Paul|Weiss

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

NEW YORK
1285 Avenue of the Americas
New York, NY 10019-6064
+1 212 373 3000

BEIJING
Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86 10 5828 6300

HONG KONG
12th Fl., Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852 2536 9933

LONDON
Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44 20 7367 1600

TOKYO
Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81 3 3597 8101

WASHINGTON, D.C.
2001 K Street NW
Washington, DC 20006-1047
+1 202 223 7300

WILMINGTON
Brandywine Building
1000 N. West Street, Suite 1200
Wilmington, DC 19801
+1 302 655 4410

December 18, 2009

Delaware Bankruptcy Court Weighs in on Creditor Groups' Disclosure and Possible Fiduciary Obligations

Hedge funds and other investors in debt or equity securities often form unofficial "ad hoc" committees through which they actively participate in chapter 11 cases. Recent decisions affirm that such ad hoc committees must comply with the disclosure requirements of Bankruptcy Rule 2019 – including the nature and amounts of claims or interests held by members and other details. What about a "group" that says it's a lot less than an ad hoc committee and therefore, outside the Rule? In a recent decision, Judge Mary Walrath of the Delaware Bankruptcy Court ruled that the members of a noteholder "group" must comply with Rule 2019 and file a verified statement setting forth, among other information, (1) the names and addresses of the members of the group; and (2) the nature and amount of the claims or interests held, the time of their acquisition, the amounts paid for them, and any sales or other disposition of the claims or interests.[1]

In *Washington Mutual Inc.*, J.P. Morgan Chase Bank moved to compel a group of creditors calling themselves the "Washington Mutual, Inc. Noteholders Group" (the "WMI Noteholders Group") to comply with Bankruptcy Rule 2019 and provide trading and other information required by that Rule. The WMI Noteholders Group argued that Rule 2019 didn't apply to it because the Group was not an "entity or committee representing more than one creditor," to which the Rule speaks, but rather, "a loose affiliation of creditors who, in the interests of efficiency are sharing the cost of advisory services in connection with the case.[2]"

---

1 *In re Washington Mutual, Inc., et al.*, Case No. 08-12229 (Bankr. Del. Dec. 2, 2009). It should be noted that in August of 2009, proposed amendments to Rule 2019 were published for public comment. The proposed amendments expand the scope of the Rule's coverage and the content of its disclosure requirements. Particularly, the pending amendments include, among others, (1) the new term "disclosable economic interest" which is defined to encompass "any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right that grants the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest," and (2) expanding the disclosure requirements to "every entity, group, or committee that consists of or represents more than one creditor or equity security holder."

2 WMI Noteholders Group's counsel, White & Case LLP, filed a Rule 2019 statement for White & Case, listing the names and addresses of the group members, providing their aggregate collective holdings and representing that each entity "makes its own decisions as to how it wishes to proceed and does not speak for, or on behalf of, any other creditor, including the other participants participating in the WMI Noteholders Group in their individual capacities."

Paul|Weiss

The Bankruptcy Court rejected the WMI Noteholders Group's position. It considered the similarities between the WMI Noteholders Group and an ad hoc committee and held that the WMI Noteholders Group possessed virtually all of the characteristics found in an ad hoc committee, as (1) it consisted of multiple creditors holding similar claims; (2) the members of the Group filed pleadings and appeared in the case collectively; and (3) the Group retained counsel, which took instructions from the Group as a whole, and which relied on the collective $1.1 billion in holdings of the members of the Group to argue in favor of their combined position.[3] The Bankruptcy Court held that under the plain language of Rule 2019, although the members of the WMI Noteholders Group called themselves a Group, they acted as an ad hoc committee or entity representing more than one entity, and therefore they had to comply with Rule 2019.

Judge Walrath found support for her conclusion in *In re Northwest Airlines Corp.*,[4] where Bankruptcy Judge Allan L. Gropper of the Southern District of New York held that an ad hoc committee of equity security holders must comply with the disclosure requirements of Rule 2019. By her ruling, Judge Walrath declined to follow the two-page order issued by Judge Richard S. Schmidt of the Bankruptcy Court for the Southern District of Texas, which held that a noteholder group is not a "committee" within the meaning of Rule 2019 and as such, the disclosure requirements of the Rule did not apply.[5]

But the Delaware Bankruptcy Court did not stop there. In response to the Group's argument that Rule 2019 didn't apply because the Rule applies only to a body that speaks on behalf of an entire class in a fiduciary capacity, the Bankruptcy Court labeled as "erroneous" the Group's assumption that it owed no fiduciary duties to other similarly-situated creditors, either in or outside the Group. However, it deferred the determination of the extent of such fiduciary duties to a later day.

Following Judge Walrath's decision, ad hoc committees and other groups of creditors acting collectively should expect to comply fully with Rule 2019's disclosure requirements, including the requirement to disclose trading information, both in the Sothern District of New York and in Delaware. Moreover, after *Washington Mutual*, such committees and groups may well find themselves with fiduciary duties to other members of their class, whether or not those members joined the group.

* * * *

This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Questions concerning issues addressed in this memorandum should be directed to any of the following:

Alan W. Kornberg (212) 373-3209 Stephen J. Shimshak (212) 373-3133

---

3 The Judge noted that while the Group's counsel contends that it speaks only for the members of the Group that agree with the filing of each pleading, he has never advised the Court in any instance that he was representing less than the entire Group.

4 363 B.R. 701 (Bankr. S.D.N.Y. 2007).

5 *In re Scotia Development LLC*, No. 07-20027 (Bankr. S.D. Tex. Apr. 18, 2007).