LAWSUITS BRING INDENTURE REPORTING REQUIREMENTS INTO THE SPOTLIGHT

The interpretation of reporting requirements imposed on issuers in indentures and the Trust Indenture Act of 1939 (the "TIA") is the focus of current lawsuits. The cases are significant for issuers that have failed to file or have made late filings under the Securities Exchange Act of 1934 (the "1934 Act").

Issuer Held in Default by New York Supreme Court as a Result of Failure to Make Timely SEC Filings

On September 19, 2006, a New York Supreme Court in The Bank of New York v. BearingPoint, Inc., Index. No. 06/600169 (N.Y. Supreme Court, September 19, 2006) (Fried, J.), held that BearingPoint, Inc. ("BearingPoint"), which had issued two series of debentures under its indenture (the "BearingPoint Indenture"), had violated both Section 314(a) of the TIA and the reporting provisions contained in the BearingPoint Indenture by failing to file SEC reports and provide copies of the reports to the trustee under the BearingPoint Indenture. The BearingPoint Indenture requires BearingPoint to file annual and quarterly reports with the indenture trustee within 15 days after having filed them with the SEC. In particular, the indenture, governed by New York law, contains the following covenant:

> "Section 5.02. *SEC and Other Reports*. The Company shall file with the Trustee, within 15 days after it files such annual and quarterly reports, information, documents and other reports (or copies of such portions of any of the foregoing as the SEC may by rules and regulations prescribe) which the Company is required to file with the SEC pursuant to Section 13 or 15(d) of the Exchange Act. The Company shall comply with the other provisions of TIA Section 314(a)."

Section 314(a) of the TIA provides:

> "Each person who . . . is or is to be an obligor upon the indenture securities covered thereby shall –
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> (1) 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 [SEC] pursuant to section 78m or 78o(d) of this title . . . ;"

Section 314(a) of the TIA is binding upon issuers whether or not the reference is included in the applicable indenture. BearingPoint had failed to file certain annual and quarterly reports with the SEC and, accordingly, did not file them with the indenture trustee.

The BearingPoint Indenture further provides that there is an event of default in the event that the issuer violates any covenant contained in the BearingPoint Indenture (including Section 5.02) and such failure continues for a period of 60 days after the issuer receives a notice of default. While there were issues raised in the case about whether such notice had been given properly, the Court held that notice was given properly.

The issue in the case is whether Section 5.02 and Section 314(a) of the TIA contain a requirement for BearingPoint to file reports with the SEC (and within 15 days thereafter to provide to the indenture trustee copies of any such reports so filed) or merely require BearingPoint, if and only if it files reports with the SEC, to provide copies of such reports to the indenture trustee within 15 days after such filing. The Court held there is an absolute requirement to make such filings with the SEC under Section 314(a) of the TIA and Section 5.02 of the BearingPoint Indenture as well. Therefore, BearingPoint's obligation to provide copies of the 1934 Act reports to the trustee is *not* dependent upon its filing of those reports with the SEC. To hold otherwise would, in the Court's view, vitiate "the clear purpose of the Indenture to provide information to the investors so they can protect their investment."

The Court further held that Section 314(a) of the TIA requires issuers to timely file reports with the SEC. The Court stated that Section 314(a) is intended to implement a basic policy of the TIA evidenced in Section 302 of the TIA, *i.e.*, that the national public interest and the interest of investors are adversely affected when issuers under indentures are not obligated to furnish to the trustee and investors adequate current information as to the issuer's financial condition.

The Court rejected several arguments made in the legal briefs submitted by BearingPoint, including that (a) the offering memorandum describing the debentures issued by BearingPoint expressly contemplates that BearingPoint might make late SEC filings, so it would have been completely irrational for the issuer to have agreed to a covenant in the BearingPoint Indenture requiring timely filing of 1934 Act reports, (b) the legislative history of the TIA demonstrates that the intent of Section 314(a) is only to require the delivery to the indenture trustee of reports filed with the SEC rather than to create an independent obligation to file the reports with the SEC, and (c) the failure of the BearingPoint Indenture to include language that is included in many other indentures clearly requiring timely filing (*e.g.*, "the Company will … file with the Commission . . . and the Trustee the annual reports, quarterly reports and other documents required to be filed with the Commission pursuant to Sections 13 and 15 of the Exchange Act, whether or not the Company has a class of securities registered under the Exchange Act. The Company will also comply with the other provisions of Section 314(a) of the Trust Indenture Act.") indicates that no such absolute obligation to make timely filings should be found.

The debentureholders brought a second cause of action asserting that, even if BearingPoint did not fail to comply with an express requirement under Section 5.02 to file reports with the SEC, it nonetheless violated an implied obligation (*i.e.*, a covenant of good faith and fair dealing) by failing to file the reports with the SEC. The Court did not rule on the second cause of action.

BearingPoint indicated in a Form 8-K that it has appealed the decision. We would be happy to discuss with you the merits of the decision and of such an appeal.

Progeny of BearingPoint

Another issuer, Affiliated Computer Services, Inc. ("ACS"), which received notice of a similar claim from bondholders, has sought a declaratory judgment that it is not in default under its indenture (the "ACS Indenture") (Affiliated Computer Services, Inc. v. The Bank of New York Trust Company, N.A., No. 306-CV-1770D (District Court, Northern District of Texas) (Fitzwater, J.)). According to the complaint, filed on September 26, 2006, Section 4.03 of the ACS Indenture provides that:

> "(a) [ACS] shall file with the Trustee, within 15 days after it files the same with the SEC, copies of the annual reports and the information, documents and other reports (or copies of those portions of any of the foregoing as the SEC may by rules and regulations prescribe) that [ACS] is required to file with the SEC pursuant to Section 13 or 15(d) of the Exchange Act. The Company shall also comply with the provisions of [the Trust Indenture Act of 1939 Section] 314(a)."

According to the complaint, ACS has not yet filed its annual report on Form 10-K for the year ended June 30, 2006 and bondholders under the ACS Indenture delivered notice to ACS alleging that such failure violates the reporting requirements of Section 4.03 of the ACS Indenture. ACS seeks a declaratory judgment that it is not in default of the requirements of Section 4.03 because neither Section 4.03 nor Section 3.14(a) of the TIA requires delivery of reports under the 1934 Act to the indenture trustee unless and until such reports have actually been filed under the 1934 Act.

No decision has been rendered in this case.

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If you wish to obtain additional information regarding these cases or the applicable indenture and TIA provisions, please contact Cristopher Greer (212-728-8214, cgreer@willkie.com), William N. Dye (212-728-8219, wdye@willkie.com), Cornelius T. Finnegan III (212-728-8235, cfinnegan@willkie.com), William E. Hiller (212-728-8228, whiller@willkie.com), Leslie M. Mazza (212-728-8245, lmazza@willkie.com), Anthony D. Schlesinger (212-728-8264, aschlesinger@willkie.com) or the partner with whom you regularly work.

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