

JUN 19 2007

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NOT FOR PUBLICATION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

In re: ) BAP No. WW-06-1407-MoRK  
 )  
 JOHN VAN ETTEN, ) Bk. No. 04-12950  
 )  
 Debtor. )  
 )  
 \_\_\_\_\_ )  
 JOHN VAN ETTEN, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM**<sup>1</sup>  
 )  
 THE STATE OF WASHINGTON; )  
 )  
 K. MICHAEL FITZGERALD, )  
 )  
 Chapter 13 Trustee, )  
 )  
 Appellees. )  
 \_\_\_\_\_ )

Argued and Submitted on May 23, 2007  
at Seattle, Washington

Filed - June 19, 2007

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Hon. Thomas T. Glover, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: MONTALI, RIBLET<sup>2</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. Robin L. Riblet, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.



1 to Trustee "to be distributed to [sic] according to the terms of  
2 the Debtor's Chapter 13 Plan, when it if [sic] confirmed." Order  
3 Authorizing Sale of Residence and Disbursement of Sale Proceeds,  
4 entered on the docket on September 22, 2004.<sup>6</sup> Trustee received  
5 \$37,530.98 in non-exempt proceeds from the sale of the residence.

6 Debtor then amended his chapter 13 plan to state that the  
7 "Trustee received from the proceeds of the sale of the Debtor's  
8 residence the amount of \$37,530.98. The Trustee, upon  
9 confirmation of the Plan, shall use these funds to pay allowed  
10 claims according to the terms of the Plan." Amended Chapter 13  
11 Plan, entered on the docket on January 13, 2005.

12 The State of Washington filed a motion to dismiss Debtor's  
13 case because of his failure to file post-petition tax returns and  
14 to pay post-petition taxes. Trustee filed an objection to  
15 confirmation to plan and motion to dismiss case. Neither the  
16 Trustee nor the State of Washington requested the court to direct  
17 Trustee or Buchanan to distribute to creditors or retain the  
18 funds they were holding.

19 Shortly thereafter, Debtor filed his own motion for  
20 voluntary dismissal and requested that Buchanan be permitted to  
21 release to Debtor the purportedly exempt sale proceeds he was

22 \_\_\_\_\_  
23 <sup>5</sup>(...continued)  
24 further court order. Debtor obtained permission from the court  
25 to use a portion of the \$40,000 to pay state taxes and to  
26 purchase a vehicle. As of December 30, Buchanan held in trust  
27 \$5,874.82 from the \$40,000 initially placed in the account.

28 <sup>6</sup>Debtor did not provide in his excerpts a copy of this  
order, the underlying motion to sell his residence, his initial  
chapter 13 plan, his amended chapter 13 plan, or Trustee's  
objection to confirmation of plan. All of these documents are  
available on the bankruptcy court's electronic docket, however.

1 holding in trust. In response, Trustee filed a "Supplemental  
2 Motion for Order Directing Disbursement of Funds on Hand with  
3 Trustee." Without any citation to authority, Trustee requested  
4 that he be allowed to remit the \$37,530.98 (minus Trustee's  
5 costs) he was holding to the Internal Revenue Service ("IRS") and  
6 to the State of Washington to pay priority taxes.<sup>7</sup> Debtor  
7 objected, noting that section 1326(a)(2) provides that if a  
8 chapter 13 plan is not confirmed, the trustee "shall return" to  
9 the debtor plan payments made by the debtor, after deducting  
10 administrative claims allowed under section 503(b).

11 The bankruptcy court held a hearing on all three motions to  
12 dismiss on June 14, 2006. Debtor did not provide a transcript of  
13 the hearing.<sup>8</sup> On October 10, 2006, the bankruptcy court entered  
14 an Order Dismissing Case and Directing Chapter 13 Trustee and  
15 William Buchanan to Hold Funds (the "Dismissal Order"), directing  
16 that:

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17  
18 <sup>7</sup>Trustee did not state that the IRS or the State of  
19 Washington had levied the funds in his possession. At the oral  
20 argument in this appeal, Debtor's counsel stated that he is  
21 unaware of any levy by the IRS on the funds held by Trustee,  
22 although the IRS did file a motion for turnover of the funds  
23 after the court entered the order now on appeal. We were also  
24 told that the bankruptcy court is holding that motion in abeyance  
25 pending resolution of this appeal.

26 <sup>8</sup>Rule 8009(b)(5) and (9) require an appellant to provide the  
27 opinion, findings of fact or conclusions of law delivered orally  
28 by the court and to include a complete transcript of relevant  
proceedings as required by the rules of this panel. See 9th Cir.  
BAP Rule 8006-1. Accordingly, the record is inadequate as a  
matter of law. Sallie Mae Servicing, LP v. Williams (In re  
Williams), 287 B.R. 787, 792 (9th Cir. BAP 2002). Despite this  
deficiency in the record, we will not dismiss the appeal because  
it presents solely an issue of law, which we review de novo.  
Therefore, the transcript is not essential to our review.

1 (2) The Chapter 13 Trustee shall hold, in custodio  
2 legis, all funds held in his trust account from the  
3 sale of the debtor's real property, and shall not  
4 disburse those funds even in response to a notice to  
withhold and deliver or other garnishment order from  
the Department of Revenue, without order of this court.

5 (3) The Chapter 13 Trustee shall release to the  
6 Debtor, from the funds that it is holding, \$2,872.60,  
7 representing the payments that the Debtor made to the  
Chapter 13 Trustee from the operation of his business  
less the disbursements that the Chapter 13 Trustee has  
made during the course of this case.

8 (4) On September 22, 2004, this court entered an Order  
9 Authorizing Sale of Residence and Disbursement of Sale  
10 Proceeds. Paragraph 3 of that order directed William  
11 Buchanan to hold certain funds in trust. The court  
12 directs William Buchanan to continue to hold those  
13 funds in trust, pursuant to the terms of that Order,  
and not disburse any of those funds, even in response  
to a notice to withhold and deliver or other  
garnishment proceedings from the State of Washington,  
without further order of this court.

14 Order Dismissing Case and Directing Chapter 13 Trustee and  
15 William Buchanan to Hold Funds, entered on the docket on October  
16 10, 2006.

17 On October 13, 2006, Debtor filed a timely motion for  
18 reconsideration of the Dismissal Order. The court entered an  
19 order denying the motion for reconsideration on October 30, 2006,  
20 specifically ordering that "the funds currently held by [Trustee  
21 and Buchanan] shall continue to be held pending entry of an order  
22 by this court after notice and hearing." Order on Motion for  
23 Reconsideration, entered on the docket on October 30, 2007.

24 On November 8, 2006, Debtor filed a timely notice of appeal  
25 of both the Dismissal Order and the Order on Motion for  
26 Reconsideration.



1 approach" to finality in bankruptcy appeals (Bonham v. Compton  
2 (In re Bonham), 229 F.3d 750, 761 (9th Cir. 2000)), the order  
3 does not "finally determine[] the discrete issue to which it is  
4 addressed," the second requisite for determining that an order is  
5 final under the pragmatic approach.<sup>9</sup> Trustee requested that he  
6 be allowed to distribute the proceeds to the priority tax  
7 claimants, while Debtor requested that all proceeds held by  
8 Trustee and Buchanan be returned to him upon dismissal. The  
9 court granted neither request, instead directing that the funds  
10 be held pending further order. Therefore, as evidenced by the  
11 language of the order itself, the order is interlocutory.

12 Even though the order does not appear to be final, we can  
13 grant leave to appeal pursuant to Federal Rule of Bankruptcy  
14 Procedure 8003(c). Under 28 U.S.C. § 158(a)(3), an appellant  
15 must obtain leave of court to appeal an interlocutory order.  
16 Debtor did not do so. Nonetheless, if an order is interlocutory,  
17 and no motion for leave to appeal has been filed, we can consider  
18 a timely notice of appeal to be a motion for leave. See Fed. R.  
19 Bankr.P. 8003(c); Pfeiffer v. Couch (In re Xebec), 147 B.R. 518,  
20 522 (9th Cir. BAP 1992). We do so here.

21 Granting leave to appeal is left to the discretion of the  
22 panel. Roderick v. Levy (In re Roderick Timber Co.), 185 B.R.  
23 601, 604 (9th Cir. BAP 1995). Granting leave is appropriate when  
24 an appeal would materially advance resolution of the dispute and

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25  
26 <sup>9</sup>The pragmatic approach to finality in bankruptcy cases  
27 requires that the order "1) resolve[] and seriously affect[]  
28 substantive rights and 2) finally determine[] the discrete issue  
to which it is addressed." Bonham, 229 F.3d at 761, quoting Law  
Offices of Nicholas A. Franke v. Tiffany (In re Lewis), 113 F.3d  
1040, 1043 (9th Cir. 1997)).

1 minimize further litigation expenses. Id. In this case,  
2 granting leave to appeal is appropriate because we can finally  
3 dispose of the remaining issues as a matter of law, thereby  
4 foreclosing further unnecessary litigation. Leave to appeal is  
5 also appropriate because Debtor is being harmed by the trustee's  
6 retention of the proceeds in contravention of section 1326(a)(2),  
7 and delay in appellate review unnecessarily prolongs the harm.  
8 We therefore grant leave to appeal the interlocutory order.

#### 9 **V. DISCUSSION**

10 Section 1326(a)(2) states that "a payment made under this  
11 subsection shall be retained by the trustee until confirmation or  
12 denial of confirmation of a plan . . . If a plan is not  
13 confirmed, the trustee shall return any such payment to the  
14 debtor, after deducting any unpaid claim allowed under section  
15 503(b) of this title." 11 U.S.C. § 1326(a)(2) (emphasis added).  
16 The term "such payment" refers to section 1326(a)(1) which  
17 requires a chapter 13 debtor to begin "making the payments  
18 proposed by a plan within 30 days after the plan is filed."  
19 Cohen v. Tran (In re Tran), 309 B.R. 330, 337 (9th Cir. BAP  
20 2004), aff'd, 177 Fed. Appx. 754 (9th Cir. 2006). If a debtor  
21 proposes to fund a portion of his chapter 13 plan with the  
22 proceeds from the sale or refinancing of his residence, those  
23 proceeds may constitute "payments" under section 1326(a). Id.

24 In this case, the initial plan filed by Debtor proposed to  
25 use proceeds from the sale of his residence to pay administrative  
26 and priority claims. The amended plan specifically identified  
27 the funds being held by Trustee (\$37,530.98) and proposed to use  
28 them to pay allowed claims pursuant to the plan. In addition,

1 the order approving the sale of the residence stated that the  
2 non-exempt portion of the sale proceeds were to be distributed  
3 pursuant to Debtor's chapter 13 plan. Consequently, the proceeds  
4 from the sale of the residence held by Trustee constituted  
5 "payments" for the purposes of section 1326(a).<sup>10</sup> Id. As such,  
6 because Debtor's chapter 13 plan was never confirmed, Trustee was  
7 compelled by statute to return the proceeds to Debtor. Id.; 11  
8 U.S.C. § 1326(a) (2).

9 Notwithstanding the unambiguous language of section  
10 1326(a) (2) mandating chapter 13 trustees to return payments made  
11 by a debtor in conjunction with a plan following dismissal of an  
12 unconfirmed chapter 13 case, some courts have held that the funds  
13 held by the trustee following dismissal are subject to levy or  
14 other forced collection under state law. In re Doherty, 229 B.R.  
15 461, 463 (Bankr. E.D. Wash. 1999); Massachusetts v. Pappalardo  
16 (In re Steenstra), 307 B.R. 732, 739 (1st Cir. BAP 2004).<sup>11</sup>

17 These courts reason that despite the clear directive of section

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19 <sup>10</sup>In In re Witte, 279 B.R. 585, 587 (Bankr. E.D. Cal. 2002),  
20 a bankruptcy court held that funds from the sale of a chapter 13  
21 debtor's residence were not "payments" proposed by a plan and  
22 section 1326(a) (2). In that case, however, neither the debtor's  
23 initial plan nor his amended plan proposed to use the sale  
24 proceeds to pay creditors; rather, both plans proposed to use  
25 debtor's disposable income to fund payments to creditors. Witte  
26 is therefore distinguishable, because both of Debtor's plans here  
27 proposed to use the sale proceeds to fund the plan.

28 <sup>11</sup>Most cases have held to the contrary: funds held by a  
chapter 13 trustee upon dismissal of case in which no plan has  
been confirmed must be returned to the debtor in accordance with  
the plain language of section 1326(a) (2). In re Bailey, 330 B.R.  
775, 776 (Bankr. D. Ore. 2005); In re Davis, 2004 WL 3310531  
(Bankr. M.D. Ala. 2004); In re Oliver, 222 B.R. 272, 275 (Bankr.  
E.D. Va. 1998); In re Walter, 199 B.R. 390, 392 (Bankr. C.D. Ill.  
1996).

1 1326(a)(2), the bankruptcy estate terminates after dismissal and  
2 the automatic stay is no longer effective, thus subjecting the  
3 funds held by the trustee to garnishment or levy by creditors.  
4 Id. Here, no evidence exists that the priority creditors have  
5 attempted to levy the funds held by Trustee, so the holdings of  
6 these cases are inapplicable; instead, the reasoning of cases  
7 like Bailey is more persuasive. Even if the State of Washington  
8 had effected a levy of the funds, we question how state law levy  
9 statutes can preempt the plain language of section 1326(a)(2).  
10 See Bailey, 330 B.R. at 776 n.3. To the extent the state  
11 statutes conflict with the Bankruptcy Code, the Bankruptcy Code  
12 generally prevails pursuant to the Supremacy Clause of the  
13 Constitution. Id.; Baker & Drake, Inc. v. Public Service  
14 Commission of Nevada (In re Baker & Drake, Inc.), 35 F.3d 1348  
15 (9th Cir. 1994). The language of section 1326(a)(2) is clear and  
16 unambiguous and its dictates must be followed.

17 In Beam v. I.R.S. (In re Beam), 192 F.3d 941 (9th Cir.  
18 1999), the Ninth Circuit held that plan payments held by a  
19 chapter 13 trustee following dismissal of a case without a  
20 confirmed plan were subject to levy by the IRS. In so holding,  
21 the Ninth Circuit noted that section 1326(a)(2) conflicted with  
22 levying statutes contained in the Internal Revenue Code and held  
23 that 28 U.S.C. § 6334 ("IRC § 6334") superseded section  
24 1326(a)(2). IRC § 6334(a) contains thirteen categories of  
25 property exempt from levy and IRC § 1334(c) specifies that no  
26 other property or rights shall be exempt from levy. The Ninth  
27 Circuit was "persuaded that Congress clearly intended to exclude  
28 from IRS Levy only those 13 categories." Beam, 192 F.3d at 944.

1 Because funds held by a chapter 13 trustee were not included in  
2 the list, the Ninth Circuit concluded that the provisions of IRC  
3 § 6334 trumped section 1326(a).

4 In the present case, no evidence exists that the IRS has  
5 attempted to levy the funds held by Trustee, so Beam is  
6 inapplicable. The pending motion by the IRS, which we believe  
7 will be rendered moot by our decision in this appeal, is not the  
8 same thing as a levy. In this case, Trustee simply seeks  
9 permission to pay priority creditors with the funds he is  
10 holding; levy and garnishment are not at issue. The plain  
11 language of section 1326(a)(2) dictates that the funds be  
12 returned to Debtor.

13 **VI. CONCLUSION**

14 For the foregoing reasons, we REVERSE and remand for the  
15 bankruptcy court to order Trustee and Buchanan to turn over the  
16 funds they hold to Debtor.