BANKRUPTCY - RESEARCH BINDER

BANKRUPTCY JUDGE RANDALL J. NEWSOME

UPDATED THROUGH VOLUME 410 OF BANKRUPTCY REPORTS

The following list of cases and supplemental information is presented for informational and educational purposes only. Though it represents the aggregation of 19 years of research, the Court makes no claims as to its current level of accuracy. Some of the cases set forth may very well have been superseded, reversed, or otherwise may no longer be good law. The Court has posted it with the intention to educate and assist those who may find it helpful. Accordingly, users should consider it a first, but by no means final, research tool, and should cite check all cases listed herein for continued viability prior to relying on such cases in practice.

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Judge Randall J. Newsome - Research Binder

ABANDONMENT

Catalano v. CIR, 279 F.3d 682 (9th Cir. 2002)

An order lifting or modifying the automatic stay by itself does not constitute a *de facto* abandonment of the property of the estate. Procedures under § 554 must be followed before property is legally abandoned.

Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001) Listing of prepetition "songrights" in a value of "unknown" "was not so defective that it would forestall a proper investigation of the asset." Accordingly, the right to post-petition royalties from these assets vested in the debtor upon confirmation of his chapter 11 plan. Unpaid prepetition royalties did not vest in the debtor, because they were subject to a separate listing requirement as causes of action.

In re Adair, 253 B.R. 85 (9th Cir. B.A.P. 2000)

Debtor had no ongoing duty to provide trustee with updated information regarding properly disclosed estate assets. (Case had been closed for 3 years).

In re DeVore, 223 B.R. 193 (9th Cir. B.A.P. 1998)

Order reopening case and withdrawing no-asset report does not negate a technical abandonment.

In re Johnston, 49 F.3d 538 (9th Cir. 1995)

Tax consequences to debtor are irrelevant in determination to abandon

In re Pace, 159 B.R. 890 (9th Cir. B.A.P. 1993), *aff'd in part, vacated in part*, 56 F.3d 1170 (9th Cir. 1995), *op amended and superseded on denial of rehearing* 67 F.3d 187 (9th Cir. 1995), *aff'd in part, vacated in part,* 67 F.3d 187 (9th Cir. 1995)

Unscheduled assets are neither abandoned nor administered under 554(d)

In re Pace, 146 B.R. 562 (9th Cir. B.A.P. 1992)

Abandonment of a promissory note does not equal abandonment of a malpractice action.

In re Pauline, 119 B.R. 727 (9th Cir. B.A.P. 1990)

(abandonment prevents trustee's property-churning conduct)

In re Berg, 45 B.R. 899, 903 (9th Cir. B.A.P. 1984)

(when abandonment occurs)

ABSTENTION--SECTIONS 305 AND 1334(C)

In re Macke Intern. Trade, Inc., 370 B.R. 236 (9th Cir. BAP 2007)

Bankruptcy court may award attorney fees to a debtor where case is dismissed pursuant to § 305(a), even if debtor meets all of the requirements for an involuntary under § 303. Case was properly dismissed under § 305, where debtor had done an assignment for the benefit of creditors six months before the involuntary was filed, and the petitioning creditor was the only creditor not to consent to the assignment.

In re Franceschi, 268 B.R. 219 (9th Cir. B.A.P. 2001), *aff'd*, 43 Fed.Appx. 87 (9th Cir. 2002)

Action for declaratory and injunctive relief properly dismissed on sovereign immunity grounds as to state bar, and on Younger abstention grounds as to the state bar's chief trial counsel. In order to abstain under Younger, the court must find that state proceedings :

1. are ongoing;
2. implicate important state interests; and
3. provide the plaintiff an adequate opportunity to litigate federal claims.

Security Farms v. International Brotherhood of Teamsters, 124 F.3d 999, 1009-10 (9th Cir. 1997)

District court's denial of abstention treated as a decision not to remand, since after the removal of the proceeding to federal court, the state court action was extinguished. "Section 1334(c) abstention should be read in pari materia with section 1452(b) remand, so that the former applies only in cases in which there is a related proceeding that either permits abstention in the interests of comity, section 1334(c)(1), or that, by legislative mandate, requires it, section 1334(c)(2)."

In re Conejo Enterprises, Inc., 96 F.3d 346 (9th Cir. 1996)

Remand order based on abstention not appealable

In re Conejo Enterprises, Inc., 71 F.3d 1460 (9th Cir. 1995) (see also "automatic stay")
Opinion Withdrawn by In re Conejo Enterprises, Inc., 78 F.3d 1456 (9th Cir. 1996), AND
Opinion Superseded by In re Conejo Enterprises, Inc., 96 F.3d 346 (9th Cir. 1996)

1) Court has jurisdiction to review mandatory abstention issue, notwithstanding pre-1994 statute to contrary.

2) Mandatory abstention not approved because after requesting mandatory abstention, creditor filed a claim making action core.

1334(c)(2)In order for mandatory abstention to apply, a proceeding must:

(1) be based on a state law claim or cause of action;
(2) lack a federal jurisdictional basis absent bankruptcy;
(3) be commenced in a state forum of appropriate jurisdiction;
(4) be capable of timely adjudication; and
(5) be a non-core proceeding.

In re Conejo Enterprises, Inc., 71 F.3d 1460, 1464 (9th Cir. 1995); see also In re Kold Kist

Brands, Inc., 158 B.R. 175, 178 (C.D. Cal. 1993); In re World Solar Corporation., 81 B.R. 603, 606 (S.D. Cal. 1988); In re Baldwin Park Inn Assoc., 144 B.R. 475 (C.D. Cal. 1992).

In re Eastman, 188 B.R. 621 (9th Cir. B.A.P. 1995)

§ 305 abstention

Dismissing a chapter 7 case under the more restrictive provisions of 305 (and not 707) requires a factual finding that *both* the debtor and creditors would be 'better served' by a dismissal.

In re Davis, 177 B.R. 907 (9th Cir. B.A.P. 1995)

Court improperly abstained where it failed to consider economy, convenience, fairness and comity

In re Eastport Associates, 935 F.2d 1071 (9th Cir. 1991)

Rehearing denied and opinion amended, July 31, 1991.

In re Tucson Estates, Inc., 912 F.2d 1162 (9th Cir. 1990)

Bankruptcy court abstention warranted for resolution of related state court case
(note: holding limited by *In re Conejo*)

ADEQUATE PROTECTION §361 B.R. 4001

In re Sunnymead Shopping Center, 178 B.R. 809 (9th Cir. B.A.P. 1995)
Acceptance of a/p payments does not violate 'one action' rule

In re Deico Electronics, 139 B.R. 945 (9th Cir. B.A.P. 1992)
No strict rules apply to amount, frequency or commencement of adequate protection payments

ADMINISTRATIVE EXPENSE §503

In re Imperial Credit Industries, Inc., 527 F.3d 959 (9th Cir. 2008)

A chapter 7 debtor's obligation on a claim arising from a capital maintenance agreement with the FDIC under § 365(o) is not entitled to administrative expense priority, where it is specifically provided for under § 507(a)(9).

In re Wind N' Wave, 509 F.3d 938 (9th Cir. 2007)

". . .[C]reditors who receive compensation under 503(b)(4) should also be compensated for costs incurred in litigating a fee award, so long as the services meet the § 503(b)(4) requirements and the case "exemplifies a 'set of circumstances' where litigation was 'necessary'". . . ."

In re Hashim, 379 B.R. 912, 914 (9th Cir. BAP 2007)

"If a court does not authorize a creditor under 11 U.S.C. § 503(b)(3) to recover, for the benefit of the estate, property that was transferred or concealed by the debtor, the Federal Rules of Civil Procedure 17(a) and 19(a) require that the court realign as plaintiff a bankruptcy trustee who is a defendant."

In re Brown & Cole Stores, LLC, 375 B.R. 873 (9th Cir. BAP 2007)

Secured creditors are entitled to the administrative expense priority allowed by § 503(b)(9). Because such claims arise prepetition, they may be subject to setoff under § 553(a) if all of the requirement of the statute are met.

In re Fowler, 394 F.3d 1208 (9th Cir. 2005)

"We hold that § 348(d) requires that postpetition employment tax debt, incurred as an administrative expense of a Chapter 11 bankruptcy estate, retains its first priority administrative expense status upon conversion to a Chapter 13 bankruptcy plan. Section 1305 is not in conflict with this holding because it does not govern the priority of the postpetition claims it allows into the bankruptcy."

In re Metro Fulfillment, Inc., 294 B.R. 306 (9th Cir. B.A.P. 2003)

Penalty wages under Cal. Labor Code §§ 203 and 203.1 that arose out of postpetition work were entitled to an administrative expense priority.

In re BCE West, L.P., 319 F.3d 1166 (9th Cir. 2003)

An alleged breach of contract for failure to seek a non-disturbance agreement which ultimately resulted in alleged post-petition damages, is a breach of contract that arose pre-petition, and thus is not entitled to an administrative priority.

In re Microage, Inc., 291 B.R.503 (9th Cir. B.A.P. 2002)

§ 502(d) may be used to bar payment of administrative claims (such as the reclamation claim in this case), but not after the administrative claim has been allowed.

In re LPM Corp., 300 F.3d 1134 (9th Cir. 2002)

Post-petition rent claims do not have super-priority over other chapter 11 administrative claims or chapter 7 administrative claims.

In re Kadjevich, 220 F.3d 1016 (9th Cir. 2000)

Creditor's claim for attorney fees arising from a prepetition fraud action and postpetition loan costs were not entitled to administrative expense priority.

In re San Rafael Baking Co., 219 B.R. 860 (9th Cir. B.A.P. 1998)

Bankruptcy court may not award administrative priority payments to employee trust fund for period after expiration of debtor's collective bargaining agreement

In re Abercrombie, 139 F.3d 755 (9th Cir. 1998)

Under chapter 11, claim for attorneys' fees based on post-petition judgment arising from pre-petition contract does not qualify for priority as "administrative expense."

In re Santa Monica Beach Hotel, Ltd., 209 B.R. 722 (9th Cir. B.A.P. 1997)

Postpetition contract must be construed to include all reasonable compensation to claimant provided under pre-petition contract

In re Endy, 104 F.3d 1154 (9th Cir. 1997)

Postconversion UST fees and Chapter 7 adm expenses prorated and have priority over Chapter 11 expenses when assets insufficient to pay all three

In re Allen Care Centers, 96 F.3d 1328 (9th Cir. 1996)

State's costs in closing down nursing home not entitled to adm priority in absence of actual benefit to estate. *Reading* and *Midlantic* distinguished.

Irmas Family Trust v. Madden (In re Joseph E.Madden), 185 B.R. 815 (9th Cir. 1995)

Despite lack of benefit to estate, where debtor-in-possession continued pre-filing Breach of contract litigation against a defendant, the successful defendant was entitled to an administrative priority for the portion of the attorney's fees incurred post-petition pursuant to attorneys' fee clause in contract.

In re Dak Industries, 66 F.3d 1091 (9th Cir. 1995)

Executory contract as in nature of a lump sum sale of software rather than a grant of permission to use intellectual property as such was a prepetition debt not entitled to administrative priority

In re Sierra Pacific Broadcasters, 185 B.R. 575 (9th Cir. B.A.P. 1995)

Post-petition injury and postpetition worker's compensation claim is administrative priority - no showing of benefit to estate necessary

In re World Sales, Inc. 183 B.R. 872 (9th Cir. B.A.P. 1995)

Where contributions to hsw fund required on a monthly basis, contract governs in determining administrative expense priority, even though employees only worked 18 of 31 days of the month, after which time business shut down

Carpenters Health & Welfare Trust Funds (In re Rufener Constr. Inc.), 53 F.3d 1064 (9th Cir. 1995)

Section 1113 limiting the power of a debtor to unilaterally terminate or modify terms of a collective bargaining agreement applies only in chapter 11 cases and not to chapter 7 cases. Therefore the unpaid contributions were not entitled to administrative expense status.

In re Pacific-Atlantic Trading Co., 27 F.3d 401 (9th Cir. 1994)

Rent accrued on nonresidential lease postpetition and pre-rejection gives rise to an administrative claim for the full amount of the rent accrued, regardless of the actual value conferred by the lease.

In re Palau Corporation., 139 B.R. 942 (9th Cir. B.A.P. 1992), *aff'd*, 18 F.3d 746 (9th Cir. 1994)

Award for postpetition wages not entitled to administrative expenses - estate received no benefit

In re Carolina Triangle Ltd. Partnership, 166 B.R. 411, 415 (9th Cir. B.A.P. 1994)

Post-petition real property taxes are not administrative expense under 503(b)(1)(B) if Trustee abandons the property. The property taxes created in rem liability against the property but not in personam liability against the estate, and as such, the property taxes were incurred by the property, not by the estate

In re Hooker Investment, Inc., 145 B.R. 138 (Bankr. S.D.N.Y. 1992)

Golden parachute not entitled to administrative expense priority

see also In re Selectors, Inc. 85 B.R. 843 (9th Cir. B.A.P. 1988)

In re Texscan, 107 B.R. 227 (9th Cir. B.A.P. 1989), *aff'd*, 976 F.2d 1269 (9th Cir. 1992)

fn. 4 - ins. carrier claims based on employees' post-petition injuries are adm

In re Glasply Marine Industries, Inc., 971 F.2d 391 (9th Cir. 1992)

In re Riverside-Linden Investment Co., 945 F.2d 320 (9th Cir. 1991)

Chapter 7 case - interest on attorney fee claim accrued from date fees awarded by bankruptcy court not from date fees invoiced

In re D. Papagni Fruit Company, 132 B.R. 42 (Bankr. E.D. Cal. 1991)

Under Cal. Law, property taxes are in rem

In re Johnson, 901 F.2d 513 (6th Cir. 1990)
60 day bar date for filing of claims in a Chapter. 7 conversion from Chapter 11 to Chapter 7 applies to administrative expenses from Chapter. 11

In re MacNeil, 907 F.2d 903 (9th Cir. 1990)
Absent factual determination whether certain secured creditors entitled to 11 U.S.C. § 507(b) superpriority, unempowered advisory opinion rendered

In re Mark Anthony Const. Inc., 886 F.2d 1101 (9th Cir. 1989)
Interest on post-petition taxes = 503(b) priority

In re Blumer, 95 Bankr 143 (9th Cir. B.A.P. 1988) *aff'd*, 826 F.2d 1069 (9th Cir. 1987)
Goods supplied in ordinary course of business

In re Dant & Russell, Inc. 853 F.2d 700 (9th Cir. 1988) - complete review of subject

In re Thompson, 788 F.2d 560, 563 (9th Cir. 1986)
Starting point is terms of the lease, but "reasonable value of the use to the debtor" is the standard

In re Spruill, 78 B.R. 766 (Bankr. E.D.N.C. 1987)
Where Trustee opposed a relief from stay motion before abandoning the property, lender was injured as consequence;(thus, in equity, property taxes could be treated as administrative expense)

In re Verco Industries, 20 B.R.664 (9th Cir. B.A.P. 1982)
Timing of payment of administrative claims is within the discretion of the court

In re Western Farmers Ass'n, 13 B.R. 132 (Bankr. W.D. Wash. 1981)
When remaining administrative claims will not be paid in full, attorney fees should not be paid ahead of reclamation creditors
.....Allowed Under
(1) 506(b)
(2) 362(h)
however, *Westside Printworks* held that attorney fees are allowed under 365(b)(1)(B), although JN is not sure this holding is right

AGENCY

In re Wingo, 89 B.R. 54 (9th Cir. B.A.P. 1988)

Buyer of property from a title co. as not necessarily charged with knowledge possessed by title co re filing of bankruptcy.

ALTER EGO

In re Audre, Inc., 216 B.R. 19 (9th Cir. B.A.P. 1997)

It is generally held that the separate corporate existence of a subsidiary will be recognized absent illegitimate purposes unless (a) the business transactions, property, employees, bank and other accounts and records of the corporation are intermingled, (b) the formalities of separate corporate procedures for each corporation are not observed, (c) the corporation is inadequately financed as a separate unit from the point of view of meeting its normal obligations; (d) the respective enterprises are not held out to the public as separate enterprises; and (e) the policies of the corporation are not directed to its own interest primarily, but rather to those of the other corporation. H. Henn and J. Alexander, Laws of Corporations § 148 at 355-56 (3rd ed. 1983).

In re Folks, 211 B.R. 378, (9th Cir. B.A.P. 1997)

Purported creditor did not have standing to assert alter ego claim

International Brotherhood of Elec. Workers, Local Union No. 332, AFL-CIO v. Hyland Wilson Elec. Contractors, Inc., 881 F.2d 820, (9th Cir. Cir. Cir. 1989)

Factors for disregarding corporation entity in 9301(a) cases

Firstmark Capital Corporation. v Hempel Financial Corporation., 859 F.2d 92 (9th Cir. 1988)

Wife cannot be liable for husband's and corporation's wrongdoing

APPEALS

In re City of Vallejo, 408 B.R. 280 (9th Cir. BAP 2009)

Banks did not meet "person aggrieved" test for appellate standing, since the order appealed from did not adversely affect their pecuniary interests, diminish their property, increase their burdens, or impair their rights.

In re Gould, 401 B.R. 415, 421 (9th Cir. BAP 2009)

Appeal was not moot, where even if the debtor had spent a tax refund that the IRS should have been allowed to set off against, the court could still order the money returned.

In re Rosson, 545 F.3d 764, 769 (9th Cir. 2008)

An order converting a chapter 13 case to chapter 7 is final and appealable.

In re Cellular 101, Inc., 539 F.3d 1150 (9th Cir. 2008)

A party's failure to timely inform the court of appeals of a settlement that it believes disposes of a pending appeal precludes the party from asserting the affirmative defense of settlement and release in a later proceeding.

In re Frye, 389 B.R. 87, 88 (9th Cir. BAP 2008)

BAP did not have jurisdiction over a petition to certify a direct appeal under 28 U.S.C. § 158(d)(2). Pursuant to Federal Rules of Bankruptcy Procedure 8007(b), "[t]he receipt by the appellate court of a copy of the notice of appeal and the assignment of a docket number does *not*, in bankruptcy appeals, constitute "docketing the appeal." That only occurs after notification that the record on appeal is complete.

In re Stasz, 387 B.R. 271 (9th Cir. BAP 2008)

Contempt order was a final order, since it completely resolved a contested matter.

In re Hupp, 383 B.R. 476 (9th Cir. BAP 2008)

Under Federal Rules of Bankruptcy Procedure 8001(e), an election to take an appeal to the district court may not include anything other than the election.

In re Ransom, 380 B.R. 809 (9th Cir. BAP 2007)

BAP allows a direct appeal to the court of appeals, even though BAP issued a decision on debtor's appeal, where that decision was interlocutory and all of the requirements of 28 U.S.C. § 158(d)(2)(A) were met.

Suter v. Goedert, 504 F.3d 982 (9th Cir. 2007)

Motion for stay pending appeal was not mooted by state supreme court's dismissal of an appeal in the underlying suit.

In re Brown, 484 F.3d 1116 (9th Cir. 2007)

Minute order that reserved issue of Rule 11 sanctions for later disposition was not a final, appealable order.

In re Berman, 344 B.R. 612 (9th Cir. BAP 2006)

Direct appeals provisions of BAPCPA do not apply to appeals arising from bankruptcy cases filed before BAPCPA's effective date.

In re Thomas, 428 F.3d 1266 (9th Cir. 2005)

"Rule 8002(b) requires an amended notice of appeal when the bankruptcy court's ruling on a postjudgment motion alters the judgment and the appellant wishes to challenge that alteration."

In re Rains, 428 F.3d 893 (9th Cir. 2005)

Bankruptcy court had jurisdiction to enforce a settlement agreement, even though the validity of the settlement was on appeal.

In re Beachport Entertainment, 396 F.3d 1083 (9th Cir. 2005)

BAP abused its discretion when it dismissed an appeal for failure to include a copy of the bankruptcy court's decision and the answer to the complaint in the appellate record.

In re Silberkraus, 336 F.3d 864 (9th Cir. 2003)

Bankruptcy court retained jurisdiction to publish its written findings of fact and conclusions of law if consistent with its oral findings.

In re Warrick, 278 B.R. 182 (9th Cir. B.A.P. 2002)

Delay of six days past the appeal deadline in moving for extension of time to file notice of appeal was not excuseable neglect, despite debtor's alleged lack of notice of order's entry.

In re Betacom of Phoenix, Inc., 250 B.R. 376 (9th Cir. B.A.P. 2000)

"In ruling on a motion for extension of time to file a notice of appeal under Rule 8002(c) that is filed within the initial ten-day period, a bankruptcy court must consider the following four factors:

1. whether the appellant is seeking the extension for a proper purpose;
2. the likelihood that the need for an extension will be met if the motion is granted;
3. the extent to which granting the extension would inconvenience the court and the appellee or unduly delay the administration of the bankruptcy case;
4. the extent to which the appellant would be harmed if the motion were denied."

In re Lam, 192 F.3d 1309 (9th Cir. 1999)

Bankruptcy creditor forfeits right to appeal from entry of default by not seeking relief in court where default was entered.

In re Arrowhead Estates Development Co, 42 F.3d 1306, (9th Cir. 1994), as amended March 23, 1995

Appellants' claims remanded for consideration on merits where notice of appal filed after bankruptcy court's oral decision but before entry of formal order in docket

In re Delaney, 29 F.3d 516, 518 (9th Cir. 1994)

Parties have an affirmative duty to 'monitor the dockets to inform themselves of the entry of orders they may wish to appeal.'...In re Sweet Transfer & Storage, Inc. , 896 F.2d 1189, 1193 (9th Cir. 1990) (superseded by Rule as stated in In re Arrowhead Estates Development) lack of notice of an entry of an order is not a ground by itself to warrant finding an otherwise untimely appeal to be timely. See B.R. 9022, Zurich Ins. Co. v. Wheeler, 838 F.2d 338, 340 (9th Cir. 1988).

In re Mouradick, 13 F.3d 326, 329 (9th Cir. 1994)

Order of bankruptcy court extending time to file notices of appeal before the 10 day limit in B.R. 8002(c) did not excuse appellant's failure to file notices of appeal within the time stated in the rule.

APPOINTMENT OF PROFESSIONALS

In re AFI Holding, Inc., 355 B.R. 139 (9th Cir. BAP 2006), *aff'd and remanded,* 530 F.3d 832 (9th Cir. 2008)(for determination of removed trustee's right to fees).

Chapter 7 trustee had a material conflict of interest and thus was not disinterested as required by § 701(a)(1) where she previously represented insiders of the debtor. Totality of circumstances test applied. Failure to disclose all connections and appearance of inpropriety also supported her removal from the case.

In re Tevis, 347 B.R. 679 (9th Cir. BAP 2006)

Attorney for chapter 7 trustee who had a preliminary consultation with the debtors in the case had burden to show that there was no confidential information disclosed by the debtors that would create a conflict of interest under California law, and thus a material adverse interest precluding appointment under § 327.

In re Triple Star Welding, 324 B.R. 778 (9th Cir. BAP 2005)

Chapter 11 debtor's attorney who failed to file a Rule 2014 statement of disinterestedness was not entitled to any fees absent full disclosure. The court had no discretion to waive this requirement. Furthermore, the court should have consider potential conflicts and receipt of a possible preference, which did not need to be addressed through an adversary proceeding.

In re Maximus Computers, Inc., 278 B.R. 189 (9th Cir. B.A.P. 2002)

Court erred in allowing creditor's counsel to represent the trustee, where firm failed to fully disclose its compensation arrangement with the creditor and whether the firm would continue to represent creditor. Firm might have been able to represent creditor in pursuing actions on behalf of the trustee under 503(b)(3)(B).

In re S.S. Retail Stores Corp., 216 F.3d 882 (9th Cir. 2000)

United States trustee originally objected to counsel for the debtor's appointment on the grounds that they were not disinterested, because one of their partners had been an assistant secretary of the debtor. The bankruptcy court found the firm to be qualified. That decision was affirmed by the bankruptcy appellate panel, but the appeal to the Ninth Circuit was dismissed as not from a final order. The firm thereafter received fees of over $200,000. Once the case was closed, the United States trustee appealed the final fee award on the grounds that the firm should not have been appointed. Held: Disgorgement would not be equitable, where the firm made full disclosure, engaged in no impropriety, and the United States trustee did not seek a stay of the order allowing its appointment.

In re Capitol Metals Co., Inc., 228 B.R. 724 (9th Cir. B.A.P. 1998)

Financial company may not serve as debtor's post-petition financial adviser after company's principal functioned as debtor's prepetition chief financial officer.

In re S.S. Retail Stores Corporation, 211 B.R. 699, 702 (9th Cir. B.A.P. 1997)

Attorney's disqualification from case because he was not disinterested was not attributable to his law firm.

In re Mehdipour, 202 B.R. 474 (9th Cir. Cir. B.A.P. 1996), *aff'd*, 139 F.3d 1303 (9th Cir. 1998)

Payment of broker's commission as administrative expense was defacto approval of broker's employment

In re Bibo, Inc., 76 F.3d 256 (9th Cir. Cir. 1996), *cert. denied sub nom.* Fukutomi v. U.S. Trustee, 117 S. Court. 69 (1996).

Bankruptcy court has authority to appoint Chapter 11 trustee sua sponte

In re Martech USA, Inc., 188 B.R. 847 (9th Cir. B.A.P. 1995), *aff'd*, 90 F.3d 408 (9th Cir. 1996)

The creditors in a bankruptcy case pending in Alaska elected Pardo, a New York resident, to serve as Chapter 7 trustee. Just prior to the election, Pardo entered into an oral, month-to-month lease of an office in Alaska. The lessor was Pardo's Alaska counsel. Pardo visited his Alaska office for the first time on the morning that he was elected.

The B.A.P. held that Pardo was ineligible to serve as trustee because he did not have an office in Alaska within the meaning of the bankruptcy code § 321(a)(1). In so holding the B.A.P. stated that a site which an individual rents for the sole purpose of allowing him an active role in one specific bankruptcy case is not to be considered that person's office under Bankruptcy Code § 321(a)(1).

In re Atkins, 69 F.3d 970, 975 (9th Cir. 1995)

Court may enter nunc pro tunc order without showing under all 9 *Crest Mirror* factors if there is a showing of exceptional circumstances: 1) satisfactorily explain failure, 2) demonstrate benefit to the estate in a significant manner.

In re Larson, 174 B.R. 797 (9th Cir. B.A.P. 1994)

Given emergency nature of services performed during pre-appointment period, the short time between commencement of services and court appointment, the small sum in question and the benefit of the services to the estate, the bankruptcy court neither abused its discretion nor committed clear error in finding the objection regarding retroactive billing to be without merit.

In re CIC Inv. Corporation., 175 B.R. 52 (9th Cir. B.A.P. 1994)

Attorney with prepetition claim against bankruptcy debtor absolutely barred from representing debtor as general counsel (In re Marro (1st Cir.) distinguished.

In re Occidental Financial Group, Inc., 40 F.3d 1059, 1062-63 (9th Cir. 1994)

Undisclosed representation of principals who were creditors in Chapter 11 required disgorgement of fees - no quantum meruit

In re Reimers, 972 F.2d 1127 (9th Cir. 1992)

Bankruptcy court only change terms of contingent fee agreement in the event of unforeseen circumstances that renders the agreement unreasonable.

In re Haley, 950 F.2d 588 (9th Cir. 1991)

Real estate broker not entitled to recover commission because court approval to act as Broker for sale of debtors' property had not been obtained

In re Downtown Inv. Club III, 89 B.R. 59 (9th Cir. B.A.P. 1988)

Representation of general partner and debtor equals a conflict of interest under the facts.

In re Downtown Investment Club III, 89 B.R. 59, 63 (9th Cir. B.A.P. 1988)

" a nunc pro tunc order is improperly sought when the employment, due to an attorney's mere negligence or inadvertence, has not yet been court approved. Allowing a judge to limit nunc pro tunc orders to extraordinary circumstances will deter attorneys from general nonobservance of §327. " But excusable or explained negligence may justify nunc pro tunc.

In re Crest Mirror & Door Co., Inc., 57 B.R. 830 (9th Cir. B.A.P. 1986)

9 part test

ARBITRATION

In re Gurga, 176 B.R. 196 (9th Cir. B.A.P. 1994)

Bankruptcy court must enforce agreement to arbitrate a claim that is noncore

ASSIGNMENT OF RENTS

In re Scottsdale Medical Pavilion. 52 F.3d 244 (9th Cir.1995), *aff'd.* 159 B.R. 295 (9th Cir. B.A.P. 1993)

(Az. law) because creditor properly perfected security interest in rents, prepetition rents constituted cash collateral

In re Days California Riverside Ltd. Partnership, 27 F.3d 374 (9th Cir.1994)

Postpetition hotel revenues, encumbered by a prepetition trust deed and security interest are 'proceeds, product, offspring, rents or profits' under §552(b). A major premise of hotel financing is the stream of revenues. Hotel room charges are held to be 'rents' for security purposes and thus subject to the lender's prepetition lien. However, the net revenues, after allocation of expenses, derived form food and beverage service are <u>not</u> 'rents.' See also *In re San Francisco Drake Hotel Assocs*., 131 B.R. 156 (Bankr. N.D. Cal. 1991), *aff'd,* 147 B.R. 538 (N.D. Cal. 1992).

ATTORNEY –Discipline; conflicts of interest; attorney/client

Hale v. United States Trustee, 509 F.3d 1139 (9th Cir. 2007)
Bankruptcy court did not abuse discretion in sanctioning counsel for repeatedly assisting pro se debtors without appearing as counsel and without performing critical and necessary services.

In re Lehtinen, 332 B.R. 404 (9th Cir. 2005)
Court's three month suspension of attorney for numerous acts of misconduct may have been warranted, but the court wrongly failed to consider mitigating and aggravating factors under the ABA standards as adopted in *In re Crayton*, infra.

In re Rindlisbacher, 225 B.R. 180 (9th Cir B.A.P. 1998)
Ethical and attorney-client obligations barred attorney from raising former client's undisclosed income as grounds for denial of client's discharge in bankruptcy.

In re Crayton, 192 B.R. 970 (9th Cir B.A.P. 1996) - disbarment
Permanent bar against bankruptcy practice in district reversed. Chapter. 11 bar left in place.

U.S. v. Blackman, 72 F.3d 1418 (9th Cir. 1995), *cert. denied*, 117 S. Court. 275 (1996)
1. Federal common law of attorney client privilege applies under FRE
2. General Rule: Client I.D. and nature of fee arrangement not protected

In re America West Airlines, 40 F.3d 1058 (9th Cir. 1994)
Under 28 U.S.C. 1654, corporations <u>and</u> partnerships must be represented by attorneys

Admiral Ins. Co. v. U.S. District. Court for District. of Arizona, 881 F.2d 1486 (9th Cir. 1989) - attorney-client privilege
Elements of privilege - no unavailability exception

In re Glad, 98 B.R. 976 (9th Cir. B.A.P. 1989)
('what' constitutes the practice of law)

In re Edsall, 89 B.R. 772 (Bankr. N.D. Ind. 1988)
Attorney not permitted to withdraw from representing debtor in dischargeability action - failure to receive payment not grounds

U.S. v. Summet, 862 F.2d 784 (9th Cir. 1988)
Censure of attorney for in-court misconduct

Merle Norman Cosmetics, Inc. v. U.S. District. Court, Cent. District of California, 856 F.2d 98 (9th Cir. 1988)

Disqualification - conflict of interest standard

AUTOMATIC STAY

1. **§ 362(a)–In General**
2. **§ 362(a) and Abandonment**
3. **§ 362(a)–Annulment**
4. **§ 362(a)–Interplay with California Law**
5. **§ 362(a)–Lawsuits and Collection Efforts**
6. **§ 362(a)– Reopening**
7. **§ 362(a)–State Court Authority**
8. **§ 362(b)–Exceptions**
9. **§ 362(c)**
10. **§ 362(d)**
11. **§ 362(k)(formerly § 362(h)**
12. **Section 362(h) (2005 version)**

1. § 362(a)--In general

Boucher v. Shaw, 572 F.3d 1087 (9th Cir. 2009)

The automatic stay has no applicability to Fair Labor Standards Act claims against individual managers of the debtor. Such claims do not seek to reach property that has been pledged to the secure the debtor's debts, or that would otherwise impact property of the estate.

In re Kronemyer, 405 B.R. 915 (9th Cir. BAP 2009)

Surety had standing to bring motion for relief from the automatic stay, even though it only had a contingent claim for contribution or reimbursement under § 502(e)(1).

In re Wardrobe, 559 F.3d 932, 937 (9th Cir. 2009)

". . .[A]n order granting limited relief from an automatic stay to allow a creditor to proceed to judgment in a pending state court action is effective only as to those claims actually pending in the state court at the time the order modifying the stay issues, or that were expressly brought to the attention of the bankruptcy court during the relief from stay proceedings."

In re Gould, 401 B.R. 415 (9th Cir. BAP 2009)

IRS had a valid right of setoff under 11 U.S.C. § 553 and IRC § 6402(a) as to chapter 13 debtors' tax refunds, even though the debtor claimed them as exempt and no objection to the exemption was filed. Bankruptcy court should have granted the IRS relief from the automatic stay for cause to allow it to exercise its setoff rights.

Reusser v. Wachovia Bank, N.A. 525 F.3d 855, 861 (9th Cir. 2008)

". . .[A] final order lifting an automatic stay is binding as to the property or interest in question–the *res*– and its scope is not limited to the particular parties before the court. Thus, while Wachovia was the deed of trust holder, but Washington Mutual was the movant under § 362, the order lifting the stay applied to Wachovia, even though it wasn't mentioned in the order.

In re Johnson, 346 B.R. 190, 194 (9th Cir. BAP 2006)

Bankruptcy court has jurisdiction to annul the stay and impose sanctions for its violation even after the case is dismissed.

In re Sewell, 345 B.R. 174, 182 (9th Cir. BAP 2006)

"Debtors' case was reinstated and the automatic stay was reimposed as of the time the Reinstatement Order was docketed, not when it was signed. . . The bankruptcy court had discretion to determine when Debtors' case was reinstated and the automatic stay was reimposed." Foreclosure sale was allowed to stand, as it occurred between the time the case was dismissed and the reinstatement order was docketed.

In re Tippett, 338 B.R. 82 (9th Cir. BAP 2006), *aff'd,* 542 F.3d 684 (9th Cir. 2008)

Debtor-initiated transfers are outside the scope of the automatic stay.

Lockyer v. Mirant Corp., 398 F.3d 1098 (9th Cir. 2005)

District Court had jurisdiction to decide whether automatic stay applied to a proceeding pending before it.

In re Umali, 345 F.3d 818 (9th Cir. 2003)

Bankruptcy petition filed in violation of court-imposed 180-day bar did not trigger automatic stay, since it was void.

40235 Washington St. Corp. v. Lusardi, 329 F.3d 1076 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 469 U.S. 2003)

Section 549(c) is not an exception to § 362. It is designed to protect purchasers from the debtor, whereas 362 is designed to protect the debtor.

In re Allen, 300 F.3d 1055 (9th Cir. 2002)

Chapter 11 plan which did not incorporate pre-confirmation § 362 stipulation and order was properly confirmed, where stipulation did not recite that it would be binding on the debtor in a chapter 11 plan.

In re Canter, 299 F.3d 1150 n. 4 (9th Cir. 2002)

"Because the stay under § 362 is "automatic" and "self-executing" only upon filing of a bankruptcy petition, no authority exists for "reinstating" an automatic stay that has been lifted."

In re Mitchell, 279 B.R. 839 (9th Cir. B.A.P. 2002)

The bona fide purchaser defense of § 549 (c) to a trustee's action to avoid a postpetition transfer does not provide an exception to the automatic stay. Purchaser out of a foreclosure that occurred a day after bankruptcy filed violated § 362.

In re Bibo, Inc., 200 B.R. 348 (9th Cir. B.A.P. 1996), *opinion vacated*, 139 F.3d 659 (9th Cir. 1998)

Debtor's subordinate lien interest in property precluded senior lien holder from foreclosing on property - § 362

In re Del Mission Limited, 98 F.3d 1147 (9th Cir. 1996)

State violated automatic stay by knowingly retaining disputed taxes after bankruptcy court ordered them repaid

Citizens Bank of Maryland v. Strumpf, 116 S.Ct. 286 (1995)

Administrative hold is not a setoff, i.e., no violation of stay

In re Ramirez, 183 B.R. 583 (9th Cir. B.A.P. 1995)

Property seized under pre-petition-bankruptcy judgment levy remains part of bankruptcy estate for purposes of automatic stay

1. Client files are property of attorney's estate
2. Stay applied even after completion of levy
3. Test for willful violation of stay
4. Damages measured from time files removed from office

Bigelow v. C.I.R., 65 F.3d 127 (9th Cir. 1995)

Tax court proceedings to resolve a disputed notice of deficiency and assertion of overpayment following a bankruptcy court order of discharge did not constitute an 'act against property of the bankruptcy estate' and did not violate the stay

Delpit v. Comm'r Internal Revenue Service, 18 F.3d 768 (9th Cir. 1994)

Stay applies to appeal from Tax court judgment regarding debtor' alleged tax deficiency

Hillis Motors, Inc. v. Hawaii Auto. Dealer's Ass'n, 997 F.2d 581 (9th Cir. 1993)

Revocation of certificate of incorporation violated automatic stay even though it occurred post-confirmation

In re Glasply Marine Industries, Inc., 971 F.2d 391 (9th Cir. 1992)

Postpetition <u>real estate taxes</u> are subject to the automatic stayIn re Schwartz, 954 F.2d 569 (9th Cir. 1992)

(IRS tax assessment and lien made in violation of 362 is <u>void</u>, not voidable

In re Advanced Ribbons & Office Products v. U.S. Interstate Distrib., 125 B.R. 259 (9th Cir. B.A.P. 1991)

Foreclosure on stock of guarantor in debtor not a violation of 523(a)(6)

In re Abrams, 127 B.R. 239 (9th Cir. B.A.P. 1991)

Failure to return property after knowledge of bankruptcy is willful violation

Globe Investment & Loan Co., Inc., 867 F. 2d 556 (9th Cir. 1989)
(1) Non-creditor mortgagee had no standing to assert stay violation
(2) stay does not provide protection to creditors

Matter of Lockard, 884 F.2d 1171 (9th Cir. 1989)
(Rejecting *Piccinin*, i.e., unusual circumstances exception to general rule that 362 does not cover non-debtors.)

In re Teerlink Ranch Ltd., 886 F.2d 1233 (9th Cir. 1989)
(Stay n/a to court having jurisdiction over debtor)

In re Shamblin, 890 F.2d 123 (9th Cir. 1989)
(1) IRS tax sale in violation of stay is void, not voidable
(2) questionable whether stay could ever be annulled retroactively

In re Krueger , 88 Bankr 238 (9th Cir. B.A.P. 1988)
(Ch 13 case dismissed without due process, thus stay never lifted, thus foreclosure sale void.)

2. § 362(a) and Abandonment

Catalano v. CIR, 279 F.3d 682 (9th Cir. 2002)
An order lifting or modifying the automatic stay by itself does not constitute a *de facto* abandonment of the property of the estate. Procedures under § 554 must be followed before property is legally abandoned.

3. § 362(a)--Annulment

In re Fjeldsted, 293 B.R.12 (9th Cir. B.A.P. 2003)
Finding of bona fide purchaser status under § 549(c) is not sufficient cause to annul the stay under a "balancing of the equities" test. Court suggests 12 factors to examine in determining whether to annul.
In re Cady, 266 B.R. 172 (9th Cir. B.A.P. 2001), *aff'd,* 315F.3d 1121 (9th Cir. 2003)
1) Balance of the equities supported denial of retroactive annulment of the stay;
2) Creditor did not violate the automatic stay by filing a nondischargeability abstract of judgment, since under state law it created no lien on estate property, and since there was no stay in effect when the property was abandoned to the debtor upon closing of the case.

In re National Environmental Waste Corp., 129 F.3d 1052 (9th Cir. 1997), *cert denied, 524 U.S. 952, 118 S.Ct. 2368,(1998)*
Standards for annulling the stay - Factors
1) How much notice the creditor had of filing
2) Did debtor assert it as a defense

3) Would Court have lifted stay anyway

4) Egregiousness of creditor's conduct

Here, retroactive annulment of automatic stay is supported by debtor's long delay in objecting to substantial notice of contract's termination relied on by debtor in obtaining confirmation of reorganization plan.

In re Kissinger, 72 F.3d 107 (9th Cir. 1995)

Court does not abuse its discretion in granting retroactive annulment of automatic stay where bankruptcy petition filed during recess in action against debtor.

Retroactive relief should only be granted in extreme circumstances, *In re Shamblin*, 890 F.2d 123, 128 (9th Cir. 1989)

4. § 362(a)--Interplay with Cal. law

In re Nghiem, 264 B.R. 557 (9th Cir. B.A.P. 2001), *cert. denied*, 539 U.S. 905 (2003)

Lender not required to give additional actual notice of foreclosure sale after bankruptcy case was dismissed, where lender had orally postponed sale during pendency of case as required by state law. In re Tome, 113 B.R. 626 (Bankr. C.D. Cal. 1990) rejected.

In re Bebensee-Wong, 248 B.R. 820 (9th Cir. B.A.P. 2000)

Recording of trustee's deed 14 days after foreclosure sale and 2 days after bankruptcy petition was filed related back to the time and date of the sale under Cal. Civ. Code § 2924h(c), and did not violate the automatic stay . (Court distinguishes case where foreclosure sale occurred after bankruptcy petition filed, implying that in that situation, the sale would be void.)

In re Hilde, 120 F.3d 950 (9th Cir. 1997)

Under California law, judgment creditor need not "perfect" lien created by service on debtor of order to appear for examination to defeat avoidance of lien by bankruptcy trustee.

5. § 362(a)--Lawsuits and collection efforts

Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210 (9th Cir. 2002)

Under § 362(a), the prohibition against continuation of judicial actions requires that the action be automatically dismissed or stayed, and not merely that it not be pursued.

In re Arneson, 282 B.R. 883 (9th Cir. B.A.P. 2002)

The automatic stay applies to collection efforts on a dischargeability judgment rendered in a previous bankruptcy case.

In re LPM Corp., 300 F.3d 1134 (9th Cir. 2002)

Bankruptcy court order requiring immediate payment of post-petition rent as an administrative priority did not relieve the landlord of the necessity of obtaining relief from the automatic stay before proceeding with a writ of execution.

In re Baldwin Builders, 232 B.R. 406 (9th Cir. B.A.P. 1999)

Bankruptcy creditor's post-petition suits to enforce pre-petition mechanic's lien violated automatic stay.

In re Way, 229 B.R. 11 (9th Cir. B.A.P. 1998)

Post-petition dismissal of debtor's pre-petition state court lawsuit did not violate automatic stay.

In re Luz International, Ltd., 219 B.R. 837 (9th Cir. B.A.P. 1998)

Bankruptcy court erred in electing to decide merits of complex multi-party setoff claim in hearing on underwriter's motion for relief from automatic stay

In re Turner, 204 B.R. 988 (9th Cir. B.A.P. 1997)

Municipal court judgment may be void for having been entered in violation of bankruptcy stay.

In re Conejo Enterprises, Inc., 96 F.3d 346 (9th Cir. 1996)

Bankruptcy court did not abuse discretion in failing to lift stay to allow remanded state court action to go forward where claimant filed a proof of claim.

Parker v. Bain, 68 F.3d 1131 (9th Cir. 1995)

1.) Stay prevents an appeal by a debtor when the action or proceeding below was against the debtor

2.) Appeal on a claim by the debtor against another is not stayed

3.) Appeal on counterclaim against debtor is stayed

Dean v. Trans World Airlines, 72 F.3d 754 (9th Cir. 1995), *cert. denied*, 519 U.S. 863 (1996)

Post-filing dismissal of action against bankruptcy debtor violates automatic stay where decision to dismiss requires court to first consider other issues presented by or related to underlying case.

In re White, 186 B.R. 700 (9th Cir. B.A.P. 1995)

Although debtor is stayed from appealing an adverse judgment where the action was brought against him, the cross-defendant is not stayed from seeking a dismissal of debtor's cross-complaint.

In re Robbins, 964 F.2d 342 (4th Cir. 1992)

Lifting stay to liquidate claim in a <u>divorce</u> case.

Noli v. C.I.R., 860 F.2d 1521 (9th Cir. 1988)

(Validity of order from bench lifting stay on Tax Ct proceeding)

In re Cimarron Investors,848 F.2d 974 (9th Cir. 1988)
(Interest - under secured creditor not entitled to interest to compensate for delay caused by stay of foreclosure)

In re Kemble, 776 F.2d 802 (9th Cir. 1985)
Judicial economy alone justifies lifting stay to permit state ct lawsuit to proceed.

6--§ 362(a)-- Reopening

In re Aheong, 276 B.R. 233 (9th Cir. B.A.P. 2002)
Bankruptcy court properly reopened case and annulled stay based on debtor's delay in raising the issue and failure to follow the local rule.

7. § 362--State Court Authority

In re Dunbar, 245 F.3d 1058 (9th Cir. 2001)
State administrative law judge's decision regarding scope of the automatic stay in bankruptcy did not preclude independent review by bankruptcy court.

In re Gruntz, 202 F.3d 1074 (9th Cir. 2000) (en banc)
1) Only bankruptcy court has authority to finally determine whether the stay applies.
2) § 362(b)(1) excepts all criminal proceedings from the stay, regardless of their purpose.

Hinduja v. Arco Products Co., 102 F.3d 987 (9th Cir. 1996)
Stipulated order for lifting automatic stay that incorporates terms of settlement does not bar separate action for breach of stipulation or underlying agreement in district court. Trustee was not required to seek enforcement of stipulation in bankruptcy court .

8. § 362(b) Exceptions

Lockyer v. Mirant Corp., 398 F.3d 1098 (9th Cir. 2005)
California attorney general's suit under the Clayton Act did not seek to protect the pecuniary interest of the state, and thus fell under § 362(b)(4).

Allen v. Allen, 275 F.3d 1160 (9th Cir. 2002), *aff'd in part*, 23 Fed.Appx. 859 (9th Cir. 2002)
Action seeking modification of existing support award was exempt from the automatic stay under § 362(b)(2)(A)(ii)

In re Chapman, 264 B.R. 565 (9th Cir. B.A.P. 2001)
Section 362(b)(4) does not stay a civil forfeiture action by the government brought under 21 U.S.C. § 881(a)(7).

In re First Alliance Mortgage Co., 263 B.R. 99 (9th Cir. B.A.P. 2001)
State's prosecution to judgment of claims for civil penalties, attorney fees and restitution under consumer laws is exempted under § 362(b)(4).

In re Berg, 230 F.3d 1165 (9th Cir. 2000)
Award of attorney fees imposed as a sanction under FRAP 38 for pursuing a frivolous appeal excepted from the stay under § 362(b)(4).

In re Boggan, 251 B.R. 95 (9th Cir. B.A.P. 2000)
Creditor who retained possession of debtor's car in order to continue perfection of its statutory repairman's lien did not violate automatic stay pursuant to § 362(b)(3).

In re Weisberg, 136 F.3d 655 (9th Cir. 1998), *cert denied,* 525 U.S. 826 , 119 S.Ct. 72(1998)
Stockbroker need not seek relief from automatic stay to liquidate bankruptcy debtor's shares of stock pledged as collateral for "margin loan" § 362(b)(6)

In re Universal Life Church, 128 F.3d 1294 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998)
The Court of appeals affirmed a judgment of the district court and dismissed on appeal. The court held that the IRS' revocation of a religious-organization debtor's tax-exempt status is permissible under the police and regulatory power exception to the bankruptcy automatic stay § 362(b)(4).

NLRB v. Continental Hagen Corp., 932 F.2d 828 (9th Cir. 1991)
(NLRB action not affected by stay under § 362(b)(4))

National Labor Relations Board v. Continental Hagen Corporation., 932 F.2d 828 (9th Cir. 1991)
NLRB action not affected by automatic bankruptcy stay

In re Wade, 115 B.R. 222 (9th Cir. B.A.P. 1990) *aff'd.* 948 F.2d 1122 (1991)
Attorney's state bar excepted from bankruptcy proceedings as governmental unit. Assertion of counter claim in relief from stay motion procedurally improper

In re Poule, 91 B.R. 83, (9th Cir. B.A.P. 1988)
(state licensing bureau not stayed from imposing fine under 362(b)(4)

9. §362(c)

In re Nelson, 391 B.R. 437 (9th Cir. BAP 2008)
Section 362(c)(4) is not ambiguous. Where two or more bankruptcy cases have been pending in the same year, no automatic stay of any kind goes into effect upon filing the third case.

10. § 362(d)

In re Johnson, 346 B.R. 190, 194 (9th Cir. BAP 2006)
In rem orders purporting to affect the stay in future cases are void.

In re Delaney-Morin, 304 B.R. 365 (9th Cir. B.A.P. 2003)
Bankruptcy court erred in granting relief from the stay because of postpetition defaults, where the hearing was noticed as a nonevidentiary one, the nature of the defaults upon which the order was based were not alleged in the motion, the debtor was not present at the hearing, and there was no competent evidence to support a finding of such defaults.

In re Duvar Apt., Inc., 205 B.R. 196 (9th Cir. B.A.P. 1996)
Debtor's bad faith filing warranted lifting stay

In re Sun Valley Newspapers, Inc., 171 B.R. 71 (9th Cir. B.A.P. 1994)
(d)(2) standard - re effective reorg, is it patently unconfirmable? Does it have a realistic chance of being confirmed? Plausible..probable...assured
Equity under (d)(2) = value less all encumbrances

In re CBJ Development, 202 B.R. 467 (9th Cir. B.A.P. 1996)
Combination hotel and bar was not "single asset real estate" and was therefore subject to automatic stay

11. § 362(k) (formerly 362(h))

In re Ozenne, 337 B.R. 214 (9th Cir. BAP 2006)
Storage company that sold debtor's personal property after being notified of his bankruptcy filing committed willful violation of the automatic stay, since under Cal. Civil Code § §1980-1991, the debtor had the right to redeem it up to the time of sale. Standard for a willful violation restated. In re Williams, 323 B.R. 691 (9th Cir. BAP 2005), *aff'd,* 204 Fed. Appx. 582 (9th Cir. 2006).
Debtor may be entitled to damages for willful violation of the automatic stay, even though the stay was subsequently annulled.

In re Peralta, 317 B.R. 381 (9th Cir. BAP 2004)
"It is settled that the "willfulness test" for automatic stay violations merely requires that: (1) the creditor know of the automatic stay; and (2) the actions that violate the stay be intentional. . . .No specific intent is required; a good faith belief that the stay is not being violated "is not relevant to whether the act was 'willful' or whether compensation must be awarded." In re Goodman, 991 F.2d 613, 618 (9th Cir.1993).

In re Hayden, 308 B.R. 428 (9th Cir. B.A.P. 2004)
Towing company did not willfully violate automatic stay by failing to return debtor's

impounded car, where statew of Washington gave the company a lien for towing and storage.

In re Dawson, 390 F.3d 1139 (9th Cir. 2004)

Damages for emotional distress caused by willful violations of the automatic stay are available under § 362(h).

In re Stinson, 295 B.R. 109 (9th Cir. B.A.P. 2003), *aff'd in part, reversed in part,* 128 Fed.Appx. 30 (9th Cir.2005)

1. Court properly prorated fees based on proportion of claims upon which debtor prevailed, where debtor's counsel was given two opportunities to correct her inadequate fee application, but failed to do so;
2. In the absence of significant economic loss, emotional distress damages are improper.
3. Court properly balanced the equities in denying punitive damages.

In re Campion, 294 B.R. 313 (9th Cir. B.A.P. 2003)

Collection company that knows of automatic stay but whose computer mistakenly sends a collection notice willfully violates the automatic stay, entitling the debtor to attorney fees.

In re Dyer, 322 F.3d 1178 (9th Cir. 2003)

"Serious" punitive damages may not be awarded under § 105 for civil contempt of the automatic stay by entities who are not individuals. Only compensatory sanctions, attorney fees and compliance with the stay may be awarded.

In re Roman, 283 B.R. 1 (9th Cir. B.A.P. 2002)

Attorneys fees are a part of the actual damages allowed by the statute. The debtor has a duty to mitigate the amount of fees incurred. Sanctions may not be awarded under both § 362(h) and § 105.

In re Colortran, Inc., 210 B.R. 823 (9th Cir. B.A.P. 1997), *aff'd in part, vacated in part*, 165 F.3d 35 (9th Cir. 1998)

Freight forwarder willfully violated automatic stay by withholding bankruptcy debtor's shipment.

In re McHenry, 179 B.R. 165 (9th Cir. B.A.P. 1995)

Technical violation of the stay did not warrant actual or punitive damages

In re Davis, 177 B.R. 907 (9th Cir. B.A.P. 1995)

Debtor's damages action for violation of automatic stay does not become moot because underlying case dismissed

Havelock v. Taxel (In re Pace), 56 F.3d 1170 (9th Cir. B.A.P. 1995), *aff'd. in part, vacated in part*., 67 F.3d 187 (9th Cir. 1995)

Under § 105 stay applies to unscheduled assets even though case closed. Trustee could

recover attorney fees and costs under 362(h) as an "individual".

"A trustee in bankruptcy is not an "individual" and thus may not recover damages under 362(h) but may seek sanctions under bankruptcy code §105(a).

In re Cascade Roads, Inc., 34 F.3d 756 (9th Cir. 1994)

U.S. is not covered by 362(h); while civil contempt power may not exist in bankruptcy court, sanctions power does.

In re Goodman, 991 F.2d 613 (9th Cir. 1993)

Standard for willful violation; 362(h) applies only to individuals, but civil contempt available

In re Stainton, 139 B.R. 232 (9th Cir. B.A.P. 1992)

When willful violation found, court must award debtor all reasonable fees

In re Pinkstaff, 974 F.2d 113 (9th Cir. 1992)

IRS liable for damages under 362(h); no sovereign immunity under 106(a), at least where IRS has filed a claim

In re Bulson, 117 B.R. 537 (9th Cir. 1990), *aff'd.* 974 F.2d 1341 (9th Cir. 1992)

Award of atty fees to debtor for wilful violation by IRS of stay.

In re Bloom, 875 F.2d 224 (9th Cir. 1989)

Standard. for finding willful violation of stay - damages and interest

In re Taylor, 884 F.2d 478 (9th Cir. 1989)

(1) damages for violation - 362(h)

(2) res judicata - stay lift order may be res judicata in subsequent case, see In re Taylor, 77 B.R. 237 (9th Cir. B.A.P. 1987) criticized.

In re Zumbrun, 88 B.R. 250 (9th Cir. B.A.P. 1988)

§ 362 (h) sanctions

12. Section 362(h) (2005 version)

In re Dumont, 383 B.R. 481, 489 (9th Cir. BAP 2008)

"Ride through" option under pre-BAPCPA law was eliminated in 2005. However, "if a debtor is in compliance with sections 521(a)(6) or 362(h)(1) and (2), then section 521(d) has no effect, and enforcing an ipso facto default clause is still barred by the Code."

AVOIDING POWERS - §§ 544, 546, 550

In re Taylor, 390 B.R. 654, 662 (9th Cir. BAP 2008)

Court did not abuse its discretion under § 550 in awarding the trustee with a money judgment in the amount of a security interest's value as of the petition date against the secured lender whose security interest was avoided under § 547, thus allowing the creditor to retain its security interest on the car and the debtor to retain the car.

In re AVI, Inc., 389 B.R. 721, 724 (9th Cir. BAP 2008)

"We hold that a trustee, subject to the requirement of establishing avoidance, may prosecute an action to recover from a subsequent transferee under § 550 without having earlier avoided the initial transfer." Bankruptcy court also correctly found that the good faith defense in § 550(b)(1) was not available to the law firm transferee.

In re Straightline Investments, Inc., 525 F.3d 870, 882 (9th Cir. 2008)

Postpetition transfer of accounts receivable was properly avoided under § 549. Under § 550 trustee was entitled to collect the entire amount factor recovered on the accounts, even though the factor had already paid the debtor, where the factor was fully aware of the bankruptcy when he advanced the money.

In re Deuel, 361 B.R. 509 (9th Cir. BAP 2006)

Under § 544(a)(3), the trustee is not deemed to have constructive notice "as of commencement of the case" from bankruptcy documents filed after the case is commenced. *Professional Investment Properties of America,* 955 F.2d 623 (9th Cir. 1992) distinguished.,

In re Incomnet, Inc., 463 F.3d 1064 (9th Cir. 2006)

In one-step, non-conduit case, defendant was "initial transferee" even though it was heavily regulated by the FCC, and was thus subject to preference avoidance.

In re Cohen, 300 F.3d 1097 (9th Cir. 2002)

Person listed as the purchaser on a cashier's check was not the initial transferee, where someone else was the actual purchaser. Payee of the check was the initial transferee, and as such, was strictly liable for the transfer under §§ 550 and 548.

In re First T.D. & Investment, Inc. 253 F.3d 520 (9th Cir. 2001)

Assignment of collateral notes and trust deeds to investors may be perfected in California without possession and thus cannot be avoided under the strong arm clause.

In re Mizudo, 223 F.3d 1050 (9th Cir. 2000)

Statute of limitations in pre-1994 § 546 did not begin to run until trustee appointed, where foreign estate administrator was neither a trustee nor debtor in possession.

In re Parmetex, Inc., 199 F.3d 1029 (9th Cir. 1999)

Statute of limitations under pre-1994 version of Bankruptcy Code began running from date of appointment of interim trustee.

In re P.R.T.C., Inc., 177 F.3d 774 (9th Cir. 1999)

Chapter 7 trustee can transfer avoiding actions to third parties, as long as they are acting in the common interests of all creditors.

In re Harvey, 222 B.R. 888 (9th Cir. B.A.P. 1998)

Bankruptcy trustee as bona fide purchaser could avoid creditors' unsecured and unrecorded interests in property where vague and inconsistent language in schedules failed to provide notice.

In re Sale Guaranty Corp., 220 B.R. 660 (9th Cir. B.A.P. 1998), *aff'd*, 199 F.3d 1375 (9th Cir. 2000)

Property held in resulting trust, and trustee had constructive knowledge of trust. Thus, transfers unavoidable under § 544 (a)(3)

In re Varner, 219 B.R. 867 (9th Cir. B.A.P. 1998)

Creditor's failure to include debtor in possession's social security and driver's license numbers on abstract of judgment did not render judgment lien avoidable

We conclude as a matter of law that a debtor in possession cannot avoid a judgment creditor's lien under § 544(a)(3) when the creditor recorded an abstract of judgment pursuant to California Code of Civil Procedure § 674(a), listed the debtor's social security and driver's license numbers as "unknown" and had no knowledge of the social security and driver's license numbers at the time the abstract was recorded or at any time prior to the bankruptcy filing. Accordingly, we reverse and direct the bankruptcy court to enter judgment I favor of the creditor.

In re Video Depot, 127 F.3d 1195 (9th Cir. 1997)

The court of appeals affirmed a judgment of the district court. The court held that under § 550(a) of the Bankruptcy Code, a bankruptcy trustee can recover a corporate debtor's pre-petition payment by cashier's check to a controlling principal's creditor

In re Megafoods Stores, Inc., 210 B.R. 351 (9th Cir. B.A.P. 1997), *aff'd in part, vacated in part*, 163 F.3d 1063 (9th Cir. 1998)

1. Debtor's commingling of unremitted retail sales taxes with personal funds no bar to creation of statutory trust in favor of taxing authority
2. § 550 and conduit theory
3. State law controls interest rate because property is not part of bankruptcy estate.

In re Hamilton Taft & Company, 114 F.3d 991 (9th Cir. 1997)

Bankruptcy trustee cannot avoid stockbroker's pre-petition transfer of security to third party in debtor' direction in reverse repurchase transaction

In re Dominion Corporation, 199 B.R. 410 (9th Cir. B.A.P. 1996)

Brokerage firm acted as conduit and not as transferee in principal's diversion of bankruptcy estate assets

In re Marino (Dye v. Rivera), 193 B.R. 907 (9th Cir. B.A.P. 1996), *aff'd* 117 F.3d 1425 (9th Cir. 1997)

Constructive notice - § 544

In re Lucas Dallas, Inc.,185 B.R. 801 (9th Cir. B.A.P. 1995) §550

"[T]he principal of a corporate debtor does not become a 'transferee' by the mere act of causing the debtor to make a fraudulent transfer."

In re Presidential Corporation, 180 B.R. 233 (9th Cir. B.A.P. 1995)

Seller's agent does not become "initial transferee" of purchase money received through escrow from corporate debtor for benefit of buyer - § 550

Loo v. Martinson (In re Skywalkers, Inc.), 49 F.3d 546 (9th Cir. 1995)

Section 550(c) does not preclude trustee from both 1) avoiding vendor's lien on liquor license and 2) recovering preferential payment made to vendor for the license. Avoidance of the lien was not a satisfaction of preference claim. Fact that the estate retained license and received proceeds of sale was of no consequence to preference action. Vendor still retained an unsecured claim for the amount owed to her

In re Acequia, Inc. 34 F.3d 800 (9th Cir. 1994)

Once a creditor with an allowable claim has been located, the trustee has an unlimited right to involve state law avoiding powers under 544(b). The amount is governed by 550 and is not limited by what creditors will receive in a plan.

In re Weisman, 5 F.3d 417 (9th Cir. 1993)

Inquiry or constructive notice - § 544(a)(3)

In re Software Centre Int'l Inc., 994 F.2d 682 (9th Cir. 1993)

2 yr state of 546(a) applies to debtor-in-possession

In re Kim, 161 B.R. 831 (9th Cir. B.A.P. 1993)

Actual knowledge by debtor-in-possession is irrelevant under 544(a)(3); no constructive notice given on abstract

In re Thomas, 147 B.R. 526 (9th Cir. B.A.P. 1992), *aff'd.* 32 F.3d 572 (9th Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995)

Huber also argues that § 544(a)(3) cannot apply because the property is impressed with a constructive trust and, as such, it is not property of the estate under § 541(d), to which a trustee's avoidance powers may apply. While some case authorities support Huber's contentions, see In

re Quality Holstein Leasing, 752 F.2d 1009, 1013 (5th Cir. 1985), the Ninth Circuit has specifically rejected this reasoning. *See* Seaway Express, 912 F.2d at 1128-29, Tleel, 876 F.2d at 772-773. Under the law in this circuit § 541(d) does not stand as a bar to the avoidance of an equitable interest, including a constructive trust interest, in real property under § 544(a)(3), *id.* Rather § 544 (a)(3) allows the trustee to avoid such interest to the same extent that they could be avoided by a bona fide purchaser under state law.

Under California law, a bona fide purchaser without actual or constructive notice takes free of a prior equitable interest or constructive interest. Rafferty v.. Kirpatrick, 29 Cal. App. 2d 503, 507-508 (1938), Tleel, 876 F.2d at 771-72. Section 544(a)(3) makes a trustee's actual knowledge irrelevant. See Tleel; Constructive notice, however, will preclude avoidance under § 544(a)(3). In re Probasco, 839 . F.2d 1352, 1354-55 (9th Cir. 1988) Whether the trustee can avoid Huber's constructive trust interest in the property under § 544(a)(3) therefore, turns upon whether the trustee had constructive or inquiry notice of that interest.

Huber's occupancy of the property did not provide constructive notice, since she occupied it with the debtor/titleholder

In re Raitan, 139 B.R. 931 (9th Cir. B.A.P. 1992)

1. C.C.P. § 708.320 does create a lien on partnership property upon the issuance of a charging order

2. Security interest in stock may have been perfected upon the holder of such stock; notice of plaintiff's interest may have held it as a bailee

In re Professional Investment Properties of America, 955 F.2d 623 (9th Cir. 1992), *cert. denied*, 506 U.S. 818 (1992)

Creditor's filing of involuntary petition put trustee on inquiry notice of creditor's interest in unrecorded instruments

In re Lendvest Mortgage, Inc., 119 B.R. 199 (9th Cir. B.A.P. 1990); see also In re Lendvest Mortgage, 42 F.3d 1181 (9th Cir. 1994)

(Where the def/dtr assumed all risk of loss and only the right to proceeds (but not the DOT) were assigned to plaintiff, transaction was not a sale)

In re Dietz, 914 F.2d 161 (9th Cir. 1990)

§ 550(b)

In re Seaway Express Corp., 105 B.R. 28 (9th Cir. B.A.P. 1989), *aff'd*. 912 F.2d 1125 (9th Cir. 1990)

(Constructive trusts - trustee has power to avoid notwithstanding 541(d))

In re Heides, 915 F.2d 531 (9th Cir. 1990)

(Failure to perfect security interest in real estate contract subordinated interest to that of trustee)

In re Mill Street, Inc.. 96 B.R. 268 (9th Cir. B.A.P. 1989)

Assignee of debt for collection is an "initial transferee" - § 550

In re Probasco, 839 F.2d 1352, 1354-55 (9th Cir. 1988)

Under cal law, bfp takes free of prior equitable interest or constructive trust interest. Section 544(a)(3) makes a trustee's actual knowledge irrelevant - see Tleel, 876 F.2d 771-772. Constructive notice, however, will preclude avoidance under section (a)(3) see in re Probasco, 839 F.2d 1352 (9th Cir. 1988). Whether the Trustee can avoid Huber's constructive trust interest in the property under 544(a)(3) turns upon whether the trustee had constructive or inquiry notice of the interest. However, Huber's occupancy of the property did not provide constructive notice because she occupied it with the debtor/title holder...In re Thomas, (9th Cir. B.A.P. (1992)

CASH COLLATERAL & POST-PETITION FINANCING §364

In re Harbin, 486 F.3d 510, 514 (9th Cir. 2007)

"...[W]e conclude that under limited circumstances, a bankruptcy court may exercise its equitable powers to grant retroactive approval of a post-petition financing transaction pursuant to 11 U.S.C. §364(c)(2).

In re Cooper Commons, LLC, 430 F.3d 1215 (9th Cir. 2005), *cert denied,* 546 U.S. 1174 , 126 S.Ct. 1340 (2006)

A post petition lender could agree to reimburse the chapter 11 trustee's fees and expenses without also agreeing to pay for the debtor's attorneys under §507(a)(1). Further, the debtor's attorneys had no standing to challenge the financing under §364(e), since they did not obtain a stay of the order pending appeal.

In re ProAlert LLC, 314 B.R. 436 (9th Cir. B.A.P. 2004)

Debtor could use cash collateral to pay administrative expenses under § 363 without having to prove entitlement to surcharge the secured creditor's collateral under § 506(c).

In re Stanton, 248 B.R. 823 (9th Cir. B.A.P. 2000), *aff'd,* 285 F.3d 888 (9th Cir. 2002), *as amended*, 303 F.3d 939 (9th Cir. 2002)

Debtors were guarantors on a factoring arrangement for their business. As additional security for payment, they pledged their house as security. The debtors subsequently filed a chapter 7 case. They continued their business's factoring arrangement, and incurred additional indebtedness that was not covered by the business's assets. The chapter 7 trustee sold their house, but the factor asserted its security interest in the proceeds in the amount of over $244,000 for postpetition indebtedness incurred by the nondebtor business.
Held: The factor's lien on the house was not avoidable under § 549, and the debtors were not required to seek court approval as to the postpetition encumbrances on their house under § 364.

In re Hotel Sierra Vista Limited Partnership, 112 F.3d 429 (9th Cir. 1997)

Proof of extent of secured creditor's interest in post-petition room revenues of debtor hotel requires pro rata allocation of hotel's operating expenses

Case remanded to determine amount of claim under *Days California*, 27 F.3d 374 (9th Cir. 1997)

Scottsdale Medical Pavilion v. Mutual Benefit Life Inc. Co. (In re Scottsdale Medical Pavilion), 52 F.3d 244 (9th Cir. 1995), *aff'g*, 159 B.R. 295 (9th Cir. B.A.P. 1993).

Secured creditor had an immediately perfected security interest in rents upon the petition date from prepetition collection of rents, which constituted cash collateral under §365(a) and was thus entitled to adequate protection.

In re Sunnymead Shopping Center Company, 178 B.R. 809 (9th Cir. B.A.P. 1995)

Secured creditor's acceptance of adequate protection payments from cash collateral securing real estate not violation of CA one-action rule

In re Defender Drug Stores, Inc., 145 B.R. 312 (9th Cir. B.A.P. 1992)

Bankruptcy court has discretion to allow enhancement fee to lender as a part of postpetition financing

In re Sun Runner Marine, Inc., 116 B.R. 712 (9th Cir. B.A.P. 1990), *vacated in part, aff'd in part*, 945 F.2d 1089 (9th Cir. 1991)

364(e) - debtor not permitted to assume liability arising from unsecured nonexecutory contract

In re Ames Dept Stores, Inc., 115 B.R. 34, 37 (S.D.N.Y. 1990)

In re Tenny Village Co., Inc., 104 B.R. 562, (D.N.H. 1989)

Freightliner Market Dev. Corp. v. Silver Wheel Freightlines, Inc., 823 F.2d 362 (9th Cir. 1987)

CERCLA

In re Hanna, 168 B.R. 386, (9th Cir. B.A.P. 1994)
Clean-up costs arising solely from pre-petition releases of petrol products were not entitled to administrative expense

In re Dant & Russell, 951 F.2d 246 (9th Cir. 1991)
Apportionment of CERCLA clean-up costs

In re Jensen, 995 F.2d 925 (9th Cir. 1993)
Environmental claims arise upon debtor's conduct

In re Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990)
Secured party that does not participate in mgmt of debtor is not an 'owner'

Louisiana-Pacific v. ASARCO, 909 F.2d 1260 (9th Cir. 1990)
Traditional rules of states re: successor liability apply

CHAPTER 7

In re Marrama, 549 U.S. 365, 127 S.Ct. 1105 (2007)

Debtor forfeited his right to convert his case to chapter 13 where he did not qualify as a debtor because of his bad faith concealment of assets

In re AFI Holding, Inc., 355 B.R. 139 (9th Cir. BAP 2006), *aff'd and remanded,* 530 F.3d 832 (9th Cir. 2008)(for determination of removed trustee's right to fees).

Chapter 7 trustee had a material conflict of interest and thus was not disinterested as required by § 701(a)(1) where she previously represented insiders of the debtor. Totality of circumstances test applied. Failure to disclose all connections and appearance of inpropriety also supported her removal from the case.

In re Concannon, 338 B.R. 90 (9th Cir. BAP 2006)

Section 506(d) cannot be used by a chapter 7 debtor to strip off a wholly unsecured nonconsensual lien.

In re Padilla, 222 F.3d 1184 (9th Cir. 2000)

1. Bad faith as a general proposition does not provide "cause" to dismiss a Chapter 7 petition under § 707(a).
2. Credit card "bust out" did not constitute cause under § 707(a).

In re Laskin, 222 B.R. 872 (9th Cir. B.A.P. 1998)

Ch. 7 debtors may not "strip off" unsecured second deed of trust on residence.

In re Oxborrow, 913 F.2d 751 (9th Cir. 1990) - § 702

Election of trustee invalid where less then 70% of creditors requested election.

CHAPTER 9

In re City of Vallejo, 408 B.R. 280 (9th Cir. BAP 2009)

City proved that it met all of the eligibility requirements to file a chapter 9 case under § 109(c).

CHAPTER 11

1. Anti-Modification
2. Appeal
3. Appointment of Ch 11 Trustee
4. Bad Faith Filing
5. Classification of Claims
6. Confirmation of Plan
7. Conversion of Ch 11 to Ch 7
8. New Value Exception and Absolute Priority Rule
9. Notice of Plan
10. §1125
11. Valuation for §1111(b) Purposes
12. Vote on Plan
13. Post Confirmation
14. Misc

1. Anti-Modification

In re Lee, 215 B.R. 22 (9th Cir. B.A.P. 1997)
Deed of trust that named certain appliances as part of security did not deprive mortgage lender of anti-modification protections.

In re Lievsay, 199 B.R. 705 (9th Cir. B.A.P. 1996), *cert. denied*, 522 U.S. 1149 (1998)
Boilerplate language in deed of trust does not take a residence out of anti-modification provision of 1123(b)

2. Appeal

In re Gotcha International L.P., 311 B.R. 250 (9th Cir. B.A.P. 2004)
Appeal of confirmation order dismissed for equitable mootness, where debtor had obtained a refinance and distributed substantial payments to all but two classes.

In re Clarke, 98 B.R. 979 (9th Cir. B.A.P. 1989)
Once plan is substantially consummated, appeal is moot

3. Appointment of Ch 11 Trustee

In re Fred Lowenchuss, 171 F.3d 673 (9th Cir. 1999), *cert. denied*, 528 U.S. 877 (1999)
1. Ch 11 Trustee properly appointed
2. Notice and opportunity for hearing adequate

In re BIBO, Inc., 76 F.3d 256 (9th Cir. 1996), *cert. denied*, 519 U.S. 817 (1996)
Court may appoint Chapter 11 trustee *sua sponte*.

4. Bad Faith Filing

In re Marsch, 36 F.3d 825 (9th Cir. 1994)
Having found that case was filed in bad faith, court abused discretion in staying dismissal for 60 days.

In re St. Paul Self Storage Limited Partnership, 185 B.R. 580 (9th Cir. B.A.P. 1995)
No business, one asset, no employees, etc. = bad faith. Dismissal under § 1112(b) appropriate.

In re Rainbow Magazine, Inc., 136 B.R. 545 (9th Cir. B.A.P. 1992)
Bad faith filing..sanctions
Also Discovery Sanctions standard

In re Can-Alta Properties, Ltd., 87 B.R. 89 (9th Cir. B.A.P. 1988)
Bad faith filing.

5. Classification of Claims

In re Barakat, 99 F.3d 1520 (9th Cir. 1996), *cert. denied*, 520 U.S. 1143 (1997)
Separate class of deficiency claimants without a business or economic justification was not allowed. Separate classification of unsecured prepetition claims of trade creditors who were continuing to do business with debtor was also impermissible.

In re Montclair Retail Center, L.P., 177 B.R. 663 (9th Cir. B.A.P. 1995)
Separate classification of secured creditor's claim had no reasonable justification. *Johnson* distinguished.

In re Johnston, 21 F.3d 323 (9th Cir. 1994)
(1) Separate classification of secured creditors' deficiency claim was proper here, where claim was currently being litigated.
(2) Full present payment to senior creditors is required before payments to junior creditors may be permitted.

In re Commercial Western Finance Corp, 761 F.2d 1329 (9th Cir. 1985)
Secured creditors' claims on different properties must be separately classified

6. Confirmation of Plan

In re Harbin, 486 F.3d 510, 514 (9th Cir. 2007)
In determining the feasibility of a plan, the bankruptcy court "must evaluate the possible effect of a debtor's ongoing civil case with a potential creditor, whether that litigation is pending at the trial level or on appeal."

In re Associated Vintage Group, Inc., 283 B.R. 549 (9th Cir. B.A.P. 2002)
Confirmation of a chapter 11 liquidating plan did not terminate ability to object to a secured claim as being preferential under § 502(d). Doctrine of claim preclusion did not apply.

In re Allen, 300 F.3d 1055 (9th Cir. 2002)

Chapter 11 plan which did not incorporate pre-confirmation § 362 stipulation and order was properly confirmed, where stipulation did not recite that it would be binding on the debtor in a chapter 11 plan.

Stratosphere Litigation L.L.C. v. Grand Casinos, Inc., 298 F.3d 1137 (9th Cir. 2002)

Third party creditor was barred by res judicata from challenging bankruptcy court's confirmation of debtor's reorganization plan after party's predecessor had previously failed to object

In re Wolfberg, 255 B.R. 879 (9th Cir. B.A.P. 2000), *aff'd*, 37 Fed.Appx. 891 (9th Cir. 2002)

Debtor's attempt to assert a claim of homestead exemption after confirmation of a chapter 11 plan was barred by res judicata.

In re Consolidated Water Utilities, Inc., 217 B.R. 588 (9th Cir. B.A.P. 1998)

Unsecured creditor who votes for reorganization plan cannot object when plan distribution does not include post-petition interest

Pursuant to Bankruptcy Code § 1141(a), all parties to a confirmed plan are bound by its terms. A confirmation order is a binding, final order, to be accorded full res judicata effect. *In re Heritage Hotel Partnership I*, 160 B.R. 374, 377 (9th Cir. B.A.P. 1993). *Aff'd without op*., 59 F.3d 175 (9th Cir.1995). As long as due process is complied with, a confirmed plan binds all entities that hold a claim or interest, even if they are not scheduled, have not filed a claim, have not received a distribution under the plan or are not permitted to retain an interest under such plan, *Id.,* A plan confirmation order precludes the raising of issues which could or should have been raised during the pendency of the case. *Id.*

Trulis v. Barton, 67 F.3d 779 (9th Cir. 1995)

Confirmed Chapter 11 plan is *res judicata* as to all parties and questions.

In re Heritage Hotel Partnership, 160 B.R. 374 (9th Cir. B.A.P. 1993), *aff'd*. 59 F.3d 175 (9th Cir. 1995)

Confirmation order of a plan which made no mention of lender liability suit acted as bar of suit under *res judicata*.

7. Conversion of Ch 11 to Ch 7 or Chapter 13

In re Owens, 552 F.3d 960 (9th Cir. 2009)

Bankruptcy court properly dismissed rather than converting chapter 11 case that was filed in bad faith as a litigation tactic. Although conversion might have benefitted moving party, the best interests of *all* creditors must be considered in converting or dismissing a case. here, creditors might have fared worse in chapter 7 because the chapter 7 discharge would have deprived them of access to the debtor's substantial future income.

In re Fowler, 394 F.3d 1208 (9th Cir. 2005)

"We hold that § 348(d) requires that postpetition employment tax debt, incurred as an administrative expense of a Chapter 11 bankruptcy estate, retains its first priority administrative

expense status upon conversion to a Chapter 13 bankruptcy plan. Section 1305 is not in conflict with this holding because it does not govern the priority of the postpetition claims it allows into the bankruptcy."

In re Consolidated Pioneer Mortgage Entities, 264 F.3d 803 (9th Cir. 2001)

Conversion from Chapter 11 to chapter 7 was warranted where corporation charge with responsibility for liquidating bankruptcy estate caused unreasonable delay by failing to account to investors.

In re Smith, 235 F.3d 472 (9th Cir.2000)

1) Under Rule 2003(e), a § 341 meeting must be adjourned to a specific time; 2) conversion of the case from chapter 11 to chapter 7 does not restart the running of the 30-day period for filing objections to exemptions.

In re Greenfield Drive Storage Park, 207 B.R. 913 (9th Cir. B.A.P. 1997)

Lapse of payments was material default under Chapter 11 plan that warranted conversion of case to Chapter 7

8. New Value Exception and Absolute Priority Rule

In re Brotby, 303 B.R. 177 (9th Cir. B.A.P. 2003)

1. Class that provided for nondischargeable debt to not receive distributions until litigation was complete, when other unsecured creditors were to receive earlier distributions, violated § 1123(a)(4); 2. Under limited circumstance, § 1141(d)(2) allows a plan to include a collection injunction, if plan provides for payment in full over time and the court has sufficient confidence that the plan is feasible; 3. misleading financial figures did not taint disclosure statement; 4. individual debtors are eligible for the new value exception to the absolute priority rule, but must prove the *Bonner Mall* test; 5**.** findings regarding good faith under § 1129(a)(3) were inadequate.

In re General Teamsters, Warehousemen and Helpers Union, Local 890, 265 F.3d 869 (9th Cir. 2001)

Following local union's liquidation, parent union did not have equity interest in local for purposes of absolute priority rule solely by effect of provision in parent union's constitution requiring local's assets to escheat to parent for two years or until local reorganized.

In re Ambanc La Mesa Ltd. Partnership, 115 F.3d 650, 656-657 (9th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998)

1. New value exception requires equivalence be contributed in cash or other present value, not notes. $320,000 held de minimus as a matter of law. Interest must be paid on unsatisfied debt where new value inadequate.

2. Discrimination between classes must satisfy four criteria to be considered fair under 11 U.S.C. § 1129(b): (1) the discrimination must be supported by a reasonable basis, (2) the debtor could not confirm or consummate the plan without the discrimination, (3) the discrimination is proposed in good faith, and (4) the degree of the discrimination is directly related to the basis or rational for the discrimination, *In re Wolff*, 22 B.R. 510, 511-12 (9th Cir. B.A.P. 1982). Moreover,

separate classification for the purpose of securing an impaired consenting class under § 1129(a)(10) is improper *See In re Greystone III Joint Venture*, 995 F2d 1274, 1279 (5th Cir. 1991) *cert. denied,*, 506 U.S. 821 (1992) and *cert. denied* 506 U.S. 822 (1992), *In re Holywell Corp.* , 913 F.2d 873, 880, (11th Cir. 1990)

In re Dollar Associates, 172 B.R. 945 (Bankr. N.D. Cal. 1994) (Carlson, J.)

Single asset real estate debtor is not permitted to confirm a "new value" plan where property is over encumbered. Plan is not "fair and equitable" under § 1129(b)(1), even though it satisfies the "new value" exception to the absolute priority rule and may technically comply with § 1129(b)(2). Plan would not serve goals of reorganization and would undermine Bankruptcy Code restriction by reducing the creditor's lien to court-determined value of collateral.

Sun Valley Newspapers, Inc. v. SunWorld Corp (In re Sun Valley Newspapers, Inc.), 171 B.R. 71 (9th Cir. B.A.P. 1994)

Following *Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership)*, 2 F.3d 899 (9th Cir. 1993), *motion to vacate denied and case dismissed,* 513 U.S. 18 (1994), the B.A.P. has held that "cause" exists under § 362(d)(1) for relief from stay where debtor's proposed "new value" plan is unconfirmable as a matter of law. After 13 months and the filing of three proposed plans, the debtor's plan still had two fatal defects:

(1) it proposed to release insider guarantees in violation of § 524(e), and

(2) the contribution of old equity in consideration for retaining their ownership interest did not meet the new value tests of *Bonner Mall*. The insiders' canceling their claim against the estate did not constitute new money or money's worth necessary for reorganization, nor has the size of claim released reasonably equivalent in value to the retained equity interest.

Everett v. Perez (In re Perez), 30 F.3d 1209 (9th Cir. 1994)

Payment of unsecured claims in full over 67 months without interest, while debtor retained some value. Was not fair and equitable and did not satisfy the absolute priority rule because unsecured creditors did not receive the full present value of their claims. Debtors in possession and their counsel have the duty to represent to the court that the plan satisfies the requirements of confirmation, so violation of the absolute priority rule may be raised on appeal although not argued in the trial court. Client is the estate, not the debtor individually, and counsel has an independent duty to determine whether an action will benefit the estate or merely cause delay.

In re Tucson Self Storage, Inc., 166 B.R. 892 (9th Cir. B.A.P. 1994)

Unfair classification, unfair discrimination, absolute priority rule

(1) Classification based solely on the right to make § 1111(b) election was improper.

(2) 100% to trade and 10% to secured deficiency claim was unfair discrimination.

(3) Payment of $50,000 to debtor was a loan, not new value. Payment of promoters and administrative claimants was not a sufficient reason for new value.

In re Johnston, 21 F.3d 323 (9th Cir.1994)

Absolute priority rule not violated by permitting a debtor to retain rights in estate property under Chapter 11 plan

In re Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993), *motion to vacate denied and case dismissed*, 513 U.S. 18 (1994)

New value exception survives bankruptcy code when all pre-code requirements of doctrine satisfied; if equity is retaining interest, must meet Bonner Mall test

In re Green, 98 B.R. 981 (9th Cir. B.A.P. 1989)
Plan calling for less than 100% payment and for debtor to retain 50% interest in lawsuit violates absolute priority rule

9. Notice of Plan

In re Maya Construction, Inc., 78 F.3d 1395 (9th Cir. 1996), *cert. denied*, 519 U.S. 862 (1996)
Where debtor knows of a potential claimant, debtor must list it and give notice. A failure to do so may bar discharge of the debt. Case remanded to determine if creditor had adequate notice of plan conf. but sat on his rights. Case may be important for what it says about unknown claimants.

In re Downtown Investment Club III, 89 B.R. 59 (9th Cir. B.A.P. 1988)
Failure to give general unsecured creditors notice of modified plan makes it void under 9024 and 1127 'material plan modifications require a formal disclosure statement and court approval

10. §1125

In re California Fidelity, Inc., 198 B.R. 567 (9th Cir. B.A.P. 1996)
§ 1125(b) - Solicitation without a disclosure statement - what constitutes a solicitation - sanctions.

Jacobsen v. AEG Capital Corp., 50 F.3d 1493 (9th Cir. 1995)
1. § 1125(e) only provides a safe harbor for disclosure and solicitation. It does not protect bad faith acts.
2. Forced sale doctrine of § 10(b)(5) has no applicability to a Chapter 11 reorganization.

In re Scioto Valley Mortg. Co., 88 B.R. 168 (Bankr. S.D. Ohio 1988)
§1125 - basic requirements of disclosure statements

11. Valuation for §1111(b) Purposes

In re Weinstein, 227 B.R. 284 (9th Cir. B.A.P. 1998)
Bankruptcy court properly applied under secured bank's statutory election to treat claim as secured by ordering debtors to repay present value of collateral in 120 monthly payments equaling secured and unsecured portions of bank's claim. §1111(b)(2) option - Adequate protection payments properly credited to secured, not unsecured claim.

In re Tuma, 916 F.2d 488 (9th Cir. 1990)
Creditor of corporation holding personal guaranty of debt could elect to have its claim

treated as secured. Valuation of stock.

In re California Hancock, Inc., 88 B.R. 226 (9th Cir. B.A.P. 1988)
Creditor was entitled to credit bid in sale pursuant to plan. §§ 1111(b) and 363(k).

12. Vote on Plan

In re Figter Limited, 118 F.3d 635 (9th Cir. 1997), *cert. denied*, 522 U.S. 996 (1997)
Sole secured creditor of single-asset bankruptcy debtor does not per se act in bad faith by acquiring and voting majority of unsecured claims to defeat proposed reorganization plan.
In re M. Long Arabians, 103 B.R. 211 (9th Cir. B.A.P. 1989)
Failure to vote on plan does not constitute acceptance of plan

In re Federal Support Company, 859 F.2d 17 (4th Cir. 1988)
Bad faith vote; fact that creditor was named as a defendant in debtor's state antitrust case did not show that creditor acted in bad faith in voting against reorganization plan.

13. Post Confirmation

In re JZ L.L.C., 371 B.R. 412 (9th Cir. BAP 2007)
Pursuant to section 1141(b), all property of the estate vests in the debtor upon confirmation of the plan, regardless of whether it was listed in the bankruptcy schedules. Thus, the debtor retains standing to control estate property after the case is closed.

In re Pegasus Gold Corp., 394 F.3d 1189 (9th Cir. 2005)
Tort and breach of contract action brought post confirmation by debtor and newly-formed corporation was within the bankruptcy court's subject matter jurisdiction. The "related to" test was too broad in this context; rather, the inquiry was whether there was a close nexus to the bankruptcy plan or proceeding.

13. Misc

General Electric Cap. v. Future Media Productions, 547 F.3d 956 (9th Cir 2008)
Where creditor's oversecured claim was paid in full out of the proceeds of an asset sale, rather than pursuant to a chapter 11 plan, and thus not subject to the "cure" provisions of § 1124 that a chapter 11 plan would allow, creditor was entitled to a default rate of interest. Court distinguishes the holding in *In re Entz-White Lumber and Supply, Inc.,* 850 F.2d 1338 (9th Cir. 1988), and disapproves of the holding in *In re Casa Blanca Project Lenders*, 196 B.R. 140 (9th Cir. BAP 1996)

In re Cooper Commons LLC, 512 F.3d 533 (9th Cir. 2008)
Counsel for former debtor-in-possession was not entitled to compensation from a carve-out negotiated by chapter 11 trustee for himself and his professionals, where the carve-out did not include debtor-in-possession counsel, and debtor-in-possession counsel had previously waived

any entitlement to a carve-out.

Miller v. U.S, 363 F.3d 999 (9th Cir. 2004)

Res judicata did not apply to IRS claim, where the plan's discharge provisions were found to be ambiguous.

In re Dynamic Brokers, Inc., 293 B.R. 489 (9th Cir. B.A.P. 2003)

Appropriate interest rate is the rate "the debtor would pay a commercial lender for a loan of equivalent amount and duration, considering the risk of default and any security."
In re El Camino Real Landscape Maintenance Contractors, Inc., 818 F.2d 1503, 1504 (9th Cir. 1987). 6% for 240 months was appropriate in this case.

In re Silberkraus, 336 F.3d 864 (9th Cir. 2003)

Fact that the debtor filed a bankruptcy petition only two days before a state court was to schedule a trial date on a creditor's claims for specific performance; the admissions by the debtor and his counsel that reorganization was impossible over the objections of creditors; and the fact that bankruptcy could not have provided more value to the debtor than proceeding with the state court action support bankruptcy court's finding that filing was frivolous and for an improper purpose.

In re Sylmar Plaza, L.P., 314 F.3d 1070 (9th Cir. 2002), *cert. denied*, 538 U.S. 1035 (2003)

Chapter 11 plan was proposed in good faith where the sole purpose was to enable debtors to cure and reinstate an obligation, thereby avoiding contractual liability for default interest.

In re Henry Mayo Newhall Memorial Hospital, 282 B.R. 444 (9th Cir. B.A.P. 2002)

Bankruptcy court properly extended exclusivity period.

In re Southern Pacific Funding Corporation, 268 F.3d 712 (9th Cir. 2001)

Subordination clause in indenture agreement that preserved certain secured creditors' rights both pre- and post- bankruptcy did not violate § 365(e)(1) of the bankruptcy code.

In re Crystal Properties, Ltd., 268 F.3d 743 (9th Cir. 2001)

"Without notice or demand" provision in default interest clause of loan agreement did not alter requirement that holder of defaulted loan must carry out some affirmative act to exercise its option to accelerate the loan and invoke the default interest clause. Default interest rate did not come into effect until holder of the note first took affirmative action to put the debtor on notice that it intended to exercise its option to accelerate, and thus invoke the default rate.

Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001)

Listing of prepetition "songrights" in a value of "unknown" "was not so defective that it would forestall a proper investigation of the asset." Accordingly, the right to post-petition royalties from these assets vested in the debtor upon confirmation of his chapter 11 plan. Unpaid prepetition royalties did not vest in the debtor, because they were subject to a separate listing requirement as causes of action.

In re Hassen Imports Partnership, 256 B.R. 916 (9th Cir. B.A.P. 2000)

1) Debtor was not entitled to attorney fees under CCP § 1717, since the dispute in question was not an action on a promissory note, but an action on confirmation of a plan, which is governed by federal bankruptcy law; 2) bankruptcy court erred in finding that secured creditor was entitle to the default rate of interest in the note, since the creditor "failed to demonstrate that the default rate reasonably compensated it for losses arising from the default;" 3) secured creditor was entitled to fees under § 506(b)for pursuing collection of note from guarantors

In re Bartleson, 253 B.R. 75 (9th Cir. B.A.P. 2000)

Because the chapter 11 plan did not contain a provision enjoining collection activity by creditors with respect to their nondischargeable claims, creditors were not precluded from pursuing their collection rights outside of the plan.

In re Fred Lowenchuss, 170 F.3d 923 (9th Cir. 1999) case 2

District Court properly vacated confirmation order where plan improperly excluded 8 million in assets.

Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434 (1999)

Shareholders may be barred from putting up new money to retain ownership of company following bankruptcy reorganization if others, including unsecured shareholders, were never allowed to propose alternative plans.

In re Duvar Apt. Inc., 205 B.R. 196 (9th Cir. B.A.P. 1996)

Transfer to shell corporation raises presumption of bad faith.

In re Kelley, 199 B.R. 698 (9th Cir. B.A.P. 1996)

Vague references in plan and disclosure statement not sufficient to avoid res judicata on counterclaims against secured creditor post-confirmation

In re Arnold and Baker Farms, 177 B.R. 648 (9th Cir. B.A.P. 1994), *aff'd*, 85 F.3d 1415 (9th Cir. 1996), *cert. denied*, 519 U.S. 1054 (1997)

Partial transfer of collateral in full satisfaction of debt failed to give creditor indubitable equivalent of secured claim.

In re Antiquities of Nevada, Inc., 173 B.R. 926 (9th Cir. B.A.P. 1994)

Debtor may not modify reorganization plan after fulfilling applicable statutory requirements to substantially consummate plan.

In re Hotel Associates of Tucson, 165 B.R. 470 (9th Cir. B.A.P. 1994)

Motive in creating an impaired class is irrelevant.

In re Boulders on the River, Inc., 164 B.R. 99 (9th Cir. B.A.P. 1994)

In this single asset, 100% plan:

(1) Converting construction financing to permanent with 25 year amortization and 7 year balloon was okay.

(2) No bad faith under § 1129(a)(3).

(3) 9% blended rate for cramdown interest was okay.

I.R.S. v. Creditors' Committee (In re Deer Park, Inc.), 10 F.3d 1478 (9th Cir. 1993)

Bankruptcy court confirmed liquidating Chapter 11 plan that sold all debtor's assets and distributed proceeds. Plan erroneously listed I.R.S. tax claim at $20,000 less than actual claim. amount. When shortfall was discovered, creditors' committee moved to modify plan to require I.R.S. to first apply payments to the "trust fund" taxes for which debtor's president was personally liable under 26 U.S.C. §§ 6672 and 7501. Motion granted and affirmed under authority of *United States v. Energy Resources Co.*, *Inc.*, 495 U.S. 545 (1990). (Chapter 11 reorganization plan could require I.R.S. to allocate payments first to trust fund taxes even though this increased risk to I.R.S. that non-trust fund taxes may not be paid.) *Held*: Liquidation may be a form of reorganization and the continued participation of debtor's president in a planned liquidation may be necessary to maximize recovery for creditors.

In re L&J Anaheim Assoc., 995 F.2d 940 (9th Cir. 1993)

Creditor plan which requires property to be sold through bankruptcy trustee impairs creditor since it deprives him of state law contract rights, even if it enhances his position.

In re Wheeler Technology, Inc., 139 B.R. 235 (9th Cir. B.A.P. 1992)

Bankruptcy court has no power to remove a creditor from a creditor's committee

In re Orange Tree Assoc., Ltd., 961 F.2d 1445 (9th Cir. 1992) §1144

Must file complaint to revoke within 180 days of confirmation order, not order modifying plan

Hay v. First Interstate Bank or Kalispell, N.A., 978 F.2d 555 (9th Cir. 1992)

Debtor barred from suing post-confirmation when it knew facts preconfirmation.

Great Western Bank v. Sierra Woods Group, 953 F.2d 1174 (9th Cir. 1992)

Fairness of a plan that includes "negative amortization" (see § 1129) must be determined on a case-by-case basis.

Official Committee of the Unsecured Creditors of White Farm Equipment Company v. United States, 111 B.R. 158 (N.D. Ill. 1990), *reversed*, 943 F.2d 752 (7th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992)

I.R.S. property tax discharged in first Chapter 11, making I.R.S. general unsecured creditor in second Chapter 11.

In re Mann Farms, Inc., 917 F.2d 1210 (9th Cir. 1990)

Where state court determination of lawsuit will not affect plan of reorganization, right is not preempted by plan.

In re Grimes, 117 B.R. 531 (9th Cir. B.A.P. 1990)

Chapter 12 filing not prohibited while Chapter 11 plan not substantially consummated.

In re Fowler, 903 F.2d 694 (9th Cir. 1990)

Reorganization cramdown rate using market formula approach must consider risk factors as well as rates for similar loans in the area. *See also In re Camino Real Maintenance Contractors, Inc.,* 818 F.2d 1503 (9th Cir. 1987).

In re Lenox, 902 F.2d 737 (9th Cir. 1990)

(1) Remand was warranted for bankruptcy court to take evidence as to feasibility of plan, and

(2) on remand, court was to enforce stipulation unless it found special circumstances justified course of action necessary to save farm and, if so, was to adopt measures that would give creditors the interest and principal which, under stipulation, they would have had by date loan was to be made current and was to shorten payment period under plan so that creditors could be repaid in 15 years rather than 23.

In re Rohnert Park Auto Parts, Inc., 113 B.R. 610 (9th Cir. B.A.P. 1990)

Plan impermissibly enjoined creditors from suing <u>co-debtors</u>

in absence of objection, court has no obligation to inquire into plan

In re Southeast Company, 868 F.2d 335 (9th Cir. 1989)

§ 1124(2). Debtor's right to cure default includes right to reinstate nondefault lower interest rate.

CHAPTER 13

1. Chapter 13 Plan
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1. Chapter 13 Plan

In re Fridley, 380 B.R. 538, 544 (9th Cir. BAP 2007)

The "applicable commitment period" of § 1325(b)(1) has a temporal component. " A debtor desiring to prepay a chapter 13 plan and obtain an early discharge without paying allowed unsecured creditors in full must follow the § 1329 modification procedure prescribed by Rule 3015(g)."

In re Ransom, 336 B.R. 790 (9th Cir. BAP 2005), *vacated,* 302 Fed. Appx. 567 (9th Cir. 2009).

Chapter 13 plan which prohibited student loan creditor from collecting accrued interest after completion of the plan was a de facto discharge of the student loan debt, for which an adversary proceeding was required and a finding of undue hardship. Thus, the provision is unenforceable.

In re Brawders, 325 B.R. 405 (9th Cir. BAP 2005), *aff"d,* 503 F.3d 856 (9th Cir. 2007)

Debtors could not alter taxing authority's lien rights on residence through a vague form plan provision that did not give adequate notice of debtor's intent. Thus, "the res judicata effect of the Plan did nothing to reduce the amount of Ventura's underlying tax assessments or affect Ventura's lien rights."

In re Sunahara, 326 B.R. 768 (9th Cir. BAP 2005)

A debtor may modify a confirmed 36-month chapter 13 plan so as to pay it off in a single lump sum and receive an early discharge. Model plan which requires a 100% pay out to unsecured creditors if it extends less than 36 months is invalid.

In re Profit, 283 B.R. 567 (9th Cir. B.A.P. 2002)

1. Under 1329(b)(1), a modified plan must meet some of the same requirements as an original plan, including the 60-month duration limit.

2. The 60-month period begins to run from the date the first plan payment is due.

In re Braker, 125 B.R. 798, (9th Cir. B.A.P. 1991)

A Chapter 13 plan may not cure and reinstates a mortgage subsequent to a pre-petition foreclosure sale, but prior to the expiration of a statutory right of redemption

2. Chapter 13 Trustee

In re Cohen, 305 B.R. 886 (9th Cir. B.A.P. 2004)

1. Chapter 13 trustee has standing to pursue avoiding actions for the benefit of the estate;

2. The right to receive a tort settlement fund is neither a "payment intangible" nor an equitable assignment**.**

In re Powers, 202 B.R. 618 (9th Cir. B.A.P. 1996), *amended* .... (1997)

Trustee need not show change in debtor's circumstances in order to move for modification of debtor's plan

In re Andrews, 49 F.3d 1404 (9th Cir. 1995)

Chapter 13 trustee has standing to object if plan doesn't comply with Title 11, even if none of creditors object

In re Andrews, 155 B.R. 769 (9th Cir. B.A.P. 1993), *aff'd*. 49 F.3d 1404 (9th Cir. 1995)

Chapter 13 trustee has standing to object to plan extending beyond three years. Court properly denied confirmation for lack of cause.

3. Child Support

In re Foster, 319 F.3d 495 (9th Cir. 2003)

Interest on nondischargeable child support continues to accrue after a chapter 13 petition is filed and survives a chapter 13 discharge.

In re Pacana, 125 B.R. 19 (9th Cir. B.A.P. 1991)

Child support debt provided for in chapter 13 plan may be collected upon by claimant outside of plan.

4. Claim and issue preclusion--binding effect of plan

Espinosa v. United Student Aid Funds, Inc., 553 F.3d 1198 (9th Cir. 2008), *cert granted,* 129 S.Ct. 2791, 174 L.Ed.2d 289 (2009)

Court holds that a student loan creditor whose proof of claim includes interest, but who receives adequate notice of a plan the terms of which do not provide for the payment of interest may be bound by it and have its claim covered by the debtor's discharge without the need for a

dischargeability adversary proceeding. *Repp and Ransom, infra* explicitly are overruled.

Ellett v. Stanislaus, 506 F.3d 774 (9th Cir. 2007)

Franchise Tax Board was not bound by debtor's discharge for lack of proper notice, where debtor listed the wrong Social Security number on his bankruptcy petition and the wrong number appeared on his § 341(a) notice.

In re Lynch, 363 B.R. 101 (9th Cir. BAP 2007)

Trustee should not have been compelled to abandon property. Even though the debtor valued the property at 560,000 as of the date of the filing of the chapter 13 petition, and the plan was confirmed without objection, that valuation was not binding on the trustee under § 348(f)(1), since no implicit valuation occurred. However, the relevant valuation date was the petition date, not the conversion date (absent a showing of bad faith).

In re Summerville, 361 B.R. 133 (9th Cir. BAP 2007)

Where plan did not affect or address the validity of a note or deed of trust other than to cure arrearages and continue regular payments, debtor was not precluded from challenging the validity of note and deed of trust in subsequent state court action.

In re Ransom, 336 B.R. 790 (9th Cir. BAP 2005)

Chapter 13 plan which prohibited student loan creditor from collecting accrued interest after completion of the plan was a de facto discharge of the student loan debt, for which an adversary proceeding was required and a finding of undue hardship. Thus, the provision is unenforceable.

In re Enewally, 368 F.3d 1165,1165 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 669 (2004)

"Although confirmed plans are *res judicata* to issues therein, the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding, or were not sufficiently evidenced in a plan to provide adequate notice to the creditor."

In re Repp, 307 B.R. 144 (9th Cir. BAP 2004)

Chapter 13 debtor's plan could not discharge a partially-repaid student loan without giving the creditor the due process protections of an adversary proceeding.

In re Shook, 278 B.R. 815 (9th Cir. B.A.P. 2002)

Debtor who failed to object to secured claim based on judgment lien after repeated notices from chapter 13 trustee was barred by laches from objecting after claim was paid. Creditor's lien could not be avoided by plan alone, which in any event did not "provide for" the lien.

In re Pardee, 218 B.R. 916 (9th Cir. B.A.P. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999)

Student loan creditor waived claim to postpetition interest by failing to object to discharge provision of debtor's Chapter 13 plan before plan's confirmation.

"In summary, the bankruptcy court erred in concluding that a holder of a nondischargeable student loan was precluded from collecting postpetition interest on this debt if the creditor's

allowed claim is paid in full pursuant to the Chapter 13 plan. We are bound by the Supreme Court's holding in *Bruning* and reject the bankruptcy court's reliance on *Wasson.*

"However, this error was harmless given the facts of this case. Although the Plan should not have been confirmed because it included the Discharge Provision, which was inconsistent with the Code, once confirmed, it was *res judicata* and binding on Appellant. Additionally, Appellant's failure to object to the Plan at the confirmation hearing constituted an implied acceptance of the Plan. By failing to appeal the Confirmation Order and having impliedly accepted the Plan, Appellant cannot now collaterally attack the Plan. Accordingly, we affirm."

5. Dismissal or Conversion

In re Rosson, 545 F.3d 764 (9th Cir. 2008)

A chapter 13 debtor does not have an absolute right to dismiss his case. The bankruptcy court did not clearly err in converting the debtor's case to chapter 7, where the debtor engaged in bad faith conduct by failing to deliver arbitration proceeds to the chapter 13 trustee. This is true even though the debtor received virtually no notice of the sua sponte conversion.

In re Marrama, 549 U.S. 365, 127 S.Ct. 1105 (2007)

Debtor forfeited his right to convert his case to chapter 13 where he did not qualify as a debtor because of his bad faith concealment of assets

In re Sobczak, 369 B.R. 519, 518 (9th Cir. BAP 2007)

Court should not have considered interests of the debtor in determining whether to dismiss under § 1307(c). It should only have considered the best interests of the estate and creditors.

In re Nelson, 343 B.R. 671 (9th Cir. BAP 2006)

Dismissal for cause under § 1307(c)(5) requires not only a denial of confirmation, but denial of a motion to file an amendment or modification of the plan. Debtor had to be given an opportunity to file an amended plan before dismissal was proper.

In re Tran, 309 B.R. 330 (9th Cir. B.A.P. 2004), *aff'd,* 177 Fed. Appx. 754 (9th Cir. 2006)

Home refinancing proceeds revested in debtor after dismissal of chapter 13 petition; funds in chapter 13 trustee's hands had to be turned over to the debtor.

In re Leavitt, 171 F.3d 1219 (9th Cir. 1999)

Ch 13 bankruptcy debtor's concealment of assets and inflation of expenses could amount to bad faith warranting dismissal of petition with prejudice.

In re Morimoto, 171 B.R. 85 (9th Cir. B.A.P. 1994)

Dismissed for bad faith for failure to file tax returns was appropriate

In re Beatty, 162 B.R. 853 (9th Cir. B.A.P. 1994)

Debtors dismissal before the order of conversion was docketed was effective

6. Disposable Income

In re Kagenveama, 541 F.3d 868 (9th Cir. 2008)

"Projected disposable income" as defined by § 1325(b)(2) means disposable income projected over the "applicable commitment period." It is not a forward looking concept that is a mere starting point for determining whether an above-median income debtor's plan must be five years in duration as a condition to confirmation.

In re Wiegand, 386 B.R. 238 (9th Cir. BAP 2008)

Official Form 22C, which allows an individual debtor in a chapter 13 case to deduct business expenses from income generated from a business, conflicts with § 1325(b)(2)(B), which allows the deduction of business income for purposes of determining disposable income, and is thus invalid.

In re Ransom, 380 B.R. 799 (9th Cir. BAP 2007)

In determining "projected disposable income" of an above-median income debtor in a chapter 13 case, the means test does not permit the debtor to claim a vehicle ownership expense for a vehicle owned free and clear of any liens.

In re Hull, 251 B.R. 726 (9th Cir. B.A.P. 2000)

Debtor's community property interest under Washington law in the income of his nondebtor spouse is part of his "disposable income" and must be counted in calculating whether he meets the test of § 1322(a)(1) and § 1325(b)(1)(B).

In re Burgie, 239 B.R. 406 (9th Cir. B.A.P. 1999)

Nonexempt assets from sale of house not subject to inclusion in plan as disposable income. (Not clear from decision whether some other ground, such as liquidation test, might justify trustee motion to modify plan).

In re Than, 215 B.R. 430 (9th Cir. B.A.P. 1997)

1. § 1329 does not require changed financial circumstances, but merely changed circumstances

2. Debtor need not meet disposable income test in a plan modification where no objection to confirmation of the original plan was made on those grounds.

In re Hagel, 184 B.R. 793 (9th Cir. B.A.P. 1995)

Debtor's social security disability income included in disposable income, even though exempt

In re Anderson, 21 F.3d 355 (9th Cir. 1994)

Debtor need only devote his <u>projected</u> rather than <u>actual</u> disposable income for 36 months

7. Good Faith/Bad Faith

In re Villanuevo, 274 B.R. 836 (9th Cir. B.A.P. 2002)

Debtor's proposal to reduce chapter 13 repayment plan from 60 to 36 months, thereby reducing percentage to unsecured creditors from 50% to 19%, did not indicate bad faith or lack of best efforts.

In re Ho, 274 B.R. 867 (9th Cir. B.A.P. 2002)

1. "While a dispute as to liability will not "necessarily render a debt unliquidated," *In re Slack*, 187 F.3d at 1074, the nature of this dispute does." 2. Bankruptcy court abused its discretion in not applying all four of the *Eisen* factors in finding bad faith.

In re Scovis, 249 F.3d 975 (9th Cir. 2001)

"....[E]ligibility would normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith." Court also assumed that a lien would be partially avoided under § 522(f), rendering the debtor over the unsecured debt limit.

In re Padilla, 213 B.R. 349 (9th Cir. B.A.P. 1997)

Timing of Chapter 13 case filed immediately after entry of adverse judgment in prior Chapter 7 case was not conclusive evidence of bad faith.

In re Eisen, 14 F.3d 469 (9th Cir. 1994)

Bad faith filing

8. IRS

In re Fowler, 394 F.3d 1208 (9th Cir. 2005)

"We hold that § 348(d) requires that postpetition employment tax debt, incurred as an administrative expense of a Chapter 11 bankruptcy estate, retains its first priority administrative expense status upon conversion to a Chapter 13 bankruptcy plan. Section 1305 is not in conflict with this holding because it does not govern the priority of the postpetition claims it allows into the bankruptcy."

U.S. I.R.S. v. Snyder, 343 F.3d 1171 (9th Cir. 2003)

Debtor's interest in a pension plan was not property of the estate, and thus it could not used to secure the IRS's claim for delinquent taxes in his chapter 13 case. This is so, even though the IRS is not subject to ERISA's antialienation provisions.

In re Bevan, 327 F.3d 994 (9th Cir. 2003)

Senior lienholder who bids in amount of deed of trust into foreclosure, takes possession of the property, then pays off amount of IRS lien is not equitably subrogated to the rights of the IRS in the debtor's chapter 13 case.

In re Beam, 192 F.3d 941 (9th Cir. 1999)

The court of appeals affirmed a judgment of the district court. The court held that a Ch. 13 bankruptcy trustee must honor an IRS notice of levy on funds deposited by the debtor toward a proposed plan that is not confirmed.

In re Greatwood, 194 B.R. 637 (9th Cir. B.A.P. 1996), *aff'd.* 120 F.3d 268 (9th Cir. 1997)

Tax protestor cannot maintain Chapter 13 proceedings to dispose of debt to IRS - statements in lieu of returns not adequateIn re Osborne, 76 F.3d 306 (9th Cir. 1996)

Prior to Bankruptcy Reform Act of 1994, Ninth Circuit case law dictated that, in Chapter 13 cases, IRS priority claim disallowed as untimely

In re Heath, 182 B.R. 557 (9th Cir. B.A.P. 1995)

In order to require Chapter 13 debtor to commit to plan all tax refunds debtor receives during plan's term, trustee must make minimal showing that debtor may receive tax refunds

9. §109

In re Guastella, 341 B.R. 908 (9th Cir. BAP 2006)

Tentative decision quantified the amount of the debt the debtor would be liable for in an amount certain. The debt was thus liquidated, since is was readily ascertainable. The court correctly looked beyond the schedules to determine the amount of the debt (which was listed as $0) and correctly determined that the schedules were not filed in good faith.

In re Slack, 187 F.3d 1070, 1073-75 (9th Cir. 1999)

". . .[A] debt is liquidated if the amount is readily ascertainable, notwithstanding the fact that the question of liability has not been finally decided."

In re Nicholes, 184 B.R. 82, 99-91 (9th Cir. B.A.P. 1995)

"Construing *Sylvester* with *Wenberg* and *Loya*, we hold that the fact that a claim is disputed does not per se exclude the claim from the eligibility calculation under § 109(e), since a disputed claim is not necessarily unliquidated. So long as a debt is subject to ready determination and precision in computation of the amount due, the it is considered liquidated and included for eligibility purposes under § 109(e) regardless of any dispute. On the other hand, if the dispute itself makes the claim difficult to ascertain or prevents the ready determination of the amount due, the debt is unliquidated and excluded from the § 109(e) computation."

In re Carty, 149 B.R. 601 (9th Cir. B.A.P. 1993)

109(g) 180 day period not tolled or renewed between time of second filing and time when motion to dismiss heard, at least based on equities of the case (10 months lapse between second filing and motion to dismiss)

10. §1322

In re Frazier, 377 B.R. 621 (9th Cir. BAP 2007)

Curing of a default as to a Montana contract for deed was governed by § 1322(b)(3), not the 60-day limitation in § 108(b).

In re Enewally, 368 F.3d 1165 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 669 (2004)
Lien stripping cannot be accomplished under § 1322(b)(2) unless the lien will be paid off within the life of the plan.

In re Zimmer, 313 F.3d 1220 (9th Cir. 2002)
A wholly unsecured lienholder is not entitled to the protections of § 1322(b)(2); The holding of *In re Lam*, 211 B.R. 36 (9th Cir. B.A.P. 1997) approved.

In re Labib-Kiyarash, 271 B.R. 189 (9th Cir. B.A.P. 2001)
Student loan that will extend beyond the life of the plan is a "long-term debt" for purposes of § 1322(b)(5). Debtor could separately classify such a student loan and pay it in full "outside" the plan if the classification meets the fairness test under § 1322(b)(1).

In re Hill, 268 B.R. 548 (9th Cir. B.A.P. 2001)
Mother whose credit cards were used by debtor daughter was not "liable with" the debtor, and thus § 1322(b)(1) dealing with separate classification of co-debtor debt was inapplicable.

In re Lee, 215 B.R. 22 (9th Cir. B.A.P. 1997)
First deed of trust on real estate and appliances can't be stripped under 1322(b)(2)

In re Lam, 211 B.R. 36 (9th Cir. B.A.P. 1997)
Bankruptcy debtors entitled to treat wholly unsecured deed of trust as unsecured lien

In re Lievsay, 199 B.R. 705 (9th Cir. B.A.P. 1996), *cert. denied*, 522 U.S. 1149 (1998)
Boilerplate language in deed of trust does not eviscerate § 1322(b)

In re Reeves, 164 B.R. 766 (9th Cir. B.A.P. 1994)
§ 1322(b)(2) applies to nonpurchase money home loans

In re Proudfoot, 144 B.R. 876 (9th Cir. B.A.P. 1992)
Garcia (sp?) Reaffirmed - cannot confirm a plan which calls for no regular payments pending sale of house without violating 1322(b0(2)

11. §1325

In re Pluma, 303 B.R. 444 (9th Cir. B.A.P. 2003), *affd,* 427 F.3d 1163 (9th Cir. 2005)
Under § 1325(a)(5)(B), bankruptcy court appropriately applied the "formula" approach for setting an interest rate, whereby a base rate is determined, and then increases the rate based on the risk of default by the debtor and the nature of the security. However, the court failed to consider all of the default risks with this particular debtor.

In re Cavanagh, 250 B.R. 107 (9th Cir. B.AP. 2000)

Under the amendments made to § 1325(b)(2)(A) by the Religious Liberty and Charitable Donation Protection Act of 1998, "a court is not supposed to engage in a separate analysis to determine whether charitable contributions up to fifteen percent are reasonably necessary for the debtor's maintenance and support." However, a court should look at the debtor's purpose in commencing or increasing the amount of tithing on the eve of or shortly after filing for bankruptcy for purposes of determining whether a chapter

12. §1325(hanging paragraph)

In re Penrod, 392 B.R. 835 (9th Cir. BAP 2008)

1) A lender's payoff of the deficiency on the trade-in is not secured by the purchase money security interest in the new car, and is not thereby protected by the hanging paragraph.

2) "[T]he hanging paragraph protects that portion of the lender's debt allocable to the car purchased, and does not protect that portion of the debt that is allocable to negative equity."

In re Rodriguez, 375 B.R. 535 (9th Cir. BAP 2007)

The "hanging paragraph" does not affect a 910 secured creditor's right to seek a deficiency claim upon surrender of the vehicle.

In re Trejos**,** 374 B.R. 210, 215 (9th Cir. BAP 2007)

Under the "hanging paragraph," chapter 13 debtor was required to pay the full contract price of his automobile. Trial court held that § 1322(b) remained applicable, and the debtor could alter the interest rate and monthly payments. The BAP did not address this issue, since the creditor did not pursue it on appeal.

13. Student Loans

In re Ransom, 336 B.R. 790 (9th Cir. BAP 2005)

Chapter 13 plan which prohibited student loan creditor from collecting accrued interest after completion of the plan was a de facto discharge of the student loan debt, for which an adversary proceeding was required and a finding of undue hardship. Thus, the provision is unenforceable.

In re Pardee, 218 B.R. 916 (9th Cir. B.A.P. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999)

Student loan creditor waived claim to postpetition interest by failing to object to discharge provision of debtor's Chapter 13 plan before plan's confirmation.

"In summary, the bankruptcy court erred in concluding that a holder of a nondischargeable student loan was precluded from collecting postpetition interest on this debt if the creditor's allowed claim is paid in full pursuant to the Chapter 13 plan. We are bound by the Supreme Court's holding in *Bruning* and reject the bankruptcy court's reliance on *Wasson.*

"However, this error was harmless given the facts of this case. Although the Plan should not have been confirmed because it included the Discharge Provision, which was inconsistent with the Code, once confirmed, it was *res judicata* and binding on Appellant. Additionally,

Appellant's failure to object to the Plan at the confirmation hearing constituted an implied acceptance of the Plan. By failing to appeal the Confirmation Order and having impliedly accepted the Plan, Appellant cannot now collaterally attack the Plan. Accordingly, we affirm."

In re Sperna, 173 B.R. 654, (9th Cir. B.A.P. 1994)
Nondischargeability of student loan not per se reasonable basis for discriminatory treatment of other unsecured debts in Chapter 13 proceeding.

14. Fees

In re Eliapo, 468 F.3d 592 (9th Cir. 2006)
1) No-look presumptive fees do not violate 11 U.S.C. § 330; 2) the bankruptcy court's criteria for awarding additional fees beyond the no-look fee did not violate § 330; and 3) the bankruptcy court did not abuse it's discretion in ruling on fees without a hearing.

In re Johnson, 344 B.R. 104 (9th Cir. BAP 2006)
Chapter 13 plan providing that attorneys' fees remaining unpaid at the completion of the case would not be discharged is not inconsistent with any provision in Title 11.

15. Discharge–§ 1328

In re Ryan, 389 B.R. 710 (9th Cir. BAP 2008)
Costs of prosecution are not criminal fines under § 1328(a)(3) and are thus dischargeable.

16. Misc

In re Croston, 313 B.R. 447 (9th Cir. B.A.P. 2004)
Debtors had an absolute right to convert from chapter 7 to chapter 13.

Till v. SCS Credit Corp., 124 S.Ct. 1951 (2004)
Formula approach for setting interest rate based on prime rate adjusted for risk of nonpayment was appropriate cramdown rate of interest.

In re Steinacher, 283 B.R. 768 (9th Cir. B.A.P. 2002)
Local LA rule requiring debtors to pay all past due mortgage payments from previous chapter 13 was invalid.

In re Slack, 187 F.3d 1070 (9th Cir. 1999)
Held that a debt is liquidated if the amount is readily ascertainable, notwithstanding the fact that the question of liability has not been finally decided.

In re Soderlund, 236 B.R. 271 (9th Cir. B.A.P. 1999)
Unsecured portion of secured creditor's claim should be counted as unsecured debt for determining chapter 13 eligibility.

In re Beguelin, 220 B.R. 94 (9th Cir. B.A.P. 1998)

Chapter 13 creditor may recover interest at federal judgment rate from date of petition through and beyond plan's confirmation where estate was solvent.

"The bankruptcy court's oral order lifting the automatic stay clearly allowed Volcano to obtain a judgment in its pending state court action against the debtor that included an award of attorney's fees and costs. The order lifting the stay is AFFIRMED.

"The bankruptcy court's determination that Volcano was entitled to postpetition interest on its claim from the date of the debtor's petition through and beyond the effective date of the confirmed Chapter 13 plan ("gap interest") is AFFIRMED.

"The bankruptcy court's determination that the state law rate of interest was the "legal rate" applicable to Volcano's claim under § 726(a)(5) is REVERSED. We hold that "interest at the legal rate" under § 726(a)(5) is measured by the federal judgment rate. The matter is remanded for a recomputation...

In re Smith, 207 B.R. 888 (9th Cir. B.A.P. 1996)

Life insurance premiums may be necessary expense under chapter 13 even when not required by law

In re Beltran, 177 B.R. 905 (9th Cir. B.A.P. 1995), *reversed* 81 F.3d 167 (9th Cir. 1996)

State filed claim should have been allowed on authority of *In re Pacific & Atlantic Trading Co.*

In re Barnes, 32 F.3d 405 (9th Cir. 1994)

Court may not confirm plan of reorganization where value of property to be distributed during term of plan on account of allowed secured claim is less than allowed amount of claim

In re West, 5 F.3d 423 (9th Cir. 1993), *cert. denied*, 511 U.S. 1081 (1994)

The debtors' joint Chapter 13 case suspended the running of § 507(a)(7)(A)(ii)'s 240-day priority period from the date of the bankruptcy petition until six months after the case was dismissed pursuant to I.R.C. § 6503. The IRS claims are therefore entitled to priority.

In re Martin, 156 B.R. 47 (9th Cir. B.A.P. 1993)

1. 60 month period of second filing does not commence from date of first filing
2. Must be cause for cure period to extend beyond 36 months

In re Tucker, 989 F.2d 328 (9th Cir. 1993)

Where debtors concealed $7000, used 6500 to increase equity in house, findings required on creditor's objection.

In re Hobdy, 130 B.R. 318 (9th Cir. B.A.P. 1991)

Failure to notify creditor that arrearages as stated in plan would be binding - violation of due process

In re Laguna , 944 F.2d 542 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992)

In absence of language in promissory note, payment of interest on arrearages was a cure, not modification

CLAIMS

1. **Definition**
2. **502(b)(2)**
3 **502(b)(6)**
4. **502(b)(7)**
5. **502(c)–Estimation**
6. **502(d)**
7. **502(e)(1)(b)**
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10. **Claims Assignment and Trading**
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14. **Informal and amended proofs of claim; reconsideration of claims**
15. **Tardily-filed claims; excusable neglect**
16. **Miscellaneous**

1. Definition

In re ZiLOG, Inc., 450 F.3d 996 (9th Cir. 2006)

1.) Federal law determines when a claim arises under the bankruptcy code; 2.) as is true of environmental claims, sex discrimination claims arise under the bankruptcy code once it is within the "fair contemplation" of the claimant; 3.) summary judgment in favor of the debtor holding that claimants' postconfirmation claims were not timely filed reversed; bankruptcy abused discretion in not finding excusable neglect for not timely filing prepetition claims.

In re Guastella, 341 B.R. 908 (9th Cir. BAP 2006)

Creditor had a claim, even though a state court had only made a tentative decision on the lawsuit creditor had against the debtor as of the date of the filing of the petition.

In re Cossu, 410 F.3d 591 (9th Cir. 2005)

Insurance company had a right to payment under indemnity agreement with the debtor for losses sustained as a result of sales of unregistered securities for another company which was not disclosed to company, and may have had such a right as to lawsuits arising out of these sales.

2. 502(b)(2)

Thrifty Oil Co. v. Bank of America National Trust and Savings Assoc., 322 F.3d 1039 (9th Cir. 2003)

Termination damages under an interest swap agreement, entered into between a lender and

a borrower as part of a larger financing transaction, may not constitute unmatured interest disallowed under § 502(b)(2) of the Bankruptcy Code.

In re Holm, 931 F.2d 620 (9th Cir. 1991)
Future profits were not unmatured interest excludable from creditor's claim. Informal proof of claim standards.

3. 502(b)(6)

In re El Toro Materials Co., Inc., 504 F.3d 978 (9th Cir. 2007), *cert denied,* 128 S.Ct. 1875 (2008)
The cap on damages from termination of a lease of real property does not cap collateral damage to the property.

In re JSJF Corp., 344 B.R. 94 (9th Cir. BAP 2006), *aff'd,* 277 Fed.Appx. 718 (9th Cir. 2008)
Section 502(b)(6) only applies to damages from the termination of a lease. A lessor may have an un-capped claim for something other than such damages.

In re AB Liquidating Corp., 416 F.3d 961 (9th Cir. 2005)
Security deposit on lease should be applied to the capped damages, rather than the gross claim.

In re Mayan Networks Corp., 306 B.R. 295 (9th Cir. B.A.P. 2004)
A draw upon a letter of credit given as security for a lease will be applied in partial satisfaction of the allowed claim under § 502(b)(6).

In re Arden, 176 F.3d 1226 (9th Cir. 1999)
§506(b)(6) cap is applicable to lessor's claim against debtor guarantor.

In re Lomax, 194 B.R. 862 (9th Cir. B.A.P. 1996)
Mid-Wilshire's election to terminate the lease as abandoned was an acceptance of the debtor's offer of surrender, restoring possession of the premises to the lessor, an triggering the limitations of damages to one year and unpaid rent to two months under § 502(b)(6). The state court's ruling did not preclude the bankruptcy court's hearing of these issues.

In re First Alliance Corp., 140 B.R. 531 (9th Cir. B.A.P. 1992)
§ 502(b)(6) - Postpetition rents do not qualify as credits against one year period. Case seems to hold that one year period runs from the date of rejection.

4. 502(b)(7)

In re Condor Systems, Inc. 296 B.R. 5 (9th Cir. B.A.P. 2003)
The § 507(b)(7) cap on allowable claims of terminated employees is calculated mechanically as of the date of the filing of the petition and prepetition severance payments and

pre-and postpetition draws on letters of credit may affect the amount of the claim but not the § 502(b)(7) cap.

In re Networks Electronics Corp., 195 B.R. 92 (9th Cir. B.A.P. 1996)

1. 502(b)(7) applies to both executory and nonexecutory contracts. Here, court finds executory contract even though employee retired nine years prior to bankruptcy

2. 502(b)(7) limits damages regardless of when termination occurs.

5. 502(c)--Estimation

In re Aquaslide 'N' Dive Corp., 85 B.R. 545 (9th Cir. B.A.P. 1987)

Bankruptcy court had right and duty to estimate personal injury claim brought against debtor.

6. 502(d)

In re MicroAge, Inc., 291 B.R. 503 (9th Cir. B.A.P. 2002)

§ 502(d) may be used to bar payment of administrative claims (such as the reclamation claim in this case), but not after the administrative claim has been allowed.

In re America West Airlines, Inc., 217 F.3d 1161 (9th Cir. 2000)

When a city fails to relinquish an avoidable tax lien, § 502(d) acts to disallow its claim, even if an avoiding action would have been barred by the § 546 statute of limitations.

In re KF Dairies, Inc., 143 B.R. 734 (9th Cir. B.A.P. 1992)

Time-bar statute inapplicable to defensive objections to avoidable transfers. § 546 does not prevent use of § 502(d) as a defense to claims, even where transfer has not been avoided.

7. 502(e)(1)(B).

In re Dant & Russell, Inc., 853 F.2d 700 (9th Cir. 1988)

8. 502(h)

In re Laizure, 548 F.3d 693 (9th Cir. 2009)

Embezzlement claim that was paid off prior to bankruptcy was revived once claimant paid trustee for preference recovery, and thus claimant had a § 523(a)(4) cause of action against debtor. § 502(h) gives a creditor a claim against the estate and the debtor.

9. 502(j)--Reconsideration

In re Wylie, 349 B.R. 204 (9th Cir. BAP 2006)

Failure to respond to objection to its claim,and failure to establish an excuse for this failure, justified denial of the claim other than on the merits. Once ten days has passed, claimant's

right to seek reconsideration under § 502(j) is gone. He is left to seek reconsideration under Rule 60(b), but is limited to the narrow grounds set forth in the rule. Claimant did not establish prerequisites for relief under Rule 60(b)(1), (b)(3), or (b)(6).

In re Cleanmaster Industries, Inc., 106 B.R. 628 (9th Cir. B.A.P. 1989)
§ 502(j). Motion to reconsider is same as Fed.R.Bankr.P. 9024/FRCP 60(b) motion, where appeal time has run.

In re James E. O'Connell Co., Inc., 893 F.2d 1072 (9th Cir. 1990)
§ 506(j). Recovery of expenses from Trustee - Burden of Proof.

In re Levoy, 182 B.R. 827 (9th Cir. B.A.P. 1995)
Motion to reconsider denial of a claim under Fed.R.Bankr.P. 3008 is timely, even though filed over one year after default.

10. Claims Assignment and Trading

In re Burnett, 306 B.R. 313 (9th Cir. B.A.P. 2004), *aff'd on other grounds,* 435 F.3d 971 (9th Cir. 2006)
"We hold that in the bankruptcy case of an individual consumer debtor, the transferee's refusal to disclose its purchase price for acquiring an account does not warrant disallowance of an otherwise valid claim."

In re Beugen, 99 B.R. 961 (9th Cir. B.A.P. 1989), *aff'd*, 930 F.2d 27 (9th Cir. 1991)
Claims may not be purchased for an improper purpose.

11. Contingent claims--definition

In re Seko Investment, Inc., 156 F.3d 1005 (9th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999)
Claims are contingent as to liability when the debtor's duty to pay arises only upon the occurrence of a future event that was contemplated by the parties at the time of the contract's execution. *See In re Sims,* 994 F.2d at 220, *cert. denied*, 510 U.S. 1049 (1994) (citing *In re All Media Properties, Inc.,* 5 B.R. 126, 132 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981)).

12. Effect of proof of claim; burden of proof; requirements for valid proof of claim; procedure

In re Garvida, 347 B.R. 697 (9th Cir. BAP 2006)
Objection to proof of claim of secured creditor in chapter 13 case was correctly sustained, where creditor was given numerous opportunities to provide the debtor with an accounting of how their claim was calculated, but failed to do so, and the debtor provided evidence as to the correct amount of the claim.

In re Campbell, 336 B.R. 430 (9th Cir. BAP 2005)

Interpreting *In re Heath, infra,* the BAP held that a chapter 13 debtor's objections to claims which did not actually contest the debtor's liability or the amount of the claims were properly overruled, even if the claims were not supported by documentation as required by Bankruptcy Rule 3001(c).

In re Heath, 331 B.R. 424 (9th Cir. BAP 2005)

"When a creditor files a proof of claim, that claim is deemed allowed under sections 501 and 502(c). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f)–it is not prima facie evidence of the validity and amount of the claim–but that by itself is not a basis to disallow the claim." Claims here were credit card claims.

In re State Line Hotel, Inc., 323 B.R. 703 (9th Cir. BAP 2005), *vacated and remanded as moot,* 242 Fed.Appx. 460 (9th Cir. 2007)

Service of an objection to a proof of claim is governed by Bankruptcy Rule 3007, not 7004. Service of the objection on the person designated on the proof of claim as the notice recipient was sufficient.

In re Olshan, 356 F.3d 1078 (9th Cir. 2004)

IRS (and presumably other claimants) is not required to fix the amount of its claim in its proof of claim**.**

In re Dynamic Brokers, Inc., 293 B.R. 489 (9th Cir. B.A.P. 2003)

"Deemed allowed" claim may only be challenged over creditor's opposition by filing a claim objection**.**

Lundell v. Anchor Const. Specialists, Inc., 223 F.3d 1035 (9th Cir. 2000)

Debtor did not meet his production burden to rebut prima facie validity of proof of claim.

In re King Street Investments, Inc., 219 B.R. 848 (9th Cir. B.A.P. 1998)

"The allegations of the proof of claim are taken as true if those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, the prima facie establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves."

In re Medina, 205 B.R. 216 (9th Cir. B.A.P. 1996)

IRS entitled to rely on presumptive validity of filed proof of claim

In re MacFarlane, 83 F.3d 1041 (9th Cir. 1996), *cert. denied*, 117 S.Ct 1243 (1997)

Taxing authority has ultimate burden of proving its claim in bankruptcy proceeding

In re Los Angeles International Airport Hotel Associates, 196 B.R. 134 (9th Cir. B.A.P. 1996),

aff'd, 106 F.3d 1479 (9th Cir. 1997)

Rule 3001(c) provides that "[w]hen a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim." The failure to attach such a writing, when required, does not automatically invalidate, the claim; it does, however, deprive the claim of prima facie validity under Rule 3001(f). *In re Stoecker*, 5 F.3d 1022, 1027-28 (7th Cir. 1993); *Ashford v. Consolidated Pioneer Mortgage (In re Consolidated Pioneer Mortgage*), 178 B.R. 222, 226-27 (9th Cir. B.A.P. 1995).

In re Consolidated Pioneer Mortgage, 178 B.R. 222 (9th Cir. B.A.P. 1995), *aff'd*. 91 F.3d 151 (9th Cir. 1996)

1. Objecting party must produce evidence tending to defeat the claim that is of a probative force equal to that of the creditor's proof of claim.

2. Failure to attach writings to claim is not basis for denying it. Merely gives claim no prima facie validity.

In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995), *cert. Denied by Lowenschuss v. Resorts Intern., Inc., 517 U.S. 1243 , 116 S.Ct. 2497 (U.S. 1996)*

Error not to allow conditional withdrawal of claim.

13. Environmental Claims

In re Jensen, 995 F.2d 925 (9th Cir.1993)

Origination for state agency's clean up of hazardous waste claim based on debtors' conduct rather than time of payment.

14. Informal and amended proofs of claim; reconsideration of claims

In re JSJF Corp., 344 B.R. 94 (9th Cir. BAP 2006), *aff'd and remanded,* 277 Fed.Appx. 718 (9th Cir. 2008)

1) In considering an objection to an amended claim, the objecting party must "show more than simply having to litigate the merits of, or to pay, a claim–there must be some legal detriment to the party opposing." 2) Motion for reconsideration may not present new legal theories or arguments that could have been raised in the original claims proceedings.

In re Wheatfield Business Park, LLC, 308 B.R. 463 (9th Cir. B.A.P. 2004)

Under Bankruptcy Rule 5005, creditor timely filed informal proof of claim by delivering claim documents to United States trustee.

Civic Center Square, Inc. v Ford (In re Roxford Foods, Inc.), 12 F.3d 875 (9th Cir. 1993)

Trustee's Right to Notice of Adversary Proceeding

After Chapter 11 case converted to Chapter 7, plaintiff commenced an adversary proceeding against the trustee and two other creditors. The trustee was served but did not respond. Default judgment was entered against the trustee. Thereafter, plaintiff moved for summary judgment but did not serve trustee based on prior entry of default. Held, Trustee's motion to vacate summary judgment was granted based on failure to serve trustee. Trustee's

informal contacts with plaintiff in the main bankruptcy case, where the same disputes were at issue, demonstrated a clear purpose to defend the adversary proceeding and were deemed to be an "appearance" under Fed.R.Civ.P. 55(b)(2).

In re Holm, 931 F.2d 620 (9th Cir. 1991)
Future profits were not unmatured interest excludable from creditor's claim. Informal proof of claim standards.

15. Tardily-filed claims; excusable neglect

In re ZiLOG, Inc., 450 F.3d 996 (9th Cir. 2006)
1.) Federal law determines when a claim arises under the bankruptcy code; 2.) as is true of environmental claims, sex discrimination claims arise under the bankruptcy code once it is within the "fair contemplation" of the claimant; 3.) summary judgment in favor of the debtor holding that claimants' postconfirmation claims were not timely filed reversed; bankruptcy abused discretion in not finding excusable neglect for not timely filing prepetition claims.

Pioneer Inv. Services Co. v Brunswick Assocs. Ltd Partnership, 507 U.S. 380(1993)
4 part test to determine whether circumstances surrounding the party's omission constitutes "excusable neglect" (weakens In re Hammer's holding re "culpable conduct"):
1. Danger of prejudice to the debtor
2. The length of the delay and its potential impact on judicial proceedings
3. The reason for the delay, including whether it was within the reasonable control of the movant
4. Whether the movant acted in good faith.

In re Gardenhire, 209 F.3d 1145 (9th Cir. 2000)
Statutory deadline for filing of IRS proof of claim was not equitably tolled, even though there was an improper dismissal of the case resulting from clerical error.

In re Osbourne, 76 F.3d 306 (9th Cir. 1996)
Tardily filed claims in chapter 13 cases are to be disallowed not merely given lower priority.

United States v. Towers (In re Pacific Atlantic Trading Co.), 33 F.3d 1064 (9th Cir. 1994)
The I.R.S. received timely notice of the bar date for filing claims in a Chapter 7 case but filed its § 507(a)(7) priority tax claim after the bar date. Th court held that the claim retained its priority status even though it was filed after the bar date. The court reasoned that subsection 726(a)(1), unlike subsections 726(a)(2) and (3), makes no distinction between timely and late claims, and that Congress intended priority claims to receive first distribution regardless of whether a proof of claim was filed timely or late.

In re Coastal Alaska Lines, Inc., 920 F.2d 1428 (9th Cir. 1990)
Relief denied to creditor who had knowledge of debtor's bankruptcy but did not file claim.

16. Miscellaneous

In re Chaussee, 399 F.3d 225 (9th Cir. BAP 2008)

The act of filing a proof of claim in a bankruptcy case may not, alone, subject the claimant to liability for violation of state and federal fair debt collection laws.

In re Lopez, 372 B.R. 40 (9th Cir. BAP 2007), *aff'd,* 550 F.3d 1202 (9th Cir. 2009)

Both pre- and post-BAPCA, debtor is permitted to make direct payments on notes secured by deeds of trust on his residence directly to creditors, while simultaneously allowing him to pay his prepetition arrears on those notes via the trustee.

In re Ritter Ranch Development, L.L.C., 255 B.R. 760 (9th Cir. B.A.P. 2000)

Community development bondholders were not "creditors" of developer**.**

In re Gerwer, 253 B.R. 66 (9th Cir. B.A.P. 2000)

Estate distribution was an involuntary payment, thus prohibiting the debtor from directing that distribution be applied first to the nondischargeable portion of a debt. Creditor had the right to apply payment from estate to the dischargeable portion of the debt.

In re Cogar, 210 B.R. 803 (9th Cir. B.A.P. 1997)

Bank's unexercised rights as senior lienholder of property owned by third party do not make bank creditor of bankruptcy estate of junior lienholder

In re Smith, 205 B.R. 226 (9th Cir. B.A.P. 1997)

Debtor not entitled to jury trial in adversary proceeding to contest IRS tax claim

In re Irizarry, 171 B.R. 874 (9th Cir. B.A.P. 1994)

Equitable remedies of cancellation of grant deed and liens and recovery of property are not claims subject to discharge. State court litigation not barred by § 362 or 524.

Ratanasen v. State of California, Dept. of Health Services, 11 F.3d 1467 (9th Cir. 1993)

State filed claim against debtor-doctor, alleging Medi-Cal over billing. Claimant's use of a random sample audit of 300 files to prove claims arising from 8,761 total actual files was held valid. Each file did not have to be examined to prove amount of claim. Court upholds as a matter of law the use of statistical sampling and extrapolation, in publicly-funded reimbursement programs.

In re Riverside-Linden Investment Co., 99 B.R. 439 (9th Cir. B.A.P. 1989), *aff'd*, 925 F.2d 320 (9th Cir. 1991)

General partner's partnership interest is not a claim.

COLLATERAL ESTOPPEL & RES JUDICATA (ISSUE AND CLAIM PRECLUSION)

Taylor v. Sturgell, –U.S.–, 128 S.Ct. 2161 (2008)

Court rejects the application of the "virtual representation" doctrine to claim and issue preclusion as to nonparties except under narrow circumstances.

Kendall v. Visa U.S.A., Inc., 5118 F.3d 1042, 1050-51 (9th Cir. 2008)

"Issue preclusion prevents a party from relitigating an issue decided in a previous action if four requirements are met: "(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action."" [citation omitted]

In re Cogliano, 355 B.R. 792 (9th Cir. BAP 2006)

The denial of the debtor's first amended claim of exemption did not preclude her assertion in her second claim of exemption that her IRA was not property of the estate. Neither issue preclusion nor claim preclusion applied, since the issue of property of the estate was not necessarily decided in the initial exemption decision. Further, the issue of property of the estate had to be decided by way of an adversary proceeding, not a contested matter.

In re George, 318 B.R. 729 (9th Cir. BAP 2004), *aff'd,* 144 Fed.Appx. 636 (9th Cir. 2005)*, cert. denied,* 546 U.S. 1094 , 126 S.Ct. 1068 (2006)

Claim preclusion barred debtor from pursuing a § 525 claim in bankruptcy court that could have been pursued in prevous litigation dismissed with prejudice in federal court.

Miller v. U.S, 363 F.3d 999 (9th Cir. 2004)

Res judicata did not apply to IRS claim, where the plan's discharge provisions were found to be ambiguous.

Latman v. Burdette, 366 F.3d 774 (9th Cir. 2004)

Res judicata did not bar trustee from seeking to surcharge a debtor's wild card exemption based on under-reporting of assets, even though the trustee could have joined this action with complaint objecting to discharge upon which he prevailed.

In re Arneson, 282 B.R. 883 (9th Cir. B.A.P. 2002)

A § 523 judgment in a prior bankruptcy case has claim preclusion effect unless and until vacated.

Stratosphere Litigation L.L.C. v. Grand Casinos, Inc., 298 F.3d 1137 (9th Cir. 2002)

Third party creditor was barred by res judicata from challenging bankruptcy court's confirmation of debtor's reorganization plan after party's predecessor had previously failed to object

Rein v. Providian Financial Corporation, 270 F.3d 895 (9th Cir. 2001)

Federal doctrine of claims preclusion requires a showing that: " 1)the parties are identical or in privity; 2)the judgment in the prior action was rendered by a court of competent jurisdiction; 3)the prior action was concluded to a final judgment on the merits; and 4) the same cause claim or cause of action was involved in both suits."

In re Wolfberg, 255 B.R. 879 (9th Cir. B.A.P. 2000), *aff'd,* 37 Fed.Appx. 891 (9th Cir. 2002)

Debtor's attempt to assert a claim of homestead exemption after confirmation of a chapter 11 plan was barred by res judicata

In re DiSalvo, 219 F.3d 1035 (9th Cir. 2000)

An individual chapter 11 debtor who defended against a nondischargeability suit was barred by the doctrine of claim preclusion from advancing additional debtor-in-possession claims in the same forum.

Siegel v. Federal Home Loan Mortgage Corporation, 143 F.3d 525 (9th Cir. 1998)

Ruling allowing bankruptcy claim on note secured by deed of trust was res judicata in subsequent suit founded on theory that could possibly have supported objection to bankruptcy court claim. Claim that is deemed allowed has res judicata effect.

In re Universal Life Church, Inc., 128 F.3d 1294 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998)

Application of collateral estoppel test in tax context

In re Russell, 76 F.3d 242 (9th Cir. 1996)

The court of appeals reversed a decision of the Ninth Circuit B.A.P. The court held that a state court proceeding in which a final judgment was entered with regard to entities that individuals completely controlled, collaterally estopped those individuals from litigating a civil rights action concerning identical issues, even though judgment on its face was not applied to individuals. (Reversing 166 B.R. 901 (9th B.A.P. 1994) which held that no res judicata effect as to counterclaim, where counterclaim was reserved in consent judgment).

In re Pizante, 186 B.R. 484 (9th Cir. B.A.P. 1995), *aff'd*, 107 F.3d 878 (9th Cir. 1997)

Default judgment rendered because of failure to respond to request for admissions does not have collateral estoppel effect, since there were issues not actually litigated

In re Ivory, 70 F.3d 73 (9th Cir. 1995)

Res judicata precludes a collateral attack on a Ch. 13 confirmation order, even if party was not a creditor and the defect was thus jurisdictional

In re Berr, 172 B.R. 299 (9th Cir. B.A.P. 1994)

Consent judgment equals collateral estoppel only where parties so intend it

In re Bugna, 33 F.3d 1054 (9th Cir. 1994)

State law of collateral estoppel applies in determination of fraud - 523(a)(4) action. Under this law, collateral estoppel bars relitigation when "(1) the issue decided in the prior action is identical to the issue presented in the second action, (2) there was a final judgment on the merits, and (3) the party against whom estoppel is asserted was a party...to the prior adjudication..." *Garrett v. City and County of San Francisco,* 818, F.2d 1515, 1520 (9th Cir. 1987)

In re Heritage Hotel Partnership, 160 B.R. 374 (9th Cir. B.A.P. 1993), *aff'd* 59 F.3d 175 (9th Cir. 1995)

Order of confirmation constitutes a final judgment...Eubanks v. FDIC, 977 F.2d 166, 169 (5th Cir. 1992)Generally, four elements must be present in order to establish the defense of res judicata (1) the parties were identical in the two actions (2) the prior judgment was rendered by a court of competent jurisdiction (3) there was a final judgment on the merits, and (4) the same cause of action was involved in both cases.

In re Int'l Nutronics, Inc., 3 F 3d 306 (9th Cir. 1993), WITHDRAWN and superseded by 28 F.3d 965 (9th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994)

The doctrine of res judicata bars a party from bringing a claim if a court of competent jurisdiction has rendered final judgment on the merits of the claim in a previous action involving the same parties or their privies. *In re Jensen*, 980 F.2d 1254, 1256 (9th Cir. 1992). Res judicata bars all grounds for recovery that could have been asserted, whether they were or not, in a prior suit between the same parties on the same cause of action *Clark v. Bear Starns & Co.*, *Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992)

Palomar Mobilehome Park Assoc, v. City of San Marcos, 989 F.2d 362 (9th Cir. 1993)

In re Heritage Hotel Partnership, 160 B.R. 374 (9th Cir. B.A.P. 1993) *aff'd.* 59 F.3d 175 (9th Cir. 1995)

Res judicata - confirmation order in Chapter 11

1. Parties identified
2. Prior judgment rendered by court of competent jurisdiction
3. There was a final judgment on the merits
4. The same cause of action was involved in both cases

Nordhorn v. Ladish Co., Inc., 9 F.3d 1402 (9th Cir. 1993)

Identity of parties - res judicata - identity of claims

(1) in order to bar a later suit under the doctrine of res judicata, an adjudication must (1) involve the same 'claim as the later suit, (2) have reached a final judgment on the merits, and (3) involve the same parties or their privies. *Blonder-Tongue*

The Ninth Circuit determines whether or not two claims are the same for purposes of res judicata with reference to the following criteria:

(1) whether rights or interest established in the prior judgment would be destroyed or impaired by prosecution of the second action, (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right and (4) whether the two suits arise out of the same transactional nucleus of facts.

Western Systems, Inc. v Ulloa, 958 F.2d 864 (9th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993)
Bar applies even though facts on which new cause of action based not known

Mason v. Genisco Tech. Corp., 960 F.2d 849 (9th Cir. 1992)
Bar

Gilbert v. Ben-Asher, 900 F.2d 1407 (9th Cir. 1990), *cert. denied*, 498 U.S. 865 (1990)
Collateral estoppel and res judicata

Bates v. Union Oil Co. Of California, 944 F.2d 647 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992)
Offensive collateral estoppel - collateral estoppel effect of a District Court judgment vacated after settlement at appeal stage

Eureka Fed Savings & Loan Assn. v. Amer. Cas. Co. Of Reading, Pa., 873 F.2d 229, 234 (9th Cir. 1989)
Collateral estoppel not available to resolve issues in a subsequent case when issues actually litigated in the earlier case were different.

In re Rahm, 641 F.2d 755, 757 (9th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981)
Prior judgment at most establishes a prima facie case of nondischargeability

In re Houtman, 568 F.2d 651 (9th Cir. 1978)

Matter of Lockard, 884 F.2d 1171 (9th Cir. 1989)
Tentative ruling by state court judge as to what constitutes property of estate not collateral estoppel

COLLECTIVE BARGAINING AGREEMENTS §1113

In re Rufener Constr., Inc., 53 F.3d 1064 (9th Cir. 1995)
1113 does not apply to Chapter 7 cases under §103

In re Hoffman Bros. Packing Co., 173 B.R. 177 (9th Cir. B.A.P. 1994)
Cannot retroactively approve debtor's unilateral changes in CBA

COMMERCIAL PAPER

In re Southern Pacific Funding Corporation, 268 F.3d 712 (9th Cir. 2001)
Subordination clause in indenture agreement that preserved certain secured creditors' rights both pre- and post- bankruptcy did not violate § 365(e)(1) of the bankruptcy code.

In re Crystal Properties, Ltd., L.P., 268 F.3d 743 (9th Cir. 2001)
"Without notice or demand" provision in default interest clause of loan agreement did not alter requirement that holder of defaulted loan must carry out some affirmative act to exercise its option to accelerate the loan and invoke the default interest clause. Default interest rate did not come into effect until holder of the note first took affirmative action to put the debtor on notice that it intended to exercise its option to accelerate, and thus invoke the default rate.

In re Bartoni-Corsi Produce, Inc., 130 F.3d 857 (9th Cir. 1997)
Under California law (3-419, 3-420) a bank does not convert a corporate bankruptcy debtor's check that lacks a payee endorsement by making a board-authorized deposit into the transferee's account

In re Lee, 179 B.R. 149 (9th Cir. B.A.P. 1995) *aff'd* 108 F.3d 239 (9th Cir. 1997)
Cashier's check is transferred as of date of delivery, not date it's honored.

In re Nusor, 123 B.R. 55 (9th Cir. B.A.P. 1991)
What constitutes negotiable instrument; holder in due course

COMMUNITY PROPERTY §541(a)(2)(A),(B)

In re Summers**,** 332 F.3d 1240 (9th Cir. 2003)

". . . [W]e conclude that a third part conveyed joint tenancy interests to Eugene and Marie Summers, a transaction to which the transmutation statute does not apply. . .The third-party deed specifying the joint tenancy character of the property rebutted the community property presumption, and rendered California's transmutation statute inapplicable"

In re Maynard**,** 264 B.R. 209 (9th Cir. B.A.P. 2001)

Nondebtor husband's interest in property did not prevent the bankruptcy court from avoiding secured creditor's lien on real property to the extent it exceeded the value of the property under § 506(d).

In re McIntyre, 222 F.3d 655 (9th Cir. 2000)

The IRS may levy upon ERISA-regulated pension benefits to satisfy a husband's tax debt against the claim that the wife has a vested interest in half of those benefits under California community property laws**.**

In re Been, 153 F.3d 1034 (9th Cir. 1998)

Under CA law, non-judicial foreclosure sale by senior lienholder terminates "sold-out" junior lienholder's secured interest in debtor's property and any remaining rights which might "arise out of" foreclosure proceeding.

Effect of Tax Returns - key: 205k266.2(3)

1) pre-'85 transaction

Nevins v. Nevins, 129 Cal.App.2d 150 (1954)

Separate federal income return was filed that did not include half of spouse's income even though he was aware of existence of wife's income is highly probative of transmutation of cp interest in his spouse's income to his spouse's separate property.

In re Marriage of Weaver, 224 Cal.App.3d 478 (Cal App. 1990)

Clear and convincing evidence required to prove oral transmutation. Statements of testamentary intent are not sufficient.

2) post-'85 transaction - Civ. Code §5110.730(a) - express writing requirement.

In re Marriage of Lehman, 18 Cal.4th 169 (1998)

Ex-wife entitled to community property share of increased benefits her former husband gets by taking early retirement

Estate of MacDonald, 51 Cal. 3d 262, 272 (1990)

Writing must contain language which expressly states that the characterization or ownership of the property is being changed

In re Roosevelt, 87 F.3d 311 (9th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997)

Under CA law, a married person may transmute an asset, in which he has a cp interest**,** to separate property of his spouse if it is made in writing (marital agreement) by an express declaration by the spouse whose interest in the property is adversely affected.

In re Mantle, 196 B.R. 513 (9th Cir. B.A.P. 1996) *rev'd*, 153 F.3d 1082 (9th Cir. 1998), *cert. denied*, 526 U.S. 1068 (1999)

B.A.P. held that spouse's interest in escrow derived form sale of marital property is not included in estate of other spouse's bankruptcy filed before final dissolution. 9th Circuit reversed, holding that division of community property is what triggers reimbursement right under Fam. Code §2640.

In re Keller, 185 B.R. 796 (9th Cir. B.A.P. 1995)

In a non-dissolving marriage, cp is property of the estate (In re Teel, 34 B.R. 762, 764 (9th Cir. B.A.P. 1983) and §541(a)(2)(A),(B). When a bankruptcy petition is filed prior to the final disposition of a property between divorcing spouses, the cp comes within the jurisdiction of the bankruptcy court to assure fairness to the creditors of the individual spouses and the marital estate. Where the bankruptcy court has exclusive jurisdiction over its distribution, division of property by the state court is precluded: The jurisdiction of the bankruptcy court is exclusive because the initiation of divorce or dissolution proceedings does not terminate either spouse's management and control over cp by placing the cp in legis of the divorce court. (Teel 34 B.R. at 764, quoting 4 Collier on Bankruptcy 541.15 (15th ed 1983) Once dissolution has been accomplished, however, the final judgment is res judicata as to the division of property and is binding on the bankruptcy trustee. Paderewski, 564 F.2d at 1356. Property interests are created and defined by state law. Butner v. US, 440 U.S. 48, 55 (1979). The bankruptcy court therefore must look to state law to determine the nature of the estate's property rights. In the instant case, those rights were defined and circumscribed by the judgment of the Family Law Court.

In re Burg, 103 B.R. 222 (9th Cir. B.A.P. 1989)

Property purchased from commingled separate and community property is presumptively community property

In re Spirtos, 56 F.3d 1007 (9th Cir. 1995)

Party to marital settlement agreement must comply with her obligations to creditors under agreement even though other party to agreement may have failed to perform

In re Gorman, 159 B.R. 543 (9th Cir. B.A.P. 1993)

Property once held as community property which is converted to joint tenancy is held as joint tenancy

In re Chenich, 87 B.R. 101 (9th Cir. 1988)

Community property passing to a spouse in a dissolution is shielded from liability on a judgment against other spouse entered after dissolution

COMPENSATION OF PROFESSIONALS

1. **Bonuses**
2. **Chapter 7**
3. **Chapter 13**
4. **§329, Rule 2014, Rule 2016 and Disclosure**
5. **§326**
6. **§328**
7. **§330 and Lodestar Approach**
8. **§503(b)**
9. **Postpetition attorney fees– § § 502(b) and 506(b)**
10. **§506(c)**
11. **§726(b)(5)**
12. **Time Sheets**
13. **Attorney fees under state law or federal bankruptcy law**
14. **Retainers**
15. **Carve-outs**
16. **Misc**

1. Bonuses

In re Meronk, 249 B.R. 208 (9th Cir. B.A.P. 2000), *aff'd*, 24 Fed.Appx. 737 (9th Cir. 2001)

Failure to make specific findings justifying bonus and failure to produce evidence that standard hourly rate did not fully compensate law firm required reversal of bonus award. Because firm declined a contingent fee arrangement that would have given them the amount they sought with bonus, and assured everyone that the hourly rate arrangement would result in less fees, they were judicially estopped from seeking more. The fact that the estate realized a surplus of $400,000 was immaterial.

In re Cedic Development Company, 219 F.3d 1115 (9th Cir. 2000)

$10,000 enhancement of debtor's attorney's fee was appropriate, where the firm's rates did not take into account the results obtained or the risk of nonpayment.

In re Music Merchants, Inc., 208 B.R. 944 (9th Cir. B.A.P. 1997)

Creditors' committee attorney has no right to receive enhanced compensation based on delay in bankruptcy court's approval of payment**.**

In re Manoa Finance Company, Inc., 853 F.2d 687 (9th Cir. 1988)

Blum/Delaware standard does allow for bonuses.

2. Chapter 7

In re Jastrem, 253 F.3d 438 (9th Cir. 2001)

In a chapter 7 bankruptcy in which the debtor is paying the filing fee by installments, an obligation for pre-petition legal services is subject to automatic stay and discharge.

In re Hines, 147 F.3d 1185 (9th Cir. 1998)

In Chapter 7 bankruptcy proceedings, automatic stay does not apply to attorney's efforts to collect previously agreed upon fees for postpetition services on behalf of debtor.

3. Chapter 13

In re Eliapo, 468 F.3d 592 (9th Cir. 2006)

1) No-look presumptive fees do not violate 11 U.S.C. § 330; 2) the bankruptcy court's criteria for awarding additional fees beyond the no-look fee did not violate § 330; and 3) the bankruptcy court did not abuse it's discretion in ruling on fees without a hearing.

4. § 329, Rule 2014, Rule 2016 and Disclosure

In re Triple Star Welding, 324 B.R. 778 (9th Cir. BAP 2005)

Chapter 11 debtor's attorney who failed to file a Rule 2014 statement of disinterestedness was not entitled to any fees absent full disclosure. The court had no discretion to waive this requirement. Furthermore, the court should have consider potential conflicts and receipt of a possible preference, which did not need to be addressed through an adversary proceeding.

In re Basham, 208 B.R. 926 (9th Cir. B.A.P. 1997), *aff'd by* In re Byrne, 152 F.3d 924, (9th Cir. 1998)

No abuse of discretion in granting motion to disgorge attorneys fees where debtors' counsel failed to timely comply with requirements regarding disclosure of attorney compensation.

In re Monument Auto Detail, Inc., 226 B.R. 219 (9th Cir. B.A.P. 1998)

Law firm cannot receive payment for services to Chapter 11 debtor when firm fails to obtain bankruptcy court authorization for employment.

In re Lewis, 113 F.3d 1040 (9th Cir. 1997)

Fees of debtor's attorney need not be excessive to support disgorgement order for violation of disclosure and reporting requirements.

In re Park-Helena Corp., 63 F.3d 877 (9th Cir. 1995), *cert. denied by* Neber & Starrett, Inc. v. Chartwell Financial Corporation, 516 U.S. 1049 (1996)

Failure to provide details of retainer provided by debtor's president results in denying fee request - 2016(b)

Ivan W. Halperin v. Occidental Fin. Group, Inc. (In re Occidental Fin. Group, Inc.), 40 F.3d 1059 (9th Cir. 1994).

An attorney's undisclosed representation of the principals of a bankruptcy debtor corporation created a conflict of interest that warranted the disgorgement of a prepetition attorney's fee when there was no valid explanation for failure to obtain the court's approval in advance. The attorney's conflict of interest was plain and substantial and his failure to disclose this dual representation deprived him of any equitable claim to a retention of the fees for pre-petition services.

In re Glad, 98 B.R. 976 (9th Cir. B.A.P. 1989)

§ 329 required return of funds from nonlawyer where services were worthless.

5. §326

In re Jenkins, 130 F.3d 1335 (9th Cir. 1997)

§ 326(a) limits both trustee's and his paralegal's compensation

In re Financial Corporation of America, 114 B.R. 221 (9th Cir. B.A.P. 1990), *aff'd and remanded*, 946 F.2d 689 (9th Cir. 1991).

In a case that is converted from Chapter 11 to Chapter 7, the fees to be awarded to the two trustees are independent and the funds turned over to the Chapter 7 trustee are included in calculating the § 326(a) maximum on the Chapter 11 trustee's compensation. Failure to include such funds would undermine the independence of the two fees and blur the differences in the functions performed by the two trustees. However, the trial court still retains discretion to set the Chapter 11 or Chapter 7 trustee's fee, subject to the statutory maximum amount. Where, as in this case, the same individual is both the Chapter 7 trustee and the Chapter 11 trustee, the court may exercise discretion to award less than the statutory minimum set forth in Code § 326(a).

6. §328

In re Circle K Corp., 279 F.3d 669 (9th Cir. 2002), *cert. denied,* 536 U.S. 959(2002)

"...[U]nless a professional's retention application unambiguously specifies that it seeks approval under § 328, it is subject to review under § 330."

In re Reimers, 972 F.2d 1127 (9th Cir. 1992)

Standard for altering court approved contingent fee is where original terms appear "to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions."

In re Knudsen Corporation, 84 B.R. 668 (9th Cir. B.A.P. 1998)

Order permitting payment of professionals each month without prior court approval of billing statements was permissible.

7. §330

In re Garcia, 335 B.R. 717 (9th Cir. BAP 2005)

Fees of counsel for trustee for getting appointed and assisting in sale of real estate were properly denied, since they involved tasks the trustee was charged with performing. Disallowance of all fees for preparation of a stipulation and mutual release and for preparing a fee application was an abuse of discretion.

In re Strand, 375 F.3d 854 (9th Cir. 2004)

1. Interim fee awards are always subject to modification; 2. Fees of $19, 065 for counsel for the chapter 7 trustee properly were cut in half, where the estate would have received a maximum of $9000 to be divided between two creditors whose claims were nondischargeable.

In re Eliapo, 298 B.R. 392 (9th Cir. B.A.P. 2003)

The two-step process for awarding fees, whereby the judge first determined whether the services rendered were beyond what was customary in a chapter 13 case under the Northern District of California guidelines, and then determined what was appropriate under the lodestar approach, was in keeping with § 330.

In re Smith, 305 F.3d 1078 (9th Cir. 2002), *cert. denied*, 538 U.S. 1032 (2003)

Test under § 330(a)(1) is whether services were reasonably likely to provide identifiable, tangible and material benefit to the estate, even if such benefits were not actually realized.

In re B.U.M. Intl., Inc. 229 F.3d 824 (9th Cir. 2000)

Financial consultant whose retention was only conditionally approved, subject to court approval of fees and costs, was not subject to § 328. Court's denial of all fees under § 330 was justified, where the consultant was found to be working on behalf of a principal, rather than the debtor.

In re Mednet, 251 B.R. 103 (9th Cir. B.A.P. 2000)

Test under § 330(a) is whether services rendered were reasonably likely to benefit the estate, not, as the Fifth Circuit has held, whether the services materially benefitted the estate.

In re Auto Parts Club, Inc., 211 B.R. 29 (9th Cir. B.A.P. 1997)

Law firm representing committee of creditors in bankruptcy case performed unnecessary services when it failed to scale back its efforts after decision to sell was made.

"Lobel failed to scale back its services once it became reasonably obvious that unsecured creditors would not receive a distribution. However, the court did not make sufficient findings regarding why Lobel should receive no compensation for work performed after the decision to sell was made, or why Lobel's fees should be reduced for services performed prior to the decision to sell. We vacate and remand in order the for the court to make appropriate findings regarding the amount of the fee award.

In re Roderick Timber Co., 185 B.R. 601 (9th Cir. B.A.P. 1995)

Trustee time must be kept separately from attorney time where trustee serves as both (court says time sheets required from trustee in <u>all</u> cases).

In re Specialty Plywood, Inc., 166 B.R. 153 (9th Cir. B.A.P. 1994)

1. Advertising expenses for other clients in auction discounted.
2. Auctioneer only entitled to compensation *pro rata* with other administrative claimants.
3. Litigated issues as to fees were federal bankruptcy issues not subject to a contractual fee provision.
4. Legal fees for pursuing application were not expenses under § 330(a). Auctioneer who was hired to sell Chapter 11 debtor's assets was not entitled to reimbursement, as "actual, necessary expense," of the legal fees that it incurred in defending its fee before bankruptcy court; such legal fees were not required to accomplish the task for which auctioneer was hired, and amount of legal fees sought was based upon estimation and was not tied to auctioneer's actual expenses.

In re Dutta, 175 B.R. 41 (9th Cir. B.A.P. 1994)

Lumping and hourly rate discussed.

While a trial court need not necessarily explain its analysis in terms of elaborate mathematical calculations, for example, it must provide sufficient insight into its exercise of discretion to allow an appellate court to exercise its reviewing function. In the absence of such a sufficient explanation, the fee award must be remanded to provide such an explanation. D'Emanuele, 904 F.2d, 1379, 1385 (citing Cunningham v. County of Los Angeles, 879 F. 2d 481 (9th Cir. 1988), *cert. denied,* 493 U.S. 1035 (1990)).

In re Kitchen Factors, Inc., 143 B.R. 560 (9th B.A.P. 1992)

Where attorney spent 12000 to receive 12000, it was not error for the bankruptcy court to vary from the lodestar and award a percentage of the recovery

Lodestar the primary but not exclusive method for determining fees. Attorney must seek effort to reasonably expected recovery, not the potential recovery.

Unsecured Creditors' Committee v. Puget Sound Plywood, Inc., 924 F.2d 955 (9th Cir. 1991)

Attorney must consider maximum probable recovery in a given situation and must balance probable benefits with probable costs.

8. §503(b)

In re Wind N' Wave, 509 F.3d 938 (9th Cir. 2007)

". . .[C]reditors who receive compensation under 503(b)(4) should also be compensated for costs incurred in litigating a fee award, so long as the services meet the § 503(b)(4) requirements and the case "exemplifies a 'set of circumstances' where litigation was 'necessary'". . . ."

In re Sedona Institute, 220 B.R. 74 (9th Cir. B.A.P. 1998)

Creditors need not show independent allowable expenses under § 503(b)(3) to recover attorney's fees and costs for motion to appoint trustee or examiner with expanded powers under § 503(b)(4)

9. Postpetition attorney fees– § § 502(b) and 506(b)

Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Electric Co., 549 U.S. 443 , 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007)

Disallowance of postpetition attorney fees on the grounds that the issues were not related to the bankruptcy was error. Court declines to consider whether § 506(b) would require a different result based on the creditor's unsecured status.

In re SNTL Corp., 380 B.R. 204 (9th Cir. BAP 2007)

Attorneys fees arising out of a prepetition contract but incurred postpetition are allowable under the broad definition of claim.

In re Karmai, 316 B.R. 544 (9th Cir. B.A.P. 2004)

Mortgage lienholder entitled to attorney fees under § 506(b), regardless of § 506(c). Issue of whether the right to attorney fees was provided for in the loan agreements was waived by the debtor, since it wasn't raised in the bankruptcy court.

In re Atwood, 293 B.R. 227 (9th Cir. B.A.P. 2003)

Attorney fees under § 506(b) may be sought by way of a proof of claim, as opposed to an application under Bankruptcy Rule 2016, but the proof of claim must establish the reasonableness of the fees.

In re Connolly, 238 B.R. 475 (9th Cir. B.A.P. 1999)

Attorney's fee provision in security agreement did not serve as ground for awarding fees and costs to over secured creditor following its successful defense of adversary preference proceeding. §506(b).

In re Kord Enterprises II, 139 F.3d 684 (9th Cir. 1998) - § 506(b)

Under Bankruptcy Code, award of attorney fees to over secured creditor is not prohibited for issues peculiar to bankruptcy.

In re Alpine Group, Inc., 151 B.R. 931 (9th Cir. B.A.P. 1993)

1. In *Salazar*, this Panel articulated four elements in order to recover attorney's fees under § 506(b): (1) there is an allowed secured claim, (2) the creditor is over secured, (3) the fees are reasonable under the circumstances, and (4) the fees are provided for under the agreement

2. Secured creditor's status not determined for all purposes as of time of filing. Here, question of whether it was over secured should have been determined as of sale.

In re Southeast Company, 868 F.2d 335 (9th Cir. 1989)

§ 506(b) fees need not be paid out immediately, but may be added to principal.

10. §506(c)

In re Debbie Reynolds Hotel and Casino, Inc., 255 F.3d 1061 (9th Cir. 2001)

1. Postpetition lender had no standing to object to $50,000 payment to debtor-in-possession's counsel out of proceeds of sale agreed to by another secured creditor;

2. Under 506(c), the party that has rendered a benefit to the secured creditor is properly reimbursed for that benefit out of secured collateral.

11. §726(b)(5)

In re Riverside-Linden Investment Co., 945 F.2d 320 (9th Cir. 1991)

Counsel for trustee not entitled to attorneys' fees charged in connection with trustee' excessive investigation of creditor

Denial of attorneys' fees in opposing objections to final fee application for winding up estate property disallowed; interest accrues from date of allowance

1. No cost benefit to investigating unsecured claim where estate was solvent and partners didn't object

2. Investigation into partners' assets unnecessary, since the partnership was solvent

12. Time Sheets

In re Mortgage & Realty Trust, 123 B.R. 626 (Bankr. C.D. Cal. 1991)

Investment bankers not entitled to indemnification or bonuses; must keep time sheets.

13. Attorney fees under state law or federal bankruptcy law

In re Deroche, 434 F.3d 1188 (9th Cir. 2006)

Debtor's counsel not entitled to attorney's fees in opposing Arizona Industrial Commission's priority claim, since only substantive bankruptcy law was involved in the action.

In re Hassan Imports Partnership, 256 B.R. 916 (9th Cir. B.A.P. 2000)

Debtor was not entitled to attorney fees under CCP § 1717, since the dispute in question was not an action on a promissory note, but an action on confirmation of a plan, which is governed by federal bankruptcy law.

In re Rothery, 200 B.R. 644 (9th Cir. B.A.P. 1996)

Action to avoid fraudulent transfer was not contract action and attorney's fee was therefore not warranted under state statute

In re Job, 198 B.R. 763 (9th Cir. B.A.P. 1996), *rev'd in part; vacated in part by In re Job*, 117 F.3d 1425 (9th Cir. 1997).

Pursuant to the California Supreme Court's recent decision in *Trope v. Trope*, we reverse the bankruptcy court's order awarding defendant Albertini attorney's fees for representation of himself. We affirm the bankruptcy court's order as to costs.

3250 Wilshire Boulevard Building v. W.R. Grace & Co., 990 F.2d 487 (9th Cir. 1993)

Where attorney's fees are not recoverable for a non-contract action under Cal. Civ. Code § 1717, they may nonetheless be recoverable under Cal. Code of Civ. P. § 1021, which permits attorney's fees agreements, but contains no restriction as to the nature of the lawsuits for which such fees may be recovered. "We conclude, therefore, that California law permits recovery of attorney's fees by agreement, for tort as well as contract actions."

California Civil Code § 1717, however, is not the only statute governing the recoverability of attorney's fees by agreement. Indeed, the district court specifically relied on California Code of Civil Procedure § 1021 when it awarded attorney's fees to MetLife. The section provides:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

Cal. Civ. Pro. Code § 1021 (West Supp. 1993). This statute permits attorney's fees agreements, but contains no restriction as to the nature of the lawsuits for which such fees may be recovered. Several recent California cases have underscored this view, holding that where attorney's fees are not recoverable for a non-contract action under section 1717, they may nonetheless be recoverable under section 1021. *Lerner v. Ward*, 16 Cal. Rptr. 2d 486, 489 (Ct. App. 1993); *Xuereb v. Marcus & Millichap, Inc.*, 5 Cal. Rptr. 2d 154, 157 (Ct. App. 1992), *rev. denied*, 1992 Cal. LEXIS 2447 (Cal. 1992). We conclude, therefore, that California law permits recovery of attorney's fees by agreement, for tort as well as contract actions.

14. Retainers

In re Dick Cepek, Inc., 339 B.R. 730 (9th Cir. BAP 2006)

A bankruptcy court cannot force chapter 11 debtor's counsel to disgorge fees drawn from a prepetition retainer in which it holds a security interest to equalize the distribution of all chapter 11 administrative claimants under § 726(b). The case was remanded, however, to determine whether counsel in fact had a security interest in the retainer.

15. Carve-outs

In re Cooper Commons LLC, 512 F.3d 533 (9th Cir. 2008)

Counsel for former debtor-in-possession was not entitled to compensation from a carve-out negotiated by chapter 11 trustee for himself and his professionals, where the carve-out did not include debtor-in-possession counsel, and debtor-in-possession counsel had previously waived any entitlement to a carve-out.

16. Misc.

In re Tredinnick, 264 B.R. 573 (9th Cir. B.A.P. 2001)

Debt arising from postpetition legal services by paralegal based on a prepetition contract with the debtor are not discharged.

In re Sanchez, 241 F.3d 1148 (9th Cir. 2001)

Debtor's attorney's collection of fee for postpetition services did not violate automatic stay where attorney had no reason to know bankruptcy court would determine fee was excessive.

Renfrow v. Draper, 232 F.3d 688 (9th Cir. 2000)

"...[I]f a divorce decree provides for the payment of attorney's fees, and state law issues are litigated in the bankruptcy proceedings, attorney's fees are available, but only to the extent that they were incurred litigating the state law issues....Ms. Renfrow is entitled to recover the attorney's fees she has incurred in litigating the validity and the amount of Mr. Draper's debts in the bankruptcy proceeding." She's also entitled to the attorney's fees she incurred in the state court proceedings before the bankruptcy was filed, and to reasonable costs in both the bankruptcy and state court action.

In re Elias, 188 F.3d 1160 (9th Cir. 1999)

The court of appeals affirmed a decision of the Bankruptcy Appeals Board. The court held that a bankruptcy court does not abuse its discretion in declining to decide a post-dismissal motion to enforce a fee agreement between a debtor and her attorney.

In re LCO Enterprises, Inc., 105 F.3d 665 (9th Cir. 1997)

Attorney's fees properly denied to prevailing litigant defending against trustee's designation of pre-petition lease payments as preferential transfers

In re Biggar, 110 F.3d 685 (9th Cir. 1997), as amended 5/6/97

Installment contract for legal services that calls for post-petition payments is dischargeable in bankruptcy

In re Lazar, 83 F.3d 306 (9th Cir. 1996)

Court abuses its discretion by subordinating fees of bankruptcy debtors' counsel to claims of examiner and examiner's accountants.

S.E.C. v. Interlink Data Network of Los Angeles, Inc., 77 F.3d 1201 (9th Cir. 1996)

Advance deposit for future work was not earned on receipt, but was in the nature of a security retainer.

In re CIC Investment Corp., 192 B.R. 549 (9th Cir. B.A.P. 1996)

Panel holds that the bankruptcy court may, in its discretion, award compensation for services rendered up to the date the employment order was reversed. However, the court must determine whether counsel's lack of disinterest impaired its representation of the estate such that compensation should be reduced or denied.

In re Sandoval, 186 B.R. 490 (9th Cir. B.A.P. 1995)

Individual attorney who did not directly receive the fee may be ordered to disgorge for incompetence.

First Interstate Bank of Nevada v. CIC Inv. Corp. (In re CIC Inv. Corp.), 175 B.R. 52 (9th Cir. B.A.P. 1994)

Where a law firm had a secured claim against the chapter 11 debtor in possession, it was not disinterested and, therefore, was not qualified to serve as general counsel for the debtor in possession. Bankruptcy courts cannot use equitable principles to disregard unambiguous statutory language.

In re Travel Headquarters, Inc., 140 B.R. 260 (9th B.A.P. 1992)

Bankruptcy court acted within discretion in awarding all fees to successor trustee because of administrative difficulties left by first trustee even though first trustee collected a lot of the money

In re Bybee, 945 F.2d 309 (9th Cir. 1991)

Attorney fees awarded to prevailing party where state law allowed them (fraudulent conveyance counts).

In re Milton Poulos, Inc., 947 F.2d 1351 (9th Cir. 1991)

Attorneys who generate PACA trust funds are entitled to attorney fees out of the "common fund."

In re Marquam Investment Corp., 942 F.2d 1462 (9th Cir. 1991)

Insider to corporation that had been dodging judgment for 11 years donated its legal services, where no time-sheets, bills, etc. sent to debtor

In re Shirley, 134 B.R. 940 (9th Cir. B.A.P. 1992)

Attorney who was never appointed to represent debtor in possession and whose fees were denied cannot sue debtor in state court.

In re Riverside-Linden Inv. Co., 945 F.2d 320 (9th Cir. 1991)

Denial of attorney's fees incurred in opposing objections to final fee application for winding up estate properly disallowed; interest accrues from date of allowance; counsel for trustee not entitled to attorney's fees charged in connection with trustee's excessive investigation of creditor.

In re Alcala, 918 F.2d 99 (9th Cir. 1990)

Attorney not employed by bankruptcy trustee could not recover fee for alleged post-petition services concerning a legal claim that was property of the bankruptcy estate; debtor attorney may be compensated only if services are rendered to estate; no attorney lien under California state law.

In re Johnson, 756 F.2d 738, 741 (9th Cir. 1985), *cert. denied*, 474 U.S. 828 (1985)

Attorney fees normally not recoverable in absence of statute.

COMPROMISE & SETTLEMENT

In re Cellular 101, Inc., 539 F.3d 1150 (9th Cir. 2008)

A party's failure to timely inform the court of appeals of a settlement that it believes disposes of a pending appeal precludes the party from asserting the affirmative defense of settlement and release in a later proceeding.

In re Valdez Fisheries Development Ass'n, Inc., 439 F.3d 545 (9th Cir. 2006)

Where bankruptcy court issued an order approving a settlement agreement, and issued a second order dismissing the case but failing to retain jurisdiction to enforce the terms of the settlement, the court had no ancillary jurisdiction under *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375 (1994) to enforce the settlement.

In re Lanijani, 325 B.R. 282 (9th Cir. BAP 2005)

". . .[W]hen a cause of action is being sold to a present or potential defendant over the objection of creditors, a bankruptcy court must, in addition to treating it as a sale, independently evaluate the transaction as a settlement under the prevailing "fair and equitable" test, and consider the possibility of authorizing the objecting creditors to prosecute the cause of action for the benefit of the estate, as permitted by § 503(b)(3)(B)."

In re Rains, 428 F.3d 893 (9th Cir. 2005)

Bankruptcy court correctly found that debtor was competent at the time he entered into a settlement, even though he had a stroke immediately after the meditation was completed.

In re Andreyev, 313 B.R. 302 (9th Cir. B.A.P. 2004)

Entry of judgment based upon the mistaken impression that the debtor had entered into a settlement agreement for $1000 in a credit card dischargeability action was erroneous.

In re Mickey Thompson Entertainment Group, Inc., 292 B.R. 415 (9th Cir. B.A.P. 2003)

Bankruptcy court abused discretion in approving trustee's settlement, where party offered trustee $45,000 more to purchase claims against insiders than the insiders offered.

Doi v. Halekulani Corp., 276 F.3d 1131 (9th Cir. 2002)

A party's affirmative response in open court to being asked if she agrees to the recited terms of a settlement agreement placed on the record constitutes a binding agreement to settle. Sanctions for reneging on the agreement were appropriate.

In re Guy F. Atkinson Company of California, 242 B.R. 497 (9th Cir. B.A.P. 1999)

Bonding companies, rather than trustee, may seek settlement of bankruptcy estate claims where sufficient reason exists to allow such relief and companies intend to maximize estate for benefit of all creditors.

In re Colortran, Inc., 218 B.R. 507 (9th Cir. B.A.P.1997)

Order denying uncontested compromise reversed.

In re Schmitt, 215 B.R. 417 (9th Cir. B.A.P. 1997)
Bankruptcy court properly approved compromise to avoid complex and probably unsuccessful litigation

Ortloff v. Silver Bar Mines, Inc., 111 F.3d 85 (9th Cir. 1997)

In re Hunter, 66 F.3d 1002 (9th Cir. 1995)
Absent an allegation of fraud on the court, a party who enters into a settlement may not maintain an independent action to set aside the judgment unless he can fit within the parameters of Rule 60(b)

Hagestad v. Tragesser, 49 F.3d 1430 (9th Cir. 1995)
Failure to reserve jurisdiction to enforce settlement left D. Court without jurisdiction to enforce

In re Lendvest Mortgage, Inc., 42 F.3d 1181 (9th Cir. 1994)
Bankruptcy court must undertake an independent allocation of a settlement before it may conclude that a preferential transfer claim has been satisfied, either completely or partially.

Bance Do Brasil , S.A. v. Latian, Inc., 234 Cal.App.3d 973 (Cal.App. 1994), *cert. denied*, 504 U.S. 986 (1992); City Equities Anaheim v. Lincoln Plaza Dev. Co. (In re City Equities Anaheim, Ltd.), 22 F.3d 954 (9th Cir. 1994)
Bankruptcy court could appropriately enforce a settlement agreement by summary proceedings commenced by motion without necessity of an adversary proceeding, oral testimony or cross-examination where material facts concerning the existence or terms of a settlement were not in dispute.

In re City Equities Anaheim, Ltd, 22 F.3d 954 (9th Cir. 1994)
Settlement enforcement - settlement agreement may be summarily enforced where no material facts concerning the existence of terms of the agreement are in dispute

Kokkonen v. Guardian Life Ins. Co of America, 511 U.S. 375, 114 S.Ct. 1673 (1994)
Court may not enforce a settlement agreement after case is dismissed unless agreement is incorporated into dismissal or court retains jurisdiction to enforce the agreement

Texaco, Inc. v. Ponsoldt, 939 F.2d 794 (9th Cir. 1991)
Settlement agreement re sale or transfer of interest in real estate must be signed by party to be charged under Civ. Code 1624(c). Those not covered by the statute of frauds are still enforceable if common sense says they are divisible.

Wilkinson v. FBI, 922 F.2d 555 (9th Cir. 1991)
District courts have the inherent power to enforce settlement agreements.

In re MGS Marketing, 111 B.R. 264 (9th Cir. B.A.P. 1990)
Settlement of suit reversed for failure to show it was in best interest of estate

Miller v. Christopher, 887 F.2d 902 (9th Cir. 1989)
Good faith settlement bars contribution

In re A&C Properties, 784 F.2d 1377 (9th Cir. 1986), *cert. denied*, 479 U.S. 854 (1986)
Factors governing review of settlements.

Adams v. Johns-Manville Corp., 876 F.2d 702 (9th Cir. 1989)
Silence...as acceptance and estoppel - Cal. Law

In re Haynes, 97 B.R. 1007 (9th Cir. B.A.P. 1989)
Oral settlement agreement made on the record is binding

CONFLICT OF LAWS

In re Miller, 292 B.R. 409 (9th Cir. B.A.P. 2003)
Nevada law applied to Nevada casino's adversary proceeding to recover gambling debts against California chapter 7 bankruptcy debtor.

In re Lindsay, 59 F.3d 942 (9th Cir. 1995), *cert. denied*, 516 U.S. 1074 (1996)
Federal choice of law rules apply in bankruptcy. Rest 2d Confl. Of Laws applied - Texas law governed foreclosure of Texas real estate

Rosenthal v. Fonda, 862 F.2d 1398 (9th Cir. 1988)
California governmental interest analysis - contracts

CONTEMPT

In re Stasz, 387 B.R. 271 (9th Cir. BAP 2008)

Failure to comply with repeated orders to appear at a Rule 2004 exam justified order of contempt and award of attorney fees as sanctions.

In re Hercules Enterprises, Inc., 387 F.3d 1024 (9th Cir. 2004)

In order to find civil contempt, "the bankruptcy court had to find that he violated a specific and definite order and that he had sufficient notice of its terms and the fact that he would be sanctioned if he did not comply."

UMW v. Bagwell, 512 U.S. 821 (1994)

Civil v. Criminal contempt

In re Dyer, 322 F.3d 1178 (9th Cir. 2003)

"Serious" punitive damages may not be awarded under § 105 for civil contempt of the automatic stay by entities who are not individuals. Only compensatory sanctions, attorney fees and compliance with the stay may be awarded.

Balla v. Idaho State Bd of Corrections, 869 F.2d 461 (9th Cir. 1989)

Prerequisites for civil contempt

CONTINUANCE

In re La Sierra Financial Services, Inc., 290 B.R. 718 (9th Cir. B.A.P. 2002)

Court will not disturb a denial of a continuance for discovery unless the party shows actual and substantial prejudice.

In re Brewster, 243 B.R. 51, 57 (9th Cir. B.A.P. 1999)

"In reviewing a denial of a continuance, we consider four factors: (1) the extent of the appellant's diligence in efforts to be prepared for trial; (2) the likelihood that the need for a continuance would have been met if the continuance had been granted; (3) the extent to which a continuance would inconvenience the court and the opposing party; and (4) the amount of harm the appellant may have suffered as a result of the denial of the continuance. United States v. Mejia, 69 F.3d 309, 314 (9th Cir. 1995)."

In re Bittleman, 107 B.R. 230 (9th Cir. B.A.P. 1988)

Denial of one hour continuance to produce witnesses is abuse of discretion

CONTRACTS - California Law

Humetrix, Inc. v. Gemplus S.C.A. 268 F.3d 210 (9th Cir. 2001)

"Under California law, a plaintiff tht prevails on a breach of contract claim "should receive as nearly as possible the equivalent of the benefits of performance," meaning the plaintiff should be put "in as good a position as he would have been had performance been rendered as promised." [citation omitted] This may include lost profits if the plaintiff can prove that the defendant's failure to perform caused the plaintiff to lose profits."

Vestar Development II, LLC v. General Dynamics Corp., 249 F.3d 958 (9th Cir. 2001)

Lost profits from agreement to negotiate sale of real property were too speculative to be allowed under Cal. Civ. Code § 3000 or § 3301.

In re Diego's Inc., 88 F.3d 775 (9th Cir. 1996)

Party is estopped from relying on statute of frauds as defense in action for breach of oral contract where other party turned down other offers in reliance on contract

In re Ankeny, 184 B.R. 64 (9th Cir. B.A.P. 1995)

Parol evidence - integrated k, letter of intent as a contract - whether principal was liable

Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc., 971 F.2d 272 (9th Cir. 1992), *cert. denied*, 507 U.S. 914 (1993)

Parol evidence inadmissible when it contradicts the plain meaning of the contract

Moore v. Pollock (In re Pollock), 139 B.R. 938 (9th Cir. B.A.P. 1992)

Severability of security agreement from lease

Whether multiple obligations in an agreement are severable is a question of state law. Under Cal. Law, this is a question of the parties intent based upon the substance and language of the agreement at issue. Keene v. Harling, 61 Cal.2d 318, 320 (1964); Gardinier, 831 F.2d at 976. The Gardinier court noted three factors that should be considered in analyzing whether obligations within an agreement are severable (1) whether nature and purpose of the obligations are different (2) whether consideration for the obligations is distinct and (3) whether obligation statute of frauds the parties are interrelated .

Schneider v. TRW, Inc., 938 F.2d 986 (9th Cir. 1991)

Wrongful termination

Foley v. Interactive Data Corp. 47 Cal.3d 654 (1988)

Tort theories restricted in wrongful termination action

Ins. Co. Of State of Pa. v. Assoc. Int'l Ins. Co., 922 F.2d 516 (9th Cir. 1990)

Contracts/insurance - although primary insurer breached notice provision in reinsurance k when faced with a claim, the reinsurer nonetheless was not relieved from its obligation under the k because of its failure to show actual and substantial prejudice to maintain a late notice defense.

In re Mediscan Research, Ltd., 109 B.R. 392 (9th Cir. B.A.P. 1989), *aff'd*, 940 F.2d 558 (1991)
Impossibility - amendment to debtor's agreement ruled unenforceable for insufficient consideration and fraud

Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703 (9th Cir. 1990)
Cap on consequential damages can be removed if repair clause in contract fails of its essential purpose

First Citizens Federal S&L Ass'n. v. Worthen Bank and Trust Co., 906 F.2d 427 (9th Cir. 1990)
Fiduciary relationship should not be inferred in bank loan participation agreements absent unequivocal language to that effect in the agreement

CONVERSION

In re Owens, 552 F.3d 960 (9th Cir. 2009)

Bankruptcy court properly dismissed rather than converting chapter 11 case that was filed in bad faith as a litigation tactic. Although conversion might have benefitted moving party, the best interests of *all* creditors must be considered in converting or dismissing a case. here, creditors might have fared worse in chapter 7 because the chapter 7 discharge would have deprived them of access to the debtor's substantial future income.

In re Marrama, 549 U.S. 365, 127 S.Ct. 1105 (2007)

Debtor forfeited his right to convert his case to chapter 13 where he did not qualify as a debtor because of his bad faith concealment of assets

In re Lynch, 363 B.R. 101 (9th Cir. BAP 2007)

Trustee should not have been compelled to abandon property. Even though the debtor valued the property at 560,000 as of the date of the filing of the chapter 13 petition, and the plan was confirmed without objection, that valuation was not binding on the trustee under § 348(f)(1), since no implicit valuation occurred. However, the relevant valuation date was the petition date, not the conversion date (absent a showing of bad faith.

In re Fowler, 394 F.3d 1208 (9th Cir. 2005)

"We hold that § 348(d) requires that postpetition employment tax debt, incurred as an administrative expense of a Chapter 11 bankruptcy estate, retains its first priority administrative expense status upon conversion to a Chapter 13 bankruptcy plan. Section 1305 is not in conflict with this holding because it does not govern the priority of the postpetition claims it allows into the bankruptcy."

In re Captain Blythers, Inc., 311 B.R. 530 (9th Cir. B.A.P. 2004), *aff'd,* 182 Fed. Appx. 708 (2006).

Chapter 11 plan which dedicated the proceeds, if any, of a cause of action to payment of creditors revested in the chapter 7 estate upon conversion.

In re Consolidated Pioneer Mortgage Entities, 264 F.3d 803 (9th Cir. 2001)

Conversion from chapter 11 to chapter 7 was warranted where corporation charge with responsibility for liquidating bankruptcy estate caused unreasonable delay by failing to account to investors. Bankruptcy court's decision to convert will be reversed only if there is no evidence in the record upon which to rationally support it.

In re Johnston, 149 B.R. 158 (9th Cir. B.A.P. 1992)

Conversion of case from 11 to 7 four months after filing held to be proper. Bankruptcy court isn't required to wait a certain time to detriment of creditors before pulling the plug.

In re Plata, 958 F.2d 918 (9th Cir. 1992)

Monies held from post-petition earning by Chapter 12 trustee go back to debtor.

CONVERSION - STATE LAW

CHoPP Computer Corp., Inc. v. U.S., 5 F.3d 1344, 1347 (9th Cir. 1993), *cert. denied*, 513 U.S. 811 (1994)

California provides the relevant substantive law in this case. That state permits recovery on a conversion theory either for the wrongful taking or for the wrongful retention of property. *See Edwards v. Jenkins*, 7 P.2d 702, 705 (Cal. 1932). In order to maintain an action for conversion, ChoPP must show that it had title to or a right to possess the funds in the PaineWebber account. *Moore v Regents of the Univ. Of Cal.,* 793 P.2d 479, 488 (Cal. 1990); *Baldwin v Marina City Properties, Inc.,* 145 Cal. Rptr. 406, 416 (Cal. App. 1978). ChoPP's interest must have existed, if at all, at the time of the levy or at the time that ChoPP demanded return of the funds after entry of the final judgment in state court

See also *In re Manser*, 99 B.R. 434 (9th Cir. B.A.P. 1989)

COSTS 28 U.S.C. §§ 1920 and 1927

In re Sandoval, 186 B.R. 490 (9th Cir. 1995)

Bankruptcy court not court of U.S. for purposes of 28 U.S.C. § 1927. See *In re Perroton,* 958 F.2d 889 (9th Cir. 1992)

Haagen-Dazs Co., Inc.v. Double Rainbow, Gourmet Ice Cream, Inc., 920 F.2d 587 (9th Cir. 1990)

Xerox of documents necessarily used in case but not entered into evidence taxable as costs

Alflex Corp. v Underwriters Lab Inc., 914 F.2d 175 (9th Cir. 1990), *cert denied*, 502 U.S. 812, 112 S.Ct. 61 (1991)

Taxing of costs for copies of depos and private service of process fees was proper.

CREDIT CARDS

In re Anastas, 94 F.3d 1280 (9th Cir. 1996)

In re Burdge, 198 B.R. 773 (9th Cir. B.A.P. 1996)

CREDIT COUNSELING--SECTION 109(h)

Warren v. Wirum, 378 B.R. 640 (N.D. Cal. 2007)

1) Because credit counseling under § 109(h) is not jurisdictional, the debtor was judicially estopped from dismissing his case for failing to obtain it, citing *In re Mendz,* 367 B.R. 107 (9th Cir. BAP 2007); 2) unless the debtor asks to be excused from filing payment advices or the trustee moves the court to decline from dismissing, the case is automatically dismissed, and the court may not retroactively waive the debtor's obligation to file payment advices.

In re Mendez, 367 B.R. 109 (9th Cir. BAP 2007)

Pre-bankruptcy credit counseling is not a jurisdictional prerequisite, but an eligibility requirement subject to waiver and estoppel. Debtor waived strict compliance with credit counseling requirements, and could not use noncompliance offensively to obtain dismissal of her bankruptcy case.

CREDITORS COMMITTEE

In re Sufolla, Inc., 2 F.3d 977 (9th Cir. 1993)

Fn. 1: "A qualified implied authorization exists under 11 U.S.C. § 1103(c)(5)" for an initiation of an adversary proceeding by a creditors committee

DAMAGES

In re First Alliance Mortg. Co., 471 F.3d 977, 998 (9th Cir. 2006)

"Under California law, punitive damages are appropriate where a plaintiff establishes by *clear and convincing evidence* that the defendant is guilty of (1) fraud, (2) oppression or (3) malice. Cal.Civ.Code §3294(a). According to the definitions provided in section 3294(c), a plaintiff may not recover punitive damages unless the defendant acted with intent or engaged in "despicable conduct"."

In re Lundell, 236 B.R. 720 (9th Cir. B.A.P. 1999)

Damage to estate from debtor's failure to deliver estate property to trustee not contingent on future determination of estate's insolvency.

Robi v. Five Platters, Inc., 918 F.2d 1439 (9th Cir. 1990)

Punitive damages - California law

In re Sansone, 99 B.R. 981, 989 (Bankr.C.D. Cal. 1989)

Test for determining right to punitives - California law

Professional Seminar Consultants, Inc. v. Sino Am. Technology Exchange Council, Inc. 727 F.2d 1470, 1476 (9th Cir. 1984)

Punitive damages

factors: 1) nature of defendant's acts, 2) amount of compensatory award, 3) defendant's wealth

Adams v. Murakami, 54 Cal.3d 105, 109 (1991)

Punitive damages

In re Wolverton Associates, 909 F.2d 1286 (9th Cir. 1990)

Punitive damages

Neal v. Farmers Ins. Exchange, 21 Cal.3d 925 (1978)

Punitive damages

DECLARATORY JUDGMENT

Fireman's Fund, Inc. v. Ignacio, 860 F.2d 353 (9th Cir. 1988)

DEEPENING INSOLVENCY DOCTRINE

Smith v. Arthur Anderson LLP, 421 F.3d 989 (9th Cir. 2005)

"We need not make any general pronouncements on the deepening insolvency theory, not least because it is difficult to grasp exactly what that theory entails. . . .We do, however, agree with the Third Circuit's observation in *Lafferty* that 'prolonging an insolvent corporation's life through bad debt may' dissipate corporate assets and thereby harm the value of corporate property. 267 F.3d 350."

DEFINITIONS

In re Trejos**,** 374 B.R. 210, 215 (9th Cir. BAP 2007)
In a decision largely governed by Nevada law, court adopts the Restatement definition of "assignment."

In re Cellular 101, Inc., 377 F.3d 1092 (9th Cir. 2004)
For purposes of § 503(b)(3), entity was a creditor, even if it's claim was disputed.

In re Ritter Ranch Development, L.L.C., 255 B.R. 760 (9th Cir. B.A.P. 2000)
Community development bondholders were not "creditors" of developer**.**

In re Hilde, 189 B.R. 776 (9th Cir. B.A.P. 1995), *rev'd* 120 F.3d 950 (9th Cir. 1997)
Definition of statutory and judicial lien under California law - C.C.P. § 1800(a)(4), (a)(9)

In re Friedman, 126 B.R. 63 (9th Cir. B.A.P. 1991)
What constitutes an "insider" under 101 (31)

Reeves v. Teuscher, 881 F.2d 1495 (9th Cir. 1989)
For purposes of 1933/1934 Acts - ltd partnerships included.

DISCHARGE AND DISCHARGEABILITY - General Principles- Collateral Estoppel, Res Judicata, Damages, Burden of Proof, Weighing Evidence, etc.

1. Attorney's Fees and §523(d)
2. Cal. Civ. Code §3287(a)
3. Cal. Civ. Code §92848
4. Collateral Estoppel
5. Default Judgment
6. Extension of time to file Complaint
7. Fraud
8. Fed. R. Bankr. P. 9006 under 4007(1)
9. FRCP 17(a)
10. Novation
11. Punitive Damages
12. Res Judicata
13. Rule 9(b) Fed.R. Civ.P. 15
14. §362
15. §509
16. §523
17. §523(a)(2)
18. §523(a)(4)
19. §523 (b)
20. §1141(d)(3)
21. Waiver
22. Prejudgment interest
23. Misc

1. Attorney's Fees and §523(d)

In re Bertola, 317 B.R. 95 (9th Cir. B.A.P. 2004)

After Cohen v. de la Cruz, 523 U.S. 213 (1998), the determinative issue in awarding attorney fees to a dischargeability plaintiff under § § 523(a)(2) and (6) is whether the successful plaintiff could recover attorney fees in a non-bankruptcy court.

In re Davison, 289 B.R. 716 (9th Cir. B.A.P. 2003)

Debtor not entitled to collect attorney fees from creditor who lost dischargeability action, since the bankruptcy court was not enforcing or interpreting the contract that provided for fees when it found no fraud.

In re Hunt, 238 F.3d 1098 (9th Cir. 2000)

Award of attorney fees under § 523(d) justified where credit card plaintiff failed to present any evidence of intent not to repay. "Substantially justified" means that complaint has a reasonable basis in law and fact. "Special circumstances" has reference to "traditional equitable

principles." Exception didn't apply here. No waiver of right under the statute, where claim raised in the pretrial order.

Renfrow v. Draper, 232 F.3d 688 (9th Cir. 2000)

"...[I]f a divorce decree provides for the payment of attorney's fees, and state law issues are litigated in the bankruptcy proceedings, attorney's fees are available, but only to the extent that they were incurred litigating the state law issues....Ms. Renfrow is entitled to recover the attorney's fees she has incurred in litigating the validity and the amount of Mr. Draper's debts in the bankruptcy proceeding." She's also entitled to the attorney's fees she incurred in the state court proceedings before the bankruptcy was filed, and to reasonable costs in both the bankruptcy and state court action.

In re Stine, 254 B.R. 244 (9th Cir. B.A.P. 2000), *aff'd*, 19 Fed.Appx. 626 (9th Cir. 2001)

Bankruptcy debtor's pro bono representation was not a special circumstance that precluded an award of attorney's fees after she prevailed in dischargeability proceeding. Secured debt on real property was a consumer debt under § 523(d).

In re Baroff, 105 F.3d 439 (9th Cir. 1997)

Prevailing party entitled to attorney's fees in dischargeability action when bankruptcy court applies state law to enforce settlement agreement that authorizes them.

In re Hashemi, 104 F.3d 1122 (9th Cir. 1996), *cert. denied,* 520 U.S. 1230, 117 S.Ct. 1824 (1997)

No right to jury trial in dischargeability proceedings, but could recover attorney fees

In re Harvey (amended opinion), 172 B.R. 314 (9th Cir. B.A.P. 1994)

Award of attorney's fees against creditor who loses on nondischargeability complaint does not require finding of bad faith.

In re Gee, 173 B.R. 189 (9th Cir. B.A.P. 1994)

No right to attorney fees for dischargeability action.

In re Vasseli, 5 F.3d 351 (9th Cir. 1993)

§ 523(d) does not give a bankruptcy court power to award attorney fees incurred on appeal.

In re Kullgren, 109 B.R. 949, 953 (Bankr. C.D. Cal. 1990)

In order to prevail on a motion for attorney's fees under § 523(d), a debtor must prove that:

(1) the creditor requested a determination of the dischargeability of the debt,
(2) the debt is a consumer debt, and
(3) the debt was discharged.

In re Itule, 114 B.R. 206 (9th Cir. B.A.P. 1990)
No right to attorney fees in dischargeability actions.

2. Cal. Civ. Code §3287(a)

In re Niles, 106 F.3d 1456 (9th Cir. 1997)
Cal. Civ. Code § 3287(a) allows prejudgment interest for damages certain, and is applicable because state law governs existence of a debt

3. Cal. Civ. Code §92848

In re Martin, 161 B.R. 672 (9th Cir. B.A.P. 1993)
Bonding company is subrogated to the rights of the creditor under Cal. Civ. Code 92848 in a dischargeability proceeding.

4. Issue Preclusion/Collateral Estoppel

In re Sabban, 384 B.R. 1 (9th Cir. BAP 2008)
Where state court did not find that damages were sustained by plaintiff because of unlicensed contractor's misrepresentations or fraud under California Business and Professions Code § § 7031(b) and 7160, § 523(a)(2) did not apply.

In re Hansen, 368 B.R. 868, 879-80 (9th Cir. BAP 2007)
Claim preclusion did not apply to creditor's lawsuit objecting to discharge, where the trustee, who settled a separate lawsuit objecting to discharge, was not in privity with the creditor.

In re Lopez, 367 B.R. 99 (9th Cir. BAP 2007)
1. The *Rooker-Feldman* doctrine does not override or supplant the issue and claim preclusion doctrines; 2. Issue preclusion applied in this § 523(a)(6) action, where the state court found that the debtor willfully and maliciously misappropriated customer lists.

In re Khaligh, 338 B.R. 817 (9th Cir. BAP 2006)
Issues that were actually litigated and necessarily decided in the course of obtaining an arbitration award that was confirmed as a judgment by a California court are eligible for issue preclusive effect under California law. The defamation judgment was found to have preclusive effect under § 523(a)(6).

In re Jung Sup Lee, 335 B.R. 130 (9th Cir. BAP 2005)
Issue preclusion applied to state court judgment for compensatory damages. Court need not have found that the debtor obtained services directly through fraudulent conduct under § 523(a)(2).

Muegler v. Bening, 413 F.3d 864 (9th Cir. 2005)
"It is only the fact of an adverse fraud judgment, and nothing more, that is required for a

debt to be nondischargeable." The debtor does not need to have received a benefit from the fraud.

In re Huang, 275 F.3d 1173 (9th Cir. 2002)

Waiver of discharge in settlement agreement was ineffective. The settlement agreement had no collateral estoppel effect under § 523(a)(2), where the settlement agreement omitted any mention of fraud or facts supporting fraud.

In re Roussos, 251 B.R. 86 (9th Cir. B.A.P. 2000), *aff'd*, 33 Fed.Appx. 365 (9th Cir. 2002)

Even though state court calculated fraud damages based on benefit of the bargain losses under California law, rather than out-of-pocket losses under federal law, collateral estoppel applied to the state court judgment.

In re Palmer, 207 F.3d 566 (9th Cir. 2000)

Default judgment in tax court did not have collateral estoppel effect, where debtor did nothing in proceeding beyond filing petition for redetermination of tax liability. "Actually litigated" requirement not met.

In re Branam, 226 B.R. 45 (9th Cir. B.A.P. 1998), *aff'd*, 205 F.3d 1350 (9th Cir. 1999)

State court judgment for assault and battery collaterally estopped debtor from relitigating whether judgment arose from willful and malicious conduct.

In re Younie, 211 B.R. 367 (9th Cir. B.A.P. 1997), *aff'd*, 163 F.3d 609 (9th Cir. 1998)

State court judgment of fraud entitled to collateral estoppel effect precluding discharge

In re Lake, 202 B.R. 751 (9th Cir. B.A.P. 1996)

State court judgment not entitled to collateral estoppel effect in bankruptcy court if obtained through extrinsic fraud

In re Bowen, 198 B.R. 551 (9th Cir. B.A.P. 1996)

Federal diversity judgment is subject to federal rule regarding collateral estoppel. Stipulated judgment met "actually litigated" requirement.

In re Green, 198 B.R. 564 (9th Cir. B.A.P. 1996)

Collateral estoppel applied to state fraud judgment.

In re Silva, 190 B.R. 889 (9th Cir. B.A.P. 1995)

Issues raised in unopposed summary judgment motion not "actually litigated" for purpose of collateral estoppel effect in later dischargeability action. Opinion does not mention Ninth Circuit Nourbaksh decision!

In re Kelly, 182 B.R. 255 (9th Cir. B.A.P. 1995), *aff'd*, 100 F.3d 110 (9th Cir. 1996)

Collateral Estoppel

In order for a prior judgment to be entitled to collateral estoppel effect, five elements mst be met:

1) The issue sought to be precluded from relitigation must be identical to that decided in a former proceeding;

2) the issue must have been actually litigated in the former proceeding;

3) it must have been necessarily decided in the former proceeding;

4) the decision in the former proceeding must be final and on the merits; and

5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Clark v. Bear Stearns & Co., Inc., 966 F.2d 1318, 1320 (9th Cir. 1992); *Berr*, 172 B.R. at 306; *Gikas v. Zolin*, 25 Cal.Rptr.2d 500, 505 (1993) (quoting *Lucido v. Superior Court*, 272 Cal.Rptr. 767, 769 (1990), *cert denied*, 500 U.S. 920 (1991); *Gutierrez v. Superior Court*, 29 Cal.Rptr.2d 376, 378 (Cal.Ct.App. 1994), *cert denied*, 514 U.S. 1049 (1995) (quoting *Lucido*, 272 Cal.Rptr. at 769). See generally, 1B James W. Moore et al., Moore's Federal Practice 0.441-43 (2d ed. 1994).

The party seeking to assert collateral estoppel has the burden of proving all the requisites for its application. To sustain this burden, a party must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action. Any reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the collateral estoppel effect. *Spilman v. Harley*, 656 F.2d 224, 227-28 (6th Cir. 1981); *Matter of Merrill*, 594 F.2d 1064, 1067 (5th Cir. 1979).

In re Bugna, 33 F.3d 1054 (9th Cir. 1994)

When debtor's fraud and breach of fiduciary duty have been fully and fairly litigated in state court prior to bankruptcy, the bankruptcy court may not invoke equitable powers to reject the dischargeability plaintiff's invocation of collateral estoppel.

Berr v. Federal Deposit Ins. Co. (In re Berr), 172 B.R. 299 (9th Cir. B.A.P. 1994)

Can a stipulated judgment for breach of contract damages, entered pursuant to a settlement agreement, have preclusive effect so as to collaterally estop the creditor from litigating nondischargeability for fraud under § 523(a)(2)(B) in the judgment debtor's subsequent bankruptcy case?

A 3-judge B.A.P. panel holds "perhaps" (and "perhaps not"), with three different opinions.

In re Nourbakhsh, 162 B.R. 841 (9th Cir. B.A.P. 1994), *aff'd*, 67 F.3d 798 (9th Cir. 1995)

Default judgment on issue of fraud has collateral estoppel effect.

In re Yarbrow, 150 B.R. 233 (9th Cir. B.A.P. 1993)

Collateral estoppel as to fraud.

5. Default Judgment

In re Munton, 351 B.R. 707 (9th Cir. BAP 2006)

Affirmative defenses not raised in prior state court action in which default was taken against the debtor may not be raised in subsequent nondischargeability proceeding. Texas contractor's statute exhibited the characteristics of an express or technical trust for purposes of §

523(a)(4).

In re Jung Sup Lee, 335 B.R. 130 (9th Cir. BAP 2005)
Claim preclusion applied to state court's finding of punitive damages, even though the judgment was by default.

In re Garcia, 313 B.R. 307 (9th Cir. B.A.P. 2004)
Default judgment had preclusive effect, even if it didn't expressly state that the debt was nondischargeable.

In re Baldwin, 249 F.3d 912 (9th Cir. 2001)
State court default judgment in favor of plaintiff alleging intentional tort had preclusive effect as to issue of willful and malicious injury in bankruptcy court nondischargeability action.

In re Harmon, 250 F.3d 1240 (9th Cir. 2001)
State court default judgment made no express finding with respect to fraud claim and therefore had no preclusive effect on fraud issue in nondischargeability action**.**

6. Extension of time to file Complaint

In re Albert, 113 B.R. 617 (9th Cir. B.A.P. 1990)
Multiple extensions of dischargeability complaint filing dates permitted under Fed.R.Bankr.P.

In re Brown, 102 B.R. 187 (9th Cir. B.A.P. 1989)
Cannot extend time for filing dischargeability complaint once time has run (citing In re Price, 79 B.R. 888, 890 (9th Cir. B.A.P. 1988), *aff'd*, 871 F.2d 97 (9th Cir. 1989).

7. Fraud

In re Tobin, 258 B.R. 199 (9th Cir. B.A.P. 2001)
Fraudulent representation imputed to debtor as corporate alter ego not proper basis for nondischargeability determination absent evidence of debtor's personal, knowing involvement in fraudulent scheme.

In re Fischer, 116 F.3d 388 (9th Cir. B.A.P. 1997)
Express novation extinguishes bankruptcy creditor's fraud claim against debtor based on original contract

In re Saylor, 178 B.R. 209 (9th Cir. B.A.P. 1995), *aff'd*, 108 F.3d 219 (9th Cir. 1997)
Fraudulent transfer action created no debt against debtor, thus no dischargeability action.

In re Aubrey, 111 B.R. 268 (9th Cir. B.A.P. 1990)
State court judgment for fraud and willfulness nondischargeable in bankrupt's estate.

8. Fed. R. Bankr. P. 9006 under 4007(1)

In re Burns, 102 B.R. 750 (9th Cir. B.A.P. 1989)
Fed.R.Bankr.P. 9006 applies in calculating time under 4007(1).

9. FRCP 17(a)

In re Capobianco, 248 B.R. 833 (9th Cir. B.A.P. 2000)
Court properly allowed plaintiff to substitute as the real party in interest under FRCP 17(a) a sole proprietorship for a corporate entity as plaintiff in a dischargeability action, where debt was owed to sole proprietor, which was subsequently incorporated.

10. Novation

Archer v. Warner, 123 S.Ct. 1462 (2003)
"We conclude that the Archers' settlement agreement and releases may have worked a kind of novation, but that fact does not bar the Archers from showing that the settlement debt arose out of [fraud], and consequently is nondischargeable..."

11. Punitive Damages

In re Jung Sup Lee, 335 B.R. 130 (9th Cir. BAP 2005)
Claim preclusion applied to state court's finding of punitive damages, even though the judgment was by default.

In re Cantrell,329 F.3d 1119 (9th Cir. 2003)
State court necessarily decided issue of fraud by awarding punitive damages. Thus the debtor was precluded from relitigating this issue.

In re Molina, 228 B.R. 248 (9th Cir. B.A.P. 1998)
California court's bare finding of attorney "fraud" sufficient to establish that punitive damages award was not dischargeable in bankruptcy.

In re Giangrasso, 145 B.R. 319 (9th Cir. B.A.P. 1992)
State court jury's punitive damages award basis sufficiently unclear to defeat exception from bankruptcy dischargeability.

12. Claim Preclusion/Res Judicata

In re Jung Sup Lee, 335 B.R. 130 (9th Cir. BAP 2005)
Claim preclusion applied to state court's finding of punitive damages, even though the judgment was by default.

Rein v. Providian Financial Corp., 270 F.3d 895 (9th Cir. 2001)
Where no court approval was obtained of either a settlement of an adversary proceeding nor a reaffirmation agreement, there was no final order and thus no claim preclusion.

In re Daily, 47 F.3d 365 (9th Cir. 1995)
Debtor agrees with creditor to allow RICO suit to go forward and have it be binding as to dischargeability suit in Bankruptcy Court. Debtor then fails to comply with discovery and has default taken against him. Held, where debtor actively participated in case for two years, the "actual litigation" requirement is satisfied.

In re Daghighfekr, 161 B.R. 685 (9th Cir. B.A.P. 1993)
Default judgment as to damages rendered in state court is res judicata, citing *In re Comer*, 723 F.2d 737, 740 (9th Cir. 1984).

13. Rule 9(b) Fed.R. Civ.P. 15

In re Englander, 92 B.R. 425 (9th Cir. B.A.P. 1988)
Specificity of complaint - Rule 9(b) Fed.R.Civ.P. 15 governs as to amended complaint adding new allegations.

14. §362

In re Gustafson, 934 F.2d 216 (9th Cir. 1991)
State is immune from money damages for stay violations under the 11th Amendment.

15. §509

In re Hamada**,** 291 F.3d 645 (9th Cir. 2002)
Issuer of letter of credit to secure a surety bond paid on a nondischargeable judgment was not subrogated to the rights of the judgment holder. Issuers of letters of credit are not "liable with" the debtor, and thus § 509 does not apply; nor did the issuer meet the requirements for equitable subrogation under California law.

16. §523

In re Arneson, 282 B.R. 883 (9th Cir. B.A.P. 2002)
A § 523 judgment in a prior bankruptcy case has claim preclusion effect unless and until vacated.

17. §523(a)(2)

In re Anguiano, 99 B.R. 436 (9th Cir. B.A.P. 1989)
Only out-of-pocket damages awarded in this 523(a)(2) case, although benefit-of-bargain damages may be appropriate in a particular case.

18. §523(a)(4)

In re Bugna, 33 F.3d 1054 (9th Cir. 1994)
Punitive damages not dischargeable under § 523(a)(4).

19. §523(b)

In re Moncur, 328 B.R. 183 (9th Cir. BAP 2005)
Debt that was declared nondischargeable in previous chapter 12 was nondischargeable in subsequent chapter 7, notwithstanding local form of discharge order that required the filing of a lawsuit in the chapter 7.

In re Paine, 283 B.R. 33 (9th Cir. B.A.P. 2002)
Most final judgments of nondischargeability rendered by bankruptcy courts, even if erroneous, are preclusive in subsequent bankruptcy cases under § 523(b).

20. §1141(d)(3)

In re Dominguez, 51 F.3d 1502 (9th Cir. 1995)
Complaint objecting to discharge deficient under 1141(d)(3) (liquidating Chapter 11)

21. Waiver

In re Boni, 240 B.R. 381 (9th Cir. B.A.P. 1999)
Absent waiver, dischargeability of debt must be determined in adversary proceeding and not on motion.

In re Santos, 112 B.R. 1001 (9th Cir. B.A.P. 1990)
Waiver may be a defense to dismiss late-filed dischargeability complaint, where defense is not raised in answer.

22. Prejudgment Interest

In re Weinberg, 410 B.R. 19, 37 (9th Cir. BAP 2009)
"It is settled law that where a debt that is found to be nondischargeable arose under state law, "the award of prejudgment interest is also governed by state law." *In re Niles,* 106 F.3d 1456, 1463 (9th Cir. 1997)".

23. Misc

In re Sasson, 424 F.3d 864 (9th Cir. 2005), *cert. denied*, Sasson v. Sokoloff, 547 U.S. 1206, 126 S.Ct. 2890 (2006)
A bankruptcy court has subject matter jurisdiction to enter a money judgment in a dischargeability proceeding, even though the underlying debt has been reduced to judgment in state court. The judgment was obtained in 1991, but the dischargeability action wasn't filed until

debtor filed for bankruptcy in 2001. In finding that the debtor engaged in willful and malicious conduct in rendering the initial state court judgment uncollectible, the bankruptcy court renewed the 1991 judgment, and tacked on interest at the federal rate for the period from 1991.

In re Hercules Enterprises, Inc., 387 F.3d 1024 (9th Cir. 2004)

In order to find civil contempt, "the bankruptcy court had to find that he violated a specific and definite order and that he had sufficient notice of its terms and the fact that he would be sanctioned if he did not comply." Bankruptcy court had power to sanction for civil contempt, but not to make such sanction nondischargeable in future bankruptcies.

Banks v. Gill Distribution Centers, Inc., 263 F.3d 862 (9th Cir. 2001)

Claim established prepetition if the creditor brought a timely state court action to collect the debt, even if the debt has not been reduced to a state court judgment.

In re Myrvang, 232 F.3d 1116 (9th Cir. 2000)

The bankruptcy court has the discretion to discharge a portion of the nondischargeable debt in question. In re Taylor, 223 B.R. 747 (9th Cir. B.A.P. 1998) disapproved. But the imposition of a penalty provision if the debtor missed a payment was beyond the authority of the bankruptcy court.

In re Gerwer, 253 B.R. 66 (9th Cir. B.A.P. 2000)

Estate distribution was an involuntary payment, thus prohibiting the debtor from directing that distribution be applied first to the nondischargeable portion of a debt. Creditor had the right to apply payment from estate to the dischargeable portion of the debt.

In re Marino, 181 F.3d 1142 (9th Cir. 1999)

Dismissal of untimely complaint in defunct Ch. 11 proceeding did not bar filing another complaint for same cause in new Ch. 7 proceeding.

In re Cole, 226 B.R. 647 (9th Cir. B.A.P. 1998)

Debtor could not prospectively contract away right to seek bankruptcy discharge.

In re Duplante, 215 B.R. 444 (9th Cir. B.A.P. 1997)

Recent court of appeals decision changed pertinent law, justifying creditor's voluntary dismissal of adversary proceeding

In re Ota, 192 B.R. 545 (9th Cir. B.A.P. 1996)

Assignee of claim has standing to object to discharge.

In re Gergely, 186 B.R. 951 (9th Cir. B.A.P. 1995), *aff'd in part, rev'd in part* 110 F.3d 1448 (9th Cir. 1997)

Where state court complaint pled no nondischargeability cause of action, state statute of limitations barred subsequent nondischargeability complaint.

In re Lawler, 141 B.R. 425 (9th Cir. B.A.P. 1992)
Burden of proof in 727 cases is preponderance of evidence.

In re Fields, 926 F.2d 501 (5th Cir. 1991), *cert. denied*, 502 U.S. 938 (1991)
Surety that paid taxes of debtor subrogated to the rights of the taxing authorities.

In re Combs, 101 B.R. 609 (9th Cir. B.A.P. 1989)
Dischargeability to be determined on basis of facts as of date of petition, not date of dischargeability trial.

In re Ellwanger, 89 B.R. 95 (9th Cir. B.A.P. 1988)
State court record makes prima facie case under *In re Houtman*, 568 F.2d 651 (9th Cir. 1978). This opinion was withdrawn from bound volume by order of Court dated Oct. 12, 1988. Subsequent opinion found at 105 B.R. 551 (9th Cir. B.A.P. 1989).

In re Lochrie, 78 B.R. 257 (9th Cir. B.A.P. 1987)
Exception to discharge to be strictly construed in favor of debtor.

DISCHARGEABILITY - Liability of Corporate Officer or Relatives for Acts of Corporation

In re Tsurukawa, 258 B.R. 192 (9th Cir. B.A.P. 2001)

"...[W]e hold that a marital union alone, without a finding of a partnership or other agency relationship between spouses, cannot serve as a basis for imputing fraud from one spouse to the other."

In re Cox, 41 F.3d 1294 (9th Cir. 1994)

Discharge granted to wife who was wholly uninvolved and unaware of husband's bad record keeping

In re Arm, 87 F.3d 1046 (9th Cir. 1996)

§ 523(a)(2)

Indirect benefit from fraud in which debtor participates is sufficient to find debt is nondischargeable.

In re Lauricella, 105 B.R. 536 (9th Cir. B.A.P. 1989)

Insufficient evidence to connect debtor with check kiting scheme of his corp.

In re Figge, 94 B.R. 654 (Bankr. C.D. Cal. 1988), *aff'd*, 928 F.2d 1136 (9th Cir. 1991)

Wife not liable for husband's participation in fraud.

In re Lansford, 822 F.2d 902, 904 (9th Cir. 1987)

Liability of wife for husband's fraud

DISCHARGEABILITY - Time for filing Nondischargeability Actions

Kontrick v. Ryan, 124 S.Ct. 906 (2004)

Rule 4004(a) time limit is not jurisdictional, and may be waived by the debtor. Debtor might have raised the issue in his amended answer, or perhaps even at any time up to the time of trial, but failed to do so. Court does not decide whether the time limit might be softened on equitable grounds.

In re Staffer, 306 F.3d 967 (9th Cir.2002)

Under Bankruptcy Rule 4007(b), a non- § 523(c) dischargeability complaint can be brought at any time (except where laches is found). The case need not be reopened to bring a complaint.

In re Bryan, 261 B.R. 240 (9th Cir. B.A.P. 2001)

Genuine issue of material fact existed as to when complaint was submitted to bankruptcy court for filing. Court had a drop box system whereby anything left in the box "would be time-stamped with that day's date."

In re Williams, 185 B.R. 598 (9th Cir. B.A.P. 1995)

Some objective evidence is required to rebut mailbox presumption (clerk's declaration, mail stamped, etc.)

In re De la Cruz, 176 B.R. 19 (9th Cir. B.A.P. 1994)

Creditor's complaint to determine dischargeability of claim untimely despite her attorney's statement that he did not receive notice of meeting of creditors. Mailbox rule - excusable neglect does not apply under 4007(c).

In re Santiago, 175 B.R. 48 (9th Cir. B.A.P. 1994)

No time limit on filing action to determine dischargeability of unscheduled debt when creditor does not receive notice of proceedings.

In re Halstead, 158 B.R. 485 (9th Cir. B.A.P. 1993), *aff'd*, 53 F.3d 253 (9th Cir. 1995)

Creditors who relied on filing-bar date stated in bankruptcy court's second notice extending complaint were entitled to equitable relief after notice was vacated. Must have at least 30 days to meet time limit.

In re Gordon, 988 F.2d 1000 (9th Cir. 1993)

Sixty day period runs from date first set for First Meeting of Creditors, not from date it is actually held.

In re Kennerley, 995 F.2d 145 (9th Cir. 1993)

Filing motion for relief is not the same as a complaint objecting to dischargeability or request for extension.

In re Marino, 37 F.3d 1354 (9th Cir. 1994)

Objection to sale does not constitute substantial compliance with time limits for filing § 523 complaint.

In re Dewalt, 961 F.2d 848 (9th Cir. 1992)

Dismissal of creditor's dischargeability complaint improper where notice of bankruptcy received only seven days before claim deadline bar.

In re Anwiler, 115 B.R. 661 (9th Cir. B.A.P. 1990), *aff'd,* 958 F.2d 925 (9th Cir. 1992), *cert. denied*, Anwiler v. Patchett, 506 U.S. 882 (1992)

"Unique circumstances" doctrine justified allowance of late filed dischargeability complaint. (Two notices, one in original court and one in second court.)

In re Albert, 113 B.R. 617 (9th Cir. B.A.P. 1990)

Multiple extensions of filing period okay.

In re Gunn, 111 B.R. 291 (9th Cir. B.A.P. 1990)

Amended creditor's complaint may relate back to original filing if no prejudice to debtor.

In re Bucknum, 105 B.R. 25 (9th Cir. B.A.P. 1989), *aff'd*, 951 F.2d 204 (9th Cir. 1991)

Scheduled creditor not entitled to rely o bankruptcy clerk's duty to notify as to when nondischargeability complaints are due.

In re Neese, 87 B.R. 609 (9th Cir. B.A.P. 1988)

Time for filing cannot be extended once sixty days has run.

In re Ricketts, 80 B.R. 495 (9th Cir. B.A.P. 1982)

Creditor who was not listed but had actual notice of the bankruptcy could not get extension to file complaint after time had run.

In re Hill, 811 F.2d 484, 487 (9th Cir. 1987)

No discretion to extend time for filing complaint once time has expired.

DISCHARGEABILITY - Effect on innocent spouse's property

In re Soderling, 998 F.2d 730 (9th Cir. 1993)
Married California debtor's federal criminal restitution judgment nondischargeable as to community property

In re Maready, 122 B.R. 378 (9th Cir. B.A.P. 1991)
Must determine whether a claim is a community claim before you can reach community property

In re LaSuer, 53 B.R. 414 (Bankr. D. Az. 1985)
Dichargeability judgment against spouse may reach innocent spouse's postpetition community property but not her own property

DISCHARGEABILITY - 523(a)(1)

In re Savaria, 317 B.R. 395 (9th Cir. BAP 2004)

"We conclude that 11 U.S.C. § 523(a)(1)(B)(ii). . .applies to postpetition filing of a late return for prepetition taxes. Since the bankruptcy distribution priority created by 11 U.S.C. § 507(a)(8)(A)(iii) and the exception to discharge created by § 523(a)(1)(B) are mutually exclusive, it follows that the postpetition filing of a late income tax return does not promote the tax debt to priority status."

In re George, 361 F.3d 1157 (9th Cir. 2004)

Claim by California Uninsured Employers Fund against employer who failed to purchase workers' compensation insurance was not "excise tax" for purposes pf bankruptcy law.

In re Bliemeister, 296 F.3d 858 (9th Cir. 2002)

Following *DeRoche,* where employee was injured in 1993 and bankruptcy not filed until 1998, transaction occurred more than three years before bankruptcy.

In re DeRoche, 287 F.3d 751 (9th Cir. 2002)

A "transaction" under Arizona Special Fund is the act of employing a worker without carrying the required insurance when the worker is injured; the date of the transaction for purposes of determining the three-year period of nondischargeability under the bankruptcy code is the date on which the worker is injured.

In re Hatton, 220 F.3d 1057 (9th Cir. 2000)

Return filed by I.R.S. and agreed to by taxpayer did not satisfy statutory requirement for filing of return as prerequisite to dischargeability of tax debt.

In re Jackson, 184 F.3d 1046 (9th Cir. 1999)

Filing a return with the IRS was tantamount to filing with the FTB.

In re Nunez, 232 B.R. 778 (9th Cir. B.A.P. 1999)

Tax Forms filed by debtor after IRS independently calculated debtor's tax liability were "returns" for purposes of bankruptcy discharge statute.

In re Rowley, 208 B.R. 942 (9th Cir. B.A.P. 1997)

Husband and wife did not fail to file mandatory "return" for purposes of discharge by failing to notify state when I.R.S. imposes tax deficiency assessment.

In re Vitaliano, 178 B.R. 205 (9th Cir. B.A.P. 1995)

I.R.S. agent's report on changes in individual's tax returns not "notice" to state tax board for purposes of statute that sets time limits for board's assessing deficiency based upon changes.

"[O]ther than a tax specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of this case . . .

"The trial court rule that since the taxes were properly assessable (and did not come within the definition of 11 U.S.C. section 523(a)(1)(B) or (C)), they were allowed priority claims under 11 . . . "

In re Camilli, 94 F.3d 1330 (9th Cir. 1996), *cert. denied*, Camilli v. Industrial Com'n of Arizona, 519 U.S. 1113 (1997)

Claim by state agency for reimbursement of workers' compensation benefits paid to debtor's employee does not constitute nondischargeable excise tax. It is a fee.

In re Bracey, 170 B.R. 398 (9th Cir. B.A.P. 1994), *aff'd in part and reversed in part*, 77 F.3d 294 (9th Cir. 1996)

Discharge of Franchise Tax Board obligations - when a protest is "filed." See also In re King, 961 F.2d 1423 (9th Cir. 1992).

In re King, 122 B.R. 383 (9th Cir. B.A.P. 1991), *aff'd*, 961 F.2d 1423 (9th Cir. 1992)

Tax assessment not dischargeable when 60 day final period fell within 240 days of petition

In re George, 95 B.R. 718 (9th Cir. B.A.P. 1989), *aff'd*, George v. Calif. State Bd. Of Equalization, 905 F.2d 1540 (9th Cir. 1990)

Responsible officer liability is a nondischargeable tax.

DISCHARGEABILITY - 523(a)(2)

In re Weinberg, 410 B.R. 19 (9th Cir. 2009)

Under the five-part test of *In re Slyman,* 234 F.3d 1081 (9th Cir. 2001), court finds in favor of the defendant based on a failure to prove intent to defraud.

In re Boyajian, 564 F.3d 1088 (9th Cir. 2009)

For purposes of § 523(a)(2)(B), only the lender who extended the original credit need have reasonably relied on a false financial statement, not the assignee of the loan.

In re Sabban, 384 B.R. 1 (9th Cir. BAP 2008)

Where state court did not find that damages were sustained by plaintiff because of unlicensed contractor's misrepresentations or fraud under California Business and Professions Code § § 7031(b) and 7160, § 523(a)(2) did not apply.

In re McGee, 359 B.R. 764, 771 (9th Cir. BAP 2006)

Bankruptcy court properly denied default judgment for a payday lender on its dischargeability complaint, where it found at the prove-up hearing that justifiable reliance was a material fact at issue, given the loan's 190.37% interest rate.

In re Vee Vinhnee, 336 B.R. 437 (9th Cir. BAP 2005)

Creditor's electronic business record were properly not admitted into evidence sua sponte, resulting in judgment for the debtor in this credit card case.

In re Cossu, 410 F.3d 591 (9th Cir. 2005)

Debt to insurance company (to extent the company had a valid claim) would be nondischargeable, where he falsely stated in a questionnaire that he was not selling unregistered securities and not engaged in any outside business.

Muegler v. Bening, 413 F.3d 864 (9th Cir. 2005)

"It is only the fact of an adverse fraud judgment, and nothing more, that is required for a debt to be nondischargeable." The debtor does not need to have received a benefit from the fraud.

In re Slyman, 234 F.3d 1081 (9th Cir. 2000)

"The five elements, each of which the creditor must prove by a preponderance of the evidence, are: (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4)justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by it's reliance on the debtor's statement or conduct."

In re Stearman, 256 B.R. 788 (9th Cir. B.A.P. 2000)

Debtor did not have an intent to deceive when she signed a promissory note, where she was expecting to receive a large inheritance from which she could repay the loan. This was true even though she was insolvent at the time of the loan even accounting for the inheritance and was in

chapter 13.

In re Kong, 239 B.R. 815 (9th Cir. B.A.P. 1999)
Even though gambler did not meet all of the Anastas factors (i.e. offer to enter into repayment plan, etc.), unreasonable belief in his ability to repay cash advances was not tantamount to fraud. No reckless indifference established.

In re Maldonado, 228 B.R. 735 (9th Cir. B.A.P. 1999)
Debtor may not discharge leaseback obligation if debtor could have anticipated that third party would rely on false financial information in deciding whether to take assignment of debt.

In re Ettell, 188 F.3d 1141 (9th Cir. 1999)
Court need not make findings as to all Daugherty factors in credit card cases.

In re Smith, 242 B.R. 694 (9th Cir. B.A.P. 1999)
Debtor could not discharge debt for purchase of business after presenting false financial statement during third-party meetings attended by seller.

In re Cobe, 229 B.R. 15 (9th Cir. B.A.P. 1998)
State Court award based on finding of intentional misrepresentation satisfied elements for nondischargeability.

In re Tallant, 218 B.R. 58 (9th Cir. B.A.P. 1998)
Attorney's failure to reveal $3 million in personal debts on law practice's profit and loss statement did not render statement materially false under 523(a)(2)(B). Debt found nondischargeable under (a)(2)(A)

In re Barrack, 217 B.R. 598 (9th Cir. B.A.P. 1998)
Creditor's claim for nondischargeability based on wilful and malicious injury not supported by same facts that failed to support claim that debtors misrepresented financial condition.

Cohen v. De La Cruz, 523 U.S. 213(1998)
Treble damages and costs awarded on account of debtor's fraud subject to exception from bankruptcy discharge

In re Gergely,110 F.3d 1448 (9th Cir. B.A.P. 1997), *aff'd*, 11 Fed.Appx. 705 (9th Cir. 2000)
Debtor-physician not entitled to discharge of debt based on malpractice in performing procedure performed on creditor's mother because of misrepresentation.

In re Lund, 202 B.R. 127 (9th Cir. B.A.P. 1996)
Landlord's testimony that debtor tenants reneged on promise to pay back rent from lawsuit proceeds did not support nondischargeability of debt for fraud.

In re Anastas, 94 F.3d 1280 (9th Cir. 1996)

"We have previously held that reckless disregard for the truth of a representation satisfies the element that the debtor has made an intentionally false representation in obtaining credit. *Houtman v. Mann (In re Hautman)*, 568 F.2d 651, 656 (9th Cir. 1978). However, in applying the concept of reckless disregard for the truth of a representation in the case of credit card debt, we must be careful to keep in mind that the representation being made by the card holder is solely as to *intent* to repay, not as to the debtor's *ability* to repay. Thus, courts faced with the issue of dischargeability of credit card debt must take care to avoid forming the inquiry under section 523(a)(2)(A) as whether the debtor recklessly represented his financial condition. The correct inquiry is whether the debtor either intentionally or with recklessness as to its truth or falsity, made the representation that he intended to repay the debt.

"As we emphasized in *Eashai*, the other elements of fraud normally required in section 523(a)(2)(A) cases also apply in the case of credit card debt. *Eashai*, 87 F.3d at 1088. Thus, to find an individual credit card charge non-dischargeable the bankruptcy court must also find justifiable reliance by the card issuer on the card holder's representation of intent to repay, and must find that representation and the card issuer's reliance on it was the proximate cause of the credit card debt sought to be discharged. As we explained in *Eashai*, the credit card issuer justifiably relies on a representation of intent to repay as long as the account is not in default and any initial investigations into a credit report do not raise red flags that would make reliance unjustifiable. *Eashai*, 87 F.3d at 1091."

In re Eashai, 87 F.3d 1082 (9th Cir. 1996)

Kiting credit cards.

Field v. Mans, 516 U.S. 59(1995)

In re Arm, 87 F.3d 1046 (9th Cir. 1996)

"We make clear, what we have not held before, that the indirect benefit to the debtor from a fraud in which he participates is sufficient to prevent the debtor from receiving the benefits that bankruptcy law accords the honest person. *See In re Ashley*, 903 F.2d 599, 604, n. 4 (9th Cir. 1990)."

In re Candland, 90 F.3d 1466 (9th Cir. 1996)

§ 523(a)(2)(B). Significant misrepresentations of financial condition of type which would generally affect lender's or guarantor's decision are "material" for purposes of nondischargeability.

In re Alvi, 191 B.R. 724 (Bankr. N.D. Ill. 1996)

(Ginsberg) *Mans* applied to credit card.

In re Lee, 186 B.R. 695 (9th Cir. B.A.P. 1995)

Credit card shopping spree. *In re Ward* disapproved.

In re Apte, 180 B.R. 223 (9th Cir. B.A.P. 1995), *aff'd*, 96 F.3d 1319 (9th Cir. 1996)

Justifiable reliance - (a)(2) and (6) not mutually exclusive.

In re Arm, 175 B.R. 349 (9th Cir. B.A.P. 1994), *aff'd*, 87 F.3d 1046 (9th Cir. 1996)
Benefit to debtor need not be direct.

In re Berr, 172 B.R. 299 (9th Cir. B.A.P. 1994)
FDIC can only rely on D'Oench Duhme doctrine where there is a disde agreement between the bank and the debtor.

In re Aboukhater, 165 B.R. 904 (9th Cir. B.A.P. 1994)
Conclusory allegations unsupported by specific facts justified dismissal.

In re Kim, 163 B.R. 157 (9th Cir. B.A.P. 1994), *aff'd*, 62 F.3d 1511 (9th Cir. 1995)
No new money requirement for an extension or renewal. Only need to show that it had valuable collection remedies at the time of the extension or renewal, that it did not exercise those remedies due to reliance on debtor's misrepresentations, and that those remedies lost value as a proximate result.

In re Yarbrow, 150 B.R. 233 (9th Cir. B.A.P. 1993)
Under the D'Oench, Duhme doctrine, bank does not need to prove reasonable reliance. Collateral estoppel applied as to fraud.

In re Begun, 136 B.R. 490, 494 (Bankr. S.D. Ohio 1992)
"False Pretense" involves an implied misrepresentation or conduct intended to create or foster a false impression . . . . A false pretense has been defined to include a "mute charade" where the debtor's conduct is designed to convey an impression without oral representation. . . . . A "false representation" on the other hand is an expressed misrepresentation.

In re Kirsh, 973 F.2d 1454 (9th Cir. 1992)
1. Test is justifiable reliance, not reasonable reliance; per curiam; judge concurring on grounds creditor had not reasonably relied.
2. § 523(a)(2)(B) only applies where the document sets forth the debtor's net worth or overall financial condition.

In re Siriani, 967 F.2d 302, 304 (9th Cir. 1992)
§ 523(a)(2)(B).
"This court has not previously ruled on what a creditor must prove in a nondischargeability action under section 523(a)(2)(B). However, we have held that, to recover under companion section 523(a)(2)(A), the creditor must show:
(1) a representation of fact by the debtor,
(2) that was material
(3) that the debtor knew at the time to be false,
(4)that the debtor made with the intention of deceiving the creditor,
(5) upon which the creditor relied,
(6) that the creditor's reliance was reasonable,
(7) that damage proximately resulted from the misrepresentation."

Same test applies in both (a)(2)(A) and (B) cases. *Siriani* concentrates on burden of proof regarding proximate cause - did creditor have reasonable prospects of collecting - and reasonable reliance.

In re Levy, 951 F.2d 196 (9th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992)
Punitive damage award not excepted from discharge under § 523(a)(2).

In re Britton, 950 F.2d 602 (9th Cir. 1991)
Debtor's misrepresentation of himself as doctor rendered subsequent judgment against him for fraud nondischargeable.

In re Franklin, 922 F.2d 536 (9th Cir. B.A.P. 1991)
Debtors could not invoke state's anti-deficiency judgment laws as defense to creditor's nondischargeability action for fraud - Creditor held guarantee secured by DOT on debtor's house.

In re Howarter, 114 B.R. 682 (9th Cir. B.A.P. 1990)
Creditor must prove reasonable reliance on debtor's misrepresentations to establish nondischargeability.

In re Neal, 113 B.R. 607 (9th Cir. B.A.P. 1990)
Cash loans not same as luxury goods and services for nondischargeability finding.

In re Hultquist, 101 B.R. 180 (9th Cir. B.A.P. 1989)
§ 523(a)(2)(A) - reasonable reliance - intent to deceive

In re Karelin, 109 B.R. 943 (9th Cir. B.A.P. 1990)
Debtor's withdrawal of funds beyond credit card limit ruled fraudulent.

In re Ashley, 903 F.2d 599 (9th Cir. 1990)
Judgment under § 523(a)(2) nondischargeable where debtor profits from loans he induced creditors to make to bankrupt corporation - Corporation, rather than debtor, received money. Review of right to fees under California law.

In re Ellwanger, 105 B.R. 551 (9th Cir. B.A.P. 1989)
Punitive damages discharged in § 523(a)(2).

In re Lewsadder, 84 B.R. 711 (Bankr. D. Or. 1988)

In re Rubin, 875 F.2d 755 (9th Cir. 1989)
Elements of § 523(a)(2); bad bookkeeping.

In re Dougherty, 84 B.R. 653 (9th Cir. B.A.P. 1988)
For credit card prerevocation charges to be found nondischargeable, card issuer had to prove that debt was incurred through actual fraud.

DISCHARGEABILITY - 523(a)(3)

In re Nielsen, 383 F.3d 922 (9th Cir. 2004)

Citing the concurrence in *Beezley*, court holds that failure to schedule a creditor in a no-asset case does not make the debt nondischargeable.

In re Beaty, 306 F.3d 914 (9th Cir. 2002)

Laches is available as a defense in a § 523(a)(3) action, but the defendant must show extraordinary circumstances and a compelling reason why the action should be barred.

In re Staffer, 306 F.3d 967 (9th Cir.2002)

Under Bankruptcy Rule 4007(b), a § 523(a)(3) complaint can be brought at any time (except where laches is found). A case need not be reopened to bring a complaint.

In re Beezley, 994 F.2d 1433 (9th Cir. 1993)

Per curiam: Refusal to reopen proper where it would be a useless act, since listing creditor would not discharge the debt.

Concurrence: Reopening was useless because the case was no asset and no bar date and therefore creditor's debt was discharged under §§ 523(a)(3)(A) and 727(b).

In re Bowen,102 B.R. 752 (9th Cir. B.A.P. 1989)

In re Price, 871 F.2d 97 (9th Cir. 1989)

Notice to creditor's counsel = notice to creditor.

In re Lochrie, 78 B.R. 257 (9th Cir. B.A.P. 1987)

§ 523(a)(3)(b) does not create a separate exception from discharge merely for the debtor's failure to schedule a creditor. Instead, the creditor must also have a cause of action under § 523(a)(2), (4), or (6). "Creditor is required" to make a showing of material prejudice to avoid proving its claim under (2), (4), or (6).

In re Fauchier, 71 B.R. 212 (9th Cir. B.A.P. 1987)

Careless error in address on schedule is enough under § 523(a)(3). Must first decide § 523(a)(3) issue, then decide (2), (4), and (6).

In re Laczko, 37 B.R. 676 (9th Cir. B.A.P. 1984), *aff'd by In re Laczko*, 772 F.2d 912 (9th Cir. 1985), *and Laczko v. Gentram, Inc.*, 772 F.2d 912 (9th Cir. 1985)

Chapter 7 debtor may not reopen case to add creditors after time for filing document had passed.

DISCHARGEABILITY– 523(a)(4)

In re Weinberg, 410 B.R. 19 (9th Cir. 2009)

1) Arizona Trust Fund Doctrine, in which a corporate officer becomes liable to creditors when the corporation transfers assets to the officer while the company is insolvent, was an express trust for purposes of 523(a)(4). 2) Bankruptcy court properly applied the balance sheet test for determining insolvency.

In re Munton, 352 B.R. 707 (9th Cir. BAP 2006)

Affirmative defenses not raised in prior state court action in which default was taken against the debtor may not be raised in subsequent nondischargeability proceeding. Texas statute contractor's statute exhibited the characteristics of an express or technical trust for purposes of § 523(a)(4).

In re Cantrell, 329 F.3d 1119 (9th Cir. 2003)

A corporate officer is not a fiduciary under § 523(a)(4).

In re Bigelow, 271 B.R. 178 (9th Cir. B.A.P. 2001)

Because money given to attorney-debtor was a classic retainer, the debtor was not required to deposit it in his trust account. Because there were no trust funds, 523(a)(4) was inapplicable.

In re Cantrell, 329 F.3d 1119 (9th Cir. 2003)

Corporate officer, director and/or controlling shareholder was not trustee of statutory trust under California law and therefore did not qualify as fiduciary for purposes of claim of non-dischargeability for fraud.

In re Jacks, 266 B.R. 728 (9th Cir. B.A.P. 2001)

Fiduciary duty owed by officers and directors of an insolvent corporation under California law was actionable under 523(a)(4), but only if the corporation was insolvent at the time of the defalcation.

In re Banks, 263 F.3d 862 (9th Cir. 2001)

When debtor/attorney placed the plaintiff/client's funds into his trust account, he became his client's fiduciary.

In re Hemmeter, 242 F.3d 1186 (9th Cir. 2001)

ERISA fiduciaries are fiduciaries within the meaning of 523(a)(4). However, no defalcation occurred, since the fiduciary's poor investments did not involve failure to account for or produce a beneficiary's funds.

In re Abrams, 229 B.R. 784 (9th Cir. B.A.P. 1999), *aff'd*, 242 F.3d 380 (9th Cir. 2000)

Second-tier general partner properly deemed fiduciary of first-tier limited partnership.

In re Stanifer, 236 B.R. 709 (9th Cir. B.A.P. 1999)

Debtor's breach of fiduciary duty with regard to pension benefits barred discharge of debt incurred as result of failure to share benefits with ex-spouse.

In re Wada, 210 B.R. 572 (9th Cir. B.A.P. 1997)

Travel agent's embezzlement of client monies precluded discharge

In re Gergely, 110 F.3d 1448 (9th Cir. B.A.P. 1997)

Med malpractice not subject to (a)(4) since there is no express trust

In re Niles, 106 F.3d 1456 (9th Cir. 1997)

Test for defalcation - need not show improper conduct; need only show that money was not turned over by fiduciary. Once plaintiff establishes express trust and fiduciary relationship, burden shifts to debtor to establish no defalcation

In re Byron v. Lewis, 97 F.3d 1182 (9th Cir. 1996)

Arizona partner's failure to account for partnership constitutes defalcation that can bar discharge

In re Bugna, 33 F.3d 1054 (9th Cir. 1994)

Relationship of partner and real estate broker sufficient to satisfy 523(a)(4) re fiduciary capacity, citing *Woolsey*.

In re Evans, 161 B.R. 474 (9th Cir. B.A.P. 1993)

State court judgment finding a fiduciary relationship between plaintiff and defendant not collateral estoppel, where defendant real estate broker never held a trust res.

In re Stokes, 142 B.R. 908 (Bankr.N.D. Cal. 1992)

Lawyer is not a fiduciary to client under §523(a)(4) except as to client's money.

In re Rose, 934 F.2d 901, 903 (7th Cir. 1991)

"Larceny is proven for 523(a)(4) purposes if the debtor has wrongfully and with fraudulent intent taken property from its owner"

In re Littleton, 942 F.2d 551 (9th Cir. 1991)

Definition of embezzlement

In re Baird, 114 B.R. 198 (9th Cir. B.A.P. 1990)

1. Arizona statutory trust sufficient to create a fiduciary relationship.
2. Defalcation committed.
3. Debtor as sole corporate officer responsible for final disbursement is liable.

In re Woosley, 117 B.R. 524 (9th Cir. B.A.P. 1990)

Debt incurred through fraud by real estate agent acting in fiduciary capacity

nondischargeable. Fiduciary relationship found even though agent acting as loan broker. Without citing *Hooper*, case seems to hold that mere status as real estate broker and fiduciary status under California statutes is sufficient.

In re Hooper, 112 B.R. 1009 (9th Cir. B.A.P. 1990)
Mere status as real estate broker not sufficient to confer fiduciary status, where broker never held anything in trust or that debt done from any real estate transaction she brokered. (Check this sentence)

In re Hultquist, 101 B.R. 180, 185 (9th Cir. B.A.P. 1989)
Fiduciary status of corporate officer is not the same as a fiduciary under (a)(4).

In re Pedrazzini, 644 F.2d 756 (9th Cir. 1981)
California statutes do not impose fiduciary duty on general contractor.

Ragsdale v. Haller, 780 F.2d 794 (9th Cir. 1986)
Partners under California law are fiduciaries as to partnership property.

In re Short, 818 F.2d 693 (9th Cir. 1987)
Joint venturers under Washington law are fiduciaries as to joint property.

In re Schneider, 99 B.R. 974 (9th Cir. B.A.P. 1989)
Complete review of § 523(a)(4) - what is fiduciary capacity.

In re Graziano, 35 B.R. 589, 594 (Bankr. E.D.N.Y. 1983)
Embezzlement = "fraudulent appropriation by a person to whom such property has been entrusted or into whose hands it has lawfully come."

In re Gonzales, 22 B.R. 58 (9th Cir. B.A.P. 1982)
Subcontractor used trust fund money to pay others. Held, "Not necessary to prove an intentional wrong by a debtor where it is shown that debtor committed a defalcation with respect to funds held in trust."

DISCHARGEABILITY - § 523(a)(5)

In re Cervantes, 219 F.3d 955 (9th Cir. 2000)
In re Leibowitz, 217 F.3d 799 (9th Cir. 2000)

An absent parent who owes money to a county for child support payments, but as to which no child support order has yet entered, may not discharge the debt in either a chapter 7 or chapter 13 case.

In re Seixas, 239 B.R. 398 (9th Cir. B.A.P. 1999)

Former spouse's contractual promise under marital settlement agreement to pay half of children's college education expenses constituted nondischargeable "child support" obligation.

In re Foross, 242 B.R. 692 (9th Cir. B.A.P. 1999)

Post-petition interest on nondischargeable child support debt is nondischargeable.

In re Lowenchuss, 170 F.3d 923 (9th Cir. 1999)

Where divorce court decided prepetition that wife was entitled to 38% of pension plan, no money judgment to discharge - property in plan belonged to wife.

In re Chang, 210 B.R. 578 (9th Cir. B.A.P. 1997) *reversed*, 163 F.3d 1138 (9th Cir. 1998), *cert. denied*, 526 U.S. 1149 (1999)

B.A.P. held that fees for evaluation and guardian *ad litem* services incurred during child custody trial were not child support and were therefore dischargeable. 9th Circuit reversed holding that (1) debts for professional fees and expenses arising from child custody proceeding were in nature of child support; (2) debts fell within child support discharge exception; and (3) father and guardian were entitled to priority in debtor's plan.

In re Jodoin, 209 B.R. 132 (9th Cir. B.A.P. 1997)

"The final determination of what portions of the judgment constitute nondischargeable alimony, support, or maintenance is a question of federal law. *Gionis v. Wayne (In re Gionis),* 170 B.R. 675, 681 (9th Cir. B.A.P. 1994) (citing *Shaver*, 736 F.2d at 1316); *see also Stout*, 691 F.2d at 861 (citing H.R. Rep. No. 95-595, at 364, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6320). Therefore, the labels used by the state court in determining the Judgment were not binding on the bankruptcy court. An independent review of the Judgment and factual inquiry into the true nature of any support was certainly within the power and discretion of the bankruptcy court. *Gionis*, 170 B.R. at 681; *Sweck v. Sweck (In re Sweck)*, 174 B.R. 532, 534 (Bankr. D.R.I. 1994) (The Code necessitates that the bankruptcy court 'determine the nature of the debts, regardless of the labels placed on them by the parties or the family court.'). However, '[w]here the award was rendered in a contested proceeding, another relevant fact is the intent of the state court.' *Gionis*, 170 B.R. at 682."

In re Crouch, 199 B.R. 690 (9th Cir. B.A.P. 1996)

Debt to count for costs incurred while debtor's minor son was incarcerated in juvenile facility was dischargeable.

In re Sternberg, 85 F.3d 1400 (9th Cir. 1996), *overruled by* In re Bammer, 131 F.3d 788 (9th Cir. 1997)

Finding that debtor and former spouse intended to create a spousal support obligation is plausible in light of evidence of need for spousal support and "label" in marital settlement agreement.

In re Gendreau, 122 F.3d 815 (9th Cir. 1997), *cert. denied*, 532 U.S. 1005 (1998)

Order which purported to be a Qualified Domestic Relationship Order under ERISA created a property interest, not a debt, and thus could not be discharged.

In re Kritt 190 B.R. 382 (9th Cir. B.A.P. 1995)

Wife may claim former husband's marital settlement obligation as nondischargeable spousal support despite failure to claim payments as income on federal and state filings.

In re Gionis, 170 B.R. 675 (9th Cir. B.A.P. 1994), *aff'd*, 92 F.3d 1192 (9th Cir. 1996)

Wife's attorney's fees nondischargeable under the facts based on need.

In re Sirigusa, 27 F.3d 406 (9th Cir. 1994)

Where bankruptcy court discharged a 1.2 million dollar property settlement, it was not a violation of § 524 to seek a modification of the alimony in Domestic Relationship Court. Bankruptcy court properly abstained from § 523(a)(5) issue.

In re McCoy, 111 B.R. 276 (9th Cir. B.A.P. 1990)

Nondebtor spouse not liable for post-separation/pre-dissolution debts of debtor/spouse.

In re Combs, 101 B.R. 609 (9th Cir. B.A.P. 1989)

Eight factors for determining dischargeability.

Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984)

Standard for determining § 523(a)(5) cases.

In re Gibson, 103 B.R. 218 (9th Cir. B.A.P. 1989)

Attorney fees are not = alimony, etc.

DISCHARGEABLITY - § 523(a)(6)

In re Weinberg, 410 B.R. 19, 36 (9th Cir. BAP 2009)

Dispute concerned a breach of an employment agreement without an associated tort, and thus was not covered by § 523(a)(6).

In re Suarez, 400 B.R. 732,734 (9th Cir. BAP 2009)

A chapter 7 debtor may not discharge a judgment for attorneys fees and costs even if that is the only monetary liability imposed on her for contempt for violating a court order. Contempt is not per se nondischargeable under § 523(a)(6), but must be premised on willful and malicious conduct.

In re Baboza, 545 F.3d 702, 706 (9th Cir. 2008)

In granting summary judgment to the holder of a copyright infringement judgment under § 523(a)(6), the bankruptcy court erred in not making a specific finding of both a willful and malicious injury. "The malicious injury requirement is separate from the willful injury requirement." Moreover, "willful" for purposes of copyright infringement is different from "willful" for purposes of **§** 523(a)(6), sincwe in the infringement context, recklessness may be sufficient to establish willfulness.

Lockerby v. Sierra, 535 F.3d 1038 (9th Cir. 2008)

Section 523(a)(6) only applies to conduct that is an intentional tort under state, and the intentional breach of a contract does not qualify as such under Arizona law.

Ditto v. McCurdy, 510 F.3d 1070, 1077 (9th Cir. 2007)

"The failure to obtain informed consent, without evidence of intent to injure, does not give rise to a willful and malicious injury within the meaning of § 523(a)(6)."

In re Sicroff, 401 F.3d 1101 (9th Cir. 2005), *cert. denied*, 545 U.S. 1139, 125 S.Ct. 2964 (2005)

State court judgment for libel was nondischargeable under 523(a)(6).

In re Peck, 295 B.R. 353 (9th Cir. B.A.P. 2003)

False accusations of child molestation were slanderous, and nondischargeable under § 523(a)(6).

In re Thiara, 285 B.R. 420 (9th Cir. B.A.P. 2002)

Failure to turnover insurance proceeds to secured creditor constituted a conversion under California law, but in the absence of a finding of subjective intent to harm, it could not be deemed a nondischargeable debt.

In re Su, 290 F.3d 1140 (9th Cir. 2002)

" § 523(a)(6) renders debt nondischargeable when there is either a subjective intent to harm, or a subjective belief that harm is substantially certain.**"** In order to prove maliciousness, there must be a wrongful act, done intentionally, which necessarily causes injury and is done

without just cause or excuse.

In re Jacks, 266 B.R. 728 (9th Cir. B.A.P. 2001)

Summary judgment for the defendant should not have been granted, where there was a genuine issue of material fact as to whether the defendant intended to injure plaintiff in having a corporation issue a guarantee of his personal obligations.

In re Peklar, 260 F.3d 1035 (9th Cir. B.A.P. 2001)

"A judgment for conversion under California substantive law decides only that the defendant has engaged in the "wrongful exercise of dominion" over the personal property of the plaintiff. It does not necessarily decide that the defendant has caused "willful and malicious injury" within the meaning of § 523(a)(6)."

In re Jercich, 238 F.3d 1202 (9th Cir. 2001), *cert. denied*, 533 U.S. 930 (2001)

Although a simple breach of contract is not actionable under § 523(a)(6), "where an intentional breach of contract is accompanied by tortious conduct which results in willful and malicious injury, the resulting debt is excepted from discharge under § 523(a)(6)." Tortious conduct does not have to be independent of the breach of contract. Here, debtor was found to have the "clear ability" to pay wages, but willfully "chose not to."

"We hold...that under *Geiger,* the willful injury requirement of § 523(a)(6) is met when it is shown either that the debtor had a subjective motive to inflict the injury *or* that the debtor believed that injury was substantially certain to occur as a result of his conduct."

In re Baldwin, 249 F.3d 912 (9th Cir. 2001)

Defendant in state court who defaulted to battery claim was collaterally estopped from discharging debt under § 523(a)(6). Participation in beating of plaintiff established that debtor intended to injure or knew that his conduct was substantially certain to lead to injury.

In re Bailey, 197 F.3d 997 (9th Cir. 1999)

No lien in settlement proceeds, therefore no property interest and no conversion.

In re Sarbaz, 227 B.R. 298 (9th Cir. B.A.P. 1998)

Geiger applied retroactively.

Kawaauhau v. Geiger, 523 U.S. 57(1998)

(a)(6) only covers acts done with the actual intent to cause injury. Negligence or recklessness not enough.

In re Bammer, 131 F.3d 788 (9th Cir. 1997)

Fraudulent conveyance judgment debt is dischargeable in bankruptcy absent finding of malicious intent. Reversed 11/20/97. No such thing as fraud committed with just cause or excuse.

In re Gergely, 110 F.3d 1448 (9th Cir. 1997)

Medical malpractice is not the same as willful and malicious injury - no certainty or near

certainty that act would cause harm.

In re Saylor, 108 F.3d 219 (9th Cir. 1997)
Creditor has no property interest in remedies under state fraudulent transfer statute that supports exception from discharge of debt for willful and malicious injury to property.

In re Lund, 202 B.R. 127 (9th Cir. B.A.P. 1996)
Debtors who failed to act in maintaining condition of dwelling not liable under (a)(6).

In re Kelly, 182 B.R. 255 (9th Cir. B.A.P. 1995), *aff'd*, 100 F.3d 110 (9th Cir. 1996)
Attorney malpractice based on gross negligence does not constitute "willful and malicious injury" precluding discharge of resulting judgment debt.

In re Gee, 173 B.R. 189 (9th Cir. B.A.P. 1994)
Judgment for sex discrimination constitutes willful and malicious injury.

In re Florida, 164 B.R. 636 (9th Cir. B.A.P. 1994)
Debtor with RICO judgment against him; collateral estoppel as to all damages and attorney fees.

In re Zelis, 161 B.R. 469 (9th Cir. B.A.P. 1993), *aff'd in part, reversed in part*, 66 F.3d 205 (9th Cir. 1995)
Sanctions by state court met *Cecchini* test - affirmed, but the settlement with Pay as to second sanction satisfied Zelis' liability.

In re Riso, 978 F.2d 1151 (9th Cir. 1992)
Breach of right of first refusal was a breach of contract - "An intentional breach of contract is excepted from discharge under § 523(a)(6) only when it is accompanied by malicious and willful tortious conduct."

In re Britton, 950 F.2d 602 (9th Cir. 1991)
Punitive damages not discharged under § 523(a)(6). Review of standard.

In re Littleton, 942. F.2d 551 (9th Cir. 1991)
(a)(6) and (a)(4) - embezzlement

In re Itule, 114 B.R. 206 (9th Cir. B.A.P. 1990)
Willful conversion - calculation of damages.

In re Keller, 106 B.R. 639 (9th Cir. B.A.P. 1989)
§ 523(a)(6) - legal malpractice.

In re Littleton, 106 B.R. 632 (9th Cir. B.A.P. 1989), *aff'd*, 942 F.2d 551 (9th Cir. 1991)
Embezzlement. Failure to pay creditors according to terms of security agreement does not

constitute willful and malicious injury.

In re Karlin, 112 B.R. 319 (9th Cir. B.A.P. 1989), *aff'd*, 940 F.2d 1534 (9th Cir. 1991)
Privacy right - intentional tort.

In re Strybel, 105 B.R. 22 (9th Cir. B.A.P. 1989)
Psychiatrist's sexual liaison with a patient is not a nondischargeable debt- no malice. Disagreed with by In re Pattison, 132 B.R. 449 (Bankr. D.N.M. 1991).

In re Sharp, 102 B.R. 764 (9th Cir. B.A.P. 1989)
(1) Whether the appellant committed a wrongful and intentional act;
(2) whether such action produced harm;
(3) whether such action was without just cause or excuse.
Failure to explain shortage in trust account invokes (a)(6) and turn over funds.

In re Manser, 99 B.R. 434 (9th Cir. B.A.P. 1989)
Willful and malicious conversion - definition. Declined to follow by In re McLaughlin, 109 B.R. 14 (Bankr. D.N.H. 1989)

In re Wood, 96 B.R. 993 (9th Cir. B.A.P. 1988)
Willful and malicious injury standard.

In re Ellwanger, 105 B.R. 551 (9th Cir. B.A.P. 1989)
Punitive damages not dischargeable.. (Note: Judge had written date of 7/7/88, but no decisions corresponded to this date.)

In re Cecchini, 780 F.2d 1440 (9th Cir. 1986)
Adopts Collier's definition of willful and malicious. Intentional injury which necessarily causes harm, committed without justification or excuse (overruled by In re Geiger, supra).

DISCHARGEABILITY– 523(a)(7)

In re Findley, 387 B.R. 260 (9th Cir. BAP 2008)

California's amendment of Business and Professions Code § 6086.10 designating attorney discipline cost awards as "penalties" did not reverse the Ninth Circuit's decision in In re Taggart, 249 F.3d 987 (9th Cir. 2001), and thus were not non-dischargeable under § 523(a)(7).

In re Taggart, 249 F.3d 987 (9th Cir. 2001)

Costs (as opposed to sanctions) for California State Bar attorney discipline proceedings are dischargeable.

DISCHARGEABILITY - 523(a)(8)

In re Coleman, 560 F.3d 1000 (9th Cir. 2009)

Student loan undue hardship determinations are ripe for decision substantially in advance of completion of a chapter 13 plan.

McKay v. Ingleson, 558 F.3d 888 (9th Cir. 2009)

A student revolving credit account funded by her university was a student loan for purposes of this section.

In re Lewis, 506 F.3d 927 (9th Cir. 2007)

The 1998 amendments to § 523(a)(8) eliminating the seven-year exception to nondischargeability applied retroactively to student loans taken out prior to 1998 in a bankruptcy filed after the 1998 amendments.

In re Carnduff, 367 B.R. 120 (9th Cir. BAP 2007)

A bankruptcy court has the power to grant a partial discharge of a student loan even when the debtor's earning capacity is expected to improve, if that improvement will be insufficient for the debtor to pay the full balance without an undue hardship. But the burden is upon the debtor to establish undue hardship as to any portion of the debt sought to be discharged.

In re McBurney, 357 B.R. 536 (9th Cir. BAP 2006)

Postpetition consolidation loan extinguished the debtor's liability on prepetition student loans and is not vulnerable to attack under § 523(a)(8).

In re Mason, 464 F.3d 878 (9th Cir. 2006)

Debtor, who was an attorney, failed to meet the good faith branch of the *Brunner* test, where, among other things, he did not attempt to take the bar exam a second time.

In re Nys, 446 F.3d 938, 941 (9th Cir. 2006)

Second prong of the *Brunner* test "does not require an exceptional circumstance beyond the inability to pay now and for a substantial portion of the loan's repayment period." In addition, ". . .the debtor cannot purposely choose to live a lifestyle that prevents her from repaying her student loans. Thus, the debtor cannot have a reasonable opportunity to improve her financial situation, yet choose not to do so." 446 F.3d at 946.

In re Howe, 319 B.R. 886 (9th Cir. BAP 2004)

Application of IRS collection standards for determining whether the debtor could maintain a minimal standard of living under the Brunner test was erroneous.

In re Hawkins, 317 B.R. 104 (9th Cir. B.A.P. 2004), *aff'd,* 469 F.3d 1316 (9th Cir. 2006)

Contract of admission, whereby debtor agreed to practice medicine in Ohio in exchange for subsidies for her education, was not an educational loan or benefit.

In re Birrane, 287 B.R. 490 (9th Cir. BAP 2002)

By failing to establish that she could not earn more money in future years, and failing to establish that she had maximized her income by seeking part time work and attempted to negotiate a repayment schedule under the Ford program, debtor failed to meet the second and third branches of the *Brunner* test.

In re Saxman, 325 F.3d 1168 (9th Cir. 2003)

Bankruptcy court has the power under § 105 to partially discharge a student loan, but only the portion which the debtor has proven imposes an undue hardship.

In re Blair, 291 B.R. 514 (9th Cir. B.A.P. 2003)

Court cannot grant partial discharge of a student loan unless it first finds undue hardship.

In re Rifino, 245 F.3d 1083 (9th Cir. 2001)

Student loan not dischargeable where debtor failed to show that hardship would persist for a significant portion of the repayment period.

In re Drysdale, 248 B.R. 386 (9th Cir. B.A.P. 2000), *aff'd*, 2 Fed.Appx. 776 (9th Cir. 2001)

Case law holding that student loan consolidation must be five years old to be eligible for discharge was applied retroactively.

In re Bernal, 207 F.3d 595 (9th Cir. 2000)

Assignee of student loan could not intervene, either permissively or as of right, in student loan dischargeability action, where default was entered before assignment. Assignee's only remedy was to obtain a substitution under Rule 25(c).

In re Nascimento, 241 B.R. 440 (9thCir. B.A.P. 1999)

Repayment of student loans would not result in undue hardship where debtor's budget retained ample room for "belt-tightening" and prospective child support obligation would last no more than several years.

In re Pena, 155 F.3d 1108 (9th Cir. 1998)

Under Bankruptcy Code, impossibility of both repaying government-guaranteed student loan and maintaining minimal living standard suffices to establish "undue hardship" exception to non-dischargeability by debtor who has tried to pay off loan.

In re Manriquez, 207 B.R. 890 (9th Cir. B.A.P. 1996)

Retroactive forbearance obtained more than seven years after student loans became due did not render loans nondischargeable

In re Thorson, 195 B.R. 101 (9th Cir. B.A.P. 1996)

Post due-date student loan deferment constitutes suspension of repayment deductible from repayment period when determining dischargeability of student loan debt

In re Pilcher, 149 B.R. 595 (9th Cir. B.A.P. 1993)
Statute applies even though loan only partially-funded by non-profit institution

In re Gustafson, 934 F.2d 216 (9th Cir. 1991)
State is immune from money damages for stay violation under the 11th Amendment.

DISCHARGEABILITY - 523(a)(9) - Drunk Driving

In re Steiger, 159 B.R. 907 (9th Cir. B.A.P. 1993)
criminal judgment meets requirements of (a)(9)

In re Hudson, 859 F. 2d 1418 (9th Cir. 1988)
claim need not be reduced to judgment prior to bankruptcy petition for statute to apply

DISCHARGEABILITY - 523(a)(15)

In re Dollaga, 260 B.R. 493 (9th Cir. B.A.P. 2001)

A person (in this case, the debtor's divorce lawyer)who is not a spouse, former spouse, or dependent of a debtor may not sue for nondischargeability under §523(a)(15).

Renfrow v. Draper, 232 F.3d 688 (9th Cir. 2000)

"...[I]f a divorce decree provides for the payment of attorney's fees, and state law issues are litigated in the bankruptcy proceedings, attorney's fees are available, but only to the extent that they were incurred litigating the state law issues....Ms. Renfrow is entitled to recover the attorney's fees she has incurred in litigating the validity and the amount of Mr. Draper's debts in the bankruptcy proceeding." She's also entitled to the attorney's fees she incurred in the state court proceedings before the bankruptcy was filed, and to reasonable costs in both the bankruptcy and state court action.

In re Myrvang, 232 F.3d 1116 (9th Cir. 2000)

In re Jodoin properly allocates the burden of proof under § 523(a)(15). The bankruptcy court has the discretion to discharge a portion of the debt in question. In re Taylor, 223 B.R. 747 (9th Cir. B.A.P. 1998) disapproved. But the imposition of a penalty provision if the debtor missed a payment was beyond the authority of the bankruptcy court.

In re Short, 232 F.3d 1018 (9th Cir. 2000)

1) Debt that was specifically incorporated into a decree of dissolution was "incurred in the course of a divorce or separation." 2) bankruptcy court properly took into account a live-in girl friend's income in determining whether the debtor had the ability to repay the debt.

In re Jodoin, 209 B.R. 132 (9th Cir. B.A.P. 1997)

Burden of proof between debtor and creditor - once plaintiff demonstrates that the debtor incurred the debt in connection with divorce, the burden shifts to the debtor to prove subsections (a) and (b). The word "unless" just prior to the subsection is crucial to this finding. It creates an exception within an exception

DISCHARGEABILITY - 523(a)(18)

In re Foster, 319 F.3d 495 (9th Cir. 2003)

Interest on nondischargeable child support continues to accrue after a chapter 13 petition is filed and survives a chapter 13 discharge.

In re Leibowitz, 217 F.3d 799 (9th Cir. 2000)

Debtor could not discharge unaccrued child support obligation assigned to county where bankruptcy petition came after changes in welfare law designed to make such debts nondischargeable.

In re Cervantes, 219 F.3d 955 (9th Cir. 2000)

An absent parent who owes money to a county for child support payments, but as to which no child support order has yet entered, may not discharge the debt in either a chapter 7 or chapter 13 case.

DISCHARGE- Objection to Discharge and Revocation

In re Caneva, 550 F.3d 755 (9th Cir. 2009)

Bankruptcy court properly denied debtor's discharge under § 727(a)(3) by summary judgment, where the debtor owned 15 business entities but had no records as to any of them. The debtor also had no documentation regarding a $500,000 brokerage fee for a $20 million loan. Debtor's conclusory statement in an affidavit that the circumstances of his businesses justified the absence of records was insufficient to rebut the plaintiff's prima facie case.

In re Khalil, 379 B.R. 163, 177 (9th Cir. BAP 2007)

"Debtor's discharge cannot be denied under § 727(a)(4) unless his false statements or omissions were made "knowingly and fraudulently." Recklessness by itself will not suffice, but recklessness combined with other circumstances can support an inference that he acted with knowing and fraudulent intent."

In re Beverly, 374 B.R. 221 (9th Cir. BAP 2007), *aff'd in part and dismissed in part,* 551 F.3d 1092 (9th Cir. 2008)

Debtor who, by way of a marital settlement agreement, exchanged his right to proceeds from the sale of the marital residence for wife's interest in an exempt ERISA-qualified pension plan, made a transfer with intent to hinder, delay or defraud under both California's UFTA and § 727(a)(2). The combination of the size of the transfer and the fact that it left the debtor with no assets with which to pay the debtor put this case outside the realm of legitimate pre-bankruptcy planning.

In re Hansen, 368 B.R. 868 (9th Cir. BAP 2007)

1. Debtor, who was an attorney, could not reasonably rely upon advice of counsel as to a deed of trust that was forged, and which purported to transfer to her mother a $115,000 security interest in her house; 2. Sheer number of inaccuracies in the schedules justified finding of knowing and fraudulent misrepresentations.

In re Roberts, 331 B.R. 876 (9th Cir. BAP 2005), *aff'd,* 241 Fed.Appx. 420 (9th Cir. 2007)

Lack of finding that the debtor knowingly made a false oath in failing to disclose items of income, and lack of finding of actual fraudulent intent, required that the denial of debtor's discharge under § 727(a)(4) be reversed.

In re Nielsen, 383 F.3d 922 (9th Cir. 2004)

Citing with approval In re Bowman, 173 B.R. 922 (9th Cir. BAP 2004), the court held that there must be a showing under § 727(d)(1) that fraud procured the discharge, rather than merely that "fraud was in the air."

In re Searles, 317 B.R. 368 (9th Cir. BAP 2004), *aff'd,* 212 Fed.Appx. 589 (9th Cir. 2006)

(1) Adversary proceeding under 11 U.S.C. § 727 was not mooted by conversion of case to chapter 13; (2) court correctly denied debtor's discharge under §§ 727(a)(2) and (4); complete review of Ninth Circuit law regarding those sections.

In re Yadidi, 274 B.R. 843 (9th Cir. B.A.P. 2002)

Section 105 does not provide an independent ground for denying debtor's discharge.

In re Wills, 243 B.R. 58 (9th Cir. B.A.P. 1999)

§727(a)(4) and (2) standards: Value of nondisclosed assets not sole criteria to consider in determining whether nondisclosure warranted denial of discharge.

In re Lawson, 122 F.3d 1237 (9th Cir. 1997)

Subordination of deed of trust on bankruptcy debtor's property by parent in favor of private lender supports inference that debtor retained secret benefit in residual equity in property. Continuing concealment doctrine.

Transfer not immune even though it occurred more than one year prior to filing.

In re Mereshian, 200 B.R. 342 (9th Cir. B.A.P. 1996)

Oral disclosure of assets and transfers at creditors' meeting of assets and property transfers supported finding that no fraud was intended.

In re Bernard, 96 F.3d 1279 (9th Cir. 1996)

Debtor's removal of money from bank account to avoid enforcement of judgment for creditor constitutes fraudulent "transfer" that precludes discharge.

In re Roosevelt, 87 F.3d 311 (9th Cir. 1996), *opinion amended*, 98 F.3d 1169 (9th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997)

For purpose of statute denying discharge for fraudulent property transfers, transfer occurs when quitclaim deed transfer executed, not when it's recorded.

In re Cox, 41 F.3d 1294 (9th Cir. 1994)

Wife's reliance on husband's record keeping justified.

"As we stated in our earlier opinion in this case, '[t]he purpose of [section 727] is to make the privilege of discharge dependent on a true presentation of the debtor's financial affairs.' *In re Cox,* 904 F.2d at 1401 (internal quotations and citations omitted). The initial burden of proof under § 727(a)(3) is on the plaintiff. Fed.R.Bank.P. 4005. 'In order to state a prima facie case under section 727(a)(3), a creditor objecting to discharge must show (1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions.' *Meridian Bank v. Alten*, 958 F.2d 1226, 1232 (3d Cir. 1992). Once the objecting party shows that the debtor's records are absent or are inadequate, the burden of proof then shifts to the debtor to justify the inadequacy or nonexistence of the records. *Id.* At 1233; *Cox*, 904 F.2d at 1404 n. 5; *Matter of Horton*, 621 F.2d 968, 972 (9th Cir. 1980); *In re Lawler*, 141 B.R. 425, 428-29 (9th Cir. B.A.P. 1992)."

In re Kubick, 171 B.R. 658 (9th Cir. B.A.P. 1994)

Elements of § 727(a)(2) and (3) are listed in the disjunctive, and each provides a separate basis for the denial of debtor's discharge.

In re Bowman, 173 B.R. 922 (9th Cir. B.A.P. 1994)

"1. Section 727(d)(1)

As a general rule, to obtain relief under section 727(d)(1), the plaintiff must prove that the debtor committed fraud in fact. *Edmonds,* 924 F.2d at 180 (10th Cir. 1991). The fraud must be proven in the procurement of the discharge and sufficient grounds must have existed which would have prevented the discharge. *In re Topper*, 85 B.R. 167, 169 (Bankr. S.D. Fla. 1988). The plaintiff must also prove that it was unaware of the fraud at the time the discharge was granted. *Id.*

"If a creditor or any other party which might object to a debtor's discharge has knowledge of a possible fraud, the burden is on the objecting party to diligently investigate any possibility (*sic*) fraudulent conduct before discharge. If the party decides to wait until after discharge, that party risks dismissal of its section 727(d)(1) action. *See Mid-Tech Consulting, Inc. v. Swendra*, 938 F.2d 885, 888 (8th Cir. 1991).

"2. Section 727(d)(2)

"As a general rule, a plaintiff must prove that the debtor acquired to became entitled to acquire property of the estate (*sic*) and knowingly and fraudulently failed to report or deliver the property to the trustee, in order to obtain relief under section 727(d)(2). Both elements must be met and the plaintiff must prove that the debtor acted with the knowing intent to defraud. *In re Yonikus*, 974 F.2d 901, 905 (7th Cir. 1992)."

In re Woodfield, 978 F.2d 516 (9th Cir. 1992)

"Badges of fraud" - § 727(a)(2) criteria.

In re Lawler, 141 B.R. 425 (9th Cir. B.A.P. 1992)

Burden of proof on obligation to discharge is preponderance.

In re Dietz, 914 F.2d 161 (9th Cir. 1990)

§ 727(d. Revocation proper even though discharge had not yet been formally entered.

In re Cox, 904 F.2d 1399 (9th Cir. 1990)

727(a)(3). Husband and wife have shared duty to maintain records, but court may consider whether spouse had a right to rely on husband's or wife's bookkeeping.

In re Stevens, 107 B.R. 702 (9th Cir. B.A.P. 1989)

Where discharge has not yet entered but 4004 period has run, complaint should be brought under § 727(d).

In re Beugen, 99 B.R. 961 (9th Cir. B.A.P. 1989), *aff'd*, 930 F.2d 26 (9th Cir. 1991)

May not purchase claims for the purpose of objecting to discharge.

In re Adeeb, 787 F.2d 1339 (9th Cir. 1986)

§ 727(a)(2).

DISCHARGE, EFFECT OF DISCHARGE, AND DISCHARGE INJUNCTION– § 524

In re Kimmel, 378 B.R. 630 (9th Cir. BAP 2007)*, aff'd*, 302 Fed. Appx. 518 (9th Cir. 2009).

Section 524(a)(3) discharges community debts of both the debtor and nondebtor spouse, unless the creditor timely files a dischargeability action in the debtor's case. The injunction applies to after-acquired community property .

In re ZiLOG, Inc., 450 F.3d 996, 1007-1010 (9th Cir. 2006)

Court can infer knowledge of a discharge injunction from the fact that the creditor knew of the bankruptcy, but such an inference is a question of fact, not a presumption implied in law. "Knowledge of the injunction, which is a prerequisite to its willful violation, cannot be imputed; it must be found."

In re Ybarra, 424 F.3d 1018 (9th Cir. 2005), *cert. denied,* 547 U.S. 1163, 126 S.Ct. 2328 (2006)

"[W]e reaffirm that claims for attorney fees and costs incurred post-petition are not discharged where post-petition, the debtor voluntarily commences litigation or otherwise voluntarily 'returns to the fray'. . . .Whether attorney fees and costs incurred pre-petition may be discharged depends on whether the debtor has taken affirmative post-petition action to litigate a prepetition claim and has thereby risked the liability of these litigation expenses." Discharge here did not apply to post-chapter 7 fees and expenses.

In re Gurrola, 328 B.R. 158 (9th Cir. BAP 2005)

Equitable estoppel did not arise from the debtor's failure to raise his bankruptcy discharge as a defense to a collection action on a prepetition debt. The effect of a discharge is self-executing.

In re Garske, 287 B.R. 537 (9th Cir. B.A.P. 2002)

Debtor who opted to continue payments on vehicle upon which debt had been discharge was not the subject of unlawful harassment by creditor under § 524, where telephone calls merely sought payments as a condition to retaining the vehicle.

In re Bennett, 298 F.3d 1059 (9th Cir. 2002)

Case remanded to determine whether attorney fees should be awarded to the debtor as sanctions for having to defend a suit brought in violation of § 524

Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002)

§ 524 does not provide a private right of action for violation of the discharge injunction, although it can be enforced through contempt proceedings.

In re Bassett, 255 B.R. 747 (9th Cir. B.A.P. 2000), *aff'd in part, denied in part*, 285 F.3d 882 (9th Cir. 2002), *cert. denied*, 537 U.S. 1002 (2002)

There is no private right of action for violation of § 524, but the discharge injunction may be enforced through civil contempt proceedings.

In re Lawson, 122 F.3d 1237 (9th Cir. 1997)

§ 727(a)(2) - "Continuing concealment" found, even though transfer occurred more than

one year prior to bankruptcy.

In re Hines, 147 F.3d 1185 (9th Cir. 1998)
Debt to attorney paid by post-dated checks for assisting in converting case from 13 to 7 was not discharged as a prepetition debt. *Hessinger* followed.

In re Watson 192 B.R. 739 (9th Cir. B.A.P. 1996), *aff'd*, 116 F.3d 488 (9th Cir. 1997)
Superior Court's determination that discharge injunction did not apply to postpetition debt had preclusive effect.

In re Cortez, 191 B.R. 174 (9th Cir. B.A.P. 1995)
Unavoided unperfected security interest survives discharge.

In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996)
§ 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors. *American Hardwoods*, *Inc.*, 885 F.2d 621 (9th Cir. 1989). 1994 Asbestos Amendment. § 524(a) also cited as support.

In re Getzoff, 180 B.R. 572 (9th Cir. B.A.P. 1995)
Creditor may not recover on guaranty executed postpetition where guaranty was not made in compliance with requirements for reaffirming discharged debt.

Hedges v. Resolution Trust Corp (In re Hedges), 32 F.3d 1360 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995)
Debtor continued to reside in property after a foreclosure sale and then filed bankruptcy. The court held that the permanent injunction under § 524(a)(2) did not bar the purchaser at the foreclosure sale from evicting the debtor or collecting postpetition rent.

In re Beeney, 142 B.R. 360 (9th Cir. B.A.P. 1992)
"An action naming the debtor solely to establish the debtor's liability in order to collect on an insurance policy is not barred by Bankruptcy Code § 524."

Kathy B. Enterprises, Inc. v. United States, 779 F.2d 1413, 1414-15 (9th Cir. 1986)
Bankruptcy court not authorized to discharge debts of nondebtors

Underhill v. Royal, 769 F.2d 1426, 1432 (9th Cir. 1985)
Bankruptcy court cannot discharge liability of nondebtor as part of plan

DISCOVERY–GENERALLY

Connecticut General v. New Images, 482 F.3d 1091 (9th Cir. 2007)

Court restates the five-part test for issuing a terminating sanction under Rule 37, and notes that the court should also consider whether lesser sanctions might work, whether it tried them and whether the court warned that terminating sanctions might be imposed. The test is not a mechanical one.

In re Khachikyan, 335 B.R. 121 (9th Cir. BAP 2005)

Rule 9014(d), included in a 2002 amendment to the rule, is intended to require a trial when there is a genuine factual dispute. Furthermore, "[a]s a strategic matter, where one wants discovery in a contested matter, it is generally too late to wait to the day of the hearing on the merits to request to conduct discovery in the future."

Ortega v. O'Connor, 50 F.3d 778 (9th Cir. 1995)

Witnesses can be excluded for failure to exchange witness list.

Hyde & Drath v. Baker, 24 F.3d 1162 (9th Cir. 1994)

Before dismissing a complaint:

"*Wanderer* requires the district court to consider:

(1) the public's interest in expeditious resolution of litigation,

(2) the court's need to manage its dockets,

(3) the risk of prejudice to the party seeking sanctions,

(4) the public policy favoring disposition of cases on the merits, and

(5) the availability of less drastic sanctions.

Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir. 1990)

No abuse of discretion for joint and several imposition of sanctions.

Holmgren v. State Farm Mutual Auto. Ins. Co., 976 F.2d 573 (9th Cir. 1992)

"Exhibits 92 and 93 meet the threshold requirements for qualification as work product: both are (a) documents sought by Holmgren that were (b) prepared for trial (c) by a representative of State Farm. They reflect the opinion of a State Farm adjuster on the range of potential liability. *See Reavis v. Metropolitan Property & Liability Ins. Co.*, 117 F.R.D. 160, 164 (S.D. Cal. 1987) (recognizing opinion work product of adjusters handling claim).

"We agree with the several courts and commentators that have concluded that opinion work product may be discovered and admitted when mental impressions are *at issue* in a case and the need for the material is compelling. *See, e.g., Bio-Rad Labs., Inc. v. Pharmacia, Inc.*, 130 F.R.D. 116, 122 (N.D.Cal.1990)."

Wanderer v. Johnston, 910 F.2d 652 (9th Cir. 1990)

Entry of default - standard for imposing under Rule 37.

In re (Subpoena served on the) California Public Utilities Commission, 892 F.2d 778 (9th Cir. 1989)

Work product, deliberational process, office reports.

DISCRIMINATION

In re Majewski, 310 F.3d 653 (9th Cir. 2002)

§ 525 is not applicable to a person who announces his intention to file for bankruptcy, but has not yet filed.

In re Turner, 199 B.R. 694 (9th Cir. B.A.P. 1996)

Because satisfaction of the debt is irrelevant for purposes of § 525(a), the court properly refused to hear evidence that the debt was satisfied. This conclusion encompasses Turner's contention that the court should not have dismissed her case before requiring the DRE to comply with her discovery requests. Since the court properly determined that there were no facts Turner could prove that would give her relief under § 525(a), discovery was irrelevant.

DISMISSAL OF THE CASE– §§ 521(i), 707(a), 1112(b) and 1307(a)

In re Warren, 568 F.3d 1113 (9th Cir. 2009)

". . .[T]he bankruptcy court has discretion, *after* the passing of the forty-five day filing deadline set forth in § 521(i)(1), to "order otherwise" and thereby waive the § 521(a)(1) filing requirement."

In re Owens, 552 F.3d 960 (9th Cir. 2009)

Bankruptcy court properly dismissed rather than converting chapter 11 case that was filed in bad faith as a litigation tactic. Although conversion might have benefitted moving party, the best interests of *all* creditors must be considered in converting or dismissing a case. Here, creditors might have fared worse in chapter 7 because the chapter 7 discharge would have deprived them of access to the debtor's substantial future income.

In re AVI, Inc., 389 B.R. 721, 724 (9th Cir. BAP 2008)

Dismissal of chapter 11 case was properly set aside, where order approving a settlement did not include a provision for dismissal of the case upon the occurrence of certain events, and the case was subsequently dismissed without notice to creditors. Court properly set aside the dismissal under Rule 60(b).

In re Hickman, 384 B.R. 832 (9th Cir. BAP 2008)

Debtor's counterclaims to a creditor's claims in a non-dischargeability proceeding were not entitled to a jury trial in bankruptcy court, since they involved the restructuring of the debtor creditor relationship. Any jury trial right debtor may have had in another forum did not provide cause for dismissal of the bankruptcy case under § 707(a), where the debtor voluntarily submitted himself to the jurisdiction of the bankruptcy court and then failed to perform his statutory duties.

Warren v. Wirum, 378 B.R. 640 (N.D. Cal. 2007)

1) Because credit counseling under § 109(h) is not jurisdictional, the debtor was judicially estopped from dismissing his case for failing to obtain it, citing *In re Mendz,* 367 B.R. 107 (9th Cir. BAP 2007); 2) unless the debtor asks to be excused from filing payment advices or the trustee moves the court to decline from dismissing, the case is automatically dismissed, and the court may not retroactively waive the debtor's obligation to file payment advices.

In re Mendez, 367 B.R. 109 (9th Cir. BAP 2007)

Pre-bankruptcy credit counseling is not a jurisdictional prerequisite, but an eligibility requirement subject to waiver and estoppel. Debtor waived strict compliance with credit counseling requirements, and could not use noncompliance offensively to obtain dismissal of her bankruptcy case.

In re Sewell, 345 B.R. 174, 182 (9th Cir. BAP 2006)

"Debtors' case was reinstated and the automatic stay was reimposed as of the time the Reinstatement Order was docketed, not when it was signed. . . The bankruptcy court had discretion to determine when Debtors' case was reinstated and the automatic stay was reimposed." Foreclosure sale was allowed to stand, as it occurred between the time the case was dismissed and

the reinstatement order was docketed.

In re Sherman, 491 F.3d 948 (9th Cir. 2007)
Dismissal of chapter 7 for cause under § 707(a) is improper if the asserted "cause" is contemplated by another provision of the bankruptcy code, such as § 362.

In re Tennant, 318 B.R. 860 (9th Cir. BAP 2004)
Court has the power under § 105 to dismiss a chapter 13 case sua sponte for failure to file schedules.

In re Bartee, 317 B.R. 362 (9th Cir. BAP 2004)
A chapter 7 debtor does not have an absolute right to dismiss. The bankruptcy court did not abuse it's discretion in denying the debtor's motion, where the case had assets, the schedules were inaccurate and there was no basis for believing that creditors would be paid outside of bankruptcy .

In re Padilla, 222 F.3d 1184 (9th Cir. 2000)
1. Bad faith "as a general proposition does not provide "cause" to dismiss a Chapter 7 petition under § 707(a).
2. Credit card "bust out" did not constitute cause under § 707(a).

In re Elias, 215 B.R. 600 (9th Cir. B.A.P. 1997), *aff'd,* 188 F.3d 1160 (9th Cir. 1999)
Effect of dismissal of case - 349(b)

In re Leavitt, 171 F.3d 1219 (9th Cir. 1999)
Bankruptcy debtor's concealment and misuse of assets warranted dismissal of Chapter 13 case with prejudice

In re Marsch, 36 F.3d 825 (9th Cir. 1994)
Having found that case was filed in bad faith, court abused discretion in staying dismissal for 60 days.

In re Eisen, 31 F.3d 1447 (9th Cir. 1994)
4 year delay in pursuing case justified alone dismissal. Court need not make findings as to each of 5 part test

In re Leach, 130 B.R. 855 (9th Cir. B.A.P. 1991)
Denial of dismissal appropriate where IRS would be prejudiced since dismissal would allow debtor to refile subsequently and discharge the obligations. Abuse of discretion standard

In re Hall, 15 B.R. 913 (9th Cir. B.A.P. 1981)
Trustee has standing to object to dismissal if creditors do not affirmatively consent. If they do, trustee may still object to recover fees.

DISMISSAL--707(b)

In re Egebjerg, 574 F.3d 1045 (9th Cir. 2009)

A debtor's obligation to repay a loan taken from his retirement plan is not a debt, and thus cannot be deducted from his income as a secured debt under the means test. Without deciding whether "other necessary expenses" is a concept limited to the fifteen categories of expenses listed in the IRS manual, or the broader definition provided in that manual, the court finds that retirement loans fall under neither interpretation; nor do they qualify as a "special circumstance."

Blausey v. U.S. Trustee, 552 F.3d 1124 (9th Cir. 2009)

Private disability insurance payments must be include in the calculation of current monthly income.

In re Ransom, 380 B.R. 799 (9th Cir. BAP 2007), *aff'd*, 577 F.3d 1026 (9th Cir. 2009)

In determining "projected disposable income" of an above-median income debtor in a chapter 13 case, the means test does not permit the debtor to claim a vehicle ownership expense for a vehicle owned free and clear of any liens.

Hebbring v. U.S. Trustee, 463 F.3d 902 (9th Cir. 2006)

The Bankruptcy Code does not per se disallow voluntary contributions to a retirement plan as a reasonably necessary expense in calculating disposable income. Courts must examine the totality of the circumstances on a case-by-case basis, including age and financial circumstances. Debtor here only owed about $12,000 in unsecured debt and was only 33 years old.

In re Khachikyan, 335 B.R. 121 (9th Cir. BAP 2005)

Debtor's filing of a chapter 7 case 17 months after accumulating about $120,000 in credit card debt is not a form of abuse that should overcome the presumption in favor of chapter 7 relief.

In re Voelkel, 322 B.R. 138 (9th Cir. BAP 2005)

Bankruptcy court applied wrong standard in dismissing chapter 7 case for substantial abuse. Abuse must be clear, and debtor is not required to live at a subsidence level.

In re Price, 353 F.3d 1135 (9th Cir. 2004)

1. Real estate mortgages are included in the calculation of consumer debt under this section, regardless of whether they are to be discharged; 2. although the ability to pay debts in a chapter 13 case would, standing alone, justify dismissal under this section, it is not a per se rule. It is merely the most important consideration.

In re Harris, 279 B.R. 254 (9th Cir. B.A.P. 2002)

Evidence failed to establish substantial abuse under § 707(b)

In re Gomes, 220 B.R. 84 (9th Cir. B.A.P. 1998) - 707(b)

Debtors' ability to repay 43 percent of unsecured debt under three-year chapter 13 plan supported dismissal of Chapter 7 case for substantial abuse.

In re Kelly, 841 F.2d 908 (9th Cir. 1988) - § 707(b)

A finding that debtors are able to repay their debts as they came due or to fund a Chapter 13 plan = substantial abuse. Debtors had paid all unsecured debt prepetition except judgment for fraud. Court held mortgage debt = consumer debt.

DUTIES OF THE DEBTOR-- § 521

In re Warren, 568 F.3d 1113 (9th Cir. 2009)

". . .[T]he bankruptcy court has discretion, after the passage of the forty-five day filing deadline set forth in § 521(i)(1), to "order[] otherwise" and thereby waive the § 521(a)(1) filing requirement."

In re Adair, 253 B.R. 85 (9th Cir. B.A.P. 2000)

Debtor had no ongoing duty to provide trustee with updated information regarding properly disclosed estate assets. (Case had been closed for 3 years).

ELECTION OF REMEDIES

Latman v. Burdette, 366 F.3d 774 (9th Cir. 2004)

"The doctrine of election of remedies prevents a party from obtaining double redress for a single wrong. . . .As a general rule, three elements must be present for a party to be bound to an election of remedies: (1) two or more remedies must have existed at the time of the election; (2) these remedies must be repugnant and inconsistent with each other, and (3) the party to be bound must have affirmatively chosen, or elected, between the available remedies.

Passanisi v. Merit-Mcbride Realtors, Inc., 190 Cal.App.3d 1496, 1506-1507 (1987)

Cal. Civ. Pro. § 726

ELIGIBILITY

In re Hunt, 160 B.R. 131 (9th Cir. B.A.P. 1993)
Neither a non-business trust nor the trustee solely in a representative capacity are persons eligible for Chapter 11 protection

In re Luna, 122 B.R. 575 (9th Cir. B.A.P. 1991)
Application of 109(g)(2) is discretionary

ENVIRONMENTAL PROBLEMS IN BANKRUPTCY CASES

In re Jensen, 995 F.2d 925 (9th Cir. 1993)

State had sufficient prepetition knowledge of debtor's potential liability to give rise to contingent prepetition claim for clean up costs.

EQUAL ACCESS TO JUSTICE ACT - 26 U.S.C. 7430

In re Cascade Roads, Inc., 34 F.3d 756 (9th Cir. 1994)

Because set-off claim was rooted in a tax claim, EAJA doesn't apply. Case remanded for consideration of sanctions under 26 U.S.C. 7430

EQUITABLE SUBORDINATION

In re First Alliance Mortg. Co., 471 F.3d 977, 1006 (9th Cir. 2006)

"Where non-insider, non-fiduciary claims are involved, as is the case here, the level of pleading and proof is elevated: gross and egregious conduct will be required before a court will equitably subordinate a claim"

In re Filtercorp, Inc., 163 F.3d 570 (9th Cir. 1998)

Mere undercapitalization of debtor is insufficient basis to equitably subordinate claims.

U.S. v. Noland, 517 U.S. 535 (1996)

May not equitably subordinate on a categorical basis. May not always need to show creditor misconduct as condition to equitable subordination.

In re Lazar, 83 F.3d 306 (9th Cir. 1996)

Three findings are generally required before equitable subordination will be granted:
1) that the claimant engaged in some type of inequitable conduct,
2) that the misconduct injured creditors or conferred unfair advantage on the claimant, and
3) that subordination would not be inconsistent with the Bankruptcy Code

In order to justify equitable subordination, the court is required to make specific findings and conclusions with respect to each of the requirements.

Stoumbos v. Kilimnik, 988 F.2d 949 (9th Cir. 1993), *cert. denied*, 510 U.S. 867 (1993)
1) claimant who is to be subordinated engaged in inequitable conduct,
2) the misconduct results in injury to competing claimants or an unfair advantage to the claimant
3) subordination is not inconsistent with bankruptcy law

Insider's action is subject to "rigorous scrutiny"

In re Fabricators, Inc., 926 F.2d 1458 (5th Cir. 1991)

Court found creditor/insider
1) engaged in inequitable conduct
2) which resulted in injury to creditors
3) equitable subordination consistent with provisions of the code

In re Virtual Network Services Corp., 902 F.2d 1246 (7th Cir. 1990)

Equitable subordination not limited to situations of inequitable action

Matter of Clark Pipe and Supply Co., Inc., 893 F.2d 693 (5th Cir. 1990)

In re Universal Farming Industries, 873 F.2d 1334 (9th Cir. 1989)

EQUITABLE SUBROGATION

In re Deuel, 361 B.R. 509, 517 (9th Cir. BAP 2007)

"Subrogation is a derivative right whereby one party is substituted in the place of another with reference to a lawful claim, demand, or right. Doctrine had no application as to trustee with bona fide purchaser status under § 544(a)(3), since equity favors such purchasers over one asserting equitable subrogation.

ESTOPPEL--EQUITABLE AND JUDICIAL

United Steelworkers of America v. Retirement Income Plan for Hourly-Rated Employees of, ASARCO, 512 F.3d 555 (9th Cir. 2008)

Three factors in determining whether to apply judicial estoppel:
1) Is the party's later position clearly inconsistent with its earlier position;
2) Whether the party achieved success in the prior proceeding; and
3) Whether the party asserting an inconsistent position would achieve an unfair advantage if not estopped.

In re An-Tze Cheng, 308 B.R. 448 (9th Cir. B.A.P. 2004), *aff'd and remanded,*
I160 Fed.Appx. 644 (9th Cir. 2005)

Judicial estoppel did not apply to Chapter 11 debtors who asserted one value of a secured claim in their lien avoidance motion and a different value in their claim objection, since they were asserting their rights as debtors in the motion and their obligation as a trustee in the objection.

Hamilton v. State Farm Fire and Casualty Co., 270 F.3d 778 (9th Cir. 2001)

Debtor who failed to list insurance claim in bankruptcy schedules was judicially estopped from asserting that claim in subsequent lawsuit. "The application of judicial estoppel is not limited to bar the assertion of inconsistent positions in the same litigation, but is also appropriate to bar litigants from making incompatible statements in two different cases."

Humetrix, Inc. v. Gemplus S.C.A., 268 F.3d 910 (9th Cir. 2001)

Promissory estoppel is a cause of action; equitable estoppel is used to bar a party from raising a defense or objection it otherwise would have. Use of equitable estoppel to defeat a statute of frauds defense has no bearing on the damages plaintiff may recover.

Wyler Summit Partnership v. Turner Broadcasting Systems, Inc., 235 F.3d 1184 (9th Cir. 2000)

"The doctrine of judicial estoppel requires, inter alia, a knowing antecedent misrepresentation by the person or party alleged to be estopped and prevents the party from tendering a contradictory assertion to a court."

In re Meronk, 249 B.R. 208 (9th Cir. B.A.P. 2000), *aff'd*, 24 Fed.Appx. 737 (9th Cir. 2001)

Law firm judicially estopped from seeking bonus, where in its retention application, it represented that it's hourly rate arrangement would result in a larger estate than a contingent fee, but then sought a bonus that would have brought their fee to the level they would have received if they had accepted the contingent fee arrangement.

Granite States Ins. Co. v. Smart Modular Technologies, Inc., 76 F.3d 1023 (9th Cir. 1996)

Under Cal. law, the elements of equitable estoppel are:
1) the party to be estopped must be apprised of the facts;
2) must intend that his conduct shall be relied upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;
3) must be ignorant of the true state of facts; and
4) must rely upon the conduct to his injury

See also Driscoll v. City of Los Angeles, 67 Cal.2d 297, 431 P.2d 245, 250 (Cal. 1967)

In re Canino, 185 B.R. 584 (9th Cir. B.A.P., 1995)
Equitable estoppel applied to exemption claim

In re Heritage Hotel Partnership, 160 B.R. 374 (9th Cir. B.A.P., 1993), *aff'd*, 59 F.3d 175 (9th Cir. 1995)
Equitable estoppel:
1) party knew facts
2. Intended that his conduct be acted upon
3. Estopping party ignorant of true facts
4. Relied to his damage
See also *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555 (9th Cir. 1992)

In re Howell, 120 B.R. 137 (9th Cir. B.A.P. 1990)
Definition of equitable estoppel. Does not apply to govt. absent affirmative misconduct.
See also *In re Santos*, 112 B.R. 1001, 1007-08 (9th Cir. B.A.P. 1990)

In re Growers-Ranchers, Ltd., 110 B.R. 915 (9th Cir. B.A.P. 1990); *aff'd*, 945 F.2d 1145 (9th Cir. 1991)
Agency director's promise not binding nor subject to estoppel when exceeding authority

EVIDENCE

In re Vinhnee, 336 B.R. 437 (9th Cir. BAP 2005)

Creditor's electronic business records were properly not admitted into evidence sua sponte, resulting in judgment for the debtor.

Sea-Land Service, Inc. v. Lozen International, LLC., 285 F.3d 808 (9th Cir. 2002)

1. Bills of lading are business records. Rule 803(6) allows the admission of business records when "two foundational facts are proved: (1) the writing is made or transmitted by a person with knowledge at or near the time of the incident recorded, and (2) the record is kept in the course of regularly conducted business activity." [citation omitted]

2. An internal company e-mail authored by one employee and forwarded by a second employee who incorporates and adopts the contents of the original message can be admissible as an adoptive admission under Federal Rules of Evidence 801(d)(2)(D).

In re Bennett, 298 F.3d 1059 (9th Cir. 2002)

Application of the parol evidence rule under California law.

Domingo v. T.K., 289 F.3d 600 (9th Cir. 2002)

Medical testimony inadmissible under *Daubert.*

In re King Street Investments, Inc., 219 B.R. 848 (9th Cir. B.A.P. 1998)

Withdrawal of objection operates as a waiver on appeal. Must also state specific grounds for objection, and grounds must be correct.

FTC v. Figgie International, Inc., 994 F.2d 595 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994)

5 part test to FRE 803 (24)

Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc., 971 F.2d 272 (9th Cir. 1992), *cert. denied*, 507 U.S. 914 (1993)

1) Under Cal. contract law, the parol evidence analysis governing this case is divided into two initial inquiries: (1) was the writing intended to be an integration, i.e., a complete and final expression of the parties' agreement, precluding any evidence of collateral agreements; and (2) is the agreement susceptible of the meaning contended for by the party offering the evidence? *Gerdlund v. Electronic Dispensing*

2) However, Cal. Also recognizes one of the broad exceptions to the parol evidence rule. Because "[n]o contract should ever be interpreted and enforced with a meaning that neither party gave it," ...parol evidence may be introduced to show the meaning of the express terms of the written contract.

3) To avoid completely eviscerating the parol evidence rule, however, there must be reasonable harmony between the parol evidence and the integrated contract for the evidence to be admissible.

Tongil Co., Ltd. v. Vessel Hyundai Innovator, 968 F.2d 999 (9th Cir. 1992)

FRE 803(6) - may not use declarations to authenticate business records - must use live witnesses.

Cooper v. Firestone Tire and Rubber Co., 945 F.2d 1103 (9th Cir. 1991)
Evidence of dissimilar accidents admissible for impeachment

Rogers v. Raymark Industries, Inc., 922 F.2d 1426 (9th Cir. 1991)
Exclusion of testimony - balancing FRE 702 and 403(b)

U.S. v. Hadley, 918 F.2d 848 (9th Cir. 1990)
Test for allowing prior bad acts into evidence - FRE 404(b)

In re Burg, 103 B.R. 222 (9th Cir. B.A.P. 1989)
Declarations may not substitute for direct evidence

In re E.R. Fegert, Inc., 887 F.2d 955 (9th Cir. 1989)
Bankruptcy Court may take judicial notice of underlying records.

Oki America Inc. v. Microtech Int'l, Inc. 872 F.2d 312 (9th Cir. 1989)
Pleadings may give rise to admissible admissions despite the hearsay rule

In re Blumer, 95 B.R. 143 (9th Cir. B.A.P. 1988)
Judicial notice

EXECUTORY CONTRACTS § 365

General

In re Imperial Credit Industries, Inc., 527 F.3d 959 (9th Cir. 2008)
A chapter 7 debtor's obligation on a claim arising from a capital maintenance agreement with the FDIC under § 365(o) is not entitled to administrative expense priority, where it is specifically provided for under § 507(a)(9).

In re JZ L.L.C., 371 B.R. 412 (9th Cir. BAP 2007)
Licensing agreement issued by debtor that was neither assumed nor assigned in chapter 11 case rides through the bankruptcy.

In re Pomona Valley Medical Group, Inc., 476 F.3d 665, 670 (9th Cir. 2006)
". . .[I]n evaluating the rejection decision, the bankruptcy court should presume that the debtor-in-possession acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate. . . .It should approve the rejection of an executory contract under § 365(a) unless it finds that the debtor-in-possession's conclusion would be 'advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.'"
Rejection of the contract does not otherwise affect the parties' substantive rights under the contract or state law. Claims under California Business and Professions Code survived motion to dismiss.

In re G.I. Industries, Inc., 204 F.3d 1276 (9th Cir. 2000)
Bankruptcy court could adjudicate validity of contract when considering proof of claim under executory agreement rejected by trustee.

In re AEG Acquisition Corp., 161 B.R. 50 (9th Cir. B.A.P. 1993)
Contract is not executory when all that is left for debtor to do is pay. Citing *In re Pacific Express, Inc.*, 780 F.2d 1482 (9th Cir. 1986).

In re Joshua Slocum, Ltd. 922 F.2d 1081 (3d Cir. 1990)
Shopping center defined

In re Qintex Entertainment, Inc., 950 F.2d 1492 (9th Cir. 1991)
Executory k does not become asset of estate until it is assumed (licensing agreement)

In re Aslan, 909 F.2d 367 (9th Cir. 1990)
When debtor secures rejection of non-assumed executory contract under §365(g), date of breach is day immediately prior to filing of bankruptcy petition (definition of executory contract discussed)

In re Westworld Comm. Healthcare, Inc., 95 B.R. 730 (Bankr.C.D. Cal. 1989)
Right to attorney fees as "any pecuniary loss" under 365(b)(1)(B)

In re Sigel & Co., Ltd., 923 F.2d 142 (9th Cir. 1991)

Purchase of joint venture share prior to filing did not terminate agreement - debtor had power to cure default when the contract says nothing about cure of a breach

In re Arizona Appetito's Stores, 893 F.2d 216 (9th Cir. 1990)

Timely motion to reject does not toll 60 days for motion to assume

In re Elm, Inc., 942 F.2d 630 (9th Cir. 1991)

1. Court should order surrender of premises, if appropriate
2. Must determine interests if necessary to decide 365(d)(4) issues.

Executory Contracts - Leases

In re Onecast Media, Inc., 439 F.3d 558 (9th Cir. 2006)

"While rejection of a lease prevents the debtor from obtaining future benefits of the lease. . ., it does not rescind the lease or defeat any pending claims or defenses that the debtor had in regard to that lease." Where the landlord drew down entirely on a letter of credit purchased by the debtor and held by the landlord as security, the trustee was entitled to recover the difference between the landlord's damages and the balance of the amount drawn down, since that amount was property of the estate.

In re At Home Corp., 392 F.3d 1064 (9th Cir. 2004), *cert. denied,* 546 U.S. 814,126 S.Ct. 338 (2005)

". . . [A] bankruptcy court has the discretion to grant a motion to reject a nonresidential lease of real property retroactively. The retroactive date of rejection need not be on or after the date on which the landlord regains possession."

In re TreeSource Industries, Inc., 363 F.3d 994 (9th Cir. 2004)

Commercial property lessor's claim for damages arising from debtor's failure to remove a concrete pad were not entitled to administrative priority. The lease was breached only upon its rejection, not postpetition and pre-rejection. Thus damages were simply an unsecured claim.

In re BCE West, L.P., 319 F.3d 1166 (9th Cir. 2003)

Section 363(d)(3) does not apply to debtor lessors, only to non-debtor lessees.

In re LPM Corp., 300 F.3d 1134 (9th Cir. 2002)

Nothing in the language of § 365(d)(3) grants a commercial landlord's administrative claim superpriority status. Rather, it simply imposes a duty on a debtor to make its rental payments in a timely manner.

In re Cukierman, 265 F.3d 846 (9th Cir. 2001)

1. Obligations denominated in commercial lease as "further rent" were entitled to administrative priority under unexpired lease provision in bankruptcy code, even though obligations actually represented repayments of promissory notes.

2. Because no action or proceeding had been brought to enforce the terms of the lease or to declare the parties respective rights, the attorney fees clause in the lease was not applicable. Further, lessor was not entitled to interest on the unpaid lease obligations "because it is not an obligation under the lease."

In re George, 177 F.3d 885 (9th Cir. 1999), *cert. denied*, 528 U.S. 1135 (2000)

agreement in question was a "true" lease, thus §365(d)(4) applied. No waiver of automatic rejection by accepting payments

In re Building Block Child Care Centers, Inc., 234 B.R. 762 (9th Cir. B.A.P. 1999)

Commercial tenant required to cure pre-petition defaults to former landlord before assuming lease with successor landlord where first landlord expressly retained right to receive cure

payments upon assumption.

In re Victoria Station, 875 F.2d 1380 (9th Cir. 1989)
60 day period for assumption of nonresidential lease may be extended more than once

In re Lomax, 194 B.R. 862 (9th Cir. B.A.P. 1996)
Landlord's election to terminate lease was acceptance of debtor's offer of surrender, resorting premises to landlord and limiting damages under 502(b)(6)

In re Circle K Corp, 98 F.3d 484 (9th Cir. 1996)
The term "gross sales" included only commissions debtor received for ticket sales, not total sales price of ticket sales.

In re McSheridan, 184 B.R. 91 (9th Cir. B.A.P. 1995)
1) rent reserved under §502(b)(6)(A)
for a charge to constitute rent reserved under §502(b)(6)(A), a 3-part test must be met:
(1) charge must be (a) designated as "rent" or additional rent in the lease; or (b) be provided as the tenant's/lessee's obligation in the lease;
(2) the charge must be related to the value of the property or the lease thereon; and
(3) the charge must be properly classifiable as rent because it is a fixed, regular or periodic charge
2) triple net lease...
- damages for breach of covenants is not a separate claim from the termination damages. In addition, the claim arising from breach of the lease conceptually encompasses all time intervals and treats the claim as if the breach occurred immediately prior to the filing of the bankruptcy case - see §502(g).

In re Westside Print Works, Inc., 180 B.R. 557 (9th Cir. B.A.P. 1995)
1. Bankruptcy Code gives lessor no independent right to recover attorneys' fees from debtor-in-possession of commercial property
2. Property tax and increased security provisions found to be ambiguous or waived.

Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.), 27 F.3d 401 (9th Cir. 1994)
Lessor was entitled to an administrative expense claim for 60 days' rent at the contract rate because the trustee had an affirmative duty under §365(d)(3) to "perform all the obligations of the debtor" under the lease.

In re First Alliance Corp., 140 B.R. 531 (9th Cir. B.A.P. 1992)
Post-petition rents are not credits against damages in landlord's claim for debtor's rejection of pre-bankruptcy lease.

In re Pollock, 139 B.R. 938 (9th Cir. B.A.P. 1992)
Severability test. Sale of business sublease assumable by debtors if severable from note obligation.

In re Standor Jewelers West, Inc., 129 B.R. 200 (9th Cir. B.A.P. 1991)

A clause in a lease providing for a substantial portion of the lease appreciation upon assignment is invalid under §365(f).

In re Windmill Farms, 841 F.2d 1467 (9th Cir. 1988)

Under Cal. law a lease terminates for nonpayment of rent at least by the time the lessor files an unlawful detainer action, provided that a proper three-days' notice to pay rent or quit has been given, and the lessee has failed to pay the rent in default within the three-day period and further provided that the lessor's notice contained an election to declare the lease forfeited.

In re Port Angeles Waterfront Assoc, 134 B.R. 377 (9th Cir. B.A.P. 1991)

Once 60 days ran, lease terminated (waterfront project = lease). *In re Moreggia & Sons, Inc.*, 852 F.2d 1179 (9th Cir. 1988) distinguished.

Moreggia & Sons, Inc. 852 F.2d 1179 (9th Cir. 1988)

Lease that is more in the nature of a financing arrangement is excepted from 60 day requirement.

In re Orvco, Inc. 95 B.R. 724 (9th Cir. B.A.P. 1989)

1) While a non bankruptcy court must order the payment of rent due during 365(d)(3) 60 day period, that doesn't mean that amount due is all an administrative priority

2) After lease is rejected, if 363(d)(3) period rent remains unpaid, landlord does not have an immediate right to payment...may be paid in administrative.

In re Texscan Corp., 107 B.R. 227 (9th Cir. B.A.P. 1989), *aff'd*. 976 F.2d 1269 (9th Cir. 1992)

Executory contract that expires postpetition but before motion to assume is filed cannot be assumed.

<u>Executory Contracts - Non-lease contracts</u>:

In re Southern Pacific Funding Corporation, 268 F.3d 712 (9th Cir. 2001)
Subordination clause in indenture agreement that preserved certain secured creditors' rights both pre- and post- bankruptcy did not violate § 365(e)(1) of the bankruptcy code.

In re Crow Winthrop Operating Partnership, 241 F.3d 1121 (9th Cir. 2001)
1) Issues of anti-assignment and change of ownership properly considered on motion rather than in an adversary proceeding; 2) bankruptcy court properly found that prohibition on change of ownership was an illegal anti-assignment clause under § 365(f).

In re Catapult Entertainment, Inc., 165 F.3d 747 (9th Cir. 1999)
Ch. 11 bankruptcy debtor in possession may not assume executory contract made nonassignable by nonbankruptcy law due to materiality of nondebtor party's identity, unless nondebtor party consents. §365(c)(1)

In re Robert L. Helms Construction and Development Co., Inc., 139 F.3d 702 (9th Cir. 1998) *en banc*
It is a question of fact for bankruptcy court whether option contract to purchase real property is an executory contract that may be accepted or rejected by bankruptcy trustee

In re The Circle K Corporation, 127 F.3d 904 (9th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998)
Lease provision barring exercise of renewal option by lessee in default does not preclude defaulting Chapter 11 bankruptcy debtor from doing so

In re Claremont Acquisition Corporation, Inc., 113 F.3d 1029 (9th Cir. 1997)
Debtor car dealer's incurable nonmonetary default precludes assignment of dealership franchise agreement in bankruptcy proceeding. §356(b)(2)(d) only applies to monetary penalties not having to be cured.

In re CFLC, Inc., 174 B.R. 119 (N.D.Cal. 1994), *aff'd* 89 F.3d 673 (9th Cir. 1996)
Executory contracts are assignable in bankruptcy notwithstanding any contractual provision restricting assignment, unless the contract is of a kind that applicable law makes nonassignable. The court in disallowing the assignment followed the traditional federal rule of nonassignability of non-exclusive patent licenses absent the express consent of the patent holder.

In re Prize Frize, Inc., 32 F.3d 426 (9th Cir. 1994)
License fees were royalties for purposes of §363(n) and had to be paid if promisor elected to retain rights under contract.

In re Texscan Corp., 976 F.2d 1269 (9th Cir. 1992)
Retrospective insurance premium k between insurer and insured is not an executory k

In re Sun Runner Marine, Inc., 945 F.2d 1089 (9th Cir. 1991)
Flooring agreement was an executory k but was not assumable because it constituted a

financial accommodation

In re Texscan Corp., 107 B.R. 227 (9th Cir. B.A.P. 1989), *aff'd.* 976 F.2d 1269 (9th Cir. 1992)
Executory contract that expires post-petition but before motion to assume is filed cannot be assumed

In re Munple, Ltd., 868 F.2d 1129 (9th Cir. 1989)
Real estate Brokers commission earned prepetition is not an executory contract**.**

EXEMPTIONS

1) General
2) Homestead
3) Lien Avoidance
4) Retirement Accounts, Life Insurance and Annuities
5) Standing
6) Exemption planning

Exemptions - 1) General

In re Gould, 401 B.R. 415 (9th Cir. BAP 2009)

IRS had a valid right of setoff under 11 U.S.C. § 553 and IRC § 6402(a) as to chapter 13 debtors' tax refunds, even though the debtor claimed them as exempt and no objection to the exemption was filed. Bankruptcy court should have granted the IRS relief from the automatic stay for cause to allow it to exercise its setoff rights.

In re Onubah, 375 B.R. 549 (9th Cir. BAP 2007)

Although the debtor did not conceal his residence, his refusal to vacate it, his conversion of his case to a chapter 11 case, and his collusion with others to file an involuntary petition against himself justified the surcharge against his exemptions.

In re Urban, 375 B.R. 882 (9th Cir. BAP 2007)

Section 522(b)(3), which allows states to opt out of the federal system but extends the domicile requirement from 180 to 730 days, does not violate the uniformity clause of the Constitution.

In re Konnoff, 356 B.R. 201, 208 (9th Cir. BAP 2006)

"Although the petition determines the exemption rights of the debtor, where the state has opted out of the federal exemption scheme. . .it is the facts of the case and the state law applicable on the petition date that controls a debtor's exemption rights. . . .By allowing them to opt out of the federal exemption scheme, Congress has granted states the prerogative to determine the scope of, and limitations on, the exemptions their residents may claim in a bankruptcy case." Debtor could not claim homestead exemption under Arizona law, where he sold the house prepetition and failed to reinvest the proceeds in another home within 18 months, even though the 18 month period expired postpetition.

In re Cogliano, 355 B.R. 792 (9th Cir. BAP 2006)

The denial of the debtor's first amended claim of exemption did not preclude her assertion in her secibd claim of exemption that her IRA was not property of the estate. Neither issue preclusion nor claim preclusion applied, since the issue of property of the estate was not necessarily decided in the initial exemption decision. Further, the issue of property of the estate had to be decided by way of an adversary proceeding, not a contested matter.

Latman v. Burdette, 366 F.3d 774 (9th Cir. 2004)

"We hold that the bankruptcy court may equitably surcharge a debtor's statutory

exemptions when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than what is permitted by the exemption scheme of the Bankruptcy Code."

In re Gose, 308 B.R. 41 (9th Cir. B.A.P. 2004)

California Code of Civil Procedure §§704.140(a) & (b) are properly read together, and allow the exemption of settlement proceeds from a personal injury claim only to the extent necessary for the debtors' support.

In re Goswani, 304 B.R. 386 (9th Cir. B.A.P. 2003)

Debtor's right to amend their exemption schedule did not terminate upon closing the case. Here, debtor had claimed the 15,000 wildcard exemption. Upon reopening to avoid a judicial lien on the residence, the debtor substituted a $10 cash claim for a claim of $10 in exemption on their house.

In re Morgan-Busby, 272 B.R. 257 (9th Cir. B.A.P. 2002)

Thirty-day time period for objecting to objects also applies to objecting to the value of the property being claimed exempt. Here, the trustee did not object to the exemption claim in stock, but reserved the right to challenge debtors' valuation of the stock. Accordingly, the trustee had the right to sell the stock, pay the debtors the amount of their grubstake exemption, and keep any remaining proceeds.

In re Clark, 266 B.R. 163 (9th Cir. B.A.P. 2001)

"The non-specific claim of exemption gives the debtor no rights, legally or practically. It is mandatory under the language of the statute that the debtor file a list of the property he claims exempt....A list of property connotes a selection of specific properties. The claim to "other assets of the petitioner" does not comply with the statute."

In re Clark, 262 B.R. 508 (9th Cir. B.A.P. 2001)

Creditor's meeting was not concluded merely because trustee failed to vocalize continued date, where continued date had been announced at previous meeting and in writing thereafter.

In re Smith, 235 F.3d 472 (9th Cir.2000)

1) Under Rule 2003(e), a § 341 meeting must be adjourned to a specific time; 2) conversion of the case from chapter 11 to chapter 7 does not restart the running of the 30-day period for filing objections to exemptions.

In re Reaves, 285 F.3d 1152 (9th Cir. 2002)

Debtor who claimed and was denied exemption in California state court levy proceeding could claim exemption under state exemption statute applicable only in bankruptcy cases. Entire amount of the $15000 wildcard exemption in CCP § 703.140(b)(2) could be used, even though the debtor was not a homeowner.

In re Wolfberg, 255 B.R. 879 (9th Cir. B.A.P. 2000), *aff'd*, 37 Fed.Appx. 891 (9th Cir. 2002)

Debtor's attempt to assert a claim of homestead exemption after confirmation of a chapter

11 plan was barred by res judicata

In re Arnold, 252 B.R. 778 (9th Cir. B.A.P. 2000)

Debtors did not act in bad faith, nor prejudice creditors or trustee, by adding pre-existing personal injury lawsuit to exemption schedule three years after filing bankruptcy petition.

In re Smith, 235 F.3d 472 (9th Cir. 2000)

Adjournment "until further notice" of creditors' meeting did not result in conclusion of the meeting for purposes of filing timely objections under Rule 4003(b) merely because no future date was specified.

In re Wolf, 248 B.R. 365 (9th Cir. B.A.P. 2000)

Debtor's exemption rights with respect to estate property inherited after he filed for bankruptcy was governed by law in effect when petition was filed.

Preblich v. Battley, 181 F.3d 1048 (9th Cir. 1999)

(1) Time for objecting to exemption does not begin to run until debtor exemption list is "sufficient to notify the creditors and trustee exactly what property the debtor is claiming as exempt." 181 F.3d at 1052.

(2) Ruling on objection to exemptions is a final, appealable order.

In re Lares, 188 F.3d 1166 (9th Cir. 1999)

The court of appeals affirmed an order of the district court. The court held that the proceeds from the sale of a bankruptcy debtor's home are not protected from a lender's setoff based on a personal guarantee by a statute exempting them from attachment, execution, or forced sale.

In re Carter, 182 F.3d 1027 (9th Cir. 1999)

Under California law, sole shareholder of Subchapter S Corporation could qualify as its "employee" for purpose of state-law bankruptcy exemption for "employee earnings."

In re Sylvester, 220 B.R. 89 (9th Cir. B.A.P. 1998)

Bankruptcy debtor may exempt portion of attorney malpractice damages attributable to misappropriated personal injury settlement funds

In re Heintz, 198 B.R. 581 (9th Cir. B.A.P. 1996)

Where debtor got exemptions by default, brother had judicial lien on exempt property, but transferred it to trustee for benefit of the estate, held

1) § 551 does not exclude exempt property from presentation

2) § 522(h) doesn't apply because property claimed exempt wasn't exemptible - *In re Morgan*, 149 B.R. 147 (9th Cir. B.A.P. 1993)

In re Goldman, 70 F.3d 1028 (9th Cir. 1995)

"Gross annual income" in C.C.P. § 704.730(a)(3) means income over a calendar year, not 12 months prior to filing

In re Canino, 185 B.R. 584 (9th Cir. B.A.P. 1995)

No informal objection to exemption allowed under R. 4003 or § 105. Bad faith 105 argument not considered. Equitable estoppel applied to sale of car, where sale completed 8 days before time for objection to exemption ran.

In re Bernard, 40 F.3d 1028 (9th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995)

1) 30 day period for objecting to exemptions begins when the 341 meeting actual concludes, however, many sessions it takes.

2) An annuity is not exempt under 704.100(a) because it has no risks, citing *Pikush*, supra. It is not exempt in this case under 704.115, because it was not reasonably necessary for support of debtor or dependents

In re Kahan, 28 F.3d 79 (9th Cir. 1994), *cert. denied,* 513 U.S. 1150, 115 S.Ct. 1100 (1995)

Trustee not barred from timely objecting to a debtor's amended schedule where debtor's initial schedules did not sufficiently notify trustee he was claiming more than a $45,000 exemption.

In re Mayer, 167 B.R. 186 (9th Cir. B.A.P. 1994)

Entitlement to homestead determined as of date bankruptcy filed, not date lien attached. At the date of the petition, the value of debtor's homestead exemption, calculated by deducting the amount of the liens from the value of the property, was approximately $34,000. Thus, there was no equity for the trustee. Thereafter, the value of the property skyrocketed and the trustee sold the property. The debtor claimed ownership of all of the net proceeds, arguing that the value of the trustee's interest must be determined as of the petition date.

The court held that because the trustee, not the debtor, owned the property, the trustee was entitled to postpetition appreciation. The court also held, following California law, that the amount of the homestead exemption must be determined as of the date of the sale by the trustee. Therefore, the debtor was entitled to the full amount of the $45,000 homestead exemption and the trustee was entitled to the balance.

In re Graziadei, 32 F.3d 1408 (9th Cir. 1994)

No bankruptcy jurisdiction over homestead property because "an action relating to homestead property could not conceivably have any effect" on the estate because the property is exempt from the estate.

In re Glass, 164 B.R. 759 (9th Cir. B.A.P. 1994), *aff'd*, 60 F.3d 565 (9th Cir. 1995)

522(g) - trustee "recovers" transfer even though he didn't file an avoidance action

In re Pikush, 157 B.R. 155 (9th Cir. B.A.P. 1993), *aff'd*. 27 F.3d 386 (9th Cir. 1994)

Single premium annuity is not exempt as life insurance under § 704.100(c)

In re Catli, 999 F.2d 1405 (9th Cir. 1993)

Pederson overruled by *Farrey*

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992)

If trustee fails to object to exemption claim, it must be allowed

In re Bronner, 135 B.R. 645 (9th Cir. B.A.P. 1992)
Failure to object to lawsuit did not revest lawsuit settlement proceeds in debtors

In re Breen, 123 B.R. 357 (9th Cir. B.A.P. 1991)
Pickup truck was exempt tool of trade - lien avoided under § 522(f)(2)
In re Herman, 120 B.R. 127 (9th Cir. B.A.P. 1990)
Exemption determined as of date of petition

In re Moffatt, 119 B.R. 201 (9th Cir. B.A.P. 1990), *aff'd.* 959 F.2d 740 (9th Cir. 1992)
Single premium immediate annuity not exempt (1) because it matured (2) not necessary for support of debtor and spouse (debtor orthodontist)

In re Homan, 112 B.R. 356 (9th Cir. B.A.P. 1989)
Nondebtor spouse could not claim state exemption under debtor/spouse's list of federal exemptions

In re Kincaid, 917 F.2d 1162 (9th Cir. 1990)
Reversing a decision of the B.A.P. upholding a ruling of the bankruptcy court, the court of appeals held that the funds held by the administrator of an ERISA deferred salary plan could not be turned over to the trustee of an employee's bankruptcy estate

In re Baldwin, 70 B.R. 612, 613 (9th Cir. B.A.P. 1987)

In re McNutt, 87 B.R. 84 (9th Cir. B.A.P. 1988)
Pick-up truck may be a tool of the trade; exemption may be combined with wild card - §522 (f)(2) applies

In re Andermahr, 30 B.R. 532, 533 (9th Cir. B.A.P. 1983)
"An exemption should be allowed no matter when it is claimed absent a showing of bad faith by the debtor or prejudice to creditors."

'Simple delay in filing an amendment where, as here, the case is not closed does not alone prejudice creditors. Nor does prejudice to creditors occur merely because a claimed exemption, if held timely, would be granted." Id at 534, quoting *Matter of Doan*, 672 F.2d 831, 833 (11th Cir. 1982).
"A debtor does not need court permission to amend any of his schedules so long as the case is still open. Bankruptcy Rule 110. By its terms, the rule permits amendments 'as a matter of course'. Bankruptcy rule 110 is not inconsistent with the code and therefore governs practice under the code", Id. at 534.

Exemptions - 2) <u>Homestead</u>

In re White, 389 B.R. 693 (9th Cir. BAP 2008)
Arizona's 18-month temporary homestead for sale proceeds does not permit use of identifiable proceeds for purposes inconsistent with the statute (here, debtor invested the money in

the stock market rather than a new homestead). Debtor, not trustee, bore risk of loss of such proceeds, and the trustee could bring a turnover action at the end of the 18-month limit without objecting to the debtor's exemption claim.

In re Rabin, 359 B.R. 242 (9th Cir. BAP 2007)

Debtors who were registered domestic partners California law were limited to a single homestead exemption in residential property in which they each held a one-half interest, when they each filed a separate chapter 7 petition.

In re Kelley, 300 B.R. 11 (9th Cir. B.A.P. 2003)

Homestead exemption properly denied, where debtor abandoned his otherwise valid declared homestead by renting out the property and living in rented premises for an extended period of time.

In re Farr, 278 B.R. 171 (9th Cir. B.A.P. 2002)

Under § 522(c), debtor was only entitled to his $100,000 homestead exemption, not to the entire value of the residence. Lien arising from nondischargeability judgment attached to nonexempt portion of homestead.

In re Viet Vu, 245 B.R. 644 (9th Cir. B.A.P. 2000)

Bankruptcy debtors not entitled to postpetition appreciation in value of residential property belonging to estate regardless of whether they had any equity when petition was filed.

In re Arrol, 170 F.3d 934 (9th Cir. 1999)

Debtor who lived in CA then moved back to home in Mich., then properly filed bankruptcy in CA, could claim $75,000 homestead on Mich. residence.

In re Cataldo, 224 B.R. 426 (9th Cir. B.A.P. 1998)

Under Hawaii law, tenancy by entireties fully exempt. No fraudulent pre-bankruptcy planning found.

In re Steward, 227 B.R. 895 (9th Cir. B.A.P. 1998)

Bankruptcy court properly determined that state-law homestead exemption applied in administratively consolidated bankruptcy cases where only one of two spouses chose federal exemption, i.e. 703.140 (husband) v. 704.730 (wife).

In re Michael, 163 F.3d 526 (9th Cir. 1998)

The court of appeals affirmed a judgment of the B.A.P. The court held that a bankruptcy debtor may amend the petition's schedules to add an exemption based on a post-petition homestead declaration.

Amiri v. Collection Bureau (In re Amiri), 184 B.R. 60 (9th Cir. B.A.P. 1995), contra, *In re Wilson*, 175 B.R. 735 (N.D. Cal. 1994), ***reversed*** 90 F.3d 347 (9th Cir. 1996)

A judicial lien does not impair a debtor's automatic homestead exemption for purposes of bankruptcy code §522(f)(1) (in effect for cases filed prior to 10/22/94) when there is little or no equity in the property.

In re Alsberg, 68 F.3d 312 (9th Cir. 1995), *cert. denied*, 517 U.S. 1168 (1996)
Debtor's right to exemption amount arises when house is sold; the estate retains the interest in the house until that time.

In re Jones, 180 B.R. 575 (9th Cir. B.A.P. 1995), ***reversed*** 106 F.3d 923 (9th Cir. 1997)
Cal law requires that debtor's surplus equity in homestead be determined as of date of filing of bankruptcy petition.

In re Hall, 1 F.3d 853 (9th Cir. 1993), ***superseded*****,** 42 F.3d 1399 (9th Cir. 1994)
Debtor claimed homestead exemption in chapter 11 under federal exemption statute claiming "all value in their homestead", (at the time 16,539). Case converted to Chapter 7, debtor amended exemption to claim under Washington statute. Amount of equity at the time: 95,000. Held: Chapter 11 claim of exemption took property out of estate - entire 95,00 goes to debtor.

In re Hyman, 123 B.R. 342 (9th Cir. B.A.P. 1991), *aff'd*. 967 F.2d 1316 (9th Cir. 1992)
1.) No presumption as to costs of sale being calculated into amount of equity for trustee
2.) Homestead attaches to equity rather than a physical asset
3.) Postpetition appreciation accrues to estate

Patterson v. Shumate, 504 U.S. 753, 112 S.Ct. 2242 (1992)
Applicable nonbankruptcy law includes ERISA's nonalienation provisions

In re Reed, 940 F.2d 1317 (9th Cir. 1991)
Homestead attaches to sum of money - is not an interest in the property.
Joint tenancy v. Community property distinguished. Postpetition appreciation accrues to estate.

In re Gitts, 116 B.R. 174 (9th Cir. B.A.P. 1990) *aff'd.* 927 F.2d 1109 (9th Cir. 1991)
Post-petition filed homestead exemption enforceable against trustee's objection

In re McFall, 112 B.R. 336 (9th Cir. B.A.P. 1990)
Homestead exemption not apportioned between spouses when one id bankruptcy debtor

In re Cole, 93 B.R. 707 (9th Cir. B.A.P. 1988)
Homestead exemption - sale of house is legitimate Chapter 11 = forced sale

Exemptions - 3) **Lien Avoidance--see under this topic heading, infra.**

Exemptions - 4) Retirement Accounts, Life Insurance and Annuities

In re Rucker, 570 F.3d 1155 (9th Cir. 2009)
Based on the totality of the circumstances, debtor's private retirement plan established under CCP § 704.115(b) was not designed and used primarily for retirement purposes, but rather was primarily designed and used to shield his assets from a large judgment creditor, even though the debtor never made large withdrawals from the plan.

In re Simpson, 557 F.3d 1010,1015 (9th Cir. 2009)
Under CCP § 704.100, "we conclude that the section applies categorically only to life insurance and that annuities are not included within the statute's reach." Single premium deferred annuity also didn't qualify as a private retirement plan under CCP 704.115, since it was not established or maintained by an employer.

Rousey v. Jacoway, 544 U.S.320, 125 S.Ct. 1561 (2005)
IRAs are exempt under 11 U.S.C. § 522(10)(E) of the federal exemptions.

In re Payne, 323 B.R. 723 (9th Cir. BAP 2005)
"An annuity may be exempt life insurance under California law if it primarily contains attributes of life insurance. That determination is a factual one, to be made on a case-by-case basis." Factors include "whether the primary purpose of the annuity was for investment or life insurance."

In re Stern, 317 F.3d 1111 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 1657 (2004)
Under Cal.Civ. Pro. Code §704.115(a), funds transferred from an IRA into a non-ERISA qualified pension plan after an adverse judgment was entered and immediately before filing for bankruptcy is insufficient as a matter of law to constitute a fraudulent transfer. The private retirement plan was ruled exempt.

In re Dudley, 249 F.3d 1170 (9th Cir. 2001)
An IRA may qualify for the exemption under § 704.115(a)(3) if the IRA was designed and used principally for retirement purposes, as opposed to only for retirement purposes.

In re Lieberman, 245 F.3d 1090 (9th Cir. 2001)
California's private retirement plan statute (Cal. Civ. Pro. Code § 704.115(a)) does not exempt an arrangement by an individual to use specified assets for retirement purposes.

In re Kim, 257 B.R. 680 (9th Cir. B.A.P. 2000), *aff'd*, 35 Fed.Appx. 592 (9th Cir. 2002)
Retirement funds in a retirement plan on the date of filing were exempt, even though they were transferred to an IRA the day after the petition was filed. Exemption rights are determined as of the date of the filing of the petition.

In re Jacoway, 255 B.R. 234 (9th Cir. B.A.P. 2000), *aff'd,* 284 F.3d 1323 (9th Cir. 2002)
IRA was exempt even though debtor took monthly partial surrender payments prior to retirement, where the IRA was used principally for retirement purposes.

In re McKown, 203 F.3d 1188 (9th Cir. 2000)
California debtor's IRA was exempt from the bankruptcy estate under bankruptcy California exemption scheme (Cal Civ. P. § 703.140(a))

In re Watson, 161 F.3d 593 (9th Cir. 1998)
The court of appeals affirmed a judgment of the B.A.P. The court held that ERISA does not exclude from the bankruptcy estate the profit-sharing plan of a corporation when the debtor is the sole shareholder and participant.

In re Metz, 225 B.R. 173 (9th Cir. B.A.P. 1998)
Company retirement plan became ERISA-qualified for exemption when sole owner-employee became joint owner with ex-spouse.

In re Friedman, 220 B.R. 670 (9th Cir. B.A.P. 1998)
Bankruptcy debtor could not claim state law exemption for pension plan funds borrowed from debtor's own company to pay household debts

In re Moses, 215 B.R. 27 (9th Cir. B.A.P. 1997), *aff'd*, 167 F.3d 470 (9th Cir. 1999)
Debtor entitled to exemption for Keough plan set up by employer which contained enforceable anti-alienation provision

In re Spenler, 212 B.R. 625 (9th Cir. B.A.P. 1997)
Income from IRAs not necessary for healthy 55 year old physician's support upon retirement

In re Rawlinson, 209 B.R. 501 (9th Cir. B.A.P. 1997)
IRA exempt under Fed exemptions

In re MacIntyre**,** 74 F.3d 186 (9th Cir. 1996)
Cal legislature exempted 'private retirement accounts' from a debtor's bankruptcy estate, and defined 'private retirement accounts' as (1) private retirement plans, (2) profit-sharing plans designed and used for retirement purposes, and (3) self-employed retirement plans and IRAS....(a)(3) is conditions "to the extent necessary" to provide for the retirement of the debtor and his dependents.
403(b) annuities are neither self-employed retirement plans nor IRAS thus not subject to 704.115(e) 'extent necessary' condition and are 704.115(1)(1) and thus fully exempt under 704.115(b)

In re Conner, 165 B.R. 901 (9th Cir. B.A.P. 1996), *aff'd.* 73 F.3d 258 (9th Cir. 1996), *cert. denied*, 519 U.S. 817 (1996)
Debtor's interest in ERISA plan exempt from bankruptcy estate regardless of debtor's control of assets in plan

In re Turner, 186 B.R. 108 (9th Cir. B.A.P. 1995)
Annuity which has life insurance characteristics may be exempt under CCP 704.100(a) (*Pikush* distinguished)

Exemptions - 4) Retirement Accounts

In re Reed, 951 F.2d 1046 (9th Cir. 1991), *op* ***withdrawn*** *and superseded*, 985 F.2d 1026 (9th Cir. 1993)
Again interpreting Arizona law, court finds that debtor's control over trust makes it not a spendthrift trust and not exempt property under state statute, which is preempted under ERISA

Pitrat v. Garlikov, 947 F.2d 419 (9th Cir. 1991), *superseded* 992 F.2d 224 (9th Cir. 1993)

1. Court refuses to follow *Lucas* adhered to *Daniel* in holding that ERISA is not applicable to nonbankruptcy law

2. Remands to determine if plan is spendthrift trust under state law (AZ)

3. ERISA's exemption is not an exemption under federal law for purposes of the federal exemption

In re Cheng, 943 F.2d 1114 (9th Cir. 1991)

A corporate retirement plan under Cal. CCP § 704.115(a)(1) or (2) is not subject to the "extent necessary to provide for the support" language of §704.115(e) as are self-employed plans

Exemptions - 5) Standing

In re Noblit, 166 B.R. 906 (D. Az. 1994) *aff'd*. 72 F.3d 757 (9th Cir. 1995)

Creditor lacks standing to assert exempt status of preferentially transferred property as a defense against avoidance

In re Alderman, 195 B.R. 106 (9th Cir. B.A.P. 1996)

Court's recognition of Ch 13 debtor's maximum homestead exemption does not bar recharacterization when debtors convert to Ch 7, i.e., value of homestead exemption not barred by Rule 4003

Exemptions-6) Exemption planning

In re Beverly, 374 B.R. 221 (9th Cir. BAP 2007)

Debtor who, by way of a marital settlement agreement, exchanged his right to proceeds from the sale of the marital residence for wife's interest in an exempt ERISA-qualified pension plan made a transfer with intent to hinder, delay or defraud under both California's UFTA and § 727(a)(2). The combination of the size of the transfer and the fact that it left the debtor with no assets with which to pay the debtor put this case outside the realm of legitimate pre-bankruptcy planning.

In re Stern, 345 F.3d 1036 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 1671 (2004)

Transfer of IRA assets into a non-qualified ERISA pension plan was not fraudulent.

FOREIGN JUDGMENTS

In re Hashim, 213 F.3d 1169 (9th Cir. 2000)

Bankruptcy court erred in denying comity to British court's unliquidated award of court costs and attorney fees.

FORECLOSURE

In re Affordable Housing Development Corp., 175 B.R. 324 (9th Cir. B.A.P. 1994)
Bankruptcy court errs in concluding bankruptcy law requires creditor to exercise its power of sale in "commercially reasonable manner"

In re Madigan, 122 B.R. 103 (9th Cir. B.A.P. 1991)
Entry of default on a debt did not trigger single action rule.

FRAUD - CALIFORNIA LAW

Atari Corp. v. Ernst & Whinney, 970 F.2d 641 (9th Cir. 1992), *amended and superseded on rehearing*, 981 F.2d 1025 (9th Cir. 1992)

Justifiable reliance requirement

In re Jogert, Inc, 950 F.2d 1498 (9th Cir. 1991) - elements under Cal. Law

1) misrepresentation
2) knowledge of falsity of misrepresentation
3) intent to induce reliance
4) justifiable reliance
5) damages

See also *Stewart v. Ragland*, (9th Cir. 1991) and *Cohen v. Wedbush, Noble, Cooke, Inc.,* 841 F.2d 282 (9th Cir. 1988) - cannot claim reliance "when the plaintiff could have, through the exercise of reasonable diligence ascertained the truth of the matter."

In re Mediscan Research Ltd., 940 F.2d 558 (9th Cir. 1991)

Intentional concealment v. affirmative misrepresentation

In re Northern Ca. Homes & Gardens, Inc., 92 B.R. 410 (9th Cir. B.A.P. 1988)

Elements of fraud - waiver - representation of opinion generally not actionable

FRAUDULENT TRANSFER

In re Bledsoe, 569 F.3d 1106, 1112 (9th Cir. 2009)

". . .[W]e hold that a state court's dissolution judgment, following a regularly conducted contested proceeding, conclusively establishes "reasonably equivalent value" for the purpose of § 548, in the absence of actual fraud." This is true even though the dissolution judgment here was by default.

In re Slatkin, 525 F.3d 805 (9th Cir. 2008)

1) Plea agreement of debtor is admissible to demonstrate that debtor operated a Ponzi scheme with an intent to defraud, and that agreement conclusively established intent to defraud as to transfer of purported profits to investor defendants;

2) Debtor was not a stockbroker for purposes of § 546(e).

In re AFI Holding, Inc., 525 F.3d 700 (9th Cir. 2008)

Under California Civil Code § 3439.04, the good faith exception to actually fraudulent transfers is not barred as a matter of law because the right to rescission and restitution were "reasonably equivalent value" under In re United Energy Corp., 944 F.2d 589 (9th Cir. 1991).

In re First Alliance Mortg. Co., 471 F.3d 977, 1001 (9th Cir. 2006)

"The proper measure of damages in fraud actions under California law. . . is "out-of-pocket" damages. These are based on what was paid due to the fraud, as compared to what would have been paid absent the fraud."

In re Costas**,** 346 B.R. 198 (9th Cir. BAP 2006)*, aff'd,* 555 F.3d 790 (9th Cir. 2009)

". . .[U]nder [Arizona] state law, a debtor's prepetition effective disclaimer of an inheritance is not avoidable as a fraudulent transfer under section 548." *In re Bright*, 241 B.R. 664 (9th Cir. BAP 1999) is still good law.

In re Northern Merchandise, Inc., 371 F.3d 1056 (9th Cir. 2004)

No fraudulent transfer found, where loan was to shareholders, but proceeds went to the debtor and the loan was secured by the debtor's assets. Bank acted in good faith under § 549(c), since there was no evidence of fraud in structuring the transaction in this fashion.

Decker v. Advantage Fund Ltd., 362 F.3d 593 (9th Cir. 2004)

Unissued stock was not an interest in property of the debtor corporation for purposes of the fraudulent transfer claim.

In re Stern, 317 F.3d 1111 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 1671 (2004)

Under Cal.Civ. Pro. Code § 704.115(a), funds transferred from an IRA into a non-ERISA qualified pension plan after an adverse judgment was entered and immediately before filing for bankruptcy is insufficient as a matter of law to constitute a fraudulent transfer. The private retirement plan was ruled exempt.

In re Roosevelt, 220 F.3d 1032 (9th Cir. 2000)

A wife who exchanges her interest in her husband's legal education for property conveyed to her by a bankruptcy debtor does not give property of value when the education was neither paid

for with community funds nor increased her husband's earning capacity during the marriage.

In re Bright, 241 B.R. 664 (9th Cir. B.A.P. 1999)

Washington state debtor's disclaimer of inheritance not "transfer" of property for purposes of federal bankruptcy law.

In re Heddings Lumber & Building Supply, Inc., 228 B.R. 727 (9th Cir. B.A.P. 1998)

Trustee claiming fraudulent and post-petition property transfer was required to prove that debtor had an interest in the transferred property.

In re Trujillo, 215 B.R. 200 (9th Cir. B.A.P. 1997), *aff'd*, 166 F.3d 1218 (9th Cir. 1998)

Debtors' transfer of property for no consideration was fraudulent conveyance. Transfer to relative "is trust"

In re Cohen, 199 B.R. 709 (9th Cir. B.A.P. 1996)

Car dealers who acted in good faith not liable for unknowing involvement in Ponzi scheme. ...although some of the transfers are avoidable under Bankruptcy Code §548, the dealers qualify for the safe harbor demarked by good faith and value given to the debtor and are entitled to retain the money they received.

In re Lindsay, 59 F.3d 942 (9th Cir. 1995), *cert. denied*, 516 U.S. 1074 (1996)

Gross inadequacy of price is a ground only if state law so states.

Under *BFP*, Beneficial was entitled to judgment as a matter of law that the foreclosure sale was not a fraudulent conveyance, so long as "all the requirement statute of frauds the State's foreclosure law have been complied with." *BFP,* 114 S.Ct., at 1757. It could be set aside only if there were "irregularity in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law." *Id*., Even if there were such an irregularity, that alone would not permit setting aside the foreclosure sale as a fraudulent conveyance. It would only destroy the irrebuttability of the presumption that the price was "reasonably equivalent value." The transfer could then be avoided if the price received was not reasonably equivalent to "the price that would have been received if the foreclosure sale had proceed according to law."

In re Roosevelt, 176 B.R. 200 (9th Cir. B.A.P. 1994)

Property transferred by husband to wife (cp medical practice and law school education) not valued from creditor's viewpoint.

BFP v. RTC, 511 U.S. 531, 114 S.Ct. 1757 (1994) - equivalent value under se 548(a)(2)

In a real property foreclosure sale, 'reasonably equivalent value' as used in §548(a)(2), is conclusively deemed to mean the price in fact received at the foreclosure sale, if there is full compliance with the requirements of the state foreclosure laws. The proper std is not 'fair market value' which is defined in Black's Law Dictionary (and by most MAI appraisals) as the price obtained after ample negotiation between a willing buyer and a willing seller. The 548(a)(2) inquiry must consider the distress and state law time constraints of a foreclosure sale that affect price.). The Court declines to impose, as federal bankruptcy policy, "reasonable" foreclosure sale practices or procedures, which may vary from state to state. Congress is not presumed, by the phrase "reasonably equivalent value" either to upset 400 years of peaceful coexistence of fraudulent transfer law and foreclosure law, or to undermine the essential state interest in the

security and stability of title to real estate.

In re Fair Oaks, Ltd., 168 B.R. 397 (9th Cir. B.A.P. 1994)
Creditor who receives a lien on real property on account of an antecedent debt of a third party does not hold the status of a bona fide encumbrancer for value under Ca law.

In re Prejean, 994 F.2d 706 (9th Cir. 1993)
1) Reasonably equivalent value must be analyzed from creditors' perspective;
2) Payment of a time-barred debt can constitute reasonably equivalent value under CFTA.

Stoumbos v. Kilimnik, 988 F.2d 949 (9th Cir. 1993), *cert. denied*, 510 U.S. 867 (1993)
Fraudulent transfer of business' goodwill by and to an insider

In re VandeKamp's Dutch Bakeries, 908 F.2d 517 (9th Cir. 1990)
Transfers avoided under 548 are automatically preserved under 551

In re United Energy Corp., 944 F.2d 589 (9th Cir. 1991)
Value given for payments in the form of release of restitution claims = reasonably eq value Ponzi scheme

In re Agric. Research and Tech. Group, Inc, 916 F.2d 528, 531 (9th Cir. 1990)
A Ponzi scheme is "an arrangement whereby an enterprise makes payments to investors from the proceeds of a later investment rather than from profits of the underlying business venture." A "debtor's actual intent to hinder, delay or defraud may be inferred from the mere existence of a Ponzi scheme." *Id.* at 535.

Kupetz v. Wolf, 845 F.2d 842 (9th Cir. 1988.)
Sale of debtor corp 2.5 yrs prior to filing of petition by means of lbo was not a 'fr conveyance

FULL FAITH AND CREDIT

Morgan Stanley Mortgage Capital Inc. v. Insurance Comm'r of State of California, 18 F.3d 790 (9th Cir. 1994)

No implied repeal of 1738 found.

Preclusive effect given to state court's decision that state insolvency court had jurisdiction over assets of entities affiliated with insolvent insurance company.

Section 1738 "commands a federal court to accept the [preclusion] rules chosen by the State from which the judgment is taken."....

GUARANTORS

In re SNTL Corp., 380 B.R. 204 (9th Cir. BAP 2007), *aff'd,* 571 F.3d 826 (9th Cir. 2009).
A debtor's previously released liability as a guarantor of an affiliate's obligation is revived when the creditor compromised a preference action against it.

Star Phoenix Mining Company v. West Bank One, 147 F.3d 1145 (9th Cir. 1998)
Creditor that fails to preserve deficiency claim against debtor does not forfeit its right to collect remaining deficiency from guarantor

In re Alcock, 50 F.3d 1456 (9th Cir. 1995)
3-606: SBA's change of priority on real estate without notice discharged guarantor. No waiver of defense in loan documents.

Effectiveness of Guarantor Waivers.
1) Guaranty agreement was not enforceable after creditor non-judicially foreclosed on real estate collateral for the principal note. Citing *Cathay Bank v. Lee,* 14 Cal.App.4th 1533 (1993), the Court held that waiver of the "Gradsky" defense must inform the guarantor that the guarantor has rights of subrogation and reimbursement and that these rights will be destroyed by foreclosure. Despite express language in the guaranty (that lender may foreclose by nonjudicial sale, that such foreclosure would not affect the guarantor's liability, and that guarantor waives any defense based on loss of subrogation or reimbursement against borrower), this was held not to be an effective waiver. *Resolution Trust Corp. v. Titan Financial. Corp.*, 22 F.3d 923 (9th Cir. 1994)

2) Guaranty agreement held to be a sufficient waiver of the *Gradsky* defense where it stated that upon default the lender may elect to nonjudicially foreclose even if the effect is to deprive the guarantor of the right to collect reimbursement from the borrower. *In re Pon*, 164 B.R. 322 (Bankr. N.D. Cal. 1994) (Carlson, J.) (Decided before *Titan Financial. Corp.*)

3) The California legislature sought to put an end to this bickering over effective waivers. A waiver of a suretyship defense is effective whether or not it refers to statutory sections or judicial decisions. Moreover, the statute sets forth language which is deemed to be an effective waiver of the *Gradsky* defense based on the creditor's election of remedies. Cal. Civ. Code §2856 (effective 1/1/95).

In re Teerlink Ranch, Ltd., 886 F.2d 1233 (9th Cir. 1989)
Payment of a debt extinguishes guarantee.

HESCA–CAL. CIVIL CODE § 1695 et seq.

Hoffman v. Lloyd, 572 F.3d 999, 1001 (9th Cir. 2009)

"To effectuate its purpose, HESCA obligates a buyer of property that is in foreclosure to provide to the seller, among other things, notice of the seller's right to rescind the sale contract. . . .until a buyer complies with this obligation, the seller may cancel the sale contract." [Citations omitted]. A general release of all known and unknown claims under Cal. Civil Code § 1542 does not vanquish the buyers right to rescind the contract of sale under HESCA.

IMMUNITY

In re Castillo, 297 F.3d 940 (9th Cir. 2002)
Chapter 13 trustee had absolute quasi-judicial immunity for both scheduling and noticing a confirmation hearing.

In re Kashani, 190 B.R. 875 (9th Cir. B.A.P. 1995)
Trustee entitled to judicial immunity

In re Jackson, 105 B.R. 542 (9th Cir. B.A.P. 1989)
Trustee entitled to judicial immunity

INJUNCTION (see also Preliminary Injunction)

In re Excel Innovations, Inc., 502 F.3d 1086 (9th Cir. 2007), *cert. denied,* 128 S.Ct. 2080 (2008)
Distinguishing *Crown Vantage, infra,* the court held that "our usual preliminary injunction standard applies to applications to stay actions against non-debtors under § 105(a). In granting or denying such an injunction, a bankruptcy court must consider whether the debtor has a reasonable likelihood of a successful reorganization, the relative hardship of the parties, and any public interest concerns if relevant."

In re Crown Vantage, Inc., 421 F.3d 963, 975 (9th Cir. 2005)
"The only requirement for the issuance of an injunction under § 105 is that the remedy conform to the objectives of the bankruptcy code." The standard for issuing a preliminary injunction does not apply to injunctions issued under § 105.

In re Manning, 236 B.R. 14 (9th Cir. B.A.P. 1999)
Bankruptcy court properly issued injunction barring state court action against creditor involved in foreign insolvency proceeding.

In re Pacific Land Sales, Inc., 187 B.R. 302 (9th Cir. B.A.P. 1995)
Bankruptcy Court has properly enjoined FCC and state court proceedings.

Amwest Mortgage Corp. v. Grady, 925 F.2d 1162 (9th Cir. 1991)
Permanent injunction of state court proceedings to protect res judicata effect of previous judgment - standard

In re Lenox, 902 F.2d 737 (9th Cir. 1990)
§105 - Bankruptcy Court has the power sua sponte to reconsider any of its orders, and may even ignore stipulations upon showing that parties have not changed their position in reliance

In re Reilly, 112 B.R. 1014 (9th Cir. B.A.P. 1990)
Orders enjoining debtors from filing documents - Protective injunctive order fails when debtors unable to defend against claims

In re American Bicycle Association, 895 F.2d 1277 (9th Cir. 1990)
Anti-injunction Act precludes bankruptcy court from enjoining IRS from collecting responsible officer 100% penalty

In re American Hardwoods, Inc., 885 F.2d 621 (9th Cir. 1989)
While Bankruptcy Court may issue preliminary injunction against collection efforts as to nondebtor corp. officers, court may not issue a permanent injunction.

In re Heincy, 858 F.2d 548 (9th Cir. 1988)
Bankruptcy Court has the power to enjoin state criminal proceedings...injunction issued is to restitution order did not comply with *Younger v. Harris*.

INSURANCE

Biltmore Associates v. Twin City Fire Ins. Co., 572 F.3d 663 (9th Cir. 2009)

The Ninth Circuit affirmed the dismissal of the case pursuant to Rule 12(b)(6). The court held that for purposes of the "insured versus insured" exclusion in the D & O polic, " the pre-filing company and the company as debtor-in-possession in chapter 11 are the same entity." Id. at 671.

Unified Western Grocers v. Twin City Fire, 457 F.3d 1106 (9th Cir. 2006)

Summary judgment dismissing a complaint for coverage under a D & O policy brought by a bankruptcy trustee was reversed. Although portions of the complaint fell within Cal. Ins. Code Section 533's exclusion for willful acts, the complaint also alleged negligence and breach of fiduciary duty which might be covered.

INTELLECTUAL PROPERTY RIGHTS

In re Cybernetic Services, Inc., 252 F.3d 1039 (9th Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002)

"...[A] security interest in a patent that does not involve a transfer of rights of ownership is a "mere license" and is not an assignment , grant or conveyance" within the meaning of 35 U.S.C. § 261. And because § 261 provides that only an "assignment, grant or conveyance shall be void" as against subsequent purchasers and mortgagees, only transfers of ownership interests need to be recorded with the PTO."

INTEREST

In re Weinberg, 410 B.R. 19, 37 (9th Cir. BAP 2009)

"It is settled law that where a debt that is found to be nondischargeable arose under state law, "the award of prejudgment interest is also governed by state law." *In re Niles,* 106 F.3d 1456, 1463 (9th Cir. 1997)".

General Electric Cap. v. Future Media Productions, 547 F.3d 956 (9th Cir 2008)

Where creditor's oversecured claim was paid in full out of the proceeds of an asset sale, rather than pursuant to a chapter 11 plan, and thus not subject to the "cure" provisions of § 1124 that a chapter 11 plan would allow, creditor was entitled to a default rate of interest. Court distinguishes the holding in *In re Entz-White Lumber and Supply, Inc.,* 850 F.2d 1338 (9th Cir. 1988), and disapproves of the holding in *In re Casa Blanca Project Lenders*, 196 B.R. 140 (9th Cir. BAP 1996)

In re Slatkin, 525 F.3d 805, 820 (9th Cir. 2008)

". . .[W]hen a court has granted judgment on all substantive issues, the court has the authority to award prejudgment interest under [Cal. Civ. Code] § 3288."

Till v. SCS Credit Corp., 124 S.Ct. 1951 (2004)

Formula approach for setting interest rate based on prime rate adjusted for risk of nonpayment was appropriate cramdown rate of interest.

In re Cardelucci, 285 F.3d 1231 (9th Cir. 2002), *cert. denied*, 537 U.S. 1072 (2002)

Postpetition interest in a chapter 11 plan based on 11 U.S.C. § 726(a)(5) is to be calculated using the federal judgment interest rate under 28 U.S.C. § 1961 rather than the contract or state law rate.

In re Crystal Properties, Ltd., L.P., 268 F.3d 743 (9th Cir. 2001)

"Without notice or demand" provision in default interest clause of loan agreement did not alter requirement that holder of defaulted loan must carry out some affirmative act to exercise its option to accelerate the loan and invoke the default interest clause. Default interest rate did not come into effect until holder of the note first took affirmative action to put the debtor on notice that it intended to exercise its option to accelerate, and thus invoke the default rate.

In re Banks, 263 F.3d 862 (9th Cir. 2001)

"The federal prejudgment interest rate applies to actions brought under federal statute, such as bankruptcy proceedings, unless the equities of the case require a different rate."

In re Udhus, 218 B.R. 513 (9th Cir. B.A.P. 1998)

Bank not entitled to default rate of interest under either § 506(b) or § 1123

In re Melenyzer, 143 B.R. 829 (Bankr. W.D Tex. 1992)

Interest under 726(a)(5) paid at federal judgment rate

In re Camino Real Landscape Maintenance Contractors Inc., 818 F.2d 1503 (9th Cir. 1987)

Prevailing market rate applies re: discount rate for present value purposes.

In re Southeast Co., 868 F.2d 335 (9th Cir. 1989)
Interest in Ch. 11 - right to 506(b) interest

In re Entz-White Lumber & Supply, Inc., 850 F.2d 1338 (9th Cir. 1988)
Right to non-default interest rate

In re Nucorp Energy, Inc., 902 F.2d 729 (9th Cir. 1990)
1961 applies to pre-judgment interest

In re Beverly Hills Bancorp, 752 F.2d 1334, 1339 (9th Cir. 1984)
No right to postpetition interest on claims.

INVOLUNTARY PETITION

In re Maple-Whitworth, Inc., 556 F.3d 742 (9th Cir. 2009), *op. amended,* 559 F.3d 917 (9th Cir. 2009)

Even though the statute refers to "petitioners", there is no requirement that all petitioners be named in a § 303(i) motion for attorney fees. however, the BAP erroneously applied the tort concept of joint and several liability to this provision, which was contrary to the individualized consideration that exercising discretion requires.

In re Wind N' Wave, 509 F.3d 938 (9th Cir. 2007)

". . .[C]reditors who receive compensation under 503(b)(4) should also be compensated for costs incurred in litigating a fee award, so long as the services meet the § 503(b)(4) requirements and the case "exemplifies a 'set of circumstances' where litigation was 'necessary'". . . ."

In re Macke Intern. Trade, Inc., 370 B.R. 236 (9th Cir. BAP 2007)

Bankruptcy court may award attorney fees to a debtor where case is dismissed pursuant to § 305(a), even if debtor meets all of the requirements for an involuntary under § 303. Case was properly dismissed under § 305, where debtor had done an assignment for the benefit of creditors six months before the involuntary was filed, and the petitioning creditor was the only creditor not to consent to the assignment.

In re Miles, 430 F.3d 1083 (9th Cir. 2005)

Bankruptcy court had "arising under" jurisdiction over state law tort suits removed from state court, since such actions were totally preempted by § 303(i).

In re Focus Media, Inc., 378 F.3d 916 (9th Cir. 2004), *cert. denied,* 544 U.S. 968, 125 S.Ct. 1742 (2005)

1. Dollar amount threshold is satisfied if at least a portion of the claim is undisputed; 2. no evidence that affiliates transferred their claims in violation of Bankruptcy Rule 1003; 3. evidence supported finding that the debtor wasn't paying its debts as they came due.

In re Mike Hammer Productions, Inc., 294 B.R. 752 (9th Cir. B.A.P. 2003)

Non-petitioning creditors lack standing to seek damages under 11 U.S.C. § 303(i)(2). Only the debtor has standing to seek such damages.

In re Miles, 294 B.R. 756 (9th Cir. B.A.P. 2003), *aff'd,* 430 F.3d 1083(9th Cir. 2005)

§ 302(i) preempts state tort remedies for bringing a wrongful involuntary petition.

In re Vortex Fishing Systems, Inc., 262 F.3d 985 (9th Cir. 2001), *amended and superseded*, 277 F.3d 1057 (9th Cir. 2002)

Proper test for determining whether alleged dispute justified involuntary bankruptcy petition was whether objective basis existed for either factual or legal dispute as to validity of debt.

In re Seko Investment, Inc., 156 F.3d 1005 (9th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999)

"The existence of a counterclaim against a creditor does not automatically render the creditor's claim the subject of a 'bona fide dispute.' So long as the petitioning creditor has established that there is no dispute regarding the debtor's liability on the creditor's claim, the

creditor has standing under §303(b)...” 156 F.3d at 1008.

In re Rothery, 143 F.3d 546 (9th Cir. 1998)

Bankruptcy court properly granted summary judgment in favor or the creditors on the issue of whether the debtor had only twelve creditors.

In re Quality Laser Works, 211 B.R. 936 (9th B.A.P. 1997), *aff'd*, 165 F.3d 37 (9th Cir. 1998)

Partnership's liquidating partner properly determined to be “custodian” for purposes of involuntary bankruptcy.

In re Federated Group, Inc., 107 F.3d 730 (9th Cir. 1997)

Joinder of indenture trustee to involuntary petition does not extinguish claims of debenture holders for purpose of “three petitioning creditors” retirement

JURISDICTION --PERSONAL

In re Etalco, 273 B.R. 211 (9th Cir. B.A.P. 2001)

Bankruptcy court in Washington state had no jurisdiction over out-of-state entity that entered into postpetition contract with Chapter 11 debtor. (Court seems to confuse venue with personal jurisdiction).

In re Tuli, 172 F.3d 707 (9th Cir. 1999)

Bankruptcy court must allow adversary plaintiff to establish "minimum contacts" with US when court sua sponte raised issue of personal jurisdiction over foreign government.

In re Pintlar, 205 B.R. 945 (Bankr.D. Idaho 1997)

New bankruptcy rule of personal jurisdiction over foreign residents applies to action pending on its effective date if it is "just and practicable".

In re PNP Holdings Corp., 184 B.R. 805 (9th Cir. B.A.P. 1995), *aff'd* 99 F.3d 910 (9th Cir. 1996)

Creditor consented to personal jurisdiction when it filed proof of claim. Rule may not apply if creditor contests personal jurisdiction prior to filing proof of claim.

JURISDICTION – SUBJECT MATTER

In re Healthcentral.Com, 504 F.3d 775 (9th Cir. 2007)

BLR 9015-2(b) improperly allowed the bankruptcy judge to certify that a proceeding was to be tried to a jury and thus the reference had to be withdrawn under 28 U.S.C. § 157(d). It thus ran afoul of the national rule, which requires that a party file a motion to withdraw and that the district court decide the motion. However, consistent with the Seventh Amendment, the bankruptcy judge may retain the proceeding until it is ready for trial.

Vacation Village, Inc. v. Clark County, Nev, 497 F.3d 902 (9th Cir. 2007)

Debtors' inverse condemnation suit against the county fell within "related to" jurisdiction of the bankruptcy court, since the claims were property of the debtors' estates.

In re Valdez Fisheries Development Ass'n, Inc., 439 F.3d 545 (9th Cir. 2006)

Bankruptcy court did not have related to jurisdiction over a lawsuit between two creditors, where there was no confirmed plan and there was no claim that the dispute would have any effect upon the case, which was closed.

In re Rains, 428 F.3d 893 (9th Cir. 2005)

Bankruptcy court had jurisdiction to enforce a settlement agreement, even though the validity of the settlement was on appeal.

In re Miles, 430 F.3d 1083 (9th Cir. 2005)

Bankruptcy court had "arising under" jurisdiction over state law tort suits removed removed from state court, since such actions were totally preempted by § 303(i). Furthermore, siblings of debtors had no standing to bring an action under § 303(i).

In re Sasson, 424 F.3d 864 (9th Cir. 2005), *cert denied,* 547 U.S. 1206, 126 S.Ct. 2890 (2006)

A bankruptcy court has subject matter jurisdiction to enter a money judgment in a dischargeability proceeding, even though the underlying debt has been reduced to judgment in state court. The judgment was obtained in 1991, but the dischargeability action wasn't filed until debtor filed for bankruptcy in 2001. In finding that the debtor engaged in willful and malicious conduct in rendering the initial state court judgment uncollectible, the bankruptcy court renewed the 1991 judgment, and tacked on interest at the federal rate for the period from 1991.

In re Pegasus Gold Corp., 394 F.3d 1189 (9th Cir. 2005)

Tort and breach of contract action brought post confirmation by debtor and newly-formed corporation was within the bankruptcy court's subject matter jurisdiction. The "related to" test was too broad in this context; rather, the inquiry was whether there was a close nexus to the bankruptcy plan or proceeding.

In re Birting Fisheries, Inc., 300 B.R. 489 (9th Cir. B.A.P. 2003)

Bankruptcy court had exclusive jurisdiction to collaterally attack state court order and review foreign-country judgment for conflict with either confirmed chapter 11 plan or Bankruptcy Code.

In re McCowan, 296 B.R. 1 (9th Cir. B.A.P. 2003)

"We hold that a bankruptcy court has ancillary jurisdiction to enforce its money judgments and retains such jurisdiction after the bankruptcy case is closed."

In re Canter, 299 F.3d 1150 (9th Cir. 2002)

District court improperly withdrew the reference under § 157(d) and enjoined municipal court unlawful detainer action

In re Graves, 279 B.R. 266 (9th Cir. B.A.P. 2002)

An injunction action under 11 U.S.C. § 110(j) is a core proceeding.

In re McGhan, 288 F.3d 1172 (9th Cir. 2002)

"Relying on *Gruntz v. County of Los Angeles,* 202 F.3d 1074 (9th Cir. 2000), we hold that state courts lack jurisdiction to determine whether a listed and scheduled creditor received adequate notice of discharge proceedings. We also hold that the state court lacked authority to modify the bankruptcy court's orders discharging Rutz's claim and permanently enjoining Rutz from collection on the debt."

In re Aheong, 276 B.R. 233 (9th Cir. B.A.P. 2002)

Bankruptcy court had both ancillary and "arising under" jurisdiction to reopen case and annul automatic stay.

In re Kieslich, 258 F.3d 968 (9th Cir. 2001)

IRS waived objection to bankruptcy court exercising noncore jurisdiction by failing to raise it before the bankruptcy court.

In re General Carriers Corp., 258 B.R. 181 (9th Cir. B.A.P. 2001)

Bankruptcy court had no jurisdiction to decide abstention motion as to state court action that had not been removed to bankruptcy court.

In re G.I. Industries, Inc., 204 F.3d 1276 (9th Cir. 2000)

Bankruptcy court could adjudicate validity of contract when considering proof of claim under executory agreement rejected by trustee.

In re Menk, 241 B.R. 896 (9th Cir. B.A.P. 1999)

Debtor's appeal was moot where debtor sought to avoid bankruptcy court's jurisdiction by contesting court's jurisdiction to reopen case for determination of whether debtor was excepted from discharge.

In re Mirzai, 236 B.R. 8 (9th Cir. B.A.P. 1999)

Bankruptcy court lacked jurisdiction to enter judgment where appeal from B.A.P. decision was pending before court of appeals.

In re Silva, 185 F.3d 992 (9th Cir. 1999)

The court held that under the Bankruptcy Code, core proceedings include a turnover request alleging that property in a third party's possession constitutes property of the bankruptcy estate.

In re Levander, 180 F.3d 1114 (9th Cir. 1999)

The Court held that a bankruptcy court had jurisdiction to amend its order awarding attorney fees to add a judgment-debtor under California law and its inherent power based on fraud perpetrated on the court.

In re Pavelich, 229 B.R. 777 (9th Cir. B.A.P. 1999)

Bankruptcy court had jurisdiction to enforce discharge in face of contrary state court judgment

In re Audre, Inc., 216 B.R. 19 (9th Cir. B.A.P. 1997)

bankruptcy court lacked jurisdiction to hear collateral attack on state court judgment even though judgment was on appeal and thus not final

In re ACI-HDT Supply Company, 205 B.R. 231 (9th Cir. B.A.P. 1997)

Bankruptcy Court lacked core jurisdiction over state law action for fraud.

In re Kennedy, 108 F.3d 1015 (9th Cir. 1997)

Bankruptcy court has jurisdiction to enter monetary judgment on disputed state court law claim in determining debt nondischargeable (9th Cir. 1997)

Hinduja v. Arco Products Co., 102 F.3d 987 (9th Cir. 1996)

Plaintiff not required to sue on stipulation for modifying stay in Bankruptcy court - could do so in District court

In re Yochum, 89 F.3d 661 (9th Cir. 1996)

Bankruptcy Court is a court of the U.S. for purposes of 26 U.S.C. 7430(c)(6)

In re Vylene Enterprises, Inc., 90 F.3d 1472 (9th Cir. 1996)

Adversary proceeding involving BREACH of a franchise agreement and BREACH of the implied covenant of good faith and fair dealing was a core proceeding under §157(b)(2)(M) since franchise agreements were property of the estate.

In re Casamont Investors, Ltd., 196 B.R. 517 (9th Cir. 1996)

Bankruptcy court abuses discretion by retaining jurisdiction over new adversary proceeding involving only state law after voluntary dismissal of bankruptcy case.

Celotex Corp. v. Edwards, 514 U.S. 300 (1995),

Execution on appeal bond was within Bankruptcy Court's related to jurisdiction - injunction issued to prohibit collecting on bond had to be heeded by Court of Appeals

In re Davis, 177 B.R. 907 (9th Cir. B.A.P. 1995)

Supplemental jurisdiction - UMW v. Gubb

In re Diversified Contract Services, Inc., 167 B.R. 591 (Bankr. N.D. Cal. 1994)

In re Ferrante, 51 F.3d 1473 (9th Cir. 1995)

Action on a trustee's surety bond = core proceeding

In re Harris Pine Mills, 44 F.3d 1431 (9th Cir. 1995), *cert. denied*, 515 U.S. 1131 (1995)
Suit against trustee arising out of post-petition sale is a core proceeding

In re Parker North American Corp., 24 F.3d 1145 (9th Cir. 1994)
Bankruptcy Court has jurisdiction over preference suit against RTC notwithstanding FIRREA, as least where RTC has filed a claim

In re Int'l. Nutronics, Inc., 3 F.3d 306 (9th Cir. 1993), *withdrawn and superseded on rehearing by* 28 F.3d 965 (9th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994)
An antitrust action arising from a sale of an estate asset is not a core proceeding

In re DeLorean Motor Co., 155 B.R. 521 (9th Cir. B.A.P. 1993)
Malicious prosecution suit against trustee who brought fraudulent transfer action against plaintiff = core proceeding

In re Lawson, 156 B.R. 43 (9th Cir. B.A.P. 1993)
Bankruptcy court has jurisdiction to dispose of pending and ancillary matters after the dismissal of the bankruptcy case. Not conditioned on express language retaining jurisdiction at least as to ancillary matters such as execution on judgments.

In re Eighty South Lake, Inc., 81 B.R. 580 (9th Cir. B.A.P. 1987)
Court retains jurisdiction after dismissal to determine sanctions

In re Carraher, 971 F.2d 327 (9th Cir. 1992)
Court may retain jurisdiction over adversary proceeding even though case has been dismissed

In re Hall Bayoutree Assoc., Ltd., 939 F.2d 802 (9th Cir. 1991)
Not improper to withdraw reference by implication but must still have cause

In re Castro, 919 F.2d 107 (9th Cir. 1990)
District Court in a noncore proceeding must make a de novo review of the case, including consideration of the record, to satisfy *Northern Pipeline*'s requirement that noncore issues are to be decided by an Article III judge.

American Principals Leasing Corp. v. U.S., 904 F.2d 477 (9th Cir. 1990)
Bankruptcy jurisdiction lacking over adjudication of tax consequences of partnership activities or non-debtor partners' tax liability. Section 505 does not extend to anyone but debtor.

In re American Hardwoods, 885 F.2d 621 (9th Cir. 1989)
Pacor standard adopted.

In re Balboa Improvements, Ltd., 99 B.R. 966 (9th Cir. B.A.P. 1989)
Dispute between real estate broker and debtor attorney = related to jurisdiction

In re Contractors Equipment Supply Co., 861F.2d 241 (9th Cir. 1988)
Bankruptcy court had jurisdiction to hear adversary proceeding between secured creditor

and county agency since secured creditor did not own property - debtor still had interest in it.

Gonzales v. Parks,830 F.2d 1033 (9th Cir. 1987)
State courts preempted from hearing lawsuit based on bad faith filing in bankruptcy court.

In re Benny, 842 F.2d 1147 (9th Cir. Cir. 1988), cert denied 488 U.S. 1014 (1989)
Bankruptcy court did not have subject matter jurisdiction over wife in Chapter 7 case initiated by involuntary joint petition against husband and wife.

JURY

In re Hickman, 384 B.R. 832 (9th Cir. BAP 2008)

Debtor's counterclaims to a creditor's claims in a non-dischargeability proceeding were not entitled to a jury trial in bankruptcy court, since they involved the restructuring of the debtor creditor relationship. Any jury trial right debtor may have had in another forum did not provide cause for dismissal of the bankruptcy case under § 707(a), where the debtor voluntarily submitted himself to the jurisdiction of the bankruptcy court and then failed to perform his statutory duties.

In re Healthcentral.Com, 504 F.3d 775 (9th Cir. 2007)

BLR 9015-2(b) improperly allowed the bankruptcy judge to certify that a proceeding was to be tried to a jury. It thus ran afoul of the national rule, which requires that a party file a motion to withdraw and that the district court decide the motion. However, consistent with the Seventh Amendment, the bankruptcy judge may retain the proceeding until it is ready for trial.

In re Smith, 205 B.R. 226 (9th Cir. B.A.P. 1997)

Debtor not entitled to trial by jury in adversary proceeding involving claims by IRS

In re Conejo Enterprises, Inc., 96 F.3d 346 (9th Cir. 1996)

No right to jury where proof of claim filed

In re Clay, 35 F.3d 190 (5th Cir. 1994)

Bankruptcy court lacks essential attributes of judicial power and thus can only try jury trials upon consent.

In re Cinematronics, Inc., 916 F.2d 1444 (9th Cir. 1990)

Withdrawal of case to the district court proper because bankruptcy court could not conduct jury trial on noncore proceeding

Mondor v. U.S. District Court for Cent. Dist. Of CA, 910 F.2d 585 (9th Cir. 1990)

Where a pre-removal jury demand would satisfy federal but not state requirements, that demand is incorporated into the federal record upon removal and is deemed to satisfy FRCP 38(b).

LACHES

Wyler Summit Partnership v. Turner Broadcasting System, Inc., 235 F.3d 1184 (9th Cir. 2000)

"Under California law, laches is available as a defense only to claims sounding in equity, not to claims at law. Wells Fargo Bank, N.A. v. Bank of America NT & SA, 38 Cal. Rptr. 2d 521, 530 (Cal. Ct. App. 1995)."

In re Roberts Farms Inc., 980 F.2d 1248 (9th Cir. 1992)

LANDLORD TENANT - CALIFORNIA LAW

In re 240 North Brand Partners, Ltd., 200 B.R. 653 (9th Cir. B.A.P. 1996)

Debtor not entitled to modify lease to commercial property prior to approved foreclosure sale

LAW OF THE CASE DOCTRINE

In re Commercial Money Centers, Inc., 392 B.R. 814, 832 (9th Cir. BAP 2008)

Under the law of the case doctrine, bankruptcy court was not barred from considering an issue that was not specifically raised by the parties.

Wyler Summit Partnership v. Turner Broadcasting System, Inc., 235 F.3d 1184 (9th Cir. 2000)

Under the law of the case doctrine, "the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case...." "For the doctrine...to apply, the issue in question must have been decided explicitly or by necessary implication in [the] previous disposition." (citations omitted)

LIEN AVOIDANCE § 522(f) and 506(d)

In re Concannon, 338 B.R. 90 (9th Cir. BAP 2006)
Section 506(d) cannot be used by a chapter 7 debtor to strip off a wholly unsecured nonconsensual lien.

In re Charnock, 318 B.R. 720 (9th Cir. BAP 2004)
Plain meaning of § 522(f) required avoidance of judicial lien that was senior to a consensual lien.

In re Darosa, 318 B.R. 871 (9th Cir. BAP 2004)
Mathematical formula for avoiding liens under § 522(f) cannot be altered to provide for potential subrogation between two judgment debtors in the future. It must be applied as written.

In re Villar, 317 B.R. 88 (9th Cir. B.A.P. 2004)
Service of a motion to avoid a judicial lien upon the creditor's P.O. box was insufficient under Bankruptcy Rule 7004(b)(3).

In re Zimmer, 313 F.3d 1220 (9th Cir. 2002)
A wholly unsecured lienholder is not entitled to the protections of § 1322(b)(2); The holding of *In re Lam*, 211 B.R. 36 (9th Cir. B.A.P. 1997) approved.

In re Chiu, 304 F.3d 905 (9th Cir. 2002)
Debtor who owned their house at the time a judgment lien was a fixed to it could avoid the lien, even though they no longer owned the house at the time the motion was filed.

In re Watts, 298 F.3d 1077 (9th Cir. 2002)
Overruling *In re Jones,* 106 F.3d 923 (9th Cir. 1997), a judgment lien attaches to a declared homestead regardless of whether there is surplus equity at the time the abstract of judgment is recorded.

In re Pederson, 230 B.R. 158 (9th Cir. B.A.P. 1999)
judgment lien that attached by virtue of preexisting judgment when debtor acquired homestead property was not avoidable.

In re Pike, 243 B.R. 66 (9th Cir. B.A.P. 1999)
Debtor's pre-bankruptcy homestead declaration not relevant in context of bankruptcy proceedings.

In re Been, 153 F.3d 1034 (9th Cir. 1998)
Under California law a non-judicial foreclosure sale by a senior lien holder terminates a "sold-out" junior lienholder's secured interest in the debtor's property and any remaining rights which might 'arise out of' the foreclosure proceedings. Thus §522(f)(c) didn't apply.

In re Toplitzky, 227 B.R. 300 (9th Cir. B.A.P. 1998)
Creditor may not retain lien against debtor's home by paying value of debtor's impaired equity exemption.

In re Stoneking, 225 B.R. 690 (9th Cir. B.A.P. 1998)

Debtor may avoid lien placed on community property residence which later became debtor's separate property following divorce.

In re Hanger, 217 B.R. 592 (9th Cir. B.A.P. 1997), *aff'd* 196 F.3d 1292 (9th Cir. 1999)

Debtors may partially avoid bank's judicial lien to extent lien impairs homestead exemption.

In re Foss, 200 B.R. 660 (9th Cir. B.A.P. 1996)

Lien against debtor's property created by divorce decree was not avoidable.

In re Barnes, 198 B.R. 779 (9th Cir. B.A.P. 1996)

Debtor cannot avoid former wife's judicial liens which fixed onto debtor's property interest in marital home during reordering of community property.

In re Wilson, 90 F.3d 347 (9th Cir. 1996)

Where debtor had undeclared homestead that had to be paid just ahead of judicial liens in the event of a forced sale, lien not impaired under pre-1994 law.

In re Barnes, 198 B.R. 779 (9th Cir. B.A.P. 1996)

In this pre-1994, California law matter, the debtor's new property interest in the house was created at the same time the November 1990 and December 1991 judgements came into being. Therefore, the liens evidencing these judgment did not fix onto the Debtor's reordered property interest and § 522(f)(1) is inapplicable. The liens are not avoidable. The June 1991 sanctions order was not directed ad dividing the community property. Therefore it did not attain lien status until Nelson recorded it, subsequent to the division of the community property. It fixed on the debtor's newly acquired interest in the house and thus was avoidable in bankruptcy.

In re Higgins, 201 B.R. 965 (9th Cir. B.A.P. 1996)

Debtors who lack equity in home may avoid creditor's judicial lien against property when lien impairs otherwise valid exemption

In re Nielsen, 197 B.R. 665 (9th Cir. B.A.P. 1996)

When calculating surplus equity in a jointly held residence, all prior liens must be deducted from the family of the property in its entirety, rather than from the debtor's fractional interest. If surplus equity exists in the property and the lien does not impair the exemption, then the lien cannot be avoided as a preference pursuant to §522(h)

In re Hastings, 185 B.R. 811 (9th Cir. B.A.P. 1995)

Even though judicial lien fixed on property before it was claimed exempt, and even though the lien would have priority over homestead under California law, it is still avoidable.

In re DeMarah, 62 F.3d 1248 (9th Cir. 1995)

Debtor may not avoid a tax lien (even the penalty portion) under § 522(h) and 724

In re Morgan, 149 B.R. 147 (9th Cir. B.A.P. 1993)

Debtor's claim of exemption made valid through lack of timely objection subject to creditor's challenge at lien avoidance hearing.

In re Yerrington, 144 B.R. 96 (9th Cir. B.A.P. 1992), *aff'd*. 19 F.3d 32 (9th Cir. 1994)

Sanderfoot applied - Alaska law - lien not avoidable.

In re Patterson, 139 B.R. 229 (9th Cir. B.A.P. 1992)

Consensual lien, judicial lien, homestead, consensual lien, judicial lien, consensual lien

The formula set forth in *In re Kruger*, 77 B.R. 785, 788-89 (Bankr. C.D. Cal. 1987) provides the correct result in this case an in various other circumstances:

1. Subtract all liens from the value of the property;

2. If the total amount of the liens is equal to or less than the value of the property and there is a judicial lien, deduct from the amount of the judicial lien the claimed exemption less the amount of equity (if any) remaining in the property after step 1. The balance left is the amount of the judicial lien which remains on the property;

3. If the total of the liens is greater than the value of the property and if the liens which are equal to the value of the property are all voluntary liens, void all liens in excess of the value of the property

4. If the total of the liens is grater than the value of the property and the judicial lien was not voided in full in step 3, determine whether the judicial lien would be partially avoided under § 506(d):

a) if the judicial lien is not fully secured under § 506(a), void the unsecured portion and subtract the amount of the exemption from the secured portion. This is the remaining amount of the judicial lien. Then recalculate the total liens against the property (using the reduced judicial lien) and void any lien in excess of the value of the property.

b) if the judicial lien is fully secured under § 506(a), subtract the amount of the exemption from the amount of the judicial lien. The balance is the remaining amount of the judicial lien. Then recalculate the total liens against the property (using the reduced judicial lien) and void any liens in excess of the value of the property (footnotes omitted).

In re Hyman, 123 B.R. 342 (9th Cir. B.A.P. 1991), *aff'd* 967 F.2d 1316 (9th Cir. 1992)

1. Homestead refers to equity not a physical asset

2. Costs of sale are not included in equity calculation

In re Herman, 120 B.R. 127 (9th Cir. B.A.P. 1990)

522(f)(1) - undeclared homestead - judicial lien avoidable even if 1) no forced sale and 2) liens could not be enforced unless debtor had equity.

In re Lange, 120 B.R. 132 (9th Cir. B.A.P. 1990)

506(d) not available to debtor in Chapter 7 cases.

In re Galvan, 110 B.R. 446 (9th Cir. B.A.P. 1990)

Unsecured portion of judicial lien cannot remain as charge against property in which debtors have exemption rights.

In re Godfrey, 102 B.R. 769 (9th Cir. B.A.P. 1989)

A lien on real property arising from a dissolution of marriage is avoidable under §522(f)(1)

LIENS - CALIFORNIA LAW

In re Conciecao**,** 331 B.R. 885 (9th Cir. BAP 2005)

Abstract of judgment that did not contain the debtor's social security number was invalid under CCP § 674.

In re El Dorado Improvement Corp., 335 F.3d 835 (9th Cir. 2003)

Under California's mechanics lien law, a private work is "accepted" by a public entity Under Cal. Civ. Code § 3086 only if the approval results in the assumption of some public interest in it.

In re Burns, 291 B.R. 846 (9th Cir. B.A.P. 2003)

Creditor's service of Order to Appear for Examination on debtor alone was sufficient to create lien in debtor's settlement funds, even where funds were in possession of a third party.

In re Spirtos, 221 F.3d 1079 (9th Cir. 2000)

Under § 108(c), the period of duration of a judgment lien under CCP § 683.020 will not expire until 30 days after all the assets in the debtor's estate have been finally distributed.

In re Southern California Plastics, Inc., 165 F.3d 1243 (9th Cir. 1999)

Allowance of creditor's claim did not perfect prejudgment attachment lien.

Fleet Credit Corp. v. TML Bus Sales, Inc., 65 F.3d 119 (9th Cir. 1995)

Lien priorities arising out of bankruptcy and fraudulent transfer - CCP § 708.410

In re Ralton, 139 B.R. 931 (9th Cir. B.A.P. 1992)

A charging order on a partnership = a judgment lien on debtor's partnership interest. Lien has priority over debtor-in-possession's hypo lien status

Bluxome Street Assoc v. Fireman's Fund Ins. Co., 206 Cal. App. 3d 1149, 254 Cal. Rptr. 198 (Cal. App. 1988)

"Contractual lien" of attorney, even though unrecorded, has priority over judgment lien

LIS PENDENS

Orange County v. Hong Kong & Shanghai Bank Corp. Ltd., 52 F.3d 821 (9th Cir. 1995)

Standard for expunging lis pendens.

Cal. Lis pendens statute requires the trial court to expunge the lis pendens if the "claimant has not established by a preponderance of the evidence the probable validity of the real property claim." Cal. Code Civ. Proc. §405.32 (1992). "Probable validity" meaning that "it is more likely than not that the claimant will obtain a judgment against the defendant on the claim." *Id* §405.3. Thus, like the statute at issue in *Dementus*, the California lis pendens statute requires the court to evaluate the merits of the underlying claim. Both the appellant in *Dementus* and the Partnership here argue that it had submitted sufficient evidence to establish the probably validity of its claim.

MANDAMUS

In re Salter, 279 B.R. 278 (9th Cir. B.A.P. 2002)
B.A.P. has authority to issue writs of mandamus**.**

MARSHALLING OF ASSETS

In re Brazier Forest Products, Inc., 921 F.2d 221 (9th Cir. 1990)

Marshaling is an equitable remedy and the decision to grant or deny marshaling of assets rests within the discretion of the trial court. *Eyre*, 218 P.2d at 898. Generally, marshaling may be invoked only: (1) on behalf of junior secured or lien creditors, (2) where the debtor has two distinct funds, and (3) where its operation would work no inequity upon the debtor or certain third parties. (Washington law)

MEETING OF CREDITORS-- § 341 AND RULE 2003

In re Clark, 262 B.R. 508 (9th Cir. B.A.P. 2001)

Creditor's meeting was not concluded merely because trustee failed to vocalize continued date, where continued date had been announced at previous meeting and in writing thereafter.

In re Smith, 235 F.3d 472 (9th Cir. 2000)

1) Under Rule 2003(e), a § 341 meeting must be adjourned to a specific time; 2) conversion of the case from chapter 11 to chapter 7 does not restart the running of the 30-day period for filing objections to exemptions.

MISCELLANEOUS

In re Consolidated Freightways Corp., 443 F.3d 1160 (9th Cir. 2006)
A federal common law rule for imposing constructive trusts on interline balances among carriers was not justified. State law would govern to determine interline balances.

In re Emerald Outdoor Advertising, LLC, 444 F.3d 1077 (9th Cir. 2006)
Deed of trust on Indian trust lands recorded perfected in accordance with Washington law had priority over subsequent lease recorded in appropriate Bureau of Indian Affairs title plant.

In re Marshall, 547 U.S. 293, 126 S.Ct. 1735 (2006)
Probate exception did not apply to deprive bankruptcy court of jurisdiction over widow's claim that her stepson tortiously interfered with her expectancy of inheritance
In re Bryan, 261 B.R. 240 (9th Cir. B.A.P. 2001)
Genuine issue of material fact existed as to when complaint was submitted to bankruptcy court for filing. Court had a drop box system whereby anything left in the box "would be time-stamped with that day's date."

In re Bigelow, 179 F.3d 1164 (9th Cir. 1999)
In bankruptcy case, corporation's notice of appeal was not per se invalid for being filed by corporate officer, instead of by corporation's counsel of record.

In re Serrato, 117 F.3d 427 (9th Cir. 1997)
Appointed trustee is not an officer of the United States

Hubbard v. U.S., 514 U.S. 695(1995)
Because a "bankruptcy court" is neither a "department" nor an "agency", statements made in bankruptcy papers are not covered by 18 U.S.C. § 1001

In re Vasseli, 5 F.3d 351 (9th Cir. 1993)
Bankruptcy court has no authority to award fees for a frivolous appeal

U.S. v. High Country Broadcasting Co., Inc., 3 F.3d 1244 (9th Cir. 1993), *cert. denied*, 513 U.S. 826 (1994)
Attempt by sole shareholder to intervene so that he could represent corp. was denied.

Rowland v. Cal. Men's Colony, 506 U.S. 194, 113 S.Ct. 716, 721 (1993)
Corp. may appear only through licensed counsel.

In re Hay, 978 F.2d 555 (9th Cir. 1992)
Failure to include counterclaim as to creditor in amendments to schedules bars suing creditor postconfirmation

In re Perroton, 958 F.2d 889 (9th Cir. 1992)
Bankruptcy courts are not courts of the U.S. and cannot waive filing fees under 28 U.S.C. §1915.

Smith v. Frank, 923 F.2d 139 (9th Cir. 1991)
When is document deemed filed

Bennett v. Williams, 892 F.2d 822 (9th Cir. 1989)
Trustee entitled to qualified immunity.

In re Godfrey, 102 B.R. 769 (9th Cir. B.A.P. 1989)
Pleading "filed" when clerk is given possession of it.

MITIGATION OF DAMAGES

Huntington Beach Union H.S. Dist. v. Continental Info Systems Corp., 621 F.2d 353, 357 (9th Cir. 1980)

Green v. Smith, 261 Cal.App.2d 392, 67 Cal. Rptr. 796 (Cal.App. 1968)

NOTICE & HEARING

Ellett v. Stanislaus, 506 F.3d 774 (9th Cir. 2007)

Franchise Tax Board was not bound by debtor's discharge for lack of proper notice, where debtor listed the wrong Social Security number on his bankruptcy petition and the wrong number appeared on his § 341(a) notice.

In re Williams, 185 B.R. 598 (9th Cir. B.A.P. 1995)

Presumption of receipt of notice - an attorney's unequivocal declaration of non-receipt of notice is not sufficient to overcome the presumption of receipt created by a court clerk's certificate of mailing.

In re Ex-Cel Concrete Company, Inc., 178 B.R. 198 (9th Cir. B.A.P. 1995)

Notice to wrong counsel for Citicorp of a sale free and clear does not constitute notice

In re The Two S Corp., 875 F.2d 240 (9th Cir. 1989)

No need to have a hearing where facts are undisputed and hearing would serve no purpose

In re Downtown Investment Club, III, 89 B.R. 59 (9th Cir. B.A.P. 1988)

Failure to give general unsecured creditors notice re modification of plan makes it void under 9024 and 1127

PACA

In re Country Harvest Buffet Restaurants, Inc., 245 B.R. 650 (9th Cir. B.A.P. 2000)

Restaurant chain qualifies as "dealer" for purposes of PACA trust provisions

In re Altabon Foods, Inc., 998 F.2d 718 (9th Cir. 1993)

1) Pursuant to the PACA, the Secretary promulgated a regulation limiting trust coverage for private agreements to those which allowed no more than 30 days for payment

2) The PACA was silent on whether the Secretary could establish a maximum payment period for private agreements, but the legislative history made clear that Congress intended that the Secretary should do so.

3) That history also suggested that 30 days was a reasonable choice in light of the standards and practices of the produce industry

PARTNERSHIPS - CA LAW

In re Fair Oaks, 168 B.R. 397 (9th Cir. B.A.P. 1994)

Property acquired by general partners before partnership documents signed = property acquired for the benefit of the partnership. All that's required is an intent to form a partnership.

Lund v. Albrecht, 936 F.2d 459 (9th Cir. 1991)

Partner breached fiduciary duty owed to another partner by failing to disclose offers on partnership realty for amounts greater than the value placed on it in their partnership dissolution negotiations.

PENDENT/SUPPLEMENTAL JURISDICTION

City of Chicago v. Int'l College of Surgeons, 522 U.S. 156, 118 S.Ct 523 (1997)
Court upholds exercise of supplemental jurisdiction under 1367 as to state law claim requiring department review of a local administrative agency

Harrell v. 20th Cen. Ins. Co., 934 F.2d 203 (9th Cir. 1991)
Not an abuse to retain state claims even if federal claims are gone

PETITION PREPARERS

In re Doser, 412 F.3d 1056 (9th Cir. 2005)

In a case involving We The People, the court held that § 110 was not vague or overbroad, and did not violate the First Amendment.

In re Reynoso, 315 B.R. 544 (9th Cir. B.A.P. 2004), *aff'd,* 477 F.3d 1117 (9th Cir. 2007)

The transformation of data into completed forms by providing software to debtors makes the software providers bankruptcy petition preparers; directing debtors to the applicable sections of the Cal. Cod of Civil Procedure also constituted the unauthorized practice of law; intentional concealment of preparers' involvement, among other things, constituted fraudulent, unfair or deceptive conduct.

In re Bankruptcy Petition Preparers, 307 B.R. 134 (9th Cir. B.A.P. 2004)

1. Selection and preparation of bankruptcy forms constituted practice of law.
2. Federal courts have inherent power to regulate practice in case before them. Bankruptcy court may require preparers to comply with state bar rules re: certification.

In re Graves, 279 B.R. 266 (9th Cir. B.A.P. 2002)

Bankruptcy court may raise § 110(j) injunctive relief sua sponte without an adversary proceeding being filed, but same protections afforded by an adversary proceeding must be given.

In re Crowe, 243 B.R. 43 (9th Cir. B.A.P. 2000), *aff'd*, 246 F.3d 673 (9th Cir. 2000)

Bankruptcy court had jurisdiction to hear US Trustee's adversary proceeding against bankruptcy petition preparer.

In re Crawford, 194 F.3d 954 (9th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000)

The court of appeals affirmed a judgment of the district court. The court held that a bankruptcy court does not violate constitutional or Privacy Act rights of a nonattorney bankruptcy petition preparer (BPP) by imposing a fine for the BPP's failure to disclose his social security number as required by 11 U.S.C. §110(c).

In re Agyekum, 225 B.R. 695 (9th Cir. B.A.P. 1998)

Lay bankruptcy petition preparer not permitted to retain fee in excess of amount allowed under local rules.

In re Fraga, 210 B.R. 812 (9th Cir. B.A.P. 1997)

Attorney's wholly owned corporation was "bankruptcy petition preparer"; corporation's attorney/owner was not

POST-CONFIRMATION MATTERS

Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d 555 (9th Cir. 1992)

Failure to disclose lawsuit as asset in the bankruptcy barred suit filed 4 months after confirmation.

POST-PETITION TRANSFERS - §549

In re AVI, Inc., 389 B.R. 721, 724 (9th Cir. BAP 2008)

Court did not abuse discretion in vacating an order dismissing a chapter 11 case, and then avoiding a transfer to a law firm that occurred while the case was dismissed.

In re Straightline Investments, Inc,. 525 F.3d 870 (9th Cir. 2008)

Postpetition transfer by debtor of accounts receivable to a factor without bankruptcy court approval were avoidable under § 549(a). This is true regardless of whether they diminished the estate, the court declining to extend the diminution of the estate doctrine of § § 547 and 548 to § 549. They were not sales in the ordinary course of business, since they failed to meet both the vertical and horizontal dimension tests of § 363(c).The earmarking doctrine did not apply, because the money received by the debtor was not designated for a specific creditor. Recoupment did not apply, because it is an equitable doctrine, and the factor engaged in inequitable conduct.

In re Stanton, 303 F.3d 939 (9th Cir. 2002)

Debtors were guarantors on a factoring arrangement for their business. As additional security for payment, they pledged their house as security. The debtors subsequently filed a chapter 7 case. They continued their business's factoring arrangement, and incurred additional indebtedness that was not covered by the business's assets. The chapter 7 trustee sold their house, but the factor asserted its security interest in the proceeds in the amount of over $244,000 for postpetition indebtedness incurred by the nondebtor business.
Held: The factor's lien on the house was not avoidable under § 549, and the debtors were not required to seek court approval as to the postpetition encumbrances on their house under § 364.

In re Mitchell, 279 B.R. 839 (9th Cir. B.A.P. 2002)

The bona fide purchaser defense of § 549 (c) to a trustee's action to avoid a postpetition transfer does not provide an exception to the automatic stay. Purchaser out of a foreclosure that occurred a day after bankruptcy filed violated § 362.

In re Home America T.V.-Appliance Audio, Inc., 232 F.3d 1046 (9th Cir. 2000), *cert. denied*, 534 U.S. 814 (2001)

"We hold that the bankruptcy trustee's action is barred by the statute of limitations applicable to her avoidance powers under § 549, notwithstanding that she seeks to exercise that authority in the context of a § 7422 tax refund suit."

In re Mora, 218 B.R. 71 (9th Cir. B.A.P. 1998), *aff'd* 199 F.3d 1024 (9th Cir. 1999)

Debtors made avoidable post-petition transfer of bankruptcy estate property by mailing pre-petition cashier's check for mortgage reduction which bank did not receive until after bankruptcy proceedings began

In re Geothermal Resources International, Inc., 93 F.3d 648 (9th Cir. 1996), *aff'd*, 182 F.3d 925 (9th Cir. 1999)

Postpetition long-term employment contract not avoidable under 549 to extent employee conferred value on company prior to entry of order for involuntary bankruptcy relief

In re McConville, 84 F.3d 340 (9th Cir. 1996), *amended and superseded by* 97 F.3d 316 (9th Cir. 1996), *withdrawn and superseded by* 110 F.3d 47 (9th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997)

Person who receives a deed of trust is not a "purchaser" under §549(c)

In re Shaw, 157 B.R. 151 (9th Cir. B.A.P. 1993)

A regularly conducted non-collusive tax sale is presumptively reasonable equivalent value under §548 but not "present fair equivalent value" under §549(c) which tolerates little deviation from fair market value

In re KF Dairies, Inc., 143 B.R. 734 (9th Cir. B.A.P. 1992)

Even if time limits have run on 549 action, creditor's claim can still be reduced under 502(d)

In re Wolverton Associates, 909 F.2d 1286 (9th Cir. 1990)

Where no evidence debtor family-held corporation surrendered leasehold interest in property prior to filing bankruptcy petition family owner's transfer of proceeds from property sale after filing is voidable postpetition transfer.

In re Shamblin, 890 F.2d 123 (9th Cir. 1989)

Tax sale not a transfer of property of the estate since it merely created a lien. Thus 549 does not apply.

PREEMPTION

In re Chaussee, 399 F.3d 225 (9th Cir. BAP 2008)

The act of filing a proof of claim in a bankruptcy case may not, alone, subject the claimant to liability for violation of state and federal fair debt collection laws.

In re Tippett, 542 F.3d 684 (9th Cir. 2008)

The bankruptcy code does not preempt Cal. Civil Code § 1214, which renders an unrecorded conveyance void as to bona fide purchasers. The transfer of the debtor's property to the bankruptcy estate upon filing their chapter 7 case was such a transfer. Thus the debtors' unauthorized transfer of their home to a bona fide purchaser was covered by this statute.

In re Miles, 430 F.3d 1083 (9th Cir. 2005)

Bankruptcy court had "arising under" jurisdiction over state law tort suits removed removed from state court, since such actions were totally preempted by § 303(i). Furthermore, siblings of debtors had no standing to bring an action under § 303(i).

40235 Washington St. Corp. v. Lusardi, 329 F.3d 1076 (9th Cir. 2003), *cert. denied,* 540 U.S. 983, 124 S.Ct. 469 (2003)

Section 362 preempts Cal. Rev. & Tax. Code § 3728. "Under the doctrine of "conflict preemption," preemption is implied where 'compliance with both federal and state regulation is physically impossible.'"

MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910 (9th Cir. 1996)

debtor's malicious prosecution action alleging defendants maliciously filed and pursued creditors' claims in it bankruptcy proceeding was preempted, and thus the district court properly determined that it lacked jurisdiction

In re Baker & Drake, Inc., 35 F.3d 1348 (9th Cir. 1994)

Nevada tax laws not preempted by bankruptcy act.

In re Cybernetic Services, Inc., 252 F.3d 1039 (9th Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002)

The recording provisions in the Patent Act do not preempt the recording provisions of Article 9 of the UCC.

PREFERENCES § 547

1. Contemporaneous Exchange
2. Dishonored Check
3. Earmarking Doctrine
4. Insolvent Debtor
5. New Value
6. 90-Day
7. §547(b)(5)
8. §547(c)
9. §547(c)(1)
10. §547(c)(2) and Ordinary Course of Business
11. §547(c)(3)
12. §547(c)(4)
13. §547(e)(1)(A)
14. §550
15. Cal. CCP §488.500
16. Misc

1. Contemporaneous Exchange

In re Marino, 193 B.R. 907 (9th Cir. B.A.P. 1996), *aff'd* 117 F.3d 1425 (9th Cir. 1997)
§547(c)(1) - 14 day delay in perfection was contemporaneous exchange

In re Upstairs Gallery, Inc., 167 B.R. 915 (9th Cir. B.A.P. 1994)
Settlement of payment in 1990 on a debt created by a 1988 lease was transfer of an antecedent debt. The debt arose in 1988, not 1990, thus no contemporaneous exchange

In re Laguna Beach Motors, Inc., 148 B.R. 317 (9th Cir. B.A.P. 1992)
Contemporaneous exchange - DePrizio rejected under these acts.

2. Dishonored Check

In re JWJ Contracting Co., Inc., 371 F.3d 1079 (9th Cir. 2004)
Creditor's acceptance of what turned out to be dishonored check, in exchange for new value given to debtor, transformed what would have been a contemporaneous exchange for new value into an avoidable credit transaction.

In re Lee, 108 F.3d 239 (9th Cir. 1997)
No transfer of debtor's property occurs at time of delivery of subsequently dishonored personal check.
A cashier's check that was used to replace a dishonored check and was received on the 90th day before the bankruptcy petition was filed was a preferential transfer. A transfer by a cashier's check occurs on the date of delivery unlike the transfer of other checks where the transfer takes place when the bank honors the check.
1. Cashier's check is property of the debtor
2. Cashier's check is transferred upon delivery, not issuance

3. §547(c)(1) - dishonor knocks a transfer out of this section - dishonor can mean a check returned to maker

4. §547(c)(4) - where check dishonored, delivery of a check thereafter does not relate back to that transaction

The payment was not a contemporaneous exchange, because that defense cannot involve a dishonored check. Dishonor changes the nature of the transaction from one intended as a contemporaneous cash exchange to a credit transaction.

Nor was the new value defense available. Such defense requires that new value be given after the transfer occurs. Here, the transfer of the cashier's check took place after the delivery of the goods..

Earmarking doctrine discussed.

3. Earmarking Doctrine

In re Adbox, Inc., 488 F.3d 836 (9th Cir. 2007)

1. A trustee who has brought a preference action on behalf of the estate is not an "opposing party," and thus counterclaims that could have been brought against the debtor prior to its bankruptcy were properly dismissed; 2. Trustee bears initial burden of proof to establish that funds were part of the bankruptcy estate. the burden then shifts to the defendant to show that there was an agreement with a lender to pay funds to a particular creditor.

In re Superior Stamp & Coin Co., Inc., 223 F.3d 1004 (9th Cir. 2000)

After debtor borrowed money to pay specific debt, bank's advancement of payments to debtor rather than directly to creditor did not preclude application of earmarking doctrine to prevent recovery by bankruptcy trustee.

In re Kemp Pacific Fisheries, Inc., 16 F.3d 313 (9th Cir. 1994)

Check that was honored was preference even though account may not have had sufficient funds to cover check. Earmarking doctrine discussed.

4. Insolvent Debtor

In re DAK Industries, Inc., 170 F.3d 1197, 1199 (9th Cir. 1999)

To succeed in a preference action, a trustee must show, *inter alia*, that the debtor was insolvent at the time of the contested transaction. 11 U.S.C. §547(b). The Bankruptcy Code defines insolvency, for a corporation, as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at fair valuation..." 11 U.S.C. §101(32). Although the Code does not define "fair valuation," courts have generally engaged in a two-step process of analysis. *See, e.g., Matter of Taxman Clothing Co.,* 905 F.2d 166, 169-70 (7th Cir. 1990). First, the court must determine whether a debtor was a "going concern" or was "on its deathbed." Second, the court must value the debtor's assets, depending on the status determined in the first part of the inquiry, and apply a simple balance sheet test to determine whether the debtor was solvent. *Id.* at 170.

In re Sierra Steel, Inc., 96 B.R. 275 (9th Cir. B.A.P. 1989)

Insolvency

5. New Value

In re AEG Acquisitions Corp., 161 B.R. 50 (9th Cir. B.A.P. 1993)
New value; DePrizio; option contract

In re Nucorp Energy, Inc., 902 F.2d 729 (9th Cir. 1990)
'New value' exception to §547(b) applies to avoidance of preferential transfer if creditor can show lien attached to property of value - property here found to be valueless

In re E.R. Fegert, Inc., 88 B.R. 258 (9th Cir. B.A.P. 1988), *aff'd* 887 F.2d 955 (9th Cir. 1989)
Release of lien - §547(c)(1) - new value

6. 90-Day

In re Smith's Home Furnishings Inc., 265 F.3d 959 (9th Cir. 2001)
Trustee required to show that creditor was under secured at some point during the preference period in order to avoid payments made by debtor to floating lien creditor during 90-day prepetition preference period.

In re Greene, 223 F.3d 1064 (9th Cir. 2000)
Rule 9006 does not apply to the 90 day preference period.

In re Bergel, 185 B.R. 338 (9th Cir. B.A.P. 1995)
Procedural bankruptcy rules do not extend 90-day period for voiding transfers when 90th day falls on Saturday, Sunday, or legal holiday

In re Unicom Computer Corp., 13 F.3d 321 (9th Cir. 1994)
Funds which debtor had no right to which were transferred within 90 days held in constructive trust for transferee and were not property of the debtor

In re Sufola, Inc., 2 F.3d 977 (9th Cir. 1993), *superseded by statute as stated in* In re Richmond Produce Co., Inc., 195 B.R. 455 (N.D. Cal. 1996)
- DePrizio followed:
Lender who holds guaranty of an insider of a debtor company is subject to year-long preference recovery period of § 547(b)(4)(B), rather than the 90 day period specified in §547(b)(4)(A). Whether a waiver of the guarantor's rights against the debtor suffices to circumvent this rule is a question we leave for another panel and another day. U.S. National Bank of Oregon saw fit to lend Sufola, Inc. A substantial amount of money on the strength of certain collateral and the personal guaranties of Sufola insiders. The Bank received a preferential payment of $4,332.05 within one year of Sufola's bankruptcy, a payment which benefitted the insiders. The Bank must now return the payment and seek its due from the collateral and the guarantors, the precise recourse for which the Bank initially bargained.

7. §547 (b)(5)

In re Powerine Oil Co., 59 F.3d 969 (9th Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996)
Fact that defendant could have drawn on letters of credit, and thus received no more than it

would have received in a Chapter 7 is irrelevant. Only refer to what debtor would receive from the estate, not some outside source. §547(b)(5)

8. §547(c)

In re National Lumber and Supply, Inc. 184 B.R. 74 (9th Cir. B.A.P. 1995)
1. §547(c) defenses must be pled specially or are waived
2. §547(c)(2) and (4) reviewed

9. §547(c)(1)

In re Walker, 77 F.3d 322 (9th Cir. 1996)
§547(c)(1) 10 day v. 30 days under Idaho law.
Bankruptcy code's definition of when transfer perfected trumps state law

In re E.R. Tegert, Inc., 887 F.2d 955 (9th Cir. 1989)
Payment of subs by general to government project is covered by §547 (c)(1)

10. §547(c)(2) and Ordinary Course of Business

In re Healthcentral.com, 504 F.3d 775 (9th Cir. 2007)
Genuine issues of material fact precluded granting of motion for summary judgment as to ordinary course defense under the pre-2005 versions of both § 547(c)(2)(B) and (C).

In re Ahaza Systems, Inc., 482 F.3d 1118, 1126 (9th Cir. 2007)
1. When there is no past debt between the parties with which to compare the challenged one, the instant debt should be compared to the debt agreements into which we would expect the debtor and creditor to enter as a part of their ordinary business operations. 2. When the debt has been restructured, the court should look at both the original and revised agreement to determine the nature of the debt.

Union Bank v. Wolan, 502 U.S. 151(1991)
Payments on long and short term debt may qualify for ordinary course of business exception.

In re Hessco Industries, Inc., 295 B.R. 372 (9th Cir. B.A.P. 2003)
Defendants failed to prove the ordinary course defense, where there was no evidence presented of "terms to which similarly situated parties adhere."

In re Jan Weilert RV, Inc., 326 F.3d 1028 (9th Cir. 2003)
Under §547(c)(2)(C), a court cannot limit "ordinary business terms" to the average transactions in the industry, but must consider the broad range of terms encompassing the practices employed by similarly situated debtors and creditors facing the same or similar problems.

In re Kaypro, 218 F.3d 1070 (9th Cir. 2000)
Whether restructuring agreements are a common industry practice and are thus subject to the ordinary course of business defense was a triable issue of fact. Evidence established that the

debtor was insolvent.

In re Grand Chevrolet, Inc., 25 F.3d 728 (9th Cir. 1994)

§547(c)(1) and (c)(2) - sight draft and time automobile purchase drafts

To qualify of the ordinary course exception, a creditor must prove by a preponderance of the evidence that (1) the debt and its payment are ordinary in relation to past practices between the debtor and the creditor, and (2) the payment was ordinary in relation to prevailing business standards. *In re Food Catering & Housing*, 971 F.2d at 398

Among the factors courts consider in determining whether transfers are ordinary in relation to past practices are (1) the length of time the parties were engaged in the transactions at issue, (2) whether the amount or form of tender differed from past practices, (3) whether the debtor or creditor engaged in any unusual collection or payment activity, and (4) whether the creditor took advantage of the debtor's deteriorating financial condition, *See In re Richardson*, 94 B.R. 56, 60 (Bankr.E.D. Pa. 1988).

In re Food Catering & Housing, Inc. 971 F.2d 396 (9th Cir. 1992)

Ordinary course of business exception

In re Powerine Oil Co., 126 B.R. 790 (9th Cir. B.A.P. 1991)

1. 'Debt' arises upon shipment tor delivery of goods, not installation or acceptance

2. Where there was no evidence that late payments followed practice of parties, no ordinary course of business

In re CHG International, Inc., 897 F.2d 1479 (9th Cir. 1990)

Long-term debt payment not included within ordinary course of business exception under §547(c)(2).

In re Seawinds Ltd., 888 F.2d 640 (9th Cir. 1989)

§547(c)(2) - ordinary course of business

In re Loretto Winery, Ltd. 107 B.R. 707 (9th Cir. B.A.P. 1989)

Objective standard - ordinary course of business - §547(c)(2)

In re Pioneer Technology, Inc., 107 B.R. 698 (9th Cir. B.A.P. 1988)

Presumption of insolvency - summary judgment, ordinary course of business - hypothetical liquidation - §547(c)(2)

11. §547(c)(3)

In re Taylor, 390 B.R. 654 (9th Cir. BAP 2008)

A security interest that was not perfected within 20 days was a preferential transfer, even though the creditor attempted to perfect within the 20-day period of the statute but did not do so until the 21st day. Idaho state statute that allowed a second 20-day period to correct mistakes was trumped by § 547(c)(3).

12. §547(c)(4)

In re IFRM, Inc., 52 F.3d 228 (9th Cir. 1995)
§547(c)(4) - complete review

13. §547(e)(1)(A)

In re Lane, 980 F.2d 601 (9th Cir. 1992)
§547(e)(1)(A) - Lis Pendens = transfer where underlying suit is for a fraudulent transfer

14. §550

In re Mill Street, Inc., 96 B.R. 268 (9th Cir. B.A.P. 1989)
Collection agency is an initial transferee from whom preference can be collected. §550

15. Cal. CCP §488.500

In re Wind Power Systems, Inc., 841 F.2d 288 (9th Cir. 1988)
Date of creation of lien - Cal. C.C.P. §488.500

16. Miscellaneous

In re SNTL Corp., 380 B.R. 204 (9th Cir. BAP 2007)
A debtor's previously released liability as a guarantor of an affiliate's obligation is revived when the creditor compromised a preference action against it.

In re Ahaza Systems, Inc., 482 F.3d 1118, 1126 (9th Cir. 2007)
1. When there is no past debt between the parties with which to compare the challenged one, the instant debt should be compared to the debt agreements into which we would expect the debtor and creditor to enter as a part of their ordinary business operations. 2. When the debt has been restructured, the court should look at both the original and revised agreement to determine the nature of the debt.

In re Incomnet, Inc., 463 F.3d 1064 (9th Cir. 2006)
Universal Service Administrative Company, to which all telecommunication providers must contribute under the 1996 Telecommunications Act, was not a mere conduit, but instead met the "dominion" and thus received preferential transfers.

In re Enterprise Acquisition Partners, Inc., 319 B.R. 626 (9th Cir. BAP 2004)
Corporation solely-owned by an insider of the debtor is not a per se insider under § 101(31).

In re Superior Fast Freight, Inc., 202 B.R. 485 (9th Cir. B.A.P. 1996)
Voluntary renewal fee with professional listing service was not payment of debt and was not subject to avoidance

In re Futoran, 76 F.3d 265 (9th Cir. 1996)

Bankruptcy debtor's payment to ex-wife in exchange for cancellation of marital termination agreement is preference recoverable by trustee.

Taylor Assoc. v. Dramant (In re Advent Management Corp.), 178 B.R. 480 (9th Cir. 1995), *aff'd* 104 F.3d 293 (9th Cir. 1997)

Transfer of property subject to a constructive trust as a preference

In an action to recover a preference, the court held that property subject to a constructive trust is the property of the debtor until the beneficiary establishes the existence of the trust. The court distinguished the *Mitsui Mfg. Bank v. Unicom Computer Corp.* (In re Unicorn Computer Corp.), 13 F.3d 321 (9th Cir. 1994) by finding that it was limited to circumstances where, unlike the case under review, the recipient of the transfer was also the beneficiary of the constructive trust.

In re Loken, 175 B.R. 56 (9th Cir. B.A.P. 1994)

State's extended perfection grace period not applicable to extend bankruptcy code's ten-day grace period for perfecting security interest in property

Parker N. Am. Corp. v. Resolution Trust corp. (In re Parker N. Am. Corp.), 24 F.3d 1145 (9th Cir. 1994)

FIRREA's impact on preference claims - financial institution reform, recovery and enforcement act did not preclude jurisdiction by a bankruptcy court over a preference action against an institution for which the RTC as receiver had filed a proof of claim arising out of the same transaction as the alleged preference

In re LCO Enterprises, 12 F.3d 938 (9th Cir. 1993)

1. Date for determining preferences may take into account postpetition facts
2. No implied immunity for preference attack for prepetition rent settlement
3. Landlord' rent concession incorporated into Chapter 11 plan precluded from recovery as preferential transfers

In re Skywalker, Inc., 155 B.R. 526 (9th Cir. B.A.P. 1993), aff'd 49 F.3d 546 (9th Cir. 1995)

Deprizio and *In re C-LCartage Co.*, 899 F.2d 1490 (6th Cir. 1990) followed

In re Mantelli, 149 B.R. 154 (9th Cir. B.A.P. 1993)

Payment of money to satisfy civil contempt order = preference. Criminal restitution and *In re Nelson*, 91 B.R. 904 (N.D. Cal. 1988) discussed

Fact that debt was nondischargeable does not mean she received more than she would have received under the distributive portions of the code.

In re Comark, 145 B.R. 47 (9th Cir. B.A.P. 1992)

Repurchase agreement repayment treated as settlement payment to preclude avoidance of transaction under §547

In re Jenson, 980 F.2d 1254 (9th Cir. 1992)

Perfection and priority attachment lien relates back to date writ issued

In re Bullion Reserve of No. America, 922 F.2d 544 (9th Cir. 1991)

Debtor - 1.5 million to personal account. K has money transferred to his account and uses it to buy stock in K&M's names. Stock then pledged to D as security for the loan - held

1. M is not an initial transferee therefore it is irrelevant that transfer was for his benefit
2. M is not an immediate or mediate transferee, because money never transferred to his account.

In re California Trade Technical Schools, Inc., 923 F.2d 641 (9th Cir. 1991)

A debtor's deposit of nontrust funds into a trust account by way of restitution may constitute a preference

In re CHG Intern. Inc., 897 F.2d 1479 (9th Cir. 1990)

Antecedent debt - whether a debt is current or antecedent depends upon when it was incurred. A debt is incurred when the debtor first becomes legally obligated to pay

In re R&T Roofing Structures and Commercial Framing, Inc., 887 F.2d 981 (9th Cir. 1989)

Prepetition seizure of bank out by IRS may be preference

In re Ehring, 91 B.R. 897 (9th Cir. B.A.P. 1988), *aff'd* 900 F.2d 184 (9th Cir. 1990)

Transfer occurred at time of perfection, not foreclosure sale

In re Nucorp Energy, 92 B.R. 416 (9th Cir. B.A.P. 1988) (see also 902 F.2d 729 (9th Cir. 1990))

Transfer occurred when check honored, not delivered

In re Lewis W. Shustleff, Inc. 778 F.2d 1416 (9th Cir. 1985)

Liquidation test

PRELIMINARY INJUNCTION

In re Excel Innovations, Inc., 502 F.3d 1086 (9th Cir. 2007), *cert. denied,* 128 S.Ct. 2080 (2008)

Distinguishing *Crown Vantage,* the court held that "our usual preliminary injunction standard applies to applications to stay actions against non-debtors under § 105(a). In granting or denying such an injunction, a bankruptcy court must consider whether the debtor has a reasonable likelihood of a successful reorganization, the relative hardship of the parties, and any public interest concerns if relevant."

In re Focus Media, Inc., 387 F.3d 1077 (9th Cir. 2004), *cert. denied,* 544 U.S. 92, 125 S.Ct. 1674 (2005)

". . .[W]e hold that where, as here, a party in an adversary bankruptcy proceeding alleges fraudulent conveyance or other equitable causes of action, *Grupo Mexicano* does not bar the issuance of a preliminary injunction."

Connecticut General Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878 (9th Cir. 2003)

"To obtain a preliminary injunction, a party must make a clear showing of either (1)a combination of probable successes on the merits and a possibility of irreparable injury, or (2) that its claims raise serious questions as to the merits and that the balance of hardships tips in its favor."

S.O.C., Inc., v. County of Clark, 152 F.3d 1136 (9th Cir. 1998), *amended by* 160 F.3d 541 (9th Cir. 1998)

To succeed on this appeal from the district court's denial of preliminary injunctive relief, Appellants "must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in their favor." Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir.1991).

CHoPP Computer Corp v. U.S., 5 F.3d 1344 (9th Cir. 1993), *cert. denied*, 513 U.S. 811 (1994)

In addition to civil contempt, damages may also be awarded for violation of a preliminary injunction

Big Country Foods, Inc. v. Board of Education, 868 F.2d 1085 (9th Cir. 1989)

Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935 (9th Cir. 1987)

PRETRIALS

Ortega v. O'Connor, 50 F.3d 778 (9th Cir. 1995), *aff'd,* 146 F.3d 1149 (9th Cir. 1998)

Exclusion of witnesses for failure to serve list on opposing attorney improper where proof of service filed showing service (N.D. Cal. Rules interpreted)

Rogers v. Raymack Industries, Inc., 922 F.2d 1426 (9th Cir. 1991)

Rule 16 of the FRCP provides that a final pretrial order controls the subsequent course of action in a trial unless modified "to prevent manifest injustice." *See* FRCP 16(e). Local Rule 235-8 of the Northern District of California incorporates Federal Rule 16 and provides that "the parties shall, not less than seven calendar days prior to the date on which the trial is scheduled to commence...exchange copies of all exhibits to be offered and all schedules, summaries, diagrams and charts to be used at the trial other than for impeachment or rebuttal."

We have applied a 3-part test to determine whether a party may present new evidence or testimony not contained in the pretrial order. Modification is permitted only when (1) the opposing party would not sustain substantial injury, (2) refusal might result in injustice, and (3) inconvenience to the court is slight. (cites omitted)

PRIORITY CLAIMS

In re Consolidated Freightways Corp. of Delaware, 564 F.3d 1161 (9th Cir. 2009)
Section 507(a)(5) covers those who rendered service within 180 days prior to the filing of the petition, regardless of whether they are retired or not. The dollar limit in this section is an aggregate limit, not an individualized recovery per employee.

In re Lorber Industries of California, 564 F.3d 1098 (9th Cir. 2009)
Reimbursement amounts for workers' compensation claims owed to the California Self-Insurer's Security Fund are not in the nature of an excise tax.

In re Imperial Credit Industries, Inc., 527 F.3d 959 (9th Cir. 2008)
A chapter 7 debtor's obligation on a claim arising from a capital maintenance agreement with the FDIC under § 365(o) is not entitled to administrative expense priority, where it is specifically provided for under § 507(a)(9).

In re Salazar, 430 F.3d 992 (9th Cir. 2005)
". . . [W]e hold that"deposit" as used in 11 U.S.C. § 507(a)(6) may include the advance handing over of full payment for consumer goods or services. . . ."

In re Irvine-Pacific Commercial Insurance Brokers, Inc., 228 B.R 245 (9th Cir. B.A.P. 1998)
Employee who resigned and later obtained a judgment against debtor employer for wrongly withheld vested deferred compensation was entitled to claim attorneys fees under employment contract. Elements of §502(a)(7) - doesn't apply to <u>former employees.</u>

In re Elsinore Corporation, 228 B.R. 731 (9th Cir. B.A.P. 1998)
Holding company's continued operation defeated employee's assertion of priority status, based on subsidiary's cessation of operations.

In re Hovan, Inc., 96 F.3d 1254 (9th Cir. 1996)
State's claim for unpaid tax penalties not entitled to priority.

In re Camilli, 94 F.3d 1330 (9th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997)
Employer's statutorily imposed debt to state for workers' compensation benefits paid to injured employee constitutes nondischargeable "tax"

In re Stone, 6 F.3d 581 (9th Cir. 1993)
The court of appeals affirmed in part and reversed in part and held that the State of Alaska could properly condition the sale of a liquor license upon satisfaction of the seller's obligation to pay municipal and state taxes, but could not create a property interest in the license in a third-party creditor in derogation of a prior federal tax lien. *See also In re Kimura*, 969 F.2d 806 (9th Cir. 1992)

In re Roth American, Inc. 975 F.2d 949 (3rd Cir. 1992)
No superpriority for prepetition wage claim

In re Rau, 113 B.R. 619 (9th Cir. B.A.P. 1990)

"Debtor's business" includes aggregate of all of debtor's businesses.

In re Peaches Records & Tapes, Inc., 102 B.R. 193 (9th Cir. B.A.P. 1989)
Under secured creditor not entitled to interest on superpriority claim.

PROPERTY OF THE ESTATE

1. Constructive Trust
2. 11 U.S.C. §541(c)(2)
3. §541(a)
4. §541(a)(6)
5. §541(a)(7)
6. §362
7. §363
8. Taxes
9. Other Trusts
10. Letter of Credit
11. Misc

1. Constructive Trust

In re Golden Triangle Capital, Inc., 171 B.R. 79 (9th Cir. B.A.P. 1994)
Following *Uniform*, court finds that check made out to third party which ends up in debtor's account is subject to constructive trust, assuming it can be traced.

In re Unicom Computer Corp., 13 F.3d 321 (9th Cir. 1994)
Property mistakenly paid to debtor held in constructive trust

In re California Trade Technical Schools, 923 F.2d 641 (9th Cir. 1991)
1. Money held for student loans was held in express trust, and as such training and commingling are irrelevant. But where money was not restored to trust account, no constructive trust available And where money was transferred to restore trust account within 90 days, it was an avoidable preference.

In re Seaway Express Corp., 912 F.2d 1125 (9th Cir. 1990)
Bankruptcy creditor not permitted to remove property from estate by asserting constructive trust on real property purchased with secured asset. Real property given to debtor prepetition to pay an account receivable in which creditor had a security interest

2. 11 U.S.C. §541(c)(2)

In re Cogliano, 355 B.R. 792 (9th Cir. BAP 2006)
The denial of the debtor's first amended claim of exemption did not preclude her assertion in her secured claim of exemption that her IRA was not property of the estate. Neither issue preclusion nor claim preclusion applied, since the issue of property of the estate was not necessarily decided in the initial exemption decision. Further, the issue of property of the estate had to be decided by way of an adversary proceeding, not a contested matter.

In re Lowenschuss, 171 F.3d 673 (9th Cir. 1999), *cert. denied*, 528 U.S. 877 (1999)
Under 11 U.S.C. §541(c)(2) a debtor's interest in a trust may be excluded from the bankruptcy estate only if the trust contains a transfer restriction and that restriction is enforceable under applicable non-bankruptcy law.

In re Conner, 165 B.R. 901 (9th Cir. B.A.P. 1994), *cert. denied*, 519 U.S. 817 (1996)
Voluntary contribution by an employee/debtor to an ERISA qualified plan, which could be withdrawn at any time, were not poe under 541(c)(2) citing *In re Reuter*, 11 F.3d 850 (9th Cir. 1993)

Patterson v. Shumate, 504 U.S. 753 (1992)
541(c)(2) ERISA - qualified pension funds are not property of the estate.

In re Jordan, 914 F.2d 197 (9th Cir. 1990)
Trust with restrictions to compensate debtor's personal injury is not a spend thrift trust and thus not excluded from estate.

3. §541(a)

In re Magnacom Wireless, LLC, 503 F.3d 984, 990 (9th Cir. 2007), *cert. denied,* 128 S.Ct. 2076, 170 L.Ed.2d 793 (2008)
". . .[O]nce an FCC license is cancelled, a licensee no longer has any right derived from that license and therefore has no entitlement to the proceeds from the auction of a new license."

In re Raintree Healthcare Corp., 431 F.3d 685 (9th Cir. 2005)
Medicare reimbursement funds that accrued up to the date of the bankruptcy petition were property of the estate. Assignee of the debtor's Medicare number which was transferred the day before the bankruptcy was not entitled to the reimbursements under Arizona law.

In re Jess, 169 F.3d 1204 (9th Cir. 1999)
9th Cir affirmed a B.A.P. judgment, holding that under §541(a) the bankruptcy estate includes the portion of an attorney-debtor's contingent fee payment that is attributable to pre-petition work.

4. §541(a)(6)

In re Johnson, 178 B.R. 216 (9th Cir. B.A.P. 1995)
Compliance with an anti-competition agreement is not "services performed" for purposes of § 541(a)(6)

In re FitzSimmons, 725 F.2d 1208 (9th Cir. 1984)
541(a)(6) - postpetition services of sole proprietor v. product of his employee's efforts.

5. §541(a)(7)

In re Carroll, 903 F.2d 1266 (9th Cir. 1990)
8% to debtor on management contract = poe under 541(a)(7)

6. §362

In re Pintlar Corp., 205 B.R. 945 (Bankr.D. Idaho 1997)
The liability portion of a corporate bankruptcy and D&O policy is not property of the

estate, thus 362 is inapplicable.

7. §363

In re Gerwer, 898 F.2d 730 (9th Cir. 1990)
Trustee in bankruptcy in liquidation or reorganization may compel turnover of property from secured creditor in possession prior to default. Issue arose in context of motion to sell under § 363

8. Taxes

Nichols v. Birdsell, 491 F.3d 987 (9th Cir. 2007)
A debtor's pre-bankruptcy application of their right to tax refunds to post-bankruptcy tax obligations constitutes an asset that must be turned over to the bankruptcy trustee.

U.S. I.R.S. v. Snyder, 343 F.3d 1171 (9th Cir. 2003)
Debtor's interest in a pension plan was not property of the estate, and thus it could not used to secure the IRS's claim for delinquent taxes in his chapter 13 case. This is so, even though the IRS is not subject to ERISA's antialienation provisions.

In re Lambert, 283 B.R. 16 (9th Cir. B.A.P. 2002)
Money paid to taxpayer under 2001 federal tax cut statute constituted advance refund of year-2001 taxes, not payment attributable to 2000 tax year.
Begier v. I.R.S., 496 U.S. 53, 110 S.Ct. 2258 (1990)
Trust fund taxes set aside by the debtor prepetition not poe - held in trust for I.R.S. - U.S. v. Randall overruled. - Contra *In re Slugg's Chicago Style*

In re Sluggo's Chicago Style, Inc., 94 B.R. 625 (9th Cir. B.A.P. 1988), *aff'd* 912 F.2d 1073 (9th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991)
Pre-petition security deposit for taxes is property of the estate

9. Other Trusts

In re Cutter, 398 B.R. 6, 19-20 (9th Cir. BAP 2008)
1. Property which the debtor transferred to a self-settled trust became property of the estate. "While California law recognizes the validity of spendthrift trusts, any spendthrift provisions are invalid when the settlor is a beneficiary."
2. "If. . .the trust agreement allows the debtor-beneficiary to exercise control over and reach trust property contributed by others, the estate is entitled to the maximum amount that the trust could pay or distribute to the debtor-beneficiary."

In re Schmitt, 215 B.R. 417 (9th Cir. B.A.P. 1997)
The court did not abuse its discretion in approving the compromise. The debtor's interest in the revocable trust was not estate property and had little value at the time of the bankruptcy filing. Hence, the probability of successful litigation was low. There were several complex disputed issued which would have made litigation somewhat costly. Applying the *Woodson* criteria, the compromise was in the best interest of the creditors. Further, it was fair and equitable

for the creditors. The fact that the full Trust documents were not provided for the bankruptcy court's review does not justify reversal.

In re Neuton, 922 F.2d 1379 (9th Cir. 1990)
25% interest in spendthrift trust - while the trust does not escape the reach of the bankruptcy estate by virtue of its contingent nature, it is not property of the estate insofar as it enjoys spendthrift status. However, 1/4 of Neuton's interest in future payments under the trust is unprotected except to the extent that such sum is deemed necessary for the support of appellant or of his dependents.

In re Fitzsimmons, 896 F.2d 373 (9th Cir. 1990)
Bankruptcy trustee cannot reach debtor- beneficiary's interest in trust containing forfeiture-in-alienation clause

In re B.I. Financial Services Group, Inc., 854 F.2d 351 (9th Cir. 1988)
Funds pooled in an investment account are property of the estate - no showing of express trust under California law.

10. Letters of Credit

In re Onecast Media, Inc., 439 F.3d 558 (9th Cir. 2006)
Where the landlord drew down entirely on a letter of credit purchased by the debtor and held by the landlord as security, the trustee was entitled to recover the difference between the landlord's damages and the balance of the amount drawn down, since that amount was property of the estate.

11. Misc

In re Schmitz, 270 F.3d 1254 (9th Cir. 2001)
Fishing quota rights enacted after the debtor filed chapter 7 were not property of bankruptcy estate where rights were calculated based on prepetition fishing history and constituted mere possibility when petition was filed.

Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001)
Listing of prepetition "songrights" in a value of "unknown" "was not so defective that it would forestall a proper investigation of the asset." Accordingly, the right to post-petition royalties from these assets vested in the debtor upon confirmation of his chapter 11 plan. Unpaid prepetition royalties did not vest in the debtor, because they were subject to a separate listing requirement as causes of action

In re Pettit, 217 F.3d 1072 (9th Cir. 2000)
Supercedes as bond held in district court registry released to judgment holder before chapter 11 was filed did not become property of the debtor's estate, and thus judgment holder did not violate automatic stay. Property became judgment holder's as of date order signed releasing funds, not date the check was received.

In re Moses, 167 F.3d 470 (9th Cir. 1999)

Debtor's "Keogh" plan with valid anti-alienation provision does not qualify as property of bankruptcy estate.

In re Tully, 202 B.R. 481 (9th Cir. B.A.P. 1996)

Real estate commission pending in escrow at time debtor filed bankruptcy petition was pre-petition earnings

In re Harrell, 73 F.3d 218 (9th Cir. 1996)

Court errs in holding that bankruptcy trustee may sell debtor's revocable opportunity to renew season tickets - not a property interest under Arizona law

In re Chappel, 189 B.R. 489 (9th Cir. B.A.P. 1995)

Under Cal. Law, right to probate estate occurs as of time of death. Prepetition decedent's estate = property of the estate.

In re Hammon, 180 B.R. 220 (9th Cir. B.A.P. 1995)

Cash deposit posted by debtor contractor in lieu of payment bond constitutes asset of estate, although creditors may have an equitable interest in it

In re Wu, 173 B.R. 411 (9th Cir. B.A.P. 1994)

Insurance commissions - postpetition services by debtor. The property analysis under *Ryerson* and *Fitzsimmons* is to first determine whether any postpetition services are necessary to obtaining the payments as issue, If not, the payments are entirely 'rooted in the pre-bankruptcy past" *Ryerson* 732 F.2d at 1426, and the payments will be included in the estate. If some postpetition services are necessary, then courts must determine the extent to which the payments are attributable to the post-petition services and the extent to which the payments are attributable to prepetition services. That portion of the payment allocable to postpetition services will not be property of the estate. That portion of the payments allocable to prepetition services or property will be property of the estate.

In re Sluggo's Chicago Style, 912 F.2d 1073 (9th Cir. 1990), *cert. denied*, 498 U.S. 1067, 111 S.Ct. 784 (1991)

Bankruptcy estate encompasses certificate of deposit provided as required security by debtor business for payment of California sale and use taxes

In re Anchorage Nautical Tours, 102 B.R. 741 (9th Cir. B.A.P. 1989)

Oral assignment of right to insurance proceeds took property out of estate

Matter of Lockard, 884 F.2d 1171 (9th Cir. 1989)

Contractor's license bond is not property of the estate.

In re Contractors Equip. Supply Co., 861 F.2d 241 (9th Cir. 1988)

Accounts receivable subject to security interest is property of the estate.

Williams v. California 1st Bank, 859 F.2d 664 (9th Cir. 1988)

Bankruptcy trustee has no authority to pursue claims on behalf of third parties.

PROPERTY, REAL and PERSONAL--California Law

In re Tippett, 542 F.3d 684 (9th Cir. 2008)
The bankruptcy code does not preempt Cal. Civil Code § 1214, which renders an unrecorded conveyance void as to bona fide purchasers. The transfer of the debtor's property to the bankruptcy estate upon filing their chapter 7 case was such a transfer. Thus the debtors' unauthorized transfer of their home to a bona fide purchaser was covered by this statute.

In re Oakmore Ranch Mgmt., 337 B.R. 222 (9th Cir. BAP 2006)
Presumption under Cal. Evidence Code § 662 that owner of legal title to property was beneficial owner was rebutted, where payees of note were debtor's children, who did not have the financial ability to acquire the property that was the subject of the note.

In re Emery, 317 F.3d 1064 (9th Cir. 2003)
When a borrower executes a deed of trust assigning to the lender the borrower's rights in any cause of action, the lender is not entitled to retain settlement proceeds the borrower gains from such an action, when the borrower is not in default.

In re Summers**,** 278 B.R. 808 (9th Cir. B.A.P. 2002)*, aff'd*, 332 F.3d 1240 (9th Cir. 2003)
Property held as joint tenants by husband and wife with their daughter was held in tenancy by the entirety under California law, not as community property. Presumption of title controls over community property presumption, even though community property was used to purchase the property.

In re First T.D. & Investment, Inc. 253 F.3d 520 (9th Cir. 2001)
Assignment of collateral notes and trust deeds to investors may be perfected in California without possession and thus cannot be avoided under the strong arm clause.

In re King Street Investments, Inc., 219 B.R. 848 (9th Cir. B.A.P. 1998)
Lenders' acceptance of deed of trust did not extinguish claims against debtor for constructive fraud in obtaining loan under anti-deficiency statute

In re Wolverton Assoc., 909 F.2d 1286 (9th Cir. 1990)
What constitutes a surrender of property

Abrenilla v. China Ins. Co. Ltd., 870 F.2d 548 (9th Cir. 1989)
What is a fixture.

REAFFIRMATION

In re Dumont, 383 B.R. 481, 489 (9th Cir. BAP 2008)

"Ride through" option under pre-BAPCPA law was eliminated in 2005. However, "if a debtor is in compliance with sections 521(a)(6) or 362(h)(1) and (2), then section 521(d) has no effect, and enforcing an ipso facto default clause is still barred by the Code."

In re Bennett, 298 F.3d 1059 (9th Cir. 2002)

Absent a valid reaffirmation agreement, an agreement to repay a discharged debt is unenforceable under section 524(a)(2), regardless of California law to the contrary

In re Bassett, 285 F.3d 882 (9th Cir. 2002), *cert. denied*, 537 U.S. 1002 (2002)

Right-to-rescind statement in reaffirmation agreement was clear and conspicuous.

In re Lopez, 274 B.R. 854 (9th Cir. B.A.P. 2002), *aff'd,* 345 F.3d 701 (9th Cir. 2003), *cert. denied*, 1245 S.Ct. 2015 (2004)

"A post-discharge agreement between a debtor and the holder of a secured claim which does not comply with the requirements of section 524(c) cannot be valid or enforceable where the consideration is based in part on a discharged debt."

Rein v. Providian Financial Corporation, 270 F.3d 895 (9th Cir. 2001)

Reaffirmation agreement entered into by debtor during prior bankruptcy proceedings was not final judgment on the merits for purposes of determining dischargeability in a subsequent bankruptcy, and thus could not be given res judicata effect, where it was unaccompanied by a court order.

In re Bassett, 255 B.R. 747 (9th Cir. B.A.P. 2000), *cert. denied*, 537 U.S. 1002 (2002)

Reaffirmation agreement which did not recite right to rescind in conspicuous type was invalid.

In re Reinertson, 241 B.R. 451 (9th Cir. B.A.P. 1999)

Debtors could not be relieved of agreement reaffirming belatedly-perfected security interest in vehicle where debtors sought relief more than one year after agreement's approval by bankruptcy court.

In re Parker, 139 F.3d 668 (9th Cir. 1998), *cert. denied*, 525 U.S. 1041 (1998)

Options of Chapter 7 debtor who wants to retain property securing debt are not limited to reaffirmation of debt or redemption of property securing it

In re Watson, 192 B.R. 739 (9th Cir. B.A.P. 1996), *aff'd.* 116 F.3d 488 (9th Cir. 1997)

Settlement agreement to release prepetition liability on note, confirm in rem liability on accounts receivable and create a new debt does not equal a reaffirmation contract

REBUTTAL v. IMPEACHMENT

Sterkel v. Fruehauf Corp., 975 F.2d 528 (8th Cir. 1992)

RECLAMATION

In re Brown & Cole Stores, LLC, 375 B.R. 873 (9th Cir. BAP 2007)

Secured creditors are entitled to the administrative expense priority allowed by § 503(b)(9). Because such claims arise prepetition, they may be subject to setoff under § 553(a) if all of the requirement of the statute are met.

In re MGS Marketing, 111 B.R. 264 (9th Cir. B.A.P. 1990)

Summary of law in context of a compromise and approval which the B.A.P. reversed - no written demand for reclamation

In re Coast Trading Co., Inc., 744 F.2d 686 (9th Cir. 1984)

RECUSAL

In re Basham, 208 B.R. 926 (9th Cir. B.A.P. 1997), *aff'd*, In re Byrne, 152 F.3d 924 (9th Cir. 1998)
Reasonable person test

In re Goodwin, 194 B.R. 214 (9th Cir. B.A.P. 1996)
1. 144 does not apply to bankruptcy judges
2. Alleged ex parte contract with attorney to make sure court was notified if party appeared so security could be arranged was not a ground for recusal under § 455

Liteky v. U.S., 510 U.S. 540 (1994)
(1) Judicial rulings alone almost never constitute valid basis for a bias or partiality recusal motion
(2) Opinions formed by the judge on the basis of facts or events occurring in the course of the current or prior proceedings do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. at 1157

Yagman v. Republic Ins., 987 F.2d 622 (9th Cir. 1993)
Recusal issue raised based on judge's conduct in previous cases

In re Georgetown Park Apartments, Ltd., 143 B.R. 557 (9th Cir. B.A.P. 1992)
Standard reviewed
28 U.S.C. § 455(a) is applicable to bankruptcy judges pursuant to bankruptcy rule 5004(a). This provision imposes a self-imposing duty on a judge, but its provision may be asserted by a party. *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980). The bias which mandates recusal must be one which is personal and must stem from extra-judicial source. *United States v. Carignan*, 600 F.2d 762, 764 (9th Cir. 1979), *Unites States v. Conforts*, at 869. Knowledge obtained in earlier proceedings in the same case is not extra-judicial. *Unites States v. Winston,* , at 223. Nor may a judge's views on legal issues serve as a basis for disqualification. *United States v. Conforte*, at 882
Generally, the judge whose recusal is sought is required to review the recusal affidavit to determine whether it is legally sufficient, assuming the truth of the allegations therein. If the judge determines that the allegations are legally sufficient, then the motion must be referred to another judge. *See United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980), 28 U.S.C. § 144. A reasonable person standard applies *United States v. Winston*, 613 F.2d 221, 222 (9th Cir. 1980)

REMEDIES

In re Egbe, 107 B.R. 711 (9th Cir. B.A.P. 1989)

Creditor has cumulative remedies so that suit on a note will not eliminate his secured status as to a car**.**

REMOVAL & REMAND

City & County of San Francisco v. PG & E Corp., 433 F.3d 1115 (9th Cir. 2006), *cert. denied,* 549 U.S. 882, 127 S.Ct. 208 (2006)

1. "Section 1452(b) does not deprive appellate courts of jurisdiction to review whether the action was properly removed in the first instance." 2. § 1447(d) does not preclude review of a district court's decision not to remand where the district court finds subject matter jurisdiction. 3. A lawsuit brought under Cal. Bus. & Prof. Code § 17200 seeking an injunction and restitution constitutes a police of regulatory power matter that is not subject to removal under § 1452(a).

Security Farms v. International Brotherhood of Teamsters, 124 F.3d 999, 1009-10 (9th Cir. 1997),

District court's denial of abstention treated as a decision not to remand, since after the removal of the proceeding to federal court, the state court action was extinguished. "Section 1334(c) abstention should be read in pari materia with section 1452(b) remand, so that the former applies only in cases in which there is a related proceeding that either permits abstention in the interests of comity, section 1334(c)(1), or that, by legislative mandate, requires it, section 1334(c)(2)."

In re Conejo Enterprises, Inc., 96 F.3d 346 (9th Cir. 1996)

Remand order based on abstention not appealable.

Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995)

If an order remands a removed bankruptcy case to state court because of a timely raised defect in removal procedure or lack of subject matter jurisdiction, a court of appeals lacks jurisdiction to review the order under §1447(d). That section, a provision of the general removal statute, bars appellate review of any "order remanding a case to the State court from which is was removed." Under *Thermtron Products, Inc. v. Hermansdorfer*, 483 U.S. 336, 345-346 (1976) *abrogated by* Quackenbush v. Allstate Ins. Co., 116 S.Ct. 1712 (1996); §1447(d), must be read *in part materia* with §1447(c), so that only remands based on the grounds recognized by §1447(c), i.e., a timely raised defect in removal procedure or lack of subject mater jurisdiction, are immune from review under §1447(d). Section 1447(d) bars review here, since the District Court's order remanded the case to "the State court from which it was removed," and untimely removal is precisely the type of removal defect contemplated by §1447(c). The same conclusion pertains regardless of whether the case was removed under § 1441(a) or §1452(a). Section 1447(d) applies "not only to remand[s]...under [the general removal statute], but to orders of remand made in cases removed under any other statutes." *United States v. Rice*, 327 U.S. 742, 752. Moreover, there is no indication that Congress intended §1452 to be the exclusive provision governing removals and remands in bankruptcy or to exclude bankruptcy cases from §1447(d)'s coverage. Although §1452(b) expressly precludes review of certain remand decision in bankruptcy cases, there is no reason §§1447(d) and 1452 cannot comfortably coexist in the bankruptcy context. The Court must, therefore, give effect to both.

RE-OPENING CASE - Sec. 350(b)

In re Lopez, 283 B.R. 22 (9th Cir. B.A.P. 2002)
Cause of action not listed by debtor in her schedules that might have value justified reopening of case, regardless of the fact that the time for revoking the debtor's discharge had past.

In re Staffer, 306 F.3d 967 (9th Cir. 2002)
Bankruptcy court erred in refusing to reopen closed case to allow unscheduled creditor to file a complaint under § 523(a)(3).

In re Paine, 250 B.R. 99 (9th Cir. B.A.P. 2000)
Debtor has no standing to challenge order reopening case.

In re Abbott, 183 B.R. 198 (9th Cir. B.A.P. 1995)
A motion to reopen is simply a mechanical device which can be brought ex parte and without notice. *In re Daniels*, 34 B.R. 782, 784 (9th Cir. B.A.P. 1983). It has no independent legal significance and determines nothing with respect to the merits of the case. *In re Germaine*, 152 B.R. 619, 624 (9th Cir. B.A.P. 1993). The order denying the motion to set aside did not diminish Earlene's property, increase her burdens or detrimentally affect her rights. She was not a "person aggrieved" by that order. The order left Earlene to defend the fraudulent transfer complaint. It did not prevent here from asserting any claims or defenses. Earlene has no standing to appeal the order reopening the case.

In re Cisneros, 994 F.2d 1462 (9th Cir. 1993)
It was not an abuse of discretion for a bankruptcy court to reopen a closed bankruptcy case to vacate its order granting a discharge that was entered by virtue of a mistake of fact. Pursuant to § 350(b), the bankruptcy court had the discretion to reopen the case, which gave it legal authority to vacate the discharge order.

In re Beeney, 142 B.R. 360 (9th Cir. B.A.P. 1992)
Reopening of case unnecessary to name debtor in a suit to recover insurance proceeds

In re Ricks, 89 B.R. 73 (9th Cir. B.A.P. 1988)
Standard for reopening to avoid lien under § 522(f).

In re Daniels, 34 B.R. 782 (9th Cir. B.A.P. 1983)
Case may be reopened without notice or hearing.

In re Income Property Builders, Inc., 699 F.2d 963 (9th Cir. 1982)
Case cannot be reopened if it has been dismissed -- only if it has been closed. Motion to vacate dismissal must be filed within one year.

ROOKER-FELDMAN DOCTRINE

Reusser v. Wachovia Bank, N.A., 525 F.3d 855 (9th Cir. 2008)

Debtors' claims under 42 U.S.C. § 1983 brought in United States District Court constituted a *de facto* appeal of a state court default judgment, and were barred by the *Rooker-Feldman* doctrine.

Vacation Village, Inc. v. Clark County, Nev, 497 F.3d 902 (9th Cir. 2007)

Doctrine only applies where the plaintiff asserts legal errors by the state court and seeks relief from a state court judgment. Doctrine did not apply in this case, because there was no state court judgment.

In re Lopez, 367 B.R. 99 (9th Cir. BAP 2007)

1. The *Rooker-Feldman* doctrine does not override or supplant the issue and claim preclusion doctrines; 2. Issue preclusion applied in this § 523(a)(6) action, where the state court found that the debtor willfully and maliciously misappropriated customer lists.

In re Harbin, 486 F.3d 510, 519 (9th Cir. 2007)

Doctrine did not prevent a bankruptcy court from considering the affect of a state court appeal on the debtor's chapter 11 plan.

In re Williams, 280 B.R. 857 (9th Cir. B.A.P. 2002)

Under Rooker-Feldman doctrine, state court decision was binding on bankruptcy case even though decision was still on appeal and not final for claim-preclusion purposes under California law.

Rule 4 & 7004-SERVICE OF PROCESS

In re Peralta, 317 B.R. 381 (9th Cir. BAP 2004)

"The mailing of a properly addressed and stamped item creates a rebuttable presumption that the addressee received it. . . .A certificate of mailing raises the presumption that the documents sent were properly mailed and received."

In re Focus Media, Inc., 387 F.3d 1077 (9th Cir. 2004), *cert. denied,* 544 U.S. 923, 125 S.Ct. 1674 (2005)

"We hold today that in an adversary proceeding in bankruptcy court, a lawyer can be deemed to be the client's implied agent to receive service of process when the lawyer repeatedly represented that client in the underlying bankruptcy case, and where the totality of the circumstances demonstrates the intent of the client to convey such authority."

In re Villar, 317 B.R. 88 (9th Cir. B.A.P. 2004)

Service of a motion to avoid a judicial lien upon the creditor's P.O. box was insufficient under Bankruptcy Rule 7004(b)(3).

In re La Sierra Financial Services, Inc., 290 B.R. 718 (9th Cir. B.A.P. 2002)

Movant not entitled to the presumption of proper service under the mailbox rule, where motion was mailed to 1 Rolling View Lane instead of 3 Rolling View Lane.

In re Sheehan, 253 F.3d 507 (9th Cir. 2001)-Rule 4(m)

Excusable neglect standard of Bankruptcy Rule 9006(b) applies to Rule 4(m). "...[I]f good cause is shown, a court shall extend the service period under Rule 4. If good cause is not shown, the court has the discretion to extend the time period. In addition, the court may extend the time limit upon a showing of excusable neglect under 9006(b)."

In re DeVore, 223 B.R. 193, 196-97 (9th Cir. B.A.P. 1998)

"Mailing a notice by first class mail to a party's last known address is sufficient to satisfy due process. *See* In re Eagle Bus Mfg., Inc., 62 F.3d 730, 736 (5th Cir.1995). In Eagle Bus, a creditor who failed to keep the debtor apprised of changes in her mailing address was "herself to blame" for not receiving notice of the claims bar date. Eagle Bus, 62 F.3d at 736. Here, the debtor left her address of record in 1994. The case remained open until 1 November 1996, yet she did not file a change of address with the court until September of 1997. LBR 105(e) provides in relevant part: "It shall be the responsibility of the debtor ... to ensure that the ... master mailing list ... [is] complete and correct." Arguably, Marshack had actual knowledge of DeVore's new address, if it is assumed he received the copy of her 4 August letter. However, the pleadings were served by trustee's counsel, who, not unreasonably, served the addresses on the court's mailing matrix, which the debtor had not updated.

Additionally, the debtor's letter of 4 August indicates she knew the trustee intended to file a motion to reopen the case to administer the state court litigation proceeds. "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry may have led." In re Gregory, 705 F.2d 1118, 1123 (9th Cir. 1983). The trustee's motion was filed and served on 12 August 1997; DeVore or her counsel could have obtained copies of the relevant documents from the court's file in time to respond. Moreover, Anderson had actual notice of the order before the appeal period expired (indeed, before the

written order had been entered). While it appears he unsuccessfully attempted to obtain a copy of the order, the record does not indicate any further attempts to do so or why these were or were not fruitful."

In re Bertain, 215 B.R. 438 (9th Cir. B.A.P. 1997) - Rule 4(m)
No abuse of discretion to toll 120-day period for service of adversary complaint during interval between dismissal and reinstatement of complaint

In re Pacific Land Sales, Inc., 187 B.R. 302 (9th Cir. B.A.P. 1995)
Defective service of process may be waived either intentionally or through estoppel.

In re Levoy, 182 B.R. 827 (9th Cir. B.A.P. 1995)
1. Debtor effectively serves government with objection to claim by mailing to Attorney General without street address or zip code
2. Personal jurisdiction existed once IRS filed claim

In re Waldner, 183 B.R. 879 (9th Cir. B.A.P. 1995)
Bankruptcy claimant fails to show good cause for untimely service of adversary complaint when service by mail available at all times

In re Cossio, 163 B.R. 150 (9th Cir. B.A.P. 1994), *aff'd.* 56 F.3d 70 (9th Cir. 1995)
When it found that there has been defective service of process, the judgment is void: "A person is not bound by a judgment in litigation to which he or she has not been made party by service of process." *Mason v. Genisco Technology Corp*, 960 F.2d 849, 851 (9th Cir. 1992). However, debtor's attorney who did not update address in file was properly served at old address under 7004 (b)(9).

In re Van Meter, 175 B.R. 64 (9th Cir. B.A.P. 1994)
Creditor's service of unissued and unfiled copies of summons and adversary complaint supports vacation of default judgment and dismissal...under 1990 version of R.4(j)
But see *In re Barr*, 217 B.R. 626, 629 (Bankr.W.D. Wa 1998) for statement of rule after amendments to FRCP 4(m)

Boudette v. Barnette, 923 F.2d 754 (9th Cir. 1991)
FRCP 4(j) - dismissal appropriate - no good cause shown

IRS
In re Morrell, 69 B.R. 147 (N.D. Cal 1986)
Without proper service, court lacks jurisdiction.

RULE 8

In re Dominguez, 51 F.3d 1502 (9th Cir. 1995)

Discharge memo that was filed at confirmation is deemed complaint objecting to discharge

RULE 9(b)

Vess v. Ciba-Geigy Corp., USA, 317 F.3d 1097 (9th Cir. 2003)

In a case where fraud is not an essential element of a claim, only allegations of fraudulent conduct must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b); allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a).

RULE 11 and other SANCTIONS

In re Lehtinan, 564 F.3d 1052 (9th Cir. 2009)

Bankruptcy court was authorized to suspend an attorney from practice under its inherent authority to sanction for bad faith conduct.

In re Brooks-Hamilton, 400 B.R. 238 (9th Cir. BAP 2009)

After remand to the bankruptcy court for further findings, the BAP remanded once again to determine, in accordance with the 4-part test of *In re Crayton, infra* whether the six-month suspension imposed on the attorney in question was appropriate**.**

In re Stasz, 387 B.R. 271 (9th Cir. BAP 2008)

Failure to comply with repeated orders to appear at a Rule 2004 exam justified order of contempt and award of attorney fees as sanctions.

Hale v. United States Trustee, 509 F.3d 1139 (9th Cir. 2007)

Bankruptcy court did not abuse discretion in sanctioning counsel for repeatedly assisting pro se debtors without appearing as counsel and without performing critical and necessary services.

In re Brooks-Hamilton, 329 B.R. 270 (9th Cir. BAP 2005), *aff'd in part, rev'd in part, remanded,* 271 Fed.Appx. 654 (2008).

Bankruptcy court did not abuse discretion in imposing a six-month suspension from practice.

In re Hercules Enterprises, Inc., 387 F.3d 1024 (9th Cir. 2004)

In order to find civil contempt, "the bankruptcy court had to find that he violated a specific and definite order and that he had sufficient notice of its terms and the fact that he would be sanctioned if he did not comply." Bankruptcy court had power to sanction for civil contempt, but not to make such sanction nondischargeable in future bankruptcies.

In re DeVille, 361 F.3d 539 (9th Cir. 2004)

Bankruptcy court properly sanctioned attorneys pursuant to its inherent power, but the B.A.P. was correct that neither that power nor B.R. 9011 authorized punitive sanctions.

In re Silberkraus, 336 F.3d 864 (9th Cir. 2003)

Fact that the debtor filed a bankruptcy petition only two days before a state court was to schedule a trial date on a creditor's claims for specific performance; the admissions by the debtor and his counsel that reorganization was impossible over the objections of creditors; and the fact that bankruptcy could not have provided more value to the debtor than proceeding with the state court action support bankruptcy court's finding that filing was frivolous and for an improper purpose. Rule 9011(c)(1)(A)'s safe harbor provision does not apply to the filing of the initial petition.

In re Dyer, 322 F.3d 1178 (9th Cir. 2003)

"Serious" punitive damages may not be awarded under § 105 for civil contempt of the automatic stay by entities who are not individuals. Only compensatory sanctions, attorney fees and compliance with the stay may be awarded. The bad faith required to find a violation of the

automatic stay is something less than what's required to impose *Chambers* sanctions. Nor can punitive sanctions be awarded under the court's inherent power to sanction.

Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. (1991)

In re Larry's Apartment, L.L.C., 249 F.3d 832 (9th Cir. 2001)
Bankruptcy court must apply federal law in determining what sanctions are to be imposed for conduct by attorney or party in bankruptcy court litigation.

Estrada v. Speno and Cohen, 244 F.3d 1050 (9th Cir. 2001)
District court may order a default judgment without considering alternative sanctions when a party willfully, repeatedly, and persistently disobeys court orders to attend court proceedings.

Primus Automotive Financial Services, Inc. v. Batarse, 115 F.3d 644 (9th Cir. 1997)
Court must make finding of bad faith as a condition to awarding sanctions under *Nasco*

In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996)
Chambers sanctions may be imposed by bankruptcy court even on a nonparty. *Sequoia* legislatively overruled

Trulis v. Barton, 67 F.3d 779 (9th Cir. 1995)
Rule 11 - *Nasco* and § 1927 sanctions for continuing lawsuit without client authority, etc.

Ortega v. O'Connor, 50 F.3d 778 (9th Cir. 1995)
There is no dispute that, in a proper case, a trial court may exclude a party's witness as a sanction for failure to comply with a pretrial order. See FRCP 16(f); *Ackley v. Western Conf. Of Teamsters,* 958 F.2d 1463, 1471 (9th Cir. 1992); *United States v. Valencia*, 656 F.2d 412, 415 (9th Cir. 1981).

In re Marsch, 36 F.3d 825 (9th Cir. 1994)
Distinguishing *Townsend*, court finds that a filing may be filed for an improper purpose, even if it isn't frivolous. A restitutionary award compensating the opposing party for unnecessary litigation expenses - as opposed to a punitive fine paid to the court - is a particularly appropriate sanction in cases involving manipulative petition filed principally for purposes of delay and harassment

Hedges v. RTC, 32 F.3d 1360 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995)
Rule 9011 was amended from "bankruptcy court" to "judicial officer" so District Courts may now impose sanctions in bankruptcy appeals

Gaskell v. Weir, 10 F.3d 626 (9th Cir. 1993)
1. Burden of proof is on sanctionee to prove inability to pay
2. The district court did not abuse its discretion in basing the sanctions on the attorney fees reasonably incurred by the defendants in defending the lawsuit. In a case like this, where the original complaint is the improper pleading, all attorney fees reasonably incurred in defending against the claims asserted I the complaint form the proper basis for sanctions. *See Lockary v. Kayfetz*, 974 f.2d 1166, 1176-77 (9th Cir. 1992) (approving a Rule 11 sanction based on the

attorney fees incurred to combat the improper pleading).

Combs v. Rockwell Int'l Corp., 927 F.2d 486 (9th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991)
Falsifying deposition transcripts is good cause for dismissal.

Lockary v. Kayfetz, 974 F.2d 1166 (9th Cir. 1992), *cert. denied*, 508 U.S. 931 (1993)
Nasco sanctions reviewed

Ferdik v. Bonzelet, 963 F.2d 1258 (9th Cir. 1992), *cert. denied*, 506 U.S. 915 (1992)
In determining whether to dismiss a case for failure to comply with a court order, the district court must weigh five factors including
(1) the public's interest in expeditious resolution of litigation;
(2) the court's need to manage its docket;
(3) the risk of prejudice to the defendants
(4) the public policy favoring disposition of cases on their merits and
(5) the availability of less drastic alternatives
Thompson, 782 F.2d at 831; *Henderson*, 779 F.2d at 1423-24.
Although it is preferred, it is not required that the district court make explicit findings in order to show that it has considered these factors and we may review the record independently to determine if the district court has abused its discretion *Malone*, 833 F.2d at 130. *Henderson* at 1424.

Business Guides, Inc. v. Chromatic Commun. Enterprises, Inc., 111 S.Ct. 922 (1991)
Party held to reasonable inquiry standard, even though it did not sign pleading
Business Guides - 892 F.2d 802 (9th Cir. 1989), *aff'd*, 498 U.S. 533, 111 S.Ct 922 (1991) - reasonable inquiry - objective standard applied (complete review)

Cooter & Gell v. Hartmarx Corp. 496 U.S. 384 (1990)
1. Rule 41 (a)(1) dismissal does not deprive court of jurisdiction to decide Rule 11 issue
2. Abuse of discretion standard of review applies to all aspects of Rule 11 award.
3. Rule 11 does not authorize District Court to impose attorney fee incurred on appeal

U.S. v. Stringfellow, 911 F.2d 225 (9th Cir. 1990)
Failure to cite relevant authority does not <u>alone</u> justify imposition of sanctions.

Townsend v. Holman Consulting Corp., en banc, 929 F2d 1358 (9th Cir. 1990)
Sanctions may be imposed for failure to conduct reasonable investigation before filing complaint, *Murphy* overruled - complete review of Rule 11 9th Cir. Cases

In re Fitzsimmons, 920 F.2d 1468 (9th Cir. 1990)
Failure to request transcript and post fee for 8 months = bad faith. No need ton consider alternative sanctions when bad faith involved.

Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406 (9th Cir. 1990), *cert. denied*, Lewis & Co. v. Thoeren, 498 U.S. 1109 (1991)
Dismissal appropriate for outrageous conduct

Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470 (9th Cir. 1990)
Uncertainty of B.A.P. decision's binding effect on circuit precludes sanctioning party seeking contrary result. Issue: whether creditor can sue for fraudulent conveyances

Maisonville v. F2 America, Inc., 902 F.2d 746 (9th Cir. 1990), *cert. denied*, Dombroski v. F2America, Inc., 498 U.S. 1025 (1991)
FRCP 11 sanction proper for attorney's failure to make reasonable inquiry before filing factually frivolous motion for reconsideration

In re Donovan, 871 F.2d 807 (9th Cir. 1989)
Failure to prosecute B.A.P. appeal - dismissed as sanction; failure to consider alternatives

West Coast Theater Corp. v. City of Portland, 897 F.2d 1519 (9th Cir. 1990)
Party cannot avoid dismissal by arguing that her attorney is to blame - complete non-cooperation justified dismissal under Rule 41

Hamilton Copper & Steel Corp. v. Primary Steel, Inc., 898 F.2d 1428 (9th Cir. 1990)
When is dismissal appropriate for failing to abide by court instructions

In re Villa Madrid, 110 B.R. 919 (9th Cir. B.A.P. 1990)
Sanctions on attorney for filing client's bad faith bankruptcy petition

Hudson v. Moore Business Forms, Inc. 898 F.2d 684 (9th 1990)
Lack of opportunity to respond orally before Rule 11 sanctions imposed does not violate due process if attorney had full opportunity to respond in writing - duty to mitigate

In re Karelin, 109 B.R. 943 (9th Cir. B.A.P. 1990)
FRCP 16(f) - no abuse is excluding evidence not exchanged with the other side

Zambrano v. City of Tustin, 885 F.2d 1473 (9th Cir. 1989)
Court may impose sanctions for violation of local rules only upon showing of bad faith, willful disobedience, or gross negligence or recklessness

In re Balboa Improvements, Ltd., 99 B.R. 966 (9th Cir. B.A.P. 1989)
Court may award sanctions even if it lacks subject matter jurisdiction

Greco v. Stubenberg, 859 F.2d 1401 (9th Cir. 1988)
District court properly dismissed appeal for failure to meet deadlines

In re Bersher Investment, 95 B.R. 126 (9th Cir. B.A.P. 1988)
Failure of debtor's counsel to notify movant that he would not opposed motion justifies sanctions

King v. Idaho Funeral Service Assoc, 862 F.2d 744 (9th Cir. 1988)

In re Asher Film Ventures Int'l., Inc., 89 B.R. 80 (9th Cir. B.A.P. 1988)
Sanctions against attorney for pleadings upheld

In re Akridge, 89 B.R. 66 (9th Cir. B.A.P. 1988)

Union's prosecution of 523(a)(6) case against a strike breaker was for purposes of harassment only

In re Webre, 88 B.R. 242 (9th Cir. B.A.P. 1988)

Relitigation of issues decided solely for harassment

Zaldivar, v. City of L.A. , 780 F.2d 823, 828 (9th Cir. 1986)

RULE 12

Ashcroft v. Iqbal. –U.S.–, 129 S.Ct. 1937, 1949-50 (2009)

1) Concept that the court must accept all of the allegations in the complaint as true does not apply to legal conclusions couched as factual allegations.

2) Only a complaint that states a plausible claim for relief will survive a Rul 12(b)(6) motion. Whether a complaint states such a claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1974 (2007)

". . .[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."

Swedberg v. Marotzke, 339 F.3d 1139 (9th Cir. 2003)

A motion to dismiss under Rule 12(b)(6) that is supported by extraneous materials cannot be regarded as one for summary judgment until the court acts to convert the motion by indicating that it will not exclude those materials from consideration; until the district court has so acted, a plaintiff is free to file a proper notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1).

Swierkiewicz v. Sorema N.A.,534 U.S. 506 (2002)

Plaintiff need not plead sufficient facts to prove a prima facie case. Court may dismiss a case under Rule 12(b)(6) only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984)

McHenry v. Renne, 84 F.3d 1172 (9th Cir. 1996)

The court of appeals affirmed a district court order. The court held that the dismissal of complaint for failure to contain a short and plain statement of the plaintiffs' claims and failure to give the defendants fair opportunity to frame responsive pleadings is not an abuse of discretion where the plaintiffs were given two opportunities to amend.

Costlaw v. Weeks, 790 F.2d 1486, 1488 (9th Cir. 1986)

District court may dismiss a complaint sua sponte as untimely so long as the defendant has not waived the defense.

In re Kubick, 171 B.R. 658 (9th Cir. B.A.P. 1994)

A complaint that merely recites statutory language fails to state a claim

In re Aboukhater, 165 B.R. 904 (9th Cir. B.A.P. 1994)

Standard for dismissal - 523 & 727 complaint

Price v. State of Hawaii, 939 F.2d 702 (9th Cir. 1991), *cert. denied*, 503 U.S. 938 (1992)

(Citing *Jones v. Comm Redev. Agency*, 733 F.2d 646, 649, (9th Cir. 1984)

RULE 13--COUNTERCLAIM AND CROSS-CLAIM

In re Adbox, Inc., 488 F.3d 836 (9th Cir. 2007)

A trustee who has brought a preference action on behalf of the estate is not an "opposing party," and thus counterclaims that could have been brought against the debtor prior to its bankruptcy were properly dismissed.

RULE 15

Ditto v. McCurdy, 510 F.3d 1070, 1077; 1079 (9th Cir. 2007)

No error in not allowing a plaintiff to amend her complaint to restore § 727 allegations 15 months after the original complaint was filed. Four factors used to determine the propriety of the amendment: bad faith, undue delay, prejudice to the opposing party, and futility of the amendment.

Amerisourcebergen Corp. v. Dialysis West, Inc., 445 F.3d 1132 (9th Cir. 2006)

". . .[A] district court need not grant leave to amend where the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile."

In re Markus, 313 F.3d 1146 (9th Cir. 2002)

Untimely complaint objecting to dischargeability does not relate back to a motion brought by a creditor that references only objections to discharge.

In re Sarbaz, 227 B.R. 298 (9th Cir. B.A.P. 1998)

Pursuant to Fed. R. Civ. P. 15(b), as incorporated by Fed. R. Bankr. P. 7015, a party can give implied consent to adjudication of issues not raised by the pleadings. Furthermore, while it may have been prudent for Feldman to move to amend his pleadings, the "failure to so amend does not affect the result of the trial of these issues." Fed.R.Civ.P. 15(b). Additionally, consent is generally found when evidence relating to issues that are beyond the pleadings is introduced without objection. 6A Wright, Miller and Kane, Federal Practice and Procedure, § 1493, at 24 (2d ed.1990). Feldman introduced evidence consistent with his opening statement and relevant to the Section 523(a)(6) claim. Sarbaz did not object. Sarbaz implicitly consented to adjudication of the claim under Section 523(a)(6). The court did not err in considering that Section.

In re Magno, 216 B.R. 34 (9th Cir. B.A.P. 1997)

Creditor's untimely amended complaint seeking exception to discharge for wrongful death judgment did not "relate back" to original complaint objecting to discharge due to debtor's concealment of assets. 727 originally pled. 523(a)(6) added past deadline.

In re Jodoin, 209 B.R. 132 (9th Cir. B.A.P. 1997)

Not error to hold part of the state court marital dissolution judgment was nondischargeable under bankruptcy code section when complaint only stated cause of action under different section - relation back

Lindauer v. Rogers, 91 F.3d 1355 (9th Cir. 1996)

The court of appeals affirmed a district court order. The court held that after final judgment has been entered, a FRCP 15(a) motion to amend a complaint may be considered only if the judgment is first reopened under Rule 59 or 60

In re Dominguez, 51 F.3d 1502, 1510 (9th Cir. 1995)

"We permit relation-back if the new claim arises from the same "conduct, transaction or occurrence" as the original claim. *Percy v. SF Gen. Hospital*, 841 F.2d at 978. We will find such a link when 'the claim to be added will likely be proved by the 'same kind of evidence' offered in support of the original pleading. *Id.* (quoting *Rural Fire Protection Co. v. Hepp*, 366 F.2d 355, 362

(9th Cir. 1966))."

Texaco, Inc. v. Ponsoldt, 939 F.2d 794 (9th Cir. 1991)

Test:

1. Undue delay
2. Bad faith
3. Futility of amendment
4. Prejudice to the opposing party

see also In re Rogstad 126 F.3d 1224 (9th Cir. 1997) (quoting *Conley*)

Jackson v. Bank of Hawaii, 902 F.2d 1385 (9th Cir. 1990)

Standard for allowing or disallowing amended complaint

Miles v. Dept of the Army, 881 F.2d 777 (9th Cir. 1989)

Relation back - filing amended complaint after dismissal

RULE 17

In re Hashim, 379 B.R. 912, 914 (9th Cir. BAP 2007)

"If a court does not authorize a creditor under 11 U.S.C. § 503(b)(3) to recover, for the benefit of the estate, property that was transferred or concealed by the debtor, the Federal Rules of Civil Procedure 17(a) and 19(a) require that the court realign as plaintiff a bankruptcy trustee who is a defendant."

In re Capobianco, 248 B.R. 833 (9th Cir. B.A.P. 2000)

Court properly allowed plaintiff to substitute as the real party in interest under FRCP 17(a) a sole proprietorship for a corporate entity as plaintiff in a dischargeability action, where debt was owed to sole proprietor, which was subsequently incorporated.

RULE 19 - INDISPENSABLE PARTY

Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496 (9th Cir. 1991)

In re Hashim, 379 B.R. 912, 914 (9th Cir. BAP 2007)

"If a court does not authorize a creditor under 11 U.S.C. § 503(b)(3) to recover, for the benefit of the estate, property that was transferred or concealed by the debtor, the Federal Rules of Civil Procedure 17(a) and 19(a) require that the court realign as plaintiff a bankruptcy trustee who is a defendant."

RULE 20

Coughlin v. Rogers, 130 F.3d 1348 (9th Cir. 1997)

Plaintiffs improperly joined, where transactions involved did not have similarity in factual background.

RULE 24–INTERVENTION

Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002)

For permissive intervention under FRCP 24(b), all that is necessary is that the intervener's claim or defense and the main action have a question of law or fact in common.

In re Bernal, 207 F.3d 595 (9th Cir. 2000)

Assignee of note's motion to intervene properly denied, where default was entered against assignor. Assignee's sole remedy was to move for substitution under Rule 25(c).

Smith v. Marsh, 194 F.3d 1045 (9th Cir. 1999)

"[T]he requirements of Rule 24(a)(2) may be broken down into four elements, each of which must be demonstrated in order to provide a non-party with a right to intervene: (1) the application must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court."

RULE 36

Conlon v. U.S., 474 F.3d 616 (9th Cir. 2007)(citing Hadley with approval).

Hadley v. U.S., 45 F.3d 1345 (9th Cir. 1995)

"Two requirements... must be met before an admission may be withdrawn: (1) presentation of the merits must be subserved, and (2) the party who obtained the admission must not be prejudiced by the withdrawal."

RULE 37

Nilsson v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988)
Default judgment and dismissal of counterclaim upheld

Toth v. TWA, Inc., 862 F.2d 1381 (9th Cir. 1988)
Sanctions under 37(b)(2) distinguished from 37(d).

RULE 41

Swedberg v. Marotzke, 339 F.3d 1139 (9th Cir. 2003)

A motion to dismiss under Rule 12(b)(6) that is supported by extraneous materials cannot be regarded as one for summary judgment until the court acts to convert the motion by indicating that it will not exclude those materials from consideration; until the district court has so acted, a plaintiff is free to file a proper notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1).

Commercial Space Mgmt. Co., Inc., v. Boeing Co., Inc., 193 F.3d 1074 (9th Cir. 1999)

The court of appeals affirmed a judgment of the district court in part and vacated in part. The court held that a Rule 41(a)(1) dismissal is effective on filing and no court order is required, and filing a notice of voluntary dismissal with the court automatically terminates the action as to the defendants who are subjects of the notice.

Pedrina v. Chun, 987 F.2d 608 (9th Cir. 1993)

Rule 41(d)(1) permits a plaintiff to dismiss less than all defendants without court order

Morris v. Morgan Stanley & Co., 942 F.2d 648 (9th Cir. 1991)

Factors in dismissal for failure to prosecute under Rule 41(b):

1. The court's need to manage its docket
2. The public interest in expeditious resolution of litigation
3. The risk of prejudice to defendants from delay,
4. The policy favoring disposition of cases on their merits *Citizens Utilities Co. v. American Tel & Tel Co.,* 595 F.2d 1171, 1174 (9th Cir. 1979) *cert denied*, 444 U.S. 931 (1979)

Lake at Las Vegas Investors Group, Inc. v Pacific Malibu Development Corp., 933 F.2d 724 (9th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992)

Two dismissal sub - 41(a)

RULE 50

Janes v. Wal-Mart Stores, Inc., 279 F.3d 883 (9th Cir. 2002)

A motion for summary judgment or a trial brief does not satisfy the requirement that a motion for judgment as a matter of law must be made before the close of evidence under Federal Rules of Civil Procedure 50.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)

"Under Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue"....[T]he court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." The standard under the rule "mirrors" the standard under Rule 56.

Schudel v. General Electric Co., 120 F.3d 991 (9th Cir. 1997)

JNOV

RULE 52

Ritchie v. U.S., 451 F.3d 1019 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1337, 167 L.Ed.2d 84 (2007)

"Rule 52(c) expressly authorizes the district judge to resolve disputed issues of fact. . . .In deciding whether to enter judgment on partial findings under Rule 52(c)**,** the district court is not required to draw any inferences in favor of the non-moving party; rather, the district court may make findings in accordance with its own view of the evidence.**"**

RULE 54

Miles v. State of California, 320 F.3d 986 (9th Cir. 2003)
Costs under Rule 54(d) may not be awarded where an underlying claim is dismissed for lack of subject matter jurisdiction, as the dismissed party is not a "prevailing party" under the rule.

In re Belli, 268 B.R. 851 (9th Cir. B.A.P. 2001)
B.A.P. lacked jurisdiction over bankruptcy court partial summary judgment order that lacked express Rule 54(b) certification.

In re Bowen, 198 B.R. 551 (9th Cir. B.A.P. 1996)
Certification is proper if it will aid "expeditious decision" of the case.

In re Lindsay, 59 F.3d 942 (9th Cir. 1995), *cert. denied*, 516 U.S. 1074 (1996)
54(b) judgment gives the prospective appellant an election to appeal at that time or later, when the entire case is over; such a judgment is "final as to the claims and parties within its scope, and could not be reviewed as part of an appeal from a subsequent judgment as to the remaining claims and parties" *Williams v. Boeing Co.*, 681 F.2d 615 (9th Cir. 1982). The court making a Rule 54(b) determination "should not direct entry of judgment under Rule 54(b) unless it has made specific findings setting forth the reasons for its order." *Morrison-Knudsen v. Archer* 655 F.2d 962, 965 (9th Cir. 1981)

Texaco, Inc. v. Pensoldt, 939 F.2d 794 (9th Cir. 1991)

Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519 (9th Cir. 1987)

Sheehan v. Atlanta Int'l Ins. Co., 812 F.2d 465, 468 (9th Cir. 1987)

Arizona State Carpenters Pension Trust Fund v. Miller, 938 F.2d 1038 (9th Cir. 1991)
If complaint seeks only on legal right, court ruling on one of several theories of recovery (here punitive damages) does not meet standard

Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir. 1989), *cert. denied*, 493 U.S. 891 (1989)
Certification under Rule 54(b)

In re Aviva Gelato, Inc., 94 B.R. 622 (9th Cir. B.A.P. 1988) *aff'd*, Kirtley v. Aviva Gelato, Inc., 930 F.2d 27 (9th Cir. 1991)
Taxing costs - abuse of discretion standard

RULE 55

In re McGee, 359 B.R. 764, 771 (9th Cir. BAP 2006)

"The factors to be considered for entry of a default judgment include (1) the possibility of prejudice to the plaintiff, (2) the merits of the plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rule of Civil Procedure favoring decisions on the merits."

In re First T.D. & Investment , Inc., 253 F.3d 520 (9th Cir. 2001)

Bankruptcy court abused discretion by entering final default judgments that directly contradicted its earlier ruling in the same action as to answering defendants.

In re Lam, 192 F.3d 1309 (9th Cir. 1999)

The court of appeals dismissed an appeal from a judgment of the B.A.P. The court held that a bankruptcy creditor forfeits the right to appeal from the entry of a default by not seeking relief in the court where the default was entered.

In re Beltran, 182 B.R. 820 (9th Cir. B.A.P. 1995)

Bankruptcy court may consider debtor's testimony in creditor's prove up hearing on motion for default judgment

In re Kubrick, 171 B.R. 658 (9th Cir. B.A.P. 1994)

When considering entry of a default judgment, the court should consider the following factors:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of the plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action
(5) the possibility of a dispute concerning material facts
(6) whether the default was due to excusable neglect and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits *Eitel v. Mccoool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986)

In re Roxford Foods, Inc., 12 F.3d 875 (9th Cir. 1993)

Failure to give notice of entry of default violated due process

In re Villegas, 132 B.R. 742 (9th Cir. B.A.P. 1991)

No discharge judgment against creditor without hearing on evidence. Court has broad discretion to require evidentiary hearing as prerequisite to entry of default judgment

In re Hammer, 112 B.R. 341 (9th Cir. B.A.P. 1990), *aff'd* 940 F.2d 524 (9th Cir. 1991)

Debtor's own negligence and lack of meritorious defense defeats motion to set aside default judgment

Yusov v. Yusuf, 892 F.2d 784 (9th Cir. 1989)

Default judgment as a sanction approved against a party who has willfully and consistently

failed to obey court orders and procedures

Ringgold Corp. v Worrall, 880 F.2d 1138 (9th Cir. 1989)
Notice required for default - notice to lawyer

In re Campbell, 105 B.R. 19 (9th Cir. B.A.P. 1989)
Default judgment entered after no proper service is void (i.e., summons expired under 7004(f))

Alan Neuman Prod. Inc. v. Albright, 862 F.2d 1388 (9th Cir. 1988), *cert. denied*, 493 U.S. 858 (1989)

In re Stuart, 88 B.R. 247 (9th Cir. B.A.P. 1988)
Need for "prove-up"

Nilsson v. Louisiana Hyrolec, 854 F.2d 1538 (9th Cir. 1988)
Court can condition setting aside default upon payment of moving party's attorney fees and costs

RULE 56 - SUMMARY JUDGMENT

In re Barboza, 545 F.3d 702, 707 (9th Cir. 2008)
Complete review of the summary judgment standard.

Swedberg v. Marotzke, 339 F.3d 1139 (9th Cir. 2003)
A motion to dismiss under Rule 12(b)(6) that is supported by extraneous materials cannot be regarded as one for summary judgment until the court acts to convert the motion by indicating that it will not exclude those materials from consideration; until the district court has so acted, a plaintiff is free to file a proper notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1).

Under Rule 56, the moving party has the initial burden to establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." British Airways Board v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The responding party then has the burden of producing evidence of "specific facts showing there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) The Supreme Court in Anderson went on to say that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248.

Fairbank v. Wunderman Cato Johnson, 212 F.3d 528 (9th Cir. 2000)
Standard for granting summary judgment--differences between federal and California standard meant that court district court could reach merits of motion after case was removed from state court.

Leslie v. Grupo ICA, 198 F.3d 1152 (9th Cir. 1999)
The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that in a federal civil action, summary judgment cannot be based on contradictions between the nonmoving party's unsworn statements and subsequent sworn testimony and declarations that seek to explain the prior statements.

General Electric Co. v. Joiner, 522 U.S. 136, 118 S.Ct 512 (1997)
Issue of whether expert evidence is admissible is not an issue of fact

In re Rothery, 143 F.3d 546 (9th Cir. 1998)
Bankruptcy court may convert motion to dismiss into summary judgment motion after evidence has been submitted and all issues have been raised and contested

In re Rogstad, 126 F.3d 1224 (9th Cir. 1997)
Error to grant summary judgment even if there is no response, where moving party hasn't established that it's entitled to judgment as a matter of law.

In re Rothery, 143 F.3d 546 (9th Cir. 1998)
Debtor not entitled to notice before Rule 12(b)(6) motion is converted into motion for summary judgment.

Jacobson v. AEG Capital Corp, 50 F.3d 1493, 1496 (9th Cir. 1995)
Judicial notice of records and transcript of bankruptcy proceeding convert 12(b) motion into one for summary judgment

In re Harris Pine Mills, 44 F.3d 1431 (9th Cir. 1995), *cert. denied,* 515 U.S. 1131, 115 S.Ct. 2555 (1995)
Failure of defendants to meet burden of showing GIMF as to fraud claims resulted in summary judgment against them

Columbia Steel Fabricators, Inc. v. Ahlstrom Recovery, 44 F. 3d 800 (9th Cir. 1995), *cert. denied*, 516 U.S. 864 (1995)
No error in granting sua sponte summary judgment for a nonappearing party

School District No. IJ v. AC and S, Inc. 5 F3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994)
Failure to attach documents to affidavits as required in 56(e) justified court's failure to consider them

Bryant v. Ford Motor Co., 886 F.2d 1526 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990)
Summary judgment proper when opponent failed to file affidavit seeking continuance to allow discovery under 56(f)

In re Bishop, 856 F.2d 78 (9th Cir. 1988)
De novo review of summary judgment

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)
Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986)
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

RULE 58- B.R. 9021

In re Garland, 295 B.R. 347 (9th Cir. B.A.P. 2003)

Under pre-12/1/2002 Rule 9021, four-page order that did not include a separate judgment and was not effective until the court denied a motion to set aside the earlier order by way of a minute order.

In re Schimmels, 85 F.3d 416 (9th Cir. 1996)

Summary judgment order which included no opinion or memorandum is a final separate order under B.R. 9021

Hollywood v. City of Santa Maria, 886 F.2d 1228 (9th Cir. 1989)

For purposes of Rule 59 motion, order which contains explanatory material is docketed and is served meets separate order requirement of rule 58

Carter v. Beverly Hills S&L Assoc., 884 F.2d 1186 (9th Cir. 1989), *cert. denied*, 497 U.S. 1024 (1990)

Rule 60(b) motion filed 18 mos. after judgment noted in minute book not untimely, because judgment not entered

Noli v. CIR, 860 F.2d 1521 (9th Cir. 1988)

No need for judgment on separate document, where debtors were present when automatic stay lifted

RULE 59

In re International Fibercom, Inc., 503 F.3d 933, 944 (9th Cir. 2007)

"Under Rule 59(a), made applicable to bankruptcy proceedings by Federal Rules of Bankruptcy Procedure 9023, a court has discretion to reopen a judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions [citations omitted]**. . .**The bankruptcy court did not abuse its diescretion in denying [the] request for a full evidentiary hearing. There was adequate factual basis for the bankruptcy court's decision."

In re Captain Blythers, Inc., 311 B.R. 530 (9th Cir. B.A.P. 2004)**,** *aff'd,* 182 Fed. Appx. 708 (2006).

The rules do not recognize a motion for reconsideration. Since the motion in question was brought within 10 days of entry of judgment, it is considered a motion to amend findings under Rule 52, or a motion to alter or amend judgment under Rule 59.

In re Brewster, 243 B.R. 51 (9th Cir. B.A..P 1999)

Rule 59(e) motion for reconsideration tolled time for appeal of order confirming reorganization plan.

In re Weisberg, 193 B.R. 916 (9th Cir. B.A.P. 1996), *aff'd in part, rev'd in part*, 136 F/3d 655 (9th Cir. 1998), *cert. denied*, Wolkowitz v. Shearson Lehman Bros., Inc., 525 U.S. 826 (1998)

"There are three grounds for granting new trials under 59(a)(2):

1. Manifest error of law,
2. Manifest error of fact, and
3. Newly discovered evidence *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir. 1978) (citing 6A Moore's Federal Practice at ¶59.07 at 59-94).

In re Carolina Triangle Ltd., 166 B.R. 411 (9th Cir. B.A.P. 1994)

A postjudgment motion that could have been brought under Rule 59(e) is properly construed as a 59(e) motion if brought within 10 days of the judgment

U.S. v. RG & B Contractors, Inc., 21 F.3d 952 (9th Cir. 1994)

10 day rule applies, even the attorney fees not yet awarded

In re Levine, 162 B.R. 858 (9th Cir. B.A.P. 1994)

Limitations period for reconsideration motion runs from entry of formal written order rather than from entry of minute order.

The 9th Cir. treats a timely filed motion for reconsideration as a motion to amend a judgment *In re Crystal Sands Properties,* 84 B.R. 665, 668 n. 3 (9th Cir. B.A.P. 1988) *But see* In re Donovan*,* 871 F. 2d 807 (9th Cir. 1989)

School District IJ v. AC and S, Inc. 5 F3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994)

Court may reconsider its grant of summary judgment under either FRCP 59(e) or 60(b)

Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an

intervening change in controlling law. *See All Hawaii Tours Corp. v. Polynesian Cultural Center*, 116 FRD 645, 648 (D. Hawaii 1987) *rev'd on other grounds*, 855 F.2d 860 (9th Cir. 1988), published at 861 F.2d 536 (withdrawn from bound volume). There may also be other, highly unusual, circumstances warranting reconsideration.

The overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into "newly discovered evidence." *See Waltman v. International Paper Co.*, 875 F.2d 468, 473-74 (9th Cir. Cir 1989) materials available at time of filing opposition to summary judgment would not be considered with motion for reconsideration). *Trentacosta v. Frontier Pac Aircraft Indus. Inc.*, 813 F.2d 1553, 1557 and n.4 (9th Cir. 1987) court did not abuse its discretion in refusing to consider affidavits opposing summary judgment filed late). *Frederick S. Wyle Professional Corp. V Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985) evidence available to party before it filed its opposition was not "newly discovered evidence" warranting reconsideration of summary judgment).

Jones v. Aero/Chem Corp., 921 F.2d 875 (9th Cir. 1990)

Newly discovered evidence does not warrant new trial in absence of showing that outcome would be different

Adriana Int'l. Corp. v. Thoeren, 913 F.2d 1406, 1416 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)

10 day time limit applies to motion to reconsider amended judgment

Osterneck v. Ernst & Whinney, 489 U.S. 169, 109 S.Ct. (1989)

RULE 60(b)

In re AVI, Inc., 389 B.R. 721, 724 (9th Cir. BAP 2008)

Dismissal of chapter 11 case was properly set aside, hwere order approving a settlement did not include a provision for dismissal of the case upon the occurrence of certain events, and the case was subsequently dismissed without notice to creditors. Court properly set aside the dismissal under Rule 60(b).

In re International Fibercom, Inc., 503 F.3d 933 (9th Cir. 2007)

Bankruptcy court properly set aside an order approving the assumption of an executory contract under Rule 60(b)(6) based upon an error of law, i.e. that the workers compensation contract was not executory, even though the order was set aside two years after it was entered. The assumption motion also violated the court's local rule requiring conspicuous notice that a claimant is taking a security interest in prepetition assets to secure a post-petition debt.

In re Wylie, 349 B.R. 204 (9th Cir. BAP 2006)

Failure to respond to objection to its claim,and failure to establish an excuse for this failure, justified denial of the claim other than on the merits. Once ten days has passed, claimant's right to seek reconsideration under § 502(j) is gone. He is left to seek reconsideration under Rule 60(b), but is limited to the narrow grounds set forth in the rule. Claimant did not establish prerequisites for relief under Rule 60(b)(1), (b)(3), or (b)(6).

In re Peralta, 317 B.R. 381 (9th Cir. BAP 2004)

"The three factors to consider with respect to vacating a default judgment are; (1) whether the defendant's culpable conduct led to the default; (2) whether the defendant has a meritorious defense; and (3) whether reopening the default judgment would prejudice the plaintiff." The concept of culpable conduct is coextensive with excuseable neglect. Prejudice can be established from the legal expense to the opposing party in having to address defenses that are meritless.

In re Williams, 287 B.R. 787 (9th Cir. B.A.P. 2002)

Motion to set aside default judgment brought 81 days after movant knew of judgment being entered was untimely.

Laurino v. Syringa General Hospital, 279 F.3d 750 (9th Cir. 2002)

"Rule 60(b)(1) provides that a court may relieve a party from a final judgment on the basis of excusable neglect. ' [T]he determination of whether neglect is excusable is an equitable one that depends on at least four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith.' " [citation omitted]

Community Dental Services v. Tani, 282 F.3d 1164 (9th Cir. 2002)

"...[W]here the client demonstrated gross negligence on the part of his counsel, a default judgment against the client may be set aside pursuant to Rule 60(b)(6)."

Speiser, Krause & Madole P.C. v. Ortiz, 271 F.3d 884 (9th Cir. 2001)

"While an attorney's egregious failure to read and follow clear and unambiguous rules might sometimes be excusable neglect, "mistakes construing the rules do not usually constitute

'excusable' neglect."

Bellevue Manor Assos. v. U.S., 165 F.3d 1249 (9th Cir. 1999) (Rule 60(b)(5))

In re Mulvania, 214 B.R. 1, (9th Cir. B.A.P. 1997)

In re Virtual Vision, Inc., 124 F.3d 1140 (9th Cir. 1997)
Creditor's own collapse is insufficient ground for failing to comply with discovery request in bankruptcy proceeding. Entry of default proper. Rule 60(b) motion denied.

Briones v. Riviera Hotel & Casino, 116 F.3d 379 (9th Cir. 1997)
Pioneer Inv. Services standard for excusable neglect applies to Rule 60(b)

(Duwamish Indian Tribe) U.S. v. State of Washington, 98 F.3d 1159 (9th Cir. 1996), *cert. denied*, 522 U.S. 806 (1997)

In re Negrete, 183 B.R. 195 (9th Cir. B.A.P. 1995), *aff'd.* 103 F.3d 139 (9th Cir. 1996)
Untimely motion for reconsideration of fee order must show exceptional or extraordinary circumstances

In re Hunter, 66 F.3d 1002 (9th Cir. 1995)
"Independent action" to relieve party of a judgment from a settlement was without jurisdiction basis

In re Weston, 41 F.3d 493 (9th Cir. 1994)
Motion for rehearing filed by attorney for nonparty tolls time limit for appeal from sanctions order against them. Motion for reconsideration filed by one tolls appeal time for all.

Kyle v. Campbell Soup Co., 28 F.3d 928 (9th Cir. 1994), *cert. denied*, 513 U.S. 867 (1994)
Mistake of law (i.e., time limits under Rule 6(b)) does not constitute excusable neglect

U.S. v. RG & B Contractors, 21 F.3d 952 (9th Cir. 1994)
60(b)(1) - error caused by corp restructuring not excusable neglect *Pioneer Inv. Services* discussed

In re Cossio, 163 B.R. 150 (9th Cir. B.A.P. 1994), *aff'd.* 56 F.3d 70 (9th Cir. 1995)
Debtor's attorney who did not update address and was served at old address was properly served under B.R. 7004(b)(9)

Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993)
4 part test to determine whether circumstances surrounding the party's omission constitutes "excusable neglect" (weakens In re Hammer's holding re "culpable conduct"):
1. Danger of prejudice to the debtor
2. The length of the delay and its potential impact on judicial proceedings
3. The reason for the delay, including whether it was within the reasonable control of the movant
4. Whether the movant acted in good faith

See also In re Nunez, 196 B.R. 150 (9th Cir. B.A.P. 1996)

In re Golob, 146 B.R. 566 (9th Cir. B.A.P. 1992)
Not use Rule 60(b)(6) if (1)(2)(3) are available. Because they were, 1 year statute barred motion

U.S. v. Alpine Land & Reservoir co., 984 F.2d 1047, (9th Cir. 1993), *cert. denied,* 510 U.S. 813, 114 S.Ct. 60 (1993)
60(b)(6) only available under extraordinary circumstances. Need to show "injury and that circumstances beyond its control prevented timely action to protect its interests"

In re Atkins, 134 B.R. 936 (9th Cir. B.A.P. 1992)
Rule 60(b) cannot be used as s substitute for an appeal. May not reargue the merits of a final order.

In re Hammer, 940 F.2d 524 (9th Cir. 1991)
Test for setting aside default judgment; may be weakened by Pioneer Services, supra

Jones v. Aero/Chem Corp., 921 F.2d 875 (9th Cir. 1990)
60(b)(2) - Test for finding misconduct regarding discovery:
1. Due diligence in discovery requests by plaintiff ?
2. Actual or constructive knowledge of missing documents by defendant ?
3. Defendant did not divulge existence

Transgo Inc. v. Ajac Transmission Parts Corp, 911 F.2d 363 (9th Cir. 1990)
60(b)(5) Test for changed circumstances in fact or law

In re Cleanmaster Industries, Inc., 106 B.R. 628 (9th Cir. B.A.P. 1989)
Affidavits did not establish why they could not have been discovered at trial, thus not newly discovered evidence. See *School District 15* (under rule 59 re summary judgment)

Nevitt v. U.S., 886 F.2d 1187 (9th Cir. 1989)
One year statute of limitations for (b)(1), (2) or (3)

Alexander v. Robertson, 882 F.2d 421 (9th Cir. 1989)
"Fraud" sufficient to set aside judgment must result in damage to the moving party

Gregorian v. Izvestra, 871 F.2d 1515 (9th Cir. 1989), *cert. denied*, 493 U.S. 891 (1989)
Culpability required to deny setting aside default

In re Donovan, 871 F.2d 807 (9th Cir. 1989)
Motion to reconsider dismissal is deemed motion under Rule 60(b). Thompson v. Housing Authority, 782 F.2d 829, 832 (9th Cir. 1986), *cert. denied*, 479 U.S. 829, 107 S.Ct. 112 (1986)

In re Martinelli, 96 B.R. 1011 (9th Cir. B.A.P. 1988)
Advice of counsel must be grossly negligent to constitute extraordinary circumstances under Rule 60(b)(6)

RULE 62 - B.R. 9024 -Motion for Stay Pending Appeal

Hilton v. Braunskill, 481 U.S. 770, 107 S.Ct.2113 (1987)

4 part test - all parts to be met with evidentiary showing

"Different rules of procedure govern the power of district courts and courts of appeals to stay an order pending appeal. See FRCP 62(c); Fed. Rule Ap. Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. (cites omitted)."

In re Ho, 265 B.R. 603 (9th Cir. B.A.P. 2001)

A bankruptcy court retains jurisdiction to enter a stay pending appeal, and such motions must ordinarily first be brought in the bankruptcy court. Once the bankruptcy court has decided the stay issue, it may not reconsider the motion after the appeal is brought.

RULE 68

Nusom v. Comh Woodburn, Inc., 122 F.3d 830 (9th Cir. 1997)

The judgment did not clearly and unambiguously waive or limit attorneys' fees as it wa silent on the subject. A rule 68 offer for judgment in a specific sum together with costs, which is silent as to attorneys' fees, does not preclude the plaintiff from seeking attorneys' fees when the underlying statute does not make attorneys' fees a part of costs. On remand, the district court was required to consider the Nusoms' fee request on the merits.

BANKRUPTCY RULE 1009(a)

In re Olson, 253 B.R. 73 (9th Cir. B.A.P. 2000)
Chapter 13 debtor could not amend petition to add spouse as co-debtor.

BANKR. RULE 3008

In re Consolidated Pioneer Mortg., 178 B.R. 222 (9th Cir. B.A.P. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996)

Motion for reconsideration of claim subject to same requirements as Rule 60 and 59

BANKR. RULE 7001

In re Cogliano, 355 B.R. 792 (9th Cir. BAP 2006)

The denial of the debtor's first amended claim of exemption did not preclude her assertion in her second claim of exemption that her IRA was not property of the estate. Neither issue preclusion nor claim preclusion applied, since the issue of property of the estate was not necessarily decided in the initial exemption decision. Further, the issue of property of the estate had to be decided by way of an adversary proceeding, not a contested matter.

In re Colortran, Inc., 218 B.R. 507, 510-11(9th Cir. B.A.P. 1997) Bankruptcy court erred by invalidating absent shipper's lien without notice and an adversary proceeding in otherwise uncontested compromise hearing

In re Lyons, 995 F.2d 923 (9th Cir. 1993)

Trustee is required to file a complaint to sell under § 363(h). No authority for granting approval by motion

BANKR. RULE 7054(b)

Renfrow v. Draper, 232 F.3d 688 (9th Cir. 2000)

"Unlike the principle that attorney's fees cannot be awarded, there is no bankruptcy law policy against the granting of costs to a prevailing party for expenses in litigating federal law questions in a bankruptcy proceeding."

BANKR. RULE 9006

In re Dwyer, 426 F.3d 1041 (9th Cir. 2005)

Day after Thanksgiving is a California holiday.

Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004), *cert. denied*, 544 U.S. 961, 125 S.Ct. 1726 (2005)

A lawyer in a large law firm, who delegated the task of calculating the deadline for filing a notice of appeal to a nonlawyer calendering clerk, is subject to the excusable neglect standard, where the clerk miscalculated the time.

In re Sheehan, 253 F.3d 507 (9th Cir. 2001)-Rule 4(m)

Excusable neglect standard of Bankruptcy Rule 9006(b) applies to Rule 4(m). "...[I]f good cause is shown, a court shall extend the service period under Rule 4. If good cause is not shown, the court has the discretion to extend the time period. In addition, the court may extend the time limit upon a showing of excusable neglect under 9006(b)."

BANKR. RULE 9010

In re America West Airlines, 40 F.3d 1058 (9th Cir. 1994)
Partner may not represent partnership without a lawyer

BANKR. RULE 9014

In re Khachikyan, 335 B.R. 121 (9th Cir. BAP 2005)

Rule 9014(d), included in a 2002 amendment to the rule, is intended to require a trial when there is a genuine factual dispute. Furthermore, "[a]s a strategic matter, where one wants discovery in a contested matter, it is generally too late to wait to the day of the hearing on the merits to request to conduct discovery in the future."

In re Nunez, 196 B.R. 150 (9th Cir. B.A.P. 1996)

Ambiguous local rules do not require lien creditor to notice hearing on objection to debtor's motion to avoid abstract of judgment

SEALING DOCUMENTS

Hagestad v. Tragesser, 49 F.3d 1430 (9th Cir. 1995)

The factors relevant to a determination of whether the strong presumption of access is overcome include the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." *EEOC v. Erection Co., Inc.*, 900 F.2d 168, 170 (9th Cir. 1990) (*citing Valley Broadcasting,* 798 F.2d at 1294). After taking all relevant factors into consideration, the district court must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture. *Valley Broadcasting*, 798 F.2d at 1295

In re Orion Pictures Corp., 21 F.3d 24 (2d Cir. 1994)

Documents containing promotional agreement were properly sealed under § 107(b)

Valley Broadcasting Co. v. U.S. D. Court of Nevada, 798 F.2d 1289 (9th Cir. 1986)

EEOC v. The Erection Co., 900 F.2d 168 (9th Cir. 1990)

Unsealing of documents - court's refusal to do so reviewable for abuse of discretion

SECTION 105(a)--Equitable powers of the Bankruptcy Court

In re Excel Innovations, Inc., 502 F.3d 1086 (9th Cir. 2007), *cert. denied,* 128 S.Ct. 2080, 170 L.Ed.2d 816 (2008)

Distinguishing *Crown Vantage, infra,* the court held that "our usual preliminary injunction standard applies to applications to stay actions against non-debtors under § 105(a). In granting or denying such an injunction, a bankruptcy court must consider whether the debtor has a reasonable likelihood of a successful reorganization, the relative hardship of the parties, and any public interest concerns if relevant."

In re Crown Vantage, Inc., 421 F.3d 963, 975 (9th Cir. 2005)

"The only requirement for the issuance of an injunction under § 105 is that the remedy conform to the objectives of the bankruptcy code." The standard for issuing a preliminary injunction does not apply to injunctions issued under § 105.

In re Beaty, 306 F.3d 915,922 (9th Cir. 2002)

"[A] bankruptcy court is a court of equity and should invoke equitable principles and doctrines, refusing to do so only where their application would be inconsistent with the Bankruptcy Code."

In re Yadidi, 274 B.R. 843 (9th Cir. B.A.P. 2002)

Section 105 does not provide an independent ground for denying debtor's discharge.

SECURED TRANSACTIONS

1. Article 9
1(a). Assignment
2. 9-105
2a 9-109
3. 9-201
4. 9-203
5. 9-504(3)
6. CCP §726
7. CCP §780
8. CCP §1717
9. Michigan Law
10. Perfection of Security Interest
11. §506
12. §506(a)
13. §506(b)
14. §506(c)
15. §552(b)
16. 35 U.S.C. §261
17. Washington Law
18. Tracing of proceeds
19. §1325 (hanging paragraph)
20 Ipso facto clauses
21. Misc

1. Article 9

In re Penrod, 392 B.R. 835 (9th Cir. BAP 2008)

1) A lender's payoff of the deficiency on the trade-in is not secured by the purchase money security interest in the new car, and is not thereby protected by the hanging paragraph.

2) "[T]he hanging paragraph protects that portion of the lender's debt allocable to the car purchased, and does not protect that portion of the debt that is allocable to negative equity."

In re Commercial Money Centers, Inc., 392 B.R. 814 (9th Cir. BAP 2008)

A surety bond was a supporting obligation, not an "instrument" under Nevada 9-102(1).

In re Pacific/West Communications Group, Inc., 301 F.3d 1150 (9th Cir. 2002)

Security interest in general intangibles did not extend to commercial tort causes of action under old Article 9. Under California's 2001 version of Article 9, a security interest may be taken in proceeds of a tort action.

In re CFLC, Inc., 166 F.3d 1012 (9th Cir. 1999)

Mere sending of preprinted invoices without further agreement between parties did not create Art. 9 security interest.

1(a).

In re Trejos**,** 374 B.R. 210, 215 (9th Cir. BAP 2007)

Purchase money character of security interest not affected by an assignment.

2. 9-105

In re Omega Environmental, Inc., 219 F.3d 984 (9th Cir. 2000)

Bank perfected its security interest in a certificate of deposit through possession under Virginia's 9-304 and 305, because a certificate of deposit is an instrument under 9-105, even though it bears the legend "nontransferable".

In re Kirkland, 91 B.R. 551 (9th Cir. B.A.P. 1988), *aff'd.* 915 F.2d 1236 (9th Cir. 1990)

1. Guarantors are entitled to notice of sale of collateral under 9-105(1)(d)
2. Waiver of right ineffective prior to default

2a 9-109

In re Commercial Money Center, Inc., 350 B.R. 465 (9th Cir. BAP 2006)

Payment streams stripped from equipment leases are payment intangibles, even though the underlying leases are chattel paper. As such, they were subject to automatic perfection under section 9-303(3), but only if the assignment of the payment stream was a true sale. Assignments here were loans, not sales.

3. 9-201

In re Coupon Clearing Services, Inc., 113 F.3d 1091 (9th Cir. 1997)

Secured creditor had given debtor adequate right in the collateral to meet 9201. Coupon cash not subject to trust or bailment.

4. 9-203

In re Bakersfield Westar Ambulance, 123 F.3d 1243, (9th Cir. 1997)

1. Bank may obtain a security interest in its own customer's deposit account under Article 9. The security interest attaches to the customer's general intangible against the bank.
2. However, the description in the security agreement was inadequate under 9-203

5. 9-504(3)

In re Alcock, 50 F.3d 1456 (9th Cir. 1995)

Guarantor could be discharged because of SBA's subordination of its lien priority without notice to guarantor.

6. CCP §726

In re Kearns, 314 B.R. 819 (9th Cir. B.A.P. 2004), *aff'd,* 201 Fed. Appx. 473 (9th Cir. 2006).

Lender retained enforceable lien on borrower's real property after exercising nonjudicial foreclosure against vehicle; "one-action/security first" rule not violated.

Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230 (9th Cir. 1994)

Receiver's sale of townhouse and furniture and payment of the proceeds to the secured creditor was not a violation of California CCP § 726. The creditor did not obtain a personal money judgment against the debtor or execute on unencumbered assets. There is no rule that prohibits a secured creditor from collecting on its "additional" collateral before foreclosing on its "primary" real property security. See Cal. Complaint. Code § 9501(4) (the mixed collateral statute)

Metropolitan Life Ins. Co. v. Sunnymead Shopping Ctr. Co. (In re Sunnymead Shopping Ctr. Co.), 178 B.R. 809 (9th Cir. 1995)

Creditor's acceptance of adequate protection payments does not violate the one-action rule. Relying in part on *Bayside Developers*, the B.A.P. has ruled that the secured creditor's acceptance during the Chapter 11 case of cash collateral rents as a form of adequate protection is to an "action" within the meaning of Cal. CCP § 726, which would later bar foreclosure on the real property or a deficiency judgment. Acceptance of rent payments as adequate protection does not violate the "one action" or "security first" principles of § 726

Great Am. First Sav. Bank v. Bayside Developers, 43 F.3d 1230 (9th Cir. 1994)

Receiving proceeds of additional collateral does not violate one-action rule.

7. CCP §780

In re Prestige Limited Partnership-Concord, 234 F.3d 1108 (9th Cir. 2000)

Secured creditor who violated CCP § 780 by pursuing a guarantor who was deemed just another co-obligor on the note still retains an unsecured claim against the debtor. The deficiency claim was not waived under CCP § 580(a) because the property was not sold.

8. CCP §1717

In re Hassen Imports Partnership, 256 B.R. 916 (9th Cir. B.A.P. 2000)

1) Debtor was not entitled to attorney fees under CCP § 1717, since the dispute in question was not an action on a promissory note, but an action on confirmation of a plan, which is governed by federal bankruptcy law; 2) bankruptcy court erred in finding that secured creditor was entitle to the default rate of interest in the note, since the creditor "failed to demonstrate that the default rate reasonably compensated it for losses arising from the default;" 3) secured creditor was entitled to fees under § 506(b)for pursuing collection of note from guarantors.

9. Michigan Law

In re Turley, 172 F.3d 671 (9th Cir. 1999)

Share in racing association is not a "certificated security" under Art. 8 of the UCC (Michigan law).

10. Perfection of Security Interest

In re Commercial Money Centers, Inc., 392 B.R. 814 (9th Cir. BAP 2008)

Secured creditor did not perfect security interest in equipment lease payments by

possession under 9-313 or by filing a financing statement.

In re First T.D. & Investment, Inc. 253 F.3d 520 (9th Cir. 2001)
Assignment of collateral notes and trust deeds to investors may be perfected in California without possession and thus cannot be avoided under the strong arm clause.

In re Cybernetic Services, Inc., 252 F.3d 1039 (9th Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002)
Creditor perfected security interest in debtor's patent by filing financing statement with California Secretary of State rather than with Patent & Trademark Office.

In re Southern California Plastics, Inc., 165 F.3d 1243 (9th Cir. 1999)
Allowance of claim is not equivalent to a judgment for purposes of perfecting an attachment lien. Attachment liens "can be created and continue to exist only in the cases and to the extent to which the California Legislature by statutory enactment has authorized their creation and continued existence."

In re Vigil Bros. Construction, Inc., 193 B.R. 513 (9th Cir. B.A.P. 1996)
Significant assignment of accounts receivable to creditor triggers commercial requirement to perfect security interest

In re Cortez, 191 B.R. 174 (9th Cir. B.A.P. 1995)
Secured creditor's unperfected and unavoided deed of trust survives discharge order

Mastro v. Witt, 39 F.3d 238 (9th Cir. 1994)
Security interest in proceeds of a land sale contract is a general intangible which must be perfected by filing a UCC financing statement with the secretary of state. Recording the security interest in the county real property records will not perfect lien.

In re Park at Dash Point, L.P., 985 F. 2d 1008 (9th Cir. 1993)
Prospective statutory amendment providing for perfection of mortgagee/assignee's security interest in rents may be applied retroactively

In re Raiton, 139 B.R. 931 (9th Cir. B.A.P. 1992)
Security interest in stock - how perfected by possession

In re Hillside Associates Ltd Partnership, 121 B.R. 23 (9th Cir. B.A.P. 1990), *appeal dismissed*, 990F.2d 1258 (9th Cir. 1933)
Lien against nursing home's contract rights not perfected against patient revenues

In re Copper King Inn, Inc., 918 F.2d 1404 (9th Cir. 1990)
Creditor did not have a perfected security interest in bankrupt debtor's property because financing statement did not mention its name

In re Boogie Enterprises, Inc., 866 F. 2d 1172 (9th Cir. 1989)
Financing statement describing collateral for loan as "personal property" was insufficient under California law, to perfect creditor's security interest in proceeds of lawsuit settlement

In re Softalk Publ. Co., Inc., 856 F.2d 1328 (9th Cir. 1989)
Financing statement that contained no description of the collateral, but only identified proceeds from the collateral was insufficient to perfect security interest under California law

11. §506

In re Pletz, 221 F.3d 1114 (9th Cir. 2000)
Under Oregon law, chapter 13 debtor's interest in property held by debtor and nondebtor spouse as tenants by the entirety had to be valued under § 506 to reflect concurrent interests of both spouses.

12. §506(a)

In re 1441 Veteran St., 154 F.3d 1103 (9th Cir. 1998), *cert. denied*, 144 F.3d 1288 (9th Cir. 1998)
The court of appeals reversed a judgment of the district court. The court held that under §506(a), a debtor cannot "strip down" a creditor's lien based on the valuation of an asset for reorganization purposes, when the bankruptcy court denies confirmation of the reorganization plan and allows the creditor to pursue its state-law remedies.

13. §506(b) (see also attorney fees, supra)

In re Imperial Coronado Partners, Ltd., 96 B.R. 997 (9th Cir. B.A.P. 1989)
506(b) - prepayment premium may be allowed as a reasonable fee

14. §506(c)

In re Los Gatos Lodge, Inc., 278 F.3d 890 (9th Cir. 2002)
A bankruptcy trustee may not surcharge a creditor under § 506(c) after the creditor's secured claim has been disallowed

In re Debbie Reynolds Hotel and Casino, Inc., 255 F.3d 1061 (9th Cir. 2001)
1. Postpetition lender had no standing to object to $50,000 payment to debtor-in-possession's counsel out of proceeds of sale agreed to by another secured creditor;
2. Under 506(c), the party that has rendered a benefit to the secured creditor is properly reimbursed for that benefit out of secured collateral.

Hartford Underwrites Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 120 S.Ct. 1942 (2000)
Only a trustee may invoke § 506(c) to charge a secured creditor with the expenses of preserving the estate, not an administrative claimant.

In re Compton Impressions, Ltd., 217 F.3d 1256 (9th Cir. 2000)
Services sought to be surcharged by the debtor-in-possession under § 506(c) were not necessary, nor did they quantifiably benefit the bank, nor did the bank consent to the charges.

Hartford Underwrites Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 120 S.Ct. 1942 (2000)
Only a trustee may invoke § 506(c) to charge a secured creditor with the expenses of preserving the estate, not an administrative claimant.

506(c) -

In re Palomar Truck Corp., 951 F.2d 229 (9th Cir. 1991), *cert. denied*, 506 U.S. 821 (1992)
In re Glasply Marine Industries, Inc., 971 F.2d 391 (9th Cir. 1992)
In re Jenson, 980 F.2d 1254 (9th Cir. 1992)
In re Cascade Hydraulics and Utility Service, Inc., 815 F.2d 546 (9th Cir. 1987)
In re James E. O'Connell Co., Inc., 893 F.2d 1072, 1074 (9th Cir. 1990)

15. §552(b)

In re Skagit Pacific Corp., 316 B.R. 330 (9th Cir. B.A.P. 2004)

"Proceeds of post-petition accounts receivable do not fall within the § 552(b) proceeds exception."

In re Northview Corp., 130 B.R. 543 (9th Cir. B.A.P. 1991)

Revenues from hotel are accounts, not rents for purposes of § 552(b)

In re Bering Trader, Inc. 944 F.2d 500 (9th Cir. 1991)

Prepetition security interest in accounts, general intangibles and proceeds does not extend to rents received postpetition under a vessel subcharter. Security interest in "accounts" is not the same as a security interest in "rents" for purposes of § 552(b).

16. 35 U.S.C. §261

In re Cybernetic Services, Inc., 252 F.3d 1039 (9th Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002)

"...[A] security interest in a patent that does not involve a transfer of rights of ownership is a "mere license" and is not an assignment , grant or conveyance" within the meaning of 35 U.S.C. § 261. And because § 261 provides that only an "assignment, grant or conveyance shall be void" as against subsequent purchasers and mortgagers, only transfers of ownership interests need to be recorded with the PTO."

17. Washington Law

In re Filtercorp, Inc., 163 F.3d 570 (9th Cir. 1998)

Under Washington law, security agreement that grants interest in "inventory" or "accounts receivable" presumptively includes after-acquired inventory or accounts receivable.

In re Heide, 915 F.2d 531 (9th Cir. 1990)

Right to receive payments under real estate contract subject to perfection under Article 9 (Washington law)

18. Tracing of proceeds

In re Skagit Pacific Corp., 316 B.R. 330 (9th Cir. B.A.P. 2004)

Because secured creditor did not use the Lowest Intermediate Balance of any other recognized tracing method as required under new 9-315, secured creditor did not meet its burden of proving that its security interest extended to proceeds of accounts receivable.

19. §1325 (hanging paragraph)

In re Penrod, 392 B.R. 835 (9th Cir. BAP 2008)

1) A lender's payoff of the deficiency on the trade-in is not secured by the purchase money security interest in the new car, and is not thereby protected by the hanging paragraph.

2) "[T]he hanging paragraph protects that portion of the lender's debt allocable to the car purchased, and does not protect that portion of the debt that is allocable to negative equity."

In re Trejos**,** 374 B.R. 210, 215 (9th Cir. BAP 2007)

Under the "hanging paragraph," chapter 13 debtor was required to pay the full contract price of his automobile. Trial court held that § 1322(b) remained applicable, and the debtor could alter the interest rate and monthly payments. The BAP did not address this issue, since the creditor did not pursue it on appeal.

20. Ipso facto clauses–enforceability

In re Dumont, 383 B.R. 481, 489 (9th Cir. BAP 2008)

"Ride through" option under pre-BAPCPA law was eliminated in 2005. However, "if a debtor is in compliance with sections 521(a)(6) or 362(h)(1) and (2), then section 521(d) has no effect, and enforcing an ipso facto default clause is still barred by the Code."

21. Misc

In re Choo, 273 B.R. 608 (9th Cir. B.A.P. 2002)

Failure to prove that secured party saved foreclosure costs from the trustee's sale of the property failed actual benefit test.

In re Prestige Ltd. Partnership - Concord, 164 F.3d 1214 (9th Cir. 1999)

The court held that under California law, a creditor waives its security interest in a debtor's ground lease by attaching a guarantor's unpledged assets in a separate state-court action.

In re Yepremian, 116 F.3d 1295 (9th Cir. 1997)

State deposition testimony of prior unrecorded joint venture agreement is insufficient to establish priority of equitable interest over subsequent recorded interest

In re CFLC, Inc., 209 B.R. 508 (9th Cir. B.A.P. 1997), *aff'd*, 166 F.3d 1012 (9th Cir. 1999)

Creditor does not have security interest or lien in property of customer's bankruptcy estate despite evidence of customer's receipt and payment of invoices containing terms for general lien in goods

In re Taffi, 96 F.3d 1190 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997)

Residence retained by debtor in bankruptcy proceeding valued at fair market value (*In re Mitchell* overruled)

In re McDonell, 204 B.R. 976 (9th Cir. B.A.P. 1996), *aff'd*, 164 F.3d 630 (9th Cir. 1998)
Recordation of certified copy of federal judgment created valid judgment lien

In re Kim, 130 F.3d 863 (9th Cir. 1997)
Valuation of security interests in business equipment and lease based on worth of equipment not business as a whole.

In re Decker, 199 B.R. 684 (9th Cir. B.A.P. 1996)
Secured creditor's lien against debtor's property senior to IRS lien

In re Leisure Time Sports, Inc., 194 B.R. 859 (9th Cir. B.A.P. 1996)
Secured party cannot transfer interest in loan collateral to third party separately from underlying debt - party who did not assign debt deemed to have done so

In re Ehrle, 189 B.R. 771 (9th Cir. B.A.P. 1995)
Sale proceeds of real property are not covered by a deed of trust

In re Auza, 181 B.R.63 (9th Cir. B.A.P. 1995)
"Dragnet clauses" in security instruments executed by debtors did

In re Crosby, 176 B.R. 189 (9th Cir. B.A.P. 1994), *aff'd.* 85 F.3d 634 (9th Cir. 1996)
Secured party properly deemed not to have retained collateral in full satisfaction of debtor's obligation absent written notice, unreasonably delay, or manifested intention to accept collateral in satisfaction of debt. Also commercially reasonably sale

In re Days California Riverside Limited Partnership, 27 F.3d 374 (9th Cir. 1994)
1. Room revenues are <u>rents</u>, not accounts
2. Food and drink revenues are accounts, not rents

In re Stoumbos, 988 F. 2d 949 (9th Cir. 1993), *cert. denied*, 510 U.S. 867 (1993)
1. Failure of security contract to make reference to after-acquired property is not a security interest in same. Security contract did not refer to "inventory" or "all inventory"

Lomas Mortgage USA v. Wiese, 980 F.2d 1279 (9th Cir. 1992), ***vacated,*** 508 U.S. 958, 113 S.Ct. 2925 (1993)
Hypothetical costs of sale not factored into amount of secured claim. *Balbus* followed.

In re Southland & Keystone, 132 B.R. 632 (9th Cir. B.A.P. 1991)
PACA claimants hold superior security to bank's blanket security over debtor's account receivable

In re Robert B. Lee Enterprises, Inc., 980 F.2d 606 (9th Cir. 1992)
Assignee of secured creditor has sam priority as secured creditor as to future advances it makes

In re Kirkland, 915 F. 2d 1236 (9th Cir. B.A.P. 1990)
Defaulting guarantor was "debtor" entitled to notice before creditor's sale of collateral under California Commercial Code. No waiver of notice found.

Crocker National Bank v. Emerald, 221 Cal. App. 3d 852 (1990)
Secured creditor barred from obtaining deficiency judgment unless collateral is sold in commercially reasonable manner

In re Estreito, 111 B.R. 294 (9th Cir. B.A.P. 1990)
Lienholder's interest on advances limited by deeds of trust reference to rate allowed by law

Newman v. First Security Bank of Bozeman, 887 F.2d 973 (9th Cir. 1989)
Secured creditor lien remains intact post bankruptcy

In re Falk Farms, Inc., 88 B.R. 254 (9th Cir. B.A.P. 1988)
True lease v. Disguised security agreement

In re Dettman, 84 B.R. 662 (9th Cir. B.A.P. 1988)
Creditor which had prepetition security in proceeds and general intangibles had valid security interest in crop diversion proceeds.

SETOFF & RECOUPMENT

In re Gould, 401 B.R. 415 (9th Cir. BAP 2009)

IRS had a valid right of setoff under 11 U.S.C. § 553 and IRC § 6402(a) as to chapter 13 debtors' tax refunds, even though the debtor claimed them as exempt and no objection to the exemption was filed. Bankruptcy court should have granted the IRS relief from the automatic stay for cause to allow it to exercise its setoff rights.

In re Straightline Investments, Inc,. 525 F.3d 870 (9th Cir. 2008)

Postpetition transfer by debtor of accounts receivable to a factor without bankruptcy court approval were avoidable under § 549(a). This is true regardless of whether they diminished the estate, the court declining to extend the diminution of the estate doctrine of § § 547 and 548 to § 549. They were not sales in the ordinary course of business, since they failed to meet both the vertical and horizontal dimension tests of § 363(c).The earmarking doctrine did not apply, because the money received by the debtor was not designated for a specific creditor. Recoupment did not apply, because it is an equitable doctrine, and the factor engaged in inequitable conduct.

In re Wade Cook Financial Corp., 375 B.R. 580 (9th Cir. BAP 2007)

Section 553 governs the IRS's right to setoff in bankruptcy, not the Internal Revenue Code. Whether the obligation to remit a refund was a prepetition debt, and whether there was a mutuality of debts, were genuine issues of material fact that required a remand.

In re Brown & Cole Stores, LLC, 375 B.R. 873 (9th Cir. BAP 2007)

Secured creditors are entitled to the administrative expense priority allowed by § 503(b)(9). Because such claims arise prepetition, they may be subject to setoff under § 553(a) if all of the requirement of the statute are met.

In re Madigan, 270 B.R. 749 (9th Cir. B.A.P. 2001)

Insurer's overpayment of prepetition disability benefits and insured's right to postpetition benefits for separate disability were not logically related so as to entitle insurer to equitable recoupment.

In re TLC Hospitals, Inc., 224 F.3d 1008 (9th Cir. 2000)

HHS's overpayments for TLC's nursing services in one fiscal year arise from the same transaction as its underpayments to TLC in a later fiscal year, thus allowing them to recoup the overpayments.

In re United Marine Shipbuilding, Inc., 146 F.3d 739 (9th Cir. 1998), *amended and superseded on denial of reh'g*, 158 F.3d 997 (9th Cir. 1998)

Governments' setoff rights are not waived when I.R.S. mistakenly disburses bankruptcy debtor's tax refund to debtor's trustee

In re Luz Int'l, Ltd., 219 B.R. 837 (9th Cir. B.A.P. 1998)

Elements of a set-off under 553

1. Pre-petition debt owed to debtor
2. Debts are mutual and pre-petition and owing between same parties
3. Parties stand in same capacity

In re Bakersfield Westar Ambulance, Inc., 123 F.3d 1243 (9th Cir. 1997)
Bank improved position under § 553(b), thus setoff.

Newbery Corp. v. Fireman's Fund Insur. Co., 95 F.3d 1392 (9th Cir. 1996)
Recoupment does not violate ratable distribution

In re HAL, Inc., 196 B.R. 159 (9th Cir. B.A.P. 1996), *aff'd.* 122 F.3d 851 (9th Cir. 1997)
Federal government agencies constitute single entity for purposes of mutuality requirement of setoff except for agencies acting in distinct private capacity

In re Harmon, 188 B.R. 421 (9th Cir. B.A.P. 1995)
Excess temporary workers' compensation payments may be deducted from debtor's permanent disability award under either recoupment or setoff

In re Cascade Roads, Inc., 34 F.3d 756 (9th Cir. 1994)
U.S. government's right of setoff deemed due to its inequitable conduct, notwithstanding setoff right found in 31 U.S.C. 3728

In re Newbery Corp., 145 B.R. 998 (9th Cir. B.A.P. 1992), *op withdrawn* 161 B.R. 999 (9th Cir. B.A.P. 1994)
Claim for prepetition damages for abandoning work on a project and a claim for rental of equipment postpetition arise out of the same transaction, this recoupment appropriate

In re De Laurentiis Entertainment Group, Inc., 963 F.2d 1269 (9th Cir. 1992), *cert. denied*, 506 U.S. 918 (1992)
Setoff available even after plan confirmed - 553 takes precedence over 1141.

In re Buckenmaier, 127 B.R. 233 (9th Cir. B.A.P. 1991)
Error to prohibit creditor's setoff claim against discharged debtor

In re Holford, 896 F.2d 176 (5th Cir. 1990)
Recoupment not barred by automatic stay

In re Davidovich, 901 F.2d 1533 (10th Cir. 1990)
Setoff v. Recoupment

Lewis Industries v. Barham Constr. Inc., 878 F.2d 1230 (9th Cir. 1989)
Failure to raise setoff at time of assumption by debtor of executory contract = estoppel

In re Pieri, 86 B.R. 208 (9th Cir. B.A.P. 1988)

Creditor may assert setoff in cross-complaint against a debtor's complaint seeking money which would be exempt.

SEVERANCE PAY

In re Selectors, Inc., 85 B.R. 843 (9th Cir. B.A.P. 1988)

SOVEREIGN IMMUNITY--STATE AND FEDERAL

Central Virginia Community College v. Katz, 546 U.S. 356, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006)
Preference action against state agencies is not barred by sovereign immunity, a finding that does not hinge on the validity of 11 U.S.C. § 106(a).

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004)
Exercise of in rem jurisdiction to discharge a student loan does not infringe sovereign immunity.

In re Balser, 327 F.3d 903 (9th Cir 2003), *cert. denied*, 124 S.Ct. 2159 (2004)
United States trustee is immune from suit if acting in his official capacity based on acts conducted within the course and scope of his employment.

In re Bliemeister, 296 F.3d 858 (9th Cir. 2002)
State waived sovereign immunity where it failed to raise it until after filing an answer and arguing a summary judgment motion.

In re Harleston, 331 F.3d 699 (9th Cir. 2003)
State waived sovereign immunity by filing proof of claim. Waiver extended to suits involving same transaction or occurrence, such as this one, which sought a declaration that a debt was discharged, even though proof of claim sought secured status.

In re Franceschi, 268 B.R. 219 (9th Cir. B.A.P. 2001), *aff'd*, 43 Fed.Appx. 87 (9th Cir. 2002)
Action for declaratory and injunctive relief properly dismissed on sovereign immunity grounds as to state bar, and on Younger abstention grounds as to the state bar's chief trial counsel.

In re Ellett, 254 F.3d 1135 (9th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002)
1) "...[W]e hold that a bankruptcy court's discharge order is binding on a State, despite the State's election not to share in the recovery of the bankruptcy estate's assets by filing a proof of claim."
2) ...[A] discharge order can be enforced against a state tax official in an action for prospective injunctive and declaratory relief under the *Ex Parte Young* doctrine."

In re Lazar, 237 F.3d 967 (9th Cir. 2001), *cert. denied*, 534 U.S. 992 (2001)
1) "...[W]e hold today that when a state or an "arm of the state" files a proof of claim in a bankruptcy proceeding, the state waives its Eleventh Amendment immunity with regard to the bankruptcy estate's claims that arise from the same transaction or occurrence as the state's claim."
2) California Underground Storage Tank Cleanup Fund is an "arm of the state."

In re Jackson, 184 F.3d 1046 (9th Cir. 1999)
FTB waived sovereign immunity by filing proof of claims.

In re Black, 222 B.R. 896 (9th Cir. B.A.P. 1998)
Bankruptcy court erred in denying motion for default judgment and ordering prove-up hearing after appellate panel had determined that evidence was sufficient to prevail on dispositive issue.

In re Lapin, 226 B.R. 637 (9th Cir. B.A.P. 1998)

California Franchise Tax Board had sovereign immunity against bankruptcy court's sanction order arising from board's attempts to collect delinquent taxes from discharged debtor.

In re White, 139 F.3d 1268 (9th Cir. 1998)

Filing of claim waived Indian tribes sovereign immunity

In re H.P.A. Assoc., 191 B.R. 167 (9th Cir. B.A.P. 1995)

Current case law from the circuit courts and the Supreme Court indicates that Congress acted within its plenary Article I powers to amend §106 of the Bankruptcy Code in order to abrogate the state's sovereign immunity as to specific Code sections. At least three of these sections were pled by the trustee in the complaint to recover a payment made to EDD from H.A.'s escrow account. Therefore, EDD's sovereign immunity defense was unavailable.

Doe v. U.S., 58 F.3d 494 (9th Cir. 1995)

As a matter of law, for purposes of waiver of sovereign immunity and setoff under 11 U.S.C. §106 all agencies of the United States, except those acting in some distinctive private capacity, are a single governmental unit.

In re Vanguard Mfg. Co., 145 B.R. 644 (9th Cir. B.A.P. 1992)

Accepting postpetition payments insufficient to constitute a waiver of sovereign immunity.

In re Town & Country Homes Nursing Services, Inc., 112 B.R. 329 (9th Cir. B.A.P. 1990), *aff'd*, 963 F.2d 1146 (9th Cir. 1991)

No sovereign immunity under 106(a) where government offset -- deemed to file informal proof of claim.

In re Pearson, 917 F.2d 1215 (9th Cir. 1990), *cert. denied*, 503 U.S. 918 (1992)

U.S. immune from money damages under 362.

In re Bulson, 117 B.R. 537 (9th Cir. B.A.P. 1990), *aff'd*, 974 F.2d 1341 (9th Cir. 1992)

IRS not immune from damages for violating automatic stay.

Hoffman v. Conn. Dept of Income Maint., 492, U.S. 96, 109 S.Ct. 2818 (1989)

STANDING, MOOTNESS AND RIPENESS

In re Kronemyer, 405 B.R. 915 (9th Cir. BAP 2009)
Surety had standing to bring motion for relief from the automatic stay, even though it only had a contingent claim for contribution or reimbursement under § 502(e)(1).

In re Coleman, 560 F.3d 1000 (9th Cir. 2009)
Student loan undue hardship determinations are ripe for decision substantially in advance of completion of a chapter 13 plan. Constitutional and prudential ripeness discussed as length.

In re Gould, 401 B.R. 415, 421 (9th Cir. BAP 2009)
Appeal was not moot, where even if the debtor had spent a tax refund that the IRS should have been allowed to set off against, the court could still order the money returned.

In re PW LLC, 391 B.R. 25, 33-37 (9th Cir. BAP 2008)
Sale involving lien stripping under § 363(f)(5) was not subject to constitutional, equitable or statutory mootness under § 363(m).

In re Nelson, 391 B.R. 437 (9th Cir. BAP 2008)
Dismissal of repeat filers' third bankruptcy case did not moot appeal from earlier order dismissing an adversary proceeding to recover for a mortgagee's violation of the automatic stay.

Suter v. Goedert, 504 F.3d 982 (9th Cir. 2007)
Motion for stay pending appeal was not mooted by state supreme court's dismissal of an appeal in the underlying suit.

Vacation Village, Inc. v. Clark County, Nev, 497 F.3d 902 (9th Cir. 2007)
Landowners' claims were ripe, because the government agency had made a final decision, and the owners also met the exhaustion requirement.

In re Sherman, 491 F.3d 948, 965 (9th Cir. 2007)
Entry of discharge in this chapter 7 case did not moot the appeal, because it did not terminate the debtor's bankruptcy, and the grant of the SEC's motion to dismiss under § 707(a) may have triggered a reconsideration of the discharge order.

In re Sobczak, 369 B.R. 512, 516 (9th Cir. BAP 2007)
Chapter 13 debtor had standing to seek dismissal under § 1307(c), since he had a pecuniary interest and practical stake in whether his case was dismissed.

Estate of Spirtos v. San Bernardino County, 443 F.3d 1172, 1177 (9th Cir. 2006)
". . .[A]s a creditor, plaintiff lacks standing to raise RICO claims on behalf of Basil's bankruptcy estate because only the bankruptcy trustee has standing to sue on behalf of the estate."

In re Miles, 430 F.3d 1083 (9th Cir. 2005)
Bankruptcy court had "arising under" jurisdiction over state law tort suits removed removed from state court, since such actions were totally preempted by § 303(i). Furthermore, siblings of debtors had no standing to bring an action under § 303(i).

Smith v. Arthur Anderson LLP, 421 F.3d 989 (9th Cir. 2005)

Plan trustee had standing to sue former officers and directors, since the trustee was seeking to redress injuries to the debtor caused by the defendants' conduct, rather than injury to creditors. Here, the trustee asserted that the defendants concealed the debtor's financial condition, and if they hadn't, the debtor might have filed for bankruptcy sooner and additional assets might not have been expended on a failed business.

In re Burrell, 415 F.3d 994 (9th Cir. 2005)

Where two potentially preclusive lower court judgments were involved, after appeal became moot through no act of party seeking relief, vacatur was required as to both judgments of the district court or BAP and the bankruptcy court.

In re Popp, 323 B.R. 260 (9th Cir. BAP 2005)

Equitable mootness did not apply to a sale order that was improperly entered under § 363. Doctrine explained.

In re Gotcha International L.P., 311 B.R. 250 (9th Cir. B.A.P. 2004)

Appeal of confirmation order dismissed for equitable mootness, where debtor had obtained a refinance and distributed substantial payments to all but two classes.

In re La Sierra Financial Services, Inc., 290 B.R. 718 (9th Cir. B.A.P. 2002)

Nonparty purchasers of property sold by a bankruptcy estate have standing to appear and seek relief from orders which may affect their property interests.

In re Chiu, 266 B.R. 743 (9th Cir. B.A.P. 2001), *aff'd*, 304 F.3d 905 (9th Cir. 2002)

Debtors had both constitutional and prudential standing to seek lien avoidance after property was sold.

In re Stoll, 252 B.R. 492 (9th Cir. B.A.P. 2000)

Chapter 7 debtor with solvent estate lacked standing to sue professionals employed by trustee.

In re P.R.T.C., Inc., 177 F.3d 774 (9th Cir. 1999)

Creditor has standing to challenge trustee's transfer of avoiding actions.

In re Cross, 218 B.R. 76 (9th Cir. B.A.P. 1998)

Securities and Exchange Commission has standing as creditor to object to discharge of disgorgement judgment against debtor

In re Abbott, 183 B.R. 198 (9th Cir. B.A.P. 1995)

Individual alleged to have received fraudulent transfer from bankruptcy debtor lacks standing to appeal bankruptcy court order denying her motion to set aside order reopening debtor's case.

"Standing represents a jurisdictional requirement which is open to review at all stages of the litigation." *National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 114 S.Ct. 798, 802 (1994). The test for standing is generally referred to as the "person aggrieved" test. Only entities who are directly and adversely affected pecuniarily by an order of the bankruptcy court have standing to appeal. *Matter of Fondiller*, 707 F.2d 441, 442 (9th Cir. 1983). The entity must demonstrate that the order diminished its property, increased its burdens or detrimentally affected its rights.

In re Umpqua Shopping Center, Inc., 111 B.R. 303 (9th Cir. B.A.P. 1990)
Debtor lacked standing to appeal for third party.

In re Brooks, 871 F.2d 89 (9th Cir. 1989)
Trustee of ex-wife's bank had no standing as non-creditor to raise violation of automatic stay in husband's bankruptcy

STARE DECISIS

In re Commercial Money Centers, Inc., 392 B.R. 814, 832 (9th Cir. BAP 2008)

Under the law of the case doctrine, bankruptcy court was not barred from considering an issue that was not specifically raised by the parties.

Humetrix, Inc. v. Gemplus S.C.A., 268 F.3d 910 (9th Cir. 2001)

Law of the case doctrine applies only if the issue was decided "explicitly or by necessary implication in the previous disposition."

In re Rainbow Magazine, 77 F.3d 278 (9th Cir. 1996)

1. The law of the case of doctrine

Caldwell asserts that the award of sanctions against him for Rainbow's bad faith filing ignores the ruling of the B.A.P.. He argues that the sanctions violate the law of the case of doctrine as well as the plain language of the mandate. We disagree.

"The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) (quoting *Maag v. Wessler*, 993 F.2d 718, 720 n.2 (9th Cir. 1993). Although the observance of the doctrine is considered discretionary, this court has ruled that the prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial *Hegler v. Borg,* 50 F.3d 1472, 1475 (9th Cir. 1995), *cert. denied*, 516 U.S. 1029 (1995).

In re Drysdale, 248 B.R. 386 (9th Cir. B.A.P. 2000), *aff'd*, 2 Fed. Appx. 776 (9th Cir. 2001)

Case law holding that student loan consolidation must be five years old to be eligible for discharge was applied retroactively.

In re Berg, 188 B.R. 615 (9th Cir. B.A.P. 1995), *aff'd*, 121 F.3d 535 (9th Cir. 1997)

A lower federal court should only deviate under compelling circumstances from the interpretation placed on a federal statute by the only circuit to have spoken.
See also In re Taffi, 68 F.3d 306 (9th Cir. 1995), *cert. denied*, 521 U.S. 1103 (1997)

STATUTE OF FRAUDS

American Int'l. Enterprises, Inc. v. F.D.I.C., 3 F.3d 1263 (9th Cir. 1993)

Neither quantum meruit nor estoppel can be used to sidestep statute of frauds as to real estate broker's contract.

STATUTE OF LIMITATIONS

State Law

In re Roberts Farms, Inc., 980 F.2d 1248 (9th Cir. 1992)
Legal bill accompanied by time sheets = open book account under CCP §337(a)

§ § 546, 108, 549(d)

In re Smith, 352 B.R. 702, 706 (9th Cir. BAP 2006)
". . . § 108(c)(1) does not operate without regard to existing nonbankruptcy law to stop the running of any periods of limitation." The Arizona Supreme Court held that § 108 did not toll the running of the statute for renewal of judgments, so the original limitation date applied.

In re Spirtos, 221 F.3d 1079 (9th Cir. 2000)
Under § 108(c), the period of duration of a judgment lien under CCP § 683.020 will not expire until 30 days after all the assets in the debtor's estate have been finally distributed.

In re National Environmental Waste Corp., 200 F.3d 1266 (9th Cir. 2000)
Under § 108, state statute of limitations is extended "where recovery of the claim will substantially benefit the creditors of the estate, even though the claim was not explicitly specified in the plan of reorganization."

In re Gardenhire, 209 F.3d 1145 (9th Cir. 2000)
Statutory deadline for filing of IRS proof of claim was not equitably tolled, even though there was an improper dismissal of the case resulting from clerical error

In re DeLaurentiis Entertainment Group, Inc., 87 F.3d 1061 (9th Cir. 1996), *cert. denied*, 519 U.S. 1007 (1996)
Liquidation estate's recovery action is time-barred when brought within two years of trustee's appointment but more than two years after start of bankruptcy case

In re Hosseinpour-Esfahani, 198 B.R. 574 (9th Cir. B.A.P. 1996)
Trustee's fraudulent conveyance complaint filed more than 2 years after appointment time-barred

In re IRFM, Inc., 65 F.3d 778 (9th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996)
546(a) - 2 year statute of limitations runs from date Chapter 11 is filed.

In re Olsen, 36 F.3d 71 (9th Cir. 1994)
Equitable tolling applies to § 549(d)

In re United Ins. Mgmt., Inc., 14 F.3d 1380 (9th Cir. 1994)
Under the equitable tolling doctrine, where a party "remains in ignorance of [a wring] without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts o the part of the party committing the fraud to conceal it from the knowledge of the other party." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773 (1991)
Applied to 546(a) but facts did not justify application here.

In re Conco Building Supplies, Inc., 102 B.R. 190 (9th Cir. B.A.P. 1989)

Two year period under § 546(a)(1) does not begin to run until permanent trustee appointed.

In re Hunters Run Ltd. Partnership, 875 F.2d 1425 (9th Cir. 1989)

108 applies generally to state law statute of limitations or duration.

In re Herzig, 96 B.R. 264 (9th Cir. B.A.P. 1989)

If two years under § 546(a)(1) has not run as of the date the case is closed, trustee may have remainder of the 2 year period in which to commence avoidance actions.

In re Petty, 93 B.R. 208 (9th Cir. B.A.P. 1988)

Trustee may reopen case and pursue preference because transfer not disclosed prior to case closing.

STATUTORY LIENS - §545

In re Berg, 188 B.R. 615 (9th Cir. B.A.P. 1995), *aff'd,* 121 F.3d 535 (9th Cir. 1997)

"A trustee standing in the shoes of a BFP under Bankruptcy Code § 545(2) does not fall within the beneficial protection of IRC § 6323 for the avoidance of a perfected federal tax lien, because § 6323 requires a higher standard.

In re T.H. Richards Processing Co., 910 F.2d 639 (9th Cir. 1990)

A producer who agrees to deferred payment arrangements for purchase of the produce does not release the producer lien as a matter of California law.

In re Loretto Winery, Ltd., 107 B.R. 707 (9th Cir. B.A.P. 1989)

California statutory producer's lien not avoidable under 11 U.S.C. § 545(2).

In re Badger Mountain Irrigation Dist., 885 F.2d 606 (9th Cir. 1989)

§ 545(2) - lienholder's statutory lien not avoidable

STATUTORY CONSTRUCTION

Blausey v. U.S. Trustee, 552 F.3d 1124, 1133 (9th Cir. 2009)

"The general rule of statutory construction is that the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." "Plain meaning" also discussed.

SUBORDINATION OF CLAIMS-- § 510(b)

In re USA Commercial Mortg. Co., 377 B.R. 608 (9th Cir. BAP 2007)

Shareholders who filed proof of interest and proof of claim for fraud and breach of contract from the sale of the stock should not have had their claims disallowed. Claims may have been subject to subordination under § 510(b), but not without an adversary proceeding being filed under Bankruptcy Rule 7001(8).

In re American Wagering, Inc., 493 F.3d 1067 (9th Cir. 2007)

Claim for money damages for failure to deliver stock promised as compensation, brought well in advance of debtors' filing for bankruptcy, was a debt not subject to subordination under 510(b).

In re Betacom of Phoenix, Inc., 240 F.3d 823 (9th Cir. 2001)

1) "Section 510(b)'s legislative history does not reveal an intent to tie mandatory subordination exclusively to securities fraud claims;" 2) Nothing in § 510(b) limits the application of the statute to those who are in actual possession of the security; 3) An actual purchase or sale of a security is not required to subordinate the claim."

SUBROGATION

In re Darosa, 318 B.R. 871 (9th Cir. BAP 2004)

Opinion describes the three kinds of subrogation (contractual, statutory and equitable), and finds that none of the three apply to debtors who each have statutory liens on their residences arising out of the same facts.

In re Bevan, 327 F.3d 994 (9th Cir. 2003)

Senior lienholder who bids in amount of deed of trust into foreclosure, takes possession of the property, then pays off amount of IRS lien is not equitably subrogated to the rights of the IRS in the debtor's chapter 13 case.

SUBSTANTIAL CONTRIBUTION

In re Wind N' Wave, 509 F.3d 938 (9th Cir. 2007)

". . .[C]reditors who receive compensation under 503(b)(4) should also be compensated for costs incurred in litigating a fee award, so long as the services meet the § 503(b)(4) requirements and the case "exemplifies a 'set of circumstances' where litigation was 'necessary'". . . ."

In re Cellular 101, Inc., 377 F.3d 1092 (9th Cir. 2004)

Creditors made substantial contribution by proposing only plan presented to the bankruptcy court, which paid 100% of claims and a portion of the equity. Court declines to decide whether creditor's motive is relevant, noting the split in the circuits.

SUBSTANTIVE CONSOLIDATION

In re Bonham, 229 F.3d 750 (9th Cir. 2000)

Ninth Circuit adopts Second Circuit Augie/Restivo test:

1. whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or
2. whether the affairs of the debtor are so entangled that consolidation will benefit all creditors.

In re Augie/Restivo Baking Co., Ltd., 860 F.2d 515 (2d Cir. 1988)

Substantive consolidation improper where creditors dealt separately with debtors.

SURETY

In re Kronemyer, 405 B.R. 915 (9th Cir. BAP 2009)

Surety had standing to bring motion for relief from the automatic stay, even though it only had a contingent claim for contribution or reimbursement under § 502(e)(1).

In re Ferrante, 51 F.3d 1473 (9th Cir. 1995)

Successor trustee is entitled to recover on previous trustee's bond, even if money in question would be paid to a secured creditor ultimately

Pearlman v. Reliance Insurance Co., 371 U.S. 132 (1962)

TAX

1. Cal. Rev. & Tax Code §6051
2. Cal. Rev. & Tax Code §18590
3. Cal. Rev & Tax Code § 6829
4. Ch 11
5. Ch 7
6. Ch 13
7. ERISA Pension
8. Excise Tax
9. §362(b)(4)
10. §362(h)
11. §503(10)(1)(B)(I)
12. §505
13. §506
14. §507(a)(7)
15. §523(a)(1)
16. §523(a)(7)
17. §724(b)
18. §4971(a) of the IRC
19. Trustee
20. Trust Fund
21. 26 U.S.C. §6321
22. 26 U.S.C. §7421(a)
23. Misc

1. Cal. Rev. & Tax Code §6051

In re Raiman, 172 B.R. 933 (9th Cir. B.A.P. 1994)
Tax claims against debtor not dischargeable when claims based on California code section taxing gross receipts of retailer even though some exclusions listed in code. Rev & Tax § 6051 is a (a)(7) tax

2. Cal. Rev. & Tax Code § 6829

In re Leal, 366 B.R. 77 (9th Cir. BAP 2007)
General partners are jointly and severally liable for nonpayment of sales taxes.

3. Cal. Rev. & Tax Code §18590

In re Bracey, 77 F.3d 294 (9th Cir. 1996)
When taxes are assessed under Cal. Rev. & Tax Code § 18590 et seq.; how the 60-day time limit for protest must be read

4. Ch 11

In re Artisan Woodworkers, 204 F.3d 888 (9th Cir. 2000)
Postpetition preconfirmation interest and penalties on nondischargeable tax were not

discharged following payment in full of prepetition debt and postconfirmation interest pursuant to confirmed Ch 11 plan.

United States v. Energy Resources Co., Inc., 495 U.S. 545 (U.S.R.I. 1990)
Bankruptcy court may order IRS to treat Ch. 11 tax payments by debtor corporation as trust fund payments if necessary for reorganization plan

In re Stanmock, Inc., 103 B.R. 228 (9th Cir. B.A.P. 1989)
Can't confirm Chapter 11 plan which allows debtor to designate how IRS will allocate payments

In re Condel, Inc., 91 B.R. 79 (9th Cir. B.A.P. 1988)
1. IRS may not be enjoined from collecting taxes from officers or directors via Chapter 11 plan.
2. IRS may apply tax payments as they see fit, since payments are not deemed "voluntary"

5. Ch 7

In re Feiler, 218 F.3d 948 (9th Cir. 2000)
Chapter 7 trustee may recover tax refunds from United States after avoiding debtors' prepetition election to carry forward net operating loss.

6. Ch 13

In re Fowler, 394 F.3d 1208 (9th Cir. 2005)
"We hold that § 348(d) requires that postpetition employment tax debt, incurred as an administrative expense of a Chapter 11 bankruptcy estate, retains its first priority administrative expense status upon conversion to a Chapter 13 bankruptcy plan. Section 1305 is not in conflict with this holding because it does not govern the priority of the postpetition claims it allows into the bankruptcy."

In re Bisch, 159 B.R. 546 (9th Cir. B.A.P. 1993)
A federal tax lien which was not included as a part of the IRS proof of claim and not provided for in the Chapter 13 remains valid despite confirmation of the plan

In re Tomlan, 907 F.2d 114 (9th Cir. 18990)
IRS must file a proof of claim to obtain priority status in Chapter 13

7. ERISA Pension

In re Snyder, 343 F.3d 1171 (9th Cir. 2003)
Debtor's interest in a pension plan was not property of the estate, and thus it could not be used to secure the IRS's claim for delinquent taxes in his chapter 13 case. This is so, even though the IRS is not subject to ERISA's antialienation provisions.

In re McIntyre, 222 F.3d 655 (9th Cir. 2000)
The IRS may levy upon ERISA-regulated pension benefits to satisfy a husband's tax debt against the claim that the wife has a vested interest in half of those benefits under California

community property laws**.**

In re Connor, 27 F.3d 365 (9th Cir. 1994)
Fed tax lien enforceable against a bankruptcy debtor's future pension payments where the debtor's unqualified right to receive the payments mature before he filed for bankruptcy

In re Anderson, 149 B.R. 591 (9th Cir. B.A.P. 1992)
A debtor's interest in an ERISA pension plan is property or a right to property to which an IRS tax lien could attach pursuant to 26 U.S.C. § 6321

8. Excise Tax

In re Lorber Industries of California, 564 F.3d 1098 (9th Cir. 2009)
Reimbursement amounts for workers' compensation claims owed to the California Self-Insurer's Security Fund are not in the nature of an excise tax.

In re George, 361 F.3d 1157 (9th Cir. 2004)
Claim by California Uninsured Employers Fund against employer who failed to purchase workers' compensation insurance was not "excise tax" for purposes pf bankruptcy law.

9. §362(b)(4)

In re Universal Life Church, Inc., 128 F.3d 1294 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998)
IRS's revocation of tax exempt status was within 362(b)(4)

10. §362(h)

In re Pinkstaff, 974 F.2d 113 (9th Cir. 1992)
IRS subject to 362(h)

11. §503(10)(1)(B)(I)

In re Pacific-Atlantic Trading Co., 64 F.3d 1292 (9th Cir. 1995)
When is a tax "incurred by the estate". When does § 503(10)(1)(B)(I) apply
Application of § 507(a)(7)(A)(iii)

12. §505

Central Valley AG Enterprises v. U.S., 532 F.3d 750, 764 (9th Cir. 2008)
Notwithstanding the finality provisions of the Tax Equity and Fiscal Responsibility Act of 1982, "Section 505 provides for bankruptcy jurisdiction to redetermine a debtor's tax liabilities notwithstanding the preclusive effects to which a tax judgment might otherwise be entitled."

American Principals Leasing Corp. v. U.S., 904 F.2d 477 (9th Cir. 1990)
Bankruptcy court does not have jurisdiction to determine nondebtors tax under § 505

13. §506

In re Pletz, 221 F.3d 1114 (9th Cir. 2000)

Under Oregon law, chapter 13 debtor's interest in property held by debtor and nondebtor spouse as tenants by the entirety had to be valued under § 506 to reflect concurrent interests of both spouses.

14. §507(a)(7)

In re Gurney, 192 B.R. 529 (9th Cir. B.A.P. 1996)

Equitable tolling extended § 507(a)(7) priority period for Arizona state taxes

15. §523(a)(1)

In re King, 122 B.R. 383 (9th Cir. B.A.P. 1991), *aff'd.* 961 F.2d 1423 (9th Cir. 1992)

Cal. Law: taxes are assessed for purposes of 523(a)(1) when they are final, i.e., 60 days after notice of proposed additional tax (when a notice of proposed deficiency assessment becomes final).

16. §523(a)(7)

McKay v. U.S., 957 F.2d 689 (9th Cir. 1992)

Tax penalties incurred more than 3 years prior to filing of petition are discharged under 523(a)(7)

17. §724(b)

In re Markair, Inc. (I), 308 F.3d 1038 (9th Cir. 2002), *cert. denied*, Barstow v. I.R.S., 539 U.S. 926 (2003)

"[T]he term "tax lien" in § 724(b) means a statutory tax lien and ...does not embrace a judicial lien securing an underlying tax obligation."

In re Markair, Inc. (II), 308 F.3d 1057 (9th Cir. 2002)

"We hold that, under § 724(b), priority unsecured creditors have a right to obtain only that portion of the proceeds equaling the amount of the tax liens; any remaining proceeds go first to the junior lien claimants, then to the holders of the tax liens insofar as their claims were not already satisfied and, finally, to the estate."

18. §4971(a) of the IRC

United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 116 S.Ct. 2106 (1996)

Exaction imposed by § 4971(a) of the IRC on the amount of an accumulated funding deficiency of a pension plan is "not entitled to seventh priority as an 'excise tax' under § 507(a)(7)(E), but instead, is, for bankruptcy purposes, a penalty to be dealt with as an ordinary, unsecured claim."

19. Trustee

Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15, 120 S.Ct. 1951 (2000)
When the substantive law creating a tax obligation puts the burden of proof on a taxpayer, the burden of proof on the tax claim in bankruptcy court remains where the substantive law put it (in this case, on the trustee in bankruptcy).

In re Bakersfield Westar, Inc., 226 B.R. 227 (9th Cir. B.A.P. 1998)
Small Business trustee may avoid shareholders' Subchapter S revocation as fraudulent transfer of property conferring benefit on shareholders at expense of company's creditors.

U.S. v. Hemmen, 51 F.3d 883 (9th Cir. 1995)
Trustee liable on tax levy, even though it was made before court actually fixed the amount of administrative expense payment to be paid to debtor's principal. 362 inapplicable

Holywell Corp. v. Smith, 503 U.S. 47, 112 S.Ct. 1021 (1992)
Trustee must file taxes for debtors

20. Trust Fund

In re Hamilton Taft & Co., 53 F.3d 285 (9th Cir. 1995), ***Vacated***, 68 F.3d 337 (9th Cir. 1995)
Trust Fund. Money transferred to third party not subject to statutory trust.

In re Deer Park, Inc., 136 B.R. 815 (9th Cir. B.A.P. 1992), *aff'd.* 10 F.3d 1478 (9th Cir. 1993)
Bankruptcy court had power to order IRS to allocate tax payments to offset trust fund tax liabilities

In re GLK, Inc, 921 F.2d 967 (9th Cir. 1990), *cert. denied*, 501 U.S. 1205 (1991)
In light of *U.S. v. Energy Resources Co.,*, 110 S.Ct 2139 (1990), bankruptcy courts could order debtors' IRS payments allocated to offset trust-fund tax liability but need not do so where such allocation is not necessary to reorganization

In re Major Dynamics, Inc., 897 F.2d 433 (9th Cir. 1990)
Post-petition tax withholding funds subject to bankruptcy code's priorities and do not create IRS trust fund

21. 26 U.S.C. §6321

U.S. v. Barbier, 896 F.2d 377 (9th Cir. 1990)
26 U.S.C. § 6321 allows tax liens to attach to all property, even debtors' personal property, even debtors' personal property exempt from levy under 26 U.S.C. § 6334.

22. 26 U.S.C. §7421(a)

In re American Bicycle Assn', 895 F.2d 1277 (9th Cir. 1990)
Because of the Anti-Injunction Act, 26 U.S.C. § 7421(a), a bankruptcy court cannot enjoin the IRS from collecting a 100% penalty against a responsible officer of a debtor corporation.

23. Misc

In re Gould, 401 B.R. 415 (9th Cir. BAP 2009)

IRS had a valid right of setoff under 11 U.S.C. § 553 and IRC § 6402(a) as to chapter 13 debtors' tax refunds, even though the debtor claimed them as exempt and no objection to the exemption was filed. Bankruptcy court should have granted the IRS relief from the automatic stay for cause to allow it to exercise its setoff rights.

In re KRSM Properties, LLC, 318 B.R. 712 (9th Cir. BAP 2004)

Limited liability corporation's assets could not be used to pay LLC members' personal tax liability, where members elect to have the LLC disregarded as a separate entity.

In re Olshan, 356 F.3d 1078 (9th Cir. 2004)

Presumption of correctness of assessment applies to all items assessed, except where there is a pattern of arbitrariness or carelessness. Although taxpayer rebutted in part presumption of correctness as to unreported business income, IRS still had right to present evidence establishing existence of unreported income.

In re Bunyan, 354 F.3d 1149 (9th Cir. 2004)

Bankruptcy court lacks jurisdiction to consider tax assessments, where they became final upon dismissal of appeals in 1993.

In re Mantz, 343 F.3d 1207 (9th Cir. 2003)

Bankruptcy court had subject matter jurisdiction to determine debtor's tax liability where there was no final administrative determination of debtor's tax liability prior to commencement of bankruptcy case.

In re Montross, 209 B.R. 943 (9th Cir. B.A.P. 1997)

Partnership that had no knowledge debtor was using partnership account for money laundering was not "transferee" for purpose of avoiding transfers into account

In re Jones, 208 B.R. 935 (9th Cir. B.A.P. 1997)

Guilty plea to "concealing ability to pay" offers no guidance on whether taxpayer "concealed assets" within meaning of regulation addressing government's ability to reopen case after acceptance of offer in compromise

In re Belozer Farms, Inc., 199 B.R. 720 (9th Cir. B.A.P. 1996)

Unpaid assessments levied against chicken processor by Oregon Fryer Commission were not a "tax" subject to priority status

In re Hovan, Inc., 96 F.3d 1254 (9th Cir. 1996)

State's claim for unpaid tax penalties not entitled to priority status

In re Los Angeles International Airport Hotel Associates, 196 B.R. 134 (9th Cir. B.A.P. 1996), *aff'd*. 106 F.3d 1479 (9th Cir. 1997)

Hotel's complimentary beverages and breakfasts constitute sales subject to California sales tax

In re Baker, 74 F.3d 906 (9th Cir. 1996), *cert. denied*, 517 U.S. 1192 (1996)

Bankruptcy court may not redetermine debtors' tax liability as established by stipulated Tax Court decision

In re Caroline Triangle Ltd., Partnership, 166 B.R. 411 (9th Cir. B.A.P. 1994)

Taxes are not incurred where property abandoned. Further, they were a lien, not a priority.

In re Smith, 158 B.R. 813 (9th Cir.. B.A.P. 1993)

Order requiring Washington not to deduct IRS taxes from lottery checks violated anti-injunction provision. 26 U.S.C. 7421

In re Kimura, 969 F.2d 806 (9th Cir. 1992)

Provision requiring trade creditors to be paid as a condition to transfer of a liquor license is invalid as to a federal tax lien

In re Sluggo's Chicago Style, Inc., 912 F.2d 1073 (9th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991)

Under California law, a security deposit held by the state taxing authority was property of the estate

In re Isom, 901 F.2d 744 (9th Cir. 1990)

IRS not required to release tax liens when underlying debt was discharged

TELEPHONE APPEARANCE

In re MEI Diversified, Inc., 186 B.R. 455 (D. Minn. 1995)

TORTS- CALIFORNIA LAW

Marin Tug & Barge, Inc. v. Westport Petroleum, Inc., 271 F.3d 825 (9th Cir. 2001)

A defendant's refusal to deal with the plaintiff, even if retaliatory, "was not "wrongful" in the sense required to make out the California tort of intentional interference with prospective economic advantage."

In re Daisy Systems Corp., 97 F.3d 1171 (9th Cir. 1996)

Fiduciary relationship may exist between investment bank and client corp that retained bank for assistance in a takeover attempt.

In re Saylor, 178 B.R. 209 (9th Cir. B.A.P. 1995), *aff'd*. 108 F.3d 219 (9th Cir. 1997)

Definition of conversion.

Robi v. Five Platters, Inc., 918 F.2d 1439 (9th Cir. 1990)

Interference of contractual relations or prospective economic advantage.

TRUSTEES

In re AFI Holding, Inc., 355 B.R. 139 (9th Cir. BAP 2006), *aff'd and remanded,* 530 F.3d 832 (9th Cir. 2008)(for determination of removed trustee's right to fees).

Chapter 7 trustee had a material conflict of interest and thus was not disinterested as required by § 701(a)(1) where she previously represented insiders of the debtor. Totality of circumstances test applied. Failure to disclose all connections and appearance of inpropriety also supported her removal from the case.

In re Crown Vantage, Inc., 421 F.3d 963, 970 (9th Cir. 2005)

". . .[A] party must first obtain leave of the bankruptcy court before it initiates an action in another forum against a bankruptcy trustee or other officer appointed by the bankruptcy court for acts done in the officer's official capacity."

In re American Eagle Mfg., Inc., 231 B.R. 320 (9th Cir. B.A.P. 1999)

Otherwise-valid Chapter 7 trustee election could not be set aside under procedural rule requiring motion for election certification no later than 10 days after creditor's meeting. Rule 2003(d) is invalid.

In re Giordano, 212 B.R. 617 (9th Cir. B.A.P. 1997), *aff'd in part, rev'd in part*, 202 F.3d 277 (9th Cir. 1999)

Bankruptcy trustee entitled to derived judicial immunity absent showing of dishonesty or bad faith.

In re Kashani, 190 B.R. 875 (9th Cir. B.A.P. 1995)

1. Leave of court must be obtained before trustee may be sued in any court other than appointing court

2. No abuse to require debtors to attach a proposed complaint to their motion for leave.

TRUSTS

In re Cutter, 398 B.R. 6, 19-20 (9th Cir. BAP 2008)

1. Property which the debtor transferred to a self-settled trust became property of the estate. "While California law recognizes the validity of spendthrift trusts, any spendthrift provisions are invalid when the settlor is a beneficiary."

2. "If. . .the trust agreement allows the debtor-beneficiary to exercise control over and reach trust property contributed by others, the estate is entitled to the maximum amount that the trust could pay or distribute to the debtor-beneficiary.

In re Commercial Money Centers, Inc., 392 B.R. 814, 830f (9th Cir. BAP 2008)

Debtor did not hold equipment lease payments in a constructive trust.

In re Sale Guaranty Corporation, 220 B.R. 660 (9th Cir. B.A.P. 1998), *aff'd*, 199 F.3d 1375 (9th Cir. 2000)

Trustee of tax-deferred sale "accommodator" could not avoid resulting trust in favor of property owners who retained obvious ownership of property pending sale. Elements of express trust discussed.

In re Coupon Clearing Services, Inc., 113 F.3d 1091 (9th Cir. 1997)

Creditor's failure to establish agency or trust relationship with debtor supports summary judgment for another creditor with perfected security interest

In re Ehrle, 189 B.R. 771 (9th Cir. 1995)

Kraus v. Willow Park Public Golf Course, 73 Cal. App.3d 354, 140 Cal. Rptr. 744(Cal. App. 1977)

In California, to impose a constructive trust, there must exist s res, the plaintiff must have right so the res, and the defendant must have gained the res by "fraud, accident, mistake, undue influence, violation of the trust or other wrongful act."

In re Advent Mgmt. Corp., 178 B.R. 480 (9th Cir. B.A.P. 1995), *aff'd* 104 F.3d 293 (9th Cir. 1997)

Complete review of constructive trust law in California

In re Markair, Inc., 172 B.R. 638 (9th Cir. B.A.P. 1994)

Unsecured creditor who fixed debtor's engine not entitled to receive insurance proceeds in connection with engine damage as constructive trust without showing entitlement ahead of other creditors

Inchoate right to constructive trust is comparable to an unperfected security interest

Under normal principle of trust, if a trustee transfers trust property to a third party, the third party holds that property free of trust unless the trustee committed a BREACH of trust in conveying the property. Restatement (Second) of Trusts §283 (1959); IV Austin W. Scott & William F. Fratcher, The Law of Trusts §283 (4th ed. 1989). Thus, absent a BREACH of trust, when a trustee enters into a contract with a third party, any trust funds transferred to that third party in consideration of the contract are transferred free of trust unless the contract provides that the transferred funds shall be held in trust.

In re Goldberg, 168 B.R. 382 (9th Cir. B.A.P. 1994)

Constructive trust imposed on property (cash used to buy home) that mistakenly came into debtor's hands. Need only show wrongful acquisition and unjust enrichment, not fraud. Strict

tracing of assets not required where no creditor will be harmed.

In re Golden Triangle Capital, Inc., 171 B.R. 79 (9th Cir. B.A.P. 1994)

In re Unicom Computer Corp., 13 F.3d 321 (9th Cir. 1994)

California law provides for the imposition of a constructive trust in a situation involving simple negligence on the part of a debtor who wrongfully detains another's property. *See* Cal. Civ. Code §§2223, 2224; *Toys "R" Us, Inc., v. Esgro,Inc. (In re Esgro, Inc.),* 645 F.2d 794, 797 (9th Cir. 1981); *GHK Assoc.. v. Mayer Group, Inc.,* 224 Cal. App. 3d 856, 878, 274 Cal Rptr, 168, 182 (1990); 11 B.E. Witkin, *Summary of California Law: Trusts* §§305(2), 306(2) (9th Cir. ed. 1990).

CHoPP Computer Corp. v. U.S., 5 F.3d 1344 (9th Cir. 1993), *cert. denied*, 513 U.S. 811 (1994)

Imposition of a constructive trust upon a wrongful taking does not automatically award equitable title to the party nor does it defeat a third party judgment lienholder's prior rights in the property.

In re Jordan, 914 F.2d 197 (9th Cir. 1990)

Reversing the Bankruptcy Appellate Panel judgment affirming the bankruptcy court, the court of appeals held that a trust containing restrictions against the reach of creditors created to compensate a debtor for the release of a personal injury claim, was not a spendthrift trust excludable from the bankrupt's estate.

In re Foam Systems, 92 B.R. 406 (9th Cir. B.A.P. 1988), *aff'd*, 893 F.2d 1338 (9th Cir. 1990)

See also In re Golden Triangle Capital, Inc., 171 B.R. 79 (9th Cir. B.A.P. 1994) Definition statute of frauds express and resulting trusts under California law.

In re Teichman, 774 F.2d 1395, 1399 (9th Cir. 1985)

Under California law, the elements of trust include "a competent trustor, an intention on the part of the trustor to create a trust, a trustee, an estate conveyed to the trustee, and acceptance of the trust the by trustee, a beneficiary, a legal purpose and a legal term."

TURNOVER

In re Anchorage Nautical Tours, Inc., 145 B.R. 637 (9th Cir. B.A.P. 1992)

Proceeds from charter boat sold without court authorization were property of the estate and subject to turnover.

USE SALE OR LEASE OF PROPERTY - §363

In re PW LLC, 391 B.R. 25, 41 (9th Cir. BAP 2008)

1) ". . . § 363(f)(3) does not authorize the sale free and clear of a lienholder's interest if the price of the estate property is equal to or less than the aggregate amount of all claims held be creditors who hold a lien or security interest in the property being sold."

2) The term "interest" in § 363(f)(5) must be read expansively, and includes liens.

3) The compelled "money satisfaction" referred to in § 363(f)(5) means that the interest holder could be compelled for less than full payment. Cramdown under § 1129(b)(2) is not a legal or equitable proceeding to which § 363(f)(5) refers.

In re Lanijani, 325 B.R. 282 (9th Cir. BAP 2005)

". . .[W]hen a cause of action is being sold to a present or potential defendant over the objection of creditors, a bankruptcy court must, in addition to treating it as a sale, independently evaluate the transaction as a settlement under the prevailing "fair and equitable" test, and consider the possibility of authorizing the objecting creditors to prosecute the cause of action for the benefit of the estate, as permitted by § 503(b)(3)(B)."

In re Flynn, 418 F.3d 1005 (9th Cir. 2005)

Finding that attorneys fees incurred in a co-owner sale constituted "compensation of a trustee" under § 363(j), the court held that the non-debtor co-owner's share of the attorneys fees incurred in the sale were not chargeable to the co-owner.

In re Popp, 323 B.R. 260 (9th Cir. BAP 2005)

Failure to make specific findings that the estate had an ownership interest in property being sold required reversal. Neither § 363(m) nor the general mootness doctrine nor equitable mootness applied.

In re Rodeo Canon Development Corp., 362 F.3d 603 (9th Cir. 2004), *remanded for further proceedings,* 126 Fed.Appx. 353 (9th Cir. 2005)

"A bankruptcy court may not allow the sale of property as "property of the estate " without first determining whether the debtor in fact owned the property....The Property would not be property of the estate if. . .it was partnership property. That Rodeo, as a partner, had at least a 50% interest in the Property does not alter that conclusion."

In re Flynn, 418 F.3d 1005 (9th Cir. 2005)

Attorney fees could not be deducted from sale of co-owned property until after the sale proceeds had been divided between the estate and co-owner. Trustee had to distribute co-owners share of the proceeds immediately after the sale.

In re Thomas, 287 B.R. 782 (9th Cir. B.A.P. 2002)

Purchaser's good faith under § 363(m) must initially be determined by bankruptcy court.

In re R.B.B., Inc., 211 F.3d 475 (9th Cir. 2000)

No assignment and sale of debtor's franchise to bona fide purchaser where order approving transactions was ambiguous as to specific entity that would take assignment and fund purchase.

In re Loloee, 241 B.R. 655 (9th Cir. B.A.P. 1999)
Sale order which purported to resolve lienholder priority dispute without notice to all lienholders was void.

In re Filtercorp, Inc., 163 F.3d 570 (9th Cir. 1998)
Failure to obtain stay of sale pending appeal mooted appeal.

In re Diego's, Inc., 88 F.3d 775 (9th Cir. 1996)
Trustee sale governed by state contract law.

In re Safeguard Self-Storage Trust, 2 F.3d 967 (9th Cir. 1993)
Revenues from leasing storage space constitute cash collateral. Contract was a lease of real property. Rents were subject to perfected deed of trust.

In re Anchorage Nautical Tours, Inc., 145 B.R. 637 (9th Cir. B.A.P. 1992)
Sale of boat was not in debtor's ordinary course of business

In re Southwest Products, Inc., 144 B.R. 100 (9th Cir. B.A.P. 1992)
Insufficient evidence of bad faith in sale by trustee to insider - thus appeal moot under 363(m)

In re Ewell, 958 F.2d 276 (9th Cir. 1992)
363(m) - "good faith". Failure to obtain stay of sale order moots appeal under § 363(m). Doubtful that FRCP 62(d) applies to sales. Even if sale occurred during 10 day period, doesn't make it void. Definition of good faith.

In re Intermagnetics America, Inc., 926 F.2d 912 (9th Cir. 1991)
Bankruptcy court order approving sale of estate property found to be fraudulent did not mandate dismissal of trustee's complaint on res judicata grounds

In re Mann, 907 F.2d 923 (9th Cir. 1990)
Failure to obtain stay pending appeal of foreclosure determination renders appeal moot under §363(m). Cal. law re: redemption rights. To set aside foreclosure, must show gross inadequacy of sale price and slight unfairness.

In re Two S Corp., 875 F.2d 240 (9th Cir. 1989)
Value is conclusively determined by sales price - no need for evidentiary hearing.

In re Air Beds, Inc., 92 B.R. 419 (9th Cir. B.A.P. 1988)
Distribution of proceeds of sale should not take place until after a plan is confirmed.

In re Onouli-Kona Land Co., 846 F.2d 1170 (9th Cir. 1988)
Sale of property mooted appeal.

USURY

In re Dominguez, 995 F.2d 883 (9th Cir. 1993)

Extension agreement did not violate usury law because savings clause operates to limit the interest rate to the maximum non-usurious rate.

VALUATION

In re Lynch, 363 B.R. 101 (9th Cir. BAP 2007)

Confirmation of a chapter 13 plan does not implicitly value a debtor's house. Where the chapter 13 is converted to chapter 7, house is valued as of the filing of the chapter 13 petition.

CSX Transportation, Inc. v. Georgia State Board of Equalization, --U.S.– (Dec. 4, 2007).

Railroad was entitled to challenge the valuation methods of the state for ad valorem tax purposes. No one single valuation method is typically used in arriving at market value. Where there is little market for an asset, the more difficult the estimate.

In re Kim, 130 F.3d 863 (9th Cir. 1997)

Laundry equipment should have been valued based on its FMV on location and in use, even though debtors could not have sold business as a turnkey operation because the creditor had a security interest in the lease.

Associates Commercial Corp. v. Rash, 519 U.S. 1106 (1997)

Property that a debtor seeks to retain over the objection of an under secured creditor is valued for the purpose of establishing the secured portion of the claim at "replacement value" rather than at "foreclosure value". Section 506(a) requires valuing the claim at "the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller."

Taffi v. United States (In re Taffi), 68 F.3d 306 (9th Cir. 1995), *cert. denied*, 521 U.S. 1103 (1997)

Where Chapter 11 debtor proposes to retain his home in his Chapter 11 plan, and liens exceeded home's value, court must value the allowed amount of secured claim under §506(a):

(1) on basis of fair market value of collateral (willing buyer and willing seller), not forced-sale liquidation value; and

(2) without deducting hypothetical costs of sale.

See Lomas Mortgage USA v. Weise (In re Weise), 980 F.2d 1279 (9th Cir. 1992), *vacated on other grounds*, 508 U.S. 958, 113 S.Ct. 2925 (1993)

In re Mitchell, 954 F.2d 557 (9th Cir. B.A.P. 1992), *cert. denied*, 506 U.S. 908 (1992)

Wholesale blue book value of automobile under 11 U.S.C. §506(a) proper

In re Wolverton Assoc., 909 F.2d 1286 (9th Cir. 1990)

Standard of review.

In re Malody, 102 B.R. 745 (9th Cir. B.A.P. 1989)

Vehicles should be valued at wholesale in Ch. 13 cases.

VENUE

In re Donald, 328 B.R. 192 (9th Cir. BAP 2005)

Debtor who worked in Los Angeles for 30 days and lived in Whittier with a friend during that period was not domiciled in the Central District of California for purposes of 28 U.S.C. § 1408. Case properly transferred to Georgia pursuant to § 1412.

In re Little Lake Industries, 158 B.R. 478 (9th Cir. B.A.P. 1993)

"Arising under title 11" = "in a case under Title 11...arising in or related to such case" for 1409 purposes

In re Hall, Bayoutree Assoc., Ltd., 939 F.2d 802 (9th Cir. 1991)

Not improper to dismiss rather than transfer, where there was evidence of bad faith

In re Reddington Investments Ltd. Partnership-VIII, 90 B.R. 429 (9th Cir. B.A.P. 1988)

B.R. 1004(b) - where first petition is filed governs which court decides venue

VEXATIOUS LITIGANT

DeLong v. Hennessey, 912 F.2d 1144 (9th Cir. 1990), *cert. denied*, 498 U.S. 1001 (1990)
Standard for enjoining filings by a vexatious litigant