By Andrew Perry

Rule 2019: Unofficial Committee Disclosures in Mass Tort Cases

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The requirement to disclose is essential to a debtor's right to avail itself of the Bankruptcy Code's benefits.[1] A debtor's failure to adequately disclose information pertaining to financial status may result in the appointment of a trustee, the dismissal or conversion of a case, or the denial of an individual debtor's discharge.[2]

However, the Federal Rules of Bankruptcy Procedure also impose disclosure requirements on other parties. Bankruptcy Rule 2019 requires attorneys representing multiple creditors to file specific disclosures when representing groups or committees. Applying Rule 2019 to the representation of claimants in mass tort bankruptcy cases presents special disclosure and professional responsibility issues claimants' counsel should consider when participating in a bankruptcy case.

Requirements Under Rule 2019

Rule 2019 requires representatives of creditors' groups, committees or equity security-holders to file verified statements disclosing information about the group, committee or equity security-holder. This includes disclosure of "the pertinent facts and circumstances concerning ... the formation of the group or committee."[3] In addition, groups, committees or equity security-holders must also disclose the identity of members, the members' financial interests at stake, and a copy of the instrument authorizing action on behalf of the group, committee or equity security-holders.[4]

Who Must Disclose?

Rule 2019 imposes an obligation on every group, committee or entity that represents multiple creditors or equity security-holders acting in concert to advance a common interest in a chapter 9 or 11 case to file a verified statement with the court.[5] Under this rule, the term "represents" is defined as taking "a position before the court or ... solicit[ing] votes regarding the confirmation of a plan on behalf of another."[6] Accordingly, "representation requires active participation in the case" and does not include an attorney who is retained to monitor a case, and "who does not advocate any position before the court or engage in solicitation activities" on behalf of a client.[7]

The committee notes advise that Rule 2019 applies to a group of creditors or equity security-holders that advance common interests, "even if the group does not call itself a committee."[8] This subsection of Rule 2019(b) settles conflicting opinions over whether the rule applies to *ad hoc* committees.[9] Therefore, under Rule 2019, an *ad hoc* committee or group must file disclosures if the *ad hoc* group or committee "acts in concert to advance" the common interests of multiple creditors.[10]

Notably, while Rule 2019 requires official groups and committees of creditors appointed by the court pursuant to § 1102 or 1114 to file a verified statement, the rule excludes such groups or committees from complying with all aspects of the rule.[11] Excluding official groups or committees from all disclosure requirements makes sense, because official committees "owe a fiduciary duty to represent the interests of all similarly situated parties in interest."[12] In addition, § 1102(b)(3) already requires an official committee to disclose the creditors comprising the committee and authorizes the bankruptcy court to compel additional disclosures as necessary.[13] Likewise, the bankruptcy court must approve any professionals hired by the official com-

1 *Williams v. U.S. Fidelity & Guar. Co.*, 236 U.S. 549, 554-55 (1915) ("It is the purpose of the bankrupt act to ... relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh.").

2 *In re Peak Serum Inc.*, 623 B.R. 609 (Bankr. D. Colo. 2020) (appointing trustee pursuant to § 1104(a) based on debtor's failure to file accurate operating reports); *In re Ozcelebi*, 639 B.R. 365 (Bankr. S.D. Tex. 2022) (converting chapter 11 case to chapter 7 based on debtor's multiple failures to disclose transfers); *In re Korn*, 523 B.R. 453 (Bankr. E.D. Pa. 2014) (dismissing chapter 11 case for cause, including debtor's "glaring omissions" from schedules); *In re Chalik*, 748 F.2d 616 (11th Cir. 1984) (affirming denial of discharge for failing to disclose corporate interests).

3 Fed. R. Bankr. P. 2019(c)(1)(A).

4 Fed. R. Bankr. P. 2019(c)(2)-(4).

5 Fed. R. Bankr. P. 2019(b)(1).

6 Fed. R. Bankr. P. 2019(a)(2).

7 Fed. R. Bankr. P. 2019 advisory committee's note, 2011 Amendment.

8 *Id.*

9 Under a prior version of Rule 2019, courts had diverging views on the application of the rule to *ad hoc* committees. *Compare In re NW Airlines Corp.*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007) (requiring *ad hoc* committee of creditors to comply with Rule 2019), and *In re Wash. Mut. Inc.*, 419 B.R. 271 (Bankr. D. Del. 2009) (same), *with In re Premier Int'l Holdings Inc.*, 423 B.R. 58, 74 (Bankr. D. Del. 2010) (distinguishing *In re Wash. Mut. Inc.* and denying motion to compel *ad hoc* committee to comply with Rule 2019 disclosures), and *In re Philadelphia Newspapers LLC*, 422 B.R. 553, 567-68 (Bankr. E.D. Pa. 2010) (adopting reasoning of *In re Premier Int'l Holdings Inc.* that for Rule 2019 to apply, *ad hoc* committee must represent interests of larger group, not just committee's members).

10 Fed. R. Bankr. P. 2019(b)(1).

11 Fed. R. Bankr. P. 2019(c)(1)(A) (excluding official committees from requirement to disclose formation of group or committee), (c)(2)(C) (excluding official committees from requirement to disclose date of acquisition of each disclosable economic interest).

12 Jennifer Albrecht, "New Bankruptcy Rule 2019: Boon or Bane for Distressed Investors?," 2011 *Colum. Bus. L. Rev.* 717, 725 (2011) (citing 7 *Collier on Bankruptcy* ¶ 1103.05[20] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010)).

13 11 U.S.C. § 1102(b)(3)(A), (C); 11 U.S.C. § 1114(b)(2) (stating committees appointed under § 1114 "have the same rights, powers, and duties as committees appointed under section ... 1102"); Fed. R. Bankr. P. 2007 (imposing further restrictions on committees appointed under § 1102).

mittee pursuant to § 327, along with any professional compensation.[14] Rule 2019 also excepts groups or committees made up entirely of affiliated entities or creditors that are insiders of one another from making disclosures.[15]

What Must Be Disclosed?

Groups or committees subject to Rule 2019 disclosures must file a verified statement with the court that includes pertinent facts and circumstances concerning the formation of the group or committee.[16] Likewise, entities must disclose the name of each creditor or equity security-holder authorizing the employment of an entity.[17] Disclosures should include the name of each party that the group or committee has authority to act on behalf of or for each entity, and the name of each creditor or equity security-holder that arranged for representation of the entity.[18]

Specifically, Rule 2019 also requires disclosure of the (1) name and address of each creditor; (2) each creditor's economic interest in the case; (3) when the creditor acquired such economic interest; and (4) a copy of the instrument, if any, authorizing the entity, group or committee to act on behalf of creditors.[19] Failure to comply with Rule 2019 may result in consequences, including (1) refusing to permit an entity, group or committee to be heard or intervene in a case; (2) holding any authority or power of an entity, group or committee to be invalid; or (3) the order of any other appropriate relief.[20]

Application to Mass Tort Cases

Rule 2019's required disclosures are like many other bankruptcy disclosure requirements. However, the effect of Rule 2019 is that any representative of an entity, group or committee comprised of multiple creditors or equityholders acting in concert to advance common interests is required to file disclosures. Representation requires taking a position on a matter before the court or soliciting votes on confirmation of a plan.[21] As applied to mass tort bankruptcies, the definition of "representation" generally requires claimants' counsel representing multiple personal-injury claimants pursuing unsecured claims to comply with Rule 2019. Thus, claimants' counsel representing multiple claimants must disclose the name, address and economic interest of the claimants that counsel represents.[22]

To address the complicated relationship between personal-injury claimants and attorneys representing claimants, bankruptcy courts often require attorneys to make supplemental disclosures under Rule 2019.[23] Required disclosures may include exemplar representation agreements between attorneys and tort claimants; applicable powers of attorney or empowering documents establishing the right to represent claimants; the names of each claimant; identification of claimed injuries; the amount of each claim if liquidated; and details regarding co-counsel, consultant or fee-sharing relationships. As noted by one bankruptcy court, requiring claimants' counsel to disclose empowering documents and comply with Rule 2019 "is vitally important ... for the confirmation because it may have a direct bearing on both good faith and the fairness of the plan's classification system."[24]

Confidentiality and Access

Generally, information disclosed under Rule 2019 becomes part of the public record.[25] However, given the sensitivity of the disclosures, bankruptcy courts recognize the necessity of protecting claimant confidentiality and generally allow certain information (*e.g.*, names and addresses of claimants) to be redacted or otherwise withheld from the public docket.[26]

Issues often arise over whether parties are entitled to access information not filed on the public docket. Courts in the Third Circuit provide that "there is a presumptive right of public access to" information filed in accordance with Rule 2019,[27] but this public right of access is not unlimited.

First, parties seeking access to Rule 2019 information must identify a proper bankruptcy purpose for accessing the information, such as in connection with claims estimations or investigating fraud in the claims process.[28] Upon articulating a proper bankruptcy purpose, case law suggests that parties must limit their use of the information disclosed under Rule 2019 to that bankruptcy purpose.[29] Finally, bankruptcy courts may prevent disclosure of claimant names or other identifying information and may limit access in duration sufficient to meet the stated bankruptcy purpose.[30] As such, bankruptcy courts must balance the public right of access to judicial records against a claimant's right to privacy when considering requests to access disclosures withheld from the public docket.

Implications on Professional Responsibility

Claimants' counsel must understand the obligation to comply with Rule 2019 when representing multiple tort claimants and comply with the rule while keeping in mind their professional obligations to their clients. For example, Model Rule of Professional Conduct 1.6, "Confidentiality of Information," provides, "A lawyer shall not reveal information relating to the representation of a client."[31] An exception

14 11 U.S.C. § 328(a).
15 Fed. R. Bankr. P. 2019(b)(1).
16 Fed. R. Bankr. P. 2019(c)(1)(A).
17 Fed. R. Bankr. P. 2019(c)(1)(B).
18 Fed. R. Bankr. P. 2019(c)(1).
19 Fed. R. Bankr. P. 2019(c)(2)-(4).
20 Fed. R. Bankr. P. 2019(e)(2).
21 Fed. R. Bankr. P. 2019 advisory committee's note, 2011 Amendment.
22 *Baron & Budd PC v. Unsecured Asbestos Claimants Comm.*, 321 B.R. 147, 167 (D.N.J. 2005) (requiring plaintiffs' law firm to file Rule 2019 disclosures).
23 *In re Imerys Talc Am. Inc.*, No. 19-10289 (LSS) (Bankr. D. Del. March 12, 2021) (order granting motion to compel compliance with Rule 2019); *In re Owens Corning Armstrong World Indus. Inc.*, 560 B.R. 229, 233 (Bankr. D. Del. 2016) (addressing whether parties' right to review filings made pursuant to orders standardizing disclosures is required under Rule 2019 in mass tort bankruptcy cases); *In re Kaiser Aluminum Corp.*, 327 B.R. 554, 559-60 (D. Del. 2005) (affirming bankruptcy court's order requiring plaintiffs' attorneys to file exemplar representation agreements to comply with Rule 2019); *Baron & Budd PC v. Unsecured Asbestos Claimants Comm.*, 321 B.R. 147, 154 (D.N.J. 2005) (affirming bankruptcy court's order requiring plaintiffs' counsel to make certain disclosures).
24 *Baron & Budd*, 321 B.R. at 160 (quoting Tr. of July 26, 2004, Bankr. Court Hearing, 54-55).
25 *In re Owens Corning Armstrong World Indus. Inc.*, 560 B.R. 229, 236 (Bankr. D. Del. 2016) (citing *In re Motions for Access of Garlock Sealing Tech. LLC*, 488 B.R. 281, 297 (D. Del. 2013); *In re Pittsburgh Corning Corp.*, No. 04-1814, 2005 WL 6128927, at *9 (W.D. Pa. Sept. 27, 2005)).
26 *In re Motions for Access of Garlock Sealing Tech. LLC*, 488 B.R. 281, 289 (D. Del. 2013) (explaining that Third Circuit authorized procedures for withholding exhibits to Rule 2019 statements from public docket in *In re Pittsburgh Corning Corp.*, 260 F. App'x 463 (3d Cir. 2008)).
27 *Id.* at 298; *In re Motions Seeking Access to 2019 Statements*, 585 B.R. 733, 749 (D. Del. 2018) (confirming 11 U.S.C. § 107(a)'s public right of access to judicial records applies to Rule 2019 statements and exhibits).
28 *In re Motions Seeking Access to 2019 Statements*, 585 B.R. at 742, 754 (affirming bankruptcy court's restriction on access to information in Rule 2019 statements to three months); *aff'd*, *In re A C & S Inc.*, 775 F. App'x 78 (3d Cir. 2019).
29 *Id.* at 755 (suggesting that it "would not be proper" to use claimant data for "lobbying or legislative efforts").
30 *Id.* at 758-59 (affirming bankruptcy court's restriction on access to information in Rule 2019 statements to three months).
31 Model Rules of Prof'l Conduct R. 1.6(a) (2022).

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to the rule applies to the extent a lawyer must breach confidentiality "to comply with other law or a court order."[32]

The comments to Model Rule 1.6 state that "[w]hether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to representation appears to be required by other law, the lawyer must discuss the matter with the client.... If, however, the other law supersedes this Rule ... paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law."[33] To the extent that a bankruptcy court orders claimants' counsel to comply with Rule 2019, "paragraph (b)(6) permits the lawyer to comply with the court's order."[34] The implication is that counsel representing multiple personal-injury claimants in mass tort bankruptcy cases in an unofficial group or committee should pay special attention to disclosure requirements under Rule 2019, and should consider obtaining client consent to disclose information in compliance with the rule.

Conclusion

Rule 2019 requires representatives of groups, committees or equity security-holders to make disclosures before taking a position in the bankruptcy court and advancing common interests. As the requirement to disclose confidential information may conflict with ethical obligations to clients, counsel involved in mass tort bankruptcy cases should be aware of the challenges surrounding compliance with Rule 2019. abi

32 Model Rules of Prof'l Conduct R. 1.6(b)(6) (2022).
33 Model Rules of Prof'l Conduct R. 1.6, cmt. 12 (2022).
34 Model Rules of Prof'l Conduct R. 1.6, cmt. 15 (2022).