

# Newsletter

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Debtor-Creditor Section, Oregon State Bar

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## COMMENTS FROM THE CHAIR

**By Patrick W. Wade**

Hershner Hunter, LLP

I spent a week in Arizona in January, trying to focus my energy for the new year. I was one of the fortunates who was able to attend the BCS Championship game between the University of Oregon and Auburn University. I came away from that experience not only in awe of the skills of both teams, who played well in a close game, but also with additional examples of teamwork.

One example was the report by our son Tom, who appeared in his last bowl game as part of the Oregon Marching Band, about the efficiency with which the band was able to assemble, perform, and exit from the field at half-time. Facing an astounding \$1,000 per SECOND penalty if it exceeded its allotted time on the field, the OMB was able to complete its mission with 22 seconds to spare through concentrated teamwork. (I don't think anyone wrote OMB a check for those unused seconds, though.)

Similarly, I was impressed by the Auburn fans, who seemed to know all the words to their many songs and cheers, and were able to wave their pom-poms in unison throughout the stadium when the occasion demanded.

Our Section survives on teamwork, and I hope by this message both to thank all those members of the Section who have labored in past years and to encourage all of you to consider giving some part of your valuable time to assist the section in providing the services we all enjoy.

Opportunities abound, and you can make a difference. Here are a few examples.

My first plug is for participation in the Legislative Committee. This Committee is chaired by Sam Sears, and because this is a legislative year, it will need a number of you to review and comment on proposed legislation. I have had the privilege of working on this committee for the past several years, and I can attest that we do make a difference. The Section generally avoids taking policy-specific positions on legislation, since our members represent all players in the debtor-creditor arena, but we have been successful in working with proponents of legislation to make proposals workable in the real-life situations in which we and our clients find ourselves. We have been working, for example, with proponents of legislation affecting the rights of tenants of foreclosed properties (SB 491). In past years, our Section's written and oral testimony before Senate and House committees has benefited practitioners by encouraging legislation that works. This session promises a lot of legislation that will affect your practice, and you can make a difference in how that legislation turns out.

Other favorites of mine include the Pro Bono Clinic and the CARE program. Both programs offer services that are necessary and well received in the community. I would encourage especially those of you who practice outside of the

*Continued next page*

major urban areas to participate in CARE presentations in schools in your communities. Our Pro Bono clinic is exploring opportunities to expand services outside the Portland metro area, and again I would encourage those of you outside that area to participate.

I could go on in similar detail about all the other committees, but you get the idea. A list of committees is posted on the Section website: <http://www.osb-dc.org/committees.php>. But don't stop there: if you have an idea for something the Section could do to benefit its members, let someone

on the Executive Committee know about your idea.

Finally, I want to take this opportunity to thank outgoing members of the Executive Committee for their service, and to welcome members whose terms began this year. Outgoing members are Thomas M. Renn (past chair), Hon. Trish M. Brown, Rex K. Daines, Loren S. Scott, and Ted A. Troutman. New members are Hon. Frank R. Alley III, Christopher N. Coyle, Justin D. Leonard, Thomas M. Orr, and Milly Whatley.

Thanks to all of them.

**In Memoriam**  
**Hon. Albert E. Radcliffe**  
**1947 - 2011**

**DISCHARGING AND RELEASING TAX LIENS ON  
REAL AND PERSONAL PROPERTY**

By **Jeffrey M. Wong**

The IRS and ODR record thousands of federal tax lien notices and state tax warrants for unpaid tax debts each year. These notices and warrants perfect the liens that arise when unpaid tax liabilities are assessed, and cloud the title of real and personal property belonging to taxpayers. Once a tax lien notice or tax warrant has been recorded, a purchaser of the property cannot acquire clear title without obtaining the discharge or release of the property from the tax lien. A federal tax lien can also encumber title when a purchaser buys real property at a foreclosure sale if the foreclosing entity does not provide a special form of notice to the IRS.

The federal and state tax lien laws establish an application process for the release or discharge of property from perfected tax liens. This article is intended to serve as a guide for practitioners in assisting a client with a discharge or release. The federal tax laws also allow taxpayers to apply for the subordination of a tax lien to a competing encumbrance. The subordination process is not discussed in this article, but is similar to the process of applying for the discharge of property.

**FUNDAMENTAL LIEN CONCEPTS**

Liens for tax liabilities arise automatically whenever an unpaid tax is assessed. IRC §§6321 and 6322; ORS 314.417. The scope of the general liens established by federal and state laws is identical: the liens attach to "all property and rights to property, whether real or personal," that belong to the taxpayer. *Id.* The liens empower the taxing agencies to seize, levy, or garnish property to collect the unpaid tax.

Recording the tax lien notice in the correct state office "perfects" the lien in the same manner as the filing of a UCC financing statement or a trust deed on real property. The IRS perfects a lien on real property

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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.

in Oregon by filing a notice of federal tax lien with the county where the real property is located. IRC §6323(f); ORS 87.806 et seq. It perfects its lien on personal property by filing a notice with the Oregon Secretary of State's UCC filing office. *Id.* The ODR perfects its tax lien by filing a "tax warrant" – rather than a notice of lien – with the county where the real property is located. ORS 314.423 and 314.430. The ODR perfects its liens on personal property by recording the tax warrant in the county of the debtor's residence. *Id.*

The filing of a federal tax lien notice or state tax warrant has two effects. First, it places the government in a priority competition with other parties who hold security interests, liens, or other interests in the property. The standard rule of "first in time, first in right" generally applies. IRC §6323; ORS 314.413. The second priority creditor can recover only after the first priority creditor has recovered its debt in full. IRC §6323(b) and ORS 314.413(2) establish several "superpriorities" for competing debts which will always be granted priority over a tax lien. IRC §6323 also establishes numerous limitations on the priority granted to competing encumbrances with property acquired by a taxpayer after a federal tax lien notice has been filed.

Second, once a federal tax lien notice or state tax warrant has been recorded, a person who purchases the property from the taxpayer without first getting it released or discharged from the lien will generally acquire the property still subject to the lien.<sup>1</sup> The seller or purchaser must obtain a discharge or release of the property from the lien for the purchaser to obtain clear title.

Federal and state statutes and regulations provide authority and procedures for obtaining the discharge or release of property from a tax lien. The lien discharge and release functions serve two important purposes.

First, the taxing agencies recover significant dollars every year from the discharge or release of property from tax liens. Second, the discharge and release procedures insure that federal and state tax liens do not unduly impede the sale of real and personal property between the taxpayers and other persons. Where the taxing agency is not entitled to a recovery from the proceeds of sale because its lien does not attach to any equity in the property (*e.g.*, where the value of the property is fully encumbered by liens senior to the tax lien), the taxing authorities usually

issue a discharge or release without demanding receipt of any sale proceeds. Both the IRS and the ODR maintain policies of not "ransoming" sale transactions for receipt of proceeds they are not entitled to.

Review of applications for discharges and releases of property focuses on the value of the property and the existence and amounts of senior liens. The party applying for the discharge or release (whether the taxpayer or the purchaser) is responsible for providing the taxing authority with the documents needed to establish the value of the lien.

IRC §§6325 and 7425 and the associated Regulations contain the federal rules governing the administrative release of federal tax liens and the discharge of property from a tax lien. IRS Publication 1468 provides an overview of the IRS's tax lien processes, and Publications 783, 784, and 1024 provide instructions on how to apply for certificates of discharge, subordination, and lien non-attachment, respectively. ORS 305.140 and OAR 150-305.140 contain the parallel state rules.

### THE LINGO AND THE LAW

The federal and state systems use different terms for their lien relief processes.

#### *Federal Terms*

In the federal system, *release* – meaning extinguishment – of a tax lien is mandatory when one of three conditions occurs. In contrast, all federal *discharges* of property from a lien are discretionary. Even if the taxpayer fulfills the required statutory conditions, the IRS may choose not to grant a discharge.

Section 6325(a) provides that a lien *shall* be released when:

- (1) The liability has been satisfied;
- (2) The liability has become legally unenforceable (*e.g.* by reason of expiration of the collection limitations period or a bankruptcy discharge); or
- (3) The taxpayer has provided the IRS with an acceptable bond which provides for payment of all liability due.

A "discharge" of property from a tax lien is the removal of the property from the lien's attachment. Section 6325(b) provides that a discharge may be granted when, to the satisfaction of the IRS:

- (1) The taxpayer establishes that the property still subject to the lien has at least twice the value of the tax due;
- (2) The IRS receives the value it is entitled to from the lien property and the remaining interest of the IRS in the property is valueless;

<sup>1</sup> Persons entitled to a super-priority under §6323(b) or ORS 314.413(2) may not need to obtain a discharge or release. The purchaser of goods sold at retail, for example, is entitled to a superpriority under §6323(b). Other superpriorities are granted to purchasers of goods in a casual sale, purchasers of securities, and purchasers of motor vehicles.

(3) A satisfactory agreement provides for the IRS's receipt of a lien on proceeds that will arise from the sale of the property in the same manner and priority as the lien had on the property; or

(4) The taxpayer provides the IRS with a deposit or bond equal to the value of the property.

Most discharge applications occur under §6325(b)(2). Discharges under §6325(b)(3) occur less frequently, but are important where disputes exist between competing creditors or the IRS and the taxpayer, and the dispute(s) cannot be resolved before a sale of property should occur. The parties can agree to leave some or all of the funds that would be paid to them in escrow after the sale has closed. An agreement that each party will have the same rights to the proceeds as it had with respect to the property preserves everyone's recovery rights. If litigation is necessary, the escrowed funds can be deposited with a court in an interpleader action, or one or more of the parties can file an action to quiet title.

### **Oregon Terms**

The Oregon Revised Statutes do not use the term "discharge" with state tax liens. Instead, ORS 305.140, 305.150, and 305.182 use "release" for both the release of real property from an ODR tax lien under specified circumstances (ORS 305.140), and the release (extinguishment) of a tax lien. ORS 305.150 and 305.182. Oregon law does not provide a specific process for the release of personal property from a state tax lien, but the ODR will typically accommodate parties who request a release of personal property from a tax lien using the procedures used for real property.

ORS 305.140 provides:

- (1) The ODR shall release property from the lien if it finds that a sale of property would not result in the satisfaction of any part of the liability;
- (2) The ODR may release property from the lien if it finds that the liability has been satisfied;
- (3) The ODR may release property if it finds that the fair market value of property still subject to the lien is at least double the tax liability due;
- (4) The ODR may release property if it receives a letter of credit or bond which it considers sufficient for payment of all liability due; or
- (5) The ODR may release property if it is paid an amount which it determines to be the value of its lien on the property.

ORS 305.140, in contrast to federal law, mandates the release of property from a state tax lien only when the ODR finds that a sale of the property will not result in any payment towards the tax liability. ODR practice is much narrower than this broad statutory language implies. In practice, the ODR will release

property from the state tax lien only if the property is being sold and it is clear that the ODR's lien does not attach to any equity. It will not release property simply because the state lien does not attach to any equity at the time an application for release is made if the property is not actually being sold. In the absence of a sale, the ODR deems itself entitled to wait for the day when its lien may acquire value through appreciation of the property or the reduction or elimination of senior encumbrances. The word "shall" is only intended to insure that the ODR will not impede a sale where there is an actual sale pending and the ODR's lien has no value.

Conversely, ORS 305.140 states that the ODR "may" release a lien where the lien has been fully satisfied. Although the word "may" appears to allow the ODR to leave warrants on record after the tax has been satisfied, the ODR will issue a release of a satisfied lien when the taxpayer or some other party complains about a cloud on title. The permissive "may" was presumably intended to relieve the ODR of having to release every tax warrant it has filed once the underlying liabilities are paid.

### **IRS PRACTICE**

Federal Regulation requires the submission of a written application for the discharge of property from a federal tax lien. *See* (revised) Publication 783 and Form 14135. The property's value, less the amounts due senior encumbrances and the reasonable costs of sale, is the "value of the lien" and the amount the IRS is entitled to receive. While the IRS will tolerate some reduction in its recovery with bargain sale prices and hefty commissions, the statutory "may" allows the IRS discretion over the size of reductions. It can refuse to grant a discharge, or it can demand that the broker's commission be reduced to a level it deems reasonable, to provide a larger distribution to the IRS.

Form 14135 and Publication 783 require the following information:

1. Identification of the type of discharge requested.
2. A detailed description of the property and its location. For real property, both the street address (if any) and the legal description are required. For personal property, a list of the items to be sold is necessary, along with descriptions that allow the value of the property to be determined (*e.g.*, make, model, age, and condition of a vehicle).
3. If discharge is requested to facilitate a sale of the property, a description of, and the documents evidencing, the manner in which the taxpayer will be divested of title (typically the sale contract or earnest money agreement).

4. Copies of the notices of federal tax lien that cloud title, or alternatively, either a preliminary title report reflecting the lien notices, or a written description of the taxpayer's name and taxpayer identification number, the date the lien was filed, the IRS office that filed it, and the serial numbers reflected on the notices of lien.

5. A list of encumbrances on the property believed to be senior to the IRS lien, along with the name and address of each encumbrance holder, the nature of the encumbrance, the amount due, the dates the senior encumbrance came into existence and was perfected, and family relationships, if any, between the taxpayer and other creditors.

6. All proposed or actual costs and commissions associated with the sale of the property.

7. Information (preferably an appraisal) reflecting the value of the property.

8. Any other information that may bear upon the application for discharge.

Discharges of property are most commonly requested where the taxpayer seeks to sell property encumbered by a tax lien. For real property, everything necessary for IRS review of the application can typically be provided by submitting four items:

A. A preliminary title report, which contains the legal description and street address of the property, the IRS's tax liens and information about senior and junior encumbrances. The title company should search for encumbrances under the taxpayer's name as well as under the property's description.

B. An appraisal of the property. Form 14135 appears to make an appraisal mandatory. *See* item 9 therein. In some instances, the IRS will accept for real property a "comparative market analysis" or other statement from a real estate agent or broker about the list price. For personal property, it may accept copies of Craigslist or want ads listings as indexes for market value. In many cases, however the IRS will hold fast to the appraisal requirement. Consulting the IRS's Lien Advisor before submitting the application for discharge about the evidence of value that will be accepted can insure a faster, more efficient closing process.

C. The sale contract or earnest money agreement, which reflects the sale price and the timing of payment.

D. A preliminary or estimated closing statement reflecting anticipated distribution of sale proceeds – *i.e.*, how much will be paid towards senior encumbrances, commissions, and the costs of sale.

The application and documents may be submitted to the Advisory Group Manager for the IRS District area or territory in which the property is located. In

Oregon, the application may be submitted directly to Lien Advisor Maria Hayden (503-415-7190), who handles most discharge applications involving Oregon properties.

The Lien Advisor must obtain the approval of his or her manager for a discharge. The Advisor's considerations include the following:

A. The IRS must be assured it is receiving the full value of its lien. To recover full value, the property must be sold for a reasonable price. Bargain or distress sales for less than fair market value are a grey area requiring the exercise of discretion. Establishing that the property will be foreclosed and sold at auction if a bargain sale is not approved may encourage the Lien Advisor to accept a significant discount in the purchase price. A Lien Advisor's decision to refuse to grant a discharge is appealable to his or her Manager. The statutory "may," however, means the IRS cannot be forced to accept a bargain sale.

B. Fair market value must be established through competent evidence. Lien Advisors have discretion regarding proof of value. Defects in the property (*e.g.* leaky roof or basement dry rot) or an imminent foreclosure sale can be bases for a reduced value if the defects were not considered in the appraisal. *See* item 14, Form 14135. Again, the permissive "may" affords the IRS broad discretion.

C. The IRS will allow only closing costs and broker commissions it deems reasonable. A real estate commission of 6% is deemed reasonable.

D. The taxpayer (seller) generally cannot recover any sale proceeds unless the proceeds pay the tax liability in full. Where the tax will be paid in full, a lien release should be requested rather than a discharge.

E. A sale for less than full market value between related parties will be deemed suspect, and a large commission promised to a broker who is related to the seller might not be allowed.

The IRS issues a Certificate of Discharge to reflect the discharge of property from a tax lien. It will not transmit a Certificate of Discharge to anyone until it has received the payment it was promised in the application process and the sale proceeds have been properly distributed. If the IRS approves a discharge application, it will send the escrow company, seller, or buyer a Conditional Commitment Letter which states that the IRS will issue a Certificate of Discharge upon receipt of the agreed sum, and of documents showing that the transaction has closed and all proceeds have been distributed in the agreed manner.

Sale costs sometimes change. Small deviations between the payments actually made and those communicated to the IRS in the review process will be tolerated. Large deviations, however, may cause the IRS

to refuse to issue the Certificate of Discharge. If the IRS refuses to issue a discharge certificate after the sale has closed, the sale may have to be undone. Accordingly, if sale costs increase significantly after application to the IRS, the application should be amended and resubmitted.

Publication 783 recommends that the discharge application be submitted to the IRS at least 45 days before the desired closing date. The escrow company or purchaser should record the Certificate of Discharge immediately after it is issued.

### **SPECIAL NOTICE REQUIREMENTS FOR NONJUDICIAL FORECLOSURE WITH FEDERAL TAX LIENS**

IRC §7425(b) creates a trap for the unwary when a senior creditor forecloses nonjudicially on property subject to a junior federal tax lien. Assume you represent the creditor who nonjudicially forecloses a trust deed on a parcel of realty, and before the foreclosure sale, you discover a federal tax lien notice that was filed after the trust deed was recorded.

The IRS is a junior creditor, and state law says that foreclosure passes title to the purchaser free and clear of junior liens, as long as junior creditors have been provided notice and the opportunity to cure before the sale. State law, however, cannot “impair the standing of the federal liens, without the consent of Congress,” *US v. City of New Britain, Connecticut*, 347 US 81, 84 (1954), and Congress has not agreed to allow its tax liens to be removed from property under state law.

Instead, §7425(b) requires a special form of notice to the IRS when a foreclosing party wishes to pass title free and clear of a junior federal tax lien. It also requires written notice of the sale to the IRS at least 25 days before the sale date, if a notice of tax lien has been on file for more than 30 days before the scheduled date of a foreclosure sale. The notice must conform to requirements in the Regulations, which are lengthy and complex. In substance, the IRS must timely receive sufficient information to investigate whether it should exercise its post-foreclosure redemption right under §7425(d) to acquire foreclosed property on which it had a junior lien. For 120 days following the foreclosure sale, the IRS may use funds specially allocated by Congress to acquire the property from the purchaser by paying the purchaser its purchase price plus statutory interest, and other specified charges. *Id.*, IRC §7810. Required information includes the taxpayer’s name and address, identification of tax liens on the property, description of the property, and the amount due the foreclosing creditor. Treas. Reg. 301.7425-3. The IRS will estimate the value of the property from available information, and if it appears the property might be sold at the foreclosure sale for

significantly less than its fair market value, it will monitor the sale, and, if the property sells for a low price, may purchase the property from the purchaser with the intent of reselling it for a higher price.

Publication 786 provides a user-friendly guide to the details of providing notice of a foreclosure sale with a junior federal tax lien. Make sure you send the special notice to the correct IRS office.

### **ODR PRACTICE**

OAR 150-305.140 states that an application for release must be accompanied by a “statement.” The rule provides parameters for the form of the statement, but is less specific than Publication 783 about the documents that are required.

Lisa Pineda-Volk (503-945-8146, fax 503-947-8735, [lisa.pineda-volk@state.or.us](mailto:lisa.pineda-volk@state.or.us)) handles all lien release applications submitted to the ODR.

You can submit the same types of documents to the ODR as you would to the IRS in applying for a federal discharge. The statement should include:

1. A description of the transaction and pertinent surrounding circumstances. If, for example, the transaction is a short sale or deed in lieu of foreclosure, explain why the property is being sold or transferred for less than fair market value.
2. Documentation establishing the taxpayer will not receive any funds from the transaction.
3. Identification of the amount to be paid to the ODR.
4. The Oregon tax liabilities owed by the taxpayer.
5. Contact information for all parties involved in the transaction.
6. Information on the value of the property. ODR will accept county tax statements reflecting real market value, appraisals and comparative market analyses.
7. If federal tax liens are at issue, a copy of any filed notice of federal tax lien. Special priority rules apply when a federal tax lien competes with a state tax lien.

Sending a copy of the purchase agreement is optional with the ODR.

The ODR’s thinking largely parallels that of the IRS. Ms. Pineda-Volk stresses that the taxpayer cannot receive any funds from the transaction, and the existence of relationships between the seller (taxpayer) and buyer, or the seller and the real estate agent, will receive scrutiny. Any relationship between the seller and other persons in the transaction should be addressed in the explanation submitted.

If the release is approved, upon ODR's receipt of the agreed amount, the ODR will transmit a lien release directly to the person who requested it. That person may be the seller, the buyer, or the escrow company. The ODR generally reviews proposed lien discharge transactions within three business days.

### **THE PRIORITY RULES ARE DIFFERENT WHEN THE IRS AND ODR COMPETE**

Where both an IRS notice of federal tax lien and an ODR warrant have been filed against a taxpayer, the person applying for a certificate of discharge or lien release must understand the applicable priority rules.

When a federal and a state tax lien compete, the taxing agency that assessed its tax liability first has priority, regardless of when and whether either government perfected its lien by filing a lien notice or warrant.<sup>2</sup> *US v. City of New Britain, Connecticut*, 347 US at 86. This rule of law results from the supremacy of federal law and the language of IRC §6323(a), which states that a federal tax lien shall not be "valid" until a notice of tax lien is filed. Section 6323(a) applies to only four types of creditors: security interest holders, purchasers, mechanic lienors, and judgment creditors. Federal law defines security interests. IRC §6323(h). State tax liens arise by virtue of state tax statutes, and do not fall within the definition of security interests. Ergo, the IRS need not have filed a notice of federal tax lien for its lien to be "valid" against a state tax lien, and reciprocally, the state's filing of a warrant is immaterial to its priority against a federal tax lien.

Under *City of New Britain*, priority is determined by the respective dates on which the federal and state tax liens became "choate," which are almost always the dates of tax assessment. The assessment date for a federal tax liability is conveniently located on the notice of federal tax lien itself. This is why the ODR requires a copy of the notice of federal tax lien when the IRS is a competing lienholder.

ODR tax warrants do not similarly show the dates any state tax liabilities were assessed. Obtaining this information requires procuring ODR "printouts" for each liability due from a taxpayer. Printouts can be obtained from Ms. Pineda-Volk as part of the lien release process.

The fact that federal law looks to assessment dates when a federal tax lien competes with a state tax lien, but to recordation dates when a federal tax lien competes with a judgment lien or consensual security interest, creates the possibility of circular priority

conflicts. The IRS may have priority over a judgment creditor, the judgment creditor may have priority over the ODR, and the ODR may have priority over the IRS.

*City of New Britain* resolves conflicts among these three creditors. Since federal law is the supreme law of the land, we initially focus on the creditor who primes the IRS. That creditor has first priority and the IRS comes in second. Any balance of funds remaining after the first creditor and IRS are paid should be distributed to the third creditor.

### **CONCLUSIONS**

Federal and state law provide clear guidelines and procedures for receiving a Certificate of Discharge or release when junior tax liens encumber real or personal property to be sold. The IRS and ODR have broad discretion to grant or deny discharge and release certificates, but they usually issue the certificate if the applicant establishes that the taxing agency will receive a portion of the sale proceeds that fairly represents the value of its lien on the property. Adequate time should be allotted in the closing process for submitting the application to the taxing authority and processing of the application. Special priority rules apply in situations where both the IRS and ODR have perfected liens against the seller.

## **SOLUTIONS FOR COMMON TAX PROBLEMS OF FINANCIALLY DISTRESSED CLIENTS**

**By Condé Cox**  
Greene & Markley PC

Foreclosures and financial workouts nearly always create income tax liability. Bankruptcy lawyers, therefore, must learn enough tax law to know how and when these tax liabilities are created and the ways careful practitioners can plan around them.

In this article I identify and analyze four tax problems commonly presented by financially distressed clients, and suggest some solutions.

The four problems and solutions are:

- (1) Taxation of COD Income and Statutory Defenses;
- (2) Transfer of Attributes to Individual's Bankruptcy Trustee and Use of Internal Revenue Code (IRC) §1398 to Split Tax Year Into Two Parts, To Allow Deduction of Losses;
- (3) Partner Pass-Through Gains Deferred by Use of Chapter 11;
- (4) New-Stock-For-Old-Debt Under IRC §382(l)(5) to Preserve Corporate NOLs and Circumvent Absolute Priority Rule.

<sup>2</sup> This rule does not apply in bankruptcy proceedings. The federal and state governments believe that 11 USC §506(a) requires recordation of the federal tax lien notice or state tax warrant before the bankruptcy case was commenced for the lien to be valid within the proceeding.

## 1. TAXATION OF COD INCOME AND THE STATUTORY DEFENSES

The most common tax problem that we bankruptcy lawyers create for our debtor clients arises from doing precisely what the client hired us to do: obtain forgiveness or discharge of debt.

Debt forgiveness – called “cancellation of debt” or COD income by tax professionals – is taxable to the extent of the principal amount of the indebtedness. Only debts that actually benefitted the taxpayer at the time of the original loan transaction can be the basis for COD income, so the release of a guarantor, without more, does not create taxable COD income.

The solutions to this problem and the available defenses, which allow COD income to be characterized as nontaxable, are set forth in IRC §108(a)(1), the applicable statute:

*Defense 1, Bankruptcy Discharge:* If your client discharges the debt through bankruptcy, there is no tax.

*Defense 2, Insolvency:* If your client is insolvent (using a balance sheet test, including exempt assets), there is no tax. If your client is made solvent as a result of the forgiveness, however, there is taxable income to the extent of the solvency created.

*Defense 3, Farming Debt:* If the debt was created in the business of farming, there is a statutory defense to the tax.

*Defense 4, Residence Acquisition Debt:* If the debt was created to acquire a residence, there is no tax if the debt is forgiven before January 1, 2013. (Thereafter, the forgiveness is taxable, but your client might use either the insolvency or bankruptcy defense after 2012.)

*Defense 5, Non-C Corp Real Estate Debt:* If your client is not a C Corporation and uses in its business real property that was acquired with the forgiven debt, then any debt forgiven is not taxed.

The Tax Court has consistently ruled that all exempt property (such as IRAs, 401ks, homesteads, etc.) must be included in the taxpayer’s balance sheet insolvency calculation. Therefore it is advisable in most cases to consider whether a client should file bankruptcy to discharge the debt (for which solvency is irrelevant for COD taxation purposes), instead of relying on the insolvency defense.

If you rely upon Defenses 1, 2, or 3 above (the most commonly used), virtually all tax attributes of the taxpayer must be reduced by the amount of the debt forgiveness or discharge. This means, for most

clients, that all loss carryforwards, all offsetting business losses, all basis in depreciable property, and all carryover tax credits must be reduced to the extent of the debt forgiven or discharged. Because nearly all defenses to COD income arise from insolvency or bankruptcy, attribute reduction nearly always is the result of debt forgiveness. It should be noted, however, that attribute reduction does not result from use of the residential acquisition indebtedness defense (#4 above), so this defense should always be considered when available.

Special planning opportunities are available by reason of the delay in the above-described attribute reduction until January 1 of the calendar year following the date on which the COD income is created. It may make sense, then, for a client to sell high-basis assets before the end of the calendar year if forgiveness is expected to substantially reduce such basis on the following January 1. High-basis property sales can also be valuable for corporate chapter 11 debtors with confirmed plans of reorganization, because attribute/basis reduction arising from the discharge of debt under the confirmed plan will also take place on January 1 of the year following plan confirmation. Individuals in chapter 11 (and farmers in chapter 12) need not address these concerns until the year after plan payments are completed (which of course is long after confirmation), because individual debtors receive a discharge only after all plan payments have been completed. Such a delay in formal discharge for individuals in chapter 11 and for all chapter 12 debtors will defer asset basis reduction but also will allow several years (while payments are being made) for the use of net operating losses (NOLs) that will not be reduced by COD income in the amount of debt discharged until after plan payments are completed.

Insider loans, or contributions to or investments in corporate debtors, can often be characterized at least in part as equity and not debt, thereby eliminating or limiting the effect of attribute reduction arising from debt discharge. Careful debtor’s counsel will, however, consider whether in some cases such insider investments should be booked solely as indebtedness and not as equity, so that stock-for-debt opportunities under a plan of reorganization are available to avoid paying unsecured creditors (which must otherwise be paid in full if insiders are to retain ownership). Such stock-for-debt plans on account of insider debt can be used to keep insiders in control of the post-confirmation debtor, as a way to circumvent the Absolute Priority Rule of Bankruptcy Code §1129(b), if new stock is issued solely “on account of” old debt and not new capital. The tax law “continuity of interest” requirement to preserve corporate NOL carryforward tax attributes, per IRC §382(l)(5), can also simultaneously be met with such insider stock-for-debt plans (more fully described below in section 4).

Note too that most purchase money obligations can be forgiven without COD income consequences: the IRC is replete with provisions, such as §1038 and §108(e) (5), that allow purchase money debts to be reduced as a retroactive adjustment to the purchase price, thereby avoiding COD income.

## **2. TRANSFER OF INDIVIDUALS' TAX ATTRIBUTES TO BANKRUPTCY TRUSTEE AND USE OF SPLIT-YEAR ELECTION TO OFFSET PREPETITION LOSSES AGAINST GAINS**

Under IRC §1399, no separate taxable estate is created by the filing of any bankruptcy petition, unless the debtor is an individual filing under chapter 7 or 11, in which case, under IRC §1398, all tax attributes that exist on January 1 of the year of bankruptcy pass to the bankruptcy trustee and the new taxable estate.

This means that the tax reporting procedures for partnerships, corporations, LLCs, and other non-individual entities seeking relief in bankruptcy are unaffected by the filing of a bankruptcy petition. But for individuals, the rules are very different and all bankruptcy lawyers should either be familiar with these special rules or employ co-counsel familiar with them.

The special rules, which apply to all cases filed by individuals in chapters 7 and 11, provide that the bankruptcy estate succeeds to the tax attributes of the debtor – including the transfer of business losses, NOLs, tax credit carryovers, charitable contribution carryovers, basis in depreciable property, and virtually all other tax attributes that existed on January 1 of the calendar year in which the petition was filed. IRC §1398(g).

This would not seem, on its face, to present difficulties for most clients. But a transfer of all tax attributes to the bankruptcy estate – deemed to occur as a matter of law – means that all taxable prepetition gains occurring during the calendar year of bankruptcy (such as foreclosures or sales during the months before bankruptcy) cannot be offset or reduced by the amount of losses and other tax attributes that were owned by the debtor from prior tax years. In other words, a bankruptcy filing takes away the losses and other offsetting deductions that your client might have otherwise planned to use to reduce or eliminate taxes arising from prebankruptcy sales or foreclosures.

So if prior to bankruptcy but during the same year, your client lost to foreclosure (or sold) a low-basis property that created a taxable gain, he cannot use his offsetting prior years' losses to reduce the taxable gain created by the foreclosure (or sale), if he files bankruptcy after the date of the disposition of the low basis property but within the same calendar year.

Do not despair, however: there is a solution in IRC §1398(c)(2), which allows individual debtors in chapter 7 or 11 cases to split the tax year for the calendar year

in which bankruptcy is filed into two parts: one tax return for the time period January 1 to the day before bankruptcy, and a second tax return for the time period starting on the day of bankruptcy and running until December 31. Any election to split the tax year must be made by the date that is three and one-half months after the day before bankruptcy, and this deadline cannot be extended. The election is made by filing a Form 4868 (typically used to extend the due date for a return) and writing across the top of the form: "Section 1398 Election." For more details see IRS Publication 908.

Once the §1398 election is made, the debtor/taxpayer can use his January 1 tax attributes (offsetting losses, carryover credits, and the like) to reduce or eliminate taxable gains from transactions between January 1 and the day before bankruptcy.

A taxpayer/debtor who does not make the §1398 election receives his unused tax attributes (as they existed on January 1 before bankruptcy, reduced by the amount used, if any, by the bankruptcy trustee) from his bankruptcy trustee when the bankruptcy case is closed, but such a closing of the file and return of tax attributes usually happens at least one tax year after the year of bankruptcy; as a result, without making the §1398 election, a tax return in the year after bankruptcy will be due, often with an otherwise avoidable tax also due.

The §1398 election is irrevocable, must be made jointly by jointly filing taxpayers, is not available to a joint filer unless the bankruptcy is also joint, and creates two tax years in a single calendar year for purposes of calculating the maximum self-employment tax.

## **3. CAPITAL GAINS CAN BE DEFERRED BY USE OF CHAPTER 11 FOR PASS-THROUGH ENTITIES**

Chapter 11 can be used to defer or avoid the taxable gains partners or LLC members realize when their entities are terminated or their primary assets are foreclosed.

When a partner or LLC member has a low basis or low capital account, the termination of the entity or sale of the entity's sole asset will result in a large capital gain for the partner. These gains are the result of the taxpayer's maximizing tax deductions and deferral over many years and then realizing taxable gains on one day in a single tax year in the accumulated collective amount of the prior years' deductions. These gains cannot escape taxation on the basis of insolvency, because capital gains are not COD income, and thus further deferral of these pass-through gains can usually be obtained only if the entity files chapter 11 to prevent such foreclosure or termination and thereby defer or avoid the pass-through of the gain to the partners or members.

Often, this problem is exacerbated by the fact that the underlying partnership or LLC debt is nonrecourse, resulting in a very high capital gain. *See Commissioner v. Tufts*, 461 US 300, 307-08, 317 (1983), which requires that the gain be calculated as the difference between the taxpayer's basis and the total debt, with the fair market value of the property being irrelevant. Capital gain can be even larger for a client that previously engaged in a §1031 exchange, which typically presents a low basis or large negative partner capital account.

While the foreclosure or sale of property owned by an individual can raise these issues, more typically the problem arises for an LLC or partnership when it terminates for tax purposes because (1) the entity ceases to do business, or (2) the number of partners is reduced to one, or (3) more than 50% of the partnership interests are transferred in a single tax year. IRC §708 governs this analysis; Oregon partnership law is not relevant. These circumstances usually present themselves when an income-producing property loses its main tenants or when the lender refuses to renew a loan that has matured.

Chapter 11 is one method by which LLCs and partnerships can be kept alive to preclude termination, to prevent loss of the entity's sole asset to foreclosure, and to extend the term of mortgage debt repayment beyond the originally contemplated maturity. Such filings can thus defer or avoid large negative capital account recapture and other similar pass-through capital gains for investors.

So long as the cost for a chapter 11 is less than the anticipated capital gain tax, filing such a case will be viewed by most clients as a proper use of chapter 11. Chapter 11 costs typically include not only attorneys fees, appraisal fees and court filing fees, but also the cost of potential "new value" investment by affected partners which the Absolute Priority Rule of Bankruptcy Code §1129(b) sometimes requires as a condition for plan confirmation. Discussion of the Absolute Priority Rule and its relationship to tax consequences appears below.

#### **4. PRESERVATION OF THE CORPORATE DEBTOR'S LARGEST ASSET, ITS NOL, WITH NEW STOCK FOR OLD DEBT IN CHAPTER 11**

Accounting losses, when added up over time, can be carried forward under the tax laws to offset against future income of a restructured company, and these NOLs are often the single largest asset owned by a company in distress.

NOLs can be carried back for a refund or carried forward to offset future tax liability; recent legislation extended the period for carryback to five years and carryforward to 20 years. Accordingly, NOLs either can be a source of cash in the form of a tax refund or can be used to relieve a restructured company from paying taxes for many years in the future. Obviously, entities

that are mere pass-throughs for tax reporting, such as LLCs and partnerships, do not own NOLs, thereby limiting the value of this NOL-preservation analysis, for the most part, to C-corporations.

The problem with NOL preservation is that legal planning for entities in financial distress often involves a change in ownership, and NOLs are disallowed under tax law to the extent that the corporate owner of the NOL undergoes a greater than 50% change in ownership in a single year. Known as the "Continuity of Interest" requirement for NOL preservation, this time-honored taxation principle is codified at IRC §§368 and 382.

Such a change in ownership is sometimes a result of the demands of new investors, but more often of the Absolute Priority Rule, Bankruptcy Code §1129(b). This rule imposes, as a condition for confirmation of a chapter 11 plan, that creditors be paid in full (or agree by a vote of two-thirds in amount and one-half in number to accept something less), or else all partners, shareholders, and other owners of the debtor must have their interests cancelled. The impact of this rule upon corporations with large NOL carryforwards is substantial, because simple chapter 11 plans that meet the Absolute Priority Rule by cancelling the equity position of the old owners will cause the corporate client to violate of the Continuity of Interest requirement and thereby lose its NOL carryforward.

The solution to this problem is found in provisions of the IRC applicable only in bankruptcy cases. IRC §382(l)(5) provides that the Continuity of Interest requirement for NOL preservation is met if the corporate taxpayer is in chapter 11 and new stock under the plan of reorganization is issued "on account of" old debt (in existence at least 18 months before bankruptcy) that was created in the ordinary course of business. It is also often possible to retain pre-filing ownership by means of the infusion of "new value" capital; such plans can be confirmed, but there is a significant risk that the IRS will view the new stock issued under the plan as not having been issued "on account of old debt" and instead "on account of the new value," which raises the possibility of destruction of the NOL carryforwards.

This means that the Continuity of Interest requirement for preservation of NOL carryforwards is met only if the entity seeking chapter 11 relief obtains confirmation of a plan of reorganization that cancels the old stock and issues new-stock-for-old-debt (and not on account of new value). This is one reason that the reorganization plans of large national corporations such as Kmart, Delta Airlines, and others, issue new stock for old debt. Careful counsel will note that there is no restriction on the identity or non-insider status of the holder of the old debt for which new stock is to be issued.

Court opinions addressing the Absolute Priority Rule in chapter 11 are therefore in reality tax cases disguised as bankruptcy cases. In *In Re 203 North LaSalle Street Partnership*, 526 US 434 (1999), the motivation of the plan proponent was to defer or avoid passed-through capital gains by use of chapter 11 to prevent or delay partnership termination. The Court's ruling made clear that creditors must have the opportunity to participate in new equity issued under the plan (by ending the exclusive period or by opening up a bidding procedure for such equity). *Id.* at 454. This raises the same issue for corporate NOL preservation, in that continuity of ownership preserves NOLs, just as deferral of partnership termination defers recapture of capital gains for LLC members and partners.

The effect of this kind of precedent is that a reorganizing corporate debtor must often terminate the 120-day exclusive period of Bankruptcy Code §1121 for the filing of an NOL-preserving plan; alternatively, plan provisions must specifically allow competitors to bid for control of the entity. It is thus fair to conclude that exclusivity – and its termination – is the ultimate tax topic for bankruptcy lawyers seeking to preserve for their corporate clients their largest single asset (the NOL) or to prevent large capital gains from passing through to partners and LLC members.

### CONCLUSION

Chapter 11 is often viewed by the bench and bar as a fight between debtors and creditors, when in reality the motivation for many plan proposals is to renew and extend debt maturity solely to defer or avoid large taxable gains for LLC or partnership investors, or to preserve long term NOL attributes for C-corporations. The devil, even for chapter 11 planning, is in the details – the tax planning details.

## CONSIDERATIONS WHEN STRIPPING WHOLLY UNSECURED LIENS IN CHAPTER 13

By Leslie A. Gordon

Todd Trierweiler & Associates

Avoiding junior liens against a primary residence has become a hot topic for bankruptcy practitioners. The economic downturn and the slumping housing market have created a greater need to understand this issue.

According to a report published by the Federal Housing Finance Agency (FHFA) on November 24, 2010, Oregon ranked 48 out of 51 (50 states plus Washington DC) in home-price appreciation (FHFA's Seasonally Adjusted Purchase-Only House Price). The drop in home values makes it possible to avoid second and third mortgages when the balance owed on the first mortgage exceeds the current fair market value

of a primary residence. The avoidance of these liens is initiated by filing a motion or adversary proceeding in a chapter 13 bankruptcy case.

Section 506 of the Bankruptcy Code allows for the avoidance of junior liens under certain circumstances. Until recently it was unclear whether debtors who had received a discharge in a chapter 7 case within the previous four years could file a chapter 13 case and seek to avoid the junior lien. The memorandum opinion in *In re Grignon*, 2010 WL 5067440 (Bankr D Or 2010), seems to have answered the question. There the court stated:

Under BAPCPA, a Chapter 13 debtor who has received a Chapter 7 discharge within 4 years of filing the Chapter 13 may not receive a discharge. §1328(f). However, nothing in the Code prohibits a debtor who is ineligible for a Chapter 13 discharge from filing a Chapter 13 case. Nor is there anything in the Code which prohibits such a debtor from stripping off a wholly unsecured lien.

Slip Or at 4. The opinion also states, however, that a chapter 13 case cannot be filed solely for the purpose of voiding a lien.

The ability to avoid junior liens has provided bankruptcy debtors with an opportunity to restructure debt against the primary residence. It also has given debtor's counsel an effective marketing strategy. The avoidance of junior liens has become a regular task in the debtor attorney's chapter 13 practice. Before attorneys file the motion or adversary proceeding to avoid a junior lien, however, they should consider the following issues.

### EFFECT ON CHAPTER 13 PLAN PAYMENTS

A debtor who no longer makes payments on a second (and possibly third) mortgage cannot list such payments on Schedule J. The lack of this obligation may result in the chapter 13 plan payments being high and burdensome for the debtor. Further, the attorney may create a plan that will pay more than is necessary to satisfy the outstanding secured and priority claims, and the best-interest number.

### PLAN PROVIDING FOR FULL PAYMENT OF ALL CLAIMS

Once the junior lien is voided it is treated as an unsecured debt in the chapter 13 bankruptcy. If the chapter 13 plan will pay 100% of the creditors' claims, does it make sense to avoid the junior lien and then have debtor pay it anyway as an unsecured claim over a three- to five-year period?

### NO EXPECTATION THAT A CHAPTER 13 CASE WILL BE COMPLETED

Debtor's attorneys may have clients who received a discharge in a chapter 7 bankruptcy within the last eight years but now find themselves struggling with debt. Filing a chapter 13 case may be the best option

for this client. In some cases, the attorney and client plan to maintain the chapter 13 case until the debtor becomes eligible for a discharge in a chapter 7, then dismiss the chapter 13 case.

This course of action is problematic because an order or judgment avoiding a junior lien is void if a case is dismissed; thus any lien avoided in the chapter 13 case would be reinstated when the case is dismissed. §349 (b)(1)(C). Practitioners should consider in advance whether it makes sense to avoid any junior lien, and whether the debtor will face foreclosure when the chapter 13 is dismissed due to delinquency on the junior lien.

### CONVERTING A CHAPTER 13 TO A CHAPTER 7

Like the dismissal of a chapter 13 case, the conversion of a chapter 13 to a chapter 7 voids the order or judgment avoiding the junior lien and reinstates the lien. While debtor's counsel cannot predict whether a debtor in a chapter 13 case will convert the case to a chapter 7, this possibility is something debtor's counsel should always consider.

### POTENTIAL TAX CONSEQUENCES

Further, avoidance of mortgage liens may have a negative tax impact. A discussion of this issue is beyond the scope of this article. However, debtor's counsel should advise the client to consult a tax professional before filing the motion or adversary proceeding.

### CONCLUSION

The issues discussed herein may appear simple and obvious. However, as the avoidance of junior liens becomes a regular feature of chapter 13 cases (and a marketing strategy of debtor's counsel), it makes sense to address them before advising clients that avoiding a wholly unsecured junior lien will benefit the debtor. In many cases, avoiding a junior lien will prove to be not in debtor's best interest.

## US SUPREME COURT CASE NOTE

**By Trish Walsh**  
Farleigh Wada Witt

### **Car-Ownership Deduction Inapplicable to Chapter 13 Debtor Who Does Not Make Loan or Lease Payments**

*Ransom v. FIA Card Services, NA*, 2011 WL 66438 (US)

In its first opinion authored by Justice Elena Kagan, the Supreme Court affirmed the Ninth Circuit and resolved a circuit split in holding 8 to 1 that a debtor

who owns his automobile outright may not claim the car-ownership deduction under chapter 13, thereby reducing the amount he will repay creditors.

A chapter 13 debtor obtains a discharge of his debts if he repays creditors the maximum amount of his monthly income that he can afford to pay. Using the "means test," a debtor deducts specified expenses from his monthly income, effectively shielding from creditors "amounts reasonably necessary to be expended" each month. Included in these amounts are transportation expenses, including vehicle ownership costs and vehicle operating costs, as defined with reference to the Local Standards compiled by the IRS.

Debtor Jason Ransom filed for chapter 13 relief in July 2006, listing as liabilities over \$82,500 in unsecured debt, including a claim held by FIA Card Services, NA. His assets included a 2004 Toyota Camry, which he owned free of any debt. Using the means test, debtor reported monthly income of \$4,248.56 and monthly expenses of \$4,038.01, leaving only \$210.55 per month for creditors. In calculating his expenses, debtor claimed a car-ownership deduction of \$471 for the Camry and an additional car-operating deduction of \$338. FIA objected to confirmation of the plan, which proposed repayment of approximately 25% of debtor's unsecured debt. FIA argued that debtor should not have claimed the car-ownership allowance because he does not make loan or lease payments on his car.

The bankruptcy court denied confirmation of the plan, finding that debtor could deduct a vehicle-ownership expense only if he is currently making loan or lease payments on the vehicle. The BAP and Ninth Circuit both affirmed. See *In re Ransom*, 577 F3d 1026, 1027 (2009) (explaining that "[a]n 'ownership cost' is not an 'expense'—either actual or applicable—if it does not exist, period").

The Supreme Court examined the text, context, and purpose of §707(n)(2)(A)(ii)(I), as well as two dictionaries, and concluded that "a person cannot claim an allowance for vehicle-ownership costs unless he has some expenses falling within that category." Therefore, whether debtor was entitled to the deduction depended upon whether "ownership" costs included only loan and lease payments or whether ownership costs also included other costs associated with having a car. Given that ownership cost as defined in the IRS's Standards reflects the five-year average of new and used car loans and leases nationwide – and that the vehicle "operating costs" category encompasses other vehicle expenses – the Court held that the less-inclusive interpretation was correct. Because debtor owned his car free and clear, the car-ownership expense amount was not applicable to him, though he was permitted to claim the operating costs. Justice Scalia dissented, reading BAPCPA's phrase "applicable

monthly expense amounts specified under the National Standards and Local Standards” to allow a debtor who owns a car free and clear to claim the car-ownership allowance.

## 9TH CIRCUIT CASE NOTES

### **Bankruptcy Court Lacks Jurisdiction Over State Court Breach of Contract Claims**

*In re Ray*, 624 F3d 1124 (9th Cir 2010)

Before his bankruptcy, the debtor and a co-owner entered into a purchase and sale agreement with Battle Ground Plaza, LLC (BG Plaza) for a parcel of commercial real property. The agreement also gave BG Plaza a right of first refusal for an adjoining half-acre parcel. When the bankruptcy court confirmed debtor’s plan on March 7, 2002, the sale to BG Plaza had not yet closed. In 2005, debtor and his co-owner decided to sell the adjoining parcel to a third party. They notified BG Plaza of this intended sale, but BG Plaza did not exercise its right of first refusal, claiming the right was not ripe until the sale of the primary parcel of real property.

The bankruptcy court approved the sale to the third party in July 2005, without objection by BG Plaza. BG Plaza also did not appeal. Before the sale closed, discovery of conditions on the half-acre parcel resulted in a reduction of the purchase price, at which point BG Plaza decided to exercise its right of first refusal and filed an objection to the sale. Following a hearing the bankruptcy court approved the sale “free and clear of all liens and encumbrances . . . including but not limited to the right of first refusal granted to [BG Plaza].” The debtor’s share of sale proceeds enabled him to pay remaining creditors under his plan, and the bankruptcy court issued a final decree closing the case on December 29, 2005.

Thereafter, BG Plaza sued the debtor, his co-owner, the third-party purchaser and the purchaser’s assignee in state court, alleging breach of its first refusal rights and seeking specific performance, damages and declaratory relief. The basis for the suit was an easement over the property it had purchased, which it claimed to have only just discovered. The state court “remanded” the action to the bankruptcy court.

The bankruptcy court reluctantly asserted jurisdiction and ruled in debtor’s favor on the breach of contract claims, and the BAP affirmed. The Ninth Circuit reversed, concluding it did not have jurisdiction. The court emphasized and reiterated that the claim was “a state law contract action independent of the bankruptcy case.” It did not “arise under” or “arise in” the bankruptcy case, so there was no

jurisdiction under 28 USC §157(b)(2). It was not “related to” the bankruptcy case, so there was no jurisdiction under §157(c)(1). There was no ancillary jurisdiction because ordinarily once the bankruptcy court confirms a plan of reorganization the debtor is without the protection of that court.

The court concluded that “[r]eopening of the bankruptcy case is rare, and only used when necessary to resolve bankruptcy issues, not to adjudicate state law claims that can be adjudicated in state court.”

### **Trust Created to Defeat Creditors; Trust as Alter Ego**

*In re Schwarzkopf*, 626 F3d 1032 (9th Cir 2010)

Chapter 7 debtors sought to discharge about \$5.4 million in debt. The trustee filed an adversary proceeding to recover about \$4 million in assets from two trusts created by debtors many years earlier. The Ninth Circuit ruled in trustee’s favor: one of the trusts was invalid because a purpose for which it was created was to defeat the claims of creditors; the other was invalid as the alter ego of one of the debtors.

The courts applied California law to two trusts created more than 10 years before the 2003 bankruptcy filing. The first, the Apartment Trust, had been funded upon its creation with corporate stock that was potentially worthless because of a Texas state court judgment against the corporation. The debtor prevailed on his appeal of the judgment, however, and recovered significant funds. The bankruptcy court found that the debtors were insolvent at the time the Apartment Trust was created, and that the transfer of stock was made “for the fraudulent purpose of avoiding the Debtors’ creditors.” It held the trust was valid, however, because it had been created for the benefit of a minor child. The district court reversed this ruling but remanded for consideration of whether the issue was time-barred.

The Ninth Circuit upheld the district court’s ruling that the trust was invalid, noting that “designating a minor child as a beneficiary does not validate a trust that was created for an improper purpose.” The court also held the claim was not time-barred by California’s seven-year statute of limitations because the statute did not begin to run until the Apartment Trust’s trustee answered the chapter 7 trustee’s complaint, thereby “repudiating” the Trust.

The bankruptcy court held that the second trust, the Grove Trust, was the alter ego of one debtor and the district court reversed, relying on a Ninth Circuit decision holding that legal ownership was a prerequisite to alter ego liability. The Ninth Circuit agreed with the bankruptcy court. It held the Grove Trust was debtor’s alter ego: he was an equitable owner because he acted as owner of the trust and its assets. The court held that the authority relied on

by the district court addressed the “legal ownership” requirement in the corporate context and did not foreclose the possibility that equitable ownership might be sufficient in some contexts. The Ninth Circuit concluded that California case law supports equitable ownership as sufficient.

### **Inherent Authority of District Court**

*Ready Transportation, Inc. v. AAR Manufacturing, Inc.*  
627 F3d 402 (9th Cir 2010)

After the parties entered into a confidential settlement agreement, the plaintiffs filed the agreement on the public docket. The defendant moved to strike. The district court denied the motion as outside its jurisdiction. (Following the settlement the court had retained jurisdiction only over an attorney fee dispute.)

The Ninth Circuit reversed. It held that the district court had inherent power to strike the document. District courts have inherent power to control their dockets and to craft appropriate sanctions for litigation conduct. The Ninth Circuit remanded the order to the district court “for the exercise of its sound discretion in consideration of the circumstances surrounding the filing of the confidential settlement agreement.”

### **Creditor Has Standing to Assert Alter Ego Claim**

*Ahcom, Ltd. v. Smeding*, 623 F3d 1248 (9th Cir 2010)

The Ninth Circuit examined California law on alter ego theory and concluded that California does not recognize a “general alter ego claim.” Rather, there must be injury particular to the party asserting the claim. The defendants were the sole owners of a corporation in chapter 11. The plaintiff had originally sued in California state court; the defendants removed to federal court and the district court dismissed, holding that only the chapter 11 trustee could assert the claim. The Ninth Circuit reversed, concluding that the injured creditor (and not the chapter 11 trustee) had standing to pursue the claim for piercing the corporate veil.

more than \$1.4 million in deferred compensation to a master plan account that specifically stated (and the CEO had specifically acknowledged when signing up for the plan) that any funds contributed were not held in trust, were solely owned by the debtor, and were subject only to the debtor’s general creditors. The CEO asserted that he owned these funds and they were not property of the estate.

Following a contested-matter hearing, the bankruptcy court approved a stipulated order between the debtor and ING Life Insurance and Annuity Company allowing ING to turn over \$1.6 million from the account to the bankruptcy estate. It held that as a matter of law the funds in the account were not excluded from the estate under §541(b)(7), as the former CEO had argued. Section 541(b)(7) excludes, among other things, funds that an employer withheld from an employee if the withholding was for contribution to an employee benefit plan subject to ERISA.

The BAP affirmed, noting that the few courts to have considered the matter have uniformly held that unfunded top hat deferred compensation plans are not excluded from the estate under §541(b)(7). “Deferred compensation” is not the same as “withholding” under ERISA: “withholding” implies the employee at some point possessed the funds, whereas “deferral” implies the employee had no past or present right to possess the funds. By the terms of the master plan account, funds in it remained part of the hospital’s unrestricted assets and were not held in trust for the CEO, and the CEO’s participation agreement acknowledged that all contributions were held solely by the debtor. The CEO’s deferred compensation plan was thus not subject to ERISA and the funds in it were not excluded from the estate under §547(b)(7).

### **Burden of Proof for Debtor’s Bad Faith Claim to Exemption is Preponderance of Evidence, Not Clear and Convincing**

*In re Nicholson*, 435 BR 622 (9th Cir BAP 2010)

The BAP vacated a bankruptcy court order overruling the chapter 7 trustee’s objection to debtors’ claimed exemption on the grounds of bad faith. The bankruptcy court had applied a “clear and convincing” burden of proof, not the “preponderance of evidence” standard that the BAP held applied.

In their original schedules, the debtors claimed that shares in a company they co-owned were worthless, and testified to that at their §341(a) meeting. The trustee filed a report of no distribution, and the co-owner of the company objected to the report on the basis that debtors had misstated the value of their shares. The trustee withdrew the report, and the co-owner offered to purchase the debtors’ shares from the trustee for \$5,000. The trustee moved to sell

## **BAP CASE NOTES**

**By Jeanne Sinnott**

Miller Nash LLP

### **Funds From Unfunded Top Hat Deferred Compensation Plans Not Excluded from Bankruptcy Estate Under §541(b)(7)**

*In re Downey Regional Medical Center-Hospital, Inc.*  
441 BR 120 (9th Cir BAP 2010)

The debtor hospital filed a chapter 11 case after suffering a liquidity crisis. Its CEO had contributed

the shares free and clear of liens. That same day, the debtors amended their schedules, now claiming the shares were worth \$20,000 and the entire amount was exempt.

Eventually, the trustee sold the shares to a third party for \$25,000, and filed an objection to the debtors' exemption as having been claimed in bad faith after concealing assets. Evidence existed that the debtors knew, at the time they filed their schedules, that the shares' value would dramatically increase shortly after the bankruptcy filing because the debtors had been negotiating a deal with a multi-billion-dollar company to increase the company's distribution capacity, which would increase the value of the company.

The bankruptcy court overruled the trustee's objection, applying a burden of proof by clear and convincing evidence. In vacating this ruling, the BAP held that the Supreme Court's decision in *Grogan v. Garner*, 498 US 279 (1991), required application of a preponderance of evidence standard to the objection. The *Grogan* Court articulated a presumption that the preponderance standard applies unless "particularly important individual interests or rights are at stake." *Id.* at 286. In *Grogan*, the Supreme Court held that exceptions to discharge are not fundamental or constitutional rights, and that since Congress was silent about the burden of proof to except a debtor from discharge, that burden was a preponderance of evidence.

The BAP rejected debtors' argument that their exemption rights under California law required the extra protection of the clear-and-convincing standard. Accordingly, the BAP held in *Nicholson* that all objections to exemptions, even those based on a debtor's bad faith, are to be proven by a preponderance of evidence. The BAP also noted that assigning a lower burden would not undermine the goal of providing a fresh start to deserving debtors, and that providing different standards of proof for discharge and objections to exemptions would create "seemingly anomalous results." It remanded to the bankruptcy court for further proceedings.

### **BAP Declines to Assign Bright-Line Rule for Adequate Protection and Instead Upholds the Flexible Rule Announced in *Deico***

*In re Big3D, Inc.*, 438 BR 214 (9th Cir BAP 2010)

This case concerns the timing of adequate protection payments. The BAP, sitting en banc, affirmed the bankruptcy court's decision to award adequate protection payments only from the date the creditor moved for adequate protection. It rejected Big3D's argument for a bright-line rule that adequate protection could never be required for a period before such date. Rather, it applied the flexible rule

announced in *In re Deico*, 139 BR 945 (9th Cir BAP 1992).

The flexible *Deico* rule is as follows: (1) adequate protection is intended to compensate secured creditors for losses caused by the debtor's bankruptcy, (2) adequate protection is payable for only that period of time after the creditor would have exercised its state court remedies, and (3) the amount, timing and frequency of payments are set by the broad discretion of the bankruptcy court.

In *Big3D*, the secured creditor had obtained a prepetition writ of possession for its printing equipment collateral, but had not sold the equipment. Two days after the creditor obtained the writ, the debtor filed chapter 11. Six months later, the creditor moved for relief from stay or, alternatively, for adequate protection, seeking "retroactive" payments for the depreciation of the equipment from the time the creditor obtained the writ.

The bankruptcy court refused to allow adequate protection payments from the date of the writ because the creditor had not completed its exercise of its state court remedy before its request – it had not sold the collateral. The court also noted that the secured creditor presented evidence that any depreciation was caused by "deteriorating economic conditions," and not by the automatic stay or the debtor's use of the equipment. Finally, the court considered the creditor's delay in filing its request when determining whether it was entitled to retroactive adequate protection. According to the court, a debtor should not be required to make substantial "catch up" payments because of a creditor's delay in requesting adequate protection. Accordingly, the court declined to award retroactive adequate protection payments.

The BAP affirmed, noting that *Deico* gives the bankruptcy court broad discretion in deciding the amount and timing of adequate protection payments. It noted further, "The discretionary standard adopted by *Deico* gives bankruptcy courts the needed flexibility to make appropriate adequate protection determinations as provided for in the Bankruptcy Code, based upon the evidence presented by the parties."

The two concurring opinions in *Big3D* agreed with the result. The first concurrence, however, urged that the BAP should have modified the *Deico* rule and held that adequate protection is not available to a secured creditor for any decline in value occurring before the creditor files a request for adequate protection. The second concurrence disagreed with the court's use of its en banc power, arguing that the facts necessary to "rewrite" *Deico* did not exist in *Big3D*.

## BANKRUPTCY COURT CASE NOTE

**By Trish Walsh**  
Farleigh Wada Witt

### **Oregon's Homestead Exemption Does Not Include "Prepaid Rent" When the Agreement Itself Does Not Require Such Payment**

*In re Schuhmann*, 2010 WL 5125321 (Bankr D Or)

The Schuhmanns executed a month-to-month residential rental agreement in Klamath Falls, under which they were to pay \$650 per month. They were not required to prepay any amounts except for the last month's rent; nevertheless, they paid their landlord \$3,900 as prepaid rent, which could be refunded to them upon notice of termination of the tenancy. Thereafter, the Schuhmanns filed for Chapter 7 relief, listing on Schedule B the \$3,900 in prepaid rent and claiming this sum on Schedule C under ORS 18.395 and 18.402, Oregon's homestead exemption.

In a Memorandum Opinion by Judge Radcliffe, the Bankruptcy Court concluded that prepaid rent did not fall within the homestead exemption, notwithstanding the Ninth Circuit's decision in *In re Casserino*, 379 F3d 1069 (9th Cir 2004). In *Casserino*, the Ninth Circuit affirmed the Bankruptcy Court and the BAP in holding that the homestead exemption—the purpose of which is to keep a roof over the debtor's head—protected any property interest that included a current right to possession. Because such a right was included in a leasehold, the term "owner" in the homestead exemption included leaseholders. The Ninth Circuit also held that *Casserino's* mandatory security deposit and prepaid last month's rent were not severable from the leasehold interest because if *Casserino* had not paid the deposit and prepaid rent, the debtor have been in material breach of the lease and would have been subject to eviction. Because the last month's rent and security deposit were an "integral part" of *Casserino's* leasehold, those amounts were included in the exempt homestead.

In *Schuhmann*, the Trustee argued that the holding of *Casserino* should not be extended to a debtor who prepays rent under a month-to-month rental agreement, where the agreement itself does not require such prepayment. The Schuhmanns argued that *Casserino* imposed no limitations on the right to exempt prepaid rent as long as the amount is within the homestead statute's \$50,000 limit for joint debtors.

The court agreed with the Trustee because the prepaid rent had "few if any of the indicia deemed relevant in *Casserino*." First, a failure to prepay the rent at issue would not have put the Schuhmanns

in material default of the lease, exposing them to eviction. Second, the prepaid rent did not entitle the debtors to have the sum paid applied to future months' rent; rather, there was nothing in the agreement that prevented either the landlord or the tenants from terminating the tenancy before the month for which the prepaid rent was earmarked. Third, if forced to turn over the prepaid rent to the Trustee, the landlord would have no right to demand a replacement of the prepaid amount.

The court also said that "normally the homestead exemption involves equity in a debtor's home . . . . *Casserino* was a limited exception whereby certain cash sums were included because they were so wrapped into the interest in the home that they couldn't be severed." The Schuhmanns' attempt to shield \$3,900 from their creditors would essentially create a "cash" homestead exemption, which would not further the statute's purpose.

## STATE COURT CASE NOTES

**By Sean C. Currie**  
Greene & Markley, PC

### **Untimely Filing of Statement of Attorney Fees**

*Johnson v. Best Overhead Door, LLC*,  
238 Or App 559, 242 P3d 740 (2010)

Fourteen days after the trial court entered judgment for plaintiff, plaintiff's attorney served a copy of her request for attorney fees on defendant and attempted to hand-deliver a copy to the trial judge. Due to a miscommunication, however, plaintiff's fee request was mailed and received by the trial court sixteen days after entry of judgment.

Defendant objected to plaintiff's fee request because plaintiff had not filed it within fourteen days of the entry of judgment as required by ORCP 68 C(4)(a). Plaintiff acknowledged the tardiness of her request, but moved under ORCP 15 D and, alternatively, ORCP 12 B, to permit the late filing. The trial court allowed the late filing of plaintiff's attorney fee statement and awarded plaintiff her attorney fees.

The Court of Appeals affirmed the award, finding that ORCP 15 D expressly provides a trial court the discretion to permit the late filing of a statement of attorney fees. In affirming the trial court's attorney fee award, the Court of Appeals rejected the defendant's argument that ORCP 15 D requires a motion to enlarge a prescribed time period before its expiration.

### **Maintaining an Action is Not "Transacting Business"**

*First Resolution Investment Corp. v. Avery*,  
238 Or App 565, \_\_ P3d \_\_ (2010)

Plaintiff sued to recover a credit card debt from the defendant. The trial court dismissed the action without prejudice because another action was pending in federal court, where the defendant alleged that plaintiff violated the Fair Debt Collection Practices Act by prosecuting a time-barred action. In addition to asserting the ongoing federal action as a defense in the state court action, the defendant alleged that the plaintiff did not have standing because it was a foreign corporation that had not been authorized to transact business in Oregon.

The federal action was resolved against the defendant and the plaintiff appealed the dismissal based on the prior federal action. Because the federal action had concluded, the Court of Appeals vacated the trial court's dismissal. It also rejected the defendant's argument that the plaintiff was not authorized to maintain an action in Oregon courts.

Although ORS 60.701(1) provides that "[a] foreign corporation may not transact business in this state until it has been authorized to do so by the Oregon Secretary of State," bringing an action does not constitute transacting business under ORS 60.701(2). The defendant argued that because maintaining an action is an exempt manner of transacting business under ORS 60.701, maintaining an action is transacting business under ORS 60.704 (requiring a foreign corporation to obtain Secretary of State authorization before transacting business). Accordingly, the defendant argued that the plaintiff did not have standing under ORS 60.704.

The Court of Appeals found this to be a strained correlation between ORS 60.701 and 60.704. It held that the plaintiff was authorized to maintain the action and that the trial court correctly declined to dismiss the action on that ground.

### **Withdrawal of Incomplete ORCP 71 B(1) Motion**

*Dickey v. Rehder*, 239 Or App 253, 244 P3d 819 (2010)

The plaintiff took a default judgment against the defendant and the defendant moved to set it aside pursuant to ORCP 71 B(1). The defendant's motion, however, was not accompanied by a responsive pleading as required by ORCP 71 B(1) and by *Duvall v. McLeod*, 331 Or 675, 680, 21 P3d 88 (2001). When the defect was brought to her attention, the defendant sought to withdraw the defective ORCP 71 B(1) motion so she could refile with a compliant motion. The trial court allowed the defendant to do so, and plaintiff's default judgment was set aside. The plaintiff appealed, arguing that the trial court erred as a matter of law by

permitting the defendant to refile her motion with a responsive pleading.

In affirming the trial court's decision, the Court of Appeals explained that ORCP 71 B(1)'s simultaneity requirement is so a trial court may find both a statutory basis for the procedural delay and a responsive pleading that advances a defense worthy of reversing the default judgment. The Court of Appeals could discern no reason under the language of ORCP 71 B(1) or applicable case law to preclude a trial court from allowing a defendant to withdraw an incomplete motion and refile a complete one. Moreover, in light of ORCP 12 A ("All pleadings shall be construed with a view of substantial justice between the parties."), the Court of Appeals refused to interpret ORCP 71 B(1) more stringently than its language requires.

### **Copy of Notice to Vacate Must be Attached to FED Complaint**

*Hill v. Evans*, 239 Or App 233, 244 P3d 822 (2010)

The defendant appealed a forcible entry and detainer judgment under ORS 105.110. The defendant asserted that the trial court erred in rejecting her affirmative defense that the plaintiff had failed to attach the notice to vacate to the complaint as required by ORS 105.124(3). The plaintiff did not dispute the missing notice to vacate, but requested that the Court of Appeals disregard the error under ORCP 12 B. The Court of Appeals declined to disregard the plaintiff's error and reversed.

The language of ORS 105.124(3) is unambiguous: a plaintiff is required to attach a copy of the notice to vacate to the complaint. "In construing the language of ORS 105.124(3), we conclude that the legislature meant what it said: 'A copy of the notice relied upon, if any, *must* be attached to the complaint.'" (Emphasis added by Court of Appeals.) The court refused to disregard the error under ORCP 12 B because a complete failure to comply with the applicable statute or rule is not the type of error or defect that ORCP 12 B seeks to remedy. *Mulier v. Johnson*, 332 Or 344, 29 P3d 1104 (2001).

### **Independent Right to Attorney Fees Under ORCP 82 A**

*Davis v. Boly* 239 Or App 420, 244 P3d 831 (2010)

These consolidated cases arose from two related actions involving a small farm owned by Boly's aunt. Davis was the attorney for Boly's aunt and, after her death, the personal representative of her estate.

In his capacity as personal representative, Davis agreed to sell the farmland to a developer. Boly objected and attempted to block the sale by recording a "Notice of Equitable Lien" on the property but he did not obtain a court order allowing the lien nor did he provide notice to the estate. The trial court ruled Boly was not entitled to the lien. It also awarded Davis

attorney fees pursuant to ORCP 82 A, on the ground that Boly's recording of the equitable lien notice constituted provisional process within the meaning of that rule.

The Court of Appeals affirmed the judgment against Boly without discussion but reversed the award of attorney fees. It concluded that ORCP 82 A(4) contemplates an attorney fee award in circumstances in which security has been posted as part of a judicially authorized issuance of provisional process. Because no judicial authorization occurred in this case, and no security was posted, the trial court was not authorized to award attorney fees under ORCP 82 A.

Absent from the court's discussion and, it appears, the arguments of the parties is the applicability of ORS 205.470, which provides for damages and attorney fees for a "knowingly" filed "invalid" claim of encumbrance.

## CONSUMER COMMITTEE NOTES

**November 18, 2010**

**By Britta Warren**

Todd Trierweiler & Associates

Robert Offerman from Auto Town Buick GMC spoke about programs for financing vehicles in pending Chapter 13 cases. Lenders require a letter of approval from the Chapter 13 Trustee. The standard letter form can be found on the Trustee's website at [www.portland13.com](http://www.portland13.com). Chapter 13 Trustee guidelines require that the loan amount not exceed \$14,000, the monthly payment must not exceed \$400, the terms of the loan repayment must be limited to 24 to 60 months, interest rate is not to exceed 29%, mileage should not exceed 100,000, and a service and safety inspection must be performed. Debtors must be current on the plan payments and must file an amended budget to reflect the change in expenses.

Charlene Hiss, Clerk of the District of Oregon Bankruptcy Court, announced rule and form changes, both locally and nationally, that became effective December 1, 2010. Notable changes are: 1) the creation of a new professional administrative expense claim form, LBF B10A; 2) a change in the deadline for chapter 11 2015 reports to the 21st of each month; 3) the creation of LBF 720.80, which requires creditors to attach documentation of the creation and perfection of security interest to Motions for Relief from Stay; 4) the extension of the response deadline for Motions to Value Property Pursuant to 11 USC 506, LBF 1317, to 28 days from the service date; 5) replacement of "household" and "household size" with "family size" or "number of persons" in official forms B22A and B22C relating to the means test and 6) the extension of the deadline to file debtor education certificates from 45 to 60 days in chapter 7 cases.

Judge Perris discussed proposed amendments to the Federal Rules of Bankruptcy Procedure. Proposals include an amendment to Rule 3001 regarding proofs of claims based on open end or revolving consumer credit agreements to require an additional statement with the name of the entity from which the creditor purchased the account, the name of the entity to which the debt was owed at the time of the last transaction, the date of the last transaction and the date of the last payment, as well as the date on which the account was charged to profit and loss. She also discussed proposed attachments to the proof of claim form for claims secured by a debtor's principal residence. The implementation of the Mortgage Proof of Claim Attachment would require a clear, uniform itemization of prepetition arrears, interest, fees and charges and the date the charges were incurred. The Notice of Mortgage Payment Change form would require the holder of a mortgage claim to provide 21 days notice prior to a change in the amount of ongoing mortgage payment. The notice must be filed as a supplement to the original claim and must be served on the debtor, counsel and the trustee. Comments to proposed changes must be made by February 16, 2011. More information can be found at [www.uscourts.gov](http://www.uscourts.gov). Judge Perris also reminded practitioners to communicate with the court regarding returns of service from registered agents so that incorrect information can be taken off the creditor mailing matrix.

Jeffrey Werstler announced that the IRS has moved to a new building located at 100 SW Main St Ste 1200, Portland, Oregon 97204. Also effective January 1, 2011, the address for the IRS Centralized Insolvency Operations has changed. Correspondence pertaining to bankruptcy cases should be sent to: Internal Revenue Service, POB 7346, Philadelphia, PA 19101 7346. (The former address was POB 21136.)

Many thanks to Mr. Altman and Mr. Camacho for providing refreshments for the meeting.

**January 13, 2011**

**By Rosemary Zook**

Todd Trierweiler & Associates

Hunter Zook announced that he will take over as Chair of the New Lawyers' Committee. Announcements relating to upcoming meetings and events will be posted on the Debtor-Creditor Section Listserve. New lawyers interested in obtaining more information or joining the Committee are encouraged to email Hunter at [hunter@orbankruptcy.com](mailto:hunter@orbankruptcy.com).

The Bankruptcy Court Saturday Session will be held on February 12, 2011, at the Salem Conference Center. For more information, visit the Oregon Debtor-Creditor Section website.

Judge Perris asked for volunteers to participate in the 2011 bankruptcy pro bono clinics. Clinics are held monthly in one of the following locations: SW

Portland, Beaverton and Gresham. Volunteers are asked to consult with two clients to discuss Chapter 7 bankruptcy issues and provide follow up services when warranted. If attorneys do not have the ability to provide follow up services, alternative arrangements can be made. Prospective volunteers should contact Maya Crawford at Legal Aid Services, 503-224-4086 or [maya.crawford@lasoregon.org](mailto:maya.crawford@lasoregon.org).

Judge Perris also briefly discussed the recent U.S. Supreme Court decision in *Ransom v. FIA Card Services, NA*, 577 F3d 1026 (summarized at page 12 of this issue). The Supreme Court, affirming the 9th Circuit, held that a debtor in bankruptcy is not entitled to a vehicle ownership expense deduction on the means test (Official Form 22A) when the vehicle in question is owned free and clear. Noteworthy is the fact that the Supreme Court quoted our own Judge Randall Dunn's BAP opinion in its decision.

The remainder of the meeting focused on topics for meetings in 2011. Among suggestions and possible topics are the following:

1. Vehicle financing.
2. Home Owners' Association dues issues relating to bankruptcy.
3. Credit ratings and the impact of bankruptcy thereon.
4. The parameters of sale and refinance of real property in relation to the bankruptcy process.
5. Modification of chapter 13 plans.
6. A panel discussion involving our chapter 7 trustees.
7. Issues relating to professional responsibilities.
8. Issues and problems faced by the Office of the US Trustee.
9. Issues surrounding reaffirmation agreements.

The next meeting will be held on March 10. Thank you to Olsen Olsen & Daines for providing food and refreshments.

### Section Website

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

### 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](mailto:Dguyol@aol.com)

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

### 24th Annual Northwest Bankruptcy Institute

April 8 and 9, 2011

Hilton Portland & Executive Tower  
Portland, Oregon

Featuring:

- "Bankruptcy Litigation: Things You Know You Knew but Forgot You Knew"
- "Defending Mortgage Foreclosures: There Is More than One Tool in the Shed"
- "U.S. Trustee Litigation"
- "The Economy, Bankruptcy, and Real Estate: Any More Shoes Going to Drop?"

Oregon: 8.75 General CLE credits and 1 Ethics credit

Washington: 8.25 General CLE credits and 1 Ethics credit (pending)

**Early registration (by 3/18/11): \$405**

**Regular registration (after 3/18/11): \$425**

### Bankruptcy Judgeship – District of Oregon, Eugene

The U.S. Court of Appeals for the Ninth Circuit invites applications for the position of Bankruptcy Judge for the District of Oregon – Eugene. The deadline for receipt of all application materials is March 17, 2011. The selection process may take up to ten months to complete. The announcement and application form can be found at [www.ce9.uscourts.gov](http://www.ce9.uscourts.gov).