Antitrust Ruling Permitting Collective Action by Lenders Provides Comfort to U.S. Debt Market Participants

A recent district court decision in the United States, CompuCredit Holdings Corp. v. Akanthos Capital Management, held that collective action by investors to maximize recoveries, including the forming of negotiating blocks to advance a common interest, does not violate U.S. antitrust laws. This decision is consistent with 2011 legislative enactments rebuffing attempts to prevent collective action by creditors in U.S. bankruptcy proceedings. Taken together, this recent court decision and legislation should provide substantial comfort to debt investors that the U.S. legal system is committed to a common-sense approach to regulating the negotiation process between debt holders and the borrower.

Collective Action by Debtholders Does Not Run Afoul of U.S. Antitrust Laws

The ability of holders of debt instruments to form coalitions to negotiate with a borrower, including during the pendency of a default, is one of the bedrock principles of U.S. bankruptcy law. Indeed, section 1102 of the Bankruptcy Code explicitly requires the appointment of at least one committee to represent the varied creditor interests in a bankruptcy case:

The 1978 Bankruptcy Code fundamentally altered pre-Code reorganization practice by reducing the need for judicial intervention and implementing a private bargaining system in which the parties’ agreement to the terms of the plan, supplemented by a few, critical, minimum treatment standards, largely governs the reorganization process. . . . Under the Bankruptcy Code, the committee is designed to counterbalance the power conferred on the debtor in possession under the Bankruptcy Code . . . to consolidate creditors’ multiple voices into one strong bargaining force, and to ensure adequate creditor representation.

Nevertheless, from time to time, borrowers attempt to undermine this principle by using U.S. antitrust laws to hamstring collective efforts by debt investors. The district court decision in CompuCredit, which was upheld upon review by senior U.S courts, flatly rejected the borrower’s efforts, holding that collective action by investors to maximize the return on their investments did not violate antitrust laws.

CompuCredit, a provider of credit and related subprime financial services products, and the holders of its convertible senior notes brought actions against each other in two separate lawsuits: (i) the noteholders sued CompuCredit, accusing CompuCredit of fraudulent transfers when it announced “a massive dividend even though it was in severe financial distress . . . deliberate[ly] . . . stripping itself of assets, distributing those assets to insiders, and disabling itself from meeting its obligations to its creditors”; and

1 See 11 U.S.C. §1102; see also the legislative history of Section 1102 of the Bankruptcy Code at P.L. 95-598, BANKRUPTCY REFORM ACT OF 1978, H.R. 95-595 at 401 (“This section provides for the appointment of creditors’ and equity security holders’ committees, which will be the primary negotiating bodies for the formulation of the plan of reorganization. They will represent the various classes of creditors and equity security holders from which they are selected.”).

2 57 Bus. Law 163, 230, FIRST REPORT OF THE SELECT ADVISORY COMMITTEE ON BUSINESS REORGANIZATION (November 2001); see also In re Daig Corp., 17 B.R. 41, 43 (Bankr. D. Minn. 1981) (“The creditors’ committee is not merely a conduit through whom the debtor speaks to and negotiates with creditors generally. On the contrary, it is purposely intended to represent the necessarily different interests and concerns of the creditors it represents. It must necessarily be adversarial in a sense, though its relation with the debtor may be supportive and friendly. There is simply no other entity established by the Code to guard those interests. The committee as the sum of its members is not intended to be merely an arbiter but a partisan which will aid, assist, and monitor the debtor pursuant to its own self-interest.”).
(ii) CompuCredit sued the noteholders for thereafter refusing to participate in a tender offer through which CompuCredit offered to repurchase outstanding notes at between 35-50% of face value, which CompuCredit claimed was in line with market trading prices at the time. CompuCredit alleged that noteholders violated antitrust laws by banding together to demand that it redeem those notes at above-market prices.

The plaintiffs in both lawsuits lost their cases. Most notably, in rejecting CompuCredit's antitrust claim, the district court determined that the noteholders were permitted to work together as a voting block in negotiations with the borrower in an effort to increase the note redemption price offered by the borrower. The district court held that the debt holders did not violate the Sherman Act, one of the primary antitrust statutes in the U.S., when they acted in a collaborative fashion to collect on their debt instruments. In its reasoning, the court specifically distinguished the noteholders' negotiations with CompuCredit regarding outstanding debt from actionable circumstances involving a group boycott of services to increase future prices for such services as well as collective negotiations by market participants to fix future prices of goods in a marketplace.

The District Court relied heavily on previous circuit court decisions, which found that collective activity to enforce debt terms is not the "sort of activity with which antitrust laws are concerned." Notwithstanding several appeals and arguments at the circuit court level, on May 28, 2013, the United States Supreme Court specifically declined to review the lower court decisions in CompuCredit. The Supreme Court's denial of the petition for writ of certiorari, therefore, leaves the district court's CompuCredit decision intact, confirming that investors do not run afoul of antitrust laws when they form a union of sorts to collectively bargain with the debt issuer regarding repayment of outstanding debt.

**Collective Action Decision is Consistent with Amended Bankruptcy Rules**

The court's decision in CompuCredit is wholly consistent with recent changes to Federal Rule of Bankruptcy Procedure 2019, which became effective on December 11, 2011. These changes clarified the extent and application of Rule 2019 after a period of increased participation by ad hoc investor groups in bankruptcy cases led to strategic efforts by parties to undermine such collective action. This clash resulted in conflicting interpretations of Rule 2019's disclosure requirements for ad hoc investor groups.

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3 See CompuCredit Holdings Corp. v. Akanthos Capital Management, LLC, 2011 WL 9753766 (N.D. Ga., June 17, 2011) at *1; affirmed by CompuCredit Holdings Corp. v. Akanthos Capital Management, LLC, 661 F.3d 1312 (11th Cir. 2011); vacated by and rehearing en banc ordered by CompuCredit holdings Corp. v. Akanthos Capital Management, LLC, 677 F.3d 1042 (11th Cir. 2012); district court opinion affirmed by an evenly divided court in CompuCredit Holdings Corp. v. Akanthos Capital Management, LLC, 698 F.3d 1348 (11th Cir. 2012); writ denied by Atlanticus Holdings Corp. v. Akanthos Capital, LLC, 2013 WL 1147201 (U.S.) (May 28, 2013), at *1.


6 See, e.g., In re Northwest Airlines Corp., 363 B.R. 701 (Bankr. S.D.N.Y. 2007) (holding that an ad hoc committee of equity security holders was obligated to provide detailed information of each member's claims); In re Scotia Development LLC, No. 07-20027 (Bankr. S.D. Tex. April 18, 2007) (holding that Rule 2019 did not apply to an ad hoc group of noteholders and therefore they were not required to file a supplemental Rule 2019 statement describing each member's claims); In re Washington Mutual, 419 B.R. 271 (Bankr. D. Del. 2009) (holding that Rule 2019 applied to an informal group of noteholders and therefore extensive disclosure was required); In re Premier International Holdings, Inc. (Six Flags), 423 B.R. 58 (Bankr. D. Del. 2010) (holding that disclosure under Rule 2019 was not required for an informal bondholders' committee); In re Accuride Corp., Case No. 09-13449 (Bankr. D. Del. Jan. 20, 2010) (holding that an ad hoc noteholders committee was required to disclose information concerning their interests under Rule 2019); In re Philadelphia Newspapers, LLC, 422 B.R. 553 (Bankr. E.D. (continued...))
In general, the prior version of Rule 2019 obligated every entity or committee representing more than one creditor and every indenture trustee to file a verified statement disclosing certain information about its claims, including the amounts of claims held, identities of the members represented, the times the claims were acquired, the amounts paid therefor, and any disposition thereof. In practice, representatives of groups of creditors (in most cases, attorneys) typically disclosed the identities of the group’s members and the aggregate claims held by the group as a whole, but not particular holdings information or pricing details given the sensitivity of such information.

In the 2007 Northwest Airlines bankruptcy case, however, the United States Bankruptcy Court for the Southern District of New York formally interpreted and applied Rule 2019’s disclosure requirements to an ad hoc group of investors, holding that the rule required each member of an ad hoc committee to publicly disclose its specific holdings, including the timing and amount paid to acquire such holdings, and to continuously update such disclosures as those holdings were bought and sold on the secondary debt market. With this interpretation, parties in a bankruptcy case could use Rule 2019 as a litigation tactic against ad hoc investor groups attempting to maximize recovery on their holdings. Similar to the efforts of the borrower in CompuCredit, such an interpretation of Rule 2019 had the potential to chill collective action by debt investors that were reluctant to disclose the pricing and timing of their trades. Parties also were concerned that requiring such detailed disclosures served no legitimate legal purpose and would only increase costs and delay in bankruptcy cases as borrowers negotiated individually with each debt holder.

Following Northwest Airlines, several courts issued conflicting opinions regarding the application of Rule 2019’s disclosure requirements. In response, amendments to Rule 2019 were proposed, public hearings were held, and eventually the United States Supreme Court and the United States Congress adopted and approved an amended Rule 2019. The new Rule 2019 introduces two new defined terms intended to clarify the scope of the rule’s application: “represent” is introduced to clarify that the rule applies only to groups or committees that actively participate in a bankruptcy case and not to those that simply seek to monitor the case docket; “disclosable economic interest” is introduced to clarify that although each member of a group or committee must disclose its holdings, that disclosure need not include pricing information or, in most cases, the date of acquisition.

The amended Rule 2019 therefore provides bankruptcy courts and debtors with the information needed to accurately assess creditor constituencies and develop appropriate restructuring plans while allowing debt investors to participate as a group in bankruptcy negotiations without concern that group participation will require onerous pricing/timing disclosures.

**Conclusion**

The court’s decision in CompuCredit and the recent amendment of Bankruptcy Rule 2019 should assure debt investors that acting in concert with similarly-situated creditors to negotiate with a debtor for repayment of debts owed will not violate U.S. antitrust laws and will not require potentially prejudicial disclosure. Rather, investors’ ability to join together and advocate common interests with one voice is

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9 See supra, n. 1.

preserved and should continue to help simplify the negotiation process with borrowers seeking to restructure their debts.

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