

# **Ninth Circuit Update**

**Published Cases June 15, 2011 to June 8, 2012**

**The Honorable Frank L. Kurtz**  
**United States Bankruptcy Court**  
**Eastern District of Washington**  
**Spokane, Washington**

**Mary Jo Heston**  
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## COVERED CASES

### *Business Cases*

1. *Radlax Gateway Hotel, LLC v. Amalgamated Bank*,  
2012 WL 1912197 (U.S. 2012)  
Debtor cannot under § 1129 cram down plan that calls for sale of encumbered assets free and clear without allowing the secured claimants to credit bid; such a sale procedure does not provide the secured claimants with the indubitable equivalent of their claims.
2. *In re Friedman*,  
466 B.R. 471 (9th Cir. BAP 2012)  
Absolute priority rule of § 1129(b)(2)(B)(ii) does not apply to individual debtors.
3. *In re Loop 76, LLC*,  
465 B.R. 525 (9th Cir. BAP 2012)  
Fact that unsecured claim is supported by a third-party guaranty is a relevant consideration in determining whether claims are substantially similar.
4. *Palmdale Hills Property, LLC*,  
457 B.R. 29 (9th Cir. BAP 2011)  
Repurchase agreements relating to mortgage loans were true sales, not secured transactions, even though the putative buyer had an obligation to resell identical loans and the loans were unique because the transaction documents unambiguously indicated the parties' intent was that the transaction be a true sale.

### *Chapter 13 Cases*

5. *In re Salazar*,  
465 B.R. 875 (9th Cir. BAP 2012)  
Debtors that post-petition received and spent tax refund constituting estate property during Chapter 13 proceeding that never resulted in a confirmed plan could not be forced to turn it over to the trustee upon conversion to Chapter 7.
6. *In re Benafel*,  
461 B.R. 581 (9th Cir. BAP 2011)  
The date for determining whether property is the debtor's principal residence for purposes of § 1322(b)(2) is the petition date, not the transaction date.

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7. *In re Abdelgadir*,  
455 B.R. 896 (9th Cir. BAP 2011)  
Debtors have absolute right to convert Chapter 13 case to Chapter 7, even if a creditor has moved to dismiss the case for bad faith.
  8. *In re Defrantz*,  
454 B.R. 108 (9th Cir. BAP 2011) (same)
  9. *In re Welsh*,  
465 B.R. 843 (9th Cir. BAP 2012)  
Debtors' Chapter 13 plan that called for making payments on six vehicle loans and that failed to include social security income was in good faith.

***Miscellaneous Cases of Note***

10. *In re Hamlin*,  
465 B.R. 863 (9th Cir. BAP 2012)  
Debtor may exempt under § 522(c)(3)(C) IRA inherited from non-spouse.
11. *In re Nash*,  
464 B.R. 874 (9th Cir. BAP 2012)  
Neither creditor nor district attorney violated the discharge injunction by arresting debtor in connection with discharged gambling debt or by postponing criminal proceeding in response to settlement agreement.
12. *In re Belice*,  
461 B.R. 564 (9th Cir. BAP 2011)  
Debtor's alleged lies about specific assets and specific income and expense items were not about his overall financial condition and thus did not need to be in writing to be nondischargeable under § 523(a)(2).
13. *In re Fish*,  
456 B.R. 413 (9th Cir. BAP 2011)  
Secured creditor's filings for relief from the stay and objection to confirmation served as informal proof of claim and thus bankruptcy court erred in sustaining objection to formal claim filed shortly after the bar date.

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## OTHER CASES

### *Ninth Circuit Cases*

14. *In re Allen*,  
2012 WL 2086563 (9th Cir. 2012)  
Mortgagee's lost note affidavit satisfied the requirements of § 3-309 and therefore constituted an acceptable substitute for the original note. The endorsement in blank on the face of the note demonstrated that the transfer included the right to enforce the note, and the loan servicer, as agent for the mortgagee, had standing to file a proof of claim.
15. *In re Jacobson*  
2012 WL 1382979 (9th Cir. 2012)  
Debtor's right to portion of proceeds from the judicial sale of homestead property was subject under California law to condition that proceeds be reinvested in new homestead, and thus debtor forfeited homestead exemption by failing, post-petition, to reinvest the sale proceeds within the required time.
16. *In re Kekaouha-Alisa*,  
674 F.3d 1083 (9th Cir. 2012)  
Failure to publicly announce postponement of nonjudicial foreclosure violates Hawaii law.
17. *In re Thorpe Insulation, Inc.*,  
671 F.3d 1011 (9th Cir. 2012)  
Bankruptcy court has discretion, even in a core proceeding, to decline to enforce an otherwise applicable agreement to arbitrate if arbitration would conflict with the underlying purposes of the Bankruptcy Code.
18. *In re Meruelo Maddux Properties, Inc.*,  
667 F.3d 1072 (9th Cir. 2012)  
Subsidiary of real estate developer, in jointly administered but not substantively consolidated case, was a single asset real estate debtor.
19. *In re Sherman*,  
658 F.3d 1009 (9th Cir. 2011)  
Section 523(a)(19)(A)(i) applies only when the debtor is culpable for the securities law violation.
20. *In re Palmdale Hills Property, LLC*,  
654 F.3d 868 (9th Cir. 2011)  
Automatic stay applicable to debtor's efforts to subordinate claims of creditor that is also in bankruptcy.

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21. *In re Jones*,  
657 F.3d 921 (9th Cir. 2011)  
Three-year lookback period for nondischargeable taxes was not tolled during prior Chapter 13 proceeding because the Franchise Tax Board was not stayed from collecting the tax debt during the prior case because the Chapter 13 estate re-vested in the debtor when the plan was confirmed, prior to the tax debt becoming due.
22. *In re J.J. Re-Bar Corp., Inc.*,  
644 F.3d 952 (9th Cir. 2011)  
Even if the debtor's confirmed Chapter 11 plan purported to prevent the IRS from seeking to assess a trust fund recovery penalty against the debtor's officers for unpaid employee withholding taxes, the plan would violate the Anti-Injunction Act.

### ***BAP Cases***

23. *In re Yucca Group, LLC*,  
2012 WL 2086485 (9th Cir. BAP 2012)  
Creditor's state court complaint, removed by the debtor to the bankruptcy court and containing an explicit demand showing the nature and amount of the claim and the creditor's intent to hold the debtor liable qualified as an informal proof of claim because it was: (1) presented to the court; (2) within the time for filing of claims; (3) by the creditor; (4) brought to the attention of the court; and (5) identified the nature and amount of claim. Although the creditor later agreed to a dismissal of the adversary proceeding, that dismissal was without prejudice and did not unequivocally indicate an intent to abandon the claim. Moreover, even though a pleading constituting a valid informal proof of claim is withdrawn, the claimant may still intend to enforce the debtor's liability through some other means and withdrawal of the pleading did not comply with Rule 3006, which provides that a creditor who has participated significantly in the case – as the creditor in this case unquestionably had – may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession.
24. *In re Parker*,  
2012 WL 1932975 (9th Cir. BAP 2012)  
The debtor's procurement of a default judgment in the bankruptcy case of two others on claims for equitable indemnification and nondischargeability under § 523(a)(2) did not judicially estop the debtor in his own bankruptcy case from opposing a creditor's § 523(a)(2) complaint against the debtor or entitle the creditor to summary judgment.
25. *In re First Yorkshire Holdings, Inc.*,  
2012 WL 1658250 (9th Cir. BAP 2012)  
Bankruptcy court erred by granting relief from the stay under § 362(d)(2) and (4) without making appropriate findings of fact.

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26. *In re Lepe*,  
2012 WL 1621136 (9th Cir. BAP 2012)  
Chapter 13 plan is not necessarily filed in bad faith merely because the main or sole purpose of the plan is to strip off a wholly unsecured junior home mortgage.
27. *In re Renteria*,  
2012 WL 1578392 (9th Cir. BAP 2012)  
Chapter 13 plan that separately classified and proposed to pay in full, with interest, one unsecured claim guaranteed by the debtor's mother while other unsecured claims were to receive nothing did not discriminate unfairly and was properly confirmed.
28. *In re Jefferies*,  
2012 WL 1497904 (9th Cir. BAP 2012)  
Amount the debtor received for transferring his interest in the family home to his ex-wife pursuant to the decree dissolving their marriage were not proceeds of a voluntary sale of his homestead, and thus was not exemptible under Washington law.
29. *In re Deitz*,  
2012 WL 1497795 (9th Cir. BAP 2012)  
Bankruptcy court had constitutional authority to enter a final judgment liquidating claim and resolving nondischargeability issues under § 523(a). Contractor/debtor's liability to homeowners was nondischargeable under § 523(a)(2) because the debtor misrepresented that he was a licensed contractor when in fact, at the time he signed the construction contract, his license had been suspended.
30. *In re Hansen*,  
2012 WL 1344389 (9th Cir. BAP 2012)  
Unpaid California unemployment insurance tax, for which responsible officer is personally liable, is not a priority "tax required to be collected" under § 507(a)(8)(C) and thus is not nondischargeable under § 523(a)(1)(A).
31. *In re Cedano*,  
2012 WL 1191860 (9th Cir. BAP 2012)  
Debtor presented no claim for wrongful foreclosure under California law because deed of trust expressly made MERS the trustee for the note and the holder's assigns, holder with the power to foreclose, and Cal-Western Reconveyance Corporation as validly substituted for MERS, even though the Substitution of Trustee was not recorded until after Cal-Western initiated the foreclosure action.

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32. *In re Viola*,  
2012 WL 1191926 (9th Cir. BAP 2012)  
Bankruptcy trustee of debtor who operated Ponzi scheme had no cause of action against the bank that maintained the debtor's trust accounts for intentionally fraudulent transfers because the bank was not a transferee, even though a bank employee was designated as successor trustee. The bankruptcy trustee had no standing to bring a claim for aiding and abetting fraudulent transfers. The trustee also cannot avoid the transfer of \$1 million to purchase Citigroup stock because the transfer was made through a subsidiary that qualifies as a financial institution and therefore the transfer is insulated from avoidance under § 546(e) because the transfer was outside the two-year period covered by § 548(a)(1)(a) and was avoidable, if at all, under § 544.
33. *In re Deed and Note Traders, LLC*,  
2012 WL 1191891 (9th Cir. BAP 2012)  
Bankruptcy court did not err in ruling that extraordinary, unforeseeable circumstances existed that justified confirming, in a second Chapter 11 case, the debtor's plan that modified the secured creditors' rights under the plan confirmed in the first case.
34. *In re Mattson*,  
2012 WL 1499824 (9th Cir. BAP 2012)  
Above-median income Chapter 13 debtors could modify a confirmed plan to increase their payout due to an increase in their income but they could not reduce the length of their plan.
35. *In re Searcy*,  
463 B.R. 888 (9th Cir. BAP 2012)  
Attorney's fees and costs awarded against inmate/debtor for filing frivolous complaint was nondischargeable under § 523(a)(7).
36. *In re de la Salle*,  
461 B.R. 593 (9th Cir. BAP 2012)  
Debtors' plan that failed to provide for payment of home mortgage debt was properly not confirmed and case was properly converted to Chapter 7.
37. *In re Hokulani Square, Inc.*,  
460 B.R. 763 (9th Cir. BAP 2011)  
Amount of secured claimant's credit bid at trustee's sale could not be included in amount of distributions for the purpose of computing the trustee's compensation.
38. *In re Placide*,  
459 B.R. 64 (9th Cir. BAP 2011)  
Bankruptcy court properly disallowed law firm's claim for \$124,000 in fees firm that successfully represented debtor in challenging another debtor's discharge given that the firm had already been paid \$49,000 and the total claims against that other debtor were only \$85,000.

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39. *In re Wilshire Courtyard*,  
459 B.R. 416 (9th Cir. BAP 2011)  
Bankruptcy court had no jurisdiction to resolve state tax consequences of transactions consummated pursuant to confirmed plan.
40. *In re Marciano*,  
459 B.R. 27 (9th Cir. BAP 2011)  
Unstayed judgments against the alleged debtor for discovery abuses in state court litigation, even though on appeal, were not subject a to bona fide dispute for purposes of § 303.
41. *Blue Pine Group, Inc.*,  
457 B.R. 64 (9th Cir. BAP 2011)  
Bankruptcy court properly imposed sanctions of \$109,000 on lawyer and law firm for violating Rule 9011 by filing a corporate bankruptcy without proper authorization, failing to conduct a reasonable inquiry into his client's corporate affairs, and, after being put on notice that he lacked proper authorization, continuing to advocate the improper filing.
42. *In re Ellsworth*,  
455 B.R. 904 (9th Cir. BAP 2011)  
Bankruptcy court did not abuse its discretion is dismissing Chapter 13 case of debtors who seriously overstated their expenses and did not file an amended plan within the time directed.
43. *In re Edwards*,  
454 B.R. 100 (9th Cir. BAP 2011)  
Creditor that prepetition completed nonjudicial foreclose and obtained unlawful detainer judgment and writ of possession was entitled to relief from the stay.
44. *In re Kayne*,  
453 B.R. 372 (9th Cir. BAP 2011)  
Sanctions properly imposed on debtor's counsel under § 707(b)(4) for failing to disclose assets and income of which the attorney was aware.
45. *In re Bay Area Glass, Inc.*,  
454 B.R. 86 (9th Cir. BAP 2011)  
Section 547(c)(9) does not exempt from avoidance the first \$5,475 of every preferential transfer in a non-consumer case; it protects only transfer for less than that amount.
46. *In re Ong*,  
461 B.R. 559 (9th Cir. BAP 2011)  
Bankruptcy court could not refuse to approve reaffirmation agreement that complied with all relevant statutory requirements of § 524, including the certification of the debtor's attorney that the agreement represented a fully informed and voluntary agreement, did not pose an undue hardship on the debtor or his dependents, and that the debtor was advised of the agreement's legal effect and consequences.