

## **ADVISORY COMMITTEE RECOMMENDS REVISED PROPOSED AMENDMENT TO BANKRUPTCY RULE 2019**

June 23, 2010

To Our Clients and Friends:

On May 27, 2010, the Judicial Conference Advisory Committee on Bankruptcy Rules issued its report to the Standing Committee on Rules of Practice and Procedure recommending approval of an amendment to Rule 2019 of the Federal Rules of Bankruptcy Procedure. While generally expanding the scope of Rule 2019 and expressly subjecting *ad hoc* committees and informal groups of creditors and equity security holders to the rule, the proposed amendment in its revised form eliminated the controversial disclosure requirement with respect to the price and time of acquisition of any claim or interest.

### **BACKGROUND**

The current 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.

As described in our prior Client Updates, the Bankruptcy Courts for the Southern District of New York, the District of Delaware and several other jurisdictions have recently handed down a series of sometimes contradictory decisions concerning the application of the rule to *ad hoc* committees and informal groups of creditors and equity security holders.<sup>1</sup> Notwithstanding multiple and inconsistent decisions on appeal in the Third Circuit, no

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<sup>1</sup> For more background concerning Rule 2019 and its application, 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-a3a8-409f28f92e93>, 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>, 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-a470-1dja70cd9ede>, and Client Update of February 9, 2010, entitled *New Developments Concerning Bankruptcy Rule 2019*, available at <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=783f09c3-a775-482b-9475-c2cfb2c0f539>.

higher court has yet ruled on this issue.

### **PROPOSED AMENDMENT TO RULE 2019**

Against this backdrop, the Advisory Committee has been considering an amendment to Rule 2019, making the disclosure requirements under the rule explicitly applicable to *ad hoc* committees and informal groups of creditors and equity security holders. In addition, the proposed amendment requires disclosure with respect to not only claims or interests but any “disclosable economic interest,” a concept broadly defined to include any economic interest that could affect the legal and strategic positions a stakeholder takes in a Chapter 11 case, including derivative transactions. As originally proposed, the amendment also required disclosure of the date when each disclosable economic interest was acquired and, if directed by the court, the amount paid for such disclosable economic interest.

Following the publication of the original proposed amendment, a number of industry groups and distressed investors voiced their opposition to the required disclosure of the time and price of acquisition of a disclosable economic interest at a public hearing and through submission of written comments to the Advisory Committee. In response to this opposition, the Advisory Committee revised the proposed amendment. In the revised proposed amendment, the time of acquisition is required to be disclosed only by each member of a committee that claims to represent any entity in addition to the members of the committee. Even under such circumstance, the required disclosure is limited to the quarter and year in which each disclosable economic interest was acquired. The revised proposed amendment does not require the disclosure of the price paid for a disclosable economic interest. The revised proposed amendment, however, clarifies that the rule does not affect the right of any party to obtain information not required to be disclosed by the rule by means of discovery or as ordered by the court under its authority outside the rule.

If approved by the Standing Committee, the proposed amendment will be submitted to the Judicial Conference, then the United States Supreme Court, and finally Congress for approval.

A copy of the revised proposed amendment to Rule 2019 can be downloaded at: <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Reports.aspx>.

Please feel free to contact us with any questions.

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