This is your Release #13 (September 2013)

Bankruptcy Deskbook

Fourth Edition

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SPECIAL ALERT

Attention, subscribers: The following late-breaking developments occurred as this supplement was going to press.

On August 29, 2013, the U.S. Court of Appeals for the Ninth Circuit reversed the earlier panel decision in *Maney v. Kagenveama* (*In re Kagenveama*)[1] and joined the Sixth, Eighth, and Eleventh Circuits in holding that an above-median debtor with no projected disposable income is required to propose a five-year plan.[2] The Court reasoned:

> In *Lanning*, the Supreme Court [rejected] an interpretation of § 1325(b) that would require courts to calculate projected disposable income using a "mechanical approach" that depends only on a debtor's current monthly income during the six-month period preceding the bankruptcy filing date. The Court favored a "forward-looking" approach that takes into account known or nearly certain information about changes in a debtor's earning power during the plan period. The policy justification for looking to future earnings is that a failure to do so "would deny creditors payments that the debtor could easily make." In other words, the statute is meant to allow creditors to receive increased payments from debtors whose earnings happen to increase. *Lanning* involved *pre*-confirmation adjustments to plan payments, "to account for known or virtually certain changes" in a debtor's income. But the same logic persuades us that Congress intended § 1325(b)(1)(B) to ensure a plan duration that gives meaning to § 1329's modification procedure as a mechanism for *post*-confirmation adjustments for unforeseen increases in a debtor's income. That mechanism will achieve its purpose most effectively if the Chapter 13 plan has a minimum duration with which modification is possible.[3]

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1. *In re* Kagenveama, 541 F.3d 868 (9th Cir. 2008).
2. Danielson v. Flores (*In re* Flores), No. 11–55452, ___ F.3d ___, 2013 WL 4566428 (9th Cir. Aug. 29, 2013).
3. *Id.*, slip op. at 15–16 (internal cites omitted).

(continued on reverse)

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This thirteenth release to the new Fourth Edition of *Bankruptcy Deskbook* updates the treatise, incorporating the burgeoning case law brought about by BAPCPA. **This release includes over 300 new case citations to aide you in your research.** What follows is just a small sampling of the coverage in this supplement:

Nondischargeability for Defalcation. *See* § 9:8.4[B] for a discussion of the **Supreme Court's decision in *Bullock v. BankChampaign, N.A.***, resolving confusion in the cases by defining "defalcation" as used in 11 U.S.C. § 523(a)(4).

Jurisdiction. There is an apparent conflict of authority as to whether federal courts must address a *Rooker-Feldman* issue before examining **preclusion law** under the full faith and credit provisions of 28 U.S.C. § 1738. The Eighth Circuit Court of Appeals stated that a federal court **may decide a question of preclusion without first resolving a *Rooker-Feldman* issue when the two inquiries overlap**. *See **new*** § 2:1.2[B][1]. Most courts have concluded that the bankruptcy court has the **power to submit proposed findings of fact and conclusions of law with respect to claims for which they cannot issue final judgments** in core matters. *See **new*** § 2:1.2[C][1]. Courts are divided as to whether bankruptcy courts may exercise **supplemental jurisdiction** under 28 U.S.C. § 1367. The Seventh Circuit in *Townsquare Media, Inc. v. Brill* stated that the court can only **recommend a decision** to the district court. *See **new*** § 2:1.2[C][2]. The Southern District of New York court explained the factors to consider in considering **mandatory or discretionary withdrawal of the reference** in *Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Securities LLC*. *See* § 2:1.2[F]. Under the so-called ***Barton* doctrine**, any party wishing to commence an action in a state court forum against a trustee, for acts done in the trustee's official capacity and within the trustee's authority as an officer of the court, must obtain leave of the bankruptcy court. *See **new*** § 2:5 for more discussion of the Barton doctrine, including its origin, applications, and exceptions.

Involuntary Cases. Courts are divided on whether unstayed non-default state judgments on appeal are subject to **bona fide dispute** for purposes of § 303(b)(1). *See* § 3:5.1 for a description of the majority and minority views, with the better argument that these judgments **are not subject to bona fide dispute**. For discussion of the problem when an involuntary petition is filed in the name of a nonexistent creditor for the purpose of preventing a pending foreclosure sale, *see* § 3:5.2. One court determined that the **dismissal of the involuntary bankruptcy case** *nunc pro tunc* to the date of filing and the voiding of the filing *ab initio* were warranted, **citing collusion** between the parties.

Closing and Reopening. *See* § 3:8 for issues arising when a Chapter 11 debtor wishes to close its case prior to full administration—**to avoid paying U.S. trustee quarterly fees**—and then later seeks to reopen the case "for cause" to obtain a final decree.

Property of the Estate. S*ee* § 5:3 for a discussion of whether fraudulently transferred funds are property of the estate under § 541(a) and therefore protected by § 362(a)(3). Whether an **assignee or a servicer is a party in interest** with standing to seek relief from stay with respect to a mortgage note may depend on if it has a colorable claim to receive payment pursuant to the note. *See* § 5:9.1[A].

Turnover Provisions. Turnover actions are listed in title 28 as "core proceedings," accordingly as those in which those judges could enter final orders. But while after *Stern*, core status is not dispositive of the bankruptcy court's authority to enter final judgments in turnover actions, most courts have held that bankruptcy judges **can constitutionally enter final judgments in turnover actions**. Courts are divided as to whether the trustee may obtain the value of property that is no longer in the possession, custody or control of the debtor and are split on whether the trustee may obtain a recovery of the **value of property no longer in the debtor's possession**, custody, or control. *See* § 7:2.1.

Disposition of Property of the Estate. *See* § 7:3 for a discussion of the trustee's duty, before final distribution, **to dispose of any property in which an entity other than the estate has an interest, such as a lien**, that was not disposed of under any other section. The trustee has the ability to avoid liens specified in § 724(a), such as those that secure fines, penalties or forfeitures, or for multiple, exemplary or punitive damages to the extent not compensation for actual pecuniary loss.

Chapter 13. There is a split of authority as to whether the funds in the hands of the Chapter 13 trustee, after dismissal and before payment to the debtor, are **subject to garnishment or levy** by a creditor. *See* § 13:4.1[C]. Order entered in Chapter 13 case prior to conversion which reclassified a secured claim of junior mortgagee as unsecured **did not have the effect of avoiding the junior mortgage lien** but only of reclassifying the claim. *See* § 13:52.

FILING INSTRUCTIONS

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REMOVE OLD PAGES NUMBERED:	INSERT NEW PAGES NUMBERED:
VOLUME 1	**VOLUME 1**
❑ Title page to I-31	❑ Title page to I-31
VOLUME 2	**VOLUME 2**
❑ Title page to xxxv	❑ Title page to xxxv

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