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KEEPING CONSUMER BANKRUPTCY APPEALS ON TRACK

Tara Twomey, Of Counsel to the National Consumer Law Center and Executive Director for the National Consumer Bankruptcy Rights Center, San Jose, CA

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Tara Twomey
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Appealing a Bankruptcy Court Decision – The 3 W's

*A. **W**hat Orders Can Be Appealed?*

Final orders or judgments may be appealed. In the bankruptcy context "finality" is more liberally applied than outside of bankruptcy. Courts take a pragmatic and flexible approach. *See, e.g.*, *In re Armstrong World Indus. Inc.*, 432 F.3d 507 (3d Cir. 2005); *Comm. of Dalkon Shield Claimants v. A. H. Robbins Co.*, 828 F.2d 239, 241 (4th Cir. 1987).

Examples of final orders may include: allowing or disallowing an exemption; granting or denying relief from the automatic stay; valuing a secured creditor's lien; and a determination of nondischargeability. To appeal a final order, the appellant must file a notice of appeal. Fed. R. Bankr. P. 8001(a), 8002.

Interlocutory orders only decide some intervening matters and require further steps to enable the court to decide the issue on the merits. When appealing an interlocutory order, appellant must file a notice of appeal together with a motion for leave to appeal. 28 U.S.C. § 158(a)(3); Fed R. Bankr. P. 8001(b), 8003. Importantly, in some circuits the denial of plan confirmation is considered an interlocutory order.

*B. **W**hen to Appeal?*

The notice of appeal must be filed within 14 days of the date of the entry of the order or judgment on the bankruptcy court's docket. Fed. R. Bankr. P. 8002. This means 14 calendar days, not business days. If the fourteenth day falls on a weekend, holiday or other day week the clerk's office is closed, the notice is timely if filed on the next day the clerk's office is open. In some limited circumstances, a bankruptcy judge may extend the time for filing the notice of appeal, however, this generally requires a motion to extend the time for filing before that time has expired. Fed. R. Bankr. P. 8002(c).

*C. **W**here to Appeal?*

Appeals from all final judgments or orders and discretionary appeals of interlocutory orders are usually heard either by the district court or bankruptcy appellate panel (First, Sixth, Eighth, Ninth and Tenth Circuits). In circuits with BAPs, the appeal will be heard by the district court only if the appellant makes an election to have the case heard by the district court at the time of the filing of the appeal or if any other party elects, not later than 30 days after service of notice of the appeal. The election must be a separate writing. Fed. R. Bankr. P. 8001(e).

Choosing BAP or District Court (When You Have a Choice): Fact or Fiction

1. Because bankruptcy judges serve on the BAP panels, they are less likely to reverse their fellow bankruptcy judges than district court judges.

2. If you want a faster decision stay at the BAP.

3. Go to the district court if the BAP has already decided the issue unfavorably to you.

4. Opt for district court if the appeal involves state law or non-federal bankruptcy law.

Direct Appeals

Deciding Whether to Appeal

A. Evaluating your case

The role of appellate courts is to determine whether the bankruptcy court made a legal error in deciding the case or issue.

The Law and Standard of Review. Is the issue purely a legal one, a factual one, or mixed question of law and fact? Legal determinations are reviewed *de novo*, that is, no deference is supposed to be given to the bankruptcy court. Factual findings are reviewed for clear error or abuse of discretion. For mixed questions of fact and law, the reviewing court accepts the bankruptcy court's finding of historical or narrative facts unless clearly erroneous, but exercises plenary review of the court choice and interpretation of law and its application to the facts. *See Mellon Bank NA v. Metro Communications Inc.*, 945 F.2d 635, 642 (3d Cir. 1991).

Is the plain language of the Bankruptcy Code on your side or is the statutory language ambiguous? Is the legislative history on your side, is it against you, or is it silent?

The Facts. **Bad facts often make bad law.** What it means is that judges are human. When presented with compelling circumstances, or the fear that the debtor is doing something bad and might get away with something, judges might interpret the law differently. In an effort to do justice, they may make rules and interpret things in ways that don't always make sense for later cases.

The Record. **If it is not in the record on appeal, it does not exist for purposes of the appeal.** Appellate courts do not hear testimony from live witnesses or consider new evidence. They only review the written record generated by the bankruptcy court, which may include documentary evidence admitted, hearing transcripts, and affidavits. In order to establish a proper record for appeal, you may need to submit affidavits or stipulations of fact. You can also request an evidentiary hearing in contested matters.

B. The Cost of Prosecuting or Defending Appeals

The appeals process can be a time-consuming drawn-out, expensive process. It rarely makes sense for your client to appeal a case, if you are not willing to put in the time to write an excellent brief and prepare for oral argument. On the flip side, as an appellee you are often involuntarily thrust into the appellate process. As an appellee you will need to weigh the merits of the appeal and decide how much effort to put into defending your success at the bankruptcy court.

C. Life as an Appellant

Sometimes you are not making the choice about whether to appeal or not. Instead, you were the winner below and now your client faces life as an appellant. The good news is that the odds are in his or her favor. The bad news is that appeals take time and cost money. Do you continue to represent the client on appeal? Will you get paid? Is there a possibility for fee shifting? If not, are you willing to defend the bankruptcy court's decision pro bono?

Brief Writing and Oral Argument

A. Know the Rules

Section 158 of 28 U.S.C. covers appeals of bankruptcy matters.
Part VIII of the Federal Rules of Bankruptcy Procedure also covers appeals from bankruptcy court decisions. For cases being appealed to the circuit courts of appeals, see the Federal Rules of Appellate Procedure.
In addition, many courts have local rules. Review those, too.

B. Brief Writing Tips[1]

Remember, your goal is to persuade, not to argue. We all have had people come up to us at cocktail parties or family reunions and say, "you know, I would make a good lawyer because I just love to argue." Those statements could not be further from the truth. Guests on the Jerry Springer show argue. Lawyers persuade. The idea behind an effective brief is to have the audience (the judge and/or the law clerk) read the brief and say to themselves, "why are these parties fighting over such an obvious issue?"

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[1] I thank Judge Terrence L. Michael, Bankruptcy Judge for the Northern District of Oklahoma for allowing me to adapt his "Ten Tips for Effective Brief Writing: Ten Year Later," which was prepared for the Oklahoma Bar Association, December 6, 2012.

Know thy audience. Most district court judges and circuit court judges are unfamiliar with bankruptcy. Not only do you need to persuade them that you are right on the legal merits of the case, you may also have to educate them about relevant bankruptcy provisions. Also remember that district courts and bankruptcy appellate panels are bound by decisions from their applicable circuit court of appeals. It sounds obvious, but some attorneys rely on opinions from other circuits to make their case even if their own circuit has already decided the issue.

Know the facts of the cases you cite. There are almost 480 volumes of West's Bankruptcy Reporter. Suffice it to say that some judge, somewhere, sometime has written and published an opinion that contains the magic words that support your position. It is extremely tempting to insert that quotation ("sound bites") into your brief and say, "see, judge, other courts agree with me so I must be right." This is a dangerous practice. Courts decide real disputes. Real disputes are fact driven. The facts of a case are at least as important as the legal analysis. Be wary of the case that is factually dissimilar to yours, but has a great sound bite. Be sure (either in your brief or at oral argument) to explain why the factually dissimilar case is applicable to your situation. Also, be cognizant of the difference between the holding of a case and the dicta contained therein. Most judges find little value in dicta unless they already agree with it.

Shorter is better. Thurgood Marshall once said that in all his years on the Supreme Court, every case came down to a single issue. If that is true, why do most briefs contain arguments covering virtually every conceivable issue (good, bad or indifferent) that could arise in the case? Weak arguments detract from the entire presentation. If you feel compelled in a particular case to include everything including the kitchen sink, maybe you ought to take another look at settling the case.

Quality is Job One. Check your cites. Make sure they are accurate and that each case you are relying on is still good law. We do. There is nothing more frustrating than being unable to find a case because the citation contained in the brief is wrong. There is nothing less persuasive than finding out that a case you have cited to us has been overruled or misquoted. These flaws weaken your entire presentation.

Leave the venom at home. Judges don't enjoy reading a brief filled with hostility toward and/or personal attacks upon the other side. Whether you like (or get along well with) your opposition has little to do with the merits of a particular case. The most effective attack you can make is to persuade (there's that word again) the judge that the other side is wrong. Remember, if you win, they lose. Isn't that enough? Words like these: ridiculous, scurrilous, ludicrous, preposterous, blatant, self-serving (come on, *all* evidence and argument is self- serving) and nonsensical do not help you. Don't use them.

C. Oral Argument

Don't kid yourself. Some cases can be won or lost at oral argument!

Know your facts. Know your record. Be prepared to answer to "Where is that in the record?" "What is your best case?" "What has happened since you filed your brief?" The judges' law clerks love trying to trip up the lawyers by finding cases the lawyers have not found.

Oral argument is an informed conversation. Oral argument serves to clarify issues that are troublesome to the court. Therefore, the most effective oral argument in appellate court is an informed conversation with the judges, not a "fire and brimstone" speech.

Single out the most important issues for oral argument.

Answer the question. Listen and focus on judges' questions. Listen, then answer, then qualify with an explanation if necessary.

Practice. Oral argument shouldn't be a rough draft. Prepare an outline of your argument, paying close attention to your introduction and how, time permitting, you would ideally like to finish your argument so you conclude on a strong note. Attend an oral argument if you have not participated in one before and consider practicing on non-bankruptcy attorneys if you are arguing to the district court or circuit court of appeals.

Table B-5.
U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding, During the 12-Month Period Ending March 31, 2020

Circuit and Nature of Proceeding	Total Appeals Terminated	Terminated on the Merits									
		By Consolidation	Percent of Total Terminated	Total	Affirmed/ Enforced [1]	Dismissed	Reversed	Remanded	Other	Certificate of Appealability	Percent Reversed [2]
Total	**49,057**	**2,797**	**61.0**	**29,901**	**19,503**	**3,208**	**2,782**	**472**	**51**	**3,885**	**8.4**
Bankruptcy	623	45	55.2	344	257	44	40	3	-	-	11.6
DC	**1,080**	**222**	**44.2**	**477**	**378**	**27**	**67**	**1**	-	**4**	**14.3**
Bankruptcy	0	-	-	-	-	-	-	-	-	-	-
1st	**1,330**	**47**	**73.0**	**971**	**645**	**102**	**86**	**11**	**6**	**121**	**8.0**
Bankruptcy	37	3	62.2	23	16	1	4	2	-	-	17.4
2nd	**4,251**	**207**	**55.3**	**2,351**	**1,439**	**459**	**257**	**49**	-	**147**	**9.9**
Bankruptcy	54	-	70.4	38	23	14	1	-	-	-	2.6
3rd	**3,713**	**647**	**57.6**	**2,140**	**1,264**	**66**	**421**	**61**	**1**	**327**	**9.2**
Bankruptcy	46	-	63.0	29	25	1	3	-	-	-	10.3
4th	**4,314**	**193**	**65.2**	**2,813**	**2,022**	**150**	**200**	**40**	-	**401**	**8.0**
Bankruptcy	35	2	45.7	16	13	-	3	-	-	-	18.8
5th	**6,822**	**531**	**55.9**	**3,813**	**2,279**	**805**	**240**	**66**	-	**423**	**6.0**
Bankruptcy	92	12	60.9	56	44	-	12	-	-	-	21.4
6th	**4,200**	**207**	**66.3**	**2,783**	**1,856**	**100**	**312**	**25**	**2**	**488**	**12.1**
Bankruptcy	26	8	50.0	13	11	-	2	-	-	-	15.4
7th	**2,649**	**110**	**54.1**	**1,434**	**969**	**79**	**148**	**36**	**24**	**178**	**11.0**
Bankruptcy	60	5	41.7	25	14	2	8	1	-	-	32.0
8th	**2,873**	**111**	**73.3**	**2,107**	**1,554**	**126**	**105**	**9**	**2**	**311**	**5.2**
Bankruptcy	14	-	78.6	11	6	3	2	-	-	-	18.2
9th	**10,319**	**342**	**63.1**	**6,508**	**4,338**	**796**	**552**	**70**	**1**	**751**	**9.1**
Bankruptcy	172	15	53.5	92	68	19	5	-	-	-	5.4
10th	**1,805**	**19**	**67.8**	**1,223**	**726**	**104**	**151**	**63**	-	**179**	**6.1**
Bankruptcy	15	-	-	10	7	3	-	-	-	-	-
11th	**5,701**	**161**	**57.6**	**3,281**	**2,033**	**394**	**243**	**41**	**15**	**555**	**6.7**
Bankruptcy	72	-	43.1	31	30	1	-	-	-	-	-

NOTE: This table does not include data for the U.S. Court of Appeals for the Federal Circuit. Beginning in March 2014, data include miscellaneous cases not included previously.

[1] Affirmed includes appeals affirmed in part and reversed in part.

[2] Percent not shown where the total number of appeals terminated on the merits is less than 10. Percent reversed not computed for original proceedings because of their difference from appeals, nor are original proceedings included in the percentage of total appeals reversed.

15-56814

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSALVA LUA

Debtor in Chapter 7 and Appellant

V

ELISSA MILLER
Chapter 7 Trustee and Respondent

Appeal from Order of Honorable Deborah J. Saltzman Granting Trustee's Objection to the Allowance of the Chapter 7 Debtor's Amended Homestead Exemption United States Bankruptcy Court for the Central District of California
Case No. 2:11-bk-41173-DS

Appellant's Opening Brief

LAW OFFICES OF BRUCE R FINK
Bruce R Fink, SBN 047788
bruce@brucefinklaw.com
1323 North Broadway
Santa Ana, California 92706
Tel.: (714) 558-3000
Fax: (714) 277-4235

Attorney for Chapter 7 Debtor and Appellant Rosalva Lua

15-56814

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Appellant's Opening Brief

Attorney for Chapter 7 Debtor and Appellant Rosalva Lua

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6. Gregg C Ojeda (Ojeda) First Attorney for Rosalva *11*

7. Rigoberto Lua (Rigoberto or Husband) Husband of Rosalva *11*

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12. Thomas Bluemel (Tom) a Real Estate Agent *11*

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1. An exemption cannot be disallowed except pursuant to express provisions found in 11 USCA, the Bankruptcy Code *19*

2. Even using State Exemptions the concept of Equitable Estoppel does not apply as a matter of law. The State Law may define the exemption (by Statute) but general case law cannot modify the Federal Bankruptcy *19*

3. The facts of the case do not support a finding of equitable estoppel. The debtor did not change horses in the middle of the stream the trustee did. *19*

ARGUMENT 1 ..... **19**

13. ...Thus, the Bankruptcy Court's "surcharge" was unauthorized if it contravened a specific provision of the Code. We conclude that it did. Section 522 (by reference to California law) entitled Law to exempt $75,000 of equity in his home from the bankruptcy estate. §522(b) (3) (A) and it made that $75,000 "not liable for payment of any administrative expense." §522(k). Insofar as Siegel and the United States equate the Bankruptcy Court's surcharge with an outright denial of Law's homestead exemption, their arguments founder upon this case's procedural history. The Bankruptcy Appellate Panel

stated that because no one "timely oppose[d] [Law]'s homestead exemption claim," the exemption "became final" before the Bankruptcy Court imposed the surcharge. ...We have held that a trustee's failure to make a timely objection prevents him from challenging an exemption. 20

14. Clearly the case at bar differs because Rosalva's homestead had not been resolved by Miller failing to object..... 21

15. The contents of Law now turns to an examination assuming Siegal could have timely objected to the homestead claimed by Law. The case goes on to say 21

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16. Again, as argued in Argument 1 above, the Law –v- Siegal case makes it clear that only Bankruptcy Code Sections 522 may be used as grounds to disallow an exemption. 24

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17. Tilem (the leprechaun) is, of course, the trustee's counsel and by extension the Trustee 25

Rosalva (Red) is a non-English Speaking layperson EOR 25

The court blames Rosalva for leading the trustee astray; waiting three years to assert a $100,000 homestead exemption; and thus assuring no funds for creditors..... 25

The reality is that funds for creditors is not the issue in this case, it is funds for the trustee 25

I shall demonstrate to this court that at no point did the debtor lead the trustee astray 25

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The trustee sent out an asset notice and creditors filed claims that totaled under $10,000 26

Counsel for the trustee filed an adversary complaint..... 27

18. The husbands default was entered in the adversary matter. EOR 268 27

19. On September 5, 2012, the trustee obtained a default judgment requiring an accounting EOR 257..... 27

On April 21, 2014 (One year seven and a half months after the judgment against Rigoberto was made) the trustee made a deal with the Rigoberto 27

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20. Now, instead of the debtor having a maximum interest in Pennywood of one-half, she suddenly has 100% as all community interest is administered in and becomes part of the bankruptcy estate..... 28

21. So, the debtor, pursuant to Law –v- Siegal, 134 S. Ct. at 1194 amended her exemption claim as to this newly created community property. EOR 127 28

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STATEMENT OF JURISDICTION

The court has jurisdiction over "final decisions" of the district court acting in its appellate capacity under 28 U.S.C. § 158(d) and 28 U.S.C. § 1291. See *Dye v. Brown (In re AFI Holding, Inc.), 530 F.3d 832, 836-37 (9th Cir. 2008)* (order)

BAP and district court decisions outright affirm or reverse final orders of bankruptcy courts are themselves final orders. See *U.S. Bank v. Vill. at Lakeridge, LLC (In re Vill. at Lakeridge, LLC), No. 13-60038, --- F.3d ---, 2016 (9th Cir. Feb. 8, 2016*

THERE ARE THREE ISSUES:

1. In light of *Law –v- Siegal, 134 S. Ct. at 1194* may an exemption be disallowed on any ground not specifically included in 11 U.S.C.A 522.

2. May the Bankruptcy Court apply State Court Case Law to expand on Section 522 as a basis to disallow the debtor's claim of a homestead exemption?

3. Do the facts of this case support the application of equitable estoppel?

STATEMENT OF THE CASE

The Journey Home a Play in Six Acts

Cast of Characters

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5. Bruce R Fink (Fink) Attorney for Rosalva

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THE PLAY'S THE THING WHEREIN I'LL CATCH THE CONSCIENCE OF THE KING[1]

Prologue - The Pot of Gold

The Pot of Gold is a house, the gold in the pot is in part the husband's interest and in part the community's interest. The Leprechaun has possession of the house and subsequently possession of the proceeds from the sale of the house.

No Reference is made to the EOR (not to be confused with Eeyore[2]) as those references are all set forth following the prologue.

As a Metaphor[3], we assume that "Red" traveled to the Bankruptcy Court where she met a Leprechaun. The Leprechaun took control of a Pot of Gold she had with her.

---

[1] Hamlet, Act 2 Scene 2 Page 24

[2] **Eeyore is a character in the Winnie-the-Pooh books by A. A. Milne. He is generally characterized as a pessimistic, gloomy, depressed, old grey stuffed donkey**

[3] a figure of speech in which a word or phrase is applied to an object or action to which it is not literally applicable.

Red said the Pot of Gold was her husband's but she might have a half interest in some of the coins. She said at least half the coins belonged to her husband and expected the Leprechaun to give him his own coins.

Prior to Red being married the Pot of Gold was owned, in equal shares, by three people. One of these three was her future husband. Before she got married, her future husband had received, as a gift, the remainder of the Pot of Gold. He owned it all when they married.

After Red married, more gold coins went into the pot from the husband's earnings. Red's portion could not be determined without an accounting but the maximum that Red had was one-half the gold.

The Leprechaun had a Mistress, Miller, who told him what to do. Miller's obligation was to pay Creditors, her fees and the Leprechaun's fees.

The Leprechaun agreed with the husband that the Leprechaun's mistress would use no more than one-half the gold (presumably the wife's maximum portion) in order to pay $10,000 and some other fees. Anything left over would go back to the husband. There was nothing for Red.

Both Miller and the Leprechaun will get more money if all the Gold were theirs as opposed to owning only half the gold. They get greedy.

Three years after all this starts, ***the Leprechaun waives his Magic Wand and Changes Everything***. He converts 100% of the gold to being Red's property.

Red now seeks a portion (Homestead Amount) from her newly created wealth.

The Leprechaun stamps his foot and call foul. He says Red led him astray. Red tricked him. Red was smarter than he was. Red hid in the bushes and snatched up his gold. Red banged the door to the gold room. Naughty, Naughty Red – She sought her entitlement.

You will decide. The details follow!

Act 1 – Rosalva Files Bankruptcy

It was just another day when, on July 21, 2011, Rosalva filed a Chapter 7 Bankruptcy. 11 U.S.C. Chapter 7. **EOR** 016, EOR 310 Rosalva, a married woman living with her husband in his separate property home, sought relief from debt.

In order to obtain financial freedom she hired attorney Ojeda and he filed a Chapter 7 case on her behalf. EOR 310

Unfortunately, she had stepped into a legal sinkhole. Ojeda prepared her schedules claiming an unwarranted homestead exemption on her husband's separate property commonly known as 2044 Pennywood Place, Pomona.

Fleeing through the (legal) woods, she substituted attorneys. EOR 307

Prior to the completion of the 341(a) EOR 59 Rosalva amended her schedules and removed the unauthorized exemption on Pennywood EOR 299, EOR 304

Act 2 – Miller Files an Adversary Complaint

Following the 341(a) hearing, Miller decided that Rosalva might have an interest in Pennywood. For this reason, Miller hires Tilem. EOR 286, EOR 283 Miller reviews several deeds, one from long before Rigoberto married Rosalva. This first set of deeds conveyed to Rigoberto all title to Pennywood. About a year after the parties marry Rigoberto refinances Pennywood and there is a deed from Rigoberto and Rosalva to Rigoberto making Pennywood his separate property. EOR 017 Miller and the court misconstrue the nature of the deed and believe that Rosalva has a legal interest in Pennywood. EOR 017

So what happens? Miller files an adversary against Rigoberto seeking an accounting of the community funds used to pay on the Pennywood loan during the course of the marriage. EOR 278. Rigoberto's default is entered on 7/24/12. EOR

268 and on 9/25/2012 a default judgment (requiring Rigoberto provide an accounting) is entered. EOR 257. On 10/18/2012, the adversary case is closed EOR 256

Act 3 –Miller moves against Rigoberto

Rosalva did not object to the actions of Miller against Rigoberto. Rosalva took the position that she had no interest in Pennywood except such as would apply in a divorce. In her amended schedules, she alleged she was not separated from Rigoberto. EOR 299

Act 4 – Miller and Rigoberto Meet and Resolve Issues.

On 12/18/2013, (14 months later) Miller brings a motion to modify the default judgment. EOR 232 apparently the Motion got Rigoberto's attention and he became active in the case. The hearing on the motion to modify the judgment is continued to provide time to allow a settlement to be approved by the court. EOR 229

Miller and Rigoberto reach a settlement. The essential terms are to sell Pennywood, give Rigoberto half the net proceeds and give the Bankruptcy Estate the other half. Further if after creditors and administrative expenses are paid, any surplus goes to Rigoberto. Rosalva does not receive any of the funds from the sale of the house. EOR 215- EOR 219

Act 5 –Miller Converts Pennywood to Community

At all times since October 13, 2011, when Rosalva filed her amended schedules, Rosalva's position was clearly that, the property was Rigoberto's and not hers. . The Motion to Approve the Compromise between Miller and Rigoberto was filed 4/22/2014 EOR 214 (docket 39) and approved by the court on 5/13/2014 EOR 187 docket 48 Rosalva did not object as it was Rigoberto's property that was involved.

On June 2, 2014 EOR 186, two and a half years since Rosalva had stated Pennywood was Rigoberto's separate property and after the court had approved the settlement between Rigoberto and Miller, the court enters a judgment that changes the nature of Pennywood from Rigoberto's separate property to community property. This would be an unanticipated (and unnecessary) action…but it was Miller's unilateral action. The consequences of Miller's action change the entire nature of Pennywood and the rights of the players in our little presentation. Rosalva

receives rights to a homestead to which she was, previously, not entitled. Rosalva did not lead Miller by the nose. Miller instead shot herself in the foot.[4]

Act 6 – Rosalva Claims a Homestead in Pennywood

On 7/24/2014 (7 weeks later) Rosalva amends her exemptions for the second time. EOR 124. Rosalva now claims an exemption of $100,000 in the community property.

The trustee Miller objects to the seconded amendment to the exemptions, specifically objecting to the homestead objection.

The bankruptcy judge sustains the objection on the grounds of equitable estoppel.

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[4] To do or say something that inadvertently undermines one's interests.
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Summary of Arguments

1. An exemption cannot be disallowed except pursuant to express provisions found in 11 USCA, the Bankruptcy Code

2. Even using State Exemptions the concept of Equitable Estoppel does not apply as a matter of law. The State Law may define the exemption (by Statute) but general case law cannot modify the Federal Bankruptcy

3. The facts of the case do not support a finding of equitable estoppel. The debtor did not change horses in the middle of the stream[5] the trustee did.

ARGUMENT 1

Until the Supreme Court decided Law v. Siegel, No. 12-5196 (U.S. Mar. 4, 2014) the bankruptcy court used equitable remedies where the debtor had acted wrongfully. Law tells that only express provisions of the bankruptcy code may be used to disallow an exemption. Disallowance of an exemption claim is the same as sustaining an objection to the exemption claim. Further Law says that when the

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[5] 1. Origin

From an 1864 speech by Abraham Lincoln, in reply to Delegation from the National Union League who were urging him to be their presidential candidate. 'An old Dutch farmer, who remarked to a companion once that it was not best to swap horses when crossing streams."

debtor uses State Law Exemptions then State Law defines the extent of the exemption. Nonetheless where State Law defines the exemption State Case Law using equitable grounds to prevent the application of the exemption violates the express provisions of 11 USCA Section 505. The bankruptcy code sets forth the exclusive list of reasons for objecting to an exemption. Quoting from Law, (emphasis added) we find:

Chapter 7 of the Bankruptcy Code gives an insolvent debtor the opportunity to discharge his debts by liquidating his assets to pay his creditors. *11U.S.C. §§704(a)(1), 726, 727. The filing of a bankruptcy petition under Chapter 7 creates a bankruptcy "estate" generally comprising all of the debtor's* property. 11 U.S. C§541(a) (1).

*We have long held that "whatever equit**ab**le powers remain in the bankruptcy courts must and can only be exercised within the confines of" the Bankruptcy Code*

> 13. …Thus, the Bankruptcy Court's "surcharge" was unauthorized if it contravened a specific provision of the Code. We conclude that it did. Section 522 (by reference to California law) entitled Law to exempt $75,000 of equity in his home from the bankruptcy estate. §522(b) (3) (A) and it made that $75,000 "not liable for payment of any administrative expense." §522(k). Insofar as Siegel and the United

> States equate the Bankruptcy Court's surcharge with an outright denial of Law's homestead exemption, their arguments founder upon this case's procedural history. The Bankruptcy Appellate Panel stated that because no one "timely oppose[d] [Law]'s homestead exemption claim," the exemption "became final" before the Bankruptcy Court imposed the surcharge. …We have held that a trustee's failure to make a timely objection prevents him from challenging an exemption.

14. Clearly the case at bar differs because Rosalva's homestead had not been resolved by Miller failing to object.

15. The contents of Law now turns to an examination assuming Siegal could have timely objected to the homestead claimed by Law. The case goes on to say:

> But even assuming the Bankruptcy Court could have revisited Law's entitlement to the exemption, §522 does not give courts discretion to grant or withhold exemptions based on whatever considerations they deem appropriate. Rather, the statute exhaustively specifies the criteria that will render property exempt. See 11 U.S.C §522(b), (d). Siegel *insists that because §522(b) says that the debtor "may exempt" certain property, rather than that he "shall be entitled" to do so, the court retains discretion to grant or deny exemptions even when the*

statutory criteria are met. But the subject of "may exempt" in §522(b) is the debtor, not the court, so it is the debtor in whom the statute vests discretion. A debtor need not invoke an exemption to which the statute entitles him; but if he does, the court may not refuse to honor the exemption absent a valid statutory basis for doing so.

Moreover, §522 sets forth a number of carefully calibrated exceptions and limitations, some of which relate to the debtor's misconduct. For example, §522(c) makes exempt property liable for certain kinds of prepetition debts, including debts arising from tax fraud, fraud in connection with student loans, and other specified types of wrongdoing. Section 522(o) prevents a debtor from claiming a homestead exemption to the extent he acquired the homestead with nonexempt property in the previous 10 years "with the intent to hinder, delay, or defraud a creditor." And §522(q) caps a debtor's homestead exemption at approximately $150,000 (but does not eliminate it entirely) where the debtor has been convicted of a felony that shows "that the filing of the case was an abuse of the provisions of " the Code, or where the debtor owes a debt arising from specified wrongful acts—such as securities fraud, civil violations of the Racketeer Influenced and Corrupt Organizations Act, or "any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years."

§522(q) and note following §522 . The Code's meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions.

Siegel points out that a handful of courts have claimed authority to disallow an exemption (or to bar a debtor from amending his schedules to claim an exemption, which is much the same thing) based on the debtor's fraudulent concealment of the asset alleged to be exempt….He suggests that those decisions reflect a general, equitable power in bankruptcy courts to deny exemptions based on a debtor's bad-faith conduct. For the reasons we have given, the Bankruptcy Code admits no such power. It is of course true that when a debtor claims a state-created exemption, the exemption's scope is determined by state law, which may provide that certain types of debtor misconduct warrant denial of the exemption. ...Some of the early decisions on which Siegel relies, and which the Fifth Circuit cited in Stewart, are instances in which federal courts applied state law to disallow state-created exemptions....But federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code.

We acknowledge that our ruling forces Siegel to shoulder a heavy financial burden resulting from Law's egregious misconduct, and that it may produce inequitable results for trustees and creditors in other cases. *We have recognized,*

*however, that in crafting the provisions of§522, "*Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors.*"* *Schwab v. Reilly, 560 U. S. 770, 791 (2010).* The same can be said of the limits imposed on recovery of administrative expenses by trustees. For the reasons we have explained, it is not for courts to alter the balance struck by the statute. *Cf. Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U. S. 365, 376–377 (1990.)* There is a huge difference between defining an exemption and allowing the exemption. In bankruptcy where the exemption is based on state law the definition and scope of an exemption is defined by state law but the allowance of an exemption on equitable grounds crosses the line from definition of the exemption to disallowance in contravention to the enumerated bankruptcy code sections which are the exclusive list of grounds to disallow the exemption claim.

Estoppel is an equity remedy. The Law case makes it clear that only statutory provisions may be used to disallow an exemption.

ARGUMENT 2

16. Again, as argued in Argument 1 above, the Law –v- Siegal case makes it clear that only Bankruptcy Code Sections 522 may be used as grounds to disallow an exemption.

Nevertheless, assuming that the restriction allows State Court Created Exemptions the argument is that where State Law (Statutes) defines exemptions the application of State Case Law would not be allowed under Law –v- Siegal.

ARGUMENT 3 THE POT OF GOLD ARGUMENT

17. Tilem (the leprechaun) is, of course, the trustee's counsel and by extension the Trustee

Rosalva (Red) is a non-English Speaking layperson EOR 092 paragraph 9.

The court blames Rosalva for leading the trustee astray; waiting three years to assert a $100,000 homestead exemption; and thus assuring no funds for creditors. (EOR 30 page 16, line 18 through page 17.)

The reality is that funds for creditors is not the issue in this case, it is funds for the trustee and her attorney that is the driving force. Creditor claims are less than $10,000 EOR 017.

I shall demonstrate to this court that at no point did the debtor lead the trustee astray. Indeed, it was the trustee's own actions that may have "shot her in the foot."

We start with a quick review of EOR 287 the trustee's application to employ counsel. As part of that application, EOR 291 counsel Tilem includes his experience

in the overlap of family law and bankruptcy. The trustee's attorney was not a "babe in the woods."

THE HISTORY OF THE CASE AND THE ACTION OR INACTION OF THE DEBTOR

This is an easy case. The debtor filed Ch 7 and, early on, removed her original homestead exemption and explained that the real property was her husband's – it had never been in her name and she had deeded away her interest years earlier. The debtor deeded her interest to her husband by Grant Deed, not gift or quitclaim deed. As such, any subsequently acquired interest in the real property went to the husband as a Grant Deed conveys any subsequently acquired title. As an example if A grants a parcel to B but doesn't gain good title until after the grant, when A does acquire good title it automatically passes to B (3 Miller & Starr, Cal. Real Est. s8:74 (4th ed.).. The deed is shown in EOR 106 - Docket 58, Exhibit 5. The court's reference to "gift" is the amount paid which affects the real property taxes. The deed itself was a Grant Deed and any subsequent interest acquired by Rosalva would, as acquired, transfer to Rigoberto. The mischaracterization of the deed led the court to believe that Rosalva had acquired some interest in the property during the marriage.

The trustee sent out an asset notice and creditors filed claims that totaled under $10,000

Counsel for the trustee filed an adversary complaint against the husband seeking an accounting (presumably of the "community" interest in the residential property. EOR 278

18. The husbands default was entered in the adversary matter. EOR 268

19. On September 5, 2012, the trustee obtained a default judgment requiring an accounting EOR 257.

The information needed to do the accounting is based on two California cases, *In re Marriage of Moore, 28 Cal.3d 366* and *Marriage of Marsden (1982) - 130 Cal. App. 3d 426,*

On October 18, 2012, the adversary case was closed. EOR 256.

On April 21, 2014 (One year seven and a half months after the judgment against Rigoberto was made) the trustee made a deal with the Rigoberto; sell the real estate – pay costs of sale – give half of the net to husband and fund the bankruptcy estate with the other one half of the net. Any funds left over after the bankruptcy expenses, fees and creditors were paid went to the husband. The debtor would not get anything. EOR 216 through EOR 219.

The best that the trustee could ever do in the case would be to determine that all payments on the house were from community funds – meaning the wife's interest would be only one-half of the equity in the house.

Then, on June 2, 2014 (one year nine months), years after the judgment was entered, the trustee got creative and had the judgment in the adversary case, modified to determine that 100% of Pennywood was community property. EOR 127 (follows EOR 126 but is not numbered).

> 20. Now, instead of the debtor having a maximum interest in Pennywood of one-half, she suddenly has 100% as all community interest is administered in and becomes part of the bankruptcy estate.
>
> 21. So, the debtor, pursuant to Law –v- Siegal, 134 S. Ct. at 1194 amended her exemption claim as to this newly created community property. EOR 127

The trustee now blames the debtor for her own choices.

At no time after the initial filing without a homestead exemption did the debtor do anything to lead the trustee astray. The trustee, for her own reasons, chose to grab 100% of the Pennywood property (by making it community).

Nothing done in this case was because of any position taken by the debtor. Unanticipated by Rosalva It was unnecessary to the resolution of the case. Miller's action drove the process – it was not a reaction to Rosalva's actions. Rosalva suddenly found new community property and her homestead rights followed.

I DEMONSTRATE THE ACTUAL TIME LINE AND THE INVOLVEMENT OF THE TRUSTEE AND THE DEBTOR AT EACH IMPORTANT STAGE

FILING DATE	DAYS FROM FILING	EOR	DESCRIPTION
7/21/2011	0	310	Original Petition Ch 7 with accompanying schedule
10/11/2011	82	307	Substitution of Attorney, Bruce R Fink debtor's new attorney
3/12/2012	235	286	Application to Employ Counsel. With a claims bar date of 6/18/2012 it seems premature. Eventually the claims come in under $10,000 total. ***Debtor had no legal basis to object***
3/15/2012	238	285	Notice of Assets. This notice advises creditors to file their claims.
3/17/2012	240	285	Notice to Creditors, Bar Date to File Claims 6/18/2012
6/6/2012	321	278	Adversary Complaint Seeking an Accounting. 12 days later all claims are in and they total less than $10,000 ***Debtor has no legal basis to object***
9/25/2012	432	257	Corrected final default judgment against Rigoberto Lua. This judgment requires that Mr. Lua give an accounting. (He does not comply – everything with him is a default). The accounting could have been obtained by just requesting the loan balance from the mortgage lender as of the appropriate dates. ***Debtor has no legal basis to object***
12/18/2013	881	232	15 months goes by after docket 16 in the adversary case. The trustee requests the final judgment be

FILING DATE	DAYS FROM FILING	EOR	DESCRIPTION
			modified to provide orders not requested in the original complaint. It is a mystery how the court could grant such a request. This is, however, a default as to Mr. Lua and the debtor is not a party to the adversary complaint. ***Debtor has no legal basis to object***
4/25/2014	1,009	202	Motion to Approve Compromise with Rigoberto Lua. Mr. Lua agrees to have the trustee sell the RE, split after sale costs with the estate and for Mr. Lua to recover any funds left over. This is still an adversary involving only Mr. Lua and affecting only his separate property. ***Debtor has no legal basis to object***
5/13/2014	1,027	187	Order on Motion to Approve Compromise. The deal is done. ***Debtor has no legal basis to object***
6/2/14	1,047	186	One year and nine months after the judgment was entered there is an Order that changes the judgment. Now, as if by magic, the husband's separate property, which he had allowed to be used to pay of the bankruptcy, has changed character to being entirely community property. ***This order is the one that triggered an amended schedule some six weeks later wherein the debtor claimed a homestead in the new*** community ***asset.***
7/21/2014	1,096	114	Amended Schedules including homestead exemption

THE TRIAL COURT SIMPLY GOT A NUMBER OF FACTS WRONG

The trial court determined the real property was community and quoted California Family Code Section 760, which states that property acquired during marriage is community. (EOR 16, Lines 18 – 26).Unfortunately the court seems to have missed the evidence provided by the trustee and her attorney. Tilem explains that prior to marriage the husband and two others acquired the property, that the other two owners gave their interest to husband by gift deed and that subsequently there was a gift deed from husband and wife to husband EOR 80 in her declaration EOR 066 (Docket 59, page 3, line 17 through page 4 line 3 and the copies of the deed attached, exhibits 3, 4 and 5) EOR 102 - EOR 107 all of which show the real estate was not community property

The court ignored the fact that the husband acquired this real estate prior to the marriage (as to a partial interest) and he received the balance of the title by gift. California Family Code Section 770 provides:

(a) Separate property of a married person includes all of the following:

(1) All property owned by the person before marriage.

(2) All property acquired by the person after marriage by gift, bequest, devise, or descent".

It is clear that the real property was the husband's separate property (until the court converted it to community property – thus making it eligible for the debtor's homestead claim).

The court appears to have ignored the rule that a default judgment cannot exceed the prayer. As a result, the court entered the order, EOR 127) which converted the husband's separate property to community.

It was this late change by the court, at the trustee's request, that kicked off the debtor's right to a homestead exemption.

Conclusion

22. The ruling should be reversed

STATEMENT OF RELATED CASES

23. There are no Related Cases

Dated *

Law Offices of Bruce R Fink

Bruce R Fink

By /s/ Bruce R Fink

Bruce R Fink

Attorney for Rosalva Lua

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure, Rule 32(a) (7) (C) (i), the attached Appellant's Opening Brief contains 4,571 words.

Dated *

Law Offices of Bruce R Fink

Bruce R Fink

By /s/ Bruce R Fink

Bruce R Fink

Attorney for Rosalva Lua

9th Circuit Case Number	15-56814

CERTIFICATE OF SERVICE

When All Case Participants are registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 27, 2016

I certify that all participants in the case are registered CM/ECF users and that serviced will be accomplished by the appellate CM/ECF system

Signature (use "s/" format) s/ Bruce R Fink