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Trustee's Broad Duty to Disclose Information to Interested Parties under Section 704(a)(7) of the Bankruptcy Code

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INTRODUCTION

A trustee has a duty to disclose information to interested parties upon request.[1] Section 1109(b) of title 11 of the United States Code (the "Bankruptcy Code") includes creditors in the definition of interested parties.[2] Trustees must obtain a court order to be excused from their duty to disclose.[3]

A trustee's duty of disclosure is "broad and extensive."[4] Courts are reluctant to excuse the trustee from their duty of disclosure unless the trustee points to a compelling "countervailing fiduciary duty … whose performance is more important than avoiding the harm resulting from withholding the information in question." [5]

[1] *See* 11 U.S.C. § 704(a)(7) ("[T]he trustee shall – ... (7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest.").
[2] 11 U.S.C.A. § 1109(b) ("A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.").
[3] 11 U.S.C. § 704(a)(7).
[4] *In re* Pearlstein, No. 17-32770-THP7, 2022 WL 1492236 at *2 (Bankr. D. Or. May 11, 2022).
[5] *Id.*

First, this article explores the expansive scope of the trustee's duty to disclose. Second, the article discusses the limitations on the trustee's duty to disclose, and when a trustee may be excused from their duty of disclosure.

DISCUSSION

I. A Trustee's Broad Duty to Disclose.

"Courts have interpreted the trustee's responsibilities broadly, making a request for information difficult for the trustee to avoid, in the absence of a court order to the contrary."[6]

A. Courts Interpret the Trustee's Duty to Disclose Broadly, as Doing so Serves an Important Public Policy Interest.

The expansive interpretation of the trustee's duty to disclose information arose when Congress adopted the Bankruptcy Code. Congress also removed the requirement that information be "reasonably requested" that was previously required in the Bankruptcy Rules enacted pursuant to the Bankruptcy Act.[7] According to the Bankruptcy Rules, Rule 218(3) mandates that trustees disclose information that have been "reasonably requested."[8] However, Congress took out the 'reasonably requested' language when it adopted the Bankruptcy Code and changed it to just "requested."[9]

This broad view of the trustee's duty of disclosure under Section 704(a)(7) of the Bankruptcy Code has been reaffirmed in subsequent holdings.[10] "The policy of open inspection, established in the Code itself through section 704(7) … is fundamental to the operation of the

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[6] Pineiro v. Pension Benefit Guar. Corp., 318 F. Supp. 2d 67 (S.D.N.Y. 2003) (internal citations and quotations omitted).
[7] *In re* Sports Accessories, Inc., 34 B.R. 80, 81 (Bankr. D. Md. 1983) (finding that the court opined that this shift in wording is to promote "more openness in the administration of the estates").
[8] In the Matter of Pine Gate Assoc., Ltd., No. B75-4345A, 1977 WL 373414 at *3 (N.D. Ga. Sept. 16, 1977) ("Rule 218(3) does provide that there is a duty to furnish information concerning the estate and its administration, but the mandate is simply to furnish information reasonably requested.")
[9] *See* 11 U.S.C. § 704(a)(7).
[10] *See generally In re* Pearlstein, No. 17-32770-THP7, 2022 WL 1492236 (Bankr. D. Or. May 11, 2022); *In re* Robert Landau Assocs., Inc., 50 B.R. 670 (Bankr. S.D.N.Y. 1985); *In re* Refco Inc., 336 B.R. 187 (Bankr. S.D.N.Y. 2006).

bankruptcy system and is the best means of avoiding any suggestion of impropriety that might or could be raised."[11] "Bankruptcy is a public process."[12] There is a significant public interest "in open review of [bankruptcy] proceedings" because "[p]ublic scrutiny is the means by which the persons for whom the system is to benefit are able to ensure its integrity and protect their rights."[13]

B. A Trustee Must Obtain a Court Order to be Excused from Their Duty to Disclose

Section 704(a)(7) states that the trustee must provide information that is requested, unless the court orders otherwise.[14] If a trustee does not want to disclose information requested by a party in interest, the trustee has two options: (1) disclose the information anyway, or (2) obtain a protective court order which will excuse the trustee from disclosing information.[15]

Moreover, "the burden is on the trustee to obtain a court order excusing the trustee from the duty of providing the information, and not on the party in interest to compel production of the information."[16] To obtain a court order, the "trustee should point to a countervailing fiduciary duty, such as to protect creditors and the estate from a particular harm, whose performance is more important than avoiding the harm resulting from withholding the information in question."[17]

Additionally, a trustee cannot circumvent their duty of disclosure by asserting their "duty to protect the privacy of the financial information of [d]ebtors."[18] Because bankruptcy is a public

[11] *In re Robert Landau Assocs.*, Inc., 50 B.R. at 677.
[12] *In re Pearlstein*, 2022 WL 1492236 at *4.
[13] *In re* Bell & Beckwith, 44 B.R. 661, 664 (Bankr. N.D. Ohio 1984).
[14] *See* 11 U.S.C. § 704(a)(7).
[15] *In re Pearlstein*, 2022 WL 1492236 at *3.
[16] *Id.*
[17] *In re* Refco Inc., 336 B.R. 187, 194 (Bankr. S.D.N.Y. 2006).
[18] *In re Pearlstein*, 2022 WL 1492236 at *4 (holding that the duty to protect the privacy of the financial information of [debtors] is not sufficient grounds for the trustee to be excused from their duty to disclose).

process, "[d]ebtors are required to provide full disclosure of all information that aids in understanding the [d]ebtors' financial affairs and transactions."[19]

II. Limitations on the Trustee's Duty to Disclose.

"To override the duty to disclose, a trustee should point to a countervailing fiduciary duty."[20]

A. Countervailing Fiduciary Duties that Courts Have Recognized to be Sufficient to Override a Duty to Disclose Through a Court Order.

Countervailing fiduciary duties that could override the duty to disclose include attorney-client privilege and safeguarding confidential information.[21]

To be excused from the duty to disclose on attorney-client privilege grounds, the burden is solely on the trustee to prove that attorney-client privilege is applicable.[22] A privilege log is an appropriate means of meeting that burden, and failure to produce a log can result in the waiver of privilege.[23]

Trustees can obtain a protective order against disclosure of information that is proprietary and confidential.[24] Section 107(b) of the Bankruptcy Code also allows for trustees to safeguard confidential information.[25] Section 107(b) also does not require trustees to show good cause for the court order.[26]

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[19] *In re* Hammeken, 316 B.R. 723, 734 (Bankr. D. Ariz. 2004).
[20] *In re Refco Inc.*, 336 B.R. at 194.
[21] *See generally In re* MF Glob. Holdings Ltd., No. 11-15059 MG, 2012 WL 734195 (Bankr. S.D.N.Y. Mar. 6, 2012).
[22] *In re* Grand Jury Investigation, 974 F.2d 1068, 1070 (9th Cir. 1992) ("The party asserting the attorney-client privilege has the burden of proving that the privilege applies to a given set of documents or communications.").
[23] Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont., 408 F.3d 1142 (9th Cir. 2005) (holding that failure to provide a privilege log can result in the waiver of attorney-client privilege depending on the factual circumstances).
[24] *In re* Grabill Corp., 109 B.R. 329, 333 (N.D. Ill. 1989) (noting that the court recognized that the trustee may be able to obtain a protective order "to reasonably limit the extent to which any sensitive or proprietary information ….").
[25] 11 U.S.C. § 107(b)(1) ("[The court] may issue an order to protect trade secret, confidential research, development, or commercial information of any entity."); *see also* Fed. R. Bankr. Proc. 9018 (providing that the court is allowed

This expansive umbrella of protection for confidential information exists because of all the "interests that are at stake."[27] Given the public nature of bankruptcy litigation, all parties have an interest in protecting their own confidential information.[28] As such, there is a policy interest in giving the parties involved a mechanism, such as a court order, to safeguard their confidential and proprietary information.[29]

B. Courts will Deny Request for Information if It is not Made in Good Faith

"Courts may also protect trustees from providing information when the request for information is not made in good faith (e.g., by a vexatious litigant or a competitor of the debtor improperly seeking competitive advantage)."[30] The trustee must make a motion to the court to declare the interested party requesting information as "vexatious litigants."[31]

Courts have the power to declare a party a vexatious litigant under the All-Writs Act.[32] The All-Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[33] Bankruptcy courts have the authority to regulate vexatious litigation because they are courts established by Congress.[34]

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to issue a court order to protect "a trade secret or other confidential research, development, or commercial information).

[26] *In re* Orion Pictures Corp., 21 F.3d 24, 28 (2d Cir. 1994) ("When congress addressed the secrecy problem in § 107(b) of the Bankruptcy Code it imposed no requirement to show 'good cause' as a condition to sealing confidential commercial information.").

[27] Sharon K. Sandeen, *Identifying and Keeping the Genie in the Bottle: The Practical and Legal Realities of Trade Secrets in Bankruptcy Proceedings*, 44 GONZ. L. REV. 81, 104 (2009).

[28] *Id.*

[29] *Id.*

[30] *In re* Pearlstein, No. 17-32770-THP7, 2022 WL 1492236 at *2 (Bankr. D. Or. May 11, 2022).

[31] *In re* DDJ, Inc., No. 05-10001-A-7, 2012 WL 8021327 at *10 (Bankr. E.D. Cal. Feb. 28, 2012) (observing that the court only heard on this matter because the trustee submitted a countermotion to the court "to declare [the interested parties requesting information] to be vexatious litigants").

[32] *Id.*

[33] 28 U.S.C. § 1651(a).

[34] *In re* GTI Capital Holdings, LLC, 420 B.R. 1, 11 (Bankr. D. Ariz. 2009).

A four-factor standard was adopted by the Ninth Circuit to determine if a party is a vexatious litigant.[35] The four factors are:

> (1) the court must give the litigant notice and opportunity to be heard before the order is entered; (2) the court must compile an adequate record for review; (3) "the court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation; and (4) the court must enter an order that is narrowly tailored to closely fit the specific vice encountered.[36]

First, there must be notice given to the litigant.[37] The Due Process clause provides a constitutional right of the litigants to be given notice.[38] Second, the court must have an adequate record to review.[39] "An adequate record for review should include a listing of all the cases and motions that led the [court] to conclude that a vexatious litigant order was needed."[40] Also, it is required that the record show "that the litigant's activities were numerous or abusive."[41]

Third, there must be "substantive findings" of frivolous actions done by the litigant.[42] To make this determination, the court must analyze "both the number and content of the filings as indicia" of the frivolous nature of the litigant's claims.[43] Additionally, the litigant's "claims must not only be numerous, but also be patently without merit."[44] Moreover, the existence of a pattern of harassing behavior also proves frivolousness.[45] To determine this, the court must analyze

[35] *In re DDJ, Inc.*, 2012 WL 8021327 at *10.
[36] De Long v. Hennessey, 912 F.2d 1144, 1147-48 (9th Cir. 1990).
[37] *Id.* at 1147.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 1148.
[43] *In re* Powell, 851 F.2d 427, 431 (D.C. Cir. 1988).
[44] Moy v. United States, 906 F.2d 467, 470 (9th Cir.1990).
[45] *De Long*, 912 F.2d at 1148.

"whether the filing of several similar types of actions constitutes an intent to harass the defendant or the court."[46]

The final factor requires that the court must give a court order that is narrowly tailored to the litigant's wrongful behavior.[47] Without a narrowly tailored court order, it is possible that the "litig[ant]'s right of access" to the court may be unconstitutionally infringed.[48] The Ninth Circuit has given some guidelines for when a court order is not narrowly tailored. A court order is not narrowly tailored when it prevented the litigant from filing any suits in district court "without first obtaining leave of court."[49] Additionally, a court order may not be narrowly tailored if it requires a showing of good cause.[50]

CONCLUSION

The presumption is that the trustee must disclose information to interested parties upon request. This presumption is strong as courts only allow for very few exceptions that will excuse the trustee from their duty to disclose. Moreover, the burden is on the trustee in every case to prove that they fall within one of these exceptions. Courts are steadfast in maintaining that the trustee's duty to provide information is a "broad and extensive" duty.[51]

[46] *Powell*, 851 F.2d at 431.
[47] *De Long*, 912 F.2d at 1148.
[48] Sires v. Gabriel, 748 F.2d 49, 51 (1st Cir. 1984).
[49] *De Long*, 912 F.2d at 1148 ("The order has no boundaries.").
[50] O'Loughlin v. Doe, 920 F.2d 614, 618 (9th Cir.1990).
[51] *In re* Pearlstein, No. 17-32770-THP7, 2022 WL 1492236 at *2 (Bankr. D. Or. May 11, 2022).