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NOTe: Fiduciary Responsibilities of Creditors' Committee Members with Respect to Securities and Commodities Transactions

Introduction

Catch−22, stuck between a rock and a hard place, damned if you do damned if you don't, a lose lose situation – these are all terms that can be used to describe the predicament of many large creditors in today's insolvency marketplace. Simply stated, the problem is this: if a large investment house sits on a creditors' committee it will be privy to non−public information which, because of its fiduciary duties, can render it ethically unable to conduct its underlying business (trading and/or publishing research on the affected securities and/or commodities), however, if it does not sit on the committee it will be denying the public its expertise in the field and thereby decreasing liquidity as well as denying itself the right to oversee the plan affecting its investment. [1]

The proposed keystone to bridge the gap between these two scenarios, which seem diametrically opposed, is the creation of an "ethical wall." [2] Through its effective implementation, an ethical wall can allow these creditors to benefit from the best of both worlds. Recently in an opinion in the case of *In re Pacific Gas & Electric Co*., [3] Judge Montali made a distinction between the use of ethical walls with respect to securities and with respect to commodities. He approved an order allowing ethical wall provisions related to securities transactions, but denied a similar order for commodities transactions. [4]

Part I of this Note investigates the role of the creditors' committee and the various fiduciary duties involved. Parts II and III examine the differences and similarities between securities and commodities transactions as well as the affects they may have on the underlying debtor. Part IV proposes the provisions for an effective ethical wall. Finally, this Note concludes that precedent and public policy require that creditors' committee members be allowed to implement effective ethical walls in *both* the securities and commodities arenas.

I. The Fiduciary Duty of Creditors' Committee Members

Creditors' committees are formed under sections 1102 and 1103 of the Bankruptcy Code. [5] Their general purpose is to represent the creditors in negotiations, with both the debtor and the U.S. Trustee, to "operate the business on an interim basis and to arrive at a plan that can be confirmed under section 1129." [6] As a part of this representation, the committee members are bound by a fiduciary duty to the creditors whom they represent. [7] This is a duty of a "high degree of loyalty and impartial service in the interest of the represented creditors." [8] Each individual committee member is bound to represent all creditors, not merely those in a similar position to himself. [9] This duty, however, is limited in application.

The creditors' committee does not owe a fiduciary duty to the debtor. [10] It also does not owe a fiduciary duty to the estate, [11] although actions that benefit the estate will also generally serve the creditor's interests as well. Individual committee members may be tempted to act in their own best interest, and this is permitted as long as it doesn't injure other creditors. [12] The committee must look at the creditors as a whole and not as individuals because their duty extends to the *class* of creditors, not to *individual* creditors. [13]

The committee faces harsh penalties if it breaches the fiduciary duty to the class of creditors. [14] These punishments can include disallowance or subordination of their claim, exposure to civil lawsuits, and other sanctions. [15]

In an effort to avoid litigation stemming from a breach of their fiduciary duty, several creditors' committees have sought declaratory judgments [16] from the bankruptcy court stating that the contemplated action would not be a *per se* breach of their fiduciary duty thereby exposing the committee to liability. [17] The requested order would not provide blanket immunity from claims such as insider trading. The only protection that would be provided is that the committee member would know that it would not be breaching its fiduciary duty with effective ethical walls in place. [18] A potential plaintiff would always be able to raise a claim against the committee member upon a showing that the ethical wall was not effective and that information had been passed to improper hands. [19]

II. Trading and Reporting on Securities

Securities trading and the value of the marketplace rest upon the theory that there is a level playing field and that all of the players have access to the same information. [20] For this reason, insiders are not allowed to use inside information when trading in the securities markets. [21] If an individual or entity were to trade on "inside information," [22] the playing field would no longer be level. To ensure the fairness of the market, the securities field is heavily regulated by the Securities and Exchange Commission ("SEC"). [23]

The SEC, along with state regulators, has oversight over the trading and reporting of securities. [24] The primary mission of the SEC is to "protect investors and maintain the integrity of the securities markets." [25] It accomplishes this goal by "promoting disclosure of important information, enforcing the securities laws, and protecting investors who interact with [the] various organizations and individuals." [26] The SEC's Office of the General Counsel will "often intervene in private appellate litigation involving novel or important interpretations of the securities laws." [27] It is in this capacity that the SEC has stated:

consistent with the requirements of the federal securities laws and the bankruptcy laws, an entity that is engaged in the trading of securities as a regular part of its business and that has implemented procedures reasonably designed to prevent the transmission to its trading personnel of information obtained through service on an official committee is not precluded from serving on the committee and, at the same time, trading in the debtor's securities. [28]

Thus, the SEC has given its explicit approval of the use of ethical walls by creditors' committee members who wish to trade in the debtor's securities. [29] In the case of *In re Federated Department Stores*, [30] the Court chose to adopt the view of the SEC. [31] In that case, the committee member sought an order declaring that it would not be breaching its fiduciary duties by trading in the debtor's securities if an effective ethical wall was created. [32]

Many courts have followed this example, and have allowed committee members to erect ethical walls enabling them to trade in the debtor's securities without breaching their fiduciary duty. [33] In *In re Pacific Gas & Electric Co.*, [34] Judge Montali followed these other decisions by allowing the committee members to trade in the debtor's securities with the creation of an ethical wall. [35] In this case, the committee members not only wanted to be able to trade in the affected securities, but also wanted to publish research about them. [36] The Court order allowed both actions to take place with the implementation of effective ethical wall procedures. [37] In doing so the Court was able to keep valuable members on the committee who were able to lend expertise in the field and thereby form a better plan and create more liquidity. [38]

III. Trading and Reporting on Commodities

The commodities market, similar to the securities market, also presumes a level playing field. [39] Inside information would serve to disrupt the integrity of this market, and is therefore prohibited when trading in the market. [40] To ensure the fairness and equity of the commodities market, it is strictly regulated by the Commodity Futures Trading Commission ("CFTC"). [41]

The CFTC has oversight over the trading and reporting of commodities. [42] Oversight by the CFTC is very similar to the oversight the SEC has over securities. [43] For example, there are reporting requirements whereby the CFTC is kept appraised of commodity trades over certain threshold limits. [44] These thresholds, or triggers, are rather sensitive so as to allow the CFTC to easily identify potential instability in the market due to unusual trading activities. [45]

Further oversight is provided in the commodities industry by the National Futures Association ("NFA"). [46] The NFA is a self−regulatory organization whose responsibilities largely overlap with the CFTC. [47] The NFA's principle functions are auditing its members, enforcing ethical standards, providing for arbitration of disputes, conducting registration screening of commodity personnel, and establishing training standards and proficiency testing of commodity personnel. [48]

Commodities trading is rather technical and its participants are very sophisticated. [49] Unlike securities markets, which are secondary markets, in the commodities markets the price at which a contract is traded has a direct impact on the issuer of that contract, especially if the issuer is a major participant in the market. [50] In securities markets the price at which a stock trades has only a secondary impact on the issuer of the security. [51]

Trading in commodities can place two parties in competition over a single commodity contract. [52] For example, company A would be willing to pay one amount for the right to purchase a given amount of electricity on a specified date. Meanwhile, company B would be willing to pay a different amount for the same contract. These companies will bid against one another until one decided that the other had bid more than the first believed the contract was worth. Because of the inherent uncertainty in future value, [53] companies A and B may have very different valuations for the same contract. This is the general basis under which the futures markets operate. A potential problem arises when company B has gained nonpublic knowledge regarding the maximum price company A will pay for the contract. With this information company B can just slightly outbid company A, thereby reducing its cost in the transaction. [54] This is precisely the potential problem that arises when a commodity trader (company B) sits on the creditors' committee for company A, because company B will be privy to non−public information about company A gained through its membership on the creditors' committee.

If a creditors' committee member (company B) were allowed to trade in commodities on information learned as a result of the committee service, that committee member may undermine the ability of the debtor (company A) to operate effectively under reorganization. [55] In undermining this ability to operate, the committee member would possibly be injuring the represented class of creditors and thereby breaching his fiduciary duty to that class. [56] Obviously, if someone else (for instance, company C) were to bid against company A in the above example without being privy to the inside information, there could be no argument that committee member B had breached any duty. [57] (That is unless, of course, company B disseminated improper information to company C. For the purposes of this illustration, we can assume that did not happen.) The implementation of an ethical wall, in effect, creates this new company C by screening off a portion of company B behind and ethical wall. Company C acts independently from committee member B. Thus, the implementation of an effective ethical wall can serve to overcome the problem of a committee member trading on inside information.

Ethical walls have been allowed as an effective barrier against insider trading. [58] In *Haviland v. J. Aron & Co.*, [59] a commodities trading department head was allegedly fired for not breaching the confines of an ethical wall put in place because his group was privy to the positions taken by clients in the commodities futures markets and these positions could not be disclosed to an affiliate broker and principal in the same energy markets. [60] Ethical walls, however, are not perfect. When the lure of easy riches becomes overwhelming it is possible for the most artfully designed walls to crumble. [61] If this were to happen, the proposed order would not provide a safe haven for the committee member who breached the wall.

In the *Pacific Gas & Electric Commodities* Order, [62] Judge Montali (in denying the motion requesting an order protecting the committee member from committing a *per se* breach of their fiduciary duty by erecting an ethical wall) first reasoned that "there is a fundamental difference between trading in securities issued by PG&E or its affiliates and engaging in commodities trading at the same time PG&E does so as part of its fundamental business." [63] By engaging in commodities trading at the same time as PG&E does, the committee member is placing himself in economic competition with the debtor on whose creditors' committee he sits. He focused on the impact trading in securities versus commodities would have on the underlying company. [64] This impact, however, would occur whether or not a trader on the kosher side [65] of an ethical wall traded in the affected commodities. If there is opportunity that would make the properly screened trader interested, it would be a logical conclusion that others who are not connected with the committee would also be interested in the opportunity. [66]

Another issue specific to the energy markets is the size and stability of the market. [67] The wholesale market for electricity has been called "dysfunctional" and electricity prices have been highly volatile. [68] Because of the volatility of the markets there is concern that the actions of one large market maker can have a disastrous effect on the market as a whole. [69] This fatalistic prediction has been tested recently when Enron filed for chapter 11 bankruptcy. [70] Despite the fact that a major market maker has sought bankruptcy protection, the energy markets have continued to thrive. [71]

Once a person has been "screened off" by the ethical wall, he or she would still be able to complete other duties that are not related to the ethical wall. For example, if an investment banker sits on the creditors' committee of a debtor whose business is to trade electricity futures, the investment banker will still be free to represent any other client whose business will not effect the price at which electricity futures are traded. [72] Although this could amount to sizable restriction on the particular employee, the firm as a whole will still be able to trade electricity futures on its trading floor. Without the ethical wall, the entire firm would be bared from doing anything that could effect the price of electricity futures. This would include a ban against the trading of electricity futures by anyone connected with the firm. By removing an entire firm's trading floor from the market, that firm will suffer a major loss in revenue and market share. [73] The ethical wall allows the firm to continue operations at the expense of placing restrictions on a small number of employees.

Another concern, even with an effective ethical wall, would be the "appearance of impropriety." [74] A member of the lay public may not see or understand the ethical wall provisions and would assume that the parties are engaging in what can most descriptively be coined as "shenanigans." The thought is that this false belief would lead to a loss of confidence in the ethics of the parties and in the justice system in general. [75] These fears are unfounded because (1) knowledge of these actions, although certainly not shielded from the public, would hardly be the makings of front page news; and (2) a properly worded order could visibly stress that if there were any improper information trading hands, the parties could be charged with breaching their fiduciary duties as well as violations of the various securities and commodities trading laws. [76]

IV. Ethical Wall Provisions

An effective ethical wall would have to provide for accountability and assurance that its provisions were being met. [77] Additional considerations include who should be charged with oversight and what consequences would result from a breach of its provisions. Once adequately constructed the ethical wall would be capable of shielding a committee member from a *per se* breach of its fiduciary duties.

Ethical walls are most commonly used to allow a law firm to take on a client that it may not otherwise be able to because of a conflict of interest. [78] Walls are also in use within many investment firms that operate as both brokers and investment bankers. [79] This prevents the investment bankers from tipping off the brokers who could act on that information to the benefit of the firm accounts or client accounts in violation of Rule 10b−5. [80] In both of these circumstances ethical walls have been effectively constructed as a two−way information barrier. [81] To be effective a wall must include: (1) a statement upon the erection of the wall that all involved know of its existence, (2) a formal mechanism by which the affected information is blocked, (3) a statement upon the completion of the transaction by all involved stating that they abided by the restrictions of the ethical wall, and (4) oversight.

The statement upon erection of the wall could be satisfied with a requirement that all parties sign an affidavit saying that they are aware of the ethical wall, its purpose, and its provisions. [82] This is really a notice requirement to put everyone on effective notice that certain information cannot, even inadvertently, be communicated to others within the organization. [83] Knowledge of the provisions and purpose of the wall are needed to allow each individual to understand what is blocked and from whom.

In this age of technology, a formal blocking mechanism could be accomplished by limiting access to files held on servers to certain individuals. [84] It could also provide for an independent intermediary who could resolve any questions that may come up. [85] For example, if an individual on one side of the wall should be required to contact this intermediary before it could disseminate any information to the other side of the wall. The intermediary could be a disinterested person within the firm or outside counsel. [86] Any uncertainty on the part of the intermediary should be resolved in favor of non−disclosure.

The statement upon the completion of the transaction could also be accomplished by requiring all parties involved to sign an affidavit stating both that they abided by all of the provisions of the wall and that they are not aware of anyone else breaching the confines of the ethical wall. This statement would provide the second half of the "bookend affidavits" proposed in this ethical wall. [87] This would require someone who breached the wall or had knowledge of someone else breaching the wall to make an affirmative misrepresentation to keep it from being discovered. [88]

Oversight poses the most controversial issue. Someone needs to be ultimately responsible for ensuring that the wall is effectively constructed and monitored throughout its existence. The courts are not the appropriate venue for this responsibility. [89] Oversight should be provided by either the affected parties or outside counsel. [90] Most investment firms already have their own compliance officers who would be fully capable of taking on this additional responsibility. [91] Outside counsel could also be utilized to issue legal opinion letters regarding the propriety of any proposed dissemination of information across the ethical wall. [92] Either of these options would allow for effective monitoring of the ethical wall and would be balanced with the requirements of professional responsibility. [93]

Conclusion

Ethical walls provide the best solution to the catch−22 that faces creditors' committee members who also wish to continue conducting their underlying business. By erecting an ethical wall these members should be able to have the piece of mind that they are not committing a *per se* breach of their fiduciary duty. Ethical walls are not perfect and there is no way to completely ensure that improper information will not trade hands. If any party wished to claim that the wall had in fact been breached, the claim would have standing and none of the parties involved would be protected by the court order allowing the ethical wall to exist. This is merely a solution that allows creditors' committee members to participate in and lend their vast knowledge to the formation of a plan that will maximize liquidity for the entire creditor class, while still allowing the committee member to continue to conduct their underlying business activities.

Robert A. Benjamin

FOOTNOTES:

[1] See In re Bonneville Pac. Corp., 196 B.R. 868, 879 (Bankr. D. Utah 1996) (noting need for expertise for reorganization purposes); In re Lyons Transp. Lines, 123 B.R. 526, 529 (Bankr. Pa. 1991) (recognizing need for experts on committee to reduce administrative expense). But see In re Attorneys Office Mgmt., Inc., 40 B.R. 127, 130 (Bankr. Cal. 1984) (finding some tasks of committee do not require any special expertise). Back To Text

[2] The term "ethical wall" has many synonyms. Some have called it an "information wall," a "conflicts wall," a "fire wall" and most commonly a "Chinese wall." The term "Chinese wall" has come under much scrutiny. See Peat, Marwick, Mitchell & Co. v. Superior Court, 200 Cal. App. 3d 272, 293−94 (1988) (Low, J. concurring) (filing a concurring opinion simply to state term "Chinese wall" is not proper term). In his concurrence Judge Low stated:

Aside from this discriminatory flavor, the term "Chinese Wall" is being used to describe a barrier of silence and secrecy. The barrier itself may work to further the cause of ethics in litigation; but the term ascribed to that barrier will necessarily be associated with constraints on the freedom of open communication. To employ in this context the image of the Great Wall of China, one of the magnificent wonders of the world and a structure of great beauty, is particularly inappropriate. One can imagine the response to the negative use of the images of the Eiffel Tower, the Great Pyramid of Cheops, or the Colossus of Rhodes.

Finally, "Chinese Wall" is not even an architecturally accurate metaphor for the barrier to communication created to preserve confidentiality. Such a barrier functions as a hermetic seal to prevent two−way communication between two groups. The Great Wall of China, on the other hand, was only a one−way barrier. It was built to keep outsiders out – not to keep insiders in.

Id. To avoid becoming involved in this controversy, this Note will use the term "ethical wall." See also United States v. Legal Servs., 249 F.3d 1077, 1080 (D.C. Cir. 2001) (referring to "Chinese wall"); Granholm v. PSC, 243 Mich.

App. 487, 499 (Mich. Ct. App. 2000) (using term "conflicts wall"). Back To Text

[3] 263 B.R. 306 (Bankr. N.D. Cal. 2001). Back To Text

[4] See In re Pac. Gas & Elec. Co., No. 01−30923−DM (Bankr. N.D. Cal. July 26, 2001) (Memorandum Decision Regarding Motion for Approval of Ethical Wall Procedures for Commodities Trading and Publishing) (denying use of ethical wall procedures for commodities trading and reporting); In re Pac. Gas and Elec. Co., No. 01−30923−DM (Bankr. N.D. Cal. June 25, 2001) (Order Permitting Trading and Publishing Research with respect to Affected Securities Upon Establishment of Ethical Wall Procedures) (allowing use of ethical wall procedures for securities trading and reporting). Back To Text

[5] See 11 U.S.C. § 1102 (1994) (providing for formation of creditors' committee); id. § 1103 (explaining powers and duties of creditors' committee). Back To Text

[6] See James White & Raymond Nimmer, Bankruptcy Cases and Materials 65 (3d ed. 1996); see also In re STN Enter., 779 F.2d 901, 905 (2d Cir. 1985) (granting committee standing to sue); In re A. C. Williams Co., 25 B.R. 173, 177 (Bankr. N.D. Ohio 1982) (stating committee should be active in arriving at plan). See generally 11 U.S.C. § 1129 (1994) (providing for prerequisite for confirmation of restructuring plan). Back To Text

[7] See Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 268−69 (1941) (finding committee members are fiduciaries); In re Mountain States Power Co. 118 F.2d 405, 407 (3d Cir. 1941) (applying fiduciary duty to those represented); see also In re J.F.D. Enter., Inc., 223 B.R. 610, 623 (Bankr. Mass. 1998) (stating no duty is owed to debtor or estate generally by either committee or counsel to committee). Back To Text

[8] George W. Walsh, The Creation, Rights, Duties and Compensation of Creditors' Committees Under Chapters X and XI of the Bankruptcy Act, 40 Brook. L. Rev. 35, 46 (1973). See In re Pierce, 237 B.R. 748, 758 (Bankr. E.D. Cal. 1999) (stating "[a]mong the duties assumed by Committee members are fiduciary duties of undivided loyalty and impartial service to all creditors"); Sassen v. Tanglegrove Townhouse Condominium Ass'n., 877 S.W.2d 489, 493 (Tex. App. 1994) (assigning high degree of loyalty to fiduciary duty). Back To Text

[9] See Berner v. Equitable Office Bldg. Corp., 175 F.2d 218, 220 (2d Cir. 1949) (stating each committee member "undertakes to act on behalf of any part of a class, he becomes a representative of the whole class, and may not deal for any part of it alone."); see also Cent. Trust Co., Rochester, N. Y. v. Official Creditors' Comm. of Geiger Enter., Inc., 454 U.S. 354, 355 (1982) (finding committee in this case had duty to represent interests of creditors with small claims); In re Nat'l Equip. & Mold Corp., 33 B.R. 574, 575 (Bankr. N.D. Ohio 1983) (declaring member of committee can not act in manner such as to only promote their own interests). Back To Text

[10] See In re Microboard Processing, Inc., 95 B.R. 283, 285 (Bankr. Conn. 1989) (defining limitations of duty); Comm. of Asbestos−Related Litigants v. Johns−Manville Corp. (In re Johns−Manville Corp.), 60 B.R. 842, 854 (Bankr. S.D.N.Y. 1986) (stating neither committee nor its members has any underlying duty to debtor or to estate); see also In re Bohack Corp., 607 F.2d 258, 262 n.4 (2d Cir. 1979) (holding "the 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"); Andrew D. Shaffer, Corporate Fiduciary − Insolvent: The Fiduciary Relationship Your Corporate Law Professor (Should Have) Warned You About, 8 ABI L. Rev. 479, 535−36 (2000) (examining fiduciary relationship of directors and officers of insolvent corporation). Back To Text

[11] See In re Microboard Processing, Inc. 95 B.R. at 285 (stating "no duty to the debtor or to the estate [is owed by the committee]"); see also In re SPM Mfg. Corp., 984 F.2d 1305, 1315 (1st Cir. 1993) (finding "the committee's fiduciary duty, as such, runs to the parties or class it represents"); In re Johns−Manville Corp., 60 B.R. at 854 (declining to extend duty to debtor or estate). Back To Text

[12] See In re Fas Mart Convenience Stores, Inc., No. 01−60386, 2001 Bankr. LEXIS 997, at *13 (Bankr. E.D. Va. Aug. 8, 2001) (holding "[m]embership on a committee does not preclude members from pursuing their own interests so long as this can be done without running afoul of their fiduciary duties to all unsecured creditors."); In re Nat'l Equip.

& Mold Corp., 33 B.R. at 575 (declaring member of committee cannot act in manner such as to only promote their own interests). Back To Text

[13] See In re SPM Mfg. Corp., 984 F.2d 1305, 1315 (1st Cir. 1993) (declaring committee "is charged with pursuing whatever lawful course best serves the interests of the class of creditors represented."); In re Seaescape Cruises, Ltd., 131 B.R. 241, 243 (Bankr. S.D. Fla. 1991) (stating fiduciary duty extends to class of creditors); see also In re Drexel Burnham Lambert Group, Inc., 138 B.R. 717, 722 (Bankr. S.D.N.Y. 1992) (finding "[t]he [fiduciary] duty extends to the class as a whole, not to its individual members"). Back To Text

[14] See In re Main, Inc. v. Blatstein, No. 98−5947, 1999 U.S. Dist. LEXIS 9312, at *63−*64 (E.D. Pa. June 23, 1999) (requiring penalties for breach of fiduciary duty); In re Southwest Equip. Rental, No. CIV−1−90−62, 1992 U.S. Dist. LEXIS 21396, at *76 (E.D. Tenn. July 9, 1992) (dictating penalty for breaching fiduciary duty to class of creditors represented); Leitch v. Marjorie M. Jelsema Ten Year Irrevocable Trust (In re Square Real Estate), 163 B.R. 108, 114 (Bankr. W.D. Mich. 1994) (speculating large penalty for breach of fiduciary duty). Back To Text

[15] See In re Taxman Clothing Co., 49 F.3d 310, 316 (7th Cir. 1995) (requiring return of fees where fees were earned by breaching fiduciary duty); Rome v. Braunstein, 19 F.3d 54, 62−63 (1st Cir. 1994) (denying fee due to breach of fiduciary duty); In re Federated Dep't Stores Inc., No. 1−90−00130, 1991 Bankr. LEXIS 288, at *2 (Bankr. S.D. Ohio Mar. 7, 1991) (listing possible penalties for breaching fiduciary duty). Back To Text

[16] An argument has been made that this type of an opinion would be an advisory opinion. In his commodities order, Judge Montali stated that "if the bankruptcy courts could only bind parties who were active litigants, and could only decide matters that were actively litigated, much of their regular business would not get done." In re Pac. Gas and Elec. Co., No. 01−30923−DM, at 9 (Bankr. N.D. Cal. July 26, 2001) (Memorandum Decision Regarding Motion for Approval of Ethical Wall Procedures for Commodities Trading and Publishing); see also Carter Day Indus., Inc. v. United States Envtl. Protection Agency (In re Combustion Equip. Assoc's, Inc.), 838 F.2d 35, 40 (2d Cir. 1988) (stating in dicta that bankruptcy court's power to estimate contingent liabilities "substitutes for ripeness"). But see Inter Urban Broad. v. Lewis (In re Inter Urban Broad), 180 B.R. 153, 155 (Bankr. E.D. La. 1995) (finding no present case or controversy to define "S" or "C" corporation status). Back To Text

[17] See In re Vista Eyecare, Inc., Case No. A00−65214 (Bankr. D. Ga. 2001) (allowing members of creditors' committee to trade in debtor's securities during pendency of case provided committee members established and implemented ethical wall procedures); In re GST Telecom, Inc., Case No. 00−1982 (Bankr. Del. 2000) (same); In re Sun Healthcare Group, Inc., Case No. 99−3657 (Bankr. D. Del. 1999) (same); In re ICO Global Communications Servs. Inc., Case No. 99−2933 (Bankr. D. Del. 1999) (same); In re Acme Metals, Inc., Case No. 98−2179 (Bankr. D. Del. 1998) (same); In re Mid Am. Waste Systems, Inc., Case No. 97−104 (Bankr. D. Del. 1997) (same); In re Ace−Texas, Inc., Case No. 96−166 (Bankr. Del. 1996) (same); Wherehouse Entm't, Inc., Case No. 95−911 (Bankr. D. Del. 1995) (same); In re Am. W. Airlines, Inc., Case No. 91−07505 (Bankr. D. Ariz. 1991) (same); see also In re County. of Orange, 179 B.R. 195, 197 (Bankr. C.D. Cal. 1995) (permitting members of official committee of unsecured creditors and subcommittee of bondholders to trade in debtor's securities with establishment and implementation of effective ethical wall procedures). Back To Text

[18] See In re Pac. Gas and Elec. Co., No. 01−30923−DM (Bankr. N.D. Cal. May 18, 2001) (Notice of Motion and Motion of Official Committee of Unsecured Creditors For Entry of an Order Permitting Trading in Affected Securities and Publishing Research upon Establishment of Ethical Wall Procedures) (proposing only protection would be against per se breach of fiduciary duty); In re County. of Orange, No. SA 94−22272−JR (Bankr. C.D. Cal. Jan. 31, 1995) (Order Granting Motion of the Official Committee of Unsecured Creditors of the County of Orange for Order Regarding Trading of Municipal Securities by Members of Official Committee and Official Subcommittees) (providing protection from same); see also Comm. of Creditors Holding Unsecured Claims v. Citicorp Venture Capital (In re Papercraft Corp.), 187 B.R. 486, 494 (Bankr. W.D. Pa. 1995) (finding per se breach where insider traded claim against debtor without disclosure or ethical wall in place). Back To Text

[19] See SEC v. Drexel Burnham Lambert, Inc., No. 88 Civ. 6209 (MP), 1989 U.S. Dist. LEXIS 10383, at *55 (S.D.N.Y. June 20, 1989) (finding breach of ethical wall); In re Federated Dep't Stores, Inc., No. 1−90−00130, 1991

Bankr. LEXIS 288, at *4 (Bankr. S.D. Ohio Mar. 7, 1991) (providing for claim to be brought if ethical wall procedures are breached). But see United States v. Stanfa, No. 94−127−1, 1996 U.S. Dist. LEXIS 10314, at *35 (E.D. Pa. July 18, 1996) (declaring that "speculative possibility of breach" of ethical wall is not enough to bring claim). Back To Text

[20] See Muskogee Envtl. Conservation Co. v. Scriminger (In re Muskogee Envtl. Conservation Co.), 236 B.R. 57, 66 (Bankr. N.D. Okla. 1999) (attempting to maintain even playing field); In re Present Corp., 141 B.R. 18, 24−25 (Bankr. W.D.N.Y 1992) (striving to maintain even playing field between insiders and outsiders); Samjens Partners I v. Burlington Indus., Inc., 663 F. Supp. 614, 626 (S.D.N.Y. 1987) (same). See generally Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1969) (explaining reasons for insider trading laws). Back To Text

[21] See 17 C.F.R. § 240.10b−5 ("Rule 10b−5") (2001) which provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

See id.; see also United States v. O'Hagan, 521 U.S. 642, 651−52 (1997) (explaining purpose of Rule 10b−5); United States v. Chestman, 947 F.2d 551, 566−67 (2d Cir. 1991) (applying misappropriation theory to find violation of Rule 10b−5). Back To Text

[22] See F. S. Tinio, Annotation, Who is an "Insider" Within § 10(b) of the Securities Exchange Act of 1934 (15 USCA § 78j(b))−− and SEC Rule 10b−5 Promulgated Thereunder −− Making Unlawful Corporate Insider's Nondisclosure of Information to Seller or Purchaser of Corporation's Stock, 2 A.L.R. Fed. 274 (2001); see also Robert E. Derecktor, Inc. v. United States, 762 F. Supp. 1019, 1028 (D.R.I. 1991) (defining inside information as "information generally not available to the public and obtained by reason of one's official DoD duties or position"). Back To Text

[23] The SEC was created by Congress in section 4(a) of the 1934 Act. See 15 U.S.C. § 78(j) (2001); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 727−29 (1975) (recounting history of '33 and '34 Acts from New Deal); see also Creation of the SEC, available at http://www.sec.gov/about/whatwedo.shtml#create, December 1999. Back To Text

[24] See GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 214 (3d Cir. 2001) (applying state securities law); SEC v. Lipson, 129 F. Supp.2d 1148, 1148 (N.D. Ill. 2001) (bringing action against individual for insider trading and reporting violations). But see Schneidewind v. ANR Pipeline Co., 108 S.Ct. 1145, 1156 (1988) (preempting state regulatory power with federal field regulation over scheme through Natural Gas Act). Back To Text

[25] The Investor's Advocate: How the SEC Protects Investors and Maintains Market Integrity, available at http://www.sec.gov/about/whatwedo.shtml, December 1999. Back To Text

[26] See id. Back To Text

[27] See id. In the Pac. Gas & Elec. Co. case, for example, the SEC voluntarily involved itself once it became aware that the motion had been filed in the Bankruptcy Court requesting the allowance of ethical wall provisions. See Jacobi v. Bache & Co., Inc., 520 F.2d 1231, 1237 (2d Cir. 1975) (noting SEC's attempt to stay out of controversy did not constitute approval); In re Network Assoc., Inc., Sec. Litig., 76 F. Supp.2d 1017, 1026 (N.D. Cal. 1999) (quoting from report provided by SEC Office of General Counsel). Back To Text

[28] In re Federated Dep't Stores, Inc., No. 1−90−00130, 1991 Bankr. LEXIS at *6 (Bankr. S.D. Ohio 1991) (Memorandum of the Securities and Exchange Commission). Back To Text

[29] The SEC has often played a role in bankruptcy proceedings. See In re Jernigan, 130 B.R. 879, 889 (Bankr. N.D. Okla. 1991) (filing brief to suggest standard to be used); In re Drexel Burnham Lambert Group, Inc., 118 B.R. 209, 211 (Bankr. S.D.N.Y. 1990) (suggesting appropriate level of judicial review); In re S. Indus. Banking Corp., 41 B.R. 606, 611 (Bankr. E.D. Tenn. 1984) (participating to question court's jurisdiction over review of fee applications). Back To Text

[30] No. 1−90−00130, 1991 Bankr. LEXIS 288 (Bankr. S.D. Ohio Mar. 7, 1991) (approving use of ethical walls by creditors' committee members when trading in debtor's securities). Back To Text

[31] See id. at *1; see also In re Federated Dep't Stores, Inc., No. 1−90−00130 (Bankr. S.D. Ohio March 7, 1991) (Memorandum of the Securities and Exchange Commission). Back To Text

[32] See In re Federated Dep't Stores, Inc., No. 1−90−00130, 1991 Bankr. LEXIS 288 (Bankr. S.D. Ohio Mar. 7, 1991) (granting specific motion); see also In re Pac. Gas and Elec. Co., No. 01−30923−DM (Bankr. N.D. Cal. May 18, 2001) (Notice of Motion and Motion of Official Committee of Unsecured Creditors For Entry of an Order Permitting Trading in Affected Securities and Publishing Research upon Establishment of Ethical Wall Procedures) (proposing only protection would be against per se breach of fiduciary duty). Back To Text

[33] See supra note 14; see also In re Convergent Technologies Sec. Litig., 948 F.2d 507, 517 (9th Cir. 1991) (finding possible Rule 10b−5 violation through publication of research reports); United States v. Cannistraro, 734 F. Supp. 1110, 1112 (D. N.J. 1990) (applying criminal penalties for publishing research report in violation of Rule 10b−5). Back To Text

[34] In re Pacific Gas and Electric Co., No. 01−30923−DM, 2002 Bankr. LEXIS 122 (Bankr. N.D. Cal. Feb. 7, 2002) (Order Permitting Trading and Publishing Research with respect to Affected Securities Upon Establishment of Ethical Wall Procedures). Back To Text

[35] See id. Back To Text

[36] See In re Media Vision Tech. Secs. Litig., No. C−94−1015 EFL, 1996 U.S. Dist. LEXIS 13808, at *6−7 (N.D. Cal. Sept. 9, 1996) (allowing Rule 10b−5 claim based on research reports if plaintiff "allege[s] how the statements reached the market, either through the reliance of the plaintiffs, or through any impact on the market price"); In re Convergent Technologies Sec. Litig., 948 F.2d at 517 (finding possible Rule 10b−5 violation through publication of research reports); Cannistraro, 734 F. Supp. at 1112 (applying criminal penalties for publishing research report in violation of Rule 10b−5). Back To Text

[37] In re Pac. Gas & Elec. Co., No. 01−30923−DM, 2002 Bankr. LEXIS 122 (Bankr. N.D. Ca. Feb. 7, 2002) (Order Permitting Trading and Publishing Research with respect to Affected Securities Upon Establishment of Ethical Wall Procedures) (putting forth specific minimum procedures for establishment of ethical wall). Back To Text

[38] See In re Bonneville Pac. Corp., 196 B.R. 868, 879 (Bankr. Utah 1996) (noting need for expertise for reorganization purposes); In re Lyons Transp. Lines, 123 B.R. 526, 529 (Bankr. Pa. 1991) (recognizing need for experts on committee to reduce administrative expense). But see In re Attorneys Office Management, Inc., 40 B.R. 127, 130 (Bankr. Cal. 1984) (finding some tasks of committee do not require any special expertise). Back To Text

[39] See ANR Pipeline Co. v. Fed. Energy Regulatory Comm'n., 71 F.3d 897, 902 (D.C. Cir. 1995) (citing statement by FERC that commodity rates should promote level playing field); S. Natural Gas Co. v. Fed. Energy Regulatory Comm'n., 813 F.2d 1111, 1112 (11th Cir. 1987) (same); see also Apex Oil Co. v. Di Mauro, 822 F.2d 246, 260 (2d Cir. 1987) (prohibiting manipulation of commodity market through use of information). Back To Text

[40] See 7 U.S.C. § 13(f)(2) (1994) (stating "[i]t shall be a felony for any person. . . willfully and knowingly to trade for such person's own account, or for or on behalf of any other account, in contracts for future delivery or options thereon on the basis of any material nonpublic information"); see also United States v. Dial, 757 F.2d 163, 168−69 (7th Cir. 1985) (finding trading in commodity futures with inside information would be harmful to market). See generally

Wendy Collins Perdue, Manipulation of Futures Markets: Redefining the Offense, 56 Fordham L. Rev. 345 (1987). Back To Text

[41] "The CFTC was created by Congress in 1974 with the mandate to regulate commodity futures and option markets in the United States. The agency protects market participants against manipulation, abusive trade practices and fraud." The CFTC at a Glance: The CFTC Mission, (2001), available at http://www.cftc.gov/cftc/cftcglan.htm. See Washington Nat'l Ins. Co. v. Jefferies & Co., No. 89 C 2216, 1990 U.S. Dist. LEXIS 12321, at *4 (N.D. Ill. Sept. 19, 1990) (citing strict regulations issued by CFTC); Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345, 1350 (D. Nev. 1980) (noting "exclusive jurisdiction to the CFTC to regulate the commodities field"); see also 7 U.S.C. § 2 (1994) (granting jurisdiction to CFTC). Back To Text

[42] See 7 U.S.C. § 2(a)(2)A (2001) (establishing CFTC); Tamari v. Bache & Co. S.A.L., 730 F.2d 1103, 1106 (7th Cir. 1984) (declaring fundamental purpose of Act is to insure fair practice and honest dealings in commodity exchanges); Smith v. Groover, 468 F. Supp. 105, 111−12 (N.D. Ill. 1979) (same). Back To Text

[43] See MBH Commodity Advisors v. CFTC, 250 F.3d 1052, 1062 (7th Cir. 2001) (noting similar statutory language); Conroy v. Andeck Resources '81 Year−End Ltd., 137 Ill. App. 3d 375, 381−82 (1985) (explaining jurisdictional disputes between SEC and CFTC due to similar oversight responsibilities). But see Bd. of Trade v. SEC, 187 F.3d 713, 723 (7th Cir. 1999) (remarking "[d]ifferences between the SEC and the CFTC about market oversight and regulation are of long standing"). Back To Text

[44] For example, a person who owns or controls 200 or more Crude Oil Futures Contracts on either the long or short side of the market must report his holding to the CFTC in a report. In addition, the futures commission merchant that carries such a person's account must also report his position to the CFTC. On the first day that the account drops below the reporting level, a report must be filed with the CFTC. See Securities Training Corporation, National Commodities Futures Examination (Vol. 1 2000) 2−28. The NFA also conducts regular surveillance of merchants to ensure compliance with ethical and capitalization standards. Id. at 2−25; see also Minpeco, S.A. v. ContiCommodity Services, Inc., 116 F.R.D. 517, 528 (S.D.N.Y. 1987) (noting reporting requirements of CFTC). Back To Text

[45] See Elliott v. CFTC, 202 F.3d 926, 931 (7th Cir. 2000) (finding culpability based on unusual trading patterns which can create market instability); Reddy v. CFTC, 191 F.3d 109, 118 (2d Cir. 1999) (allowing reliance on circumstantial evidence of unusual trading activities); CFTC v. British Am. Commodity Options Corp., No. 77 Civ. 1822 (LPG), 1978 U.S. Dist. LEXIS 15769, at *34−35 (S.D.N.Y. Aug. 31, 1978) (describing CFTC monitoring activities). Back To Text

[46] See Asa−Brandt, Inc. v. ADM Investor Servs., 138 F. Supp. 2d 1144, 1169 (N.D. Iowa 2001) (noting NFA oversight responsibilities in commodities markets); Schimpf v. Gerald, Inc., 52 F. Supp. 2d 976, 993 (E.D. Wis. 1999) (allowing for possibility of NFA oversight); see also 7 U.S.C. § 21 (2001) (providing rules for futures associations). Back To Text

[47] Membership in the NFA is mandatory for all parties participating in the futures markets. This includes futures commission merchants, introducing brokers, commodity pool operators, and commodity trading advisors. Floor brokers, floor traders and commodity trading advisors who do not direct or place trades for customers are exempt from the membership requirement, but they are still subject to direct oversight by the CFTC. See Securities Training Corporation, National Commodities Futures Examination (Vol. 1 2000), 2−1; see also Cunningham v. Waters Tan & Co., 65 F.3d 1351, 1353 (7th Cir. 1995) (providing example of how NFA interacts with CFTC); Stewart v. GNP Commodities, 851 F. Supp. 283, 284 (N.D. Ill. 1994) (noting pool operators are required to register with NFA). Back To Text

[48] See Securities Training Corporation, National Commodities Futures Examination (Vol. 1 2000), 2−1; see also R.J. O'Brien & Assoc. v. Pipkin, 64 F.3d 257, 262 (7th Cir. 1995) (same); Cremin v. Merrill Lynch Pierce Fenner & Smith, 957 F. Supp. 1460, 1467 (N.D. Ill. 1997) (finding NFA has been delegated registration function by federal government). Back To Text

[49] "Most of the participants in the futures and option markets are commercial or institutional users of the commodities they trade." The CFTC at a Glance: Who Uses Futures and Options Markets?, (2001), available at http://www.cftc.gov/cftc/cftcglan.htm. See In re Buckeye Countrymark, 227 B.R. 498, 501 (Bankr. S.D. Ohio 1998) (noting that the "law governing commodity trading is complex and requires a specialized knowledge of the law as well as a refined knowledge of its discourse"); Anderson v. Brock Investor Servs., No. 4−92−1032, 1993 U.S. Dist. LEXIS 19455, at *2 (D. Minn. Jan. 14, 1993) (describing commodities markets as "arcane and somewhat complicated"). Back To Text

[50] See Leist v. Simplot, 638 F.2d 283, 286−88 (2d Cir. 1980) (providing detailed explanation of how commodity futures markets function including impact on seller of contract); Paladin Assocs. v. Mont. Power Co., 97 F. Supp. 2d 1013, 1019 (D. Mont. 2000) (noting consequence of natural gas futures prices on regulated market); see also Stone v. Saxon & Windsor Group, Ltd., 485 F. Supp. 1212, 1214 (N.D. Ill. 1980) (describing effect of speculation on commodities pricing). Back To Text

[51] See Viernow v. Euripides Dev. Corp., 157 F.3d 785, 789 n.7 (10th Cir. 1998) (explaining issuer of security does not have control over secondary market); Geneva Steel v. United States, 914 F. Supp. 563, 572 (Ct. Int'l Trade 1996) (showing use of secondary market as benchmark for determining corporate value); Brager & Co. v. Leumi Sec. Corp., 84 F.R.D. 220, 221 (S.D.N.Y. 1979) (noting different effects of trading in primary and secondary markets). Back To Text

[52] See Gen. Elec. v. Masters Mail Order Co. of Wash., D.C., 122 F. Supp. 797, 801 (S.D.N.Y. 1954) (stating parties to commodities contract must be in competition with each other or antitrust issues may arise); State ex rel. Knox v. Edward Hines Lumber Co., 115 So. 598, 607 (Miss. 1928) (explaining necessity of competition for market to exist). But see Old Dearborn Distrib. Co. v. Seagram−Distillers Corp., 299 U.S. 183, 187 (1936) (upholding Fair Trade Act of Illinois which allowed for trademark holder to set price for certain commodities). Back To Text

[53] See Dayton Power & Light Co. v. Public Util. Comm'n., 292 U.S. 290, 310 (1934) (observing calculation of future value is "at best an approximation"); Custom Chrome, Inc. v. Comm'r., 217 F.3d 1117, 1125 (9th Cir. 2000) (asserting uncertainty of future value); see also Los Angeles Gas & Elec. Corp. v. R.R. Comm'n. of Cal., 289 U.S. 287, 311 (1933) (declaring "[t]he determination of present value is not an end in itself. Its purpose is to afford ground for prediction as to the future"). Back To Text

[54] B's cost is reduced because it knows how much A is willing to pay. With knowledge of this ceiling, any price B pays above this number is additional profit to the seller of the contract and represents no increase in value to B. See David L. Threlkeld & Co. v. Metallgesellschaft, Ltd., 923 F.2d 245, 246 (2d Cir. 1991) (stating sophisticated commodities traders only profit by calculated speculation); Leist v. Simplot 638 F.2d 283, 286−87 (2d Cir. 1980) (explaining profit is only made through change in contract price). Cf. CFTC v. Midland Rare Coin Exch., Inc., No. 97−7422−Civ.−(DIMITROULEAS/JOHNSON), 1999 U.S. Dist. LEXIS 20979, at *15 (S.D. Fla. Oct. 20, 1999) (noting inherent risk in commodity transactions). Back To Text

[55] Remember that a committee member only owes a fiduciary duty to members of the represented class and not to the debtor or the estate generally. See supra note 11. Also remember that a committee member is allowed to act in their own self interest as long as that action does not injure the represented class of creditors. See supra note 12; see also Bailey v. Jamesway Corp. (In re Jamesway Corp.), No. 95 B 44821 (JLG), 1997 Bankr. LEXIS 825, at *43 (Bankr. S.D.N.Y. June 11, 1997) (noting problem if debtor is not able to effectively operate their business). Back To Text

[56] See Tidwell v. Wedgestone Fin. (In re Hercules Automotive Prods.), 245 B.R. 903, 914−15 (Bankr. M.D. Ga. 1999) (postulating failure to attempt to operate debtor as going concern could be breach of fiduciary duty); In re Seaescape Cruises, Ltd., 131 B.R. 241, 243 (Bankr. S.D. Fla. 1991) (noting possibility of breach of fiduciary duty if class of creditors is injured by action of creditor committee member). Cf. In re Microwave Products of Am., Inc., 102 B.R. 666, 671−72 (Bankr. W.D. Tenn. 1989) (observing business expertise in operation of business assists in effective restructuring). Back To Text

[57] Company B (the committee member) had nothing to do with it. Company C acted independently, although it is possible the effect was the same on the debtor, company A. See SEC v. Adler, 137 F.3d 1325, 1337 (11th Cir. 1998) (requiring actual use of inside information to bring about liability); see also Colan v. Monumental Corp., 713 F.2d 330, 333−34 (7th Cir. 1983) (holding ownership of options can not implicate section 16(b)). Back To Text

[58] See Connell v. Chase Manhattan Bank Nat'l Ass'n, 1981 N.Y. Misc. LEXIS 3519, at *5 (N.Y. Sup. Ct. Jan. 5, 1981) (stating legal inference of imputed knowledge "has no application to a case in which a deliberate block to an otherwise appropriate flow of information has been properly created"); see also Winston v. Fed. Express Corp., 853 F.2d 455, 457 (6th Cir. 1988) (allowing for protection from insider trading claims if ethical wall had been erected); SEC v. Seibald, No. 95 Civ. 2081 (LLS), 1997 U.S. Dist. LEXIS 14940, at *21 (S.D.N.Y Sept. 30, 1997) (showing case where ethical wall was breached and insider trading liability was applied based on sale of options by individual who breached wall); United States v. Marcus Schloss & Co., No. 88 Cr. 796 (CSH), 1989 U.S. Dist. LEXIS 14735, at *30 (S.D.N.Y. Dec. 11, 1989) (allowing for possibility of ethical wall defense to negate per se trading violation in case where insider trading dealt with commodities). Back To Text

[59] 622 N.Y.S.2d 703 (1st Dept. 1995). Back To Text

[60] The issue in the case was primarily whether the employee was at−will, but it serves to show that an ethical wall will hold up to valid threats to ones continued employment. See Slade v. Shearson, Hammill & Co., 517 F.2d 398, 402−03 (2d Cir. 1974) (showing SEC believes in strength of properly erected wall); Koppers Co. v. Am. Express Co., 689 F. Supp. 1413, 1417 (W.D. Pa. 1988) (accepting strength of ethical wall); Connell v. Chase Manhattan Bank Nat'l Ass'n, 1981 N.Y. Misc. LEXIS 3519, at *3 (N.Y. Supp. Ct. Jan. 5, 1981) (upholding use of ethical wall in banking setting). Back To Text

[61] See Aetna Cas. & Sur. Co. v. Mitchell Bros. Inc., No. 1980950, 2001 Ala. LEXIS 177, at *23 (Ala. May 18, 2001) (showing where ethical wall was breached by insurance company); InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 903−04 (Tex. Ct. App. 1987) (claiming information freely passed between and among effected parties despite claims ethical wall existed). Back To Text

[62] In re Pac. Gas and Elec. Co., No. 10−30923−DM (Bankr. N.D. Ca. July 26, 2001) (Memorandum Decision Regarding Motion for Approval of Ethical Wall Procedures for Commodities Trading and Publishing). Back To Text

[63] Id. at 11. Back To Text

[64] "Typically a debt instrument represents the issuer's obligation to pay the fixed amount stated, whether or not it has been purchased or sold above par or at a discount. . . . Similarly, an equity interest provides no greater or lesser ownership of the enterprise based upon the amount paid for it or information used to purchase or sell it." Id. He then noted that "trading in commodities. . . could directly affect the price at which PG&E purchases those commodities or could enhance the trader's competitive position over PG&E." Id. Back To Text

[65] This is the side of the wall which is not privy to the inside information. Back To Text

[66] See Canadian Ass'n. of Petroleum Producers v. FERC, 254 F.3d 289, 293−94 (D.C. Cir. 2001) (describing rate of return necessary to attract investors); Capital Transit Co. v. Pub. Util. Comm'n., 213 F.2d 176, 186 (D.C. Cir. 1953) (explaining reasonable rate of return will attract investors); see also Exxon Corp. v. United States, 19 Cl. Ct. 755, 762−63 (Cl. Ct. 1990) (providing explanation of rationale investor will analyze when deciding whether or not to invest). Back To Text

[67] See Public Serv. Co. v. Patch, 167 F.3d 29, 32 (1st Cir. 1998) (observing instability of energy prices); Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504, 1529 (E.D. Cal. 1983) (stating possible problems of monopolistic power in energy market); Worth v. Huntington Bancshares, Inc., No. 52861, 1987 Ohio App. LEXIS 9827, at *28−*29 (Ohio Ct. App. Nov. 25, 1987) (explaining fluctuating size of energy market). Back To Text

[68] See supra note 62, at 12; see also Pac. Gas & Elec. v. FERC (In re Cal. Power Exch. Corp.), 245 F.3d 1110, 1116 (9th Cir. 2001) (recognizing "wholesale electricity price spikes"); Sacks v. Comm'n., 69 F.3d 982, 984 (9th Cir. 1995) (citing rise in electricity prices at 1.5 times rate of inflation). Back To Text

[69] See Transcon. Oil Corp. v. Trenton Prods. Co., 560 F.2d 94, 106−07 (2d Cir. 1977) (noting effect market maker can have on market pricing when placing large orders); Omri Yadlin, Is Stock Manipulation Bad? Questioning the Conventional Wisdom with Evidence from the Israeli Experience, 2 Theoretical Inq. L. 839 (2001) (observing "effect on the market price will clearly take place when . . . the firm itself, [is] a potential bidder, or a market maker"). Back To Text

[70] See In re Enron Corp., No. 01−16034 (AJG), 2001 Bankr. LEXIS 1564 (Bankr. S.D.N.Y. Dec. 4, 2001); see also Dan Morgan and Juliet Eilperin, Campaign Gifts, Lobbying Built Enron's Power In Washington, The Wash. Post, Dec. 25, 2001, at A01 (describing Enron's role in deregulation of wholesale electricity market); George Sladoje, Reflections on 2001, L.A. Times, Dec. 30, 2001, at B5 (describing state of California energy market after Enron filed for bankruptcy protection). Back To Text

[71] See David Barboza, Energy Traders Continue to Prowl the Floor That Enron Helped Build, N.Y. Times, December 6, 2001, at C1 (stating "[w]ith Enron in chapter 11 bankruptcy protection, there are worries about whether the market it pioneered will continue to thrive. Most industry experts say it will."); Irwin Stelzer, At last: a magic bullet to slay the poverty dragon, London Times, Dec. 16, 2001, at Business Section (declaring "energy markets remain liquid and competitive even though Enron has collapsed"). Back To Text

[72] See SEC v. Gonzalez de Castilla, 145 F. Supp. 2d 402, 417 (S.D.N.Y. 2001) (finding no liability for individual who did not have any inside information); Frank H. Easterbrook and Daniel R. Fischel, Optimal Damages in Securities Cases, 52 U. Chi. L. Rev. 611, 647 (1985) (recognizing no insider trading violation where insider had no actual knowledge of inside information). Cf. Comm. of Creditors Holding Unsecured Claims v. Citicorp Venture Capital, Ltd (In re Papercraft Corp.), 187 B.R. 486, 499 (Bankr. W.D. Penn. 1995) (finding insiders did not disclose inside information to note holders when purchasing their claims and referring to lack of ethical wall which may have sanitized transaction). The banker should consult with the individual responsible for oversight of the wall to determine if any proposed transactions would be problematic. See infra note 91 and accompanying text. Back To Text

[73] See Respondi v. Merrill Lynch & Co., No. 96 C 2618, 1998 U.S. Dist. LEXIS 9902, at *2−*3 (N.D. Ill. June 24, 1998) (detailing situation where loss of trading floor business led to loss of revenue and employee layoffs); Kirkland v. E.F. Hutton & Co., 564 F. Supp. 427, 447 (E.D. Mich. 1983) (finding Rule 10b−5 violation using imputed knowledge); Makofsky v. Ultra Dynamics Corp., 383 F. Supp. 631, 640 (S.D.N.Y. 1974) (showing how inside information is imputed to others). Back To Text

[74] See United States v. Mauro, 846 F. Supp. 245, 255 (W.D.N.Y. 1994) (suggesting ethical wall can avoid appearance of impropriety); Moore v. State, 934 S.W.2d 289, 292 (Mo. 1996) (noting use of ethical wall to avoid appearance of impropriety); Ranum v. Colo. Real Estate Comm., 713 P.2d 418, 420 (Colo. Ct. App. 1985) (same). Back To Text

[75] See In re Neely, 178 W. Va. 722, 726 (1987) (noting problem from loss of confidence in judiciary); Joseph P. Bauer, A Federal Law of Unfair Competition: What Should be the Reach of Section 43(A) of the Lanham Act?, 31 UCLA L. Rev. 671, 752−53 (1984) (opining there will be "diminished participation, investment, and creativity by others" if there is "a loss of confidence in the system"); see also Helen A. Garten, Subtle Hazards, Financial Risks, and Diversified Banks: An Essay on the Perils of Regulatory Reform, 49 Md. L. Rev. 314, 325−26 (1990) (stating exposure of conflict of interest could cause "loss of confidence [which] presumably may cause depositors to withdraw their funds from the banking system"). Back To Text

[76] See In re Federated Dep't Stores, Inc., No. 1−90−00130, 1991 Bankr. LEXIS 288, at *4 (Bankr. S.D. Ohio Mar. 7, 1991) (providing for claim to be brought if ethical wall procedures are breached); SEC v. Drexel Burnham Lambert, Inc., No. 88 Civ. 6209 (MP), 1989 U.S. Dist. LEXIS 10383, at *55 (S.D.N.Y. June 20, 1989) (finding breach of ethical wall); Joseph W. Bellacosa, A Nation Under Lost Lawyers: The Legal Profession at the Close of the Twentieth Century: Article: A Millennial Renewal of the "Spirit Of The Bar", 100 Dick. L. Rev. 505, 509 (1996) (calling much

of lawyer's skilled work "boring and un−news−worthy" to general public). Back To Text

[77] See In re Timber Creek, 187 B.R. 240, 243−44 (Bankr. W.D. Tenn. 1995) (approving use of ethical wall in bankruptcy proceeding if adequately constructed); Harvey L. Pitt and Karl A. Groskaufmanis, Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, 78 Geo. L.J. 1559, 1623 n.384 (1990) (recognizing need for provisions which provide for impenetrable wall); see also Cory Zion, The Legal and Ethical Issues of Fetal Tissue Research and Transplantation, 75 Or. L. Rev. 1281, 1294 (1996) (pointing to statutory provisions creating ethical wall in abortion context). Back To Text

[78] See Model Rules of Prof'l Conduct R. 1.7 (2000) (Conflict of Interest: General Rule); Model Rules of Prof'l Conduct R. 1.9 (2000) (Conflict of Interest: Former Client); see also Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1273 (7th Cir. 1983) (dissent providing for opportunity to rebut presumption of shared confidences through use of ethical wall); Geisler v. Wyeth Labs., 716 F. Supp. 520, 527 (D. Kan. 1989) (holding ethical wall can serve as efficient block of disqualifying information). Back To Text

[79] See Slade v. Shearson, Hammill & Co., 517 F.2d 398, 400−02 (2d Cir. 1974) (observing existence of ethical wall in investment banking firm); Koppers Co. v. Am. Express Co., 689 F. Supp. 1413, 1416 (W.D. Pa. 1988) (noting existence of ethical wall separating investment banking side from trading side of firm); Connell v. Chase Manhattan Bank Nat'l. Ass'n., 1981 N.Y. Misc. LEXIS 3519, at *3 (N.Y. Sup. Ct. Jan. 5, 1981) (identifying ethical wall around employees who give investment advice); see also United States v. Marcus Schloss & Co., No. 88 Cr. 796 (CSH), 1989 U.S. Dist. LEXIS 14735, at *29 (S.D.N.Y. Dec. 6, 1989) (accepting ethical wall defense if one had been in effect). Back To Text

[80] See 17 C.F.R. § 240.10b−5 (2001) (Manipulative and Deceptive Devices and Contrivances); Anixter v. Home−Stake Prod. Co. (In re Home−Stake Prod. Co. Sec. Litig.), 939 F.2d 1420, 1435 (10th Cir. 1991) (noting use of ethical wall in securities case); Sharp v. Coopers & Lybrand, 649 F.2d 175, 184 (3d Cir. 1981) (suggesting formation of ethical wall between partners and employees). Back To Text

[81] See Roberts v. Hutchins, 572 So. 2d 1231, 1234 n. 3 (Ala. 1990) (defining ethical wall as "any set of physical and procedural barriers [intended to block information]"); Peat, Marwick, Mitchell & Co. v. Super. Court, 200 Cal. App. 3d 272, 294 (1988) (calling ethical wall "barrier of silence and secrecy"); Amoco Chemicals Corp. v. MacArthur, 568 F. Supp. 42, 47 n. 9 (N.D. Ga. 1983) (describing ethical wall as a barrier of information). Back To Text

[82] See Andrew J. Drucker, Explanations, Suggestions, and Solutions to Conflict Tracking and Prevention in Response to the Growth and Expansion of the Larger Law Firm, 24 Del. J. Corp. L. 529, 550 (1999) (suggesting use of affidavit "of oath to obey and perform all the conditions by which the Wall maintains its effectiveness"); see also Thomas F.A. Hetherington, Confusing Conflicts: National Medical Enterprises, Inc. v. Godbey and the Problem of Disqualification When No Previous Attorney−Client Relationship Exists, 34 Hous. L. Rev. 909, 926 (1997) (noting use of affidavits in ethical walls). But see Karen A. Haase, You Can Check Out Anytime You Like, But You Can Never Leave: Attorney Conflict of Interest and Imputed Disqualification Under Nebraska's New Bright Line Rule, 74 Neb. L. Rev. 137, 168 (1995) (questioning effectiveness in client's eyes of affidavit asserting existence of ethical wall in disqualification situation). Back To Text

[83] See Atasi Corp. v. Seagate Tech., 847 F.2d 826, 831 (Fed. Cir. 1988) (criticizing failure of firm to notify all employees of existence of ethical wall); Smith v. Whatcott, 757 F.2d 1098, 1101 (10th Cir. 1985) (noting lack of ethical wall provision to prevent inadvertent disclosure). See generally Rivera v. Chicago Pneumatic Tool Co., No. 51 63 64, 1991 Conn. Super. LEXIS 1832, at *3−4 (Aug. 5, 1991) (declaring ethical wall protects against even inadvertent disclosures). Back To Text

[84] See Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977) (showing where firm policy screened attorney from case, required that case files be placed in locked storage, and limited access to these files on "need to know" basis); In re Chicago S. Shore & S. Bend R.R., 101 B.R. 10 (Bankr. N.D. Ill. 1989) (law firm disseminated policy, restricted access to files, and developed word processing code limiting access to file documents). But see Cheng v. GAF Corp., 631 F.2d 1052, 1058 (2d Cir. 1980) (questioning whether information screening can really take place in

very small office where there is high level of shared office space). Back To Text

[85] See Harden v. Raffensperger, Hughes & Co., 65 F.3d 1392, 1403 (7th Cir. 1995) (allowing for use of independent intermediary); Marc I. Steinberg and John Fletcher, Compliance Programs for Insider Trading, 47 SMU L. Rev. 1783, 1815 n. 213 (1994) (adopting use of outside counsel to assist in ethical wall decisions). But see J. Bradley Bennett, White Collar Crime, Blue Collar Tactics: A Defense Lawyer's Perspective, 28 W. St. U. L. Rev. 65, 73 (2001) (allowing government agency to decide for itself when deciding whether attorney−client information is privileged or not). Back To Text

[86] Most firms already have internal compliance officers who could fulfill this function. Outside counsel could also provide assistance in determining possible legal issues associated with the dissemination of certain information. Internal compliance officers and outside counsel, however, may not be truly independent because they derive their income from the entity they advise. True independence is probably not necessary as it is in everyone's best interest to protect the ethical wall. The possible punishments for breaching the wall (disallowance of claim, civil damages, etc.) will usually outweigh any possible gain derived from a breach of the wall. See Sullivan v. Mass. Mut. Life Ins. Co., 802 F. Supp. 716, 720 (D. Conn. 1992) (observing internal compliance procedures); In re Federated Dep't Stores, Inc., No. 1−90−00130, 1991 Bankr. LEXIS 288, at *4 (Bankr. S.D. Ohio March 7, 1991) (ordering use of internal compliance department to oversee ethical wall provisions); SEC v. Drexel Burnham Lambert, Inc., No. 88 Civ. 6209 (MP), 1989 U.S. Dist. LEXIS 10383, at *54−*55 (S.D.N.Y. June 20, 1989) (noting use of internal compliance reviews); see also supra note 15 and accompanying text. Back To Text

[87] See supra note 81 and accompanying text; see also United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990) (using affidavit to affirm that ethical wall procedures were followed); Interpetrol Bermuda, Ltd. v. Rosenwasser, No. 86 Civ. 5631 (JFK), 1988 U.S. Dist. LEXIS 14307, at *9 (S.D.N.Y. Dec. 20, 1988) (citing use of affidavits to confirm adherence to ethical wall procedures). But see Van Jackson v. Check 'N Go of Ill., Inc., 114 F. Supp. 2d 731, 733−34 (N.D. Ill. 2000) (finding even though affidavit was filed claiming no breach of ethical wall firm was too small for there to have been effective screening). Back To Text

[88] See Union Oil Co. v. Atlantic Richfield Co., 34 F. Supp. 2d 1208, 1219 (C.D. Cal. 1998) (dealing with affirmative misrepresentations in affidavit); J. Randy Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, 78 N.C. L. Rev. 539, 599 (2000) (recounting acts of perjury when swearing affidavits); Stephen H. Kupperman and George C. Freeman III, Selected Topics in Securities Arbitration: Rule 15c2−2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights Of Review, and Attorneys' Fees and Costs, 65 Tul. L. Rev. 1547, 1611−12 (1991) (calling knowing misrepresentation on affidavit perjury). Back To Text

[89] See East Hartford Educ. Ass'n. v. Bd of Educ., 562 F.2d 838, 856 (2d Cir. 1977) (questioning "proper scope of judicial oversight of local affairs" by "busy court"); see also Williams v. Austrian, 331 U.S. 642, 671 (1947) (referring to "overworked federal judiciary"); Rosenwinkel v. Hall, 61 F.2d 724, 726 (7th Cir. 1932) (observing "district court is an extremely busy court and that it cannot well suspend all its activities to immediately conduct an investigation"). Back To Text

[90] See Koppers Co. v. Am. Express Co., 689 F. Supp. 1413, 1416 (W.D. Pa. 1988) (discussing use of watch lists of protected securities to monitor possible leaks in ethical wall); Early v. City of Roanoke, 4 Va. Cir. 284, 287 (Va. Cir. Ct. 1985) (noting need for outside monitoring); see also SEC v. Drexel Burnham Lambert, Inc., No. 88 Civ. 6209 (MP), 1989 U.S. Dist. LEXIS 10383, at *95 (S.D.N.Y. June 20, 1989) (referring to restricted list of protected securities to assist in monitoring ethical wall provisions). Back To Text

[91] See Olson v. Merrill Lynch, Pierce, Fenner & Smith, 51 F.3d 157, 159 (8th Cir. 1995) (noting existence of compliance officer in "investment firm that underwrites and sells municipal bonds"); De Kwiatkowski v. Bear Stearns & Co., 126 F. Supp. 2d 672, 702 n. 17 (S.D.N.Y. 2000) (recognizing compliance officer's responsibilities include oversight of futures accounts); John H. Walsh, Right The First Time: Regulation, Quality, and Preventive Compliance in the Securities Industry, 1997 Colum. Bus. L. Rev. 165, 192 (1997) (suggesting compliance officer should provide oversight functions). Back To Text

[92] Neither an internal compliance officer nor outside counsel would provide for a truly independent opinion. Independence, however, is not necessary because it remains in everybody's best interest to maintain the constraints of the ethical wall. See supra note 86 and accompanying text. Back To Text

[93] See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (recognizing goal of achieving "a high standard of business ethics in the securities industry"); Trust & Inv. Advisers v. Hogsett, 43 F.3d 290, 294 (7th Cir. 1994) (holding proceeding by state securities division to revoke investment advisor's license); see also Paul G. Mahoney, The Political Economy of the Securities Act of 1933, 30 U. Chi. J. Legal Stud. 1, 20−21 (2001) (outlining background of federal regulation of investment banking ethics). Back To Text