

JUL 31 2006

NOT FOR PUBLICATION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**

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In re:)	BAP No. WW-05-1425-NKPa
)	
JUSTIN EUGENE EVANS and)	Bk. No. 05-15492
JEANNE JESELLE EVANS,)	
)	
Debtors.)	
_____)	
)	
JUSTIN J. SHRENGER and)	
HOWARD HUI ZHENG,)	
)	
Appellants.)	
)	
v.)	MEMORANDUM¹
)	
JUSTIN EUGENE EVANS and)	
JEANNE JESELLE EVANS,)	
)	
Appellees.)	
_____)	

Argued and Submitted on June 23, 2006
at Seattle, Washington

Filed - July 31, 2006

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

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding.

Before: NIELSEN,² KLEIN and PAPPAS, Bankruptcy Judges.

¹This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata, including claim preclusion and issue preclusion. See 9th Cir. BAP Rule 8013-1(a).

²Hon. George B. Nielsen, Jr., Bankruptcy Judge for the District of Arizona, sitting by designation.

1 Appellants appeal the bankruptcy court's decision
2 confirming debtors' Chapter 13 plan. We AFFIRM.

3 **FACTS**

4 On April 27, 2005, debtors Justin Eugene and Jeanne
5 Jeselle Evans ("appellees") filed a voluntary petition for
6 relief under Chapter 7 of the Bankruptcy Code.³ Previously,
7 appellants Justin J. Shrenger and Howard Hui Zheng
8 ("appellants") and Deep Magic LLC initiated a civil action in
9 Los Angeles Superior Court against Justin Evans and others. In
10 February of 2005, the Superior Court entered an order striking
11 Mr. Evans' answer and dismissing his cross-complaint with
12 prejudice as a discovery sanction. No appeal of this order was
13 filed. The bankruptcy filing prevented any attempt to obtain a
14 judgment against Mr. Evans, based on the order.

15 On June 2 of 2005, appellees filed a motion to convert
16 their bankruptcy to Chapter 13. Appellant Shrenger filed an
17 opposition, focused on two arguments: debtors were ineligible
18 for relief under Chapter 13 because their unsecured debts
19 exceeded the maximum allowed by section 109(e) when the claims
20 of appellant and other creditors were properly valued.
21 Appellant also objected that debtors had insufficient income to
22 fund a plan.

23 The initial hearing on the contested conversion motion
24 was conducted on June 22, 2005, before Bankruptcy Judge
25 Overstreet. She cautioned appellant that, based upon his
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28 ³Unless otherwise indicated, all references to "chapter" or
"section" are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

1 submissions, she could not determine how the damage claim had
2 been calculated. A hearing was set for July 15, 2005, to
3 determine whether debtors had sufficient income to support their
4 Chapter 13 plan. Another hearing was set for July 22 on the
5 section 109(e) eligibility issue. Regarding these hearings,
6 Judge Overstreet ordered:

7 1) For the income hearing, debtors must provide a
8 declaration demonstrating they had net income.

9 2) For the eligibility hearing, if debtors demonstrated
10 sufficient income, then appellant would have to establish the
11 amount of his claim. Judge Overstreet required a "declaration
12 from him that itemizes-what I'm looking for is ascertainable
13 means. He can tell me how he came up with that number. Because
14 if he can't, then I don't believe it is easily ascertainable
15You will need to go back and look at that complaint to make
16 sure [E]ssentially I would be looking for the same kind of
17 presentation that he would have to make with regard to his
18 motion for default. He has got to be able to break the numbers
19 down."

20 Bankruptcy Judge Glover presided over the July 15 income
21 hearing. Following argument, he overruled appellants'
22 conversion objections based on lack of regular income and bad
23 faith.

24 At the second hearing, conducted on July 22, Judge Glover
25 ruled the claim was not subject to ready determination. An
26 order denying the objection and converting the case to Chapter
27 13 was entered on August 9, 2005. Appellants filed a notice of
28 appeal on August 17, 2005.

1 While the appeal was pending before the United States
2 District Court for the Western District of Washington, debtors
3 continued their plan confirmation efforts. Appellants objected,
4 arguing the plan was not feasible as it understated federal tax
5 withholding obligations. Appellants also argued that debtors'
6 plan evidenced bad faith.

7 At the October 12, 2005, confirmation hearing the plan
8 was confirmed. A confirmation order was entered on October 17,
9 2005. Appellants timely appealed to this Panel.

10 Appellees filed a Motion before us to limit issues on
11 appeal to those not under consideration by the district court.
12 Appellants filed an Opposition. On April 19 of 2006, our
13 Motions Panel ruled the motion would be under advisement until
14 this panel ruled. Appellees recently moved for an order
15 allowing consideration of an addendum to their brief. By order
16 filed June 5, 2006, we took that motion under advisement as
17 well.

18 In a March 27, 2006, disposition of the appeal before it,
19 the district court affirmed that debtors were eligible to
20 proceed under Chapter 13, noting the right to convert was
21 absolute, so long as conversion prerequisites are met. "Order
22 on Bankruptcy Appeal" ("Order") at 2.

23 The district court noted the appeal focused primarily on
24 the bankruptcy court's resolution of three issues: (1) whether
25 the debtors' unsecured, liquidated debt was less than \$307,675
26 upon filing; (2) whether debtors had "regular income" and (3)
27 whether debtors sought to convert their case in bad faith. Id.
28 at 2.

1 As to the first issue, the district court analyzed if
2 appellants' proof of claim was prima facie evidence of a
3 liquidated claim, and whether its amount could be readily
4 ascertained through a default hearing held in the California
5 state court case. Id. at 5-7.

6 The court cited our decision in Ho v. Dowell (In re Ho),
7 274 B.R. 867, 871 n. 5 (9th Cir. BAP 2002) and affirmed, finding
8 that the proof of claim did not establish the debt as
9 liquidated. Order at 5.

10 As to whether the claim was readily ascertainable, the
11 district court also affirmed, noting:

12 ... the debt does not appear to be
13 capable of ready determination through a
14 simple hearing, given Mr. Shrenger's
15 failure to explain how his claims for
16 damages were calculated. Mr. Schrenger
17 claims that he is owed \$106,000 in 'cash
18 payments...converted or misappropriated'
19 by Mr. Evans, as well as \$100,000 in
20 damages for defamation and tortious
21 interference. Mr. Shrenger did not
22 explain how he arrived at these figures,
23 despite Judge Overstreet's explicit
24 direction that Mr. Shrenger needed to
25 provide more information regarding these
26 claims. Judge Overstreet informed
27 Appellants' counsel that 'essentially I
28 would be looking for the same kind of
 presentation that [Mr. Shrenger] would
 have to make with regard to his motion
 for default. He has got to be able to
 break the numbers down'.... As a result,
 the Bankruptcy Court provided Appellants
 with the opportunity to demonstrate how
 Mr. Shrenger calculated the amount of
 damages claimed and to explain what type
 of proof Mr. Shrenger would present to
 quantify his claims. Appellants did not
 avail themselves of this opportunity.
 Under these circumstances, the
 Bankruptcy Court did not err in
 concluding that Mr. Shrenger's claims
 against Mr. Evans were not liquidated.

1 Id. at 6-7.

2 The district court also affirmed the bankruptcy court's
3 determination that debtors did not engage in bad faith by
4 converting their case. After citing our Circuit's familiar
5 Leavitt factors,⁴ the district court noted appellants'
6 contention that two factors were present: (1) misrepresentation
7 of facts because amended schedules differed from the original
8 schedules and (2) bankruptcy was solely filed to defeat state
9 court litigation. Appellants also argued that debtors engaged
10 in egregious behavior. However, the court found the egregious
11 behavior argument was not raised below in the bankruptcy court.
12 Id. at 9.

13 The district court cited Judge Glover's comments at the
14 hearing. When appellants suggested the amendments were made in
15 bad faith, noting in particular that debtor had "... simply
16 said that, whoops, our expenses are less than what we
17 originally represented to the Court in our original schedules,"
18 Judge Glover asked, "What's wrong with that?" He then stated:

19 The good faith standard that's been set
20 by the circuit is to be very cautiously
21 applied, because some of those
22 requirements standing alone don't make
any sense. For instance, almost all
bankruptcy cases are filed - or a big
portion of them - because somebody's

23

24 ⁴1) Whether the debtor misrepresented facts in his petition or
25 plan, unfairly manipulated the Bankruptcy Code, or otherwise filed
his Chapter 13 petition or plan in an inequitable manner.

26 2) The debtor's history of filings and dismissals.

27 3) Whether the debtor only intended to defeat state court
litigation.

28 4) Whether egregious behavior is present.

Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th
Cir. 1999).

1 suing the debtor. And that doesn't make
2 sense to me. What else is the debtor
3 going to do except propose what they can?
4 And why would a debtor ever want to say,
5 okay, let's let the litigation in state
6 court go forward and take all of those
7 risks. It doesn't make any sense to me.

8 Id. at 9-10.

9 The court rejected appellants' argument that these
10 comments indicated the bankruptcy court refused to apply
11 Leavitt. Judge Glover was found not in error in dismissing
12 arguments that amending the schedules demonstrated bad faith.
13 The district court noted that amendment of schedules is
14 liberally allowed without leave of court. Second, the
15 bankruptcy court did not commit reversible error in determining
16 that filing bankruptcy to defeat state court litigation,
17 standing alone, does not support a bad faith finding. Id. at
18 9-11. See, In re Ho, supra at 876-77 (holding that a bankruptcy
19 court abused its discretion when it based a bad faith
20 determination exclusively on this factor). Cf. Dressler v.
21 Seeley Co. (In re Silberkraus), 336 F.3d 864, 871 (9th Cir.
22 2003) (Chapter 11 bad faith demonstrated by filing shortly
23 before trial setting, combined with factors of near
24 impossibility of reorganization and that bankruptcy could not
25 provide more value to debtor than proceeding with state court
26 litigation).

27 **ISSUES**

28 1. Should this Panel exercise its discretion and decline
to rule on eligibility and good faith issues under the doctrine
of law of the case, as these or similar issues were previously
ruled upon by the district court.

1 in the earlier disposition. Rebel Oil Co., Inc. v. Atlantic
2 Richfield Co., 146 F.3d 1088, 1093 (9th Cir. 1998), cert.
3 denied, 119 S.Ct 541 (1998).

4 Applying the doctrine as between appellate tribunals,
5 our Circuit instructs:

6 The law of the case doctrine
7 provides that a panel of this court has
8 discretion to depart from the law of the
9 case established by the same panel, or
10 another, where: '(1) the decision is
11 clearly erroneous and its enforcement
would work a manifest injustice, (2)
intervening controlling authority makes
reconsideration appropriate, or (3)
substantially different evidence was
adduced at a subsequent trial.'

12 Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning
13 Agency, 216 F.3d 764, 787 (9th Cir. 2000), aff'd, 122 S.Ct.
14 1465 (2002) (citations, footnote and internal quotes omitted).

15 The doctrine is not an absolute bar to revisiting legal
16 issues. It merely expresses the practice of courts generally
17 to refuse to reopen what has been decided. American Express
18 Travel Related Serv. Co. v. Fraschilla (In re Fraschilla), 235
19 B.R. 449, 454 (9th Cir. BAP 1999), (citations omitted), aff'd,
20 242 F.3d 381 (9th Cir 2000) (Table).

21 The doctrine is flexible. While it is axiomatic that an
22 appellate panel would not be bound by the trial court's law of
23 the case, Soper v. Crystal Palace Gambling Hall, Inc. (In re
24 Crystal Palace Gambling Hall, Inc.), 36 B.R. 947, 952 (9th Cir.
25 BAP 1984), appeal dismissed, 785 F.2d 315 (9th Cir. 1986), the
26 issue is whether this Panel should defer to the ruling of the
27 district court in an earlier appeal in the same case.

28

1 The district court affirmed the bankruptcy court's
2 ruling that appellants' claim was not liquidated for purposes
3 of § 109(e). A debt is liquidated for such purposes:

4 [I]f the amount of the creditor's claim
5 at the time of the filing the petition
6 is ascertainable with certainty, a
7 dispute regarding liability will not
8 necessarily render a debt
9 unliquidated.... Even if a debtor
10 disputes the existence of liability, if
11 the amount of the debt is calculable
12 with certainty, then it is liquidated
13 for the purposes of § 109(e).... [A]
14 debt is liquidated if the amount is
15 readily ascertainable, notwithstanding
16 the fact that the question of liability
17 has not been finally decided.

18 Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 983-84 (9th
19 Cir. 2001) (emphasis original). See also, Guastella v. Hampton
20 (In re Guastella), 341 B.R. 908, 916 (9th Cir. BAP 2006).

21 The district court found the bankruptcy court did not
22 err in determining the debt was not readily ascertainable.
23 Order at 6-7. The issue was fully briefed in that court.
24 Nothing in appellants' brief suggests this Panel would decide
25 the issue differently. Appellants argue the only step
26 necessary for entry of a judgment in the California state
27 litigation is the "default prove up in State Court."
28 Appellants' Opening Brief at 20-21. They urge that only a
simple hearing, not an extensive and contested evidentiary
hearing, is necessary to determine the exact amount owed. This
identical argument was rejected by the district court, which
noted appellants failed to provide the declaration required by
Judge Overstreet to calculate damages. Id. at 6-7.

1 Appellants argue the bankruptcy court erred by ignoring
2 the evidentiary effect of their subsequently filed claims.
3 They also argue that bankruptcy courts frequently refer to
4 proofs of claim in determining section 109(e) eligibility.
5 Opening Brief at 21-24.

6 These issues were before the district court, which
7 rejected them and invoked In re Ho, 274 B.R. at 871, n. 5.
8 Order at 5. Ho noted:

9 DHE argues that Debtor is
10 ineligible to be a chapter 13 debtor
11 based on its claim alone, because it has
12 filed a \$1,387,651.39 proof of claim,
13 Debtor has not objected to its claim
14 and, under § 502(a), a claim is deemed
15 allowed absent an objection. We reject
16 DHE's argument for two reasons. First,
17 the bankruptcy court did not rely in
18 this theory when it concluded that DHE's
19 claim was liquidated in the amount of
20 \$50,000. Second, the amount of a chapter
21 13 debtor's debt is determined as of the
22 date of the filing of the petition. In
23 re Slack, 187 F.3d 1070, 1073 (9th
24 Cir.1999). A court cannot look to
25 postpetition events to determine the
26 amount of a debt.

19 Id. (Emphasis added.)

20 Guastella recognized that normally there is no need to
21 look beyond the schedules:

22
23 The phrase 'checking only to see if
24 the schedules were made in good faith'
25 does not mandate that the court make
26 findings of 'bad faith.' Neither does it
27 require that a debtor intentionally
28 misrepresent her debts to create the
appearance of eligibility before there
can be an absence of good faith.

Bankruptcy courts have consistently
recognized that, as a matter of public

1 policy, the issue of chapter 13
2 eligibility should be determined
3 quickly. The Pearson court addressed the
4 policy considerations by comparing
5 chapter 13 eligibility with the issue of
6 subject matter jurisdiction in federal
7 diversity cases.

8 This threshold eligibility
9 determination for Chapter 13 is in many
10 respects like the threshold subject
11 matter jurisdiction determination in
12 diversity cases where the \$10,000
13 minimum amount in controversy is chal-
14 lenged. Clearly in both situations
15 Congress intended to limit the class of
16 persons who might avail themselves of
17 access to the federal forum. Just as
18 clearly, it is necessary that the
19 procedures for determining initial
20 jurisdiction cannot be allowed to
21 dominate the proceedings themselves nor
22 to delay them unduly. As important as
23 this may be in the ordinary diversity
24 litigation in a district court, it is
25 even more important with respect to
26 Chapter 13 proceedings for time is of
27 the essence. The resources of the debtor
28 are almost by definition limited and the
means of determining eligibility must be
efficient and inexpensive. To allow an
extensive inquiry in each case would do
much toward defeating the very object of
the statute.

In re Pearson, 773 F.2d at 757
(emphasis added).

19 Pearson's 'diversity' analogy adds
20 another dimension to our decision
21 because diversity jurisdiction, like
22 chapter 13 eligibility, is determined by
23 the 'amount in controversy.' Discussing
24 the test for diversity jurisdiction, the
25 U.S. Supreme Court in St. Paul Mercury
26 Indem. Co. v. Red Cab Co., 303 U.S. 283,
27 58 S.Ct. 586, 82 L.Ed. 845 (1938)
28 recognized that the 'amount in
controversy' cannot always be
ascertained. It defined a diversity test
very similar to the Scovis test used in
chapter 13 cases stating, 'the amount
claimed in good faith by the plaintiff
controls unless it appears to a legal
certainty that the claim is for less
than the jurisdictional amount or the

1 amount claimed is merely colorable. In
2 re Pearson, 773 F.2d at 757 (citing St.
3 Paul Mercury, 303 U.S. at 288-90....

4 Guastella, 341 B.R. at 920. (emphasis original).

5 In the present case, as noted by the district court,
6 appellant was given an opportunity by the bankruptcy court to
7 establish their claim was liquidated by presenting evidence.
8 The bankruptcy court was willing to look past the schedules,
9 as appellant had asserted not only that debtors were
10 ineligible for chapter 13 relief, but also that the conversion
11 was in bad faith. See Guastella 341 B.R. at 918. However,
12 appellant failed to produce the required evidence to liquidate
13 the claim.

14 Here, by the time of the confirmation hearing, the
15 bankruptcy court had resolved eligibility. Yet, appellants'
16 plan objection again argued that the proof of claim filed by
17 appellant and two other unsecured creditors established claim
18 amounts. They again urge that no extensive hearing was
19 necessary to establish the exact amount of liability. These
20 were essentially the same issues raised during the conversion
21 litigation, resolved by the bankruptcy court and affirmed by
22 the district court. Perceiving no reason to depart from law of
23 the case principles, we are constrained to accept the district
24 court's ruling that appellants' claim is not liquidated for
25 purposes of determining debtor eligibility under Chapter 13.

26 2. Good faith

27 In addition to eligibility, the district court also
28 affirmed the bankruptcy court on whether debtors converted
 their case in bad faith. Order at 9-11. We conclude

1 application of the law of the case doctrine is appropriate
2 here as well, although appellees' motion to limit the issues
3 on appeal did not ask us to invoke preclusionary doctrines.⁵

4 The good faith requirement of section 1325(a)(3) is a
5 mandatory confirmation requirement. Chinichian v. Campolongo,
6 (In re Chinichian) 784 F.2d 1440, 1444 (9th Cir.1986).

7 Debtors have the burden of proving that each confirmation
8 element is met. Id. at 1443-44; See also, Guastella, at 919.

9 A bankruptcy court must inquire whether debtors have
10 misrepresented facts in their plan, unfairly manipulated the
11 Bankruptcy Code, or otherwise proposed the plan in an
12 inequitable manner. Although it may consider the
13 substantiality of the proposed repayment, the court makes its
14 good-faith determination in the light of all militating
15 factors. Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re
16 Sylmar Plaza, L.P.), 314 F.3d 1070, 1075 (9th Cir. 2002)
17 (Chapter 11); In re Goeb, 675 F.2d 1386, 1390 (9th Cir.1982).

18 In its affirmance, the district court specifically
19 referenced the Leavitt factors in determining whether the
20 bankruptcy court erred in concluding the conversion was in
21 good faith. The court rejected appellants' argument that the
22 bankruptcy court refused to apply Leavitt. Judge Glover was
23 found not to have erred in dismissing arguments that amending
24 schedules demonstrates bad faith. The district court noted
25 that amendment of schedules is liberally allowed without leave
26 of court. Further, the bankruptcy court was found not in

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28 ⁵Instead, appellees argued the issue of plan good faith was
not appealed to district court. Motion at 7-8.

1 error in determining that filing bankruptcy to defeat state
2 court litigation, standing alone, does not support a bad faith
3 finding. Order at 9-11.

4 In the instant appeal, appellants argue that under the
5 "totality of the circumstances" test, the plan was proposed in
6 bad faith. They urge this is a minimum payment plan.

7 Appellants calculate repayment to unsecured creditors of 0.2%,
8 whereas debtors allegedly estimated a 5% return. Second,
9 debtors allegedly misrepresented facts in their schedules by
10 amending schedules to assert certain debts were unliquidated,
11 when previously listed in specific claim amounts. Third,
12 debtors amended their schedules to establish a small surplus
13 to fund minimum repayments. Fourth, debtors engaged in
14 egregious behavior before and after filing. The state court
15 found Mr. Evans " ... willfully disobeyed court orders ...
16 withheld material documents, refused to provide substantive
17 responses to material discovery, and ... used the discovery
18 process as an excuse to delay the resolution" of the action.
19 Finally, the timing of the petition and conversion to chapter
20 13 reflect debtors filed to thwart entry of judgment in the
21 California civil action and acquire a chapter 13 discharge for
22 otherwise nondischargeable debt. Appellants' Opening Brief at
23 24-30.

24 The confirmation hearing transcript adds little to the
25 existing record on debtors' good faith. Appellants' counsel
26 noted that the [plan objection] " ... that was filed relists
27 some issues that we've already argued, so I'm not going to
28 argue them today. I just needed to renote them in the motion.

1 But what I want to talk about today is the feasibility of the
2 plan." Because the bankruptcy court did not readdress the good
3 faith issue during the confirmation hearing or make written
4 findings, the record for "good faith" review primarily
5 consists of the earlier conversion hearings.⁶ See Leavitt, 171
6 F.3d at 1223 (a complete understanding of issues may be had
7 from the record without the aid of separate written findings).
8 This is the record that was before the district court in the
9 conversion appeal, which specifically included issues of good
10 faith. It is essentially the same record this Panel must
11 review in determining whether the plan was proposed in good
12 faith. We may affirm on any basis fairly supported by that
13 record. Jorgenson v. State Line Hotel, Inc. (In re State Line
14 Hotel, Inc.), 323 B.R. 703, 708 (9th Cir. BAP 2005); Williams
15 v. Swenson (In re Williams), 280 B.R. 857, 863 n. 7 (9th Cir.
16 BAP 2002).

17 A determination regarding the good faith of instituting
18 a Chapter 13 case and the good faith in proposing a particular
19 Chapter 13 plan involve similar factual inquiries under the
20 totality of the circumstances. Matter of Love, 957 F.2d 1350,
21 1356-57 (7th Cir. 1992). Eligibility and good faith were

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24 ⁶We would prefer a more extensive confirmation hearing record
25 to review. However, the bankruptcy court had before it the evidence
26 the parties chose to present. Apparently counsel appeared without
27 witnesses or exhibits and relied upon filed declarations, prior
28 briefing and oral argument. Transcript of October 12, 2005 at 3-6.
Appellants did not object to the evidence and do not claim the
bankruptcy court refused to permit further evidence. They do not
argue there are disputed factual issues, but instead that the
bankruptcy court failed to correctly apply existing law. Reply at
1-2.

1 tested at the outset of the case when debtors moved to
2 convert. These matters were resolved by the bankruptcy court
3 and on appeal by the time the confirmation process began.
4 Much of appellants' confirmation objection reprised this
5 earlier litigation and in effect, sought reconsideration of
6 the bankruptcy court's earlier rulings. Appellants continue
7 their reprise in the appeal before us, creating a troubling
8 procedural posture involving two appellate tribunals. The law
9 of the case doctrine is in place to end endless litigation.
10 This panel finds no reason not to apply the doctrine here.⁷

11 3. Plan feasibility

12 A bankruptcy court is to confirm a plan if, among other
13 things, debtor will be able to make all payments under the
14 plan and to comply with the plan. Section 1325(a)(6). This
15 is the feasibility requirement. In re Gavia, 24 B.R. 573, 574
16 (9th Cir. BAP 1982).

17 In evaluating whether a plan is feasible, some courts
18 stress the desirability of providing a cushion enabling debtor
19 to meet unexpected expenses. That is not an absolute
20 requirement. The test is whether the expectations of income
21 reflected in the Plan are sufficiently realistic that debtors
22 should be given an opportunity to carry out their plan.
23 Ferreira, 223 B.R. at 262-63.

24 Here, appellants assert the plan is unfeasible because
25 debtors understated necessary federal tax withholdings. Based

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27 ⁷Had we not applied the preclusive doctrine, we can
28 nevertheless find no clear error in the bankruptcy court's factual
finding of good faith. Guastella at 915, citing Smyrnos v. Padilla
(In re Padilla), 213 B.R. 349, 352 (9th Cir. BAP 1997).

1 on Ms Evans' salary record and expert declarations, appellants
2 assert:

3 ... it was apparent at the confirmation
4 hearing that Debtors had understated the
5 actual withholdings from Ms. Evans'
6 paycheck in Amended Schedule I, and
7 therefore overstated their true monthly
8 take-home income, by \$216.55 per month.
9 Simple arithmetic clearly demonstrated
10 that Debtors cannot possibly make their
11 Plan payments (\$482.82), meet their
12 current tax and insurance withholdings
13 (\$561.80), and pay their living expenses
14 (\$2,486.00) from their gross income
15 (\$3,333.33) per month.

16 Opening Brief at 14-15.

17 Appellants complain that although the bankruptcy court
18 had this information at the confirmation hearing, the court
19 ignored lack of feasibility in favor of a "proof in the
20 pudding" test:

21 THE COURT: With regard to these matters
22 the objecting creditor has as creative
23 argument as I have ever seen--and it
24 comes from elsewhere, I know--but it
25 seems to me, you know, the proof of the
26 plan like this is really in the pudding,
27 and the debtor, you know, is going to
28 get a chance to make these payments
because he's already making the
payments.

 I would have to say, Ms. Latta,
that your client needs to be aware that
specific attention has been given with
respect to the issue of --involving the
taxes. And so the debtor, for instance,
won't be in a position in the future to
come back to the Court and say, Your
Honor, we want to modify the Plan
because of a change in circumstances....

 Years ago I got overruled by the
Eighth Circuit, I think it was, on
projecting certain kinds of income in
the future. But the projections need to
be made as to the time of the
confirmation. Okay, sometimes that works

1 for expenses too. In this particular
2 instance, the debtor is going to have to
perform under this plan.

3 Now the issues of this plan
4 concerning, you know, the matters on
5 appeal, which relate to whether or not
6 we have a liquidated claim, that is
really a separate issue. But I'm going
7 to find this plan is fine and confirm it
subject to those restrictions and issues
you are entertaining.

8 The bankruptcy court also had the October 7, 2005
9 declaration of debtor Jeanne J. Evans and debtors' reply of the
10 same date explaining their decision regarding tax withholding.
11 Based on this record, it appears the bankruptcy court weighed
12 the competing declarations and concluded the plan was feasible.
13 This finding is not clearly erroneous. If the trial court's
14 account of the evidence is plausible in light of the record
15 viewed in its entirety, the appellate court may not reverse,
16 even though convinced that had it been sitting as the trier of
17 fact, it would have weighed the evidence differently. McClure
18 v. Thompson, 323 F.3d 1233, 1240-41 (9th Cir. 2003); Phoenix
19 Eng'g & Supply Inc. v. Universal Elec. Co., Inc., 104 F.3d
20 1137, 1141 (9th Cir. 1997).

21 The bankruptcy court's analysis is plausible and will
22 not be disturbed.

23 **CONCLUSION**

24 Mindful that application of the law of the case doctrine
25 is not necessarily mandatory in this instance, this Panel
26 nevertheless elects to apply it to the district court
27 determinations on issues of eligibility and good faith.
28 Finally, we affirm the bankruptcy court's ruling that the plan

1 is feasible, finding no clear error. Given this disposition, we
2 deny as moot the pending motions.

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