

Recent Litigation Regarding Indenture Reporting Requirements

January 5, 2009 William Greenhill

Litigation has increased recently regarding the interpretation of the reporting requirements that indentures and the Trust Indenture Act of 1939 (the "TIA") impose on issuers that have failed to make filings, or that have made late filings, under the Securities Exchange Act of 1934 (the "Exchange Act"). The assertions in these lawsuits include that such failures constitute a default under the issuers' indentures and a violation of the TIA. With one exception, the courts have construed issuer SEC filing requirements in indentures and the related requirement under Section 314(a) of the TIA to impose on the issuer only a ministerial duty to deliver its SEC reports to the trustee after it has filed the reports with the SEC and to make such delivery within the time period prescribed by the indenture. This trend should give issuers and their trustees some comfort that the failure by the issuer to timely file its SEC reports is neither a default under their indentures nor a violation of Section 314(a) of the TIA.

U.S. Court of Appeals for the 8th Circuit Holds an Issuer Not in Default Under an Indenture Due to its Failure to Make Timely Filings with the SEC

In a case of first impression rendered on December 1, 2008, the United States Court of Appeals for the Eighth Circuit held in *UnitedHealth Group Inc. v. Wilmington Trust Co.*, 548 F.3d 1124 (8th Cir. 2008), that UnitedHealth Group Inc ("UHG"), a publicly held company which had issued a series of senior secured notes ("Notes") under an indenture ("Indenture"), had no independent obligation under either the Indenture or the TIA to timely file reports with the Securities and Exchange Commission ("SEC").

As a publicly traded company, UHG is required to make periodic filings with the SEC. UHG came under public scrutiny in 2006 for allegedly backdating employee stock options. In response, UHG formed a committee of independent directors to study its financial affairs. Because of this ongoing review, UHG failed to file its 2006 second quarter report on Form 10-Q ("Report") with the SEC by its due date. Under such circumstances, SEC regulations require a delinquent filer to submit a form 12b-25 notification of late filing. UHG complied with this requirement and forwarded a copy of the filing to the trustee. Thereafter, certain hedge funds, which collectively owned in excess of twenty-five percent of the outstanding principal amount of the Notes, sent UHG a notice of default under the Indenture and demanded that the default be cured. The notice claimed that UHG's failure to timely file the Report violated Section 504(i) of the Indenture. Section 5.04(i) read as follows:

"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 [Securities and Exchange] Commission 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 filing with the Commission. The Company shall also comply with the provisions of TIA [Trust Indenture Act] Section 314(a)."

UHG filed an action in the federal district court in Minnesota against the trustee seeking a

declaratory judgment that it had not violated the terms of the indenture by failing to file the Report. After the cure period had expired, the hedge fund noteholders instructed the trustee to accelerate the Notes and to deliver a notice of acceleration to UHG. The trustee answered UHG's action by filing a counter claim for breach of contract and violation of the TIA Section 314(a). UHG ultimately filed the Report and otherwise complied with the Exchange Act reporting regulations.

The trial court granted a summary judgment in favor of UHG, and the U.S. Court of Appeals affirmed that judgment.

Section 504(i) of the Indenture. In affirming the trial court's judgment, the Court of Appeals panel rejected arguments by the trustee that Section 504(i) of the Indenture imposed an independent contractual obligation on UHG to file timely SEC reports and within, fifteen days thereafter, to forward copies of such reports to the trustee. The Court noted that Section 504(i) of the Indenture, reduced to its essence, reads as follows: "the Company 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." The trustee argued that the plain meaning of the phrase "then required to file" imposed an independent contractual obligation on UHG to file timely reports. The Court, however, concluded that Section 504(i) of the Indenture imposed nothing more on UHG than a ministerial obligation to forward copies of SEC reports to the trustee within fifteen days of their being filed with the SEC. The Court held that, based on the plain meaning of the Indenture, the Indenture imposed no independent contractual obligation to file timely SEC reports. The Court concluded that UHG's delay in filing the Report, while potentially a violation of SEC regulations, did not constitute a default under the Indenture. Since UHG did ultimately file its "then required" reports and, within fifteen days thereafter, did transmit copies the same to the trustee, UHG had fulfilled its contractual duties under the Indenture.

In reaching its decision, the Court noted that the interpretation of similar indenture requirements had been presented to three federal district courts and to a New York state trial court, and that, although none of these court decisions was binding on it, the three federal courts all concluded, on nearly identical facts, that similar indenture provisions did not impose independent obligations on issuers to file timely SEC reports. See *Finisar Corp. v. U.S. Bank Trust, National Association*, No. C 07-4052, 2008 WL 3916050 (N.D. Cal. Aug. 25, 2008); *Affiliated Computer Services, 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 National Association*, No. H-07-121, 2007 WL 1729977 (S.D. Tex. June 13, 2007).

The Court also referred to, and declined to follow, an unpublished opinion of the Supreme Court of New York (also a trial court). In this case, the trial court had reached an opposite conclusion. *The Bank of New York v. BearingPoint, Inc.*, No. 600169/06, 2006 WL 2670143 (N.Y. Sup. Ct. Sept. 18, 2006). The *BearingPoint* court rejected a debt issuer's argument that a similar indenture provision made "SEC filings optional under the Indenture." The 8th Circuit Court concluded that the New York trial court's analysis focused on the mandatory language of the indenture but did not distinguish between two distinct duties: one to file reports with the SEC in the first instance and another to forward copies of the reports to the trustee. More importantly, the New York trial court did not consider any timing issues and simply eliminated the phrase "within 15 days after it files such . . . reports . . . with the SEC," replacing it with a set of ellipses. The Court observed that the *Finisar*, *Affiliated Computer Services*, and *Cyberonics* courts all considered and rejected *BearingPoint*, as did the trial court in the *UnitedHealth Group* case. They did so after coming to the same conclusion: the indenture provisions at issue imposed 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. The Court concurred with this conclusion and, therefore, declined to follow BearingPoint.

SECTION 314(a) of the TIA. Section 314(a) of the TIA provides, in part, as follows:

“Each person who . . . is or is to be an obligor upon the indenture securities covered thereby shall: (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 [Securities and Exchange] Commission pursuant to [Section 13] or [Section 15(d)] of [the Exchange Act]. . . .”

The Court observed that Section 314(a) does nothing more than impose on UHG a statutory obligation to provide copies of required SEC reports to the indenture trustee and does not impose any new obligations or duties. The Court noted that Section 314(a) of the TIA is actually less burdensome than Section 504(i) of the Indenture insofar as it imposes no time constraints with respect to the filing of the reports. The Court concluded that while the Indenture creates a relative deadline of fifteen days after actual filing with the SEC, the TIA is completely silent as to when copies of the SEC reports must be forwarded to the trustee and that Section 314(a) does not independently impose any particular timetable for filing reports, nor does it incorporate the SEC’s regulatory deadlines. The Court concluded that TIA Section 314(a) requires only that debt issuers forward to their trustees copies of such reports as are actually filed with the SEC. Since UHG ultimately filed all required reports with the SEC and promptly forwarded copies of the same to the trustee, the company violated no statutory duties under the TIA. In reaching this conclusion, the Court rejected the holding to the contrary by the New York state trial court in the Bearing Point case and concurred with a similar conclusion by the Federal District Court for the Northern District of Texas in the Computer Services case.

In affirming the district court’s judgment, the Court summarized its decision by concluding that although UHG was “indisputably delinquent” in filing the Report, whatever duties UHG might have neglected were imposed by the SEC and the Exchange Act and not by the Indenture or the TIA. UHG’s obligation to its noteholders was simply to forward to the trustee copies of the required SEC reports within fifteen days of actually filing them with the SEC. UHG’s late filing, therefore, was not a default under the Indenture. Moreover, in all cases UHG diligently forwarded copies of its required reports to the trustee within fifteen days of actually submitting them to the SEC. Consequently, UHG had met all of its contractual and statutory duties, and the noteholders were not entitled to accelerated payments on the Notes.

If you have any questions regarding this matter, please contact Bill Greenhill in the Fort Worth office of Haynes Boone: 817.347.6602, [\[email protected\]](#).