Rule 2019 Redux: The *Ad Hoc* Committee Disclosure Debate Resurrected

March/April 2010

Mark G. Douglas

Bankruptcy headlines in 2007 were awash with tidings of controversial developments in the chapter 11 cases of Northwest Airlines and its affiliates that sent shock waves through the "distressed" investment community. A New York bankruptcy court ruled that an unofficial, or "*ad hoc*," committee consisting of hedge funds and other distressed investment entities holding Northwest stock and claims was obligated under a formerly obscure provision in the Federal Rules of Bankruptcy Procedure—Rule 2019—to disclose the details of its members' trading positions, including the acquisition prices.

The ruling was particularly rankling to distressed investors, who play a prominent role in major chapter 11 cases, principally by virtue of collective participation in *ad hoc* creditor groups. Traditionally, these entities have closely guarded information concerning their trading positions to maximize both profit potential and negotiating leverage. Compelling disclosure of this information could discourage hedge funds and other distressed investors from sitting on informal committees, resulting in a significant shift in what has increasingly become a commonplace negotiating infrastructure in chapter 11 mega-cases.

Close on the heels of the rulings in *Northwest Airlines*, however, the Texas bankruptcy court presiding over the chapter 11 cases of Scotia Pacific Company LLC and its affiliates denied the

debtors' request for an order compelling a group of noteholders to disclose the details of its members' trading positions, ruling that an informal creditor group jointly represented by a single law firm is not the kind of "committee" covered by Rule 2019.

Developments in these and other cases are being monitored closely by the distressed investment community, including trading-industry watchdogs, such as the Loan Syndications and Trading Association ("LSTA") and the Securities Industry and Financial Markets Association ("SIFMA"), which have been actively lobbying to repeal or alter Rule 2019 since 2007. LSTA and SIFMA, two of the nation's leading industry groups in the debt and equity markets, have consistently expressed concern that construing Rule 2019 to apply to informal creditor groups "will have a serious detrimental impact on the willingness and ability of many stakeholders to participate in future chapter 11 cases."

The Rule 2019 *ad hoc* committee controversy lay relatively dormant for nearly two and one-half years. Then, rulings handed down by no fewer than four bankruptcy courts at the end of 2009 and the beginning of 2010 breathed new life into the smoldering flames. The latest tally of bankruptcy courts considering this issue shows three courts taking the position that Rule 2019 applies to informal creditor groups and three advocating the opposite approach.

Role of Formal and Informal Committees

An essential part of the chapter 11 process is constructive dialogue and negotiation among all stakeholders involved in the bankruptcy case, with a view toward building a consensus on the terms of a confirmable chapter 11 plan. The Bankruptcy Code establishes a framework to promote such interaction by providing for the appointment of official committees of creditors

and shareholders entrusted by statute with the duty to participate in the formulation of a chapter 11 plan.

Collective stakeholder participation in a chapter 11 case, however, extends beyond membership on committees officially sanctioned by the Bankruptcy Code. Unofficial, or "*ad hoc*," committees have also long played prominent roles in bankruptcy cases. Like official committees of unsecured creditors, shareholders, retirees, or other creditor groups, *ad hoc* committees commonly retain professionals and participate in a chapter 11 case by filing pleadings, appearing before the bankruptcy court, and otherwise seeking to influence the outcome of the restructuring and the ultimate recovery on their claims or interests. By acting collectively, committee members share the costs of participating in a chapter 11 case and have the ability to wield greater influence than they would by acting alone. The Bankruptcy Code itself acknowledges that unofficial committees can play an important role in a chapter 11 case by providing in sections 503(b)(3)(D) and (4) that costs, including professional fees, incurred by such committees in making a "substantial contribution" to the case will be paid by the estate as priority administrative expenses.

The members of an official committee bear fiduciary duties to both the bankruptcy estate and the committee's constituency. Official creditors' committees also have a duty under section 1102(b)(3) (added to the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005) to provide access to information for their creditor constituents and are obligated to solicit and receive comments from creditors concerning developments in the

chapter 11 case. Any fees and expenses of their professionals must be allowed by the bankruptcy court before being paid by the estate under sections 503(b)(2), 330, and 331.

Ad hoc committees, by contrast, are largely unregulated. For this reason, they are generally the preferred mechanism for creditors and shareholders, such as hedge funds and other "distressed" investors, that want to wield enhanced influence and bargaining power in a chapter 11 case without being subject to the statutory obligations borne by official committees and the same degree of bankruptcy-court scrutiny. Even so, the conduct of unofficial committees is subject to a certain amount of scrutiny by means of information disclosure requirements contained in the Federal Rules of Bankruptcy Procedure. Or perhaps not.

Bankruptcy Rule 2019

Rule 2019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") provides that, in a case under chapter 9 or chapter 11 of the Bankruptcy Code, "*every entity or committee*" (other than an official committee) "*representing more than one creditor or equity security holder*" and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement with the court disclosing the following information:

> (1) the name and address of the creditor or equity security holder;
>
> (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition;
>
> (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the name or names 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, or the appearance in the case of any indenture trustee, *the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof.*

The consequences of noncompliance with the disclosure requirements are specified in Rule 2019(b), which authorizes the court, upon finding that any entity covered by Rule 2019(a) has failed to comply with either the rule or "any other applicable law regulating the activities and personnel" of the entity, to deny the offender any right to be heard or intervene in the bankruptcy case. The bankruptcy court may also examine any operative instrument authorizing the entity to represent its constituency, and any claim or interest acquired by any entity or committee either before or after the chapter 11 filing date, "and grant appropriate relief." Finally, the court may "hold invalid any authority, acceptance, rejection, or objection given, procured, or received by an entity or committee" failing to comply with either Rule 2019's disclosure requirements or the chapter 11 vote solicitation requirements specified in section 1125 of the Bankruptcy Code.

Legislative History of Rule 2019

The purpose of Rule 2019 and its predecessors under the former Bankruptcy Act of 1898, as amended by the Chandler Act of 1938, and accompanying procedural rules is to provide for disclosure of the composition and activities of groups acting in a representative capacity in order to help foster fair and equitable plans free from deception and overreaching. Rule 2019 was derived from former Chapter X Rule 10-211, which succeeded sections 209–213 of the Bankruptcy Act of 1898. Chapter X, which created a statutory mechanism for corporate reorganizations to supplant federal common-law equity receiverships as part of the Chandler Act of 1938, was adopted following the issuance of a series of comprehensive Securities and Exchange Commission reports authored by (then Professor and later Justice) William O. Douglas

in 1937 (the "SEC Report"). Among other things, the SEC Report detailed perceived abuses of unofficial committees in equity receiverships during the Great Depression.

The primary evil identified by the SEC Report was the use of "deposit agreements" by unofficial "protective committees" or "reorganization committees" in equity receiverships, whereby creditors deposited their securities with a designated institution and ceded control of their rights in the reorganization to the committee. These committees were typically organized by insider groups dominated by the debtor and/or its banks and institutional investors. The committees would solicit smaller investors (rarely at arm's length) to enter into a "deposit" agreement whereby the smaller investors would deposit their securities and the "committee" would negotiate with the debtor, with negligible, if any, participation by the smaller investors represented by the committee.

The SEC Report contained a disclosure recommendation that eventually became Rule 10-211 as the best means of ensuring that all stakeholders would be made aware of one another's "actual economic interest" in the bankruptcy case:

> Every person who represents more than twelve creditors or stockholders (including committees and indenture trustees) and who appears in the proceedings shall file with the court a sworn statement setting forth the amount of securities or claims owned by him, the dates of acquisition, the amounts paid therefor, and any sales or transfers thereof. Attorneys who appear in the proceedings should be required to furnish similar information respecting their clients. *This will provide a routine method of advising the court and all parties in interest of the actual economic interest of all persons participating in the proceedings*.

The SEC Report also recommended that deposit agreements be eliminated:

> [W]e recommend at this time that with respect to all such reorganizations, legislation be adopted which will provide . . . [t]hat deposit agreements be

> outlawed, except where it may be shown that physical possession of the security is necessary in order to protect adequately the interests of investors; and that the powers contained in deposit agreements, in the cases where their use is authorized, be limited both in duration and in scope to the particular needs of the occasion.

The text of former Rule 10-211 is virtually identical to the language of Rule 2019. The drafters of the Bankruptcy Code and the Bankruptcy Rules incorporated the substance of the former rule in Rule 2019 as "a comprehensive regulation of representation in chapter 9 and chapter 11 reorganization cases."

Ambiguities in Rule 2019?

Rule 2019 does not define the terms "committee" and "representing," nor are those terms defined elsewhere in the Bankruptcy Code or the Bankruptcy Rules. In addition, Rule 2019 itself does not define the term "entity." However, section 101(15) of the Bankruptcy Code provides that the "term 'entity' includes person, estate, trust, governmental unit, and United States trustee." Section 101(41) provides that the "term 'person' includes individual, partnership, and corporation."

Other reference materials often consulted by courts provide additional guidance as to the commonly understood meaning of these terms. For example, the Shorter Oxford English Dictionary defines "committee" as a "body of two or more people appointed for some special function by, and [usually] out of a ([usually] larger) body." Black's Law Dictionary defines "entity" as "an organization (such as a business or a governmental unit) that has a legal identity apart from its members." Black's defines "representative" as "[o]ne who stands for or acts on behalf of another," and Merriam-Webster's Collegiate Dictionary defines "represent" as "to take the place of in some respect [or] to act in the place of or for usually by legal right." The

definitions given to these terms play a prominent role in the evolving courtroom drama regarding Rule 2019.

Northwest Airlines and *Scopac*: Rule 2019 Emerges From Obscurity

Prior to 2007, the limited jurisprudence construing Rule 2019 dealt principally with whether a purportedly representative entity has "authority" to act as "agent" on behalf of others, especially if the entity claims that it represents a larger group of creditors. That changed abruptly in 2007.

Sixteen months after Northwest Airlines and three affiliates filed for chapter 11 protection in New York in September 2005, and the day before the debtors filed a plan of reorganization, an *ad hoc* committee of equity security holders filed a notice of appearance in the case. Its verified statement under Rule 2019 identified committee members, including hedge funds and other investment entities, that collectively owned more than 19 million shares of stock (of approximately 87 million shares outstanding) and more than $264 million in claims. The Rule 2019 statement did not disclose the amount of claims or interests owned by individual committee members, the specific dates on which such claims or interests were acquired, the amounts paid for them, or any post-acquisition sales or dispositions.

In February 2007, Northwest filed a motion for, among other things, an order directing disclosure of the missing information. The *ad hoc* committee opposed the motion, contending that Rule 2019, which by its express terms covers "every entity or committee representing more than one creditor or equity security holder," may apply to the committee's lawyers, who "represent" all committee members, but not to each individual member, which "represents" no one but itself, even though it sits on a committee. Moreover, the committee contended, the

information already contained in its Rule 2019 statement was adequate to satisfy the rule's purpose in promoting the formulation of a fair chapter 11 plan through an above-board negotiation process.

Bankruptcy judge Allan Gropper issued a memorandum decision on February 26, 2007, requiring the *ad hoc* committee to provide the detailed information requested by Northwest. He rejected the committee's interpretation of Rule 2019, explaining that the members of the *ad hoc* committee were clearly acting collectively in seeking the appointment of an official equity committee and in litigating discovery issues, so that the *ad hoc* committee as well as its lawyers could fairly be characterized as "representing" the interests of multiple shareholders within the strictures of the rule. Observing that "[a]d hoc or unofficial committees play an important role in reorganization cases," the judge traced the history of Rule 2019 and its predecessors back to the 1930s. "The Rule is long standing," Judge Gropper wrote, "and there is no basis for failure to apply it as written."

Shortly afterward, Judge Richard S. Schmidt of the U.S. Bankruptcy Court for the Southern District of Texas, in an unpublished bench ruling—*In re Scotia Development LLC* ("*Scopac*")—denied a motion filed by chapter 11 debtor Scotia Pacific Company LLC ("Scopac") to compel an *ad hoc* noteholder group consisting principally of hedge and private equity funds to file an amended Rule 2019 statement disclosing information concerning the composition of the committee and its members' trading positions. In opposing the motion, the noteholder group argued that Rule 2019's legislative history demonstrates that the rule applies only to committees that act as fiduciaries on behalf of others. According to the noteholder group, unlike informal

committees in cases under chapter 11 of the Bankruptcy Code, "protective committee" arrangements in equity receiverships under the former Bankruptcy Act were fraught with opportunity for insider dealing and created a need for public investors to be protected from insiders in reorganization cases. In denying Scopac's motion at a hearing held on April 10, 2007, Judge Schmidt observed that the noteholder group was "not a committee" within the meaning of Rule 2019, but merely a "bunch of creditors" represented by a single law firm.

Proposed Changes to Rule 2019

In the aftermath of *Northwest Airlines* and *Scopac*, efforts were made to repeal Rule 2019, spearheaded by SIFMA and LSTA. In response, however, the Advisory Committee on Bankruptcy Rules recommended changes to Rule 2019 that require more, rather than less, disclosure. As amended, the proposed rule would require disclosure by not only representative committees, but also "every entity, group, or committee *that consists of or* represents more than one creditor or equity security holder." Moreover, the required disclosures would be expanded to include disclosure of each party's "disclosable economic interest," a term defined to mean "any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right that grants the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest." Under the proposed changes, the bankruptcy court would also have the authority to order the disclosure of amounts paid for claims or interests, but pricing disclosure would not be required without a court order. The Advisory Committee heard testimony on the proposed amendments to Rule 2019 on February 5, 2010. The comment period for the proposed changes closed on February 16, 2010.

Fanning the Flames: The 2019 Controversy Resurfaces

Lyondell Chemical and *Washington Mutual*

As noted, the Rule 2019 controversy lay dormant for nearly two and one-half years. It resurfaced at the end of 2009, amid a flurry of corporate bankruptcies filed during the Great Recession triggered by the subprime-mortgage meltdown and the ensuing credit crisis. At the beginning of October 2009, Judge Robert E. Gerber of the U.S. Bankruptcy Court for the Southern District of New York ordered (without discussion) a law firm purporting to represent several thousand people asserting personal-injury claims against chapter 11 debtor Lyondell Chemical Company to file an amended statement complying fully with Rule 2019. That ruling, however, did not involve the applicability of the rule to *ad hoc* committees.

In December 2009, a Delaware bankruptcy judge ruled in *In re Washington Mutual, Inc.* that an informal group of noteholders was obligated to disclose its members' trading positions under Rule 2019, despite its contention that the group was merely a "loose affiliation" of like-minded creditors sharing costs. According to the court, "Ad hoc committees (which are covered by Rule 2019) are typically a 'loose affiliation of creditors.' "

Guided by the bankruptcy court's "well-reasoned decision" on this issue in *Northwest Airlines*, bankruptcy judge Mary F. Walrath concurred with the noteholders' position that Rule 2019 is intended to apply only to "a body that purports to speak on behalf of an entire class or broader group of stakeholders in a fiduciary capacity with the power to bind the stakeholders that are members of such a committee." However, the court faulted the noteholders' argument for being "premised on the erroneous assumption that the Group owes no fiduciary duties to other similarly situated creditors, either in or outside the Group." According to the court, case law

suggests that members of a class of creditors "may, in fact, owe fiduciary duties to other members of the class." Still, the bankruptcy court demurred from elaborating on the point, stating merely that "[i]t is not necessary, at this stage, to determine the precise extent of fiduciary duties owed but only to recognize that collective action by creditors in a class implies some obligation to other members of that class."

After thoroughly examining the language and legislative provenance of Rule 2019, Judge Walrath concluded that the concerns which led to the promulgation of the disclosure rule more than 70 years ago are equally relevant today:

> Although much has changed in the financial universe since 1937, concerns regarding the actual economic interests of creditors participating in bankruptcy cases still exist. The proliferation of short-selling and the advent of myriad derivative products now allow creditors to take multiple stakes in the capital structure of debtors. Such varied holdings have the potential to create complex, conflicting incentives for large creditors. In addition, collective action by creditors through the use of *ad hoc* committees or groups allows creditors to utilize other group members' holdings to obtain a greater degree of influence in a bankruptcy case than single creditors acting alone. As such, the policies behind the disclosure requirements of Rule 2019 are as relevant today as they were 70 years ago.

Furthermore, Judge Walrath explained, the complexity of capital structures and the increasing prevalence of stakeholders holding claims or interests at several different levels in a debtor's capital structure create potential conflicts that make full disclosure under Rule 2019 of even greater importance than it was when the disclosure rule was first enacted:

> The implications of creditors holding claims at different levels of the debtors' capital structure is an issue that has risen to prominence in recent years. . . . The proliferation of complex financial instruments results in a situation where, although a creditor is nominally a member of a certain class of creditors through ownership of securities in that class, the creditor may in fact have a total economic interest adverse to the class as a whole.

> While this possibility is a strong argument in favor of disclosure of the total economic interest of *all* creditors, the unique problems associated with collective action by creditors through *ad hoc* committees or groups requires [sic] disclosure for those groups in particular. Collective action of creditors through the use of an *ad hoc* committee or group is a form of leverage, wherein the parties utilize other group members' holdings to obtain a greater degree of influence on the case. This enables theoretically better returns than if creditors were to act individually in a case. This is especially true, for example, where a group or committee controls one-third of a class of claims, which might allow the group to block confirmation of a plan. *See* 11 U.S.C. § 1126(c) (requiring two-thirds in amount voting of a class of creditors to accept a plan).
>
> The Advisory Committee on Bankruptcy Rules recognized the potential problems posed by this and has proposed an amended Rule 2019 to modernize the rule. While existing Rule 2019 may not require the disclosure of all the types of economic interests that exist in the modern financial system, that is not a reason to fail to enforce the existing Rule as written.

Premier Int'l (Six Flags)

A second bankruptcy judge from Delaware took up the Rule 2019 gauntlet on January 20, 2010. In *In re Premier Int'l Holdings, Inc.*, bankruptcy judge Christopher S. Sontchi declined to follow *Washington Mutual* and *Northwest Airline*s, ruling that, under the plain meaning of the language of Rule 2019, an informal bondholders' committee is not a "committee representing more than one creditor," and therefore, its members need not make the disclosures required by the rule.

Premier International Holdings, Inc. (a.k.a. Six Flags, Inc.) ("Six Flags"), which owns and operates 20 amusement parks throughout North America, filed for chapter 11 protection in June 2009 in Delaware. An official creditors' committee was appointed in the case, and two informal noteholder committees were formed, one of which (the "SFO Committee") consisted of creditors holding in aggregate $400 million in notes issued by a Six Flags debtor-subsidiary. The official creditors' committee filed a motion on December 29, 2009, for an order compelling the SFO Committee to comply with Rule 2019 by disclosing committee members' trading positions,

failing which the SFO Committee should be barred from further participation in the chapter 11 cases.

Initially, Judge Sontchi examined the language of Rule 2019 in an effort to divine its "plain meaning." He concluded that the SFO Committee was not a "committee" within the meaning of Rule 2019, nor did it "represent" more than one creditor:

> A "committee" is a "body of two or more people appointed for some special function by, and usu. out of a (usu. larger) body." . . . The use of the word "appointed" clearly contemplates some action [to] be taken by the larger body. . . . Thus, a self-appointed subset of a larger group—whether it calls itself an informal committee, an *ad hoc* committee, or by some other name—simply does not constitute a committee under the plain meaning of the word. In order for a group to constitute a committee under Rule 2019 it would need to be formed by a larger group either by consent, contract or applicable law—not by "self-help." This construct is supported by the rule's applicability to indenture trustees, which are delegated with certain rights and obligations on behalf of all holders of the debt by operation of contract, *i.e.*, the indenture. Similarly, official committees under section 1102 of the Bankruptcy Code (although exempted from Rule 2019) receive their authority from federal law, *i.e.*, the Bankruptcy Code.
>
> The meaning of "represent" is: "take the place of (another); be a substitute in some capacity for; act or speak for another by a deputed right." . . . A deputed right is one that is assigned to another person. . . . Thus, the plain meaning of "represent" contemplates an active appointment of an agent to assert deputed rights. It is black letter law that a person cannot establish itself as another's agent such that it may bind the purported principal without that principal's consent unless the principal ratifies the agent's actions. . . .
>
> Thus, under the plain meaning of the phrase "a committee representing more than one creditor," a committee must consist of a group representing the interests of a larger group with that larger group's consent or by operation of law. As the [SFO Committee] does not represent any persons other than its members either by consent or operation of law, it is not a "committee" under Rule 2019 and, thus, its members need not make the disclosures required under the rule.

The bankruptcy court, however, went beyond an examination of the plain meaning of Rule 2019, concluding that the legislative history of the rule supports its determination that the SFO

Committee is not subject to Rule 2019's disclosure requirements. Judge Sontchi embarked on a detailed analysis of the history of equity receiverships and the legislative provenance of informal committee disclosure requirements, as a "reality check" on its own interpretation. The court concluded as follows:

> The nub of the question is how the legislative history of Rules 10-211 and 2019 applies to the informal and *ad hoc* committees of today and, more specifically, the [SFO Committee]. Certainly there are parallels between the "protective committees" under equity receivership and the informal committees of today. For example, both are usually composed of Wall Street banks and institutional investors. Both are formed for the purpose of obtaining leverage in the reorganization that would not be available to disparate creditors. Both are involved in the negotiation and formulation of a plan of reorganization.
>
> The differences, however, far outweigh the similarities. The "protective committees" that were the target of the reforms under the Chandler Act were able to control completely the entire reorganization—from inception to formulation to solicitation to implementation. They were granted the authority to negotiate on behalf of and to bind creditors through the use of deposit agreements. They were so intimately involved with management so as to be virtually in control of the business. They could force disparate treatment of similarly situated creditors. Finally, they were able "to steal" the company for an inadequate "upset price" at a foreclosure sale by credit bidding their debt.
>
> The informal and *ad hoc* committees of today have none of these expansive powers. Indeed, the Chandler Act so effectively curbed the power of protective committees that they virtually ceased to exist within a few years of the Act's passage. Rule 10-211 was, for all intents and purposes, superfluous almost immediately after its passage. There was nothing left to regulate.
>
> The Bankruptcy Code continues to limit the powers of committees, albeit in other ways. For example, the debtor is given exclusive authority to propose and to solicit a plan of reorganization; claims and interests may only be classified with substantially similar creditors; creditors in the same class must be treated equally; a trustee or examiner can be appointed for cause. Even if an informal committee were to try to exercise the powers formerly available to protective committees, it would be prevented by the Bankruptcy Code. Thus, Rule 2019 is also, for all intents and purpose, superfluous—the problem it was designed to address by requiring certain disclosures simply no longer exists.

Finally, Judge Sontchi characterized contrary court authority as “not persuasive.” Among other things, the bankruptcy court explained that: (i) the *Northwest* court did not address whether, under the plain meaning of Rule 2019, a self-appointed subgroup of creditors with neither the authority nor the consent of the larger creditor group constitutes a “committee” under Rule 2019; (ii) the *Washington Mutual* court did not specifically analyze whether an *ad hoc* committee is a “committee” under the rule but merely assumed that it was and misinterpreted the legislative history in drawing parallels between protective committees in equity receiverships and “informal” and “*ad hoc*” committees prevalent in today’s chapter 11 cases; and (iii) the courts in both cases mistakenly focused on the conduct and role of an *ad hoc* committee in determining whether it is a “committee” under Rule 2019, because Rule 2019 is “a prophylactic rule designed to provide to the Court and others at the inception of the case to preserve the integrity of the reorganization process to follow” and it would be “turning the rule on its head to await events before determining whether to require disclosures that were meant to be made prior to the occurrence of these events.”

Accuride

The final component of the recent triumvirate of Delaware bankruptcy-court decisions regarding Rule 2019 was an unpublished bench ruling issued by bankruptcy judge Brendan L. Shannon on January 20, 2010, in *In re Accuride Corp*. The order contains no discussion and simply grants a motion to compel compliance with Rule 2019 “for the reasons stated in Open Court.” The transcript of the hearing reflects the fact that Judge Shannon approved the motion because he concurred with the conclusions reached in *Northwest Airlines* and *Washington Mutual*, except that he did not necessarily concur with the *Washington Mutual* court’s pronouncement that there are fiduciary obligations that arise by definition in the context of multiple representations.

The Latest Word: *Philadelphia Newspapers*

A further recent development in the evolving jurisprudence construing Rule 2019 was contributed on February 3, 2010, by bankruptcy judge Stephen Raslavich of the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. In *In re Philadelphia Newspapers, LLC*, the debtors, which publish Philadelphia's two major newspapers, filed for chapter 11 protection in Pennsylvania on February 22, 2009. Shortly after the petition date, lawyers for a self-styled "Steering Group of Pre-petition Lenders" (the "steering group"), holding a majority of the debtors' outstanding secured debt, filed an appearance in the case, together with a series of statements under Rule 2019. The disclosures, however, did not comply fully with Rule 2019 because information regarding acquisition and/or divestiture dates and pricing was lacking. The debtors sought a court order compelling compliance with Rule 2019, but not until December 2009—nearly seven months after the steering group first appeared, and roughly one week after *Washington Mutual* was handed down.

Judge Raslavich acknowledged that Rule 2019 clearly calls for disclosure of the requested information, but he ruled that the steering group was not subject to the rule in accordance with the "plain meaning" of its language. The steering group, he explained, was not an "entity" within the meaning of Rule 2019 "because it is not an organization that has a legal identity apart from its individual members." Agreeing with the reasoning articulated in *Premier Int'l*, Judge Raslavich also ruled that the steering group was not a "committee" within the meaning of Rule 2019 because the steering group formed itself, rather than being "appointed by any larger deliberative body, either by consent, contract or applicable non-bankruptcy law." Finally, for the same reasons expressed in *Premier Int'l*, the court held that the steering committee could not

fairly be characterized as "representing more than one creditor," as required by Rule 2019, because it was not "a group representing the interests of a larger group with the larger group's consent or by operation of law." Judge Raslavich concluded with the observation that, because the proposed amendments to Rule 2019 are expressly intended to extend coverage of the rule to a body such as the steering group, the "collective wisdom" of the National Rules Committee would appear to be that the language of Rule 2019 in its present form does not extend to "a group of creditors that act in concert to advance common interests, even if the group does not call itself a committee."

Where Do We Go From Here?

Hedge funds and other distressed investors closely guard trading information, such as the acquisition price of stock or claims, disclosure of which to the public could compromise their ability to maximize investment returns. Hedge funds and other distressed investors have made and continue to make enormous investments in all levels of the capital structures of distressed companies. As a consequence, these funds and investors have regularly assumed prominent roles in major chapter 11 cases. This dynamic could change if such investors are discouraged from participating due to disclosure requirements in the federal bankruptcy laws.

With four new bankruptcy rulings taking opposite sides on the issue of *ad hoc* committee disclosure, and pending changes to Rule 2019 that would impose additional disclosure requirements, the Rule 2019 ante has been upped considerably. Where the chips will ultimately fall remains to be seen at this juncture.

In re Northwest Airlines Corp., 363 B.R. 701 (Bankr. S.D.N.Y. 2007).

In re Scotia Development LLC, Case No. 07-20027-C-11 (Bankr. S.D. Tex. Apr. 18, 2007).

In re Lyondell Chemical Co., Case No. 09-10023 (Bankr. S.D.N.Y. Oct. 1, 2009).

In re Washington Mutual, Inc., 419 B.R. 271 (Bankr. D. Del. 2009).

In re Premier Int'l Holdings, Inc., 423 B.R. 58 (Bankr. D. Del. 2010).

In re Accuride Corp., Case. No. 09-13449 (Bankr. D. Del. Jan. 20, 2010).

In re Philadelphia Newspapers, LLC, 422 B.R. 553 (Bankr. E.D. Pa. 2010).