

Newsletter

Volume XXVIII, Number 2

Debtor-Creditor Section, Oregon State Bar

Spring 2009

COMMENTS FROM THE CHAIR

By Thomas M. Renn

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On special occasions, the Debtor-Creditor Section bestows its highest honor, the Section's Award of Merit, on deserving recipients. The described criteria for the award include (1) extraordinary service to the members of the Debtor-Creditor Section; (2) outstanding contributions to the legal education of Oregon lawyers in the debtor-creditor field; (3) the promotion of professionalism among lawyers practicing debtor-creditor law; (4) meaningful community involvement, including pro bono assistance to Oregonians with debtor-creditor legal problems; and (5) other deserving qualities, including leadership, industry, participation, and commitment.

Since the Award of Merit was established 15 years ago, we have honored twelve Section members. Those recipients, and the year each was honored, are as follows:

Honorable Henry L. Hess—1994
 Honorable Elizabeth L. Perris—1994,
 Kevin D. Padrick—1996
 William N. Stiles—1996
 Valerie A. Tomasi—1997
 Honorable Donal D. Sullivan—1997
 Mark B. Comstock—1998
 Honorable Polly S. Higdon—1999
 Richard R. Rasmussen—2002
 Linda R. Johannsen—2006
 Richard A. Edwards—2007
 Laura J. Walker—2007

In 2007, the Section renamed the award the "William N. Stiles Award of

Merit." We have updated the plaque with the new name and a short tribute to Bill. That tribute includes the statement that "Bill's generosity, encyclopedic knowledge of the law, professionalism, and high ethical standards made him an ideal mentor and role model to scores of lawyers." We will include more detailed information about Bill and the Award on our website. With the granting of the Award, the Section honors Bill and the other recipients with our appreciation and respect. If you know of a Section member who deserves consideration for this award, please send your suggestion to Teresa Pearson at teresa.pearson@millernash.com.

The Award plaque itself is a hefty 36" x 60" glass-covered display that had a home in a conference room at the former Oregon State Bar offices. It seems that few Section members had actually seen the plaque or knew of its location. The plaque did not find a place at the new Bar offices, but we have obtained permission to hang the plaque in a place of honor at the Portland Bankruptcy Court. Next time you are at the Bankruptcy Court, look for the new version of the plaque.

Our Award of Merit Committee membership consists of all of the past chairs of the Section. History was one of my college majors, and I enjoyed researching the history of the Section and talking with some of the past chairs. It's quite a story of volunteer activity and dedication to the goals of the Section. I have tracked the names of all of the past chairs back to 1972, when the Section was originally known as the Creditors Rights Section. We have posted those names on the Award of Merit

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portion of the Section's website.

In February, we held our annual Saturday Session discussion at the Salem Conference Center. Since then, in conjunction with the court and the US Trustee's office, we have been working on some of the issues and sug-

gestions that came up during the morning. Please check out Tara Schleicher's article on the Saturday Session in this newsletter. If you have any additional suggestions, or if you would like to work on any of the issues described in her article, please let me know.

2009 BANKRUPTCY COURT SATURDAY SESSION

By **Tara Schleicher**, Farleigh Wada Witt
& **Honorable Elizabeth L. Perris**

Once a year the Debtor-Creditor Section organizes a Saturday Session to provide an opportunity for judges, trustees and lawyers to exchange ideas about ways to improve the practice of bankruptcy law in an informal setting. At the 2009 Saturday Session, held February 7, 2009, at the Salem Conference Center, approximately 70 members of the bench, the trustee panel and the bar participated in productive presentations and break-out discussions on three areas related to bankruptcy practice in Oregon: (1) how to make consumer bankruptcy practice more efficient and less expensive; (2) how to assist lawyers new to the practice in learning how to effectively and efficiently practice in this area; and (3) how to make the §363 motion and order process more predictable and efficient in chapter 11 cases when the sale involves substantially all the debtor's assets. After the break-out sessions, each discussion group leader announced to all attendees the ideas his or her group came up with. In the regroup session, we compiled the small-group discussion report, which was then considered further by those who could implement the changes suggested.

The judges, in a follow-up meeting, broke the small-group discussion report into four parts: one each for the Court, the Section, the United States Trustee (UST), and the chapter 13 trustees. The Court indicated under the Court section what its action plan is with respect to the items. Some other groups have met and generated action plans as well. The outline generated from the judges'

meeting is set forth below, with actions taken and follow-up plans, where applicable. (In some cases an item appears on more than one list because aspects of it can be worked on by more than one group.)

I. Court

1. GOAL: Reduce inconsistency in what trustees routinely request from debtors.

ACTION: The court obtained a copy of the Washington local rule and form on the subject. The court is not currently considering a similar rule and form because, by its terms, the Washington form allows trustees to request additional documents and thus is not likely to resolve the issues that exist in Oregon. The court reminds lawyers that they can ask for a court ruling on whether particular routine individual trustee requests are appropriate by asking for a protective order in an actual case.

2. GOAL: Publicize through the web site trustee document requirements.

ACTION PLAN: The court will add a FAQ (frequently asked question) to its website with a link to the area of the Debtor-Creditor site that itemizes specific trustee document requirements as soon as the Debtor-Creditor site webmaster advises the court that the section is ready to accept the link traffic.

3. GOAL: For motions for relief from stay, add to the documents that can be requested documents that provide proof of ownership of the debt.

ACTION: The appropriate form was so revised.

Debtor-Creditor Newsletter

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This publication provides 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.

4. GOAL: Make more use of the meet-me line – for example, at the chapter 13 confirmation hearing level.

ACTION PLAN: The court will use the meet-me line for initial and adjourned confirmation hearings in which the confirmation order has been submitted to the trustee, the plan is ready to confirm and the trustee has submitted the order to the court in advance of the hearing. The court already offers that option at adjourned confirmation hearings if counsel is from out of town.

5. GOAL: Develop a resource list in conjunction with the section, the UST, and the chapter 13 trustees. The resource list should identify who to call with questions.

ACTION PLAN: The court is developing a list of persons to call with particular types of questions as part of the clerk's office tour it is planning for the new lawyers later this spring. That list can be made available. Mike Blaskowsky from the bankruptcy clerk's office heads the "clerk's office tour" program. The court would like to work with the section, the UST and the chapter 13 trustees to develop a broader resource list. Once the resource list is completed, it can be given out at ECF training sessions as well.

6. GOAL: Develop Guidelines for chapter 11 §363 sales of substantially all assets of the estate, similar in concept to cash collateral guidelines.

ACTION PLAN: Judge Dunn and Judge Alley will serve on a committee appointed by the Debtor-Creditor Section to draft the Guidelines. We recognize that such Guidelines would be helpful with out of state buyers and newer lawyers. Among the things to be done:

- a. Change the local rules to make use of LBF 760.5 the starting point, but allow deviation. This action has been taken. See G.O. 09-2, pt. 2.
- b. Guidelines should be a list of "zingers" that the court will not approve without an extraordinary showing.
- c. Guidelines should list everything the court needs to see in the motion.
- d. Guidelines should have a smaller list of what needs to be in the notice of sale.
- e. (i) Bidders who get liquidated damages should have to supply expert reports to others; and (ii) liquidated damages (break-up fee) should be limited to actual and necessary expenses.
- f. The Guidelines should require disclosure of the following: (i) prior marketing efforts, if any; (ii) financial qualifications of buyer; (iii) terms of sale; (iv) proposed bidding procedures; (v) free and clear terms - scope; (vi) due diligence period; (vii) any privacy or urgency concerns (e.g., retailer or healthcare). Responses should follow the same format to address issues raised in the motion. Any competing bidder should disclose (ii) (iii) and (v).
- g. Sale notice should be sent to industry competitors.
- h. When drafting the Guidelines, look at the

Guidelines on the subject issued by the Northern District of California.

II. Debtor-Creditor Section

1. GOAL: The Debtor-Creditor Section website is a clearing-house of information. It should be better publicized, kept up to date and accurate, and made a better resource for the public. It should also contain a list of documents trustees are looking for.

ACTION PLAN: The website committee has made substantial improvements to the website and will continue to do so with these goals in mind.

2. GOAL: Improve mentoring of new lawyers on the consumer side; develop standards for mentoring of new lawyers; create a list of potential mentors, as well as a list of lawyers who are willing to take a five-minute call.

ACTION PLAN: The Executive Committee has appointed some of its members to solicit participation and publish such a list of lawyers.

3. GOAL: Develop a resource list in conjunction with the court, the UST, and chapter 13 trustees. The resource list should identify who to call with questions.

ACTION PLAN: The Executive Committee has appointed some of its members to solicit participation and publish such a list of resources.

4. GOAL: Create referral lists of lawyers for creditors and lawyers who will take smaller chapter 11 cases.

ACTION PLAN: The Executive Committee has appointed some of its members to solicit participation and publish such a list of resources.

5. GOAL: Create a "cheat sheet" for new lawyers, including: red flags; resources; organizations; bar committees; details about who, when and how to contact the Clerk's office; tips on when it's appropriate to contact Judicial assistants.

ACTION PLAN: The Executive Committee has appointed some of its members to begin work on this cheat sheet.

6. GOAL: Produce updated information about bankruptcy judges, either independently or in conjunction with the Federal Bar Association. The current handbook with judges' preferences is old and the recent update excluded bankruptcy judges.

ACTION PLAN: The Executive Committee has appointed some of its members to begin work on this process.

7. GOAL: Help the court by appointing a committee to develop §363 sale guidelines in chapter 11 cases.

ACTION PLAN: A committee has been appointed to develop these guidelines. In developing those guidelines, it will consider the Northern District of California's website and find other guidelines and rules. The committee should address in the guidelines the items identified in Part I.6. above.

III. United States Trustee

1. GOAL: Achieve more consistency in what trustees require; establish minimums required by trustees, but not if it will lead to overkill (that is, requiring all the documents that any single trustee wants to be produced to all trustees).

ACTION PLAN: The Portland-based chapter 7 trustees have been working on standardizing their document requests. Eugene Assistant UST Gail Geiger will meet with the Eugene-based trustees to discuss standardization. The UST does not believe it is appropriate to dictate what documents the trustees may request, so long as the trustees' requests cover at least the documents required to be produced by statute or rule and the requests are reasonable.

2. GOAL: Chapter 7 trustees should clarify at the end of the §341(a) meeting whether the case is asset or no-asset, and whether the meeting will be continued.

ACTION PLAN: The UST has reminded trustees to clarify these matters. The UST also will be alert to the concern when attending and reviewing §341 meetings. People with specific complaints about future trustee conduct should contact the UST.

3. GOAL: Take appropriate action with respect to debtors' lawyers who are paid up front but fail to deliver all reasonably required services.

ACTION PLAN: The UST attempts to address concerns about the quality and cost of professionals' services in bankruptcy cases. It will continue to encourage people with specific concerns in this area to contact the UST.

4. GOAL: Develop a resource list in conjunction with the section, the court, and the chapter 13 trustees. The resource list should identify who to call with various kinds of questions.

ACTION PLAN: The UST will contribute to this effort.

5. QUESTION: Is information about the potential of debtors being judgment-proof included in prepetition credit counseling? If not, could it be?

RESPONSE: This information may be discussed by credit counselors but it is not required to be discussed. The regulation on the content of credit counseling courses is quite general and likely will not be modified to include this level of specificity.

6. GOAL: Provide a representative to serve on the committee drafting the §363 Guidelines.

ACTION PLAN: UST Trial Attorney M. Vivienne Popperl will serve on this committee.

IV. Chapter 13 Trustees

1. GOAL: Develop a resource list in conjunction with the section, the UST, and the court. The resource list should identify who to call with questions. See sections I.5, II.3 and III.4 above.

2. GOAL: More "dance" programs.

ACTION PLAN: Brian Lynch's office presents a Chapter

13 Nuts and Bolts program on May 22, 2009, in Portland, and hopes to present a similar program in Bend in June. An application for two (2) hours of CLE credit is pending.

3. GOAL: Let lawyers know that they can call the trustee's office with questions.

Conclusion

The attendees' active participation made this Saturday Session more than just a discussion. The group established specific goals, and the Court, the Section, the UST's office, and the Chapter 13 Trustee's office came up with concrete plans to help implement the goals. The groups will continue to work toward achieving the goals.

FEWER STRIKES, MORE HOME RUNS: COURT AND BAR ACHIEVE 84% REDUCTION IN ORDERS STRIKING AND RETURNING

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

In recent years the Bankruptcy Court has worked to reduce the percentage of documents stricken by the clerk's office. In September 2005, 3.2% of documents filed by attorneys, trustees, and creditors were stricken. Common reasons included that the document (1) was not filed on the current version of the applicable local bankruptcy form (LBF), (2) was not completely filled out or signed, and (3) was not filed correctly in the court's electronic filing system (ECF). The clerk's former practice was to immediately enter an order returning or striking the document. For many filers and their staff, this approach was as welcome as hearing an umpire holler, "You're outta here!"

At its strategic planning session in October 2006, the Bankruptcy Court in conjunction with representatives of the Debtor-Creditor Section set a "big, hairy, audacious goal" of a 75% reduction in the rate of orders striking and returning documents entered by the bankruptcy clerk. The Court-Bar team hit a home run when it achieved this goal in October 2007. The team sent the ball out of the park the next month when it reduced the rate further to an average of one-half of one percent (.5%) of filed documents, an overall 84% reduction from the September 2005 baseline.

We at the Court have pursued a number of strategies to help filers improve their batting average. First, we reviewed and revised a number of filing requirements. Second, we added LBF numbers, LBF revision dates, and procedural reminders in ECF to help filers avoid the most common filing errors. Third, we improved our notifications to the bankruptcy community about new LBFs and General Orders. And finally, Court staff now call or email filers and ask them to refile rather than immediately entering an order striking. Informal feedback indicates that lawyers appreciate the Court's new coaching techniques.

Of course, the Bar has been a Most Valuable Player in the quest for fewer strikes. The Bar's input on streamlining filing processes, compliance with filing requirements, and refiling of documents promptly upon request have resulted in a winning situation for everyone.

Reaffirmation agreements and amended schedules are now the most common "foul balls." The data also show that 30,000 documents were filed in the Court in March 2009, a monthly total topped only by the 35,000 documents filed in October 2005.

The Court will continue to monitor the rate of strikes and returns. It is committed to simplifying forms and procedures wherever possible. Any comments or suggestions can be submitted via the "Comments" button in ECF or by emailing me at charlene_hiss@orb.uscourts.gov.

MORTGAGE MODIFICATIONS ON THE HORIZON?

By Sean Currie

Debtors in chapter 13 bankruptcies can modify almost all types of debts. They can change interest rates, amortization, and terms of loans. 11 USC §1322(b)(2). They can also "strip down" most secured debts to the value of the collateral. §506. The strip-down process bifurcates an undersecured lender's claim into a secured claim for the value of the collateral and a general unsecured claim for the deficiency.

In contrast, the Code does not permit modification of mortgage loans secured solely by the debtor's principal residence. §1322(b)(2). The policy behind this prohibition is that it enables the flow of capital into the home lending market and, perhaps, reduces the interest rates for the wider public.

In lean economic times, arguments abound on whether the law should dispense with or retain this prohibition on mortgage modification. Opponents of allowing bankruptcy judges to modify mortgage contracts echo the policy above. Proponents of mortgage modification point out that mortgage lenders do not fare much better through foreclosure than they would through a mortgage modification.

Although mortgage modification proponents have won over some members of Congress, their effort to amend the Code appears dead, at least for the time being. HR 1106, the Helping Families Save Their Home Act of 2009, would have enabled bankruptcy judges to modify home mortgages for debtors with a five-year chapter 13 repayment plan. The bill passed the House of Representatives but stalled in the Senate, and the Senate defeated a related bill, S. 896.

Here in Oregon, the bankruptcy bench and bar are at work on developing procedures for consensual mortgage modifications in chapter 13. Check in with the Circle of Love for further developments.

NINTH CIRCUIT CASE NOTES

By Ivy B. Grey

Davis Wright Tremaine LLP

FAILING TO OBJECT TO A PLAN THAT DISCHARGES STUDENT LOANS WILL RESULT IN DISCHARGED STUDENT LOANS

Espinosa v. United Student Aid Funds, Inc.,
553 F3d 1193 (9th Cir 2008)

Debtor's chapter 13 plan proposed to repay \$13,250 in student loans to creditor. Creditor received notice of the plan and filed a proof of claim for \$17,832. When the court confirmed the plan, it also notified creditor that its claim would be repaid at \$13,250 rather than the higher amount. Creditor did not object. Instead, after debtor had successfully completed the plan and received a discharge, creditor engaged in self-help collection in violation of the discharge injunction.

Creditor argued it did not violate the discharge injunction because student loans may not be discharged without a showing of undue hardship. Creditor was merely awaiting the adversary proceeding to object – the usual procedure for discharging student loans. Creditor also argued that actual notice of plan confirmation was insufficient because it did not clearly state that by simply including the student loans in the plan, debtor would be able to discharge his student loans without a showing of hardship.

The Ninth Circuit rejected creditor's arguments. Creditor's remedy was to object to the plan, which it did not do. Further, the discharge order was a final judgment which could not be set aside after the time for appeal had run except in the very limited circumstances described in FRCP 60(b). The court examined the reasoning of cases in other circuits that disagree, but concluded that it is consistent with both statutory and constitutional law to allow student loans to be discharged if included in a chapter 13 plan, so long as creditor receives notice.

DISCLAIMING INHERITANCE PREPETITION IS NOT A VOIDABLE TRANSFER

In re Costas, 555 F3d 790 (9th Cir 2009)

Debtor was the beneficiary of a revocable trust. The trust provided that should a named beneficiary die prior to distribution, the gift would pass to the beneficiary's children to share equally.

The testator died in February 2002 and debtor-beneficiary disclaimed the gift in November 2002. Debtor-beneficiary filed for bankruptcy less than one month later, in December 2002.

The issue was whether this disclaimer, which occurred within 90 days of the petition, was a voidable fraudulent

transfer. The trustee argued that it was, based on *Drye v. United States*, 528 US 49 (1999), and the Code's expansive definition of "transfer," because it indirectly disposed of the right to channel the interest in the trust. The debtor argued that state law on "property" should control, and that the state law relation-back rule effectively means the interest disclaimed was never debtor's "property."

The court rejected trustee's arguments. It held that the *Drye* ruling is limited to the federal tax lien context. Bankruptcy law is more deferential to substantive state rights than is federal tax law. Finally, the court found that the trust property never became property of the estate because the disclaimer occurred prepetition rather than postpetition. Affirming the BAP decision, the court held that a properly executed disclaimer does not qualify as a transfer of an interest of the debtor in property under §548 of the Code.

A SINGLE-PREMIUM ANNUITY IS NON-EXEMPT PROPERTY OF THE ESTATE

In re Simpson, 557 F3d 1010 (9th Cir 2009)

A few months before filing for bankruptcy, debtor purchased a single-premium annuity for \$10,000. The annuity had a guaranteed minimum growth of 1.75% on 90% of the premium paid. It had no loan value and is a non-qualified retirement plan and a non-qualified insurance plan for IRS purposes. If surrendered early, there would be a penalty, but the penalty would be waived if the cause of surrender was the purchaser's death. Unlike life insurance, this death benefit is taxable.

When debtor filed for bankruptcy, he claimed that this annuity was exempt – as either a "private retirement plan" or a life insurance policy under California law – and therefore not property of the estate. The Ninth Circuit rejected both claims. It looked at nine factors from *In re Turner*, 186 BR 108, 117 (9th Cir BAP 1995), to reject the "life insurance" argument. The annuity provided a guaranteed stream of income and had no risk of divestment which precluded it from being treated as an exempt insurance policy. In rejecting the "private retirement plan" argument, the court noted that no California Court of Appeal had interpreted the statute as debtor wanted it interpreted.

STUDENT LOAN CATEGORIZED AS A REVOLVING CREDIT ACCOUNT IS EXCEPTED FROM DISCHARGE

McKay v. Ingleson, 558 F3d 888 (9th Cir 2009)

Debtor filed a chapter 7 case in 2003 and was granted a discharge that same year. Debtor's debt of several thousand dollars to the university, pursuant to a "Graduate and Professional Student Account and Deferment Agreement," was discharged. The university did not meaningfully participate in the bankruptcy case.

In 2005, after debtor had not made payments on her educational debt, the university brought a state court action and obtained a default judgment against debtor. Debtor brought an adversary proceeding against the university for violation of the discharge injunction and lost.

Looking to prior case law on point and to the dictionary for the common meaning of "loan," the court concluded that even if debtor had a revolving credit account, it was still a loan for the purposes of the Code. The court found debtor's evidence that some features of her debt were not consistent with a loan to be inconsequential and unpersuasive. Since debtor had incurred debt for receiving educational services, the promise to remit this cost in exchange for the opportunity to attend classes created a debtor-creditor relationship, and this debt was excepted from discharge. See *In re Johnson*, 218 BR 449, 456-57 (BAP 8th Cir 1998). Thus the university had not violated the discharge injunction.

HARDSHIP DETERMINATION IS RIPE TO BE HEARD PRIOR TO PLAN COMPLETION

In re Coleman, 560 F3d 1000 (9th Cir 2009)

Debtor, an irregularly employed art teacher, sought bankruptcy relief under chapter 13. Debtor owed more than \$100,000 in student loans, and the bankruptcy court confirmed a 5-year repayment plan. After making plan payments for approximately one year, debtor sought discharge of her student loans due to hardship. The issue before the Ninth Circuit was whether "hardship" under §528(a)(8) can be ripe for determination before the debtor has received a discharge.

Following its own precedent and incorporating reasoning from the Fourth Circuit's *In re Ekenasi*, 325 F3d 541, 547 (4th Cir 2003), the Ninth Circuit found that BR 4007(b) permits courts to consider hardship at any time. There is no hard and fast rule that the decision cannot be made before the time of discharge.

On the merits of the case, creditor argued that the question whether debtor made a good faith effort to pay could not be shown after only a year of plan payments. The court responded that if the debtor had tried in vain to make payments for a number of years prior to the bankruptcy, not much additional time is needed under the plan to show continued good faith effort to pay. The court concluded that a debtor primarily burdened by student debt would not emerge from bankruptcy with a fresh start if she is forced to pursue the undue hardship matter *pro se* and must wait until plan completion to do so. The court affirmed, allowing the bankruptcy court to hear Debtor's request.

A GUARANTY AGENCY MAY ALSO BE A DEBT COLLECTOR SUBJECT TO FDCPA

Rowe v. Educational Credit Management Corporation, 559 F3d 1028 (9th Cir 2009)

Plaintiff borrowed \$2,500 from a federal savings and loan company for educational purposes. The Oregon State

Scholarship Commission guaranteed the loan. Plaintiff defaulted and the loan was turned over to defendant (ECMC). Plaintiff repaid his loan in full in July 2005 but ECMC continued to garnish his wages until November 2005. Plaintiff sued for unfair debt collection practices under state and federal law. ECMC denied its status as a “debt collector” under the Fair Debt Collection Practices Act (FDCPA). Its primary argument was that collecting the debts was incidental to a bona fide fiduciary obligation. ECMC alternatively argued that it essentially originated the debt and was therefore not a debt collector.

A guaranty agency is an organization that insures student loans for lenders and administers the student loan insurance program for the federal government. Often, the due diligence of a guaranty agency will result in lower rates of default and higher rates of payment. The FDCPA regulates debt collectors; the Higher Education Act regulates guaranty agencies. The two acts are inconsistent but are not mutually exclusive.

The court found that although ECMC successfully argued that it was a guaranty agency, it did not successfully avoid categorization as a debt collector as well. Further, ECMC could not fit within the exception to the FDCPA, which requires both (1) that the entity have a fiduciary obligation and (2) that the collection activity be incidental to its fiduciary obligation. The court agreed that ECMC was a fiduciary to the US Department of Education, but found that its collection activity was **not** central to its relationship with the DOE. Rather, ECMC’s central purpose was to guaranty the student loans made by other agencies. The court reversed and remanded to allow the case to go forward in the lower court and to reach the merits of plaintiff’s claims.

BAP CASE NOTES

By Chris Parnell
Farleigh Wada Witt

SUSPENSION SANCTION IMPOSED ON ATTORNEY REQUIRES CONSIDERATION OF ABA STANDARDS OF REASONABLENESS

In re Brooks-Hamilton, 400 BR 238 (9th Cir BAP 2009)

Although the confirmed plan provided that City of Oakland’s claim would be paid through a sale of debtor’s property, debtor’s attorney David Smyth nevertheless filed an objection to Oakland’s proof of claim, alleging that it could not be paid since the plan did not provide for payment of secured claims and Oakland had not filed an unsecured claim. The bankruptcy court reviewed the plan and objection, then initially imposed a monetary sanction and six-month suspension from practice against Smyth under Rule 9011. Smyth appealed and the Ninth Circuit ultimately remanded for redetermination of the sanction. On remand,

the bankruptcy court reduced the monetary sanction but re-imposed the suspension, and Smyth again appealed.

The BAP held that the bankruptcy court abused its discretion since it did not address ABA standards in determining whether sanctions against Smyth were appropriate, as required by prior decisions. While the bankruptcy court unquestionably had authority under Rule 9011 to impose a suspension sanction, the issue was whether the sanction was appropriate under the circumstances. Under *In re Lehtinen*, 332 BR 404 (9th Cir BAP 2005), and *In re Crayton*, 192 BR 270 (9th Cir BAP 1996), that inquiry requires the court to consider, among other factors, the ABA standards for reasonableness. The BAP vacated the suspension order and remanded for further findings, with a strong recommendation to refer the matter to the Standing Committee on Professional Conduct for the district.

A concurring opinion expressed discomfort with the rule that the BAP must follow its own precedent, “regardless of how flawed it must be.”

STATUTORY ATTORNEY FEE AWARD HELD NONDISCHARGEABLE UNDER §523(A)(6) EVEN ABSENT COMPENSATORY DAMAGES

In re Suarez, 400 BR 732 (9th Cir BAP 2009)

Addressing an issue of apparent first impression in the Ninth Circuit, the BAP held that a judgment for attorney fees and costs assessed against a chapter 7 debtor based on debtor’s willful and malicious conduct in repeatedly violating a state court order was nondischargeable under §523(a)(6), even in the absence of any compensatory damages.

The new wife of debtor’s former husband had previously obtained a state court contempt judgment against debtor for violating a protective order prohibiting harassment. She brought an adversary proceeding to except from discharge, based on the debtor’s “willful and malicious injury,” an award of attorney fees and costs entered by the state court. Debtor conceded that she had acted willfully and maliciously in violating the protective order, but argued that the lack of any underlying compensatory damages award prevented the new wife creditor from demonstrating the requisite “injury.” The bankruptcy court entered judgment against debtor, and she appealed.

The BAP determined that the conduct leading to the contempt was both “willful” and “malicious” under §523(a)(6), and that the debt arising from that willful and malicious conduct sufficed as an “injury” and was nondischargeable. While not exactly on point, the BAP applied the reasoning in *In re Zelis*, 66 F3d 205 (9th Cir 1995), which held that a state court sanctions judgment against a debtor for filing a frivolous appeal fell within §523(a)(6) because the debtor acted intentionally and his conduct necessarily caused injury to his creditors in the form of attorney fees and delay.

BANKRUPTCY COURT DISTRICT OF OREGON CASE NOTES

By Donald H. Grim
Greene & Markley, PC

CLAIM MODIFICATION FOR DEBTOR'S RESIDENCE POSSIBLE UNDER §1322(B)

In re Grimes, 2009 WL 960143 (Bankr D Or 2009)

Shortly before filing chapter 13, debtor surrendered his former residence and moved into one unit of a triplex he owned (the Property). Debtor owed lender \$266,250 on the loan used to purchase the Property, secured by a deed of trust. On the filing date, the Property was valued at \$200,000. Debtor proposed to modify lender's rights in the Property pursuant to §1322(b)(2). Lender objected, arguing that the Code expressly prohibits modifying the rights of a secured interest in real property that is the "debtor's principal residence." §1322(b)(2).

The court noted that the restriction on modification "applies to claims 'secured *only* by a security interest in real property that is the debtor's primary residence.' (emphasis added)" 2009 WL 960143 at *4, citing *In re McVay*, 150 BR 254 (Bankr D Or 1993). Where mixed use properties are concerned, courts "have generally focused upon the actual use of the property to produce income." *Id.*

Here, the debtor purchased the Property for investment and income purposes. Although he later moved into one of the units, he intended to continue using the remaining units as rentals. Due to the mixed use of the Property, the lender's claim was not secured "*only* by a security interest in real property that is the debtor's primary residence." Debtor was therefore "not precluded by §1322(b)(2) from modifying the secured claim in his chapter 13 plan."

CHAPTER 7 ANALYSIS CONSIDERS DEBTORS' ABILITY TO FUND CHAPTER 11 CASE

In re Stewart, 2009 WL 960188 (Bankr D Or 2009)

An unsecured creditor moved to dismiss this chapter 7 case pursuant to §707(b)(2) and (3), claiming the case abused the provisions of chapter 7.

The court first analyzed the case for abuse pursuant to §707(b)(2). On Form B22A (the means test), debtors claimed as an expense mortgage payments for a home they intended to surrender, and no longer made payments on. Creditor argued that because debtors no longer lived in the home, made no payments on the mortgage, and intended to surrender it, they should not be permitted to claim an expense when calculating monthly disposable income.

The court disagreed based on §707(b)(2)(A)(iii)(I), which provides in part that "[t]he debtor's average monthly pay-

ments on account of secured debts shall be calculated as the sum of - (1) the total of all amounts **scheduled as contractually due** to secured creditors in each month of the 60 months following the date of the petition." (Emphasis added.)

There is a split of authority among the courts that have interpreted this statute. According to the minority, a debtor may not include in the means test calculation a deduction for monthly payments on secured debt for which the debtor intends to surrender the collateral. *See In re Scaggs*, 349 BR 594 (Bankr D SC 2007).

Under the majority view of "scheduled as contractually due," however, debtors may subtract secured debt payments contractually due as of the petition date (in their means test calculations) regardless of their intent to surrender the collateral. *See In re Walker*, 2006 WL 1314125 (Bankr ND Ga 2006). The court here followed the majority. "The statute does not require debtors to retain the collateral and actually make payments on secured debt 'as a prerequisite to allowing the deduction.'" 2009 WL 960188 at *7, citing *In re Benedetti*, 372 BR 90, 95 (Bankr SD Fla 2007). No presumption of abuse arose and the motion under §707(b)(2) was denied.

The Ninth Circuit recognizes six nonexclusive factors for the §707(b)(3) totality of circumstances test. *In re Price*, 353 F3d 1135, 1139, 40 (9th Cir 2004). Here, the court eliminated the "contractually due" but unpaid mortgage payments, and substituted the appropriate IRS housing and utility allowance. Under this calculation, the debtors had a monthly disposable income sufficient to fund a chapter 13 plan.

Unfortunately, debtors' unsecured debt was in excess of the statutory limit for chapter 13, and their income was insufficient to fund a chapter 11 plan. The court concluded that in the totality of the circumstances, dismissal of the chapter 7 case was not appropriate.

STATE COURT CASE NOTES

By Jessica L. Shoup
Greene & Markley, PC

REPRESENTATION OF CREDITORS ON APPEAL, AFTER WITHDRAWAL FROM REPRESENTATION OF ESTATE, NOT PERMITTED

In re Campbell, 345 Or 670, 202 P3d 871 (2009)

The accused attorney represented debtor in a chapter 13 bankruptcy case with a single parcel of real property as its primary asset. The court ordered the case converted to a chapter 7 and appointed a trustee. At time of the conversion, debtor owed attorney \$20,000 in fees. Attorney's claimed fees were an administrative expense of the estate. The trustee appointed attorney as special counsel to bring an adversary

proceeding against the senior lien holder on the property. Defeating the senior lien holder's claim would provide a distribution for the junior lien holders and make payment of the administrative claims more likely. The trustee changed her position and negotiated a settlement with the senior lien holder.

Attorney resigned as special counsel, claiming he could not advocate for the settlement. Attorney then filed an objection to the settlement on behalf of his firm and encouraged the junior lien holders to do the same. After the court allowed the settlement, attorney, on his own behalf and as counsel for the junior lienholders, appealed to the BAP and then to the Ninth Circuit.

The Bar argued that Attorney violated DR 5-101(A)(1) when he was employed as special counsel in the chapter 7 case. According to the Bar, Attorney was not a disinterested person under §101(14) of the Bankruptcy Code. The court disagreed, citing *In re Heatron*, 5 BR 703, 705 (Bankr WD Mo1980), and stating, "special counsel may be an attorney that has represented the debtor, if it is in the best interest of the estate." §327(e). The court accepted the trustee's testimony that attorney's familiarity with the case made it in the estate's best interest to hire him as special counsel. The court further held that attorney's interest and the estate's were aligned until the trustee changed her position.

The court agreed, however, with the Bar's argument that attorney violated DR 5-105(C) by representing his firm and the junior lien holders after having represented the debtor and the bankruptcy estate. DR 5-105(C) provides a lawyer cannot represent a new client in the same or significantly related matter as a former client when the clients' interest conflict or will likely conflict. Attorney argued for a distinction between representation of the estate and the trustee, claiming they were separate interests and not in conflict. Attorney also claimed that an appeal is a "contested matter," which is not the same matter as an "adversary proceeding." The court disagreed: the trustee's decisions represented the estate's interest and the matter on appeal was the same as that in the adversary proceeding. Thus attorney had violated DR 5-105(C) and was subject to sanctions.

NO DUTY TO INFORM PURCHASER AT FORECLOSURE SALE OF LACK OF NOTICE TO JUNIOR LIEN HOLDER

Outback Properties, LLC v. Johnson,
225 Or App 366, 201 P3d 246 (2009)

Defendant, in his capacity as trustee of a trust deed, sold property at a foreclosure sale to plaintiff. Plaintiff brought negligence and breach of contract claims against Defendant when a junior lien holder (the Estate of Ell) retained its interest in the property because of lack of notice of the sale. Defendant had no address for Ell or the Estate. Defendant had noted on all pertinent documents that Ell was a mortgagee, had not been noticed, and his address was unknown. The trustee's deed stated in part: "the Trustee does hereby

convey unto [plaintiff] all interest which the grantor has or had the power to convey at the time of grantor's execution of said Trust Deed"

Plaintiff claimed defendant negligently failed to provide notice of the defect. The court noted that defendant made the decision to proceed with the foreclosure under the notion that pursuant to ORS 86.742(6), the omitted lien holder had five years to redeem the property or commence an action against the trustee. Negligence liability for purely economic harm requires the existence of some duty beyond that of reasonable care. The defendant here had no such enhanced duty.

Plaintiff also argued that the trustee's deed was a contract by which defendant purported to convey the property free and clear of liens, and that Plaintiff did not receive the estate he bargained for. The court noted the apparent distinctions between the definition of "convey" and "covenant" stating, "[a] promise to convey property thus is distinct from a promise that the property conveyed is free from encumbrances." ORS 93.140 provides, "[n]o covenant shall be implied in any conveyance of real estate, except as provided by ORS 93.850 to 93.870." The court held that the deed conveyed an interest without any express covenants of the quality of title, and under ORS 93.140, no covenant was implied. The court affirmed the trial court's grant of summary judgment to defendant.

GOING PAPERLESS?

The Debtor Creditor Section spends a considerable amount of money each year to publish the Section's Newsletter. The Executive Committee has discussed the possibility of publishing the Newsletter electronically.

Before making a final decision on this question, the Executive Committee seeks membership comments. Do you believe we should publish the Newsletter electronically? Or should we continue as we have in the past? Please send your comments to Newsletter Editor-in-Chief Deborah Guyol, dguyol@aol.com.

CONSUMER BANKRUPTCY COMMITTEE

The Consumer Bankruptcy Committee (also known as the Circle of Love) usually meets every other month on the third Thursday of the month in the 8th Floor conference room at the United States Bankruptcy Court – 1001 SW 5th Avenue, Portland, Oregon 97204. The committee is chaired by Laura Donaldson, who can be reached at 503-227-2004 or laura@kunidonaldson.com. To learn more about the Committee or to be added to the mailing list, please contact Ms. Donaldson.

Meeting of January 22, 2009

By Laura Donaldson
Kuni Donaldson LLP

Judge Perris discussed her work with the national committees on bills relating to bankruptcy. She provided the group with handouts, including proposed changes to the current law (the “Helping Families Save Their Homes in Bankruptcy Act”) and a letter dated January 14, 2009, from the National Conference of Bankruptcy Judges to Senator Durbin and Congressman Conyers with comments by the judges on the “Helping Families Save Their Homes in Bankruptcy Act of 2009.” Judge Perris discussed the issues that the judges identified that could have a substantial impact on bankruptcy administration in an attempt to avoid unintended consequences from passage of the legislation. She further discussed the separate sections of the Code that would be modified, and how those modifications could affect judges, debtors, creditors and the workings of chapter 13. She explained that this still faces many challenges, but the need for change is great. She encouraged the bar to review the changes and actively participate with comments.

Brian Lynch, Chapter 13 Trustee, reported on how the trustees felt about the potential changes to the Code and their concerns (similar to those of the judges) about benefits and drawbacks. He further discussed how his office will address the legislation if passed. Brian discussed issues debtors are having with loan modifications and some new resources that might be helpful, including the site www.dclmwp.com, the Debtor’s Counsel Loss Mitigation Web Portal. The site works as follows. Debtor’s counsel submits a loan modification request for the client, and the site managers work with servicers to provide a faster response to debtor’s attorney. The website is in its test phase; it has been tested in the Middle and Western Districts of Tennessee and the Central District of California with success, and is free to debtors and debtors’ counsel. The participating loan servicers promise a prompt reply. Brian asked members of the bar to test this website and provide feedback on how it is working and any problems experienced.

Brian said it is the Trustee’s position that if any portion of a motor vehicle debt is unsecured, the loan on the vehicle should be paid through the plan. This holds true even if

there is a co-debtor responsible for payment of the vehicle loan who has not filed bankruptcy.

Tom Renn, chapter 7 trustee, discussed document production in chapter 7 cases. He sought feedback from debtors’ attorneys aimed at making the process easier and less frustrating. Items of concern include (1) consistency among the trustee in how documents were to be produced and what documents were to be produced (a standardized process), and (2) eliminating paperwork not felt to add to the process, including debtor questionnaires. Tom also said our trustees are frustrated by debtors and their attorneys who still do not provide tax returns; the trustees are considering ways to sanction for continued noncompliance, including moving to dismiss cases. Tom will meet again with the trustees as a group to further discuss the items raised at this meeting.

Richard Parker addressed assumptions of car leases and how they are treated (see Judge Brown’s opinion in *In re Fassler*, No. 08-33326). Rich noted that assumption of a lease under §365 does not require court approval, which is important because many lease holders ask debtors to reaffirm lease obligations or lose their vehicles. Further, in every reported case involving assumption under §365(p), the court has refused to approve a stipulation for waiver of a debtor’s discharge rights under §524. Waiver constitutes a reaffirmation agreement which must be presented to the court in accordance with §524(c). *In re Matrix Development Group*, No. 08-32798, was also briefly discussed as it relates to future advances securing pre-existing debt.

Meeting of March 5, 2009,

**By Laura Donaldson, Kuni Donaldson LLP
& Aaron Varhola**

Andrew Toth-Fejel promoted his website – The Bankruptcy Bulletin, <http://blsbulletins.blogspot.com/>. He sent around a sign-up sheet for attorneys or others who wish to be notified by email of updates on his website, which provides information on case law and litigation support for bankruptcy attorneys. Recent posts on the site include updates on Congress’s mortgage modification bill, which passed the House on March 5 but still needed to pass the Senate.

Brian Lynch introduced his new assistant, Michelle Nunnenkamp. He asked that attorneys pay attention to the person’s initials at the bottom of the trustee’s objection to confirmation, as they indicate which paralegal will work with the attorney to resolve the objection (either Jackie Troutman or Michelle Nunnenkamp). Jack Fisher will cover the Thursday afternoon calendar and Wayne Godare the Wednesday miscellaneous calendar; for further information about a specific case, contact the chapter 13 staff attorney who conducted the §341(a) meeting.

If you are handling a case for a flat fee, you can email to the trustee’s office your Order Confirming Plan with the /s/ signature, and the trustee will upload that Order to the court. The judge does not need an original signature on the

OCP for those cases. The court will assume the original signature appears on the attorney's order in their file. If there is a no-look fee application or a case with hourly fees where a certification is required, then the signature on the OCP will still be required.

Lynch intends to begin using a new motion to dismiss for failure to file tax returns; debtors' counsel will have to file the returns or request a hearing. New strict compliance orders would require debtors to bring payments current or the Chapter 13 Trustee will seek a hearing or dismissal.

Lynch described a problem with motions for relief from stay: relief is granted through a motion for relief, and debtor files an objection to the Trustee paying the mortgage company's claim. Debtor wants to sell house and mortgage arrears are being paid through escrow rather than through the plan. Brian wants to be paid on the mortgage arrears that would otherwise have been paid through the plan. Ann Chapman calls this the "touch touch" approach – the trustee touches the transaction (trustee's approval of sale) so he feels he should be paid. When debtors file a motion to disallow the claim or file an objection to the claim (to suspend payments on the claim), Brian objects to disallowance for this reason – that he isn't getting paid.

Judge Brown felt this process will clog the system with litigation. Brian proposed that we add a box to the proof of claim or stipulated order that says suspension of payments to the claim through plan is okay, but disallowance of the claim is not okay, or have a box marked "other" that can be used on the Objection to Claims forms. Alan Unkeles and Todd Trierweiler would like the Objection to Claim form to contain a box for suspending payment.

According to Jack Fisher, many modified plans are filed pre-confirmation. Plans saying, for example, "\$200 x 3, then \$500 thereafter" are fine, but Jack asked that 2(b)(1) payments be tailored to be consistent with the payments in Paragraph 1 step payments. Having to modify the plans is driving up costs.

Charlene Hiss of the bankruptcy court clerk's office announced rollout of ECF Version 3.3 on March 30 – Version 3.2 was discontinued because of problems. Statistics for the Executive Office of the US Trustee will be collected through ECF. Attorneys will be asked to vote on whether they want cascading ECF menus – they have been put into the training database.

Cary Gluesenkamp announced the National Association of Consumer Bankruptcy Attorneys annual convention, May 29-31 in Chicago.

Tom Renn announced that the Debtor-Creditor Section has revamped its website for trustee information and document production information. The trustees are trying to come up with more consistent document requirements. Trustees Renn, Robert Morrow and Kenneth Eiler have new e-mails in the form "firstname.lastname@7trustee.net." Renn asks that documents for cases in which he is a trustee be sent to renndocs@7trustee.net and that people use the trustee

email addresses from the Debtor-Creditor Section website, not the ECF addresses from court documents.

Meeting of May 7th, 2009

By Britta Warren

Todd Trierweiler and Associates

Thank you to Brian Lynch's office for providing refreshments at the meeting. Laura Donaldson, the committee chair, suggested that two or more people volunteer in advance to provide food and refreshments for upcoming meetings. This will allow smaller firms to contribute to the meetings but also keep costs down. Participants can also contribute money to help pay for refreshments. A volunteer schedule for refreshments will be posted on the Debtor-Creditor Section website for future contributors.

Judge Perris will host a brown bag lunch on Friday, May 29, 2009, at the Bankruptcy Court, 8th Floor conference room, from 12:00 pm to 1:30 pm. Participants can also call in on the Meet Me Line. The purpose of this discussion is to develop uniform local bankruptcy procedures for real property loan modifications. Judge Perris emphasized that this meeting is meant to facilitate discussion of how to develop local procedures and reduce costs; it will not be a panel presentation on home loan modifications. Please come with questions.

Pam Griffith from the US Trustee's office voiced concern that loan modifications could become the next big scam, where unscrupulous companies instruct debtors to pay monthly mortgage payments to the scammer while they work out the terms of the loan modification. Brian Lynch responded by requesting that debtors in bankruptcy negotiate loan modifications directly with their lenders or through their attorney's office. He also said that the trustee's approval of loan modifications will be required in all chapter 13 cases.

Thomas Renn discussed the revised procedure for document production for Portland chapter 7 trustees. The simplified requirements are the result of requests from the bankruptcy bar. Some of the most notable changes are: (1) the debtor questionnaire will be discontinued, and (2) debtors will no longer be required to send 60 days of pay stubs to the chapter 7 trustee in advance of the §341 meeting. (Note that the US Trustee will still require 60 days of pay stubs.) The document production requirement is effective immediately and will be posted on the Debtor-Creditor Section website. It clearly identifies which documents must be sent to the case trustee 7 days before to the §341 meeting and which must be provided at the §341 meeting. Because the document production process has been simplified, trustees will expect better compliance from debtors' attorneys. Motions to dismiss will be filed in cases that fail to meet the requirements.

Renn also addressed local procedures for nonjudicial relief. This topic was discussed in response to the chapter 7

trustees' practice of signing off on nonjudicial relief without debtor's attorney's signature. He clarified that under the rule, when a debtor indicates in the Statement of Intent that the debtor intends to surrender the property at issue, the debtor is also impliedly consenting to relief from stay. If the creditor provides the trustee with a nonjudicial relief request and the debtor has indicated he or she intends to surrender the property, the trustee will sign it unless he or she receives a written request in advance from the debtor's attorney.

Tom also told the group about the Public Education Committee and its outreach efforts. The Committee needs volunteers to work on new projects. Anyone who is interested should contact Tom or Pamela Griffith. A group is also being formed to offer resources to new lawyers in the bankruptcy bar. This group needs more experienced attorneys to volunteer for presentations and mentoring opportunities. If interested in participating, please contact Thomas Renn or Laura Donaldson.

Brian Lynch clarified that the Chapter 13 Trustee will not pursue Social Security stimulus payments. He also announced a presentation his office will offer on May 22, 2009, from 1:30 pm to 3:30 pm, at the Wells Fargo Tower, 21st Floor. The presentation is entitled Chapter 13 Nuts and Bolts and covers plan drafting issues and common errors on the B22 form.

Mr. Lynch also reiterated that the Trustee will require impaired vehicles to be paid in the chapter 13 plan. His office will carefully review valuation of vehicles and will object to confirmation if a vehicle that is worth less than the amount owed is not provided for in the plan. Mr. Lynch also reminded the group that procedures for defaults on strict compliance orders have changed recently. Instead of emailing debtor's attorney, the Trustee files a Notice of Default via ECF.

Pamela Griffith announced that the US Trustee will provide language translators for chapter 7 §341 meetings. This is a pilot program in which translation equipment in the hearing room allows the trustee to dial up a translator for over 165 different languages. Please be sure to notify the case trustee in advance if you will need access to the translation equipment.

Rich Parker and Andy Toth-Fejel announced recent decisions, including *In re Lorber Industries*, Ninth Circuit Court of Appeals, Case Nos. 07-56227 & 07-56309 (May 4, 2009).

Finally, the next Circle of Love meeting is scheduled for June 4, 2009. Kuni Donaldson and Rich Parker will provide snacks. We look forward to seeing you all there.

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