

SEP 29 2005

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

NOT FOR PUBLICATION

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

6	In re:)	BAP No.	AZ-04-1604-KMoS
)		
7	WILLIAM H. TIMMER,)	Bk. No.	04-01400
)		
8	Debtor.)		
)		
9	_____)		
)		
10	KENNETH LEE ALLEN,)		
)		
11	Appellant)		
)		
12	v.)	MEMORANDUM*	
)		
13)		
)		
14	WILLIAM E. PIERCE, Trustee;)		
	UNITED STATES TRUSTEE,)		
)		
15)		
)		
16	Appellees.)		
)		
	_____)		

Submitted Without Oral Argument on
September 22, 2005 at Phoenix, Arizona

Filed - September 29, 2005

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

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI, SMITH, Bankruptcy Judges.

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

1 A bankruptcy petition preparer ("BPP") in Arizona appeals
2 from an injunction enjoining him from acting as a document
3 preparer until he obtains certification in accordance with the
4 Rules of the Supreme Court of the State of Arizona. The
5 bankruptcy court issued the injunction pursuant to Arizona
6 Bankruptcy Court General Order No. 89 ("Arizona Bankruptcy
7 General Order 89"), which provides that a BPP is required to be a
8 certified legal document preparer, pursuant to the requirements
9 of the Rules of the Supreme Court of the State of Arizona.
10 Specifically, Arizona Bankruptcy General Order 89 adopts Rule 31
11 of the Rules of the Supreme Court of Arizona ("Arizona Supreme
12 Court Rule 31") and amendments thereto, governing the
13 unauthorized practice of law, and provides for sanctions pursuant
14 to 11 U.S.C. § 110 ("§ 110").

15 We AFFIRM.

16
17 FACTS

18 On October 15, 2004, the bankruptcy court issued an Order To
19 Show Cause ("OSC") because appellant Kenneth Allen ("Allen")
20 filed a document in the bankruptcy case of William Timmer without
21 a certification as required by Arizona Bankruptcy General Order
22 89. The OSC ordered Allen to appear and show cause why he should
23 not be held in civil contempt or otherwise sanctioned as provided
24 in § 110 for failure to comply with Arizona Bankruptcy General
25 Order 89 and for engaging in the unauthorized practice of law.
26 The OSC further provided that "sanctions to be imposed may
27 include ... entry of an injunction permanently enjoining the
28

1 bankruptcy petition preparer from further acting as a bankruptcy
2 petition preparer."

3 On October 28, 2005, Allen filed a "motion to dismiss" the
4 OSC for lack of subject-matter jurisdiction. Allen argued that
5 Rule 31 of the Arizona Supreme Court conflicts with § 110(a) and
6 violates the Supremacy Clause of the United States Constitution.
7 Allen also contended that Arizona Bankruptcy General Order 89
8 interferes with his "right to contract" under Article 1, Section
9 10 of the United States Constitution, his rights under the First
10 and Fourteenth Amendments of the United States Constitution, as
11 well as his rights under the Judiciary Act of 1789 §§ 34 and 35.

12 Additionally, the "motion to dismiss" referenced and
13 attached Allen's declaration, as well the declaration of Robert
14 Lauenders, both of which were filed in another bankruptcy case
15 titled In re Michael Mulcahy, No. 04-01218, on September 17,
16 2004. These declarations had been filed in response to an OSC,
17 also issued for Allen's violation of Arizona Bankruptcy General
18 Order 89. In Allen's declaration, he conceded that he prepared
19 the petition for the debtor and failed to include a certification
20 number. His response also included a recitation of the OSC which
21 stated that he had failed to include a certification number and
22 that he could be sanctioned for the unauthorized practice of law.
23 He further explained that he did not violate Arizona Bankruptcy
24 General Order 89 because he prepared the documents under Rule
25 31(a)(4) of the Arizona Supreme Court as a "legal
26 assistant/paralegal, authorized to do so by the Law Office of
27
28

1 Robert J. Lauenders, P.C., 3100 N. Navajo Drive, Suite #B-3,
2 Prescott, Valley, AZ 86314.”¹

3 In connection with the OSC issued in the case of William
4 Timmer, in which this appeal arises, the bankruptcy court entered
5 an order on November 23, 2004, enjoining Allen from acting as a
6 document preparer in the United States Bankruptcy Court for the
7 District of Arizona:

8 unless and until he becomes a certified legal document
9 preparer in accordance with the Rules of the Supreme
10 Court of the State of Arizona, or is otherwise acting
11 as a legal assistant/paralegal employed and properly
supervised by an active member of the State Bar of
Arizona who is the lawyer for the debtor/client and who
appears in the bankruptcy case in that capacity.

12 The court ruled that Arizona Bankruptcy General Order 89 was
13 applicable and unequivocal. The court explained that the
14 Bankruptcy Court for the District of Arizona adopted Arizona
15 Bankruptcy General Order 89, which states that Rule 31 sets forth
16 the general rule that only an active member of the State Bar may
17 practice law in the State of Arizona. The amendments to Rule 31
18 create a limited exception for certified legal document
19 preparers, provided the services are performed in compliance with
20 the Arizona Code of Judicial Administration, Part 7, Chapter 2,
21 Section 7-208, which includes the preparation of legal documents.
22 The court concluded that Arizona Bankruptcy General Order 89
23 commands that only certified BPPs are permitted to prepare
24 documents.

26 ¹Allen contends the court never addressed this declaration
27 in connection with the OSC in the case of Michael Mulcahy, in
28 which it was originally filed. In re Michael Mulcahy, Case No.
04-01218.

1 ISSUES

- 2 1. Whether the bankruptcy court had jurisdiction.
- 3 2. Whether the bankruptcy court had the authority to adopt
- 4 Arizona Bankruptcy General Order 89.
- 5 3. Whether Arizona Supreme Court Rule 31, and by implication
- 6 Arizona Bankruptcy General Order 89, conflict with § 110?
- 7 4. Whether Arizona Bankruptcy General Order 89 violates
- 8 rights guaranteed under the First, Ninth, Tenth, and
- 9 Fourteenth Amendments and Article 1, § 10 of the United
- 10 States Constitution?
- 11

12 STANDARD OF REVIEW

13 We review the bankruptcy court's jurisdiction de

14 novo. See Ferm v. United States Tr. (In re Crowe), 243 B.R. 43,

15 47 (9th Cir. BAP 2000). Interpretations of the Bankruptcy Code

16 and other statutes and rules are issues of statutory

17 interpretation, which we review de novo. In re Bankruptcy

18 Petition Preparers Who Are Not Certified Pursuant to Requirements

19 of the Arizona Supreme Court ("In re BPP"), 307 B.R. 134, 139-40

20 (9th Cir. BAP 2004) (citing Steinberg v. Crossland Mortgage

21 Corp. (In re Park at Dash Point, L.P.), 985 F. 2d 1008, 1010 (9th

22 Cir. 1993)); Indus. Comm'n of Arizona v. Solot (In re Sierra Pac.

23 Broadcasters), 185 B.R. 575, 577 (9th Cir. BAP 1995). A

24 bankruptcy court's determination regarding discretionary

25 abstention is a matter fundamentally within the discretion of the

26 court to be reviewed for abuse of discretion. In re BPP, 307

27 B.R. at 140.

28

1 DISCUSSION

2
3 I.

4 Appellant challenges the bankruptcy court's subject-matter
5 jurisdiction, but does not articulate a specific jurisdictional
6 defect. We are persuaded the bankruptcy court had subject-matter
7 jurisdiction.

8 Specifically, 28 U.S.C. § 1334(b) confers original but not
9 exclusive jurisdiction over all civil proceedings arising under
10 title 11, or arising in or related to cases under title 11. All
11 questions of the application of § 110, by definition, "arise
12 under" Title 11.³

13 A § 110 injunction action is a core proceeding to be heard
14 and determined by a bankruptcy judge. 28 U.S.C. § 157(b)(1);
15 Demos v. Russell Brown (In re Graves), 279 B.R. 266, 271 (9th
16 Cir. BAP 2002). Under 11 U.S.C. § 105(a), a bankruptcy judge may
17 launch a § 110(j) injunction proceeding sua sponte. Id. at 273.
18 Accordingly, the bankruptcy court had subject-matter
19 jurisdiction.

20
21 II.

22 Allen challenges the Arizona bankruptcy court's authority to
23 adopt Arizona Bankruptcy General Order 89, as well as the court's
24 method of adoption. He argues that in this instance only

25 _____
26 ³In connection with the OSC hearing, Allen argued that he
27 prepared the documents as a legal assistant pursuant to Rule 31.
28 The bankruptcy court determined Allen to be a BPP, as defined
under § 110. Because the bankruptcy court's determination was
not specifically questioned on appeal, we deem the issue waived.

1 Congress had the authority to adopt Arizona Bankruptcy General
2 Order 89. The bankruptcy court concluded that its general order
3 was applicable and unequivocal.

4 Arizona Bankruptcy General Order 89, effective July 1, 2003,
5 provides, in pertinent part:

6 11 U.S.C. Section 110(k) does not permit a bankruptcy
7 petition preparer to engage in activities "that are
8 otherwise prohibited by law, including the rules and
9 laws that prohibit the unauthorized practice of law."
10 The Supreme Court of the State of Arizona has enacted
11 amendments to its Rule 31 governing the unauthorized
12 practice of law which are effective commencing July 1,
13 2003. Rule 31 sets forth the general rule that only an
14 active member of the State Bar of Arizona may practice
15 law in the State of Arizona. The amendments create a
16 limited exception to that general rule for certified
legal document preparers provided that the services
performed are in compliance with the Arizona Code of
Judicial Administration, Part 7, Chapter 2, Section 7-
208, which include the preparation of legal documents
documents. only bankruptcy petition preparers, as
defined by 11 U.S.C. Section 110, who are certified
legal document preparers pursuant to the Rules of the
Supreme Court of Arizona are permitted to prepare
documents for filing in the United States Bankruptcy
Court for the District of Arizona.

17 Arizona Bankruptcy General Order 89 also requires BPPs to
18 provide their certification number and a business phone number on
19 any document which is filed with the court, and further provides
20 that a BPP who is not certified may be subject to sanctions
21 provided in § 110 and/or as provided by the law.

22 General orders are permissible to regulate practice when
23 there is no controlling law embodied in federal law, the Federal
24 Rules of Bankruptcy Procedure, Official Forms, and local rules of
25 the district. Fed. R. Bankr. P. 9029(b). The violator of a
26 general order must have had actual notice of the requirements of
27 the general order before sanctions may be imposed. Id.

28 We previously addressed, in In re BPP, the validity of

1 Arizona Bankruptcy General Order 89. In re BPP, 307 B.R. at 142.
2 We limited our review to the Rule 9029(b) standard of whether the
3 general order was consistent with federal law, the Federal Rules
4 of Bankruptcy Procedure, Official Forms, and local rules of the
5 district.

6 As to the precise terms of the general order, our review was
7 deferential: "We do not review independently a district court's
8 determination of the scope and application of local rules and
9 general orders because we give district courts broad discretion
10 in interpreting, applying and determining the requirements of
11 their own local rules and general orders." In re BPP, 307 B.R. at
12 142 (quoting United States v. Gray, 876 F. 2d 1411, 1414 (9th
13 Cir. 1989)).

14 Moreover, federal courts, including bankruptcy courts, have
15 inherent power to regulate practice in cases before them. In re
16 BPP, 307 B.R. at 307 (citing Gallo v. United States Dist. Ct. for
17 the Dist. Of Arizona, 349 F.3d 1169, 1180-81 (9th Cir. 2003)).
18 The bankruptcy court has the authority to deal with abuses in
19 practice under its inherent power. Chambers v. NASCO, Inc., 501
20 U.S. 32, 47 (1991). In this instance, the court had the
21 authority to promulgate a general order designed to police the
22 unauthorized practice of law in cases before it and to protect
23 consumers from abuses by non-lawyers. In re BPP, 307 B.R. at
24 143.

25 As to the adoption of Arizona Bankruptcy General Order 89,
26 there is no specific required procedure to be followed. Instead,
27 Rule 9029(b) restricts sanctions to those who have actual
28 knowledge of the requirement. Fed. R. Bankr. P. 9029(b).

1 In this instance, Allen's response filed on September 14,
2 2004, in connection with the bankruptcy case of Michael Mulcahy,
3 establishes that he had actual notice of Arizona Bankruptcy
4 General Order 89 and the requirements therein. Allen plainly had
5 notice of the requirements again in the OSC issued in the instant
6 case on October 15, 2004. The OSC listed a number of sanctions
7 that could be imposed, including the potential entry of an
8 injunction permanently enjoining him from further acting as a BPP
9 and/or referral to the disciplinary process of the State Bar of
10 Arizona and the rules of the Supreme Court of the State of
11 Arizona. Because Allen had actual notice of the requirement and
12 of the potential consequence, the bankruptcy court had the
13 authority to enjoin Allen unless and until he became a certified
14 document preparer.

15 The bankruptcy court correctly concluded that Arizona
16 Bankruptcy General Order 89 was applicable.

17
18 III.

19 Allen next contends that Arizona Supreme Court Rule 31, and
20 by implication Arizona Bankruptcy General Order 89, conflicts
21 with § 110. To the extent Allen's argument to the bankruptcy
22 court challenged the validity of Arizona Supreme Court Rule 31,
23 we construe the bankruptcy court's silence on the matter as
24 discretionary abstention under 28 U.S.C. § 1334(c)(1). In re
25 BPP, 307 B.R. at 141. As Arizona courts unquestionably have
26 jurisdiction to determine the validity of Arizona rules, the
27 bankruptcy court properly abstained. Id.

28 In In re BPP, we determined that Arizona Supreme Court Rule

1 31, and by implication, Arizona Bankruptcy General Order 89, does
2 not conflict with § 110. In re BPP, 307 B.R. at 142-43. The
3 salient question was “whether the bankruptcy court may validly
4 order that BPPs, all of whom are subject to § 110, also comply
5 with state certification requirements established to regulate the
6 unauthorized practice of law.” Id. We answered the question in
7 the affirmative, and held that there was no conflict between the
8 Arizona Rule adopted by Arizona Bankruptcy General Order 89 and
9 the Code. Id. at 143.

10 Specifically, § 110 defines a BPP, establishes certain
11 duties and requirements and creates BPP liability for misconduct.
12 But § 110 does not, nor does any other portion of the Bankruptcy
13 Code, impose minimum qualifications, or adopt certification
14 standards for BPPs or a mechanism for establishing such
15 standards. Id. Because Arizona Supreme Court Rule 31 adopts
16 certification requirements that are not addressed by the
17 Bankruptcy Code, there is no conflict.

18 Moreover, the Bankruptcy Code leaves room for state-law
19 regulation of BPPs. Thus, § 110(k) provides: “Nothing in this
20 section shall be construed to permit activities that are
21 otherwise prohibited by law, including rules and law that
22 prohibit the unauthorized practice of law.” In re BPP, 307 B.R.
23 at 137. State law governs the unauthorized practice of law. Id.
24 We agree with the bankruptcy court for the District of Arizona:

25 As a result of [§ 110(k)], a document preparer may not
26 use § 110 as a “safe harbor” if a rule or certain rules
27 prohibit the unauthorized practice of law or the
28 document preparer’s activities are otherwise prohibited
by law. In Arizona, Supreme Court Rule 31(a)(3) limits
who may practice law.

1 In re Gabrielson, 217 B.R. 819, 826 (Bankr. D. Ariz. 1998).

2 Because the Bankruptcy Code contains no certification
3 provision and leaves to state law the governance of unauthorized
4 practice of law, there is no conflict between Arizona Supreme
5 Court Rule 31 adopted by Arizona Bankruptcy General Order 89 and
6 the Bankruptcy Code. In re BPP, 307 B.R. at 142-43.

7 Likewise, Allen's contention that Arizona Supreme Court Rule
8 31 violates the Supremacy Clause fails because state law is pre-
9 empted only to the extent that it actually conflicts with federal
10 law. English v. Gen. Elec. Co., 496 U.S. 72, 78-79. Here, there
11 is no actual conflict. It is possible for one to comply with
12 both state and federal requirements. Id. Moreover, because
13 there is no preemption, even if Arizona Bankruptcy General Order
14 89 had not been adopted, BPPs would still have to comply with the
15 Bankruptcy Code and with Arizona law.

16
17 IV

18 A. First Amendment

19 Allen contends that the court has violated his First
20 Amendment rights by enforcing Arizona Supreme Court Rule 31 vis-
21 à-vis Arizona Bankruptcy General Order 89.

22 Section 110, as well as Arizona Bankruptcy General Order 89,
23 is aimed at conduct. Scott v. United States Tr. (In re Doser),
24 412 F. 3d 1056, 1063 (9th Cir. 2004). A bankruptcy court's order
25 enjoining a BPP from preparing bankruptcy petitions does not
26 violate the First Amendment. Ferm v. United States Tr. (In re
27 Crowe), 243 B.R. 43, 50 (9th Cir. BAP 1999), aff'd 246 F.3d 673
28 (9th Cir. 2000); see United States v. O'Brien, 391 U.S. 367, 376-

1 77 (1968). Even assuming § 110 and Arizona Bankruptcy General
2 Order 89 regulate speech, they do not infringe First Amendment
3 rights. In re Doser, 412 F. 3d at 1063.

4 Likewise, Allen's contention that the court abused its
5 discretion for overbreadth by not adhering and/or adopting other
6 state laws with the same subject lacks merit.

7
8 B. Ninth and Tenth Amendments

9 Allen raises for the first time on appeal the argument that
10 Arizona Bankruptcy General Order 89 abridges the Ninth and Tenth
11 Amendments of the Constitution. Because this argument was not
12 raised at the bankruptcy court, we decline to address the
13 argument on appeal. Leibowitz v. County of Orange (In re
14 Leibowitz), 230 B.R. 392, 399 (9th Cir. BAP 1999), Concrete
15 Equip. Co. v. Fox (In re Vigil Bros. Constr., Inc.), 193 B.R.
16 513, 520 (9th Cir. BAP 1996); McCoy v. Bank of Am. (In re McCoy),
17 111 B.R. 276, 281-82 (9th Cir. BAP 1990).

18
19 C. Equal Protection

20 Although Allen frames his issue statement to refer to the
21 trustee, clerks of the court, real estate brokers, and
22 secretaries, his equal protection argument centers around only
23 one of the exemptions to Arizona Supreme Court Rule 31 as
24 violative of equal protection under the Fourteenth Amendment.

25 Arizona Supreme Court Rule 31(b) provides that except as
26 provided in subsection (d): "no person shall practice law in this
27 state or represent in any way that he or she may practice law in
28 this state unless the person is an active member of the state

1 bar." Accordingly, subsection (d) lays out the exceptions to
2 this general rule.

3 Allen focuses on exemption number 22, which states:

4 "Nothing in these rules shall prohibit an officer or employee of
5 a governmental entity from performing the duties of his or her
6 office or carrying out the regular course of business of the
7 governmental entity."

8 Allen contends that this exemption allows a trustee, clerk,
9 secretary, etc., to be exempted from the general rule. The crux
10 of Allen's argument is that Arizona Supreme Court Rule 31 and its
11 exemptions therein impermissibly discriminate between him and
12 those persons who are exempted from the general rule.

13 To the extent that Allen's challenge requires us to consider
14 the validity of Arizona Supreme Court Rule 31 as a matter of
15 Arizona law, we decline. In re BPP, 307 B.R. at 141. We also
16 construe Allen's argument to be an equal protection challenge to
17 Arizona Bankruptcy General Order 89.

18 The Due Process Clause of the Fifth Amendment, which applies
19 to the federal government, incorporates the Fourteenth
20 Amendment's guarantee of equal protection. Ferm v. United States
21 Tr. (In re Crawford) 194 F. 3d 954, 960-61 (9th Cir. 1999),
22 (citing Bolling v. Sharpe, 347 U.S. 497). A general order not
23 affecting fundamental rights will pass scrutiny if it bears "a
24 rational relationship to a legitimate state interest." Gallo v.
25 U.S. Dist. Court, 349 F.3d 1169, 1179 (9th Cir. 2003). Requiring
26 the certification of BPPs is rationally related to the legitimate
27 governmental interest in protecting consumers from abuses by non-
28 lawyers. In BPP, 307 B.R. at 143.

