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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 No. CC-04-1462-BKMa
WIND N' WAVE,) Bk. No. LA-99-55241-EC
Debtor.)

SALOMON NORTH AMERICA;
NORTH SPORTS, INC.;
NITRO; LAW OFFICES OF DAVID
B. BLOOM,
Appellants,

v.)

O P I N I O N

NANCY KNUPFER, Chapter 7
Trustee; UNITED STATES
TRUSTEE,
Appellees.

Argued and Submitted on February 23, 2005 at
Los Angeles, California

Filed - May 2, 2005

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

Honorable Ellen A. Carroll, Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN and MARLAR, Bankruptcy Judges.

1 BRANDT, Bankruptcy Judge:

2
3 This appeal presents the question of whether Bankruptcy Code
4 § 503(b)(4)¹ permits a fee award to counsel representing petitioning
5 creditors in prosecuting an involuntary petition where the creditors,
6 although eligible for reimbursement of actual expenses under
7 § 503(b)(3), had no other actual expenses to claim.

8 The bankruptcy court declined to follow our precedent, In re Sedona
9 Institute, 220 B.R. 74 (9th Cir. BAP 1998), and held that no fee could
10 be awarded unless the petitioning creditors actually had expenses other
11 than professional fees and costs.

12 We are persuaded that Sedona Institute, which permits a fee award
13 under § 503(b)(4) so long as there is a § 503(b)(3)-eligible creditor
14 regardless of whether that creditor actually incurred an out-of-pocket
15 expense, is correct, and that it has not been undermined by the Supreme
16 Court's decision in Lamie v. United States Trustee, 540 U.S. 526 (2004).
17 Accordingly, we REVERSE.

18
19 **I. FACTS**

20 The facts are undisputed. In December of 1999, appellants Salomon
21 North America, Inc., North Sports, Inc., and NITRO (collectively, the
22 "Petitioning Creditors"), suppliers of athletic inventory, filed an
23 involuntary chapter 7 petition under § 303 against Wind N' Wave, a Los
24 Angeles sports retailer. Appellant Law Offices of David B. Bloom (the
25 "Bloom Firm") represented the Petitioning Creditors. In March of 2000,
26

27 ¹ Absent contrary indication, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330; all
"Rule" references are to the Federal Rules of Bankruptcy Procedure.

1 the bankruptcy court entered an Order for Relief, and appellee Nancy
2 Knupfer ("Trustee") was appointed as chapter 7 trustee. All fees in
3 question were incurred before the Trustee took over the estate.

4 The ultimate liquidation of the estate was projected to result in
5 a 12% return to six general unsecured creditors, three of which were
6 the Petitioning Creditors.

7 In April of 2000 the Bloom Firm filed an application for payment of
8 its fees, as an administrative claim, for work on behalf of the
9 Petitioning Creditors prior to the entry of the order for relief. When
10 the fee application came on for hearing more than four years later,
11 neither the U.S. Trustee nor the Trustee opposed it. To the contrary,
12 her counsel orally advised the court that the Trustee had "signed off"
13 on the application.

14 Nevertheless, the bankruptcy court orally ruled that certain items
15 in the application were improper, and sua sponte raised the legal
16 question of whether the Petitioning Creditors actually had to have some
17 out-of-pocket expenses allowed under § 503(b)(3)(A) before their
18 attorney could be awarded compensation and expenses:

19 Sub-section 503(b)(4) says, reasonable compensation for
20 professional services rendered by an attorney of an entity
21 whose expense is allowable under paragraph 3 of this sub-
22 section. I'm not aware that the creditors have any expenses
allowable under paragraph 3, so I don't know how you would
get to seeking expenses under paragraph 4.

23 Transcript, 3 August 2004, at 18-19.

24 The Bloom Firm filed a memorandum analyzing Sedona Institute and a
25 revised application making the appropriate reductions. The supporting
26 declaration of counsel claimed that "[d]ue to the actions and
27 perseverance of Applicant . . . the Trustee was able to investigate and
28 ultimately succeeded in collecting funds on behalf of the Estate,

1 utilizing, in part, information obtained from the Petitioning Creditors
2 through Applicant." The revised application, paragraph 12, read:

3 It was the expectation of the Petitioning Creditors and
4 Applicant that, should Petitioning Creditors successful[ly]
5 prosecute the Involuntary Petition, resulting in an asset
6 estate, that the reasonable[,] necessary and actual fees and
7 costs incurred in the prosecution of That [sic] Petition
8 would be an administrative expense. To the extent that those
9 fees and expenses are not paid by the Estate, Petitioning
10 Creditors must take the burden of those fees and expenses not
11 withstanding [sic] that their efforts benefitted the entire
12 Estate.

13 In response, the Trustee filed comments taking a neutral, but
14 supportive, position. Saying that she had no personal knowledge of the
15 work, which was all performed before she was appointed, she noted:

16 [i]n general I believe the reduced fees and costs . . . to be
17 reasonable for the identified tasks as counsel for the
18 Petitioning Creditors, but I will leave that final
19 determination in the capable hands of the trier of fact.

20 Nor did the U.S. Trustee oppose the motion or otherwise participate
21 either in the bankruptcy court or in this appeal.

22 After hearing, the bankruptcy court denied the application,
23 specifically rejecting Sedona Institute. It ruled that "for an entity
24 to have a claim under Section 503(b)(4) there must first be an allowable
25 claim of a claimant under Section 503(b)(3)." Transcript, 1 September
26 2004, at 4.

27 The bankruptcy court entered an order on 14 September 2004
28 denying the revised application; the Petitioning Creditors timely
29 appealed. We granted Appellants' motion for stay pending appeal and
30 ordered that this appeal be expedited.

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
3 § 157(a), (b) (2) (A) and (B). We do under 28 U.S.C. § 158(c).

4
5 **III. ISSUES**

- 6 A. Whether the Trustee has waived the estate's rights; and
7 B. Whether a creditor must have an allowed expense under § 503(b) (3)
8 in order for its attorney to recover fees under § 503(b) (4).

9
10 **IV. STANDARDS OF REVIEW**

11 We review the bankruptcy court's conclusions of law, and its
12 interpretation of the Bankruptcy Code and Rules, de novo. No deference
13 is given to the trial court's conclusions. Rule 8013; In re Staffer,
14 262 B.R. 80, 82 (9th Cir. BAP 2001), aff'd, 306 F.3d 967 (9th Cir.
15 2002); In re Pardee, 218 B.R. 916, 919 (9th Cir. BAP 1998), aff'd, 193
16 F.3d 1083 (9th Cir. 1999).

17
18 **V. DISCUSSION**

19 This appeal involves the interpretation and interaction of two
20 subsections of the Code relating to allowance of administrative
21 expenses. Sections 503(b) (3) (A) and (b) (4) provide, in part:

22 (b) After notice and a hearing, there shall be allowed
23 administrative expenses, . . . including -

24

25 (3) the actual, necessary expenses, other than
26 compensation and reimbursement specified in
27 paragraph (4) of this subsection, **incurred by-**

28 (A) a creditor that files a petition under section
303 of this title;

. . . .

1 (4) reasonable compensation for professional services
2 rendered by an attorney or an accountant of an entity **whose**
3 **expense is allowable** under paragraph (3) of this subsection,
4 based on the time, the nature, the extent, and the value of
such services, . . . and reimbursement for actual, necessary
expenses incurred by such attorney or accountant[.]

5 (emphasis added).

6 This provision for paying the expenses and professional fees of
7 petitioning creditors who successfully prosecute involuntary petitions
8 is reciprocal to the provision in § 303(i) for making petitioning
9 creditors pay the fees and expenses of alleged debtors who successfully
10 defend involuntary petitions.

11
12 **A. Waiver by Trustee?**

13 We raise on our own authority the question whether the Trustee
14 should be allowed to participate in this appeal in light of the fact
15 that the Trustee did not align herself against the appellants in the
16 trial court.

17 The Trustee initially "signed off" on the fee application and
18 thereafter filed only comments, expressing no position on the legal
19 issue, and stating that the fees and expenses sought in the revised
20 application were reasonable. The Trustee's counsel attended the
21 bankruptcy court hearings, but did not argue, nor did she specifically
22 preserve her right to defend an appeal. See Orix Credit Alliance, Inc.
23 v. Taylor Machine Works, Inc., 125 F.3d 468, 478 (7th Cir. 1997)
24 (discussing preservation of issues for appeal: that the party "stated
25 distinctly the matter objected to and the grounds of the objection, and
26 therefore provided the court 'with full information' so that the court
27 could 'avoid all errors that are avoidable.'" (citations omitted)).

28 In In re Enewally, 368 F.3d 1165 (9th Cir. 2004), cert. denied,

1 125 S. Ct. 669 (2004), the creditor bank did not object to the debtor's
2 valuation of collateral, but on appeal the bank challenged the value
3 determined by the bankruptcy court. Applying the general rule against
4 raising issues on appeal which were not presented to the trial court,
5 the Ninth Circuit affirmed the district court, holding that the bank had
6 forfeited that right. Id. at 1173. But Enewally also recognized three
7 exceptions to the general rule, one of which is that "the issue
8 presented is purely one of law and the opposing party will suffer no
9 prejudice as a result of the failure to raise the issue below." Id.
10 (citation omitted). See also In re Focus Media, Inc., 378 F.3d 916, 927
11 n.9 (9th Cir. 2004), cert. denied, 125 S.Ct. 1742 (2005) (reaching
12 merits on the legal issue even when appellant waived issue at summary
13 judgment).

14 This exception applies here: the appeal concerns primarily an
15 issue of law, the record is adequate for purposes of review, and
16 Appellants have not even argued waiver. The § 503(b) issue was clearly
17 before the bankruptcy court, so there is no question that it was fairly
18 put "on notice as to the substance of the issue." See Nelson v. Adams
19 USA, Inc., 529 U.S. 460, 469 (2000).

20 We will exercise our discretion to consider the Trustee's brief to
21 the extent her arguments pertain to the issue of law.

22 But we reject the Trustee's attempt to raise a new factual issue
23 for the first time on appeal: whether the Petitioning Creditors are
24 actually indebted to the Bloom Firm for the fees. The bankruptcy court
25 decided the matter on the assumption of the accuracy of the unchallenged
26 assertion in the moving papers that Petitioning Creditors are obliged to
27 compensate their counsel to the extent that a § 503(b)(4) award is not
28 made. We accept the appeal in that procedural posture (which comports

1 with the reality that few lawyers will voluntarily agree to donate
2 services to a client capable of paying fees) and, noting that none of
3 the Enewally exceptions permit the factual premise to be challenged at
4 this stage of the litigation, we decline to consider it.

5
6 **B. Merits**

7 The analysis naturally begins with Sedona Institute, a voluntary
8 chapter 11 case. There, the applicant, a law firm representing
9 creditors during a case, sought legal fees under § 503(b)(4) incurred in
10 prosecuting a successful effort to obtain the appointment of a chapter
11 11 trustee or examiner. Because neither the law firm nor its client had
12 an allowable expense under § 503(b)(3), in the context wherein a
13 § 503(b)(3)(D) "substantial contribution" was asserted, the bankruptcy
14 court denied the application.

15 This Panel, over a dissent, reversed. Citing In re Marquam
16 Investment Corp., 176 B.R. 34 (Bankr. D. Or. 1994), rev'd on other
17 grounds, 188 B.R. 434 (D. Or. 1995), and considering 4 Collier on
18 Bankruptcy, ¶ 503.11 at 503-72-73 (15th ed. rev. 1997), the majority
19 held:

20 We then are faced with one of those "rare cases" in which
21 a literal interpretation is not warranted in light of the
22 absurdity of the result and where arrival at the appropriate
23 result requires a more liberal reading of the statute.

24

25 We are reluctant to stray from a strict interpretation,
26 and yet are compelled to do so in order to avoid a result
27 which would clearly run afoul of Congressional intent. We
28 conclude . . . that where a [§ 503(b)(3)(D)] creditor makes a
substantial contribution in a case, reasonable professional
fees and costs may be awarded under § 503(b)(4) regardless of
whether the creditor has an independent allowable expense
under § 503(b)(3).

Sedona Institute, 220 B.R. at 80-81. We remanded, inter alia, for

1 findings on whether the creditors had made a "substantial contribution"
2 as a condition for awarding professional fees and costs. Id. at 81.

3 The dissent in Sedona Institute, which the bankruptcy court
4 followed here, reasoned:

5 It is a simple matter to read and understand the
6 requirements of Section 503(b). Application of the section
7 according to its terms does not "run afoul" of any
8 Congressional intent of which I am aware. To begin with, the
9 requirement that a creditor have an administrative claim is
10 consistent with the obvious Congressional intent to limit
11 administrative expenses. Whether an attorney for a creditor
12 with a 32 cent stamp expense could be compensated under
13 Section 503(b)(4) remains a question, inter alia, of the
14 reasonableness of the fees in question, but does not render
15 the statute absurd or capricious.

16

17 It is clear to me that the line drawn in Section 503(b)
18 is a very reasonable attempt by Congress to limit
19 administrative expenses under Section 503(b)(4) to attorneys
20 for creditors with claims under Section 503(b)(3)
21 Congress obviously did not want attorneys making
22 administrative claims when their efforts mainly benefitted the
23 attorneys. In this case, the creditors were not personally
24 liable for the fees. The ability of the attorneys to be
25 compensated was totally contingent on the allowance of the
26 fees under Section 503(b)(4).

27 Id. at 83-84 (Russell, B.J., dissenting).

28 1. Sedona Institute as Precedent

Regardless of whether, as a formal jurisprudential rule, the
bankruptcy court is bound by BAP precedent,² we regard ourselves as bound

² We have held that our decisions bind all bankruptcy courts
in the Ninth Circuit. In re Windmill Farms, Inc., 70 B.R. 618, 622
(9th Cir. BAP 1987), rev'd on other grounds, 841 F.2d 1467 (9th Cir.
1988). See also Hon. Henry J. Boroff, The Precedential Effect of
Bankruptcy Appellate Panel Decisions, 103 Com. L.J. 212 (1998).

The Ninth Circuit has not determined whether BAP decisions are
binding in the "circuit as a whole." In re Zimmer, 313 F.3d 1220, 1225
(continued...)

1 by our prior decisions, and "will not overrule our prior rulings unless
2 a Ninth Circuit Court of Appeals decision, Supreme Court decision or
3 subsequent legislation has undermined those rulings." In re Ball, 185
4 B.R. 595, 597 (9th Cir. BAP 1995); In re Aheong, 276 B.R. 233, 249 (9th
5 Cir. BAP 2002) (stare decisis); In re Cady, 266 B.R. 172, 180-81, n.8
6 (9th Cir. BAP 2001), aff'd, 315 F.3d 1121 (9th Cir. 2003) (same).

7 We note, further, that no reported case adopts the dissent in
8 Sedona Institute and, accordingly, do not agree with the bankruptcy
9 court's characterization of that decision as a minority position. In
10 the few reported decisions which touch upon the question in a manner
11 consistent with the Sedona Institute dissent, it is usually in the
12 context of dictum in which the court is not focused on the precise
13 question confronting us. For example, in a case involving requests by
14 mortgage creditors for fee awards under § 506(b) against debtors in stay
15 relief matters, a bankruptcy court in another circuit observed, in pure
16 dictum, that "reasonable attorneys fees are expressly available to
17 creditors as an administrative expense under § 503(b)(4) in the few
18 situations where they can recover other expenses under § 503(b)(3) - for
19 example, for filing an involuntary petition or recovering for the estate
20 property the debtor had transferred or concealed." In re Biazo, 314
21 B.R. 451, 458 (Bankr. D. Kan. 2004). Although it is not evident that
22 the Biazo court's generic description actually takes a position in the
23 Sedona Institute debate, it plainly was not addressing the 503(b)(4)

24
25 ²(...continued)
26 n.3 (9th Cir. 2002). Some bankruptcy courts have ruled that BAP
27 decisions do not bind them. Compare In re Locke, 180 B.R. 245, 254
28 (Bankr. C.D. Cal. 1995) (BAP decisions not binding on bankruptcy
courts), with In re Barakat, 173 B.R. 672, 676-80 (Bankr. C.D. Cal.
1994) (BAP decisions binding on bankruptcy courts), aff'd on other
grounds, 99 F.3d 1520 (9th Cir. 1996).

1 distinction between "is allowable" and "is allowed."

2 Moreover, Sedona Institute's majority opinion has been cited with
3 approval by other bankruptcy courts both within and outside this
4 Circuit. In re Gurley, 235 B.R. 626, 635 (Bankr. W.D. Tenn. 1999) ("the
5 ability to recover attorney fees and expenses logically depends upon
6 whether the fees have been incurred by an entity who falls into one of
7 the categories established section 503(b)(3), not upon whether such
8 entities have incurred expenses other than professional fees"); In re
9 Godon, Inc., 275 B.R. 555, 567 (Bankr. E.D. Cal. 2002) ("It is not . . .
10 essential that the eligible creditor have actually incurred an
11 expense".) In In re Western Asbestos. Co., 318 B.R. 527 (Bankr. N.D.
12 Cal. 2004), the bankruptcy court, construing Sedona Institute as dicta,
13 held:

14 A more natural reading is that 11 U.S.C. § 503(b)(3)(D)
15 permits an administrative claim for expenses other than
16 attorneys' fees and expenses that are actually incurred by a
17 creditor who made a substantial contribution. Section 11
18 U.S.C. § 503(b)(4) permits an administrative claim for
attorneys' fees and expenses of an attorney who represents a
creditor who made a substantial contribution regardless of
whether the fees and expenses were incurred by the creditor.

19 Id. at 530 (although, at 530-31, it disapproved of Sedona Institute on
20 a different legal issue).

21
22 2. Sedona Institute: Correct?

23 Nor are we persuaded by the Trustee's argument that Lamie v. U.S.
24 Trustee, 540 U.S. 526 (2004), is supervening contrary authority. There
25 the Supreme Court held that, under the plain (but "awkward" and
26 "ungrammatical") language of the Code, a debtor's attorney could not be
27 awarded compensation under § 330(a)(1) unless the attorney had been
28 appointed under § 327. The Supreme Court's approach was to apply the

1 Code according to its plain terms, beginning its analysis with the
2 existing statutory text:

3 It is well established that "when the statute's language is
4 plain, the sole function of the courts--at least where the
5 disposition required by the text is not absurd--is to enforce
it according to its terms."

6 Id. at 534 (citation omitted; emphasis added).

7 But, as held in Sedona Institute, 220 B.R. at 78-79, the results of
8 the Trustee's interpretation here would be absurd.

9 Moreover, were we to agree that Lamie eviscerates Sedona Institute,
10 it does not follow that we must reach a contrary result. Rather, we
11 take a fresh look at the statute, unconstrained by our prior analysis.
12 In doing so, we conclude that on a strict reading the plain text of
13 § 503(b) (3) and (4) does not require the petitioning creditor to have
14 been allowed expenses. The statute's criterion is that the creditor's
15 expenses be "allowable," not "allowed." The argument that the
16 § 503(b) (3) entity must actually have an expense would be more plausible
17 if the pertinent statutory phrase read "an entity whose expense is
18 allowed under § 503(b) (3)."

19 Indeed, the concession by the Sedona Institute majority that it was
20 taking liberties with the language of the statute upon which the trial
21 court relied in this instance appears, in retrospect, to have been
22 improvident. The construction adopted by the trial court, and by the
23 dissent in Sedona Institute, disregards the distinction between
24 "allowed" and "allowable." That language is fairly read, as in Western
25 Asbestos, 318 B.R. at 530, to require only that the creditor be
26 qualified for an award of expenses under § 503(b) (3) for compensation to
27 be awarded to the creditor's counsel (or accountant) under § 503(b) (4).
28 The section does not by its terms mandate that the creditor have

1 expenses which have been allowed, nor even any other expenses at all.
2 We decline to read in such a requirement.

3 This analysis is further supported by the recognition that, in the
4 instance of involuntary petitions, the availability of awards to
5 successful petitioning creditors and their counsel under §§ 503(b) (3) (A)
6 and (b) (4) are essentially symmetric with the rights of alleged debtors
7 to recover fees and costs under § 303(i) when they successfully fend off
8 an involuntary petition. The language of § 303(i) does not admit of the
9 construction that the alleged debtor must actually have a separately-
10 reimbursable expense before fees and costs could be awarded. An
11 asymmetric construction of §§ 503(b) (3) (A) and (b) (4) would be unfair
12 and absurd.

13 We are persuaded that the trial court's construction of the statute
14 is incorrect, and we need not reach the public policy arguments.

16 VI. CONCLUSION

17 We exercise our discretion to hear this appeal on the issue of law
18 presented, notwithstanding possible waiver of the estate's rights on
19 appeal by the Trustee's lack of objection to the Revised Application.

20 Sedona Institute is not distinguishable, and there is no basis for
21 us to depart from its holding "that an independent allowable expense
22 claim under [§ 503] (b) (3) is not a prerequisite to an award of
23 reasonable fees under § 503(b) (4)." 220 B.R. at 81. Alternatively,
24 freshly construing the statute, we so hold.

25 We REVERSE and REMAND for determination of the administrative
26 claim, and accordingly VACATE our order staying distribution, effective
27 on the finality of that determination.