

Newsletter

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Debtor-Creditor Section, Oregon State Bar

Fall 2011

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COMMENTS FROM THE CHAIR

By Patrick W. Wade

Hershner Hunter, LLP

I'm happy to report that our Section continues to do well.

First, the August 3 reception at the Hatfield Courthouse in Portland for visiting bankruptcy judges, held in connection with the Federal Judicial Council workshops, was a huge success. The Section hosted this event in cooperation with the Oregon chapter of the Federal Bar Association. I estimate that attendance easily exceeded 200 judges and guests. Judge Dunn and friends entertained those attending with a vibrant musical performance. Thanks are due to the planning committee for this event: Charlene Hiss, Caroline Cantrell, Dave Hercher, Karen Lee, and especially Becky Kamitsuka, whose energy was a model for all of us and whose attention to detail made this event come off without a hitch.

The Fundamentals of Bankruptcy CLE program was held on August 12, 2011. Reports are that the program was well attended and very much appreciated. At the September meeting of the Executive Committee, we decided the Section would hold a similar program every year, focusing each program on a different topic. One program will be an introduction to basic bankruptcy law and practice, oriented both to newer lawyers and to those whose practice seldom reaches the bankruptcy courts.

Our Section annual meeting CLE, High Desert Roundup, was another great success, with over 120 in attendance and a good variety of

topics. All our speakers did a great job presenting timely and practical information that will be of great use to those who attended.

Speaking of annual meeting CLE programs, our program for next year is to be held in the Portland metropolitan area. The Executive Committee seeks your input on selection of a venue. If you have comments on this topic, please forward them to any board member. If you have ideas about the program, please consider volunteering to work with the planning committee. To do so, just call Susan Ford or Tom Huntsberger. (By the way – for those of you who raised your hands at the annual meeting and said you were willing to work on the Saturday Session – Loren Scott's phone number is 541.868.8005.)

On the Pro Bono front, we have both encouraging news and unsettling news. In Lane County, a new Pro Bono group is organizing to provide services in association with the Lane County office of Legal Aid Services of Oregon and the University of Oregon Law School. A kickoff event is set for October 7 at the law school. If you would like to volunteer for this program, please get in touch with Tom Huntsberger or Becky Kamitsuka. Unfortunately, funding for legal aid services in Oregon will be cut back substantially in the near future, putting both the Portland and Lane County programs at risk. Cutbacks to this important program

Continued next page

will require that we develop alternative funding to maintain the program's viability.

I will also take this opportunity to welcome to the Executive Committee the new members elected at the annual meeting — Wayne Godare, Howard Newman, Karen Oakes, Clarke Balcom, and Keith Karnes — and to thank outgoing members Gary Blacklidge, Matt Goldberg, Tom Huntsberger, Becky Kamitsuka, and Miles Monson for their service.

In closing, I repeat here the call for volunteers to assist in all aspects

of the Section's activities. We have been blessed with great programs throughout this year and previous years due to the generosity of the many individuals who have served on committees to carry out the Section's work. Make a point to see how you can contribute.

Thank you for the opportunity to serve as the Chair of the Section this year. It has been extremely rewarding and I look forward to continuing to work with Tara and the rest of your talented Executive Committee in my role as Past Chair next year.

ANNOUNCEMENT

Courtesy of Hon. Frank R. Alley

Modern word processing technology provides many opportunities for both self-expression and efficient conveyance of information. In order to help Judges, Law Clerks, and Case Administrators identify the nature and purpose of filed documents, the following Local Typographical Rules (LTRs) have been adopted by the Court for use in all contested cases and adversary proceedings, and in any instance where use of an LBF has been waived or excused. [Note: all documents shall be in 12 point, unless a larger font is needed for legibility, or a smaller one needed to satisfy page limitations. Fiddling with margins is strictly prohibited.]

- Complaints shall be composed and filed in Courier New
- Answers shall be composed and filed in Times New Roman
- Replies shall be composed and filed in Arial
- ~~Motions to Strike or Dismiss shall be composed and filed in Arial Narrow-Strikeout~~
- Motions to Continue, Postpone, Extend or Otherwise Delay shall be composed and filed in Poor Richard
- Motions pertaining to Discovery disputes shall be composed and filed in Comic Sans
- *Motions for Sanctions shall be shall be composed and filed in Backadider.*
- Motions for Contempt shall be composed and filed in Chiller.
- ***Motions requesting Expedited Consideration shall have titles set out in Magneto***
- Motions to Reconsider will be composed and filed in Perpetua...

Briefs and Memoranda should be served with a font appropriate to the content of the document. Counsel presenting a simple memorandum outlining facts and containing basic legal discussion should consider a light, clean sans serif such as Arial, Trebuchet MS, Gill Sans, or Tahoma. Heavier fare will be well matched by traditional serifs such as Georgia, Garamond, or Cambria. For briefs on appeal try a dessert font such as **BIONDI, Elephant, or Cooper Black.**

To learn more, see Garfield, *Just My Type*, Gotham Books 2010.

Debtor-Creditor Newsletter

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

2011 OREGON LEGISLATIVE UPDATE

By Laurie Hager
Sussman Shank LLP

The 2011 Oregon Legislative Session ended on June 30, 2011. Many of these new laws are already in effect, and others will be effective soon. The following is a summary of a portion of the new laws that affect Debtor-Creditor issues.

I. CONSUMER PROTECTION

A. SB 292 (Ch 502) "Free Offers"

SB 292 amends ORS 646.605 through 646.652, making it an unlawful business practice for sellers to impose cumbersome financial obligations on consumers who sign up for "free trial offers." Consumers have encountered problems with these free trial offers including disclosure of personal account information to third parties, membership fees without additional warning, and cumbersome cancellation procedures. SB 292 now imposes disclosure and billing requirements for such offers and requires a consumer's affirmative consent to the terms of a free offer. SB 292 takes effect January 1, 2012.

B. SB 487 (Ch 509) Automatic Renewal Arrangements

SB 487 amends ORS 646.605 through 646.652 by prohibiting offers of automatic renewal or continuous service arrangements unless the offer complies with disclosure requirements. SB 487 prohibits charging a consumer without first obtaining the consumer's affirmative consent to the offer, and requires that the consumer be provided an acknowledgment that can be retained by the consumer containing the terms of the offer and the cancellation policy. Any violation of these provisions constitutes an unlawful business practice. If such a contract is offered without satisfying the requirement, any product provided to the consumer as part of the arrangement is deemed an unconditional gift to the consumer. A number of exemptions are listed, primarily for services provided by persons regulated by the state or federal government. SB 487 takes effect January 1, 2012.

II. TRUST DEEDS

A. SB 491 (Ch 510) Notice to Tenants and Termination of Tenancy in Event of Foreclosure

SB 491 amends ORS 86.745, 86.755, 90.300, 105.124, and 105.126 with respect to the rights of residential tenants in the event the leased premises are subject to foreclosure. SB 491-B further modifies the requirements for notice of foreclosure and termination of tenancy

for residential dwellings in foreclosure. The measure conforms state law to recent federal law with regard to notice periods. When the federal law sunsets in 2014, the notice periods will revert to the current state requirements. SB 491 also obligates purchasers of foreclosed properties to provide notice of the change in ownership, in a form that will be provided in ORS 86.755. In certain situations, the amendment also requires the purchaser to serve a notice to terminate the tenancy at least 90 days before initiating eviction proceedings in certain situations. It also adds a right to prevailing party attorney fees in a purchaser's eviction actions in certain situations. SB 491 took effect on September 21, 2011.

B. SB 519 (Ch 712) Right of First Refusal

SB 519 adds a provision to ORS 86.755 regarding trustee sales of real property upon which a single residential unit subject to an affordable housing covenant is situated. In those circumstances, an eligible covenant holder may purchase the property from the trustee for the lesser of the sum of obligations secured by the trust deed of the mortgage on the property or the highest bid received for the property, other than a bid from an eligible covenant holder. Also, if an eligible covenant holder purchases the property in accordance with this rule, the sale forecloses and terminates all other interests in the property as provided in ORS 86.770. The covenant holder takes the property subject to any interest that was prior to the covenant holder's interest in the property. SB 519 takes effect January 1, 2012.

III. PROCEDURE, JUDGMENTS, AND ENFORCEMENT OF JUDGMENTS

A. SB 740 (Ch 429) Legal Description for Property Sold by Sheriff

SB 740 changes ORS 18.862, 18.870, 18.906, and 18.924, and requires the writ of execution of real property and any related notices to include a street address, if any, in addition to the legal description of the real property. SB 740 takes effect January 1, 2012.

B. SB 926 (Ch 733) Financial Institution Account Review Upon Writ of Garnishment

SB 926 amends ORS 18.600, 18.619, 18.790 and 18.838. The law now requires financial institutions to perform garnishment account review of judgment debtor accounts when the financial institution receives a writ of garnishment. The purpose of the review is to determine whether certain payments protected as exempt property were deposited in debtor's account during the statutory specified lookback period. The new law also changes the garnishment forms that the garnishor provides to the garnishee bank to address the new law. SB 926 took effect on August 5, 2011.

C.SB 935 (Ch 93) Personal Exemptions

SB 935 increases from \$3,000 to \$5,000 the exemption for tools, implements, apparatus, team, harness, or library necessary to carry on an occupation. SB 935 took effect May 19, 2011.

D.HB 2252 (Ch 223) State Agency Collections Write-off Process

State agencies no longer have to receive approval from the Secretary of State before determining that a debt is uncollectible. HB 2252 took effect June 2, 2011.

E. HB 2667 (Ch 398) Amendment to Summons

Among other things, HB 2667 amends the summons language requirements under ORCP 7C. The statutory form of summons now contains website information for the Oregon State Bar's Lawyer Referral Service. HB 2667 took effect June 17, 2011.

F. HB 2677 (Ch 226) Assignment of Judgment

HB 2677 amends ORS 18.205 regarding assignments of judgments. The law now addresses issues related to corporate judgment debtors by providing that, in addition to the judgment creditor and the judgment creditor's attorney, the judgment creditor's agent may also sign the assignment of judgment document. The law also provides that the assignment of judgment is not subject to ORS 9.320, which otherwise requires corporations to appear through counsel. HB 2677 takes effect January 1, 2011.

G.HB 2682 (Ch 228) Increases Minimum Wage Exemption to Garnishment

HB 2682 increases the minimum wage exemption to garnishment as follows:

1. If the payment is for a one-week period (without regard to whether the period is a calendar week or any other seven-day period), the minimum exemption is now \$218 (formerly \$196).
2. If the payment is for a two-week period, the minimum exemption is now \$435 (formerly \$392).
3. If the payment is for one-half of one month (*i.e.*, the debtor is paid twice each month), the minimum exemption is \$468 (formerly \$420).
4. The minimum exemption for a monthly payment is \$936 (formerly \$840).

The statutory garnishment forms are updated to reflect these changes. HB 2682 took effect June 2, 2011.

H. HB 2692 (Ch 195) Certain Personal Identification Documents not Subject to Execution and Changes to Writ of Execution Procedures

Under HB 2692, identification documents such as a driver's license, passport, birth certificate, or Social Security card are not subject to execution, and a writ of execution may not direct a sheriff to levy on an identification document except for the purpose of delivering the document pursuant to the terms of a judgment specifying the return of such personal property. The bill requires the sheriff to provide additional notices concerning the execution sale of real property. The bill also allows a judgment debtor to pay the sheriff the full amount of the judgment in U.S. currency prior to an execution sale of personal property. HB 2692 takes effect January 1, 2012.

I. HB 2708 (Ch 230) Shields Consignor's Art from Creditors of Consignee

HB 2708 amends the law to protect the art of any consignor, whether an artist or a non-artist owner of the art, from the creditors of the consignee (art dealer). Prior law only protected an "artist's" art from the consignee's creditors. HB 2708 took effect June 2, 2011.

J. HB 2710 (Ch 595) Court Fees

HB 2710 makes many changes to court filing fees. It also requires that the caption of any complaint or other document filed in a circuit court for the purpose of commencing an action or other civil proceeding include a reference to the statute that establishes the filing fee for the proceeding. For contract and tort actions, the caption must state the amount in controversy.

If at any time a party files an amended pleading in a proceeding, and the pleading increases the amount in controversy, the caption of the pleading must note that increased amount. The court shall collect an additional filing fee from the party filing the pleading that is equal to the difference between the filing fee paid by the party when the original pleading was filed and the filing fee that would have been collected if the amount had been pleaded in the original pleading.

While HB 2710 became effective July 1, 2011, certain provisions apply only to proceedings filed on or after October 1, 2011. For more information about HB 2710, see: <http://www.leg.state.or.us/11orlaws/sess0500.dir/0595.pdf>

IV. STATUTORY LIENS

HB 2253 (Ch 359) Agricultural Produce and Grain Producer Liens

HB 2253 requires holders of agricultural produce liens to file written notice of such liens with the Secretary of State within 45 days after the close of furnishing the labor, services, or materials.

This amendment requires holders of grain producers' liens to file written notice of such liens with the Secretary of State within 180 days after furnishing the labor, services, or materials. HB 2253 takes effect January 1, 2012.

V. MISCELLANEOUS

A. HB 2678 (Ch 449) Dishonored Check Fee

HB 2678 changes ORS 30.701 to increase the dishonored check fee from \$25 to \$35 per check. HB 2678 takes effect January 1, 2012.

B. HB 2916 (Ch 480) Short Sale Deficiency

HB 2916 creates a new law providing that if a lender reports to the IRS that, as a consequence of or in conjunction with a short sale of residential property, the lender has canceled all or a portion of a borrower's debt under a real estate loan agreement, and the lender provides the borrower written evidence of the lender's report to the IRS, the lender or an assignee of the lender may not bring an action or otherwise seek payment for the residual debt following the short sale.

The Act does not say whether the bar to pursuing the residual debt applies if the lender does not provide the borrower written evidence of the lender's report to the IRS. HB 2916 took effect June 23, 2011.

"JUST THE FACTS" ABOUT CONSUMER DRAGNET CLAUSES IN OREGON

By Michael Fuller
OlsenDaines, PC

Drag • net (noun)

1. A net drawn through a river or across ground to trap fish or game.
2. A 1950's crime drama starring detective Joe Friday and his partners.

A third definition, likely more relevant to Oregon consumers, refers to adhesion contract clauses, typically found in bank and credit union car loan boilerplate provisions. A dragnet (or cross-collateralization) clause includes within the coverage of

a security agreement all prior and future debts of the debtor. Thus, although an antecedent or subsequent loan by the same lender may not contain a security agreement, a default by the debtor triggers the lender's rights against the debtor's collateral.

Dragnet clauses date back to early common law. See *US v. Hooe*, 3 Cranch 73, 7 US 73, 89 (1805). Although there is no majority rule regarding their enforcement, *In re Auza*, 181 BR 63, 67 (9th Cir BAP 1995), they are disfavored and strictly construed in many jurisdictions. See, e.g., *Canal National Bank v. Becker*, 431 A2d 71, 74 (Me 1981), where the Court observed: "Therefore, a dragnet mortgage 'is not a favorite of the law and is subject to interpretation and construction,'" and cited *Emporia State Bank and Trust Co. v. Mounkes*, 519 P2d 618, 621 (Kan 1974); *Freese Leasing, Inc. v. Union Trust and Savings Bank*, 253 NW2d 921, 925 (Iowa 1977); *First Security Bank of Utah v. Shiew*, 609 P2d 952, 955 (Utah 1980).

Oregon is apparently not a "strict construction" jurisdiction. In fact, cases interpreting dragnet clauses under Oregon law are rare, and no published State or US District Court opinion has addressed dragnet clauses in a consumer context. This article suggests an approach to dealing with this dearth of authority.

Oregon District Court Judge Brown's 2009 unpublished opinion in *In re Matrix Development Corp.*, 2009 WL 2163462 (D Or), contains the most recent discussion of dragnet clauses. In *Matrix*, the Court interpreted the enforceability of commercial real estate loan dragnet clauses under Oregon law. See *Butner v. U.S.*, 440 US 48, 55 (1979) ("Property interests are created and defined by state law.").

Dragnet Clauses for Future Advances

With regard to subsequent loans, the *Matrix* court ruled that "no matter how the clause is drafted, the future advances to be covered must be **of the same class** as the primary obligation," 2009 WL 2163462 at *4 (emphasis added), quoting *Community Bank v. Jones*, 278 Or 647, 666 (1977). In *Community Bank*, the Oregon Supreme Court reasoned that an unsecured loan to pay overdraft fees did not meet the "same class" standard because it was not related to the purpose of the original floor-financing loan containing the dragnet clause.

Applying *Community Bank* in the consumer context, a purchase-money car loan contract with a dragnet clause presumably will not secure a future advance on an unrelated credit card, despite the language of the contract.

Dragnet Clauses for Prior Debts

With regard to antecedent loans, *Matrix* held a dragnet clause is enforceable as written, so long as the

clause is unambiguous. The *Community Bank* opinion is silent about dragnet clauses incorporating prior debts. *Matrix* therefore based its holding on Oregon's general principles of contract construction. 2009 WL 2163462 at *6, citing *Eagle Indus., Inc. v. Thompson*, 321 Or 398, 405 (1995) (if the provision is not ambiguous, the court enforces the provision according to its terms).

Thus, under *Matrix's* interpretation of Oregon law, a clearly written dragnet clause in a security agreement may incorporate prior existing loans between a creditor and debtor, regardless of whether the prior loan is specifically referenced. It is unclear whether the District Court's interpretation would have been different had the issue occurred in a consumer context.

In its ruling, *Matrix* rejected *In re Wollin*, 249 BR 555 (Bankr D Or 2000). Before *Matrix*, *Wollin* was the only available opinion interpreting an antecedent debt dragnet clause under Oregon law. *Wollin* remains the only published opinion decided in a consumer context.

In *Wollin*, the court limited the enforceability of a credit union's dragnet clauses in consumer purchase-money car loan contracts. The *Wollin* Court held that to be enforceable, dragnet clauses must make "specific reference" to prior loans. Because the debtors' antecedent debts were not specifically referenced, they were not secured by the debtors' collateral.

It is unclear to what extent, if any, *Wollin* remains binding authority on Oregon bankruptcy courts after *Matrix*. It is also unclear what persuasive authority, if any, *Matrix* or *Wollin* might have in a state court case interpreting the enforceability of an antecedent debt dragnet clause, especially in a consumer context.

A Consumer Versus Commercial Context Distinction

Both *Matrix* and *Community Bank* were decided in the commercial context and neither addressed consumer-related policy concerns. *Community Bank* involved a floor-financing agreement, and the Oregon Supreme Court's reasoning relied almost exclusively on commercial transaction policy concerns. 278 Or at 666-67 ("To permit such a belated reordering of priorities would do little to lend stability to commercial transactions. Consistency and predictability in commercial transactions is one of the purposes of the Uniform Code."); see also *id.* at 666, citing "Curbing the Abuses of the Dragnet Clause," 34 *U.Pitt.L.Rev.* 691 (1973) (limited to commercial policy arguments).

In contrast, *Wollin* dealt with a consumer loan, cited consumer-related policy concerns and came to a different conclusion. "[G]uided by the policy that dragnet clauses are generally disfavored and strictly construed, this Court adopts the 'specific reference' standard as divining the parties' true intent and comporting with sound public policy." 249 BR at 560. It also said, "Some courts have noted that dragnet

clauses may be more strictly construed in the consumer context, because of the parties' unequal bargaining position." *Id* at 559 n.9. Its authority is now uncertain.

Legislative Intent Behind the Revised UCC

The revised UCC took effect in Oregon on July 1, 2001. Official Comment #5 to revised UCC §9-204 (ORS 79.0204) makes clear the intent of the drafters to reject case law imposing limitations on dragnet clauses. The Comment specifically references an intent to reject the "same class" standard for future advances, as decided in *Community Bank*.

An Idaho bankruptcy court interpreting Oregon law recently reasoned that the Legislature's adoption of revised UCC "casts doubt on the continued vitality" of the *Wollin* ruling. *In re Hobart*, 452 BR 789, 800 (Bankr D Idaho 2011). The *Hobart* opinion found Comment #5 instructive as to legislative intent, citing *State v. Maybee*, 235 Or App 292, 303 (2010) ("legislative intent can be derived from the language of the statute along with the official comments"). See also *In re Nagata*, 2006 WL 2131318 (Bankr D Hawaii 2006) (*Wollin* inapplicable because it was decided before revised UCC took effect).

Interestingly, although the *Hobart* opinion refers to the Oregon Bankruptcy Court's *Matrix* decision in a footnote, it makes no reference to the treatment of *Matrix* on appeal by the Oregon District Court.

Public Policy and Unconscionability

Despite the plain language of revised UCC §9-204, at least two legal theories under Oregon law could support a consumer versus commercial distinction when interpreting the enforceability of dragnet clauses. Such a distinction might apply the "same class" standard for future advances and preserve the "specific reference" approach for prior loans in the consumer context.

First, although security agreements under Oregon law are generally binding according to their terms (see *Matrix*; ORS 79.0201), contract provisions that violate public policy may still be held unenforceable. *Phillips v. Thorp*, 10 Or 494, 498 (1883).

Second, state courts may refuse to enforce a particularly harsh dragnet clause against an unsophisticated consumer under the theory of unconscionability. See *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or App 553 (2007). Because unconscionability analysis takes into account the bargaining power of the parties, unfair surprise and oppression, *id* at 566-67, it may be the strongest argument in favor of a consumer context distinction. As the Maine Supreme Court opinion in *Canal National Bank* noted, while dragnet clauses can properly serve purposes of commercial convenience, in the consumer context they are more problematic, "as by their broad

and general terms they enwrap the unsuspecting debtor in the folds of indebtedness . . . which he did not contemplate.” 431 A2d at 74, *citing Berger v. Fuller*, 21 SW2d 419, 421 (Ark 1929).

Conclusion

Eventually a state court or the legislature will decide whether dragnet clauses in consumer contracts are enforceable under Oregon law. Until then, the very limited treatment cited in this article appears to provide the only authority on the matter.

HOW TO TALK BACK TO A JUDGE

By Hon. Frank R. Alley

Maybe it's the Internet. The Net is frequently cited as the cause of many of modern society's failings, and it's clearly the best place to find examples of coarse language, weak arguments, and shoddy personal conduct. Whether a cause or an effect of our degraded standards of discourse, the Internet assures that word gets around. Unhappily, the legal profession – and lawyers, of all people, should know better – is no exception. For example, an attorney in a chapter 11 case was aggrieved by a decision of the court respecting an exemption claim. His written response to the court was less than temperate:

In your fourth published example of “Ready-Aim-Fire” against this attorney, it is obvious that you have not reviewed the record in this case which does not support the purported findings of fact.

The Court's opinion notes here that “it gets worse”:

Your conduct in this case has been without citation to any authority for the propositions that: your jurisdiction is never ending and without geographic bounds, your unconditional releases are meaningless, and pronouncements of the United States Supreme court are mere suggestions.

In the OSC . . . you found that “[the parties] entered into an agreed order to strike the claim.” Where you draw this conclusion can only be from the ether.

And, as a finale:

It is sad when a man of your intellectual ability cannot get it right when your own record does not support your half-baked findings.

After giving the matter some thought (something he might have done before filing the document) counsel sent a bottle of wine to chambers, with a note asking that counsel and the judge settle their differences privately. Whether the gesture was driven by contrition or self-preservation is unclear, but the response was not: both the note and the bottle were returned unopened.

The court's official response would have made Curtis LeMay proud: Counsel was ordered to appear before an *en banc* panel of the court. The outcome was a long opinion holding forth on the powers of courts and the duties of attorneys, and imposing a 60-day suspension from practice before the bankruptcy court, and ending, for good measure, with a formal referral to the state bar “for the imposition of any additional sanctions that the . . . Bar may find appropriate.” The opinion was signed by every member of the court.

I am not going to comment on the academic aspects of the opinion. We all know well enough that lawyers are supposed to behave respectfully toward judges, and that judges have the power to impose sanctions when they do not. If you need case citations to be convinced of these propositions, I can't help you here or anywhere else. I also have nothing to say about the sanction, since I don't know anything about the lawyer's prior record. Still, it must be acknowledged by bench and bar alike that our professional life often involves heightened tensions, and the temptation to intemperance. With that in mind, I want to make some practical observations.

- Don't get personal. Documents addressing the court should not include the second person: you can say “the court erred,” but not “you messed up.” You are not dueling with opposing parties or the court, but advancing a case. The most effective language in a legal brief (other than factual recitations) describes ideas, not people. (Note that nobody is mentioned by name here.)
- An apology (to a judge or anyone else) must be swift, certain, and unconditional. An apology conditioned on losing another round of debate gets you nowhere (except, maybe, to an *en banc* hearing).
- Don't make wisecracks. Counsel's remarks about the ether sound like the work of a frathouse wise guy. If you don't understand the court's reasoning, say so (nicely); there is no shame in that, and it might lead to a civilized discussion on the merits. Besides, there is an ether: it's called the case reporter system. Judges do go there on occasion, and often find interesting stuff when they do.
- Heated or protracted disputes call for increased vigilance. The opinion described above was docketed as document #680. In any case with more than two or three hundred documents, chances are everyone is half crazy. Be especially careful what you write.
- In court documents and in all other places, do not use *italics*, or **bold**, or **STRANGE FONTS**. Pry the CAPS LOCK key from your keyboard

and replace it with a sharp object. Your arguments must be based on what the words say, not on how they look.

- Mind your tone. Words that sound impressive and inspiring thundered out at a convention may have the opposite effect when read in chambers. Your arguments must be based on what the words say, not on how they sound.
- Use adjectives sparingly. When you must use them, remember that adjectives are better used to describe, not to insult. Our friend may have shaved a week or two off his suspension by dropping the terms “purported” and “half-baked.”
- When contending against the court’s position, be firm and positive, and support your position as best you can. It is not useful to attack the court’s views unless you have something from a smarter (that is, higher) court to support your arguments.
- Get a good editor. What I mean is, have someone you trust read the document before anyone else sees it. I have two editors working for me in chambers (and an Editor-in-Chief at home) who have spared me (and many of you) a lot of grief over the years. If you don’t have anyone you trust that much, you need to get another career.

Finally, avoid, at all costs, the phrase “With all due respect.” An alert judge, skilled in analyzing language, will realize that the phrase suggests that there is a limit to the respect actually due. That may be so, but oral argument is not a good time to bring it up. The other 90% of us will simply note that the phrase is code for “I think you’re being a jerk but you’ve got the robe and I can’t do anything about that.”

To be fair, this discussion requires acknowledgment that sometimes the abuse flows from the bench down. Recently a trial judge issued an OSC in a discovery dispute likening the attorneys to kindergartners, and inviting them to a “party” where he would instruct them on civility and professional conduct. No RSVP was required, and the order made it clear that the Marshals Service was available to assist with attendance. Inevitably, the order went viral on the internet. The Chief Judge reprimanded the trial judge in an email. Unhappily, the email message was copied to all the other trial judges in the judicial district, and now the entire country has seen it. Now everyone is embarrassed except the original kindergartners, because nobody remembers who they are.

I don’t know what causes these incidents, but I have a theory: sometimes the judge or attorney is trying to be funny, and not quite getting it right. Humor is dangerous, and can cause great damage in

unskilled hands. Perhaps what we need is a Humor Safety Course, inspired by the Hunters’ Safety Courses sponsored by the American Rifle Association and similar groups. (If this seems odd to you, consider that personal courtesy and careful humor are essential skills in any group dedicated to weaponry. It’s no different in litigation.)

What moved me to write this piece (I was supposed to do a book review!) was the recent appearance of these stories in internet legal periodicals, and a memorial for the late Don Ashmanskas. Both on and off the bench, Judge Ash wielded a wicked sense of humor that taught and entertained, but never caused distress. This piece is inspired by a tract he wrote called “Tips for Better Brief Writing and Oral Argument.” It’s funny, and valuable. Let me know if you’d like to read it.

ADVISING DEBTORS IN COLLECTION LAWSUITS

By Tim L. Eblen
Eblen Freed LLP

A potential client comes to your office with a summons and complaint served by a creditor. The client seeks counsel on how best to respond to this collection lawsuit. What do you advise?

I’ve seen this litigation from both sides – I spent five years doing collection litigation for a creditor’s rights firm, and I currently represent both creditors and debtors in consumer law cases, workouts, and bankruptcy. I have found that certain approaches help a debtor’s attorney, or pro se debtor, achieve a fair and efficient resolution of any debt collection case. The following discussion assumes a civil lawsuit has been filed and the client’s goal is an efficient and practical resolution, which is typically the case. Of course, no general rule can apply to every situation.

Analyze the Case

The main value an attorney brings to any debt collection matter is the ability to analyze the debt at issue, and the debtor’s situation as a whole. Based on the analysis, the attorney may determine what defenses the debtor may have to paying the debt, and whether the debtor should attempt to pay the debt, negotiate a settlement or defend the case.

First, review the facts of the transaction that created the debt obligation to see whether affirmative defenses to liability or counterclaims exist. One potential defense to consider right away is the statute of limitations. In Oregon, the six-year limitations period for contracts is most often the one applicable in collection cases. ORS 12.080. Note, however, that a four-year period may also apply (ORS 72.7250), and

that any voluntary payment by the debtor restarts the applicable limitations period. ORS 12.240.

Second, review the facts of the transaction and of all collection efforts, to ascertain whether any state or federal consumer protection laws, or common law torts, may be implicated. For example, has there been a violation of the Oregon Unlawful Trade Practices Act, Oregon Unlawful Debt Collection Practices Act, Federal Fair Debt Collection Practices Act, Federal Fair Credit Reporting Act?

Third, consider the debtor's overall financial picture. Could bankruptcy be a better solution than settlement with the creditor?

If you do not feel comfortable spotting and evaluating the issues outlined above, you should promptly refer the debtor to an attorney who specializes in this area.

Communicate with the Creditor

Avoid unproductive posturing. Coming out of the gate with aggressive threats or statements that are unsupported or irrelevant is unlikely to be productive. First, most creditors are accustomed to such posturing and immune to it. Second, this stance becomes a form of bluff that, once called, leaves you in a weak position to negotiate a resolution. The creditor may well harden its position after being forced to address untenable arguments by an aggressive debtor or debtor's attorney.

For example, it is counterproductive to begin by claiming (without foundation) that the client was "harassed" by a debt collector, that consumer law counterclaims could therefore be asserted, and so the debt should be significantly reduced. If, from the creditor's perspective and records, it appears that the debt is due and owing, the debtor has yet to make any payments to address the debt, and the "harassment" consists of multiple lawful attempts by the debt collector to get the debtor to agree to payment terms before initiating a lawsuit, the creditor will not be persuaded by this argument.

Another example: when a debt has been assigned to a collection agency, some attorneys argue that because the creditor bought the debt for "pennies on the dollar," it is unreasonable to expect the debtor to pay anything near the full amount of the debt. Whether or not it is true that the creditor purchased the debt, it is irrelevant to your client's liability and thus irrelevant to discussions with the creditor. If the creditor will settle for a deep discount, it will do so without a lecture about how much it should be willing to take. Also note that many collection agencies are NOT debt buyers, but have been assigned the debt for purposes of collection; their fee is contingent upon any recovery.

Articulate substantive defenses and counterclaims. Creditors will take notice when potential defenses

and counterclaims are set forth in a letter, supported by specific facts. It is in the creditor's best interest to investigate any claims made by the debtor, evaluate potential exposure, and approach settlement accordingly. Taking time to spell out the defenses and counterclaims and the facts that support them increases the likelihood that the creditor will take them seriously, investigate them and settle them.

Do not begin by filing an Answer. If your client's goal is an efficient resolution, it usually makes little sense to take the time and expense of filing an Answer and serving discovery requests upon the creditor.

This move creates court-imposed deadlines that will speed up the process, when it may be in your client's interest to slow things down so there is time to negotiate a settlement. Once an Answer is filed, any collection case under \$50,000 goes to court-annexed arbitration. You will find you and the creditor spend as much time dealing with procedural aspects of the arbitration process, as you do seeking a fair resolution.

If instead you begin with a simple phone call and letter, you give the creditor a less expensive way to assess the case, provide documentation and offer an acceptable resolution. The creditor will see the value in resources saved of an early settlement. After a creditor goes to the expense of responding to discovery requests, preparing for trial, paying arbitration fees, etc., the cost of proceeding with litigation may appear smaller and settlement less attractive.

Make good-faith reasoned settlement offers. This may sound like negotiation 101, but I have been surprised by how many times a debtor's attorney will make unnecessarily snide comments about a creditor, make a low-ball settlement offer without providing reasons, and expect a positive response from the creditor. That approach rarely works.

A debtor who seeks legal counsel to resolve a collection lawsuit needs help in assessing what to offer, what information to share with the creditor, and what concessions are necessary.

A lump-sum settlement offer gives a debtor the opportunity to pay less than the full amount of the debt – the bird-in-the-hand theory. It also may be that giving the creditor financial information about the debtor can persuade the creditor to accept a reduced settlement amount, and thus avoid unnecessary back and forth. In one case where I represented a creditor, debtor's counsel sent me a completed chapter 7 bankruptcy petition. That document allowed me to see the extent of the debtor's liabilities and nonexempt assets, and caused my client to consider a low settlement offer that it otherwise would have dismissed out of hand.

More commonly the debtor cannot offer settlement in full, but needs a payment plan. Although generally

I do not counsel debtors to provide detailed financial information to their creditors, in some cases this step is helpful. If the debtor has stable employment, and has offered a thoughtful and practical payment plan, it can make sense to give the creditor the debtor's employment information. This gives the creditor some security: if debtor defaults on the payment plan, the creditor can issue a writ of garnishment and may thus agree to a lower monthly payment amount.

In the payment plan context, expect that the creditor will want to secure the payment plan with a judgment. The creditor has already gone to the expense of initiating a lawsuit to secure payment of the debt. It is rare that a creditor in this position will allow a debtor to pay over time and dismiss the pending lawsuit without the security of a judgment.

If a judgment could hurt the debtor economically, a Confession of Judgment may be an alternative. A Confession allows the creditor to hold a judgment in its file, knowing it can file it in the event of default, while keeping the existence of the judgment out of the public record. Note that a Confession of Judgment is always an option for a commercial debt, but for a consumer debt it is only an option after a civil lawsuit has been filed. ORCP 73.

Conclusion

Debt collectors are easy targets for criticism, but scapegoating them does not help the debtor dealing with a specific collection lawsuit. A cool-headed and fair-minded approach to assisting debtors who find themselves defendants in collection lawsuits will help the debtors get where they want to be: debt free.

SUPREME COURT CASE NOTE

By Margot Lutzenhiser

Farleigh Wada Witt

Family Dispute Among the Ultra Rich Results in Limitations to the Constitutional Authority of Bankruptcy Judges

Stern v. Marshall, 131 S Ct 2594 (2011)

In a 5-4 decision, the Supreme Court ruled that the grant of authority to bankruptcy courts in 28 USC §157(b)(2)(c) is unconstitutional.

The original parties in this case were reality TV star Anna Nicole Smith (aka Vickie Lynn Marshall) and Pierce Marshall, the son of wealthy oil tycoon J. Howard Marshall II. The Supreme Court heard this case on two occasions – first on a jurisdictional question and later on a constitutional issue. Both parties died during the pendency of the case. Representatives of their respective estates were the parties when the Supreme Court heard the case last summer.

Vickie married Pierce's elderly father, J. Howard

Marshall II. Before Howard's death, Vickie sued Pierce in Texas probate court asserting Pierce had fraudulently induced his father to sign a trust that did not include Vickie. After Howard's death, Vickie filed for bankruptcy in California. Pierce filed a complaint in Vickie's bankruptcy case alleging defamation stemming from statements Vickie's attorneys made to the press about Pierce's supposed fraudulent actions relating to his father's estate. Vickie responded with a counterclaim alleging that Pierce had tortiously interfered with the gift she expected to receive from Howard. The question in this case was whether the bankruptcy court had authority to enter a final judgment on Vickie's counterclaim.

In 28 USC §157(b), Congress gave bankruptcy courts statutory authority to enter final judgments on "core" matters. For "noncore" matters, bankruptcy courts may "submit proposed findings of fact and conclusions of law to the district court." *Id.* §157(c) (1). "Core" matters are defined as proceedings that arise "under" or "in" a Title 11 case, whereas "noncore" matters are those that simply "relate to a case under Title 11." Without further explanation, the distinction between "core" and "noncore" matters is obscure at best. To clarify things, Congress created a nonexclusive list of 16 "core" proceedings in the statute, including "counterclaims by the estate against persons filing claims against the estate." *See id.* §157(b)(2).

The Bankruptcy Court heard Pierce's claim and Vickie's counterclaim and entered a judgment of \$425 million for Vickie on her counterclaim. Pierce appealed. The District Court held that the Bankruptcy Court had not had statutory authority to enter a final judgment on the counterclaim because it did not "arise in" or "under" a Title 11 case. Before the District Court could review the record and issue an opinion, the Texas probate court concluded its jury trial on the same issues and entered a substantial judgment in favor of Pierce. The District Court declined to give that judgment preclusive effect and entered a judgment in favor of Vickie. Pierce again appealed.

The Court of Appeals reversed the District Court's decision on a different theory – the "probate exception" to subject matter jurisdiction to hear Vickie's counterclaim, because tortious interference with a gift was a "thinly veiled" will contest that came within the "exclusive jurisdiction" of the Texas probate court. *In re Marshall*, 392 F3d 1118, 1137 (9th Cir 2004). The Supreme Court reversed and remanded.

On remand, the Court of Appeals considered whether the Bankruptcy Court had statutory authority to enter a final judgment on Vickie's counterclaim and, if not, whether the District Court should have given the Texas probate court's judgment preclusive effect. The Court of Appeals concluded that Vickie's counterclaim was not a "core" proceeding "arising in a case under"

Title 11, because its resolution was not necessary to resolving the claim itself. 131 S Ct at 2602, citing *In re Marshall*, 600 F3d 1037 (9th Cir 2010). The Court of Appeals further concluded that the probate court judgment should have been given preclusive effect because it was the “earliest final judgment on matters relevant to this proceeding.” *Id.* It reversed the District Court’s judgment in favor of Vickie. Vickie appealed.

The Supreme Court disagreed with the Appellate Court’s reasoning but affirmed. It held that 28 USC §157(b)(2)(c) clearly and unequivocally gave bankruptcy courts the statutory authority to hear all counterclaims because it specifically designates counterclaims as “core.” 131 S Ct at 2604-05. However, the Court then held that §157(b)(2)(c) is unconstitutionally broad. It referred to the seminal *Northern Pipeline* decision, 458 US 50 (1982), where the Court “considered whether bankruptcy judges serving under the Bankruptcy Act of 1978 – who also lacked the tenure and salary guarantees of Article III – could ‘constitutionally be vested with jurisdiction to decide [a] state-law contract claim’ against an entity that was not otherwise part of the bankruptcy proceedings.” 131 S Ct at 2609-10. In *Northern Pipeline*, a plurality concluded that Congress could vest bankruptcy courts with the authority to hear cases to the extent that the cases satisfied the “public rights exception.”

“[I]t is still the case that what makes a right ‘public’ rather than private is that the right is integrally related to particular federal government action.” 131 S Ct at 2613. The Court then discussed in detail a myriad of cases that applied the “public rights exception.” The Court noted that these cases express “varied formulations of the public rights exception.” *Id.* at 2614. It concluded that Vickie’s counterclaim did not fall within any of these formulations. It was unrelated to Pierce’s proof of claim (there was very little factual overlap between the tortious interference and defamation claims). The claim itself was based entirely on unsettled Texas probate law (and did not implicate any federal laws). Additionally, Vickie’s claim sought affirmative recovery from Pierce (not simply an offset against Pierce’s claim). Therefore, the Court concluded that resolving Vickie’s counterclaim was not vital to the claims allowance process in her bankruptcy case. Vickie’s claim was instead “a state tort action that exists without regard to any bankruptcy proceeding.” *Id.* at 2618. Thus, the counterclaim was not “integrally related to a particular federal government action.” It appears that the Court would have come to the opposite conclusion if Pierce’s claim and Vickie’s counterclaim had an identity of issues such that resolving Pierce’s claim would have “necessarily” resolved Vickie’s counterclaim.

The Court also considered whether a party can consent to the bankruptcy court entering a final judgment in a case. In *Marshall*, Vickie argued that

Pierce had consented to having the action heard and decided by the Bankruptcy Court. In fact, Pierce had told the Bankruptcy Court that he was “happy” to have the matter litigated there, and did not raise the issue of that court’s authority to enter a final judgment until after he had lost the case. *Id.* at 2607-08. The Court concluded Pierce had given his consent, although this consent did not affect the outcome.

Four justices dissented. Their principal argument related to precedent: that the Court had overstated the importance of the plurality opinion in *Northern Pipeline* and understated the importance of other precedents. Applying the approach of these other precedents, the dissent argued that the compulsory nature of Vickie’s counterclaim, the control exercised by Article III judges over bankruptcy proceedings, the parties’ consent to bankruptcy court jurisdiction and the importance of the legislative purpose in granting adjudicatory power to bankruptcy courts all support a contrary result. The dissent also made the case that the majority’s ruling will have a significant impact, given the “staggering” volume of bankruptcy cases: “a constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.” *Id.* at 2629.

NINTH CIRCUIT CASE NOTE

By Margot Lutzenhiser

Farleigh Wada Witt

Dueling Debtors and the Automatic Stay — an Equitable Subordination Action Requires Relief from the Stay

In re Palmdale Hills Prop., LLC, ___ F3d ___, 2011 WL 3320429 (9th Cir)

Both parties in this case were corporate debtors. Over a period of several years Palmdale Hills Property, LLC (Palmdale), a chapter 11 debtor in the Central District of California, borrowed money from Lehman Commercial Paper Inc. (Lehman), a debtor in the Southern District of New York. Palmdale began an adversary proceeding against Lehman (among others), to equitably subordinate Lehman’s security interests in certain collateral. Lehman filed multiple motions for relief from Palmdale’s stay to foreclose on the collateral securing loans made to Palmdale that were in default. Lehman argued that relief should be granted because (1) the property was declining in value, and (2) Palmdale’s proposed reorganization plan was not feasible because it required equitably subordinating Lehman’s security interests, which was prohibited by the automatic stay in Lehman’s bankruptcy.

The bankruptcy court denied Lehman’s motions and held that equitable subordination did not violate Lehman’s stay. The BAP reversed: “because equitable

subordination seeks to minimize an otherwise allowable claim, it is an affirmative action to take control of Lehman's property and thus prohibited by Lehman's stay." Therefore Palmdale was required to obtain relief from Lehman's stay in the Southern District of New York before proceeding with its equitable subordination action in California. Palmdale appealed and the Ninth Circuit affirmed.

The court discussed the importance of differentiating between "actions for affirmative relief" against a debtor's estate, which are stayed, and "defensive actions," which are not stayed. For instance, §362(a) prohibits someone from filing a lawsuit against a debtor that could have been initiated prepetition (*i.e.*, an action for affirmative relief). In contrast, a debtor's objection to a claim or motion to disallow a claim is generally defensive and thus is not stayed. "This is only natural because a core power of the bankruptcy courts is to determine the validity, amount, and priority of claims." In doing so, the court "protects the estate and other creditors from invalid claims."

The court concluded that Palmdale's action to equitably subordinate Lehman's claim was one for affirmative relief, because subordination of a claim "presupposes that the claim is allowed but for equitable reasons must be subordinated to the other allowed claims." Equitable subordination changes the "character and value" of a creditor's claim or lien because it reorders the priority of that claim or lien. Unlike a situation where Lehman simply had its claim disallowed in full, in this case Lehman had a "valid, enforceable claim secured by a lien, which would be wrested from its estate and given to Palmdale" by equitable subordination. Because an action for equitable subordination is more than a simple defensive maneuver, Palmdale was required to obtain relief from Lehman's automatic stay before it could move forward with its equitable subordination action.

are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than \$5,475." The secured creditor argued that only the amount in excess of \$5,475 should have been disallowed.

The BAP affirmed the lower court, noting, "When Congress intends to limit avoidance to only a portion of a particular transfer, it knows how to do so," and finding that the plain language of §547(c)(9) renders the entire transfer voidable, not just the amount of the transfer above \$5,475.

Purported Mortgage Assignee Lacks Standing Because Assignment Did Not Transfer Note Underlying Mortgage

In re Veal, 450 BR 897 (9th Cir BAP 2011)

In 2006, the debtors executed a promissory note, secured by a mortgage on real property. The lender assigned both the note and the mortgage to a second lender, which then assigned the mortgage to Wells Fargo. The mortgage assignment to Wells Fargo did not "contain language effecting an assignment of the Note." 450 BR at 905.

The debtors later filed chapter 13 bankruptcy, and the automatic stay prevented Wells Fargo and its purported servicing agent, American Home Mortgage Servicing, Inc. (AHMSI), from exercising nonbankruptcy remedies. AHMSI filed a proof of claim, to which the debtors objected, and Wells Fargo moved for relief from the automatic stay, which the debtors also opposed. The bankruptcy court ruled against the debtors in both matters.

The BAP reversed with respect to Wells Fargo's motion for relief, and vacated and remanded with respect to the objection to AHMSI's proof of claim. The court held that neither Wells Fargo nor AHMSI had demonstrated that they had standing as "real part[ies] in interest."

In Wells Fargo's case, the BAP noted that under "common law generally, the transfer of a mortgage without the transfer of the obligation it secures renders the mortgage ineffective and unenforceable in the hands of the transferee." *Id* at 915. The BAP held that Wells Fargo had not produced documents or other evidence to show that it was a "person entitled to enforce" the note, as is required of a real party in interest.

With respect to AHMSI, the court held that the bankruptcy court had not made findings sufficient to determine whether it was a real party in interest, as is required for standing to file a proof of claim. When the debtors challenged AHMSI's standing to file a proof of claim, AHMSI presented no evidence showing it had an agency relationship with Wells Fargo, nor that either AHMSI or Wells Fargo was a person entitled to enforce the note. The BAP directed the court on remand to

BAP CASE NOTES

By Jeanne Sinnott

Miller Nash LLP

Exception to §547(c)(9) for Avoidable Preferences Avoids Entire Transfer, Not Just Amount above Amount Listed in Statute

In re Bay Area Glass, Inc. 454 BR 86 (9th Cir BAP 2011)

A secured creditor appealed the bankruptcy court's decision disallowing its secured claim in full because it was an avoidable preference under §547(b). The creditor argued that the entire amount should not have been disallowed because §547(c)(9) creates an exception up to \$5,475 (this amount adjusts periodically under §104(a)). At the time of the case, §547(c)(9) provided, "The trustee may not avoid . . . a transfer if, in a case filed by a debtor whose debts

render findings on the disputed factual issues of who was the “person entitled to enforce” the note, and of AMHSI’s alleged authority to service the loan.

None of Debtor’s Personal Property Protected by Automatic Stay after Debtor Fails to File Statement of Intention

In re Blixseth, 454 BR 92 (9th Cir BAP 2011)

The chapter 7 debtor had guaranteed a \$13 million loan made to her son by Western Capital Partners, LLC. The loan was secured by collateral of \$2 million in “ALL PERSONAL PROPERTY OWED [sic] BY DEBTOR, FAMILY COMPOUND AT YELLOWSTONE MOUNTAIN CLUB.” The debtor listed Western Capital as a secured creditor in her bankruptcy schedules. She listed \$69 million in personal property assets in her Schedule B.

Western Capital filed three motions for relief from the automatic stay in order to liquidate various items of the debtor’s personal property. The motions were based on both §362(d)(2) and §363(h). The trustee did not file objections to the motions, nor did he move for determination of consequential value or benefit under §362(h)(2). The debtor also failed to file a statement of intention indicating whether she intended to relinquish or retain the personal property that Western Capital sought.

The bankruptcy court held that the debtor’s failure to file a statement of intent and the trustee’s failure to object to the motions “indicat[ed] . . . that Debtor’s personal property is of inconsequential value to the bankruptcy estate.” It held that §362(h) entitled Western Capital to mandatory relief, and Western Capital proceeded to sell debtor’s personal property in two sales. Some of the property was not included in the Yellowstone Mountain Club property listed as collateral on the loan. The trustee filed a motion to enforce, claiming §362(h) relief applied only to the collateral property. The bankruptcy court denied the motion, and the BAP affirmed.

The BAP held that the stay was lifted for all the debtor’s personal property: “the effects of §362(h) and §521(a)(2) do not depend on how (or even if) personal property securing a debt is scheduled.” It rejected the trustee’s argument that §521(a)(2) required personal property subject to §362(h) be scheduled, holding that it only requires debt to be scheduled. It rejected several other arguments surrounding §362(h) and §521(a)(2), holding: “Under the unambiguous language of §362(h), all personal property secured by a scheduled debt is released from the automatic stay if a debtor fails to timely file and comply with her statement of intention.”

BANKRUPTCY COURT CASE NOTES

By Margot Lutzenhiser
Farleigh Wada Witt

Horse Boarders and Christmas Tree Retailers Are Not Eligible for Chapter 12 Relief

In re Jones, 2011 WL 3320504 (Bankr D Or)

In re Cooper, 2011 WL 3882278 (Bankr D Or)

Last summer Judge Alley issued two opinions addressing Chapter 12 eligibility. Both begin the eligibility discussion by noting that the court applies a “totality of the circumstances” test when determining whether a debtor is engaged in a “farming operation” under 11 USC §101(21). Section 101(21) includes a non-exhaustive list of farming operations, including, “tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.” Oregon bankruptcy courts consider a number of factors when deciding whether activities outside this list are “farming operations,” including, (1) whether the location of the operation would be considered a traditional farm, (2) the nature of the operation, (3) the type of product and its eventual market, (4) the physical presence of family members on the farm, (5) ownership of traditional farm assets, (6) the debtor’s involvement with the “process of growing or developing crops or livestock,” and (7) “[p]erhaps the key factor is whether or not the practice or operation is subject to the inherent risks of farming.” See *In re Sugar Pine Ranch*, 100 BR 28, 31 (Bankr D Or 1989).

In *In re Jones*, the debtor’s income came primarily from boarding and training horses owned by third parties. The debtor received a flat monthly fee of \$350 for boarding each horse. The debtor generated some additional income from giving riding lessons. The debtor’s operation also involved caring for abandoned and neglected horses for a charitable foundation, of which the debtor was executive director. The court acknowledged a split in authority on whether horse boarding is a “farming operation,” but concluded that the debtor’s boarding and training business was not a “farming operation.” The debtor did not produce or sell a product – she neither bred nor sold horses. Rather, she provided services. Because the debtor’s fees were fixed they were “only indirectly tied to the inherent risks of farming such as weather, disease, yield, prices, etc.” The facts that the debtor’s operation was located on “traditional” farm ground, the debtor lived on the premises, and many of her assets and improvements to the property were “traditional” farm assets were not enough to establish chapter 12 eligibility.

The debtors in *In re Cooper* ran three operations – a vineyard and two Christmas tree farms. There was no question that the vineyard and one of the Christmas tree farms (where the debtors grew trees) were farming operations. The court raised, *sua sponte*, the issue of whether the debtors' second Christmas tree operation also met this standard. For this "farm" (the Retail Tree Business), the debtors simply purchased trees from a third party and resold them. The Retail Tree Business accounted for over half of the debtors' gross annual income. Thus, the debtors could pass the gross income test of 11 USC §101(18)(A) only if the Retail Tree Business was considered a "farming operation."

Applying the *Sugar Pine Ranch* standard discussed above, the court concluded that the Retail Tree Business was not a farming operation because the company "did not cultivate trees; it merely marketed them." Like the horse-boarding business in *Jones*, this business was only indirectly affected by inherent farming risks "such as disease, weather, market fluctuations in seedling costs, etc." The court observed that if the "mere purchase and sale of farm by-products" constituted a farming operation, then "corner vegetable/fruit market[s] or butcher[s] would qualify for Chapter 12 relief. This is clearly not what Congress intended." Therefore, the debtors were ineligible for this relief.

STATE COURT CASE NOTES

By Sean C. Currie
Greene & Markley, PC

Attorney Fees Recoverable Regardless of Who Pays

Menasha Forest Products Corp. v. Curry County Title, Inc., 350 Or 81, 249 P3d 1265 (2011)

An escrow contract between Menasha and Curry provided that the prevailing party in an action on the contract would be entitled to "reasonable attorney fees expended or incurred." Menasha sued Curry for breach of contract and Curry's principal, Transnation, for negligence and declaratory relief. Curry and Transnation prevailed and sought their attorney fees. Menasha objected to an award of attorney fees because Transnation paid for the attorney to appear on its behalf and on behalf of Curry; thus Curry had not "incurred" the fees. The Court of Appeals agreed and reduced the amount of attorney fees awarded to Curry to its indemnification obligation to Transnation.

The Supreme Court, reversing the Court of Appeals, found that even though Curry was not charged with the full amount of attorney fees, it still "incurred" attorney fees because it was liable for them. Moreover, "whether or by what means a party to a legal action (or someone else) pays an attorney's bill has no bearing on the question of whether the party 'incurred' attorney fees." Accordingly, Curry and Transnation were entitled to recover the full amount of their attorney fees.

Oregon Reciprocal Attorney Fee Provision Trumps Choice-of-Law Provision

Capital One Bank v. Fort, 242 Or App 166, 255 P3d 508 (2011)

Bank sued Defendant for breach of a credit card agreement that contained a choice-of-law provision providing the agreement would "be governed by Virginia law and Federal law." Defendant conceded liability for breach of the cardholder agreement but prevailed on his statute-of-limitations defense (under Virginia law). The arbitrator concluded that Defendant was not entitled to attorney fees, however, because Virginia law does not have a reciprocal attorney fee provision analogous to ORS 20.096. Defendant filed a written exception to the arbitrator's denial of attorney fees with the trial court. The trial court affirmed the arbitrator's denial of attorney fees.

The Court of Appeals reversed, based on affirmative answers to three questions. First, it found that applying Virginia law would be irreconcilable with a fundamental policy of Oregon—namely, the right of the prevailing party to recover reciprocal attorney fees under contracts containing one-sided attorney-fee provisions. Second, Oregon had a materially greater interest than Virginia in determining whether the right to recover prevailing party attorney fees should be reciprocal: Defendant was an Oregon resident when he entered into the cardholder agreement, the bank enjoyed superior bargaining power and the suit was initiated in an Oregon court. Finally, Oregon law would apply in the absence of a choice-of-law provision. Accordingly, Defendant was entitled to an award of attorney fees.

Global Credit Collapse Is No Excuse

Butler Block, LLC v. Tri-County Metropolitan Transp. Dist., 242 Or App 395, 255 P3d 665 (2011)

In 2004, the parties entered into a development agreement whereby Defendant (TriMet) agreed to convey a parcel of land to Plaintiff in exchange for Plaintiff's commitment to develop the parcel. Plaintiff was unable to obtain financing for the development, however, and following several extensions and negotiations, TriMet terminated the agreement. Plaintiff sued for breach of the development agreement and TriMet prevailed on summary judgment.

On appeal, Plaintiff contended that there were issues of material fact as to whether TriMet anticipatorily breached the development agreement. Plaintiff claimed it was entitled to an extension of time to perform because its inability to obtain construction financing was "due to the unexpected collapse" of the global credit and Portland real estate markets.

The Court of Appeals affirmed the grant of summary judgment. It did not decide whether global credit markets gave Plaintiff the right to an extension under the contract. Rather, it found no anticipatory breach

because TriMet never objectively manifested that it unequivocally and absolutely would not perform. Rather, TriMet had demonstrated its willingness to negotiate, while Plaintiff had failed to provide information to which TriMet was entitled.

No New Notice of Appeal Required

Ass'n of Unit Owners of Timbercrest Condominiums v. Warren, 242 Or App 425, 256 P3d 146 (2011)

The issue on this appeal was whether a new notice of appeal is required when a party has filed a motion for a new trial and a notice of appeal is filed before the motion for new trial is decided.

The trial court granted Defendant's motion for summary judgment. Defendant tendered a form of general judgment which the court signed. Two days later, before the judgment was entered, Plaintiff filed a "motion to reconsider the court's ruling on [Defendant's] motion for summary judgment; alternative motion to clarify ruling." The trial court clerk entered the judgment in the register and two weeks later Plaintiff filed a notice of appeal. Two months later, the trial court denied the motion to reconsider. Plaintiff did not file a new notice of appeal.

On appeal, Defendant contended that the motion to reconsider was substantively a motion for a new trial and that the Court of Appeals lacked jurisdiction because Plaintiff's notice of appeal was premature. The Court of Appeals agreed that the motion to reconsider was a motion for a new trial, and that the notice of appeal was premature, but found that it had jurisdiction over the appeal if the trial court intended to enter an appealable judgment. The Court reasoned that it retained concurrent jurisdiction with the trial court under ORS 19.270(1) – which allows a trial court to decide a motion for a new trial during the pendency of an appeal – and, therefore, no new notice of appeal was required.

Attorney Fees on Appeal Must Be Expressly Provided For by Agreement

Synectic Ventures I, LLC v. EVI Corp., 244 Or App 406, __P3d __ (2011)

Plaintiffs sued Defendant and others to collect on a promissory note and foreclose a security interest under the terms of a loan agreement. Defendant prevailed at trial and on appeal. Defendant then petitioned the Court of Appeals for an award of its attorney fees on appeal.

The Court denied Defendant's petition. It relied on *Adair v. McAtee*, 236 Or 391, 396, 388 P2d 748 (1964), in which the Court stated that "attorney's fees will not be allowed upon appeal in the absence of statute so providing or in the absence of an express agreement that the prevailing party is entitled to attorney's fees on appeal."

FED Notice Must Precisely Specify Date and Time of Tenancy Termination

Greenway v. Parlanti, 245 Or App 144, __ P3d __ (2011)

Landlord provided Tenant with a 24-hour notice that her tenancy would be terminated due to threats of violence by Tenant's son. The notice stated that tenancy was to be terminated "twenty four (24) hours from the time of service upon you of this notice." Landlord prevailed at trial on the forcible entry and detainer (FED) action to evict Tenant. Tenant appealed, arguing that the written notice terminating her tenancy did not comply with the statutory requirements in ORS 90.396(1) and was therefore invalid.

The Court of Appeals agreed with Tenant and reversed. "Proper notice of termination of a tenancy is a prerequisite to maintaining an FED action." Because the legislature used the word "specifying" in ORS 90.396(1), a landlord is required to include the specific date and time of termination of the tenancy in the notice. The Court of Appeals noted that, because the Residential Landlord Tenant Act permits service of a written notice of termination of tenancy in various ways, the failure to require a landlord to include the specific date and time of termination of tenancy would force a tenant to guess when the tenancy terminates.

You Too Can Be An Author

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

Deborah S. Guyol

5161 NE Wistaria Drive, Portland, Oregon 97213

Tel: 503-284-6951 / Email: Dguyol@aol.com

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

Means test standards will change for cases filed on or after November 1, 2011. More information is available on the US Trustee's website at:

www.justice.gov.ust.eo.bapcpa/meanstesting.htm

CONSUMER COMMITTEE NOTES

Meeting of May 19, 2011

By Rose Zook

From the Bench: Lien Avoidance Procedures

Judge Perris opened the meeting with a discussion of the procedure for avoiding liens: specifically, whether it is better to use a motion or an adversary proceeding. She believes a motion is most efficient because on average, attorney's fees for the adversary process are double those for a motion. Attorneys who choose the adversary proceeding may be required to justify their chosen course.

Oregon Attorney Assistance Program

Meloney Crawford, Attorney Counselor with the Oregon Attorney Assistance Program (OAAP), appeared as a guest speaker to discuss the resources available to lawyers and judges in Oregon. The OAAP is a confidential service funded by the Professional Liability Fund that provides assistance with various personal issues faced by Oregon attorneys. Ms. Crawford's discussion focused on coping mechanisms and tools for dealing with stress; examples include getting enough exercise, utilizing creative outlets, and monitoring eating and other consumption habits. The OAAP is a useful resource for dealing with many issues such as alcoholism, drug addiction, time management, career transition, compulsive disorders, relationships, depression, anxiety, and other issues that affect the ability of a lawyer or judge to function effectively. For more information about the program, visit www.oaap.org, or call 503-226-1057 or 800-321-6227.

Oregon Ethics Opinions

Rich Parker, Attorney at Parker, Butte & Lane, P.C., discussed a recent Oregon State Bar opinion on ethical considerations and the use of email listserves (Formal Opinion No. 2011-184). The opinion addresses issues faced by lawyers seeking advice or mentorship, lawyers acting in a mentoring role, and concerns on disclosure and attorney-client privilege. The entire opinion can be found at www.osbar.org/ethics/ethicsops.html.

New Procedure for Chapter 7 Trustee Assignment

Pam Griffith, Assistant US Trustee, announced that the court has a new procedure for trustee assignment in chapter 7 cases. This system is designed to address a national concern on "trustee shopping" by promoting random trustee assignment. The Office of the US Trustee in Portland is soliciting comments on the new system.

Comments from the Office of the Chapter 13 Trustee

Jack Fisher, Staff Attorney for Wayne Godare, Chapter 13 Trustee, asked that attorneys note the following concerns and issues.

1. It is helpful to provide advance notice to the trustee's office when an interpreter will be required for a §341(a) meeting of creditors.
2. When utilizing the trustee's standard language, please take care to alter the language to meet the specific needs of your case. Do not merely cut and paste generic language into your plan.
3. Please do not send required documents the day before the date set for the §341(a) meeting of creditors or the confirmation or adjourned confirmation hearing.

Housekeeping

Thank you to the Office of the Chapter 13 Trustee for providing refreshments.

Meeting of July 21, 2011

By Rose Zook

Internal Revenue Service - Service Problems

Jeffrey Werstler from the IRS warned that in many cases the IRS is not receiving notice at the correct address. The address for service is P.O. Box 7346, Philadelphia, PA 19101-7346. This address is also available on the bankruptcy court website

In re Reed, Case No. 10-38478-elp13

Judge Perris summarized the court's holding in *Reed* by posing the following questions:

1. How does one calculate projected disposable income after the Supreme Court's decision in *Hamilton v. Lanning*, 130 S Ct 2464 (2010)?

In *Reed*, debtors' Form B22C showed negative disposable income and Schedule I reflected positive income. Debtors proposed a 43-month plan with all funds to be distributed to secured creditors. The *Lanning* Court held that "projecting" is a forward-looking concept that must take into account anticipated changes.

The holding in *Reed* is that one should not merely look at debtor's Schedules I & J to determine disposable monthly income and ability to pay. Post-*Lanning*, the focus should be on anticipated changes. The trustee bears the initial burden to prove that there has been a change from the time the B22C was filed, or that change is certain or virtually certain. Schedules I & J can be part of that proof but alone are not enough.

2. How do the decisions in *Lanning* and *Ransom v. FIA Card Services, NA*, 131 S Ct 716 (2011), affect the applicable commitment period portion of *In re Kagenveama*, 541 F3d 868 (9th Cir 2008), in the context of *Reed*?

The court in *Reed* concluded that *Kagenveama* was not overruled by *Lanning* and *Ransom*: an above-median-income debtor with negative disposable monthly income has a commitment period of 0 months (0 x 60 = 0).

***Stern v. Marshall*, 131 S Ct 2594, 2595 (June 23, 2011)**

The Supreme Court in *Stern* limited the extent of bankruptcy courts' authority to enter final judgment on the estate's common-law-based counterclaims. The Court, in a 5-4 decision, held that 28 USC §157(b)(2)(C), which allowed for the bankruptcy court to hear counterclaims by the estate against persons filing claims, violates Article III of the Constitution. See a summary of this decision at pages 10-11 of this issue.

Housekeeping

Thank you to Olsen Olsen & Daines for providing refreshments.

Meeting of September 8, 2011

By Tony Kullen

Clerk's Office and Bankruptcy Court Update

Charlene Hiss, Clerk of the Bankruptcy Court, discussed the launch of ECF version 4.1. ECF version 4.2 should be released shortly, and the new version will incorporate the rules changes effective on December 1, 2011.

Important new features of ECF 4.1/4.2 include:

1. Filing Agents. Attorneys and trustees may now register one or more filing agents (paralegals, associate attorneys, etc), who will have separate log in accounts, but will be able to file documents to a case docket under the lead attorney's name.

The attorney of record may identify which agent filed a particular document or transaction by searching under Utility>View Your Transaction Log. The attorney can control what permissions each agent may have (e.g., file cases or pay fees only). See <http://www.orb.uscourts.gov/Ecf/manual.cfm> for instructions.

2. Limited Notice. Attorneys may limit notices if only engaged in part of a case (e.g., receive notices in an adversary proceeding but not in the underlying bankruptcy case).

3. Additional Case Report Options. New case report filters allow for limited searches by attorney name, bar number, or party role.

4. Tracking Balance Due in Installment Fee Cases. There is a new "Filing Fee" selection under the "Query" menu, which lists a record of payments and remaining balance due for installment fee cases.

Ms. Hiss also discussed changes in Local Bankruptcy Rules and Forms, effective December 1, 2011. Updated LBFs will include the Notice of Motion for Relief from Stay (LBF 721) and Notice of Motion to Impose/Extend Stay (LBF 721.5). Mortgage creditors will have to file a new Mortgage Proof of Claim form. There is also a new form, "Notice of Mortgage Fee Change," which will be entered on the claims page, not on the main docket. Secured creditors receiving cure payments for post-petition defaults must provide notice to the Trustee upon receipt of the final cure payment.

The proposed changes are available for comment on the court website. The changes aim to reconcile Eugene and Portland confirmation practices, in addition to other changes.

There are also proposed changes to the Federal Rules of Bankruptcy Procedure, which are published and available for comment at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PublishedRules.aspx>.

After October 1, the Bankruptcy Noticing Center will no longer mail hard copies of the Proof of Claim form, as a survey showed fewer than 4% of paper forms were returned. Notice of Bankruptcy Case will now contain instructions on where to find the form online.

The court will discontinue use of the phone recording system to provide available dates for hearings on Motions for Relief from Stay. Available hearing dates will be published and updated on the court website only. Those without internet access may call the Clerk's office and ask for assistance to obtain a hearing date.

Chapter 13 Trustee Update

Wayne Godare discussed problems with untimely lien stripping actions. He reminded practitioners that the standard chapter 13 plan language for avoiding wholly unsecured junior liens requires the party to file an adversary proceeding or motion to avoid lien within 60 days of confirmation. As of September 9, 2011, there were over 50 confirmed chapter 13 cases in Portland where there has been no action on lien avoidance within 60 days of confirmation. This is a problem: when the junior lien is eventually stripped, the former junior secured creditor usually becomes the largest general unsecured creditor. If payments have already been issued to other unsecured creditors, the former junior lien holder has not received its pro-rata share. Recovering overpayments made to the other unsecured creditors is difficult and costly for the Trustee's office.

Mr. Godare's office will release a new "Feasibility Application" in the coming months. This application

will be web-based and hosted on the Trustee's website. It will be able to analyze 36- or 60-month plans, and will enable an attorney to "reverse-engineer" a fixed creditor payment, based on the amount of the claim, the applicable interest rate and the number of months in which to pay that claim.

The IRS: Deceptive Advertising, "Substitutes for Returns" and Dischargeability

Jeffrey Werstler described a problem: a new type of advertising mimics the authorized IRS Notice of Federal Tax Lien. These ads look official, with notices of improper use of postage and other indicators commonly found on federal mailings, but with phone numbers that go to tax settlement companies. The IRS asks that attorneys forward any objectionable notices to the IRS or the US Trustee's office, for possible referral to, and investigation by, the IRS Office of Professional Responsibility.

Mr. Werstler also discussed changes in dischargeability of tax liability for taxpayers, where the IRS has filed a Substitute for Return (SFR) for a debtor who did not file a timely tax return for a particular year.

The Old Way: If the IRS filed an SFR and the client did not sign the assessment of liability, the assessed tax debt would be nondischargeable, since the debtor never filed the applicable tax return.

The taxpayer could get around the nondischargeability of the SFR assessment by:

1. Signing a "consent to assessment," which was not an admission to tax liability; the taxpayer could go back and challenge the assessment as long as the tax was paid, or
2. Filing a tax return, to claim deductions not included in the IRS SFR.

In either case, the debtor could wait two years, then file for bankruptcy and discharge the assessed tax debt.

The New Way: BAPCPA changed the law to prevent discharge of tax liability for years when no tax return was filed. The IRS Office of Chief Counsel recently issued a memorandum establishing the IRS's position on dischargeability.

1. If the IRS filed an SFR, and the client consents to the assessment (or does nothing), then the debt may not be discharged in bankruptcy, since the return was never filed.
2. If the client files a return after the SFR is issued, and the return indicates a **liability equal to or less than** the amount in the SFR, then the debt is nondischargeable to the extent of the liability indicated on the return (unless the IRS rejects or audits the return and establishes a liability greater than that indicated on the return).

3. If the client files a return after the SFR is issued, and the return indicates a **liability greater than** the amount in the SFR, the taxpayer may be eligible for discharge of the difference between the SFR amount and the tax liability shown on the untimely return.

4. In each circumstance, penalties may be discharged.

Mr. Werstler took questions about the IRS's approach. Kelly Brown asked what would prevent the IRS from issuing an SFR to every taxpayer who has not filed a return by April 16th, to limit the dischargeability of tax debts. Mr. Werstler believes that is unlikely to happen. In general, the IRS only files an SFR where it believes a substantial tax liability is due. Before the IRS issues the SFR, it sends several letters to the taxpayer requesting the taxpayer file a return. Finally, the IRS sends a letter of pending SFR, giving the taxpayer a last chance to file voluntarily. Only then is the SFR issued. This procedure gives taxpayers ample opportunity to voluntarily comply.

Christopher Coyle asked for the basis of the IRS's position under the IRC. Mr. Werstler did not refer him to any specific case or code section, but referred everyone to the IRS website for additional information.

Practitioners can review the IRS Office of Chief Counsel's Notice [CC-2010-016](#), "Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities on Late Filed Returns," which includes a chart in the appendix showing the IRS's position in various circumstances. Attorneys should also review Internal Revenue Manual 5.9.2 ("The Bankruptcy Code and Collection," http://www.irs.gov/irm/part5/irm_05-009-002.html).

Chapter 7 Trustees Discussion

Thomas Renn stated that a new "fillable PDF" version of the Domestic Support Obligation form is available on the trustee's website. It is compatible with chapter 7 or 13 cases and may be used statewide.

Mr. Renn also reminded attendees that the Debtor-Creditor Section Website Committee is still seeking additional members; interested parties may contact Mr. Renn directly.

In response to a question, Rodolfo Camacho discussed use of the web-based trustee document production platform, currently used by Mr. Eiler only. Mr. Camacho said all trustees use either "BMS" or "EPIC" case management software. BMS began using the web based document disclosure system under an experiment with the San Diego court system; in that test, the meeting of creditors could not proceed unless all necessary documents were uploaded to the disclosure system. The trial is now complete, and those trustees using the BMS system will likely migrate to the new web-based disclosure system. Mr. Camacho also

pointed out that BMS and EPIC tend to mimic each other's features, so trustees on EPIC will probably have a similar system available shortly.

The document disclosure discussion led to discussion of the requirement to provide the last-filed tax return to the trustee at least seven days before the meeting of creditors. Mr. Camacho reminded attorneys that the "last year for which a return was filed" may be several years ago, and that the return should be produced unless it is so old as to be useless. That is, if the last return filed was in 2004, then provide that return; however, if the debtor has been retired since 1995 and receives SSI only, then the 1995 return need not be disclosed.

Peter McKittrick raised the issue of attorneys who repeatedly fail to provide the tax return or other required documents. His practice is to give the attorney a warning; he may later file a motion to dismiss the case for failure to provide required documentation. He reminds the bar that the rules provide that the court **shall** grant dismissal under these circumstances.

The trustees also discussed the issue of requesting future or unfiled returns. As Mr. Camacho pointed out, the US Trustee's office will not permit a trustee to order a taxpayer to file a tax return. However, the case trustee may still require the preparation and presentation of a tax return for an unfiled year, to evaluate potential assets of the estate. The trustee may seek an order to compel production of a tax return, and may seek to revoke the discharge if the debtor fails to comply. This issue is not moot if the trustee declares the case to be a no-asset case; the IRS is an interested party and may file a similar motion as a creditor.

Housekeeping

The next Circle of Love meeting will be held on November 10, 2011 at 4:30pm. Thanks to Vanessa Pancic for providing refreshments.

**As of November 1, many
bankruptcy fees will increase.
The new fee schedule is available
on the Bankruptcy Court website
under Court News &
Announcements.**

www.orb.uscourts.gov