Trust Indenture Act Creates no Independent Duty upon Issuer Timely to File SEC Reports

Publicly traded companies are required to make periodic financial disclosures, including quarterly filings with the Securities and Exchange Commission ("SEC"). Recently, the Eighth Circuit held in *UnitedHealth Group Inc*. v. *Wilmington Trust Co*.[1] that a public registrant's admitted failure timely to file reports with the SEC did not constitute a violation of a governing notes indenture (the "Indenture"), the Trust Indenture Act of 1939 ("TIA") or the implied covenant of good faith and fair dealing.

I. Background

In March 2006, UnitedHealth Group ("UHG") issued $850 million of senior notes pursuant to an indenture between it and the Bank of New York ("BONY") as trustee. UHG made all required interest payments, and the debt was continuously rated investment grade.

In 2006, UHG came under scrutiny for backdating employee stock options. UHG formed a committee of independent directors to study its financial affairs. Because of an ongoing review by its independent directors, UHG failed timely to file its second quarter SEC Form 10-Q due August 9, 2006. Consistent with SEC rules, on August 10, 2006 UHG filed an SEC Form 12b-25 notification of its late filing, explaining the reasons for delay, and attaching substantially the same information as it would have in the Form 10-Q. Two weeks later certain hedge fund investors in the notes served UHG with a notice of default, claiming that its failure timely to file its second quarter report violated § 504(i) of the Indenture, which reads:

> "So long as any of the Securities remain Outstanding, the Company shall cause copies of all current, quarterly and annual financial reports on Forms 8-K, 10-Q and 10-K, respectively, and all proxy statements, which the Company is then required to file with the [SEC] pursuant to Section 13 or 15(d) of the Exchange Act to be filed with the Trustee and mailed to the Holders of such series of Securities at their addresses appearing in the Security Register maintained by the Security Registrar, in each case, within 15 days of the filing with the Commission. The Company shall also comply with the provisions of [Trust Indenture Act] § 314(a)."[2]

UHG disclosed the notice of default in an SEC Form 8-K filing, asserting that it was not in default. In mid-October 2006, UHG reported the findings and recommendation of its review committee and that it had not yet determined if it needed to restate its past financial statements. UHG stated that it would delay filing its third quarter Form 10-Q.

On October 25, 2006, UHG commenced an action against BONY as trustee, seeking a declaratory judgment that it had not violated the terms of the Indenture by failing timely to file its SEC reports.[3] Within days, the hedge funds caused the trustee to serve a notice of acceleration on UHG, claiming that UHG had not cured the alleged default and demanding accelerated payment of the full principal amount of the notes. The trustee counterclaimed against UHG for breach of contract, violation of the TIA and breach of an implied covenant of good faith and fair dealing.

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1 No. 08-1904, 2008 WL 5047669 (8th Cir. Dec. 1, 2008).

2 *Id.* at *1 (emphasis by Court of Appeals).

3 Wilmington Trust Co. succeeded BONY as trustee and was substituted as the defendant.

During the lawsuit, UHG filed its second quarter Form 10-Q, almost seven months late. At the same time, UHG amended its earlier filed first quarter report, filed late a third quarter report, and filed its annual report on Form 10-K.

Both sides moved for summary judgment. The district court granted summary judgment in favor of UHG on all claims and counterclaims.[4] The trustee appealed.

II. The Eighth Circuit's Decision

Conducting a *de novo* review of the district court's grant of summary judgment, the Eighth Circuit addressed each of the trustee's claims.

A. The Indenture. First the Court of Appeals addressed the Indenture, which was governed by New York law, and required that "[UHG] shall cause copies of . . . financial reports . . . which the Company is then required to file with the Commission pursuant to Section 13 or 15(d) of the Exchange Act to be filed with the Trustee . . . within fifteen days of filing with the Commission."[5] The language of § 504(i) of the Indenture derived from a Model Simplified Indenture drafted by the American Bar Association in 1983, at a time preceding the Internet and electronic communications. The Court of Appeals observed that "[t]he fact that § 504(i) may be of slight value in the Internet age does not empower [the trustee] to impose unbargained for duties on UHG simply to breathe new relevance into an outdated provision."[6] The Court of Appeals analyzed the basic syntax of the provision and determined that "[t]he clause imposes no absolute timetable or independent obligation to comply with the Exchange Act or SEC regulations," but rather, that the provision "merely refers [to the Exchange Act] in order to establish which reports must be forwarded."[7] Because the terms of the Indenture failed to incorporate the SEC filing deadlines, the Court of Appeals found that the Indenture imposed no independent obligation to file timely SEC reports, and therefore that UHG's failure, while potentially a violation of SEC regulations, did not amount to a default under the Indenture.[8]

B. The Trust Indenture Act. The TIA requires an obligor to "file with the indenture trustee copies of the annual reports and of the information, documents, and other reports . . . which such obligor is required to file with the [Securities and Exchange] Commission . . . ."[9] The Court of Appeals dispensed with this claim stating that the TIA "merely identifies *which* reports must eventually be forwarded to the trustee," and does not create a duty to

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4 *UnitedHealth Group Inc*. v. *Wilmington Trust Co*., 538 F.Supp. 2d 1108 (D.Minn. 2008).

5 *UnitedHealth Group Inc*. v. *Wilmington Trust Co.*, No. 08-1904, 2008 WL 5047669, at *3 (8th Cir. Dec. 1, 2008) (hereinafter *UnitedHealth*).

6 *Id.* at *7.

7 *Id*. at *3.

8 In reaching this conclusion, the Court of Appeals noted that three other federal courts had recently found that similar indenture provisions did not impose independent obligations to file timely SEC reports. *See Finistar Corp*. v. *U.S. Bank Trust Nat'l Ass'n*, No. C 07-4052, 2008 WL 3916050 (N.D. Cal. Aug. 25, 2008); *Affiliated Computer Servs., Inc*. v. *Wilmington Trust Co*., No. 3:06-CV-1770-D, 2008 WL 373162 (N.D. Tex. Feb. 12, 2008); *Cyberonics, Inc*. v. *Wells Fargo Bank Nat'l Ass'n*, No. H-07-121, 2007 WL 1729977 (S.D. Tex. June 13, 2007). The Court of Appeals chose not to follow an unpublished decision of a New York trial court. *See Bank of New York* v. *BearingPoint, Inc.*, No. 600169/06, 2006 WL 2670143 (N.Y. Sup. Ct. Sept. 18, 2006).

9 *UnitedHealth* at *5 (citing TIA §314 (a)).

file those reports on time.[10] In fact, the TIA is even less restrictive than the language of the Indenture, and creates no independent duty on the issuer to meet SEC deadlines.[11]

C. Covenant of Good Faith and Fair Dealing. Lastly, the Court of Appeals addressed whether the failure to file the reports in a timely way violated New York's implied "covenant of good faith and fair dealing" present in every contract.[12] The court found that UHG had not violated this covenant, because in spite of its "indisputably delinquent" delay in filing with the SEC, "UHG took all reasonable and necessary steps to provide its noteholders with as much information as possible and as accurately as possible," as well as "continued to make all required payments on the notes."[13] The Court of Appeals held that this behavior did not have the effect of "'depriv[ing] the other party of the benefits of their agreement,'" and so was not a violation of the covenant of good faith and fair dealing.[14]

III. Significance of the Decision

Public registrants that delay the timely filing of periodic SEC reports in order to "get it right" do not run afoul of the TIA, most commonly worded indentures or the implied covenant of good faith and fair dealing in respect of their noteholders. The TIA does not impose an independent obligation on public registrants to file timely SEC reports. The parties could have drafted their own language imposing a timetable or incorporating SEC regulations, as is the case in some forms of indentures used by issuers. But, as both the district court and the Court of Appeals found, "this is not the agreement they made." Even when a note issuer's SEC filings are late, the issuer will have "breached no express or implied covenant of the indenture agreement" as long as it continued to act "prudently and responsibly with respect to its investors."[15]

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.

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10 *Id.*

11 The TIA only requires that the reports be eventually forwarded after filing with the SEC, while the terms of the Indenture required forwarding within fifteen days of filing. *Id.*

12 *Id.* at *6. New York recognizes an implied covenant of good faith and fair dealing in every contract, which precludes each party from engaging in conduct that has the effect of depriving the other party of the benefits of its agreement. *Id.* (citing *Filner* v. *Shapiro*, 633 F.2d 139, 143 (2d Cir. 1980)).

13 *Id.* at *7.

14 *Id.* at *6 (quoting *Filner*, 633 F.2d at 143).

15 *Id.* at *7.