

MAR 30 2007

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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NOT FOR PUBLICATION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

7	In re:	)	BAP Nos.	AZ-06-1129-DSPa
		)		AZ-06-1130-DSPa
8	JWJ CONTRACTING CO., INC.,	)		AZ-06-1143-DSPa
		)		AZ-06-1225-DSPa
9	Debtor.	)		AZ-06-1330-DSPa
)		
10	_____	)	Bk. No.	94-06045-PHX-RTB
	CARL C. JACOBSON, JR.,)		
11	Trustee of the	)	Adv. No.	04-01226-PHX-RTB
	Carl C. Jacobson Irrevocable)		
12	Life Insurance Trust,)		
)		
13	Appellant,)		
)		
14	v.	)	M E M O R A N D U M ¹	
)		
15	FINOVA CAPITAL CORPORATION,)		
)		
16	Appellee.)		
)		
17	_____)		
	CARL C. JACOBSON, JR. and)		
18	MARILYN JACOBSON,)		
)		
19	Appellants,)		
)		
20	v.)		
)		
21	FINOVA CAPITAL CORPORATION,)		
)		
22	Appellee.)		
)		
23	_____)		

¹This 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.

1 EINAR J. JOHNSON,)
)
 2 Appellant,)
)
 3 v.)
)
 4 FINOVA CAPITAL CORPORATION,)
)
 5 Appellee.)
)
 6 FINOVA CAPITAL CORPORATION,)
)
 7 Appellant,)
)
 8 v.)
)
 9 CARL C. JACOBSON, JR.,)
)
 10 Trustee of the)
)
 11 Carl C. Jacobson Irrevocable)
)
 12 Life Insurance Trust,)
)
 13 Appellee.)
)
 14 CARL C. JACOBSON, JR.,)
)
 15 Trustee of the)
)
 16 Carl C. Jacobson Irrevocable)
)
 17 Life Insurance Trust,)
)
 18 Appellant,)
)
 19 v.)
)
 20 JOSEPH J. JANAS, Chapter 7)
)
 21 Trustee,)
)
 22 Appellee.)
)
 23 _____)
)

20 Argued and Submitted on January 18, 2007
 21 at Phoenix, Arizona

22 Filed - March 30, 2007

23 Appeal from the United States Bankruptcy Court
 24 for the District of Arizona

25 Hon. Redfield T. Baum, Chief Bankruptcy Judge, Presiding.

26 Before: DUNN, SMITH and PAPPAS, Bankruptcy Judges.
 27

1 This Memorandum encompasses five related appeals which were
2 consolidated for purposes of oral argument.

3 The bankruptcy court granted summary judgment in favor of
4 Finova Capital Corporation ("Finova"), determining that Finova's
5 interest in proceeds ("8.5 Acres Proceeds") from the sale of 8.5
6 acres of real property ("8.5 Acres") was superior to that of the
7 Carl C. Jacobson, Sr. Irrevocable Life Insurance Trust ("Jacobson
8 Trust"), which held title at the time the 8.5 Acres were sold,
9 notwithstanding that Finova previously had stipulated to release
10 its deed of trust lien on the 8.5 Acres after its secured claim
11 in a related bankruptcy case had been paid in full. The court
12 held that because Finova, after releasing its deed of trust lien,
13 paid a preference judgment to the bankruptcy trustee in the
14 present case ("JWJ Trustee"), Finova regained its secured rights
15 with respect to the 8.5 Acres Proceeds by operation of § 550 and
16 §§ 502(d) and (h) and "for equitable reasons."² The Jacobson
17 Trust appealed (AZ-06-1129).

18 By virtue of an agreement between the JWJ Trustee and
19 Finova, the JWJ Trustee had derivative rights to a portion of any
20 interest Finova was determined to have in the 8.5 Acres Proceeds.
21 Accordingly, judgment was entered, recognizing the JWJ Trustee's
22 rights in the 8.5 Acres Proceeds. The Jacobson Trust appealed
23 (AZ-06-1330).

24
25 ²Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated prior to the effective date (October 17,
2005) of most of the provisions of the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
April 20, 2005, 119 Stat. 23 ("BAPCPA").

1 Finova also was granted summary judgment on two guaranties
2 of the underlying obligation which formed the basis for the
3 dispute over the 8.5 Acres Proceeds. The guarantors appealed
4 (AZ-06-1130 and AZ-06-1143).

5 Finally, although summary judgment was entered in Finova's
6 favor, the bankruptcy court denied Finova's motion for an award
7 of attorneys' fees and costs against the Jacobson Trust. Finova
8 appealed (AZ-06-1225).

9 For the reasons set forth below, we:

- 10 1. REVERSE the bankruptcy court's grant of summary judgment
11 to Finova on its claim to the 8.5 Acres Proceeds.
- 12 2. REVERSE the derivative judgment entered in favor of the
13 JWW Trustee.
- 14 3. AFFIRM the bankruptcy court's grant of summary judgment
15 against the guarantors.
- 16 4. AFFIRM the bankruptcy court's denial of Finova's request
17 for attorneys fees and costs against the Jacobson Trust.

18 **I. FACTS**

19 The factual history behind the seemingly unending
20 litigation regarding this case and the present claims is
21 convoluted. It involves two unsuccessful chapter 11
22 reorganization cases and several lawsuits in state and
23 federal court. The apparently sole remaining dispute
regards conflicting claims to the approximate one million
dollars representing the net proceeds from the sale of
certain real property, commonly referred to as the '8.5
Acres.'

24 Minute Entry/Order at 1, Mar. 2, 2006.

25 Carl C. Jacobson, Jr. and Einar J. Johnson operated two
26 construction companies: International Surfacing, Inc. ("ISI") and
27 JWW Contracting Co., Inc. ("JWW"). A financing arrangement for
28 ISI, entered into in 1993, is at the heart of this dispute.

1 In June 1993, ISI entered into a Loan and Security Agreement
2 ("ISI Loan") with Finova Capital Corporation ("Finova").³ The
3 ISI Loan was secured by all of ISI's assets. In addition, Mr.
4 Jacobson and his wife, Marilyn Jacobson ("Jacobsons"), and Mr.
5 Johnson and his wife, Corra Johnson ("Johnsons"), personally
6 guaranteed the ISI Loan.

7 In March 1995, the ISI Loan was amended. As a condition to
8 the amendment, Finova required the Jacobsons to pledge additional
9 collateral to secure both the ISI Loan and their guaranties. To
10 meet this requirement, Mr. Jacobson, as trustee of the Jacobson
11 Trust, caused the Jacobson Trust to convey the 8.5 Acres to
12 himself and his wife. The Jacobsons then executed a deed of
13 trust ("Deed of Trust" or "Finova's Deed of Trust") granting
14 Finova a lien on the 8.5 Acres to secure the ISI Loan and the
15 Jacobsons' guaranties of the ISI Loan ("Deed of Trust Lien").

16 The 8.5 Acres had been the subject of a number of transfers
17 prior to the time the Jacobsons took title to the 8.5 Acres from
18 the Jacobson Trust. As noted by the bankruptcy judge, "[c]learly
19 the 8.5 Acres was used by Jacobson and Johnson to secure the
20 debts of JWJ and ISI as needed." Minute Entry/Order at 7, Mar.
21 2, 2006.

22 To illustrate: In January 1994, JWJ deeded the 8.5 Acres to
23 the Johnson & Jacobson Partnership ("JJP"), which in turn
24 transferred the 8.5 Acres to the Jacobson Trust in May 1994, but
25 not before encumbering the property with a deed of trust lien to
26 Tanner Concrete ("Tanner") to secure JWJ's debt to Tanner in the

27
28 ³The lender on the ISI Loan was actually Greyhound Financial
Capital Corporation, Finova's predecessor in interest.

1 approximate amount of \$1.8 million. This deed of trust provided
2 that in the event Tanner made a claim against JWW's bond and was
3 paid on that bond claim by the bond issuer, Continental Insurance
4 Company ("Continental"), Tanner was to assign the deed of trust
5 to Continental. By August 1994, Continental had received an
6 assignment of the deed of trust (hereinafter "Continental Trust
7 Deed"). Continental then subordinated the priority of the
8 Continental Trust Deed to the Deed of Trust Lien granted Finova
9 by the Jacobsons in 1995.

10 Both JWW and ISI ultimately filed for relief under chapter
11 11 of the Bankruptcy Code: JWW in July 1994, ISI in May 1996.
12 The cases were neither consolidated nor jointly administered, and
13 each was assigned to a different bankruptcy judge.⁴

14 Unfortunately, throughout the pendency of the cases, the parties
15 did not take into consideration the implications that might arise
16 in one case from the resolution of a particular dispute in the
17 other. The result has been an explosion of litigation that has
18 left at least one of the bankruptcy judges feeling "whip-sawed."

19 A. The Finova Deed of Trust Lien

20 Finova filed a secured claim in the ISI bankruptcy case in
21 the amount of \$2,911,911.53, plus interest and fees. ISI moved
22 to sell certain assets free and clear of liens in order to pay
23 its debt to Finova. The order ("Disbursement Order") entered by
24 _____

25 ⁴These appeals all arise from final dispositions made by the
26 bankruptcy judge in the JWW bankruptcy case. However, to address
27 the issues on appeal, it is necessary to discuss the dispositions
28 made by the bankruptcy judge in the ISI bankruptcy case.
Throughout this Memorandum, we refer to the court in the JWW
bankruptcy case as the "bankruptcy court" and to the court in the
ISI bankruptcy case as the "ISI court."

1 the ISI court in February 1997 contains the following language
2 requiring a release of Finova's lien in assets:

3 Effective immediately upon (a) the transfer of the Sale
4 Proceeds to Finova pursuant to the terms of this Order
5 in the amount of Finova's claim and (b) this Order
6 becoming final and non-appealable, but not before,
7 Finova's security interest in the remaining Collateral
8 . . . shall be extinguished. Thereafter, Finova shall
9 execute and deliver to Debtor any and all documents
submitted to it for execution which are reasonably
necessary so as to effectuate the release of its
security interest in the Collateral (and in certain
real property [the 8.5 Acres] not owned by Debtor which
was provided to Finova as additional security under the
Loan Agreement).

10 Emphasis added.

11 The provisions of the Disbursement Order were expressly
12 approved by both ISI and Finova, and it fixed the amount of
13 Finova's secured claim at \$2,341,710.94. Finova was paid the
14 full amount of its allowed secured claim on the same date,
15 exclusively from the sale of ISI assets ("ISI Sale Proceeds"),
16 not from proceeds from the sale of the 8.5 Acres.

17 In the meantime, the JWW Trustee, appointed once the JWW
18 bankruptcy case converted to chapter 7 in October 1994, was at
19 work pursuing avoidable transfers on behalf of the JWW bankruptcy
20 estate. At the time the Disbursement Order was entered, the JWW
21 Trustee already had advised Finova, by letter from his counsel
22 dated November 13, 1996, that he claimed an interest in the ISI
23 Sale Proceeds based on avoidance claims he was asserting against
24 ISI. In response, the Disbursement Order explicitly stated:

25 The transfer of the Sale Proceeds to FINOVA in the
26 amount necessary to satisfy FINOVA's Claim shall be
27 made free and clear of any and all liens and claims,
28 including, without limitation, any claims which have
been or may be asserted against the Sale Proceeds by
Joseph J. Janas, as Chapter 7 Trustee in *In re JWW
Contracting, Inc.*, United States Bankruptcy Court for

1 the District of Arizona, Case No. 94-06045-PHX-RTB.

2 (*Italics in original.*)

3 The Disbursement Order was "effective immediately upon
4 entry, but . . . subject to modification prior to becoming final"
5 and would become final in the absence of an objection filed
6 within 20 days after the Disbursement Order was served. The JWW
7 Trustee timely objected to paragraph 14 of the Disbursement
8 Order; attached to the objection was a copy of an adversary
9 proceeding ("JWW/Finova Adversary") he had filed the day before
10 in the JWW Bankruptcy Case, asserting that Finova was the
11 beneficiary of alleged avoidable transfers made from JWW to ISI
12 in 1993 and 1994 in the approximate total amount of \$1.4 million.
13 In his objection, the JWW Trustee asserted that the Disbursement
14 Order improperly impaired his ability to pursue the JWW/Finova
15 Adversary. The ISI court overruled the objection on the basis
16 that, even if successful in his adversary proceeding against
17 Finova, the JWW Trustee would not have an interest in the ISI
18 Sale Proceeds as a result.

19 Despite being on notice of the JWW Trustee's avoidance
20 claims against it, Finova did not request modification of the
21 Disbursement Order to preserve the Deed of Trust Lien.

22 By November 1997, Finova was requesting that the
23 Disbursement Order be modified with respect to the ISI Sale
24 Proceeds and any remaining ISI collateral⁵ it previously had
25 released when its agreed secured claim was paid. In its "Motion
26 to Confirm Secured Status," Finova asserted that when it

27
28 ⁵Notably missing was a request that the Disbursement Order
be modified as to the release of the Deed of Trust Lien on the
8.5 Acres.

1 stipulated to the Disbursement Order, it had no reason to believe
2 the JWJ Trustee could recover any avoided transfers from Finova
3 because he did not allege Finova was an initial transferee. Only
4 after the JWJ bankruptcy court ruled in October 1997 that the JWJ
5 Trustee could amend his complaint in the JWJ/Finova Adversary to
6 allege that Finova was an initial transferee did Finova become
7 concerned that it had given up too much in the Disbursement
8 Order. As noted above, even then, Finova did not address its
9 release of the Deed of Trust Lien.

10 Ultimately, Finova resolved its concerns about its secured
11 status by entering into an agreement with the ISI Chapter 11
12 Trustee and Continental ("ISI Settlement"), which divided rights
13 to the \$315,191.69 then remaining of the ISI Sale Proceeds.
14 Finova was granted a security interest in \$120,000.00 of the ISI
15 Sale Proceeds to secure its contingent claim in the event Finova
16 paid any money (by judgment or settlement) to the JWJ Trustee in
17 connection with the JWJ/Finova Adversary. Under the ISI
18 Settlement, Finova was obligated to "take all reasonably
19 necessary action to pursue all reasonably available guarantees
20 and collateral." The ISI Settlement further provided:

21 8. Nothing in this Agreement shall in any manner
22 alter, amend, modify or otherwise affect Finova's
claims and rights against any guarantor.

23 9. To the extent necessary, this Agreement shall be
24 deemed to amend the Disbursement Order and the
Continental Settlement Agreement.⁶ Except as modified
25 by this Agreement, all other terms and conditions of
the Disbursement Order and the Continental Settlement
Agreement shall remain in full force and effect.

26 _____
27 ⁶The Continental Settlement Agreement referred to was an
28 agreement between the ISI Trustee and Continental, previously
approved by the ISI court, with respect to the remaining ISI Sale
Proceeds.

1 The ISI Settlement was approved by the ISI court in August 1998.

2 Thereafter, on September 7, 2000, the bankruptcy court
3 entered judgment against Finova in the JWJ/Finova Adversary in
4 the amount of \$823,299.69, with interest from June 10, 1997, at
5 6.241%. Finova paid the judgment on September 27, 2000, by a
6 wire transfer in the amount of \$1,005,667.

7 Throughout the proceedings as summarized above, Finova did
8 nothing to reinstate or revoke the release of the Deed of Trust
9 Lien provided for in the Disbursement Order. When a purchaser
10 for the 8.5 Acres was located, the 8.5 Acres were sold, with the
11 consent of all concerned parties, to an unrelated third party,
12 and the parties' dispute transferred to the proceeds of that sale
13 ("8.5 Acres Proceeds").

14 In September 2002, the Jacobson Trust filed a complaint in
15 the United States District Court for the District of Arizona
16 against Finova ("Declaratory Judgment Action"),⁷ seeking a
17 determination that its right, title to, and interest in the 8.5
18 Acres Proceeds⁸ were superior to those of Finova and the JWJ
19 Trustee. Finova answered, and filed a third-party complaint
20

21 ⁷The JWJ Trustee was also a defendant in the Declaratory
22 Judgment Action. The district court granted the JWJ Trustee's
23 motion to dismiss on the basis that the Jacobson Trust had not
24 obtained relief from the automatic stay to sue the JWJ Trustee.
25 After the initial appeals in this dispute were filed, the JWJ
26 Trustee sought leave from the Panel to intervene in Appeal No.
AZ-06-1129. That motion was granted; subsequently, the
bankruptcy court entered a judgment with respect to the JWJ
Trustee, which forms the basis of Appeal No. AZ-06-1330.

27 ⁸First American Title Insurance Company held the 8.5 Acres
28 Proceeds in escrow until granted leave to interplead them into
the registry of the bankruptcy court, at which time it was
dismissed as a party in the Declaratory Judgment Action.

1 against the Jacobsons and against the Johnsons, seeking judgment
2 against them on continuing personal guaranties. The district
3 court referred the Declaratory Judgment Action to the JWJ
4 bankruptcy court in September 2004.

5 Obviously concerned at this point about the release language
6 in the Disbursement Order as it related to the 8.5 Acres
7 Proceeds, Finova entered into a settlement agreement
8 ("Clarification Agreement") with the ISI Trustee and the JWJ
9 Trustee which purported to "clarify" that the Disbursement Order
10 did not release Finova's Deed of Trust Lien against the 8.5
11 Acres. The ISI court denied both the motion to approve the
12 Clarification Agreement and the motion to reconsider that denial.
13 In refusing to approve the Clarification Agreement, the ISI court
14 emphatically stated that the Disbursement Order acted to
15 terminate Finova's Deed of Trust Lien.

16 In denying the motion for reconsideration, the ISI court
17 stated:

18 The Court finds this entire dance distasteful.
19 Litigation is supposed to be conducted on the merits,
20 not by stealth. Taken separately, these two
21 settlements seem fair enough. Thus it seems reasonable
22 enough that the parties to a dispute should be able to
23 carve up the spoils in a way that reflects their
24 perceived risks--that's what happened in the JWJ
25 Bankruptcy before Judge Baum. In this case, it seems
26 reasonable enough to resolve a dispute by a stipulated
27 "clarification" of an order previously agreed to by the
28 same parties while insisting that parties who are
strangers to the [Disbursement Order], i.e. the
Insiders, have no standing to complain. Both of these
propositions are reasonable on their face, until it
becomes clear that 1) the purpose of the
"clarification" is to pre-empt the issue in another
adversary proceeding (where the Insiders are plaintiffs
and do have standing) so as to be able to state to the
other judge, "See, this is what the judge who entered
the order thinks the order means; that should be the
end of it," and 2) that the division of the spoils in

1 the one case is what is driving the request for
2 "clarification" in the other.

3 Under Advisement Decision at 4, Jan. 13, 2005.

4 Having lost in its attempt to "clarify" in the ISI court
5 that the Disbursement Order did not operate to release its lien
6 as to the 8.5 Acres Proceeds, Finova then sought summary judgment
7 in the Declaratory Judgment Action pending before the bankruptcy
8 court that its claim to the 8.5 Acres Proceeds trumped that of
9 the Jacobson Trust based on the Deed of Trust Lien. In denying
10 this motion, the bankruptcy court stated:

11 . . . Finova has released any lien claim to the 8.5
12 [A]cres and the proceeds thereof, which proceeds are
13 now held by this court and the right thereto is the
14 fundamental issue to be resolved in this adversary
15 proceeding. The fact of the release of this lien is
16 aptly set forth by Judge Case in his two rulings of
17 October 21, 2004 and January 13, 2005. . . .

18 Therefore, if Finova has any rights to the [8.5
19 Acres Proceeds] . . . it must be a right independent
20 from the deed of trust lien held at a prior time by
21 Finova which lien has been released.

22 Minute Entry/Order at 1-2, Jun. 2, 2005.

23 Inspired by these rulings, the Jacobson Trust then filed its
24 own motion for summary judgment. The bankruptcy court denied the
25 Jacobson Trust's motion, holding that, by operation of §§ 550,
26 502(d) and 502(h), when Finova paid the avoidable transfer
27 judgment in the JWJ/Finova Adversary, Finova became a secured
28 creditor in the JWJ bankruptcy case: more specifically, its lien
on the 8.5 Acres, and thus the 8.5 Acres Proceeds, was restored
by that payment. The bankruptcy court noted no fewer than three
times that it would be "fundamentally inequitable" for the
Jacobson Trust to have an interest in the 8.5 Acres Proceeds
superior to Finova (1) where Finova's Deed of Trust Lien had been

1 granted on a consensual basis by Mr. Jacobson, who in effect,
2 throughout time manipulated the title to the 8.5 Acres, (2) where
3 Finova and the other creditors of JWJ and ISI hold "tens of
4 millions of dollars" in unpaid claims, and (3) where Mr. Jacobson
5 "pled guilty to various felonies" in connection with loans to
6 JWJ. The bankruptcy court entered summary judgment in favor of
7 Finova, and the Jacobson Trust appealed (Appeal No. AZ-06-1129).

8
9 B. The JWJ Trustee's Interest in the 8.5 Acres Proceeds

10 The following facts set forth briefly the state of the JWJ
11 Trustee's interest both in the 8.5 Acres Proceeds and in the
12 Declaratory Judgment Action.

13 In 1996, the JWJ Trustee filed an adversary proceeding
14 ("JWJ/Jacobson Trust Adversary") through which he obtained
15 partial summary judgment that an aggregate of \$412,990.29
16 constituted avoidable preferential transfers from JWJ to the
17 Jacobson Trust and a related entity. Second Amended Complaint
18 (Adv. Proc. No. 96-492), p. 7, paras. 19(a)-(f). Thereafter, the
19 JWJ Trustee and the Jacobson Trust reached a settlement, approved
20 by the bankruptcy court on July 21, 1999, pursuant to which the
21 Jacobson Trust paid \$375,000 to the JWJ Trustee, and in exchange
22 for which the JWJ Trustee

23 (a) discharges and releases [the Jacobson Trust and its
24 attorneys], from all claims, known or unknown, held by
25 the [JWJ Trustee] and the Bankruptcy Estate regarding
26 the Transfers, (b) agrees not to pursue recovery of any
27 further money or property (including but not limited to
28 the . . . 8.5-acre parcel . . .) from any of the
Defendants in connection with any other claims, causes
of action, or liabilities with respect to the facts,
acts and/or omissions underlying the operations of JWJ
and/or the JWJ bankruptcy. . . .

1 Complaint, p.4, Ex B. Emphasis added.

2 Subsequent to this agreement not to pursue recovery of the
3 8.5 Acres, the JWJ Trustee obtained two partial summary judgments
4 in the JWJ/Jacobson Trust Adversary related to the 8.5 Acres.
5 The first, entered in June 2001, was a judgment which declared
6 the transfer of the 8.5 Acres from JWJ to JJP avoidable as a
7 preferential transfer pursuant to § 547. Statement of Facts in
8 Support of Trustee's Fifth Motion for Partial Summary Judgment
9 (Adv. Pro. No. 96-492), Ex B; Judgment (Jun. 29, 2001) (Adv.
10 Proc. No. 96-492). The second, entered in October 2003, was a
11 judgment which declared the following transfers of the 8.5 Acres
12 avoidable as fraudulent transfers pursuant to § 548(b)(1):

13 (1) from JWJ to JJP on January 7, 1994;

14 (2) from JJP to the Jacobson Trust on May 27, 1994; and

15 (3) from the Jacobson Trust to the Jacobsons on April 14,
16 1995 (the recording date).

17 Finova's Request for Judicial Notice in Support of Motion for
18 Summary Judgment, Ex. 5. Neither judgment provided for a § 550
19 recovery of the 8.5 Acres or its value.

20 In 2004, the bankruptcy court approved a settlement
21 ("JWJ/Finova Settlement") over the objection of the Jacobson
22 Trust, which provided that, to the extent Finova recovers an
23 interest in the 8.5 Acres Proceeds, the JWJ Trustee and Finova
24 will divide those proceeds, 63% to the JWJ Trustee and 37% to
25 Finova. Motion for Approval of Amended Compromise Agreements
26 (ISI and Finova), Ex. 1-A, p. 2; Order Approving Amended
27 Compromises.

1 As a consequence, the bankruptcy court noted when denying
2 Finova's original motion for summary judgment in the Declaratory
3 Judgment Action:

4 [T]he JWJ [Trustee] has agreed that the only manner in
5 which the JWJ bankruptcy estate will share in any of these
6 proceeds is if Finova prevails on any claims it may have to
those monies. That agreement has been approved by this
court.

7 Minute Entry/Order at 2, Jun. 2, 2005.

8 When the bankruptcy court entered summary judgment in favor
9 of Finova, it did not enter summary judgment in favor of the JWJ
10 Trustee, although it did recognize the JWJ Trustee's rights in
11 the 8.5 Acres Proceeds: "Counsel for Finova shall serve and lodge
12 an appropriate form of judgment, which shall direct the clerk of
13 this court to release the impound funds to Finova and the JWJ
14 Trustee pursuant to their respective rights therein."

15 Minute Entry/Order at 9, Mar. 2, 2006.

16 On August 4, 2006, the Panel granted the JWJ Trustee's
17 motion to intervene in Appeal No. AZ-06-1129, noting that the JWJ
18 Trustee was an original defendant in the Declaratory Judgment
19 Action; that once the Declaratory Judgment Action was referred by
20 the district court, the bankruptcy court entered an order joining
21 the JWJ Trustee as a defendant; and that the JWJ Trustee's
22 financial stake in the outcome of the appeal is greater in dollar
23 amount than Finova's. The Panel determined that the absence of
24 an order granting judgment to the JWJ Trustee rendered the
25 judgment in favor of Finova interlocutory since it disposed of
26 the claims of fewer than all parties to the action. In response,
27 the bankruptcy court entered a Judgment for Final Defendant ("JWJ
28 Trustee Judgment") on August 30, 2006, and the Jacobson Trust

1 appealed (Appeal No. AZ-06-1330).

2
3 C. Who Owned the 8.5 Acres and When?

4 In addition to the question as to the present validity of
5 the Finova Deed of Trust Lien, title to the 8.5 Acres is raised
6 as a factor in determining whether Finova or the Jacobson Trust
7 has a superior interest in the 8.5 Acres Proceeds.

8 As noted earlier, the 8.5 Acres were the subject of numerous
9 Jacobson-related entity transfers beginning, for our purposes, in
10 January 1994, at which time the 8.5 Acres were owned by JWJ.
11 Additional factors impacting the interest of the Jacobson Trust
12 in the 8.5 Acres also were addressed above.

13 To recap:

14 1. In January 1994, JWJ deeded the 8.5 Acres to JJP.

15 2. In May 1994, JJP transferred the 8.5 Acres to the
16 Jacobson Trust, after encumbering the 8.5 Acres with a deed of
17 trust lien to secure JWJ's construction debt to Tanner in the
18 approximate amount of \$1.8 million.

19 3. Pursuant to its terms, Tanner assigned this deed of
20 trust to Continental upon Continental's payment of JWJ's debt to
21 Tanner.

22 4. In April 1995, the Jacobson Trust transferred the 8.5
23 Acres to the Jacobsons.

24 5. The Continental Trust Deed was subordinated to the
25 Finova Deed of Trust Lien granted by the Jacobsons in 1995.

26 6. In 1999, the JWJ Trustee settled the JWJ/Jacobson Trust
27 Adversary. Pursuant to the terms of the settlement, the JWJ
28 Trustee agreed "not to pursue recovery of any further money or

1 property (including but not limited to the . . . 8.5-acre parcel
2 . . .)."⁹

3 Thereafter, in September 1999, in separate litigation in the
4 United States District Court for the District of Arizona
5 ("Continental Litigation"), Continental, the Johnsons, the
6 Jacobsons, and the Jacobson Trust entered into a settlement
7 agreement which settled Continental's claims against the other
8 parties for their liability to Continental for losses incurred in
9 conjunction with the insolvency of JWJ and ISI. Upon payment of
10 \$1,250,000, plus interest at 8% per annum from June 1, 1999, to
11 Continental pursuant to the agreement, Continental assigned the
12 Continental Trust Deed to the Jacobson Trust. Settlement
13 Agreement and Release Dated May 18, 1999, p. 5, para. 8; Minute
14 Entry/Order at 3-4, Mar. 2, 2006.

15 In August 2000, at the direction of the Jacobson Trust, the
16 title company conducted a trustee's sale under the Continental
17 Trust Deed and recorded a trustee's deed conveying title to the
18 8.5 Acres to the Jacobson Trust.

19 Finally, in September 2000, the Jacobson Trust sold the 8.5
20 Acres to an unrelated third party with the consent of Finova,
21 subject to the parties retaining their respective claims to the
22 8.5 Acres Proceeds. Request for Judicial Notice and Supplemental
23 Statement of Undisputed Facts in Support of Jacobson Trust's
24 Summary Judgment Motion, Ex. G.

25
26 ⁹Again, subsequent to this agreement not to pursue recovery
27 of the 8.5 Acres, the JWJ Trustee obtained two partial summary
28 judgments in the JWJ/Jacobson Trust Adversary related to the 8.5
Acres. One avoided the transfer of the 8.5 Acres from JWJ to JJP
as a preference; the other avoided certain transfers of the 8.5
Acres as fraudulent transfers. Neither judgment allowed recovery
of the 8.5 Acres or its value.

1 D. The Enforceability of Finova's Guaranties

2 In June 1993, Finova required that the Jacobsons and the
3 Johnsons personally guaranty payment of the ISI Loan
4 ("Guaranties"). Finova's secured debt on the ISI Loan was paid
5 in full in February 1997, pursuant to the entry and
6 implementation of the Disbursement Order. Thus, after February
7 1997, the Jacobsons and the Johnsons owed nothing on account of
8 the Guaranties. However, in the Declaratory Judgment Action,
9 Finova filed third-party complaints against the Jacobsons and the
10 Johnsons, seeking to enforce the Guaranties as a source of
11 repayment to Finova for its payment of the 2000 JWJ/Finova
12 Judgment in the amount of \$1,005,667, together with interest from
13 September 27, 2000, and attorneys' fees and costs. Finova relied
14 on a "clawback" provision in the Guaranties as the basis for the
15 third-party claims. That provision states:

16 If any payments of money or transfers of property made
17 to [Finova] by [ISI] . . . [or any Guarantor] . . .
18 should for any reason subsequently be declared to be
19 . . . fraudulent . . . , preferential or otherwise
20 voidable or recoverable in whole or in part for any
21 reason (hereinafter collectively called "voidable
22 transfers") under the Bankruptcy Code . . . and
23 [Finova] is required to repay or restore . . . any such
24 voidable transfer, . . . then as to any such voidable
25 transfer or the amount repaid or restored and all costs
26 and expenses (including attorneys' fees) of [Finova]
27 related thereto, the undersigned's liability hereunder
28 shall automatically be revived, reinstated and restored
and shall exist as though such voidable transfer had
never been made to [Finova].¹⁰

25 ¹⁰Contrary to the assertions of counsel for Finova at oral
26 argument, the Deed of Trust granted to Finova on the 8.5 Acres in
27 conjunction with the amendment of the ISI Loan in 1995 does not
28 contain a comparable provision, as found by the ISI court.
"[T]here is no clawback provision in the deed of trust; even in
the lengthy motion for reconsideration that proposition was not
challenged." Request for Judicial Notice in Support of Response
(continued...)

1 In addition to challenging the fairness of the clawback
2 provision, the Jacobsons and the Johnsons asserted that the
3 Guaranties were unconscionable, in particular because they
4 contain the following broad waiver of defenses:

5 The undersigned waives any defense arising by reason of
6 any disability or other defense of Borrower or by
7 reason of the cessation from any cause whatsoever of
8 the liability of Borrower or by reason of any act or
9 omission of Lender or others which directly or
10 indirectly results in or aids the discharge or release
11 of Borrower or any Indebtedness or any security in
12 respect thereof by operation of law or otherwise. The
13 undersigned waives any and all suretyship defenses and
14 defenses in the nature thereof. . . . The obligations
15 hereunder shall be enforceable without regard to the
16 validity, regularity or enforceability of any of the
17 Indebtedness or any of the documents related thereto,
18 any other guaranty of the Indebtedness or any
19 collateral security documents securing any of the
20 Indebtedness or securing any other guaranty of the
21 Indebtedness. No exercise by Lender of, and no
22 omission of Lender to exercise, any power or authority
23 recognized herein and no impairment or suspension of
24 any right or remedy of Lender against Borrower, any
25 other guarantor, maker or endorser or any collateral
26 security shall in any way suspend, discharge, release,
27 exonerate or otherwise affect any of the undersigned's
28 obligations hereunder or any collateral security
furnished by the undersigned or give to the undersigned
any right of recourse against Lender. The undersigned
specifically agrees that the failure of Lender: (a) to
perfect any lien on or security interest in any
property heretofore or hereafter given by Borrower or
any guarantor, maker or endorser to secure payment of
the Indebtedness or of any guaranty of the
Indebtedness, or to record or file any document
relating thereto or (b) to file or enforce a claim
against the estate (either in administration,
bankruptcy or other proceeding) of Borrower, any
guarantor, maker or endorser, shall not in any manner
whatsoever terminate, diminish, exonerate or otherwise
affect the liability of the undersigned hereunder.
The bankruptcy court granted summary judgment to Finova on

the third party claims. The Jacobsons appealed (Appeal No. AZ-

27 ¹⁰ (...continued)
28 to Finova Capital Corporation's Motion for Summary Judgment, Ex.
6, p. 4.

1 06-1130), as did Mr. Johnson (Appeal No. AZ-06-1143).¹¹

2 E. Finova's Right to Attorneys' Fees and Costs Against the
3 Jacobson Trust

4 After summary judgment was entered in its favor in the
5 Declaratory Judgment Action, Finova moved, as the prevailing
6 party, for an award of attorneys' fees and expenses in the total
7 amount of \$140,854.89, against the Jacobson Trust, pursuant to
8 both Rule 54(d)(2) of the Federal Rules of Civil Procedure and
9 § 12-341.01 of the Arizona Revised Statutes ("Fee Motion"). The
10 Jacobson Trust did not oppose the Fee Motion. Notwithstanding
11 the absence of objection, the bankruptcy court denied the Fee
12 Motion. Finova appealed (Appeal No. AZ-06-1225).

13
14 **II. JURISDICTION**

15 The bankruptcy court had jurisdiction under 28 U.S.C.
16 §§ 1334 and 157(b)(1) and (b)(2). We have jurisdiction under 28
17 U.S.C. § 158(c).

18
19 **III. ISSUES**

20 (A) Whether the bankruptcy court erred in finding that
21 Finova had a secured interest in and a right superior to the
22 interest and right of the Jacobson Trust in the 8.5 Acres
23 Proceeds.

24 (B) Whether the bankruptcy court erred in finding that the
25 Jacobsons and the Johnsons were personally liable to Finova,
26 through personal guaranties, on the corporate debt of ISI.

27
28

¹¹Mrs. Johnson is deceased.

1 (C) Whether the bankruptcy court erred in denying Finova's
2 unopposed motion for attorneys' fees and costs against the
3 Jacobson Trust.

4
5 **IV. STANDARDS OF REVIEW**

6 We review summary judgment orders de novo. Tobin v. San
7 Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP
8 2001). Viewing the evidence in the light most favorable to the
9 non-moving party, we must determine "whether there are any
10 genuine issues of material fact and whether the trial court
11 correctly applied relevant substantive law." Id.

12 We review interpretations of state law de novo. In re
13 Kirkland, 915 F.2d 1236, 1238 (9th Cir. 1990). Unless the Code
14 provides otherwise, we must apply state law when adjudicating a
15 dispute arising from a contract claim. Rubenstein v. Ball Bros.,
16 Inc. (In re New England Fish Co.), 749 F.2d 1277, 1280 (9th Cir.
17 1984). We apply the law that a court of the forum state would
18 apply in deciding questions of state law. Id. at 1281. When
19 interpreting state law, we are bound by the decisions of the
20 highest state court. Kirkland, 915 F.2d at 1239. In the absence
21 of such a decision, we use intermediate appellate court decisions
22 and related statutes, treaties, and restatements as guidance to
23 predict how the highest state court would decide the issue. Id.
24 If we do not have convincing evidence that the highest court of
25 the state would decide differently, we must follow the decisions
26 of the state's intermediate courts. Id.

27 An award of attorneys' fees under A.R.S. § 12-341.01 is
28 discretionary with the court; we review an order denying such

1 fees for an abuse of discretion. Newbery Corp. v. Fireman's Fund
2 Ins. Co., 95 F.3d 1392, 1405 (9th Cir. 1996).

3
4 **V. DISCUSSION**

5 A. Appeal of the Bankruptcy Court's Rulings Regarding the
6 Parties' Interests in and Rights to the 8.5 Acres
Proceeds (Appeal Nos. AZ-06-1129 and AZ-06-1330)

7 1. The bankruptcy court erred in finding that Finova held
8 an interest in and right to the 8.5 Acres Proceeds
superior to the Jacobson Trust.

9 Like the bankruptcy court, we have the unenviable task of
10 unraveling the factual, procedural and legal tangles created by
11 the parties and their counsel with respect to the parties'
12 interests in and rights to the 8.5 Acres Proceeds. It has not
13 been, as the record and the briefs indicate, easy.

14 As the bankruptcy court noted, the dispute before us centers
15 on competing interests in and rights to the 8.5 Acres Proceeds.
16 Finova and the Jacobson Trust each contends that it holds the
17 superior interest in and right to the 8.5 Acres Proceeds. Guided
18 by equitable concerns, the bankruptcy court crafted a unique
19 resolution. Applying §§ 550, 502(d) and 502(h) to the facts, the
20 bankruptcy court determined that Finova regained its secured
21 interest in the 8.5 Acres Proceeds because it held such a secured
22 interest in the 8.5 Acres prior to the petition dates of the ISI
23 and JWJ bankruptcies, thereby trumping the interest and rights of
24 the Jacobson Trust with respect to the 8.5 Acres Proceeds.

25 We acknowledge that neither the JWJ Trustee nor Finova is
26 blameless in the machinations in the ISI and JWJ bankruptcy cases
27 with regard to the 8.5 Acres. Nor are we completely sympathetic
28 to the beneficiaries of the Jacobson Trust, in light of their

1 passivity with respect to Mr. Jacobson's transfers of the 8.5
2 Acres as his needs dictated. We recognize that we must apply the
3 law to the facts before us, mindful that bankruptcy courts are
4 bound to apply a code of law and do not have a roving mandate to
5 do equity. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206-
6 07 (1988). Given the facts of the case and the applicable law,
7 we determine that Finova does not have an interest in and right
8 superior to the rights of the Jacobson Trust to the 8.5 Acres
9 Proceeds.

10 When a trustee recovers an avoidable transfer of property
11 from a creditor pursuant to § 550, that creditor is entitled,
12 under § 502(h), to assert a claim against the estate, the same as
13 if such claim had arisen prior to the petition date. Verco
14 Indus. v. Spartan Plastics (In re Verco Indus.), 704 F.2d 1134,
15 1139 (9th Cir. 1983); Cohen v. Eiler (In re Cohen), 305 B.R. 886,
16 898 (9th Cir. BAP 2004); Southmark Corp. v. Schulte, Roth &
17 Zabel, L.L.P., 242 B.R. 330, 341 (N.D. Tex. 1999), aff'd in part,
18 239 F.3d 365 (5th Cir. 2000). Specifically, § 502(h) provides
19 that:

20 [a] claim arising from the recovery of property under
21 . . . [§ 550] of this title shall be determined, and
22 shall be allowed under subsection (a), (b), or (c) of
23 this section, or disallowed under subsection (d) or (e)
of this section, the same as if such claim had arisen
before the date of the filing of the petition.

24 Emphasis added.

25 In other words, a creditor gains the right to assert a
26 § 502(h) claim if the trustee requires the creditor to repay or
27 return a payment received during the preference or fraudulent
28 conveyance period. Verco, 704 F.2d at 1138 (quoting Misty Mgmt.

1 Corp. v. Lockwood, 539 F.2d 1205, 1214 (9th Cir. 1976)); Cohen,
2 305 B.R. at 898; In re Gurley, 311 B.R. 910, 918-19 (Bankr. M.D.
3 Fla. 2001). Because the creditor loses the value of the payment
4 or property received, the obligation previously satisfied by the
5 payment is revived. Gurley, 311 B.R. at 918; see also Verco, 704
6 F.2d at 1138 (quoting Misty Mgmt. Corp. v. Lockwood, 539 F.2d at
7 1214, that "a transferee guilty of fraudulent behavior may
8 nevertheless prove a claim against a bankruptcy estate, once he
9 returns the fraudulently conveyed property to the estate . . .
10 [as a] rule to the contrary would allow the estate to recover the
11 voidable conveyance and to retain whatever consideration it had
12 paid therefor . . . [thereby creating] a result [that] would
13 clearly be inequitable.").

14 The creditor does not have an automatically allowable claim
15 against the estate, however. Under § 502(d), unless the creditor
16 returns the avoided transfer to the estate, the court will
17 disallow the claim. 11 U.S.C. § 502(d); Verco, 704 F.2d at 1139
18 (stating that "[a] claim is not allowable under 11 U.S.C.
19 § 502(d) until after the property has been surrendered to the
20 estate.").

21 Where such a claim is allowable, the creditor holds a claim
22 as if it existed at the time the debtor filed its bankruptcy
23 petition, even if the trustee moves to avoid and recover the
24 transfer after the filing of the petition. Verco, 704 F.2d at
25 1139 (quoting 3 Collier on Bankruptcy ¶ 502.08 n.6 (15th ed.
26 1982), that "'where a claim is allowable as provided in [§ 502],
27 its status is as a claim in existence on the date of the filing
28 of the petition regardless of when, after the petition, the

1 trustee has taken the necessary action and recovered.'"); see
2 also Fleet Nat'l Bank v. Gray (In re Bankvest Capital Corp.), 375
3 F.3d 51, 69 (1st Cir. 2004) (the avoidance and recovery of the
4 transfer "restores the original claim, with the transferee's
5 status becoming that of the holder of a prepetition claim
6 existing at the time of the filing of the debtor's petition.");
7 In re Toronto, 165 B.R. 746, 754 (Bankr. D. Conn. 1994) (when the
8 trustee recovers property pursuant to § 550, the "transferee
9 receiving a prohibited transfer is returned to its pre-transfer
10 status"); Aargus Polybag Co. v. Commonwealth Edison Co. (In re
11 Aargus Polybag Co.), 172 B.R. 586, 589 (Bankr. N.D. Ill.
12 1994) ("The effect of § 502(h) is to restore the creditor to the
13 status it would have had if the avoided payment had not been
14 made."); Allied Cos., Inc. v. Broughton Foods Co. (In re Allied
15 Cos., Inc.), 155 B.R. 739, 744 (Bankr. S.D. Ind. 1992)
16 ("[A]lthough a creditor did not have a claim at the time of
17 bankruptcy because its claim had been satisfied by a preferential
18 payment, subsequent avoidance of the payment relates back to the
19 time before bankruptcy, so the claim is deemed to have been
20 unpaid at the time the petition was filed.") The claim takes on
21 the characteristics of the original claim, including its secured
22 status. Bankvest, 375 F.3d at 67.

23 Both Finova and the JWW Trustee ask us to uphold the
24 bankruptcy court's application of § 502(h) to the facts of this
25 case. This we cannot do, as the bankruptcy court erroneously
26 applied § 502(h) to the facts at hand.

27 We must interpret § 502(h) according to its terms. Busseto
28 Foods, Inc. v. Laizure (In re Laizure), 349 B.R. 604, 607 (9th

1 Cir. BAP 2006) (quoting Lamie v. U.S. Trustee, 540 U.S. 526, 534
2 (2004)). Section 502(h), by its terms, only allows the
3 creditor's claim to take on its original characteristics as of
4 the petition date. Verco, 704 F.2d at 1139.

5 Finova does not hold a right superior to that held by the
6 Jacobson Trust in the 8.5 Acres Proceeds because, contrary to the
7 bankruptcy court's finding, Finova did not obtain its Deed of
8 Trust Lien on the 8.5 Acres until after JWJ filed its bankruptcy
9 petition. The bankruptcy court mistakenly determined that Finova
10 was a creditor secured by the 8.5 Acres prior to the filing of
11 both the JWJ and ISI bankruptcies. However, when ISI entered
12 into the ISI Loan with Finova, the assets securing the ISI Loan
13 did not include the 8.5 Acres. Finova did not obtain its
14 security interest in the 8.5 Acres until a year after JWJ filed
15 its chapter 11 bankruptcy petition; JWJ filed for chapter 11
16 bankruptcy protection in July 1994, and Finova obtained its Deed
17 of Trust Lien in the 8.5 Acres, through the amendment to the ISI
18 Loan, in March 1995. Thus, Finova's secured status does not
19 relate back to the date of filing of the JWJ bankruptcy petition;
20 at the time JWJ filed for bankruptcy protection, Finova did not
21 have a security interest in the 8.5 Acres.¹²

22 In addition, Finova gave up its security interest in the 8.5
23 Acres. In the Disbursement Order, Finova explicitly relinquished
24

25 ¹²This is not to say that Finova does not have an unsecured
26 claim under § 502(h) against the JWJ estate. See Laizure, 349
27 B.R. at 607. In fact, it appears Finova did file an unsecured
28 claim, which was resolved in an overall settlement with the JWJ
Trustee that included the JWJ/Finova Settlement approved by the
bankruptcy court. Motion for Approval of Amended Compromise
Agreements (ISI and Finova), pp. 4-5.

1 and agreed to release its security interest in the 8.5 Acres in
2 exchange for full payment on its claim against ISI.¹³

3 Specifically, the Disbursement Order stated that, effective
4 immediately upon the payment of Finova's claim by ISI,

5 Finova's security interest in the remaining collateral
6 . . . shall be released and extinguished . . . [and
7 that] Finova shall execute and deliver to [ISI] any and
8 all documents submitted to it for execution which are
9 reasonably necessary so as to effectuate the release of
10 its security interest in the Collateral (and in certain
11 real property [the 8.5 Acres] not owned by [ISI] which
12 was provided to Finova as additional security under the
13 Loan Agreement).

14 Emphasis added.

15 Under the ISI Settlement, Finova further failed to assert or
16 even mention its alleged security interest in the 8.5 Acres.

17 Finova merely claimed a security interest in the remaining ISI
18 Sale Proceeds to secure its contingent claim should the JWJ
19 Trustee be successful in his avoidance and recovery action
20 against Finova. In fact, the ISI Settlement expressly provided
21 that, except for the modifications contained therein, "all other
22 terms and conditions of the Disbursement Order . . . shall remain
23 in full force and effect."

24 All of these circumstances demonstrate that Finova never
25 held a secured interest in the 8.5 Acres as of the date of the
26 filing of the JWJ bankruptcy petition, entitling it to a right
27 superior to that of the Jacobson Trust in the 8.5 Acres Proceeds.
28 The later Deed of Trust Lien that Finova did hold was
relinquished under the terms of the Disbursement Order.

¹³In its October 21, 2004, decision on the motion to approve the proposed settlement agreement among ISI, JWJ and Finova, the ISI court pointed out that Finova did not execute the documents releasing its lien as required under the Disbursement Order.

1 At oral argument, Finova argued that any ownership interest
2 in the 8.5 Acres that the Jacobson Trust acquired through
3 foreclosure of the Continental Trust Deed should be subordinated
4 to Finova's interest in the 8.5 Acres Proceeds, based on
5 Continental's 1995 agreement to subordinate the priority of the
6 Continental Trust Deed to the Deed of Trust Lien. This argument
7 fails because we have determined, consistent with the bankruptcy
8 court's decision denying Finova's motion for summary judgment in
9 the Declaratory Judgment Action, that Finova released the Deed of
10 Trust Lien. It would not be appropriate to subordinate the
11 Jacobson Trust's interest in the 8.5 Acres Proceeds to a non-
12 existent lien.

13
14 2. The bankruptcy court erred in entering the JWJ Trustee
15 Judgment.

16 As Finova does not have an interest in or right to the 8.5
17 Acres Proceeds, so the JWJ Trustee does not have an interest in
18 or right to the 8.5 Acres Proceeds. The JWJ Trustee relinquished
19 the estate's interest in and right to the 8.5 Acres when he
20 entered into the Jacobson Trust/JWJ Trustee Settlement whereby he
21 relinquished the estate's claims against the Jacobson Trust in
22 exchange for a \$375,000 payment from the Jacobson Trust.

23 Whatever rights the JWJ Trustee may have are derivative of
24 Finova's interest in and right to the 8.5 Acres Proceeds, which
25 we have determined do not exist. The JWJ Trustee attempted to
26 recapture the estate's stake in the 8.5 Acres Proceeds through
27 the JWJ/Finova Settlement in which Finova agreed to share a
28 percentage of its recovery in the 8.5 Acres Proceeds. As Finova

1 has failed to establish its interest in and right to the 8.5
2 Acres Proceeds and thereby recover any of the 8.5 Acres Proceeds,
3 the JWJ Trustee has no corresponding interest or right.

4
5 3. The bankruptcy court did not provide adequate factual
6 findings or analysis to support its ruling on equitable
7 grounds.

8 Both Finova and the JWJ Trustee argue that we should uphold
9 the bankruptcy court's rulings on their interests in and rights
10 to the 8.5 Acres Proceeds on equitable grounds. We decline to do
11 so.

12 An equitable lien is "the right to have a fund or specific
13 property applied to the payment of a particular debt." United
14 States v. Adamant Co., 197 F.2d 1, 10 (9th Cir. 1952). A court
15 of equity may imply and declare a lien based on "the fundamental
16 maxims of equity . . . out of general considerations of right and
17 justice as applied to the relationship of the parties and the
18 circumstances of their dealing." Id., (quoting Cleveland Clinic
19 Found. v. Humphrys, 97 F.2d 849, 856 (6th Cir. 1938)).

20 A court looks to state law in determining whether a party
21 has a valid equitable lien in property. Trust Corp. of Mont. v.
22 Patterson (In re Copper King Inn, Inc.), 918 F.2d 1404, 1407 (9th
23 Cir. 1990) ("State law controls the validity and effect of liens
24 in the bankruptcy context."); In re Dean & Jean Fashions, Inc.,
25 329 F.Supp. 663, 666 (W.D. Okla. 1971) ("Whether an equitable lien
26 exists at all is a question to be determined in accordance with
27 state law."). In Arizona,

28 [a]n equitable lien is a right over real property
constituting an encumbrance, so that the real property
itself may be proceeded against in an equitable action

1 and either sold or sequestered upon proof of a contract
2 out of which the lien could grow or of a duty on the
3 part of the holder so as to give the other party a
charge or a lien on it.

4 Coventry Homes, Inc. v. Scottscom P'ship, 745 P.2d 962, 965
5 (Ariz. Ct. App. 1987).

6 An equitable lien may arise when a party can, in an equity
7 proceeding, reach the property of another for a claim on the
8 ground that the latter would be unjustly enriched. Byers v. Wik,
9 818 P.2d 200, 209 (Ariz. Ct. App. 1991) (quoting Restatement
10 (First) of Restitution § 161 (1937)); Coventry, 745 P.2d at 965
11 ("An equitable lien, when imposed to prevent unjust enrichment,
12 is a form of constructive trust."). Alternatively, "[a]n
13 equitable lien may arise from express contract where the parties
14 indicate an intent to charge or appropriate particular property
15 as security for an obligation." Kalmanoff v. Weitz, 444 P.2d
16 728, 729 (Ariz. Ct. App. 1968). In such a case, the parties'
17 intentions, not the form of the contract, control. Id.; City of
18 Glendale v. Arizona Sav. & Loan Ass'n, 409 P.2d 299, 301 (Ariz.
19 Ct. App. 1965) (stating that, in Arizona, "the existence of an
20 equitable lien is determined by the intention of the contracting
21 parties as manifested in the contract taken as a whole.").

22 There is no evidence in the record of a contract between
23 Finova and the Jacobson Trust through which the Jacobson Trust
24 intended to grant Finova a security interest in the 8.5 Acres.
25 There likewise is no evidence in the record of any intent by the
26 Jacobson Trust to grant Finova a security interest in the 8.5
27 Acres.

1 The bankruptcy court apparently felt that it would be
2 inequitable to prefer the rights of the Jacobson Trust over
3 Finova to the 8.5 Acres Proceeds, based on the bankruptcy court's
4 concerns over the manipulations of ownership of the 8.5 Acres
5 engineered by Mr. Jacobson and Mr. Johnson, and Mr. Jacobson's
6 felonious conduct. However, the bankruptcy court's summary
7 judgment findings set forth neither sufficient facts, nor an
8 analysis of such facts, adequate to justify the imposition of an
9 equitable lien for Finova's benefit on the 8.5 Acres Proceeds at
10 the expense of the Jacobson Trust and its beneficiaries.

11 The Jacobson Trust paid \$375,000 to the JWW Trustee to
12 settle JWW estate claims with respect to the Jacobson Trust and
13 the 8.5 Acres, and the Jacobson Trust was assigned the interest
14 it foreclosed in the Continental Trust Deed only after
15 Continental was paid \$1,125,000, plus accrued interest at 8%.
16 The assertion by Finova and the JWW Trustee at oral argument that
17 the Jacobson Trust paid nothing for its interest in the 8.5 Acres
18 is not supported by the record.

19 At oral argument, Finova asserted that the Deed of Trust,
20 like the Guaranties, included a "clawback" provision that
21 reinstated the Deed of Trust Lien after its release, when Finova
22 paid the JWW/Finova Adversary judgment to the JWW Trustee. As
23 discussed above, the "clawback" provision of the Guaranties
24 clearly provides that if a payment received by Finova is required
25 to be repaid to a bankruptcy trustee, the obligations of the
26 guarantors are revived and continue as if such payment had not
27 been received by Finova. There is no comparable language in the
28 Deed of Trust. The Deed of Trust language cited by Finova in

1 support of its "clawback" argument comes primarily from section
2 4.4 of the Deed of Trust ("Rights, Powers and Remedies
3 Cumulative; Waiver"). Section 4.4(c) specifically provides that
4 the obligations under the Deed of Trust will continue "unless
5 expressly released and discharged in writing by" Finova.
6 Declaration of Jeffrey D. Weiss in Support of Finova's Motion for
7 Summary Judgment, Ex A, p. 30.

8 Such express written release was provided by Finova when it
9 stipulated to the terms of the Disbursement Order. Accordingly,
10 we agree with the ISI court and the bankruptcy court that Finova
11 released the Deed of Trust Lien, and we agree with the ISI court
12 that there is no "clawback" provision in the Deed of Trust
13 comparable to the explicit "clawback" provision contained in the
14 Guaranties. The language of the Deed of Trust cited by Finova
15 does not support the imposition of an equitable lien on the 8.5
16 Acres Proceeds.

17
18 B. Appeals of Summary Judgments in Favor of Finova
19 as to the Personal Liability of the Jacobsons and
the Johnsons on the Corporate Debts of ISI

20 The Jacobsons and the Johnsons advance nearly identical
21 arguments against the enforceability of the Guaranties as to
22 their personal liability. They contend, in essence, that,
23 because the terms of the Guaranties - specifically, the waiver of
24 defenses, in addition to the "clawback" provision - are
25 unconscionable, the Guaranties are unenforceable, thereby
26 extinguishing their liability on the corporate debt of ISI.

27 The Jacobsons and the Johnsons characterize the Guaranties
28 as adhesion contracts, which involve inequalities in bargaining

1 power, resulting in unfair pressure on the alleged oppressed
2 parties to agree to the terms of a contract without an
3 opportunity to negotiate them. See Broemmer v. Abortion Serv. of
4 Phoenix, Ltd., 840 P.2d 1013, 1015 (Ariz. 1992). The Jacobsons
5 and the Johnsons argue that because they had no chance to
6 negotiate the terms, nor understood the terms¹⁴ of the Guaranties
7 that waived all of their remedies against Finova, and because
8 Finova was in a position of superior bargaining power due to its
9 sophistication in business, the Guaranties are both unreasonable
10 and unconscionable. As such, they assert, the Guaranties cannot
11 be enforced.

12 The Jacobsons and the Johnsons largely ground their
13 arguments in contract concepts used in consumer, not commercial,
14 contexts. There is no basis in the record to determine that the
15 ISI Loan represented anything other than a substantial commercial
16 business transaction rather than a consumer transaction.
17 Stanley v. Klopp, Inc., 510 F. Supp. 807, 810 (E.D. Pa.
18 1981) ("Although commercial contracts can be unenforceable in
19 whole or in part for unconscionability, it would be improper to
20 borrow, without differentiation, concepts developed to protect
21 consumers and employ them in favor of one commercial party over
22 another."). Commercial contracts rarely are found to be
23 unconscionable, though they could be deemed so. Id.

26 ¹⁴Mr. Johnson additionally argues that Finova must first
27 seek recovery against ISI or foreclose on the 8.5 Acres before
28 seeking recovery against him. As Finova points out, it actually
first tried to recover from ISI, but could not recover in full,
before turning to the Johnsons.

1 We find that neither the terms of the Guaranties nor the
2 dealings surrounding the Guaranties render the Guaranties so
3 unconscionable as to make them unenforceable for the following
4 reasons.

5 First, under Arizona law, a party can agree to waive its
6 guaranty defense rights by contract. Data Sales Co. v. Diamond Z
7 Mfg., 74 P.3d 268, 272 (Ariz. Ct. App. 2004). The appellate
8 court in Data found that there is no Arizona case law addressing
9 this issue. Id. Thus, the appellate court in Data reviewed and
10 applied the Restatement (Third) of Suretyship & Guaranty (1996)
11 ("Restatement") in its analysis. Data, 74 P.3d at 272 (stating
12 that Arizona courts will follow the Restatement of the Law when
13 applicable, where there are no relevant Arizona decisions);
14 accord First Nat'l Bank of Ariz. v. Bennett Venture, Ltd., 637
15 P.2d 1065, 1067 (Ariz. Ct. App. 1981). In Data, the appellant
16 had executed a continuing guaranty, guaranteeing payments under a
17 lease assumed by another company, but argued that it could not
18 consent, in advance, to modifications to the lease. The Data
19 court looked to Restatement § 48, which stated that the guarantor
20 could consent in advance to a waiver of its rights to a discharge
21 of the subject obligation. Data, 74 P.3d at 272. Under
22 Restatement § 48, consent may be express or implied from the
23 circumstances. Id. at 272-73. If express, the waiver may be
24 effectuated by either specific or general language indicating
25 that the guarantor waives defenses in the guaranty. Id. A
26 comment to the Restatement also states that a guarantor can waive
27 any defenses as stated in the guaranty. Id. at 273. Applying
28 the Restatement, the Data court found that the appellant could

1 and did expressly waive its defenses to the guaranty. Id. at
2 274.

3 Here, the Guaranties explicitly state that the signatories
4 to the loan agreement “[waive] any and all suretyship defenses
5 and defenses in the nature thereof” and that the “obligations
6 [therein] shall be enforceable without regard to the validity,
7 regularity or enforceability of any of the Indebtedness or any of
8 the documents relating thereto.” Answer to Complaint and Third-
9 Party Claims, Ex B, pp. 3-4 and Ex C, pp. 3-4. The Guaranties
10 even contain a provision that states that the signatories warrant
11 and agree “that the waivers set forth in this Continuing Guaranty
12 are made with full knowledge of their significance and
13 consequences, and that under the circumstances the waivers are
14 reasonable and not contrary to public policy or law.” Emphasis
15 added. Thus, by signing the Guaranties, the Jacobsons and the
16 Johnsons expressly waived their guaranty defenses. Answer to
17 Complaint and Third-Party Claims, Ex B, p. 6 and Ex C, p. 6.

18 Second, the Guaranties clearly and unambiguously provide for
19 a waiver of defenses. “Agreements which are clear and
20 unambiguous will be enforced according to their terms, and words
21 used will be given their normal meaning.” Horizon Resources
22 Bethany Ltd. v. Cutco Industries, Inc., 881 P.2d 1177, 1182
23 (Ariz. Ct. App. 1994). The waiver language in the Guaranties
24 clearly states that the signatories “[waive] any and all
25 suretyship defenses and defenses in the nature thereof.” There
26 is nothing confusing or unclear in that language. At oral
27 argument, counsel for the Jacobsons agreed that the language of
28 the Guaranties is clear.

1 Third, contrary to assertions of the Johnsons and the
2 Jacobsons, they had opportunities to negotiate the terms of the
3 Guaranties. As Finova points out, changes had been made to the
4 ISI Loan, at the request of the Borrower, which evidences that
5 the Johnsons and the Jacobsons had the opportunity to negotiate
6 terms. There is no evidence in the record tending to indicate
7 that the Johnsons or the Jacobsons ever attempted to negotiate
8 changes to the clear provisions of the Guaranties, as conceded by
9 counsel for the Jacobsons at oral argument. The Johnsons and
10 Jacobsons even ratified the ISI Loan by pledging additional
11 collateral, i.e., the 8.5 Acres, in the amendment to the ISI
12 Loan. We do not find the terms of the Guaranties unreasonable or
13 unconscionable in the context of the ISI Loan transaction.

14
15 C. The Bankruptcy Court's Denial of Finova's Request for
16 Attorneys' Fees and Expenses Against the Jacobson Trust

- 17 1. Finova is no longer the prevailing party in its dispute
18 against the Jacobson Trust.

19 Following entry of summary judgment in its favor and against
20 the Jacobson Trust on the issue of which entity had the superior
21 interest in and claim to the 8.5 Acres Proceeds, Finova filed its
22 Fee Motion seeking to recover its attorneys' fees and expenses
23 against the Jacobson Trust. Because we have reversed the summary
24 judgment with respect to which the attorneys' fees were
25 requested, Finova no longer has a claim to attorneys' fees
26 against the Jacobson Trust as a prevailing party.

1 2. The bankruptcy court did not err in denying Finova's
2 request for attorneys' fees and expenses against the
 Jacobson Trust.

3 Finova asserted the right to attorneys' fees and expenses
4 pursuant to Rule 54(d)(2) of the Federal Rules of Civil Procedure
5 and § 12-341.01 of the Arizona Revised Statutes.

6 Finova asserts that the bankruptcy court erred when it
7 denied the Fee Motion in the absence of an objection by the
8 Jacobson Trust. Fed. R. Civ. P. 54(d)(2) merely states the
9 procedure for bringing an attorneys' fee claim to the court's
10 attention. It does not confer a substantive right to attorneys'
11 fees.

12 Arizona Revised Statutes § 12-341.01 provides in relevant
13 part: "In any contested action arising out of a contract,
14 express or implied, the court may award the successful party
15 reasonable attorney fees." Emphasis added. However, the
16 bankruptcy court did not grant Finova summary judgment against
17 the Jacobson Trust based on any contract.

18 The basis of the bankruptcy court's summary judgment ruling
19 was a remedy crafted by the court pursuant to the Bankruptcy
20 Code, i.e., recognition of Finova's claim in the JWJ case which
21 arose pursuant to the interplay of § 550 and §§ 502(d) and (h),
22 when Finova paid the JWJ Trustee the full amount of the judgment
23 in the JWJ/Finova Adversary, and in light of equitable
24 considerations.

25 Even had the bankruptcy court found a contractual basis for
26 awarding Finova the superior interest in the 8.5 Acres Proceeds,
27 no contract existed between Finova and the Jacobson Trust. The
28 deed of trust under which Finova asserted its right to the 8.5

1 Acres Proceeds was granted by the Jacobsons personally.

2 Finally, despite Finova's contentions otherwise, the
3 bankruptcy court adequately articulated its reasons for denying
4 the Fee Motion. The appropriate factors to be considered in an
5 award of attorneys' fees under A.R.S. § 12-341.01 are found in
6 Newbery Corp. v. Fireman's Fund Ins. Co., 95 F.3d 1392, 1405-06
7 (9th Cir. 1996):

8 The Arizona Supreme Court has outlined six factors
9 which courts should use in determining whether to grant
10 attorneys' fees and costs. The factors are (1) whether
11 the unsuccessful party's claim or defense was
12 meritorious; (2) whether the litigation could have been
13 avoided or settled and the successful party's efforts
14 were completely superfluous in achieving that result;
15 (3) whether assessing fees against the unsuccessful
16 party would cause an extreme hardship; (4) whether the
17 successful party prevailed with respect to all the
18 relief sought; (5) whether the legal question was novel
19 and whether such claim or defense has previously been
20 adjudicated in this jurisdiction; and (6) whether the
21 award would discourage other parties with tenable
22 claims or defenses from litigating or defending
23 legitimate contract issues for fear of incurring
24 liability for substantial amounts of attorneys' fees.

17 Citing Associated Indemnity Corp. v. Warner, 143 Ariz. 567, 694
18 P.2d 1181, 1184 (1985).

19 An award of attorneys' fees under A.R.S. § 12-341.01 is
20 discretionary based upon an application of the above factors. It
21 is clear from the record that the bankruptcy judge did consider
22 at least some of the required factors. Of particular import, the
23 bankruptcy court expressed its concerns over the second and third
24 factors.

25 As to whether the litigation could have been avoided or
26 settled and the successful party's efforts were superfluous in
27 achieving the result, the bankruptcy court stated:

28

1 . . . I'm trying to be diplomatic here, but I guess
2 I'll have to be blunt. I'll put it this way; I think
3 Finova might have avoided a lot of the litigation that
4 they've brought into this Court...had they been a
5 little more thoughtful sometime in the past.

6 . . . But I guess in a simple sense, I'm saying to some
7 extent, at least preliminarily, I think Finova has to
8 bear some of the burden here, and then maybe that I
9 don't award 'em any fees.

10 Hearing Transcript (May 16, 2006), pp. 20-21.

11 The bankruptcy court also noted that Finova did not prevail
12 against the Jacobson Trust on any theory it put forward:

13 Let me - let me ask a blunt question. I'll apologize
14 for it because it may be perceived as a little rude.
15 You know, to some extent the ruling came out and is
16 somewhat independent of anything that anybody argued,
17 and so should I award fees to Finova for something
18 that, in a simple sense, I kind of had to spade out
19 myself . . . without any help from - your law firm?

20 Id. at p. 17.

21 As to whether assessing fees against the Jacobson Trust
22 would cause an extreme hardship, the bankruptcy court pointed out
23 that the impact of a fee award would be on the beneficiaries of
24 the Jacobson Trust: "[I]f I award Finova fees, technically that
25 comes from the beneficiaries, not from the parties that Finova
26 contracted with." Id. at p. 19. The bankruptcy court
27 articulated that imposing the award on the beneficiaries of the
28 Jacobson Trust would be punitive under the facts of this case.
Clearly, a punitive award would constitute an extreme hardship,
even without reference to or evaluation of the relative financial
positions of the parties.

Based on the foregoing, the bankruptcy court did not abuse
its discretion in denying Finova the right to collect attorneys'
fees against the Jacobson Trust pursuant to A.R.S. § 12-341.01.

1 **VI. CONCLUSION**

2 The bankruptcy court erred in granting summary judgment in
3 favor of Finova and against the Jacobson Trust on the issue of
4 which entity had the superior interest in the 8.5 Acres Proceeds.
5 Because Finova is not entitled to summary judgment, the
6 bankruptcy court also erred when it entered the judgment in favor
7 of the JWJ Trustee on its derivative interest in the 8.5 Acres
8 Proceeds. In addition, to the extent the bankruptcy court
9 granted Finova or the JWJ Trustee summary judgment on equitable
10 grounds, the court did not provide adequate factual findings to
11 support its ruling. We therefore REVERSE and REMAND as to AZ-06-
12 1129 and AZ-06-1330.

13 The bankruptcy court did not err in granting summary
14 judgment in favor of Finova on its third party guaranty claims
15 against the Jacobsons and the Johnsons. We therefore AFFIRM as
16 to AZ-06-1130 and AZ 06-1143.

17 Finally, the bankruptcy court did not err in denying
18 Finova's Fee Motion. We AFFIRM as to AZ-06-1225.
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