RULE 2019

Rule 2019. Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases

(a) Data required. 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 assleged 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 trusteee, and, in the case of a committee, the name and 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;

(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 therefor, 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.

… (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 S. 1125(b) of the Code.

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What constitutes a committee?
At least one court has held that an informal group of creditors is not subject to Rule 2019 when the group has not been delegated to act on behalf of other creditors. (See *In re Scotia Dev. LLC, No. 07-20027 (Bankr. S.D. Tex. Apr. 18, 2007*).

Central to Rule 2019 is the idea of representation.

> "As Rule 2019(b) suggests, the operative portion of the agreements deposited under Rule 2019(a) ar the representation provisions." (See *In re Kaiser Aluminum Corp., 327 B.R. 554 (D. Del. 2005)*)
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> See also *In re Reid v. White Motor Corp., 886 F. 2d 1462, 1471 (6th Cir. 1989)*)

Must have an instrument (presumably a binding engagement document or the like)

The history of the application of Rule 2019 is inconsistent:

> See *In re Northwest Corp., 363 BR 701, 704 (Bankr. S.D.N.Y. 2007)* and also *In re Wash. Mutual Corp., No. 08-12229, 2009 WL 4363539, 5-6, (Bankr. D. Del. Dec 2, 2009)*.

However, in the event that the words and provisions of a statute are ambiguous or susceptible to different interpretations, a court should look to legislative history for guidance. See *In re Boston Univ. v. Mehta, 310 F. 3d 308, 311 (3d Cir. 2002)*.

> The Supreme Court has squarely held that the strict language of the Bankruptcy Code does not control if the application of that language "will produce a result demonstrably at odds with the intention of its drafters." See *In re United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989)*.
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> > When a statute is ambiguous, "the intention of the drafters, rather than strict language, controls."

The precursor to Rule 2019 was Rule 10-211 of Chapter X of the former Bankruptcy Act. Rule 10-211 was a product of the post-Depression era in which the Securities and Exchange Commission took legislative initiative as a result of its concerns that public investors needed protection from insiders in reorganization cases.

> See *Sparkle L. Alexander, The Rule 2019 Battle: When Hedge Funds Collide with the Bankruptcy Code, 73:4 Brooklyn L.R., 1411, 1419 (2008)*.

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Supreme Court Justice William O. Douglas stated that Rule 10-211 "is designed to ensure that the inside group does not manipulate a prepetition committee to secure a dominant position in the reorganization and capture the emoluments of control." (1937)

> See *In re Phila. & Reading Coal & Iron Co., 105 F. 2d 358, 359 (3d Cir. 1939)*:
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> > "In too many of those proceedings it had appeared that unqualified and unrepresentative committees sought and obtained the right to represent defenseless security holders while actually working in the interests of the debtor or other adverse parties."

In *Northwest*, the debtors filed a motion to compel an ad hoc committee of equity holders to make certain disclosures under Rule 2019. The Court held that the Ad Hoc Equity Committee was required to comply with the 2019(a)(4) disclosure requirements because the Ad Hoc Equity Committee members "purport to speak for a group and implicitly ask the court and other parties to give their positions a degree of credibility appropriate to a unified group with large holdings." Further, the Court based its decision in part on its finding that the Ad Hoc Equity Committee had actively sought the formation of an official committee of equity holders.

> Arguably, this decision was incorrect in that the Ad Hoc Committee was a non-fiduciary committee and the Court was incorrect in arguing that whenever the Ad Hoc Committee filed a pleading or spoke at a hearing, it implicitly "asked the court to "give their positions … credibility". This has no bearing on whether Rule 2019 is applicable.
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> Participating and taking an active role in a reorganization is a basic right granted under the Bankruptcy Code and courts encourage such participation. See Section 1109(b).
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> See also *In re Szostek, 886 F. 2d 1405, 1414 (3d Cir. 1989)*:
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> > "… creditors are obligated to take an active role in protecting their claims."

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The court in *Washington Mutual* recently compelled a noteholder group to make disclosures under Rule 2019(a)(4). This decision was incorrect, as well.

> The brief of Amici Curae Securities Industry and Financial Markets Association and Loan Syndications and Trading Association in support of the noteholder grou's objection to Scotia Pacific Company LLC's Motion for Order Compelling Ad Hoc Committee to Fully Comply with Rule 2019(a) by Filing Complete and Proper Verified Statement Disclosing Its Membership and Their Interests:
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> > … forcing disclosure of the type of information sought in the *Washington Mutual* case "will require public dissemination of highly confidential and proprietary information from certain stakeholders."

The *Washington Mutual* court also concluded that "collective action by creditors in a class implies some obligation to other members of that class."

> The *Washington Mutual* court did not point to any case in which noteholders were found to owe a fiduciary duty to other members of their class. Indeed, members of an ad hoc group of noteholders who do not constitute a committee, do not purport to represent any other creditors and are not empowered by any instrument to undertake such a representation, cannot be said to have violated an amorphpous obligation to other members of theiir class.

Section 107(b)(1) of the Code provides that "the bankruptcy court may … protect an entity with respect to a trade secret or confidential research, development, or commercial information."

See *In re Video Software Dealers Ass'n v. Orion Pictures Corp., 21 F. 3d 24, 27 (2d Cir. 1994)*. Courts have an unqualified obligation to protect such commercial information.

> "If the information fits any of the specified categories [in section 107(b)(1)], the court is required to protect a requesting interested party and has no discretion to deny the application."