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UPDATE

May 20, 2010

Written in Collaboration with:

Potter Anderson & Corroon LLP

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December 7, 2009

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Norton Journal of Bankruptcy Law and Practice
December 12, 2007

Bankruptcy Rule 2019: To Disclose or Not Disclose, That is the Question
The Bankruptcy Strategist
October 18, 2007

Bankruptcy Rule 2019 and the Unwarranted Attack on Hedge Funds
ABI Journal
September 2007

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Bankruptcy Law 360
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Washington Mutual 2019 Ruling, Part II

In a Bracewell & Giuliani client alert dated December 7, 2009 (which can be found **here**), we reported on a decision ("WaMu I") from Judge Walrath of the Delaware Bankruptcy Court that required a group of bondholders of Washington Mutual, Inc. ("WMI") to comply fully with the disclosure requirements of Bankruptcy Rule 2019. Since then, Judge Walrath scheduled a hearing for May 19, 2010 and indicated her intention at that hearing to enter an order expanding her WaMu I ruling to apply to all "groups of creditors represented by counsel," subject to the ability of any group or counsel to assert an objection as to why Rule 2019 should not apply to it.

On May 17, 2010, approximately 15 law firms representing various creditor groups filed initial or amended Rule 2019 statements that provided the information they believed was required by WaMu I. The only objection that was actually filed came from a group of senior and subordinated noteholders of WMI's subsidiary, Washington Mutual Bank (the "WMB Noteholder Group"), represented by Bracewell & Giuliani and Potter Anderson & Corroon (which can be found **here**). Among other things, the WMB Noteholder Group argued that Rule 2019 ought not to apply to a group of creditors who engage common counsel solely for the purpose of filing and defending against objections to their consolidated proof of claim.

At the May 19, 2010 hearing, Judge Walrath issued a bench ruling ("WaMu II") that upheld the objection of the WMB Noteholder Group. In addition, she used the hearing as an opportunity both to clarify the circumstances in general under which Rule 2019 applies (in her view) and to provide more specificity as to what a group of debt or equity security holders is required to disclose under Rule 2019.

Specifically, Judge Walrath held that:

- Bankruptcy Rule 2019 generally applies only to groups of creditors who share a similar economic interest, such as a bondholder group or a shareholder group.
- However, Rule 2019 does *not* apply to a bondholder group or other group of similarly-situated creditors whose only participation in a Chapter 11 case is to file a consolidated proof of claim and engage common counsel to defend against objections to the proof of claim.

- In addition, Rule 2019 does *not* apply to counsel who represents more than one creditor if those creditors do not share similar interests. For example, counsel who represents three trade creditors with respect to their individual trade claims need not comply with Rule 2019, nor does counsel who represents different creditors as defendants in unrelated adversary proceedings.
- Where Rule 2019 does apply, such as to a group of bondholders, it is not sufficient to report a range of bond trading dates and a range of trading prices. Instead, the statement must include, on a holder by holder basis, the date of each trade, and the price paid/received in such trade.
- In addition, creditors in a Rule 2019 group must also report other economic interests they may have. For example, if a member of the WMI senior bondholder group also holds WMI subordinated bonds or equity, it must also disclose those other holdings.

In sum, the good news of WaMu II is that Judge Walrath narrowed the circumstances under which she believes Rule 2019 applies. The bad news is that she has stated clearly that a creditor to whom Rule 2019 does apply cannot simply state a start and end date for its trading activities and a low and high price for the trades. Instead, each trade must be individually identified by date and price.[1]

Bracewell has written extensively on Rule 2019 and we have come down squarely on the side that Rule 2019 *does not* apply to ad hoc committees such as noteholder and lender groups or, at least, it *should not* apply. Efficient organization of informal groups of the debt holders in bankruptcy is crucial in order to ensure broad input from a cross-section of par and secondary holders, including institutional investors and hedge funds. The courts remain split, even within Delaware, so the ultimate resolution of this debate will have to await a binding appellate ruling or an amendment to Rule 2019 itself. On this latter point, amendments to Rule 2019 actually are being considered currently by the Advisory Committee on Bankruptcy Rules, but whether those amendments broaden or narrow the applicability and disclosure requirements of Rule 2019 is very much an open question.

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[1] As to the specific Rule 2019 statements filed in the WMI case, Judge Walrath noted that the majority of them did not comply with Rule 2019 because they only indicated date and price ranges, rather than details of each individual trade. Nevertheless, the Court determined that based on the information provided it appeared that no one group represented a sufficiently large class of creditors that would be unduly influential in the case. Accordingly, the Court decided that for purposes of the WMI case only it would accept those statements as filed.

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