

JUN 14 2007

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-07-1030-PaMkB
	)		
ANNETTE D. GOODE-PARKER,	)	Bk. No.	LA 01-30943-BR
	)		
Debtor.	)		
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	)		
ANNETTE D. GOODE-PARKER;	)		
PAULA LAUREN GIBSON,	)		
	)		
Appellants,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
ALFRED SIEGEL, chapter 7	)		
trustee,	)		
	)		
Appellee.	)		
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Argued and Submitted on May 17, 2007  
at Pasadena, California

Filed - June 14, 2007

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

Honorable Barry Russell, Chief Bankruptcy Judge, Presiding.

Before: PAPPAS, MARKELL<sup>2</sup> and BRANDT, 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> The Honorable Bruce A. Markell, United States Bankruptcy Judge for the District of Nevada, sitting by designation.

1 Paula Lauren Gibson ("Gibson") and the chapter 7<sup>3</sup> debtor  
2 appeal the bankruptcy court's order sustaining the objection of  
3 Alfred Siegel, trustee ("Trustee"), to Gibson's proof of claim.  
4 We AFFIRM.

5 **FACTS**

6 Appellant Annette Goode-Parker ("Debtor") retained attorney  
7 Harold Greenberg ("Greenberg")<sup>4</sup> to represent her in a divorce  
8 action on May 29, 2001. At that time, Debtor and her spouse,  
9 Marvin Parker, jointly owned a condominium in Los Angeles County  
10 (the "Property"). Although Debtor desired to retain the  
11 Property, the mortgage payments on the condominium were  
12 delinquent, and a foreclosure sale was scheduled to occur on June  
13 6, 2001. Greenberg alleges that, at his urging, Wells Fargo Bank,  
14 the mortgage holder, agreed to a 30-day stay of the sale.  
15 However, during this time, Debtor was unable to negotiate an  
16 arrangement satisfactory to Wells Fargo to further delay  
17 foreclosure.

18 Allegedly based upon advice given to her by Greenberg, Debtor  
19 filed a pro se petition for relief under chapter 13 of the  
20 Bankruptcy Code on July 6, 2001. Debtor alleges Greenberg told  
21 her this course of action was the only way she could save her  
22 ownership interest in the Property.

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24 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
27 enacted and promulgated prior to the effective date (October 17,  
2005) of the relevant provisions of the Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,  
April 20, 2005, 119 Stat. 23.

28 <sup>4</sup> Unless otherwise noted, we refer to Greenberg, his law  
firm, and his associate, Carlo Fisco, collectively herein as  
"Greenberg."

1 An attorney, Jeffrey Wishman, appeared for Debtor in her  
2 bankruptcy case on July 20, 2001. Because Debtor was unable to  
3 devise a chapter 13 plan that would pay both Wells Fargo and a  
4 large tax claim of the IRS, she moved to convert the case to a  
5 proceeding under chapter 7. The bankruptcy court granted the  
6 motion to convert the case on March 12, 2002. Alfred H. Siegel  
7 was appointed to serve as trustee in the case.

8 The bankruptcy court granted Debtor a discharge on June 24,  
9 2002; the bankruptcy case was closed on July 12, 2002.

10 The Property was sold at a foreclosure sale on July 26, 2002,  
11 for \$140,050. On August 10, 2002, Debtor received a letter from  
12 Wells Fargo informing her of the sale. She alleges that it was  
13 then she realized that the advice allegedly given by Greenberg to  
14 file for bankruptcy relief was, in her opinion, wrong.

15 On or about June 25, 2003, Debtor engaged a new attorney,  
16 Gibson, who commenced a malpractice action against Greenberg on  
17 Debtor's behalf. Annette Goode-Parker v. Harold Greenberg et al.,  
18 Los Angeles Superior Court Case no. BC-299713 (the "Malpractice  
19 Action"). On February 3, 2004, Debtor's second amended complaint  
20 was filed in the Malpractice Action alleging, among other things,  
21 that Greenberg was negligent in not obtaining title to the  
22 Property for Debtor, and in advising her to file the bankruptcy  
23 case.

24 In December 2004, Gibson withdrew as counsel for Debtor in  
25 the Malpractice Action. Debtor engaged new counsel, David  
26 Cordier.

27 On March 29, 2005, the Superior Court ruled that, in light of  
28 her bankruptcy filing, Debtor lacked standing to prosecute the

1 Malpractice Action and granted leave to Trustee to intervene as  
2 the proper party-plaintiff in the Malpractice Action. On June 21,  
3 2005, Trustee moved to reopen the bankruptcy case in order to  
4 participate in, and administer any recovery from, the Malpractice  
5 Action. The motion was granted by the bankruptcy court on August  
6 15, 2005, and Trustee was reappointed. Trustee intervened in the  
7 state court action and, eventually, entered into a settlement  
8 agreement with Greenberg calling for payment of \$35,000 to the  
9 bankruptcy estate, which the bankruptcy court approved.<sup>5</sup>

10 On January 9, 2006, Gibson filed a Proof of Claim in the  
11 bankruptcy case for "reasonable attorneys' fees" and \$3,500 in  
12 costs incurred while serving as Debtor's counsel in the  
13 Malpractice Action from June 2003 to November 2004. Trustee  
14 objected to this claim on September 6, 2006, principally because  
15 Gibson was never employed by Trustee, the employment was never  
16 approved by the court, the representation was for a non-bankruptcy  
17 matter, and therefore, Gibson was not entitled to payment from the  
18 bankruptcy estate. On October 11, 2006, Gibson filed an  
19 opposition to Trustee's objection, arguing that she had inadequate  
20 notice of the hearing scheduled for October 24, 2006, that she  
21 claimed an attorney's lien on the proceeds of the Malpractice  
22 Action, and that Trustee had acted improperly in administering the  
23 Malpractice Action.

24 The bankruptcy court conducted a hearing on Trustee's  
25 objection to Gibson's claim on October 24, 2006. Trustee was

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26  
27 <sup>5</sup> Appellants' objections to the proposed compromise were  
28 overruled by the bankruptcy court. The Panel affirms the  
bankruptcy court's order approving the compromise in the related  
appeal, Goode-Parker v. Siegel, case no. CC-06-1408 (9th Cir. BAP  
June 14, 2007).

1 represented by counsel; Gibson appeared pro se and was heard.  
2 Debtor appeared at the hearing, but did not participate in the  
3 argument.<sup>6</sup>

4 The bankruptcy court attempted on several occasions during  
5 the hearing to focus Gibson's attention on its concern that her  
6 claim arose after the filing of Debtor's bankruptcy petition, and  
7 therefore, that Gibson did not hold a valid claim in Debtor's  
8 bankruptcy case.

9 THE COURT: Let me ask you because, again, I  
10 certainly sympathize with your situation and  
11 you've obviously spent time and effort, but  
12 doesn't the statute say this [claim] is post-  
13 petition?

12 MS. GIBSON: But it's also post-discharge and I  
13 think that's the key. . . .

14 Tr. Hr'g 3:6-11 (October 24, 2006).

15 THE COURT: I want to ask you. The problem is  
16 it's still - I'm faced with the legal question  
17 dealing with the allowance of your claim.

17 MS. GIBSON: Your Honor, if I could just make  
18 this one point. I understand you're going to  
19 rule against me.

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20 <sup>6</sup> Debtor has joined as an Appellant in this appeal. While  
21 no objection has been raised to Debtor's standing in this appeal,  
22 we have a responsibility to examine the standing of the parties to  
23 an appeal because it implicates the jurisdictional authority of  
24 the Panel. Paine v. Dickey (In re Paine), 250 B.R. 99 (9th Cir.  
25 BAP 2000). On the surface, it would seem that Debtor lacks  
26 standing to appeal the outcome of Trustee's objection to Gibson's  
27 claim. Heath v. Am. Express Travel Related Servs. (In re Heath),  
28 331 B.R. 424, 429 (9th Cir. BAP 2005) ("debtors only have standing  
to object to claims where there is 'a sufficient possibility' of a  
surplus to give them a pecuniary interest."). Debtor did not  
actively participate in oral argument in the bankruptcy court, and  
thus has raised no issues or arguments distinct from those  
advanced jointly with Gibson in their pleadings and briefs.  
However, if Gibson is not paid from the bankruptcy estate,  
presumably she can collect amounts owed on this post-petition,  
undischarged debt directly from Debtor. Therefore, Debtor has the  
requisite pecuniary interest in the outcome of this appeal to  
justify her standing. Id.

1 THE COURT: Let me ask you. . . . I still have  
2 the issue before me do I not of whether or not  
you can have a claim?

3 MS. GIBSON: Well, I think that in the other  
4 cases dealt with the situation where lawyers  
5 were doing things for the Debtor that were  
6 intimately connected to the bankruptcy. This  
is not that situation. As far as I know, this  
is a Debtor that's been discharged.

7 THE COURT: Let me stop you. You're asking for  
8 a claim as to the estate. You can still . . .  
have a claim against your client.

9 MS. GIBSON: Well, under California state law,  
10 my claim is against the attorneys who have  
taken over the case and I think I cited the  
cases in my papers.

11 THE COURT: I don't think California law will  
12 trump the bankruptcy statute, does it?

13 MS. GIBSON: Well -

14 THE COURT: That's sort of a rhetorical  
question.

15 Tr. Hr'g 5:10 - 6:9.

16 The bankruptcy court sustained Trustee's objection to  
17 Gibson's claim: "I'm going to disallow the claim. Again, from  
18 your standpoint I totally understand but I'm bound by the statute  
19 and bound by the Supreme Court." Tr. Hr'g 8:17-20. The court  
20 issued an Order Sustaining Objection to Claim of Paula Lauren  
21 Gibson on November 6, 2006. Appellants timely filed a notice of  
22 appeal on November 9, 2007.

23

24

**JURISDICTION**

25 The bankruptcy court had jurisdiction under 28 U.S.C.  
26 §§ 1334(b) and 157(b) (2) (B). We have jurisdiction under 28 U.S.C.  
27 § 158(b).

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**ISSUES ON APPEAL**

Whether the bankruptcy court erred in sustaining Trustee's objection to Gibson's proof of claim because she did not hold an allowable claim in Debtor's bankruptcy case.

Whether Gibson's rights under the Fifth Amendment to the United States Constitution were infringed.

**STANDARDS OF REVIEW**

There are no issues of fact presented in this appeal. Whether the bankruptcy court correctly interpreted and applied the Bankruptcy Code is a legal question which we review de novo. Bitters v. Networks Elec. Corp. (In re Networks Elec. Corp.), 195 B.R. 92, 96 (9th Cir. BAP 1996). We review the bankruptcy court's ruling concerning constitutional issues de novo. Cogswell v. City of Seattle, 347 F.3d 809, 813 (9th Cir. 2003).

**DISCUSSION**

1. The court did not err in sustaining Trustee's objection to Gibson's proof of claim.

A primer on the Code's provisions for allowance of creditors' claims in bankruptcy cases is in order.

In bankruptcy cases, a "claim" refers to a party's right to payment from, or to an equitable remedy against, the debtor. § 101(5). Section 501(a) instructs that "A creditor . . . may file a proof of claim." Section 502(a) provides that a "claim . . . , proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects." If an objection to a claim is made, § 502(b) mandates

1 that the bankruptcy court, "after notice and a hearing, shall  
2 determine the amount of such claim in lawful currency of the  
3 United States as of the date of the filing of the petition, and  
4 shall allow such claim in such amount . . ." unless one or more of  
5 several grounds for disallowance exist. (Emphasis added).

6 As noted above, only a "creditor" may hold an allowable  
7 claim. Under the Bankruptcy Code, with some exceptions not  
8 applicable here, a creditor is an " [an] entity that has a claim  
9 against the debtor that arose at the time of or before the order  
10 for relief concerning debtor . . . ." § 101(10) (A) (emphasis  
11 added).

12 When this statutory regime is applied to the undisputed  
13 facts,<sup>7</sup> it is clear that Gibson was not a creditor, and did not  
14 hold an allowable claim, in Debtor's bankruptcy case. This is  
15 because her right to payment from Debtor of the attorney fees and  
16 costs incurred in the Malpractice Action did not arise "at the  
17 time of or before the order for relief concerning the debtor  
18 . . ." for purposes of § 101(10) (A).

19 Appellants' argument on appeal that Gibson is a creditor of  
20 the estate is fundamentally flawed. It is apparently based on  
21 their contention in the bankruptcy court that an order for relief  
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23 <sup>7</sup> A properly executed and filed proof of claim constitutes  
24 "prima facie evidence of the validity and amount of the claim."  
25 Rule 3001(f). An objection to the proof of claim "creates a  
26 dispute which is a contested matter" which must be resolved after  
27 notice and opportunity for hearing. Lundell v. Anchor Const.  
28 Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000). "Upon  
objection, the proof of claim provides 'some evidence as to its  
validity and amount' and is 'strong enough to carry over a mere  
formal objection without more.'" Id. (quoting Wright v. Holm (In  
re Holm), 931 F.2d 620, 623 (9th Cir. 1991) (additional citations  
omitted). Here, Trustee has not disputed the facts which Gibson  
alleges establish her right to file a proof of claim.



1 was entered when the bankruptcy case was reopened:

2           The Bankruptcy Code's definition of "creditor"  
3 includes "an entity that has a claim against  
4 the debtor that arose at the time of or before  
5 the order for relief concerning the debtor."  
6 11 U.S.C. § 10(A). [sic] The Code defines  
7 "Claim" as a (A) right to payment, whether or  
8 not such right is reduced to judgment,  
9 liquidated, unliquidated, fixed, contingent,  
10 matured, unmatured, disputed, undisputed,  
11 legal, equitable, secured, or unsecured . . .  
12 . The order for relief concerning the debtor  
13 was the reopening of the bankruptcy estate on  
14 or about June 2005.

15 Opposition to Objection to Proof of Claim Filed by Paula Lauren  
16 Gibson, Points and Authorities at p. 2 (emphasis added).

17           Appellants' position is incorrect. Under § 348(a),  
18 "[c]onversion of a case from a case under one chapter of [title  
19 11] to a case under another chapter of [title 11] constitutes an  
20 order for relief under the chapter to which the case is converted  
21 . . . ." Put another way, the conversion of Debtor's bankruptcy  
22 case from a chapter 13 case to a chapter 7 case on March 12, 2002,  
23 constituted the "order for relief" for purposes of Debtor's  
24 chapter 7 bankruptcy case. As a result, Gibson did not have a  
25 "right to payment" (i.e., a "claim") which "arose at or before the  
26 order for relief concerning the debtor."<sup>8</sup>

27           Appellants assign too much significance to reopening. We  
28 have repeatedly ruled that reopening a bankruptcy case is "a

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29           <sup>8</sup> Gibson is also not protected by any of the statutory  
30 exceptions to this rule, in that she is not "an entity that has a  
31 claim against the estate of a kind specified in sections  
32 348(d) (i.e., a post-petition, preconversion debt), 502(f) (a debt  
33 arising in the "gap" between filing of an involuntary petition and  
34 entry of an order for relief on that petition), 502(g) (a claim  
35 arising from the rejection of an executory contract or lease),  
36 502(h) (a claim arising from the avoidance of a transfer from the  
37 debtor to the creditor) or 502(i) (certain post-petition tax  
38 claims)" for purposes of § 101(10) (B). Gibson also does not hold  
39 a community claim for purposes of § 101(10) (C).

1 ministerial act that functions primarily to enable the file to be  
2 managed by the clerk as an active matter and that, by itself,  
3 lacks independent legal significance and determines nothing with  
4 respect to the merits of the case.” Menk v. LaPaglia (In re  
5 Menk), 241 B.R. 896, 913 (9th Cir. BAP 1997) (citing, DeVore v.  
6 Marshack (In re DeVore), 223 B.R. 193, 198 (9th Cir. BAP 1998);  
7 Abbott v. Daff (In re Abbott), 183 B.R. 198, 200 (9th Cir. BAP  
8 1995); United States v. Germaine (In re Germaine), 152 B.R. 619,  
9 624 (9th Cir. BAP 1993).

10 We know of no case law which holds that reopening a  
11 bankruptcy case constitutes a new order for relief. In two  
12 reported decisions in which the courts considered such an  
13 argument, both concluded that deeming the reopening to be a new  
14 order for relief would substantially alter the structure of the  
15 Bankruptcy Code. Johnson v. Long Beach Mortgage Loan Trust, 451  
16 F.Supp.2d 16, 50 (D.D.C. 2006); Hoffman v. Money Mortgage Corp. of  
17 Am., 248 B.R. 79, 87 (Bankr. W.D. Tex. 2001). The Hoffman court  
18 in particular noted that entering a new order for relief could  
19 change the Code’s treatment of property interests, claims,  
20 exemption rights, and preferences, among others.

21 If Congress intended the “reopening” of a case  
22 as the equivalent of the entry of an “order  
23 for relief” for some purposes . . . then we  
24 would expect to see a detailed listing of the  
25 circumstances in which these basic concepts  
26 are altered by the opening of the case within  
27 section 350 itself. After all, if a case is  
28 converted pursuant to section [348], or  
dismissed, pursuant to section 349, those  
sections set out in significant detail the  
resulting impact of the twin notions of “order  
for relief” and “commencement of the case.”  
Section 350(b) is, by contrast, succinct and  
utterly silent with regard to impact on either  
of these notions.

1 Hoffman, 248 B.R. at 81.

2 Appellants offer no reasoned analysis as to why we should  
3 adopt the revolutionary view that reopening a case constitutes a  
4 new order for relief, and consequently, that Gibson's services  
5 rendered to Debtor, after conversion but before the reopening of  
6 the case, qualify Gibson as a creditor of the estate. Rather, we  
7 conclude that the entry of the order for relief in Debtor's case  
8 occurred on March 12, 2002, when, on Debtor's motion, the  
9 bankruptcy court converted her original chapter 13 case to a  
10 proceeding under chapter 7.

11 Gibson's services to Debtor allegedly began with the filing  
12 of the state court complaint in the Malpractice Action in June  
13 2003 and ended with Gibson's withdrawal as Debtor's counsel in  
14 that action in November 2004. However, to support her claim,  
15 Gibson's proof of claim identifies services for the period from  
16 November 2003 through November 2004. But even if we were to  
17 accept the June 2003 date for the commencement of services, this  
18 date is fifteen months after entry of the order for relief. All  
19 of Gibson's services were provided after the conversion of the  
20 case and thus Gibson does not hold an allowable claim in Debtor's  
21 chapter 7 bankruptcy case.<sup>9</sup>

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23 <sup>9</sup> Considerable attention was devoted by Trustee, Gibson and  
24 the bankruptcy court to the implications of the Supreme Court's  
25 decision in Lamie v. U. S. Trustee, 540 U.S. 526 (2004), which  
26 held that, under the 1994 amendments to § 330(a), a debtor's  
27 attorney is not entitled to payment for services from the  
28 bankruptcy estate. See Tr. Hr'g 2:12-18, 8:10-20, 9:7-8.  
However, Gibson provided no services to Debtor in connection with  
the bankruptcy case, and therefore, would be entitled to no  
compensation from the bankruptcy estate, even if the statute  
allowed such, as "debtor's attorney." As such, Lamie is  
inapplicable here.

1 Before leaving this discussion, we briefly address Gibson's  
2 allegation that she holds an "attorney's lien" on the proceeds of  
3 settlement of the Malpractice Action. Gibson appears to argue  
4 that California law allows an attorney's charging lien for the  
5 services she provided and the costs she incurred in bringing and  
6 prosecuting the Malpractice Action from March 2003 through  
7 November 2004 against any settlement reached in that action.  
8 Gibson did not cite to any statutory authority for the attorney's  
9 lien, relying instead on three California cases which we discuss  
10 below.

11 Gibson did not properly raise this argument in Appellants'  
12 Opening Brief; it is first addressed in Appellants' Reply Brief.<sup>10</sup>  
13 "Issues not raised in the opening brief are usually deemed  
14 waived." Balser v. DOJ, 327 F.3d 903, 911 (9th Cir. 2004). We  
15 have discretion whether to entertain such issues. Id. We see no  
16 reason to exercise that discretion here.

17 Even were the Panel to consider Gibson's attorney's lien  
18 argument on the merits, it fails. Under California law, an

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19  
20 <sup>10</sup> Appellants do not directly assert that Gibson had an  
21 attorney's lien in their Opening Brief. They make indirect  
22 references to an attorney's "property right" in litigation  
23 proceeds in their discussion of Lamie. Then, in opposition to  
24 Trustee's earlier citation in the bankruptcy court proceedings to  
25 Pac. Far E. Line v. Official Creditors Comm., 654 F.2d 664 (9th  
26 Cir. 1991), Appellants also cite Pac. Far E. Line for the  
27 proposition that "an attorney retained under a contingency fee  
28 contract, and later discharged by the client without cause, holds  
a claim against the client for the reasonable value of his  
services." Id. at 668. However, Appellants do not tie these  
references in their Opening Brief to any specific argument that  
Gibson held an attorney's lien in these settlement proceeds. We  
also note that Pac. Far E. Line dealt with a written contingency  
fee agreement and all the attorney services were performed  
prepetition. We discuss below our conclusion that attorney  
charging liens in California must be based on a written agreement  
between attorney and client.

1 attorney's lien upon a settlement or judgment for compensation of  
2 services provided in recovering funds from another is denominated  
3 a "charging lien," and is imposed to secure either an "hourly or  
4 contingency fee arrangement." Cetenko v. United Cal. Bank, 30  
5 Cal.3d 528, 531-32 (Cal. Ct. App. 1982). The California Supreme  
6 Court recently examined attorney's liens in Fletcher v. Davis, 33  
7 Cal.4th 61, 65 (2004), and ruled unequivocally that, with  
8 exceptions not relevant here, "an attorney's lien is created only  
9 by contract. . . . Unlike a service lien or a mechanic's lien,  
10 for example (Civ. Code §§ 3051, 3110) an attorney's lien is not  
11 created by the mere fact that an attorney has performed services  
12 in a case." Id. The court reasoned that a charging lien creates  
13 "an adverse interest within the meaning of Rule 3-300 [Code of  
14 Professional Responsibility] and thus requires the client's  
15 informed written consent." Id. at 69 (emphasis added).

16 In Fletcher, the court examined a case in which the attorney  
17 still possessed the recovered funds on which he asserted a lien.  
18 However, one of the cases cited by Gibson involved an attorney  
19 who, like her, asserted a charging lien on a fund after the  
20 attorney was discharged. Weiss v. Marcus, 51 Cal. App.3d 590, 598  
21 (Cal. Ct. App. 1975). In that case, the court recognized a  
22 continuing lien based on the original written agreement between  
23 the attorney and client. The second decision cited by Gibson was  
24 Siciliano v. Fireman's Fund Ins. Co., 62 Cal. App.3d 745 (1976) in  
25 which the court enforced a lien based on a written contingent fee  
26 agreement between the attorney and client.

27 The other case cited by Gibson is Huskinson & Brown, LLP v.  
28 Wolf, 32 Cal.4th 453 (2004). Huskinson was a dispute between a

1 law firm and a second firm to which it had referred a client with  
2 a written referral fee agreement. The Huskinson court ruled that  
3 the first firm could recover from the second in quantum meruit.  
4 Interestingly, the word "lien" never appears in the Huskinson  
5 decision.

6 In short, California case law is consistent in holding that  
7 an attorney's lien on settlement proceeds is enforceable if  
8 supported by a written representation agreement between an  
9 attorney and his or her client. At oral argument before this  
10 Panel, Gibson admitted that no written agreement existed between  
11 Debtor and herself. Moreover, even if some form of agreement  
12 could be established, both Gibson and Debtor indicated to the  
13 bankruptcy court that Gibson's services were provided pro bono:  
14 "Objector previously represented the debtor in connection with  
15 Goode-Parker v. Law Office of Harold Greenberg, Los Angeles  
16 Superior Court case number BC 299713. . . such representation was  
17 intended to be on a pro bono basis. . . ." Objection of Creditor  
18 Paula Lauren Gibson to Trustee's Motion to Approve Settlement at  
19 p. 2; Debtor's amended Schedule F, filed January 9, 2006, lists  
20 Gibson as an unsecured creditor for "Pro Bono (for Debtor only)  
21 Legal Services."

22 For all the above reasons, we conclude that the bankruptcy  
23 court did not err in sustaining Trustee's objection to Gibson's  
24 proof of claim because she did not hold an allowable claim in  
25 Debtor's bankruptcy case.<sup>11</sup>

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26  
27 <sup>11</sup> Our holding is limited to Gibson's asserted claim under  
28 § 502. Gibson has not argued, nor do we consider, whether she may  
assert a right to a post-petition administrative expense under  
(continued...)

1 2. Gibson's Fifth Amendment rights were not infringed.

2 Gibson's Fifth Amendment argument is articulated in a mere  
3 three sentences in her opening brief: "The fifth amendment of the  
4 U.S. Constitution prohibits the taking of property without just  
5 compensation. Without compensation, appellant Gibson's property  
6 has been taken to advantage [sic] the other unsecured creditors.  
7 in [sic] violation of that amendment." Appellants' Opening Brief  
8 at 8. Gibson provides no additional elaboration, authority or  
9 reasoned analysis for this argument.

10 The Fifth Amendment forbids the taking of "private property  
11 . . . for public use, without just compensation." U.S. CONST. AMEND.  
12 V. The Ninth Circuit utilizes a two-step analysis in order to  
13 determine whether a "taking" has occurred. Engquist v. Or. Dept.  
14 Of Agric., 478 F.3d 985, 1002 (9th Cir. 2007). The first step is  
15 to determine "whether the subject matter is 'property' within the  
16 meaning of the Fifth Amendment" and the second step is to  
17 determine "whether there has been a taking of that property, for  
18 which compensation is due." Id. (citing Konizeski v. Livermore  
19 Labs (In re Consol. U.S. Atmospheric Testing Litig.), 820 F.2d  
20 982, 988 (9th Cir. 1987).

21 Constitutionally protected property interests have expanded  
22 beyond real and personal property and the actual ownership of real  
23 estate, chattels and money. Board of Regents of State Colls. v.  
24 Roth, 408 U.S. 564, 571-72 (1972). Property protected by the  
25 Fifth Amendment has now been extended to include such things as

26 \_\_\_\_\_  
27 <sup>11</sup>(...continued)  
28 § 503. At oral argument, counsel for the Trustee conceded that  
Gibson is not foreclosed from applying to the bankruptcy court for  
allowance of such a claim.

1 interests in health and welfare benefits. Goldberg v. Kelly, 397  
2 U.S. 254, 261-62 (1970). Such an expansion does not, however,  
3 mean that every potential interest constitutes a protected right.  
4 Rather, a protected property interest requires "a legitimate claim  
5 of entitlement" to be established. Pierre v. West, 211 F.3d 1364,  
6 1366 (Fed. Cir. 2000) (quoting Roth, 408 U.S. at 577; Am. Mfrs.  
7 Mut. Ins. v. Sullivan, 526 U.S. 40, 60 (1999)).

8 As discussed above, Gibson did not hold an allowable claim  
9 against, and could prove no entitlement to payment of fees from,  
10 the bankruptcy estate. She submitted her proof of claim in the  
11 reopened bankruptcy case, to which Trustee objected. Gibson  
12 appeared at the hearing conducted by the bankruptcy court  
13 concerning her claim, the court considered Gibson's arguments, and  
14 correctly disallowed the claim. As the bankruptcy court properly  
15 concluded, there was no statutory basis for Gibson to recover fees  
16 from the bankruptcy estate. Simply put, that Gibson will not be  
17 paid from the funds recovered by Trustee from settlement of the  
18 Malpractice Action does not, under these facts, amount to a  
19 "taking" by the bankruptcy court.

20 Gibson raised an additional, due process argument in the  
21 bankruptcy court, but has not specifically argued it on appeal:  
22 whether Gibson had adequate notice of the hearing on the objection  
23 to her claim. To the extent that Gibson's vague Fifth Amendment  
24 argument is intended to address procedural concerns, we will  
25 address it here.

26 Gibson alleges that she did not receive the notice until  
27 October 9, 2006, for the hearing scheduled on October 24, 2006.  
28 Rule 3007 requires 30 days' notice to the affected creditor of a



1 hearing on an objection to her claim. The Ninth Circuit  
2 ordinarily does "not condone violations of the Bankruptcy Rules'  
3 notice requirements." Preblich v. Battley, 181 F.3d 1048, 1051  
4 (9th Cir. 1997). However, the Preblich court ruled that, to  
5 assert a violation of the Due Process Clause, an individual must  
6 first show that he or she has been deprived of life, liberty or  
7 property. Where a creditor can not establish that he or she is  
8 being deprived of property, the lack of notice or inadequate  
9 notice of a hearing denying their claim is harmless. Id. Here,  
10 Gibson has not been deprived of a property interest by the  
11 bankruptcy court and thus, to the extent notice to her was  
12 inadequate, it was harmless.

13  
14 **CONCLUSION**

15 We AFFIRM the order of the bankruptcy court.  
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