Public Right to Full Disclosure in Bankruptcy Extends to Rule 2019 Statements

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One of the hallmarks of the U.S. bankruptcy system is ready access to information concerning any entity that files for bankruptcy protection. The integrity of that system is premised upon the presumption that not only creditors and other interested parties in a bankruptcy case, but also the public at large, should have the ability to examine any document filed with the bankruptcy court. Rooted in the common-law right of access to public documents, full disclosure promotes the legitimacy of the bankruptcy court as an institution entrusted with impartially applying the nation's bankruptcy laws and administering debtors' estates for the benefit of all interested parties. Unrestricted access to judicial records also fosters confidence among creditors regarding the fairness of the bankruptcy system.

However, the right of public access is a qualified one—it has exceptions. Thus, a bankruptcy court has the power under the Bankruptcy Code to implement appropriate protective measures where: (i) disclosure of information would result in the revelation of trade secrets or confidential commercial information; (ii) information in a court filing is scandalous or defamatory; or (iii) disclosure of information would create undue risk of identity theft or other unlawful injury to an individual or to his or her property. More generally, "privacy interests" sometimes lead courts to direct that access to certain court documents be restricted (e.g., by filing documents under seal). *See Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, No. 11-4376, 2013 BL 102426 (2d Cir. Apr. 16, 2013) ("Important as public access to court documents may be, it is not

an exceptional and fundamental value. It is a qualified right; and many proceedings move forward in U.S. courtrooms with some documents filed under seal . . . .").

Absent one of these particular circumstances, however, the deep-rooted policy of full disclosure in bankruptcy is difficult to overcome. A ruling recently handed down by a Delaware district court illustrates the presumption favoring public access to information in a bankruptcy case. In *In re Motions for Access of Garlock Sealing Technologies LLC*, 488 B.R. 281 (D. Del. 2013), the court reversed lower-court rulings denying a chapter 11 debtor access to exhibits accompanying statements filed under Rule 2019 of the Federal Rules of Bankruptcy Procedure ("Rule 2019") by attorneys representing multiple asbestos claimants in 12 separate bankruptcy cases. According to the court, "As the 2019 Exhibits are judicial records that were filed with the Bankruptcy Court, there is a presumptive right of public access to them," and the appellees failed to rebut that presumption. The ruling also reflects a growing trend promoting transparency regarding claims: (i) asserted in asbestos-related bankruptcy cases; and (ii) submitted to trusts established at the completion of such cases.

Public Access to Court Documents

The public's general right to inspect and copy public documents, including judicial records, has long been part of common law. The existence of such rights, which are based upon the public's interest in monitoring the workings of the judicial system, are universally regarded as fundamental to a democratic state. They are closely allied to the presumption in the First Amendment of the U.S. Constitution that court proceedings should ordinarily be open to the press and the public.

Section 107(a) of the Bankruptcy Code recognizes the right of public access in a bankruptcy case. It provides that "[e]xcept as provided in subsection (b) and (c) [of this section] and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." The scope of the provision extends to nearly all documents filed with the court.

Even so, the common-law right of access to public documents is not absolute. Confidentiality may be justified if access to information is sought for an improper purpose or if the information has been categorically designated as off-limits by Congress. In bankruptcy cases, this caveat is reflected in sections 107(b) and (c) of the Bankruptcy Code. Section 107(b) provides as follows:

> On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—
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> (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
>
> (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

Section 107(c) authorizes the bankruptcy court to protect individuals against disclosure of information that would create undue risk of identity theft or other unlawful personal injury or injury to property. Section 112 of the Bankruptcy Code similarly establishes limitations on disclosure of the names of an individual debtor's minor children.

In *Garlock Sealing*, the district court considered whether the right of public access to information filed in a bankruptcy case extends to exhibits accompanying statements filed under Rule 2019.

Garlock Sealing

Garlock Sealing Technologies LLC ("Garlock"), a manufacturer of sealing products, filed for chapter 11 protection in 2010 in North Carolina to deal with current and future asbestos liabilities by means of a trust established pursuant to section 524(g) of the Bankruptcy Code. In connection with its efforts to estimate its liability for mesothelioma claims, Garlock sought access to information filed in 12 other asbestos-related bankruptcies.

Specifically, Garlock sought information contained in exhibits (the "2019 Exhibits") referred to in, but not annexed to, Rule 2019 statements filed in these bankruptcy cases by various attorneys representing multiple asbestos claimants. Under the version of Rule 2019 in effect at the time, any entity representing more than one creditor in a chapter 11 bankruptcy case, other than an official committee, was obligated to file a verified statement with the court disclosing, among other things: (i) the name and address of each creditor; (ii) the nature and amount of each represented creditor's claim; (iii) the circumstances and terms under which the representative entity was employed; and (iv) the acquisition date of each claim owned by the representative and the amount paid for each such claim.

Beginning in 2004, the bankruptcy courts entered orders in the 12 asbestos-chapter 11 cases—all of which were presided over by the same bankruptcy judge sitting in different districts—requiring all law firms that represented multiple asbestos personal-injury claimants to comply with Rule 2019 by filing verified statements and submitting to the clerk of the court compact discs containing the 2019 Exhibits, i.e., the individual claimant information required by the rule. The Rule 2019 statements were publicly available, but the 2019 Exhibits were not. Instead, although the 2019 Exhibits were not formally sealed, the bankruptcy judge ordered that they be

made available to third parties only upon court order. That "procedural framework" was upheld on appeal by two district courts and the Third Circuit Court of Appeals. *See In re Kaiser Aluminum Corp.*, 327 B.R. 554 (D. Del. 2005); *In re Pittsburgh Corning Corp.*, 2005 WL 6128987 (W.D. Pa. Sept. 27, 2005), *aff'd*, 260 F. App'x 463 (3d Cir. Jan. 10, 2008).

In addition to seeking discovery of information included in the 2019 Exhibits in connection with litigation in its own chapter 11 case, Garlock filed motions in January 2011 seeking access to the 2019 Exhibits filed in these other asbestos-bankruptcy cases. According to Garlock, by comparing the 2019 Exhibits filed in other asbestos-bankruptcy cases with the discovery that Garlock obtained in connection with its own tort litigation, it could verify whether lawyers and claimants are being untruthful about exposure to Garlock's products and the injuries sustained through such exposure—in other words, as evidence of "fraud in the tort system."

The bankruptcy judge denied Garlock's requests in October 2011. Among other things, the judge concluded that: (i) Garlock had neither standing to intervene, Article III standing, nor "prudential" standing to seek access to the 2019 Exhibits in the other asbestos cases; and (ii) Garlock's expressed desire to use the 2019 Exhibits in pending and potential litigation "improperly" attempted to use Rule 2019 for purposes for which it was not intended. According to the judge, "Rule 2019 is not a discovery tool but is to ensure that plans are negotiated and voted on by those authorized to act on behalf of real parties in interest in a case." Addressing the right of public access to judicial records, the bankruptcy judge wrote that restriction of access to an individual claimant's personal details "is not inconsistent with the public's right of access."

Garlock appealed to the district court, which consolidated all of the matters in a single proceeding.

The District Court's Ruling

The district court reversed. At the outset, the court concluded that Garlock had standing both to seek access to the 2019 Exhibits, as a member of the public confronting an obstacle preventing access to a judicial record, and to appeal the bankruptcy judge's October 2011 order, because Garlock was "aggrieved" by the denial of access. The district court also determined that Garlock was not precluded from pursuing the appeal under the doctrines of collateral estoppel or res judicata because, among other things, no previous order or final judgment decided the issue of Garlock's right as a member of the public to access the 2019 Exhibits.

Addressing the merits of the appeal, the district court first concluded that the 2019 Exhibits were "judicial records" because they had been filed with the clerk of the court, even if not publicly available without a court order.

Next, the court explained that, because the 2019 Exhibits are public records, there is a presumptive right of public access to them in accordance with the Third Circuit's ruling in *Goldstein v. Forbes (In re Cedant Corp.)*, 260 F.3d 183 (3d Cir. 2001), as well as section 107 of the Bankruptcy Code.

Finally, the district court in *Garlock Sealing* ruled that the presumption of public access had not been rebutted. It acknowledged the appellees' concerns about possible misuse of asbestos claimants' personal information but concluded that "they fail to show any clearly defined and

serious injury," particularly given the restrictions which the court intended to place on Garlock's use of the 2019 Exhibits.

The court similarly rejected the argument that Rule 2019 was not intended as a vehicle for obtaining discovery. "[J]ust because Garlock might have another mechanism for obtaining the information it seeks here," the court wrote, "does not, in the circumstances presented here, diminish Garlock's right to pursue access through the process it is pursuing in this court." Emphasizing that balancing the factors for and against access is an exercise committed to the discretion of the court, the district court ruled that Garlock should have access to the 2019 Exhibits.

Alternatively, the court ruled, even if the 2019 Exhibits were not judicial records, it would still grant Garlock access to them. The court explained that the Rule 2019 orders operated to a certain extent as confidentiality orders. Applying the balancing test articulated by the Third Circuit Court of Appeals in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), the court ruled that Garlock had demonstrated good cause to modify the orders to give it access to the 2019 Exhibits, subject to certain restrictions. The court wrote that "Garlock's purpose in seeking access to the 2019 Exhibits—to permit its expert in its own bankruptcy to develop or rebut an opinion as to an estimate of Garlock's aggregate liability for asbestos claims . . . — is a proper purpose for seeking access."

However, the court determined that Garlock's access to the 2019 Exhibits should be subject to certain restrictions to prevent identity theft and other potential damage which the bankruptcy

judge envisioned might ensue from unfettered access. Specifically, the court directed that: (i) access is to be provided solely for the purpose of using the 2019 Exhibits in connection with Garlock's asbestos claims-estimation hearings; (ii) Garlock may not publicly disclose information in the exhibits except in an aggregate format that does not identify individuals; (iii) Garlock is obligated to propose a form of protective order to the bankruptcy court presiding over its chapter 11 case before disclosing any information obtained from the 2019 Exhibits; and (iv) Garlock shall not be granted access to any attorney-retention agreements.

Outlook

Part of *Garlock Sealing*'s import is explained by its context—large asbestos-bankruptcy cases—where companies seek a permanent resolution of thousands of existing and future claims. In such cases, the debtor's legitimate efforts, through discovery and other means, to develop an accurate estimate of its aggregate liability for current and future asbestos claims, as well as to rebut competing estimates, for the purpose of funding a section 524(g) trust must be balanced against the privacy interests of asbestos claimants (and their counsel).

The ruling reaffirms the importance of the right, albeit qualified, of public access to documents filed in a bankruptcy case. According to *Garlock Sealing*, statements and accompanying exhibits filed under Rule 2019 do not enjoy any special immunity from disclosure.

Garlock Sealing is emblematic of a growing movement promoting transparency regarding the assertion of claims in asbestos-related bankruptcy cases, including the submission to, and treatment by, asbestos trusts established at the conclusion of such cases. In granting Garlock's motion for access to the 2019 Exhibits, the court took judicial notice of recently proposed

legislation at the state and federal levels designed to address a perceived lack of transparency in the asbestos-bankruptcy claim and trust system created by chapter 11 plans, plan confirmation orders, sealing orders, and other orders limiting public access to information. This lack of transparency has fueled widespread concerns of potential fraud in asbestos litigation.

For example, a pending federal bill, the Furthering Asbestos Claim Transparency Act of 2013 (the "FACT Act"), proposes amending the Bankruptcy Code to require all section 524(g) trusts to file publicly available reports on a quarterly basis, disclosing the details of payment demands and disbursements, including the names and exposure histories of claimants, except as provided in a protective order or as necessary to prevent disclosure of confidential medical records or protect against identity theft. As proposed, the FACT Act would apply retroactively to bankruptcy cases commenced and bankruptcy trusts established before its passage.

The *Garlock Sealing* court agreed to take judicial notice of the proposed legislation, noting that "these legislative proposals have arguable relevance to issues in this appeal, including at least whether there is public interest in transparency in asbestos litigation," a factor (in accordance with *Pansy*) the court deemed relevant in assessing whether a third party should have standing to challenge protective and confidentiality orders in an effort to obtain access to information or judicial proceedings. By providing Garlock with access—albeit restricted—to information that has been closely guarded by attorneys for asbestos claimants, the court appears to agree that transparency is the better course of action.

Jones Day represented Kaiser Aluminum Corp. and USG Corp., two of the reorganized debtors as to which Garlock is seeking access to the 2019 Exhibits.