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Investigate Before You File: Truthfulness in Pleadings

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You can ask any attorney, whether seasoned or newly admitted, about one of the most important ethical rules that every attorney learns in law school: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Rule 3.1 ABA Model Rules of Professional Conduct. However, despite learning this rule, sometimes an attorney's over-zealousness can lead to sanctionable conduct.

In this client alert, we will be focusing our attention on the importance of truthfulness in pleadings and the ramifications for failing to do so in federal and bankruptcy courts. Although the scope of this alert is on the federal and bankruptcy courts, state courts also follow the same general principals as those courts. *See* New York CPLR § 3013; *See* Michigan Court Rules: Rule 2.111; *See also* Illinois 735 ILCS 5/Art. II Pt. 6.

Besides our ethical guidelines to pleadings and representation, the federal rules also provide guidance on this issue. In a prior client alert, "Lawyers Crossing the Line: Sanctioned and Reprimanded," we discussed the rules governing the truthfulness of pleadings brought in federal courts and its incorporation into the bankruptcy courts. Rule 11 of the Federal Rules of Civil Procedure states in relevant part that in any pleading submitted to the court, the attorney or litigant certifies to the court that to the best of the person's knowledge, information, and belief, formed after an inquiry under the circumstances, the pleading is not for an improper purpose, is non-frivolous, has evidentiary support, and the denials of factual contentions are warranted on the evidence. Fed. R. Civ. P. 11(b).

If any provision of Rule 11(b) is violated, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b). Fed. R. Civ. P. 11(c). Rule 11(c)(2) states that "a sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2).

Also as discussed in the prior client alert, the Federal Rules of Civil Procedure have been incorporated into the Bankruptcy Rules. The Federal Rules of Bankruptcy Procedure apply the same standard for truthfulness in pleadings submitted in the federal courts as to the bankruptcy courts, specifically in Rule 9011. See Fed. R. Bankr. P. 9011(b). Similarly to Rule 11, Rule 9011 includes a provision stating that any violation of section (b) will result in sanctions as the court deems appropriate. See Fed. R. Bankr. P. 9011(c).

The Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure clearly state the standards for truthfulness in pleadings in the federal and bankruptcy courts, and the ramifications for not adhering to them. However, attorneys sometimes still fail to adhere to these guidelines.

In a recent case in the Bankruptcy Court of the Eastern District of California, a lender and its lawyer were sanctioned under Bankruptcy Rule 9011 for filing a dischargeabililty complaint against a consumer, based only on the allegation that it must have been fraud since the debtor filed a chapter 7 petition 43 days after taking down a $9,000 loan. Bankruptcy Judge Christopher M. Klein of Sacramento, California "said that the 'boilerplate complaint' was 'a case of sue first and ask questions later.'" After further investigation, Judge Klein found that the lawyer and law firm had filed identical complaints in six other cases. *In re Fielder*, 23-02038 (Bankr. E.D. Cal. Nov. 2, 2023).

Judge Klein found that the adversary complaint failed to identify any allegation that could have evidentiary support following discovery and did not have a reasonable basis in law and fact. He stated that "[t]he existence of an early payment default fraud indicator may trigger an inquiry by a creditor but is not alone sufficient ground for a lawsuit in which the essential elements of fraud must be proved by preponderance of evidence." *Id*.

Further, Judge Klein explained, "that the signature on the Complaint constitutes a certification that the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." *Id*.

Judge Klein issued a sanction upon the lender assessing $350 in costs to be paid as compensation for the time the debtor spent in traveling to and from court on "multiple trips." In assessing this sanction, Judge Klein reasoned that Rule 9011(b) requires an inquiry reasonable under the circumstances, and that the lender did not conduct a reasonable inquiry by failing to send anyone to the creditor's meeting, for not taking discovery, and for making no inquiry from the debtor's counsel. *Id*.

Court-initiated non-monetary sanctions were issued upon the lawyer and law firm. Judge Klein's reasoning for this sanction was that the filing of six similar complaints by the same lawyer and law firm "established a pattern of violations of Rule 9011(b)(2)." The lawyer and law firm are now subject to 19 months of pre-filing review "by the undersigned judge" of every complaint filed in the district alleging a nondischargeable debt. *Id*.

As this case illustrates, it is imperative that any pleading submitted with the court must have a reasonable basis of law and fact. As shown, this is both an ethical and procedural issue. Failure to adhere to the standards set forth in the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure may result in sanctions subject to the discretion of the court. It is best practice to refer to the appropriate rules before filing any pleadings with the court. *See* Client Alert- "When is it Due: A Cautionary Tale for Business and Legal

Professionals”

Please note this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and the recipient. If you have any questions regarding the provisions discussed above, or any other aspect of bankruptcy law, please contact Michael H. Traison (mtraison@cullenllp.com) at 312.860.4230.

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Practices

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