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The Trend Towards Greater Disclosure of Bondholder Positions in Bankruptcy – The Advisory Committee on the Federal Rules of Bankruptcy Procedure Proposes a Substantial Rewrite of Federal Rule of Bankruptcy Procedure 2019

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The Advisory Committee on the Federal Rules of Bankruptcy Procedure has proposed an amendment to Rule 2019 of the Federal Rules of Bankruptcy Procedure that would require greater disclosure by creditors and equity holders serving on an unofficial or ad hoc committee in Chapter 9 and 11 bankruptcies. The authors of this article examine the proposed rule and decisions under the current rule, and discuss its implications for distressed investors and the bankruptcy community at large.

The Advisory Committee on the Federal Rules of Bankruptcy Procedure (the "Advisory Committee") proposed an amendment to Rule 2019 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rule 2019")[1] in August 2009 that would require greater disclosure

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by participating creditors and equity holders in Chapter 9 and 11 bankruptcies. On May 27, 2010, the Advisory Committee made substantial revisions to the proposed new Bankruptcy Rule 2019, promulgating a new version ("Proposed Rule 2019") that addressed the concerns raised regarding the rule as proposed in August 2009. In essence, Proposed Rule 2019 expands the scope and content of the disclosure requirements of parties' economic interests in a way that might require holders to disclose investing positions previously thought to be confidential and proprietary. Consequently, distressed investors might be deterred from participating in bankruptcy cases because bondholder positions would be subjected to a more exacting scrutiny than they currently are under Bankruptcy Rule 2019.

By its terms, Bankruptcy Rule 2019 is applicable only to disclosure by entities representing more than one creditor, unofficial committees and indenture trustees. Proposed Rule 2019 would provide clarity to ambiguities within Bankruptcy Rule 2019 that courts have inconsistently applied, putting an end to recent litigation over the meaning of the term committee in the rule while expanding the scope of disclosure.

The most controversial aspect of Proposed Rule 2019 as originally proposed in August 2009 was the requirement that parties disclose the amount paid and purchase date for each disclosable economic interest. Based on comments submitted and the Advisory Committee's Hearing on Proposed Rule 2019 (the "Hearing"), the Advisory Committee revised Proposed Rule 2019 and removed the purchase price and specific date-acquired disclosure requirements from Proposed Rule 2019.

The revised Proposed Rule 2019 must be approved by the Standing Committee, the Judicial Conference and the United States Supreme Court before it is effective. Proposed Rule 2019's effective date is slated for December 1, 2010.

HEDGE FUND PARTICIPATION IN BANKRUPTCY

Hedge funds have increasingly played a more active role in business bankruptcy cases in the United States. Their participation greatly facilitates resolution of restructurings by providing liquidity to those unwilling or unable to remain engaged in the process. They often form unofficial ad

hoc committees, consisting of multiple claims of the same nature. Through collective action, hedge funds pool their resources, sharing the costs of advisors and exerting greater influence in bankruptcy cases by allowing the aggregate amount of all members' holdings to stand behind a legal position, a proposed valuation, or an alternative recovery proposal. For example, hedge funds may form an ad hoc committee in order to create a blocking position with respect to the treatment of their claims, and thus be in a position to negotiate for concessions within the debtor's plan of reorganization. Additionally, collective action creates judicial economy in bankruptcy cases because there are fewer parties at the negotiating table.

The increase of short-selling debt and the emergence of many derivative products have increased the ability of creditors to take multiple positions in a debtor's capital structure, thereby creating differing and complex incentives for certain creditors. The conflicting positions available to a creditor have created a concern that a creditor's net economic interest might conflict with its public position as a creditor in the bankruptcy case. This lack of transparency has led to Proposed Rule 2019.

DETAILS OF PROPOSED RULE 2019

Proposed Rule 2019 would expand the scope and coverage of Bankruptcy Rule 2019's disclosure requirements. As compared to Bankruptcy Rule 2019's heading, "Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases," Proposed Rule 2019 is entitled "Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases" to reflect the enlarged focus on disclosure.

Proposed Rule 2019 also introduces a new term "disclosable economic interest" which extends the scope of the rule beyond claims and interests owned to include any economic interest that could affect the legal and strategic positions a stakeholder might take in a Chapter 9 or 11 case. If adopted, Proposed Rule 2019 would specifically be extended to every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are acting in concert to advance common interests and are not comprised entirely of af-

filiates or insiders of one another. Proposed Rule 2019 no longer excludes official committees, unless specifically indicated in a particular provision of the rule. Certain entities are excluded from Proposed Rule 2019's disclosure requirements, including indenture trustees (marking another departure from Bankruptcy Rule 2019).

Subdivision (c) of Proposed Rule 2019 sets forth the information that would be required to be disclosed under the rule. Proposed Rule 2019 would require disclosure regarding the pertinent facts and circumstances surrounding the formation of a committee or group, and the employment of an entity. In addition, Proposed Rule 2019 would require that an entity, each member of a group or committee and each creditor or equity security holder represented by an entity, group or committee (other than a committee appointed under Sections 1102 or 1114) disclose the following in a verified statement:

(i) its name and address;

(ii) the nature and amount of each disclosable economic interest as of the date the entity was employed or the group or committee was formed; and

(iii) with respect to each member of a group or committee that claims to represent any entity in addition to the members of the group or committee, other than a committee appointed under Sections 1102 or 1114 of the Bankruptcy Code (official committees), the date of acquisition by quarter and year of each disclosable economic interest, if less than one year before the petition date.

Proposed Rule 2019 also requires that each creditor or equity security holder represented by an entity, group, or committee attach to its verified statement a copy of the instrument that authorizes the entity, group or committee to act on behalf of creditors or equity security holders, if there is one. Proposed Rule 2019 would also impose a duty to supplement the verified statement if the entity, group or committee takes a position before the court or solicits votes on a plan if there has been any material change in the facts contained in the previously filed statement.

Lastly, the amendment addresses the court's authority to determine

violations of Proposed Rule 2019 and impose corresponding sanctions. On a motion of any party in interest or *sua sponte*, a court may determine whether there has been any failure to comply with Proposed Rule 2019. If it is determined that there was a failure to comply, a court may (i) refuse to permit the entity, group, or committee to be heard or to intervene in the case, (ii) hold invalid any authority, acceptance, rejection, or objection given, procured or received by the non-complying party or (iii) grant other appropriate relief.

SUMMARY OF THE ADVISORY COMMITTEE'S HEARING ON PROPOSED RULE 2019

On February 5, 2009, the Advisory Committee held the Hearing, at which the following parties were among those who testified: John Kibbe of Richards Kibbe & Orbe LLP; Elliot Ganz of the Loan Syndications and Trading Association ("LSTA"); Kirk Wickman from Angelo, Gordon & Company, L.P. ("Angelo Gordon"); the Honorable Robert E. Gerber, United States Bankruptcy Judge for the Southern District of New York; and Thomas E. Lauria of White & Case LLP. As a result of the Hearing, the Advisory Committee revised Proposed Rule 2019 by making significant changes to Proposed Rule 2019. The two most controversial provisions that were removed from the August 12, 2009 Proposed Rule 2019 were (i) the disclosure of the price paid for a claim in bankruptcy and (ii) the specific date the bankruptcy claim was acquired.

LSTA and the Securities Industry and Financial Markets Association ("SIFMA") originally argued for the repeal of Bankruptcy Rule 2019. LSTA and SIFMA had expressed the concern that the rule and the cases interpreting the rule encouraged adverse parties to demand the disclosure of sensitive and confidential pricing information, giving rise to a litany of unnecessary and distracting litigation proceedings. In fact, the associations' request to repeal Bankruptcy Rule 2019 sparked the Advisory Committee's consideration to revise the rule.

At the Hearing and in their corresponding testimony materials, LSTA and SIFMA changed tack and asserted that Proposed Rule 2019 satisfies legitimate disclosure concerns, but goes beyond the practical and neces-

sary requirements of disclosure. LSTA and SIFMA stated that compelling public disclosure of the date and price at which investors bought and/or sold bankruptcy claims is overreaching. They argued that pricing of distressed investments is normally treated as extremely confidential and should not be subject to disclosure. LSTA and SIFMA also objected to the disclosure of the date on which claims were acquired because the price could easily be determined based on the date purchased. The associations asserted that price is irrelevant to how a claim should be treated in a bankruptcy proceeding. Furthermore, if there were certain situations where pricing was relevant, LSTA and SIFMA argued the discovery process or Bankruptcy Rule 2004 examinations are sufficient to uncover the necessary information. LSTA and SIFMA supported a revised version of Proposed Rule 2019 that removes the provisions addressing the disclosure of amount paid and date acquired. Neither association expressed an issue with bankruptcy judges having the authority *sua sponte* to require disclosure of the amount paid for a claim and the date it was acquired.

The testimony from Angelo Gordon echoed many of the concerns of LSTA and SIFMA. Angelo Gordon also highlighted certain ramifications of Proposed Rule 2019. The company argued that the pricing and purchase date disclosure would be harmful to clients and to investment advisors. If passed as proposed, Angelo Gordon asserted that it and other similarly situated distressed investment companies would most likely stop serving on ad hoc committees thereby resulting in a less efficient bankruptcy process. Angelo Gordon also suggested that Proposed Rule 2019 contain a provision excluding from its coverage funds represented by one investment advisor.

Judge Gerber testified in support of Proposed Rule 2019 as written. Judge Gerber noted that the provisions of Bankruptcy Rule 2019 are rarely, if ever, followed by even the most sophisticated parties. He stated that the ambiguity of Bankruptcy Rule 2019 has led to disparate interpretations and applications of the rule throughout the bankruptcy community. He further stated his belief that judges are spending too much time on issues pertaining to Bankruptcy Rule 2019 and that the rule should be clarified so that compliance is routine.

In response to the criticism of Proposed Rule 2019's provisions regard-

ing disclosure of amount paid and date acquired, Judge Gerber asserted that while the amount paid for disclosable economic interests is not relevant to the amount of allowed claims in a bankruptcy case, it can be relevant to a party's course of conduct throughout a bankruptcy case. Judge Gerber testified that bankruptcy judges should be able to decide whether the paid amount is relevant in each particular case and would not have an issue with the Advisory Committee omitting the price/date requirement so long as the court retains the power to order disclosure upon a strong showing of cause.

His testimony acknowledged that most of the time, participation of ad hoc committees is useful and beneficial to the bankruptcy process, but that the courts need to be able to maintain the integrity and transparency of the bankruptcy process. Judge Gerber indicated that he would not have an issue if the rule did not include in its text a provision about the right of a judge to require disclosure, so long as in a comment to the rule it was stated that the pricing/date information can be acquired through discovery, Bankruptcy Rule 2004 or by order of the court. Lastly, Judge Gerber expressed two technical issues with the rule that would revise the rule explicitly to apply to the disclosure of short positions and swaps or include a comment stating that failure to include certain financial instruments does not exclude them from the breadth of the rule.

Instead of supporting Proposed Rule 2019 or any revisions thereto, Mr. Lauria advocated for the repeal of Bankruptcy Rule 2019 because bankruptcy courts have the inherent power to require disclosure and parties have the tool of discovery to help them obtain relevant information. He asserted that Proposed Rule 2019 is a violation of due process rights because it acts as a barrier to a free and open bankruptcy process. Mr. Lauria emphasized how distressed investors benefit the bankruptcy process and argued that Proposed Rule 2019 would have a chilling effect on such participation.

CURRENT BANKRUPTCY RULE 2019

Bankruptcy Rule 2019 has been part of the Federal Rules of Bankruptcy Procedure since the adoption of Title 11 of the United States Code (the "Bankruptcy Code") in 1978. The predecessor to the Bankruptcy Code is the Bankruptcy Act. Rule 10-211 under Chapter X of the Bankruptcy

Act ("Rule 10-211") was the direct predecessor of Bankruptcy Rule 2019, and the rules' text is similar. Rule 10-211 was originally adopted to address concerns within the corporate reorganization practice of the 1930s, requiring disclosure relating to the creation and solicitation of bondholder protective committees.[2]

Bankruptcy Rule 2019 acts as a procedural mechanism for implementing and enforcing strict limitations on unofficial committees. Bankruptcy Rule 2019 requires "every entity or committee representing more than one creditor or equity security holder" to file a verified statement (the "2019 Statement") that includes, among other things, the name and address of the creditor or equity security holder, the nature and amount of the claim or interest and the time of acquisition thereof unless acquired more than one year before the bankruptcy filing.[3] Disclosure of committee members and their holdings inform others about which creditors are controlling the reorganization. The disclosure of who formed the committee lets others (particularly non-participating similarly situated creditors) know about those who are directing the committee. Disclosure regarding the committee arrangements between the committee and the members thereof informs others about the circumstances surrounding the committee formation, including what powers the committee exercises on behalf of its members.

BACKGROUND AND LEGISLATIVE HISTORY OF BANKRUPTCY RULE 2019[4]

Equity Receiverships and Origin of Protective Committees

The origin of corporate reorganization has its roots in the railroad failures of the late 19th century, which led to equity receiverships. The railroads were the nation's first large corporations and upon their failure, there was not an existing structure in the courts to address the process of reorganization. In confronting this situation, the courts put together a framework based on their equitable authority to appoint receivers to preserve the value of property and the rights of mortgage holders to foreclose on property upon a default.

A typical equity receivership involved railroads that financed them-

selves by issuing common stock, preferred stock and several different mortgage bonds, secured by different portions of the railroad. If the railroad was unable to make required bond payments, a creditor would file a "creditor's bill" asking the court to appoint a receiver over the railroad's property. The appointment of the receiver resulted in the protection of the railroad's assets from creditors. If a creditor took action against railroad property, the receiver would get a court injunction staying such action. The creditor would then file a foreclosure bill, asking the court to sell the railroad property.

The reorganization process often took years while a plan was being negotiated. During negotiations, investment banks that underwrote the bonds would form "protective committees" to represent the bondholders. If the railroad issued multiple bond classes, multiple committees might be formed. Holders of common stock and preferred stock might also form committees. For similar reasons that led to the formation of ad hoc committees today, these protective committees provided additional leverage within the reorganization process and allowed creditors to use other members' holdings to obtain greater influence than they would have acting alone.

The difference however is that members of protective committees were required to deposit their bonds (or stock) with the committee to ensure committee authority. As a result, the committee had control over the bonds during negotiations. Once an agreement was reached on the plan of reorganization, numerous committees would combine to form a reorganization committee which would hold all of the issued securities so that they might purchase the railroad assets at the foreclosure sale. The reorganization committee would bid the face value of the issued securities at the auction, thus trumping any other bid for the assets. Upon sale, the reorganization committee would transfer the assets to a shell corporation and distribute to the old bondholders and equity holders the equity of the new corporation in accordance with the plan of reorganization.

This framework presented problems because insiders controlled the process and facilitated disparate treatment to similarly situated creditors. It was thought that Wall Street investment firms dominated the protective committees and often worked in tandem with the existing railroad management. Minority dissenters and individual bondholders had an ex-

tremely limited ability to participate in the process because they lacked a large enough stake in the railroad to thwart the goal of the protective committees. Furthermore, the return for consenting creditors was far greater than the return for those who did not consent.

The Chandler Act and Rule 10-211 Under Chapter X of the Bankruptcy Act

In the early 1930s, Congress codified the equity receivership reorganization process. Congress, however, did not address the dominance of the protective committees controlled by insiders and Wall Street. Those concerns were documented in the 1937 SEC Report on Protective Committees (the "SEC Report") issued under then SEC chairman, William O. Douglas (who later became a Justice of the United States Supreme Court). The SEC Report, comprised of four volumes, was full of criticism of Wall Street and those who furthered their own interests through the equity receivership process. The SEC Report drew attention to the exorbitant fees that Wall Street bankers charged in accomplishing a reorganization as well as the fees of the lawyers involved. Furthermore, the SEC Report admonished that bankers and lawyers generally had previous relationships with the managers of the railroads and would often ignore possible litigation against those managers. It concluded that the insiders needed to be removed from the reorganization process and replaced with an independent trustee.

The SEC Report and lobbying by the SEC resulted in the passage of the Chandler Act of 1938, which included Chapter X of the Bankruptcy Act. Chapter X was intended to eliminate the domination of management and thwart self-serving parties within the reorganization process. The Chandler Act granted to an independent trustee the power to formulate a reorganization plan. The new framework also required bankers (in their capacity as underwriters) to disclose the names of their security holders. Previously, the underwriters knew all of the investors who held the securities and as soon as the corporation became financially distressed, the banks knew who to contact to form a protective committee to the disadvantage of outside groups. Chapter X also required that security holders commit to the committee first and then the committee was to negotiate the terms

of the reorganization. Chapter X required that that the plan of reorganization be proposed before anyone committed to it, minimizing the effect the bankers had on the process before the plan was drafted. While modern Chapter 11 has eliminated the requirement of an independent trustee in reorganization cases, it has retained the prohibition of soliciting acceptances of a plan before its submission to creditors for a vote (together with a court approved disclosure statement).

THE INCONSISTENT APPLICATION OF BANKRUPTCY RULE 2019

In recent decisions, courts have been inconsistent in their interpretation of the scope and breadth of Bankruptcy Rule 2019, highlighting the need for changes to the rule.

The *Northwest I* and *Northwest II* Opinions

One of the first major decisions to address the application of Bankruptcy Rule 2019 is *In re Northwest Airlines Corp*. ("*Northwest I*").[5] In this case, the debtors moved to require an ad hoc committee of equity holders to supplement their 2019 Statement, arguing that it provided inadequate disclosure based on the failure to identify the amounts of claims or interests owned by committee members. Committee counsel argued that the ad hoc committee was not bound by the rule because it applies only to "every entity or committee representing more than one creditor or equity security holder." Committee counsel submitted that no member of the ad hoc committee represents any other party besides itself, that the attorneys are the only party representing more than one creditor or equity security holder and that they do not have any claims or interest in the debtors.

Judge Gropper disagreed with the committee and held that the statement filed on behalf of the committee failed to disclose information required by Bankruptcy Rule 2019. The court emphasized that the notice of appearance was made as a committee, the committee moved for the appointment of an official shareholders committee and the committee had been active throughout the case. Furthermore, the committee retained

counsel compensated by the committee that received direction from, and represented the interests of, the committee. Judge Gropper noted that Bankruptcy Rule 2019 was meant to apply to the formal organization of a group of creditors or shareholders holding similar claims who have consolidated their efforts. Specifically, the court stated that "by appearing as a 'committee' of shareholders, the members purport to speak for a group and implicitly ask the court and other parties to give their positions a degree of credibility appropriate to a unified group with large holdings." Judge Gropper relied on the SEC Report and Rule 10-211 to determine that Bankruptcy Rule 2019 applied to the committee, but did not examine the history of equity receiverships before the SEC Report.

Judge Gropper had another opportunity to discuss Bankruptcy Rule 2019 in the same bankruptcy case in *In re Northwest Airlines Corp*. ("*Northwest II*").[6] The second opinion addressed whether the ad hoc committee of equity holders from *Northwest I* were able to file their amended 2019 Statement under seal so that it would be available only to the court and the U.S. Trustee. Specifically, the committee moved for an order seeking to file under seal the disclosure regarding the specifics of the purchases and sales of the securities. The committee reasoned that this information is confidential investment information. The Debtors, the official committee of unsecured creditors and Bloomberg News opposed the motion.

Again, Judge Gropper highlighted the SEC Report on Protective Committees and Rule 10-211 in denying the motion. The court emphasized that the primary purpose of Bankruptcy Rule 2019 to provide disclosure for all parties in interest overrides any interest in keeping information confidential.

The *Scotia Development* Order

In *In re Scotia Development LLC* ("*Scotia*"),[7] however, the United States Bankruptcy Court for the Southern District of Texas ruled that an ad hoc group of certain noteholders was not required to make individualized disclosures under Rule 2019, because they were not members of an official committee.

In *Scotia*, a certain ad hoc group of senior secured noteholders had engaged in an aggressive litigation strategy, contesting approximately 20 of

the debtors' pleadings within two months of the petition date. In addition, this group, through its counsel, filed a 2019 Statement that simply identified the group's membership and that the members held, in the aggregate, approximately 90 percent of the principal amount of the debtor's senior secured notes.

In response, and specifically taking a cue from the developments in *Northwest*, the debtors filed a motion to compel the ad hoc group to disclose the individual holdings of each member, as well as the time of acquisition and the consideration given therefor. The group objected to the debtor's motion, making a number of statutory and constitutional arguments against disclosure. Its most salient arguments were that it was not a "committee" (as the term is understood under the Code), that legislative history and practice did not support disclosure and that *Northwest I* and *II* were wrongly decided and, in any event, were distinguishable.

In support of its position that it was not a "committee," the group pointed to legal and non-legal definitions of that word, and argued that a "committee" was a group that acts in a representative or official capacity. Because the ad hoc group was not appointed, had fluid membership, specifically disclaimed acting in a fiduciary capacity, was comprised of 90-95 percent of all the noteholders (i.e., the group was not a representative, but the noteholders themselves), it was not a committee of the holder, but rather simply a group that shared costs and had a common consensus of views. The group further argued that here was no need to disclose individual holdings because all of the holders were part of the group.

Additionally, the ad hoc group asserted that the SEC Report identified situations that were materially different from those presented in *Scotia*. The ad hoc group suggested that the policy behind these rules did not apply to it because it was not representing any noteholders in any fiduciary capacity (and the group itself was comprised of substantially all noteholders).

The group also argued that Judge Gropper's decision in *Northwest* stood for the proposition that any collective creditor group that seeks standing and credibility would be a committee for Bankruptcy Rule 2019 purposes, and therefore, conversely, a creditor who is not a member of a group does not deserve to be taken seriously. The group also distinguished the facts in *Scotia*, pointing out that the ad hoc group in *Northwest* had previously (and

unsuccessfully) tried to have it itself appointed as an official committee and that the group only held about 27 percent of the relevant securities in question, both of which suggested that it was acting in a representative capacity.

The ad hoc group's objection was also supported by LSTA and SIFMA. These associations not only echoed some of the group's positions, but also stressed the macro effects of the *Northwest* decision and the Scotia debtors' position. Specifically, LSTA and SIFMA argued that stringent individual disclosure requirements would discourage group cooperation amongst the creditor body and debtors, thereby threatening the reorganization process in many cases. Moreover, according to the associations, creditors would be disincentivized to enter into the distressed debt marketplace out of fear of forced disclosure and the prospect of increased costs (as they would be less willing or able to share advisors).

After considering both the ad hoc group's and the associations' respective objections, the Bankruptcy Court entered an order denying the debtors' motion and found that the group was not a "committee" within the meaning of Bankruptcy Rule 2019. Although the court did not draft an opinion on the matter, it implied that a committee would exist only if an ad hoc group was acting in a fiduciary or representative capacity.

Bankruptcy Rule 2019's Recent Application in the Delaware Bankruptcy Court

The WaMu *Opinion*

The first recent Delaware opinion addressing the application of Bankruptcy Rule 2019 to ad hoc committees is *In re Washington Mutual, Incorporated* ("*WaMu*"),[8] in which Judge Walrath held that an informal committee of noteholders was required to comply with the rule because it constituted an entity within the meaning of Bankruptcy Rule 2019(a).

The informal committee of noteholders appeared in the *WaMu* case by filing a notice of appearance. Contemporaneously therewith, the informal committee of noteholders' counsel filed a 2019 Statement, listing the names and addresses of the 23 entities participating in the informal committee of noteholders. Judge Walrath noted that the informal committee of noteholders was very active in the bankruptcy cases. JPMorgan Chase

Bank, National Association filed a motion to compel the informal committee of noteholders to comply with Bankruptcy Rule 2019.

The informal committee of noteholders argued that Bankruptcy Rule 2019 was inapplicable because the informal committee of noteholders was not an "entity or committee representing more than one creditor." Rather, the informal committee of noteholders asserted that it was a loose affiliation of creditors sharing the costs of advisors. The informal committee of noteholders also asserted that they did not speak for or bind individual members absent their individual consent and did not owe duties to anyone who was not a member of the informal committee of noteholders. Judge Walrath found that the plain language of Bankruptcy Rule 2019 applied to the informal committee of noteholders because it had the same characteristics as an ad hoc committee and possessed an identity apart from its individual members.

The informal committee of noteholders also argued that Bankruptcy Rule 2019 was intended to apply only to groups that purport to speak on behalf of a broad group of stakeholders in a fiduciary capacity. Judge Walrath rejected this argument as well and instead asserted that the assumption that the informal committee of noteholders did not owe fiduciary duties to similarly situated creditors was mistaken. The court suggested that members of an ad hoc group or committee may, in fact, owe fiduciary duties to other members of the same class that are not members of the group or committee.

Judge Walrath relied on *Northwest I*, *Northwest II*, the 1937 SEC Report and Rule 10-211 in reaching her conclusion. The court also noted that Proposed Rule 2019 recommended more disclosure.

The Six Flags *Opinion*

More recently, Judge Sontchi declined to follow Judge Walrath's interpretation of Bankruptcy Rule 2019. The court's opinion in *In re Premier International Holdings Inc.* ("*Six Flags*")[9] adopted a more narrow view, holding that an ad hoc group of noteholders was not subject to the disclosure requirements of Bankruptcy Rule 2019. Judge Sontchi concluded that as written, Bankruptcy Rule 2019 "contemplates a subset of a larger group authorized by the larger group to act on its behalf. That is not the case here."

In *Six Flags*, there were three committees involved. The Official Committee of Unsecured Creditors filed a motion to compel the SFO Noteholders Committee to comply with Bankruptcy Rule 2019. The Official Committee did not file a motion to compel the SFO Noteholders Committee (their ally in the case) to comply with Bankruptcy Rule 2019. The issue in *Six Flags* was whether the SFO Noteholders Committee is "a committee representing more than one creditor." The court decided that under the plain meaning of the phrase, a committee must consist of a group representing the interests of a larger group with that larger group's consent or by operation of law, and that the SFO Noteholders Committee was not a committee because it did not represent any persons other than its members either by consent or operation of law.

Based on the court's in-depth analysis of the legislative history of Bankruptcy Rule 2019, Judge Sontchi wrote that "the informal and ad hoc committees *as they exist today* are very different from the 'protective committees' that were the target of the reforms in the 1930s" and concluded that the legislative history does not support the incorporation of the current ad hoc committees into Bankruptcy Rule 2019. The court even went so far as asserting that Bankruptcy Rule 2019 is, for all intents and purposes, superfluous. The *Six Flags* decision also analyzed the *WaMu* and *Northwest* decisions and stressed that, even though these cases addressed the same issue, the decisions were not persuasive.

The Accuride *Order*

Only two days after the *Six Flags* decision, Judge Shannon of Delaware entered an order (the "*Accuride Order*") compelling an ad hoc noteholder group to comply with Bankruptcy Rule 2019.[10] The official committee of equity security holders filed a motion (the "*Accuride Motion*") to compel the ad hoc noteholder group to comply with Bankruptcy Rule 2019, prohibit further participation by the ad hoc noteholder group until they did comply and direct the debtors to withhold payments to the ad hoc noteholder group pending compliance.[11] The movants argued that the ad hoc noteholder group is subject to Bankruptcy Rule 2019 and relied on the *Northwest I* and *WaMu* decisions in their argument. The movants

emphasized that the ad hoc noteholder group was playing a pivotal role in the case, was driving many of the key decisions for the debtors, was acting through a single set of professionals, and was presenting a unified position to the court and other parties in interest. Additionally, the movants argued that, because the estates were currently financing the costs of the ad hoc noteholder group's professionals, parties-in-interest should know what parties are being compensated for these expenses.

Without issuing an opinion, Judge Shannon granted the *Accuride Motion* and ordered the ad hoc noteholder group to comply with Bankruptcy Rule 2019.

The *Philadelphia Newspapers* Opinion

The most recent opinion addressing the application of Bankruptcy Rule 2019 is *In re Philadelphia Newspapers, LLC*. ("*Philadelphia Newspapers*").[12] In this case, the debtors filed a motion to compel a steering group of prepetition lenders to comply with Bankruptcy Rule 2019. In the court's decision, Judge Raslavitch noted that the courts are divided in applying Bankruptcy Rule 2019 to ad hoc committees and, after careful consideration of the issue, concluded that although arguments can be made for why Bankruptcy Rule 2019 should be expanded to include ad hoc committees, the current language does not compel disclosure by ad hoc committees.

Attorneys for the steering group of prepetition lenders filed three 2019 Statements throughout the case, including the identities of lender members, the aggregate balance outstanding under the prepetition term loan and the aggregate amount of the debt held by each member at a date close to filing. The debtors asserted that the 2019 Statements failed to comply with the terms of Bankruptcy Rule 2019 and sought disclosure of the amount of each of the claims, the dates the claims were acquired, the amount paid for the claims and any subsequent dispositions thereof. The debtors relied on the *Northwest I* and *WaMu* decisions in their analysis.

The court determined that the steering group of prepetition lenders is not subject to Bankruptcy Rule 2019 because it is not an "entity" or a "committee" as required by the rule. Using a plain language approach, the court concluded that the steering group of prepetition lenders is not an entity because

it is not a person, estate, trust, governmental unit or United States Trustee, nor is it an organization that has a legal identity apart from its owners. Additionally, the steering group of prepetition lenders is not a committee because it is not a body appointed by a larger body for some specific purpose.

The court also determined that the steering group of prepetition lenders did not meet the "representing more than one creditor" requirement of Bankruptcy Rule 2019. Judge Raslavitch agreed with Judge Sontchi's reasoning in *Six Flags* and declined to further analyze the meaning of that phrase. In its conclusion, the court noted that both sides of the Bankruptcy Rule 2019 have merit and states that "if Congress ultimately accedes to the proposed amendment to [Bankruptcy] Rule 2019, it should settle the matter."

CONCLUSION

Based on the different holdings in the above cases, it has become unclear how bankruptcy courts will interpret Bankruptcy Rule 2019. Proposed Rule 2019 would provide greater guidance as to how and when to apply such disclosure requirements to entities, groups and committees that represent multiple creditors or equity security holders that are acting in concert and are not composed entirely of affiliates or insiders. In light of comments received and testimony made at the Hearing, the Advisory Committee revised the originally published version of the rule and unanimously recommended that Proposed Rule 2019, as revised, be approved in order to implement uniform disclosure requirements for creditors acting collectively. Until Proposed Rule 2019 becomes effective, it is likely that courts will continue to send conflicting messages as to the applicability of Bankruptcy Rule 2019.

NOTES

[1] A copy of Proposed Rule 2019 is available at http://www.lsta.org/WorkArea/showcontent.aspx?id=10460.

[2] For a more detailed discussion of bondholder protective committees, see the next discussion entitled "Background and Legislative History of Bankruptcy Rule 2019."

[3] The pertinent part of Bankruptcy Rule 2019 is: "In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 or 1114 of the Code, every entity or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement setting forth (1) the name and address of the creditor or equity security holder; (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of the entity, the organization or formation of the committee, or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof. The statement shall include a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision." Bankruptcy Rule 2019(a).

[4] This discussion is drawn from recent reported decisions involving the interpretation of Bankruptcy Rule 2019.

[5] 363 B.R. 701 (Bankr. S.D.N.Y. 2007).

[6] 363 B.R. 704 (Bankr. S.D.N.Y. 2007).

[7] Bankr. Case No. 07-20027 (RSS) (Bankr. S.D. Tex. 2007).

[8] 419 B.R. 271 (Bankr. D. Del. 2009).

[9] 2010 Bankr. LEXIS 98 (Bankr. D. Del. 2010).

[10] *In re Accuride Corporation*, Case No. 09-13449 (BLS) (Bankr. D. Del. Jan. 22, 2010).

[11] *In re Accuride Corporation*, Case No. 09-13449 (BLS) (Bankr. D. Del. Jan. 4, 2010).

[12] 2010 Bankr. LEXIS 336 (Bankr. E.D. Pa. 2010).