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NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

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

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In re:)	BAP No.	EC-05-1285-MoPaBu
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DAVID RIOS and ELEANOR RIOS,)	Bk. No.	01-34212-D-13L
)		
Debtors.)		
_____)		
MARK A. WOLFF,)		
)		
Appellant,)		
)		
v.)	<u>MEMORANDUM</u> ¹	
)		
DAVID RIOS; ELEANOR RIOS;)		
LAWRENCE LOHEIT, Chapter 13)		
Trustee,)		
)		
Appellees.)		
_____)		

Argued and Submitted on March 24, 2006
at Sacramento, California

Filed - May 1, 2006

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

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding.

Before: MONTALI, PAPPAS and BUFFORD,² Bankruptcy Judges.

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

²Hon. Samuel L. Bufford, Bankruptcy Judge for the Central District of California, sitting by designation.

1 Chapter 13³ debtors filed and the court approved an amended
2 plan providing that all secured, priority and administrative
3 expenses would be paid with a lump sum payment by December 25,
4 2004. In April 2005, the chapter 13 trustee filed a final report
5 and account indicating that the debtors had completed their plan
6 payments by December 29, 2004, and that all disbursements had been
7 made, including payments for the allowed fees of debtors' counsel.
8 Debtors' counsel did not object to the final account, but instead
9 filed a fee application two weeks later requesting an additional
10 \$2,166.50 in fees for work performed between April 13, 2004 and
11 December 15, 2004. The court approved the final account and
12 granted debtors their discharge on May 26, 2005.

13 On June 21, 2005, the bankruptcy court held a hearing on the
14 fee application of debtors' counsel. The court approved the fees,
15 but denied counsel's request that the fees be paid through the
16 plan as moot, since the final account had been approved and the
17 debtors had made payments as set forth in the amended plan. The
18 court also denied counsel's request that the debtors be ordered to
19 pay the additional fees directly. Counsel appealed and we AFFIRM.

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21 **I.**
FACTS

22 Appellant Mark A. Wolff, Esq. ("Attorney") was counsel for
23 chapter 13 debtors David and Eleanor Rios ("Debtors"). On October
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25 ³Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated prior to the effective date (October 17,
1995) of The Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 8, 2004, Debtors filed their second modified plan and a motion to
2 confirm that plan. The second modified plan provided that
3 "Debtors shall pay a lump sum payment by December 25, 2004 to
4 complete this plan. The amount of the lump sum shall be the
5 amount necessary to pay all secured, priority and administrative
6 expenses" The second modified plan also stated that
7 "[Attorney] opts to have his or her fees approved and paid in
8 accordance with the court's Guidelines for Payment of Attorneys'
9 Fees in Chapter 13 Cases." The second modified plan also deleted
10 a provision from Debtors' prior plan stating that additional
11 attorneys fees "shall be paid directly by debtor to the extent
12 such funds are not paid through this Chapter 13 Plan." The
13 bankruptcy court entered an order confirming the second modified
14 plan on December 15, 2004.

15 The Eastern District of California's Guidelines for Payment
16 of Attorneys' Fees in Chapter 13 Cases ("Guidelines") provide
17 that, except for pre-petition retainers, all attorney fees "shall
18 be paid through the plan unless otherwise ordered." Guidelines at
19 ¶ 5. "Absent court authorization, the attorney may not receive
20 fees directly from the debtor other than the pre-petition
21 retainer." Id. If an attorney's initial fee is insufficient to
22 compensate him or her fully for the legal services rendered in the
23 case, he or she may apply for additional fees. Id. at ¶ 4. Here,
24 Attorney applied for and received approval of \$3,341 in additional
25 fees and costs incurred between December 2001 and April 2004.
26 Pursuant to the order approving the fees, the confirmed plan then
27 in effect and the Guidelines, those fees were treated as a
28 priority administrative expense.

1 On April 14, 2005, appellee Lawrence Loheit ("Trustee"),
2 chapter 13 trustee in Debtors' case, filed a final report and
3 account indicating that Debtors had completed their plan on
4 December 29, 2004, that Attorney had been paid \$4,841.00 in
5 allowed fees and costs, and that Debtors would be receiving a
6 refund in the amount of \$2,134.63. Trustee served the final
7 account on Attorney on April 14, 2005.

8 Attorney did not object to the final account, but instead
9 filed (on April 28, 2005) a second application for additional fees
10 and costs in the amount of \$2,166.50 (the "Application").
11 Attorney requested that these additional fees be paid through the
12 chapter 13 plan "to the extent available" and "directly by Debtor
13 to the extent not available through the Chapter 13 plan." No one
14 opposed the Application.⁴

15 On June 7, 2005, the bankruptcy court held a hearing on the
16 Application, but continued the hearing so that Attorney could file
17 further briefs. Attorney did so and the court held a further
18 hearing on June 21, when it approved the fees requested in the
19 Application, but denied as moot Attorney's request that the fees
20 be paid through the plan. The court also denied Attorney's
21 request that Debtors be directed to pay the fees personally,
22 citing In re Hanson, 223 B.R. 775 (Bankr. D. Ore. 1998) and
23 holding that Debtors' personal liability for the fees was
24 discharged when Debtors received their discharge.

25
26 ⁴Debtors have taken no position either before us or at the
27 bankruptcy court. We question Trustee's standing before us since
28 he took no position on the Application. Investors Thrift v. Lam
(In re Lam), 192 F.3d 1309, 1310-11 (9th Cir. 1999).
Nevertheless, we are obligated to decide the merits of Attorney's
position whether or not there is opposition.

1 On June 27, 2005, the bankruptcy court entered its civil
2 minute order granting the Application in part and denying it in
3 part. Attorney filed a timely notice of appeal on July 1, 2005.

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5 **II.
ISSUE**

6 Did the bankruptcy court err in concluding that, upon entry
7 of an order of discharge, Debtors were not personally liable for
8 attorneys' fees incurred by Attorney during the course of their
9 case?

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11 **III.
STANDARD OF REVIEW**

12 A bankruptcy court's findings of fact are reviewed for clear
13 error, and conclusions of law are subject to de novo review.
14 Devers v. Bank of Sheridan, Mont. (In re Devers), 759 F.2d 751,
15 753 (9th Cir. 1985). To the extent that questions of fact cannot
16 be separated from questions of law, we review these questions as
17 mixed questions of law and fact, applying a de novo standard.
18 Ratanasen v. Cal. Dep't of Health Servs., 11 F.3d 1467, 1469 (9th
19 Cir. 1993).

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21 **IV.
DISCUSSION**

22 Citing Hanson, the bankruptcy court held that upon entry of
23 Debtors' discharge, their personal liability for any unpaid
24 administrative expenses owed to Attorney was discharged. In
25 Hanson, the court held that the chapter 13 discharge bars
26 collection of postconfirmation fees not paid through the plan
27 where the plan provides for payment of postconfirmation fees.
28 Hanson, 223 B.R. at 778. The Hanson analysis applies in this

1 case.

2 As noted in Hanson, a chapter 13 discharge applies to "all
3 unsecured debts provided for by the plan." 11 U.S.C. § 1328(a);
4 Hanson, 223 B.R. at 778. "[T]he phrase 'provided for' . . .
5 simply requires that for a claim to become dischargeable the plan
6 must 'make a provision for' it, i.e., deal with it or refer to
7 it." Lawrence Tractor Co. v. Gregory (In re Gregory), 705 F.2d
8 1118, 1122 (9th Cir. 1983).

9 Here, the second modified plan contained a specific term
10 providing specific treatment for administrative expenses: Debtors
11 were to make a lump sum payment by December 25, 2004, in an amount
12 sufficient to pay all secured, priority and administrative
13 expenses.⁵ As in Hanson, the Eastern District of California
14 clearly treats chapter 13 attorneys' fees as administrative
15 expenses, with the Guidelines requiring fee applications for fees
16 in excess of the initial fee and granting priority treatment to
17 the fees. Hanson, 223 B.R. at 778 ("In this district, expenses of
18 administration in Chapter 13 have long been understood to include
19 debtor's attorney fees throughout the case, including through the
20 discharge."). Therefore, because the second amended plan did
21 "provide for" Attorney's administrative claim, the claim is
22 discharged.⁶ Id. If Attorney wanted to avoid such a discharge,

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24 ⁵In light of this provision, Attorney's repeated assertions
25 in his brief that Debtors' plan did not make explicit provision
26 for treatment of his claim are inaccurate.

27 ⁶Attorney argues that the decision of the district court in
28 Cornelison v. Wallace, 202 B.R. 991, 993 (D. Kan. 1996) -- and not
Hanson -- should apply in this case. We disagree. In Cornelison,
(continued...)

1 he and Debtors could have amended the plan to provide that his
2 additional fees would be paid outside the Plan.⁷ See Opinion in
3 In re Johnson, BAP No. EC-05-1286-MoPaBu, issued contemporaneously
4 with this Memorandum.

5 At the time the third amended plan was filed in October
6 2004, Attorney had received all of his initial fees and most of
7 his additional fees requested in his first fee application.⁸
8 Therefore, the provision that administrative expenses would be
9 satisfied in full through the balloon payment necessarily applied
10 to any other fees and administrative expenses incurred by Attorney
11 during the course of the case. It was thus incumbent on Attorney
12 to make Debtors and Trustee aware of the full extent of his

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14 ⁶(...continued)

15 the district court merely pointed out that the bankruptcy court
16 had "noted that the [chapter 13 attorney's] fee was a postpetition
17 obligation that would not be affected by the discharge to be
18 granted the debtors." Id. The district court did not explicitly
19 adopt this holding, and the bankruptcy court's comment is not
20 accompanied by any further analysis. In any event, the plan in
effect at that time did not make any provision for the additional
fees, as the district court held that an award of fees would
require amendment of the plan. In contrast, the plan in effect
here does specifically provide for administrative expenses. Thus,
the reasoned analysis of Hanson is more applicable in this case.

21 ⁷As noted earlier, Debtors' prior confirmed plan (the first
22 modified plan) specifically provided that any additional
23 attorneys' fees would be paid directly by Debtors to the extent
24 the claim was not paid in full under the Plan. Attorney and
25 Debtors deleted this provision in the second modified plan and
substituted the provision that all administrative fees would be
paid in full through the balloon payment. This revision reflects
a deliberate decision by Debtors and Attorney that the balloon
payment would be in an amount sufficient to pay any additional
attorneys' fees in full.

26 ⁸The Trustee's disbursement report shows that Attorney
27 received monthly disbursements through May 31, 2002.
28 Disbursements to Attorney recommenced on July 30, 2004
(immediately after his additional fees were approved by the court)
and ended on October 29, 2004.

1 administrative claim prior to the balloon payment and
2 disbursement. Failing that, he should have asked for a delay in
3 the distribution provided in the final account (which was approved
4 by the court in May 2005) and requested that his additional
5 administrative expenses be paid from the balloon payment prior to
6 discharge (and, in this case, prior to a refund to Debtors in an
7 amount exceeding Attorney's administrative claim).

8 At the time Debtors made their final plan payment and Trustee
9 made his final distributions, Attorney had incurred additional
10 fees (which were later approved by the court). He has not
11 received payment in full for these fees. Nevertheless, Debtors'
12 liability for these additional amounts is discharged; Attorney is
13 not excused from the consequences of section 1328 because of his
14 delay in filing a fee application until after the final payment by
15 Debtors and until after final disbursement by Trustee. As several
16 courts have held, a debtor who has provided for full payment of
17 priority claims in his or her plan is entitled to discharge of
18 priority debts that have not been paid in full when the priority
19 claimant filed its claim after completion of the debtor's chapter
20 13 payments. See In re Friauf, 172 B.R. 273, 276 (Bankr. D. Minn.
21 1994) (debtor was entitled to discharge of priority debts not paid
22 in full -- despite plan's provision that such claims would be paid
23 in full -- when priority claimant delayed filing claim until
24 debtor had almost completed her plan payments); United States v.
25 Vlavianos (In re Vlavianos), 71 B.R. 789, 793 (Bankr. W.D. Va.
26 1986) (Debtor's chapter 13 provided for full payment of priority
27 tax claims; however, IRS did not receive full payment "simply
28 because it did not amend its claim to assert a higher amount until

1 after all payments under the debtor's plan had been completed. . .
2 . Since the only prerequisite under § 1328(a) for the discharge of
3 a debt is that the plan provide for the payment of the debt, not
4 that the debt actually be paid, the court concludes that the
5 balance of IRS's claim . . . is dischargeable.").

6 We agree with Hanson that an administrative claim "provided
7 for" in a chapter 13 plan is discharged upon entry of discharge.
8 Attorney's administrative claim was "provided for" under the
9 second modified plan and Debtors' personal liability for that
10 claim is therefore discharged under section 1328(a).

11
12 **V.
CONCLUSION**

13 For the foregoing reasons, we AFFIRM.
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