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HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No.	NC-07-1187-KJuMk
)		
JOHN WILLIAM FINDLEY, III,)	Bk. No.	04-41110
)		
Debtor.)	Adv. No.	06-04180
)		
JOHN WILLIAM FINDLEY, III,)		
)		
Appellant,)		
)		
v.)	OPINION	
)		
STATE BAR OF CALIFORNIA,)		
)		
Appellee.)		

Argued on January 24, 2008
at San Francisco, California

Submitted after Post-Argument Briefing on March 17, 2008

Filed - April 7, 2008

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Leslie Tchaikovsky, Bankruptcy Judge, Presiding

Before: KLEIN, JURY, and MARKELL, Bankruptcy Judges.

1 KLEIN, Bankruptcy Judge:
2

3 The issue is whether California's 2003 amendment of its
4 Business and Professions Code ("BUS. & PROF. CODE") § 6086.10
5 designating attorney discipline cost awards as "penalties"
6 legislatively reversed the result of the Ninth Circuit decision
7 in Taggart v. State Bar (In re Taggart), 249 F.3d 987 (9th Cir.
8 2001). The Taggart decision established that such awards are
9 compensatory in nature and, thus, not excepted from discharge
10 under 11 U.S.C. § 523(a)(7) as penalties that are not
11 compensation for actual pecuniary loss. Construing the 2003
12 amendment as superseding Taggart, the bankruptcy court excepted
13 such a cost award from the debtor's discharge per § 523(a)(7).

14 Although BUS. & PROF. CODE § 6086.10(e) plainly was designed
15 to qualify attorney discipline cost awards for the § 523(a)(7)
16 discharge exception, the Ninth Circuit has recently held in a
17 related context that amended § 6086.10 "cannot be construed as
18 remotely punitive so as to negate California's civil intentions."
19 Gadda v. State Bar, 511 F.3d 933, 939 (9th Cir. 2007). In the
20 wake of Gadda, we must honor Taggart until such time as the Ninth
21 Circuit decides that Taggart lacks vitality. Hence, we REVERSE.
22

23 FACTS

24 There are no genuine issues of material fact.

25 Appellant, chapter 7 debtor John William Findley, III, is
26 admitted to practice law in California. The appellee State Bar
27 of California prosecuted him for violations of the California
28 Rules of Professional Conduct and the BUS. & PROF. CODE based on a

1 complaint made by a Findley client.

2 The State Bar Court Hearing Department rendered findings on
3 January 12, 2004, and recommended that Findley be suspended from
4 practice for one year and be on probation for two years.

5 Before the State Bar Court Review Department acted on the
6 recommendation, Findley filed a chapter 7 case on March 2, 2004.

7 The State Bar Court Review Department adopted the hearing
8 officer's findings and disciplinary recommendation, with minor
9 modifications, in an Opinion on Review issued on June 15, 2005.

10 The State Bar Court issued a Certificate of Costs on August
11 24, 2005, ordering Findley to pay the State Bar \$14,054.94 based
12 on BUS. & PROF. CODE § 6086.10, which requires disciplined
13 attorneys, absent proof of hardship, to pay the cost of the
14 disciplinary action. The award consisted of: \$56.89, witness
15 fees; \$406.80, cost of certifying court documents; \$128.25, cost
16 for Review Department transcripts; and \$13,463.00, "Reasonable
17 Costs Pursuant to Formula Approved by the Board of Governors."

18 The California Supreme Court,¹ on November 16, 2005, adopted
19 the Opinion and the discipline cost order.

20 When Findley interposed his bankruptcy discharge to excuse
21 payment of the \$14,054.94 discipline cost award, the State Bar
22 sued to have the debt excepted from discharge per § 523(a)(7).

23 The State Bar sought summary judgment, contending the 2003
24 amendment to BUS. & PROF. CODE § 6086.10 made discipline cost

25
26 ¹ The California Supreme Court has plenary authority over
27 California attorneys. The State Bar is its administrative arm in
28 attorney discipline matters. The State Bar Court recommends
discipline. An order finally imposing discipline, including a
cost order, is an order of the California Supreme Court. See In
re Atty. Discipline Sys., 19 Cal. 4th 582, 599-600 (1998).

1 awards punitive in nature as a matter of state law and, hence,
2 statutorily overruled the contrary conclusion stated in Taggart.

3 The State Bar's summary judgment evidence included the
4 declaration of Lawrence Doyle, Chief Legislative Counsel for the
5 State Bar in 2003, accompanied by a copy of the Enrolled Bill
6 Report for Assembly Bill 1708, which bill was the vehicle for
7 adding new BUS. & PROF. CODE § 6086.10(e).

8 Doyle averred that he was responsible for drafting Bus. &
9 PROF. CODE § 6086.10(e) and designed it as a response to Taggart
10 to "clarify and re-state the intent of California Legislature
11 that disciplinary costs are monetary sanctions and are part of
12 the punishment imposed" on California lawyers for professional
13 misconduct by requiring them to pay the costs of the proceeding:

14 (e) In addition to other monetary sanctions as may be
15 ordered by the Supreme Court pursuant to Section 6086.13,
16 costs imposed pursuant to this section are penalties,
17 payable to and for the benefit of the State Bar of
18 California, a public corporation created pursuant to Article
19 VI of the California Constitution, to promote rehabilitation
20 and to protect the public. This subdivision is declaratory
21 of existing law.

22 CAL. BUS. & PROF. CODE § 6086.10(e).²

23 ² The Doyle summary judgment declaration explained:

24 3. Section 6086.10(e) was drafted in response to the In Re
25 Taggart, 249 F.3d 987(9th Cir. 2000) decision construing the
26 costs imposed under [§] 6086.10 in State Bar disciplinary
27 matters as not being intended by the California Legislature
28 as punishment against a disciplined attorney. Taggart then
held that these disciplinary costs did not constitute
nondischargeable fines or penalties under the Bankruptcy
Code, 11 U.S.C. § 527(a)(7).

4. Section 6086.10(e) was added to the California Business
and Professions Code to expressly clarify and re-state the
intent of California Legislature that disciplinary costs are
(continued...)

1 The Enrolled Bill Report was specific that the amendment
2 would make discipline cost awards "not dischargeable in
3 bankruptcy." Enr. Bill Rep. AB 1708, at 3 ¶ 2.³

4 The bankruptcy court held that the amendment supplanted
5 Taggart and entered summary judgment. This timely appeal ensued.

6
7 JURISDICTION

8 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
9 We have jurisdiction under 28 U.S.C. § 158(a)(1).

10
11
12

²(...continued)

13 monetary sanctions and are a part of the punishment imposed
14 on California lawyers for professional misconduct by making
15 him or her pay for part of the costs of the proceeding.
16 Because there was apparent confusion in Taggart, 249 F.3d at
17 991-92, about the purpose of costs first added under [§]
18 6086.10 in 1986 and the monetary sanction later added under
19 [§] 6083.13 [sic] by Cal[.] Stat[s.] 1992, Ch[.] 2300, [§]
20 1, the amendment in [§] 6086[.10](e) also made clear that
21 disciplinary costs are penalties "[i]n addition to other
22 monetary sanctions as may be ordered by the Supreme Court
23 pursuant to [§] 6086.13." (It should also be noted that
24 imposition and collection of monetary sanctions under [§]
25 6086.13 was conditioned upon approval by the Supreme Court
26 [of] a court rule – a condition that has not occurred.)

27 Decl. of Lawrence D. Doyle at 1:21-2:22 ("Doyle Decl.").

28 ³ In addition, the Enrolled Bill Report explained:

4. [BUS. & PROF. CODE § 6086.10] would (1) enable the Bar to
pursue orders for disciplined attorneys to pay [costs] as
money judgments; and (2) specify that orders to pay
disciplinary costs [subdiv. (d)] are penalties, as
originally intended by the Legislature, and therefore not
dischargeable in bankruptcy.

Enr. Bill Rep. AB 1708, at 5 ¶ 4 (emphasis supplied).

1 discipline cost awards into § 523(a) (7) through the device of new
2 BUS. & PROF. CODE § 6086.10(e). That subsection was enacted in
3 2003 with the aim of reversing the result of the Ninth Circuit's
4 Taggart decision that the prior version of § 6086.10 reflected
5 compensation for actual pecuniary loss that was not excepted from
6 discharge by § 523(a) (7). Taggart, 249 F.3d at 994.⁵

7 As will be seen, the case in support of legislative reversal
8 of Taggart is meritorious but is not necessarily compelling. The
9 counterpoints to the basic argument, coupled with the ruling in
10 Gadda that the 2003 amendment of BUS. & PROF. CODE § 6086.10(a)
11 permitting enforcement of a discipline cost award as a money
12 judgment is not an ex post facto law because it "cannot be
13 construed as remotely punitive so as to negate California's civil
14 intentions," Gadda, 511 F.3d at 939, make it unsound for an
15 inferior tribunal within the Ninth Circuit to disregard Taggart.

16
17 I

18 The Supreme Court laid the foundation for analysis of
19 § 523(a) (7) in Kelly v. Robinson, in which a criminal restitution
20 award against a welfare fraudster based on actual loss was held
21

22 ⁵ The State Bar's position was that the Ninth Circuit's
23 Taggart panel was confused about the purpose and status of
24 discipline cost awards and that the 2003 amendment did not change
25 the law in that respect. Doyle Decl. ¶ 4. This explains the
26 inclusion of the final sentence of BUS. & PROF. CODE § 6086.10(e):
27 "This subdivision is declaratory of existing law." Although in
28 Taggart the trial judge and the BAP had (noting it was a "close"
case) each held Taggart's discipline cost award nondischargeable
per § 523(a) (7), Taggart v. State Bar, No. CC-98-1716-KMyP (9th
Cir. BAP June 15, 1999), aff'g No. RS-98-1277-MJ (C.D. Cal.), we
do not here suggest Taggart was incorrectly decided.

1 to qualify for the § 523(a)(7) exception to discharge. Kelly v.
2 Robinson, 479 U.S. 36, 50-53 (1986).

3 The Court placed a two-part gloss on § 523(a)(7) that it
4 justified by what it described as a longstanding "fundamental
5 policy against federal interference with state criminal
6 prosecutions" in which "rehabilitative" and "deterrent" goals
7 loom large and by a sense that it would be "unseemly to require
8 state prosecutors to submit the judgments of their criminal
9 courts to federal bankruptcy courts." Kelly, 479 U.S. at 48-49 &
10 n.8. These added up to a combination of "strong interests of the
11 States," and of a uniform hands-off-restitution construction of
12 the former Bankruptcy Act as to which there was no indication
13 that Congress meant to change the law. Kelly, 479 U.S. at 53.

14 Under the first part of the Court's gloss, restitution
15 orders are more "for the benefit of a governmental unit," as that
16 term is used in § 523(a)(7), than for the benefit of the victim
17 who typically receives the restitution. The Court reasoned that
18 the "criminal justice system is not operated primarily for the
19 benefit of victims, but for the benefit of society as a whole."
20 Kelly, 479 U.S. at 52. Accordingly, it was willing to gloss over
21 the reality that the actual restitution payments generally wind
22 up with the victim.

23 The second part of the Court's gloss holds that restitution
24 orders are not, in the words of § 523(a)(7), "compensation for
25 actual pecuniary loss." The rationale is that the "victim has no
26 control over the amount of restitution awarded or over the
27 decision to award restitution," which decision "generally does
28 not turn on the victim's injury, but on the penal goals of the

1 State and the situation of the defendant.” Kelly, 479 U.S. at
2 52. Thus, “they are not assessed ‘for ... compensation’ of the
3 victim.” Kelly, 479 U.S. at 53 (omission in original).

4 The Kelly analysis illuminates the following language from
5 § 6086.10(e): “costs imposed pursuant to this section are
6 penalties, payable to and for the benefit of the State Bar of
7 California, a public corporation created pursuant to Article VI
8 of the California Constitution, to promote rehabilitation and to
9 protect the public.” CAL. BUS. & PROF. CODE § 6086.10(e) (emphasis
10 supplied). Subsection (e) plainly was drafted to satisfy Kelly.
11

12 II

13 The bankruptcy court concluded that discipline cost awards
14 to the State Bar under BUS. & PROF. CODE § 6086.10, as amended in
15 2003 by the addition of § 6086.10(e), now satisfy the controlling
16 § 523(a)(7) test that is based on Kelly.⁶
17

18 ⁶ The bankruptcy court’s decision is consistent with results
19 in other jurisdictions. See, e.g., N.H. Sup. Ct. Prof’l Conduct
20 Comm. v. Richmond (In re Richmond), 351 B.R. 6, 14 (Bankr. D.N.H.
21 2006) (attorney discipline costs excepted from discharge); Atty.
22 Grievance Comm’n v. Smith (In re Smith), 317 B.R. 302, 312
23 (Bankr. D. Md. 2004) (same); Supreme Court v. Bertsche (In re
24 Bertsche), 261 B.R. 436, 437-38 (Bankr. S.D. Ohio 2000) (same);
25 State Bar v. Doerr (In re Doerr), 185 B.R. 533, 537 (Bankr. W.D.
26 Mich. 1995) (same); Cillo v. Fla. Bar (In re Cillo), 165 B.R. 46,
27 50 (M.D. Fla. 1994) (same); In re Williams, 158 B.R. 488, 491
28 (Bankr. D. Idaho 1993) (same); Atty. Regis. & Disciplinary Comm’n
v. Betts (In re Betts), 149 B.R. 891, 898 (Bankr. N.D. Ill. 1993)
(same); Bd. of Attys. Prof’l Responsibility v. Haberman (In re
Haberman), 137 B.R. 292, 295-96 (Bankr. E.D. Wis. 1992) (same).
The Ninth Circuit in Taggart, acknowledging the existence of such
results in other jurisdictions, reasoned that the analysis needed
to be made on a state-by-state basis. Taggart, 249 F.3d at 993-
94 & n.8.

1 A

2 On its face, the new § 6086.10(e) appears to touch all the
3 Kelly bases. The California legislature declared the award to be
4 a penalty, payable to a governmental unit, and for the purposes
5 of promoting rehabilitation and protecting the public.

6 New § 6086.10(e) tracks the first part of § 523(a)(7) and,
7 as noted, echoes Kelly: "costs imposed pursuant to this section
8 are penalties, payable to and for the benefit of the State Bar of
9 California, a public corporation created pursuant to Article VI
10 of the California Constitution, to promote rehabilitation and to
11 protect the public." CAL. BUS. & PROF. CODE § 6086.10(e) (emphasis
12 supplied).⁷

13
14 ⁷ BUS. & PROF. CODE § 6086.10 (2003 amendments emphasized):

15 (a) Any order imposing a public reproof on a member of the
16 State Bar shall include a direction that the member shall
17 pay costs. In any order imposing discipline, or accepting a
18 resignation with a disciplinary matter pending, the Supreme
19 Court shall include a direction that the member shall pay
20 costs. An order pursuant to this subdivision is enforceable
21 both as provided in Section 6140.7 and as a money judgment.

22 (b) The costs required to be imposed pursuant to this
23 section include all of the following:

24 (1) The actual expense incurred by the State Bar for the
25 original and copies of any reporter's transcript of the
26 State Bar proceedings, and any fee paid for the services of
27 the reporter.

28 (2) All expenses paid by the State Bar which would qualify
as taxable costs recoverable in civil proceedings.

(3) The charges determined by the State Bar to be
"reasonable costs" of investigation, hearing, and review.
These amounts shall serve to defray the costs, other than
fees for the services of attorneys or experts, of the State
(continued...)

1 Part of the rationale of the Ninth Circuit in Taggart for
2 concluding that attorney discipline costs are dischargeable was
3 that § 6086.10 did not contain language suggestive of a penalty.
4 In contrast, another section of the same statute, BUS. & PROF. CODE
5 § 6086.13, unambiguously authorizes awards of monetary penalties
6 against disciplined attorneys. Taggart, 249 F.3d at 992-94.
7 Unlike § 6086.10, the § 6086.13 penalty does not depend, and is
8 not linked to, actual expenses incurred by the State Bar.⁸

9
10 ⁷(...continued)

11 Bar in the preparation or hearing of disciplinary
12 proceedings, and costs incurred in the administrative
13 processing of the disciplinary proceeding and in the
14 administration of the Client Security Fund.

15 (c) A member may be granted relief, in whole or in part,
16 from an order assessing costs under this section, or may be
17 granted an extension of time to pay these costs, in the
18 discretion of the State Bar, upon grounds of hardship,
19 special circumstances, or other good cause.

20 (d) In the event an attorney is exonerated of all charges
21 following a formal hearing, he or she is entitled to
22 reimbursement from the State Bar in an amount determined by
23 the State Bar to be reasonable expenses, other than fees for
24 attorneys or experts, of preparation for the hearing.

25 (e) In addition to other monetary sanctions as may be
26 ordered by the Supreme Court pursuant to Section 6086.13,
27 costs imposed pursuant to this section are penalties,
28 payable to and for the benefit of the State Bar of
California, a public corporation created pursuant to Article
VI of the California Constitution, to promote rehabilitation
and to protect the public. This subdivision is declaratory
of existing law.

CAL. BUS. & PROF. CODE § 6086.10 (emphasized language added by
Stats. 2003, c.334 [A.B. 1708], § 4; eff. Sept. 8, 2003).

⁸ The entirety of BUS. & PROF. CODE § 6086.13 provides:

(continued...)

1 The contrast between § 6086.10 and § 6086.13 led the Ninth
2 Circuit to conclude that the California Legislature intended cost
3 awards under BUS. & PROF. CODE § 6086.10 to be compensatory rather
4 than penal in nature. Hence, the Taggart court ruled that
5 attorney discipline cost awards under BUS. & PROF. CODE § 6086.10
6 do not qualify for the § 523(a)(7) exception to discharge.
7 Taggart, 249 F.3d at 992-94.

8
9 ⁸(...continued)

10 (a) Any order of the Supreme Court imposing suspension or
11 disbarment of a member of the State Bar, or accepting
12 resignation with a disciplinary matter pending may include
13 an order that the member pay a monetary sanction not to
exceed five thousand dollars (\$5,000) for each violation,
subject to a total limit of fifty thousand dollars
(\$50,000).

14 (b) Monetary sanctions collected under subdivision (a) shall
15 be deposited into the Client Security Fund.

16 (c) The State Bar shall, with the approval of the Supreme
17 Court, adopt rules setting forth guidelines for the
18 imposition and collection of monetary sanctions under this
section.

19 (d) The authority granted under this section is in addition
20 to the provisions of Section 6086.10 and any other authority
to impose costs or monetary sanctions.

21 (e) Monetary sanctions imposed under this section shall not
22 be collected to the extent that the collection would impair
23 the collection of criminal penalties or civil judgments
24 arising out of transactions connected with the discipline of
25 the attorney. In the event monetary sanctions are collected
26 under this section and criminal penalties or civil judgments
27 arising out of transactions connected with the discipline of
the attorney are otherwise uncollectible, those penalties or
judgments may be reimbursed from the Client Security Fund to
the extent of the monetary sanctions collected under this
section.

28 CAL. BUS. & PROF. CODE § 6086.13.

1 Now that § 6086.10(e) labels attorney discipline cost awards
2 as "penalties" and adds that they "promote rehabilitation" and
3 "protect the public," it is more difficult to say that the state
4 legislature does not intend such awards to be penalties.

5 This sufficiently erodes the intellectual foundation of
6 Taggart that there is reason to doubt the continuing validity of
7 the conclusion it reached regarding the § 523(a)(7) discharge
8 status of California's attorney discipline cost awards.

9
10 B

11 The argument for the legislative overruling of the Taggart
12 result by the enactment of BUS. & PROF. CODE § 6086.10(e), however,
13 has enough weaknesses so as to give an inferior tribunal pause
14 before distinguishing away circuit precedent as obsolete.

15
16 1

17 In the first place, § 523(a)(7) is a federal statute that
18 the California legislature lacks authority to alter. Whether
19 something is a "fine," a "penalty," or "restitution" as those
20 terms are used in § 523(a)(7) is a question of federal law. In
21 Taggart, the Ninth Circuit viewed the central question as whether
22 discipline cost awards are "penal in nature." Taggart, 249 F.3d
23 at 994. It assessed this question with reference to the
24 structure of the attorney discipline statute, the California
25 civil principle that prevailing parties may recover their costs
26 of litigation, and legislative history. Taggart, 249 F.3d at
27 991-94.

28 State legislatures cannot amend the Bankruptcy Code. Nor

1 can there be an effective state statute providing that a
2 particular category of debt shall be excepted from bankruptcy
3 discharge by virtue of § 523(a). The best that a state
4 legislature can do on its own is to establish an obligation that
5 meets the criteria of the federal statute.

6 The California legislature in 2003 amended the statute that
7 had been held in Taggart to constitute compensation for "actual
8 pecuniary loss" in three respects. In § 6086.10(a), it made the
9 award enforceable as a money judgment. In § 6086.10(e), saying
10 that it was "declaratory of existing law," it labeled discipline
11 cost awards as "penalties" and designated the purpose of such
12 awards as "to promote rehabilitation and to protect the public."
13 CAL. BUS. & PROF. CODE § 6086.10.

14
15 2

16 The State Bar contends that the 2003 amendments meet the
17 criteria of § 523(a)(7). The label "penalty" has been affixed to
18 § 6086.10. Because the Supreme Court focused in Kelly on a
19 state's purposes and interests for imposing the monetary
20 obligation in determining its characterization of the obligation
21 under § 523(a)(7), the purpose of § 6086.10 was stated as
22 promoting rehabilitation and protecting the public.

23 It does not necessarily follow from the mere addition of
24 labels arguably not affecting substance that Taggart's conclusion
25 that such cost awards are compensation for actual pecuniary loss
26 is no longer viable. The provision that § 6086.10(e) was
27 "declaratory of existing law" smacks of a motion to reconsider
28 the result in Taggart and cannot change the underlying Taggart

1 analysis. As the Supreme Court has explained, the "location and
2 labels of a statutory provision do not by themselves transform a
3 civil remedy into a criminal one." Smith v. Doe, 538 U.S. 84, 94
4 (2003) (Ex Post Facto Clause).

5 The form of the Taggart analysis, the validity of which is
6 not called into question by this appeal, focused on underlying
7 substance, not mere cosmetics. One could construe the enactment
8 of § 6086.10(e) as solely to affix a label ("penalty") and state
9 purposes ("to promote rehabilitation and to protect the public")
10 so as to make such awards appear to be within the zone of
11 § 523(a)(7)'s coverage.

12 What did not change is the unabashedly compensatory nature
13 of § 6086.10 that is apparent from the face of § 6086.10(b):

14 (b) The costs required to be imposed pursuant to this
15 section include all of the following:

16 (1) The actual expense incurred by the State Bar for the
17 original and copies of any reporter's transcript of the
18 State Bar proceedings, and any fee paid for the services of
19 the reporter.

20 (2) All expenses paid by the State Bar which would qualify
21 as taxable costs recoverable in civil proceedings.

22 (3) The charges determined by the State Bar to be
23 "reasonable costs" of investigation, hearing, and review.
24 These amounts shall serve to defray the costs, other than
25 fees for the services of attorneys or experts, of the State
26 Bar in the preparation or hearing of disciplinary
27 proceedings, and costs incurred in the administrative
28 processing of the disciplinary proceeding and in the
administration of the Client Security Fund.

24 CAL. BUS. & PROF. CODE § 6086.10(b) (emphasis supplied).

25 Moreover, the overall structure of the statute remained
26 static. There was no change to the penalty provisions of
27 § 6086.13, the existence of which provisions were emphasized in
28 Taggart. The addition of authority in § 6086.10(a) for

1 enforcement by way of money judgment is consistent with a civil
2 purpose.

3 Nor was there any change that necessarily would eviscerate
4 the Ninth Circuit's analogy in Taggart to mandatory costs in
5 civil litigation. It noted in particular that such costs are
6 awarded "even where the losing party's claims or defenses have
7 merit" and indicated that it was "highly unlikely" that
8 California "imposed mandatory costs in civil proceedings in order
9 to punish losing parties or to deter them from bringing
10 litigation or asserting defenses." Taggart, 249 F.3d at 993 n.6.
11 The formula for attorney discipline costs includes costs for
12 overcoming an attorney's meritorious defenses.

13 These considerations, viewed through the matrix of the
14 Taggart analysis, could support a conclusion that § 6086.10(e)
15 amounts to no more than insubstantial cosmetics and does not
16 qualify attorney discipline cost awards for exception to
17 discharge under § 523(a)(7).

18
19 3

20 Although the State Bar invokes Kelly, there are a number of
21 differences from Kelly that also may give one pause. First, the
22 cost award, as evident from the face of the cost order and from
23 § 6086.10(b), unambiguously represents the recovery by the State
24 Bar of its own actual expense of investigating and prosecuting
25 the disciplinary action. Unlike Kelly, where the Supreme Court
26 reasoned that victims have little control over restitution
27 awards, here the State Bar has substantial control over the
28 amount of the award and over the decision to make the award.

1 under § 523(a)(7) is correlatively ineligible for distribution as
2 a general unsecured claim. Rather, payment on claims for
3 penalties is statutorily subordinated to timely-filed and
4 tardily-filed unsecured claims. 11 U.S.C. § 726(a)(4). The
5 senior claims must be paid in full before anything can be paid on
6 claims for penalties. 11 U.S.C. § 726(b). Nor does status as a
7 money judgment help in light of the trustee's authority to "avoid
8 a lien that secures a claim of a kind specified in
9 [§] 726(a)(4)." 11 U.S.C. § 724(a). Thus, the State Bar, if
10 victorious, will be obliged to note in its chapter 7 proofs of
11 claim that its debt is statutorily subordinated.

12 Second, the State Bar could be setting itself up for pyrrhic
13 victory in chapter 13 cases. Debts that are excepted from
14 discharge under § 523(a)(7) are (other than debts "for
15 restitution, for a criminal fine, included in a sentence on the
16 debtor's conviction of a crime") dischargeable in chapter 13
17 cases. 11 U.S.C. § 1328(a)(3).

18 One essential element of chapter 13 plan confirmation is
19 that the value of "property to be distributed under the plan
20 [i.e., payments] on account of each allowed unsecured claim is
21 not less than the amount that would be paid on such claim if the
22 estate of the debtor were liquidated under chapter 7 of this
23 title on such date." 11 U.S.C. § 1325(a)(4) (emphasis added).

24 One can envision confirmable plans under which the State Bar
25 receives nothing or only token payments, by virtue of separate
26 classification based on the effect of the § 726(a)(4)
27 subordination, while general unsecured claims are paid
28 substantial dividends during the life of the plan. It would then

1 suffer a discharge of the discipline cost award debt. Nor is
2 this possibility trivial in view of the 2005 amendments to the
3 Bankruptcy Code that were designed to channel a higher proportion
4 of debtors into chapter 13.

5 In short, the State Bar's case for the legislative
6 overruling of the Taggart result is not airtight. There is a
7 nontrivial chance that the Ninth Circuit, applying the same
8 matrix of analysis as in Taggart, will continue to regard
9 § 6086.10 as compensatory.

10 We do not need, however, to consider whether that modicum of
11 risk, standing alone, would necessitate upsetting the summary
12 judgment in favor of the State Bar. The effect of the Ninth
13 Circuit's subsequent decision in Gadda must now be added to the
14 summary judgment equation.

16 III

17 The Ninth Circuit interpreted revised BUS. & PROF. CODE
18 § 6086.10 in Gadda, which was issued shortly before the oral
19 argument of this appeal. We asked the parties to address Gadda
20 in post-argument briefs in light of its focus on the same 2003
21 legislative act that forms the basis of this appeal.

22 Mr. Gadda's discipline, including a \$21,845.14 discipline
23 cost award, was complete before the enactment of the 2003
24 amendments added a sentence to § 6086.10(a) (in addition to
25 adding § 6086.10(e)) permitting entry of a money judgment on
26 account of such a cost award. When, in 2005, the State Bar
27 threatened Gadda with a money judgment on the cost award, he sued
28 in federal court challenging the State Bar's ability to collect.

1 The issue was retroactive application of the 2003
2 amendments, which was alleged to violate both the Due Process
3 Clause of the Fourteenth Amendment and the Ex Post Facto Clause.
4 After concluding that amended § 6086.10 survived rational basis
5 scrutiny under standard due process analysis, the Ninth Circuit
6 addressed the Ex Post Facto Clause. Gadda, 511 F.3d at 939.

7 The test for whether an enactment constitutes punishment
8 that could offend the Ex Post Facto Clause is whether: (1) the
9 legislature in enacting the statute intended to impose punishment
10 and (2), if not, whether the enactment is so punitive in purpose
11 or effect as to negate the state's intention to deem it civil.
12 Smith, 538 U.S. at 92; Kansas v. Hendricks, 521 U.S. 346, 361
13 (1997); Hatton v. Bonner 356 F.3d 955, 961 (9th Cir. 2004).

14 The Ninth Circuit concluded the 2003 amendment to
15 § 6086.10(a) "cannot be construed as remotely punitive so as to
16 negate California's civil intentions." Gadda, 511 F.3d at 939.
17 In order to reach this conclusion under the Supreme Court's test,
18 the court of appeals also implicitly concluded that the state
19 legislature in amending § 6086.10 did not intend to impose
20 punishment. While this does not necessarily exclude construing
21 § 6086.10 as nevertheless constituting a civil "penalty" for
22 § 523(a) (7) purposes, the Gadda decision clouds that picture.

23 The gravamen of the arguments made in post-argument briefing
24 was that the contexts are different. True enough. Legal
25 training prepares one to accept seemingly inconsistent
26 propositions that "punitive" and "penalty" might mean different
27 things in different contexts and be determined by different
28 standards and that "civil" does not necessarily equate with

1 "compensatory." When coping with such matters, one looks for
2 principled distinctions. The post-argument briefs, however, do
3 not articulate principled distinctions. That leaves open the
4 possibility that the Ninth Circuit would rule that the State Bar,
5 which was the appellee in Gadda,⁹ is impermissibly trying to have
6 it both ways. We leave that question to the court of appeals.

7 However clear the California legislature may have been
8 regarding its intentions vis-à-vis § 523(a)(7) and the result in
9 Taggart, we cannot say with sufficient confidence that the Ninth
10 Circuit would regard "new" § 6086.10 as leading to a conclusion
11 different than its conclusion under "old" § 6086.10. In other
12 words, we cannot say that the State Bar is entitled to judgment
13 as a matter of law. Fed. R. Civ. P. 56(c), incorporated by Fed.
14 R. Bankr. P. 7056.

16 CONCLUSION

17 While we recognize that the State Bar has a meritorious case
18 for contending that application of the Ninth Circuit's Taggart
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21 ⁹ The appearance of Gadda on the scene illustrates Karl
22 Llewellyn's observation about the challenge facing counsel when
rendering advice predicting future appellate decisions:

23 [I]f the reckoning is from original lay action to the legal
24 result on eventual appeal in an eventual lawsuit arising out
25 of such action, that whole picture must be discounted as
26 still subject to skewing or scuttling by the uncontrollable
and by ninnyes in the litigating.

27 KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 17 (1960)
28 (emphasis in original).

1 precedent leads to a conclusion opposite from that reached in
2 Taggart, the situation is not so clear as to warrant disregard of
3 the Taggart result by inferior tribunals within the Ninth
4 Circuit. Unless and until the court of appeals rules to the
5 contrary, we think it prudent to adhere to the Taggart result.
6 Accordingly, the judgment is REVERSED.

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