

# Newsletter

Volume XXVIII, Number 1 Debtor-Creditor Section, Oregon State Bar Winter 2009

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**By Thomas M. Renn**

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Bankruptcy, unemployment, and foreclosures have been lead stories and front-page news in our lives. In recent weeks, I have had many bankruptcy conversations that were initiated by non-lawyers. Instead of their eyes glazing over when they hear about my area of practice, they have expressed animated views on the economy and the merits of our bankruptcy laws. One such conversation, with a woman born in Germany, involved amazement at the American notion of wiping out debt and giving people a fresh start at a new financial life. I expect these conversations will continue as we struggle through economic hard times.

Because of these issues, other Oregon State Bar sections have contacted me to discuss coordinating programs that overlap with their special areas of interest. The Debtor-Creditor Section has never been more relevant. Of course, that means that we are all getting busier, and we find it difficult to prioritize volunteer activities in the face of looming client demands. Instead of limiting those activities, I hope we can help by becoming even more involved through our great Section committees.

As an example, our Legislative Committee has worked hard up to and during this legislative year. The Section has sponsored four bills and actively reviews many other bills that potentially affect Debtor-Creditor practice. Although the Section doesn't take a position on issues on which our membership might have different policy positions, we don't hesitate to offer suggestions or opinions on improving how the law operates. I think this approach enhances our credibility with the

Legislature. The Legislative Committee meets every Wednesday by telephone, and they often need help testifying in Salem. Please contact David Hercher at 503-205-2628 if you are interested in participating at any level. We have posted a description of the four Section bills on our Section website at <http://osb-dc.org/legislativecommittee.htm>.

The New Lawyers Committee remains busy with regular meetings and educational presentations. We offer free Section memberships to new lawyers in their year of admission and the following three calendar years. You can find more information about the committee and the form for free membership at <http://osb-dc.org/nlcom.htm>. Please contact Doug Ricks at 503-241-4869 if you have questions or want to join the committee.

The 22<sup>nd</sup> Annual Northwest Bankruptcy Institute will be held at the Hilton in Vancouver, Washington, on April 10-11, 2009. The topic, Dirty Debt – Dealing with Real Estate Issues Inside and Outside Bankruptcy, will be timely. Please join us for the usual exciting and valuable education and networking opportunities with the Creditor/Debtor Section of the Washington State Bar.

As you can see in this issue, the Newsletter Committee continues to produce a great product with the newest cases and topics discussed. Our newsletter editor, Debbie Guyol, continues her work on the newsletter, and she also circulates a weekly summary of updates to the bankruptcy court's website ([www.orb.uscourts.gov](http://www.orb.uscourts.gov)), including new decisions posted on the site. That

*Continued next page*

summary helps us keep current with the newest information and changes from the court. The Section website contains an archive of the newsletters in our members-only section of the website and Debbie's court summaries at <http://www.osb-dc.org/orb.htm>. The members-only password has not changed, but you can send me an email requesting the user name and password if you don't have them.

We are currently discussing whether to distribute the newsletter in an electronic version and discontinue the printed version. Other sections have taken that step with minimal problems and have saved the significant printing and postage costs. If you have thoughts or concerns about electronic newsletters, please let me know.

All our committees have their chairs and contact information located on the Debtor-Creditor Section website located at [www.osb-dc.org](http://www.osb-dc.org). Speaking of the

website, we are looking for help with keeping the website current and interesting. We have a great webmaster that does all of the technical changes, and you can let me know if you would like to help. The beginning of the year is an excellent time to become involved with any of the committees or to volunteer for any of our events. If you have any questions, please contact the committee chair or any member of the Executive Committee.

We have a great Section because of the many volunteers that make these events happen. The committee chairs deserve our thanks, as do the many other Section members who participate in various Section activities. Thank you all, and please let me know what I can do this year to make ours an even better section. You can reach me at 503-643-8842 or [thomas.renn@psinet.com](mailto:thomas.renn@psinet.com).

## FORECLOSURE RESCUERS: GOOD SAMARITANS OR SCAM ARTISTS?

By **Terrance J. Slominski**  
Slominski & Associates

In 2008 few news stories were as prevalent as those about mortgage fraud. One type of mortgage fraud has come to be known as Foreclosure Rescue. A cottage industry developed in Oregon and throughout most of the United States in which individuals and organizations offer to save consumers from losing their homes in a foreclosure. It has been hard to escape advertisements – posted on lawns, utility poles, and Craig's List – with the message "Save Your Home." Certainly some rescuers mean well and act accordingly. Many are professionals who negotiate workout rescue plans as part of their licensed profession – e.g., lawyers, real estate brokers and mortgage brokers. The term Foreclosure Rescue, however, has almost come to mean real estate or mortgage scams aimed at consumers who face foreclosure.

### SCAM VARIETIES

Although the methods and forms of the scams vary, they generally fit within four categories.

#### 1. Sale-Leaseback

In this scam the consumer contracts to transfer the home to the rescuer or a third party. At the same time, the consumer enters into a triple-net lease from the purchaser, with an option to purchase the house at a later date for an agreed-upon price or formula. Often the payments under the lease are higher than what the consumer was paying before being rescued, and those payments when added to the option price make it difficult or impossible for the consumer to exercise the option to repurchase. After the consumer misses

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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

a payment or two, the new owner may file an FED action to eject the consumer from the property.

In the typical sale-leaseback scenario, the new owner or third party will either cure the default and continue to make payments on the old mortgage or take out a new mortgage at a lower rate of interest, ostensibly to allow the consumer lower lease payments. Often, however, the rescuer will pocket lease payments from the consumer and not bother to pay the previous or new mortgage, thus setting the consumer up for a new foreclosure.

## 2. Equity Stripping

Equity Stripping is a device used by estate planners and others to protect a consumer's assets. Whether Equity Stripping is a viable or legal estate planning tool depends on many factors, but it is probably safe to say that it is based on the assumption that a creditor will not execute on property over-encumbered with debt. Equity Stripping may be combined with Sale-Leaseback. For this scheme the rescuer or third party obtains new financing in excess of the amount owed by the consumer. The consumer is promised that the house will be saved and that the consumer will receive several thousand dollars in cash back at closing. While the consumer may receive a few thousand dollars at closing, the Equity Stripper often receives tens of thousands of dollars of the consumer's equity. The Equity Stripper then pockets the consumer's lease payments without paying the new mortgage and moves on to the next vulnerable consumer. Shortly thereafter, the consumer receives a notice from a lender that the property is being foreclosed.

The Sale-Leaseback scenario, regardless of whether it includes Equity Stripping, is often a form of predatory lending, and the homeowner's recourse is the same as if the transaction were in the traditional form of a mortgage.

## 3. Loan Modifications

According to the FBI, loan modification schemes are prevalent in areas where foreclosure rates are high. In most of these scams, homeowners are asked for an upfront fee to start a loan modification program. At best, the homeowner pays the scammer for work that probably could have been done for free through nonprofit organizations or loan-modification assistance programs (*e.g.*, Community Housing Council, a nonprofit based in Fresno). At worst, the homeowner pays for work that is not done at all.

## 4. Stealing the Home

In these schemes, there is little pretense of helping the consumer. The rescuer gets the homeowner to unwittingly sign over ownership of the home. Often, the foreclosure consultant promises that he will bring the mortgage up to date and allow the homeowner to stay in the home, setting up a payment plan for the homeowner to pay him back. The victim doesn't realize that the home has actually been sold to the scammer (usually at a ridiculously low price) and ends up paying extremely high rent to stay in the home.

The homeowner usually believes that he or she is signing new loan documents to bring the mortgage current, rather than signing over title to the scammer. In some cases, the scammer may even forge the homeowner's signature on documents.

## REMEDIES AND SOLUTIONS

An attorney representing a homeowner who appears to have been scammed should first obtain copies of **all** documents that concern the loan in any way, including but not limited to: closing documents, correspondence and good faith estimates from loan brokers and proposed lenders, notices of default as well as any other documents that facially appear to concern the origination of the loan or transfer of **any** interest in the property. If the property is in foreclosure, it is important to obtain copies of all documents filed in the county deed records relating to the foreclosure, such as assignments of a beneficial interest in the deed of trust, appointments of successor trustees, notices of default and affidavits of publication and services of the notice of sale. These documents can be obtained from the customer service department of a title company doing business in the county where the property is located. The documents should be reviewed for compliance with lending laws discussed briefly below. This discussion of lending laws and remedies is meant only as a starting point for analysis. Case law and treatises such as those offered by The National Consumer Law Center should be consulted for in-depth discussion of each area of law.

### 1. Home Ownership and Equity Protection Act of 1994 (HOEPA)

HOEPA amended the Truth in Lending Act (TILA), 15 USC §§1601 et seq., and established requirements for certain loans with high interest rates or high fees. The rules for these loans are contained in 12 CFR §226.32 (§32 of the Federal Reserve Board's Regulation Z, which implements TILA). Loans subject to HOEPA cannot have: balloon payments, negative amortization, default interest rates higher than pre-default rates, rebates of interest upon default less favorable than those using the actuarial method, a repayment schedule that consolidates more than two periodic payments to be paid in advance from the proceeds of the loan, most prepayment penalties, loans based on collateral value of the property without regard to ability to pay, refinancing of a HOEPA loan into another HOEPA loan within the first twelve months of origination, and false structuring of a document (such as a high-cost mortgage) as a home equity line of credit where there is no reasonable expectation that repeat transactions will occur.

A HOEPA loan requires heightened and more detailed disclosure under TILA than a non-HOEPA loan, and failure to comply with HOEPA rules may result in the usual three-day rescission period being extended for up to three years. Rescission under TILA allows the homeowner to recover all fees and costs of the loan as well as payments made to the lender for principal and interest. Since most foreclosure res-

cues are not in the form of a traditional loan and mortgage, it is highly unlikely they will comply with HOEPA disclosure requirements.

In most cases the homeowner can assert a claim for declaratory relief declaring the transaction to be an Equitable Mortgage (see comments below) and at the same time make a claim to rescind the mortgage under TILA. The typical Sale-Leaseback and Equity Stripping transactions generally have large costs and fees to be paid by the homeowner which, when added together, qualify the loan as a HOEPA loan. Care should be taken to comply with the TILA notice requirements for rescission. By combining a claim for an Equitable Mortgage with a claim for rescission, the homeowner can unwind the transaction to the date of the transaction and recover all costs, fees and payments made through the date of the rescission. *See Hodges v. Swafford*, 868 NE2d 1179 (Ind App 2007). A very good resource on this subject is *Truth in Lending* (6<sup>th</sup> ed 2007 & Supp 2008), available from the National Consumer Law Center, <https://shop.consumerlaw.org>.

## 2. Financial Abuse of the Elderly or Disabled

Practitioners should look at ORS 124.100 to 124.140, which provides a cause of action for financial abuse of a vulnerable person (including the elderly, financially incapable persons, incapacitated persons, and persons with disabilities susceptible to force, threat, duress, coercion, persuasion or physical or emotional injury because of the person's physical or mental impairment). In a successful claim under ORS 124.100, the court must award the plaintiff an amount equal to three times the economic and non-economic damages resulting from the financial abuse, plus reasonable attorney fees.

## 3. The Mortgage Lender & Broker Act

ORS 59.925 provides a cause of action against a mortgage banker or mortgage broker for violations of provisions in ORS 59.840 to 59.980. A person suffering an ascertainable loss may recover damages in an amount equal to the ascertainable loss. Attorney fees may be awarded to the prevailing party. In some cases, the plaintiff may have a claim against the mortgage broker's bond or letter of credit; *see* ORS 59.850.

## 4. Unlawful Trade Practices Act (UTPA)

A homeowner defrauded in a foreclosure rescue scam may have a claim under the UTPA, ORS 646.605 to 646.652, if the scammer does any one of the prohibited acts described in the extensive list in ORS 646.608 involving real estate, goods or services. Practitioners should carefully review all of the potential violations (including ORS 646.608(1)(u) which requires that the Attorney General has first established a rule declaring the conduct to be unfair or deceptive in trade or commerce). Although the UTPA does not apply to the terms of a loan, it does apply to, for example, a nonlender's representations with respect to services or goods promised in

connection with the loan. *Cullen v. Investment Strategies, Inc.* 139 Or App 119, 911 P2d 936 (1996).

## 5. New Legislation

In March 2008, the Oregon Legislature passed HB 3630, amending ORS 646.607 and 646.608 and placing severe restrictions on persons acting as Foreclosure Consultants and Equity Purchasers. The new law requires written contracts containing certain terms and prohibits certain acts. Licensed professionals, such as mortgage brokers, attorneys, escrow agents, and real estate brokers, are excluded from the term Foreclosure Consultant when they act within the scope of their license and exemption. Although the stringent requirements of the new law should put most Foreclosure Consultants out of business, the fact that mortgage brokers are excepted from the definition of Foreclosure Consultants may defeat the purpose of the law; many homeowners who fall victim to Foreclosure Rescue scams work with and through mortgage brokers. However, it is at least arguable that any exempted professional who participates in or benefits from a prohibited act is not acting within the scope of his or her license.

Both Equity Purchasers and Foreclosure Consultants who violate the new law may be subject to a private right of action under the UTPA.

## 6. Common Law Remedies

A victimized homeowner also has common-law remedies such as breach of contract and fraud, depending on the facts of the case. A breach of contract claim may not provide a complete remedy, however, and all the elements of fraud may be hard to prove. A party may use fraud as a basis for common law rescission if the party acts quickly upon learning of the fraud. A stronger claim may be for declaratory relief, asking the court to declare the agreement to be an equitable mortgage. As such it may require judicial foreclosure as well provide a six month redemption period. *See Swenson v. Mills*, 198 Or App 236, 108 P3d 77 (2005). That claim can be combined with rescission and a HOEPA claim under TILA. *See Jones v. Rees-Max LLC*, 514 F Supp 2d 1139 (D Minn 2007).

### The Honorable Donal Dennis Sullivan

May 29, 1931 – January 23, 2009  
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## BEYOND 2005: CURRENT TRENDS AND FUTURE PREDICTIONS FROM THE PERSPECTIVE OF BANKRUPTCY PROFESSIONALS AND PRACTITIONERS

By **Britta Warren and Rosemary McIntosh**

Todd Trierweiler and Associates

As new attorneys, we are familiar only with post-BAPCPA rules and procedures. Our experience has shown us that debtors must meet arbitrary requirements to file for chapter 7 relief under the Bankruptcy Code and then jump through further hoops to receive a discharge. Debtors who belong in a chapter 7 may wind up in a chapter 13, only to be forced into despair when the chapter 13 fails.

The current economic downturn has made funding a chapter 13 plan difficult. Debtors incur unnecessary attorneys' fees while attempting to keep their case alive by modifying their plan payments to reflect a reduced income. In the end, some debtors are so discouraged that they give up. Conversion to a chapter 7 entails mounting the document requirements once again, and incurring more fees.

The result is that many debtors are denied a fresh start, the quintessential hallmark of bankruptcy. Instead, debtors are left with the stigma of a failed bankruptcy on their credit report as well as their original debts, which have ballooned due to the accrual of interest and penalties during the pendency of the bankruptcy.

We are hopeful that the new administration will reevaluate the effects of BAPCPA on the average debtor, specifically the utility of the means test, the treatment and dischargeability of student loans and the availability of home mortgage cram-downs, so that those seeking protection under the Bankruptcy Code will, in fact, receive a fresh start.

To supplement our own experience on the subject, we solicited input from professionals in various roles in the bankruptcy field. We posed the question: *How has the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) changed the practice of bankruptcy law in Oregon?* Here is what they had to say:

### **Honorable Elizabeth L. Perris, Chief Bankruptcy Judge, District of Oregon**

1. As the amount of consumer and commercial debt has increased, the business community has become more vocal about the impact of bankruptcy and has grown far more interested in the bankruptcy laws. The bankruptcy principles of fresh start and equality of distribution have been eroded as more special-interest legislation has been enacted.

The advocacy for special-interest bankruptcy provisions is likely to continue. The question for the future is whether at some point the pendulum will swing back from the current

trend toward limiting the impact of bankruptcy on creditors toward increasing the fresh start opportunities for debtors. If the pendulum swings in that direction, creditors will likely return to more rigorous credit-granting criteria.

2. Bankruptcy has always been cyclical, with filings increasing during recessions. We now know that the adoption of BAPCPA in 2005 did not change that, because the recent downturn has led to substantial increases in bankruptcy filings, particularly in areas most impacted by the real estate downturn. The current efforts to deal with the mortgage crisis illustrate how hard it is to create a national scale work-out scheme without the potential of bankruptcy relief.

3. A lot of effort during the last few decades has been devoted to making assets bankruptcy proof, through either creation of special purpose entities or application of provisions in the bankruptcy laws such as the limitations on the automatic stay for certain financial assets. To the extent that exceptions to the automatic stay continue to expand, the utility of bankruptcy as a means to maximize value for all creditors through the orderly disposition of assets is limited.

### **Brian D. Lynch, Chapter 13 Trustee**

I can think of three big areas where change has occurred as a result of BAPCPA.

One overlooked but important effect of BAPCPA is the empowerment of debtors' counsel. The National Association of Consumer Bankruptcy Attorneys (NACBA) really grew up around BAPCPA, and has remained an important advocate and source of education for debtors' counsel. Their conferences are popular and well attended, not the least by our bar.

The projected-disposable-income test and the B22C form have greatly affected the process of confirmation. The uncertainty in the law on the meaning of projected disposable income has caused extra work both for the debtor's attorney and the trustee's office, and has raised many new legal issues in an area that had been fairly predictable pre-BAPCPA.

Finally, the changes to the chapter 13 law and practice have affected the economics of chapter 13, increasing the debtor's attorney's fees but in general reducing the value of disbursements to creditors through chapter 13.

### **Richard J. Parker, Parker Bush & Lane, PC**

While it may be reassuring to be part of one of the few growth industries for the coming year, I am concerned about the ongoing destruction of the middle class. I see increasing numbers of people who have lost not only the equity in their homes through devaluation or sub-prime refinances, but also the bulk of their retirement savings. The loss of value of 401K plans, and borrowing necessitated by the stagnation of income and loss of fringe benefits in the face of rising costs, will have an adverse impact for years. This impact is made even worse by some quirks of the tax code such as the alternative minimum tax and a less progressive tax rate than we had historically.

Over the course of 30 years in practice, I have seen several recessions. None has been such a perfect storm of events as the one we're experiencing now, which has made many families downwardly mobile. If you add the burden of non-dischargeable student loans to the housing and 401K mix, you have an inevitable downward slide of the middle class and an inability to climb out of an existing adverse situation. I see more and more senior citizens still burdened by large student loan debt and facing garnishment of social security by the agencies.

The changes to the Code from BAPCPA have not made a great difference to lower income people, except to raise the cost of relief and to aggravate attorneys with additional paperwork. However, many middle class families are now forced into chapter 13 cases, where they really do not belong. There are many cases which require no payment to general unsecured creditors and the trustee and the debtor attorneys are left to do CPR on cases which should have been simple chapter 7 liquidations.

All of the above is compounded by the job losses from business shutdowns. Even discounting the fallout from the housing crisis (realtors, brokers, contractors, etc.), many marginal business ventures that provided income for two or three people have been forced to close. In addition, restaurants that have supported entire families have shut down. Even Genoa, a Portland institution for 38 years, has closed, stating that it could not survive in the current economic climate.

I do not see an easy cure for the current situation, but it would be greatly eased by amending §1322(b)(2) to allow residential mortgages to be modified. That change, together with relaxation of the student loan discharge standards and changes in the tax code to allow for greater deductions, would give the middle class a fighting chance. If some of these changes are not made, I see a massive increase in bankruptcy filings and a continued decline in the standard of living for much of the population. Even if some of the changes are made, we should still anticipate increased bankruptcy filings for 2009.

### **Todd Trierweiler, Todd Trierweiler & Associates, Bankruptcy Law Center**

#### **Uncertainty**

BAPCPA has changed the practice of bankruptcy in Oregon in significant ways. For the last two decades, most of the major issues in the bankruptcy practice were well established. Debtors' counsel could fairly accurately predict the outcome in a client's case, as well as the cost of filing the case. Now, uncertainty begins when the debtor walks in the door and you have to decide whether he or she will qualify for a chapter 7 or chapter 13 bankruptcy. Often this determination is easy, but in a number of cases it requires rigorous review of the client's finances. Those close calls create stress for the client as well as higher cost. Even if the debtor is eligible for chapter 7, there is still uncertainty about whether the client will be subject to a random audit, or may fail to

comply with additional procedural requirements such as taking the financial management course post-filing. If the debtor moves into a chapter 13, there are issues of what the debtor's payments would be under means testing (*i.e.*, three years or five years). If the debtor has a business, there is the question of how to account for the debtor's expenses. Is a debtor with a negative disposable income required to pay for sixty months, thirty-six months, something in between, or something less? Is the debtor able to cram down the debt on a vehicle? These and other issues await the debtor in a chapter 13 case. Whenever you have uncertainty, you have unhappy clients, an increase in malpractice claims, and a significant increase in costs.

#### **Unintended Consequences**

BAPCPA has had several unintended consequences. Initially, a major goal of Congress was to encourage the filing of chapter 13 cases. Some debtors' counsel believed this was a smoke screen, but if it was indeed the intent, Congress did a poor job of drafting the statute. With the elimination of the super-discharge, requirements for many parties to file five-year plans, reduction in cramdown on vehicle debt, and the other burdens on chapter 13 debtors, chapter 13 became much less attractive. As a side note, one of Congress's major concerns was to keep people out of bankruptcy by requiring a credit counseling class. In three years of filing thousands of post-BAPCPA chapter 7 cases, I have not had a single client who failed the credit counseling class and was thus prevented from filing for bankruptcy. This requirement is an unnecessary burden upon the debtors.

Unsecured creditors were major proponents of BAPCPA. Unsecured creditors receive significantly less now in chapter 13 cases than they did before the change in the law.

Finally, an unfortunate result of the means test is that renters and parties without significant secured debt were placed at a disadvantage relative to persons with higher income but also higher secured debt payments. Due to poor drafting, BAPCPA created contradictions in the statutes that cannot be neatly reconciled, and it created a system where lower income clients were treated less fairly than some high-income filers.

BAPCPA has put significant reporting requirements on clients who often are document-challenged. Many trustees who review the documents give them cursory attention at best. A fair number of clients simply do not file for bankruptcy because they cannot obtain the necessary documents or are worn down by the sheer volume of information they must provide. Those who are able to obtain the documentation are faced with increased costs by attorneys who must review the documents. Very little of the documentation provides benefit to the system; there are only increased costs.

Credit counseling classes create an additional level of cost and burden on the debtor. In a random audit of the clients taking the credit counseling class, virtually none of our clients felt they had gained anything from the pre- or post-filing courses.

## Future Issues

I believe there will be three areas of impact of the new bankruptcy law moving forward.

First, there will be more litigation dealing with liens against second mortgages on residences. Even if the current administration does not change the law, debtor's counsel can strip liens where there is no equity in the debtor's residence.

Second, due to increased costs and decreased income, a significant portion of the population will be unable to file for protection under the Bankruptcy Code.

Finally, with credit tightening and lenders having their own financial issues, the creditor's bar will be more aggressive in the bankruptcy process. This will increase the costs in the system.

## CONCLUSION

We offer our sincere thanks to those who contributed to this article: Judge Elizabeth Perris, Brian D. Lynch, Richard Parker and Todd Trierweiler.

## WORDS TO THE WISE FROM A SUSPENDED DEBTOR-CREDITOR ATTORNEY

By Andrew Toth-Fejel<sup>1</sup>

Every month in the *Oregon State Bar Bulletin*, we read stories of the discipline meted out to attorneys. We may wonder, as we read, how anyone could be so foolish. But (sometimes in the same breath) we worry that we too might run afoul of the Bar's disciplinary process. So we try to follow the Rules of Professional Conduct and to practice law ethically. As a debtor-creditor attorney for 17 years, I, too, intended to follow these rules and practice law well, yet I was suspended.

There were three claims against me that resulted in my suspension. None were brought by clients.

1. I faced a sanctions motion by a creditor in a chapter 11 case involving a sham corporate debtor. I had plenty of clues that I should have investigated the client and its principal more thoroughly. But my wife had just been hospitalized, money was very tight and time in the office was limited, so I participated in the bad faith filing of the case. Soon thereafter, when the sanctions motion was filed against the debtor, its principal and me, I knew I needed to withdraw as counsel. Although I sought an ethically appropriate way to do so, I failed to contact the bar, the PLF, or any of my

colleagues, for advice. Although the corporation's principal stopped cooperating in the case, I foolishly tried to defend the sanctions motion against both my client and myself. A huge sanctions order was entered against me, resulting in significant risks to an innocent former law partner, and many months of litigation and appeals involving the PLF.

2. When a title company sent me a debtor-client's large check that belonged to the chapter 7 trustee, I delayed dealing with it for months. I told myself that the debtor had a possible exemption (the funds were indirectly related to a retirement account), and that there was no hurry since other assets would eventually be available from a personal injury settlement. Because of my client's gambling problem, I had worked for her through the intervention of her adult children to whom she had given power of attorney, but she withdrew that power of attorney and was difficult to work with, adding to my rationalizations for avoiding the matter. As a result not only did I not reply timely to the turnover order that the trustee was compelled to get from the court, I also made false representations to the trustee's attorney.

3. In another matter, I became dissatisfied with my partnership's expense allocation formula and our efforts to renegotiate it, so when a client made a payment, I deposited it into my personal account instead of the partnership account. I convinced myself that I would make up the funds shortly, and on that occasion I did. But then I did the same with other client payments. For a while I was able to reimburse the partnership, but eventually I could not. This cycle continued for months until my partner discovered it and understandably reported it to the Bar.

Following my suspension, I have had to relearn principles of healthy law practice. These will be at the heart of my practice when I am reinstated. In the hope that other attorneys will benefit from my experience, I urge you to heed the following principles in your practices.

## Trust Your Instinct for Trouble

We are all ethical beings who begin to build moral compasses very early in life. As attorneys dealing with difficult clients and facing litigation and practice dilemmas, we need to become more attuned to circumstances we should avoid. Beyond having a clear understanding of the Rules of Professional Conduct and an absolute commitment to abide by them, we all need to figure out what we are not willing to live with in terms of risk and professional discomfort, and to be uncompromising about it.

In each of the instances described above, I rationalized behavior that I knew was highly problematic. I let my own financial and personal issues cloud my judgment. Since then, I have been mindful of the courage and steadfastness of attorneys who make hard choices without regard for personal benefit, based on their knowledge of the ethical rules and their gut sense of what is right – a higher standard than those rules. Their moral standards are independent of those of their clients; they lead their clients instead of allowing their clients to sway their decisions. I try to emulate those attorneys.

<sup>1</sup> Bankruptcy Litigation Support for Attorneys, [Andy@BLSforAttorneys.com](mailto:Andy@BLSforAttorneys.com); Telephone office: 503-292-4344, cell: 503-310-7944

I let my own moral compass slip. Now I urge attorneys not only to meet the minimum standards of the Rules of Professional Conduct, but also to be conscious of their own ethical comfort level. Ultimately your decisions need to come from your own personal code. And when you feel yourself slipping, seek support from mentors or the Bar's counsel so you can stick to both the formal ethics rules **and** your personal code. Not only will this help you avoid ethical trouble, it will help you sleep at night and have a more satisfying law practice. You will live a life of integrity instead of simply following external rules.

## **Cultivate Diverse Professional Relationships**

We all understand the critical importance of colleagues and mentors; most of us benefit from friendships with attorneys in related fields whom we can consult on legal questions and for client referrals. It is also good to have attorney friends in different fields who can give an outsider's informed perspective on a practice-administrative or client-relationship problem. In appropriate circumstances, an accountant, realtor, banker or business person can open our eyes to solutions beyond our usual perspective. Joining bar organizations introduces us to different perspectives – such as those of opposing counsel, judges and trustees – adding understanding and human richness to the day-by-day law experience.

On the other side, acting as mentor to less-experienced attorneys reminds us of how much we know, and of the value of our own experience; one learns a great deal in the process of teaching.

I feel some of my problems arose from letting my professional associations wither. I lost sight of the infinite benefits – tangible and intangible – of professional and business friendships, and told myself I didn't have time to keep them up. I did not appreciate that those connections could help me practice law and help make it more enjoyable. I grew distant from my partner down the hall as our financial tensions grew, and I allowed myself to get professionally isolated. When the situation described above in the first claim against me arose, I did not have any attorney friend I felt I could turn to for counsel. In retrospect there was an obvious solution, one that any attorney acquaintance would have been able to point me towards. This failure to make that one phone call resulted in a very large sanctions order and judgment against me in bankruptcy court, and a PLF claim against not only me but also my uninvolved former law partner.

Today I am convinced that the time invested in cultivating diverse attorney and other professional relationships is time well spent – on so many human and professional levels. And indeed, during my suspension I have built a web of enjoyable and sustaining friendships, which remind me how sadly unwise I was to neglect this aspect of life and law practice.

## **Stay Close to Family and Friends**

The practice of law can be all-consuming, but if your law practice takes over your life it can be destructive. Keeping the people who are important to you as the focus of your life is critical to maintaining a healthy perspective. Tending to your family reminds you of your personal roots and your life goals. Finding new friendships and nourishing old ones is essential to maintaining balance in your life.

I hardly noticed as I let my law practice take over my life. Although I was helping to raise three kids and support my then-wife through a Ph. D. program, all my other time and energy went into the law. My large out-of-state family got fewer and fewer phone calls from me. I stopped connecting with old friends and had no time to make new ones. I developed mental and emotional tunnel vision. There were virtually no enjoyable or interesting parts of my life outside the law, other than my immediate family members – and my time with them grew more tense as my law practice crowded my consciousness. Eventually, in part because of my fixation on the law practice and inability to find a balanced life, and in part because of my suspension, my 21-year marriage ended in divorce and my relationship with my children was deeply wounded.

The more challenging your law practice is, the more important it is to stay close to your family and friends – to stay grounded. Build time into your schedule for getting together with your friends outside the law. Participate in an activity that inspired your earlier passions, perhaps spending a season with the Mazamas training to summit Mount Hood or sitting on the board of a chamber music group. Force yourself to keep law in perspective.

## **Like Your Work or Change It**

Changes in the legal profession in recent decades mean many attorneys have professional lives different – and less satisfying – than those they anticipated. Many attorneys find themselves frustrated and confused, and trying to practice law in unhappy environments. The traumatic financial events of the last year are reminders that the business and legal worlds will continue to evolve, and likely even more quickly.

People react differently to unhappy situations. Some have no trouble saying, "I'm outta here," then figuring out how to make a transition. Others, like me in the past, reason that the bad situation could be of their own making, and that they can fix things with a change in approach and perhaps a redoubling of effort. Out of misplaced loyalty and fear of the unfamiliar, I stayed with a law partnership long after it became clear that staying was not in my own best interest. I spent years fruitlessly negotiating with my former partner over an expense division formula. I made efforts to leave and join other firms, but never quite made it happen. Further, I did not believe I could administer my own solo attorney business and so mistakenly restricted my options. I did not seek objective advice about my partnership disagreement or about the skills it takes to be a solo practitioner. I did not demand for myself a certain minimum level of job satisfaction.

Few work environments are perfect, and it can be difficult to discern whether an unsatisfactory environment can be made tolerable. If you feel the need to change your work environment, set aside sufficient time and seek out good counsel to help make a change. Have confidence in your capacity to move into other areas of law and to use talents you may not have tapped. Nurture your ability to adjust to new challenges – that is one of the most important skills of the contemporary professional.

### Take Care of Business

Most attorneys enter law practice unprepared to operate a business; they must learn to do so at the same time they learn to practice law. Many choose a legal career without any interest in operating a business, and resist that aspect of practice. This is a mistake. Attorneys in private practice should understand that unless they master the business side, they will flounder.

I had no family background in running a business and no desire to do so. Indeed, I looked at “business people” as fixated on making money, perhaps even greedy or unscrupulous. I reluctantly learned the minimum that I thought I needed, but I had no passion for it, and in particular did not grasp the connection between a financially sound business and a satisfying professional life. I avoided office administrative issues, to my financial detriment. I focused less on my own financial responsibilities than on my responsibilities to my clients. I called this attitude “dedication.” That “dedication” cost me a couple hundred thousand dollars in lost revenues over about six years. And the lost revenue in turn drove me to take on clients I should have turned away, because of their intractable financial predicaments or the delicate ethical issues presented, or both.

During the traumatic two years that the ethics complaints against me were pending – after I went from a partnership to a solo practice – I felt I had finally learned the importance of running a sound business and the skills to do so. I learned these lessons in part by necessity – I was on my own with an employee to pay and an ex-partner to repay – and in part from reflecting on my ethics violations and why they had occurred. Then after my license to practice law was suspended, working as an employee or on contract in law firms, I paid close attention to the infinite variety of law firm business models and practices. I witnessed the consistent correlation between attorneys’ attention to sound financial management and their job satisfaction.

Learn how to take good care of the business side, or sooner or later, one way or another, there will be no law practice to take care of.

### Conclusion

While other principles are also important, the foregoing are the ones that, when violated, proved most damaging to me. The practice of law challenges our intellectual and emotional intelligence, our whole persons. Many enter the field exactly because it is **not** one-dimensional, because they

enjoy the challenge and excitement of handling different kinds of responsibilities. But law practice takes much professional wisdom. Embrace the process of striving for that wisdom. I look forward to rejoining you in the future and doing the same.

## MATRIX DEVELOPMENT – WELCOME TO THE REAL WORLD

By Susan Alterman

On October 9, 2008, in *Matrix Development Corporation*, Case No. 08-32798 (Bankr D Or 2008), the court issued a letter ruling that will be of great interest, and some concern, to lenders that use dragnet clauses in their loan documents. Judge Brown’s decision brings to light an earlier decision, *In re Wollin*, 249 BR 555 (Bankr D Or 2000), and its application to all dragnet clauses, consumer and commercial. If the *Wollin* case didn’t catch your attention in 2000, you should take note of it now in conjunction with the *Matrix* decision.

Bank made a series of loans to Matrix Development Corporation (Debtor), with each loan evidenced by a promissory note. Bank also made a loan to Debtor’s wholly-owned subsidiary (Subsidiary), evidenced by a separate promissory note. Debtor guaranteed the note from the Subsidiary. Debtor signed separate loan agreements for each note. Each loan agreement included the following provision, purporting to cross-default and cross-collateralize all the loans to Debtor and Subsidiary:

#### G. Cross-Default/Cross-Collateral:

Borrower understands that the Loan is cross-defaulted with the other loans from Lender to Borrower or its affiliates (collectively, the “**Related Loans**”), such that a default under any one of the Related Loans constitutes a default under the Loan. Additionally, all of the Related Loans are cross-collateralized, such that following an event of default under any of the Related Loans, Lender, in its discretion, may exercise its rights and remedies against any and all of the collateral securing any of the Related Loans.... (emphasis in original)

Debtor gave Bank trust deeds to secure its debts to Bank. Each trust deed included the following provision as section 1.2, stating what obligations the deed of trust secured:

Borrower makes the grant, conveyance, transfer and assignment set forth in Section 1.1, and grants the security interest set forth in Section 2.1 for the purpose of securing the following obligations (the “**Secured Obligations**”) in any order of priority that Lender may choose: (emphasis in original)

Three sub-paragraphs of Section 1.2 listed the obligations that the deeds of trust secured and were relevant to the court’s ruling. These were:

**1.2.2. Loan Documents.** Payment and/or performance of each and every other obligation of Borrower under the Note, this Deed of Trust, any construction or land loan agreement executed in conjunction therewith (the “**Loan Agreement**”), all other documents evidencing, securing, or otherwise governing the Loan (specifically excluding, however, for purposes of establishing the Secured Obligations, any obligations of Borrower arising solely under any guaranty of the Secured Obligations or any indemnity agreement that by its terms is not secured hereby), and any and all amendments, modifications, and supplements thereto (collectively, the “**Loan Documents**”), the provisions of which are incorporated herein by this reference;

**1.2.3. Related Loan Documents.** Payment and/or performance of each covenant and obligation on the part of Borrower or its affiliates to be performed pursuant to any and all loan documents (the “**Related Loan Documents**”) that have been or may be executed by Borrower or its affiliates evidencing or securing one or more present or future loans by Lender or its affiliates to Borrower or its affiliates (collectively, the “**Related Loans**”), whether now existing or made in the future, together with any and all modifications, extensions and renewals thereof; provided, however, that nothing contained herein shall be construed as imposing an obligation upon Lender, or as evidencing Lender’s intention, to make any Related Loan to Borrower or its affiliates . . .

**1.2.4. Future Obligations.** Payment to Lender of all future advances, indebtedness and further sums and/or performance of such further obligations as Borrower or the then record owner of the Project or the then owner of the balance of the Collateral may undertake to pay and/or perform (whether as principal, surety, or guarantor) for the benefit of Lender, its successors or assigns, (it being contemplated by Borrower and Lender that Borrower may hereafter become indebted to Lender in such further sum or sums), when such borrowing and/or obligations are evidenced by a written instrument reciting that it or they are secured by this Deed of Trust;

After Debtor filed its bankruptcy petition, Bank argued that all the notes from Debtor and Subsidiary were secured by all the trust deeds from Debtor and Subsidiary.<sup>1</sup> Bank also argued that Debtor’s guaranty of Subsidiary’s note was secured by Debtor’s other trust deeds to Bank. Debtor countered with a three-part argument: First, because paragraph 1.2.2 of the notes excludes from the Secured Obligations any

guaranty of the Secured Obligations, Debtor’s guaranty of Subsidiary’s debt was not itself secured by the trust deeds; second, loans that the Bank made in connection with a particular trust deed were not secured by any prior trust deed because no written instrument for any loan recited that the loan was secured by the prior deeds of trust (relying on the language of section 1.2.4); and last, that no trust deed secured antecedent debt; that is, no trust deed secured any debt that Debtor already owed to the Bank. Debtor thus argued that each trust deed secured only its own loan and not any of the other loans.

The Court ruled in favor of the Bank on the first issue, but ruled in favor of the Debtor on the others.

### Guaranteed Debt

On the first issue, the court agreed that paragraph 1.2.2 did exclude from the Secured Obligations any guaranty of the Secured Obligations, but ruled that paragraph 1.2.3 included within Secured Obligations any debt of an affiliate of Debtor. The loan to Subsidiary was a loan to an affiliate of Debtor, and was therefore included in the definition of a Secured Obligation under 1.2.3 even though it wasn’t covered under 1.2.2. Accordingly, the Subsidiary note was secured by antecedent and subsequent trust deeds to the same degree that the Debtor’s own obligations were secured by those trust deeds.

### Future Advances

On the second question (whether the loans were secured by the earlier trust deeds), the court considered the language of paragraph 1.2.4, said that it plainly applied to all future advances and was not limited to future advances under any specific note. The court held that the trust deeds did not secure any later debt incurred by Debtor because none of the later notes said they were secured by any identified earlier deed of trust. The court then took away Bank’s victory on the first issue, ruling that the Subsidiary note qualified as a future advance, relative to prior trust deeds from Debtor, but because the Subsidiary note did not say it was secured by any of Debtor’s property (only by Subsidiary’s property), it was not a Secured Obligation.

### Antecedent Debt

The court’s ruling on the third question should cause Oregon lenders to consider redrafting their dragnet clauses. The Bank argued that section 1.2.3, which states that obligations existing at the time the deed of trust is executed are to be Secured Obligations, made each note secured by any trust deed executed afterward a Secured Obligation. The court agreed that section 1.2.3 says exactly that, but ruled against Bank based on *In re Wollin*, 249 B.R. 555 (Bankr. D. Or. 2000). In *Wollin*, the debtors borrowed from a credit union to buy cars, and gave the credit union a security interest in the cars. Each security agreement said the security interest in the car secured not only the current loan but all prior loans. The *Wollin* court rejected the credit union’s argument that the language meant what it said, holding instead

1 The opinion doesn’t say why the Bank had to make this argument. One inference is that some of the properties were worth more than their debt, and others were worth less than their debt, and the Bank wanted to use the equity surplus in the first group against the undersecured debt in the second group.

that (as quoted by Judge Brown in *Matrix*): since the antecedent debt is already owed by the borrower to the lender, the parties would have had no good reason not to identify it in the subsequent security instrument if they had truly intended that the deed of trust or mortgage to cover it.<sup>2</sup>

All the notes and trust deeds in *Matrix* were signed after 2000, when *Wollin* was decided. The court, stating that *Wollin* was good law, concluded that the Bank was on notice that, if it wanted a trust deed to secure antecedent debt, it must identify the antecedent debt in the trust deed. Thus none of the trust deeds secured any of the antecedent debt, because the Bank didn't specifically identify any antecedent debt in any of the trust deeds.

What lesson does *Matrix* offer banks that use dragnet clauses?

In Oregon, and under the jurisdiction of the Bankruptcy Court, a dragnet clause in any security agreement or trust deed must specifically describe all antecedent debt intended to be secured by that security agreement or trust deed. Each subsequent security agreement or trust deed must again recite all known antecedent debt of the borrower in order to properly secure and cross-collateralize the debt. Unless you specifically list the prior debt, "all prior debt is secured" now means "no prior debt is secured."

## NINTH CIRCUIT CASE NOTES

By **Matthew Goldberg**

K&L Gates

### **WILLFUL COPYRIGHT INFRINGEMENT MAY NOT SATISFY §523(A)(6)'S REQUIREMENT OF WILLFULNESS TO RENDER A JUDGMENT NONDISCHARGEABLE**

*In re Barboza*, 545 F3d 702 (9<sup>th</sup> Cir 2008)

Debtors copied, distributed and sold unauthorized copies of Spanish-language movies. The copyright holder sued the debtors in district court and received a jury verdict of \$900,000 for willful copyright infringement.

Debtors filed for bankruptcy. The court declared the debt nondischargeable as a willful and malicious injury under §523(a)(6). The BAP affirmed, and the debtors appealed.

The Ninth Circuit reversed and remanded, reasoning that willful has different meanings in different contexts. In the law of copyright infringement, willful may mean intentional **or** reckless. In the context of §523(a)(6), however,

willful does not include reckless. Citing the US Supreme Court decision in *Kawaauhau v. Geiger*, 523 US 57 (1998), the Ninth Circuit stated that willful injuries under §523(a)(6) must be deliberate or intentional. Thus, a finding of reckless infringement would be an insufficient basis on which to declare a debt nondischargeable.

The court remanded to the bankruptcy court for a clearer determination of whether the jury's verdict in the district court case had been based on debtor's knowing or reckless conduct. The court also found that both the bankruptcy court and the BAP had committed reversible error by failing to separately consider §523(a)(6)'s requirement that a non-dischargeable debt must have been malicious in addition to having been willful.

### **PRODUCING BOXES OF UNIDENTIFIED DOCUMENTS WILL NOT DEFEAT DENIAL OF DISCHARGE CLAIM**

*In re Caneva*, 550 F3d 755 (9<sup>th</sup> Cir 2008)

Debtor repeatedly amended his schedules and statement of financial affairs. One amendment added to Schedule B ownership interests in 15 business entities, though the extent of these interests was listed as unknown. Debtor admitted that many of his business entities had kept no records, but he eventually produced several boxes of unidentified documents.

Creditor sued to have Debtor's discharge denied under §727(a)(3) for failing to keep or preserve records. The bankruptcy court denied debtor's discharge, and the district court affirmed. The debtor appealed.

The Ninth Circuit affirmed, stating the debtor had an affirmative duty to keep and preserve records that would allow the trustee and creditors to ascertain the debtor's financial condition and transactions. Moreover, debtor had not even tried to meet his burden of justifying his failure to keep records.

The court did note that §727(a)(3) does not require absolute completeness in keeping business records. The expected quality of a debtor's business records varies, the court said, depending on the financial sophistication of the debtor and the quantity of assets involved in the case. Because this debtor had controlled various businesses with significant assets – including an airplane – the debtor's document-dump was insufficient to preserve his discharge.

### **NO ABSOLUTE RIGHT TO DISMISS CHAPTER 13 CASE**

*In re Rosson*, 545 F3d 764 (9<sup>th</sup> Cir)

Debtor filed for chapter 13, and told the court he would use the expected proceeds of an arbitration award to pay his debts under his plan. Debtor received proceeds in the amount of \$185,000. The bankruptcy court ordered the award deposited with the trustee.

<sup>2</sup> The *Wollin* court cited an Alaska case that involved real estate loans.

The next month, at an unrelated hearing, the court learned that the arbitration proceeds had not been deposited. It ordered the debtor to deposit the proceeds within one hour or the court would convert the case to chapter 7. The money was not delivered, and the case was converted – though no formal conversion order was issued.

That same day the debtor moved to dismiss his chapter 13 case. The bankruptcy court denied the motion and entered a formal order converting the case to chapter 7. The district court affirmed and the debtor appealed, arguing his right to dismiss was absolute.

Although §1307(b) states that a court shall dismiss a case upon the request of the debtor, §1307(c) states that a court may convert a chapter 13 case for cause. The court noted that these two subsections are in conflict when the debtor seeks a voluntary dismissal and a creditor or trustee moves for conversion.

The Ninth Circuit affirmed, stating that a debtor's right of voluntary dismissal under §1307(b) is not absolute, but is qualified by the authority of a bankruptcy court to deny dismissal on grounds of bad-faith conduct or to prevent an abuse of process. 545 F3d at 774. The court relied on the US Supreme Court's decision in *Marrama v. Citizens Bank of Massachusetts*, 549 US 365 (2007), which held that the right of a chapter 7 debtor to convert to chapter 13 is not absolute. Because the language in §706(a), which *Marrama* analyzed, is indistinguishable from that of §1307(b), the court held that *Marrama* controlled.

Though *Marrama* did not define bad faith, the court found that debtor's behavior in this case rose to the bad-faith level. Eventually, debtor had deposited some proceeds with the trustee, but in an amount of only \$104,000; he had used the difference to remodel his home. Besides debtor's dubious explanation that he thought remodeling his home with part of the proceeds was consistent with his chapter 13 plan, the court emphasized that the use of the money was in outright defiance of the bankruptcy court's order.

not dissatisfied with the firm's services, she stated that she was prepared to proceed *pro se* since she could not afford to be represented.

Muhlheim moved to withdraw, and the US Trustee objected on the grounds that there were pending discovery requests and an imminent evidentiary hearing on the motion to dismiss. The bankruptcy court did not accept Muhlheim's argument that it could no longer ethically represent the debtor because she had discharged the firm. The court gave Muhlheim three days to refund the retainer and be withdrawn from the case, or the motion to withdraw would be denied. The next day Muhlheim refunded the \$1,000.

The US Trustee sought clarification on whether Muhlheim could seek attorney fees for its services. The court clarified its order to state that unless Muhlheim filed a declaration within 5 days that it was not waiving its fees, the motion to withdraw would be granted and the fees deemed waived; if such declaration were filed, the motion to withdraw would be denied and Muhlheim would be permitted to require payment for the \$1,000 previously refunded. Muhlheim challenged this order on the basis that it violated the Oregon Rules of Professional Conduct and the Bankruptcy Code, and sought to have the order amended. The court denied the motion and Muhlheim appealed.

The District Court held that the bankruptcy court did not abuse its discretion in formulating its unusual grant/deny alternatives, since the judge had considered all of the pertinent issues and made a compromise. With regard to Muhlheim's argument that continuing representation after being discharged by its client was unethical under Oregon Rules of Professional Conduct 1.16(a), the court noted that the rule permits a lawyer to continue representation when ordered to do so by the court, notwithstanding good cause for terminating the representation.

The District Court agreed with Muhlheim that it was entitled to notice and a hearing regarding the reasonableness of its fees under Ninth Circuit precedent, and remanded to the bankruptcy court to give Muhlheim an opportunity to present legal argument and evidence.

## DISTRICT OF OREGON CASE NOTES

**By Chris Parnell**  
Farleigh Wada Witt

### **BANKRUPTCY COURT'S COMPROMISE ON REPRESENTATION AFFIRMED AND REMANDED**

*Muhlheim Boyd, LLP v. Miller*, 2008 WL 4775108  
(D Or 2008)

After the US Trustee filed a motion to dismiss for abuse of chapter 7, Muhlheim Boyd LLP (Muhlheim) was substituted as counsel for debtor. Debtor paid Muhlheim a retainer of \$1,000. Debtor worked with Muhlheim for several weeks, then asked the firm to withdraw. While she was

### **POST-DISCHARGE FCRA CLAIMS FAIL CLOSE NEXUS JURISDICTION TEST**

*Duke v. Trans Union LLC*,  
2008 WL 4319982 (D Or 2008)

*Kasim v. Equifax Info. Svcs., LLC*,  
2008 WL 4858267 (D Or 2008)

In this pair of cases involving the same attorneys on appeal, the District Court affirmed the bankruptcy court's dismissal of plaintiffs' FCRA claims for lack of subject matter jurisdiction. There was no bankruptcy court jurisdiction over the non-core proceedings under the Ninth Circuit's close nexus test articulated in *In re Pegasus Gold Corp.*, 394 F.3d 1189 (9th Cir 2005).

In *Duke*, plaintiffs filed for chapter 13 bankruptcy in 2001 and received a discharge; in *Kasim*, plaintiff filed for chapter 11 bankruptcy in 2004 and received a discharge. Both plaintiffs commenced actions in bankruptcy court in 2007 alleging post-discharge FCRA violations against the credit reporting agency defendants. In both cases, plaintiffs conceded that the proceedings were non-core, but argued that the bankruptcy court could exercise jurisdiction since the actions raised issues concerning the effect of the discharge and thus the requisite close nexus existed between the bankruptcy and FCRA claims.

The District Court held that such issues do not rely on an interpretation, implementation, consummation, execution, or administration of a bankruptcy plan, and therefore the bankruptcy court lacked subject matter jurisdiction.

held an equitable interest in the trust and its assets; or (2) could exercise powers over the corpus of the trust for his own benefit.

The BAP agreed with the bankruptcy court's conclusion that Debtor did hold an equitable interest in the trust as a beneficiary. The BAP went a step further, and held that the bankruptcy court should have granted summary judgment to the Trustee as to the entire trust corpus rather than only specific trust properties, since the trust agreement allowed the debtor to exercise control over and reach trust property contributed by others. Ultimately the BAP held that the entire trust corpus was property of the estate, since debtor possessed the power to invade the corpus and make distributions for his own benefit.

## BAP CASE NOTE

**By Chris Parnell**  
Farleigh Wada Witt

### SELF-SETTLED SPENDTHRIFT TRUST ASSETS MAY BE PROPERTY OF THE ESTATE

*In re Cutter*, 398 BR 6 (9th Cir BAP 2008)

In *Cutter*, the court considered whether certain assets owned by debtor's self-settled spendthrift trust were property of the estate. The BAP characterized the trust as a failed asset protection scheme, and expressly published its opinion in order to call attention to a fundamental fallacy inherent in that scheme. It ruled in favor of the bankruptcy trustee (the Trustee) that certain trust assets could be reached by debtor's creditors and thus were property of the bankruptcy estate.

Debtor created an irrevocable trust with himself as trustee and the primary beneficiaries his surviving issue and the lineal descendants of non-surviving issue. Debtor was not a named beneficiary, but the trust agreement provided him as trustee sole discretion to make distributions from the trust to provide for the health, the education, or the support and maintenance in the customary manner of living of the trustor while he was alive. The trust agreement contained a spendthrift clause.

Over the course of approximately 15 years leading up to the petition date, debtor contributed certain real property to the trust. The Trustee sued, *inter alia*, to quiet title as to those properties. The bankruptcy court granted partial summary judgment as to certain properties since it found that debtor was a beneficiary of the trust, and that those properties were property of the estate. On appeal, the BAP noted that since debtor held title to the properties in his capacity as trustee, under §541(d) the corpus of the trust would not be property of the bankruptcy estate unless he either (1)

## BANKRUPTCY COURT CASE NOTES

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

### POST-CONFIRMATION OF CHAPTER 13 PLAN MODIFIES VALUE OF SURRENDERED VEHICLE

*In re Berendt*, 2008 WL 4410995 (Bankr D Or 2008)

At the time the debtors' chapter 13 plan was confirmed, they owned a 1998 GMC Jimmy, which was collateral for a debt owed to creditor. After confirmation, debtors concluded they could not afford to make the payments on the Jimmy, so they surrendered it to creditor. Creditor sold it, then looked to debtors for the deficiency. Debtors moved to modify their plan to terminate payments to creditor, and treat the deficiency as an unsecured claim.

The sole issue was whether a claim, treated as fully secured in the original confirmed plan, could be treated as partially secured in a modified plan. Courts are deeply divided on the issue of whether §1329 permits such modifications. The only circuit court decision on point held that this type of proposed plan modification is an impermissible reclassification of the claim. *In re Nolan*, 232 F3d 528 (6<sup>th</sup> Cir 2000). The Oregon bankruptcy court disagreed with *Nolan* and, following a separate line of cases, held that modification of a chapter 13 plan under these circumstances is allowed.

The court explained its reasoning as follows. First, §1329(a)(1) allows the modification of a chapter 13 plan to reduce the payments to a particular class of claims. Because each secured claim is separately classified, a reduction of a particular payment to zero should be allowed, once the collateral is surrendered. Second, nothing prevents a debtor from objecting to a claim after the plan is confirmed. See FRBP 3007. In addition, an order allowing or disallowing claims may be reconsidered after confirmation. FRBP 3008. Thus, nothing prevents the revaluation of collateral

during the pendency of a case, depending on the circumstances. Here, the Jimmy was being revalued to determine whether the creditor was fully or only partly secured. Third, the Code contemplates that a secured creditor's rights may be affected by the surrender of collateral. §§1325(a), 1329(b)(1). Finally, the Code contemplates that a secured creditor's rights may be changed by a plan modification. §1323(c).

In sum, there is no impediment to modification of a confirmed chapter 13 plan to reflect the surrender of collateral and its sale for less than the amount of the debt.

### **COURT RECOGNIZES EQUITABLE TITLE IN HOMESTEAD**

*In re Lindquist*, 395 BR 707 (Bankr D Or 2008)

Husband and wife, co-debtors in chapter 7, sought to avoid a judgment lien on their residence. Shortly before filing their petition, they refinanced their residence - a mobile home and the property it was situated on. Although husband made all payments on the home, the refinance transferred title to wife only, to gain a more favorable interest rate. If both husband and wife both qualified for the homestead exemption, the total amount exempt would, of course, be larger than if only wife qualified. ORS 18.428. The issue before the court was whether a homestead exemption extends to a debtor's equitable interests, as opposed to legal interests, in a debtor's residence.

Because Oregon is an opt-out state, the issue is determined under Oregon exemption law. In Oregon, homestead exemptions are liberally construed to assure the unfortunate debtor . . . the shelter and influence of home. *In re Banfield's Estate*, 137 Or 167, 178-179, 298 P 905, 907 (1931), quoted in *Sticka v. Casserino*, 379 F3d 1069, 1072 (9<sup>th</sup> Cir 2004). The court looked to Oregon and the Ninth Circuit for authority that an Oregon homestead exemption extends beyond pure fee ownership. A homestead right is not an estate in land, but a mere privilege or exemption of such an estate as the holder has in the land. *Marvin & Co. v. Piazza*, 129 Or 128, 132, 276 P 680, 681 (1929) (citing *Mansfield v. Hill*, 56 Or 400, 107 P 471 (1910), 56 Or 400, 108 P 1007).

The court held that husband had an equitable ownership interest in the property. In Oregon such an interest will support a claim for a homestead exemption.

### **EFFECT OF ORDER TERMINATING AUTOMATIC STAY**

*In re Graham, II*, 2008 WL 4628444 (Bankr D Or 2007).

Debtor filed his chapter 11 petition within one year of the order dismissing his chapter 13 proceeding. Debtor moved for an extension of the automatic stay beyond the 30-day cutoff date imposed in such instances. The court denied the motion. Creditor moved for a determination that the stay was terminated with respect to property of the debtor,

as well as property of the bankruptcy estate, pursuant to §362(c)(3)(A) (added by BAPCPA).

Following the majority of courts that have considered the issue, the bankruptcy court held that §362(c)(3)(A) terminates the automatic stay with respect to the debtor and property of the debtor, but leaves the stay in place respecting property of the estate. *See In re Holcomb*, 380 BR 813 (10<sup>th</sup> Cir BAP 2008). Further, the automatic stay was terminated only with regard to actions taken by creditor prepetition. *See In re Paschal*, 337 BR 274 (Bankr EDNC 2006). As creditor had no action pending at the time this case was filed, it could not enforce its lien rights without leave under § 362(d).

## **STATE COURT CASE NOTES**

**By Jessica L. Shoup**  
Greene & Markley, P.C.

### **MOORED SAILBOATS ARE FLOATING HOMES**

*Ramsum v. Woldridge*, 222 Or App 109,  
192 P3d 851 (2008)

Multiple defendants, each living on a separate sailboat, rented moorage slips from plaintiff. Plaintiff served defendants with a 30-day eviction notice pursuant to ORS 91.070. Defendants claimed their sailboats were "floating homes," and that under the Residential Landlord and Tenant Act (RLTA), they must receive a 180-day notice prior to eviction.

The RLTA applies only to the rental of a "dwelling unit." ORS 90.115. A "dwelling unit" includes a rented moorage slip for a "floating home," but not a rented moorage slip for a "boat." ORS 90.100(9). Thus, the RLTA applies to the moorage slips here only if the defendants' sailboats are floating homes. A "floating home" is a moored structure, secured to a pier or piling, and used primarily as a domicile. ORS 830.700(4).

The court held that the defendants' sailboats were "floating homes." It consulted the dictionary definition of "structure" to conclude the sailboats were "structures." The structures were attached to the docks with ropes tied to dock cleats. Finally, it was undisputed that the defendants used the floating homes as their primary residences.

### **REASONABLE KNOWLEDGE OF HARM NEEDED TO COMMENCE STATUTE OF LIMITATIONS FOR NEGLIGENCE AND BREACH OF FIDUCIARY DUTY**

*Kelly v. Lessner*, 224 Or App 31, 197 P3d 52 (2008)

Plaintiff appealed a judgment dismissing her amended complaint for failure to bring the suit against her CPA and financial advisor within the two-year limitations period of ORCP 21 A(9). Defendant had advised plaintiff to lend

\$100,000 to one of defendant's other clients, Starr. In reliance on defendant's advice, plaintiff made the loan, secured by a trust deed on Starr's residence. Defendant prepared the trust deed and told plaintiff that the loan was fully secured. No payments were made on the loan and plaintiff became aware of Starr's failing business. Plaintiff did not learn that she was substantially undersecured until the sale of Starr's home.

For claims based on negligence and breach of fiduciary duty, the statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware of a substantial possibility that each of the three elements [of a claim] (harm, causation, and tortious conduct) exists. *Gaston v. Parsons*, 318 Or 247, 256, 864 P2d 1319 (1994). In reversing the decision below, the court held that because plaintiff believed she could recover her money through foreclosure, a jury could find that plaintiff did not learn she had been harmed by her CPA's advice until becoming aware that she was not fully secured. See, e.g., *McLean v. Charles Ellis Realty, Inc.*, 189 Or App 417, 76 P3d 661 (2003), *rev denied*, 337 Or 34 (2004).

## CONSUMER COMMITTEE REPORT

By Aaron R. Varhola

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 8<sup>th</sup> Floor conference room at the United States Bankruptcy Court - 1001 SW 5<sup>th</sup> Avenue, Portland, Oregon 97204. The committee is chaired by Laura Donaldson, who can be reached at 503-227-2004 or [laura@kunidonaldson.com](mailto:laura@kunidonaldson.com). To learn more about the Committee or to be added to the mailing list, please contact Ms. Donaldson.

Following are notes from the November 13, 2008, meeting:

Chapter 13 Trustee Brian Lynch announced that he will consider the Dave Ramsey financial management video for the financial management class for chapter 13 debtors. Lynch also announced a program for mortgage workouts, which is not available to debtors in bankruptcy. It will be available for all Fannie Mae or Freddie Mac loans.

National Data Center access is now available for debtors' attorneys.

The chapter 13 case closing process will change - the final account will not be filed until all checks have cleared, or 60 days after the discharge is entered.

Judge Perris advised that chapter 13 plans should have case numbers on them and the lead time for a modified plan before a confirmation hearing has changed from 11 to 14 days.

Judge Perris reported she is concerned about the increasing number of chapter 13 confirmation hearing setovers.

Reasons given are (1) that the IRS is slow to withdraw its objections, (2) that the chapter 13 trustee does not get documentation in a timely manner, and (3) debtors have failed to file their tax returns before confirmation hearings.

The IRS responded that they move as quickly as they can but holdups are in the system. The IRS wants to send a letter and two telephone contacts to debtors' attorneys and wants five business days between filing of the tax returns and the withdrawal of its objection. The IRS has made withdrawal of its objections a priority issue; it can fax or email a withdrawal on the same day it receives a signed return, unless there is a substantive objection based on the contents of the return.

Judge Brown is concerned about a stealth objection - large unassessed tax liabilities that endanger the feasibility of plans. Jan from the IRS responded that she would like to be informed when this problem occurs.

Laura Donaldson asked if a chapter 13 plan can provide for paying a CPA to file unfiled tax returns as an administrative expense of the estate. Wayne Godare and Jack Fisher replied that the debtor could lower the plan payments for the first several months of the plan or that the accountant could file an administrative expense claim.

Brian Lynch asked people to get documents (especially confirmation orders) in sooner or ask Jackie Troutman or Michelle of the Chapter 13 Trustee's Office if objections are resolved before the confirmation hearings.

It's agreed that the need for original signatures on the confirmation orders is delaying the confirmation orders.

Judge Perris suggested that the due date for unfiled tax returns should be put in the confirmation order. She would like to see confirmation orders in advance as well. She will put the tax order date in bold print on the adjourned confirmation hearing order, with small print for the adjourned confirmation hearing date. Judge Perris also warns counsel to not be surprised about strict enforcement of the tax order, especially if counsel does not move for an extension.

Requests for documentation tend to be holdups for confirmation of chapter 13 Plans. Todd Trierweiler said that he would like to see the request for information before the §341 meeting.

Missing tax returns tend to be the number one problem, but there are other problems such as missing bank statements or attorney disclosure statements. The Chapter 13 Trustee's Office said that in most districts, vehicles are typically paid through the plan, but if there is negative equity or the vehicle is undersecured, that office will insist the vehicle be paid through the plan.

Other suggestions for making chapter 13 function more smoothly included: (1) scheduling confirmation hearings into groups by lawyer rather than by case number; (2) holding chapter 13 attorney fee reaffirmation hearings by phone; and (3) providing debtors' counsel with a web page or email showing what is needed before confirmation and what has

been provided. Wayne Godare noted that many attorneys send all the documents on the Wednesday before the confirmation hearing, and that attorneys make the same errors over and over again.

The Tenth Circuit affirmed that the projected disposable income is the same as current monthly income on Form B22C, but that modifications may be made depending on a debtor's circumstances. *In re Lanning*, 545 F3d 1269 (10th Cir 2008) (debtor received a severance pay package that skewed the CMI, making it unrepresentative of projected disposable income), contradicting *In re Kagenveama*, 541 F3d 868 (9th Cir 2008), which stated that the B22C determination for projected disposable income held because of the plain language of §1325(b) links 'disposable income' to 'projected disposable income' and [the court] is bound by the definition of 'disposable income' provided in §1325(b)(2)(B).

Judge Brown would like debtors to appear in person at reaffirmation hearings.

Rich Parker mentioned *In re Broderick*, No. 08-31249 (Bankr D Or 11/20/08), in which Judge Perris ruled from the bench that there must be a connection between a secured vehicle loan and an antecedent debt for a cross-collateralization dragnet clause to be effective against that antecedent debt. In that case, the antecedent debt was not specifically referenced in the vehicle security agreement. While the decision of the court was not written, the letter submissions of debtor and creditor counsel are instructive. Comments to the Uniform Commercial Code do not control if they conflict with case law, such as *Community Bank v. Jones*, 278 Or 647, 566 P2d 470 (1977). See *In re Matrix Development Corporation*, No. 08-32798-tmb11 (Bankr D Or Oct 6, 2008); *In re Wollin*, 249 BR 555 (Bankr D Or 2000).

The next Circle of Love meeting will be Thursday, March 5, 2009, at 4:30 pm. All consumer bankruptcy practitioners, trustees, judges, and others interested are welcome.

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