

JUN 28 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NOT FOR PUBLICATION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

In re:) BAP Nos. HI-04-1172-MoRB
) HI-04-1181-MoRB
 WORLDPOINT INTERACTIVE, INC.,) (cross-appeals)
 a Delaware corporation,)
) Bk. No. 02-00867
 Debtor.) Adv. No. 03-90015
 _____)
 WAGNER CHOI & EVERS,)
)
 Appellant/Cross-Appellee,)
)
 v.) **MEMORANDUM**¹
)
 MARY LOU WOO, Chapter 7)
 Trustee,)
)
 Appellee/Cross-Appellant.)
 _____)

Argued by Telephone Conference
and Submitted on May 12, 2005

Filed - June 28, 2005

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

Honorable Lloyd King, Bankruptcy Judge, Presiding.

Before: MONTALI, RIMEL² and BRANDT, Bankruptcy Judges.

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

²Hon. Whitney Rimel, Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 The debtor's former law firm asserted a secured claim
2 against assets of the debtor. The trustee objected to the claim
3 on many grounds, asserting (inter alia) that the transaction by
4 which the firm obtained its security interest violated the Hawaii
5 Rules of Professional Conduct, particularly the rule requiring a
6 lawyer to give his or her client a reasonable opportunity to seek
7 the advice of independent counsel before entering a business
8 transaction in which the lawyer acquires a security interest
9 adverse to the client. The bankruptcy court eventually entered a
10 judgment determining that the firm had violated the ethical rules
11 and that its security interest in the assets of the debtor was
12 therefore invalid and unenforceable. The bankruptcy court also
13 held that the firm was not negligent in providing certain legal
14 advice to debtor. The bankruptcy court reserved for later
15 resolution other issues pertaining to the trustee's claim
16 objection.

17 The firm appealed the bankruptcy's court invalidation of its
18 lien, while the trustee cross-appealed the bankruptcy court's
19 determination that the firm had not acted negligently with
20 respect to a different matter. We AFFIRM in both appeals.

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22 **I.
FACTS**

23 A. Facts Relating to the Main Appeal

24 WorldPoint Interactive, Inc. ("WorldPoint" or "Debtor"),
25 formerly known as Universal Resource Locator, Inc. ("URL"), is a
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1 debtor under chapter 7 of the United States Bankruptcy Code.³
2 Appellee Mary Lou Woo ("Trustee") is the trustee of Debtor's
3 bankruptcy estate. Appellant Wagner Choi & Evers, LLP ("WCE") is
4 a law firm that formerly represented Debtor. Massimo Fuchs
5 ("Fuchs") and Larry Cross ("Cross")⁴ were the directors of
6 Debtor.

7 In June 1995, the State of Hawaii ("Hawaii") made a loan to
8 URL. URL signed a security agreement in favor of Hawaii, which
9 recorded a financing statement on June 20, 1995. On January 13,
10 1997, URL changed its name to WorldPoint, but Hawaii did not
11 record a new or amended financing statement under Debtor's new
12 name.

13 On November 11, 1997, Debtor executed a loan and security
14 agreement in favor of Fuchs, granting Fuchs a blanket lien on
15 Debtor's assets. Fuchs perfected his lien by recording financing
16 statements in Delaware on August 4, 2001.

17 On June 8, 2001, Hawaii filed a collection action against
18 Debtor in Hawaii state court (the "Collection Action"). On or
19 about July 9, 2001, Debtor consulted with WCE in connection with
20 the Collection Action and other matters. On behalf of WCE, James
21 A. Wagner ("Wagner") executed a retention letter agreement
22 ("Retention Agreement"), which Fuchs signed. The first sentence
23 of the Retention Agreement states that "[t]his letter will
24 confirm that we have been retained to represent you in connection
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26 ³Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

28 ⁴Cross is now deceased.

1 with the above matter." (Emphasis added). The "above matter" is
2 identified as a "creditor workout." The Retention Agreement
3 incorporated WCE's standard fee and retainer policy, but did not
4 provide anywhere that Debtor would provide a security interest or
5 lien to WCE to secure payment of fees. The letter required
6 Debtor to pay a \$2000 retainer; that amount was never paid. The
7 letter did not specifically mention the Collection Action.

8 On July 18, 2001, Wagner contacted counsel for Hawaii in the
9 Collection Action; Wagner indicated that WCE represented Debtor
10 in the action and requested an extension of time in which to file
11 an answer. On July 19, 2001, another attorney at WCE, James F.
12 Evers ("Evers"), signed and faxed a letter to counsel for Hawaii
13 confirming that WCE "is serving as counsel for WorldPoint" and
14 that Hawaii had granted an extension of time for filing an
15 answer. In this letter, Evers indicated that Debtor was
16 contemplating an auction of its assets.⁵

17 On the morning of July 24, 2001, Evers sent another letter
18 to Hawaii's counsel. This letter was similar to the July 19
19 letter, except that, inter alia, it changed the extension of time
20 for filing the answer from July 31 to August 31, 2001, and
21 refined the terms for depositing the proceeds from any auction
22 into an escrow account. The letter also noted that Debtor "is
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24 ⁵There are several instances where testimony of Evers is
25 inconsistent with documented evidence. For example,
26 notwithstanding the fact that Evers signed and faxed the letter,
27 he contended at trial that the letter was a draft. He also
28 contended at trial that WCE did not represent Debtor with respect
to the Collection Action, despite his confirmation in the letter
that Hawaii had "graciously given us" (emphasis added) an
extension of time to file an answer.

1 not admitting that the State of Hawaii has a valid lien[.]”⁶

2 Debtor, with the assistance of WCE, proceeded with plans to
3 liquidate its assets through an auction. Hawaii agreed to allow
4 the auction to proceed as long as the net sale proceeds were
5 placed in an escrow account.⁷

6 The time records for Evers for July 24, 2001, indicate that
7 he conferred with Wagner regarding a UCC-1 to cover litigation
8 expenses and that he drafted a security agreement and financing
9 statement. Fuchs testified that prior to that date, Evers had
10 not discussed drafting a security agreement in favor of WCE.
11 Evers filed a declaration stating that he had previously
12 discussed with Fuchs the possibility of WCE obtaining a security
13 interest in Debtor’s assets.

14 On the afternoon of July 24, 2001, Evers called Fuchs and
15 stated that he had developed a means for defeating Hawaii’s
16 purported security interest in Debtor’s assets. He requested
17 Fuchs to meet him that evening on a street corner in downtown
18 Honolulu to sign some documents. After business hours, Evers
19 presented documents to Fuchs which created a blanket security
20 interest in favor of WCE in Debtor’s assets. Fuchs testified
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22 ⁶In litigation discussed later, WCE (seeking to establish
23 priority of its lien over that of Hawaii) convinced a state court
24 that Hawaii’s failure to record amended UCC-1 financing
25 statements under WorldPoint’s name (after URL changed its name to
WorldPoint) defeated the first priority of Hawaii’s lien.

26 ⁷On July 16, 2001, Cross sent an e-mail to Fuchs (copied to
27 Wagner) suggesting that any sale proceeds be placed in WCE’s
28 retainer/escrow account and not in Debtor’s checking account “due
to possible/probably [sic] State intervention.” He added a
postscript indicating that “I’m willing to assign all such
residual values to Lawyer Wagner ASAP.”

1 that Evers told him only that the security interest was to
2 protect the auction proceeds from the claims of Hawaii and that
3 WCE would not record documents relating to WCE's security
4 interest unless necessary to protect those proceeds.

5 Evers brought Fuchs to the offices of another attorney for
6 execution and notarization of a security agreement in the amount
7 of \$250,000.00. Fuchs testified that Evers did not discuss the
8 terms or ramifications of the agreement; moreover, Evers did not
9 advise Fuchs or Debtor to seek independent counsel and did not
10 give Fuchs an opportunity to consult such counsel before
11 executing the agreements. Fuchs executed the documents on behalf
12 of Debtor, but was not given copies.⁸

13 The next day, WCE attempted to record the UCC-1 financing
14 statements with the Bureau of Conveyances, State of Hawaii, but
15 the office rejected it. On July 26, 2001, WCE recorded the

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17 ⁸Evers disagrees with this recitation of facts. He insists
18 that Fuchs knew that WCE would require a security interest and
19 that he discussed with Fuchs the security agreement in detail
(although the Retention Agreement did not contain any reference
to liens or other security interests).

20 In its Findings of Fact and Conclusions of Law, the
21 bankruptcy court acknowledged the inconsistencies and conflicts
22 between the testimony of Fuchs and the testimony of Evers. The
23 court notes however, that even if Evers had discussed the
24 transaction in as much detail and for as long (allegedly thirty
25 minutes) as he contended, he still did not advise Fuchs to seek
26 independent legal counsel and did not give Fuchs sufficient
27 opportunity to consult another attorney. WCE did not cite to
28 anything in the excerpts (such as testimony by Evers) to support
its contention that Evers advised Debtor that it could consult
with independent counsel. Moreover, as discussed later, WCE
simply did not give Debtor a reasonable opportunity for such a
consultation, inasmuch as the documents were drafted and signed
on July 24, and WCE attempted to record the financing statements
the following day (with actual recordation occurring in Hawaii on
July 26).

1 financing statements in Hawaii. On the same day, Fuchs sent an
2 e-mail to Wagner complaining that Evers had forced him to sign
3 the security documents without providing him an opportunity to
4 review them, that Evers had not provided copies, and that Evers
5 had recorded the financing statements despite assurances that
6 financing statements securing the 1997 loan from Fuchs to Debtor
7 would be recorded first. Evers testified that upon receiving
8 this e-mail, he terminated WCE's representation of Debtor.⁹
9 Fuchs testified that WCE did not deny the allegations of his e-
10 mail.

11 On July 25, 2001, Debtor and 1726, Inc. d/b/a Mark Glen
12 Auctions ("Glen") executed an auction agreement whereby Glen
13 agreed to sell Debtor's assets. The auction occurred on July 28,
14 2001. After the auction, Glen filed an interpleader action
15 ("Interpleader Action") naming as defendants all parties with
16 possible interests in the proceeds of the sale.

17 On or about August 4, 2001, Fuchs discovered that UCC-1
18 financing statements must be recorded in the state of
19 incorporation (which, in Debtor's case, was Delaware). On that
20 date, Fuchs recorded a UCC-1 financing statement in Delaware
21 reflecting his security interest (arising from the 1997 security
22 agreement) in Debtor's assets. On August 6, 2001, after Fuchs
23 informed WCE of the necessity of recording in Delaware, WCE
24 recorded its UCC-1 financing statement in Delaware. By agreement
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27 ⁹Fuchs does not agree. In any event, WCE resumed its
28 representation of WCE and Fuchs did eventually inform WCE how to
record its financing statement in Delaware and did eventually
agree to subordinate his lien to that of WCE.

1 dated August 9, 2001, Fuchs agreed to subordinate his security
2 interest to that of WCE.

3 Although WCE contends that it was not representing Debtor in
4 the Collection Action when the Debtor executed a lien in favor of
5 WCE, it did eventually agree to represent Debtor in the
6 Collection Action "[b]ecause WCE would have to defeat [Hawaii's]
7 lien claim in the [Interpleader Action] if WCE was to prevail on
8 its own lien claim." Appellant's Opening Brief at pages 9-10.

9 WCE moved for summary judgment in the Interpleader Action,
10 arguing that its lien against the assets of Debtor primed any
11 lien of Hawaii. Hawaii filed its own motion for summary
12 judgment. Before the state court could enter its written
13 findings and conclusions with respect to the competing motions
14 for summary judgment, an involuntary bankruptcy petition was
15 filed against Debtor.

16 On March 15, 2002 (before the order for relief on the
17 involuntary petition was entered on April 2, 2002), WCE filed a
18 motion for relief from stay so that the state court could enter
19 its findings of facts and conclusions of law in the Interpleader
20 Action. In the memorandum in support of the motion for relief
21 from stay, WCE states that the state court's ruling "will not
22 necessarily be binding upon the bankruptcy [T]rustee" and that
23 "WCE knows of no basis on which the [T]rustee could challenge
24 [the Interpleader Action] ruling, but in any event if a basis
25 exists the [T]rustee is not precluded from seeking appropriate
26 relief." (Emphasis added.) In its reply in support of the
27 motion for relief from stay, WCE states that the Interpleader
28 Action "ruling is not binding on the bankruptcy [T]rustee; it is

1 binding as between the parties to the state court litigation” and
2 that the “order on that point will not prejudice the bankruptcy
3 [T]rustee.” (Emphasis added.)

4 On April 16, 2002, the bankruptcy court granted relief from
5 the stay so that the state court hearing the Interpleader Action
6 could enter findings and an order “concerning the relative
7 priorities of interests asserted by [WCE] and the State of
8 Hawaii.” (Emphasis added.) In the course of determining the
9 relative priorities of liens, the state court held that WCE had a
10 valid enforceable security interest.

11 On July 8, 2002, WCE filed a secured claim against Debtor in
12 the amount of \$114,364.59, which it amended on June 5, 2003.
13 Trustee objected to the claim on many grounds, including
14 allegations that WCE committed malpractice and violated various
15 rules of professional conduct.¹⁰

16 The bankruptcy court treated the claims objection as an
17 adversary proceeding and held a trial on October 27 and 28, 2003,
18 and on January 20, 21 and 22, 2004. In its findings and
19 conclusions issued after trial, the bankruptcy court held that
20 because Debtor was not afforded a reasonable opportunity to
21 consult independent counsel before granting a blanket lien in its
22 assets to WCE, WCE had violated Hawaii’s Rules of Professional
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25 ¹⁰Even though Federal Rule of Bankruptcy Procedure 8009(b)
26 requires appellant to provide the panel with underlying papers
27 pertaining to the order, neither WCE nor Trustee provided the
28 objection to the claim in its excerpts of record. In addition,
other pleadings and documents related to the objection and
required by Rule 8009(b) are not included in the excerpts.

1 Conduct and its lien was thus invalid and unenforceable.¹¹ The
2 bankruptcy court also indicated that unresolved issues remain
3 pending with respect to Trustee's objection to WCE's claim.

4 On March 25, 2004, the bankruptcy court entered a judgment
5 stating that WCE's security interest was invalid and
6 unenforceable and treating WCE's amended proof of claim as a
7 general unsecured claim.¹² WCE filed a timely notice of appeal
8 on April 2, 2004.¹³

9 B. Facts Relevant to the Cross-Appeal

10 In 2001, Eicon, Inc. ("Eicon") filed an action against
11 Debtor in California (the "Eicon Action"). On July 19, 2001, a
12 messenger delivered an envelope containing a cross-complaint and
13 other documents to Fuchs' home. Fuchs contends that he consulted
14 with Evers about the service and that Evers indicated that
15 service was improper because it should have been served by a
16 sheriff (and not a messenger). According to Fuchs, Evers
17 suggested that Fuchs e-mail opposing counsel in the California
18 action and inform him about the improper service. Fuchs did send
19 an e-mail to the opposing counsel objecting to the manner of
20 service; that e-mail does not indicate that WCE had rendered any
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23 ¹¹The bankruptcy court also ruled that WCE had not provided
24 negligent legal services with respect to separate litigation
25 initiated against Debtor in California. Trustee has cross-
26 appealed this ruling, which is discussed in more detail in the
27 next section.

28 ¹²Neither WCE nor Trustee provided a copy of this judgment
in their excerpts.

¹³WCE did not provide a copy of its notice of appeal in its
excerpts.

1 advice in the matter. Fuchs acknowledged that WCE never agreed
2 to represent Debtor in the Eicon Action.

3 Evers denied that WCE ever gave any advice to Fuchs
4 regarding service of the cross-complaint in the Eicon Action.
5 Evers further testified that he repeatedly informed Fuchs that
6 WCE could not represent Debtor in the Eicon Action since it was
7 pending in California where WCE's attorneys were not admitted to
8 practice.

9 Opposing counsel in the Eicon Action communicated directly
10 with Fuchs and informed him that service was proper.
11 Nonetheless, Debtor never filed an answer and a default judgment
12 was entered against Debtor in the Eicon Action in 2002.¹⁴

13 In her objection to WCE's claim, Trustee alleged that WCE
14 provided negligent legal advice to Debtor with respect to service
15 of the Eicon Action, thus leading to a default judgment against
16 Debtor. The bankruptcy court disagreed, holding that "WCE was
17 not negligent in providing legal service to [Debtor]."

18 The bankruptcy court did not enter an order or judgment with
19 respect to the negligence count against WCE. The judgment
20 entered on March 25 simply invalidated WCE's security interest
21 and treated WCE's claim as an unsecured claim. Nonetheless, on
22 April 6, 2004, Trustee filed a notice of appeal, cross-appealing
23 "from the Findings of Fact and Conclusions of Law and
24 Judgment."¹⁵

26 ¹⁴The Eicon Action cross-complaint and default judgment are
27 not in the excerpts.

28 ¹⁵After the bankruptcy court issued its findings, Trustee
was successful in setting aside the default and default judgment
in the Eicon matter.

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**II.
ISSUES**

1. Did the Rooker-Feldman doctrine preclude the bankruptcy court from entering an order invalidating WCE's security interests after a state court issued an order stating that WCE's security interest was valid?

2. Are the appeal and cross-appeal interlocutory and, if so, should this panel grant leave to appeal?

3. Did the bankruptcy court err in holding that WCE obtained its security interests in Debtor's assets in violation of the Hawaii Rules of Professional Conduct?

4. Did the bankruptcy court err in invalidating WCE's security interest because of WCE's violation of the Hawaii Rules of Professional Conduct?

5. Did the bankruptcy court err in holding that WCE did not provide negligent legal advice to Debtor?

**III.
STANDARD OF REVIEW**

A bankruptcy court's findings of fact are reviewed for clear error, and conclusions of law are subject to de novo review. Devers v. Bank of Sheridan, Montana (In re Devers), 759 F.2d 751, 753 (9th Cir. 1985). Review under the clearly erroneous standard is "significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.'" Granite State Ins. Co. v. Smart Modular Technologies, Inc., 76 F.3d 1023, 1028 (9th Cir. 1996) (quoting Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 623 (1993)).

1 A bankruptcy court's findings of credibility are entitled to
2 deference, because it is in a superior position to evaluate and
3 weigh the evidence. See Exxon Co. v. Sofec, Inc., 54 F.3d 570,
4 576 (9th Cir. 1995), aff'd, 517 U.S. 830 (1996).

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6 **IV.
JURISDICTION**

7 On March 9, 2005, this panel issued an order requesting the
8 parties to file supplemental briefs addressing two jurisdictional
9 issues: (1) whether the Rooker-Feldman doctrine precluded the
10 bankruptcy court from entering an order invalidating WCE's
11 blanket lien on Debtor's assets and (2) whether the appeal and
12 cross-appeal were interlocutory and, if so, whether this panel
13 should grant leave to consider the interlocutory appeals. The
14 parties have filed their supplemental briefs.

15 A. The Rooker-Feldman Issue

16 As noted previously, the bankruptcy court entered an order
17 granting relief from the stay to permit WCE to obtain an order
18 from the state court in the Interpleader Action with respect to
19 the relative priority of its security interest in Debtor's assets
20 as against the security interest of Hawaii. On May 2, 2002, the
21 state court entered its findings and conclusions and an order
22 stating that "WCE holds a perfected security interest in the
23 assets of [Debtor]" and that "WCE's perfected security interest
24 in the assets of [Debtor] is a first priority lien against the
25 assets of [Debtor]." The bankruptcy court's subsequent order,
26 however, invalidates WCE's security interest inasmuch as it was
27 obtained in violation of the Hawaii Rules of Professional
28 Conduct.

1 Because the bankruptcy court's judgment seemed inconsistent
2 with the state court order, this panel queried whether the
3 Rooker-Feldman doctrine precluded entry of the subsequent
4 bankruptcy judgment. See D.C. Court of Appeals v. Feldman, 460
5 U.S. 462, 486 (1983); Rooker v. Fid. Trust Co., 263 U.S. 413,
6 415-16 (1923); Huse v. Huse-Sporsen, A.S. (In re Birting
7 Fisheries, Inc.), 300 B.R. 489, 497-98 (9th Cir. BAP 2003).
8 Notably, WCE had not raised this as a issue, either before the
9 bankruptcy court or before this panel.

10 In response, Trustee pointed to the numerous examples where
11 WCE represented to the bankruptcy court in the context of its
12 motion for relief from stay that the ruling of the state court
13 would not bind Trustee. Remarkably, WCE did not mention these
14 statements in its supplemental brief. To the extent WCE agreed
15 on the record that the state court order and findings would not
16 be binding on Trustee, the Rooker-Feldman doctrine is
17 inapplicable to Trustee's subsequent objection to WCE's secured
18 claim and the bankruptcy court's resulting order. At WCE's
19 insistence and agreement, the Interpleader Action did not include
20 any defenses or claims that could have been raised by the
21 Trustee. WCE cannot now utilize preclusive devices such as the
22 Rooker-Feldman doctrine to prevent the assertion of such claims,
23 objections and defenses by Trustee before the bankruptcy court.
24 Cf. Craig v. County of Maui, 157 F. Supp. 2d 1137, 1141 (D. Haw.
25 2001) (under Hawaii law, the defense of res judicata or claim
26 preclusion "is deemed to have been waived by the defendant [i.e.,
27 WCE] where the first suit [i.e., the Interpleader Action] did not
28 include the subject matter of the second [i.e., the claims

1 objection] at the insistence of the defendant [i.e., WCE]”).¹⁶

2 In any event, after the panel issued its order requesting
3 supplemental briefing, the United States Supreme Court issued
4 Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. ___, 125
5 S. Ct. 1517 (2005), which limits the Rooker-Feldman doctrine to
6 cases in which “the losing party in state court filed suit in
7 federal court after the state proceedings ended, complaining of
8 an injury caused by the state-court judgment and seeking review
9 and rejection of that judgment.” 125 S. Ct. at 1526. Here,
10 Trustee was not the losing party in state court; WCE acknowledged
11 repeatedly in its pleadings in support of relief from stay that
12 Trustee was not bound by the state court decision. Moreover,
13 Trustee is not seeking to revisit the grounds supporting the
14 state court’s determination that WCE’s lien primes Hawaii’s lien;
15 therefore, its objection to claim does not seek “review and
16 rejection” of that order. Id.

17 Even if Trustee had been a party to the Interpleader Action,
18 the Exxon Mobil decision clarifies that the Rooker-Feldman
19 doctrine is inapplicable here, inasmuch as the bankruptcy court
20 held concurrent jurisdiction over matters pertaining to the
21 validity of WCE’s security interest and claim at the time the
22 state court entered its judgment. Bankruptcy courts have core

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24 ¹⁶See also Norfolk Southern Corp. v. Chevron U.S.A., Inc.,
25 371 F.3d 1285 (11th Cir. 2004) (when a defendant signs a
26 settlement agreement stating that only some claims will be
27 precluded in the future, the defendant has preemptively waived
28 any potential res judicata defense in future action; a party can
agree to waive the defense of issue or claim preclusion); Clark
v. Yosemite Comm. College Dist., 785 F.2d 781, 788 (9th Cir.
1986) (“a party who successfully blocks litigation of a cause of
action in one proceeding may not hide behind the defense of res
judicata in the second proceeding . . .”).

1 jurisdiction over allowance and disallowance of claims and over
2 determinations of the validity, extent or priority of liens
3 against estate property. See 28 U.S.C. § 157 (b) (2) (B) and (K).
4 WCE moved the bankruptcy court for relief from the stay so that
5 the state court could enter a judgment, and acknowledged that
6 Trustee could litigate similar issues in bankruptcy court.
7 Because the bankruptcy case existed before the Interpleader
8 Action judgment was entered (and where the bankruptcy court had
9 to grant relief from the stay in order for the state court to
10 even have jurisdiction to enter the judgment), the bankruptcy
11 court held concurrent jurisdiction with the state court.
12 Consequently, as noted by the Supreme Court in Exxon Mobil, the
13 Rooker-Feldman doctrine is inapplicable:

14 When there is parallel state and federal litigation,
15 Rooker-Feldman is not triggered simply by the entry of
16 judgment in state court. This Court has repeatedly
17 held that 'the pendency of an action in the state court
18 is no bar to proceedings concerning the same matter in
19 the Federal court having jurisdiction.' [Citations
20 omitted]. Comity or abstention doctrines may, in
21 various circumstances, permit or require the federal
22 court to stay or dismiss the federal action in favor of
23 state-court litigation. [Citations omitted]. But
24 neither Rooker nor Feldman supports the notion that
25 properly invoked concurrent jurisdiction vanishes if a
26 state court reaches judgment on the same or related
27 question while the case remains *sub judice* in a federal
28 court.

22 Exxon-Mobil, 125 S. Ct. at 1526-27 (emphasis added).

23 The Supreme Court in Exxon-Mobil states that in
24 circumstances where the federal and state court have concurrent
25 jurisdiction, disposition of the federal action would be governed
26 by preclusion law. Id. at 1527. Therefore, at oral argument,
27 counsel for WCE urged this panel to apply the principles of claim
28 or issue preclusion. Claim and issue preclusion are not,

1 however, jurisdictional matters but are affirmative defenses.
2 Id. at 1527; Contractors' State License Board of Calif. v.
3 Dunbar (In re Dunbar), 245 F.3d 1058, 1063 n.5 (9th Cir. 2001)
4 ("Rooker-Feldman is a jurisdiction-stripping doctrine while
5 collateral estoppel and res judicata are affirmative defenses
6 that have nothing to do with a federal court's jurisdiction.").
7 Because issue and claim preclusion are affirmative defenses, they
8 must be raised by a party before the trial court or they are
9 waived. Horwitz v. State Bd. of Med. Examiners, 822 F.2d 1508,
10 1512 (10th Cir. 1987) ("Res judicata rules and principles . . .
11 are waived if not raised as affirmative defenses in the trial
12 court and cannot be raised for the first time on appeal . . .
13 ."); American Capital Corp. v. U.S., 65 Fed. Cl. 241, 2005 WL
14 1023517 (Fed. Cl. 2005) (government waived defense of collateral
15 estoppel by not asserting it in answer or raising issue in any
16 motion before trial court before seeking reconsideration of order
17 granting partial summary judgment). Because WCE did not raise
18 the affirmative defenses of issue or claim preclusion before the
19 trial court, and in fact did not raise these defenses in its
20 opening appellate brief, we will not consider them on appeal.
21 Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]n
22 appellate court will not consider issues not properly raised
23 before the [trial] court. Furthermore, on appeal, arguments not
24 raised by a party in its opening brief are deemed waived.").

25 B. Interlocutory Jurisdiction

26 The bankruptcy court indicated in its findings of fact and
27 conclusions of law that unresolved issues remain pending with
28 respect to Trustee's objection to WCE's claim. As such, the

1 order is interlocutory. See Belli v. Temkin (In re Belli), 268
2 B.R. 851, 855 (9th Cir. BAP 2001) (an order that disposes of
3 fewer than all the claims for relief is not final as to any of
4 the claims for relief, unless the court directs the entry of a
5 final judgment (under Federal Rule of Civil Procedure 54(b) and
6 Rule 7054)) upon an express determination that there is no just
7 reason for delay and upon an express direction for the entry of
8 judgment); Slimick v. Silva (In re Slimick), 928 F.2d 304, 307
9 (9th Cir. 1990), citing United States v. F. & M. Schaefer Brewing
10 Co., 356 U.S. 227, 234 (1958) (disposition is final if it
11 contains a complete act of adjudication, fully adjudicates the
12 issues at bar, and clearly evidences the judge's intention that
13 it be the court's final act in the matter).¹⁷

14 Both WCE and Trustee request the panel to grant leave to
15 hear this interlocutory appeal, since the issues have been fully
16 briefed. Because both parties have requested leave, and because
17 judicial economy and efficiency are served by having the appeals
18 considered on their merits after full briefing, we will grant
19 leave to hear both interlocutory appeals (the main appeal and the
20 cross appeal). We do this reluctantly as to the cross appeal
21 because there is no order expressly disposing of the Trustee's
22 negligence claim against WCE, but it is clear that the bankruptcy
23 court intended to dispose of that claim entirely.

25 ¹⁷WCE argues in its supplemental brief that the decision is
26 final. Not only does this contradict the bankruptcy court's own
27 statement that other issues pertaining to the objection remain
28 open, but it also ignores the possibility that even if this panel
reversed the bankruptcy court's invalidation of the security
agreement, the bankruptcy court could eventually disallow the
claim in its entirety on other grounds.

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**V.
DISCUSSION**

A. The Main Appeal

The bankruptcy court invalidated WCE's security interest because it concluded that WCE had violated Rule 1.8(a) ("Rule 1.8") of the Hawaii Rules of Professional Conduct in acquiring that interest. Rule 1.8(a) provides that

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

Hawaii Rules of Prof. Conduct, Rule 1.8 (emphasis added).

WCE contends that the bankruptcy court erred as a matter of fact (alleging that the court erred in concluding that Debtor was not given a sufficient opportunity to consult independent counsel) and as a matter of law (alleging that Rule 1.8(a) was inapplicable to its transactions with Debtor and further alleging that invalidation of the security interest was an improper remedy for a violation of Rule 1.8(a)). We disagree.

1. Factual Finding

The bankruptcy court found that WCE did not provide Debtor with a reasonable opportunity to seek the advice of independent counsel. On appeal, WCE argues that the bankruptcy court erred in making this factual finding. Among other things, WCE states

1 on page 23 of its opening brief (without citation to the excerpts
2 of record) that "Fuchs was informed of [the right to have
3 independent counsel review the security documents] and elected
4 not to seek an independent review."

5 The record contains sufficient evidence to support the
6 bankruptcy court's finding, including Fuchs' testimony and the
7 fact that WCE's own time records indicate that the security
8 documents were drafted on July 24, that the documents were
9 presented to Fuchs and signed on the evening of July 24, and that
10 WCE attempted record the financing statements on July 25 and then
11 did record the financing statements in Hawaii on July 26. That
12 time period simply did not give Debtor a reasonable opportunity
13 to seek independent counsel.¹⁸ Nothing in the record leaves this
14 panel with a definite and firm conviction that the bankruptcy
15 court's factual finding is incorrect. The bankruptcy court did
16 not err.

17 **2. Application of Rule 1.8(a) v. Rule 1.8(j)**

18 WCE also argues that the bankruptcy court erred as a matter
19 of law by applying Rule 1.8(a) instead of Rule 1.8(j) to the
20 transactions between Debtor and WCE. As noted previously, Rule
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23 ¹⁸WCE argues that its security interest did not become
24 perfected until it recorded its financing statements in Delaware
25 on August 6 and that Debtor had an opportunity to consult
26 independent counsel before that date. This argument is
27 disingenuous, inasmuch as Evers admitted that he believed that
28 the recording in Hawaii on July 26 was sufficient to perfect
WCE's interests until informed otherwise by Fuchs. Evers
intended for WCE's security interests to become perfected on July
25 (when he initially attempted to record the financing
statements in Hawaii) and WCE's post hoc argument that another
counsel could have been consulted prior to perfection is
rejected.

1 1.8(a) requires that a lawyer give his or her client a reasonable
2 opportunity to obtain the advice of disinterested counsel before
3 the lawyer obtains a security interest adverse to a client.

4 WCE argues that subsection (a) of Rule 1.8 is inapplicable,
5 because its transactions with Debtor are covered by subsection
6 (j)¹⁹ of Rule 1.8, which does not require that a client be
7 provided with a reasonable opportunity to confer with independent
8 counsel.

9 Subsection (j) of Rule 1.8 states that a lawyer "shall not
10 acquire a proprietary interest in the cause of action or subject
11 matter of litigation the lawyer is conducting for a client,
12 except that the lawyer may (1) acquire a lien granted²⁰ by law to
13 secure the lawyer's fee or expenses; and (2) contract with a
14 client for a reasonable contingent fee in a civil case." WCE
15 contends that Rule 1.8(j)(1) is applicable because WCE was
16 acquiring a lien on the subject matter of the Interpleader Action
17 and the Collection Action. As discussed below, if WCE's lien did
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19 ¹⁹Subsection (j) has been moved to subsection (i) of Rule
20 1.8 of the Model Rules of Professional Conduct, upon which the
21 Hawaii Rules of Professional Conduct are based. The Hawaii
22 rules, however, have not adopted that particular change.

22 ²⁰Model Rule of Professional Conduct 1.8(i) (formerly
23 1.8(j)) states that the lawyer may acquire a lien "authorized" by
24 law to secure the lawyer's fees or expenses, but Hawaii's Rule
25 1.8 states that the lien must be "granted" by law. This is a
26 significant difference, as discussed later.

25 On February 7, 2005, WCE filed a Notice of Amendment of HRPC
26 1.8(j). According to WCE, the Hawaii Supreme Court (on February
27 1, 2005) entered an order amending Rule 1.8(j) to change
28 "granted" to "authorized." According to the Supreme Court's
order, however, the change does not become effective until July
1, 2005. Therefore, Rule 1.8(j) as currently drafted governs
this appeal.

1 indeed fall within the scope of subsection (j)(1), subsection (a)
2 is inapplicable.

3 On May 31, 2002, the American Bar Association issued ABA
4 Formal Opinion 02-427 entitled "Contractual Security Interest
5 Obtained By a Lawyer To Secure Payment of a Fee" (the "Opinion").
6 The Opinion indicates that a lawyer does not have to comply with
7 the requisites of Model Rule 1.8(a) (i.e., allowing the client a
8 reasonable opportunity to consult independent counsel) if the
9 lawyer's security interest falls within the parameters of Model
10 Rule 1.8(i) (formerly Rule 1.8(j)). Model Rule 1.8(i) permits a
11 lawyer to acquire a lien in the "cause of action or subject
12 matter of litigation" if the lien is "authorized" by law to
13 secure the lawyer's fees or expenses. The Opinion notes that the
14 term "authorized" was substituted in lieu of "granted" so that
15 any legally recognized lien, such as consensual liens, would be
16 included.²¹

17 Here, the Hawaii statute currently in effect does not use
18 the more inclusive term "authorized." Rather, Rule 1.8(j)
19 applies to liens "granted" by law. The lien acquired by WCE was
20 not "granted" by law; it was "granted" by contractual agreement.

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22 ²¹WCE cites to several cases from other states (including
23 Skarecky & Horenstein, P.A. v. 3605 North 36th St. Co., 170 Ariz.
24 424, 825 P.2d 949 (Ariz. 1992)) in which the court held that a
25 lien "granted" by law encompasses consensual liens. No Hawaii
26 case is cited. To the extent that the comments to Model Rule 1.8
27 indicate that the language was changed because courts construed
28 "liens granted by law" to exclude consensual liens, WCE's cited
cases are not persuasive. In any event, as noted below, even if
the Rule 1.8(j)(1) refers to consensual liens, that subsection is
still inapplicable because the assets upon which WCE acquired the
lien existed before the security documents were executed. WCE's
efforts in the Collection Action and the Interpleader Action did
not involve the recovery of such assets for Debtor.

1 Rule 1.8(j) is thus inapplicable and the bankruptcy court did not
2 err in applying Rule 1.8(a). In any event, the lien in question
3 was not in "the subject matter of litigation." Even though the
4 Interpleader Action involved a dispute as to whom held a secured
5 interest in the funds, WCE's stance in that litigation was to
6 protect its own security interest. In essence, the subject
7 matter of the litigation was the lien itself. Moreover, WCE
8 repeatedly contended that -- despite its communications with
9 Hawaii's counsel and its Retention Agreement with Debtor -- that
10 it did not represent Debtor in the Collection Action. According
11 to its own admission in its Opening Brief, it commenced
12 representation of Debtor in the Collection Action in order to
13 protect its lien and interests in the Interpleader Action. WCE's
14 contention now that it was taking a security interest in the
15 subject matter of that litigation is unfounded, particularly when
16 the subject matter of the Collection Action was Hawaii's efforts
17 to collect on Debtor's obligations to it.

18 Even if the broader "authorized" language were contained in
19 current Rule 1.8(j), WCE would not be sheltered from complying
20 with Rule 1.8(a). As noted by the ABA in its Opinion (quoting
21 the comments to the Model Rules): "When a lawyer acquires by
22 contract a security interest in property other than that
23 recovered by the lawyer's efforts in the litigation, such an
24 acquisition is a business or financial transaction with a client
25 and is governed by the requirements of paragraph (a)." (Emphasis
26 added). Here, the Debtor had the assets before the security
27 agreements with WCE were executed. WCE's efforts did not result
28 in a recovery of those assets for Debtor, and its lien thus falls

1 outside the scope of subsection (j). The requirements of Rule
2 1.8(a) therefore apply.

3 For the foregoing reasons, we hold that the bankruptcy court
4 did not err as a matter of law in applying the requirements of
5 Rule 1.8(a) to WCE's security transactions with Debtor.

6 **3. Proper Remedy for Violating Rule 1.8(a)**

7 Citing only two Connecticut cases, WCE also argues that the
8 bankruptcy court erred in invalidating WCE's lien as a punishment
9 or remedy for WCE's violation of Rule 1.8. See Ankerman v.
10 Mancuso, 830 A.2d 388, 393 (Conn. App. Ct. 2003), aff'd, 860 A.2d
11 244 (Conn. 2004) ("We conclude that under the facts, a violation
12 of rule 1.8(j) of the Rules of Professional Conduct cannot be the
13 sole basis to bar the enforcement of an otherwise valid
14 promissory note and mortgage"), citing Noble v. Marshall, 579
15 A.2d 594 (Conn. App. Ct. 1990) ("[T]he Rules of Professional
16 Conduct do not of themselves give rise to a cause of action, even
17 to an attorney's client.").

18 Both of these cases are inconsistent with pertinent
19 restatements, commentary and case law from jurisdictions other
20 than Connecticut. For example, section 6 of the Restatement
21 (Third) of Law Governing Lawyering entitled "Judicial Remedies
22 Available To a Client or Nonclient for Lawyer Wrongs" provides
23 that for "a lawyer's breach of a duty owed to the lawyer's client
24 or to a nonclient, judicial remedies may be available through
25 judgment or order Judicial remedies include . . .
26 ordering cancellation or reformation of a contract, deed, or
27 similar instrument[.]" Restatement (Third) of Law Governing
28 Lawyering § 6 (2000) (emphasis added). Comment e to this

1 Restatement section provides:

2 Cancellation of an instrument with otherwise legal
3 effect would be appropriate when, for example, a lawyer
4 obtains a deed to a client's property through undue
5 influence in violation of limitations on business
6 dealings with a client (see § 126) or on client gifts
7 to lawyers (see § 127) or when the instrument was
8 prepared by a lawyer representing clients with
9 substantial conflicts of interests (see § 130). The
10 remedy implements substantive standards applicable to
11 lawyers as an expression of the strong public policy of
12 the jurisdiction.

13 The Reporter's Note to Comment (e) further states:

14 Cases setting aside such a contract or gift to a
15 lawyer-recipient include Hicks v. Clayton, 136 Cal.
16 Rptr. 512 (Cal. App. 1977) (lawyer's purchase of
17 client's property with \$14,000 in equity for \$33 worth
18 of stock was inequitable and subject to imposition of
19 constructive trust, rescission, restitution, and
20 incidental damages); Succession of Cloud, 530 So. 2d
21 1146 (La. 1988) (lawyer's violation of lawyer-code
22 prohibition against acquisition of interest in client's
23 mineral holdings as basis for nullifying transfer);
24 Cuthbert v. Heidsieck, 364 S.W.2d 583 (Mo. 1963)
25 (setting aside client gift of \$20,000 in stock to
26 lawyer)

27 Succession of Cloud, 530 So. 2d at 1150-51, is particularly
28 instructive. In Cloud, an attorney acquired a proprietary
interest in his client's mineral interest in violation of the
Louisiana Code of Professional Responsibility. The Louisiana
Supreme Court held that annulment of the contract transferring
the proprietary interest to the attorney was the appropriate
judicial remedy. Id. The court noted that the standards of the
Code of Professional Responsibility have the force and effect of
substantive law. "The disciplinary rules are mandatory rules
that provide the minimum level of conduct to which an attorney
must conform without being subject to disciplinary action. When
an attorney enters into a contract with his client in direct and
flagrant violation of a disciplinary rule and a subsequent civil

1 action raises the issue of enforcement (or annulment) of the
2 contract, this court, in order to preserve the integrity of its
3 inherent judicial power, should prohibit enforcement of the
4 contract which directly contravenes the [Code of Professional
5 Conduct].” Id. at 1150 (emphasis added).

6 Leading treatises on legal professional responsibility echo
7 the sentiment of the Cloud court. For example, section 12.4 of
8 The Law of Lawyering specifically provides that a violation of
9 Model Rule 1.8(a) (which is identical to Hawaii’s Rule 1.8(a) and
10 which WCE violated) may result in a rescission of the offensive
11 transaction or contract. See Geoffrey C. Hazard, The Law of
12 Lawyering, 3d Ed. § 12.4 (2004 Supp.) (“Courts scrutinize lawyer-
13 client transactions with special care, and may rescind the
14 transaction or award damages for violating the principles
15 underlying Rule 1.8(a).”).²²

16 The foregoing authorities are more persuasive than Ankerman
17 and demonstrate that the bankruptcy court did not err as a matter
18 of law in rescinding or voiding a transaction that violated Rule
19 1.8(a).²³ We therefore affirm.

21 ²²Trustee cites Lee v. Aiu, 936 P.2d 655 (Haw. 1997) in
22 support of her argument that the bankruptcy court appropriately
23 voided the transaction because it violated Rule 1.8(a). The
24 court in Lee did refer the attorney to the Office of Disciplinary
25 Counsel for violating Rule 1.8(a) (id. at 671) and did affirm a
26 jury’s determination that the attorney tortiously interfered with
a contractual relationship, among other things. Lee, however,
does not support Trustee’s conclusion that the court rescinded a
mortgage because of a violation of Rule 1.8(a).

27 ²³Interestingly, WCE did not cite a comment to the preamble
28 to Hawaii’s Rules of Professional Comment in its appellate briefs
or to the bankruptcy court. In particular, comment [6] to the
preamble (which does not have the force of a rule itself) states:

(continued...)

1 B. The Cross-Appeal

2 Trustee has appealed the bankruptcy court's finding that WCE
3 was not negligent in providing legal service to Debtor with
4

5 ²³ (...continued)

6 Violation of a rule should not give rise to a cause of
7 action nor should it create any presumption that a
8 legal duty has been breached. The rules are designed
9 to provide guidance to lawyers and to provide a
10 structure for regulating conduct through disciplinary
11 agencies. They are not designed to be a basis for
12 civil liability. Furthermore, the purpose of the rules
13 can be subverted when they are invoked by opposing
14 parties as procedural weapons. The fact that a rule is
15 a just basis for a lawyer's self-assessment, or for
sanctioning a lawyer under the administration of a
disciplinary authority, does not imply that an
antagonist in a collateral proceeding or transaction
has standing to seek enforcement of the rule.
Accordingly, nothing in the rules should be deemed to
augment any substantive legal duty of lawyers or the
extra-disciplinary consequences of violating such a
duty.

16 See Comment [6] to the Preamble [entitled "Scope"] of the Hawaii
17 Rules of Prof. Conduct.

18 Notwithstanding the disclaimer that the professional rules
19 are not designed to be the basis of civil liability, the rules do
20 establish standards of conduct for attorneys. See Munneke &
21 Davis, The Standard of Care in Legal Malpractice: Do the Model
22 Rules of Professional Conduct Define It?, 22 J. Legal Prof. 33
23 (1998) ("The Preamble language [admonishing against using Rules
24 as basis for civil liability] has been criticized as self-serving
25 economic protectionism, drafted by the organized bar and the
26 courts. In fact, . . . courts consistently cite ethical rules to
27 support decisions that modify the standards of civil
28 liability."). While perhaps an attorney may not be sued for
affirmative damages because of his or her violation of the rules,
he or she should not be able to retain property that was acquired
unethically. We do not believe the preamble contemplates
allowing an attorney to keep property or interests acquired in
violation of the rules; like the Cloud court and Professor Hazard
and the drafters of the Restatement (Third) of Law Governing
Lawyering, we believe that when an attorney fails to comply with
the requisites of Rule 1.8, the attorney's self-interested and
unethical transaction should be voidable. Rescission of the
offensive transaction is permissible.

1 respect to the Eicon Action. Under Hawaii law, there are four
2 primary elements to a negligence claim:

3 (1) A duty or obligation, recognized by the law,
4 requiring the defendant to conform to a certain
5 standard of conduct, for the protection of others
6 against unreasonable risks;

7 (2) A failure on the defendant's part to conform to
8 the standard required: a breach of duty;

9 (3) A reasonably close causal connection between the
10 conduct and the resulting injury; and

11 (4) Actual loss or damage resulting to the interests
12 of another.

13 Doe Parents No. 1 v. State of Hawaii, 58 P.3d 545, 579 (Haw.
14 2002). "In order to prevail on a claim of professional
15 negligence, a plaintiff must establish that defendant's
16 negligence was the proximate cause of plaintiff's loss.
17 Defendant's negligent conduct is the proximate cause of harm to
18 plaintiff if the conduct is a 'substantial factor' in bringing
19 about the harm." Goss v. Crossley (In re The Hawaii Corp.), 567
20 F. Supp. 609, 630-31 (D. Haw. 1983) (internal citations omitted)
21 (emphasis added); see also Dunbar v. Thompson, 901 P.2d 1285,
22 1293 (Haw. Ct. App. 1995) ("[I]n Hawai'i, an actor's negligence
23 can be a legal cause of harm to another only if such negligence
24 is causative, i.e., a 'substantial factor in bringing about the
25 harm.'" (internal quotations and citations omitted).

26 Here, Trustee bore the burden of proving the requisite
27 elements of negligence, including causation. Miyamoto v. Lum, 84
28 P.3d 509, 523 (Haw. 2004). Trustee, however, did not demonstrate
that any negligence by WCE was a "substantial factor" in bringing
about harm to Debtor (i.e., the entry of the default judgment in
the Eicon Action). The bankruptcy court found that WCE advised

1 Fuchs that the attempted service in the Eicon Action was invalid
2 and "that Fuchs should tell plaintiff's counsel in the Eicon
3 litigation to start over." Fuchs did so, and plaintiff's counsel
4 disagreed in his response to Fuchs. Rather than file an answer
5 upon receiving the response from plaintiff's counsel, Fuchs and
6 Worldpoint simply chose to do nothing. (In fact, the record does
7 not reflect that Fuchs even called WCE to advise it of the
8 plaintiff's position). This decision, not WCE's advice, caused
9 entry of the default judgment. Because WCE actions were not a
10 "substantial factor" in any harm to Debtor, the bankruptcy court
11 did not err in concluding that WCE was not negligent.

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13 **VI.**
CONCLUSION

14 For the foregoing reasons, we AFFIRM in both the main appeal
15 and the cross-appeal.
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