

# **2013 Bankruptcy Year in Review Nevada Decisions**

**Northern Nevada Bankruptcy  
Bar Association**

**Lunch Program Materials  
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Case summaries prepared by

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

## About the Authors

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Below is a summary of bankruptcy decisions from approximately April 1, 2013, through January 30, 2014 from the U.S. District Court for the District of Nevada, the U.S. Bankruptcy Court for the District of Nevada, and the Nevada Supreme Court. While attempting to be comprehensive, the authors make no representations that this summary captures every decision during this period.

## **APPEALS--PROCEDURE**

***Crowley v. Burke*, Case No. 3:13-cv-219, 2013 WL 6284170 (D. Nev. Dec. 4, 2013) (Jones, C.J.)**

The court dismissed the appeal of monetary sanctions order for lack of jurisdiction. Because the amount of sanctions had not yet been determined, the appeal was premature.

***City Nat'l Bank v. Charleston Assocs., LLC*, Case No. 2:11-cv-2023, 2013 WL 5947761 (D. Nev. Nov. 5, 2013) (Du, J.)**

Court agreed that with appellee that the judgment on remand was entered prematurely. Court may not enter its mandate until at least 21 days after the entry of the appellate judgment. The motion for stay pending appeal was filed prior to the expiration of that time, such that the issuance of the mandate should have been automatically stayed until there is a ruling on the motion for stay. However, the Court held that with resolution of the stay motion, the mandate may be issued and the Bankruptcy Court may enter judgment.

***Pajarillo v. JP Morgan Chase Bank, N.A.*, Case No. 2:13-cv-674-GMN-CWH (D. Nev. Oct. 9, 2013) (Navarro, J.), available at**

**[http://scholar.google.com/scholar\\_case?case=16649529604329014912](http://scholar.google.com/scholar_case?case=16649529604329014912).**

Denying debtor/appellant's request to consolidate appeal with two other appeals pending before the Bankruptcy Appellate Panel. Appellant provided no authority for such consolidation. Appellee in this case had elected to transfer the appeal to district court, with the appellees in the other case had not made such election.

***Montana v. Blixseth*, Case No. 2:13-cv-1324, 2013 WL 5408668 (D. Nev. Sept. 25, 2013) (Dorsey, J.)**

Certifying appeal directly to the Circuit. She held that there is no controlling law over whether any bona fide dispute over a petitioning creditor claim disqualifies the claim in total. The Court also held it was unresolved if an uncontested tax returns counts as an uncontested claim. The issues also were subject to conflicting decisions in other jurisdictions, and certification will materially advance the underlying issue, the dismissal of the involuntary petition.

***Winterton v. U.S. Trustee (In re Lish), Case No. 2:12-cv-2204, 2013 WL 4006603 (D. Nev. Aug. 15, 2013) (Gordon, J.)***

Granting motion to dismiss appeal for failure to prosecute. Debtors filed Chapter 13 and converted to Chapter 11, and the bankruptcy court ordered the appointment of a trustee. Debtors' counsel attempted to conduct discovery against creditor bank for potential negligence claim. The bankruptcy court granted a protective order, prompting appeal from debtors' counsel. Appellant did not file designation of record after five months, prompting bank to move to dismiss. District Court held that failure to prosecute constitute bad faith. Court rejected as untimely and unsubstantiated Appellant's assertion that he had been directed not to perfect appeal with designation of record due to ongoing settlement discussions. The best interpretation of record suggests settlement discussions occurred five months after deadline for designation. The undue delay also prejudiced bank, although not greatly. The District Court denied a request for fees and costs as unsupported by authority or argument.

***Frey Irrevocable Trust v. Tennvada Holdings I, LLC, Case No. 2:12-cv-1592, 2013 WL 1786580 (D. Nev. April 25, 2013) (Mahan, J.)***

Dismissing appeal from order dismissing third-party claim in adversary proceeding. There was no final order, and leave was not sought to pursue an interlocutory appeal.

**APPEALS--STAY PENDING APPEAL**

***Gonzales v. Desert Land, LLC, Case No. 3:11-cv-613, 2014 WL 132134 (D. Nev. Jan. 10, 2014) (Joanes, J.)***

Denying stay pending appeal, holding appellant had not show strong likelihood that \$10-million fee due upon transfer of real property, under terms of settlement agreement previously approved by presiding judge, was an interest in land. Court also held that loss of immediate payment of that fee at the time of the transfer is plainly reparable via money damages.

approving the fees of debtor's previous bankruptcy counsel. The appeal was unlikely to prevail given the broad, bare-bones objections filed to fee application, and the monetary issue would not impose irreparable harm without a stay.

***In re Capability Ranch, LLC, Case No. 2:13-cv-1812, 2013 WL 6058198 (D. Nev. Nov. 15, 2013) (Mahan, J.)***

Denying stay pending appeal of an order approving the fees of debtor's previous bankruptcy counsel. The appeal was unlikely to prevail given the broad, bare-bones objections filed to fee application, and the monetary issue would not impose irreparable harm without a stay.

***City Nat'l Bank v. Charleston Assocs., LLC, Case No. 2:11-cv-2023, 2013 WL 5947761 (D. Nev. Nov. 5, 2013) (Du, J.)***

Denying appellee's motion for stay pending appeal to the circuit. District Court had reversed bankruptcy court and directed entry of summary judgment for appellant. Appellee failed to establish likelihood of success of merits with same argument presented in appeal regarding rights under loan documents, which district court found inconsistent with the plain language of the documents. District Court also found that a temporary change of management and potential change in architecture of debtor's project did not constitute irreparable harm.

***Mountain Paradise Vill., Inc. v. Federal Nat'l Mortgage Assn., Case No. 2:13-cv-1813, 2013 WL 5637931 (D. Nev. Oct. 15, 2013) (Navarro, J.)***

Denying debtor's motion for a stay pending appeal from an order granting stay relief and denying debtor's third disclosure statement. The Court held there was no abuse of discretion in granting stay relief, although the opinion does not discuss the evaluation in the underlying order. Court held that if the stay is not granted to stop an impending foreclosure sale, the debtor appellant could suffer irreparable harm due to the loss of its appeal rights. But Court weighed the harm to other parties in staying the matter, noting the loss of cash collateral paid to debtor's principal as a management fee and delay in resolution of case in the unlikely event of a successful appeal. Thus, no good cause for stay was found.

***Whipple v. Landis (In re Whipple), Case No. 3:13-cv-251, 2013 WL 4506157 (D. Nev. Aug. 21, 2013) (Jones, C.J.)***

Denying a motion for stay pending appeal from an order converting a Chapter 11 case to Chapter 7. Court accepted the argument that there was a likelihood of irreparable harm with stay relief and sales of their rental properties to bona fide purchasers. But Court held that debtors were unlikely to prevail with their appeal. Debtors asserted they were ineligible for Chapter 7 based on their income under Section 1112(f). But Debtors failed to address their net worth. Court also noted that they qualified for conversion based on unauthorized use of cash collateral and failure to comply with a court order.

***Pro Se Servs. v. A&A Auto Wrecking, LLC, Case No. 3:13-cv-244, 2013 WL 3367636 (D. Nev. June 5, 2013) (Du, J.)***

Denying motion for stay pending appeal, holding that renewed motion failed to sufficiently identify the evidentiary basis for the likelihood of success.

***Pro Se Servs. v. A&A Auto Wrecking, LLC, Case No. 3:13-cv-244 (D. Nev. May 24, 2013) (Du, J.), available at***

**[http://scholar.google.com/scholar\\_case?case=13191983134114744496](http://scholar.google.com/scholar_case?case=13191983134114744496).**

Denying motion for emergency stay pending appeal to prevent transfer of assets to third party. Although Bankruptcy Court was unable to take up stay motion before transfer date, Judge Du declined to consider subsequent stay motion until first heard by Bankruptcy Court.

**AUTOMATIC STAY**

***Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi), Case No. 2:12-cv-683, 2014 WL 198582 (D. Nev. Jan. 15, 2014) (Navarro, C.J., aff'g Markell, J.)***

Affirming denial of motion for sanctions for violation of automatic stay over control of exempt funds in bank account. Although the bank willfully violated the automatic stay in failing to turn over the funds, debtors were not injured. “The record does not show that Appellants had a right to receive the bank account funds during the time that Wells Fargo refused to release the funds to Appellants; only the Trustee had that right, pursuant to section 542's turnover requirement. Therefore, although Wells Fargo violated section 542's requirement to turn the funds over to the Trustee, Appellants' claim of injury is not supported by the record where it is solely premised on their inability to exercise control over the funds themselves. The Bankruptcy Court made a factual determination that Appellants' "inchoate" right (as described by the BAP) to claim the funds as exempt was not injured by Wells Fargo's violation of section 542, and the record does not support a finding otherwise. This is particularly true where Appellants appear to have ultimately received the full monetary equivalent of their claimed exemption at the direction of the Trustee, some time after their right vested, when Wells Fargo released the funds to Appellants upon the direction of the Trustee. “

***Phillips v. First Horizon Home Loan Corp., Case No. 3:12-cv-13, 2014 WL 132179 (D. Nev. Jan. 10, 2014) (Jones, J.)***

Denying motion for leave to amend lawsuit over home foreclosure. Plaintiff asserted that that automatic stay preceding sale was *void ab initio* due to scrivener's error in lender's motion for stay relief. Judge Jones held he had no original jurisdiction over a claim for damages based on a willful violation of the stay under Section 362(k). The matter was before District Court as litigation removed to federal court based on diversity. Plaintiff could not use the District Court collaterally attack the ruling of the bankruptcy court.

***City Nat'l Bank v. Charleston Assocs., LLC, Case No. 2:11-cv-2023, 2013 WL 3875386 (D. Nev. July 25, 2013) (Du, J., rev'g Riegle, J.)***

Reversing determination that lender violated the stay with postpetition recording that reflected transfer of easement rights over debtor's property based on prepetition foreclosure on property. Debtor asserted that easement rights had been transferred to related entities prior to foreclosure and these rights never were discussed in the settlement negotiations that resulted in foreclosure. Court held that purported transferred interests were as a result of undocumented oral agreements, which as transfers of interests in real property were void as violations of the statute of frauds. The District Court held that certain terms as to voluntary transfers did not apply to the foreclosure, that the foreclosure included the easement rights, and foreclosure was prepetition, thus obviating dispute over alleged violation of automatic stay.

## **CLAIMS**

### ***In re Phillips*, 491 B.R. 255 (Bankr. D. Nev. 2013) (Markell, J.)**

The case details the standards to evaluate the rights of agents and holders to file a proof of claim and obtain stay relief. Judge Markell provides another detailed discussion on UCC Article 3 and case law interpreting the issues. Ultimately, the agent of the holder of the note was authorized to file the proof of claim and proceed with foreclosure upon the grant of stay relief.

### ***In re DiGiacinto*, Case No. BK-N-12-52663, 2013 WL 3279159 (Bankr. D. Nev. June 26, 2013) (Beesley, J.)**

Debt owed to the Nevada Division of Industrial Relations for uninsured workers of debtor's sole proprietorship is not priority claim under Section 507(a)(8)(E). A private creditor similarly situated to the Division can be hypothesized, so the debt does not qualify as an excise tax entitled to priority payment. The plain language of Nevada statutes do not identify payments to the Division as having the same priority as excise taxes.

### ***Hymas v. Deutsche Bank Nat'l Trust Co.*, Case No. 2:13-cv-1869, 2013 WL 6795731 (D. Nev. Dec. 16, 2013) (Jones, C.J.)**

Judge Jones declined to dismiss a state-law action for wrongful foreclosure. Plaintiff's lender had filed for Chapter 11 and transferred its assets to a liquidating trust, a separate entity. Notwithstanding the transfer, debtor's agent purportedly transferred the note to defendant. Therefore, Judge Jones found that plaintiff stated a claim that defendant was not the proper party in interest and lacked standing to foreclosure.

### ***McDonald v. United States (In re McDonald)*, Case No. 2:12-cv-1711, 2013 WL 5437344 (D. Nev. Sept. 27, 2013) (Mahan, J., aff'g & rev'g in part Markell, J.)**

Affirming that when discharged Chapter 13 debtors reopened case to allege IRS violated discharge injunction, the Bankruptcy Court properly ordered them to exhaust their administrative remedies under Revenue Code. Although the statute authorized the bankruptcy court to award damages, such provision comes after language regarding administrative procedures. However, he reversed the bankruptcy court's ruling on the date calculation for the IRS to take action as the underlying motion served on the IRS was not in the required form under the regulations.

### ***Pace v. JPMorgan Chase Bank, N.A.*, Case No. 2:13-cv-339, 2013 WL 4041065 (D. Nev. Aug. 6, 2013) (Mahan, J., aff'g Riegler, J.)**

Affirming judgment for lenders on debtor's claims that lenders lacked secured claims. Although Chase assigned the interest in the deed of trust, there was no evidence that it intended to split the interest in the deed of trust from the interest in the note. Chase also continued to function as a servicing agent even after the transfer of interest in the deed of trust.

***Rhodes v. Rhodes Cos. (In re Rhodes Cos.)*, Case No. 2:12-cv-139, 2013 WL 2394696 (D. Nev. May 29, 2013) (Du, J., aff'g Riegle, J.)**

Affirming order sustaining objection to debtor's principal's claim to debtor's tax return. Principal sought reimbursement for taxes paid by him on account of taxable income allocated to him from debtor. The case turns on a range of issues concerning tax obligations.

**CLAIMS--UNSCHEDULED**

***Fuleihan v. Wells Fargo Bank, N.A.*, Case No. 2:13-cv-1145, 2013 WL 6409888 (D. Nev. Dec. 6, 2013) (Mahan, J.)**

Dismissing plaintiff borrower's claims over foreclosure based on res judicata arising from same claim denied in conjunction with plaintiff's prior bankruptcy. The Court rejected plaintiff's claim of newly discovered information, noting the common nucleus of facts and assertion of fraudulent coverup given her repeated attempts to prosecute the claims.

***DaPrizio v. Harrah's Las Vegas, Inc.*, Case No. 2:10-cv-604, 2013 WL 5328386 (D. Nev. Sept. 20, 2013) (Navarro, J.)**

Dismissing claims that plaintiff failed to schedule claim in prior Chapter 7 case. No basis found that the claim was omitted by mistake or inadvertence, so Court imposed judicial estoppel.

***Hernandez v. Creative Concepts, Inc.*, Case No. 2:10-cv-2132, 2013 WL 4045941 (D. Nev. Aug. 8, 2013) (Pro, J.)**

Denying motion for summary judgment based on plaintiff's failure to schedule claim in bankruptcy case. Although plaintiff lacks standing since claim belongs to his bankruptcy estate, the Court granted leave to amend with the substitution of the trustee under Rule 17.

***Correos v. National Default Serv'g Corp.*, Case No. 2:12-cv-556, 2013 WL 2096407 (D. Nev. May 14, 2013) (Mahan, J.)**

Granting summary judgment to defendants on home-loan claims that plaintiffs did not schedule in bankruptcies. Plaintiffs asserted that they did not have notice of relevant conduct until later when their second bankruptcy case was pending. Court noted they did not amend their schedules to assert the claim, even though they had scheduled one defendant as a creditor based on the assignment of the loan to it. Although both bankruptcy cases were dismissed, Court held plaintiffs were not absolved of scheduling their claims.

***Blanchard v. Federal Nat'l Mortgage Assn.*, Case No. 2:12-cv-2203, 2013 WL 1867059 (D. Nev. May 2, 2013) (Mahan, J.)**

Dismissing home-loan claims in issue preclusion. Plaintiff brought previous action on home-loan claims, which were dismissed as failure to schedule them in prior bankruptcy was res judicata or claim preclusion. Although plaintiff claims new action involves different claims, the court imposed issue preclusion arising from prior rulings.



**(NON)DISCHARGE(ABILITY)**

***Ojima Oji, LLC v. Grisley (In re Grisley)*, Adv. No. 10-01428, 2013 WL 6198208 (Bankr. D. Nev. Nov. 27, 2013) (Collins, Thad, J., sitting by designation)**

Order granting discharge, rejecting creditor's arguments that debtors intentionally failed to disclose numerous personal bank account, business entities, pre- and post-petition transfers, and payments made to parties. Decision turned on two day trial, including testimony of debtors' bankruptcy attorneys, with holding that omissions were neither material nor intentional. For example, undisclosed bank accounts were already closed or had no funds. Debtors also initially engaged a consumer counsel with an "emergency" petition due to impending judgment. Initial counsel was not familiar with commercial issues in case, but understood that a commercial debtor's counsel would substitute in and amend papers. The contemplated replacement counsel did not take the case, and matter lingered before new counsel appeared. Both original and replacement counsel testified that debtors tried to disclose necessary information to them.

***J&J Sports Prods., Inc. v. Guzman*, Case No. 2:12-cv-1483-RCJ-GWF (D. Nev. Nov. 14, 2013) (Jones, C.J.), available at**

**[http://scholar.google.com/scholar\\_case?case=9812418533981077602](http://scholar.google.com/scholar_case?case=9812418533981077602)**

Default judgment vacated and action dismissed based on prior discharge of debt in defendants' bankruptcy. Plaintiffs asserted they only had learned of bankruptcy, although defendants scheduled the plaintiff as a creditor; the opinion does not address the ramification of the prosecution. Court granted plaintiff's motion to vacate and dismiss, although it noted uncertain basis. Court held there was no clerical error under Rule 60(a), and the judgment was not void under Rule 60(b)(4) due to the automatic stay because the action was filed after the stay dissolved with debtors' discharge. Court held it had jurisdiction over dispute and granted motion based on pre-litigation discharge of debt under Section 727.

***U.S. v. Haischer*, Case No. 2:11-cr-267, 2013 WL 3463598 (D. Nev. July 9, 2013) (Du, J.)**

Granting motion to impose restitution award under Mandatory Victims Restitution Act, notwithstanding prior discharge of the debt in bankruptcy.

**DISCOVERY**

***Crowley v. Burke*, Case No. 3:13-cv-219, 2013 WL 6284170 (D. Nev. Dec. 4, 2013) (Jones, C.J., aff'g, rev'g & rem'g in part, Beesley, J.)**

Rule 2004 examination of debtor does not inherently requires a showing of good cause by the examining party. Good cause is required if debtor moves to quash the examination, but that did not happen. Debtor's motion for a protective order puts burden on debtor to show good cause, but debtor's conclusory statements were insufficient. Debtor's pending writ petition to prevent his examination did not divest the bankruptcy court of jurisdiction to order debtor's examination.

***Crowley v. U.S. Bankr. Court*, Case No. 3:13-cv-151 (D. Nev. April 6, 2013) (Jones, C.J.), available at [http://scholar.google.com/scholar\\_case?case=14564397750339336378](http://scholar.google.com/scholar_case?case=14564397750339336378).**

Denying petition for writ of mandamus seeking to stop debtor's Rule 2004 examination. While Rule 2004 does not contain a textual requirement for good cause, an impending cram down on payment of creditor's unsecured claim is *per se* good cause to examine debtor about his assets.

### **EXEMPTIONS**

***Van Meter v. Nillson (In re Nillson)*, 129 Nev. A.O. 101, 315 P.3d 966 (2013) (Gibbons, J.) (en banc)**

Debtor could not claim homestead exemption for former residence still owned by resident former spouse since he did not physically reside there. Court also held that debtor must attest that he or she resides at property to record the homestead exemption. *Compare Greene v. Savage*, 583 F.3d 614 (9th Cir. 2009). Court also rejected concept of constructive homestead based on residence of debtor's dependent children.

***Weinstein v. Fox (In re Fox)*, 129 Nev. A.O. 39, 302 P.3d 1137 (2013) (Cherry, J.) (en banc)**

Debtor could not claim vehicle and wildcard exemptions for non-debtor spouse based on plain language of the statute.

***Todd v. Whinery*, Case No. 2:12-cv-1841, 2013 WL 3285525 (D. Nev. June 26, 2013) (Dawson, J.)**

A creditor objected to debtor's exemptions for lost wages awarded in a prior settlement in litigation from a car accident. While the bankruptcy court granted summary judgment for the creditor, Judge Dawson reversed and remanded because genuine issues of material fact remained in the allocation of the settlement award.

***In re Ray*, Case No. 12-41467, 2013 WL 3187317 (Bankr. D. Idaho June 21, 2013) (Pappas, J.)**

When debtor claims a vehicle as exempt under Nevada law but its value including unsecured equity exceeds the exemption by amount deemed meaningful by the trustee, the trustee is duty bound to sell the vehicle and pay the debtor the value of his exemption. The trustee also is entitled to turnover of the vehicle.

### **FIDUCIARY DUTIES**

***Official Cte. of Unsecured Creditors v. Marini (In re Windspire Energy, Inc.)*, Case No. 3:13-cv-10, 2014 WL 763514 (D. Nev. Feb. 18, 2014) (Jones, J.), superseding 2014 WL 132442 (Jan. 10, 2014) (no longer available)**

Denying a motion to dismiss claims for breach of fiduciary duties brought against minority shareholders. The extent of control under Delaware law is a factual issue for a jury. Judge Jones also held that the committee sufficiently plead claims for equitable subordination and claim disallowance based on the conduct of insiders.

***Litigation Trust of the Rhodes Cos. v. Rhodes (In re Rhodes Cos.)*, Case No. 2:12-cv-1272, 2013 WL 7020748 (D. Nev. Dec. 27, 2013) (Du, J.), adopting recommendations, 2013 WL 5785291 (Bankr. D. Nev. July 1, 2013) (Riegle, J.)**

Judgment granted for debtor's director due to expiration of statute of limitations for fiduciary claims. Court rejected plaintiff's theory of adverse domination, which tolls the accrual of a cause of action by a corporation to bring claims against its directors because the corporation is adversely dominated by the director. Nevada has not adopted such a rationale, and Judge Pro rejected it in *USACM Liquidation Trust v. Deloitte*, 764 F. Supp.2d 1210 (D. Nev. 2011), aff'd \_\_\_ F.3d \_\_\_, 2014 WL 612503 (9th Cir. Feb. 18, 2014) (superseding 523 Fed. Appx. 488 (9th Cir. 2013)). The argument also conflicts with Nevada's rule that a sole actor's conduct is imputed to the corporation, even when the actor's conduct is against the corporate interest.

***Bagley v. Beville*, Case No. 2:13-cv-1119, 2013 WL 6837559 (D. Nev. Dec. 26, 2013) (Mahan, J.)**

Dismissal granted for debtor's former director due to expiration of statute of limitations for fiduciary claims. Nevada statute of limitations applied because Nevada was the place of debtor's business and location of its bankruptcy. Incorporation in Maryland did not trump Nevada's interests. Court applied a three-year statute of limitations, found defendant resigned as a director more than three years before the bankruptcy, and dismissed the claims.

**FORUM--AUTHORITY, VENUE & JURISDICTION**

***Verano Land Group, L.P. v. VTLM Tex. L.P.*, Case No. 2:13-cv-939, 2014 WL 347315 (D. Nev. Jan. 30, 2014) (Mahan, J.)**

Although defendants removed state-court litigation to federal district court based on one defendant's bankruptcy petition in Texas, court equitably remanded related-to litigation based on 16 months in state court with 211 filings and 23 hearings. 28 U.S.C. 1452(b). Defendants argued that related Texas litigation and Texas bankruptcy made Texas better forum. Court noted that the state court and Nevada Supreme Court already had considered and rejected arguments regarding best forum, and Court declined to take them up again.

***Shengdatech Liquidating Trust v. Hansen, Barnett & Maxwell, P.C.*, Case No. 3:13-cv-563, 2013 WL 6408518 (D. Nev. Nov. 25, 2013) (Jones, C.J.)**

Granting defendant's motion to withdraw the reference of claims brought in bankruptcy court by debtor's liquidating trust against debtor's professionals. The trust brought claims for professional negligence and malpractice, breach of contract, and fraudulent transfer. The Court held there was no mandatory withdrawal involving interpretation of non-bankruptcy federal law. But it granted permissive withdrawal as (1) the bankruptcy court lacks constitutional authority to finally determine the non-core common law claims, and (2) the bankruptcy court lacks statutory authority to conduct the demanded jury trial as defendants would not consent to the jury trial in bankruptcy court. Judge Jones cited judicial efficiency in withdrawal rather than de novo review.

***Cory v. eBet Ltd. (In re Sona Mobile Holding Corp.), Case No. 2:12-cv-252, 2013 WL 3678856 (D. Nev. July 5, 2013) (Pro, J.)***

Transferring venue of non-core adversary proceeding due to forum selection clause. Although plaintiff trustees established additional costs of litigation in different venue, they did not establish that the additional costs would effectively deny them their day in court.

***Summit Growth Mgmt., LLC v. Marek, Case No. 3:12-cv-170, 2013 WL 2285077 (D. Nev. May 22, 2013) (Jones, C.J.)***

Denying defendant's motion to dismiss. Defendant was an officer of a debtor that confirmed plan, and plaintiff brought claims against defendant individually for his representations. District Court had jurisdiction over claims brought against defendant individually; the Bankruptcy Court did not retain jurisdiction since claims do not involve plan terms or claims against debtor. Court also denied defendant's substantive arguments as to plaintiff's standing and pleading of claims.

***Official Cte. of Unsecured Creditors v. Marini (In re Windspire Energy, Inc.), Case No. 3:13-cv-10 (D. Nev. April 1, 2013) (Jones, C.J.), available at [http://scholar.google.com/scholar\\_case?case=1621411216628493158](http://scholar.google.com/scholar_case?case=1621411216628493158).***

Reference withdrawn based on recommendation of Judge Beesley that Bankruptcy Court lacked constitutional authority to enter final judgment on claims for breach of fiduciary duty, aiding and abetting the same, corporate waste, equitable subordination/equitable disallowance, recharacterization, and recovery of fraudulent transfer.

**FRAUDULENT TRANSFERS**

***Brinko v. Rio Props., Inc. (In re National Consumer Mortgage, LLC), Case No. 2:10-cv-930, 2013 WL 6844494 (D. Nev. Dec. 20, 2013) (Pro, J.)***

Trustee brought fraudulent transfer claims against casino when debtor's principal received checks or cash from debtor, purchased cashier's checks payable to himself, deposited them with the front money account with defendant casino, and used the funds at the sports book. Banks that issued checks did not control the funds and were mere conduits, such that defendant could not present evidence or argument that the funds were not debtor's money with the purchase of the cashier's checks. As the the casino defendant, Judge Pro held that based on state gaming regulations, the casino remained a conduit without transferee liability for front money accounts. Unresolved was when the casino became a subsequent transferee and for what amount, depending on judicial decisions involving markers, bets, and losses.

**GUARANTORS**

***Insolvency Servs. Group, Inc. v. Meritage Homes Corp., Case No. 2:11-cv-1364, 2014 WL 317750 (D. Nev. Jan. 28, 2014) (Pro, J.)***

Awarding attorney's fees as part of judgment, including fees in litigating an appeal in a related bankruptcy. The underlying litigation involved a broadly worded guarantee, and the Court held that the appeal from the related bankruptcy involved a number of issues related to the guarantee.

***Branch Banking & Trust Co. v. Brown*, Case No. 3:12-cv-644, 2014 WL 177534 (D. Nev. Jan. 13, 2014) (McKibben, J.)**

In action against guarantors of debtor's debt, granting partial summary judgment for plaintiff lender on liability, as distribution in bankruptcy does not affect guarantor's liability.

***Branch Banking & Trust Co. v. Jarrett*, Case No. 3:13-cv-235, 2013 WL 5741240 (D. Nev. Oct. 22, 2013) (Jones, C.J.)**

Lender brought action against guarantors of secured debt following borrower's Chapter 11 reorganization. Judge Jones held that the lender was entitled to recover its legal fees from the bankruptcy against the guarantors. He rejected the guarantors' argument that the bank must bring the action and thus only could cover fees if it filed an involuntary bankruptcy. The guarantee language did not address which party brought a legal action, only that one was commenced. Judge Jones also rejected the argument that the bank's participation in the bankruptcy was to enforce the loan provisions; he held that the lender participated to protect its rights to collect the debt. Judge Jones also found that the bank was the prevailing party in the case, noting its efforts that increased the debtor's monthly payment obligation.

Judge Jones held he still is required to conduct a valuation hearing under state law to determine the guarantors' liability. The bankruptcy case was not res judicata on valuation because the guarantee litigation involved the value on the date of the civil litigation--and thus was not actually litigated in the bankruptcy over a year earlier. Judge Jones noted that actions against non-debtors are state law claims that are not affected by debtor's bankruptcy.

**INVOLUNTARY PETITIONS**

***Montana v. Blixseth*, Case No. 2:13-cv-1324, 2013 WL 5408668 (D. Nev. Sept. 25, 2013) (Dorsey, J.)**

Certifying appeal directly to the Circuit. She held that there is no controlling law over whether any bona fide dispute over a petitioning creditor claim disqualifies the claim in total. The Court also held it was unresolved if an uncontested tax returns counts as an uncontested claim. The issues also were subject to conflicting decisions in other jurisdictions, and certification will materially advance the underlying issue, the dismissal of the involuntary petition.

**REAFFIRMATION**

***In re Henderson*, 492 B.R. 537 (Bankr. D. Nev. 2013) (Markell, J.)**

Judge Markell denied several reaffirmation agreements filed by debtors seeking to keep vehicles worth less than the debt secured by the vehicle. Debtors claimed that the vehicles were necessary for debtors to get to work, and they were worried that they would lose them to repossession if they didn't reaffirm the debts since their bankruptcies constituted defaults under their loans. Judge Markell pointed to a change in Nevada law, preventing repossession unless the default significantly impairs the prospect of payment, performance of realization of the lender's collateral. Judge Markell held the filing of a bankruptcy petition does not create such a significant impairment. Thus, the lender cannot repossess, and reaffirmation is not in the debtor's best interest, a necessary element for reaffirmation.

## **SALE**

### ***Pro Se Servs. v. A&A Auto Wrecking, LLC, Case No. 3:13-cv-244, 2014 WL 335043 (D. Nev. Jan. 28, 2014) (Du, J.)***

Granting motion to dismiss appeal as moot based on consummated sale to good faith purchaser under Section 363(m). Court rejected argument that buyer was not entitled to safe harbor provision based on appellant's litigated and appealed dispute over ownership in asset sold to buyer. Court noted Bankruptcy Court conducted three-day evidentiary hearing to determine rights in property, and there was no evidence presented that buyer was aware of dispute. Court also rejected argument that financial remedy could be reached even without undoing sale. Because the buyer was not a creditor named in the appeal, Judge Du held her ability to fashion relief was irrelevant.

### ***BOH Park Highlands NV, L.P. v. Wilmington Trust, N.A. (In re November 2005 Land Investors, LLC), Case No. 2:13-cv-639, 2014 WL 223353 (D. Nev. Jan. 20, 2014) (Pro, J.)***

Affirming allocation of proceeds from Section 363 sale as appellant could be compelled to accept a monetary settlement, based on contractual agreements among parties.

## **SANCTIONS**

### ***Dignity Health v. Seare (In re Seare), 493 B.R. 158 (Bankr. D. Nev. 2013) (Markell, J.)***

Debtors' counsel sanctioned for failing to represent them in a nondischargeability adversary. Debtors had brought employment litigation against former employer/hospital. Things went poorly, resulting in judgment against debtors for committing fraud on court. Debtors sought counsel to address wage garnishment. Debtors' bankruptcy counsel did not closely review papers, presumed hospital debt was dischargeable medical bills, and filed bankruptcy. When hospital brought nondischargeability action due to fraud, debtors' counsel refused to defend them. Counsel inappropriately unbundled services by ignoring debtors' desire to address the garnishment, violating numerous obligations under state legal ethics and the bankruptcy code.

### ***Kelly v. Cuomo (In re Cuomo), Adv No. 12-1124, 2013 WL 3155425 (Bankr. D. Nev. June 20, 2013) (Markell, J.)***

Judge Markell sanctioned debtor's counsel for failing to review a client's prior bankruptcy petitions to determine whether the information in those petitions is consistent with the information in the client's current credit reports and the information provided by the client. Debtor's counsel failed his duty of competence, instead placing the burden on the debtor to provide accurate information such that counsel performed more like a petition preparer than counsel. Debtor's failure did not maximize his client's chances for a fresh start. Debtor's counsel was required to disgorge a portion of his fees based on the fact that debtor still had ongoing matters that counsel should have addressed.

***Crowley v. Burke*, Case No. 3:13-cv-219, 2013 WL 6284170 (D. Nev. Dec. 4, 2013) (Jones, C.J., rev'g & rem'g Beesley, J.)**

Judge Jones held the bankruptcy court abused its discretion in barring debtor from refiling for bankruptcy for one year, due to lack of explicit findings of bad faith or to prevent an abuse of process. Absent such findings, the bankruptcy court also abused its discretion in denying debtor's unilateral "notice" of dismissal of his bankruptcy and granting of a competing motion to dismiss with bar on refiling. The issues were reversed and remanded to the bankruptcy court.

**STANDING**

***In re B & M Land & Livestock, LLC*, 498 B.R. 262 (Bankr. D. Nev. 2013) (Beesley, J.)**

Dismissing case as an unauthorized filing, when debtor's sole member was herself a Chapter 7 debtor. Member's legal and equitable interests in the debtor were property of the member's bankruptcy estate. Where the filing entity is a single-member entity, and the single member is a debtor, the trustee of the member's estate controls entity's rights, including the right to file for bankruptcy. Thus, the member lacked standing to file the entity's bankruptcy petition.

***Official Cte. of Unsecured Creditors v. Marini (In re Windspire Energy, Inc.)*, Case No. 3:13-cv-10, 2014 WL 763514 (D. Nev. Feb. 18, 2014) (Jones, J.), superseding 2014 WL 132442 (Jan. 10, 2014) (no longer available)**

Denying defendants' motion to join trustee as plaintiff with prosecuting committee and to amend to add counterclaim against trustee. Committee adequately represented the interests of the estate, such that trustee's participation was not necessary. Rejecting the potential joinder of trustee as inappropriate to seek declaratory relief against trustee to resolve pending core matters before Bankruptcy Court. Defendants can litigate the matters before Bankruptcy Court and bring an appeal for review by District Court.

***Greenwood v. OneWest Bank FSB (In re Greenwood)*, Case No. 3:13-cv-293 (D. Nev. July 30, 2013) (Jones, C.J.), available at**

**[http://scholar.google.com/scholar\\_case?case=17858126720593361842](http://scholar.google.com/scholar_case?case=17858126720593361842).**

Dismissing appeal by Chapter 7 debtors for lack of standing. Debtors filed an adversary to determine the validity of a lien recorded against estate property and recorded a notice of lis pendens. After the Bankruptcy Court approved a settlement between the trustee and defendant as to the validity of defendant's security interest, defendant moved to strike and cancel the lis pendens. The Bankruptcy Court ordered Debtors to remove the lis pendens, warning that their discharge would not be entered until they removed the lis pendens. Debtors appealed. District Court held debtors lacked standing to litigate any purported interests in estate property, and the District Court dismissed the appeal for lack of jurisdiction.