OREGON DEBTOR-CREDITOR

Newsletter

Volume XXIV, Number 3 Debtor-Creditor Section, Oregon State Bar Fall 2005

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COMMENTS FROM THE CHAIR

By Peter C. McKittrick
Farleigh Witt

Being Chair of the Section has its advantages. I get to work with a great group of folks on the Executive Committee. I get to write a column about whatever I want, and it doesn't need to be deep or scholarly. So excuse me if I babble.

This is a dynamic time of year. For families, the kids are back in school. Soccer, football and sundry other sports are in full swing. For outdoor enthusiasts, the leaves are changing, the air is cool and Indian summer has arrived (and departed). For sports fans, football, baseball and basketball are all in play.

For Debtor-Creditor lawyers, the end of an era has arrived and our world has changed. The statistics are staggering. In the two-week period before the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) became effective on October 17, approximately 5,800 cases were filed in Portland alone. Another 3,500 cases were filed in Eugene. That is the number of cases normally filed in a few months, not a couple of weeks. We all owe huge thanks to the clerks' offices in both divisions for their hard work in processing the crush of cases, while at the same time gearing up for the new BAPCPA requirements. Consumer debtors' lawyers and their staff are breathing a sigh of relief, much like CPAs on April 16th. (One informal source tells me that only three new cases were filed in Portland in the week after October 17th.) Trustees are panicking at the thought of handling as many as 600 cases apiece in the month of November. The US Trustee's office is trying to figure out the logistics of seven trustees holding hearings in Portland on the same day in November. No one predicted this onslaught of filings. We knew there would be a spike; we just didn't expect the tidal wave now rolling through our system. I am sure there will be some casualties, but we will survive and tell our grandchildren about the great storm of 2005.

The Section continues to work to help you through the transition. Our annual meeting and CLE devoted to BAPCPA was an unmitigated success. The program was exceptionally well planned, and the speakers were top notch. The planning committee of Judge Perris, Susan Ford, Miles Monson and Caroline Cantrell spent countless hours to put together the program and arrange for the facilities.

This issue of the Newsletter presents some of the BAPCPA issues addressed at our annual meeting and CLE. The Consumer Law Subcommittee will continue to

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provide a forum for discussion of issues as they arise.

But BAPCPA is not the only thing on my mind. The Section's Pro Bono Subcommittee is a unique and powerful program that needs our support. It is planning a session in early 2006 to train creditors' attorneys in counseling debtors about chapter 7 under the new law. Experienced debtors' counsel will actually file the cases – all you need to do is meet the client and provide the initial bankruptcy advice. So please, continue to volunteer. The Section's Pro Bono Clinic had plans of expanding to a Gresham site and we still have our eyes on a Southern Oregon program. The need for these programs is just as great now as it was before October 17th.

I would like also to recognize another stellar contribution to our Section. Gary Blacklidge has served as Chair of the Legislative Subcommittee for many years. This committee's work is not only critical to each of us, but is extremely time-consuming during peak legislative seasons. This is Gary's last year as Chair. He has performed his role effectively and without seeking attention for his efforts. On behalf of the Section, I would like to thank Gary for all his years of service.

I have enjoyed working with the Executive Committee this year, and I believe we have accomplished a great deal. Tom Stilley is poised to carry us into the next year as your new chair. I know he will do a fine job.

In a year or so, all the change we are experiencing will be history. We will probably look back and realize not that much has changed. People still will file bankruptcy. Credit will still be too easy to obtain. Businesses will still collapse under the weight of economic change and poor management. Some of the uncertainties in the law will have been settled by the courts. Creative lawyers will have found loopholes in the new provisions.

Thanks to all for a great year, and on behalf of the Committee may you all have a wonderful holiday season.

WOMBATS

WOMBATS meetings in 2006 will focus on the recent amendments to the Bankruptcy Code. Gail Geiger, Office of the US Trustee, will make a presentation on means testing at the January meeting. Additional topics will be announced via email. If you have ideas for topics or would like to add your name to the WOMBATS email list, please contact *lwalker@chbh.com*.

Tentative meeting dates in 2006:

January 18

March 15

May 17

September 13

November 15.

Editor's Note:

The first five articles in this issue address aspects of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Throughout these articles the acronym BAPCPA refers to this Act, most provisions of which were effective October 17, 2005. Provisions of the Bankruptcy Code as amended by BAPCPA are highlighted in bold type.

Debtor-Creditor Newsletter

The Debtor-Creditor Newsletter is published three times a year by the Debtor-Creditor Section, Oregon State Bar, P.O. Box 1689, Lake Oswego, OR 97035.

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The purpose of this publication is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities.

WHAT BANKRUPTCY ATTORNEYS NEED TO KNOW ABOUT THE NEW BANKRUPTCY RULES & FORMS

By Teresa H. Pearson
Miller Nash LLP

INTRODUCTION

Along with new bankruptcy code provisions come new bankruptcy rules and forms. After the adoption of BAPCPA, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States began to formulate these new rules and forms. The Judicial Conference of the United States has approved new official bankruptcy forms, which must be used (with appropriate modifications as needed). **FRBP 9009**. Under the Rules Enabling Act, 28 USC §§2071-2077, it usually takes three years formally to adopt new bankruptcy rules. Because there was insufficient time to enact new bankruptcy rules before BAPCPA went into effect, the Rules Committee has promulgated proposed interim rules, with the idea that the bankruptcy courts can adopt the interim rules by general order, and that those interim rules will apply until such time as the new rules can be officially enacted.

In **General Order 05-1**, the Oregon bankruptcy court adopted the national interim rules, and made substantial changes to its Local Bankruptcy Rules. Some of the new rules in General Order 05-1 apply to cases filed before October 17, 2005, some apply to cases filed after that date, and some apply to all cases. In addition to rule changes, the Oregon bankruptcy court made a number of changes to its Local Bankruptcy Forms to accommodate BAPCPA. General Order 05-1 and the new LBFs can be found on the Oregon bankruptcy court's website at *www.orb.uscourts.gov*.

The Rules Committee took a minimalist approach, making changes to the rules and forms only where absolutely necessary to comply with BAPCPA. Professor Jeffrey W. Morris, the Reporter for the Advisory Committee on Bankruptcy Rules, has written a helpful memorandum that summarizes by category the changes to the new rules. This memorandum, dated August 5, 2005, is published at *www.uscourts.gov/rules/BK_Reporter_Memo.pdf*. Clean and redline versions of the rules that have changed are also available at *www.uscourts.gov/rules*. Notwithstanding this minimalist approach, there are significant changes of which practitioners should be aware. Some highlights from the new rules follow.

SIGNIFICANT CHANGES TO CONSUMER RULES

Under BAPCPA, it is now possible for a debtor to file a chapter 7 bankruptcy case in forma pauperis, without payment of a filing fee. **FRBP 1006** was amended to provide a procedure for obtaining fee waivers. **New Official Form 3B** is the application a debtor can use to ask to waive the filing fee.

A number of rules relate to the requirement that the debtor provide additional information under BAPCPA. **FRBP 1007** has been amended to require debtors to file certain financial records, a statement of current monthly income, and documents relating to credit counseling required by BAPCPA with the court. However, the amendments to **LBR 1007** clarify that, in Oregon, some of these documents must only be served on the US Trustee and the case trustee, and **not** filed with the court. **New Official Form 22** is the debtor's statement of current monthly income (the "means test" form), and **new Official Form 23** is the debtor's certification of completion of its postpetition credit counseling requirement. There is a new **LBF 525** that debtors in chapter 12 and 13 cases must use to certify the status of payments on their domestic support obligations. Amendments to **FRBP 4002** set forth the rules for a creditor's request for copies of tax returns from the debtor, and **General Order 05-1** contains further rules on the procedures for such requests. Amendments to **FRBP 4008** relate to the debtor's requirement to provide additional information before a reaffirmation agreement can be approved.

Several new rules implement the BAPCPA changes relating to dismissal and conversion of cases, and withholding the debtor's discharge until specific requirements have been met. **FRBP 1017** has been amended to clarify the rules for dismissal or conversion of a chapter 7 case for abuse under §707(b). **FRBP 4004** provides that the clerk cannot issue a discharge if the debtor has not filed its certificate of completion of its postpetition credit counseling requirement, or if a reaffirmation agreement presumed to be an undue hardship is pending.

Additional changes to the rules require the clerk to provide new notices. **FRBP 4006** now requires the clerk to notify parties in interest if the case is closed without entry of the discharge. **New FRBP 5008** requires the clerk to notify creditors when the presumption of abuse has arisen under §707(b), or if the debtor has failed to file information from which the presumption of abuse can be discerned within 10 days after the petition is filed. Amendments to **FRBP 2002** require the clerk to give notice about the presumption of abuse to the debtor, all creditors, and indenture trustees.

Oregon now has new form plans for chapters 12 and 13. **LBF 1200.5** and **1300.5**. One very significant change under the new form plans is that the debtor may propose treatment that is allowed only if a creditor consents, and the creditor's failure to object to the proposed plan will be deemed to be consent.

SIGNIFICANT CHANGES TO BUSINESS RULES

BAPCPA imposes a number of new requirements on small business debtors in chapter 11, but it also allows those small business debtors to take advantage of a streamlined plan process. Amendments to **FRBP 1020** set forth the procedures for identifying the debtor as a small business debtor, and the mechanisms for resolving disputes about characterization of the debtor. **Official Form 1** (the petition) has been amended to allow the chapter 11 debtor to check a box if it designates itself a small business debtor. **FRBP 9006** has been amended to recognize BAPCPA's restriction on the bankruptcy court's ability to extend the time for a small business debtor to file its schedules and statements of affairs. The bankruptcy court may conditionally approve a disclosure statement in a small business case pursuant to amendments to F**RBP 3017.1**. **FRBP 3016** has been amended to recognize that a plan may provide adequate information to replace a disclosure statement altogether in a small business case. Amendments to **FRBP 2002**, however, require 25 days notice to parties in interest before the court can make a final determination that a small business debtor's plan does not require a separate disclosure statement.

Changes to BAPCPA make it easier for chapter 11 debtors seeking approval of prepackaged plans. Amendments to **FRBP 2003(a)** implement new **§341(e)**, pursuant to which a party in interest can ask that the §341 meeting of creditors not occur in the case of a debtor who is seeking approval of a prepackaged bankruptcy plan.

Under BAPCPA, individual debtors in chapter 11 may modify their plans after confirmation. Amendments to **FRBP 3019** provide procedures for such modifications.

SIGNIFICANT CHANGES TO GENERALLY APPLICABLE RULES

BAPCPA amended **§506** to require that personal property collateral be valued at replacement value. **Official Form 6** has been modified so that the schedules no longer require the debtor to list assets at market value. The schedules no longer specify what type of valuation the debtor must use in its schedules.

BAPCPA amended **§548** to allow the trustee to go back two years to recover fraudulent transfers, rather than just one year, and to go back ten years to recover a debtor's transfers to a self-settled asset protection trust. **Official Form 7** has been modified so that question 10 on the statement of financial affairs requires debtor to disclose all transfers within 2 years before the petition date, and all transfers to a self-settled asset protection trust within 10 years before the petition date.

A number of changes to the rules are intended to protect the rights of foreign creditors. BAPCPA provides that any notice or procedure shall provide creditors with foreign addresses with such additional time as is reasonable to respond or to file a proof of claim. **§1514(d)**. Amendments to **FRBP 2002** permit the court (sua sponte or on motion of a party in interest) to enlarge the time for foreign creditors to respond to notices or to file claims, and/or to require notices to go by additional means (e.g., email). Amendments to **FRBP 3002** provide that if notice of the deadline to file proof of claim was mailed to a creditor at a foreign address, the creditor can move for a 60-day extension. **Official Form 9** (notice of commencement of case) has been modified to notify foreign creditors of these rights.

BAPCPA provides that a trustee can sell personally identifiable information only if it is consistent with debtor's stated privacy policy or if the trustee obtains court approval after a hearing at which a consumer privacy ombudsman can appear and be heard. **§363(b)(1)**. Amendments to **FRBP 2002(c)(1)** require notice of a sale or lease under §363 of personally identifiable information to state whether the sale is consistent with a policy prohibiting the transfer of that information. Amendments to **FRBP 6004** require that a motion under §362 to sell or lease personally identifiable information must include a request for a consumer privacy ombudsman, and set forth procedures for appointment of the consumer privacy ombudsman.

Direct appeals from the bankruptcy court to the circuit court of appeals are now allowed under BAPCPA. Amendments to **FRBP 8001** set forth the procedure for obtaining a certification from the bankruptcy court to allow the direct appeal. **FRBP 8003** is amended to clarify the effect of certification when leave to appeal is required under 28 USC §158(a) before the appeal may proceed.

NEW RULES FOR HEALTH CARE BANKRUPTCY CASES

BAPCPA requires appointment of a patient care ombudsman to look out for the interests of patients in health care bankruptcy cases. **New FRBP 1021** sets forth procedures for identifying the debtor as a health care business, and amendments to **FRBP 2007.2** set forth procedures for appointment of the patient care ombudsman.

Official Form 1 (the petition) now allows the debtor to check a box if it designates itself a health care business. **New FRBP 2015.1** provides rules implementing the ombudsman's duty to report on quality of patient care. **New FRBP 2015.2** provides the procedures the debtor must follow to give notice before transferring patients when closing a health care facility. **New FRBP 6011** describes the procedures a trustee must follow to give notice (by publication and mail) before disposing of patient records.

CONCLUSION

Extensive changes to the bankruptcy code in BAPCPA have led to significant changes in both federal and local bankruptcy rules and forms. In addition to the changes described above, there are other changes that will undoubtedly affect the practice of bankruptcy law in Oregon. A careful reading of all the new rules and forms is essential!

NEW OBLIGATIONS OF DEBTOR'S COUNSEL

By Richard J. Parker
Parker, Bush & Lane, PC

Among the many negative themes running through BAPCPA are additional duties for all the players, whether they be debtors, attorneys, judges, clerks or creditors. This article addresses some of these new duties.

DEBT RELIEF AGENCIES AND ASSISTED PERSONS

1. Restrictions – §526

Under BAPCPA provisions, any attorney can be considered a "debt relief agency" (hereafter DRA). A DRA as defined by **§101(12A)** is "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110." There are several exceptions to the rule, but these are
of little help to the typical attorney in private practice. **Section 101(3)** defines "assisted person" as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000."

This definition can sweep into the pot not only debtors' counsel, but an attorney who represents a non-institutional creditor, a domestic relations attorney, and indeed, many attorneys engaged in civil litigation. For example, a domestic relations attorney (who is being paid) who discusses options for his or her ("assisted person") client before, during or after a dissolution proceeding, probably is a DRA.

Once an attorney is deemed to be a DRA, numerous restrictions and duties are imposed upon that attorney by **new §526**, and by reference therein, the duties under **§§521, 527 and 528**. The statutes are too lengthy to be quoted here, but lawyers should review all of them carefully to make sure they do not run afoul of the provisions. (Some provisions are of questionable constitutionality. For example, how can it be justified that the advice we give to persons with more than $150,000 in assets is different than the advice given to those with less in assets? See §101(3).)

As an example, **§526(a)(4)**, depending on how you read it, may prohibit not only giving advice to incur more debt, but also advising payment of an attorney under this title. As a practical matter this could affect the ability of an attorney to accept credit cards for payment in many types of cases; could prevent the attorney from advising the "assisted person" to obtain a loan from family or friends to pay for a bankruptcy; and could prohibit an attorney from responding if asked whether the assisted person can borrow money to pay for the bankruptcy. It may go so far as to require the attorney to ask the assisted person about the source of funds to pay for bankruptcy. Query: is a prohibition of advice to a client to get a good car before going into a 5-year repayment plan in keeping with our ethical obligations to our clients?

2. Disclosures – §527

While **§526** restricts what a DRA may say to an "assisted person," **§527** mandates certain actions and disclosures. These include delivery of a written notice (required by **§342(b)(1)**) and a written notice advising the assisted person he or she does not need an attorney to file bankruptcy, as well as many other lengthy recitals.

3. DRA Requirements – §528

Section 528 provides that within 5 days of the first date on which the DRA provides services to an "assisted person," a written contract must be executed. As a practical matter, it will probably be necessary to have both a written consultation agreement and a written fee agreement for the bankruptcy case. Another controversial provision of **§528** requires that all advertising by a DRA must include the following statement or something substantially similar:

WE ARE A DEBT RELIEF AGENCY. WE HELP PEOPLE FILE FOR BANKRUPTCY RELIEF UNDER THE BANKRUPTCY CODE.

As noted, it is not clear who is a DRA, but if you are one you must comply. There is no automatic sanction for a failure to do so, but the US Trustee might ask for injunctive relief or seek other remedies, and **§526** permits an "assisted person" to seek actual damages and attorneys fees resulting from any failure to comply with **§527** or **§528**.

4. Other New Duties of Counsel for All Debtors

In addition to the restrictions, disclosures and requirements listed above for a DRA representing an assisted person, an attorney for any debtor must now collect a much larger array of documents. The sections setting out these new requirements include, but are not limited to, the following:

§342(c)(2)(A) – communications received from creditors within 90 days

§521(b)(1) – copy of credit counseling completion certificate

§521(e)(2)(A) – most recent tax return to trustee

§701(b)(2)(A)(i) – the means test requires six months of income records; *see* §101(10A)(definition of current monthly income) and §521(a)(1)(B)(ii)(debtor's duties)

§1308 – four years of tax returns

ATTORNEY CERTIFICATIONS – §§524(k) AND 707(b)

Given the new certification requirements under **§524** reaffirmation agreements, it is unlikely that many attorneys will sign reaffirmation agreements.

New language in **§707(b)(4)(C)** states that the signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has performed a reasonable investigation into the circumstances that gave rise to the petition, pleading or written motion – and also that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect. One school of thought is that this is merely a restatement of FRCP 11 (FRBP 9011). The other school of thought is that this is a radical departure from prior practice in that it might be read to require the attorney for a debtor to independently verify the contents of the Schedules and Statement of Financial Affairs. Unresolved issues include: what is a reasonable investigation? What is meant by "the circumstances that gave rise to the petition?" What is meant by inquiry, and is inquiry different from "a reasonable investigation?"

Finally, **§707(b)(4)(B)** provides that in cases in which the trustee files and prevails on a motion to convert or dismiss under the section, the court may impose attorney fess and costs or other sanctions (civil penalties) against an attorney who filed the case.

In reviewing this section, it is important to remember that all of it refers to rule **FRBP 9011**. That rule provides for notice and a 21-day opportunity to withdraw or correct the questioned document before sanctions may be imposed.

A FEW PRACTICAL CONSIDERATIONS FOR CREDITORS UNDER BAPCPA

By Richard T. Anderson, Jr.
Anderson & Monson, PC

INTRODUCTION

First – it cannot be said enough – read the actual code sections carefully and don't rely upon what others have said or written about them. Many of the amendments are far from clear, and the "last word" is far from written. Second, read new Bankruptcy District of Oregon **General Order 05-1**, and know it and the new and revised forms inside and out.

AUTOMATIC STAY "CONFUSION TRAPS"

You might think a law providing that the automatic stay goes away on its own without your creditor-client having to file a motion and obtain an order would be a good thing. Alas, not necessarily so. For example:

1. Be careful when relying upon the automatic stay termination provisions of **§§362(h)(1) and (2)** (30-day rules on the statement of intent) and **§521(a)(6)** (45-day rule for failure to "act" with respect to purchase money security interest in personal property). Whether the stay has actually terminated will depend upon whether the factual predicates have been satisfied – and compliance with factual predicates is frequently less than certain (no matter how certain your client may be). Also be aware that if the trustee files a motion to continue the stay pursuant to **§362(h)(2)**, **General Order 05-1 paragraph 25.D** provides that the stay will continue as to the property until the court rules on the motion.

2. Automatic stay termination because of multiple bankruptcy filings sounds good, but look carefully at **§362(c)(3)** (stay terminates on 30th day after filing of second case if earlier case dismissed within previous year – "two strikes") and **§362(c)(4)** (no stay on third case if two or more cases were pending within previous year – "three strikes"). You need to know whether any of the previous cases were dismissed under **§707(b)** (which dismissals don't qualify as strikes). And consider how the

statute dispenses with the stay. Under **§362(c)(3)(A)**, which applies when there has been one previous qualifying dismissed case, the stay may terminate only with "respect to the debtor on the 30th day after the filing of the later case." Does this mean the stay has not terminated with respect to collateral which is still property of the estate? This interpretation would require the creditor to obtain an order terminating the stay to recover and dispose of collateral. *See* para. 4 below.

3. **New §362(b)(21)** provides a petition does not operate as a stay under §362(a) of any act to enforce any lien against or security interest in real property: (1) if the debtor is ineligible under **§109(g)** to be a debtor; or (2) if the case was filed in violation of a bankruptcy court order in a prior case prohibiting the debtor from being a debtor in another case under the Bankruptcy Code. Unfortunately, these issues are again susceptible to interpretation. For instance, was the prior case actually dismissed because of the debtor's wilful failure to abide by orders of the court? Uncertainty can be reduced if the dismissal order in the first case provides that the dismissal is on §109(g) grounds.

4. Creditors who want assurance the stay has terminated under **§362(c)** may file a motion under **§362(j)**, which provides: "On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated." **General Order 05-1 paragraph 25.C** requires the moving party to use **LBF 720.95**. LBF 720.95 only applies, however, in the multiple case **§362(c)** scenario. And, when there has only been one previously dismissed case, the language in the motion and order provides assurance the stay has terminated only "**with respect to the debtor**" (emphasis in LBF 720.95). Creditors who want assurance that the stay has terminated with respect to property of the estate should probably file a conventional motion for relief from stay.

PROBLEM AREAS FOR 910-DAY AND 1-YEAR PROPERTY UNDER §1325(a)

The new last paragraph of **§1325(a)** was generally thought to shield purchase money car lenders from cram-down if the purchase money secured debt was incurred within 910 days prior to bankruptcy, and other purchase money secured creditors if the debt was incurred within one year of bankruptcy. New **§1326(a)(1)(C)** also requires the debtor (unless the court orders otherwise) to make preconfirmation adequate protection payments directly to the creditor. In Oregon these rights can be impaired if your client is asleep at the switch.

1. The new Oregon form of chapter 13 plan (**LBF 1300.05**), paragraph 2(b)(2), allows debtors to propose a cram-down of purchase money secured debt which is otherwise statutorily protected from cram-down under §1325(a). The debtor merely proposes cram-down in paragraph 2(b)(2) of the plan, and if the creditor does not file a written objection, the creditor is deemed to have consented to the proposed treatment and cram-down is allowed. LBF 1300.05 is actually more than a chapter 13 plan, for as disclosed in the caption of the document, it is also a Motion to Value Collateral, Motion to Avoid Liens and a "Secured Claim Amount Limited with Creditor Consent." The Western District of Washington form plan contains a similar section wherein the debtor can propose a cram-down notwithstanding §1325(a), but cram-down can occur only if the creditor files a written consent. (*See* new Western District of Washington form Chapter 13 plan, paragraph 3.C.(3)). The lesson here is to advise your clients that §1325(a) does not automatically protect them from cram-down in the District of Oregon.

2. **New §1326(a)(1)** requires debtors to make pre-confirmation adequate protection payments on certain purchase money secured debt directly to creditors. The statute applies "unless the court orders otherwise." In Oregon, **General Order 05-1 paragraph 24.B** requires adequate protection payments be made to the chapter 13 trustee, who then disburses the payment to the creditor. The trustee is required to disburse adequate protection payments in the normal disbursement cycle, but only if funds are available and only if "the creditor has filed a proper secured proof of claim." Thus, as a general practice, creditors should file a secured proof of claim immediately after receiving notice of the petition if they want their adequate protection payments.

NB: The trustee needs to see the critical lien and perfection documents in your proof of claim in order to disburse. Pursuant to **LBR 3001-A.4**, no more than five pages of documents attached to the proof of claim will be scanned and only the proof of claim and the first five pages of attachments are made part of the court's official record. Make sure your lien and perfection documents are in the first five pages of attachments!

DO YOU NEED TO OBJECT UNDER §1325(b)(1)?

Under **§1325(b)(1)**, if the trustee or an unsecured creditor objects to confirmation of a chapter 13 plan, the plan cannot be confirmed unless "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan." The applicable commitment period is

three years for the "below the median" debtor, and five years for the "above the median" debtor. **§1325(b)(4)**. While many debtors' attorneys tell me their plans will run for the applicable period no matter what, I have concluded this section is important, for I think it acts as the trigger requiring payments to be made for the applicable commitment period. It also mandates that all projected disposable income be paid to "unsecured creditors"– which I suspect some will argue does not include the debtor's attorney's fees. Without this objection, debtors may have room to argue that a plan may be completed before the applicable commitment period.

"FAST TRACK" IN EUGENE

Make sure your clients know there is a much shorter time period to object to confirmation of chapter 13 plans in Eugene. **General Order 05-1 paragraph 23.B** requires any party objecting to confirmation to deliver a written objection to the trustee, debtor and debtors' counsel (but not to the court or other interested parties) not less than five days before the first date set for the meeting of creditors; or to attend the meeting of creditors and advise the trustee and the debtor of the objection on the record. If the party still objects to confirmation after the meeting of creditors, then within eight days of the first meeting date, that party must file and serve a written objection to confirmation. Evidence on the objection may be taken at the first confirmation hearing date. For cases filed before October 17, 2005, look out for the "Fast Track" orders.

REAFFIRMATION AGREEMENTS

At the last minute, the US Court's Administrative Office Director's F**orm B240** (Reaffirmation Agreement) was issued. It can be found at *http://www.uscourts.gov/rules/revised_forms.html*. This ten-page document was prepared to comply with the new reaffirmation requirements under **§524**. **General Order 05-1 paragraph 29.A** adopts this form as **LBF 718.5**, but as of October 12, 2005, the form was awaiting publication to the court's website. In the District of Oregon, a reaffirmation cover sheet is also required. For cases filed before October 17, 2005 the coversheet is **LBF 718**; for cases filed on and after October 17, 2005, the coversheet is **LBF 718.05**.

EXCEPTIONS AND IDIOSYNCRACIES OF THE AUTOMATIC STAY UNDER BAPCPA

By Sally Leisure

INTRODUCTION

Last year I wrote two articles for the *Debtor-Creditor Newsletter* discussing exceptions to the automatic stay. The BAPCPA, which generally became effective on October 17, 2005, clarifies some existing exceptions and ads idiosyncracies. Under §362(a), creditors are stayed from attempting to collect prepetition liabilities from the bankruptcy debtor. Section 362(b) lists certain actions that are excepted from the effect of the stay. The BAPCPA adds further hurdles for debtors to overcome before the stay will protect them. This article lists new exceptions and new rules limiting the stay.

EXCEPTIONS

In domestic relations cases, actions to determine property rights between a debtor and spouse are stayed, but actions to determine paternity and support are excepted from the stay. The BAPCPA seeks to clarify this rule by itemizing the excepted actions and specifying means of enforcement. Actions:

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

are not stayed. **§362(b)(2)(A)**.

Also not stayed are: "the collection of a domestic support obligation from property that is not property of the estate," **§362(b)(2)(B)**; "the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administative order or a statute," **§362(b)(2)(C)**; and the following actions taken to enforce payment of support: "the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license," **§362(b)(2)(D)**; "the reporting of overdue support owed by a parent to any consumer reporting agency," **§362(b)(2)(E)**; and "the interception of a tax refund," **§362(b)(2)(F)**.

The amendments expand the scope of enforceable postpetition tax liens to include those arising from "a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit." **§362(b)(18)**. Absent a challenge to the underlying tax liability, a governmental unit can set off a prepetition tax refund against a prepetition liability. **§362(b)(26)**. The automatic stay formerly stayed all proceedings concerning the debtor before the US Tax Court; now it applies only to individual prepetition liabilities. The bankruptcy court has discretion to determine the scope of the stay with respect to corporate tax liabilities. **§362(a)(8)**.

Lessors of residential real property can now continue eviction proceedings if "the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor." **§362(b)(22)**. A lessor can proceed to terminate a tenancy postpetition "based on endangerment of such property or the illegal use of controlled substances on such property" if he files and serves a sworn certificate attesting to the conduct. **§362(b)(23)**.

The amendments authorize a creditor to proceed with a transfer that is unavoidable under §544 (the strong-arm clause) or §549 (postpetition transfers). **§362(b)(24)**. It is not clear how this provision will affect the rule that acts done in violation of the stay are void. *See In re Sambo's Restaurant*, 754 F2d 811, 816 (9th Cir 1985). In *In re Cueva*, 371 F3d 232 (5th Cir 2004), a creditor allowed a foreclosure to proceed after the petition was filed; the buyer at the foreclosure sale argued that because §549(c) protects a bona fide purchaser in a postpetition transaction, the buyer at foreclosure is protected. The court held the sale was void. The Fifth Circuit, like the Ninth, holds the stay voids any acts to enforce liens and thus the sale in this case was void. Section 549(c) "is not an exception to the automatic stay." 371 F3d at 238. Will this rule be abrogated by the amendments that except certain unavoidable transfers from the effect of the stay?

An employer is not stayed from continuing to withhold income from the debtor's wages under an agreement to do so to fund pension, profit-sharing, stock bonus, or other ERISA-approved plan, either because the withholding is excepted or because no claim or debt exists. **§362(b)(19)**.

The amendments add "securities self regulatory organizations" to governmental units that can enforce police or regulatory powers regardless of the stay. **§362(b)(25)**. Certain securities and financial transactions are more carefully defined and more broadly excepted from the stay; and further, the court is not allowed to exercise equitable powers to impose a stay on these transactions. **§362(o)**.

GET OUT OF STAY FREE CARDS

It is important to avoid violating the stay because the courts have the authority to impose sanctions. **§362(k)**. However, the amendments give a creditor relief from punitive sanctions if the creditor's conduct was undertaken with a good faith belief that the stay had terminated. Formerly a violation of the stay did not depend on a creditor's intent to violate the stay but could be based on knowledge of the stay and acting intentionally. *In re Bloom*, 875 F2d 224, 227 (9th Cir 1989). Note also that **new §342(g)(2)** provides that "a monetary penalty may not be imposed on a creditor for a violation of a stay in effect under **§362(a)** . . . unless the conduct. . . occurs after such creditor receives notice effective under this section of the order for relief."

Actions to enforce a lien against or security interest in real property are excepted from the stay if the debtor is ineligible under **§109(g)** or if the case was filed in violation of an order in a preceding case. **§362(b)(21)**. Can a creditor rely on **§362(b)(21)** to shift the burden of requesting court relief to the debtor?

If a determination about the stay was made in a prior bankruptcy case and the order recorded in the proper public records, the order remains effective as to the property, regardless of who then owns it, for two years. **§362(b)(20)**.

The stay is abrogated if a prior bankruptcy case was dismissed within one year for failure to file or act on the debtor's statement of intent as required by **§521**. Bad faith is presumed if, within one year after an earlier dismissal, an individual files a case with no change in circumstances or, if the previous case was dismissed for failure to file documents, to follow a court order requiring adequate protection, or to perform a plan. **§362(c)(4)(D)(i)(II), (III)**. When a case is dismissed because of creation of a debt repayment plan, however, the subsequent case is not presumed to be filed in bad faith. **§362(i)**. If a case was pending within one year prior, other than a case filed after a dismissal under **§707(b)**, then the stay with respect to secured debt terminates on the 30th day after the filing unless a party in interest moves to continue the stay. **§362(c)(3)(A)**. The stay with respect to secured property terminates without hearing if, within 30 days after the first **§341(a)** meeting of creditors, the debtor has not honored the statement of intent filed pursuant to **§521(a)(6)** by redeeming, reaffirming, or surrendering the property.

If the court determines that the estate comprises single-asset real estate, then on the later of 90 days after the entry of the order for relief or 30 days after the court determines this section applies, the debtor must pay the then contractual nondefault rate of interest rather than the fair market rate. **§362(d)(3)**.

In an individual case, the stay shall terminate 60 days after such relief is requested. **§362(e)(2)**.

CONCLUSION

The bankruptcy stay is crucial to the orderly administration of cases. The amendments have changed some of the old familiar rules concerning the stay. Don't assume you know the law; with each issue your clients bring to you, read the Code carefully.

CHAPTER 13 PANEL

By Ted Troutman

At the section's annual CLE, October 7, 2005, a panel consisting of Bankruptcy Judges Randall L. Dunn (Portland) and Paul B. Snyder, (Tacoma), Chapter 13 Trustees Fred G. Long (Eugene) and Brian Lynch (Portland), and Ted A. Troutman, Attorney, Beaverton, Oregon, discussed issues arising from changes to chapter 13 under BAPCPA. This article summarizes that discussion.

The judges presented new forms of chapter 13 plans for Oregon and Washington. *See* **LBF 1300.5**. (The impact of new cramdown provisions is discussed in Richard Anderson's article, pages 6-8 of this *Newsletter* issue.)

BAPCPA provides that a creditor whose claim is secured by personal property must receive adequate protection payments from the debtor from the beginning of the case. **§1326(a)(1)(B) and (C)**. The Oregon plan form provides that the trustee will make these pre-confirmation adequate protection payments, so as to avoid any dispute over whether or not the payments were made. Payments on claims secured by personal property must be made in equal installments for the life of the plan, unless the creditor agrees to other treatment. **§1325(a)(5)(B)(iii)**.

To illustrate how these provisions work, the panel presented a hypothetical assuming an above-median-income debtor with a prepetition domestic support obligation that had been assigned to the state. The debtor had purchased one car within 910 days of the filing and a second car more than 910 days before filing. *See* last paragraph of **§1325(a)**. There was also an arrearage on the debtor's home loan. Under the hypothetical plan, because the first car was purchased for debtor's personal (not business) use, the creditor was entitled to payment of the creditor's entire claim. **§1325(a)**. The debtor proposed to reduce the value of the car (as allowed by the Oregon form plan) and make equal monthly payments as required by **§1325(a)(5)(B)(iii)**. The Trustees argued that a debtor could propose other than equal monthly payments so long as the creditor agreed, either explicitly or implicitly (by failing to object).

The plan also proposed to surrender a mobile home used for vacations. Although arguably the debtor could reduce his CMI (current monthly income) under **§707(b)(2)** by all of his monthly payments on secured debt, the trustees on the panel believed that this could constitute bad faith under **§1325(a)(7)**. The counter-argument questions how this could be bad faith under **§1325(a)(7)** given that **§1325(b)(3)** provides that "amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with . . . **707(b)(2)**." Trustee Brian Lynch suggested that **§707(b)(2)** is just a formula and does not determine what is or is not good faith under the totality of the circumstances.

There was also discussion of whether in a case where the debtors have above-median income, the commitment period is automatically 60 months. **§1322(d), §1325 (b)(1)(B)**. During questions from the audience, Richard Anderson opined that BAPCPA requires an above-median-income debtor to make payments for 60 months if the trustee or a holder of an allowed unsecured claim has objected to a plan proposing a shorter term. **§1325(b)(1)**. The trustees seemed to agree with that opinion.

Trustee Fred Long discussed the trustee's new duties of notification to domestic support obligation (DSO) creditors. **§1302(d)**. The debtor in the hypothetical would not be required to pay the entire DSO arrearage over the life of the plan since the debtor proposed a 60-month plan and the DSO had been assigned to the state. **§1322(a)(4)**. Mr. Long also pointed out that debtors must certify they are current on postpetition support as a condition to plan confirmation. **§1325(a)(8)**. Debtors must also certify that all prepetition and postpetition DSO obligations (unless prepetition amounts are not being paid in full) have been paid before a discharge can be granted.

Brian Lynch stated his view that a below-median income debtor could pay off a plan in less than the proposed number of months by paying only secured and priority debt after the first 36 months, so long as the disposable income required to be paid to unsecured creditors (including debtor's attorney) under the **§707(b)** formula had been fully paid.

Judge Dunn discussed the new exceptions to discharge in chapter 13: **§§1328(a)(2) and (4), 1328(b), 1328(f), 1328(g) and 1328(h)**.

POSTJUDGMENT INTEREST – PRACTICE TIPS

By Joseph M. VanLeuven
Davis Wright Tremaine LLP

The award of postjudgment interest in federal court is governed by federal law – even in diversity cases. 28 USC §1961 provides for the award of postjudgment interest at the one-year T-bill rate. Most contracts these days provide for much higher rates. While some courts have held that the §1961 rate is mandatory, most hold that it may be waived by agreement. *See, e.g., Citicorp Real Estate, Inc. v. Smith*, 155 F3d 1097, 1108 (9th Cir 1998).

To avoid application of the statutory rate and ensure application of the contract rate:

- Draft contracts and notes to make explicit that the contract rate applies to any judgment entered in an action on the contract. This will strengthen the waiver argument.
- When suing on the contract, include a claim for postjudgment interest at the contract rate (assuming that rate is higher than the one-year T-bill rate). Several cases have refused to award postjudgment interest at the contract rate, despite clear contractual language, when the claim to that rate of interest was not included in the complaint or at least in the pretrial order. *E.g., Horizon Holdings, LLC v Genmar Holdings, Inc.*, 244 F Supp 2d 1250, 1276-77 (D Kan 2003); *BP Products North America, Inc. v Youssef*, 296 F Supp 2d 1351, 1355 (M D Fla 2004).
- Your form of judgment should include postjudgment interest on the principal recovery, plus costs, prejudgment interest and attorney fees, if any. Postjudgment interest runs on the entire judgment, including prejudgment interest. *Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F3d 288 (9th Cir 1995).

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NINTH CIRCUIT CASE NOTES

By Ashley Hohimer
Miller Nash LLP

LARGER, LEGITIMATE PURPOSE NOT SUFFICIENT JUST CAUSE UNDER SECTION 523(a)(6)

In re Sicroff, 401 F3d 1101 (9th Cir 2005)

Debtor was a graduate student in the geography department at the University of California at Davis. When the University decided to close the department, debtor mailed letters to the University administrators and local papers, placing blame for the department's failure on a particular professor. Based on debtor's accusations, the professor sued debtor for libel. Judgment was entered in favor of the professor, and debtor subsequently filed for bankruptcy. The professor filed an adversary complaint to determine the dischargeability of the judgment debt. Although finding debtor's conduct willful and intentional, the bankruptcy court held that the debt to the professor was dischargeable because debtor's actions were not malicious under §523(a)(6). In support of its holding, the bankruptcy court found that debtor's statements had been made not to spite the professor, but rather to address the larger, legitimate purpose of why the University was eliminating the geography department. The bankruptcy court held that this "larger purpose" provided debtor with just cause and excuse. The district court affirmed.

The Ninth Circuit reversed. It reiterated that under *In re Jercich*, 238 F3d 1202 (9th Cir 2001), an injury is malicious if it (1) is a wrongful act, (2) is done intentionally, (3) causes injury, and (4) is done without just cause or excuse. Since debtor's libelous acts were wrongful, were intentional, and caused injury, the only open issue was whether the fourth criterion was satisfied. Referencing its previous decision in *In re Bammer*, 131 F3d 788 (9th Cir 1997), the court acknowledged that it would be inconsistent with §523 "to permit a standardless, unmeasurable, emotional and nonlegal concept such as compassion to negate an identifiably and legally wrongful act." Based on its rationale in *Bammer*, the court found the goal of protesting the geography department's closure did not provide debtor with just cause or excuse to sully the professor's reputation along the way. The debt was nondischargeable even though debtor's actions may have been connected to a "larger, legitimate purpose."

RECEIPT OF BENEFIT NO LONGER ELEMENT OF FRAUD UNDER §523(a)(2)(A)

Muegler v. Bening, 413 F3d 980 (9th Cir 2005)

Before filing chapter 7, debtor was found guilty in federal district court of committing intentional fraud under Missouri law. The district court awarded debtor's creditor compensatory and punitive damages, debts that debtor later attempted to discharge in bankruptcy. Creditor argued that (1) the debt had been procured by fraud and was thus nondischargeable under §523(a)(2)(A), and (2) debtor was estopped from relitigating the issue of fraud in bankruptcy court because the issue had already been litigated in district court. The bankruptcy court agreed with creditor, and debtor appealed.

Debtor maintained that there was no identity of the issues because pursuant to §523(a)(2)(A), creditor was required to prove that debtor had "obtained a direct or indirect benefit from his misrepresentation" – an element not required under Missouri law. Debtor cited previous Ninth Circuit authority wherein the court had ruled that a "receipt of benefits" must be established. Although recognizing the legitimacy of debtor's argument under the court's previous decisions, the court found that in light of the Supreme Court's ruling in *Cohen v. de la Cruz*, 523 US 213 (1998), establishing a direct or indirect benefit was no longer necessary to satisfy §523(a)(2)(A).

In *Cohen*, the Supreme Court held that "'any debt . . . for money, property, or services, or . . . credit, to the extent obtained by' fraud encompasses any liability arising from money, property, etc., *that is fraudulently obtained*." 523 US at 223 (emphasis in original). Following the Fifth and Fourth Circuits' reasoning, the appellate court interpreted *Cohen* to mean that the only issue material to nondischargeability is whether the debt arises from fraud. Because a fraud judgment had been entered against debtor, nothing else was necessary for the debt to be nondischargeable. Finding the "receipt of benefit" rule no longer an element of fraud under §523(a)(2)(A), the court held that debtor could not discharge the debt.

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SECURITY DEPOSIT DEDUCTED FROM LANDLORD'S CLAIM AFTER CAP APPLIED

In re AB Liquidating Corp., 416 F3d 961 (9th Cir 2005)

Debtor entered into a five-year lease for certain commercial real property and provided landlord with a $1 million security deposit in the form of a letter of credit. Debtor subsequently filed chapter 11 and rejected the lease, and the landlord filed a proof of claim for $2 million. The creditor's committee objected, arguing that under §502(b)(6) (commonly referred to as the "Landlord's Cap"), landlord's allowed claim (the amount of one year's rent) must be reduced by the amount of the security deposit. Landlord attempted to convince the court that the security deposit amount should be applied to reduce the damages **before** calculating the allowed claim. The bankruptcy court found in favor of the committee, and the district court affirmed.

On appeal, the Ninth Circuit agreed with the lower courts' interpretation of §502(b)(6) as requiring a court to (1) determine the landlord's gross damages, (2) compare the gross damages to the statutory cap of one year's rent, (3) subtract any security deposit or letter or credit from the lesser of gross damages or one year's rent, and (4) allow the claim for that amount. The court's decision followed the analytical framework set forth in the Second Circuit's decision in *Oldden v. Tonto Realty Co.*, 143 F2d 916 (2d Cir 1944), which was endorsed by Congress in the legislative history of §502(b)(6).

CO-OWNER OF PROPERTY NOT REQUIRED TO PAY PRO RATA SHARE OF TRUSTEE'S ATTORNEY FEES

In re Flynn, 418 F3d 1005 (9th Cir 2005)

Debtor filed chapter 7 and a trustee was appointed. Debtor's estate included a 50% interest in real property in California, which he co-owned with his mother. At the time his petition was filed, the property was the subject of a state-court partition action. The trustee continued to litigate the action and ultimately reached a settlement agreement with debtor's mother that the property would be sold pursuant to §363(h). The sale of the property generated approximately $120,000 in net proceeds, out of which the trustee attempted to deduct his law firm's fees pursuant to §363(j). Debtor's mother objected, arguing that the trustee's fees should be paid solely from the estate's one-half share of the sale proceeds. The bankruptcy court disagreed and granted the trustee's motion. The BAP affirmed.

The Ninth Circuit reversed. It held that the attorney fees incurred by the trustee could not be deducted from the sale proceeds prior to dividing the proceeds between the estate and debtor's mother. Looking at the plain language of §363(j), the court held that only costs and expenses of sale were deductible from the proceeds – not compensation of the trustee. Because the trustee's attorney fees incurred to preserve and dispose of the property fell squarely within the trustee's duties, the court found that the fees could not be charged against debtor's mother's share of the proceeds. Refusing to depart from the wording of the statute, the court rejected the trustee's argument that the fees had been properly charged to debtor's mother because she directly benefited from the work. Section 363(j) also provides no authority for the trustee to withhold proceeds from the co-owner's share of the sale proceeds.

BAP CASE NOTE

By Doug Pahl
Perkins Coie

WHAT'S WRONG WITH BEING PAID EARLY? MODIFIED PLANS UNDER §1329

In *In re Sunahara*, 326 BR 768 (9th Cir BAP 2005), the BAP concluded that a debtor who wanted to pay off creditors in less than than 36 months could do so. In his plan, the debtor proposed to pay creditors a total of $41,400 over sixty months, an estimated fifty-percent dividend. Before confirmation, the debtor moved to refinance certain real estate, use the proceeds to pay in full the base plan and receive an immediate discharge. After the plan was confirmed, the trustee objected to the motion for early pay-off, arguing that it amounted to a plan modification under §1329, which in turn required the debtor to satisfy the disposable income requirement of §1325(b). The trustee also argued that the modification was at odds with the model plan provided for by the local bankruptcy rules. Under the model plan, "[u]nless all allowed claims are paid in full, this plan shall not be completed in fewer than 36 months from the first payment date."

Section 1329 sets forth requirements for modifying chapter 13 plans. In particular, §1329(b)(1) provides that "[s]ections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section." Section 1325(a) provides, in part: "Except as provided in subsection (b), the court shall confirm a plan if . . . ." Section 1325(b)(1) states:

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan: (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

The *Sunahara* panel focused on the precise plan modification requirements of §1329, taking particular note that Congress required plan modification to comply with §1325(a), but made no mention of compliance with §1325(b)'s disposable income requirement.

> Section 1329(b) expressly applies certain specific Code sections to plan modifications but does not apply §1325(b). Period. The incorporation of §1325(a) is not, as has been posed by some courts, the functional equivalent of an indirect incorporation of §1325(b). . . .
>
> Simply put, the plain language of §1329(b) does not mandate satisfaction of the disposable income test of 1325(b)(1)(B) with respect to modified plans.

326 BR at 781 (emphasis in original).

The court noted that the debtor had not waived rights to a plan modification by agreeing to the terms of the model plan, concluding, "A local rule prohibiting Debtor from doing what he is entitled to do under the Code is inconsistent with an Act of Congress and is, therefore, invalid under Rule 9029(a)." *Id* at 783.

Judge Brandt dissented, arguing that the debtor waived his objection to the model plan by proposing four such plans. Judge Brandt also raised other questions regarding the nature of the modification and service of process that counseled against reversal. The *Sunahara* decision has also drawn fire from Chief Judge McManus of the Eastern District of California. *See In re Keller*, 329 BR 697 (Bankr ED Cal 2005) ("logic is debatable and is contrary to the weight of authority").

LOCAL BANKRUPTCY COURT CASE NOTE

By Ashley Hohimer
Miller Nash LLP

NON-RECOURSE OBLIGATIONS NOT CONSIDERED WHEN ASSESSING CHAPTER 12 ELIGIBILITY

In re Osborne, 323 BR 489 (Bankr D Or 2005)

Debtors owned farmland in California, and filed chapter 11 in the late 1990s. Debtors' bank was listed as a creditor with a security interest in debtors' farmland and certain equipment and fixtures. After the case converted to Chapter 7, debtors received their discharge, and much of the collateral was either sold or otherwise disposed of. Debtors did retain their land and continued to farm, but in the early 2000s they suffered another crop loss and defaulted on the bank's loan.

Debtors filed chapter 12, and in their bankruptcy schedules they listed the debt owed to the bank at $480,000, the same value listed for the collateral securing the bank's claim. The bank filed a proof of claim for over $1,442,000 and attacked debtors' eligibility for chapter 12 relief, arguing that debtors' combined debts exceeded the $1,500,000 aggregate debt limit of §101(18)(A). Debtors replied that the bank's claim was "non-recourse" as a result of their prior chapter 7 discharge, and therefore the bank's claim was limited to the value of the collateral. The bank responded that for eligibility purposes, the full value of its claim should be considered, despite the fact that the bank would not be entitled to any deficiency after the sale of its collateral.

Considering applicable Ninth Circuit authority, Judge Radcliffe held that because (1) the only evidence presented regarding the valuation of the property was the figure from debtors' schedules and (2) as a result of debtors' previous chapter 7 discharge, the bank had no unsecured claim, only the $480,000 figure should be considered when assessing whether debtors' debts were within the statutory limits on eligibility for chapter 12 relief.

STATE COURT CASE NOTES

By Aaron Wigod
Greene & Markley PC

THE LIMITS OF ISSUE PRECLUSION

Hayes Oyster Co. v. Dulcich, 199 Or App 43 (2005)

Plaintiff brought a conversion action against four defendants. The trial court granted summary judgment dismissing one defendant and a jury awarded compensatory damages against the remaining defendants. The Court of Appeals, 170 Or App 219, reversed and remanded the summary judgment dismissal and affirmed judgment against the other defendants. In the second trial the remaining defendant moved based on issue preclusion to exclude any new evidence offered by plaintiff on the amount of damages. The trial court agreed that issue preclusion prevented plaintiff from presenting new evidence to increase the amount of damages because that issue had been fully litigated in the first trial.

Plaintiff appealed and the court of appeals reversed. It found that the first trial was not a "prior proceeding" within the meaning of issue preclusion; rather the first trial was an earlier phase of the same case. The court also found that "[b]y erroneously granting summary judgment in defendant's favor before the [first] trial, the trial court effectively removed defendant from the litigation. That is, plaintiff was no longer in the position to obtain discovery from this defendant and had no reason to develop evidence at trial concerning this defendant's liability." 199 Or App at 51. Thus, plaintiff had not had a full and fair opportunity to be heard on the issue of damages.

WHAT IS A "COMPENSATED" GUARANTOR?

Marc Nelson Oil Products, Inc. v. Grim Logging Co., Inc., 199 Or App 73 (2005)

Plaintiff filed a collection action against a business and personal guarantor. The trial court ruled that the guarantor was not discharged by the assignment of the debt. If a guarantor is "uncompensated," a change to the guaranteed contract discharges guarantor if the change is material, as long as the change is not one that could inure only to the guarantor's benefit. However, if guarantor is "compensated," an alteration to the contract discharges guarantor only if it materially increases guarantor's risk on the contract.

Following the Oregon Supreme Court's expansive view of who qualifies as a compensated guarantor, the court of appeals rejected the guarantor's argument that because he did not receive any consideration in return for his guaranty, he was an uncompensated guarantor. The court

found that since guarantor had a significant self interest in the business, he "cannot reasonably be viewed as acting purely gratuitously – *i.e.*, 'for the sole purpose of helping another' rather than in his personal interest and the interest of the company that he partially owns." 199 Or App at 82. Although that conclusion required that the guarantor meet the higher burden of showing a material increase in risk, the court of appeals reversed, finding that the assignment did materially increase the guarantor's risk.

ATTORNEY FEE ISSUE NOT PRESERVED

Marc Nelson Oil Products, Inc. v. Grim Logging Co., Inc.
200 Or App 239 (2005)

In the court of appeals' first opinion, discussed above, the court reversed and remanded with instructions to enter judgment, including an award of attorney fees, for defendant guarantor. On reconsideration, plaintiff contended that defendant was not entitled to an attorney fee award because it had defeated plaintiff's attorney fee request by arguing that the guaranty clause of the contract did not include an attorney fee provision. Plaintiff on appeal endorsed defendant's trial court argument that there is no basis for guarantor to recover attorney fees. In effect, the parties had "reverse[d] their stances and take[n] positions opposite of those they took before the trial court." The court concluded that therefore the attorney fee issue was not properly preserved for appeal. Aside from the attorney fee issue, the court adhered to its opinion at 199 Or App 73.

ACTUAL NOTICE RESULTS IN RELATION BACK OF AMENDED PLEADING

McLain v. Maletis Beverage, 200 Or.App. 374 (2005).

Motorist brought a negligence action arising from an auto accident and subsequently filed an amended complaint naming the correct owner of the truck involved. The trial court granted the truck owner's motion for summary judgment because the statute of limitations had expired before the correct owner of the truck was served. The court of appeals reversed. It held that for an amended pleading to relate back to original pleading for statute of limitations purposes, the truck owner need only have had notice of the action within the limitations period; it need not have been served. The court of appeals noted that the appellate courts' reliance on service for relation back in previous decisions was only because service was the means by which notice was provided to the proper defendant in those circumstances. Notice, not service, is what ORCP 23 C requires for relation back for statute of limitations purposes.

CONSUMER BANKRUPTCY

By Michelle Freed
Todd Trierweiler & Associates

The Consumer Bankruptcy Subcommittee meets in the eight floor conference room of the United States Bankruptcy Court. The next meeting will be held on November 17th, 2005 at 4:30 pm. The Consumer Bankruptcy Subcommittee is chaired by Laura Donaldson. Ms. Donaldson can be reached at 503-408-9600, or *ldonaldson@mccaffreylaw.net*.
To learn more about the Consumer Bankruptcy Subcommittee, or to be added to its email list, please contact Michelle Freed at Todd Trierweiler & Associates, 503-253 7777, or *michellef@bankruptcylawctr.com*.

The Consumer Subcommittee has spent the last three meetings in large part discussing issues raised by BAPCPA. The minutes from these meetings are summarized below.

Meeting of June 23, 2005

Judge Dunn offered drafts of the new chapter 13 plan and orders confirming plans and encouraged lawyers to review the drafts and direct any comments, suggestions or changes to him.

Pam Griffith announced that the US Trustee's office would double book chapter 7 §341(a) meetings to accommodate the increased volume of filings. Attorneys should check their hearing times and locations carefully. If you are scheduled to attend hearings in two locations at the same time, please notify the chapter 7 trustee.

Chapter 13 Trustee Brian Lynch encouraged lawyers to file supplemental fee requests as early as possible. Supplemental fee requests do not reach his office from ECF until the Order has been signed or a hearing has been set. That added delay increases the chance that funds that should be disbursed to the debtor's attorney will instead go to other creditors or back to the debtor. You can email Mr. Lynch's office to notify him that a supplemental fee request will be filed.

Mr. Lynch also announced that his office will direct changes in wage orders to employers and stop wage orders when a case has been dismissed. Further announcements will be forthcoming when the court has given more direction on this issue. (At the October 13th meeting, Mr. Lynch announced that the new General Order indicates that wage orders would be required by the trustee. The trustee will file any notice of increased payments due under a wage order. If a debtor's counsel does not wish a wage order, debtor's counsel must be prepared to explain to the trustee why one should not be required.)

Meeting of July 28, 2005

Bob Vanden Bos asked for comments on *In re Sunahara*, 326 BR 768 (9th Cir BAP 2005) (summarized in this *Newsletter* at page 13), which holds that a chapter 13 plan can be paid off in less than 36 months without modifying the plan, as long as the terms of the plan are satisfied. The trustee's office will continue to analyze modifications in terms of good faith, best interests, and ability to pay. Judge Dunn pointed out that Judge Higdon's decision in this district held just the opposite and that this district may not be bound by *Sunahara*.

As a reminder, under BAPCPA we need to redact social security numbers and names of children from tax returns. With electronic filing, it will be harder for the clerk's office to catch this.

Meeting of September 8, 2005

Brian Lynch announced that his trustee percentage will rise to 8-3/4% in October. Mr. Lynch is looking into becoming a financial education advisor for chapter 13 clients. He hopes to be able to offer a class to debtors after the §341(a) meeting at no additional cost to the debtor. A suggestion was made that the Section organize an educational class for chapter 7 debtors.

With respect to calculating plan payments under BAPCPA, the trustee's office plans to treat housing and utility expenses separately – one number for rent or mortgage and one for utilities and maintenance, including insurance and property taxes. The trustee's office will use either the debtor's actual mortgage payment or the IRS standard, whichever is higher. The size of a debtor's household will be dictated by the number of dependents the debtor claims on tax returns.

Under BAPCPA, the debtor's attorney will need to provide certificates to the court stating, among other things, that the debtor has been advised of alternatives to bankruptcy, and that the requirements of §521 have been completed. A suggestion was made that the debtors' bar develop a certificate attorneys would feel comfortable signing. Todd Trierweiler and Ann Chapman have volunteered to develop such a certificate.

The court will consider updating local forms only once per month and providing that information on its web site.

You Too Can Be An Author

If you would like to write an article, or would like to read an article on a particular topic, please contact:

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