

## **Exceptions to Public Document Access in Bankruptcy Narrowly Construed**

November/December 2005

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One of the hallmarks of the U.S. bankruptcy system is ready access to information concerning any debtor that files for bankruptcy protection. The integrity of that system is premised upon the presumption that not only creditors and other interested parties in a bankruptcy case, but the public at large, should have the unfettered ability to examine any document filed by a debtor with the bankruptcy court. Rooted in the common law right of access to public documents, full disclosure promotes the legitimacy of the bankruptcy court as an institution entrusted with impartially applying the nation's bankruptcy laws and administering debtors' estates for the benefit of all interested parties. Unrestricted access to judicial records also fosters confidence among creditors regarding the fairness of the bankruptcy system.

As with every general rule, the principle of full public access has exceptions. Thus, where disclosure of information would result in the revelation of trade secrets or where the matters involved are scandalous or defamatory, a bankruptcy court has the power to implement protective measures that are appropriate to the circumstances. The manner in which such relief should be fashioned was the subject of a ruling recently handed down by the First Circuit Court of Appeals. In *In re Gitto Global Corp.*, the Court of Appeals held that potentially untrue statements must either be irrelevant or included for an improper purpose to qualify as "scandalous or defamatory" information and, therefore, be protected from public disclosure.

## Public Access to Court Documents

The public's general right to inspect and copy public documents, including judicial records, has long been a part of the common law. The existence of such rights, which are based upon the public's interest in monitoring the workings of the judicial system, are universally regarded as being "fundamental to a democratic state." They are closely allied to the First Amendment presumption that court proceedings should ordinarily be open to the press and the public.

Section 107(a) of the Bankruptcy Code recognizes the right of public access in a bankruptcy case. It provides that "[e]xcept as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." The scope of the provision extends to nearly all documents filed with the court, but there are certain exceptions. For example, other rules shield from public disclosure an individual debtor's social security number (or the fact that none exists) to prevent this information from becoming part of the public record.

The common law right of access to public documents is not absolute — confidentiality may be justified if access to information is sought for an improper purpose. This caveat is reflected in section 107(b)(2) of the Bankruptcy Code. It provides that if an interested party so requests, "the bankruptcy court shall . . . (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title." The statute also authorizes the bankruptcy court to undertake such protective measures on its own initiative. The second prong of the exception applies to any "person," which includes individuals,

partnerships and corporations but excludes most governmental entities. No such restriction applies to the first prong, whose scope encompasses not only any "person," but governmental entities, estates and trusts as well.

Rules of bankruptcy procedure create a mechanism for the application of section 107(b). Rule 1007(j) requires any party seeking to prevent disclosure of a list of creditors or stockholders to file a motion seeking such relief with the court, which will impound the list, or permit only limited inspection, upon a showing of "cause." Also, Rule 9018 permits the court, upon request or its own initiative, to issue any order:

- (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information;
- (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code; or
- (3) to protect governmental matters that are made confidential by statute or regulation.

Any of the relief contemplated by section 107 and the procedural rules implementing it is subject to the caveat that exceptions to the broad right of public access should be made sparingly. The statute's application was recently addressed by the First Circuit for the first time in *Gitto Global*.

### **Gitto Global**

Plastics manufacturer Gitto Global Corp. filed for chapter 11 protection in 2004. Shortly thereafter, the bankruptcy court appointed an examiner to investigate allegations of fraud, mismanagement, accounting irregularities and other misconduct committed by Gitto's pre-bankruptcy management. The examiner compiled his report by the end of 2004, but sought court authority to file the document under seal and to have it impounded pending further order of the

court. The court granted the motion, subject to a requirement that any party-in-interest be allowed to seek court permission to unseal the report. It later issued orders modifying the terms of access to permit partial disclosure of the report in redacted form.

Gitto's chairman, its chief executive officer and 24 other individuals (collectively, the "officers") requested that the entire report remain sealed, arguing that there is no right of public access to the report under either common law or the First Amendment. They also claimed that because the document contained scandalous and defamatory material within the meaning of section 107(b)(2), the usual presumption of public access under section 107(a) does not apply. Two news organizations opposed the request. The media contended that common law, the First Amendment and section 107(a) created a right of public access to the report, and that the officers failed to prove that any portions of the report were defamatory or scandalous such that section 107(b)(2) applied to overcome the presumption of access.

The bankruptcy court concluded that there was nothing scandalous or defamatory in the report. It ruled that the entire report (with minor exceptions) should be made publicly available consistent with section 107(a) and the common law presumption of access. It declined to address whether the First Amendment also creates such a right. The district court affirmed that ruling on appeal, although it adopted a broader definition of "defamatory" than the bankruptcy court. The officers appealed to the First Circuit.

### **The First Circuit's Ruling**

The officers fared no better with the Court of Appeals. After exploring the presumption of access to documents filed in court under common law, the First Circuit explained that, in the bankruptcy context, this right is codified in section 107, which "establishes a broad right of public access, subject only to limited exceptions set forth in the statute, to all papers filed in a bankruptcy case." Because it directly addresses the question of access, the Court of Appeals concluded, section 107 supplants the common law for purposes of determining public access to papers filed in a bankruptcy case.

The First Circuit then directed its inquiry to the issue at hand — namely, whether material in the report falls within the section 107(b)(2) exception for "defamatory matter." According to the officers, they were only required to "identify material that would cause a reasonable person to alter his opinion of them" to qualify for the exception. The First Circuit rejected such a low threshold for non-disclosure, agreeing with the district court that "it would sweep all manner of documents into its embrace" in contravention of the section 107(a) presumption favoring public access in the bankruptcy context.

It found similarly unpersuasive the officers' contention that section 107(b), like the common law, obligates a bankruptcy court to engage in a balancing of competing interests to determine what protective measures justice requires, whether it be sealing or a more modest form of protection. Once an interested party identifies material that is scandalous or defamatory, the Court of Appeals emphasized, "the court must protect the party. . . . [a]lthough the protection may stop short of sealing the entire document containing the defamatory material." According to the First

Circuit, section 107 "speaks directly to the issues regarding disclosure that are addressed by the common law analysis; its framework is not merely a prelude to the common law analysis."

Observing that "[p]apers filed in the bankruptcy court do not fall within the § 107(b)(2) exception merely because they would have a detrimental impact on an interested party's reputation," the First Circuit concluded that "something more" is required to render statements as defamatory within the meaning of the statute. It faulted as "largely unworkable" the lower courts' test equating defamatory with "untruthful." According to the Court of Appeals, it would be unrealistic to require a bankruptcy court to resolve factual disputes at a preliminary stage in the case, and "[t]he untruthfulness requirement would add an enormous burden to the bankruptcy courts' already heavy docket by turning motions for protection under § 107(b)(2) into an occasion for mini-trials."

The Court of Appeals opted instead for a two part test: (i) where untruthfulness is readily apparent, the court may prevent disclosure of the information; and (ii) where, as is more likely in the great majority of cases, information that would alter a party's reputation in the eyes of a reasonable person can only be shown to be "potentially untrue," an "additional showing" is required before the court can limit access to the information. Looking to analogous federal procedural rules for guidance, the First Circuit concluded that the precise nature of this additional showing is context-sensitive. In other words, "the purpose of including material in a paper filed with the court should inform the inquiry into whether that material falls within the § 107(b)(2) exception." The Court of Appeals, after examining other cases interpreting the exclusion, agreed with the district court below that, in order to fall within the scope of section

107(b)(2), potentially untrue statements must also be "irrelevant or included within a bankruptcy filing for an improper end."

Having established the groundrules for application of section 107(b)(2), the First Circuit examined whether the information that the officers wanted to remain under seal (namely, allegations of mismanagement or other fiduciary improprieties) satisfied either prong of the test. The Court of Appeals easily concluded that it did not. First, the officers had not proven that the material in the report was inaccurate — at best, they demonstrated that certain statements were potentially untrue, a contingency that would be resolved only after the examiner's continuing investigation produced supporting or contradictory evidence. Next, the First Circuit determined that the statements were neither irrelevant, as pertaining directly to the examiner's investigation of alleged managerial misconduct and accounting irregularities, nor included for an improper end, given the absence of any indication that the examiner was other than disinterested or filed his report in bad faith or with an ulterior motive. It accordingly affirmed the rulings below.

### **Outlook**

The right of access to documents filed in court is rooted strongly in the U.S. system of justice. Exceptions to the rule are drawn narrowly, and courts generally cast a critical eye on any attempt to abridge it. The First Circuit's ruling in *Gitto Global* demonstrates that the right of access is as important in bankruptcy as in any other context.

Even so, bankruptcy courts can, and frequently do, implement appropriate measures to shield information from disclosure that legitimately falls within the categories described in section

107(b)(2). It remains to be seen whether bankruptcy courts will embrace the First Circuit's formulation of the standard to be applied in cases of allegedly defamatory statements.



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*Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.)*, 422 F.3d 1 (1<sup>st</sup> Cir. 2005).