

MAY 19 2006

NOT FOR PUBLICATION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 Nos.	CC-04-1621-MoBK
	)		CC-05-1118-MoBK
BASIL N. SPIRTOS,	)		
	)	Bk. No.	LA 87-10752-AA
Debtor.	)	Adv. No.	AD 02-02726-AA
_____	)		
THELMA V. SPIRTOS,	)		
	)		
Appellant,	)		
v.	)		
	)		
DAVID L. RAY; SALTZBURG, RAY	)		
& BERGMAN, LLP; SHALANT LAW	)		
OFFICE; JOSEPH L. SHALANT;	)		
IRENE MORENO,	)		
	)		
Appellees.	)		
_____	)		

**MEMORANDUM**<sup>1</sup>

Argued and Submitted on February 24, 2006  
at Pasadena, California

Filed - May 19, 2006

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

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: MONTALI, BRANDT and KLEIN, Bankruptcy Judges.

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

1           Thelma Spirtos ("Thelma") appeals (BAP No. CC-04-1621) from  
2 the bankruptcy court's orders approving the proposed settlement of  
3 a claim by the bankruptcy estate of Dr. Basil N. Spirtos  
4 ("Basil"), Thelma's deceased former husband, against the estate's  
5 Chapter 7 trustee David L. Ray, Esq. ("Ray") and his law firm,  
6 Saltzburg, Ray & Bergman, LLP (collectively, the "Ray  
7 Defendants"). Thelma filed a claim against Basil for  
8 approximately \$2.3 million in support and other obligations and  
9 she objects that the proposed settlement amount of \$150,000 plus  
10 waivers of claims by the Ray Defendants is too low. She alleges  
11 that if the action had been brought to trial the estate would have  
12 prevailed, possible recoveries of \$800,000.00 or more could have  
13 been obtained easily out of insurance, going to trial would not  
14 have exposed the estate to any risk because the action was being  
15 prosecuted on a contingency basis by Joseph Shalant, Esq.  
16 ("Shalant"), and the settlement is not fair and equitable because  
17 Shalant is supposedly the only party to benefit and he had  
18 undisclosed conflicts of interest and was later disbarred. Thelma  
19 also appeals (BAP No. CC-05-1118) from an order awarding  
20 \$60,000.00 in fees and \$16,605.84 in costs to Shalant.

21           We AFFIRM the bankruptcy court's orders. By separate orders  
22 we also GRANT sanctions motions by the Ray Defendants and Moreno  
23 against Thelma and her attorney, jointly and severally, for  
24 frivolous arguments in these appeals.<sup>2</sup>

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26           <sup>2</sup> Unless otherwise indicated, all chapter, section and  
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,  
28 as enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
(continued...)

1 **I. FACTS**

2 Basil was an obstetrician/gynecologist. He was sued by Irene  
3 Moreno ("Moreno"), as guardian ad litem for her son, Raymond  
4 Guerena. In April of 1983 Moreno obtained a malpractice judgment  
5 against Basil in the principal amount of approximately  
6 \$826,000.00. After some partial distributions, Moreno's claim  
7 against Basil's bankruptcy estate was allowed in the amount of  
8 \$663,485.15.

9 Thelma and Basil were married in 1954. Thelma filed for  
10 divorce in December of 1982. Thelma and Basil entered into a  
11 Marital Settlement Agreement on July 1, 1983, under which Thelma  
12 agreed to assume one-half of the Moreno judgment while receiving a  
13 large portion of the former community property. That agreement  
14 was incorporated into a final judgment of dissolution entered in  
15 early 1984. On June 28, 1984, Thelma filed a voluntary Chapter 11  
16 petition (Case No. LA 84-13757-AA). Her case was converted to  
17 Chapter 7 on July 16, 2001.

18 Basil filed his voluntary Chapter 11 petition on May 28,  
19 1987. His case was converted to Chapter 7 in February, 1989.

20 A. The Basil Settlement

21 Ray was appointed as Chapter 7 trustee in Basil's case and  
22 with the bankruptcy court's approval he hired his law firm as the  
23 estate's attorneys. Ray and Basil disputed whether the assets of  
24 Basil's pension and profit sharing plan were available to pay  
25 creditors. The bankruptcy court ruled for Basil. Ray accepted

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27 <sup>2</sup>(...continued)  
28 Pub. L. 109-8, 119 Stat. 23, because the case from which this  
appeal arises was filed before its effective date (generally  
October 17, 2005).

1 that ruling but Moreno filed an appeal and eventually obtained a  
2 ruling that the assets were neither excluded from Basil's  
3 bankruptcy estate nor exempt. See generally In re Spirtos, 992  
4 F.2d 1004, 1007 (9th Cir. 1993) (vacating and remanding for  
5 determination whether assets were included in estate). Meanwhile  
6 Basil had dissipated the assets.

7 Ray filed nine adversary proceedings to retrieve the assets.  
8 Ray determined that Basil had no real property and few other  
9 assets except future income and one of two medical corporations he  
10 owned in Lake Arrowhead, California, which Ray estimated to have a  
11 net worth of \$125,445. Ray entered into a settlement with Basil  
12 (the "Basil Settlement") which provides in part:

13 3. Agreement

14 a. [Basil] agrees to pay the sum of \$100,000  
15 ("Settlement Sum") . . . . Counsel for [Basil] will  
16 deliver to counsel for the Trustee a check for  
\$10,000 as a down payment . . . .

17 b. . . . [Basil] will pay to the Trustee the  
18 remaining balance of \$90,000 over three years payable  
the first of each month in installments of \$2500.

19 c. The Settlement Sum shall be secured by a lien  
20 on [Basil's] medical practice located in Lake  
21 Arrowhead, California. [Basil] will cooperate in the  
22 execution of all documents deemed necessary by the  
23 Trustee to perfect such security interest.

24 d. [Basil] shall execute a stipulated judgment in  
25 the amount of \$500,000 which may be entered by the  
26 Trustee after giving five days written notice to  
27 [Basil] that he is in default under the terms of  
28 [this settlement agreement]. [Basil] may cure  
without penalty any default of which he has been  
given notice during the five day grace period. . . .

29 e. [Basil's] obligations hereunder shall be  
30 deemed nondischargeable pursuant to the provisions of  
31 11 U.S.C. § 523(a)(4) and any other applicable  
32 provision of the Bankruptcy Code. [Emphasis added.]

33 The Basil Settlement was approved by the bankruptcy court in

1 September of 1994 over Moreno's and Thelma's objections. Ray  
2 apparently did not perfect a security interest in Basil's two  
3 medical corporations nor did he obtain an executed stipulated  
4 judgment from Basil, although Ray has not explicitly conceded  
5 these omissions.

6 B. Defaults under the Basil Settlement

7 Basil paid the initial \$10,000.00 and irregularly made  
8 payments thereafter. On December 5, 1995, Ray's attorneys wrote  
9 to Basil demanding \$5,000.00 in arrears. Shortly afterwards  
10 Moreno advised Ray that both of Basil's medical corporations were  
11 in Chapter 11 bankruptcy. The bankruptcies were precipitated by  
12 Thelma's levy on the corporations' bank accounts based on a writ  
13 of execution for unpaid support obligations. Thelma asserted that  
14 the corporations were Basil's alter egos. On April 2, 1996,  
15 Moreno wrote Ray requesting that he declare Basil in default and  
16 enter the \$500,000.00 stipulated judgment.

17 Ray did not seek to enter the \$500,000.00 judgment. He  
18 attempted to justify this later, in a declaration filed in  
19 Moreno's action against him and his attorneys (Adv. Proc. No.  
20 AD 02-2726-AA), by stating that Basil was seeking to have Thelma's  
21 levies lifted and:

22 Based on [Basil's] promise to continue to make  
23 payments once the levy on his accounts was lifted,  
24 and the fact that he cured the prior delinquency in  
25 June 1995, I reasonably believed [Basil] would again  
26 bring his payments current. Based on the information  
27 regarding the levy on his accounts and my counsel's  
28 prior investigation into the extent of his assets, I  
determined it was not prudent to force the bankruptcy  
estate to incur expenses by seeking the entry of the  
stipulated judgment because to my knowledge [Basil]  
did not have the means by which to satisfy a \$500,000  
judgment. Further, I believed by entering the  
stipulated judgment the estate would lose the ability  
to obtain the monthly payments from [Basil] once the

1           levy against his accounts was lifted.

2           Moreno later alleged that in fact Ray did not seek  
3 enforcement because he had never obtained Basil's signature on the  
4 stipulated \$500,000.00 judgment and had not perfected the security  
5 interests contemplated by the Basil Settlement. The Ray  
6 Defendants responded, among other things, that Moreno's claims are  
7 time barred and barred by claim or issue preclusion because she  
8 had raised the same objections in response to their fee  
9 applications, which were granted.

10           Probably none of this would matter if Basil turned out to  
11 have no assets, which appeared to be the situation when Basil died  
12 intestate on May 9, 1996. At that time he had paid only  
13 \$37,500.00 of his liability under the Basil Settlement.

14           C. Basil's probate

15           In January, 1997, Thelma initiated proceedings for Basil's  
16 probate estate in the Superior Court, San Bernadino, California  
17 (Case No. SPR-022211), apparently because she suspected that Basil  
18 had hidden assets. Basil's son Nicholas was later appointed as  
19 administrator. Neither Moreno nor Thelma filed timely, valid  
20 claims in Basil's probate proceedings.<sup>3</sup> Ray learned of Basil's  
21 probate estate in March of 2000, and in July of that year he filed  
22 a proof of claim for \$62,500.00, the balance of the \$100,000.00  
23 Settlement Sum under the Basil Settlement. Ray did not send a  
24 default notice to Basil's executor nor did he claim any  
25 entitlement to have a \$500,000.00 stipulated judgment entered.

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27           <sup>3</sup> Thelma filed a proof of claim for \$841,105.00 in Basil's  
28 probate proceedings but her claim was eventually disallowed as  
untimely and, alternatively, as invalid because she did not prove  
that it was served on the probate administrator.

1           The excerpts of record do not reflect that Thelma found any  
2 hidden assets. Nevertheless, Basil's probate estate received an  
3 unexpected windfall of \$969,261.75 from the liquidation of a  
4 mutual insurance company of which Basil was a member. Moreno's  
5 Complaint against the Ray Defendants explains:

6           27. . . . [Basil] in 1993 (about three years  
7 before he died) submitted an application for medical  
8 malpractice insurance with the Professional Mutual  
9 Insurance Company Risk Retention Group ("RRG") [.]  
10 [Basil] then paid premiums for two years to RRG for  
11 his policy of medical malpractice insurance. In  
12 1993, [Basil] paid a total of \$19,250 in premiums to  
RRG. By virtue of these payments, [Basil] became a  
stockholder of RRG (a mutual insurance company). In  
1994, the policy was renewed and [Basil] paid a total  
of \$32,340 in premiums to RRG. On May 8, 1994, the  
RRG policy of insurance was cancelled because RRG was  
in liquidation.

13           28. . . . [I]n October, 1999, Nicholas Spirtos  
14 learned that there were some RRG funds in the  
15 possession of a receiver in Missouri and that [Basil]  
16 may be entitled to some of those funds because he was  
17 a RRG stockholder. In December, 1999, Nicholas  
18 Spirtos contacted the RRG receiver and discovered  
19 that [Basil] would be entitled to 7.75% of the class  
20 distribution fund. In March, 2001, Nicholas . . .  
21 received [Basil's] share of those funds in the sum of  
22 \$969,261.75. . . .

23           29. . . . [I]n early November, 2001, [the Ray  
24 Defendants] learned that [Basil's] probate estate had  
25 obtained funds totalling almost \$1 million.  
26 Defendant Ray . . . sent a notice of [Basil's]  
27 default on January 17, 2002, to Brian Hartnell,  
28 Nicholas Spirtos' lawyer. A few days later, on  
January 22, 2002, Mr. Hartnell filed an Ex Parte  
Petition for an Order Instructing the Administrator  
to pay defendant Ray \$62,500 with the San Bernadino  
Superior Court.<sup>4</sup> This petition was granted and  
Nicholas Spirtos shortly thereafter sent defendant  
Ray \$62,500.

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27           <sup>4</sup> In response to the petition for instructions in the  
28 probate proceedings Thelma filed a notice of removal to the  
bankruptcy court, but Nicholas Spirtos filed a motion to remand  
back to the probate court which the bankruptcy court granted on  
March 13, 2002.

1           Only four other claims were filed against Basil's probate  
2 estate, besides Ray's claim on behalf of Basil's bankruptcy estate  
3 and Thelma's disallowed claim. Two of those additional claims  
4 were untimely (a claim for \$38,334.56 by Kalisch, Cotugno and Rust  
5 and a claim for \$9,300 by James S. Roundtree). The remaining two  
6 claims were paid in full just like Ray's \$62,500 claim (\$13,729.51  
7 to the State of California and \$6,750.00 to Lorene and Jeff  
8 Berry), and the balance of the \$969,261.75 windfall apparently was  
9 distributed to Basil's heirs (although the excerpts of record are  
10 not entirely clear on this point).

11           D. Moreno's Complaint and Shalant's contingency fee

12           On November 12, 2002, Moreno filed her Complaint against the  
13 Ray Defendants for negligence and breach of fiduciary duty based  
14 on the above facts. She later filed a motion for authorization to  
15 represent the creditors of Basil's bankruptcy estate against the  
16 Ray Defendants. The motion includes a request to appoint Shalant  
17 as special litigation counsel to litigate the bankruptcy estate's  
18 claim against the Ray Defendants for a 40% contingency fee and  
19 with no reimbursement of costs unless a recovery is obtained. The  
20 motion was supplemented a few days later by Shalant's declaration  
21 setting forth "the economic terms of the proposed representation"  
22 by Shalant. The motion was granted.

23           Moreno asserted that as a "direct and proximate result" of  
24 their omissions the Ray Defendants "failed to obtain the \$500,000  
25 stipulated judgment, less the \$37,500 that had been paid," for a  
26 net judgment of \$462,500 which they allegedly could have obtained  
27 as early as December 15, 1995. Applying an interest rate of 10%  
28 per annum Moreno calculated that by the time Basil's probate



1 estate received the windfall, in November of 2001, the total  
2 recovery could have been \$734,450, rather than the \$62,500  
3 actually received, for net damages of \$671,950. Moreno asserted  
4 that interest continued to accrue at 10% per annum, resulting in  
5 damages of about \$830,000 as of mid-2004. As additional damages  
6 Moreno asserted that if the Ray Defendants had acted expeditiously  
7 then Ray's law firm would not have charged \$21,000 in legal fees  
8 and costs for resisting Moreno's attempts to remove Ray as  
9 Chapter 7 trustee and for responding to Thelma's complaints to the  
10 United States Trustee.

11 E. The Ray Defendants' motion for summary judgment

12 In July of 2003 the Ray Defendants filed a motion for summary  
13 judgment (the "Ray MSJ") asserting that Ray's actions "were a  
14 proper exercise of his discretionary authority" and alternatively  
15 that Moreno's claims are "time barred" or "barred by the doctrine  
16 of res judicata." Moreno filed an opposition, which is not in the  
17 excerpts of record, and the Ray Defendants filed a reply.<sup>5</sup>

18 On the time bar issues, the parties disputed when Moreno was  
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20 <sup>5</sup> The Ray Defendants have filed a Motion to Enlarge the  
21 Record on Appeal. That motion (the "Enlargement Motion") does not  
22 include Moreno's opposition to the Ray MSJ. Instead it includes a  
23 Memorandum of Contentions of Fact and Law filed by Moreno in June  
24 of 2004 (the "Moreno Memorandum") and one other document. Thelma  
25 has not opposed this motion, but we questioned counsel for the Ray  
26 Defendants at oral argument and he admitted that these documents  
27 were not brought to the bankruptcy court's attention in connection  
28 with the Ray Settlement. Ordinarily we would not consider such  
documents. Nevertheless, unlike the bankruptcy court we are not  
familiar with Moreno's arguments against the Ray Defendants, and  
without understanding the competing arguments we might be hampered  
in assessing the merits of the Ray Settlement. Rather than reject  
Thelma's arguments based on inadequacy of the record (see In re  
Anderson, 69 B.R. 105, 109 (9th Cir. BAP 1986)) we will treat the  
Ray Defendants' reference to the Moreno Memorandum as a  
supplemental recitation of uncontested background facts. In all  
other respects we deny the Enlargement Motion.

1 damaged, when she knew or should have known of the relevant facts,  
2 and whether the Ray Defendants concealed the facts. As for res  
3 judicata, the Ray Defendants did not distinguish between claim  
4 preclusion and issue preclusion but they argued that Moreno's  
5 claims are precluded because of the bankruptcy court's earlier  
6 approval of Ray's final accounting and the Ray Defendants' fee  
7 applications over Moreno's objections. Those earlier objections  
8 were similar to the claims in her Complaint except that Moreno  
9 claims she did not know at that time, and believes now, that Ray  
10 never obtained Basil's signature on a stipulated \$500,000.00  
11 judgment. As for Ray's alleged discretion Moreno argued that Ray  
12 had an obligation under the Basil Settlement to follow through  
13 with perfecting the security interests and obtaining Basil's  
14 signature on the \$500,000.00 stipulated judgment because the  
15 bankruptcy court's approval of the settlement was predicated on  
16 these things, collection efforts would only have been enhanced by  
17 pursuing all remedies, and although Basil might have appeared to  
18 have few assets he had earning power.

19       The Ray Defendants replied that Basil's apparent lack of  
20 funds made it within Ray's discretion to determine that it was  
21 uneconomic to pursue him. Also, "Moreno cannot show . . . that  
22 'but for' Ray's alleged failure to secure a security agreement she  
23 would have realized additional funds" because Basil's medical  
24 corporations "filed for bankruptcy prior to April 1996."  
25 According to the Ray Defendants, "[t]he security interest that was  
26 to be granted under the [Basil Settlement] was in the stock of the  
27 medical corporation[s]," not their assets, so there would have  
28 been no secured claim in the corporations' bankruptcy cases. The

1 excerpts of record do show a concession by Moreno that the Basil  
2 Settlement reasonably can be read this way,<sup>6</sup> although she alleged,  
3 based on a sale of Basil's medical corporations to San Bernardino  
4 Mountains Community Hospital, that in early 1996 the corporations  
5 had assets worth at least \$540,770.16 as against liabilities of  
6 \$143,988.00.

7 On October 3, 2003, the bankruptcy court entered an order  
8 denying the Ray MSJ (the "MSJ Order"). The order states:

9 There are material facts in dispute including:

10 a) the fact of whether Mr. Ray ever obtained a  
11 stipulated judgment from the debtor;

12 b) whether Mr. Ray had a security interest in the  
13 liens or assets of the Debtor's medical practice;

14 c) when [Moreno] knew or should have known of  
15 material facts essential to establish the elements of  
16 her causes of action for negligence and breach of  
17 fiduciary duty; and

18 d) when [Moreno] sustained the actual damage;

19 The court does not find at this time that the  
20 action is barred by the statute of limitations  
21 because it has not been shown that there is any  
22 applicable statute of limitations or what statute the  
23 9th Circuit Court of Appeals would invoke in this  
24 particular case.

25 The Court also finds that [Moreno] has standing to  
26 bring this case.

27 As far as the arguments concerning res judicata,  
28 the Court is uncertain based on the present record  
what [Moreno] knew or what [her] lawyers knew and  
when they knew it. Because the Court cannot make a  
clear finding as to this issue, the Court cannot make  
a finding of res judicata regarding the Court's

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26 <sup>6</sup> The Moreno Memorandum made this concession as part of an  
27 argument that Moreno's claims are not time barred. Moreno claimed  
28 that she reasonably assumed that the security interests were in  
the stock of the corporations rather than their assets, and that  
explained why Ray did not collect anything from the corporations'  
bankruptcy estates.

1 approval of a prior fee application of [Ray's law  
2 firm].

3 In December of 2003 the bankruptcy court entered an order  
4 that the Ray Defendants are entitled to a trial by jury.<sup>7</sup> Moreno  
5 and the Ray Defendants prepared for trial but ultimately reached a  
6 settlement.

7 F. The Ray Settlement

8 In October of 2004 Moreno and the Ray Defendants filed a  
9 joint Motion to Approve Compromise (the "Ray Settlement Motion").  
10 In exchange for a payment of \$150,000.00 by the Ray Defendants and  
11 their agreement not make any claim for fees and costs related to  
12 the defense of the adversary proceeding or the administration of  
13 the settlement funds, they would obtain a full satisfaction,  
14 release, and dismissal of the adversary proceeding with prejudice  
15 (the "Ray Settlement").

16 The Ray Settlement Motion argues that (a) the complexity and  
17 hazards of litigation weigh in favor of approval of the settlement  
18 because among other things Chapter 7 trustees are "given a  
19 tremendous amount of discretion" and Ray and his firm have "viable  
20 defenses" left for trial by the MSJ Order; (b) the settlement  
21 provides "\$150,000 which can be used to satisfy the claims of  
22 creditors"; (c) a trial would involve substantial expenses for  
23 "expert fees, attorneys' fees, jury fees and other trial costs";  
24 (d) the time required for a trial favors approval of the  
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26 <sup>7</sup> That order also transferred the adversary proceeding to  
27 the federal district court (C.D. Cal., Civ. Case No. CV04-185 SJO  
28 [SSx]). That transfer did not deprive the bankruptcy court of  
jurisdiction to approve the settlement of the adversary proceeding  
because the settlement occurred in the bankruptcy case, not the  
adversary proceeding.

1 settlement; and (e) "[w]hile collectability is not necessarily an  
2 issue because of the [Ray] [D]efendants' insurance coverage, the  
3 policy does provide that defense costs reduces [sic] the amount  
4 available for indemnity payments" and "the Estate would have to  
5 engage in costly collection efforts to collect any judgment in  
6 excess of policy limits."

7       Thelma filed an objection to the Ray Settlement Motion. She  
8 generally repeats her arguments on this appeal and we address them  
9 in the Discussion section below.

10       The bankruptcy court heard oral arguments at a hearing on  
11 October 27, 2004, and entered substantially identical orders in  
12 Basil's and Thelma's bankruptcy cases granting the Ray Settlement  
13 Motion and approving the Ray Settlement on November 30, 2004 (the  
14 "Settlement Orders"). On December 10, 2004, Thelma filed a notice  
15 of appeal from those orders.

16       G. The Fee Order

17       Meanwhile in October of 2004 Moreno filed a Motion for an  
18 Order Authorizing Payment of Attorney's Fees and Costs from the  
19 Settlement Proceeds and for the Pro Rata Distribution of the Net  
20 Settlement Proceeds to Unsecured Creditors (the "Fee Motion").  
21 The Fee Motion includes an extensive review of the work performed  
22 and the history of the adversary proceeding, and it argues that  
23 the fees are commensurate with the time, effort, skill, and  
24 dedication involved and, in any event, Shalant is on a fixed 40%  
25 contingency that must be approved unless there are specific  
26 findings that the compensation terms were improvident in light of  
27 unanticipated events.

28       Thelma filed an opposition to the Fee Motion but it is not in

1 the excerpts of record, nor is a transcript of the hearing on the  
2 Fee Motion on November 17, 2004.<sup>8</sup> The bankruptcy court entered an  
3 order on December 8, 2004, approving Shalant's fees of \$60,000.00  
4 and costs of \$16,605.84 while disallowing three items: "sanctions  
5 of \$983.50 which had been previously assessed," "\$1,200 paid to  
6 former expert witness Seymour Abrahams," and, "without prejudice,"  
7 "\$865 for incurred mileage and parking expenses" (the "Fee  
8 Order").

9 H. Thelma's appeals

10 On December 20, 2004, Thelma filed an amended notice of  
11 appeal incorporating the Settlement Orders and the Fee Order. On  
12 March 14, 2005, a member of this panel issued an order directing  
13 Thelma to file a separate notice of appeal with respect to the Fee  
14 Order within ten days. Thelma timely filed a separate notice.

15 Thelma moved for consolidation of these appeals. That motion  
16 was denied by a member of this panel. Thelma nevertheless filed a  
17 consolidated brief relating to both appeals. She has also missed  
18 deadlines and as noted above she did not file complete excerpts of  
19 the record. The Ray Defendants filed a motion to dismiss in which  
20 Moreno joined. That motion was denied but as a sanction for  
21 Thelma's "repeated noncompliance with BAP orders and procedural  
22 deadlines" a member of this panel issued an order on October 25,  
23 2005, that Thelma "will not be permitted to file a reply brief"  
24 citing In re Turner, 186 B.R. 108, 113 (9th Cir. BAP 1995).  
25 (Emphasis in original.) The same order permitted appellees to  
26

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27  
28 <sup>8</sup> In BAP No. CC-05-1118 Thelma's lack of adequate response  
to an order to complete the record resulted in an order deeming  
the record complete despite the lack of a transcript.

1 file consolidated responsive briefs. Both the Ray Defendants and  
2 Moreno have filed motions under Fed. R. Bankr. P. 8020 for  
3 sanctions for a frivolous appeal.

## 4 **II. ISSUES**

5 A. Does Thelma have standing to appeal from the Settlement  
6 Orders or the Fee Order?

7 B. If Thelma had standing, has she established error?

8 C. Are appellees entitled to sanctions?

## 9 **III. STANDARDS OF REVIEW**

10 We review the bankruptcy court's decision to approve a  
11 settlement for abuse of discretion. In re A&C Properties, 784  
12 F.2d 1377, 1381 (9th Cir. 1986). We do not disturb a bankruptcy  
13 court's award of professional fees unless the court abused its  
14 discretion or erroneously applied the law. In re Garcia, 335 B.R.  
15 717, 723 (9th Cir. BAP 2005).

16 We review the bankruptcy court's factual findings for clear  
17 error. "When there are two permissible views of the evidence, the  
18 trial judge's choice between them cannot be clearly erroneous."  
19 In re Baldwin Bldrs., 232 B.R. 406, 410 (9th Cir. BAP 1999)  
20 (citations omitted).

## 21 **IV. DISCUSSION**

### 22 A. Thelma lacks standing

23 We have noted that Thelma is a debtor in her own Chapter 7  
24 bankruptcy case (LA 84-13757-AA). Thelma offers no evidence that  
25 she has been authorized to pursue the claim against Basil's  
26 estate. To the contrary, her Chapter 7 trustee R. Todd Neilson  
27 ("Neilson") filed a notice of non-opposition to the Ray Settlement  
28 Motion. As the Ray Defendants argue, these facts suggest that

1 Thelma lacks standing. That was not the basis of the bankruptcy  
2 court's orders, but standing is jurisdictional so it can be raised  
3 by the Ray Defendants on appeal and we must also consider it sua  
4 sponte. In re Lucas Dallas, Inc., 185 B.R. 801, 804 (9th Cir. BAP  
5 1995).

6 Ordinarily a Chapter 7 debtor lacks standing to appeal orders  
7 potentially affecting the size of her bankruptcy estate, such as  
8 the Settlement Orders' resolution of the claim against Basil or  
9 the Fee Order's allowance of Shalant's fees and costs. The debtor  
10 usually has no pecuniary interest in amount of funds that might  
11 come into her estate, and the disposition of estate assets does  
12 not increase her burdens or detrimentally affect her rights. See  
13 Matter of Fondiller, 707 F.2d 441, 442 (9th Cir. 1983) (to have  
14 appellate standing under "person aggrieved" test, Chapter 7 debtor  
15 must be "directly and adversely affected pecuniarily by the order  
16 of the bankruptcy court"). See also Lujan v. Defenders of  
17 Wildlife, 504 U.S. 555, 560-61 (1992) (Constitutional standing  
18 requires non-conjectural injury in fact).

19 There is an exception if a Chapter 7 debtor can show a  
20 sufficient likelihood of a pecuniary interest such as  
21 (1) reduction of nondischargeable debt, (2) an ownership interest  
22 in the asset at issue, or (3) a surplus estate. See, e.g., In re  
23 Blue Mountain Inv., Ltd., 186 B.R. 508, 512 (D. Kan. 1995) (after  
24 conversion Chapter 7 debtor had standing to appeal order  
25 dismissing adversary proceeding where debtor was at least  
26 potentially solvent).

27 The first of these three examples -- reduction of  
28 nondischargeable debt -- is inapplicable. Thelma has received her



1 discharge and Moreno does not assert that her debt is  
2 nondischargeable.

3       The second example -- an ownership interest in the asset at  
4 issue -- is also inapplicable. Thelma's estate, rather than  
5 Thelma, owns the claim against Basil's bankruptcy estate. The  
6 Ninth Circuit has recently held, in one of Thelma's other appeals,  
7 that the Bankruptcy Code "endows the bankruptcy trustee with the  
8 exclusive right to sue on behalf of the estate." Estate of Thelma  
9 V. Spirtos et al. v. Superior Court, \_\_\_ F.3d \_\_\_ (9th Cir. 2006)  
10 (text accompanying n. 3). Thelma has argued on a previous appeal  
11 before us that under her Modified Second Amended Disclosure  
12 Statement and Plan Of Reorganization (the "Plan"), which was  
13 confirmed before her case was converted to Chapter 7, the claim  
14 against Basil was returned to her. We rejected that argument  
15 because Thelma pledged the claim to support her Plan and she is  
16 judicially and equitably estopped to assert that she owns the  
17 claim. In re Thelma Spirtos (BAP No. CC-02-1243-KMaP). Our  
18 decision is final because Thelma's appeal to the Ninth Circuit  
19 (9th Cir. No. 03-55753) was dismissed for failure to pay fees or  
20 file a motion to proceed in forma pauperis. We grant the Ray  
21 Defendants' requests that we take judicial notice of these  
22 matters.

23       Thelma's counsel has attempted to revive a variation of the  
24 same argument. He alleges that Thelma only pledged \$350,000.00 in  
25 support of her Plan and kept the rest for herself:

26               Ms. Jackson [the Ray Defendants' attorney] has  
27 said that the claim of Thelma Spirtos doesn't belong  
28 to her. I'd like to remind her and the Court that  
the [Plan] sets forth \$350,000 of that, of her over  
\$2,000,000 claim, to her estate. So anything in  
excess of the \$350,000 belongs to her, Thelma. So

1           that's clearly inaccurate, because she's got a claim  
2           for over \$2,000,000.

3 Transcript Oct. 27, 2004, p. 13:19-25.

4           Our prior decision disposes of this argument. What Thelma  
5 pledged was not just a portion of the claim against Basil but all  
6 of it -- or, as we previously stated, simply "the asset (her claim  
7 against Basil Spirtos)." (Memorandum, BAP No. CC-02-1243, p. 3.)  
8 She cannot collaterally attack that decision by arguing now that  
9 she only pledged part of the asset. Even if our decision were not  
10 the law of the case, which it is, we would apply the same  
11 reasoning to Thelma's latest version of her argument. Thelma's  
12 Plan pledges her "[c]laim against Basil Spirtos, M.D. bankruptcy  
13 estate" and later attributes a value of "\$351,527" to that  
14 claim, but says nothing about limiting her pledge to that  
15 estimated amount. Thelma's Plan pp. 9-20 (quoted in Memorandum,  
16 BAP No. CC-02-1243 at p. 5, n. 2). Thelma is judicially and  
17 equitably estopped to treat her apparent pledge of the entire  
18 asset as actually pledging only part of the asset.

19           Thelma argues that much of what she is owed by Basil consists  
20 of child support, and she claims without citation that arrearages  
21 in child support are not assets of her bankruptcy estate. She  
22 claims that our prior decision noted that this issue was yet to be  
23 determined. (BAP No. CC-02-1243 p.10 n.6.) What we actually  
24 stated was that we did not need to address this argument. We  
25 added that Thelma's argument "should have been raised to the court  
26 in the Basil Spirtos case" and no evidence was presented to show  
27 that Thelma "claimed an exemption" in all or part of her claim  
28 against Basil. (Id.) Thelma still has not presented such

1 evidence, she waived this argument by not presenting it to the  
2 bankruptcy court in this case, and at this late stage she is also  
3 estopped to argue this issue. See In re Assoc. Vintage Group,  
4 Inc., 283 B.R. 549, 566 (9th Cir. BAP 2002).

5 On this appeal Thelma's brief asserts the third and final  
6 example of how she might have standing -- a solvent estate.  
7 Although Thelma says nothing about what assets remain in her  
8 bankruptcy estate she does allege that there are "no impaired  
9 creditors in the Thelma case," that "her counsel and daughter,  
10 Michelle Spirtos, presented conclusive evidence to this court  
11 [sic] on October 6, 2004 in Thelma's case that the only claimant  
12 at the time of the appointment of [Neilson, successor to Ray as  
13 the Chapter 7 trustee to Thelma's estate,] was Shalant/Moreno,"  
14 and that there "were, and continue to be, funds sufficient to pay  
15 that claim, and end Thelma's case." (Emphasis added.)

16 Thelma has not presented us with any copies of the evidence  
17 that she says she presented to "this court" on October 6, 2004  
18 (apparently Thelma means the bankruptcy court).<sup>9</sup> Contrary to her  
19 representations there is substantial evidence that liabilities  
20 exceed assets. Liabilities are significant because: (1) Moreno  
21 has an allowed claim of \$663,485.15 in Basil's case, (2) Thelma's  
22 estate is liable for at least half of the debt to Moreno (In re  
23 Spirtos, 154 B.R. 550, 556 (9th Cir. BAP 1993), aff'd, 56 F.3d

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24  
25 <sup>9</sup> We are not aware of any presentation of evidence to the  
26 BAP on October 6, 2004. The BAP dockets for Thelma's various  
27 appeals in 2003 and 2004 do not reflect anything filed or heard on  
28 that date (BAP Nos. CC-03-1010, CC-03-1518, CC-03-1634, CC-04-  
1087, CC-04-1228, CC-04-1417, CC-04-1545, CC-04-1578, CC-04-1588,  
and CC-04-1621). The words "this court" appear to have been  
copied from Thelma's objection to the Ray Settlement Motion,  
p. 2:23-24.

1 1007 (9th Cir. 1995)), (3) Thelma's objections to Moreno's claims  
2 in her own and Basil's bankruptcy cases have been overruled (In re  
3 Spirtos, 221 F.3d 1079, 1080 n. 1 (9th Cir. 2000)),  
4 (4) notwithstanding Thelma's assertion that there is only one  
5 claim in her estate, her brief acknowledges that Neilson's counsel  
6 incurred fees of \$404,000.00 (allegedly in violation of an  
7 agreement to dismiss her case), (5) if Neilson's counsel incurred  
8 fees then it is likely he did as well, and (6) Thelma's estate  
9 would have to pay post-petition interest on all claims before  
10 Thelma received any distribution, and her case was filed a very  
11 long time ago. See 11 U.S.C. § 726(a)(5) and (6). As for assets,  
12 Thelma relies on the value of the adversary proceeding against the  
13 Ray Defendants, which she estimates at up to \$830,000, but after  
14 deducting 40% for contingency fees, plus litigation expenses, any  
15 other costs of administration, and distributions to other  
16 creditors of Basil's estate including the portion of Moreno's  
17 claim for which Basil and not Thelma is liable, there is no  
18 realistic possibility that the remaining funds would be enough to  
19 make Thelma's estate solvent.<sup>10</sup>

20 For all of these reasons Thelma has not met her burden to  
21 establish a concrete, particularized, and actual or imminent  
22

---

23 <sup>10</sup> A letter from Thelma's counsel dated May 4, 2006, has  
24 been filed. It alleges (p.6) that "there is approximately \$400k  
25 in Thelma's estate and the Moreno Claim is around \$300k due to  
26 offsets from payments received in Basil's estate" and (p.7) that  
27 "the amount pledged in Thelma's plan" is limited to \$351,000.  
There is still no evidence to support Thelma's factual allegations  
about the funds in her estate and the amount of Moreno's claim,  
but even accepting them as true they do not change the above  
analysis. Thelma has not established that she has standing.

28 We note that a letter has also been filed from the Ray  
Defendants' counsel dated May 12, 2006. The letter does not alter  
our analysis.

1 injury from the relief sought in the Ray Settlement Motion and the  
2 Fee Motion, nor has she shown a pecuniary interest in the  
3 bankruptcy court's disposition of those motions. She lacks  
4 standing. See Churchill County v. Babbitt, 150 F.3d 1072, 1077-  
5 1078 (9th Cir. 1998) (to support standing, injury must be concrete  
6 and particularized and actual or imminent, not conjectural or  
7 hypothetical), amended, 158 F.3d 491.

8 B. Alternatively, even if Thelma had standing she has not  
9 established any error by the bankruptcy court

10 1. The Fee Order

11 Thelma has provided neither her objection to the Fee Motion  
12 nor the transcript of the hearing on that motion. We will not  
13 consider arguments for which the excerpts of record are  
14 inadequate. Anderson, 69 B.R. at 109.

15 If we were to consider the merits of the Fee Order, we would  
16 affirm. Shalant was retained with the bankruptcy court's approval  
17 on a contingency basis, with contingency fees set at 40%. As his  
18 Fee Motion points out, it is an abuse of discretion to disregard  
19 an approved contingency fee agreement unless there are specific  
20 findings that the terms were improvident in light of developments  
21 not capable of being anticipated at the time of the fixing of the  
22 terms and conditions of employment. 11 U.S.C. § 329(a). See In  
23 re Reimers, 972 F.2d 1127, 1128-29 (9th Cir. 1992).

24 Thelma alleges that Shalant had undisclosed conflicts of  
25 interest, but her only discernable grounds for alleging such  
26 conflicts are unproven claims of personal animosity against Thelma  
27 and her family and speculation that Shalant knew of his "impending  
28 disbarment" and that this would prevent him from actually trying

1 the adversary proceeding against the Ray Defendants. These  
2 arguments do not appear to have been raised in the bankruptcy  
3 court in any discernable fashion. Moreover, the excerpts of  
4 record and Moreno's brief on this appeal both suggest that the  
5 sanctions proposed by the State Bar of California were only  
6 recommendations until May, 2005, when Shalant was placed on  
7 inactive status. Thelma cites no authority that the future  
8 possibility of sanctions creates a conflict of interest at the  
9 time of employment.<sup>11</sup>

## 10 2. The Settlement Orders

11 Regarding the Settlement Orders we have noted some gaps in  
12 the excerpts of record, but those gaps are not so great that they  
13 preclude our review. We therefore turn to the applicable legal  
14 standards.

15 The party proposing a settlement has the burden of persuading  
16 the bankruptcy court that it is fair and equitable and should be  
17 approved. A&C Properties, 784 F.2d at 1381 (citation omitted).  
18 Ultimately, though, the bankruptcy court's role in approving any  
19 settlement under Rule 9019 is limited, and our role on appellate  
20 review is even more limited. "The law favors compromise and not  
21 litigation for its own sake, and as long as the bankruptcy court  
22 amply considered the various factors that determined the  
23

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24 <sup>11</sup> At oral argument before us Thelma's attorney moved to  
25 strike the brief filed in these appeals by Shalant's attorney.  
26 The same day Thelma filed a written motion to strike. We denied  
27 the oral motion as untimely and without merit and we deny the  
28 written motion on the same grounds. Thelma's only argument is  
that Shalant's attorney has not received permission from the  
bankruptcy court to represent Basil's bankruptcy estate.  
Shalant's attorney is representing Shalant on these appeals, not  
the bankruptcy estate.

1 reasonableness of the compromise, the court's decision must be  
2 affirmed." Id. (citations omitted). Rather than an exhaustive  
3 investigation or a mini-trial on the merits, the bankruptcy court  
4 need only find that the settlement was negotiated in good faith  
5 and is reasonable, fair and equitable. Id. "It has been held  
6 that the [bankruptcy] court's proper role is 'to canvas the issues  
7 and see whether the settlement falls below the lowest point in the  
8 range of reasonableness.'" In re Pacific Gas & Elec. Co., 304  
9 B.R. 395, 417 (Bankr. N.D. Cal. 2004) (citations omitted).

10 Applying these general principles, the relevant factors are:

11 (a) The probability of success in the litigation;  
12 (b) the difficulties, if any, to be encountered in  
13 the matter of collection; (c) the complexity of the  
14 litigation involved, and the expense, inconvenience  
and delay necessarily attending it; (d) the paramount  
interest of the creditors and a proper deference to  
their reasonable views in the premises.

15 A & C Properties, 784 F.2d at 1381 (citations omitted).

16 At the end of a hearing on the Ray Settlement Motion the  
17 bankruptcy court asked, "[h]ow much would the creditors see of  
18 this if it's approved?" Transcript Oct. 27, 2004, p. 12:2-7. The  
19 response was that after deducting Shalant's 40% fee plus about  
20 \$19,000 of costs creditors would receive about \$70,000. The  
21 bankruptcy court verified its understanding of some other terms of  
22 the Ray Settlement and concluded:

23 . . . Well, I believe that [Thelma's attorney]  
24 referred to the A and C case, which does set out the  
25 various factors that the Court should consider here.  
26 I believe that they've been satisfied. The  
compromise, to me, appears to be fair and equitable  
in this particular -- and is clearly, in my thinking,  
in the best interests of the [sic] and the estate.

27 I might add that I happen to be personally aware,  
28 much more so than usual, of the facts of this case,  
having dealt with a number of pre-trial motions, and  
I certainly can find that this is a complex matter.

1 It would incur much further expense.

2 It's not at all clear that the estate would  
3 prevail, necessarily. It may or certainly may not.  
4 It would encompass further delay if the settlement is  
not approved. It clearly is going to be a net  
benefit to the creditors of the estate.

5 I might further add that I agree with Mr. Shalant  
6 that I thought especially the lawyering by Ms.  
7 Jackson and her associates [the Ray Defendants'  
attorneys] was excellent that I saw in this court.

8 So, for those various and sundry reasons, I'm  
9 going to grant the motions in the two matters, and  
I'm going to ask Mr. Shalant to prepare the  
appropriate orders.

10 Transcript Oct. 27, 2004, pp. 14:15-15:11.

11 The bankruptcy court also stated, in the Settlement Orders  
12 themselves, that it has "considered the papers filed in support of  
13 and in opposition to the [Joint Compromise] Motion, the arguments  
14 of counsel and [has] determined the four factors for approval of a  
15 compromise have been met, that the compromise is fair and  
16 equitable and that it is not clear the Estate would prevail if the  
17 matter was tried . . . ."12

18 The bankruptcy court had ample evidence to support these  
19 findings. Beyond all the facts and arguments reviewed above, the  
20 bankruptcy court had the analysis of the attorneys who would have  
21 had to try the matter. Shalant's declaration noted that trial  
22 would be expensive, the standard applicable to trustees and  
23 attorneys "is not a simple negligence standard, but a difficult  
24

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25 <sup>12</sup> The bankruptcy court did not explicitly review each of  
26 the four factors at the hearing, but if this was error at all it  
27 is either waived or immaterial. The bankruptcy court cited A&C  
28 Properties at the hearing, it focused on the factors that were  
contested, its Settlement Orders state that it considered all four  
factors, and finally Thelma has not objected, either before the  
bankruptcy court or on this appeal, that any factor was omitted.



1 standard to meet that necessitates expert testimony to determine  
2 breach," the trial would "come down to a battle of the expert  
3 witnesses and the jury might find in favor of defendants," and the  
4 affirmative defenses could completely bar recovery and "remain at  
5 issue for trial." Ray's declaration thoroughly analyzed the  
6 issues.

7       Thelma's objections, to the extent we can understand them,  
8 are either irrelevant or insufficient. She states, in her written  
9 objection to the Ray Settlement Motion:

10           1) the proposed amount of settlement is too low;  
11           2) the attorney representing the estate of Basil  
12           Spirtos [i.e., Shalant] has a direct conflict of  
13           interests with the position of Thelma and her family;  
14           [and] 3) the proposed settlement is deliberately  
15           inadequate, in order that Joseph Shalant could deny  
16           Thelma a global settlement, as promised by [another  
17           of Moreno's attorneys], and end these insidious  
18           cases. In other words, by settling for such a low  
19           amount, on a possible \$800,000.00 plus recovery,  
20           Shalant is able to manipulate the estate of Thelma  
21           Spirtos, and attempt to obtain more at the expense of  
22           Thelma and her family because he gains personal  
23           satisfaction from doing so.

24           Mr. Shalant has been sanctioned by the State Bar  
25           of California, and at the bottom of his claim (i.e.  
26           the Moreno claim) is the collection of an illegal fee  
27           in violation of California's MICRA law [discussed  
28           below].

          \* \* \*

29           Shalant settled the case against Ray for an  
30           inadequate amount for two reasons: 1) his  
31           malpractice in not designating a probate expert for  
32           trial; and 2) his personal incentive, predicated upon  
33           the inherent bias of his position in the case.  
34           Shalant believes that ultimately he can obtain more  
35           in the long run from Thelma and her family by  
36           accepting less from the adversary proceeding against  
37           Ray.

          \* \* \*

38           The entire strategy of the trustee [Neilson] was to  
39           pretend their [sic] were additional creditors in the  
40           Thelma case in order that he and his counsel could  
41           churn fees.

1           It is hard to see what most of this has to do with the Ray  
2 Settlement. MICRA is an acronym for the Medical Injury  
3 Compensation Reform Act, California Business and Professions Code  
4 section 6146. That statute limits the percentage contingency fees  
5 that can be charged by attorneys in medical malpractice cases, and  
6 the State Bar of California has determined in an unrelated case  
7 that Shalant violated MICRA by charging a flat fee which, together  
8 with a contingency fee, could exceed the allowable limits. Thelma  
9 does not explain how this is remotely relevant to the Ray  
10 Settlement Motion. Perhaps she believes that MICRA applied to  
11 Moreno's original malpractice action against Basil and therefore  
12 it somehow bars Shalant from collecting an additional 40% fee from  
13 the estate in this adversary proceeding, even though this  
14 adversary proceeding does not involve medical malpractice and any  
15 recovery will go to Basil's estate, not Moreno. Whatever her  
16 theory, she offers no factual or legal support for applying MICRA  
17 in this case.

18           Thelma's arguments are equally opaque when she complains of a  
19 "deliberately inadequate" settlement, or a strategy by Shalant to  
20 "obtain more in the long run" by "accepting less from the  
21 adversary proceeding against Ray," or a strategy by Neilson to  
22 "pretend" that there were "additional creditors in the Thelma  
23 case" to churn fees. Perhaps Thelma believes that the settlement  
24 amount is intentionally too low so that her estate will not be  
25 solvent, thereby depriving her of standing to object to both  
26 current and future fees. If so, she assumes the predicate: she  
27 presents no factual or legal basis to conclude that the settlement  
28 amount is in fact too low.

1           Nearly all of Thelma's objections to the Ray Settlement  
2 Motion consist of complaints about everything except that motion.  
3 Mostly she complains about Shalant and the other professionals,  
4 and she cites various disciplinary proceedings against Shalant  
5 that allegedly show his propensity to pressure clients into  
6 inadequate settlements or charge excessive fees. If Thelma had  
7 evidence of such misconduct in this case that would be relevant,  
8 but the closest she comes to such evidence is her unsupported  
9 conclusion that Shalant favored settlement to shield himself from  
10 his "malpractice in not designating a probate expert for trial."  
11 Thelma offers no explanation why a probate expert would be needed,  
12 no evidence that Shalant's prospects at trial would be lessened by  
13 non-designation of such an expert, no explanation of how Shalant  
14 could persuade Moreno to enter into an inadequate settlement, nor  
15 any other factors that might begin to support her theory.

16           On this appeal Thelma expands on some of the A&C Properties  
17 factors that were not seriously disputed by any party before the  
18 bankruptcy court: the alleged lack of risk to the bankruptcy  
19 estate of proceeding to trial against the Ray Defendants because  
20 Shalant was working on a contingency basis, the lack of difficulty  
21 of collection because of malpractice insurance, and the fact that  
22 Thelma is the largest creditor of Basil's bankruptcy estate. It  
23 is not necessary, however, to satisfy each of the A&C Properties  
24 factors provided that the factors as a whole favor approving the  
25 settlement. See, e.g., In re WCI Cable, Inc., 282 B.R. 457,  
26 473-74 (Bankr. D. Or. 2002). The overwhelming weight of the other  
27 A&C Properties factors support approval of the Ray Settlement.

28

1 For all of these reasons, even if Thelma had standing to  
2 appeal from and object to the Settlement Orders and the Fee Order,  
3 we would reject Thelma's arguments.

4 C. Sanctions

5 Rule 8020 permits us to award sanctions for a frivolous  
6 appeal. See Fed. R. Bankr. P. 8020. An appeal is frivolous if  
7 the result is obvious, or if the appellant's arguments are wholly  
8 without merit. In re Weinstein, 227 B.R. 284, 297 (9th Cir. BAP  
9 1998); In re Sandoval, 186 B.R. 490, 496 n. 7 (9th Cir. BAP 1995);  
10 Matter of Hawaii Corp., 796 F.2d 1139, 1144 (9th Cir. 1986).

11 The Ray Defendants have filed a Motion for Sanctions for  
12 Frivolous Appeal seeking an award under Fed. R. Bankr. P. 8020 of  
13 \$10,000.00 against Thelma and her attorney, jointly and severally.  
14 They argue that Thelma's brief on this appeal is filled with ad  
15 hominem attacks and "self-serving 'spin' of the events spanning  
16 over the past 20 years without proper citation to facts in the  
17 record" (emphasis in original), that Thelma does not address the  
18 core issue of whether Moreno's claims against the Ray Defendants  
19 are "worth substantially more than the \$150,000 settlement (taking  
20 into account the risk and expense of going forward with a jury  
21 trial) and that, as a consequence, the bankruptcy court abused its  
22 discretion in approving the settlement," and that Thelma is a  
23 vexatious litigant. The Ray Defendants cite other decisions in  
24 which sanctions have been awarded against Thelma and her  
25 representatives.

26 Moreno has also filed a Motion for Sanctions for Frivolous  
27 Appeal, seeking an award of \$20,000 against Thelma and her counsel  
28 "based on \$15,000 of interest which has been lost to Moreno as

1 well as an additional \$5,000 in attorney fees and costs associated  
2 with responding to this meritless appeal." Moreno echoes the Ray  
3 Defendants' arguments about frivolousness and vexatiousness.<sup>13</sup>  
4 Moreno calculates \$15,000 of interest by applying "the legal rate"  
5 of 10% interest to the \$150,000 amount of the settlement, which  
6 she implies has been delayed for one year by these appeals.

7 Thelma filed an opposition to these two motions on the day of  
8 oral argument, February 24, 2006. The opposition alleges that a  
9 "nearly identical" motion was denied by another court and she  
10 states that we can review the "sealed docket order" of that court  
11 to verify this. The opposition also states without citation that  
12 "there is simply no way of denying the fact that a disbarred  
13 lawyer should not be allowed to collect a fee in a case where the  
14 settlement is inappropriate."

15 We are persuaded that sanctions are appropriate. There might  
16 be valid reasons to oppose the Ray Settlement, but Thelma advances  
17 none. Her arguments on this appeal are wholly without merit.

18 It is appropriate to compensate both appellees for their  
19 attorneys' fees. Moreno estimates her fees at \$5,000.00. That is  
20 an appropriate amount for the work involved in responding to  
21 Thelma's tangled arguments on this appeal. The Ray Defendants do  
22 not estimate the amount of their fees but we believe that their  
23 work on this appeal likewise warrants an award of \$5,000.00.

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24  
25 <sup>13</sup> Moreno's brief on this appeal quotes another attorney's  
26 views of Thelma in a document from a case before the District  
27 Court involving other persons who are not parties to this appeal  
28 (State of California ex rel. Thelma V. Spirtos et al. v. United  
States et al., U.S. Dist. Ct., C.D. Cal., Case No. 03-CV-4579 CAS  
(FMOx)). Moreno asks us to take judicial notice of that document.  
This is not a proper subject for judicial notice. See In re  
Blumer, 95 B.R. 143, 146-47 (9th Cir. BAP 1988).

1 In addition, we recognize that Moreno should be compensated  
2 for the significant delay in distributing the \$150,000.00 Ray  
3 Settlement proceeds. The 10% interest rate that Moreno seeks is  
4 higher than many current investments and the federal judgment  
5 rate, and therefore rather than \$15,000.00 in interest we will in  
6 our discretion award \$10,000.00.

7 By separate orders issued concurrently with this memorandum  
8 disposition we award Moreno \$15,000.00 and the Ray Defendants  
9 \$5,000.00 against Thelma and her attorney, jointly and severally.

10 **V. CONCLUSION**

11 Thelma may have every justification for feeling wronged by  
12 Basil and it is unfortunate that she is saddled with a portion of  
13 his debts. That is no justification for a frivolous appeal that  
14 wastes time and legal fees and delays payment to Moreno, a  
15 rightful creditor of Basil and Thelma.

16 Thelma lacks standing to object to the Settlement Orders or  
17 the Fee Order. Those orders might affect the eventual  
18 distributions from Basil's bankruptcy estate to her own bankruptcy  
19 estate, but as a Chapter 7 debtor she has shown no pecuniary  
20 interest or other basis for standing. Even if Thelma had standing  
21 we would reject her arguments because they are opaque, almost  
22 entirely irrelevant, and frivolous, and the excerpts of record are  
23 inadequate to review the Fee Order.

24 The Settlement Orders and the Fee Order are AFFIRMED, and  
25 sanctions for Thelma's frivolous appeal are awarded by separate  
26 orders.

27

28