

Newsletter

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Debtor-Creditor Section, Oregon State Bar

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COMMENTS FROM THE CHAIR

HIGHLIGHTS

- 1 **Comments from the Chair**
By Miles D. Monson
- 2 **Reaffirmation Agreements in the District of Oregon**
By Michael Fuller
- 4 **Debtor's Liability for Postpetition Homeowners Association Fee Arrearages**
By Kathleen Cushing and Tim Zimmerman
- 5 **US Supreme Court Case Notes**
By Jessica L. Shoup
- 6 **9th Circuit Case Notes**
By Ivy B. Grey
- 7 **BAP Case Note**
By Chris Parnell
- 8 **State Court Case Notes**
By Sean C. Currie
- 8 **Consumer Bankruptcy Committee**
By Britta Warren and Rosemary Zook

YOUR TIME

By Miles D. Monson

Anderson & Monson, PC

Most lawyers treat time as a precious commodity. Unlike money, time is the great equalizer. Each one of us has exactly the same amount. The trick is to make good use of our time. Imagine if every one of your cases went to trial. Our judicial system would cease functioning. Similarly, if everyone was paid for every service that was given, many of our organizations would cease functioning. Giving of your time is critical to many of the services we take for granted.

Over the years I have volunteered as an assistant soccer coach, even though I knew nothing about soccer. I volunteered as a basketball coach when my sons were playing basketball, even though I did not know that teams actually ran plays on their way to the basket. When I was 19 years old I volunteered to go on a two-year mission to northern Ohio for my church. I have served as a lay minister for five years. I have volunteered with youth groups for teenagers and young adults. Within the Oregon State Bar's Debtor-Creditor Section, I have served as chair of the CLE Committee, served on the Executive Committee and served as your Secretary, Treasurer, Chair-Elect and now Chair. In the community, I currently serve on a board that oversees eight church congregations. I also serve on a music committee (I can't sing, play an instrument or read a note of music, but I organize, plan, and make things happen) and a financial audit committee. Each month I visit the homes of individuals – some are disabled, some widows – to help with their needs. Six or seven times a year I write and deliver a sermon. Occasionally I volunteer with an organization that prepares and serves meals to the homeless. If you ever feel

life is hard for you, spend some time with people who struggle to find their next meal and see if your perspective changes. I get tired just listing the various activities that occupy service opportunities! But the fact is that over the years it averages out to just a few hours each week. The key is constancy, not the amount of time or the number of activities.

The spirit of volunteering can rub off on others. Three of my four sons have also served two-year missions for our church in countries around the world, using money they helped earn. One son served in Argentina, another in the Philippines, and a third currently serves in Honduras. My fourth son is in college preparing to serve somewhere in the world.

I am generally a private person and not comfortable with what could be seen as blowing my own horn about volunteer service. However, I feel strongly about service and the significant results that be achieved and the rewards that can come to individuals that more than compensate for the time spent. I am certainly not unique in providing volunteer service. The more I learn about the lives of members of the Debtor-Creditor Section, the more I learn about the service you provide to individuals and to the community. Within our section, thousands of hours of service are donated each year. Why do we serve? Here are a few thoughts:

- **Peer Pressure** - We may volunteer because others are doing it, or someone we respect has done it or has asked us to help.

Continued next page

- **Giving Back** - We feel we have been the recipient of many blessings and want to give others the same support.
- **To Learn** - There's nothing like real world experience, and volunteering provides experience that does not come from a book.
- **Gain Access** - We might want access to organizations we are interested in; volunteering to serve the group gives that access.
- **To Improve a Process** - We may feel a need to make the world a better place, whether for ourselves or those we care about, and the best way to do that is to roll up our sleeves and become involved.
- **Future Financial Gain** - Serving provides a chance to network with potential clients. This is one of our profession's oldest reasons for volunteering.
- **Asked by Someone in Authority** - This is why at times we ask a judge to solicit volunteers.
- **Our Unique Skills** - We have specialized training and experience in areas not common in the community and are in a unique position to share those skills with others.
- **Being Seen** - Some of us have a need for recognition, and service can help fulfill that need.
- **Future Political or Judicial Office** - One of the best ways to build a resumé that shows a well-rounded character, unselfishness, and leadership, is to serve others.
- **Supporting a Friend or Family Member** - Sometimes we just want to help a friend.

Members of our Section have tremendous capacity. If you would like to rearrange some of your time, the Debtor-Creditor Section provides many opportunities for service – from the Legislative Committee to the Pro Bono Committee, from the CLE Committee to the Website Committee to the CARE Committee, and on and on. In the end why we serve is not important; what matters is that we use part of the twenty-four hours each of us has each day to enrich the lives of our families and communities. And the nice side benefit is that when you give of your time you grow and develop personally and professionally.

REAFFIRMATION AGREEMENTS IN THE DISTRICT OF OREGON

By **Michael Fuller**
Olsen Daines

Reaffirmation agreements are voluntary between debtors and creditors. A secured creditor may insist that a debtor reaffirm in order to maintain possession of collateral. An unsecured creditor may seek reaffirmation in lieu of filing an objection. A debtor may wish to reaffirm a debt for a variety of reasons, including to continue a long-term relationship with a lender or to keep open the possibility of refinancing a particular loan in the future.

1. Filing the Statement of Intent

The first step for a debtor is to file a statement of intent with respect to retention of the property. §521(a)(2)(A); LBF 521.05. The statement of intent shall list all the debtor's secured debts and leases, and state whether debtor intends to surrender the collateral, or, if the debtor intends to maintain possession, whether debtor will redeem or reaffirm. *Id.* It must be filed by the earlier of 30 days after the chapter 7 petition is filed or the first meeting of creditors, §521(a)(2)(A), and served on the trustee and any creditor listed in the statement. FRBP 1007(b)(2); LBR 1007-3.

2. Entering Into the Reaffirmation Agreement

A debtor who intends to reaffirm a debt shall enter into a reaffirmation agreement on Form B240A within 30 days after the first meeting of creditors. §521(a)(2)(B). Typically, after the debtor states an intent to reaffirm, the creditor drafts the reaffirmation agreement and provides it to debtor's counsel for review.

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This publication provides information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities.

Failure to timely file the statement of intent and enter into a reaffirmation agreement with regard to personal property causes the following to occur: the automatic stay is terminated, the personal property is no longer property of the estate, and the creditor may enforce the original contract terms, including repossession under an ipso facto (*i.e.*, default upon filing bankruptcy) clause. §362(h)(1)(A); *see Kiefer v. Northwest Comm. Credit Union*, 2009 WL 2515606 (Bankr D Or 2009). The stay does not terminate, however, when a creditor refuses to agree to the reaffirmation on the original terms. §362(h)(1)(B).

The debtor cannot retain personal property secured by an allowed purchase-money security interest if a reaffirmation agreement is not entered into within 45 days after the meeting of creditors. §521(a)(6).

For a reaffirmation agreement to be valid, it must (i) be entered into before the discharge order, (ii) contain disclosures required by §524(k) (incorporated into the official forms), (iii) be filed with the court, and (iv) if applicable, be accompanied by an affidavit or declaration from the debtor's attorney, or a motion for court approval signed by the debtor. §524(c).

3. The Attorney Certification or Motion for Court Approval

If a debtor is represented by an attorney during the negotiation of the reaffirmation agreement, the agreement must be accompanied by the attorney's affidavit or declaration. The requirements of the affidavit or declaration, set forth in §524(c)(3), include a statement that the agreement does not impose an undue hardship on the debtor or the debtor's dependents.

If a debtor is not represented by an attorney during the negotiation, the debtor must sign the motion for court approval, stating that he or she is not represented by an attorney in connection with the reaffirmation agreement and that the reaffirmation agreement is in his or her best interest. §524(k)(7); Form B240B.

No District of Oregon decision addresses the question, but courts elsewhere have declined to approve reaffirmation agreements where the debtor was represented by a bankruptcy attorney for other purposes but not for negotiation of the reaffirmation agreement. *See In re Minardi*, 399 BR 841, 848-49 (Bankr ND Okla 2009) (debtor's attorney's attempt to limit services to exclude negotiation of reaffirmation agreements was impermissible), and *In re Hoffman*, 358 BR 839, 842 (Bankr WD Va 2006) (denying motion to approve reaffirmation agreement where attorney signed the motion for court approval but did not represent debtors during the negotiation).

4. Filing the Reaffirmation Agreement

After a debtor and creditor have entered into a reaffirmation agreement, the agreement must be filed, and if applicable, be accompanied by an attorney certification or debtor's motion for court approval. The agreement must be filed no later than 60 days after the meeting of creditors, and must be accompanied by cover sheet Official Form 27. *See* LBR 4008-1(a), (b). The Court may set a hearing to determine whether the agreement is in the debtor's best

interest and whether it would impose an undue hardship. *In re Bower*, 2007 WL 2163472 (Bankr D Or 2007).

A reaffirmation agreements between a debtor and a credit union becomes effective upon filing, so long as debtor's counsel has signed the certification.

5. Other Considerations

"Ride Through" and Real Property. "Ride through," as adopted by the 9th Circuit prior to BAPCPA in *In re Parker*, 139 F3d 668 (9th Cir. 1998), allows a debtor to retain property by continuing to make payments under the contract, regardless of an ipso facto clause. The underlying personal liability on the note is discharged but the lien survives. BAPCPA ended "ride through" with regard to personal property. *In re Dumont*, 581 F3d 1104, 1119 (9th Cir. 2009) ("At least where the debtor has not attempted to reaffirm, our decision in *Parker* has been superseded by BAPCPA.").

Because the courts have not applied the BAPCPA requirements to mortgages, a debtor who is current on payments may keep their real property regardless of whether a reaffirmation agreement is entered into. *See id.* at 1108 n.2.

"Back Door Ride Through" Doctrine and Personal Property. "Back door ride through" occurs when a debtor substantially complies with the BAPCPA requirements and attempts to reaffirm, but is unable to obtain court approval of the reaffirmation agreement. *See Id.* at 1112 n.14 (citing several lower court decisions allowing "back door ride-through" when reaffirmation agreements are not approved for reasons beyond the debtor's control); *In re Bower*, 2007 WL 2163472; *In re Hamilton*, Case No. A-08-00823-HAR at n.1 (Bankr D Alaska 2009) (accessible on Fastcase) ("Most courts that have discussed the issue have found 'backdoor ride-through' is available.") (Internal citations omitted). It is unclear whether debtors in the 9th Circuit may obtain back-door ride-through.

Rescission. A debtor may rescind a reaffirmation agreement by notifying the creditor within 60 days after the agreement was filed, or the date of the discharge order, whichever occurs later. §524(c)(4). Although not required, a good practice would be to file a copy of the rescission notice with the court.

Conclusion

The reaffirmation process provides both debtors and creditors the ability to effectively maintain a debt, and often a business relationship, after bankruptcy. However, the decision to reaffirm an otherwise dischargeable debt must be made only after careful consideration of the circumstances.

DEBTOR'S LIABILITY FOR POSTPETITION HOMEOWNERS ASSOCIATION FEE ARREARAGES

By **Kathleen Cushing** and
Tim Zimmerman, General Counsel, FirstCommerce LLC

Bankruptcy practitioners should understand and explain to debtors who own condos or homes subject to Home Owners Association (HOA) fees the effect of §523(a)(16) of the Code, as amended by BAPCPA in 2005. A chapter 7 bankruptcy discharge can discharge all HOA fees accrued before the filing date, but it does not remove a debtor's obligation to pay postpetition HOA assessments.

Under pre-BAPCPA law, a debtor was responsible for HOA assessments that came due after the order for relief only if the debtor physically occupied a dwelling unit in a condominium or cooperative project, or if the debtor rented a dwelling unit to a tenant and received rental payments. Thus, before BAPCPA a debtor could surrender possession of the dwelling unit – and be relieved of future HOA fees – because the law treated that act as abandonment of ownership interest, even though the debtor still held legal title to the property.

Now §523(a)(16) eliminates this strategy as an option – it excepts from discharge under §727 any debt of an individual:

for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or in a homeowners association, *for as long as the debtor or the trustee has a legal, equitable or possessory ownership interest in such unit, such corporation or such lot.*

(Emphasis added.) See *In re Williams*, No. 08-71337 (Bankr ED Mich 2010) (accessible on Fastcase).

Although few bankruptcy lawyers actually do so, they should as a rule contact the HOA lawyer before filing a chapter 7 case to discuss options related to the property. It can save substantial trouble if they work out a plan of action. If a chapter 7 debtor wants to keep the property, there could be an agreement in advance that allows him or her to pay the postpetition assessments as they come due and pay off any delinquent prepetition assessments over time.

The prepetition assessment lien usually survives the chapter 7 discharge, so debtors' attorneys should explain to their clients who intend to keep their property that if they do not arrange for repayment of the prepetition assessments as well, the HOA could foreclose the lien.

If the debtor does not want to retain the property – and wants to avoid liability on as much of the postpetition assessments as possible – debtor's counsel should contact HOA counsel promptly to discuss whether the HOA might accept a deed in lieu of foreclosure. In the alternative, debtor's counsel and HOA counsel could work together to

persuade a mortgage holder to take a deed in lieu. If the lender is undersecured and there is no equity for the HOA, it might be in the best interests of the HOA to release its lien and allow the lender to take the property free and clear of the HOA lien. The HOA could thereby at least begin getting payments on future assessments.

Until the unit is sold and while the case is open, the unit remains protected by the automatic stay. In some bankruptcy jurisdictions, courts will permit relief from the stay if the HOA wants to pursue its lien claim in the unit and the debtor has not paid three or more months of postpetition assessments. But the HOA's attorney must analyze the decision to pursue collection of its post-petition arrearage fees, as costs could be prohibitive. Trustees rarely abandon the unit within 90 days of the filing – the trustee's appraisal of the unit's value could take six months or more. Therefore the HOA's attorney should communicate promptly with the trustee to assess the best course of action for the HOA.

An HOA is often motivated to take action against a chapter 7 debtor when the debtor continues to reside in the property and accepts the benefits of membership (for example, use of recreational facilities such as swimming pools), but fails to pay the ongoing assessments. It then could become a matter of principle for the HOA to pursue the debtor for postpetition assessments.

Priority Issues

There is a statutory process by which a condominium (but not a HOA) can get priority over first mortgage holders. See ORS 100.450. Generally, a condominium's lien has priority over all other liens except taxes and first mortgages. ORS 100.450(1). For instance, a condominium's lien is senior to a second mortgage regardless of whether the second mortgage was recorded before the assessment became due. If the condominium association gives notice to the first-mortgage holder, and if the debtor is delinquent on the first-mortgage debt, and the lender fails to commence foreclosure within 90 days, the condominium association lien will become senior to the first mortgage. ORS 100.450(7). This process can benefit the debtor because if the condominium lien is superior, then ample equity is available and the HOA may rely on foreclosure to collect rather than pursuing the debtor. The lender may be forced to step up and pay the balance to protect its lien.

Hot Topic

The current hot button debtor-creditor issue for HOAs and debtors is the failure of lenders to complete their foreclosures. When a chapter 7 debtor does not want the property, and discontinues payments to the lender, the lender may start and then delay the foreclosure. In the meantime, the debtor is liable for the postpetition assessments that accrue. Oregon does not yet have any statutory authority to force a lender to timely complete or begin a foreclosure. In contrast, the Florida Supreme Court recently ordered amendment of the Florida Civil Procedure Rules to add a form requiring a court's permission for the plaintiff to indefinitely delay a foreclosure sale. See *In Re: Amendments to the Florida Rules of Civil Procedure – Form 1.996 (Final Judgment of Foreclosure)*, No. SC09-1460, No. SC09-1579 (Fla 2/11/10) (accessible on Fastcase).

Conclusion

Oregon has no procedure to prevent lenders from intentionally delaying foreclosures of abandoned properties in Oregon. Thus, in the current environment, attorneys for chapter 7 debtors and HOAs should communicate early in the process to alleviate the burdens to both.

US SUPREME COURT CASE NOTES

By Jessica L. Shoup

Greene & Markley, PC

TRUSTEE NEED NOT OBJECT TO EXEMPTION WITHIN 30 DAYS TO PRESERVE THE ESTATE'S ABILITY TO RECOVER EXCESS VALUE

Schwab v. Reilly, 130 S Ct 2652 (2010)

Chapter 7 debtor's Schedule B showed assets with an estimated value of \$10,718; her Schedule C claimed two exemptions: a "tools of the trade" exemption for the maximum of \$1,850 and a "miscellaneous" exemption of \$8,868 (allowable maximum of \$10,225). The two claimed exemption amounts equaled the estimated value of the assets listed on Schedule B.

The trustee did not object to the exemptions. Due to an appraisal valuing the property at \$17,200, the trustee later sought court approval to auction the property and retain the amount in excess of the exemptions. The debtor objected, arguing the trustee had forfeited the estate's claim to any value that exceeded the exemption amount when he failed to object within the 30-day period allowed by FRBP 4003(b). The bankruptcy court, district court and court of appeals all ruled in favor of the debtor. The Supreme Court reversed.

The case was governed by §522(l), which, in summary, provides that debtor must "file a list of property that debtor claims as exempt" and that "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." The Court agreed with the trustee's reading of the statute, however, noting that the Code defines the "property" a debtor may "claim as exempt" as the debtor's "interest" up to a specified dollar amount in the assets described in the category, *not* as the assets themselves." 130 S Ct at 2661-62 (emphasis in original). The Court ruled that the trustee had no duty to object because the debtor's claimed exemption was facially unobjectionable—the "property claimed as exempt" was within the limits the Code allowed.

The Court rejected debtor's argument that pursuant to *Taylor v. Freeland & Kronz*, 503 US 638 (1992), the parties in interest were put on notice of the debtor's intent to claim an exemption in the full value of the property, and therefore, absent an objection, the property claimed as exempt should be excluded from the estate. The Court distinguished this case from *Taylor* by pointing out that *Taylor* involved the trustee's obligation to object when the exemption value claimed by a debtor was *not* plainly within the limits of the code (debtor there had listed the value of claimed exempt property as "unknown"). The Court held that trustee was

not required to object to exemptions to preserve the estate's right to retain the value in excess of the value of the exempt interest.

Three justices dissented. They agreed with the debtor and the lower courts that once the clock ran on the 30 days without objection, the property debtor listed as exempt became exempt "and therefore outside the bankruptcy estate the trustee is charged to administer." 130 S Ct at 2672. The dissent also noted that the trustee obtained the appraisal of the property before the 30-day objection period had expired. *Id* at 2671.

FORWARD-LOOKING APPROACH TO DEBTOR'S PROJECTED DISPOSABLE INCOME IN CHAPTER 13

Hamilton v. Lanning, 130 S Ct 2464 (2010)

A chapter 13 debtor's income for the six months prior to her bankruptcy included a one-time buyout payment from her former employer. Thus her "current monthly income" – her average income over those six months – was higher than the median monthly income, and her monthly "disposable income" on Form 22C was \$1,114.98. Her actual monthly income (shown on Schedule I) from her new job was significantly lower than the amount reported on Form 22C because it did not include the buyout, and the monthly disposable income, calculated by subtracting expenses on Schedule J from income on Schedule I, was only \$149.03. She filed a plan that required her to pay \$144 per month for 36 months.

The trustee objected to confirmation of the plan partly on the basis that debtor was not committing all of her "projected disposable income" to the plan. The Court's decision, affirming the decisions of all the lower courts, contrasted the trustee's "mechanical approach" to the question of what constitutes "projected disposable income" under §1325(b)(1) to the "forward-looking approach," which most lower courts had adopted. The trustee argued that "projected disposable income" meant the past average monthly disposable income multiplied by the months in the debtor's plan and that based on this mechanical approach, debtor had a monthly net disposable income of \$756. There was no dispute that the debtor's "actual income was insufficient to make payments in that amount." 130 S Ct at 2470.

The Court adopted the forward-looking approach for several reasons, including the ordinary meaning of the term "projected," which, the Court concluded, is not "simple multiplication." *Id* at 2472. Further, this approach is consistent with pre-BAPCPA decisional law.

Congress did not amend the term "projected disposable income" in 2005, and pre-BAPCPA bankruptcy practice reflected a widely acknowledged and well-documented view that courts may take into account known or virtually certain changes to debtor's income and expenses when projecting disposable income.

Id at 2473-74.

The Court held that the forward-looking approach was correct and that in calculating a debtor's projected disposable income a "court may account for changes in the

debtor's income or expenses that are known or virtually certain at the time of confirmation." It specifically rejected the mechanical approach of *In re Kagenveama*, 541 F3d 868, 873 (9th Cir 2008). 130 S Ct at 2475. Justice Scalia in dissent argued strenuously in favor of the mechanical approach.

9TH CIRCUIT CASE NOTES

By Ivy B. Grey

Davis Wright Tremaine LLP

FEE AWARDS PERMITTED FOR ENTIRE §303(I) ACTION

In re Southern Cal. Sunbelt Developers, 608 F3d 456 (9th Cir 2010)

The court considered three questions in interpreting §303(i): (1) whether fees on fees are allowed when seeking an award under the section; (2) whether punitive damages may be awarded without actual damages; and (3) whether the individuals who controlled the entities filing wrongful involuntary petitions could be held personally liable for costs and attorneys' fees. It answered the first two questions affirmatively; the answer to the third question was sometimes.

Thirteen creditor entities filed involuntary bankruptcy petitions against two alleged debtors. The 13 entities were controlled by only two individuals. The involuntary petitions were dismissed because the debts were subject to a bona fide dispute. Debtors sought costs, attorneys' fees, and punitive damages against the petitioning creditors. Debtors sought damages under §303(i)(1) only; the bankruptcy court raised additional issues, sua sponte, under §303(i)(2) and its inherent power to impose sanctions, and awarded \$745,318 in costs and fees, including costs and fees incurred by the alleged debtors in litigating the §303(i) motions themselves (so-called fees on fees), and \$130,00 in punitive damages. It also ruled that the two controlling individuals were jointly and severally liable for the attorneys' fee award. The District Court affirmed.

The Ninth Circuit affirmed the monetary awards against the entities but reversed as to a portion of the controlling individuals' liability. First the court considered whether §303(i)(1) is a fee-shifting provision or a sanctions provision. Determining that it was the former, the court held that fees were available based on the merits of the litigation as a whole. The debtor must prevail on only a central issue in the proceeding; a showing of bad faith is not necessary.

Further, it held that fees on fees "are plainly recoverable" for time spent in establishing the entitlement to and amount of the fee. 608 F3d at 463, citing *In re Nucorp Energy, Inc.*, 764 F2d 655, 659-60 (9th Cir 1985). Fees for litigating claims for damages are also recoverable because, under *Commissioner v. Jean*, 496 US 154 (1990), a fee award presumptively encompasses all aspects of the civil litigation. Thus the court should make a single determination for fee eligibility.

Second, following *Siddiqui v. United States*, 359 F3d 1200, 1203 (9th Cir 2004), the court applied federal common law

to allow punitive damages even in the absence of an award of actual damages.

Finally, the court held that the individuals who controlled the petitioning creditors could be held jointly and severally liable only for the costs and fees incurred in obtaining dismissal of the involuntary petitions; the bankruptcy court had erred, it held, for holding them liable as well for the costs and fees incurred on the §303(i) motions themselves.

CALCULATING DAMAGES FOR CONSTRUCTIVE FRAUDULENT CONVEYANCE

In re JTS Corp., 617 F3d 1102 (9th Cir 2010)

Defendant Tramiel was a director of JTS Corporation. The company was struggling to stay afloat, so the board approached Tramiel with an offer to sell him several parcels of real estate for \$10 million; the corporation would retain an option to repurchase. Tramiel accepted the deal and paid for the property, but the corporation failed anyway and ended up in chapter 7. The trustee then sued JTS's directors (including Tramiel), attorneys and a shareholder, alleging the real estate transaction was a fraudulent conveyance. Tramiel's codefendants settled with the trustee for a payment of \$4.5 million and trial proceeded against Tramiel. The bankruptcy court ruled the transaction was a fraudulent transfer and then addressed the question of damages.

The bankruptcy court calculated the fair market value of the property sold as over \$15 million, but discounted that value to around \$12 million to take into account JTS's need for a quick sale as well as for the bundling of the properties. The court then allowed Tramiel to offset his liability by the value he had paid as a good faith transferee and by the amount paid in settlement by his codefendants. Because these offsets exceeded the \$12 million value, Tramiel owed nothing to the estate.

The district court on appeal refused to apply discounts to determine the properties' fair market value and also did not allow Tramiel an offset for the \$4.5 million paid by his codefendants; thus it ruled his liability was over \$6 million.

The Ninth Circuit agreed with the bankruptcy court's fair market value calculation and also agreed with the bankruptcy court that under California law, Tramiel's liability was offset by the amount paid by his codefendants, so that Tramiel had no liability to the trustee for the conveyance.

UNDER CREDIT REPAIR ORGANIZATION ACT SUE DOES NOT MEAN ARBITRATE

Greenwood v. CompuCredit Corp., 615 F3d 1204 (9th Cir 2010)

CompuCredit marketed credit cards to consumers with poor credit touting the cards' usefulness to rebuild credit. Consumers who received the card sued alleging violations of the Credit Repair Organization Act (CROA). The credit card agreement in question contained a provision requiring the cardholder to arbitrate any claims against the company, and the defendants moved to compel arbitration of the CROA claims.

The district court denied the motion. It held that the arbitration provision was void under CROA. The Ninth Circuit affirmed. It considered whether Congress's open support of arbitration compelled a different result, but decided that the consumer's "right to sue" in CROA means

a right “to bring an action in a court of law.” Arbitration, in contrast, is a variety of “alternative dispute resolution,” clearly a different creature than an action in a court of law. Further, CROA contains language precluding waiver of any right of a consumer. The court affirmed the district court’s finding that the arbitration provision in the credit card contracts was void under CROA.

TRUSTEE MAY FORCE SALE OF HOMESTEAD PROPERTY TO RECOVER EQUITY EXCEEDING CLAIMED EXEMPTION

In re Gebhart, 2010 WL 3547641, ___F3d___ (9th Cir 2010)

In this consolidated appeal, the Ninth Circuit addressed the question whether the trustee can force a sale of homestead property in a chapter 7 cases when the value of the debtor’s home has increased to provide equity in excess of the homestead exemption. The court held that the answer is yes.

In both cases, the debtor’s equity in the homestead property was less than the applicable homestead exemption at the time of filing. In both cases, the value of the homestead property increased – so that the debtor’s equity eventually exceeded the homestead exemption – after the debtor received a discharge but before the case was closed. The court held the trustee should be able to access the excess equity because homestead exemptions are limited to specific dollar amounts. Until the case is closed, “any additional value in the property remains part of the estate, regardless of whether the extra value was present at the time of filing or whether the property increased in value after filing.”

BAP CASE NOTE

By Chris Parnell
Farleigh Wada Witt

CATCH-22: STRIPPED OFF LIENS COUNT AS UNSECURED DEBT FOR CHAPTER 13 ELIGIBILITY

In re Smith, 435 BR 637 (9th Cir BAP 2010)

The BAP affirmed the bankruptcy court’s dismissal of two different debtors’ chapter 13 cases on the basis that the debtors exceeded the §109(e) unsecured debt limit for chapter 13 eligibility, which calculation included the amount owed on wholly unsecured junior liens.

In both cases debtors’ residences were worth less than the amount owed to the first lienholder. Although both debtors listed the second liens as secured debt on their schedules, both debtors subsequently “stripped off” the junior liens under §506(a), changing the status of the debts to unsecured. The issue for the BAP was whether the stripped-off debt constituted unsecured debt for purposes of the §109(e) eligibility calculation, notwithstanding that the lien had not been avoided as of the petition date.

The court recognized the problems faced by debtors in the current depressed housing market, but noted that it was bound by *In re Scovis*, 249 F3d 975 (9th Cir 2001), which

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Your letter should include the topic for the article and indicate whether you are willing to be the author.

Section Website

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

held that junior lienholder claims were to be counted as unsecured claims as of the petition date for purposes of §109(e) eligibility. Thus, the bankruptcy court correctly determined that debtors exceeded the unsecured debt limit.

In a concurring opinion, Judge Jaroslovsky wrote that “the confluence of new circumstances and old cases has created a perfect Catch-22 for [debtors]: they are ineligible for chapter 13 because they need the relief afforded by chapter 13, and would be eligible if they did not need the relief.”

STATE COURT CASE NOTES

By Sean C. Currie

Greene & Markley, P.C.

PRO SE ATTORNEY ENTITLED TO OWN ATTORNEY FEES

Colby v. Gunson, 349 Or 1, 238 P3d 374 (2010)

Attorney filed pro se action seeking access to state medical examiner records. The trial court dismissed attorney’s action. The Court of Appeals reversed and remanded. Attorney then requested attorney fees under ORS 192.490(3). The Court of Appeals denied the request, concluding that “attorney fees” means the fees paid to an attorney for client services and cannot include the value of legal services performed by an attorney acting on his own behalf.

The Oregon Supreme Court reversed. It reasoned that the plain and ordinary meaning of the term “attorney fees” includes the reasonable value of legal services performed by an attorney acting on his own behalf in a suit seeking disclosure of public records. The Supreme Court found it immaterial that the pro se attorney was not required to pay himself for his services. Attorney was licensed to practice law and he performed legal services in seeking the disclosure of public records. Accordingly, he was entitled to recover attorney fees.

ENTRUSTMENT DOCTRINE

Lisoski v. Broehl, 235 Or App 57, 230 P3d 63 (2010)

Plaintiff sought a judgment declaring that he was the legal owner of a boat he had purchased from American Yacht Brokers (AYB), purportedly on consignment from defendant. Shortly after plaintiff’s purchase, AYB went out of business and filed for bankruptcy. It did not pay defendant for the boat. Several months later, defendant retook possession of the boat from plaintiff, claiming that AYB had sold it without her permission. The trial court ruled for defendant.

The Court of Appeals reversed. It concluded that the action was equitable in nature and thus its review was de novo. After reviewing the evidence, it found that defendant was aware that AYB had possession of the boat prior to transferring possession to Plaintiff and, therefore, Plaintiff was the legal owner of the boat. Pursuant to the entrustment doctrine, ORS 72.4030(3), “[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives the merchant power to transfer all rights of the entruster to a buyer in the ordinary course of business.” Because defendant had delivered possession of the boat to AYB, a merchant dealing in boats, or had acquiesced to AYB retaining possession of the boat, AYB was empowered to transfer full legal title to Plaintiff.

CONSUMER BANKRUPTCY COMMITTEE

August 12 Meeting

By Britta Warren

Todd Trierweiler & Associates

The Chapter 13 Trustee’s office introduced the new staff attorney, Jordan Hantman. He received a warm welcome from the group.

The remainder of the short meeting was spent discussing the Trustee’s interpretation of the Supreme Court’s *Lanning* decision (see September 9 Meeting discussion for more). The Trustee will no longer require the “Not Less Than” number in determining disposable income. Above-median-income debtors will now be required to be in the chapter 13 plan for 60 months, regardless of whether the B22 results in a negative disposable income. In order to determine the distribution to unsecured creditors for those above-median debtors, the Trustee will use the net income listed on Schedule I and deduct allowed IRS expenses. For expenses exceeding the IRS-allowed expenses, the Trustee will use a subjective test of “reasonable and necessary.” The Trustee believes this approach will provide a more predictable and uniform determination of what must be paid during the life of the chapter 13 plan. For access to the Trustee’s Payment Calculation program, email ch13info@portland13.com and enter “PC Calc” in the subject line.

Thank you to George Hoselton and his staff for providing refreshments for the meeting.

September 9 Meeting

By Rosemary Zook

Todd Trierweiler & Associates

Wayne Godare, standing Chapter 13 Trustee, started the meeting with an open invitation to come by his office on October 1 for a discussion on the US Supreme Court's decision in *Hamilton v. Lanning*, 130 S Ct 2464(2010), and its effect on *In re Kagenveama*, 527 F3d 990 (9th Cir 2008). Although the discussion will have taken place by the time this article appears, Wayne has kindly invited anyone with questions or concerns, about *Lanning* or in general, to contact him directly.

Mortgage Loan Modifications

Jennifer Aspaas, attorney with Routh Crabtree Olsen, P.S., gave a lecture about the various government programs available to homeowners seeking mortgage loan modifications. Below is a brief summary of her points.

The Home Affordability & Stability Plan (HASP) developed by the United States Treasury under the Obama Administration is a program designed to help at-risk homeowners modify or refinance their mortgages. Several sub-programs under the umbrella of HASP provide for different types of modifications. For example, homeowners may be able to cap mortgage arrearage, reduce the interest rate, extend the term of the loan, or even obtain a brand new 40-year loan.

Readers should be aware that the processes to obtain a loan modification have been unclear, and that a high percentage of homeowners default during the initial 90-day trial period. Here are some resources to help homeowners and practitioners navigate the modification process.

1. www.makinghomeeaffordable.gov
2. www.knowyouroptions.com
3. 888-995-HOPE

From the Bench: Issues with Reaffirmation Agreements

Judge Perris observed that the court has had an influx of late-filed reaffirmation agreements. In many cases, the discharge has already been entered or the vehicle has been repossessed when the agreement is filed, and attorneys and debtors seek the court's help. The court will address this issue more strictly in the future.

Judge Brown added that attorneys should consider the benefit of asking court approval of a reaffirmation agreement. If approval is denied, the creditor may view the debtor as having fully complied with the bankruptcy process and allow debtor to continue making payments regardless. Alternatively, if the agreement is denied and the vehicle is repossessed within three weeks, the debtor can request a hearing and judicial relief.

Tax Issues in Bankruptcy

Jeffrey Wong, local solo practitioner, gave a presentation on tax issues in the context of bankruptcy.

Nondischargeability. The following is a non-exhaustive list of circumstances in which tax liabilities are nondischargeable:

1. The tax liability is considered priority (see below).
2. The tax returns remain unfiled, or were filed less than two years before the filing of the bankruptcy case. 11 USC §523(a)(1)(B).
3. The debtor engaged in fraud or willful evasion with respect to the tax returns or liability in question. "Willful evasion" comes in two flavors: willful evasion of assessment (lies or omissions on return(s)), and willful evasion of collection (fraudulent transfer of assets, etc.). Mr. Wong recommended a review of case law on the subject but did not provide specific cites.

Priority. 11 USC §507(a)(8) sets out general priority principles. Almost every form of tax liability that the debtor incurs is nondischargeable for three years following the due date of the return. This rule applies to all taxes except real property taxes. Readers should note that the due date could be affected if an extension was filed, or if April 15 falls on a weekend.

1. Income taxes are nondischargeable if the returns are filed less than two years before the bankruptcy filing.
2. Income taxes assessed less than 240 days before the bankruptcy filing are nondischargeable.
3. Taxes that have a withholding requirement, such as §941 and federal excise taxes, are entitled to priority indefinitely. The 10-year statute of limitations can be extended by agreement between the taxpayer and the IRS if the agreement is made before the 10-year period expires.

4. For further discussion about priority and nondischargeability of tax liabilities, see *In re Payne*, 283 BR 719 (Bankr ND Ill 2002); *In re Nunez*, 232 BR 778 (9th Cir BAP 1999); and *In re Rohde*, 2006 WL 205042 (Bankr D Or 2006).

Tolling. 11 USC §507(a)(8) also sets forth (following subsection (G)) rules about the suspension of applicable time periods.

An Offer in Compromise filed during the 240-day period will cause suspension of this period for the entire duration that the government is stayed from collection.

Pursuant to 11 USC §523(a)(1), the two-year rule is not affected by either of the above events.

New from the Local IRS Office

Jeffrey Werstler of the IRS announced more staff changes in our local IRS office. In addition, the office will be moving to a new location. The new addresses and telephone numbers appear in the box to the right.

Housekeeping

The next meeting will be held November 18, 2010. Thank you to Kelly Brown and Anita Manishan for providing refreshments.

SECTION OFFICERS AND EXECUTIVE COMMITTEE FOR 2011

- Chair Patrick W. Wade
- Chair-Elect Tara J. Schleicher
- Past Chair..... Miles D. Monson
- Treasurer Susan S. Ford
- Secretary Caroline M. Cantrell

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- Hon. Frank R. Alley, III
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- Milly Whatley

Internal Revenue Service

The address for legal notice remains the same:

**IRS
PO Box 21126
Philadelphia PA 19114**

If you do not know that a specific person is locally assigned to the case, call:

**Voice: (800)-913-9358
FAX: (267)-941-1015**

New Portland address: This is used only when you are working with a local employee. This is NOT our legal notice address.

**Attn: (name of employee)
Internal Revenue Service M/S O240
100 SW MAIN ST
STE 1200
PORTLAND OR 97204-2871**

Insolvency Group 3- Portland New Numbers		
Muehleck, Henry	Manager	503-415-7129
Jatip, Cristal	Secretary	503-415-7176
Barela, Maria	Specialist	503-415-7172
Burns, Barbara	Specialist	503-415-7173
Kalik, Donna	Specialist	503-415-7174
Kushner, Philip	Specialist	503-415-7175
Textor, Robert	Specialist	503-415-7177
Werstler, Jeffrey	Revenue Officer Advisor	503-415-7178
	New Fax	503-415-7087

New Eugene address: This is used only when you are working with a local employee. This is NOT our legal notice address.

**300 COUNTRY CLUB RD
STE 260
EUGENE OR 97401-6021**

<i>No changes for Eugene</i> Internal Revenue Service Insolvency Group 3 - Eugene		
Anderson, Susan	Specialist	541-465-6465 x242
Kreidler, Carrie	Specialist	541-465-6465 x285