



Signed and Filed: April 02, 2009

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
HELLER EHRMAN LLP,) No. 08-32514DM
Debtor.) Chapter 11

MEMORANDUM DECISION

The Official Committee of Unsecured Creditors (the "Committee") in the chapter 11 case of Heller Ehrman LLP ("Debtor") filed a motion for an order authorizing it to pursue certain estate causes of action. In particular, the Committee sought authorization to prosecute causes of action

owned by the estate arising from or relating to: (A) any avoidable transfer actions that the Debtor may have against Bank of America and/or Citibank for pre or post petition avoidable transfers, and related claims for recovery or turnover of property and disallowance of claims until such recovery pursuant to Bankruptcy Code section 502(d)^[1], and/or (B) the partnership doctrines set forth in Jewel v. Boxer, 156 Cal. App. 3d 171 (1984) (collectively the "Estate Representative Actions").

The Committee further sought an order reserving the estate's rights to assert in later proceedings any rights, remedies, or

¹Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as revised by The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

1 claims not asserted by it in the Estate Representative Actions,
2 even though the later claims may otherwise be barred by
3 application of claim preclusion (also known as res judicata).

4 Bank of America ("BOA") and Citibank (collectively, the
5 "Banks") opposed the motion to the extent the Committee seeks
6 "blanket exemption from ordinary rules of claim preclusion so that
7 it can split claims that might otherwise be required to be brought
8 in a single action." Following argument at a hearing on March 27,
9 2009, the court took the motion under advisement. For the reasons
10 set forth below, the court will authorize the Committee to pursue
11 avoidance actions arising out of the events described in paragraph
12 9 of the Committee's memorandum of points and authorities in
13 support of its motion and will reserve the right of the estate to
14 assert in a later action against the Banks any rights, remedies
15 and claims not asserted by the Committee in its avoidance action.

16 The court will also authorize the Committee to pursue the
17 Jewel v. Boxer causes of actions, but will not at this juncture
18 issue an order reserving for future litigation other unknown
19 causes of action which may otherwise be subject to claim
20 preclusion following a judgment on the Jewel v. Boxer claims. The
21 defendants in any Jewel v. Boxer actions have not been
22 specifically identified, and have not had sufficient opportunity
23 to object to a pre-litigation order impairing their rights to
24 invoke claim preclusion as a defense in a subsequent action.

25 A. Actions Against the Banks

26 While the Committee's motion states that it is seeking the
27 right to prosecute "any avoidance actions that the Debtor may
28 have" against the Banks, counsel for Debtor and for the Committee

1 indicated at the hearing that the "Estate Representative Actions"
2 which the Committee seeks to prosecute are much narrower. As
3 argued at the hearing and as set forth in paragraphs 9 and 10 and
4 elsewhere in the Committee's memorandum of points and authorities,
5 the Committee wants to file avoidance actions relating to (1)
6 BOA's termination of a financing statement in 2007, (2) BOA's
7 filing of a UCC correction statement on October 1, 2008, and (3)
8 BOA's filing of a new financing statement on October 2, 2008. The
9 Committee will seek to avoid the Banks' security interests as
10 preferential and to recover payments made to the Banks within the
11 preference period of section 547 and after the petition date.

12 The Committee has requested that, prior to the filing of any
13 avoidance action against the Banks, this court enter an order
14 protecting any judgment entered in that action from application of
15 the doctrine of claim preclusion. "Under the doctrine of claim
16 preclusion, a final judgment forecloses 'successive litigation of
17 the very same claim, whether or not relitigation of the claim
18 raises the same issues as the earlier suit.'" Taylor v. Sturgell,
19 __ U.S. ___, 128 S.Ct. 2161, 2171 (2008), quoting Hampshire v.
20 Maine, 532 U.S. 742, 748 (2001). Claim preclusion and the
21 related doctrine of issue preclusion² "protect against 'the
22 expense and vexation attending multiple lawsuits, conserv[e]

24 ²Issue preclusion precludes relitigation of issues argued and
25 decided in prior proceedings, while claim preclusion forecloses
26 litigation of matters that have not been litigated. Paine v.
27 Griffin (In re Paine), 283 B.R. 33, 38 (9th Cir. BAP 2002). The
28 Committee's counsel conceded at the hearing that issue preclusion
may apply (if legally and factually appropriate) in litigation
subsequent to the Estate Representative Actions. The Committee is
not requesting this court to exempt it from the application of
that doctrine.

1 judicial resources, and foste[r] reliance on judicial action by
2 minimizing the possibility of inconsistent decisions.'" Sturgell,
3 128 S.Ct. at 2171, quoting Montana v. United States, 440 U.S. 147,
4 153-154 (1979).

5 Claim preclusion requires (1) parties to be identical or in
6 privity, (2) the existence of a judgment rendered by a court of
7 competent jurisdiction, (3) a prior action concluded to final
8 judgment on the merits, and (4) the same claim or causes of action
9 to be involved in both matters. Paine, 283 B.R. at 39. To
10 determine whether the fourth factor has been satisfied, courts in
11 the Ninth Circuit consider

12 (1) whether rights or interests established in the prior
13 judgment would be destroyed or impaired by prosecution
14 of the second action; (2) whether substantially the same
15 evidence is presented in the two actions; (3) whether
the two suits involve infringement of the same rights;
and (4) whether the two suits arise out of the same
transactional nucleus of facts.

16 The Alary Corp. v. Sims (In re Assoc. Vintage Group, Inc.), 283
17 B.R. 549, 558 (9th Cir. BAP 2002), quoting Harris v. Jacobs, 621
18 F.2d 341, 343 (9th Cir. 1980). "The most important criterion is
19 the transactional nucleus of facts." Assoc. Vintage, 283 B.R. at
20 558 (internal quotations and citations omitted).

21 The Banks argue that this court should not countenance the
22 Committee's effort to avoid the preclusive effect of any judgment
23 entered in its Estate Representative Actions and to split claims
24 that may arise out of the same nucleus of operative facts. The
25 court disagrees. Case law and the Restatement (Second) of
26 Judgments ("Restatement") acknowledge that a court can except
27 claims not resolved in its judgment from claim preclusion. "[A]
28 claim is not extinguished if the court in the first action

1 expressly reserve[s] the plaintiff's right to maintain the second
2 action." Id. at 564, citing Restatement § 26(1)(b) (providing
3 that an exception exists to the rule against splitting when the
4 "court in the first action has expressly reserved the plaintiff's
5 right to maintain the second action"). See also Dodd v. Hood
6 River County, 59 F.3d 852, 862 (9th Cir. 1995) (quoting a comment
7 accompanying Restatement § 26(1)(b) and acknowledging that a court
8 may be able to reserve part of a plaintiff's claim for subsequent
9 litigation). Comment (b) to Restatement § 26(1)(b) explains why
10 courts should have the ability to narrow the ordinary rules of
11 claim preclusion with respect to their own judgments:

12 It may appear in the course of an action that the
13 plaintiff is splitting a claim, but that there are
14 special reasons that justify his doing so, and
15 accordingly that the judgment in the action ought not to
16 have the usual consequences of extinguishing the entire
17 claim; rather the plaintiff should be left with an
18 opportunity to litigate in a second action that part of
19 the claim which he justifiably omitted from the first
20 action.

21 Restatement § 26(1)(b), cmt. b.³

22 Here, the Committee has established special and persuasive
23 reasons to split its preference avoidance claims from other
24 potential claims against the Banks. The preference claim is
25 discrete, yet resolution of it significantly affects any plan of
26 reorganization. The court could require the Committee to wait to
27 file the avoidance actions until it has had more opportunity to
28 determine the existence of other claims against the Banks (which,

29 ³This case presents the unusual situation where the court is
30 asked to split claims even before the first action has been filed,
31 let alone reduced to judgment. That makes it all the more
32 appropriate to grant the Committee's motion here, so the Banks
33 will know the rules before any adversary proceeding against them
34 has been commenced.

1 depending on the claim, may not satisfy the elements of claim
2 preclusion in any event), but such a delay would impair the
3 ability of the estate and its creditors to propose and implement a
4 plan of reorganization, particularly when resolution of any
5 preference avoidance action would clarify whether the Banks must
6 return approximately \$51 million that would then be available to
7 the entire creditor body.

8 Since the first hearing in this case, all parties have known
9 that one of the biggest issues in this case was whether BOA's
10 filing of the correction statement and the new financing statement
11 constituted avoidable preferential transfers. While the
12 consequences of this preference claim are significant, the issues
13 presented by this action appear discrete: do the section 547(b)
14 elements of a preference exist and do any of the statutory
15 defenses of section 547(c) apply? Even if the Committee did bring
16 other claims in the context of any avoidance action, the court
17 could and likely would sever the preference claim for earlier
18 resolution, given the discrete issues it presents and its
19 significance to the estate and all creditors. Except for actions
20 that could be brought under other avoiding powers of the
21 Bankruptcy Code, Debtor's other claims against the Banks likely
22 came into the estate under section 541, further distinguishing
23 them from Estate Representative Actions arising under the special
24 statutory powers conveyed to trustees (and those accorded trustee
25 powers) under sections 544-551.

26 Therefore, "special reasons" justify allowing the preference
27 claim to proceed without the possibility of a judgment on it
28 extinguishing other claims against the Banks. The court will

1 exercise its discretion to except the estate's preference claims
2 from the ordinary rules of claim preclusion and claim splitting.⁴

3 B. Jewel v. Boxer Claims

4 The court will not, at this time, enter a similar order that
5 in effect excepts any judgment in a Jewel v. Boxer action from
6 claim preclusion. The prospective defendants in those actions
7 have not been identified and, unlike the Banks, have not had
8 sufficient opportunity to object to the denial or limitation of
9 their rights to invoke claim preclusion in a later action.

10 Moreover, the Committee has not demonstrated why or how immediate
11 prosecution of the Jewel v. Boxer causes of action (unlike the
12 avoidance action against the Banks) is necessary for formulating
13 and implementing a plan. Moreover, the Committee has not stated
14 whether it is contemplating filing other types of claims arising

16 ⁴At the hearing, the court expressed its doubt that it could
17 reserve claims that have not been identified. This concern was
18 magnified by language in Wright & Miller's Federal Practice and
19 Procedure that a court can foreclose application of the ordinary
20 rules of claim preclusion and claim splitting with respect to
21 "specified parts of the claim or cause of action that was advanced
22 in the first action. . ." C. Wright, A. Miller & E. Cooper, 18
23 Fed. Prac. & Proc. Juris. 2d § 4413 (Updated 2008); but see
24 Comment b to Restatement 26(1)(b) (first court can split claims
25 where "plaintiff should be left with an opportunity to litigate in
26 a second action that part of the claim which he justifiably
27 omitted from the first action").

28 Here, the claims being reserved have not been brought and have
not been identified. Yet, in Associated Vintage, the BAP applied
the exception of Restatement § 26(1)(b) to a confirmation order,
even though the claims reserved in the plan and order were not
specifically identified. Here, unlike in Associated Vintage, the
possible defendants in the later action have been identified (the
Banks) and the express reservation puts the Banks on notice that
repose will not be achieved simply because a judgment has been
entered on a preference claim. Even though the reserved claims
have not been identified, the court will reserve expressly the
estate's right to maintain a subsequent action on claims not
brought in the Estate Representative Action against the Banks.

1 out of the same nucleus of transactional facts against the
2 prospective unnamed Jewel v. Boxer defendants. In contrast, the
3 Committee did state on page 6 of its memorandum of points and
4 authorities in support of its motion that it is not aware of any
5 rights or remedies the estate may have against the Banks that
6 would not be asserted in an avoidance action. Under these
7 circumstances, the Committee has not provided justification for a
8 wholesale exemption of the Jewel v. Boxer actions from the rules
9 of claim preclusion.

10 Counsel for the Committee should upload an order consistent
11 with this memorandum decision and comply with B.L.R. 9021-1 in
12 doing so.

13 **END OF MEMORANDUM DECISION**

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