. Statutes in *pari materia* will be looked at. ...<sup>7</sup>

We also have at our disposal a range of substantive sources of interpretation. Several years ago, one particularly diligent commentator constructed a schematic comprised of thirty-two

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<sup>6</sup> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.

Midlantic Nat'l Bank v. N.J. Dep't of Env'tl Prot., 474 U.S. 494, 501 (1986), quoted in Varsity Carpet Servs. v. Richardson (In re Colortex Indus.), 19 F.3d 1371, 1375 (11<sup>th</sup> Cir. 1994) (“silent abrogation of judicially created concepts is particularly disfavored when construing the Bankruptcy Code”); In re Muhaimin, No. 05-90314 (Bankr. D. Md. Apr. 25, 2006) (following the normal rule of statutory construction, BAPCPA does not alter existing judicial doctrine where Congress has not made its intent specific); In re Brown, No. 05-90230 (Bankr. D. Md. Apr. 25, 2006) (same); In re Flythe, No. 05-90128 (Bankr. D. Md. Apr. 25, 2006) (same); accord In re Montoya, 333 B.R. 449 (Bankr. D. Utah 2005) (construing the meaning of “good faith” under BAPCPA § 362(c)(3)).

<sup>7</sup> Statutes and Statutory Construction, 6<sup>th</sup> Ed., Norman J. Singer, West Group (2002), Vol. 1A, § 22:29, 353-57 (internal citations omitted).

varieties of sources useful in interpreting the Code to whatever end we may have in mind.<sup>8</sup> Our greatest resource as a profession, however, may be our innate creativity and resourcefulness as we wrestle with the challenge of dealing with failed and failing businesses within the framework of the new statute.

Arguably, our greatest strength as bankruptcy practitioners may also be our greatest weakness. Neither exigent circumstances nor a lofty view of bankruptcy policy can authorize us to derogate from the statutory text. In interpreting any statute, a federal court begins “with the understanding that Congress ‘says in a statute what it means and means in a statute what it says there.’”<sup>9</sup> Where statutory language is plain, the sole function of the courts is to enforce it according to its terms.<sup>10</sup> “[O]nly absurd results and ‘the most extraordinary showing of contrary intentions’ justify a limitation on the ‘plain meaning’ of the statutory language.”<sup>11</sup> Where absurd results present themselves, however, or where a statute by its terms leaves room for interpreta-

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<sup>8</sup> The commentator, Karen M. Gebbia-Pinetti, described the broad contours of her schematic as follows:

Interpreters may consult a variety of sources in their efforts to implement the legislature’s intent, statute’s purpose, text’s meaning, best result, or other objective ... First, sources may have existed before the enactment of the statute (historic), may have been created contemporaneous with the enactment of the statute (contemporaneous), or may have been created after the statute was enacted (subsequent). Second, in each of these three categories, sources may be either internal or external to the statute. Finally, external sources may be closely and integrally related to the statute (intrinsic) or only remotely related to the statute (extrinsic).

Using her system, one broad category of interpretive sources are those internal to the statute. These may be contemporaneous, historic or subsequent to the enactment of a particular statutory provision. For example, internal, contemporaneous sources of interpretation include the statutory text; formalist holistic (or structural) analysis reflecting the use of a term or phrase in other sections of the statute; substantive holistic analysis of the substantive effect of the provision and related provisions; and overarching substantive holistic analysis of the effect, design, object, or policy of the statute as a whole (such as the rehabilitation of debtors and the maximization of value and fair and equitable treatment of similarly situated creditors).

A second broad category of interpretive sources includes those external but intrinsic to the statute (which may be contemporaneous, historic or subsequent), such as the legislative history of the statute, judicial precedents interpreting the provision and prior versions of the provision, and proposed amendments that were not enacted.

Finally, at the far end of the interpretive spectrum is a category of sources that are external and extrinsic to the statute (which may also be contemporaneous, historic or subsequent), such as dictionaries, non-bankruptcy statutes, scholarly writings and other commentary.

See “Interpreting the Bankruptcy Code: an empirical study of the Supreme Court’s bankruptcy decisions”, Karen M. Gebbia-Pinetti, 3 Chapman Law Review 173 (2000).

<sup>9</sup> Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000), quoting Conn. Nat’l Bank v. Germain, 503 U.S. 249, 254 (1992).

<sup>10</sup> United States v. Ron Pair Enters., 489 U.S. 235, 240-41 (1989); accord TRW Inc. v. Andrews, 534 U.S. 19, 28-29 (2001) (court may not imply exceptions to statutory provision that would in practical effect render that provision superfluous) (internal quotation omitted); In re Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 849, 851 (3d Cir. 1994) (court may not add qualifiers to statute whose language is clear, substituting its favored policies for those Congress enacts, no matter how unwise the court finds them to be).

<sup>11</sup> First Merchants Acceptance Corp. v. J.C. Bradford & Co. (In re First Merchants Acceptance Corp.), 198 F.3d 394, 402 (3d Cir. 1999), quoting Garcia v. United States, 469 U.S. 70, 75 (1984), reh’g denied, 469 U.S. 1230 (1985).

tion, a creative and practical approach may allow us to ameliorate what we perceive as deficiencies in the statute.

Certainly our skills and abilities will be called upon to interpret a statute that is beset with anomalies. At one extreme, BAPCPA introduced changes in the Code that are at once ambiguous and sweeping. An example is new § 1102(b)(3), which directs committees of unsecured creditors and equity security holders to provide creditors and interest holders who are not committee members with “access to information” and “solicit and receive comments” from them but fails to define any of its key terms. The resourcefulness of bankruptcy practitioners has been such, however, that while (as of this writing) only one published decision interprets the section,<sup>12</sup> its ambiguous terms have already been clothed with such particular meaning that many lines of inquiry may have been effectively foreclosed.

At the opposite extreme, BAPCPA revised portions of the Code in terms so decisive and so prolix as to suggest that no interpretation is necessary and no room for judicial discretion remains. Examples include the various provisions treating the assumption, assignment and rejection of executory contracts and unexpired leases.<sup>13</sup> A literal implementation of some of these changes is likely to discourage the rehabilitation of debtors and foster unequal treatment of similarly situated creditors – consequences that many would view as simply unacceptable from a substantive holistic perspective. In this area, our inventiveness may allow us to identify a host of ambiguities in the statutory text that may never have suggested themselves to Congress when it enacted BAPCPA. Here, again, the resourcefulness we have consistently displayed as a profession may be our greatest strength, but is also our greatest temptation.

## I.

### **Clarifying ambiguity: committees of creditors and equity security holders “provide access to information” and “solicit and receive comments”**

BAPCPA added a new provision to § 1102 of the Code, which deals generally with creditors’ and equity security holders’ committees. New § 1102(b)(3) imposes upon such committees the following requirements:

- (b)(3) A committee appointed under subsection (a)<sup>14</sup> 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 subparagraph (A); and
  - (C) be subject to a court order that compels any additional report or

<sup>12</sup> In re Refco, 336 B.R. 187 (Bankr. S.D.N.Y. 2006) (Drain, J.).

<sup>13</sup> See, e.g., 11 U.S.C. §§ 365(b)(1)(A), 365(b)(2)(D), 365(d)(4), 365(f)(1) and 503(b)(7).

<sup>14</sup> Subparagraph (a), in turn, describes committees of creditors (which the United States trustee “shall” appoint) and committees of equity security holders (which the United States trustee “may” appoint).

disclosure to be made to the creditors described in subparagraph (A).

Committees are thus directed to provide similarly situated holders of claims and interests with “access to information” and to solicit and receive comments from these holders, but – as a host of commentators have pointed out – “the key words ‘access’, ‘information,’ ‘solicit,’ ‘reports,’ ‘disclosures’ and ‘available’ are not defined.”<sup>15</sup>

In fact, the section is breathtakingly silent as to virtually every question that may arise in its implementation, including –

- the nature, scope and extent (including frequency of disclosure and any materiality threshold) as to the “information” to which “access” is to be provided;
- whether access must or may be offered to privileged or confidential information, attorney work product, trade secrets, information obtained from Rule 2004 examinations, pending litigation and/or settlement discussions, and other non-public information;
- whether the committee (or the Court) may/must/should condition disclosure of sensitive non-public information upon the recipient’s willingness to enter into a nondisclosure agreement or to consent to the imposition of a trading wall;
- the interplay between the new statutory obligation and § 107(b) (“On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court’s own motion, the bankruptcy court may ... protect an entity with respect to a trade secret or confidential research, development, or commercial information”) and Fed. R. Bankr. P. 9018 (“On motion or on its own initiative, with or without notice, the court may make an order which justice requires ... to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information” ...);
- the extent to which the debtor-in-possession and other stakeholders should share information with the committee and (concomitantly) the duties, if any, which the committee has with regard to the further disclosure of information belonging to third parties;
- the extent of the duty (if any) of the committee to investigate the *bona fides* of a purported holder of a claim or interest before making disclosure (is a good faith belief that a party requesting information is a creditor necessary? sufficient?);
- the process, or protocol, by which “access” to the information is to be provided (telephone? e-mail? internet access? designated point of contact?);
- whether the committee may delegate its responsibilities to an outside vendor and, if so, to

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<sup>15</sup> “Committee counsel bridges gaps in 1102”, Bankruptcy Court Decisions, LRP Pubs., Vol. 46, Issue 3 (March 21, 2006), at 4.

what extent the vendor's fees are professional compensation requiring Court approval and/or are compensable as an actual, necessary cost of preserving the estate;

- the cost factor in implementing the processes contemplated by this section, and the extent to which the process should vary depending upon the relative size of the case;
- the interplay between § 1102(b)(3) and § 1125 (postpetition disclosure and solicitation);
- the liability (if any) the committee may incur to a recipient of information or to third parties if the information it discloses is materially incomplete or inaccurate (and need an aggrieved party allege willful misconduct or gross negligence?);
- the immunity (if any) available to protect committee members from such liability;
- the liability (if any) of non-members for further disclosure and/or use of information received from a member of the committee (as a matter of right without restriction);
- the nature, scope and extent (including frequency) of the “comments” that a committee should solicit from its constituency, and the process, or protocol, by which such comments should be solicited;
- whether the committee has a duty to take any action with regard to such comments as it may receive (for example: should comments be reported to the entire body of (known) unsecured creditors? if so, how often, and to what purpose?);
- the standard and the relevant facts and circumstances by which the Bankruptcy Court should decide whether to enter an order that compels “any additional” report or disclosure to be made pursuant to subsection (b)(3)(C);
- whether subsection (b)(3)(C) affords the Bankruptcy Court with the means (or the sole means) to enforce the provisions of section (b)(3) if the committee is completely derelict in its duties and fails to make any report or disclosure, or whether the Court may/must invoke its “all writs” power under § 105(a) of the Code to that purpose;
- whether a non-member has standing to enforce the provisions of this section if a committee neglects or refuses to perform its duties and (if so) the remedies available (declaratory and injunctive relief? money damages? a priority claim in the bankruptcy?);
- the standard to be applied to assess the committee's performance of either its duty to disclose or its duty to solicit; and finally,
- the ultimate purpose of such disclosure and information-sharing (e.g. would “best practices” for such disclosure vary, not only as between the small business case and the megacase, but as between a reorganization and a liquidation?);

The centerpiece of the puzzle is what is meant by the undefined “information”. One looks in vain to § 101(Definitions) of the Code for a definition of the term. The legislative history provides little guidance as to what is meant by the term.<sup>16</sup> Another option is to look for the common meaning of the term.<sup>17</sup> The dictionary, however, is not particularly enlightening.<sup>18</sup>

Turning to other sections of the Code, § 704(7) provides that “the 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 for the Southern District of New York relied, in part, on this provision in issuing what has been, to date, the single published decision to explore any of these questions.<sup>19</sup>

Ranging further, § 1125 of the Code provides a definition of “*adequate* information” (emphasis added) in the context of postpetition disclosure and solicitation.<sup>20</sup> One might argue that, by negative implication, § 1102(b)(3) requires only that “information” be provided to holders of claims and interests, and not “adequate information”. By this logic, the information disclosed by a committee might pass muster under that section even if it is not “of a kind, and in sufficient detail” to permit the holder of a claim or interest to make informed judgments regarding the case. Such a reading would render it difficult (if not impossible) to hold a committee to a meaningful standard in evaluating its performance of its role as communications director.

The response is that such an interpretation disregards the scant legislative history we have, as well as the maxim that, where possible, every word of a statute should be given effect.

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<sup>16</sup> The legislative history simply recites the text of the statute. See H.R. Rep. No. 109-31, 109<sup>th</sup> Cong. 1<sup>st</sup> Sess. 87 (April 8, 2005) at 87 (“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 for these creditors and, pursuant to court order, make additional reports and disclosures available to them”).

<sup>17</sup> “When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.” *Smith v. U.S.*, 508 U.S. 223, 228 (1993).

<sup>18</sup> For example, Merriam-Webster’s Collegiate Dictionary defines “information” as –

1: the communication or reception of knowledge or intelligence. 2 a(1): knowledge obtained from investigation, study, or instruction. (2): intelligence, news. (3): facts, data. ...

Tenth Ed., Merriam-Webster, Inc. (1996).

<sup>19</sup> See *In re Refco*, 336 B.R. 187 (Bankr. S.D.N.Y. 2006) (Drain, J.), discussed *infra*.

<sup>20</sup> As amended by BAPCPA, § 1125 defines “adequate information” as:

... information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information

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It also defies common logic. Even where Congress did not take care to establish a statutory standard of adequacy, it is hard to argue that Congress intended that holders of claims and interests be provided with information that is per se inadequate.

The question then becomes how far afield to search for parallels and analogies to define an ambiguous term or phrase. Unsurprisingly, at least one prominent jurist has looked to BAPCPA provisions as sources of interpretation in cases that continue to be decided under the “old Code”.<sup>21</sup> The maxim *in pari materia* is a rule of statutory construction that authorizes us to look further, to other statutes that relate to the same object or that have a common purpose, since wherever possible, such statutes should be construed so as not to be in conflict with each other.<sup>22</sup> Thus, it seems entirely reasonable to review the administrative rules of the Internal Revenue Service for companies in Chapter 11 bankruptcy for a definition of “ordinary course indebtedness” in a bankruptcy context.<sup>23</sup>

On the other hand, the analytical issue is “defining how large a class to include as ‘part of the same material’”.<sup>24</sup> A broad view of the rule of *in pari materia* suggests that a phrase contained in a section of the Code should not be construed in such a way to set it on a collision course with federal securities laws that have a great deal to say about the disclosure of material, non-public information. Even a casual search in a *Westlaw* electronic database turns up a large number of published decisions that mention “access [w/2] information”; and picking through even a handful of results turns up some plausible parallels.<sup>25</sup> A resourceful advocate might spend a great deal of time scouting out cases to argue for a greater (or lesser) degree of “access” or amount of “information” as necessary (or sufficient) to satisfy the requirements of § 1102(b)(3), but the benefits of the exercise might be questioned.

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<sup>21</sup> As Judge Easterbrook commented in a recent dissent in an “old Code” case, “Use of non-bankruptcy law to flesh out terms not defined in the Bankruptcy Code is the norm.” *In re Payne*, 431 F.3d 1055, 1060 (7<sup>th</sup> Cir. 2005) (Easterbrook, J., dissenting) (“My colleagues show convincingly that the absence of a statutory definition of the word ‘return’ in tax law leaves the judiciary with discretion to vary the definition according to both economic and legal context.”; construing the meaning of a “return” for purposes of pre-BAPCPA § 523(a) with reference to language newly added to the amended statute).

<sup>22</sup> *Black’s Law Dictionary* observes that “Statutes ‘in pari materia’ are those relating to the same person or thing or having a common purpose. . . . This rule of statutory construction, that statutes which relate to the same subject matter should be read, construed and applied together so that the legislature’s intention can be gathered from the whole of the enactments, applies only when the particular statute is ambiguous.” 791, 6<sup>th</sup> Ed. (1990). See *Quack-enbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (endorsing the rule).

<sup>23</sup> See *Caradon Doors and Windows, Inc. v. Eagle-Picher Indus. (In re Eagle-Picher Indus.)*, May 5, 2006 (6<sup>th</sup> Cir. 2006).

<sup>24</sup> *Statutory Interpretation: the Search for Legislative Intent*, Ronald Benton Brown and Sharon Jacobs Brown, National Institute for Trial Advocacy (2002), § 4.6, at 45-46.

<sup>25</sup> A recent search in the *Westlaw* “FBKR” database (bankruptcy cases, all courts) turned up 281 hits; narrowing the search to First Circuit courts reduced the number of hits to 65. Putting in a few additional limiting terms (“defin!” and “scope”) yielded examples such as a case interpreting what constitutes “access to information” in the context of nonpublic information under § 12(2) of the Securities Act of 1933, *Maldonado v. Dominguez*, 137 F.3d 1 (1<sup>st</sup> Cir. 1998); pleading requirements under the Private Securities Litigation Reform Act (PLSRA), *Bielski v. Cabletron Sys. (In re Cabletron Sys.)*, 311 F.3d 11 (1<sup>st</sup> Cir. 2004), and discoverable information under the Administrative Procedure Act, *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338 (1<sup>st</sup> Cir. 2005).

A practical solution was obviously necessary, and practitioners promptly found one. Common sense dictates that a committee should not make *carte blanche* disclosure to non-members of all information that comes into its possession. Unlike common creditors, committee members are commonly held to fiduciary responsibilities in the performance of their duties. The creditor body commonly includes securities traders and competitors of the debtor, particularly in mega-cases where debt and equity securities trade on a daily basis. To allow all of these holders of claims and interests free and unrestricted access to all non-public information (whether or not material) that comes into the hands of the committee, without regard to the source, would court violations of the securities laws, loss of the attorney-client or other privilege, loss of confidential and trade secret information – in short, would invite disaster.<sup>26</sup>

The (perhaps inevitable) solution to the immediate problems posed by the new provision appeared only weeks after BAPCPA took effect. The *Refco* case – to date the only published decision dealing with § 1102(b)(3) – saw the first of what have come to be known as “information-sharing protocol orders” or “comfort orders”.<sup>27</sup> Within weeks the order (with some embellishments) had already become a standard, both in “large and rapidly moving” cases like *Refco*, and in smaller cases, where responding to creditor requests might quickly exhaust committee resources.<sup>28</sup>

The issue was joined in *Refco* when the creditors’ committee filed a motion seeking an order defining and limiting its duties (and its liabilities) arising under § 1102(b). The court performed a three-part analysis, canvassing (i) § 704(7) of the Code, which addresses disclosure requirements for Chapter 7 trustees); (ii) case law interpreting § 339(1) of the Bankruptcy Act of 1898, which required a committee “to report to the creditors from time to time concerning the progress of the proceeding”, and Bankruptcy Act Rule 11-29, described by the court as having

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<sup>26</sup> “Creditors’ Committees: the Fallout from BAPCPA Changes to § 1102”, *American Bankruptcy Institute Journal*, Vol. XV, No. 3 (April, 2006). The risk of securities laws violations that might result from a broad reading of § 1102 were adopted is particularly acute in view of today’s active distressed debt market. When claims traders sit on creditors’ committees, the courts will enter orders approving information blocking (or “Screening Wall”) procedures and permitting claims trading upon request by creditors’ committee members, ordering the committee member to screen its claims traders from information received by the entity through its participation on the committee. A recent example is the order entered on April 27, 2006 in the case of Dana Corporation, Case No. 06-10354 (Bankr. S.D.N.Y.). There, relying on § 105(a) of the Code, Judge Lifland approved a protocol whereby the creditor was required, as a condition of claims trading, to cause to be filed with the Court a declaration or affidavit of each individual performing committee-related activities on the creditor’s behalf, stating that the individual would comply with the Screening Wall procedures. Such a requirement is entirely reasonable given the fiduciary duties incumbent upon committee members and their superior access to information. At a minimum, given the information-sharing requirement introduced by BAPCPA, common sense dictates that a comparable protocol should be imposed upon a creditor seeking information from the Committee pursuant to § 1102(b)(3). BAPCPA, of course, contains no such requirement.

<sup>27</sup> An interim order entered on December 23, 2005, which became a final order some weeks later, on February 7, 2006. *In re Refco*, No. 05-60006, 2005 WL 3543953 (Bankr. S.D.N.Y. Dec. 23, 2005) and 336 B.R. 187 (Bankr. S.D.N.Y. 2006).

<sup>28</sup> See “Committee counsel bridges gaps in 1102”, *Bankruptcy Court Decisions*, LRP Pubs., Vol. 46, Issue 3 (March 21, 2006), at 4.

derived from § 339(1) of the Act; and finally, (iii) the duties and functions of an official creditors committee as they may pertain to an interpretation of § 1102(b)(3).<sup>29</sup> The court concluded that the committee must balance its need to preserve access to sensitive information, to protect the attorney-client privilege, and to comply with the securities laws, against “the right, now codified in § 1102(b)(3), 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*” [emphasis added].<sup>30</sup> To assist it in doing so in the case at issue, the court entered the requested comfort order, whose provisions are presented in tabular form in **Table 1**.

Comfort orders are not bulletproof, and a careful parsing of the *Refco* decision suggests various bases that may be used by counsel to challenge (or, by the courts, as cause to refuse to enter) such orders. For example, the court moved quickly past a critical threshold issue (one having constitutional implications), as follows:

[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.<sup>31</sup>

In its substantive analysis, the court essentially authorized an elaborate construct with specific provisions that can be found nowhere in the Code. In the process, as illustrated above, the court – striking a parallel with federal securities laws – located a materiality requirement in § 1102(b)(3) that appears nowhere in the text of the statute.<sup>32</sup> Moreover, courts that have followed *Refco* may not have been fully mindful of that court’s observation that the “balance” between competing interests must be sought afresh on a case by case basis,<sup>33</sup> since orders entered in subsequent cases have struck the balance in virtually identical ways in each instance.

It is also important to remember what the *Refco* decision did not do. The case established a court-approved information protocol, not court-approved notice. It is possible that a party in interest could mount a successful challenge to a comfort order enacted early in the case on pro-

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<sup>29</sup> *Id.* at 192-96 (passim).

<sup>30</sup> *Id.* at 197-98.

<sup>31</sup> *Id.* at 190 (footnote omitted).

<sup>32</sup> Compare “material developments”, *id.* at 197, with “material non-public information”, *id.* at 196.

<sup>33</sup> Thus, the court stated

In *Refco*’s case, as set forth in the order attached as Exhibit A hereto, the balance has been achieved 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.

*Id.* at 197-98.

cedural due process grounds, perhaps further alleging that the court lacked jurisdiction to enter an order in the absence of a “case or controversy”.<sup>34</sup>

In short, *Refco* and its progeny did not resolve all of the problems inherent in §1102(b)(3) – nor could it, given the expansive list of open issues that can be found in a provision that has been in effect for less than a year. What is most noteworthy about the case is the creative and practical approach it embodied – an approach that is likely to become increasingly apparent as practitioners endeavor look for ways to operate a functional bankruptcy system within the framework of BAPCPA.

## II.

### **Reintroducing judicial discretion: executory contracts and unexpired leases**

Described as making the most substantive change in the bankruptcy laws since the enactment of the Code in 1978,<sup>35</sup> BAPCPA significantly altered the law regarding executory contracts and unexpired leases in decisive and apparently quite inflexible ways. Even a cursory review of the changes in the provisions governing nonresidential real property leases suggests that the legislative intent was to shift the balance of power decisively away from debtors in favor of landlords.

To date, we have no case law interpreting the revised provisions. Given the resourcefulness of bankruptcy practitioners, however, it is predictable that the results will not be as one-sided as the statutory text suggests. Commentators have suggested that debtors will step up their efforts to recharacterize their leases as disguised secured financings to reduce the effects of the revisions. It is foreseeable that debtors will employ every means at their disposal, from canons of construction to a liberal dose of chutzpah, to regain leverage. In particular, debtors are likely to rely upon existing case law, with the presumption that Congress enacted BAPCPA with knowledge of judicially created concepts interpreting prior versions of the Code.<sup>36</sup>

Key provisions in the new law that affect a debtor’s treatment of its contracts and leases include the following: (1) revisions that permits cure of nonmonetary defaults under a nonresidential real property lease; (2) a new, “bright line” rule shortening the time period for assumption or rejection of nonresidential real property leases; (3) clarification that a debtor may not circumvent lease and tenant mix restrictions in assigning a shopping center lease; and (4) a new provision according administrative expense priority to claims of landlords for rejection of a previously-assigned nonresidential real property lease.<sup>37</sup> These provisions (blacklined against pre-

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<sup>34</sup> One would, of course, be ill advised to delay such a challenge, particularly if the movant demanded information that had been withheld by a committee in connection with a consummated bankruptcy sale or a confirmed plan. On such facts, doctrines of statutory and equitable mootness would likely come into play.

<sup>35</sup> See *supra*, note 2.

<sup>36</sup> See *supra*, note 6.

<sup>37</sup> Other revisions to the Code affecting leases of personal property the deletion of §§ 365(c)(4) and 365(d)(5)-(10), which dealt with the assumption and rejection of unexpired leases of nonresidential real property under which

BAPCA versions where applicable) read as follows:

1. *Cure of existing defaults as condition to assumption, §§ 365(b)(1)(A) and 365(b)(2)(D):*

BAPCPA contains two revised provision that address the requirement that, as a condition to assumption, a debtor must cure existing defaults under an executory contract or unexpired lease, unless a default relates to a penalty rate or penalty provision under the contract or lease.

a. *Requirement to cure existing defaults as condition to assumption, §365(b)(1)(A):*

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default, **other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph ...**

b. *No requirement to cure defaults relating to penalty rates or penalty provisions, §365(b)(2)(D):*

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to – . . .

(D) the satisfaction of any penalty rate or **penalty** provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

At first blush, § 365(b)(1)(A) is virtually impossible to parse. Reviewing it with a complementary provision, § 365(b)(2)(D), the schematic appears to break down as follows:

*Basic rule:* Where there has been a default under an executory contract or unexpired lease, the default must be cured before the contract or lease may be assumed.

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the debtor is the lessee of an aircraft terminal or aircraft gate or is an affected air carrier (provisions inserted by long-expired statutory authority), and consequent renumbering of former § 365(d)(10) as § 365(d)(5); and the addition of new § 365(p), which deals with the consequences of a rejection or failure to timely assume a lease of personal property (a provision that may have its greatest impact upon consumer debtors).

*Exception:* Incurable nonmonetary defaults under an unexpired lease of real property need not be cured.

*Exception:* Defaults arising from a failure to operate in accordance with a non-residential real property lease must be cured by performance at and after assumption (and any pecuniary loss resulting from such default shall be compensated in accordance with the provisions of § 365(b)(1)(A)).

*Exception:* A default that is a breach of a provision relating to the satisfaction of a penalty rate or penalty provision relating to a default arising from a failure to perform nonmonetary obligations need not be cured.

So deconstructed, the statutory provisions provide fertile ground for statutory interpretation.

- One objective of revised §§ 365(b)(1)(A) and 365(b)(2)(D) is made manifest in the text. Before BAPCPA, the Code carved out an exception whereby a breach of a “penalty rate or provision” need not be cured, but courts were split as to whether Congress intended “penalty” to modify “rate”, or “rate” and “provision”.<sup>38</sup> Even as revised, however, these sections shed no light on what is meant by a “penalty” or even whether it implies something punitive.<sup>39</sup>

- It has been suggested that not *all* nonmonetary defaults under a nonresidential real property lease must be cured by performance “at *and* after” assumption [emphasis added]. On its face, this appears to be an unwarranted misreading of the statutory text, although the proponents’ objective is sensible. In particular, it could be devastating to the financial prospects of a retail debtor if a default under a lease provision prohibiting a store from “going dark” must be cured at and after assumption, since such a provision would make it impossible for a prospective new tenant/assignee to change signage, restock inventory and otherwise prepare to re-open the store. That is the result, however unworkable it may be, of a literal reading of § 365(b)(1)(A); and given what appears to be the pro-landlord thrust of BAPCPA as a whole, Congress may have anticipated such a result. The question then becomes whether the bankruptcy court retains any equitable discretion to alter a result that is not plainly absurd.

- Another possibility suggests itself: it is a recognized principle of statutory construction that the term “and” is ordinarily accepted for its conjunctive connotation. There are exceptions to the rule where a literal interpretation of the statutory language either produces an outcome demonstrably at odds with the intent of the drafters or – as, arguably, is the case here – when a

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<sup>38</sup> Compare Eagle Ins. Co. v. Bankvest Capital Corp. (In re Bankvest Capital Corp.), 360 F.3d 291 (1<sup>st</sup> Cir. 2004) (incurable nonmonetary default under equipment lease need not be cured as condition to assumption) with Worthington v. G.M.C. (In re Claremont Acquisition Corp.), 113 F.3d 1029 (9<sup>th</sup> Cir. 1997) (incurable nonmonetary default prevented assignment).

<sup>39</sup> See Bruce H. White and William L. Medford, “Assumption of Executory Contracts and Curing Defaults: in the Interest of Penalties”, American Bankruptcy Institute Journal, October, 2002.

literal application of the statutory language results in an outcome “that can truly be characterized as absurd”.<sup>40</sup> Here, the text of the statute does not state that defaults must be cured at and immediately after assumption. Instead, the statute indicates that such defaults are to be cured *at the moment of* assumption, and at an unspecified point in time thereafter. Thus, by the *literal* language of the statute, an assignee might turn on the lights on the closing date, go dark the following day and remain dark for twelve months thereafter, in compliance with the text. The absurdity of that result suggests the possibility that this may fall into one of the narrow exceptions to the plain meaning approach.

- The revised provisions, like their precursors, require that – without any stated exception – a breach of an executory contract must be cured as a condition to assumption. Courts have, however, frequently considered the materiality of the default and the extent of the harm to the nondebtor party in deciding whether an incurable breach must be cured or whether the contract is rendered unassumable by the default.<sup>41</sup> Debtors may be expected to cite this case law in interpreting the revised provisions as well.

2. *Extension of time to assume or reject nonresidential real property leases, § 365(d)(4):*

BAPCPA also shortens the time period in which a debtor may assume or reject its unexpired leases of nonresidential real property to a maximum of 210 days (an initial 120 day period plus one 90 day extension), as follows:

- (A) ~~Notwithstanding paragraphs (1) and (2), Subject to subparagraph B, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is~~ **shall be** deemed rejected, and the trustee shall immediately surrender ~~such~~ **that** nonresidential real property to the lessor, **if the trustee does not assume or reject the unexpired lease by the earlier of –**
- (i) the date that is 120 days after the date of the order for relief; or**
  - (ii) the date of the entry of an order confirming a plan.**
- (B) **(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.**
- (ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.**

Based upon the scant legislative history, this revision represents a reaction against Congress’ sense that the courts too often allowed debtors an indefinite period of time to decide what

<sup>40</sup> See *In re Muhaimin*, No. 05-90314 (Bankr. D. Md. Apr. 25, 2006) (internal citation omitted); *In re Brown*, No. 05-90230 (Bankr. D. Md. Apr. 25, 2006) (same); *In re Flythe*, No. 05-90128 (Bankr. D. Md. Apr. 25, 2006) (same).

<sup>41</sup> See, e.g., *In re New Breed Realty Enters.*, 278 B.R. 314 (Bankr. E.D.N.Y. 2002) (prohibiting assumption of executory contract following incurable nonmonetary default; interpreting pre-2005 Bankruptcy Code provision).

to do about their unexpired leases, thereby undermining the text of the statute.<sup>42</sup> In truth, most courts did construe pre-BAPCPA § 365(d)(4) in debtor-friendly fashion. The statute required a debtor to assume or reject within a 60-day period, unless that period was extended “for cause”. The courts considered a number of factors in assessing whether a debtor had shown “cause” for the requested extension, such as whether the lease in question was a primary asset of the debtor, whether the debtor had had the time necessary to intelligently appraise the potential value of the lease, and whether the debtor continued to meet its financial obligations under the lease.<sup>43</sup> Under both the Code and its predecessor statute, the Bankruptcy Act, courts tended to allow debtors a “reasonable time” to decide what to do with their leases.<sup>44</sup> To prevail against a debtor, an objecting landlord essentially had to show that an extension would prejudice its interests beyond the compensation available under the Code.<sup>45</sup>

It has been predicted that revised § 365(d)(4), coupled with new restrictions on cure of nonmonetary defaults and new priority provisions depleting a debtor’s cash, will lead to a greater incidence of section 363 sales, inclusion of motions to approve sales of so-called “designation rights” among a debtor’s “first day” orders, placing heightened importance upon pre-bankruptcy planning; and a greater tendency to liquidate, rather than reorganize, under Chapter 11.<sup>46</sup>

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<sup>42</sup> “Subsection (a) of section 404 of the Act amends section 365(d)(4) of the Bankruptcy Code to establish a firm, bright line deadline by which an unexpired lease of nonresidential real property must be assumed or rejected ... this provision is designed to remove the bankruptcy judge’s discretion to grant extensions of the time for the retail debtor to decide whether to assume or reject a lease after a maximum possible period of 210 days from the time of entry of the order for relief. Beyond that maximum period, the judge has no authority to grant further time unless the lessor has agreed in writing to the extension.” H.R. Rep. No. 109-31, 109<sup>th</sup> Cong. 1<sup>st</sup> Sess. 87 (April 8, 2005) at 86-87.

<sup>43</sup> See, e.g., In re Wedtech Corp., 72 B.R. 464, 471-72 (Bankr. S.D.N.Y. 1987). Wedtech – which relied upon Theatre Holding Corp. v. Mauro, 681 F.2d 102 (2d Cir. 1982), a Second Circuit case which predated the inclusion of § 365(d)(4) in the Code.

<sup>44</sup> See, e.g., Theatre Holding Corp., 681 F.2d at 106, citing In re Midtown Skating Corp., 3 B.R. 194, 197 (Bankr. S.D.N.Y. 1980).

<sup>45</sup> In re Wedtech Corp., 72 B.R. at 471-72 (affirming bankruptcy court order allowing only 30 days in which to assume or reject lease under §365(d) where, *inter alia*, debtor’s continued occupation of the leased property could damage the lessors beyond the compensation available under the Code); see also In re Channel Home Ctrs., 989 F.2d 682, 683 (3d Cir. 1993) (granting debtor’s motion to extend time under § 365(d)(4) based upon a finding that no landlord would be prejudiced by such extension); In re Perfectlite Co., 116 B.R. 84, 86, 88 (Bankr. N.D. Ohio 1990) (denying debtor’s motion to extend time under §365(d)(4) where debtor failed to (i) consider how its continued possession of the premises would affect the lessor or (ii) show how an extension of time would better enable it to decide whether to assume or reject the subject lease); compare Legacy, Ltd. v. Rickel Home Ctrs. (In re Rickel Home Ctrs.), No. 96-26, Civ. A. 96-553-SLR, 1997 WL 538785, at \*5 (D. Del. Aug. 13, 1997) (reasoning that ex parte extensions of time under §365(d)(4) are improper where a property owner can demonstrate that it was substantially or irreparably harmed) (internal citation omitted); In re Beker Indus. Corp., 64 B.R. 890, 898-99 (Bankr. S.D.N.Y. 1986) (considering the uncertainty and prospect of increased fixed costs facing nondebtor party as decisive factors in determining that debtor had sufficient time to assume or reject executory contracts).

<sup>46</sup> Under the pre-BAPCPA Code, it was common for retail debtors to sell the right to designate proposed assignees of their leasehold interests, deferring a determination as to the permissibility of the actual assignment for months or years. These sales permitted debtors to obtain cash infusions while avoiding the risk of premature assumption or rejection, shifting to the buyer the carrying cost of the debtor’s leases. Since a 210-day cutoff dampens the upside potential for the designation rights buyer speculating in real estate, it is likely that designation rights will sell more cheaply under BAPCPA than in the past. See Rafael Klotz, “BAPCPA’s Impact on 363 Sales under the Bankruptcy

Given the costly and reorganization-threatening implications of these changes, resourceful debtors can be expected to resort to canons of construction to resist them, including the precept that, if Congress intends for legislation to overrule prior case law, it makes that intent specific. Landlords, of course, can argue that, given the unambiguous text and taking the statute as a whole, virtually every question should be resolved in their favor. Debtors, however, can be expected to contend that it is not clear that, in enacting BAPCPA, the legislature entirely succeeded in reading the courts' equitable discretion out of the Code, as follows:

- Besides routinely finding “cause” to extend the debtor’s time to assume or reject virtually to the point of plan confirmation, most courts have entered “bridge” orders permitting the assumption of unexpired leases after the expiration of the statutory time period, construing former § 365(d)(4) in such a way that a debtor’s request to extend time need only be filed, and not ruled upon, within 60 days after the order for relief. Former §365(d)(4) provided that –

Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, *or within such additional time as the court, for cause, within such 60-day period, fixes*, then such lease is deemed rejected [emphasis added].

The majority reasoned that, since a court’s calendar is beyond a movant’s control, it would put undue pressure on the courts or work a forfeiture if it the court, in a particular instance, were unable hear a debtor’s motion to extend within the 60-day period prescribed by statute. They rationalized this result by deeming the series of dependent clauses contained in the statute (“or within such additional time as the court, for cause, within such 60-day period, fixes”) to be ambiguous, and then going on the infer that the legislature intended that the 60-day period modified the term “for cause”, which preceded it, rather than verb (“fixes”), which followed.<sup>47</sup>

Although the (arguably) ambiguous dependent clauses have been removed from the statute, it may still be possible for a debtor to argue that a lease should not be deemed rejected where the debtor clearly manifested its intention to assume within the statutory period. While the legislative history establishes that revised § 365(d)(4) was meant to establish a bright line rule “if the trustee does not assume or reject”, nothing in the text or the legislative history suggests that Congress intended to work a forfeiture of a leasehold interest where the trustee, or debtor, takes affirmative steps to assume or reject within the statutory period but the bankruptcy court does not

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Code”, paper presented at Bankruptcy Court Practice 2006 16<sup>th</sup> Annual Bench Meets Bar Conference, Boston Bar Association (May 17, 2006).

<sup>47</sup> See, e.g., Southwest Aircraft Serv. v. Long Beach (In re Southwest Aircraft Serv.), 831 F.2d 848 (9<sup>th</sup> Cir. 1987) (reasoning that this interpretation best comports with congressional intent in that it preserves the authority of the court to rule on timely-filed motions and strikes the balance between creditor protection and debtor relief that Congress intended); accord By-Rite Distrib., Inc. v. Brierley (In re By-Rite Distrib., Inc.), 55 B.R. 740 (D. Utah 1985); In re Bon Ton Rest. & Pastry Shop, Inc., 52 B.R. 850 (Bankr. N.D. Ill. 1985).

act in a timely manner.<sup>48</sup> A debtor might rely upon such cases to contend that its leasehold interests should not be deemed rejected where it moved to assume in a timely manner but an order did not enter within the 210-day period because (for example) the Committee interposed an objection that required protracted hearings.

- Similarly, numerous courts have allowed debtors to assume or reject retroactive to the motion date, or have permitted an equitable tolling of the statutory time limitation. As the First Circuit Court of Appeals reasoned, the goal of the 1984 amendments to the Code was to promote certainty, but retroactive authorization is permissible because, as courts of equity, bankruptcy courts “may sometimes abandon mechanical solutions in favor of the pliant reins of fairness”.<sup>49</sup> Still other courts have permitted a debtor to assume a lease by means other than by motion, subject to later ratification by the courts.<sup>50</sup> Accordingly, a debtor may argue that, particularly where the landlord has not been prejudiced, particular facts and circumstances may warrant invoking the court’s equitable discretion to avoid working a forfeiture.
- Where new § 365(d)(4)(B)(ii) requires the landlord’s consent to extensions of time beyond the 210-day period, debtors may cite to precedent construing “consent” requirements in other contexts to argue that a landlord’s consent may not be unreasonably withheld.<sup>51</sup>
- Similarly, based upon case law interpreting the old Code, debtors may argue that a landlord has waived or is estopped from asserting its right to withhold consent under §365(d)(4)(B)(ii).<sup>52</sup>

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<sup>48</sup> But see Deborah A. Crabbe, “Will Past Cases Influence the Application of New § 365(d)(4)?”, American Bankruptcy Institute Journal, November, 2005 (concluding that “[s]uch leeway with the statutory provisions under new § 365(d)(4), however, does not appear likely” because new § 365(d)(4) contains no ambiguity and the legislative history appears to foreclose any option to hear a motion outside the initial 120-day period).

<sup>49</sup> Thinking Machs. v. Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.), 67 F.3d 1021, 1024 (1<sup>st</sup> Cir. 1995) (holding that rejection of nonresidential lease was effective only upon court approval, but courts have discretion to grant relief retroactive to the motion date). Compare In re GST Telecom, Inc., No. 00-1982-GMS, 2001 WL 686971 (D. Del. June 8, 2001) (on unique facts, court may use its equitable discretion to allow retroactive assumption of unexpired lease even though debtor’s motion was not filed until four days after expiration of the statutory time period); but see In re Del Grosso, 115 B.R. 136 (Bankr. N.D. Ill. 1990) (no equitable tolling to permit assumption where statutory time period had run); In re Boston Bus. Machs., 87 B.R. 867 (Bankr. E.D. Pa. 1988) (same).

<sup>50</sup> See, e.g., In re Casual Male Corp., 120 B.R. 256 (Bankr. D. Mass. 1990).

<sup>51</sup> See, e.g., Restatement 2d. Property, § 15.2, comment g (“If the landlord or the tenant withholds unreasonably his consent to a proposed transfer by the other party, the other party may proceed to make the transfer without regard to the terms of the restraint on alienation, because the restraint is valid only to the extent the consent to a transfer is not withheld unreasonably. No legitimate purpose is served by either party to a lease refusing unreasonably to consent to a transfer by the other.”); see also Appeal of Two-Forty Assocs. (In re Barclay Indus.), 736 F.2d 75 (3d Cir. 1984) (where landlord refused to consent to debtor’s collateral assignment of commercial lease as security, such consent must be reasonably withheld under New Jersey law in order to prevent assignment; reversing and remanding bankruptcy court’s decision for further proceedings).

<sup>52</sup> See, e.g., In re Car-Gill, Inc., 125 B.R. 133 (Bankr. E.D. Pa. 1991) (landlord may, by certain courses of conduct, effect a waiver of its rights under section 365(d)(4), or, alternatively, be estopped from asserting such rights); In re THW Enters., 89 B.R. 351 (Bankr. S.D.N.Y. 1988) (landlord waived debtor’s deemed rejection by knowingly and unconditionally accepting 14 months’ rent); In re Pier 5 Mgmt. Co., 83 B.R. 392 (Bankr. E.D. Va. 1988) (landlord estopped from contesting belated motion to assume lease by its refusal to supply information necessary to cal-

- Where exceptional circumstances were shown, a few courts have reconsidered and vacated orders approving assumption or rejection.<sup>53</sup>

### 3. *Restrictions on Assignment, § 365(f)(1):*

BAPCPA amended § 365(f)(1) to incorporate an express requirement that any assignment of a shopping center lease is subject to the “adequate assurance” requirements set forth in § 365(b), as follows:

Except as provided in ~~subsection~~ **subsections (b) and (c)** of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection; ~~except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event.~~

Pre- and post-BAPCPA, the Code has allowed a trustee to assign an unexpired lease only if the new tenant gives adequate assurance of future performance.<sup>54</sup> The meaning of “adequate assurance” is found in § 365(b), which requires the trustee to cure existing defaults.<sup>55</sup> To assign a shopping center lease, a trustee must also provide adequate assurance of the source of rent and other consideration due under the lease and that any percentage rent due under the lease will not decline substantially.<sup>56</sup> The Code further requires that assumption and assignment of a shopping center lease is subject to all lease provisions, including restrictions as to radius, location, use or exclusivity;<sup>57</sup> shall not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center;<sup>58</sup> and shall not disrupt any tenant

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culate rent); In re Ranch House of Orange-Brevard, Inc., 78 B.R. 323 (Bankr. M.D. Fla. 1987) (landlord waives right to contest debtor’s belated assumption of lease by accepting rent); In re Edward Harvey Co., 68 B.R. 851 (Bankr. D. Mass. 1987) (section 365(d)(4) 60 day requirement was effectively tolled where landlord’s termination of debtor’s leasehold was void as a fraudulent conveyance, and trustee needed time to determine whether the estate in fact had a leasehold interest); but see In re Damach, Inc., 235 B.R. 727 (Bankr. D. Conn. 1999) (statutory time limitation is substantive matter that may not be modified or extended for excusable neglect under Rule 9006(b)).

<sup>53</sup> See In re Sleepmaster Fin. Corp., 284 B.R. 411 (Bankr. D. Del. 2002) (vacating order authorizing debtors to reject unexpired leases and executory contracts where rejection was based on inadvertence); In re Muma Servs. Inc., 279 B.R. 478 (Bankr. D. Del. 2002) (vacating order authorizing debtor to reject equipment leases based upon debtor’s affirmative misrepresentations); but see Vision Metals, Inc. v. SMS Demag, Inc. (In re Vision Metals, Inc.), 311 B.R. 692 (Bankr. D. Del. 2004) (denying debtor’s motion to vacate order authorizing assumption of supply and settlement agreements where debtor failed to demonstrate any exceptional circumstances that might warrant relief).

<sup>54</sup> 11 U.S.C. § 365(f)(2)(B).

<sup>55</sup> See discussion of § 365(b)(1) and (2), supra.

<sup>56</sup> See § 365(b)(3)(A) and (B).

<sup>57</sup> 11 U.S.C. § 365(b)(3)(C).

<sup>58</sup> Id.

mix or balance in the shopping center.<sup>59</sup>

As expressed in § 365(b), the legislative intent appears clear. Before BAPCPA, however, the Code contained a seeming contradiction between § 365(b)(3), which conditions the assignment of a shopping center lease on rigid adherence to the requirements of use clauses, tenant mix and balance; and § 365(f)(1), which permits assignment notwithstanding any provision of the lease that prohibits, restricts or conditions such assignment. Past courts – most notably in In re Rickel Home Ctrs., Inc. – have struck down (or at least modified) use restrictions pursuant to § 365(f).<sup>60</sup> The legislative history indicates that, in making § 365(f) expressly subject to §365(b), Congress was reacting to decisions like Rickel.<sup>61</sup>

As resourceful debtors hunt for ways to salvage potentially profitable sales of shopping center leases burdened with “*de facto* anti-assignment clauses”, a number of statutory construction problems may arise:

- In a recent case decided prior to the enactment of BAPCPA, In re Trak Auto Corporation, the Fourth Circuit Court of Appeals resolved the tension between § 365(b) and § 365(f)(1) in a manner that presaged BAPCPA.<sup>62</sup> Reasoning that the more specific provision controlled, the court concluded that § 365(b) trumped §365(f)(1). Consequently, it reversed the lower courts to hold that a use restriction prevented assignment of the debtor’s lease except to another auto supply store, even though the market was saturated with auto stores. In dicta, the court suggested (but did not decide) that a provision prohibiting leasing to anyone but the original tenant might be unenforceable under § 365(f)(1) as a *de facto* anti-assignment clause.<sup>63</sup> Now that Congress has codified the holding of Trak Auto, debtors may seek to rely on its dicta to challenge a use clause that is too tightly drawn to permit any assignment whatsoever.
- By its terms, § 365(b) arguably is not self-executing. If solvent shopping center entities are silent, a debtor will likely be able to assume and assign its leases without interference. *Some retail debtors have already adopted the straightforward expedient of asking the courts simply to refuse to enforce use restrictions and “going dark” provisions in their leases.*<sup>64</sup> The handful of

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<sup>59</sup> 11 U.S.C. § 365(b)(3)(D). See also § 365(b)(4), which provides that, if there has been a default under an unexpired lease, the lessor may not be required to provide services or supplies incidental to a lease without compensation.

<sup>60</sup> 240 B.R. 826 (D. Del. 1998), appeal dismissed as moot, 209 F.3d 291 (3d Cir.), cert. denied sub nom. L.R.S.C. Co. v. Rickel Home Ctrs., Inc., 531 U.S. 873 (2000).

<sup>61</sup> “Section 404(b) amends section 365(f) to assure that section 365(f) does not override any part of section 365(b). Thus, section 404(b) makes a trustee’s authority to assign an executory contract or unexpired lease subject not only to section 365(c), but also to section 365(b), which is given full effect. Therefore, for example, assumption or assignment of a lease of real property in a shopping center must be subject to the provisions of the lease, such as use clauses.” H.R. Rep. No. 109-31, 109<sup>th</sup> Cong. 1<sup>st</sup> Sess. 87 (April 8, 2005) at 87.

<sup>62</sup> 367 F.3d 237 (4<sup>th</sup> Cir. 2004) (use clause may not be modified as *de facto* anti-assignment clause under §365(f)).

<sup>63</sup> See generally “Reexamining the Protections Afforded to Solvent Shopping Center Tenants Under § 365 of the Bankruptcy Code in Light of In re Trak Auto Corporation,” Part I, American Bankruptcy Institute Journal (the “ABIJ”), Vol. XXIII, No. 10 (December/January 2005), Pamela Smith Holleman and Magdalena Ellis.

<sup>64</sup> In re Cornell Trading, Inc., Case No. 06-10017 (various unpublished motions requesting, inter alia, that use

unpublished orders suggests that, to date, debtors and objecting landlords have resolved their differences consensually. It is not clear how a court that receives such a motion can make the requested finding that a use clause is unenforceable given the plain text of revised § 365(f)(1) and absent fairly egregious facts.

- If debtors adopt this tactic and fail to give notice to all parties in interest in a shopping center, ***including nondebtor tenants as well as landlords***, there will be a further erosion of the protections that Congress intended to provide to solvent tenants in a shopping center, which has been likened to a planned community.<sup>65</sup> Indeed, the legislative history of prior versions of Code § 365(b)(3) strongly implies that Congressional intent to afford standing to nondebtor tenants.
- Prospective bidders seeking to acquire leasehold rights pursuant to § 363 asset sales may be tempted, in view of the leverage given landlords by revised § 365(f)(1), to purchase the landlord's waiver of restrictive use clauses and the like by means of a side deal. Since the landlord may always be viewed as a prospective bidder for its own leasehold, query whether another bidder's pre-auction purchase of the landlord's consent is collusive, particularly if it is not disclosed to the debtor or to the Court.

#### 4. ***Administrative expense claims for leases assumed and then rejected, § 503(b)(7):***

BAPCPA added new § 502(b)(7), which limits the claim of a nonresidential real property landlord that arises from the rejection of a previously assumed lease, as follows:

- (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –
  - 
  - (7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty obligation, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6).

Now, as under the pre-BAPCPA Code, the rejection of an executory contract or unexpired lease gives the counterparty (landlord) an unsecured claim against the estate, unless such

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clauses, "going dark" clauses and continuous operations provisions be ruled unenforceable under § 365(f)(1) and not valid restrictions on assignment under § 365(b)(3)(C)).

<sup>65</sup> See "Reexamining the Protections Afforded to Solvent Shopping Center Tenants Under § 365 of the Bankruptcy Code in Light of *In re Trak Auto Corporation*," Part II, *ABIJ* Vol. XXIV, No. 1 (February 2005), Holleman and Ellis, discussing history of the Bankruptcy Reform Act of 1984.

contract or lease was first assumed before it was rejected.<sup>66</sup> In the case of a nonresidential landlord, § 502(b)(6) caps the claim at 15% of the rent reserved for the remaining term of the lease.<sup>67</sup>

The text of § 502(b)(7) suggests that Congress wished to cushion the blow for debtors that must reckon with strict new limits on the time in which they must assume or reject unexpired leases under revised § 365(d)(4), by capping these post-assumption, rejection damages.<sup>68</sup> It is questionable whether the new provision will help debtors much and, to date, we have no case law interpreting it; but the mechanics of the provision are hardly clear. Issues that may confront a reviewing court may include the following:

- New § 502(b)(7) incorporates § 502(b)(6) by reference. This tells us that the remainder of the landlord's claim for post-assumption rejection damages is a *capped* claim, but little more. Existing case law interpreting § 502(b)(6) is not uniform: for example, courts have differed as to how to interpret the reference in § 502(b)(6)(A) to "the rent reserved by such lease, without acceleration, for the greater of one year, or 15%".<sup>69</sup>
- Courts have interpreted the requirement for "prompt" cure to allow a debtor to make

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<sup>66</sup> See § 365(g)(1) (rejection of an executory contract or unexpired lease constitutes a breach of such contract or lease that – if the contract or lease had not been assumed prior to such rejection – is deemed to have occurred immediately before the date of filing of the petition) and § 502(g) (providing that a claim for rejection damages shall be determined as if such claim had arisen before the date of the filing of the petition). Where a contract or lease was assumed prior to rejection, the counterparty (landlord)'s claim is deemed to have arisen either at the time of the rejection or, if the case has been converted, immediately prior to the date of conversion. See § 365(g)(2). Before the enactment of BAPCPA, many courts deemed such claims administrative expenses not subject to the "cap". Because this approach could produce huge priority claims that must be cashed-out on the effective date of a plan, it logically would cause debtors to think long and hard before assuming a lease, and to push the limits of § 365(d)(4) to buy as much time as possible before being forced to make a decision that could be unmade only at great cost.

<sup>67</sup> § 502(b)(6) disallows a landlord's claim for damages resulting from the termination of a lease of real property if the claim exceeds –

- (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –
  - (i) the date of the filing of the petition; and
  - (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
- (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates ...

<sup>68</sup> The legislative history merely parrots the statute: "Section 445 of the Act amends section 503(b) of the Bankruptcy Code to add a new administrative expense priority for a nonresidential real property lease that is assumed under section 365 and then subsequently rejected. The amount of the priority is the sum of all monetary obligations due under the lease (excluding penalties and obligations arising from or relating to a failure to operate) for the two-year period following the rejection date or actual turnover of the premises (whichever is later), without reduction or setoff for any reason, except for sums actually received or to be received from a nondebtor. Any remaining sums due for the balance of the term of the lease are treated as a claim under section 502(b)(6) of the Bankruptcy Code." H.R. Rep. No. 109-31, 109<sup>th</sup> Cong. 1<sup>st</sup> Sess. 87 (April 8, 2005) at 96.

<sup>69</sup> See Chapter 11 Theory & Practice: A Guide to Reorganization, Queenan, Hendel, Hillinger (eds.), LRP Publications (2003), § 18.23.

payments over time. What result if the debtor assumes and then – before it completes payment of the cure amount – rejects a lease? Is the unsatisfied cure obligation attributable to "the period of two years following the later of the rejection date or the date of actual turnover of the premises", and thus entitled to priority treatment? If not, is the unpaid balance of the cure amount an uncapped administrative expense? Should the prepetition portion of the cure be treated differently than the postpetition arrearage? Put another way, should the cure payment be treated as unpaid rent due under the lease and added to the capped claim under § 502(b)(6)(B)?

- § 502(b)(6)(B) affords the landlord an administrative expense claim for monetary obligations commencing as of the later of the rejection date or the date of actual turnover of the premises, but is silent as to what starts the clock on the landlord's claim if the debtor rejects but remains on the premises as a holdover tenant. Similarly, the new section apparently requires the landlord to give the debtor credit for rents received from a third party, but does not expressly require a setoff of holdover rent, § 365(d)(3) payments or security deposits provided to the landlord by the *debtor*. Courts may be asked to construe this provision in the context of the wealth of case law addressing these topics.
- Will the enactment of § 502(b)(7) and other cash-depleting provisions make it more difficult for a landlord to obtain prompt payment of administrative expense claims for unpaid rent obligations arising after the order for relief pursuant to § 365(d)(3), inasmuch as the courts may become increasingly reluctant to make a finding that the estate is administratively solvent?

TABLE 1

## "COMFORT" ORDERS ENTERED PURSUANT TO BAPCPA § 1102(b)(3)

Case Name	FLYi, Inc.	Refco, Inc.	Calpine Corporation, Inc.	Airway Industries, Inc.
Case No./Citation	No. 05-20011	336 B.R. 187 (Bankr. S.D.N.Y. 2006); see also 2005 WL 3543953 (No. 05-60006, Dec. 23, 2005)	No. 05-60200	No. 06-20224 (JFK)
District:	Bankr. D. Del.	Bankr. S.D.N.Y.	Bankr. S.D.N.Y.	Bankr. W.D. Pa.
Judge issuing order:	Walrath, J.	Drain, J.	Lifland, J.	Deller, J.
Case filed:	Nov. 7, 2005	Oct. 17, 2005	Dec. 20, 2005	Jan. 20, 2006
Assets/Liabilities at time of filing:	A: \$287,133,387 L: \$260,771,743	A: \$242,129,868 L: \$16,393,000	A: \$1,399,062,533 L: \$6,611,504,737	A: \$14,437,715 L: \$67,946,301
Procedural posture:	Motion by debtors	Motion by Committee	Motion by Committee	Motion by Committee
Order date:	Nov. 17, 2005 (unpublished)	Interim order published Dec. 23, 2005; final order published Jan. 20, 2006	Order dated Feb. 15, 2006; effectively revised by Stipulation and Agreed Order dated Feb. 23, 2006 and modified by order dated April 11, 2006 (unpublished)	Feb. 22, 2006 (unpublished)
Statutory predicates:	§§ 1102(b)(3), 105(a) and 107(b) and FRBP 9018	§§ 1102(b)(3), 1103(c) and 105(a)	§§ 1102(b)(3), 1103(c) and 105(a)	§§ 1102(b)(3), 1103(c) and 105(a)
<i>Modes of access to creditor information:</i>				
Internet-accessed website authorized:	yes (permissive)	yes	yes	yes (permissive)
Other modes of access to information:	The Committee shall respond to written and telephonic inquiries and comments received from creditors	Distribute case updates via electronic mail; establish and maintain a telephone number and electronic mail address for creditors to submit questions and comments to the Committee.	same as <i>Refco</i>	Distribute case updates via electronic mail; establish and maintain a telephone number and electronic mail address for creditors to submit questions and comments to the Committee.
Information to be disclosed:	--access to documents, pleadings and other materials that the Committee, in its reasonable business judgment, are relevant and informative for creditors, including documents pertaining to any plan of reorganization and pleadings filed by the Committee.	--general case information; --monthly Committee written reports; --highlights of significant events in the cases; --calendar with upcoming significant events in the cases; --access to claims docket; --general overview of Chapter 11 process; --press releases (if any) issued by the Committee and the Debtors; --a non-public registration form for creditors	same as <i>Refco</i> (20 days)	--general case information; --quarterly Committee written reports; --highlights of significant and material events in the cases; --calendar with upcoming significant and material events in the cases; --access to claims docket; --general overview of Chapter

TABLE 1  
 "COMFORT" ORDERS ENTERED PURSUANT TO BAPCPA § 1102(b)(3)

		to request "real-time" case updates via e-mail; --a non-public form to submit creditor questions, comments and requests for access to information; --responses to creditor questions; --answers to frequently asked questions; --links to other relevant websites.		11 process; --press releases (if any) issued by the Committee and the Debtors; --responses to creditor questions, comments and requests for access to information; provided that the Committee may privately provide such responses in the exercise of its reasonable discretion; --answers to frequently asked questions; --links to other relevant websites; provided that no access or link will bypass the login and password requirements of the PACER or ECF websites.
<b>Information subject to discovery (e.g. Rule 2004 examinations)</b>	not specifically addressed	Governed by specific discovery orders.	same as <i>Refco</i>	same as <i>Refco</i>
<b>Identification of information provided by third parties:</b>	not specifically addressed	Debtors shall assist Committee in identifying any confidential information concerning the debtors that is provided by the debtors, their agents or professionals, or by any third party.	same as <i>Refco</i> , except that confidential information provided to Committee pursuant to confidentiality agreement with Canadian affiliates and monitor appointed in Canadian proceeding shall not be subject to disclosure (April 11, 2006 modification)	same as <i>Refco</i>
Process for responding to creditor information requests and for dispute resolution:	none specific	Committee must respond within 20* days to written requests submitted on the Committee website or by e-mail. If the response is to deny the request, the creditor may, after a good faith effort to meet and confer with the Committee, move to compel such disclosure "for cause".  If an Information Request implicates confidential information of the debtor or third	same as <i>Refco</i> (20 days)	same as <i>Refco</i> (20 days)

TABLE 1  
 "COMFORT" ORDERS ENTERED PURSUANT TO BAPCPA § 1102(b)(3)

		<p>parties, or if the Committee on its own wishes to disclose such information, it must submit a Committee Information Demand to debtor's counsel (and the third party if applicable). Absent objection within 15 days, the Committee may disclose the information. If an objection is filed, a hearing will be scheduled to rule on the request (pursuant to §704(a)(7) in the case of debtor information).</p> <p>*10 days on or after Jan. 31, 2006</p>		
<p><b>Privileged, confidential and other non-public information:</b></p>	<p>The Committee is not authorized or required by §1102(b)(3) to provide access to any confidential information of the debtors.</p> <p>The Committee may, but is not required, to provide access to privileged information so long as (a) the privileged information is not confidential, and (b) the relevant privilege is held and controlled solely by the Committee.</p>	<p>Committee need not disclose without further order of the Court, and may take into consideration in deciding whether to release such information to a requesting creditor, whether creditor is willing to agree to reasonable confidentiality and trading restrictions.</p>	<p>same as <i>Refco</i></p>	<p>same as <i>Refco</i></p>
<p><b>Provisions specific to claims/equity securities traders:</b></p>	<p>none specific</p>	<p>none specific</p>	<p>none specific</p>	<p>If the requesting creditor is involved in trading claims against or equity interest in the debtors, it must file and serve upon the Committee, the debtors and the U.S. Trustee a document confirming that it has established a "Screening Wall".</p>
<p><b>Provisions specific to market competitors:</b></p>	<p>none specific</p>	<p>none specific</p>	<p>none specific</p>	<p>If the requesting creditor is a competitor or prospective competitor of the debtors and the information requested may impair the debtors, no information may be disclosed unless the</p>

TABLE 1

“COMFORT” ORDERS ENTERED PURSUANT TO BAPCPA § 1102(b)(3)

<p><b>Exculpation</b></p>	<p>none</p>	<p>Exculpation for Committee, debtors, their directors, officers, employees, members, attorneys, consultants, advisors and agents for acts and omissions in the preparation, dissemination and implementation of creditor information protocol, coextensive with the excused party’s qualified immunity under applicable law; provided that exculpation shall not affect liability for breach of fiduciary duty, gross negligence and willful misconduct (including fraud, criminal conduct, breach of any confidentiality agreement or order)</p>	<p>same as <i>Refco</i></p>	<p>Court orders such disclosure after notice and a hearing. same as <i>Refco</i></p>
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“COMFORT” ORDERS ENTERED PURSUANT TO BAPCPA § 1102(b)(3)

Case Name	AmCast Automotive of Indiana, Inc. and AmCast Industrial Corporation	G+G Retail, Inc.	Riverstone Networks, Inc.	OCA, Inc.
<b>Case No./Citation</b>	No. 05-33322	No. 06-10152	No. 06-10110 (CSS)	No. 06-10179 (B)
<b>District:</b>	Bankr. S.D. Ind.	Bankr. S.D.N.Y.	Bankr. D. Delaware	Bankr. E.D. La.
<b>Judge issuing order:</b>	Otte, J.	Drain, J.	Sontchi, J.	Brown, J.
<b>Case filed:</b>	Dec. 1, 2005	Jan. 25, 2006	Feb. 7, 2006	Mar. 14, 2006
<b>Assets/Liabilities at time of filing:</b>	A: \$56,639,073 L: \$91,796,762	A: \$83,611,955 L: \$37,290,048	A: \$128,361,583 L: \$81,580,504	A: \$86,902,729 L: \$112,028,256
<b>Procedural posture:</b>	Motion by Committee	Motion by Committee	Motion by Committee	Motion by Committee
<b>Order date:</b>	March 6, 2006 (unpublished)	March 9, 2006 (unpublished)	April 11, 2006 (unpublished)	May 15, 2006 (unpublished)
<b>Statutory predicates:</b>	§§ 1102(b)(3), 105(a) and 107(b) and FRBP 9018	§§ 1102(b)(3), 105(a) and 107(b) and FRBP 9018 (cited as authority by Committee in its motion)	§§ 1102(b)(3), 1103(c) and 105(a)	§§ 1102(b)(3), 1103(c) and 105(a)
<b>Modes of access to creditor information:</b>				
<b>Internet-accessed website authorized:</b>	no	yes (permissive)	yes (permissive)	yes (permissive)
<b>Other modes of access to information:</b>	Requests to be made by calling (in the case of general information requests) or writing (in the case of requests for pleadings) to Committee counsel or writing to authorized representative.  The Committee, by and through counsel, shall provide copies of pleadings filed in the case and shall “be available” to parties requesting details of the status of the cases.	Respond to written and telephonic inquiries.	Establish and maintain an electronic mail address for creditors to submit questions and comments to the Committee.	Establish and maintain an electronic mail address for creditors to submit questions and comments to the Committee.
<b>Information to be disclosed:</b>	--copies of pleadings filed in the cases; --details regarding the status of the cases.	---access to documents, pleadings and other materials that the Committee believes, in its reasonable business judgment, are reasonably relevant and informative for creditors, including documents pertaining to any plan of reorganization in the case and pleadings filed by the Committee.	--general case information; --monthly Committee written reports; --highlights of significant and material events in the cases; --calendar with upcoming significant and material events in the cases; --access to claims docket; --	--general case information; --quarterly Committee written reports; --highlights of significant and material events in the cases; --calendar with upcoming significant and material events in the cases; --access to claims docket; --

“COMFORT” ORDERS ENTERED PURSUANT TO BAPCPA § 1102(b)(3)

				<p>general overview of Chapter 11 process;          --press releases (if any) issued by the Committee and the Debtors;          --responses to creditor questions; --answers to frequently asked questions;          --links to other relevant websites.</p>	<p>--general overview of Chapter 11 process;          --press releases (if any) issued by the Committee and the Debtors;          --responses to creditor questions, comments and requests for access to information; provided that the Committee may privately provide such responses in the exercise of its reasonable discretion;          --answers to frequently asked questions;          --links to other relevant websites.</p>
<b>Information subject to discovery (e.g. Rule 2004 examinations)</b>	not specifically addressed	not specifically addressed	not specifically addressed	same as <i>Refco</i>	same as <i>Refco</i>
<b>Identification of information provided by third parties:</b>	not specifically addressed	not specifically addressed	not specifically addressed	same as <i>Refco</i>	same as <i>Refco</i>
Process for responding to creditor information requests and for dispute resolution:	In the event that a party seeks information and the Committee fails or refuses to produce it, the requesting party may seek an order of the Court directing the production of the information sought.	Committee “shall respond” to written and telephonic inquiries; no specifics provided; no dispute resolution mechanism discussed.	Committee “shall respond” to written and telephonic inquiries; no specifics provided; no dispute resolution mechanism discussed.	same as <i>Refco</i> (20 days)	same as <i>Refco</i> (20 days)
<b>Privileged, confidential and other non-public information:</b>	Committee has no obligation to disclose.	Committee has no obligation to disclose.	Committee has no obligation to disclose.	same as <i>Refco</i>	same as <i>Refco</i>
<b>Provisions specific to claims/equity securities traders:</b>	none specific	none specific	none specific	Same as <i>Airway Industries</i>	Same as <i>Airway Industries</i>
<b>Provisions specific to market competitors:</b>	none specific	none specific	none specific	Same as <i>Airway Industries</i>	Same as <i>Airway Industries</i>

“COMFORT” ORDERS ENTERED PURSUANT TO BAPCPA § 1102(b)(3)

<p><b>Exculpation</b></p>	<p>Not specifically addressed; but the Committee’s obligations under §1102(b)(3)(A) shall be satisfied by complying with the provisions of the procedures set forth in the order.</p>	<p>Not specifically addressed; but the Committee’s obligations under §1102(b)(3)(A) shall be satisfied by complying with the provisions of the procedures set forth in the order.</p>	<p>same as <i>Refco</i></p>	<p>same as <i>Refco</i></p>
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