Protective Orders in the Bankruptcy Court: The Congressional Mandate of Bankruptcy Code Section 107 and Its Constitutional Implications

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I. Introduction

> The people's government, made for the people, made by the people, and answerable to the people.[1]

A government of the people—this concept is a central underpinning of democracy. It is embedded within the provisions of the United States Constitution and permeates the public's perception of the government. This concept has been a driving force in the creation of the public access doctrine[2] and the ongoing legal debate regarding the scope of its application to judicial proceedings and records.

Subsection 107(a)[3] of the United States Bankruptcy Code[4] embraces the conventional understanding of the public access doctrine by creating a presumption in favor of public access to *all* papers filed in a bankruptcy case as well as to bankruptcy court dockets. The legal precedent for implementing such a presumption of public access is found in the First Amendment and the common law right of access. The incorporation of this presumption into the Bankruptcy Code furthers the underlying goals of the public access doctrine: "[enhancement of] popular trust in the fairness of the justice system, [promotion of] public participation in the workings of the government, and [protection of] constitutional guarantees."[5]

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1. Daniel Webster, Second Speech on Foote's Resolution (Jan. 26, 1830), *in* THE SHORTER BARTLETT'S QUOTATIONS 419 (Christopher Morley et al. eds., 1965).

2. In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978), the Court recognized "a general right to inspect and copy public records and documents" and court "supervisory power over [their] own records and files." The Court further recognized that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 599.

3. Section 107 provides:

> § 107. *Public access to papers*
>
> (a) Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.
>
> (b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—
>
> (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
>
> (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

11 U.S.C. § 107 (1993).

4. *Id.* §§ 101-1330 (1993 & Supp. 1996) [hereinafter Bankruptcy Code].

5. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429 (1991) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571-72 (1980) (plurality opinion)).

The right of public access codified in subsection 107(a) is not absolute,[6] and, accordingly, the presumption of public access is a rebuttable presumption. Specifically, subsection 107(b) sets out two exceptions to the presumption established in subsection 107(a). It is within the discretion of the trial court to determine whether an exception applies in any given circumstance.[7] However, subsection 107(b) states that "[o]n the request of a party in interest, the bankruptcy court *shall*"[8] protect the party if either of the subsection 107(b) exceptions is applicable.

The mandatory language of section 107 and the actions taken by bankruptcy courts pursuant to this mandate raise constitutional questions with respect to the First Amendment. This Article explores the constitutional dilemma posed to a bankruptcy judge faced with a request under subsection 107(b) and proposes an interpretation of section 107 that does not infringe upon First Amendment guarantees. Part II of the Article analyzes the development of the public access doctrine and the constitutional implications of its codification in section 107. Part III describes the various approaches taken by courts to implement section 107 and discusses categories of information that qualify for protection under subsection (b). Part IV suggests a constitutional reading of section 107, employing a case study of *Phar-Mor, Inc. v. Defendants Named Under Seal (In re Phar-Mor, Inc.).*[9] The Article concludes by proposing an approach to section 107 of the

6. *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509 (1984) ("Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.") [hereinafter *Press-Enterprise I*]; Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978) ("It is uncontested, however, that the right to inspect and copy judicial records is not absolute."); *see also* Diane Apa, *Common Law Right of Public Access—The Third Circuit Limits Its Expansive Approach to the Common-Law Right of Public Access to Judicial Records*, 39 VILL. L. REV. 981, 982-85 (1994); John E. Joiner, *Constitutional Law Survey: Commercial Speech*, 72 DENV. U. L. REV. 613, 619-20 (1995); Miller, *supra* note 5, at 429; Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95, 141 n.219 (1995) and cases cited therein; Dane A. Drobny, Note, *Death TV: Media Access to Executions Under the First Amendment*, 70 WASH. U. L.Q. 1179, 1184-87 (1992).

7. *See, e.g., Nixon*, 435 U.S. at 598-99 (stating that, in the common law right-of-access context, "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case"); *In re* Epic Assocs. V, 54 B.R. 445, 450 (Bankr. E.D. Va. 1985) (applying the standard of discretion recognized by the Supreme Court in *Nixon* in the bankruptcy context under section 107).

8. 11 U.S.C. § 107(b) (1993) (emphasis added).

9. 191 B.R. 675 (Bankr. N.D. Ohio 1995).

Bankruptcy Code which is both practical and within constitutional bounds.

II. The Development of Section 107

The legal rights embodied in section 107 arise from Supreme Court jurisprudence. Section 107 is a composite of various public access principles cultivated by the United States Supreme Court in numerous decisions that implicate both the First Amendment and the common law right of access. Likewise, the exceptions to public access provided for in the Bankruptcy Code have a rich heritage in Supreme Court decisions as well as in the Supreme Court's former Rules of Equity.

A. The Public Access Doctrine Under the First Amendment

The First Amendment protects freedom of speech, freedom of the press, and the right of association from most forms of government interference.[10] The rights guaranteed in the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."[11] A right of public access to judicial proceedings is derived from this core purpose. Conducting open trials is believed to foster public trust in the judicial system and to enhance public discussion of government affairs. Thus, "the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which ha[ve] long been open to the public."[12]

The First Amendment right of public access originated in the context of criminal trials. The practice of holding criminal trials open to public scrutiny is deeply rooted in our legal heritage.[13] Allowing the public to observe the operation of justice in the criminal context was believed to "serve an important prophylactic purpose, providing an

10. U.S. CONST. amend. I.

11. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

12. *Id.* at 576.

13. The First Amendment right-of-access cases "have been rooted in the historic common law public character of criminal proceedings since the Norman Conquest in England and the United States Constitution as an 'indispensable attribute of an Anglo-American trial.'" United States v. Hurley (*In re* Globe Newspaper Co.), 920 F.2d 88, 94 (1st Cir. 1990) (quoting *Richmond Newspapers*, 448 U.S. at 569); *see also* James J. Mangan & Stephen R. Heifetz, *Sixth Amendment at Trial*, 83 GEO. L.J. 1190, 1191 n.2008 (1995) and cases cited therein; Sandra Sanders, Note, *Arizona's Public Records Laws and the Technology Age: Applying "Paper" Laws to Computer Records*, 37 ARIZ. L. REV. 931, 936-37 (1995) ("The right of public access to court hearings has a strong historical background.").

outlet for community concern, hostility, and emotion."[14] Such practice was common in both America and England prior to the ratification of the Constitution and the Bill of Rights. This widely accepted practice was recognized by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia.*[15] In that case, the Court affirmed that the guarantees of the First Amendment encompassed the tradition of public access to criminal trials.

Subsequent to *Richmond Newspapers*, the Court decided a trilogy of cases in which it reaffirmed its holding in *Richmond Newspapers*[16] and expanded it to cover voir dire proceedings[17] as well as preliminary hearings in a criminal action.[18] The Court used a two-step analysis to assess whether the particular proceeding warranted First Amendment protection under the presumption of public access. In the first step of this analysis, the Court considered whether the particular proceeding had been traditionally open to public observation.[19] In the second step, the Court analyzed the particular proceeding to determine the import of public access to the particular documents on public discussion and scrutiny of government affairs.[20] In sum, if the proceeding has been traditionally open to the public and public access furthers the democratic process, public access to the proceeding is protected by the First Amendment.[21]

The presumption of public access is rebuttable. In evaluating cases under the First Amendment presumption of public access, the standard of review exercised by the Supreme Court is one of strict scrutiny.[22] The government or party seeking to close the proceedings must demonstrate that "the denial [of the right of access] is necessi-

14. *Richmond Newspapers*, 448 U.S. at 571. Chief Justice Burger's opinion in *Richmond Newspapers* provides a detailed account of the history of open criminal trials. *See id.* at 564-74.

15. *See id.* at 580 & n.17; Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) ("The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." (citing *Richmond Newspapers*, 448 U.S. at 579-80 & n.16)).

16. *See Globe Newspaper*, 457 U.S. 596.

17. *See Press-Enterprise I*, *supra* note 6.

18. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1985) [hereinafter *Press-Enterprise II*].

19. *See id.* at 8; *Globe Newspaper*, 457 U.S. at 605.

20. *See Press-Enterprise II*, *supra* note 18, at 8-9; *Globe Newspaper*, 457 U.S. at 606.

21. *See* Richard J. Ovelman, *The Year's Access Developments*, 399 PRACTICING L. INST. 7, 19-25 (1994). For a critical review of the Court's two-step analysis in public access cases, see Judge Kimba M. Wood, *Re-examining the Access Doctrine*, COMM. LAW., Winter 1994, at 3.

22. *See* Ovelman, *supra* note 21, at 23.

tated by a compelling governmental interest, and is narrowly tailored to serve that interest."[23] To date, the Court has not rendered a public access decision in which the opposing party has satisfied this burden.[24] Thus, little guidance can be extracted from the Court's existing public access decisions. However, a vast volume of public access cases has been decided by the lower courts, and factors such as a defendant's right to a fair trial,[25] the protection of privileged information,[26] and privacy interests of the parties[27] have on occasion trumped the public's presumptive right of access under the First Amendment.

The Supreme Court decisions in the public access arena evidence that public access to criminal trials is a well-settled principle. Nevertheless, the Court has not pronounced its position on the application of the First Amendment presumption of public access to noncriminal

23. *Globe Newspaper*, 457 U.S. at 607-09 (expanding on the latter element, that the remedy be narrowly tailored to address the harm, the Court stated that all reasonable alternatives to closure must be exhausted and the trial court must pronounce specific findings of fact to support its conclusion). The standard of review for public access cases was stated slightly differently in *Press-Enterprise I* and *Press-Enterprise II* in that the Court required the party opposing closure to demonstrate an "overriding" rather than "compelling" interest. *See Press-Enterprise I*, *supra* note 6, at 510; *Press-Enterprise II*, *supra* note 18, at 9-10.

24. Although the Supreme Court has not elaborated on the compelling interest standard in the public access context, the Court has addressed this standard in a variety of other contexts related to the First Amendment. *See, e.g.*, Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) (acknowledging that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech," but holding that the Establishment Clause was not implicated by permitting a private party to display a cross on government property); Burson v. Freeman, 504 U.S. 191 (1992) (finding that the state's interest in preventing voter intimidation and election fraud was compelling and justified statute which restricted distribution of campaign materials at polling places); Osborne v. Ohio, 495 U.S. 103 (1990) (recognizing a compelling state interest in protecting the physical and psychological well-being of minors which justified statute prohibiting access and viewing of child pornography); Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that the government's interest in controlling discipline and uniformity in the military was compelling in face of challenge based upon the First Amendment Free Exercise Clause).

25. *See* United States v. Doe, 63 F.3d 121, 128 (2d Cir. 1995) (citing cases) (explaining the various interests determined by courts to be "compelling" in the context of public access cases); *In re* Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984); United States v. Gotti, 18 Media L. Rep. (BNA) 1567 (E.D.N.Y. 1990); United States v. Martin, 684 F. Supp. 341 (D. Mass. 1988); *see also* Utah v. Archuleta, 21 Media L. Rep. (BNA) 2241 (Utah 1993); Gannett Co. v. Falvey, 19 Media. L. Rep. (BNA) 2127 (N.Y. App. Div. 1992).

26. *See Doe*, 63 F.3d at 128; United States v. Cojab, 996 F.2d 1404, 1408-09 (2d Cir. 1993); United States v. Bell, 464 F.2d 667, 670 (2d Cir. 1972).

27. *See Doe*, 63 F.3d at 128; *Cojab*, 996 F.2d at 1408-09; United States *ex rel.* Smallwood v. Lavalle, 377 F. Supp. 1148 (E.D.N.Y. 1974), *aff'd*, 508 F.2d 837 (2d Cir. 1974); *see also* Peter B. v. Wisconsin, 22 Media L. Rep. (BNA) 1588 (Wis. Ct. App. 1994); Austin Daily Herald v. Mork, 22 Media L. Rep. (BNA) 1442 (Minn. Ct. App. 1993).

judicial proceedings or to judicial records and documents. By contrast, the lower courts have relied upon the Court's criminal-access cases in extending the First Amendment presumption of public access to criminal records,[28] civil trials,[29] and civil records.[30] Although little consistency pervades these opinions, a common thread runs through the vast majority of these decisions: the acknowledgment that the First Amendment right of public access is a qualified, not an absolute, right that should be evaluated on a case-by-case basis.

B. The Common Law Right of Public Access

In *Nixon v. Warner Communications, Inc.*,[31] the United States Supreme Court recognized a common law right of public access "to inspect and copy public records and documents, including judicial records and documents."[32] The policy reasoning articulated by the Court in support of its conclusion is similar to that subsequently stated in the Court's First Amendment right-of-access cases. Indeed, the Court acknowledged that a "citizen's desire to keep a watchful eye on the workings of public agencies"[33] and "a newspaper publisher's intention to publish information concerning the operation of govern-

28. *See In re* The State-Record Co., 18 Media L. Rep. (BNA) 1286 (4th Cir. 1990); Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989); *see also Ex parte* Consolidated Publ'g Co., 20 Media L. Rep. (BNA) 1105 (Ala. 1992).

29. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983); Baltimore Sun Co. v. Astri Inv. Management & Sec. Corp. (*In re* Astri Inv. Management & Sec. Corp.), 88 B.R. 730 (Bankr. D. Md. 1988); *see also* State v. Cottman Transmission Sys., Inc., 542 A.2d 859 (Md. App. 1988). Although the Supreme Court has not explicitly endorsed a First Amendment right of access to civil trials, there is dicta in a Supreme Court case that suggests that similar access concerns may arise in both the criminal and civil trial context. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 387 n.15 (1979) (noting that "in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases").

30. *See* Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 22 Media L. Rep. (BNA) 1754 (7th Cir. 1994); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984); *see also* Smith v. Smith, 18 Media L. Rep. (BNA) 1784 (N.C. Gen. Ct. 1991); Sharon L. Sobczak, *To Seal or Not to Seal?: In Search of Standards*, 60 DEF. COUNS. J. 406, 408 (1993) (noting that the Third, Fourth, Sixth, Seventh, and Ninth Circuits have extended the Supreme Court's reasoning in the First Amendment right-of-access cases to grant public access outside of the criminal proceeding context).

31. 435 U.S. 589 (1978).

32. *Id.* at 597 (footnotes omitted).

33. *Id.* at 597-98 (citations omitted); *see also* Sobczak, *supra* note 30, at 409 ("The Supreme Court has found that public access has an 'educative' effect by affording the public an opportunity to understand the court system, thus producing 'an informed and enlightened public opinion.'" (quoting Grosjean v. American Press Co., 297 U.S. 233, 247 (1936))); United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (stating that the common law right of public access to judicial records and documents is "fundamental to a

ment"[34] are grounds upon which lower courts have relied to grant access to public records under the common law doctrine.

Again, the Court found that this common law right of access to public records and documents is not absolute.[35] In defining the boundaries of the public's common law right of access, the Court noted: "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."[36] The examples cited by the Court to illustrate such "improper purposes" include the use of public records and documents for the dissemination of libelous statements and the exposure of privileged business information.[37]

The items of public record at issue in *Nixon* were various tapes that had been admitted into evidence during the trial of the petitioner's former advisors. The Court reversed the decision of the court of appeals, which had authorized the release of the tapes, and held that respondents did not have a common law right of access to such

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democratic state"), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

34. *Nixon*, 435 U.S. at 597-98 (citations omitted).

35. *See id.* In fact, at least one court has determined that the presumption of public access does not come into existence if documents are properly filed with the clerk of court under seal. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 897 (E.D. Pa. 1981). *But see* Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157 (3d Cir. 1993) (holding that the common law presumption of access applies to judicial records and documents under seal).

In *United States v. Amodeo*, the United States Court of Appeals for the Second Circuit applied a "continuum" of relevance in its public access analysis. 71 F.3d 1044 (2d Cir. 1995) (holding that Part I of a report filed by a court-appointed officer in an action under the Racketeer Influenced and Corrupt Organizations Act was entitled to remain under seal because the allegations therein were unsworn and releasing the information would more likely mislead rather than inform the public). Under this continuum of relevance, "the weight to be given the presumption of access [is] governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Id.* at 1049. Thus, the court determined that at the one end of the continuum, the presumption of access to evidence introduced at a trial is especially strong. However, at the other end, the court noted that where "documents are usually filed with the court and are generally available, the weight of the presumption is stronger than where filing with the court is unusual or is generally under seal." *Id.* at 1050.

36. *Nixon*, 435 U.S. at 598; *see also* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984) ("[W]e have no question as to the court's jurisdiction to [enter protective orders] under the inherent 'equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices.'" (quoting International Prods. Corp. v. Koons, 325 F.2d 403, 407-08 (2d Cir. 1963))).

37. *Nixon*, 435 U.S. at 597-98 ("Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.") (citations omitted).

tapes.[38] Further, the Court briefly addressed respondent's First Amendment right-of-access argument. The Court stated that because the general public did not have physical access to the tapes, the respondent did not have a First Amendment right to copy the tapes. "The First Amendment generally grants the press no right to information about a trial superior to that of the general public."[39]

In 1994, the Tenth Circuit in *Lanphere & Urbaniak v. Colorado*[40] relied on the Court's discussion in *Nixon* in stating, "Courts have historically recognized a common law right, though not an absolute right, of access to governmental records, including judicial records."[41] As for a constitutional right of access, the court found that, although the First Amendment ensured public access to judicial proceedings, no such First Amendment right extended to judicial records and documents.[42] Thus, the public's right to inspect and copy judicial records

38. In analyzing the arguments presented by the parties in support of their respective positions, the Court noted that it "normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts." *Id.* at 602. However, the Court did not apply this balancing test to the facts before it in *Nixon* because the Court found that the Presidential Recording Act tipped the scales in favor of denying release of the tapes. *See id.* at 605-06 ("Because of this congressionally prescribed avenue of public access we need not weigh the parties' competing arguments as though the District Court were the only potential source of information regarding these historical materials."). The Presidential Recording Act directed the Administrator of General Services to review the tape recordings of former President Richard M. Nixon and submit to Congress regulations regarding public access to these tapes. *See id.* at 604 n.16.

39. *Id.* at 609. Indeed, in cases involving the media's right of access, the Supreme Court has consistently held that "[t]he proposition 'that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally . . . finds no support in the words of the Constitution or in any decision of this Court.'" Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (quoting Pell v. Procunier, 417 U.S. 817, 834-35 (1974)). Further, the Supreme Court has recognized that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981) (holding that a statute penalizing persons distributing unstamped mail in a letter box approved by the United States Postal Service did not infringe upon protected First Amendment rights) (citing Greer v. Spock, 424 U.S. 828 (1976) (no First Amendment right of public access to military base); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (no First Amendment right of public access to advertising space on city transit system); Adderley v. Florida, 385 U.S. 39 (1966) (no First Amendment right of public access to jail or prison)).

40. 21 F.3d 1508 (10th Cir.), *cert. denied*, 115 S. Ct. 638 (1994).

41. *Id.* at 1511-13 (noting that the Court "has never intimated a First Amendment guarantee of a right of access to all sources of information within government control") (citing Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) (plurality opinion)).

42. *See id.*; *see also* United States v. Corbitt, 879 F.2d 224 (7th Cir. 1989) (evaluating access to presentence reports under the Supreme Court's two-step analysis set forth in *Globe Newspaper* and holding that no First Amendment right of access existed as to such reports); Stone v. University of Md. Med. Sys. Corp., 855 F.2d 178, 180 (4th Cir. 1988)

and documents endures under the common law public access doctrine.[43]

In *Lanphere & Urbaniak,* the Tenth Circuit also analyzed the question of public access to judicial records under the two-step analysis formulated by the Supreme Court in *Globe Newspaper*[44] and subsequent First Amendment criminal-access cases.[45] The circuit court held that access to judicial records in a criminal proceeding, sought to obtain personal information about the defendant, did not satisfy either step in the *Globe Newspaper* analysis. Accordingly, the circuit court concluded that *Globe Newspaper* also supported its holding that no First Amendment right of public access to the records existed.[46]

C. The Development of Section 107

The legislative history of section 107 of the Bankruptcy Code provides little insight into its meaning.[47] Some literature suggests that subsection 107(a) was enacted to recognize explicitly the common law public access doctrine in the bankruptcy context.[48] As explained by one notable commentary in the bankruptcy field:

(recognizing that the First Amendment right of public access "has been extended only to particular judicial records and documents").

43. *See Lanphere & Urbaniak*, 21 F.3d at 1511 (explaining the common law public access doctrine). In its decision, the Tenth Circuit held that the Colorado Legislature had supplanted the common law right of access to judicial records with an explicit statutory scheme and, thus, did not apply the common law access doctrine to the facts before it. *See id.*

44. 457 U.S. 596 (1982).

45. *See Lanphere & Urbaniak*, 21 F.3d at 1512.

46. *See id.* The Tenth Circuit then proceeded to analyze the Colorado statute which limited public access to judicial records and documents. Although the Tenth Circuit found that the statute had First Amendment implications, it upheld the statute under the test set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). *Lanphere & Urbaniak*, 21 F.3d at 1513-16.

47. The legislative history does little more than parrot the language of the statute. The full report on section 107 given by both the Senate and the House of Representatives states:

> Subsection (a) of this section makes all papers filed in a bankruptcy case and the dockets of the bankruptcy court public and open to examination at reasonable times without charge. "Docket" includes the claims docket, the proceedings docket, and all papers filed in a case.
> Subsection (b) permits the court, on its own motion, and requires the court, on the request of a party in interest, to protect trade secrets, confidential research, development, or commercial information, and to protect persons against scandalous or defamatory matter.

H.R. REP. NO. 95-595, at 317-18 (1977); S. REP. NO. 95-989, at 30 (1978).

48. *See* 2 COLLIER ON BANKRUPTCY ¶ 107.01 (Lawrence P. King ed., 15th ed. 1995); *see also In re* Nunn, 49 B.R. 963, 964 (Bankr. E.D. Va. 1985) (explaining the correlation

> Section 107(a), derived from former Rule 508 of the Rules of Bankruptcy Procedure, codifies the public's general right under common law to inspect and copy public documents, including judicial records . . . .
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> . . . .
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> This right of access to public documents is not absolute, however, and confidentiality may be warranted if access is sought for an improper purpose. Section 107(b) follows former Bankruptcy Rule 918 and [provides for appropriate exceptions] . . . .[49]

Given the fact that the enactment of section 107 and the Supreme Court's decision in *Nixon* were rendered almost simultaneously, it is possible to conclude that section 107 was intended to complement and implement the *Nixon* decision.

A review of section 107's development illustrates its common law heritage. Simply stated, subsection 107(a) implements the common law doctrine of public access to judicial records which arose prior to the ratification of the Constitution, and which was acknowledged by the Supreme Court in *Nixon.* The courts of the United States have applied the exceptions to open access set forth in subsection 107(b) for over a century, and the Supreme Court explicitly recognized these exceptions in *Nixon.* Thus, a plain reading of section 107 shows no evidence of a constitutional defect because each subsection of section 107 is consistent with legal principles established early under the common law and later by the Supreme Court's decision in *Nixon.*

The exceptions to the public's right of access promulgated in subsection 107(b) apply when the desired judicial records and documents contain, on the one hand, matters which relate to trade secrets, confidential research, development, or commercial information, or, on the other hand, matters which are scandalous or defamatory.[50] Both exceptions were specifically acknowledged by the Supreme Court in *Nixon* as instances in which documents have traditionally been excepted from disclosure under the common law public access doctrine.[51] Moreover, the special protection granted by the exceptions set forth in subsection 107(b) can be traced back to the provisions of

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between the enactment of subsection 107(a) of the Bankruptcy Code and the Supreme Court's decision in *Nixon*).

49. *Id.* ¶¶ 107-1 to -2 (footnotes omitted) (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 (1978) and *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984)).

50. 11 U.S.C. § 107(b)(1),(2) (1993).

51. *Nixon*, 435 U.S. at 598; *see also supra* notes 36-37 and accompanying text.

the United States Constitution and the rules of law promulgated shortly thereafter.

Subsection 107(b)(1) safeguards several specific types of business information from public disclosure: trade secrets, confidential research, development and commercial information. A trade secret is most commonly defined to consist of information assembled in one form or another by a person or business which retains value as a result of its continued secrecy.[52] The Constitution provides legal protection for trade secrets. The United States Constitution states that "[t]he Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[53] Shortly after the ratification of the Constitution, laws protecting patents and copyrights were enacted, and the courts exerted jurisdiction over trade secret disputes.[54] Modern legislation[55] continues this tradition as evidenced by the Uniform Trade Secrets Act, Rule 26(c) of the Federal Rules of Civil Procedure, and subsection 107(b)(1) of the Bankruptcy Code.

"Confidential" or "commercial" information represents a slightly more expansive concept than that contemplated by "trade secret." To establish that a document falls into a subsection 107(b)(1) category, the party need not demonstrate that the information contained in the document has independent value as a result of its continued secrecy. Rather, a party can obtain protection by showing that disclosure "would cause 'an unfair advantage to competitors by providing them

52. The Uniform Trade Secrets Act defines a trade secret as follows:

> (4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 438 (1990).

53. U.S. CONST. art. I, § 8, cl. 8.

54. *See* James R. McKown, *Taking Property: Constitutional Ramifications of Litigation Involving Trade Secrets,* 13 REV. LITIG. 253, 257 (1994) (noting that the first patent and copyright system was implemented in 1790 and that courts have exercised jurisdiction over trade secret cases for more than 150 years).

55. For a detailed breakdown of state statutes enacted to deter misappropriation of trade secrets by employees, see *id.* at 257-58 & nn.16-18. Further, it is important to note that the underlying rationale for the continued protection of trade secrets is twofold: "[t]he maintenance of standards of commercial ethics and the encouragement of invention." Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974).

information as to the commercial operations of the debtor.'"[56] In other words, confidential or commercial information need not rise to the level of a trade secret to warrant protection.[57]

Like trade secrets, "the authority to protect persons from scandalous or defamatory material has been entrusted to the courts for well over a century."[58] Therefore, subsection 107(b)(2) did not introduce a novel concept into our jurisprudence. Quite the contrary. The tradition of shielding individuals from the adverse effects of scandalous and defamatory material contained in judicial records and documents is firmly rooted in our legal heritage. As early as 1842, courts were granted the power to provide such protection by Rule 26 of the Rules of Practice for the Courts of Equity of the United States.[59] "Equity Rule 26 directed a judge to order the expungement of any scandalous or impertinent material contained in a bill filed with the court."[60]

The authority bestowed upon the courts by Equity Rule 26 has weathered the test of time, as the Rule was re-enacted as Rule 21 of the Equity Rules of 1912[61] and then later implemented as Rule 12(f) of the Federal Rules of Civil Procedure.[62] This series of rules provided the foundation for the protections set forth in subsection 107(b)(2). A comparison of the two, however, evidences several distinctions. For instance, unlike Equity Rule 26, a bankruptcy judge is not *directed* to expunge or strike the offending materials. However,

56. Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24, 27 (2d Cir. 1994) (quoting Ad Hoc Protective Comm. for 10 1/2% Debenture Holders v. Itel Corp. (*In re* Itel Corp.), 17 B.R. 942, 944 (B.A.P. 9th Cir. 1982)). The term "commercial information" was given an even more expansive interpretation in *In re Lomas Financial Corp.*, No. 90 Civ. 7827, 1991 WL 21231, at *2 (S.D.N.Y. Feb. 11, 1991). In *Lomas*, the district court defined "commercial information" to "include information related 'to the buying and selling of securities on the open market.'" *Id.* (quoting Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 361-63 (1979)). Under this definition, the district court concluded that information which would allow the creditor's committee to affect the market trading of the debtor's securities was commercial information for purposes of subsection 107(b)(1). *See id.*

57. *See Orion Pictures*, 21 F.3d at 28 (explaining that the standard requiring confidential commercial information to rise to the level of a trade secret in order to receive protection under the Federal Rules of Civil Procedure is not applicable to subsection 107(b)(1) of the Bankruptcy Code).

58. Phar-Mor, Inc. v. Defendants Named Under Seal (*In re* Phar-Mor, Inc.), 191 B.R. 675, 678-79 (Bankr. N.D. Ohio 1995).

59. *See id.* at 678 (citing 210 U.S. app. at 508 n.1, 516-17 (1906) (stating that the United States Supreme Court adopted the Rules of Practice for the Courts of Equity of the United States during the January Term of 1842)).

60. *Id.*

61. *See id.* at 678 (citing 226 U.S. app. at 649, 654 (1912)).

62. *See* FED. R. CIV. P. 12(f) and corresponding advisory committee's note.

the discretion provided a bankruptcy judge in selecting an appropriate remedy does not alter the underlying basis of subsection 107(b)(2): "A person within the courts' jurisdiction should not be subjected to scandalous or defamatory material submitted under the guise of a properly pleaded court document."[63]

Notwithstanding its common law foundation, section 107 may have constitutional implications under the Supreme Court's First Amendment right-of-access decisions issued after *Nixon*.[64] The qualified right of access enunciated by the Supreme Court in these cases clearly supports the presumption in favor of access to judicial records and documents created by subsection 107(a). Also, the more rigid boundaries of the First Amendment right of access justify the statutory scheme of section 107, which limits infringement upon public access to those exceptions explicitly set forth in subsection 107(b).[65] As is further discussed in Part IV of this Article,[66] the subsection 107(b) exceptions do not violate the qualified First Amendment right of access and can be applied by bankruptcy courts in a manner that facilitates the underlying statutory goals.

III. The Application of Section 107

Bankruptcy courts have invoked a wide array of authority to support their respective approaches to the application of section 107. Although the language of subsection 107(b) mirrors that of former Rule 918[67] of the Federal Rules of Bankruptcy Procedure, the proce-

63. *Phar-Mor*, 191 B.R. at 678-79.

64. *See supra* notes 16-18 and accompanying text.

65. *See supra* notes 22-23 and accompanying text for a discussion of the standard of review applicable to cases under the First Amendment right of public access.

66. *See infra* notes 114-136 and accompanying text.

67. The language of former Bankruptcy Rule 918 is also set forth in current Bankruptcy Rule 9018, which implements the statutory directive of subsection 107(b). Bankruptcy Rule 9018 provides in pertinent part:

> *Secret, Confidential, Scandalous or Defamatory Matter*
>
> On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

FED. R. BANKR. P. 9018. For a discussion of the type of materials within the third category of information protected by Rule 9018 (which is not explicitly recognized by subsection 107(b)), see *In re Robert Landau Assocs., Inc.*, 50 B.R. 670 (Bankr. S.D.N.Y. 1985).

dural structure of section 107 does not have a counterpart in the Bankruptcy Act of 1898. Thus, bankruptcy courts turned to analogous nonbankruptcy cases to implement this new congressional mandate. Unfortunately, the divergent results produced by this practice have blurred the distinction between the common law right of public access and the First Amendment right. As a result, little uniformity exists in the application of section 107.

A. The Fundamentals of Section 107

The presumption of public access created by subsection 107(a) extends to all papers and documents filed with the bankruptcy court in a case under Title 11 of the United States Code, including the bankruptcy court's docket.[68] The legislative history of subsection 107(a) indicates that the term "'[d]ocket' includes the claims docket, the pro-

68. *See* 2 COLLIER ON BANKRUPTCY, *supra* note 48, ¶ 107-1 ("Section 107(a) provides that all papers filed in a case under Title 11 and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge."); *see also* Air Line Pilots Ass'n, Int'l v. American Nat'l Bank and Trust Co. (*In re* Ionosphere Clubs, Inc.), 156 B.R. 414 (Bankr. S.D.N.Y. 1993) (holding that until the bankruptcy examiner's report is filed with the court, no public right of access attaches to it under subsection 107(a)).

Because subsection 107(a) applies only to information filed with the bankruptcy court, it follows that a protective order issued under subsection 107(b) is of a limited nature in that the protective order does not extend to materials outside of the bankruptcy case. Thus, if a party legally obtains the information contained in the judicial record through independent means, a protective order issued under subsection 107(b) presumably does not reach this information. To hold that protection under subsection 107(b) extends to materials obtained through proper channels outside of the judicial system would implicate the prior restraint doctrine. *See* Butterworth v. Smith, 494 U.S. 624 (1990) (holding that a statute prohibiting a witness from disclosing testimony after a grand jury's term ended constituted a prior restraint on pure speech in violation of the First Amendment); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) (stating that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order"); Procter & Gamble v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996) (holding that where the press obtains information relevant to litigation through independent means, any restriction on the publication of the information implicates the prior restraint doctrine and is only warranted in the most extreme circumstances). Such an extended application of subsection 107(b) is not supported by the plain language of the statute or by the case law thereunder. Accordingly, the prior restraint doctrine is not relevant to the application of subsection 107(b). *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (rejecting the prior restraint analysis in the discovery context, as the protective order at issue only extended to matters generated by the litigation); *see also* Gannett Co. v. DePasquale, 443 U.S. 368, 393 n.25 (1979) (explaining that when a protective order does not involve information already in the possession of the press, the constitutional right of access, and not the prior restraint doctrine, is the proper inquiry); Miller, *supra* note 5, at 436-39 (discussing the distinction between a protective order issued in the discovery context and a prior restraint in violation of the First Amendment).

ceedings docket, and all papers filed in a case."[69] Therefore, the subsection 107(a) presumption of public access appears to have sweeping coverage over any and all items filed with the bankruptcy court.

Subsection 107(b) provides that upon the request of "a party in interest, the bankruptcy court shall" protect the requesting party if either subsection 107(b)(1) or (2) is applicable. Although the phrase "a party in interest" is used throughout the Bankruptcy Code, the phrase is not explicitly defined therein.[70] However, some guidance as to the scope of the phrase is provided in section 1109 of the Bankruptcy Code. Subsection 1109(b) provides in pertinent part: "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."[71] It is a reasonable deduction from this provision that the phrase "a party in interest" extends to those parties specifically referenced in section 1109. The fact that section 107 is applicable to cases filed under any chapter of the Bankruptcy Code and not just Chapter 11[72] should not impair the utility of this analogy for establishing the base group included within the phrase.[73]

Having determined that those encompassed within the phrase "a party in interest" may include the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an eq-

69. H.R. REP. NO. 95-595, at 317-18 (1977); S. REP. NO. 95-989, at 30 (1978); *see also supra* note 46.

70. *See In re* Overmyer, 24 B.R. 437, 440 & n.3 (Bankr. S.D.N.Y. 1982) (noting that the phrase "a party in interest" is used in 11 U.S.C. §§ 107(b), 303(g), 304(b), 326(a), 330(a), 362(d), 366(b), 502(a), 506(d), 706(b), and 727(c)(2), yet is not defined in any provision of the Bankruptcy Code).

71. 11 U.S.C. § 1109(b) (1993).

72. *See Overmyer*, 24 B.R. at 440 n.4 ("[Title] 11 U.S.C. § 103(f) provides that subchapters I, II, III of Chapter 11 apply only in a case under Chapter 11. Code § 1109(b) appears in subchapter I of Chapter 11.").

73. *See id.* at 440 (explaining that, under the Rules of Construction set forth in 11 U.S.C. § 102(3), "includes" and "including" are not words of limitation).

In interpreting the phrase "a party in interest," some courts have narrowly construed the category of creditors falling within the scope of the phrase to those creditors who hold an allowed claim in the bankruptcy case. *See In re* Stewart, 46 B.R. 73 (Bankr. D. Or. 1985) (holding that a creditor who had not filed a proof of claim in the debtor's bankruptcy case was not a party in interest entitled to object to the debtor's discharge). *But see In re* Hardy, 56 B.R. 95, 96 (Bankr. N.D. Ala. 1985) (holding that Chapter 13 confirmation plan by debtor when no creditors filed proof of claim was required by statute). Further, the phrase "a party in interest" has been held not to include a debtor who owes money to the estate and a noncreditor seeking information for use in litigation against a debtor-related entity. *See* 2 COLLIER ON BANKRUPTCY, *supra* note 48, ¶ 107-4 and cases cited therein.

uity security holder, and any indenture trustee, it is necessary to analyze the obligation of the bankruptcy court upon receiving a request for protection from any such party. The language of subsection 107(b) as it relates to a request from a party in interest is mandatory. Accordingly, "if the information fits any of the specified categories [11 U.S.C. subsections 107(b)(1) or (2)], the court is *required* to protect a requesting interested party and has no discretion to deny the application."[74]

Although subsection 107(b) directs the trial court to protect a party in interest, it grants the court considerable discretion in performing this task. This dual structure distinguishes subsection 107(b) from statutes placing an unconstitutional ban on the public's First Amendment right of access. Such statutes strip judges of all discretion in a particular type of proceeding. For example, a statute requiring courts to close all trials relating to sexual offenses committed against minors was struck down by the Supreme Court as unconstitutional.[75] In contrast, subsection 107(b) requires the bankruptcy judge to protect the requesting party only if one of the traditional exceptions to public access is determined to be applicable.[76] The bankruptcy judge retains complete discretion in reviewing the record to determine if an exception is applicable and in fashioning an appropriate remedy.[77]

74. Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24, 27 (2d Cir. 1994); *see also* 2 COLLIER ON BANKRUPTCY, *supra* note 48, ¶ 107-4 (stating that "[p]rotection [under 11 U.S.C. § 107(b)] is mandatory when requested by a 'party in interest'").

75. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609-11 (1982).

76. *See* discussion *supra* notes 68-70 and accompanying text.

77. *See* Phar-Mor, Inc. v. Defendants Named Under Seal (*In re* Phar-Mor, Inc.), 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995) ("The discretion lies not in whether a court may protect an interested party, but in whether the matters complained of fall within the exception and in what type of protective remedy is necessary under the facts of each case."). Moreover, because subsection 107(b) sets forth two specific exceptions to the general common law rule in favor of public access to judicial records and documents, the court must structure the remedy it provides under subsection 107(b) to protect only that information which is a trade secret, confidential research, development or commercial information, or scandalous or defamatory. *See, e.g., id.* at 680 (explaining that the actions of the party objecting to the sealing of the complaint had stripped the court of the least intrusive method of protection which would have been releasing the complaint in a redacted form). General protective orders which seal the entire record of any given proceeding are not warranted unless every document in the record satisfies one of the categories protected in subsection 107(b). *See, e.g.*, United States v. Continental Airlines, Inc. (*In re* Continental Airlines, Inc.), 150 B.R. 334, 339 (Bankr. D. Del. 1993) (examining each portion of examiner's report to determine which statements, if any, satisfied subsection 107(b)); *In re* Lomas Fin. Corp., No. 90 Civ. 7827, 1991 WL 21231, at *2 (S.D.N.Y. Feb. 11, 1991) (finding that sealing entire document when only four sentences warranted protection under subsection 107(b) was an overbroad remedy).

Under subsection 107(b), the burden of proof in establishing the applicability of the exceptions rests with the requesting interested party.[78] To satisfy this burden, the requesting party need only show that the information sought to be protected is either confidential commercial information or is scandalous or defamatory. The party is not required by the statute to demonstrate "good cause," as is required, for example, by Rule 26(c) of the Federal Rules of Civil Procedure.[79]

78. Although there are no reported decisions explicitly addressing the burden of proof under subsection 107(b) of the Bankruptcy Code, nonbankruptcy cases dealing with similar exceptions to the presumption of public access hold that the burden lies with the party seeking the application of the exception. *See* Miller v. Indiana Hosp., 16 F.3d 549, 551-52 (3d Cir. 1994) (holding that "[a] party to seal . . . a judicial record bears the heavy burden of showing that 'the material is the kind of information that courts will protect.'" (quoting in part Publicker Indus. Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984))); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 890 (E.D. Pa. 1981) (finding the presumption of public access must be balanced against legitimate privacy concerns of the party). Placing the burden on the requesting interested party under subsection 107(b) appears to be warranted in light of the strong presumption in favor of public access. In meeting this burden, the requesting party should be able to generically bring to the court's attention the facts which classify the information as a protected category under subsection 107(b) without disclosing the specific items sought to be protected. For an example of an argument which suffices under this standard of proof, see *Phar-Mor*, 191 B.R. at 677-79 (finding that when a reasonable person would alter their opinion of defendant based on allegations in complaint, court is within its power to protect defendant by limited public access).

79. When Congress addressed the secrecy problem in subsection 107(b) of the Bankruptcy Code it imposed no requirement to show "good cause" as a condition to sealing confidential commercial information. This omission is particularly significant because Rule 26(c) of the Federal Rules of Civil Procedure, from which the language of subsection 107(b) appears to have been drawn, expressly required "good cause" to be established before a discovery protective order could be granted—even when the material sought to be protected was "a trade secret or other confidential research, development, or commercial information."

Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24, 28 (2d Cir. 1994) (explaining that the congressional mandate of subsection 107(b) eliminates the need to inquire whether cause exists for the requested protection); *see also Phar-Mor*, 191 B.R. at 679 (finding that "[t]he mandatory language of § 107(b) negates the need for such inquiries [into good cause or compelling reasons]") (citing *Orion*, 21 F.3d at 28). *But see In re* Foundation for New Era Philanthropy, 23 Media L. Rep. (BNA) 2498 (Bankr. E.D. Pa. 1995) (suggesting that the "good cause" requirement used in the context of protective orders under Rule 26(c) of the Federal Rules of Civil Procedure should likewise be used in the bankruptcy court's analysis under § 107 of the Bankruptcy Code).

Rule 26(c) of the Federal Rules of Civil Procedure is applicable in a bankruptcy case pursuant to Bankruptcy Rule 7026. However, Part VII of the Bankruptcy Rules (which encompasses Rule 7026) only governs adversary proceedings under Bankruptcy Rule 7001 and contested matters, unless the court directs otherwise, under Bankruptcy Rule 9014. Thus, a request for a protective order in the discovery context during the course of an adversary proceeding or a contested matter requires a showing of "good cause" to justify the order under Bankruptcy Rule 7026(c). The term "good cause" under Rule 26(c) of the Federal Rules of Civil Procedure has been interpreted to require a "show[ing] that disclosure will work a clearly defined and serious injury." Zenith Radio Corp. v. Matsushita

"Because Congress enacted an express statutory scheme, issues concerning public disclosure of documents in bankruptcy cases should be resolved under section 107."[80] Accordingly, the bankruptcy court need not balance the equities of the case, as Congress has already performed that task. The bankruptcy court need look only to the explicit language of section 107. The outcome of Congress's evaluation of public access in the bankruptcy context is that, if information is a trade secret, confidential research, development or commercial information, or scandalous or defamatory, the information and the requesting party are entitled to protection.[81] Thus, the bankruptcy court's decision focuses on whether the information satisfies the criteria set forth in subsection 107(b).[82] The special protection granted to the two categories of information delineated in subsection 107(b) is justified in the bankruptcy context, as the participation of all interested parties is encouraged and full disclosure by the debtor is required.

Even if a party in interest fails to request protection under subsection 107(b), the court on its own initiative may provide protection to the appropriate entity or person. In considering whether to take action sua sponte under section 107, the bankruptcy court must balance the commercial interests or tort rights to be protected "against the fundamental interest in having open public and party access to

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Elec. Indus. Co., 529 F. Supp. 866, 891 (E.D. Pa. 1981) (citing Essex Wire Co. v. Eastern Elec. Sales Co. 48 F.R.D. 308 (E.D. Pa. 1969)). Otherwise, a request for a protective order in a bankruptcy case is governed by section 107 and the requesting party need only demonstrate one of the subsection 107(b) exceptions to justify its request for protection.

80. *Phar-Mor*, 191 B.R. at 679 (citing *Continental Airlines*, 150 B.R. at 334).

81. *See supra* note 74 and accompanying text.

82. In reaching its decision, the bankruptcy court should set forth specific findings of fact to support its conclusion. Otherwise, upon appeal, the record may be deemed insufficient to support the bankruptcy court's discretionary decision. For the proposition that the trial court must make "findings specific enough that a reviewing court can determine whether the closure order was properly entered," see *In re Foundation for New Era Philanthropy*, 23 Media L. Rep. (BNA) 2498 (Bankr. E.D. Pa. 1995) (citing Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984). *See also* United States v. Antar, 38 F.3d 1348, 1361-62 (3d Cir. 1994) (nonbankruptcy case in which the Third Circuit reiterated the need for a trial court to make specific findings on the record with respect to closure decisions). The need for a trial court to create a record to support its decision arises because the standard of review upon appeal is for abuse of discretion, as is demonstrated by the recent Sixth Circuit decision in *Procter & Gamble v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996) (addressing the issue of prior restraint under the First Amendment in the nonbankruptcy context). *See also* Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995) (nonbankruptcy case) ("We review the district court's denial of access to its records for abuse of discretion."); *Continental Airlines*, 150 B.R. at 338-39) (reviewing a bankruptcy court's decision to seal a document under subsection 107(b) and stating that "[a] bankruptcy court decision constitutes an abuse of discretion if the court failed to apply the proper legal standards or based its decision on clearly erroneous findings of fact").

papers filed in judicial proceedings."[83] "[T]he Bankruptcy Court is entitled to substantial deference and latitude with respect to [such] discretionary case management decisions."[84]

The final issue that may arise in the basic application of section 107 of the Bankruptcy Code is the ability of third parties to intervene in proceedings. The majority view is that permissive intervention should be freely granted to third parties who represent the public's interest in a particular bankruptcy proceeding.[85] Third-party intervention is encouraged in public access proceedings because "otherwise the decision of the Court could be shielded from effective review and, thus, without a right to intervene, the public would have no way to protect its broad right of access granted by section 107(a) and the common law."[86]

B. The Subsection 107(b)(1) Exception

Subsection 107(b)(1) provides "protect[ion to] an *entity* with respect to a trade secret or confidential research, development, or commercial information."[87] Subsection 101(15) of the Bankruptcy Code defines an "entity" to "include[ ] [a] person, estate, trust, governmental unit, and [the] United States trustee."[88]

A common type of document sought to be protected pursuant to the 107(b)(1) exception is the list of creditors that must be filed by the debtor in accordance with Bankruptcy Rule 1007(a).[89] The majority of bankruptcy courts that have addressed the issue of sealing a list of

83. *Continental Airlines*, 150 B.R. at 338; *see also In re* General Homes Corp., 181 B.R. 898, 903 (Bankr. S.D. Tex. 1995) (holding that a bankruptcy court must balance the competing interests of secrecy and the presumption in favor of access when exercising its discretionary powers under subsection 107(b)).

84. *Continental Airlines*, 150 B.R. at 338.

85. *See Phar-Mor*, 191 B.R. at 675-76; *In re* Apex Oil Co., 101 B.R. 92, 93 (Bankr. E.D. Mo. 1989); *In re* EPIC Assocs. V, 54 B.R. 445, 447-48 (Bankr. E.D. Va. 1985); *see also* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 778 (3d Cir. 1994) (nonbankruptcy public access case) (holding that "the procedural device of permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action").

86. *EPIC Assocs.*, 54 B.R. at 448.

87. 11 U.S.C. § 107(b)(1) (1993) (emphasis added).

88. *Id.* § 101(15); *see also* 2 COLLIER ON BANKRUPTCY, *supra* note 48, ¶ 107-5.

89. *See* FED. R. BANKR. P. 1007(a), (j). To support an argument in favor of protecting a list of creditors, the requesting party often relies on subsection (j) of Bankruptcy Rule 1007. Subsection (j) provides in pertinent part:

> *IMPOUNDING OF LISTS.* On motion of a party in interest and for cause shown the court may direct the impounding of the lists filed under this rule, and may refuse to permit inspection by any entity. The court may permit inspection or use of lists, however, by any party in interest on terms prescribed by the court.

creditors have refused to provide protection under subsection 107(b)(1).[90] Bankruptcy courts unanimously agree that general concerns, such as a fear of embarrassment due to being listed in the bankruptcy case, are insufficient to classify a list of creditors as confidential commercial information.[91] However, in *In re EPIC Associates V*,[92] the parties requesting protection asserted that a run on area banks listed as large creditors was certain to result from disclosure. The bankruptcy court found this assertion persuasive and, based on the specific offer, a protective order sealed the identity of the banks.[93] Bankruptcy courts tend to treat requests to shield other papers produced as a result of the bankruptcy case, such as a motion to convert,[94] settlement agreements,[95] and fee examiner reports,[96]

Id. The interplay between subsection 107(b)(1) and Bankruptcy Rule 1007(j) often causes a bankruptcy court to scrutinize more intensely lists and schedules filed pursuant to Bankruptcy Rule 1007(a) because of Rule 1007(j)'s cause requirement. However, most courts separately analyze the protection granted lists and schedules under the respective provisions and hold that such information fails to qualify as a trade secret or confidential or commercial information for purposes of subsection 107(b)(1).

90. *See, e.g.*, *In re* Foundation for a New Era Philanthropy, 23 Media L. Rep. 2498 (BNA) (Bankr. E.D. Pa. 1995) (holding that desire to protect charitable organization donor from public exposure did not outweigh right to public access in refusing to seal the debtor's list of creditors); *In re* Moramerica Fin. Corp., 158 B.R. 135 (Bankr. N.D. Iowa 1993) (finding that privacy interests of the debtor's investors did not warrant sealing the list of creditors); Ad Hoc Protective Comm. for 10 1/2% Debenture Holders v. Itel Corp. (*In re* Itel Corp.), 17 B.R. 942 (B.A.P. 9th Cir. 1982) (holding that the debtor's list of creditors did not rise to the level of commercial information to qualify for protection under subsection 107(b)(1)).

91. *See supra* note 90 and accompanying text.

92. 54 B.R. 445 (Bankr. E.D. Va. 1985).

93. *Id.* at 449-50.

94. *See In re* Reliable Investors Corp., 44 B.R. 904 (Bankr. W.D. Wis. 1984) (denying the debtor's request to seal a secured creditor and indenture trustee's motion to convert or appoint a trustee because such general concerns as the substance of the motion adversely affecting a vote on confirmation did not categorize the motion as confidential or commercial information). Likewise, allegations set forth in a creditor's application to extend the time provided for objecting to the debtor's discharge were found to be ineligible for subsection 107(b) protection. *See In re* Overmyer, 24 B.R. 437, 441-42 (Bankr. S.D.N.Y. 1982) (finding that the allegations were relevant to and in support of the issues raised by the application and therefore were part of the public record). *But see In re* Lomas Fin. Corp., No. 90 Civ. 7827, 1991 WL 21231, at *1 (S.D.N.Y. Feb. 11, 1991) (holding that certain information contained in the response by the official creditor's committee to the debtor's application for extension of the exclusivity period constituted "commercial information" and, thus, sealing the offending portions of the response).

95. *See In re* Analytical Sys., Inc., 83 B.R. 833 (Bankr. N.D. Ga. 1987) (holding that a settlement agreement between the debtor and a creditor did not contain information rising to the level of a trade secret or confidential or commercial information and thus did not warrant protection).

96. *See* United States v. Continental Airlines, Inc. (*In re* Continental Airlines), 150 B.R. 334 (Bankr. D. Del. 1993) (reversing the bankruptcy court's decision which sealed all

in a similar manner, rarely finding that they qualify for protection.[97]

In cases concerning a debtor's business operations, bankruptcy courts are more receptive to arguments presented under subsection 107(b)(1). Documents relating to business transactions of the debtor have been protected as confidential commercial information.[98] For example, in *Orion Pictures*, documents connected with a promotional agreement between the debtor and a third party qualified for protection.[99] The willingness of bankruptcy courts to more readily withhold business-related materials from public disclosure can be traced to two complementary policies: (1) business information which rises to the level of a trade secret or confidential or commercial information has traditionally received the protection of American courts;[100] and (2) there is a need to protect the viability of a debtor-in-possession from competitors who might otherwise obtain an unfair advantage via the disclosure of information related to the debtor's business operations.[101]

C. The Subsection 107(b)(2) Exception

Under subsection 107(b)(2), the bankruptcy court may "protect a person with respect to scandalous or defamatory matter contained in a

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fee examiner reports and responses thereto); *see also In re* Revco, 18 Media L. Rep. 1591 (BNA) (Bankr. N.D. Ohio 1990) (directing the final report of the examiner to be unsealed); *In re* Apex Oil Co., 101 B.R. 92 (Bankr. E.D. Mo. 1989) (finding that party could object to the sealing of the examiner's reports but had no right to immediate review of documents underlying the report).

97. *See also In re* General Homes Corp., 181 B.R. 898 (Bankr. S.D. Tex. 1995) (holding that the stipulation between the debtor and the creditor's committee which sought to have the bankruptcy court vacate prior order sanctioning the creditor's committee was not warranted under subsection 107(b)); *In re* Texaco, Inc., 84 B.R. 14 (Bankr. S.D.N.Y. 1988) (finding that requesting party was not entitled to have transcripts of depositions sealed until such time as the transcripts were admitted into evidence at the debtor's confirmation hearing).

98. *See, e.g.*, Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24, 27 (2d Cir. 1994) (protecting documents relating to promotional agreement from disclosure as confidential and commercial information under subsection 107(b)(1)); *In re* Nunn, 49 B.R. 963 (Bankr. E.D. Va. 1985) (finding that the debtor's customer list constituted commercial information and qualified for protection under subsection 107(b)(1)). *But see In re* Bell & Beckwith, 44 B.R. 661 (Bankr. N.D. Ohio 1984) (holding that the customers of the debtor did not hold a sufficient privacy interest in their financial affairs to warrant sealing the debtor's customer list under section 107).

99. *Orion Pictures*, 21 F.3d at 27-28.

100. *See* discussion *supra* notes 52-56 and accompanying text.

101. *See* Ad Hoc Protective Comm. for 10 1/2% Debenture Holders v. Itel Corp. (*In re* Itel Corp.), 17 B.R. 942, 944-45 (B.A.P. 9th Cir. 1982) (finding that names and addresses of creditors did not constitute protected commercial information).

paper filed in a case under this title."[102] The definition of "person" in subsection 101(41) includes "individual[s], partnership[s], and corporation[s]."[103] Although the class of persons covered by subsection 107(b)(2) is well defined, the type of materials constituting scandalous or defamatory matter is not.

When determining whether materials filed are scandalous or defamatory, bankruptcy courts consider both the truth of the matter asserted[104] and "whether a reasonable person could alter their opinion of [the party] based on the statements therein, taking those statements in the context in which they appear."[105] Thus, documents asserting truthful, yet prejudicial, allegations[106] or documents causing mere embarrassment to the party[107] are not scandalous or defamatory materials under subsection 107(b)(2). Vague and voluminous allegations stated in pleadings filed with the court are likewise ineligible for protection under this analysis.[108] As one bankruptcy court noted: "No reasonable person would be caused to alter any opinion of [the party]" based on such allegations.[109]

Scandalous or defamatory material is composed of false allegations that cause an injury to the party. This injury may relate to the party's reputation in the business community[110] or to aspects of the

102. 11 U.S.C. § 107(b)(2) (1993).

103. *Id.* § 101(41); *see also* 2 COLLIER ON BANKRUPTCY, *supra* note 48, ¶ 107-5.

104. *In re* Whitener, 57 B.R. 707, 709 (Bankr. E.D. Va. 1986) (finding that "[t]he dissemination of truthful matter cannot be enjoined merely because the matter is prejudicial; subsection 107(b)(2) requires that the matter be scandalous or defamatory").

105. Phar-Mor, Inc. v. Defendants Named Under Seal (*In re* Phar-Mor), 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995) (citing *In re* Commodore Corp., 70 B.R. 543, 546 (Bankr. N.D. Ind. 1987) and *In re* Sherman-Noyes & Prairie Apartments Real Estate Inv. Partnership, 59 B.R. 905, 909 (Bankr. N.D. Ill. 1986)).

106. *See In re* Whitener, 14 Collier Bankr. Cas. 2d (MB) 395, 398-99 (Bankr. E.D. Va. 1986) (holding that the debtor was not entitled to have bankruptcy discharge expunged from the record because mere prejudice does not convert truthful allegations to scandalous or defamatory matter).

107. *See In re* Analytical Sys., Inc., 83 B.R. 833, 836 (Bankr. N.D. Ga. 1987) (finding that record was insufficient to show material contained in settlement agreement was scandalous or defamatory, as the record only supported a possible finding of embarrassment).

108. *See Commodore*, 70 B.R. at 546 (finding that the allegations in various pleadings which the requesting party sought to have court strike from the record were not likely to alter any person's opinion of the party as the allegations were vague and voluminous in nature); *Sherman-Noyes & Prairie*, 59 B.R. at 908-09 (finding that voluminous allegations by debtor would tax credulity when examining files).

109. *Sherman-Noyes & Prairie*, 59 B.R. at 909; *see also Commodore*, 70 B.R. at 546 (adopting the reasoning set forth by the court in *Sherman-Noyes & Prairie*).

110. *See Phar-Mor*, 191 B.R. at 679-80 (holding false allegations in complaint amounted to scandalous or defamatory material because the allegations were misleading and would cause a reasonable person to alter their opinion of the defendants). *But see* Hope *ex rel.* Clark v. Pearson, 38 B.R. 423 (Bankr. M.D. Ga. 1984) (holding fear that release of allega-

party's personal affairs which fall within the rubric of the constitutional right of privacy.[111] Actual pecuniary loss is not necessary to establish an injury under subsection 107(b)(2).[112]

IV. Following the Congressional Mandate of Section 107 Within Constitutional Bounds

"It is a well-established rule of statutory construction that 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, [reviewing courts should] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'"[113] By interpreting section 107 in light of the foregoing rule of construction, bankruptcy courts can protect the types of information set forth in subsection 107(b) without offending the First Amendment or common law rights of access embodied by subsection 107(a).

A. A Constitutional Application of Section 107

A proper interpretation of subsection 107(a) begins by recognizing its common law heritage. As noted, section 107 essentially codifies the broad common law public access doctrine[114] to allow disclosure of filed papers. Subsection 107(b) codifies two exceptions to disclosure discussed by the Supreme Court in *Nixon v. Warner Communications, Inc.*[115] While acknowledging that the First Amendment right of access to judicial records is based upon the common law doctrine,[116] the Supreme Court has allowed only a qualified First Amendment right of

tions in a pleading would adversely affect business activities is not sufficient under subsection 107(b)(2)).

111. *See In re* Bell & Beckwith, 44 B.R. 661, 662-63 (Bankr. N.D. Ohio 1984). The bankruptcy court in *Bell & Beckwith* held that the financial affairs and privacy interests of creditor's customers did not constitute scandalous or defamatory material under subsection 107(b)(2). However, the court noted that, if the privacy interests asserted by a party constitute a constitutionally protected privacy right, protection under subsection 107(b)(2) may be considered. *Id.* at 664. The court cited "marriage, procreation, contraception, family relationships, child bearing, and education" as examples of such constitutionally protected privacy rights. *Id.* at 662 (citing Paul v. Davis, 424 U.S. 693 (1976)).

112. *See Phar-Mor*, 191 B.R. at 679 (holding allegations in complaint were scandalous or defamatory without a showing that the defendants would suffer a pecuniary loss if allegations were unsealed).

113. United States v. Three Juveniles, 61 F.3d 86, 90 (1st Cir. 1995) (quoting DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988)).

114. *See supra* notes 48-49 and accompanying text.

115. 435 U.S. 589, 598 (1978).

116. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-76 (1980) (plurality opinion).

public access to such records in the context of criminal trials.[117] The Supreme Court has not endorsed a general First Amendment right of public access to court documents.[118]

The appellate courts that have protected public access to judicial records and documents under the First Amendment have supported their decisions by drawing analogies to the Supreme Court decisions.[119] The propriety of such analogies is questionable because the "Court has never intimated a First Amendment guarantee of a right of access to *all* sources of information within government control."[120] Nevertheless, the First Amendment is not violated by the subsection 107(b) exceptions under the Supreme Court's two-step analysis set forth in *Globe Newspaper Co. v. Superior Court.*[121]

The first step in the Supreme Court's analysis evaluates whether a particular proceeding or record has historically been available to the public. Courts have traditionally not allowed access to information protected by the subsection 107(b) exceptions.[122] Information containing a trade secret, confidential research, development or commercial information, or alleging scandalous or defamatory matter has not "historically . . . been open to the press . . . [or] general public."[123] The sensitive and private nature of the information protected by sub-

117. *See* discussion *supra* notes 24-26 and accompanying text.

118. *See* Lanphere & Urbaniak v. Colorado, 21 F.3d 1508, 1511-13 (10th Cir.) (finding that "there is . . . no First Amendment right . . . of access to government records"), *cert. denied*, 115 S. Ct. 638 (1994); *see also supra* notes 36-39 and accompanying text.

119. *See* discussion *supra* notes 24-26 and accompanying text.

120. Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) (plurality opinion) (denying access to a prison where inmate committed suicide); *see also* discussion *supra* note 35 and accompanying text.

121. 457 U.S. 596, 605-06 (1982). In adopting the two-step analysis relying on historical openness and the significance of access to the particular proceeding, the Court reasoned: "Two features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment." *Id.* at 605 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)).

Under the Supreme Court's public access analysis, several lower courts have determined that access to judicial records and documents is not guaranteed by the First Amendment. *See Lanphere & Urbaniak*, 21 F.3d at 1512-16 (declining to extend the Supreme Court's public access analysis to criminal records sought for commercial purposes); United States v. Corbitt, 879 F.2d 224, 228 (7th Cir. 1989) (holding that no public right of access to presentence reports exists under the Supreme Court's two-step analysis); *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985) (distinguishing pretrial access to judicial records and documents from access to the trial itself); *see also* Sobczak, *supra* note 30, at 407-10 (discussing the *Reporters Committee for Freedom of the Press* decision in light of Supreme Court precedent).

122. *See* discussion *supra* notes 52-63 and accompanying text.

123. *Globe Newspaper*, 457 U.S. at 605; *see also* discussion *supra* notes 46-56 and accompanying text.

section 107(b) justifies its special treatment.[124] The Supreme Court's own historical adherence to this protection further justifies a finding that these two categories of information fail to satisfy the first step in the Court's two-prong public access analysis.[125]

The second step in the analysis considers whether "access to . . . [the information] plays a particularly significant role in the functioning of the judicial process and the government as a whole."[126] Subsection 107(b) does not restrict access to every document in the bankruptcy case.[127] Rather, the protection afforded by subsection 107(b) is specifically tailored to two narrow types of information, both highly private in nature. It is difficult to perceive how information regarding confidential business affairs or false and injurious allegations could enhance public scrutiny "of the judicial process and the government as a whole."[128]

Most often, the information protected by subsection 107(b) is one document, or a portion of a document, among a multitude of filings.[129] To suggest that one document could be "particularly significant" to the judicial process or the government as a whole is spurious, and indeed ignores the private rather than public nature inherent in a document covered by subsection 107(b).[130] Thus, a conclusion that the information protected by subsection 107(b) is essential to public eval-

124. *See* Nixon v. Warner Communications, 435 U.S. 589, 597 (1978) (court can insure that its records are not used to promote public scandal through publication of disgusting details of divorce); Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24, 27 (2d Cir. 1994) (stating that "[i]n limited circumstances, courts must deny access to judicial documents—generally where open inspection may be used as a vehicle for improper purposes"); Schmedding v. May, 48 N.W. 201 (Mich. 1891) (court refused to permit its records to be used as sources of business information that might harm litigant's competitive standing).

125. *See, e.g.*, *Nixon*, 435 U.S. at 597-98 (explaining the traditional exceptions to public access recognized by courts).

126. *Globe Newspaper*, 457 U.S. at 606.

127. *See* discussion *supra* notes 67-68, 77 and accompanying text (explaining the restrictive nature of section 107's application and the necessity for a party to show that each document sought to be protected satisfies one of the subsection 107(b) exceptions).

128. *Globe Newspaper*, 457 U.S. at 606. For an excellent discussion of the privacy concerns implicated by a presumption of private access, see Miller, *supra* note 5, at 463-77.

129. For example, the complaint which Phar-Mor ultimately withdrew was only one document of more than 9,000 documents filed in the main case, as well as the thousands of documents filed in the 36-plus adversary proceedings.

130. *See* discussion *supra* notes 52-63 and accompanying text (discussing the reasons supporting the traditional protection of confidential business information and scandalous and defamatory materials).

uation of the government expands the public access analysis well beyond the current bounds of Supreme Court precedent.[131]

Moreover, section 107 places the relevant decisions regarding the exceptions and remedies to be provided under subsection 107(b) completely within the discretion of the bankruptcy court through, among other things, protective orders.[132] Indeed, "[a] well-drafted protective order that limits access to and the use and dissemination of the information is the most effective means of preserving an individual's privacy or the commercial value of the data while making it available for legitimate litigation purposes."[133] The discretion granted the bankruptcy court under subsection 107(b) includes a myriad of options in fashioning an appropriate remedy. For example, if only a portion of the document contains offending language, the court can strike or expunge that language from the document, or place a limited seal on those few sentences.[134] For example, if the identity of the parties named in a particular document is all that is sought to be protected, the court can release the document in a redacted form.[135] Further, if upon review the filing appears to be imprudent or irrelevant, the court can give the requesting party an opportunity to withdraw the document.[136] Regardless of the option selected, it is clear that the discre-

131. *See, e.g.*, Lanphere & Urbaniak v. Colorado, 21 F.3d 1508, 1512-16 (10th Cir.) (declining to extend the Supreme Court's public access analysis to criminal records sought for commercial purposes), *cert. denied*, 115 S. Ct. 638 (1994).

132. *See* discussion *supra* notes 75-77 and accompanying text (explaining the discretion provided by section 107 and distinguishing the section from those statutes determined to be an unconstitutional ban on public access).

133. Miller, *supra* note 5, at 476 (arguing against stripping a trial court of all protection in the discovery context under Rule 26(c) of the Federal Rules of Civil Procedure).

134. *See* Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24 (2d Cir. 1994) (sealing each document relating to promotional agreement as confidential or commercial information under subsection 107(b)(1)); *In re* Lomas Fin. Corp., No. 90 Civ. 7827, 1991 WL 21231 (S.D.N.Y. Feb. 11, 1991) (sealing only the four sentences in document which satisfied subsection 107(b)); *see also* Pepsico, Inc. v. Redmond, 46 F.3d 29 (7th Cir. 1995) (nonbankruptcy case) (endorsing partial seal on documents containing trade secrets).

135. *See* Phar-Mor, Inc. v. Defendants Named Under Seal (*In re* Phar-Mor, Inc.), 191 B.R. 675, 680 (Bankr. N.D. Ohio 1995) (finding that the release of a document in a redacted form is an appropriate means to protect the identity of parties under subsection 107(b); however, the factual circumstances before the court precluded the use of this remedy) (citing Krause v. Rhodes, 671 F.2d 212 (6th Cir. 1982)); *In re* EPIC Assocs. V, 54 B.R. 445 (Bankr. E.D. Va. 1985) (sealing only names of creditor financial institutions under subsection 107(b) to protect against a run on the bank); *see also* United States v. Amodeo, 44 F.3d 141 (2d Cir. 1995) (nonbankruptcy case) (recognizing authority of district court to edit and redact offending materials in documents filed with the court before public access is granted to those documents).

136. *See Phar-Mor*, 191 B.R. at 680; *see also* Church of Scientology Int'l v. Fishman, 35 F.3d 570 (9th Cir. 1994) (unpublished table decision), No. 94-55443, 1994 WL 467999 (9th

tion granted by section 107 fosters the creation of a remedy specifically tailored to protect the privacy and business interests of a party without unduly burdening the public's right of access to judicial records.

B. A Case Study of Section 107: *Phar-Mor, Inc. v. Defendants Named Under Seal*

1. The Facts

Phar-Mor, Inc. is a multistate deep-discount drug store which successfully reorganized through a Chapter 11 proceeding. The Chapter 11 examiner's report disclosed numerous pre-petition insider transactions.[137] Phar-Mor's former president, Michael Monus, was the owner of or a partner or investor in several entities associated with Phar-Mor.[138] One of these entities was a limited partnership that owned the real estate Phar-Mor leased for its corporate headquarters and other business operations.[139] Mr. Monus was the limited partnership's general partner and was responsible for its day-to-day operations pursuant to the limited partnership agreement.[140] Citing his participation in insider transactions with several entities, including the limited partnership, Phar-Mor's board of directors terminated Mr. Monus immediately prior to filing its Chapter 11 petition.[141]

Phar-Mor, the debtor-in-possession, instituted negotiations during the administration of the Chapter 11 case to recoup all or some of the lease payments it made to the limited partnership. It also attempted to renegotiate the terms of the leases. Faced with a statute of limitations on claims of preferences and fraudulent transfers, and while settlement negotiations were ongoing, Phar-Mor brought an adversary action against the partnership and its limited partners.[142] The complaint alleged that the partnership or its limited partners had en-

Cir. Aug. 30, 1994) (nonbankruptcy case) (recognizing authority of district court to seal or return documents containing offending or privileged information).

137. *See* Examiner's Report, *In re* Phar-Mor, Inc., Ch. 11 Case Nos. 92-41599 through 92-41614 (Bankr. N.D. Ohio 1994) (No. 4243) [hereinafter Chapter 11 Examiner's Report].

138. *See* Jay Alix, Phar-Mor Examiner, Summary Discussion and Overview of Examiner's Final Report (Jan. 19, 1994) (on file with *Hastings Constitutional Law Quarterly*).

139. *See* Chapter 11 Examiner's Report, *supra* note 137, at 13-1 ff.

140. *See Phar-Mor*, 191 B.R. at 677-78.

141. *See* Chapter 11 Examiner's Report, *supra* note 137, at 13-9.

142. *See* Complaint, Phar-Mor, Inc. v. Defendants Named Under Seal (*In re* Phar-Mor, Inc.), Ch. 11 Case No. 92-41599, Adv. No. 94-4074 (Bankr. N.D. Ohio 1994) (As part of the court's remedy in *Phar-Mor*, the court granted plaintiff leave to withdraw the complaint in lieu of permanently sealing it. *See Phar-Mor*, 191 B.R. at 680.) [hereinafter Complaint]. Mr. Monus was a debtor in his own personal Chapter 11 case, and automatic stay did not permit him to be joined as a party. *See id.* at 677.

gaged in various preference or fraudulent transfer actions and breaches of fiduciary duty.[143] Phar-Mor had knowledge, however, that the day-to-day operations of the partnership had been exclusively controlled by Mr. Monus and that the limited partners had no control over such operations.

Along with the adversary complaint, debtor-in-possession Phar-Mor filed a motion to have the complaint held under seal pending the completion of settlement negotiations.[144] The motion set forth the circumstances surrounding the filing of the complaint and stated the debtor-in-possession's belief that publicity surrounding the allegations of the complaint would likely cause settlement negotiations to break down.[145] The court entered an order holding the complaint under seal and extending for a like period the time in which defendants could answer or otherwise respond to the complaint.[146]

Phar-Mor's action against the limited partnership was ultimately settled.[147] Upon settlement, the limited partners asked the court to permanently seal the record.[148] A newspaper of general circulation in the area sought and was granted intervention to oppose, in the public interest, the permanent sealing of the record.[149] The intervenor presented a three-fold argument in support of its position.[150] First, the intervenor argued that common law, the First Amendment, and various statutes, including 11 U.S.C. § 107(a), gave the newspaper a right of access to the papers filed in the adversary action.[151] Second, the intervenor argued that 11 U.S.C. § 107(b)(2) was an unconstitutional infringement of the rights guaranteed by the First Amendment.[152] Finally, the intervenor argued that if the defendant limited partners were entitled to protection, the protection must take the form least restrictive of access to the court papers.[153]

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143. *See* Complaint, *supra* note 142.

144. *See* Motion to Permanently Seal Adversary Proceedings, Phar-Mor, Inc. v. Defendants Named Under Seal (*In re* Phar-Mor, Inc.), Ch. 11 Case No. 92-41599, Adv. No. 94-4074 (Bankr. N.D. Ohio 1994).

145. *See id.*

146. *See* Phar-Mor, Inc. v. Defendants Under Seal (*In re* Phar-Mor, Inc.), Ch. 11 Case No. 92-41599, Adv. No. 94-4074 (Bankr. N.D. Ohio 1994) (order sealing complaint).

147. *See Phar-Mor*, 119 B.R. at 678.

148. *See id.* at 677.

149. *See id.*

150. *See id.* at 678.

151. *See id.*

152. *See id.*

153. *See id.*

2. The Decision

The court first traced the language of 11 U.S.C. § 107(b)(2) from the original form in the first equity rules.[154] Noting that the authority described in subsection 107(b)(2) (and its predecessors) has stood without constitutional challenge since 1842, the court was comfortable in dismissing intervenor's First Amendment challenge.[155] Next, the court considered the intervenor's argument that there was a common law right of access to judicial records.[156] Recognizing that the right was not absolute,[157] the court reviewed the court-constructed limits on the right of access, as well as the congressionally enacted statutory limits on the privilege of inspection of judicial records.[158]

According to the court, section 107 gives access to court papers with specific exceptions for confidential commercial information and scandalous or defamatory material, codifying the Supreme Court's *Nixon* decision as to bankruptcy proceedings.[159] The court held that this express statutory scheme mandates that issues of public access to bankruptcy court papers be decided by application of 11 U.S.C. § 107.[160]

In the bankruptcy setting, the court acknowledged the threshold requirement that persons seeking subsection 107(b) protection show that they are an interested party.[161] The court held that the interested party then bears the burden of showing how the matters complained of are scandalous or defamatory.[162] The test applied by the court in *Phar-Mor* considers "whether a reasonable person could alter their opinion of a party based on the statements in the context in which they appear."[163]

Under this test, the court held that the statements in the sealed complaint constituted scandalous or defamatory matters.[164] The court noted that the complaint was filed for various strategic reasons that would not likely be appreciated by a reasonable lay person.[165] Recognizing that the defendant limited partners were persons with positive

154. *See supra* notes 50-56 and accompanying text.
155. *See Phar-Mor*, 119 B.R. at 679.
156. *See id.*
157. *See id.* (citing Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978)).
158. *See id.*
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.*
163. *See id.*
164. *See id.*
165. *See id.* at 679-80.

reputations in the business and professional communities, the court concluded that the allegations in the sealed complaint would cause the public to alter its opinion of the defendants.[166] It was actually Mr. Monus, the former president and general partner of the defendant partnership, who was believed to have breached a fiduciary duty. Yet, because of the stay in his individual Chapter 11 case (and Phar-Mor's reluctance to seek relief from the stay necessarily implicating issues of the pending criminal prosecution), the complaint could not identify the actual perpetrator.[167]

Finally, the court, holding that defendants were entitled to protection, turned to considerations regarding the appropriate degree of protection.[168] The court recognized that a previous court-approved method of using redacted papers had been foreclosed by intervenor's own action.[169] As the adversary action had been settled without defendants ever having responded to the complaint, the court concluded that, based upon the facts before it, granting leave to the plaintiff to withdraw the complaint was the appropriate remedy.[170] The withdrawal of the offending complaint was the least intrusive method of protecting the defendants and serving the underlying goals of 11 U.S.C. § 107.[171]

V. Conclusion

Bankruptcy Code subsection 107(b), although a restriction on public access to court papers, does not offend First Amendment principles. It is consistent with established constitutional and common law protections of proprietary information. It also recognizes the inherent authority of a court to control its own docket, as well as the conduct of those appearing before it.

Public access to bankruptcy court papers should not come at the expense of a person's ability to seek the protection of the bankruptcy laws. Denying a party in interest the type of protection set forth in subsection 107(b) would tend to discourage persons from using the bankruptcy courts and, consequently, thwart the rehabilitative objectives of the Bankruptcy Code. Such a disincentive is not mandated by the First Amendment or common law public access doctrine and

166. *See id.* at 680.
167. *See id.* at 677-78, 680.
168. *See id.* at 680.
169. *See id.*
170. *See id.*
171. *See id.*

should not be created by a court's reluctance to apply subsection 107(b). Section 107 strikes an appropriate balance between two principles that have historically received judicial protection; i.e., the public's right of access and the privacy interests of litigants. Its application fosters the underlying goals of the Bankruptcy Code.