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February 11, 2010

09-BK-104

By Email
Rules_Comments@ao.uscourts.gov

Advisory Committee on Bankruptcy Rules
c/o Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Fed. R. Bankr. P. 2019 ("PBR 2019")

To the Members of the Judicial Conference Advisory Committee on Bankruptcy Rules:

Pursuant to the memorandum dated August 12, 2009 of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, I submit this comment to the proposed amendment to Rule 2019, to supplement my comment dated February 1, 2010.

I am the chairman of the Business Solutions & Governance Department of Dewey & LeBoeuf LLP and teach Corporate Reorganization at Harvard Law School and University of Michigan Law School. This comment is solely my comment and is not submitted on behalf of any of these entities. I have practiced in the field of corporate reorganization for 32 years. My practice has been balanced among representing debtors, creditors' committees, bondholders, shareholders, lenders, and other investors.

Anticipating What Compliance with Proposed Rule 2019 will Look Like, Exposes a Means to Attain Far More Efficiently the Transparency and Integrity the Rule is Intended to Promote, while Avoiding Needless Court Time, Disputes, and Chilling Effects. Proposed Rule 2019 requires disclosure of something new to Bankruptcy Court practice, namely contracts to which the title 11 debtor is not a party. In short, I write to provide a few simple examples of the disclosures anticipatable by Proposed Rule 2019, to illustrate (a) the obstacles the courts and other litigants will confront in

interpreting the disclosures, and (b) that the transparency sought can be and often can only be attained by obtaining the certifications my first comment suggested.

I also write to urge that the disclosure requirement apply to members of the most important committees in the case -- the statutory committees.

Example 1: Creditor A discloses it holds: (a) $1 million face amount of the debtor's senior bonds, and (b) a short sale of $400,000 of the debtor's senior bonds.

What does the disclosure mean? It can mean many different things. Creditor A may simply want the value of the debtor's estate to increase, because Creditor A will earn more from the appreciation of its $1 million of senior bonds, than it will lose from its short sale of $400,000 of senior bonds. Conversely, Creditor A may want the value of the debtor's estate to decline initially from bad news or a bad litigation outcome so that Creditor A can take a profit on its short sale, and then Creditor A may hope good things will happen to the debtor's estate so that it can profit on its long position in the senior bonds.

This disclosure alerts everyone that Creditor A holds an economic interest that appreciates if claims against the estate depreciate, and therefore may urge a result that is bad for the debtor's estate, but also may urge a result that is good for the debtor's estate and unsecured claimholders.

Example 2: Creditor A discloses it holds: (a) $1 million face amount of the debtor's secured bank debt, and (b) a short sale of $400,000 of the debtor's senior bonds. What does the disclosure mean?

This disclosure may mean that Creditor A believes the collateral for its secured bank debt will provide a profit on its bank debt claim, and that the estate does not have sufficient unencumbered assets to provide a high return on the debtor's senior bonds. Or, the disclosure may mean that Creditor A is comfortable that its secured bank debt claim is protected in any scenario, but that Creditor A will urge positions that are bad for the debtor's estate so the return on the senior bonds will decline and Creditor A will profit from the decline.

This disclosure alerts the court and other parties that Creditor A holds an economic interest that appreciates if claims against the estate depreciate, and therefore may or may not take positions that will harm the debtor's estate and unsecured claimholders.

Example 3: Creditor A discloses it holds: (a) $1 million face amount of the debtor's secured bank debt, and (b) a synthetic repo total return swap on $100 million of the debtor's senior bonds.[1]

Without understanding the nature of a synthetic repo total return swap and which side of it Creditor A is on, a person cannot understand Creditor A's potential motivations for the debtor's estate to appreciate or depreciate. Specifically, they will not know whether Creditor A has an incentive for the senior bonds to gain value or lose value.

This disclosure would likely lead to inquiries, disputes, and court time designed to find out one thing: whether Creditor A may benefit if the debtor's senior bonds depreciate.

Example 4: Creditor A discloses it holds: (a) $4 million face amount of the debtor's senior bonds.

Creditor A supports approval of a settlement that is very unfair to the debtor's estate, but is a windfall for the estate of an affiliate of the debtor. Creditor A holds $50 million face amount of the affiliate's senior bonds, but is not required to disclose it because Creditor A is a member of a group that only appears in the debtor's case, and proposed Rule 2019(c)(2)(B) does not require disclosure of economic interests in other debtors' cases.

Conclusions:

(a) The disclosures required by currently Proposed Rule 2019 will sometimes alert the court and other parties that a creditor has economic interests motivating it to support relief that decreases the value of claims against the estate, and sometimes will not alert them.

(b) Making sense of the disclosures will frequently entail (i) court time, (ii) disputes over the accuracy and completeness of disclosures for either legitimate or tactical purposes, and (iii) a chilling effect on creditors asked to divulge proprietary documents in the dispute process.

(c) The point of each disclosure is to alert the court and other parties as to whether a creditor-litigant has an economic interest that may appreciate if the estate and claims against the estate depreciate. This is a mathematical calculation based on the terms of each short sale, repo, total return swap, credit default swap, and other derivatives. This calculation can be done by each economic interest holder, but often cannot be done by the court and

[1] Explained at: http://www.financial-edu.com/total-return-swap-trs-part-3.php

other parties absent an analysis of each derivative contract and sometimes the use of the correct computer software.

(d) Rather than plow through the types of disclosures in the four examples above, which disclosures can only lead to the consumption of court time, slower processing of the chapter 11 case, disputes as to the meanings of the disclosures, and resultant chilling effects and tactical deployments of the rule, the transparency and integrity for which Proposed Rule 2019 is intended can be attained by having each creditor provide the verified certifications contained in my comment dated February 1, 2010, as follows:

1. On behalf of [insert name of party in interest ("PIA") holding claims against debtor], I certify that PIA holds an aggregate of $____ of prepetition claims against the debtor's estate and an aggregate of $____ of postpetition claims against the debtor's estate.

2. On behalf of PIA, I certify that PIA [does or does not] hold other disclosable economic interests that may increase in value if claims against the debtor's estate decrease in value.

3. On behalf of PIA, I certify that PIA [does or does not] hold claims or other disclosable economic interests in respect of an affiliate of the debtor that may increase in value if claims against the debtor's estate decrease in value.

(e) Another way to accomplish the transparency and integrity sought by Proposed Rule 2019 is to impose a simple rule of pleading: "Every pleading filed in a title 11 case that asserts its proponents hold claims against the title 11 estate(s), must also disclose whether any of the proponents hold any economic interests that increase in value if claims against any of the debtors' estates or their affiliates' estates decrease in value." This would apply to every entity and committee, and gets to the bottom line without court time, chilling effects, disputes, and tactical deployments of the rule. False pleadings would of course be subject to Bankruptcy Rule 9011. Likewise, nothing in this proposal precludes discovery of additional facts and details when appropriate.

(f) In his testimony at the February 5, 2010 hearing, and its online synopsis,[2] Bankruptcy Judge Gerber referred to the foregoing certifications as "self-

[2] Available at:
http://www.uscourts.gov/rules/2009%20Comments%20Committee%20Folders/BK%20Comments%202009/09-BK-019-Testimony-Gerber.pdf

serving certifications where those making the disclosures determine what should be disclosed."[3] As I explained to Judge Gerber after his testimony, this was a misunderstanding. The certifications are not subjective. Either the arithmetic shows a derivative may go up in value when a claim against the estate goes down in value, or not. Put differently, once a litigant admits it holds economic interests that may appreciate if claims against the estate depreciate, the purpose of the proposed rule is served. The court and other parties know the dispute must be determined on the facts and law without deference to the litigant where there is otherwise room for deference.

(g) Proposed Rule 2019 has no requirement that will alert the court and other parties that a creditor has a motivation to support a settlement because it is bad for the debtor's estate, but good for an affiliated debtor's estate.

(h) Proposed Rule 2019 has no disclosure requirements for statutory committee members. Regardless of whatever checking the United States Trustee performs or does not perform, there is no transparency to the court and other parties. Because there is no requirement that statutory committee members provide public disclosure, none of us can know when statutory committees took positions based on economic interests contrary to the estate. The past lack of disclosure should not be allowed to maintain secrecy for the key committees in chapter 11 cases.

(i) To the extent the rule or an Advisory Committee comment refer to the trial court's power to order an entity to disclose the prices or acquisition dates for its economic interests, it should be made clear that the rule is not purporting to alter any substantive law that otherwise does not make price or date material or relevant, and is not purporting to create a right of discovery not otherwise available and appropriate.

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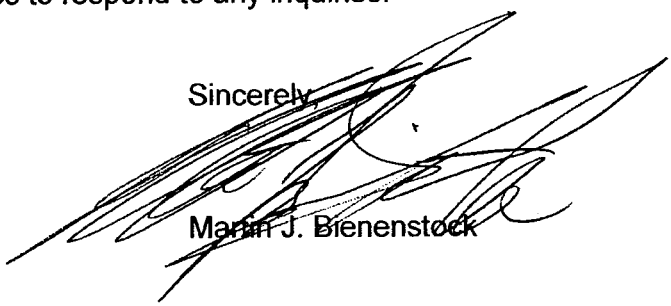
[3] As in this comment, my comment dated February 1, 2010, provides in the second paragraph of its first page that I submitted the comment on my own behalf and not on behalf of Dewey & LeBoeuf LLP or any institution at which I teach, and that my practice is balanced among debtors, committees, lenders, and investors. Judge Gerber's testimony directed to that comment provides: "A few – White & Case and Dewey & LeBoeuf, arguing interests of their respective clients – still seem to argue that there should be no regulation at all, or would allow for self-serving certifications where those making the disclosures determine what should be disclosed...." To be clear: (i) my comment was and is totally independent of White & Case, (ii) as is manifest from my comment, I have not argued for no regulation at all, (iii) this comment is my comment and not the comment of Dewey & LeBoeuf LLP, (iv) this comment is not on behalf of any past, present, or future client, and (v) I ask that this comment be evaluated solely on its analysis, logic, and common sense in the interest of producing the transparency and integrity underlying the purpose of Proposed Rule 2019 without creating unnecessary disputes for courts and chilling effects and tactical ploys for litigants.

In summary, currently Proposed Rule 2019 (a) does not ask entities to certify answers to the real inquiries, namely whether they hold interests that appreciate if the debtor's estate depreciates, and if they hold interests in an affiliated debtor that appreciate if the debtor's estate depreciates, and (b) does not apply to statutory committees. My suggestion solves both problems, while (a) requiring less court time, (b) imposing less of a chilling effect on investors, (c) reducing the ability to use Rule 2019 as a tactic, and (d) reducing the imposition of barriers to the court that could render Rule 2019 invalid under 28 U.S.C. § 2075 as an impermissible obstacle to an entity's absolute rights to appear and be heard under Bankruptcy Code section 1109(b).

I appreciate the opportunity to submit this comment and I am available to the Advisory Committee on Bankruptcy Rules to respond to any inquiries.

Sincerely,



Martin J. Bienenstock