Practice Update

Proof of Claim Could Cost You Your Privilege

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Bankruptcy Court Holds Attorney's Signature on Proof of Claim Form Renders Attorney a Fact Witness to Allegations in Proof of Claim, Waiving Attorney-Client and Work-Product Privileges

By Steven R. Wirth and Jason L. Margolin

A properly filed proof of claim serves as *prima facie* evidence as to a claim's validity. But when this written statement is signed by a creditor's attorney, the court may find that the attorney has become a fact witness and that there has been a waiver of critical privileges. This was the recent holding of *In re Rodriguez*, Bankr. No. 10-70606, Adv. No. 11-07012, 2013 WL 2450925, at *6 (Bankr. S.D. Tex. June 5, 2013) (granting in part and denying in part a motion to compel, thereby authorizing the deposition of the creditor's attorney on the facts alleged within the proof of claim). Although this is an unpublished opinion, it should serve as a cautionary tale for clients and practitioners in the future.

Significance of Ruling

In this opinion, the bankruptcy court held that by signing a proof of claim form, the creditors' attorney made himself a fact witness, thereby waiving work-product and attorney-client privileges as to the facts alleged in the proof of claim. As a result, the

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creditors' attorney was ordered to appear for deposition and answer numerous questions that would normally be subject to sustainable privilege objections. In light of this holding, attorneys representing creditors, whether acting as in-house or outside counsel, should encourage their clients to have their corporate representatives sign proof of claim forms going forward to ensure that the privilege is protected.

A Proof of Claim

A proof of claim is a written statement setting forth a creditor's claim. The written statement must substantially conform to the appropriate Official Form. Official Form 10 is the current Official Form for such proofs of claim. A properly filed proof of claim serves as *prima facie* evidence as to the claim's validity and amount, and thus, as to the facts alleged therein.[1] Official Form 10 was revised in 2011 to, among other changes, include a declaration under penalty of perjury that the information is "true and correct to the best of my knowledge, information and reasonable belief."[2]

Holding

Essentially, the *Rodriguez* court held that by signing the clients' proofs of claim, their attorney asserted personal knowledge of the facts alleged in the proof of claim, thereby becoming a fact witness to the facts alleged therein, just as if the attorney had filed an affidavit supporting the merits of a case.[3] The court also ruled that Texas' offensive use doctrine supported the waiver of the attorney-client privilege. In addition to ruling that the attorney-client privilege was waived, the court also held that because the attorney signed the proofs of claim, the work-product privilege was waived as to the facts alleged in the proofs of claim; however, the legal basis of the proofs of claim were still protected.

Pursuant to the Federal Rules of Evidence, the court applied state privilege law (here, Texas law) because state law governed the proceedings (the Trustee's causes of action for state law breach of contract and indemnity). Nevertheless, the court applied the uniform standard embodied in Fed. R. Civ. P. 26, which codifies the work-product doctrine, as it was made applicable through Rule 7026 of the Federal Rules of Bankruptcy Procedure.

When considering both the attorney-client privilege and the work-product doctrine, the *Rodriguez* court ruled that the creditors waived both privileges when they consented to their attorney filing proofs of claim in the bankruptcy case. The waiver of the privileges extended to all facts contained in the proofs of claim, and allowed the opposing party to question the creditors' attorney on numerous questions that the court acknowledged would normally be subject to sustainable privilege objections.

The court did not indicate that this ruling was dependent upon the changes to the proof of claim form (Official Form 10) made in 2011; and in fact the movant argued that it was not because Rule 9011(b) already states that the attorney's signature on any document certifies that "to the best of the person's knowledge, information, and belief, formed after inquiry reasonable under the circumstances," that there is evidentiary support for the position. Instead, the court noted that a proof of claim serves as prima facie evidence as to the claim's validity, which makes it analogous to signing an affidavit rather than signing a complaint. While the court did not address the change to Official Form 10 in its opinion, it seems likely that other courts could find additional support for the waiver of privilege based upon the additional certification included on the signature block to the revised proof of claim form.

Potential Counter Arguments Not Raised

The client, not the attorney, holds the privilege, and therefore, the privilege cannot be waived by the attorney's conduct unless the client consents. In *Rodriguez*, there was no dispute that the Petitioning Creditors consented to having Womble sign the proofs of claim, and the court held that this consent constituted the waiver by the Petitioning Creditors – the clients. Thus, courts should not interpret *Rodriguez* to impose a waiver absent some finding that the client consented to the attorney signing the proof of claim.

In *Rodriguez*, a deposition of the lead creditor demonstrated a lack of personal knowledge as to the amounts and facts in the proofs of claim. This further supported the movant's waiver argument because there was no alternative source of the information sought through the deposition of the attorney. If the Petitioning Creditors had been able to demonstrate that another source of the information was available, at least some of the work-product privilege may have been sustained pursuant to Fed. R. Civ. P. 26(b)(3), made applicable by Fed. R. Bankr. P. 7026 (restricting production unless a party "is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.").

Best Practice Suggests a Change for Practitioners

Previously, it had been common practice for attorneys to sign proof of claim forms on behalf of the creditors they represent, just as attorneys routinely sign pleadings and motions. In light of *Rodriguez*, attorneys, whether in-house or outside counsel, should exercise caution before signing any proof of claim form. While several counter-arguments to the waiver of privilege exist, it is better to avoid having to raise them. Although *Rodriguez* remains an unpublished decision from a Texas bankruptcy court, other courts may choose to follow *Rodriguez*, and the consequences of a waiver of the attorney-client privilege could be severe. For example, a waiver may allow for disclosure of facts

that compromise the allowance or amount of the proof of claim, create exposure to the creditor's counsel, and may exponentially increase litigation costs if disputes over the scope of the waiver follow. A debtor's counsel will also likely use the threat of conducting discovery and a deposition for strategic advantage for obtaining a more favorable resolution of a disputed claim.

The reasoning of *Rodriguez* is also consistent with Florida privilege law.[4] A proof of claim serves as *prima facie* evidence as to the validity and amount of the claim – a "sword." If the only basis for the facts that support the claim are in the mind of the creditor's attorney, then Florida law is unlikely to provide an applicable privilege – a "shield" – once the proof of claim is filed. Moreover, because the work-product doctrine is governed by federal law, it should be consistently applied in any bankruptcy court. Thus, the best practice is for the individual creditor or the corporate creditor's representative to sign the proof of claim form. By having the person who would serve as the creditor's fact witness sign the proof of claim form, creditors can avoid this potential misstep and protect their rights.

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[1]*See* Fed. R. Bankr. P. 3001(f); In re Rodriguez, 2013 WL 2450925, at * 3.

[2]*See* Official Form 10; 2011 Committee Note to Official Form 10.

[3]*See In re Rodriguez*, 2013 WL 2450925 at *3-4 (*citing Comp. Network Corp. v. Spohler*, 95 F.R.D. 500 (D.D.C. 1982) (holding that attorney became a factual witness to matters contained within his affidavit by submitting that affidavit in support of an opposition to a motion to compel expedited discovery because the affidavit touched on the merits of the litigation)).

[4]*See, e.g., GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987) ("In the ordinary case, inquiry of the type sought by GAB might be foreclosed by the attorney-client privilege. The

privilege, however, ‘was intended as a shield, not a sword.’”)

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