§ 1307(c)
ERISA
§ 109(e)
standing
contract interpretation
actual and apparent authority

In re Grayson, Case No. 301-30932-elp13

12/05/02 ELP unpub

Bankruptcy court's recommendation to withdraw reference and proposed findings of fact and conclusions of law on motion to dismiss a chapter 13 case. The Department of Labor ("DOL") filed a motion to dismiss, arguing that the debtor was ineligible for chapter 13 relief based on a prepetition stipulated order entered in connection with a district court ERISA action. Among other things, the stipulated order made the debtor liable for receivership costs, fees and expenses.

The court first recommends that the District Court conclude that the DOL is a party in interest with standing to request dismissal of debtor's chapter 13 case under § 1307(c). The DOL is not bound by a postpetition settlement agreement, because the DOL was not a party to that agreement and a private party's settlement does not bar the DOL from pursuing its own action to address ERISA violations.

The court next addresses the eligibility requirements for chapter 13 relief under § 109(e). As an initial matter, the court recommends that the District Court not consider postpetition events in determining debtor's eligibility. Debtor argued that the debt for receivership fees and expenses should not be included in the § 109(e) eligibility calculation, because it was contingent and unliquidated on the petition date. The court recommends that the District Court find that the debt for receivership fees and expenses was not contingent on the petition date. The court applied contract law principles and rejected debtor's argument that he was only secondarily liable for the debt. The court also recommends that the District court find that the debt was liquidated on the petition date, because it was subject to ready determination and precision in computation of the amount due. Debtor disputed his liability for the debt, arguing that his attorney did not have authority to sign the stipulated order on his behalf. The court found that the dispute as to liability did not make the debt unliquidated, because only a simple evidentiary hearing would be required to determine whether debtor's attorney was authorized to sign the stipulated order. The bankruptcy court recommended that the debt be included in the § 109(e) eligibility calculation if, after conducting the evidentiary hearing, the District Court concluded that debtor’s attorney acted with actual or apparent authority when he signed the stipulated order. Finally the court states its proposed finding that the amount of the debt necessary to push debtor over the eligibility limit was liquidated on the petition date because it was subject to ready determination.

P02-8(25)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: BARCLAY LLOYD GRAYSON, Debtor.	)))))))	Bankruptcy Case No. 301-30932-elp13 RECOMMENDATION TO WITHDRAW REFERENCE AND PROPOSED FINDINGS AND CONCLUSION ON MOTION TO DISMISS

The United States Department of Labor ("DOL") filed a motion to dismiss the chapter 13[1] case of Barclay Grayson ("debtor"). For the reasons discussed below, I recommend that the United States District Court for the District of Oregon ("the District Court") withdraw reference of this matter and grant the motion to dismiss.

FACTS

On September 21, 2000, the DOL and the Securities and Exchange Commission ("SEC") each filed separate suits against debtor, Jeffrey Grayson and Capital Consultants, LLC ("CCL") in the District Court. The DOL action was based on alleged violations of

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[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

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the Employee Retirement Income Security Act ("ERISA"). On that same day, the defendants consented to the appointment of a permanent receiver for CCL. The Stipulation and Order re Preliminary Injunction and Appointment of Receiver entered in the DOL action ("the stipulated order") gave the receiver

> plenary authority and control with respect to the management and administration of Capital Consultants to the extent that such management or administration relates to Plans or to any investments or assets held by or on behalf of Plans . . . .

Stipulated Order, ¶ 7.[2]

The stipulated order was signed by the defendants' attorneys and states in relevant part as follows:

> 4. The undersigned attorneys acknowledge and represent that they are counsel of record for the parties on whose behalf they have executed the Consent Order and are authorized and empowered to execute the Consent Order on behalf of their respective clients.
>
> . . . .
>
> 12. Defendants Capital Consultants, Jeffrey Grayson, and Barclay Grayson shall pay the reasonable costs, fees and expenses of the receiver incurred in connection with the performance of his or her duties described in this order, including the costs and expenses of those persons who may be engaged or employed by the receiver to assist him or her in carrying out his or her duties and obligations. . . .

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[2] With certain exceptions not relevant here, the stipulated order defines "Plans" as "any employee benefit plans subject to the coverage of ERISA[.]" Stipulated Order, ¶ 2.

A stipulated order was also entered in the SEC action, containing a substantially identical provision regarding the payment of receivership fees and expenses.[3]

On January 9, 2001, the receiver filed a Second Interim Report of Receiver, identifying estimated fees and costs through December 31, 2000 in the total amount of $1,563,000.

Debtor filed his chapter 13 petition on February 8, 2001.

Postpetition, debtor entered into a settlement agreement ("the settlement agreement") with the receiver and claimants in several separate pending actions. The DOL was not a party to the settlement agreement. In return for a payment of $500,000, the parties to the settlement agreement, including the receiver, agreed to release debtor from any and all claims. ¶ 3.1. In addition, the settlement agreement states as follows:

> The Receiver will withdraw his pending motion to dismiss [debtor's] Chapter 13 bankruptcy case and will stipulate that the claim of the Receiver against [debtor] was contingent and unliquidated as of [the petition date]. . . . [Debtor] stipulated that he would be liable for a portion of the fees and costs of the Receiver and his professionals; however, his liability shall be satisfied in full pursuant to the terms of this settlement.

¶ 5.

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[3] Debtor argues that, to the extent he remains liable for receivership fees and expenses under the stipulated orders, he should be relieved from that obligation. As I explained in my November 1, 2002 letter to the parties, I will defer to the District Court, which entered the stipulated orders, to determine whether such relief is warranted.

PROCEDURAL BACKGROUND

The District Court withdrew reference of debtor's chapter 13 case shortly after it was filed.

After the settlement agreement, the DOL filed a motion to dismiss debtor's bankruptcy case, asserting that he is ineligible to be a chapter 13 debtor, because his noncontingent, liquidated, unsecured debt exceeds the § 109(e) eligibility limit and he does not have regular income. The DOL also asserted that the case should be dismissed because debtor filed it in bad faith. Debtor responded that the DOL lacked standing to request dismissal of his chapter 13 case, that his qualifying unsecured debt on the petition date did not exceed the eligibility limit and that the regular income requirement of § 109(e) is met. Debtor also denied that he filed his petition in bad faith. After the DOL filed its reply, the District Court referred the motion to dismiss to the bankruptcy court.

I held a preliminary hearing and requested additional briefing. It was decided at the preliminary hearing that I initially would determine whether the DOL has standing to request dismissal and whether debtor's noncontingent, liquidated, unsecured debt exceeds the limit set forth in § 109(e), leaving the other issues raised in the motion to dismiss for later, if necessary.

The following constitute my proposed findings and conclusions regarding standing and whether debtor's debts exceed the applicable limits. Because the central issues raised by the DOL's motion to dismiss involve the enforceability and interpretation of the stipulated order, which was entered by the District Court, I recommend that the District Court withdraw reference of the motion to dismiss.

DISCUSSION

1. The DOL is a party in interest with standing to seek dismissal of debtor's chapter 13 case.

Section 1307(c) provides that a chapter 13 case may be dismissed for cause "on request of a party in interest . . . ." A creditor is a "party in interest" with standing to request dismissal of a chapter 13 case. 4 Keith M. Lundin, CHAPTER 13 BANKRUPTCY 3D ED. § 332.1 (2002). A creditor is an "entity that has a claim against the debtor that arose at the time of or before the order for relief . . ." § 101(10)(A). A "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" § 101(5)(A). The threshold question in this matter is whether the DOL is a "party in interest" with standing to request dismissal of debtor's case.

Debtor contends that the DOL does not have standing to request dismissal of his case, because its claim against him is derivative of the claims that were resolved in the settlement agreement. Debtor also argues that the DOL is bound by the settlement agreement, because it is in privity with the settling parties. Neither the facts of this case nor the applicable law provide any basis for finding that the DOL is bound by the settlement agreement.

It is undisputed that the DOL was not a party to the settlement agreement. See Settlement Agreement, ¶ 1 (defining parties to agreement); ¶ 9.1.2 (excluding DOL from claims bar). Moreover, the discussions at the District Court hearing to approve the settlement indicate that the common consensus was that the DOL could pursue whatever remedies it thought appropriate, because it was not bound by the settlement. See Transcript of January 24, 2002 hearing, pages 14-19.[4]

In Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 690-91 (7th Cir. 1986), the court analyzed the legislative history and statutory scheme of ERISA and observed that, in enacting ERISA,

> Congress was not only concerned about the welfare of individual beneficiaries but was equally concerned with the impact of employee benefit plans on the stability of

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[4] Footnote 6 of the District Court's Opinion and Order approving the settlement agreement states:

> I note that, at the January 24 hearing, a few of the attorneys for Claimants expressed some reluctance to endorse wholeheartedly the Settlement in light of the position taken by the [DOL] that, despite the claims bar language in the Settlement Agreement, the DOL was free to pursue claims against [debtor] for the total amount of losses in this matter. Subsequent to the hearing, I have received letters from counsel (including counsel for [debtor]) stating that the Receiver, plaintiffs, and [debtor] all agree that the Settlement may be approved even though DOL has reserved the right to seek additional relief from [debtor].

employment, the successful development of industrial relations, the revenues of the United States, the free flow of commerce, and the general welfare of the nation.

Consequently, ERISA provides for enforcement of its provisions by private parties and the government. Donovan v. Cunningham, 716 F.2d 1455, 1462 (5th Cir. 1983). There is a

well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests.

Herman v. S. Carolina Nat'l Bank, 140 F.3d 1413, 1425 (11th Cir. 1998). The cases concerning alleged ERISA violations follow this general rule. A private party's settlement does not bar the DOL from pursuing its own action to address ERISA violations. Id. at 1424; Fitzsimmons, 805 F.2d at 694; Donovan v. Cunningham, 716 F.2d 1455, 1462-3 (5th Cir. 1983). The DOL is not in privity with private parties seeking redress for alleged ERISA violations, because the department's interests are "separate and distinct" from those of private litigants. Herman, 140 F.3d at 1424.

Debtor cites no authority in support of his position that the DOL is bound by the settlement agreement. In addition, his attempts to distinguish the cases relied upon by the DOL and cited above are not persuasive. The factual differences seized upon by debtor simply are not important. The case law establishes a bright line rule that the DOL is not bound by private settlements. The cases discussed above are on point and are persuasively dispositive of this issue.

2. <u>Section 109(e) eligibility requirements</u>

When debtor filed his chapter 13 petition, § 109(e) stated that

> [o]nly an individual . . . that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $269,250 . . . may be a debtor under chapter 13 of this title.[5]

Failure to meet the eligibility requirements of § 109(e) is "cause" for dismissal of a chapter 13 case under § 1307(c). 8 Lawrence P. King, COLLIER ON BANKRUPTCY ¶ 1307.04 (15th ed. Rev. 2001). The DOL argues that debtor's obligation to pay the receivership fees and expenses makes him ineligible to be a chapter 13 debtor.[6] Debtor argues that this debt should not be included in the § 109(e) eligibility calculation, because it was contingent and unliquidated on the petition date.[7]

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[5] The amounts set forth in § 109(e) are subject to periodic adjustment pursuant to § 104(b).

[6] This is the only debt relied upon by the DOL to establish debtor's ineligibility. <u>See</u> Motion to Dismiss, p. 10 at note 3.

[7] In addition to the arguments discussed below, debtor filed an unsolicited Post-Hearing Memorandum, arguing that the debt for receivership fees and expenses was contingent and unliquidated on the petition date, because all provisions in the stipulated order were preliminary and subject to revision upon a final adjudication of the DOL action. Debtor relies on several cases, which stand for the proposition that the grant of a preliminary injunction does not foreclose contrary findings and conclusions after a trial on the
(continued...)

In determining eligibility under § 109(e), the petition date is the decisive date. 2 Lawrence P. King, COLLIER ON BANKRUPTCY ¶ 109.06[2][a] (15th ed. Rev. 2001). A court generally should not consider postpetition events in determining whether a debtor is eligible to be a chapter 13 debtor. In re Slack, 187 F.3d 1070, 1073 (9th Cir. 1999); In re Ho, 274 B.R. 867, 874 (9th Cir. BAP 2002). Many of debtor's arguments are based on postpetition events. For example, debtor argues that the receiver's postpetition agreement to release him from liability for receivership fees and expenses removes this debt from the eligibility calculation. Similarly, debtor relies on the receiver's stipulation in the settlement agreement that the debt was contingent and unliquidated on the petition date. The District Court should reject these arguments. Debtor's entry into the settlement agreement is a postpetition event and thus is not relevant in determining his

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[7](...continued)
merits. See, e.g., Ross-Whitney Corp. v. Smith Kline & French Labs., 207 F.2d 190, 199 (9th Cir. 1953). The problem with debtor's argument is that it ignores the fact that the stipulated order contains both permanent and preliminary provisions. Debtor agreed to the appointment of a permanent receiver. The portions of the stipulated order related to the receivership are not preliminary. In addition, while the injunctions imposed under the stipulated order are preliminary in most respects, debtor is

> permanently enjoined from having, exercising, or attempting to exercise any authority or control with respect to the management or administration of Capital Consultants to the extent that such management or administration relates to Plans or to any investments or assets held by or on behalf of Plans.

¶ 3 (Emphasis supplied).

eligibility to be a chapter 13 debtor. To the extent debtor raises other arguments based on postpetition events, those arguments should be rejected.[8]

According to debtor's bankruptcy schedules, he owed a total of $185,825.80 in noncontingent, liquidated, unsecured debt as of the petition date.[9] Debtor listed the receiver as a precautionary creditor in his Schedule F. The entry states that the debt was incurred on September 21, 2000, and describes it as unliquidated, disputed and of unknown amount.

As a threshold matter, the District Court needs to decide if it should look beyond debtor's schedules in determining his eligibility under § 109(e). For the reasons stated below, I believe that it should.

In In re Scovis, 249 F.3d 975, 982 (9th Cir. 2001), the Ninth Circuit held that a "bankruptcy court should normally look to the petition to determine the amount of debt owed, checking only to see that the schedules were made in good faith." The debtor in Scovis

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[8] While I have concluded that debtor was obligated to pay the receivership fees and expenses as of the petition date, I am not convinced that he remains obligated under the terms of the settlement agreement. Debtor therefore may be eligible to re-file a chapter 13 petition, if the release from liability for the receivership fees and expenses is enforceable and the District Court dismisses this case.

[9] This sum is comprised of the unsecured portion of a secured debt owed to one of debtor's attorneys in the amount of $10,734.95 (Schedule D); $125,913.79 in unsecured priority claims (Schedule E); and $49,177.06 in unsecured nonpriority claims (Schedule F).

scheduled a number of debts at specific amounts. The eligibility dispute in that case concerned the accuracy of those amounts. While Scovis instructs "that, as to the factual question of the amount of a debt, generally the debtor's schedules will control[,]" it does not stand for the proposition that a bankruptcy court is not permitted further inquiry where, as here, a debtor does not assign an amount to the debt, but rather schedules it as being of "unknown" amount. Ho, 274 B.R. at 875 n. 9. Indeed, a debtor invites further examination when he or she schedules a debt as being of unknown amount. A "[d]ebtor cannot circumvent [the § 109(e)] limitation on eligibility by simply ignoring what he knows and listing the amounts of the debts as 'unknown' in his schedules. To decide otherwise would eviscerate the chapter 13 eligibility requirements." In re Redburn, 193 B.R. 249, 256 (Bankr. W.D.Mich. 1996). In this case, the amount claimed by the receiver was known on the petition date, because the receiver had already filed his Second Interim Report, identifying estimated fees and costs in the amount of $1,563,000. Debtor was obligated to disclose the amount of the debt, even if he disputed his liability for that debt.

A. The debt for receivership fees and expenses was not contingent on the petition date.

Debtor asserts that the debt for receivership fees and expenses is contingent, because he is only secondarily liable for that debt. Debtor maintains that the CCL receivership estate and his father, Jeffrey Grayson, are primarily responsible for the fees and expenses and that his liability is in the nature of a conditional guaranty. I recommend that the District Court reject this argument.

"A debt is noncontingent if all events giving rise to liability occurred prior to the filing of the bankruptcy petition." In re Loya, 123 B.R. 338, 340 (9th Cir. BAP 1991).

> [T]he rule is clear that a contingent debt is "one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor."

In re Fostvedt, 823 F.2d 305, 306 (9th Cir. 1987)(quoting Brockenbrough v. Commissioner, 61 B.R. 685, 686 (W.D. Va. 1986)). "The classic example of a contingent debt is a guaranty because the guarantor has no liability unless and until the principal defaults." In re Pennypacker, 115 B.R. 504, 507 (Bankr. E.D. Pa. 1990). However, other prepetition, contract claims against a debtor are usually not considered contingent, because "the debtor's liability is fixed by contract from the inception and is not dependent on any future event other than the passage of time." 1 Keith M. Lundin, CHAPTER 13 BANKRUPTCY, 3D ED. § 15.4 (2002).

As an initial matter, I agree with debtor that the stipulated order should be interpreted in accordance with general principles of contract law. "An Agreed Order is a contract and its interpretation is governed by basic rules of contract construction." In re Thornburg, 277 B.R. 719, 726 (Bankr. E.D. Tex. 2002). See also Sanders v. U.S., 252 F.3d 1329, 1334 (Fed. Cir. 2001)(court approved stipulated order characterized as a contract); U.S. v. New Jersey, 194 F.3d 426, 430 (3d Cir. 1999)(consent decrees interpreted with reference to principles of contract interpretation).[10] If the District Court agrees with this determination, the application of basic principles of contract construction lead me to conclude that the debt for receivership fees was not contingent on the petition date.

The Oregon Supreme Court has set out a three-step process to be used when interpreting a contract. "First, the court examines the text of the disputed provision, in the context of the document as a whole. If the provision is clear, the analysis ends." Yogman v. Parrott, 325 Or. 358, 361 (1997) If the provision in question is ambiguous, the court examines extrinsic evidence to determine the parties' intent and construes the language accordingly. Id. at 363. Where a contract is ambiguous, "the parties' practical construction of an agreement may hint at their intention." Id. at 364. If after the first two steps the ambiguity has not been resolved, "the court relies on appropriate maxims of construction." Id.

Language in a contract is ambiguous "'if it has no definite significance or if it is capable of more than one sensible and reasonable interpretation; it is unambiguous if its meaning is so clear as to preclude doubt by a reasonable person.'" Hamilton

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[10] The DOL's reliance on McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994), and Kim v. Fujikawa, 871 F.2d 1427 (9th Cir. 1989), is misplaced. Neither of these cases involves the interpretation of a stipulated order.

Props., Inc. v. Associated Grocers, Inc., 144 Or.App. 171, 176, (1996)(quoting Deerfield Commodities v. Nerco, Inc., 72 Or.App. 305, 317 (1985)). "Ambiguity arises where the words of a contract are reasonably susceptible to more than one meaning. However, the court should not attribute possible but unlikely meanings to the terms of a contract." JGN Corp. v. Nat'l Am. Ins. Co., 736 F.Supp. 1570, 1573 (D. Or. 1988)(applying Oregon law; citations omitted), aff'd, 898 F.2d 156 (9th Cir. 1990).

Paragraph 12 of the stipulated order states as follows:

> Defendants Capital Consultants, Jeffrey Grayson, and Barclay Grayson shall pay the reasonable costs, fees and expenses of the receiver incurred in connection with the performance of his or her duties described in this order, including the costs and expenses of those persons who may be engaged or employed by the receiver to assist him or her in carrying out his or her duties and obligations. . . .

This provision is not ambiguous on the issue of whether debtor is primarily or secondarily liable for the receivership fees.

> For an instrument to be enforceable as a guaranty, it must show, with reasonable clarity, an intent to be liable on an obligation in case of default by the primary obligor, and the agreement must contain the express conditions of the liability and obligations of each party within the four corners of the document. If the language chosen by the parties indicates an intention to answer for the principal debt or obligation of another person, the writing should be construed as a contract of guaranty. The courts generally attempt to determine whether the words used, against the background of the circumstances which surrounded the use of those words, would cause the creditor reasonably to believe that the promisor had agreed to answer for a principal obligation on the part of another person.

38 AM.JUR.2D GUARANTY, § 5 (1999)(footnotes omitted). The agreement between the parties in this case does not evidence an intent to hold

debtor only secondarily liable for the receivership fees and expenses. The stipulated order does not expressly condition debtor's liability on the default of any other party. Neither the words used nor the surrounding circumstances suggests that debtor's liability under the stipulated order is conditional.

Debtor argues that paragraph 12 of the stipulated order is ambiguous, because it does not explicitly apportion liability among CCL, his father and him. The law does not require an express apportionment of liability among joint promisors. An obligation entered into by more than one person is presumed to be joint. Silvertooth v. Kelley, 162 Or. 381, 389 (1939); 12 Richard A. Lord, WILLISTON ON CONTRACTS § 36:3 (4th ed. 1999); 17A AM.JUR.2D CONTRACTS § 430 (2002). "[A] several responsibility will not arise except by words of severance." Silvertooth, 162 Or. at 390. The stipulated order contains no words of severance.[11]

In the event of a joint contract, each obligor is liable for the entire amount promised and a right of contribution between the

[11] Debtor argues that the stipulated order is ambiguous, because it was negotiated in an atmosphere of confusion. As evidence of this, he points to the fact that the stipulated order in the SEC case, which was executed on the same day as the one in the DOL case, contains a number of strike-outs. This argument is not persuasive. The DOL disputes debtor's characterization of the events. However, even if I assume that debtor's characterization is accurate, it simply does not necessarily follow that a contract negotiated amid confusion is ambiguous. Moreover, even assuming that the strike-outs in the SEC order result in some ambiguity as to that order, the stipulated order entered in the DOL action contains no strike-outs.

obligors exists. Silvertooth, 162 Or. at 389. See also Lord, WILLISTON ON CONTRACTS § 36:14 ("[A]n obligor who is compelled to pay in excess of his or her proper share is entitled to contribution or indemnification from the other obligors according to the contract or relationship with them."). However, this right of contribution does not render the debt contingent. In Fostvedt, 823 F.2d 305, the debtor argued that a joint debt on a promissory note was contingent, because the amount he ultimately would pay was dependent upon the amount paid by his co-obligors and upon whether the creditor actually demanded payment of him. The Ninth Circuit rejected this argument as "without merit." 823 F.2d at 305. See also 1 NORTON BANKRUPTCY LAW AND PRACTICE 2D § 18:12 (2002)("The courts have generally rejected efforts by Chapter 13 petitioners to exclude or to prorate debts that are joint obligations of the debtor and nonfiling third parties.").

Because paragraph 12 of the stipulated order is unambiguous, it is not necessary to consider whether the extrinsic evidence relied upon by debtor supports his position that he is only secondarily liable for the receivership fees and expenses under the stipulated order. See Yogman, 325 Or. at 361 (if disputed provision is not ambiguous, the analysis ends). However, if I did consider that evidence, I would not find it persuasive.

Debtor argues that the receiver's agreement to withdraw his claim for fees and expenses and to stipulate that that claim was contingent on the petition date are evidence of the parties' intent that debtor's liability would be secondary. There are several problems with this argument. Debtor and the DOL were the parties to the stipulated order, the receiver was not. Therefore, the receiver's conduct is not evidence of the parties' intent. In addition, the receiver's postpetition agreement to withdraw his claim simply is not probative of the nature of debtor's liability on the petition date. Finally, to the extent the receiver's stipulation is relevant at all, it has very little probative value given the receiver's earlier representations. The receiver filed his First Interim Fee Application on April 19, 2001, before entering into the settlement agreement. A review of the application clearly indicates that the receiver did not view debtor to be only secondarily liable. To the contrary, he intended to look to debtor for payment of his fees and expenses. See First Interim Fee Application, 5:1-5; 15:18-28 (attached as exhibit 2 to Declaration of Stephen Boyke).

Debtor also argues that the District Court considered his liability to be secondary. He relies on the following portion of paragraph 4 of the District Court's Order Authorizing Summary Procedure for Administration of Claims by and Against [CCL], which states as follows:

> The claims for fees and expenses of the Receiver and his professionals will have the highest priority among CCL creditors; however, whether and to what extent the Receiver's fees and expenses may be paid from the collateral of any secured creditor or from investments of CCL made for clients will be determined by the court.

I do not view this evidence as supporting debtor's position. The order merely provides that, to the extent there is a claim against CCL for receivership fees, it will have the highest priority. It does not express any opinion as to the nature of debtor's liability for those fees.

I recommend that the District Court conclude that the debt owed by debtor for receivership fees and expenses was not contingent on the petition date.

B. <u>The debt for receivership fees and expenses was liquidated on the petition date</u>.

Debtor asserts that disputes concerning his liability for and the amount of the receivership fees and expenses render this debt unliquidated. I recommend that the District Court reject debtor's arguments.

Whether a debt is liquidated for purposes of § 109(e) depends on whether the debt is capable of "ready determination and precision in computation of the amount due." <u>In re Fostvedt</u>, 823 F.2d 305, 306 (9th Cir. 1987)(quoting <u>In re Sylvester</u>, 19 B.R. 671, 673 (9th Cir. BAP 1982)). "Whether a debt is subject to 'ready determination' depends on whether the amount is easily calculable or whether an extensive hearing is needed to determine the amount of the debt." <u>In re Ho</u>, 274 B.R. 867, 873 (9th Cir. BAP 2002).

Generally, disputes as to a debtor's liability for a debt do not render that debt unliquidated. <u>In re Slack</u>, 187 F.3d 1070, 1074-75 (9th Cir. 1999). However, certain liability disputes may render a debt unliquidated. Ho, 274 B.R. at 874-75 (discussing and interpreting Slack). "The issue boils down to whether a dispute over liability or amount precludes the ready determination of a debt." In re Nicholes, 184 B.R. 82, 89 (9th Cir. BAP 1995)(cited with approval in Slack).

> [T]he fact that a claim is disputed does not per se exclude the claim from the eligibility calculation under § 109(e), since a disputed claim is not necessarily unliquidated. So long as a debt is subject to ready determination and precision in computation of the amount due, then it is considered liquidated and included for eligibility purposes under § 109(e), regardless of any dispute. On the other hand, if the dispute itself makes the claim difficult to ascertain or prevents the ready determination of the amount due, the debt is unliquidated and excluded from the § 109(e) computation.

Id. at 90-91. Accord Ho, 274 B.R. at 875.

1. Debtor's Liability

Debtor argues that the debt is unliquidated, because he was not aware of the provision in the stipulated order making him personally liable for the receivership fees and expenses and he did not authorize his attorney to agree to any such provision.

Whether debtor had personal knowledge of the provision in the stipulated order making him liable for the receivership fees and expenses is irrelevant, if his attorney was acting within the scope of his authority. Kaiser Found. Health Plan of the N.W. v. Doe, 136 Or.App. 566, 574 (1995), modified on other grounds, 138 Or.App. 428 (1996). "[K]nowledge of an attorney, acquired during the time he or she is acting within the scope of his or her employment, is imputed to the client." 7 AM.JUR.2D ATTORNEYS AT LAW § 154 (1997). Debtor will be bound by his attorney's acts if the attorney was acting within the scope of his actual or apparent authority. Kaiser, 136 Or.App. at 573 (1995); 12 Richard A. Lord, WILLISTON ON CONTRACTS § 35:62 (4th ed. 1999).

Actual authority may be express or implied. Kaiser, 136 Or.App. at 573 n.3.

> Express authority is that authority that the principal confers upon the agent in express terms. The express authority to do a certain thing, carries with it the implied authority to do those other things that are reasonably necessary to carry out the authorized task.

Id. "Apparent authority is created by conduct of the principal, which when reasonably interpreted causes a third party to believe that the principal has authorized the agent to act on the principal's behalf in the matter." Id. at 573. Apparent authority to act may arise even where the principal does not intend to confer such authority. 12 Lord, WILLISTON ON CONTRACTS § 35:11.

The dispute debtor raises about his liability for this debt does not make the debt unliquidated. Although there will need to be a hearing to determine whether his attorney acted within the scope of his authority, it would not require an "extensive" hearing to determine that issue. Debtors' argument for nonliability raises relatively simple evidentiary and legal issues, which can be readily ascertained in a simple hearing. If, after conducting that hearing, the District Court determines that debtor's attorney acted within the scope of his actual or apparent authority, the debt for receivership fees and expenses should be included in the § 109(e) calculation.

2. Amount of Debt

On January 9, 2001, the receiver filed a Second Interim Report of Receiver, identifying the following fees and expenses for the prepetition period of September 21, 2000 through December 31, 2000:

1. Thomas F. Lennon, receiver

Fees	$ 260,000
Costs	$ 24,000

2. Receiver's ERISA Bond

	$ 30,000

3. Allen Matkins et. al LLC, general counsel

Fees	$ 397,000
Costs	$ 44,000

4. Foster Pepper & Shefelman PLLC, local counsel

Fees	$ 72,000
Costs	$ 4,000

5. KPMG, LLP, accountants and consultants

Fees	$ 495,000
Costs	$ 25,000

6. Pricewaterhouse, computer consultants

Fees	$ 165,000
Costs	$ 47,000

TOTAL:	$1,563,000

It is undisputed that debtor had $185,825.80 of liquidated, unsecured debt on the petition date. Therefore, if only $83,424.20

of the $1,563,000 in receivership fees and expenses was readily determinable on the petition date, debtor is ineligible for chapter 13 relief. See In re Wenberg, 94 B.R. 631 (9th Cir. BAP 1988), aff'd, 902 F.2d 768 (9th Cir. 1990)(adopting BAP opinion). I conclude that at least $83,424.20 in receivership fees and expenses was liquidated on the petition date.

The amount necessary to push debtor over the § 109(e) eligibility limit is only approximately 5% of the total fees and expenses in question. As a practical matter, it is highly unlikely that such a small proportion would not be capable of ready determination. A simple review of billing statements would confirm the requisite amount. At the final hearing on the motion to dismiss, debtor's attorney conceded this point. Therefore, a hearing to liquidate this debt in the requisite amount may not be necessary in this case. I will, however, review the argument raised by debtor for the sake of completeness.

Debtor argued in his briefs that the amount of the debt was not readily ascertainable on the petition date, because the receivership fees and expenses were subject to numerous and voluminous objections.[12]

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[12] Citing In re Scovis, 249 F.3d 975 (9th Cir. 2001), debtor argued in his first brief that this debt is unliquidated, because it would be avoidable as a fraudulent transfer under § 548. Debtor's argument is that he did not receive reasonably equivalent value in return for his promise to pay receivership fees and expenses and that promise rendered him insolvent. The debtors in Scovis claimed (continued...)

The objections upon which debtor relied are those attached as exhibits 3 - 8 to the Declaration of Stephen Boyke.[13] Debtor did not raise any additional objections to the fees and expenses set forth above. I have reviewed the objections upon which debtor relied to establish that this debt was not liquidated. Nothing in those objections convinces me that this debt was not liquidated in the requisite amount on the petition date. Only the objection of the plaintiffs in the case of Chilia et. al v. Capital Consultants et. al, Case No. CV 00-1633 HU, attached as exhibit 8 to the Declaration of Stephen Boyke, raises any specific objections with regard to the proper amount of fees and expenses. Debtor cannot rely on this objection to disallow the entire obligation for receivership fees and expenses for two reasons. First, the objection is only to fees, not expenses. The expenses detailed in

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[12](...continued)
a homestead exemption in their schedules. The court concluded that a claim secured only by a lien which is avoidable by a declared exemption is unsecured for chapter 13 eligibility purposes. 249 F.3d at 984. Debtor may have abandoned this argument. He did not raise it in his later briefs or at the final hearing on the motion to dismiss. If he has not abandoned it, I reject it. As I said at the preliminary hearing, the facts of this case are distinguishable and Debtor's argument takes the Scovis case too far.

[13] The objections are to the postpetition fee applications of the receiver and his professionals. The receiver's application is attached as exhibit 2 to the Declaration of Stephen Boyke. The receiver's prepetition interim report covered the period from September 21, 2000 through December 31, 2000. The fee applications cover an additional month, through January 31, 2001. The DOL relies only on the fees and expenses incurred through December 31, 2000.

the receiver's interim report total $174,000.[14] This amount alone is sufficient to push debtor over the eligibility limit. In addition, the Chilia parties only object to the fees attributable to the receiver, KPMG and Pricewaterhouse. Even if I assume that the fees and costs for these three entities are disallowed entirely, those incurred by the remaining two (Allen Matkins and Foster Pepper) are sufficient to result in debtor's ineligibility. This would be true even if the total amount of those fees and costs ($517,000) was reduced by 75%.

Under any reasonably conceivable circumstances, only a simple hearing would be required to confirm the requisite amount of $83,424.20. Therefore, I recommend that the District Court conclude that at least $83,424.20 of the debt for receivership fees and costs was liquidated on the petition date.

CONCLUSION

For the foregoing reasons, I recommend that the District Court determine whether debtor's attorney in the DOL and SEC actions had actual or apparent authority to enter into the stipulated orders. If so, and if the court agrees with my recommended interpretation of the orders' provisions regarding debtor's liability for receivership fees and expenses, I recommend that the District Court grant the DOL's motion to dismiss on the basis that, on the date debtor filed his chapter 13 petition, he had

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[14] This sum is comprised of amounts labeled "costs" in the receiver's report and the charge for the receiver's bond.

noncontingent, liquidated, unsecured debt exceeding the limit set forth in § 109(e). Such dismissal should be without prejudice to debtor refiling under chapter 13, if at the time of refiling, his debts do not exceed the applicable limits under § 109(e).

ELIZABETH L. PERRIS
Bankruptcy Judge

cc: S. Ward Greene
Stacey E. Elias
United States Trustee