

**OCT 04 2006**

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

|    |                       |   |                                |                 |
|----|-----------------------|---|--------------------------------|-----------------|
| 6  | In re:                | ) | BAP No.                        | WW-05-1411-DMcK |
|    |                       | ) |                                |                 |
| 7  | DEBORAH J. MACGIBBON, | ) |                                |                 |
|    |                       | ) | Bk. No.                        | 05-15099        |
| 8  | Debtor.               | ) |                                |                 |
|    |                       | ) |                                |                 |
| 9  | _____                 | ) |                                |                 |
|    |                       | ) |                                |                 |
| 10 | RICHARD MACGIBBON,    | ) |                                |                 |
|    |                       | ) |                                |                 |
| 11 | Appellant,            | ) |                                |                 |
|    |                       | ) |                                |                 |
| 12 | v.                    | ) | <b>MEMORANDUM</b> <sup>1</sup> |                 |
|    |                       | ) |                                |                 |
| 13 | DEBORAH J. MACGIBBON, | ) |                                |                 |
|    |                       | ) |                                |                 |
| 14 | Appellee.             | ) |                                |                 |
|    |                       | ) |                                |                 |

Argued and Submitted on September 13, 2006  
at Seattle, Washington

Filed - October 4, 2006

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

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

\_\_\_\_\_  
Before: DUNN, McMANUS<sup>2</sup> and KLEIN, Bankruptcy Judges.

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

<sup>2</sup> Hon. Michael S. McManus, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.



1 Deborah and Richard divorced. On or about February 28, 2000, the  
2 King County (Washington) Superior Court (the "Superior Court")  
3 entered the decree of dissolution (the "Decree"), ending the  
4 MacGibbons' twenty-year marriage and requiring Richard to pay  
5 child support and spousal maintenance.<sup>3</sup>

6 Richard did not, however, make the full spousal maintenance  
7 payments to Deborah as required under the Decree. On or about  
8 April 7, 2004, Deborah obtained a judgment against Richard in the  
9 amount of \$90,777.55 for unpaid spousal maintenance during 2000  
10 (the "Spousal Maintenance Judgement").<sup>4</sup>

11  
12 B. Richard's chapter 11 bankruptcy

13 On or about April 13, 2004, Richard filed for chapter 11  
14 bankruptcy protection pursuant to 11 U.S.C. § 1101 et seq.<sup>5</sup>  
15 Jerome Shulkin represented Richard in his chapter 11 case and in  
16 the instant chapter 11 case filed by Deborah.<sup>6</sup> In Richard's  
17 chapter 11 case, Deborah filed a priority claim in the

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18  
19 <sup>3</sup> Specifically, under the Decree, after paying child support  
20 and federal income taxes, Richard must pay half of his remaining  
21 income to Deborah as spousal maintenance.

22 <sup>4</sup> Richard later appealed the Spousal Maintenance Judgment.  
23 August 26, 2005 Hr'g Tr. at 38:8-16, Bankruptcy Court Docket No.  
24 129. The Washington State appellate court affirmed the lower  
25 court's decision on or about July 5, 2005. August 26, 2005 Hr'g  
26 Tr. at 38:11-15, Bankruptcy Court Docket No. 129.

27 <sup>5</sup> Unless otherwise indicated, all chapter, section and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
enacted and promulgated prior to the effective date, October 17,  
2005, of the Bankruptcy Abuse Prevention and Consumer Protection  
Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

<sup>6</sup> Lawrence Engel is the attorney currently representing  
Richard in the appeal before us.

1 approximate amount of \$289,000, which included the Spousal  
2 Maintenance Judgment.<sup>7</sup>

3 On or about November 22, 2004, an administrative judge  
4 awarded Deborah \$55,948.74 in additional spousal maintenance for  
5 2001 (the "Administrative Award"). Richard appealed the  
6 Administrative Award to the Superior Court, with the hearing on  
7 the appeal set for September 12, 2005.<sup>8</sup> Richard also has  
8 appealed the Superior Court's awards of spousal maintenance for  
9 2002 and 2003.<sup>9</sup>

10 During the course of his chapter 11 case, with the  
11 bankruptcy court's approval, Richard sold his residence and  
12 deposited approximately \$170,000 in proceeds into Jerome  
13 Shulkin's trust account (the "Trust Account").

14  
15 C. Deborah's bankruptcy

16 On April 20, 2005, Deborah filed for chapter 11 bankruptcy  
17 protection, allegedly in order to stop a sheriff's execution sale

18  
19 \_\_\_\_\_  
20 <sup>7</sup> The claim also included unpaid child support and spousal  
21 maintenance for 2004, deficiencies in spousal maintenance for  
22 2001 through 2003 and various state court judgments against  
23 Richard for contempt, attorney's fees and costs on appeal.  
24 Subsequently, sometime in September 2004, Deborah obtained an  
25 order from the Superior Court, enabling her to recover  
26 approximately \$168,700 from Richard's retirement account. Even  
27 with the \$168,700 recovery, Deborah asserted that, as of April  
28 20, 2005, Richard still owed an additional \$186,000 in back child  
support and spousal maintenance.

<sup>8</sup> Neither Richard nor Deborah mentioned whether the hearing  
on the appeal took place or, if such a hearing took place and  
concluded, what the Superior Court ruled on the appeal.

<sup>9</sup> See August 1, 2005 Disclosure Statement at 3, Bankruptcy  
Court Docket No. 56.

1 of her claims against Richard.<sup>10</sup>

2 On June 24, 2005, the bankruptcy court dismissed Richard's  
3 chapter 11 case. At the time of the dismissal, the amount in the  
4 Trust Account had fallen to \$145,000, reduced by the costs of  
5 sale of the residence and attorney's fees and costs. Immediately  
6 after the dismissal of Richard's chapter 11 case, the State of  
7 Washington sought to recover \$125,906.44 from the Trust Account  
8 for past due child support and spousal maintenance by serving an  
9 order to withhold and deliver on Jerome Shulkin. Richard then  
10 filed a chapter 13 bankruptcy petition on July 5, 2005.<sup>11</sup>

11 According to the schedules filed in that case, the amount in the  
12 Trust Account had dwindled to approximately \$125,000, reduced by  
13 further fees paid to Jerome Shulkin.

14 At the July 15, 2005 hearing on a motion to dismiss or  
15 convert Deborah's chapter 11 case, the bankruptcy court set  
16 August 1, 2005, as the date for filing the plan and disclosure  
17 statement and the bar date for filing proofs of claim.<sup>12</sup> The  
18

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19 <sup>10</sup> Marsele Burns was the executing creditor, to whom Deborah  
20 owed \$57,047.37. Marsele Burns earlier filed an appeal of the  
21 chapter 11 plan confirmation, which was before a separate Panel.  
22 The Panel recently affirmed the bankruptcy court's confirmation  
23 of the plan in an unpublished memorandum decision, Burns v.  
MacGibbon (In re MacGibbon), BAP No. WW-05-1422-PaNK (9th Cir.  
24 BAP August 14, 2006).

25 <sup>11</sup> The court later dismissed Richard's chapter 13 case on  
26 August 30, 2005.

27 <sup>12</sup> On July 8, 2005, the bankruptcy court entered an order  
28 setting the claims bar date at August 31, 2005. At the July 15,  
2005 hearing, Richard moved to set aside the order. July 15,  
2005 Hr'g Tr. at 12:4-5, Bankruptcy Court Docket No. 91. The  
bankruptcy court granted the motion, setting the claims bar date  
at August 1, 2005. July 15, 2006 Hr'g Tr. at 12:6-10, Bankruptcy  
(continued...)

1 bankruptcy court also set a hearing on August 26, 2005, for final  
2 approval of the disclosure statement and confirmation of the  
3 plan.

4  
5 D. Richard's original proofs of claim

6 On July 28, 2005, Richard filed six proofs of claim  
7 (collectively, the "Original Claims"), numbered 14 through 19 on  
8 the claims register.<sup>13</sup> All six of the claims listed "[t]he  
9 Marital Community of Richard D. and Marie C. Lucas-MacGibbon" as  
10 the name of the creditor and had the same supporting documents  
11 attached: to wit, pages one, four and eight of the Decree and a  
12 certification of the Decree issued by the state court clerk.  
13 None of the Original Claims stated whether they were secured or  
14 unsecured claims.

15 Claim No. 14 claimed \$8,000 and asserted "Support Overpay  
16 2001" as the basis for the claim. Claim No. 15 claimed \$20,000  
17 and asserted "Hold Harmless Repo [sic], Et Al [sic]" as the basis  
18 for the claim.<sup>14</sup> Claim Nos. 16 through 18 all listed the same  
19 claim amount of \$40,000, but stated different bases for the  
20

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21 <sup>12</sup>(...continued)  
22 Court Docket No. 91. Looking at the docket, it appears that the  
23 bankruptcy court did not enter a separate order setting the  
24 deadline for filing the plan and disclosure statement nor did the  
25 bankruptcy court include the deadline in its order setting the  
26 claims bar date.

27 <sup>13</sup> Richard filed both the Original Claims and the amendments  
28 thereto without the aid of an attorney.

<sup>14</sup> The response filed by Richard to the Objection indicated  
that the claim allegedly arose out of the repossession of a 1997  
Subaru Legacy, financed by Flying Tiger Employees Federal Credit  
Union.

1 claims. Claim No. 16 listed "Order to Work," Claim No. 17 listed  
2 "Order to Re-Educate," and Claim No. 18 listed "1999 JTTR" as  
3 their bases, respectively.<sup>15</sup> Claim No. 19 claimed \$60,000 and  
4 asserted "2004 Overpay" as the basis for the claim. All six  
5 claims noted that the listed claim amounts were estimates, with  
6 final amounts pending at state and federal courts and agencies.

7 On August 1, 2005, Deborah filed her disclosure statement  
8 and plan. The plan listed two separate classes of unsecured  
9 creditors' claims. Richard's claims were the only claims in  
10 Class 2. The plan proposed to pay Class 1 unsecured creditors  
11 with funds recovered by the State of Washington from the Trust  
12 Account. The plan also provided that, although Richard would not  
13 receive any distribution from the funds recovered from the Trust  
14 Account, to the extent permitted by state law and approved by the  
15 bankruptcy court, he would have the right to offset any allowed  
16 claims against any amounts he owed to Deborah.<sup>16</sup>

17  
18 E. Deborah's objection to Richard's claims

19 On August 12, 2005, Deborah filed an objection to the  
20

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21 <sup>15</sup> Richard stated "JTTR" on Claim Nos. 18 and 32, and based  
22 on other documents in the record, we understand "1999 JTTR" to  
mean the "Joint Income Tax Return" for 1999.

23 <sup>16</sup> Specifically, the plan provides: "To the extent permitted  
24 by state law and to the extent approved by the Bankruptcy Court,  
[Richard] shall be entitled to offset any claim allowed by the  
25 Bankruptcy Court (whether determined by the Bankruptcy Court or  
by the King County Superior Court) against sums that the creditor  
26 owes to [Deborah], excluding any sums owed for child support,  
provided, however, that no offset shall be asserted against the  
27 funds garnished by the State of Washington on June 24, 2005, or  
otherwise used to establish the Dividend Fund." August 1, 2005  
28 Disclosure Statement, App. A at 5:23-26, 6:1-3 (Plan of  
Reorganization), Bankruptcy Court Docket No. 56.

1 Original Claims (the "Objection"). She served the Objection on  
2 Richard on the same day.<sup>17</sup> In the Objection, Deborah asserted  
3 that Richard failed to provide adequate proof explaining the  
4 legal and factual basis for each claim. She further contended  
5 that Richard owed matured debts that constituted property of the  
6 estate, which, under Section 502(d), would provide a separate  
7 basis to disallow his claims.

8 Deborah also objected to each claim on individual grounds.  
9 With respect to Claim No. 14, she asserted that, as the issue of  
10 overpayment on child support was on appeal before the Superior  
11 Court, the bankruptcy court should only allow Claim No. 14 to the  
12 extent allowed by the Superior Court or the Department. With  
13 respect to Claim No. 15, Deborah contended that there was no  
14 evidence that Richard had paid the debt to the lienholder or that  
15 the lienholder had filed a claim against him.

16 With respect to Claim Nos. 16 and 17, Deborah contended that  
17 the Decree did not contain an order to work or to re-educate.  
18 With respect to Claim No. 18, Deborah contended that the  
19 bankruptcy court should disallow the claim, unless Richard  
20 provided evidence that he owed penalties and interest or evidence  
21 that he had paid the IRS.

22 With respect to Claim No. 19, Deborah asserted that, under  
23 the Decree, Richard must provide his 2004 federal income tax  
24

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25 <sup>17</sup> Although the parties did not provide it in the record,  
26 according to the Request for Special Notice filed by Richard  
27 MacGibbon, available on the bankruptcy court's docket, Richard  
28 listed his address as PMB 3281, P.O. Box 257, Olympia, Washington  
98507-0257 - the same address on Richard's proofs of claim. The  
address listed in the Declaration of Service filed by Deborah  
regarding service of the Objection matched this address.



1 return in order to determine whether he had overpaid support in  
2 2004 and that the Decree provided the mechanism by which any such  
3 overpayment would be corrected, i.e., as a deduction from future  
4 spousal maintenance payments. Deborah's position was that  
5 Richard owed approximately \$10,662.40 for unpaid child support  
6 and spousal maintenance for 2004. As Richard failed to provide  
7 his 2004 federal income tax return, there was no way to determine  
8 whether Richard had overpaid or underpaid child support and  
9 spousal maintenance for 2004.

10 Deborah then moved, ex parte, for an order shortening time  
11 for the hearing on the Objection, requesting that the hearing on  
12 the Objection be held on August 26, 2005, at the same time as the  
13 hearing on confirmation of the plan and other related matters.  
14 Richard did not object to the motion shortening time for the  
15 hearing on the Objection. On August 12, 2005, the court entered  
16 an order shortening time for the hearing on the Objection  
17 ("Shortening Time Objection Order"). On the same day, Deborah  
18 served the Shortening Time Objection Order on Richard.<sup>18</sup>

19  
20 F. Richard's amended proofs of claim

21 Richard filed seven amendments to the Original Claims  
22 (collectively, the "Amended Claims"), numbered 27 through 33 on  
23  
24  
25

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26 <sup>18</sup> According to the Declaration of Service filed by Deborah,  
27 she served both the Objection and Shortening Time Objection Order  
28 concurrently. Deborah served the Shortening Time Objection Order  
on Richard at the address listed on his proofs of claim and on  
his Request for Special Notice. See supra note 17.

1 the claims register.<sup>19</sup> Richard filed Claim No. 27 on August 12,  
2 2005, and the remaining Amended Claims on August 18, 2005.

3 All of the Amended Claims listed "[t]he Marital Community of  
4 Richard D. and Marie C. Lucas-MacGibbon" as the name of the  
5 creditor and included either portions of the Decree or the entire  
6 Decree. Nearly all of the Amended Claims had a number of  
7 additional documents attached in support. All of the Amended  
8 Claims, except Claim No. 27, included a letter, seemingly  
9 directed to the bankruptcy court, stating that the attached  
10 documents were in response to the Objection.

11 Claim No. 27 amended Claim No. 19. Claim No. 27 claimed  
12 \$147,405.95 and asserted "2004 Overpay" as the basis for the  
13 claim. The claim did not list whether it was a secured or  
14 unsecured or priority claim. In addition to pages 4 and 5 of the  
15 Decree, Richard attached various correspondence, dated between  
16 August 2 and 12, 2005, between himself and Jim Burkhead, a  
17 support enforcement officer with the child support division of  
18 the Department of Social and Health Services (the "Department"),  
19 regarding the accounting of spousal maintenance and child support  
20 payments, a debt calculation from the Department on such payments  
21 made, a table keeping track of his child support payments to the  
22 Department and a table calculating adjustments to the spousal  
23 maintenance payments.<sup>20</sup>

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26 <sup>19</sup> It appears that Claim No. 33 amended Claim No. 27. As  
27 Claim No. 33 has not been made part of the record in the instant  
28 appeal before us, we will not address it here.

<sup>20</sup> Both tables were presumably created by Richard.

1           Claim No. 28 amended Claim No. 14. It claimed an unsecured  
2 priority claim of \$7,644.30 under Section 507(a)(7), based on  
3 "Support Overpay 2001 [name omitted]." Along with a copy of the  
4 Decree, Richard attached various correspondence, dated between  
5 January 20 and September 16, 2004, between himself and the  
6 Department, regarding alleged overpayments on child support for a  
7 child who was allegedly no longer a minor dependent. Richard  
8 also provided various documents which he had sent to the  
9 Department in support of his allegations, including the child's  
10 school transcripts, a table listing alleged overpayments during  
11 2001, a case payment history from the Department, and notes from  
12 a juvenile court hearing regarding the child.

13           Claim No. 29 amended Claim No. 15. It claimed \$20,000 for  
14 debt incurred from 2001 to 2005, and asserted "Hold Harmless  
15 Provision/TFCU/Decree (DCD) [and] Court Order Decree (DCD)" as  
16 the basis for the claim. The claim did not list whether it was a  
17 secured or unsecured or priority claim. Again, Richard attached  
18 a copy of the Decree in support. He also attached two letters.  
19 The first letter, dated July 2, 2003, and written by the  
20 Department, notified Richard that the payroll deduction notice to  
21 his employer had been released. The second letter, dated January  
22 25, 2004, written by Richard and addressed to the Department,  
23 requested a "lift of garnishment" of his wages and discussed  
24 alleged misrepresentations in a declaration filed by Deborah, in  
25 connection with a motion under Rule 60 of the Federal Rules of  
26 Civil Procedure brought by Richard in Superior Court.

27           Richard also attached a declaration by his current wife,  
28 Marie MacGibbon ("Marie"), which seemingly attempted to counter

1 the statements made by Deborah in her declaration filed in the  
2 Superior Court. Richard also attached a promissory note made by  
3 Deborah to her divorce attorneys and a timeline summarizing  
4 Deborah's prior bankruptcies and child support and spousal  
5 maintenance payments made by Richard between 2000 and 2004.<sup>21</sup>

6 Claim No. 30 amended Claim No. 16. It claimed an unsecured  
7 priority claim of \$40,000 under Section 507(a)(7), based on an  
8 "Order to Return to Work/Decree (DCD) [and] Court Order Decree  
9 (DCD)." In support of the claim, Richard attached pages 4 and 5  
10 of the Decree and an entire copy of the Decree. He did not  
11 include any other documents.

12 Claim No. 31 amended Claim No. 17. It claimed an unsecured  
13 priority claim of \$40,000 pursuant to Section 507(a)(7) and an  
14 "Order to Re-Educate/Decree (DCD) [and] Court Order Decree (DCD)"  
15 as the basis for the claim. Along with a copy of the Decree,  
16 Richard attached several e-mails, of a personal nature, between  
17 Deborah and Philip Walter.<sup>22</sup>

18 Claim No. 32, consisting of documents totaling 130 pages,  
19 amended Claim No. 18. It claimed an unsecured priority claim of  
20 \$40,000 under Section 507(a)(8), based on a "1999 JTTR/Decree  
21 (DCD) [and] Court Order Decree."<sup>23</sup> In addition to a copy of the  
22 entire Decree, Richard attached a declaration from Devon Sloan,  
23 the ex-wife of Philip Walter, which Richard filed in state court.

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24 <sup>21</sup> The timeline was, presumably, generated by Richard.

25  
26 <sup>22</sup> According to documents filed with Claim No. 32, it  
27 appears that Philip Walter was the accountant for Deborah and  
28 Richard during their marriage and the accountant for Deborah  
after their divorce.

<sup>23</sup> See supra note 15.

1 He also attached a table tracking alleged overpayments on child  
2 support.<sup>24</sup>

3 Richard also included various correspondence between Deborah  
4 and Philip Walter, Deborah and Camden Hall, her divorce attorney,  
5 Philip Walter, Deborah and himself, himself and Philip Walter,  
6 and himself and the Department, in support of his claim. The  
7 bulk of the correspondence between Deborah and Philip Walter  
8 involved the preparation and filing of her 1999 federal income  
9 tax return and the calculations he had made on spousal  
10 maintenance payments.<sup>25</sup> The correspondence between Philip Walter  
11 and Richard and Deborah addressed attempts by both Richard and  
12 Deborah at preparing and filing a joint income tax return, as  
13 required under the Decree. The correspondence between Richard  
14 and the Department discussed alleged overpayments on child  
15 support and his requests for a setoff to be applied to spousal  
16 maintenance payments.<sup>26</sup>

17 Richard also filed a response to the Objection on August 22,  
18 2005 (the "Response"). In the Response, Richard argued that his  
19 Amended Claims provided sufficient evidence to support Deborah's  
20 legal liability. He also contended that, contrary to Deborah's  
21 assertion, the debts he owed to Deborah had not matured because  
22 she had not reduced them to judgment.

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24 <sup>24</sup> The table was, presumably, created by Richard.

25 <sup>25</sup> Richard also included e-mail correspondence, of a  
26 personal nature, between Deborah and Philip Walter - some of  
27 which were the same e-mail correspondence he had attached to  
28 Claim No. 31.

<sup>26</sup> See supra p. 11.

1 Richard also set forth arguments to counter the individual  
2 objections to each of his claims as follows:

3 Denial of Claim No. 14 would be premature because he has  
4 appealed the Administrative Order, with his appeal set for  
5 hearing before the Superior Court on September 12, 2005.

6 Although the lienholder did not file a claim in Richard's  
7 previous bankruptcies, Claim No. 15 should be allowed because the  
8 lienholder did pursue Richard for payment, requiring Richard to  
9 employ an attorney and harming Richard by filing negative reports  
10 with credit bureaus.

11 With respect to Claim Nos. 16 and 17, Richard admitted that  
12 the Decree did not contain an order to work or to re-educate, but  
13 stated that the findings of fact and conclusions of law related  
14 to the Decree (the "Findings") referred to such goals, which he  
15 believed Deborah must achieve.

16 With respect to Claim No. 18, Richard asserted that the  
17 Decree required both parties to file a joint income tax return,  
18 but Deborah, not Richard, refused to do so.

19 With respect to Claim No. 19, Richard argued that he has a  
20 right to a refund of the amounts he overpaid. The Decree  
21 required him to pay 50% of his income. After paying Deborah  
22 \$168,000 pursuant to a qualified domestic relations order and  
23 making the monthly spousal maintenance payments, Richard had paid  
24 over and above the required 50% during 2004.

25  
26 G. Richard's ballots and objection to confirmation

27 Prior to the August 26, 2005 hearing, Deborah sent copies of  
28 the plan and the disclosure statement and ballots for voting to

1 accept or reject the plan to the creditors. On August 19, 2005,  
2 Richard and Marie submitted 24 ballots, purporting each to vote a  
3 one half-interest of the marital community claims in both Class 1  
4 and Class 2. All 24 ballots rejected confirmation of the plan.  
5 On August 22, 2005, Deborah filed a motion to designate the  
6 ballots as improperly voted pursuant to Section 1126(e) (the  
7 "Ballot Motion"). She also moved, ex parte, to shorten time for  
8 a hearing on the Ballot Motion, requesting that the hearing be  
9 set for August 26, 2005. On August 22, 2005, the court entered  
10 an order shortening time on the hearing for the Ballot Motion.

11 On August 24, 2005, Richard filed an objection to  
12 confirmation of the plan. On the same day, Richard filed an  
13 amended objection to confirmation of the plan. Richard did not  
14 contest the classification of his claims or the treatment of his  
15 claims under the plan in either his objection or amended  
16 objection to confirmation.

#### 17 18 H. The August 26, 2005 hearing

19 On August 26, 2005, the bankruptcy court held the hearing on  
20 final approval of the disclosure statement, plan confirmation,  
21 the Ballot Motion and the Objection. As part of the hearing on  
22 plan confirmation, the court heard arguments regarding the  
23 classification of Richard's claims under the plan. The  
24 bankruptcy court also listened to testimony from Deborah. The  
25 bankruptcy court allowed Richard and another creditor, Marsele  
26 Burns, who also objected to the disclosure statement and plan

1 confirmation, to cross-examine Deborah.<sup>27</sup> Twice, before moving  
2 on to its ruling, the bankruptcy court asked the parties whether  
3 they had any further evidence to present that day.<sup>28</sup> Neither  
4 Richard nor Marsele Burns presented further evidence nor called  
5 any witnesses to testify, although Richard was present at the  
6 hearing. Nor did they introduce any new issues or arguments at  
7 the hearing.

8 At the August 26, 2005 hearing, the bankruptcy court  
9 approved the disclosure statement and confirmed the plan. As  
10 part of its confirmation of the plan, the bankruptcy court found  
11 that Marie had no interest in Richard's claims against Deborah  
12 and disallowed her alleged half-interest in the claims. The  
13 bankruptcy court then disallowed the ballots that Richard and  
14 Marie submitted as purported Class 1 creditors and restricted  
15 Richard's remaining ballots to Class 2 for voting purposes only,  
16 assuming that his claims were allowed. Later, on September 13,  
17 2005, the bankruptcy court entered an order approving the  
18 disclosure statement and confirming the plan. Richard did not  
19 appeal the Confirmation Order.<sup>29</sup>

20 In conjunction with its ruling on plan confirmation, the  
21 bankruptcy court also ruled on the Objection. It sustained

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22  
23 <sup>27</sup> See supra note 10.

24 <sup>28</sup> The bankruptcy court first asked whether the parties had  
25 any further evidence after Deborah stepped down from the witness  
26 stand. August 26, 2005 Hr'g. Tr. at 66:10-12, Bankruptcy Court  
27 Docket No. 129. The bankruptcy court then asked, a second time,  
whether the parties had "other evidence that [the court] need[ed]  
to look at today?" August 26, 2005 Hr'g. Tr. at 67:19-20,  
Bankruptcy Court Docket No. 129.

28 <sup>29</sup> See supra note 10.



1 Deborah's objections to all of Richard's claims. Although the  
2 bankruptcy court addressed each claim in its ruling, it did not  
3 refer to the specific claim numbers.<sup>30</sup> Rather, the bankruptcy  
4 court referred to each claim by its subject.

5 The bankruptcy court disallowed the "indemnity claim" (i.e.,  
6 Claim Nos. 15 and 29) because Richard had no proof that he had to  
7 make any indemnity payments.<sup>31</sup> The bankruptcy court disallowed  
8 the claim based on the alleged failure to file the 1999 joint  
9 federal income tax return (i.e., Claim Nos. 18 and 32) on the  
10 ground that Richard presented no evidence on any damages he had  
11 allegedly suffered.<sup>32</sup> The bankruptcy court disallowed the claim  
12 on the "order to work" (i.e., Claim Nos. 16 and 30) and the  
13 "order to re-educate" (i.e., Claim Nos. 17 and 31) because the  
14 Decree mandated no such obligations.<sup>33</sup> The bankruptcy court also  
15

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16 <sup>30</sup> The bankruptcy court did not explicitly state that it was  
17 addressing the Amended Claims. In discussing the claim involving  
18 the joint income tax return, however, the bankruptcy court did  
19 state that, "[I]t appear[ed] to [the bankruptcy court], from what  
20 [Richard] has submitted, that he [was] the perpetrator of the  
21 problem with respect to that." August 26, 2005 Hr'g Tr. at 4:11-  
22 13, Bankruptcy Court Docket No. 90. Claim No. 18 had only pages  
23 one, four and eight of the Decree attached as evidence. Claim  
24 No. 32, the amendment to Claim No. 18, had 130 pages attached,  
all of which provided a history of the interaction between the  
parties regarding the joint federal income tax return. Thus, it  
can be inferred that the bankruptcy court was addressing the  
Amended Claims at the August 26, 2005 hearing. The order on the  
Objection included the claim amounts stated in the Amended Claims  
as well.

25 <sup>31</sup> August 26, 2005 Hr'g. Tr. at 4:5-7, Bankruptcy Court  
26 Docket No. 90.

27 <sup>32</sup> August 26, 2005 Hr'g. Tr. at 4:8-11, Bankruptcy Court  
28 Docket No. 90.

<sup>33</sup> August 26, 2005 Hr'g. Tr. at 3:25, 4:1-4, Bankruptcy  
Court Docket No. 90.

1 disallowed the claims on the alleged overpayments made in 2004  
2 (i.e., Claim Nos. 19 and 27) and in 2001 (i.e., Claim Nos. 14 and  
3 28) on the ground that the state court's orders regarding the  
4 claims were "res judicata" (i.e., claim preclusive).<sup>34</sup>

5  
6 I. The bankruptcy court's order sustaining Deborah's Objection

7 On September 9, 2005, Deborah filed a notice of presentation  
8 of the order on the Objection (the "Objection Order"), stating  
9 that the Objection Order would be presented for entry before the  
10 bankruptcy court on September 30, 2005 at 9:30 a.m. On September  
11 27, 2005, a notice of intent to argue was noted on the bankruptcy  
12 court's docket, which was electronically mailed to Jerome  
13 Shulkin, among others.<sup>35</sup>

14 On September 30, 2005, Deborah presented the Objection Order  
15 for entry before the bankruptcy court. Although not included in  
16 the record submitted by the parties, according to the minutes  
17 entered on the bankruptcy court's public docket, neither Richard  
18 nor Jerome Shulkin appeared or filed an objection to entry of the  
19 Objection Order.

20 On October 3, 2005, the bankruptcy court entered the  
21 Objection Order, sustaining the objections to and disallowing  
22

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23 <sup>34</sup> At the August 26, 2005 hearing, the bankruptcy court  
24 referred to a claim as "the No. 6 claim." August 26, 2005 Hr'g.  
25 Tr. at 4:17-20, Bankruptcy Court Docket No. 90. Given the  
26 context surrounding the claim and looking over the Objection,  
27 which listed Claim No. 19 (plus the amount of the amended claim)  
as the sixth claim therein, it appears that the bankruptcy court  
was referring to Claim Nos. 19 and 27.

28 <sup>35</sup> Although the parties did not include the notice of intent  
to argue in the record, we obtained this information from our  
review of the bankruptcy court's docket.

1 Richard's claims. The Objection Order summarized the alleged  
2 amounts and bases of both the Original Claims and Amended Claims.  
3 The Objection Order then, for the most part, repeated each of the  
4 grounds that the bankruptcy court had stated in disallowing the  
5 claims at the August 26, 2005 hearing. The Objection Order  
6 differed from the ruling given at the August 26, 2005 hearing  
7 with respect to Claim Nos. 19 and 27. In its ruling at the  
8 August 26, 2005 hearing, the bankruptcy court stated claim  
9 preclusion as the ground for disallowing Claim Nos. 19 and 27.  
10 The Objection Order provided that the bankruptcy court disallowed  
11 Claim Nos. 19 and 27 on the grounds that Richard failed to  
12 provide a verified copy of his 2004 income tax return as required  
13 under the Decree and otherwise failed to provide sufficient  
14 evidence in support of his claim.<sup>36</sup>

15 Richard timely filed his notice of appeal on October 7,  
16 2005.

## 18 II. ISSUES

19 (1) Whether the bankruptcy court lacked jurisdiction to  
20 determine the allowance or disallowance of Richard's claims.

21 (2) Whether the bankruptcy court failed to provide Richard  
22 an adequate opportunity for hearing on his claims.<sup>37</sup>

---

24 <sup>36</sup> According to her brief, Deborah also believed that the  
25 bankruptcy court had included Claim Nos. 19 and 27 in its ruling  
26 on Claim Nos. 14 and 28. Thus, in the Objection Order, Deborah  
attempted to "clarify the issue." Appellee's Br. at 11.

27 <sup>37</sup> In his brief, Richard stated two similar issues: 1)  
28 whether the bankruptcy court erred in failing to afford him an  
opportunity for hearing and 2) whether the bankruptcy court erred  
in failing to hold an evidentiary hearing on the Objection. We

(continued...)

1 (3) Whether the bankruptcy court erred in disallowing  
2 Richard's claims.

3 (4) Whether we need to address the issue of recoupment  
4 raised by Richard for the first time on appeal.

5  
6 III. STANDARD OF REVIEW

7 We review questions of jurisdiction de novo. Tucker  
8 Plastics v. Pay 'N Pak Stores, Inc. (In re PNP Holdings Corp.),  
9 184 B.R. 805, 806 (9th Cir. BAP 1995), aff'd, 99 F.3d 910 (9th  
10 Cir. 1996). Whether a particular procedure comports with the  
11 requirements of due process is a question of law, which we review  
12 de novo. Garner v. Shier (In re Garner), 246 B.R. 617, 619 (9th  
13 Cir. BAP 2000).

14 We review the bankruptcy court's legal conclusions and its  
15 interpretations of statutes and rules de novo. Wall St. Plaza,  
16 LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th Cir.  
17 BAP 2006). Whether the bankruptcy court's compliance with a  
18 given statute or rule has been established is a question of fact,  
19 which we review for clear error. Id.

20 We review the factual determinations of the bankruptcy court  
21 for clear error. Id. A factual determination is clearly  
22 erroneous if, after viewing the record, the appellate court  
23 firmly and definitively believes that a mistake has been made.  
24 Id. We may view a factual determination as clearly erroneous if  
25 it was without adequate evidentiary support or was induced by an  
26 erroneous view of the law. Id.

27  
28 <sup>37</sup> (...continued)  
believe that these two issues are essentially the same and have  
addressed them as such.



1 Collier on Bankruptcy ¶ 3.03[3][a] (15th ed. 2006).

2 The bankruptcy court has jurisdiction over core proceedings.  
3 28 U.S.C. § 1334(b); Durkin v. Benedor Corp. (In re G.I. Indus.,  
4 Inc.), 204 F.3d 1276, 1279 (9th Cir. 2000). The allowance or  
5 disallowance of claims and the estimation of claims for the  
6 purposes of chapter 11 plan confirmation are just two of the  
7 kinds of core proceedings over which the bankruptcy court has  
8 jurisdiction. 28 U.S.C. § 157(b)(2)(B). See also Durkin, 204  
9 F.3d at 1279-80; Benedor Corp. v. Conejo Enter., Inc. (In re  
10 Conejo Enter., Inc.), 96 F.3d 346, 353 (9th Cir. 1996).

11 "[A] proof of claim provides the basis of creditor  
12 participation in a case." 9 Collier on Bankruptcy ¶ 3001.02  
13 (15th ed. 2006) (citation omitted). Once a creditor files a proof  
14 of claim, he voluntarily submits himself to the core jurisdiction  
15 of the bankruptcy court. Langenkamp v. Culp, 498 U.S. 42, 44  
16 (1990) (stating that "by filing a claim against a bankruptcy  
17 estate the creditor triggers the process of 'allowance and  
18 disallowance of claims,' thereby subjecting himself to the  
19 bankruptcy court's equitable power") (citing Granfinanciera, S.A.  
20 v. Nordberg, 492 U.S. 33, 58-59 n.14 (1989)); Durkin, 204 F.3d at  
21 1280; Benedor, 96 F.3d at 353 (stating that, as the allowance and  
22 disallowance of claims is a core proceeding under Section  
23 157(b)(2)(B), once the creditor filed its proof of claim, it  
24 subjected itself to the bankruptcy court's core jurisdiction);  
25 PNP Holdings Corp., 184 B.R. at 806.

26 Here, Richard willingly subjected himself to the bankruptcy  
27 court's jurisdiction by filing his claims. Once he had done so,  
28 he triggered the claims allowance process, thereby submitting

1 himself to the bankruptcy court's authority. Simply because  
2 Richard would not receive a share of the distribution under the  
3 plan from funds recovered from the Trust Account does not mean  
4 that the bankruptcy court's jurisdiction suddenly terminated.

5 Further, under the confirmed plan, the bankruptcy court  
6 expressly retained its jurisdiction over Richard. Specifically,  
7 the confirmed plan provided that the bankruptcy court had  
8 jurisdiction over any objection to claims, any hearing or  
9 determination involving "all causes of action, controversies,  
10 disputes or conflicts between or among [Deborah] and any other  
11 party, including those that were pending prior to confirmation,"  
12 and any hearing or determination on "any dispute relating to the  
13 terms or implementation of the Plan or order of Confirmation, or  
14 to the rights or obligations of any parties in interest with  
15 respect thereto." August 1, 2005 Disclosure Statement, App. A,  
16 10:11-12, 10:16-17, 11:1-2 (Plan of Reorganization), Bankruptcy  
17 Court Docket No. 56. Thus, Richard's argument that the  
18 bankruptcy court lacked jurisdiction fails.

19  
20 B. Adequate Opportunity for Hearing

21 Richard contends that the bankruptcy court did not afford  
22 him an opportunity for a fair hearing and to present evidence on  
23 his claims. Richard claims that the bankruptcy court only "made  
24 superficial inquiries of [Jerome] Shulkin and then ruled."  
25 Appellant's Br. at 23-24. He also alleges that the bankruptcy  
26 court was biased; according to Richard, the bankruptcy court had  
27 "already made [its] decision on the claims issues, without  
28 holding any hearing" and had "truly wanted to hear no more from

1 [Richard].” Appellant’s Reply Br. at 9. As the bankruptcy court  
2 had “already berated [Jerome] Shulkin on the record on a number  
3 of occasions, [Richard] had no reason to believe that he would  
4 have an opportunity to proceed with any claims evidence.”  
5 Appellant’s Reply Br. at 9. He asserts that, although his claims  
6 required a full evidentiary hearing, the bankruptcy court only  
7 considered his claims as “an afterthought after Plan confirmation  
8 proceedings.” Appellant’s Reply Br. at 10.

9 We determine, to the contrary, that the bankruptcy court  
10 afforded Richard an adequate opportunity for hearing and to  
11 present evidence on his claims.

12 Under Rule 9014, the filing of an objection to a proof of  
13 claim creates a dispute which constitutes a contested matter and  
14 must be resolved after notice and opportunity for hearing.  
15 Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell), 223  
16 F.3d 1035, 1039 (9th Cir. 2000); Garner, 246 B.R. at 624.  
17 “Section 102(1)(A) defines ‘after notice and a hearing’ and  
18 similar phrases to mean ‘after such notice as is appropriate in  
19 the particular circumstances . . . .’” Highland Fed. Bank v.  
20 Maynard (In re Maynard), 264 B.R. 209, 215 (9th Cir. BAP  
21 2001) (citing United States v. Yochum (In re Yochum), 89 F.3d 661,  
22 672 (9th Cir. 1996)). Similarly, due process requires that when a  
23 property interest is at stake, there be notice and an opportunity  
24 for hearing appropriate to the nature of the case. Id.

25 Richard had ample opportunity for a hearing on the  
26 Objection. Deborah served the Objection and the Shortening Time  
27  
28



1 Objection Order on Richard at his known address.<sup>38</sup> Given that  
2 Richard's claims had a substantial potential impact on the  
3 confirmation of Deborah's plan, we do not find the hearing on the  
4 Objection on shortened time to have been inappropriate. Further,  
5 though Deborah moved to hold the hearing on the Objection on  
6 shortened time, Richard did not object. There is nothing in the  
7 record, nor in Richard's brief, challenging the notice of  
8 Deborah's motion to shorten time on the hearing on the Objection,  
9 the Shortening Time Objection Order, the entry of the Objection  
10 Order, or the Objection Order itself.

11 Richard also had ample opportunity to present evidence at  
12 the hearing on the Objection. At the hearing, the bankruptcy  
13 court twice asked the parties whether they had any further  
14 evidence to present that day.<sup>39</sup> The bankruptcy court allowed  
15 Jerome Shulkin to cross-examine Deborah, which he did at length,  
16 and a chance to follow up with additional questions, which Jerome  
17 Shulkin did. A number of the questions he asked during both  
18 examinations focused not only on the feasibility of the plan, but  
19 on the payments that Deborah had received from Richard for child  
20 support and maintenance, which allegedly formed the basis of  
21 Richard's claims. The bankruptcy court also afforded Richard  
22 another opportunity to object to the entry of the Objection Order  
23 by setting a hearing; neither Richard nor Jerome Shulkin appeared  
24 at that hearing.

25 Richard complains of the bankruptcy court's bias against  
26 him, but we find nothing in the transcript or on the record

---

27 <sup>38</sup> See supra note 17.

28 <sup>39</sup> See supra note 28.

1 indicating any unfair prejudice. Though the bankruptcy court  
2 questioned Richard's standing to participate in Deborah's  
3 bankruptcy, the bankruptcy court eventually concluded that  
4 Richard "[was] a party in interest at [the confirmation] hearing  
5 in the sense that certain things that [Jerome Shulkin's] going to  
6 be claiming [Richard's] going to say, hey, that's not right.  
7 I've got a different claim to this." July 15, 2005 Hr'g Tr.  
8 10:6-10, Bankruptcy Court Docket No. 91. The bankruptcy court  
9 allowed Richard to file an objection to the plan and to appear at  
10 the confirmation hearing.

11 Further, given the obvious experience of Jerome Shulkin and  
12 his familiarity with the bankruptcy court, it is difficult to  
13 believe that he would be intimidated into silence, as Richard  
14 claims.<sup>40</sup> Even if the bankruptcy court had "berated" Jerome  
15 Shulkin (and we find no evidence of this), Richard should have  
16 presented his evidence nonetheless. Though the bankruptcy court  
17 expressly invited the parties to present evidence, Richard and  
18 his counsel did not avail themselves of this opportunity.

19 We find no evidence that the bankruptcy court denied due  
20 process to Richard or that the bankruptcy court harbored any  
21 unfair prejudice against him.  
22

### 23 C. Presumption of Prima Facie Validity of Proofs of Claim

24 Richard complains that the bankruptcy court erred in failing  
25

---

26  
27 <sup>40</sup> At the July 15, 2005 hearing, when the bankruptcy court  
28 told Jerome Shulkin that, "I'm not trying to lecture you on this.  
You and I have been in this business for longer than either one  
of us wants to admit at this point," Jerome Shulkin agreed. July  
15, 2005 Hr'g Tr. at 9:3-5, Bankruptcy Court Docket No. 91.

1 to treat his claims as presumptively valid pursuant to Section  
2 502 and Rule 3001(f).<sup>41</sup> Though Deborah had objected to the  
3 Original Claims on the ground that he failed to attach sufficient  
4 documentation, Richard asserts that he corrected the deficiencies  
5 by filing his Amended Claims, which attached "extensive"  
6 evidence. Once he had done so, Richard further asserts that  
7 Deborah had the burden of providing evidence to defeat their  
8 prima facie validity. Richard argues that both Deborah and the  
9 bankruptcy court disregarded the evidence attached to the Amended  
10 Claims.

11 Richard misses the essence of the Objection and the grounds  
12 set forth by the bankruptcy court in sustaining it. The facts  
13 that Richard alleged and the evidence that he submitted in  
14 support of his claims were insufficient to establish his claims.

15 Under Section 501(a), a creditor may file a proof of claim.  
16 11 U.S.C. § 501(a); Garner, 246 B.R. at 620. A proof of claim is  
17 a written statement setting forth a creditor's claim. Fed. R.  
18 Bankr. P. 3001(a). The claimant must allege facts sufficient to  
19 support a legal liability to the claimant in the proof of claim.  
20 Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991);  
21 Ashford v. Consol. Pioneer Mortgage (In re Consol. Pioneer  
22 Mortgage), 178 B.R. 222, 226 (9th Cir. BAP 1995); Hardin v.  
23 Gianni (In re King St. Inv., Inc.), 219 B.R. 848, 858 (9th Cir.  
24 BAP 1998) (citing Holm, 931 F.2d at 623). A proof of claim  
25 executed and filed in accordance with the rules constitutes prima  
26 facie evidence of the validity and amount of the claim. Fed. R.  
27 Bankr. P. 3001(f). For a proof of claim to have prima facie

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28 <sup>41</sup> Richard did not cite to the applicable statute and rule.

1 validity, it must comply with the rules and set forth all the  
2 necessary facts to establish the claim. Holm, 931 F.2d at 623;  
3 Ashford, 178 B.R. at 226; Hardin, 219 B.R. at 858. See also 9  
4 Collier on Bankruptcy ¶ 3001.09[1] (15th ed. 2006); 4 Collier on  
5 Bankruptcy ¶ 502.03[3][f] (15th ed. 2006).

6 Under Section 502(a), a proof of claim is deemed allowed,  
7 unless a party-in-interest objects. 11 U.S.C. § 502(a); Siegel  
8 v. Fed. Home Loan Mortgage Corp. (In re Siegel), 143 F.3d 525,  
9 530 (9th Cir. 1998); Garner, 246 B.R. at 620. If a party in  
10 interest objects, he or she must provide evidence and show facts  
11 sufficient to refute the claim. Holm, 931 F.2d at 623; Ashford,  
12 178 B.R. at 226; Hardin, 219 at 858. If the objecting party in  
13 interest has provided sufficient evidence and facts to refute the  
14 claim, the claimant must prove the validity of the claim by a  
15 preponderance of the evidence. Holm, 931 F.2d at 623; Ashford,  
16 178 B.R. at 226; Hardin, 219 at 858. "But the ultimate burden of  
17 persuasion is always on the claimant." Holm, 931 F.2d at 623  
18 (quoting 3 Collier on Bankruptcy ¶ 502.02 (15th ed. 1991)).

19 Here, neither the Original Claims nor the Amended Claims  
20 have prima facie validity because they fail to set forth facts  
21 sufficient to show that Deborah was legally liable to Richard for  
22 any of the alleged debts. In both the Original Claims and  
23 Amended Claims, Richard asserted that: 1) Richard made  
24 overpayments on child support and spousal maintenance during 2001  
25 and 2004 and that Deborah owed him refunds for the alleged  
26 overpayments; 2) Deborah owed penalties and interest arising from  
27 their 1999 joint income tax return (which they did not actually  
28 file jointly); 3) Richard paid the debt owed to Flying Tiger

1 Employees Federal Credit Union on the 1997 Subaru Legacy and  
2 suffered financial harm from negotiating the debt, though Deborah  
3 owned the vehicle; and 4) Deborah owed Richard for failing to  
4 return to school or to work. None of the claims filed with the  
5 bankruptcy court nor any of the attached evidence provide any  
6 facts demonstrating that Deborah incurred any liability to  
7 Richard.

8  
9 1. No presumption of prima facie validity on the Original Claims

10 With respect to the Original Claims, as we have noted  
11 earlier, Richard attached only portions of the Decree as evidence  
12 in support of his claims. The Decree does not, however, provide  
13 any facts demonstrating Deborah's liability to Richard for the  
14 alleged debts. The Decree merely sets out the method for payment  
15 of any refunds that Deborah may owe to Richard and establishes  
16 the party responsible for payment of any additional assessments,  
17 penalties and interest in the event of a tax audit.<sup>42</sup> The Decree  
18 also contains no provision indicating that Deborah must pay  
19 Richard if she fails to return to work or to school. In short,  
20 neither the Original Claims nor the Decree itself establishes any  
21 facts explaining why and how Richard has a claim against Deborah.

22  
23  
24  
25 \_\_\_\_\_  
26 <sup>42</sup> In fact, the Decree specifically states that "[i]f there  
27 are any tax audits for 1999 . . . Mr. MacGibbon shall hold Ms.  
28 MacGibbon harmless for any expense, including without limitation,  
accounting or attorney fees, and from any tax, additional  
assessments, penalties and interest." Objection to Claims of  
Richard MacGibbon, Exh. A at 8:10-11 (Decree of Dissolution),  
Bankruptcy Court Docket No. 63.

1 2. No presumption of prima facie validity on the Amended Claims

2 With respect to the Amended Claims, we have noted that  
3 Richard attached numerous documents, in addition to copies of the  
4 Decree or portions thereof, in an attempt to bolster his claims.  
5 Though the number of documents increased, the Amended Claims  
6 still did not set forth sufficient facts to establish Richard's  
7 claims.

8  
9 a. Claim No. 27 and Claims Nos. 29 through 32

10 Claim No. 27 fails to set forth sufficient facts and  
11 evidence showing that Richard had a right to offset future  
12 spousal maintenance payments for alleged overpayments on spousal  
13 maintenance and child support in 2004. In fact, the Decree  
14 provides certain conditions precedent in order for Richard to  
15 have a right to a refund or offset.

16 Specifically, under the Decree, "[i]n any year in which a  
17 change in [Richard's] income would result in an adjustment to the  
18 base [spousal] maintenance of 10 percent or more, such adjustment  
19 must be made . . . based upon [Richard's] prior year's tax  
20 return." Objection to Claims of Richard MacGibbon, Exh. A at  
21 4:24-26 (Decree of Dissolution), Bankruptcy Court Docket No. 63.  
22 Richard is eligible only for a refund from Deborah for spousal  
23 maintenance payments when he provides written notice "at the end  
24 of the fifth month following any four months in a calendar year  
25 in which his anticipated net income (after child support and tax  
26 payments) is less than two times the established base monthly  
27 maintenance payment rate." Objection to Claims of Richard  
28 MacGibbon, Exh. A at 4:25-26, 5:2-4 (Decree of Dissolution),

1 Bankruptcy Court Docket No. 63. Richard must also provide  
2 Deborah with a verified copy of his prior year's tax return.  
3 Objection to Claims of Richard MacGibbon, Exh. A at 5:3-4 (Decree  
4 of Dissolution), Bankruptcy Court Docket No. 63. Though Richard  
5 provided tables, calculations and an accounting with the claim,  
6 none of these documents indicate that the conditions precedent  
7 were met. Further, and most important, Richard did not provide a  
8 verified copy of his 2004 federal income tax return to Deborah as  
9 required under the Decree to show that he was eligible for a  
10 refund or offset. In addition, he did not include a copy of his  
11 2004 federal income tax return with his amended proof of claim.  
12 Accordingly, neither the amended proof of claim nor the documents  
13 attached demonstrate that the conditions precedent had occurred,  
14 giving Richard no right to an offset against future spousal  
15 maintenance payments for the alleged overpayments of spousal  
16 maintenance for 2004.

17 Claim No. 29 also does not provide sufficient facts and  
18 evidence demonstrating that Deborah owed Richard for his payment  
19 of the debt to Flying Tiger Employees Federal Credit Union and  
20 that Richard had suffered financial harm from negotiating the  
21 debt. Though the Decree contained a provision stating that  
22 neither party can hold the other accountable for any liabilities  
23 or collection actions relating to their separate or community  
24 debts, Richard does not show that he paid Deborah's debt for the  
25 1997 Subaru Legacy. The documents that Richard did attach,  
26 concerning the "lift of garnishment," the Rule 60 motion, and the  
27 promissory note, had no relevance to this particular claim. He  
28 further included no evidence of his specific damages.

1 Both Claim Nos. 30 and 31 were not supported by any evidence  
2 demonstrating that Deborah owed Richard anything for failing to  
3 return to work or to school. In his Response, Richard cites to  
4 the Findings on the Decree as evidence that the Superior Court  
5 intended that Richard would be entitled to a refund from Deborah  
6 on his spousal maintenance payments if she failed to return to  
7 work or to school. Richard did not attach a copy of the Findings  
8 to the Amended Claims to support his allegations. Richard did  
9 attach a copy of the Findings as an exhibit to his Response, but  
10 there is nothing in the Findings stating that Richard would have  
11 a right to repayment from Deborah if she failed to return to work  
12 or to re-educate herself.<sup>43</sup> There is also nothing in the Decree  
13 that mandates such a refund under those circumstances. Again,  
14 neither the claims nor the evidence set forth facts showing that  
15 such a debt exists and that Deborah is liable for it.

16 Claim No. 32 also does not allege facts or present evidence  
17 sufficient to show that Deborah owed any taxes or penalties for  
18 the failure to file a 1999 joint federal income tax return.  
19 Richard and Deborah did not file a joint federal income tax  
20 return for 1999. Penalties and interest were assessed against  
21 Richard for his individual 1999 federal income tax return. None  
22 of the documents show that Deborah was liable for any portion of  
23 the penalties and interest. The Decree itself provides that, in  
24 the event of an audit, Richard, not Deborah, must pay for any  
25 additional assessments, penalties, and interest for the 1999  
26

---

27  
28 <sup>43</sup> Richard MacGibbon's Response to Debtors [sic] Objection  
to Claims, Exh. C at 6:1-26, 7:1-25 (Findings of Fact and  
Conclusions of Law), Bankruptcy Docket No. 73.



1 federal income tax return.<sup>44</sup> As the bankruptcy court pointed out  
2 at the August 26, 2005 hearing, "[i]t appear[ed] . . . from what  
3 [Richard] has submitted, that he [was] the perpetrator of the  
4 problem."<sup>45</sup>

5  
6 b. Claim No. 28

7 As to Claim No. 28, like the other Amended Claims, it fails  
8 to set forth sufficient facts and evidence demonstrating that  
9 Richard had overpaid child support and/or spousal maintenance for  
10 2001, giving him the right to offset the amount claimed. In his  
11 claim, Richard alleged that he had made overpayments on child  
12 support in 2001 for one of his children who was no longer a  
13 minor. Though Richard provided numerous documents, none of them  
14 establishes his allegation that the child had reached legal  
15 maturity nor the amount of his claim. Claim No. 28, like the  
16 other Amended Claims, lacks sufficient evidence to support its  
17 allegations. Thus, Claim No. 28 lacks prima facie validity.

18 The bankruptcy court, at the August 26, 2005 hearing and in  
19 the Objection Order, did not disallow Claim No. 28 on this  
20 ground, however. Rather, the bankruptcy court disallowed Claim  
21 No. 28 on the ground that the Administrative Order effected claim  
22 preclusion. The basis for this determination is not clear from  
23 the record.

24 28 U.S.C. § 1738 provides that judicial proceedings of any  
25 court "shall have the same full faith and credit in every court  
26 of the United States . . . as they have by law or usage in the

27  
28 <sup>44</sup> See supra note 42.

<sup>45</sup> See supra note 30.

1 courts of such State.” Thus, federal courts must accord state  
2 court judgments the same preclusive effect that those judgments  
3 would enjoy under the law of the state in which they were  
4 rendered. Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S.  
5 373, 380 (1985).

6 Federal courts also may accord the same preclusive effect as  
7 the state would impose to the decisions of state administrative  
8 agencies “acting in a judicial capacity [to resolve] disputed  
9 issues of fact properly before [them] which the parties have had  
10 an adequate opportunity to litigate . . . .” United States v.  
11 Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966); Univ. of  
12 Tenn. v. Elliott, 478 U.S. 788, 799 (1986) (quoting Utah Constr. &  
13 Mining Co., 384 U.S. at 422); Miller v. County of Santa Cruz, 39  
14 F.3d 1030, 1032-33 (9th Cir. 1994); Dias v. Elique, 436 F.3d  
15 1125, 1128 (9th Cir. 2006); Restatement (Second) of Judgments  
16 § 83 (1982). Federal courts may even accord preclusive effect  
17 “to unreviewed [state] administrative findings under federal  
18 common law rules of preclusion,” so long as the state  
19 administrative proceeding satisfies the fairness requirements set  
20 out in Utah Construction. Guild Wineries & Distilleries v.  
21 Whitehall Co., 853 F.2d 755, 758-59 (9th Cir. 1988) (stating that  
22 “the federal common law rules of preclusion described in Elliott  
23 extend to state administrative adjudications of legal as well as  
24 factual issues, even if unreviewed, so long as the state  
25 proceeding satisfies the requirements of fairness outlined in  
26 Utah Construction”); Plaine v. McCabe, 797 F.2d 713, 719 (9th  
27 Cir. 1986) (stating that “when an administrative proceeding meets  
28 the requirements set forth in Utah Construction, it may rise to

1 the level of a 'judicial proceeding' entitled to preclusive  
2 effect by section 1738"); Eilrich v. Remas, 839 F.2d 630, 632  
3 (9th Cir. 1988) (citing Elliott, 478 U.S. at 796-97); Miller v.  
4 County of Santa Cruz, 39 F.3d at 1032-33 (quoting Guild Wineries,  
5 853 F.2d at 758). These fairness requirements are: "(1) that the  
6 administrative agency act in a judicial capacity, (2) that the  
7 agency resolve disputed issues of fact properly before it, and  
8 (3) that the parties have an adequate opportunity to litigate."  
9 Miller, 39 F.3d at 1033.

10 In determining whether a state administrative proceeding  
11 meets the Utah Construction requirements, the federal court first  
12 must ask whether a state administrative proceeding has been  
13 "conducted with sufficient safeguards to be equated with a state  
14 court judgment." Plaine, 797 F.2d at 719. Such an inquiry  
15 demands that the federal court carefully review the  
16 administrative record "to ensure that, at a minimum, it meets the  
17 state's own criteria necessary to require a court of that state  
18 to give preclusive effect to the state agency's decisions." Id.  
19 The federal court must consider the relevant state law test in  
20 making its determination. Dias v. Elique, 436 F.3d 1125, 1128  
21 (9th Cir. 2006) (quoting Plaine, 797 F.2d at 719). See also Olson  
22 v. Morris, 188 F.3d 1083 (9th Cir. 1999) (applying Arizona claim  
23 preclusion law to administrative proceedings).

24 The federal court must apply the state's law of claim  
25 preclusion in determining the preclusive effects of a state  
26 administrative proceeding. See McInnes v. California, 943 F.2d  
27 1088, 1094 n.5 (9th Cir. 1991); Feminist Women's Health Ctr. v.  
28 Codispoti, 63 F.3d 863, 867 (9th Cir. 1995); see also Baldwin v.

1 Kilpatrick (In re Baldwin), 249 F.3d 912, 917 (9th Cir. 2001).  
2 Here, Washington law on claim preclusion applies. Under  
3 Washington law, claim preclusion forbids re-litigation of "all  
4 issues which might have been raised and determined." Shoemaker  
5 v. City of Bremerton, 745 P.2d 858, 860 (Wash. 1987). In  
6 Washington, claim preclusion applies to the final decisions of  
7 administrative agencies. State v. Dupard, 609 P.2d 961, 964  
8 (Wash. 1980) (stating that "[d]ecisions of administrative agencies  
9 may be accorded preclusive effect in subsequent litigation"); In  
10 re Marriage of Aldrich, 864 P.2d 388, 391 (Wash. Ct. App.  
11 1993) (stating that claim preclusion comes into effect when the  
12 decision in question becomes final); Devore v. Dep't of Social &  
13 Health Serv., 906 P.2d 1016, 1018 (Wash. Ct. App. 1995). See  
14 generally Wash. Rev. Code Ann. § 34.05.010(1) (West  
15 2006) (defining an adjudicative proceeding as "a proceeding before  
16 an agency in which an opportunity for hearing before that agency  
17 is required by statute or constitution right before or after the  
18 entry of an order by the agency"). Washington courts also  
19 consider additional factors in applying claim preclusion to  
20 administrative proceedings: "(1) whether the agency acting within  
21 its competence made a factual decision; (2) agency and court  
22 procedural differences; and (3) policy considerations." Dupard,  
23 609 P.2d at 964.

24 Unfortunately, neither the August 26, 2005 hearing  
25 transcript nor the Objection Order provides any analysis of claim  
26 preclusion issues. At the August 26, 2005 hearing, the  
27 bankruptcy court simply stated, "You know, those orders that were  
28 already entered in state court are res judicata on those kinds of

1 matters for that period of time.”<sup>46</sup> The Objection Order merely  
2 reiterated the bankruptcy court’s statement.

3 Neither Richard nor Deborah submitted any evidence to aid  
4 the bankruptcy court in its determination. We are likewise  
5 constrained in our review due to the paucity of the record with  
6 regard to any prior administrative proceedings. Aside from the  
7 summary of administrative proceedings contained in Deborah’s  
8 disclosure statement, neither Richard nor Deborah have submitted  
9 a copy of the record from the administrative proceedings between  
10 them, any subsequent order, or the findings of fact and  
11 conclusions of law which Washington requires as part of final  
12 orders in administrative proceedings. Wash. Rev. Code Ann.  
13 § 34.05.461(3) (West 2006).

14 Confining our review to the August 26, 2005 hearing  
15 transcript and the Objection Order, we believe that the  
16 bankruptcy court did not have sufficient grounds to support its  
17 disallowance of Claim No. 28 on the ground of claim preclusion.  
18 However, under the circumstances, any error is harmless because,  
19 as we noted previously, Claim No. 28 does not set forth  
20 sufficient facts and evidence to establish that Richard had  
21 overpaid child support and/or spousal maintenance for 2001.

22 In sum, after reviewing the Original Claims and the Amended  
23 Claims with their supporting “evidence” attached, Richard did not  
24 present sufficient evidence to support his claims. As Richard  
25 did not set forth facts necessary to establish his claims, his  
26 claims had no prima facie validity under Rule 3001 and Section  
27

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28 <sup>46</sup> August 26, 2005 Hr’g Tr. at 4:21-23, Bankruptcy Court  
Docket No. 129.

1 502. Thus, the bankruptcy court did not err in not treating  
2 Claim Nos. 27 through 32 as presumptively valid.

3  
4 D. Recoupment

5 For the first time on appeal, Richard requests that we make  
6 a determination as to whether his claims for "Support Overpay  
7 2001" (i.e., Claim Nos. 14 and 28) and "2004 Overpay" (i.e.,  
8 Claim Nos. 19 and 27) qualify as recoupments or setoffs. Richard  
9 cites to Ninth Circuit case law, which allows a reviewing court  
10 to consider an issue raised for the first time on appeal in  
11 certain exceptional circumstances. See Smyth v. City of Oakland  
12 (In re Ralbert Rallington Brooks-Hamilton), 329 B.R. 270, 279  
13 (9th Cir. BAP 2005). One of these exceptions allows the  
14 reviewing court to address an issue first brought on appeal if it  
15 is purely legal and does not result in prejudice to the opposing  
16 party. The issue of recoupment versus setoff, Richard argues,  
17 falls within this exception. Thus, Richard asserts, we have the  
18 authority to review this issue.

19 We decline to make such a determination. Generally, the  
20 reviewing court will not consider an issue if a party raises it  
21 for the first time on appeal. Id.; Milgard Tempering, Inc. v.  
22 DaRosa (In re DaRosa), 318 B.R. 871, 878 n.11 (9th Cir. BAP  
23 2004); Franchise Tax Bd. v. Roberts (In re Roberts), 175 B.R.  
24 339, 345 (9th Cir. BAP 1994). A reviewing court may, however,  
25 consider an issue raised for the first time on appeal if: (1)  
26 exceptional circumstances exist as to why the party failed to  
27 raise the issue in the trial court; (2) the new issue arises  
28 while the appeal is pending because of a change in the law; or

1 (3) it is purely one of law and the opposing party will not  
2 suffer prejudice from the party's failure to raise the issue in  
3 the trial court. DaRosa, 318 B.R. at 878 n.11; Roberts, 175 B.R.  
4 at 345. A reviewing court "may consent to consider a pure  
5 question of law when it does not affect or rely upon the factual  
6 record developed by the parties, or where the pertinent record  
7 has been fully developed." Roberts, 175 B.R. at 345.

8 Contrary to Richard's assertion, the issues involving  
9 recoupment and setoff do not simply present questions of law.  
10 Recoupment, an equitable doctrine, is the right to reduce the  
11 amount of a claim. 5 Collier on Bankruptcy ¶ 553.10 (15th ed.  
12 2006). The party asserting the right of recoupment must show  
13 that "he or she is not liable in part or in full for the  
14 plaintiff's claim due to matters or events arising out of the  
15 same transaction." Id. In the Ninth Circuit, this would require  
16 a court to apply a test (i.e., the logical relationship test).  
17 See Aetna U.S. Healthcare, Inc. v. Madigan (In re Madigan), 270  
18 B.R. 749, 755 (9th Cir. BAP 2001) (applying the "logical  
19 relationship test" to determine whether the alleged recoupment  
20 arises from the event or matter forming the basis of the opposing  
21 party's claim); see also 5 Collier on Bankruptcy ¶ 553.10[1]  
22 (15th ed. 2006) (stating that the Ninth Circuit uses the logical  
23 relationship test to determine whether the debts arise out of the  
24 same transaction).

25 A determination on whether recoupment or setoff applies  
26 would require us to rely on the record and make a factual  
27 determination. Further, there is nothing in the record - in any  
28 of the documents Richard provided with the Original Claims or the

1 Amended Claims - establishing that Richard overpaid child support  
2 and spousal maintenance payments to Deborah, thus entitling him  
3 to reduce the amount of Deborah's claims against him. Thus, the  
4 exception does not apply and we will not consider this issue.

5  
6 V. CONCLUSION

7 Contrary to Richard's assertion, the bankruptcy court had  
8 jurisdiction to allow or disallow his claims. By filing his  
9 proofs of claim, Richard voluntarily subjected himself to the  
10 bankruptcy court's authority. Simply because Richard was not  
11 included in the creditor class receiving distributions from funds  
12 recovered from the Trust Account under the plan does not mean  
13 that the bankruptcy court's jurisdiction terminated.

14 The bankruptcy court also properly provided Richard with an  
15 adequate opportunity for hearing and to present his evidence.  
16 Richard was duly notified of the Objection and the bankruptcy  
17 court's order shortening time on the hearing on the Objection.  
18 Richard did not challenge the adequacy of the notice or the  
19 Objection. Richard filed his Response to the Objection, along  
20 with his Amended Claims, and was given an adequate opportunity to  
21 present evidence in support of his claims at the August 26, 2005  
22 hearing.

23 The bankruptcy court also did not err in disallowing  
24 Richard's claims. Neither the Original Claims nor the Amended  
25 Claims were entitled to the presumption of prima facie validity  
26 under Rule 3001 and Section 502. None of the claims provided  
27 facts and evidence sufficient to demonstrate that Deborah was  
28 legally liable to Richard for any of the alleged debts.



1 In light of the provisions of the confirmed plan<sup>47</sup> and the  
2 on-going disputes within the family law proceedings taking place  
3 in the Superior Court, however, the bankruptcy court's decision  
4 regarding the disallowance of Richard's claims for the purposes  
5 of bankruptcy is not preclusive as to the disputes within the  
6 family law proceedings. See Restatement (Second) of Judgments  
7 § 26(1)(b) (1982) (providing an exception to claim preclusion by  
8 allowing the plaintiff to bring another action against the  
9 defendant on part or all of a previously-litigated claim when  
10 "[t]he court in the first action has expressly reserved the  
11 plaintiff's right to maintain the second action"); see also  
12 Christopher Klein et al., Principles of Preclusion and Estoppel  
13 in Bankruptcy Cases, 79 Am. Bankr. L.J. 839, 850, 875 (2005).  
14 Under the terms of the confirmed plan, the Superior Court has  
15 continuing jurisdiction to consider Richard's claimed offsets  
16 against amounts owing to Deborah.<sup>48</sup>

17 With respect to the issue of recoupment, we decline to  
18 consider it as Richard did not raise it before the bankruptcy  
19 court. The issue does not fall within any of the exceptions  
20 under current Ninth Circuit law, despite Richard's assertions to  
21 the contrary.

22 AFFIRMED.

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27  
28 <sup>47</sup> See supra note 16.

<sup>48</sup> See supra note 16.