

Newsletter

Volume XXVI, Number 2 Debtor-Creditor Section, Oregon State Bar Spring 2007

HIGHLIGHTS

- 1 **Comments from the Chair**
By Stephen T. Tweet
- 3 **Homestead Exemption
in Question**
By Donald H. Grim
- 6 **Ninth Circuit Clarifies
Law on Ordinary Course
of Business Defense to
Preference Cases**
By Teresa H. Pearson
- 9 **Lender Beware**
By Kathryn P. Salyer
- 11 **Ninth Circuit Case Notes**
By Matthew A. Goldberg
- 13 **BAP Case Notes**
By Doug Pahl
- 14 **State Court Case Notes**
By Donald H. Grim
- 15 **Consumer Committee**
By Kathryn E. Eaton

COMMENTS FROM THE CHAIR

By Stephen T. Tweet

Albert & Tweet, LLP

Commenting on the nature of work, the humorist Sam Ewing said:

“Hard work spotlights the character of people; some turn up their sleeves, some turn up their noses, and some don’t turn up at all.”

I’m pleased to say that the Debtor-Creditor Section is blessed with many talented volunteers who roll up their sleeves and undertake a number of tasks for the good of the Section, the Bar, and the communities in which we live. Most of you are aware of our CLEs, including the Annual Meeting, Northwest Bankruptcy Institute, and Saturday Session. In this article, however, I thought I’d highlight some of our other vital committees and activities that could use your help.

Legislative Committee

With the Legislature in session, the Legislative Committee has been extremely busy reviewing bills and testifying before the Legislature. Judging by the emails I receive daily, the work has been constant and nearly full-time. You may view a report on the Legislative Committee on

the Section website, <http://osb.dc.org>. As noted on the site, any Section member who would like to join the Committee or to suggest that the Section take a position on a bill should contact the Committee chair, David Hercher, at 503-205-2628, dave.hercher@millernash.com, or Tom Stillely at 503-243-1649, tom@sussman-shank.com.

Website

Speaking of the website, the Debtor-Creditor Section website is a recent and valuable creation. It contains numerous links helpful to Section members. Questions and suggestions concerning the website may be addressed to Tom Renn at 503-643-8842, thomas.renn@psinet.com.

Local Rules Project

In the fall of 2006 the Section formed an ad hoc local bankruptcy rules committee. The Committee expects to conclude its work in the summer of this year. Again, please check the Section website for information about this important ongoing project and member contacts.

Continued next page

C.A.R.E. Program

The Credit Abuse Reporting Education (C.A.R.E.) Program provides education on credit card use to high school students. The program has taken off in the last year. Approximately 42 classes at 15 Oregon high schools were held in 2006. A number of presentations are being scheduled for the balance of the 2006-2007 school year. The feedback has been very positive. Several schools have asked for repeat presentations. Hundreds of students have attended the class. If you are interested in becoming a C.A.R.E. volunteer, please contact Laura Walker in Portland, 503-224-3092, lwalker@chbh.com, or Becky Kamitsuka in Eugene, 541-465-6330, becky.kamitsuka@usdoj.gov. For more information please also review Laura Walker's article about the C.A.R.E. Program in the Winter 2007 Debtor-Creditor Newsletter. That article also includes a list of the judges and lawyers who made this project work in 2006.

Pro Bono Bankruptcy Clinic

For the past 11 years, the Debtor-Creditor Section, in partnership with Legal Aid Services of Oregon, has held a clinic once a month for indigent and low income individuals. The clinic services are limited to Chapter 7 bankruptcies only. Approximately 40 to 60 attorneys volunteer their time to the clinic each year, including judges and US Trustee personnel. From 70 to 100 low-income clients are served annually, but many more come in for informational talks. A number of attorneys volunteering for the program have commented about

the sense of satisfaction received in counseling these people. Often questions can be answered and anxieties alleviated without the necessity of a bankruptcy filing. Training programs are available for those who wish to participate. Again, see the website for further details.

Young Lawyers

A new-lawyer group (Portland and Eugene divisions) meets monthly to assist new admittees in becoming familiar with the bench and the bar and issues unique to the debtor-creditor practice. Those interested should contact Kevin Spence in Portland 503-593-4252; kevin.spence@gmail.com or Natalie Scott in Eugene 541-868-8005; nscott@mb-lawoffice.com).

Thanks to all who are doing their share and then some. As you can see, there are more than enough good projects to work on. Don't be shy. Roll up your sleeves and get involved!

VOLUNTEER OPPORTUNITY:

We would like to have section members volunteer to help Habitat for Humanity this summer. Please contact Rich Parker, rijp@pbl.net, to add your name to the list and work on a project. Volunteers can work any number of days, Thursday through Saturday, and no skill is required. Participants must be 14 years or older. The work day is 8:30 am to 4:00 pm.

SECTION WEBSITE

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

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.

HOMESTEAD EXEMPTION IN QUESTION

By **Donald H. Grim,**
Greene & Markley, P.C.

Introduction

Uncharacteristically, two recent District of Oregon Bankruptcy Court decisions have taken directly contrary positions. The issue is whether a debtor's interest in exempt proceeds of a postpetition sale of the homestead is conditional upon reinvestment in another homestead within one year. In *In re Judith Ann Boiselle*, Case No. 05-64619-fra7, Judge Alley held that proceeds from a postpetition sale of debtor's homestead should be treated the same as proceeds from a prepetition sale: *i.e.*, to retain exempt status, proceeds must be reinvested by the debtor within the one year statutory period. Then Judge Perris came to the opposite conclusion in *In re Laura Lane*, Case No. 06-32879-elp7: *i.e.*, exemptions are fixed as of the date the petition was filed and postpetition changes are irrelevant.

The following analysis attempts to predict how the Ninth Circuit might decide this issue on appeal. In my opinion (from what I hope is a safe distance) the Ninth Circuit would, and should, agree with Judge Perris.

Oregon Exemption Law Applies

Federal statutes provide for a standard homestead exemption. See 11 USC §522(d). However, states are free to opt out of the federal exemption, §522(b)(1) (§522(b)(2) under BAPCPA), and most have done so. *In re Graziadei*, 32 F3d 1408, 1410 n.3 (9th Cir 1994). Oregon is an opt-out state. See ORS 18.300. When a state has opted out of the exemption scheme set forth in §522(b), the extent to which property is exempt is controlled by state law, while questions of impairment and lien avoidance under §522(f) are controlled by federal law. *In re Thornton*, 91 BR 913, 914 (Bankr CD Cal 1988).

The Oregon homestead exemption statute, ORS 18.395, provides in relevant part:

(1) A homestead shall be exempt from sale on execution, from the lien of every judgment and from liability in any form for the debts of the owner to the amount in value of \$30,000,

except as otherwise provided by law. . . .
The homestead . . . exemption shall not be impaired by:

. . .

(c) The sale of the property.

(2) The exemption shall extend to the proceeds derived from such sale * * * if the proceeds are held for a period not exceeding one year and held with the intention to procure another homestead therewith.

(3) The exemption period under subsection (1)(b) and (c) of this section shall be one year from the removal, absence or sale, whichever occurs first.

However, the Supreme Court has held that [s]tates may not pass or enforce laws to interfere with or complement the Bankruptcy [Code] or to provide additional or auxiliary regulations. *International Shoe Co. v. Pinkus*, 278 US 261, 265 (1929) (noting that the intent of Congress in establishing uniform bankruptcy law necessarily excludes inconsistent state regulation). As the Supreme Court recognized in discussing the interplay between §522(f) and state exemption exceptions, the state's ability to define its exemptions is not absolute and must yield to conflicting policies in the Bankruptcy Code. *Owen v. Owen*, 500 US 305, 313 (1991). In other words, while states may carve out their specific exemptions, the state exemption law must not conflict with a general policies underlying §522, such as the date for determination of exemptions. *In re Kim*, 257 BR 680, 687 (9th Cir BAP 2000).

The Relevant Date for Determining the Status of Exemptions is the Petition Date

a. The General Rule

The general rule is that the debtor's exemption rights are fixed at the date the petition is filed. *White v. Stump*, 266 US 310 (1924). "When the law speaks of property which is exempt and of rights to exemptions, it, of course, refers to some point of time. In our opinion this point of time is the one as of which the general estate passes out of the bankrupt's control, and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed." *Id.* at 313. The Ninth Circuit has also held that the relevant date for determining the status of exemptions is the petition

Continued next page

date. *Kim*, 257 BR at 684; see also *In re Reaves*, 285 F3d 1152, 1156 (9th Cir 2002); *In re Heintz*, 198 BR 581, 585 (9th Cir BAP 1996).

b. Golden Does Not Control

The Ninth Circuit has consistently held that when, at the date of the petition, a debtor's homestead exemption is in the form of proceeds from a prepetition sale, the debtor must reinvest them in another residence within the state law statutory period in order to maintain the exemption. See e.g. *Golden*, 789 F2d 698 (9th Cir 1986); *In re Smith*, 342 BR 801, 808 (9th Cir BAP 2006); *In re Earnest*, 42 BR 395 (Bankr D Or 1984). This line of cases holds that if state law requires the reinvestment of sale proceeds of a homestead within a statutory period, and the debtor fails to do so, the proceeds are deemed nonexempt and become property of the estate. *Smith*, 342 BR at 808.

However, the holding of *Golden* was limited to specific facts where the state exemption law contains a sunset provision requiring the court to look to facts occurring after the petition date to determine whether the exemption was available. *Kim*, 257 BR at 686 (observing the limitation of the holding in *In re Golden*). The debtor in *Golden* held **proceeds** on the date of filing, rather than an interest in the residence.

The situation at issue here, unlike *Golden*, involves the Trustee's postpetition sale of a homestead. The debtor's exemption at the petition date is not in proceeds but is in the homestead itself. Courts that have considered the postpetition sale of a residence have consistently distinguished *Golden*. *Golden* is distinguishable because the debtor in that case held proceeds on the date of filing rather than an interest in the residence. *In re Herman*, 120 BR 127, 130 n.5 (9th Cir BAP 1990). The *Golden* court looked to the exemption in proceeds existing at the date of the petition and the affirmative requirement that those proceeds be reinvested in order for the exemption to continue beyond six months. *Id.* In this case, the homestead exemption existing at the date of the petition was not limited by such a requirement of affirmative action for its continuing validity. *Id.*; see also *In re Seyfert*, 97 BR 590 (Bankr SD Cal 1989) (holding on similar facts that *Golden* was not dispositive). As noted in *In re Combs*, 166 BR 417, 420 (Bankr ND Cal 1994), *Golden* is based on a

peculiar temporal exemption statute and its holding is thus limited to its facts.

Because *Golden* is specific to facts involving a debtor's prepetition sale of the homestead, it is not controlling where the debtor's exemption at the date of the petition is not in proceeds but is an exemption in the homestead itself.

c. Post-Petition Sale of Homestead Follows the General Rule

Courts in the Ninth Circuit, considering the postpetition sale of a debtor's homestead, have followed the general rule that debtor's exemption rights are fixed as of the petition date. *White v. Stump*, 266 US 310, 313(1924). See also *Owen*, 500 US at 308 (the proper date for determining whether an exemption exists is the date of filing of the bankruptcy petition).

A California bankruptcy court, citing *White* and *Owen*, was persuaded by a long line of cases that a debtor's exemption rights are fixed as of the petition date. *Seyfert*, 97 BR at 592. In *Seyfert*, a consolidation of two cases, debtors were entitled to an unconditional release of proceeds from a trustee's postpetition sale of their residence, up to the exemption amount. The trustee, whose position was based on *Golden*, was informed that debtors were entitled to an immediate release of the sales proceeds attributable to their homestead exemptions. As of the date of the bankruptcy petitions, debtors held valid homestead exemptions in their residences. Therefore, it was of no consequence that after the trustee remitted the proceeds, debtors elected not to reinvest them in a new residence. *Id.*

When the property is excluded from the bankruptcy estate at the time of the bankruptcy filing, a subsequent change in its form does not bring it into the estate unless another provision of §541(a) would capture it as a postpetition asset. *In re Bartholomew*, 214 BR 322, 328 (Bankr SD Ohio 1997). In a case based on California exemption statutes, debtor filed a chapter 7 petition and the following day entered into a contract to sell the homestead. *Herman*, 120 BR at 129. Affirming the bankruptcy court's decision, the Ninth Circuit BAP held it need not reach the issue of whether the sale was voluntary or involuntary because that was irrelevant. *Id.* at 130. Absent conversion from one chapter to another, the nature and extent of a debtor's exemption rights are deter-

mined as of the date of the petition. Thus, any postpetition disposition of the property or postpetition change in the character of the property into proceeds has no impact upon the exemption analysis. *Id.*; see also *Graziadei*, 32 F3d at 1410 (postpetition disposition of the property did not alter the debtor's entitlement to the homestead exemption amount).

In another case, the Ninth Circuit BAP held that debtor's retirement accounts, characterized at the date of the petition, retained their exempt status regardless of debtor's postpetition conduct. *Kim*, 257 BR at 684. The BAP concluded that federal law (1) requires exemptions to be determined as of the petition date and (2) does not permit the consideration of postpetition conduct in determining exemptions. *Id.* Because *Kim* involved the postpetition exemption status of retirement accounts, one might assume its holding does not apply equally to homesteads. The opinion quoted at length, however, from a Texas opinion that unequivocally addressed the postpetition homestead exemption.

The practical implication is that [exempt] property is forever protected from the claims of pre-petition creditors, and is essentially removed from the bankruptcy process. [Citations omitted.]

No change in the form or character of the exempt property should change this result. Nothing in section 522(c) even vaguely suggests that, as a precondition to enjoying the protections of that provision, the debtor must maintain the exempt character of the property. If the debtor decides, as part of his fresh start, to sell the house, buy a Winnebago, and travel around the country from campground to campground with his wife and his dog, the statute appears to place no impediment in his path. . . . Were the rule otherwise, then estates could be reopened to administer such proceeds at virtually any time, robbing bankruptcy administration of any sort of meaningful finality, and robbing the bankruptcy discharge of its efficacy.

Id. at 689, (quoting *Lowe v. Yochem*, 184 BR 733, 738 (Bankr WD Tex 1995) (brackets in original)). In an unpublished opinion, the Ninth Circuit Court of Appeals affirmed *Kim*, expressly for the reasons

stated in the BAP's opinion. 35 Fed Appx 592 (9th Cir 2002).

In *Graziadei*, a chapter 7 trustee was ordered by the bankruptcy court to return to debtor the sale proceeds from debtor's homestead. The Ninth Circuit Court of Appeals approached the exemption status of the homestead from a jurisdictional viewpoint. "We have clearly held that a bankruptcy court has 'no jurisdiction' over [exempt] homestead property and that such property 'cannot be administered by the bankruptcy court.'" *Graziadei*, 32 F3d at 1410 (quoting *In re Browne*, 462 F2d 129, 132 (9th Cir 1972), applying 28 USC §1334(b)). This is because a bankruptcy court has jurisdiction only over matters that could conceivably have any effect on the estate. *Id.* n.2 (quoting *In re Fietz*, 852 F2d 455, 457 (9th Cir 1988), applying 28 USC §1334(b)). An action relating to homestead property could not conceivably have any effect on the estate because such property is exempt from the estate. Accordingly, the bankruptcy court lacks jurisdiction over such property. *Id.* (quoting *In re Turner*, 724 F2d 338, 341 (2d Cir 1983)).

Conclusion

US Supreme Court and Ninth Circuit opinions leave little doubt that a debtor's interest in the homestead exemption is determined as of the petition date and, therefore, is not conditional upon reinvestment in another homestead within one year. Where debtor's interest at the petition date is in the property itself, a postpetition change in the character of the property into proceeds has no impact on the analysis. In short, Oregon's one-year deadline to reinvest proceeds does not apply when the sale of debtor's homestead is postpetition.

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NINTH CIRCUIT CLARIFIES LAW ON ORDINARY COURSE OF BUSINESS DEFENSE TO PREFERENCE CASES

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

Introduction

The Ninth Circuit Court of Appeals has recently provided some welcome clarification to the law on how the ordinary course of business defense to an alleged preference applies to restructuring agreements and to first time transactions between a debtor and a creditor. *In re Ahaza Systems, Inc.*, 482 F3d 1118, 2007 WL 968386 (9th Cir. 2007).

Facts of the Case

Before filing chapter 7 bankruptcy, Ahaza Systems, Inc. (Debtor) entered into a Settlement Agreement and Release (Agreement) with Stratos Product Development, LLC (Creditor) resolving certain contract disputes between the parties. The Agreement provided that Debtor would pay a lump sum of \$380,000 to Creditor upon execution of the Agreement, and thereafter make 12 monthly payments to Creditor of \$35,000 each. The Debtor made the lump sum payment and eight of the monthly payments to the Creditor before filing for bankruptcy.

The bankruptcy trustee (Trustee) sued the Creditor for recovery of the last two monthly payments as preferential transfers under 11 USC §547. The Trustee attached a copy of the Agreement to the complaint. The Agreement included some recitals about the Debtor's and Creditor's allegations against each other in their dispute over their relationship before they entered into the Agreement, but specifically stated that those allegations were disputed.

In its answer, the Creditor admitted the prima facie elements of the preference pursuant to §547(b), but alleged an ordinary-course defense pursuant to §547(c)(2). The only question before the bankruptcy court was whether Creditor met the requirements of §547(c)(2) and proved its alleged ordinary course of business defense to the preference. The Creditor and the Trustee filed cross-motions for summary judgment.

In support of its motion for summary judgment, the Creditor filed two declarations. The first declaration was from a vice president and controller of an industry group, and discussed general industry standards between vendors and start-up companies in the high-tech industry, but contained no information specific to Debtor and its business practices. The second declaration was from Creditor's owner and vice president of operations, asserting that it was ordinary for Creditor to enter into agreements such as the Agreement. That declaration also lacked any information specific to Debtor.

In support of its cross-motion for summary judgment, the Trustee filed a declaration of its counsel establishing that the Trustee had issued a demand for payment prior to filing the preference case and a declaration of the estate's accountant establishing the history of payments made under the Agreement. The declarations were the only evidence in the record on summary judgment. Thus, the record did not contain any evidence on the transactional history or the payment history between Debtor and Creditor prior to the Agreement.

The Trustee conceded that the Creditor established the Agreement was ordinary in the industry, but argued that the obligations incurred in the Agreement were not incurred in the ordinary course of business between the Debtor and the Creditor specifically, and that the payments pursuant to the Agreement were not made in the ordinary course of business between the Debtor and the Creditor specifically. The Creditor argued that the evidence showing the Agreement was ordinary in the industry was sufficient to show that it was ordinary between the Creditor and the Debtor.

The bankruptcy court granted summary judgment in favor of the Creditor and the BAP affirmed. The Ninth Circuit Court of Appeals reversed in part, affirmed in part, and remanded the case for further proceedings.

Basic Principles of the Ordinary Course of Business Defense

The Ninth Circuit has described the requirements for proving the ordinary-course defense as follows:

If, however, 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, the transfer may not be avoided. 11 U.S.C. § 547(c)(2). This is commonly referred to as the ordinary course of business exception.

In re Kaypro, 218 F3d 1070, 1073 (9th Cir 2000). The creditor has the burden of proving the ordinary course defense. 11 USC §547(g).

The first two elements of the defense, set forth in §547(c)(2)(A) and (B), require that the underlying debt be incurred by the transferor in the ordinary course of business of the debtor and the transferee, and that the payments be made in the ordinary course of business between the debtor and the transferee. These two elements are sometimes referred to collectively as the “subjective test,” because they relate to the specific course of dealing engaged in by the debtor and the transferee.

The third element, set forth in §547(c)(2)(C), requires that the transfers be made in accordance with ordinary business terms. This third element is sometimes referred to as the “objective test,” because it relates to prevailing business standards in the industry.

As the Ninth Circuit has recognized, both the subjective test and the objective test must be satisfied before the ordinary course defense applies:

To qualify for the ordinary course exception, a creditor must prove that: 1) the debt and its payment are ordinary in relation to past practices between the debtor and this particular creditor; and 2) the payment was ordinary in relation to prevailing business standards.

In re Food Catering & Housing, Inc., 971 F2d 396, 398 (9th Cir 1992) (emphasis in original).

Appellate courts in the Ninth Circuit have not previously addressed the requirements of §547(c)(2)(A) in reported opinions. Prior cases either ignore §547(c)(2)(A) or simply presume it has been satisfied. In *In re Food Catering & Housing*, 971 F2d at 398, the Ninth Circuit did not address the requirements of §547(c)(2)(A), because it held that the creditor could not prevail under §547(c)(2)(B).

In *In re Grand Chevrolet, Inc.*, 25 F3d 728, 732 (9th Cir 1994), it was undisputed that the requirements of §547(c)(2)(A) were met, because the creditor and the debtor had engaged in similar transactions for approximately six years. The issue in *In re Loretto Winery, Ltd.*, 107 BR 707, 709 (9th Cir BAP 1989), was whether the defendant met the requirements of the objective test of §547(c)(2)(C). The Bankruptcy Appellate Panel’s opinion in *Loretto Winery* did not address the requirements of the subjective tests of §547(c)(2)(A) or (B).

Courts apply a fact-specific inquiry to determine whether a creditor has satisfied the requirements of §547(c)(2)(B). *In re Fred Hawes Org., Inc.*, 957 F2d 239, 244 (6th Cir 1992). The Ninth Circuit has adopted the following test to use in making the inquiry:

Among the factors courts consider in determining whether transfers are ordinary in relation to past practices are: 1) the length of time the parties were engaged in the transactions at issue; 2) whether the amount or form of tender differed from past practices; 3) whether the debtor or creditor engaged in any unusual collection or payment activity; and, 4) whether the creditor took advantage of the debtor’s deteriorating financial condition.

Grand Chevrolet, 25 F3d at 732. Although there is no per se rule against late payments, *id.*, the Ninth Circuit has held that “[d]elay is particularly relevant in taking a payment outside the ordinary course of business exception.” *Food Catering & Housing*, 971 F2d at 398.

The Ninth Circuit has previously held that payments made pursuant to a restructuring agreement are not per se outside of the ordinary course of business for purposes of the objective test of §547(c)(2)(C). However, the court had not addressed previously how to treat restructuring agreements under the subjective test of §547(c)(2)(A) and (B). *Kaypro*, 218 F3d at 1073-74.

The New Law from Ahaza

In *Ahaza*, the court had to decide what standard should be used to determine satisfaction of the subjective test, where there were no other dealings between the parties and the Debtor had made payments to Creditor pursuant to what was effectively a settlement or restructuring agreement. In short, can

transfers be considered made in the ordinary course of business if they are made as part of a first-time transaction that was settled or restructured?

The court held that first-time transactions can qualify for the ordinary course of business defense, but held that the subjective test for such transactions is different than the test in cases where there are prior transactions between the debtor and creditor. The court did not disturb the holdings of *Food Catering & Housing* and *Grand Chevrolet*, which require a creditor to address past practices between the specific parties to establish the creditor's ordinary course of business defense if there are prior transactions between the debtor and creditor. Instead, it stated a new rule for first-time transactions. In those cases, to establish the ordinary course of business defense a creditor must address how the specific debtor and the specific creditor dealt with other, similarly situated parties.

The trustee had argued that it would make §547(c)(2)(A) into mere surplusage if evidence sufficient to show compliance with the objective test of §547(c)(2)(C) could also prove the subjective requirements of §547(c)(2)(A). The court addressed that argument in an informative way, by clarifying that the objective test of §547(c)(2)(C) deals with the **broad range** of practices in the industry, but the new subjective test is not nearly so broad. Under the new subjective test for first-time transactions, a creditor must provide evidence as closely as feasible of the practices of the actual creditor and the actual debtor with similarly situated entities. Thus, in theory it would be possible for a first-time transaction to be ordinary in the industry, but not ordinary between the debtor and the creditor.

After deciding that first time transactions can qualify for the ordinary course of business defense, the Court of Appeals examined what constitutes the relevant debt when a settlement or restructuring agreement is involved. The Creditor in *Ahaza* had provided no evidence to the court of any course of dealing between Debtor and Creditor prior to the Agreement. Although the Agreement (attached to the complaint) recited some the allegations of the Debtor and Creditor against each other in their pre-agreement dispute, it did not describe the prior business relationship between the Debtor and Creditor. Presumably, the Creditor chose not to put

that information in the record for a reason: because it likely showed Creditor's collection pressure against Debtor.

The court held that, in evaluating whether the debt incurred pursuant to a settled or restructured transaction qualifies for the ordinary course of business defense, the term debt includes the original facts of the underlying transaction that was later settled or restructured. It held that both the pre-Agreement relationship between the Debtor and Creditor, and the terms of the Agreement itself were relevant and necessary to assess whether Creditor had met its burden of proof under §547(c)(2)(A).

In a straightforward application of *Grand Chevrolet*, the court decided that the question of whether the Creditor established that the payments from Debtor to Creditor were ordinary with respect to Debtor's payment history pursuant to the Agreement was too close to justify summary judgment for either party. One of the *Grand Chevrolet* factors weighed in favor of the Creditor, one weighed in favor of the Trustee, and there was no evidence on the other two factors. Even though lateness was the factor in the Trustee's favor, and delay is a particularly relevant factor under *Food Catering & Housing*, the court held that the bankruptcy court, as the finder of fact, should decide whether the payments were made in the ordinary course of business. Notably, the court specifically pointed out that the threat of litigation that preceded the Creditor and Debtor entering into the Agreement could also be relevant to determining whether the payments were made in the ordinary course of business. Thus both the pre-Agreement relationship between the Debtor and Creditor and the terms of the Agreement itself are also relevant and necessary to assess whether Creditor had met its burden of proof under §547(c)(2)(B) to show that the debt was paid in the ordinary course of business.

Implications of *Ahaza*

The Ninth Circuit has previously has looked to past practices between the Debtor and the Creditor to decide whether the Creditor satisfied the subjective test of the ordinary course of business defense. In this case, there were no past practices to consider. Instead of holding that Creditor **could not** meet its burden of proof to establish the subjective test of the ordinary course of business defense, the Court

of Appeals essentially decided that a different test applies if there are no past practices between the parties.

The dissent was troubled by the fact that, as a result of the *Ahaza* decision, there is now a different subjective test for first time transactions than for transactions where the debtor and creditor had a history of prior dealings (even if that history of prior dealings was in circumstances different enough to be unpersuasive in evaluating an ordinary course of business defense). The dissent's concerns certainly open up the possibility for a creditor in future cases to argue that the court should consider the behavior of the specific creditor and the specific debtor with similarly situated entities under circumstances where the creditor and debtor's prior dealings with each other are not by themselves convincing enough to establish an ordinary course of business defense.

After *Ahaza*, a creditor attempting to establish an ordinary course of business defense to a preference case now has to first consider if the allegedly preferential payments were made pursuant to a first time transaction between the debtor and the creditor. If so, the creditor must then focus on proving the debtor's and creditor's past practices when dealing with other, similarly situated parties. If there are no such past practices, then the debtor may consider what would ordinarily be expected of similarly situated parties. Where a creditor wants to establish that transfers pursuant to a restructuring or settlement agreement are incurred in the ordinary course of business, the creditor must now put in evidence the entire relationship between the creditor and the debtor, and not merely rely on evidence of what occurred after the settlement or restructuring.

Ahaza is a pre-Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) case. However, the results in *Ahaza* remain relevant in post-BAPCPA cases. In BAPCPA, Congress retained the requirement that the debt be incurred in the ordinary course of business between the debtor and the creditor. However, Congress reorganized §547(c)(2), and made a portion of it disjunctive rather than conjunctive (changing the word "and" to "or" in §547(c)(2)). BAPCPA §409. This means that a creditor can establish its defense by showing either that the debt was paid in the ordinary course of business

between the creditor and the debtor, or that the payments are ordinary in the industry.

After *Ahaza*, in a post-BAPCPA case where a creditor is relying on the subjective test to show that the transfers were paid in accordance with the ordinary course of business between the debtor and a creditor, a prudent creditor should also put forth evidence of the entire presettlement or prerestructuring relationship between the creditor and the debtor, and not merely rely on evidence of what occurred after the settlement or restructuring.

Conclusion

In *Ahaza*, the Ninth Circuit Court of Appeals did not simply expand or contract the ordinary course of business defense. Although allowing first-time transactions to qualify for the ordinary course defense is a creditor-friendly outcome, requiring the creditor to provide evidence of the entire context in which a restructuring or settlement occurs may ultimately restrict the ability of some creditors to prevail on ordinary-course defenses. The decision in *Ahaza* emphasizes that the ordinary course of business defense is, and should remain, very dependent on the specific facts of each case.

LENDER BEWARE

By Kathryn P. Salyer,
Farleigh Witt

Early this year the Oregon Court of Appeals handed down its decision in *Vasquez-Lopez v. Beneficial Mortgage, Inc.*, 210 Or App 553, 152 P3d 940 (2007). This case opened a veritable Pandora's Box for lenders alleged to have engaged in predatory lending practices, and could have a significant impact on defense strategies for consumer lending claims. Given the issues considered by the court (enforceability of arbitration clauses and review of punitive damage awards), this case is likely to be reviewed by the Oregon Supreme Court. Until then, the judicial landscape appears to be quite friendly for borrowers who charge their lenders with predatory lending practices.

The plaintiffs were immigrants who neither read nor spoke English. Their suit alleged that defendant, Beneficial Mortgage, engaged in predatory lending practices by (1) fraudulently inducing them to borrow money at an extremely disadvantageous interest rate and (2) lying to them about what their monthly payments would cover. Defendant moved to compel arbitration pursuant to an arbitration rider contained in the loan documents. The trial court denied that motion on the grounds that the arbitration rider was unconscionable. At trial, the jury found in favor of plaintiffs and awarded them economic, non-economic and punitive damages, as well as enhanced attorney fees. Each of these issues was appealed, and on each issue plaintiffs prevailed.

1. The Arbitration Rider

The Court of Appeals considered at length both the enforceability of the arbitration rider and the proper forum for deciding that issue. The defendant argued that the issue of the arbitration rider's validity should have been submitted to the arbitrator and that, even if the trial court was the proper forum, it erred in deciding that the arbitration agreement was unconscionable.

After a lengthy discussion of the two United States Supreme Court cases which considered whether the trial court was the proper forum, *Prima Paint v. Flood & Conklin*, 388 US 395, 87 S Ct 1801, 18 L Ed 2d 1279 (1967), and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 US 44, 126 S Ct 1204, 163 L Ed 2d 1038 (2006), the Oregon Court of Appeals held that the issue turns on whether the arbitration clause is challenged on the same theory on which the entire contract is challenged. It ruled that the court is the proper forum to determine the validity of an arbitration clause if the claim addresses only the arbitration clause, or if the claim addresses the arbitration clause under a legal theory that is different from the theory that is employed to challenge the entire contract.

The Court of Appeals then considered the nature or identity of the claim to which this rule applies. The court held that under §4 of the Federal Arbitration Act, the trial court should focus on what is at issue at the time it is called upon to decide whether to stay proceedings pending arbitration; that is, the proper frame of reference includes not

merely the pleadings, but all subsequently filed motions as well. In this case, the challenge to the arbitration rider was distinct from the challenges to the substantive provisions of the agreement. For that reason, the court held that the trial court did not err in deciding the validity of the arbitration rider instead of staying the proceedings while the arbitrator decided it.

The court went on to affirm the trial court's ruling that the arbitration rider was both procedurally and substantively unconscionable. The provision was procedurally unconscionable because the parties had unequal bargaining power and the defendant affirmatively concealed the arbitration rider's terms by allegedly misleading the plaintiffs with a half-truth (*i.e.*, that they could go to court after arbitration). The court also found that the provisions were substantively unconscionable because the arbitration rider contained at least three terms that were potentially unreasonably favorable to the defendant: it banned class actions, it contained a cost-sharing provision which required the parties to equally divide any arbitration costs over \$1,000, and it contained a confidentiality provision. (The court concluded that the confidentiality provision potentially offered benefits to both parties.)

Having decided that the arbitration rider was infected with serious procedural and substantive unfairness, the court then considered whether the trial court should have severed the unconscionable provisions or declared the entire rider unenforceable. The Court of Appeals held that the trial court's decision to choose unenforceability was not an abuse of discretion.

2. The Affirmative Defenses

Defendant asserted as an affirmative defense that the plaintiffs were barred from recovering damages because they fraudulently induced the defendant to enter into the loan transaction. The defendants alleged that the plaintiffs, as part of their loan application, asserted that they had fully disclosed all of their outstanding financial obligations when, in fact, they knowingly concealed a tax liability to the federal government, with the intention that doing so would induce the defendant to approve their loan application. The trial court directed a verdict for the plaintiffs against this defense.

The Court of Appeals affirmed this ruling, holding that defendant's argument was subject to many shortcomings. Among these: defendant had presented no evidence (1) that the plaintiffs' tax returns were false, (2) that plaintiffs had an actual (versus potential) tax liability, and (3) that the tax returns had been submitted to the defendant. Further, the court held that defendant had no right to rely on plaintiffs' allegedly false returns because, as a large and sophisticated organization that employs underwriters whose jobs include reviewing loan applications for misrepresentation, it could have discovered this potential fraud internally before making the loan. According to the court, on this evidence, no reasonable juror could find, by clear and convincing evidence, that defendant's reliance was reasonable. This specific holding has potentially far-reaching impact in cases where lenders charge borrowers with application fraud.

3. Punitive Damages

A third major issue considered by the court of appeals was the jury's award of \$500,000 in punitive damages. The trial court remitted the damages to \$237,592.50, relying principally on the fact that the ratio between the punitive damages and compensatory damages awarded by the jury was approximately 15:1. The trial court's award represented a ratio of 7.5:1.

The Court of Appeals reinstated the jury verdict. The court determined that this case was one of moderate reprehensibility, presumably because no physical injury or threat to health or safety was involved. Importantly, the court held that, under binding precedent from both the US Supreme Court and the Oregon Supreme Court, the appropriate denominator in the punitive to compensatory ratio calculation is the amount of **potential compensatory damages**. Here, potential compensatory damages were about ten times the amount plaintiffs were actually awarded, and the appropriate punitive-to-compensatory damage ratio (for moderate reprehensibility) was 1.5:1. Thus the jury's award of \$500,000 was proper.

4. Attorney Fees

The final issue considered by the court was whether plaintiffs were entitled to an enhanced attorney fee award. The plaintiffs' attorneys were

awarded \$182,107.50 by the trial court. The trial court increased the fee award based on evidence submitted by the plaintiffs that established (1) that few lawyers in Oregon were willing to represent clients in unfair or predatory mortgage lending cases because they are financially risky and involve complex issues; and (2) that the firm was required to work exclusively on this case during a one-month period of time, which required it in turn to decrease the number of potential new clients that it interviewed during that month. The Court of Appeals held that these factual findings were supported by evidence in the record and thus the trial court's award of enhanced attorney fees was not an abuse of discretion.

Conclusion

Notably, each issue considered by the Court of Appeals was decided in favor of the borrower. The court's decision may have been a reaction to the seemingly bad facts before it, or it may be a signal that lenders will face increased judicial scrutiny of their relationships with borrowers.

NINTH CIRCUIT CASE NOTES

By **Matthew A. Goldberg**

Kirkpatrick & Lockhart Preston Gates Ellis, LLP

IN RE AHAZA SYSTEMS, INC.,

482 F3d 1118 (9th Cir 2007)

In this case of first impression, the Ninth Circuit affirmed the BAP's holding that even the initial transaction between a creditor and debtor can qualify as a debt "incurred by the debtor in the ordinary course of business . . . of the debtor and the transferee under §547(c)(2)."

Debtor Ahaza Systems, a start-up technology company, contracted with Stratos Product Development, LLC (Stratos), for product development services. The relationship between the companies eventually soured. Stratos alleged claims against debtor for breach of contract. Instead of litigating these claims, the parties entered into a Settlement Agreement, which provided for an immediate lump sum payment from debtor to Stratos in addition to monthly payments for a period of one year (Agreement).

Continued next page

Significantly, the underlying product development deal and the subsequent Agreement were the first transactions between the two companies. Ahaza ultimately filed a chapter 7 petition, and the trustee brought an adversary proceeding to recover as preferences the last two payments Debtor had made to Stratos. Based in part on evidence introduced by Stratos regarding typical business practices between vendors and start-up technology companies, including payment agreements and debt restructuring such as those in which Stratos and Debtor had engaged, the bankruptcy court granted Stratos's motion for summary judgment.

The BAP affirmed, and the trustee appealed to the Ninth Circuit. Siding with the Sixth and Seventh Circuits, the court agreed that first-time transactions are not per se ineligible from the ordinary-course exception of §547(c). In such cases, the court stated, the instant debt should be compared to the debt agreements into which we would expect the debtor and creditor to enter as part of their ordinary business operations. The court cautioned that this analysis should be as specific to the actual parties as possible, *i.e.*, ordinary in relation to this debtor and this creditor's past practices when dealing with other, similarly situated parties.

Notably, the court made clear that restructured debts may be considered as having been incurred in the ordinary course of business. Though *Ahaza* is a pre-BAPCPA case, it is nevertheless relevant post-BAPCPA as it concerns the ordinary course of business of the debtor and creditor analysis, which BAPCPA did not alter.

UNITED STATES V. MILWITT,

475 F3d 1150 (9th Cir 2007)

In another case of first impression, the Ninth Circuit held that 18 USC §157, which makes it a crime to file a bankruptcy petition to further a fraudulent scheme, creates a specific intent crime that requires a specific intent to defraud an identifiable victim or class of victims of the identified fraudulent scheme. Though the defendant, Milwitt, was found guilty at trial, the Ninth Circuit reversed the conviction on the grounds that the government had failed to meet the standard of proof required by §157.

Milwitt advertised himself in the San Francisco Yellow Pages as a landlord-tenant attorney, though

he had never attended law school. Several clients who were having problems with their landlords engaged Milwitt to represent them. In addition to advising his clients to withhold their rent payments, Milwitt filed bogus bankruptcy petitions on their behalf, without their knowledge or consent.

Milwitt's scheme eventually unraveled and he was charged under §157 with defrauding the landlords through the use of the unauthorized and false bankruptcy petitions. At trial, however, the government's case focused on the harm suffered by the tenants, who had paid Milwitt for his so-called representation.

On appeal, the Ninth Circuit stated that the government had failed to prove that Milwitt's scheme had been carried out with specific intent to defraud the landlords by filing the bogus petitions. The court contrasted §157 with an older bankruptcy crime statute, 18 USC §152, which prohibits, among other things, making false statements to the bankruptcy court. The government likely could have obtained a conviction against Milwitt under §152; its decision to proceed solely under §157 proved fatal to its case.

The court found that the only fraudulent scheme about which the government had proven anything was one by Milwitt to deprive his client-tenants of money by fraudulently representing them, and that the purpose of the bankruptcy filing was to conceal the fraud from the tenants. Without proving specific intent to defraud the landlords, in addition to proving that the bankruptcy petitions had been filed as a means of executing the scheme, the government simply failed to satisfy its burden of proof. The case is instructive about the nuances of §157, not to mention the importance of pleading multiple claims and maintaining consistency between allegations and evidence during the course of litigation.

IN RE REYNOSO,

477 F3d 1117 (9th Cir 2007)

In yet another case of first impression (and another case involving the unauthorized practice of law), the Ninth Circuit affirmed the BAP, holding that a web-based bankruptcy software provider qualified as a bankruptcy petition preparer under §110 and, furthermore, engaged in fraud and the unauthorized practice of law.

Debtor paid to use defendant Frankfort's web-based software, which prepared a bankruptcy petition and schedules based on information input by debtor. During debtor's §341(a) meeting, the trustee noticed mistakes in debtor's filings and, learning from debtor about Frankfort's software, brought an adversary proceeding against Frankfort alleging violations of §110. Because a previous adversary proceeding, brought by a different trustee, had resulted in an unfavorable ruling for Frankfort with respect to its status as a petition preparer, the bankruptcy court ruled that Frankfort was collaterally estopped from arguing that it did not meet the statutory criteria. The BAP affirmed the collateral estoppel ruling.

On appeal, the Ninth Circuit addressed the §110 issue on the merits, finding, for the first time, that a software provider could qualify as a petition preparer if it provided customers with completed bankruptcy petitions for a fee. Having so found, the court considered whether Frankfort's web-based service constituted the unauthorized practice of law (under California law).

Noting that the determination of whether particular assistance rendered in the preparation of legal form constitutes the unauthorized practice of law is often especially challenging, the court identified several features of Frankfort's business, which, taken together, led the court to hold that Frankfort had indeed engaged in unauthorized practice. First, Frankfort's site held itself out as providing services comparable to a top-notch bankruptcy lawyer. Second, the software decided where in the schedules to place information provided by the debtor and selected exemptions for the debtor.

In addition to affirming the unauthorized practice holding, the court affirmed the bankruptcy court's finding that Frankfort's efforts to intentionally conceal its role as a petition preparer constituted fraudulent, unfair and deceptive acts under §110(i). Section 110(i) authorizes the bankruptcy court to certify such a finding to the district court for a determination of damages and enjoin the preparer from preparing any more petitions.

BAP CASE NOTE

By Doug Pahl,
Perkins Coie LLP

DON'T BE DISTRACTED BY *ROOKER-FELDMAN* – BANKRUPTCY COURTS MAY EXERCISE DISCRETION WHEN ASKED TO APPLY ISSUE PRECLUSION

In re Lopez, 2007 WL 1128811, ___ BR ___
(9th Cir BAP 2007)

Before the chapter 7 filing, ESR sued the debtor in state court asserting several claims, including misappropriation of trade secrets. At the conclusion of the contentious bench trial, the court found in favor of ESR, concluding that the debtor had misappropriated ESR's trade secrets, and awarding damages of \$800,000 and attorney fees of \$386,367. The state court subsequently entered a written order, drafted by ESR's counsel, finding that the debtor's actions were willful and malicious.

After the debtor's chapter 7 petition, ESR filed a complaint for determination that the state court judgment was nondischargeable under §§523(a)(4) and 523(a)(6). In its motion for summary judgment, ESR sought a ruling from the bankruptcy court that the state court judgment had preclusive effect. The debtor attacked the state court judgment and argued that the bankruptcy court had the "equitable power" to ignore it. The bankruptcy court granted summary judgment to ESR, concluding that it had no discretion to disregard the state court's action. The bankruptcy court specifically concluded that the *Rooker-Feldman* doctrine barred the debtor's challenge to the state court judgment.

The BAP reversed and remanded. The panel noted that while some state court findings are entitled to preclusive effect, the *Rooker-Feldman* doctrine is not an issue preclusion doctrine and does not override issue and claim preclusion doctrines. *Rooker-Feldman* "is a narrow doctrine, confined to 'cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" (Quoting *Lance v. Dennis*, 126 S Ct 1198, 1201-02.) The panel reasoned that the debtor was not attempting to reverse the state court judgment, but instead

was seeking the ability to assert that his actions were not willful and malicious under §523(a)(6). The BAP concluded the *Rooker-Feldman* doctrine served as no barrier to the bankruptcy court's power to make determinations under §523(a)(6), determinations which are in the bankruptcy court's exclusive jurisdiction. Rules governing issue preclusion may prevent the debtor from attacking certain findings, but the *Rooker-Feldman* doctrine did not apply.

The BAP was also concerned by the bankruptcy court's apparent view that it lacked the authority to disregard the state court judgment and by its mechanical application of issue preclusion without exercising independent judgment. The panel reviewed the background of issue preclusion and explained that "the decision to apply issue preclusion entails a measure of discretion and flexibility." Noting the broad discretion of trial courts in applying rules of issue preclusion, the panel stated that "reasonable doubts about what was decided in a prior judgment are resolved against applying issue preclusion." The BAP reviewed the debtor's arguments that the willful and malicious standard had not been satisfied and concluded that the bankruptcy court erred in ruling that it lacked the discretion to review these arguments or disregard the state court judgment.

STATE COURT CASE NOTES

By Donald H. Grim,
Greene & Markley, P.C.

NOT ATTORNEY'S EXCUSABLE NEGLIGENCE

Trucke v. Baughman, 210 Or App 448,
150 P3d 1080 (2007)

Following mother's failure to appear for a scheduled hearing, a default judgment was entered in the Umatilla County Circuit Court requiring her to pay child support. The case had been transferred from Marion County Circuit Court. Mother's attorney in Marion County moved to withdraw from the case due to the change in venue. The order to withdraw was granted after the case file had been mailed to Umatilla County.

The order allowing withdrawal did not catch up with the case file and Umatilla County Circuit Court

continued to consider the withdrawn attorney to be mother's attorney of record. Mother, residing in Salem, was unaware of her obligations in Umatilla County and did not know of the judgment against her until father's attorney served her directly, by which time an order of default and general judgment had been entered against her.

Mother moved to set aside the judgment, arguing that she was unaware of the hearing because the notice was sent to her former attorney. Father objected, asserting that "professional mistakes or negligence of [mother's] trial counsel does not constitute 'mistake, inadvertence, surprise, or excusable neglect' necessary to set aside a judgment under ORCP 71B." Agreeing with father, the court determined that attorney remained mother's attorney of record because the Umatilla County Circuit Court never received notice of the attorney's withdrawal. The Court of Appeal reversed and remanded, concluding that "this is not a case of attorney neglect at all."

A transferring court retains jurisdiction to enter orders in a case until the case file is received and filed by the court to which the case is being transferred. ORS 14.160. Because the Umatilla County Circuit Court did not receive and process the case file until after the order to withdraw had been granted, the Marion County Circuit Court retained jurisdiction until that date. When the Marion County Circuit Court granted the motion to withdraw, attorney ceased to be mother's attorney of record. There was no obvious fault of anyone involved, and certainly none attributable to mother.

SETTLEMENT AGREEMENT NOT AN UNAMBIGUOUS AND UNCONDITIONAL RELEASE

Terrain Tamers Chip Hauling, Inc. v. Insurance Marketing Corp. of Oregon, 210 Or App 534, 152 P3d 915 (2007)

Terrain Tamers, a hauling company, purchased insurance through Insurance Marketing Corporation of Oregon (IMCO), an insurance agent. IMCO agreed to obtain a \$2 million automobile liability policy and a \$3 million excess liability policy. IMCO procured the automobile liability policy but neglected to procure the excess liability policy.

A Terrain Tamers' employee thereafter caused an accident which resulted in serious injury to a third party. Terrain Tamers and the injured party settled the claim. The settlement agreement provided that

Terrain Tamers would stipulate to an entry of judgment against it in the amount of \$5.75 million. The first \$2 million was paid by the automobile liability carrier. Terrain Tamers agreed to sue IMCO for failure to procure the \$3 million excess liability policy and grant a security interest in favor of the injured third party. In exchange, the third party agreed not to "take any steps to enforce or execute" the judgment against Terrain Tamers "during the pendency of any action" against IMCO and to execute a satisfaction of judgment upon final completion of that action.

Terrain Tamers accordingly sued IMCO and IMCO moved for summary judgment. Relying on *Oregon Mutual Ins. Co. v. Gibson*, 88 Or App 574, 746 P2d 245 (1987), IMCO argued that the settlement agreement left Terrain Tamers with no liability to the third party and, therefore, Terrain Tamers has "no damage which is cognizable by a liability insurance policy." Consequently, there is nothing left for IMCO to insure. The trial court agreed.

The Court of Appeals reversed. *Oregon Mutual Ins. Co.* is not controlling because the agreement did not unambiguously and unconditionally release Terrain Tamers from further liability. Terrain Tamers did not assign its rights against IMCO, but instead agreed to pursue a claim against IMCO and pay the third party whatever it recovered. It was not clear that the covenant not to execute was unconditional or that it completely absolved Terrain Tamers of future liability. Therefore, the Court of Appeals could not say with certainty that Terrain Tamers could never be required to pay any more than what it already had paid. *Oregon Mutual Ins. Co.*, 88 Or App at 578.

CONSUMER COMMITTEE

By Kathryn E. Eaton,

M. Caroline Cantrell & Assoc. PC

The Consumer Bankruptcy Committee typically meets every other month on the third Thursday of the month. The next meeting will be July 19th at 4:30 pm in the judges' conference room on the 8th floor of the Portland bankruptcy court. The minutes from the meeting of March 15, 2007, are summarized below.

Brian Lynch, Chapter 13 Trustee, requested that debtors' attorneys notify his office when a foreclosure has occurred on a property that has Home Owners' Association (HOA) fees being paid through the Plan. Payments on the HOA claims will not be stopped simply because a Motion for Relief has been granted; rather they will continue to be paid until the foreclosure has actually occurred.

An agreement to re-split a secured claim during the life of the case requires a modified plan, as otherwise the Trustee's accounting system is not able to process the payments correctly.

Mr. Lynch announced that his office will not issue objections to administrative claims filed by chapter 7 trustees in converted cases; rather the debtor's attorney must file any objections to these claims.

Mr. Lynch discussed two options for including sale or refinance language in Ch 13 plans: either (1) note it up for approval by the court, or (2) use the standard language in the plan which calls for Trustee's permission. Debtors need to represent that the sale is an arms-length transaction for fair value. The Trustee's office is looking at the standard language and the sale or refinance process and may modify the standard language in the future. Check the Trustee's website frequently for updates to standard language.

Last, Mr. Lynch reminded attorneys that Trustee motions to dismiss for missed plan payments can be resolved with modified plans including last chance language.

Tom Renn, on behalf of the Debtor-Creditor Section, announced that there is a new webmaster for the Section's website, which is being updated and restructured. He requested that each Committee of the Section appoint a website liaison to keep the website current and accurate.

Pam Griffith spoke on behalf of the US Trustee's office. She reported that several attorneys have complained about the length of §341(a) meetings, which causes the schedule to get backed up. The UST's office will reduce the number of hearings per half hour to alleviate this problem. Also, attorneys can assist by having all the documents ready to hand to the trustee, by getting to the hearing room early and asking the debtors to arrive early. Ann

Continued next page

Chapman recommended that more signs be posted in the hearing rooms about having identification and documents ready to hand over. (As of this writing, such signs have been posted.)

Trustees are setting over hearings because of debtors' failure to provide required documents in advance (e.g., tax returns and pay stubs). Trustees are requesting Domestic Support Obligation notices, bank statements and pay advices in advance when possible. Also, debtors' attorneys are asked to inform the case trustee if the debtor was not required to file tax returns.

Pam also stated that the hearings are going longer because the UST is attending more hearings. They are looking at each case and scrutinizing them more thoroughly than in the past due to Means Test issues.

The UST's office has been using the IRS guidelines for testing abuse under §707(b). This method gives the debtors the higher of actual or IRS expenses.

Kathryn Eaton reported from the subcommittee on getting the attorney fees increased in chapter 13 cases. The subcommittee met with Judge Perris and Brian Lynch and reached an agreement for the short term:

Fixed fees for the life of the case will remain at \$4,000. The rationale for no change is that the majority of attorneys using this option are outside of the greater Portland area where hourly rates are lower and firms tend to be smaller. This option reduces the amount of record keeping burden on such small firms.

The maximum fixed fee prior to confirmation will increase from \$2,500 to \$3,000 effective May 1, 2007. Check the court's website for updated forms at that time.

The group decided to table a decision on fee increases for cases that are fully itemized. The Court wants to examine the entire Chapter 13 process in light of the fact that our region has some of the highest Chapter 13 fees in the country. The Court needs to understand whether there are process differences underlying this fact and if so, if there are ways to streamline or change those processes to reduce the cost of Chapter 13 cases to our debtors.

Mark your calendar now for the
**DEBTOR-CREDITOR SECTION
ANNUAL MEETING**

Friday, November 9, 2007
a one-day event at

The Benson Hotel
Portland

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