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How A "Flyspeck"[1] Case Nearly Upended The Constitutional Authority Of The 9TH Cir. BAP

By Cassandra J. Richey, Esq., Prober & Raphael

The 9th Circuit issued a 3 Judge panel ruling on March 25, 2016 from an Appeal from the 9th Circuit BAP on the "sexy" issue of mandamus writs, identified throughout as "*Ozenne I*"; the subsequent 9th Circuit en banc panel ruling issued a ruling on November 9, 2016, identified as "*Ozenne II*" throughout this article to distinguish the two 9th Circuit Court rulings.

The 9th Cir. en banc panel in *Ozenne II* took a step back from the brink and ruled that if a case can be disposed on other grounds (rather than mandamus jurisdiction); the BAP has constitutional authority to do so.

I've been a bankruptcy attorney for twenty-five years and the disdain shown by District Court Judges and appellate Courts for their Bankruptcy Court brethren is shocking at times. I once had a District Court Judge opine to the combined experience of two bankruptcy attorneys' of nearly 75 years experience that "he knew more about bankruptcy law than the two of us combined." He said that we "likely thought he was going to get it wrong." As the losing side, I can say that I felt that he got it wrong, but having both won and lost appellate battles for truly idiosyncratic reasons, the statement "in effect" that a Bankruptcy Court Appellate panel is "not a Court" is amazingly breathtaking and par for the course.

Of course, the *Ozenne I* 9th circuit panel was "shooting from the hip" without briefing or oral argument. Judge Bybee (in *Ozenne I's* dissent) pointed out that the Constitutionality of the BAP Court for the 9th Circuit should not have even been in play because there were so many other grounds to say "no" to Mr. Ozenne, and his untimely mandamus writ.

> ***The ruling Ozenne I panel made the determination that the BAP is not a 'Court' thus calling into question the BAP's ability to issue any Orders, because it lacked 'constitutional jurisdiction' delegated directly from Congress.***

But I digress; no Court has ruled that Mr. Ozenne has a case. But the issue is the reasoning that got the Courts to say "no" and dismiss Mr. Ozenne's mandamus writ. All Courts came to the same conclusion, the Appellant, Gary Lawrence Ozenne, had no case. Not without trying, as the *Ozenne II* En Banc opinion pointed out, Mr. Ozenne filed five Chapter 13 cases dating back to 1997, in an effort to stop the foreclosure sale (the second of two) that occurred on *July 31, 2002*. Mr. Ozenne was not deterred by a mere foreclosure, and proceeded to make numerous attempts to re-open his case (or cases) in order to obtain damages for alleged violations of the automatic stay stemming from the foreclosure sale. The District Court in 2003 weighed in that no, Mr. Ozenne had no remedy because too long had passed to re-open the fifth bankruptcy case. The 9th Cir. affirmed June 24, 2005 and the Supreme Court denied *certiorari*, *Ozenne v. Chase Manhattan Bank, 546 U.S. 1178 (2006).* There was another trip up the appellate Courts, and the Supreme Court denied *certiorari*, again in 2010, *Ozenne v. Chase Manhattan Bank,* 559 U.S. 943 (2010).

Ozenne I caused consternation when on the way to tossing Mr. Ozenne out the Courthouse door, two of the three Judges on the *Ozenne I* panel stated that the grounds for doing so was that since BAP Courts are not Article III judges with lifetime appointments (neither are Bankruptcy Judges who make of the BAP "panels"), that they could not be a "court established *directly* by Act of Congress" and thus had no jurisdiction to hear the mandamus writ.

The constitutionality of the Bankruptcy Courts since_*N. Pipeline Construction. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63-64 (1982) has been the bugbear of constitutional law.

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The Supreme Court when it wants to make a point trots out the distinction with little thought to the earthquakes and tremors that follow in its wake. As the dissent outlines in footnote 4 of *Ozenne I* at page 30, "there is more than a little confusion over the constitutional source of Congress's power to establish the Bankruptcy Courts."

BAP Court judgments, post *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) are subject to review of Article III judges absent "consent of the parties", But see, *Wellness Int.'l Network, LTC v. Sharif*, 575 U.S.___, (2015) No. 13-935 Slip Opinion (May 26, 2015) n.7 (Thomas, J., dissenting) (noting that the *Northern Pipeline* plurality was "considering whether Article III imposes limits on Congress' bankruptcy power," not "whether Congress has the power to establish bankruptcy courts as an antecedent matter.")

Mr. Ozenne, as a Pro Se appellate litigant, jumped the line in procedure and filed a Mandamus Writ with the 9th Cir. BAP without obtaining consent of the other interested parties in the case (or filing the required timely appeal in the underlying Bankruptcy Court). The BAP quickly disposed of the decades old dispute, and ruled that the BAP had jurisdiction to deny the Writ based upon prior case law, *citing In re Salter*, 279 B.R. 281 (9th Cir. BAP 2002). Mr. Ozenne, forseeably, appealed the BAP's ruling. The *Ozenne I* panel took the bait provided by Mr. Ozenne to "sua sponte" find that *In re Salter* was overruled, and while the BAP panel didn't have jurisdiction because not an "Article III" Court, the *Ozenne I* panel did have the proper jurisdiction to deny the Mandamus Writ. In the course of this analysis, the ruling *Ozenne I* panel made the determination that the BAP is not a "Court" thus calling into question the BAP's ability to issue any Orders, because it lacked "constitutional jurisdiction" delegated *directly* from Congress.

In the interim, the American Bar Association requested an "en banc panel" revisit the decision due to the impact losing the BAP Courts would have on pending Bankruptcy litigation were the District Courts the only remedy available.

Ozenne II righted the BAP's jurisdiction by vacating the ruling in *Ozenne I*, and finding that the Debtor's Mandamus Writ was untimely and could not substitute for a timely appeal. Thus, there was no need to review judicial standing or the constitutionality of the basis for the BAP to dispose of Mr. Ozenne and his Mandamus Writ. The actual ruling states that the debtor could not substitute filing a timely appeal with a mandamus petition. (A Mandamus Writ may not side step the appellate process, and as recited above, Mr. Ozenne had already made it up to the Supreme Court twice where *certiorari* was denied on the same issues.)

For those unfamiliar with a "mandamus writ" (not ordinarily encountered in the bankruptcy Courts), a "writ" is an Order issued by a Court directing an action. The "All Writs Act" permits federal appellate courts to issue necessary "writs" (i.e. orders) appropriate *to their jurisdiction* and principles of law." A "mandamus" writ is one that is "mandatory" or required under the law where there is a clear legal right in the plaintiff for such direction or command." Such "mandamus" writs have traditionally been issued where there has been an "abuse of power." The irony is not lost on this bankruptcy practitioner. (Here, the abuse of power was the *Ozenne I's* overreaction to a "wild card" mandamus writ by overreaching to "kick" the BAP in its appellate jurisdiction).

How does a bankruptcy practitioner help a creditor client avoid a 20 year case worthy of Dickens? The key appears to be 1) pay attention to violations of the automatic stay (even when alleged) and take the necessary actions to cure timely; 2) Here, if the Trustee's Deed Upon Sale had been properly rescinded at the time of the 2001 bankruptcy case, the Pro Se Debtor would not have had a leg to stand on through the numerous appeals. Although in Mr. Ozenne's case, I'm sure he would have tried something else. At some point, a vexatious litigant Order may be necessary and required if your client does not want 20 years of legal bills.[2]

As to appellate Courts leaning over backwards to help a Debtor obtain "alleged damages from an alleged violation of automatic stay nearly 20 years old"? Flyspecks can still cause major damage in the gears of Appellate Jurisdiction, unless we have the Judge Bybee's of the world paying attention. At the end of this day, *Ozenne II* and Judge Bybee give us all hope that Bankruptcy Courts may continue to do their necessary work unimpeded.

1 Honorable Judge Jay S. Bybee, in his dissent in Ozenne I (9th Cir. opinion entered March 25, 2016 on BAP appeal no. 11-1208, no. 11-60039, In re Gary Lawrence Ozenne, Debtor and Appellant) (identified throughout as Ozenne I) refers to the underlying bankruptcy case as a "flyspeck" case for which there is no dispute that the Debtor has no remedy. The exact quote (page 18 is "I am going to start with an observation: even among flyspecks this case is nothing").

2 Although the Trustee's Deed Upon Sale was "void" due to the bankruptcy

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filing, (which was evidently the basis over the years for the allegation of a violation of the automatic stay) and the subsequent dismissal brought the parties to the point they would have been at Dismissal- Bankruptcy Court Judge Meredith Jury was rightly concerned that there was a "wild deed" in having two foreclosure sales on the same Deed of Trust back in 2002, one of the Trustee's Deeds Upon Sale was retroactively rescinded in 2003.

Cassandra J. Richey has over 25 years' experience as a bankruptcy attorney, and for the last ten years has specialized in a secured creditor consumer practice with Prober & Raphael, ALC. She has experience as a staff attorney for a Chapter 13 Trustee and externed for a bankruptcy Judge. She can be reached at crichey@pralc.com.

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trustees' and servicers' counsel encouraging judges to draw narrow interpretations of HBOR in other aspects as well.

Melissa Robbins Coutts is an attorney with McCarthy & Holthus, LLP and manages the firm's Civil Litigation Department. Ms. Coutts represents trustees, lenders, and servicers in default and title related litigation and appeals in both Arizona and California. She can be reached at mcoutts@mccarthyholthus.com.