

Equitable Subordination, Recharacterization and Other Claims Issues

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I. EQUITABLE SUBORDINATION

A. Key Principles:

- Equitable subordination is a remedial measure, not penal, employed to correct some wrong.
- By its nature, the remedy alters substantive rights, “subordinating” an otherwise valid claim to other claims.
- Focus is on the conduct of the parties. Must have both a “bad act” and actual harm to creditors.

B. Antecedents:

1. ***Pepper v. Litton*, 308 U.S. 295 (1939) (citations and footnotes omitted; emphasis added)**

Hence, this Court has held that a bankruptcy court has full power to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry [The Court] may ascertain the validity of liens, marshal them, and control their enforcement and liquidation. And the bankruptcy trustee may collaterally attack a judgment offered as a claim against the estate for the purpose of showing that it was obtained by collusion of the parties or is founded upon no real debt. *Id.* at 305-306.

That equitable power also exists in passing on claims presented by an officer, director, or stockholder in the bankruptcy proceedings of his corporation. The mere fact that an officer, director, or stockholder has a claim against his bankrupt corporation or that he has reduced that claim to judgment does not mean that the bankruptcy court must accord it *pari passu* treatment with the claims of other creditors. ***Its disallowance or subordination may be necessitated by certain cardinal principles of equity jurisprudence.*** *Id.* at 306.

As we have said, the bankruptcy court in passing on allowance of claims sits as a court of equity. Hence these rules governing the fiduciary responsibilities of directors and stockholders come into play on allowance of their claims in bankruptcy. ***In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice***

or unfairness is not done in administration of the bankrupt estate. Id. at 307-308.

2. ***Benjamin v. Diamond (In re Mobile Steel Company), 563 F.3d 692 (5th Cir. 1977)***

- Decided under the Bankruptcy Act, but universally cited and referred to in cases under the Bankruptcy Code.
 - Sets out “three cubed” principles:
 - * *Three things that must be present for equitable subordination to be appropriate*
 - * *Three principles of equitable subordination*
 - * *Three classes of misconduct that may lead to equitable subordination.*
- (a) Three things that must be present for equitable subordination to be appropriate:
- (i) The claimant must have engaged in some type of inequitable conduct.
 - (ii) The misconduct must have resulted in an injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant.
 - (iii) Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.
- (b) In determining whether the prior three conditions have been satisfied, three principles must be reviewed:
- (i) Inequitable conduct against the debtor or its creditors may be sufficient to warrant subordination of a claim regardless of whether it was related to the acquisition or assertion of the claim.
 - (ii) A claim should only be subordinated to the extent necessary to offset the harm which the debtor and its creditors have suffered on account of the inequitable conduct.
 - (iii) Allocation of the burden of proof: An objection based on equitable grounds must contain some substantial factual basis. The objecting party must come forward with enough evidence to overcome the prima facie validity of the claim, which places the burden back on the claimant to prove the validity and honesty of the claim.

- (c) For the purposes of an equitable subordination analysis, alleged misconduct can be divided into three classes.
 - (i) Initial undercapitalization.

[F]or the purposes of determining whether claims against the bankrupt estate held by organizers or shareholders should be subordinated on the ground of undercapitalization, the amount of capitalization that is adequate is “what reasonably prudent men with a general background knowledge of the particular type of business and its hazards would determine was reasonable capitalization in the light of any special circumstances which existed at the time of incorporation....” *Mobile Steel*, 563 F.2d at 703 (quoting N. Lattin, The Law of Corporations §§ 15, 77 (1971)). “Foremost among the standards which the general statement suggest are the following: (1) Capitalization is inadequate if, in the opinion of a skilled financial analyst, it would definitely be insufficient to support a business of the size and nature of the bankrupt in light of the circumstances existing at the time the bankrupt was capitalized; (2) Capitalization is inadequate if, at the time when the advances were made, the bankrupt could not have borrowed a similar amount of money from an informed outside source.” *Id.*

- (ii) Mismanagement, breach of fiduciary duties, and abuse of fiduciary position.
- (iii) Other allegedly inequitable conduct towards the debtor or creditors.

C. Other Equitable Subordination Cases

1. *United States Abatement Corp. v. Mobil Exploration & Producing U.S., Inc. (Matter of United States Abatement Corp.)*, 39 F.3d 556 (5th Cir. 1994) (restating and reinforcing *Mobile Steel* factors and holding that exercising contractual right of recoupment is not inequitable or sufficient “control” over the debtor to warrant equitable subordination).
2. *In re Lifschultz Fast Freight*, 132 F.3d 339 (7th Cir. 1997) (turning to the “most influential discussion of equitable subordination, the magisterial *Mobile Steel*” for discussion of three conditions that must exist before a claim may be equitably subordinated; also refusing to adopt a no-fault rule for equitable subordination, referring to a prior 7th Circuit case on tax penalties (*see also Sender* case, later in materials, on this point)).
3. *In re Kreisler*, 546 F.3d 863 (7th Cir. 2008) (reversing lower court’s equitable subordination of claim because, although misconduct had been committed, there was no injury or harm. “Only misconduct that harms

other creditors will suffice and there is no evidence that [the] scheme harmed any of their creditors”).

4. *Schubert v. Lucent Techs., Inc. (In re Winstar Comms., Inc.)*, 554 F.3d 382 (3rd. Cir. 2009) (affirming lower court’s equitable subordination, but holding that claims can only be subordinated to other claims, not to equity interests. Court also addressed the issue of quantification of the harm, and stated that “[a] bankruptcy court should . . . attempt to identify the nature and extent of the harm it intends to compensate in a manner that will permit a judgment to be made regarding the proportionality of the remedy to the injury that has been suffered by those who will benefit from the subordination.” *Id.* at 413 (quoting *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 991 (3rd. Cir. 1998))).
5. *Wooley v. Faulkner (In re SI Restructuring, Inc.)*, 532 F.3d 355 (5th Cir. 2008) (reinforcing *Mobile Steel* factors and the fact that there must be actual harm).

*****BONUS RULING***** “A deepening insolvency theory of damages has been criticized and rejected by many courts. We agree with the Third Circuit Court of Appeals, which recently concluded that deepening insolvency is not a valid theory of damages.” *Id.* at 363-64 (footnotes omitted).

Quoting *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 174 (Del. Ch. 2006), the Fifth Circuit stated: “Even when a firm is insolvent, the directors may, in the appropriate exercise of their business judgment, take action that might, if it does not pan out, result in the firm being painted in a deeper hue of red. The fact that the residual claimants of the firm at that time are creditors does not mean that the directors cannot choose to continue the firm’s operations in the hope that they can expand the inadequate pie such that the firm’s creditors get a greater recovery. By doing so, the directors do not become a guarantor of success.”

6. *Elway Co. LLP v. Miller (In re Elrod Holdings Corp.)*, 392 B.R. 110, 115 (Bankr. D. Del. 2008) (equitable subordination is not a cause of action specific to a debtor in possession or trustee; a secured creditor may seek equitable subordination of another creditor’s claim).

[A] secured creditor is capable of having suffered a particularized injury and . . . a court may fashion a remedy in response to that injury that benefits only the affected secured creditor and not all general creditors ultimately seeking to recover from a debtor’s estate. An injured secured creditor should be permitted to pursue its separate interest apart from the trustee. Accordingly, the Court holds that a secured creditor has standing to seek the equitable subordination of another secured creditor’s claim to the extent that it seeks relief for a particularized injury, which differs from the injury incurred by all creditors.

II. RECHARACTERIZATION

A. Key Principles:

- Focus is on substance of transaction rather than form.
- No wrong, inequitable conduct or harm is necessary to employ the remedy.
- No alteration of substantive rights; instead, merely recognizes the true nature of the transaction and the relative rights of the parties stemming therefrom.
- Arguably, it's not "re-" characterization, but straight-up "characterization."

B. Seminal Case: *Roth Steel Tube Co. v. Commissioner*, 800 F.2d 625 (6th Cir. 1986)

Tax case examining whether tax payer could take a bad debt deduction for un-repaid advances to a subsidiary, or whether the advances were capital contributions thus limiting the deduction only to the extent of capital gains. Looking to prior decision of 6th Circuit, *Smith v. Commissioner*, 370 F.2d 178, 180 (6th Cir. 1966), the court identified eleven (11) factors for use in determining whether an advance is a loan or a capital contribution:

Eleven factor test

(No one factor controls. Must look to the facts and circumstances of each case)

1. Names given to the instruments (if any) evidencing the indebtedness
2. Presence or absence of a fixed maturity date and schedule of payments
3. Presence or absence of a fixed interest rate and interest payments
4. Source of repayments
5. Adequacy or inadequacy of capitalization
6. Identity of interest between the creditor and stockholder
7. Security, if any, given for the advance
8. Corporation's ability to obtain financing from outside institutions
9. Extent to which the advances were subordinated to the claims of outside creditors
10. Extent to which the advances were used to acquire capital assets
11. Presence or absence of a sinking fund for repayments

Employing its 11 factor test, *Roth Steel* court found the advances to be capital contributions, upholding ruling of lower court.

C. Other Cases

1. *Bayer Corp. v. Masco Tech, Inc. (In re Autostyle Plastics, Inc.)*, 269 F.3d 726 (6th Cir. 2001):
 - Equitable subordination and recharacterization case
 - Adopts 5th Circuit’s *Mobile Steel* analysis for equitable subordination (fact of insider relationship alone is not enough for equitable subordination because insiders have the greatest interest in seeing success)
 - Adopts and follows the *Roth Steel* factors
 - Good discussion of loan participations
2. *Sender v. The Bronze Group, Ltd. (In re Hedged-Investments Assocs., Inc.)*, 380 F.3d 1292 (10th Cir. 2004)
 - Equitable subordination and recharacterization case
 - Adopts 5th Circuit’s *Mobile Steel* analysis for equitable subordination (citing to 10th Circuit’s prior decision in *Sloan v. Zions First Nat’l Bank (In re Castletons, Inc.)*, 990 F.2d 551, 559 (10th Cir. 1993))
 - Declines to extend “no fault” equitable subordination outside of the tax penalty area (*United States v. Reorganized CF&I Fabricators of Utah (In re CF&I Fabricators of Utah, Inc.)*, 53 F.3d 1155 (10th Cir. 1995)), and requires showing of inequitable conduct for equitable subordination; none shown
 - Refers to *Autostyle Plastics* and adopts a 13-factor test for recharacterization similar to *Autostyle* and *Roth Steel*:
 1. Names given to the certificates evidencing the indebtedness
 2. Presence or absence of fixed maturity date
 3. Source of payments
 4. Right to enforce payment of principal and interest
 5. Participation in management flowing as a result
 6. Status of contribution in relation to regular corporate creditors
 7. Intent of the parties
 8. “Thin” or adequate capitalization
 9. Identity of interest between creditor and stockholder
 10. Source of interest payments
 11. Ability of corporation to obtain loans from outside lending institutions
 12. Extent to which advance was used to acquire capital assets
 13. Failure of debtor to repay on the due date or to seek a postponement

- Request for recharacterization denied
3. *Cohen v. KB Mezzanine Fund II, LP (In re Submicron Sys. Corp.)*, 432 F.3d 448 (3d Cir. 2004)
 - Court declines to adopt any particular test, saying that it's the intent of the parties that really matters.
 - “No mechanistic scorecard suffices. And none should, for Kabuki outcomes elude difficult fact patterns [T]he determinative inquiry in classifying advances as debt or equity is the intent of the parties as it existed at the time of the transaction.”
 - Court declined to recharacterize or equitably subordinate.
 4. *Dornier GMBH v. The Official Committee of Unsecured Creditors (In re Official Committee of Unsecured Creditor For Dornier Aviation (North America), Inc.)*, 453 F.3d 225 (4th Cir. 2006)
 - Court declares that 4th Circuit agrees that recharacterization is “well within the broad powers afforded a bankruptcy court in § 105(a) and facilitates the application of the priority scheme laid out in § 726” and “is integral to the consistent application of the Bankruptcy Code” thus “join[ing] every other circuit that has considered the question.”
 - Adopts the *Autostyle* 11-part test (from *Roth Steel*)
 - Recharacterization affirmed based on insider status, lack of fixed maturity date, no requirement to repay until subsidiary became profitable, long history of sub's unprofitability and parent's assumption of sub's losses
 5. *Miller v. Dow (In re Lexington Oil and Gas Ltd.)*, 423 B.R. 353 (Bankr. E.D. Okla. 2010) (adopting 13-part *Hedged-Investments* test to re-characterize purported promissory notes as equity. Court added an additional element of “precision in the ‘loan’” transaction and found that unlike ordinary loan transactions, where all i's are dotted and t's are crossed before money is lent, the transaction before the court was sloppy, money was “lent” before definitive documentation was executed and the actions of the “lenders” otherwise did not square with the actions of a prudent lender).

D. No Recharacterization?

1. *Unsecured Creditors' Committees of Pacific Express, Inc. and Pacific Express Holding, Inc. v. Pioneer Commercial Funding Corp. (In re Pacific Express, Inc.)*, 69 B.R. 112, 115 (Bankr. 9th Cir. 1986) (citations omitted):

While the Code supports the court's ability to determine the amount and the allowance or disallowance of claims, those

provisions do not provide for the characterization of claims as equity or debt. The result achieved by such a determination, *i.e.*, subordination, is governed by 11 U.S.C. Section 510(c). Where there is a specific provision governing these determinations, it is inconsistent with the interpretation of the Bankruptcy Code to allow such determinations to be made under different standards through the use of the court's equitable powers.

The court viewed the matter as an issue of equitable subordination rather than characterization (or recharacterization), confusing the issues and the remedies of each. But regardless, *Pacific Express* is still the governing law in the 9th Circuit, so recharacterization is theoretically not available in that Circuit.

2. Has *Pacific Express* been implicitly overruled by the Supreme Court?

In *Travelers Cas. & Surety Co. of America v. Pacific Gas & Elec. Co.*, 127 S. Ct. 1199 (2007), the Supreme Court reinforced that during the claims allowance process, courts must look to state law to determine the validity and enforceability of a claim.

At least one commentator has suggested that following the Supreme Court's dictate in *Travelers*, which requires bankruptcy courts to look to non-bankruptcy law to determine the validity or nature of a claim, necessarily allows (if not requires) the court to engage in recharacterization, as many states' laws and judicial decisions give courts the power to distinguish between loans and capital contributions. See generally Neil M. Peretz, *Recharacterization in the Ninth Circuit: Has the Supreme Court Finally Derailed the Pacific Express*, 17 Norton Jrl. of Bk. Law and Prac. 297 (April 2008).

III. ANOTHER POSSIBLE THEORY: DE FACTO PARTNERSHIP

***Lain v. ZC Specialty Ins. Co. (In re Senior Living Props., LLC)*, 309 B.R. 223 (Bankr. N.D. Tex. 2004)**

The chapter 11 plan trustee sued ZC Specialty Insurance Company ("ZC") for a declaration that ZC was a partner with SLP in the ownership and operation of SLP's nursing homes in Texas and Illinois and that, as a result, ZC was liable for all of SLP's debts. ZC countered that it merely held a debtor-creditor relationship with SLP, due to providing a surety bond for the payment of a large portion of SLP's mortgage owing to GMAC Commercial Mortgage Corporation ("GMAC").

The focus of the parties, and the court's decision, was the contractual relationship between the parties and specifically, the terms of a certain Reimbursement Agreement and related agreements and documents between the parties. The court applied Illinois partnership law, as the Reimbursement Agreement contained an Illinois choice of law provision, and found that under the Illinois Uniform Partnership Act, among other things and with certain exceptions, when a person receives a share of the profits of a business it will be considered prima facie evidence that such person is a partner in the business.

Court found, *inter alia*, that under the terms of the Reimbursement Agreement, the fees being paid to ZC were from free cash flow (*i.e.*, profits) instead of operating revenue, and was thus *prima facie* evidence that ZC was SLP's partner under Illinois law.

**IV. DO BAD ACTS TRAVEL WITH THE CLAIM?
(Put another way, can a transferee be equitably subordinated?)**

Enron Corp. v. Springfield Assocs., L.L.C. (In re Enron Corp.), 379 B.R. 425 (S.D.N.Y. 2007)

The debtor filed an adversary proceeding against transferee of creditors' claims, seeking equitable subordination of the claims based on the acts of the transferor, and disallowance of the claims under section 502(d) on the grounds that the transferor had received an avoidable transfer that had not been repaid.

Reversing the bankruptcy court, the district court held that equitable subordination and disallowance under 502(d) are disabilities that are personal in nature, and do not inhere to or travel with the claim *if it is sold*. In the context of an assignment, however (or another context wherein the transferee stands in the shoes of the transferor), the transferee takes the claim subject to any disabilities of the transferor.

Policy Concerns raised by the parties and addressed by the court:

- Claims "washing"
- Time value of money in pursuing direct action against transferor for fraud
- Insolvency of the transferor

V. RULE 2019 DISCLOSURE OBLIGATIONS

A. Text of Bankruptcy Rule 2019(a)

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

(a) *Data Required.* In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 or 1114 of the Code, 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 alleged 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 trustee, and, in the case of a committee, the name or 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; and

- (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.* On motion of any party in interest or on its own initiative, the court may (1) determine whether there has been a failure to comply with the provisions of subdivision (a) of this rule or with any other applicable law regulating the activities and personnel of any entity, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that entity, committee, or indenture trustee to be heard further or to intervene in the case; (2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any entity or committee in contemplation or in the course of a case under the Code and grant appropriate relief; and (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 § 1125(b) of the Code.

B. Should Ad Hoc and other unofficial committees or groups be compelled to make full Rule 2019 disclosures? Recent case law is split on both the answer and the rationale.

1. Rule 2019 disclosures are required.

- (a) *In re Northwest Airlines Corp.*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007) (Ad Hoc Equity Committee)

Looking to the plain language of the Rule, court required compliance by the self-styled “ad hoc committee,” finding that the disclosure made by the committee’s law firm was deficient. Court overruled the contention that further disclosure was not required because (i) no committee member represented any entity other than itself and (ii) although the law firm represented more than one creditor or equity security holder, the firm itself did not hold a claim or interest against the debtor. “Where an *ad hoc* committee has appeared as such, the committee is required to provide the information plainly required by Rule 2019 on behalf of each of its members.”

Court subsequently denied committee's request to file the Rule 2019 disclosures under seal. "By acting as a group, the members of the shareholders' Committee subordinated to the requirements of Rule 2019 their interest in keeping private the prices at which they individually purchased or sold the Debtors' securities. This is not unfair because their negotiating decisions as a Committee should be based on the interests of the entire shareholders' group, not their individual financial advantage." *In re Northwest Airlines Corp.*, 363 B.R. 704, 708 (Bankr. S.D.N.Y. 2007).

(b) *In re Washington Mutual, Inc.*, 419 B.R. 271 (Bankr. D. Del. 2009) (Noteholders Group)

Court found that the noteholder group "possesses virtually all the characteristics typically found in an ad hoc committee, save the name." Court further held that "collective action by creditors through the use of ad hoc committees or groups allows creditors to utilize other group members' holdings to obtain a greater degree of influence in a bankruptcy case than single creditors acting alone. As such, the policies behind the disclosure requirements of Rule 2019 are as relevant today as they were 70 years ago [when originally enacted, to combat abuses by protective committees]."

(c) *In re Accuride Corp.*, Case No. 09-13449 (Bankr. D. Del. Jan. 20, 2010) (Ad Hoc Noteholder Group)

Motion of Official Equity Committee to compel Rule 2019 disclosures by Ad Hoc Noteholder Group granted. Court stated it was in agreement with the *Washington Mutual* and *Northwest* decisions that the Ad Hoc Committee was an "entity" and that the history and development of Rule 2019 since the 1930's required disclosure, which is a central element of the Bankruptcy Code. Court refused to bar the Ad Hoc Committee's participation or strike the appearance as a result of the delay in compliance.

2. No Rule 2019 disclosures required

(a) *In re Scotia Dev. LLC*, Case No. 07-21027 (Bankr. S.D. Tex. April 17, 2007) (Ad Hoc Noteholder Group)

Court found the ad hoc group was not a "committee" within the meaning of Rule 2019 and thus not subject to the Rule's disclosure requirements. Court's very brief order did not explain its rationale or cite to any authorities.

(b) *In re Premier Int'l Holdings, Inc.*, 423 B.R. 58 (Bankr. D. Del. 2010) (Informal Noteholder Committee)

Looking to the plain language of the words "committee" and "represent," as defined in the Oxford Shorter English Dictionary, court found that compliance with Rule 2019 was not required. To be a "committee" requires an appointment, by either the larger group or by operation of law.

To “represent” requires the appointment of an agent by another to assert his or her rights. Here, the informal noteholder group was not “appointed” by the larger overall group of holders, and thus did not represent any persons other than its members either by consent or operation of law. To buttress its conclusion, court looked to prior law and purpose for predecessor rule, and found that none of the evils to which the prior rule was directed — those created and embodied by protective committees — exist today.

(c) *In re Philadelphia Newspapers, LLC*, 422 B.R. 553 (Bankr. E.D. Pa. 2010) (Steering Group of Prepetition Lenders)

Court’s reasoning is essentially the same as, and relies heavily upon, *Premier*.

C. Proposed Amendments to Rule 2019 (See attachment)

1. Adoption of Amendments. On May 27, 2010, after written comment and public meetings, the Judicial Conference Advisory Committee on Bankruptcy Rules issued its report to the Judicial Conference Standing Committee on Rules of Practice and Procedure recommending adoption of amendments to certain Bankruptcy Rules, including Rule 2019, as modified by the Advisory Committee’s Report. In September 2010, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States issued its report to the Chief Justice and the members of the Judicial Conference recommending adoption of, *inter alia*, an amended Rule 2019, per the Advisory Committee’s Report. If approved and adopted, new Rule 2019 will go into effect on December 1, 2011.
2. Nature of Rule 2019 Amendments. New title of Rule: “Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases.” The Advisory Committee Note (*see* Attachment) provides that:

The rule is substantially amended to expand the scope of its coverage and the content of its disclosure requirements. Stylistic and organizational changes are also made in order to provide greater clarity. Because the rule no longer applies only to representatives of creditors and equity security holders, the title of the rule has been changed to reflect its broadened focus on disclosure of financial information in chapter 9 and chapter 11 cases.

- (a) New “definition” section added defining the words “disclosable economic interest” and “represent” or “represents.”

“Represents” now means “to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another.”

- (b) Coverage: Subsection (b)(1) expands the Rule’s coverage to an entity, group or committee that represents one or more creditors or equity security holders, and groups or committees that consist of more than one creditor or equity security holder.

Subsection (b)(2) excludes the following from the disclosure requirements unless the court orders otherwise: indenture trustees, an agent under a credit agreement, a class action representative and a governmental unit that is not a person.

- (c) Information required to be disclosed.

- facts and circumstances surrounding the formation of the unofficial group or committee, including name of each entity at whose instance the group or committee was formed or for whom it has agreed to act, other than with respect to an official committee ((c)(1)(A)), or with regard to an entity, the employment of the entity, including the name of each creditor or equity security holder at whose instance the employment was arranged ((c)(1)(B)).
- to the extent not disclosed under subdivision (c)(1), name and address, nature and amount of each “disclosable economic interest” held as of the date of employment or formation and the date of acquisition by quarter and year of each disclosable economic interest with regard to each member that claims to represent any entity in addition to the members of the group or committee (except if acquired more than one year before the petition date);
- If not disclosed under subdivision (c)(1) or (c)(2), with regard to each represented creditor or equity security holder (except for an official committee), name, address, nature and amount of disclosable economic interest and copy of instrument authorizing the group to act.

- (d) Supplemental statement is required to be filed at the time a position is taken before the court or votes are solicited if any facts have materially changed since the time of the last statement.

- (e) Sanctions. If court determines there has been a failure to comply (either on its own motion or motion of a party in interest), it may (i) refuse the entity or group to be heard, (ii) hold invalid any authority, acceptance, rejection or objection given, procured, or received by the group or entity, or (iii) grant other appropriate relief.

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MEMORANDUM

DATE: May 27, 2010

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Laura Taylor Swain, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 29 and 30, 2010, in New Orleans, Louisiana. Among the matters before the Committee were the proposed amendments and new rules that were published for public comment in August 2009. More than 150 written comments were submitted in response to the publication. The Committee held a hearing in New York City on February 5, 2010. Fifteen witnesses testified on the proposed amendments to two rules and on one proposed new rule. The Committee also conducted a telephonic hearing with one witness on December 22, 2009.

Through a series of telephonic subcommittee meetings and at its New Orleans meeting, the Committee carefully considered all of the comments and testimony it had received and, as is discussed below, it is recommending changes to several of the published rules in response. The Committee also studied a number of new proposals for amendments to the Bankruptcy Rules and Forms.

The Committee took action on the following matters, which it presents to the Standing Committee with the indicated recommendations:

(a) approval for transmission to the Judicial Conference of published amendments to Rules 2003, 2019, 3001, 4004, 6003, Official Forms 22A, 22B, and 22C, and new Rules 1004.2 and 3002.1;

(b) approval for transmission to the Judicial Conference without publication of amendments to Official Forms 20A and 20B; and

(c) approval for publication for comment of amendments to Rules 3001, 7054, and 7056, and Official Forms 10 and 25A, and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2).

After a discussion of the action items listed above, this report presents information on the following topics: the Committee's continued work on a possible revision of the bankruptcy appellate rules, the status of the Forms Modernization Project, and changes in the Committee's membership.

II. Action Items

A. Items for Final Approval

I. Amendments and New Rules Published for Comment in August 2009. The Advisory Committee recommends that the proposed amendments and new rules that are summarized below be approved and forwarded to the Judicial Conference. The texts of the amended rules and forms and of the new rules are set out in Appendix A.

Rule 1004.2 is new. Subdivision (a) requires that the entity filing a chapter 15 petition identify in the petition the country in which the debtor has the center of its main interests ("COMI"). It also requires that the filer list each country in which a case involving the debtor is pending. Subdivision (b) sets a deadline for challenging the statement of the debtor's COMI. In response to comments received after initial publication of the proposed rule in August 2008, the Committee changed the deadline in subdivision (b) for filing a motion challenging the COMI designation from "60 days after the notice of the petition has been given" to "no later than seven days before the date set for the hearing on the petition."

No comments were submitted on the proposed rule in response to the August 2009 publication. Only stylistic changes were made after that publication. The Committee voted unanimously to approve it.

Rule 2003 is amended in subdivision (e) to require the presiding official at a meeting of creditors to file a statement specifying the date and time to which the meeting is adjourned. This requirement will ensure that the record clearly reflects whether the meeting of creditors was concluded or adjourned to another day.

Nine comments were submitted about this proposed amendment. Eight of the comments expressed support for the amended rule as proposed. These comments were submitted by six individual members of the consumer bar, by Bankruptcy Judge Marvin Isgur of the Southern District of Texas, and by David Shaev on behalf of the National Association of Consumer Bankruptcy Attorneys.

The ninth comment was submitted by Deborah A. Butler, Associate Chief Counsel of the IRS, on behalf of the Office of Chief Counsel. She recommended revising the proposed amendment to require the official presiding at the meeting of creditors to specify whether the meeting is being held open pursuant to § 1308(b) to allow a taxpayer additional time to file a tax return, or adjourned for some other purpose. Only if the trustee declared that the meeting was being “held open” under § 1308(b) would the debtor be protected from dismissal or conversion under § 1307(e) for the failure to file a tax return within the time specified by § 1308.

The Committee, by a 9 to 4 vote, approved the amendment to Rule 2003(e) as published, with a clarifying change to the Committee Note. It concluded that holding open a meeting is equivalent to adjourning it to a specific date and that a chapter 13 case should not be subject to conversion or dismissal merely because of the language the trustee uses in adjourning a meeting of creditors.

Rule 2019 is amended to expand the scope of the rule’s coverage and the content of its disclosure requirements. As amended, the rule requires disclosures in chapter 9 and chapter 11 cases by committees, groups, or entities that consist of or represent more than one creditor or equity security holder. The type of financial information that must be disclosed is expanded to extend to all “disclosable economic interests,” a term that is broadly defined in subsection (a) to include, not just claims or interests, but all economic rights and interests that could affect the legal and strategic positions that a stakeholder takes in a case. Stylistic and organizational changes are made throughout the rule, resulting in new subdivisions (c), (d), and (e).

Publication of the proposed amendments to this rule attracted much attention. Seven witnesses presented testimony concerning the Rule 2019 amendments at the Committee’s hearing in New York on February 5, 2010, and 14 individuals or organizations submitted written comments on the amendments. The major topics addressed by the testimony and comments are discussed below.

Price and date of acquisition information. Most of the opposition to the published amendments focused on proposed Rule 2019(c)(2)(B) and (C) and (c)(3)(B) and (C). As published, these provisions would have required the disclosure of the date when each disclosable economic interest was acquired (if not more than one year before the filing of the petition) and, if directed by the court, the amount paid for each disclosable economic interest. These disclosure obligations would have applied to each covered entity, indenture trustee, member of a group or committee, and to each creditor or equity security holder represented by a covered entity, indenture trustee, or committee or group (other than an official committee).

The objectors to these provisions raised a consistent set of concerns:

- The price paid for a claim or interest is generally irrelevant to any issue in a chapter 11 case.
- If this information should ever be relevant, it could be obtained through discovery or pursuant to the court's inherent authority to order its disclosure.
- Pricing information is highly guarded by distressed debt purchasers. Requiring its disclosure will allow competing firms to determine the disclosing party's trading strategy.
- Parties in interest engage in the strategic use of the authority to compel the disclosure of this confidential information.
- The existence of this requirement, proposed to be made explicitly applicable to *ad hoc* committees, will discourage the formation of such groups and will decrease the purchasing of distressed debt.
- The disclosure of the date of purchase enables other parties to determine the purchase price. Thus the required disclosure in all cases of the date of purchase will result in the acquisition price being revealed, whether or not the court directs its disclosure.

Bankruptcy Judge Robert Gerber of the Southern District of New York testified in favor of the published amendments, including the provisions for disclosure of date and price of acquisition. He indicated, however, that a more general disclosure of the time of acquisition and a required showing of relevance of price might be sufficient to serve the rule's purposes.

Disclosure regarding clients who do not actively participate in the case. The National Bankruptcy Conference ("NBC") commented that an entity, such as a law firm, should not be made subject to the rule when it represents more than one client with respect to a chapter 11 case but it does not appear in court to seek or oppose the granting of relief on behalf of more than one of those clients. NBC argued that if a client remains passive in the case, there is no reason to require the public disclosure of its holdings merely because it retained a firm that happens to represent one or more other creditors or equity security holders.

Exclusions from the rule. Several comments asserted that administrative agents under credit agreements should not be required to disclose information regarding each of the lenders in its syndicated credit facility; others argued further that such agents should be exempted altogether from the rule's coverage. It was argued that these entities are not agents in the traditional sense of that term since the lenders are free to take positions adverse to the agent. Furthermore, it was contended, the lenders themselves are often not acting in concert with each other and so should not be covered by the rule just because there happens to be an administrative agent under the credit agreement.

Somewhat similarly, the argument was made that indenture trustees should not be required to make disclosures regarding every bondholder under the applicable indenture merely because the bonds were issued under an indenture. Another comment stated that the rule should be revised to make clear that it does not cover class action representatives.

Supplemental statements. Several comments addressed the proposed requirement in subdivision (d) that supplemental verified statements be filed monthly, setting forth any material changes in the facts disclosed in a previously filed statement. The comments expressed concern that the requirement would be overly burdensome on the parties and the court. Some commentators sought clarification that a supplemental statement would not have to be filed if no changes had occurred. One comment suggested that verified statements be supplemented only when the group, committee, or entity that filed the original statement was seeking to participate in matters before the court. That change, it was argued, would relieve parties no longer active in the case from the continuing obligation to file supplemental statements.

The enforcement provision of subdivision (e). The published draft of amended Rule 2019 proposed mostly organizational and stylistic changes to the existing provisions of Rule 2019(b), which authorize sanctions for the failure to comply with the rule's requirements. Under the revised rule, those provisions are set forth in subdivision (e). Although this part of the rule did not attract attention at the New York hearing, two sets of written comments criticized the breadth of proposed subdivision (e). Like the existing rule, the proposed subdivision would have authorized the court to determine and impose sanctions for violations of applicable law other than Rule 2019. It would also continue to specify certain materials that the court could examine in making its determination.

Both the comment submitted by the Loan Syndications and Trading Association ("LSTA") and the Securities Industry and Financial Markets Association ("SIFMA") and the comment submitted by the Insolvency Law Committee of the Business Law Section of the California State Bar questioned the authority of bankruptcy courts to determine "whether there has been any failure to comply with any other applicable law regulating the activities and personnel of any entity, group, committee, or indenture trustee" and "whether there has been any impropriety in connection with any solicitation." LSTA and SIFMA also argued that the materials that the court can examine in making a determination under this subdivision should be left to the Federal Rules of Evidence.

Disclosure by entities that are seeking or opposing relief. As published, Rule 2019(b) would have authorized the court, on motion of a party in interest or on its own motion, to require disclosure of some or all of the information specified in subdivision (c)(2) by an entity that seeks or opposes the granting of relief. This part of the rule would apply to individual entities that do not represent others. While disclosure by such entities would not be routinely required, the provision would authorize the court to order disclosure when knowledge of a party's economic stake in the debtor would assist the court in evaluating the party's arguments.

Two commentators expressed concerns about this part of the proposed rule. The Clearing House Association argued that the addition of the provision was inconsistent with the original purpose of the rule – protection of represented parties; that the information could be obtained by means of discovery or Rule 2004 if relevant; and that the provision would lead to abusive litigation by parties seeking merely to harass opponents. Bankruptcy Judge Michael Lynn of the Northern District of Texas also expressed concern about the likely tactical use of this provision. He suggested

that an order for such disclosure by an entity that is not representing others should issue only on the court's own motion, or on motion by the U.S. trustee, the case trustee, or an examiner.

Repeal of Rule 2019 or adoption of an alternative to its verified statement requirement. The Committee's consideration of Rule 2019 was prompted by a suggestion of two trade associations that the rule be repealed. After publication of the proposed amendments, however, those organizations no longer advocated repeal. The only commentator who supported repeal of Rule 2019 was attorney Thomas Lauria. In both his testimony and his written comments, he argued that the rule chills participation by *ad hoc* committees in chapter 11 cases, that it is used improperly for tactical purposes by parties, and that its valid purpose can be fulfilled by the use of discovery. Another attorney, Martin Bienenstock, suggested that parties be allowed to satisfy Rule 2019 by filing three certifications rather than the verified statement required by the rule. The certifications would require a party to state the amount of its pre- and postpetition claims against the debtor and whether it held economic interests in the debtor or in an affiliate of the debtor that would increase in value if the debtor's estate decreased in value.

The overwhelming majority of commentators supported a clarified and reinvigorated Rule 2019, even if they opposed specific aspects of the proposed amendments. They favored providing greater transparency in the chapter 11 reorganization process and permitting creditors and equity security holders to have access to information about possible conflicts of interest of those purporting to represent them.

The Committee's careful consideration of all the views expressed in the testimony and comments led it to make several changes to the published rule. In addition to stylistic changes, the Committee unanimously recommends that revised Rule 2019 be approved with the following changes made after publication, all of which are responsive to suggestions made in the comments and testimony and narrow in some respects the provisions of the published rule:

- the addition of a definition of "represent" or "represents" in subdivision (a)(2) that limits the meaning of the terms to taking a position before the court or soliciting votes on a plan, thereby removing entities that are only passively involved in a case from coverage under the rule;
- the addition of a provision in subdivision (b)(1) providing that the covered groups, committees, and entities are those that represent or consist of multiple creditors or equity security holders that act in concert to advance their common interests and are not composed entirely of affiliates or insiders of one another;
- the elimination of the provision in subdivision (b) of the published amendments that authorized the court to require disclosure by an entity that does not represent anyone else;
- the addition of subdivision (b)(2), which excludes certain entities from the rule's disclosure requirements unless the court orders otherwise;
- the elimination from subdivision (c) of the authorization for the court to order the disclosure of the amount paid for a disclosable economic interest;

- with respect to disclosure of the date of acquisition of a disclosable economic interest, the limitation of the requirement in subdivision (c) to the quarter and year of acquisition and the restriction of its application to an unofficial group or committee that claims to represent any entity other than its members;
- revision of subdivision (d) to require the filing of supplemental statements only when a covered entity, group, or committee is taking a position before the court or solicits votes on a plan, and any fact disclosed in its most recently filed statement has changed materially;
- revision of subdivision (e) to limit the scope of this sanctions provision to failures to comply with the provisions of Rule 2019 and to eliminate the enumeration of materials the court may examine in making a determination of noncompliance; and
- the addition of a sentence to the Committee Note stating that the rule does not affect the right to obtain information by means of discovery or as ordered by the court under authority outside the rule.

Rule 3001 is amended to prescribe in greater detail the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the possible consequences of failing to provide the required information. As published, existing subdivision (c) was redesignated as (c)(1), and it included a new provision applicable to a claim based on an open-end or revolving consumer credit agreement. The new clause would have required the proof of claim to be accompanied by the last account statement sent to the debtor prior to the filing of the bankruptcy petition. Based on the testimony and comments that were submitted, the Committee voted to withdraw that proposed provision. In its place, the Committee recommends approval for publication of a new subdivision (c)(3), which is discussed below in section II B of this report.

New subdivision (c)(2) requires additional information to be filed with a proof of claim in a case in which the debtor is an individual. This additional information includes an itemization of interest, fees, expenses, and other charges incurred prior to the petition and included in a claim; a statement of the amount necessary to cure any prepetition default on a claim secured by a security interest in the debtor's property; and, for a claim secured by a security interest in the debtor's principal residence, an escrow account statement as of the petition date if an escrow account has been established. Subdivision (c)(2) also authorizes the imposition of sanctions on a creditor who fails to provide the information required by this subdivision.

The Committee received numerous comments and testimony favoring and opposing the published version of Rule 3001(c)(2) – both as applied to credit card and other unsecured claims and as applied to home mortgage claims. They are summarized below.

Requirement in subparagraph (A) for itemized statement of interest, fees, expenses, or charges. Most of the comments concerning this provision related to unsecured claims, particularly those based on credit card debt. Despite the current and longstanding requirement of the proof of claim form that an “itemized statement of interest or charges” be attached if the “claim includes interest or other charges in addition to the principal amount of claim,” commentators opposing this

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35 ~~impropriety in connection with any solicitation and, if it so~~
36 ~~determines, the court may refuse to permit that entity,~~
37 ~~committee, or indenture trustee to be heard further or to~~
38 ~~intervene in the case; (2) examine any representation~~
39 ~~provision of a deposit agreement, proxy, trust mortgage, trust~~
40 ~~indenture, or deed of trust, or committee or other~~
41 ~~authorization, and any claim or interest acquired by any entity~~
42 ~~or committee in contemplation or in the course of a case~~
43 ~~under the Code and grant appropriate relief; and (3) hold~~
44 ~~invalid any authority, acceptance, rejection, or objection~~
45 ~~given, procured, or received by an entity or committee who~~
46 ~~has not complied with this rule or with § 1125(b) of the Code.~~

**Rule 2019. Disclosure Regarding Creditors and Equity
Security Holders in Chapter 9 and Chapter 11 Cases**

1 (a) DEFINITIONS. In this rule the following terms
2 have the meanings indicated:

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3 (1) “Disclosable economic interest” means any
4 claim, interest, pledge, lien, option, participation, derivative
5 instrument, or any other right or derivative right granting the
6 holder an economic interest that is affected by the value,
7 acquisition, or disposition of a claim or interest.

8 (2) “Represent” or “represents” means to take a
9 position before the court or to solicit votes regarding the
10 confirmation of a plan on behalf of another.

11 **(b) DISCLOSURE BY GROUPS, COMMITTEES, AND**
12 **ENTITIES.**

13 (1) In a chapter 9 or 11 case, a verified statement
14 setting forth the information specified in subdivision (c) of
15 this rule shall be filed by every group or committee that
16 consists of or represents, and every entity that represents,
17 multiple creditors or equity security holders that are (A)
18 acting in concert to advance their common interests.

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19 and (B) not composed entirely of affiliates or insiders of one
20 another.

21 (2) Unless the court orders otherwise, an entity is
22 not required to file the verified statement described in
23 paragraph (1) of this subdivision solely because of its status
24 as:

25 (A) an indenture trustee;

26 (B) an agent for one or more other entities
27 under an agreement for the extension of credit;

28 (C) a class action representative; or

29 (D) a governmental unit that is not a person.

30 (c) INFORMATION REQUIRED. The verified
31 statement shall include:

32 (1) the pertinent facts and circumstances concerning:

33 (A) with respect to a group or committee, other
34 than a committee appointed under § 1102 or § 1114 of the
35 Code, the formation of the group or committee, including the

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36 name of each entity at whose instance the group or committee
37 was formed or for whom the group or committee has agreed
38 to act; or

39 (B) with respect to an entity, the employment
40 of the entity, including the name of each creditor or equity
41 security holder at whose instance the employment was
42 arranged;

43 (2) if not disclosed under subdivision (c)(1), with
44 respect to an entity, and with respect to each member of a
45 group or committee;

46 (A) name and address;

47 (B) the nature and amount of each disclosable
48 economic interest held in relation to the debtor as of the date
49 the entity was employed or the group or committee was
50 formed; and

50 (C) with respect to each member of a group or
51 committee that claims to represent any entity in addition to

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52 the members of the group or committee, other than a
53 committee appointed under § 1102 or § 1114 of the Code, the
54 date of acquisition by quarter and year of each disclosable
55 economic interest, unless acquired more than one year before
56 the petition was filed;

57 (3) if not disclosed under subdivision (c)(1) or (c)(2),
58 with respect to each creditor or equity security holder
59 represented by an entity, group, or committee, other than a
60 committee appointed under § 1102 or § 1114 of the Code:

61 (A) name and address; and

62 (B) the nature and amount of each disclosable
63 economic interest held in relation to the debtor as of the date
64 of the statement; and

65 (4) a copy of the instrument, if any,
66 authorizing the entity, group, or committee to act on behalf of
67 creditors or equity security holders.

68 (d) SUPPLEMENTAL STATEMENTS. If any fact

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69 disclosed in its most recently filed statement has changed
70 materially, an entity, group, or committee shall file a verified
71 supplemental statement whenever it takes a position before
72 the court or solicits votes on the confirmation of a plan. The
73 supplemental statement shall set forth the material changes in
74 the facts required by subdivision (c) to be disclosed.

75 (e) DETERMINATION OF FAILURE TO COMPLY;
76 SANCTIONS.

77 (1) On motion of any party in interest, or on its own
78 motion, the court may determine whether there has been a
79 failure to comply with any provision of this rule.

80 (2) If the court finds such a failure to comply, it may:

81 (A) refuse to permit the entity, group,

82 or committee to be heard or to intervene in the case;

83 (B) hold invalid any authority, acceptance,

84 rejection, or objection given, procured, or received by the

85 entity, group, or committee; or

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(C) grant other appropriate relief.

COMMITTEE NOTE

The rule is substantially amended to expand the scope of its coverage and the content of its disclosure requirements. Stylistic and organizational changes are also made in order to provide greater clarity. Because the rule no longer applies only to representatives of creditors and equity security holders, the title of the rule has been changed to reflect its broadened focus on disclosure of financial information in chapter 9 and chapter 11 cases.

Subdivision (a). The content of subdivision (a) is new. It sets forth two definitions. The first is the definition of the term “disclosable economic interest,” which is used in subdivisions (c)(2) and (c)(3). The definition of the term is intended to be sufficiently broad to cover any economic interest that could affect the legal and strategic positions a stakeholder takes in a chapter 9 or chapter 11 case. A disclosable economic interest extends beyond claims and interests owned by a stakeholder and includes, among other types of holdings, short positions, credit default swaps, and total return swaps.

The second definition is of “represent” or “represents.” The definition provides that representation requires active participation in the case or in a proceeding on behalf of another entity – either by taking a position on a matter before the court or by soliciting votes on the confirmation of a plan. Thus, for example, an attorney who is retained and consulted by a creditor or equity security holder to monitor the case, but who does not advocate any position before the court or engage in solicitation activities on behalf of that client, does not represent the creditor or equity security holder for purposes of this rule.

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Subdivision (b). Subdivision (b)(1) specifies who is covered by the rule's disclosure requirements. In addition to an entity, group, or committee that *represents* more than one creditor or equity security holder, the amendment extends the rule's coverage to groups or committees that *consist of* more than one creditor or equity security holder. The rule no longer excludes official committees, except as specifically indicated. The rule applies to a group of creditors or equity security holders that act in concert to advance common interests (except when the group consists exclusively of affiliates or insiders of one another), even if the group does not call itself a committee.

Subdivision (b)(2) excludes certain entities from the rule's coverage. Even though these entities may represent multiple creditors or equity security holders, they do so under formal legal arrangements of trust or contract law that preclude them from acting on the basis of conflicting economic interests. For example, an indenture trustee's responsibilities are defined by the indenture, and individual interests of bondholders would not affect the trustee's representation.

Subdivision (c). Subdivision (c) sets forth the information that must be included in a verified statement required to be filed under this rule. Subdivision (c)(1) continues to require disclosure concerning the formation of a committee or group, other than an official committee, and the employment of an entity.

Subdivision (c)(2) specifies information that must be disclosed with respect to the entity and each member of the committee and group filing the statement. In the case of a committee or group, the information about the nature and amount of a disclosable economic interest must be specifically provided on a member-by-member basis, and not in the aggregate. The quarter and

year in which each disclosable economic interest was acquired by each member of a committee or group (other than an official committee) that claims to represent others must also be specifically provided, except for a disclosable economic interest acquired more than a year before the filing of the petition. Although the rule no longer requires the disclosure of the precise date of acquisition or the amount paid for disclosable economic interests, nothing in this rule precludes either the discovery of that information or its disclosure when ordered by the court pursuant to authority outside this rule.

Subdivision (c)(3) specifies information that must be disclosed with respect to creditors or equity security holders that are represented by an entity, group, or committee. This provision does not apply with respect to those represented by official committees. The information required to be disclosed under subdivision (c)(3) parallels that required to be disclosed under subdivision (c)(2)(A) and (B). The amendment also clarifies that under (c)(3) the nature and amount of each disclosable economic interest of represented creditors and shareholders must be stated as of the date of the verified statement.

Subdivision (c)(4) requires the attachment of any instrument authorizing the filer of the verified statement to act on behalf of creditors or equity security holders.

Subdivision (d). Subdivision (d) requires the filing of a supplemental statement at the time an entity, group, or committee takes a position before the court or solicits votes on a plan if there has been a material change in any of the information contained in its last filed statement. The supplemental verified statement must set forth the material changes that have occurred regarding the information required to be disclosed by subdivision (c) of this rule.

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Subdivision (e). Subdivision (e) addresses the court's authority to determine whether there has been a violation of this rule and to impose a sanction for any violation. It no longer addresses the court's authority to determine violations of other applicable laws regulating the activities and personnel of an entity, group, or committee.

Changes Made After Publication

Subdivision (a). A definition of "represent" or "represents" was added, and the subdivision was divided into paragraphs (1) and (2).

Subdivision (b). The provision authorizing the court to require disclosure by an entity that seeks or opposes the granting of relief was deleted.

In the paragraph now designated as (1), language was added providing that groups, committees, and entities are covered by the rule only if they consist of or represent multiple creditors or equity security holders "that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another." The phrase "and, unless the court directs otherwise, every indenture trustee," was deleted.

Subdivision (b)(2) was added to specify entities that are not required to file a verified statement merely because they act in one of the designated capacities.

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Subdivision (c). The authorization in subdivision (c)(2)(B) and (c)(3)(B) for the court to require the disclosure of the amount paid for a disclosable economic interest was deleted.

The requirement in subdivision (c)(2)(C) and (c)(3)(C) for disclosure of the acquisition date of each disclosable economic interest was modified. The requirement was made applicable only to members of an unofficial group or committee that claims to represent any entity in addition to the members of the group or committee, and the date that must be disclosed was limited to the quarter and year of acquisition.

Subdivision (d). The requirement of monthly supplementation of a verified statement was modified to require supplementation whenever a covered group, committee, or entity takes a position before the court or solicits votes on the confirmation of a plan and there has been a material change in any fact disclosed in its most recently filed statement.

Subdivision (e). The provisions published as subdivision (e)(1)(B) and (C), which authorized the court to determine failures to comply with legal requirements other than those imposed by Rule 2019, were deleted.

Subdivision (e)(2), which enumerated the materials the court could examine in making a determination of noncompliance, was deleted.

Committee Note. In the discussion of the definition of “disclosable economic interest,” the specific examples of “short positions, credit default swaps, and total return swaps” were added to illustrate the breadth of the definition. A sentence was added to the discussion of subdivision (c)(2) that states that the rule does not affect

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the right of a party to obtain information by means of discovery or as ordered by the court under any authority outside the rule.

Other changes. Stylistic and organizational changes were made throughout the rule and Committee Note to reduce the length and clarify the meaning of the published proposal.

Rule 3001. Proof of Claim

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(c) SUPPORTING INFORMATION.

(1) Claim Based on a Writing. When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply. In a case in which the debtor is an individual: