OREGON DEBTOR-CREDITOR

Newsletter

Volume XXIII, Number 2 Debtor-Creditor Section, Oregon State Bar Spring 2004

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COMMENTS FROM THE CHAIR

By Carolyn G. Wade
Hershner, Hunter, Andrews, Neill & Smith LLP

PREPARING FOR A WINNING SEASON.

It was 10 years ago that baseball became a major part of my life. My son began playing seriously and at first I participated by cheering from the bleachers and keeping score. It wasn't long before I began calculating and recording statistics, and from there it was only a short distance to the dugout where helmets, bats, and boys were shuffled, assembled, and sent to the plate. When the first base line needed someone who knew the signals, I became a coach. As the seasons ensued, I came to respect the game and the life lessons it teaches. I'm talking about more than hand-eye coordination and teamwork. I'm talking about themes for living because, as George Will put it, "Baseball is like nothing so much as the universe."

There are many lessons from the field that I apply to practicing law. In fact, I think we all would agree that the following three concepts apply to our work on behalf of the client, no matter which team you're on.

AXIOM #1: A SACRIFICE CAN BE AS GOOD AS A HOMERUN.

What the client needs is to win, which both on the field and off means coming out ahead. Most of the time an out-of-the-ballpark hit isn't necessary to serve the client. It may feel anticlimactic, particularly if a rivalry of sorts is involved, but a settlement usually serves the client better than a battle in court. A settlement looks more like a sacrifice than a home run, and it certainly doesn't inspire crowd-roaring adulation. Yet, as we all know, litigation is not only expensive, it carries intangible costs: interruption of business, disruption of personal lives, and stress enough to cover the infield during an opening day downpour. A settlement can equal or even exceed a win at trial for the client.

When I help a client to settle a case, the client may not experience that grand slam feeling, but will usually concede that ending the case and avoiding disruption and costs spelled victory just the same.

AXIOM #2: WITH TWO OUTS, RUN ON ANYTHING.

When you're in the 9th inning and your client is behind, there may be nothing to lose by trying a new approach. In that situation, I remind myself of that mangled expression, "It ain't over 'til it's over," and push to the limit for the sake of the client. Just as I told my baserunners, I look for an opening – an error, a passed ball, an umpire's decision that goes our way – and I run like mad. You never know when an opportunity can be turned into a rally.

AXIOM #3: DON'T WATCH, JUST RUN!

I don't know how many times I have shouted this instruction out to a runner during a single game. It's not that I don't want him to pay attention to what's going on around him. It's that once the opportunity is at hand, the player must forget the scoreboard, the fans, the signals from the opposing coach, and focus solely on the base ahead. After considering the options and deciding that running is the right answer, I have to go for it no matter what the odds. In the 9th inning – in any inning – you have to run full out.

Thinking of baseball and law this way brings meaning to both for me. Like baseball, law is a competition. Still, I understand that sports analogies can be highly simplistic – no metaphor tells the whole story. Outcomes in baseball rarely affect more than the already-exorbitant salaries of the players and owners. Lawsuits, on the other hand, involve ordinary persons, and the outcome can affect the rest of their lives. Baseball is about eye-hand coordination and teamwork. Law is about duties and rights, justice, and perhaps most of all about compromise. Representing clients intelligently is the noble task of practicing law. Representing clients vigorously is the heart of the profession. And as we all know from baseball, heart is usually what brings it home in the final innings.

You Too Can Be An Author

If you would like to write an article, or would like to read an article on a particular topic, please contact:

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11 USC §523(a)(19): DEPRIVING PERPETRATORS OF SECURITIES FRAUD OF A DISCHARGE IN BANKRUPTCY (OR NOT)

By Hilary L. Barnes,
Stoel Rives LLP

Gregg J. Simon,
Scalambrino & Arnoff, Chicago

A new and virtually untested provision of the Bankruptcy Code, 11 USC §523(a)(19), is being tested on the same set of facts in two courts: here in Oregon and in the Northern District of Illinois. And at least in the initial stage, the cases have dramatically different results.

BACKGROUND OF THE CASES

The companion cases in Oregon and Illinois arise out of one multi-count complaint in Texas state court. John and Sara Peterman and Reactance, Inc., their company, sued Liquivision Entertainment, Inc. (LEI), and LEI's officers and directors, alleging breach of contract and that the defendants defrauded and fraudulently induced plaintiffs to pay them $200,000 in connection with the sale of LEI stock. Rather than litigate, the defendants settled all of the counts of the complaint without admitting any liability, and agreed among other things that if the defendants failed to perform their responsibilities under the settlement agreement, an agreed judgment would be entered against them in favor of the plaintiffs in the amount of $300,000. When the defendants failed to perform under the settlement agreement, the agreed judgment was entered in state court, stating that the defendants had damaged the plaintiffs in the amount of $300,000, plus interest, and that the defendants were jointly and severally liable for payment of the damages. The agreed judgment, however, neither specified which counts of the complaint that judgment was entered on nor did it include any other factual findings.

Thereafter, two of the defendant officers and directors filed for bankruptcy relief, one in Oregon and the other in Illinois. The plaintiffs filed adversary proceedings seeking to deny discharge of the debt arising from the settlement agreement and agreed judgment. The initial complaint in Oregon, since amended, did not include an objection to discharge under 11 USC §523(a)(19), while the complaint filed in Illinois did. The debtors answered the complaints, admitting that they agreed to settle the state court claims (including claims alleging that debtor defrauded plaintiffs in connection with the sale of securities) and that an agreed judgment was entered against

them. Based upon the debtors' admissions, the plaintiffs moved for summary judgment in Oregon and for judgment on the pleadings in Illinois.

THE BANKRUPTCY CODE PROVISION

The Sarbanes-Oxley Act (Corporate and Criminal Fraud Accountability Act of 2002) added §523(a)(19) to the Bankruptcy Code to augment the nondischargeability provisions. *See* Teresa H. Pearson, "What Bankruptcy Lawyers Need to Know About the Sarbanes-Oxley Act of 2002 and the Corporate and Criminal Fraud Accountability Act of 2002," Oregon Debtor-Creditor Newsletter, Spring 2003. The new subsection provides:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt —
>
> (19) that —
>
> (A) is for —
>
> (i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and
>
> (B) results from —
>
> (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding; (ii) any settlement agreement entered into by the debtor; or (iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

Therefore, the express language of §523(a)(19) excepts a debt from discharge if two conditions are met:

> (1) the debt is for the violation of certain federal securities laws, state securities laws or regulations under the federal or state securities laws or is for common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and (2) the debt results from a judgment, order, consent order or decree in a federal or state judicial or administrative proceeding or any settlement agreement entered by the debtor or any court or administrative order for the payment of damages, a fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost or other payment owed by the debtor.

In Re Whitcomb, 303 B.R. 806, 810 (Bankr ND Ill 2004). *See also In re Gibbons*, 289 B.R. 588, 592 (Bankr SDNY 2003) (citing 148 CONG. REC. §1787 (daily ed. March 12, 2002) and S. REP. No. 107-146 (2002)). The statutory language covers "settlement agreements" without regard to whether the debtor admits liability.

According to the legislative history, this section was enacted to close a "loophole" in the existing laws governing personal bankruptcy that "allowed securities laws violators to unfairly discharge their debts to defrauded investors." *See* S. REP. No. 107-146 (2002) (statement of Senator Leahy); Lucien Murley, *Note*, "Closing a Bankruptcy Loop-Hole or Impairing a Debtor's Fresh Start? Sarbanes-Oxley Creates a New Exception to Discharge," 92 *Ky LJ* 317, 318 (2003/2004). Further, as Senator Leahy noted:

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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.

SENATOR PATRICK LEAHY: The [Act] would amend the Bankruptcy Code to make judgments and settlements based upon securities law violations non-dischargeable, protecting victims' ability to recover their losses. Current bankruptcy law may permit such wrongdoers to discharge their obligations under court judgments or settlements based on securities fraud and other securities violations. This loophole in the law should be closed to help defrauded investors recoup their losses and to hold accountable those who perpetrate securities fraud after government unit or private suit results in a judgment or settlement against the wrongdoer.

. . . Under current laws, State regulators are often forced to 'reprove' their fraud cases in bankruptcy court to prevent discharge because remedial statutes often have different technical elements than the analogous common law causes of action. Moreover, settlements may not have the same collateral estoppel effect as judgments obtained through fully litigated legal proceedings . . . By ensuring securities fraud judgments and settlements in State cases are non-dischargeable, precious state enforcement resources will be preserved and directed at preventing fraud in the first place.

148 CONG. REC. §1787 (daily ed. March 12, 2002) (emphasis added). In addition, the following was included in the Congressional Record for the express purpose of guiding courts' interpretation of the Act:

Section 803.—Debts non-dischargeable if incurred in violation of securities fraud laws

This provision would amend the federal bankruptcy code to make judgments and settlements **arising from** state and federal securities law violations brought by state or federal regulators and private individuals non-dischargeable. Current bankruptcy law may permit wrongdoers to discharge their obligations under court judgments or settlements based on securities fraud and securities law violations. The section, by its terms, applies to both regulatory and more traditional fraud matters, so long as they arise under the securities laws, whether federal, state, or local.

This provision is meant to prevent wrongdoers from using the bankruptcy laws as a shield and to allow defrauded investors to recover as much as possible.

148 CONG. REC. S7418 (daily ed. July 26, 2002) (emphasis added).

In *In re Gibbons*, 289 B.R. 588 (so far the only case other than *In re Whitcomb* to interpret and apply §523(a)(19)), Smith filed an adversary complaint seeking to have her debt held nondischargeable for fraud after the debtor defaulted in NASD arbitration proceedings and her arbitration award against him was affirmed by a court. 289 BR at 590.

After the plaintiff filed a summary judgment motion asking the court to hold her debt nondischargeable under §523(a)(19), the debtor raised three relevant arguments in opposition: (a) he claimed that the default entered in the arbitration violated his Due Process rights; (b) he disputed plaintiff's factual allegations and noted there were inconsistencies in her story; and (c) he claimed that the Act should be strictly and narrowly construed against plaintiff in keeping with the case law interpreting the other bankruptcy exceptions to discharge. In granting plaintiff's motion, the court rejected debtor's due process arguments and his arguments about plaintiff's factual allegations, holding that it was necessary *only* to find that plaintiff's debt was *based on* a judgment for fraud in connection with the purchase and sale of securities for the debt to be nondischargeable under §523(a)(19). *Id.* at 592.

The *Gibbons* court noted that the section, by its terms, applied to both statutory claims and common law fraud claims arising in connection with the purchase or sale of a security. *Id.* Finally, the court noted that its review of the Act's legislative history revealed that Congress decided that the usual canon of construction (exceptions to discharge construed strictly and narrowly against a creditor and liberally in favor of a debtor) should not apply to this exception. *Id.* at 597. In fact, the Gibbons court said, "Congress thought it more important to close a loophole in the law that in some cases prevented defrauded investors from recouping their losses or required them to prove their case all over again." *Id.* at 596.

THE ILLINOIS AND OREGON RULINGS

Plaintiffs prevailed in their nondischargeability proceeding brought under §523(a)(19) in the bankruptcy court for the Northern District of Illinois. The court granted their motion for judgment on the pleadings and found the debt arising from the state court complaint and settlement agreement nondischargeable. The court stated:

Both elements under §523(a)(19) are present. First, the Debtor admits and the Court finds, the State Court Complaint alleged that the debt results from fraud, fraudulent inducement and fraudulent misrepresentations made by the Debtor and others, which induced the Petermans to purchase common stock in LiquiVision. Finally, the Debtor admits and the Court

> finds, the debt results from the Settlement Agreement entered into by the Debtor for the payment of damages. Specifically, the Settlement Agreement provided that the Debtor agreed to enter into an agreed judgment with the Petermans and Reactance in the sum of $300,000.00. Further, the agreed judgment order was entered by the state court on September 9, 2002, after the effective date of § 523(a)(19), in connection with the settlement of the State Court Complaint, by which the Debtor agreed to entry of the judgment against him.

In Re Whitcomb, 303 B.R. at 810 (citations omitted). The court also denied a motion to reconsider its decision. That case is now on appeal to the District Court for the Northern District of Illinois.

In contrast, in *In re Johnson* (Bankr D. Or. Adv. Pro. No. 03-3356, filed 7/24/03), the bankruptcy court for the District of Oregon denied summary judgment under 11 USC §523(a)(19), finding in an unwritten ruling that a question of fact existed about whether the underlying judgment and settlement agreement were "for fraud." The complaint in the case has since been amended to include 11 USC §523(a)(19) claims alleging that both the agreed judgment and the settlement agreement are nondischargeable. That case is scheduled for trial in August 2004.

The conflicting rulings reflect differing interpretations of §523(a)(19)'s "is for" requirement. Whereas the Illinois court read the "is for" requirement as meaning "based upon claims of fraud," the Oregon court has seemingly interpreted "is for" to require actual proof of fraud. Which begs the question: If §523(a)(19) requires the same thing already required under (a)(2) and (a)(4), what is the point of the section at all? If indeed §523(a)(19) requires an express factual showing that the underlying debt was "for fraud," as opposed to being "based upon claims of fraud," and without that showing a debt arising from a settlement agreement or an agreed order that disposes of fraud claims is dischargeable, is the provision toothless? Under those circumstances the debt would already be nondischargeable under §523(a)(2) or (a)(4). Such an interpretation would mean a defendant could settle claims related to securities fraud rather than litigate, and then receive a discharge of that debt in bankruptcy by averring that the claims of securities were settled rather than proven, **even though §523(a)(19) specifically includes settlement agreements**. This appears to be exactly the sort of conduct Congress intended to punish.

With all due respect to the Oregon court, given the legislative history surrounding the addition of §523(a)(19), it is hard to imagine that Congress meant to require a creditor to prove fraud—that is, the elements of §523(a)(2) or (a)(4)—before §523(a)(19) can be applied to a situation involving a settlement agreement or an agreed judgment. Such a narrow interpretation is also at odds with legislative history supporting broad application of the provision to prevent defendants from settling securities fraud cases, then declaring bankruptcy and discharging the settlement debt.

A practice point for potential debtors: if one opts to settle a multi-count complaint that includes allegations related to violations of securities laws or common law fraud in the sale of securities, prudence would dictate that such settlement would carve out the fraud claims so that §523(a)(19) would not come to bear on any subsequent bankruptcy.

So far only a few bankruptcy courts have applied §523(a)(19). The picture may well be different after some appellate decisions have been rendered. Stay tuned.

DEBTORS' ATTORNEYS HANDED THEIR HAT

By Stephen T. Boyke
Greene & Markley, PC

We certainly look for certainty from decisions of the United States Supreme Court. We have received certainty from the court in *Lamie v. U.S. Trustee*, 124 S Ct 1023 (2004), at least with respect to a narrow issue. *Lamie* holds a debtor's attorney in a chapter 7 case cannot be paid compensation from the bankruptcy estate unless the attorney is employed by the chapter 7 trustee. Nonetheless, the ruling raises more questions than it answers.

BACKGROUND

Before 1994, the Bankruptcy Code allowed for a chapter 7 debtor's attorney to be paid from assets of the bankruptcy estate for routine services rendered in connection with the case. The rule predated the Bankruptcy Code. In 11 USC §330, the chapter 7 debtor's attorney was specifically identified as one entitled to such payment. As part of the 1994 amendments to the Bankruptcy Code, §330 was revised in several respects. For example, a separate provision allowing for payment of debtors' attorneys in chapter 12 and 13 cases was added. In addition, the reference to "debtor's attorney" was removed from the section.

When this deletion was discovered by practitioners, there was speculation about whether it was a scrivener's error or the true intention of Congress. Common wisdom postulated that if the deletion was a mere scrivener's error, then debtors' attorneys could still be paid from the

estate in chapter 7 cases. The opposite view was that no compensation could be awarded from the bankruptcy estate because that is what the plain reading of the statute dictated. Not surprisingly, as the issue worked its way through the courts, a split developed among the circuits. The Fifth and Eleventh Circuits held no compensation was allowable; the Second, Third and Ninth Circuits held compensation could be allowed.

The issue was first addressed in Oregon in 1996 by Judge Polly S. Higdon in *In re Fassinger*, 191 BR 864 (Bankr D Or 1996). Judge Higdon held the deletion of "debtor's attorney" from §330, along with the new provision for compensation of debtors' attorneys in chapter 12 and chapter 13 cases meant that a debtor's attorney could not be paid from the bankruptcy estate unless first employed by the trustee. The decision also held that the debtor's attorney **could not** have an allowed administrative claim under §503(b). Later that year, Judge Elizabeth L. Perris came to the same conclusion in *In re Century Cleaning Services, Inc.*, 202 BR 149 (Bankr D Or 1996). Judge Perris's decision was affirmed by the BAP in *In re Century Cleaning Services, Inc.*, 215 BR 18 (9th Cir BAP 1997). The Ninth Circuit reversed. *In re Century Cleaning Services, Inc.*, 195 F3d 1053 (9th Cir 1999). *Lamie*, of course, abrogates the Ninth Circuit's reversal.

LAMIE

The facts in *Lamie* are simple. Begun as a chapter 11 case, the case was converted to a chapter 7. The debtor's attorney, Lamie, sought to be compensated from the chapter 7 estate for postconversion services. The case worked its way through the bankruptcy court, district court, and Court of Appeals for the Fourth Circuit with all courts ruling against the debtor's attorney.

The Supreme Court began its opinion with a discussion of the 1994 amendments to §330 and identified the issue clearly — whether the new statute was ambiguous by reason of a scrivener's error or whether a plain reading of the statute should control. The Court, although recognizing the new statute as awkward and even ungrammatical, held it was not ambiguous, and applied the plain meaning rule to its interpretation of the statute. The Court bolstered its analysis with a dose of statutory construction, showed how its decision would not lead to absurd results and observed that even if legislative history were analyzed, which was not required, such history is at best neutral on the issue.

In *dicta*, the court identified as "common practice" the arrangement whereby debtors' attorneys are paid before the bankruptcy case is filed in an amount sufficient to complete the work.

Lamie brings certainty. Only an act of Congress will change the rule that a chapter 7 debtor's attorney cannot be compensated from the chapter 7 estate.

LAMIE'S EFFECT IN THE NINTH CIRCUIT

The Ninth Circuit decision in *Century Cleaning* has been fully abrogated. The lower court decisions in *Century Cleaning* are in accord with *Lamie*. However, *Century Cleaning* contained an additional fact, resulting in an additional issue, neither of which was present in *Lamie*. The debtor's attorney in *Century Cleaning* had a retainer and sought to be paid from it. Both the bankruptcy court and the BAP held the debtor's attorney could be paid from the retainer even if the attorney was not authorized to be paid under §330. A retainer was not at issue in *Lamie*, and the retainer was ignored by the Ninth Circuit decision in *Century Cleaning*. It would appear the lower court rulings on the retainer issue remain good law in Oregon.

THE QUESTIONS

Like a scientific discovery, the decision in *Lamie*, having settled one specific question, leaves many more questions unanswered. For example:

- Does the retainer issue holding in *Century Cleaning* remain good law?
- How will the "reasonableness" of fees be interpreted under 11 USC §329 with respect to such retainer deposits? May a debtor's attorney be compensated for preparing a will for the debtor? May the attorney be compensated from the retainer for representing the debtor in a nondischargeability action?
- Should debtors' attorneys in chapter 7 cases consider earned on receipt retainers in representing chapter 7 debtors?
- Should the rules be different if the debtor's attorney takes a security interest in property of the debtor other than a cash retainer?
- Can the chapter 7 trustee obtain turnover of an unused retainer under 11 USC §542?
- Will chapter 7 trustees consider hiring debtor's attorney as special counsel under 11 USC §327(e)?
- Is a legal services or retainer agreement between a chapter 7 debtor and his attorney an executory contract capable of assumption or rejection?
- Should chapter 7 debtors' attorneys find a new line of work?

Other courts have addressed some of these questions, at least in part, but only time will provide conclusive answers. *Lamie* brings certainty to the question of whether a chapter 7 debtor's attorney can be paid from the bankruptcy estate. The answer is no, unless that attorney is employed by the trustee. It remains to be seen how such lawyers will be paid if the trustee does not hire them.

PRO BONO REPORT

By Valerie T. Auerbach
Farleigh Wada & Witt, PC

The pro bono subcommittee of the Debtor Creditor section is pleased to announce that it is currently in its seventh successful year of running the bankruptcy clinic for low income debtors in the tri-county area. The committee, with the help of dozens of volunteer attorneys, legal aid, the bankruptcy judges and the US Trustee's office, hosts an evening clinic one night each month, alternating at sites in Portland and Beaverton.

The clinic operates as follows. At 6:30pm, a bankruptcy judge, US Trustee's office attorney or another volunteer attorney gives an informational talk to all interested parties about their general rights under the bankruptcy code and debtor protection laws. After this talk, each volunteer attorney meets with two or three scheduled low income clients. Typically about 40 people attend the talk, and approximately 16 of them schedule appointments. If the attorney and client agree that a Chapter 7 filing is in the best interests of the client, the attorney will assist the client with this filing. Todd Trierweiller has generously volunteered his paralegals to assist volunteer attorneys with the preparation of the petition and schedules.

The clinic does not handle bankruptcies under any other chapter of the code. Anyone interested in volunteering should contact the committee chair, Valerie T. Auerbach at 503-228-6044 or *vauerbach@fwwlaw.com.*

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UNITED STATES SUPREME COURT CASE NOTE

By Matthew A. Arbaugh

DEBTOR MUST RAISE UNTIMELINESS OF COMPLAINT PRIOR TO ANY DECISION ON THE MERITS

Kontrick v. Ryan, 124 SCt 1023 (2004)

The debtor, Kontrick, filed for protection under chapter 7. A creditor, Ryan, sought to file a complaint excepting the debt owed to Ryan from discharge for violation of 11 USC §727, transferring property within one year of filing with an intent to defraud creditors. Bankruptcy Rule 4004 requires creditors to file complaints objecting to discharge within 60 days of the first date set for the meeting of creditors. Ryan obtained three extensions of time to file the complaint before finally filing a complaint. After filing the original complaint, Ryan filed an amended complaint with leave of court but without a court approved time extension. On Ryan's motion for summary judgment, the bankruptcy court ruled that certain transfers did violate §727. Kontrick moved for reconsideration and for the first time raised the issue of the timeliness of Ryan's amended complaint, alleging the timeliness rules are "jurisdictional" in nature.

The bankruptcy court disagreed and denied the motion. It held Kontrick waived the right to assert untimeliness of the complaint as a defense by not asserting it before the court reached the merits of the decision. The District Court and the Seventh Circuit affirmed.

The Supreme Court affirmed. Only Congress can determine a lower court's jurisdiction and Congress did not make the time rules for filing jurisdictional. The Court distinguished the defense of untimeliness from the defense of lack of subject matter jurisdiction, which can be raised at any time in the proceedings. Then the Court followed FRCP 8(c) and FRBP 7008(a) to hold that time bars generally must be raised in an answer or responsive pleading. Despite numerous opportunities, Kontrick failed to raise this defense before the lower court's decision on the merits in the summary judgment motion. Therefore, Kontrick waived his ability to raise the untimeliness of the complaint as a defense to the denial of discharge action.

NINTH CIRCUIT CASE NOTES

By Ashley S. Hohimer
Miller Nash LLP

BAP GIVEN ADDITIONAL AUTHORITY TO POLICE THE BANKRUPTCY BAR

In re Morrissey, 349 F3d 1187 (9th Cir 2003)

The chapter 7 debtor was a practicing attorney who represented himself throughout the case. An employee timely filed a proof of claim, to which the debtor objected. The bankruptcy court, after a trial, allowed the employee's claim. The debtor appealed to the BAP.

After the BAP threatened to dismiss the appeal for failure to prosecute, the debtor proceeded with the litigation and the case was argued and submitted. The BAP found that the debtor's brief seriously violated FRBP 8010 by failing to include a statement of appellate jurisdiction, an intelligible statement of issues presented, and the applicable standard of review. Furthermore, the argument lacked citations to authorities and the record was inadequate. The BAP imposed sanctions on the debtor for his procedural violations, and the sanctions took the form of summary affirmance of the bankruptcy court's judgment.

The debtor appealed to the Ninth Circuit, which considered the appropriate standard of review. Although recognizing that BAP decisions were generally reviewed de novo, the court decided to give greater deference to the BAP and the district courts when reviewing procedural decisions. After emphasizing the importance of the intermediate level of review that the BAP affords, the Ninth Circuit reviewed the BAP's decision for abuse of discretion. Under that standard, the court found the BAP's summary affirmance to be an appropriate sanction.

NINTH CIRCUIT REJECTS PER SE RULE FOR SUBSTANTIAL ABUSE

In re Price, 353 F3d 1135 (9th Cir 2004)

The debtor was, by trade, a computer consultant. For a period of time, however, he and his wife decided to try their hand at operating a chain of retail clothing stores. The debtor financed the business venture through cash and credit card advances. Ultimately, the business failed and the marriage ended in divorce.

Despite the fact that he secured a new job with a six figure salary, the debtor was unable to pay his debts as they became due. He filed for chapter 7, listing total debt of over $300,000 in his schedules. The debtor claimed that most of the debt to be discharged was business debt. To reach this favorable business to consumer ratio, the debtor excluded his home mortgage from his figures. The trustee moved to dismiss the debtor's petition for substantial abuse under section 707(b). After a hearing, the bankruptcy court found the debts to be primarily consumer. Agreeing with the trustee that the debtor had the ability to pay his debts, the court dismissed the petition. The debtor appealed and the BAP affirmed.

The Ninth Circuit reiterated that a section 707(b) dismissal is appropriate only if (1) the debts are primarily consumer and (2) granting the debtor's petition would be substantial abuse of chapter 7. Looking at the first prerequisite, the court unequivocally held that a residential mortgage is a consumer debt. The court rejected the debtor's claim that the only debts to consider when looking at the business to consumer ratio are debts sought to be discharged. The court instead said that the focus should be on the aggregate debts listed in the debtor's schedules.

Looking at the second prerequisite, the court found that although the debtor's ability to pay his debts and fund a chapter 13 plan justified a §707(b) dismissal, it did not compel one. Although the Ninth Circuit ultimately affirmed the BAP's ruling, it refused to establish an absolute per se rule that ability to pay one's debts means substantial abuse exists.

NO MAGIC WORDS NECESSARY TO ABROGATE TRIBAL SOVEREIGN IMMUNITY

Krystal Energy Co. v. Navajo Nation, 357 F3d 1055 (9th Cir 2004)

The debtor commenced an adversary proceeding against the Navajo Nation, a Native American Indian tribe. The district court dismissed the action, holding that the Navajo Nation was immune from suit in the absence of explicit abrogation of that immunity by Congress. The Ninth Circuit reversed the district court's ruling, finding that Congress had unequivocally abrogated the sovereign immunity of Indian tribes in section 106(a) of the Bankruptcy Code.

Section 106(a) explicitly authorizes suits against "governmental units." The definition of "governmental units" in section 101(27) first lists a subset of specific governmental bodies, and then includes a catchall phrase "other foreign or domestic governments." Despite the fact that section 101(27) did not specifically enumerate Indian tribes in its initial definition, the Ninth Circuit found the catchall phrase applicable. Therefore, as governments, the tribes are subject to suit in bankruptcy.

FEDERAL TAX REFUND CLAIMS ARE NOT CORE PROCEEDINGS

Dunmore v. U.S., 358 F3d 1107 (9th Cir 2004)

While waiting for an IRS decision on refund claims for tax overpayments, the debtor filed chapter 7. On the advice of his tax attorney, the debtor omitted the refund claims as assets on his bankruptcy petition. Shortly after filing bankruptcy, the debtor received notice that the IRS had disallowed his refund claims. The debtor received a discharge one year later.

Over a year after receiving his discharge, the debtor filed a complaint pursuing his refund claims in district court. The government argued that the debtor lacked standing to pursue the refund claims: because he had failed to schedule the claims on his bankruptcy petition, the claims now belonged to the bankruptcy estate by operation of section 544(d). The district court transferred the debtor's case back to the bankruptcy court to permit the debtor to seek the trustee's abandonment of the claims. After securing abandonment, the debtor moved to transfer the case back to the district court. The bankruptcy court refused, concluding that it had core jurisdiction over the refund claims. The claims were subsequently dismissed for failure to prosecute.

On appeal, the Ninth Circuit found that the bankruptcy court had improperly exercised jurisdiction over the case. Applying *Security Farms v. Int'l Bhd. of Teamsters*, 124 F3d 999, 1008 (9th Cir 1997), the court held that because the claims did not depend on the Bankruptcy Code for their existence, they were noncore proceedings. Thus, the bankruptcy court could not enter final judgment without the debtor's consent. The court's power to dispose of the debtor's claims was limited to hearing the case and submitting proposed findings of fact and conclusions of law to the district court.

BANKRUPTCY COURT HAS INHERENT POWER TO SANCTION

In re Deville, 361 F3d 539 (9th Cir 2004)

The appellants, the debtor and his attorney, improperly used the processes of the bankruptcy court to block a state-court civil action. The bankruptcy court, after making multiple findings of misconduct, imposed sanctions on the appellants. The appellants challenged the sanctions, arguing that (1) the bankruptcy court violated due process by failing both to specify the source of the court's sanctioning authority and to notify the appellants that their actions were sanctionable; (2) the bankruptcy court lacked the power to impose the sanctions; and (3) the appellants should have been afforded the protections that attach to contempt proceedings.

The Ninth Circuit was not persuaded by these arguments. After finding the appellants had received actual advance notice that the court found their actions sanctionable, the court held that the bankruptcy court's failure to identify its inherent power as the basis for disciplinary hearings was not a due process violation, because the appellants had notice of the **conduct** alleged to be sanctionable. The Ninth Circuit also disagreed with the appellants' assertion that FRCP 11, and its bankruptcy twin FRBP 9011, limited the court's ability to impose sanctions via its inherent power. Relying on *Chambers v. NASCO*, 501 US 32, 49-50 (1991), the Ninth Circuit held that the inherent powers of the court may be relied on when statutes or rules prove inadequate to remedy misconduct.

Finally, the Ninth Circuit affirmed the BAP's ruling that even though a penalty had been imposed as a deterrent, the appellants were not entitled to any procedural protections afforded in a criminal contempt hearing. Because the penalty was sanctioned under Rule 9011(c)(2), no formal hearing or jury trial was required.

WOMBATS 2004

WOMBATS – Women Bankruptcy Attorneys – announces its continuing schedule of brown-bag lunch meetings.

September 23, 2004
Brian Lynch, the new chapter 13 trustee, will speak.

December 2, 2004
Update on Electronic Filing at the Bankruptcy Court.

All meetings are held in the 8th floor conference room of the US Bankruptcy Court in Portland, from 11:45 to 1:15. Please contact Laura Walker, **lwalker@chbh.com**, with questions, comments, or ideas for speakers and topics, or to be added to the WOMBATS email list.

BAP CASE NOTES

By Matthew A. Arbaugh

BAP WEIGHS IN ON APPROPRIATE INTEREST RATE FOR TAXING AUTHORITY'S SECURED CLAIM

In re Pluma, 303 BR 444 (9th Cir BAP 2003)

This case came before the BAP on an appeal filed by the tax collector for the County of San Diego. The debtor filed a chapter 13 plan proposing to pay 4.3% interest on the amounts owed to the County. The County argued that a 10% interest rate was necessary to ensure it would receive present value on the amounts owed. After listening to experts from both sides, the bankruptcy court ruled that the appropriate interest rate was 4.26%. The BAP reversed and remanded.

The BAP first addressed the proper method for determining interest on deferred tax payments. The Ninth Circuit's rule is that the interest rate in these situations is to be determined on a case by case basis. There are two main approaches for finding the "market rate." The first is the "similar loan approach," which requires reviewing testimony on loans in the same market of similar length and secured by similar property. The second, the "formula approach," requires the court to focus on the risks associated with a debtor and the specific security for the debt. The BAP ruled that both methods are acceptable, but took issue with the lower court's application of the "formula approach." The lower court failed to adequately consider the risks associated with the debtor's potential for default based on their prior and current financial problems. The BAP held that courts using this approach must consider all risks associated with the debtor, however small. The BAP remanded for consideration of all the relevant risks in determining the appropriate interest rate.

BANKRUPTCY COURT CANNOT AWARD FEE SHIFTING SANCTIONS ON ITS OWN MOTION

In re Loyd, 304 BR 372 (9th Cir BAP 2003)

This debtor's case started as a chapter 13, was converted to a chapter 11 and then to a chapter 7. Despite remaining ineligible for chapter 13 relief, the debtor filed two motions to reconvert to chapter 13. On its own motion, the bankruptcy court ordered debtor's counsel to show why the case should not be dismissed with prejudice. The court found the motions to reconvert were filed in bad faith, imposed sanctions against debtor's counsel in the amount of $1,000 and awarded the chapter 7 trustee reasonable attorney fees of $3,593. The debtor's attorney appealed to the BAP.

The majority of the BAP held that under the plain language of Rule 9011, a court may not on its own motion shift attorney fees as a sanction. A bankruptcy court, on its own motion, can only require payments of a penalty into the court as a sanction. There was no dispute that this bankruptcy court acted on its own motion.

Judge Klein contributed a vociferous dissent, agreeing that Rule 9011 does not support the award, but contending that Judicial Code §1927 does. Judge Klein relied on Ninth Circuit law allowing courts to impose fee shifting as a penalty to an attorney who acts in bad faith, and argued that the majority's conclusion that the code section was unavailable to bankruptcy judges was based on "dubious" precedent. He asserted that bankruptcy judges need the power to shift fees as sanctions in order to enforce the Code.

BE CAREFUL WHEN DISTRIBUTING FROM A SPENDTHRIFT TRUST POSTPETITION

In re Coumbe, 304 BR 378 (9th Cir BAP 2003)

After filing the bankruptcy petition, the debtor received a distribution from a spendthrift trust. The trustee moved for turnover of the funds, arguing the trust was not a valid spendthrift trust and thus the distribution rightfully belonged to the estate as a "bequest, devise, or inheritance." The lower court denied the motion and held the distribution was not property of the estate because the trust was a valid spendthrift trust.

On appeal, the BAP affirmed in part, reversed in part, and remanded. The BAP agreed that the trust was a valid spendthrift trust under Arizona law: the debtor was the trustee and primary beneficiary but his children were secondary beneficiaries and this was enough to validate the trust as a spendthrift trust. The most important part of the decision was the BAP's holding that while distributions from the **corpus** of a spendthrift trust are not property of the estate, any distribution from the **income** of a spendthrift trust **is** property of the estate. The BAP reversed the lower court's determination that the distribution was not property of the estate because the lower court made no finding about whether the distribution came from the corpus or the income of the trust.

DEBTORS ALLOWED TO REOPEN CASE TO AVOID JUDICIAL LIEN

In re Goswami, 304 BR 387 (9th Cir BAP 2003)

The debtors applied to reopen their case for the purpose of avoiding a judicial lien. They had property valued at $60,000 but encumbered by $70,000 in debt. During their chapter 7 bankruptcy, the debtors did not claim an exemption in the property. Almost five years after the case closed, they sought to reopen their

case and amend their exemption schedules to avoid the judicial lien. The debtors intended to remove the $10 "wild card" exemption previously claimed for "cash on hand" and claim a $10 "wild card" exemption in the property, thereby allowing them to avoid the judicial lien as impairing an exemption. The bankruptcy court denied the motion and debtors appealed.

In an opinion by Judge Perris, the BAP reversed. Nothing in the Code or case law prevented debtors from reopening their case to amend exemptions in order to avoid judicial liens. The BAP pointed out that exemptions are determined as of the date of filing and not as of the date the case closed. The BAP also stated that the debtor's ability to amend an exemption schedule does not terminate with the close of the case. The BAP warned debtors, however, to be sure and give clear and complete notice to the US Trustee of their intentions upon reopening of the case. This will ensure the US Trustee has a full opportunity to review the application to reopen and is not prejudiced by the debtor's later actions in the reopened bankruptcy.

LOCAL BANKRUPTCY COURT CASE NOTE

By Ashley S. Hohimer
Miller Nash LLP

A FACTOR TO BE CONSIDERED

In re Krysl, 304 BR 425 (Bankr D Or 2004)

Plaintiff, an assignee of a claim, brought an adversary proceeding for denial of a chapter 7 discharge. The debtors moved to dismiss the complaint, arguing that the plaintiff was unlawfully conducting collection activity without first registering as a "collection agency," as required under Oregon law. The plaintiff argued he was exempt from registration on the theory that he was merely providing "factoring services" to a commercial client. Because the Oregon statutory definition of collection agency excluded persons engaged in the business of "soliciting or collecting accounts that have been purchased from commercial clients under an agreement," the plaintiff maintained he had no obligation to register.

In an amended memorandum opinion, Judge Radcliffe concluded that the factoring exception specifically contemplated debts that were purchased from an original obligee, where there was some form of "umbrella" or "overall financing agreement" in place. Because there was only one contract between the original obligee and the plaintiff, and that contract involved the sale of a single account, the plaintiff did not qualify as a person providing "factoring services." Thus, the complaint was dismissed based on the plaintiff's failure to register as a "collection agency."

STATE COURT CASE NOTES

By Heather Harriman
Greene & Markley, PC

FRAUDULENT CONCEALMENT IN DISSOLUTION PROCEEDING

Conrad & Conrad, 191 Or App 283, 81 P3d 749 (2003)

The issue in this case is one of first impression: whether ORS 107.452, which provides for the reopening of dissolution cases under certain circumstances, allows a party to a dissolution case to divide property that was excluded from the original decree because the other party concealed the true ownership of the property.

Wife owned a piece of real property. At the time of the couple's dissolution, wife offered evidence that the timber rights on the property had been sold. Two years later, husband sought to reopen the case alleging that wife failed to disclose her ownership interest in the timber. The lower court concluded that husband could not reopen the case because a judgment cannot be set aside for intrinsic fraud (as opposed to extrinsic fraud).

After a lengthy discussion of the overall purpose of the property distribution statute, which is full and frank disclosure of all assets, the Court of Appeals held that ORS 107.452 allows a party to reopen a dissolution case for fraudulent concealment of the true ownership of an asset, even if the parties knew of the asset's existence at the time of the dissolution.

DEFAULT JUDGMENTS: YOU MAY NOT GET WHAT YOU ASK FOR

Moser v. DKN Ind., 191 Or App 346, 82 P3d 1052 (2004)

This case presents a friendly reminder: when granting a default judgment, the court may independently review the affidavit in support of default and determine if the amount sought is correct. Unless the plaintiff requests findings of fact, the court may reduce the amount of damages to an amount the court deems reasonable and the court will not need to explain its reduction. In this case, plaintiff sought default judgment in the amount of $6,000 (noneconomic damages). The court, after reviewing plaintiff's affidavit in support of default, determined that $500 adequately compensated plaintiff. Plaintiff did not request findings of fact, so the court was not required to explain why it had awarded plaintiff only $500 in damages.

WAGE WITHHOLDING VS. GARNISHMENT

Morrow and Morrow, 191 Or App 354, 82 P3d 647 (2004)

Mother and father divorced. Father had two jobs: one at OHSU and one at AT&T. Father's wages from OHSU were subject to a wage withholding order (ORS ch. 25) for current child support plus 20% for arrearages. Father's wages from AT&T were not subject to the withholding order. Mother served a writ of garnishment upon AT&T for unpaid child support and healthcare reimbursement. Father filed a claim of exemption, asserting that the maximum amount of money under ORS ch. 25 was already being withheld by the OHSU withholding order and Mother could not also garnish his AT&T wages.

The court held that Mother could use garnishment proceedings to enforce the support order even though Father's OHSU wages were already subject to the withholding order. Exploring the differences between "garnishment" and "withholding" and the procedures in ORS chapters 18 and 25, the court concluded that garnishments are not subject to the withholding limit at 120% of wages as stated in ORS 25.414(1)(b). However, the court specifically noted in two footnotes that Father did not argue that (1) the combined total of the garnishment and withholding order would exceed statutory withholding limits, or (2) Mother has a chance of double recovery by allowing the garnishment to go forward in the face of the withholding order, so it did not address these issues.

HUSBAND AND WIFE EACH GET HALF OF THE JUDGMENT

McCormick v. City of Portland
191 Or App 383, 82 P3d 1043 (2004)

Husband and wife (plaintiffs) brought claims against the City of Portland for damages to their real property as a result of a landslide. The jury returned a verdict in their favor in the amount of $62,173.44 and the court entered judgment. Plaintiffs appealed on several grounds, one of which was that the court should have treated plaintiffs as two claimants, each of whom is entitled to one half of the total judgment. The court agreed.

Plaintiffs owned real property as tenants by the entirety. The court recognized a line of cases that suggests tenants by the entirety own the entire property rather than a one half interest. In fact, the trial court used this reasoning in refusing to split the judgment. The Court of Appeals determined, however, that Oregon's version of tenancy by the entirety is more akin to a tenancy in common, which provides each tenant with an individual right to bring an action relating to the real property. Thus, the court should have awarded each plaintiff a separate judgment of $31,086.72 (one half of the total judgment).

STATUTE OF LIMITATIONS: NEGLIGENT CONSTRUCTION

Lozano v. Schlesinger
191 Or App 400, 84 P3d 816 (2004)

The 10 year statute of limitations in ORS 12.135 does not apply to a suit brought by a buyer who purchased a house from a seller who also built the house for his or her own family's residence. Seller built a home and used it as his residence for several years before selling to buyer. Buyer sued seller for negligent construction when buyer discovered major water damage in the home. Seller moved for summary judgment, arguing that the 10 year statute of limitations under ORS 12.135 barred plaintiff's complaint. The court, after a review of legislative intent, concluded that ORS 12.135 applies only to actions brought by a "contractee," that is, the recipient of services under a construction contract. The court noted that a different statute of limitations could apply but defendant had failed to raise any other defense.

REASONABLE RELIANCE REQUIRED FOR FRAUD; REVIEW OF PIERCING THE CORPORATE VEIL

OPERB v. Simat, Helliesen and Eichner
191 Or App 408, 83 P3d 350 (2004)

In this factually complex and lengthy opinion the Court of Appeals ruled on three important issues.

First, the court clarified that **reasonable** reliance is an essential element of fraud. The trial court found that plaintiff had established "unreasonable and unjustified" reliance upon defendant's misrepresentations. It entered judgment in favor of plaintiff for fraud because it believed that reliance need not be reasonable to support fraud. The case relied on by the trial court, according to the Court of Appeals, merely provides that reliance is to be viewed in the totality of the circumstances. Thus, the Court of Appeals held that reliance must be reasonable, but reasonableness is measured by the totality of the circumstances. Here, since the trial court explicitly found that plaintiff's reliance was unreasonable, there was no need to remand. The Court of Appeals reversed the judgment for fraud.

Second, to be liable on a claim for piercing the corporate veil, the offending shareholder must have had actual control over the entire corporation. Plaintiff argued that defendant Simon played a substantial role in the improper acts. The Court of Appeals held that was not enough. To be liable on a piercing theory, a shareholder must have had control over the entire corporation, not just the improper conduct that caused plaintiff's harm.

Finally, the court discussed the requisite causation between the improper conduct and the harm. The trial

court determined that defendant Reinbold diverted $2 million. Reinbold argued that plaintiff failed to prove that the diversion of $2 million in assets materially caused the corporation's inability to pay its debts. Plaintiff argued that the $2 million, if not diverted by Reinbold, would have improved the likelihood that the corporation would have obtained the investors it needed to meet its obligations. The Court of Appeals ignored the mathematical gymnastics engaged in by the parties and concluded that plaintiff had proven causation between the milking of $2 million and plaintiff's harm.

RECIPROCITY OF ATTORNEY FEES

Benchmark Northwest, Inc. v. Sambhi
191 Or App 520, 83 P3d 348 (2004)

Defendants executed a promissory note in favor of plaintiff. The note contained an attorney fee clause entitling plaintiff to reasonable attorney fees and collection costs if the note was placed in the hands of an attorney for collection. Plaintiff sued on note. Defendants successfully defended that action and were awarded attorney fees under ORS 20.096(1) (reciprocal attorney fees on contract action where contract provides for attorney fees to only one of the parties).

Plaintiff moved to set aside the judgment. Defendants successfully resisted that motion and sought attorney fees incurred in resisting the motion plus collection costs for their original judgment of attorney fees. Plaintiff opposed defendants' second attorney fee petition, arguing that ORS 20.096(1) does not extend to collection costs and fees incurred in resisting plaintiff's motion to set aside the judgment. The Court of Appeals held that defendants were entitled to their fees: ORS 20.096(1) is to be broadly construed and the scope of defendants' attorney fees should mirror plaintiff's attorney fees had plaintiff prevailed.

ASSIGNMENT OF CONTRACT WITHOUT CONSENT

Clapp v. Orix Credit Alliance, Inc.
192 Or App 320, 84 P3d 833 (2004)

Laser purchased a tractor on an installment basis, granting Orix a security interest in the tractor. The installment contract provided that Laser could not assign the contract without the prior written consent of Orix. Laser assigned its interest in the contract to plaintiff. The tractor was totally destroyed in an accident and plaintiff notified Orix of the loss and demanded the net insurance proceeds in excess of the amount due under the installment contract. Orix paid the net insurance proceeds to Laser. Plaintiff sued to recover the net insurance proceeds under the theory of money had and received. Orix prevailed at summary judgment, arguing that (1) the assignment was ineffective because Orix did not grant permission for the assignment and (2) even if it was effective, the assignment agreement did not cover insurance proceeds.

The Court of Appeals reversed. First, it rejected the trial court's ruling that the assignment was too limited to have transferred a right to the insurance proceeds. The plain language of the assignment provides that Laser transferred all of its "right, title and interest" in the contract and in the property. Thus, it is a broad assignment and includes the insurance proceeds.

The Court of Appeals next concluded that the prohibition against assignment did not invalidate the assignment from Laser to plaintiff, entitling Laser to the net insurance proceeds. Under Article 2 of the UCC, the court concluded that the prohibition did not prevent the assignment because the transfer did not materially impair Orix's rights under the contract or increase Orix's obligations. *See* ORS 72.2100. Likewise, under ORS 79.040(2), a prohibition on assignment does not prevent an unauthorized assignment from taking effect. Orix had notice of the assignment and thus remained liable to plaintiff for the net insurance proceeds.

STRICT FORECLOSURE NOT AVAILABLE IF YOU MATERIALLY BREACHED YOUR END OF THE DEAL

Kim v. Park, 192 Or App 365, 86 P3d 63 (2004)

Defendants purchased an apartment building from plaintiff on a land sale contract. The contract required plaintiff to make certain plumbing repairs within a specified time. Plaintiff did not make repairs within that time. Defendants stopped making the installment payments. Plaintiff sued for strict foreclosure. Applying general principles concerning breach of contract and excuse of performance, the court held that a material breach of a land sale contract by a party prevents that party from obtaining strict foreclosure and also excuses the other party's performance. Here, plaintiff's failure to repair the plumbing constituted an unjustified material breach that excused defendants' obligation to make payments. Plaintiff was therefore not entitled to strict foreclosure. Defendants' payment obligation will resume once plaintiff cures his material breach.

DISMISSAL OF ACTION FOR LACK OF PERSONAL JURISDICTION

Burden v. Copco Refrigeration, Inc.
192 Or App 378, 86 P3d 59 (2004)

One business day before trial, defendant faxed a motion to dismiss to plaintiff, asserting that plaintiff's process server's certification of service contained hearsay

and therefore plaintiff had not put forth competent evidence to prove service of process. The trial court denied the motion, the case was tried, and plaintiff prevailed. The Court of Appeals reversed. It held that (1) the motion was timely, and (2) plaintiff's process server's certificate of service was hearsay and plaintiff had not offered competent evidence of service.

Under ORCP 21, a motion to dismiss for insufficiency of service "shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." The Court of Appeals concluded that "on application of any party" means that the matter need be heard before trial only if one of the parties requests a pretrial determination of sufficiency of service. Here, neither party requested a pretrial determination of the sufficiency of process. Therefore, defendant's motion to dismiss was timely.

Next, the court considered the merits of defendant's motion. Plaintiff argued that service was presumptively adequate and defendant had failed to rebut that presumption. The court disagreed. First, while some cases suggest a presumption in favor of adequate service, those cases mean that use of one of the service methods in ORCP 7 D(2) presumptively meets the general requirement in ORCP 7 D(1) that service be done in a manner reasonably calculated to notify the defendant of the action. Second, the court may consider affidavits and other evidence under ORCP 21 to determine the sufficiency of service. Here, the process server's certificate of service was not sworn and could not therefore be considered as an affidavit. Thus, the certificate was "other evidence" to which the general rules of evidence, namely the hearsay rule, apply. The court held that because plaintiff did not offer a reason why the certificate was not hearsay, the certificate was excluded as incompetent hearsay evidence. Plaintiff therefore failed to prove sufficient service and the action should have been dismissed.

SETTLEMENTS ON THE RECORD

Newton/Boldt v. Newton
192 Or App 386, 86 P3d 49 (2004)

Another friendly reminder: a settlement agreed to in open court is a contract. The only way to avoid such a settlement based upon unilateral mistake (*i.e.*, party's subjective understanding of settlement terms was mistaken) is to prove that the mistake concerned a basic term of the settlement **and** that the other party knew or reasonably should have known of the mistaken understanding.

Plaintiff and defendant entered their settlement on the record in open court. The court engaged in a careful examination of the parties' understanding of and assent to the terms as stated on the record. Thereafter, defendant drafted written documentation to memorialize the settlement. Plaintiff refused to sign. Defendant moved the court for an order implementing the settlement agreement. Plaintiff argued (and the trial court agreed) that plaintiff did not understand the terms of the settlement and the settlement was therefore a nullity. The Court of Appeals reversed. It held that given the trial court's careful colloquy concerning plaintiff's understanding of the terms of the settlement, plaintiff's arguments, at most, demonstrate that she was negligent in her communications with her counsel concerning the terms of the settlement.

YOU CANNOT GET MORE THAN YOU PRAY FOR

Montoya v. Housing Authority of Portland
192 Or App 408, 86 P3d 80 (2004)

Plaintiff sued for noneconomic damages of $40,000 and economic damages of $25,800. Defendant failed to appear. The court entered a default order and judgment of $40,000 noneconomic damages and $39,766 in economic damages. This award exceeded plaintiff's prayer for relief by $13,966. Defendant moved to set aside the default judgment. The Court of Appeals ruled that the judgment should have been set aside to the extent it exceeds the amount for which plaintiff prayed. A court only acquires personal jurisdiction over a nonappearing party to the extent of the relief requested in the complaint. Thus, the default judgment is void to the extent it exceeds the dollar amount pleaded.

VALUATION OF CLOSELY-HELD BUSINESSES

Hanson and Hanson, 192 Or App 422, 86 P3d 94 (2004)

The central issue in this case is how to value a closely-held business — specifically, when to apply a marketability discount in valuing a closely-held business. In *Tofte and Tofte*, 134 Or App 449, 895 P2d 1387 (1995), the court discounted a business valuation for reduced marketability because the appraiser in that case compared the closely-held business with a similar publicly traded business. Because publicly traded businesses are generally more marketable than closely-held businesses, the valuation of a closely-held business should be adjusted downward for the reduced marketability. Here, however, the appraisers compared the closely-held business with other closely-held businesses, so there was no need to discount the valuation for reduced marketability.

CONSUMER BANKRUPTCY

By Amanda Bailey
Vanden Bos & Chapman, LLP

The Consumer Bankruptcy Committee of the Debtor Creditor Section met on March 18, 2004 and discussed the following matters:

Scott Hutchinson announced that a Young Lawyers subcommittee has been formed, and he encourages all young lawyers to participate. The subcommittee's goal is to put on three events per year. It has put on two events to date—a Portland bankruptcy court tour and a Eugene bankruptcy court tour. The subcommittee plans to present a chapter 7 trustee discussion panel in April or May and a chapter 13 trustee discussion panel in the fall.

Wayne Godare, chapter 13 trustee's attorney, updated the anticipated completion date of the new version of the feasibility program to the end of March. The DANCE will be held after completion of the program. The DANCE of homogeneity is put on by Wayne Godare and the trustee's office to promote standardized language in chapter 13 plans. The goal of DANCE is to achieve consistency and efficiency in plan language used by lawyers and the trustee's office. The chapter 13 trustee's office will send out a flyer announcing training classes. If you wish to receive a flyer announcing sign ups for DANCE, contact the trustee's office. Mr. Godare anticipates there will be 40 people per session.

Brian Lynch is the new chapter 13 trustee in Portland.

The Oregon exemption statutes have been renumbered and are now found in ORS Chapter 18 instead of Chapter 23.

Tom Renn, chapter 7 trustee, reported that Mr. Friedman, of the US Trustee's office, believes the proposed amendments to the Federal Rules of Bankruptcy Procedure on document production will pass.

Mr. Renn requested that debtor's counsel bring to the chapter 7 trustee's or US Trustee's attention any asset needing immediate attention as disclosed on "Exhibit C." Due to electronic filing, the chapter 7 trustees are not receiving their paperwork as quickly as before.

The chapter 13 trustee's convention will be held in Las Vegas on June 28.

Todd Trierweiler raised the issue of the court returning petitions due to a disk error. Mr. Trierweiler has received returned petitions as late as 2 weeks after the petitions were filed. This delay can cause problems if there is a pending foreclosure or garnishment. Judge Dunn suggested that the lawyer should ask the court to file the case nunc pro tunc if a time-sensitive issue exists.

Matt Armony, manager of the IRS in Oregon, reported that a national team conducted an evaluation of centralization. As a result, all chapter 7 work will be moved to the service center in Philadelphia. An automated proof of claim program will start filing proofs of claim in August. All phone calls about chapter 7 cases will be routed to an 800 number in Philadelphia and mail in chapter 7 cases should be sent to Philadelphia.

Chapter 13 work will remain in the local office and practioners will still work with Jeffrey Werstler and the other Portland specialists. The IRS will file claims for unfiled returns with estimated claim amounts based on the IRS's data.

Ann Chapman asked who would be permitted to discuss tax issues on chapter 7 cases with the Philadelphia office. Mr. Werstler responded that the technicians will refer to the powers of attorney in the system, and will speak only to the person listed first on the POA.

Mr. Werstler announced that Aimee Lobo Berg, IRS District Counsel, will work in Portland with her work load divided between bankruptcy and tax.

Robert Vanden Bos asked about discharge orders that are sent to debtors with an attachment on the back page indicating they had not been sent to certain creditors and that this may affect dischargeability. Mr. Vanden Bos questioned why these were sent and what purpose they serve. Judge Dunn and Judge Brown will investigate and report their findings.

Ann Chapman raised the issue of gay and lesbian couples filing for bankruptcy and asked what the trustees' positions were on this issue. Pam Griffith has stated the US Trustee's office would refer the issue to the National Solicitor General.

Judge Dunn reported on the status of the *Fillman* case, which has been held over for the new chapter 13 trustee to handle. The issue is, if a chapter 13 is dismissed or converted, what happens to adequate protection provisions that require the trustee to distribute money to creditors instead of debtors or chapter 7 trustees.

The Consumer Bankruptcy Subcommittee usually meets every other month on the third Thursday of the month at 4:30pm in the 8th floor conference room at the United States Bankruptcy Court in Portland. The next meeting will be August 19, 2004 at 4:30pm. All bankruptcy practitioners are encouraged to attend. Please contact Ian Wallace at 503-253-7777 to add topics to the agenda or for further information.

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