

JAN 31 2017

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. SC-15-1204-FYJu  
 )  
 JOSEPH ZENOVIC, ) Bk. No. 13-07230-LT7  
 )  
 Debtor. ) Adv. Pro. 13-90218-LT  
 )  
 \_\_\_\_\_ )  
 )  
 JOSEPH ZENOVIC, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 MALCOLM CRUMP, as Trustee of )  
 the Malcolm A. and S'anta Lou )  
 Crump Family Trust UTD )  
 12/10/87; S'ANTA LOU CRUMP, )  
 as Trustee of the Malcolm A. )  
 and S'anta Lou Crump Family )  
 Trust UTD 12/10/87; ANGELA )  
 CRUMP, )  
 )  
 Appellees. )  
 )  
 \_\_\_\_\_ )

Argued and Submitted on January 19, 2017  
at San Diego, California

Filed - January 31, 2017

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

Honorable Laura S. Taylor, Chief Bankruptcy Judge, Presiding

Appearances: Kerry Todd Curry of Curry & Associates argued on  
 behalf of Appellant Joseph Zenovic; Jason M.  
 Santana argued on behalf of Appellees Malcolm A.  
 Crump, S'anta Lou Crump, and Angela Crump.

\_\_\_\_\_  
 \* This disposition is not appropriate for publication.  
 Although it may be cited for whatever persuasive value it may  
 have, see Fed. R. App. P. 32.1, it has no precedential value, see  
 9th Cir. BAP Rule 8024-1.

1 Before: FARIS, YUN,\*\* and JURY, Bankruptcy Judges.

2 **INTRODUCTION**

3 Chapter 7<sup>1</sup> debtor Joseph Zenovic appeals from the bankruptcy  
4 court's judgment following trial determining that appellees  
5 Malcolm, S'anta Lou, and Angela Crump hold a nondischargeable  
6 claim in the amount of \$266,481.64. He does not challenge the  
7 court's finding of liability or determination of  
8 nondischargeability, but rather only disputes the bankruptcy  
9 court's calculation of damages. We agree with the bankruptcy  
10 court's application of California's seven percent prejudgment  
11 interest rate, rather than the much lower federal rate. However,  
12 we hold that the bankruptcy court erred in valuing certain real  
13 property for the purpose of calculating the damages claim.  
14 Accordingly, we AFFIRM IN PART, REVERSE IN PART, and REMAND to  
15 enter judgment consistent with this decision.

16 **FACTUAL BACKGROUND**

17 **A. The Crumps and their desire to build an eldercare facility**

18 Malcolm and S'anta Crump, a married couple, their adult  
19 daughter, Angela, and several extended family members owned  
20 interests in an income-producing commercial property. In 2008,  
21 the family decided to sell the property, and each of the Crumps  
22

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23  
24 <sup>\*\*</sup> The Honorable Scott H. Yun, United States Bankruptcy  
25 Judge for the Central District of California, sitting by  
designation.

26 <sup>1</sup> Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, and all "Civil Rule" references are to the Federal  
Rules of Civil Procedure.

1 expected to receive a substantial cash distribution.

2 In order to replace the lost rental income, Mr. Crump,  
3 Mrs. Crump, and Angela decided to seek a replacement rental  
4 property in Ramona, California. They contacted Mrs. Crump's  
5 friend and real estate broker, Karen Clendenen. Ms. Clendenen  
6 suggested that the Crumps participate in an exchange under  
7 section 1031 of the Internal Revenue Code in order to defer  
8 capital gains taxes.

9 After considering several properties, Mrs. Crump shifted her  
10 focus to building and operating an eldercare facility. At this  
11 point, Ms. Clendenen introduced her to Mr. Zenovic, with whom she  
12 shared office space.

13 Ms. Clendenen introduced Mr. Zenovic as a general contractor  
14 with experience on projects in the Ramona area. Mr. Zenovic told  
15 Mrs. Crump that his company, Meadow Builders, owned two parcels  
16 of contiguous real property (the "Property") in Ramona totaling  
17 1.3 acres. Mr. Zenovic represented to her that the Property was  
18 suitable for her needs and "buildable and ready to go."

19 After a number of meetings with Mr. Zenovic and  
20 Ms. Clendenen, the Crumps decided to purchase the Property and  
21 hire Mr. Zenovic as the general contractor to construct an  
22 eldercare facility on the Property. In fact, neither Mr. Zenovic  
23 nor Meadow Builders held a general contractor's license in the  
24 state of California.

25 **B. The purchase contracts**

26 Ms. Clendenen represented both the Crumps and Mr. Zenovic  
27 and drafted the relevant contracts: a Vacant Land Purchase  
28 Agreement ("Purchase Agreement"), an addendum ("Addendum") to the

1 Purchase Agreement, and a second Vacant Land Purchase Agreement  
2 ("Second Purchase Agreement"). Unfortunately, she drafted the  
3 contracts ineptly.

4 The Purchase Agreement, which Ms. Clendenen prepared using a  
5 standard form from the California Association of Realtors,  
6 provided that the Crumps would purchase the larger of the two  
7 parcels comprising the Property for a purchase price of \$641,000.

8 The Second Purchase Agreement identified the smaller parcel  
9 comprising the Property and a purchase price of \$115,000.

10 The Addendum cryptically provided as follows:

11 Purchase price to include the following:

- 12 1. Landscape = \$20,000
- 13 2. Road Improvements - \$15,000
- 14 3. Furniture - \$20,000
- 15 4. Sewer construction - \$36,000
- 16 5. \$400,000 for cost of approx. 2600 sq. ft. home
- 17 6. Lot with 2 APN #-281-452-04-00 and 281-443-17-00

18 There will be a separate agreement between Buyer  
19 and Seller on APN # 281-443-17-00 for \$115,000 to  
20 close as part of this transaction. Seller to pay  
total amount toward Buyers [sic] bills (to be  
determined by Buyer)[.]

21 Buyer will be closing escrow on land only.  
22 Construction to start once escrow is closed on  
23 land. Total purchase price to be \$641,000 to  
include construction and cost above.

24 The testimony at trial and the bankruptcy court's findings  
25 explain that the contracts provided for \$491,000 in construction  
26 costs and \$150,000 for the cost of the Property, totaling  
27 \$641,000. The Crumps paid Mr. Zenovic a total of \$756,000 but  
28 received an immediate refund of \$115,000 less escrow fees. (This

1 was the ostensible purchase price for the smaller lot, which  
2 proceeds the Seller was to use to pay the Buyer's bills.)<sup>2</sup> Title  
3 to both lots would pass to the Crumps at closing, and Mr. Zenovic  
4 agreed to build a home after the closing.

5 **C. Mr. Zenovic's failure to construct the eldercare facility**

6 In December 2008, the parties executed the Purchase  
7 Agreements. Escrow closed later that month, and the monies were  
8 wired into Mr. Zenovic's bank account.

9 Mr. Zenovic did not even begin to construct the eldercare  
10 facility. Rather, he used the Crumps' money to pay unrelated  
11 personal and business debts. By April 2009, he had depleted  
12 almost all of those funds. The bankruptcy court rejected  
13 Mr. Zenovic's attempts to explain this away, and he does not  
14 appeal this aspect of the bankruptcy court's decision.

15 Over the next year, Mr. Zenovic repeatedly put off the  
16 Crumps' questions regarding the start of construction. The  
17 Crumps finally learned in February 2010 that the eldercare  
18 facility could not be constructed on the Property because it was  
19 nearly impossible to obtain a sewer permit to service the  
20 Property. They discovered that, since 2006, Mr. Zenovic had  
21 attempted to obtain a sewer permit from the Ramona Municipal  
22 Water District but had failed.

23 In September and November 2010, the Crumps wrote to  
24 Mr. Zenovic, demanding a financial accounting, but he refused to

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25  
26 <sup>2</sup> The bankruptcy court questioned the propriety of this  
27 treatment. It is likely that this cash payment to the Crumps had  
28 an adverse effect on the Crumps' efforts to defer capital gains  
tax, but it had no adverse effect on Mr. Zenovic and therefore is  
not relevant to this appeal.

1 provide any information.

2 **D. Litigation in state court and bankruptcy court**

3 In October 2011, the Crumps sued Mr. Zenovic, Meadow  
4 Builders, and Ms. Clendenen and her employer in San Diego  
5 Superior Court (the "State Court Action"). Their allegations  
6 against Mr. Zenovic included a fraud claim. After nearly two  
7 years of litigating the State Court Action, and about two weeks  
8 before the start of trial, Mr. Zenovic filed his chapter 7  
9 petition.

10 Around the same time, the Crumps settled with Ms. Clendenen  
11 and her employer (the "Realtor Defendants") for \$498,000. The  
12 Crumps received the settlement payment in October 2013.

13 The Crumps filed an adversary complaint against Mr. Zenovic  
14 on August 16, 2013, asserting that their claim was  
15 nondischargeable under §§ 523(a)(2)(A) and (a)(6).

16 **E. The adversary proceeding trial and closing briefs**

17 The bankruptcy court conducted a six-day trial in December  
18 2014. Among other things, the Crumps introduced the testimony of  
19 a real estate agent who had been trying to sell the Property for  
20 a year and a half. She testified that she had reduced the asking  
21 price several times and that it was currently offered at \$79,900.  
22 The Crumps offered no other evidence of the value of the Property  
23 at trial.

24 The parties filed closing briefs, in which they discussed  
25 the proper measure of damages. The Crumps argued that the court  
26 should enter judgment totaling \$264,660.05. Their reasoning was  
27 as follows:

28 (1) Excluding prejudgment interest, the Crumps' out-of-

1 pocket losses totaled **\$566,925.96**, which consisted of  
2 construction costs totaling \$491,000, third-party payments  
3 totaling \$4,925.96, and decrease in the Property's value totaling  
4 \$71,000 (\$150,000 purchase price minus \$79,000 current value).

5 (2) Mr. Zenovic was entitled to a credit against his  
6 liability for the **\$498,000** settlement that the Crumps received  
7 from the Realtor Defendants.

8 (3) The Crumps were entitled to prejudgment interest at  
9 seven percent per annum totaling **\$195,743.09**. They calculated  
10 prejudgment interest in two time periods:

11 (a) December 2008 (closing of transaction) to October  
12 2013 (receipt of settlement funds from the Realtor Defendants).

13 \$562,000 (\$491K construction costs + \$71K real property)  
14  $\times \quad 7\%$  (interest rate per annum)  
            
15 \$39,340 (interest per year (or \$3,278.33 per month))

16 \$3,278.33 (interest per month)  
17  $\times \quad 58$  months (Dec. 2008 - Oct. 2013)  
**\$190,143.14 - interest accrued Dec. 2008 - Oct. 2013**

18 (b) November 2013 to January 2015 (entry of judgment).

19 \$64,000 (damages after \$562K is reduced by \$498K)  
20  $\times \quad 7\%$  (interest rate per annum)  
            
21 \$4,480 (interest per year (or \$373.33 per month))

22 \$373.33 (interest per month)  
23  $\times \quad 15$  months (Nov. 2013 - Jan. 2015)  
**\$5,599.95 - interest accrued Nov. 2013 - Jan. 2015**

24 In sum, the Crumps added the principal damages and  
25 prejudgment interest, then subtracted the settlement credit:

26 \$566,925.96 (damages)  
27  $+\$195,743.09$  (prejudgment interest)  
            
28 \$762,669.05  
 $-\$498,000.00$  (settlement credit)  
            
**\$264,669.05 - total damages**

In contrast, Mr. Zenovic argued that the Crumps had been

1 fully compensated by the settlement with the Realtor Defendants  
2 and were not entitled to recover anything from him. He claimed  
3 that their damages prior to the settlement with the Realtor  
4 Defendants totaled only \$376,959.24.<sup>3</sup> When the \$498,000  
5 settlement was subtracted, the Crumps were allegedly "ahead" by  
6 \$121,040.76. Mr. Zenovic claimed that the Crumps also saved an  
7 additional \$205,295 that they would have had to spend on building  
8 permits and related costs, so they were actually "ahead" by a  
9 total of \$326,335.76.

10 Mr. Zenovic also argued that the Crumps had failed to offer  
11 evidence of the value of the Property at the time the Purchase  
12 Agreement was executed in December 2008. He said that the  
13 current value of the Property was irrelevant and that any decline  
14 in property value was due to the Great Recession and not his  
15 conduct. He further contended that the Crumps did nothing to  
16 sell the Property after deciding in late 2010 that they did not  
17 want to proceed with construction of the eldercare facility.

18 Mr. Zenovic did not substantively discuss the applicable  
19 prejudgment interest rate in his closing brief.

20 **F. The bankruptcy court's ruling and damages award**

21 The bankruptcy court made an oral ruling and also issued  
22 written findings of fact and conclusions of law. It explained  
23 that the oral and written rulings should be read together.

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24  
25 <sup>3</sup> Mr. Zenovic claimed that the Crumps paid him \$756,000  
26 between the Purchase Agreement (\$641,000) and Second Purchase  
27 Agreement (\$115,000). They received the Property back (the  
28 larger parcel valued at \$150,000 and the smaller parcel valued at  
\$115,000) as well as a cash rebate of \$114,040.76, for a total  
offset of \$379,040.76. As such, he claimed that their damages  
were \$376,959.24.



1 The bankruptcy court determined that Mr. Zenovic committed  
2 fraud and that the judgment was nondischargeable under  
3 § 523(a)(2)(A). It said that Mr. Zenovic misrepresented material  
4 facts, including his status as a general contractor, the status  
5 of the Property (including the sewer issues), and the status of  
6 the construction payment. It also found that Mr. Zenovic made  
7 the false statements knowingly and with an intent to deceive the  
8 Crumps and that the Crumps relied on the statements and suffered  
9 injury. The court found Mr. Zenovic's testimony not credible and  
10 rejected each of his excuses and defenses. Mr. Zenovic does not  
11 challenge any of these findings on appeal.

12 Regarding damages, the bankruptcy court held that the Crumps  
13 were entitled to a nondischargeable judgment in the amount of  
14 \$68,925.96.<sup>4</sup> The court adopted the prejudgment interest  
15 calculation suggested by the Crumps in their closing brief.

16 The bankruptcy court utilized the California prejudgment  
17 interest rate, which was seven percent. It said that the  
18 equities supported using the higher state rate.

19 The bankruptcy court issued its judgment on June 19, 2015,  
20 at which time damages and prejudgment interest totaled  
21 \$266,481.64.

22 Mr. Zenovic timely filed his notice of appeal.

### 23 JURISDICTION

24 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.

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25  
26 <sup>4</sup> The court calculated the contract price minus the current  
27 value of the Property minus the settlement with the Realtor  
28 Defendants as \$64,000 (\$641,000 - \$79,000 - \$498,000 = \$64,000).  
The court then added the \$4,925.96 third-party costs for a total  
of \$68,925.96.

1 §§ 1334 and 157(b)(1) and (2)(I). We have jurisdiction under  
2 28 U.S.C. § 158.<sup>5</sup>

### 3 ISSUES

4 (1) Whether the bankruptcy court erred in determining the  
5 value of the Property for the purpose of calculating damages.

6 (2) Whether the bankruptcy court erred in selecting the  
7 applicable prejudgment interest rate.

### 8 STANDARDS OF REVIEW

9 We review legal issues de novo and the bankruptcy court's  
10 factual findings under a clearly erroneous standard. Village  
11 Nurseries v. Gould (In re Baldwin Builders), 232 B.R. 406, 409-10  
12 (9th Cir. BAP 1999).

13 "[W]e review the legal standards used in the calculation of  
14 damages de novo." R.B. Matthews, Inc. v. Transamerica Transp.  
15 Servs., Inc., 945 F.2d 269, 272 (9th Cir. 1991) (citing Galindo  
16 v. Stody Co., 793 F.2d 1502, 1516 (9th Cir. 1986)); see Oswalt  
17 v. Resolute Indus., Inc., 642 F.3d 856, 859-60 (9th Cir. 2011)  
18 ("We review de novo the legal conclusion that damages are  
19 available and review for clear error factual findings underlying  
20 the damages award."). De novo review is independent and gives no  
21 deference to the trial court's conclusion. Roth v. Educ. Credit  
22 Mgmt. Agency (In re Roth), 490 B.R. 908, 915 (9th Cir. BAP 2013).

23 We review the bankruptcy court's prejudgment interest award  
24 for abuse of discretion. Simeonoff v. Hiner, 249 F.3d 883, 894  
25

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26 <sup>5</sup> The BAP clerk's office determined that the judgment was  
27 interlocutory inasmuch as it did not dispose of the Crumps'  
28 § 523(a)(6) claim. Mr. Zenovic thereafter requested and obtained  
from the bankruptcy court a Civil Rule 54(b) determination.

1 (9th Cir. 2001); see von Gunten v. Neilson (In re Slatkin),  
2 243 F. App'x 255, 259 (9th Cir. 2007) (“[t]he award of  
3 pre-judgment interest is within the sound discretion of the trial  
4 court”). To determine whether the bankruptcy court abused its  
5 discretion, we conduct a two-step inquiry: (1) we review de novo  
6 whether the bankruptcy court “identified the correct legal rule  
7 to apply to the relief requested” and (2) if it did, whether the  
8 bankruptcy court’s application of the legal standard was  
9 illogical, implausible, or “without support in inferences that  
10 may be drawn from the facts in the record.” United States v.  
11 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

12 We may affirm the bankruptcy court on any basis supported by  
13 the record. Heilman v. Heilman (In re Heilman), 430 B.R. 213,  
14 216 (9th Cir. BAP 2010).

## 15 DISCUSSION

### 16 **A. The bankruptcy court erred in determining damages when it** 17 **valued the Property as of the date of trial.**

18 Mr. Zenovic contends that the bankruptcy court erred in its  
19 damages calculation by not valuing the Property correctly. We  
20 disagree with most of his reasoning but agree with his  
21 conclusion. The bankruptcy court valued the Property as of the  
22 trial date. Instead, the court should have valued the Property  
23 at an earlier date.

24 A court must award damages to sufficiently compensate the  
25 plaintiffs for out-of-pocket losses that they have suffered.  
26 Section § 3343(a) of the California Civil Code provides that a  
27 person “defrauded in the purchase, sale or exchange of property  
28 is entitled to recover the difference between the actual value of

1 that with which the defrauded person parted and the actual value  
2 of that which he received . . . .” Cal. Civ. Code § 3343; see  
3 Ambassador Hotel Co. v. Wei-Chuan Inv., 189 F.3d 1017, 1032 (9th  
4 Cir. 1999) (“The California Legislature has specifically provided  
5 that the victim of fraud in the sale, purchase or exchange of  
6 property may recover only out-of-pocket losses plus certain  
7 additional damages[.]”); Kenly v. Ukegawa, 16 Cal. App. 4th 49,  
8 53 n.2 (1993) (“under the out-of-pocket approach, the defrauded  
9 party receives only the difference between the value of the  
10 property received and the amount he paid”).

11 Generally, “out-of-pocket damages are calculated as of the  
12 time of the transaction[.]” Ambassador Hotel Co., 189 F.3d at  
13 1032; see Burkett v. J.A. Thompson & Son, 150 Cal. App. 2d 523,  
14 527 (1957) (“He was entitled to recover the ‘out-of-pocket loss,’  
15 or the difference between the price [the buyer] paid and the  
16 actual value at the time she made the purchase.”). But  
17 subsequent events can sometimes illuminate the property’s value  
18 at the date of the transfer:

19 the plaintiff should receive as damages the difference  
20 in value between everything with which he parted and  
21 everything he received, and the statute contains  
22 nothing to show that the difference must be calculated  
23 solely on the basis of the facts existing at the time  
24 the contract was made or performed. The section must  
25 be applied realistically so as to give the defrauded  
26 person his actual out-of-pocket loss, and, where  
27 necessary to reach that result, the court must consider  
28 subsequent circumstances.

25 Garrett v. Perry, 53 Cal. 2d 178, 184 (1959).

26 In the present case, the Crumps entered into the purchase  
27 contracts with Mr. Zenovic in December 2008. The Crumps obtained  
28 title to the Property when escrow closed thirty days later. At

1 that point, the Crumps owned the Property and were free to sell  
2 or dispose of the Property as they wished. The bankruptcy court  
3 could have chosen the closing date as an appropriate date to  
4 value the Property. See Rivera v. Johnson, No. E051949, 2012 WL  
5 831879, at \*9 (Cal. Ct. App. Mar. 12, 2012) (unpublished) (“in  
6 determining whether [buyer] has suffered compensatory damages,  
7 the actual value of the property at the time of the sale is a  
8 material issue of fact”).

9 The bankruptcy court also might reasonably have chosen a  
10 somewhat later date to more accurately compensate the Crumps for  
11 their out-of-pocket losses. For example, the bankruptcy court  
12 might have found that a reasonable person in the Crumps’ position  
13 would not have sold the Property until such person realized that  
14 Mr. Zenovic was not going to build the house as promised. Such a  
15 finding could justify a later valuation date. Accord generally  
16 Garrett, 53 Cal. 2d at 184 (“section [3343] must be applied  
17 realistically so as to give the defrauded person his actual  
18 out-of-pocket loss, and, where necessary to reach that result,  
19 the court must consider subsequent circumstances”); Feckenscher  
20 v. Gamble, 12 Cal. 2d 482, 500 (1938) (“Although there was some  
21 equity in the property which plaintiff acquired in the trade at  
22 the time she actually acquired it, yet by reason of one of the  
23 misrepresentations made to her to the effect that the trust deed  
24 was not immediately due, she lost the entire property by a sale  
25 under the trust deed, so that it can reasonably be said that she  
26 actually received nothing of value from the transaction.”).

27 Mr. Zenovic’s own authority supports this view. In his  
28 opening brief, he cites the Restatement (Second) of Torts § 548A

1 in support of his argument that he is not liable for subsequent  
2 losses suffered by the Crumps. But comment b states:

3 the matter misrepresented must be considered in the  
4 light of its tendency to cause those losses and the  
5 likelihood that they will follow. Thus **one who**  
6 **misrepresents the financial condition of a corporation**  
7 **in order to sell its stock will become liable to a**  
8 **purchaser who relies upon the misinformation for the**  
9 **loss that he sustains when the facts as to the finances**  
10 **of the corporation become generally known and as a**  
11 **result the value of the shares is depreciated on the**  
12 **market, because that is the obviously foreseeable**  
13 **result of the facts misrepresented.**

14 Restatement (Second) of Torts § 548A (1977) (emphasis added).

15 Similarly, any decline in the value of the Property between the  
16 date of the sale and the time its deficiencies were discovered  
17 might have been a foreseeable result of his fraudulent conduct.

18 He should not be rewarded for his deception, and a valuation date  
19 that considers the effect of his fraud might be appropriate.<sup>6</sup>

20 But here the bankruptcy court fixed the value of the  
21 Property as of the date of trial, about six years after the  
22 Crumps obtained title to the Property and long after they had  
23 realized that Mr. Zenovic was not going to do what he promised.  
24 Neither the Crumps nor the bankruptcy court explained why the

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25 <sup>6</sup> Mr. Zenovic contends that the Property should be valued at  
26 the price specified for the land under the purchase contracts,  
27 which was \$265,000. We reject this argument. Mr. Zenovic does  
28 not challenge on appeal the bankruptcy court's findings that he  
defrauded the Crumps by, among other things, misrepresenting the  
buildable status of the Property. If the Crumps had known the  
true status of the Property, there is every reason to think that  
they would not have agreed to the stipulated price. Mr. Zenovic  
is not entitled to the benefit of a contract price that was  
infected with his fraudulent misrepresentations.

1 date of trial was an appropriate date for this purpose.<sup>7</sup>

2 The danger of using an unduly late valuation date is that it  
3 might subject the defendant to liability for losses that the  
4 defendant did not cause. As a general rule, “[a] fraudulent  
5 misrepresentation is a legal cause of a pecuniary loss resulting  
6 from action or inaction in reliance upon it if, but only if, the  
7 loss might reasonably be expected to result from the reliance.”  
8 Restatement (Second) of Torts § 548A. “Pecuniary losses that  
9 could not reasonably be expected to result from the  
10 misrepresentation are, in general, not legally caused by it and  
11 are beyond the scope of the maker’s liability.” Id. at cmt. b.  
12 Delaying the valuation date could result in a damages award that  
13 forces the wrongdoer to compensate the victim for losses that the  
14 wrongdoer did not cause, such as declines in the general market.

15 Accordingly, the bankruptcy court erred when it fixed the  
16 actual value of the Property at the time of trial.

17 The Crumps did not present any evidence at trial of the  
18 value of the Property either at the time they received it or when  
19 they discovered Mr. Zenovic’s fraud. They bore the burden of  
20 proving the amount of their damages. See Saunders v. Taylor,  
21 42 Cal. App. 4th 1538, 1543 (Cal Ct. App. 1996). Because they  
22 failed to carry their burden to prove their damages, they are not  
23 entitled to damages for the loss in value of the Property.

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24  
25  
26 <sup>7</sup> At oral argument, when asked by the Panel why the trial  
27 date was correct, counsel for the Crumps merely said that this  
28 later date benefitted Mr. Zenovic because the Property probably  
gained value between 2010 and the trial date. No evidence in the  
record supports this assertion.

1 **B. The bankruptcy court did not err in determining that the**  
2 **California prejudgment interest rate of seven percent was**  
3 **appropriate.**

4 Mr. Zenovic argues that the bankruptcy court erred in  
5 applying California's seven percent prejudgment interest rate,  
6 rather than the lower federal rate (which was 0.4 percent when  
7 the bankruptcy court entered its judgment). He does not  
8 challenge the imposition of prejudgment interest, but only the  
9 rate of interest that the bankruptcy court selected. Although we  
10 do not agree with all of the bankruptcy court's reasons to use  
11 the higher interest rate, we discern no abuse of discretion.<sup>8</sup>

12 The court may award prejudgment interest in consideration of  
13 the equities of the case. "Awards of pre-judgment interest are  
14 governed by considerations of fairness and are awarded when it is  
15 necessary to make the wronged party whole." Purcell v. United  
16 States, 1 F.3d 932, 942-43 (9th Cir. 1993) (citation omitted).  
17 Prejudgment interest is intended "to compensate for the loss of  
18 use of money due as damages from the time the claim accrues until  
19 judgment is entered." Barnard v. Theobald, 721 F.3d 1069, 1078

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20 <sup>8</sup> The bankruptcy court said that the federal rate was  
21 inadequate because the Crumps intended to use the Property as an  
22 income-producing eldercare facility. But there is no evidence in  
23 the record to show that the Property would have returned a  
24 profit, much less a seven percent return on investment.

25 The bankruptcy court also reasoned that California's strong  
26 public policy and laws against unlicensed contractors  
27 warranted the state interest rate. This is inconsistent with the  
28 Ninth Circuit's admonition that "[p]rejudgment interest is an  
element of compensation, not a penalty. Although a defendant's  
bad faith conduct may influence whether a court awards  
prejudgment interest, it should not influence the rate of the  
interest." Dishman v. UNUM Life Ins. Co. of Am., 269 F.3d 974,  
988 (9th Cir. 2001).



1 (9th Cir. 2013). Whether to award prejudgment interest is in  
2 "the district court's sound discretion." Id.

3 The correct rate of prejudgment interest in federal court  
4 depends on the nature of the claims. "'Prejudgment interest is a  
5 substantive aspect of a plaintiff's claim, rather than a merely  
6 procedural mechanism.' . . . State law generally governs awards  
7 of prejudgment interest in diversity actions, but federal law may  
8 apply to the calculation of prejudgment interest when a  
9 substantive claim derives from federal law alone." Oak Harbor  
10 Freight Lines, Inc. v. Sears Roebuck, & Co., 513 F.3d 949, 961  
11 (9th Cir. 2008) (quoting Sea Hawk Seafoods, Inc. v. Exxon Corp.  
12 (In re the Exxon Valdez), 484 F.3d 1098, 1101 (9th Cir. 2007)).  
13 Even in a federal question case, where the federal interest rate  
14 ordinarily applies, the court may choose a different rate if "the  
15 equities of a particular case demand a different rate.'" S.E.C.  
16 v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1099 (9th Cir.  
17 2010) (citation omitted); see United States v. Gordon, 393 F.3d  
18 1044, 1063 n.12 (9th Cir. 2004) ("Under federal law the rate of  
19 prejudgment interest is the Treasury Bill rate as defined in  
20 28 U.S.C. § 1961 unless the district court finds on substantial  
21 evidence that a different prejudgment interest rate is  
22 appropriate.").

23 In the present case, the bankruptcy court chose to use the  
24 California rate of seven percent. We think that this rate was  
25 appropriate in this case.

26 Section 523 cases often require bankruptcy courts to decide  
27 both state law and federal law issues. In order to decide such a  
28 case, the bankruptcy court must first decide that the debtor owes

1 a "debt." In this case, as in most such cases, the "debt"  
2 alleged by the Crumps is entirely a creature of state law. Next,  
3 the bankruptcy court must determine whether that debt meets the  
4 standard for nondischargeability. This second question depends  
5 on federal law. But in cases based on § 523(a)(2), such as this  
6 one, the state law and federal law issues are often identical.  
7 This is so because § 523(a)(2) applies to debts for "false  
8 pretenses, a false representation, or actual fraud," and the  
9 Supreme Court has held that these terms must be given their  
10 standard common law meanings. Husky Int'l Elecs., Inc. v. Ritz,  
11 136 S. Ct. 1581, 1586 (2016); Field v. Mans, 516 U.S. 59, 69-70  
12 (1995). As the bankruptcy court noted, a claim under  
13 § 523(a)(2)(A) alleging fraud may be analyzed as a claim for  
14 fraud in the inducement under California law. "The elements of  
15 fraud under § 523(a)(2)(A) match the elements of common law fraud  
16 and of actual fraud under California law." Lee v. Tcast  
17 Commc'ns, Inc. (In re Jung Sup Lee), 335 B.R. 130, 136 (9th Cir.  
18 BAP 2005) (citation omitted). Thus, this case is analogous to a  
19 diversity case in which a federal court decides state law claims.  
20 In such a case, the bankruptcy court may choose to award  
21 prejudgment interest at the state law rate.

22 Mr. Zenovic cites several cases in which the federal court  
23 declined to utilize the state court prejudgment interest rate.  
24 However, those cases are either not binding authority or are  
25 readily distinguishable; none of them stand for the proposition  
26 that a bankruptcy court deciding a state law issue as a precursor  
27 to the underlying bankruptcy law question must use the federal  
28 prejudgment interest rate.

1 We also think that Mr. Zenovic's argument, if accepted,  
2 would create an incentive to forum shop. As Mr. Zenovic points  
3 out, the State Court Action was only about two weeks away from  
4 trial when he filed his bankruptcy petition. He says that the  
5 Crumps could have moved for relief from the automatic stay to  
6 permit the trial to go forward. He confidently asserts that the  
7 bankruptcy court would have granted that motion. He points out  
8 that, if that had all happened, the state court would have  
9 allowed prejudgment interest at the state law rate. Mr. Zenovic  
10 has more confidence in his predictive capacities than we have in  
11 ours, but his argument nicely makes the point that, if he is  
12 right, he saved himself substantial amounts of interest on a  
13 nondischargeable judgment by filing his bankruptcy case. It  
14 would be inequitable to allow Mr. Zenovic to benefit from forum  
15 shopping. See generally Kukulka-Stone v. Ekrem (In re Ekrem),  
16 192 B.R. 982, 997 (Bankr. C.D. Cal. 1996) (the debtor "should not  
17 be rewarded with the lower federal rate because this case was  
18 litigated in a federal bankruptcy court"). In these  
19 circumstances, we think that the bankruptcy court did not abuse  
20 its discretion when it held that prejudgment interest at the  
21 federal rate would confer a windfall upon Mr. Zenovic.

22 **C. The Crumps are entitled to a nondischargeable award of**  
23 **\$164,047.82.**

24 We therefore accept the seven percent prejudgment interest  
25 rate but adjust the court's damages award to exclude damages for  
26 loss of property value.

27 Rather than remanding this issue for the bankruptcy court to  
28 recalculate the final award, we have undertaken the calculations

1 ourselves. "Most of the changes we have made involved  
2 arithmetical calculations that we could perform as easily as the  
3 trial court and a remand would necessarily have involved a waste  
4 of judicial resources." Felder v. United States, 543 F.2d 657,  
5 671 (9th Cir. 1976) (also stating that "[t]he interests of  
6 justice and the best interest of the parties require that we  
7 recalculate the damages on the basis of the record before us and  
8 order the entry of a modified judgment"); see Six (6) Mexican  
9 Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1310 (9th Cir.  
10 1990) ("Our exercise of this discretion [to recalculate an award  
11 prior to remand] is particularly appropriate where recalculation  
12 involves issues that we are equally situated to decide.");  
13 28 U.S.C. § 2106 ("any other court of appellate jurisdiction may  
14 affirm, modify, vacate, set aside or reverse any judgment,  
15 decree, or order of a court lawfully brought before it for  
16 review, and may remand the cause and direct the entry of such  
17 appropriate judgment, decree, or order, or require such further  
18 proceedings to be had as may be just under the circumstances").

19 The reduced award is calculated as follows using the  
20 bankruptcy court's methodology (which the Crumps originally  
21 proposed):

22 (1) Out-of-pocket losses: \$491,000 + \$4,925.96 = **\$495,925.96**

23 (2) Prejudgment interest at 7% on \$491,000 from December  
24 2008 through October 2013: **\$166,121.86**

25 (3) Settlement credit: **\$498,000**

26 We apply the Realtor Defendants' settlement credit first  
27 against the principal damages (rather than the pre-October 2013  
28 prejudgment interest), as directed by Newby v. Vroman, 11 Cal.

1 App. 4th 283 (Cal. Ct. App. 1992). In calculating prejudgment  
2 interest following a settlement with some of the defendants, the  
3 California appellate court stated, "the plaintiff is entitled to  
4 further prejudgment interest from the nonsettling defendants only  
5 **on the remaining principal balance of the judgment after its**  
6 **reduction by such settlement amount."** 11 Cal. App. 4th at 290  
7 (emphasis added); see Transwest Capital, Inc. v. Cashless  
8 Concepts, Inc., No. 1:12-cv-00049-SAB, 2013 WL 4460240, at \*4  
9 (E.D. Cal. Aug. 16, 2013) (relying on Newby and subtracting the  
10 settlement amount from the principal damages amount, then  
11 calculating post-settlement prejudgment interest on the remaining  
12 principal damages).

13 In this case, the Realtor Defendants' settlement payment of  
14 \$498,000 in October 2013 was greater than the Crumps' principal  
15 damages of \$495,925.96. Accordingly, there is no principal  
16 damage award after October 2013, and we do not award prejudgment  
17 interest after that date.

18 Thus, the total award is calculated by adding the principal  
19 damages and the prejudgment interest, then subtracting the  
20 settlement credit:

21 \$495,925.96  
22 +\$166,121.86  
23 \$662,047.82  
24 -\$498,000.00  
25 **\$164,047.82**

26 We therefore award the Crumps \$164,047.82.

#### 27 **CONCLUSION**

28 For the reasons set forth above, the bankruptcy court did  
not err in awarding the Crumps seven percent prejudgment  
interest, but erred in determining the value of the Property.

1 Therefore, we AFFIRM IN PART, REVERSE IN PART, and REMAND to the  
2 bankruptcy court to enter judgment consistent with this decision.

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