O R E G O N   D E B T O R - C R E D I T O R

Newsletter

Volume XXIV, Number 1 Debtor-Creditor Section, Oregon State Bar Winter 2005

HIGHLIGHTS

1 **Comments From the Chair**
By Peter C. McKittrick

3 **New Legislation Creates Notice Requirements (and Traps!)in Construction Defect Cases**
By S. Ward Greene

4 **Chapter 7 Debtor Converts Collateral Post-Discharge— What Can the Secured Creditor Do?**
By David B. Gray

5 **The Home Equity Conversion Mortgage—A Tool for Debtor-Creditor Attorneys**
By Dan Clark

6 **Ninth Circuit Case Notes**
By Ashley S. Hohimer

8 **BAP Case Notes**
By Douglas Pahl

10 **State Court Case Notes**
By Aaron Wigod

12 **WOMBATS Report — ECF Update**
By Laura Walker

14 **Consumer Bankruptcy Committee**
By Amanda Bailey

COMMENTS FROM THE CHAIR

By Peter C. McKittrick
Farleigh Witt

I began writing this column in the waiting area of a sports facility as I watched my son participate in his fourth sporting event of the weekend. An elderly woman approached me and struck up a conversation. She was clearly impressed with my computer, and immediately assumed I knew all about the creature. She told me she had never learned to use a computer, despite urging from her children that she really should get with it and go online. The woman shared with me her story of listening that morning to a radio talk show about computers. “They were speaking a foreign language, using all these fancy words,” she complained.

As I reflected on my conversation with my new octogenarian friend, I thought of how much our profession has changed since I started in 1985. Gone are whiteout, fax paper, and hand written letters. The arrival of not only computers, but pdf, cell phones, email and wireless modems, is changing our world. Who would have thought the most valuable high school class I took was typing?

Like our profession, the world of our section is changing. This year should bring full-blown electronic filing (ECF). Our trustees are up and running with ECF, and the system seems to work. I am sure that electronic filing will have its bugs at first, but will ultimately make our lives more convenient—or will it just allow us to extend those deadlines from 4 pm to 11:59 pm?

We have just gone live with our section website, which can be found at *http://osb-dc.org*. Victoria Short Baum and Tom Renn spent countless hours last year designing and implementing the site. The site includes links to other useful sites, section information, and lots of other features. Among the features to come are an updated section directory with many of the phone numbers and email addresses we use, additional links to other sites, our newsletters and other important section information. We elected to have the newsletters posted in a password-protected fashion. The password will be uniform and available to section members. It can also be retrieved in the unlikely event someone misplaces the password. The Executive Committee would love to hear from you about suggested additions or changes to improve the website.

We have formed a new committee to look into the Court Care program, which will provide financial-responsibility education to young

adults. The program has been implemented in other states and appears to be a valuable tool to assist young people in understanding the potential problems associated with credit in our society.

We will also be reviewing our CLE publications with an eye towards updating some of the publications we all use. We are focusing on the Commercial Practice Manual and the Bankruptcy Law CLE. Both publications are now several years old.

Our Young Lawyers Committee is off to a great start. For several years—until a couple years ago—few young lawyers entered into the debtor-creditor practice area. Now we have several young lawyers who are actively engaged in the practice. The Young Lawyers are sponsoring lots of events, and I hear that they don't even mind if some older folks show up every once in awhile.

As you can see, we have lots of plans for the upcoming year. If we are going to accomplish our goals, we will need help. If you are not already serving on a committee, please consider getting involved in one or more. Committee service is a great way to meet people, enrich your professional experience, and sometimes get a free lunch or at least some cookies. You can contact me for any information on committees and other volunteer opportunities. Thank you to those of you that are already serving.

We welcome your input on how we can better serve our members. If you have any ideas on how the Section can improve its service to members, please speak up.

Well, it's time to grab my cell phone, Blackberry, Wi Fi equipped laptop, MP3 player and head to my virtual office. Now if I could just find a piece of paper . . .

I look forward to the year, and hope that the executive committee and the section can work together to make our section even more dynamic.

Young Lawyers Committee

The Young Lawyers Committee of the Debtor-Creditor Section has elected new co-chairs: Julia Manela in Eugene and Charles Harrell in Portland. On January 13, 2005 the Committee presented a panel presentation on "Tips for New Bankruptcy Attorneys" with Judges Alley, Radcliffe, and Dunn.

The next event scheduled is a US Trustee Seminar on Wednesday, February 16 from noon to 1:30 pm in the bankruptcy court video conference rooms in Portland and Eugene. The seminar will be video-linked between Eugene and Portland. The Committee will meet on February 17, 2005, and thereafter will meet on the first Thursday of each month, starting on March 3. All meetings are held at noon at the bankruptcy court video conference rooms in Eugene and Portland. The regular committee meetings are video linked. For more information on the committee or the events contact Julia Manela, *Manela@mbclawoffice.com*, or Charles Harrell, *Charrell@vandenbos-chapman.com*

Debtor-Creditor Newsletter

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The purpose of this publication is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities.

NEW LEGISLATION CREATES NOTICE REQUIREMENTS (AND TRAPS!)IN CONSTRUCTION DEFECT CASES

By S. Ward Greene
Greene & Markley, P.C.

The 2003 Oregon legislature quietly passed a statute that substantially changes construction defect litigation concerning residential property in Oregon. The new statute, ORS 701.560 to ORS 701.595, creates important defenses for contractors and suppliers — and malpractice traps for unwary lawyers.

It is not an overstatement to say that this law changes everything. If they were giving out a prize for the best special interest legislation, the building contractors' lobbyists would be in the running. Apparently California and Washington have adopted similar laws, so we are not alone.

Among other things, the statute creates complex notice requirements which will help builders (including subcontractors and suppliers) identify and correct any defect before it can result in litigation. The statute requires owners (defined to include members of homeowners' associations and unit owners' associations) to give written notice of, inter alia: any defect, the remediation the owner believes is necessary; any incidental damage not curable by remediation; **and** "any report or other document evidencing the existence of the defects and any incidental damage." ORS 701.565(3). Think of it! Before commencing arbitration or filing an action for any construction defect (which is broadly defined), the owner must "show his cards" to the builder. The builder then has ample time to propose a solution. Furthermore, the owner's notice is admissible into evidence if litigation or arbitration ensues. ORS 701.580(5).

The new statute includes a provision extending the statute of limitations or the statute of ultimate repose, but only if the owner sends the required notice on time. ORS 701.585(1). Any remediation performed pursuant to the notice does not constitute new performance, however, and therefore "relates back to the earliest date of substantial completion or abandonment of the construction, alteration or repair of the improvement to real property." ORS 701.585(4). Thus even if the remediation is rife with defects, it appears the owner would be without any remedy if the original limitation period has run.

In what can only be described as the *coup de grace*, the legislation provides that if an owner compels arbitration or commences a court action without following the new statutory procedure "the arbitrator or court **must** dismiss the arbitration or action without prejudice." ORS 701.595 (emphasis added). I suppose the best tactic for a defendant would be to wait until the last possible moment, and then spring the defense on an unsuspecting plaintiff. Although the dismissal would be without prejudice, the statute of limitations may have run.

The only requirement the new law imposes on a contractor is that it furnish the owner with a conspicuous notice in substantially the form provided by the legislature. However, the notice is not self-explanatory. Moreover, the legislation expressly permits the notice to be included as part of the underlying contract. ORS 701.590. Builders, subcontractors or suppliers who deal in residential property must include this notice in any contract if they intend to invoke the notice and cure provisions of the new law.

To summarize, if you represent an owner of residential property who has a construction defect claim, you **must** follow the notice provisions of this statute. If you represent building contractors, you **must** advise them to include the statutory notice in all their contracts. You should plan to become very friendly with the PLF if you fail on either of these counts.

BANKRUPTCY REFORM LEGISLATION RETURNS

The Bankruptcy Abuse and Consumer Protection Act of 2005 (essentially the same bankruptcy reform bill that has been before Congress in the past) was recently introduced in the Senate as S.256. Republicans are "confident" that it will come to the floor this year, and pass.

CHAPTER 7 DEBTOR CONVERTS COLLATERAL POST-DISCHARGE—WHAT CAN THE SECURED CREDITOR DO?

By David B. Gray
Swensen & Gray

Debtor Debbie purchases a Hobart mixer for her restaurant—a $10,000 top-of-the-line Master Chef model. She finances $9,500 of the purchase through Silver Bank, which perfects the purchase money security interest by filing a UCC statement. Debbie gets in over her head, incurs too much credit card debt, closes her restaurant and files a chapter 7. She wants to start a new restaurant, so she keeps the mixer. Her capable attorney advises her that she does not need to reaffirm the debt because she is current on payments to Silver Bank.

Debbie is granted a chapter 7 discharge. Two years later her new restaurant is not doing well. In need of funds, she sells her Hobart mixer through the classified ads for $4,000 cash. She does not know the purchaser. Debbie still owes $6,000 on the mixer. She stops making payments to Silver Bank.

Debbie tells Silver Bank that the mixer is gone, that she has no way to locate it and that her debt to Silver Bank was discharged in bankruptcy. She further advises Silver Bank that it is a violation of the bankruptcy injunction for Silver Bank to contact her regarding the debt.

WHAT CAN SILVER BANK DO?

Silver Bank Cannot Pursue the Contract Debt

Section 523(a)(2) of the Bankruptcy Code provides that a discharge operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. In short, the discharge relieves the debtor from personal liability for the debt.

An exception to this rule exists if the debtor had "reaffirmed" the debt in order to keep collateral. A reaffirmation agreement is a formal document that generally provides that the debtor agrees to repay the secured creditor pursuant to the terms of the contract, but not in any amount that will exceed the value of the collateral at the time of her petition. However, Debbie's attorney was correct: She does not need to reaffirm the debt to keep the collateral if she is current on payments. *In re Parker*, 139 F3d 668 (9th Cir 1998).

Silver Bank Can Contact Debbie Regarding the Debt

Debbie is incorrect—Silver Bank is legally allowed to demand payments due on its collateral by both oral and written communications. The debtors in *In re Garske*, 287 BR 537 (9th Cir BAP 2002), brought claims against creditor Arcadia claiming that it violated 11 USC §524 by telephoning debtor on numerous occasions, advising debtor that she needed to make payment or the collateral, a car, would be repossessed. Debtor sought an injunction from further collection efforts, as well as compensatory and punitive damages. The Ninth Circuit noted that, while §524 is designed to allow debtors a fresh start by discharging their personal liability on debts, the debtor is still liable for contract payments on property that is retained, though not for any deficiency owed at the time of the bankruptcy. The court held that the creditor's telephone calls advising the debtor of the past due balance did not constitute a violation of §524, and that there would necessarily be contact between the parties.

Silver Bank Is Generally Restricted to Recovery of the Collateral

The secured creditor's recourse typically, if payments are not forthcoming, is to institute an "in rem" proceeding seeking recovery of the collateral. *Arruda v. Sears, Roebuck & Co.*, 310 F3d 13 (1st Cir 2002). The creditor can use self-help, a lawsuit for possession (replevin) or judicial foreclosure.

Silver Bank Can Pursue Recovery of the Mixer from the Transferee

Because unavoided liens pass through bankruptcy, the creditor continues to have a security interest in the collateral post-discharge, if it can locate the collateral. So the buyer of Debbie's Hobart mixer is subject to Silver Bank's lien. If Silver Bank can locate the mixer, it can repossess it from the purchaser and sell it to make a recovery.

What If Debbie Does Not Provide Silver Bank the Name of the Purchaser or the Location of the Mixer?

May Silver Bank personally pursue Debbie for the amount due if Debbie cannot identify the purchaser of the mixer? If the mixer cannot be found, or is damaged or destroyed, and there is no property damage insurance on the collateral, does Silver Bank have any recourse?

Though much case law discusses the avoidance of a discharge and dischargeability of debts relating to acts (such as conversion of collateral) that occurred prepeti-

tion or during the course of a bankruptcy (see annotations for 11 USC §523 and §727), there are virtually no published opinions addressing remedies for a debtor's post-discharge transfer, conversion or destruction of collateral.

The bankruptcy cases discussing conversion of assets pre-bankruptcy focus on the debtor's intent regarding such transfer or concealment of collateral, and the necessary proof for a creditor challenging the discharge. But if the discharge has already been granted and debtor has retained collateral and impliedly agreed to make payment for the value going forward, dischargeability is not in issue.

Because Debbie's conduct with the mixer here occurred post-discharge, equity suggests that Silver Bank should be allowed to pursue Debbie for the value of the collateral. Some authorities try to make a clear line of demarcation between the secured creditor's entitlement to pursue postdischarge actions against the debtor only in "in rem" proceedings, and not "in personam." Where the collateral can be located, that demarcation makes sense. When the collateral cannot be located due to the debtor's conduct, however, there is little reason to prohibit an in personam proceeding against the debtor.

Silver Bank cannot pursue the contract debt—that was discharged. But Silver Bank should be allowed to pursue Debbie on a tort theory, based upon post-discharge conversion of Silver Bank's property interest. Debbie should be liable for the amount required to pay either (1) the value of the collateral when she petitioned for chapter 7, or (2) the value of the collateral at the time of the conversion, whichever is less.

(If you have any case law concerning the recovery of the value of converted collateral post-discharge, please contact David Gray at (503)225-0081 for a potential follow up to this article.)

THE HOME EQUITY CONVERSION MORTGAGE—A TOOL FOR DEBTOR-CREDITOR ATTORNEYS

By Dan Clark

Usually by the time clients contact an attorney, their credit scores are damaged and their available resources are gone. They have inadequate incomes that contributed to the problem in the first place. Because mortgage lenders are more focused than ever on credit scores, a bad credit rating (especially if it derives from missed home loan payments) will usually make it impossible for clients to refinance their homes and gain liquidity. So it is hard to help them utilize what may be their single greatest remaining resource: their home equity.

Enter the Housing and Urban Development home loan for persons 62 years of age or older: the home equity reverse mortgage, commonly referred to as simply the reverse mortgage. The good news is that there are no income requirements and no credit score acceptance levels for the reverse mortgage. Even better news is that there are no monthly payments of any kind as long as the client lives in the home.

The main difference between the reverse mortgage and a regular home mortgage is that the principal on a regular refinance mortgage is paid down monthly and amortized, usually over thirty years. The principal on a reverse mortgage gradually increases because no payments are being made, a process called negative amortization. The HUD funding level is based on the assumption that if interest rates return to their expected level and the client lives to be one hundred years old, the amount the client owes will equal the value of the home. If the client dies or sells at an earlier age, there should be equity left for the client or any heirs. A client could take out a reverse mortgage at the age of sixty-two, and if he or she lives to age eighty-two, have the use of this money for twenty years without making any payments, and pass on a significant inheritance to the heirs.

The success rate for qualifying applyicants is over 90%, and although the process is somewhat more lengthy than an ordinary home refinance mortgage, it is fairly straightforward and the client need not produce income or asset records.

The only requirements are: (1) the home must be in reasonable repair (although repairs can also be completed with loan money after the loan has closed), and (2) the client must be able to pay off any current mortgage debt with the proceeds of the reverse mortgage.

The amount of the loan depends on several factors. One is the age of the applicant. This loan actually favors the older person with a higher loan-to-value percentage. The current interest rate is another factor: a lower rate at the time of application will yield a higher loan-to-value percentage. A calculator to figure loan amounts is available at *www.elderloan.com*.

This loan has some additional safeguards built in: both the interest rate and the broker origination fee are set by HUD, and there are no "junk" costs such as processing or underwriting fees, so anyone applying to any mortgage lender offering the HUD reverse mortgage should be presented with similar application costs.

The salient factor of interest to debtor-creditor attorneys is that credit scores are not used in qualifying for the loans, which creates opportunities for resolving credit problems late in the game. One Portland couple recently applied for and received a reverse mortgage that allowed them to fend off a sheriff's sale that had already been scheduled. Another couple recently entered chapter 13 long enough to process a reverse mortgage, which yielded sufficient funds to enable them to pay off their debts and emerge from bankruptcy.

The HUD reverse mortgage is a flexible and powerful tool for attorneys practicing in the debtor-creditor field.

Dan Clark is a loan officer with American Pacific Mortgage specializing in the reverse mortgage for seniors. Phone: 503-805-9185; Web: *www.elderloan.com*; email: *dhclark@comcast.net*.

NINTH CIRCUIT CASE NOTES

By Ashley S. Hohimer
Miller Nash LLP

IN RE DAWSON RECONSIDERED: EMOTIONAL-DISTRESS DAMAGES ARE RECOVERABLE FOR VIOLATIONS OF STAY

In re Dawson, 390 F3d 1139 (9th Cir 2004)

The Ninth Circuit has held that a debtor **may** recover damages for emotional distress under §362(h) of the Bankruptcy Code. The court revisited its recent opinion in *In re Dawson*, 367 F3d 1174, *withdrawn*, 385 F3d 1194 (9th Cir 2004), and held that actual damages recoverable by an individual for willful violations of the automatic stay **include** damages for emotional distress.

In accepting the chapter 13 debtor's argument, the court first noted that the Bankruptcy Code does not define "actual damages." Congress signaled its intent to redress harms that are unique to human beings, however, by choosing the term "individual" in the statute. The legislative history provides further evidence that Congress intended to achieve nonfinancial goals through use of the automatic stay provision. Ultimately the court concluded that because Congress meant for the stay to protect more than just debtors' financial interests, any emotional distress damages that result from a stay violation may be actual damages recoverable under §362(h).

LAWYER DEEMED TO BE CLIENT'S IMPLIED AGENT TO RECEIVE SERVICE OF PROCESS

In re Focus Media Inc., 387 F3d 1077 (9th Cir 2004)

An involuntary bankruptcy case was filed against a corporate debtor, and four months into the case the trustee brought an adversary proceeding against the debtor's sole shareholder. The proofs of service filed with the bankruptcy court reflected that the summons and complaint had been served on the defendant in care of his attorney, who had acted as counsel for the defendant in the related bankruptcy case. The defendant argued that service was inadequate.

The bankruptcy court found that the attorney, as counsel for the defendant in the related bankruptcy case, was impliedly authorized to receive service of process on the defendant's behalf in the adversary case. The district court affirmed, and the defendant appealed to the Ninth Circuit.

The Ninth Circuit affirmed the lower courts' holdings, holding that in an adversary proceeding, an agent of a defendant authorized by appointment to receive service of process may include an agent impliedly authorized to accept service of process if (1) the agent is the attorney representing the defendant in the related bankruptcy case, and (2) the totality of the circumstances demonstrates the intent of the client to convey such authority.

BANKRUPTCY COURT LACKS AUTHORITY TO DECIDE NONDISCHARGEABILITY SANCTIONS IMPOSED ON NONDEBTOR

In re Hercules Enterprises, Inc.
387 F3d 1024 (9th Cir 2004)

Before filing for chapter 7, the corporate debtor operated as a gym and health club. Once in bankruptcy, the debtor's sole owner removed equipment from the gym without the bankruptcy court's authorization. The owner ignored the bankruptcy court's order compelling the owner to return the equipment to the trustee. The owner was held in contempt of court and ordered to pay the trustee an amount equal to the fees and costs incurred as a result of his misconduct. Additionally, the court ordered that the sanction against the owner not be dischargeable in any personal bankruptcy that the owner might file in the future. The district court affirmed both aspects of the bankruptcy court's order, and the owner appealed to the Ninth Circuit.

The Ninth Circuit affirmed the monetary sanctions imposed by the bankruptcy court, but vacated the portion of the order purporting to make the sanction nondischargeable in the event of any future bankruptcy filing by the owner. The court held that a bankruptcy court lacks authority to adjudicate the subsequent dischargeability of a sanction properly imposed on a nonparty participant in a bankruptcy proceeding. The court pointed out that the type of sanctions imposed on the owner would generally not be dischargeable in a future bankruptcy under §523(a)(7) of the Bankruptcy Code, but held that the final determination of dischargeability resides with the bankruptcy court presiding over the subsequent bankruptcy case.

FAILURE TO LIST CREDITOR ON MATRIX IN NO-ASSET CHAPTER 7 NOT JUSTIFICATION TO REVOKE DISCHARGE

In re Nielsen, 383 F3d 922 (9th Cir 2004)

Debtor ran a TV repair shop and needed a loan. Debtor's customer offered to help debtor by pledging her own property as security for the loan. When debtor failed to pay off the loan, the bank took customer's property. Although debtor promised to pay customer back with interest, he decided to file chapter 7 instead. Finding that there were no assets to distribute, the court ultimately granted debtor a discharge, and the case was closed.

Despite being debtor's largest unsecured creditor, customer was not listed in the mailing matrix and never received notice of the bankruptcy case. When customer subsequently contacted debtor about paying off the debt, he informed her that his debts had been discharged in bankruptcy. Customer sued debtor in bankruptcy court, seeking a revocation of his discharge on the basis that debtor had acted fraudulently by omitting her from the mailing list. The bankruptcy court declined to revoke the discharge, concluding that even if debtor had purposely omitted customer's name on the matrix, the omission was not material. As a no-asset, no-bar-date bankruptcy case, the discharge would have been granted even if customer had received notice. The district court affirmed the bankruptcy court's holding.

On appeal, the Ninth Circuit agreed that revoking a debtor's discharge was not appropriate because the discharge was not "obtained through" fraud. Adopting the concurring opinion in *In re Beezley*, 994 F2d 1433 (9th Cir 1993), the court held that although §523(a)(3)(A) makes some debts nondischargeable if a creditor is not properly scheduled, this is not the effect in a no-asset, no-bar-date chapter 7 case. Because customer could not prove that "but for the fraud, the discharge would not have been granted," a revocation of the discharge was not appropriate.

NINTH CIRCUIT ADOPTS TOTALITY OF CIRCUMSTANCES TEST AS APPROPRIATE STANDARD UNDER SECTION 303(i)(1)

Higgins v. Vortex Fishing Systems, Inc.
379 F3d 701 (9th Cir 2004)

Debtor corporation was formed by principal, who invented a beeping fishing lure, and lender, who put up money in exchange for shares and voting rights. Principal and lender wound up in a bitter dispute, resulting in principal's being voted out of corporation. Principal then got together with various creditors and filed an involuntary chapter 7 bankruptcy against debtor. The bankruptcy court dismissed the petition, and the decision was appealed twice, with the Ninth Circuit ultimately affirming the bankruptcy court's decision to dismiss. The bankruptcy court awarded the debtor trial and appellate attorney fees under §303(i)(1) of the Bankruptcy Code, and principal and the creditors appealed the award.

The Ninth Circuit reviewed the plain language of §303(i) and found that the statute's use of the word "may" rather than "shall" indicated that fees and costs need not be awarded in all cases. Recognizing that discretion lay with the awarding court, the court held that the appropriate standard for making a §303(i)(1) determination was a totality of the circumstances test. The court concluded that the bankruptcy court's analysis of the circumstances surrounding the involuntary petition was sufficient to meet the totality of the circumstances standard. It affirmed the award of fees related to the initial litigation, but reversed the portion of the award attributable to the appeal, as §303(i)(1) gives the bankruptcy court discretion to award fees only at the trial level.

BAP CASE NOTES

By Douglas Pahl
Perkins Coie LLP

INSIDER'S PROFESSIONAL CORPORATION IS NOT AN INSIDER UNDER SECTION 101(31)

In re Enterprise Acquisition Partners, Inc.
___ BR___ , 2004 WL 3116106 (9th Cir BAP 2004)

Miller Avenue Professional Services, Inc. ("MAPPS") made a $125,000 prepetition loan to the debtor, secured by the debtor's accounts receivable. Ninety-two days prior to the petition date, MAPPS perfected its security interest by filing a UCC-1.

Patricia Mapps, the president, sole shareholder and sole employee of MAPPS, was married to Patrick Salmon, a ten-percent shareholder, officer and director of the debtor.

The trustee brought an action to avoid MAPPS's perfection of its security interest as a preference. The trustee argued that §547(b)'s one-year reach-back provision controlled because MAPPS was an insider of the debtor.

Section 101(31)(B) contains the following, nonexclusive list of *per se* insiders: a director of the debtor; an officer of the debtor; a person in control of the debtor; a partnership in which the debtor is a general partner; a general partner of the debtor; or a relative of a general partner, director, officer, or person in control of the debtor. In addition to *per se* insiders, courts have bestowed insider status on those who have a "sufficiently close relationship with the debtor that . . . conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor." *In re Anderson*, 165 BR 482, 485 (Bankr D Or 1994) (quoting *Wilson v. Huffman*, 712 F2d 206, 210 (5th Cir 1983)) (internal quotations omitted).

The bankruptcy court, on stipulated facts, addressed only one issue: was Ms. Mapps a *per se* insider under §101(31). The court concluded she was, reasoning that: (1) Mr. Salmon, as an officer and director of the debtor, was a *per se* insider of the debtor; (2) Ms. Mapps, as Mr. Salmon's spouse, was also a *per se* insider of the debtor; and (3) because Ms. Mapps and MAPPS were, "under these circumstances, indistinguishable," MAPPS was also a *per se* insider of the debtor. Allowing the trustee the benefit of longer reach-back period applicable to transfers to insiders, the court ordered that the alleged preference be avoided.

The BAP reversed, concluding that the bankruptcy court's interpretation impermissibly expanded the statutory list of per se insiders. The BAP, reviewing the question of law *de novo*, found "no way reasonably to read the term 'relative of a general partner, director, [or] officer' as also including corporations that are wholly owned by a relative of a general partner, director, or officer." The clear language of the statute must be applied, reasoned the panel, unless to do so would lead to absurd results. The BAP distinguished the case of *Tyee Timbers, Inc.*, 139 BR 520 (Bankr D Or 1992), which involved an insider of an affiliate. Under §101(31)(E), both affiliates and their insiders are per se insiders of the debtor. The present case did not involve an affiliate or an insider of an affiliate.

The BAP also considered whether the bankruptcy court properly pierced MAPPS's corporate veil to find that the loan came not from the corporation but from Ms. Mapps. Construing California law, the court concluded that the bankruptcy court failed to consider both elements of the required alter ego inquiry: (1) whether there is "such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist"; and (2) whether, "if the acts are treated as those of the corporation alone, an inequitable result will follow." *Mesler v. Bragg Mgmt. Co.*, 702 P2d 601, 606 (Cal 1985) (internal citations omitted). California courts also require a showing of some conduct amounting to bad faith that would render it inequitable for the corporate owner to hide behind the corporate form. *Senora Diamond Corp. v. Superior Court*, 99 Cal Rptr2d 824, 837 (Cal App 2000).

The BAP concluded that, while the bankruptcy court considered the unity of interest element of the above test, it failed to consider the second element, whether an inequitable result would follow. The BAP found no evidence to support a finding of bad faith. The BAP observed that there was nothing inherently inequitable about receiving a preferential transfer and nothing improper about utilizing a corporate entity to limit liability.

CHAPTER 7 DEBTOR LLC'S PAYMENTS OF ITS SOLE MEMBER'S ESTIMATED TAXES SUBJECT TO TURNOVER

In re KRSM Properties, LLC
318 BR 712 (9th Cir BAP 2004)

The chapter 7 debtor was a California limited liability company. Michael and Stella Gilliam, the debtor's sole member owners, had elected to have the LLC disregarded for federal tax purposes and to pay personal income tax on income resulting from LLC business.

Prior to the petition date, the debtor sold real property and received net proceeds of $146,513.25. In the weeks after the sale, the debtor issued checks totaling $136,000 to the Internal Revenue Service ("IRS") and the California Franchise Tax Board ("FTB"), reflecting the Gilliams' estimated personal income taxes.

Following the petition date, the trustee demanded that the IRS and FTB return the funds to the estate. The IRS and FTB agreed after entry of appropriate orders. Over the Gilliams' objections, the bankruptcy court ordered that the funds be returned to the trustee. The Gilliams appealed.

The question addressed by the BAP was whether the debtor's payment to the taxing authorities of its members estimated taxes was subject to turnover. The Gilliams argued that their election to have the LLC disregarded for federal tax purposes entitled them to have LLC funds used to pay their estimated taxes. The Gilliams also argued that the LLC's bank account, from which the tax payments were issued, was nothing more than the Gilliams' sole proprietorship account.

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The BAP rejected these arguments and specifically declined to treat the LLC as a sole proprietorship. The debtor, as an LLC, was a "person" under §101(9) and (41) of the Bankruptcy Code. To consider the debtor a sole proprietorship would be inappropriate, because a sole proprietorship is not a "person" under the Code, and only "persons" are eligible to be debtors under §109.

The court held that the Gilliams' tax election did not change the legal status of the LLC's assets. "When the LLC sold the real property it owned in its name, the proceeds from the sale remained its property." After identifying nothing inequitable in the turnover of the funds to the trustee, the court made the following observations:

The owners elected to have the LLC ignored as a separately-taxed entity so that they could enjoy limited liability while avoiding double corporate and individual taxation. That choice comes with benefits and, as this appeal demonstrates, burdens.

When the owners caused the LLC to file a voluntary chapter 7 case, they elected to run the gauntlet of the chapter 7 distribution scheme under the gimlet eye of a trustee whose duty runs to the maximization of LLC estate assets. Regardless of the wisdom of the choice to file the LLC case, an LLC is not a personal piggy bank and, under the chapter 7 liquidation scheme, payment of the owners' personal income taxes must first give way to payment of the LLC's creditors.

The BAP found no error in the bankruptcy court's entry of turnover orders.

SAVE THE DATE!

This year the Federal Bar Association's Annual Judges Appreciation Dinner will honor the district's bankruptcy judges. Most of the bankruptcy judges–as well as many other federal judges—will be attending. Ward Greene of Greene & Markley will be making remarks on behalf of those who practice in the area. Please mark your calendar for April 6, 2005, at the Hilton Hotel in downtown Portland. If you have any ideas of any bankruptcy practitioners who have hidden talents that might provide entertainment during the evening, please call Courtney Angeli at Stoel Rives, LLP, (503) 294-9358 or email her at *cwangeli@stoel.com*
The FBA will be sending invitations to all section members

STATE COURT CASE NOTES

By Aaron Wigod
Greene & Markley, PC

SUBSTANCE OVER FORM

Galfano v. KTVL TV
196 Or App 425, 102 P3d 766 (2004)

The trial court awarded defendants attorney fees in a "supplemental general judgment" based on the dismissal of one of plaintiff's claims. Plaintiff appealed.

The Court of Appeals on its own motion considered whether a "supplemental general judgment" was appealable. It concluded it was by examining the substance of the trial court's disposition, rather than the form, to determine whether it satisfied the definition of one of the three types of judgments in ORS 18.005. The judgment satisfied the definition of a supplemental judgment in ORS 18.005(15) because (1) it was the trial court's final decision on the claim for attorney fees and included the word "judgment"; (2) it was rendered after a general judgment has been entered pursuant to ORCP 68 C(5)(b); and (3) an award of attorney fees affected a substantial right of a party.

IS YOUR CLIENT EXCUSABLY IGNORANT?

Dimeo v. Gesik, 195 Or App 362, 98 P3d 397 (2004)

A lienholder filed suit seeking judicial foreclosure of his trust deed. The bank that held a later trust deed argued it was equitably subrogated to the lienholder's trust deed. The trial court's grant of summary judgment for the lienholder was reversed on appeal. On remand the trial court awarded prevailing party fees to the lienholder on the ground that the bank's equitable subrogation claim was not objectively reasonable. The bank appealed this award.

The doctrine of equitable subrogation does not apply unless the lender was ignorant of the intervening lien and the lender's ignorance was excusable. Oregon appellate courts have not defined what constitutes "excusable ignorance" in most contexts, including equitable subrogation.

The Court of Appeals reversed the prevailing party fee award, helping somewhat to define excusable ignorance. It found that when the bank asserted its equitable subrogation claim, it had evidence, although ambiguous, that the bank's manager had seen a title insurance policy showing the bank in first position. Although this was not a finding that the bank was excusably ignorant on those facts, it was a finding that the bank had an objectively reasonable basis for arguing it was excusably ignorant. Because equitable subrogation is a "flexible concept," a party with any evidence to support a claim can rarely be said to have no objectively reasonable basis for the claim.

NO PRAYER FOR MONEY DAMAGES, NO STATUTE OF LIMITATIONS

Frasier v. Nolan, 195 Or App 211, 98 P3d 392 (2004).

A property owner sued developers requesting a determination of the title to common areas, imposition of a constructive trust, and specific performance of restrictions in a declaration. Defendants argued that the claim was barred by the statute of limitations, which defendants argued began to run when the property owner had constructive notice of defendants' failure to convey title to the common areas. In response, the property owner argued that the claims were equitable in nature, and thus, subject to the doctrine of laches rather than a statute of limitations. Defendants agreed that statutes of limitations apply to equity cases only as presumptively reasonable periods in which a case must be filed. However, defendants argued that the equitable relief in this case was only ancillary to the rights of the parties under the declaration, and therefore, a statute of limitations should apply. The trial court agreed and found that the action was time barred. The property owner appealed.

The Court of Appeals reversed. The claims were equitable in nature because the claims did not seek money damages. Thus, the Court of Appeals held that the statute of limitation applied to the equitable claims only as a presumptively reasonable period in which the property owner must file a claim.

LANDLORDS MUST STRICTLY COMPLY

Tompte v. Stone, 195 Or App 599, 98 P3d 1171 (2004).

Evicted tenants filed a damages claim under the Oregon Residential Landlord and Tenant Act against their landlord who disposed of the tenants' personal property left in home. The tenants argued that the notice did not comply with ORS 90.425 because only seven days notice was given instead of eight before their landlord sold the personal property. The trial court found that the landlord's notice substantially complied with the statute.

The Court of Appeals reversed. The statute governing notice did not allow for substantial compliance. Whether the doctrine of substantial compliance applies is a question of statutory interpretation. Since ORS 90.425 (16) provides that "[c]omplete compliance in good faith with this section shall constitute a complete defense," substantial compliance is not a defense.

REALLY, LANDLORDS MUST STRICTLY COMPLY

Waldvogel v. Jones, 196 Or App 446, 103 P3d 124 (2004)

A former residential tenant brought an action against his landlord for unlawful entry and sought to recover twice the amount of the security deposit. The tenant argued that the landlord withheld the tenant's security deposit without providing a written account within 31 days after termination of tenancy. The trial court entered judgment in favor of landlord and tenant appealed.

The Court of Appeals held that the tenant was entitled to recover twice the amount of security deposit. The court quoted *Beckett v. Olson*, 75 Or App 610, 613-14, 707 P2d 635 (1985), on interpretation of ORS 90.300(14): the language "'the tenant may recover' rather than 'the tenant *shall* recover' does not give the *court* any discretion. Rather, it is a statement of the steps the tenant, as a matter of right, *may* take if the landlord does not comply with the statute." (Emphasis in original.) Once the tenant takes the step of seeking twice the security deposit as a remedy, the trial court must award the double damages that the statute requires.

TO THE WATER'S EDGE?

Denison v. Hodge, 196 Or App 248, 100 P3d 1144 (2004)

A landowner brought an action against his neighbor for trespass, ejectment, and declaratory relief, seeking to establish his right to land bordering a navigable stream. The case involved interpretation of a deed with a legal description that provided in part: "thence S 38 55' E. 54.5' to a cedar Post on the bank of the Alsea River; thence along the bank of the Alsea River S 35 39' W 108.9_to a cedar post." The landowner argued that the deed conveyed the property to the bank of the river wherever the river meandered. The neighbor argued, and the trial court agreed, that the deed conveyed only the land contained within the line between the two cedar posts at the angle and distance stated in the deed.

The Court of Appeals reversed, holding that the deed conveyed the land to the bank of the river wherever it meandered. ORS 93.310(2) provides that the boundaries or monuments are paramount in interpreting a deed. Relying on that statute, the Court of Appeals concluded that the two posts are "artificial monuments that determine the corners of the property, while the bank functions as a natural monument along which the property line proceeds from the first cedar post to the second cedar post." The precise distance along the bank of the river is not stated in the deed because "it will follow the changing sinuosities of the river."

18th ANNUAL NORTHWEST BANKRUPTCY INSTITUTE

April 15-16, 2005
Grand Hyatt Seattle

Continue the tradition of learning from the best and brightest of the bankruptcy bar. This year's institute will cover a diverse range of topics, including ethics, religious organization bankruptcy filings, and family law issues in bankruptcy.

Special rates at the Grand Hyatt are available through March 23. For reservations and rates call: 1-800-233-1234 or 206-774-1234 and request the Oregon State Bar NW Bankruptcy Institute rate.

WOMBATS REPORT — ECF UPDATE

By Laura Walker
Cable, Huston, Benedict, Haagensen & Lloyd, LLP

ECF UPDATE

The women bankruptcy attorneys group (WOMBATS) met on December 2, 2004, to discuss the bankruptcy court's implementation of electronic filing (ECF). Judge Trish Brown gave a presentation about the schedule for expanding participation in electronic filing. Ken Eiler, one of the Chapter 7 panel trustees, talked about his experience using the system.

Judge Brown stated that electronic filing is currently used by the panel trustees, the US Trustee's office and a few attorneys (primarily debtors' counsel) who are frequent filers. This group is considered the "beta test" group to help work out the bugs in the system. The court plans to expand participation and make electronic filing available to other practitioners in April 2005.

All bankruptcy attorneys and staff who have not used ECF in other districts will need to complete a training session before using ECF. The training sessions will start in April and continue until all bankruptcy attorneys in the state are trained. There are not enough slots in the schedule for everyone to be trained at once, so the court asks offices with multiple people involved in bankruptcy work to spread out the training over several weeks or months and take no more than two slots per attorney at any one training session. Persons already using electronic filing in other jurisdictions (such as Washington) need not attend training, but will be required to demonstrate their knowledge of Oregon's ECF procedures to receive a login and password.

Practitioners should review information about electronic filing on the court's web site, *www.orb.uscourts.gov*. The web site includes links to a tutorial and additional information regarding hardware and software requirements to participate in the system. The training will require completion of "homework" in order to obtain a login and password and begin filing electronically.

Documents filed electronically must be in pdf format. You can convert documents from Word or Word Perfect to pdf on your computer by "writing" or "printing" to a pdf file. To do this, it is necessary to have a full version of Adobe Acrobat, for "reader" and "writer." This must be purchased; it is not available as a free download.

Judge Brown and Ken Eiler offered some tips about using electronic filing:

1. Each document must be entered under a category, such as motion, notice, complaint or order. Ken advised that the category is not always what you might think. For example, a trustee's notice of settlement may be an “order” rather than a “notice” if it has a place for a judge’s signature. If a document is entered in the wrong category, it could be stricken by the court. The court will distribute in training, and post on its website, a chart showing the category and specific menu item for every document that may be filed with the court.

2. The procedure for processing orders is different from that for other pleadings. A proposed order filed electronically may not show up on the court docket immediately. The proposed order is placed in the judge’s electronic mailbox. After the judge signs the order, it is entered in the docket and appears on PACER.

3. Documents should be filed using the court’s standard forms. If you do not use the correct form, your document may be rejected.

4. Pay attention to the procedures for electronic filing, including use of the required fonts. There is limited space on standard forms to add “extra” information, but the court may include a space for adding more information as needed. In some cases, you may be able to attach a separate page for explanation. The exact procedure for doing this will be clarified in the future. One option is to attach an exhibit or to put the additional comments in a cover letter to the judge and attach that as an additional document after filing the pleading. The current users are experimenting to determine what works best.

5. The court will have a help desk to assist e-filers with questions and problems. You will be able to obtain “live” help by telephone while you are in the process of filing a document if you call during help desk hours.

6. All attorney payments associated with bankruptcy documents (such as filing fees for debtor’s cases, relief from stay motions and adversary complaints) will be made by credit card. You may want to have a separate credit card account to use exclusively for filing fees. This is especially true for sole practitioners, who should not use their personal credit cards for business charges. We also discussed the procedure for transferring funds from client trust accounts to reimburse the credit card charges for electronically filed documents. You should pay particular attention to office procedures on this issue to avoid ethical problems.

7. You may be able to file multiple documents and pay for them together at the end. Be aware, however, that once a payment is entered, “you can’t go back” and it may be difficult to unwind the payment or obtain a refund.

8. Both Judge Brown and Ken Eiler encouraged practitioners to allow plenty of time to get documents filed electronically and not wait till the last minute, especially if you are a new user. Although it may be possible to file after hours and even up until 11:59 PM, problems can arise that cause you to miss a filing deadline if you wait until the last minute.

MEETINGS IN 2005

We have scheduled meetings for the following dates:

February 3, 2005

April 21, 2005

June 9, 2005

September 15, 2005

November 10, 2005

We are firming up speakers for these meetings. Peter Jarvis is scheduled to speak on April 21, 2005 regarding ethical issues or conflicts of interest in bankruptcy practice. Tom Renn, a chapter 7 trustee, has also agreed to speak about tips for bankruptcy practitioners. You can add your name to the email notification list for WOMBATS by sending an email to *lwalker@chbh.com*. We encourage anyone interested in bankruptcy practice to attend the meetings.

CONSUMER BANKRUPTCY

By Amanda Bailey
VandenBos & Chapman, LLP

OCTOBER 21, 2004, MEETING

Judge Dunn circulated a proposed Motion to Adjust Real Estate Trust Deed Obligation and Order to Adjust Real Estate Trust Deed, which will confirm the amount owed to mortgage creditors as of discharge date. Any debtor who has made all payments required to satisfy the mortgage can file this motion shortly before the discharge date, and the creditor can object. If there are no objections, the debtor can get an order stating that the debtor is current—that is, there are no arrearages, interest, attorney fees or charges outstanding at discharge. Service of the motion will have to comply with Rule 7004.

Brian Lynch, chapter 13 trustee, presented a payoff issue. If a payoff amount is requested but payment to the trustee is delayed, the payoff amount could change because the trustee's commission may fluctuate between the payoff request and actual payoff date.

Mr. Lynch also announced that his office has a mailbox to email preconfirmation information. The email address is: *precon@portland13.com*.

The chapter 13 trustee's office will object to exemptions claimed under the old statute.

Judge Dunn asked that attorneys work out objections in a more timely fashion before any adjourned confirmation hearing.

Judge Perris clarified the procedure for continuing motions to dismiss by the chapter 13 trustee's office. She will continue the scheduled hearing one time, if the continuation date is within two weeks. The hearing will cover only the amounts in default as of the filing of the motion to dismiss. The chapter 13 trustee must send out a new notice if there is a further default.

Caroline Cantrell requested clarification of attorney fee provisions in the new Order Confirming Plan. Paragraph 4 of the OCP should contain either the actual attorney fees incurred through a specified date or the cap (amount projected in the plan), whichever is smaller. The certification at the end of the OCP (after the judge's signature block) should contain the actual attorney fees incurred, regardless of whether the amount exceeds the projection in the plan.

Ms. Cantrell also asked about the propriety of objecting to attorney fees for creditors in connection with motions for relief from stay. Judge Dunn responded that debtors' attorneys should object to a creditor's attorney fees by way of objection to claim. Attorney fees included in a stipulated order on relief from stay are not subject to objection by persons who stipulated to the order. Keep this in mind when negotiating a deal with the creditor and creditor's attorney.

DECEMBER 9, 2004, MEETING

Judge Perris announced a change to preconfirmation motions to dismiss by the chapter 13 trustee's office. Beginning January 1, 2005, the trustee will no longer file motions to dismiss. Instead, when the debtor is not current on payments the trustee will send notice of that fact (which will not be filed with the court) to the debtor and debtor's counsel and will advise the debtor and debtor's counsel that at the confirmation hearing he will orally ask the court to dismiss the case for nonpayment. The judges will grant such oral motions as appropriate.

Judge Perris also announced a different approach to postconfirmation plan amendments or modifications through stipulated motions. Judge Perris stated that only minor modifications were intended to be made through this process. She will put together a proposal for the judges to review. She hopes the changes will make it less expensive and more efficient to modify a plan, and will give creditors a better picture of what is being modified.

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: 503-281-2466 ■ Email: Dguyol@aol.com

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

Jack Fisher, chapter 13 trustee's attorney, announced that the trustee's office has made the Trustee's Motion to Dismiss into a form similar to the LBFs, and has created a new Order resolving Trustee's Motion to Dismiss. Any debtor who agrees to resolve within six months should contact Shea at the trustee's office (*sheaw@portland13.com*) with written confirmation of the agreement. She will draft the Order and file it with the Court. In chapter 13 cases where a wage order has been entered but payments are not received by the trustee's office, the trustee's office will send a 10-day notice. Debtors can either make the delinquent payments or request a hearing within 10 days. If there is no response within 10 days, the trustee's office will send out a statement of failure to comply.

Brian Lynch, chapter 13 trustee, noted that documents sent to his office as email attachments do not need to be faxed as well. The trustee's office prefers receiving documents electronically.

Judge Perris stated that she will accept faxed signatures on stipulations. The Portland judges are accepting orders resolving the Chapter 13 trustee's motions to dismiss in which the trustee represents that it is an agreed order. The trustee accepts email confirmation of the agreement.

Judge Brown addressed electronic filing. Currently, the trustees and US Trustee are filing electronically. Todd Trierweiler and Eric Olson's office are BETA testing. The Bankruptcy Court hopes to start allowing attorneys to file electronically beginning April 1, 2005, but only after the attorney takes a class on electronic filing. Classes will begin April 1, 2005. A live help desk will be set up during business hours to answer questions on electronic filing. All documents electronically filed are filed and docketed instantaneously, regardless of the time of day they are filed. Judge Brown also announced that beginning April 1, 2005, E-Orders will be filed. Judges will get electronic orders in their mailboxes.

There have been some problems with the bankruptcy noticing center getting out timely scheduling orders in adversary proceedings where an answer has been filed. Keep an eye open if you expect scheduling orders to be sent out in your adversary proceeding.

Judge Brown reminded all practitioners that filing fees for bankruptcy cases and motions for relief filed electronically must be paid by credit card. Firms must have credit cards for these filing fees.

Ann Chapman announced a new committee for the Debtor-Creditor Section: C.A.R.E. (Credit Abuse Resistance Education). This committee will put on programs at high schools to educate young adults about credit. The committee will need volunteer speakers.

Jack Fisher asked debtor's attorneys to remind their clients of step-payments (increases in monthly payments over the life of the plan).

In paragraph 5 of the Order Confirming Plan, be sure to list the creditors either (1) in mailing matrix format, or (2) horizontally, separating creditors by placing one creditor per line. Do not bunch up the creditors and addresses.

If a creditor's attorney has filed an objection to a plan, the debtor must serve the Order Confirming Plan on the objecting creditor's attorney as well as the creditor and registered agent (if necessary).

The Committee is looking for a new chair and a new secretary. Anyone interested in serving should email Ian Wallace at *ianwa@bankruptcylawctr.com* or Amanda Bailey at *abailey@vandenbos-chapman.com*

The Consumer Bankruptcy Committee usually meets every other month on the third Thursday at 4:30pm in the 8th floor conference room at the United States Bankruptcy Court in Portland. The next meeting will be February 17, 2005. All bankruptcy practitioners are encouraged to attend. Please contact Ian Wallace at 503-253-7777 to add topics to the agenda or to obtain further information.

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