INTRA-COMMITTEE CONFLICTS, MULTIPLE CREDITORS' COMMITTEES, ALTERING COMMITTEE MEMBERSHIP AND OTHER ALTERNATIVES FOR ENSURING ADEQUATE REPRESENTATION UNDER SECTION 1102 OF THE BANKRUPTCY CODE

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The present creditors' committee under section 1102 of the Bankruptcy Code[1] evolved from the former "protective committee" found in federal equity receivership cases. Protective committees were usually appointed for each class of public debt. Today, a single creditors' committee is often appointed to represent the interests of all unsecured creditors as a class. As a result, the unsecured creditors' committee represents diverse creditor groups that often have competing interests.

In some instances, the competing interests of creditors' committee members may result in a situation where the creditors' committee is not adequately representing the interests of a particular creditor group. Often, the dispute arises because a committee member allegedly has a competing fiduciary or contractual duty or because a particular creditor group believes that it is under-represented or disenfranchised. In those cases, the bankruptcy court usually must determine whether it is necessary to appoint an additional committee under section 1102(a)(2) of the Bankruptcy Code so that the creditor group is adequately represented. A bankruptcy court may also consider some other form of relief, such as altering the creditors' committee membership or appointing an official subcommittee to insure that a creditor group is adequately represented in the reorganization process.

INTRODUCTION

In order to understand the dynamics of a modern creditors' committee, it is important to understand the roots of such committees and the prior practices for selecting creditors' committee members in federal bankruptcy cases. Those roots are found in creditors' committees in federal equity receivership cases.

The concept of a committee to protect the interests of creditors was common in federal equity receivership cases.[2] Such committees were referred to as "protective

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[1] *See* 11 U.S.C. § 1102 (2006); Daniel J. Bussel, *Coalition-Building Through Bankruptcy Creditors' Committees*, 43 UCLA L. REV. 1547, 1553 n.15 (1996) (detailing history of corporate reorganization law); *see generally* Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) (discussing history of bankruptcy laws).

[2] *See* Bussel, *supra* note 1, at 1553 (explaining formation and role of protective committees in federal equity receivership cases); *see also* Rosset v. Mayfair Bldg. Corp. (*In re* Mayfair Bldg. Corp.), 97 F.2d 826, 827 (7th Cir. 1938) (stating bondholders' protective committee was created for purpose of enforcing and collecting bonds of committee members); Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11*

committees." In contrast to the appointment of a single creditors' committee under section 1102 of the Bankruptcy Code, a protective committee was formed for each class of public debt.[3] The protective committee would utilize proxies or the actual deposit of securities to empower itself to negotiate a plan of arrangement on behalf of the committee's constituents.[4]

A debtor's management and its allies, often large institutional investors, usually created the protective committees.[5] Protective committees were criticized because there was little protection for dissenting creditors and because other creditors that consented to the reorganization were often taken advantage of in the informal extrajudicial process.[6]

In enacting the Bankruptcy Code of 1978, Congress intended that creditors' committees would "provide supervision of the debtor in possession and of the trustee" and "protect their constituents' interests."[7] Congress intended that creditors' committee would serve as the "primary negotiating bodies" for the formulation of plans of reorganization.[8]

Congress further intended that creditors' committees would adequately represent their constituents, but authorized the bankruptcy court to appoint additional committees "if necessary to assure adequate representation" of creditors.[9] Congress believed that such authority would be "relied upon in cases in which the debtor proposes to affect several classes of debt . . . under the plan, and in which they need representation."[10]

Disputes have arisen concerning whether a particular creditors' committee member, or the committee itself, is adequately representing the interests of some of its constituents. For example, disputes have arisen where a committee member allegedly has a competing fiduciary or contractual duty that precludes it from adequately representing the interests of its constituents. In those instances, a bankruptcy court may consider altering the membership of the creditors' committee.

In addition, other disputes have arisen where intra-committee conflict forms the basis for a claim of lack of adequate representation. Certainly, some conflict among creditors' committee members is inherent in the process of bringing together different creditor groups in an effort to reach a consensus. On the other hand, at

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Reorganization Remain a Viable Option For Distressed Businesses in the Twenty-First Century?, 78 AM. BANKR. L.J. 153, 163 (2004) (discussing history and development of federal receivership).

[3] *See* Bussel, *supra* note 1, at 1553 ("[C]ommittees representing each class of public debt would form."); *see also In re* Jeppson, 66 B.R. 269, 277–78 (Bankr. D. Utah 1986) (noting committees were formed to create aggregate representation and allow submission of bankruptcy plans for debtor); Tabb, *supra* note 1, at 22 (discussing history of equity receiverships and use of protective committees).

[4] *See* Bussel, *supra* note 1, at 1553 (discussing use of proxies by committees).

[5] *See id.* at 1556, 1560 (discussing debtor's control over committees).

[6] *See id.* at 1556 (describing how debtors' management and its allies are able to control reorganization process and realize "spoils" of reorganization).

[7] H.R. REP. NO. 95-595 (1977).

[8] H.R. REP. NO. 95-595, at 401 (1977).

[9] 11 U.S.C. § 1102(a)(2) (2006).

[10] H.R. REP. NO. 95-595, at 401.

some point, the conflict may rise to a level at which a creditor or group of creditors is effectively disenfranchised and without a voice. When the conflict reaches that level, a bankruptcy court may consider ordering the appointment of one or more additional committees, altering the membership of the creditors' committee, or appointing official subcommittees, as may be necessary to assure adequate representation.

I. APPOINTMENT OF CREDITORS' COMMITTEES IN GENERAL

Under the former Bankruptcy Act (repealed 1978),[11] creditors' committee members were selected by the creditors.[12] When Congress enacted the current Bankruptcy Code in 1978, Congress rejected a procedure for the election of creditors' committee members and, instead, provided the bankruptcy court with the responsibility for the appointment of creditors' committee members.[13] Moreover, the bankruptcy court had the authority under former section 1102(c) of the Bankruptcy Code to change the size or membership of a creditors' committee if the committee was not representative of different kinds of claims represented by the committee.[14]

In 1986, Congress shifted the responsibility for the appointment of a creditors' committee to the United States Trustee because Congress considered the

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[11] Bankruptcy Act, Amendments of 1938, Pub. L. No. 75-696, 52 Stat. 840 (1938) (formerly codified as amended, at 11 U.S.C. §§ 1-1103 (1976)).

[12] *See* 11 U.S.C. § 609 (1976) (repealed 1978) (providing, in chapter X, any committee need only file document evidencing authority to act on behalf of committee members, signed statement identifying committee members, nature and amount of their claims, and circumstances of committee's formation); 11 U.S.C. § 738 (1976) (repealed 1978) (providing, in chapter XI, for election of official creditors' committee of at least three, but no more than eleven creditors); Richard Niles Chassin, *Judicial Misinterpretations of Creditors' Committees*, 1 BANKR. DEV. J. 107, 109 (1984) (noting creditors elected members of creditors' committee).

[13] 11 U.S.C. § 1102(a)(1) (1982), *amended by* Act of Oct. 27, 1986, Pub. L. No. 99-554, § 221, 100 Stat. 3088, 3101 (charging court with appointment of committee of creditors); *see also* 124 CONG. REC. H11102 (daily ed. Sept. 28, 1978) (statement of Rep Edwards); 124 CONG. REC. S17419 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini); Kenneth N. Klee and K. John Shaffer, *Creditors' Committees under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. REV. 995, 1001–02 (1993) (tracking shift in responsibility for appointing creditors' committees to bankruptcy courts).

[14] *See* 11 U.S.C. § 1102(c) (repealed 1986):

> On request of a party in interest and after notice and a hearing, the court may change the membership or size of a committee appointed under subsection (a) of this section if the membership of such committee is not representative of the different kinds of claim or interests . . . .

Id.; *see also* Chassin, *supra* note 12, at 117–18 (discussing operation of section 1102); Thomas Henry Coleman & David E. Woodruff, *Looking Out For Shareholders: The Role of the Equity Committee in Chapter 11 Reorganization Cases of Large, Publicly Held Companies*, 68 AM. BANKR. L.J. 295, 302–03 (1994) (indicating some courts find removal of section 1102(c) from Code to mean they no longer have authority to alter creditor committee membership, while other courts have held they retain some authority to alter committee membership under section 105(a)).

appointment process to be "an administrative task."[15] The bankruptcy court, however, retained the authority to order the appointment of additional committees as necessary, but the United States Trustee had the authority to actually appoint the committee members once the court so ordered.[16] In 1986, Congress also deleted section 1102(c) of the Bankruptcy Code.[17]

Section 1102(a)(1) of the Bankruptcy Code provides, that "as soon as practicable after the order for relief under chapter 11 of this title, the United States Trustee *shall* appoint a committee of creditors holding unsecured claims and *may* appoint additional committees of creditors or of equity security holders as the United States Trustee deems appropriate."[18] Accordingly, section 1102(a)(1) mandates that the United States Trustee appoint at least one creditors' committee in a chapter 11 case if creditors are willing to serve.[19]

The United States Trustee has the discretion to appoint additional committees under section 1102(a)(1).[20] On request of a party in interest, however, the bankruptcy "court *may* order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders."[21] If the court orders the appointment of an

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[15] 11 U.S.C. § 1102(c) (1982) (repealed 1986); H.R. REP. NO. 99-764, at 28 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5227, 5240–41 ("Section 218 amends 11 U.S.C. [§] 1102 to transfer the authority to appoint the chapter 11 committee of unsecured creditors from the court to the U.S. Trustee, as it is an administrative task."); Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 453 (1995) (explaining courts evaluate whether creditors' committees provide adequate representation after United States Trustee performs "administrative task" of appointing committee); Greg M. Zipes & Lisa L. Lambert, *Creditors' Committee Formation Dynamics: Issues in the Real World*, 77 AM. BANKR. L.J. 229, 234 n.33 (2003) (discussing shift of responsibility for appointing creditors' committees).

[16] H.R. REP. NO. 95-595, at 114 (1977); *see also* Miller, *supra* note 15, at 451–52 (commenting on courts' authority to appoint additional committees). *But see* Carl A. Eklund & Lynn W. Roberts, *The Problem with Creditors' Committees in Chapter 11: How to Manage the Inherent Conflicts Without Loss of Function*, 5 AM. BANKR. INST. L. REV. 129, 131 (2000) (noting often-litigated issue is whether court has authority to alter committee).

[17] Act of Oct. 27, 1986, Pub. L. No. 99-554, § 221, 100 Stat. 3088, 3101; *see also* Coleman & Woodruff, *supra* note 14, at 302 (citing 1986 deletion of section 1102(c) of Bankruptcy Code); Eklund & Roberts, *supra* note 16, at 131 (discussing litigation after 1986 deletion of section 1102(c) of Bankruptcy Code).

[18] 11 U.S.C. § 1102(a)(1) (2006) (emphasis added).

[19] *See* H.R. REP. NO. 95-595, at 114 (1977) ("Subsection (a) requires the court to appoint at least one committee."); *see also* Coleman & Woodruff, *supra* note 14, at 296 (discussing appointment of committee by United States trustee). The bankruptcy court, however, may "for cause" order that a creditors' committee not be appointed in a chapter 11 case filed by "small business debtor." *See* 11 U.S.C. §§ 1102(a)(3), 101(51C) (2006) (defining "small business"); *id.* § 101(51D) (defining "small business debtor"); *see also* Ned W. Waxman, *The Bankruptcy Reform Act of 1994*, 11 BANK. DEV. J. 311, 335 (1994) (explaining when debtor elects to be treated as small business, the court may decline appointment of committee).

[20] *See* 11 U.S.C. § 1102(a)(1) (2006) ("The United States trustee . . . may appoint additional committees of creditors . . . as the United States trustee deems appropriate."); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1102.03[4], at 1102–25 (Alan N. Resnick et al. eds., 15th ed. 2003) (discussing power of United State trustee in appointing committee).

[21] 11 U.S.C. § 1102(a)(2) (2006); *see also In re* Garden Ridge Corp., No. 04-10324, 2005 WL 523129, at *2 (Bankr. D. Del. March 2, 2005) (noting under section 1102(a)(2), "court *may* order the appointment of

additional committee, "the United States trustee shall appoint any such committee."[22]

A creditors' committee shall "ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds of claims represented on such committee . . . ."[23] In accordance with the legislative history, courts have interpreted the language regarding the "ordinary" appointment of the seven largest unsecured creditors as non-binding.[24] A creditors' committee may also consist of the members of a committee organized by creditors before the commencement of the bankruptcy case, if such committee was "fairly chosen and is representative of the different kinds of claims to be represented."[25]

II. FIDUCIARY DUTY OF CREDITORS' COMMITTEE MEMBERS

A member of a creditors' committee owes a fiduciary duty to the *class* of creditors that the committee was appointed to represent.[26] That fiduciary duty is

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additional committees.") (emphasis in original); Victor v. Edison Bros. Stores (*In re* Edison Bros. Stores), No. 95-1354, 1996 WL 534853, at *3 (D. Del. Sept. 17, 1996) (Section 1102(a) "explicitly provides the bankruptcy court with discretion."); Mirant Americas Energy Mktg., L.P., v. Enron Corp., No. 02 Civ. 6274, 2003 WL 22327118, at *3 (Bankr. S.D.N.Y. Oct. 10, 2003) (quoting *Edison Bros.*).

[22] 11 U.S.C. § 1102(a)(2) (2006). Section 1114(d) of the Bankruptcy Code provides for the appointment of a retirees' committee if the debtor seeks to modify or not pay retirees' benefits, or if the court otherwise determines that it is appropriate. *See* 11 U.S.C. § 1114(d) (2006). A discussion of section 1114(d) is beyond the scope of this paper.

[23] 11 U.S.C. § 1102(b)(1) (2006); *see id.* § 101(5) (defining "claim"); *id.* § 101(41) (defining "person"). *See* discussion *infra* Part VII regarding the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which added subsection (a)(4) to section 1102.

[24] *See In re* Dow Corning Corp., 212 B.R. 258, 261 (E.D. Mich. 1997) (citing legislative history for proposition language of section 1102(b)(1) is "precatory rather than mandatory"); H.R. REP. NO. 95-595, at 401 (1977) (referring to language of section 1102(b)(1) as "precatory"). Notably, in *Dow Corning*, the district court held that a United States trustee could appoint a person that was not a creditor to the creditors' committee. *See Dow Corning*, 212 B.R. at 261, 264 (allowing appointment of attorney to committee); Klee & Shaffer, *supra* note 13, at 1005 (stating most courts have interpreted provision favoring appointment of seven largest creditors as permissive).

[25] 11 U.S.C. § 1102(b)(1) (2006).

[26] *See* Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 256 (3d Cir. 2001) (stating members of official creditor's committee owe fiduciary duty "toward their constituent members"); Walsh v. Westmoreland Human Opportunities, Inc. (*In re* Life Serv. Sys., Inc.), 279 B.R. 504, 513 (Bankr. W.D. Pa. 2002) ("Members of a creditors' committee owe a fiduciary duty to the committee's constituents—*i.e.*, the class of general unsecured creditors in general."); *In re* Dow Corning Corp., 255 B.R. 445, 485 (E.D. Mich. 2000) (noting "fiduciary duty extends to the class as a whole, not to its individual members." (quoting *In re* Drexel Burnham Lambert Group, Inc., 138 B.R. 717, 722 (Bankr. S.D.N.Y. 1992))), *aff'd sub nom* Class Five Nevada Claimants v. Dow Corning Corp., 280 F.3d 648 (6th Cir. 2002), *cert. denied*, 537 U.S. 816 (2002); ABF Capital Mgmt. v. Kidder Peabody & Co. (*In re* Granite Partners, L.P.), 210 B.R. 508, 516 (Bankr. S.D.N.Y. 1997) ("The committee and its members owe a fiduciary duty to *the class of* creditors that the committee represents.") (emphasis in original); Pan Am. Corp. v. Delta Air Lines, 175 B.R. 438, 514 (S.D.N.Y. 1994) (noting creditors committee owes fiduciary duty only to class of creditors, not to debtor or any other party); *In re* Drexel Burnham Lambert Group, Inc., 138 B.R. 717, 722 (Bankr. S.D.N.Y. 1992) (discussing fiduciary duty extending to class of committee constituents and correlative grant of limited immunity), *aff'd*, 140 B.R. 347 (S.D.N.Y. 1992); Johns-Manville Sales Corp. v. Doan (*In re* Johns-Manville Corp.), 26 B.R. 919, 924 (Bankr. S.D.N.Y. 1983) ("[A] holder of a claim or an equity interest who serves on a committee undertakes to act in a fiduciary capacity on behalf of the members of the class he represents.");

owed to all of its constituents, whether or not a particular group of constituents has a seat on the creditors' committee.[27] In exercising that fiduciary duty, the committee must "guide its actions so as to safeguard as much as possible the rights of minority as well as majority creditors."[28] Creditors' committee members, however, do not owe a fiduciary duty to any particular creditor.[29] A committee member is held to a standard of conduct that is "[n]ot honesty alone, but the punctilio of an honor the most sensitive . . . ."[30] The committee members' fiduciary duty to the represented class includes obligations of fidelity, undivided loyalty, and impartial service in pursuing the class' interests.[31]

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see also In re PWS Holding Corp., 228 F.3d 224, 246 (3d Cir. 2000) (creditors' committee stands as fiduciary to "committee's constituents"); *In re* Garden Ridge Corp., No. 04-10324, 2005 WL 523129, at *3 (Bankr. D. Del. March 2, 2005) ("[O]fficial committee of unsecured creditors has a duty to represent all general unsecured creditors, including landlords to the extent that they have general unsecured claims."); *Mirant*, 2003 WL 22327118, at *4 ("It is well settled that a creditors' committee owes a fiduciary obligation to its constituency.").

[27] *See Mirant*, 2003 WL 22327118, at *7 (noting concerns are "tempered . . . by the fundamental notion that a committee represents all unsecured creditors whether or not a member of a particular group is included in its membership." (quoting *In re* McLean Indus., Inc., 70 B.R. 852, 862 (Bankr. S.D.N.Y. 1987))); Rickel & Assocs. v. Smith (*In re* Rickel & Assocs.), 272 B.R. 74, 100 (Bankr. S.D.N.Y. 2002) (stating creditors' committee "serve more than one master."); Krafsur v. UOP (*In re* El Paso Refinery, L.P.), 196 B.R. 58, 74 (Bankr. W.D. Tex. 1996) (observing "courts are uniformed in their opinion that the members of creditors committee owe a fiduciary duty to the class that the committee represents . . . .").

[28] Shaw & Levine v. Gulf & Western Indus. (*In re* Bohack Corp.), 607 F.2d 258, 262 n.4 (2d Cir. 1979).

[29] *See Dow Corning Corp*., 255 B.R. at 485 (stating "fiduciary duty extends to the class as a whole, *not to its individual members*." (quoting *Drexel Burnham*, 138 B.R. at 722)) (emphasis added)); *Granite Partners,* 210 B.R. at 516 (acknowledging creditors' committee members "do not . . . owe a fiduciary duty to any particular creditor."). A creditors' committee also does not owe any fiduciary duty to the debtor or its estate. *See Life Serv. Sys.*, 279 B.R. at 513 (indicating purpose of creditor committee is to maximize distribution to creditor class); *In re* Fas Mart Convenience Stores, Inc., 265 B.R. 427, 432 (Bankr. E.D. Va. 2001) (positing fiduciary duty owed to all creditors, but not to debtor); *Granite Partners*, 210 B.R. at 516 (noting no fiduciary attaches from creditor committee members to parties other than class of creditors, including the estate); *In re* Barney's, Inc., 197 B.R. 431, 441–42 (Bankr. S.D.N.Y. 1996) (contrasting committee's lack of duty owed to debtor or its estate with committee's fiduciary duty to all creditors represented by committee); *In re* Seascape Cruises, Ltd., 131 B.R. 241, 243 (Bankr. S.D. Fla. 1991) (recognizing committee's fiduciary obligations do not extend to debtor).

[30] *In re* Mountain States Power Co., 118 F.2d 405, 407 (3d Cir. 1941) (quoting Meinhard v. Salmon, 249 N.Y. 458, 464 (1928)).

[31] *See id.* (noting duty of "undivided loyalty" (quoting *Meinhard,* 249 N.Y. at 464)); *Life Serv. Sys.,* 279 B.R. at 513 (stating members of committee have duty of fidelity, undivided loyalty, and impartial service to creditor class); *Fas Mar Convenience Stores*, 265 B.R. at 432 (recognizing duty of undivided loyalty and impartial service to creditors); *In re* Nationwide Sports Distrib., Inc., 227 B.R. 455, 464 (Bankr. E.D. Pa. 1998) (quoting *Meinhard*, 249 N.Y. at 464) (describing duty of "undivided loyalty"); United Steel Workers v. Lampl (*In re* Mesta Mach. Co.), 67 B.R. 151, 156 (Bankr. W.D. Pa. 1986) (noting committee members have obligations of fidelity, undivided loyalty, and impartial service); Pension Benefit Guaranty Corp. v. Pincus, Verlin, Hahn, Reich & Goldstein Prof'l Corp., 42 B.R. 960, 963 (Bankr. E.D. Pa. 1984) (opining committee owes duty of loyalty to class it represents).

III. FACTORS RELEVANT TO "ADEQUATE REPRESENTATION" AND THE APPOINTMENT OF ADDITIONAL COMMITTEES

A creditors' committee should be "representative" of the creditors that the committee was formed to serve.[32] A creditors' committee, however, need not "faithfully reproduce the exact complexion of the creditor body."[33] When determining whether it is necessary to appoint an additional committee, the "issue is not whether the creditors' committee is an exact replica of the creditor body, but whether representation of various creditor types is adequate."[34]

The Bankruptcy Code does not define "adequate representation."[35] It is clear, however, that "adequate representation" does not mean that a creditor is successful on all of its positions[36] or that its interests are exclusively represented,[37] but rather means that the creditor has a "meaningful voice" on the committee.[38]

The test of adequate representation is "necessarily vague."[39] Indeed, "[n]oteworthy is the absence of any indication from the statutory language that the

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[32] *See* 11 U.S.C. § 1102(a)(2) (2006) (authorizing appointment of additional committees "if necessary to assure adequate representation of creditors . . . ."); *id.* § 1102(b)(1) (providing for appointment of pre-petition committee as creditors' committee if pre-petition committee is "representative of the different claims to be represented."); *see also* Bussel, *supra* note 1, at 1548 ("Creditors' committees in bankruptcy reorganization cases perform a 'representative' function."); Klee & Shaffer, *supra* note 13, at 1011 ("The final requirement under section 1102(b)(1) is that an official creditors' committee be 'representative' of the class of creditors the committee is entrusted to represent.").

[33] *In re* Hills Stores Co., 137 B.R. 4, 7 (Bankr. S.D.N.Y. 1992).

[34] *In re* Enron Corp., 279 B.R. 671, 690 (Bankr. S.D.N.Y. 2002); *see also Hills Stores,* 137 B.R. at 7 ("What is required is adequate representation of various creditor types."); *see generally* Zipes & Lambert, *supra* note 15, at 234–35 (discussing appointment of additional committees and adequate representation).

[35] *In re* Winn-Dixie Stores, Inc., 326 B.R. 853, 857 (Bankr. M.D. Fla. 2005); *see also Hills Stores Co.*, 137 B.R. at 5 ("[N]o 'bright-line' test for adequate representation . . . ."); Neil B. Glassman et al, *Equity Committees: A Consequence of the "Zone of Insolvency,"* AM. BANKR. INST. J., Dec. 2005-Jan. 2006, at 28 ("Section 1102 does not define what constitutes 'adequate representation.'").

[36] *See Enron Corp.*, 279 B.R. at 693 ("Whether a particular party is successful on all of its positions is not the test . . . ."); Mirant Am. Energy Mktg., L.P., v. Official Comm. of Unsecured Cred. Enron Corp., No. 02 Civ. 6274, 2003 WL 22327118, at *7 (stating although creditors' committee represents all unsecured creditors, it "'does not guarantee a favorable result for [particular creditors] . . . ." (quoting Albero v. Johns Manville (*In re* Johns-Manville Corp.), 68 B.R. 155, 161 (Bankr. S.D.N.Y. 1986))); *see generally* Zipes & Lambert, *supra* note 15, at 235–38 (discussing "adequate representation").

[37] *See Winn-Dixie Stores*, 326 B.R. at 857 (describing adequate representation analysis); s*ee also* Bussel, *supra* note 1, at 1560 ("The committees may 'represent' various classes of debt . . . .").

[38] *In re* Dow Corning Corp., 194 B.R. 121, 141 (Bankr. E.D. Mich. 1996) ("[A]dequate representation exists if [a creditor group has] a meaningful voice on the committee in relation to their posture in the case."), *rev'd on other grounds*, 86 F.3d 482 (6th Cir. 1996); s*ee* Eklund & Roberts, *supra* note 16, at 143 (defining "meaningful voice"); Zipes & Lambert, *supra* note 15, at 235 (stating a court is likely to find adequate representation "if each group has a meaningful voice in the proceedings in relation to its position in the case.").

[39] *See In re* McLean Indus., Inc., 70 B.R. 852, 860 (Bankr. S.D.N.Y. 1987) ("The test of necessity to ensure adequate representation is necessarily vague."); *cf.* Shaw & Levine v. Gulf & Western Indus., Inc. (*In re* Bohack Corp.), 607 F.2d 258, 262 n.4 (2d Cir. 1979) ("[T]he committee owes a fiduciary duty to the creditors, and must guide its actions so as to safeguard as much as possible the rights of minority as well as majority creditors." (citing Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 268–69 (1941))); *In re*

Court's ability to determine the issue of adequate representation is fettered by any constraint."[40] The issue of adequate representation is determined by the facts of the case.[41]

Courts have considered the following factors in determining if it is necessary to appoint an additional committee to ensure "adequate representation" under section 1102(a)(2):

> (i) presence of widely and publicly held debt securities;[42]
> (ii) ability of the committee to function;[43]
> (iii) the standing and desire of the various constituencies,[44] including the uniqueness of the movant's interests and whether they are being represented;[45]
> (iv) whether different classes may be treated differently under a plan and need representation;[46]

Doehler-Jarvis, Inc., Nos. 97-953–962-SLR, 1997 WL 827396, at *3 (D. Del. Oct. 7, 1997) ("Under section 1102 of the Code, adequate representation exists as long as the diversified interests of various creditor groups are represented and participate in the Committee." (citing *In re* Trans World Airlines, Inc., No. 92-115, 1992 WL 168152, * 3 (D. Del. Mar. 20, 1992))).

[40] *In re* E. Maine Elec. Coop., Inc., 121 B.R. 917, 932 (Bankr. D. Me. 1990) (quoting *McLean*, 70 B.R. at 856); *see also In re* Hills Stores Co., 137 B.R. 4, 5 (Bankr. S.D.N.Y. 1992) ("[T]he statute affords no 'bright-line' test for adequate representation . . . ."); *McLean*, 70 B.R. at 860 (asserting adequate representation test is statutorily vague).

[41] *See, e.g.,* Edison Bros. Stores, Inc. v. Edison Bros. Stores (*In re* Edison Bros. Inc.), No. 95-1354, 1996 WL 534853, at *3 (D. Del. Sept. 17, 1996) ("As there is no statutory test for adequate representation, it must be determined by the facts of the case." (citing *In re* Johns-Manville Corp., 68 B.R. 155, 158 (Bankr. S.D.N.Y. 1986))); *Hills Stores*, 137 B.R. at 5 (citing *In re* Beker Indus. Corp., 55 B.R. 945, 948 (Bankr. S.D.N.Y. 1985)) (claiming absence of statutory test warrants examination of facts); *In re* Wang Lab., Inc., 149 B.R. 1, 2 (Bankr. D. Mass. 1992) (citing *Beker*, 55 B.R. at 948) (explaining adequate representation must be decided on facts of case since there is no statutory test).

[42] *See McLean*, 70 B.R. at 860 (explaining presence of widely and publicly held debt securities factors into determining whether to appoint additional committee).

[43] *See In re* Enron Corp., 279 B.R. 671, 685 (Bankr. S.D.N.Y. 2002) (stating guidelines for adequate representation includes ability of committee to function); *Hills Stores*, 137 B.R. at 6 (declaring ability of committee to function is included in adequate representation test under section 1102); *McLean,* 70 B.R. at 860 (including ability to function as part of adequate representation test); *see also In re* Garden Ridge Corp., No. 04-10324, 2005 WL 523129, at *2 (Bankr. D. Del. 2005) (stating ability to function must be considered when determining whether to authorize additional committee); *In re* Agway, Inc., 297 B.R. 371, 374 (Bankr. N.D.N.Y. 2003) (declaring pertinent factors to adequate representation include ability of committee to function).

[44] *See Garden Ridge*, 2005 WL 523129, at *2 (acknowledging standing and desires of various constituencies are included under adequate representation test); *Agway*, 297 B.R. at 374 (declaring standing and desires of various constituencies factor into whether an additional committee is warranted); *Enron Corp.,* 279 B.R. at 685 (listing standing and desires of various constituencies as factor for determining adequate representation); *Hills Stores*, 137 B.R. at 6 (explaining standing and desires of constituencies are factors under adequate representation test); *McLean,* 70 B.R. at 860 (stating determination of whether U.S. trustee's method of representation is adequate depends in part on standing and desires of various contingencies).

[45] *See In re* Winn-Dixie Stores, Inc., 326 B.R. 853, 858 (Bankr. M.D. Fla. 2005) (declaring uniqueness of plan participants' position is relevant when analyzing adequate representation issue); *In re* Mansfield Ferrous Castings, Inc., 96 B.R. 799, 781 (Bankr. N.D. Ohio 1988) (acknowledging employees' unique position as beneficiaries of trust which holds debtor's stock).

> (v) the ability of creditors to participate in the case even without an official committee and the potential to recover expenses under section 503(b)(3)(D) of the Bankruptcy Code;[47]
> (vi) the movant's motivation;[48]
> (vii) the tasks that a separate committee is to perform;[49] and
> (viii) the nature of the case.[50]

If appointing an additional committee is "necessary" under section 1102(a)(2) to ensure "adequate representation," a bankruptcy court still has the discretion to decide whether to order the appointment of the additional committee.[51] In addition to the factors set forth above, a court will often consider the following factors when deciding whether to exercise its discretion to order the trustee to appoint an additional committee:

> (i) cost and expense associated with an additional committee;[52]

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[46] *See Garden Ridge*, 2005 WL 523129, at *2 (noting additional factors include "whether different classes may be treated differently under a plan and need representation); *Enron Corp*., 279 B.R. at 685 (same); *see also Drexel*, 118 B.R. at 212 ("[T]he chief concern of adequacy of representation is whether it appears that different classes of debt and equity holders may be treated differently under a plan and need representation through appointment of additional committees.").

[47] *See Garden Ridge*, 2005 WL 523129, at *2 (noting other factors include ability of creditors to participate in case even without an official committee); *Agway*, 297 B.R. at 374 ("[C]ourts have considered the fact that all creditors . . . have the potential to recover expenses through § 503(b)." (citing *In re* Dow Corning Corp., 194 B.R. 121, 144 (Bankr. E.D. Mich. 1996))); *Enron Corp.*, 279 B.R. at 685, 694 (explaining other considerations have included ability to participate in the case even without an unofficial committee and potential to recover expenses); *Hills Stores*, 137 B.R. at 8 (interpreting section 503 as permitting the formation of an unofficial committee, retaining counsel and financial advisor and seeking reimbursement of their expenses); *see also Winn-Dixie*, 326 B.R. at 857 (listing factors court takes into consideration when determining whether moving party is adequately represented).

[48] *See Enron Corp.*, 279 B.R. at 685 (listing motivation of movant as consideration); *In re* Orfa Corp., 121 B.R. 294, 295 (Bankr. E.D. Pa. 1990) (denying motion due to "apparently-selfish motivations of [its] supporters."); Eklund & Roberts, *supra* note 16, at 149 (examining balance between need for separate committee and movant's motive).

[49] *See Garden Ridge*, 2005 WL 523129, at *2 (indicating task committee is to perform is factor to be considered); *Enron Corp.*, 279 B.R. at 685 (same); *see also In re* McLean Indus., Inc., 70 B.R. 852, 860 (Bankr. S.D.N.Y. 1987) (indicating task separate committee is to perform is measured in relation to ability of committee to function, nature of case, and standing and desires of various constituencies).

[50] *See, e.g.*, *Winn-Dixie*, 326 B.R. at 857 (stating court have looked at nature of case in determining whether moving party is adequately represented); *Garden Ridge*, 2005 WL 523129, at *2 (same); *Agway*, 297 B.R. at 374 (same); *Enron Corp.*, 279 B.R. at 685, 688 (same).

[51] *See* 11 U.S.C. § 1102(a)(2) (2006) ("[T]he court *may* order the appointment of additional committees of creditors . . . if necessary to assure adequate representation of creditors.") (emphasis added); *see Enron Corp.*, 279 B.R. at 685 ("The court's ability to exercise discretion, even once inadequate representation is found, is arguably derived from the use of the word 'may' in 11 U.S.C. § 1102(a)(2)."); *Dow Corning*, 194 B.R. at 142–43 (analyzing how courts interpret discretionary language of section 1102(a)(2)); *In re* Wang Labs., Inc., 149 B.R. 1, 2 (Bankr. D. Mass. 1992) ("The statute involves two inquiries. It must first be determined whether the appointment of a committee is necessary to assure adequate representation. If it is, then the Court must consider whether it should exercise its discretion and make the appointment.").

[52] *See Winn-Dixie*, 326 B.R. at 857–58 (finding "that the additional costs, especially those associated with the retention of experts, militate against the appointment of an additional committee."); *Garden Ridge*, 2005 WL 523129, at *2 (listing cost as something to be considered); *see also Enron Corp.*, 279 B.R. at 685, 694

(ii) the timeliness of the request;[53] and
(iii) the potential for added complexity.[54]

Regardless of the factors that a court considers, "[t]he decision is not to be taken lightly, and involves a delicate balancing of various and sometimes diverging interests."[55] The appointment of an additional committee is considered to be an "extraordinary remedy."[56] The movant requesting the appointment of an additional committee bears the burden of proving that its interests are not adequately represented.[57]

IV. SOME INTRA-COMMITTEE CONFLICT IS INHERENT AND ACCEPTABLE

Although creditors' committee members owe a fiduciary duty to the class of unsecured creditors that the committee represents, there are conflicts between committee members and between the committee and creditor groups in that class. Whether or not the creditors' committee can adequately represent the interests of the other parties to the conflict often ends up in a dispute regarding whether a creditors' committee member should be removed or whether an additional committee should be appointed. Conflicts, however, are not unusual in reorganization and can be expected among creditors who have separate business interests.[58]

(noting cost is to be considering but stating "[a]dded cost alone does not justify the denial of appointment of an additional committee where it is warranted."); *McLean*, 70 B.R. at 860 ("Cost alone cannot, and should not, deprive public debt and security holders of representation.").

[53] *See Agway*, 297 B.R. at 374 (noting courts have considered point in proceeding when motion is made); *Enron Corp.*, 279 B.R. at 685 (recognizing timeliness of application as factor); *Dow Corning*, 194 B.R. at 142–43 (finding time of application to be typical discretionary factor).

[54] *See Agway*, 297 B.R. at 374 (recognizing potential for added complexity as factor); *Enron Corp.*, 279 B.R. at 685 (same); *Dow Corning*, 194 B.R. at 143 (same).

[55] *Enron Corp.*, 279 B.R. at 685; *see also Garden Ridge*, 2005 WL 523129, at *2 (quoting *Enron Corp.*)

[56] *Garden Ridge*, 2005 WL 523129, at *3 ("Many courts are reluctant to appoint an additional committee of creditors because it is an extraordinary remedy."); *see also In re* Sharon Steel Corp., 100 B.R. 767, 778 (Bankr. W.D. Pa. 1989) (positing courts recognize appointment of separate committee as extraordinary remedy).

[57] *See, e.g.*, *Winn-Dixie*, 326 B.R. at 857 (noting party seeking appointment bears burden of proof); *Garden Ridge*, 2005 WL 53219, at *3 (same); *Agway*, 297 B.R. at 374 (same); *Enron Corp.*, 279 B.R. at 685 ("The burden is on the moving party to prove that the existing committee does not provide adequate representation.").

[58] In *In re* Altair Airlines, Inc., 727 F.2d 88 (3d Cir. 1984), the court stated as follows:

> Undoubtedly ALPA's members may be interested in a plan of reorganization which preserves both their jobs and their collective bargaining agreement, while other creditors may be interested in liquidation, or a reorganization involving a merger with a non-union airline. Such conflicts of interest are not unusual in reorganizations. Materialman creditors, for example, may sometimes prefer to forego full payment for past sales in hopes of preserving a customer, while lenders may prefer liquidation and prompt payment.

Id. at 90; *see In re* Hills Stores Co., 137 B.R. 4, 6 (Bankr. S.D.N.Y. 1992) (discussing how conflicts among creditors should be expected and are not unusual); *Sharon Steel*, 100 B.R. at 777 ("It is universally

Unsecured creditors of an insolvent estate compete for a larger distribution. The more that one creditor receives the less that another creditor may receive. Thus, there is usually some general adversity between committee members. Some conflict among committee members is inherent and may facilitate negotiation.[59]

Similarly, a committee is often at odds with particular groups of unsecured creditors. For example, a committee may oppose the interests of one unsecured creditor group in favor of the interests of other unsecured creditors.[60] As the district court declared in *Mirant Americas Energy Marketing, L.P.*,

> A rule of decision based purely on whether separate 'classes' of creditors have differing interests would lead to the unnecessary proliferation of committees at an astronomical cost to the bankruptcy estates. Moreover, because creditors would be balkanized into several independent committees, each furthering the interests of only certain groups, the consultation and balancing of interests necessary for a successful negotiation of a reorganization plan would be severely hampered . . . .[61]

In some instances, however, intra-committee conflict may rise to a level sufficient to justify the appointment of an additional committee to protect the interests of unsecured creditors. For example, where the conflict precludes the committee from being able to function, the appointment of an additional committee may be appropriate.[62] In *In re McLean Industries, Inc.*, the bankruptcy court declared that:

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recognized that intercreditor conflicts inhere in any committee . . . .").

[59] *See In re* SPM Mfg. Corp., 984 F.2d 1305, 1316–17 (1st Cir. 1993) (indicating committee process is enhanced when it is adversarial); *see also Garden Ridge*, 2005 WL 523129, at *3 ("Mere conflict between members of the Official Committee is no basis for the appointment of an additional committee of creditors."); *Dow Corning*, 194 B.R. at 145 ("It is common for a committee to take a position contrary to that expressed by one of its members."); *In re* Microboard Processing, Inc., 95 B.R. 283, 285 (Bankr. D. Conn. 1989) (pointing out inherent conflict among committee members of insolvent estate is tolerable and does not justify removal of committee members or preclude their appointment to committee); Eklund & Roberts, *supra* note 16, at 129–30 (suggesting creditors who also serve as committee members face inherent conflict of divvying up estate for all creditors while seeking to maximize return for their own creditor class).

[60] *In re* Nat'l Liquidators, Inc., 182 B.R. 186, 192 (S.D. Ohio 1992) (discussing inherent tension between committee, its members and constituents); Eklund & Roberts, *supra* note 16, at 130–31 ("When the task of plan analysis and drafting begins and distribution issues are considered, the distinctions between unsecured claimants, which may have seemed innocuous when case began, can become battlegrounds within committee.").

[61] Mirant Am. Energy Mktg., L.P. v. Official Comm. of Unsecured Creds. of Enron Corp., No. 02 Civ. 6274, 2003 WL 22327118, at *8 (Bankr. S.D.N.Y. October 10, 2003) (citation omitted).

[62] *See Enron Corp.*, 279 B.R. at 686 ("[A] strong indicator of whether a committee is able to adequately represent its constituents is its ability to function. A committee that is hopelessly divided, unable to take position on important matters and ineffective would clearly support an argument for a separate committee."); *see also Garden Ridge*, 2005 WL 523129, at *4 ("Courts generally will not authorize an additional committee of unsecured creditors unless the current committee is 'hopelessly divided, unable to take a position on important matter and ineffective . . . .'" (quoting *Enron*, 279 B.R. at 686)). In *In re Hills Stores*, 137 B.R. 4 (Bankr. S.D.N.Y. 1992), the court stated as follows:

> creditors committees often contain creditors having a variety of view-points. Some members may favor liquidation; others may favor continuation of the business in order to preserve jobs or the viability of an important customer. Some debt may be contractually subordinated to other debt. Debentures, for example, are often subordinate to senior institutional indebtedness but not to trade debt . . . . Such conflicts are not unusual in reorganization . . . . . In the usual case, they might not require a separate committee unless they impair the ability of the unsecured creditors committee to reach a consensus.[63]

V. CONFLICTS, ADEQUATE REPRESENTATION, AND THE APPOINTMENT OF ADDITIONAL COMMITTEES

There are several reported decisions considering when a conflict has risen to the level that either (a) a creditor is not eligible to participate on a creditors' committee or (b) the creditors' committee is incapable of representing a creditor group. Although the bases for conflicts between creditor groups are numerous, much of the case law falls within the following two categories: (i) allegedly competing fiduciary (or contractual) duties and (ii) alleged under-representation.

A. Allegedly Competing Fiduciary (or Contractual) Duties

Creditors have sought the appointment of an additional committee or the removal of certain committee members based upon the argument that persons with competing fiduciary duties were serving on a creditors' committee. The case law addressing this issue reflects the fact that adequate representation and the necessity for the appointment of an additional committee is determined on a case-by-case basis. The issue of competing duties has arisen where (i) a creditors' committee member, such as a creditor's attorney, indenture trustee or union, owes a fiduciary or contractual duty to an entity other than the class of creditors represented by the

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> What subordinated bondholders have painted is a picture reflecting no darker image than ordinary fears, concerns, and conflicts that are inherent in reorganization process. Were this a case where creditors of separate debtors had vastly conflicting aims and entitlement and had shown themselves unable to function on a single committee, I might be more inclined to subordinated bondholders' view" and favor appointment of a bondholders' committee.

Id. at 6.

[63] *In re* McLean Indus., Inc. 70 B.R. 852, 861 (Bankr. S.D.N.Y. 1987) (citation omitted); *see also Garden Ridge,* 2005 WL 523129, at *4 ("Adequate representation is lacking only when these conflicts prevent an official committee from upholding its fiduciary obligations to all general unsecured creditors." (quoting *In re* Sharon Steel Corp., 100 B.R. 767, 777–78 (Bankr. W.D. Pa. 1989))).

creditors' committee or (ii) a single creditors' committee was appointed to represent creditors of estates with competing interests.

1. Indenture Trustees, Union Representatives, Attorneys and Their Competing Duties

An indenture trustee owes either contractual or fiduciary duties to bondholders.[64] A member of a creditors' committee, however, also owes a fiduciary duty to the class of creditors that the committee was appointed to represent.[65] Thus, an indenture trustee serving on a creditors' committee owes (a) contractual or fiduciary duties to the bondholders and (b) an undivided duty of loyalty to the class represented by the creditors' committee. The class represented by the creditors' committee usually includes bondholders and trade creditors. What if the interests of the bondholders diverge from the interests of other unsecured creditors? Can the indenture trustee serve two masters?

In practice, indenture trustees regularly serve on creditors' committees. Often, individual bondholders are also appointed to the committee. In many cases, the amount of bond debt significantly exceeds the amount of trade debt, and the indenture trustees and bondholders constitute a majority of the creditors' committee. Thus, by acting in the interests of the bondholders, the indenture trustees, along with the individual bondholders, may control the committee. Where the interests of trade creditors diverge from the interests of bondholders does the indenture trustee have a conflict of interest? Can the indenture trustee dismiss the competing

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[64] An indenture trustee *may* (at least prior to a default) only owe contractual duties, as opposed to fiduciary duties, to bondholders. *See* Lorenz v. CSX Corp., 1 F.3d 1406, 1415 (3d Cir. 1993) ("The courts of New York consistently have held that the duties of an indenture trustee, unlike those of a typical trustee, are defined exclusively by the terms of the indenture."); Meckel v. Cont'l Res. Co., 758 F.2d 811, 816 (2d Cir. 1985) ("Unlike the ordinary trustee, who has historic common-law duties imposed beyond those in trust agreement, an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by terms of indenture agreement."); *see also* E.F. Hutton Southwest Props. II, Ltd. v. Union Planters Nat'l Bank (*In re* E.F. Hutton Southwest Props. II, Ltd.), 953 F.2d 963, 972 (5th Cir. 1992) ("[F]iduciary duties . . . are not activated until a conflict arises where it is evident that the indenture trustee may be sacrificing the interests of the beneficiaries in favor of its own financial position."); Elliot Assoc. v. J. Henry Schroder Bank & Trust Co., 838 F.2d 66, 71 (2d Cir. 1988) ("[S]o long as the trustee fulfills its obligations under the express terms of the indenture, it owes the debenture holders no additional, implicit pre-default duties or obligations except to avoid conflicts of interest."); Philip v. L.F. Rothschild & Co., No. 90-Civ-0708**,** 2000 WL 1263554, at *4–5 (S.D.N.Y. 2000) (noting indenture trustee owes fiduciary duty to bondholders); LNC Inv., Inc. v. First Fidelity Bank Nat'l Ass'n, 935 F. Supp. 1333, 1347–49 (S.D.N.Y. 1996) (stating post-default, indenture trustee owes fiduciary duties under the common law); Beck v. Mfrs. Hanover Trust Co., 632 N.Y.S.2d 520, 527 (1st Dept. 1995) (acknowledging limits on indenture trustee's duties before event of default, but explained those limits do not apply after event of default because at that point it is clear indenture trustee's obligations come more closely to resemble those of ordinary fiduciary, regardless of any limitations or exculpatory provisions contained in indenture); United States Trust Co. v. First Nat'l City Bank*,* 394 N.Y.S.2d 653, 660–61 (1st Dept. 1977) (holding Trust Indenture Act does not abrogate indenture trustee's common-law fiduciary duty of loyalty). *Cf.* Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 268 (1941) ("Protective committees, as well as indenture trustees, are fiduciaries.").

[65] *See* cases cited *supra* note 21.

interests of the trade creditors if the bondholders hold the vast majority of debt represented by the committee?

In *Woods v. City National Bank & Trust Co.*,[66] the Supreme Court considered whether an indenture trustee and its counsel could be compensated for services provided in a chapter X bankruptcy case where, *inter alia*, (i) the indenture trustee was trustee for bonds issued by the debtor and its competitors and (ii) counsel for the committee was the indenture trustee's general counsel, who was also counsel for the bondholders' committee in the competitors' bankruptcy cases. The Court held that,

> Where a claimant, who represented members of the investing public, was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted . . . . Protective committees, as well as indenture trustees, are fiduciaries . . . . A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.[67]

The indenture trustee in *Woods* had many relationships that affected the Court's decision. The Court's decision, however, highlights the fact that an indenture trustee's appointment to a committee raises questions regarding the indenture trustee's ability to serve two masters where the interests of the bondholders and other unsecured creditors are likely to diverge.

In *In re Value Merchants, Inc.*,[68] the bankruptcy court held that the United States Trustee's refusal to appoint an indenture trustee to a creditors' committee was arbitrary and capricious.[69] On appeal to the district court, the United States Trustee argued, *inter alia*, that the indenture trustee's duties to the bondholders may conflict with the creditors' committee's fiduciary duty to unsecured creditors.[70] Citing *Woods*, the district court stated an indenture trustee's dual duties "may theoretically conflict."[71] The district court, however, refused to adopt a *per se* rule precluding or

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[66] 312 U.S. 262 (1941).
[67] *Id.* at 268–69.
[68] 202 B.R. 280 (E.D. Wis. 1996).
[69] *See id.* at 288 (affirming bankruptcy court's finding that refusal of United States Trustee to appoint indenture trustee to committee was "arbitrary and capricious").
[70] *See id*. at 288 (acknowledging argument made by United States trustee).
[71] *Id*. at 289.

permitting an indenture trustee to serve on a creditors' committee.[72] Rather, the district court declared that the issue should be decided based on the facts of each case and "rarely if ever will the issue be clear cut."[73]

The district court noted that indenture trustees have been criticized as "'weak partners,' hamstrung by other loyalties, [and] prohibited from voting the claims that they represent . . . ."[74] On the other hand, the court stated that "indenture trustees bring prestige and neutrality to the committee table, often fostering the consensus-building process."[75] The court added that an indenture trustee may better represent the interests of small to medium-sized bondholders than large institutional bondholders serving as committee members.[76] Acknowledging that the potential conflicts surrounding the appointment of an indenture trustee to a creditors' committee presents a "complicated issue,"[77] the court held that the potential conflict of interest was not sufficient to automatically disqualify the indenture trustee from serving on the creditors' committee.[78]

The *Value Merchants* court remarked that:

> Even assuming that an indenture trustee will feel obliged to serve the interests of their bondholders—and perhaps deviate to some degree from their theoretical duty to . . . other types of creditors—so too will other committee members have their own interest . . . in the back of their minds as the committee negotiates and reaches consensus. This is what statutory committee members expect of each other . . . ."[79]

This reasoning seems to excuse a breach of fiduciary duty on the basis that other committee members are doing the same thing and, therefore, they will cancel each other out.[80]

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[72] *See id*. at 288 ("This Court is of the view that neither United States Trustees nor bankruptcy courts should adopt per se rules in favor of or against the appointment of indenture trustees to creditors' committees.").

[73] *Id.* at 288.

[74] *Id.*

[75] *Id.*

[76] *See id.* ("[A]s professional fiduciaries for all bondholders, they may better represent the interests of small to medium-sized bondholders than will the large bondholders who are likely candidates for service on statutory committees.").

[77] *Id.* at 289.

[78] *See id.* ("It is by no means clear, however, that this fact should automatically disqualify indenture trustee from service on today's statutory committees."); *see also* Bussel, *supra* note 1, at 1590 n.178 (referring to conflict due to indenture trustee's fiduciary obligations as "a false one").

[79] *In re* Value Merchs., Inc., 202 B.R. 280, 289 (E.D. Wis. 1996).

[80] *Cf. In re* Schatz Fed. Bearings Co., 5 B.R. 543, 548 (Bankr. S.D.N.Y. 1980) (refusing to deny committee membership to union despite allegations of competing fiduciary duties). The *Schatz* Court reasoned that "the Union may exercise only one vote as a member of the Official Creditors' Committee. Therefore, . . . nine other members of the Committee will have equal standing and weight in expressing their views . . . ." *Id.* Some commentators have stated that:

In *In re The Charter Company*,[81] the bankruptcy court addressed a motion to remove indenture trustees from a creditors' committee on the grounds, *inter alia*, that the indenture trustees "occupy a dual fiduciary capacity with an unavoidable inherent conflict of interest . . . ."[82] In *Charter Company*, the debt represented by the indenture trustees was junior to other debt represented by other committee members.[83]

The bankruptcy court denied the motion. The court declared that adopting the standard espoused by the movants "would be destructive to the creditors' committee system."[84] The court stated that if an actual conflict arose, it could be brought to the court's attention.[85]

The same potential for competing duties may arise when other creditor representatives serve on the creditors' committee. For example, a union representative or a creditor's attorney may suffer from the same potential conflicts.

In *Schatz Federal Bearings Co.*,[86] the creditors' committee opposed a union's motion for appointment to the committee, contending that there would be a conflict between the fiduciary duty the union owed to its members and the committee's duty to its class of creditors. The committee argued that the debtor may need to reduce its work force, or liquidate, to preserve the estate's value, which would conflict with the union's duty to preserve its members' jobs.[87] The court rejected the committee's challenge reasoning that the union's single vote on the committee would be outweighed by the vote of the other nine committee members.[88]

The Third Circuit has declared that a union serving on a creditors' committee was entitled to advocate its platform for the preservation of jobs and the underlying collective bargaining. Specifically, in *In re Altair Airlines, Inc.*, the Third Circuit has declared that:

> [B]ased on the reasoning of *Schatz*, no conflict of interest should ever preclude a creditor from committee membership, because the committee's other members could always overrule the conflicted member. This clearly is not, and should not be, the prevailing view. In a close vote, a member whose exercise of fiduciary duty is in question should not decide the outcome of the committee's vote.

Klee & Shaffer, *supra* note 13, at 1016.

[81] 42 B.R. 251 (Bankr. M.D. Fl. 1984).

[82] *Id.* at 252.

[83] *See id.* (stating "that the debt represented by the debentures is junior to certain debt represented by other committee members.").

[84] *Id.*

[85] *See id.* at 252–53 ("In the event that an actual conflict does arise . . . it can be brought to the Court's attention.").

[86] 5 B.R. 543 (Bankr. S.D.N.Y. 1980).

[87] *See id.* at 548 (acknowledging committee's argument that "in an effort to preserve the estate of the debtor it might be contemplated that drastic reductions in the work force or total liquidation might be in order, whereas the Union has a duty to its membership to preserve jobs and maintain the present operations.").

[88] *See id*. ("[T]he Union may exercise only one vote as a member of the Official Creditors' Committee. Therefore, . . . nine other members of the Committee will have equal standing and weight in expressing their views with regard to the actions of the Committee as a whole.").

> Undoubtedly, ALPA's members may be interested in a plan of reorganization which preserves both their jobs and their collective bargaining agreement, while other creditors may be interested in liquidation, or a reorganization involving a merger with a non-union airline. Such conflicts of interest are not unusual in reorganizations. Materialman creditors, for example, may sometimes prefer to forego full payment for past sales in hopes of preserving a customer, while lenders may prefer liquidation and prompt payment. Section 1103(c)(2) contemplates that the Creditors' Committee may 'investigate . . . the desirability of the continuance of [the debtor's] business . . . .' There is no reason why the voice of the collective bargaining representative should be the one claimant voice excluded from the performance of the statutory role. The Bankruptcy Code has been said to be 'in tension with our national labor policy . . . .' But that tension does not suggest that collective bargaining representatives should have no role in the reorganization process. Quite the contrary; resolution of the tension suggests that those representatives should be heard in appropriate cases. Clearly a case in which unpaid sums due under a collective bargaining agreement amount to the second largest unsecured claim against the debtor's estate is an appropriate case.[89]

The Third Circuit's language is broad. The Court did not, however, go so far as to state that a committee member could press its platform even if doing so was contrary to the interests of the class represented by the committee. In other words, *Altair Airlines* does not stand for the proposition that a union can breach its fiduciary duty to its class members in furtherance of the union's agenda.[90] In fact, the Third Circuit has declared that the duty is breached where a committee member pursues "a course of action that furthers its self interest to the potential detriment of

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[89] *In re* Altair Airlines, Inc., 727 F.2d 88, 90–91 (3d Cir. 1984).

[90] *See In re* Garden Ridge Corp., No. 04-10324, 2005 WL 523129, at *4 (Bankr. D. Del. 2005) (stating "each member of the Official Committee is free to represent its own interests in an individual capacity apart from membership in the Official Committee", but "[i]f an Official Committee member advances its own interests through its position on the committee, that member is in breach of its fiduciary duty to committee constituents."); *In re* Enduro Stainless, Inc., 59 B.R. 603, 605 (Bankr. N.D. Ohio 1986) (acknowledging "the Union may not act *through the committee* to further only its self-interests, but until such actions are brought to the court's attention, the court will not deny its application based on mere assumptions."); *see also In re* Nationwide Sports Distrib., Inc., 227 B.R. 455, 463 (Bankr. E.D. Pa. 1998) ("[T]he creditors appointed to the creditors' committee have a fiduciary obligation to act in the interests of the members whom they represent . . . [which prohibits them] from using their position to advance their own individual interests.").

fellow committee members."[91]

In contrast, in *In re Celotex Corporation*,[92] the bankruptcy court declared that it was improper for a creditor's attorney to participate on the committee because of competing fiduciary duties.[93] The court reasoned that:

> Each legal representative who sits on the committee has a fiduciary duty to its own client/member as well as a fiduciary duty to the committee and each of its constituents . . . . From this perspective, this Court can observe a potential conflict on the party of those attorneys . . . [who] have different fiduciary duties to their individual clients as distinct from that owed to the constituency of the committee.[94]

2. Multiples Estates, But One Creditors' Committee

The problem of competing fiduciary duties and divided loyalties does not arise solely in the context of creditor representatives' participation on creditors' committees. The problem also commonly arises in instances where a single creditors' committee has been appointed to serve creditors of multiple estates with conflicting interests.

The issue of substantive consolidation gives rise to thorny conflict issues where a single committee has been appointed to serve creditors of multiple estates with competing interests. Where the creditors of any estate would benefit from maintaining the estate's financial independence from the other estates, a creditors' committee may have a difficult conflict.

In *In re The White Motor Credit Corp.*,[95] the bankruptcy court held that separate committees were *required* in jointly-administered cases of separate debtors. The court declared that, "[a]s a matter of law, section 1102 indicates that each case should have a Court-appointed committee. While such language does not, preclude the Court from appointing identical committees in related cases, it cannot be said to authorize a single committee under the circumstance of these proceedings."[96]

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[91] Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 256 (3d Cir. 2001); *accord In re* Spiegel, 292 B.R. 748, 750 (Bankr. S.D.N.Y. 2003) (citing *Westmoreland*, 246 F.3d at 256) ("A creditor's committee stands as a fiduciary to the class of creditors it represents.").

[92] 123 B.R. 917 (Bankr. M.D. Fla. 1991).

[93] *See id.* at 922 ("These legal representatives have different fiduciary duties to their individual clients as distinct from that owed to the constituency of the committee.").

[94] *Id.* at 921–22.

[95] 18 B.R. 720 (Bankr. N.D. Ohio 1980).

[96] *Id.* at 722.

In *White Motor*, the court was likely persuaded by the creditors' unanimous agreement that a separate committee should be formed for each debtor's creditors.[97] Moreover, the court also relied upon the fact that "[a]bsent a successful effort toward substantive consolidation, creditors of one debtor . . . [do not have an] interest in the assets or future of an affiliated debtor."[98]

Ironically, the case that has caused the most stir regarding the appointment of a single creditors' committee for multiple estates raised the issue in *dictum*. Specifically, in *Gill v. Sierra Pacific Construction, Inc.* (*In re Parkway Calabasas Ltd.*),[99] the court raised the conflict issue in a footnote to its opinion regarding the effect of substantive consolidation on a fraudulent conveyance claim. Dismayed at the lack of objection to substantive consolidation, the bankruptcy court declared that there is often a "sinister" explanation for the lack of opposition to substantive consolidation.[100] That sinister explanation was described as the selfish desire of professionals to assure a fund for the payment of their fees.[101]

The court declared that:

> Where there are no separate trustees, creditors' committees or counsel, each has a hopelessly irresolvable conflict of interest on a motion for substantive consolidation. Each is required to support the substantive consolidation for the benefit of the less solvent estate and its creditors, and to oppose it for the benefit of the more solvent estate and its creditors.[102]

The bankruptcy court concluded that the only reasonable point to obtain a "mechanical advantage" on this problem is at the outset of the case when the decision to appoint one or more committees is made. Thus, the court adopted a *presumption* that it is improper to appoint a single creditors' committee under the following circumstances:

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[97] *See id.* at 721–22 (indicating creditors unanimously wanted each debtor to have separate committee); *see also In re* Orfa Corp., 121 B.R. 294, 297 (Bankr. E.D. Pa. 1990) (suggesting unanimous support of creditors in *White Motor* was significant factor in decision).

[98] *White Motor*, 18 B.R. at 722.

[99] 89 B.R. 832 (Bankr. C.D. Cal. 1988), *aff'd*, 949 F.2d 1058 (9th Cir. 1991).

[100] *Id.* at 835 n.3 (explaining there are often sinister explanations when counsel does not oppose motion for substantive consolidation); *see Orfa*, 121 B.R. at 297 (noting frustration of court in *In re Parkway Calabasas Ltd.* of the lack of opposition to Debtors' substantive consolidation motion "which operated to the detriment of one of the debtors.").

[101] *See Parkway Calabasas*, 89 B.R. at 834 n.3 (theorizing professionals' support of motions for substantive consolidation "often arises from the selfish purpose of assuring a fund for the payment of all of their fees, and to avoid the possibility that they will not be paid for the portion of their work performed for an administratively insolvent estate."); *see also In re* Lee, 94 B.R. 172, 179 (Bankr. C.D. Cal. 1989) (noting lack of separate counsel for related debtors in substantive consolidation may result in harm because of conflicts of interests).

[102] *Parkway Calabasas*, 89 B.R. at 834 n.3 (citation omitted).

> (a) where creditors of the debtors have dealt with such debtors as an economic unit (which may be reflected in a guaranties and subordination agreements);
>
> (b) where the affairs of the respective debtors (as reflected in inter-debtor accounts, jointly-owned assets, guarantees, subordination agreements, or shared officers, directors or owners) appear to be substantially entangled;
>
> (c) where assets have been transferred from one debtor to another in transactions that are not at arms length;
>
> (d) where piercing of the corporate veil of one of the debtors is necessary or advisable to protect the rights of creditors or another debtor.[103]

The *Calabasas* decision raises many interesting questions. Should one committee ever be put in the position of deciding whether to substantively consolidate multiple estates? Does it make a difference if the committee members all have claims against each estate? Does it make a difference in a mega-case with over 50 or 100 affiliated-debtors where the cost may be extreme?[104] Does it make a difference if there is only one operating debtor among jointly-administered debtors?[105]

At least one commentator has wondered whether the *Calabasas* factors "could be used to justify the appointment of a *single* creditors' committee, as each seems to indicate the need for (or the desirability of) substantive consolidation and . . . only one creditors' committee."[106] The factors listed by the court in *Calabasas* are certainly relevant to the issue of substantive consolidation and appear to be worded in a way that favors substantive consolidation and the appointment of a single committee.[107] In other words, the factors may be stated more appropriately in the

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[103] *Id.*; *see also Lee*, 94 B.R. at 180 (adopting presumption established in *Parkway*).

[104] *See In re* McLean Indus., Inc., 70 B.R. 852, 862 (Bankr. S.D.N.Y. 1987) (rejecting *White Motor* on basis that "cost could be extreme" if a separate committee was required for each jointly-administered debtor case); *see also In re* Sharon Steel Corp., 100 B.R. 767, 778 (Bankr. W.D. Pa. 1989) (recognizing separate committees impose additional expenses on debtor's estate adversely affecting its ability to reorganize).

[105] *See In re* Hills Stores, Co., 137 B.R. 4, 6 (Bankr. S.D.N.Y. 1992) (noting if "this [was] a case where the creditors of separate debtors had vastly conflicting aims and entitlement and had shown themselves unable to function on a single committee, I might be more inclined to [appoint an additional committee], but here there is only one operating debtor engaged in a single business."); *see also Sharon Steel*, 100 B.R. at 777–78 (proposing single committee is sufficient representation as long as creditor groups' diverse interests are represented on and have participated in committee).

[106] Klee & Shaffer, *supra* note 13, at 1031 (emphasis in original).

[107] *See In re* Enron Corp., 279 B.R. 671, 689 (Bankr. S.D.N.Y. 2002) ("[T]he operation of a single committee is not so distinct from the functioning of ENA and Enron Corp. pre-petition."); Klee & Shaffer,

converse.[108] An important aspect of the court's message, however, is that the creditors of each estate are entitled to undivided loyalty when a committee considers those factors.[109]

Where one estate will benefit from substantive consolidation at the expense of another estate, it may be inappropriate to have a single creditors' committee for both estates. As courts are reluctant to appoint multiple committees because of the additional expenses, a bankruptcy court would likely require factual support, rather than conclusory statements, demonstrating the harm to an estate before ordering the appointment of an additional creditors' committee.[110]

B. Alleged Under-Representation of Creditor Group

1. Under-Representation in General

The Bankruptcy Code does not require that a creditors' committee "faithfully reproduce the exact complexion of the creditor body" so that each creditor group is numerically represented on the creditors' committee in the same proportion as the creditor group is to the creditor body.[111] It is not necessary for the committee to be

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supra note 13, at 1031 (suggesting factors in *In re Parkway Calabasas* "could be used to justify the appointment of a single creditors' committee, as each seems to indicate the need for (or the desirability of) substantive consolidation and, thus, only one creditors' committee"); *see also* Eklund & Roberts, *supra* note 16, at 150 (noting current trend is to appoint one consolidated committee, even if cases are complicated and related).

[108] *See, e.g.*, Mirant Am. Energy Mktg., L.P., v. Official Comm. of Unsecured Cred. of Enron Corp., No. 02 Civ. 6274, 2003 WL 22327118, at *5 (Bankr. S.D.N.Y. Oct. 10, 2003) (recognizing efficiency of single creditors' committee jointly administering cases). In *Mirant*, the district court stated that the presumption adopted in *Parkway Calabasas* was tangential dictum that has been followed by only a few courts. *Id*. The district court in *Mirant* favored a case-by-case approach to any alleged conflicts of interest, focusing on whether the conflicts impaired the committee's ability to function. *See id*. at *5–8. The district court stated that, "despite the likely conflicts, and in recognition of the greater efficiencies achieved, jointly administered cases with a single creditors' committee is commonplace." *Id*. at *7.

[109] Gill v. Sierra Pacific Constr., Inc. (*In re* Parkway Calabasas Ltd.), 89 B.R. 832, 835 n.3 (Bankr. C.D. Cal. 1988) ("[R]espective committees of unsecured creditors . . . and their counsel should be . . . looking out for the interests" of their creditor constituency). Indeed, separate counsel may be appropriate to advise each creditors' committee regarding the appropriateness of substantive consolidation. *See In re* Lee, 94 B.R. 172, 179 (Bankr. C.D. Cal. 1989) (stating substantive consolidation and inter-debtor claims should be reviewed by separate counsel for each debtor estate).

[110] *See Enron Corp.*, 279 B.R. at 686 ("Movants have not cited a single instance where the ability of the Creditors' Committee to function has been impaired. In fact, the Creditors' Committee notes that it has voted unanimously in favor of opposing the appointment of additional committees."); *see also id.* at 688 ("[T]here is no evidence that there is any conflict on the Creditors' Committee with respect to maximizing value and no evidence that the movants have not had a meaningful voice."); *Sharon Steel*, 100 B.R. at 778 ("Similar attempts elsewhere to divide creditors' committees, on the basis of real or imagined conflicts, have been uniformly unsuccessful.").

[111] *In re* Hills Stores Co., 137 B.R. 4, 7 (Bankr. S.D.N.Y. 1992) (stating "[n]owhere does the Code mandate a committee faithfully reproduce the exact complexion of the creditor body. What is required is adequate representation of various creditor types."); *see also In re* Garden Ridge Corp., No. 04-10324, 2005 WL 523129, at *3 (Bankr. D. Del. March 2, 2005) ("There is no hard and fast rule requiring proportionate representation of distinct groups of creditors on a committee of unsecured creditors."); *In re* Dow Corning

"an exact reflection" of its constituents.[112] Nevertheless, both large creditor groups and minority creditor groups have raised the claim of under-representation as a basis for the appointment of an additional creditors' committee.

In *Hills Stores*, subordinated bondholders, whose claims totaled 35% of the unsecured creditor body, argued that their 27% of creditors' committee seats was inadequate.[113] The bondholders sought the appointment of an additional committee of subordinated bondholders (or a sub-committee of such bondholders).[114] The bankruptcy court rejected the bondholders' argument and declared that the 8% difference "does not establish such inadequate representation as to warrant the formation of a separate committee."[115] The court noted that no creditor group held a majority of the creditors' committee seats and no group could control the committee without the aid of another group.[116]

The court concluded that the bondholders had not demonstrated that there exists a conflict among the unsecured creditors "so profound as to impede the committee's ability to function."[117] The court added that the claimed pattern of discrimination by senior and trade creditors was "devoid of factual support."[118]

In *Sharon Steel*, bondholders also sought the appointment of a separate bondholders' committee.[119] The bondholders argued that they were under-represented by holding only 6 of 13 seats on the creditors' committee and that the differing interests of trade creditors and bondholders created a conflict that prevented the committee from reaching an agreement regarding a plan of reorganization.[120]

The bankruptcy court rejected the bondholders' argument, reasoning that the bondholders had failed to demonstrate any particular instance in which the Committee rejected the bondholders' proposal or voted in a manner other than unanimously or virtually so.[121] The court added that the bondholders had similarly

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Corp., 194 B.R. 121, 141 (Bankr. E.D. Mich. 1996) (finding no requirement that creditors' committee be exact reflection of members).

[112] *See Garden Ridge*, 2005 WL 523129, at *3 ("For a particular group of creditors to be adequately represented by an existing committee, it is not necessary for the committee to be an exact reflection of that committee's designated constituents." (quoting *Dow Corning*, 194 B.R. at 141)); *see also Hills Stores*, 137 B.R. at 7 (finding creditors' committee need not be mirror image of creditor members).

[113] *See generally Hills Stores*, 137 B.R. 4.

[114] *Id.* at 4 (stating "four subordinated bondholders ask for the appointment of either an official subordinated bondholders' subcommittee of the Committee or, in the alternative, for their own committee.").

[115] *Id.* at 7.

[116] *See id*. (noting "there is not one group which by itself can control the decisions of the Committee without the aid of another.").

[117] *Id.*

[118] *Id.*

[119] *See In re* Sharon Steel Corp., 100 B.R. 767, 771 (Bankr. W.D. Pa. 1989) (holding appointment of separate committee of holders was not necessary to assure adequate representation).

[120] *See id*. at 776–77, 781 (acklowledging argument by bondholders).

[121] *See id.* at 777 ("The Debenture Group has not, however, as shown in their affidavits and arguments, both oral and written, made a single proposal to the Official Committee with respect to a plan of reorganization or the handling of an issue, which has been rejected by the Official Committee.").

failed to show any facts to support the alleged inability of the committee to function.[122]

In *Public Service Company of New Hampshire*,[123] bondholders sought the appointment of an additional committee of bondholders or, alternatively, the appointment of additional individual bondholders to the existing creditors' committee and the formation of a bondholders' subcommittee. The existing creditors' committee was comprised of nine members, two indenture trustees, two institutional bondholders, two individual bondholders, and three trade creditors.[124]

The court declared that the movants did establish that individual bondholders would benefit from an increased voice in the bankruptcy case and "thus more adequate representation, in the sense that individual debentureholders normally will prefer a much quicker resolution of a reorganization than entities with 'greater staying power' or entities who might want to continue doing business with the reorganized company."[125] Although the court found that the movants had established a "question of adequate representation" of individual bondholders, the court concluded that the appointment of a separate committee was not justified at that time.[126] The court reasoned that the expense, delay and disruption of appointing such a committee weighed against appointing an additional committee.[127]

In *McLean*, bondholders also sought the appointment of an additional bondholders' committee arguing, *inter alia*, that they were under-represented with two seats (a bondholder and an indenture trustee) on the creditors' committee.[128] In concluding that an evidentiary hearing on the motion was required, the court declared that it could not determine as "a matter of law" that the bondholders were *per se* entitled to a separate committee.[129]

Thus, as evidenced in those cases, a creditor group with some representation on a creditors' committee will have a difficult time persuading a bankruptcy court that an additional committee composed of that group's creditors should be appointed. Even where a court determines that the group is not adequately represented by the existing creditors' committee, a court may exercise its discretion not to order the

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[122] *See id.* at 778 (noting the Debenture Group failed to show diverse interests prohibited the Official Committee from meeting fiduciary obligations to unsecured creditors).

[123] 89 B.R. 1014 (Bankr. D.N.H. 1988).

[124] *See id.* at 1016 ("Of the nine voting members, two members of the original committee were indenture trustees for various issues of the unsecured debentures; four members were institutional holders of such debentures; and three members were trade creditors.").

[125] *Id.* at 1019.

[126] *Id.* at 1019–20 (indicating "the record does not establish that the remedy by appointment of a separate committee is justified at this time and at this stage in the case.").

[127] *See id.* at 1020 (considering delay and disruption that appointment would entail). The bankruptcy court, however, concluded that the lesser remedy of expanding the existing creditors' committee was appropriate. Thus, the court ordered the appointment of two additional individual bondholders to the creditors' committee. *See id.* at 1020–21.

[128] *In re* McLean Indus. Inc., 70 B.R. 852, 854–55 (Bankr. S.D.N.Y 1987) (acknowledging bondholder's argument).

[129] *Id.* at 862 ("We cannot say, however, as a matter of law, that they require a separate committee *per se*.")

appointment of an additional committee. Rather, the court may deny such request or expand the existing committee to include more members of that creditor group.

As the case law establishes, it is very difficult to force the bankruptcy court to order the trustee to appoint an additional committee or to expand an existing committee on the basis of alleged under-representation. In light of the actual or potential divergence of interests between trade creditors and bondholders, however, one or both of a trade creditors' committee and a bondholders' committee have been appointed to ensure that creditors are adequately represented.[130]

2. Under-Representation and the Disenfranchised Minority

A disenfranchised or dissident minority creditor group's claim that it is under-represented may present a thorny "adequate representation" issue. The creditors' committee may be functioning and taking a position on the important issues in the case although a minority of the committee may be effectively silenced by the majority. Assume, for example, that a group of bondholders holds a majority of the seats on the creditors' committee and that a group of trade creditors holds a minority of seats on the committee. Assume further that the bondholders unanimously vote in favor of a platform that involves selling the debtors' assets and pursuing avoidance actions against creditors, while the trade creditors unanimously vote against such a platform. In that example, the trade creditors have the right to be heard at the committee meetings, but can be consistently outvoted by the bondholders.

A dissident faction of creditors is "not automatically entitled to separate committees."[131] Whether or not a disenfranchised minority constitutes a basis for the appointment of an additional creditors' committee depends upon the interpretation of "adequate representation." "Adequate representation" does not mean that a creditor is successful on all of its positions,[132] but rather means that the creditor has a "meaningful voice" on the committee.[133] Does the trade creditor minority have a "meaningful voice" when it is consistently outvoted by the bondholder majority?

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[130] *See, e.g.*, *In re* Metricom, Inc., 275 B.R. 364, 365–66 (Bankr. N.D. Cal. 2002) (referring to bondholders' and trade creditors' committee); Johnson v. The Celotex Corp. (*In re* Celotex Corp.), 232 B.R. 484, 485 (M.D. Fla. 1998) (discussing trade creditors' committee); *In re* Heck's Props., Inc., 151 B.R. 739, 744 (S.D. W. Va. 1992) (analyzing appointment of three different committees including trade creditors' committee); *In re* Revco D.S., Inc., 118 B.R. 464, 467 (Bankr. N.D. Ohio 1990) (addressing divergent interests of some parties and separate trade creditors' committee).

[131] *In re* Texaco, 79 B.R. 560, 567 (Bankr. S.D.N.Y. 1987); *see also In re* Salant, 53 B.R. 158, 161 (Bankr. S.D.N.Y. 1985) (acknowledging court's role in determining whether certain committees are necessary).

[132] *In re* Enron Corp., 279 B.R. 671, 693 (Bankr. S.D.N.Y. 2002) (asserting success is not determinative of adequate representation).

[133] *In re* Dow Corning Corp., 194 B.R. 121, 141 (Bankr. E.D. Mich. 1996) (stating "adequate representation exists if [a creditor group has] a meaningful voice on the committee in relation to their posture in the case").

If a minority is entitled to nothing more than the opportunity to participate in the committee's deliberations, then the minority may be adequately represented by the committee even though the minority is consistently outvoted so long as the minority has a representative on the committee.[134] If adequate representation entitles a minority to have its views advocated by the committee, then the minority may not be adequately represented if it is consistently outvoted even though the minority has a representative on the committee.[135]

In *McLean*, the bankruptcy court declared that "[i]t would seem to require no citation . . . to reason that a committee in a case involving conflicts among creditors should not be dominated by one or more particular faction."[136] Although that proposition may have seemed obvious to the *McLean* court, many creditors' committees are dominated by a particular group of creditors, usually bondholders. The interests of those bondholders may diverge from the interests of trade creditors.[137]

In *Dow Corning*, the bankruptcy court declared that a committee may not adequately represent a particular group of creditors "if the committee is so dominated by one group of creditors that a separate group has virtually no say in the decision-making process. Consequently, courts look to see whether conflicts of

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[134] *See* Eklund & Roberts, *supra* note 16, at 143 ("A 'meaningful voice' can thus be defined as the full opportunity of a committee member, prior to a committee vote, to present [to] the committee the position of the creditor constituency holding claims most similar to the claim of that member."); *see also In re* Sharon Steel Corp., 100 B.R. 767, 777–78 (Bankr. W.D. Pa. 1989) (concluding adequate representation exists if diverse interests of group is represented on, and have participated in, the committee).

[135] One commentator has stated:

> [I]t is more likely that two or more of one type of creditor (e.g., institutional lenders) on the committee will continually vote their own interests, dominating the committee and overpowering another type of creditor (e.g., trade creditors) with fewer representatives on the committee. In such case, the group of creditors represented by the 'squelched' committee members are not 'adequately represented' by the committee if they consistently are denied a meaningful voice on the committee . . . . Unless the committee is unable to serve the best interests of the creditor constituency, the divergence of interests and inherent conflicts are accepted by the committee process and reorganization scheme and the overpowered creditor is not considered to be disenfranchised.

Eklund & Roberts, *supra* note 16, at 142–43 (footnotes omitted).

[136] *In re* McLean Indus., Inc., 70 B.R. 852, 862 (Bankr. S.D.N.Y. 1987).

[137] *See Sharon Steel*, 100 B.R. at 776 (recognizing "differing interests of the trade creditors and the holders of debentures creates a conflict"); *In re* Pub. Serv. Co., 89 B.R. 1014, 1019 (Bankr. D.N.H. 1988) ("[I]ndividual debentureholders normally will prefer a much quicker resolution of reorganization than entities with 'greater staying power' or entities who might want to continue doing business with the reorganized company."); *McLean Indus.*, 70 B.R. at 861 ("Some [creditors' committee] members may favor liquidation; others may favor continuation of the business in order to preserve jobs or the viability of an important customer."); Klee & Shaffer, *supra* note 13, at 1028 ("Often, the interests of trade creditors will differ significantly from those of institutional creditors who do not conduct business with the debtor on a day-to-day basis and who may not be particularly interested in the debtor's reorganization.").

interest on the committee effectively disenfranchise particular groups of creditors."[138]

VI. OTHER POTENTIAL MEANS OF ENSURING ADEQUATE REPRESENTATION

Even if a court determines that a creditor group is not adequately represented by an official creditors' committee, the court has the discretion whether to order the trustee to appoint an additional committee.[139] One of the main factors in decisions refusing to order the appointment of an additional committee is the expense associated with the additional committee, including the fees that would be incurred by the estate to pay for the committee's professionals.[140] Courts, however, also consider whether the creditor group seeking the appointment of an additional committee has significant resources to advocate the group's interests.[141] Shifting the

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[138] *Dow Corning*, 194 B.R. at 142; *see also Enron Corp.*, 279 B.R. at 686 (quoting *Dow Corning*, 194 B.R. at 142).

[139] *See* 11 U.S.C. § 1102(a)(2) (2006) ("[T]he court *may* order the appointment of additional committees of creditors . . . if necessary to assure adequate representation of creditors . . . ."); *Enron Corp.*, 279 B.R. at 685 (listing set of factors courts apply in analyzing adequacy of representation); *Dow Corning*, 194 B.R. at 143 ("Court need not order appointment of additional committee even if the present ones do not adequately represent [creditors'] interests."); *In re* Wang Labs., Inc., 149 B.R. 1, 2 (Bankr. D. Mass. 1992) (stating court may order appointment of additional committees if necessary to assure adequate representation of creditors or of equity security holders).

[140] *See In re* Orfa Corp., 121 B.R. 294, 299 (Bankr. E.D. Pa. 1990) ("Another important issue is avoidance of the additional and unnecessary administrative costs that would result if another committee and a potential enclave of additional professionals is appointed."); *Sharon Steel*, 100 B.R. at 778 (noting "separate committees impose additional administrative expenses on the debtor's estate which adversely affect the debtor's ability to reorganize and that separate teams of professionals rarely contribute to the spirit of compromise that is intended as the guiding star of chapter 11."); *In re* Baldwin-United Corp., 45 B.R. 375, 376 (Bankr. S.D. Ohio 1983) (stating separate equity committees would present "astronomical cost" to estates and may not engender harmony or alleviate conflict). *But see Enron Corp.*, 279 B.R. at 694 ("Added cost alone does not justify the denial of appointment of an additional committee where it is warranted."); *McLean*, 70 B.R. at 860, 862 (arguing "cost could be extreme" but "[c]ost alone cannot, and should not, deprive public debt and security holders of representation"). In *In re* Hill Stores Co., 137 B.R. 4 (Bankr. S.D.N.Y. 1992), the court stated:

> [A]ppointment of an additional committee or subcommittee would no doubt delay the confirmation process, result in additional expense for the estate and possibly cause the proliferation of other committees. Nevertheless, if I believed the delay and expense were justified by facts instead of speculation, I would not hesitate to order the appointment of an additional committee to assure adequate representation.

Id. at 8 (citation omitted).

[141] *Compare Enron Corp.*, 279 B.R. at 694 (referring to "ability of each creditor to participate through its retained counsel . . .") *with In re* Mansfield Ferrous Castings, Inc., 96 B.R. 779, 781 (Bankr. N.D. Ohio 1988) (noting employees "lack the resources to protect their interests individually . . . ."). *See also* Albero v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 68 B.R. 155, 159 (S.D.N.Y. 1986) (discussing guidelines developed by various courts to determine when additional committee is necessary).

expense of professionals is often a significant impetus for a creditor group's motion for the appointment of an additional committee.[142]

Where there is no "adequate representation," a bankruptcy court may have options other than simply deciding whether to order the trustee to appoint an additional creditors' committee. Among the potential options are (i) expanding the existing creditors' committee, (ii) utilizing examiners to deal with issues creating intra-committee conflicts or (iii) order the appointment of one or more subcommittees with clearly defined powers.[143]

In *Public Service Company*, the bankruptcy court denied a motion for the appointment of an additional committee.[144] As the court believed that there was a question regarding whether the individual bondholders were adequately represented by the creditors' committee, the court ordered the United States Trustee to appoint two additional individual bondholders to the existing committee.

Prior to Congress' enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, courts were split on whether a bankruptcy court has the authority to order the United States Trustee to alter the size or composition

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[142] In *Sharon Steel*, the Court stated:

> The sole purpose appears to be to get his professionals on the payroll of the debtor so as to be paid for every undertaking, necessary or unnecessary, without being subject to the increased level of scrutiny under section 503(b)(3) and (4) which requires a 'substantial contribution in a case' before any compensation can be awarded.

100 B.R. at 780–81; *see also Hills Stores*, 137 B.R. at 8 ("In fact, it emerged in oral argument this morning that the subordinated bondholders have had counsel for one year. This is not then a dispute about adequate representation, but about adequate assurance of alternative compensation."). *But see* Ad Hoc Bondholders Group v. Interco Inc. (*In re* Interco Inc.), 141 B.R. 422, 424 (Bankr. E.D. Mo. 1992) (raising financial concern because appointment of additional committees is "'closely followed by applications to retain attorneys and accountants.'" (citing *In re* Beker Indus. Corp., 55 B.R. 945, 948 (Bankr. S.D.N.Y. 1985))).

[143] *See In re* Pub. Serv. Co., 89 B.R. 1014, 1020–21 (Bankr. D.N.H. 1988) (expanding existing creditors' committee); *see also Enron Corp.*, 279 B.R. at 693–94:

> [A]ny argument that there should be a separate committee to investigate the alleged questionable transactions is alleviated by the investigating and reporting role of the ENA Examiner and the Enron Corp. Examiner . . . . The only entity with the fiduciary duty solely to ENA is that ENA Examiner. As such, his role, in addition to the role of the current Creditors' Committee . . . assures that all interests are being considered

Id.; Klee & Shaffer, *supra* note 13, at 1032:

> Given the potential expense and administrative problems associated with multiple committees, it would seem that the better practice would be to appoint a single creditors' committee in most cases, and to rely upon such techniques as employing special counsel, adopting recusal rules, or establishing special subcommittees to deal with situations in which conflicts among the estates arise.

Id.

[144] *See Pub. Serv. Co.*, 89 B.R. at 1020 ("[T]he court concludes that the motion before it must be denied to the extent that it requests the appointment of a separate committee . . . .").

of a creditors' committee.[145] Section 405(a) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added subsection (a)(4) to section 1102 of the Bankruptcy Code. Subsection (a)(4) provides as follows:

> On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders. The court may order the United States trustee to increase the number of members of a committee to include a creditor that is a small business concern (as described in section 3(a)(1) of the Small Business Act . . .), if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large.[146]

It appears that new subsection (a)(4) resolves the issue (at least for cases filed after October 17, 2005, the effective date for section 405(a)) of whether a bankruptcy court has the authority to order the United States Trustee to change the

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[145] *See* Bodenstein v. Lentz et al. (*In re* Mercury Fin. Co.), 240 B.R. 270, 276–77 (Bankr. N.D. Ill. 1999) (discussing majority view allowing court to alter committee and minority view prohibiting court alteration of committee); *In re* Pierce, 237 B.R. 748, 752 (Bankr. E.D. Cal. 1999) ("Bankruptcy and appellate courts are not in agreement about whether a bankruptcy court has any authority to review the appointment by the UST of members to a creditors' committee . . . ."); Klee & Shaffer, *supra* note 13, at 1032 ("[N]o other body of law governing creditors' committees appears to be in such a current state of disarray."). Originally, bankruptcy courts appointed the members of a creditors' committee. In 1986, however, Congress amended the Bankruptcy Code. *See generally* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088. One of those amendments granted the United States Trustee the power to appoint members of a creditors' committee. *See Mercury*, 240 B.R. at 275 (quoting text of repealed section 1102(c)); *see also* Masters, Mates & Pilots Plans v. Lykes Bros. Steamship Co., Inc. (*In re* Lykes Steamship Co.), 200 B.R. 933, 939–40 (Bankr. M.D. Fla. 1996) (describing legislative changes to section 1102); *In re* Columbia Gas Sys., Inc., 133 B.R. 174, 175 (Bankr. D. Del. 1991) (qualifying changes to section 1102). Courts were then split on whether the grant to the United States Trustee of the right to appoint members of a creditors' committee rendered a bankruptcy court unable to review the United States Trustee's appointments. *Compare, e.g.*, *Lykes*, 200 B.R. at 939–40 (determining section 105(a) authorizes review of United States Trustee's committee appointments) *and Columbia Gas*, 133 B.R. at 175–76 (deleting former section 1102(c) was a "housekeeping matter" and did not address court's power to review United States Trustee's appointments where United States Trustee committed abuse of discretion) *with* Smith v. Wheeler Tech., Inc. (*In re* Wheeler Tech., Inc.), 139 B.R. 235, 239 (B.A.P. 9th Cir. 1992) ("The power to appoint and delete members of the Creditors' Committee now resides exclusively with the U.S. Trustee.") *and In re* The Drexel Burnham Lambert Group, Inc., 118 B.R. 209, 210–11 (Bankr. S.D.N.Y. 1990) (holding bankruptcy court has no authority to alter committee membership as determined by United States Trustee) *and In re* Gates Eng'g Co., 104 B.R. 653, 654 (Bankr. D. Del. 1989) ("Subsequent to 1986, subsection (c) was deleted in § 1102 so that the court no longer had any authority over the composition of committees appointed by the U.S. Trustee.").

[146] 11 U.S.C. § 1102(a)(4) (2006).

membership of a creditors' committee.[147] Pursuant to section 1102(a)(4), it appears that a bankruptcy court may add creditors to the creditors' committee, remove creditors from the committee, or both add and remove creditors as is necessary to ensure adequate representation.

In light of section 1102(a)(4), the choice is not between granting or denying a motion for the appointment of an additional committee. The court may alter the composition of the creditors' committee as a middle ground. It is likely that section 1102(a)(4) will make additional committees less common. Section 1102(a)(4) can be used to resolve disputes regarding adequate representation of a creditor group in lieu of ordering the appointment of an additional committee under section 1102(a)(2). For example, courts may use their power under section 1102(a)(4) to add trade creditors to a committee where the committee is dominated by bondholders in lieu of appointing a separate official committee of unsecured trade creditors. Although as indicated above, courts hold that a creditors' committee need not "faithfully reproduce the exact complexion of the creditor body,"[148] it is possible that courts will exercise their power under section 1102(a)(4) to make a committee more reflective of the complexion of the creditor body in an appropriate case. Courts, however, will not lightly grant such motions as routinely doing so will both interfere with the United States Trustee's role in appointing committees and encourage frequent motions to alter committee membership.

In addition, where the committee faces a conflict between constituents holding claims against different debtors in jointly-administered cases, a court may consider appointing an examiner to investigate the nature of the conflict. Section 1104(c) of the Bankruptcy Code provides, in relevant part, that:

> If the court does not order the appointment of a trustee . . . , then . . . on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate . . . ."[149]

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[147] The second sentence of subsection 1102(a)(4) appears to set forth a specific concern for the interests of "small business concerns" that does not limit the first sentence of subsection 1102(a)(4), which gives a bankruptcy court broad power to order the United States Trustee to change the membership of a creditors' committee. One could argue, however, that Congress intended the second sentence of subsection 1102(a)(4) to define the scope of the bankruptcy court's ability to alter the membership of a creditors' committee. Specifically, one could argue that the bankruptcy court's ability to alter the membership of a creditors' committee is limited to expanding a committee's membership to one or more creditors that are small business concerns. Subsection 1102(a)(4) does not indicate whether the bankruptcy court may order the trustee to add particular creditors or simply to order the United States Trustee to add creditors (selected by the Trustee) from a particular group of creditors. In any event, it is now clear that a bankruptcy court has the authority to alter the membership of a creditors' committee in some fashion.

[148] *In re* Hills Stores, Co., 137 B.R. 4, 7 (Bankr. S.D.N.Y. 1992); *see In re* Enron Corp., 279 B.R. 671, 690 (Bankr. S.D.N.Y. 2002) (quoting *Hills Stores*).

[149] 11 U.S.C. § 1104(c).

There is ample authority for the proposition that a bankruptcy court *sua sponte* may appoint an examiner under section 1104(c).[150] Assuming that the bankruptcy court has the authority *sua sponte* to order the appointment of an examiner without awaiting a motion for the appointment of a trustee, the court may utilize an examiner for each estate to deal with issues such as substantive consolidation.

An examiner, as a fiduciary for a particular estate, may be able to conduct an independent investigation of issues on which the committee is conflicted. Of course, individual committee members may take positions on the conflict issues through their individual counsel.[151] The fact that an examiner for ENA and an examiner for Enron Corporation were considering intercompany debt[152] was a significant factor in the bankruptcy court's decision not to order the appointment an additional creditors' committee in *Enron Corp*.[153]

There are potentially debilitating limitations to the employment of an examiner. An examiner may be limited to investigation, as opposed to advocacy.[154] In addition, an examiner's authority to engage professionals has been questioned.[155]

A bankruptcy court may have the authority to order the appointment of subcommittees with certain powers. Although section 1102 does not specifically

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[150] *See, e.g., In re* First Am. Health Care, 208 B.R. 992, 994 (Bankr. S.D. Ga. 1996) (recognizing bankruptcy court's power to *sua sponte* appoint examiner); Keene Corp. v. Coleman (*In re* Keene Corp.), 164 B.R. 844, 855 (Bankr. S.D.N.Y. 1994) (affirming bankruptcy court's authority to appoint examiner); *In re* Pub. Serv. Co., 99 B.R. 177, 182 (Bankr. D.N.H. 1989) (determining court has authority to appoint examiner).

[151] *See Enron Corp.*, 279 B.R. at 691 (acknowledging individual parties may voice their positions on issues through individual counsel and through composition of Creditor's Committee).

[152] The intercompany debt issue is only a small part of the factors that a party litigating substantive consolidation would consider.

[153] *See Enron Corp.*, 279 B.R. at 691 (noting examiners are involved in issue of intercompany debts); *see also id.* at 693 ("[A]ny argument that there should be a separate committee to investigate the alleged questionable transactions is alleviated by the investigating and reporting role of the ENA Examiner and the Enron Corp. Examiner . . . ."); *id.* at 694 ("The only entity with the fiduciary duty solely to ENA is that ENA Examiner. As such, his role, in addition to the role of the current Creditors' Committee . . . assures that all interests are being considered . . . .").

[154] *See* Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 578 (3d Cir. 2003) (discussing examiner's role as investigating and reporting on investigation); Official Comm. of Asbestos Pers. Injury Claimants v. Sealed Air Corp. (*In re* W.R. Grace & Co.), 285 B.R. 148, 156–57 (Bankr. D. Del. 2002) (refusing to allow examiner to appear as plaintiff in adversary proceeding). *But see In re* Texasoil Enter., Inc., 296 B.R. 431, 435–36 (Bankr. N.D. Tex. 2003) (permitting expansion of examiner's duties to suit needs of case).

[155] *See W.R. Grace*, 285 B.R. at 157 ("The Bankruptcy Code does not authorize the retention by an examiner of attorneys or other professionals."); *In re* Tarkowski, 104 B.R. 828, 829 (Bankr. E.D. Mich. 1989) (finding Bankruptcy Code does not provide for appointment of professionals to assist examiner). *But see In re* Southmark Corp., 113 B.R. 280, 281–84 (Bankr. N.D. Tex. 1990) (analyzing whether Code allows for professionals to be retained, and concluding given size of case and issues presented professionals were needed). Of course, the bankruptcy court could appoint a law firm as examiner, but that would not help to the extent accounting services were required. *Id.* at 282. Notably, the *W.R. Grace* decision was based largely on a Third Circuit panel opinion narrowly interpreting standing under a section of the Bankruptcy Code. As the panel opinion upon which *W.R. Grace* relied has been vacated by the Third Circuit *en banc*, it is unclear whether the *W.R. Grace* court would reach the same conclusion today.

address a bankruptcy court's power to order the appointment of subcommittees, one could argue that the bankruptcy court has the power to do so as a lesser-included power of either its right to reconstitute a committee or its right to order the appointment of additional committees. In addition, one could argue that section 105(a) also provides a basis for the appointment of a subcommittee that is "necessary or appropriate" to assure adequate representation of the subcommittee's constituency.[156]

In *In re County of Orange*,[157] the United States Trustee utilized subcommittees as an alternative to the appointment of an additional committee. Specifically, the trustee initially formed an official committee of creditors and a vendors' subcommittee. Subsequently, bondholders and employees requested the appointment of subcommittees to represent their interests.[158] The trustee believed that the bondholders and employees were already adequately protected and initially declined their requests for the appointment of subcommittees.[159] Subsequently, the trustee agreed to appoint the bondholders' and employees' subcommittees, provided that such subcommittees would only seek compensation based upon a "substantial contribution" under section 503(b)(3)(D).[160] Each subcommittee was entitled to designate representatives to sit on the committee.[161]

The committee/subcommittee structure employed in *County of Orange* was proposed by the trustee. The trustee's decision to employ that structure was described as follows:

> [S]hortly after the County filed bankruptcy, certain constituencies began to organize themselves into separate subgroups (e.g., vendors, bondholders, school districts). The Trustee recognized that these subgroups could make a substantial contribution to the

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[156] 11 U.S.C. § 105(a) (2006) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); *see also In re* Value Merchs., Inc., 202 B.R. 280, 287 (E.D. Wis. 1996) (recognizing bankruptcy courts power under section 105(a) to review trustee's decisions); *In re* Plabell Rubber Prods., 140 B.R. 179, 180–81 (Bankr. N.D. Ohio 1992) (noting section 105(a) give courts ability to ensure trustee does not act arbitrarily and capriciously).

[157] 179 B.R. 195, 197, 198 n.3 (Bankr. C.D. Cal. 1995) (utilizing subcommittee structure proposed by trustee).

[158] *See id.* at 198 (noting trustee appoint a bondholders subcommittee of creditors and employee representatives). After forming the Vendor Subcommittee, a group of bondholders and various employee organizations approached the Trustee about forming separate subcommittees. *See id.* at 198 n.4.

[159] *See id.* at 198 n.4 (stating trustee initially declined requests "believing that these groups were already adequately represented").

[160] *Id.*; *see also* 11 U.S.C. § 503(b)(3)(D) (2006) ("[T]here shall be allowed, administrative expenses, . . . including . . . the actual, necessary expenses, . . . incurred by . . . a creditor, an indenture trustee, an equity security holders, or a committee representing creditors or equity security holders . . . ."); 11 U.S.C. § 503(b)(4) (2006) (allowing administrative expense for "reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection . . . .").

[161] *See County of Orange*, 179 B.R. at 197–98 n.3 ("[T]he Trustee took the unusual approach of forming official subcommittees that could designate representatives to sit on the Committee.").

> reorganization process by facilitating the flow of information and lending their expertise to the process. However, both the Trustee's policy and her personal experience weighed against forming more than one committee. Accordingly, the Trustee took the unusual approach of forming official subcommittees that could designate representatives to sit on the Committee.[162]

The committee/subcommittee structure employed in *County of Orange* was interesting in its attempt to permit various constituencies to designate representatives to sit on the creditors' committee. The *County of Orange* structure also granted "official" status to several subcommittees, while apparently allowing only the vendor subcommittee and its professionals to obtain compensation under section 330 of the Bankruptcy Code.[163] Thus, the *County of Orange* structure allowed somewhat greater representation to creditor groups while attempting to limit the burden on the debtor's estate from the fees and expenses of the creditor groups and their professionals.

CONCLUSION

A creditors' committee appointed under section 1102 of the Bankruptcy Code owes a fiduciary duty to the class of creditors that it represents. Thus, the committee is expected to adequately represent that class of creditors. That class of creditors, however, is usually very diverse and comprised of creditors with competing interests.

In bankruptcy, there is often conflict between creditors vying for a larger share of a debtor's limited assets. Indeed, some conflict is expected between committee members with diverse interests. Some conflict is also expected between a creditors' committee and particular creditors or creditor groups within the committee's constituency. Many courts believe that some conflict with or within creditors' committees aids the reorganization process and forces parties to negotiate.

In some instances, however, the conflict within a creditors' committee or between a committee and one or more of its constituents rises to the level where the committee may not adequately represent the interests of a particular creditor group. The disputes often focus on a committee member's allegedly competing fiduciary or contractual duty or the creditor group's alleged under-representation on the committee. The bankruptcy court must resolve such disputes by determining whether it is necessary to appoint an additional committee under section 1102(a)(2) of the Bankruptcy Code so that the creditor group is adequately represented. Courts

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[162] *Id.*

[163] *See id.* at 198–99 (describing structure as allowing vendor subcommittee to "receive compensation for their professionals at the end of the case based on a substantial contribution standard."); *see generally* 11 U.S.C. § 330 (2006) (allowing compensation of officers).

are hesitant to order the appointment of additional committees due to the added expense that falls upon the debtor's estate. A bankruptcy court may be able to fashion a less expensive remedy, such as changing the membership of an existing creditors' committee under section 1102(a)(4), appointing examiners, or ordering the appointment of subcommittees, to ensure that a creditor group is adequately represented.