

MAR 11 2014

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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-13-1300-DJuKi
)		
WALLACE EUGENE FRANCIS,)	Bk. No.	12-11910
TRACY DANIELLE FRANCIS,)		
)	Adv. No.	13-01040
Debtors.)		
_____)		
)		
WALLACE EUGENE FRANCIS,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
DEBRA LYN WALLACE,)		
)		
Appellee.)		
_____)		

Argued and Submitted on February 20, 2014
at San Francisco, CA

Filed - March 11, 2014

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

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Appearances: Thomas P. Kelly, III, argued for Appellant Wallace Eugene Francis; Deborah S. Bull argued for Appellee Debra Lynn Wallace.

Before: DUNN, JURY, and KIRSCHER, Bankruptcy Judges.

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1 DUNN, Bankruptcy Judge:

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3 Wallace Eugene Francis ("Francis"), a chapter 7¹ debtor,²
4 appeals the bankruptcy court's summary judgment determination
5 that his obligation to "pay and hold Wife harmless" from certain
6 credit card obligations, as provided in the stipulated marital
7 dissolution judgment with his former spouse, appellee Debra Lyn
8 Wallace ("Wallace"), was excepted from his discharge under
9 § 523(a)(15). We AFFIRM.

10 **I. FACTUAL BACKGROUND**

11 The relevant facts in this appeal are straightforward and
12 are not in dispute.

13 Francis filed a petition for relief under chapter 7 on
14 July 12, 2012. Wallace was listed as an unsecured creditor on
15 Francis' Schedule F. However, the amount of Wallace's claim was
16 stated as "unknown," and Francis specified Wallace's claim as
17 "contingent," "unliquidated" and "disputed."³

18
19 ¹ Unless otherwise indicated, all chapter and section
20 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-
21 1532, and all "Rule" references are to the Federal Rules of
22 Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of
23 Civil Procedure are referred to as "Civil Rules."

24 ² The joint debtors in the underlying main bankruptcy case
25 are Francis and his current wife, Tracy Danielle Francis, but
26 since all issues in this appeal relate solely to Francis, no
27 further references to Ms. Francis will be made.

28 ³ Francis did not include the schedules filed in his main
chapter 7 case in his excerpts of record. However, in order to
review the complete record of relevant documents, we accessed the
bankruptcy court's electronic docket and the imaged documents

(continued...)

1 Prior to the bankruptcy filing, the parties stipulated to a
2 marital dissolution judgment ("Judgment") that was entered by the
3 Sonoma County Superior Court in case no. SFL-44977 on May 26,
4 2009. Part C of the Judgment, titled "Property Division,"
5 included the following preamble in Section 1.01:

6 Husband [Francis] will be confirmed, awarded and
7 assigned as his separate property, those assets and
8 liabilities as set forth below, including without
9 limitation, those assets which are his separate
10 property. Wife [Wallace] transfers to Husband as his
separate property all of her right, title and interest
in each asset. Husband will pay and hold Wife harmless
from each liability.

11 (Emphasis added.) Section 1.01 goes on to list various property
12 items that were recognized as the separate property of Francis
13 and various debt obligations, including credit card debts
14 ("Credit Card Debts"), that Francis covenanted to pay and from
15 which, he agreed to hold Wallace harmless. Part D, Section 1.05
16 states that:

17 This [Judgment] is the result of the joint efforts of
18 the parties. This [Judgment] and each of its
19 provisions will be interpreted fairly, simply, and not
strictly for or against either party.

20 The Judgment further provided that it would be "governed by, and
21 interpreted in accordance with California law." Part D, Section
22 1.07 of the Judgment.

23 At some point in time, Francis stopped making payments on
24

25 ³(...continued)

26 included therein to review Francis' Schedule F. See O'Rourke v.
27 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58
28 (9th Cir. 1989) (holding that this Panel can take judicial notice
of the bankruptcy court record).

1 the Credit Card Debts, and Wallace filed suit in California state
2 court to enforce the Judgment. Francis' chapter 7 filing
3 followed closely thereafter.

4 Francis filed an adversary proceeding against Wallace,
5 seeking a determination that any obligation to pay the Credit
6 Card Debts under the Judgment was not excepted from his discharge
7 under § 523(a)(15). Wallace answered the adversary proceeding
8 complaint, requesting that Francis' obligations under the
9 Judgment "be deemed non-dischargeable and that [Wallace] be
10 awarded the costs of defending this action, attorney's fees and
11 such other relief as this Court determines is just and proper."
12 Wallace subsequently filed a motion for summary judgment ("SJ
13 Motion"), arguing that Francis' obligation to pay the Credit Card
14 Debts under the Judgment, along with any attorneys fees and costs
15 incurred to enforce the Judgment, was excepted from his discharge
16 under § 523(a)(15). Francis opposed the SJ Motion, arguing that
17 the "hold harmless" language of the Judgment did not support a
18 nondischargeable debt to Wallace under § 523(a)(15) because there
19 was no explicit obligation to "indemnify" her for purposes of
20 California law.

21 The bankruptcy court heard argument on the SJ Motion on
22 May 24, 2013 and took the matter under submission. It entered
23 its Memorandum on Motion for Summary Judgment ("Memorandum")
24 granting Wallace's SJ Motion on May 30, 2013. The summary
25 judgment order and a judgment in favor of Wallace in the
26 adversary proceeding were entered on June 12, 2013.

27 Francis filed a timely notice of appeal.

28 //

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction under 28 U.S.C.
3 §§ 1334 and 157(b)(1) and (b)(2)(I). We have jurisdiction under
4 28 U.S.C. § 158.

5 **III. ISSUE**

6 As stated by Francis, the sole issue in this appeal is, "Did
7 the Bankruptcy Court err by failing to apply California law in
8 granting the Appellee's Motion for Summary Judgment?"

9 **IV. STANDARDS OF REVIEW**

10 We review a bankruptcy court's legal conclusions, including
11 its interpretation of provisions of the Bankruptcy Code, de novo.
12 Roberts v. Erhard (In re Roberts), 331 B.R. 876, 880 (9th Cir.
13 BAP 2005), aff'd, 241 F. App'x 420 (9th Cir. 2007). We also
14 review de novo a bankruptcy court's decision to grant a motion
15 for summary judgment. Marciano v. Fahs (In re Marciano), 459
16 B.R. 27, 35 (9th Cir. BAP 2011), aff'd, 708 F.3d 1123 (9th Cir.
17 2013). De novo review requires that we consider a matter anew,
18 as if no decision had been made previously. United States v.
19 Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v.
20 Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

21 We may affirm the decision of the bankruptcy court on any
22 basis supported by the record. Shanks v. Dressel, 540 F.3d 1082,
23 1086 (9th Cir. 2008).

24 **V. SUMMARY JUDGMENT STANDARDS**

25 Summary judgment is appropriately granted where review of
26 the relevant record establishes that there is no genuine issue as
27 to any material fact, and the moving party is entitled to
28 judgment as a matter of law. Civil Rule 56(a), applicable in

1 adversary proceedings in bankruptcy under Rule 7056; Celotex
2 Corp. v. Catrett, 477 U.S. 317, 322 (1986); Ilko v. Cal. State
3 Bd. of Equalization (In re Ilko), 651 F.3d 1049, 1052 (9th Cir.
4 2011).

5 VI. DISCUSSION

6 1. Section 523(a)(15) - Its Interpretation and Application

7 While our consideration of issues with respect to exceptions
8 to discharge under § 523(a), and particularly § 523(a)(15), is
9 informed by state law, our interpretation of § 523(a)(15) is
10 fundamentally a question of federal law. See, e.g., Taylor v.
11 Taylor (In re Taylor), 737 F.3d 670, 676-77 (10th Cir. 2013):

12 The nature of the obligation is not restricted to the
13 parties' label in the settlement agreement and is a
14 question of federal law. Sylvester [v. Sylvester], 865
15 F.2d at 1166; see Young v. Young (In re Young), 35 F.3d
16 499, 500 (10th Cir. 1994) (finding that shared intent
17 "is not limited to the words of the settlement
agreement, even if unambiguous" and stating that "the
bankruptcy court is required to look behind the words
and labels of the agreement in resolving this issue.").
That said, state law may inform the nature of the
interest.

18 Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 137-38 (9th Cir.
19 BAP 1997); Gionis v. Wayne (In re Gionis), 170 B.R. 675, 681 (9th
20 Cir. BAP 1994):

21 The ultimate issue on the merits, whether a state
22 court's award of \$185,000 in connection with a marital
23 dissolution constitutes nondischargeable alimony,
24 maintenance, or support, is a question of federal law
with respect to which the labels that were applied
under state law are not binding.

25 Sweck v. Sweck (In re Sweck), 174 B.R. 532, 534 (Bankr. D.R.I.
26 1994) (The Bankruptcy Code requires that the bankruptcy court
27 "determine the nature of the debts, regardless of the labels
28 placed on them by the parties or the family court.").

1 Section 523(a)(15) sets forth an exception to a chapter 7
2 debtor's discharge for a debt owed "to a spouse, former spouse,
3 or child of the debtor and [not a support obligation] that is
4 incurred by the debtor in the course of a divorce or separation
5 or in connection with a separation agreement, divorce decree or
6 other order of a court of record,"4 The legislative
7 history of the 1994 amendments to the Bankruptcy Code, which
8 added the initial version of § 523(a)(15), gives a strong
9 indication of congressional intent in providing the additional
10 exception to discharge in § 523(a)(15):

11 Subsection (e) [of § 304 of H.R. 5116] adds a new
12 exception to discharge for some debts arising out of a
13 divorce decree or separation agreement that are not in
14 the nature of alimony, maintenance or support. In some
15 instances, divorcing spouses have agreed to make
16 payments of marital debts, holding the other spouse
17 harmless from those debts, in exchange for a reduction
18 in alimony payments. In other cases, spouses have
19 agreed to lower alimony based on a larger property

17 4 § 523(a)(15), as originally adopted in the Bankruptcy
18 Reform Act of 1994, was modified by two affirmative defenses or
19 "exceptions within the exception," for situations where:

- 20 (A) the debtor does not have the ability to pay such
21 debt from income or property of the debtor not
22 reasonably necessary to be expended for the maintenance
23 or support of the debtor or a dependent of the debtor
24 and, if the debtor is engaged in a business, for the
25 payment of expenditures necessary for the continuation,
26 preservation, and operation of such business; or
27 (B) discharging such debt would result in a benefit to
28 the debtor that outweighs the detrimental consequences
to a spouse, former spouse, or child of the debtor.

26 The two quoted defenses or exceptions to the application of
27 § 523(a)(15) were deleted by Congress in the amendments to the
28 Bankruptcy Code included in the Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005.

1 settlement. If such "hold harmless" and property
2 settlement obligations are not found to be in the
3 nature of alimony, maintenance, or support, they are
4 dischargeable under current law. The nondebtor spouse
5 may be saddled with substantial debt and little or no
6 alimony or support. . . .

7 140 Cong. Rec. H 10770 (Oct. 4, 1994) (emphasis added). We note
8 that in Part B of the Judgment, titled "Spousal Support," Francis
9 and Wallace each waived and released "all right and claim to
10 receive spousal support from the other at any time."

11 Decisions of Circuit Courts of Appeals interpreting
12 § 523(a)(15) have been consistent in recognizing its breadth.
13 See, e.g., Short v. Short (In re Short), 232 F.3d 1018, 1020 (9th
14 Cir. 2000) ("We conclude that the debt is nondischargeable
15 because it was incurred by the debtor as part of the division of
16 property in the course of a judgment of dissolution."); In re
17 Crosswhite, 148 F.3d 879, 883 (7th Cir. 1998) (§ 523(a)(15) "sets
18 forth as nondischargeable any marital debt other than alimony,
19 maintenance or support that is incurred in connection with a
20 divorce or separation"); Gamble v. Gamble (In re Gamble), 143
21 F.3d 223, 225 (5th Cir. 1998) ("Section 523(a)(15) purports to
22 apply to 'any debt . . . [not in the nature of alimony or child
23 support] that is incurred in the course of a divorce or
24 separation,' and the bankruptcy court was clearly correct to give
25 this provision the full reach implicated by its plain
26 language."); McCafferty v. McCafferty (In re McCafferty), 96 F.3d
27 192, 200 (6th Cir. 1996) ("Congress amended the Bankruptcy Code
28 in 1994 to allow exemptions from discharge for all obligations
incurred as a result of a divorce decree."). In In re Short, the
Ninth Circuit concluded that a debt incurred by the debtor to his

1 former spouse prior to their marriage but which he agreed to pay
2 in their stipulated dissolution judgment was excepted from his
3 discharge under § 523(a)(15).

4 A nondebtor ex-spouse in a § 523(a)(15) action bears the
5 burden of proof to establish by a preponderance of the evidence
6 that the subject debt 1) is not a support obligation of the kind
7 described in § 523(a)(5), and 2) was incurred by the debtor in a
8 divorce or separation or under a separation agreement, divorce
9 decree or marital dissolution judgment or order. See, e.g.,
10 McFadden v. Putnam (In re Putnam), 2012 WL 8134423 at *18 (Bankr.
11 E.D. Cal. Aug. 30, 2012); Burckhalter v. Burckhalter (In re
12 Burckhalter), 389 B.R. 185, 188 (Bankr. D. Colo. 2008); Ruhlen v.
13 Montgomery (In re Montgomery), 310 B.R. 169, 175-76 (Bankr. C.D.
14 Cal. 2004). Since, as noted above, the parties each waived
15 support in Part B of the Judgment, the first element is
16 undisputed. There likewise can be no dispute that Francis'
17 obligation to pay and hold Wallace harmless from the Credit Card
18 Debts arises directly from his covenants in part C of the marital
19 dissolution Judgment. There is no requirement in § 523(a)(15)
20 that a debt obligation incurred as part of a dissolution judgment
21 be payable directly to the ex-spouse in order to be excepted from
22 a debtor's discharge. In re Montgomery, 310 B.R. at 177-78;
23 Johnston v. Henson (In re Henson), 197 B.R. 299, 303 (Bankr. E.D.
24 Ark. 1996):

25 Section 523(a)(15) does not require that a court order
26 the debt be paid directly to the spouse. The statute
27 provides that a debtor is not discharged from any debt
28 incurred by the debtor in the course of a divorce or in
connection with a divorce decree. The statute does not
impose a "direct pay" requirement.

1 (Emphasis in original.) See also Wodark v. Wodark (In re
2 Wodark), 425 B.R. 834, 838 (10th Cir. BAP 2010).

3 2. Section 101(12) and California Indemnity Law

4 Francis' sole argument in this appeal is that under
5 California contract law, an obligation to "hold harmless" is not
6 synonymous with an obligation to "indemnify," and in order for
7 Wallace to be able to enforce against Francis the third party
8 liabilities allocated to Francis in the Judgment, clear
9 "indemnification" language needed to be used in the Judgment.
10 Accordingly, Francis' real argument is not so much with the
11 bankruptcy court's interpretation of § 523(a)(15) but rather that
12 Francis' obligation to "pay and hold [Wallace] harmless" from the
13 Credit Card Debts in the Judgment is not a "debt" in terms of
14 "liability on a claim" for purposes of § 101(12). If Francis'
15 Judgment obligation is not an enforceable "debt," it cannot be
16 excepted from Francis' discharge under § 523(a)(15) and, in fact,
17 does not need to be discharged.

18 That argument was not specifically made at any point to the
19 bankruptcy court or in the briefs Francis filed in this appeal
20 and could be treated as waived. See, e.g., United States v.
21 Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990) (issues not raised
22 at the trial court ordinarily will not be considered for the
23 first time on appeal); Law Offices of Neil Vincent Wake v. Sedona
24 Inst. (In re Sedona Inst.), 220 B.R. 74, 76 (9th Cir. BAP 1998)
25 (arguments not specifically and distinctly made in appellant's
26 opening brief are waived and ordinarily, will not be considered),
27 aff'd, 21 Fed. Appx. 723 (9th Cir. 2001). However, since
28 Francis' argument presents a question of law that has a

1 potentially important impact at the intersection of federal
2 bankruptcy law and California law, we exercise our discretion to
3 consider it.

4 Francis cites California Civil Code ("CCC") § 2772 for its
5 definition of "indemnity" as "a contract by which one engages to
6 save another from a legal consequence of the conduct of one of
7 the parties, or of some other person" and argues, relying on
8 authorities outside the family law area, that an obligation to
9 indemnify is legally distinct from an obligation to hold
10 harmless.

11 Are the words "indemnify" and "hold harmless"
12 synonymous? No. One is offensive and the other is
13 defensive - even though both contemplate third-party
14 liability situations. "Indemnify" is an offensive
15 right - a sword - allowing an indemnitee to seek
16 indemnification. "Hold harmless" is defensive: The
17 right not to be bothered by the other party itself
18 seeking indemnification.

19 Queen Villas Homeowners Ass'n v. TCB Property Management, 149
20 Cal. App. 4th 1, 9 (2007) (explanatory dicta in a case where the
21 subject contract included obligations both to indemnify and hold
22 harmless). See also Myers Building Indus., Ltd. v. Interface
23 Tech., Inc., 13 Cal. App. 4th 949, 969 (1993) ("Indemnity
24 agreements ordinarily relate to third party claims." Again, that
25 statement is dicta in a decision involving a contract that
26 included both indemnification and hold harmless provisions and
27 where the issue was whether an attorneys fee provision was
28 reciprocal in its application under CCC § 1717.).

Francis argues that even if he breached his obligation under
the Judgment to pay the Credit Card Debts, the third party
creditors are not pursuing him. (At oral argument, Francis'

1 counsel indicated that the Credit Card Debts had been paid by
2 Wallace.) His obligation to pay the Credit Card Debts was not a
3 direct obligation to Wallace, and in the absence of clear
4 indemnification language in the Judgment in her favor, Wallace
5 cannot enforce that obligation. Gotcha!

6 Francis underlines that argument by citing California
7 decisions for the proposition that indemnification language in a
8 contract "must be particularly clear and explicit, and will be
9 construed strictly against the indemnitee." Appellant's Opening
10 Brief at 12, citing Prince v. Pac. Gas & Elec. Co., 45 Cal. 4th
11 1151, 1158 (2009); Crawford v. Weather Shield Mfg., Inc. 44 Cal.
12 4th 541, 552 (2008); and E.L White, Inc. v. City of Huntington
13 Beach, 21 Cal. 3d 497, 507 (1978). Here, however, Francis
14 overreaches. While it is true that those decisions stand for the
15 proposition that in order to enforce an express indemnity, the
16 contract language must be clear and specific, Francis ignores the
17 line of California authority discussed in some of the same
18 decisions that recognizes that implied indemnity obligations may
19 be enforced as a matter of equity.

20 The obligation of indemnity, which we have defined as
21 "the obligation resting on one party to make good a
22 loss or damage another has incurred" (citations
23 omitted) . . . may find its source in equitable
24 considerations brought into play either by contractual
25 language not specifically dealing with indemnification
26 or by the equities of the particular case. (Citations
27 omitted.)

28 E.L. White, Inc. v. City of Huntington Beach, 21 Cal. 3d at 506-
07. See Prince v. Pac. Gas & Elec. Co., 45 Cal. 4th at 1157-59;
Garlock Sealing Tech., LLC v. Nak Sealing Tech. Corp., 148 Cal.
App. 4th 937, 967-72 (2007) ("As our review of the cases

1 demonstrates, a duty to indemnify has been implied from the
2 obligation of the contracting parties to perform their promises,
3 the reasoning being that a promise to perform includes an implied
4 promise to perform properly.").

5 In this case, Francis "promised" in the Judgment to "pay and
6 hold [Wallace] harmless" from the Credit Card Debts. It is
7 undisputed that he breached the promise to pay the subject debts.
8 Wallace apparently paid them and was damaged as a result. In
9 these circumstances, in spite of the absence of specific
10 "indemnification" language in Francis' covenants in the Judgment,
11 Wallace has an implied indemnification claim against Francis
12 under California law that constitutes a "debt" for purposes of
13 § 101(12). See In re Putnam, 2012 WL 8134423 at *8; Garlock
14 Sealing Tech., LLC v Nak Sealing Tech Corp., 148 Cal. App. 4th at
15 973 (The conceptual basis for implied contractual indemnity "is
16 the idea of a contracting party's fair responsibility for
17 foreseeable damages caused by its breach of the promises it made
18 in the contract."). By its terms, the Judgment provided that it
19 was to be "interpreted fairly, simply and not strictly for or
20 against either party."

21 3. Enforcing California Marital Dissolution Judgments

22 Beyond the dubious merits of Francis' arguments in a pure
23 contract context, as discussed above, the undisputed fact in this
24 appeal is that the parties' agreement was incorporated and merged
25 into the Judgment that the Sonoma County Superior Court entered
26 in their marital dissolution proceeding. See Judgment, Part D,
27 Section 1.01; Flynn v. Flynn, 42 Cal. 2d 55, 59 (1954) ("It is
28 settled that a document may be incorporated either expressly or

1 by apt reference into a judgment or decree so as to make it an
2 operative part of the order of the court."). In the two-page
3 first part of the Judgment prepared and signed by the California
4 Superior Court judge, the court expressly reserved jurisdiction
5 "to make other orders necessary to carry out this [Judgment]."

6 Under California law, parties have many avenues for
7 enforcing judgment obligations. In fact, California Family Code
8 ("CFC") § 290 provides that, "[a] judgment or order made or
9 entered pursuant to [the CFC] may be enforced by the court by
10 execution, the appointment of a receiver, or contempt, or by any
11 other order as the court in its discretion determines from time
12 to time to be necessary." (Emphasis added.) The Judgment
13 specifically references its satisfaction of the requirements of
14 CFC § 2105(c) and the parties' compliance with CFC § 2104 and
15 indicates that the matter was heard pursuant to CFC § 2336. See
16 Judgment at 1-2. Accordingly, the record reflects the undisputed
17 fact that the Judgment was "made or entered" pursuant to the CFC.

18 CFC § 290 gives courts broad discretionary authority in
19 enforcing the dissolution judgments they enter. That authority
20 includes the power to enforce a judgment party's covenants to pay
21 and hold harmless his or her ex-spouse from debts to third
22 parties. See, e.g., In re Putnam, 2012 WL 8134423 at *10; In re
23 Montgomery, 310 B.R. at 180; Fithian v. Fithian, 74 Cal. App. 3d
24 397, 402 (1977) ("That a court in a dissolution action has the
25 power to order a spouse to pay money or deliver property into the
26 hands of a third party cannot be doubted."); Young v. Superior
27 Court, 105 Cal. App. 2d 65, 67 (1951):

28 If [a property settlement] agreement or any of its

1 provisions are actually incorporated in the [divorce]
2 decree and the decree orders the performance of such
3 agreement or such provision or provisions, then the
4 agreement or the provision or provisions so
5 incorporated are merged in the decree and may be
6 enforced only as an order of the court.

7 (citing Shogren v. Superior Court, 93 Cal. App. 2d 356 (1949)).

8 The Judgment obligated Francis to pay and hold Wallace
9 harmless from the Credit Card Debts. Wallace's claim for
10 Francis' failure to pay and hold her harmless from the Credit
11 Card Debts was an enforceable Judgment debt in California state
12 court. Although it is not material to our determination of this
13 appeal, we note that Francis sought the protection of the
14 automatic stay in bankruptcy shortly after Wallace initiated
15 efforts in California state court to enforce the Judgment. We
16 conclude that Francis' arguments in this appeal are meritless,
17 and the bankruptcy court did not err in granting summary judgment
18 to Wallace on the § 523(a)(15) claim contested in the adversary
19 proceeding.

20 **VII. CONCLUSION**

21 For the foregoing reasons, we AFFIRM.

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23 Concurrence begins on next page.
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1 JURY, Bankruptcy Judge, concurring:

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3 I concur in the Opinion affirming the bankruptcy court's
4 judgment that a debt owed by Francis to Wallace is
5 nondischargeable under § 523(a)(15). I also do not quibble with
6 the essence of the reasoning applied by the majority in reaching
7 that conclusion. I write separately, however, to emphasize that
8 the existence of a "debt" owed by Francis to Wallace arises under
9 application of California law and, to that extent, I disagree
10 with the majority's statement "[w]hile our consideration of
11 issues with respect to exceptions to discharge under § 523(a),
12 and particularly § 523(a)(15), is *informed by state law*, our
13 interpretation of § 523(a)(15) is fundamentally a question of
14 federal law" (italicized emphasis added). I feel compelled to
15 make this distinction since Francis has submitted that the sole
16 issue on appeal is that the bankruptcy court erred by not
17 applying California law. I conclude that the bankruptcy court
18 did indeed apply California law to determine that Francis owes a
19 debt to Wallace. Under federal law, this Opinion confirms that
20 debt is nondischargeable.

21 Section 523(a)(15) provides an exception to discharge "from
22 any debt" to a former spouse incurred by the debtor in connection
23 with a separation agreement which is not excepted under (a)(5).
24 The term "debt" is defined in § 101(12) as "liability on a
25 claim." The term "claim" is further defined in § 101(5) to mean:

26 (A) right to payment, whether or not such right is reduced
27 to judgment, liquidated, unliquidated, fixed, contingent,
28 matured, unmatured, disputed, undisputed, secured, or
unsecured; or

1 (B) right to an equitable remedy for breach of performance
2 if such breach gives rise to a right to payment,

3 It is subsection (B) of this definition which creates a debt –
4 i.e. a right to payment – in this circumstance. The Supreme
5 Court has held that a “right to payment” is “nothing more nor
6 less than an enforceable obligation.” Johnson v. Home State
7 Bank, 501 U.S. 78, 83 (1991). Whether a right to payment exists
8 in a bankruptcy case is generally determined by reference to
9 state law. Butner v. United States, 440 U.S. 48, 55 (1979).

10 Francis asserts that the nuances between the terms “hold
11 harmless” and “indemnification” compels the conclusion under
12 California law that no right to payment exists from Francis to
13 Wallace. As recognized by the majority, this conclusion is
14 wrong. An excellent discussion of the mechanism by which
15 California law creates this right to payment is found in an
16 unpublished opinion from a bankruptcy court, McFadden v. Putnam
17 (In re Putnam), 2012 WL 8134423, at *9-10 (Bankr. E.D. Cal.
18 2012), where the judge tussled with an argument similar to the
19 one made here by Francis.

20 In Putnam, the debtor had obligated himself under a Marital
21 Settlement Agreement (MSA) to make lease payments on his ex-
22 wife’s (McFadden’s) car and to make other payments to third-party
23 creditors. After the debtor defaulted on these payments, and
24 therefore defaulted under the terms of the MSA, he filed
25 bankruptcy and sought to discharge the obligations because they
26 did not create a “right to payment” or debt which would be
27 nondischargeable under § 523(a)(15). After noting that McFadden
28 might be entitled to specific performance of the MSA on those

1 terms, the judge recognized that was not enough under
2 § 101(5)(B):

3 That McFadden has a right to an equitable remedy is not
4 quite enough. A right to an equitable remedy for
5 breach of performance will only constitute a 'claim' if
6 the breach of performance also 'gives rise to a right
7 to payment.' At first, it appears on the face of the
8 Dissolution Judgment that compelling specific
9 performance of Putnam's obligations under the judgment
10 would result in payment to *third-party creditors* but
11 not necessarily to McFadden. However, McFadden may
12 have rights to payment as well, through the State
13 Court's use of its equitable power in enforcing the
14 terms of the Dissolution Judgment. Id. at *10.

15 The bankruptcy court then noted, as the majority here also
16 does, that although a MSA is interpreted as a contract under
17 California law, once it is incorporated into a dissolution
18 judgment, post judgment remedies supplied by the Cal. Fam. Code
19 become available for enforcement. This analysis then leads to
20 the discussion of Cal. Fam. Code § 290 which provides the "right
21 to payment:"

22 Thus, to enforce her rights, McFadden may rely on
23 California Family Code section 290, which generally
24 provides that '[a] judgment or order made or entered
25 pursuant to [the California Family Code] may be
26 enforced by the court by execution, the appointment of
27 a receiver, or contempt, or by any other order as the
28 court in its discretion determines from time to time to
be necessary.' This statute give the state court broad
discretion in fashioning orders enforcing family law
judgments. As a result, a court has equitable power to
determine the manner in which an obligation under a
dissolution judgment is to be paid or performed. And
this would include the 'power to order a spouse to pay
money or deliver property into the hands of a third
party.' Id.

Consistent with this reasoning, the Putnam court concluded
that the state court could award monetary damages to McFadden
based on the debtor's breach of the MSA. Id. That award of
monetary damages is a right to payment: a debt owed to a former

1 spouse.

2 Cal. Fam. Code § 290 applies equally here as in Putnam and
3 the remedy available to Wallace is enforcement of a "right to
4 payment" from Francis. The bankruptcy court did not err by
5 applying the wrong law. The debt arose under California law,
6 properly applied, a debt which is nondischargeable under
7 § 523(a)(15).

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