

MAR 21 2008

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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NOT FOR PUBLICATION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-07-1413-BMdK
7	EDWARD GODFREY,	)	Bk. No. LA 05-18335-TD
8	Debtor.	)	
9	_____	)	
10	RICHARD K. DIAMOND,	)	
11	Chapter 7 Trustee,	)	
12	Appellant,	)	
13	v.	)	<b>MEMORANDUM<sup>1</sup></b>
14	MOLLY LOMENZO,	)	
15	Appellee.	)	
16	_____	)	

Submitted Without Oral Argument on March 19, 2008  
at Pasadena, California

Filed - March 21, 2008

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Before: BRANDT<sup>2</sup>, MACDONALD<sup>3</sup>, and KLEIN, 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.

<sup>2</sup> Hon. Philip H. Brandt, U.S. Bankruptcy Judge for the Western District of Washington, sitting by designation.

<sup>3</sup> Hon. Donald MacDonald, Chief U.S. Bankruptcy Judge for the District of Alaska, sitting by designation.

1 Is a debt based on a promissory note executed pre-petition but  
2 funded post-petition allowable as a pre-petition claim? The bankruptcy  
3 court answered this question affirmatively, overruling the chapter 7<sup>4</sup>  
4 trustee's objection.

5 We REVERSE.  
6

7  
8 **I. FACTS**

9 Edward Godfrey filed a chapter 7 petition on 18 April 2005, and  
10 appellant Richard K. Diamond ("Trustee") was appointed trustee. Mr.  
11 Godfrey is now deceased, but his death does not abate the bankruptcy.  
12 Rule 1016; In re Eads, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991).

13 Molly Lomenzo, Godfrey's mother, filed a proof of claim which  
14 included a debt of \$50,000 plus interest based on a promissory note dated  
15 April 2005. Trustee objected to this claim, among others. The  
16 documentation attached to the proof of claim indicated that the funds  
17 loaned on the 15 April note were wire-transferred to Debtor on 20 April  
18 2005, two days after the bankruptcy petition was filed. The trustee  
19 argued that the debt was a post-petition debt, not eligible for allowance  
20 in the bankruptcy case.

21 Although Lomenzo did not respond or appear at hearing, the  
22 bankruptcy court overruled the trustee's objection because, under  
23 California law, a note is presumed to be supported by consideration. CCC

24  
25 <sup>4</sup> Unless otherwise indicated, all chapter, section, and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as  
27 enacted and promulgated prior to the effective date (October 17, 2005)  
28 of the provisions of the Bankruptcy Abuse Prevention and Consumer  
Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119. Stat. 23.

"CCC" references are to the California Civil Code.

1 § 1614 provides “[a] written instrument is presumptive evidence of a  
2 consideration.” Accordingly, although the note was funded post-petition,  
3 the court ruled that the note was valid as of the petition date and  
4 entitled to allowance. The court entered its order overruling the  
5 trustee’s objection on 18 October 2007; the trustee timely appealed.

6  
7 **II. JURISDICTION**

8 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and  
9 § 157(b) (1) and (b) (2) (B), and this panel does under 28 U.S.C. § 158(c).

10  
11 **III. ISSUE**

12 Whether the bankruptcy court erred in overruling Trustee’s objection  
13 to Lomenzo’s claim.

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15 **IV. STANDARD OF REVIEW**

16 The bankruptcy court’s ruling was based on its interpretation of  
17 California law and, implicitly, the Bankruptcy Code. We review issues  
18 of statutory construction de novo. In re Simpson, 366 B.R. 64, 70 (9th  
19 Cir. BAP 2007).

20  
21 **V. DISCUSSION**

22 The bankruptcy court upheld the validity of the promissory note as  
23 of the petition date based on California’s statutory presumption of  
24 consideration. The trustee argues that this presumption was overcome by  
25 the evidence that the funds had not been transferred as of the petition  
26 date, which is the operative date for determining the existence of a  
27 claim. The trustee cites no case law on point, and we have found no  
28 bankruptcy cases dealing with this issue. Nor does case law under CCC

1 § 1614 address the situation presented here: most of the cases involving  
2 promissory notes involve a complete absence of consideration, as opposed  
3 to delay in the delivery of consideration. See, e.g., Saks v. Charity  
4 Mission Baptist Church, 90 Cal.App.4th 1116, 1133 (2001). But we must  
5 evaluate the claim as of the petition date, § 502(b), and as the trustee  
6 points out, a chapter 7 discharge discharges those debts that arose  
7 before the date of the order for relief. 11 U.S.C. § 727(b). Moreover,  
8 under California law, a note not supported by consideration is  
9 unenforceable. Tracy v. Alvord, 118 Cal. 654, 655 (1897).

10 Although the promissory note existed as of the petition date, it was  
11 not then supported by consideration. CCC § 1614 confers the presumption  
12 that a duly-executed promissory note is supported by consideration, but  
13 that is a rebuttable presumption affecting only the burden of producing  
14 evidence, not the burden of proof. Rancho Santa Fe Pharmacy, Inc., v.  
15 Seyfert, 219 Cal.App.3d 875, 884 (1990) (not cited by the trustee to  
16 bankruptcy court or in his brief to this panel):

17 [W]hen the party against whom such a presumption operates  
18 produces some quantum of evidence casting doubt on the truth  
19 of the presumed fact, the other party is no longer aided by  
20 the presumption. The presumption disappears, leaving it to  
the party in whose favor it initially worked to prove the fact  
in question.

21 Id. at 882. This is consistent with Federal Rule of Evidence 301, which  
22 provides:

23 In all civil actions and proceedings not otherwise provided  
24 for by Act of Congress or by these rules, a presumption  
25 imposes on the party against whom it is directed the burden of  
26 going forward with evidence to rebut or meet the presumption,  
but does not shift to such party the burden of proof in the  
sense of the risk of nonpersuasion, which remains throughout  
the trial upon the party on whom it was originally cast.

1 See also Cal. Evid. Code § 604 (also not cited to the bankruptcy court  
2 or in the trustee's brief), which sets forth the effect of a presumption  
3 affecting the burden of producing evidence as requiring:

4 the trier of fact to assume the existence of the presumed fact  
5 unless and until evidence is introduced which would support a  
6 finding of its nonexistence, in which case the trier of fact  
shall determine the existence or nonexistence of the presumed  
fact from the evidence and without regard to the presumption.

7 Accordingly, the trustee merely needed to show some – any – evidence  
8 that there was no consideration at the time the note was executed, or at  
9 least by the petition date, to overcome the presumption. As Ms. Lomenzo  
10 attached bank records to her sworn proof of claim which indicated the  
11 funds were transferred after the bankruptcy petition was filed, the  
12 trustee needed only to point that out. Regardless of whether the note  
13 was supported by consideration when Mr. Godfrey filed his bankruptcy  
14 petition, the amount of the enforceable obligation debt then owed to Ms.  
15 Lomenzo was zero, and the claim could not be allowed. 11 U.S.C.  
16 § 502(b).

17

18

## VI. CONCLUSION

19 The bankruptcy court erred in concluding that the 15 April 2005  
20 promissory note was enforceable as of the petition date. The presumption  
21 that the note was supported by consideration was overcome, and the claim  
22 objection should have been sustained.

23 Accordingly, we REVERSE.

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