Recent Developments Regarding Indenture Reporting Covenants

On April 16, 2009, the Fifth Circuit, in *Affiliated Computer Services, Inc. v. Wilmington Trust Co.*,[1] became the second federal court of appeals to hold that a failure to file reports timely with the Securities and Exchange Commission ("SEC") does not violate Section 314(a) of the Trust Indenture Act of 1939 ("TIA") or indenture covenants patterned on the language of Section 314(a).[2] Each of the federal district courts[3] that have considered the same issue have reached the same conclusion, contrary to the decision reached by a New York Supreme Court, in *Bank of New York v. BearingPoint, Inc.*[4]

Affiliated Computer Services, Inc. ("ACS") brought a declaratory judgment action against Wilmington Trust Company seeking a determination that ACS was not in breach of its indenture covenant. ACS failed to timely file with the SEC its Form 10-K for 2006 because of an ongoing internal investigation into its historical stock option practices. The covenant stated in relevant part: "ACS shall file with the Trustee, within 15 days after it files the same with the SEC, copies of the annual reports ... that [ACS] is required to file with the SEC pursuant to Section 13 or 15(d) of the Exchange Act." ACS argued that the reports were not due to the trustee unless and until filed with the SEC. The Fifth Circuit found that neither the indenture covenant nor Section 314(a) of the TIA imposed on ACS an independent obligation to file reports timely with the SEC.

In so holding, the Fifth Circuit relied heavily on the opinion of the Eighth Circuit in *UnitedHealth Group, Inc. v. Wilmington Trust Co.*[5] UnitedHealth Group ("UHG") failed to file timely a Form 10-Q due to an internal investigation into possible backdating of employee stock options. A notice of default was sent to UHG on behalf of certain hedge funds which collectively owned more than twenty-five percent of the outstanding principal amount of the notes. The covenant stated in relevant part: "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 ... within 15 days of filing with the [SEC]." The Eighth Circuit held that "the indenture provisions at issue [impose] nothing more than the ministerial duty to forward copies of certain reports, identified by reference to the Exchange Act, within fifteen days of actually filing the reports with the SEC."[6] The Eighth Circuit went on to hold that the TIA likewise imposes on issuers only a duty to forward to their trustees copies of any reports that are actually filed with the SEC.

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1 2009 WL 1011695 (5th Cir. 2009).

2 Section 314(a) of the Trust Indenture Act, codified as 15 U.S.C. § 77nnn, provides that an issuer must "file with the indenture trustee copies of the annual reports and of the information, documents, and other reports (or copies of such portion of any of the foregoing as the Commission may by rules and regulations prescribe), which such obligor is required to file with the Commission pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934." Indenture covenants, the terms of which are often governed by New York law, often mirror this language.

3 *Cyberonics, Inc. v. Wells Fargo Bank Nat'l Ass'n,* 2007 WL 1729977 (S.D.Tex. 2007); *Finisar Corp. v. U.S. Bank Trust Nat'l Ass'n,* 2008 WL 3916050 (N.D. Cal. 2008); *UnitedHealth Group, Inc. v. Wilmington Trust Co.,* 538 F.Supp.2d 1108 (D.Minn. 2008), aff'd., 548 F.3d 1124 (8th Cir. 2008); *Affiliated Computer Services, Inc. v. Wilmington Trust Co.,* 2008 WL 373162 (N.D.Tex 2008), aff'd., 2009 WL 1011695 (5th Cir. 2009).

4 13 Misc.3d 1209(A), 2006 WL 2670143 (N.Y. Sup.Ct. 2006).

5 *UnitedHealth Group, Inc. v. Wilmington Trust Co.,* 548 F.3d 1124 (8th Cir. 2008).

6 *Id.* at 1130.

These federal cases are in direct conflict with the decision in *Bank of New York v. BearingPoint, Inc*., where the Bank of New York, as trustee, claimed that BearingPoint breached its indenture reporting covenant by failing to file timely with the SEC its 10-K and 10-Q filings. The covenant at issue in *BearingPoint* stated in relevant part: "the Company shall file with the Trustee, within 15 days after it files such annual and quarterly reports, information, documents and other reports with the SEC, copies of [such reports and information] ... which [BearingPoint] is required to file with the SEC...." Focusing on the words "shall file" and "required to file", the court in *BearingPoint* found that "the [indenture] unambiguously obligates BearingPoint to make the required SEC filings and to provide copies of them to the Trustee."[7] In parsing almost identical language, the Eighth Circuit in *UnitedHealth* came to the opposite conclusion.[8]

The Fifth Circuit in *Affiliated Computer Services* agreed with the Eighth Circuit, concluding that neither the TIA nor the indenture covenant imposes an obligation to file reports timely with the SEC.

Conclusion

With the single exception of *BearingPoint,* case law indicates that courts will not infer that Section 314(a) of the TIA or indenture covenants patterned on the language in Section 314(a) impose on issuers an independent obligation timely to file reports with the SEC. Under the rulings issued by the Fifth and Eight Circuits, if bondholders wish to impose such an obligation on an issuer, the indenture must explicitly so provide.

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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 Richard E. Farley at 212.701.3434 or rfarley@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.

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7 2006 WL 2670143 at 7.

8 In so doing, the Eighth Circuit refused to follow the only New York case interpreting the language of these covenants, which by their terms are governed by New York law. Among other things, in so holding, the Fifth Circuit stated that construction of Section 314(a) is a matter of federal law. 2009 WL 1011695 at 8.

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