

**JUN 20 2005**

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

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

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In re:	)	BAP No. EC-04-1461-PMaS
	)	
CHARLES E. BLAIR,	)	Bk. No. 01-17265
	)	
Debtor.	)	
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CHARLES E. BLAIR,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>MEMORANDUM<sup>1</sup></b>
	)	
BETH MAXWELL STRATTON, Chapter 7	)	
Trustee,	)	
	)	
Appellee.	)	
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Argued and Submitted on  
May 20, 2005 at Sacramento, California

Filed - June 20, 2005

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

Honorable Whitney Rimel, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: PERRIS, MARLAR and SMITH, Bankruptcy Judges.

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

1 The debtor in this chapter 7<sup>2</sup> case argues that the bankruptcy  
2 court erred in determining that the base upon which the trustee's  
3 fees were calculated could include funds disbursed by an escrow  
4 agent at the trustee's direction. We AFFIRM.

5 FACTS<sup>3</sup>

6 During the course of the bankruptcy case of Charles Eugene  
7 Blair ("debtor"), Beth Maxwell Stratton ("the trustee") administered  
8 two parcels of real property, referred to as the Rose Avenue  
9 Property and the Apartments. The trustee's administration  
10 culminated in the sale of both parcels free and clear of existing  
11 liens.

12 The bankruptcy court's orders approving sale of the properties  
13 specifically contemplated the use of an escrow agent to close the  
14 sales and pay off certain secured creditors. Both sales resulted in  
15 net funds for the estate. Debtor's creditors received 100% of their  
16 claims and there was a surplus for debtor.<sup>4</sup>

17 The trustee filed a Final Report and Application for  
18 Compensation and Reimbursement ("the fee application") requesting

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20 <sup>2</sup> Unless otherwise indicated, all chapter and section  
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

22 <sup>3</sup> We have provided an abbreviated set of facts. Debtor  
23 states in his opening brief that he agrees with the statement of  
24 facts set forth by the bankruptcy court in its published opinion.  
25 See In re Blair, 313 B.R. 865 (Bankr. E.D. Cal. 2004).

26 <sup>4</sup> There is no dispute that the bankruptcy estate in this  
case is solvent. As a result, debtor has standing to challenge the  
trustee's fee application. See, e.g., In re Mark Bell Furniture  
Warehouse, Inc., 992 F.2d 7, 10 (1st Cir. 1993) (a solvent debtor has  
standing to appeal orders affecting the size of his estate).

1 fees in the amount of \$34,726.47. As the Bankruptcy Code requires,  
2 the trustee calculated her maximum fees based on disbursements in  
3 the case. The trustee included in the base amount funds disbursed  
4 to the secured creditors by the escrow company in connection with  
5 liquidation of the two properties.

6 Debtor objected to the amount of fees requested by the trustee.  
7 The bankruptcy court entered an order overruling debtor's objection  
8 and awarding the trustee the full amount of fees requested. Debtor  
9 timely appealed.

#### 10 ISSUE

11 Whether the bankruptcy court erred in determining that a  
12 chapter 7 trustee's fee base can include amounts distributed to  
13 secured creditors through the escrow process.

#### 14 STANDARD OF REVIEW

15 A bankruptcy court's award of trustee fees "will be upheld  
16 unless the awarding court abused its discretion or erroneously  
17 applied the law." S.W. Media, Inc. v. Rau, 708 F.2d 419, 422 (9th  
18 Cir. 1983). Debtor argues that the bankruptcy court erroneously  
19 applied the law, because it misconstrued § 326(a). This is a  
20 question of law that we review de novo. See In re Crouch, 199 B.R.  
21 690, 691 (9th Cir. BAP 1996).

22 The trustee argues that "[t]he issue of whether the escrow  
23 holders . . . were acting as agents of the trustee is a question of  
24 fact[,] " which is reviewed for clear error. Appellee's Brief at 10.  
25 The clear error standard of review does not apply, because, as we  
26 discuss below, there is no question that the court authorized the

1 trustee to use an escrow handler in connection with the property  
2 sales. The resolution of this appeal turns on the proper  
3 construction of § 326(a), which is a question of law subject to de  
4 novo review.

#### 5 DISCUSSION

6 The Bankruptcy Code directs that a trustee be awarded  
7 "reasonable compensation for actual, necessary services rendered . .  
8 . ." § 330(a)(1)(A). The compensation allowed under § 330 is  
9 subject to the ceiling set forth in § 326(a), which limits a chapter  
10 7 trustee's compensation to a percentage of the funds disbursed by  
11 the trustee to creditors, specifically including secured creditors.<sup>5</sup>  
12 Debtor does not dispute the reasonableness of the compensation  
13 allowed to the trustee under § 330. The only argument raised by  
14 debtor on appeal is that the bankruptcy court exceeded the maximum  
15 amount allowed under § 326(a), because it improperly included in the  
16 base amount funds distributed to the secured creditors by the escrow  
17 agent.

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20 <sup>5</sup> § 326(a) states as follows:

21 In a case under chapter 7 or 11, the court may allow  
22 reasonable compensation under section 330 of this title of the  
23 trustee for the trustee's services, payable after the trustee  
24 renders such services, not to exceed 25 percent on the first  
25 \$5,000 or less, 10 percent on any amount in excess of \$5,000  
26 but not in excess of \$50,000, 5 percent on any amount in excess  
of \$50,000 but not in excess of \$1,000,000, and reasonable  
compensation not to exceed 3 percent of such moneys in excess  
of \$1,000,000, upon all moneys disbursed or turned over in the  
case by the trustee to parties in interest, excluding the  
debtor, but including holders of secured claims.

1 Two bankruptcy court decisions cited by the trustee are  
2 directly on point. In In re Reid, 251 B.R. 512 (Bankr. W.D. Mo.  
3 2000), the chapter 7 trustee discovered, marketed and sold several  
4 parcels of real property. Secured lienholders were paid by escrow  
5 agents at the closings. As framed by the bankruptcy court, the  
6 issue presented in Reid was

7 whether those payments represent "moneys disbursed or turned  
8 over in the case by the trustee to parties in interest,  
9 excluding the debtor, but including the holders of secured  
claims," even though the trustee did not himself write a check  
to those creditors.

10 Id. at 517 (quoting § 326(a)) (footnote omitted). The court in Reid  
11 held as follows:

12 I find that moneys can be disbursed by the trustee to creditors  
13 even though the trustee does not write the check or deliver an  
14 envelop [sic] with cash to such creditors. Buyers of real  
15 property may well be more comfortable, and more willing to buy,  
16 if the sale is closed through a third party, such as a title  
company or a real estate broker. That third party, who makes  
the actual disbursements to the secured creditor, does so  
pursuant to instructions from the trustee. In that situation,  
I find that disbursements are made "by" the trustee.

17 Id. at 518.

18 The second case, In re Tyczka, 287 B.R. 465 (Bankr. E.D. Mo.  
19 2002), followed Reid. In Tyczka, the chapter 7 trustee authorized  
20 the title company to pay two secured creditors from the proceeds of  
21 the sale of debtor's residence. The court held that the funds  
22 distributed to the secured creditors by the title company could be  
23 included in the trustee's fee base, stating as follows:

24 It is of no consequence that the disbursements of sale proceeds  
25 to the secured creditors . . . were actually made by the title  
26 company, rather than by [the] Trustee. [The] Trustee  
authorized these disbursements through his participation in the  
closing process. Therefore, the disbursements made by the

1 title company are properly included in the calculation of [the]  
2 Trustee's maximum fees.

3 Id. at 469.

4 Debtor's reliance on In re Moreno, 295 B.R. 402 (Bankr. S.D.  
5 Fla. 2003) and In re Indoor-Outdoor Dining, Inc., 77 B.R. 952  
6 (Bankr. S.D. Fla. 1987), is misplaced. The courts in Moreno and  
7 Indoor-Outdoor held that a trustee's fee base could not include  
8 funds distributed to creditors by a settlement agent and a title  
9 company, respectively. While we find the reasoning of Moreno and  
10 Indoor-Outdoor questionable, we need not decide whether the  
11 reasoning is persuasive because of factual distinctions. The  
12 trustees in Moreno and Indoor-Outdoor each failed to obtain court  
13 approval for the use of a third party to disburse the sale proceeds.  
14 See Moreno, 295 B.R. at 403; Indoor-Outdoor, 77 B.R. at 953. In  
15 contrast, the bankruptcy court in this case "expressly approved the  
16 use of an escrow holder and its role in distributing the sale  
17 proceeds to secured creditors" when it entered the orders approving  
18 sale of the properties. In re Blair, 313 B.R. 865, 869 (Bankr. E.D.  
19 Cal. 2004).

20 The Ninth Circuit Court of Appeals has observed that the policy  
21 underlying § 326(a) is to ensure that a trustee is compensated  
22 commensurate with the value of the services conferred on the  
23 bankruptcy estate. S.W. Media, Inc. v. Rau, 708 F.2d 419, 423 (9th  
24 Cir. 1983). "The crucial test seems to be . . . whether or not the  
25 particular property or fund has been justifiably administered in the  
26 bankruptcy court, or whether or not the trustee has properly

1 performed services in relation thereto.'" Id. at 424 n.4 (quoting  
2 In re Schautz, 390 F.2d 797, 800 (2d Cir. 1968)). In this case,  
3 debtor does not dispute the bankruptcy court's finding that the  
4 sales benefitted the estate, and thus that the trustee justifiably  
5 administered the properties. See Blair, 313 B.R. at 870. Likewise,  
6 there is no suggestion that the trustee improperly performed her  
7 services.

8 Debtor argues that the bankruptcy court's interpretation of  
9 § 326(a) violates the plain meaning rule of statutory construction.  
10 We reject this argument. While § 326(a) provides that a trustee's  
11 compensation is based on amounts disbursed "by the trustee[,]"  
12 allowing the fee base to include funds distributed to the secured  
13 creditors through the escrow process is not inconsistent with the  
14 plain meaning of § 326(a), because the escrow handler was acting as  
15 the trustee's agent and following the trustee's instructions when it  
16 distributed funds to the secured creditors. Therefore, in a legal  
17 sense, the distributions were made by the trustee.

18 "An escrow holder is an agent . . . of the parties to the  
19 escrow." Summit Fin. Holdings, Ltd. v. Cont'l Lawyers Title Co., 41  
20 P.3d 548, 551 (Cal. 2002). An agent is "[o]ne who is authorized to  
21 act for or in the place of another; a representative." BLACK'S LAW  
22 DICTIONARY 68 (8th ed. 2004). A court should "presume that Congress  
23 legislates against the backdrop of established principles of state  
24 and federal common law, and that when it wishes to deviate from  
25 deeply rooted principles, it will say so." United States v. Baxter  
26 Int'l Inc., 345 F.3d 866, 900 (11th Cir. 2003), cert. denied, 124 S.

1 Ct. 2907 (2004). See also In re Tsurukawa, 287 B.R. 515, 525 (9th  
2 Cir. BAP 2002) (Congress generally did not intend for the Bankruptcy  
3 Code to preempt common law).

4 There is no indication that Congress intended to override well-  
5 established principles of agency law when it enacted § 326(a). To  
6 the contrary, the legislative history indicates that Congress  
7 intended that a trustee be compensated for liquidating secured  
8 property:

9 It should be noted that the bases (sic) on which the maximum  
10 fee is computed includes moneys turned over to secured  
11 creditors, to cover the situation where the trustee liquidates  
property subject to a lien and distributes the proceeds.

12 8 NORTON BANKRUPTCY CODE PAMPHLET 2004-2005 EDITION, 157 (quoting House and  
13 Senate reports). As the court in Reid correctly noted, parties  
14 routinely use a neutral third party to liquidate real property. 251  
15 B.R. at 518.

16 While debtor does not dispute that the bankruptcy court did, in  
17 fact, authorize the use of an escrow agent when it approved sale of  
18 the properties, he does argue that the court's authorization was  
19 improper, because the agent was not employed pursuant to § 327 and  
20 because use of the escrow agent violated § 345.

21 We decline to address these arguments. Nothing in the record  
22 provided on appeal suggests that debtor raised either of these  
23 arguments at any point in the bankruptcy proceedings. We do not  
24 consider an issue raised for the first time on appeal where, as  
25 here, there are no exceptional circumstances, no change in the law  
26 since the trial court acted and the issue is not a pure issue of

1 law. In re Ehrle, 189 B.R. 771 (9th Cir. BAP 1995). The bankruptcy  
2 court expressly authorized use of an escrow agent when it entered  
3 the orders approving sale of the properties. If debtor believed  
4 that that authorization violated §§ 327 and/or 345, the time to  
5 object was in connection with the sale of the properties. Debtor  
6 will not be permitted to collaterally attack the sale orders in this  
7 appeal.

8 If we were to reach the merits of debtor's arguments regarding  
9 §§ 327 and 345, we likely would reject them. Section 327 states as  
10 follows:

11 (a) Except as otherwise provided in this section, the  
12 trustee, with the court's approval, may employ one or more  
13 attorneys, accountants, appraisers, auctioneers, or other  
14 professional persons, that do not hold or represent an interest  
adverse to the estate, and that are disinterested persons, to  
represent or assist the trustee in carrying out the trustee's  
duties under this title.

15 Not every person employed by a trustee is a "professional person"  
16 within the meaning of § 327. A "professional person" "is one who  
17 takes a central role in the administration of the bankruptcy estate  
18 and in the bankruptcy proceedings[.]'" In re Napoleon, 233 B.R.  
19 910, 914 n.1 (Bankr. N.J. 1999) (quoting In re D'Lites of Am., Inc.,  
20 108 B.R. 352, 355 (Bankr. N.D. Ga. 1989)). Individuals or entities  
21 that perform mechanical, nondiscretionary tasks are not  
22 "professional persons" within the meaning of § 327. In re ACandS,  
23 Inc., 297 B.R. 395, 402 (Bankr. Del. 2003); In re Fretheim, 102 B.R.  
24 298, 299 (Bankr. Conn. 1989). An escrow agent cannot exercise  
25 discretion; it is a limited agent that "must comply strictly with  
26 the instructions of the parties." Summit Fin., 41 P.3d at 552.

1 Section 345 states, in relevant part, as follows:

2 (a) A trustee . . . may make such deposit or investment of  
3 the money of the estate . . . as will yield the maximum  
4 reasonable net return on such money, taking into account the  
5 safety of such deposit or investment.

6 (b) Except with respect to a deposit or investment that is  
7 insured or guaranteed by the United States or by a department,  
8 agency, or instrumentality of the United States or backed by  
9 the full faith and credit of the United States, the trustee  
10 shall require from an entity with which such money is deposited  
11 or invested-

12 (1) a bond-

13 (A) in favor of the United States;

14 (B) secured by the undertaking of a corporate  
15 surety approved by the United States trustee for the  
16 district in which the case is pending; and

17 (C) conditioned on-

18 (i) a proper accounting for all money so  
19 deposited or invested and for any return on such  
20 money;

21 (ii) prompt repayment of such money and  
22 return; and

23 (iii) faithful performance of duties as a  
24 depository; or

25 (2) the deposit of securities of the kind specified in  
26 section 9303 of title 31;

unless the court for cause orders otherwise.

21 (Emphasis supplied.) Section 345 regulates the types of deposits  
22 and investments a trustee may make. The trustee in this case did  
23 not deposit the sale proceeds with the escrow company; the  
24 purchasers of the properties did. Debtor does not allege that the  
25 trustee failed to comply with § 345 when the net funds were  
26 ultimately transferred to her by the escrow agent. Even if § 345

1 did apply, a court can order that the security requirements of § 345  
2 not apply when cause exists. The bankruptcy court in this case  
3 arguably did just that when it approved the use of an escrow agent  
4 in the sale orders.<sup>6</sup>

5 Finally, debtor's discussion of the constructive disbursement  
6 doctrine is not relevant to the matter before us for two reasons.  
7 First, the constructive disbursement doctrine "allows a trustee to  
8 receive compensation for disbursements of property or other  
9 consideration which are deemed to be 'moneys disbursed or turned  
10 over' under § 326(a)." In re Lan Assocs. XI, L.P., 192 F.3d 109,  
11 118 (3d Cir. 1999) (quoting § 326(a)). In this case, actual money  
12 was disbursed.<sup>7</sup> Second, as the Lan court noted, the courts are  
13 split as to the propriety of allowing a trustee's compensation to be  
14 based on the value of property or other non-monetary consideration.  
15 See id. at 118 (rejecting constructive disbursement doctrine).

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17 <sup>6</sup> Debtor, in his reply brief, requests that we take judicial  
18 notice of a copy of a list of authorized depositories for the  
19 Eastern District of California. The escrow agent used by the  
20 trustee (Fidelity Title) does not appear on the list. We hereby  
21 deny debtor's request for judicial notice. There is no indication  
22 that the list was made part of the record before the bankruptcy  
23 court. We cannot consider evidence that was not filed below. In re  
24 McCoy, 111 B.R. 276, 279 (9th Cir. BAP 1990). In addition, taking  
25 judicial notice of the list would serve no purpose, given our  
26 conclusion that § 345 is not implicated in this case.

<sup>7</sup> The courts in Moreno and Indoor-Outdoor, which cases are  
discussed above, rejected application of the constructive  
disbursement doctrine as an alternative basis for disallowing the  
requested fees. It is not clear why the Moreno and Indoor-Outdoor  
courts even discussed the constructive disbursement doctrine, given  
that actual money, not property or other non-monetary consideration,  
was disbursed in both cases.

1 However, despite debtor's convoluted arguments to the contrary, the  
2 Ninth Circuit adopted the constructive disbursement doctrine in York  
3 Int'l Bldg., Inc. v. Chaney, 527 F.2d 1061, 1074 n.12 (9th Cir.  
4 1975) (treating assumption of existing mortgage as a disbursement), a  
5 fact it acknowledged, in dicta, in a subsequent case. See Rau, 708  
6 F.2d at 423-24.

7 CONCLUSION

8 For the reasons set forth above, we AFFIRM.

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