

SEP 06 2006

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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NOT FOR PUBLICATION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

In re:)	BAP Nos.	EW-05-1273-NBS
)		EW-05-1276-NBS
THE CATHOLIC BISHOP OF SPOKANE,)		
a/k/a The Catholic Diocese of)	Bk. No.	04-08822
Spokane,)		
)	Adv. Nos.	04-00291
Debtor.)		05-80038
<hr/>			
TORT CLAIMANTS' COMMITTEE,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
THE CATHOLIC DIOCESE OF SPOKANE;)		
TORT LITIGANTS' COMMITTEE;)		
MICHAEL SHEA, et al.,)		
)		
Appellees.)		
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Argued and Submitted on July 20, 2006
at Spokane, Washington

Filed - September 6, 2006

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

Honorable Patricia C. Williams, Chief Bankruptcy Judge, Presiding

Before: NAUGLE,² BRANDT and SMITH, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. David N. Naugle, Bankruptcy Judge for the Central District of California, sitting by designation.

1 Appellant and proposed intervenor, the Torts Claimants'
2 Committee (the "TCC") appeals from the bankruptcy court's orders
3 denying intervention pursuant to Fed.R.Civ.P. 24 (a)(1) and (2)³
4 (made applicable in bankruptcy adversary proceedings by Fed.R.
5 Bankr.P. 7024). We REVERSE and REMAND.

6
7 **FACTS**

8 The Catholic Bishop of Spokane, a/k/a The Catholic Diocese
9 of Spokane, (the "Debtor") filed a voluntary petition for relief
10 under Chapter 11 on December 6, 2004. The United States Trustee
11 appointed a five-member official creditors' committee, the TCC,
12 pursuant to § 1102⁴, to represent the interests of all holders of
13 sexual abuse claims against the Debtor. Initially, the TCC was
14 comprised of three members who had not filed lawsuits against the
15 Debtor prior to the petition date (the "Claimants") and two
16 members who had filed lawsuits against the Debtor prior to the
17 petition date (the "Litigants").

18 Subsequently, Michael Shea ("Shea"), a Litigant member of
19 the TCC, filed an adversary proceeding in his individual
20

21 ³ The bankruptcy court also denied permissive intervention
22 pursuant to Fed.R.Civ.P. 24(b). The TCC has not raised the
23 denial of permissive intervention on appeal.

24 ⁴ Unless otherwise indicated, all "Code," chapter and
25 section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
26 1330 prior to its amendment by the Bankruptcy Abuse Prevention
27 and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23,
28 as the case from which these adversary proceedings and these
appeals arise was filed before its effective date (generally
17 October 2005). All Rule references are to the Federal Rules
of Bankruptcy Procedure, and all "FRCP" references are to the
Federal Rules of Civil Procedure.

1 capacity against the Debtor seeking a declaratory judgment that
2 the Debtor, and therefore, the estate owned certain property (the
3 "Disputed Property"), which the Debtor contended was owned by its
4 parishes, schools and related entities (the "Shea Adversary").

5 On February 2, 2005, the United States Trustee reconstituted
6 the TCC by removing the two Litigant members, including Shea,
7 and appointing a second official creditors' committee, the Tort
8 Litigants' Committee (the "TLC"), pursuant to § 1102, to
9 represent the interests of the Litigants. The TCC contends that
10 counsel for the TLC have represented that the Litigants are a
11 separate class of creditors with unique interests. Shea was
12 appointed to the TLC.

13 Subsequently, the TLC filed an adversary proceeding against
14 the Debtor and related parish entities seeking declaratory relief
15 regarding ownership of the Disputed Property (the "TLC
16 Adversary")⁵. The TCC filed Motions to Intervene in the Shea
17 Adversary and the TLC Adversary (collectively, the "Related
18 Adversaries"). The TCC contends that it has an unconditional
19 right to intervene in the Related Adversaries pursuant to
20 § 1109(b), and therefore, satisfies the requirement for
21 intervention under FRCP 24(a)(1) and (a)(2) because the TCC's
22 exclusion from the Related Adversaries impairs its ability to
23 protect its interests; and such interests are not adequately
24 represented by the TLC and Shea. The TCC also sought permissive
25 intervention under FRCP 24(b).

26
27 ⁵ A copy of the complaint in the TLC Adversary has not
28 been included as part of the appendix as required by Rule 8009
(b)(1). We may and do take judicial notice. In re E.R. Fegert,
Inc., 887 F.2d 955, 957-58 (9th Cir. 1989).

1 The bankruptcy court denied intervention concluding that:
2 (1) § 1109(b) does not create an absolute right to intervene in
3 an adversary proceeding; (2) the TCC has not established a right
4 under FRCP 24(a) (2); and (3) permissive intervention under 24(b)
5 is not permitted. The TCC filed motions for reconsideration,
6 which were denied. The TCC appeals only the denial of
7 intervention of right pursuant to FRCP 24(a) (1) and (a) (2). The
8 Debtor and Shea filed appellee briefs. The TLC filed a joinder in
9 the Debtor's responsive brief.

10
11 **JURISDICTION**

12 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
13 and § 157(b) (1) and (b) (2). This panel has jurisdiction under 28
14 U.S.C. § 158 (a) (1) and (b).

15
16 **ISSUES**

- 17 1. Whether the bankruptcy court erred in finding that the TCC
18 did not establish a right to intervene under FRCP 24(a) (2).
19 2. Whether the bankruptcy court erred in finding that
20 § 1109(b) is not a statute which confers an unconditional
21 right to intervene in an adversary proceeding.

22
23 **THE PARTIES' REQUESTS FOR JUDICIAL NOTICE**

24 The TCC, Shea and the Debtor filed respective Motions for
25 Requests for Judicial Notice after entry of the order on
26 appeal as follows: (a) The TCC requests that the panel take
27 judicial notice of the: (1) Motion to Approve Settlement Offer
28 and Authorize Debtor to [Enter] Into Proposed Stipulation of

1 Settlement; and (2) Agenda for Case Management Status Conference;
2 (b) Shea requests that the panel take judicial notice of the Plan
3 of Reorganization filed by the TCC; and (c) the Debtor requests
4 that the panel take judicial notice of the bankruptcy court's
5 Order Denying Motion to (1) Approve Settlement Offer and (2)
6 Authorize Debtor to [Enter] Into Proposed Stipulation of
7 Settlement; and (3) the oral decision in which the bankruptcy
8 court stated its decision on the Settlement Motion (collectively,
9 the "Requests for Judicial Notice").

10 In support of the Requests for Judicial Notice, all parties
11 rely upon *Nugent v. Betacom of Phoenix, Inc.* (In re Betacom of
12 Phoenix, Inc.), 250 B.R. 376, 377-78 n.3 (9th Cir. BAP 2000). In
13 *Nugent*, the court lacked information on which to make a
14 determination as to the effect of the district court's rulings on
15 a motion for summary judgment. *Id.* In determining whether the
16 appeal was moot, the court was required to take judicial notice
17 of the memorandum and order on the motion for summary judgment to
18 determine its effect on the appeal. Here, the Requests for
19 Judicial Notice are distinguished from the requests in *Nugent* as
20 the parties are not requesting that the panel take judicial
21 notice of the district court's order reversing the bankruptcy
22 court's decision on the substantive issue regarding property of
23 the estate to determine whether the instant appeal is moot.

24 Papers not filed with the court or admitted into evidence
25 are not part of the record and cannot be part of the record on
26 appeal. *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1077
27 (9th Cir. 1988). In this matter, the documents were filed with
28 the bankruptcy court in early 2006, and the orders on appeal were

1 DISCUSSION

2 1. The TCC Established A Right To Intervene
3 Pursuant To FRCP 24(a) (2)

4 FRCP 24(a) provides:

5 Upon timely application anyone shall be
6 permitted to intervene in an action:...

7 (2) when the applicant claims an interest
8 relating to the property or transaction
9 which is the subject of the action and the
10 applicant is so situated that the disposition
of the action may as a practical matter impair
or impede the applicant's ability to protect
that interest, unless the applicant's interest
is adequately represented by the parties.

11 FRCP 24(a).

12 FRCP 24(a) is construed "liberally in favor of potential
13 intervenors." State ex.rel.Lockyer v. Chao, 450 F.3d 436, 440
14 (9th Cir. 2006). An applicant seeking intervention of right must
15 demonstrate that:

16 (1) it has a significant protectable interest
17 relating to the property or transaction that
18 is the subject of the action;(2) the disposition
19 of the action may, as a practical matter, impair
20 or impede the applicant's ability to protect its
interest;(3) the application is timely; and (4)
the existing parties may not adequately represent
the applicant's interest.

21 Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998).

22 No party challenges the bankruptcy court's determination
23 that the TCC's motion was timely, and that it has a protectable
24 interest in the determination of the extent of the property of
25 the estate, the subject matter of the Related Adversaries.

1 A. The Disposition Of The Action Will Impair Or
2 Impede The TCC's Ability To Protect Its Interest

3 The TCC argues that the bankruptcy court erred when it
4 determined that the TCC's ability to protect its interest was
5 satisfied because individual claimants could file and seek
6 allowance of claims, and the TCC could object to any potential
7 settlement in the Related Adversaries. The TCC contends that if
8 the Related Adversaries are settled, it will have no role in
9 the determination regarding the Disputed Property, i.e., whether
10 it is property of the estate, and its only remedy will be to
11 object to a discriminatory settlement.

12 In support of its position, the TCC relies upon FDIC v.
13 Engle, 524 F.2d 1339, 1340-41 (9th Cir. 1975). In Engle, the FDIC
14 brought suit against Bennett, alleging receipt of fraudulent
15 transfer of certain real property. A lis pendens was filed as to
16 the property. While the action was pending, the Stones, who
17 obtained a state court judgment against Bennett, sought to
18 enforce it against his interest in the property, buying the
19 property at a sheriff's sale. The Stones moved to intervene as
20 successors to Bennett. The court denied intervention as the FDIC
21 and Bennett were prepared to stipulate to judgment in favor of
22 the FDIC. Judgment in favor of the FDIC was subsequently
23 entered. On appeal, because the FDIC took the position that the
24 lis pendens would be binding on the Stones in any other forum,
25 the court determined that the judgment would "impede them as a
26 practical matter in their ability to protect their interests in
27 the property in question." Id. at 1341.

1 Here, the outcome of the Related Adversaries will determine
2 the extent to which the Disputed Property is available for
3 satisfaction of allowed claims. TCC's exclusion from that
4 determination may very well adversely affect its ability to
5 maximize the recovery for its constituency.

6 In Sierra Club v. EPA, 995 F.2d 1478, 1483, 1485-86 (9th
7 Cir. 1993), relief was sought in the form of a declaratory
8 judgment and an injunction, which "would necessarily result in
9 practical impairment of the City's interests." (citations
10 omitted). Id. at 1486. "The issue is participation in the lawsuit,
11 not the outcome." Id. at 1481. "Participation in the lawsuit"
12 includes participation in potential settlement discussions. Id.
13 If the outcome is that some of the Disputed Property is not
14 property of the estate, the TCC's interests will be practically
15 impaired as in Sierra Club.

16 Proposed intervenors' interests "might not be impaired if
17 they have 'other means' to protect them." State ex. rel. Lockyer v.
18 Chao, 450 F.3d 436, 442 (9th Cir. 2006) (quoting United States v.
19 Alisal Water Corp., 370 F.3d 915, 921 (9th Cir. 2004)). The
20 bankruptcy court concluded that the TCC's ability to protect its
21 interest was satisfied because individual claimants could seek
22 allowance of claims and the TCC could object to any potential
23 settlement. A potential settlement may include a proposed
24 treatment and disposition of the Litigants' claims, a
25 determination of what property of the estate is made available to
26 satisfy such claims, and an allocation of such property, all
27 of which may be incorporated in a proposed plan of
28 reorganization. Additionally, if a potential settlement were to

1 include a provision regarding the proposed treatment of the TLC
2 and Shea as a class of creditors, apart from the TCC, to be
3 incorporated in any proposed plan of reorganization, such
4 provision may allow for different treatment under the Code, and
5 the TCC may not have a valid basis for objection to the
6 settlement under the circumstances.

7 The claims process and the ability to object to any
8 settlement may not provide the TCC with sufficient means to
9 protect its interest. Thus, disposition of this action, by
10 settlement or otherwise, may impair the TCC's ability to protect
11 its interest, and provides no mechanism for it to be heard on the
12 subject matter of the Related Adversaries, the extent of the
13 property of the estate.

14 B. Shea And The TLC Do Not Adequately Represent The TCC's
15 Interest

16 In this Circuit, "in determining whether an applicant's
17 interest is adequately represented by existing parties, we
18 consider: (1) whether the interest of a present party is such
19 that it will undoubtedly make all the intervenor's arguments; (2)
20 whether the present party is capable and willing to make such
21 arguments; and (3) whether the would-be intervenor would offer
22 any necessary elements to the proceedings that other parties
23 would neglect." Northwest Forest Resource Council v Glickman,
24 82 F.3d 825, 838 (9th Cir. 1996). The burden is on the proposed
25 intervenor to demonstrate that its interest is not adequately
26 protected. Id.

27 A presumption of adequacy of representation arises where
28 the proposed intervenor and the existing party have the same

1 ultimate objective. Sw. Ctr. for Biological Diversity v. Berg,
2 268 F.3d 810, 823 (9th Cir. 2001). The proposed intervenor need
3 only show that the representation "may be" inadequate. Id. In
4 Berg, the court questioned whether the presumption of inadequacy
5 applied "because complexity makes the determination of the
6 ultimate objective more difficult." Id. at 823. Ultimately, the
7 court did not need to answer the question raised as the
8 presumption was rebutted where the parties did not have
9 "sufficiently congruent interests." Id.

10 In Berg, the City contended that it shared the same ultimate
11 objective as the proposed intervenors. However, the City
12 admitted that its interests may diverge in that its range of
13 considerations were broader than that of the developer motivated
14 by profit, and the developers had different duties under the plan
15 related to mitigation. The City's responsive motion indicated
16 that it would not represent the proposed intervenor's congruent
17 interests. Id.

18 Here, the TCC argues that the presumption of adequacy was
19 improperly applied by the bankruptcy court. The TCC contends that
20 the ultimate objective of Shea and the TLC is to maximize the
21 Disputed Property available to the Litigants and minimize the
22 Disputed Property available to the Claimants. It further contends
23 that the complexity of this case renders the ultimate objective
24 of the parties different, and therefore, the presumption of
25 adequacy of representation should not apply.

26 In its Motions to Intervene, the TCC represented to the
27 bankruptcy court that both the TCC and the TLC had the same
28 goal of establishing that the Disputed Property is property of

1 the estate. However, appellant TCC claimed that its interests
2 were not adequately represented because the TCC and the TLC
3 represent distinct constituencies, and the TCC's arguments are
4 not identical.

5 The TCC further argues that the presumption is rebutted
6 because Shea, the TLC and the TCC have conflicting interests.
7 It contends that the bankruptcy court agreed that the interests
8 of the TCC and the TLC are "diametrically opposed" on the
9 division of property and ignored that the division of the
10 "Disputed Property can be shaped and potentially determined by
11 how the Adversary Proceedings are litigated and settled." TCC
12 Brief at 29.

13 As the bankruptcy court noted, beyond the determination of
14 whether the Disputed Property is property of the estate, the TCC,
15 the TLC and Shea have conflicting interests, as the record
16 reflects that the two committees disagree on many issues,
17 including the "ultimate results and reorganization process."
18 Transcript of Oral Decision, April 28, 2005.

19 We construe FRCP 24(a)(2) liberally in favor of
20 the TCC. Chao, 450 F.3d at 440. The TCC need only show that the
21 representation "may be" inadequate. Berg, 268 F.3d at 823. The
22 record reflects that there is animosity, mistrust and ill will
23 among certain members of the TCC and the TLC. The bankruptcy
24 court determined that the "level of distrust [is] extreme."
25 Transcript of Oral Decision, April 28, 2005. The U.S. Trustee
26 reconstituted the TCC and formed the TCC and the TLC. The TCC is
27 comprised of representatives who had not filed pre-petition suits
28

1 for damages, and the TLC is comprised of representatives who had
2 filed pre-petition suits for damages.

3 In analyzing whether the TLC and Shea adequately represent
4 the TCC's interest, the bankruptcy court concluded that the TLC's
5 and the TCC's interests are identical. The bankruptcy court
6 further concluded that "[t]heir interest is to--it's in their
7 best interest to increase the number and amount in value of
8 assets of the bankruptcy estate so that they can recover a
9 greater return on their claim." Transcript of Oral Decision,
10 April 28, 2005.

11 While it may be in the best interest of the TCC, the TLC and
12 Shea to have as much of the Disputed Property as possible
13 determined to be property of the estate in order to recover a
14 greater return on their claims, the TLC and Shea have the ability
15 to affect the outcome of the Related Adversaries and the
16 determination of whether the Disputed Property, or some portion
17 of the Disputed Property, is property of the estate. The TLC and
18 Shea also have the ability to negotiate a settlement, and have
19 apparently attempted to do so, whereby their individual claims
20 may be afforded advantages over the individual claims of the
21 representatives of the TCC. The TCC's Motion and Memorandum re
22 Appointment of Additional Committee Members, or Alternatively,
23 For Removal of Certain Tort Claimant's Committee Members and
24 Shea's Declaration in Support Thereof demonstrates a divisiveness
25 between those who have filed state court claims and those who
26 "hold minimal or nonexistent claims." E.R. at 7-29. Accordingly,
27 as in Berg, this circumstance shows the TLC's inability to
28 adequately represent the TCC's interests. Berg, 268 F.3d at 823.

