# 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.

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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.