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What's in a Name? Proposed Amendments to Bankruptcy Rule 2019 Attempt to Clarify Whether a "Committee" by any Other Name Is Still a Committee

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I. Introduction

Federal Rule of Bankruptcy Procedure ("Rule 2019") has garnered increased attention in recent years in light of the impact of its disclosure requirements on distressed investors participating in Chapter 11 cases. Although Rule 2019 has been part of the Bankruptcy Code since its enactment in 1978, discussion of the scope of the Rule and its attendant disclosure requirements has been minimal. [FN1] However, with the advent of secondary market investors, in particular hedge funds, [FN2] becoming actively involved in corporate restructuring, a thorny issue has surfaced as to whether unofficial or ad hoc "committees" [FN3] are subject to the mandates of Rule 2019.

Rule 2019 is a disclosure rule aimed at fostering greater transparency in the bankruptcy process. [FN4] It imposes certain disclosure requirements on committees purporting to represent more than one creditor or equity security holder in Chapter 11 cases. [FN5] Rule 2019 directs a committee to file detailed public disclosures concerning its members' financial position including, what they bought and sold, on what date, and what price they paid for their position. [FN6]

The notion of mandating disclosures concerning the acquisition of distressed debt pursuant to Rule 2019 has caused considerable consternation among secondary market investors. In recent years, hedge funds have participated more aggressively in corporate restructurings, while at the same time opposed attempts to force disclosure of their investment positions through Rule 2019. Based on the confidential and proprietary nature of these investment practices, these parties maintain an interest in participating in the bankruptcy process without having to "show their hands" concerning their debt investment strategies.

In light of these competing interests, an interesting debate has emerged with respect to whether informal ad hoc committees, often comprised of secondary market investors, are subject to the mandates of Rule 2019. Proposed amendments to Rule 2019 which ostensibly will settle the question of whether such ad hoc committees must comply with Rule 2019 are on the horizon. The proposed revisions to Rule 2019, which are in the latter stages of the amendment process, currently are slated to take effect in December 2011. This article will review the current debate over the scope of Rule 2019, examine the likely impact of the proposed amendments in terms of bringing such ad hoc committees within the purview of revised Rule 2019, and the fallout which could occur in terms of the participation of distressed debt investors in Chapter 11 cases.

II. Background Of Rule 2019

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A. History of Rule 2019

A proper understanding of the scope and applicability of Rule 2019, as well as the proposed amendments, requires an understanding of the origins of the Rule. The lineage of Rule2019 can be traced back to Rule 10-211, promulgated as part of Chapter X of the Bankruptcy Act, which was enacted to curb abusive practices by so-called "protective committees" during equity receiverships in the 1930s. [FN7] These protective committees, often formed during railroad reorganizations and with the support of the debtor, would solicit individual creditors to enter into deposit agreements pursuant to which an individual deposited securities or bonds with an institution designated by the protective committee and ceded all rights to participate in negotiations in the reorganization process to the protective committee. [FN8]

In essence, these protective committees constituted a collusive effort between a debtor and its main institutional investors [FN9] to manipulate the receivership process to their advantage while disregarding the interests of the individual investors that the protective committees purportedly represented. [FN10] These nonstatutory committees were able to dominate the equity reorganization process based, at least in part, on their ability to consolidate the voting power of numerous individual investors without disclosing their ulterior motives with respect to the reorganization of the debtor. [FN11]

Following investigations conducted by the SEC and the revelation of the exploitative practices of these protective committees, [FN12] Rule 10-211 was enacted as part of Chapter X of the Chandler Act. [FN13] Rule 10-211 was the procedural mechanism adopted to police the activities of protective committees by requiring disclosure of the circumstances surrounding the formation of the respective protective committee and its financial position in the reorganization process. [FN14] The disclosures required under Rule 10-211 mirrored those disclosures currently required under Rule 2019, including: (1) the committee members and their holdings, (2) the persons responsible for formation of the committee, and (3) the disclosure of trading activity and deposit arrangements of the committee members. [FN15]

B. Current Form of Rule 2019

The language of Rule 10-211 largely was adopted in toto when Rule 2019 was created as part of the overhaul of the bankruptcy system that occurred with the 1978 enactment of the Bankruptcy Code. [FN16] The current version of Rule 2019 provides:

> **REPRESENTATION OF CREDITORS AND EQUITY SECURITY HOLDERS IN CHAPTER 9 MUNICIPALITY ANC CHAPTER 11 REORGANIZATION CASES**
>
> **(a) Data required**. In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 or 1114 of the Code, every entity or 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 setting forth (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 there-

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for, and any sales or other disposition thereof. The statement shall include a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

(b) Failure to Comply; Effect. On motion of any party in interest or on its own initiative, the court may (1) determine whether there has been a failure to comply with the provisions of subdivision (a) of this rule or with any other applicable law regulating the activities and personnel of any entity, committee, or indenture trustee or any, other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that entity, committee, or indenture trustee to be heard further or to intervene in the case; (2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any entity or committee in contemplation or in the course of a case under the Code and grant appropriate relief; and (3) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by an entity or committee who has not complied with this rule or with § 1125(b) of the Code. [FN17]

The technical disclosures required under subdivision (a) of Rule 2019 are relatively straightforward. One notable wrinkle with respect to Rule 2019(a) is that ad hoc committees often attempt to file a verified statement that divulges only the aggregate holdings of the committee members while withholding the financial information for the individual committee members. [FN18] Another important point is that the required disclosures under Rule 2019 are an ongoing obligation such that supplemental statements are required where material changes occur to the committee members' holdings. [FN19]

The consequences of the failure to comply with the requirements of subdivision (a) are set forth in Rule 2019(b), and empower a bankruptcy court with considerable discretion to enforce Rule 2019. Interestingly, Rule 2019(b) allows a court to impose sanctions for a failure to comply with the disclosure requirements of subdivision (a) as well as for "any other applicable law regulating the activities and personnel" of a committee. [FN20] Specifically, Rule 2019(b) addresses "impropriety in connection with any solicitation," [FN21] which could include solicitation of votes on a plan or a trustee's election. [FN22] This reference to improper solicitation harkens back to the original purpose of implementing Rule 10-211, namely preventing organized groups of creditors from improperly soliciting individual investors to gain an unfair advantage in the reorganization process. [FN23] The ultimate penalty meted out under Rule 2019(b) is the complete denial of participation in the Chapter 11 case. The consequences of such a ban are severe, however, this type of sanction generally is limited to circumstances involving a willful failure to comply with subdivision (a), and prohibits only participation by the committee and not the individual members it purportedly represents. [FN24]

III. Current Status of Ad Hoc Committees Under Rule 2019

The crux of the debate over Rule 2019's application to ad hoc committees centers around the interpretation of the terms "committee" and "entity" and the phrase "representing more than one creditor." Despite the fact that these provisions are used in other sections of the Bankruptcy Code, discerning their meaning in the context of Rule 2019 has proved challenging to courts and attorneys alike. [FN25] The Bankruptcy Code does provide a definition of the term "entity," however the term "committee" as well as the phrase "representing more than one creditor" are left undefined.

The term "entity" is defined in section 101(15) to include any "person, estate, trust, governmental unit and United States Trustee," [FN26] although this definition is nonexclusive. In turn, the term "person" is defined by

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the Bankruptcy Code to include an "individual, partnership and corporation." [FN27] Furthermore, the ordinary meaning of the term "entity," as defined by Black's Law Dictionary, is "an organization (such as a business or a governmental unit) that has a legal identity apart from its members." [FN28]

The Bankruptcy Code is devoid of definitions for the terms "committee" or "representing." With respect to the term "committee," the common usage can be understood as "[a] subordinate group to which a deliberative assembly or other organization refers business for consideration, investigation, oversight, or action." [FN29] The ordinary meaning of the term "representing" generally entails one acting on behalf of another. [FN30]

As these terms are ill-defined in the context of Rule 2019, a question persists as to whether ad hoc committees fall within the bounds of an "entity or committee representing more than one creditor." Ad hoc committees contend that an examination of the plain meaning of the terms "entity," "committee," and "representing" demonstrate that Rule 2019 was intended to encompass formalized arrangements between a committee and its constituents where the individual members are bound by the actions of the committee. In contrast, most ad hoc committees are structured as a type of informal arrangement constituting a loose consortium of creditors who share a collective interest. Such ad hoc committees often retain common professionals to represent them, however, the individual members generally have no duties to and cannot bind other members of the committee.

Although Rule 2019 has been part of the Bankruptcy Code since its codification in 1978, there is a paucity of cases which actually interpret the provisions of the Rule. [FN31] As debtors or other interested parties often did not challenge an ad hoc committee's failure to comply with Rule 2019, the customary practice which resulted was for such committees to file disclosure statements identifying the committee members and their aggregate holdings without divulging information as to the individual holdings of each committee member. [FN32] With the rise in influence of secondary market investors in Chapter 11 cases, debtors began pressing ad hoc committees to comply more fully with the mandates of Rule 2019.

Against this backdrop, a series of cases addressing Rule 2019's application to ad hoc committees has emerged, resulting in a sharp divergence of opinion among bankruptcy jurists. As discussed herein, the proposed amendments to Rule 2019 likely will extinguish the debate over the interpretation of Rule 2019. Therefore, this article canvasses only selected cases in order to provide context for the existing controversy over Rule 2019 and the impact of the forthcoming amendments.

In re Northwest Airlines Corp. ***[FN33]***

This decision, issued by Judge Gropper out of the Southern District of New York, addressed whether an ad hoc committee of equity security holders was subject to Rule 2019. [FN34] Notably, the court did not engage in a textual analysis of Rule 2019, rather, Judge Gropper summarily dismissed the committee's argument that it did not fit within the parameters of Rule 2019 based on the facts and circumstances of the case. [FN35] The court noted that the ad hoc committee had actively been engaged throughout the case and appeared before the court on several issues, such that the assertion of a unified position by the members justified application of Rule 2019. [FN36] Judge Gropper reasoned that:

> Rule 2019 more appropriately seems to apply to the formal organization of a group of creditors holding similar claims, who have elected to consolidate their collection efforts... That is exactly the situation in this case, except that here there are shareholders rather than creditors. Where an *ad hoc* committee has appeared as such, the committee is required to provide the information plainly required by Rule 2019 on behalf of each of its members. [FN37]

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Based on this analysis, the court ordered that the ad hoc committee comply with Rule 2019. [FN38]

In re Washington Mutual, Inc. ***[FN39]***

Washington Mutual involved an informal group of the debtors' noteholders which had termed themselves a "Noteholders Group" (the "Noteholders Group") and opposed a motion to compel under Rule 2019 in the District of Delaware. [FN40] Judge Walrath's opinion in *Washington Mutual* began with the assumption that Rule 2019 applied to ad hoc committees, and addressed the more limited question of whether the Noteholders Group was in fact an ad hoc committee subject to Rule 2019's disclosure requirements. [FN41] The court found that the voluntary nature of the Noteholders Group was not determinative since most ad hoc committees are comprised of a "loose affiliation" of creditors of an "at-will nature." [FN42] Furthermore, the court emphasized that the Noteholders Group possessed the same characteristics of a typical ad hoc committee, i.e., it consisted of similar claimholders who retained the same counsel which presented a unified position in pleadings and hearings before the court. [FN43] In light of this conclusion, Judge Walrath held that "[u]nder the plain language of Rule 2019... although the [Noteholders Group] call themselves a Group, they are in fact acting as an ad hoc committee or entity representing more than one creditor," and therefore had to comply with Rule 2019. [FN44]

In re Scotia Development, LLC ***[FN45]***

Scotia Development involved an unpublished bench decision out of the Southern District of Texas which dealt with an ad hoc group of debtholders organized for the purposes of negotiating with the debtor. [FN46] This ad hoc noteholder group originally provided a limited disclosure under Rule 2019, however, the debtor pressed for disclosure of the trading histories of the individual noteholders. [FN47] The bankruptcy court in *Scotia Development* denied the debtor's request for more detailed disclosures under Rule 2019, finding that the noteholder group was not a "committee" within the meaning of Rule 2019 because it was merely a "bunch of creditors" represented by a single law firm. [FN48]

In re Premier International Holdings, Inc. ***[FN49]***

In *Premier*, the Delaware Bankruptcy Court was presented with the question of whether an informal committee of noteholders whose members owned approximately 95% of the outstanding class of the debtor's notes (the "Noteholders Committee") came within the purview of Rule 2019. [FN50] Judge Sontchi examined the text of Rule 2019 and relying upon the plain meaning rule concluded that the Noteholder Committee did not constitute a "committee representing more than one creditor," and therefore was exempt from the disclosures mandated by Rule 2019. [FN51] In reaching this decision, the court seized upon the common usage of the term "committee" as comprised of some persons or group "appointed" by a larger group for a specific purpose. [FN52] Thus, absent some formal appointment by the entire body which the Noteholders Committee purportedly represented, Judge Sontchi held that it could not be deemed a "committee" for purposes of Rule 2019. [FN53]

Despite finding that its plain meaning analysis was determinative, the court in *Premier* examined the legislative history of Rule 2019 to act as a "reality check" of its application of the plain meaning rule. [FN54] After undertaking an extensive analysis of the legislative history underlying Rule 2019, Judge Sontchi determined that the legislative history also supported his conclusion that Rule 2019 was inapplicable to the Noteholders Committee. [FN55] The court reasoned that ad hoc committees, such as the Noteholders Committee, do not possess the types of expansive and potentially abusive powers exercised by protective committees prior to the enactment of Rule 2019. [FN56] Similarly, Judge Sontchi emphasized that the Bankruptcy Code provides additional safeguards, such as the debtor's plan exclusivity and the appointment of a trustee or examiner, that would prevent an

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ad hoc committee from manipulating the Chapter 11 process. [FN57] In fact, Judge Sontchi went so far as to suggest in dictum that Rule 2019 is rendered superfluous by the provisions of the Bankruptcy Code which already limit such ad hoc committees from wielding a disproportionate amount of influence. [FN58]

In re Accuride Corp. ***[FN59]***

In *Accuride*, the Official Committee of Equity Security Holders moved to compel an ad hoc committee of noteholders to file Rule 2019 disclosures in the District of Delaware. In a truncated bench ruling, Judge Shannon ordered the ad hoc committee to comply with Rule 2019. [FN60] At the hearing during which he issued his oral ruling, Judge Shannon noted that his view of the scope of Rule 2019 was consistent with that of the decisions issued in *Northwest Airlines* and *Washington Mutual*. [FN61] In explaining the rationale for his decision, Judge Shannon noted that his review of Rule 2019's history and development, in conjunction with his view that disclosure is a central concept of the Bankruptcy Code, lead to the conclusion that the ad hoc committee of noteholders was subject to Rule 2019. [FN62]

In re Philadelphia Newspapers, LLC ***[FN63]***

In *Philadelphia Newspapers*, a decision out of the Bankruptcy Court for the Eastern District of Pennsylvania, Judge Raslavich considered whether a self-styled "Steering Group of Pre-Petition Lenders" (the "Steering Group") needed to comply with Rule 2019. [FN64] The court applied the plain meaning rule and largely adopted the analysis set forth by Judge Sontchi in *Premier* in reaching the conclusion that Rule 2019 was inapplicable to the Steering Group. [FN65] In sum, Judge Raslavlich held that the Steering Group: (1) did not qualify as an "entity" since it did not have a legal identity separate from its members; (2) did not constitute a "committee" since it formed itself and was not appointed by a larger deliberative body; and (3) was not "representing" its members since there was no formalized grant of agency from the members to the Steering Group. [FN66]

These decisions present an interesting dichotomy both in terms of the ultimate decisions reached concerning the scope of Rule 2019 as well as the approaches to statutory interpretation utilized by the courts in reaching their respective decisions. [FN67] As wryly-observed by Judge Raslavich in *Philadelphia Newspapers*, courts apparently applying the same plain meaning approach to Rule 2019 reached markedly different results. [FN68] Based on the sharp split among jurists as to the interpretation of Rule 2019, it is unsurprising that the Rule was selected for amendments intended to clarify its scope.

IV. Proposed Amendments Attempt to Settle the Rule 2019 Debate

The set of proposed amendments to Rule 2019 ("Proposed Rule 2019") began the rule-making process [FN69] by circulation for public comment by the Committee on Rules of Practice and Procedure of the Judicial Conference in August 2009. On May 27, 2010, the Advisory Committee on Bankruptcy Rules (the "Advisory Committee") issued a report to the Standing Committee on Rules of Practice and Procedure (the "Standing Committee"), in which the Advisory Committee recommended the substantive revisions embodied by Proposed Rule 2019. In June 2010, the Standing Committee approved the changes contained in Proposed Rule 2019 and submitted it to the entire Judicial Conference. On September 14, 2010, the Judicial Conference met and approved the recommendation to amend Rule 2019 in substantially the form proposed by the Standing Committee. Proposed Rule 2019 now will be presented to the Supreme Court, which will meet in April 2011 to consider the proposed revisions. Assuming that Proposed Rule 2019 is approved by the Supreme Court without revision, and is

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not vetoed by Congress, it is slated to become effective on December 1, 2011.

As currently drafted, Proposed Rule 2019 almost certainly will expand the coverage of the Rule's disclosure requirements to include ad hoc committees of distressed investors. Importantly, the text of Proposed Rule 2019 provides that the disclosure requirements apply to "every *group* or committee that *consists of* or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another." [FN70] The full text of Proposed Rule 2019 is as follows:

> **Rule 2019. Disclosures Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases.**
>
> (a) DEFINITIONS. In this rule the following terms have the meanings indicated:
>
> (1) "Disclosable economic interest" means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right granting the holder an economic interest that is affected by the value, acquisition of disposition of a claim or interest.
>
> (2) "Represent" or "represents" means to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another.
>
> (b) DISCLOSURE BY GROUPS, COMMITTEES, AND ENTITIES.
>
> (1) In a chapter 9 or 11 case, a verified statement setting forth the information specified in subdivision © of this rule shall be filed by every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another.
>
> (2) Unless the court orders otherwise, an entity is not required to file the verified statement described in paragraph (1) of this subdivision solely because of its status as:
>
> (A) an indenture trustee;
>
> (B) an agent for one or more other entities under an agreement for the extension of credit;
>
> (C) a class action representative; or
>
> (D) a governmental unit that is not a person.
>
> (c) INFORMATION REQUIRED. The verified statement shall include
>
> (1) the pertinent facts and circumstances concerning;
>
> (A) with respect to a group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group or committee was formed or for whom the group or committee has agreed to act; or
>
> (B) with respect to an entity, the employment of the entity, including the name of each creditor or equity security holder at whose instance the employment was arranged;
>
> (2) if not disclosed under subdivision (c)(1), with respect to an entity, and with respect to each member of a group or committee:
>
> (A) name and address;
>
> (B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed; and
>
> (C) with respect to each member of a group or committee that claims to represent any entity in addition to the members of the group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the date of acquisition by quarter and year of each disclosable economic interest, unless acquired more than one year before the petition was filed;
>
> (3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security

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holder represented by an entity, group, or committee, other than a committee appointed under § 1102 or § 1114 of the Code;

(A) name and address; and

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date of the statement; and

(4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders.

(d) SUPPLEMENTAL STATEMENTS. If any fact disclosed in its most recently filed statement has changed materially, an entity, group, or committee shall file a verified supplemental statement whenever it takes a position before the court or solicits votes on the confirmation of a plan. The supplemental statement shall set forth the material changes in the facts required by subdivision (c) to be disclosed.

(e) DETERMINATION OF FAILURE TO COMPLY; SANCTIONS.

(1) On motion of any party in interest, or on its own motion, the court may determine whether there has been a failure to comply with any provisions of this rule.

(2) If the court finds such a failure to comply, it may;

(A) refuse to permit the entity, group, or committee to be heard or to intervene in the case;

(B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by the entity, group, or committee; or

(C) grant other appropriate relief. [FN71]

The inclusion of the term "group" suggests that the scope of Proposed Rule 2019 will encompass any association of creditors regardless of the informal ad hoc nature of the arrangement. Similarly, Proposed Rule 2019 applies to a group or committee that merely "consists of, " rather than "represents," multiple creditors. Proposed Rule 2019 also defines the term "represents" to include "to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another." [FN72] These changes apparently eliminate any requirement that a formal agency-type of relationship exist between the members and the group or committee representing them, and extend the Rule to include a group merely taking a unified position before the bankruptcy court. [FN73] In addition, the Committee Note to this subsection of Proposed Rule 2019 explains that "[t]he rule applies to a group of creditors or equity security holders that act in concert to advance common interests (except when the group consists exclusively of affiliates or insiders of one another), even if the group does not call itself a committee." [FN74]

Another notable change included in Proposed Rule 2019 that implicates the application of the Rule to ad hoc groups of distressed investors is that the verified statement to be filed must specify the individual member's [FN75] "disclosable economic interest," which is defined as "any claim, interest, pledge, lien, option, participation, derivative, instrument, or any other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest." [FN76] The Committee Note further provides that the definition of "disclosable economic interest" is "intended to be sufficiently broad to cover any economic interest that could affect the legal and strategic positions a stakeholder takes in a chapter 9 or chapter 11 case. A disclosable economic interest extends beyond claims and interests owned by a stakeholder and includes, among other types of holdings, short positions, credit default swaps, and total return swaps." [FN77] Requiring disclosure of more complex and unconventional types of "claims," such as credit default swaps, suggests that the scope of Proposed Rule 2019 is intended to apply to ad hoc groups of distressed investors participating in Chapter 11 cases.

The current version of Proposed Rule 2019 seemingly forecloses the position taken by ad hoc groups of dis-

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tressed investors under now-existing Rule 2019 that the informal nature of their arrangements exempts them from filing the required disclosures. Importantly, the Committee Note to Proposed Rule 2019 commences by stating:

> The rule is substantially amended to expand the scope of its coverage and the content of its disclosure requirements... Because the rule no longer applies only to representatives of creditors and equity security holders, the title of the rule has been changed to reflect its broadened focus on disclosure of financial information in chapter 9 and chapter 11 cases. [FN78]

Interestingly, in the *Philadelphia Newspapers* case, Judge Raslavich considered the very question of whether the language of Proposed Rule 2019 would encompass ad hoc committees of distressed investors, such as the Steering Group of lenders in that case. He concluded, in dictum, that "the proposed amendment [to Rule 2019] is *expressly* intended to *extend* coverage of the rule to a body such as the Steering Group... [A]nd if the proposed rule is enacted in its current form disputes of the type presented herein may indeed become a thing of the past." [FN79]

The merits of amending Rule 2019 to include ad hoc groups of distressed investors are open for debate. Proponents of expanding the scope of Rule 2019 to include secondary market investors emphasize that distressed investors often are focused on maximizing their investment return regardless of the consequences to the debtor's reorganization. [FN80] In the context of Proposed Rule 2019, this point is particularly salient with respect to hedge funds since they often hold interests at different levels of the debtor's capital structure. As observed by Judge Walrath in *Washington Mutual*, "[t]he 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." [FN81]

Furthermore, ad hoc committees of distressed investors often represent one of, if not the most, significant stakeholders in a Chapter 11 case, and thus are able to wield a substantial amount of influence over the reorganization process. [FN82] Therefore, proponents of Proposed Rule 2019 posit that increased disclosure is warranted to allow the bankruptcy court and interested parties the opportunity to evaluate the underlying motivations of such distressed investing groups in the Chapter 11 process. [FN83]

In contrast, distressed investor groups contend that enhanced disclosures under Rule 2019 saddle them with unfair disadvantages as compared to other stakeholders. Besides the obvious point that the disclosures under Proposed Rule 2019 require distressed investors to reveal confidential and proprietary information, [FN84] these investors take the position that all other parties are self-interested and similarly seek to secure an optimal recovery on their respective claims. [FN85] Furthermore, opponents to Proposed Rule 2019 emphasize that a claim purchased in the secondary market is to be viewed as the legal equivalent of the original claim under the Bankruptcy Code, and thus the price paid for an investor's position on such claim should be irrelevant to its bankruptcy recovery. [FN86]

Furthermore, ad hoc committees often increase efficiency by creating an economy of scale among similarly-situated creditors who can act collectively and engage in negotiations with the debtor with a unified voice. This pooling of resources creates an ancillary benefit to the debtor's estate since it avoids unnecessary delays and duplicative negotiations with individual creditor constituents. If secondary market investors are reluctant to form ad hoc groups because of the requirements of Proposed Rule 2019, it could result in the unintended consequence of undermining a debtor's ability to engage in consensus-building with key creditor constituencies.

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Regardless of the merits of the enactment of Proposed Rule 2019, the fallout with respect to the continued participation of distressed investor groups in Chapter 11 cases will be monitored closely by bankruptcy professionals. Irrespective of any criticisms of the motivations or tactics of secondary market investors, they undoubtedly provide a critical source of liquidity in a bankruptcy case. [FN87] Often hedge funds, or similar distressed investors, represent the only resource for creditors holding unrealized claims against a debtor to obtain a cash infusion that is otherwise not available.

Furthermore, the tightening of liquidity in the secondary claims market may hinder debtors themselves by depriving them of significant resources to fund the Chapter 11 process as well as to emerge from bankruptcy as adequately capitalized entities. The liquidity which results from investor participation in the distressed securities market often will increase the value of claims against the debtor's estate, thereby generating interest in exit financing and rights offerings that are used to facilitate a debtor's reorganization. In addition, hedge funds who invest significant resources in a debtor's distressed securities are more likely to participate in DIP financing and to provide the necessary assurances to confirm a plan of reorganization.

The increased scope of Proposed Rule 2019 likely will cause hedge funds to be reluctant to form groups due to an unwillingness to disclose pricing information. This may artificially cause such secondary market investors to retreat from the distressed securities market and refrain from actively participating in Chapter 11 cases. Although recent trends suggest that distressed investor groups will not shun the financial opportunities provided by Chapter 11 bankruptcies altogether, the increased scrutiny imposed by Proposed Rule 2019 could chill the participation of such distressed investors to a large degree and greatly impact the current restructuring landscape.

V. Conclusion

In many respects, the Bankruptcy Code adheres to the principal that the “truth will set you free.” i.e., full disclosure leads to a more transparent, impartial and efficient process for all parties involved. [FN88] The proposed amendments to Rule 2019 should serve to resolve the nettlesome question of whether ad hoc committees of distressed investors must comply with the disclosures mandated by the Rule, however, subjecting distressed investors to these disclosure requirements could result in certain unintended consequences that could negatively impact the efficient accomplishment of Chapter 11 restructuring. While the underlying purpose of Proposed Rule 2019 is to increase transparency and uncover potentially divergent economic interests among interested parties, a more intriguing question is whether the enhanced disclosure requirements will deter distressed investors from participating in the Chapter 11 process altogether.

[FN1]. See Flaschen & Mayr, Ad Hoc Committees and the Misuse of Bankruptcy Rule 2019, 16 Norton J. Bankr. L. & Prac. 6 Art. 3 at 1 (Dec. 2007) (“Although Rule 2019 and its predecessors have been around for almost 70 years, there has been very little discussion concerning the specific applicability of the rule.”).

[FN2]. The term “hedge funds” as used throughout this article is intended to refer to any investment vehicle which pools capital from numerous investors in order to invest in distressed debt, and includes actual hedge funds, proprietary trading groups, venture capitalists, and investment banks.

[FN3]. For purposes of simplicity, this article will refer to these constituencies generally as ad hoc committees. These informal committees, however, have used various self-styled monikers. See In re Philadelphia Newspapers, LLC, 422 B.R. 553, 556-57, 63 Collier Bankr. Cas. 2d (MB) 371, Bankr. L. Rep. (CCH) P 81877 (Bankr.

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E.D. Pa. 2010) (observing that secured lenders originally identified themselves as a "steering committee" but later changed this designation to a "steering group" in an apparent attempt to circumvent Rule 2019). Efforts to designate a constituency group as something other than a "committee" largely constitute a wasted effort, however, as courts disregard the description used by such groups in determining whether Rule 2019 applies. See Philadelphia Newspapers, 422 B.R. at 557 n.6 (explaining that whether a group calls itself a "committee" is not determinative as to whether Rule 2019 applies in the same way that a creditor calling itself "secured" does not automatically accede to the rights and benefits afforded to a secured creditor under the Bankruptcy Code) (citation omitted).

[FN4]. See 9 Collier on Bankruptcy ¶ 2019.01, p. 2019-2 (15th ed. rev.2010) (hereinafter "Collier") ("[Rule 2019] is part of the disclosure scheme of the Bankruptcy Code and is designed to foster the goal of reorganization plans which deal fairly with creditors and which are arrived at openly. Rule 2019 has been used as a control device to provide to stakeholders complete disclosure of material facts in the solicitation and voting process and to prevent conflicts of interest among creditors' counsel from undermining the fairness of the plan process.") (internal citations omitted); see also In re Gitto Global Corp., 422 F.3d 1, 7, 45 Bankr. Ct. Dec. (CRR) 67, 54 Collier Bankr. Cas. 2d (MB) 1308, 33 Media L. Rep. (BNA) 2297, Bankr. L. Rep. (CCH) P 80349 (1st Cir. 2005) (quoting In re Crawford, 194 F.3d 954, 960, Bankr. L. Rep. (CCH) P 78016 (9th Cir. 1999)) (explaining that the interest of transparency is paramount in the bankruptcy arena because unrestricted access to bankruptcy records "fosters confidence among creditors regarding the fairness of the bankruptcy system.").

[FN5]. Fed. R. Bankr. P. 2019(a). The disclosure requirements of Rule 2019 also apply to committees participating in reorganization cases under Chapter 9.

[FN6]. Fed. R. Bankr. P. 2019(a).

[FN7]. See Flaschen & Mayr, 16 Norton J. Bankr. L. & Prac. 6 Art. 3 at 2. The history of Rule 2019 is adroitly recounted by Judge Sontchi's opinion in In re Premier Intern. Holdings, Inc., 423 B.R. 58, 63 Collier Bankr. Cas. 2d (MB) 614 (Bankr. D. Del. 2010) (hereinafter "Premier").

[FN8]. See Alexander, Note, The Rule 2019 Battle: When Hedge Funds Collide with the Bankruptcy Code, 73 Brook. L. Rev. 1411, 1418 (2008); see also Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1937) (hereinafter the "SEC Report"), available at http:// c0403731.cdn.cloudfiles.rackspacecloud.c/collection/papers/1930/1937_0510_SEC_ 003.pdf (last visited on December 9, 2010). These deposit agreements were structured with one-sided contractual terms which gave a protective committee unfettered authority over an investors' securities while immunizing the protective committee from responsibility with respect to negotiations in the reorganization process. See Alexander,73 Brook. L. Rev. at 1418 n.54 (citing SEC Report); see also Flaschen & Mayr, 16 Norton J. Bankr. L & Prac. 6 Art. 3 at 2 ("The committees would solicit smaller investors to enter into a 'deposit agreement' (or similar instruments, which were rarely arms-length) pursuant to which the smaller investors would deposit their securities, and then the 'committee' would negotiate with the debtor with little, if any, participation by the smaller holders that the committee represented.") (alterations in original); SEC Report at 586 ("These [deposit agreements] bind the depositor to go along with the Committee through thick and thin."); see also Premier, 423 B.R. at 67 (explaining that due to the imbalance of power between the protective committees and the individual investors, "[n]one of the individual [investors] had enough of an investment in the [debtor] to go through the effort necessary to keep the committees from doing whatever they pleased [and] as a result, insiders remained in control of the process and ended up in control of the [debtor].").

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[FN9]. See Premier, 423 B.R. at 67 (noting that committees involved in equity receiverships worked in concert with the existing management of the debtor).

[FN10]. See Premier, 423 B.R. at 68 (noting the perception that protective committees exercised disproportionate dominance over equity receivership proceedings and that such protective committees largely were comprised of insiders and large institutional Wall Street banks which furthered their own interests at the expense of other individuals involved in the reorganization); see also Alexander, 74 Brook. L. Rev. at 1418 n.54 (cataloging abuses perpetrated by protective committees, including trading a debtors' securities based on inside information, setting fees without court supervision, and using “high pressure” tactics to get investors to enter into deposit agreements) (citing SEC Report).

[FN11]. See generally Premier 423 B.R. at 67 (detailing the abuses committed by insiders and the discriminatory treatment of nonconsenting creditors in equity receivership practice based on the formation of protective committees).

[FN12]. The investigation conducted by the SEC was spearheaded by William O. Douglas, then Chairman of the SEC, who would later serve as justice of the U.S. Supreme Court. See generally SEC Report. The investigations into the influence of Wall Street institutions in equity receiverships was representative of a period in American history in which public suspicion of Wall Street activities ran high. See Premier, 423 B.R. at 68 (noting that the SEC Report mirrored public criticism of “Wall Street's stranglehold on large-scale corporation reorganization”).

[FN13]. Technically, section 211 of Chapter X of the Chandler Act provided the substance of the disclosure rules and subsequently was combined with section 201 of the Chandler Act into Rule 10-211 was enacted to enforce its term. For purposes of simplicity, this article refers to Rule 10-211 alone as the operative legislation which was the predecessor of Rule 2019. The text of section 211 provides:

Every person or committee, representing more than twelve creditors or stockholders, and appearing in the proceeding, shall file a sworn statement containing--

(1) a copy of every instrument under which any such representation is empowered to act on behalf of creditors or stockholders;

(2) the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the names of the persons who, directly or indirectly, arranged for such employment or at whose instance, directly or indirectly, the committee was organized or formed or agreed to act;

(3) the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, when acquired, the amounts paid therefor, and any sales or any other disposition thereof, at or about the time of such employment of such person or the organization or formation of such committee or the appearance of the indenture trustee;

(4) the claims or stock represented by such person or committee and the amounts thereof, a statement that each holder acquired his holding more than one year before the filing of the petition, otherwise, the time of acquisition.

Act of June 22, 1938 chap. 575, 52 stat. 840, Chapter X, § 211 (1938) (hereinafter “Chandler Act”).

[FN14]. Premier, 423 B.R. at 71; see In re Washington Mut., Inc., 419 B.R. 271, 278, 52 Bankr. Ct. Dec. (CRR) 141, 62 Collier Bankr. Cas. 2d (MB) 2024 (Bankr. D. Del. 2009) (quoting SEC Report at 902) (examining the relevant legislative history and concluding that Rule 2019's predecessor was created to monitor deposit agreements as well as to “provide a routine method of advising the court and all parties in interest of the actual eco-

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nomic interest of all persons participating in the proceedings").

[FN15]. Rule 10-211 provides:

(a) Data required

Every person or committee representing more than one creditor or stockholder, and, every indenture trustee, shall file a signed statement with the court setting forth (1) the names and addresses of such creditors or stockholders; (2) the nature and amounts of their claims or stock and the time of the acquisition thereof unless they are 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 such person or the indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of such person, the organization or formation of such committee, or the appearance in the case of any indenture trustee, a showing of the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof. The statement shall include a copy of the instrument, if any, whereby such person, committee or indenture trustee is empowered to act on behalf of creditors or stockholders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

(b) Failure to comply, effect.

The court on its own initiative or on application or motion of any party in interest (1) may determine whether there has been a failure to comply with the provisions of this rule or with any other applicable law regulating the activities and personnel of any person, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that any such person, committee, or indenture trustee to be heard further or to intervene in the case; (2) may examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or stock acquired by any person or committee in contemplation or in the course of a case under the Act and grant appropriate relief pursuant to the Act and (3) may hold invalid any authority or acceptance, given, procured, or received by entity person or committee who has not complied with subdivision (a) of this rule or with Rule 10-304.

See Chandler Act, Chapter X, Rule 10-211.

[FN16]. See Premier, 423 B.R. at 72 (comparing the text of the rules and concluding that "there is not a single substantive difference between Rule 10-211 and Rule 2019").

[FN17]. Fed. R. Civ. P. 2019.

[FN18]. See Flaschen & Mayr, 16 Norton J. Bankr. L. & Prac. 6 Art. 3 at 1 ("[T]he customary practice has been for counsel to *ad hoc* committees to file a disclosure identifying the members of the committee and their aggregate (but not individual) holdings.") (alterations in original).

[FN19]. Fed. R. Bankr. P. 2019(a); see Collier. ¶ 2019.04[2], p. 2019-6 (explaining that Rule 2019 mandates that committees update the information contained in an originally filed statement, but noting that "[t]his requirement would not make it necessary to update periodically a list of security holders where the securities are publicly traded").

[FN20]. Fed. R. Bankr. P. 2019(b).

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[FN21]. Fed. R. Bankr. P. 2019(b).

[FN22]. See Colliers, ¶ 2019.05[1], p. 2019- 7 (citing In re Mirant Corp., 334 B.R. 787, 798 (Bankr. N.D. Tex. 2005)). Colliers also notes that Rule 2019(b) could apply to voting on elections under section 1111(b)(1)(A)(i). Colliers, ¶ 2019.05[1], p. 2019- 7.

[FN23]. See Washington Mutual, 419 B.R. at 278 (observing that Rule 10-211 was enacted as part of a "comprehensive legislative scheme to combat a variety of problems related to the committee system in equity receiverships and reorganizations").

[FN24]. See Colliers, ¶ 2019.05[1], p. 2019-7, 8 (explaining that a complete ban on participation applies where the failure to disclose was willful and that the "failure by a representative to comply with Rule 2019(a) will not prevent further participation in the case by those the representative purported to represent").

[FN25]. See Levin & Edwards, Significant Case Law Developments in Chapter 11, 19 Norton J. Bankr. L. & Prac. 4, Art. 5 at 431 (2010) (questioning whether the plain meaning rule can properly be applied to Rule 2019 because "[w]ith the inherent ambiguity in definitions, the statute is only as plain as the various definitions one can find in a dictionary").

[FN26]. 11 U.S.C.A. § 101(15). Traditionally, courts have interpreted the term "entity" to include lawyers and law firms with respect to Rule 2019. See, e.g., In re Muralo Co., 295 B.R. 512, 524 (Bankr. D.N.J. 2003) ("Rule 2019(a) requires entities, including counsel, who would represent in a chapter 11 case more than one creditor, to file a verified statement listing those creditors."); In re Oklahoma P.A.C. First Ltd. Partnership, 122 B.R. 387, 390-91, 24 Collier Bankr. Cas. 2d (MB) 1057 (Bankr. D. Ariz. 1990) (Rule 2019 applies to counsel).

[FN27]. 11 U.S.C.A. § 101(41).

[FN28]. Black's Law Dictionary, 573 (8th ed. 2004) (hereinafter "Black's"); see also The American Heritage Dictionary 288 (4th ed. 2001) (defining "entity" as "something that exists as a particular and discrete unit").

[FN29]. Black's, 289.

[FN30]. See Black's, 1328 (defining "representative" as "one who stands for or acts on behalf of another"); Merriam-Webster's New College Dictionary, 941 (3d ed. 2001) (defining "represent" as "[t]o function as the official and authorized delegate or agent for").

[FN31]. See Philadelphia Newspapers, 422 B.R. at 422 n.1 (observing that Rule 2019 has "generated relatively little litigation" and in most cases in which the issue has arisen, it has been settled without a court decision) (citing In re Le-Nature's, Inc., 380 B.R. 747, 49 Bankr. Ct. Dec. (CRR) 84 (Bankr. W.D. Pa. 2008); In re Musicland Holding Corp., 362 B.R. 644, 47 Bankr. Ct. Dec. (CRR) 259 (Bankr. S.D. N.Y. 2007); In re Dura Automotive Systems, Inc., 403 B.R. 300 (D. Del. 2009)).

[FN32]. See Zelmanovitz & Olsen, Rule 2019: A Long Neglected Rule of Disclosure Gains Increasing Prominence in Bankruptcy, http:// www.morganlewis.com/pubs/Restructuring_Newsletter_Summer20071.pdf (last visited December 9, 2010) (noting that the accepted protocol for ad hoc committees under Rule 2019 had been to file a verified statement disclosing the aggregate holdings of a particular tranche of debt or equity group even in situations where committee members held claims or interests at multiple levels of the debtor's capital structure).

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[FN33]. In re Northwest Airlines Corp., 363 B.R. 701, 47 Bankr. Ct. Dec. (CRR) 248 (Bankr. S.D. N.Y. 2007).

[FN34]. Northwest Airlines, 363 B.R. at 702.

[FN35]. See Northwest Airlines, 363 B.R. at 703.

[FN36]. Northwest Airlines, 363 B.R. at 703 (noting that counsel for the ad hoc committee "had been actively litigating discovery issues in numerous hearings and conferences before the Court... [and] does not purport to represent the separate interests of any Committee member, [rather] it takes its instructions from the Committee as a whole and represents one entity for purposes of the Rule.").

[FN37]. Northwest Airlines, 363 B.R. at 703 (internal quotation marks and citation omitted).

[FN38]. Northwest Airlines, 363 B.R. at 704.

[FN39]. In re Washington Mut., Inc., 419 B.R. 271, 52 Bankr. Ct. Dec. (CRR) 141, 62 Collier Bankr. Cas. 2d (MB) 2024 (Bankr. D. Del. 2009). In the *Washington Mutual* Chapter 11 case, Potter Anderson & Corroon represented a group of senior and subordinated bondholders.

[FN40]. Washington Mutual, 419 B.R. at 272. The members of the Noteholders Group collectively held over $1.1 billion in principal amount of notes issued by the debtors. Washington Mutual, 419 B.R. at 273.

[FN41]. See Washington Mutual, 419 B.R. at 274-75 (rejecting the argument of the Noteholders Group that its informal arrangement rendered it outside the confines of Rule 2019 because such informal arrangements are typical of ad hoc committees which are covered under Rule 2019).

[FN42]. Washington Mutual, 419 B.R. at 274 ("Ad hoc committees due to their unofficial status, are typically a 'loose affiliation' of creditors. The at-will nature of committee membership is one of the defining characteristics of ad hoc committees.") (citing Robert J. Rosenberg, et al., Ad Hoc Committees and Other (Unofficial) Creditor Groups: Management, Disclosure and Ethical Issues, ABI Business Reorganization Committee Newsletter (June 2008)).

[FN43]. Washington Mutual, 419 B.R. at 275.

[FN44]. Washington Mutual, 419 B.R. at 275.

[FN45]. In re Scotia Development, LLC, Case No. 07-20027 (Bankr. S.D. Tex. 2007).

[FN46]. The ad hoc committee of debt holders owned approximately 95% of the $876 million principal amount of notes issued by the debtor. Interestingly, it was the debtor who actually requested that the noteholders unify as a group for purposes of negotiating a plan of reorganization.

[FN47]. See Scotia Pacific Company LLC's Motion for an Order Compelling the Ad Hoc Noteholder Committee to Fully Comply with Bankruptcy Rule 2019(a) by Filing a Compete and Proper Verified Statement Disclosing Its Membership and Their Interests, at 2, In re Scotia Development LLC, Case No. 07-20027 (Bankr. S.D. Tex. Mar. 16, 2007) [Docket No. 492].

[FN48]. See Courtroom Minutes & Transcript of Hearing, at 5, In re Scotia Development LLC, Case No. 07-20027 (Bankr. S.D. Tex. Apr. 17, 2007); see also Order Denying Scotia Pacific Company LLC's Motion for

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an Order Compelling the Ad Hoc Noteholder Group to Fully Comply with Bankruptcy Rule 2019(a) by Filing a Compete and Proper Verified Statement Disclosing Its Membership and Their Interests, In re Scotia Development LLC, Case No. 07-20027 (Bankr. S.D. Tex. Apr. 18, 2007) ([Docket No. 658].

[FN49]. In re Premier Intern. Holdings, Inc., 423 B.R. 58, 63 Collier Bankr. Cas. 2d (MB) 614 (Bankr. D. Del. 2010).

[FN50]. Premier, 423 B.R. at 60-61.

[FN51]. Premier, 423 B.R. at 63-65. The opinion provides the following detailed linguistic analysis:

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 work "appointed" clearly contemplates some action to be taken by a 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."

Premier, 423 B.R. at 65 (internal citations omitted and emphasis in original).

[FN52]. Premier, 423 B.R. at 65.

[FN53]. Premier, 423 B.R. at 65.

[FN54]. Premier, 423 B.R. at 65 ("Although the Court's determination of the plain meaning of the text is determinative, it is appropriate to review the legislative history of Rule 2019 as a 'reality check' on the Court's interpretation of the Rule.").

[FN55]. Premier, 423 B.R. at 72-73.

[FN56]. Premier, 423 B.R. at 73 (explaining that unlike ad hoc committees participating in modern Chapter 11 cases, protective committees could bind their individual constituents, were intimately involved with the debtor's management and could impose disparate treatment of similarly situated creditors).

[FN57]. Premier, 423 B.R. at 73 (cataloging the checks on an ad hoc committee's influence, including: (1) the debtor's exclusive authority to propose and solicit a plan; (2) classification of claims and interests with those similarly situated creditors; (3) required equal treatment among creditors in a class; and (4) the appointment of an examiner or trustee for cause).

[FN58]. Premier, 423 B.R. at 73. Judge Sontchi recognized that courts must be cautious in interpreting a statute so as to determine that all or part of it is rendered surplusage, however, he concluded that he was compelled to reach this determination "based on the extensive legislative history, the clear purpose behind the Chandler Act and Rule 10-211 and the changes implemented in the Bankruptcy Code." Premier, 423 B.R. at 58 n.41. Judge Sontchi did make clear, however, that his holding in *Premier* was primarily based on the plain meaning of Rule 2019. Premier, 423 B.R. at 58 n.41.

[FN59]. In re Accuride Corp., Case No. 09-13449 (Bankr. D. Del. 2009).

[FN60]. See Order (A) Compelling the Ad Hoc Noteholder Group to Comply with Fed. R. Bankr. P. 2019; (B) Prohibiting Further Participation in These Cases by the Ad Hoc Noteholder Group Pending Compliance with

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Fed. R. Bankr. P. 2019; and (C) Directing the Debtors to Withhold Further Payments to or on behalf of such Group Pending Compliance with Fed. R. Bankr. P. 2019, In re Accuride Corp., Case No. 09-13449 (Bankr. D. Del. Jan. 22, 2010). [Docket No. 633].

[FN61]. See Transcript of Hearing, at 116, In re Accuride Corp, Case No. 09-13449 (Bankr. D. Del. Jan. 20, 2010). Judge Shannon did specifically note that his approval of the motion included a caveat that he did not necessarily concur with Judge Walrath's conclusion in *Washington Mutual* that fiduciary obligations arise automatically in the context of multiple representation. See Transcript of Hearing, at 116-17, In re Accuride Corp, Case No. 09-13449 (Bankr. D. Del. Jan. 20, 2010).

[FN62]. See Transcript of Hearing, at 117, In re Accuride Corp, Case No. 09-13449 (Bankr. D. Del. Jan. 20, 2010) ("But looking at Bankruptcy Rule 2019, and I have considered its history and its development from the '30's and more importantly since the advent of the Bankruptcy Code in 1978, it is a statute that requires disclosure.").

[FN63]. In re Philadelphia Newspapers, LLC, 422 B.R. 553, 63 Collier Bankr. Cas. 2d (MB) 371, Bankr. L. Rep. (CCH) P 81877 (Bankr. E.D. Pa. 2010).

[FN64]. Philadelphia Newspapers, 422 B.R. at 555. The Steering Group was comprised of certain funds which were holders of approximately $300 million of debt generated by the debtors' prepetition secured credit facility. Philadelphia Newspapers, 422 B.R. at 556.

[FN65]. Philadelphia Newspapers, 422 B.R. at 565-67.

[FN66]. See Philadelphia Newspapers, 422 B.R. at 566-67. Despite reaching the conclusion that the plain meaning rule rendered Rule 2019 inapposite to the Steering Group, the court undertook its own "reality check" by examining both the proposed amendments to Rule 2019 and the legislative history of the Rule. See Philadelphia Newspapers, 422 B.R. at 567 ("In reaching its decision that the 'plain meaning' of Rule 2019 renders it inapplicable to the Steering Group, however, the Court, apart from a review of the legislative history, finds a 'reality check' of a different sort to exist by reason of the amendments to Rule 2019 proposed by the Judicial Conference's Committee on Rule of Practice and Procedure.").

[FN67]. For an additional case discussing the applicability of Rule 2019 to an ad hoc committee see In re Milacron, Inc., Case No. 09-11235, 2010 WL 3604188, at *2-3 (Bankr. S.D. Ohio Sept. 15, 2010) (holding that Rule 2019 applied to group of equity noteholders because the group referred to itself collectively in filings before the bankruptcy court and sought authority to prosecute litigation actions against the debtor's officers and directors as a single unit).

[FN68]. See Philadelphia Newspapers, 422 B.R. at 565 (noting that "[i]n four decisions courts have expressly based their ruling on the 'plain meaning' of the text of Rule 2019 but have evenly split on that 'plain meaning.") Similarly, Judge Raslavich observed that the courts in *Washington Mutual* and *Premier* both engaged in extensive analysis of the legislative history of Rule 2019 and reached "diametrically opposite conclusions as to the import of such extrinsic evidence." Philadelphia Newspapers, 422 B.R. at 565.

[FN69]. The timeline for the Federal rulemaking process is as follows: (1) initial consideration by the Advisory Committee; (2) publication and public comment period; (3) consideration of public comments and final approval by the Advisory Committee; (4) approval of proposed amendments by the Standing Committee; (5) approval of

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the Judicial Conference; (6) approval of the U.S. Supreme Court; and (7) congressional approval followed by the rules taking effect.

[FN70]. See Report of the Judicial Conference Committee of the Rules of Practice and Procedure, Appendix B-25 (Sept. 14, 2010) (hereinafter "Rule 2019 Report").

[FN71]. Rule 2019 Report, Appendix B-25:30.

[FN72]. Rule 2019 Report, Appendix B-25.

[FN73]. The Committee Notes provide, however, that "representation requires active participation in the case or in a proceeding on behalf of another entity," such that an attorney monitoring the case without advocating a position before the court does not fall within the definition of "representing." Rule 2019 Report, Appendix B-30.

[FN74]. Rule 2019 Report, Appendix B-31. It is noteworthy that that administrative agents of a debtor's credit facility or indenture trustee's are specifically exempted from the disclosure requirements. Rule 2019 Report, Appendix B-31. Furthermore, Proposed Rule 2019 requires that members of official committees appointed by the Bankruptcy Court must make certain disclosures under the Rule. Rule 2019 Report, Appendix B-31.

[FN75]. The Committee Notes explain that Proposed Rule 2019 is intended to close the loophole of ad hoc committee's filing statements disclosing the aggregate holdings without disclosing information for each individual member. See Rule 2019 Report, Appendix B-31 ("[T]he information about the nature and amount of a disclosable economic interest must be specifically provided on a member-by-member basis, and not in the aggregate.").

[FN76]. Rule 2019 Report, Appendix B-25.

[FN77]. Rule 2019 Report, Appendix B-30.

[FN78]. Rule 2019 Report, Appendix B-30.

[FN79]. Philadelphia Newspapers, 422 B.R. at 567 (emphasis in original).

[FN80]. See generally Letter from Judge Robert E. Gerber to Advisory Committee on Bankruptcy Rules, 2 (Jan. 9, 2009) (hereinafter "Gerber Letter") (noting that distressed debt investors often have an agenda which consists of "simply maximizing return for themselves, in the shortest possible time horizon, without a broader regard for spending the time and effort necessary to stabilize the business, and or to maximize its value for the good of all.") (internal footnote and citation omitted); Robert J. Rosenberg & Michael Rtela, Hedge Funds, The New Masters of the Bankruptcy Universe, 17 Norton J. Bankr. L. & Prac. 5 Art. 7 (2008) (explaining that hedge funds in Chapter 11 cases engage in both "quick flip" and "loan to own" strategies and "are more likely than more traditional investors to seek short-term returns that are not necessarily tied to the debtor's successful reorganization"); Mike Spector & Tom McGinty, Bankruptcy Court Is Latest Battleground for Traders, Wall Street Journal (Sept. 7, 2010) (available at http://online.wsj.com/article/SB10001424052748703309704575413643530508) (last visited December 9, 2010) (discussing the increased influence of hedge funds in the Chapter 11 process and opining that such investment has transformed the bankruptcy system into a type of "money-making venue" where distressed companies purchase debt at a steep discount and use sophisticated trading techniques to obtain a profit).

[FN81]. Washington Mutual, 419 B.R. at 279; see also Washington Mutual, 419 B.R. at 280 ("The proliferation

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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.").

[FN82]. See generally Levin & Edwards, 19 Norton J. Bankr. L & Prac. at 427 (noting that ad hoc groups often wield significant power in all aspects of a debtor's reorganization).

[FN83]. See Alexander,73 Brook. L. Rev. at 1441-42 (opining that increased disclosures allow creditors to evaluate the motivations of the committee and make an informed decision as to whether that committee will adequately represent their interests); see also Gerber Letter, 7 (noting that where an ad hoc committee seeks to exert its influence as a major creditor constituency and argue the best course for the debtor's estate and its creditors, the private agenda of such committee is relevant in evaluating the underlying motivations for such positions).

[FN84]. See Flaschen & Mayr, 16 Norton J. Bankr. L. & Prac. at 8 (arguing that trading strategies constitute sensitive and proprietary business information which hedge funds have a legitimate interest in protecting); Letter from Ira. D. Hammerman, Securities Industry and Financial Markets Association and Elliot Ganz, the Loan Syndication and Trading Association to Peter G. McCabe, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Nov. 30, 2007) available at http://www.sifma.org (discussing the adverse consequences of public disclosure of investment data).

[FN85]. See Flaschen & Mayr, 16 Norton J. Bankr. L. & Prac. at 11 (arguing that hedge funds should be viewed on par with all other individual claimants who possess individual needs and motivations based on numerous factors and act in accordance with those motivations); see also Gerber Letter, 2 (noting that distressed investors seek to maximize their investment as do all other investors).

[FN86]. See generally Shropshire, Woodliff & Co. v. Bush, 204 U.S. 186, 189, 27 S. Ct. 178, 51 L. Ed. 436 (1907) (treatment of the claim is determined by the claim itself and the claimant); In re Davis, 352 B.R. 651, 655 (Bankr. N.D. Tex. 2006) ("[C]ourts should focus on the nature of the underlying debt, not the identity of the holder of the claim, in determining a party's rights with respect to a claim.").

[FN87]. See Gerber Letter, 2 ("Investors in distressed debt provide an escape mechanism for the predecessor creditors who were (or would be) left unpaid at the time of the bankruptcy filing. With distressed debt investors buying up the debt, the predecessor creditors can then sell their bonds, claims, or participations in bank debt, and thereby realize some recovery on their positions at an earlier time, and with greater certainty, than they might ultimately achieve in distributions on their claims.") (internal footnote and citation omitted).

[FN88]. See generally In re eToys, Inc., 331 B.R. 176, 187, 45 Bankr. Ct. Dec. (CRR) 117 (Bankr. D. Del. 2005) ("Disclosure ?goes to the heart of the integrity of the bankruptcy system.'") (citing In re B.E.S. Concrete Products, Inc., 93 B.R. 228, 236, 19 Collier Bankr. Cas. 2d (MB) 1172 (Bankr. E.D. Cal. 1988)); In re Sanchez, 372 B.R. 289, 305 (Bankr. S.D. Tex. 2007) ("The three most important words in the bankruptcy system are: disclose, disclose, disclose.").

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