

# Newsletter

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## COMMENTS FROM THE CHAIR

**By Thomas W. Stilley**  
Sussman Shank LLP

As we dry out from one of the soggiest winters in recent memory we can all look forward to a summer hopefully filled with fun and sun. During the long winter months the Debtor-Creditor Section has been busy.

The Section website is up and running, thanks primarily to the work of Tom Renn and Victoria Short Baum. The Website is filled with information about the Section and useful resources. Included is a calendar with information on all upcoming and past Section events together with resource materials. The Online Membership Directory remains a work in process but already contains member information and the contacts for the various Section committees. Click on [www.osb-dc.org](http://www.osb-dc.org) and take a few minutes to see what the Website has to offer.

Another new Section benefit is the Bankruptcy Court website summaries that are emailed to members by Debbie Guyol, the Section newsletter editor. Debbie reports to the Section each week as new information becomes available on the court's website in an effort to keep the members apprised of changes in forms and rules, court

opinions, and other developments. We hope you find this service valuable.

In February, the Section held a very successful and informative Saturday Session at the Salem Conference Center. Doug Shultz and Dawnne Linenbrink did an excellent job organizing the Saturday Session and seeing that everything ran smoothly. The main topics discussed were Electronic Case Filing and the Bankruptcy Court's new General Order 05-1, which implements all the changes that resulted from the enactment of the BAPCPA. A spirited discussion of ECF was led by a panel comprising Tom Renn, Charlene Hiss, Judy Adair, and Rusty Griffin. The General Order 05-1 discussion was led by Ann Chapman, Mike Blaskowsky, Michael Grassmueck, and Todd Trierweiler.

By the time you receive this newsletter, the 19<sup>th</sup> Annual Northwest Bankruptcy Institute will be history. As in the past, this event offered another exceptional CLE program as well as networking opportunities with our fellow bankruptcy practitioners across the Columbia river.

Faced with a deadline of April 1, 2006, for submission of new legislation, our Legislative

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## LACK OF STANDING STALLS MOMENTUM ON CHALLENGES TO DEBT RELIEF AGENCY REGULATIONS

By James T. Yand  
Stafford Frey Cooper PC

Attorneys' efforts to replicate or expand upon the decision last fall by Chief Judge Lamar W. Davis of the Bankruptcy Court for the Southern District of Georgia have been stymied by standing issues raised by the United States Trustee's office.

Last fall Judge Davis, ruling that attorneys are not debt-relief agencies, wrote that he did not believe Congress intended to include them based on the language of the statute. The US Trustee appealed that ruling to the federal district court. The government contends that the language and legislative history clearly indicate that attorneys are covered. The appeal is still pending.

In another Georgia case, bankruptcy attorney John K. James filed a "motion to determine attorney status" with the chief bankruptcy judge for the Bankruptcy Court for the Middle District of Georgia. James argued that the debt-relief agency provisions of BAPCPA,

as applied to attorneys, violate the First Amendment. He also claimed that the law's structure and legislative history indicate Congress did not intend the term to apply to attorneys.

The chief judge ruled against James, not on the merits but on jurisdictional grounds: because he lacked standing. Judge Hershner denied the motion on the basis that no "case or controversy" existed. *In re McCartney*, 336 BR 588 (Bankr MD Ga 2006). He quoted *Aldridge v. United States*, 59 Fed Cl 387, 388-89 (2004), as follows:

A fundamental jurisdictional consideration for any federal court, including Article I courts, is whether the plaintiff has constitutional standing. *Glass v. United States*, 258 F3d 1349, 1355-56 (Fed Cir 2001); *Sterling Savings v. United States*, 57 Fed Cl 234, 236 (2003). The inquiry is a reflection of the concern that there be an

*Continued on page 3*

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Comments from the Chair

committee, headed by David Hercher, has been busy. It has submitted four proposals for new legislation to be considered by the 2007 Oregon Legislature: two regarding foreclosure sales, one on wage garnishment, and the other a technical amendment to UCC Article 9.

As in most recent years, we plan to hold our 2006 annual meeting in the fall. Committee chairs Susan Ford and Miles Monson, and the Annual Meeting and CLE

committees, are currently determining the CLE topics and planning the social events. This year the annual meeting will be held September 29 - 30, 2006, at Mt. Bachelor Village in Bend.

Have a great summer. As always, if you have any questions or suggestions please let me know.

### Debtor-Creditor Newsletter

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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.

actual “case or controversy” before the court. See *Arizonans For Official English v. Arizona*, 520 US 43, 64, 117 S Ct 1055, 137 LEd2d 170 (1997). The litigant must show, “first and foremost, ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent.’” *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 US 555, 560, 112 S Ct 2130, 119 LEd 2d 351 (1992)). In the absence of standing the court has no jurisdiction to decide the merits of a claim. See *Arizonans For Official English*, 520 US at 67, 117 S Ct 1055, 137 LEd2d 170.

Three elements must be present for a plaintiff to satisfy the “case or controversy” requirement of constitutional standing. First, the plaintiff must demonstrate “actual injury.” *Warth v. Seldin*, 422 US 490, 498, 95 S Ct 2197, 45 L Ed 2d 343 (1975). Second, the plaintiff must establish a causal link between the injury and the challenged conduct. *Lujan*, 504 US at 560, 112 S Ct 2130, 119 L Ed 2d 351. Third, it “must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* 59 Fed Cl at 388-89.

336 BR at 591. The court then quoted *Barr v. Matteo*, 355 US 171, 172, 78 S Ct 204, 2 L Ed2d 179 (1957):

Thus, an advisory opinion cannot be extracted from a federal court by agreement of the parties, and no matter how much they may favor the settlement of an important question of constitutional law, broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court.

336 BR at 591.

Because no one had threatened to enforce the Debt Relief Agencies provisions against counsel, the court held it lacked jurisdiction to decide whether the BAPCPA provisions applied to counsel. Judge Hershner did not even once refer to Judge Davis’s opinion.

Debtors’ attorney Jay Jump of Seattle’s The Jump Law Group argued a similar motion before Chief Judge Karen Overstreet of the Western District of Washington and lost on the same jurisdictional grounds: lack of standing. Judge Overstreet in her oral ruling on the motion acknowledged that attorneys and the court both would like the issue resolved. But under the standing rules outlined by the Supreme Court and as applied to the case at bar, the court could not enforce rights belonging to a third party (Mr. Jump) rather than those of the debtor. She also declined to issue a declaratory ruling

since there was no evidence showing the US Trustee was prepared to take adverse action against Mr. Jump or the Debtor. In short, the motion failed because it sought to enforce the rights of counsel rather than the debtor.

In Oregon, the challenge has been filed by attorneys directly against Attorney General Gonzales and United States Trustee Lashinsky on First Amendment grounds. *Olsen v. Gonzales*, No. 05-6365-HO. The complaint alleges that §§526 – 528 limit the advice that attorneys can give their clients and require attorneys to make certain disclosures. Plaintiffs contend these limitations chill and restrict free speech and compel speech in violation of the First Amendment. The government moved to dismiss, arguing that the new restrictions are limited in scope and do not unduly restrict the conduct of attorneys. On April 3, Keith Karnes of Olsen, Olsen & Daines filed Plaintiff Response in Opposition, a copy of which is available on the firm’s website, along with other pleadings from the case. [www.olsendaines.com](http://www.olsendaines.com). No hearing date for the government’s motion has been scheduled.

Henry J. Sommer, president of the National Association of Consumer Bankruptcy Attorneys, has reported that the NACBA will file suit to challenge the new provisions on First Amendment and other grounds. He has been joined by constitutional scholar Erwin Chemerinsky of Duke Law School. They contend that preventing lawyers from giving important, lawful information to their clients cannot be reconciled with the First Amendment. There is also a compelled-speech argument based on attorneys having to advertise that they are a debt-relief agency and they help people file bankruptcy cases when that may not be the case. Sommer and Chemerinsky argue that these disclosures require attorneys to say something that is not necessarily true.

Finally there is increasing concern that bankruptcy lawyers will leave this practice area as a result of the new regulations and questions about whether malpractice insurance will cover debtor work. By clarifying whether the regulations apply to attorneys, the courts would help the bankruptcy bar decide how best to provide bankruptcy services to their clients in

## SECTION WEBSITE

The Debtor-Creditor Section website, <http://osb-dc.org>, is now accepting postings for job vacancies.

## JUST HOW GOOD IS AN OREGON JUDGMENT LIEN?

By **Wendell Kusnerus**,  
Kilmer, Voorhees & Laurick PC

We all know that a money judgment creates a judgment lien which attaches to all of the judgment debtor's real property in the county where the judgment is entered or recorded. ORS 18.150. Of course, a judgment lien, like any other lien, would be of limited utility to protect the creditor if it could be evaded by the simple device of selling the property, and so, historically, ORS 18.165 has provided that "A conveyance of real property, or any portion thereof, or interest therein, shall be void as against the lien of a judgment, unless the conveyance is recorded at the time the judgment is entered, or at the time the judgment is recorded under ORS 18.152." This is the familiar "first in time, first in right" rule; if the judgment was already of record, a purchaser took the property subject to the judgment lien. Consequently, prudent purchasers made sure that any existing judgment liens were paid as part of any sale transaction.

The 2005 legislature appears to have changed that. HB 2359 (2005 Oregon Laws Chapter 568) amended ORS 18.165, which now reads:

If a judgment with lien effect under ORS 18.150, 18.152 or 18.158 is entered or recorded in a county before a conveyance, or a memorandum of a conveyance, of real property of the debtor is recorded in that county, the conveyance of the judgment debtor's interest is void as against the lien of the judgment unless:

- (a) The grantee under the conveyance is a purchaser in good faith for a valuable consideration and the conveyance or memorandum of the conveyance is recorded within 20 days after delivery and acceptance of the conveyance, excluding Saturdays and legal holidays under ORS 187.010 and 187.020;
- (b) The judgment creditor has actual notice, record notice or inquiry notice of a conveyance to a grantee when the judgment is entered or recorded in the county;
- (c) The conveyance is a fulfillment deed entitled to priority over the judgment under ORS 93.645; or
- (d) The conveyance is a mortgage, trust deed or other security instrument given to secure financing for the purchase of the real property described in the conveyance.

Subsections (b) and (c) don't appear controversial. However, subsection (a) appears to mean that a conveyance (which is defined as a "deed, a land sale contract, an assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or any other agreement affecting the title of real property within this state, including a deed, a mortgage, an assignment for security purposes or an assignment solely of proceeds, given by a purchaser or seller under a land sale contract or given by a person with title to the real property") takes priority over the judgment lien, as long as: (1) the grantee is a purchaser in good faith and for valuable consideration; and (2) the conveyance or a memorandum thereof is recorded within 20 days after the conveyance is delivered or accepted. Presumably, a person with actual notice of the judgment lien would not be a purchaser in good faith. But a purchaser with a pure heart but empty head would appear to take free of the judgment lien, as long as it gets around to recording its conveyance within 20 days - excluding weekends and holidays.

Subsection (d) may have even more dramatic effects. It does not even contain a requirement of good faith; it simply provides that a "mortgage, trust deed or other security instrument given to secure financing for the purchase of the real property" is not subject to the judgment lien.

On its face, HB 2359 appears to have reduced Oregon judgment liens to virtual irrelevance.

### **Debtor-Creditor Annual Meeting 2006**

**September 29 – 30**

**Mt. Bachelor Village in Bend**

Besides the CLE program, there will be a private tour and dinner at Deschutes Brewery, golf and other activities.

**Save the Dates!**

## THE 2006 BANKRUPTCY COURT SATURDAY SESSION

By **Teresa H. Pearson**  
Miller Nash LLP

The annual Saturday Session of the Oregon Bankruptcy bench and bar took place on February 25, 2006, at the Salem Conference Center. Approximately 50 people attended.

Chief Bankruptcy Judge Elizabeth L. Perris led the program with her State of the Court Address. Judge Perris reported on bankruptcy case filing statistics for the District of Oregon. Judge Perris reported that the Court has experienced big changes in the last year with the conversion to CM/ECF and the new bankruptcy rules promulgated after Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Judge Perris acknowledged that the Court would need to do some fine-tuning of General Order 05-1 after it had some experience with new cases filed under BAPCPA. The Court intends to close its after-hours drop box on May 1, 2006. Although there are no immediate plans to do so, eventually the Court will likely make ECF participation mandatory for attorneys.

US Trustee for Region 18, Ilene J. Lashinsky, then provided an update on BAPCPA's impact on the US Trustee's office. Ms. Lashinsky stated that the US Trustee's office has approved 128 credit-counseling providers and 197 debtor-education providers. Two of the credit counseling providers are nationwide. The US Trustee's office encourages chapter 13 trustees to provide debtor education. The reapplication process for providers will start this spring, and Ms. Lashinsky encouraged practitioners to provide the US Trustee's office with information about the quality of service offered by various providers. The US Trustee will accredit providers annually. Ms. Lashinsky advised practitioners to read *In re Rodriguez*, case no. 05-05694-TLM (Bankr D Idaho 2005), because it contains a well-written discussion of issues arising under 11 USC §109(h).

Ms. Lashinsky discussed the ongoing debate over whether attorneys are debt relief agencies under the Bankruptcy Code. A bankruptcy court in Georgia has held that attorneys are not debt relief agencies. The US Trustee in that region has appealed, and briefs from that case are available at the US Trustee's office's website: [http://www.usdoj.gov/ust/eo/legal\\_matters/index.htm](http://www.usdoj.gov/ust/eo/legal_matters/index.htm). In Oregon, this issue has arisen in the Eugene case of *Olsen v. Gonzales*, case no. 05-06365-HO (D Or).

With respect to chapter 11 cases, the US Trustee's office is working on promoting uniformity throughout the United States, and will consider fee issues in larger cases. One particular issue is the US Trustee's authority to appoint the trustee in chapter 11 cases. Ms. Lashinsky also mentioned that the National Conference of Bankruptcy Judges is including the US Trustee's office in its conference this year.

Bankruptcy Court Clerk Terence Dunn then reported on the State of the Clerk's Office. On behalf of the clerks, Mr. Dunn expressed thanks to all for making it through the heavy filing period around October 17, 2005. Mr. Dunn noted that chapter 7 and chapter 13 fees will increase [this has taken place since the Saturday Session], and chapter 11 fees may or may not increase. The clerk's office in Portland is putting in a new telephone system this year, which is expected to cut over sometime in March. The old numbers will still work for a while. The new main telephone number will be 503-326-1500. It is possible that the Meet-Me telephone number will change, but Mr. Dunn did not know when that would occur. The Eugene clerk's office will change to a new telephone system when it moves to the new federal courthouse.

Mr. Dunn commented that the clerk's office tries not to change the local bankruptcy forms too often. The index of forms on the Bankruptcy Court's website has the most current information. Usually the clerk's office gives 30 to 45 days notice of the transition to new forms. LBF 100 was changed effective February 1, 2006, to help the US Trustee's office with credit counseling certificates. Other form changes became mandatory on March 1, 2006. The clerk's office is working to convert all the local bankruptcy forms to .pdf fileable forms, and hopes to finish that project in the next few months. The clerk's office is also trying to format the chapter 13 confirmation order form so that all work on it can be done electronically.

Mr. Dunn encouraged practitioners to review frequently the Bankruptcy Court's website for new and updated information.

Next, a panel consisting of bankruptcy attorney and trustee Tom Renn, Chief Deputy Clerk Charlene Hiss, case administration supervisor for Eugene Judy Adair, and Rusty Griffin of Todd Treirweiler and Associates, discussed CM/ECF and how it is working in Oregon. Ms. Hiss and Ms. Adair described the CM/ECF system from the Court's perspective. Mr. Renn commented on how trustees are using the system, and Mr. Griffin explained how the system is working in a debtors' law practice. About half of the attendees at the program were ECF

filers. Attendees had numerous comments regarding what was working and what was not. The Bankruptcy Court is very interested in hearing questions and concerns about the CM/ECF system, and has a help desk phone line set up to assist filers. The number is 503-326-1510.

Ann Chapman, Mike Blaskowsky, Michael Grassmueck, and Todd Trierweiler ended the program with a panel discussion on General Order 05-1 and the new local bankruptcy forms. There is still some confusion regarding rules and forms applying to new post-BAPCPA cases. Payment advices required by §521(a)(1)(B)(iv) are not to be filed with the Court; rather they must be served on the US Trustee (not the case trustee) at the time the debtor's schedules are filed. The US Trustee's office appreciates receiving explanatory material with information about debtor's income and expenses for the means test. Most of the trustees have websites explaining what information they want regarding domestic support obligations. These websites can be accessed through the Debtor-Creditor Section's website at <http://osb-dc.org/Subs/Bapcpa.htm>. There are new forms for chapter 12 and 13 plans. For chapter 13 cases, Eugene is still using its "fast track" procedure, even though that is no longer on its notices to creditors.

The Saturday Session was a useful dialog between the bench and bar on many of the new changes arising from CM/ECF and BAPCPA. Materials from the program will be available on the Debtor-Creditor Section's website at <http://osb-dc.org>.

## ELECTRONIC CASE FILING - ECF

By **Rusty Griffin, Legal Assistant**  
Todd Trierweiler & Associates

### ECF 101

**E**CF – electronic case filing – is the bankruptcy court system that allows attorneys, trustees and select creditors to file and retrieve bankruptcy petitions and other documents using a standard web browser. Some of the issues associated with ECF were discussed at the Saturday Session on February 25, 2006.

ECF has numerous benefits. All documents and filings are available 24 hours a day, 7 days a week. A case can be filed and immediate confirmation – including case number and a trustee assignment – can be received at any time: weekends, holidays and any other time the court is closed. Case information is also available at all times. This means you can download documents and print copies for yourself or your clients without waiting for requests to be processed. The most obvious ECF benefit is reduced costs for mail, courier services and copies.

Convenience is another benefit. For example: a client who has a foreclosure sale scheduled for 9:00 am can meet with our office at 8:00 am; using ECF we can file a bankruptcy petition, have a case number and trustee assigned, and serve the foreclosing entity before 9:00 am. In contrast, with paper filing none of this could be achieved before the 9:00 am deadline.

There are some costs to changing over to ECF – primarily the start-up cost in time as well as money. These costs are mostly temporary. I believe that the benefits far outweigh the costs, and that the change is inevitable in any event.

The ECF system is based on simple file uploading. The only type of file accepted by the court at this time is PDF (portable document format). These files are created in a text-based word processing environment (such as Microsoft Word or Corel Wordperfect) and then converted to a non-modifiable PDF file. The text-based PDF files retain all of the same formatting as the documents from which they were created.

Once you have a document in the correct format, go to the bankruptcy court web site and simply follow the prompts known as "event" to submit the document for filing. A filing receipt can then be printed. Most documents are docketed immediately upon filing.

Because no one learns without some trial and error, the bankruptcy court maintains a technical support team known as the ECF Helpdesk. The knowledgeable staff

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Advertising will be limited to those entities which provide goods and services to section members. Cost and ad sizes are:

Quarter page	\$150
Half page	\$250
Full page	\$450

For information, write: **Deborah S. Guyol**  
5161 NE Wistaria Drive, Portland, Oregon 97213

members are available to answer questions about choosing “events” and to lend their expertise and advice about all things ECF. If you need assistance with filing questions, from how to sign up to help with individual documents, call the help desk at 503-326-1510 or visit the website <http://www.orb.uscourts.gov/orb/ecf/nsf/ecftrng.htm>. If you’re still among the uninitiated, go to the web site to sign up for ECF training.

## ECF AND THE PAPERLESS OFFICE

For the past seven years my work has involved turning paper into all types of electronic formats. I have done this for different companies in many different fields. I have found one thing all industries have in common: a moment comes when individuals within it must leap forward and embrace change. This leap may be uncomfortable, but it is necessary. I believe the time for our great leap is now.

The change that will soon be required for all of us is the bankruptcy court’s ECF program. Although no target date has been set for mandatory ECF, it is clear to me that that date will come soon. The Washington bankruptcy court adopted a mandatory ECF system two years ago – and it has survived.

As of February 2006, only about 20% of all documents filed with the court used the ECF system. This means that the firms filing 80% of documents must still make the leap into electronic case filing. This leap is essential for the future of our industry and – more urgently – the future of our individual businesses. I am sure many Oregon attorneys have filed bankruptcy petitions for companies that failed to keep pace with technology.

That being said, implementation is easier than one might think. It is certainly easier than it was five years ago, or even two years ago, when Washington adopted ECF. Most firms are just a step or two away. The court has already provided numerous Adobe versions of forms that can be populated and filed. Microsoft Word and Corel WordPerfect documents can be converted to files that can be uploaded with ease. Software such as Bestcase and New Hope allow uploads directly to the court’s website with the click of a single button. These software brands have been tested for years and are extremely versatile – the kinks have been mostly eliminated.

Most firms already save petitions in an electronic format within a client folder, creating a virtual file room. Imagine the possibility of these file folders replacing your paper files. A paperless office! Scanners could replace copy machines. Debtors and creditors could be served via email. Laptops replace suitcases full of file folders. Wireless access points could be available in the

courtroom. No more diving into the back seat of your car for lost files. The location of the file would have no bearing on your ability to review a case, or prepare for a hearing. You could conceivably work from the ski slopes, or the beach, or even the martini bar.

I believe these changes are inevitable. Oregon will become a mandatory ECF state, and over the next years and decades we will become less and less dependent on paper. It can be done! Other industries have been successful with similar changes and it is our turn to step into the future and make our great leap towards our eventual freedom from paper.

## SUPREME COURT CASE NOTE

**By Doug Pahl**

Perkins Coie LLP

### **HIGH COURT RULES STATES WAIVED SOVEREIGN IMMUNITY RELATING TO BANKRUPTCY LAWS BY RATIFYING THE CONSTITUTION**

*Central Virginia Community College v. Katz,*  
126 S Ct 990 (2006)

In *Seminole Tribe of Florida v. Florida*, 517 US 44 (1996), the Supreme Court held that Indian tribes could not sue states to enforce statutes promulgated pursuant to the Indian Commerce Clause. Commentators have since wondered whether the Seminole case could be read to limit the authority to enforce the Bankruptcy Code against states. The Court has answered that question in the negative.

*Central Virginia* involved a preference action brought against a number of state institutions of higher learning. The State’s motion to dismiss on sovereign immunity grounds was denied by the bankruptcy court, a ruling that was affirmed at each subsequent level of appeal.

Affirming once again, Justice Stevens, writing for a 5 to 4 majority, focused on the history and scope of the Bankruptcy Clause. Article I, Section 8, Clause 4 of the Constitution states that Congress shall have the power to establish “uniform Laws on the subject of Bankruptcies throughout the United States.” In *Tennessee Student Assistance Corp. v. Hood*, 541 US 440, 124 S Ct 1905 (2004), the Court held that *in rem* proceedings do not infringe states’ sovereign immunity. The *Central Virginia* Court, citing *Hood*, reasoned that bankruptcy jurisdiction has historically been understood as “principally in rem.” “The Framers would have understood that laws ‘on the subject of Bankruptcies’ included law providing, in certain limited respects, for

more than simple adjudications of rights in the res.” 126 S Ct at 1000. Thus, even if the preference suit at issue in *Central Virginia* was not *in rem*, the Framers would have interpreted the Bankruptcy Clause to allow preference suits unimpaired by sovereign immunity defenses.

Justice Stevens concluded: “In ratifying the Bankruptcy Clause, the States acquiesced in the subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.” 126 S Ct at 1005.

## NINTH CIRCUIT CASE NOTES

By **Matthew A. Goldberg**  
Preston Gates & Ellis, LLP

### “CAUSE” FOR DISMISSAL UNDER §707(A) DOES NOT INCLUDE DEBTOR MISCONDUCT CONTEMPLATED BY OTHER CODE SECTIONS

*In re Sherman*, 441 F3d 794 (9th Cir 2006)

Faced with having to disgorge over \$600,000 in connection with a securities fraud action, one of the implicated attorneys and his wife filed for chapter 7 relief. The Securities and Exchange Commission moved for dismissal under §707(a), which the bankruptcy court denied. While the SEC’s appeal was pending in district court, the bankruptcy court entered an order granting debtors a discharge under §727. The district court reversed, finding that the timing and circumstances of the debtors’ filing constituted “cause” for dismissal under §707(a).

The Ninth Circuit reversed, holding that the bankruptcy court did not err in denying the SEC’s motion to dismiss because the misconduct alleged by the SEC did not constitute cause under §707(a), but instead was addressed by other sections of the Code that provided their own distinct remedies. The Ninth Circuit also voided the debtors’ discharge, however, finding that the bankruptcy court did not have jurisdiction to enter a discharge order while an appeal of its denial of the SEC’s motion to dismiss was pending.

Before reaching the merits of the §707(a) issue, the court addressed a threshold standing inquiry: whether the SEC was a “creditor” under the Code with standing to seek dismissal of debtors’ case. The court cited to a Supreme Court definition of “claim” as “nothing more nor less than an enforceable obligation,” and found that because the disgorgement order was an enforceable obligation, the SEC was a creditor with standing even though the disgorged funds would not have gone to the

SEC directly. The agency’s interest in enforcing the disgorgement order was not diminished by the fact that the agency would not be the recipient of the funds.

The court began its analysis of the merits by citing to *In re Padilla*, 222 F3d 1184 (9th Cir 2000), which held that if the asserted “cause” for dismissal under §707(a) is contemplated by another Code provision, then it cannot constitute cause under §707. Next, the court applied this test to the three types of misconduct by debtors alleged by the SEC. First, the SEC alleged that debtors filed for bankruptcy to thwart the disgorgement proceeding pending in district court. Second, the SEC alleged that debtors preferentially favored other creditors in an attempt to disadvantage the SEC. Third, the SEC complained that debtors deliberately misrepresented their liabilities and expenses.

Finding that each of the alleged instances of misconduct by debtors was specifically addressed by another Code section, the court held that there was no “cause” under §707(a) and, therefore, the bankruptcy court did not err by denying the SEC’s motion to dismiss. The court stated that the exceptions in §362(b) and (d) “account[] for the fact that it may not always be appropriate to permit debtors to take advantage of the automatic stay,” and, thus, provide a remedy against debtors who impermissibly use bankruptcy “to seek refuge from another court.” 441 F3d at 814. With respect to the alleged preferential transfers, the court pointed to §547 and noted that the section’s reservation of the avoidance power to the trustee was not inconsistent with the notion that the Code expressly contemplated this type of misconduct. As for the allegedly misleading information provided by debtors, the court found that denial of discharge under §727(a)(4)(A) was the appropriate remedy. Though the court sympathized with the SEC and the district court’s frustration with debtors’ behavior, the court stated that §707(a) does not “permit a free-floating concept of cause for dismissal to substitute for careful application of the bankruptcy scheme Congress devised, including the multitude of remedies for abusive behavior or behavior harmful to the public interest.” 441 F3d at 819.

**NO BANKRUPTCY COURT JURISDICTION OVER CAUSES OF ACTION BETWEEN CREDITORS FOLLOWING DISMISSAL OF BANKRUPTCY CASE**

*In re Valdez Fisheries Development Association, Inc.*  
439 F3d 545 (9th Cir 2006)

Sea Hawk Seafoods sued Valdez Fisheries Development Association (“VFDA”) in Alaska state court for breach of contract. After the court entered judgment in Sea Hawk’s favor, the State of Alaska called over \$7 million of loans it had made to VFDA. VFDA transferred approximately \$2 million in cash and accounts receivable to the State. Sea Hawk then sued the State in state court under state fraudulent transfer law. In the interim, VFDA had filed for chapter 11 relief. Sea Hawk and VFDA settled their lawsuit with the approval of the bankruptcy court, which subsequently dismissed the chapter 11 case. Sea Hawk returned to state court to continue prosecuting its fraudulent transfer action against the State, which objected on the ground that the settlement agreement had released this claim in addition to the breach of contract claim. Sea Hawk then moved to reopen the bankruptcy case to file an adversary proceeding against the State seeking a determination of whether the settlement agreement released the fraudulent transfer claim. The bankruptcy court found that the fraudulent transfer claim had also been released in the settlement. Sea Hawk appealed, objecting to the bankruptcy court’s jurisdiction to make its finding. The district court affirmed.

The Ninth Circuit reversed, holding that the bankruptcy court did not have jurisdiction to interpret the settlement agreement in the context of an adversary proceeding between two creditors initiated after the dismissal of the associated bankruptcy case. The court rejected the bankruptcy court’s determination that it had “related to” jurisdiction over the adversary proceeding under 28 USC 1334(b). The court cited *In re Fietz*, 852 F2d 455, 457 (9th Cir 1988), for its articulation of the standard for “related to” jurisdiction, which deems an action “related to” a bankruptcy case if “the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy.” 439 F3d at 547. Because VFDA’s bankruptcy case had been dismissed by the time Sea Hawk filed its adversary proceeding, the outcome of the proceeding could not have had an effect on the bankruptcy estate.

The State argued that the bankruptcy court had “related to” jurisdiction under a line of cases in which, following plan confirmation, jurisdiction was found to exist over proceedings with a “close nexus” to the plan because they affected its interpretation or

implementation. The court found the “close nexus” test inapplicable because no plan had been confirmed.

The district court had not applied “related to” jurisdiction principles when it affirmed the bankruptcy court’s finding of jurisdiction over Sea Hawk’s claim against the State, but instead had looked to the bankruptcy court’s approval of the settlement agreement as an independent basis for jurisdiction. The Ninth Circuit rejected this argument as well, because the bankruptcy court’s order approving the settlement agreement neither explicitly retained jurisdiction over the agreement nor incorporated the agreement’s terms. “[I]n the absence of a specific retention of jurisdiction or a condition [in the approval order] requiring the parties’ compliance with the terms of the settlement agreement,” the court stated, the bankruptcy court was divested of jurisdiction over the interpretation and enforcement of the agreement, functions that would have to be left to the state courts. 439 F3d at 549.

**REJECTION OF LEASE UNDER §365(G) DOES NOT DIVEST BANKRUPTCY ESTATE OF RIGHTS OF A BREACHING PARTY UNDER TERMS OF CONTRACT AND APPLICABLE STATE LAW**

*In re OneCast Media, Inc.*, 439 F3d 558 (9th Cir 2006)

After the debtor, OneCast Media, Inc., filed for bankruptcy, the chapter 7 trustee rejected debtor’s lease, which was secured by a security deposit of cash and a letter of credit. The landlord drew down the letter of credit and retained the proceeds. The trustee sought recovery of the remaining security deposit. To the extent the trustee sought recovery of funds acquired by the landlord from the letter of credit, the bankruptcy court held that it had no jurisdiction because the letter of credit rights were not property of the estate. The district court reversed and remanded the case so the trustee could pursue its claim against the landlord.

The Ninth Circuit affirmed. It held that although rejection of the lease constituted a breach of contract by debtor under §365(g) and prevented debtor from obtaining future benefits under the lease, the estate was not divested of a breaching party’s rights under the lease and applicable state law. Thus, the trustee still could assert its claim against the landlord based on the rejected lease, seeking recovery of that portion of the security deposit that exceeded the landlord’s actual damages.

This analysis should not have changed, the court stated, because some of the funds came from a letter of credit. The court cited the “independence principle” of letter of credit law, which requires treating the relationships between the issuer bank and the

beneficiary (here, the landlord) and the issuer bank and the purchaser of the letter of credit (here, the debtor) as separate from the underlying relationship between the purchaser and the beneficiary. Allowing the trustee, as successor to the debtor's rights, to sue the landlord did not offend the independence principle. The trustee was not, for example, attempting to interfere with the landlord's draw on the letter of credit. Such an action would have implicated the bankruptcy court's jurisdiction because a non-debtor beneficiary's letter-of-credit rights generally are not property of the estate, even if the purchaser of the letter is the debtor. Instead, the trustee was pursuing damages arising out of the rejected lease, which implicated only the relationship between debtor and the landlord. The court held that the bankruptcy had jurisdiction over this claim, which clearly was property of the estate under §541(a)(1).

## BAP CASE NOTE

By Doug Pahl  
Perkins Coie LLP

### **FORGIVENESS IS EASIER THAN PERMISSION: CHAPTER 7 DEBTOR'S UNAUTHORIZED SALE OF RESIDENCE NOT A STAY VIOLATION**

*In re Tippett*, 338 BR 82 (9<sup>th</sup> Cir. BAP 2006)

Without notice or consent, the Tippetts, postpetition chapter 7 debtors, sold their home, paid off their lender and retained the net proceeds of \$76,582.76. When the trustee learned of the sale, he filed an adversary proceeding seeking turnover, quieting title and avoiding the liens of the new lenders (the "Lenders"). The Lenders and the purchaser, Mr. Coleman, who had taken up residence in the home, moved to annul the automatic stay under §362(d) and give retroactive effect to the sale and the resulting liens.

The bankruptcy court held that the transfer and the liens were void *ab initio* as a result of the automatic stay violations by the debtors and the Lenders, and that annulment of the stay was not warranted. The court also concluded that §549(c) provided no defense because it was not an exception to the automatic stay and because there had been no transfer. The court quieted title in the trustee but granted the Lenders an equitable lien and allowed Coleman to remain in possession of the residence pending the certified appeal.

The BAP reversed. It focused on the scope of the automatic stay under Ninth Circuit authority. Specifically, the BAP asked whether §362(a) applies to a debtor's postpetition sale of estate property, or whether §549 governed such postpetition transfers to the exclusion of §362.

In the view of the BAP, §549 implies that debtors may effect valid postpetition transfers. Section 549(a) states: "Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate— (1) that occurs after the commencement of the case; and (2) . . . (B) that is not authorized under this title or by the court." Section 549(c) sets forth a good faith purchaser exception to the trustee's avoidance power.

The Panel reasoned that because Congress included a mechanism for avoiding "a transfer of estate property, it obviously contemplated that there could be an unauthorized transfer of estate property postpetition." 338 BR at 86. The Panel referred to the statement *In re Schwartz*, 954 F2d 569, 571, 574 (9<sup>th</sup> Cir 1992), that the "automatic stay does not apply to sales or transfers of property initiated by the debtor."

The BAP concluded that *Schwartz* controlled. The *Schwartz* court "explicitly determined . . . that debtor-initiated transfers were outside the stay's scope." 338 BR at 89. Because the bankruptcy court's ruling was predicated only on the conclusion that the attempted transfers were void under §362, and §362 is inapplicable, the Panel reversed. The automatic stay was not applicable and the trustee had not sought relief under §549; therefore the transfer was effective.

## LOCAL BANKRUPTCY COURT CASE NOTE

By Matthew A. Goldberg  
Preston Gates & Ellis, LLP

### **"INQUIRY NOTICE" ALIVE AND WELL IN OREGON: CONSTRUCTIVE NOTICE UNDER §544(A)(3) CAN ARISE IN THE ABSENCE OF ANY RECORD NOTICE**

*In re Roman Catholic Archbishop of Portland*, 335 BR 868  
(Bankr D Or 2005)

The Tort Claimants Committee ("TCC") sought to avoid any unrecorded interests in the extensive real estate holdings of debtor, the Archdiocese of Portland. Though the real estate was titled in debtor's name, debtor maintained that the property was held in trust for the parishes and schools of the Archdiocese, and could not be used to satisfy the claims of debtor's creditors. The court concluded that because there was no constructive notice of any purported beneficial interests, the TCC (authorized by the court to utilize the trustee's avoidance powers) could avoid any such interests under §544(a)(3).

Though the Ninth Circuit has held that a trustee can avoid an unrecorded interest in a constructive trust,

debtor argued that an unrecorded interest in an express or charitable trust should not be subject to the same rule. The court, however, stated that the determinative factor was not the character of the trust but whether there was constructive notice of its existence.

Having decided that the alleged trust interests were not exempt from the avoidance power of §544(a)(3), the court construed the constructive notice inquiry to require consideration of whether there was either record or inquiry notice of the alleged interests. The court had previously ruled, in the context of a motion for partial summary judgment, that the parishes and schools were not distinct legal entities but were simply divisions of debtor. Thus, references to the parishes or schools in the real property records, the court reasoned, are no more than references to the debtor itself, which could not serve to put a bona fide purchaser under Oregon law on record notice of an interest claimed by any entity other than debtor.

Before deciding whether there was inquiry notice, the court rejected debtor's argument that the 1987 enactment of ORS 93.643, which states that recordation of an interest in real property is the only way to give constructive notice of that interest, was intended by the legislature to abolish the concept of inquiry notice in Oregon. Because the court found that the legislature's intent could not be determined conclusively based on the text, statutory context and legislative history of the statute, the court applied the canon of statutory interpretation promoting strict construction of statutes in derogation of the common law. The court cited a 1927 Oregon case describing inquiry notice as "well settled" law, as well as Oregon cases applying the rules of inquiry notice in the years following the enactment of ORS 93.643. In the absence of a clearly expressed legislative intent to abolish such an entrenched doctrine, the court found that ORS 93.643 applied only to record notice and did not affect inquiry notice.

The court then analyzed the arguments advanced by debtor to establish that the TCC members had a duty to inquire into the possibility of unrecorded interests in debtor's real property. Among other theories, the court considered whether debtor's bankruptcy petition, its articles of incorporation, publicity in the form of newspaper articles, or the use and possession of the property by the parishes and schools would have put a reasonably prudent person on inquiry notice of potential unrecorded interests. The court rejected all of debtor's arguments, holding that any unrecorded interests were avoided and that debtor owned both legal and equitable title to its real estate holdings.

## STATE COURT CASE NOTES

**By Heather E. Harriman and Daniel L. Steinberg  
(With the assistance of Donald Grim)**

Greene & Markley, PC

### ALLEGED VIOLATION

*In re Conduct of Tichenor*, 340 Or 108, 129 P3d 690 (2006)

The Oregon State Bar alleged that the accused violated DR 7-106(C)(1) when he asked a criminal defendant's character witnesses if they had knowledge of certain prior instances of defendant's conduct. The accused had based his questions on statements allegedly made by the defendant's wife to her sister, who in turn had relayed the statements to the accused who later learned that the wife denied having made the statements.

The trial panel of the Disciplinary Board concluded the accused had violated OEC 405(1) because he did not have a reasonable basis to believe the conduct referred to in the questions actually occurred; therefore, he also violated DR 7-106(C)(1).

In dismissing the complaint, the Supreme Court explained that the corollary rule to OEC 405(1) requires lawyers to have a reasonable or good-faith basis to believe the mentioned conduct occurred but does not require they be able to produce admissible evidence proving the conduct occurred. Because the act is not being admitted as fact, the good-faith basis test does not have an admissibility requirement. Therefore, a violation of OEC 405(1) does not *per se* give rise to a violation of DR 7-106(C)(1).

### AWARD FOR ATTORNEY FEES PREMATURE

*In re Marriage of Bradach*, 203 Or App 477, 124 P3d 1288 (2005)

In a proceeding in which each spouse prevailed to some extent, the trial court, without a hearing, granted husband's petition for attorney fees in spite of the wife's timely filed written objections. In vacating and remanding, the Court of Appeals noted that where a party properly challenged an entitlement to attorney fees, the court erred in awarding such fees without holding a hearing as required by ORCP 68.

### **COURT NOT ALLOWED TO WEIGH EVIDENCE WHEN CONSIDERING MOTION FOR DIRECTED VERDICT**

*Fang v. Li*, 203 Or App 481, 125 P3d 832 (2005)

Plaintiff, the purchaser of a dry cleaning business, brought a fraud and rescission action against seller. On plaintiff's motion for a directed verdict, the trial court dismissed the jury, granted the motion, and entered judgment in favor of plaintiff. It found that defendant's testimony was not credible, plaintiff's conduct during the transaction was understandable, and plaintiff had acted reasonably in relying on defendant's representations. Furthermore, although it was "impossible to tell" from the evidence precisely how poorly the business was faring before the sale, "it appears the business was in trouble."

In its decision to reverse and remand, the Court of Appeals stated: "plaintiff's arguments on appeal depend on a weighing of conflicting evidence and an evaluation of witness credibility. Moreover, the trial court's own explanation for its decision on the directed verdict makes it clear that it weighed the evidence rather than evaluated whether, taking the evidence in the light most favorable to defendants, plaintiff was entitled to judgment as a matter of law."

### **FORUM NON CONVENIENS REQUIRES SHOWING OF JURISDICTION**

*Maricich v. Lacoss*, 204 Or App 61, 129 P3d 193 (2006)

Trust beneficiary brought an action against trustee, a California resident, seeking an accounting, trustee's removal, and a surcharge for breach of fiduciary duty due to trustee's alleged misappropriation of funds. The trustee moved for summary judgment, asserting that Oregon lacked personal jurisdiction over him: he resides in California, the trust was administered in California, and all trust assets were located in states other than Oregon. Treating defendant's motion for summary judgment as a motion to dismiss for *forum non conveniens*, the trial court issued a general judgment of dismissal without prejudice.

The Court of Appeals reversed. It observed that dismissing a case for *forum non conveniens* presumes that the trial court has jurisdiction but defers its jurisdiction in favor of the jurisdiction of another court. A legal predicate to a trial court's discretion to dismiss a complaint on grounds of *forum non conveniens* is a finding the trial court had jurisdiction in the first place. Because the trial court expressly refused to rule on its own jurisdiction, dismissing the case for *forum non conveniens* was an abuse of its discretion.

### **CLAIM FOR ASSUMPSIT IS IMPROPER FOR INTERFERENCE WITH INTANGIBLE PROPERTY RIGHT**

*Jantzen Beach Associates, LLC v. Jantzen Dynamic Corp.*  
204 Or App 68, 129 P3d 186 (2006)

When defendant built a structure in violation of a restrictive covenant, the neighboring commercial property owner pursued an action based on assumpsit rather than breach of a restrictive covenant. The circuit court concluded that defendant had been unjustly enriched and awarded damages to the adjacent property owner. The Court of Appeals reversed, ruling that a common-law action of assumpsit would not lie.

On reconsideration, the Court of Appeals observed that, in Oregon, assumpsit requires a plaintiff to prove that defendant converted tangible property belonging to plaintiff, in addition to the mere use of, or interference with, the plaintiff's real property rights. Plaintiff's interest in the restrictive covenant is an intangible, nonpossessory interest, and a claim in assumpsit has not been recognized in Oregon for an interference with that type of interest.

### **ISSUE OF FIRST IMPRESSION RELATING TO CLAIM PRECLUSION**

*Hodges v. Blazer Homes, Inc.*, 204 Or App 86,  
129 P3d 196 (2006)

In 1994 Blazer Homes, Inc., a home builder, sued Hodges for money allegedly still owing under a home construction contract. Hodges counter sued and prevailed in arbitration. Six years later, in 2000, Hodges filed this negligence action against Blazer Homes and others to redress damages allegedly undiscoverable until that year. The damage allegedly resulted from water intrusion, previously unknown construction defects, and the use of improper construction materials. The circuit court granted Blazer Homes summary judgment on the ground that plaintiff's action was barred by the earlier contract action. Hodges appealed.

No Oregon case had yet decided, for the purpose of claim preclusion, whether a second claim "could have been brought" in the first action when the second action is based on facts that the plaintiff did not know and could not reasonably have known at the time of the first action. In overruling the trial court, and as a matter of first impression, the Court of Appeals held that claim preclusion could not apply if the party asserting the second claim lacked actual or constructive knowledge of the relevant facts at the time the first claim was asserted.

## GROUNDINGS FOR JNOV MUST BE RAISED IN MOTION FOR DIRECTED VERDICT

*Hamilton v. Lane County*, 204 Or App 147, 129 P3d 235 (2006)

Plaintiff sued Lane County and others, alleging discrimination and retaliation under state and federal civil rights statutes. At the close of evidence, defendant moved for a directed verdict pursuant to ORCP 60. The motion was denied and the jury returned a verdict for plaintiff.

Defendant timely moved for a judgment notwithstanding the verdict ("JNOV") on alternative grounds not previously raised in defendant's motion for directed verdict. The trial court granted the JNOV motion and entered a general judgment in favor of defendant. The Court of Appeals reversed.

Under ORCP 63A, a trial court cannot grant a motion for JNOV unless it has previously denied a motion for a directed verdict. In addition, a court cannot grant a motion for JNOV on grounds not previously asserted in a motion for a directed verdict.

## EXTRINSIC EVIDENCE STILL CONSIDERED

*Batzer Construction Inc., v. Boyer*, 204 Or App 309, 129 P3d 773 (2006)

Defendant claimed the contract term "[plaintiff's] cost" was ambiguous. Considering extrinsic evidence, the trial court accepted plaintiff's argument that the term could only be interpreted to mean the expenses plaintiffs had incurred to construct the building. On appeal, the threshold issue was whether a trial court can consider the circumstances underlying the formation of a contract in order to determine whether the contract terms are ambiguous.

The Oregon Supreme Court has interpreted ORS 42.220 to allow a trial court to consider extrinsic evidence to determine whether the terms of an agreement are ambiguous. Notwithstanding Ninth Circuit precedent to the contrary, the Court of Appeals held that "ORS 42.220 and ORS 41.740 still allow a trial court to consider the circumstances underlying the formation of a contract to determine whether a particular contractual provision is ambiguous."

## CONSUMER COMMITTEE

By **Michelle Freed**  
Todd Trierweiler & Associates

The Consumer Bankruptcy Committee meets in the 8th floor conference room at the United States Bankruptcy Court at 1001 SW Fifth Avenue, Portland Oregon 97204. Meetings are usually held on the third Thursday of the month at 4:30 p.m. The Consumer Bankruptcy Committee is chaired by Laura Donaldson, 503-257-8900 or [lldonaldson@comcast.net](mailto:lldonaldson@comcast.net). To learn more about the Committee or to be added to the mailing list, contact Michelle Freed, Todd Trierweiler & Associates, at 503-253-7777 or [michellefr@bankruptcylawctr.com](mailto:michellefr@bankruptcylawctr.com).

## MEETING OF JANUARY 19, 2006

Chapter 13 trustee Brian Lynch reminded counsel to use the preconfirmation and postconfirmation email addresses and to send any attachments to these email addresses. If you email his office, you do not need to fax a copy. His office needs hard copies only of documents that are required to have an original signature.

Check the chapter 13 trustee's web site at [www.portland13.com](http://www.portland13.com) for new language in chapter 13 plans on sale or refinance of real property.

Chapter 7 trustees Tom Renn and Michael Grassmueck attended the meeting. They said that for now they (and some other chapter 7 trustees) are not dismissing cases for failure to provide the last year's tax returns or tax transcripts, which the debtor is required to provide seven days before the §341(a) meeting. Under 11 USC §521(b)(2)(b), if a debtor fails to comply with this provision of the Code, the court shall dismiss the case unless the debtor demonstrates that the failure to comply is beyond the debtor's control.

While the Code requires that a debtor provide tax returns or tax transcripts only for the last year that the debtor was required to and did in fact file tax returns, individual chapter 7 trustees may request that the debtor file **any** unfiled tax returns. The trustees are requesting both federal and state tax returns or tax transcripts.

Most trustees will accept the tax returns or tax transcripts and pay advices through email or regular mail. Remember to redact social security numbers as well as identifying information for minors. If the debtor does not have pay advices for the last 60 days, send a letter to the trustee before the §341(a) meeting so stating.

Chapter 7 trustees are discussing changes in the law and how they will conduct their §341(a) meetings. They would like to be as consistent as possible from trustee to trustee.

As a reminder, if a case has been open for an extended period you can call the trustee to check on the status of the case and seek abandonment of property of the estate that may be appreciating while the case is open.

Mr. Grassmueck said that factors prompting an inquiry into the value of personal property include high credit card debt, expensive or large homes, and high income. In these cases, an appraiser may go to the debtor's home to value the personal property. In addition, he noted that comparative market analyses on real property can vary greatly, so be cautious in selecting a realtor to value real property.

In new cases with outstanding domestic support obligations (DSO), some chapter 7 trustees understand that they are encouraged to collect on exempt assets to satisfy the DSO. Counsel should watch this issue closely for developments.

The IRS announced they will send some of their work to Washington State because their Oregon office is short-staffed. The IRS reminded counsel that they intend to pursue exempt assets more aggressively.

The Honorable Trish Brown reminded debtors' attorneys to use the new Order Confirming Plan only for cases filed on or after October 17, 2006. Cases filed before October 17 require the old Order Confirming Plan – form 1350. The post-October 17 form is 1350.05.

Judge Brown discussed a BAP case on revocation of discharge. *In re Roberts*, 331 B.R. 876. There the court held that the debtors' reckless disregard for the truth did not necessarily establish fraudulent intent such that revocation of discharge was appropriate. Counsel should review this decision carefully.

## MEETING OF FEBRUARY 16, 2006

The 14th annual National Association of Consumer Bankruptcy Attorneys will meet in New Orleans from May 19th to May 21st. You can register online at [www.nacba.org](http://www.nacba.org).

The chapter 13 trustees' conference will meet June 28th through July 2nd in Denver.

Chapter 13 trustee Brian Lynch raised a question about notice of sales in chapter 13 cases. Language in the Order Confirming Plan prohibits a debtor from selling or otherwise encumbering real property without a notice to creditors and the trustee, and without an opportunity for a hearing. Up until now, if a plan stated there would be a sale or refinance of real property and the trustee did not object, the sale would be approved. The trustee's office encourages debtors' counsel to give more information in the plan regarding sales or refinances of

real property, as well as a request that creditors object immediately to the sale or refinance if a debtor wishes to complete the sale or refinance without additional notice. This procedure may satisfy concerns about proper notice.

A recent BAP decision held that a debtor's sale of real property without notice to a trustee or creditors would stand so as to not divest a bona fide purchaser for value, although the court specifically reserved the question of whether the debtor should be denied a discharge because of these actions.

Modified plans submitted in response to postconfirmation motions to dismiss should be filed within 30 days despite potential objections from the trustee's office. By filing the plan and having a hearing set on the matter, debtors' counsel can avoid an order of noncompliance if all objections to the modified plan have not been resolved prior to the expiration of the 30-day period. Debtors should make their new plan payments while any objections are being resolved.

Chapter 7 trustees Tom Renn and Michael Grassmueck attended the meeting. The Portland chapter 7 trustees will require debtor's counsel to fill out forms providing DSO information. This form should be submitted to the trustee as soon after the filing date as possible. A copy of the form is available at: <http://osbdc.org/Files/TPanelDSONoticeForm.pdf>.

The Portland chapter 7 trustees will continue to work on a document checklist. While the trustees may differ in the specific documents they require, they hope to be as consistent as possible in these areas. The goal is to have this information collected and updated on the Debtor-Creditor Section web site – <http://osb-dc.org>. – along with information specific to each trustee. The site will include information about each trustee's individual policies, such as whether the trustee will accept documents the day of the hearing, whether the trustee prefers documents in electronic form, and whether the trustee will require hard copies.

The Debtor-Creditor Section site also summarizes changes to the Bankruptcy Court's web site, and includes job postings. If you have any suggestions about this web site, direct them to Tom Renn or to the site's web master.

If a debtor or debtor's counsel is unable to get specific information required for DSO notification – for example in cases where there is a restraining order – as much information as possible should be provided to the trustee. At the very least, the debtor or debtor's counsel should be able to determine who is collecting the payments and provide this agency information to the trustee.

Pam Griffith, assistant US Trustee, reminded debtors' counsel that they do need to file pre-filing counseling certificates and post-filing debtor education certificates with the court.

Since the January meeting, one trustee has filed a motion to dismiss for failure to provide tax returns or tax transcripts within 7 days of the §341(a) meeting. Judge Alley heard the matter, and the case was not dismissed for failure to provide tax returns or transcripts. Counsel should watch for developments in this area.

### MEETING OF MARCH 23, 2006

The Portland chapter 7 trustees have suggested debtors' counsel provide some sort of spreadsheet to show how they arrive at the debtor's income level on the means testing form.

The US Trustee's office approves of consumer credit counseling agencies, but Oregon law also requires credit counselors to be licensed. At this time, at least four credit counseling agencies have been approved by the US Trustee, but they are not licensed by the state.

The position of the US Trustee on means testing is that a debtor can take the ownership expense for an automobile only if the vehicle is financed. If the car is owned free and clear, the debtor may take only the operation expense. However, if the car is over six years old or has at least 75,000 miles, the debtor may claim an additional \$200 in operation expenses per qualifying car.

The US Trustee considers the household size of the debtor to include the debtor and those that the debtor does or can claim as a dependent for tax purposes.

The US Trustee considers unemployment compensation reportable income rather than a benefit under the Social Security Act.

Portland chapter 7 trustees remind debtors' counsel to get DSO information to the trustee as soon as possible. If counsel is unable to provide this information (perhaps due to a restraining order) please advise the trustee.

Debtors' counsel are encouraged to refer to the Debtor-Creditor Section web site for information on documentation necessary for §341(a) meetings and for the preferred method of delivery for each Trustee. Counsel may also join the Section list serve. Counsel should be cautious when posing questions on the list serve – access to the list serve is not limited to debtors' attorneys. Judges, trustees, and adverse counsel may be reading your questions. The website is [www.osb-dc.org](http://www.osb-dc.org)

The US Trustee, after a complaint by creditor's counsel, contacted trustees about their requests for

stipulated orders for motions for relief. The trustees stated they do consider such stipulated orders, but often they need additional documentation. They will sign a stipulated order when appropriate.

Jeffrey Werstler from the IRS provided a copy of his response to a question posed on the Debtor-Creditor Section list serve about using invalid social security numbers when filing a bankruptcy. If the IRS gets a W-2 based on an invalid social security number, this often results in an audit for the legitimate holder of that social security number. Also please note that the IRS intends to pursue exempted, abandoned, and excluded assets more aggressively. Trustees may also pursue collection on tax liens by subordinating the penalty portion of the lien. Debtors' counsel should be alert for developments in this area.

## 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](mailto:Dguyol@aol.com)

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

## PAPER AND EMAIL NOTICES

**By Charlene M. Hiss, Chief Deputy Clerk**  
US Bankruptcy Court for the District of Oregon

1. Before 10/17/05, e-filers who received email notices also received paper notices from the Bankruptcy Noticing Center (BNC). The duplicate paper notices have been eliminated with a few exceptions - notably §341(a) meeting notices.

2. To determine prior to filing who will be electronically served via ECF, proceed as follows:

**STEP 1** Click on Utilities on the ECF Main Menu Bar.

**STEP 2** Click on Mailings.

**STEP 3** Click on Mailing Info for a Case.

**STEP 4** Enter the case number.

**STEP 5** The Mailing Information for Case screen appears. It displays an Electronic Mail Notice List (*i.e.*, parties who will receive an email Notice of Electronic Filing (NEF)), a Manual Notice list (*i.e.*, parties who must be manually served), and hyperlinks to the Creditor List and Mailing Matrix.

3. To determine who was served with a filed document, you must look two places:

a. To determine who was served electronically via ECF, go to the Docket Report while logged into ECF (not PACER) as follows:

**STEP 1** Click on Reports on the ECF Main Menu Bar.

**STEP 2** Click on Docket Report.

**STEP 3** Enter the case number and click "Include links to Notice of Electronic Filing" if it is not already checked. Click Next.

**STEP 4** Find the document of interest and click on the silver ball to the left of the document number, then click Display Receipt.

**STEP 5** The NEF appears. Scroll to the bottom and find the heading "Notice has been electronically mailed via ECF to:" for a list of parties served via ECF.

b. To determine who was served by the filer or the BNC (whether by mail, fax, email, or EDI), look at the filed certificate of service. For documents served by parties, it may be part of the original document or a separate docket entry entitled Certificate of Service linked to the original document. A BNC Certificate of Service will be a separate docket entry linked to the order, judgment, notice, etc. and is generally docketed within two business days of the filing of original document. The list of those served follows a copy of the document.

Presorted Standard  
US Postage  
PAID  
Portland, OR  
Permit No. 341

Oregon State Bar  
Debtor-Creditor Section  
5200 SW Meadows Road  
PO Box 1689  
Lake Oswego, OR 97035-0889