Consumer Case Law Update

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2016

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Consumer Connect, ABI Winter Leadership Conference
December 2, 2016

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Consumer Case Update- Selected Cases 2015-2016

by M. Jonathan Hayes

Supreme Court Cases

Husky International Electronics, Inc. v. Ritz, , --- U.S. ----, 136 S.Ct. 1581 (May 16, 2016)

Issue: Does the term "actual fraud" in section 523(a)(2)(A) include the making of a fraudulent conveyance by the debtor?

Holding: Yes. A debt can be excepted from discharge under section 523(a)(2)(A) when there is evidence of actual fraud that need not include a false representation to the creditor. The Supreme Court left open the issue of whether the "actual fraud" in transferring and hiding assets here makes the debt owed to this creditor non-dischargeable.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion.

"Husky International Electronics, Inc., is a Colorado based supplier of components used in electronic devices. Between 2003 and 2007, Husky sold its products to Chrysalis Manufacturing Corp., and Chrysalis incurred a debt to Husky of $163,999.38." Daniel Ritz was a director and "owned at least 30% of Chrysalis' common stock." "All parties agree that between 2006 and 2007, Ritz drained Chrysalis of assets it could have used to pay its debts to creditors like Husky by transferring large sums of Chrysalis' funds to other entities Ritz controlled." Husky sued Ritz in state court seeking to hold him personally liable for "actual fraud' for purposes of a Texas law that allows creditors to hold shareholders responsible for corporate debt." Ritz filed chapter 7 and Husky filed a non-dischargeability complaint saying that "the same intercompany-transfer scheme constituted 'actual fraud' under 11 U. S. C. §523(a)(2)(A)'s exemption to discharge." The district court ruled that there was no "actual fraud" and the Circuit Court of Appeals affirmed. "In transferring Chrysalis' assets, Ritz may have hindered Husky's ability to recover its debt, but the Fifth Circuit found that he did not make any false representations to Husky regarding those assets or the transfers and therefore did not commit "actual fraud."

The Supreme Court reversed, 7-1. It started with "the presumption that Congress did not intend 'actual fraud' to mean the same thing as 'a false representation.'" So what does "actual fraud" mean? "Thus, anything that counts as 'fraud' and is done with wrongful intent is 'actual fraud.'" "There is no need to adopt a definition for all times and all circumstances here because, from the beginning of English bankruptcy practice, courts and legislatures have used the term 'fraud' to describe a debtor's transfer of assets that, like Ritz' scheme, impairs a creditor's ability to collect the debt." The majority opinion discussed the history of bankruptcy and the discharge at some length and concluded "we interpret 'actual fraud' to

encompass fraudulent conveyance schemes, even when those schemes do not involve a false representation."

The debtor argued that section 727 provides a remedy for debtors who fraudulently transfer assets before filing. The court said,

> "Although the two provisions could cover some of the same conduct, they are meaningfully different. Section 727(a)(2) is broader than §523(a)(2)(A) in scope—preventing an offending debtor from discharging all debt in bankruptcy. But it is narrower than §523(a)(2)(A) in timing—applying only if the debtor fraudulently conveys assets in the year preceding the bankruptcy filing. In short, while §727(a)(2) is a blunt remedy for actions that hinder the entire bankruptcy process, §523(a)(2)(A) is a tailored remedy for behavior connected to specific debts."

As to the code requiring that the debt be "obtained by" the fraud, the court seems to acknowledge that the times that a person obtains a asset or a debt to a specific creditor via a fraudulent conveyance may be "rare." In a footnote, the court leaves the issue open as to whether the "actual fraud" here necessarily leads to a non-dischargeable debt. "We take no position on that contention here and leave it to the Fifth Circuit to decide on remand whether the debt to Husky was 'obtained by' Ritz' asset-transfer scheme."

In his dissent, Justice Thomas states "Section 523(a)(2) covers only situations in which 'money, property, [or] services' are 'obtained by . . . actual fraud,' and results in a debt." "I do not quibble with the majority's conclusion that the *common-law* definition of 'actual fraud' included fraudulent transfers." [emphasis in original] "In my view, context dictates that 'actual fraud' ordinarily does not include fraudulent transfers because 'that meaning does not fit' with the rest of §523(a)(2)."

Editor's Note: On August 10, 2016 the 5th Circuit remanded the case "to the district court (for remand to the bankruptcy court) for additional fact-finding as to whether Husky may successfully establish Ritz's liability under state law."

The 5th Circuit concluded, "If the bankruptcy court concludes on remand that Ritz's conduct satisfies the actual fraud prong of TUFTA and that the actual fraud was for Ritz's 'direct personal benefit,' Tex. Bus. Orgs. Code Ann. § 21.223(b), then Ritz is liable for Chrysalis's debt to Husky under Texas's veil-piercing statute and the bankruptcy court must then address whether Ritz should be denied a discharge under 11 U.S.C. § 523(a)(2)(A), consistent with the Supreme Court's opinion in this case. If, however, the bankruptcy court concludes that Ritz's conduct does not amount to actual fraud under Texas state law, then there is no debt to discharge, and the question of deniability under § 523(a)(2)(A) becomes moot."

Husky International Electronics, Inc. v. Daniel Lee Ritz, Jr. (In re Daniel Lee Ritz, Jr.) 2016 WL 4253552 (5th Cir. 2016)

9th Circuit Court of Appeals Cases
2015-2016

Blixseth v. Yellowstone Mountain Club LLC (In re Blixseth), 796 F. 3d 1004 (9th Cir. August 2015)

Issue: Does the debtor and his attorney deserve to be sanctioned here for a frivolous appeal?

Holding: Yes, Fed. R. App. P. 38; 28 U.S.C. § 1927.

ORDER ON OSC RE SANCTIONS

"In a recusal motion, [the debtor] and his attorneys hurled nineteen accusations of misconduct at a bankruptcy judge who had ruled against [the debtor]. In a forty-seven page opinion, the judge found the accusations to be meritless." The district court and the 9th Circuit affirmed. The 9th Circuit then issued an OSC re Sanctions against the debtor and his attorneys for bringing a frivolous appeal.

The 9th Circuit awarded sanctions pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1927. "Sanctions pursuant to section 1927 must be supported by a finding of subjective bad faith.' We have held that '[b]ad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent.'" "[The debtor's] personal 'response' is almost entirely nonresponsive. Mostly he reasserts the conspiracy theory he advanced throughout Yellowstone's bankruptcy proceedings. [The debtor] criticizes the bankruptcy judge's rulings, but, as we explain in our opinion, adverse rulings are almost never a valid basis for a recusal motion." "[The debtor] also hurls baseless accusations against one of the judges on this panel. Nothing in [the debtor's] personal response comes close to persuading us that his recusal motion or the resulting appeals weren't a meritless 'effort . . . to rid himself of a judge who had ruled against him.'" "[The debtor and his attorney] spend significant time discussing facts outside the record, but fail to defend many of the nineteen frivolous accusations they raised."

As to the debtor's attorney, "Flynn has not retracted his 'demonstrably inaccurate' statements to the court at oral argument regarding the involvement of a senior bankruptcy judge in a mediation." "At argument, we also warned Flynn about his improper reliance on facts outside the record; nonetheless, Flynn continues to rely on such facts." The attorneys "argue that the appeal was not frivolous because one could have inferred that the bankruptcy judge was biased against [the debtor] from the nineteen accusations that they raised. As explained in our opinion and order to show cause, we find this argument risible."

"We refer the determination of an appropriate amount of attorneys' fees and costs to the Appellate Commissioner, who shall have authority to enter an order awarding fees to appellees. See 9th Cir. R. 39-1.9."

Note: risible means "such as to provoke laughter." Another definition: "provoking laughter through being ludicrous."

HSBC Bank USA v Blendheim (In the Matter of Blendheim), 803 F. 3d 477 (9th Cir. Sept 2015)

Issue: "[B]y making Chapter 20 debtors like the Blendheims ineligible for a discharge, [did] Congress also render[] them ineligible for Chapter 13's lien-voidance mechanism?

Holding: No.

Appeal from District Court

Paez, Bybee, Callahan

Judge Jay Bybee

These are chapter 20 debtors. "The day after receiving the discharge in their Chapter 7 case [in 2009], the Blendheims filed a second bankruptcy petition under Chapter 13 to restructure debts relating to their primary residence, a condominium in West Seattle." In the chapter 13 case, the bank filed a proof of claim. The debtors objected to the POC on the basis that the promissory note was not attached and that the promissory note attached to the POC in the first case was forged. The bank did not respond and the court disallowed the claim. The debtor then filed a declaratory relief complaint, arguing that there was no lien under 506(d) which says the lien is void because there is no allowed claim. The bank filed a motion to reconsider which was denied. Declaratory relief was granted. The court then confirmed the "11th Amended Plan" (which by now has been completed). The bank argued that the lien will come back when the case ends because there is no discharge. The bankruptcy court rejected that and the district court affirmed.

The 9th Circuit also affirmed. The court affirmed that if the chapter 13 case is dismissed or converted, the code provides that the lien is resurrected. But a case can be "closed" without dismissal or conversion. "[T]he Code contemplates closure of a case pursuant to § 350(a), which provides that '[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case.'" "To conclude . . . that 'the only way to make a lien strip 'permanent' is by discharge,' is to ignore the Bankruptcy Code's unequivocal distinction between *in personam* and *in rem* liability."

The bank also argued that the chapter 13 was a bad faith filing because it was filed while the chapter 7 case was still technically open. It also argued that there was no change in

circumstances which made the chapter 13 a bad faith filing. The 9th circuit rejected those arguments saying the bankruptcy court's findings were not clearly erroneous.

> "Because nothing in the Bankruptcy Code prohibits debtors from seeking the benefits of Chapter 13 reorganization in the wake of a Chapter 7 discharge, we see no reason to force debtors to wait until the Chapter 7 case has administratively closed before filing for relief under Chapter 13. We also agree with the Eleventh Circuit that the fact-sensitive good faith inquiry, in which courts may examine an individual debtor's purpose in filing for Chapter 13 relief and take into account the unique circumstances of each case, is a better tool for sorting out which cases may proceed than the blunt instrument of a flat prohibition."

Penrod v. AmeriCredit Financial Services, Inc. (In re Penrod), 802 F. 3d 1084 (9th Cir. October 2015)

Issue: "We are asked to decide whether a debtor who prevails in a contract dispute on the basis of federal bankruptcy law may recover reasonable attorney's fees under California Civil Code § 1717."

Holding: Yes.

Appeal from District Court

Judge Paul Watford

The debtor here filed a chapter 13 plan which proposed to bifurcate the debtor's auto loan. The plan was confirmed over the debtor's objection. There followed lengthy appeals but the debtor prevailed. The debtor then moved in the bankruptcy court for allowance of attorneys fees of some $245,000. "As the basis for this request, Penrod relied on a provision in her contract with AmeriCredit stating that, in the event of a default (which the contract defined to include filing for bankruptcy), 'You will pay our reasonable costs to collect what you owe, including attorney fees, court costs, collection agency fees, and fees paid for other reasonable collection efforts.'" California Civil Code section 1717 provides that a contract provision that makes one side entitled to attorneys fees, makes the other side entitled as well.

> "The bankruptcy court denied Penrod's motion for attorney's fees on the ground that Penrod did not prevail 'on the contract' because her success in the litigation with AmeriCredit turned on a question of federal bankruptcy law. The court held that a debtor prevails 'on the contract' only when she prevails on an issue of state law or non-bankruptcy federal law. The district court affirmed."

Section 1717 provides "the action in which the fees are incurred must be an action 'on a contract,' a phrase that is liberally construed." The creditor conceded that the debtor was the

prevailing party. "Under California law, an action is 'on a contract' when a party seeks to enforce, or avoid enforcement of, the provisions of the contract." "AmeriCredit insisted that it was entitled to have its claim treated as fully secured. The only possible source of that asserted right was the contract—in particular, the provision in which Penrod granted a security interest in her Taurus to secure 'payment of all you owe on this contract.'"

The fact that Penrod won based on non-contract law doesn't matter. This is based on the Supreme Court's decision in *Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007). "The [Supreme] Court held that nothing in the Bankruptcy Code expressly disallows claims for attorney's fees simply because the fees are incurred litigating questions of federal bankruptcy law." The 9th Circuit opinion states that "California law does not categorically exempt from recovery under state fee-shifting statutes attorney's fees incurred in litigating issues under bankruptcy law." The creditor would have had the right to attorney's fees had it prevailed because it was litigating to "ensure that it would collect 100% of what it was owed on the loan. AmeriCredit had no reason to litigate that issue other than as part of an attempt to collect from Penrod what she owed."

The 9th Circuit therefore reversed and remanded for a determination of how much the fees should be.

America's Servicing Company v. Schwartz-Tallard (In re Schwartz-Tallard), 803 F. 3d 1095 (9th Cir. October 2015)

Issue: Does section 362(k) "authorize[] an award of all attorney's fees reasonably incurred to remedy a stay violation, including fees incurred in prosecuting the damages action"? "Did Congress intend to authorize recovery of attorney's fees incurred in litigation for one purpose (ending the stay violation) but not for another (recovering damages)?"

Holding: Yes to the first question, no to the second. "We see nothing in the statute that suggests Congress intended to cleave litigation-related fees into two categories, one recoverable by the debtor, the other not."

Appeal from the BAP (Kirscher Pappas Dunn)

Judge Paul Watford, for *en banc* court. Judge Bea concurring, O'Scannlain joining, and Judge Ikuta dissenting.

Here the creditor conducted a foreclosure sale in violation of the automatic stay. The debtor filed a motion for contempt seeking sanctions. The bankruptcy court agreed and awarded sanctions. "The court also awarded Schwartz-Tallard $40,000 in economic and emotional distress damages, $20,000 in punitive damages, and $20,000 in attorney's fees." The creditor transferred the property back to the debtor and appealed the bankruptcy court's order, *only as to the damages awarded*. The district court affirmed but remanded asking for a recalculation of the amount awarded. The debtor then moved for additional fees, "roughly $10,000" spent defending the appeal. The bankruptcy court denied the request for additional fees based on

Sternberg. The debtor then appealed that to the BAP. The BAP reversed and awarded the additional fees. The creditor appealed to the 9th Circuit.

The 9th Circuit affirmed the BAP's award of additional fees, 2-1. Subsequently the 9th Circuit voted to rehear the matter *en banc*. The 9th Circuit here again affirmed the BAP specifically overruling *Sternberg v. Johnson*.

"We find it unnecessary to resolve the issue that divided the three-judge panel. Rather than decide whether *Sternberg*'s holding extends to the facts of this case, we think the better course is to jettison *Sternberg*'s erroneous interpretation of § 362(k) altogether." "Although the 'American Rule' usually requires parties to bear their own attorney's fees, a common-law exception to the rule permits fee awards in litigation brought to remedy willful violations of court orders. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717–18 (1967). Perhaps to eliminate any doubt about the source of a court's authority to remedy violations of the automatic stay, Congress enacted § 362(h) in 1984." "It seems evident . . . that Congress sought to encourage injured debtors to bring suit to vindicate their statutory right to the automatic stay's protection, one of the most important rights afforded to debtors by the Bankruptcy Code." The opinion comments that the *Sternberg* reading requires the court to separately analyze how much of the fees were incurred stopping the violation and how much in chasing damages. The court should not assume Congress intended to multiply the litigation issues.

The concurring opinion stated simply that the language is unambiguous and therefore the opinion should end there.

The sole dissenter, Judge Ikuta, argued that the statute is ambiguous as to "actual damages" and that *Sternberg* got it right. She says the pragmatic concerns should not be part of the analysis.

Eden Place, LLC v. Perl (In re Perl), 811 F. 3d 1120 (9th Cir. January 6, 2016)

Issue: Where the state unlawful detainer court has issued a judgment for possession, is the debtor and the estate "completely divested of all legal and equitable possessory rights that would otherwise be protected by the automatic stay"?

Holding: Yes.

Appeal from the BAP (Kirscher Taylor Dunn)

Judge Graber, Rawlinson, Watford

Opinion by Rawlinson, dissent by Watford

Eden Place purchased the debtor's home at the foreclosure sale. Eden Place filed an unlawful

detainer and "in response," the debtor sued Eden Place to set aside the foreclosure sale. The UD court entered judgment for possession to Eden Place along with a writ of possession and the sheriff posted the lockout notice. The debtor then filed chapter 13 and threatened Eden Place with contempt if it proceeded. Eden Place filed a motion for relief but the sheriff did the lockout before the hearing. Judge Bason ruled that Eden Place violated the automatic stay but deferred the hearing on damages. Before he could rule on that issue, the chapter 13 was dismissed. In the meantime, Eden Place appealed to the BAP.

The BAP affirmed saying that the debtor "had a recognizable equitable interest in the property by virtue of his physical occupancy, notwithstanding the illegality of his continued occupancy. The BAP noted that 'changing the locks on the Residence, locking inside Perl's personal property, which was also property of the estate, was an act to exercise control over property of the estate in violation of' the automatic stay."

The 9th Circuit reversed. It dealt first with whether the appeal was moot. "Notwithstanding the fact that no financial penalty or sanction has yet been assessed against Eden Place, the bankruptcy court's determination that Eden Place violated the automatic stay is a substantive ruling with real effects, including money damages that could be sought by Perl indefinitely." "There is no question that the discrete issue addressed by the bankruptcy court—violation of the automatic stay—has been definitively and finally resolved. Resolution of that issue is as final as it will ever be in this case."

As to the purported violation of the stay,

> "In California, an unlawful detainer proceeding is *quasi in rem* and, accordingly, a judgment rendered in an unlawful detainer proceeding is 'not binding upon the world, but conclusive only between the parties and their privies.'
>
> "[U]nlawful detainer proceedings under [C.C.P.] § 1161a are expressly designed to determine who has superior title to the property, including the right to immediate possession. As a result, the prevailing party in the unlawful detainer proceeding under § 1161a has 'better title' than the evicted resident. The conclusion that the occupying resident retains an equitable possessory interest is inconsistent with § 1161a, which contemplates a final and binding adjudication of legal title and rights of immediate possession.
>
> "The unlawful detainer judgment and writ of possession entered pursuant to California Code Civil Procedure § 415.46 bestowed legal title and all rights of possession upon Eden Place. Thus, at the time of the filing of the bankruptcy petition, Perl had been completely divested of all legal and equitable possessory rights that would otherwise be protected by the automatic stay."

In his dissent, Judge Watford was adamant that the order appealed was not final and that the appeal should therefore be dismissed.

Zachary v. California Bank and Trust (In re Zachary), 811 F. 3d, 1191 (9th Cir. Jan, 2016)

Issue: Does the exception to the absolute priority rule in individual chapter 11 cases permit the debtor to retain all of his property over the rejection of the plan by unsecured creditors or only keep property acquired postpetition?

Holding: Only property acquired postpetition, i.e., the "narrow view."

Direct appeal from the bankruptcy court
Judge Thomas Holman, Eastern District of California

Judge Andrew Hurwitz, Paez, Murguia

The chapter 11 individual debtors here proposed to pay $5,000 to unsecured creditors with claims of $2 million. The major unsecured creditor voted no and objected to the plan on the basis that it violated the absolute priority rule (APR). The bankruptcy judge agreed and denied confirmation of the Plan. The court authorized a direct appeal to the 9th Circuit.

The 9th Circuit affirmed. The opinion discussed the history of the absolute priority rule and stated, "Before the adoption of BAPCPA in 2005, it was clear that 'no Chapter 11 reorganization plan can be confirmed over the creditors' legitimate objections . . . if it fails to comply with the absolute priority rule.'" "BAPCPA amended the absolutely priority rule itself . . . [in] § 1129(b)(2)(B)(ii)." The added language leaves the absolute priority rule as it was but adds, "except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115. . . ." Section 1115 says that property of the estate in an individual case consists of everything included in section 541(a) *plus* everything the debtor acquires thereafter.

The court then reviewed holdings of other jurisdictions describing the decisions as the "broad view" or the "narrow view." The broad view is that the debtor may keep all property, whether owned on the petition date or acquired thereafter. The narrow view is that the new exception to the absolute priority rule is the debtor may keep only property acquired postpetition. The 9th Circuit said, "all of our sister circuits that have considered the issue have adopted the narrow view, as have a sizeable majority of the district, bankruptcy appellate, and bankruptcy courts. We today agree with our sister circuits and overrule *In re Friedman*."

The argument, according to the 9th Circuit, comes down to the meaning of "included" in the new exception, i.e., the debtor "may retain property *included* in the estate under section 1115." It says that since 1115 and the new APR exception were added at the same time, "it is only 'that property' that 'the debtor may retain' when his unsecured creditors are not fully paid.'"

As to the argument that Congress was trying to make individual chapter 11s work the same as chapter 13, it said that Congress "could have achieved that goal in a far more straightforward manner," i.e., by saying that the APR does not apply in individual chapter 11s.

Note: The debtor argued that BAP decisions are binding on the 9th Circuit but the 9th Circuit refused to consider that saying the issue is the "continued applicability of the absolute priority rule regardless of the precedential effect of BAP opinions." Note also: The "direct appeal" was accepted by the 9th Circuit on July 11, 2013, all briefs were filed by December 5, 2013. Oral argument was October 21, 2015.

Bos v. Board of Trustees (In re Bos), 818 F. 3d, 486 (9th Cir. Mar, 2016)

Issue: Is an action seeking to find that a debt is non-dischargeable, an action "on the contract" sufficient to award attorney's fees to the prevailing party?

Holding: No. *Penrod* does not apply unless there was an issue as to enforceability of the contract.

Order re Request for Attorney's Fees on Appeal

The chapter 7 debtor here was sued by a union pension fund trust. The trust asked the court to find that trust contributions owed by the debtor's corporation, and, under ERISA, also owed by the debtor, was non-dischargeable under 523(a)(4). The bankruptcy court ruled for the trust, the district court affirmed. The 9th circuit reversed saying he was not a fiduciary under ERISA. The debtor then asked for attorney's fees.

The 9th Circuit denied the request for fees saying the action was not "on the contract." "[W]e have previously held that a nondischargeability action is 'on a contract' within section 1717 if 'the bankruptcy court needed to determine the enforceability of the . . . agreement to determine dischargeability.'" "[I]f the bankruptcy court did not need to determine whether the contract was enforceable, then the dischargeability claim is not an action on the contract within the meaning of [California Civil Code] § 1717."

As to *Penrod*, the 9th Circuit said,

> "Penrod incurred her attorney's fees in an action that sought 'to enforce, or avoid enforcement of, the provisions of the contract' between herself and one of her creditors. Specifically, the action underlying Penrod's motion for fees had asked 'whether [a] provision of the contract should be enforced according to its terms, or whether its enforceability was limited by bankruptcy law to exclude [a particular] portion of the loan. By prevailing in that litigation, Penrod obtained a ruling that precluded [her creditor] from fully enforcing the terms of the contract.' Penrod's action, in other words, required 'the bankruptcy court . . . to determine the enforceability of the . . .

> agreement,' and so it was comfortably an action 'on a contract' within section 1717's previously recognized reach."

The 9th Circuit also said that the non-dischargeability action did not "arise" under ERISA and therefore the attorney's fees clause in ERISA did not apply anyway.

9th Circuit Bankruptcy Appellate Panel Cases 2015-2016

Boukatch v. MidFirst Bank (In re Boukatch), 533 B.R. 292 (9th Cir. BAP July, 2015)

Issue: May a chapter 13 debtor strip off a wholly unsecured secured claim when he is not entitled to a discharge in the case?

Holding: Yes. Nothing in the code prevents it and plan language that provides for the strip is res judicata on the issue.

Judge Eddward Ballinger, Arizona

Kirscher, Pappas, Jury

Opinion by Kirscher

The debtors here filed a chapter 13 which was converted to chapter 7. They received a discharge in the chapter 7. Shortly thereafter they filed another chapter 13. The debtors filed a motion to strip a second from their home on the basis that the first lien was more than the value of the home. Neither the chapter 13 trustee nor the bank whose lien was to be stripped objected. The court denied the motion saying "Under the analysis of Victorio v. Billingslea, 470 B.R. 545 (S.D. Cal. 2012)," the lien cannot be stripped since the debtor is not eligible for a discharge in this case.

The BAP reversed. Generally a chapter 13 plan may not modify a lien, i.e., "a secured claim," on the debtor's home. "However, if 'the claim is determined to be wholly unsecured, the rights of the 'creditor holding only an unsecured claim may be modified under § 1322(b)(2),' and the creditor's lien may be avoided, notwithstanding the antimodification protection provided for in [§] 1322(b)(2).'" "A confirmed plan is binding on the debtor and the creditor and vests all property of the estate in the debtor 'free and clear of any claim or interest of any creditor provided for by the plan.' § 1327(c). Provided the confirmed plan remains in effect, avoided liens remain avoided, as the plan is binding and through 'res judicata precludes a creditor from bringing a collateral attack of that order.'" The BAP says that completion of the plan is the appropriate end of a chapter 20 case. And "nothing in the bankruptcy code prevents a lien strip in a chapter 20 case."

Pham v. Golden (In re Pham), 536 B.R. 424 (9th Cir. BAP Sept, 2015)

Issue: Do local rules 1001-1(f), 7026-1(c), and 9011-3 permit the court to sanction a non-party for discovery abuses?

Holding: No, those rules apply to parties, not non-parties.

Judge Catherine Bauer, Central District

Kirscher, Brandt, Dunn

Opinion by Kirscher

The chapter 7 trustee here filed a complaint against two individuals seeking to avoid fraudulent transfers by the debtors to the defendants. The trustees' attorney subpoenaed the debtors seeking to take their deposition and demanding documents. A dispute arose about the depositions and production. The trustee filed a motion, "pursuant to Local Bankruptcy Rules 1001-1(f), 7026-1(c), and 9011-3" to compel the attendance at deposition and production of documents and for an award of attorney's fees against the debtors and their attorney (who was also representing the defendants). The bankruptcy judge granted the motions and awarded fees of $17,515.

The BAP reversed. The debtors were not parties to the adversary proceeding, and this was not a rule 2004 exam. "In these circumstances, Debtors were entitled to the protections provided them as nonparty witnesses under the Federal Rules of Civil Procedure and the Bankruptcy Rules, particularly Civil Rule 45 and Rule 9016 (incorporating Civil Rule 45), which were cited in the issued subpeonas. Further, we fail to see how Nguyen, an attorney for a nonparty, would be subject to complying with a 'meeting of counsel,' a 'joint discovery stipulation' or any other aspect of discovery by the Trustee under Civil Rule 26 or LBR 7026-1(c)." Sanctions against non-party witnesses must be brought under FRCP 37 and 45.

Specifically, LBR 9011-3(a) permits sanctions for violation of the rules but FRBP 9011 carves out discovery disputes. The local rules "cannot be applied in a manner that conflicts with the federal rules." As to LBR 9026, "we fail to see how the requirements of LBR 7026-1 apply to counsel for a nonparty." "Civil Rule 26 does not provide for the imposition of sanctions except in one circumstance — improper certification in signing disclosure and discovery requests, responses and objections. Improper certification was not an issue here." As to LBR 1001-1(f), it "is a 'catch all' rule providing for the sanction of attorney's fees for the failure of 'counsel or of a party' to comply with the LBRs, the Civil Rules or the Rules, or with any order of the bankruptcy court." But, "Rule 1001 does not expressly authorize sanctions for violating other federal rules. Therefore, LBR 1001-1(f) is inconsistent with Rule 1001 in that it grants the court sanction authority not provided for in Rule 1001. Thus, it is invalid, and the bankruptcy court could not rely on this local rule to sanction Appellants."

The BAP noted that the court could have issued sanctions under FRBP 7037 but there are insufficient findings by the court to permit affirmation of the ruling under that rule. "We

conclude that LBR 7026-1, as promulgated, imposes obligations, such as 'meet and confer' and 'joint discovery stipulation' on parties but not on nonparties."

Whatley v. Stijakovich-Santilli (In re Stijakovich-Santilli), 542 B.R. 245 (9th Cir. BAP Dec 2015)

Issue: Was the trustee's objection to the debtor's homestead exemption too late under the facts here?

Holding: No, the facts establish that the debtor fraudulently asserted the claim of exemption pursuant to FRBP 4003.

Judge Robert Bardwil, Eastern District of California

Faris, Dunn, Jury

Opinion by Faris

The chapter 7 debtor here disclosed a home and claimed the homestead exemption in that home. Seven months after the meeting of creditors was concluded, the trustee filed an objection to the exemption saying that the debtor did not live in the property on the petition date. As evidence, the trustee used the debtor's tax return that listed the property as exclusively rental property. The debtor opposed insisting that she lived in the property. The court ruled for the debtor because "the bankruptcy court believed that the Debtor resided on the Subject Property, but misreported its status on her tax returns." A big part of the ruling is that the trustee did not submit sufficient evidence to establish that the debtor was lying essentially. The trustee did further investigation and filed a new objection. This time the debtor fessed up admitting that she did not live there. She kept some of her stuff there and her attorney told her that was enough. She argued however that the objection was, in any event, too late. The court agreed "holding that the Debtor did not 'fraudulently assert[ ] the claim of exemption'" and therefore the objection was too late. "The court said that the Trustee should have 'taken more concrete steps to determine whether the debtor was actually living on the Property [after the meeting of creditors].'" The court also bought the argument that the exemption was not claimed fraudulently because of the attorney's advice.

The BAP reversed. FRBP 4003(b)(2) provides that "[t]he trustee may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption." Fraud is a misstatement of a material fact that the trustee reasonably relied on. The BAP ruled that the evidence established the false statement and the justifiable reliance. As to the trustee's obligations to investigate, "We hold that the bankruptcy court erred in imposing a duty to investigate on the Trustee. The question under Rule 4003(b)(2) is whether the debtor 'fraudulently asserted' the exemption." As to the 30 day rule as discussed in *Taylor*, the BAP said,

> "[T]he *Taylor* rule is not as absolute as some might suggest. In this circuit, if the debtor makes a vague assertion of an exemption, the bankruptcy court can determine the extent

> to which the exemption claim is valid, even after the thirty-day deadline has run [citing] *In Hyman v. Plotkin (In re Hyman)."*

The BAP discussed *Hyman* at some length and clarified that there it was not clear that the debtor was claiming the exemption at all or to what extent. It did state though "that a trustee is entitled to rely on, and need not investigate, the information the debtor chooses to include in the schedules."

Elliott v. Weil (In re Elliott), 544 B.R. 421 (9th Cir. BAP January 2016)

Issue: May the debtor claim the homestead exemption in property that he "concealed" on the petition date and that was "recovered" for the estate by the trustee?

Holding: No, pursuant to § 522(g)(1).

Judge Victoria Kaufman, Central District of California

Dunn, Kirscher, Gan

Opinion by Dunn

This case is known as Elliott III. The debtor owned a home when he filed chapter 7. It was actually owned by a corporation on the petition date. He hid that from the trustee and lied about the ownership. When the trustee found out about it, the debtor claimed a homestead exemption in the house. The trustee objected and Judge Kaufman disallowed the exemption. The BAP reversed, Elliott I, saying bad faith cannot be the basis to disallow an exemption based on *Law v. Siegel*. While that appeal was pending, the trustee filed an adversary proceeding seeking to revoke the discharge and for turnover of the property. Judge Kaufman revoked the discharge and ordered turnover. The BAP, Elliott II, reversed again saying the complaint to revoke the discharge was too late. It also reversed the turnover saying there might not be any equity and remanded to allow the court to revisit that.

After Elliott II, the trustee renewed the turnover and the objection to exemption. The court found there was equity, even if the homestead was allowed, and again ordered turnover. As to the exemption, the trustee argued that she had "recovered" the property for the estate and therefore the debtor could not it exempt it under § 522(g)(1). The debtor argued that "§ 522(g)(1) simply was not applicable because '[t]here is no Court order in this case setting aside a transfer.'"

The BAP affirmed saying, "The purpose of § 522(g) is to prevent a debtor from claiming an exemption in recovered property which was transferred in a manner giving rise to the trustee's avoiding powers, where the transfer was voluntary or where the transfer or property interest was concealed."

It concluded:

> "Mr. Elliott could have exempted the Buckingham Property in his original schedules on the petition date if he had disclosed it as real property in which he claimed an interest, despite its transfer to LWI, but he did not disclose an exemptible interest in the property. Mr. Elliott's transfers of the Buckingham Property were voluntary, and he concealed his interest in the Buckingham Property in his petition and schedules and in his testimony at the § 341(a) meeting."

Shalaby v. Nakhuda (In re Nakhuda), 544 B.R. 886 (9th Cir. BAP February 2016)

Issue: What is the standard for assessing sanctions under Rule 9011 when the court initiates the OSC on its own?

Holding: The conduct must be "akin to contempt" which requires "more than ignorance or negligence on the part of [the attorney]."

Judge Roger Efremsky, Northern District of California

Jury, Kurtz, Wanslee

Opinion by Jury

This chapter 7 debtor had a pretty incompetent attorney. For example, he argued that the trustee had no power to take the debtor's business because he claimed it exempt or it had no value and because closing it down was unfair. He said that only half of community property is property of the estate. Plus he was not one to give up. He amended the debtor's schedules probably ten times. He filed motion after motion taking indefensible positions including motions to replace the trustee and recuse the judge. The bankruptcy judge finally had enough and issued an OSC re sanctions. "The court identified its authority for issuance of the OSC and possible sanctions as the court's inherent powers and § 105, § 329(b), Rule 9011(b) and (c), and paragraphs 8 and 9 of the ECF Procedures for the bankruptcy court." After responses and more motions and hearings, the court ordered him to disgorge his $4,000 in fees, suspended him from bankruptcy practice until he took certain remedial steps and finally sanctioned him $8,000 under Rule 9011 payable to the court clerk.

The BAP affirmed the disgorgement and the suspension. It reversed on the Rule 9011 sanctions. It distinguished between party initiated sanctions and court initiated sanctions. In considering party initiated sanctions, there is a reasonableness standard.

> "When assessing sanctions *sua sponte* under Rule 9011(c)(1)(B) and under the law of this Circuit, the bankruptcy court is required to issue an order to show cause to provide notice and an opportunity to be heard and to apply a higher standard 'akin to contempt' than in the case of party-initiated sanctions. The reason behind the heightened standard is because, unlike party initiated motions, court-initiated sanctions under Rule

> 9011(c)(1)(B) do not involve the 21-day safe harbor provision for the offending party to correct or withdraw the challenged submission."
>
> "Here, the bankruptcy court expressly applied the objective reasonableness standard to [the attorney's] numerous violations of Rule 9011. The court dismissed [the attorney's] contentions that his 'good faith belief' or 'opinion' supported his positions on the basis that his subjective intent was irrelevant since his conduct is measured against a reasonableness standard which consists of a competent attorney admitted to practice law before the court."

The BAP said the record "certainly shows that [the attorney's] legal positions and arguments were objectively frivolous under the reasonableness standard." "But even if [the attorney's] positions were frivolous under the reasonableness standard, the standard for court-initiated sanctions in the Ninth Circuit is 'akin to contempt.'" The BAP said that here there was no showing of an "improper purpose under Rule 9011(b)(1)." There was no showing that the attorney "acted knowingly or intentionally." "[A]t a minimum, his conduct was negligent. The heightened standard of 'akin to contempt' requires more than ignorance or negligence on the part of [the attorney]."

As to disgorgement, that was appropriate under Section 329. The suspension was appropriate under the local rules.

Chagolla v. JP Morgan Chase Bank NA (In re Chagolla), 544 B.R. 676 (9th Cir. BAP February 2016)

Issue: May the debtor file a Lam Motion and avoid a lien even though the chapter 13 plan has been completed and the discharge entered?

Holding: Yes if the avoidance was "called for in the plan" and there is no showing of prejudice to the lender.

Judge Stephen Johnson, Northern District of California

Jury, Kurtz, Wanslee

Opinion by Jury

The chapter 13 debtors here confirmed their chapter 13 plan and ultimately completed the payments and received a discharge. The plan provided that they would move to strip off a completely unsecured second on their home which they never did. A year after discharge and closing of the case, the debtor moved to reopen and to avoid the lien. The second did not oppose the request to avoid the lien. The bankruptcy court denied the request saying "(1) it lacked jurisdiction to grant the motion, (2) the motion was untimely based on case law the court reviewed, and (3) the motion was not heard in conjunction with the hearing on the plan as required by § 506(a)."

The BAP reversed. As to jurisdiction, "it is well established that a bankruptcy court retains continuing jurisdiction to interpret and enforce its own orders." "[P]ost-confirmation, the Ninth Circuit has restricted 'related to' jurisdiction to matters that are 'closely related,' including all 'matters 'affecting the interpretation, implementation, consummation, execution, or administration of the confirmed plan.'" Because the plan proposed to avoid the lien, the bankruptcy court had jurisdiction to resolve that issue. As to the timeliness, "It has been consistently held that there exists no time limit to bring a motion to avoid a lien under § 522(f)" and there is no meaningful difference, "from a practical standpoint," between 506(a) and 522(f).

> "In order to bring a motion to avoid lien under § 506(a) after a debtor has received a discharge or the case is closed, at a minimum, the following must be satisfied: first, the confirmed plan must call for avoiding the wholly unsecured junior lien and treat any claim as unsecured; second, the chapter 13 trustee must treat the claim as unsecured pursuant to the plan; and third, the creditor must not be sufficiently prejudiced so that it would be inequitable to allow avoidance after entry of discharge or the closing of the case."

Here there was no showing that Chase was prejudiced and therefore the lien avoidance should have been avoided.

Diaz v. Kosmala (In re Diaz), 547 B.R. 329 (9th Cir. BAP March 2016)

Issue: Did the court properly disallow the debtor's homestead exemption since he did not reside in the property on the petition date? Who has the burden of proving the exemption?

Holding: No, the requirement that he reside in the property does not mean that he physically occupy the property on the petition date. The debtor has the burden of proving the exemption.

Judge Catherine Bauer, Central District of California

Gan, Dunn, Kirscher

Opinion by Scott Gan, Arizona

The chapter 7 debtor here had a huge amount of medical problems. Indeed, Judge Bauer stated that she was not sure he even had the capacity to file this chapter 7 in the first place. In 2011, after months in the hospital, he "was released to the care of his mother, who lived across the street and six doors down from the Property." That is where he lived for about two years before the petition date. The homestead was occupied by the debtor's brother and his wife. Sometime after the petition date, the debtor's condition improved (according to him) and he moved back into the home. There seem to be disputed facts about this. The trustee objected to the exemption. The court disallowed the exemption "because at the time of the bankruptcy three and a half years ago he was not living in the property," and "we do have to

look at a snapshot at the time of filing," and generally because it didn't seem fair that he get the exemption of $175,000.

The BAP reversed. "Under California law, the relevant factors for determining if a debtor *resides* in a property are the physical fact of the occupancy of the property and the debtor's intention to live there." [emphasis added] "California courts have long held that a lack of physical occupancy does not preclude a party from establishing actual residency and claiming the homestead, if the claimant intends to return." "Conversely, physical occupancy on the filing date without the requisite intent to live there, is not sufficient to establish residency." Here, there was clearly insufficient fact development to determine the debtor's intent so the court remanded.

As to the burden of proof, the BAP volunteered (since it did not appear to be an issue in the lower court) that "We are persuaded by the reasoning in *In re Tallerico* and conclude that where a state law exemption statute specifically allocates the burden of proof to the debtor, Rule 4003(c) does not change that allocation." In other words, the burden of proving the exemption is on the debtor even though 4003(c) says it's on the party objecting to the exemption.

Desert Pine Villas Homeowners Assn v. Kabiling (In re Kabiling), 551 B.R. 440 (9th Cir. BAP June 2016)

Issue: Did the demand by a creditor for post-petition attorney's fees here violate the discharge injunction?

Holding: Yes.

Judge Laurel David, Las Vegas

Barash, Dunn, Faris

Opinion by Barash

The debtors here owned a condo which they held as rental property. They got behind on the association dues and filed chapter 7. After the discharge was entered, the HOA "nonjudicially foreclosed on its HOA liens" and subsequently filed suit against the debtors seeking to quiet title under Nevada law. The complaint requested attorneys fees. The debtors advised the HOA "that the filing of the Complaint violated the discharge injunction." The HOA responded that it was not attempting to collect a debt and would therefore proceed. The debtors filed a motion in bankruptcy court asking that the HOA be held in contempt and for sanctions. The court held an evidentiary hearing and awarded sanctions of some $8,000.

The BAP affirmed. The HOA conceded that it knew about the discharge and that it applied to it. "Desert Pines argues that it should not be held in contempt because the Discharge Order does not prohibit it from seeking attorneys' fees in a post-discharge lawsuit against the

Debtors. This argument is without merit." "Desert Pines does not dispute that the delinquent assessments arose prior to the Petition Date. Thus, the only relationship described in the Complaint between the Debtors and the Property is based on pre-discharge circumstances. Moreover, the Complaint does not identify any postpetition conduct by the Debtors, any postpetition default by the Debtors, or any postpetition contract between Desert Pines and the Debtors on which the Quiet Title Action was based."

> "It does not matter whether Desert Pines believed in good faith that including a demand for attorneys' fees in the Complaint would not violate the discharge injunction. By including allegations regarding prepetition debts of the Debtors, failing to disclose that those debts were discharged, and failing to make explicit that the Debtors were named only as putative parties from whom no sums were sought, Desert Pines violated the discharge injunction."

Cardenas v. Shannon (In re Shannon), --- B.R. --- (9th Cir. BAP July 2016)

Issue: Did the court properly award attorney's fees to the debtors for their successful defense of a 523 complaint?

Holding: No. There was no showing that the action was "on the contract," even in part.

Judge Eddward Ballinger, District of Arizona

Jaime, Jury, Kurtz

Opinion by Jaime

The creditor here filed a complaint seeking to declare the debt owed to be non-dischargeable under 523(a)(2)(A). The dispute revolved around the development of real property in Washington. The creditor put in the property and the debtor was supposed to develop and sell it. After a three day trial, the bankruptcy court ruled "That the [debtors] did not make any representation to the Cardenases that they knew to be false and they did not make any representations with the intent and purpose of deceiving the Cardenases; and (2) That any damages suffered by the Cardenases are not a result from reasonably relying on representations by the [debtors]." "The bankruptcy court's ruling was based primarily upon its evaluation of live witness testimony." After the ruling, the bankruptcy court awarded the debtors approximately $5,000 in costs and $72,000 in attorney's fees.

The BAP affirmed as to the non-dischargeability and the award of costs. It reversed as to the attorney's fees. As to the non-dischargeability, the findings were not clearly erroneous. As to the costs, the BAP says the issue was not raised in the creditor's appellate brief and is therefore waived.

As to the fees, the parties had executed a written agreement which provided for attorney's fees. The BAP said that under Washington law, "an action is on a contract if the action arose

out of the contract and if the contract is central to the dispute." Washington law further provides that "[i]f a party alleges breach of a duty imposed by an external source, such as a statute or the common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship." "These Washington cases are consistent with Ninth Circuit case law." The opinion discusses two 9th Circuit cases that suggest that a non-dischargeability action may be partially "on the contract." In one case, a statute of frauds issue was key. Another case "held that attorney's fees should be awarded solely to the extent they were incurred in litigating state law issues." In other words, the court might be able to allocate the attorneys fees as part "on the contract" and part on bankruptcy law. The BAP remanded to the bankruptcy court on the issue of attorney's fees.

Note: Suppose the contract provided that each side agrees they will not defraud the other. Then would the fraud claims arise under the contract and not an "external source."

9th Circuit Judges' Opinions 2016

In re Tallerico, 532 B.R. 774 (Bkrtcy, E. D. Cal. 2015) Klein.J.

Issue: Does the debtor in California have the burden of proof in establishing a right to an exemption?

Holding: Yes.

Judge Christopher Klein

The chapter 7 debtor here claimed certain equipment and business property as exempt under CCP 703.140(b) including the wildcard. A creditor objected arguing that the exempted property did not belong to the debtor but to his corporation which was not a debtor. At the evidentiary hearing, the court "ruled that at trial the debtor would have the burden of proof based on California Code of Civil Procedure § 703.580(b) because this state statute trumps the contrary provision in Rule 4003(c)." The court said, "The outcome to this dispute turns on the burden of proof because the evidence is not compelling for either side."

California law provides that a person claiming an objection has the burden of proof. Cal.Code Civ. P. § 703.580(b) "[W]hen state law provides the rule of decision, state law also governs the effect of presumptions regarding a claim or defense. Fed.R.Evid. 302." But "Bankruptcy Code § 522(l) provides that property claimed as exempt is exempt unless a party in interest objects." FRBP 4003(c) states "objecting party has the burden of proving that the exemptions are not properly claimed." The bankruptcy rules enabling act, 28 U.S.C. § 2075, provides that the rules "shall not abridge, enlarge, or modify any *substantive* right." [emphasis added] But generally speaking, the rules may "override" procedural provisions of the bankruptcy code.

The key according to Klein is that "the [Supreme] Court's conclusions [in *Raleigh*] that burden of proof is substantive and that Congress made no provision qualifying or rejecting substantive nonbankruptcy law, it followed that bankruptcy courts must apply the burden that accompanies the underlying substantive claim — there, the law of Illinois." *Raleigh* applied to claims litigation but Klein says there is no reason why the rule would not apply to exemptions litigation.

In re Lua, 529 B.R. 766 (Bkrtcy, C. D. Cal. 2015) Saltzman, J.

Issue: Should the debtor's homestead exemption be denied here where the debtor waited two years to claim it and did so only after the trustee had found a buyer for the property?

Holding: Yes, based on equitable estoppel which is permitted under California law.

Judge Deborah Saltzman

The chapter 7 debtor here is wife who filed by herself. She initially claimed a homestead exemption in 30% of her home which was in her husband's name and was his property before their marriage. A couple months later, she amended her exemptions to use the wildcard to protect a tax refund and some other property. She removed the homestead exemption from schedule C. Total unsecured creditors were $10,000. The trustee decided to try to make a deal with the husband since it appeared that some portion of the home might be property of the estate. The trustee sued husband and ultimately - two years after the Sched C was amended, obtained as default judgment which provided that the home was 100% community property. Around that time, husband and the debtor separated (stated in a footnote). The trustee then hired a broker. The trustee then reached a settlement with husband saying the home could be sold and the estate and husband would split the new proceeds. Debtor refused to cooperate with the sale and amended her Sched C again claiming a 100% homestead. The trustee filed a motion for turnover and an objection to the exemption. The effect of the exemption is that a sale of the property would leave nothing for the estate.

In ruling for the trustee, the court acknowledged that bad faith, or even section 105 generally, could not provide a basis for disallowing the exemption. But, "The exemption should be disallowed if, in an action in California state court to seize property claimed as exempt, there would be a basis in California law to disallow the claimed exemption on equitable grounds." She added, "California courts have long recognized that equitable estoppel applies to homestead exemptions." She found the debtor's conduct to support equitable estoppel. She said, the "concept of estoppel is now codified in California Evidence Code section 623. 'Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.'"

The "statement or conduct" here? "Here, the Debtor made a written statement, under penalty of perjury, that she was not claiming a homestead exemption in the Property when she filed her First Amended Schedules. Almost three years later, she changed her schedules to claim

an exemption in the Property." Further, she did not object to the settlement by the trustee with her husband, did not object to hiring a broker, didn't even object to the turnover motion (until it was too late). Further, the trustee was "ignorant of the truth," and finally, the trustee was "induced to act" on the false statement or representation. "The Trustee, on behalf of all creditors, relied on the Debtor's representation that she was not going to claim a homestead exemption in entering into the Settlement with the Husband and pursuing the sale of the Property." There was some discussion that the half of the proceeds to be received by the husband benefitted the "marital community."

In re Lua, 551 B.R. 448 (C. D. Cal. 2015)

Issue: Should the debtor's homestead exemption be denied here where the debtor waited two years to claim it and did so only after the trustee had found a buyer for the property?

Holding: Yes, based on equitable estoppel which is permitted under California law.

Appeal from ruling of Judge Deborah Saltzman to the district court.

District Court Judge Cormac Carney

The district court opinion restates the facts as set forth by Judge Saltzman. The opinion notes however that the debtor, as appellant, did not argues that equitable estoppel does not apply at all, only that her conduct did not support the conclusion that she should not receive the homestead exemption. The district court notes that findings of fact are reviewed for clear error.

> "Here, the Debtor's First Amended Schedules—submitted to the Court under a penalty of perjury in October 2011—qualify as a 'representation' that the Debtor was not claiming a homestead exemption in the Property. This representation alone meets the element for equitable estoppel. Additionally, the Debtor's silence in the face of years of efforts by the Trustee to extract value from the Property in order to pay creditors qualifies as a 'concealment' for the purposes of equitable estoppel. The Debtor concealed from the Trustee and the Bankruptcy Court the fact that she would amend her Schedules as soon as the sale of the Property produced value."
>
> "The Debtor made the strategic decision to forgo a possible homestead exemption in favor of protecting personal property. She cannot now backtrack, after considerable effort and litigation by the Trustee to establish the Debtor's interest in the property, and claim that her mistake regarding the character of the Property permits her to pull the rug out from under her creditors."

The opinion goes on to say that the findings that the debtor's acts were with intent to mislead the trustee and did mislead the trustee are not clearly erroneous. He said the arguments "defy reason."