

**Blaine F. Bates**  
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE LAWRENCE A. BROCK and  
DIANE MELREE BROCK,

Debtors.

BAP No.    CO-12-001

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LAWRENCE A. BROCK and DIANE  
MELREE BROCK,

Appellants,

Bankr. No. 10-32881  
Chapter 11

v.

OPINION\*

ALEC J. GLASSER, Trustee of Alec J.  
Glasser Defined Benefit Pension Plan,

Appellee.

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Appeal from the United States Bankruptcy Court  
for the District of Colorado

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Before THURMAN, Chief Judge, CORNISH, and MOSIER<sup>1</sup>, Bankruptcy Judges.

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THURMAN, Chief Judge.

Debtors Lawrence and Diane Brock ( the “Brocks”) ask this Court to assign error to the bankruptcy court’s allowance of an unsecured claim, asserted by The Alec J. Glasser Defined Benefit Pension Plan (the “Plan”), against their Chapter 11 estate. The Brocks contend that the Plan’s claim cannot be asserted against

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\* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

<sup>1</sup> Honorable R. Kimball Mosier, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

them personally as it is the debt of their personal trust, the Lawrence A. Brock and Diane Melree Brock Revocable Inter Vivos Trust (the “Brock Trust”), and was not personally guaranteed. As there was no error in the bankruptcy court’s allowance of the Plan’s claim, we AFFIRM the appealed order.

I.     BACKGROUND<sup>2</sup>

The Brocks moved from California to Colorado in 1995. In 2007, anticipating a return to California, they began looking for investment property there. They became interested in a commercial property in Laguna Beach (the “CA Property”) that was owned by Forest Partners I, an entity controlled by Alec Glasser (“Glasser”). Mr. Brock traveled to California to see the CA Property, and retained a California real estate broker to negotiate its purchase. The Brocks and Glasser agreed to a sale of the CA Property to Park Center Exchange I, LLC f/b/o Brock (“Park Center”), which the Brocks owned, for a price of \$4,037,733. Although the sale was intended to be fully paid in cash, the Brocks’ financing fell through shortly before the anticipated closing date. The Brocks then arranged for payment of \$1.065 million in cash, and two loans from other Glasser-controlled entities, AJG Property LP (“AJG”) and the Plan, to cover the balance of the purchase price. The Brock Trust executed two promissory notes; one to AJG (the “AJG Note”) in the amount of \$2.45 million, and one to the Plan (the “Plan Note”) in the amount of \$500,000. Both notes were secured by trust deeds to the CA Property, and all of the transaction documents were executed by the Brocks, as trustees on behalf of the Brock Trust. AJG held the primary trust deed on the

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<sup>2</sup> This matter was tried to the bankruptcy court on September 14 and 16, 2011. Transcripts of proceedings on those dates are included in Appellants’ Appendix (“Appx”), beginning at page 84. They appear to be complete. However, the September 16 transcript begins with cross-examination of Lawrence Brock, who did not testify on September 14. There is no explanation for the lack of a transcript of Mr. Brock’s initial testimony in either the transcript or the bankruptcy court’s docket, yet it appears that this Court was not provided with at least a portion of the trial record.

CA Property, and the Plan's trust deed was subordinate.

As part of this temporary financing arrangement, the Brocks agreed to refinance the AJG Note by March 17, 2008 (only three months later), as Glasser did not want AJG to carry the debt on the CA Property. The Brocks were unable to obtain refinancing within that time period, and the deadline was extended by mutual agreement. On May 22, 2008 the Brocks, as trustees of the Brock Trust, closed on a \$2.6 million loan from Bank of the West (the "Bank"), which was used to pay off the AJG Note.<sup>3</sup> The Bank loan was conditioned on it holding the primary security on the CA Property and, as such, the Plan was required to subordinate its trust deed to the Bank's interest. Though he anticipated subordination of the Plan's lien would be required for the refinancing, Glasser found the terms of the Bank's subordination agreement much more onerous than expected. Therefore, Glasser requested additional collateralization of the Plan Note from the Brocks in return for its execution of the subordination agreement.<sup>4</sup>

The Brocks reluctantly agreed to provide a junior deed of trust ("CO Trust Deed") to their residence in Boulder, Colorado (the "CO Property") as additional security for the Plan Note. Despite Glasser's execution of the subordination agreement and his repeated requests for the trust deed, the Brocks failed to execute the CO Trust Deed until March 2009. The CO Trust Deed, which was executed by the Brocks personally, expressly provided that it was intended to provide security for the Plan Note, an obligation of the Brock Trust. At the Brocks' request, Glasser agreed not to immediately record the CO Trust Deed in order to allow the Brocks to refinance the CO Property.<sup>5</sup>

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<sup>3</sup> In the refinancing, the Brock Trust replaced Park Center as obligor.

<sup>4</sup> This was after Glasser unsuccessfully attempted to obtain the Bank's agreement to some editing of the subordination agreement.

<sup>5</sup> Glasser in fact held the CO Trust Deed for 18 months without recording it.

(continued...)

A few months after the Brocks purchased the CA Property, the principal lessee, an art gallery, defaulted on its lease.<sup>6</sup> In response, the Brocks remodeled the CA Property and secured new tenants. Although the building was then again fully rented, it thereafter maintained a negative cash flow due to generally lower leasing rates. Ultimately, the Brocks defaulted on the Bank's loan and, in June 2010, the Bank obtained an order from the California Superior Court appointing a receiver for the CA Property. The Bank also filed a separate action in California Superior Court against the Brocks on their personal guaranty. In September 2010, immediately before an Answer was due in the guaranty action, the Brocks filed their individual Chapter 11 bankruptcy petition in Colorado, in which they have remained as debtors in possession.

Both the Plan and the Bank filed proofs of claim in the Brocks' bankruptcy, and the Brocks objected to both. In October 2010, the Brocks stipulated to the Bank's request for relief from stay in their bankruptcy, and agreed both to allow the California receivership to remain in effect and to release the receiver from the turnover provisions of 11 U.S.C. § 541.<sup>7</sup> Once the stipulation was approved by the bankruptcy court, the Bank foreclosed its lien on the CA Property.<sup>8</sup>

The Plan's initial proof of claim ("POC"), based on the Plan Note, stated

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<sup>5</sup> (...continued)

As a result, the Plan's security interest was not perfected on the date the Brocks filed their petition, and its claim was considered wholly unsecured in the Brocks' bankruptcy.

<sup>6</sup> Part of what led to the Brocks' purchase deal "going bad" was the collapse of the real estate market in California (and elsewhere) in 2008, which also caused lease prices to plummet.

<sup>7</sup> Unless otherwise noted, all further statutory references in this decision will be to the Bankruptcy Code, which is Title 11 of the United States Code.

<sup>8</sup> In June 2011, the Bank successfully credit bid the sum of \$1.6 million at the foreclosure sale of the CA Property, leaving it with a deficiency in the amount of \$1.7 million, which it sought to recover from the Brocks based on their guaranty.

that it was secured by both the CA and CO Properties, but was later amended to an unsecured claim of approximately \$554,000.<sup>9</sup> The Brocks' primary objection to the Plan's claim in their bankruptcy was that recovery on a loan used to purchase real property was limited to the property itself under California law.<sup>10</sup> The Brocks also objected to the Plan's claim based on their assertions that the CO Trust Deed both had been executed by them under duress, and was unsupported by consideration. Finally, the Brocks claimed that the Plan loan was not enforceable against them individually, because the obligations under the Plan Note were owed only by the Brock Trust.<sup>11</sup> The bankruptcy court disagreed, however, and allowed the Plan's unsecured claim in the Brocks' bankruptcy.<sup>12</sup> The Brocks appealed.

The bankruptcy court subsequently entered an order sustaining the Brocks' objection to the Bank's claim, determining that their transaction with the Bank was governed by California law and, therefore, the Bank's deficiency claim against them was precluded by its anti-deficiency provisions. The Bank had asserted that the Brocks' guaranty of the Brock Trust's obligations to the Bank expressly waived protection of California's anti-deficiency laws. However, while

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<sup>9</sup> The Plan's claim was unsecured because the CA Property had been foreclosed for an amount that was insufficient to pay off the Plan Note, and the CO Trust Deed had not been filed until after the Brocks' petition in bankruptcy was filed. As the CO Trust Deed was not perfected by filing as of the date of the petition's filing, it was invalid as security for the Plan Note. *See* § 544(b)(1); Colo. Rev. Stat. § 38-35-109(1) (2010).

<sup>10</sup> *See* Cal. Civ. Proc. Code §§ 580b and 580d (1989), California's "anti-deficiency" laws, precluding personal liability of borrowers on real property loans.

<sup>11</sup> Before the bankruptcy court, the Brocks' entire personal liability argument consisted of a one sentence paragraph out of 27 paragraphs in their amended objection to the Plan's POC. *See* Debtors' Amended Objection to Claim [] at 3, ¶ 21, *in Appx* at 74.

<sup>12</sup> Bankruptcy court's Order entered December 16, 2011 ("Appealed Order") at 13-14, *in Appx* at 400-01.

California allows such waivers by “true guarantors,” they may not be effective when executed by the borrowers themselves. The bankruptcy court ruled that the Bank could not seek its loan deficiency from the Brocks because they were the settlors, beneficiaries, and trustees of the borrower, the Brock Trust, and were thus effectively borrowers rather than true guarantors with respect to the Bank’s loan. In so ruling, the bankruptcy court noted that the Brock Trust was “simply a collection of assets and liabilities” used as “a probate avoidance device,” rather than a true legal entity.<sup>13</sup> The Bank appealed that ruling to the Colorado district court, which has not yet issued a decision.

## II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.<sup>14</sup> The Appealed Order fully resolved the issues between the parties regarding the Plan’s claim against the Brocks’ estate.<sup>15</sup> On December 30, 2011, the bankruptcy court granted the Brocks’ timely motion for extension of time to appeal, pursuant to Rule 8002(c)(2),<sup>16</sup> allowing them until January 13, 2012, to file a notice of appeal. The Brocks’ notice of appeal filed on that date was therefore timely. None of the parties elected to have this appeal heard by the United States District Court for the District of Colorado, and they have therefore consented to appellate review by this Court.

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<sup>13</sup> See Order entered June 28, 2013, at 16, disallowing the Bank’s POC in its entirety (bankruptcy court docket entry 325, *in Appx* at 4).

<sup>14</sup> 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

<sup>15</sup> A judgment was entered on the same day as the order.

<sup>16</sup> Fed. R. Bankr. P. 8002(c)(2).

III.    PENDING MOTIONS

A.    The Plan's Motion to Dismiss

The Plan has a pending motion to dismiss this appeal, which asserts that the Brocks failed to pursue it appropriately, resulting in substantial delay. In fact, resolution of this appeal was significantly delayed by a stay that both parties requested from this Court in order to allow them to obtain the bankruptcy court's approval of a settlement agreement they had reached. However, the Bank objected to the Brocks' motion for approval of the settlement. In response, the Brocks and the Plan argued that the Bank was without standing to object to the settlement. Ultimately, the bankruptcy court decided that the Bank's objection to settlement would not be heard until after the Brocks' objection to the Bank's claim had been resolved. Shortly after the bankruptcy court granted the Brocks' objection and disallowed the Bank's claim, the Brocks withdrew their motion to approve the settlement agreement. Shortly after that, the bankruptcy court specifically allowed withdrawal of the motion to approve settlement and, therefore, the settlement agreement was never approved.

The Plan contends that the Brocks' agreement to settle was not made in good faith, and they simply used the agreement to delay prosecution of the appeal, without ever actually intending to obtain its approval. Although it is possible the Brocks were motivated by something other than good faith when they sought to withdraw the motion to approve once the Bank's claim was disallowed, this Court will not infer a bad faith motive from that act alone. Moreover, even if the Plan had established that the Brocks never intended to obtain approval of the settlement, such an intent would not necessarily support the sanction of dismissal of their appeal. Such a sanction seems particularly inappropriate here, as the Plan seeks redress not for delay of the appeal, but for failure of the settlement. But that decision was made by the bankruptcy court, whose approval of any such settlement is required. Accordingly, this Court will not sanction a party based on

the action of the bankruptcy court, and the motion to dismiss is DENIED.

B.     The Brocks' Motion to Strike

The Brocks moved to strike a large portion of the Plan's appellate appendix which consists of exhibits that the Plan designated for trial, but did not submit as evidence. These exhibits were apparently included in the Plan's appendix to support its claim that it had been prepared to offer proof at trial that the Brocks and the Brock Trust shared an identity, but did not do so because the personal liability issue was waived. Nonetheless, as the documents were not offered as evidence at trial, they may not be submitted on appeal as part of the trial court's "record."<sup>17</sup> The Brocks' motion to strike is therefore GRANTED, and pages 569-836 of the Plan's Appendix are hereby STRICKEN.

C.     The Plan's Motion to Strike

Similarly, the Plan filed its own motion to strike portions of the Brocks' appendix, seeking to exclude anything in the appendix that was not identified in the Brocks' designation of the appellate record.<sup>18</sup> The referenced documents include, among other items, the bankruptcy court's docket, the Plan's POCs, the Brocks' objections to the Plan's POCs, the parties' stipulated facts for trial, and the Brocks' trial brief.

Rule 8009(b)(2) lists documents that must be contained in an appellant's appendix, which include pleadings essentially equivalent to the complaint and answer, motions and responses to them that were ruled on by the bankruptcy court, and "relevant entries in the bankruptcy docket." Likewise, this Court's

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<sup>17</sup>     See *Utah v. U.S. Dep't of Interior*, 535 F.3d 1184, 1196 n.7 (10th Cir. 2008) (evidence not submitted to the trial court is not properly part of the appellate record). Nonetheless, this Court accepts at face value the Plan's assertion that it could have pursued the personal liability issue at trial, and thus additional documentation of that ability is unnecessary.

<sup>18</sup>     Specifically, the motion targets pages 1-83 and 354-387 of Appellants' appendix.



local rules provide that “the appendix constitutes the record on appeal and must contain all excerpts from the record relevant to the appeal.” The documents targeted by the Plan’s motion fall generally within the parameters set by Rule 8009 and L.R. 8009-3, and are certainly relevant to this Court’s consideration of the issues on appeal. Therefore, the Plan’s motion to strike is DENIED.<sup>19</sup>

#### IV. ISSUE AND STANDARD OF REVIEW

Whether the bankruptcy court properly ruled that the Plan could assert a claim arising from an obligation of the Brock Trust against the Brocks’ personal estate.

This is a state law legal issue, reviewable on appeal *de novo*.<sup>20</sup>

#### V. DISCUSSION

##### A. Waiver

In the bankruptcy court, the Brocks only superficially raised the issue of their personal liability for Brock Trust obligations that is now the single issue on appeal. The issue was briefly raised in the Brocks’ objections to the Plan’s POC, and was not mentioned at all in their trial brief.<sup>21</sup> It also was not mentioned in the Brocks’ statement of issues on appeal, which is entirely devoted to applicability of California law.<sup>22</sup> Most significantly, at trial, counsel for the Brocks told the bankruptcy court that they were “no longer arguing that the trust is a shield in this case because we don’t need to argue that,” and then devoted his entire opening

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<sup>19</sup> In any event, this Court endeavors not to consider documents it deems irrelevant, whether or not they are included in an appendix.

<sup>20</sup> *Kelaidis v. Cmty. Nat’l Bank (In re Kelaidis)*, 276 B.R. 266, 270 (10th Cir. BAP 2002) (appellate court must reach its own conclusions regarding state law issues).

<sup>21</sup> Debtors’ Trial Brief *in Appx* at 77-83. The trial brief is almost entirely dedicated to applicability of California law, with brief references to duress and lack of consideration, but no statement whatsoever regarding the estate’s liability for Brock Trust obligations.

<sup>22</sup> Appellants’ Designation of Record and Statement of the Issues to be Presented on Appeal, *in Appellee’s Appendix* at 854-55.

argument to California anti-deficiency law.<sup>23</sup> Based on that statement, the Plan abandoned its plan to present a case at trial that the Brock Trust and the Brocks were alter egos. Finally, the bankruptcy court's decision denying the Brocks' objection to the Plan's claim contains only one brief paragraph regarding the Brocks' liability for Brock Trust obligations, which states:

In addition, the Court finds unpersuasive the Brocks' argument a claim cannot be advanced against them personally because their Trust was the purchaser of the [CA] Property. First, the [CO Property] Deed, which must form the basis of Glasser's claim because the [CA] Property is, according to the testimony, worth less than the Bank loan, shows it was made by Lawrence Brock and Diane Brock, with no reference to the Trust. Second, the Brocks are both the settlors and beneficiaries of the Trust; therefore creditors can reach their interests.<sup>24</sup>

That the bankruptcy court addressed the issue at all is somewhat unexpected, given that the Brocks' personal liability for their trust's obligations was not addressed in any meaningful way at trial. However, as it was addressed below, we are prepared to consider it here as well.

It is well-established that an issue not raised in the trial court will be considered on appeal "only in the most unusual circumstances."<sup>25</sup> Thus, "vague, arguable references" to an issue are insufficient to preserve it for appeal, and an issue that is "raised but not pursued" in the trial court also cannot be the basis for an appeal.<sup>26</sup> The *Lyons* case specifies that "issues that were raised and then abandoned pre-trial" may be considered "not passed upon below" and, therefore,

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<sup>23</sup> Appx at 97.

<sup>24</sup> See Appealed Order at 13, in Appx at 400 (footnote omitted). The bankruptcy court cited, among other things, the Restatement (Second) of Trusts § 156 in support of this statement, which provides that creditors of a creator of a trust may reach trust assets in satisfaction of the creator's debt.

<sup>25</sup> *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993).

<sup>26</sup> *Id.* at 721-22 (internal quotation marks omitted).

not suitable for appellate consideration.<sup>27</sup>

In this case, the Brocks raised the issue of their personal liability for obligations of the Brock Trust in their objections to the Plan's POC. However, that issue was implicitly abandoned by their failure to include it as an issue in their trial brief, and was explicitly abandoned by their counsel at trial. It would therefore be appropriate for this Court to consider it waived. Nonetheless, because the bankruptcy court ruled on the issue, albeit briefly, the issue was at least arguably "passed upon below," and this Court will therefore consider the merits of it.

B.     The Brocks' personal liability

The Brocks contend on appeal that the bankruptcy court erred by allowing a claim against their personal estate, arguing that the court relied on a principle set forth in the Restatement of Trusts that is inapplicable to the present facts, which is that creditors of an individual may reach assets held by a trust that was created and controlled by that individual to satisfy the individual's debts.<sup>28</sup> The Brocks argue this principle does not support the converse: that property held by an individual may be reached in satisfaction of his trust's creditors, even without the individual's personal guaranty of the trust's debt.

Regardless of how this assertion might be received in an ordinary replevin or foreclosure action, this Court must consider it within the context of a bankruptcy case. Immediately upon the filing of the Brocks' bankruptcy petition, any "interests" they had in property became property of their bankruptcy estate.

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<sup>27</sup>     *Id.* at 722 (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)).

<sup>28</sup>     In California, this concept is imposed by statute. *See* Cal. Prob. Code § 18200 (1990) (trust property subject to claims of settlor's creditors as long as settlor is alive and retains power to revoke the trust); *Carolina Cas. Ins. Co. v. L.M. Ross Law Group, LLP*, 184 Cal. App. 4th Supp. 196, 208 (2010) (no distinction in California between revocable trust property and property owned by the settlor during settlor's lifetime).

The definition of “estate property” is quite broad, and includes “all legal or equitable interests of the debtor in property as of the commencement of the case.”<sup>29</sup> Typically, whether a debtor has an interest in property is determined under state law, which creates and defines those interests, but whether they are included in a debtor’s bankruptcy estate is a matter of federal law.<sup>30</sup> However, “the right to use an item or to control its use” is generally considered to be an interest in property that is included in a debtor’s bankruptcy estate.<sup>31</sup>

In this case, there is a revocable inter vivos trust that was settled by the Brocks under California law. Such trusts are typically created as estate planning devices to avoid probate.<sup>32</sup> During their lifetimes, the trust’s settlors retain the rights to use and control property held by the trust, to add to or remove property held by the trust, and to revoke the trust at any time. Based on these retained rights, any income that the trust earns is taxable to the settlors,<sup>33</sup> and both substantively and with respect to rights of creditors, “property held in a revocable trust is ordinarily to be treated as if it were property of the settlor.”<sup>34</sup>

Indeed, the Brocks admit that Brock Trust assets are assets of their individual estate, and therefore available for payment of their creditors.<sup>35</sup>

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<sup>29</sup> See § 541(a)(1); *Parks v. FIA Card Servs., N.A. (In re Marshall)*, 550 F.3d 1251, 1255 (10th Cir. 2008) (§ 541 definition of estate property should be generously construed).

<sup>30</sup> *In re Marshall*, 550 F.3d at 1255.

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., *Zanelli v. McGrath*, 166 Cal. App. 4th Supp. 615, 633 (2008) (California law recognizes a revocable inter vivos trust as a probate avoidance device).

<sup>33</sup> Myron Kove *et al.*, *Bogert Trusts and Estates* § 233 (2013).

<sup>34</sup> Restatement (Third) of Trusts § 25 cmt. a (2003).

<sup>35</sup> See Appellants’ Opening Brief at 6; Appellants’ Reply Brief at 3, 5-6 (acknowledging that creditors of a trust settlor can reach the assets of a trust to  
(continued...))

Effectively then, although the Brocks agree that Brock Trust assets may be used to satisfy their personal debts, they contend that those same assets may not be reached by creditors of the Brock Trust. Such a position may have had some appeal when the Plan was asserting a secured interest in the Brocks' residence, which was apparently never held by the Brock Trust. But the Plan's claim now is simply to a proportionate share of what may be netted from disposition of all estate assets, including Brock Trust assets. To deny that recovery would illogically deprive the Plan of assets that belonged to the Brock Trust when the bankruptcy petition was filed, while allowing recovery from those same assets to non-trust creditors. Avoidance of such an illogical result is precisely why the Brocks' and the Brock Trust's debts and assets must be treated as one and the same.

It is notable that the Brocks actually embraced this identity of interest with the Brock Trust in their objection to the Bank's claim against their estate, in which they asserted that the claims were barred by California's anti-deficiency law. The Brocks' similar defense to the Plan's claim did not require such an identity of interest since, as they did not provide personal guaranties to the Plan that waived the anti-deficiency laws, the Plan's claim would have been barred by those laws, even against the Brock Trust. However, the bankruptcy court determined that the Plan's claim was not governed by California law, and the Brocks specifically waived inclusion of that ruling in this appeal.<sup>36</sup>

On the other hand, the bankruptcy court ruled that the Bank's claim was governed by California law, and that its claim was therefore precluded by the anti-deficiency provisions. It is well-established in California that its anti-

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<sup>35</sup> (...continued)  
the same extent as the settlor himself can reach them).

<sup>36</sup> See Appellants' Opening Brief at 4 n.2.

deficiency laws “reflect a legislative policy that strictly limits the right to recover deficiency judgments for the amount the debt exceeds the value of the security” and, therefore, the law’s protection “cannot be subverted by artifice.”<sup>37</sup> Because of this, a loan borrower may not waive the anti-deficiency law’s protection, but a loan guarantor may do so. However, a guarantor’s waiver is closely scrutinized to ensure that it was given by “a true guarantor” rather than “merely the principal debtor under a different name.”<sup>38</sup>

The Brocks’ guaranty expressly waived anti-deficiency law protection, and thus appeared to allow the Bank to assert its deficiency claim against their bankruptcy estate. Yet the bankruptcy court sustained the Brocks’ objection to the Bank’s claim, after determining that the Brocks were not “true guarantors,” but were simply the borrower, the Brock Trust, under different names. As such, the Brocks could not waive the anti-deficiency laws. The result for the Brocks was that they avoided liability to the Bank only because they were considered to share an identity with their revocable trust. But reliance on that unity of interest does not help their objection to the Plan’s claim because that claim is governed by Colorado law, which has no anti-deficiency bar.

Glasser did not record the CO Trust Deed before the Brocks filed their bankruptcy petition, and the Plan’s security interest in the CO Property was therefore unperfected at the time of filing, and could not be perfected thereafter as the automatic stay prohibited such action.<sup>39</sup> Under Colorado law, “the failure to perfect a security interest does not affect the validity of the security interest

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<sup>37</sup>     *Cadle Co. II v. Harvey*, 83 Cal. App. 4th Supp. 927, 932 (2000).

<sup>38</sup>     *Id.*

<sup>39</sup>     § 362(a)(4).

between the parties.”<sup>40</sup> The CO Trust Deed specifically states that it was intended to be security for the Plan Note. Thus, although the Brocks expressly agreed to execute the CO Trust Deed as additional security for the Brock Trust’s debt, they now contend that the same debt may not be asserted against their individual estate as an unsecured claim. Although the unperfected CO Trust Deed does not endow the Plan with a secured interest in the CO Property that is superior to that of a bankruptcy trustee (or, as in this case, the debtors in possession) and other estate creditors, it remains a valid obligation of both the Brocks and the Brock Trust, which is precisely how it was treated by the bankruptcy court.

## VI. CONCLUSION

The Brock Trust and the Brocks share an identity that renders both trust and individual assets available to creditors of either. The bankruptcy court’s ruling allowing the Plan to recover against the Brocks’ estate as an unsecured creditor is therefore AFFIRMED.

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<sup>40</sup> *Bank of Am. Nat’l Trust and Sav. Ass’n v. Denver Hotel Ass’n Ltd. P’ship*, 830 P.2d 1138, 1140 (Colo. App. 1992), relying on Colo. Rev. Stat. 4-9-201.