Service of Pleadings on Counsel under Bankruptcy Rules 7004, 9014 and 9010

Contributing Editor:
Kenneth M. Misken
McGuireWoods LLP; McLean, Va.
kmisken@mcguirewoods.com

Also Written by:
Michael J. Lichtenstein
Shulman, Rogers, Gandal, Pordy & Ecker PA
Potomac, Md.
mlichtenstein@shulmanrogers.com

About the Authors

Kenneth Misken is counsel at McGuireWoods LLP in its Restructuring and Insolvency Group in McLean, Va. Michael Lichtenstein is a shareholder at Shulman, Rogers, Gandal, Pordy & Ecker PA in Potomac, Md.

There are significant differences between nonbankruptcy civil litigation and bankruptcy proceedings, and in particular, the service rules applicable to each. One of the specific differences between nonbankruptcy civil litigation and bankruptcy proceedings is that the Rules of Bankruptcy Procedures (the "Bankruptcy Rules"), as interpreted by case law, may allow for service of process on attorneys. Some courts have concluded that service of process on an attorney satisfies due process even if the attorney has not entered an appearance in the bankruptcy case. At least one court has determined that where an attorney has entered an appearance in the bankruptcy case in accordance with Bankruptcy Rule 9010, service on the attorney, on behalf of the creditor, is not only allowed but may be required.

Rules 7004 and 9014

Kenneth M. Misken

Bankruptcy Rule 7004 is the cornerstone for service of process in bankruptcy cases. The service requirement is not only applicable to service of process in an adversary proceeding, but also to contested matters. Bankruptcy Rule 9014 incorporates Bankruptcy Rule 7004 and requires a motion initiating a contested matter to be served in the same manner as a summons and complaint. Bankruptcy Rules 7004 and 9014 reflect the wide-reaching effect of bankruptcy court jurisdiction and congressional intent to facilitate service of process for debtors and ensure that the due-process rights of creditors and other parties in interest are protected.

One particular issue that has arisen in connection with service of process in bankruptcy cases is whether a defendant's counsel is an agent upon whom a debtor can serve a summons and complaint in an adversary proceeding. Many courts have found that an attorney has either express or implied authority to accept service as long as due process is served.[1]

Express Authority

In *In re Ms. Interpret*,[2] the defendant, a German company, moved to dismiss the debtor's complaint to recover a preference on the grounds of improper service. The creditor was not authorized to do business in the state of New York and had no assets in the state.[3] The debtor served the creditor in care of the creditor's counsel in New York.[4] The law firm that was served had attended four creditors' committee meetings and participated in one conference call.[5] The attorney was described as a quiet but active committee member.[6]

The debtor alleged that service of process was proper because the creditor had expressly appointed the law firm as its authorized agent by listing the law firm as the party to receive notices in the creditor's proof of claim.[7] Alternatively, the debtor argued that the creditor had impliedly authorized the law firm to accept service because the creditor was active in the bankruptcy through the law firm.[8] The bankruptcy court agreed that the creditor expressly authorized the law firm as its agent for service of process by signing its proof of claim through its counsel,[9] concluding that due process was satisfied because the creditor received sufficient notice allowing it to defend its position.[10]

Implied Authority

Michael J. Lichtenstein

In *In re Reisman*,[11] the debtor sued a corporate creditor to avoid a judicial lien as a preference and served only the creditor's attorney with a summons and a copy of the complaint.[12] Even though the attorney filed a notice of appearance and request for notices and participated in the bankruptcy case, the creditor asserted lack of personal jurisdiction because of ineffective service.[13] The court dismissed the complaint but later reinstated it.[14] Although finding that the attorney was not *expressly* authorized to accept service, the court nonetheless concluded that the attorney had *implicit* authority to accept service on the creditor's behalf.[15]

The *Reisman* court considered the attorney's request for notices and his active role in the chapter 11 proceeding.[16] The court was confident that the creditor defendant would have actual knowledge of the pending preference action from its lawyer, and therefore, due process was satisfied.[17]

In re Moralo Co. Inc.[18] involved a debtor and its affiliate that purportedly filed chapter 11 petitions because of thousands of asbestos-related lawsuits filed in various state courts. The debtors sought to serve the summons and complaint on certain counsel as implied or court-designated agents of more than 60,000 asbestos plaintiffs.[19] The debtors identified 76 law firms that represented the defendants, with

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1 *See United States v. Ziegler Bolt and Parts Co.*, 111 F.3d 878, 881 (Fed. Cir. 1997).
2 222 B.R. 409, 411 (Bankr. S.D.N.Y. 1998).
3 *Id.*
4 *Id.*
5 *Id.* at 412.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* at 415.
10 *Id.; but see In re Boykin*, 246 B.R. 825 (Bankr. E.D. Va. 2000) (concluding that it is not proper to serve person listed on proof of claim unless that person is individual listed in Bankruptcy Rule 7004(b)(3) to receive service).
11 139 B.R. 797, 799 (Bankr. S.D.N.Y. 1992).
12 *Id.*
13 *Id.*
14 *Id.* at 802.
15 *Id.* at 801.
16 *Id.*
17 *Id.*
18 295 B.R. 512 (Bankr. D. N.J. 2003).
19 *Id.* at 513-14.

approximately 40,000 of the defendants represented by three law firms.[20] Early on, some of the lawyers had been active in the proceedings by appearing at a hearing on first-day orders or related hearings and by allegedly seeking the appointment of an official committee of asbestos claimants.[21]

The court expressed that under certain circumstances a court may find implied authority in an attorney to accept service of process.[22] The court considered the fact that most of the defendants were represented by one of the 76 firms that had filed notices of appearance in the chapter 11 proceedings and noted that the substance of the adversary proceeding was linked to the state court actions.[23] The court also believed there would not be any burden on the defendants if the attorneys were served as agents.[24] The court explained that in mass tort cases such as *Moralo*, service on counsel might actually be better than mailing documents directly to the tens of thousands of individuals.[25] The court concluded that due process would be served through service of process on counsel, considering the bankruptcy court's nationwide jurisdiction and the presence of the thousands of asbestos claimants as defendants in the adversary proceeding.[26]

Citing to similar bankruptcy and district court decisions, and adopting the conclusion of these courts, the Ninth Circuit Court of Appeals explained that "the basic concept that a party's bankruptcy attorney can be authorized impliedly to accept service of process on the client's behalf in a related adversary proceeding is neither novel nor inconsistent with general principles of agency law."[27] After an involuntary petition was filed, the trustee sued the debtor's sole shareholder, seeking to set aside fraudulent conveyances in excess of $20 million and seeking to freeze the defendant's assets.[28] The trustee served only the defendant's counsel with the pleadings and the summons.[29] The bankruptcy court found that the defendant's lawyer in the underlying bankruptcy proceeding was impliedly authorized to accept service in the adversary proceeding.[30]

The Ninth Circuit in *Focus Media* upheld this finding, agreeing that in an adversary proceeding, a lawyer can be deemed to be an implied agent to receive service of process if the lawyer has repeatedly represented the client in the underlying bankruptcy case and if the totality of circumstances demonstrates the client's intent to convey such authority.[31] The Ninth Circuit noted that the attorney had appeared extensively in the underlying bankruptcy proceeding and had repeatedly informed the judge and other parties that he was appearing as the defendant's personal lawyer (even though he also represented the debtor corporation).[32] There was also evidence that the defendant had previously been served with pleadings in the bankruptcy proceedings in care of the attorney and had not objected.[33] The defendant signed a declaration in state court declaring that the attorney was the defendant's general counsel and had been consulted on a variety of issues and assisted the defendant in connection with the corporation's bankruptcy.[34]

Bankruptcy Rule 9010

What if an attorney enters an appearance in accordance with Bankruptcy Rule

20 *Id.* at 515.
21 *Id.*
22 *Id.* at 519.
23 *Id.* at 520-21.
24 *In re Moralo Co. Inc.*, 295 B.R. at 525.
25 *Id.*
26 *Id.* at 526-27.
27 *In re Focus Media*, 387 F.3d 1077, 1082 (9th Cir. 2004).
28 *Id.* at 1080.
29 *Id.*
30 *Id.*
31 *Id.* at 1079.
32 *Id.* at 1084.
33 *Id.*
34 *Id.*

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The International Insolvency Institute is pleased to announce its Eleventh Annual International Insolvency Conference which will proceed at New York's historic Columbia University on Monday, June 13 and Tuesday, June 14, 2011.

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ABC Names New Officers, Directors, Emeritus Directors and Certified Attorneys

Written by:
C. Daniel Motsinger
Krieg DeVault LLP; Indianapolis
cmotsinger@kdlegal.com

The American Board of Certification (ABC) elected new officers and members to its board of directors at its Annual Meeting, held in November in New York. ABC certification is available to all qualified attorneys, and those elected to the ABC's executive committee include **C. Daniel Motsinger**, Chair (Krieg DeVault LLP; Indianapolis), **Bettie Kelley Sousa**, President (Smith Debnam Narron Drake Saintsing & Myers LLP; Raleigh, N.C.), **John F. Young**, President-Elect (Markus Williams Young & Zimmermann LLC; Denver), **Mac D. Finlayson**, Treasurer (Morrel Saffa Craige PC; Tulsa, Okla.), **Candace C. Carlyon**, Secretary (Shea & Carlyon Ltd.; Las Vegas), Prof. **Nancy Rapoport**, Dean of Faculty (William S. Boyd School of Law; Las Vegas), **Craig M. Geno**, Chair of Standards Committee (Harris Jernigan & Geno PLLC; Ridgeland, Miss.), **Michael P. Horan**, ABI Representative at Large (Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis PA; St. Petersburg, Fla.), **Robert L. Pollak**, CLLA Representative at Large (Glassberg Pollak & Associates; San Francisco), **Walter J. Greenhalgh**, Chair of Marketing Committee (Duane Morris; Newark, N.J.), **J. Scott Bovitz**, Chair of State Bar Liaison Committee (Bovitz & Spitzer; Los Angeles) and **Mark A. Craige**, Chair of Technology Committee (Morrel Saffa Craige PC; Tulsa, Okla.).

About the Author

Dan Motsinger is a partner at Krieg DeVault LLP in Indianapolis and is chair of the American Board of Certification.

C. Daniel Motsinger

ABC congratulates its newly elected directors, who will serve three-year terms. They include **Mary Beth Ausbrooks** (Rothschild & Ausbrooks PLLC; Nashville, Tenn.), **Wesley H. Avery** (Roquemore, Pringle & Moore Inc.; Los Angeles), **Prof. Gregory M. Duhl** (William Mitchell College of Law; St. Paul, Minn.), Prof. **Nicholas L. Georgakopoulos** (Indiana University School of Law; Indianapolis), **H. Jason Gold** (Wiley Rein LLP; McLean, Va.), **Todd L. Gurstel** (Gurstel Chargo Attorneys at Law; Golden Valley, Minn.), **R. Stephen LaPlante** (Keating & LaPlante LLP; Evansville, Ind.), **Paul A. Matthews** (Bourland, Heflin, Alvarez, Minor & Matthews PLC; Memphis, Tenn.), **Michael T. O'Halloran** (Law Office of Michael T. O'Halloran; San Diego), Prof. **Nancy B. Rapoport** (William S. Boyd School of Law; Las Vegas), **Mark J. Sheriff** (Wiles, Boyle, Burkholder & Bringardner Co. LPA; Columbus), **Michael B. Watkins** (Barnes & Thornburg LLP; South Bend, Ind.), **Stephen D. Wheelis** (Wheelis & Rozanski APLC; Alexandria, La.) and **Constance L. Young** (Johnson, Allison & Hord PA; Charlotte, N.C.).

Former ABC officers and directors have been elected as ABC's newest emeritus directors and are recognized for their past exemplary service to the ABC with an honorary lifetime appointment to ABC's board of directors. Those recognized include **Prof. G. Ray Warner** (St. John's University School of Law and Of Counsel, Greenberg Traurig LLP; Queens, N.Y.), **Rudy J. Cerone** (McGlinchey Stafford PLLC; New Orleans), **Harry W. Greenfield** (Buckley King LPA; Cleveland) and **John D. Penn** (Haynes and Boone LLP; Fort Worth, Texas).

Finally, **Richard M. Dauval** (Leavengood & Nash PA; St. Petersburg, Fla.) has been recently certified in Consumer Bankruptcy and **Michael B. Schaedle** (Blank Rome LLP; Philadelphia) has received certification in Business Bankruptcy. ABC also thanks all of its existing certified members for their continued success in serving the public interest by fostering bankruptcy and creditors' rights certification. ■

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9010 and requests service of all pleadings affecting the attorney's client? *Must* the attorney be served with the summons and complaint (or contested matter pleadings) to satisfy due process? At least one court has concluded that the answer, at least when it involves an objection to a claim, is "yes."

In *In re Lomas Financial Corp.*,[35] the debtor filed an omnibus objection to claims in which the debtor sought to disallow more than 500 claims, including the claims of CDC Servicing Inc.[36] The debtor did not serve the objection on the parties who requested notice in accordance with Bankruptcy Rules 2002(g) or 9010(b), including the designated counsel for CDC.[37] Despite the debtor's oversight, a colleague of the attorney in charge of the CDC representation received a copy of the objection during the course of the representation of an unrelated creditor.[38] The court explained that the colleague had no reason to review the objection to claim with an eye toward the CDC claim.[39]

CDC failed to respond to the objection, and the court entered an order disallowing CDC's claim.[40] Approximately one month after the order was entered, the attorney representing CDC discovered that CDC's claim had been disallowed and, after a period of failed negotiations with the debtor's counsel, filed a motion under Bankruptcy Rule 3008 requesting the court to reconsider and vacate its order.[41]

At the various hearings on the Bankruptcy Rule 3008 motion, the debtor's counsel argued that service

35 212 B.R. 46 (Bankr. D. Del. 1997).
36 *Id.* at 48.
37 *Id.*
38 *Id.* at 49.
39 *Id.*
40 *Id.* at 49-50.
41 *Id.*

on an attorney who entered an appearance under Bankruptcy Rule 9010 is not required, because "had the rule makers intended to require service on an attorney appearing on behalf of a corporate party, they would have expressly provided so, as they did when they amended Rule 7004 in 1994 to require service on an insured depository institution be effected on their counsel, if any has appeared."[42] Since there is no similar provision with regards to service of a corporate party, the debtor argued that counsel representing corporate defendants need not be served, even if counsel had entered an appearance and requested service in accordance with Bankruptcy Rule 9010.[43]

The court did not stop its analysis with Bankruptcy Rule 7004(h)(1), explaining that Bankruptcy Rule 7004(b)(9) requires a party to serve the debtor and its counsel if the debtor is represented by counsel.[44] Although the court recognized that Bankruptcy Rule 7004 does not require a similar requirement on a nondebtor party (whether an individual or a corporation), the court explained that the absence of such a requirement in Bankruptcy Rule 7004 does not lead to the conclusion that the rule makers intended that no service on a nondebtor's counsel was required. Instead, the court looked at Bankruptcy Rule 9010 for such a requirement.[45]

Bankruptcy Rule 9010(a)(1) provides that a "debtor, creditor, equity security holder, indenture trustee, committee or other party may appear in a case under the Code and act either in the entity's own behalf or by an attorney authorized to practice in the court." Bankruptcy Rule 9010(b) provides that an "attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record." Looking at Bankruptcy Rule 9010, the court explained that "[w]here a creditor with a substantial claim elects to have its attorney act in its stead pursuant to Rule 9010, then it seems [to the court] that the creditor should be accorded the same right that the debtor has by reasons of Rule 7004(b)(9). In other words, Rule 9010 can be read as the creditor's counterpart to the debtor's Rule 7004(b)(9) right."[46] The court concluded, at least in the objection-to-claim context, that the filing of a notice and appearance and request for documents in accordance with Bankruptcy Rule 9010 triggers the same right for a creditor that Bankruptcy Rule 7004(b)(9) grants a debtor at the outset of the case.[47]

42 *Id.* at 50.
43 *Id.*
44 *Id.* at 53.

45 *Id.*
46 *Id.* at 54.
47 *Id.*

Conclusion

The case law suggests that it might not only be proper to serve a creditor's attorney with a summons and complaint or a motion initiating a contested matter when the attorney has either express or implied authority, but it may also be required. Before anyone initiates an adversary proceeding or a contested matter, the initiating party should review the case docket to determine whether the adverse party has had counsel enter an appearance and request service of documents in accordance with Bankruptcy Rule 9010. If the adversary party's counsel has entered an appearance, the initiating party should not only serve the adverse party in accordance with Bankruptcy Rule 7004 (whether an adversary proceeding or a contested matter), but the initiating party should also serve the adverse party's counsel.

Although it could be argued that Bankruptcy Rules 7004 and 9014 do not require an initiating party to serve an adversary party's counsel, even if a request for documents under Bankruptcy Rule 9010 has been filed, the better practice is to serve the adverse party's counsel. Not only could it be required, but the court could easily find that excusable neglect exists if counsel is not served. ■

Legislative Highlights

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refers to "day," the answer is "yes," but if it refers to "time of day," the answer is "no." The latter approach seems to have more logic behind it, given a legislative purpose, stated in the House report[4] to give debtors a chance to rethink whether to file.

A "Third Way" Solution to the Foreclosure Mess?

In January, President Obama named William Daley—a former Commerce Department Secretary and executive at JPMorgan Chase—to serve as his new Chief of Staff. Daley's Wall Street background signals to some in Washington, D.C., a move toward a less-hostile approach to the business community. Interestingly, Daley was also a board member of the Washington-based "Third Way," a think tank that "advances more moderate policy ideas," according to its mission statement. It is noteworthy that Third Way's board, like Daley, mostly works in finance for some of the top banks in America, all of whom have been exposed by the foreclosure crisis.

In the wake of the *Ibanez* ruling by the Supreme Judicial Court in Massachusetts, Third Way offered a legislative fix to the situation, stating in their introduction: "As egregious as the paperwork failures were in the Massachusetts case, it would be far more damaging to the American economy if every foreclosure and every securitization were suddenly open to question." Third Way outlined a three-pronged approach to "protect injured homeowners, keep the housing market moving and prevent future failures." First, injured homeowners who were robo-signed for foreclosures despite a pending request for a modification or short sale should have their foreclosure proceedings suspended. These homeowners should instead receive an expedited review of their modification or short sale application, to be completed within 30 days. Second, to provide some certainty to the housing market and not create a "cottage legal industry aimed at stalling inevitable foreclosures," Congress should create a limited safe harbor from paperwork-related litigation for pending foreclosures on abandoned or severely delinquent properties—loans in default for 18 months or more.

Finally, Third Way says that the newly created Consumer Financial Protection Bureau should take the lead in creating compliance procedures and an audit system to regulate the processing of foreclosure paperwork in order to prevent widespread future document failures. While it is highly unlikely that the President's new Chief of Staff had any role in making the recommendation, it's likely that Third Way will have a better chance of being listened to in the corridors of power with one of their own meeting with the President on a daily basis. ■

4 H.R. Rep. No. 109-31, Pt. 1, at 17-18 (2005).