

1 **FOR PUBLICATION**

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8 UNITED STATES BANKRUPTCY COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 In re: ) CASE NO. 94-04555-A7  
11 David C. Emelity, )  
12 Debtor. )  
\_\_\_\_\_ )

13  
14 David C. Emelity ("Debtor") moved to avoid and expunge the  
15 lien of Michelle Emelity ("Michelle"), his former spouse, on the  
16 ground that it violated the discharge injunction under 11 U.S.C.  
17 § 524.<sup>1</sup> Michelle's lien arose from a postpetition judgment  
18 awarded in her favor in connection with the division of  
19 community property. At issue is whether the debt associated  
20 with Michelle's lien is a prepetition debt and therefore  
21 dischargeable.

22 This Court has jurisdiction to determine this matter  
23 pursuant to 28 U.S.C. §§ 1334 and 157(b)(1) and General Order  
24 No. 312-D of the United States District Court for the Southern  
25 District of California. This is a core proceeding pursuant to  
26 28 U.S.C. § 157(b)(2)(I).

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<sup>1</sup> Hereinafter all references to section numbers are references to the United States Bankruptcy Code.

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2 FACTS

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4 Debtor and Michelle separated on March 11, 1993. The  
5 marriage was terminated in November 1993, but the superior court  
6 retained jurisdiction to decide the support and division of  
7 community property issues at a later date. Debtor filed a  
8 voluntary Chapter 7 petition on April 4, 1994. The community  
9 property had not yet been divided.

10 Debtor listed Michelle in his bankruptcy schedules as an  
11 unsecured creditor holding a contingent and disputed claim that  
12 related to the pending property settlement in their divorce.  
13 Debtor also listed the divorce proceeding on his Statement of  
14 Affairs. Michelle did not file a complaint to determine the  
15 dischargeability of the alleged debt nor did she object to the  
16 Debtor's discharge.<sup>2</sup> Debtor received his discharge on September  
17 3, 1994.

18 In February 1996, after trial on the property division  
19 issues, the superior court set a value on Debtor's medical  
20 practice at \$20,000 and ordered Debtor to pay a \$10,000  
21 equalization payment to Michelle. Michelle recorded a judgment  
22 lien reflecting the equalization payment on February 5, 1997.

23 Debtor acquired an interest in real property after his  
24 discharge. Debtor is in escrow to sell the property but,  
25 because of Michelle's lien, he is unable to provide clear title  
26 to the buyer. Debtor therefore filed a motion to reopen his

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28 <sup>2</sup> This bankruptcy case was filed prior to the 1994 amendments and the  
enactment of § 523(a)(15).

1 bankruptcy case to avoid and expunge the lien on the ground that  
2 it violated the discharge injunction under § 524. The motion to  
3 reopen was unopposed; the case was reopened on June 8, 2000.

4  
5 DISCUSSION  
6

7 Debtor argues that he properly scheduled Michelle's claim  
8 and because she never filed a motion for relief from stay, nor a  
9 dischargeability complaint, the debt has been discharged.  
10 Therefore, Michelle's lien should be expunged and declared null  
11 and void.<sup>3</sup>

12 In contrast, Michelle argues that the discharge did not  
13 deprive her of her ownership interest in the medical practice.  
14 She further argues that the debt in question was not discharged  
15 because it arose postpetition. Michelle relies on In re  
16 Marriage of Seligman, 14 Cal.App.4th 300 (1993) and argues that  
17 the case stands for the proposition that a court-ordered  
18 division of community property does not give rise to a right to  
19 payment of money and is therefore not a claim within the meaning  
20 of the Bankruptcy Code ("Code").  
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22 <sup>3</sup> In a motion for reconsideration, Debtor argued that Farrey v.  
23 Sanderfoot, 500 U.S. 291 (1991) applies. The Court disagrees. In Sanderfoot, the  
24 Supreme Court eliminated the ability to avoid judicial liens where title is  
25 transferred to the debtor. The Supreme Court held that the debtor, who received  
26 title to the community residence in fee simple, could not avoid the judicial lien  
27 securing his wife's share of the equity. The Court reasoned that the debtor did  
28 not possess his new fee simple interest before the lien "fixed" so § 522(f) was not  
available. Here, Debtor did not receive title to the community residence. Rather,  
Michelle's lien was recorded against property that the Debtor obtained postpetition  
and which is his separate property. Further, Michelle's lien was recorded against  
the property almost a year after the superior court awarded the equalization payment  
in her favor. Finally, at no time has Debtor argued that Michelle's lien impairs  
an exemption.

1 A discharge in bankruptcy discharges debts. § 524(a)(1). A  
2 "debt" means liability on a claim. § 101(12). A "claim" means  
3 a

4 right to payment, whether or not such right  
5 is reduced to judgment, liquidated,  
6 unliquidated, fixed, contingent, matured,  
7 unmatured, disputed, undisputed, legal,  
8 equitable, secured, or unsecured; or a right  
to an equitable remedy for breach of  
performance if such breach gives rise to a  
right to payment....

9 § 101(5). The Code includes a right to payment that is both  
10 contingent and disputed within the definition of claim. "By  
11 providing for the 'broadest definition of claim' Congress  
12 intended to ensure that 'all legal obligations of the debtor, no  
13 matter how remote or contingent, will be able to be dealt with  
14 in the bankruptcy case.'" In re Hassanally, 208 B.R. 46, 50  
15 (9th Cir. BAP 1997) (citations omitted). "This policy promotes  
16 the debtor's fresh start." *Id.* (citation omitted).

17 A key phrase in § 101(5) is "right to payment." "While  
18 state law determines the existence of a claim based on a cause  
19 of action, federal law determines when the claim arises for  
20 bankruptcy purposes." *Id.* at 50 (citing Johnson v. Home State  
21 Bank, 501 U.S. 78, 83 (1991)). Moreover, notice and due process  
22 affect the bankruptcy court's ability to discharge claims. *Id.*  
23 at 54. In deciding whether Michelle's right to the equalization  
24 payment was discharged, a tripartite analysis is involved: Does  
25 a claim exist under state law? If so, when did it arise under  
26 bankruptcy law? And, did the creditor receive proper notice?

27 A. THE EXISTENCE OF THE CLAIM UNDER STATE LAW.

28 The existence of Michelle's claim under state law is

1 indisputable. The superior court ordered Debtor to pay Michelle  
2 the \$10,000 equalization payment in connection with the division  
3 of community property. Michelle had a right to payment for  
4 which Debtor was liable. However, the Court must look to  
5 federal law to determine whether the claim arose before or after  
6 Debtor's bankruptcy filing.

7 **B. THE CLAIM AROSE PREPETITION.**

8 Michelle argues that *Seligman*, 14 Cal.App.4th at 300,  
9 stands for the proposition that a state court's division of  
10 community property, claimed exempt and abandoned by the trustee,  
11 does not constitute a "claim" within the meaning of the Code.  
12 In *Seligman*, the superior court divided community property after  
13 the wife had filed bankruptcy and ordered the wife to surrender  
14 certain items of personal property in her possession.<sup>4</sup> The wife  
15 appealed, contending that her discharge in bankruptcy deprived  
16 the superior court of jurisdiction to divide the community  
17 property. In analyzing the lower court's jurisdiction, the  
18 appellate court found, *inter alia*, that the division of  
19 community property did not require payment of any kind and  
20 required only the wife's performance to surrender certain  
21 personal property items. The appellate court concluded such  
22 performance was not a "claim" within the meaning of the Code.<sup>5</sup>  
23 Id. at 309.

24 \_\_\_\_\_  
25 <sup>4</sup> The husband was ordered to make an equalization payment to the wife.

26 <sup>5</sup> The appellate court also found that the wife's scheduling of certain  
27 personal property as exempt in her bankruptcy petition did not transmute it from  
28 community property into her separate property. The court further held that once  
wife's trustee in bankruptcy abandoned everything she had scheduled by filing his  
"no asset" report, that property was no longer subject to disposition by the  
Bankruptcy Court. Id. at 310.

1           The Court finds Seligman factually distinguishable from the  
2 instant case. The dischargeability of an equalization payment  
3 was not at issue before the court because it was the husband,  
4 and not the wife, who was ordered to make the payment. Further,  
5 there is more involved here than simply a surrender of some  
6 personal property items. The superior court ordered Debtor to  
7 pay \$10,000 to Michelle. The only similarity between this case  
8 and Seligman is that the debtors in both cases seek to avoid  
9 obligations arising out of their divorce.

10           “A contingent claim is a debt ‘which the debtor will be  
11 called upon to pay only upon the occurrence or happening of an  
12 extrinsic event which will trigger the liability of the debtor  
13 to the alleged creditor.’” Hassanally, 208 B.R. at 50 (citation  
14 omitted). It is well settled that a contingent claim can  
15 constitute a “debt.” *Id.* Even though the legislative  
16 history indicates that Congress intended an expansive definition  
17 of the term, courts have struggled with how far the concept of a  
18 contingent claim should be expanded. One court observed that  
19 while a claim in bankruptcy encompasses even contingent rights  
20 to payment, for that term to have meaning, it must have limits.  
21 In re CD Realty Partners, 205 B.R. 651, 656 (Bankr. D. Mass.  
22 1997) (noting that a contingent claim “might be said to exist  
23 somewhere on a continuum between being and nonbeing”).  
24 Accordingly, bankruptcy courts have devised various tests in  
25 order to establish a cut-off point for a contingent claim. The  
26 outcome of the case may very well depend upon the test applied.

27           1. The Right to Payment or Accrued State Law Claim Test.

28           One line of cases holds that a debt arising from a

1 postpetition dissolution decree accrues at the time the state  
2 court issues an order creating a right to payment. In these  
3 cases the debt at issue is viewed as arising postpetition and is  
4 therefore nondischargeable. See In re Arleaux, 229 B.R. 182,  
5 186 (8th Cir. BAP 1999) citing McSherry v. Trans World Airlines,  
6 Inc., 81 F.3d 739, 740-41 (8th Cir.1996) (claim does not arise  
7 in bankruptcy until a cause of action has accrued under  
8 non-bankruptcy law); In re Berlinger, M.D., 246 B.R. 196, 199  
9 (Bankr. D.N.J. 2000) (same); In re Scholl, 234 B.R. 636, 641  
10 (Bankr. E.D. Pa. 1999) (noting that when a right to payment  
11 arises must be resolved by reference to state law). These  
12 courts looked to state law to determine when the right to  
13 payment accrues.

14 Under the so-called "right to payment" or "accrued state  
15 law claim" test, which these courts applied, a claim does not  
16 arise in bankruptcy until an action has accrued under relevant  
17 substantive nonbankruptcy law. Hassanally, 208 B.R. at 51.  
18 However, the right to payment or accrued state law claim test is  
19 no longer viable in the Ninth Circuit because "it interprets the  
20 term claim more narrowly than Congress intended." Id.

21 Moreover, to the extent these decisions are based solely on  
22 In re Matter of Frenville Co., Inc., 744 F.2d 332 (3d Cir.  
23 1984), cert. denied, 469 U.S. 1160 (1985), that case has been  
24 universally criticized and is not followed outside the Third  
25 Circuit. Hassanally, 208 B.R. at 51 (citations omitted). "The  
26 Frenville court confuses 'a "right to payment" for federal  
27 bankruptcy purposes with the accrual of a cause of action for  
28 state law purposes.'" In re Jensen, 127 B.R. 27, 30 (9th Cir.

1 BAP 1991) (citation omitted). Accordingly, the Court must  
2 reject those cases which rely on the right to payment or accrued  
3 state law claim test.

4 2. The Fair Contemplation or Prepetition Relationship  
5 Test.

6 Ninth Circuit law suggests that where the parties could  
7 have fairly contemplated a claim prior to bankruptcy, the claim  
8 will be held to have arisen prepetition, even when the actual  
9 right to payment matures postpetition. California Dep't of  
10 Health Services v. Jensen (In re Jensen), 995 F.2d 925, 930 (9th  
11 Cir. 1993). The so-called fair contemplation test espoused in  
12 Jensen has been found to be equivalent to the prepetition  
13 relationship or Piper test. Hassanally, 208 B.R. 52 (citations  
14 omitted). Under the Piper test there must be some prepetition  
15 relationship, such as contract, exposure, impact, or privity,  
16 between the debtor's prepetition conduct and the claimant in  
17 order for a future claimant to have a claim under the Code. The  
18 relationship must be of such degree that the claim could fairly  
19 have been contemplated by the parties prepetition. The  
20 prepetition relationship test has been most often applied to  
21 tort and statutory environmental claims.

22 Although the claim at issue is neither tort nor statutory,  
23 the fair contemplation test and prepetition relationship test  
24 offer guidance in this case. One court noted:

25 The general principle is that a claim in the  
26 form of an unmatured or contingent right to  
27 payment can fairly be deemed to arise  
28 prepetition if, prior to the bankruptcy  
filing, the possibility of the claim was in  
the contemplation of the parties. The concept  
is the same, regardless of whether the claim

1 was in the contemplation of the parties  
2 because they were "acutely aware" of one  
3 another, because a legal relationship such as  
4 a contract covering the potential claim  
5 existed between the parties, or because there  
6 was some 'contract, exposure, impact, or  
7 privity' between the parties involved in a  
8 tort. Big Yank Corp. v. Liberty Mut. Fire  
9 Ins. Co. (In re Water Valley Finishing,  
10 Inc.), 203 B.R. 537, 541 (S.D.N.Y. 1996),  
11 rev'd on other grounds, 139 F.3d 325 (2nd  
12 Cir. 1998).

13 It is undisputed that Debtor and Michelle had an extensive  
14 prepetition relationship. The claim at issue is rooted in the  
15 parties' dissolution proceeding which was pending at the time of  
16 Debtor's filing. It can also be said that the dissolution  
17 proceeding triggered Debtor's potential liability. Even though  
18 the marriage was terminated prepetition, both parties were aware  
19 that the division of community property would be made at a later  
20 time. Thus, the Court finds that it was within the fair  
21 contemplation of the parties that a contingent claim regarding  
22 the property division existed at the time of Debtor's bankruptcy  
23 filing. "The policies of the Bankruptcy Code are best served by  
24 an inclusive interpretation of 'claim', as 11 U.S.C. § 101(5)  
25 contemplates." Hassanally, 208 B.R. at 53.

26 C. NOTICE AND DUE PROCESS.

27 Debtor listed Michelle as an unsecured creditor with a  
28 contingent and disputed debt. Debtor also listed the pending  
divorce action in his Statement of Affairs. Michelle was  
therefore put on notice that Debtor sought to discharge any  
marital debts that arose from the pending property division.

Although the scheduling of Michelle's claim resulted in the  
debt being dischargeable, this may not always be the case.

1 Scheduling a debt is important for notice purposes.  
2 Nonetheless, the claim-debt analysis is still required because a  
3 discharge extinguishes only rights to payment. See Gendreau v.  
4 Gendreau, 122 F.3d 815, 818-19 (9th Cir. 1997) (an interest in  
5 property such as pension funds is not dischargeable); In re  
6 Granados, 214 B.R. 241 (Bankr. E.D. Cal. 1997) (same).

7 D. MICHELLE'S REMEDY.

8 Although the result may appear harsh, Michelle may have a  
9 remedy. The discharge does not preclude a state court from  
10 modifying an alimony award based upon "changed circumstances"  
11 such as the discharge of a property settlement debt. In re  
12 Siragusa, 27 F.3d 406, 408 (9th Cir. 1994). This Court makes no  
13 determination whether Michelle may or may not be entitled to  
14 such a modification as that is within the jurisdiction of the  
15 state court.

16  
17 CONCLUSION

18  
19 Michelle's right to payment, albeit contingent, disputed  
20 and unliquidated, arose prepetition. The debt arising from the  
21 equalization payment was therefore discharged. The lien should  
22 be expunged because it is null and void. In re Boni, 240 B.R.  
23 381, 384 n.5 (9th Cir. BAP 1991).

24 This Memorandum Decision constitutes findings of fact and  
25 conclusions of law pursuant to Federal Rule of Bankruptcy  
26 Procedure 7052.

27  
28 Dated: July 5, 2000

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**JOHN J. HARGROVE**  
**United States Bankruptcy Judge**

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