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WHEN IS A COMMITTEE NOT A COMMITTEE FOR BANKRUPTCY RULE 2019 PURPOSES?

Courts Are Split 3 to 3 And The Debate Continues ...

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Although 2010 is still young, the bankruptcy courts have been busy interpreting Rule 2019 of the Federal Rules of Bankruptcy Procedure as it applies to *ad hoc* groups of creditors in bankruptcy cases. A ruling issued on February 4, 2010, in *In re Philadelphia Newspapers, LL*, Case No. 09-11204 (Bankr. E.D.Pa.) found Rule 2019 does not apply to *ad hoc* groups. The score is now tied at three to three. While each of the six courts that have considered Rule 2019 based their decisions on the “plain meaning” of the rule, they are split on exactly what is Rule 2019’s “plain meaning.”

Rule 2019 requires that every “entity or committee representing more than one creditor or equity security holder” provide a verified statement listing:

1. The name and address of each creditor or equity security holder;
2. The nature and amount of the claim or interest and the time of its acquisition;
3. A recital of the pertinent facts involved in the formation of the committee; and

4. The amounts of claims or interests owned by the entity, the amounts paid for such claims or interests, and any sales or dispositions of such interests.

Rule 2019 exempts from such disclosure however, any committee officially appointed through section 1102 or 1114 of the Bankruptcy Code. As such, an official creditors committee, official equity committee, official futures committee or any other similarly official committee need not comply with the Rule 2019.

Courts in three recent cases — *In re Washington Mutual, Inc.*, 419 B.R. 271 (Bankr. D.Del. 2009), *In re Accuride Corp.*, Case No. 09-13449 (Bankr.D.Del.) (bench ruling issued on Jan. 20, 2010), and *In re Northwest Airlines*, 363 B.R. 701 (Bankr.S.D.N.Y. 2007) — have ruled that Rule 2019 applies to *ad hoc* committees of Noteholders or equity security holders. These rulings hinged on the courts’ determinations that the *ad hoc* groups are “committees” under Rule 2019 because, among other reasons, they consisted of multiple creditors with similar claims, filed pleadings collectively rather than individually, and

collectively retained counsel to represent the group as a whole.

Likewise, courts in two other recent cases — *In re Premier International Holdings, Inc., et al*, 2010 WL 198676 (Bankr. D. Del. Jan. 20, 2010), and *In re Scotia Development, LLC*, Case No. 07-20027 (Bankr. S.D. Tex.) (bench ruling issued on April 17, 2007) — held that Rule 2019 does not apply to *ad hoc* committees. These courts’ decisions appear to be based on the “plain meaning” of Rule 2019 that an informal “committee” is not a “committee” at all, at least not in the way the term is used in the rule.

In re Philadelphia Newspapers, the most recent decision to address Rule 2019, sides with the opinions issued in *Premier International* and *Scotia Development*. In *Philadelphia Newspapers*, the bankruptcy court determined that the plain meaning of the “current iteration” of Rule 2019 does not compel the conclusion that *ad hoc* groups represent the interests

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of more than one creditor. Moreover, the bankruptcy court concluded that the fact that an *ad hoc* group calls itself a “committee” is not dispositive of whether they are a “committee” under Rule 2019 because its members are self-appointed, rather than “appointed by any larger deliberative body ... contract or applicable non-bankruptcy law.” The bankruptcy court, adopting the rationale of the *Premier* court, concluded that the *ad hoc* committee was not “representing more than one creditor” because it represented its own interests rather than those of a larger group.

The *Philadelphia Newspapers* court took note of a pending proposal by the Judicial Conference Committee on Rules and of Practice and Procedure. The proposal will amend Rule 2019 to expressly extend its coverage to *ad hoc* committees. This modification to Rule 2019, if implemented, likely would settle the issue in favor of requiring *ad hoc* committees to comply with the rule and to file verified statements setting forth the nature and value of the members’ claims against a debtor.

The Debtors filed a notice of appeal of the *Philadelphia Newspapers* decision on the same day it was issued. Clearly, the outcome of this issue is far from decided. What is clear, however, is that bankruptcy courts are split on the issue and creditors should not presume to know how a particular court will address Rule 2019’s applicability in their case.

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