Current Developments

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2013 Ninth Circuit Bankruptcy Year in Review

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Case summaries prepared by
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*These summaries have been prepared by the authors and do not necessarily reflect the views of the judges participating in the conference. Any errors in the summaries are the fault of the authors, not the judges.

About the Authors

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About the Summaries

Below is a summary of recent bankruptcy decisions from the U.S. Supreme Court, the U.S. Court of Appeals for the Ninth Circuit, the U.S. Bankruptcy Appellate Panel for the Ninth Circuit, the U.S. District Court for the District of Nevada, and the U.S. Bankruptcy Court for the District of Nevada. The summary is not comprehensive and does not identify some significant decisions, particularly those issued later in the year by the BAP, District Court or Bankruptcy Court. It looks at decisions from January 1, 2013, through July 24, 2013.

U.S. Supreme Court

DEFENSE OF MARRIAGE ACT

***United States v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675 (2013) (Kennedy, J.), *aff'g* 699 F.3d 169 (2d Cir. 2012) (Jacobs, C.J.), *aff'g* 833 F. Supp.2d 394 (S.D.N.Y. 2012) (Jones, J.)**

In finding the Defense of Marriage Act unconstitutional, Justice Kennedy noted that the Act "deprives [same-sex couples] of the Bankruptcy Code's special protections for domestic-support obligations. See 11 U.S.C. §§ 101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15)."

DISCHARGE(ABILITY)

***Bullock v. BankChampaign, N.A.*, ___ U.S. ___, 133 S.Ct. 1754 (2013) (Breyer, J.), *vac'g & rem'g* 670 F.3d 1160 (11th Cir. 2012) (Bucklew, J.), *which aff'd* Case No. 09-84300-JAC-7, 2010 WL 2202826 (Bankr. N.D. Ala. May 27, 2010) (Caddell, J.)**

In resolving a circuit split and abrogating prior Ninth Circuit law, the Supreme Court held unanimously that defalcation for nondischargeable debt under Section 523(a)(4) "includes a culpable state of mind requirement … one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." Thus, the Supreme Court reversed and remanded the nondischargeability judgment for an absence of findings as to the Debtor's scienter regarding his management of a family trust. This abrogated the Ninth Circuit standard that did not impose a scienter requirement under Section 523(a)(4). *In re Sherman*, 658 F.3d 1009 (9th Cir. 2011); *In re Hemmeter*, 242 F.3d 1186 (9th Cir. 2001).

Bullock has been cited four times so far within the circuit:

Pemstein v. Pemstein (In re Pemstein), 492 B.R. 274 (BAP 9th Cir. 2013) (per curiam, Markell, Pappas & Taylor, J., on panel), *rev'g, vac'g & rem'g* 476 B.R. 254 (Bankr. C.D. Cal. 2012) (Kwan, J.)

Remanding to evaluate scienter, including applicability of prior state-law judgment and whether finding underlying those state law claims necessarily preclude any other finding that intent.

Borsos v. United Healthcare Workers-West (In re Borsos), Case No. EC-12-1163-MkDJu, 2013 WL 2480657 (BAP 9th Cir. June 10, 2013) (per curiam, Dunn, Jury & Markell, J., on panel; vac'g & rem'g C. Klein, J.).

Bullock was decided between the entry of the nondischargeability judgment and the ruling on appeal. The Bankruptcy Court findings did not address scienter, since it was not necessary under Ninth Circuit law prior to Bullock. The panel remanded for determination regarding scienter. The panel noted that the record lead to an inference of a lack of intent by the Debtor, but noted that the determination may depend on the Bankruptcy Court's assessment of Debtor's credibility.

Kurtz v. 3H Corp., Case No. CV 12-07175 DMG, 2013 WL 3467105 (C.D. Cal. July 10, 2013) (Gee, J., aff'g Kaufman, J.)

The District Court affirmed the nondischargeability judgment based on the preclusive effect of the arbitration award underlying the judgment. "The Award … found, in ruling on punitive damages, that the breach was 'willful, malicious and oppressive,' calling it 'reprehensible' and 'essentially a form of theft.' The finding of willfulness is equivalent to a finding of intent as required by *Bullock.* The finding that the conduct was willful, malicious, and oppressive was necessary to the finding that punitive damages were to be awarded."

Estate of Courtnage v. Warburton (In re Warburton), Case No. 12-00018, 2013 WL 2237526 (Bankr. D. Mont. May 21, 2013) (Kirscher, J.)

Holding debt nondischargeable based on defalcation including scienter finding. "The evidence … easily establishes that [Debtors] consciously disregarded or was willfully blind to a substantial and unjustifiable risk that their conduct would violate a fiduciary duty. Their failure to deposit cash receipts, misappropriation of money and taking of [inventory from the partnership between Debtors and Plaintiff] off-site and failure to return is 'a gross deviation from the standard of conduct that a law-abiding person would observe' in their situation."

U.S. Circuit Court for the Ninth Circuit

AUTOMATIC STAY

***Arkison v. Griffin (In re Griffin)*, ___ F.3d ___, Case No. 12-60046, 2013 WL 3199063 (9th Cir. June 26, 2013) (per curiam; Alarcon, Ikuta & McKeown, J., on panel), aff'g Case No. WW-11-1362-HKiJu, 2012 WL 1191894 (BAP 9th Cir. April 6, 2012) (per curiam, Hollowell, Jury & Kirscher, J., on panel, aff'g Overstreet, J.)**

Affirming that lender established prudential standing to move for stay relief. Lender produced a copy of a copy of the original note and attested that original note is in the bank's files. The Circuit affirmed that a duplicate of a duplicate still qualified as a duplicate for admissibility under FRE 1003. The Circuit also held that the Bankruptcy Court did not abuse its discretion in finding that the lender has at least a colorable claim to the property at issue, such that it was released from the stay in order to argue the merits in a separate proceeding.

CHAPTER 11

***Marshall v. Marshall (In re Marshall)*, ___ F.3d ___, Case No. 09-55573, 2013 WL 3242487 (9th Cir. June 28, 2013) (Nguyen, J.), *aff'g* 403 B.R. 668 (C.D. Cal. 2009) (Carter, J.), *aff'g* 300 B.R. 507 (Bankr. C.D. Cal. 2003) (Bufford, J.), *amend'g & supersed'g* 298 B.R. 684 (Bankr. C.D. Cal. 2003) (Bufford, J.)**

This is a spin-off of the Anna Nicole Smith bankruptcy, which derived from her dispute with one of her husband's sons, Pierce Marshall. This bankruptcy was filed by one of her husband's other sons, Howard Marshall, who was aligned with Ms. Smith. Howard's case was non-randomly assigned to Judge Bufford, as he had presided over Ms. Smith's bankruptcy case. Pierce moved for recusal or reassignment, motions that were denied by the Bankruptcy Court and affirmed on appeals to the District Court and Circuit Court. Although not technically related cases as defined by the district's general order regarding case assignments, the Circuit affirmed that such assignment was consistent with the Court's inherent and discretion assignment of cases, particularly those involving related issues. As to recusal, Pierce's objections to the Judge Bufford's ruling in Ms. Smith's case are grounds for appeal, not recusal. While Pierce also sought recusal after being sanctioned in Ms. Smith's case, the Circuit noted that the District Court on appeal increased the amount of the sanction, further validating the sanctions.

Pierce also objected that Howard's plan failed to satisfy the best interests of creditors. The Circuit rejected that, noting that Pierce failed to file a proof of claim. To the extent that Pierce remained a hypothetical creditor such that he could file a proof of claim if the case converted to Chapter 7, the best interest of creditors test does not extend that far. In comparing the plan payments to the potential payments in liquidation, the Bankruptcy Court need not consider the rights of a creditor who may regain the right to file a proof of claim if the plan is denied and the case is converted.

The Circuit affirmed the case and/or plan was not proposed in bad faith. Debtor's solvency is not a prerequisite for a finding of good faith, and the Bankruptcy Court reasonably concluded that the technical insolvency did not bespeak bad faith. Second, the scheduling of assets, even if scheduled as contingent, provides sufficient notice to creditors such that a dispute over their

contingent nature does not trigger a bad faith finding. Finally, the case was not filed in bad faith to avoid Pierce's judgment; the plan originally proposed payment, but it was amended to remove payment only after Pierce failed to file a proof of claim.

Finally, the Circuit affirmed denial of Pierce's motion to dismiss the case as a bad faith filing under Section 1112. The Circuit agreed that the presentation of a confirmable plan is a compelling ground to deny a motion to dismiss. Circuit also noted initial plan with payment of Pierce's claim; evidence supporting conclusion that Debtor did not have sufficient funds to post a bond to stay Pierce from collecting on his judgment pending appeal in state court; and the usual rational for a bankruptcy petition, that is, to delay collection, particularly in light of the significant size of Pierce's judgment.

CHAPTER 13

***Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120 (9th Cir. 2013) (Ripple, J.), *aff'g* 465 B.R. 843 (BAP 9th Cir. 2012) (Perris, J.; Pappas, J., dissenting), *aff'g* 440 B.R. 836 (Bankr. D. Mont. 2010) (Kirscher, J.)**

Circuit affirmed that BAPCPA forecloses consideration of Social Security income or payments to secured creditors as part of the inquiry of good faith under Section 1325(a). Trustee objected that plan was not proposed in good faith. Debtors were above their state median income and utilized means test to determine disposable income to pay unsecured claims. They excluded Social Security income and reduced disposable income for payments to secured creditors for their home, vehicles, trailer, and ATVs.

Trustee asserted plan was in bad faith by paying an 8 percent dividend, retaining "luxury" items, and failing to commit all disposable income to plan. Circuit affirmed that Social Security income is exempt from bankruptcy under 42 U.S.C. § 407(a) and excluded in means test, while payments to secured creditors are authorized in means test under Section 707. Judge Pappas, in dissent, had asserted the bankruptcy court did not look at totality of the circumstances in deciding good faith. Circuit held that by adopting means test, Congress reduced the bankruptcy court's discretion to review income and payments.

DISCHARGE(ABILITY)

***Anwar v. Johnson*, ___ F.3d ___, Case No. 11-16612, 2013 WL 3306327 (9th Cir. July 2, 2013) (Thomas, J., aff'g Bolton, J.), *originally published as memorandum*, 510 Fed. Appx. 499 (9th Cir. 2013)**

Affirming dismissal for untimely filed complaint to determine dischargeability. The bankruptcy court correctly held that it lacks discretion to grant an equitable exception to the deadline set by Rules 4007(c) and 9006(b)(3). Section 105 is not applicable, and a local rule to extend deadlines cannot be applied to circumvent the standard set in the federal rule. The Court declined to consider as not before it whether the bankruptcy court can retroactively extend the Rule 4007(c) filing deadline due to the court's own actions, such as misleading the parties or technical problems with the court's electronic filing system.

***Hedlund v. Educational Res. Inst., Inc.*, ___ F.3d ___ Case No. 12-35258, 2013 WL 2232325**

(9th Cir. May 22, 2013) (Tashima, J.), *rev'g & rem'g* 468 B.R. 901 (D. Ore. 2012) (Aiken, C.J.)

Holding that the good faith conduct of a debtor seeking to discharge student loan debt shall be reviewed for clear error, not de novo. Therefore, the District Court erred in reversing the Bankruptcy Court's finding that Debtor's good-faith conduct. Although the dischargability decision is one of law and subject to de novo review, the findings of good faith have and shall be reviewed for clear error. The evidence presented may have been interpreted to finding a lack of good faith. However, it was not interpreted as such by the Bankruptcy Court, and it was not so strong as demand such a finding on appeal.

***Aguiluz v. Jaffe (In re Aguiluz)*, Case No. 11-60050, 2013 WL 646855 (9th Cir. Feb. 7, 2013) (mem.), *aff'g* Case No. CC-10-1411-MkKiD, 2011 WL 4485181 (BAP 9th Cir. July 12, 2011) (mem., aff'g P. Carroll, C.J.; Markell, J., on panel)**

Affirming nondischargeability of nine monetary sanctions for discovery violations in state court proceedings as arising from willful and malicious injuries under Section 523(a)(6).

EVIDENCE

***Alaska Rent-a-Car, Inc. v. Avis Budget Group, Inc.*, 709 F.3d 872 (9th Cir. 2013) (Kleinfeld, aff'g Burgess, J.)**

District Court did not abuse its discretion in admitting expert testimony as to damages based on an economic comparison to business operation of a competitor bought out of bankruptcy.

***Redmond v. Sulphur Mountain Land & Livestock, LLC (In re Redmond)*, Case No. 11-55827, 2013 WL 646854 (9th Cir. Feb. 22, 2013) (mem., aff'g Carney, J.)**

Affirming sanction of terminating sanction in proceeding and for entry of judgment against Debtors for noncompliance with order to compel, with prior notice of potential terminating sanctions. District Court did not abuse discretion with sanction arising after Debtors' long history of obstruction and repeated failure to comply with court orders.

EXEMPTIONS

***Orange County's Credit Union v. Garcia (In re Garcia)*, 709 F.3d 861 (9th Cir. 2013) (Silverman, J.), *aff'g* 451 B.R. 909 (C.D. Cal. 2011) (Tucker, J.), *rev'g* 433 B.R. 759 (Bankr. C.D. Cal. 2010) (Albert, J.)**

Circuit held that (1) a vehicle may fall within California's wildcard or grubstake exemption, and (2) if that exempt vehicle is a tool of the debtor's trade and secured by a nonpossessory, non-PMSI lien, the debtor can avoid the lien pursuant to Section 522(f)(1)(B). Debtor was a real estate agent who obtained a loan secured by her Mercedes. She filed for Chapter 7, exempted the vehicle with the state wildcard exemption, then sought to strip the lien. Judge Albert initially ruled that because other exemptions address vehicles, the wildcard exemption could not cover vehicles. He also held that legislative history did not support lien stripping on luxury items. The District Court reversed, and Circuit Court agreed. The wildcard applies to "any property"

so includes vehicles. The Circuit also affirmed that a vehicle can be a tool of a debtor's trade, although the factual decision was remanded to the bankruptcy court.

INVOLUNTARY PETITION

***Marciano v. Chapnick (In re Marciano)*, 708 F.3d 1123 (9th Cir. 2013) (Hurwitz, J.; Ikuta, J., dissenting), *aff'g* 459 B.R. 27 (BAP 9th Cir. 2011) (Dunn, J.; Markell, J., dissenting), *aff'g* 446 B.R. 407 (Bankr. C.D. Cal. 2010) (Kaufman, J.)**

In question of first impression, Circuit held that an unstayed state judgment on appeal is per se a "claim against [the debtor] that is not contingent as to liability for the subject of a bona fide dispute as to liability or amount" under Section 303(b)(1). Appellees had obtained judgment against appellant, who appealed without a stay. During the appeal, other creditors of appellant initiated collection efforts. Appellees therefore became petitioning creditors and filed an involuntary petition against appellant. Appellant moved to dismiss on grounds that a bona fide dispute existed based on appeal. Circuit affirmed, adopting majority "Drexler" position that an unstayed judgment is not subject to bona fide dispute under the Code and as a matter of federalism. Judge Ikuta dissented, as did Judge Markell below, that a judgment on appeal should not be subject to a per se rule that it is not subject to a bona fide dispute, given the scrutiny applied to petitioning creditors.

Circuit also affirmed the bankruptcy court's order precluding discovery on Debtor's claim that the petitioning creditors filed the petition in bad faith. The Circuit noted that the "Code does not expressly provide for dismissal of an otherwise proper involuntary petition because of the subjective 'bad faith' of the filers." But if such a defense was available, the Circuit noted that because of the substantial judgments of the petitioning creditors, the bankruptcy court did not abuse its discretion that discovery was unlikely to produce material evidence. Judge Markell dissented below "[b]ecause of the long traditional of requiring good faith to initiate any proceeding in federal court."

PROPERTY OF THE ESTATE

***Ah Quin v. County of Kauai*, ___ F.3d ___, Case No. 10-16000 (9th Cir. July 24, 2013) (Graber, J.; Bybee, J., dissenting), *vac'g & rem'g* 433 B.R. 320 (D. Haw. 2010) (Kurren, M.J.)**

Debtor filed prepetition action for employment discrimination with litigation counsel, then filed Chapter 7 petition with different bankruptcy counsel while litigation pending. Debtor did not schedule or disclose litigation, received a discharge, and saw bankruptcy case closed. Debtor's litigation counsel later learned of bankruptcy and disclosed to defense counsel. Debtor also moved to reopen her bankruptcy case, with declarations that the omitted claim arose from her misunderstanding as to what she was required to do in the bankruptcy. The case was reopened, and Debtor scheduled the claim. Subsequently, defendant moved to dismiss for judicial estoppel for failure to disclose the claim in the bankruptcy. The District Court granted the motion. Two months later, the Chapter 7 trustee abandoned the claim to Debtor without objection from her creditors, and the case was closed a month later.

On appeal, Circuit Court found that District Court too narrowly applied judicial estoppel and its

exception for equitable exceptions for "inadvertence or mistake." Majority held the Circuit had not yet adopted a standard for "inadvertence or mistake." Held that when a debtor reopens the case, corrects her error by scheduling the claim, and allows the processing of the information in the Bankruptcy Court, "a presumption of deceit no longer comports" the Supreme Court's standard for "inadvertence or mistake." Open reopening for administrative of claim, the Bankruptcy Court's no longer has accepted the initial non-disclosure that may trigger judicial estoppel. Additionally, Debtor does not obtain an unfair advantage once the case is reopened and claim is scheduled for administration. Majority distinguished deterrence justification. Finally, majority held that by applying judicial estoppel, harm is suffered by debtor's innocent creditors whose lose right to potential recovery, while benefit is provided to alleged bad-actor defendant.

Without presumption of deceit, District Courts "must determine whether the omission occurred by accident or was made without intent to conceal. … The relevant inquiry is, more broadly, the plaintiff's subjective intent when filling out and signing the bankruptcy schedules." The majority remanded for factual findings as to mistake or inadvertence.

Judge Bybee dissented, asserting that the majority's approach is inconsistent with and broader than the standards adopted by other circuits.

U.S. Bankruptcy Appellate Panel for the Ninth Circuit

CLAIMS

***O'Donnell v. Tristar Esperanza Props., LLC (In re Tristar Esperanza Props., LLC)*, 488 B.R. 394, (BAP 9th Cir. 2013) (C. Klein, J., aff'g Albert, J.)**

Affirming Section 510(b) subordination of judgment award to former member of Debtor LLC based on the LLC's failure to compensate her for selling back her interest under the operating agreement. BAP specifically affirmed that although former member obtained a judgment, the judgment still fell within mandatory subordination for "damages arising from the purchase or sale" of a security of Debtor. BAP also affirmed rejection of appellant's argument that the judgment fell outside of subordination as a claim for breach of contract on the operating agreement. The opinion is one of first impression for the BAP on Section 510(b) subordination for an LLC and arbitration stemming from the withdrawal of an LLC operating agreement. Judge Klein reviews the legislative history in affirming Judge Albert.

***Pierce v. Carson (In re Rader)*, 488 B.R. 406 (BAP 9th Cir. 2013) (S. Klein, J., aff'g Baum, J.; Markell, J., on panel)**

Panel affirmed the denial of the trustee's objection to a creditor's deficiency sought in its proof of claim. Creditor filed a proof of claim for an amount secured by debtor's property and an unsecured amount beyond the property value. The creditor, debtor and trustee also stipulated to stay relief to permit foreclosure, which occurred. The trustee then objected to the unsecured claim, asserting that creditor did not comply with Arizona law to establish a deficiency judgment. The panel held that the Code implicitly preempts the state law provisions to obtain a deficiency judgment due to conflicts with the Code. The rights to an unsecured deficiency can be determined through the claims objection process. Additionally, the automatic stay and discharge injunction legal bars to the immediate prosecution of a deficiency action as required under state law—and thus state law is preempted.

DISCHARGE(ABILITY)

***Leavitt v. Finney (In re Finney)*, 486 B.R. 177 (BAP 9th Cir. 2013) (Dunn, J., rev'g Riegle, J.)**

A Chapter 13 debtor is not eligible for a discharge when she previously obtained a discharge based on a petition filed three years prior in Chapter 13 but voluntarily converted to Chapter 7. The bankruptcy court applied Section 1328(f)(2), holding that Debtor had filed her prior petition in Chapter 13 more than two years ago and thus was not subject to the statute's ban on a second discharge. Panel held that although Debtor's prior case started in Chapter 13 and then converted to Chapter 7, it was treated as if it were filed as a Chapter 7 case pursuant to Section 348. Therefore, the court should have applied Section 1328(f)(1), prohibiting a second discharge if prior discharge arose from a Chapter 7 case filed in the prior four years.

***Black v. Bonnie Springs Family L.P. (In re Black)*, 478 B.R. 202 (BAP 9th Cir. 2013) (Dunn, J., aff'g Markell, J.)**

Panel affirmed denial of discharge on summary judgment based on preclusive state court judgment. The panel held that Judge Markell correctly determined that "willfulness" for abuse of process and nuisance claims under Nevada law is congruent with "willfulness" under Section 523(a)(6). The decision reviews the meanings of "willfulness" under state and federal law.

EXEMPTIONS

***McCoy v. Kuiken (In re Kuiken)*, 484 B.R. 766, (BAP 9th Cir. 2013) (Jury, J., rev'g Mann, J.; Markell, J., on panel)**

In a decision of first impression in the circuit, the BAP held that because a debtor did not hold a continuous interest in the property subject to the judgment creditor's lien between the time the lien was recorded and the petition was filed, the debtor could not avoid the lien based on impairment of his homestead exemption under Section 522(f).

TURNOVER

***Newman v. Schwartzer (In re Newman)*, 487 B.R. (BAP 9th Cir. 2013) (Jury, J., aff'g Riegle, J.)**

Affirming order compelling Chapter 7 Debtor to turn over tax refund, including earned income credit. Debtor did not exempt the earned income credit before the turnover order. After entry of the order, debtor amended his schedules to assert the exemption and filed a notice of appeal of the turnover order. The Panel did not consider the later exemption as it was not before the bankruptcy court, and the bankruptcy court's turnover order subsumed a determination that the tax refund is nonexempt estate property. Panel also affirmed that entire refund was property of the estate as a matter of community property law, even though Debtor's spouse did not file for bankruptcy. Panel also affirmed turnover, holding that Section 542 does not require Debtor to have present possession, custody or control of property when the turnover demand is made. The obligation applies to property in Debtor's possession, custody or control during the case. The statute also calls for turnover of the property or its value.

U.S. District Court, District of Nevada (appeals)

APPEALS AND PETITIONS FOR WRITS

***Ahern Rentals, Inc. v. Goldman Sachs Palmetto State Credit Fund, L.P. (In re Ahern Rentals, Inc.)*, Case No. 3:12-cv-0676-LRH-VPC, 2013 WL 273403 (D. Nev. Jan. 23, 2013) (Hicks, J.), *denying stay of order finding exclusivity order is interlocutory*, 2013 WL 150489 (D. Nev. Jan. 14, 2013) (Hicks, J., appeal from Beesley, J.)**

Judge Hicks declined to stay his order pending appeal. He disagreed that Debtor's analysis of the limited legislative history on exclusivity periods warranted a stay, particularly when contrary to a prior decision of the BAP. The question of first impression also did not warrant a stay, given the BAP decision supporting the ruling and notwithstanding the Debtor's citation to nonbinding, non-precedential decisions from outside the circuit. Finally, de novo review does not in itself warrant a stay.

***Equity Holders v. Legal iGaming, Inc. (In re Legal iGaming, Inc.)*, Case No. 2:12-cv-00047-MMD-GWF, 2013 WL 209825 (D. Nev. Jan. 16, 2013) (Du, J., appeal from Beesley, J.)**

Judge Du dismissed equity holder's appeals of sale order and motion for reconsideration as equitably moot. Appellants did not obtain stay; plan was confirmed with final order; sale was to good faith, third-party purchaser; and sale proceeds already distributed to creditor.

Judge Du also denied cross motion to vacate confirmation order. Appellants asserted that while their appeal of sale order was pending, the bankruptcy court was divested of jurisdiction. Judge Du disagreed, holding that absent the stay, the bankruptcy court simply could not substantially modify the order on appeal. No such modification occurred, and the bankruptcy court had jurisdiction to confirm plan.

***Ahern Rentals, Inc. v. Goldman Sachs Palmetto State Credit Fund, L.P. (In re Ahern Rentals, Inc.)*, Case No. 3:12-cv-0676-LRH-VPC, 2013 WL 150489 (D. Nev. Jan. 14, 2013) (Hicks, J., appeal from Beesley, J.), *stay pending appeal denied*, 2013 WL 273403 (D. Nev. Jan. 23, 2013) (Hicks, J.)**

Judge Hicks dismissed as interlocutory debtor's appeal of order denying second motion to extend exclusivity. District Court held that while adjustment to original exclusivity period is appealable as a right under 28 U.S.C. § 158(a)(2), refusal to extend exclusivity requires leave for appeal under § 158(a)(3). Judge Hicks then treated notice of appeal as motion for leave to appeal. He denied the motion, noting the bankruptcy court's order was based on factual cause of debtor's conduct, and the appeal did not involve a "controlling question of law as to which there is a substantial ground for difference of opinion."

***CT Inv. Mgmt. Co. v. Desert Oasis Apts., LLC (In re Desert Oasis Apts., LLC)*, Case No. 2:12-cv-00370-MMD-VPC, 2013 WL 210020 (D. Nev. Jan. 17, 2012) (Du, J., appeal from Markell, J.)**

Dismissing appeal from confirmation order as moot when Debtor refinanced and paid off appellant.

ATTORNEY'S FEES

***CT Inv. Mgmt. Co. v. Desert Oasis Apts., LLC (In re Desert Oasis Apts., LLC)*, Case No. 2:12-cv-00370-MMD-VPC, 2013 WL 210020 (D. Nev. Jan. 17, 2013) (Du, J.)**

After appellant took appeal of confirmation order, Debtor refinancing property and paid off appellant's debt. Appellee moved to dismiss and sought costs under FRAP 39 and FRBP 8014. Judge Du held that FRAP 39 does not provide for costs in appeals to the U.S. District Court. FRBP 8014 also was not applicable because appellee had not prevailed on the merits as the appeal was dismissed as moot.

CLAIMS

***Dreyfuss v. Cory (In re Cloobeck)*, Case No. 2:12-cv-1506-LRH-VCF, 2013 WL 560321 (D. Nev. Feb. 12, 2013) (Hicks, J., aff'g Markell, J.)**

Creditor objected to Ch. 7 trustee's final report listing payment of federal taxes three years prior, arguing there no basis for payment. Judge Hicks affirmed that objection was untimely since creditor was aware of payment at time it was made. Creditor failed to provide evidence to support his legal theory.

EXEMPTIONS

***Todd v. Rothschild (In re Todd)*, Case No. 2:12-cv-1092-KJD-GWF, 2013 WL 1182092 (D. Nev. March 18, 2013) (Dawson, J., aff'g Riegle, J.)**

Judge Dawson affirming order sustaining objection to asserted exemption amounts. Court affirmed that property was subject to consensual prepetition mortgage.

PROPERTY OF ESTATE

***Dordeen v. Taylor, Bean & Whitaker Mortgage Co. (In re Dordeen)*, 489 B.R. 203 (D. Nev. 2013) (Jones, C.J., aff'g in part, rev'g in part & rem'g Markell, J.)**

As Judge Jones explained, the proceeding constituted "a fairly standard residential foreclosure avoidance action" that was dismissed for failure to state a claim. Judge Jones reversed on remanded on the claim for quiet title based on information pled in complaint. Debtors allege that their original lender forgave the principal balance before the loan was transferred, and such forgiveness would have extinguished the note and security interest. Debtors also allege that defendant's records appear to reflect a zero balance.

U.S. District Court, District of Nevada (litigation)

AUTOMATIC STAY

***AAA Nev. Ins. Co. v. Chau*, Case No. 2:08-cv-00827-RCJ-CWH, 2013 WL 496064 (D. Nev. Feb. 7, 2013) (Jones, C.J.), *vacating in part unrelated portion of order*, 2012 WL 3516510 (D. Nev. Aug. 14, 2012) (Jones, C.J.)**

Plaintiff insurer filed a declaratory relief action against defendant insured. Party injured in accident intervened. Court eventually issued injunction against Intervenor due to ongoing attempts to obtain judgment beyond policy limit and ordered Plaintiff to file application for fees and costs. Before Intervenor responded, Defendant filed for bankruptcy and Intervenor asserted automatic stay. Judge Jones held that the stay did not apply as the application for fees was between Plaintiff and Intervenor.

***Barnett-Moore v. Federal Home Loan Mortgage Corp.*, Case No. 3:12-cv-250-RCJ-VPC (D. Nev. Jan. 25, 2013) (Jones, C.J.)**

Granting summary judgment for defendant/lender. Plaintiff alleged foreclosure was void because she filed for bankruptcy the same day as foreclosure. Plaintiff admits that she filed nearly two hours after the foreclosure, and Judge Jones held the stay did not become effective until she filed and not earlier in the day. Plaintiff asserted that the stay should be applied retroactively under Rule 6(a)(3) as she was unable to file earlier in the day due to a snowstorm that morning. Judge Jones held Plaintiff failed to demonstrate the clerk's office was inaccessible that day because she still filed that day.

***Buenaventura v. Chau*, Case No. 2:12-cv-1402-JCM-VCF, 2013 WL 286399 (D. Nev. Jan. 23, 2013) (Mahan, J.)**

Defendant's bankruptcy stayed determination of Plaintiff's motion to remand to state court.

CLAIMS

***Renteria v. Canepa*, Case No. 3:11-cv-00534-ECR-CWH, 2012 WL 2575346 (D. Nev. July 3, 2012) (Reed, J.), *motion to set aside denied*, 2013 WL 837127 (D. Nev. March 5, 2013) (Jones, C.J.)**

Granting judgment to Plaintiff for number of claims, including non-debtor's breach of settlement agreement approved in related bankruptcy case. Defendant objected to payment of postpetition interest under Section 502(b)(2). Judge Reed held that postpetition interest is allowable against nondebtors.

DISCHARGE(ABILITY)

***Webster v. Beazer Homes Holding Corp.*, Case No. 2:11-cv-00784-LRH-CWH, 2013 WL 271448 (D. Nev. Jan. 23, 2013) (Hicks, J.)**

Denying Defendant's motion for summary judgment. Defendant alleged that because Plaintiff filed for bankruptcy and received a discharge, she cannot recover consequential damages from Defendant since debt owed by Plaintiff was discharged in her bankruptcy case. Defendant did not cite any authority and Judge Hicks held that Plaintiff still is entitled to recover such damages for herself.

LITIGATION

***Wells Fargo Bank, N.A. v. Elefante*, Case No. 2:12-cv-01521-RCJ-CWH, 2013 WL 1104763 (D. Nev. March 12, 2013) (Jones, C. J.)**

Denying motion to dismiss filed by defendants sued as guarantors of debt. Obligor filed for bankruptcy, which constituted a trigger for their liability under their contractual guarantees.

***Kaplan v. Rivera (In re Kaplan)*, Case No. 3:11-cv-00772-RCJ, 2013 WL 1110775 (D. Nev. March 7, 2013) (Jones, C.J.)**

Denying Defendant's motion for jury trial as untimely. Reference previously withdrawn at defendant's request. Although Debtor originally requested jury trial, Debtor did not seek it with his first amended complaint. Defendants did not seek a jury trial until substantially after the 14-day period to request a jury trial after the last pleading under Rule 38. Court declined to exercise discretion to grant a jury trial after the deadline under Rule 39.

PROPERTY OF THE ESTATE

***Goodman v. Takeda Pharms. N. Am., Inc.*, Case No. 2:12-cv-01083-MMD-GWF, 2013 WL 1249756 (D. Nev. March 26, 2013) (Du, J.)**

Denying defendant's motion to dismiss sought based on plaintiff's failure to schedule claims in Chapter 7 schedules. Debtor reopened case and scheduled, and Chapter 7 trustee moved for substitution as real party in interest. Judge Du declined to apply judicial estoppel as the trustee has the opportunity to administer the claims for the benefit of the creditors. Judge Du did limit any damage award to the amount necessary to repay the debtor's creditors as determined by the trustee.

***Gale v. Citimortgage, Inc.*, Case No. 2:12-cv-02065-GMN-VCF, 2013 WL 144259 (D. Nev. Jan. 11, 2013) (Navarro, J.)**

Plaintiff brought action against lender and sought injunction to prevent injunction. Debtor did not schedule underlying claims in prior bankruptcy. Judge Navarro declined to apply judicial estoppel, highlighting the fact that the Ninth Circuit has not said the "amount that must be 'known'" by the debtor at the time of the bankruptcy filing to require scheduling of claim and invoke judicial estoppel.

***Price v. Computer Sciences Corp.*, Case No. 2:11-cv-1242-JCM-VCP, 2013 WL 79945 (D. Nev. Jan. 3, 2013) (Mahan, J.)**

Granting summary judgment based on judicial estoppel because plaintiff failed to schedule employment claim in bankruptcy filed after alleged misconduct and before filing action. Plaintiff had filed prepetition complaint with Nevada Equal Rights Commission, so she had knowledge of claim before filing bankruptcy.

VENUE

***In re New England Compounding Pharmacy, Inc., Products Liab. Litig.*, ___ F. Supp.2d ___, Case No. MDL 2419, 2013 WL 595774 (MDL Feb. 12, 2013) (Heyburn II, J.)**

Panel granted motion to centralize litigation and defendant's pending bankruptcy in Massachusetts was factor weighing in favor of transfer to Massachusetts in choice between two venues.

U.S. Bankruptcy Court, District of Nevada

ABANDONMENT

***In re Sas*, 488 B.R. 178 (Bankr. D. Nev. 2013) (Nakagawa, C.J.)**

Judge Nakagawa denied trustee's motion to revoke abandonment of litigation claims that ultimately resulted in significantly greater recovery than scheduled amount. Debtor initially did not schedule litigation but disclosed it on SOFA. After questioning at creditors meeting, Debtor amended schedules to list it valued at maximum exemption amount for personal injury claims. Although Trustee designated case as "Asset," she filed a "Report of No Distribution" and the case was closed. Nine months later, Debtor obtained a $200,000 judgment in arbitration on litigation claim. Debtors then reopened case to schedule additional creditors and update the case with the award.

Court held that simply because claim resulted in more than scheduled value does not establish that false or incomplete information was provided by Debtors to Trustee. Abandonment also was not result of a mistake or inadvertence of the trustee without undue prejudice. Factors under Rule 60 weighed against trustee. Although there was no undue prejudice since the award funds were not distributed, the Court found the trustee did not act diligently and had ability to investigate the circumstances of the claim.

AUTOMATIC STAY

***In re CBS I, LLC*, Case No. BK-S-12-16833-MKN, 2013 WL 769683 (Bankr. D. Nev. Feb. 22, 2013) (Nakagawa, C.J.)**

Judge Nakagawa modified the stay to permit a creditor to obtain a garnishment judgment against Debtor for allegedly failing to honor a writ of garnishment. Service of the writ on Debtor did not violate the automatic stay as it was an action against a member, not the Debtor. Debtor in possession was obligated to comply with state laws under 28 U.S.C. § 959. Although relief from the stay may not be necessary based on the federal statute, Judge Nakagawa granted it to permit the creditor to obtain a garnishment judgment against Debtor. He declined to allow the creditor to enforce it against property of the estate, and he denied the creditor's motion for allowance of an administrative expense or provide for claims estimation prior to entry of the judgment.

SERVICE

***In re Gordon*, Case No. BK-S-11-22221-LBR, 2013 WL 1163773 (Bankr. D. Nev. March 20, 2013) (Riegle, J.)**

Court vacated order sustaining debtor's objection to bank claim due to insufficient notice. Objection was served by mail on outside counsel for bank who requested special notice, as well as by mail on address on proof of claim for notice. Judge Riegle held that Rule 7004(h) requires service by certified mail on bank officer. She rejected Debtor's argument that service of claim objection is controlled by Rule 3007, not Rule 7004. Address on proof of claim is for notice, which differs from service. Finally, while there is an exception for mail service on bank counsel appearing in case, filing request for special notice does not constitute appearance nor does it authorize said counsel to accept service of adversary complaint.

***Gordon v. Bank of Am., N.A. (In re Gordon)*, Adv. P. 12-1239-LBR, 2013 WL 1187561 (Bankr. D. Nev. March 21, 2013) (Riegle, J.)**

Denying Plaintiff's motion for default judgment premised on order sustaining Debtor's objection to Defendant's claim. Prior order was subsequently vacated and no longer preclusive. Additionally, claims were mere allegations sufficient on their own to prove claim. Court also noted deficiencies in adversary that warranted denial of default judgment. Service of the complaint and summons on Defendant's counsel in main case insufficient, particularly under heightened standards for service on a bank under Rule 7004(h). Service on bank counsel by mail may only be conducted when counsel has appeared in the case. In this case, bank counsel had filed only a request for special notice and therefore had not appeared. Another firm appeared for the bank on a claim objection, but the claim involved property not at issue in the adversary. Mail service also at the incorrect street number or incorrect suite number was insufficient. Plaintiff failed to file any evidence in support of default judgment.