

MAR 03 2006

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-05-1093-HBK  
 )  
 6 CELLULAR 101, INC., ) Bk. No. ND 99-12733-RR  
 7 )  
 Debtor. )  
 8 )  
 9 CELLULAR 101, INC.; PATRICK )  
 LOWERY, )  
 10 )  
 Appellants, )  
 11 v. ) **M E M O R A N D U M**<sup>1</sup>  
 )  
 12 CHANNEL COMMUNICATIONS, INC.; )  
 JOHN PRICE; U.S. TRUSTEE, )  
 13 )  
 Appellees. )  
 14 )

Submitted Without Oral Argument<sup>2</sup>  
on January 18, 2006

Filed - March 3, 2006

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Robin L. Riblet, Bankruptcy Judge, Presiding

BEFORE: HAINES,<sup>3</sup> BRANDT, and KLEIN, Bankruptcy Judges.

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

<sup>2</sup> The Panel has determined that this appeal is suitable for decision without oral argument. See Fed.R.Civ.P. 8012 and 9th Cir. BAP Rule 8012-1.

<sup>3</sup> Hon. Randolph J. Haines, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

1 **Introduction**

2 Creditors and former business associates of the Debtor filed  
3 a joint plan of reorganization. The bankruptcy court awarded an  
4 administrative claim to Channel Communications, Inc. ("Channel")  
5 and John Price and his wife ("Price"), jointly. Debtor appealed  
6 the award of the administrative claim, which was affirmed by the  
7 District Court and by the Ninth Circuit Court of Appeals.  
8 Cellular 101, Inc. v. Channel Communications, Inc. (In re  
9 Cellular 101, Inc.), 377 F.3d 1092 (9th Cir. 2004) (No. 02-56772).

10 While the appeal was pending in the Ninth Circuit, the  
11 subsequent parent company of Channel, AT&T Wireless of Santa  
12 Barbara LLC ("AT&T"), entered into a settlement agreement that  
13 resolved the state court litigation filed by the Debtor against  
14 AT&T and Channel. Following the resolution of the appeal by the  
15 Ninth Circuit, Price and Channel requested that the bankruptcy  
16 court order a disbursing agent to release the funds held for the  
17 previously awarded administrative claim. Debtor objected to the  
18 request and argued that the settlement agreement was as a release  
19 of the claims held by Price and Channel. The bankruptcy court  
20 overruled Debtor's objection and ordered the disbursing agent to  
21 pay the administrative claim.

22 We conclude that Debtor's argument that the settlement  
23 agreement released Channel's administrative claim would have  
24 mooted the appeal that was pending before the Ninth Circuit. By  
25 failing to raise the settlement defense during the appeal and  
26 allowing the Ninth Circuit to rule on the issue of the award of  
27 the administrative claim, the Debtor has waived this issue and  
28 may not now raise it. Therefore, we AFFIRM the bankruptcy

1 court's decision.

2 **Facts**

3 AT&T provides wireless services in Santa Barbara County.  
4 Channel was owned by John Price and his wife, and was an  
5 authorized dealer for AT&T. Cellular 101, Inc., owned by Patrick  
6 Lowery, was an agent of Channel and subdealer for AT&T.

7 To resolve business disputes between them, Price contracted  
8 to sell Channel to AT&T. Cellular, however, had a right of first  
9 refusal if Price were to sell his stock ownership of Channel.  
10 Cellular filed suit in California state court to enforce that  
11 right of first refusal and ultimately filed a Chapter 11 case to  
12 block the sale.

13 After expiration of exclusivity, Channel, Price and AT&T  
14 filed a joint plan of reorganization for Cellular. It provided  
15 for sale to AT&T of 80% of Price's stock ownership of Channel,  
16 and Price's payment to Cellular of almost \$2 million of the sale  
17 proceeds, which was sufficient to satisfy all claims in  
18 Cellular's bankruptcy case with some left over for the equity  
19 owner Lowery. The bankruptcy court confirmed the plan. Pursuant  
20 to the plan, Price sold Channel to AT&T, so Channel became a  
21 subsidiary of AT&T. And Price paid \$2 million of the sale  
22 proceeds to Cellular.

23 In March of 2001 Channel and Price filed in the Cellular  
24 bankruptcy case an administrative claim for attorneys' fees and  
25 costs. The bankruptcy court awarded \$206,317.60. Cellular  
26 appealed that award of the administrative claim. A disbursing  
27 agent under the plan held \$250,000 in its trust account, pending  
28 the appeal, for payment of the administrative claim.

1 The award of the administrative claim was affirmed by the  
2 District Court and then by the Ninth Circuit Court of Appeals on  
3 July 28, 2004. Cellular 101, Inc. v. Channel Communications,  
4 Inc. (In re Cellular 101, Inc.), 377 F.3d 1092 (9th Cir.  
5 2004) (No. 02-56772).

6 Price and Channel moved for an order directing the  
7 disbursing agent to pay the administrative claim, plus interest.  
8 Cellular opposed that motion, arguing that AT&T, on behalf of its  
9 new subsidiary Channel, had released the claim in a March, 2003,  
10 settlement (the "Settlement Agreement") of the state court  
11 litigation that Cellular had filed against Channel and AT&T. The  
12 bankruptcy court denied Cellular's objection, granted the motion  
13 and ordered disbursement of the funds to pay the administrative  
14 claim. Cellular appealed that order, and that is the appeal  
15 currently pending before this Panel.<sup>4</sup>

#### 16 **Issue**

17 Whether the Debtor waived its objection by failing to raise  
18 the settlement defense in the prior appeal to the Ninth Circuit.

#### 19 **Standard of Review**

20 What constitutes law of the case presents a legal issue that  
21 this Panel reviews under a de novo standard.<sup>5</sup> This Panel may  
22  
23

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24  
25 <sup>4</sup> The bankruptcy court denied a stay pending appeal, and no  
26 such stay has been sought from this Panel. Consequently the  
27 funds to satisfy the administrative claim have been paid to Price  
28 by the disbursing agent.

<sup>5</sup> Liberty Mut. Ins. Co. v. Equal Employment Opportunity  
Comm'n, 691 F.2d 438 (9th Cir. 1982); AT&T Universal Card Servs.  
V. Black (In re Black), 222 B.R. 896, 899 (9th Cir. BAP 1998).

1 affirm on any basis that is fairly supported by the record.<sup>6</sup>

2 **Analysis**

3 It is undisputed that the administrative claim awarded to  
4 Channel and Price was a joint claim, rather than joint and  
5 several. It is also undisputed that Price was not a party to the  
6 March 2003 Settlement Agreement in which AT&T allegedly released  
7 the claim on behalf of its subsidiary Channel,<sup>7</sup> and the  
8 Settlement Agreement was confidential and unknown to Price when  
9 it was made. Cellular's principal argument is that Channel's  
10 release of the joint claim held by Channel and Price also  
11 effectively released the claim on behalf of Price.<sup>8</sup> We need not  
12 decide that issue, however, in order to resolve this appeal.

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14 <sup>6</sup> Leavitt v. Soto (In re Leavitt), 209 B.R. 935, 940 (9th  
15 Cir. BAP 1997); Steckman v. Hart Brewing, Inc., 143 F.3d 1293  
(9th Cir. 1998)

16 <sup>7</sup> The record contains no evidence that in the Settlement  
17 Agreement Cellular actually paid anything to Channel, or that  
18 Channel actually received any consideration or benefit, for its  
19 alleged release of the \$206,000 jointly held claim against  
20 Cellular. In fact, Channel was not a signatory of the Settlement  
21 Agreement, but Cellular argues that its release of its claim  
22 occurred because the release of claims by AT&T included releases  
23 on behalf of its "subsidiaries," which included Channel. Nor is  
there any evidence the parties to the Settlement Agreement  
actually intended the broad mutual releases to include Channel's  
claim against Cellular, or that the general release would relieve  
Cellular of any obligation to Price for the joint obligation.

24 <sup>8</sup> Resolution of this issue may turn on whether Cellular had  
25 a right to assume that AT&T and Channel would "account" to Price  
26 for the benefit they received for the release, or whether  
27 Cellular had reason to know that AT&T and Channel would "alone  
28 receive benefit" from Cellular's performance of the Settlement  
Agreement and would not account to Price. See Hurley v. S. Cal.  
Edison Co., 183 F.2d 125, 131 (9th Cir. 1950). The Bankruptcy  
Court ruled against Cellular on this issue because "Price wasn't  
an affiliate of AT&T." Transcript of Jan. 31, 2005, at 11 (App.  
at 340).

1 The Settlement Agreement was made in March, 2003. The  
2 District Court's affirmance of the award of the administrative  
3 claim had been appealed to the Ninth Circuit in October of 2002,  
4 and was not argued to the Ninth Circuit until February, 2004.  
5 Consequently Channel's alleged release of the claim had been made  
6 almost a year before the appeal of the claim was argued to the  
7 Ninth Circuit, and almost a year and a half before it was decided  
8 by the Ninth Circuit.

9 Channel's alleged release of the administrative claim would  
10 have mooted the appeal that was pending before the Ninth  
11 Circuit.<sup>9</sup> Cellular, the appellant, therefore had an obligation  
12 to bring the mootness of the appeal to the attention of the Ninth  
13 Circuit before the appeal was argued and decided. Cellular did  
14 not do so, however, and did not raise the alleged release of the  
15 claim until after the Ninth Circuit affirmed the award and Price  
16 sought its enforcement by the bankruptcy court. In effect, by  
17 remaining silent Cellular attempted to preserve two bites at the  
18 apple - to defeat the claim on the merits before the Ninth  
19 Circuit and, only if that was not successful, subsequently argue  
20 that the claim had previously been released and satisfied.  
21 Although it ultimately ruled on the merits, the bankruptcy court  
22 reached this same conclusion,<sup>10</sup> and it is not clearly erroneous.

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24 <sup>9</sup> Di Giorgio v. Lee (In re Di Giorgio), 134 F.3d 971, 974  
25 (9th Cir. 1998).

26 <sup>10</sup> "[I]f, in fact, this was moot by the time that it got to  
27 the Ninth Circuit for oral argument, it certainly could have been  
28 and should have been raised there. . . . '[Y]ou were rolling the  
dice to see if the judge on - below would get reversed.  
Otherwise, you've got another arrow in your quiver.' I think you  
(continued...)

1 The previous Ninth Circuit ruling - that Price and Channel are  
2 entitled to an administrative claim<sup>11</sup> - is law of the case as to  
3 all issues that could have been raised before it was decided.<sup>12</sup>

4 Cellular argues that its settlement defense was not waived  
5 by its failure to argue it during the prior appeal because the  
6 Ninth Circuit would not have considered it but instead would have  
7 remanded to the bankruptcy court.<sup>13</sup> Cellular relies on U-Haul  
8 Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1037-38 (9th Cir.  
9 1986), for the proposition that failure to raise an argument in a  
10 prior appeal does not cause a waiver if the argument is one that  
11 the prior appellate court would not have decided. But that  
12 analysis does not apply here because Cellular's argument was  
13 jurisdictional and therefore had to be considered as a threshold  
14 matter. If the claim had been settled, there would have been no  
15 case or controversy before the Ninth Circuit and therefore no  
16 jurisdiction for it to rule on the merits. Cellular therefore

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17  
18 <sup>10</sup> (...continued)  
19 have to shoot all the arrows at one time." Transcript of Jan.  
20 31, 2005, at 11 (App. at 340).

21 <sup>11</sup> Cellular 101, Inc. v. Channel Communications, Inc. (In re  
22 Cellular 101, Inc.), 377 F.3d 1092, 1098 (9th Cir. 2004) ("The  
23 bankruptcy court did not err in approving the Channel and Price  
24 administrative claim.")

25 <sup>12</sup> Munoz v. Imperial County, 667 F.2d 811, 817 (9th Cir.  
26 1982) ("We need not and do not consider a new contention that  
27 could have been but was not raised on the prior appeal.  
28 [citations omitted] It is already law of the case . . .").

29 <sup>13</sup> Appellant's Reply Brief at 15-16. Contrary to the  
30 argument made in the briefs to this Panel, however, Appellant's  
31 counsel conceded in oral argument to the bankruptcy court that  
32 "In hindsight, perhaps" Cellular "could have" raised the  
33 settlement argument before the Ninth Circuit in an additional  
34 brief or at least in oral argument. Transcript of Jan. 31, 2005,  
35 at 5 (App. at 334).

1 had a duty to bring the potential mootness of the appeal to the  
2 attention of the Ninth Circuit.<sup>14</sup> A party who seeks a  
3 determination of the merits waives any such jurisdictional or  
4 quasi-jurisdictional defense that is not timely asserted.<sup>15</sup>

5 **Conclusion**

6 Having failed to raise the settlement defense in the prior  
7 appeal when it had an obligation to do so, Cellular has waived  
8 the argument. The bankruptcy court's decision is therefore  
9 AFFIRMED.

10 Price requests it be awarded attorneys' fees and costs as  
11 sanctions pursuant to 28 U.S.C. § 1927 on the ground this appeal  
12 was frivolous and unreasonably and vexatiously multiplied the  
13 proceedings. Assuming, without deciding, that we have authority  
14 to make an award under § 1927, the request is DENIED because it  
15 was not made in "a separately filed motion" as required by  
16 Federal Bankruptcy Rule 8020 and In re Tanzi, 297 B.R. 607, 613  
17 (9th Cir. BAP 2003).

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20 <sup>14</sup> Bd. of License Comm'rs v. Pastore, 469 U.S. 238, 240  
21 (1985) ("It is appropriate to remind counsel that they have a  
22 'continuing duty to inform the Court of any development which may  
23 conceivably affect the outcome' of the litigation. [citation  
24 omitted]. When a development after this Court grants certiorari  
or notes probable jurisdiction could have the effect of depriving  
the Court of jurisdiction due to the absence of a continuing case  
or controversy, that development should be called to the  
attention of the Court without delay.").

25 <sup>15</sup> Hill v. Blind Indus. and Servs., 179 F.3d 754, 756 (9th  
26 Cir. 1999) (a party cannot "hedge[] its bet" on the outcome on  
27 the merits by failing to raise a quasi-jurisdictional defense  
28 because "[s]uch conduct undermines the integrity of the judicial  
system . . . wastes judicial resources, burdens jurors and  
witnesses, and imposes substantial costs upon the  
litigants.") (sovereign immunity defense waived by proceeding on  
the merits before raising it).