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A Little Help, Please!

Creditors' attorneys may be at risk under the current Rules of Professional Conduct

It's a case about a horse trailer being sold at auction to partially satisfy its now-former owner's debt to a creditor. Sounds like fairly ho-hum stuff. But there the former owner was, in late-December, having to ask the Ohio Supreme Court for justice.

The trailer's former owner requested that the Court take his case because the appellate court's ruling "raises a substantial question affecting the practice of law" and is of "great general interest." The crazy part is that he is right — at least to the first part. Whether there is a "great general interest" is debatable, but attorneys who have any sort of a commercial practice should be paying close attention.

The case involves a serious ethical dilemma for lawyers who represent creditors attempting to collect on a cognovit note. A cognovit note is a document on which a debtor consents in advance to allowing the creditor, upon default, to obtain a judgment on the outstanding balance without notice or a hearing. Not only that, it can also authorize the creditor's attorney to appear in court on behalf of the debtor, admit that the debtor owes the money, and ask that judgment be entered on behalf of the debtor. This is called a confession of judgment.

Representing Both Sides in a Proceeding

The potential conflict of interest for a creditor's attorney confessing judgment is obvious. As the former owner of the horse trailer points out in his Memorandum in Support of Jurisdiction, Rule 1.7(c)(2) of the Ohio Rules of Professional Conduct provides: "Even if each affected client consents, the lawyer shall not accept or continue the

representation if ... the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding."

So how is this issue just now coming before the Ohio Supreme Court? The answer is that prior to February 2007, when the current Rules became effective, a creditor's attorney had the imprimatur of the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline to confess judgment on the debtor's behalf. In Opinion 93-003, the Board advised that a confession of judgment under former Disciplinary Rule 5-105 ("DR 5-105") was permitted so long as the debtor expressly waived the conflict of interest. But former DR 5-105 is not current Rule 1.7(c).

Although the Board could have issued a new advisory opinion, it appears that the Supreme Court will have the first shot at resolving this conflict-of-interest question — on a legal rather than an advisory basis.

Cognovit Notes

Cognovit notes permit creditors to enforce their contractual rights without having to go through protracted and costly litigation. While detractors claim that they violate debtors' due process rights, the U.S. Supreme Court long ago held that cognovit notes are legal — although they are "the loosest way of binding a man's property that ever was devised in any civilized country."

Ohio is one of just a handful of states that statutorily authorize cognovit notes. The General Assembly, however, set strict limits on their use. They are permitted in commercial transactions only. And, pursuant to Section 2323.13 of the Ohio Revised Code, a creditor's attorney must produce a "warrant of attorney"

— a provision in a document that authorizes a "confession of judgment" — signed by the debtor and accompanied by the following statutory warning:

Warning — By signing this paper, you give up your right to notice and court trial. If you do not pay on time, a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause.

The result is that commercial debtors signing cognovit notes knowingly relinquish their rights and authorize their creditors' attorneys to confess judgment on their behalf. On the other hand, courts cannot enforce confessions of judgment failing to meet any of these safeguards.

Statutory Permission vs. Ethical Prohibition

Although creditors' attorneys can *statutorily* represent debtors in a proceeding, how can they do so and abide by their professional obligations under Rule 1.7(c)(2)?

In Opinion 93-003, the Board advised that former DR 5-105 permitted parties to waive a conflict of interest if each consented to the representation after full disclosure of the possible effects of the representation. Thus, the Board advised that a creditor's attorney could confess judgment on a debtor's behalf so long as the warrant of attorney contained an express conflict waiver or it specified that the creditor's attorney may confess judgment.

Some, including the aforementioned former trailer's owner, argue that those kinds of conflict waivers are not permitted under Rule 1.7(c)(2). However, despite Rule 1.7(c)(2)'s inflexible position, the official comments to Rule 1.7 explain, "No change in the substance of the referenced Ohio rules on conflicts and conflict waivers is intended, except the requirement that conflict waivers be confirmed in writing." Therefore, if the

official comment could be relied upon, a creditor's attorney who, according to Opinion 93-003, was permitted under former DR 5-105 to confess judgment on a debtor's behalf should still be allowed to do so, notwithstanding the Rule 1.7(c)(2) prohibition.

The Supreme Court may well take up the case and provide us with the legal answer. However, if the Court decides not to hear the case, the Board should quickly issue an advisory opinion affirming Opinion 93-003 — or not. We need to know. Our licenses are at risk.

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Nominations for the 2013-14 Award, and the basis therefore, should be submitted in writing to: The Ethics and Professionalism Committee, Cleveland Metropolitan Bar Association, 1301 East Ninth St., Second Level, Cleveland, OH 44114-1253, ATTN: Tom Horwitz, chair. Please include your address and telephone number. Nominations must be submitted no later than Friday, April 25 2014.

Nominations will be reviewed and evaluated by a selection committee of lawyers, judges and law professors. The award will be formally presented at the Association's annual meeting in June 2014.



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