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Beyond Rule 9011: Should You Really Sign That Proof of Claim?

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Proofs of claim are commonplace to creditors and the attorneys who represent them. A lender with any significant volume of accounts is likely to have a system in place to handle customers' bankruptcy filings, including working with a bankruptcy attorney to file a proof of claim.

For many attorneys, a routine part of preparing a proof of claim is to sign the forms on behalf of their clients. Rule 3001 of the Federal Rules of Bankruptcy Procedure expressly authorizes a creditor's authorized agent to sign the claim,[1] and it might be more efficient for the attorney to sign than to coordinate the extra step of obtaining the client's signature. The client also might prefer to have his/her attorney sign the claim as a certification that the format of the claim is technically correct.

Attorneys who sign proofs of claim are likely aware of the Rule 9011 implications of their signatures; after all, the proof of claim form itself points the signer to Rule 9011 and emphasizes both the need for accuracy and the penalties for perjury.[2] A client's review and specific approval of the final proof of claim before filing might provide an attorney with some comfort that the Rule 9011 duty to verify the accuracy of information has been fulfilled.

However, to sign a proof of claim on a client's behalf is to do more than simply represent to the court that you have reasonably verified the information on the form. Signing a proof of claim makes the attorney a potential fact witness, unshielded by privileges and perhaps even vulnerable to disqualification in later litigation. Recent bankruptcy court decisions have shed light on these risks. While in most cases these risks might be unlikely to cause problems for a signing attorney, having the client sign the proof of claim is a simple step that avoids pitfalls and ensures that evidence is being presented to the court by a proper witness.

Rule 9011: Duty to Review

The Rule 9011 implications of signing a proof of claim might be obvious, but they should not be overlooked. Bankruptcy Rule 9011, the counterpart to Rule 11 of the Federal Rules of Civil Procedure, requires that each paper that is submitted to the court must be signed by the attorney (if unrepresented) or party submitting it.[3] By signing, the person signing the document is certifying that, to the best of his/her knowledge after a reasonable inquiry, that

- there is at least a nonfrivolous argument that the claims presented in the document are warranted by law; and
- the allegations and factual contentions in the document have evidentiary support, or are likely to after further investigation, among other things.[4]

The Rule 9011 implications flowing from an attorney's signature on a proof of claim were explored in *In re Obasi*, a 2011 decision from the U.S. Bankruptcy Court for the Southern District of New York.[5] In *Obasi*, the proof of claim in question was for a mortgage, and it was signed electronically by the mortgagor's attorney.[6] The debtor objected to the proof of claim, both because the mortgage's chain of title was incomplete and because of an alleged dispute regarding the claim's request for attorneys' fees.[7]

At a deposition for the debtor's objection, the signing attorney testified that he did not personally sign the proof of claim and had not even personally seen the claim before it was filed.[8] Instead, he explained that his firm's procedure was to have staff prepare each proof of claim and have a junior attorney review the claim prior to filing.[9] The signing attorney provided a checklist to use for claim review and preauthorized the use of his electronic signature for filing, but only the junior attorney actually reviewed each claim and directed it to be filed.[10]

This system of claim preparation and review was unacceptable to the court. The court emphasized that Rule 9011 imposes a *personal and nondelegable* responsibility to conduct a "reasonable investigation" of the proof of claim.[11] It was irrelevant how thorough the firm's review process might have been, since the attorney signing the proof of

1 *See* Fed. R. Bankr. P. 3001(b).
2 The instructions for Box 8 of the proof of claim form provide, among other things, that "[i]f you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration.... Criminal penalties apply for making a false statement on a proof of claim." U.S. Courts, Official Bankruptcy Form B10, Proof of Claim, at 1 (April 2013), *available at* www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Current/B_010.pdf at 2.
3 Fed. R. Bankr. P. 9011(a); *see also In re Dansereau*, 274 B.R. 686, 688 (Bankr. W.D. Tex. 2002) ("Rule 9011 applies to proofs of claim filed in bankruptcy cases.").
4 Fed. R. Bankr. P. 9011(b).
5 2011 Bankr. LEXIS 5011, 2011 WL 6336153 (Bankr. S.D.N.Y. Dec. 19, 2011).
6 *Id.* at *2.
7 *Id.* at *3.
8 *Id.* at *5.
9 *Id.*
10 *Id.*
11 *Id.* at *11-16.

claim had no intention of personally reviewing the document.[12] The court noted that even the fact that the information in a document might be accurate does not satisfy the Rule 9011 inquiry requirement.[13]

Rule 9011 dictates that an attorney signing a proof of claim *personally* make a reasonable inquiry as to its facts and a creditor's rights to make a claim. Though *Obasi* dealt with a case where the attorney whose name appeared on the form did not personally sign the claim, the court's reasoning suggests that the same result would be reached if an attorney does personally authorize his/her signature on a claim without having personally verified its contents.

As an aside, the requirements of Rule 9011 are not limited to attorneys; they apply to anyone who signs a submission to the court.[14] Any representative of a creditor who signs a proof of claim on the creditor's behalf will be held to the same standard of inquiry as would a signing attorney.[15]

Becoming a Fact Witness

Another hazard of an attorney's signing a proof of claim is that it makes the attorney a potential fact witness in future litigation regarding the claim. This scenario was recently encountered by the U.S. Bankruptcy Court for the Southern District of Texas in *Schmidt v. Rodriguez (In re Rodriguez)*.[16] *Rodriguez* involved the deposition of an attorney who signed his client's proofs of claim in the bankruptcy; the attorney objected to and refused to answer a total of 102 questions at the deposition on the grounds of privilege.[17]

In analyzing the potential application of privileges, the *Rodriguez* court first distinguished between an attorney's signature on a proof of claim and on a complaint.[18] Importantly, unlike a complaint, "[a] properly filed proof of claim is *prima facie evidence* as to the claim's validity" and thus, as to the facts alleged in the claim.[19] The court quoted from an analogous case, *Comp. Network Corp. v. Spohler*:

> Here, [the attorney] was being a factual witness concerning fact issues [that] goes to the heart of this legal controversy. He cannot foreclose discovery of the factual basis for his factual representations in the affidavit anymore (sic) than he could take the witness stand and testify on direct examination to the factual matters set forth in his affidavit, and then preclude cross-examination by invoking the attorney/client privilege.[20]

Presenting factual evidence to the court by signing and submitting proofs of claim waived the attorney/client privilege as to the facts of the claim.[21] When questioned at the deposition about his activities prior to filing the proof of claim, such as the documents that he reviewed, the people with whom he spoke and his understanding of the law, the attorney in *Rodriguez* asserted the work-product privilege.[22] The court noted that the attorney's refusal to answer these questions on the grounds of the work-product privilege would usually be appropriate.[23] However, he had made himself a fact witness by signing the proofs of claim, and the court found that he could not "shield from discovery via the work-product privilege the basis for factual assertions [that were] made as a fact witness."[24]

As demonstrated by *Rodriguez*, an attorney who signs a proof of claim on a client's behalf becomes a potential fact witness in future litigation. As a fact witness, the attorney could be exposed not only to questions regarding the facts of the claim, but also a broad range of topics relating to the attorney's practice and even legal knowledge.

Disqualification

Even worse, it is possible that since an attorney who signs a proof of claim becomes a potential fact witness, the attorney could be disqualified from representing the client in a future proceeding due to the dual "attorney" and "client" roles. Disqualification was at issue in *Duke Invs. Ltd. v. Amegy Bank NA (In re Duke Invs. Ltd.)*, wherein the court chose to publish its opinion "because it underscores the problems that can arise when an attorney signs a proof of claim on behalf of the client."[25]

In *Duke*, an attorney prepared a proof of claim with the aid of significant consultation with his client.[26] After the client performed a final review, the attorney signed and filed the claim.[27] The debtor then filed an adversary proceeding to contest the claim, alleging that the creditor wrongfully charged the debtor fees, expenses and an exorbitant interest rate.[28] The debtor also filed a motion to disqualify both the attorney and his law firm from representing the creditor in the adversary proceeding, claiming that the attorney would "likely be a material fact witness."[29]

The court based its decision on the disqualification standards in both the Texas Disciplinary Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct.[30] Under both sets of rules, a primary question is whether the lawyer will be a "necessary" witness in a proceeding.[31] Key to the *Duke* court's reasoning was that although the attorney had prepared the proof of claim, he had done so in close consultation with the creditor, and there was at least one representative of the creditor who could testify to all the facts of the claim.[32] The attorney's testimony was therefore merely cumulative, and the debtor failed to meet its burden to prove that he was a "necessary" witness.[33] Although the particular facts of *Duke* dictated that the attorney should not be disqualified, the court nonetheless took the opportunity to issue a warning to creditors' attorneys:

12 *Id.* at *17-18.
13 *Id.* at *19-20 (citing *In re Ulmer*, 363 B.R. 777, 782 (Bankr. D.S.C. 2007)).
14 Fed. R. Bankr. P. 9011(a) ("By presenting to the court ... a petition, pleading, written motion, or other paper, an attorney *or unrepresented party* is certifying that...." (emphasis added)).
15 *Id.*
16 2013 Bankr. LEXIS 5048, 2013 WL 2450925 (Bankr. S.D. Tex. June 5, 2013).
17 *Id.* at *8.
18 *Id.* at *11.
19 *Id.* (emphasis added); Fed. R. Bankr. P. 3002(f) ("A proof of claim executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim.").
20 *Id.* at *12-13 (quoting *Comp. Network Corp. v. Spohler*, 95 F.R.D. 500, 502 (D.D.C. 1982)).
21 *Id.* at *13.
22 *Id.* at *18. The work-product privilege is defined by Fed. R. Civ. P. 26(b)(3). *Id.*
23 *Id.* at *19.
24 *Id.* at *20.
25 454 B.R. 414, 417 (Bankr. S.D. Tex. 2011).
26 *Id.* at 417-18. As of the petition date, the attorneys' fees claimed by the attorney's law firm totaled nearly $450,000. *Id.* at 419.
27 *Id.* at 418-19.
28 *Id.* at 419.
29 *Id.* at 420.
30 *Id.* at 422.
31 *Id.* at 422-23; *see also* Model Rules of Prof'l Conduct R. 3.07(a); Tex. Disciplinary R. Prof. Conduct 3.08(a).
32 *Id.* at 422-25.
33 *Id.*

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> Despite this holding, Stohner — and all other attorneys representing creditors in bankruptcy cases — ought to think twice before signing proofs of claim for their clients. There is no question that any attorney is allowed to do so, but the attorney puts himself at risk by becoming a fact witness. The Court would suggest that attorneys encourage clients to sign proofs of claim to avoid what has occurred in this suit. Here, the time-consuming and costly effects of the Motion are particularly instructive. Indeed, this whole ordeal could have been avoided if Stohner simply had a representative from [his client] knowledgeable about the loan ... sign the proof of claim.[34]

Best Practices

These cases demonstrate that the choice of which person will sign a proof of claim can be very important. To sign a proof of claim is to certify that you have personally made a reasonable investigation of the facts, and that the claim is correct to the best of your knowledge. For an attorney, to sign the claim makes the client's facts your facts; the proof of claim is *prima facie* evidence, and your signature makes you a potential fact witness in a proceeding involving the claim. Signing the claim likely waives any privileges that might otherwise protect your testimony, and it could even result in your disqualification from representing your client. Even if no sanctions or disqualification result, you could be forced to spend time and money litigating any of these issues.

All of these pitfalls might be easily avoided by having your client sign each proof of claim. Although the representative who signs still bears the burden to personally verify all the facts under Rule 9011, it is the creditor who should be testifying to the contents of its own records. Getting your client's signature is a small step that can avoid a large hassle down the road. abi

34 *Id.* at 426-27.