AMERICAN BANKRUPTCY INSTITUTE

2021 Consumer Practice Extravaganza

Defending a 523/727 Action

CONCURRENT SESSION

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2021

A PRIMER ON 11 U.S.C. § 523 / § 727 LITIGATION

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YOUR PRESENTER – STEPHEN BERKEN

Stephen is the Colorado state chair for the National Association of Consumer Bankruptcy Attorneys. He is the founding member of the Colorado Consumer Bankruptcy Association. He is the creator of the Colorado Debtors' Counsel Listserv, an Internet-based source of information for debtors' counsel in the state of Colorado. The Listserv is provided as a free service to counsel of the Debtors' Bar. Mr. Berken is on the ABI Advisory Board for Colorado. Mr. Berken is a board-certified expert in consumer bankruptcy, American Bankruptcy Board of Certification. He is the state chair for C.A.R.E. (Credit Abuse Resistance Education). Mr. Berken was named Bankruptcy Attorney of the Year by 5280 Magazine for 2014, 2015, 2016 and 2017.

Stephen E. Berken is a partner with Berken Cloyes, PC. His practice focuses on areas of consumer bankruptcy law. Mr. Berken earned his B.A. degree, cum laude, from the University of California in 1981, and his J.D. degree from Hastings College of the Law, the University of California in 1984. Mr. Berken is a frequent lecturer before various professional groups. Mr. Berken handles cases involving Chapter 7 and 13, defense and prosecution of bankruptcy adversary matters.

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YOUR PRESENTER – RANDY NUSSBAUM

Randy is a Certified Bankruptcy Specialist (Arizona Board of Legal Specialization) and a Certified Business Bankruptcy Specialist (American Board of Certification).

Randy is a respected lecturer and author on topics regarding bankruptcy, construction, and real estate. His peers have honored him with multiple peer rankings for his professional achievements: Super Lawyers' "Top 50" list of Arizona attorneys multiple times; The Best Lawyers in America© since 2010; Best Lawyers © "Lawyer of the Year" (Scottsdale), in Bankruptcy and Creditor Debtor Rights (2019) and in Bankruptcy Litigation (2021).

Randy has represented secured and unsecured creditors, surety companies, creditor committees, lessors, professional athletes, doctors, lawyers, and trustees in Chapter 7, 11, and 13 proceedings, including adversary actions (bankruptcy litigation). The cases have involved such diverse matters as real estate, construction, manufacturing, trucking, asset-based lending, bankruptcy related to divorce, and high-value, and complex individual bankruptcies.

INTRODUCTION

- The Code § 523 and Congress have declared 19 types of debts as not dischargeable. Debts listed under § 523 are non-dischargeable as to a particular creditor.
- Some unique types of debts are not dischargeable: alcohol involved accidents, violation of federal election laws, and HOA dues among others.
- Offenses that go to the heart and integrity of the bankruptcy system may result in a revocation of discharge under § 727. Revocation of discharge under §727 means no debts are discharged regardless of creditor.

DEFENDING 11 U.S.C. § 523 / § 727 CLAIMS

- Counseling bankruptcy clients regarding potential litigation and denial of discharge and non-chargeability issues.
  - Client advisory: Denial of Discharge and Non-Dischargeability Issues.
  - Definitions of grounds for denial of discharge.
  - Types of debt declared non-dischargeable.
  - Importance of accurate Schedules and Statement of Financial Affairs.
- Credit card dischargeability issues.
  - Timing of credit card purchases and statutory presumptions.
  - Types of less "acceptable" charges.

DEFENDING 11 U.S.C. § 523 / § 727 CLAIMS (CONT.)

- Addressing the initial demand.
  - Maximum efforts to avoid litigation.
  - Consider the amount of the demand, the attorney representing the creditor, type of claim, your client's ability to defend or settle, collectability of your client post-bankruptcy, whether your client is a good witness, creditor's goal, and realistic chance of succeeding if fully litigated.
  - Consideration when tendering an offer: if an offer is made and the creditor loses or is awarded an amount less than the offer, this increases the chances your client will recover legal fees which statutorily mandated.
- What to do once your client is sued.
  - Estimate the cost of litigation and come to an understanding with your client about defending the case.
  - Know our adversary and the judge.

DEFENDING 11 U.S.C. § 523 / § 727 CLAIMS (CONT.)

- Community liability
  - In nasty dischargeability litigation, if the parties are divorcing, the "innocent" spouse's post-divorce exposure may be dischargeable, as explained by Judge Collins. See *Mangold (*included in your materials).
- Defense strategies
  - Slow-playing the defense – especially if your client needs to raise money to try the case.
  - Normal defense – this strategy may encourage the creditor to back down or settle.
  - Aggressive defense – if the plaintiff will not back down unless forced, this option can be effective.
  - Who is on the other side – Bankruptcy law is not technical—it is hyper-technical. A prima facie case must be established. For clients on the budget, and where the opposition may not know how to frame the issues for the court, consider doing no motions, lest you educate the other side on its failings.

DEFENDING 11 U.S.C. § 523 / § 727 CLAIMS (CONT.)

- Other Strategical Thoughts
  - Recognize your client's strongest defenses and focus on them.
  - If the client has collectability issues, let the plaintiff know.
  - Self-employed debtors are especially difficult collection targets.
  - Take appropriate steps to set up the plaintiff for potential attorney's fees recovery for your client and emphasize that the plaintiff could have attorney's fees exposure.

DEFENDING 11 U.S.C. § 523 / § 727 CLAIMS (CONT.)

- Point out that the money your client is using to defend the litigation could be used to settle.
- Remind the plaintiff that a debtor has two automatic appeal rights to either Bankruptcy Appellate Panel or District Court and then to the Ninth Circuit.
- If facing a 11 U.S.C. § 727 action, find an innovative way to free up money from the bankruptcy estate that may flow to the creditor in return for dropping the 11 U.S.C. § 727 action.

CREDITOR CONSIDERATIONS

- Question the debtor at the first meeting of creditors. The debtor may offer admissions that will force a settlement.
- Incorporate arguments for both 11 U.S.C. § 727 and 11 U.S.C. § 523. If you limit your Complaint to 11 U.S.C. § 727, you may not be able to settle with a monetary payment.
- Always sue both spouses, even if only one files for bankruptcy.
- File the Complaint on time. See *Anwar v. Johnson* (included in your materials).
- Analyze the debtor's defenses.
- Chapter 13 precludes a creditor from collecting from the debtor while the chapter 13 is underway.

SUMMARY

Lawyers should not dabble in this type of litigation. Much depends on the attorneys involved and the judge drawn. Unlike other litigation, you are facing the probability that your adversary is a deadbeat and may be willing to go to herculean lengths to avoid paying a penny even if it makes no business sense to do so.

Finally, the law on the recovery of attorneys' fees is evolving daily. Stay abreast of this issue since the last things you want to do are; a) prevail, but not be able to recover legal fees; or b) lose and then have to pay your adversaries' fees.

Randy Nussbaum
Sacks Tierney
Scottsdale, Arizona

A PRIMER ON 11 U.S.C. § 523 / § 727 LITIGATION

If you think *real* lawyers are litigators, you have found a home in the practice of bankruptcy law. Contested hearings and adversaries (i.e., complaints/lawsuits) are an every-week occurrence—if you are so motivated. Contrast that to the young associate in a large firm. He or she may go years and years before being trusted with a full-blown trial.

As to the practice, bankruptcy is the means of discharging debt. Counsel should assume that all debts are dischargeable—unless they aren't.

And the Code—and Congress—have declared that 19 types of debts are not dischargeable. Those debts are within the framework contained in § 523 of the Bankruptcy Code. If you had to guess which debts are not dischargeable, you would probably do well going with the obvious. Torts such as fraud, false pretenses, embezzlement, larceny, child support and alimony, most student loans. But you probably didn't know that alcohol related accidents related to driving drunk, violation of federal election laws and HOA dues are also on the list.

Debts listed under § 523 are non-dischargeable as to a particular creditor. Offenses that go to the heart and integrity of the bankruptcy system may result in the revocation of the discharge order. Those offenses are within § 727. A revocation of discharge means NO debts are discharged regardless of the creditor.

A lawyer seeking to provide proper representation of Chapter 7 clients needs to have a working knowledge of 11 U.S.C. § 523 / § 727 litigation. This type of litigation may be threatened or pursued even in relatively simple bankruptcy filings and it's impossible to dispense any advice to a client unless you understand it.

Similarly, a lawyer who may be asked to evaluate and pursue a creditor's claim under those same Code sections cannot provide guidance to clients without recognizing the nuances and material aspects of such litigation.

This outline is designed to alert lawyers as to certain discrete aspects of this litigation which may be misunderstood or even ignored and which should be considered before ever accepting this form of representation. These considerations can potentially save a client money, lead to an expeditious and appropriate settlement, and in certain instances, even assist the lawyer in avoiding malpractice.

Defending 11 U.S.C. § 523 / § 727 Claims

I find it amazing that consumer lawyers rarely bother to provide any education to a client about this type of litigation at the onset of the relationship. Presumably, those lawyers may be charging a set fee, and the last thing they desire is devote any attention to a subject which may never come to fruition. I have found this practice to be extremely problematic for the lawyer and the client because even if such litigation is rare, without providing some rudimentary advice in this area, a client cannot make an informed decision in many cases to proceed in bankruptcy. As a practical matter, since such litigation is rare, most attorney can get away with ignoring this area, but woe to the lawyer who never warned a client about this possibility when this issue arises.

Unless a client has independently researched adversary proceedings, the attorney will have a lot of explaining to do to the client when such litigation is threatened. This scenario is especially awkward when the lawyer has accepted the representation on a set fee and has not properly warned the client as to why, how, and when such litigation may arise and the potential cost to defend it.

The following is the verbiage I use in any consumer representation. Admittedly, my consumer representation is fairly discrete and normally involves high-debt individuals facing anything but normal financial difficulty, but I have never had a client complain about this warning.

* * *

DENIAL OF DISCHARGE AND NON-DISCHARGEABILITY ISSUES

The reason for filing a bankruptcy proceeding in the first place is to obtain the "fresh start" afforded by the United States Bankruptcy Code as a result of the Order of Discharge entered by the Court which legally extinguishes a debtor's personal liability for all claims of creditors which existed at the time of the bankruptcy filing. However, a debtor's right to a full or partial discharge is not automatic, and the deadline for the Trustee or creditors to challenge either the overall discharge or the dischargeability of a particular debt is sixty (60) days after the date first set for the Meeting of Creditors. That date is typically disclosed to all creditors in the Notice of Commencement of the case which they receive by mail directly from the Court shortly after the case is filed.

The grounds for a denial of discharge of all debts are set forth in section 727 of the Bankruptcy Code and generally require that the objecting party prove that the debtor engaged in one or more of the following types of conduct: 1) with intent to hinder, delay or defraud a creditor or an officer of the bankruptcy estate, transferred, destroyed or concealed property of the estate within one year before the filing of the Petition or after filing of the Petition; 2) concealed, destroyed, falsified, or failed to preserve information, books, and records about the debtor's financial condition and/or business transactions; 3) knowingly or fraudulently made a false oath in connection with the case; 4) failed to explain satisfactorily any loss of assets; 5) refused to obey lawful orders of the Court and/or respond to material questions

or to testify; or 6) has received a bankruptcy discharge within the last eight (8) years.

The grounds for denial of discharge of a particular creditor's debt include: 1) proving that the debt was obtained through false pretenses, false representations or fraud, including false financial statements; 2) fraud while acting in a fiduciary capacity, embezzlement or larceny; or 3) willful and malicious injury to another's person or property.

In order to establish such grounds for denial of discharge or dischargeability, the Trustee or a creditor must file a lawsuit in Bankruptcy Court, known as an adversary proceeding, within that 60-day deadline. Upon failure to do so, the right to challenge a debtor's discharge or the dischargeability of a specific debt on the grounds set forth above is generally lost forever, except by seeking revocation of a discharge within one year after it was granted on the grounds that it was obtained through fraud or the debtor became entitled to property which belonged to the estate after filing and failed to report it or turn it over.

Thus, if no objections are filed in the form of such lawsuits within 60 days, an Order of Discharge will be entered relating back to the date of filing, and a debtor will have achieved the goal of obtaining a fresh start even though the Trustee's administration of the bankruptcy estate may continue for some months and even years thereafter as he seeks to liquidate non-exempt assets and pursue recoveries of avoidance actions.

Of course, there are other types of debt which can be declared non-dischargeable either in bankruptcy court or in state court without regard to the filing deadline mentioned above, but they are usually well known and identified in advance and consist of certain income, employment and sales taxes; unscheduled debts; alimony, support, maintenance and property settlement or equalization obligations; governmental fines and penalties; educational loans; damages for death and injuries caused by intoxicated operation of a vehicle; certain FDIC and restitution orders; and post-petition homeowners association fees.

Part of the due diligence we will spend with you in preparing your case Schedules and Statement of Financial Affairs will include trying to ascertain and identify whether any potential grounds exist for challenges to your discharge or the dischargeability of any specific debts. Please be aware, however, that if any such lawsuits are filed, we will need to enter into a separate Fee Agreement supported with a separate retainer because of the additional services and costs which the defense of those kinds of lawsuits can present.

* * *

And, in certain instances in which issues may arise with credit card debt, I include the following verbiage automatically.

* * *

CREDIT CARD DISCHARGEABILITY ISSUES

We will need to track what and how much you have charged on your credit cards and the timing of your cash advances because if those charges have occurred within two to three months of your bankruptcy filing, certain statutory presumptions will be triggered by that credit card use. Specifically, when you utilize your credit cards shortly before bankruptcy, there is a presumption that such credit card use was fraudulent and if the creditor decides to file a Complaint objecting to the dischargeability of its debt, you could find yourselves having to pay some, if not all of that indebtedness back. The credit card company can even object to the discharge of its debt if the charges were incurred outside of the statutory period, but bringing such an action is rare because the creditor will then have to carry the burden of proving that you either could not or did not intend to pay back that indebtedness.

To state the obvious—the more distance from the use of the credit card to the filing—the better. Consider three months to be the minimum distance unless the usage was nominal. Charging gas for the car? Not so bad. Charging airline tickets to Las Vegas? Not so good.

You will know relatively quickly if such a Complaint is being brought because the law provides that the creditor has to file such a Complaint within sixty (60) days of your first meeting of creditors and since your first meeting of creditors occurs approximately one and a half months after you file, you will know if such Complaints are being brought within about three and a half months of your filing. If such a claim is brought, then we will need to enter into a separate agreement regarding fees and costs because defending these matters is not within the scope of our Fee Agreement.

* * *

So, what do you need to consider when you're representing a debtor who receives that all-threatening letter from a disgruntled creditor?

Addressing the Initial Demand

Your first responsibility to a debtor facing this type of claim is to find a way of avoiding it proceeding to litigation.

Although if you had engaged in proper due diligence, you may be prepared from the onset for such a demand, presumably you are not, either because you didn't know the background behind the debt's creation or your initial due diligence simply didn't reveal such a potential claim. You therefore need to consider the following the moment you receive that demand:

1. The amount of the demand;
2. The attorney representing the creditor;
3. Whether it's the type of claim for which your client may be able to recover legal fees;
4. Your client's ability to defend;
5. Your client's ability to settle;
6. Potential collectability of your client post-bankruptcy;
7. Whether your client is a good witness;
8. What is really driving the creditor; and
9. Realistic chances of succeeding if fully litigated.

I know from personal experience in having represented a large number of creditors in consumer bankruptcy cases, in the vast majority of the cases, the creditor would rather reach a relatively quick settlement at minimal cost versus the investment of proceeding to trial and then having to potentially chase the debtor. As debtor's counsel, you need to quickly consider all the factors and present a resolution short of a Complaint being filed. Even if the offer that is made fails, in almost all instances, I can't see a downside to tendering the offer. At the very least, it may generate a counterproposal which may be acceptable or it may alert you to the unfortunate reality that the case may not be easily resolvable. Why not ascertain this from day one.

The dynamics are very similar when being threatened by a Chapter 7 trustee with a claim under 11 U.S.C. § 727 except in those situations, as I will explain later in this article, it's very difficult to buy your way out of a claim 11 U.S.C. § 727 claim. Nevertheless, it's oftentimes possible to avoid such a Complaint by engaging in open lines of communication with the trustee's counsel since in the end, the trustee's goal is always to try to find a means of recovery as a vehicle for creditors to garner some type of recovery.

Another important reason needs to be considered in tendering any offer. If an offer is made and the creditor loses or is awarded an amount less than what was offered, this increases the chances that your client will recover legal fees when statutorily mandated, or in a close call, convincing the court to so award fees under the circumstances.

So, what are tactical considerations once your client is actually sued?

What to Do Once Your Client is Sued

I will ignore the tactical option of potentially converting to Chapter 13 or Chapter 11, but in certain instances, that option has to be given some thought. Certain claims can't be pursued in a Chapter 13 and can be in a Chapter 7 and in some instances, careful maneuvering can minimize your client's real exposure. However, this type of analysis is beyond the scope of this presentation.

Since in almost all instances by the time your client is sued, settlement is not on the horizon, your client should be fully prepared for the Complaint and what needs to be done to defend it. This is where it's important to have a working knowledge of what it costs to defend different types of litigation of this sort. You need to come to an understanding with your client as to what needs to be paid when because you're doing both your client and yourself a great disservice if you don't.

The absolute worst thing you can do as an attorney in that situation is force a creditor to run up a substantial bill, accrue a large A/R on your end, and then leave your client high and dry.

If by chance you feel you're capable of defending the case, but don't understand the true cost of such litigation, you may want to consult with an experienced lawyer at that time. Over the years, I have literally been shocked by how often lawyers grossly underestimate potential defense costs.

You need to know your adversary and your judge. Certain judges have specific idiosyncrasies and even biases. Litigation is unpredictable, but it helps to have at least working knowledge of a judge's history. Similarly, if your client is being pursued for a large claim and the law firm assigns its junior associate to the matter, this may give you an inkling as to that firm's or even that client's attitude is about the litigation. I'm not suggesting that young associates will not do a brilliant job, but if a 30+ year lawyer at a high hourly rate is representing the creditor, you need to assume the creditor is in the litigation for the long haul.

In a moment I'll talk about different defense strategies to utilize, but will first touch upon a subject which is often overlooked or missed and is incredibly crucial in the defense of such litigation.

Specifically, you need to consider to what extent the community may be liable, especially in the face of a potential divorce.

Community Liability

I have attached a copy of the *Mangold* decision, which is Judge Collins' posted case on this issue. For over 25 years I have defended and prosecuted matters involving the wrongful conduct of one spouse and the impact on the community. In the case of a married couple intending on remaining married, except in rare instances, any non-dischargeable judgment will be rendered against the community, as well as the responsible spouse. But, as is often the case, in nasty dischargeability litigation, if the parties are divorcing, the "innocent" spouse's post-divorce exposure may be dischargeable, as explained by Judge Collins. Interestingly enough, I have a difficult time seeing how a creditor could ever argue that a divorce triggered by this situation is in bad faith, especially if the "innocent" spouse would be facing substantial exposure as a member of the community, which could be eliminated by a divorce.

I will now outline different defense strategies that need to be considered.

Different Defense Strategies

Over the years, I've identified three major approaches to the defense of this litigation. To some extent, your options may be limited depending upon your adversary's attitude and demeanor, but oftentimes you have a fair amount of control on defense strategies.

1. Slow-playing the defense – Especially if your client needs to raise money to ultimately try the case, as long as you don't blow any deadlines or prejudice your

client, it's possible to "slow-play" the case so that you minimize the actual day-by-day work that has to be done. Occasionally a creditor will lose interest over time and the strategy can be successful and can result in a palatable settlement. The greatest risk of this alternative is that if it doesn't cost the creditor a lot of money to keep the case going, it may, and you could end up ultimately having to try a case because the creditor's investment may be minimal.

2. Present a normal defense – With this choice, you present a traditional and normal defense, but try to proceed in a rational and methodical fashion. You prepare and file appropriate motions and engage in traditional discovery, but you try to stretch the work out over time for budgeting purposes. This strategy may encourage the creditor to back down or settle, while at the same time not running up so much expense quickly so that settlement is no longer realistic.

3. Aggressively defend – If you don't perceive that the plaintiff will back down unless forced to do so and your client can afford it, this option can be highly effective. Incredibly enough, it's not unusual for a creditor to not have any idea of the cost of pursuing this type of litigation and a "no holds barred" defense can catch many plaintiffs off guard and strongly encourage them to throw in the towel and accept less than what they had initially wanted. Without question, the greatest downside of this approach is the cost and the realization that if the case doesn't settle very quickly, it may become un-settleable because of the investment by both sides.

4. Who is on the other side? – Bankruptcy law is not technical—it is hyper-technical. And those who do not regularly practice bankruptcy law are often at a loss to understand what is needed to establish a prima facie case. For those clients on a budget, and where the opposition may not know how to frame the issues for the court, consider doing no discovery, and no motions for summary judgment, and no motions to dismiss, lest you educate the other side as to its failings.

5. Is there fee shifting? –Section 523(d) provides that the unsuccessful effort by a creditor to sue for fraud (*i.e.*, 523 (a)(2) and where the debt is consumer in nature, may be liable to pay attorney's fees unless the court finds that the claim was not "essentially justified." But what of contracts in which there is fee shifting to the prevailing party? Or if the choice of law is within a state that statutory provides for fee shifting (*i.e.*, "mutuality." Often creditors do not realize their exposure to paying fees to debtors until a motion for fees is filed under Fed.R.Civ.P. Rule 54.

The following are a few other strategical points to think about in defending this type of litigation.

Other Strategical Thoughts

Recognize your strongest defenses and focus on them. If your client may have erred and has substantial exposure, you want to point out collectability to encourage the plaintiff to back down. Self-employed debtors may be impossible to collect from, should judgment enter against

them. In cases in which attorneys' fees can be recovered, and it's very important that you take appropriate steps to do what you can to set up the plaintiff for a potential attorney fee recovery for your client, point out that the plaintiff could have attorney fee exposure. The case law has been evolving over the years on this issue and you need to be kept updated since the trend has been to allow debtors to recover legal fees and this needs to be emphasized with the plaintiff.

It's not unusual to point out that the very money that the client is using to defend the case could be used to settle. Along the same lines, I often point out to the plaintiff that the legal fees are being paid by a third party when that is the case so that the plaintiff recognizes that the debtor doesn't have the personal resources. Sometimes, especially when I perceive that the court can go either way, I remind a plaintiff that a debtor has two automatic appeal rights, either to the Bankruptcy Appellate Panel or District Court and then to the Ninth Circuit. This is totally different than normal Federal or State Court litigation and it can be a major factor when a plaintiff has available a reasonable offer and is toying with the potential cost involved of having to continue to appeal even a favorable ruling.

If your client is facing only an 11 U.S.C. § 727 action, since you're not supposed to be able to buy your way out of such litigation, you have to be very innovative to try to find a way of freeing up money for the bankruptcy estate that may flow to the creditor. Let it suffice to say that your client will not be able to write a check directly to the creditor in return for dropping the 11 U.S.C. § 727 action in most instances, but by using your imagination, oftentimes there are ways to circumvent this very serious concern.

I will now touch upon some crucial creditor considerations.

Creditor Considerations

I find it astonishing how often creditors, in their zeal to prosecute a case, disregard some basic strategical factors.

First of all, question the debtor at the first meeting of creditors. Debtors are normally totally unprepared for well thought out questions. They will oftentimes be surprisingly candid and frank about what occurred because they don't understand the ramifications of doing so. Twice, I've been able to successfully force a settlement because of a debtor's admissions at the first meeting of creditors. You will be limited to just a few minutes, but if you alert the Chapter 7 trustee that you need some more time, the trustees will appreciate the courtesy and will often give you more time than the normal amount allocated of a few minutes.

So the debtor can write your client a check, even if you believe your strongest argument is under 11 U.S.C. § 727, try to make sure you have a claim under 11 U.S.C. § 523 included as well. You have to act in good faith, but once you limit your Complaint to an 11 U.S.C. § 727 Complaint, you then have to work around the reality that you're not supposed to be able to settle such a case with a monetary payment.

Always sue both spouses even if only one files for bankruptcy or only one is an alleged wrongdoer. You have to make sure to procure a judgment against the community under Arizona

law. This area of the law can be very confusing, but when in doubt, name them both even if only one has filed.

File the Complaint on time. The controlling case in the Ninth Circuit is *Anwar v. Johnson*, 510 F. App'x 499 (9th Cir. 2013) a copy of which is attached. The creditor in *Anwar* did not file on time because of a computer glitch even though the file was opened prior to the statutory extended deadline. The creditor argued that the old standards shouldn't apply because of the possibility of computer problems on a filing. Since I argued the case, I can unequivocally state that the judges were extremely unsympathetic to the creditor when I pointed out that unlike in the past, the creditor no longer had to rush down to the Bankruptcy Court by 5:00 p.m., but had until midnight to make sure the Complaint was timely filed. The exceptions to the statutory deadline are extremely limited, although Hurricane Katrina was found to be a sufficient basis for untimely filings when a Bankruptcy Court was flooded and it was physically impossible at the time to file anything.

Really analyze the debtor's defenses, cries of poverty, and potential defenses. Also, unless you represent an institutional client with unlimited funds, never let your client "tilt at windmills." Despite having been relatively successful over the years in pursuing this type of litigation, I have discovered that rarely will a creditor "come out ahead." If the debtor is "hell bent" on not paying your client, and you recognize right away that the debtor will not let business considerations influence his or her decision, make sure your client has the money, the stomach, and the commitment to chase a debtor in the face of potentially never recovering a penny.

Clients with questionable pre-petition conduct (incapable of accounting for loss of assets, inflated credit applications, sketchy pre-petition transfers) are best suited for Chapter 13. While many of the debts that are non-dischargeable in Chapter 7 are likewise non-dischargeable in Chapter 13 (*i.e.*, section 1328), should a debtor lose a § 523 adversary, the creditor is precluded from collecting from the debtor while the chapter 13 is underway, usually five years. That may be enough to disincentivize the creditor that contemplates filing an adversary action. Likewise, § 727 is not available to a creditor or the trustee within Chapter 13.

Summary

I always warn lawyers not to dabble in this type of litigation. So much depends upon your opposition and the attorneys involved and the judge you draw. Unlike other litigation, you are facing the real probability that your adversary is a total deadbeat and may be willing to go to herculean lengths to avoid paying a penny even if it makes no business sense to do so.

Finally, the law on the recovery of attorney's fees is evolving on a daily basis and make sure you stay abreast of this issue since the last things you want to do are; a) prevail, but not be able to recover legal fees; or b) lose and then have to pay your adversaries'.

Attachments (*In re Mangold, Anwar v. Johnson*)

Randy Nussbaum

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For more than 40 years, Randy Nussbaum has assisted individuals and businesses with complex bankruptcy protection (debtor and creditor), transaction and litigation matters. He especially enjoys helping his clients achieve their business and financial objectives using innovative legal strategies. Randy has represented secured and unsecured creditors, surety companies, creditor committees, lessors, professional athletes, doctors, lawyers, and trustees in Chapter 7, 11, and 13 proceedings, including adversary actions (bankruptcy litigation). The cases have involved such diverse matters as real estate, construction, manufacturing, trucking, asset-based lending, bankruptcy related to divorce, and high-value, and complex individual bankruptcies.

Randy is a Certified Bankruptcy Specialist (Arizona Board of Legal Specialization) and a Certified Business Bankruptcy Specialist (American Board of Certification). Randy is a respected lecturer and author on topics regarding bankruptcy, construction, and real estate. His peers have honored him with multiple peer rankings for his professional achievements. Randy has been named to the Super Lawyers' "Top 50" list of Arizona attorneys multiple times and has been selected as one of The Best Lawyers in America© since 2010. *Best Lawyers* also has twice selected Randy as its "Lawyer of the Year" (Scottsdale), in Bankruptcy and Creditor Debtor Rights (2019) and in Bankruptcy Litigation (2021).

Randy has presented at American Bankruptcy Institute programs annually since 2011. He most recently presented "Intersection Between Divorce and Bankruptcy" (panel moderator), 29th Annual Southwest Bankruptcy Conference (2021); "Sensible Alternatives to Reorganization" (panel moderator), *Insolvency 2020;* and "There Is a Place for Mediation in Bankruptcy Court," 27th Annual Southwest Bankruptcy Conference (2019).

Recognized for his life-long commitment to community service, in 2018 Randy joined the distinguished roster of honorees inducted into the Scottsdale History Hall of Fame.

SO ORDERED.

Dated: May 25, 2018

Daniel P. Collins, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re **ROBERT W. MANGOLD and MICHELE M. MANGOLD,** Debtors. **MICHELE MANGOLD,** Movant, v. **THOMAS M. PICCOLO, JOSHUA T. GREER, and MOYES, SELLERS AND HENDRICKS,** Respondents.	Chapter 7 Proceedings Case No: 2:12-bk-16858-DPC **UNDER ADVISEMENT RULING REGARDING POST-NUPTIAL AGREEMENT AND MICHELE MANGOLD'S LIABILITY TO THOMAS J. PICCOLO** [NOT FOR PUBLICATION]

Thomas M. Piccolo ("Piccolo") holds a nondischargeable judgment against Robert M. Mangold ("Mr. Mangold") and the marital community of Mr. Mangold and Michele Mangold ("Ms. Mangold"). Ms. Mangold contends her Post Nuptial Agreement ("Post Nuptial Agreement") with Mr. Mangold prevents Piccolo from collecting on his judgment by garnishing wages earned by her after her bankruptcy discharge and after execution of the Post Nuptial Agreement. Piccolo contends the Post Nuptial Agreement is unenforceable as it is a sham contract and a fraudulent agreement. Piccolo also contends that, where a creditor obtains a nondischargeable judgment against a marital community, under Arizona law both spouses remain liable on that obligation even if the marital community is properly dissolved by agreement or by a valid court decree

dissolving the marriage.

This Court now finds that, under the facts of this case, the Post Nuptial Agreement is unenforceable and avoidable. The Court also finds that sole and separate property acquired by an "innocent" spouse is not forever liable for nondischargeable debts incurred by the "guilty" spouse during the existence of their marital community.[1]

I. BACKGROUND

1. On June 25, 2010, a judgment was entered by the Arizona Superior Court, Maricopa County ("State Court") in favor of Piccolo and against Mr. Mangold in the amount of $1,625,787.26 plus interest at the rate of 10% per annum in case number CV2009-013428 ("State Court Action"). *See* Exhibit A attached to the Notice of Errata filed at docket number 9 in adversary case number 2:12-ap-01863-DPC ("Adversary Proceeding").

2. Mr. and Ms. Mangold filed their joint chapter 7 bankruptcy on July 27, 2012 ("Petition Date") at case number 2:12-bk-16858-DPC (DE[2] 1).

3. On November 1, 2012, Guaranty Solutions, LLC (assignee of Piccolo) filed an adversary proceeding against Mr. and Ms. Mangold seeking to hold certain obligations nondischargeable under 11 U.S.C. §§ 523(a)(2), (4), (6) and (19).[3] *See* docket entry number 1 in the Adversary Proceeding. On November 8, 2013, the Court signed the parties' stipulated order substituting in Piccolo as the party plaintiff. *See* docket entry 35 in the Adversary Proceeding. On December 3, 2014, this Court entered judgment ("Community Judgment") in favor of Piccolo and against Mr. Mangold's sole and

[1] This Order sets forth the Court's findings of fact and conclusions of law under Rule 7052 of the Rules of Bankruptcy Procedure.

[2] "DE" refers to docket entries in the administrative file concerning this chapter 7 case.

[3] Unless indicated otherwise, statutory citations herein refer to the U.S. Bankruptcy Code ("Code"), 11 U.S.C. §§ 101-1532 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

separate property and against the property belonging to the marital community of Mr. and Ms. Mangold. *See* Adversary Proceeding docket number 69.

4. On February 18, 2015, this Court entered a Stipulated Judgment against Ms. Mangold in the amount of $10,000 ("Ms. Mangold Judgment"). *See* Adversary Proceeding docket number 84. The Ms. Mangold Judgment has been fully satisfied. *See* the Satisfaction of Judgment at Adversary Proceeding docket number 227.

5. Ms. Mangold received her bankruptcy discharge on November 13, 2012. DE 23. At that time, Mr. Mangold was also discharged of all pre-petition debt except the Community Judgment.

6. On October 1, 2015, Mr. and Ms. Mangold entered into the Post Nuptial Agreement. *See* Ex 1 and Ex 4.[4]

7. As a part of his continuing efforts to gain satisfaction of the Community Judgment, Piccolo garnished Ms. Mangold's wages from Expert Realty[5] and has sought to conduct post-judgment discovery from Ms. Mangold so as to locate assets of Ms. Mangold from which the Community Judgment could be paid.

8. Claiming Piccolo violated her discharge injunction, Ms. Mangold filed a Motion for Sanctions for Violation of 11 U.S.C. § 524 ("Sanctions Motion") against Piccolo and his attorney, Joshua T. Greer ("Greer") and Greer's law firm, Moyes, Sellers and Hendricks (the "Law Firm"). Ms. Mangold's November 21, 2017 Sanctions Motion (DE 67) contends her wages from Expert Realty are her sole and separate property and, therefore, not available to Piccolo for collection on his Community Judgment. Piccolo responded to the Sanctions Motion on November 27, 2017 (DE 68). Ms. Mangold replied on December 21, 2017 (DE 71).

[4] All exhibits admitted at the March 27, 2018 trial of this matter shall be hereinafter referred to as "Ex ___".

[5] Expert Realty is an entity created by the Mangolds but allegedly owned by just Ms. Mangold as her sole and separate property.

9. Piccolo filed his December 12, 2017 Motion for Sanctions Pursuant to Rule 9011 ("9011 Motion") (DE 69). Ms. Mangold responded on December 21, 2017 (DE 72) and Piccolo replied the day after Christmas (DE 74).

10. On January 11, 2018, this Court held its initial hearing on the Sanctions Motion and the 9011 Motion (DE 76). At that hearing, the Court established a schedule for additional briefing and set an evidentiary hearing for March 27, 2018.

11. On January 25, 2018, Piccolo filed his Memorandum Regarding Post-Nuptial Agreement (DE 78). Ms. Mangold filed a Statement of Facts on February 15, 2018 (DE 79). Piccolo filed a reply on March 9, 2018 (DE 80). A Joint Pretrial Statement was filed on March 20, 2018 (DE 85) and then was amended on March 26, 2018 (DE 88). Ms. Mangold filed her Final Reply Brief on March 21, 2018 (DE 87) and Piccolo filed a Notice of Errata on March 27, 2018 (DE 89).

12. An evidentiary hearing was conducted by the Court on March 27, 2018. Ms. Mangold, Mr. Mangold and Donna Navarro testified at trial. When the trial concluded, the Court took this matter under advisement.

13. On April 5, 2018, the parties filed a Stipulation for Entry of Order Regarding Asset (DE 92) and the Court entered an order that day approving the Stipulation (DE 94). In essence, the Stipulation notes the parties agree that all assets owned by the Mangolds as of October 1, 2015 (the date the Post Nuptial Agreement was executed), remain subject to collection by Piccolo in connection with his Community Judgment.

II. JURISDICTION

This Court has jurisdiction over these matters pursuant to 28 U.S.C. §§ 157(b) and 1334.

III. ISSUES

A. Whether the Post Nuptial Agreement is enforceable.

B. Whether the Community Judgment is enforceable against Ms. Mangold's sole and separate property.

IV. ANALYSIS

Mr. Piccolo's Community Judgment exceeds $1.6 million. That Community Judgment is nondischargeable and is subject to Piccolo's collection efforts against the marital community assets of Mr. and Ms. Mangold as well as the sole and separate assets of Mr. Mangold. Post-petition community property acquired by the Mangolds is liable for Piccolo's Community Judgment. *See Valley Nat'l Bank v. LeSueur (In re LeSueur),* 53 B.R. 414 (Bankr. D. Ariz. 1985) *and In re Rawlinson*, 322 B.R. 879, 844-885 (Bankr. D.Ariz. 2005). The Community Judgment is not the sole and separate obligation of Ms. Mangold. *See Tsurukawa v. Nikon Precision, Inc.* (*In re Tsurukawa*), 258 B.R. 192 (9th Cir. B.A.P. 2001). None of these facts or legal issues are in dispute.

The controversy between these parties lies with Ms. Mangold's contention that the Post Nuptial Agreement dissolved the Mangolds' marital community and, since that date, all property acquired by her constitutes her sole and separate property. Ms. Mangold does acknowledge, however, that property which was transferred to her or was acknowledged in the Post Nuptial Agreement as belonging to her remains available to collection efforts by Piccolo. *See* DE 94. Piccolo claims the Post Nuptial Agreement is unenforceable and avoidable as a fraudulent transfer and, therefore, did not dissolve the Mangolds' marital community. For the reasons stated below, the Court agrees with Mr. Piccolo. Piccolo further suggests that any property acquired hereafter by Ms. Mangold is also available for Piccolo's Community Judgment collection efforts. For the reasons stated below, the Court disagrees.

A. The Post-Nuptial Agreement.

The Post Nuptial Agreement is invalid for two reasons. First, this Court finds the Mangolds' intention in executing the Post Nuptial Agreement was improper as they were principally attempting to avoid payment to Piccolo. Under Arizona's version of the Uniform Fraudulent Transfer Act ("UFTA") (A.R.S. §§ 44-1001, *et seq*.), transfers by a debtor are invalid and avoidable if they were made with the intent to hinder, delay or defraud creditors. The Court finds this was exactly the Mangolds' intent in executing the Post Nuptial Agreement.

Second, this Court finds the Mangolds entered into the Post Nuptial Agreement with no intention of adhering to the terms of the Post Nuptial Agreement. The Court in *Arizona Cotton Ginning Co. v. Nichols*, 454 P.2d 163, 166 (Ariz. 1969) explains the consequences where parties to a contract have no intention of being bound by the terms of that contract:

> Where neither party intends that a contract shall result by what is done, no valid contract results; and where both parties actually intend that there shall be no contract and that intent is known and admitted, there is no occasion to consider the existence or nonexistence of any objective manifestation to the contrary . . . . Where parties executed what on its face purported to be a written contract, at execution neither party intended it to be a contract, and therefore the whole transaction was a sham.

Id.

1. The Mangolds' Agreement Was Entered Into With the Intent to Hinder, Delay or Defraud Piccolo.

Ms. Mangold admitted in her pleadings and at trial that her primary motive for executing the Post Nuptial Agreement was to avoid her liability on garnishment on Piccolo's Community Judgment. *See* DEs 87 and 91, Trial Audio Recording at 9:29 a.m. She also pointed to a more theoretical reason, namely her desire to protect herself from possible future community judgments that could result from her husband's future

conduct.[6]

The Court finds Ms. Mangold signed the Post Nuptial Agreement intending to avoid the consequences of the Community Judgment. Parties seeking to avoid exposing their future community property to existing community judgments by entering into post-marriage agreements to declare such property sole and separate property of each spouse have run afoul of fraudulent transfer laws. *See In re Beverly*, 374 B.R. 221, 234 (B.A.P. 9th Cir. 2007), *aff'd in part, dismissed in part*, 551 F.3d 1092 (9th Cir. 2008). As one court noted, to consider transmutation of property interests not subject to the UFTA would give short shrift to the UFTA. *State ex rel. Indus. Comm'n of Arizona v. Wright*, 43 P.3d 203, 207 (Ariz. Ct. App. 2002).

In determining whether the Post Nuptial Agreement was entered into by the Mangolds for an improper purpose, i.e. fraud, fraudulent intent, a fraudulent objective, or even resulting in a fraudulent transfer or conveyance in this case, the Court looks to the UFTA for guidance. In Arizona, the UFTA is codified in Arizona's Revised Statutes §§ 44-1001, *et seq*. It is not necessarily the transaction itself, but rather the purpose behind the transaction, that brings it within the inquiry of A.R.S. § 44–1004. *State ex rel. Indus. Comm'n of Arizona v. Wright*, 43 P.3d 203, 207 (Ariz. Ct. App. 2002). Sections

[6] Ms. Mangold testified she was informed by counsel that divorcing Mr. Mangold would not protect her future earnings from Piccolo. The Court does not presume this advice was correct, nor was the rationale for this advice adequately explained in the pleadings or at trial. However, the Court does not mean to encourage Ms. Mangold to divorce Mr. Mangold in an effort to free her from Piccolo's financial grip. Encouraging or suggesting one divorce their mate is not the job of the courts. *See Spector v. Spector*, 531 P.2d 176, 181 (Ariz. 1975) (Agreements between spouses that provide for or tend to induce divorce or separation, are contrary to public policy).

44-1004[7] and 1005[8] aid courts in ascertaining fraudulent intent. The badges of fraud outlined in § 44-1004(B) are factors courts should consider when looking at whether the purpose of contracting parties reflect their fraudulent intent. Badges of fraud are merely signs or marks of fraud from which intent may be inferred. *Gerow v. Covill*, 960 P.2d 55, 63 (Ariz. Ct. App. 1998), *as amended* (Aug. 26, 1998) (citing *Torosian v. Paulos*, 313 P.2d 382, 388 (Ariz. 1957)); A.R.S. § 44–1004.

> [T]hey are facts having a tendency to show the existence of fraud, although their value as evidence is relative and not absolute . . . . Often a single one of them may establish and stamp a transaction as fraudulent. When, however, several are found in the same transaction, strong, clear evidence will be required to repel the conclusion of fraudulent intent.

Torosian, 313 P.2d at 388.

The Mangolds' Post Nuptial Agreement sought to put collectible assets out of the reach of Piccolo in a manner that hindered, delayed or defrauded him. The Mangolds'

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[7] **A.R.S. Section 44-1004. Transfers fraudulent as to present and future creditors**
A. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation under any of the following:
1. With actual intent to hinder, delay or defraud any creditor of the debtor.
2. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:
(a) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
(b) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.
B. In determining actual intent under subsection A, paragraph 1, consideration may be given, among other factors, to whether:
1. The transfer or obligation was to an insider.
2. The debtor retained possession or control of the property transferred after the transfer.
3. The transfer or obligation was disclosed or concealed.
4. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
5. The transfer was of substantially all of the debtor's assets.
6. The debtor absconded.
7. The debtor removed or concealed assets.
8. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
10. The transfer occurred shortly before or shortly after a substantial debt was incurred.
11. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

[8] A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

intent was to remove community wages earned by Ms. Mangold and other future interests acquired by her out of Piccolo's reach by converting their future community assets to her sole and separate ownership. This transfer to Ms. Mangold was without consideration to Mr. Mangold. Several of the § 44-1004(b) badges of fraud are implicated by the Mangolds' actions:

1. This was an insider transaction;
2. At the conclusion of the transaction, both parties maintained complete control over all current and future assets;
4. The existence of the Community Judgment precipitated the Mangolds' execution of the Post Nuptial Agreement;
5. The transfer to Ms. Mangold alone of important wage rights together with the creation of the Expert Realty entity through which she was to earn revenue;
9. The Mangolds were insolvent at the time of the transaction; and
10. This transaction occurred shortly after satisfaction of the Ms. Mangold Judgment.

But for the Mangolds' desire to evade Piccolo's Community Judgment, the Mangolds would not have entered into the Post Nuptial Agreement. This Court finds the Post Nuptial Agreement is avoidable as both an intentional and constructive fraudulent transfer under §§ 44-1004 and 1005 of Arizona's UFTA.

2. <u>The Mangolds Did Not Intend to Be Bound by Their Agreement</u>.

Ms. Mangold testified that the written terms of the Post Nuptial Agreement did not match her understanding of what the Post Nuptial Agreement was to achieve relative to the Mangolds' community property existing at the time of execution and as it pertained to the married couples' property interests in the future. DE 91, Trial Audio Recording at

9:47-9:53 am. Specifically, Ms. Mangold said that the Post Nuptial Agreement should not alter community property interests or any interests that were affected by a judgment. *Id*. However, Ms. Mangold conceded that the Post Nuptial Agreement did not actually read consistent with her understanding in this regard. Moreover, there are two versions of the Post Nuptial Agreement, both reflecting the same date and signatures. *See* Exs. 1 and 4. It was not clear to the Court which Post Nuptial Agreement was the controlling version. Ms. Mangold conceded she also did not know which version controlled. *See id.* and DE 91, Trial Audio Recording at 9:47-9:53 a.m.

The evidence before this Court demonstrates that, after execution of their agreement, the Debtors' continued to conduct their financial affairs in the same manner as before the Post Nuptial Agreement was executed. All purchases made and expenses and costs incurred by the Mangolds continued to be paid by Mr. Mangold. Mr. Mangold was not reimbursed by Ms. Mangold for covering her share of these payments nor did the Post Nuptial Agreement require he be reimbursed by Ms. Mangold for his expenditures on her behalf. Mr. and Ms. Mangold also continued to treat their income as jointly owned. The Mangolds never intended to dissolve their marital community. Not only did Mr. and Ms. Mangold's actions and course of conduct show that they did not actually intend to carry out the terms of the Post Nuptial Agreement, but the property acquired by Ms. Mangold and Mr. Mangold after execution of the Post Nuptial Agreement was so fully commingled that any separate identity it could have had was lost. *See Potthoff v. Potthoff*, 627 P.2d 708, 713 (Ariz. Ct. App. 1981) (A transmutation of separate property occurs where commingling of property is such that the identity of the property as separate or community is lost and it therefore becomes community).

The Court finds the Mangolds did not abide by, or ever intend to abide by the terms of the Post Nuptial Agreement, regardless of which version of the Post Nuptial Agreement the parties held up as a shield to Piccolo's collection efforts. The Mangolds'

primary intent in executing the Post Nuptial Agreement was to seek to shelter assets acquired by them after execution of that agreement and to place Ms. Mangold's future income out of the reach of Piccolo's Community Judgment.

3. Summary As To The Post Nuptial Agreement

The Post Nuptial Agreement is invalid and unenforceable because this Court finds the Post Nuptial Agreement was entered into with fraudulent intent at a time when the Mangolds were insolvent and where Mr. Mangold received no consideration for the transfer of these future community property rights. The Post Nuptial Agreement is hereby avoided as both an intentional fraudulent transfer and a constructive fraudulent transfer under §§ 44-1004 and 1005 of the Arizona Revised Statutes. Moreover, Mr. and Ms. Mangold did not have the intent to be bound by the Post Nuptial Agreement, either at the time it was executed or thereafter. The Court finds the Post Nuptial Agreement is void as a sham transaction. Because the Post Nuptial Agreement is unenforceable, the Mangolds' community was never dissolved. Their marital community remains intact to this day. Ms. Mangold's wages in question remain property of the Mangolds' community and are available for garnishment by Piccolo as he seeks to enforce the Community Judgment.

B. Sole and Separate Property of Ms. Mangold.

Ms. Mangold cites Bankruptcy Judge Case's decision in the Arizona bankruptcy matter of *Taylor Freezer Sales of Arizona, Inc.* (*In re Oliphant),* 221 B.R. 506 (Bankr. D. Ariz. 1998) for the notion that, if a creditor is successful in a nondischargeability case against a divorced debtor, that creditor/plaintiff "could only then recover from debtor's post-divorce separate property." DE 71 at page 4 of 33. The Court does not read *Oliphant* to support Ms. Mangold's position. In *Oliphant*, the court denied the "innocent"

spouse's motion to dismiss a nondischargeability adversary proceeding in her bankruptcy holding there were adequate material allegations supporting the creditor's claim that the debtor was not "innocent" so that the debtor's § 523 liability needed to be tried to the court.

For his part, Piccolo contends that neither a valid post nuptial agreement between the Mangolds nor a non-collusive divorce could free Ms. Mangold of her community's debt to Piccolo. Piccolo points to *Community Guardian Bank v. Hamlin*, 182 Ariz. 627, 631-32 (App. 1995) *corrected* (7-10-1995) for the proposition that, upon the dissolution of a marital community, both spouses become liable for the debts of the community as successors to the marital community. The *Hamlin* court specifically held "…both spouses remain jointly liable for the community obligations after divorce." I*d* at 631.[9] *Hamlin*, of course, was not a bankruptcy case nor did either spouse in *Hamlin* obtain a bankruptcy discharge. Here, however, Ms. Mangold's sole and separate debts were discharged. She has no sole and separate liability to Piccolo. After satisfaction of the Ms. Mangold Judgment, Piccolo has not been entitled to collect from the sole and separate property of Ms. Mangold. To date, this point has been moot as Ms. Mangold has not owned any sole and separate property. Hereafter, if and when she acquires sole and separate property, a community debt incurred by Mr. Mangold alone may not be satisfied from the post discharge separate property acquired by Ms. Mangold. The language of the Community Judgment itself acknowledges this fact by indicating that

[9] This Court questions whether *Hamlin* overstated its holding relative to the spouse who did not incur the community debt at issue in that case. As to that spouse, this Court contends her liability on that community debt does not make her sole and separate property liable for the community debt but, rather, extends post-divorce only to the extent of the community property (or the value of that property) which she received from her divorce. After all, the community's creditors were never entitled to collect from her sole and separate property and such creditors would be disadvantaged by the divorce disposition only to the extent she left the community with community property which should be available to pay the community's creditors. Moreover, she benefitted from the incurrence of the community debt to the extent she walked away from the community with community assets that should have been delivered to the community's creditors. Furthermore, if the creditors wanted her sole and separate property to be available to satisfy their claims, they could and should have had her personally (i.e. solely and separately) sign for the debt. If the community debt was a tort incurred by the debtor's spouse, the tort victim would have no claim against the innocent spouse's sole and separate property, so why should the post divorce sole and separate property of the debtor stand good for the tortfeasor's liability?

judgment is against Mr. Mangold's sole and separate property and the community property of the Mangolds.

Piccolo also points to the case of *In re Kimmel*, 378 B.R. 630 (9th Cir. B.A.P. 2007), not because it is factually similar to the case at bar but because of dicta in that case suggesting that, upon the filing of a bankruptcy by an innocent spouse, a creditor could have filed a nondischargeable claim to demonstrate the non-filing spouse incurred a nondischargeable debt to that creditor and, once proven, "then 524(a)(3) would not protect after acquired community property." *Id.* at 181. Significantly, *Kimmel* involved a post-nuptial agreement entered into by the spouses many, many years prior to the creditor's efforts to reopen one spouse's discharge. Also, *Kimmel* did not involve a filed §§ 523 or 727 adversary proceeding but, rather, addressed the effect of a community discharge under § 524. *Kimmel* is neither binding on the Court nor persuasive on issues before the Court.

If and when Ms. Mangold's marital community is legally and unavoidably dissolved, thereafter her earnings and legitimately acquired post-marital dissolution property will become her sole and separate property. Ms. Mangold is not solely and separately liable to Piccolo on his Community Judgment and Ms. Mangold has received a discharge of her sole and separate debts. That sole and separate property acquired after her bankruptcy discharge will not be available to Piccolo in collection of his Community Judgment nor would that Community Judgment become her sole and separate liability. In short, should Ms. Mangold ever acquire sole and separate property hereafter, that property would not be available for involuntary collection remedies on Piccolo's Community Judgment. *See In re Rawlinson* at 883-885.[10]

[10] This Court is aware of the irony of its criticism of dicta contained in the *Kimmel* case when Section IV (B) of this Order is also dicta. However, the parties asked for direction on this topic and the Court's thoughts in this regard might be of value in the parties' efforts to resolve this long and hard fought battle.

V. CONCLUSION

The Mangolds' Post Nuptial Agreement is a sham agreement, is unenforceable and is hereby avoided as an actual and constructively fraudulent transfer. However, should Ms. Mangold's community ever be lawfully and unavoidably dissolved by an enforceable post nuptial agreement or separation agreement or by a noncollusive, lawful dissolution of her marriage to Mr. Mangold or if the marital community is dissolved by the passing of her spouse, Ms. Mangold may then acquire sole and separate property which would not be susceptible to collection remedies available to the holder of the Community Judgment.[11]

Based on the foregoing, the Sanctions Motion against Piccolo, Greer and the Law Firm is hereby denied. The 9011 Motion is also denied for the reason that, based on the novelty and complexity of the legal issues presented to the Court and the contested nature of the facts surrounding the Post Nuptial Agreement, Ms. Mangold's counsel's pursuit of the Sanctions Motion and his defense of the 9011 Motion were (1) not presented for any improper purpose; (2) warranted under existing law; (3) his factual contentions had evidentiary support; and (4) his denial of factual contentions were warranted on the evidence.

DATED AND SIGNED ABOVE.

To be Noticed through the BNC to:
Interested Parties

Harold Campbell
Campbell & Coombs, PC
1811 S. Alma School Rd., Suite 225
Mesa, AZ 85210

[11] Under Arizona's community property laws, property acquired by Ms. Mangold through "gift, devise or descent" would also become her sole and separate property. *See* ARS § 25-213 (A).

Joshua T. Greer
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510 Fed.Appx. 499
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Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

Amina ANWAR; et al., Appellants,
v.
D. Lee JOHNSON; et al., Appellees.

No. 11–16612.
|
Argued and Submitted Feb. 12, 2013.
|
Filed Feb. 19, 2013.

Synopsis

Background: Creditors of bankruptcy debtors filed complaint challenging dischargeability of debts. The Bankruptcy Court dismissed the complaints for lack of jurisdiction, and the United States District Court for the District of Arizona, Susan R. Bolton, J., affirmed. Creditors appealed.

Holdings: The Court of Appeals held that:

bankruptcy court lacked jurisdiction to grant creditors equitable exception to 60–day deadline for filing challenge to dischargeability of debts, and

local rule of bankruptcy procedure permitting retroactive extension of filing deadlines could not circumvent federal rule setting deadline for filing challenge to dischargeability of debts.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

Attorneys and Law Firms

***499** Mark Clarence McClanahan, Mark C. McClanahan, P.C., Portland, OR, Mark E. Hall, Esquire, Marc J. Victor PC, Chandler, AZ, for Appellants.

Randy Nussbaum, Esquire, Beth J. Shapiro, Nussbaum, Gillis & Dinner P.C., Scottsdale, AZ, for Appellees.

Appeal from the United States District Court for the District of Arizona, Susan R. Bolton, District Judge, Presiding. D.C. No. 2:10–cv–02036–SRB.

Before FARRIS, THOMAS, and N.R. SMITH, Circuit Judges.

MEMORANDUM [*]

****1** Amina Anwar and David C. McClanahan (collectively, "Anwar") appeal from the district court's judgment affirming the dismissal of their complaints challenging the dischargeability in bankruptcy of debts owed to them by D. Lee Johnson and David Vergeyle. We have jurisdiction under 28 U.S.C. §§ 158(d) and 1291, and we affirm.

***500** I

The bankruptcy court correctly held that it lacked discretion to grant an equitable exception to the deadline set for filing nondischargeability complaints in Federal Rule of Bankruptcy Procedure ("FRBP") 4007(c). Consistent with the plain language of that rule, as well as FRBP 9006(b)(3)' s specific instruction that bankruptcy courts may only extend the deadline as Rule 4007(c) itself permits, [1] we have repeatedly held that the deadline for filing nondischargeability complaints is "strict" and "cannot be extended unless a motion is made before the 60–day limit expires." *Allred v. Kennerley (In re Kennerley),* 995 F.2d 145, 146 (9th Cir.1993) (citing *Anwiler v. Patchett (In re Anwiler),* 958 F.2d 925, 927 (9th Cir.1992)); *see also, e.g., Classic Auto Refinishing, Inc. v. Marino (In re Marino),* 37 F.3d 1354, 1358 (9th Cir.1994); *Jones v. Hill (In re Hill),* 811 F.2d 484, 486 (9th Cir.1987). [2]

The bankruptcy court's equitable power under section 105(a) of the Bankruptcy Code, 11 U.S.C. § 105(a), cannot be used to circumvent deadlines made firm by the Bankruptcy Code and

FRBP. *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988); *see also Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.),* 920 F.2d 1428, 1432 (9th Cir.1990) (holding that the bankruptcy court may not use its equitable power under § 105(a) to enlarge time for filing a proof of claim under FRBP 3002(c) where FRBP 9006(b)(3) limits grounds for extension to those stated in FRBP 3002(c) itself). Given Anwar's failure to move for an extension of the filing period before the deadline expired, the bankruptcy court lacked discretion to grant her relief. *See In re Hill,* 811 F.2d at 486.

II

Local Rule of Bankruptcy Procedure ("LRBP") 5005–2(n) cannot provide Anwar an extension for filing nondischargeability complaints that is expressly foreclosed by the federal bankruptcy rules. *See Sunahara v. Burchard (In re Sunahara),* 326 B.R. 768, 782 (9th Cir. BAP 2005) (citation omitted). While LRBP 5005–2(n) might be validly applied in the mine run of bankruptcy cases, in which the court may retroactively extend filing deadlines upon a showing of excusable neglect, *see* Fed. R. Bankr.P. 9006(b)(1), it cannot be applied to circumvent FRBP 9006(b)(3). As we have already stated, FRBP 9006(b)(3) precludes both the application of an "excusable neglect" exception to FRBP 4007(c)'s filing deadline and the retroactive extension of FRBP 4007(c)'s filing deadline by limiting the grounds for extension to that which FRBP 4007(c) itself permits, *i.e.,* only "for cause" upon motion filed by a party in interest before the filing deadline has passed. Where, as here, a local procedural rule conflicts with a federal rule, the local rule "cannot be enforced." *Pradier v. Elespuru,* 641 F.2d 808, 810 (9th Cir.1981).

III

****2** Because Anwar failed to raise any argument for relief under ***501** 11 U.S.C. § 523(a)(3)(B) in the bankruptcy court or the district court and has not established any exceptional circumstances, the argument has been waived. *Concrete Equip. Co., Inc. v. Fox (In re Vigil Bros. Constr., Inc.),* 193 B.R. 513, 520 (9th Cir. BAP 1996) (citing *United States v. Oregon,* 769 F.2d 1410, 1414 (9th Cir.1985)). We need not and do not address any other issue urged by the parties.

AFFIRMED.

All Citations

510 Fed.Appx. 499, 2013 WL 645744

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

1 This precludes any retroactive extension of Rule 4007(c)'s filing deadline on the basis of "excusable neglect." As a result, the bankruptcy court correctly declined to apply the factors articulated in *Pioneer Investment Services v. Brunswick Associates Limited Partnership,* 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). *See Kelly v. Gordon (In re Gordon),* 988 F.2d 1000, 1001 n. 1 (9th Cir.1993).

2 The question of whether the bankruptcy court may retroactively extend Rule 4007(c)'s filing deadline due to its own actions, such as misleading the parties or technical problems with the court's electronic filing system, is not presented by this appeal.

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Faculty

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Randy Nussbaum is an attorney with Sacks Tierney P.A. in Scottsdale, Ariz., and has assisted individuals and businesses with complex bankruptcy protection (debtor and creditor), transaction and litigation matters for nearly 40 years. He has represented secured and unsecured creditors, surety companies, creditors' committees, lessors, professional athletes, doctors, lawyers, and trustees in chapter 7, 11 and 13 proceedings, including adversary actions (bankruptcy litigation). The cases have involved such diverse matters as real estate, construction, manufacturing, trucking, asset-based lending, bankruptcy related to divorce, and high-value and complex individual bankruptcies. Mr. Nussbaum is a Certified Bankruptcy Specialist by the Arizona Board of Legal Specialization and is Board Certified in Business Bankruptcy Law by the American Board of Certification. He has been named to the *Super Lawyers* "Top 50" list of Arizona attorneys multiple times and has been listed in *The Best Lawyers in America* annually since 2010; he was selected as its "Lawyer of the Year" (Scottsdale) for Bankruptcy and Creditor Debtor Rights in 2019 and for Bankruptcy Litigation in 2021. Mr. Nussbaum is a 1990 graduate of Scottsdale Leadership and has volunteered for the organization for nearly 30 years, serves on its advisory board, and is a recipient of the prestigious Frank W. Hodges Alumni Achievement Award. He also served as a Sterling Awards Jurist for the Scottsdale Chamber of Commerce and received the Chamber's Volunteer of the Year Award for 2017. In 2018, he was inducted into the Scottsdale History Hall of Fame. Mr. Nussbaum received his B.A. *cum laude* and in 1977 his J.D. in 1980 from Arizona State University, graduating in the top 25 percent of his class.