NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. AZ-05-1360-KPaD
ROBERT W. NICHOLS and MARY ANN NICHOLS,	AZ-06-1002-KPaD AZ-06-1013-KPaD (Consolidated)
Debtors.	
	Bk. Nos. 02-02215-EWH 05-02153-JMM
ROBERT W. NICHOLS; MARY ANN NICHOLS,	Adv. No. 02-00089
Appellants,	
v.	**MEMORANDUM**
LOUISE WHIPPLE,	
Appellee.	
LOUISE WHIPPLE; THE ESTATE OF EDSON WHIPPLE,	
Appellants,	
v.	
ROBERT W. NICHOLS; MARY ANN NICHOLS,	
Appellees.	

Argued and Submitted on October 19, 2006
at Phoenix, Arizona

Filed - January 3, 2007

Appeals from the United States Bankruptcy Court
for the District of Arizona

Honorable Eileen W. Hollowell and James M. Marlar, Bankruptcy Judges, Presiding

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Before: KLEIN, PAPPAS, and DUNN, Bankruptcy Judges.

These appeals stem from a chapter 7 case and a subsequent chapter 13 case filed by the same debtors.

In No. AZ-05-1360, the debtors challenge an order under Federal Rule of Civil Procedure 60(b)(5) declining to revise an adversary proceeding judgment excepting a prebankruptcy state-court judgment debt against them from discharge by adding to that declaration a money judgment redundant of the state-court judgment and then reducing that judgment by half.

In Nos. AZ-06-1002 and 1013, creditors appeal orders declining to dismiss the chapter 13 case on the basis of debt-limit ineligibility and confirming a chapter 13 plan.

We AFFIRM the Rule 60(b)(5) order declining to add a money judgment to the nondischargeability judgment, VACATE the order confirming the chapter 13 plan, REVERSE the order denying the motion to dismiss the chapter 13 case, and REMAND with instructions to dismiss the chapter 13 case.

FACTS

Louise and (the late) Edson Whipple obtained an $848,947.10 judgment in Pima County (Arizona) Superior Court against Robert and Mary Ann Nichols and others in July 2001.

The Arizona court amended its judgment in January 2002 to delete a fraud determination without altering the damages award.

The Nichols filed a chapter 7 case in May 2002, in which the Whipples commenced an adversary proceeding ("Adv. No. 02-0089") on July 29, 2002, seeking to except the Arizona judgment debt from discharge and to deny discharge.

After a claims bar date was fixed in January 2003, the Whipples timely filed a proof of claim for the full $848,947.10 Arizona judgment debt. The chapter 7 trustee later concluded, however, that there were no assets to distribute.

At the trial of Adv. No. 02-0089 on September 22, 2003, the Whipples prosecuted only the fiduciary fraud count under 11 U.S.C. § 523(a)(4) and abandoned the other counts. The court (Judge Hollowell) took the issues under submission for decision.

Four days after the trial, the Nichols filed in the main bankruptcy case an objection to the $848,947.10 Whipple claim to the extent it exceeded $424,473.55 on the theory that the Whipples had assigned one-half of the claim to a third-party.[1]

The court rendered findings of fact and conclusions of law in Adv. No. 02-0089 in December 2003, ruling the Arizona judgment debt to be nondischargeable under § 523(a)(4), but deferred entry of judgment until the claim objection was resolved.

The Whipples, saying they were saving costs and having prevailed in their nondischargeability action, elected not to

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[1]The Nichols did not demonstrate why they had standing to object to the claim in the chapter 7 case to the claim that was based on the state court's judgment. In order for a debtor acting in an individual capacity to have standing to object to a claim in a chapter 7 case, the debtor must demonstrate "injury in fact" by allowance of the claim. Cheng v. K & S Diversified Invs., Inc. (In re Cheng), 308 B.R. 448, 454 (9th Cir. BAP 2004), aff'd mem., 160 F. App'x 644 (9th Cir. 2005); see United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 551 (1996); Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101, 1108-09 (9th Cir. 2003); Dellamarggio v. B-Line, LLC (In re Barker), 306 B.R. 339, 346-47 (Bankr. E.D. Cal. 2004); 4 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 502.02[2][c] (15th ed. rev. 2006).

contest the claim objection. Hence, on March 25, 2004, an order was entered allowing the Whipple claim in the sum of $424,473.55.

Also on March 25, 2004, the bankruptcy court entered judgment in Adv. No. 02-0089, declaring the Arizona judgment debt to be nondischargeable and noting that the claim objection had no effect on the judgment:

> Based upon the reasoning as set out in the Memorandum Decision filed herein on December 15, 2003, which constitutes [t]he court's findings of fact and conclusions of law and the further determination of the court that the objection of the debtors to the Whipple's claim in this bankruptcy has no effect on this Judgment of Non-Dischargeability; it is hereby judged and decreed that the judgment in the amount of $848,947.10, entered against debtors, Nichols, in Pima County Superior Court, . . . is non-dischargeable, pursuant to 11 U.S.C. § 523(a)(4).

J., Adv. No. 02-0089 (March 25, 2004) (emphasis added).

We ultimately dismissed the Nichols' appeal of this judgment, which did not purport to constitute a money judgment separate from the Arizona judgment. Dismissal Order, BAP No. AZ-04-1180 (Aug. 2, 2005). Our dismissal order was not appealed.

Meanwhile, in August 2004, the Arizona court entered a second amended judgment (prepared by the Nichols' bankruptcy counsel) deleting its determination of joint and several liability and reducing the judgment against the Nichols to $174,485.17. The Arizona court restated the judgment debt as $257,096.46, including $82,308.29 in accrued interest as of July 18, 2001, with interest thereafter at an annual rate of 10 percent on $174,485.17 (i.e., $17,448.52/yr or $47.804164/day).[2]

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[2]The second amended judgment, prepared on the stationery of the Nichols' bankruptcy counsel, provides, in part:

(continued...)

On September 14, 2004, the Nichols filed a motion to convert their chapter 7 case to chapter 13. By that date, interest of $55,118.20[3] had accrued in the 3-year, 48-day interval since July 18, 2001, raising the total debt to $312,214.66. The bankruptcy court denied the motion because the judgment debt exceeded the $290,525 chapter 13 debt limit[4] imposed by 11 U.S.C. § 109(e) and rendered the Nichols ineligible for chapter 13 relief.[5] The

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[2](...continued)
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendants/Counterclaimants, Louise Whipple, in her individual capacity, and the Estate of Edson L. Whipple, and against Plaintiffs/Counterdefendants, Robert W. Nichols and Mary Ann Nichols, husband and wife ("Nichols"), as follows:

(I) For the sum of One Hundred Seventy Four Thousand Four Hundred Eighty Five and 17/100 Dollars ($174,485.17), representing the Defendants' share of the partnership distributions received by Nichols (the "Nichols Distribution");

(J) For interest on the Nichols Distribution through July 18, 2001 in the sum of Eighty Two Thousand Three Hundred Eight and 29/100 Dollars ($82,308.29);

(K) For interest on the Nichols Distribution from and after July 18, 2001, at the rate of 10% per annum, until paid;

(L) For the sum of Three Hundred Sixty Nine and 00/100 ($303.00) [sic] as and for punitive damages.

[3]$55,118.20 = (3 yrs x $17,448.52) + (48 days x $47.804164).

[4]Although the chapter 13 debt limit rose to $307,675 effective April 1, 2004, that adjustment did not affect pending cases. The conversion of a case does not effect a change in the date of the filing of the petition. 11 U.S.C. § 348(a).

[5]Judge Hollowell's memorandum decision contained a red herring that the Nichols' counsel later exploited in the subsequent chapter 13 case in a manner that became material.

The preambular portion of the memorandum decision misstates the date of the second amended judgment as July 18, 2002, instead of July 18, 2001. The error was immaterial at the time because deleting one year's interest of $17,448.52 from the $312,214.66 as of September 14, 2004, nevertheless left the debtors over the

(continued...)

Nichols did not attempt to appeal this interlocutory order.

On April 13, 2005, the Nichols filed a motion under Federal Rule of Civil Procedure 60(b)(5) requesting that Judge Hollowell modify the § 523(a)(4) judgment in Adv. No. 02-0089 to reflect the principal amount of the second amended state-court judgment, $174,485.17 and that the bankruptcy court make a monetary award of 50 percent of the $174,485.17 based on the order allowing the Whipple claim at $424,473.55. In other words, the Nichols wanted to reduce the nondischargeable judgment debt to about $87,243.

On April 21, 2005, after the chapter 13 debt limit had risen to $307,675 and with the chapter 7 case still open, the Nichols filed a chapter 13 case that was assigned to Judge Marlar. In Schedule F, they listed the second amended judgment debt to the Whipples as $147,234.00.

On August 10, 2005, Judge Hollowell entered the order that became our No. AZ-05-1360. Acting on the Rule 60(b)(5) motion, the court modified the § 523(a)(4) judgment in Adv. No. 02-0089 to recite that the second amended state-court judgment was in the principal amount of $174,485.17 but refused to enter a money judgment and refused to order that the nondischargeable judgment debt be reduced by 50 percent based on the claim allowance in the chapter 7 case. The Nichols appealed.

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[5](...continued)
$290,525 limit, which is what the court held: "Even if somehow the Debtors could establish that they are entitled to treat their case as converted as of the September 14, 2004 date that they filed their motion to convert ..., the accrual of interest on the Amended Judgment would still exceed the $290,575.00 limit of § 109(e)." Mem. Decision, at 5 (Nov. 30, 2004).

On August 17, 2005, the Whipples filed a motion to dismiss the chapter 13 case and an objection to plan confirmation in which they argued that the Nichols were ineligible for chapter 13 relief because the net judgment debt was (with post-judgment interest, minus $10,244 garnishment credit) $312,587.90, which exceeded the § 109(e) $307,675 debt limitation.

As evidence to support their position, the Whipples filed exhibits supplying: (1) all three versions of the state-court judgment; (2) the § 523(a)(4) judgment rendered in the chapter 7 case; (3) Judge Hollowell's memorandum decision denying the motion to convert to chapter 13; and (4) Judge Hollowell's order on the Nichols' Rule 60(b)(5) motion.

The Nichols filed an opposition on September 16, 2005, asserting they met the § 109(e) eligibility requirements.

In the opposition papers, the Nichols tried to exploit Judge Hollowell's clerical misstatement of the date of the state court judgment as July 18, 2002 (instead of 2001) that she made in the memorandum decision denying the motion to convert the chapter 7 case to chapter 13. They contended it was issue preclusive, even though it was plain to all that the correct date of the Arizona court's judgment was July 18, 2001.

Specifically, without revealing to Judge Marlar that the true measuring date for calculation of interest stated in the state court judgment (which had been prepared by the Nichols' bankruptcy counsel) was July 18, 2001, they presented an affidavit by a certified public accountant calculating post-judgment interest based on a July 18, 2002, judgment, instead of a July 18, 2001, judgment. Thus, by ignoring $17,448.52 in

interest, they contended that the net judgment debt as of the date of the filing of the chapter 13 petition was $302,706.49.[6]

Shortly thereafter, the Whipples filed a motion to have the debt-limit eligibility question resolved separately from the other issues they raised regarding chapter 13 plan confirmation. In the motion, they pointed out the omission of one year of post-judgment interest on the second amended judgment and explained how it was based on the misstatement in Judge Hollowell's

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[6]The September 16, 2005, Nichols opposition to the motion to dismiss the later-filed chapter 13 case asserted:

> In denying the Motion to Convert, Judge Hollowell made certain findings regarding the amount of the indebtedness due to Whipple[s]. Those finding[s] are contained in a Memorandum Decision dated November 30, 2004. In her decision, Judge Hollowell, found that the principal amount of the debt was $174,485.17, with interest accrued through July 18, 2002 [instead of 2001] of $82,308.29. A copy of the November 30, 2004 decision is attached hereto as Exhibit "D". Attached hereto as Exhibit E is the Affidavit of Chris Linscott, certified public accountant, who has calculated the amount of the indebtedness due and owing to the Movant through the date of the filing of the Debtors' chapter 13 petition herein, at $309,505.71 [i.e., ignoring $17,448.52 for 7/18/01-7/18/02]. Attached hereto as Exhibit "F", is the Affidavit of Robert W. Nichols, in which Mr. Nichols states the amount of funds that were garnished from his wages and those of his wife are [sic] pre-petition and appl[ied] to the Whipple indebtedness. After reduction of these payments, and including the other unsecured indebtedness set forth in the Debtors' schedules, the total amount of indebtedness held by the Debtors is $302,706.49, below the statutory maximum of $307,6[75].00. Accordingly, the Debtors qualify for chapter 13 relief within the meaning of Bankruptcy Code § 109.

Resp. to Mot. to Dismiss & Objection, at 3-4 (emphasis supplied).

On October 30, 2005, the Whipples filed a motion in the chapter 7 case seeking to correct the "clerical" error inherent in Judge Hollowell's misstatement of the year of the second amended judgment. At the hearing, the court confessed clerical error as to the amount and explained that to correct the error, the Whipples would first have to obtain relief from stay in the subsequent chapter 13 case that had by then been filed.

memorandum decision denying the motion to convert. Thus, they asserted that, with interest correctly calculated, the net due on the second amended judgment (after deducting garnishment credit) exceeded the $307,675 limit imposed by § 109(e).

A comedy of scheduling errors ensued. The Whipples' counsel had given notice of a September 26, 2005, hearing on the motion to dismiss and objection to plan confirmation but erroneously thought that it was not actually calendared and did not attend.

The result was that Judge Marlar entered an order denying the Whipples' motion to dismiss and objection to confirmation:

> The [Nichols] filed a written Response . . ., and included therewith such information and affidavits establishing eligibility of the [Nichols] for chapter 13 relief, and responses to the objections to the [Nichols'] Chapter 13 Plan. The [Whipples] scheduled a hearing on its Motion and Objection for September 26, 2005, however, it neither filed any reply to the [Nichols'] Response, provided no controverting evidence with respect to the affidavits filed by the [Nichols], and failed to attend the hearing scheduled for September 26, 2005.

Order Den. Mot. to Dismiss & Objection, at 1-2 (Oct. 24, 2005).

The Whipples, within ten days, filed a motion to alter or amend and a supporting memorandum that focused on the erroneous calculation of post-judgment interest on which the court had relied in determining chapter 13 eligibility. Their non-Arizona counsel also explained his theory of why his September 26 absence resulted from misunderstanding or miscommunication regarding local Arizona bankruptcy practice.

On November 28, 2005, at the time set for hearing on the Whipples' motion to bifurcate the dismissal question, the court set a December 12, 2005, hearing on the motion to alter or amend.

On December 12, the Whipple's counsel, who was trying to appear by telephone, obtained telephonic contact with the courtroom some minutes after the motion had been called for hearing and decided.

The court entered an order (prepared by the Nichols' counsel) denying the motion to alter or amend on the basis that the Whipples "failed to appear" and for "good cause appearing." On the same date, the court approved an order confirming the Nichols' chapter 13 plan.

The Whipples timely appealed both orders, which are our Nos. AZ-06-1002 and AZ-06-1013.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334. We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUES

1. Whether it was error to decline to enter a money judgment supplementary to a § 523(a) judgment of nondischargeability.
2. Whether a bankruptcy court's erroneous statement of the date of a prior state-court judgment is issue preclusive as to the incorrect date.
3. Whether discretion is abused by refusing to dismiss a chapter 13 case in the face of unambiguous evidence that the debtors are not eligible for chapter 13 relief.

STANDARD OF REVIEW

Review of orders under Federal Rule of Civil Procedure 60(b)(5) is for abuse of discretion. A court abuses its discretion if it applies incorrect law, rests its decision on a clearly erroneous finding of material fact, or leaves an appellate court with a definite and firm conviction that there has been a clear error of judgment. SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); Khachikyan v. Hahn (In re Khachikyan), 335 B.R. 121, 125 (9th Cir. BAP 2005). We review findings of fact for clear error and conclusions of law de novo. Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 980 (9th Cir. 2001).

DISCUSSION

We begin with the nondischargeability judgment and then address the chapter 13 rulings.

I

In No. AZ-05-1360, the Nichols argue that the court erred when it refused to reduce the nondischargeability judgment by 50 percent. This argument rests on two false premises — one of procedure and one of law.

A

First, as a procedural matter, the nondischargeability judgment entered in the adversary proceeding was not a money judgment. Rather, it was a declaration that the money judgment that had already been entered by the Arizona state court represented a debt that was excepted from discharge under

§ 523(a)(4). The fact that the bankruptcy court described the state-court judgment by the amount of the state court's award does not transform the bankruptcy adversary proceeding judgment into a money judgment.

There is no merit to the Nichols' argument that the bankruptcy court was required to enter a money judgment. The Ninth Circuit recognized in Sasson v. Sokoloff, 424 F.3d 864, 868 (9th Cir. 2005), that a bankruptcy court has authority to enter a separate money judgment. It explained, however, that a money judgment is not needed in the ordinary case and that there needs to be some justification for a redundant money judgment. The Nichols' argument conflates authority with duty. It is one thing to have the authority to do something; it is quite another thing to do it. Here, there is no special justification for the bankruptcy court to enter a money judgment, and it neither was required, nor purported, to do so.

Although Sasson recognizes that a bankruptcy court has authority to enter a money judgment in conjunction with its nondischargeability judgment, that decision also makes clear that such a duplicate judgment is neither required, nor appropriate, except under unusual circumstances, such as where the state-court judgment has become unenforceable by lapse of registration. Id. at 874.

Here, the bankruptcy court's § 523(a)(4) judgment merely stated that the state-court judgment was nondischargeable. It did not enter a separate money judgment. The bankruptcy court's judgment encompassed the amount contained in the state court judgment, whatever amount that may be or may become.

The gravamen of the Nichols' Rule 60(b)(5) motion is that they want the bankruptcy court to take the extraordinary step of entering a money judgment, and then they want to quarrel with the amount of that judgment.

Since the bankruptcy court did not have a duty to enter a money judgment that duplicated the Arizona judgment, and since the Arizona court's actions in twice adjusting its own judgment at the requests of the Nichols confirm that the state court was fully in control of the amount of the judgment, it cannot be said that the bankruptcy court abused its discretion when it did not perceive a basis for taking the extraordinary step of entering a money judgment redundant of the Arizona court's judgment. Hence, there is no procedural error.

B

Second, the argument regarding the nondischargeability judgment rests on the false premise of substantive law that a debt loses its nondischargeable status if a portion of it is assigned by the creditor who is prosecuting the nondischargeability action. It does not.

The Nichols contend that the Whipples assigned to a third party a 50 percent interest in any amounts to be collected under the second amended judgment. They also contend that the assignment was the basis for the objection to the Whipples' proof of claim, which was sustained by the court.

The Nichols contend that the combination of the sustained objection to claim and the putative assignment of a 50 percent interest in the proceeds to a third party, mean that the Whipples

no longer had any "right to payment" beyond the remaining 50 percent interest. Hence, it is argued, the Whipples may not assert more than a 50 percent interest in the second amended state court judgment, and, in turn, only 50 percent of the judgment should be deemed nondischargeable.

The Whipples counter that they did not make an assignment and that their acquiescence in the claim objection in order to save costs was not a concession to the contrary.

The canard is that the Nichols ignore the distinction between a claim against the bankruptcy estate and a nondischargeable debt. The rejection or adjustment of a claim, which can be by summary procedure and liberally reconsidered, does not necessarily affect the amount of a nondischargeable debt. Cf. 11 U.S.C. § 502(j). We need not parse the variations, however, because the acquiescence in a claim of $424,473.55 is not an acquiescence to a smaller sum. When the state court reduced its judgment to less than $424,473.55, the outcome of the claim objection lost whatever materiality it may have had.

Furthermore, regardless of whether an assignment had been made, it does not change the fact that the state court entered a judgment in favor of the Whipples only. Any quarrel over the assignment is between the Whipples and the assignee. The Nichols owe the entire amount of the nondischargeability judgment to the Whipples. If the Whipples then owe 50 percent to an assignee, then that is a separate matter to be resolved by the state court, and it does not involve the Nichols.

Thus, the argument that the nondischargeable amount should be reduced by 50 percent lacks merit.

The bankruptcy court properly refused to grant the Nichols' request to reduce the nondischargeable debt owed to the Whipples.

II

In Nos. AZ-06-1002 and AZ-06-1013, the Whipples argue that the chapter 13 court erred when it denied their motion to reconsider the denial of their motion to dismiss and objection to confirmation. They contend that the Nichols had more debt than the limits imposed by § 109(e) on chapter 13 eligibility. We agree.

The Panel finds no merit in Nichols' contention that the misstatement by the chapter 7 court of the year of the state-court judgment in its memorandum denying their motion to convert to chapter 13 is issue preclusive. The inaccuracy was not material to the decision that was being made because, under either the correct or the incorrect year, the Nichols were not eligible for chapter 13 relief. Nor was the date actually litigated. Each of these defects is sufficient to defeat application of issue preclusion.

It is plain that the Nichols knowingly provided the chapter 13 court with incorrect calculations. If that court examined the second amended state-court money judgment that was determined to be nondischargeable by the chapter 7 bankruptcy court, a copy of which was an exhibit to the Whipple motion and objection, the chapter 13 court would have independently arrived at the proper calculation. Instead, the chapter 13 court relied upon the affidavit supplied by the Nichols that was based upon a stray and immaterial misstatement in the chapter 7 court's memorandum

decision denying the Nichols' motion to convert, which misstatement the Nichols and their counsel knew to be incorrect.

If the chapter 13 court had examined the second amended state-court judgment, it could have calculated with certainty that the debt amount of the judgment exceeded the limits of § 109(e). Patently incorrect facts are never issue preclusive. Hence, the chapter 13 court should have dismissed or converted the case.

III

The Nichols argue that the chapter 13 court did not abuse its discretion when it denied the motion for reconsideration because of the Whipples' counsel's failure to appear at both the September 26 hearing on the motion to dismiss and the December 12 hearing on the motion for reconsideration. Their theory is that the Whipples effectively abandoned their objections when they failed to appear at the hearings on both motions. While there is much to support the view that the Whipples' counsel is his own worst enemy, we are not persuaded that, in context, the motion can correctly be viewed as having been abandoned.

The bankruptcy court has the inherent power to dismiss a case if the debtor is ineligible for relief. Guastella, 341 B.R. at 917. Section 109(e) states that: "[o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $307,675 . . . may be a debtor under chapter 13 of this title." 11 U.S.C. § 109(e).

Bankruptcy courts generally rely on the chapter 13 debtor's schedules to determine eligibility, unless a good faith objection is made. Scovis, 249 F. 3d at 981.

If a good faith objection to the debtor's eligibility is made, the bankruptcy court should look "past the schedules to other evidence submitted." Id. (citation omitted).

In this case, the Nichols' schedule F stated that the amount of the second amended state court judgment was only $147,234. The Nichols never explained where this amount came from, but it is obvious that it does not square with the amount provided in the second amended judgment, even if the credit for garnished wages is considered.

After the Whipples did not appear in court on September 26, the court acted on the motion on the merits. Those merits, however, required consideration of the exhibits in support of the motion, which contained unambiguous evidence that required the opposite result. The Nichols' misleading response did not overcome the evidence supporting the motion. It was clear error to deny the motion.

The Whipples then filed a motion for reconsideration, and again raised the § 109(e) eligibility issue to the court. The Whipples provided the court with a comparison of the interest calculation provided by the Nichols, which was based on admitted clerical error, and an interest calculation based on the 2001 date stated in the second amended judgment.

The court set a hearing on the motion for reconsideration on December 12. Again, the Whipples did not appear. The court

again denied the motion for reconsideration on its merits.[7]

Had the bankruptcy court looked "past the schedules," it would have concluded that the amount of the second amended judgment exceeds the debt limitation imposed by § 109(e).

The calculation, as of the date of the filing of the chapter 13 case, based on the admitted clerical error was:

$174,485.17 (principal)
+ $82,308.29 (interest through July 18, **2002**)
+ $48,182.40 (post-judgment interest from July 19, **2002** through April 21, 2005)
+ $369.00 (punitive damages)
= $305,344.86
- $10,848.51 (amount garnished)

Total: $294,496.35

However, the calculation with the correct date contained in the second amended judgment is as follows:

$174,485.17 (principal)
+ $82,308.29 (interest through July 18, **2001**)
+ $65,629.40 (post-judgment interest from July 19, **2001** through April 21, 2005)
+ $369.00 (punitive damages)
= $322,791.86
- $10,848.51 (amount garnished)

Total: $311,943.35

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[7]The Whipples' attorney gave the following excuse for not appearing at the December 12, 2005, hearing:

> At the December 12, 2005, hearing, Whipple's counsel called the judge's clerk and confirmed that he would be appearing telephonically, but, after attempting to call the court he was unsuccessful and calling the clerk was advised he had called another clerk's number and then joined the hearing in progress. The court informed counsel that the case had been called a few minutes previous and since counsel was not on the line the Court had denied Whipple's Motion to Alter or Amend and also entered its Order confirming the Debtor's Chapter 13 Plan.

Whipple Reply Brief, pg. 3.

Under § 109(e), the debt limitation for noncontingent, liquidated, unsecured debt is $307,675. The amount due on the second amended judgment exceeds the statutory cap by $4,268.35.

Because the chapter 13 court relied on inaccurate information provided by the Nichols, and did not independently examine the evidence provided by the Whipples with the correct information, the court clearly erred when it denied the Whipples' motion for reconsideration on the merits and confirmed the Nichols' chapter 13 plan. As noted, it is an abuse of discretion to rely upon a clearly erroneous view of material fact. It follows that discretion was abused when the motions for reconsideration and to dismiss the chapter 13 case were denied.

CONCLUSION

In the chapter 7 appeal, the court properly refused to grant the Nichols' request to reduce the nondischargeable debt owed to the Whipples. Neither the bankruptcy court's judgment, nor its amended judgment purported to fix the amount of the debt, but rather merely declared the state-court judgment debt to be excepted from discharge. Moreover, the debt was owed by the Nichols to the Whipples, and any dispute over a purported assignment is between the Whipples and the assignee. Hence, we AFFIRM the order on the Rule 60(b)(5) motion.

In the chapter 13 appeals, the court clearly erred by ignoring the second amended state-court judgment that was in evidence and, by relying on inaccurate information provided by the Nichols' counsel (which counsel presumably knew to be inaccurate), rested its decision on a clearly erroneous finding

of material fact. When correctly calculated, the amount of the second amended state court judgment owed by the Nichols to the Whipples exceeds the debt limitation imposed by § 109(e). Because the Nichols are ineligible to be chapter 13 debtors, we VACATE the order confirming the chapter 13 plan, REVERSE the order denying the motion to dismiss the chapter 13 case, and REMAND with instructions to dismiss the Nichols' chapter 13 case.

KLEIN, Bankruptcy Judge, concurring:

I endorse everything in the per curiam decision and am compelled to add an observation out of a sense that professional obligations occasionally warrant the type of candor that is ordinarily omitted from judicial decisions. In my view, the presentation by counsel for the Nichols of affidavits based on Judge Hollowell's immaterial and plainly inadvertent typographic error regarding the date of the state court judgment (the correct date of which, as well as counsel's actual knowledge of which, cannot be disputed) constituted an intentional effort by counsel for the Nichols to mislead Judge Marlar in a manner that amounts to an attempt to perpetrate a fraud on the court and that offends every relevant canon of professional responsibility of which I am aware. Similarly, his contention presented in the briefs to us that Judge Hollowell's immaterial misstatement was issue preclusive is, by any measure, frivolous. While we could impose sanctions, the better course is to leave counsel to the mercy of the bankruptcy court and the Arizona bar disciplinary

authorities. Nothing in our decision prevents appropriate disciplinary action.