Gerber Testimony re Rule 2019

I. Overview

Was gratified by the bankruptcy community's response to the thoughts expressed in my earlier letter, and though I'd agree or ultimately not quarrel with some of the suggestions recently made, I very much like the Rule as proposed.

Will talk briefly about (a) the developments since the time of my earlier letter; (b) comments by those who generally endorse the Rule as revised but who seek clarifications or carveouts; (c) comments by lawyers for distressed debt investors still seeking to be free of any regulation, or of any meaningful disclosure; and (d) technical points, which, while they'd seemingly be uncontroversial to all but those who want to be free of any regulation, are important to the usefulness of the Rule.

II. Developments in Last Year

A. Decisions on present Rule 2019

Washington Mutual, 419 B.R. 271 (Bankr. D. Del. 2009) (Judge Mary Walrath), agreeing with Judge Gropper's decision in *Northwest Airlines*.

Premier International Holdings (often referred to as "*Six Flags*"), 2010 Bankr. LEXIS 98 (Bankr. D. Del. 2010) (Judge Chris Sontchi), disagreeing with Judge Walrath's *Washington Mutual* decision, ruling that ad hoc committee wasn't a committee of the type present Rule 2019 covers.

Accuride (Bankr. D. Del. 2010) (Judge Brendan Shannon), disagreeing with Judge Sontchi's decision in *Six Flags*.

B. Implementation of Present Rule 2019

Lyondell Chemical (Bankr. S.D.N.Y. 2009) (Judge Robert Gerber), where there were differences in needs and concerns of 2015 bondholders, depending on whether they were beneficiaries of credit default swaps.

General Motors (Bankr. S.D.N.Y. 2009) (Judge Robert Gerber), where the Rule 2019 filing, when made, undercut assertions made by parties in their briefs.

III. Comments by Those Generally Supportive

Have no disagreement with the comments by the National Bankruptcy Conference.

Re the comments by the LSTA, Richards Kibbe, Akin Gump, and Angelo Gordon, views of Bankruptcy Judges as their issues are not uniform. All agree that the amount paid to acquire bonds, bank debt or other claims is irrelevant to the amount of the distressed debt investors' allowed claims. And neither I nor others I spoke to would quarrel with the contention that the date purchased can reveal the amount paid, at least to those with access to databases available to some. But at least some judges regard price paid as relevant to the distressed debt investors' *behavior* in the chapter 11 cases, and the extent to which other creditors may look to their leadership. And all or most judges would likely agree that price paid and date purchased is *sometimes* relevant, as it was in *DBSD North America*, --B.R. --, 2009 WL 508874 (Bankr. S.D.N.Y. 2009) (designating vote of creditor that bought claims at par, after plan was filed).

I haven't polled the other bankruptcy judges around the country, and speak only for myself. But though other judges would prefer a stronger regulatory regime, I personally would be amenable to amending the proposed rule to require only generalized

discussion of the date acquired (*e.g.*, pre-petition or post-petition, before or after the filing of a proposed reorganization plan, or within or outside of the last 60 days), or (though this would be somewhat less useful), to dropping requirements for *any* disclosure of the date of purchase. But I could support that only if, by the words of the Rule or accompanying Committee Comments, it were clear that the Court retains the power to require disclosure of both date and price information, upon an appropriate showing of relevance or other cause—normally by discovery, but where necessary, by public disclosure. While I'd be amenable to requiring a strong showing of relevance and cause for disclosure of price or date of purchase information when such is requested by a *private litigant* (to prevent exploitation of the Rule by private litigants, as in *Six Flags*), I'm unwilling to accede to the notion that a Court's ability to require disclosure by appropriate means, when the Court considers such appropriate, could ever be circumscribed by parties' claims to the confidentiality of their trading practices, or by any usefulness they might provide (or say they provide) to the chapter 11 process.

IV. Comments by Those Resisting Any Reform

A few—White & Case and Dewey & LeBoef, 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. I find these contentions remarkable, and worse. While the bankruptcy system was initially created, and continued for many years, to serve the *victims* of financial distress, there's more than enough room in the bankruptcy system to serve those who choose to enter it to make a profit. But the notion that the transparency and integrity of

the system that investors choose to enter should be abandoned to suit their desires is offensive to me.

The vast majority of distressed debt investors act entirely appropriately, whether as passive investors or when participating more proactively, and they should continue to feel welcome in our cases. And most of the time, their participation is constructive. I'm gratified that their trade organizations, the LSTA and SIFMA, are amenable to regulation, subject only to the relatively modest comments made in their summary of testimony and letter. But if there's any message that I would like to get across today beyond any other, it's that we should not abandon the federal courts' inherent ability to maintain the integrity and transparency of our system in order to satisfy investors' agendas, or to respond to suggestions that regulating them will chill their desires to participate in our cases. If investors choose to enter the federal courts to achieve their ends, they must comply with the federal courts' most basic needs and concerns.

I'm troubled, as others are, by distressed debt investors and other creditors using Rule 2019 (in either its present form or as it might be amended) for tactical purposes against each other, and am especially troubled by their invocation of the Rule selectively, as they did in *Six Flags*, looking for enforcement against their opponent but not their ally. But I'm not of a mind to abandon the basic regulation we need because of such abuses; doing so would be an invitation to even greater abuse, and to a loss of the tools we judges need to minimize abuse, and otherwise to do our jobs.

V. Technical Matters

A. Short positions

I didn't understand the Committee to have intended to exclude short positions from the type of interests that have to be disclosed. In fact, they're a classic example of the types of interests that require disclosure. But the proposed Rule as drafted doesn't mention them explicitly. And while I think it's implied, I think short positions cry out for disclosure so much that the Rule's list of disclosable interests should specifically name them.

I do not understand any of those generally supportive of reform to oppose such a requirement.

B. Swaps

The same is true with respect to swaps, particularly credit default swaps and total return swaps. They are, of course, a kind of derivative. But they are in such commonplace use nowadays, and can have such a dramatic effect on parties' positions, that they too cry out for disclosure. To the extent that any swaps are closed out as quickly as some suggest they may be, there will simply be less to disclose.

Once more, I do not understand any of those generally supportive of reform to oppose such a requirement.

C. The Drafting

A mark-up showing the few words I would add to the existing draft to implement my technical comments accompanies this Summary.

~~given, procured, or received by an entity or committee who 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

(a) DEFINITION. In this rule, "disclosable economic interest" means any claim, interest, pledge, lien, option, participation, swap, derivative instrument, or any other right or derivative right that grants the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest. short position,

(b) DISCLOSURE BY ENTITIES, GROUPS, COMMITTEES, INDENTURE TRUSTEES, AND OTHER PARTIES IN INTEREST. In a chapter 9 or 11 case, every entity, group, or committee that consists of or represents more than one creditor or equity security holder and, unless the court directs otherwise, every indenture trustee, shall file a