

To: NNBBBA Membership
From: Louis M. Bubala
Subject: New Bankruptcy Decisions of Note
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Below are recent bankruptcy decisions from the circuit, BAP, district and bankruptcy courts that have crossed my desk, and links to find the slip copies when available. LMB

This month features 4 decisions involving Nevada's judges:

- 1 opinion from Judge Jones
- 1 opinion from Judge Markell
- 1 opinion effectively affirming Chief Judge Nakagawa
- 1 opinion adopting per curiam BAP opinion with Judge Markell on panel

Ninth Circuit--Published

<http://www.ca9.uscourts.gov/opinions>

Western Aircraft, Inc. v. Lisowski (In re Silver State Helicopters, LLC), ___ F.3d ___ (9th Cir. May 28, 2009), *appeal from* Case No. BK-S-08-10936-MKN (Bankr. D. Nev. Sept. 16, 2008) (Nakagawa, C.J.), *available online at* <http://www.nvb.uscourts.gov>.

Circuit denied permission for direct appeal under BAPCPA. 28 U.S.C. § 158(d)(2). Issue presented was timing of payment of administrative non-residential rent prior to lease rejection. Judge Nakagawa denied creditor's demand for immediate payment of administrative rent, holding that timing of payment was within court's discretion. Although Judge Nakagawa certified for appeal the question of whether Sec. 365(d)(3) requires immediate payment of accrued rent, circuit concluded issue was within bankruptcy court's discretion and was unlikely to have a substantial impact on the case proceedings.

Cunning v. Rucker (In re Rucker), ___ F.3d ___ (9th Cir. June 26, 2009)

Circuit articulated new "totality of the circumstances" standard in determining whether debtor's contributions to retirement plans are exempt from execution under Cal. Civ. Proc. Code § 704.115(b). Debtor owed \$6.5-million judgment, made almost no payments, and contributed \$1.2 million to retirement plans in entities he owned, controlled, and was sole plan member. Debtor's contributions exceeded IRS allowable contributions, exceeded salary in certain years, and were underreported to IRS. Debtor also made statement that payment of debt "would be like paying into a black hole."

Bankruptcy court sustained objection to exemption, finding that debtor primarily used plans to shield assets and that debtor lacked credibility. On appeal, district court reversed on ground that plans used primarily for retirement purposes, even if they also shielded assets. Circuit rejected the district court's "either/or" analysis of retirement v. shield.

Circuit driven by precedence that review of purpose of retirement plan is question of fact and, thus, reviewed for clear error. District court reviewed *de novo* on theory that exemption is application of law to fact. Circuit held *de novo* review not applicable because of contested facts concerning purpose of retirement plan, and that bankruptcy court's finding on that point is entitled to deference in absence of a clear error.

Debtor introduced evidence that he did not make withdrawals from plans except for small constructive rent payment. Circuit held that lack of withdrawals or loans does not conclusively establish plan primarily established for retirement, and instead applied totality of circumstances.

Batlan v. Bledsoe (In re Bledsoe), ___ F.3d ___ (9th Cir. June 25, 2009) (O'Scannlain, J., concurring and dissenting in part)

Holding that a marital dissolution judgment conclusively establishes "reasonably equivalent value" such that a transfer cannot be avoided under Sec. 548(a)(1)(B) absent fraud, collusion or violation of state law. Also holding that avoidance must allege extrinsic fraud to avoid dissolution judgment under Sec. 544 and Oregon's Uniform Fraudulent Transfer Act.

State court entered default judgment against debtor for failure to participate in divorce proceedings, resulting in \$800 distribution to debtor and \$94,000 distribution to ex-husband. Debtor filed Ch. 7 petition, and trustee sought to avoid transfers.

Trustee only alleged constructive fraud based on theory that debtor received inadequate consideration in divorce. Thus, bankruptcy court properly granted summary judgment to ex-husband on Sec. 544 claim because Oregon requires allegation and evidence of extrinsic fraud. As to Sec. 548, circuit adopted reasoning from *BFP v. RTC*, 511 U.S. 531, 533 (1994), that a foreclosure state conducted in compliance with state law conclusively establishes an exchange for reasonably equivalent value. Circuit noted state-law interests in both mortgages and marriage. Circuit also noted trustee's argument favored a policy that would allow debtors to challenge divorce division in bankruptcy anytime the division was unequal.

Judge O'Scannlain concurred in result, but dissented that a marriage dissolution does not constitute a transfer subject to avoidance under Sec. 548. He argued that a division of marital property merely establishes ownership of property, not its value.

Wirum v. Warren (In re Warren), ___ F.3d ___ (9th Cir. June 18, 2009)

Holding that bankruptcy court has discretion after the fact to waive the requirement that debtor file certain financial information under Sec. 521(a)(1), and is not obligated to dismiss the case if the information is not filed within 45 days of petition as otherwise required by Sec. 521(i)(1). Case arose when debtor filed Ch. 7 petition to avoid seizure of funds owed for child support, then sought to dismiss the case while sanctions were pending and trustee investigated assets. Bankruptcy court relied on statutory language of Sec. 521(a)(1) that requires filing of financial information unless the court "orders otherwise." Circuit noted that "orders otherwise" language predates BAPCPA's dismissal provision of Sec. 521(i)(1). If dismissal was mandatory despite "orders otherwise" language, debtors could manipulate and abuse system for dismissal by refusing to provide required financial information.

Footnote discusses proper usage of *nunc pro tunc* for clarification rather than backdating.

Egebjerg v. Anderson (In re Egebjerg), ___ F.3d ___ (9th Cir. May 29, 2009)

Holding that debtor's repayment of 401(k) loan is not a monthly payment on account of secured debtor or other necessary expense. Thus, the 401(k) "loan" is not a debt that can be deducted from monthly income to determine disposable monthly income under Sec. 707(b)(2). BAPCPA did not change that, and circuit noted other Congressional action in Code with other specific 401(k) provisions. Repayment also specifically excluded from IRS definition of "necessary expense." Sec. 707(b)(2)(A)(ii), *incorp'g* IRS Manual Sec. 5.15.1.23. Court rejected prior case law allowing repayment under "totality of circumstances," as primary evaluation now must be presumptive abuse. Circuit also adopted majority view that 401(k) repayment did not create special circumstance contrary to presumptive abuse. Sec. 707(b)(2)(B). With that adjustment to debtor's petition, the filing of the case was presumptively abusive under the means test, and the Circuit affirmed dismissal of debtor's petition.

Ninth Circuit--Unpublished

<http://www.ca9.uscourts.gov/memoranda>

Cutter v. Superwash Nev., Inc. (In re MLCI, Inc.), ___ Fed. Appx. ___, Case No. 08-15404 (9th Cir. June 18, 2009) (per curiam), *aff'g & adopting* Case No. AZ-07-1189-PaMkKu (BAP 9th Cir. Jan. 8, 2008) (unpublished; per curiam; Markell, J., on panel).

Affirming dismissal of adversary proceeding removed from state court. Holding that bankruptcy court had jurisdiction post-confirmation over claims filed by debtor's principals when claims implicated settlement agreement approved as part of plan confirmation. Bankruptcy court also had "related to" jurisdiction based on complaint's claims that actually belonged to debtor, and "supplemental" jurisdiction for principal's claims. Principals' proposed amended complaint that eliminated claims related to bankruptcy (and the basis of principals' motion for remand) did not deprive court of jurisdiction, as jurisdiction is determined at time of removal.

Bankruptcy court also properly applied claim preclusion to dismiss principals' claims that could have been decided as part of bankruptcy, but were not decided prior to confirmation order. BAP noted unity of interest in claims that could have been litigated by debtor prior to confirmation, and claims that debtor's principals brought after confirmation.

D. Nev.

3685 San Fernando Lenders, LLC v. Compass USA SPE, LLC (In re USA Commercial Mortgage Co.), Case No. 2:07-cv-892-RCJ-GWF, 2009 WL 1490568 (D. Nev. April 20, 2009) (Jones, J.)

Court acknowledged motion for substitution of parties based on assignment, but withheld approval of assignment of substantive rights. Movant (Silar) financed defendant/counter-claimants' (Compass) purchase of loan-serving contracts for loans funded by plaintiffs/counter-defendants. Movant foreclosed on Compass's collateral, and asserted they assigned servicing rights to related third party (Asset Recovery). Silar and Asset Recovery then moved to substitute Asset Recovery for Compass as to contractual claims. FRCP 25(c). Because there was an unresolved factual issue of whether the lenders had already terminated the servicing rights, the court declined to rule on whether Silar had anything to foreclose upon and assign to Asset Recovery. Thus, the court "acknowledged" the motion, but did not approve the assignment of the servicing rights.

Bankr. D. Nev.

In re Bissell, Case No. BK-S-05-17178-BAM, 2009 WL 1451646 (Bankr. D. Nev. May 20, 2009) (Markell, J.)

Ch. 13 Trustee moved to dismiss when debtors ran arrearage with plan payments. Debtors opposed, offering to extend plan period. Court granted motion, holding debtors did not comply with standards for plan modification. Sec. 1329; FRBP 3015(g).

Trustee offered to withdraw motion if debtors cured default, filed a modified plan or reached other stipulated resolution. Debtor instead proposed to extend plan period without plan modification, and trustee refused to stipulate to such resolution. Although the trustee and debtor had agreed to prior plan extension, the trustee no longer could agree because a change in office policy. Court rejected debtors' arguments that creditors would not have any grounds to object to the extension, on theory that creditors received same amount. Court held that argument ignores time value of money and potential increased risk of future default on plan. Court did not find any case law permitting extension without plan modification, and cited extensive case law requiring plan modification.

BAP--Unpublished

Rico Corp. v. Arundotech, LLC (In re Arundotech, LLC), Case No. CC-08-1282-PaDC (BAP 9th Cir. May 4, 2009) (per curiam)

Bankruptcy court abused discretion in conditioning stay relief with non-debtor's payment of 5/6th of arbitration cost. Debtor/supplier initiated prepetition arbitration against purchaser. Purchaser's counterclaim required arbitration before three-member panel rather than single arbitrator. Debtor/supplier then filed petition. Bankruptcy court held that because contract required parties to pay for own costs of arbitration, purchaser required to pay greater portion of arbitration because counterclaim increased number of arbitrator (3 arbitrator * 2 parties=6 payment portions; purchaser responsible for both portions of 2 additional arbitrators, plus half of original arbitrator; thus purchaser pays 5/6th of total arbitration).

BAP noted that bankruptcy court has discretion to reallocate arbitration costs if they "would significantly exceed those Debtor would have incurred litigating in bankruptcy court." However, nothing in record establishes arbitration costs, the amount of increased cost for arbitration panel, or the potential litigation cost. Thus, bankruptcy court did not identify basis for allocation of costs as condition for stay relief. Reversed and remanded to consider these issues.

Judge Carlson concurred in result only. He argues that either (1) the record contains sufficient evidence that the costs of arbitration sufficiently interfere with the objections of the Code that would require the matter to be tried before the bankruptcy court, or (2) the record does not and the court cannot reform the terms of the arbitration contract by reallocating the costs under the Federal Arbitration Act. Judge Carlson notes the absence of clear Ninth Circuit law involving conflicts between the Code and Arbitration Act. The majority also raises issues related to Judge Carlson's concurrence, but held they involve issues not on appeal.

Dourbetas v. Gionis (In re Gionis), Case No. CC-08-1201-LPaD (BAP 9th Cir. April 30, 2009) (per curiam)

BAP affirmed (1) that issue preclusion did not apply to impose summary judgment on creditor's claim of nondischargeability and (2) that debt was dischargeable. Parties entered stipulation and judgment in prior proceeding to resolve breach, intentional fraud, and negligent fraud from sale of note. BAP affirmed that fraud elements were not actually litigated, and that a finding of fraud was not necessary to support the judgment. Parties settlement agreement also stipulated to final approval by the bankruptcy court, thereby reserving issue of dischargeability. BAP held that bankruptcy court's factual findings concerning dischargeability were not clearly erroneous. Although there was circumstantial evidence of intent, BAP held court made reasonable inference from other evidence to find lack of intent and, thus, dischargeability.

Farnsworth v. Castro (In re Castro), Case No. CC-08-1274-DLPa (BAP 9th Cir. April 17, 2009) (per curiam)

Affirming violation of automatic stay when creditor refused to return vehicles levied prepetition, but reversing order of damages for debtors. Debtor filed Ch. 7 petition to stop sale of vehicles, then demanded vehicles based on vehicle exemption. Sec. 542. Creditor declined, asserting that Ch. 7 trustee did not request vehicles back. Bankruptcy Court and BAP held that although debtors were ineligible because they did not obtain credit counseling, ineligibility does not destroy jurisdiction. Sec. 109(h). Specifically, the stay arises upon the "commencement" of a case regardless of eligibility. Secs. 541; 362(a)(3); 362(b)(21). Bankruptcy court and BAP also held that creditor, not debtor, has burden to return property; creditor's remedy is to file a motion for stay relief. Fact that trustee did not request vehicles is not dispositive. With claimed exemptions, vehicles would be turned over to debtors. BAP also affirmed that although debtor's

case was dismissed for lack of credit counseling, debtors had standing to pursue their adversary proceeding for violation of automatic stay.

BAP reversed award of damages and fees. Estate property reverts with debtors 30 days after claim of exemption. In the interim, debtors have ownership interest and Ch. 7 trustee has possessory interest. In this case, the court dismissed the case for lack of credit counsel before the 30 days ran. Thus, debtors did not reacquire possessory interest that could be basis for damages as required under Sec. 362(k).

Hamel v. Lalliss (In re Hamel), Case No. AZ-08-1290-PaDJu (BAP 9th Cir. April 16, 2009) (per curiam)

Debtor's parents bought debtor's non-exempt assets from estate. Debtor's then-wife (a non-debtor) also obtained an order for abandonment of debtor's exempt assets (for distribution through divorce proceedings). Dispute arose between parents and ex-wife as to rights in property; parents filed turnover action; and court granted summary judgment for ex-wife on residence and household goods.

BAP affirmed summary judgment because parents failed to file adequate record. Bankruptcy court held hearings and made oral rulings reflected in minute orders. Neither parents nor ex-wife submitted transcripts from hearing, making it impossible for BAP to review the bankruptcy court's decision. BAP considered "informed review" based on briefs and descriptions of lower court, but still found the record insufficient to review.

BAP reversed sanctions against parents, holding that FRBP 9011(b)(2) only applies to counsel. BAP declined ex-wife's request that sanctions against parents be transferred to parents' counsel. Ex-wife did not cite authority, and raised issue for first time on appeal. Ex-wife still could move for sanctions against parents' counsel for relief from a final order and judgment. FRBP 9024, inc. FRCP 60(b).

Beckx v. Beckx (In re Beckx), Case No. CC-08-1193-CDPa (BAP 9th Cir. March 18, 2009) (per curiam)

Bankruptcy court was not clearly erroneous in holding that "equalizing payment" to ex-spouse as part of prepetition divorce was in the nature of a domestic support obligation and entitled to priority payment. Sec. 104(14A). Issue arose when both parties to divorce explicitly waived domestic support in divorce proceedings, the husband took the residence, did not make ongoing support obligations prior to waiver, and agreed to make an equalizing payment upon sale of house for unpaid support. However, debtor/ex-husband was unable to sell house because of real-estate collapse, filed a Ch. 13 petition, and scheduled equalizing payment as unsecured.

BAP held that pre-BAPCPA case law on the meaning of "in the nature of alimony, maintenance or support" remain good law. Thus, bankruptcy court may inquire in to intent of parties in divorce settlement. *Collier Family Law* ¶6.04[2]; *Friedkin v. Sternberg*, 85 F.2d 1400 (9th Cir. 1996) (later overruled on other grounds). BAP specifically cited Nevada division that parol evidence is admissible to ascertain meaning of support and look beyond labels. *Shaver v. Shaver*, 40 B.R. 964 (D. Nev. 1983), *aff'd*, 736 F.2d 1314 (9th Cir. 1984).

Bankruptcy court did not err with questions of ex-wife, who was appearing *pro se*. Debtor argued that court asked leading questions that gave appearance of advocacy. Debtor waived issue because he did not object at trial. BAP also held that debtor must show questioning "shows actual bias or leaving an abiding impression that the jury perceived an appearance of advocacy or partiality." Additionally, the manner in which the court takes evidence is in the nature of an evidentiary ruling, requiring appellant to show abuse of discretion and prejudice for the appellate court to overturn. Debtor did not assert prejudice or actual bias by court.

Held that debtor waived objection to ex-wife's non-compliance with local rules on trial procedure when debtor declined bankruptcy court's offer to reset the hearing date.