I. SUPREME COURT CASES - DECIDED

A. Decided - *Travelers Indemnity Co. v. Bailey*, 129 S.Ct. 2195 (2009) Reversing a decision of the Second Circuit, reported at 517 F.3d 52 (2008), the Supreme Court held that an injunction entered as an element of the 1986 reorganization plan of Johns-Manville Corporation barred state law actions against an insurance company based on allegations either of its own wrongdoing while acting as Manville's insurer or of its misuse of information obtained from Manville as its insurer. The Supreme Court held that the finality of the bankruptcy court's orders following the conclusion of direct review generally stood in the way of challenging the enforceability of the injunction.

II. SUPREME COURT CASES - PENDING

A. *United Student Aid Funds v. Espinosa*, 553 F.2d 1193 (9th Cir. 2008). Chapter 13 debtor included provision in plan that treated student loan debts as paid in full at the end of the plan. The debtor sought an order holding a student loan lender in contempt for executing on tax refunds after the term of the plan. The lender argued that the Chapter 13 plan was entered in violation of its rights, and the debt was nondischargeable. The bankruptcy court agreed with the debtor that the student loans had been discharged through the plan. The district court disagreed, and found that the discharge violated the lender's due process because no adversary action was filed to discharge the debt. The Ninth Circuit held that the provisions of the confirmed plan controlled, and that the lender's recourse was in objecting to the plan. In doing so, it reaffirmed its"long-standing circuit law holds that student loan debts can be discharged by way of a Chapter 13 plan if the creditor does not object, after receiving notice of the proposed plan, and that such notice is not constitutionally inadequate." *Id*. at 1205 (internal citations omitted).

1. *In re Meshke*, Case No. 08-647 (DMD) (Bankr. D. Alaska) Debtor proposed to pay creditors 80% in Chapter 13, and to discharge three student loans at the end of the term. State of Alaska objected and was removed from the discharge. Court approved Chapter 13 plan with discharge language, and no additional notice required.

2. *In re V arick*, Case No. 09-241 (DMD)(Bankr. D. Alaska) Debtor proposed Chapter 13 plan providing that over $155,000 in student loans would be discharged at the end of the plan discharged. Chapter 13 trustee objected to the provision. Debtor challenged trustee's standing. Because sec. 1302(b)(2)(B) provides that a Chapter 13 trustee "shall appear and be heard at any hearing that concerns ... confirmation of a plan....", he had standing to object to the proposed discharge of the student loans even if the creditor does not.

B. *Schwab v. Reilly*, 534 F.3d 173 (3rd Cir. 2008). Debtor listed $10,718 in business equipment and exempted the equipment under the tools of the trade exemption (522(d)(6) and the wildcard exemption (522(d)(5)). The trustee did not object to the exemptions, but sought to sell the equipment for $17,000. Relying upon *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), the bankruptcy court held that the trustee had waived his right to challenge the debtor's valuation. On appeal to the district court, the trustee argued that he did not object to the debtor's exemption, but rather the valuation which was not governed by the 30 day objection requirement contained in Rule 4003. The Third Circuit agreed that a debtor's exemption of property for the total stated value placed the trustee on notice that the debtor exempted the entire property.

C. *Milavetz, Gallop & Milavetz v. United States*, 541 F.3d 785 (8th Cir. 2008) - whether attorneys are included within the definition of a "debt relief agency." The Eighth Circuit held that the broad statutory definition of "debt relief agencies" included attorneys, and were not subject to any exclusions. The Eighth Circuit affirmed, however, the district court's decision that section 526(a)(4) was unconstitutionally broad as it precludes attorneys from providing appropriate advice by prohibiting attorneys to advise clients to incur additional debts when contemplating bankruptcy.

D. *In re Lanning*, 545 F.3d 1269 (10th Cir. 2008). On November 2nd, the Supreme Court granted certiorari "limited to the following question: Whether, in calculating the debtor's 'projected disposable income' during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period." The Tenth Circuit adopted a "forward looking approach" to determining "projected disposable income" for purposes of calculating monthly plan payments under Chapter 13. The Ninth Circuit rejected the forward looking approach in *Kagenveama* discussed below.

III. MEANS TEST

A. *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008) Ninth Circuit determined that "projected disposable income" for purposes of section 1325(b)(1)(B) is the debtor's disposable income defined by subsection (b)(2) projected out over the applicable commitment period. Specifically, income is to be measured as of the petition date based upon the means test, looking "backwards." The Court also rejected the argument that this calculation was only the starting point to determine disposable income. Three other circuit courts have taken the opposite position – that courts should predict what a debtor's income will be:

I. *Coop v. Frederickson (In re Frederickson*), 545 F.3d 652 (8th Cir. 2008) (*cert. denied, Frederickson v. Coop*, 129 S. Ct. 1630 (2009)("starting point").

ii. *Nowlin v. Peake (In re Nowlin)*, 576 F.3d 258 (5th Cir. 2009)(adjust for reasonably certain changes).

iii. *In re Turner*, 574 F.3d 349 (7th Cir. 2009)(take changes into account).

This split likely will be decided in *Hamilton v. Lanning (In re Lanning*), 545 F.3d 1269 (10th Cir. 2008), in which the Tenth Circuit held that current monthly income (CMI) is the presumptive starting point for determining income for PDI purposes but is subject to a showing of a change in circumstances.

B. *In re Ransom*, 577 F.3d 1026 (9th Cir. 2009). Chapter 13 debtor took a $471 vehicle ownership expense on a car he owned outright, making his disposable income $210.55. Debtor proposed to pay $500 per month in his plan. MBNA objected that the vehicle deduction should not have been taken and argued that the debtor must commit $688.55 (the $210.55 the debtor showed as disposable income plus the vehicle deduction of $471) to his plan per month. The Bankruptcy Court, B.A.P. and Ninth Circuit all held the debtor could not take the ownership expense without having a loan or lease payment. The Ninth Circuit said that a debtor only has an "applicable" vehicle ownership expense if the debtor has an actual car payment.

1. *In re Vesper*, 8 ABR 379 (Bankr. D. Alaska 2007) Judge MacDonald holds that debtor is entitled to claim the standardized IRS ownership expenses for two vehicles that are owned free and clear in the means test for purposes of determining whether abuse is presumed in filing of Chapter 7.

C. *In re Martinez*, 2009 WL 3338405 (9th Cir. B.A.P. 2009) (2-1 decision) In light of *Ransom*, the B.A.P. holds that a Chapter 13 (3 cases actually) that strips off a junior secured creditor on debtor's residence cannot deduct those payments in calculating projectable monthly income. Because *Kagenveama* was limited to reconciling the phrase "projected disposable income", the Ninth Circuit's decision does not control the calculation of expenses necessary for that equation. Rather, *Ransom* informs that calculation. This lead the court to conclude,"[p]hantom payments for valueless collateral are not reasonably necessary for a debtor's support and maintenance."

D. *In re Smith*, 2009 WL 3338406 (9th Cir. B.A.P. 2009) (2-1 decision) In light of *Ransom*, the B.A.P. holds that a Chapter 13 debtor may not deduct secured debts from the calculation of his or her calculation of disposable monthly income. Objections were filed to Chapter 13 plan, that debtor failed to commit all "projectable disposable income." Debtor included $7,185 in monthly payments for two houses and a vehicle that they proposed to surrender. The Court rejects *Kagenveama* as binding precedent on the determination of monthly *expenses*,

which must be determined looking forward. Accordingly, expenses for collateral to be surrendered are not to be included. because such payments are not necessary for the debtor's support. Indeed, there are no payments.

E. *In re Egeberg*, 574 F.3d 1045 (9th Cir.2009) - debtor could not deduct pension loans in means test as secured debt or other necessary expense because debtor could ask the loan administrator to treat his outstanding loan balance as an early withdrawal from his 401(k) and thereby relieve himself of a future repayment obligation.

IV. Ride Through - Reaffirmations

A. *In re Dumont*, 581 F.3d 1104 (9th Cir. 2009) - Ninth Circuit rejects the ride through option for personal property under 11 U.S.C. § 521(d). Debtor failed to reaffirm car loan, and Ford repossessed the vehicle despite payments from debtor. The court found no violation of the automatic stay. The Ninth Circuit did note an exception for "[a] debtor who files an intent to reaffirm on the original contract terms but is unable to complete such a reaffirmation due to the creditor's refusal is not subject to the section." *Id*. at 1114. Also, the Court noted that "section 521(d) gives Ford no substantive right to take action against the collateral." *Id*. at 1115. Rather, the right to repossess depends upon state law.

B. *In re Potter*, 9 ABR 135 (Bankr. D. Alaska) (DMD) Court concluded that BAPCPA requires a debtor reaffirm a secured debt before the granting of the discharge. The debtor filed her reaffirmation agreement shortly after the case was closed, though the agreement was apparently signed before the case was closed. The Court noted its prior practice to vacate the discharge to allow reaffirmation. However, under BAPCPA such practice is not allowed. Though reaffirmation was not possible, the Court concluded by noting that "the issue of whether [an ipso facto] clause can be enforced under Alaska law in a situation such as this must be determined by the state court."

C. *In re Nelson*, 9 ABR 20 (Bankr. D. Alaska 2009) Debtors sought reaffirmation of car and house loan. Debtor had shortfalls in payments to both creditors, but sought to juggle debts to make payments. Court denied the reaffirmations for undue hardship, but noted that a backdoor ride through concept may apply so long as the debtors kept the payments current. The Court advised that it would be wise for a creditor to get a bankruptcy court ruling before foreclosing.

D. *In re Hamilton*, 9 ABR 138 (Bankr. D. Alaska) (HAR) On application to reaffirm junior deed on residence, Judge Ross entered order denying reaffirmation on basis of undue hardship. Order also noted that BAPCPA's changes for reaffirmation requirements do not apply where real property is the collateral, and that the ride through option still exists for real property. Judge Ross also noted the possibility of a back door ride through where the debtor makes an effort to reaffirm.

V. Sanctions

A. *In re Lehtinen*, 564 F.3d 1052 (9th Cir. 2009) Bankruptcy Court suspended Chapter 13 debtor's attorney for three months and required disgorgement. Debtor's counsel sent a contract attorney to the debtor's 341 meeting, failed to inform the debtor of the confirmation hearing, failed to attend the confirmation hearing, assumed that the case was dismissed when in fact, the debtor attended the hearing and the plan was confirmed. Debtor also alleged that counsel had pressured her to list her house for sale with his brokerage firm and to obtain a loan from a friend that conditioned the loan on engaging the counsel as broker. The Ninth Circuit affirmed the bankruptcy court's "inherent sanction powers" to sanction attorneys that practice before it. Because the attorney was given adequate due process, "the bankruptcy court possessed the inherent power to suspend him." *Id*. at 1061.

B. *In re Catholic Bishop of Northern Alaska*, 9 ABR 115 (DMD) Counsel for the Unsecured Creditors Committee took a deposition of a member of the debtor in an unrelated civil case. Debtor sought sanctions, including disqualification of counsel, for conducting what was "in essence, a Rule 2004 examination of CBNC", without prior authorization. Though the automatic stay did not preclude the deposition in the unrelated civil case, the questions regarding debtor's assets and financed violated the stay. Section 362(k)(1) provides individual debtors with a mechanism to collect compensatory damages and attorney fees for violations of the automatic stay. However, that provision is inapplicable to corporate debtors. Nonetheless, corporate debtors may recover damages under the court's civil contempt powers, if the contemnor knew of the automatic stay and that the actions violated the stay. Punitive damages, however, are not available under the contempt powers. Court ordered disallowance of at least $7,500 in counsel's fees related to the deposition.

C. *In re OK Lumber Company, Inc*., 9 ABR 14 (Bankr. D. Alaska 2009) - Debtor's continued use of cash collateral without court approval subjected debtor and counsel to sanctions.

D. *Weidner v. Alaska Communications Systems Group, Inc.* 8 ABR 461 (Bankr. D. Alaska 2008) (DMD). ***ACS ordered to pay Brock Wiedner the $250 filing fee for his adversary action when it the stay in his case and yet acted A creditor's good faith belief that its conduct was justified is irrelevant to the determination of a stay violation.***

VI. Duty to Disclose

A. *In re Allvest Corporation*, 9 ABR 132 (Bankr. D. Alaska) (DMD) Trustee served a supboena compelling the debtor's counsel in a federal criminal action to turnover debtor's federal criminal presentence report to determine whether representations regarding the debtor's assets were truthful. Weimer sought to

quash the subpoena as irrelevant and privileged under the work product doctrine. Judge MacDonald agreed that the information sought was relevant, and should be turned. However, the trustee was required to obtain the documents through the District Court.

VII. Exemption

A. *In re Greene*, 583 F.3d 614 (9th Cir. 2009) - the 1,215 day period to trigger the $125,000 limitation upon the homestead exemption is triggered measured from the date the property interest acquired rather than the date the property become the homestead.

B. *In re Black*, 9 ABR 8 (Bankr. D. Alaska 2008) Trustee objected to debtor's amendment of exemption to assert a homestead exemption after Trustee discovered undisclosed sale of real property. Though debtor may amend exemptions, amendment may be disallowed where debtor has engaged in bad faith or prejudice. Amendment disallowed.

C. *In re Tinkess*, 9 ABR 33 (Bankr. D. Alaska 2009) Actually three cases where Alaska National Insurance Company objected to debtors' claim of exemptions in permanent fund dividends that had been seized pre-petition but remained in the state court registry as of the petition date. ANIC argued that the debtors did not have a property interest in the PFDs as of the petition date. Relying upon *In re Jousma*, 5 ABR 423 (D. Alaska 1998), the court held that a judicial levy against the PFDs did not divest the debtors' of their interests until the seized funds are released, though subject to the lien. Because the debtors retain the ability to avoid judicial liens under § 522(f), the debtors retained the right to exempt the encumbered property. The fact that debtors had received 20% of the PFDs under Alaska's state exemption pre-petition did not preclude debtors from exempting the balance of the PFDs under 11 U.S.C. § 522(d)(5). As part of this analysis, the court concludes that Alaska is not an "opt-out" state, and Alaska debtors may elect either Alaska exemptions or those found in § 522(d).

D. *In re Hanrath*, Debtor omits numerous items from schedules and statements, including over $5,000 in cash, and refuses to account for $24,000. Debtor filed amended exemptions to correct exemptions. Trustee objected to amended exemptions as being filed in bad faith. Court held that pattern of creditors omissions and actions established bad faith sufficient to deny amendment.

VIII. Discharge

A. *In re Craig*, 579 F.3d 1040 (9th Cir. 2009) student loan partially discharged.

B. *In re Khalil*, 578 F.3d 1167 (9th Cir. 2009) Ninth Circuit affirms Bankruptcy Appellate Panel's decision at 379 B.R. 163 (9th Cir. B.A.P. 2007) holding that reckless indifference to accuracy can be probative of fraudulent intent to support

denial of discharge under 727(a)(4) where there is a pattern of behavior.

IX. Conversion/Dismissal of Cases

A. *In re Warren*, 568 F. 3d 1113.1116-17 (9th Cir 2009) Pro se debtors sought to dismiss Chapter 7 after Trustee discovered potential non-exempt assets, apparently $93,330 in a frozen bank account. Debtor tried to case dismissed for failure to obtain credit counseling, not eligible, failure to file pay advices. Debtor argued that § 521(a)(1) requires that the case "shall be automatically dismissed effective on the forty sixth day." Ninth Circuit held that "dismissal is not mandated where the debtor is seeking to take advantage of either § 109(h) or § 521(I) to the prejudice of his creditors." The Ninth Circuit recognized that "our interpretation of § 521is in conflict with the majority of bankruptcy and district courts to address this issue." *Id*. at 1119.

B. *In re Burke*, 8 ABR 510 (Bankr. D. Alaska 2008) Chapter 13 case dismissed as filed in bad faith where debtor's plan, schedules, and statements were "riddled with errors and inconsistencies," and failed to address substantial unpaid tax liabilities. Debtors also lacked ability to fund a Chapter 13 plan to pay rent or mortgage payments.

C. *In re Zaruba*, Case No. 07-0100 (DMD) (Bankr. D. Alaska 2007) Creditor sought dismissal or conversion of Chapter 11 for bad faith filing to stay collection efforts pending appeal without posting bond. Court confirmed that good faith, or the absence thereof, was measured by totality of circumstances. Debtor's operation of business and inability to satisfy judgment from non-business assets, together with continued prosecution of appeal while proposing a plan of reorganization, weighed in favor of good faith filing.

D. *In re Inn at Whittier, LLC*, 9 ABR 11 (Bankr. D. Alaska 2009) (DMD) Conversion of case from Chapter 11 to Chapter 7 does not impose automatic stay anew. Order of conversion differs from petition and does not re-trigger automatic stay.

X. Fraudulent Transfer

A. *Barstow v. Rains*, 9 ABR 61 (Bankr. D. Alaska)(DMD). Roughly six years before filing for bankruptcy debtor conveyed her 50% interest in a duplex to her mother for no consideration. The trustee filed a fraudulent conveyance action against the mother, who moved for summary judgment that the action was time barred by the applicable statute of limitations. The trustee argued that the debtor's continued possession of the premises as a tenant precluded the transfer from being perfected until the day before the petition was filed. Because Alaska law holds that continued possession after conveyance suggests "outstanding equities in third parties" and "imposes a 'duty upon the purchaser to make a reasonable investigation into the existence of a claim", a bona fide purchaser may

have concluded that no conveyance had occurred to commence the statute of limitations. As a result, the court denied the motion for summary judgment.

XI. Taxes

A. *In re Joye*, __F3rd___, 2009 WL 2568649 (9th Cir. 2009) adopts the reasoning of a Tenth Circuit B.A.P. decision In re Dixon, 218 B.R. 150 (10th Cir. B.A.P., 1998) but conflicts with a Fifth Circuit decision (In re Ripley, 926 F.2d 440 (5th Cir. 1991), holds that, in a chapter 13 case, a tax debt is "payable" when it is "capable of being paid". For individual tax debt in a chapter 13 case, this point in time would be when the tax period giving rise to the tax debt concludes (here, 12/31/00). The taxing authority had argued that it was a post-petition debt since it wasn't due until after the March, 2001 petition date.

XII. Negative Equity & Car Loans

A In re Penrod, 392 B.R. 835 (9th Cir. B.A.P. 2008) (on appeal to the 9th Cir., oral argument was held Nov. 5, 2009)(negative equity not purchase money). The loan in question involved rollover of a $7,000 unpaid balance on a prior vehicle loan ("negative equity" on that loan, a phrase that the judge referred to as an "oxymoron at war with itself" because equity in property usually refers to a positive amount of value in the property, in excess of the debt; the judge also noted that the amount is essentially another creditor's unsecured loan).

1. Contra

a. Ford Motor Co. v. Dale (In re Dale), __F.3d __, 2009 WL 2857998 (5th Cir. 2009)
b. In the Matter of Peaslee, __N.E. 2d__, 13 N.Y. 3d 75, 2009 WL 1766000 (N.Y. Ct. of Appeals 2009).
c. In re Graupner, 537 F.3d 1295 (11th Cir. 2008).
d. In re Price, 562 F.3d 618 (4th Cir. 2009).

XIII. Rule 2004 Examinations

A. *In re Adak Fisheries, LLC,* Case No. 09-00623 DMD (Bankr. D. Alaska 2009)
B. *In re Catholic Bishop of Northern Alaska,* Case No. 09-00623 (Bankr. D. Alaska 2009)
C. *In re Zaruba,* Case No. J-7-00100 DMD (Bankr. D. Alaska 2007)

Rule 2004 examinations sought by the creditors or UCC. *Zaruba* is the earliest case and permitted creditor to conduct Rule 2004 examination in advance of hearing on disclosure

statement. Court restricted the time for examination and matters of inquiry based on prior deposition of debtor.

In *Adak*, the secured creditor sought to examine current and past owners, as well as the landlord. In *CBNA*, the order notes a dispute whether the parties to be examined were controlled by the debtor, or true third parties. Rule 2004 examinations were designed generally to provide trustees expedited discovery of the debtor, its finances, and assets. Where a contested matter or adversary exists, the rules of discovery govern, and a Rule 2004 examination is inappropriate.

XIV. Chapter 11

A. Confirmation of Plan - *In re Zaruba,* Case No. J-7-00100 DMD (Bankr. D. Alaska 2007) Creditor objected to Chapter 11 as not feasible and gerrymandering classification to exclude judgment creditor pending appeal. Plan required creditor's consent on how to liquidate assets to pay its claims reserving the right to bring the matter before the court or appoint a liquidating trustee at a flat 3% commission, though restrictions on the order of liquidation would exist. Such requirements rendered the plan not feasible given the contentious history between debtor and creditor. Objection to separate classification of judgment creditor was overruled. Classification was proper where "it was proposed as a means of dealing with the estate's only actively disputed claim and in lieu of a state court supersedeas bond."

B. Derivative Standing - *In re Catholic Bishop of Northern Alaska*, 9 ABR 115 (DMD) UCC sought derivative authority to filed third party complaint. After a thorough case review, Court concluded that "a bankruptcy court may grant a creditors' committee derivative standing to pursue estate litigation, even absent consent of the debtor in possession." The Court proceeded to review standards previously adopted by various courts, noting that prior B.A.P. decisions required consideration whether the proposed litigation is "necessary and beneficial" or if the failure of the debtor to act was "unjustifiable." Debtor's refusal to investigate claims with a potential net benefit of $2 million or more was unjustified.

C. Retainer for Debtor's Counsel - *In re Lythgoe*, Case No. 07-658 HAR (Bankr. D. Alaska 2009). Debtor's counsel received retainer from debtor's company prior to petition date. Post-petition company's judgment creditor served writ of execution on debtor's counsel. Counsel had performed services far exceeding retainer by that time. Issue was raised in interim fee application, and creditor sought comfort order that it could litigate the issue in state court. Counsel obtained, at a minimum, a possessory security interest in the money which was senior to the execution. Court refused to issue comfort order, finding that judgment creditor's relief was in appeal rather than further litigation in state court.