Akin Gump
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Bankruptcy Alert

Amended Bankruptcy Rule 2019 Is Now in Effect!

December 2, 2011

Bankruptcy Rule 2019, which contains certain disclosure requirements for "committees" representing one or more creditors, has been the subject of much controversy over the past few years. In August 2009, the Advisory Committee on Bankruptcy Rules (the "Rules Committee") first published proposed amendments to the Rule, which were widely criticized by the distressed investor community. In June 2010, distressed investors received some good news when, following a period of extensive public comment and hearings to consider the proposed amendments, the Rules Committee modified its original proposal to eliminate some of its more controversial features. The amendments as published in June 2010 have been approved by the Supreme Court and Congress, and are in effect as of December 1, 2011.[1]

Background

Prior to being amended, Bankruptcy Rule 2019 provided that "every entity or committee representing more than one creditor" must file a verified statement disclosing information about its claims including, among other things, (i) the nature and amount of its claims or interests, (ii) the date of acquisition of its claims or interests acquired in the year before filing of the bankruptcy cases, (iii) the amount paid, and (iv) any subsequent sales of claims or interests.[2] Historically, law firms representing ad hoc committees complied with Rule 2019 by disclosing the names of the members of their group and the aggregate amount of claims held by such members. However, in recent years courts were divided on requiring the members of ad hoc committees to comply strictly with all of Rule 2019's disclosure requirements, including disclosure of the price paid for a claim in bankruptcy and the date such claim was acquired.[3]

In August 2009, the Rules Committee first published proposed amendments to Rule 2019 that would have required, among other things, each member of an ad hoc committee to disclose the price paid and the date each claim or economic interest was acquired, if directed by the court. At a February 5, 2010, public hearing before the Rules Committee, which included testimony from Akin Gump Strauss Hauer & Feld LLP financial restructuring partner Abid Qureshi and, among others, Elliot Ganz of the Loan Syndications and Trading Association, the Rules Committee was strongly urged to drop the price and date disclosure requirements in its revised proposal for Rule 2019. Those giving testimony argued that such information was both irrelevant to the bankruptcy process and proprietary in nature. In June 2010, after the conclusion of the public comment period, the Rules Committee adopted significant changes to the amendments it originally proposed, which are now embodied in the new Rule 2019.

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[1] The full text of the amendments can be found at: http://www.supremecourt.gov/orders/courtorders/frbk11.pdf.

[2] Fed. R. Bankr. P. 2019(a).

[3] *In re Philadelphia Newspapers, LLC,* Case No. 09-11204 (Bankr. D. Del. Feb. 4, 2010) (court did not require price and date disclosure); *In re Accuride Corporation* Case No. 09-13449 (Bankr. D. Del. Jan. 25, 2010) (court required price and date disclosure); *In re Premier International Holdings, Inc.* Case No. 09-12019 (Bankr. D. Del. Jan. 9, 2010) (court did not require price and date disclosure); *In re Washington Mutual, Inc.* Case No. 08-12229 (Bankr. D. Del. Dec. 2, 2009) (court required price and date disclosure). See our Client Alerts titled "Rule 2019 Does Not Apply to Steering Groups," published February 5, 2010, and "Rule 2019 Does Not Apply to Ad Hoc Committees," published January 12, 2010.

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Amended Rule 2019

The new Rule 2019 requires the disclosure of more information about the economic interests of creditors and equity holders than the prior iteration of the Rule, and applies to a broader range of parties. Some of the highlights of the new Rule 2019 include the following:

- The Rule applies to every group or committee of creditors or equity holders, and every entity that "represents" multiple creditors or equity holders that are "acting in concert to advance their common interests." A group or entity is considered to "represent" multiple creditors or equity holders if it takes a position before the bankruptcy court, or solicits votes on a plan of reorganization, "on behalf of another."

- Each member of a group or committee to which the Rule applies must individually disclose the nature and amount of each "disclosable economic interest" held in relation to the debtor.

- A "disclosable economic interest" is defined broadly to include any economic interest that could affect the legal and strategic positions a stakeholder takes in a chapter 11 case beyond just claims and interests, including, among other things, short positions, credit default swaps, total return swaps, participations, and derivative instruments.

- Creditors and equity holders are *not* required to disclose the price paid for any claim or economic interest, or the date of acquisition.

- With respect only to members of a group or committee that claim to "represent" any entity in addition to the members of such group or committee (other than official creditor or equity holder committees), such members must disclose, by quarter and year, the date of acquisition of each "disclosable economic interest" acquired within one year of the petition date.

- If any fact disclosed changes "materially," it must be updated whenever the entity, group, or committee takes a position before the bankruptcy court, or solicits votes on a plan.

- If the court determines, on its own or on a motion of any party in interest, that there has been a failure to comply with the Rule, the court may, among other things, refuse to permit the entity, group, or committee to be heard or to intervene in the case.

- Indenture trustees, administrative agents under credit agreements and groups composed entirely of insiders or affiliates are exempted from the Rule.

While the new Rule 2019 is in many respects clearer and more precise than its predecessor, and therefore less likely to spark the type of litigation seen under the prior Rule, disputes will undoubtedly arise in connection with the interpretation of some of its provisions.

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