

Apr 7 2008

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

**ORDERED PUBLISHED**

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

In re:	)	BAP No.	NC-07-1187-KJuMk
	)		
JOHN WILLIAM FINDLEY, III,	)	Bk. No.	04-41110
	)		
Debtor.	)	Adv. No.	06-04180
	)		
JOHN WILLIAM FINDLEY, III,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>OPINION</b>	
	)		
STATE BAR OF CALIFORNIA,	)		
	)		
Appellee.	)		
	)		

Argued on January 24, 2008  
at San Francisco, California

Submitted after Post-Argument Briefing on March 17, 2008

Filed - April 7, 2008

Appeal from the United States Bankruptcy Court  
for the Northern District of California

Honorable Leslie Tchaikovsky, Bankruptcy Judge, Presiding

Before: KLEIN, JURY, and MARKELL, Bankruptcy Judges.

1 KLEIN, Bankruptcy Judge:

2  
3 The issue is whether California's 2003 amendment of its  
4 Business and Professions Code ("BUS. & PROF. CODE") § 6086.10  
5 designating attorney discipline cost awards as "penalties"  
6 legislatively reversed the result of the Ninth Circuit decision  
7 in Taggart v. State Bar (In re Taggart), 249 F.3d 987 (9th Cir.  
8 2001). The Taggart decision established that such awards are  
9 compensatory in nature and, thus, not excepted from discharge  
10 under 11 U.S.C. § 523(a)(7) as penalties that are not  
11 compensation for actual pecuniary loss. Construing the 2003  
12 amendment as superseding Taggart, the bankruptcy court excepted  
13 such a cost award from the debtor's discharge per § 523(a)(7).

14 Although BUS. & PROF. CODE § 6086.10(e) plainly was designed  
15 to qualify attorney discipline cost awards for the § 523(a)(7)  
16 discharge exception, the Ninth Circuit has recently held in a  
17 related context that amended § 6086.10 "cannot be construed as  
18 remotely punitive so as to negate California's civil intentions."  
19 Gadda v. State Bar, 511 F.3d 933, 939 (9th Cir. 2007). In the  
20 wake of Gadda, we must honor Taggart until such time as the Ninth  
21 Circuit decides that Taggart lacks vitality. Hence, we REVERSE.

## 22 23 FACTS

24 There are no genuine issues of material fact.

25 Appellant, chapter 7 debtor John William Findley, III, is  
26 admitted to practice law in California. The appellee State Bar  
27 of California prosecuted him for violations of the California  
28 Rules of Professional Conduct and the BUS. & PROF. CODE based on a

1 complaint made by a Findley client.

2 The State Bar Court Hearing Department rendered findings on  
3 January 12, 2004, and recommended that Findley be suspended from  
4 practice for one year and be on probation for two years.

5 Before the State Bar Court Review Department acted on the  
6 recommendation, Findley filed a chapter 7 case on March 2, 2004.

7 The State Bar Court Review Department adopted the hearing  
8 officer's findings and disciplinary recommendation, with minor  
9 modifications, in an Opinion on Review issued on June 15, 2005.

10 The State Bar Court issued a Certificate of Costs on August  
11 24, 2005, ordering Findley to pay the State Bar \$14,054.94 based  
12 on BUS. & PROF. CODE § 6086.10, which requires disciplined  
13 attorneys, absent proof of hardship, to pay the cost of the  
14 disciplinary action. The award consisted of: \$56.89, witness  
15 fees; \$406.80, cost of certifying court documents; \$128.25, cost  
16 for Review Department transcripts; and \$13,463.00, "Reasonable  
17 Costs Pursuant to Formula Approved by the Board of Governors."

18 The California Supreme Court,<sup>1</sup> on November 16, 2005, adopted  
19 the Opinion and the discipline cost order.

20 When Findley interposed his bankruptcy discharge to excuse  
21 payment of the \$14,054.94 discipline cost award, the State Bar  
22 sued to have the debt excepted from discharge per § 523(a)(7).

23 The State Bar sought summary judgment, contending the 2003  
24 amendment to BUS. & PROF. CODE § 6086.10 made discipline cost

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26 <sup>1</sup> The California Supreme Court has plenary authority over  
27 California attorneys. The State Bar is its administrative arm in  
28 attorney discipline matters. The State Bar Court recommends  
discipline. An order finally imposing discipline, including a  
cost order, is an order of the California Supreme Court. See In  
re Atty. Discipline Sys., 19 Cal. 4th 582, 599-600 (1998).

1 awards punitive in nature as a matter of state law and, hence,  
2 statutorily overruled the contrary conclusion stated in Taggart.

3 The State Bar's summary judgment evidence included the  
4 declaration of Lawrence Doyle, Chief Legislative Counsel for the  
5 State Bar in 2003, accompanied by a copy of the Enrolled Bill  
6 Report for Assembly Bill 1708, which bill was the vehicle for  
7 adding new BUS. & PROF. CODE § 6086.10(e).

8 Doyle averred that he was responsible for drafting BUS. &  
9 PROF. CODE § 6086.10(e) and designed it as a response to Taggart  
10 to "clarify and re-state the intent of California Legislature  
11 that disciplinary costs are monetary sanctions and are part of  
12 the punishment imposed" on California lawyers for professional  
13 misconduct by requiring them to pay the costs of the proceeding:

14 (e) In addition to other monetary sanctions as may be  
15 ordered by the Supreme Court pursuant to Section 6086.13,  
16 costs imposed pursuant to this section are penalties,  
17 payable to and for the benefit of the State Bar of  
18 California, a public corporation created pursuant to Article  
VI of the California Constitution, to promote rehabilitation  
and to protect the public. This subdivision is declaratory  
of existing law.

19 CAL. BUS. & PROF. CODE § 6086.10(e).<sup>2</sup>

20  
21 <sup>2</sup> The Doyle summary judgment declaration explained:

22 3. Section 6086.10(e) was drafted in response to the In Re  
23 Taggart, 249 F.3d 987(9th Cir. 2000) decision construing the  
24 costs imposed under [§] 6086.10 in State Bar disciplinary  
25 matters as not being intended by the California Legislature  
26 as punishment against a disciplined attorney. Taggart then  
held that these disciplinary costs did not constitute  
nondischargeable fines or penalties under the Bankruptcy  
Code, 11 U.S.C. § 527(a)(7).

27 4. Section 6086.10(e) was added to the California Business  
28 and Professions Code to expressly clarify and re-state the  
intent of California Legislature that disciplinary costs are  
(continued...)

1 The Enrolled Bill Report was specific that the amendment  
2 would make discipline cost awards "not dischargeable in  
3 bankruptcy." Enr. Bill Rep. AB 1708, at 3 ¶ 2.<sup>3</sup>

4 The bankruptcy court held that the amendment supplanted  
5 Taggart and entered summary judgment. This timely appeal ensued.

#### 7 JURISDICTION

8 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
9 We have jurisdiction under 28 U.S.C. § 158(a)(1).

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12 <sup>2</sup>(...continued)

13 monetary sanctions and are a part of the punishment imposed  
14 on California lawyers for professional misconduct by making  
15 him or her pay for part of the costs of the proceeding.  
16 Because there was apparent confusion in Taggart, 249 F.3d at  
17 991-92, about the purpose of costs first added under [§]  
18 6086.10 in 1986 and the monetary sanction later added under  
19 [§] 6083.13 [sic] by Cal[.] Stat[s.] 1992, Ch[.] 2300, [§]  
20 1, the amendment in [§] 6086[.10](e) also made clear that  
21 disciplinary costs are penalties "[i]n addition to other  
22 monetary sanctions as may be ordered by the Supreme Court  
23 pursuant to [§] 6086.13." (It should also be noted that  
24 imposition and collection of monetary sanctions under [§]  
25 6086.13 was conditioned upon approval by the Supreme Court  
26 [of] a court rule – a condition that has not occurred.)

27 Decl. of Lawrence D. Doyle at 1:21-2:22 ("Doyle Decl.")).

28 <sup>3</sup> In addition, the Enrolled Bill Report explained:

4. [BUS. & PROF. CODE § 6086.10] would (1) enable the Bar to  
pursue orders for disciplined attorneys to pay [costs] as  
money judgments; and (2) specify that orders to pay  
disciplinary costs [subdiv. (d)] are penalties, as  
originally intended by the Legislature, and therefore not  
dischargeable in bankruptcy.

Enr. Bill Rep. AB 1708, at 5 ¶ 4 (emphasis supplied).

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STANDARD OF REVIEW

We review summary judgment de novo to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006), aff'd & adopted, 506 F.3d 956 (9th Cir. 2007).

The centerpiece of this appeal is 11 U.S.C. § 523(a)(7), which excepts from discharge a “fine, penalty, or forfeiture” (other than certain tax penalties) that is “payable to and for the benefit of a governmental unit” and that “is not compensation for actual pecuniary loss.” 11 U.S.C. § 523(a)(7).<sup>4</sup>

<sup>4</sup> The precise language of § 523(a)(7) provides that a debt of an individual is excepted from discharge:

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition.

6

1 discipline cost awards into § 523(a)(7) through the device of new  
2 BUS. & PROF. CODE § 6086.10(e). That subsection was enacted in  
3 2003 with the aim of reversing the result of the Ninth Circuit's  
4 Taggart decision that the prior version of § 6086.10 reflected  
5 compensation for actual pecuniary loss that was not excepted from  
6 discharge by § 523(a)(7). Taggart, 249 F.3d at 994.<sup>5</sup>

7 As will be seen, the case in support of legislative reversal  
8 of Taggart is meritorious but is not necessarily compelling. The  
9 counterpoints to the basic argument, coupled with the ruling in  
10 Gadda that the 2003 amendment of BUS. & PROF. CODE § 6086.10(a)  
11 permitting enforcement of a discipline cost award as a money  
12 judgment is not an ex post facto law because it "cannot be  
13 construed as remotely punitive so as to negate California's civil  
14 intentions," Gadda, 511 F.3d at 939, make it unsound for an  
15 inferior tribunal within the Ninth Circuit to disregard Taggart.

16  
17 I

18 The Supreme Court laid the foundation for analysis of  
19 § 523(a)(7) in Kelly v. Robinson, in which a criminal restitution  
20 award against a welfare fraudster based on actual loss was held  
21

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22 <sup>5</sup> The State Bar's position was that the Ninth Circuit's  
23 Taggart panel was confused about the purpose and status of  
24 discipline cost awards and that the 2003 amendment did not change  
25 the law in that respect. Doyle Decl. ¶ 4. This explains the  
26 inclusion of the final sentence of BUS. & PROF. CODE § 6086.10(e):  
27 "This subdivision is declaratory of existing law." Although in  
28 Taggart the trial judge and the BAP had (noting it was a "close"  
case) each held Taggart's discipline cost award nondischargeable  
per § 523(a)(7), Taggart v. State Bar, No. CC-98-1716-KMyP (9th  
Cir. BAP June 15, 1999), aff'g No. RS-98-1277-MJ (C.D. Cal.), we  
do not here suggest Taggart was incorrectly decided.

1 to qualify for the § 523(a)(7) exception to discharge. Kelly v.  
2 Robinson, 479 U.S. 36, 50-53 (1986).

3 The Court placed a two-part gloss on § 523(a)(7) that it  
4 justified by what it described as a longstanding "fundamental  
5 policy against federal interference with state criminal  
6 prosecutions" in which "rehabilitative" and "deterrent" goals  
7 loom large and by a sense that it would be "unseemly to require  
8 state prosecutors to submit the judgments of their criminal  
9 courts to federal bankruptcy courts." Kelly, 479 U.S. at 48-49 &  
10 n.8. These added up to a combination of "strong interests of the  
11 States," and of a uniform hands-off-restitution construction of  
12 the former Bankruptcy Act as to which there was no indication  
13 that Congress meant to change the law. Kelly, 479 U.S. at 53.

14 Under the first part of the Court's gloss, restitution  
15 orders are more "for the benefit of a governmental unit," as that  
16 term is used in § 523(a)(7), than for the benefit of the victim  
17 who typically receives the restitution. The Court reasoned that  
18 the "criminal justice system is not operated primarily for the  
19 benefit of victims, but for the benefit of society as a whole."  
20 Kelly, 479 U.S. at 52. Accordingly, it was willing to gloss over  
21 the reality that the actual restitution payments generally wind  
22 up with the victim.

23 The second part of the Court's gloss holds that restitution  
24 orders are not, in the words of § 523(a)(7), "compensation for  
25 actual pecuniary loss." The rationale is that the "victim has no  
26 control over the amount of restitution awarded or over the  
27 decision to award restitution," which decision "generally does  
28 not turn on the victim's injury, but on the penal goals of the



1 State and the situation of the defendant.” Kelly, 479 U.S. at  
2 52. Thus, “they are not assessed ‘for ... compensation’ of the  
3 victim.” Kelly, 479 U.S. at 53 (omission in original).

4 The Kelly analysis illuminates the following language from  
5 § 6086.10(e): “costs imposed pursuant to this section are  
6 penalties, payable to and for the benefit of the State Bar of  
7 California, a public corporation created pursuant to Article VI  
8 of the California Constitution, to promote rehabilitation and to  
9 protect the public.” CAL. BUS. & PROF. CODE § 6086.10(e) (emphasis  
10 supplied). Subsection (e) plainly was drafted to satisfy Kelly.  
11

## 12 II

13 The bankruptcy court concluded that discipline cost awards  
14 to the State Bar under BUS. & PROF. CODE § 6086.10, as amended in  
15 2003 by the addition of § 6086.10(e), now satisfy the controlling  
16 § 523(a)(7) test that is based on Kelly.<sup>6</sup>  
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18 <sup>6</sup> The bankruptcy court’s decision is consistent with results  
19 in other jurisdictions. See, e.g., N.H. Sup. Ct. Prof’l Conduct  
20 Comm. v. Richmond (In re Richmond), 351 B.R. 6, 14 (Bankr. D.N.H.  
21 2006) (attorney discipline costs excepted from discharge); Atty.  
22 Grievance Comm’n v. Smith (In re Smith), 317 B.R. 302, 312  
23 (Bankr. D. Md. 2004) (same); Supreme Court v. Bertsche (In re  
24 Bertsche), 261 B.R. 436, 437-38 (Bankr. S.D. Ohio 2000) (same);  
25 State Bar v. Doerr (In re Doerr), 185 B.R. 533, 537 (Bankr. W.D.  
26 Mich. 1995) (same); Cillo v. Fla. Bar (In re Cillo), 165 B.R. 46,  
27 50 (M.D. Fla. 1994) (same); In re Williams, 158 B.R. 488, 491  
28 (Bankr. D. Idaho 1993) (same); Atty. Regis. & Disciplinary Comm’n  
v. Betts (In re Betts), 149 B.R. 891, 898 (Bankr. N.D. Ill. 1993)  
(same); Bd. of Attys. Prof’l Responsibility v. Haberman (In re  
Haberman), 137 B.R. 292, 295-96 (Bankr. E.D. Wis. 1992) (same).  
The Ninth Circuit in Taggart, acknowledging the existence of such  
results in other jurisdictions, reasoned that the analysis needed  
to be made on a state-by-state basis. Taggart, 249 F.3d at 993-  
94 & n.8.

1 A

2 On its face, the new § 6086.10(e) appears to touch all the  
3 Kelly bases. The California legislature declared the award to be  
4 a penalty, payable to a governmental unit, and for the purposes  
5 of promoting rehabilitation and protecting the public.

6 New § 6086.10(e) tracks the first part of § 523(a)(7) and,  
7 as noted, echoes Kelly: "costs imposed pursuant to this section  
8 are penalties, payable to and for the benefit of the State Bar of  
9 California, a public corporation created pursuant to Article VI  
10 of the California Constitution, to promote rehabilitation and to  
11 protect the public." CAL. BUS. & PROF. CODE § 6086.10(e) (emphasis  
12 supplied).<sup>7</sup>

13  
14 <sup>7</sup> BUS. & PROF. CODE § 6086.10 (2003 amendments emphasized):

15 (a) Any order imposing a public reproof on a member of the  
16 State Bar shall include a direction that the member shall  
17 pay costs. In any order imposing discipline, or accepting a  
18 resignation with a disciplinary matter pending, the Supreme  
19 Court shall include a direction that the member shall pay  
20 costs. An order pursuant to this subdivision is enforceable  
21 both as provided in Section 6140.7 and as a money judgment.

22 (b) The costs required to be imposed pursuant to this  
23 section include all of the following:

24 (1) The actual expense incurred by the State Bar for the  
25 original and copies of any reporter's transcript of the  
26 State Bar proceedings, and any fee paid for the services of  
27 the reporter.

28 (2) All expenses paid by the State Bar which would qualify  
as taxable costs recoverable in civil proceedings.

(3) The charges determined by the State Bar to be  
"reasonable costs" of investigation, hearing, and review.  
These amounts shall serve to defray the costs, other than  
fees for the services of attorneys or experts, of the State  
(continued...)

1 Part of the rationale of the Ninth Circuit in Taggart for  
2 concluding that attorney discipline costs are dischargeable was  
3 that § 6086.10 did not contain language suggestive of a penalty.  
4 In contrast, another section of the same statute, BUS. & PROF. CODE  
5 § 6086.13, unambiguously authorizes awards of monetary penalties  
6 against disciplined attorneys. Taggart, 249 F.3d at 992-94.  
7 Unlike § 6086.10, the § 6086.13 penalty does not depend, and is  
8 not linked to, actual expenses incurred by the State Bar.<sup>8</sup>

9  
10 <sup>7</sup>(...continued)

11 Bar in the preparation or hearing of disciplinary  
12 proceedings, and costs incurred in the administrative  
13 processing of the disciplinary proceeding and in the  
14 administration of the Client Security Fund.

15 (c) A member may be granted relief, in whole or in part,  
16 from an order assessing costs under this section, or may be  
17 granted an extension of time to pay these costs, in the  
18 discretion of the State Bar, upon grounds of hardship,  
19 special circumstances, or other good cause.

20 (d) In the event an attorney is exonerated of all charges  
21 following a formal hearing, he or she is entitled to  
22 reimbursement from the State Bar in an amount determined by  
23 the State Bar to be reasonable expenses, other than fees for  
24 attorneys or experts, of preparation for the hearing.

25 (e) In addition to other monetary sanctions as may be  
26 ordered by the Supreme Court pursuant to Section 6086.13,  
27 costs imposed pursuant to this section are penalties,  
28 payable to and for the benefit of the State Bar of  
California, a public corporation created pursuant to Article  
VI of the California Constitution, to promote rehabilitation  
and to protect the public. This subdivision is declaratory  
of existing law.

29 CAL. BUS. & PROF. CODE § 6086.10 (emphasized language added by  
30 Stats. 2003, c.334 [A.B. 1708], § 4; eff. Sept. 8, 2003).

31 <sup>8</sup> The entirety of BUS. & PROF. CODE § 6086.13 provides:

(continued...)

1 The contrast between § 6086.10 and § 6086.13 led the Ninth  
2 Circuit to conclude that the California Legislature intended cost  
3 awards under BUS. & PROF. CODE § 6086.10 to be compensatory rather  
4 than penal in nature. Hence, the Taggart court ruled that  
5 attorney discipline cost awards under BUS. & PROF. CODE § 6086.10  
6 do not qualify for the § 523(a)(7) exception to discharge.  
7 Taggart, 249 F.3d at 992-94.

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8  
9 <sup>8</sup>(...continued)

10 (a) Any order of the Supreme Court imposing suspension or  
11 disbarment of a member of the State Bar, or accepting  
12 resignation with a disciplinary matter pending may include  
13 an order that the member pay a monetary sanction not to  
exceed five thousand dollars (\$5,000) for each violation,  
subject to a total limit of fifty thousand dollars  
(\$50,000).

14 (b) Monetary sanctions collected under subdivision (a) shall  
15 be deposited into the Client Security Fund.

16 (c) The State Bar shall, with the approval of the Supreme  
17 Court, adopt rules setting forth guidelines for the  
18 imposition and collection of monetary sanctions under this  
section.

19 (d) The authority granted under this section is in addition  
20 to the provisions of Section 6086.10 and any other authority  
to impose costs or monetary sanctions.

21 (e) Monetary sanctions imposed under this section shall not  
22 be collected to the extent that the collection would impair  
23 the collection of criminal penalties or civil judgments  
24 arising out of transactions connected with the discipline of  
the attorney. In the event monetary sanctions are collected  
25 under this section and criminal penalties or civil judgments  
26 arising out of transactions connected with the discipline of  
the attorney are otherwise uncollectible, those penalties or  
27 judgments may be reimbursed from the Client Security Fund to  
the extent of the monetary sanctions collected under this  
section.

28 CAL. BUS. & PROF. CODE § 6086.13.

1 Now that § 6086.10(e) labels attorney discipline cost awards  
2 as "penalties" and adds that they "promote rehabilitation" and  
3 "protect the public," it is more difficult to say that the state  
4 legislature does not intend such awards to be penalties.

5 This sufficiently erodes the intellectual foundation of  
6 Taggart that there is reason to doubt the continuing validity of  
7 the conclusion it reached regarding the § 523(a)(7) discharge  
8 status of California's attorney discipline cost awards.

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10 B

11 The argument for the legislative overruling of the Taggart  
12 result by the enactment of BUS. & PROF. CODE § 6086.10(e), however,  
13 has enough weaknesses so as to give an inferior tribunal pause  
14 before distinguishing away circuit precedent as obsolete.

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16 1

17 In the first place, § 523(a)(7) is a federal statute that  
18 the California legislature lacks authority to alter. Whether  
19 something is a "fine," a "penalty," or "restitution" as those  
20 terms are used in § 523(a)(7) is a question of federal law. In  
21 Taggart, the Ninth Circuit viewed the central question as whether  
22 discipline cost awards are "penal in nature." Taggart, 249 F.3d  
23 at 994. It assessed this question with reference to the  
24 structure of the attorney discipline statute, the California  
25 civil principle that prevailing parties may recover their costs  
26 of litigation, and legislative history. Taggart, 249 F.3d at  
27 991-94.

28 State legislatures cannot amend the Bankruptcy Code. Nor

1 can there be an effective state statute providing that a  
2 particular category of debt shall be excepted from bankruptcy  
3 discharge by virtue of § 523(a). The best that a state  
4 legislature can do on its own is to establish an obligation that  
5 meets the criteria of the federal statute.

6 The California legislature in 2003 amended the statute that  
7 had been held in Taggart to constitute compensation for "actual  
8 pecuniary loss" in three respects. In § 6086.10(a), it made the  
9 award enforceable as a money judgment. In § 6086.10(e), saying  
10 that it was "declaratory of existing law," it labeled discipline  
11 cost awards as "penalties" and designated the purpose of such  
12 awards as "to promote rehabilitation and to protect the public."  
13 CAL. BUS. & PROF. CODE § 6086.10.

14  
15 2

16 The State Bar contends that the 2003 amendments meet the  
17 criteria of § 523(a)(7). The label "penalty" has been affixed to  
18 § 6086.10. Because the Supreme Court focused in Kelly on a  
19 state's purposes and interests for imposing the monetary  
20 obligation in determining its characterization of the obligation  
21 under § 523(a)(7), the purpose of § 6086.10 was stated as  
22 promoting rehabilitation and protecting the public.

23 It does not necessarily follow from the mere addition of  
24 labels arguably not affecting substance that Taggart's conclusion  
25 that such cost awards are compensation for actual pecuniary loss  
26 is no longer viable. The provision that § 6086.10(e) was  
27 "declaratory of existing law" smacks of a motion to reconsider  
28 the result in Taggart and cannot change the underlying Taggart

1 analysis. As the Supreme Court has explained, the "location and  
2 labels of a statutory provision do not by themselves transform a  
3 civil remedy into a criminal one." Smith v. Doe, 538 U.S. 84, 94  
4 (2003) (Ex Post Facto Clause).

5 The form of the Taggart analysis, the validity of which is  
6 not called into question by this appeal, focused on underlying  
7 substance, not mere cosmetics. One could construe the enactment  
8 of § 6086.10(e) as solely to affix a label ("penalty") and state  
9 purposes ("to promote rehabilitation and to protect the public")  
10 so as to make such awards appear to be within the zone of  
11 § 523(a)(7)'s coverage.

12 What did not change is the unabashedly compensatory nature  
13 of § 6086.10 that is apparent from the face of § 6086.10(b):

14 (b) The costs required to be imposed pursuant to this  
15 section include all of the following:

16 (1) The actual expense incurred by the State Bar for the  
17 original and copies of any reporter's transcript of the  
State Bar proceedings, and any fee paid for the services of  
the reporter.

18 (2) All expenses paid by the State Bar which would qualify  
19 as taxable costs recoverable in civil proceedings.

20 (3) The charges determined by the State Bar to be  
21 "reasonable costs" of investigation, hearing, and review.  
22 These amounts shall serve to defray the costs, other than  
23 fees for the services of attorneys or experts, of the State  
Bar in the preparation or hearing of disciplinary  
proceedings, and costs incurred in the administrative  
processing of the disciplinary proceeding and in the  
administration of the Client Security Fund.

24 CAL. BUS. & PROF. CODE § 6086.10(b) (emphasis supplied).

25 Moreover, the overall structure of the statute remained  
26 static. There was no change to the penalty provisions of  
27 § 6086.13, the existence of which provisions were emphasized in  
28 Taggart. The addition of authority in § 6086.10(a) for

1 enforcement by way of money judgment is consistent with a civil  
2 purpose.

3 Nor was there any change that necessarily would eviscerate  
4 the Ninth Circuit's analogy in Taggart to mandatory costs in  
5 civil litigation. It noted in particular that such costs are  
6 awarded "even where the losing party's claims or defenses have  
7 merit" and indicated that it was "highly unlikely" that  
8 California "imposed mandatory costs in civil proceedings in order  
9 to punish losing parties or to deter them from bringing  
10 litigation or asserting defenses." Taggart, 249 F.3d at 993 n.6.  
11 The formula for attorney discipline costs includes costs for  
12 overcoming an attorney's meritorious defenses.

13 These considerations, viewed through the matrix of the  
14 Taggart analysis, could support a conclusion that § 6086.10(e)  
15 amounts to no more than insubstantial cosmetics and does not  
16 qualify attorney discipline cost awards for exception to  
17 discharge under § 523(a)(7).

18  
19 3

20 Although the State Bar invokes Kelly, there are a number of  
21 differences from Kelly that also may give one pause. First, the  
22 cost award, as evident from the face of the cost order and from  
23 § 6086.10(b), unambiguously represents the recovery by the State  
24 Bar of its own actual expense of investigating and prosecuting  
25 the disciplinary action. Unlike Kelly, where the Supreme Court  
26 reasoned that victims have little control over restitution  
27 awards, here the State Bar has substantial control over the  
28 amount of the award and over the decision to make the award.



1 Kelly, 479 U.S. at 52.

2       Second, unlike Kelly, this is a civil enforcement matter and  
3 not a criminal prosecution. The firm federal policy of  
4 reluctance to interfere with state criminal judgments was the key  
5 justification for the gloss that the Supreme Court imposed on  
6 § 523(a)(7). Kelly, 479 U.S. at 44-46. One may doubt whether  
7 that "hands-off" policy of federal deference to states is as  
8 potent in civil enforcement matters as in criminal prosecutions.

9       Third, there is a more logical and powerful nexus between  
10 criminal restitution, as in Kelly, and purposes of benefitting  
11 society as a whole and of rehabilitating the offender than in  
12 making a disciplined attorney pay such items as the State Bar's  
13 witness fees, costs of certifying court documents, and transcript  
14 expenses. This difference adds to the interpretative risk that a  
15 cost award will not be viewed as reflecting the same penal and  
16 rehabilitative interests of the state as a sentence imposed  
17 following a criminal conviction. Kelly, 479 U.S. at 53.

18       In this connection, the Ninth Circuit noted in Taggart that  
19 it had not yet decided whether, "under Kelly, the costs imposed  
20 as part of a sentence for a criminal offense are nondischargeable  
21 under § 523(a)(7)." Taggart, 249 F.3d at 993-94 n.9. That  
22 parallel unanswered question, which is directly linked to a  
23 criminal context, adds further uncertainty.

26       Finally, the law of unintended consequences may mean that  
27 less is at stake in the § 523(a)(7) debate than initially meets  
28 the eye. First, a debt for a "penalty" that is nondischargeable

1 under § 523(a)(7) is correlatively ineligible for distribution as  
2 a general unsecured claim. Rather, payment on claims for  
3 penalties is statutorily subordinated to timely-filed and  
4 tardily-filed unsecured claims. 11 U.S.C. § 726(a)(4). The  
5 senior claims must be paid in full before anything can be paid on  
6 claims for penalties. 11 U.S.C. § 726(b). Nor does status as a  
7 money judgment help in light of the trustee's authority to "avoid  
8 a lien that secures a claim of a kind specified in  
9 [§] 726(a)(4)." 11 U.S.C. § 724(a). Thus, the State Bar, if  
10 victorious, will be obliged to note in its chapter 7 proofs of  
11 claim that its debt is statutorily subordinated.

12 Second, the State Bar could be setting itself up for pyrrhic  
13 victory in chapter 13 cases. Debts that are excepted from  
14 discharge under § 523(a)(7) are (other than debts "for  
15 restitution, for a criminal fine, included in a sentence on the  
16 debtor's conviction of a crime") dischargeable in chapter 13  
17 cases. 11 U.S.C. § 1328(a)(3).

18 One essential element of chapter 13 plan confirmation is  
19 that the value of "property to be distributed under the plan  
20 [i.e., payments] on account of each allowed unsecured claim is  
21 not less than the amount that would be paid on such claim if the  
22 estate of the debtor were liquidated under chapter 7 of this  
23 title on such date." 11 U.S.C. § 1325(a)(4) (emphasis added).

24 One can envision confirmable plans under which the State Bar  
25 receives nothing or only token payments, by virtue of separate  
26 classification based on the effect of the § 726(a)(4)  
27 subordination, while general unsecured claims are paid  
28 substantial dividends during the life of the plan. It would then

1 suffer a discharge of the discipline cost award debt. Nor is  
2 this possibility trivial in view of the 2005 amendments to the  
3 Bankruptcy Code that were designed to channel a higher proportion  
4 of debtors into chapter 13.

5 In short, the State Bar's case for the legislative  
6 overruling of the Taggart result is not airtight. There is a  
7 nontrivial chance that the Ninth Circuit, applying the same  
8 matrix of analysis as in Taggart, will continue to regard  
9 § 6086.10 as compensatory.

10 We do not need, however, to consider whether that modicum of  
11 risk, standing alone, would necessitate upsetting the summary  
12 judgment in favor of the State Bar. The effect of the Ninth  
13 Circuit's subsequent decision in Gadda must now be added to the  
14 summary judgment equation.

### 16 III

17 The Ninth Circuit interpreted revised BUS. & PROF. CODE  
18 § 6086.10 in Gadda, which was issued shortly before the oral  
19 argument of this appeal. We asked the parties to address Gadda  
20 in post-argument briefs in light of its focus on the same 2003  
21 legislative act that forms the basis of this appeal.

22 Mr. Gadda's discipline, including a \$21,845.14 discipline  
23 cost award, was complete before the enactment of the 2003  
24 amendments added a sentence to § 6086.10(a) (in addition to  
25 adding § 6086.10(e)) permitting entry of a money judgment on  
26 account of such a cost award. When, in 2005, the State Bar  
27 threatened Gadda with a money judgment on the cost award, he sued  
28 in federal court challenging the State Bar's ability to collect.

1       The issue was retroactive application of the 2003  
2 amendments, which was alleged to violate both the Due Process  
3 Clause of the Fourteenth Amendment and the Ex Post Facto Clause.  
4 After concluding that amended § 6086.10 survived rational basis  
5 scrutiny under standard due process analysis, the Ninth Circuit  
6 addressed the Ex Post Facto Clause. Gadda, 511 F.3d at 939.

7       The test for whether an enactment constitutes punishment  
8 that could offend the Ex Post Facto Clause is whether: (1) the  
9 legislature in enacting the statute intended to impose punishment  
10 and (2), if not, whether the enactment is so punitive in purpose  
11 or effect as to negate the state's intention to deem it civil.  
12 Smith, 538 U.S. at 92; Kansas v. Hendricks, 521 U.S. 346, 361  
13 (1997); Hatton v. Bonner 356 F.3d 955, 961 (9th Cir. 2004).

14       The Ninth Circuit concluded the 2003 amendment to  
15 § 6086.10(a) "cannot be construed as remotely punitive so as to  
16 negate California's civil intentions." Gadda, 511 F.3d at 939.  
17 In order to reach this conclusion under the Supreme Court's test,  
18 the court of appeals also implicitly concluded that the state  
19 legislature in amending § 6086.10 did not intend to impose  
20 punishment. While this does not necessarily exclude construing  
21 § 6086.10 as nevertheless constituting a civil "penalty" for  
22 § 523(a)(7) purposes, the Gadda decision clouds that picture.

23       The gravamen of the arguments made in post-argument briefing  
24 was that the contexts are different. True enough. Legal  
25 training prepares one to accept seemingly inconsistent  
26 propositions that "punitive" and "penalty" might mean different  
27 things in different contexts and be determined by different  
28 standards and that "civil" does not necessarily equate with

1 "compensatory." When coping with such matters, one looks for  
2 principled distinctions. The post-argument briefs, however, do  
3 not articulate principled distinctions. That leaves open the  
4 possibility that the Ninth Circuit would rule that the State Bar,  
5 which was the appellee in Gadda,<sup>9</sup> is impermissibly trying to have  
6 it both ways. We leave that question to the court of appeals.

7 However clear the California legislature may have been  
8 regarding its intentions vis-à-vis § 523(a)(7) and the result in  
9 Taggart, we cannot say with sufficient confidence that the Ninth  
10 Circuit would regard "new" § 6086.10 as leading to a conclusion  
11 different than its conclusion under "old" § 6086.10. In other  
12 words, we cannot say that the State Bar is entitled to judgment  
13 as a matter of law. Fed. R. Civ. P. 56(c), incorporated by Fed.  
14 R. Bankr. P. 7056.

## 16 CONCLUSION

17 While we recognize that the State Bar has a meritorious case  
18 for contending that application of the Ninth Circuit's Taggart  
19

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20  
21 <sup>9</sup> The appearance of Gadda on the scene illustrates Karl  
22 Llewellyn's observation about the challenge facing counsel when  
rendering advice predicting future appellate decisions:

23 [I]f the reckoning is from original lay action to the legal  
24 result on eventual appeal in an eventual lawsuit arising out  
25 of such action, that whole picture must be discounted as  
26 still subject to skewing or scuttling by the uncontrollable  
possible early appearance in some unhappy forum of a  
parallel situation botched by some other outfit in the doing  
and by ninnies in the litigating.

27 KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 17 (1960)  
28 (emphasis in original).

1 precedent leads to a conclusion opposite from that reached in  
2 Taggart, the situation is not so clear as to warrant disregard of  
3 the Taggart result by inferior tribunals within the Ninth  
4 Circuit. Unless and until the court of appeals rules to the  
5 contrary, we think it prudent to adhere to the Taggart result.  
6 Accordingly, the judgment is REVERSED.