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BANKRUPTCY, FINANCIAL REORGANIZATION & CREDITORS' RIGHTS GROUP

NEW DECISION REQUIRING DISCLOSURES FOR INFORMAL COMMITTEES IN BANKRUPTCY CASES

By: Sharon L. Levine, Esq., Sheila A. Sadighi, Esq., S. Jason Teele, Esq., and Andy Winchell, Esq.[1]

December 14, 2009

In a recent decision from the United States Bankruptcy Court for the District of Delaware, Judge Mary Walrath has required that members of an informal committee of noteholders comply with expansive disclosure requirements beyond the standard established for official committees. In a written opinion issued on December 2, 2009 in the case of *In re Washington Mutual, Inc.*, Case No. 08-12229 (MFW), Judge Walrath granted a motion to require an informal group of noteholders to comply with Rule 2019 of the Federal Rules of Bankruptcy Procedure.

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.

A secured lender in the *Washington Mutual* case had moved the court for an order forcing the *ad hoc* Washington Mutual, Inc., Noteholders Group to comply with Rule 2019. The noteholders group had filed a notice of appearance through counsel listing the names and addresses of its 23 constituent entities. The noteholders group remained active in the case, filed responsive pleadings in various matters and appeared at numerous hearings. In response to the secured lender's motion, the noteholders group denied that it was a "committee" and represented itself as a "loose affiliation" of creditors. The noteholders group further explained that its members could be bound to a course of action only through their unanimous consent.

Judge Walrath concluded, however, that the noteholders committee was analogous to an *ad hoc* committee, but without the name. This conclusion was based on three specific factual findings. <u>First</u>, Judge Walrath found that the noteholders committee consisted of multiple creditors with similar claims. <u>Second</u>, the noteholders committee's members filed pleadings collectively rather than individually, which is indicative of the kind of action taken by an

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entity representing more than one creditor. Third, the noteholders committee collectively retained counsel, who took direction from the group as a whole and never indicated that it was speaking for anything less than the entire group. As such, Judge Walrath concluded that the noteholders group was acting as an *ad hoc* committee and is subject to the disclosure requirements of Rule 2019.

Judge Walrath's opinion came against the backdrop of two other conflicting decisions: First, in *In re Northwest Airlines*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007), the United States Bankruptcy Court for the Southern District of New York required *an ad* hoc committee of equity security holders to amend its Rule 2019 disclosures beyond the previously customary aggregate holdings of the committee members. The disclosures the Court required included each member's holdings of claims and equity interests, the dates that such claims or interest were purchased, and the purchase price paid. The Court later denied the ad hoc committee's request to file such information under seal. Second, in an unpublished opinion in *In re Scotia Development LLC*, the United States Bankruptcy Court for the Southern District of Texas held that a noteholder group was not a committee within the meaning of Rule 2019.

Thus, there is now authority in the two courts where large bankruptcy cases tend to file holding that informal committees must make the extensive disclosures required by Rule 2019 of the Federal Rules of Bankruptcy Procedure.

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1 Sharon L. Levine and S. Jason Teele* are Members and Andy Winchell is Counsel in Lowenstein Sandler PC's Bankruptcy, Financial Reorganization & Creditors' Rights Department. They may be reached by calling 973-597-2500 or via email at slevine@lowenstein.com, ssadighi@lowenstein.com, steele@lowenstein.com or awinchell@lowenstein.com.

* S. Jason Teele is a Member of the Firm effective January 1, 2010.

www.lowenstein.com

New York
1251 Avenue of the Americas
New York, NY 10020
212 262 6700

Palo Alto
590 Forest Avenue
Palo Alto, CA 94301
650 433 5800

Roseland
65 Livingston Avenue
Roseland, NJ 07068
973 597 2500

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