

**MAR 28 2007**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

|    |                                    |   |                               |
|----|------------------------------------|---|-------------------------------|
| 6  | In re:                             | ) | BAP Nos. CC-06-1123-MoDK      |
|    |                                    | ) | CC-06-1242-MoDK               |
| 7  | JOHN F. MACK, D.D.S.,              | ) |                               |
|    |                                    | ) |                               |
| 8  |                                    | ) | Bk. No. RS 02-28995-DN        |
|    | Debtor.                            | ) |                               |
| 9  |                                    | ) | Adv. No. RS 06-1160-DN        |
|    | <u>HARRY W. HUMPHREYS, D.D.S.,</u> | ) |                               |
| 10 |                                    | ) |                               |
|    | Appellant,                         | ) |                               |
| 11 |                                    | ) |                               |
|    | v.                                 | ) | <b>MEMORANDUM<sup>1</sup></b> |
| 12 |                                    | ) |                               |
|    | EMC MORTGAGE CORPORATION,          | ) |                               |
| 13 |                                    | ) |                               |
|    | Appellee.                          | ) |                               |
| 14 |                                    | ) |                               |

Argued and Submitted on February 22, 2007  
at Pasadena, California

Filed - March 28, 2007

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable David N. Naugle, Bankruptcy Judge, Presiding.

Before: MONTALI, DUNN and KLEIN, Bankruptcy Judges.

<sup>1</sup>This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1           In these consolidated appeals, the creditor proponent of a  
2 confirmed liquidating chapter 11 plan sought to enforce a plan  
3 provision that purported to require a secured creditor to accept  
4 a replacement note and deed of trust that negatively impaired its  
5 rights. In connection with the plan confirmation, the plan  
6 proponent did not serve the secured creditor with the plan,  
7 disclosure statement, ballot, or notice of confirmation hearing.  
8 The secured creditor's successor in interest later rebuffed the  
9 plan proponent's request that it accept the replacement note and  
10 deed of trust, which precipitated the disputes now before us.

11           The plan proponent filed a motion for contempt and monetary  
12 sanctions, arguing that the successor in interest was violating  
13 the order confirming the liquidation plan. The successor in  
14 interest objected, noting that its predecessor in interest had  
15 not received sufficient notice of the plan and disclosure  
16 statement to satisfy due process concerns. The court denied the  
17 contempt motion and the plan proponent appealed (BAP No. CC-06-  
18 1123). We AFFIRM.

19           Subsequently, the plan proponent filed an adversary  
20 proceeding seeking an order compelling the successor in interest  
21 to "accept the replacement note and deed of trust upon the terms  
22 and conditions as set forth therein and pursuant to the [plan]."  
23 The successor in interest argued that the order denying the  
24 contempt motion precluded the plan proponent from prosecuting the  
25 adversary proceeding. The bankruptcy court agreed, and dismissed  
26 the adversary proceeding. The plan proponent appealed (BAP No.  
27 CC-06-1242) and we AFFIRM.

28

1 **I. FACTS**

2 On June 18, 2001, debtor John Mack ("Debtor") executed a  
3 promissory note ("Note") in favor of Pacific Horizon Bancorp,  
4 Inc. ("Pacific Horizon") in the amount of \$385,000.00 at an  
5 interest rate of 8.75 percent over a thirty-year term. The Note  
6 was secured by a deed of trust (the "Deed of Trust") covering  
7 certain real property located in Newport Beach, California (the  
8 "Property"). Pacific Horizon assigned its interests in the Note  
9 and Deed of Trust to Indymac Bank ("Indymac") prior to Debtor's  
10 petition date.

11 Debtor filed for relief under Chapter 11 on November 22,  
12 2002. He listed Indymac on the creditor mailing matrix. Indymac  
13 filed a proof of claim on January 13, 2003, using a different  
14 address. In addition, on April 1, 2003, Indymac filed a motion  
15 for relief from stay which identified its counsel's address.

16 On November 10, 2003, creditor and appellant Harry W.  
17 Humphreys, D.D.S. ("Proponent") filed a plan and disclosure  
18 statement and notice of hearing on approval of disclosure  
19 statement. Despite having at least three different addresses in  
20 the record for serving Indymac and even though the plan changed  
21 the terms of the Note and Deed of Trust,<sup>2</sup> Proponent did not serve

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22  
23 <sup>2</sup>Under Proponent's plan, Indymac would receive a replacement  
24 note and deed of trust that lowered the interest rate from 8.75  
25 percent to 5.25 percent with no points and costs. The Deed of  
26 Trust was modified significantly, although these modifications  
(including a deletion of an assignment of rents) were not  
discussed in the disclosure statement or plan.

27 Notwithstanding these substantial modifications to Indymac's  
28 Note and Deed of Trust, Proponent asserted at page 7, line 26 of  
the plan that Indymac's claim was not impaired. However, in the  
(continued...)

1 Indymac with the disclosure statement, plan or notice.

2 On December 19, 2003, the bankruptcy court entered an order  
3 approving Proponent's disclosure statement and fixing a time to  
4 accept or reject the plan. Proponent did not serve the order on  
5 Indymac or its counsel. Similarly, Proponent did not serve his  
6 notice of confirmation hearing on Indymac or its counsel.

7 The confirmation hearing was set for January 30, 2004.  
8 Proponent concedes that he failed to serve Indymac with the plan,  
9 disclosure statement, ballot, and notice of hearing.

10 Nevertheless, the unsecured creditors' committee did serve  
11 Indymac with a notice of non-opposition to the plan on January  
12 16, 2004. That non-opposition did not mention Indymac or its  
13 treatment under the plan. In addition, Debtor filed an  
14 opposition to the plan which noted that the plan would impair  
15 Indymac's rights. Debtor served his opposition on Indymac by

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16 <sup>2</sup>(...continued)  
17 previous paragraph (page 7, line 17) of the plan, Proponent  
18 acknowledged that Class 1 (the class containing Indymac) was  
19 impaired. Proponent filed a later version of his plan which  
20 contained the same modifications of Indymac's Note and Deed of  
21 Trust, and contained the identical contradictory language (at  
22 page 7, line 27 and page 8, line 8) regarding impairment.  
23 Neither version of the Plan was served on Indymac by Proponent.  
24 As a matter of law, the chapter 11 plan could not have been  
25 confirmed without a "cram-down" analysis focused on Indymac  
26 unless Indymac either actually accepted the plan or was  
27 unimpaired. 11 U.S.C. § 1129(a)(8) & (b).

28 The later version of the plan, which was confirmed,  
indicates that all other classes are unimpaired. If this is  
accurate, and Indymac did not cast an accepting vote as the sole  
impaired class, the plan confirmation requirements of section  
1129(a)(10) may not have been satisfied. Neither of the  
defective confirmation issues nor the possibility of a judicial  
estoppel based on the plan proponent's representation that  
Indymac was unimpaired have been presented to us on appeal,  
however, so we do not address them.

1 mail on January 28, 2004, only two days prior to the confirmation  
2 hearing and the entry of the order confirming the plan.  
3 Unsurprisingly, the order confirming the plan was not served on  
4 Indymac.

5       Following confirmation of the plan, title to the Property  
6 was transferred to Proponent, who then transferred ownership to  
7 Kenneth J. Catanzarite ("Catanzarite"), Proponent's counsel of  
8 record. In April, May and August 2004, Catanzarite sent letters  
9 to counsel for Indymac requesting that Indymac execute the  
10 replacement note and deed of trust.

11       On January 31, 2005, Indymac sold its interests in the Note  
12 and Deed of Trust to appellee EMC Mortgage Corporation ("EMC").  
13 EMC recorded a notice of sale on the Property, and Catanzarite  
14 sent a letter to EMC on April 22, 2005, requesting that it  
15 withdraw the notice of sale and execute the replacement note and  
16 deed of trust. After Catanzarite sent several other letters  
17 demanding execution of the replacement note and deed of trust,  
18 Proponent (not Catanzarite acting on his own behalf) filed a  
19 motion to hold EMC in contempt for disobeying the confirmation  
20 order. EMC opposed the motion and the bankruptcy court held a  
21 hearing on the contempt motion. The court entered an order  
22 denying the motion on March 22, 2006, and Proponent filed a  
23 timely notice of appeal on March 29, 2006.

24       Approximately one month later, Proponent filed an adversary  
25 proceeding seeking a judgment that "EMC accept the replacement  
26 note and deed of trust upon the terms and conditions as set forth  
27  
28

1 therein and pursuant to the [p]lan . . ."<sup>3</sup> EMC moved for  
2 dismissal of the adversary proceeding for failure to state a  
3 claim for which relief could be granted, inasmuch as the  
4 bankruptcy court had already determined that the plan was not  
5 binding on EMC because of lack of due process. Proponent opposed  
6 the motion to dismiss and filed an amended complaint adding a  
7 breach of contract claim. After a hearing, the bankruptcy court  
8 entered an order granting EMC's motion, dismissing with prejudice  
9 "the claims asserted by [Proponent] in the above referenced  
10 adversary proceeding." Proponent filed a timely notice of  
11 appeal.

## 12 II. ISSUES

13 1. Did the bankruptcy court err in denying Proponent's  
14 contempt motion and holding that Proponent's plan of liquidation  
15 was not binding on EMC because of lack of due process?

16 2. Did the bankruptcy court err in concluding that its  
17 denial of the contempt motion precluded Proponent from attempting  
18 to enforce the plan through the adversary proceeding?

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21 <sup>3</sup>At oral argument before this panel, counsel for Proponent  
22 stated that the bankruptcy court directed him to file the  
23 adversary proceeding. The record and transcripts do not support  
24 this contention. Rather, at the hearing on the contempt motion,  
25 the bankruptcy court cited Commercial W. Fin. Corp. v. Andrew (In  
26 re Commercial W. Fin. Corp.), 761 F.2d 1329 (9th Cir. 1985), for  
27 the proposition that an adversary proceeding is necessary to  
28 obtain a determination of the validity, extent and priority of  
liens in the context of plan confirmation. In other words, the  
court was questioning whether the plan itself could have modified  
the Note and Deed of Trust absent an adversary proceeding; the  
court did not say that an adversary proceeding was necessary to  
enforce the order confirming the plan.



1 While an order granting or denying a motion to impose civil  
2 contempt is generally interlocutory and not appealable if it is  
3 entered in the course of ongoing litigation,<sup>4</sup> where a contempt  
4 order disposes of the only matter before the court, the order is  
5 appealable as a final judgment. Shuffler v. Heritage Bank, 720  
6 F.2d 1141, 1145 (9th Cir. 1983) (order finding party in contempt  
7 of prior judgment is final); Hilao v. Estate of Marcos, 103 F.3d  
8 762, 764 (9th Cir. 1996) (post-judgment orders of contempt are  
9 final and appealable). In this case, the contempt motion was a  
10 self-contained and self-standing contested matter<sup>5</sup> filed in the  
11 main chapter 11 case; it was not a motion in an ongoing adversary  
12 proceeding. The contempt motion pertained to a purported  
13 violation of a prior final order, the confirmation order. The  
14 order denying the motion ended the only pending litigation  
15 between the parties on the merits and left nothing for the court  
16 to do. Consequently, it was final. Catlin v. United States, 324  
17 U.S. 229, 233 (1945) ("A 'final decision' generally is one which  
18 ends the litigation on the merits and leaves nothing for the  
19 court to do but execute the judgment.").

20 Similarly, the order dismissing the adversary proceeding is  
21 final. An order granting dismissal is final and appealable "if  
22 it (1) is a full adjudication of the issues, and (2) clearly

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23  
24 <sup>4</sup>See Goldblum v. Nat'l Broad. Corp., 584 F.2d 904, 906 n.2  
25 (9th Cir. 1978) ("The contempt citation, being civil in nature  
26 and having been issued against a party to the ongoing litigation,  
is unappealable."); Sims v. Falk, 877 F.2d 31, 31-32 (9th Cir.  
1989) (order denying pretrial contempt motion is not final).

27 <sup>5</sup>Contempt is sought by motion under Federal Rule of  
28 Bankruptcy Procedure 9020; that rule provides that such a motion  
is governed by Federal Rule of Bankruptcy Procedure 9014,  
entitled "Contested Matters."

1 evidences the judge's intention that it be the court's final act  
2 in the matter." National Distribution Agency v. Nationwide Mut.  
3 Ins. Co., 117 F.3d 432, 433 (9th Cir. 1997). The order  
4 dismissing the adversary proceeding indicates that the entire  
5 adversary proceeding was to be dismissed, even though Proponent  
6 amended his complaint to add a breach of contract cause of action  
7 after EMC filed its motion to dismiss. Consequently, the order  
8 of dismissal was final.

9 Both orders on appeal being final, we have jurisdiction  
10 under 28 U.S.C. § 158.

## 11 V. DISCUSSION

### 12 A. The Contempt Motion

13 A party cannot be held in contempt for failure to comply  
14 with a court order if that order is not enforceable against it.  
15 "The validity of a contempt adjudication is based on the  
16 legitimacy of the underlying order." Kirkland v. Legion Ins.  
17 Co., 343 F.3d 1135 (9th Cir. 2003) (reversing entry of contempt  
18 because underlying order was entered in error). Thus, the  
19 bankruptcy court correctly declined to hold EMC in contempt if  
20 the confirmation order and the plan were not enforceable against  
21 it.

22 A judgment may be void or unenforceable against a party if  
23 it was entered or obtained "in a manner inconsistent with due  
24 process of law." Owens-Corning Fiberglass Corp. v. Ctr.  
25 Wholesale, Inc. (In re Ctr. Wholesale, Inc.), 759 F.2d 1440, 1448  
26 (9th Cir. 1985). "If the notice is inadequate, then the order is  
27 void." GMAC Mortgage Corp. v. Salisbury (In re Loloe), 241 B.R.  
28 655, 661 (9th Cir. BAP 1999).

1 The Supreme Court identified the due process requirements  
2 for notice in Mullane v. Central Hanover Bank & Trust Co., 339  
3 U.S. 306, 314 (1950):

4 An elementary and fundamental requirement of due  
5 process in any proceeding which is to be accorded  
6 finality is notice reasonably calculated, under all the  
7 circumstances, to apprise interested parties of the  
8 pendency of the action and to afford them an  
9 opportunity to present their objections. The notice  
must be of such nature as reasonably to convey the  
required information . . . and it must afford a  
reasonable time for those interested to make their  
appearance.

10 See also Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (the  
11 "fundamental requirement of due process is the opportunity to be  
12 heard at a meaningful time and in a meaningful manner"); Memphis  
13 Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978) ("[t]he  
14 purpose of notice under the Due Process Clause is to apprise the  
15 affected individual of, and permit adequate preparation for, an  
16 impending 'hearing'").

17 "Parties are entitled to presume that the court will comply  
18 with applicable rules of procedure and that they will receive the  
19 notice that is usually required." Loloee, 241 B.R. at 662. The  
20 more a party deviates from the prescribed procedure, "the greater  
21 the quality and amount of notice needed to comply with due  
22 process." Id. Here, Proponent did not serve Indymac with the  
23 plan, disclosure statement, ballot, notice of hearing, or order  
24 confirming plan. Proponent admittedly did not comply with the  
25 statutory requirements for providing notice. See 11 U.S.C.  
26 § 1125(c) (requiring transmittal of disclosure statement to  
27 creditors); Fed. R. Bankr. P. 2002(b) (requiring 25 days' notice  
28 of, inter alia, deadlines for objecting to disclosure statement,

1 for objecting to plan, and for accepting or rejecting plan); Fed.  
2 R. Bankr. P. 3017(d) (requiring service of plan, disclosure  
3 statement, and notice of time for accepting or rejecting plan).

4 Proponent argues that because Indymac received an objection  
5 to the plan and a statement of non-opposition to the plan from  
6 other parties, Indymac must have known of the existence of the  
7 plan and, hence, received adequate notice to satisfy due process  
8 concerns. We disagree. The statement of non-opposition did not  
9 even refer to Indymac. The objection, which did mention Indymac,  
10 was served only two days prior to the hearing and after the  
11 deadline for accepting or rejecting the plan. Rule 2002 creates  
12 an expectation that a creditor will receive at least twenty-five  
13 days notice of a plan that affects its rights. Receipt of copies  
14 of other parties' responsive papers shortly before the  
15 confirmation hearing provides neither the quality nor the amount  
16 of notice needed to comply with due process. Loloee, 241 B.R. at  
17 662.

18 The Bankruptcy Rules and Bankruptcy Code provide specific  
19 procedures for proposing and obtaining confirmation of a plan.  
20 Creditors, even those that have knowledge of a bankruptcy case,  
21 have a "'right to assume' that [they] will receive all of the  
22 notices required by statute" and have "no duty to inquire about  
23 further court action." Reliable Elec. Co., Inc. v. Olson Const.  
24 Co., 726 F.2d 620, 622 (10th Cir. 1984) (creditor possessing  
25 actual knowledge of bankruptcy case did not receive adequate  
26 notice of confirmation hearing; consequently, confirmed plan was  
27 not binding on creditor); see also City of New York v. New York,  
28 N.H. & H. R.R., 344 U.S. 293, 297 (1953) ("even creditors who

1 have knowledge of a reorganization have a right to assume that  
2 the statutory 'reasonable notice' will be given to them before  
3 their claims are forever barred."); Fireman's Fund Mortgage Corp.  
4 v. Hobdy (In re Hobdy), 130 B.R. 318, 320-21 (9th Cir. BAP 1991)  
5 ("A creditor who is aware that a bankruptcy petition has been  
6 filed is not necessarily put on inquiry notice about every matter  
7 brought before the court . . . [and] should be able to assume  
8 that he will 'receive all of the notices required by statute  
9 before his claim is forever barred.'").

10 We agree with the Tenth Circuit's explanation of why  
11 constitutional due process concerns take precedence when a plan  
12 proponent is attempting to modify the property rights of a known  
13 creditor:

14 A fundamental right guaranteed by the Constitution is  
15 the opportunity to be heard when a property interest is  
16 at stake. Specifically, the (chapter 11)  
17 reorganization process depends upon all creditors and  
interested parties being properly notified of all vital  
steps in the proceeding so they may have the  
opportunity to protect their interests.

18 Reliable Elec., 726 F.2d at 623. Here, Indymac was not properly  
19 notified of the vital steps in the confirmation process or of  
20 Proponent's intent to restructure and replace the Note and Deed  
21 of Trust; it did not have sufficient opportunity to protect its  
22 interests. Therefore, like the creditor in Reliable Electric who  
23 was not served with a plan and disclosure statement affecting its  
24 claim, Indymac (and thus EMC) is not bound by the terms of the  
25 plan and confirmation order. Hobdy, 130 B.R. at 320-21 (creditor  
26 was not bound by chapter 13 plan that reduced its claim "without  
27 the requisite notice and opportunity to be heard"); see also  
28 Dalton Dev. Project v. Unsecured Creditors Comm. (In re Unioil),

1 948 F.2d 678, 683 (10th Cir. 1991) (partnership was not bound by  
2 debtor's confirmed reorganization plan, since partnership had not  
3 been given formal notice of confirmation hearing or bar date);  
4 In re Parkwood Realty Corp., 157 B.R. 687, 691 (Bankr. W.D. Wash.  
5 1993) (a creditor who had no notice of chapter 11 plan or the  
6 debtor's intention to reject its executory contract through a  
7 boilerplate clause in the plan was not bound by the terms of the  
8 plan, as the lack of notice violated due process).

9 Therefore, comparing the notice "that was actually given  
10 with the notice that would have been given if the rules of  
11 procedure had been followed" (Loloe, 241 B.R. at 662), we agree  
12 that Indymac did not receive notice reasonably calculated under  
13 all of the circumstances to apprise it that its Note and Deed of  
14 Trust were subject to modification by the plan. Id. at 661.

15 The Ninth Circuit's decision in Lawrence Tractor Co. v.  
16 Gregory (In re Gregory), 705 F.2d 1118 (9th Cir. 1983), does not  
17 require a different result. In Gregory, the unsecured creditor  
18 received a notice from the bankruptcy court that provided enough  
19 information to alert the creditor that it would not be paid  
20 anything under the debtor's chapter 13 plan. The creditor did  
21 not receive the plan, and the adequacy of the timing of the  
22 notice was not raised as an issue.

23 In rejecting the creditor's argument that it was denied due  
24 process, the Ninth Circuit noted that the Bankruptcy Code "does  
25 not require that the plan be sent to all creditors" although

26 [i]t would clearly be preferable if each creditor of a  
27 debtor who has initiated a Chapter 13 proceeding  
28 received, in addition to notice of the confirmation  
hearing, a copy of the debtor's plan and an explicit  
statement of the plan's proposal regarding its claim.

1        However, the Code does not require such detailed  
2        notice, and we hold that in the circumstances of this  
3        case, although the notice received by [the creditor]  
      was not unambiguous, it was not constitutionally  
      inadequate.

4        Id. at 1123. Therefore, the Ninth Circuit held that “[w]hen the  
5        holder of a large, unsecured claim such as Lawrence receives any  
6        notice from the bankruptcy court that its debtor has initiated  
7        bankruptcy proceedings, it is under constructive or inquiry  
8        notice that its claim may be affected, and it ignores the  
9        proceedings to which the notice refers at its peril. . . .” Id.

10       Here, unlike in Gregory’s chapter 13 case, the Bankruptcy  
11       Code and Rules mandated service of Proponent’s chapter 11 plan  
12       and disclosure statement on all creditors. And unlike the  
13       creditor in Gregory, Indymac did not receive a timely notice from  
14       the court referring to the treatment of its claim.

15       Several other pertinent differences affect the applicability  
16       of Gregory. First, the context is different because chapter 13,  
17       unlike chapter 11, does not require that impaired creditors  
18       either accept or reject the plan and does not provide a “cram-  
19       down” procedure for dealing with a rejecting class. Moreover,  
20       there is a fundamental difference between unsecured and secured  
21       creditors. Secured creditors are presumptively entitled to rely  
22       on their security, which is property for Fifth Amendment  
23       purposes.

24       The present circumstances implicate the Ninth Circuit’s  
25       directive that creditors should not be “unfairly punishe[d] . . .  
26       [by] holding them to the highest standards of diligence in a  
27       situation caused by negligence of a debtor [or, here, Proponent]”  
28       since this would “reward[] the debtor . . . for negligent

1 filing." Manufacturers Hanover v. Dewalt (In re Dewalt), 961  
2 F.2d 848, 850 (9th Cir. 1992).

3 Consequently, because Proponent's failure to provide  
4 reasonable notice of the plan and confirmation process  
5 constitutes a denial of due process to Indymac, the plan and  
6 confirmation order were not binding on Indymac or EMC. Id. at  
7 662. The bankruptcy court did not err in denying Proponent's  
8 contempt motion.<sup>6</sup>

9 B. The Adversary Proceeding

10 After the bankruptcy court denied the contempt motion,  
11 Proponent filed his complaint seeking a judicial declaration that  
12 "EMC is subject to the Confirmation Order and Plan and must  
13 accept the replacement note and deed of trust upon the terms and  
14 conditions as set forth therein and pursuant to the Plan." EMC  
15 argued that the bankruptcy court's ruling on the contempt motion  
16 barred the adversary proceeding on grounds of "res judicata."<sup>7</sup>

---

18 <sup>6</sup>Even if Indymac had received due process and was bound by  
19 the terms of the plan, it is unclear how it could have been held  
20 in contempt of an order that did not direct it to do anything.  
21 The order directs Debtor to execute whatever documents are  
22 necessary to effectuate the plan, but does not contain similar  
23 directives for Indymac or other creditors.

24 <sup>7</sup>The terms "res judicata" and "collateral estoppel" have  
25 been supplanted by the more accurate terms "claim preclusion" and  
26 "issue preclusion," respectively. These often-coupled, familiar  
27 phrases are more accurately expressed as issue preclusion and  
28 claim preclusion respectively. See Paine v. Griffin (In re  
Paine), 283 B.R. 33, 38 (9th Cir. BAP 2002) (noting that "issue  
preclusion" includes the doctrines of direct estoppel and  
collateral estoppel while "'claim preclusion' includes doctrines  
of merger and bar" and has "often been called 'res judicata' in a  
non-generic sense"), citing Migra v. Warren City School Dist. Bd.  
of Educ., 465 U.S. 75, 77 n.1 (1984). We use the accepted modern  
terminology.

1 The bankruptcy court agreed, and dismissed the adversary  
2 proceeding.

3 Both claim preclusion and issue preclusion apply in  
4 bankruptcy. Paine, 283 B.R. at 39, citing Brown v. Felsen, 442  
5 U.S. 127, 134-39 (1979), and Grogan v. Garner, 498 U.S. 279, 285  
6 (1991). We affirm on grounds of issue preclusion. In the  
7 course of resolving the contempt motion, the parties actually  
8 litigated, in circumstances that qualify for issue preclusion,  
9 the issue of whether Indymac received notice of the plan and of  
10 the confirmation hearing that sufficed for due process purposes.

11 Issue preclusion forecloses relitigation of matters that  
12 have already been decided in prior proceedings. Paine, 283 B.R.  
13 at 39; see also Harmon v. Kobrin (In re Harmon), 250 F.3d 1240,  
14 1245 (9th Cir. 2001), quoting Lucido v. Superior Court, 51 Cal.3d  
15 335, 272 Cal.Rptr. 767, 795 P.2d 1223, 1225 (1990); Christopher  
16 Klein, et al., Principles of Preclusion & Estoppel in Bankruptcy  
17 Cases, 79 Am. Bankr. L.J. 839, 852 (2005).

18 Since issue preclusion is an affirmative defense, the party  
19 asserting issue preclusion has the burden of establishing the  
20 following requirements:

21 First, the issue sought to be precluded from  
22 relitigation must be identical to that decided in a  
23 former proceeding. Second, this issue must have been  
24 actually litigated in the former proceeding. Third, it  
25 must have been necessarily decided in the former  
26 proceeding. Fourth, the decision in the former  
27 proceeding must be final and on the merits. Finally,  
28 the party against whom preclusion is sought must be the  
same as, or in privity with, the party to the former  
proceeding.

27 Harmon, 250 F.3d at 1225. All of these elements are present  
28 here.

1 First, the issue sought to precluded from relitigation is  
2 identical to that presented to the bankruptcy court in the  
3 context of the contempt motion: did the lack of formal notice of  
4 the plan and the confirmation process operate to deprive Indymac  
5 of due process, thereby overriding whatever binding effect the  
6 plan and confirmation order may have had on Indymac and its  
7 successors in interest, including EMC?

8 This issue was actually briefed and litigated by the parties  
9 in the context of the contempt motion. The bankruptcy court  
10 necessarily decided it in denying the contempt motion; the  
11 court's explanation of its ruling indicated that it believed the  
12 plan was not binding on EMC and did not present any other reason  
13 for the denial of the contempt motion. The parties in both  
14 matters were identical. Furthermore, as discussed in the  
15 jurisdiction section above, the order on the contempt motion is  
16 final. Therefore, the affirmative defense of issue preclusion  
17 applies and we affirm. Harmon, 250 F.3d at 1225.

18 Alternatively, we affirm on the grounds of claim preclusion.  
19 Claim preclusion requires (1) parties to be identical or in  
20 privity, (2) the existence of a judgment rendered by a court of  
21 competent jurisdiction, (3) a prior action concluded to final  
22 judgment on the merits, and (4) the same claim or causes of  
23 action to be involved in both matters. Paine, 283 B.R. at 39.  
24 The first three elements exist here: the parties are identical  
25 and a final order on the merits has been entered by a court of  
26 competent jurisdiction.

27 Proponent contends that the contempt motion and the  
28 adversary proceeding do not involve the same claim or cause of

1 action. We disagree. Under the Restatement's broad  
2 transactional test for determining whether the same "claim"  
3 existed in both the contempt motion and the adversary proceeding  
4 (see Restatement (Second) of Judgments § 24), both matters arise  
5 out of the same set of facts and ultimately seek the same relief,  
6 viz., enforcement of the confirmation order, and are thus the  
7 "same" claim for the purposes of claim preclusion. In both  
8 matters, Proponent sought to enforce the confirmation order and  
9 have EMC execute the replacement note and deed of trust. The  
10 material facts are the same in both actions. Proponent argues  
11 that the "facts" may be different because discovery may disclose  
12 that Indymac had actual or constructive notice of the plan and  
13 confirmation order. These "facts," however, could and should  
14 have been discovered in the context of the contested contempt  
15 matter. The full panoply of discovery in adversary proceedings  
16 is equally available to parties to contested matters. See Fed.  
17 R. Bankr. P. 9014(c).

18 We therefore conclude that the adversary proceeding is  
19 barred by claim preclusion and that the bankruptcy court did not  
20 err in dismissing it.<sup>8</sup>

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22 <sup>8</sup>Even if claim and issue preclusion did not apply, we could  
23 affirm simply because Proponent cannot establish an essential  
24 element of his claim for relief. We can affirm on any basis  
25 presented by the record, even if the bankruptcy court did not  
rely on that reason. Woolsey v. Edwards (In re Woolsey), 117  
B.R. 524, 530 (9th Cir. BAP 1990).

26 Proponent's adversary proceeding seeks to enforce the plan  
27 and confirmation order but neither the plan nor the confirmation  
28 order is enforceable against EMC on due process grounds. While  
Proponent argues that he wants to conduct additional discovery to  
determine Indymac's actual or constructive knowledge of the plan,  
(continued...)

1 **VI. CONCLUSION**

2 For the foregoing reasons, we AFFIRM the bankruptcy court's  
3 order denying the contempt motion and its order dismissing  
4 Proponent's adversary proceeding.  
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18 <sup>8</sup>(...continued)  
19 such evidence is irrelevant because the record shows that  
20 Proponent did not comply with basic statutory and rule  
21 requirements in notifying Indymac of a plan and confirmation  
22 order that substantially modified its property interests. Any  
actual or constructive notice given to Indymac by the opposition  
and non-opposition is simply insufficient to overcome the extreme  
lapse in formal notice. Loloee, 241 B.R. at 662.

23 Thus, the relief Proponent seeks in the adversary proceeding  
24 cannot be granted, and dismissal is appropriate under Rule 7012  
(incorporating Federal Rule of Civil Procedure 12(b)) for failure  
25 to state a claim upon which relief can be granted. See Pyle v.  
Hatley, 239 F.Supp.2d 970, 982 (C.D. Cal. 2002) ("A trial court  
26 may act on its own initiative to note the inadequacy of a  
complaint and dismiss it for failure to state a claim . . .' A  
27 complaint should be dismissed when it is clear the plaintiff can  
prove no set of facts in support of the claim that would entitle  
28 him to relief."), quoting Sparling v. Hoffman Constr. Co., 864  
F.2d 635, 638 (9th Cir. 1988) (quoting other cases).