Chapman and Cutler LLP

# Chapman Sidebar

Updates from Chapman's Litigation, Bankruptcy, and Restructuring Group June 19, 2014

## A Creditor May Obtain a Judicial Lien upon Distributions from a Trust

Debtors often attempt to use trusts as a shield to dissuade creditors from collection efforts. However, courts continue to narrowly construe the protections afforded by trusts against legitimate creditors. Therefore, a prudent creditor should pursue all potential remedies against valuable trusts, including judicial liens, as did Community Bank of Elmhurst.

Following a commercial foreclosure, the trial court in *Community Bank of Elmhurst v. Klein* granted the plaintiff's motion for a judicial lien over principal distributions from a trust under which the judgment debtor was a beneficiary.

The second district affirmed the trial court's ruling and rejected the judgment debtor's argument that trust distributions are exempt from creditors pursuant to 735 ILCS 2-1403. The appellate court reasoned that the plain language of section 2-1403 provides that no property held "in trust" may be used for the satisfaction of a judgment; however, a distribution is no longer held "in trust" and therefore may be used to satisfy a judgment. The appellate court further held that there is nothing in section 2-1403 that requires a creditor to wait until the beneficiary receives a distribution before obtaining a lien. *Community Bank of Elmhurst v. Klein*, 2014 IL App (2d) 121074.

---

## Attorneys Beware! Executing a Proof of Claim May Be a Waiver of Privilege

A bankruptcy decision found that an attorney who executes a proof of claim on a creditor's behalf waives attorney-client and work product privilege as to the facts alleged in the proof of claim. *See In re Rodriguez,* 2013 WL 2450925 (S.D. Tex. June 5, 2013). Therefore, to avoid inadvertently waiving any privileges, a creditor's proof of claim should not be executed by an attorney but rather by an employee of the creditor who is *not* an attorney and who is prepared to testify as a witness if the claim is contested.

In *Rodriguez*, the bankruptcy trustee objected to the contents of the creditors' proofs of claim. When the proofs of claim were contested, the creditors' attorney who executed the proofs of claim was deposed. Citing attorney-client and work product privilege, creditors' counsel objected. Nonetheless, the court, upon a motion to compel, required that the executing attorney answer all questions pertaining to the facts alleged in the proofs of claim. While the court did protect the executing attorney's "legal opinions, legal research and thoughts" pursuant to the work-product doctrine, the creditors were ordered to produce and disclose all information, attorney-client communications, and documents that the executing attorney utilized in preparing the proofs of claim. In making these determinations, the *Rodriguez* court compared a proof of claim to an affidavit, and held that an attorney executing a proof of claim becomes a fact witness and waives privilege with respect to all facts and allegations asserted in the proof of claim.

Although courts in other jurisdictions have yet to address this issue, it is possible that they will follow the *Rodriguez* decision. This can result in disclosures that compromise a creditor's claim or create litigation risk for the creditor. Thus, it is not advisable for an in-house attorney or a creditor's outside counsel to execute proofs of claims. Instead, an employee of the creditor who is *not* an attorney and who is prepared to testify as a witness if the claim is contested should execute the proof of claim on a creditor's behalf.

## Lenders' Obligations under the Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act (*"SCRA"*) eases legal and financial burdens on military servicemembers. First enacted in 1940, Congress drafted the SCRA believing that servicemembers should not face the distraction of legal proceedings unfolding at home such that they could focus squarely on the defense of the country. The law does not relieve servicemembers of civil liability entirely. Rather it legally suspends enforcement of certain civil actions until a more suitable time. Consequently, financial institutions that lend to servicemembers as well as other organizations that do business with servicemembers should recognize what the SCRA requires—especially since violating it can carry serious legal consequences.

Any servicemember currently on active duty is covered by the SCRA, which offers many protections including special procedures for default judgments, evictions, mortgage foreclosures, and termination of leases. These special procedures are designed to suspend proceedings whether or not servicemember defendants have appeared or been served. The law also imposes a maximum interest rate of six percent on any obligation or liability during the servicemember's period of active duty military service and one year thereafter. Additional protections include the ability to terminate automobile and property leases, protections under installment contracts, assignments, and leases, government guaranties on certain life insurance policies, and even state tax relief. 50 U.S.C. App. § 500 *et seq*.

Courts will liberally interpret the SCRA such that the law will usually apply if the legal action involves a servicemember on active duty. Accordingly, lenders should assume that when dealing with servicemembers, the SCRA will apply. When in doubt, always check whether the defendant is in the military. Regularly checking for military status both before initiating a complaint and at major points during litigation is a way to form good habits, even if those checks are not explicitly necessary. Forewarned is forearmed.

## For More Information

For more information, please visit us online at chapman.com or contact one of the members of our Litigation, Bankruptcy and Restructuring Group:

Mike Benz • 312.845.2969
Joseph Lombardo • 312.845.3428
Jim Sullivan • 312.845.3445
Gina Lavarda • 312.845.3725
Jennifer Majewski • 312.845.3745
Mark Silverman • 312.845.3786
Eric Silvestri • 312.845.3915
Brittany Viola • 312.845.3448

Chapman and Cutler LLP
Attorneys at Law · Focused on Finance®