

Newsletter

Volume XXIV, Number 2 Debtor-Creditor Section, Oregon State Bar Spring 2005

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COMMENTS FROM THE CHAIR

By Peter C. McKittrick
Farleigh Witt

Twenty years ago a travel-agent friend from Seattle called me and asked if my roommate and I wanted to travel to an island in off the coast of the Yucatan Peninsula of Mexico. Until that call, I had never heard of the island of Cozumel. It was February in Oregon, and unless you were in the year 2005, that meant wet and gray weather. The sunny skies and warm Caribbean waters of the Peninsula sounded like the perfect getaway. During our trip, we took a ferry to the mainland city of Playa Del Carmen. It was a sleepy little village with a population of about 400 people. It had one hotel, a couple of local restaurants, and a few cabs that would hang around for tourists that wanted to be transported to Cancun.

My family and I were fortunate enough to have the opportunity to return to the Yucatan for a five-week trip this year in March and April. Our first stop was the island of Cozumel. After several days on the island, we headed to the mainland. As the ferry pulled in to the town (now city) of Playa Del Carmen, all I could think was "Dios Mio!" Playa Del Carmen in twenty years has transformed itself from a small village to a major tourist destination complete with condos, luxury

hotels, streets full of shops and restaurants—and lots of people. What happened to the sleepy little village with the idyllic beach and the funky local businesses?

One afternoon I wandered the streets of Playa, and ventured outside the main shopping district. There I found a bit of the old Playa—small local shops, local restaurants and the friendly smiles that greet you when you do your best to speak the language. The charm of Mexico is still there, you just need to hunt for it.

You're probably wondering what this has to do with the Debtor-Creditor Section and my message to the section. My message relates to change. As you are all no doubt aware, President Bush has signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and the bankruptcy reform we have anticipated for years will become a reality as of October 17, 2005. Most professionals who work in the bankruptcy system have an opinion on the legislation, or at least parts of it. Chapter 7 trustees wonder what it will do to their caseloads; chapter 13 trustees are concerned about the possible increase in chapter 13 filings. The debtors' bar is concerned that the Act could increase their

responsibilities and potential liability for the acts of their clients. The creditor community is licking its chops, thinking that the Act will stop abusive filings.

Change is inevitable. The pendulum is always swinging to the left or to the right. Now the bankruptcy code and the system in which we operate will change drastically. Change is always disruptive, often scary, but usually not as bad as we imagine. Debtor-Creditor practitioners have always had one advantage over practitioners in other areas—we generally work together to reach common ground that meets the needs of our respective clients. The transition to the new bankruptcy law should be no exception. The court, the clerk's office, debtors' attorneys, creditors' attorneys, trustees and other practitioners will work together to make the transition as painless as possible.

Our executive committee and the Section as a whole will also try to make the transition easier. We are holding the annual meeting and CLE program on October 7 and 8, so we can bring you a first rate program on the changes. We are expediting an update of the Bankruptcy Law CLE published by the Oregon State Bar. The website committee will work with the executive committee to make the website an additional tool for updates on important issues stemming from the legislation.

I traveled to the Yucatan and saw a village transformed into a major city. I came home to learn we had a new bankruptcy law. I found the nuggets in Playa. I am sure they are in the Act also. Let's start looking.

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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Your letter should include the topic for the article and indicate whether you are willing to be the author.

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.

SOME BANKRUPTCY AMENDMENTS ARE EFFECTIVE NOW!

By Sally Leisure
Attorney at Law

We've been anticipating for years that Congress would amend the bankruptcy code. With the enactment of PL 109-8 (S256), 119 Stat. 23, on April 20, 2005, it finally happened. The new law, referred to herein as the Bankruptcy Bill, can be found on Westlaw and in the May 4, 2005, Bankruptcy Reporter advance sheet.

We expected substantial changes affecting individual filings, and we always knew we would have 180 days after enactment to adapt to the changes. Generally that is true: the amendments apply to cases commenced on or after October 17, 2005. Bankruptcy Bill §1501. However, some amendments became effective on April 20, 2005, the date of enactment. Bankruptcy Bill §1501. At least one provision is retroactive to July 30, 2002. Bankruptcy Bill §1404. This article will identify the aberrations.

Several provisions affecting homestead exemptions, 11 USC §522, are effective now. Some will not affect Oregonians at all because of the low exemption allowed under state law. Effective immediately:

- The state homestead exemption cannot be claimed in property acquired by the debtor within 1215 days prior to filing and is capped at \$125,000. This cap does not apply to an exemption claimed by a family farmer for a principal residence, or to an interest that was transferred from a debtor's principal residence acquired more than 1215 days prior to filing the bankruptcy case to a homestead in the same state. Bankruptcy Bill §322(p).
- The exemption will be reduced to the extent that the value of an interest in homestead property was derived from nonexempt property transferred within the last ten years with the intent to hinder, delay or defraud creditors. Bankruptcy Bill §308(4).
- The exemption is unavailable if the debtor has been convicted of a felony demonstrating that the filing was an abuse of the bankruptcy laws, or owes a debt arising from violation of securities laws, fraud, or conduct that causes serious injury or death to another within five years prior to filing—unless the exemption is reasonably necessary to the support of debtor or dependents. Bankruptcy Bill §322(q). Again, given Oregon's low exemption, this provision may not impact Oregon debtors.

- The court will hold a hearing ten days prior to entry of the discharge to determine the applicability of the homestead exemption in light of these facts in cases filed on or after April 20, 2005. Bankruptcy Bill §330(a).

Amendments to 28 USC §1334, which grants exclusive jurisdiction to the district court in the district in which a case is filed are also effective immediately. Bankruptcy Bill §324. The jurisdiction used to be described as "exclusive jurisdiction of all cases"; now, in addition, it covers all property of the debtor at commencement of the case, property of the estate, and all claims construing the employment and disclosure requirements of professionals in a case.

Amendments to filing fees were to take effect immediately but have not yet been implemented. The fee schedules in the amendments appear to reduce some fees instead of increasing them, as was probably intended. Bankruptcy Bill §325.

**Oregon Law Institute of
Lewis & Clark Law School**

BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

Join representatives from the bench, debtor's counsel, creditor's counsel, and the Trustee's office, for a day-long seminar that will address the most important areas of change, including: Chapter 13 procedures, credit counseling and debtor education, means testing, new attorney liability provisions, tax liabilities, changes to Chapter 7, child support changes, and much, much more!

THURSDAY, JUNE 30, 2005

Oregon Convention Center
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7.5 MCLE Credits

CREDITORS' COUNSEL CAN'T IGNORE THE BANKRUPTCY BILL

By Brandy A. Sargent
Stoel Rives LLP

As most Oregon practitioners are probably aware, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Bankruptcy Bill") (also affectionately referred to by many as "BARF"—Bankruptcy Abuse Reform Fiasco) mainly affects debtors filing petitions under chapters 7 and 13. Creditors' counsel may be breathing a sigh of relief—after all, they do not need to calculate median income or schedule "credit counseling" for their clients. This does not mean creditors' counsel can ignore the Bankruptcy Bill, however. In addition to some debtor-specific provisions that can affect a client (for example new §502(k), which allows a creditor's claim for unsecured consumer debt to be reduced by up to 20% if the creditor fails to agree to an "alternative repayment schedule" proposed by a credit counseling agency), there are also provisions that directly affect creditors. This article highlights some of those provisions. References herein to sections of the current Bankruptcy Code are simply to §___. References to the as yet uncodified Bankruptcy Bill are styled "Bankruptcy Bill §___."

PREFERENCE REFORM

Creditor practitioners have become accustomed to boilerplate preference complaints where the amount demanded is so little and the costs of defense are so high that the only cost-effective option is to settle. One reason for this state of affairs is that arguably the best defense available to creditors—the "ordinary course of business" defense of §547(c)(2)—can be difficult to prove and rarely supports the (relatively) less expensive option of a motion for summary judgment. See Charles Jordan Tabb, "Panglossian Preference Paradigm?," 5 *Am. Bankr. Inst. L. Rev.* 407, 418 (Winter 1997) ("many smaller cases simply settle, often splitting the difference, with little regard to the merits of the case"). Section 547(c)(2) currently provides a creditor with a defense to a preference complaint if the creditor proves that the transfer was "(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; (B) made in the ordinary course of business or financial affairs of the debtor and the transferee;

and (C) made according to ordinary business terms." *In re Kaypro*, 218 F.3d 1070, 1073 (9th Cir. 2000). Under the Bankruptcy Bill, this section will make the defense available if the creditor can prove that the debt was incurred in the ordinary course of business between the debtor and the transferee **and** the payment was **either** made in the ordinary course of business of the debtor and the transferee or was made according to ordinary business terms. Bankruptcy Bill §409.

Another change to preference law has to do with the so-called "DePrizio Problem." In *Levit v. Ingersoll Rand Financial Corporation*, 874 F.2d 1186, 1200-01 (7th Cir. 1989), the court held that the "look back" period for preference recovery was one year, not 90 days, for payments made to creditors which benefited an insider. *DePrizio* involved a so-called "triangular preference" where the debtor construction company made payments to secured lenders on loans that had been guaranteed by insiders. See Richard C. Josephson, "The DePrizio Override," 4 *Bus. L. Today* 40 (May/June 1995). The court based its holding on the interplay between then existing §547 and §550. Section 547 allowed the avoidance of payments for the benefit of insiders up to one year prepetition; §550 authorized recovery from the initial transferee—the lender. *DePrizio*, 874 F.2d at 1195-1201.

The Bankruptcy Reform Act of 1994 tried to overturn *DePrizio* by amending §550 to provide that "the trustee may not recover under subsection (a) from a transferee that is not an insider." §550(c)(2). The "DePrizio Fix" worked for the most part. However, a local case, *In re Williams*, 234 BR 801 (Bankr D Or 1999), pointed out the continuing problem. In *Williams*, two debtors had granted a security interest in their mobile home to a lender. The lender perfected within the 90-day preference period. The trustee in the debtors' subsequent bankruptcy tried to avoid the lien. The lender argued that §550 would not allow such a result, because the lender was not an insider. The trustee argued that he did not have to recover anything pursuant to §550, only to avoid the lien under §547. The court agreed. See John C. Murray, "DePrizio Lives (in a Mobile Home in Oregon)," 18 *Am. Bankr. Inst. J.* 14 (Oct. 1999).

Amended §547(i) provides:

If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided

under this section only with respect to the creditor that is an insider.

Bankruptcy Bill §1213. We can all hope this puts an end to the *DePrizio* problem.

Amended §547(c)(8) also provides that “in a case filed by a debtor whose debts are not primarily consumer debts” (*i.e.*, business bankruptcies) payments cannot be avoided if the “value of all property that constitutes or is affected by such transfer is less than \$5,000.” Bankruptcy Bill §409.

Section 549, dealing with postpetition “preferences,” has been amended to overrule the holding in *In re McConville*, 110 F3d 47 (9th Cir 1997). In *McConville*, a lender without knowledge of a bankruptcy made a postpetition mortgage loan to the debtor. The court held that the “good faith purchaser” provisions of §549(c) did not protect the lender because the granting of a lien on property was not a “transfer of property.” *Id.* at 49. Amended §549(c) uses the phrase “transfer of an interest in real property.” Bankruptcy Bill §1214.

Finally, the venue rules of 28 USC §1409(b) have been changed to provide that venue in an adversary proceeding seeking to recover a consumer debt of less than \$15,000 or a nonconsumer debt of less than \$10,000 is appropriate only in the district where the **defendant** resides. Bankruptcy Bill §410. While this may sound good in theory, remember that venue can be waived. Plaintiffs could still theoretically file in the bankruptcy court and wait for a defendant to raise the venue argument.

LEASING ISSUES

Counsel representing nonresidential retail landlords may be pleased to learn that the Bankruptcy Bill has eliminated the seemingly endless motions to extend time to assume or reject leases. Currently under §365(d)(4) nonresidential leases of real property are deemed rejected unless the trustee assumes within 60 days or the court, for cause, extends the 60-day period. This provision has led some debtors to file motions to extend on their petition date. (In the *K-Mart* case, the debtor even tried to extend that time past confirmation.) New §365(d)(4) will make the lease deemed rejected on the earlier of (i) 120 days after the order for relief, or (ii) confirmation of the plan. The debtor will be allowed to extend that time for 90 days, for cause, and any subsequent extensions may be granted only with the prior written consent of the landlord. Bankruptcy Bill §404.

At the recent Northwest Bankruptcy Institute, Professor Klee posited that this provision has the potential to drastically alter the course of retail bankruptcies, with some debtors going so far as to engineer an involuntary petition in order to operate in the gap period, since the 120 days does not begin to run until entry of the order for relief. Most commercial landlords, particularly in a less than stellar economy, are happy to keep the tenant unless they have a replacement tenant or the debtor is not current on its postpetition obligations. Retail landlords get especially very nervous close to the fall back-to-school season and Christmas. Faced with the possibility of a “dark” store during those periods, landlords may be willing to cut a deal on extension. Another possibility is that commercial landlords (and retail landlords in particular) could use their new veto as leverage against some of the more odious debtor tendencies. For example, a landlord could agree to several extensions of time to assume or reject on the condition that, if the lease is rejected, no going-out-of-business sale be held at the store.

Softening the blow to the debtor of §365(d)(4) is amended §502(b)(7), which provides that if a lease is assumed by the debtor and subsequently rejected, the landlord’s damages are limited to:

monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor.

Bankruptcy Bill §445. Any excess balance would be a capped, unsecured §502(b)(6) claim. Prior to this change, if a debtor assumed a lease and then rejected it, the full amount of the landlord’s damages over the term of the lease was an administrative priority claim.

A related change addresses nonmonetary defaults. The Ninth Circuit in *In re Claremont Acquisition Corp.*, 113 F3d 1029 (1997), held that debtors could not assume and assign an executory contract because they were unable to cure a nonmonetary default. In *Claremont* the debtors operated automobile dealerships under a franchise agreement. Two weeks before filing for bankruptcy, the debtors closed their dealerships in violation of their franchise agreements. As the Ninth Circuit noted, this event of default is a “‘historical fact’ and, by definition, cannot be cured.” *Id.* at 1033. Debtors’ assets were sold and the debtors attempted to assume and assign the franchise agreements. Pointing to current §365(b)(2)(D), the debtors claimed that they could not be required to cure a

nonmonetary default. General Motors (“GM”) argued that the section meant debtors could not be required to cure any penalties arising from a nonmonetary default. *Id.* The Ninth Circuit found GM’s construction of §365(b)(2)(D) more reasonable, grammatical, and in line with legislative history. *Id.* at 1034. The court therefore held that because the debtors could not cure their failure to operate, they could not assume and assign their franchise agreements. *Id.*

As amended, §365(b)(1)(A) provides that nonmonetary defaults of nonresidential real property leases do not have to be cured:

if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease.

Bankruptcy Bill §328. The landlord will, however, be entitled to assert “pecuniary losses resulting from such default.” *Id.*

Nonmonetary defaults of executory contracts and personal property leases are not treated similarly. Under amended §365(b)(2)(D), *Claremont* is still good law with respect to all executory contracts and leases except real property leases covered by §365(b)(1)(A).

PROTECTION FOR WAREHOUSEMEN’S LIENS

New §546(i) provides that warehouseman’s liens cannot be avoided. Bankruptcy Bill §406. Section 546(i)(2) provides that the exception should be applied in a manner consistent with any state statute similar to UCC §7-209. Oregon has codified §7-209 at ORS 77.2090. That section gives a warehouseman a lien against the bailor for goods covered by a warehouse receipt for storage and other charges (except for money advances and interest, which are governed by ORS ch. 79). *See* ORS 77.2090(1), (2). This type of lien requires no filings or statutory notice procedures; it is perfected so long as a proper warehouse receipt has been issued. Note that the warehouseman can also create a so-called “spreading lien” by including statutory language related to “other goods” when the stored goods rotate. For a primer on the requirements for a valid warehouseman’s lien, particularly on rotating goods, *see In Re Julien Co.*, 136 BR 765 (Bankr WD Tenn 1992).

EXPANDED RECLAMATION RIGHTS.

The Bankruptcy Bill expands the rights of suppliers of goods to seek reclamation of goods delivered to a debtor during the period before bankruptcy. The amendments also strengthen the position of suppliers with respect to other unsecured creditors. Bankruptcy Bill §1227.

Currently a seller of goods can reclaim goods received by the (insolvent) debtor in the ordinary course within 10 days after receipt of the goods. §546(c). The reclamation claim must be valid under applicable nonbankruptcy law (typically UCC §2-702) **and** the seller must satisfy additional requirements. The UCC has relatively stringent tests for reclaiming goods. For example, the seller must establish that the goods were still held by the debtor in their original form when the reclamation demand was made; or, the reclamation demand must identify the goods sought to be reclaimed with reasonable specificity. Generally, any demand for reclamation is junior and subject to a lien on inventory, cutting off many trade creditors’ reclamation claims. Section 546(c) also limits reclamation rights. It provides that in lieu of actually taking back the goods, the court may provide the reclamation creditor with an administrative priority or a lien. Debtors often provide early in their cases that any valid reclamation claims will be given administrative priority, and disputes about whether or not the claim is valid are put off. The result may be litigation over the validity of reclamation claims and compromise of the seller’s rights.

The Bankruptcy Bill extends the time period in which a trade creditor can make a demand, thereby expanding the universe of goods that can be reclaimed. The supplier of goods will have 45 days after delivery in the ordinary course to an insolvent debtor to make a reclamation demand. Bankruptcy Bill §1227(a). Also, the requirement that the reclamation claim be valid under the UCC is removed. Suppliers will not have to worry about whether the goods were still in the debtor’s possession or in their original form, or whether the demand was made with sufficient particularity. However, the demand is still subject to the prior rights of a secured creditor with a security interest in the goods supplied. *Id.*

The amendments leave some reclamation questions unanswered. Currently, §546(c)(2) specifically provides that if the court denies the creditor the right to physically reclaim the goods, the creditor is to be granted either a lien or an administrative priority. The amendments have stricken this language, making it unclear whether the creditor can **only** retake the goods or whether the court can still grant valid reclamation claims an administrative priority or lien. The amendments **do** provide that reclamation is in addition to the right under §503(b) to

receive an administrative expense priority for goods delivered 20 days prebankruptcy; so presumably, reclamation creditors who supplied goods during this timeframe will receive an administrative priority under both §503 and §546(c). But the remedy for suppliers during the 20 to 45 days prebankruptcy is not clear.

EXPANDED RIGHTS FOR UTILITIES

The Bankruptcy Bill gives utility companies the power to alter, refuse, or discontinue utility service to a debtor without having to obtain relief from the automatic stay or court approval. Bankruptcy Bill §417. As a result of these changes, chapter 11 debtors must work out a mutually agreeable form of assurance within the first 30 days of the case to avoid termination by the utility companies.

Currently, utility companies are barred from discontinuing or altering service to a debtor unless within 20 days after the date of the order for relief, the debtor furnishes "adequate assurance of payment" either in the form of a deposit or other security. §366. Adequate assurance is typically given in the form of an administrative expense priority.

Amended §366 defines the term "assurance of payment." It includes a cash deposit, letter of credit, certificate of deposit, surety bond, prepayment of utility consumption, or another form of security. Bankruptcy Bill §417. The administrative expense priority that utility companies are now given is no longer listed as an acceptable form of adequate assurance. The utility company can alter, refuse or discontinue utility service to a chapter 11 debtor if during the 30 days beginning from the petition date the utility does not receive adequate assurance "satisfactory" to the utility. In deciding whether the assurance of payment is adequate, the court may not consider the absence of security before the petition date, the timely payments by the debtor for service prepetition, or the availability of an administrative expense priority. Further, a utility can offset a security deposit without notice or court order. *Id.*

The Bankruptcy Bill does not require that the utility seek court approval before terminating service in accordance with the new provision, and as amended §366 will arguably eliminate the need to seek relief from the automatic stay before terminating service.

CONCLUSION

This article is intended only to highlight some provisions of the Bankruptcy Bill that may affect creditors. You should refer to the full Bankruptcy Bill or a new edition of the Bankruptcy Code to determine what sections affect your clients.

OSB Debtor-Creditor Section Annual Meeting and CLE

October 7-8, 2005, Portland Oregon.

The focus of the CLE will be state and national legislative changes and case law, with an emphasis on the practical impact of the new bankruptcy legislation effective in mid-October. Both national and local speakers will be featured and topics will cover both business and consumer issues.

The program will be held at the Benson Hotel. Featured national speakers, Judge Newsome and Judge Markell, will provide a detailed overview of the changes. Because this program will be held just before the effective date of the Act, we will be able to provide the most up-to-date information available from Oregon judges and the US Trustee's office on practical impacts of the law. The program will be comprehensive for both business and consumer practitioners.

Please call Miles Monson at 503-646-9230 with any questions.

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CAPPED CLAIMS AND LETTERS OF CREDIT

By Wendell Kusnerus
Davis Wright Tremaine

Letters of credit have yet to find a comfortable place in bankruptcy law.” *In re Mayan Networks Corp.*, 306 BR 295, 301 (9th Cir BAP 2004). As some recent cases illustrate, this is particularly true when the letter of credit relates to a claim that is “capped” by Bankruptcy Code §502.

There are a few fundamental issues on which the cases are pretty much in agreement. Neither the letter of credit nor its proceeds are property of the debtor's bankruptcy estate, and the automatic stay does not prevent the beneficiary from drawing on the letter of credit. *Mayan Networks*, 306 BR at 299; *In re Kmart Corp.*, 297 BR 525 (ND Ill 2003). Therefore, a creditor can draw on a letter of credit and obtain prompt, full payment of what would otherwise be a claim against the estate.

However, things are not so simple if the claim is held by a landlord or an employee of the debtor. Under §502(b)(6), a landlord's claim against the estate for damages resulting from the termination of a real property lease will be disallowed to the extent that it exceeds “the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease.” Under §502(b)(7) an employee's claim for damages resulting from the termination of an employment contract will be disallowed to the extent that it exceeds one year's compensation. According to the legislative history, these caps are designed to compensate the claimant, while not permitting a claim so large as to prevent other general unsecured creditors from recovering a dividend from the estate. *Mayan Networks*, 306 BR at 298.

If a landlord or employee holds a letter of credit, the result of a bankruptcy filing is typically a prompt draw on the letter of credit, followed by a claim from the issuing bank on its reimbursement agreement with the debtor. The net effect may be to expose the estate to a claim that exceeds the cap.

If the landlord or employee files a claim for additional damages, in excess of the payment on the letter of credit, should the letter of credit payment be applied to reduce the claim under the cap? Or should the creditor be enti-

pled to apply the letter of credit payment against the “excess” claim, and recover the entire amount permitted under the cap from the estate?

Prior to the tenant's chapter 11 filing, the landlord in *In re PPI Enterprises*, 324 F3d 197 (3d Cir 2003), had drawn \$650,000 on a standby letter of credit. The Third Circuit avoided deciding whether as a general rule letter of credit proceeds must be applied against the statutory cap. Instead, the court found that in this particular lease, the “parties intended the letter of credit to operate as a security deposit,” because the lease specifically referred to the letter of credit as “security” for the tenant's obligations, “in lieu” of the tenant's cash security obligation in the lease. It is well-established that a security deposit must be applied against the cap; the parties having agreed that the letter of credit should be treated as a security deposit, the court held that the security deposit rule should apply.

The claimant hoping that a letter of credit will provide a foolproof way around the statutory caps should review *In re Stonebridge Technologies, Inc.*, 291 BR 63 (Bankr ND Tex 2003), which held that a trustee could recover letter of credit proceeds from a landlord, to the extent the proceeds exceeded the cap. Once again, the lease language equated the letter of credit with a security deposit, thereby enabling the court to apply the security deposit rules.

In re Condor Systems, Inc., 296 BR 5 (9th Cir BAP 2003), which involved employee termination claims, reached the opposite result. Two executives who had been terminated prepetition held severance packages funded by standby letters of credit. The opinion, by Judge Klein, treated the letter of credit draw as a payment by a co-obligor, which as a general rule does not reduce the cap. PPI was distinguished because its letter of credit had been explicitly agreed to be a security deposit, thereby invoking the well-established rule requiring application of a security deposit to the capped claim. In an ominous passage for banks which issue letters of credit, the opinion declares, “The underlying premise of both the §502(b)(6) and (b)(7) caps is that the property of the estate will be liable for up to one-year's rent or one-year's compensation of a terminated employee.” 296 BR at 16. Furthermore, “[t]he Bankruptcy Code's provisions regarding co-obligors allow for subrogation or for reimbursement or contribution, but only to the extent that the cap is not exceeded and only after the terminated employee's claim is paid in full.” 296 BR at 19.

Mayan Networks also dealt with a letter of credit to a landlord. The letter of credit was less than the §502(b)(6) cap, so the specific issue before the court was only whether the landlord's capped claim had to be reduced by the letter of credit draw; all three panel members agreed that it did. The majority based its ruling on the legislative history of the cap, which endorsed the result in the pre-code case of *Oldden Tonto Realty Corp.*, 143 F2d 916 (2d Cir 1944), requiring that a security deposit count toward the landlord's claim. Since the debtor had pledged cash to secure the letter of credit, the majority ruled that the effect was identical to a security deposit provided directly to the landlord, and that the structure of the arrangement was really an attempt to circumvent *Oldden*. If the collateral would come back to the Debtor, then it is a security deposit for purposes of this analysis, and the letter of credit must be treated as if it were a security deposit.

In a concurring opinion, Judge Klein took dead aim at the letter of credit bank. He expanded on his analysis from *In re Condor Systems, Inc.*, to explicitly state that the bank's reimbursement claim against the estate would also be subject to the §502(b)(6) cap. Furthermore, if this claim is secured by collateral which exceeds the cap, the issuing bank's claim would still be limited to the amount of the cap, and it would have to turn over the excess to the estate.

Judge Klein argued that "a letter of credit is merely a powerful guaranty in which the issuer winds up with the same bankruptcy rights as other guarantors," 306 BR at 301, and that §509 and §502(e)(1)(C) combine to subject a guarantor's subrogation claim against the estate to the same limits as the underlying creditor's claim. Under §553, a "guarantor" can set off any collateral it holds against the claim, but only up to the cap; the excess must be turned over to the estate pursuant to §542(b).

Judge Klein's concurring opinion was criticized by Cisar and Simoni, "Secured Letters of Credit and the §502(B)(6) Cap on Lease Rejection Damages," 24-FEB *Am. Bankr. Inst. J.* 10 (2005). A crucial part of the argument is based on the premise that the letter of credit should be treated as a mere species of guaranty, and the issuing bank's claim must be treated as being based on subrogation to the landlord's claim. But a letter of credit differs from a guaranty in crucial respects. *Western Security Bank v. Superior Court*, 15 Cal 4th 232, 933 P2d 507 (1997). For example, under the "independence principal," the issuing bank must pay even if the debtor claims

to have a defense to the underlying claim, nor is the issuing bank entitled to a guarantor's suretyship defenses. Furthermore, while UCC §5-117 does provide that the issuing bank is subrogated to the rights of the beneficiary (in this case, the landlord), that is rarely the sole basis for the bank's claim; the bank typically has a reimbursement agreement with the debtor, which often is similar to any other bank loan. These are not academic distinctions. The bank is required to pay on the letter of credit without any reference to the validity of the beneficiary's claim; however, if the beneficiary's claim would be disallowed because the debtor turned out to have a valid defense, then under Judge Klein's subrogation-only analysis the bank's claim would also be disallowed. Furthermore, Judge Klein would apparently conclude that if the letter of credit is less than the cap, then the issuing bank would not be entitled to any payment at all until the landlord is paid its full capped claim, due to the subordination provisions of §509.

To an issuing bank, perhaps the most worrisome aspect is Judge Klein's conclusion, based on §502(e), that not only is the bank's reimbursement claim subject to the cap, but any collateral in excess of the cap must be turned over to the estate. But this conclusion ignores §506(d)(1), which provides that a lien is not void if the underlying claim is disallowed only under §502(e).

Judge Klein's *Mayan Networks* analysis remains a concurring opinion which has not yet been followed by any court, although it appears to be an elaboration on his opinion for the court in *In re Condor Systems*, and hence a party can argue that the latter case is controlling precedent based on the same reasoning. Until the situation clarifies, a bank should act very carefully before issuing a letter of credit for a capped claim, especially if the letter of credit is for either more or less than the exact amount of the cap.

NINTH CIRCUIT NOTES

By Ashley Hohimer
Miller Nash LLP

RETROACTIVE REJECTION CAN
PREDATE LANDLORD'S
REPOSSESSION OF THE PREMISES

In re At Home Corp.
392 F3d 1064 (9th Cir 2004)

The debtor entered into a nonresidential lease agreement with lessor and placed about \$20 million in escrow to fund remodeling of the leased premises. Before the debtor took possession of the premises, but after the renovations were “virtually complete,” the debtor filed chapter 11. On the date of the petition, the debtor also filed an emergency motion seeking an order rejecting the lease nunc pro tunc to the date the motion was filed. Although the landlord did not quarrel with the decision to reject the lease, an objection was made to the retroactive effect requested. The effective date of rejection governed whether the landlord would be entitled to over \$1 million in additional rent. The bankruptcy court approved the retroactive rejection of the lease, and the district court affirmed.

On appeal, the Ninth Circuit agreed. It rejected the landlord’s argument that the bankruptcy court lacked authority to approve rejection of the leases as of a date before the landlord regained possession of the leased premises. Recognizing that under §365(a), rejection does not take effect until judicial approval is secured, the court followed the First Circuit’s reasoning in *In re Thinking Machines Corp.*, 67 F3d 1021 (1st Cir. 1995), and held that a court has the equitable power to order rejection to operate retroactively. Furthermore, the court noted that §365(d) does not mention the term “possession,” much less elevate it to a condition precedent to a bankruptcy court’s exercise of its equitable powers. Because the legally operative event in §365(d) is the assumption or rejection of the lease, the landlord’s possession of the premises is not a requirement for retroactive relief.

PROBATE EXCEPTION APPLIES
IN FEDERAL-QUESTION CASES

In re Marshall, 392 F3d 1118 (9th Cir 2004)

The debtor married in 1994. Twelve years before the marriage, her husband had transferred a large part of his oil fortune to an inter vivos trust, designating himself and his son as cotrustees. The trust instrument expressly provided for the disposition of trust property upon the husband’s death.

During the one-year duration of their marriage, the debtor’s husband made numerous gifts to the debtor, together valued at about \$6 million. But neither a trust modification nor a last will and testament was executed identifying the debtor as a beneficiary of the trust. When the debtor’s husband died of heart failure in 1995, at the age of ninety, the debtor received far less of her husband’s fortune than she had expected.

The debtor contested the will in Texas probate court, alleging that her stepson had interfered with her statutory right to support from her husband and had breached his fiduciary duties as trustee. While the probate proceedings were pending, the debtor—now residing in California—filed chapter 11. When the stepson filed a claim in her bankruptcy case and commenced an adversary proceeding for defamation and attorney fees, the debtor counterclaimed for tortious interference with her expectation of both inter vivos and postmortem gifts.

The Texas probate court awarded the debtor nothing. The bankruptcy court entered a final judgment of over \$475 million for debtor and against the stepson. On review, the district court reduced the judgment to \$88 million. The Ninth Circuit vacated the district court’s judgment, and directed that the debtor’s claims against the stepson be dismissed for lack of jurisdiction. Citing Second Circuit case law, the court held that the bankruptcy court lacked jurisdiction to hear the claims pursuant to the probate exception to federal jurisdiction. The court refused to follow the Eleventh Circuit minority view, and rejected the debtor’s argument that the probate exception operates only in diversity cases. Recognizing that “the evil to be avoided is federal interference with state probate proceedings,” the court interpreted the probate exception to cover federal-question cases as well. Because the debtor’s adversary claims involved only state law probate matters, the court held the matters should be decided in Texas probate court, not in bankruptcy.

STATE PREFERENCE AVOIDANCE STATUTE PREEMPTED BY BANKRUPTCY CODE

Sherwood Partners, Inc. v. Lycos, Inc.
394 F3d 1198 (9th Cir 2005)

The debtor, a unified message service provider, made a voluntary general assignment for the benefit of creditors. After shutting down the debtor's business, the assignee proceeded to sue a creditor in California state court to recover a \$1 million payment made by the debtor. The suit was pursuant to California Civil Procedure Code §1800, which gives an assignee the power to void preferential transfers that cannot otherwise be voided by an unsecured creditor. The defendant creditor removed to federal court on diversity grounds and moved to dismiss, arguing that the state preference statute was preempted by the Bankruptcy Code.

The district court denied the creditor's motion, and the Ninth Circuit reversed. It held that the Bankruptcy Code preempted the state statute. The court found that the state avoidance powers given to the assignee were not expressly incorporated into the Bankruptcy Code by §544(b), and held that §1800 could not peaceably coexist with the federal bankruptcy scheme. Because the state statute had the potential to interfere with a bankruptcy trustee's powers under the strong-arm provision, the statute was preempted by the federal bankruptcy law.

CONVERSION FROM CHAPTER 11 TO 13 WON'T AFFECT POSTPETITION TAX CLAIM STATUS

In re Fowler, 394 F3d 1208 (9th Cir 2005)

After filing chapter 11, the debtors continued operating their adult care facility business. The IRS asserted an administrative expense claim for postpetition taxes. Three years later, the debtors ceased operation of the facility, and the case converted to chapter 13.

Before a chapter 13 plan was confirmed, the IRS filed an amended administrative expense claim to encompass the additional interest and penalties that had accrued while the estate was proceeding under chapter 11. The debtors objected, arguing that the IRS could no longer make an administrative expense claim because §1305 of the Code relegated the claim to prepetition unsecured priority status. The bankruptcy court agreed, ruling that a tax claim filed during the pendency of a chapter 13 petition must be prioritized "as if such claim had arisen before the date of the filing of the petition." The district court reversed, relying on §348(d) to hold that postpetition, preconversion administrative expense claims retain their administrative status.

The Ninth Circuit affirmed the district court's decision. Recognizing that §348(d) has generally been interpreted to preserve administrative expense claims upon conversion from chapter 11 to chapter 7, the court saw no reason to treat differently administrative expense priority in a conversion from chapter 11 to chapter 13. Furthermore, the court held that §1305 does not govern priority status, but rather permits an eligible postpetition creditor to participate in a chapter 13 bankruptcy proceeding.

SUMMARY DISMISSAL TOO HARSH A SANCTION FOR PROCEDURAL VIOLATIONS

In re Beachport Entertainment
396 F3d 1083 (9th Cir 2005)

In 1998, the debtor contracted with California State University to pay \$1 million for the right to conduct events in the University's sports complex. The debtor made two \$500,000 payments to the University's Foundation, the second of which the chapter 7 trustee sought to avoid as a fraudulent transfer after the debtor filed bankruptcy. The bankruptcy court granted summary judgment in favor of the defendant, on the basis that (1) the suit was barred under the 11th Amendment because the Foundation was an instrumentality of the State of California, and (2) the suit was time-barred pursuant to §548 of the Code. The trustee appealed to the BAP.

When the trustee did not file a designation of record and statement of issues as required by Bankruptcy Rule 8006, the clerk notified the trustee that the appeal was deficient and would be dismissed unless the trustee provided the court with the required information within 14 days. The trustee finally filed the designation of record and statement of appeal a week after the court's deadline, and the Foundation moved to dismiss for failure to prosecute. The BAP denied the motion, finding that the defendant had not been prejudiced by the delay in completing the record. But when the BAP discovered during oral argument that the trustee had not provided the court with the order appealed from, in violation of Rule 8009(b), the BAP immediately dismissed the appeal.

Upon review, the Ninth Circuit held that the BAP's summary dismissal was inappropriately harsh relative to the harm caused by the trustee's violation of the procedural rule. Although the court sympathized with the BAP's frustration and recognized the necessity of compliance with procedural rules, the court decided that the BAP should have considered the impact of the sanction and "the relevant culpability of the appellant and his attorney." Because the BAP did not give the trustee an opportunity to argue against dismissal, nor did it consider alternative sanctions available, summary dismissal was an abuse of its discretion.

BAP CASE NOTES

By Douglas Pahl
Perkins Coie LLP

DISCHARGE OF STUDENT LOAN DEBT: BAP
EXPLAINS UNDUE HARDSHIP TEST

In re Howe, 319 BR 886 (9th Cir BAP 2005)

The debtor filed an adversary to determine the dischargeability of \$81,000 in student loan debt. The bankruptcy court discharged all but \$36,000 of the debt, holding under §523(a)(8) that the debtor had shown that repayment of the debt would impose an undue hardship on her. The BAP reversed, concluding that the bankruptcy court had applied an incorrect standard.

To establish undue hardship, a debtor must satisfy a three-pronged test. The BAP focused on the first prong, which requires that the debtor establish that he or she “cannot maintain, based on current income and expenses, a ‘minimal’ standard of living if forced to repay the loans.” 319 BR at 889, quoting *In re Rifino*, 245 F3d 1083, 1087 (9th Cir 2001). What constitutes a minimal standard of living requires a review of the particular facts of each case.

The bankruptcy court used the Internal Revenue Service Collection Financial Standards to establish a “minimal standard of living.” The BAP disagreed with both the bankruptcy court’s adoption of the IRS standards and its failure to conduct an individualized analysis of the debtor’s expenses. Further, it held the bankruptcy court erroneously allowed the debtor the maximum amount permitted by the IRS Standards, even though some of the debtor’s actual expenses were lower.

The debtor’s budget should be viewed in light of what is necessary to maintain a standard of living for the long-term, and expenses such as the purchase of a new car may be appropriate. The BAP rejected the creditor’s argument that a debtor should be required to relocate to reduce her housing expenses even though those expenses satisfied §523(a)(8) and were within the IRS standards. It noted that the result on remand may not be any more favorable to the creditor.

ANTI-SLAPP STATUTE DOES NOT APPLY TO
FEDERAL QUESTIONS, BUT IS APPLICABLE
TO PENDENT STATE LAW CLAIMS

In re Bah, 321 BR 41 (9th Cir BAP 2005)

Philip and George Restaino sued the debtor in California state court in 2001. The case settled but the Restainos later sued the debtor for breach of the settlement agreement. The debtor filed a chapter 11 petition and brought an adversary proceeding against the Restainos seeking turnover of property of the estate and determination of the nature, extent and validity of liens. The complaint also contained state law claims, including intentional interference, breach of fiduciary duty and conspiracy to defraud.

The Restainos moved to strike the claims under California’s anti-SLAPP statute, Cal Code Civ Pro §425.16. That statute “was enacted in order to provide for the early dismissal of meritless suits aimed at chilling the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F.Supp.2d 1127, 1128 (ND Cal 1999). The Restainos argued that because the debtor’s adversary proceeding was commenced in retaliation for the Restainos’ exercise of their free speech or petition rights, the proceeding should be dismissed pursuant to the anti-SLAPP statute. The bankruptcy court concluded that the statute does not apply to bankruptcy actions and refused to dismiss any of the claims.

The BAP agreed with the bankruptcy court that the anti-SLAPP statute does not apply to claims arising under the Bankruptcy Code. However, it concluded that the bankruptcy court erred in holding that the anti-SLAPP statute did not apply to pendent state law claims asserted by the debtor in the adversary proceeding. Substantive state interests are furthered by the statute and application of the statute would not undermine federal interests. The BAP remanded for consideration of whether any of the pendent state claims satisfy the anti-SLAPP statute.

STATE COURT CASE NOTES

By Aaron Wigod
Greene & Markley, PC

"NATURAL PERSON" INCLUDES GRANTEES

Premier West Bank v. GSA Wholesale, LLC
196 Or App 640, 103 P3d 1169 (2004)

Plaintiff obtained a judgment against defendant's father in a previous action. That judgment became a lien on the residence owned by defendant's father. Defendant's father subsequently conveyed his residence to defendant who paid no consideration for the conveyance, but assumed the mortgage on the property. Plaintiff petitioned for an order authorizing the sheriff to sell the residence to satisfy the judgment against defendant's father, and the trial court granted the order.

On appeal defendant contended that the execution statutes apply only to property that is still owned by the judgment debtor at the time of execution. The court of appeals disagreed. It held that the term "natural person" in the statute meant any person, whether or not that person is the judgment debtor. However, because the trial court failed to address whether the defendant's father was entitled to a homestead exemption, the court of appeals vacated the order and remanded for further proceedings.

ENTRY OF JUDGMENT IS THE END

Bailey v. Vanderkin
198 Or App 232, 108 P3d 68 (2005)

One partner in a limited liability company sued another, they apparently settled, and the case was dismissed for lack of prosecution in September 2001. Neither party appealed that judgment or sought to have it set aside. Instead, in December 2001, defendant filed a motion in the same action to enforce the settlement agreement. The trial court granted the motion and entered judgment enforcing the settlement agreement. The court of appeals held that the trial court lacked jurisdiction to grant the motion enforcing the settlement agreement. It relied on the definition of "judgment" as the "final determination of the rights of the parties in an action" to reach this result.

CHARACTER OVER FORM

Swenson v. Mills
198 Or App 236, 108 P3d 77 (2005)

Plaintiff sued defendant for defaulting on a lease that had been assigned to defendant through a quitclaim deed. Defendant argued that grantor was an equitable mortgagor rather than a lessee and that the interest defendant received from grantor could be terminated only by foreclosure. The court agreed: the transaction, although structured as an outright sale of the subject property, was actually a security agreement securing an obligation to repay a debt through lease payments. Thus the interest transferred to defendant by grantor was that of an equitable mortgagor, which could be terminated only by foreclosure subject to the right of redemption.

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:

Deborah S. Guyol

5161 NE Wistaria Drive,
Portland, Oregon 97213

Tel: 503-281-2466 ■ Email: Dguyol@aol.com

Your letter should include the topic for the article and indicate whether you are willing to be the author.

OREGON LAUNCHES CARE PROGRAM

By Laura Walker
Cable Huston Benedict

The Debtor-Creditor Section of the Oregon State Bar is launching the CARE Program in Oregon. CARE (Credit Abuse Resistance Education) is the brain-child of Hon. John C. Ninfo II, a bankruptcy judge in the Western District of New York. The CARE Program aims to educate young adults about the risks of credit card abuse and to encourage responsible use of credit cards. Additional information about the program is available at the web site, www.careprogram.us.

Credit card companies aggressively solicit customers on college campuses. Statistics indicate that college graduates have an average of \$19,000 in student loan debt and \$3,000 in credit card debt when they graduate. The CARE Program seeks to inform young adults how credit cards work and how much you really spend for goods and services if you make only minimum credit card payments. The Program also provides practical advice to help young adults manage their financial affairs and stay out of financial trouble.

Judge Ninfo's "Dos and Don'ts" of Credit include (among others):

1. Always have a budget and live within it.
2. Don't have more than one credit card.
3. If you can eat, drink or smoke it, don't charge it.
4. Use a debit card, a check or cash whenever possible—you will spend less.
5. Always have a plan to repay your debt. Never make just a minimum payment.

Presentations will be made at Portland area high schools beginning in May and June of 2005. Each presentation will last 45 minutes to one hour. A practicing bankruptcy attorney and a local bankruptcy judge will lead discussions at each presentation. The CARE committee is seeking volunteers to make presentations to more high schools next year. The CARE Program provides materials to assist with the presentations, including a short video and written materials to hand out to students. The goal is to expand the program and to solicit participation in Salem, Eugene and other communities.

If you are interested in participating in the CARE program, please contact Laura Walker at telephone (503) 224-3092 or email lwalker@chbh.com.

CONSUMER BANKRUPTCY COMMITTEE

By Ian Wallace
Todd Trierweiler & Associates

FEBRUARY 17, 2005, MEETING

Regarding the new post-confirmation modified plan notice form, Brian Lynch, Chapter 13 Trustee, stated that all requests for waiver of schedules relating to the notice of modified plan should be directed to Chris at postcon@portland13.com. Mr. Lynch offered the following guidelines for schedule waiver requests:

- If the modified plan would permanently change plan payments, amended schedules will be required.
- If the modified plan would change plan payments only temporarily, the trustee's office will likely waive the requirement for amended schedules.
- If the modified plan seeks to use a tax refund of \$2500 or less, the trustee's office will likely waive the requirement for amended schedules.
- If the modified plan proposes to surrender something other than a house, the trustee's office will likely waive the requirement for amended schedules.
- If the modified plan proposes to surrender a house, the trustee's office will require amended schedules.

Judge Perris provided examples of non-material modifications not requiring an amended plan: agreed changes to a secured creditor's claim and scrivener's error. Judge Perris confirmed the new plan modification notice is mandatory as of April 1, 2005.

For debtors to retain Earned Income Credit (EIC) tax refunds, Mr. Lynch requires either of the following: specific language in the chapter 13 plan providing for retention of any tax refund attributable to the EIC, or incorporation of the refund into Schedule I as a form of income.

Mr. Lynch also announced that he is considering making wage orders mandatory with a possible opt-out provision, and is actively seeking comments on this issue.

A bankruptcy technician for the Oregon Department of Revenue pointed out that the "Bankruptcy Request to File" letters sent out by the ODR are Objections to Confirmation even when the return at issue is not due at time of case filing. Most bankruptcy judges will not hold up confirmation if the return is not yet due on the petition date.

The IRS representative requested that practitioners use the IRS address on the bankruptcy website, which enables the IRS to receive electronic notice of the bankruptcy filing. Carol Budnick will leave the IRS as of March 3, 2005, and will not be immediately replaced. Jeffrey Werstler announced his increased role in attending 341 meetings, as well as an expanded role in reviewing and investigating debtors' interests in trusts.

There was discussion of fees debtors' attorneys can charge for preparation of supplemental fee applications and fees. Judge Perris stated that \$35 is a standard fee for preparation of the fee applications. Any suggestions or comments on this subject should be directed to Judge Perris.

The new Chapter 7 Trustee, Rodolfo Camacho, will begin at the end of March.

APRIL 21, 2005, MEETING

Ted Hillison of Chase Home Finance presented a review of impacts the recent bankruptcy legislation will have on the financing options and lending market for debtors (both pre and post bankruptcy filing). Any follow-up questions or comments can be directed to Mr. Hillison at his office in Clackamas, Oregon (1-866-875-6560 ext. 202), or email at edward.b.hillison@jpmchase.com.

Jack Fisher and Wayne Godare of Mr. Lynch's office discussed several issues. First, the post-confirmation modified plan notice is now in place. An attorney can sign this plan on behalf of his or her client. Paragraph 6 of the notice is unambiguous: you must notify all creditors even for positive changes to creditor treatment.

They reminded debtors' attorneys that when resolving a Motion to Dismiss with the strict compliance order, a wage order is always part of the deal unless otherwise specified or permitted by the trustee.

Preconfirmation volume is increasing. To help the trustee's office handle this increase and reduce the disruption the move to electronic filing is causing, Mr. Godare stressed to debtors' counsel the need to provide as much information as legally and practically possible. At a minimum, read and adhere to the forms.

- Preconfirmation modified plan notice (form 1355.05): Read and adhere to paragraph 4, which certifies that a separate summary of the modifications has been served on the Trustee along with his copy of the modified plan and any modified budget or other pertinent information." This paragraph is not surplusage.

- The request on Exhibit C to disclose the debtor's telephone number is often ignored. Debtors' counsel at the meeting asked why such information is necessary, and were told that occasions arise when the trustee's office needs to communicate directly with the debtor. Further, the request is part of the approved form.
- Exhibit D-2 explicitly requires that a copy of Schedule C from the prior year's tax return (or an explanation of its absence if appropriate) be attached. Exhibit D-2 requests lists or further explanation for certain line items, including secured debt and rents or leases. Such lists or explanatory documents are rarely included. They are always required.

The trustee's office has a new email policy. All pre-confirmation questions and correspondence should be e-mailed to precon@portland13.com and all post-confirmation questions and correspondence should be directed to postcon@portland13.com. If you email to these addresses, your messages will be delivered to the correct individual in the Trustee's office. Be sure to put the debtor's name and case number in the subject line. Do not "carbon copy" other trustee email addresses, nor is it necessary to send or fax a hard copy of the emailed information (unless law or local rule specifically requires it).

Judge Dunn delivered a message from Judge Brown strongly encouraging people to sign up for e-filing. Within the next year e-filing may be mandatory for all districts. Counsel can take a class to learn the procedures. The judges would like you to take this class and get on board with e-filing. Mr. Trierweiler pointed out that e-filing leads to cost savings. Both Michael Caro and Judge Dunn noted that procedures can vary between jurisdictions, so it is crucial to get the proper education. You can sign up for classes, which are held a few times each week, on the court's website.

Matthew Armory of the IRS confirmed that the IRS is shifting the bulk of its bankruptcy work to its Philadelphia service center beginning in early June. A letter detailing this change and its impact on practice will be sent out shortly. Jeffrey Werstler reminded us that Carol Budnick and Pat Brown have left the local office. Mr. Werstler will take over most of their work. Also, for most audit situations you can contact Mr. Werstler first.

Judge Dunn confirmed that the new Motion for Relief form is mandatory in all situations beginning May 1, 2005.

Pam Griffith of the U.S. Trustee's office acknowledged significant changes due to the recent bankruptcy reform legislation. She also confirmed that very little is known about how these changes will affect the US Trustee's office, but these issues are being furiously worked on by a committee in Washington, DC. The US Trustee's office will notify all as soon as more information is available.

A day-long Oregon Law Institute CLE at the Portland Convention Center on June 30th, 2005, will be devoted to analyzing the new bankruptcy law.

Judge Dunn noted that the Commercial Law League of America is conducting a series of phone conferences about aspects of the new bankruptcy law. He also noted that the American Bankruptcy Institute World website has excellent information and analysis on the new law.

Caroline Cantrell, on behalf of the Debtor-Creditor section, said that the Section will present a one and one-half-day CLE on the new legislation and all the issues surrounding it. This CLE is scheduled for sometime in late summer, and the section seeks volunteers to help organize and plan it. Contact Caroline Cantrell for more information.

There was general discussion about the radical nature of the new law and general consensus on the unknown impacts the law will have on daily practice. Judge Dunn said he had started to look at the form Plan and Order Confirming Plan for consistency with the new laws. Mr. Trierweiler echoed a common concern about what effect these laws might have on pro bono efforts. There will be much more to come on this issue—stay tuned.

The duties of chair and secretary of the subcommittee were passed to S. Marc Hull (chair—of Todd Trierweiler & Assoc) and Laura L. Donaldson (secretary—of Donaldson McCaffrey McElroy & Arsanjani LLP). Good luck! And thanks to Ian Wallace and Amanda Bailey for their time and service.

The consumer bankruptcy subcommittee usually meets every other month on the third Thursday of the month at 4:30 pm in the 8th floor conference room at the United States Bankruptcy Court in Portland. Because of the new legislation, we will meet **each month** during the summer. The next two meetings will be on the **fourth** Thursday: June 23, 2005, and July 28, 2005. All bankruptcy practitioners are encouraged to attend.

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