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CONSUMER UPDATE

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Public Comment Draft

LOCAL BANKRUPTCY RULES

United States Bankruptcy Court

District of Nevada

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New and modified content

U.S. Bankruptcy Court
District of Nevada

PART III – LOCAL RULES OF BANKRUPTCY PRACTICE

LR 1001. TITLE AND SCOPE OF RULES.

(a) Title. These are the Local Rules of Bankruptcy Practice of the United States District Court for the District of Nevada. This part governs cases and proceedings before the United States Bankruptcy Court of this District. These Rules may be cited as LR __.

(b) Applicability of local bankruptcy and district court rules.

~~(1) All cases and proceedings within the bankruptcy jurisdiction of the courts are~~ ~~(2)~~(1) ~~referred to the bankruptcy judges~~ All cases under title 11 and all proceedings arising under, arising in or related to a case under title 11 are referred to the bankruptcy courts for this district. If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under these rules, the bankruptcy judge shall, unless otherwise ordered by the district court or consistent with LR 5011, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event that the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution.

~~(3)~~(2) The Federal Rules of Bankruptcy Procedure and these Local Rules govern procedure in all bankruptcy cases and proceedings in the District of Nevada. Except for those matters contained in Part IA of the Local Rules of Practice for the United States District Court for the District of Nevada, no other local rules apply unless they are specifically adopted by reference in these bankruptcy local rules.

~~(4)~~(3) Except as provided in LR 8001, et seq., these rules do not apply to bankruptcy proceedings in the district court.

~~(5)~~(4) These rules supplement or, as permitted, modify the Federal Rules of Bankruptcy Procedure and are to be construed to be consistent with the Federal Rules of Bankruptcy Procedure and to promote the just, efficient and economic determination of every action and proceeding.

~~(6)~~(5) These rules are effective starting (will add effective date) and govern all actions and proceedings pending or begun on or after that date.

(c) General and administrative orders, guidelines, and policy statements.

(1) These rules may be amended by general order of the district court or by administrative order of the bankruptcy court. There may be matters relating to internal bankruptcy court administration that, in the discretion of the bankruptcy court en banc, may be accomplished by administrative orders.

(2) The clerk will maintain copies of orders, guidelines, and policy statements that relate to practice before this court and will make copies available:

(A) On request and the payment of a nominal charge; and,

(A) The names and addresses of creditors, either alphabetically or alphabetically by category, including those parties to pending lawsuits indicated on the debtor's statement of financial affairs, and those additional parties and governmental entities specified in LR 2002;

(B) Zip codes for all postal addresses; and,

(C) The names and addresses of all general partners or corporate officers for any debtor that is a partnership or corporation, and any managers of any limited liability company.

(3) The clerk will maintain requirements for a master mailing list that specify the format of a list to be submitted for filing. This may include the requirement that the list be submitted electronically. The clerk may from time to time revise the requirements. When revised, the clerk will reissue the requirements with a notation of the effective date of the revision. Copies of the requirements for the format of a master mailing list will be available from the clerk and will be posted on the court's website.

(4) If the debtor fails to timely prepare and file a master mailing list in a format that conforms to the clerk's requirements for a master mailing list, the attorney for the debtor or the debtor in proper person will be required to mail the Notice of Chapter __Bankruptcy Case, Meeting of Creditors, & Deadlines and the Discharge of Debtor to all creditors and parties in interest pursuant to LR 2002(a).

(5) Amendment.

(A) If any amended schedule of creditors is filed, a supplement to the master list must be submitted. The supplement must not repeat those creditors on the prior master list, and must list only the following information:

(i) The complete names and addresses of additional creditors and corrections to the master list, together with the bankruptcy case number;

(ii) The complete name and address of any party requesting special notice together with the bankruptcy case number; and,

(iii) The complete name and address of the most recent addition of any creditor that is either scheduled or has filed a proof of claim.

(B) Besides the notice of the amendment required by Fed. R. Bankr. P. 1009(a), upon filing an amendment, the debtor must send a copy of the Notice of Chapter__Bankruptcy Case, Meeting of Creditors, & Deadlines issued in the bankruptcy case to the added creditors, and must file evidence of sending the notice.

~~(7)~~(6) The debtor is responsible for the accuracy and completeness of the master list and any supplement. The clerk will not compare the names and addresses of the creditors listed in the schedules with the names and addresses shown on the master list or supplement.

~~(8)~~(7) A party serving notice is responsible for determining the appropriate address pursuant to, among other rules, Fed. R. Bankr. P. 2002(g).

(c) Special notice list. The debtor may prepare and file a special notice list including the

(4) The debtor in one (1) case is a general partner or majority shareholder of the debtor in the other case;

(5) The debtors have the same partners or substantially the same shareholders; or,

(6) The debtors are affiliated as that term is defined under 11 U.S.C. §101(2).

(c) Reservation of judicial discretion to deem case as related. Without limiting the foregoing, the court may deem the case to be so related that it should be treated as related.

(d) Assignment to judges. Unless the court directs otherwise, related cases filed at the same time will be assigned to the same judge. Whenever the clerk is apprised of related cases, after consulting with the assigned judge and the proposed judge, the clerk will reassign the second case to the judge to whom the first case was assigned, unless the court orders otherwise.

(e) Nonlimitation of applicability. A judge may assign any case or adversary proceeding to another judge.

(f) Trustee assignment. If a debtor files a chapter 7 or 13 bankruptcy case within one (1) year of a prior dismissed chapter 7 or 13 case, the U.S. Trustee's Office will request that the new case be assigned to the trustee that administered the prior case, with the exception of a change in venue.

(g) Joint administration. A motion seeking to jointly administer two (2) or more cases will, if granted, result in the joint administration of such cases unless otherwise ordered by the court.

(1) A motion to jointly administer two (2) or more cases must be filed in all cases listed in the motion, and the hearing on the joint administration will be held by the judge in the first assigned case.

(2) The party which obtained the order for joint administration must, within fourteen (14) days of the entry of the order, file with the court a combined matrix constituting a total mailing list of all interested parties in all the jointly administered cases without duplication.

(h) Assignment of jointly administered or consolidated cases. Unless otherwise ordered, jointly administered cases will be assigned to the lowest number of the cases. Subsequent filings of papers must be filed only in the lead case.

(i) Caption of jointly administered or consolidated cases. The caption of jointly administered or consolidated cases must include the name of each debtor entity, a list of each case number and a note specifying "Jointly Administered" [or Consolidated] under Case No. BK-X-XX-XXXX."

LR 1015.1. ASSIGNMENT OF CHAPTER 11 CASES.

(a) District-Wide Assignment of Chapter 11 Cases. Except as provided in subsections (b) or (c), the clerk shall assign cases filed under chapter 11 to a bankruptcy judge in this district without regard to the address or location stated on the debtor's petition. This rule shall take precedence over anything to the contrary in Local Rule 1071.

(b) Exceptions. The following cases are exceptions to subsection (a), and the clerk shall follow **LR** 1071 in assigning bankruptcy judges in this district to the following types of chapter 11 cases:

(1) Cases in which the debtor is an individual;

(2) Cases in which the petition indicates that the debtor is:

(i) a small business debtor (as defined in the 11 U.S.C. § 101(51D)); or

(ii) Single asset real estate (as defined in 11 U.S.C. § 101(51B)); or

(iii) Health care business (as defined in 11 U.S.C. § 101(27A)).

(c) Reassignment. Within five days of the filing of its petition, the debtor may request a transfer of the debtor's case to another division of the court for cause shown and as the interests of justice may require. The judge initially assigned to the case shall make the determination of cause and the interests of justice. The debtor may make a request under this subsection on an ex parte basis. Nothing in this section shall affect the right of any other party in interest to request a change of venue to another division.

LR 1016. NOTIFICATION OF DEATH OR INCOMPETENCY.

If a debtor dies or is deemed incompetent, the debtor's executor, administrator, counsel or guardian must file a statement of that fact and, if applicable, a Certificate of Death with the court and must immediately serve the statement and Certificate of Death on the trustee if there is one, or on the United States Trustee if no trustee has been appointed. The statement of that fact and a Certificate of Death filed and served shall comply with LR 9037.

LR 1070. JURISDICTION.

(a) Any case, contested matter, or adversary proceeding that is referred either automatically or otherwise to a particular bankruptcy judge may be heard by any other bankruptcy judge or by a bankruptcy judge designated and assigned temporarily to this district.

(b) Judges assigned to either unofficial division of this court may hear cases in any official duty station in the district.

LR 1071. UNOFFICIAL DIVISIONS - BANKRUPTCY COURT.

(a) The State of Nevada is one (1) judicial district and is divided into two (2) unofficial divisions as follows:

(1) Southern Division: Clark, Esmeralda, Lincoln, and Nye Counties.

(2) Northern Division: Carson City, Churchill, Douglas, Elko, Eureka, Humboldt, Lander, Lyon, Mineral, Pershing, Storey, Washoe, and White Pine Counties.

under which the case is pending at the time the claim is filed.

(b) Transferred claims.

(1) Each proof of claim for a transferred claim must state on the face of the claim form, immediately adjacent to the bankruptcy case number, that the claim has been "transferred other than for security" or that the claim has been "transferred for security," whichever applies.

(2) Each claimant who files a proof of claim for a transferred claim must prepare and provide to the clerk, together with the proof of claim, the notice that is required to be sent by Fed. R. Bankr. P. 3001(e)(2), 3001(e)(3), or 3001(e)(4).

(c) Jointly administered cases. In cases which are jointly administered, but not substantively consolidated, claims must be filed only in the case to which claim relates, and such filing does not constitute the filing of a claim in any other jointly administered case.

(d) Substantively consolidated cases. In cases which have been substantively consolidated, all claims must be filed only in the lead case, and the claims register will be maintained in the lead case.

LR 3002. FILING A PROOF OF CLAIM.

(a) Copies and Service. If a creditor has not filed its proof of claim electronically and wishes to receive a file-stamped copy of it, the creditor must submit an additional copy to be returned. A request for return by mail must include a self-addressed, stamped envelope. If the debtor is not represented by an attorney, the creditor must serve a copy of the proof of claim on the debtor.

(b) Claim arising from rejection of executory contract or unexpired lease. A proof of claim arising from the rejection of an executory contract or unexpired lease of the debtor under 11 U.S.C. § 365(d) must be filed not later than ninety (90) days after the first date set for the meeting of creditors held under 11 U.S.C. § 341(a), unless the court orders otherwise.

(c) Proof of claim form. A proof of claim ~~should~~ shall be filed with the court using the most current Official Form B10, as prescribed by the Judicial Conference of the United States.

(d) Change of address for a creditor who has filed a proof of claim. A creditor who has filed a proof of claim shall file an amended proof of claim using the most current Official Form B10 to effectuate a change of address to which distribution of payments are made from a chapter 11 plan, chapter 13 plan or a chapter 7 estate.

LR 3003. FILING PROOF OF CLAIM OR EQUITY INTEREST IN CHAPTER 11 REORGANIZATION CASE.

Unless the court orders otherwise, a proof of claim in a chapter 11 case must be filed within ninety (90) days after the date first set for the meeting of creditors under 11 U.S.C. § 341(a). The notice setting the date for the first meeting of creditors must also provide a bar date for filing claims.

LR 3007. CLAIMS - OBJECTIONS.

(b) Order. The clerk will not process a payment from the unclaimed funds' account without receiving a written court order ~~and the prescribed fee~~.

LR 3012. VALUATION OF SECURITY.

If a plan proposes to pay a secured creditor in accordance with 11 U.S.C. § 1325(a)(5)(B), the debtor must file a motion to value the collateral under Fed. R. Bankr. P. 3012 to be heard on or before the hearing on confirmation of the chapter 13 plan. The motion must be served in accordance with the provisions of Fed. R. Bankr. P. 7004 and LR 7004.

LR 3015. CHAPTER 13 PLAN AND CONFIRMATION.

(a) Standard form of chapter 13 plans and orders confirming chapter 13 plans. Each chapter 13 standing trustee may issue a form chapter 13 plan, a form chapter 13 plan summary and a form order for confirming a chapter 13 plan. Unless the court orders otherwise, the format prescribed by the trustee must be observed. The standing trustees may, from time to time, revise the form plans, form plan summaries and orders. The trustees will reissue any revised form plans and orders with a notation of the effective date of the revision.

(b) Chapter 13 plan guidelines. Each chapter 13 standing trustee may issue guidelines for the administration of chapter 13 plans. The guidelines will set forth positions that the trustee will generally follow in administering plans. The guidelines may also set procedures for scheduling confirmation hearings, filing objections to confirmation, and submitting orders confirming chapter 13 plans. The standing trustees may, from time to time revise the guidelines. The trustees will reissue any revised guidelines with a notation of the effective date of the revision.

(c) Copies of forms and guidelines. Copies of the form chapter 13 plan, a chapter 13 plan summary and the form order confirming a chapter 13 plan, and guidelines will be available from each trustee. If there are revisions to the form chapter 13 plan or form chapter 13 plan summary, the standing trustee will post the revisions on the respective trustee's website and advise the clerk of the bankruptcy court of any changes.

(d) Extension of time. A motion to extend the time to file a plan must be filed within the fourteen (14) day time period provided by Fed. R. Bankr. P. 3015(b), and will be set on a hearing date of not less than fourteen (14) days' notice.

(e) Service of plan. Upon the filing of a plan or an amended plan, the debtor shall serve a copy of the plan, or a summary thereof, on the chapter 13 trustee, all creditors, and other parties in interest who do not receive copies by electronic filing; however, if an amended plan was served upon any party in interest, but the amended plan: (i) does not change or amend that party's treatment under the plan; and (ii) such party in interest did not file an objection to the amended plan or a notice of appearance in the case, such party in interest need not receive notice of any subsequent plans at the time of confirmation, provided the court approves the amended plan and the prior notice. The debtor shall file with the plan or amended plan a certificate of service certifying that a copy of the plan or summary of the plan has been served upon the trustee, all creditors and parties in interest, in accordance with Fed. R. Bankr. P. 2002(b).

~~(e)~~(f) *Service of Modification of a Chapter 13 Plan. A request by the debtor to modify a Chapter 13 Plan pursuant to 11 U.S.C. §1329 shall be filed on the form chapter 13 plan and shall be set for hearing on the court's calendar on a date and time designated for chapter 13 plan confirmation matters pursuant to LR 9014(b)(1). Upon the filing of the modification of the chapter 13 plan, the debtor shall serve a copy of the modified plan, or a chapter 13 plan summary, on the chapter 13 trustee, all creditors, and other parties in interest who do not receive copies by electronic filing. The debtor shall file with the modified plan a Certificate of Service certifying that a copy of the chapter 13 plan or chapter 13 plan summary and the time fixed for filing objections pursuant to Fed. R. Bankr. P. 3015(g) has been served upon the trustee, all creditors and parties in interest, in accordance with Fed. R. Bankr. P. 2002(b) and LR 9014 (b)(1)and (2).*

~~(f)~~(g) Direct payments to lessors and creditors. As authorized by 11 U.S.C. § 1326(a)(1), all payments that the debtor is obligated to make under Section 1326(a)(1)(B) or 1326(a)(1)(C) must be made to the lessor or creditor only if the debtor's plan so provides. In all other cases, the payments must be made to the chapter 13 trustee together with all payments made to the trustee under Section 1326(a)(1)(A). chapter 13 trustees must separately account to each lessor or creditor for all payments received either (i) in the same way that they account for all other payments received under Section 1326(a); or (ii) as the court approves in accordance with separate agreements with each lessor or creditor.

(1) Payments tendered to the trustee that are intended as lease or adequate protection payments pursuant to the express terms of the debtor's proposed chapter 13 plan or that are deemed to be lease or adequate protection payments pursuant to 11 U.S.C. 1326(a)(1)(B) and (C) may be disbursed to the applicable lessor or secured creditor by the trustee prior to confirmation of the debtor's chapter 13 plan along with the trustee's regular monthly disbursements and the trustee may retain his or her applicable percentage fee on these preconfirmation disbursements in the same manner as if the disbursements were made after plan confirmation.

(2) Payments tendered to the trustee that are intended as lease or adequate protection payments pursuant to the express terms of the debtor's proposed chapter 13 plan or that are deemed to be lease or adequate protection payments must be impressed with a lien in favor of the secured creditor, and must be distributed to the secured creditor pursuant to this subsection (e)(1) . Such payments received by the trustee will not be refunded to the debtor upon conversion or dismissal of the chapter 13 case. The filing of an amended chapter 13 plan may not recharacterize any lease or adequate protection payment received by the trustee prior to the date the amended plan was filed.

LR 3015.1. DESTRUCTION OF ORDERS CONFIRMING, AMENDING, MODIFYING CHAPTER 13 PLANS.

Notwithstanding LR 9004(c)(1)(D), LR 5005(a)(3) and the court's electronic filing procedures, any original order confirming a chapter 13 plan, amended plan, modified plan, or trustees' modified plan may be appropriately destroyed by shredding twenty-eight (28) weeks after the entry of the order unless there is an appeal of such order. In the event the order becomes subject matter of a dispute for any reason after its destruction, the electronic image on file with the clerk is the equivalent of the original.

LR 3016. FILING OF CHAPTER 11 PLANS; HEARINGS.

In a chapter 11 case, an original plan must be submitted along with copies as required by LR 1002(a) and LR 9004(d). If a chapter 11 plan has not been filed or approved within six (6) months after commencement of the case, the debtor in possession must file a report with the court explaining why a

(a) Motions for relief from automatic stay.

(1) Section 362 information sheet.

(A) A form of § 362 cover sheet is available from the clerk's office or on the court's website.

(B) All motions for relief from the automatic stay and any oppositions to it must have attached as a cover sheet a properly filled out § 362 information sheet, which must be signed by counsel and/or the moving or opposing party.

(C) Unless the court orders otherwise, a properly completed § 362 information sheet will satisfy the requirements for a statement of facts and legal memorandum in cases under chapters 7 and 13.

(2) Parties are directed to communicate in good faith regarding resolution of the motion before filing a motion for relief from stay including, as appropriate, communication with any trustee appointed in the case. Such attempts to resolve the dispute must be made in a reasonable time frame prior to, but in any case no less than 72 hours (if debtor is represented by counsel) or 5 days (if debtor(s) are representing themselves), before the motion is filed. Movant must provide evidence of their attempt to resolve the matter with more than conclusory, which shall be filed with the motion. ~~and t~~The court may refuse to entertain a motion or opposition if the parties do not comply with this rule. The court may award, deny, or adjust fees of counsel for noncompliance. Compliance with this subsection is not required for motions for relief from stay relating to property identified by the debtor as being surrendered in the schedules, statements, or the proposed plan of reorganization.

(3) When, in accordance with a prior court order, an ex parte order is submitted regarding relief from stay, the order must be accompanied by evidence (which may be in the form of a declaration or affidavit) establishing each of the following:

(A) The identification of the prior order of the court authorizing the ex parte relief;

(B) The facts and circumstances of default under the prior order;

(C) The method of service of notice of default;

(D) The time period for cure; and,

(E) The failure to cure within that time.

(b) Applications for use of cash collateral or postpetition financing.

(1) The court and its individual judges may provide guidelines for applications seeking to approve the use of cash collateral and/or postpetition financing. The guidelines will be posted on the court's website.

(2) Motions for using cash collateral or obtaining credit to be heard on less than twenty-one (21) days' notice must be accompanied by separately filed affidavits or declarations setting forth the nature and extent of the immediate and irreparable harm that will result if the request is not

NEW NEVADA & NINTH CIRCUIT BANKRUPTCY DECISIONS*

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Welcome back. Writing for free sometimes falls to the backburner, but here's a summary of the latest bankruptcy and related decisions tied to the district for the past month or so.

Mark your calendars: The first ever Western Consumer Bankruptcy Conference is in Las Vegas on January 21, 2013. The American Bankruptcy Institute has had great success with similar programs in the Midwest, and Las Vegas made sense to host a regional program for Nevada, Arizona and California. Panels will cover developments in consumer law, individual Chapter 11s, the state of mortgages, evidence with valuations and claim objections, and ethics related to representation questions. Judges Riegle and Beesley are the judicial chairs, and speakers include Judges Markell, Zive, Mann, Tighe and Johnson. Hope to see you there.

In the case law, Judge Du weighs in on *Stern* and the withdrawal of reference; Judge Ferenbach also considers a discovery motion during a dispute over the bankruptcy court's jurisdiction. Judge Du declined to hold a former debtor to be judicially estopped from raising claims of wrongful foreclosure in litigation, even though the claims were scheduled. See below for the details. There are multiple cases on how to account for a debtor's planned savings for retirement. And the circuit weighs in with a split decision, holding that debtors with no disposable income can confirm shortened plans, thus revitalizing *Kagenveama*. Finally, not summarized but probably of interest, the Nevada Supreme Court's latest decision on loans and deeds of trust: *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. A.O. 48, ___ P.3d ___, 2012 WL 4461716 (Sept. 27, 2012) (en banc).

AUTOMATIC STAY

Leafty v. Aussie Sonoran Capital, LLC (In re Leafty), ___ B.R. ___, Case No. AZ-11-1491-JuBrD, 2012 WL 4808423 (BAP 9th Cir. Oct. 10, 2012) (Jury, J.)

BAP affirmed dismissal of case of repeat filer under Section 109(g)(2) when Chapter 13 debtor filed notice of voluntary dismissal and refilled the same day (in attempt to stop foreclosure that day, as stay relief already had been granted in the first case). Although court has discretion to suspend Section 109(g)(2) and permit repeat filing, court did not abuse its discretion with dismissal in these circumstances. BAP also affirmed that second petition did not trigger a stay since debtor was ineligible under Section 109(g)(2), under BAPCA amendment of Section 362(b)(21)(A). Although the bankruptcy court erroneously cited Section 362(b)(20), as the correct statute applies as a matter of law.

* This memo does not necessarily reflect the views of Mr. Bubala, Armstrong Teasdale LLP, or their clients. The comments are intended to be of a general nature only, do not constitute legal advice, and are not intended to be confidential. No recipient may rely on them for any legal purpose, including creating an attorney-client relationship.

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Tindall v. Mathon Fund, LLC (In re Mathon Fund, LLC), Case No. AZ-11-1633-JuHlD, 2012 WL 4800196 (BAP 9th Cir. Oct. 9, 2012) (mem.)

BAP affirmed refusal to retroactively annul the automatic stay under Section 362(d)(1) when Appellants did not move until five years after litigation commenced and three years after original obligor stipulated about effect of stay.

CASH COLLATERAL

Far East Nat'l Bank v. U.S. Trustee (In re Premier Golf Props., LP), 477 B.R. 767 (BAP 9th Cir. 2012) (Hollowell, J.), aff'g 2011 WL 4352003 (Bankr. S.D. Cal. Sept. 1, 2011) (Bowie, J.)

Affirming that green fees and driving range fees did not constitute bank's cash collateral and, thus, could be used by debtor without bank's approval. Opinion involves discussion of historical issues with hotel revenues and UCC.

CHAPTER 7

Ng v. Farmer (In re Ng), 477 B.R. 118 (BAP 9th Cir. 2012) (Pappas, C.J.), aff'g Case No. 10-2001, 2011 WL 5925527 (Bankr. D. Hawaii Nov. 28, 2011) (King, J.)

Affirming dismissal under Section 707(b)(3)(B). Debtors could use Chapter 13 to treat tax debt and to repay creditors without hardship using funds otherwise set aside for voluntary retirement contributions and pension loan repayments.

CHAPTER 13

Danielson v. Flores (In re Flores), 692 F.3d 1021 (9th Cir. 2012) (Chen, D.J.; Graber, J., diss'g)

Chapter 13 debtor with no disposable income may confirm a three-year plan rather than a five-year plan under *Kagenveama*. Circuit reversed and remanded the decision of the bankruptcy court, which had sustained the trustee's objection to the shorter plan. Circuit rejected the bankruptcy court's holding that *Kagenveama* was irreconcilable with *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). The opinion contains a detailed recitation of statutory and case law that permits a shorted plan period. Judge Graber argued that *Kagenveama* is clearly irreconcilable with *Hamilton*.

Parks v. Drummond (In re Parks), 475 B.R. 703 (BAP 9th Cir. 2012) (Jury, J.), aff'g Case No. 11-60050-13, 2011 WL 2493071 (Bankr. D. Mont. June 22, 2011) (Kirscher, J.)

Affirming denial of confirmation because above-median-income Chapter 13 debtor's plan improperly deducted voluntary post-petition 401(k) contributions for purposes of calculating disposable income under Section 1325(b)(2). BAP rejected debtor's argument that the 2005 statutory addition of Section 541(b)(7)(A) that states that withholdings for retirement accounts are not property of the estate and thus should be deducted from disposable income. BAP held that by adding language in Section 541, the statutory amendment is limited to pre-petition contributions.

Zapata v. U.S. Trustee (In re Zapata), Case No. CC-11-1184-PaKiNo, 2012 WL 4466283 (BAP 9th Cir. Sept. 28, 2012) (mem.)

BAP affirmed dismissal. Debtors provide no evidence beyond conclusory statements that they attended 341 meeting, and they did not argue they had commenced Chapter 13 plan payments within 30 days of the order for relief or filing of the plan. Absence of hearing did not violate Section 1307(c) as debtors received written warning of dismissal, explicitly waived right to hearing with statement in brief, and were given option to convert to Chapter 7.

DISCHARGE(ABILITY)

Haynes v. City & County of S.F., 688 F.3d 984 (9th Cir. 2012) (Reinhardt, J.), rem'g Cotterill v. City & County of S.F., Case No. C 08-02295 JSW, 2010 WL 1910528 (N.D. Cal. May 11, 2010) (White, J.), adopt'g 2010 WL 1223146 (N.D. Cal. March 10, 2011) (Larson, M.J.)

Trial court sanctioned counsel and rejected arguments that counsel could not afford to pay sanction. Trial court cited as persuasive a Seventh Circuit decision that misconduct constitutes a tort, that there is no basis to reduce damages based on the tortfeasor's ability to pay, and that the remedy for inability to pay may be to file for bankruptcy. The Circuit remanded, holding that the court does have discretion to modify sanctions based on counsel's ability to pay.

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Molasky v. W. Leslie Sully, Jr., Chartered Profit Sharing Plan (In re Molasky), ___ Fed. Appx. ___, Case No. 11-15059, 2012 WL 4019027 (9th Cir. Sept. 13, 2012) (mem; Murgia, J., diss'g), vacat'g & rem'g Case No. 2:10-cv-781, 2010 WL 5418993 (D. Nev. Dec. 23, 2010) (Mahan, J.)

Molasky v. Bustos (In re Molasky), ___ Fed. Appx. ___, Case No. 11-15060, 2012 WL 4018953 (9th Cir. Sept. 13, 2012) (mem; Murgia, J., diss'g), vacat'g & rem'g Case No. 2:10-cv-781, 2010 WL 5419058 (D. Nev. Dec. 23, 2010) (Mahan, J.)

[Both cases] Circuit remanded for a determination of whether bankruptcy court still had jurisdiction over Section 523 action after initial plaintiff was dismissed, leaving an intervenor who had not sought leave for additional time to file his own claims. Judge Murgia dissenting, arguing that the intervenor no longer could prosecute his own claims.

Educational Credit Mgmt. Corp. v. Jorgensen (In re Jorgensen), ___ B.R. ___, Case No. HI-12-1055-JuHPa, 2012 WL 3963339 (BAP 9th Cir. Sept. 11, 2012) (Jury, J.), aff'g Adv. No. 11-90016, 2012 WL 171599 (Bankr. D. Hawaii Jan. 20, 2012) (Faris, J.)

Affirming partial discharge of student loan debt. Debtor was an untenured faculty member with about $40,000 in student loan debt, but she had recently undergone treatment for cancer with ongoing treatment and side effects. BAP held bankruptcy court did not abuse discretion in requiring debtor to further reduce expenses, particularly given food expenses tied to her health and clothing expenses for a professional in Hawaii. Bankruptcy court also was not clearly erroneous in finding additional circumstances given her faculty prospects and side effects from cancer. BAP also affirming finding of good faith based on her work and payment history. While lender disputed debtor's purchase of care and payment for non-medically necessary dental work as bad faith, bankruptcy court already factored these issues in with the partial denial of discharge related to those expenses.

Cummings v. U.S. Trustee (In re Cummings), Case No. AZ-12-1114-DJuHl, 2012 WL 4747218 (BAP 9th Cir. Oct. 3, 2012) (mem.)

Affirming denial of discharge. Bankruptcy Court did not err with ruling based on allegations arising from conduct in case but not alleged in complaint. Debtors consented to admission of all records from case, and court may rule on all evidence before it. BAP also discusses standards for denial of discharge for false oath under Section 727(a)(4)(A).

Diephoz v. Zahlmann (In re Diepholz), Case No. AZ-11-1581-DJuJHl, 2012 WL 4747238 (BAP 9th Cir. Oct. 4, 2012) (mem.)

BAP vacated and remanded denial of dismissal of tardily filed nondischargeability action. Debtors' petition misspelled their name, and original schedules and matrix did not list creditor, who did not receive mail notice. Creditor allegedly was advised of bankruptcy but asserted it could not locate it on bankruptcy because of misspelling. Debtor asserted that it added creditor and its counsel to mailing matrix, and mailed papers to them, but it delayed almost five months before filing a certificate of service. BAP held that bankruptcy court did not make specific findings of fact to rebut the mailbox rule's presumption of service, which, if applied, may have warranted dismissal of the untimely action. BAP also held that while failure to properly spell name on petition was not a fatal violation of Rule 1005, bankruptcy court did not err in finding that creditors ultimately did not receive sufficient notice before the bar date to file the action. However, creditor waited 103 days to file action, and BAP remanded for findings on reasonableness of delay.

Haag v. Northwestern Bank (In re Haag), Case No. AZ-11-1661-DJuBr, 2012 WL 4465353 (BAP 9th Cir. Sept. 27, 2012) (mem.)

BAP affirmed denial of discharge for hindering collection efforts by placing funds in a safe deposit box in the year prior to petition. Debtor claimed creditor engaged in inappropriate collection efforts and disputed his intent to hinder. BAP countered that debtor admitted transferring funds to safe deposit box, and that trial court found badges of fraud.

Farmers Ins. Co. v. Hopkins, Case No. 2:10-cv-67-RCJ, 2012 WL 4051870 (D. Nev. Sept. 11, 2012) (Navarro, J.)

Granted default judgment for insurance company seeking declaration relief on its obligations of its policy, noting that the insured no longer could pursue claims against Chrysler due to its bankruptcy.

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EVIDENCE

Perfectly Fresh Farms, Inc. v. U.S. Dep't of Agric., 692 F.3d 960 (9th Cir. 2012) (Berzon, J.)

Affirming that bankruptcy schedules of creditors constitute evidence admissible in statutory PACA claims over liability. The Circuit suggests, but does not find, that the schedules are affirmative admissions.

Kabins Family L.P. v. Chain Consortium, Case No. 2:09-cv-1125-GMN-RJJ, 2012 WL 3994050 (D. Nev. Sept. 11, 2012) (Johnston, M.J.)

In conjunction with motion for leave to file an amended complaint, striking deposition of defendant's principal taken in connection with principal's bankruptcy since the motion for leave does not require an affidavit. In dictum, noting that although the defendants did not participate in the deposition such that it would limit the transcript's use in this proceeding under Rule 32, such transcripts may be used as a substitute for a supporting affidavit with certain motions.

EXEMPTIONS

Henry v. Rizzolo, Case No. 2:08-cv-635-PMP-GWF, 2012 WL 4092604 (D. Nev. Sept. 17, 2012) (Foley, M.J.)

State exemption for annuities does not apply if there is intent to defraud creditors. NRS 687B.290. The intent to defraud may be inferred from the circumstances, including badges of fraud. The court also held that based on Nevada case law, the plaintiffs hold an equitable lien against property or funds placed in an otherwise exempt asset. Plaintiffs have the burden of tracing the funds by a preponderance of evidence, which they met in this case.

Tober v. Lang (In re Tober), 688 F.3d 1160 (9th Cir. 2012) (N.R. Smith, J.), rev'g & rem'g In re Hummel, 440 B.R. 814 (BAP 9th Cir. 2010) (Jury, J.)

Interpreting Arizona law, the Circuit held that a debtor may exempt the cash surrender value of life insurance policies and the proceeds of annuity contracts if the contract names his or her child as the beneficiary, even if the child is an adult and no longer a dependent. Case focuses on the placement of the adjectives "other" and "dependent" at the end of the clause of potential beneficiaries that allow the debtor to claim the exemption.

JURISDICTION

Rosenberg v. Bookstein, Case No. 2:12-cv-00627-MMD-RJJ, 2012 WL 4361255 (D. Nev. Sept. 21, 2012) (Du, J.)

Judge Du held that the bankruptcy court lacks constitutional authority under *Stern* to enter final judgment on state-law fraudulent-conveyance claims, but denied the motion to withdraw the reference as premature. Article III permits a bankruptcy judge to issue proposed findings of fact and conclusions of law. The court rejected defendants' argument that the bankruptcy court lacks jurisdiction to even hear the fraudulent conveyance claims.

Litigation Trust of Rhodes Cos. v. Rhodes, Case No. 2:12-cv-1272-MMD-VCF, 2012 WL 3860654 (D. Nev. Sept. 5, 2012) (Ferenbach, M.J.)

A post-confirmation litigation trust filed adversary proceedings in bankruptcy court, and Defendants moved to withdraw the reference on the grounds that the bankruptcy court lacked jurisdiction. While the motion was pending, Plaintiff issued discovery and Defendants moved the District Court to stay the discovery. Judge Ferenbach denied the stay motion, holding that the matter remained pending before the bankruptcy court, which is authorized to rule on a discovery motion under Rule 5011 and LR 5011. The Court also held that a stay was not warranted on a concern over whether civil or bankruptcy rules would apply to the discovery matter.

LITIGATION

Evergreen Safety Council v. RSA Network Inc., ___ F.3d ___, Case No. 11-35680, 2012 WL 4902830 (9th Cir. Oct. 17, 2012) (M. Smith, J.), aff'g Case No. C09-1643-RSM, 2011 WL 2462303 (W.D. Wash. June 17, 2011)

Affirming summary judgment granted due to laches. Circuit held that Defendant/Appellee demonstrated significant evidentiary prejudice because Plaintiff/Appellant had destroyed business records after its bankruptcy and Plaintiff/Appellant's principal had kept minimal records after his personal bankruptcy.

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Lane v. Facebook, Inc., ___ F.3d ___, Case No. 10-16380, 2012 WL 4125857 (9th Cir. Sept. 20, 2012) (Hug, J.)

Affirming settlement over objections that the settlement was too low. District Court was given representation that a defendant was near bankruptcy, "likely making any substantial damages against it annihilative."

Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015 (9th Cir. 2012) (B. Fletcher, J.; Noonan, J., diss'g)

Fair Debt Collection Practices Act does not permit a debt collector to mail letters to debtors in care of their employer's address. Judge Fletcher briefly discusses the financial characteristics of those most likely subject to debt collection practices, noting that federal judges are unlikely to have relevant personal experience.

Nevada v. MERS, Inc., ___ Fed. Appx. ___, Case No. 11-16310, 2012 WL 4058052 (9th Cir. Sept. 17, 2012) (mem.), aff'g Bates v. MERS, Case No. 3:10-CV-407-RCJ, 2011 WL 1304486 (D. Nev. March 30, 2011) (Jones, C.J.), reconsideration denied, 2011 WL 1582945 (D. Nev. April 25, 2011) (Jones, C.J.)

Affirming dismissal of claims brought on behalf of state under the Nevada False Claim Act. Appellant alleged improper listing of MERS as the beneficiary on deeds of trusts to avoid paying new recording fees. District Court had diversity jurisdiction because the State was a nominal party. Defendant lenders also did not have an obligation to record assignments of interest under Nevada state law, with an obligation a necessary element to bring a NFCA claim.

Stephens Media LLC v. CitiHealth, LLC, Case No. 2:09-cv-02285-MMD-RJJ, 2012 WL 4711957 (D. Nev. Oct. 3, 2012) (Du, J.)

Holding that there was no excusable neglect that would warrant denial of default judgment simply because defendant's principals filed for personal bankruptcy; principals notified plaintiff of their bankruptcy filings.

Summit Growth Mgmt., LLC v. Marek, Case No. 3:12-cv-170-RCJ-WGC, 2012 WL 3886089 (D. Nev. Sept. 6, 2012) (Jones, C.J.)

Plaintiff provided DIP financing in a Nevada bankruptcy, and Defendant was a director and officer of the debtor. In subsequent litigation, Defendant asserted lack of personal jurisdiction since he resides in Arizona. District Court found it has personal jurisdiction because Defendant participated in debtor's two bankruptcy filings in Nevada.

Lawrimore v. Lawrimore, Case No. 51556, 2012 WL 4049012 (Nev. Sept. 13, 2012) (unpublished)

Affirming modification of spousal support from monthly payments to lump sum based on Appellant's failure to make payments and comply with orders through various conduct, including filing of bankruptcy.

PROFESSIONAL FEES

Gruntz v. Zimmerman (In re Gruntz), Case No. CC-11-1483-MkHTa, 2012 WL 4857558 (BAP 9th Cir. Oct. 15, 2012) (mem.; Markell, J., on panel) [See also Property of the Estate]

Affirming payment of fees to Chapter 7 trustee's property manager incurred in overseeing debtor's ranch. BAP affirmed that the objection of Appellant (the debtor's former husband) that the estate had no interest in the ranch, and that thus the bankruptcy court lacked jurisdiction to approve the payment of the fees. The necessity and benefit of the services is measured at the time they were rendered, and Appellant did not raise the dispute on ownership at that time (only raising them in objection to the fee application motion).

PROOF OF CLAIM

Green v. Waterfall Victoria Master Fund 2008-1 Grantor Trust Series A (In re Green), Case No. CC-11-1374-MkHHa, 2012 WL 4867552 (BAP 9th Cir. Oct. 15, 2012) (mem.; Markell, J., on panel)

Affirming order overruling debtor's objection to proof of claim filed by servicing agent for entity that acquired debt from debtor's lender. The creditor's servicing agent presented the original note endorsed in blank by the original lender, demonstrating the creditor's possession and that the note was payable to bearer. BAP rejected debtor's

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arguments the bankruptcy court improperly applied the UCC and should have applied the California Civil Code. BAP also followed circuit law that MERS' role as a nominal beneficiary does not impermissibly split the note and DOT.

C & S Co. v. Nelson (In re South Edge, LLC), Case No. 2:11-cv-1607-LRH-VCF, 2012 WL 3962449 (D. Nev. Sept. 7, 2012) (Hicks, J., aff'g Markell, J.)

Affirming order sustaining in part trustee's objection to claim. Appellant was engaged in arbitration against multiple parties when one of them was subject to an involuntary petition. An order for relief was entered and a trustee appointed. The Trustee and Appellant then submitted a stipulation and order, approved by the bankruptcy court, permitting the arbitration to proceed. The parties also agreed that Appellant "shall not exercise any right, remedy or claim against Debtor or its property," except for Appellant's claim against Debtor's construction bond. When Appellant filed a claim in the case, the trustee objected. Judge Hicks held that the stipulation is subject to standards of contract interpretation and was not ambiguous. Even if it were, negotiations on the stipulation reflected that the trustee rejected proposed language that would have allowed Appellant to seek a deficiency judgment.

PROPERTY OF THE ESTATE

Demarest v. Ocwen Loan Funding, Inc., ___ Fed. Appx. ___, Case No. 10-56062, 2012 WL 4320115 (9th Cir. Sept. 21, 2012) (mem.)

Frost v. Schiro, ___ Fed. Appx. ___, Case No. 11-17168, 2012 WL 4044531 (9th Cir. Sept. 14, 2012) (mem.)

[Both cases] Holding that district court did not abuse its discretion by applying judicial estoppel to prevent Plaintiff/Appellant from pursuing claims that were not disclosed in her bankruptcy schedules or statement.

Gruntz v. Zimmerman (In re Gruntz), Case No. CC-11-1483-MkHTa, 2012 WL 4857558 (BAP 9th Cir. Oct. 15, 2012) (mem.; Markell, J., on panel) [See also Professional Fees]

Affirming payment of fees to Chapter 7 trustee's property manager incurred in overseeing debtor's ranch. BAP rejected argument from Appellant (debtor's former husband) that fees were improperly paid from rent on property that he remained co-owner and entitled to half the rents. But because property division was not complete in state court, the entire property and rents came in to the estate and may be utilized to pay professional fees.

Hernandez v. IndyMac Bank, Case No. 2:12-cv-369-MMD-CWH, 2012 WL 3860646 (D. Nev. Sept. 5, 2012) (Du, J.), vac'g in part on reconsideration 2012 WL 2072863 (D. Nev. June 8, 2012) (Navarro, J.)

Judge Du granted a TRO to stop a foreclosure, rejecting Defendant's argument that Plaintiff was judicially estopped from pursuing the underlying claims because they were not scheduled in his prior bankruptcy. The Court held that intent is a factor in deciding whether to apply judicial estoppel, and it considered whether Debtor knew at the time of his bankruptcy of sufficient facts that would give rise to his claims. The issues with the lender arose shortly before he filed for bankruptcy and continued to develop; even the creditor parties' conduct reflects their lack of understanding of their own rights. The Court found that Plaintiff is likely to prevail on a claim of statutorily defective foreclosure.

SANCTIONS

In re Spoonhouse, 477 B.R. 147 (Bankr. D. Nev. 2012) (Nakagawa, C.J.)

Debtor's counsel violated Rule 9011 in filing petitions that he had not reviewed and without original signed copies from debtors. Court cited other failings and ordered counsel to disgorge all fees.

TAXES

Carey v. United States, ___ Fed. Appx. ___, Case No. 11-60001, 2012 WL 4395616 (9th Cir. Sept. 26, 2012) (mem.), aff'g Case No. EC-10-1017, 2010 WL 5600987 (BAP 9th Cir. Nov. 30, 2010) (mem.), aff'g Adv. Pro. 09-2632, 2011 WL 244249 (Bankr. E.D. Cal. Jan. 13, 2010).

Affirming dismissal of debtor's adversary on ground that the bankruptcy court lacked jurisdiction to enjoin the government from collecting federal tax liabilities under the Anti Injunction Act.

NEW NEVADA & NINTH CIRCUIT BANKRUPTCY DECISIONS*

November 12, 2012

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New opinions on discharge issues from Judges Nakagawa, Markell and Collins (visiting). Judge Nakagawa considered debtor's testimony over her alleged false oath in a prior bankruptcy case (discharge granted). Judge Markell was presented with a default judgment entered as a discovery sanction. While such judgment qualified as actually litigated for preclusive effect under Nevada law, the judgment was not preclusive because fraud was not necessarily determined (debt discharged). Judge Collins also considered evidence and intent. The Debtor's primarily language was Thai; the record revealed a loan application prepared by someone other than the debtor, at another time; and successor creditor's failure to establish reliance based on inference from documents simply in the original lender's loan file (debt discharged).

Don't forget the American Bankruptcy Institute's first ever Western Consumer Bankruptcy Conference is in Las Vegas on January 21, 2013. There's more on ABI's website, http://www.abiworld.org/WCBC13.

APPEALS

McCarthy v. Goldman (In re McCarthy), ___ Fed. Appx. ___, Case No. 10-56743, 2012 WL 4917592 (9th Cir. Oct. 9, 2012) (mem.)

Affirming dismissal of appeal on ground that order on motion to determine property of the estate is interlocutory.

Campos v. Aleman (In re Aleman), Case No. CC-11-1423-HHaMk, 2012 WL 5418947 (BAP 9th Cir. Nov. 7, 2012) (mem.; Markell, J., on panel)

Dismissed as moot appeal over denial of waiver of filing fee for nondischargeability fee and entry of discharge, as date to file nondischargeability adversary passed without complaint being filed.

Zuckerman v. Rund (In re Zuckerman), Case No. CC-11-1664-KiNoPa, 2012 WL 5359497 (BAP 9th Cir. Oct. 31, 2012) (mem.)

Dismissed as moot appeal of order disallowing claim after Trustee filed notice that the estate was administratively insolvent and there were no funds to pay any creditors. BAP was unable to find any cases addressing the issue.

* This memo does not necessarily reflect the views of Mr. Bubala, Armstrong Teasdale LLP, or their clients. The comments are intended to be of a general nature only, do not constitute legal advice, and are not intended to be confidential. No recipient may rely on them for any legal purpose, including creating an attorney-client relationship.

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Meritage Homes of Nev., Inc. v. JPMorgan Chase Bank, N.A. (In re South Edge LLC), 478 B.R. 403 (D. Nev. 2012) (Pro, J., aff'g Markell, J.)

Appellant contested certain release provisions in the plan. Appeal was not moot. Although assets had been transferred, Appellant did not seek to undue the transfer and the Court still can provide effective relief by striking or modifying the release provisions. The District Court weighs the factors and found the matter was not equitably moot.

CHAPTER 11

Meritage Homes of Nev., Inc. v. JPMorgan Chase Bank, N.A. (In re South Edge LLC), 478 B.R. 403 (D. Nev. 2012) (Pro, J., aff'g Markell, J.)

Holding that an "exculpation clause" for settling third parties for their conduct in prosecuting the plan does not constitute an impermissible release under Section 524(e). The clause merely articulated the standard of the Bankruptcy Code, to the extent it preempts a different standard of care imposed by a state law claim. The court declined to decide whether this standard preempts state law claims, as they had not arisen. District Court also affirmed that there were sufficient findings to support the release; that the plan contained a permissible post-confirmation injunction limited in scope and duration to ensure administration of estate assets; and the Bankruptcy Court properly gave notice and had the right to decide the plan's impact on a guarantee.

CLAIMS (AND OBJECTIONS)

Pequignot v. Deutsche Bank Nat'l Trust Co. (In re Pequignot), ___ Fed. Appx. ___, Case No. 10-35923, 2012 WL 4917029 (9th Cir. Oct. 9, 2012) (mem.), aff'g Case No. 08-18197TTG, 2010 WL 3606326 (W.D. Wash. Sept. 10, 2010)

Affirming denial of Debtor's objection to claim, citing limited right of rescission under 15 U.S.C. § 1635 and UCC provision making an indorsement in blank payable to bearer under UCC 3-205(b).

CONTEMPT

SMB Group, Inc. v. Diamond (In SMB Group, Inc.), Case No. CC-11-1610-KiDMk, 2012 WL 5419275 (BAP 9th Cir. Nov. 7, 2012) (mem.; Markell, J., on panel; vac'g & rem'g B. Russell, J.)

Chapter 11 Debtor filed Section 105 motion for contempt for violation of automatic stay by Chapter 7 trustee administering related cases. The Bankruptcy Court denied the motion, but the BAP reversed and remanded because the decision did not contain findings of fact and conclusions of law required by FRBP 9014 and FRCP 52.

CONVERSION OR DISMISSAL

Jackson v. Barris (In re Jackson), Case No. NC-11-1683-HPaMk, 2012 WL 5416529 (BAP 9th Cir. Nov. 6, 2012) (mem.; Markell, J., on panel; aff'g Johnson, J.)

Affirming conversion of case for failure to prosecute or comply with orders. Debtor appealed, asserting denial of due process by *sua sponte* conversion without notice and hearing called for under Section 1112. BAP noted that Debtor received written and oral notices that the case could be converted if it was not prosecuted or for noncompliance with orders. Court also conducted hearing on motion to dismiss or convert on day after *sua sponte* conversion. Debtor did not argue conversion was not warranted, and Debtor could not demonstrate compliance with orders.

Oliver v. U.S. Trustee (In re Oliver), Case No. CC-11-1482-PaKiRn, 2012 WL 5232201 (BAP 9th Cir. Oct. 23, 2012) (mem.; aff'g Tighe, J.)

Affirming dismissal of Chapter 13 case for failure to attend fourth 341 meeting or make plan payments. Two absences from creditor meeting were excused due to court's clerical errors. Debtor also failed to attend originally scheduled 341 meeting, submitted a letter to the court two days later, and the court entered an order rescheduling the 341 meeting. BAP also ruled on the merits rather than dispose of as moot because on post-appellate events. BAP noted Debtor had filed another Chapter 13 petition, giving her an opportunity to reorganize. Debtor's secured lender also had obtained stay relief in both cases permitting it to evict Debtor. Neither order was appealed.

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DISCHARGE(ABILITY)

McCarthy v. Nature's Wing Fin Design, LLC (In re McCarthy), ___ Fed. Appx. ___, Case No. 11-60069, 2012 WL 4912075 (9th Cir. Oct. 9, 2012) (mem.), aff'g Case No. CC-10-1445-PaMkB, 2011 WL 4485866 (BAP 9th Cir. Aug. 10, 2011) (per curiam; Markell, J., on panel)

Affirming determination of nondischargeable debt. BAP did not abuse discretion by declining to take judicial notice of facts within an order from another action involving the appellee.

Pequignot v. Deutsche Bank Nat'l Trust Co. (In re Pequignot), ___ Fed. Appx. ___, Case No. 10-35923, 2012 WL 4917029 (9th Cir. Oct. 9, 2012) (mem.), aff'g Case No. 08-18197TTG, 2010 WL 3605326 (W.D. Wash. Sept. 10, 2010)

Affirming denial of order denying debtor's objection to secured claim. Debtor failed to come forward with evidence to rebut proof of claim's prima facie validity.

Zhong v. Li (In re Li), Case No. CC-11-1490-HTaMK, 2012 WL 5419068 (BAP 9th Cir. Nov. 7, 2012) (mem.; Markell, J., on panel; aff'g Donovan, J.)

BAP affirmed denial of motion for default judgment on nondischargeability action. Although creditor obtained default, his complaint alleged of postpetition conduct related to the prepetition lease of Appellant's property. The BAP noted that there was no allegation of reliance on a fraudulent statement before executing the lease.

Saccheri v. St. Lawrence Valley Dairy (In re Saccheri), Case No. EC-12-1269-JuKiD, 2012 WL 5359512 (BAP 9th Cir. Nov. 1, 2012) (mem., aff'g in part and rev'g in part Ford, J.)

BAP affirmed nondischargeability for fraud under Section 523(a)(2) and embezzlement under Section 523(a)(4). Debtor, an attorney, managed a dairy that he bought with several clients, took funds, entered a settlement agreement with the dairy, defaulted, and filed for bankruptcy. BAP affirmed numerous factual determinations and fraud elements, including the investors' justifiable reliance on their long-time attorney. BAP overrule defalcation finding because president is not a fiduciary under California law. However, BAP affirmed judgment under Section 523(a)(4) based on established embezzlement. BAP affirmed award of prejudgment interest as reasonable based on rate under settlement agreement. But BAP reversed as to attorney's fees because the issues litigated involved fraud and nondischargeability, and not the terms of the settlement agreement that contained the attorney's fee clause.

DenBeste v. Power (In re DenBeste), Case No. NC-12-1087-HPaMk, 2012 WL 5416513 (BAP 9th Cir. Nov. 6, 2012) (mem.; Markell, J., on panel), aff'g Adv. Pro. 11-1184, 2012 WL 1067702 (Bankr. N.D. Cal. March 19, 2012) (Jaroslovsky, J.)

Affirming denial of discharge and prior denial of Debtor's motion to dismiss. Adversary filed based on Debtor's failure to schedule assets or timely and completely supplement the schedules after the assets came to light. On the dismissal, BAP affirmed that a creditor has standing to prosecution action under Section 727. On the denial of discharge, the BAP found the errors in the schedules filed under oath and the sworn testimony at the creditors meeting were sufficient to warrant the denial, and BAP did not err in rejecting Debtor's claim that omissions were inadvertent.

Artesia Group, LLC v. Ohler (In re Ohler), Adv. Pro. 11-01376-BAM, 2012 WL 5408771 (Bankr. D. Nev. Nov. 6, 2012) (Markell, J), available at http://www.nvb.uscourts.gov/downloads/opinions/bam-11-01376-artesia-ohler.pdf

Although a prebankruptcy default judgment for discovery sanction may be grounds for actually litigated and issue preclusion in a nondischargeability case, the creditor still must prove that the fraud was necessarily determined by the trial court. Judge Markell held that default judgment did not expressly find that debtor had committed fraud and therefore was not preclusive as to the nondischargeable claims under Section 523(a)(2)(A) & (B). The application for default judgment did not seek punitive damages, there was no finding of fraud in the judgment, and the judgment did not indicate what facts were essentially for the determination.

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Shapiro v. Smith (In re Smith), ___ B.R. ___, Adv. No. 11-01339-MKN, 2012 WL 5353381 (Bankr. D. Nev. Oct. 2, 2012) (Nakagawa, C.J.)

Judge Nakagawa overruled the Chapter 7 trustee's objection to discharge and denied his claim for unjust enrichment. In Debtor/Defendant's previous Chapter 13 case, she failed to disclose her interest in real property or obtain Chapter 13 court approval for its sale. The Chapter 7 trustee sought to deny discharge due to a false oath in a prior case under Sections 727(a)(4) and 727(a)(7). After trial with the debtor as the only witness, the Court held that the trustee failed to establish that Debtor knowingly made a false oath or had actual fraudulent intent in omitting the property. The Debtor testified that she had disclosed the property to her Chapter 13 counsel and thought she signed papers that reflected her interest in the property. The Court also noted Debtor's testimony that she understood the Chapter 13 case needed to be dismissed prior to the sale of the property, and that the sale was disclosed in her Chapter 7 case. Based on the same factual circumstances, the Court held that Debtor was not unjustly enriched.

Waugh Real Estate Holdings, Inc. v. Daecharkhom (In re Daecharkhom), ___ B.R. ___, 2012 WL 5353363 (Bankr. D. Nev. Oct. 4, 2012) (Collins, J., sitting by designation)

The Court held that the debt from a home loan was dischargeable over the lender's objection under Section 523(a)(2). The lender asserts that the borrower overstated her income on her loan application and falsely attested that the property would be used as the principal residence. The Court held that the lender failed to offer sufficient evidence of reliance on the statements, and that there was insufficient evidence of intent to deceive the lender. The Court noted that Debtor's primary language is Thai and found that he has a language barrier, noting that the Court *sua sponte* stopped his testimony to obtain a translator to assure that Debtor understood the questions at trial. The Court found that the loan application appears to have been filed out by someone else at a different time, and that it was doubtful that Debtor knew what he was signing. The Court also held that Plaintiff failed to prove reliance since Plaintiff was an assignee of the note and did not present any evidence from the original lender. The Court could not find any case that allowed intent to be inferred from the mere fact that the documents were in the loan file. The Court also rejected the Plaintiff's arguments re the residency statement since Debtor testified he lived in the property and Plaintiff failed to establish any reliance on the original loan file.

INVOLUNTARY PETITION

Hilrock Corp. v. Imani Fe, LP (In re Imani Fe, LP), Case No. CC-12-1111-HHaMk, 2012 WL 5418983 (BAP 9th Cir. Nov. 7, 2012) (mem.; Markell, J., on panel; aff'g P. Carroll, J.)

Bankruptcy Court dismissed involuntary petition and subsequently awarded debtor's motion for fees. On appeal, BAP held creditors only appealed fee order, that the dismissal order was a final order, and that the BAP had no jurisdiction to consider the dismissal order. BAP held that Section 303(i)'s award of fees is an independent, substantive right, not subject to the timelines for filing fee applications under the Federal Rules of Bankruptcy Procedure or the local rules. BAP also held that because the Bankruptcy Court already ruled on certain matters on summary judgment of the petition, the creditors could not relitigate them in contesting the fees. BAP also affirmed that setoff does not apply to the award of fees and any debt owed to the petitioning creditors.

JURISDICTION

Litigation Trust of Rhodes Cos. v. Rhodes (In re Rhodes Cos.), Case No. 2:12-cv-01272-MMD-VCF, 2012 WL 5456084 (D. Nev. Nov. 7, 2012) (Du, J.)

Judge Du held that the Bankruptcy Court lacks constitutional authority to enter final judgments on claims of fraudulent conveyance, following her decision in *Rosenberg v. Bookstein*, 479 B.R. 584 (D. Nev. 2012) (and noting the question is pending before the Ninth Circuit in Bellingham Insurance). Judge Du also denied a motion to withdraw the reference, noting the Bankruptcy Court can handle pretrial matters and held that the Bankruptcy Court is a more competent venue for pretrial matters involving core claims.

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LITIGATION

Hernandez v. IndyMac Bank, Case No. 2:12-cv-369-MMD-CWH, 2012 WL 5381533 (D. Nev. Oct. 31, 2012) (Du, J.), adopting holding from 2012 WL 3860646 (D. Nev. Sept. 5, 2012) (Du, J.)

Judge Du denied defendant/lender's motion to dismiss that asserted plaintiff was judicially estopped from bringing lending claim since it was not disclosed in plaintiff's prior bankruptcy. Judge Du previously granted a TRO over the same objection, noting here that a debtor cannot be presumed to have understood the nature of the claims at issue in his bankruptcy case before or during his bankruptcy filing.

Blanchard v. JP Morgan Chase Bank, Case No. 2:11-cv-1127 JCM-PAL, 2012 WL 5198468 (D. Nev. Oct. 18, 2012) (Mahan, J.)

Plaintiff was judicially estopped from pursuing claims of predatory lending that were not scheduled in Plaintiff's previous bankruptcy case. Court held that at the time of the bankruptcy debtor was aware of the facts of his claims.

PROPERTY OF THE ESTATE

Slates v. Reger (In re Slates), Case No. EC-12-1168-KiDJu, 2012 WL 5359489 (BAP 9th Cir. Oct. 31, 2012) (mem., aff'g in part and vac'g & rem'g in part Klein, J.)

Debtor scheduled possible disability benefits and exempted the proceeds under California law. But Debtor did not exempt the proceeds from an administrative proceeding to be filed over his disability benefits. The Trustee sought to settle the subsequent litigation under Rule 9019. BAP affirmed that because the asserted exemption in pension benefits did not adequately describe the litigation claim, which sounded in tort, and was not exempt. BAP also affirmed that litigation claim was not abandoned under Section 554 based on the court's approval of the trustee's final report, since the case remained open. BAP rejected argument that trustee was not diligent in pursuing the claim, particular given the ambiguity of the schedules. However, case remanded because there were no findings of fact or conclusion of law to justify the settlement under Rule 9019 or a sale of the claim under Section 363(b).

REMAND

Wood v. Goulart (In re Wood), Case No. EC-12-1108-JuKiD, 2012 WL 5359514 (BAP 9th Cir. Oct. 31, 2012) (mem., aff'g Bardwil, J.)

Bankruptcy court dismissed Chapter 11 case, BAP affirmed, and further appeal was pending before Ninth Circuit. A year after dismissal, Debtor removed a state court action against him for unlawful detainer. The Bankruptcy Court remanded the matter for lack of jurisdiction because the Chapter 11 case was dismissed prior to removal. BAP held that Bankruptcy Court had jurisdiction to determine whether the removed case was properly before it; pending appeal did not divest bankruptcy court of matters not on appeal. BAP also held that Bankruptcy Court may not exercise discretion to retain jurisdiction over a "related to" proceeding initiated after dismissal of case. Such a proceeding cannot conceivably have any effect on the estate.

SECURED CLAIMS

Bishay v. Marshack (In re Bishay), Case No. CC-12-1143-TaMkH, 2012 WL 5236169 (BAP 9th Cir. Oct. 24, 2012) (mem.; Markell, J., on panel; aff'g Smith, J.)

Affirming that Appellant's trust deed was junior to a subsequently recorded trust deed based on a subordination agreement, even though the agreement could not be located and was never introduced at trial. BAP affirmed that based on Appellant's admission of the agreement, it was not necessary for the court to determine the terms of the agreement with certainty. Questions about terms only apply to the scope of a disputed subordination.

Wilmington Trust FSB v. A1 Concrete Cutting & Demolition, LLC (In re Fontainbleau Las Vegas Holdings, LLC), 128 Nev. A.O. 53, ___ P.3d ___, Case No. 56542, 2012 WL 5285396 (Oct. 12, 2012) (Cherry, J.; en banc)

Mechanic's liens are not equitably subrogated under NRS 108.225 to replacement financing that is recorded after the creation of mechanic's lien is created. The Court held that equitable principles cannot trump statutory language. The Court also held that a contract that purports prospectively to subordinate a mechanic's lien claimant's rights is not enforceable. However, a mechanic's lien claimant may waive its rights under NRS 108.2457.

NEW NEVADA & NINTH CIRCUIT BANKRUPTCY DECISIONS*

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The biggest news comes in the form of the Ninth Circuit's decision in *Bellingham Insurance*. The Circuit held that bankruptcy courts lack constitutional authority to decide federal fraudulent conveyance claims, unless (1) the parties consent explicitly or implicitly or (2) the claim is necessary to resolve a claim objection. The Circuit also held that the bankruptcy court can continue to preside through the point of submission of proposed findings of fact and conclusions of law. This appears to be consistent with practice as it has developed in the District of Nevada, both by the bankruptcy and district courts. Unresolved and next? The Bankruptcy Court's constitutional authority to decide other claims such as preference claims.

Don't forget the American Bankruptcy Institute's first ever Western Consumer Bankruptcy Conference is in Las Vegas on January 21, 2013. There's more on ABI's website, http://www.abiworld.org/WCBC13.

APPEALS

Stephens v. Smith (In re Gomez), Case No. CC-12-1144-DHKi, 2012 WL 5938722 (BAP 9th Cir. Nov. 28, 2012) (mem.; vac'g & rem'g Donovan, J.)

BAP vacated and remanded order denying motion for reconsideration for failure to failure to provide findings of fact and conclusions of law. FRBP 7052, 9014. Bankruptcy Court denied motion with handwritten "Motion denied" entered on top of motion papers without hearing.

AUTOMATIC STAY

First Street Holdings NV, LLC v. MS Mission Holdings, LLC (In re First Street Holdings NV, LLC), Case No. NC-11-1729-MkHPa, 2012 WL _____ (BAP 9th Cir. Dec. 5, 2012) (mem.; Markell, J., on panel; vac'g & rem'g Efremsky, J.)

BAP vacated order granting stay relief on grounds that debtors were denied due process with exclusion of non-appraiser expert witnesses. Court orally set deadline to disclose such experts but did not include it in written scheduling order issued two days later. Due to inconsistent positions taken by Court in oral and written orders, BAP held exclusion of evidence constituted denial of due process. Remanded to Bankruptcy Court, which could take up exclusion on other alternative grounds such as hearsay.

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* This memo does not necessarily reflect the views of Mr. Bubala, Armstrong Teasdale LLP, or their clients. The comments are intended to be of a general nature only, do not constitute legal advice, and are not intended to be confidential. No recipient may rely on them for any legal purpose, including creating an attorney-client relationship.

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Panel found "little satisfaction" in proceeding with its ruling as not moot. Lender had obtained stay relief and foreclosed on real property. However, the lender had not foreclosed on the membership interests of borrowers, so the panel felt compelled to proceed because it was possible there was some relief to be granted.

CHAPTER 13

Meyer v. UST – U.S. Trustee (In re Scholz), ___ F.3d ___, Case No. 11-60023, 2012 WL 5519600 (9th Cir. Nov. 15, 2012) (Watford, J.), rev'g 447 B.R. 887 (BAP 9th Cir. 2011) (Markell, J.; Zive, J., on panel), which vac'd & rem'd in part 427 B.R. 864 (Bankr. E.D. Cal. 2010) (Lee, J.)

Chapter 13 Debtor, a retired railroad employee, excluded annuity payments received under the Railroad Retirement Act from his current monthly income. Bankruptcy Court confirmed plan. BAP held that there was no statutory basis to exclude RRA annuity income from current monthly income. BAP also held that because the RRA contains an "anti-anticipation clause," the income cannot be anticipated and included in projected disposable income to pay creditors through plan. Circuit reversed. RRA used "anticipation" as a term of art from trust law and interpreted by the U.S. Supreme Court, essentially preventing distribution before funds are due. While the Supreme Court in *Hamilton* (2010) gave bankruptcy court's discretion to consider changes to projected disposable income, there was no argument made that debtor's RRA annuity income would change in the future.

BAC Home Loans Servicing, LP v. Nieto (In re Nieto), Case No. NV-11-1124-JuPaD, 2012 WL _____ (BAP 9th Cir. Nov. 28, 2012) (mem., aff'g Markell, J.)

Affirming confirmation of Chapter 13 plan. Bankruptcy Court ruled that date to determine principal residence was confirmation date and confirmed plan. While appeal was under submission, BAP held that petition date was the proper date to determine principal residence. *In re Benafel*, 461 B.R. 581 (BAP 9th Cir. 2011). But BAP affirmed here because it was undisputed that even at petition date, Debtor no longer lived as property in question. Appellant/Lender had argued that because prepetition loan documents identified the property as principal residence, Debtor was unable to change that designation by moving out and renting the property. Appellate opinion does not address Lender's argument except to note that Bankruptcy Court ruled for Debtor in underlying dispute.

CONTRACTUAL INTERPRETATION

Spiegel v. Wright Grandchildren, L.P. (In re Spiegel), ___ Fed. Appx. ___, Case No. 11-60024, 2012 WL 5489951 (9th Cir. Nov. 13, 2012) (mem.), rev'g Case No. EC-10-1228-DHKi, 2011 WL 3299105 (BAP 9th Cir. March 1, 2011) (mem., aff'g D. Russell, J.)

Circuit held that contractual language was not ambiguous and required lender to release deed of trust on secondary piece of property if debtor had tendered $150,000 to lender. BAP had affirmed that release also was subject to condition that Loan-To-Value of remaining property was less than 50 percent.

DISCHARGE(ABILITY)

Cha v. Rappaport (In re Cha), ___ B.R. ___, Case No. NC-11-1579-JoJuKi, 2012 WL 604413 (BAP 9th Cir. Dec. 5, 2012) (W. Johnson, J., aff'g Jaralovsky, J.)

BAP affirmed nondischargeable debt owed by Debtors for unpaid rent for lease obtained by false financial statements. Bankruptcy Court and BAP rejected argument that because property was in title of Appellee's father's company, Appellee could not have prosecuted nondischarability action. Appellee testified to assignment of rights to him but did not have assignment as exhibit at trial and Bankruptcy Court declined to take judicial notice of prior filing. But BAP found no contrary evidence. Prior state court judgment for unpaid rent, awarded to Appellee, also was preclusive as to rights to prosecute nondischargeability action.

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Garcia v. Gertes (In re Gertes), Case No. CC-12-1257-HKiD, 2012 WL 6050535 (BAP 9th Cir. Dec. 5, 2012) (mem., aff'g B. Russell, J.)

BAP affirmed credibility determination on whether debtor made a false oath in the scheduling of property. Appellant had loaned money on the belief it would be used to fund development on real estate project owned by Debtor. Documents recorded with county reflected Debtor as sole property owner. However, Debtor scheduled only a one-third interest in property. Based on evidence presented a trial, BAP affirmed that Bankruptcy Court did not err in finding that Debtor did not make material omission with schedule.

Antioch Cmty. Fed. Credit Union v. Pagnini (In re Pagnini), Case No. NC-12-1085-PaMkH, 2012 WL 5489032 (BAP 9th Cir. Nov. 13, 2012) (mem.; Markell, J., on panel; aff'g Jellen, J.)

BAP affirmed that lender failed to show damages were proximately caused by Debtor's fraud and, thus, the debt was dischargeable. Debtor sold vehicle with secured creditor's permission for 40% of debt, then had loan written down with replacement collateral vehicle. But Debtor misrepresented condition and, thus, value of replacement vehicle. But only collection right that was lost was repossession of vehicle. BAP deferred to evidentiary determinations that there was no evidence that bank could have sold the vehicle for more and that Debtor did not have funds to pay more.

Hasnain v. Chadd (In re Hasnain), Case No. NC-11-1631-DJuKi, 2012 WL 5471453 (BAP 9th Cir. Nov. 9, 2012) (mem.; aff'g S. Johnson, J.)

Affirming nondischargeability based on preclusive effect of confirmed arbitration award for violation of California securities laws, fraud and conversion. Debt arose when Debtor's husband was sued over business venture and Debtor was named a defendant even though she was not a party to the business and had not signed documents with the business. Debtor willingly subjected herself to the debt because she moved to compel arbitration and participated in the arbitration. BAP also rejected argument that matters were not actually litigated because she thought she was only a witness. BAP notes Debtor was represented by counsel as a defendant in the action. BAP also held the issues of fraud and securities violations were "necessarily decided" in the arbitration, defining the terms as "the issues at hand were not 'entirely unnecessary' to the judgment in the prior proceeding." Debtor had not appealed from the confirmed arbitration award, and she could not relitigate the disputes in the nondischargeability action.

EVIDENCE

Tishgart v. Hoffman (In re Tishgart), Case No. NC-12-1160-PaMkH, 2012 WL 5489034 (BAP 9th Cir. Nov. 13, 2012) (mem.; Markell, J., on panel; aff'g Jaroslovsky, J.)

Lengthy discussion on the standards applied in sustaining the Bankruptcy Court's refusal to set aside admissions arising from Debtor's failure to respond to request for admissions.

EXEMPTIONS

Diener v. McBeth (In re Diener), ___ B.R. ___, Case No. CC-12-1093-KiNoPa, 2012 WL 5874648 (BAP 9th Cir. Nov. 21, 2012) (Kirscher, J., aff'g Riblet, J.)

Affirming order sustaining trustee's objection to debtor's exemption as funds from Marital Settlement Agreement were part of property settlement. The MSA was unambiguous with its language that it did not provide for any alimony that might be entitled to exemption, contrary to debtor's argument. Bankruptcy Court erred in admitting extrinsic evidence of parties' intentions with MSA, but error was harmless based on sustained objection. BAP also held that Bankruptcy Court erred in applying standards from *In re Combs* (BAP 1989), which only applies in nondischargeability cases under Section 523(a)(5). BAP discussed differences between a debtor trying to discharge obligation under support agreement (*Combs*), and debtor trying to exempt proceeds of support payment (current case).

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Altick v. Green (In re Altick), Case No. NC-12-1121-PaMkH, 2012 WL 5503429 (BAP 9th Cir. Nov. 13, 2012) (mem.; Markell, J., on panel; aff'g Jaroslovsky, J.)

Affirming sustained objection to amended exemption asserted only after Trustee moved to sell the property. Debtor had confirmed a Chapter 11 plan with assertion that his interest in a land-holding LLC was worthless. Case was converted to Chapter 7, and coowners in LLC offered to purchase interest. Debtor then asserted wildcard exemption, and trustee objected that the amended exemption was claimed in bad faith due to prior conduct.

JURISDICTION

Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), ___ F.3d ___, Case No. 11-35162, 2012 WL 6013836 (9th Cir. Dec. 4, 2012) (Paez, J., aff'g Pechman, J.)

Following additional briefing regarding *Stern*, the Ninth Circuit held that Bankruptcy Courts lack constitutional authority to enter final judgment on a federal fraudulent conveyance claim as it does not involve a public right, IF it is not necessary for determination of a defendant's claim against the estate. The same might be restated as Bankruptcy Courts do have constitutional authority to enter final judgment on a federal fraudulent conveyance claim even though it does not involve a public right, IF it is necessary for determination of a defendant's claim against the estate. The Ninth Circuit further held that the Bankruptcy Court retains and has statutory authority to hear such matters and make reports and recommendations for de novo review by the Article III U.S. District Court. All this said, the Circuit held that parties can waive their right to Article III adjudication, including waiver implied by conduct.

LITIGATION

Harris v. Bank of Am., N.A. (In re Harris), Case No. CC-11-1600-DHKi, 2012 WL 5986534 (BAP 9th Cir. Nov. 29, 2012) (mem., aff'g Bluebond, J.)

Affirming dismissal of debtor's litigation (on third amended complaint) over wrongful foreclosure for failure to state a claim. As to fraud claim, Debtor failed to allege when, where or how, and thus did not allege the specific circumstances. As to wrongful foreclosure, naked assertion without supporting facts is insufficient to survive dismissal. BAP affirmed rejection of factual allegation in debtor's opposition to motion to dismiss as not included in the complaint. BAP also affirmed that Debtor failed to provide sufficient evidence of offer of tender. Dismissal with prejudice also affirmed since Bankruptcy Court already had permitted three amended complaints.

United Here Health v. Tinoco's Kitchen, LLC, Case No. 2:11-cv-02025-MMD-GWF, 2012 WL 5511639 (D. Nev. Nov. 13, 2012) (Du, J.)

Based on plaintiff's motion for leave to amend to clarify that they are not seeking injunctive relief against debtor defendant in violation of the automatic stay, Court granted injunctive relief.

PROPERTY OF THE ESTATE

Tishgart v. Hoffman (In re Tishgart), Case No. NC-12-1160-PaMkH, 2012 WL 5489034 (BAP 9th Cir. Nov. 13, 2012) (mem.; Markell, J., on panel; aff'g Jaroslovsky, J.)

Affirming turnover order. Chapter 7 debtor was an attorney who had prepetition clients with contingency fee agreements. Debtor received payments postpetition. BAP considered whether the payments were the result of postpetition work or simply the result of the prepetition contingency fee agreement and prepetition work.