

Newsletter

Volume XXVI, Number 1 Debtor-Creditor Section, Oregon State Bar Winter 2007

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COMMENTS FROM THE CHAIR

By Stephen T. Tweet

Albert & Tweet, LLP

As I write this – my first article as Debtor-Creditor Section “Grand Pooh-Bah” – I find it hard to concentrate on the practice of law. The new year is fresh upon us, and I already miss the holidays. My home is still decorated; I know I need to take the lights down but I don’t want to. And I’m still wondering what Mr. Potter did with the money Uncle Billy absent-mindedly left with him. (You fans of *It’s a Wonderful Life* know what I’m talking about.)

Speaking of distractions, while visions of sugarplums don’t usually dance in my head I admit to being more than a little distracted by thoughts of e-filing. Two of my staff dutifully attended the training last year, understood it, then returned to the office and attempted to apply their newfound wisdom, only to come up against a brick wall. Their difficulty did not lie in the training – the work of court staff was heroic, above and beyond the call of duty. Rather, the challenge was choreographing what they had learned with our own bankruptcy software, attempting to put together all the new forms required by the new law, and brushing up on our newly-learned scanning procedure. They sheepishly asked if they could attend class a second time. As a result, we are now successful e-filers.

Darlene and Beth, my Indispensable Legal Assistants (ILAs), were so moved by the experience they penned the following for our holiday party (loosely based on “The Night Before Christmas”):

’Twas the second time for both, more knowledge to amass

They drove the long distance to go to the class

Feeling like failures, they trudged down the hall

And entered the room, filled with classmates wall to wall

Some lawyers, some staff, they were all there to learn

A certificate of completion at least they could earn

Electronic filing would soon be required

They’d need the information so recently acquired

They rode home together to brave this new phase

TOO MUCH to learn! It made their eyes glaze

Heads spinning with procedures, “events” and terms

Two heads better than one the class just confirms

Practice, more practice, until they felt ready

They entered the website with hands not quite steady

Continued from page 1

Comments from the Chair

That first filing! How bless-ed, how awesome, how joyful!

But then the court called to give them an earful

The wrong "event" was used, a certificate not filed,

Darlene took it in stride, but Beth just went wild!

"How can they expect us to do it just right?"

She shrieked as she walked down the hall out of sight

They collected themselves and tried it once more

No call from the court, must have been a perfect score.

Of course Steve gets the credit for all of the work

Since he is the filer according to the Clerk

John Albert has not yet achieved such fine status

Since he's been temporarily granted a hiatus

He still prefers the old-fashioned way "What's wrong with my computer!" he's been heard to say.

Late at night in the office when no one is there;

Not a mouse is still clicking, nary a body in a chair

E-filings from the court still magically fill

Our e-mails to the brim just ready to spill

There's been some grumbling in pure exasperation

As attorneys and staff strive to live up to expectations

The world-is-a-changing, that's one thing for sure

HOW MUCH TECHNOLOGY MUST WE BE EXPECTED TO ENDURE?

A little more yet, apparently. My ILAs still have an occasional question or wake-up call from the court, but on the whole they are competent e-filers and insist they now "love" it. E-filing is here to stay, and after getting over the initial learning hurdle, it really does make it easier to file and keep up with the status of cases. As for me, on icy days I'm glad no one has to get into a car and drive to Portland or Eugene to file that brief I just got around to drafting.

Finally, on a different but equally important topic, I would be remiss if I did not thank the hard-working members of the Executive Committee whose terms expired last year, namely: Peter McKittrick, George Hoselton, Judge Perris and Doug Schulz. Also many thanks to the Section's immediate past chair, Tom Stillely.

Debtor-Creditor Newsletter

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

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

COUNSEL IN THE CROSSHAIRS: INSOLVENCY COUNSEL AND ETHICS ISSUES

By **Steven M. Hedberg**,
Perkins Coie LLP¹

One of the first lessons instilled in every lawyer is the counselor's duty to advocate zealously on behalf of his or her client.² More than a well worn cliché, this duty is derived from the legal codes of professional conduct to which each lawyer solemnly swears. Most practitioners understand, however, that a blind dedication to zealous advocacy may result in their overlooking the obligation to adhere to certain standards of conduct. A lawyer's duty of zealous representation and a lawyer's legal, moral and ethical obligation to uphold the rule of law can come into conflict, giving rise to a perfect storm of imperfect choices that can leave even the most preeminent of legal counsel searching for answers.

In the bankruptcy arena, lawyers must look for guidance to the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, applicable state law and the rules and codes of professional conduct. Trying to balance obligations under those authorities with obligations to the client, court, other counsel and oneself can often lead to unsettling situations that leave lawyers feeling less like officers of the court and more like counsel in the crosshairs.

This article highlights some of the difficult choices that bankruptcy counsel may be forced to address in representing debtors, particularly in a chapter 13 case. We will use the following chapter 13 hypothetical as a construct for our discussion and look to Oregon Rules of Professional Conduct (RPC) in analyzing ethical considerations.

In our story, Joe and Debbie Smith, a married couple, have incurred substantial credit card debt and health-related bills. Although both are currently working and their combined income is \$100,000 per year, their bills exceed their monthly income by a substantial sum. They have determined the only hope to save their house and get back on their feet is to file a bankruptcy petition.

The Smiths have approached you about filing and have completed the necessary debt counseling. You

have determined that they are qualified to file for bankruptcy protection. In preparation for their bankruptcy filing they have come to your office to fill out the necessary paperwork.

*While you are preparing the Smiths' schedules, they mention that they own several valuable pieces of furniture, some of which are family heirlooms and some custom-made pieces. Despite this fact, they insist on listing the value of their furnishings at \$3,000, the exact amount of the exemption for furnishings. See 11 USC §522(d); ORS 18.345. Later during the consultation, the couple states that the value of their jewelry is only \$3,600, the amount of the jewelry exemption. *Id.* However, you recognize that Mr. Smith's watch is a Rolex and Mrs. Smith's ring is the newest diamond ring style from Tiffany's.*

What do you do in each of these circumstances? What is required by the rules?

A debtor has a duty to prepare schedules carefully, completely, and accurately. *In re Mohring*, 142 BR 389, 394 (Bankr ED Cal 1992). Although there are "no bright-line rules for how much itemization and specificity is required," a debtor is required to be as particular as is reasonable under the circumstances. *Id.* at 395. If possible, a debtor should list the "approximate dollar amount" of each asset. See *In re Wenande*, 107 BR 770, 772 (Bankr D Wyo 1989). If faced with a range of values, a debtor should "choose a value in the middle of the range." *In re Seruntine*, 46 BR 286, 288 (Bankr CD Cal 1984). There may be assets, however, the value of which is unknown; when that is the case, "a simple statement to that effect" will suffice. *In re Wenande*, 107 BR at 772.

Under Bankruptcy Rule 9011, when an attorney presents a petition to the court, that attorney is certifying, to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that:

- The petition is not being presented for any improper purpose;
- The claims, defenses and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary

¹ The opinions expressed herein are personal to the author and do not represent the opinions of Perkins Coie LLP. Special thanks to Jeanette Thomas and Justin Moon for their assistance in preparing these materials.

² Unlike the now-repealed Oregon Disciplinary Rules, Oregon's Rules of Professional Conduct make no reference to zealous representation. Instead, the Oregon Rules now provide for duties of competence in RPC 1.1 and diligence in RPC 1.3.

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Counsel in the Crosshairs

support after a reasonable opportunity for further investigation or discovery; and

- The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

If, after notice and a reasonable opportunity to respond, a court determines that these representations are untrue, the court may impose an appropriate sanction upon an attorney, law firm, or party guilty of such a violation.

In addition, Oregon RPC 3.3(a)(3) provides that a lawyer cannot offer evidence that the lawyer knows to be false. If a lawyer or the lawyer's client has offered material evidence and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Oregon RPC 1.0(h) provides that "[k]nowingly," "known," or "knows" denotes actual knowledge of the fact in question and that a person's knowledge may be inferred from circumstances. As a result, a lawyer has no general duty to investigate a client's affairs, but must inquire further into a client's affairs when it would be reasonable to do so.

Thus, while mere suspicion that a client is committing or intends to commit fraud does not preclude a lawyer from counseling a client about the legal consequences of proposed conduct, it is improper to act on behalf of a client if it should have been apparent to the lawyer under all of the circumstances that a client is using the lawyer's assistance to further fraudulent or improper conduct.

In our hypothetical, while it may appear that the debtors are misrepresenting the value of the furniture and jewelry, that conclusion is not certain. Is the Rolex a fake? Is the diamond in the ring cubic zirconium? Are the Smiths' "family heirlooms" quality furniture or do the pieces only carry sentimental value?

In light of this uncertainty, the ethical lawyer should first investigate further to determine the true value of the furniture and jewelry and provide the debtors with a summary of the law relating to the valuation of excluded items. Second, if it becomes apparent that the debtors are seeking to use the lawyer's services to put forward false or misleading information, the lawyer should (1) advise the debtors of the consequences of their actions and (2) advise the debtors to file amended schedules that provide a more accurate approximate dollar value of the items.

Unfortunately, the ethical considerations in our continuing hypothetical are just beginning. After filing their petition, the debtors are getting ready for the §341 meeting. You prepare them for what to expect, and attend the meeting with your clients. At the meeting, the chapter 13 trustee asks Mr. Smith whether there are any unliquidated claims, such as lawsuits against third parties. Mr. Smith says that there are none; however, immediately before the meeting you overheard the Smiths discuss a potential lawsuit against Mr. Smith's health club for personal injuries caused by a gym accident.

What do you do? Do you ask for a recess? Do you address this later in the interview? What do the rules require?

The Bankruptcy Code and Rules "impose upon the bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims.*" *In re Coastal Plains*, 179 F3d 197, 207-208 (5th Cir 1999) (emphasis in original), *cert. denied*, 528 US 1117, 120 S Ct 936, 145 L Ed2d 814 (2000); *see Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F2d 555, 557 (9th Cir 1992); 11 USC §521(1). The debtor's duty to disclose potential claims as assets does not end when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding. *In re Coastal Plains*, 179 F3d at 208; *Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n*, 932 F Supp 859, 867 (ED Texas 1996); Fed R Bankr P 1009(a).

Not only do the Bankruptcy Code and Rules require that debtors disclose all assets, but in addition, at the §341 meeting, debtors testify under oath. Under Oregon RPC 3.3, when a lawyer knows that the testimony being offered is false, the lawyer has a duty to take "reasonable remedial measures."

In this instance, you should ask for a short recess and advise the Smiths that they are providing answers and testimony under oath and that the law requires them to disclose all assets – including unliquidated claims. You should also advise the debtors that they may want to reconsider their responses.

In the event that the Smiths do not heed your advice at the meeting and do not amend their schedules, your continued representation of them would likely violate Oregon RPC 3.3 and result in professional misconduct, a violation of the professional rules, under Oregon RPC 8.4.

Similarly, under Oregon RPC 1.2(c), a lawyer cannot counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent. While a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may

counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law, a lawyer who knowingly represents a client who intends to engage in fraudulent conduct violates Oregon RPC 1.2(c).

Moreover, the failure to give notice of a potential cause of action may judicially estop a debtor from bringing that cause of action in the future. *Hay*, 978 F2d at 557 (failure to include a potential cause of action in bankruptcy schedules and disclosure statements estops the debtor from prosecuting that cause of action); *In re Coastal Plains*, 179 F3d at 208 (a debtor is barred from bringing claims known but not disclosed in its bankruptcy schedules); *Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.*, 989 F2d 570, 571 (1st Cir), cert. denied, 510 US 931, 114 S Ct 344, 126 L Ed2d 309 (1993) (debtor who obtained relief on the representation that no claims existed cannot resurrect such claims and obtain relief on the opposite basis); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F2d 414, 419 (3rd Cir), cert. denied, 488 US 967, 109 S Ct 495, 102 L Ed2d 532 (1988) (debtor's failure to list potential claims against a creditor "worked in opposition to preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect," and debtor is estopped by reason of such failure to disclose).

With this in mind, under Oregon RPC 1.2(c), you should discuss the legal consequences of the proposed course of conduct and advise your clients that the failure to disclose their cause of action will likely preclude them from pursuing the cause of action in the future.

Not to be outdone, when the chapter 13 trustee questions Mrs. Smith about her job, Mrs. Smith answers the trustee's questions accurately except that she fails to mention she has found a new job that will pay her almost twice what she is currently earning. She has accepted the job and will start in a month. Conveniently, her start date is one day after the proposed confirmation hearing.

What do you do? Do you address Mrs. Smith's statements now, later or not at all?

Except as provided in §1325(b) of the Code, a court will confirm a plan if it satisfies the conditions set forth in §1325(a). Section 1325(b)(1) provides that if the chapter 13 trustee or an unsecured creditor objects, the court cannot approve the plan unless the debtor has pledged under the plan all projected disposable income for the applicable commitment period.

The term "disposable income" is defined as "current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in

accordance with applicable non-bankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended...for the maintenance or support of the debtor or a dependent of the debtor...for charitable contributions...to a qualified religious or charitable entity or organization." 11 USC §1325(b)(2)(A).

If objections to a debtor's proposed plan are filed, §1325(b)(1)(B) requires the court to determine whether a debtor is committing all of her projected disposable income to be received in the applicable commitment period. §1325(b)(1)(B). Consequently, "projected disposable income" under §1325(b)(1)(B) necessarily refers to income that the debtor reasonably expects to receive during the term of her plan – not solely the income that she received prior to confirmation of the plan.

In our case, despite the fact that Mrs. Smith's income is set to increase after confirmation of the plan, this additional income should still be accounted for in the calculation of the debtors' disposable income for purposes of the contributions made to unsecured creditors. See *In re Pak*, 343 BR 239, 245 (ND Cal 2006) (In determining the debtor's projected disposable income for purposes of confirming a chapter 13 plan, actual and anticipated future income must be considered, rather than simply debtor's current monthly income.); *In re Jass*, 340 BR 411, 415 (Bankr D Utah 2006) ("Projected disposable income" is a future-oriented concept and thus differs from the statutory definition

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SECTION WEBSITE

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

The Debtor-Creditor Newsletter will accept camera-ready display ads

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

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Counsel in the Crosshairs

of “disposable income,” which is based on historical numbers.).

The additional income is relevant to whether the proposed plan provides that all of the debtors’ projected disposable income will be applied to make payments under the plan. If the debtors’ income was, in fact, understated, the debtors’ disposable income was also understated. An accurate income projection would result in a greater amount of the Smiths’ projected disposable income being applied to the plan.

Another consideration is Oregon RPC 1.0(e), which defines fraud as conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. In *In re Hockett*, 303 Or 150, 734 P2d 877 (1987), the Supreme Court of Oregon, in examining fraud for purposes of former DR 7-102(A)(7),³ held that fraud refers to conduct that is actionable in Oregon in a tortious sense. *See* 303 Or at 158 (fraud requires, among other things, “a false representation to another with the intent that the other act upon the false representation to his or her damage”).

It follows that fraud may include the intentional withholding of material information when, in the absence such information, a statement is a material misrepresentation.

In our hypothetical, Mrs. Smith may be attempting to shield assets from creditors with intent to deceive, or she may simply be unaware that she has a legal duty to disclose her increase in earnings. Under Oregon RPC 2.1, a lawyer, in representing and advising a client, must exercise independent professional judgment and render candid advice regarding the law. In addition, under Oregon RPC 1.2(c), a lawyer may discuss the legal consequences of a client’s proposed course of conduct and may counsel or assist a client in order to make a good faith effort to determine the validity, scope, meaning or application of the law.

Here, if Mrs. Smith is unaware of her duty to disclose her post-confirmation increase in income, it is your duty to inform her that she has a legal obligation to do so. In addition, as stated above, under Oregon RPC 3.3(a)(3), a lawyer who knows that the testimony being offered is false has a duty to take “reasonable remedial measures.” Although Mrs. Smith has not exactly offered false testimony, she has essentially testified untruthfully by omitting material information, and her failure to fully disclose her increased income may amount to fraud. A short recess may be necessary to advise Mrs. Smith that

she has a legal duty to disclose her income increase and to testify truthfully.

Finally, you are at the confirmation hearing and you intend to put both of your clients on the stand to testify as to the reasonableness of their plan, their ability to meet the payments required thereunder and their necessary expenses. After you have put Mr. Smith on the stand, you overhear Mrs. Smith telling her mother, who has attended the hearing with her, that they had recently won \$10,000 in the lottery and were using those funds to pay off their car loan.

You realize that this will affect their plan payments as they will now be able to make larger payments under the plan. You ask Mr. Smith if there has been any material change in their financial condition. He answers no. You ask him whether they have recently inherited money or won money playing the lottery. Again he answers no.

What do you do? Do you ask for a recess? Can you allow Mr. Smith to continue testifying and seek confirmation of their plan? Can you put Mrs. Smith on the stand if she also denies that they won money in the lottery?

You must ask for a recess to attempt to rectify the situation. The use of the lottery funds is an improper postpetition transfer in violation of §549 of the Code and the estate is entitled to turnover of the payment pursuant to §542. A court may also determine that the car-loan payoff is void if it was made in response to a demand from the lender without relief from the automatic stay provisions of §362.

As stated above, the debtor’s duty to disclose potential assets does not end when the debtor files schedules, but continues for the duration of the bankruptcy proceeding. *In re Coastal Plains*, 179 F3d at 208; *Youngblood Group v. Lufkin Fed. Sav. & Loan Ass’n*, 932 F.Supp. at 867; Fed. R. Bankr. P. 1009(a). Therefore, upon learning of the existence of the lottery funds you should advise the debtors to amend their schedules to reflect the additional lottery funds – an amendment that will also change the amount of the debtors’ disposable income for purposes of the plan.

Under Oregon RPC 3.3(a)(3), a lawyer cannot offer evidence that the lawyer knows to be false. Similarly, under Oregon RPC 3.3(b) a lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage or is engaging in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

³ The Oregon Rules of Professional Conduct became effective January 1, 2005..

Oregon RPC 1.16(b) provides that a lawyer **may** withdraw from representing a client if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent or the client has used the lawyer's services to perpetrate a crime or fraud. Oregon RPC 1.16(a) provides that a lawyer **must** withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other laws.

On our facts, if after being counseled Mr. Smith refuses to retract his statements and testify truthfully, under Oregon RPC 3.3(a)(3), you may be compelled to take remedial measures. Ethics opinions and case law appear to agree that the initial "remedial measure" taken should be a private meeting between lawyer and client during which the lawyer advises the client of the law and attempts to persuade the client to testify truthfully.

A more difficult question is whether you must disclose the falsity of Mr. Smith's testimony to the court if your efforts to persuade him to testify truthfully prove unsuccessful. In these circumstances, a lawyer has two sources of guidance. First, the duty of confidentiality outlined in Oregon RPC 1.6(a) provides that a lawyer shall not reveal information relating to the representation of a client. Oregon RPC 1.6(b)(1), however, creates an exception allowing the lawyer who reasonably believes such disclosure is necessary, "to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime." As a result, although Oregon RPC 1.6(a) makes such information a client confidence that may not be disclosed without client consent, Oregon RPC 1.6(b)(1) permits a lawyer to reveal confidential information to the extent reasonably necessary to prevent the client from committing the crime. Second, under Oregon RPC 3.3(a)(3), a lawyer may refuse to offer evidence that the lawyer believes is false. Further, Oregon RPC 3.3(b) directs a lawyer who knows that his client intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Thus the scope of your duty depends upon whether the failure to disclose the falsity of Mr. Smith's testimony constitutes a crime and, if so, whether it is a completed or continuing crime under federal or state law. If it is a completed crime - that is, a past act - pursuant to Oregon RPC 1.6 you may not disclose it without Mr. Smith's consent. If it is a continuing crime, and if the bankruptcy proceeding has not concluded, then under Oregon RPC 3.3 you have a duty to disclose it to the trustee in bankruptcy. If the proceeding has concluded, then pursuant to that rule and RPC 1.6 you may disclose it. Here, disclosure to the tribunal may be necessary.

With regard to Mrs. Smith, you should consult with her about her testimony to decide whether to call her as a witness to testify. If you determine that she will not testify truthfully, under Oregon RPC 3.3(a)(3), you cannot call her as a witness and may refuse to do so. Finally, under Oregon RPC 1.16(b), you may withdraw from your representation of Mr. and Mrs. Smith if they persist in using your services to offer untruthful and fraudulent testimony to the court and, under Oregon RPC 1.16(a)(1), you must withdraw if representation of Mr. and Mrs. Smith will result in violation of the Oregon Rules of Professional Conduct or other laws.

While the duty to advocate on behalf of your clients when representing debtors in bankruptcy proceedings is fraught with ethical and moral considerations that cannot be ignored, striking the proper balance is not impossible. By looking to the bankruptcy code, the bankruptcy rules, and to the code of professional conduct for guidance and direction, bankruptcy counsel can take at least some of the tension and uncertainty out of this inherently difficult decision-making process. Counsel's ethical obligations cannot be evaluated in a vacuum. As you can see, one's duties are driven by an interwoven mix of facts, substantive state and federal law, and the related rules of professional conduct. Read the Oregon rules. They are barely 20 pages long. When your "Joe and Debbie Smith" walk into your office, you will be glad that you did.

WOMBATS ANNOUNCEMENT

WOMBATS is an informal networking group for women bankruptcy attorneys. We meet 4-5 times per year over lunch and sometimes invite outside speakers. We encourage mentoring of younger women attorneys in our field and discuss recent developments and issues of concern.

The next WOMBATS meeting will be on **March 20, 2007**, from 11:45 am to 1:15 pm in the 8th Floor conference room, U.S. Bankruptcy Court, 1001 SW Fifth Ave., Portland, Oregon. There will also be a meeting on May 22. Members in Eugene can participate by videoconference if arranged in advance. Bring a brown-bag lunch and join other women bankruptcy attorneys for informal networking and discussion of bankruptcy issues. Meeting announcements are sent via email. If you would like to be on the WOMBATS email list, please contact Laura Walker at 503-224-3092 or email lwalker@chbh.com.

C.A.R.E. PROGRAM

By Laura Walker

Cable Huston Benedict Haagensen & Lloyd LLP

The Debtor-Creditor Section launched a local chapter of the Credit Abuse Reporting Education (C.A.R.E.) program last year. The program, founded by Judge John Ninfo of the U.S. Bankruptcy Court in Rochester, New York, provides education on credit cards to high school students. Additional information on the program is available at the web site www.careprogram.us.

During the fall, committee volunteers and bankruptcy judges made presentations to approximately 42 classes at 15 Oregon high schools. The schools that received presentations this fall include:

Date	High School	No. of Presentations	Speaker(s)
Portland Area			
11/27/06	Beaverton High School	1 class/30 students	Rick Anderson and Judge Perris
10/27/06	Canby High School	3 classes/120 students	Aaron Bell and Judge Perris
11/13/06 & 11/14/06	Centennial High School	1 class/30 students 1 class/30 students	Cathy Travis and Judge Perris Cathy Travis and Judge Dunn
11/27/06	Cleveland High School	3 classes /100 students	Vivienne Popperl and Judge Dunn
12/11/06	Grant High School	4 classes/145 students	Judge Dunn, Gary Scharff and Debbie Guyol
11/20/06 & 11/21/06	Hood River High School	4 classes/100 students	Carolyn Smale
11/28/06	Tigard High School	1 class/30 students	Gary Scharff and Teresa Pearson
12/7/06 &12/8/06	Tualatin High School	4 classes/110 students 3 classes/75 students	Allen Painter and Carla McClurg Judge Dunn and Laura Walker
Eugene Area			
10/18/06	South Eugene High School	3 classes/ 75 students	Judge Radcliffe, Nancy Radcliffe, Ron Sticka, Scott McCleery, Julia Manela and Becky Kamitsuka
12/23/06	Thurston High School	5 classes/ 150 students	Kent Anderson, Nancy Radcliffe, Gail Geiger and Julia Manela
10/26/06	Willamette High School	2 classes/ 70 students	Gail Geiger
1/2/06	North Eugene High School	1 class/25 students	Judge Radcliffe and Scott McCleery
11/13/06	Marist High School	3 classes/ 70 students	Judge Radcliffe and Ron Sticka
11/26/06	Springfield High School	2 classes/60 students	Gail Geiger and Stephen Behrends
12/4/06	Sheldon High School	1 class/28 students	Judge Radcliffe and Becky Kamitsuka

Many thanks to the speakers and volunteers who have given generously of their time and effort to make this program a success.

The C.A.R.E. Committee is scheduling additional presentations this spring. We maintain a list of volunteers and contact them as needed to meet the requests from schools. If you are interested in becoming a C.A.R.E. volunteer, you can contact Laura Walker in Portland at 503-224-3092, email lwalker@chbh.com, or Becky Kamitsuka in Eugene at 541-465-6330, email becky.kamitsuka@usdoj.gov.

NINTH CIRCUIT CASE NOTES

By **Matthew A. Goldberg**

K&L Gates

ATTEMPTING TO DEMYSTIFY “INITIAL TRANSFEREE” STATUS UNDER §550(A)(1)

In re Incomnet, Inc., 463 F3d 1064 (9th Cir 2006)

Debtor was a telecommunications carrier required by law to help fund a trust intended to subsidize access to information services for schools, libraries, low-income customers and other public beneficiaries. The Federal Communications Commission (“FCC”) delegated administration of the trust to a Delaware nonprofit corporation called the Universal Service Administrative Company (“USAC”). Debtor paid USAC about \$470,000 during the 90 days prior to the filing of its chapter 11 petition, funds that USAC commingled with the other money in the trust.

The Unsecured Creditors Committee brought suit against USAC under §547 to avoid the transfer of debtor’s contributions during the preference period. USAC argued that it was not an “initial transferee” under §550(a)(1) because it had handled the contributions as a “mere conduit” for the carriers to whom it distributed the funds.

The Ninth Circuit affirmed the BAP’s conclusion that USAC satisfied the definition of “initial transferee,” a status not explicitly defined in the Code. Taking the opportunity to “clarify a somewhat murky area of our jurisprudence,” the court addressed at length the two primary standards used by courts to determine “initial transferee” status. The court definitively adopted the majority standard by choosing the “dominion” test instead of the alternative “control” test. Dominion turns largely on legal title, while control is determined by considering the totality of the circumstances. Regrettably, the definition of “dominion” adopted by the court includes the word “control,” which may perpetuate the confusion. Many courts apply the “dominion and control test” as such, without differentiating between the two.

The court focused on the party with “legal control” over the trust funds: USAC. The FCC’s oversight is too indirect, the court decided, to find USAC incapable of being a transferee on its own. The court also rejected the notion that USAC had been holding the alleged preference payments in a fiduciary capacity for the beneficiaries of the trust, despite USAC’s argument that it received the contributions as no more than an agent of the beneficiaries.

The court relied on USAC’s independence as support for the finding that it was an initial transferee. USAC had a board, a CEO, a budget and had even invoiced a carrier directly concerning a delinquent contribution. For the court, this independent status, combined with legal title to the trust funds, was sufficient to make USAC an “initial transferee,” notwithstanding the existence of governing FCC regulations and oversight by the commission.

DISCHARGING STUDENT LOANS FOR UNDUE HARDSHIP UNDER §523(A)(8): YOU HAVE TO FAIL THE BAR EXAM AT LEAST TWICE

In re Mason, 464 F3d 878 (9th Cir 2006)

Debtor was a 33-year-old single man who received a law degree from Gonzaga University. Debtor owed \$193,000 in student loans but found it difficult to gain employment as an attorney due, in part, to a learning disability from which he had suffered since grade school. After failing the Idaho Bar Exam and thereby losing the opportunity to take a job in Micron’s legal department in Boise, debtor filed for chapter 7 relief and sought to discharge his student loans under §523(a)(8). The bankruptcy court found “undue hardship” to justify discharging all but about \$30,000 of the loan debt. The BAP affirmed.

Applying the test from *In re Brunner*, 831 F.2d 395 (2d Cir. 1987), the Ninth Circuit did not disturb the bankruptcy court’s finding that debtor met the first prong of the test, which requires a showing that debtor cannot repay the loans while maintaining a “minimal” standard of living. The panel also accepted the bankruptcy court’s finding of a future inability to pay caused, at least in part, by debtor’s disability. The court refused to accept, however, the bankruptcy court’s finding regarding debtor’s good faith in attempting to repay the loans. Pointing to debtor’s part-time work installing siding and his failure to look for legal work or retake the bar exam, the court held that debtor did not meet his burden under §523(a)(8) to demonstrate good faith and, thus, that his student loans were dischargeable.

SINGING THE PRAISES OF “NO LOOK” FEES IN CHAPTER 13

In re Eliapo, 468 F3d 592 (9th Cir 2006)

Debtor’s chapter 13 attorney submitted a fee application under the “no look” guidelines of California’s Northern District. The court approved the attorney’s “no look” application for \$2,350: \$1,400 for a “basic case,” and additional fees of \$950 to address debtor’s real

Continued from page 9

Ninth Circuit Case Notes

property and vehicle issues. In accordance with the local rules, the attorney filed a second fee application for an additional \$1,248, based on time actually spent. Finding debtor's case not especially complicated, the bankruptcy judge disallowed all but \$394 of the requested additional compensation, stating that the attorney's work was duplicative and somewhat "suspect." The attorney appealed, arguing that "no look" guidelines violate §330 and that he was impermissibly deprived of a hearing on his application.

The Ninth Circuit affirmed the BAP's decision that nothing in §330 precludes "no look" presumptive fees for routine services in chapter 13 cases. The court declined to designate the so-called lodestar method, which specifies an hourly rate and determines compensation based on the number of hours worked, as the mandatory standard for compensation under §330. Presumptive fees were lauded by the court for their administrative efficiency in "basic cases." The court was careful to differentiate §330(a)(1), which applies to fees of certain professionals, from §330(a)(4)(B), which governs compensation for a chapter 13 debtor's attorney. While subsection (a)(1) has a hearing requirement, subsection (a)(4)(B) does not. Although §330(a)(4)(B) does not require a hearing, the court found that Fed. R. Bank. P. 2017(b), which requires notice and hearing before the court reduces "excessive" fees, also applied in this case, providing independent grounds for a hearing. Therefore the court reversed the bankruptcy court's decision not to afford debtor's attorney a hearing on his second fee application and remanded for such a hearing.

BAP CASE NOTES

By Doug Pahl
Perkins Coie LLP

NO DOUBLE HOMESTEAD EXEMPTION FOR CALIFORNIA DOMESTIC PARTNERS

In re Rabin, --- B.R. ----, 2006 WL 3848768 (9th Cir BAP)

In 2000, California voters approved Proposition 22, the California Defense of Marriage Act, which states: "Only marriage between a man and a woman is valid or recognized in California." In 2003, although bound by Proposition 22, the California Legislature enacted the California Domestic Partner Rights and Responsibilities Act (DPRRA), dramatically expanding the rights and responsibilities of couples who had registered in the state as domestic partners. The new law provided to domestic partners largely the same rights and responsibilities

afforded to married couples under state law.

Debtors Marla Rabin and Nanoshka Johnson registered as domestic partners in California. They jointly owned a business and a home in San Francisco and were parents to a child. In 2005, they filed separate petitions for relief, each disclosing a 50 percent interest in the homestead and each claiming a full \$75,000 homestead exemption provided under California law. The trustee objected to the claimed exemptions arguing that, as domestic partners with the same rights and responsibilities as married spouses, the debtors were entitled to share only a single exemption. The bankruptcy court sustained the trustee's objection.

Because California has not authorized debtors to use the exemptions provided under 11 USC §522(d), California debtors are limited to those exemptions provided under non-bankruptcy law. In relation to the \$75,000 homestead exemption, California law provides that where "the judgment debtor is married:...the two spouses are entitled to one exemption...." Cal Civ Proc Code §703.110(a).

On appeal, the BAP reviewed the language of DPRRA, which states: "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted or imposed upon spouses." Cal. Family Code §297.5. The Panel also discussed *Knight v. Superior Court*, 128 Cal App 4th 14, 26 Cal Rptr 3d 687, rev. denied 6/29/05 (2005), which involved a challenge to DPRRA as being contrary to the Defense of Marriage Act. The *Knight* court concluded that domestic partnerships under DPRRA are not disguised marriages: "The numerous dissimilarities between the two types of unions disclose that the Legislature has not created a 'same-sex marriage' under the guise of another name. 128 Cal App 4th at 31.

The BAP found the *Knight* decision to be unhelpful. "The dichotomy observed by the Court in *Knight* appears to be between the 'status' of marriage, and the rights and responsibilities associated with marriage. Debtors offer no method of distinguishing between the two."

Writing for the Panel, Judge Alley framed the issue as an economic one: "Wherever the line may be drawn by California's courts between marital status on one hand, and the economic rights and liabilities of couples on the other, we hold that application of the homestead exemption statute clearly falls in the latter category." The Panel upheld the decision of the bankruptcy court, limiting the debtors to a single homestead exemption – a result the Panel found to be "more consonant with the Legislature's stated purpose of equalizing, for purposes of creditor/debtor relations, the status of registered domestic partners and married couples."

NO-SHOW DEBTOR DEFEATS NONDISCHARGABILITY ACTION

In re McGee, --- B.R. ---, 2006 WL 3627216 (9th Cir BAP)

The debtor borrowed \$715 from Cashco Financial Services two months prior to filing his bankruptcy petition. The loan called for eight monthly payments of \$148.99, reflecting a finance charge of over 190 percent per annum. In connection with the loan, the debtor executed a credit application in which he represented that he was not contemplating bankruptcy and that he had sufficient funds to pay the loan in full.

Cashco sought a nondischargeability determination pursuant to 11 USC §523(a)(2)(B), alleging the debtor obtained the loan by use of materially false written statements upon which Cashco reasonably relied. The debtor failed to answer Cashco's nondischargeability complaint and Cashco moved unopposed for entry of default pursuant to Fed. R. Civ. Pro. 55.

At the default hearing, Cashco appeared telephonically and presented no further evidence. Judge Radcliffe concluded that entry of default in favor of Cashco was appropriate but that entry of a default judgment was not, citing the contradictory evidence in the record regarding whether Cashco reasonably relied on the debtor's representations regarding his sound financial condition and his lack of intention to seek bankruptcy protection. The bankruptcy court noted, "[W]hen an interest rate that high is being charged, there's also an inference that can be drawn from the evidence that the plaintiff knew they were lending to a very high-risk debtor who might well be insolvent, who might well file bankruptcy."

Finding that Cashco had not met its burden of proof under §523(a)(2)(A) – specifically that it had failed to prove reliance – the bankruptcy court denied Cashco's request for a default judgment. The court then *sua sponte* entered judgment discharging the debt and dismissing Cashco's adversary proceeding.

The issue on appeal was whether the bankruptcy court abused its discretion when, despite Cashco's unrebutted *prima facie* allegations, it refused to enter a default judgment based on inferences unfavorable to Cashco. Cashco did not appeal the entry of judgment in favor of the debtor.

The BAP referenced the general rule – that, upon default, factual allegations in the complaint will be taken as true. The Panel explained, however, that "a default is not an absolute confession of liability, for the facts alleged in the complaint may be insufficient to establish liability." Rule 55 gives courts considerable leeway to decide what is required for entry of a default judgment. The bankruptcy court has broad discretion to conduct a

prove-up hearing to establish the truth of the allegations in the complaint, and that is what took place in this case.

The Panel concluded that the bankruptcy court's review of the unrebutted evidence about Cashco's reliance was proper and the inference drawn by the court was reasonable in light of the contradictory evidence in the record, particularly the "eye-popping" interest rate and in the absence of any direct testimony on reliance by Cashco.

STATE COURT CASE NOTES

By **Heather Harriman Vogl and Donald H. Grim**
Greene & Markley, P.C.

ATTORNEY'S CONDUCT PRIVILEGED

Reynolds v. Schrock, 341 Or 338, 142 P3d 1062 (2006)

A real estate investor brought an action against (1) a joint venturer for breach of fiduciary duty and (2) the joint venturer's attorney for aiding and abetting the breach of fiduciary duty by giving substantial assistance and encouragement. The trial court entered summary judgment in favor of the attorney and the Court of Appeals reversed. The Supreme Court agreed with the trial court.

Previous Oregon case law has held that a lawyer may be liable for aiding and abetting one person's breach of fiduciary duty to a third party, even where the lawyer has no independent duty to the third party. *Granewich v. Harding*, 329 Or 47, 985 P2d 788 (1999). Limiting *Granewich*, the Oregon Supreme Court held that lawyers enjoy a qualified privilege when acting on behalf of a client and within the scope of the lawyer-client relationship. Thus, a lawyer may not be held jointly liable with a client for the client's breach of fiduciary duty unless the third party shows that the lawyer was acting outside the scope of the lawyer-client relationship.

ADEQUATE DEMAND FOR ATTORNEY FEES

Woods v. Carl Karcher Enterprises, Inc.,
341 Or 549, 146 P3d 319 (2006)

Plaintiff sent prelitigation demand letter by first class mail to restaurant where injury occurred. The letter, addressed "To Whom it May Concern," demanded payment for damages, including reasonable attorney fees under ORS 20.080(1). The arbitrator awarded plaintiff damages but no attorney fees, on the ground that the demand letter was insufficient for reasons not explained in the opinion. Both the trial court and the Court of

Continued from page 11

BAP Case Notes

Appeals affirmed the denial of attorney fees on the basis that the plaintiff did not send the demand letter to someone with authority to act upon it.

The Supreme Court reversed. It agreed that the purpose of the demand is to give the defendant an opportunity to settle and also agreed that the demand must be made in a manner reasonably calculated to apprise the defendant of the demand. However, there is no requirement that a demand letter under ORS 20.080(1) comply with service requirements of ORCP 7. Thus, plaintiff's service upon one of defendant's fast-food chains by regular mail was sufficient.

DO NOT MAKE ADVANCE PAYMENT TO INJURED PERSON UNLESS YOU WANT TO EXTEND THE STATUTE OF LIMITATIONS

Hamilton v. Paynter, 342 Or 48, --- P3d --- (2006)

Plaintiff was injured in automobile accident. Defendants paid plaintiff \$1,000 as partial payment towards plaintiff's claimed injuries. Plaintiff sued more than two years after her injury. Defendants moved to dismiss, asserting that the statute of limitations barred her claim. The trial court granted defendants' motion. The Court of Appeals affirmed. Although ORS 12.155 tolls the statute of limitations if a defendant makes an "advance payment" for injuries without giving notice of the expiration of the statute of limitations, the Court of Appeals concluded that defendants were not "persons" within the meaning of the statute. Thus, defendants' failure to give the notice did not toll the statute of limitations.

In reversing, the Supreme Court held that the term "person," as used in ORS 12.155, is defined broadly in ORS 174.100(5). The term is not limited to insurers, notwithstanding the requirement that the notice of the expiration date must be in a form prescribed by the Department of Consumer and Business Services, which oversees insurance. Thus, the statute of limitations was tolled and plaintiff's claim was not barred.

NO CLAIM PRECLUSION (RES JUDICATA) FOR FRAUDULENT TRANSFER ACTION

Jakobitz v. Iron Horse Bus. Serv., Inc.,
208 Or App 515, 145 P3d 277 (2006)

Defendants defaulted on a contract to purchase plaintiffs' telecommunications company. Thereafter, plaintiffs brought two lawsuits against defendants, as well as third party claims in a third suit. Plaintiffs

prevailed on claims of breach of contract, but their claims for fraud in the inducement of the contract and piercing the corporate veil were dismissed with prejudice.

During discovery in these earlier cases, plaintiffs learned that defendants had systematically stripped the company of its assets and transferred them to other entities. In a this case, plaintiffs asserted claims against defendants based on fraudulent transfer of assets. Defendants moved for summary judgment, arguing that the previous judgments precluded plaintiffs' current claims. The trial court denied the motion and defendants appealed. The Court of Appeals affirmed, concluding that the breach of contract and fraudulent transfers "were separate transactions that had separate origins and motives."

PARTY CAN SUPPLEMENT DEFICIENT ATTORNEY FEE STATEMENT AT HEARING

Russell v. Nikon, Inc.,
208 Or App 606, 145 P3d 312 (2006)

Plaintiff appealed a judgment entered following a court-annexed arbitration awarding defendant costs and attorney fees. Plaintiff argued that the award of attorney fees was erroneous because defendant did not submit a sufficiently detailed fee statement. The trial court denied plaintiff's exceptions and plaintiff appealed.

The Court of Appeals held that an inadequate fee statement does not preclude an award of attorney fees if other evidence supporting the reasonableness of the fees is presented at hearing. A deficient fee statement can be remedied by evidence of reasonableness, however, only if that evidence furnishes the details that are missing from the fee statement. Evidence of reasonableness lacking those details cannot, by itself, support an award of attorney fees.

INTEREST STILL OWING AFTER SATISFACTION OF JUDGMENT

Stauffer v. Oregon Citizen's Alliance,
209 Or App 232, --- P3d --- (2006)

In a personal injury case, one defendant agreed to pay the principal judgment and plaintiff entered a satisfaction of judgment as to that defendant only. Plaintiff then sought payment of accrued interest on the judgment from the remaining defendants. The trial court entered an order requiring those defendants not included in the agreement to pay the interest.

Defendants appealed. Relying upon ORS 31.810(6) (requiring contribution among joint tortfeasors), the remaining defendants claimed that the satisfaction was equally effective as a satisfaction of the unpaid

interest as to them. In affirming the trial court, the Court of Appeals noted that ORS 31.815 (covenant not to sue or enforce judgement against one tortfeasor) was the applicable statute. Therefore, the agreement and satisfaction as to one debtor did not discharge any of the remaining debtors from liability unless its terms so provided. See ORS 31.815(1)(a).

NO AUTHORITY TO SELL

*Staffordshire Investments, Inc. v.
Cal-Western Reconveyance Corp.*
209 Or App 528, ---P3d --- (2006)

At a trust deed foreclosure auction, the debtor's living trust informed prospective bidders that he had entered into a new forbearance agreement with the mortgagee and the sale should not go forward. Debtor showed bidders a receipt of payment mailed to lender as the first payment under the agreement. Despite debtor's objections, the auctioneer conducted the sale. Plaintiff was the high bidder. Later, the mortgagee voided the sale and returned plaintiff's funds.

Plaintiff sued, alleging breach of contract and breach of warranty of authority. The trial court granted plaintiff's motion for summary judgment and defendant, mortgagee, appealed. The Court of Appeals reversed.

As a matter of first impression and in an opinion based, in part, upon the unique language of the forbearance agreement, the Court of Appeals held that the trustee's statutory authority to sell was suspended by the forbearance agreement and, therefore, the sale agreement was void and unenforceable. Plaintiff's remedy was limited to return of the purchase funds and, if applicable, interest.

SUBSEQUENT PURCHASERS CAN MAINTAIN CONSTRUCTION DEFECT CASES AGAINST ORIGINAL BUILDER

Harris v. Suniga, 209 Or App 410,--- P3d --- (2006)
Bunnell v. Dalton Construction, Inc.
210 Or App 138, --- P3d --- (2006)

In two recent Court of Appeals cases, the Court reinforced and explained *Newman v. Tualatin Development Co. Inc.*, 287 Or 47 (1979), which held that a subsequent purchaser of real property (one not in privity of contract with the builder) can maintain an action against the builder of the property under claim of negligent construction.

In *Harris*, the Court undertook a long and detailed exploration of the economic loss doctrine and considered whether the doctrine precludes a claim for negligent

construction. Generally, the economic loss doctrine forbids maintaining a negligence action for solely economic losses. The Court concluded that the economic loss doctrine did not prohibit the negligent construction claim because the latter is based on damage to property, not economic loss.

In *Bunnell*, the defendant argued that the plaintiff knew about the alleged defects and so the plaintiff should not be entitled to bring a negligent construction claim. The Court recognized that such knowledge may be considered in determining the amount of damages, but it does not preclude the claim itself.

CONSUMER COMMITTEE

By Kathryn E. Eaton

M. Caroline Cantrell & Assoc PC

The Consumer Bankruptcy Committee usually meets every other month on the third Thursday of the month in the 8th floor conference room at the United States Bankruptcy Court at 1001 SW Fifth Avenue, Portland Oregon 97204. Our next meeting will be on Thursday, March 15th at 4:30 pm. The Committee is chaired by Laura Donaldson, who can be reached at 503-241-4869 or laura@vbcattorneys.com. To learn more about the Committee or to be added to the mailing list, please contact Kathryn Eaton, M. Caroline Cantrell & Assoc. PC, at 503-236-9211 or keaton@bankruptcyoregon.com.

NOVEMBER 15, 2006

Todd Trierweiler introduced the group to Peer Technologies, a tech support company that his office has used. Todd thought that, since ECF was becoming mandatory, other firms might need similar services to prepare for the change. You can contact Peer Technologies at www.peer-tech.com, or 503-297-0337.

Chapter 13 Trustee Brian Lynch provided an update on his office's project to get delinquent tax returns from debtors. They have contacted 75% of debtors to request missing returns. His office may file motions to dismiss if the returns are not received, starting in January. His office cannot provide information that attorneys could access online about the status of missing returns. Perhaps in the future, the trustee could ask debtors to sign transcript authorizations so the trustee could obtain tax information without having to chase the debtors for missing returns.

Mr. Lynch announced that his office is changing its procedures for calculation of disposable income. Please be advised that the following describes his office's current positions, which are subject to change:

Continued from page 14
Consumer Committee

If the debtors are below median, the CMI worksheet his office has been using is no longer required. The trustee will use Schedule I – Schedule J for plan payments for below-median debtors. The plan must still be feasible, and the trustee will use his standard approach for evaluating the reasonableness of the Schedule J expenses. If the trustee questions the Schedule J expenses, he will compare them to the IRS guidelines.

For above-median debtors, the B22C is still required for computation of the commitment period. The trustee will depart from the B22C if current income is different, and will use the current income as reported on Schedule I for the “going forward” income. Allowed expenses will be the IRS guidelines plus secured payments outside the plan. Payments to unsecured creditors will be plan payments minus payments in Para 2(b)(1) and (2), provided the liquidation test does not require a higher payment. The trustee will be scrutinizing other necessary expenses carefully, since the consensus is that the IRS allowances are fairly generous. Thrifty debtors will do best under the current policies. The trustee reserves the right to challenge any expense the trustee regards as unreasonable.

There will be no change to the analysis of increased income during the plan – *i.e.*, the 10% increase year over year rule still applies.

Pam Griffith from the US Trustee’s Office announced that, as of now, there have been no audits in our district. An independent firm is conducting the audits. They will be looking at the accuracy of the information provided by the client in preparation of the bankruptcy schedules.

The UST’s office is seeing many issues in the means testing arena.

The UST’s office continues to have problems getting the tax returns and pay advices timely. The office has filed motions to dismiss on that basis in Eastern OR and the judges may start granting dismissals. Debtors’ attorneys are advised to make very clear what is required of debtors, in simple, basic terms. Represented parties are generally filing Credit Counseling Certificates, but pro se debtors are still having problems fulfilling the counseling requirement.

Chapter 13 debtors do have longer to complete the Debtor Education (DE) course, but notices about the DE requirement still say they must complete the course within 45 days of the 341(a) meeting.

Chapter 7 trustee Tom Renn requested that debtors’ attorneys send the Domestic Support Obligation forms containing the contact information for the obligee as early in the case as possible.

Mr. Renn announced that the Debtor-Creditor Section has formed a Public Education Committee chaired by Judge Radcliffe. The purpose of the committee is to educate the public about bankruptcy. The court held a strategic planning session in October to identify issues the court expects to face in the next five years, and to develop action plans around those issues. This committee was an outgrowth of that session.

Debtors’ attorneys are asked to notify the trustee immediately if the debtor is in the health-care or patient-care business. The trustees face big issues in these cases, including appointment of a patient ombudsman.

If attorneys have questions about service, they can look under the Utilities menu on ECF. That will tell the attorney which parties will be served via ECF and which must be served on paper. In adversary proceedings, neither the trustee nor the UST is a party. If you want to serve either the trustee or the UST in an adversary proceeding, you must do so yourself, as they will not be served automatically.

Please be aware that ECF service may not be proper in a contested case, and that service is not waivable.

The IRS will always object to service if not done properly – *i.e.*, tripartite service to the Service, the Attorney General and the local US Attorney.

In support of mandatory ECF filing, an ECF subcommittee has been formed to get the Bar on board. There will be workshops and brown bag lunches. Please be on the lookout for further information if you are not currently an ECF participant.

JANUARY 24, 2007

The Chapter 13 Trustee’s office announced that median incomes for Oregon are increasing as of February 1, 2007.

On issues regarding disposable income, the trustee’s office reported that the method discussed in *DeMonica* appears to be working well. Other districts around the country report difficulty with a literal application of the B22C analysis. Decreases in income create impossible numbers and resulting inequity. The *DeMonica* method uses current income from Schedule I less taxes and other deductions minus allowed IRS expenses to compute the plan payment.

If the debtors are surrendering a vehicle, the payment for that vehicle is not included in the allowed expenses. The question is, what is the secured debt actually to be paid?

DeMonica presents a consistent approach, at least for the time being. The Trustee will have a spreadsheet available on his website soon for counsel to use.

There are still unresolved issues regarding nonfiling spouses in computing DMI. Also, there has only been one objection to the use of DeMonica by a creditor thus far.

Judge Perris reported that the Saturday Session was fruitful. There was a lot of discussion about ECF, particularly trying to make ECF more user-friendly. The court has decided to allow attorneys to know which Case Administrator is assigned to a particular case, enabling them to talk to the Case Administrator about specific problems or questions.

The Local Rules are being revamped. Attorneys are encouraged to funnel comments to the LBR Committee comprised of David Foraker, David Hercher and Thomas Huntsberger.

Judge Perris announced that the court has initiated a project to reduce the number of stricken documents.

Judge Perris described her approach to reaffirmation hearings. She looks at the magnitude of the shortage in the debtor's budget. She reviews whether the debtor is current on payments at the time of the hearing. If not, she will not approve the reaffirmation agreement. She reviews the file for big discrepancies between Schedules I and J on the one hand and the reaffirmation request on the other. She also looks at the length and stability of employment, the age of the car loan and the number of times the debtor has paid late.

A proposal is under review for creating an order that would allow mortgage creditors to send statements and report to credit bureaus without obtaining a reaffirmation on the mortgage loan.

The group discussed the fact that some car lenders are repossessing vehicles that are not reaffirmed, even when the postpetition payments are current. Attorneys should refer cases with good fact patterns to Todd Trierweiler's office for pro bono representation on the issue of whether acceptance of payments postpetition constitutes waiver of the right to repossess.

We also discussed the problem of creditors changing registered agents or other addresses without notifying the court. This is a particular problem in chapter 13 cases, where the registered agent may change several times during the life of the case. Debtors' attorneys serve the registered agent per the matrix and receive returned mail, necessitating extra research and re-service of documents and incurring extra costs for the debtors. The group asked that the judges consider implementing a local rule requiring creditors to file change of addresses.

Kathryn Eaton presented the results of the survey of the debtors' bar on a proposal to increase no-look

fees in chapter 13 cases. The results show that attorneys typically spend an additional three to five hours preconfirmation since the implementation of BAPCPA. The project team's initial recommendation was to increase attorney fees by \$500 across the board, which is less than the research would indicate is warranted but modest enough that the court might approve it.

Wayne Godare from the chapter 13 trustee's office stated that our district spends more on attorney fees than any other district in our Region, which includes OR, WA, ID, MT and AK. Input on this issue is needed from the chapter 13 trustee's office.

Several attorneys argued that a \$500 increase is not sufficient based on the evidence. More on this proposal will follow after the chapter 13 trustee has time to study the proposal in detail.

Rich Parker announced that the Debtor-Creditor Section is studying several pieces of new state legislation being considered this year.

Tom Renn announced that there is a new webmaster for the Debtor-Creditor Section website. Hopefully the website will be updated soon and will be maintained more often.

ECF UPDATE

By Charlene Hiss, Chief Deputy Clerk
U.S. Bankruptcy Court for the District of Oregon

Per G.O. #06-2, all attorneys practicing before the bankruptcy court must register for ECF by **May 1, 2007**, so they may complete the training and proficiency exam and begin electronic filing by **August 1, 2007**. More than 400 attorneys must complete these requirements. If you are among them, we encourage you to beat the rush. If you act soon, you will give yourself extra time for preparation and be able to take advantage of more choices of training dates, less competition for the Help Desk, etc.

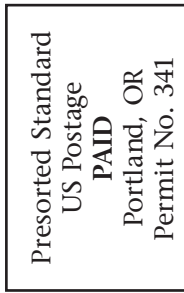
The ECF Committee of the Debtor-Creditor Section is sponsoring "brown bag" workshops to assist attorneys and their staff who are new to ECF. These workshops do not replace ECF training at the court, which teaches you how to e-file documents, pay fees, etc. Instead, they are designed to help you get started with the ECF process and revamp your office procedures for an e-filing world. More information is available at www.orb.uscourts.gov. If you are an experienced ECF filer who is interested in assisting new ECF users, either at the workshops or as an information resource, please contact us at ecfsurvey@orb.uscourts.gov.

The Court held a strategic planning meeting on October 23-24. Attorneys, trustees, the U.S. Trustee, creditor and pro se debtor representatives, judges, and court staff collaborated in determining the major initiatives on which the court should focus its efforts in order to excel in critical areas. One of the four initiatives selected was improving ECF ease of use, which encompasses a number of action items. To this end, the court, in conjunction with members of the Bar and trustees, has:

- Worked with national technical support to improve ECF speed;
- Created an awareness and assistance campaign for new ECF users to ease their transition;
- Decided to grant “full faith and credit” to those using ECF in other districts by no longer requiring them to complete a proficiency exam;
- Added a free text box to motion and notice events so e-filers can add to docket text;
- Continued to add procedural guidance to ECF events;
- Begun a process of re-evaluating its approach to ECF errors; and
- Added the following to the ECF menus: Help Desk phone numbers, an “Info” button which links to the procedures on the court’s website, and a “Comments” button which can be used to send suggestions and comments about ECF to the court.

If you have ideas about how to improve ECF, please send them to ecfsurvey@orb.uscourts.gov or click the “Comments” button in ECF.

Thanks to the 250 attorneys, 434 creditors, and all trustees and U.S. Trustees who have become e-filers. New technology brings a promise and a threat - a promise that our lives will be easier, and a threat that we will lose things we cherish. Let’s work together on ECF to realize the promise of keeping the bankruptcy system affordable by finding new ways to be efficient without losing our best attributes — a sense of community, a dedication to service, and an aspiration to excellence.



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