

In re: Bankest Capital Corp., Case No. 04-10941-BKC-AJC

**Banco Espirito Santo International, Ltd. V. Diana Jean Garmendia,
Adv. Pro. No. 06-1495-BKC-AJC-A**

Defendant filed a proof of claim as an unsecured creditor of the Debtor, Bankest Capital Corp. The proof of claim indicates Defendant's claim is for "money loaned" between June 2002 through July 2003, in the principal amount of \$4,580,000. Attached to the proof of claim is a spread sheet indicating loans were made and promissory notes were issued.

Plaintiff asserted Defendant's claim must be subordinated under 11 U.S.C. §510 because the claim against the Debtor is not simply and solely for money loaned, but rather for tort-based and statutory damages. Plaintiff relied on allegations made in various causes of action brought in other judicial proceedings not before this court, as well as Defendant's Rule 2004 testimony, to establish the Defendant is claiming damages in addition to recovery on the notes.

Upon summary judgment motion, the Court determined the promissory notes issued to Defendant by the Debtor are securities as contemplated by 11 U.S.C. §510. However, the Court was unable to conclude that the Defendant's claim sought tort-based and/or statutory damages, thereby requiring subordination. The Court stated the allegations in the other proceedings were not relevant nor determinative of the issue of statutory subordination in this case. Section 510(b) involves subordination of claims for the purpose of distribution under title 11; and, distribution of property of the estate is made with respect to a claim filed in a case. The Court denied summary judgment and set the matter for trial.