NEW DEVELOPMENTS CONCERNING BANKRUPTCY RULE 2019

February 9, 2010

To Our Clients and Friends:

New developments concerning the application of Rule 2019 of the Federal Rules of Bankruptcy Procedure continue at a rapid pace. As described in our prior Client Updates, Rule 2019 requires any entity or committee, other than an official committee, representing more than one creditor or equity security holder, to disclose: (i) the amounts of claims or interests owned by the members of the committee, (ii) the time of acquisition of such claims or interests, (iii) the amounts paid for such claims or interests and (iv) any sales or other dispositions of such claims or interests. The Bankruptcy Courts for the Southern District of New York, Delaware and several other jurisdictions have handed down a series of sometimes contradictory decisions concerning the application of the rule.[1]

PHILADELPHIA NEWSPAPERS

On February 4, 2010, Judge Stephen Raslavich of the United States Bankruptcy Court for the Eastern District of Pennsylvania issued an opinion in the Chapter 11 proceeding of Philadelphia Newspapers, LLC holding that a steering group of prepetition lenders was not required to comply with Rule 2019. In so holding, Judge Raslavich followed the recent decision of Judge Sontchi of the Delaware Bankruptcy Court in *In re Premier International Holdings, Inc.,* 2010 WL 198676 (Bankr. D. Del.), refusing to apply Rule 2019 to *ad hoc* committees or informal groups of creditors and equity security holders, and rejected the contrary decisions of the United States Bankruptcy Court for the Southern District of New York in *In re Northwest Airlines Corp.*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007), and Judges Mary Walrath and Brendan Shannon of the Delaware Bankruptcy Court in *In re Washington Mutual,*

[1] *For more background concerning Rule 2019 and its application, including a discussion of Northwest, Washington Mutual, Premier International and Accuride, please see our Client Update of December 17, 2009, entitled Bankruptcy Court Compels Washington Mutual Noteholder Group to Disclose the Amounts of Their Claims and Prices Paid for Such Claims, available at http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=7f651a88-dce4-42c8-a3a8-409f28f99e93, Client Update of January 19, 2010, entitled Delaware Bankruptcy Court Declines to Compel Six Flags Noteholder Group to Disclose the Amounts of Their Claims and Prices Paid for Such Claims, available at http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=83176dfe-f3ed-4307-8775-abdef5b8ff62 and our Client Update of January 27, 2010, entitled One More Decision from the Delaware Bankruptcy Court Concerning Bankruptcy Rule 2019, available at http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=ac60b766-0474-4787-a470-1dfa70cd9ede.*

Inc., 2009 WL 4363539 (Bankr. D. Del. 2009) and *In re Accuride Corp.*, Case No. 09-13449 (Bankr. D. Del. Jan. 22, 2010), respectively.

In *Philadelphia Newspapers*, Judge Raslavich held that the steering group was not an entity or committee within the meaning of Rule 2019 because it was not "a group representing the interests of a larger group with that larger group's consent or by operation of law." While observing that Judge Walrath in *Washington Mutual* was correct in stating that the policies behind the disclosure requirements of Rule 2019 remained relevant today, he cautioned that this observation must be tempered by the fact that it was not the role of the courts to act upon and decide policy disputes.

Judge Raslavich's decision in *Philadelphia Newspapers* has been appealed. With multiple and inconsistent decisions currently on appeal in the Third Circuit, it seems likely that a higher court will rule on this issue before too long.

PROPOSED AMENDMENT TO RULE 2019

Meanwhile, the Judicial Conference Advisory Committee on Bankruptcy Rules has been considering an amendment to Rule 2019, which in its current form would explicitly subject *ad hoc* committees and informal groups of creditors and equity security holders to the disclosure requirements under Rule 2019. Notably, the proposed amendment requires disclosure with respect to not only claims or interests but any "disclosable economic interest," a concept intended to be sufficiently broad to cover any economic interest that could affect the legal and strategic positions a stakeholder takes in a Chapter 11 case, including derivative transactions.

A public hearing on the proposed amendment was held on February 5, 2010. A number of industry groups and distressed investors testified in opposition to the proposed amendment, focusing principally on the requirement for disclosure of the time and price of acquisition of a "disclosable economic interest." Judge Gerber of the United States Bankruptcy Court for the Southern District of New York, a principal proponent of the proposal, urged approval of the amendment. Nonetheless, Judge Gerber expressed his support for the deletion of the disclosure requirements for the time and price of acquisition so long as the bankruptcy court otherwise retains the power to require disclosure of such information in appropriate circumstances.

The Advisory Committee will accept comments on the proposed amendment until February 16, 2010, after which it will determine whether to submit the proposed amendment to the Standing Committee on Rules of Practice and Procedure. If the amendment is approved by the Standing Committee, it will be submitted to the Judicial Conference and later the Supreme Court and finally Congress for approval.

Please feel free to contact us with any questions.

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