

**JUN 27 2005**

**NOT FOR PUBLICATION**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**

In re:	)	BAP No.	OR-04-1536-RKMo
	)		
ADVANCED RODS, INC.,	)	Bk. No.	04-62021
	)		
Debtor.	)	Adv. Nos.	04-6247
	)		04-6248
<hr/>			
CRAIG S. LAUSMANN,	)		
	)		
Appellant,	)		
	)		
v.	)		
	)		
MICHAEL A. GRASSMUECK, trustee;	)		
KOGAP ENTERPRISES, INC; ADVANCED	)		
RODS, INC.; UNITED STATES TRUSTEE;	)		
CREDITORS' COMMITTEE,	)		
	)		
Appellees.	)		
	)		

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

Argued and Submitted on May 20, 2005  
at Eugene, Oregon

Filed - June 27, 2005

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

Honorable Frank R. Alley, III, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: RIEGLE,<sup>2</sup> KLEIN and MONTALI, Bankruptcy Judges.

<sup>1</sup>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.

<sup>2</sup>Hon. Linda Rieggle, Bankruptcy Judge for the District of Nevada, sitting by designation.

1 Appellant filed an adversary proceeding against the trustee  
2 and a non-debtor who was a party to a settlement agreement with  
3 the appellant. Subsequently, the trustee filed an adversary  
4 proceeding against the appellant. The appellant filed a jury  
5 demand in both adversaries. The bankruptcy court ruled that the  
6 appellant had waived the right to a jury trial by filing his  
7 complaint. We REVERSE and REMAND for the purpose of allowing  
8 clarification of the appellant's complaint.

9 **FACTS**

10 The debtor, Advanced Rods, Inc. ("debtor") purchased certain  
11 assets from KOGAP Enterprises, Inc. ("KOGAP") pursuant to an  
12 agreement ("Asset Sale Agreement") with KOGAP. The appellant,  
13 Craig S. Lausmann ("Lausmann") is an officer and director of the  
14 debtor.

15 Disputes arose among the parties. In 2003, the debtor,  
16 Lausmann, and KOGAP entered into a settlement agreement  
17 ("Settlement Agreement"). Under the terms of the Settlement  
18 Agreement, KOGAP was to pay Lausmann certain sums on a monthly  
19 basis.

20 Debtor filed a Chapter 11 petition on March 18, 2004.  
21 Later, the case was converted to a Chapter 7. Lausmann has not  
22 filed a proof of claim in the debtor's bankruptcy case.

23 In July 2004, the trustee made a demand on KOGAP to withhold  
24 a certain sum of money each month from KOGAP's payments to  
25 Lausmann under the Settlement Agreement.

26 The trustee, in his answer to Lausmann's complaint, states  
27 that the demand was made to "avoid Lausmann's fraudulent  
28 conveyance of the Debtor's interest in the Settlement Agreement

1 to himself." Defendant Michael A. Grassmueck's Answer to Craig  
2 Lausmann's Complaint, at ¶ 3. KOGAP consented to the trustee's  
3 demand and has withheld sums from its payments to Lausmann under  
4 the Settlement Agreement (the "Withheld KOGAP Payments").

5 Lausmann filed a complaint against the trustee and KOGAP on  
6 September 2, 2004 (at 3:58 p.m.). The gravamen of the complaint  
7 is that Lausmann is entitled to the Withheld KOGAP Payments under  
8 the Settlement Agreement.

9 The claims against the trustee in Lausmann's complaint are:  
10 (1) for interference with economic relationship, and (2) that the  
11 trustee abandon its claim to the Withheld KOGAP Payments under  
12 U.S.C. § 554.

13 Lausmann's claim against KOGAP is for breach of contract for  
14 assenting to the trustee's demand and withholding the payments  
15 under the Settlement Agreement.

16 On the same day (approximately fifteen minutes later), the  
17 trustee filed a complaint against Lausmann alleging fraudulent  
18 conveyance and breach of contract. The trustee's complaint  
19 alleges that Lausmann's obligation to capitalize the debtor under  
20 the Asset Sale Agreement was cancelled by the Settlement  
21 Agreement with no equivalent value given to the debtor.

22 Lausmann made a demand for a jury trial in both adversary  
23 proceedings.<sup>3</sup> The bankruptcy court denied Lausmann a jury trial  
24 in both proceedings by an order entered on September 22, 2004  
25 which stated:

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27  
28 <sup>3</sup>The two adversary proceedings were consolidated on  
September 22, 2004.

1 The Court finds that plaintiff Craig Lausmann  
2 in his adversary proceeding has waived the  
3 right to jury trial. The Court further finds  
4 that referral of this litigation which is  
essentially a core proceeding would be  
inappropriate.

5 On December 20, 2004, the Panel granted leave to appeal the  
6 bankruptcy court's interlocutory order denying a jury trial.

7 **ISSUE**

8 Whether the bankruptcy court erred in finding that Lausmann  
9 waived the right to a jury trial by filing his complaint against  
10 the trustee and KOGAP.

11 **STANDARD OF REVIEW**

12 The Panel reviews *de novo* whether Lausmann has waived the  
13 right to a jury trial, *Dunmore v. United States*, 358 F.3d 1107,  
14 1111 (9th Cir. 2004) and whether he is entitled to a jury trial.  
15 *Id.*

16 **DISCUSSION**

17 The Seventh Amendment guarantees the right to a jury trial  
18 in actions which are legal in nature as opposed to equitable.<sup>4</sup>  
19 *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41-42 (1989). In  
20 *Granfinanciera* the Supreme Court enunciated a three-part analysis  
21 for determining the right to a jury trial. A court must  
22 determine whether the action is one historically tried to juries.  
23 *Id.* at 42. Next, the court must consider whether the matter  
24 should be characterized as legal, rather than equitable, in  
25 nature. If the matter is equitable in nature, then the party

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26  
27 <sup>4</sup>The Seventh Amendment provides that "[i]n Suits at common  
28 law, where the value in controversy shall exceed twenty dollars,  
the right of trial by jury shall be preserved. . . ."

1 does not have a right to a jury trial. *Id.* If the matter is  
2 legal, then a court must decide, as the third part of the test,  
3 whether the matter involved private rights<sup>5</sup> as opposed to public  
4 rights.<sup>6</sup> There is no right to a jury trial for issues of public  
5 rights. *Granfinanciera*, 492 U.S. 33, 42 n. 4 (1989). However,  
6 before this three-part inquiry is made a court must first  
7 determine whether a party has waived its Seventh Amendment right  
8 to a jury trial.

9 The Supreme Court has held that when a party is entitled to  
10 a jury trial, the right may be waived by the filing of a proof of  
11 claim in bankruptcy. *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990).  
12 A claim waives the right to a jury trial for the resolution of  
13 disputes which are "vital to the bankruptcy process, including  
14 disputes that are part of the claims-allowance process and the  
15 hierarchical reordering of . . . creditors' claims." *Dunmore v.*  
16 *United States*, 358 F.3d 1107, 1116 (9th Cir. 2004). This is so  
17 because the filing of the claim "converts the creditor's legal  
18 claim into an equitable claim to a pro rata share of the *res*."  
19 *Katchen v. Landy*, 382 U.S. 323, 336 (1966). Claims can lose  
20 their legal nature, and be converted into claims in equity, if  
21 the action in which claims are brought is "integrally related" to

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23 <sup>5</sup>A "private right" is the "liability of one individual to  
24 another under the law as defined" such as "[w]holly private tort,  
25 contract, and property cases." *Granfinanciera*, 492 U.S. 33, 51  
and n. 8 (1989).

26 <sup>6</sup>"Public rights" are "statutory rights that are integral  
27 parts of a public regulatory scheme" and whose resolution  
28 Congress has assigned to a specialized court of equity such as  
bankruptcy courts. See *Granfinanciera*, 492 U.S. 33, 55 n. 10  
(1989).

1 the claims allowance process. *In re CBI Holding Co.*, 311 B.R.  
2 350, 365 (S.D.N.Y. 2004) (citations omitted).

3 As stated in *Germain v. Connecticut Nat'l Bank*, 988 F.2d  
4 1323 (2d Cir. 1993):

5 [B]y filing a proof of claim a creditor  
6 forsakes its right to adjudicate before a  
7 jury any issue **that bears directly on the**  
8 **allowance** of that claim - and does so not so  
much on a theory of waiver as on the theory  
that the legal issue has been converted to an  
issue of equity.

9 *Germain* at 1329 (emphasis in the original).

10 Therefore, a party's right to a jury trial on traditionally  
11 legal claims arising in an adversary proceeding depends on: (1)  
12 whether the party has filed a proof of claim against the  
13 bankruptcy estate; and (2) whether the resolution of the  
14 adversary proceeding affects the allowance of the proof of claim.  
15 *In re CBI Holding Co.*, 311 B.R. 350, 365-366 (S.D.N.Y.  
16 2004) (citations omitted).

17 In this appeal, Lausmann contends that he is entitled to a  
18 jury trial on the following claims brought in his complaint  
19 against the trustee and KOGAP: (1) interference with economic  
20 relationship against the trustee; (2) that the trustee abandon  
21 its claim to the Withheld KOGAP Payments under 11 U.S.C. § 554;  
22 and (3) breach of contract against KOGAP. Regarding the  
23 trustee's complaint against him, Lausmann argues that he is  
24 entitled to a jury trial on the trustee's claims for: (1)  
25 fraudulent conveyance; and (2) breach of contract (for Lausmann's  
26 purported failure to capitalize the debtor as required under the  
27 Asset Sale Agreement).

28

1           **1. Lausmann v. Trustee and KOGAP**

2                   **a. Lausmann v. Trustee**

3           Bankruptcy estates are sued by naming the trustee as the  
4 party-defendant in an official capacity.<sup>7</sup> A suit against a  
5 trustee in its official capacity amounts to a "claim" against the  
6 estate,<sup>8</sup> and therefore waives the right to a jury trial, given  
7 that any judgment against a trustee in an official capacity is  
8 payable from estate assets.<sup>9</sup> See *In re Warmus*, 252 B.R. 584,  
9 587 (Bankr. S.D. Fla. 2000) (fact that counterclaim against  
10 trustee as trustee/plaintiff was filed, as opposed to filing  
11 third-party complaint against trustee individually, shows intent  
12 to recover from bankruptcy estate as opposed to trustee  
13 personally and amounts to waiver of right to jury trial), *aff'd*,  
14 276 B.R. 688 (S.D. Fla. 2002); *In re Sunshine Trading & Transp.*  
15 *Co., Inc.*, 193 B.R. 752 (Bankr. E.D. Va. 1995) (suit against  
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17           <sup>7</sup>Pursuant to 11 U.S.C. § 323, a trustee "is the  
18 representative of the estate" with the capacity to sue and be  
19 sued.

20           <sup>8</sup>A complaint may constitute a "claim" against the estate.  
21 See *In re Sambo's Restaurants, Inc.*, 754 F.2d 811, 815 (9th Cir.  
22 1985) (filing of complaint together with correspondence and motion  
23 sufficient to constitute proof of claim).

24           <sup>9</sup>As stated in *In re Elac Food Corp.*, 226 B.R. 320, 323 (D.  
25 Puerto Rico 1998) (citation omitted):

26                   For purposes of standing in litigation, an  
27 estate in bankruptcy is viewed as a distinct  
28 entity, but not as a legal person. Thus, the  
estate can be sued, but only in the name of  
its trustee. Such an action involves only  
the trustee's 'official capacity,' so that  
the estate, rather than the trustee  
personally, is liable.

1 trustee in official capacity for tortious interference with  
2 contract is necessarily a claim against the estate "since  
3 collection of damages is limited to the *res* of the estate").

4 While a trustee is generally entitled to broad immunity, a  
5 trustee may be sued in an individual capacity for intentional or  
6 negligent actions which amount to violations of the duties  
7 imposed upon the trustee by law. *Bennett v. Williams*, 892 F.2d  
8 822, 823 (9th Cir. 1989); *In re Cochise College Park, Inc.*, 703  
9 F.2d 1339, 1357 (9th Cir. 1983); *In re Kashani*, 190 B.R. 875,  
10 883-84 (9th Cir. BAP 1995). Recovery on a claim brought against  
11 a trustee in its individual capacity will come from the personal  
12 assets of the trustee, and not from the assets of the bankruptcy  
13 estate. Thus jury trial rights are preserved if the complaint  
14 seeks recovery against the trustee in its personal capacity, as  
15 opposed to official (or representative) capacity.

16 During the oral argument of this appeal, Lausmann's counsel  
17 stated that Lausmann "makes no claim against the bankrupt  
18 estate." Counsel represented that Lausmann seeks recovery from  
19 the trustee personally, as opposed to against the trustee in an  
20 official capacity.

21 Despite the statements of counsel at oral argument as to  
22 what Lausmann contemplates by bringing suit, it is not at all  
23 apparent that Lausmann seeks recovery only from the trustee as an  
24 individual, and not from the estate. Lausmann's complaint is  
25 less than entirely clear in this regard. For example, the  
26 complaint makes no allegation that the trustee is liable in a  
27 personal, as opposed to official, capacity. Furthermore, the  
28 prayer for relief does not seek recovery from the trustee



1 personally, as opposed to against the assets of the estate.<sup>10</sup>  
2 Additionally, Lausmann identifies the defendant in the case  
3 caption of his complaint as "Michael A. Grassmueck, Inc., an  
4 Oregon Corporation." While there is no requirement to aver the  
5 capacity of a party to be sued,<sup>11</sup> this characterization does not  
6 indicate whether suit is brought against the trustee in its  
7 official as opposed to personal capacity. Furthermore, Lausmann  
8 makes no allegation that the trustee acted outside the scope of  
9 its authority in making the demand upon KOGAP, or that it  
10 intentionally violated a duty, acted in bad faith, or was  
11 unreasonable. See *Leonard v. Vrooman*, 383 F.2d 556, 561 (9th  
12 Cir. 1967) (trustee is not personally liable if it "acts  
13 reasonably under the circumstances and in good faith"), *cert.*  
14 *denied*, 390 U.S. 925 (1968).

15 On the other hand, it is not impossible to construe the  
16 complaint as one against the trustee, individually. The  
17 complaint alleges intentional and wrongful possession of  
18 property, which, if true, might serve as the basis for personal  
19 liability on the part of a bankruptcy trustee. See, e.g.;  
20 *Leonard v. Vrooman*, 383 F.2d 556 (9th Cir. 1967) (trustee  
21 personally liable to owner for damages arising from wrongful  
22 possession of property which was not property of the estate),  
23 *cert. denied*, 390 U.S. 925 (1968). It is also true that

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24  
25 <sup>10</sup>Lausmann's prayer for relief, at paragraph two, states that  
26 "On Plaintiff's Second Claim for Relief for Judgment against  
27 Defendant Grassmueck in the amount of \$16,666.16 . . . ."

28 <sup>11</sup>FED. R. CIV. P. 9(a), made applicable in adversary  
proceedings by FED. R. BANKR. P. 7009.

1 Lausmann's naming of the corporation as the party-defendant and  
2 his characterization of the defendant throughout the complaint as  
3 "Defendant Grassmueck" does not indicate one way or the other  
4 whether the proceeding is brought against the trustee in its  
5 representative, as opposed to individual, capacity.<sup>12</sup>

6 A broad reading of the complaint might even suggest that  
7 Lausmann intended to present both claims: One against the estate  
8 **through** the trustee in its representative capacity, and one  
9 against the trustee, personally. At oral argument, counsel for  
10 Lausmann stated that the order denying the jury trial was issued  
11 by the bankruptcy court "while the pleadings were still open."

12 For these reasons, we reverse and remand to permit a  
13 clarification of the pleadings in order to determine whether the  
14 proceeding is one brought against the trustee in its personal, as  
15 opposed to official, capacity.

16 **b. Lausmann v. KOGAP (Breach of Contract)**

17 Lausmann's complaint includes a cause of action against  
18 KOGAP for breach of contract. The alleged basis is KOGAP's

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19  
20 <sup>12</sup>Additionally, it is well established that a bankruptcy  
21 trustee may not be sued for actions taken in the scope of its  
22 authority without first obtaining leave of court. *In re Davis*,  
23 312 B.R. 681, 686 (Bankr. D. Nev. 2004). As discussed in *In re*  
24 *Davis*, there are two exceptions to this rule. Leave of court  
25 need not be sought if the trustee is acting in excess of its  
26 authority or in an unofficial capacity. See *In re Leonard v.*  
27 *Vrooman*, 383 F.2d 556, 560 (9th Cir. 1967), cert. denied, 390  
28 U.S. 925 (1968). Second, as provided by 28 U.S.C. § 959(a), a  
trustee may be sued without first seeking permission from the  
appointing court if the trustee is "carrying on the debtor's  
business." *In re Davis*, 312 B.R. 681, 686 (Bankr. D. Nev. 2004).  
Lausmann's counsel, at the oral argument of this matter, stated  
that the trustee was not "carrying on the business of the debtor"  
and that Lausmann did not seek leave of court before filing his  
complaint.

1 withholding of the Withheld KOGAP Payments upon the demand of the  
2 trustee. The complaint seeks the Withheld KOGAP Payments  
3 (\$16,666); "additional sums as may become due"; and unspecified  
4 consequential damages.

5 An action for money damages based on a breach of contract is  
6 traditionally legal in nature, *Dairy Queen, Inc. v. Wood*, 369  
7 U.S. 469, 477 (1962) to which jury trial rights attach. *In re*  
8 *Cinematronics, Inc.*, 916 F.2d 1444(9th Cir. 1990) (jury trial  
9 right affirmed in suit for breach of contract, among other  
10 claims). Lausmann is entitled to a jury trial on his complaint  
11 against KOGAP if his complaint is merely a private right of  
12 action that does not engage the claims-allowance process.

13 However, if Lausmann has filed a "claim" in the bankruptcy  
14 he will have no jury trial right over claims in the adversary  
15 proceeding against KOGAP which are "integrally related" to the  
16 claims allowance process. A party's right to a jury trial on a  
17 traditionally legal claim depends on whether: (1) the party has  
18 filed a claim against the bankruptcy estate; and (2) resolution  
19 of the adversary proceeding affects the allowance of that proof  
20 of claim. *In re CBI Holding Co.*, 311 B.R. 350, 366 (S.D.N.Y.  
21 2004) (accounting firm had no right to jury trial on complaint  
22 brought by plaintiff-liquidating agent against firm where firm  
23 had filed proof of claim and plaintiff's claims were integrally  
24 related to claims allowance process; plaintiff's success on its  
25 complaint would result in disallowance of firm's proof of claim).

26 Lausmann's complaint against KOGAP arises from the same  
27 facts, involves the same contracts (Asset Sale Agreement and  
28 Settlement Agreement) and measures the same conduct that is the

1 basis for his action against the trustee. Resolution of  
2 Lausmann's complaint against KOGAP necessarily involves  
3 consideration of the merits of Lausmann's complaint against the  
4 trustee. See *In re Frost, Inc.*, 145 B.R. 878 (Bankr. W.D. Mich.  
5 1992) (no jury trial right on debtor-plaintiff's complaint; same  
6 conduct formed basis of both plaintiff's complaint for breach of  
7 contract and defendant's proof of claim and resolution of  
8 adversary proceeding required consideration of merits of proof of  
9 claim).

10 Without clarification of whether Lausmann's complaint is  
11 against the trustee in its official, as opposed to personal,  
12 capacity it cannot be determined whether Lausmann has made a  
13 "claim" in the bankruptcy to which his complaint against KOGAP  
14 could be "integrally related."

## 15 **2. Trustee v. Lausmann**

16 The Trustee's complaint alleges, among other things,  
17 fraudulent conveyance and breach of contract against Lausmann.

18 Under the three-part analysis in *Granfinanciera*, there is a  
19 Seventh Amendment right to a jury trial for actions for breach of  
20 contract, *In re Cinematronics, Inc.*, 916 F.2d 1444, 1448 (9th  
21 Cir. 1990) and fraudulent conveyance, *Granfinanciera, S.A. v.*  
22 *Nordberg*, 492 U.S. 33 (1989).

23 *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990), however,  
24 makes it clear that a creditor who makes a claim against the  
25 bankruptcy estate has no right to a jury trial on issues raised  
26 in defense of such a claim. Should Lausmann's complaint be  
27 construed as one against the trustee in its official, as opposed  
28 to personal, capacity then the trustee's complaint could be

