

2014 Ninth Circuit **Bankruptcy Year in Review**

A Two-Part Presentation for the Northern Nevada Bankruptcy Bar Association

Part I, Presented February 10, 2015
Decisions of the
U.S. District Court, District of Nevada
U.S. Bankruptcy Court, District of Nevada
Nevada Supreme Court

Part II, Presented April 14, 2015
Decisions of the
U.S. Supreme Court
U.S. Court of Appeals, 9th Circuit
U.S. Bankruptcy Appellate Panel, 9th Circuit

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Any errors in the summaries from Mr. Bubala are his fault. This covers decisions in 2014, although some may have been omitted or missed. Some decisions from Jan/Feb 2014 were in the 2013 program and not duplicated here. Appellate decisions limited to published, except for BAP decisions involving Nevada cases or judges.

Northern Nevada Bankruptcy Bar Association

Part II: 2014 Decisions of the U.S. Supreme Court U.S. Court of Appeals, Ninth Circuit U.S. Bankruptcy Appellate Panel, Ninth Circuit

****APPEALS/MOOTNESS/PLEADING STANDARD****

Rev Op Group v. ML Mgr. LLC (In re Mortgages Ltd.), 771 F.3d 623 (9th Cir. 2014)

Judge Wallace reversed and remanded declaratory judgment, holding Bankruptcy Court erred in disregarding lender's denials in answer as not plausible. Debtor arranged and serviced loans with direct, partial lenders, and plan assigned its rights to Appellee. Adversary sought to determine rights when Appellant denied granting agency to Appellee. The Bankruptcy Court held the denial was not plausible, entered declaratory judgment for Appellee under Arizona law and authorized several sales.

The Circuit held the appeal was not moot. Although the plan was substantially consummated with the transfer of rights to Appellee, the court still could craft a remedy addressing the rights of Appellant and Appellees for prospective sales. A further review of the plausibility of the Appellant's objections would provide an equitable remedy to Appellant. The Circuit the reversed, holding that the Bankruptcy Court erred in applying the plausibility standard. The Bankruptcy Court could not disregard Appellant's pleadings that it denied signing agency agreements under Rule 7008(a), unless there are specific findings the statement was in bad faith under Rule 7011 or should be struck under Civil Rule 12(f). No such findings were made.

****AUTHORITY/JURISDICTION****

Executive Benefits Ins. Agency v. Arkinson, 573 U.S. ___, 134 S. Ct. 2165 (2014)

Justice Thomas held that under a *Stern*, bankruptcy-related claim that the bankruptcy court lacks authority to enter final judgment, the bankruptcy court may issue proposed findings of fact and conclusions of law to be reviewed de novo by the district court. Obviously there is more to the opinion that has been well discussed.

Mastro v. Rigby, 764 F.3d 1090 (9th Cir. 2014), appeal from 465 B.R. 576 (Bankr. W.D. Wash. 2011)

Judge Tashima held that Bankruptcy Court did not exceed its jurisdiction when it entered final judgment on *Stern* claims for fraudulent transfer against a nonclaimant due the parties' consent. But the court reversed and remanded dismissal of the appeal arising from "fugitive disentitlement doctrine," where the district court dismissed appeal based to appellant's fleeing to France.

***Schultze v. Chandler*, 765 F.3d 945 (9th Cir. 2014)**

Judge Thomas affirmed Bankruptcy Court's subject matter jurisdiction over a post-confirmation legal malpractice action brought against the unsecured creditors committee's counsel, and dismissed for failure to state a claim. The plan failed, resulting in a reopening of the case and its conversion to Chapter 7. The former committee members faulted committee counsel for a lack of performance that permitted the plan failure and individually brought an action against committee counsel in state court. Counsel removed the action, and the bankruptcy court held the committee counsel did not owe a duty to the individual members of the committee. The Circuit also affirmed that the litigation was a core proceeding as it involved claims against estate professionals.

***Keys v. 701 Mariposa Project, LLC (In re Mariposa Project, LLC)*, 514 B.R. 10 (BAP 9th Cir. 2014)**

Holding Bankruptcy Court lacked personal jurisdiction due to service failure in debtor's claim objection to creditor claim filed by debtor. Bankruptcy court entered uncontested order disallowing the claim, then denied creditor's motion to set it aside. Panel held that although debtor had actual notice of the claim objection and not lost due process rights, personal jurisdiction was not satisfied since debtor had not participated in case or filed proof of claim. Therefore, service under Rule 7004(b)(1) was necessary in addition to notice under Rule 3007(a). Objection had been sent to creditor's address, from which debtor had already evicted the creditor. Although creditor received email from debtor about claim objection, panel declined to find substantial compliance in debtor's defective service in an an offensive stance (noting cases where defective service was honored to prevent dismissal for failure of service).

***Frates v. Wells Fargo Bank, N.A. (In re Frates)*, 507 B.R. 298 (BAP 9th Cir. 2014)**

Holding that debtors satisfied service requirements for motion to avoid judicial lien under Section 522(f). Bankruptcy Court had denied motion on grounds that notice did not identify property, and papers not served on counsel listed on recorded abstract of judgment. Panel held notice sufficient under Rule 9013 by stating debtor sought to avoid creditor's line, listing date line record, county where it was recorded, and the document number. The motion, which also was served with the notice, also identified the physical address of debtor's property. Service also proper on WF's CEO under Rule 7004(h), and WF's counsel had not appeared in the case such that counsel would be entitled to mail service under Rule 7004(h)(1). Panel provided detail rejection that notice was required on counsel listed on recorded abstract of judgment under California Civil Code of Procedure. There was no evidence that attorney that recorded abstract is authorized to accept service of the motion to avoid the lien. Service is governed by Rules 1001 and 7004, and does not require compliance with California Civil Code of Procedure.

****AUTOMATIC STAY****

***America's Serv'g Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, ___ F.3d ___ (Dec. 19, 2014), granting rehearing en banc (Set for week of June 15, 2015) from 765 F.3d 1096 (9th Cir. 2014), withdrawing & superseding 751 F.3d 966 (9th Cir. 2014), aff'g 473 B.R. 340 (BAP 9th Cir. 2012) (rev'g Judge Riegle)**

Can a debtor recover, as damages, attorneys' fees for defending against a creditor appeal for a finding that the creditor violated the automatic stay? An en banc panel will decide after a split three-judge panel held fees are recoverable in that circumstances, and panel decisions are not precedential. That said, the three-judge panel affirmed the BAP, holding that fees based on the use of the automatic stay as a shield rather than a sword, a distinction established in under *Sternberg* (9th Cir. 2010). Former Chief Judge Wallace dissented, arguing that *Sternberg* cannot be distinguished, such that fees are not authorized. Judge Wallace also raised issues on the powers of Article I and III courts, given the BAP's decision citing to its to its own decision that was rejected in *Sternberg*. An interesting question: Will the en banc panel reconsider the circuit's approach to attorneys' fees as damages under Section 362(k)(1) given the three-judge panel decisions in *Sternberg* and *Snowden*, including Judge Watford's concurrence in *Snowden* critical of *Sternberg*? The original *Schwartz-Tallard* decision in April 2014 was withdrawn and replaced in August 2014, as majority and dissent bolstered arguments. Judge Watford's concurrent in *Snowden* was entered two weeks later. The petition for rehearing en banc does not seek such a broad review, but the order granting the petition did not specify the issues.

***Snowden v. Check Into Cash of Wash. Inc. (In re Snowden)*, 769 F.3d 651 (9th Cir. 2014), on appeal from 422 B.R. 737 (Bankr. W.D. Wash. 2009)**

Judge McKeown affirmed that a creditor's conditional settlement offer does not resolve a stay violation, and debtor's attorneys fees are recoverable to bring the matter to resolution. Creditor offered settlement of \$1,415 based on funds obtained, bank fees, and three hours of time for debtor's counsel, with no admission of stay violation. Debtor made a verbal counteroffer for \$25,000 that was not accepted. The Circuit held there was no unconditional resolution, and it was necessary for debtor to go to court to end the stay violation. The stay violation ended the date of Bankruptcy Court found a violation of the automatic stay. Debtor's fees, however, are limited to efforts to remedying the stay violation, and are not recoverable in relation to her claim for emotional distress and punitive damages.

Judge Watford concurred that the circuit "has made calculating attorney's fees under 11 U.S.C. 362(k)(1) unnecessarily complicated." He noted the Circuit's *Sternberg* decision, prohibiting the recovery of fees after the violation has ended. He asserted that the more sensible reading of the statute allows recovery of fees both for remedying a violation and in bringing an action to recover the actual damages caused by the violation, consistent with the Fifth Circuit. Judge Watford agreed that under *Sternberg* the violation ended when the court ordered the return of the property as the creditor no longer contested its obligation to pay the sums or that it violated the automatic stay. After the ruling of a violation of the automatic stay, the creditors' only contested issues were the recovery for emotional distress and punitive damages.

***Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi)*, 764 F.3d 1168 (9th Cir. 2014), *aff'g* 473 B.R. 802 (D. Nev. 2012), on appeal following prior remand, 432 B.R. 812 (B.A.P. 9th Cir. 2010)**

Judge Bybee held that wages enter the bankruptcy estate and remaining property of the estate during the allowed period for objections to any claimed exemption, but revert automatically with the debtor if there are no objections. The matter arose from the bank's temporary administrative freeze on debtors' account upon the filing of bankruptcy and refusal to release the funds to the debtor. "Before the account funds reverted in the Debtors, they remained estate property, and the Debtors had no right to possess or control them. Accordingly, the operation of the administrative pledge could cause the Debtors no injury before the account funds reverted. After the account funds reverted in the Debtors, they lost their status as estate property and thus were no longer subject to § 362(a)(3). We therefore affirm the district court's order affirming the bankruptcy court's judgment of dismissal with prejudice."

***Ellis v. Yu (In re Ellis)*, ___ B.R. ___, Case No. NC-14-1052 (BAP 9th Cir. Nov. 19, 2014)**

Reversing in rem stay relief under Section 362(d)(4) as appellee was not a creditor with a claim secured by an interest in the property. Debtor filed five bankruptcy cases over six years, all dismissed. Lender foreclosed prepetition, obtained unlawful detainer judgment, and sold property to appellee with assignment of UD judgment. Appellee's ownership did not entitle him to in rem relief because he was not a secured creditor.

***Cruz v. Stein Strauss Trust # 1361 (In re Cruz)*, 516 B.R. 594 (BAP 9th Cir. 2014)**

Affirming retroactive annulment of automatic stay to ratify foreclosure sale. Real property interests had been fractionalized with multiple skeleton bankruptcy petitions filed. Debtor did not own interest when he filed, but acquired 5 percent interest postpetition the same day as the foreclosure sale. Panel noted that stay still applied for property of the debtor, but detailed circumstances that supported annulment of the stay.

***Yellow Express, LLC v. Dingley (In re Dingley)*, 514 B.R. 591 (BAP 9th Cir. 2014) (appeal from Beesley, J.; on appeal)**

In a decision predicated on precedence but primed by the panel for circuit review, the BAP reversed sanctions for creditor's participation in post-petition civil contempt proceedings in state court against debtor. Panel held that under 1977 Circuit decision under the Act, and followed by a 1982 BAP decision, civil contempt proceedings are not subject to the automatic stay. Judge Jury concurred to write that this is a court-created exception to the automatic stay that is not consistent with the modern breadth of the automatic stay.

***Eden Place, LLC v. Perl (In re Perl)*, 513 B.R. 566 (BAP 9th Cir. 2014)**

Property owner, who obtained prepetition unlawful detainer judgment against former owner, violated automatic stay with postpetition eviction because debtor still had protected interest in the property by virtue of possession under California law.

Hudson v. Martingale Invs., LLC (In re Hudson), 504 B.R. 569 (BAP 9th Cir. 2014)

Panel reversed a retroactive order terminating the stay, holding the bankruptcy court erred by admitting hearsay evidence. Dispute arose whether debtor's residence had been sold at foreclosure minutes before bankruptcy. Buyer was unaware of the bankruptcy, had filed an action to remove debtor, then moved for stay relief to proceed with action. Buyer provided declarations of employees for itself and foreclosure trustee, as custodians of records, citing a third-party report of the foreclosure including time of sale. They could authenticate the record, even from a third-party. But they did not testify that the buyer or trustee kept the report in the regular course of their business under FRE 803(6)(B). The Panel also noted an absence of evidence that they relied on the third-party report. Without those two points, the report was not authenticated and did not satisfy the business record exception to the hearsay rule.

****CHAPTER 11****

Wages v. J.P. Morgan Chase Bank, N.A. (In re Wages), 508 B.R. 161 (BAP 9th Cir. 2014), aff'g 479 B.R. 576 (Bankr. D. Idaho 2012)

Affirming that Ch 11 anti-modification clause under Section 1123(b)(5) applies to loan secured only by real property the debtor uses as a residential mortgage. Debtors resided on property but used the residence and multiple acres for business purposes. The panel rejected contrary approaches in other circuits that the real property must be only the debtor's principal residence and have no other use, or a case by case analysis. The panel adopted a bright-line approach that if the property is used as the principal residence, then debt cannot be modified. Judge Kurtz dissented that the majority distorted the statute to apply to a "claim secured only by a secured interest in real property that *includes* the debtor's principal residence."

United States v. Villalobos (In re Villalobos), Case No. NV-13-1179 (BAP 9th Cir. March 10, 2014) (not for publication; rev'g & rem'g Zive, J.)

Reversing confirmation order for noncompliance with Section 1129(a)(9)(C), (11) & (15). Debtor failed to prove it was likely to meet its obligation to repay the IRS's priority tax claims in installments over a period not later than five years after order for relief. Panel also held that the burden had been incorrectly shifted to IRS regarding the value of the property to be distributed is not less than the projected disposable income of the debtor. Also lengthy discussion on mootness based on confirmed plan.

****CHAPTER 13****

Drummond v. Luedtke (In re Luedtke), 508 B.R. 408 (BAP 9th Cir. 2014)

Holding that above-median income Ch 13 debtors could not claim a \$200 "older vehicle operating expense" in calculating their disposable income for Section 1325(b). The panel considered and distinguished prior Supreme Court and appellate decisions

****CLAIMS****

***Khan v. Barton (In re Khan)*, ___ B.R. ___, Case No. CC-14-1021 (BAP 9th Cir. Dec. 9, 2014)**

Affirming (1) creditor claims not subject to subordination; (2) order overruling debtors' claim objections; (3) dismissal of related adversaries, and (4) conversion from Ch 13 to Ch 7 as filed in bad faith to frustrate state court litigation. Appellant/Debtors and Appellee/Creditor co-founded businesses. Their relationship deteriorated, Appellee obtained a liability & declaratory judgment, and Debtors filed on the eve of trial to determine punitive damages. Bankruptcy Court granted stay relief, and state court granted compensatory and punitive damages. Panel held that even if claims subordinated they would not be disallowed. Panel also held that no mandatory subordination arose here under Section 510(b) for damages arising from purchase or sale of security. Panel held that Section 510(b) does not apply in the case of an individual debtor. Detailed discussion on that, and totality of circumstances that warranted conversion.

***Sterba v. PNC Bank (In re Sterba)*, 516 B.R. 579 (BAP 9th Cir. 2014)**

Holding that in federal question issues with conflict of law, statute of limitations are procedural and subject to forum state, rather than choice of law that otherwise applies to substantive questions. Debtor objected to claim as untimely under forum/California law. Bankruptcy Court denied objection, citing California choice of law provisions and holding claim was timely under contractual choice of law/Ohio law. Panel held bankruptcy court erred by not applying federal choice of law, required by federal question nature of bankruptcy. Panel further held it is bound by 1981 Circuit decision, citing Restatement (Second) of Conflict of Laws and holding statutes of limitations to be procedural. Panel noted that Restatement revised in 1988 to make statute of limitations subject to the same conflict of law principles of substantive matters, thus undermining rationale of 1981 circuit decision. Panel held it was bound by Circuit decision, although noting some decisions have indicated that the Circuit would decide the matter differently if presented with the issue now. Thus, objection sustained based on forum's shorter statute of limitations.

***Bagley v. United States (In re Desert Capital REIT, Inc.)*, Case No. NV-13-1233 (BAP 9th Cir. Aug. 11, 2014) (not for publication; aff'g Riegler, J.)**

Debtor was a real estate investment trust, subject to certain IRS provisions. Panel affirmed orders that overruled trustee's objection to IRS claim and allowed it in full as general unsecured claim. Panel also affirmed earlier order sustaining trustee's claim objection that none of the IRS's claim was entitled to priority under Section 507(a)(8).

****DISCHARGE/ABILITY****

***Hawkins v. Franchise Tax Bd.*, 769 F.3d 662 (9th Cir. 2014), *rev'g & rem'g* 447 B.R. 291 (N.D. Cal. 2011) and 430 B.R. 225 (Bankr. N.D. Cal. 2010)**

Judge Thomas held the specific intent is the mental state necessary to show that a debtor "willfully attempted in any manner to evade or defeat" taxes such that they are nondischargeable under Section 523(a)(1)(c). The majority held that "willful" is not subject to a plain meaning

interpretation, but that it should be construed narrowly under the “fresh start” context of bankruptcy, legislative history and IRC provisions. As the Circuit had not before set such a standard, and the lower decisions found for the taxing entity primarily based on debtor’s lifestyle choices and expenditures, the Circuit reversed and remanded for reanalysis. Judge Rawlinson dissented in favor of affirmation, noting that the Tenth Circuit had found a debtor’s conduct willful when there is knowledge of the tax debts but decides to spend funds for other purposes.

Deitz v. Ford (In re Deitz), 760 F.3d 1038 (9th Cir. 2014), adopting 469 B.R. 11 (9th Cir. BAP 2012)

The Circuit adopted Judge Pappas’ majority opinion as its own, affirming a nondischargeability judgment. The Circuit affirmed the Bankruptcy Court’s (1) authority of to liquidate amount of nondischargeable debt with final judgment and (2) ultimate determination of nondischargeability. As to nondischargeability, the decision affirmed factual findings of misrepresentations of debtor/unlicensed contractor, including evidence of habit to debtor to prove alleged conduct was in conformity with routine practice under FRE 406. The opinion also affirmed creditors’ justifiable reliance on Debtor’s misrepresentations, another factual determination.

The BAP opinion included a concurrence by Judge Markell, included in the adoption of the Circuit opinion. Judge Markell noted how *Stern* “may have reshaped the jurisdictional landscape in nondischargeability actions.” Judge Markell agreed that the outcome in the case at hand was controlled by two Ninth Circuit decisions. But those decisions were written well before *Stern*, and *Deitz* highlights potential jurisdictional flaws and challenges in allocating decision making authority between district courts and bankruptcy courts.

Bechtold v. Gillespie (In re Gillespie), 516 B.R. 586 (BAP 9th Cir. 2014)

Discussing the availability of an award of attorney’s fees after discharge, based on the debtor’s voluntary return to the fray.

Rivera v. Orange County Probation Dept. (In re Rivera), 511 B.R. 643 (BAP 9th Cir. 2014)

Affirming that probation department did not violate discharge injunction by continued attempts to collect amounts owed by debtor under California law arising from the prepetition detention of her minor son. BAPCPA specified that domestic support obligations may be recovered by governmental units, and California permits partial recovery from parents for the costs of food, food preparation, clothing, personal supplies and medical expenses when a child is detained.

Hussain v. Malik (In re Hussain), 508 B.R. 417 (BAP 9th Cir. 2014)

Affirming that parties suing for denial of discharge had standing as creditors, based on debtor’s bad checks tendered to repay funds owed by entity associated with debtor. The bad checks create a quasi-contractual relationship under California law. Panel also affirmed denial of discharge for failure to maintain business records under Section 727(a)(3). Debtor only provided tax returns based on business operations over four years. The production of bottom line numbers of income, expenses or losses for a calendar year may not be (and was not) sufficient.

Shahrestani v. Alazzeah (In re Alazzeah), 509 B.R. 689 (BAP 9th Cir. 2014)

Affirming summary judgment on Section 727 action based on affirmative defense of beyond statute of limitations. Creditor had email communication with debtor, agreeing to an extension of time to file the complaint. However, no stipulation or motion was filed, and the complaint was filed four days after the deadline. Fifteen months after the complaint was filed and after failure to get settlement approved, debtor moved for summary judgment. Panel affirmed that debtor preserved right by pleading affirmative defense. Panel also affirmed that because creditor did not file a motion or stipulation before the bar date for the complaint, he could not obtain an extension under Rule 4004. Circuit also held discharge deadlines are strict and cannot be extended unless a timely motion is filed.

Sachan v. Huh (In re Huh), 506 B.R. 257 (BAP 9th Cir. 2014) (en banc)

Affirming judgment for debtor in 523(a)(2)(A) proceeding, holding that the principal/debtor's debt owed for agent's conduct is not nondischargeable unless the debtor is culpable. "While the principal/debtor need not have participated actively in the fraud for creditor to obtain an exception to discharge, the creditor must show that the debtor knew, or should have known, of the agent's fraud." Case arose out of conduct of sales agent associated with debtor's real estate brokerage. Debtor had only been found vicariously liable in underlying state court action. Lengthy discussion about developments in case law before US Supreme Court, Ninth Circuit and BAP.

Francis v. Wallace (In re Francis), 505 B.R. 914 (BAP 9th Cir. 2014)

Affirming that obligation to "pay and hold [former spouse] harmless" constitutes a nondischargeable debt due on credit card under Section 523(a)(15). Discussion on law between hold harmless and identification. Judge Jury concurred to highlight her difference of opinion as to whether the obligation arose under California or federal law.

Daecharkhom v. Waugh Real Estate Holdings, LLC (In re Daecharkhom), 505 B.R. 898 (BAP 9th Cir. 2014), rev'g & rem'g separate damages order from substantive ruling in 481 B.R. 641 (Bankr. D. Nev. 2012) (T. Collins, visiting judge)

Holding no special circumstances existed to reduce attorney's fees awarded to debtor in defending nondischargeability action that was not substantially justified. Section 523(d) provides that in defeating an action over a consumer debt, the court shall award reasonable fees, unless special circumstances make the award unjust. The bankruptcy court did not make findings of the special circumstances. The record reflects that debtor scheduled the debt in the name of the creditor's predecessor in interest, but creditor still had notice to file a timely nondischargeability action. Debtor also requested a translator shortly before a scheduled deposition, and creditor then did not take the deposition because it did not want to pay the translator cost. The request was not improper, given that trial was stopped in order to obtain translator. There is no evidence that debtor's testimony at creditor meeting or deposition would have supported creditor's claim that failed based on failure to establish justifiable reliance by creditor's predecessor in interest..

***DeNoce v. Neff (In re Neff)*, 505 B.R. 255 (BAP 9th Cir. 2014)**

Affirming that Section 727(a)(2)(A)'s one-year lookback period on property transfers is a statute of repose not subject to equitable tolling. Debtor had filed two successive Ch 13 case that were dismissed in the 18 months before the current Chapter 7 case. Seventeen months before the current case, debtor transferred property to his trust. Plaintiff alleged the transfer was fraudulent and debtor's discharge should be denied. The panel distinguishes statutes of repose, which set the last date for a party to bring an action and is designed to benefit the defendant, from a statute of limitations, which is an affirmative defense to an untimely claim and may be equitably tolled based on the time of discovery of plaintiff's right. The panel noted a dearth of on-point, analytical case law except a decision from N.D. Texas, relying on a Supreme Court decision under 507(a)(8)(A) and 523. The panel distinguished that case, noting that the debtor is the intended beneficiary on the time period in Section 727 (in contrast to Section 523 where an individual creditor is an beneficiary and involves a statute of statute subject tolling).

***Wank v. Gordon (In re Wank)*, 505 B.R. 878 (BAP 9th Cir. 2014)**

Panel vacated and remanded summary judgment of nondischargeability under Section 523(a)(2)(A). Debtor reached a prepetition settlement with Appellees and signed a declaration stipulating to facts underpinning the 523 claim. Panel held the bankruptcy court erred in relying on declaration. The Circuit does not recognize prepetition agreements to consent to nondischargeability. The detail of the declaration explicitly stated that it was designed to provide the basis for nondischargeability in the event of a later bankruptcy. Panel also held bankruptcy court inappropriately made credibility determinations, weighed evidence and drew inferences based on the declaration compared to additional declarations and evidence. Finally, the bankruptcy court erred in determining Appellee's actual and justifiable reliance on debtor's representations. Record reflected Appellee already decided to invest with debtor based on information provided by others. Judge Ballinger concurred, reversing only because the bankruptcy court did not justify its decision to disregard debtor's subsequent sworn statements as a self-serving sham.

***Bendetti v. Guinness (In re Guinness)*, 505 B.R. 1 (BAP 9th Cir. 2014)**

Affirming that debt owed to debtor's husband's former wife and the former wife's attorney is dischargeable. The debt was not owed to "a spouse, former spouse or child **of the debtor**," and does not fall within Section 523(a)(5) or (15). The debt arose from a fraudulent conveyance judgment entered against debtor and her husband, in conjunction with her husband's dissolution proceeding. The bankruptcy court and panel declined to expand the plain language of Section 523 simply because debtor had been joined as a party in the dissolution proceedings. The panel also declined to impute a familial relationship on debtor based on her alleged participation in the transfer of marital assets. Agency rules do not create familial relationships.

***Wallace v. Rosales (In re Wallace)*, Case No. NV-13-1518 (BAP 9th Cir. Oct. 28, 2014) (not for publication; aff'g oral ruling by King, J., and written order by Riegle, J.), following prior appeals, 490 B.R. 898 (BAP 9th Cir. 2013) and Case No. NV-11-1681, 2012 WL 2401871 (BAP 9th Cir. 2012)**

Affirming denial of motion to reopen case seeking award of attorney's fees and case in defending prior appeal of contempt order against appellees. Panel held that the bankruptcy court was precluded from awarding the appellate attorney's fees. Dispute arose because appellees were held in contempt for violating the discharge injunction and ordered to pay debtor's fees. The case had been remanded for factual findings to support punitive damages, which were made and the case closed. Debtor then moved to reopen, seeking award of fees incurred in prior appeal. Debtor argued violation of discharge continued throughout appeal. Court denied motion, holding only appellate court had authority to award fees for appeal. Panel affirmed under 1996 Circuit authority that limited bankruptcy court's authority under Section 105. Panel rejected debtor's arguments premised under *Schwartz-Tallard* that debtor's damages for violation of automatic stay may include fees incurred in defending appeal, as it comes under Section 362(k).

***Bustos v. Molasky (In re Molasky)*, Case No. NV-14-1109 (BAP 9th Cir. Oct. 20, 2014) (not for publication; aff'g Nakagawa, C.J.), following remand from 492 F. Appx. 801 (9th Cir. 2012) and *Molasky v. Sulley (In re Molasky)*, 492 F. Appx. 805 (9th Cir. 2012)**

Affirming order dismissing appellant's adversary as an intervenor in a Section 523(a) exception to discharge. Debtor had executed a note in favor of OneCap, and Appellant was one of the investors in OneCap's note at issue. OneCap brought 523 action without naming appellant. There was a related settlement not resolving the note in question. The parties agreed to allow Appellant to intervene in the OneCap adversary, and Debtor waived timeliness of statute of limitations. Appellant was allowed to intervene but not bring his own claims. OneCap was dismissed for failure to prosecute, and then Appellant was dismissed because he had no independent claims. After the circuit remanded the case, the bankruptcy court found Appellant did not show cause to extend the Section 523 deadline. On appeal again, the BAP held that Appellant was a permissive intervenor and thus not entitled to certain equitable or jurisdictional arguments. Panel also found no abuse of discretion in not extending 523 deadline. Affirming that since the Circuit remanded the case, two other decisions rejected a more liberal treatment of cause for extension of deadline, and bankruptcy court did not err in applying them.

***Buenaventura v. Chau (In re Buenaventura)*, Case No. NV 13-1146 (BAP 9th Cir. Feb. 19, 2014) (not for publication; aff'g Nakagawa, C.J.)**

Affirming dismissal of Section 523 and 727 claims for failure to satisfy pleading standards. Appellant's husband died in accident cause by one of the debtors, obtained a judgment, and sought to execute on debtor's potential bad faith insurance claims although a federal court already had found debtor's insurer had not acted in bad faith by failing to settle before trial. Debtors filed for bankruptcy, did not schedule claims against insurer or counsel, but amended later to add them on advice of counsel but with statement that they do not believe they have claims. Appellants brought 523/727 action, alleging debtors committed fraud in colluding with insurer in the bad faith declaratory judgment, seeking discharge of the judgment, and concealing

bad faith and malpractice claims. Panel reviewed allegations and affirmed that they do not satisfy pleading standards. [I am uncertain on the status of the case and interplay with a separate appeal to U.S. District Court, where Judge Mahan allowed Appellants to take Rule 2004 examinations to inquire about bad faith and malpractice claims based on change in prior ruling in the federal bad-faith litigation. *Buenaventura v. Chau (In re Chau)*, Case No. 2:13-cv-00630-JCM (D. Nev. Feb. 11, 2014)]

***Keeton v. Flanagan (In re Flanagan)*, Case No. NV-13-1188 (BAP 9th Cir. Feb. 26, 2014) (not for publication; aff'g, rev'g & rem'g in part Beesley, J.)**

Affirming nondischargeability judgment under 523(a)(2)(A); reversing denial and remanding for hearings on award of attorney's fees and costs under prevailing Alaska law; reversing judgment under 523(a)(4); and affirming denial of judgment on 523(a)(6)/(19) under Alaska Unfair Trade Practices & Consumer Protection Act and Alaska Securities Act. Debtor secured funds from Appellant for development that failed. Panel discussed absence of goods or services that trigger Unfair Trade Practices Act, as well as the definition of securities. Panel also has lengthier discussions on these and other points raised in the adversary.

****DISMISSAL****

***Sullivan v. Harnisch (In re Sullivan)*, ___ B.R. ___, Case No. CC-14-1225 (BAP 9th Cir. Dec. 22, 2014)**

Reversing dismissal of Ch 11 case on motion filed 15 days after petition, holding (1) abuse of discretion to fail to consider the best interests of creditor and estate, and (2) finding of bad faith was in error. Panel noted that there were no findings that effort to stop collection was unreasonable or intended to harass Appellees. Bankruptcy Court also erred in disinclination to examine debtor's financial status in considering bad faith. Panel held petition appropriately provided breathing spell and leveled the playing field for other estate creditors. Opinion also discussed two-party disputes and less than 100% plan.

***Aspen Skiing Co. v. Cherrett (In re Cherrett)*, ___ B.R. ___, Case No. CC-14-1056 (BAP 9th Cir. Nov. 7, 2014)**

Affirming denial of motion to dismiss bankruptcy case that asserted Ch 7 debts were not primarily consumer debts that should be repaid under Ch 13 and constituted abuse under Section 707(b)(1). As matter of first impression in circuit, Panel held an order denying a motion to dismiss for abuse may be considered final for appellate review for judicial efficiency. Debtor, a well compensated professional in the hospitality industry, obtained loan from employer to purchase house, which he maintained even after leaving employment as an investment. Debtor initially scheduled debt as consumer debt, and former employer/lender moved to dismiss for abuse. Debtor amended petition to state debts were primarily business debts. Panel rejected lender's view that a housing loan is consumer debt as a matter of law under Section 101(8), and that business-related loan is irrelevant because housing loan turns on debtor's purpose for debt. Debtor testified purpose of loan was to augment compensation.

***Rivera v. Curry (In re Rivera)*, 517 B.R. 140 (BAP 9th Cir. Sept. 29, 2014) (not for publication, but published; mem., Davis, J., on panel)**

Dismissing appeal from order of dismissal of bankruptcy case, due to debtor's failure to participate in proceedings below on dismissal. After Bankruptcy Court orally granted motion to dismiss Ch 13 case, debtor filed a notice of conversion to Ch 7. Notwithstanding the conversion, the case was still dismissed, and debtor appealed. Potential questions existed as to whether Ch 13 problems warranted dismissal of Ch 7 case. But an errant ruling did not void or invalidate the order of dismissal. Debtor's proper action should have been a motion for reconsideration of the dismissal, and the panel declined to opine about debtor's ability to still move under Rule 9024.

***Shapiro v. Grossman (In re Grossman)*, Case No. NV-13-1325 (BAP 9th Cir. Feb. 4, 2014) (not for publication; rev'g & rem'g Riegler, J.)**

Bankruptcy court did not make findings necessary to show cause in granting Ch. 7 debtor's 707(a) motion to dismiss or that dismissal would not prejudice creditors. Debtor's debt was \$120,000 in medical debt. She scheduled monthly income of \$5,000 in maintenance from former husband. Debtor subsequently provided divorce decree that provided that monthly payments are half maintenance and half equalization of property settlement. Trustee asserted equalization was not exempt, and debtor moved to dismiss. Debtor asserted she had chronic medical problems that will result in more bills, did not want to spend funds litigating over nonexempt assets, and wanted to proceed to pay creditors outside of bankruptcy. Judge Riegler granted dismissal, noting that it was not good to put debtor further in debt over this dispute; debtor likely could get the state court to recharacterize the payments as maintenance; debtor's asserted additional medical expenses; and administrative cost to receive additional payments over four years. Panel held there was no evidence that creditors would not be prejudiced, and bankruptcy court did not consider potential prejudice to creditors. Debtor is unemployed and has no other income. Payment now also was supported by debtor's medical condition and her asserted expected additional medical bills. Panel also found support in debtor's failure to list the equalization payment and the speculative nature of recharacterization of the payments. Finally, panel noted trustee contemplated selling the asset.

****EXEMPTIONS****

***Law v. Siegel*, 571 U.S. ___, 134 S. Ct. 1188 (2014), remanded to 748 F.3d 1304 (9th Cir. 2014), rev'g 435 Fed. Appx. 697 (9th Cir. 2011), Case No. CC-09-1077, 2009 WL 7751415 (BAP 9th Cir. Oct. 22, 2009) (not for publication; Markell, J., concurring) and 401 B.R. 447 (Bankr. C.D. Cal. 2009)**

Justice Scalia held that exempt assets generally are not liable for any expenses associated with administering the estate, and the bankruptcy court may not order that a debtor's exempt assets be used to pay administrative expenses incurred as a result of the debtor's misconduct. The Circuit remanded to the BAP, with directions to remand to the Bankruptcy Court for proceedings consistent with the Supreme Court's decision. Judge Markell had concurred in affirming the surcharge based on precedence but questioned the rationale given the historical changes.

***Clark v. Rameker*, 573 U.S. ___, 135 S. Ct. 2242 (2014), aff'g 714 F.3d 559 (7th Cir. 2013) (which had rev'd 466 B.R. 135 (W.D. Wis. 2012), which had rev'd 450 B.R. 858 (Bankr. W.D. Wis. 2011)**

Justice Sotomayor affirmed that inherited IRAs do not qualify as exempt retirement funds under Section 522(b)(3)(C).

***Elliott v. Weil (In re Elliott)*, ___ B.R. ___, Case No. CC-14-1050, 2014 WL 6972472 (BAP 9th Cir. Dec. 10, 2014)**

Vacating & remanding order sustaining objection to exemption premised on bad faith, but noting possible statutory basis under California exemption to deny exemption.. See *Gray v. Warfield*.

***Gray v. Warfield (In re Gray)*, ___ B.R. ___, Case No. AZ-13-1502 (BAP 9th Cir. Dec. 9, 2014), vac'g & rem'g 498 B.R. 238 (Bankr. D. Ariz. 2013)**

Vacating & remanding order sustaining objection to exemption premised on bad faith, holding Bankruptcy Court lacks discretion to disallow amended exemptions or deny leave to amend exemptions based on equitable grounds not specified in the Code. Debtor's schedules did not list prepaid rent as an asset (and thus did not claim it as exempt under Arizona law). Details emerged at creditors meeting, debtor amended schedules to include rent, trustee demanded turnover, and debtor amended schedules to claim exemption. Bankruptcy Court, without evidentiary hearing, sustained objection to exemption based on bad faith failure to schedule asset. Panel reversed under *Law v. Siegel*. Although *Law's* dicta stated there was no equitable power to deny an exemption for bad faith conduct, Panel found rationale sufficiently persuasive. Panel noted that it is possible exemption could be subject to attack under state law, but no such attack was made in this case. Remanded for possible consideration of state law.

***Starky v. Birdsell (In re Starky)*, ___ B.R. ___, Case No. AZ-14-1106 (BAP 9th Cir. Dec. 8, 2014)**

Affirming award of fees & costs to trustee's counsel in extended proceedings over debtor's exemptions, primary due to action or inaction of debtor and counsel. Debtors largely sustained their exemptions over trustee's objections. Opinion focuses on delinquency of some consumer counsel in responding to document requests. Following court's initial order denying exemptions, trustee properly filed motion (rather than adversary) to compel the debtor to deliver property to the trustee under Rule 7001(1). At worst, the procedural issue was a harmless error. Affirmed award of fees for failure to cooperate with trustee under Section 523(a)(3)-(4) and Rule 4002(a)(4). Debtor waived that argument, but contested reasonable of fees under Section 330. Panel affirmed that work was reasonable and beneficial as additional information only provided after trustee's investigation and pursuit of matters against debtor.

***Calderon v. Lang (In re Calderon)*, 507 B.R. 724 (BAP 9th Cir. 2014)**

Holding that debtor may claim homestead exemption under Arizona law in former residence after moving out, not maintaining possessions there and living elsewhere. Vacating order denying exemption, and remanding for determination of debtor's intent.

****FRAUDULENT TRANSFERS/TURNOVER****

***Mano-Y&M, Ltd. v. Field (In re Mortgage Store, Inc.)*, ___ F.3d ____, Case No. 13-16020, 2014 WL 6844630 (9th Cir. Dec. 5, 2014), *aff'g* Case No. 12-0653, 2013 WL 1680636 (D. Haw. April 16, 2013)**

Judge Tashima affirmed that appellant was liable as an initial transferee under Section 550. Appellant sold property to Lindell, who made payment with transfer from Debtor, for which he at least indirectly controlled. Appellant argued that under *Presidential* (BAP 1995), the initial transferee from Debtor was Lindell, and the Appellant was subsequent transferee entitled to raise additional defenses. Circuit rejected that argument, holding the *Presidential* was no longer good law since it based on prior “dominion and control” test rather than current “dominion” test. Although Lindell may have had some equitable interest in funds paid by Debtor, he did not have unfettered control of them.

***Kismet Acquisition, LLC v. Icenhower (In re Icenhower)*, 757 F.3d 1044 (9th Cir. 2014)**

Judge Farris affirmed the avoidance of an unauthorized postpetition transfer involving property in Mexico. First, he rejected debtor’s argument that the common law “local action doctrine” prevents district courts from exercising jurisdiction over actions directly affecting land in a different state. The doctrine is preempted by 28 USC 1334(e), providing jurisdiction over all the estate property “wherever located.” The court also rejected arguments about extraterritorially and a forum selection clause for Mexican court. There was insufficient briefing to overturn a ruling that applied US law on good faith purchasers, rather than Mexican law. Finally, one of the defendants, although insulated from the transaction, was charged with notice of all facts made known to her attorney.

***Kismet Acquisition, LLC v. Diaz-Barba (In re Icenhower)*, 755 F.3d 1130 (9th Cir. 2014)**

Judge Farris affirmed a range of sanctions entered against the purchaser of property following its recovery as a fraudulent conveyance and then an unauthorized post-petition transfer. The decision did not meaningfully turn on bankruptcy law.

***Shapiro v. Henson*, 739 F.23d 1198 (9th Cir. 2014), *rev'g* 449 B.R. 109 (D. Nev. 2011) (Reed, J.)**

Judge N.R. Smith reversed the lower rulings that held a trustee’s right of turnover under Section 542(a) is limited to when the debtor has possession of the property at the time the motion is filed. Turnover available to any property in debtor’s possession at any point during case.

***Tracht Gut, LLC v. County of L.A. Treasurer (In re Tracht Gut, LLC)*, 503 B.R. 804 (BAP 9th Cir. 2014)**

The panel affirmed dismissal without leave to amend debtor’s complaint alleging fraudulent transfer based on price paid to acquire debtor’s properties in pre-petition tax sale. Debtor’s allegations were conclusory without any factual support. Justice also did not compel right to amend because tax sale under California is presumptively for reasonably equivalent value. Opinion also notes that there was no stay violation based on post-petition recording of tax deed,

as recording is a ministerial act that does not violate the stay. Panel highlight right to amend under 2009 revisions to the rules now limits unilateral right to amend to 21 days once there is filed a Rule 12 motion to dismiss.

****LITIGATION****

Stipp v. CMV-NV One, LLC (In re Plise), 506 B.R. 870 (BAP 9th Cir. 2014)

Reversing sanctions on third-party's noncompliance with subpoena, as sanctions incorrectly entered under Rule 37 rather than Rule 45. Appellant was debtor's special litigation counsel, general counsel for debtor's affiliated company, and held an interest in debtor's affiliated companies. Appellant properly objection to the subpoena under Rule 45, and sanctions were not warranted in conjunction with motion to compel under Rule 37.

Brosio v. Deutsche Bank Nat'l Trust Co. (In re Brosio), 505 B.R. 903 (BAP 9th Cir. 2014)

Affirming that debtor was not the prevailing party entitled to attorney's fees under the California Civil Code and that her fee request was not reasonable.

Braun v. Nevada State Bank (In re Braun), Case No. NV-13-1559 (BAP 9th Cir. Oct. 20, 2014) (not for publication; aff'g Beesley, J.)

Affirming valuation of real property in connection with appellee's deficiency claim. Debtor had multiple investment properties, abandoned the one relevant for this case, the lender foreclosed on it, resold it, and the new buyer had put it back on the market. Lender sought to recover deficiency. Panel held harmless error with bankruptcy court's statement of value on earlier date of abandonment, rather than on foreclosure date, based on findings that value did not change and was worth that much on foreclosure date too. Panel rejected debtor's argument that bankruptcy court created its own value "out of thin air," noting court may determine FMV within ranges of prices set forth by appraisers. Panel also rejected argument that bankruptcy court split the difference in adopting the value, a practice rejected by the U.S. Supreme Court; panel held that record reflect court's consideration of range of information.

Leonard v. Piccirilli (In re Mega-C Power Corp.), Case No. NV-13-1330 (BAP 9th Cir. Oct. 30, 2014) (not for publication; aff'g Zive, J.)

Affirming finding of contempt for appellee's failure to turn over shares as required under plan, and methodology used in calculation of damages that resulted in sanctions for about 1/10th of the amount sought by the liquidating trustee. Lengthy discussion on points from long-pending case.

Paulson v. Go Global, Inc. (In re Go Global, Inc.), Case No. NV-12-1596 (BAP 9th Cir. Jan. 13, 2014) (not for publication; aff'g Markell, J.)

Lengthy discussion affirming \$5-million judgment entered after trial against appellants for conduct associated with entities and investments affiliated with debtors. Mostly non-bankruptcy law.

****PROPERTY****

Wu v. Markosian (In re Markosian), 506 B.R. 273 (BAP 9th Cir. 2014)

As matter of first impression in Circuit, affirming that Ch 11 postpetition earnings are property of the estate under Section 1115, but revert to debtor upon subsequent conversion to Ch 7. Section 1115 was added by BAPCPA to make individual Ch 11 debtor's postpetition earnings property of the estate. Panel held that under Section 348 regarding effect of conversion of chapter, the petition date remains the same. Case law also holds that and property of the estate is determined by the filing date, not the conversion date. Section 541(a)(6) excludes from Ch 7 estate the debtor's earnings for postpetition services. Panel rejected contrary decisions from other courts on the grounds that they incorrectly read additional terms into the statutes.

Dale v. Maney (In re Dale), 505 B.R. 8 (BAP 9th Cir. 2014)

Panel affirmed that debtor's parental inheritance received more than 180 days after Ch 13 petition but prior to confirmation is an asset of the estate. Section 541(a)(5) states that property of the estate includes an inheritance. Section 1306(a)(1) further states that in addition to Section 541 property, estate property includes all categories of property under Section 541 acquired after the commencement of the case "but before the case is closed, dismissed, or converted." The temporal limitation on post-petition inheritances does not apply in Chapter 13, and the panel agreed with a recent Fourth Circuit decision.

****SALES****

Rev Op Group v. ML Mgr. LLC (In re Mortgages Ltd.), 771 F.3d 1211 (9th Cir. 2014)

Judge Wallace held appeals over orders authorizing post-confirmation sales were equitably moot, at least primarily based on Appellant's failure to seek to seek a stay. The Circuit noted exceptions in its rulings that failure to seek a stay is dispositive and held it could not resolve those distinctions as in a three-judge panel opinion. But even under a four-part evaluation of *Thorpe Insulation* (2012), the Circuit found the appeals moot. There was no stay sought without good reason. Although Appellant believed a stay would require a substantial bond that it could not afford, it was not even sought. The plan was substantially consummated. Any remedy would inequitably harm third parties (the buyers) not before the court. There is no equitable remedy for the sales already complete, and the costs of any clawback are either impossible or inequitable, as well as costing significant sums probably in excess of recovery.

Kallman & Co. v. Gottlieb (In re Lewis), 515 B.R. 591 (BAP 9th Cir. 2014), following prior remand from Case No. CC-12-1268, 2013 WL 2367797 (BAP 9th Cir. May 30, 2013)

Affirming nondebtor spouse's Section 363(i) purchase of community property consisting of debtor spouse's litigation rights approved for sale to debtor's former employer (the defendant). Panel noted absence of law that defining "consummation," as spouse must exercise rights and purchase before consummation of approved sale. Here, original sale never consummated based on subsequent order approving sale to nondebtor spouse. Defendant also never funded purchase price. Defendant could have protected self by promptly paying, obtained Rule 6004(h)

waiver of stay, or sought Section 363(m) good faith finding. Court also held that the litigation claims, although not scheduled as community property, are in fact community property under California law. Nondebtor spouse also not bound by debtor's failure to designate as community property, since she was not a codebtor and did not sign the schedules.

***In re KVN Corp.*, 514 B.R. 1 (BAP 9th Cir. 2014)**

Bankruptcy court abused discretion in denying stipulation between trustee and fully secured creditor to sell collateral with carveout to pay some proceeds to the estate. General rule prohibits trustee sales of fully encumbered assets, but no ban of sale with carveout to benefit the estate. The UST Ch 7 Trustee Handbook permits sales with meaningful creditor distribution.

***TMC Aerospace, Inc. v. Joseph (In re Ice Mgmt. Sys., Inc.)*, Case No. CC-14-1046 (BAP 9th Cir. Dec. 8, 2014) (not for publication; Davis, J., on panel)**

Affirming that sale under Section 363(b)(1) subject to secured claims, the lien still attaches to the collateral and does not attach to the proceeds. There is no substitution of collateral as is the case of a sale under Section 363(f). Contains longer discussion of the issues.

****SANCTIONS****

***DeLuca v. Seare (In re Seare)*, 515 B.R. 599 (BAP 9th Cir. 2014), *aff'g sub nom Dignity Health v. Seare (In re Seare)*, 493 B.R. 158 (Bankr. D. Nev. 2013) (Markell, J.)**

Affirmed sanctions imposed tied to counsel's scope of services and investigation of creditor claim before bankruptcy. Judge Jury concurred to highlight issues on unbundling of services.

***DeLuca v. Cuomo (In re Cuomo)*, Case No. NV-13-1294 (BAP 9th Cir. Oct. 21, 2014) (not for publication), *aff'g Kelly v. Cuomo (In re Cuomo)*, Adv. No. 12-1124, 2013 WL 3155425 (Bankr. D. Nev. June 20, 2013) (Markell, J.)**

Affirming sanctions on debtor's counsel following his failure to schedule a debt despite listed in two prior dismissed cases and failure to represent debtor in subsequent nondischargeability action. Bulk of opinion rejects arguments that counsel was denied due process.

****SETTLEMENT****

***Dye v. Sachs (In re Flashcom, Inc.)*, Case No. CC-13-1311 (BAP 9th Cir. Oct. 1, 2014) (not for publication; Davis, J., on panel), *aff'g* 495 B.R. 490 (Bankr. C.D. Cal. 2013)**

Affirming denial in part of motion for entry of a \$9 million stipulated judgment. Appellee was party to settlement agreement, allowing her to pay \$62,500 (a buyout option) or have judgment entered against her for \$ million with other obligors. Appellee did not pay, and liquidating trustee sought entry of full judgment. Panel affirmed that under California law, the buyout option constituted an unenforceable penalty. Bankruptcy Court also had inherent authority modify the court-approved settlement agreement to limit the amount of the judgment to the amount of damages the liquidating trustee actually suffered from the non-payment of the buyout option.