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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	CC-06-1374-BPaMk
)		CC-06-1395-BPaMk
LORBER INDUSTRIES OF)		(Cross-Appeals)
CALIFORNIA,)		
)	Bk. No.	LA 06-10399 TD
Debtor.)		

CALIFORNIA SELF-INSURERS'
SECURITY FUND,
Appellant/Cross-Appellee,

v.)

O P I N I O N

LORBER INDUSTRIES OF
CALIFORNIA,
Appellee/Cross-Appellant,

v.)

OFFICIAL COMMITTEE OF
UNSECURED CREDITORS,
Appellee/Cross-Appellee.

Argued and Submitted on May 17, 2007
at Pasadena, California

Filed - July 16, 2007

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Before: BRANDT, PAPPAS and MARKELL,¹ Bankruptcy Judges.

¹ Hon. Bruce A. Markell, Bankruptcy Judge for the
District of Nevada, sitting by designation.

1 BRANDT, Bankruptcy Judge:

2
3 Post-petition, the chapter 11² debtor, which had self-insured
4 its state statutory workers' compensation obligations, defaulted on
5 those obligations. The state fund established by statute to make
6 the defaulting debtor's compensation payments objected to the
7 debtor's plan, arguing that its claim was entitled to priority as
8 an excise tax under § 507(a)(8)(E). The bankruptcy court overruled
9 the objection, concluding that the debtor's reimbursement
10 obligation was an excise tax, but that the transaction date was
11 when the debtor was granted self-insured status, more than a decade
12 pre-petition. The fund appealed the denial of priority, and the
13 debtor cross-appealed the determination that the obligation was an
14 excise tax.

15 Our analysis differs from the bankruptcy court's: we agree
16 that the debtor's duty to reimburse the fund is an excise tax, but
17 hold that the event which gives rise to the fund's obligation to
18 make compensation payments to injured workers is the transaction on
19 which it is imposed. Here, that was the debtor's post-petition
20 default, outside of the three year pre-petition period for which
21 the Code grants priority for excise taxes. We AFFIRM.

22
23
24
25 ² Absent contrary indication, all "Code," chapter and
26 section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1330 as amended by the Bankruptcy Abuse Prevention and Consumer
28 Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23.
All "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and all "FRCP" references are to the Federal Rules of
Civil Procedure. "CLC" refers to the California Labor Code.

1 to exceed \$1 million in the aggregate); and

2 3. . . . to continue using its pre-petition Workers'
3 Comp Program bank account at U.S. Bank for the purposes
4 of administering the Workers' Comp Program.

4 Order Authorizing Debtor To Pay Prepetition Workers' Compensation
5 Claims . . . , 22 February 2006.

6 Lorber paid its claims while operating post-petition, but
7 ceased operating and defaulted on its self-insurance obligations
8 after about three months, becoming an "insolvent self-insurer."
9 CLC § 3741(c). As indicated in the Director's 28 April 2006
10 letter, Exhibit A to the Fund's amended proof of claim:

11 Lorber Industries of California was self-insured . . .
12 from July 1, 1992 through its closure of operations on
13 May 1, 2006. . . . [I]t would cease operations on May 1,
14 2006 and default on [its] existing workers' compensation
15 liabilities. . . . [Lorber] has fallen under the
16 provisions of Labor Code 3701.5, and its remaining self-
17 insured workers' compensation liabilities will need to be
18 taken over by the Self Insurers Security Fund.

16 The Fund "assume[d] the workers' compensation obligations of
17 [Lorber as] an insolvent self-insurer" under CLC § 3743. Lorber,
18 357 B.R. at 623. Only then did the Fund pursue its right to draw
19 on Lorber's security – the letter of credit – under § 3701.5(c),
20 and on 9 May 2006 filed a proof of claim seeking reimbursement for
21 workers' compensation obligations arising from pre-petition
22 injuries suffered by Lorber's employees or former employees. The
23 claim is for the amounts the Fund expects to pay to workers injured
24 during the three years pre-petition, to the extent that sum exceeds
25 the letter of credit, in an unknown amount. The Fund filed an
26 amended proof of claim on 25 October 2006, asserting a net priority
27 claim in the amount of its estimated future liability for assumed
28 claims and related expenses after application of the security.

1 3. The Plan and the Fund's Objection. Lorber's first
2 amended plan treats the Fund's claim as a general unsecured claim.
3 The Fund objected to confirmation, arguing that its claim is for an
4 excise tax entitled to priority under § 507(a)(8)(E)(ii). That
5 section provides:

6 (a) The following expenses and claims have priority in
7 the following order:

8 (8) Eighth, allowed unsecured claims of
9 governmental units, only to the extent that
10 such claims are for-

11 (E) an excise tax on-

12 . . .

13 (ii) . . . a transaction occurring during the
14 three years immediately preceding the date of
15 the filing of the petition[.]

16 The bankruptcy court issued its decision after a contested hearing.
17 The court engaged in a two-step analysis, considering first whether
18 the Fund's claim could be classified as an excise tax. The
19 bankruptcy court initially applied the four-part test of In re
20 Lorber Indus. of California, Inc., 675 F.2d 1062, 1066 (9th Cir.
21 1982), and the additional test from In re George, 361 F.3d 1157
22 (9th Cir. 2004), concluding the claim met the criteria for an
23 excise tax. Lorber, 357 B.R. at 623.

24 The second issue was when the transaction occurred. The
25 bankruptcy court held that the critical event was the date the
26 debtor was granted self-insured status:

27 Thus, under the logic of George, it seems that the
28 relevant transaction in this case would be when the
Debtor applied for and was granted self-insured status.
Because this occurred in 1992, the Fund's claim would not
fall within the 'three years immediately preceding the
date of filing of the petition.'

1 Id. at 624. The bankruptcy court overruled the Fund's objection,
2 entering its order on 27 October 2006. The Fund timely appealed
3 the order on the transaction issue (No. CC-06-1371) and Lorber
4 timely cross-appealed the order on the excise tax issue (No. CC-06-
5 1395). We heard both in a single argument.

6 Meanwhile, Lorber's first amended plan had been confirmed by
7 order entered 23 October 2006, with an effective date of 16 March
8 2007. We granted a limited stay pending these appeals, precluding
9 payment of claims junior to priority claims.

10 11 **II. JURISDICTION**

12 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334(b)
13 and § 157(b)(1) and (2)(B) and (L), and we do under 28 U.S.C.
14 § 158(a)(1) and (c).

15 16 **III. ISSUES**

- 17 A. Whether the plan confirmation moots this appeal;
18 B. Whether, under § 507(a)(8)(E)(ii), the Fund's claim is an
19 "excise tax"; and, if so,
20 C. What was the "transaction date"?

21 22 **IV. STANDARD OF REVIEW**

23 We review conclusions of law, including the bankruptcy court's
24 interpretation of the Code, de novo. In re Staffer, 262 B.R. 80,
25 82 (9th Cir. BAP 2001), aff'd, 306 F.3d 967 (9th Cir. 2002); In re
26 Pardee, 218 B.R. 916, 919 (9th Cir. BAP 1998), aff'd, 193 F.3d 1083
27 (9th Cir. 1999).

1 **V. DISCUSSION**

2 A. Mootness?

3 Lorber argues in its reply brief that this appeal is moot, as
4 a liquidating plan has been confirmed and the effective date has
5 passed. The Fund filed a motion for limited stay pending appeal,
6 which the bankruptcy court denied. But on 22 March 2007 we granted
7 a temporary stay, providing in part:

8 A temporary stay of distributions to any creditors
9 junior in priority to claims under 11 U.S.C. § 507(a) (8)
10 is hereby ORDERED GRANTED in order to maintain the status
11 quo while the Panel considers the appellant's motion for
stay pending appeal and the opposition that appellee has
indicated it intends to file.

12 The temporary stay remains in effect.

13 Further, the bankruptcy court's docket indicates that on 25
14 April 2007 the parties (along with the Liquidating Trustee)
15 stipulated that:

16 (i) even if the Fund prevails in the pending appeal,
17 . . . only the lesser of 10% of such claim or \$250,000
will be treated as a priority claim under the Plan; [and]
18 (ii) the balance of any allowed claim will be treated as
a general unsecured claim under the Plan[.]

19 Notice of Motion and Motion for Order Approving
20 Stipulation . . . 2:15-19. The bankruptcy court approved the
21 stipulation on 24 May 2007.

22 Accordingly, since our decision might affect creditor
23 distributions under the plan, the appeal is not moot.

24
25 B. Excise Tax?

26 We begin with the cross appeal: is the Fund's claim for an
27 "excise tax"? The Code grants eighth-tier priority status to
28 allowed unsecured claims of governmental units for excise taxes on

1 transactions occurring during the three years immediately preceding
2 date of bankruptcy petition filing. § 507(a)(8)(E).

3 The Code does not define "excise tax," and state law labels
4 are not binding in the determination. In re Camilli, 94 F.3d 1330,
5 1331 (9th Cir. 1996). Rather, whether a government exaction is a
6 tax for bankruptcy priority purposes is a matter of federal law,
7 and the court is to engage in a functional examination. See City
8 of New York v. Feiring, 313 U.S. 283, 285 (1941). Further, § 507
9 priority is to be strictly construed: the Supreme Court recently
10 held that premiums owed by an employer to a workers' compensation
11 carrier do not fit within § 507(a)(5) (for contributions to an
12 employee benefit plan), noting that "preferential treatment of a
13 class of creditors is in order only when clearly authorized by
14 Congress." Howard Delivery Service, Inc. v. Zurich American Ins.
15 Co., ___ U.S. ___, 126 S. Ct. 2105, 2109 (2006) (citation omitted).

16 Lorber, 675 F.2d 1062, decided under the Bankruptcy Act,³ is
17 the beginning point of this analysis: the Ninth Circuit held that
18 charges for sewer services were "user fees," not excise taxes, and
19 adopted a four-part test to determine whether a governmental
20 exaction is a tax. For bankruptcy purposes, an excise tax is:

- 21 (a) An involuntary pecuniary burden, regardless of name,
22 laid upon individuals or property;
- 23 (b) Imposed by, or under authority of the legislature;
- 24 (c) For public purposes, including the purposes of
25 defraying expenses of government or undertakings
26 authorized by it;

27 ³ Repealed by Bankruptcy Reform Act of 1978, P.L. 95-598
28 (Nov. 6, 1978), which replaced the Bankruptcy Act with the
Bankruptcy Code.

1 (d) Under the police or taxing power of the state.

2 Id. at 1066.

3 Each of the four Lorber elements is met here. All California
4 employers must either insure or self-insure their workers'
5 compensation obligations, and they must participate in the system.
6 CLC § 3700 and 3701. The legislature imposed the mandate for the
7 public purpose of ensuring that employees are adequately insured by
8 a solvent company. See Tucci v. Club Mediterranee, S.A., 107 Cal.
9 Rptr. 2d 401, 408 (Cal. Ct. App. 2001). The state's authority for
10 the scheme is expressly derived from its police power. CLC § 3201.

11 But that does not end the inquiry: in Camilli, the Ninth
12 Circuit looked to CLC § 3717(a), which applies to uninsured
13 employers, and followed the Sixth Circuit's analysis in its two In
14 re Suburban Motor Freight cases, 998 F.2d 338 (6th Cir. 1993) and
15 36 F.3d 484, 488 (6th Cir. 1994). Those cases examined the
16 differences between premium payments due from subscribers and
17 reimbursement obligations arising in connection with a self-
18 insurer's failure to pay claims, finding the former was an excise
19 tax and the latter (because it was not the sole source of
20 compensation) was not. The court found that a claim by the Arizona
21 fund was an excise tax under § 507, because the Arizona fund
22 carries its statutory burden alone: "there are no private
23 creditors with claims similar to [the Arizona fund's]"
24 Camilli, 94 F.3d at 1334.

25 George came along several years later. The Georges were
26 California employers whose employee was injured on the first day of
27 his job. Because the Georges were not self-insured, and failed to
28 purchase workers' compensation insurance, the employee's injury was

1 not covered. The injured employee had already been compensated by
2 the California Uninsured Employers Fund, which filed a priority
3 claim for excise tax under § 507 in the Georges' chapter 7
4 bankruptcy. The George court distinguished Camilli, and held that,
5 because under the Arizona scheme only the last employer of the
6 injured worker has liability, while the California Fund was not the
7 sole source of compensation for a cumulatively injured worker,
8 Camilli did not control. George, 361 F.3d at 1162-1163.

9 Also, George added an additional "hypothetical creditor"
10 requirement to the Lorber test, and held that

11 if a creditor similarly situated to the government can be
12 hypothesized under the relevant statute, then by the
13 reasoning of Camilli, the government claim is not a tax.
14 Under the California scheme [CLC § 3717], another
15 employer could have a competing claim against the
16 uninsured employer if the worker has suffered a
17 cumulative injury.

18 Id. at 1162 (footnote omitted). Other jurisdictions have held that
19 mandatory "contributions" to state workers' or unemployment
20 compensation funds are entitled to excise tax priority. See In re
21 Olga Coal Co., 194 B.R. 741, 746-48 (Bankr. S.D.N.Y. 1996) and
22 cases cited therein including In re Chateaugay Corp., 177 B.R. 176,
23 181 (S.D.N.Y. 1995), aff'd, 89 F.3d 942 (2d Cir. 1996). See also
24 Matter of Pierce, 935 F.2d 709, 711 (5th Cir. 1991); In re William
25 Akers, Jr., Co., 121 F.2d 846 (3d Cir. 1941); In re Nail, 163 B.R.
26 105 (Bankr. E.D. Mich. 1994); In re Continental Minerals Corp., 132
27 B.R. 757, 759 (Bankr. D. Nev. 1991); In re Ndos
28 i, 116 B.R. 687, 689
n.1 (Bankr. D. Minn. 1990), aff'd, 950 F.2d 1376 (8th Cir. 1991).

Here the statute provides no express exclusion for claims of
cumulative injury, and the Fund must pay the entire claim. CLC
§ 3743. There can be no hypothetical creditor with a similar

1 claim. Lorber's argument that its letter of credit issuer is one
2 is inapt: the issuer is not obligated to pay injured workers, its
3 liability is contractual, not statutory, and the Fund's claim is
4 only for the excess over the letter of credit proceeds. The fifth
5 prong in George is met, as well as the four Lorber elements.

6 We will AFFIRM in the cross-appeal: the Fund's claim is for
7 an excise tax.

8
9 C. When did the "transaction" occur?

10 Only excise taxes on transactions occurring within the three
11 years before the petition date are entitled to priority under
12 § 507(a)(8)(E)(ii), so we must still consider the merits of the
13 Fund's appeal: when did the "transaction" occur? This issue was
14 not raised by the parties in their briefs before the bankruptcy
15 court or contested at hearing, except in a brief exchange with the
16 court. See Transcript, 29 August 2006, at 30:9-18.

17 The answer determines the extent to which, if any, the Fund's
18 claim has priority. The bankruptcy court, construing George,
19 concluded that the operative transaction was the Director's
20 approval in 1992 of Lorber's application to self-insure. We do not
21 so construe George. The Ninth Circuit held:

22 The Trust Fund claim against the Georges was not an
23 exaction "on a transaction" the Georges made. Their only
24 relevant transaction was hiring the employee who got
25 injured, but hiring does not occasion a Trust Fund claim
26 in California, and neither does an employee injury. What
27 occasions such a claim is the failure to make the
28 transaction of purchasing workers' compensation insurance
(or applying for self-insured status). It is hard to
squeeze the absence of a transaction, which triggers
California Trust Fund liability, into the bankruptcy
statute requirement of "a transaction occurring during"
the three years preceding bankruptcy.

1 George, 361 F.3d at 1163 (emphasis added).

2 The Fund argues the "transaction(s)" in this case were the
3 dates of pre-petition injuries which occurred within three years of
4 filing. In In re DeRoche, 287 F.3d 751 (9th Cir. 2002), the Ninth
5 Circuit interpreted the rights of the Special Fund maintained by
6 the Industrial Commission of Arizona as triggered when an employer
7 fails to insure. DeRoche was a chapter 7 debtor who failed to
8 carry workers' compensation insurance. DeRoche held that

9 [a]s used in § 507(a)(8)(E)(ii), a "transaction" is the
10 act of employing a worker without carrying the required
11 insurance when the worker is injured. The date of the
transaction is the date on which the worker is injured.

12 Id. at 757 (emphasis added). The Circuit expressly limited its
13 holding to Arizona's statutory scheme, but reserved the possibility
14 that it could apply elsewhere. Id. at 757 n.3.

15 Later that year, in In re Bliemeister, 296 F.3d 858 (9th Cir.
16 2002), the debtor, an Arizona employer, had an employee who was
17 injured in 1993. Bliemeister had no workers' compensation
18 insurance at the time. She filed a chapter 7 petition in 1998,
19 approximately five years later, and the issue was when the
20 transaction occurred. The Ninth Circuit cited DeRoche and held
21 that the Arizona fund's claim for its payment for the injury, which
22 had occurred more than three years pre-petition, was not entitled
23 to priority under § 507(a)(8)(E)(ii).

24 The problem with the Fund's theory in this appeal, that the
25 workers' injury dates are the transaction dates, is that the facts
26 here differ: Lorber filed its chapter 11 on 10 February 2006, but
27 did not default on self-insurance until 26 April 2006, about two
28 and a half months post-petition, and it ceased operation a few days

1 thereafter. Lorber was self-insured when the injuries occurred,
2 and the Fund did not then become liable to the injured employees.

3 Under Bliemeister, the "transaction" was employing a worker
4 without carrying the required insurance when the worker was
5 injured. That's when the debtor defaulted and the Arizona fund's
6 obligation to pay on the worker's claim arose. And George teaches
7 that the failure to obtain insurance – by analogy here, the end of
8 Lorber's approved self-insured status – is not a "transaction."
9 Here, if there was a "transaction," it was post-petition. In this
10 case the Fund's claim is not entitled to § 507(a)(8)(E) priority
11 because at all times when Lorber was in operation and employing
12 workers, including the three years preceding its bankruptcy
13 petition, it was self-insured.

14 The Fund became obligated to make compensation payments to
15 Lorber's injured workers only when Lorber was no longer self-
16 insured. The distilled message of the authorities is that the
17 "transaction" giving rise to an excise tax in the workers'
18 compensation arena is the event occasioning the Fund's (or an
19 equivalent agency's) statutory obligation to make or continue
20 compensation payments to the defaulting self-insurer's (or
21 uninsured employer's) injured workers. We are mindful that § 507
22 priority is to be strictly construed, and we cannot find that
23 priority treatment as an excise tax is authorized here. See Howard
24 Delivery Service, Inc., 126 S. Ct. at 2109.

25 We also note that the Fund's claim might be entitled to
26 priority status as an administrative expense under § 507(a)(2), but
27 the Fund did not pursue this avenue, it has not been briefed, and
28 there is the parties' post-appeal stipulation to consider. See In

1 re United Healthcare System, Inc., 396 F.3d 247, 249 n.3 (3d Cir.
2 2005). Accordingly, we express no view on that possibility.

3
4 **VI. CONCLUSION**

5 This appeal is not moot, because of the stay on distributions
6 under the confirmed plan.

7 We reach the same result as the bankruptcy court by a
8 different path, but we may affirm on any ground supported by the
9 record. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional
10 Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003).

11 The Fund's claim is not entitled to priority under
12 § 507(a)(8)(E). We AFFIRM.