

MAY 27 2009

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6	In re:	)	BAP No. CC-08-1343-DMkPa
7	DAVID E. KRONEMYER,	)	Bk. No. LA 07-10159 ER
8	Debtor.	)	
9	_____	)	
10	DAVID E. KRONEMYER,	)	
11	Appellant,	)	
12	v.	)	<b>OPINION</b>
13	AMERICAN CONTRACTORS	)	
14	INDEMNITY CO.,	)	
15	Appellee.	)	
	_____	)	

Argued and Submitted on May 14, 2009  
at Pasadena, California

Filed - May 27, 2009

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

Hon. Ernest M. Robles, Bankruptcy Judge, Presiding.

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Before: DUNN, MARKELL and PAPPAS, Bankruptcy Judges.

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1 DUNN, Bankruptcy Judge:  
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3 The bankruptcy court granted relief from the automatic stay  
4 to allow an objection to the debtor's final accounting and a  
5 related surcharge request in a state court guardianship  
6 proceeding to go forward. The debtor appealed, asserting that  
7 the movant, a surety with a contingent claim against the debtor,  
8 lacked standing to bring the motion, particularly where the  
9 beneficiary of the suretyship failed to file a proof of claim in  
10 the bankruptcy case. We AFFIRM.<sup>1</sup>  
11

### 12 I. FACTS

13 Appellant, David E. Kronemyer, was the court-appointed  
14 guardian of the Estate of Yvonne Leal ("Leal Estate") between  
15 1993 and November 18, 2003, the date Yvonne Leal reached the age  
16 of 18.<sup>2</sup> Appellee, American Contractors Indemnity Company  
17 ("ACIC"), issued two fiduciary bonds to Mr. Kronemyer in his  
18 capacity as guardian of the Leal Estate.

19 When the guardianship terminated, the State Court appointed  
20 a professional fiduciary conservator ("Conservator") for the Leal  
21 Estate. Mr. Kronemyer filed his Sixth and Final Account and  
22 Report ("Final Account") with respect to the guardianship on May  
23 19, 2004. The Conservator filed objections to the Final Account  
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25 <sup>1</sup> Unless otherwise indicated, all chapter and section  
26 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-  
1532.

27 <sup>2</sup> San Diego Superior Court ("State Court"), Case No.  
28 P158102.

1 on March 25, 2005, including a request that Mr. Kronemyer be  
2 surcharged ("Surcharge Request").

3 In addition to making the Surcharge Request, the Conservator  
4 filed a criminal complaint ("Criminal Proceeding") against  
5 Mr. Kronemyer with the San Diego County District Attorney. On  
6 June 25, 2007, Mr. Kronemyer pleaded guilty to one count of  
7 violating Cal. Penal Code § 506.<sup>3</sup> A \$10,000 restitution judgment  
8 ("Criminal Court Judgment") was entered against Mr. Kronemyer in  
9 the Criminal Proceeding on February 11, 2008. Mr. Kronemyer paid  
10 the restitution obligation. He asserts that the Criminal Court  
11 Judgment, the terms of which were approved by the Leal Estate,  
12 resolved all disputes between the parties, including any claims  
13 involved in the Surcharge Request.

14 Mr. Kronemyer filed a voluntary chapter 11 petition on  
15 January 8, 2007. On May 18, 2007, he filed an amended Schedule  
16 F, adding the Leal Estate as a creditor, with a disputed claim of  
17 \$23,043. The bankruptcy case was converted to chapter 7 on his  
18 motion on May 16, 2008.

19 The Leal Estate did not file a proof of claim in the  
20 bankruptcy case.<sup>4</sup> However, ACIC did file a proof of claim based  
21 on its potential liability to the Leal Estate as Mr. Kronemyer's  
22 surety. ACIC also filed an adversary proceeding ("Adversary  
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24 <sup>3</sup> Among other things, Cal. Penal Code § 506 deals with  
25 fiduciary embezzlements.

26 <sup>4</sup> The deadline for filing proofs of claim in the chapter  
27 7 case was September 30, 2008. See Docket No. 56. The chapter 7  
28 trustee filed a "no asset" report on January 21, 2009. See  
Docket No. 85.

1 Proceeding") seeking a determination that whatever amount it  
2 might ultimately be obligated to pay on Mr. Kronemyer's behalf  
3 under the bonds it had issued in the guardianship proceeding  
4 would be excepted from Mr. Kronemyer's discharge under  
5 § 523(a)(4). In response to a question at oral argument,  
6 Mr. Kronemyer advised the Panel that the Leal Estate had been  
7 joined as a party plaintiff in the Adversary Proceeding.

8 ACIC filed a motion for relief from the automatic stay  
9 ("Motion"), seeking authority for ACIC and the Conservator to  
10 proceed in the State Court to final judgment on the Surcharge  
11 Request. The Conservator later joined in the Motion.

12 Mr. Kronemyer opposed the Motion on multiple grounds.  
13 First, he asserted that the Criminal Court Judgment not only  
14 resolved the Surcharge Request, it barred any further action  
15 against him by the Leal Estate. Second, Mr. Kronemyer asserted  
16 that because ACIC, a subrogated surety, holds no claim against  
17 him, ACIC had no standing to bring the Motion. Finally,  
18 Mr. Kronemyer asserted that even if ACIC had standing, ACIC could  
19 not demonstrate cause for relief from the automatic stay.

20 The bankruptcy court held that ACIC, as a creditor holding a  
21 contingent claim, was a party in interest and therefore had  
22 standing to bring the Motion. The bankruptcy court determined  
23 that "cause" existed to grant the Motion because resolution of  
24 the Surcharge Request in the State Court would serve to  
25 liquidate, in the forum more familiar with the dispute among the  
26 parties, ACIC's contingent claim in the bankruptcy case.  
27 Further, the bankruptcy court concluded that the preclusive  
28 effect of the Criminal Court Judgment on the Surcharge Request

1 could be resolved more expeditiously by the State Court.

2 Mr. Kronemyer timely appealed the order granting ACIC relief  
3 from the automatic stay.

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5 **II. JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C.  
7 §§ 1334 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C.  
8 § 158.

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10 **III. ISSUES**

11 Whether the bankruptcy court erred when it determined that  
12 ACIC had standing to file and prosecute the Motion.

13 Whether the bankruptcy court abused its discretion when it  
14 granted ACIC relief from the automatic stay.

15 Whether the bankruptcy court erred when it included  
16 "ancillary" provisions in the order granting relief from the  
17 automatic stay.

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19 **IV. STANDARDS OF REVIEW**

20 Standing is a legal issue that we review de novo. Loyd v.  
21 Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000); Aheong v.  
22 Mellon Mtge. Co. (In re Aheong), 276 B.R. 233, 238 (9th Cir. BAP  
23 2002).

24 We review de novo contentions that present an issue of law  
25 regarding stay relief. Mataya v. Kissinger (In re Kissinger), 72  
26 F.3d 107, 108 (9th Cir. 1995). The decision of a bankruptcy  
27 court to grant relief from the automatic stay under § 362(d) is  
28 reviewed for abuse of discretion. Id.; First Fed. Bank v.

1 Robbins (In re Robbins), 310 B.R. 626, 629 (9th Cir. BAP 2004).

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3 **V. DISCUSSION**

4 A. ACIC Had Standing to File and Prosecute the Motion

5 Mr. Kronemyer asserts that the bankruptcy court erred in  
6 granting the Motion because ACIC had no standing to file and  
7 prosecute the Motion.

8 Section 362(d) authorizes the bankruptcy court to grant  
9 relief from the automatic stay “[o]n request of a party in  
10 interest.” The issue before us, therefore, is whether ACIC is a  
11 “party in interest” in Mr. Kronemyer’s bankruptcy case. The term  
12 “party in interest” is not defined in the Bankruptcy Code.  
13 Status as “a party in interest” under § 362(d) “must be  
14 determined on a case-by-case basis, with reference to the  
15 interest asserted and how [that] interest is affected by the  
16 automatic stay.” In re Woodberry, 383 B.R. 373, 378 (Bankr.  
17 D.S.C. 2008) (internal quotation marks and citation omitted).

18 As noted by the bankruptcy court, the Bankruptcy Code  
19 defines “creditor” as “an entity that has a claim against the  
20 debtor that arose at the time of or before the order for relief  
21 concerning the debtor.” § 101(10). The Bankruptcy Code further  
22 defines “claim” as a “right to payment, whether or not such right  
23 is . . . contingent . . . .” § 101(5) (emphasis added).

24 While Mr. Kronemyer effectively concedes that ACIC has a  
25 contingent claim under this analysis, he argues that holding such  
26 a contingent claim, under the facts of this case, does not confer  
27 standing on ACIC. Mr. Kronemyer asserts that because ACIC is a  
28 surety with a contingent claim on the petition date, § 502(e)(1)

1 mandates that the proof of claim ACIC filed in the case be  
2 disallowed. Section 502(e)(1) provides:

3 Notwithstanding subsections (a), (b) and (c) of this  
4 section and paragraph (2) of this subsection, the court  
5 shall disallow any claim for reimbursement or  
6 contribution of an entity that is liable with the  
7 debtor on or has secured the claim of a creditor, to  
8 the extent that -

9 . . .  
10 (B) such claim for reimbursement or contribution is  
11 contingent as of the time of allowance or disallowance  
12 of such claim for reimbursement or contribution . . . .

13 In Mr. Kronemyer's view, because the claim must be  
14 disallowed under § 502(e)(1), and indeed had been disallowed by  
15 the time of oral argument of this appeal,<sup>5</sup> ACIC cannot be said to  
16 hold a claim, and therefore cannot be a creditor for purposes of  
17 the Bankruptcy Code in general, and § 362(d) in particular.

18 Mr. Kronemyer appears to mistake the disallowance of a claim  
19 with the existence and, using his term, "viability," of a claim.  
20 Many rights under the Bankruptcy Code are keyed to "allowed"  
21 claims. In fact, allowability of claims is a bankruptcy concept.  
22 For instance, only holders of allowed claims may receive  
23 distributions from the bankruptcy estate in chapter 7 cases. See  
24 § 726(a). Whether a claim is to be allowed or disallowed is  
25 determined by the provisions of § 502, whereas the existence of a  
26 claim is controlled by state or other federal law.<sup>6</sup> Disallowance

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27 <sup>5</sup> The bankruptcy court disallowed ACIC's contingent claim  
28 by order entered on March 11, 2009.

<sup>6</sup> Section 501(b) expressly authorized ACIC to file a  
claim when the Leal Estate did not. "The rationale . . . is to  
ensure that some or all of the debt for which the [surety] is  
(continued...)

1 of ACIC's claim means that ACIC is not entitled to any  
2 distribution from Mr. Kronemyer's bankruptcy estate, but  
3 determining whether ACIC's claim is valid is crucial to deciding  
4 if it should be excepted from Mr. Kronemyer's discharge in the  
5 Adversary Proceeding.

6 Mr. Kronemyer also asserts that because § 502(e)(1) requires  
7 ACIC's claim to be disallowed if contingent, any liability he  
8 might have to ACIC must be fixed prior to the petition date or  
9 ACIC never can have any claim against him. However, the mere  
10 fact that rights are fixed as of the petition date does not mean  
11 that a claim cannot be liquidated thereafter. As noted by the  
12 bankruptcy court, § 502(e)(2) provides that a "claim for  
13 reimbursement or contribution . . . that becomes fixed after the  
14 commencement of the case shall be determined, and shall be  
15 allowed . . . or disallowed . . . the same as if such claim had  
16 become fixed before the date of the filing of the petition."

17 As a secondary argument, Mr. Kronemyer asserts that ACIC can  
18 never have more than a contingent claim, because (1) the Leal  
19 Estate did not file a proof of claim in his bankruptcy case, and  
20 (2) ACIC's claim is derivative of any claim of the Leal Estate.

21 Under California law, "[a] suretyship obligation is deemed  
22 unconditional unless its terms import some condition precedent to  
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24 <sup>6</sup>(...continued)  
25 liable is paid through distributions in the bankruptcy case."  
26 4 COLLIER ON BANKRUPTCY ¶ 501.03[1], at p. 501-17 (15th ed. rev.  
27 2009). On the other hand, disallowance of the claim of a surety  
28 serves the purpose of ensuring that distribution of estate assets  
is not made both to the primary creditor and to the surety.  
4 COLLIER ON BANKRUPTCY ¶ 502.06[d], at pp. 502-62--502-63 (15th ed.  
rev. 2009).

1 the liability of the surety." Cal. Civ. Code § 2806. Further,  
2 Cal. Civ. Code § 2807 provides: "A surety who has assumed  
3 liability for payment or performance is liable to the creditor  
4 immediately upon the default of the principal, and without demand  
5 or notice." Thus, the Leal Estate need never seek recovery from  
6 Mr. Kronemyer, but may instead look directly to ACIC to satisfy  
7 any surcharge that is ordered in the guardianship proceeding.

8 Under Cal. Civ. Code § 2847, ACIC has a direct claim against  
9 Mr. Kronemyer for reimbursement of any amount ultimately paid on  
10 its bonds.<sup>7</sup> Consequently, whether the Leal Estate filed a proof  
11 of claim in the bankruptcy case is not relevant to the issue of  
12 whether ACIC as a party in interest had standing to bring the  
13 Motion.

14 Further, we observe that the chapter 7 trustee filed a "No  
15 Asset" report on January 21, 2009. See Docket No. 85. "In no-  
16 asset chapter 7 liquidation cases, the filing of a proof of claim  
17 serves no practical purpose since there will be no distribution  
18 from the estate in which to participate." 4 COLLIER ON BANKRUPTCY  
19 ¶ 501.01[3][b], at p. 501-6 (15th ed. rev. 2009).

20 The bankruptcy court properly concluded that because ACIC  
21 possessed a claim to payment against Mr. Kronemyer, even though  
22 that claim was contingent both as of the petition date and as of  
23 the date of the Motion, ACIC is a creditor within the meaning of  
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25 <sup>7</sup> Cal. Civ. Code § 2847 provides: "If a surety satisfies  
26 the principal obligation, or any part thereof, whether with or  
27 without legal proceedings, the principal is bound to reimburse  
28 what he has disbursed, including necessary costs and expenses  
. . . ."

1 the Bankruptcy Code. As a creditor, ACIC had standing as a party  
2 in interest to bring the Motion. See, e.g., Roslyn Sav. Bank v.  
3 Comcoach Corp. (In re Comcoach Corp.), 698 F.2d 571, 573-74 (2d  
4 Cir. 1983) (taking the narrow view that only creditors have  
5 standing to bring a motion for relief from the automatic stay);  
6 In re B & I Realty Co., 158 B.R. 220, 222-23 (Bankr. W.D. Wash.  
7 1993); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 175, reprinted  
8 in 1978 U.S. Code Cong. & Admin. News 5787, 6136 ("Creditors may  
9 obtain relief from the stay if their interests would be harmed by  
10 continuance of the stay.") (emphasis added).

11  
12 B. The Bankruptcy Court Did Not Abuse Its Discretion When It  
13 Granted Relief From the Automatic Stay

14 What constitutes "cause" for granting relief from the  
15 automatic stay is decided on a case-by-case basis. Christensen  
16 v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d  
17 1162, 1166 (9th Cir. 1990); see also Piombo Corp. v. Castlerock  
18 Props. (In re Castlerock Props.), 781 F.2d 159, 163 (9th Cir.  
19 1986).

20 Among factors appropriate to consider in determining whether  
21 relief from the automatic stay should be granted to allow state  
22 court proceedings to continue are considerations of judicial  
23 economy and the expertise of the state court, see MacDonald v.  
24 MacDonald (In re MacDonald), 755 F.2d 715, 717 (9th Cir. 1985),  
25 as well as prejudice to the parties and whether exclusively  
26 bankruptcy issues are involved, see Ozai v. Tabuena (In re Ozai),  
27 34 B.R. 764, 766 (9th Cir. BAP 1983).

28 As advocated by Mr. Kronemyer, the bankruptcy court applied

1 factors (the "Curtis Factors") articulated in In re Curtis, 40  
2 B.R. 795, 799-800 (Bankr. D. Utah 1984), and adopted more  
3 recently by the bankruptcy court in Truebro, Inc. v. Plumberex  
4 Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.),  
5 311 B.R. 551, 559-60 (Bankr. C.D. Cal. 2004). We agree that the  
6 Curtis factors are appropriate, nonexclusive, factors to consider  
7 in deciding whether to grant relief from the automatic stay to  
8 allow pending litigation to continue in another forum.

9         The bankruptcy court determined that the Surcharge Request  
10 constituted an existing proceeding for purposes of the Motion  
11 despite the fact that it had not been initiated by ACIC. ACIC  
12 asserted in its motion that as a surety, it had the right to  
13 participate in the Surcharge Request proceeding. We agree. ACIC  
14 has a substantial interest, as a surety whose contingent claim is  
15 being liquidated, in the Surcharge Request proceeding. It is  
16 ACIC that will have initial liability to the Leal Estate for any  
17 surcharge ordered against Mr. Kronemyer in the State Court. It  
18 is disingenuous to suggest otherwise.

19         Additionally, although stayed by an order of this Panel, the  
20 Surcharge Request was ready for prompt determination in the State  
21 Court. Thus, judicial economy weighs in favor of allowing the  
22 Surcharge Request to proceed in the State Court. Further, the  
23 Surcharge Request is unique to the guardianship proceeding, and  
24 thus squarely within the expertise of the State Court.

25         The bankruptcy court further determined that resolution of  
26 the Surcharge Request would assist the bankruptcy court in  
27 determining whether ACIC has a claim against Mr. Kronemyer.  
28 Despite the fact that ACIC's claim has since been disallowed

1 under § 502(e) (1), resolution of the Surcharge Request remains  
2 important to determining ACIC's rights in the bankruptcy context  
3 both pursuant to § 502(e) (2), and with respect to the pending  
4 Adversary Proceeding ACIC brought for a determination that its  
5 claim is excepted from Mr. Kronemyer's discharge.

6 Finally, the bankruptcy court considered and rejected  
7 Mr. Kronemyer's assertion that the Motion should be denied  
8 because the Criminal Court Judgment was preclusive as to the  
9 Surcharge Request. As noted by the bankruptcy court,  
10 Mr. Kronemyer remains free to raise preclusion defensively in the  
11 State Court with respect to the Surcharge Request. Since  
12 Mr. Kronemyer's preclusion argument raises issues that must be  
13 resolved under California state law, we conclude that the  
14 bankruptcy court did not abuse its discretion in deferring to the  
15 state court to determine the preclusive effect, if any, of the  
16 Criminal Court Judgment with respect to the Surcharge Request.  
17 Diamond v. Kolcum (In re Diamond), 285 F.3d 822, 826 (9th Cir.  
18 2002) ("In determining whether a party should be estopped from  
19 relitigating an issue decided in a prior state court action, the  
20 bankruptcy court must look to that state's law of collateral  
21 estoppel.") (citation omitted).

22 The bankruptcy court did not abuse its discretion in  
23 granting the Motion to allow the Surcharge Request to proceed  
24 before the State Court.

25  
26 C. The Bankruptcy Court Did Not Err by Including "Ancillary"  
27 Provisions in the Order

28 Mr. Kronemyer asserts that the bankruptcy court had no legal

1 authority to include two "ancillary" provisions, not requested in  
2 the Motion, in its Order.

3 One provision states that the Order "shall be binding and  
4 effective despite any conversion of this bankruptcy case to a  
5 case under any other chapter of Title 11 of the United States  
6 Code." This provision specifically was requested in the Motion.  
7 Thus, Mr. Kronemyer's argument that this provision violated his  
8 due process rights is not well taken. Further, the provision  
9 only articulates existing law. Once the automatic stay has been  
10 lifted, it is not "reimposed" if the bankruptcy case subsequently  
11 is converted to another chapter. See, e.g., British Aviation  
12 Ins. Co. v. Menut (In re State Airlines, Inc.), 873 F.2d 264,  
13 268-69 (11th Cir. 1989); In re Staff Inv. Co., 146 B.R. 256, 260  
14 (Bankr. E.D. Cal. 1993).

15 The other provision states that ACIC "is permitted to  
16 enforce its final judgment only by proceeding against  
17 [Mr. Kronemyer] as to non-estate property or earnings."  
18 Mr. Kronemyer contends that this language is tantamount to a  
19 determination that any final judgment will be nondischargeable.  
20 We disagree. The discharge order entered in the bankruptcy case  
21 will determine the scope of Mr. Kronemyer's discharge, subject to  
22 any determination by the bankruptcy court in the Adversary  
23 Proceeding. The subject provision only makes clear that ACIC  
24 cannot enforce any final judgment against assets of  
25 Mr. Kronemyer's bankruptcy estate. Since the chapter 7 trustee  
26 subsequently filed a "no asset" report, arguably there are no  
27 nonexempt estate assets, and this issue is moot.

28 We find no error in the form of the bankruptcy court's order

1 granting the Motion.

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**VI. CONCLUSION**

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The bankruptcy court did not err when it determined that ACIC had standing to bring the Motion. Nor did the bankruptcy court abuse its discretion in granting the Motion. Accordingly, We AFFIRM.

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