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To Credit Bid or Not to Credit Bid? Creditors May No Longer Get to Ask

By Elena González

The Third and Fifth Circuits recently ruled that when a debtor sells its assets pursuant to a plan of reorganization, a secured creditor does not have an absolute right to credit bid. *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 302 n.4, 320–21 (3d Cir. 2010). (A credit bid permits a secured lender to bid its debt instead of cash. Judge Ambro's dissenting opinion provides a thorough explanation of credit bidding.) (*Philadelphia Newspapers*); *Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d. 229 (5th Cir. 2009) (Jones, C.J.) (*Pacific Lumber*). These decisions have altered the generally accepted expectation by secured lenders of their right to credit bid in the context of a Chapter 11 plan and will impact the relationship between secured lenders and distressed debtors.

The Facts

In 2006, the debtors, Philadelphia Newspapers, LLC, acquired the *Philadelphia Inquirer*, *Philadelphia Daily News*, and www.philly.com for $515 million with a $295 million loan secured by a first priority lien on substantially all of the debtors' assets in favor of a group of lenders.

In February 2009, the debtors filed a Chapter 11 petition after defaulting on their loan agreements. The debtors' proposed plan provided for a sale of substantially all the debtors' assets at auction, generating $37 million in cash for the lenders, and provided that the lenders would receive the Philadelphia headquarters of the debtors, valued at $29.5 million. The debtors' bid procedures required the funding of the purchase in cash and specifically precluded the lenders from credit bidding.

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A Debtor's Dilemma: Retaining Postconfirmation Jurisdicition in the Fifth Circuit

By Thomas Rice

In a Chapter 11 case, the plan of reorganization is the final negotiated contract between the debtor and its creditors. The terms of the plan will govern the relationship between the parties after confirmation. Thus, the terms of the plan should be subject to a negotiation between the debtor and creditors that leads to a contract approved by the bankruptcy court.

Of course, a bankruptcy plan is no ordinary contract. It is an agreement that must be negotiated between multiple constituencies, all of which are looking out for their own best interests. Additionally, it is governed by the parameters of the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and must be approved by a judge. More specifically, for the court to approve a Chapter 11 plan, it must contain certain information and details to satisfy the requirements of 11 U.S.C. § 1123.

One of the provisions a plan may contain is reservation of the right to deal with claims or causes of action held by the debtor after confirmation of the plan. 11 U.S.C. § 1123(b)(3)(B). In a significant number of Chapter 11 cases, the pursuit of causes of actions held by the debtor may be the only chance that creditors have to recover any value on their claims. Thus, proper retention of the right to pursue postconfirmation causes of action is a critical aspect of most plans.

In an effort to retain these valuable rights, many plans of reorganization generally provide that some postconfirmation entity, such as the reorganized debtor or a liquidating trust, will retain

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The Uncertain State of Rule 2019 Disclosure as Applied to Ad Hoc Committees

By Edward L. Schnitzer and Anting J. Wang

Bankruptcy courts across the country have issued numerous conflicting decisions concerning the application of Federal Rule of Bankruptcy Procedure 2019 (Rule 2019 or the Rule) to informal or ad hoc groups of creditors.

However, the proposed amendments have not yet been formally codified and thus the conflicting case law surrounding Rule 2019 remains. Until then, practitioners would be wise to pay particular attention not only to the prevailing holdings in each jurisdiction but also to the particular decisions set forth by individual judges.

The Statutory Framework

Rule 2019 requires that "entities" or "committees" disclose the name of each committee member, the nature and amount of each member's claim, and the date and price paid for each claim, among other information. The rule reads in pertinent part:

> [E]very entity or committee representing more than one creditor . . . shall file a verified statement setting forth (1) the name and address of the creditor . . . ; (2) the nature and amount of the claim or interest and the time of acquisition thereof . . . ; (3) a recital of the pertinent facts and circumstances in connection with the employment 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 . . . the amounts of claims or interests owned by the entity, the members of the committee . . . times when acquired, the amounts paid therefor, and any sales or other disposition thereof. The statement shall include a copy

Application of Federal Rule of Bankruptcy Procedure 2019

February 26, 2007. In *In re Northwest Airlines Corp.*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007) (*Northwest I*), New York Bankruptcy Judge Allan L. Gropper holds that an ad hoc committee of equity security holders must file an amended Rule 2019 statement disclosing all information as required by the Rule. In a subsequent opinion, the court rejects the committee's request to file this information under seal. *In re Northwest Airlines Corp.*, 363 B.R. 704 (Bankr. S.D.N.Y. 2007) (*Northwest II*).

April 18, 2007. Texas Bankruptcy Judge Richard S. Schmidt holds that a noteholder group is not a "committee" as envisioned by Rule 2019 and thus is not subject to the Rule's disclosure requirements. *In re Scotia Development LLC*, No. 07-20027, 2007 Bankr. LEXIS 4731 (Bankr. S.D. Tex. Apr. 18, 2007).

December 2, 2009. Following *Northwest I*, Delaware Bankruptcy Judge Mary F. Walrath holds that an informal group of noteholders would be compelled to abide by the disclosure requirements of Rule 2019. *In re Washington Mutual, Inc.*, 419 B.R. 271 (Bankr. D. Del. 2009).

January 20, 2010. Delaware Bankruptcy Judge Christopher S. Sontchi respectfully disagrees with Judge Walrath and holds that an informal group of noteholders would not be bound by such disclosure requirements, reasoning that ad hoc committees do not fall within the plain meaning of the Rule and that the Rule's legislative history did not mandate such disclosure. *In re Premier Int'l Holdings, Inc.*, 423 B.R. 58 (Bankr. D. Del. 2010).

January 22, 2010. Delaware Bankruptcy Judge Brendan L. Shannon follows the holdings of *Northwest* and *Washington Mutual* and orders an ad hoc noteholder group to comply with Rule 2019. *In re Accuride Corp.*, No. 09-13449 (Bankr. D. Del. Jan. 22, 2010).

February 4, 2010. Chief Judge Stephen Raslavich of the Eastern District of Pennsylvania Bankruptcy Court adopts Judge Sontchi's reasoning in *Premier Int'l Holdings* and finds that 2019 does not apply to an ad hoc pre-petition lending group. *In re Philadelphia Newspapers, LLC*, 422 B.R. 553 (Bankr. E.D. Pa. 2010).

September 15, 2010. Bankruptcy Judge J. Vincent Aug Jr. of the Southern District of Ohio distinguishes *Philadelphia Newspapers* and holds that a group of senior secured noteholders must disclose all relevant information in accordance with Rule 2019. *In re Milacron, Inc.*, No. 09-11235, 2010 Bankr. LEXIS 2956 (Bankr. S.D. Ohio Sept. 15, 2010).

Current Developments. In September 2010, the Judicial Conference approved a revised version of Rule 2019 proposed by the Committee on Rules of Practice and Procedure (the Standing Committee), which would "expand the scope of its coverage and the content of its disclosure requirements." Standing Committee Note ¶ 1. Such revisions are slated to become effective December 1, 2011, if they pass the final steps of the approval process.

of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders.

Fed. R. Bankr. P. 2019 (2008).

The scope of Rule 2019 is debatable as it is unclear what groups qualify as "entities" or "committees" under the Rule. For example, distressed investors often form informal coalitions by which to participate in a particular bankruptcy proceeding. These ad hoc committees are able to share in legal fees as well as benefit from the greater leverage in negotiations when representing a group of creditors, as opposed to any single creditor. However, it is unclear whether such ad hoc committees fall within the scope of Rule 2019 as members are free to enter and exit the group as they see fit and need not comply with the various fiduciary and reporting obligations that attach to official committees. *See, e.g.*, 11 U.S.C. §§ 1102–1103 (2008).

This lack of a formal reporting requirement is of great benefit to funds that engage in claims-trading. Without the necessity of 2019 disclosures, distressed funds are able to move in and out of debtors' securities with relative ease, as well as take potentially conflicting positions with few repercussions (e.g., holding debt and equity in a debtor simultaneously). Further, funds are able to zealously guard their proprietary trading strategies, which may entail instantaneous trades unencumbered by disclosure requirements. Thus, the lack of disclosure requirements is central to these entities' business models and the general liquidity of the claims-trading market as a whole.

Rule 2019 was developed to safeguard small investors from "protective committees" that acted in fiduciary capacity in the Great Depression.

New York

Courts have been conflicted as to which entities disclosure requirements should apply, and whether such requirements should be enforced loosely or stringently. One decision that rigorously applied the Rule and mandated full disclosure by an ad hoc committee was *In re Northwest Airlines Corp.*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007) (*Northwest I*).

In *Northwest I*, an ad hoc committee of equity security holders filed a Rule 2019 statement. The statement disclosed the identities of the members of the committee; the total number of debtors' shares held by committee members; the total value of the committee's claims against the debtors; and that some of the claims were acquired by members of the committee post-petition, among other information. *Id.* at 702. The debtors moved to require the committee to amend their statement, arguing that it did not comply with the requirements of Rule 2019 as it failed to disclose "the amounts of claims or interest owned by the members of the committee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof." *Id.* at 701. The committee members argued that such detailed disclosures were unnecessary as the Rule only applies to "every entity or committee representing more than one creditor or equity security holder." *Id.* at 703. Because no member of the committee represented any party other than itself, such thorough disclosure was unnecessary. *Id.*

Judge Allan L. Gropper disagreed and ordered the committee to file an amended Rule 2019 statement with the requisite information. The court stated that the committee had essentially been acting as a unified group in the bankruptcy proceedings with the added leverage and credibility attributable to such unified entity. Further, any committee purporting to speak for a group increased its likelihood of eventually being paid from the debtors' estate under Section 503(b)(3)(D) of the Code. Thus, the "[r]ule cannot be so blithely avoided" and the debtors' motion was granted. *Id.* at 703.

Following the court's decision, the committee filed a motion seeking to file the amended Rule 2019 statement under seal, arguing that its members traded using complex and proprietary strategies that required the maintenance of strict confidentiality. (Mot. of Ad Hoc Equity Comm. dated Mar. 1, 2007.) However, the debtors countered by maintaining that such information did not constitute trade secrets or proprietary information and merely comprised historical, factual data of which the Securities and Exchange Commission routinely requires disclosure. (Debtors' Obj. to Mot. of Ad Hoc Equity Comm. dated Mar. 5, 2007.) Thus, disclosure of this information formed a "part of the disclosure scheme of the Bankruptcy Code . . . designed to foster the goal of reorganization plans which deal fairly with creditors and which are arrived at openly." (Debtors' Obj. at 14.)

The court denied the committee's motion to file under seal. *See In re Northwest Airlines Corp.*, 363 B.R. 704 (Bankr. S.D.N.Y. 2007) (*Northwest II*). It rejected the argument that the committee members' trading practices constituted commercial information and dismissed the committee's fears as "improbable." *Id.* at 707. Further, the court held that the disclosures were necessary as they would allow other parties in the reorganization to assess whether the committee adequately represented their interests. Whether the committee owed such shareholders a fiduciary duty was not addressed—instead, the court stressed that the purpose of Rule 2019 is to provide outsiders with sufficient information such that they may ascertain whether the committee would sufficiently advance their interests and know "where their champions are coming from." *Id.* at 709.

Texas

The *Northwest* decisions were quickly tested in *In re Scotia Development LLC*, No. 07-20027, 2007 Bankr. LEXIS 4731 (Bankr. S.D. Tex. Apr. 18, 2007). In *Scotia*, holders of a debtors' timber notes organized an ad hoc committee for added leverage in negotiations. At the time of the bankruptcy filing, the noteholders held approximately 95 percent of the debtors' timber notes.

As in *Northwest*, the noteholder group filed a statement pursuant to Rule 2019 but which lacked much of the specific information required by the Rule. The statement included the names of the committee members and their aggregate note holdings but omitted detailed information such as the price paid for each member's holdings and the time of their acquisition. The debtors moved for an order compelling the noteholders to disclose all information required under Rule 2019.

Judge Richard S. Schmidt, in a two-page order, denied the debtors' motion to compel. The order simply stated that the noteholders were "not a committee within the meaning of Bankruptcy Rule 2019 [and] . . . not subject to the disclosure requirements under Bankruptcy Rule 2019." *Id.* at *6. Presumably, the court was persuaded by some or all of the arguments asserted by the noteholders in their objection, which included that the group was not a "committee" within the plain meaning of Rule; that Rule 2019 was developed to safeguard small investors from "protective committees" that acted in a fiduciary capacity in the Great Depression and thus was inapplicable here; that the disclosures impinged on the noteholders' substantive rights such as their First Amendment right not to speak and disclose confidential and proprietary information for no legitimate purpose; and that Rule 2019's enforcement is discretionary and should not be enforced even if applicable. (Noteholder Group's Obj. to Scotia Pacific Co. LLC's Mot. for an Order Compelling the Ad Hoc Committee to Fully Comply with Bankruptcy Rule 2019(a) dated Apr. 6, 2007.) Although Judge Schmidt set forth little reason for his decision, such order gave hope to distressed funds seeking to maintain the confidentiality of their portfolios and trading strategies.

Delaware

The Washington Mutual *Decision*

Washington Mutual appeared to represent a tidal shift in bankruptcy disclosure law, as Judge Walrath of the influential Delaware Bankruptcy Court initially joined the Southern District of New York in mandating complete Rule 2019 disclosures for ad hoc committees and any funds that comprise such committees. In *Washington Mutual*, the 2008 financial crisis triggered the sale of substantially all of a bank's assets to a buyer. The acquired bank and its affiliates subsequently filed for bankruptcy in September 2008, and a noteholder group was formed, which filed a Rule 2019 statement listing the names of the entities participating in the group and stating that the group collectively held over $1.1 billion in principal amount of notes issued by the debtors. Believing such disclosure was deficient, the debtors' new owner filed a motion compelling the noteholders' compliance with Bankruptcy Rule 2019 in full.

The noteholders argued that such compliance was unnecessary as they were merely a "loose affiliation" of creditors who in the interest of efficiency were sharing the cost of legal services. *Id.* at 274. Each member of the group had no ability to bind and owed no duties to any other entity of the group absent its consent. Thus, the group did not qualify as either an "entity" or a "committee" as envisioned by the Rule. *Id.*

However, the court disagreed. As in *Northwest*, the court held that although the group may disavow the label "committee," it in fact possessed virtually all the characteristics and took advantage of all the benefits attributable to ad hoc committees. The noteholders group consisted of multiple creditors holding similar claims, filed pleadings and appeared in the bankruptcy proceedings collectively and not individually, and used their aggregate $1.1 billion in holdings as leverage in negotiating common objectives. *Id.* at 275. Thus, the court granted the motion to compel and ordered the noteholders group to comply in full with the disclosure requirements of Rule 2019.

Interestingly, the *Washington Mutual* court also opined that an ad hoc committee likely owes fiduciary duties to similarly situated creditors, whether members of the committee or not. The court reasoned that when a party purports to act for the benefit of a class, the party assumes a fiduciary role as to the class and thus has "some obligation to other members of that class." *Id.* at 279. Further, any negotiating decisions as a committee "should be based on the interest of the entire shareholders' group, not their individual financial advantage." *Id.* (quoting *Northwest II*, 363 B.R. at 708). Thus, ad hoc committees and other similar groups are on notice that, at least in Delaware, they may be found to owe duties to other members of their respective class of creditors or investors.

When a party purports to act for the benefit of a class, the party assumes a fiduciary role as to that class.

The Premier *Decision*

Although *Washington Mutual* appeared

to mandate Rule 2019 disclosure in Delaware for *ad hoc* committees, that position was quickly placed in doubt when Judge Christopher S. Sontchi of the same court issued a decision holding otherwise less than two months later. The *Premier* bankruptcy arose from Chapter 11 petitions filed by the owners and operators of the well-known Six Flags amusement parks. In addition to an official unsecured creditors' committee, two unofficial creditors' committees that held different classes of notes (the Informal Committee and the Ad Hoc Committee) were formed. While all three committees opposed the debtors' initial plan of reorganization, the Informal Committee alone supported the debtors' revised reorganization plan. As a result, the official committee filed a motion seeking to compel the Informal Committee's compliance with Rule 2019.

In a 34-page decision, Judge Sontchi held that such compliance was unnecessary. The court reasoned that under the plain meaning of the Rule, a true committee is a formal group that represents a larger body, either through consent, contract, or applicable law. *Id.* at 65. By contrast, the Informal Committee had anointed itself a committee without the consent of its alleged constituency and thus represented no one other than its membership. As a result, Rule 2019 disclosures were not properly applied to the Informal Committee. *Id.*

The court also articulated its disagreements with the *Northwest* and *Washington Mutual* opinions, noting that *Northwest* and *Washington Mutual* did not conduct proper plain-meaning analyses to determine if the entity at issue "constitutes a 'committee' under Rule 2019"; their interpretations of the legislative history of Rule 2019 was "flawed"; that "it is a mistake" to evaluate the conduct and role of an ad hoc committee in determining whether it falls within the scope of Rule 2019; and *Washington Mutual*'s identification of a proposed change to Rule 2019 to expand the required disclosure "is of no moment with regard to whether the rule applies in the first place." *Id.* at 75–76. Further, the court noted that the official committee appeared to be using the motion as a litigation tactic against the Informal Committee, as no similar motion was sought against the Ad Hoc Committee. *Id.* Thus, the motion was denied, and the Informal Committee was not required to reveal its members' positions in the debtors' holdings.

The Accuride *Decision*

Reinforcing Delaware's intra-court split is a decision from Judge Brendan L. Shannon in *In re Accuride Corp.*, No. 09-13449 (Bankr. D. Del. Jan. 22, 2010) issued just two days after Judge Sontchi's opinion in *Premier*. In his decision, Judge Shannon directed an ad hoc noteholder group to comply with Rule 2019 by filing a full and complete Rule 2019 statement. The court's logic in adopting such ruling remains unknown as the two-page decision merely sets forth the court's conclusion.

Proposed revisions clarify that the amendment extends the Rule's coverage to groups of committees that "consist of" or "represent" more than one creditor or equity security holder.

Pennsylvania

At this point, three different courts had issued five decisions regarding Rule 2019. The opinions were sharply split and appeared to stem from diametrically opposed interpretations of the plain meaning of Rule 2019 and its legislative history. The Bankruptcy Court of the Eastern District of Pennsylvania joined the fray with its opinion in *In re Philadelphia Newspapers, LLC*, 422 B.R. 553 (Bankr. E.D. Pa. 2010).

In *Philadelphia Newspapers*, a pre-petition lending group (the Steering Group) filed a statement pursuant to Rule 2019 that omitted much of the specific information required by the Rule. The statement included the names of the group members and their aggregate debt holdings but not detailed information such as the price paid for each member's claims and the dates of their acquisition. The debtors moved for an order compelling the Steering Group to disclose all information required under Rule 2019.

In denying the debtors' motion, Chief Judge Stephen Raslavich followed *Premier* and held that complete disclosure was unnecessary as groups that are self-appointed cannot be considered "committees." *Id.* at 563. Further, an entity is an "organization (such as a business or governmental unit) that has a legal identity apart from its members or owners." *Id.* at 565. Because the Steering Group had no legal identity apart from its members, Chief Judge Raslavich found that it could not be an "entity" as contemplated by the Rule. *Id.* Finally, the court noted that the proposed amendments seeking to expand the Rule's scope supported his conclusion—"[i]t is logical to infer that if the rule already covered the Steering Group, there would be no need to expand the Rule to do so." *Id.* at 567.

Ohio

After a brief spell of inactivity, the Southern District of Ohio issued a decision in *In re Milacron, Inc.*, No. 09-11235, 2010 Bankr. LEXIS 2956 (Bankr. S.D. Ohio Sept. 15, 2010). In *Milacron*, a group of senior secured noteholders filed a motion seeking standing to commence and prosecute various causes of action against certain directors and officers of the debtors. One of the directors filed a Rule 2019 motion, requesting that the "nameless movants" reveal themselves in accordance with the Rule. *Id.* at *2. The noteholders responded with an amended motion that identified the names of certain investment funds but provided no other Rule 2019 information. Accordingly, the director argued that Rule 2019 was not satisfied and moved for full disclosure.

Judge J. Vincent Aug Jr. held that full disclosure under Rule 2019 was appropriate and prohibited the group from being heard on "any matter" until they filed a revised verified statement setting forth all required, Rule 2019 information. *Id.* at *5. Judge Vincent found that the noteholders' papers clearly revealed that they were an entity representing more than one creditor, thereby meriting application of the Rule. Further, he held that disclosure of their specific identities was inevitable and necessary—because the noteholders sought standing to bring fiduciary duty claims against certain directors and officers, among other claims, their identities were necessary to evaluate the merits of the claim and determine whether standing was appropriate. While observing that the *Philadelphia Newspapers* opinion would support the noteholders, Judge Vincent held that such an opinion was not binding in Ohio. Further, the court noted that its mandate of full disclosure was supported by the recent draft revisions to Rule 2019, which expand the content and scope of disclosure requirements.

Interestingly, the courts in *Philadelphia Newspapers* and *Milacron* both rely on the draft revisions but come to opposite conclusions based on the same evidence. *Philadelphia Newspapers* reasoned that the precise purpose of the draft revisions are to expand the scope of the rule, and thus only limited disclosure is needed now. By contrast, *Milacron* held that the expanded scope of the draft revisions support a holding of full disclosure today. Regardless, the Bankruptcy Court of the Southern District of Ohio mandated full disclosure under Rule 2019.

Proposed Revised Rule 2019

The amendments to Rule 2019 recently approved by the Judicial Conference embrace full disclosure by clarifying and extending the Rule's reach and application. First, the title of the Rule was changed from "Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases" to "Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases." Such change was intended to "reflect [the Rule's] broadened focus on disclosure of financial information." Standing Committee Note ¶ 1.

Further, the proposed revisions require the disclosure of all "disclosable economic interests"—the definition extends beyond mere claims and interests owned by a stakeholder. Instead, distressed investors holding and/or trading derivative instruments such as short positions, credit default swaps, or total return swaps will be required to disclose these holdings, including the nature and amount of each disclosable economic interest and the date of acquisition by quarter and year (unless acquired more than one year before the petition was filed). Proposed Rule 2019(c)(2); Standing Committee Note ¶ 2.

Last, to address previous confusion in which particular entities argued that they were not subject to the Rule because they did not "represent" anyone other than themselves, the proposed revisions clarify that the amendment extends the Rule's coverage to groups of committees that "consist of" or "represent" more than one creditor or equity security holder. Moreover, the Rule now applies to groups of creditors or equity security holders that act in concert to advance common interests, even if the group does not formally call itself a committee. Standing Committee Note ¶ 4.

To be sure, these changes are significant and greatly expand the reach of the Rule. However, the proposed revisions must be approved by the Supreme Court and also survive congressional review before their scheduled effective date of December 1, 2011. If and until then, the morass surrounding Rule 2019 remains.

Conclusion

At this time, it is unclear whether Rule 2019 requires all ad hoc committees and investor groups to disclose details of trades in a debtor's claims or interests. Currently, *Northwest*, *Washington Mutual*, *Accuride*, and *Milacron* advocate full and complete Rule 2019 disclosure, while *Scotia*, *Premier*, and *Philadelphia Newspapers* hold that the Rule does not apply to ad hoc committees and investor groups. Although proposed revisions that clarify and expand the scope of the Rule are slated to be effective December 1, 2011, until such revisions are formally codified, practitioners should be aware of each jurisdiction's prevailing case law when faced with a disclosure dispute and also research a particular judge's individual holdings on Rule 2019 as necessary.

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