

FEB 29 2008

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

**NOT FOR PUBLICATION**

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

6	In re:	)	BAP No. CC-07-1353-DMkMo
7	LARRY MARC GERSTEN and	)	Bk. No. SA 95-22155-ES
8	SUSAN DENISE GERSTEN,	)	Adv. No. SA 07-01261-ES
9	Debtors.	)	
10	_____	)	
11	MICHAEL SANFORD KOGAN and	)	
12	KEVIN JAMES LAMB,	)	
13	Appellants,	)	
14	v.	)	<b>MEMORANDUM<sup>1</sup></b>
15	LARRY MARC GERSTEN and	)	
16	SUSAN DENISE GERSTEN,	)	
17	Appellees.	)	
18	_____	)	

Argued and Submitted on February 21, 2008  
at Pasadena, California

Filed - February 29, 2008

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

Honorable Erithe Smith, Bankruptcy Judge, Presiding

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

\_\_\_\_\_  
<sup>1</sup>This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Chapter 7<sup>2</sup> debtors filed a malpractice action in state court  
2 against attorneys who had represented them during the course of  
3 their bankruptcy case. The attorneys removed the state court  
4 action to the bankruptcy court. The bankruptcy court, finding  
5 that the conduct upon which the malpractice litigation was based  
6 appeared to have occurred postpetition and that the outcome would  
7 not impact administration of the bankruptcy estate, remanded the  
8 matter back to state court. We AFFIRM.

9  
10 **I. FACTS**

11 On October 7, 1994, an arbitration award ("Arbitration  
12 Award") was entered against debtor, Larry Marc Gersten  
13 ("Gersten"), and four others in the amount of \$1,730.989.00. A  
14 judgment ("Judgment") confirming the Arbitration Award was  
15 entered in the same amount on December 5, 1994. Seeking to levy  
16 upon the residence Gersten owned with his wife, Susan Denise  
17 Gersten ("Residence"), the Judgment creditor recorded a Notice of  
18 Levy Under Writ of Execution on January 6, 1995, but failed to  
19 record an abstract of the Judgment. The Gerstens filed a  
20 voluntary chapter 7 petition in the Santa Ana Division of the  
21 United States Bankruptcy Court for the Central District of  
22 California on November 29, 1995.

23 The Gerstens assert that although Kevin James Lamb ("Lamb")  
24 was the attorney of record in their bankruptcy case, Michael

---

25  
26 <sup>2</sup>Unless otherwise indicated, all chapter references are to  
27 the Bankruptcy Code, §§ 101-1330, as enacted and promulgated  
28 prior to October 17, 2005, the effective date of most of the  
provisions of the Bankruptcy Abuse Prevention and Consumer  
Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

1 Sanford Kogan ("Kogan") was the primary attorney representing  
2 their interests concerning the Judgment.<sup>3</sup> Gersten contends he  
3 hired Kogan after entry of the Arbitration Award but before entry  
4 of the Judgment.<sup>4</sup>

5 At the time the Gerstens filed their bankruptcy case in  
6 1995, the purchase money encumbrance and their homestead  
7 exemption on the Residence exceeded its fair market value, such  
8 that no non-exempt equity was available in the Residence for the  
9 benefit of the Gerstens' unsecured creditors. The Gerstens  
10 received their chapter 7 discharge on March 20, 1996.

11 More than ten years later, the bankruptcy case remained  
12 open. In 2006, the chapter 7 trustee in the Gerstens' case  
13 successfully objected to the secured claim of the Judgment  
14 creditor on the basis that the creditor's lien had not been  
15 perfected under California law. Having avoided the Judgment lien  
16 against the Residence, the chapter 7 trustee sought to recover  
17 from the Gerstens the substantial equity that had accrued as a  
18 result of appreciation in the value of the Residence in the years  
19 since their bankruptcy petition had been filed. The Gerstens  
20 settled the trustee's claim for the postpetition increase in  
21 equity by paying \$550,000 to their bankruptcy estate. The

---

22  
23 <sup>3</sup>According to the Gerstens, Lamb filed their bankruptcy  
24 petition at Kogan's request; Kogan paid Lamb's fees and costs to  
25 file the petition from funds the Gerstens had paid to Kogan.  
Although Kogan later appeared in the bankruptcy case on behalf of  
the Gerstens, Lamb remained attorney of record.

26 <sup>4</sup>Kogan disputes that he represented the Gerstens in any way  
27 as their general bankruptcy counsel or in connection with the  
28 Judgment. He asserts his representation was limited to the role  
of Special Counsel in connection with the chapter 7 trustee's  
objection to the Gerstens' claim of exemptions in various pension  
plan assets. We do not resolve this issue.

1 settlement was approved by the bankruptcy court on May 15, 2007.

2 On May 18, 2007, the Gerstens sued Kogan and Lamb in the  
3 Superior Court of the State of California, County of Orange, for  
4 malpractice ("Malpractice Litigation"), based primarily on their  
5 failure either to object to the Judgment creditor's claim or to  
6 obtain an order requiring the chapter 7 trustee to abandon the  
7 Residence.

8 Kogan removed the Malpractice Litigation to the bankruptcy  
9 court pursuant to Fed. R. Bankr. P. 9027(a)(3)(A), asserting that  
10 the Malpractice Litigation was a civil action which related to  
11 the administration of the bankruptcy estate, that the claims  
12 contained in the complaint ("Complaint") concerned title 11  
13 issues and related to property of the bankruptcy estate, and that  
14 the claims contained in the Complaint were inseparable from the  
15 chapter 7 bankruptcy case. The Gerstens promptly moved to remand  
16 the Malpractice Litigation back to state court, contending that  
17 the actions complained of occurred postpetition and did not  
18 impact administration of the bankruptcy estate. The bankruptcy  
19 court granted the motion to remand, and this appeal followed.

## 20 21 **II. JURISDICTION**

22 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
23 § 1452(b). We have jurisdiction to determine whether remand was  
24 appropriate pursuant to 28 U.S.C. §§ 1452(b) and 158.

## 25 26 **III. ISSUE**

27 Whether the bankruptcy court abused its discretion in  
28 granting the Gerstens' motion to remand.

1 **IV. STANDARDS FOR REVIEW**

2 "Decisions to remand under 28 U.S.C. § 1452(b) are committed  
3 to the sound discretion of the bankruptcy judge and are reviewed  
4 for abuse of discretion." McCarthy v. Prince (In re McCarthy),  
5 230 B.R. 414, 416 (9th Cir. BAP 1999).

6 A bankruptcy court abuses its discretion if it bases its  
7 decision on a clearly erroneous view of the facts. Khachikyan v.  
8 Hahn (In re Khachikyan), 335 B.R. 121, 125 (9th Cir. BAP 2005).

9 A finding of fact is not clearly erroneous if a permissible view  
10 of the evidence of record supports the finding. SEC v. Rubera,  
11 350 F.3d 1084, 1094 (9th Cir. 2003). Clear error exists when,  
12 after examining the evidence, the reviewing court is left with a  
13 definite and firm conviction that a mistake has been committed.  
14 Granite State Ins. Co. v. Smart Modular Tech., Inc., 76 F.3d  
15 1023, 1028 (9th Cir. 1996).

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **V. DISCUSSION**

2 As relevant to the matter before us, 28 U.S.C. § 1452(a)  
3 provides:

4 A party may remove any claim or cause of action in a  
5 civil action . . . to the district court for the  
6 district where such civil action is pending, **if such  
district court has jurisdiction of such claim or cause  
of action under section 1334 of this title.**

7 28 U.S.C. § 1452(a) (emphasis added).<sup>5 6</sup>

8 28 U.S.C. § 1452(b) provides that the bankruptcy court to  
9 which a claim or cause of action has been removed "may remand  
10 such claim or cause of action on any equitable ground." The  
11 "'any equitable ground' remand standard is an unusually broad  
12 grant of authority." McCarthy, 230 B.R. at 417.

13  
14 <sup>5</sup>28 U.S.C. § 1334 speaks to the bankruptcy jurisdiction of  
15 the district courts over bankruptcy cases and proceedings. 28  
16 U.S.C. § 157(a) authorizes each district court to refer "any or  
17 all cases under title 11 and any or all proceedings arising under  
18 title 11 or arising in or related to a case under title 11 . . .  
19 to the bankruptcy judges for the district." The District Court  
20 for the Central District of California has a standing order of  
reference in place under 28 U.S.C. § 157(a). Accordingly, the  
jurisdiction of the bankruptcy court is synonymous with the  
bankruptcy jurisdiction of the district court for purposes of the  
analysis set forth in this Memorandum.

21 <sup>6</sup>The parties concede that bankruptcy jurisdiction over the  
22 Malpractice Litigation existed under 28 U.S.C. § 1334. We  
23 observe that exclusive jurisdiction over the Malpractice  
24 Litigation does not exist in the bankruptcy court when Congress  
25 has not preempted the field of state law malpractice claims  
26 brought by debtors against their bankruptcy attorneys. See  
27 generally Miles v. Okun (In re Miles), 430 F.3d 1083 (9th Cir.  
28 2005); MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910  
(1996); Gonzales v. Parks, 830 F.2d 1033 (9th Cir. 1987). In  
fact, Kogan conceded at oral argument that the state court had  
concurrent jurisdiction over the Malpractice Litigation.  
Ultimately, we are not asked to decide whether the bankruptcy  
court had jurisdiction over the Malpractice Litigation. We are  
asked only whether the bankruptcy court erred in granting the  
motion to remand.

1 Kogan asserts that in granting the motion to remand, the  
2 bankruptcy court failed to articulate a legal theory based upon  
3 the facts. We disagree. The findings of the bankruptcy court  
4 constitute "equitable grounds" within the contemplation of 28  
5 U.S.C. § 1452(b) and are clearly stated on the record:

6 When I look at it, it seems to me that, A, it's post-  
7 petition conduct and therefore not property of the  
8 estate. Two even if it is property of the estate, the  
Trustee has not expressed any interest in pursuing it  
and has even stood in court today and said that.

9 Three, the Trustee has filed a formal report in the  
10 case, you know, for the wind-up of the administration.  
11 Four, under these circumstances, it appears that this  
litigation is not going to have any impact on the  
administration of the bankruptcy estate.

12 Under all of those circumstances, I think it's  
13 appropriate to grant the motion.

14 Hearing Transcript, August 23, 2007, pp. 6:16-7:3.

15 As the bankruptcy court correctly recognized, whether the  
16 Malpractice Litigation would impact the administration of the  
17 Gerstens' bankruptcy estate depends on whether it constitutes  
18 property of the bankruptcy estate under § 541 of the Bankruptcy  
19 Code. Section 541(a)(1) provides that "[t]he commencement of a  
20 case under section 301, 302, or 303 of this title creates an  
21 estate . . . comprised of all legal or equitable interests of  
22 the debtor in property as of the commencement of the case." The  
23 Complaint asserts no cause of action for negligence occurring  
24 before the bankruptcy petition was filed, but rather asserts that  
25 the cause of action stems from actions Kogan or Lamb failed to  
26 take while the bankruptcy case was pending. Accordingly, the  
27 Malpractice Litigation could not have been property of the estate  
28 at the time the estate was created.

1 Property acquired after the commencement of the case becomes  
2 property of the estate only if it is acquired by the estate  
3 itself. 11 U.S.C. § 541(a)(7). The only injury alleged in the  
4 Complaint is the injury to the Gerstens in the form of the loss  
5 of postpetition appreciation in the value of the Residence.  
6 Under no set of circumstances could the estate assert an injury  
7 where it was, in effect, the beneficiary of the alleged  
8 malpractice.<sup>7</sup> Therefore the causes of action which form the  
9 basis for the Malpractice Litigation belong to the Gerstens.

10 Kogan also asserts that the bankruptcy court abused its  
11 discretion in granting the motion to remand because there were  
12 insufficient facts in evidence to support remand. Again we  
13 disagree. The bankruptcy court considered the causes of action  
14 stated in the Complaint, their relation to bankruptcy generally  
15 and the Gerstens' bankruptcy estate in particular, and received a  
16 report from the chapter 7 trustee on the status of administration  
17 of the case. The decision of the bankruptcy court was made on a  
18 fully-informed basis.<sup>8</sup> That the bankruptcy court did not  
19 consider issues that relate to the merits of the Malpractice  
20 Litigation does not constitute error.

21 \_\_\_\_\_  
22 <sup>7</sup>In fact the chapter 7 trustee, who was present in the  
23 courtroom on other matters, participated in the hearing on the  
24 motion to remand at the request of the bankruptcy court and  
disclaimed any interest in the Malpractice Litigation.

25 <sup>8</sup>At oral argument Kogan complained that it was inappropriate  
26 for the court to discuss with the trustee, who happened to be in  
27 the courtroom on another matter, whether he was interested in  
28 prosecuting the Malpractice Litigation, and then use the  
trustee's lack of interest in doing so as informing the court's  
conclusions about whether the Malpractice Litigation was property  
of the estate and whether to remand. The bankruptcy court  
committed no error by conducting its colloquy with the trustee.



1 Finally, Kogan and Lamb contend that the Malpractice  
2 Litigation is best heard by the bankruptcy court, because the  
3 bankruptcy court is the court with expertise in the operation of  
4 the Bankruptcy Code and application of its provisions; because no  
5 cause of action for malpractice would exist but for their alleged  
6 inaction in their representation of the Gerstens during the case;  
7 and because the bankruptcy court had familiarity with the facts  
8 of the Gerstens' bankruptcy case. The record reflects that the  
9 bankruptcy judge who presided over the case for a substantial  
10 period of the time frame at issue has since retired. Further, it  
11 is uncertain whether the bankruptcy court would be the trier of  
12 fact in the Malpractice Litigation even if the motion to remand  
13 had not been granted. Either party could demand a jury trial.  
14 Additionally, the Gerstens arguably could object to the  
15 bankruptcy court entering a final judgment in the Malpractice  
16 Litigation. See 28 U.S.C. § 157(c).

17 Most importantly, Kogan has conceded that the bankruptcy  
18 court did not have exclusive jurisdiction over the Malpractice  
19 Litigation. As we stated in McCarthy, "[t]here is nothing wrong  
20 with letting a state court decide a matter over which it has  
21 concurrent jurisdiction." McCarthy, 230 B.R. at 418. It was not  
22 an abuse of discretion for the bankruptcy court to do so here.

## 23 24 **VI. CONCLUSION**

25 The state court had concurrent jurisdiction over the  
26 Malpractice Litigation when it was based on postpetition  
27 representation of chapter 7 debtors, did not constitute property  
28 of the debtors' bankruptcy estate, and could not conceivably

1 impact the administration of the debtors' bankruptcy estate. The  
2 bankruptcy court did not abuse its discretion in granting the  
3 Gerstens' motion to remand the Malpractice Litigation to state  
4 court. We AFFIRM.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28