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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-07-1269-MoPaD
		)		
7	YEHUDA SABBAN,	)	Bk. No.	SV 05-15431-KT
		)		
8	Debtor.	)	Adv. No.	SV 05-01574-KT
		)		
9	_____	)		
		)		
10	ABDUL M. GHOMESHI,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)	<b>O P I N I O N</b>	
		)		
13	YEHUDA SABBAN,	)		
		)		
14	Appellee.	)		
		)		

Submitted Without Oral Argument  
on January 25, 2008

Filed - February 20, 2008

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

Hon. Kathleen Thompson, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: MONTALI, PAPPAS and DUNN, Bankruptcy Judges.

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1 MONTALI, Bankruptcy Judge:

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3 The debtor, an unlicensed contractor, entered into a home  
4 improvement contract with the creditor. Prior to bankruptcy, a  
5 state court entered a judgment against the debtor in the amount  
6 of \$123,500 and additionally awarded the creditor attorneys' fees  
7 in the amount of \$71,269.30. The creditor sought summary  
8 judgment from the bankruptcy court that all of the amounts  
9 awarded by the state court were nondischargeable under 11 U.S.C.  
10 § 523(a)(2)(A).<sup>1</sup> The bankruptcy court ordered that the \$123,500  
11 award to the creditor was dischargeable but that the \$71,269.30  
12 in attorneys' fees was nondischargeable. The creditor appealed;  
13 the debtor did not cross-appeal, nor did he file a responsive  
14 brief. We AFFIRM in part and REVERSE in part to correct a \$500  
15 error in drafting.

16 **I. FACTS**

17 A. The State Court Action

18 Following trial, a state court entered a judgment in the  
19 amount of \$123,500 in favor of appellant Abdul M. Ghomeshi  
20 ("Creditor") against appellee Yehuda Sabban ("Debtor"). The  
21 state court also stated that Creditor was entitled to recover  
22 attorneys' fees, which it later fixed at \$71,269.30. The state  
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24 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as  
27 enacted and promulgated prior to the effective date of The  
28 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23.

1 court also made certain factual findings which the bankruptcy  
2 court later adopted under the doctrine of issue preclusion.<sup>2</sup> No  
3 party has appealed the bankruptcy court's application of issue  
4 preclusion principles, thus this recitation of facts incorporates  
5 the findings of the state court as adopted by the bankruptcy  
6 court.

7 Debtor held an eighty percent interest in a general  
8 partnership, Pacific Coast Creations ("Pacific"), created to  
9 provide home improvement work. Even though neither Debtor nor  
10 Pacific were licensed in California, Debtor represented himself  
11 and Pacific as licensed contractors.

12 A representative of Pacific contacted Creditor soliciting  
13 home improvement work. Creditor entered into a series of written  
14 and oral contracts with Debtor and Pacific, which served as the  
15 general contractor for the remodeling of Creditor's home.  
16 Creditor testified that he would not have hired Pacific if he had  
17 known the truth about the unlicensed status of Pacific and  
18 Debtor.

19 The state court specifically found that Creditor acted in  
20 reliance on Debtor's representations that Pacific was licensed  
21 and was thus induced into entering into the contracts with  
22 \_\_\_\_\_

23 <sup>2</sup> Issue preclusion, often called "collateral estoppel,"  
24 forecloses relitigation of matters that have already been decided  
25 in prior proceedings. Paine v. Griffin (In re Paine), 283 B.R.  
26 33, 39 (9th Cir. BAP 2002); see also Harmon v. Kobrin (In re  
27 Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001) (applying California  
28 law), quoting Lucido v. Superior Court, 51 Cal.3d 335, 341; 272  
Cal.Rptr. 767, 769; 795 P.2d 1223, 1225 (1990); Christopher  
Klein, et al., Principles of Preclusion & Estoppel in Bankruptcy  
Cases, 79 Am. Bankr. L.J. 839, 852 (2005). Issue preclusion  
applies in nondischargeability proceedings. Grogan v. Garner,  
498 U.S. 279, 284-85 (1991).

1 Pacific. The state court also found that when Debtor represented  
2 to Creditor that Pacific was a licensed contractor, he "knew it  
3 was a false representation, a fraudulent representation, and a  
4 false statement knowingly made."

5 Creditor paid \$123,000 to Pacific and Debtor while and after  
6 the improvement work was performed.<sup>3</sup> Debtor in turn paid  
7 \$129,217.95 to licensed subcontractors and other providers of  
8 goods and services for the benefit of Creditor.

9 After "considerable problems developed" between Creditor and  
10 Debtor, Creditor sued for breach of contract, fraud and  
11 violations of California Business and Professions Code section  
12 7160 ("§ 7160") and California Business and Professions Code  
13 section 7031(b) ("§ 7031(b)"). Creditor eventually dismissed the  
14 breach of contract and fraud causes of action, and trial  
15 proceeded on the allegations that Debtor had violated § 7160 and  
16 § 7031(b).

17 Section 7160 provides that any person who is induced to  
18 contract for a work of home or other improvement "in reliance on  
19 false or fraudulent representations or false statements knowingly  
20 made" may recover a penalty of \$500, plus reasonable attorneys'  
21 fees "in addition to any damages sustained by him by reason of  
22 such statements or representations made by the contractor or  
23 solicitor." Cal. Bus. & Prof. Code § 7160. The state court  
24 awarded Creditor \$500 plus attorneys' fees under this section,  
25 but specifically held that the \$123,000 paid by Creditor, and  
26 which Creditor sought to recover pursuant to § 7031(b), did not

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27  
28 <sup>3</sup> The state court found that Creditor paid \$123,000 to the  
"defendants." The defendants included Debtor and Julian Berariu,  
individually and doing business as Pacific.

1 constitute damages for the purposes of § 7160. In other words,  
2 the state court found that Creditor did not sustain such damages  
3 "by reason of such statements or representations made by the  
4 contractor or solicitor." Cal. Bus. & Prof. Code § 7160.

5 Even though the state court found that Creditor did not  
6 suffer actual damages for purposes of the fraud provisions of  
7 § 7160, it nonetheless awarded Creditor \$123,000 "in the nature  
8 of disgorgement" pursuant to § 7031(b). Section 7031 prohibits  
9 unlicensed contractors from maintaining actions to recover  
10 compensation and additionally permits a party who has utilized  
11 the services of an unlicensed contractor "to recover all  
12 compensation paid" to the contractor. The statute does not on  
13 its face limit disgorgement only to those who have been defrauded  
14 by an unlicensed contractor. Instead, as the California Supreme  
15 Court has held, the statutory prohibition against compensation to  
16 unlicensed contractors "operates even where the person for whom  
17 the work was performed knew the contractor was unlicensed."  
18 Hydrotech Sys, Ltd. v. Oasis Waterpark, 52 Cal.3d 988, 997; 803  
19 P.2d 370, 376 (1991).

20 B. The Nondischargeability Action

21 Debtor filed his chapter 7 case on August 8, 2005, and  
22 Creditor filed his complaint to determine dischargeability on  
23 November 14, 2005. Creditor filed a motion for summary judgment.  
24 Debtor's opposition to the motion included a cross-motion for  
25 summary judgment. The bankruptcy court issued a tentative ruling  
26 stating that it would grant summary judgment in favor of Creditor  
27 declaring the full amount of the state court judgment (the  
28 \$123,000 awarded under § 7031(b) plus the \$500 penalty and

1 attorneys' fees awarded under § 7160's fraud provisions)  
2 nondischargeable.

3 At the initial hearing on the motion for summary judgment,  
4 counsel for Debtor argued that the court had erred in its  
5 tentative ruling by treating the \$123,000 award under § 7031(b)  
6 as a claim for money, property, services, or credit obtained by  
7 fraud under section 523(a)(2)(A), particularly when the state  
8 court specifically held that Creditor did not suffer damages in  
9 that amount as a result of Debtor's fraud (under § 7160) in  
10 procuring the contracts. The court therefore permitted the  
11 parties to submit supplemental briefs on the issue of whether the  
12 § 7031(b) award of \$123,000 would be nondischargeable under Cohen  
13 v. De La Cruz, 523 U.S. 213 (1998).

14 At a subsequent hearing the court modified its tentative  
15 ruling and ordered that the amount awarded under § 7031(b) was  
16 dischargeable. The court noted that § 7031(b) is "a regulatory  
17 statute about status" and "not a tort statute about misconduct."  
18 The bankruptcy court agreed with the state court that the  
19 \$123,000 in damages did not result from Debtor's fraud or  
20 misrepresentation. The court did find that the \$500 penalty and  
21 the attorneys' fees in excess of \$71,000 awarded under § 7160  
22 were nondischargeable.<sup>4</sup>

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24 <sup>4</sup> In directing counsel how to word the order, the court  
25 inadvertently included the \$500 penalty in the dischargeable  
26 debt. The court had specifically held that the penalty was  
27 nondischargeable, but the state court's judgment in the amount of  
28 \$123,500 included the \$123,000 awarded under § 7031(b) and the  
\$500 awarded under § 7160. Under the bankruptcy court's own  
ruling, the latter portion should not have been included in the  
discharged amount.

(continued...)

1 On June 20, 2007, the bankruptcy court entered a stipulated  
2 order on Creditor's motion for summary judgment, providing that  
3 the portion of the state court judgment (\$123,500) attributable  
4 to § 7031(b) was subject to discharge and that attorneys' fees in  
5 the amount of \$71,269.30 awarded under § 7160 were  
6 nondischargeable.<sup>5</sup> Creditor filed a timely notice of appeal on  
7 June 29, 2007.

## 8 II. JURISDICTION

9 On October 3, 2007, the clerk of this panel entered an order  
10 noting that the order on the motion for summary judgment is not a  
11 separate final judgment itself, citing Casey v. Albertson's,  
12 Inc., 362 F.3d 1254, 1256 (9th Cir. 2004). The clerk ordered the  
13 parties to obtain a separate judgment no later than October 17,  
14 2007, or the separate document requirement would be deemed waived  
15 pursuant to Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978).  
16 Neither Creditor nor Debtor obtained a separate judgment by the  
17 deadline, so the separate document requirement is deemed waived.

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19 \_\_\_\_\_  
20 <sup>4</sup>(...continued)

21 Despite this error, Creditor prepared and submitted an order  
22 which its counsel "approved as to form and content" and which  
23 included the \$500 penalty in the dischargeable portion. Creditor  
24 did not request the bankruptcy court to correct this error and  
25 has not raised this error on appeal. Normally we would not  
26 address or rectify it in this appeal. Golden v. Chicago Title  
27 Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002)  
28 (issues not raised at the trial court will not be considered for  
the first time on appeal; arguments not specifically and  
distinctly made in an appellant's opening brief are waived).  
However, this was plainly a drafting error, and while no doubt  
little consolation for Creditor, we will reverse as to the \$500  
penalty.

<sup>5</sup> Even though the title of the order refers only to the  
Creditor's motion for summary judgment, the portion of the order  
discharging the § 7031(b) disgorgement award is actually a grant  
of the Debtor's cross-motion for summary judgment.

1 See Casey, 362 F.3d at 1256 (party waived separate judgment rule  
2 where district court had granted summary judgment in a 7-page  
3 civil minute order that concluded "IT IS SO ORDERED" even though  
4 no separate judgment was entered).

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
6 §§ 1334 and 157(b) (2) (I) and we have jurisdiction under 28 U.S.C.  
7 § 158.

### 8 **III. ISSUE**

9 Did the bankruptcy court err in holding that the state  
10 court's award of \$123,000 to Creditor under § 7031(b) was not  
11 excepted from discharge pursuant to section 523(a) (2) (A)?

### 12 **IV. STANDARD OF REVIEW**

13 We review de novo the bankruptcy court's ruling on a motion  
14 for summary judgment. Tobin v. San Souci Ltd. P'ship (In re  
15 Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001); Woodworking  
16 Enters., Inc. v. Baird (In re Baird), 114 B.R. 198, 201 (9th Cir.  
17 BAP 1990).

### 18 **V. DISCUSSION**

19 Section 523(a) (2) (A) excepts from discharge any debt for  
20 money, property, services, or an extension, renewal, or  
21 refinancing of credit, to the extent obtained by false pretenses,  
22 a false representation, or actual fraud. 11 U.S.C.

23 § 523(a) (2) (A). In order to establish that a debt is  
24 nondischargeable under section 523(a) (2) (A), a creditor must  
25 establish five elements by a preponderance of the evidence:

26 (1) misrepresentation, fraudulent omission or deceptive  
27 conduct by the debtor; (2) knowledge of the falsity or  
28 deceptiveness of his statement or conduct; (3) an  
intent to deceive; (4) justifiable reliance by the  
creditor on the debtor's statement or conduct; and (5)



1 damage to the creditor proximately caused by its  
2 reliance on the debtor's statement or conduct.

3 Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman),  
4 234 F.3d 1081, 1085 (9th Cir. 2000).

5 Because an exception to discharge impairs a debtor's fresh  
6 start, section 523(a)(2)(A) "should not be read more broadly than  
7 necessary to effectuate policy, e.g., preventing debtors from  
8 avoiding debts incurred by fraud or other culpable conduct."  
9 Hayhoe v. Cole (In re Cole), 226 B.R. 647, 654 (9th Cir. BAP  
10 1998).

11 The limits on the dischargeability of debts contained  
12 in section 523 should be construed strictly against  
13 creditors and in favor of debtors. E.g., Gleason v.  
14 Thaw, 236 U.S. 558, 562, 35 S.Ct. 287, 289, 59 L.Ed.  
15 717 (1915) ("[I]n view of the well-known purposes of  
the [bankruptcy laws], exceptions to the operations of  
a discharge should be confined to those plainly  
expressed."); In re Houtman, 568 F.2d 651, 656 (9th  
Cir. 1978).

16 Klapp v. Landsman (In re Klapp), 706 F.2d 998, 999 (9th Cir.  
17 1983); see also Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154  
18 (9th Cir. 1992); Beaupied v. Chang (In re Chang), 163 F.3d 1138,  
19 1140 (9th Cir. 1998).

20 At issue here is whether the state court's award of \$123,000  
21 to Creditor pursuant to § 7031(b) constitutes damages  
22 "proximately caused" by Creditor's reliance on Debtor's  
23 misrepresentation regarding his unlicensed status. More  
24 particularly, the question is whether in light of Cohen v. De La  
25 Cruz, the § 7031(b) award is a debt for money "obtained by" false  
26 pretenses, a false representation, or actual fraud under section  
27 523(a)(2)(A). Given that we are to construe strictly the  
28 exceptions to discharge and that the exception under section

1 523(a)(2)(A) is limited to debts arising from a debtor's  
2 fraudulent conduct, we conclude that the § 7031(b) award is  
3 dischargeable.

4 In Cohen v. De La Cruz, 523 U.S. at 221, the Supreme Court  
5 held that the fraud exception to discharge contained in section  
6 523(a)(2)(A) "prohibit[s] the discharge of any liability arising  
7 from a debtor's fraudulent acquisition of money, property, etc.,  
8 including an award of treble damages for the fraud." Id.  
9 (emphasis added). The debtor landlord in De La Cruz had charged  
10 rents in violation of a rent control ordinance, and the  
11 creditors/tenants asserted that the rent payments had been  
12 obtained by "actual fraud" and were thus nondischargeable under  
13 section 523(a)(2)(A). The tenants also sought treble damages and  
14 attorneys' fees pursuant to the New Jersey Consumer Fraud Act.  
15 Id. at 215.

16 The debtor landlord argued that the treble damages were not  
17 encompassed by section 523(a)(2)(A) because they did not  
18 represent money or services that the debtor "obtained" from the  
19 creditors. The Supreme Court disagreed, stating that the "most  
20 straightforward reading of [section] 523(a)(2)(A) is that it  
21 prevents discharge of 'any debt' respecting 'money, property,  
22 services, or . . . credit' that the debtor has fraudulently  
23 obtained, including treble damages assessed on account of the  
24 fraud." Id. at 218 (emphasis added).

25 While the Supreme Court held that a debtor need not "obtain"  
26 or receive money or property fraudulently in order for a creditor  
27 to prevail under section 523(a)(2)(A), it repeatedly acknowledged  
28 that the liability must "arise from" the fraud to be

1 nondischargeable.<sup>6</sup> All such damages, including statutory  
2 punitive damages "assessed on account of the fraud," escape  
3 discharge. Here, however, the § 7031(b) damages were not  
4 "assessed on account" of or flow from Debtor's fraud; in fact,  
5 the state court held that Creditor suffered no compensatory  
6 damages as a result of Debtor's fraudulent representation.

7 The statutory disgorgement did not require a showing of  
8 fraud; section 7031 is neutral as to fraudulent intent and was  
9 enacted to deter unlicensed contractors from offering their  
10 services for pay. Hydrotech Systems, 803 P.2d at 374.  
11 Creditor could have been awarded the \$123,000 disgorgement even  
12 if he had known before entering the home improvement contract

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13  
14 <sup>6</sup> The Supreme Court stated:

15 Moreover, the phrase "to the extent obtained by" in  
16 [section] 523(a)(2)(A), as the Court of Appeals  
17 recognized, does not impose any limitation on the  
18 extent to which "any debt" arising from fraud is  
19 excepted from discharge. "[T]o the extent obtained by"  
20 modifies "money, property, services, or . . . credit" -  
21 not "any debt" - so that the exception encompasses "any  
22 debt . . . for money, property, services, or . . .  
23 credit, to the extent [that the money, property,  
24 services, or . . . credit is] obtained by" fraud. The  
25 phrase thereby makes clear that the share of money,  
26 property, etc., that is obtained by fraud gives rise to  
27 a nondischargeable debt. Once it is established that  
28 specific money or property has been obtained by fraud,  
however, "any debt" arising therefrom is excepted from  
discharge.

25 Id. at 218-19 (emphasis added). The Supreme Court thus rejected  
26 the debtor's argument that treble damages assessed on account of  
27 fraud were dischargeable because the statutory damages did not  
28 represent the money or property "obtained by" the fraud. In so  
holding, it clarified that "'any debt' arising therefrom" (i.e.,  
the fraud) is excepted from the discharge. The Supreme Court did  
not open the door for damages not arising from fraud to be  
excepted from discharge.

1 that Debtor and Pacific were unlicensed. Id. at 376. The  
2 disgorgement award was thus unrelated to Debtor's fraud, and  
3 could have been granted in the absence of justifiable reliance,  
4 another essential element of section 523(a)(2)(A).

5 As a consequence, the award did not "arise from" Debtor's  
6 fraud and Cohen v. De La Cruz is distinguishable.<sup>7</sup> Creditor has  
7 not demonstrated that the amount represents damages he incurred  
8 as a result of Debtor's fraud, a requisite for the application of  
9 section 523(a)(2)(A).<sup>8</sup> Slyman, 234 F.3d at 1085. Therefore, the  
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11 <sup>7</sup> Other cases declaring statutory damages nondischargeable  
12 are similarly distinguishable. For example, in Albarran v. New  
13 Form, Inc. (In re Albarran), 347 B.R. 369 (9th Cir. BAP 2006),  
14 and Star's Edge, Inc. v. Braun (In re Braun), 327 B.R. 447  
15 (Bankr. N.D. Cal. 2005), the courts held that statutory damages  
16 for copyright infringement were nondischargeable, as those  
17 damages are the debt resulting from a debtor's willful and  
malicious injury under section 523(a)(6). Here, however, the  
\$123,000 statutory damages imposed under § 7031(b) did not result  
from debtor's fraud or misrepresentation, and thus fell outside  
the scope of section 523(a)(2)(A).

18 <sup>8</sup> Courts have excepted debts from discharge where the  
19 debtor has misrepresented the status of his or her professional  
20 license, but only to the extent the creditors were actually  
21 injured because of the misrepresentations. See Sinha v. Clark  
22 (In re Clark), 330 B.R. 702 (Bankr. C.D. Ill. 2005) (applying  
23 section 523(a)(2)(A) to except from discharge amounts paid by  
24 homeowners to correct construction defects caused by contractor  
25 who had misrepresented his licensing status, but granting  
26 discharge to other portions of state court judgment against  
27 debtor/contractor); McCain v. Fuselier (In re Fuselier), 211 B.R.  
28 540 (Bankr. W.D. La. 1997) (finding that creditors suffered  
damages from debtor's substandard work in constructing home and  
that creditors would not have hired debtor but for his  
misrepresentations as to his licensing status and expertise,  
court excepted damages from discharge under section 523(a)(2)(A);  
McDaniel v. Border (In re McDaniel), 181 B.R. 883 (Bankr. S.D.  
Tex. 1994) (excepting from discharge damages arising from defects  
in architectural work where architect had misrepresented the  
status of his license).

(continued...)

1 bankruptcy court did not err in holding that such damages fall  
2 outside the ambit of the fraud exception to discharge.<sup>9</sup>

3 **VI. CONCLUSION**

4 Because the \$123,000 disgorgement of compensation under  
5 § 7031(b) did not arise or flow from Debtor's fraudulent conduct,  
6 the bankruptcy court correctly held that section 523(a)(2)(A) did  
7 not apply to that debt. We therefore AFFIRM the determination  
8 that the award of \$123,000 was dischargeable, but REVERSE as to  
9 the determination that the \$500 penalty was dischargeable.

10  
11 PAPPAS, Bankruptcy Judge, dissenting:

12  
13 I must dissent.

14 The debtor deceived Creditor. The state court found that

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<sup>8</sup>(...continued)

17 Unlike here, none of these courts found an absence of actual  
18 damage to the creditor as a result of the debtor's fraud. None  
19 of these cases involved statutory disgorgement of compensation  
20 paid to an unlicensed contractor notwithstanding the absence of  
21 actual injury or the absence of fraud. As noted in 5 Bruner and  
22 O'Connor on Construction Law § 16:22 (updated May 2007),  
California is one of few jurisdictions that has enacted a statute  
authorizing the disgorgement of compensation by unlicensed  
contractors in the absence of actual damages.

23 <sup>9</sup> We offer no defense of Debtor's mischief, described so  
24 emphatically by Judge Pappas in his dissent. The disagreement  
25 with him is whether we are to focus solely on Debtor's conduct,  
26 as he does, or on the unequivocal facts in the record, viz., the  
27 determination of the state court, as we do. Judge Pappas says  
28 the fraud taints the entire relationship of the parties,  
including whatever economic consequences follow. We say the  
Supreme Court instructs us to find damages resulting from the  
fraud, and to refuse to discharge all that follow. Here we are  
bound by the determination of the state court that there were  
none.

1 the debtor employed "a false representation, a fraudulent  
2 representation, and a false statement knowingly made . . ." about  
3 the status of his licensure as a contractor to induce Creditor to  
4 enter into the construction contracts. Because his conduct was  
5 fraudulent, under the time-tested policies of the Bankruptcy Code  
6 and Supreme Court case law, all debts that debtor owes to  
7 Creditor arising from that fraudulent relationship must be  
8 excepted from his discharge in bankruptcy under § 523(a)(2)(A).  
9 That includes the debtor's statutory liability to Creditor under  
10 Cal. Bus. & Prof. Code § 7031(b).

11 Our analysis should be driven by the facts, not concerns for  
12 a hypothetical "innocent" unlicensed contractor. Here, the  
13 debtor is precluded from contesting that he lied to Creditor,  
14 telling him his business held a state contractor's license; that,  
15 solely in reliance upon this false representation, Creditor was  
16 induced to contract with the debtor, and thus paid him \$123,000;  
17 and that, at the time of contracting, the debtor knew his  
18 statements to Creditor were false. These facts unmistakably  
19 describe fraud, and based upon these findings, the state court  
20 ordered the debtor to repay all the monies he received from  
21 Creditor, as required by the California statute,<sup>10</sup> and in  
22 addition, to pay a statutory penalty, and to pay Creditor's  
23 attorneys fees.

24 The debtor's attempt to discharge Creditor's claim should  
25 have been rebuffed by the bankruptcy court because "[t]he  
26 Bankruptcy Code has long prohibited debtors from discharging

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27  
28 <sup>10</sup> In enforcing § 7031(b), the state court noted it was  
implementing the California legislature's goal of "protecting the  
homeowner" by providing a "stimulus" to contractors to obey the  
law.

1 liabilities incurred on account of their fraud, embodying a basic  
2 policy animating the Code of affording relief only to an 'honest  
3 but unfortunate debtor.'" Cohen v. De La Cruz, 523 U.S. 213, 217  
4 (1998), quoting Grogan v. Garner, 498 U.S. 279, 287 (1991). We  
5 recently reiterated this fundamental policy. Albarran v. New  
6 Form, Inc. (In re Albarran), 347 B.R. 369, 379 (9th Cir. BAP  
7 2006) (noting, in deeming statutory damages for copyright  
8 infringement nondischargeable, that "only the 'honest but  
9 unfortunate' debtor is entitled to an entirely unencumbered fresh  
10 start.")

11 To implement this fundamental bankruptcy policy, Cohen  
12 instructs that § 523(a)(2)(A) be read in a "straightforward"  
13 fashion, to prevent discharge of any debt respecting money,  
14 property, services or credit that the debtor has fraudulently  
15 obtained. 523 U.S. at 218. According to the Court, this  
16 discharge exception "makes clear" that "[o]nce it has been  
17 established that specific money or property has been obtained by  
18 fraud, . . . 'any debt' arising therefrom is excepted from  
19 discharge." Id. In other words, if a debt "results from" or is  
20 "traceable to" fraud, it can not be discharged in bankruptcy.

21 Id.<sup>11</sup>

22 \_\_\_\_\_  
23 <sup>11</sup> Indeed, in contrast to the approach taken by the  
24 majority, our court of appeals has endorsed an expansive reading  
25 of Cohen. For example, in a slightly different context, the  
26 court indicated that it is not necessary for a debtor to have  
27 received any benefit from his or her fraudulent conduct for the  
28 resulting debt to be excepted from discharge in bankruptcy.  
Muegler v. Bening, 413 F.3d 980, 983-84 (9th Cir. 2005) citing  
with approval, Deodati v. M.M. Winkler & Assoc. (In re M.M.  
Winkler & Assoc.), 239 F.3d 746, 749 (5th Cir. 2001) (observing  
that, as interpreted by Cohen, § 523(a)(2)(A) must be read to  
"protect fraud victims rather than debtors."), and Pleasants v.  
(continued...)

1           The majority reasons that because even an innocent  
2 unlicensed contractor is liable to a homeowner in California to  
3 disgorge payments under § 7031(b), this debtor should also get a  
4 pass. While acknowledging Cohen, the majority relies upon cases  
5 which, while not dealing precisely with § 523(a)(2)(A), and in  
6 some instances pre-dating Cohen, advise that the Code's  
7 exceptions to discharge should be interpreted "narrowly" or  
8 "strictly."

9           We should decline to employ a general rule of construction  
10 in favor of the specific interpretation given the same statute at  
11 issue in this appeal by Cohen. Here, the facts show that but for  
12 the debtor's fraud, Creditor would have never hired nor paid him.  
13 Plainly, the debtor's responsibility to disgorge payments to  
14 Creditor is directly traceable to his deception.

15           At bottom, the majority aligns with a debtor who, as to his  
16 dealings with Creditor, was not honest. We should instead  
17 protect the victim of the debtor's fraud. Cohen, 523 U.S. at 223  
18 (observing that it is "unlikely that Congress . . . would have  
19 favored the interest in giving perpetrators of fraud a fresh  
20 start over the interest of protecting victims of fraud."),  
21 quoting Grogan, 498 U.S. at 287. Cohen admonishes that all  
22 financial liability stemming from a fraudulent act, whether it be  
23 compensatory, punitive or statutory, is excepted from discharge.

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25           <sup>11</sup>(...continued)  
26 Kendrick (In re Pleasants), 219 F.3d 372, 375 (4th Cir. 2000).  
27 This holding should assuage the majority's concerns that the  
28 \$123,000 awarded to Creditor did not represent "compensatory  
damages." As Cohen underscores, § 523(a)(2) excepts "any  
liability" arising from a debtor's fraud, "including treble  
damages, attorney's fees, and other relief that may exceed the  
value obtained by the debtor." Cohen, 523 U.S. at 223(emphasis  
added).



1 Since it is undisputed that this debtor is not an honest,  
2 unfortunate one, he is undeserving of a discharge of this debt.  
3 I therefore dissent.

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