

Newsletter

Volume XXV, Number 3 Debtor-Creditor Section, Oregon State Bar Fall 2006

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COMMENTS FROM THE CHAIR

By Thomas W. Stilley
Sussman Shank LLP

I always look forward to fall. It is one of my favorite times of the year - cooler weather, falling leaves, kids back in school, football and soccer games, cross country meets, long bike rides and family outings before the rain sets in and the only daylight hours seem to be spent at the office.

One of the fall activities that I look forward to each year is the Section's Annual Meeting and CLE, which was held this year at Mt. Bachelor Village in Bend on September 29th and 30th. I hope each of you who attended the meeting found the CLE program and social events informative, worthwhile, and fun (well maybe fun is not the word for the CLE). I would like to personally thank all those who devoted their time and effort to making this a successful event, especially Oregon Supreme Court Chief Justice Paul De Muniz, Circuit Court Judge John Wittmayer, Bankruptcy Judges Elizabeth Perris and Frank Alley, and meeting organizers Susan Ford and Caroline Cantrell. We were all saddened by the news that one of our scheduled presenters, the Hon. Howard Lichtig, a former bankruptcy attorney and member of the Section, died in a motorcycle accident on the eve of the annual meeting. Our condolences go out to his family, friends and colleagues. He was a valued member of the Oregon

judiciary and will be sorely missed.

Although in recent years we have held the Annual Meeting in Portland with excellent attendance, we felt a change of venue was warranted for numerous reasons. While the largest concentration of Section members is in Portland, often Portland members attend only part of the program, find it difficult to stay away from the office because of pressing client matters, or forego the social events because of other commitments. Because of these and other factors, I believe overnight, out-of-town meetings can provide added benefits, including better attendance from those registered and the opportunity for Section members to get to know one another in a relaxed nonadversarial setting. I know the cost of out-of-town meetings is a consideration, but we have done our best to secure reasonably priced lodging and obtain subsidies to help defray the costs to the members. Thanks to Sussman Shank LLP for sponsoring the Deschutes Brewery dinner tour and curbside reception, which allowed us to offer that event, including the Green Bus transportation, for less than its actual cost. Golf at Widgi Creek on Saturday afternoon was a pleasure - the weather gods cooperated to provide us with a perfect fall day. I would appreciate any input the members have regarding both the Annual Meeting

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Comments from the Chair

and CLE program, including the social events and the venue. Partly because the Northwest Bankruptcy Institute will be held in Vancouver, B.C., in 2007, we plan to hold the 2007 Annual Meeting in Portland, and the 2008 meeting at the Oregon Coast.

At the Annual Meeting we elected our officers and executive committee members for the coming year. They are:

Stephen T. Tweet - Chair
Teresa H. Pearson - Chair Elect
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Hon. Albert E. Radcliffe

Brandy Sargent
Tara Schleicher

Finally, I would like to thank the following members whose terms are expiring this year for all their hard work and commitment, although I know this will not be the end of their involvement and leadership in Section activities:

Peter C. McKittrick
George Hoselton
Hon. Elizabeth L. Perris
Douglas R. Schultz

As this year draws to a close, I want to say it has been an honor to serve as your section chair and to work with so many talented and dedicated people. The Section continues to look for ways to better serve its members and the public. Please take a few minutes to check the Section's website for events and opportunities. If you have suggestions on what we should be doing, or doing better, please let me or one of the other executive committee members know.

WOMBATS ANNOUNCEMENT

WOMBATS is an informal networking group for women bankruptcy attorneys. We meet 4-5 times per year over lunch and sometimes invite outside speakers. We encourage mentoring of younger women attorneys in our field and discuss recent developments and issues of concern.

The next WOMBATS meeting will be on November 15, 2006, in the 8th floor conference room, US Bankruptcy Court, in Portland. Eugene members may participate by telephone conference; contact Ginger at Judge Radcliffe's office.

This is a brown bag lunch meeting from 11:45a.m. to 1:15p.m. Jeff Wong of Greene and Markley will make a presentation on offers in compromise on tax debts (negotiating settlements with the IRS). We will apply for CLE credit.

For further information, email Laura Walker, lwalker@chbh.com.

Debtor-Creditor Newsletter

The Debtor-Creditor Newsletter is published three times a year by the Debtor-Creditor Section, Oregon State Bar, P.O. Box 1689, Lake Oswego, OR 97035.

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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.

FEDERAL JUDGES STRIKE DOWN PORTIONS OF BAPCPA AS UNCONSTITUTIONAL

By James T. Yand
Stafford Frey Cooper, PC

Two more federal courts have weighed in on the constitutional challenges to the “debt relief agency” amendments to the Bankruptcy Code as they apply to attorneys. Their decisions have taken a bite out of the new provisions by holding that §526(a)(4) violates attorneys’ free speech rights under the First Amendment.

The most recent decision was delivered on August 11, 2006, when many people were still focused on their summer vacations. In *Olsen v. Gonzales*, 2006 WL 2345503 (D Or 2006), Judge Hogan ruled that one provision of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) violated plaintiffs’ free speech rights. Less than a month earlier, a Texas court had come to the same conclusion. *Hersh v. United States*, 347 BR 19 (ND Tex. 2006). In both cases, lawyers challenged the constitutionality of §§526, 527 and 528 of the Bankruptcy Code enacted in BAPCPA.

REVIEW OF BAPCPA REQUIREMENTS

Sections 526, 527 and 528 of the Code after BAPCPA require “debt relief agencies” that render “bankruptcy assistance” to enter into written contracts with “assisted persons,” disclose the extent of services provided and fees charged, and disclose clearly and conspicuously in all advertising that their services contemplate bankruptcy. Debt relief agencies are required to provide a detailed written notice to all assisted persons of the disclosure requirements of the Code, the obligation of accuracy and truthfulness on those disclosures, and the fact that failure to comply with those requirements carries potential civil and criminal sanctions. 11 USC §527.

Debt relief agencies must also advise the assisted person that the person may proceed *pro se*, or may hire an attorney, or may hire a bankruptcy petition preparer, but that only attorneys and not petition preparers can render legal advice. *Id.* They are required to provide the assisted person with information on how to value assets, how to complete bankruptcy schedules, and how to determine what property is exempt. *Id.* Debt relief agencies are prohibited from failing to provide the services they contracted to provide, counseling any person to make false statements, or advising the person “to incur more debt in contemplation of such person

filing a case under this title or to pay an attorney or bankruptcy petition preparer.” §526(a)(4). Section 526(c) creates civil liability for violation of the duties enumerated.

ATTORNEYS AS DEBT RELIEF AGENCIES UNDER BAPCPA

As a threshold question, Judge Hogan considered whether attorneys were covered by the definition of “debt relief agency” as set forth in BAPCPA. Judge Hogan reviewed Judge Davis’s reasoning in *In re Attorneys at Law and Debt Relief Agencies*, 332 BR 66 (Bankr SD Ga 2005), but concluded that the plain language of BAPCPA includes attorneys in the definition of “debt relief agency.” BAPCPA defines “bankruptcy assistance” to include services provided for the purpose of counsel and legal representation. The definition of “debt relief agency” specifically lists five exclusions and Congress could have put attorneys in the list if it meant to exclude attorneys. Judge Hogan’s conclusion that attorneys are debt relief agencies covered by the BAPCPA restrictions leaves only those fortunate few bankruptcy lawyers practicing in the Southern District of Georgia free from the impact of debt relief agency provisions. This issue will undoubtedly make its way up the appeals chain until it reaches the United States Supreme Court for a final decision.

Like the Oregon court, the Texas court held that the plain language of the definitions of “debt relief agency” and “bankruptcy assistance” covered attorneys. Despite apparent inconsistencies with other sections of the statute - such as the requirement in §527(b) that a debt relief agency disclose that an assisted person can hire an attorney and that only an attorney can provide legal advice - the court found that “any inferences possibly created by imprecise drafting are surely overwhelmed by the plain language.” The legislative history also confirmed that Congress had attorneys in mind since the House Report on the BAPCPA mentions “attorney” 164 times.

CASE AND CONTROVERSY STANDING REQUIREMENT

Judge Hogan then addressed standing, the stumbling block that derailed many earlier challenges. Judge Hogan found that the Oregon plaintiffs had not been threatened with enforcement of the BAPCPA. Absent injury, plaintiffs lacked standing to challenge the new regulations.

The court found, however, that one provision of the new law was ripe for determination. Plaintiffs had argued that §§526(a)(1) and (a)(4) had a chilling effect

on providing legal advice to their clients. On this point, Judge Hogan turned his attention to the *Hersh* decision. There, the government attempted to avoid constitutional issues by attacking Ms. Hersh's standing - no government agency had taken any action to enforce the BAPCPA provisions against her. The court rejected this argument, finding that the alleged suppression of her speech under BAPCPA was sufficient to give standing.

SECTION 526(A)(4) UNCONSTITUTIONALLY RESTRICTS SPEECH

The Texas court then addressed Ms. Hersh's contention that §526(a)(4) was an unconstitutional restriction on speech. (As noted earlier, this section prohibits a "debt relief agency" from advising a client "to incur more debt in contemplation of such person filing a case" or "to pay an attorney or bankruptcy petitioner fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.") The first question was the standard of scrutiny to be applied to the restriction on speech. Ms. Hersh argued that §526(a)(4) was content-based and required strict scrutiny, which requires the restriction to be narrowly tailored to promote a compelling government interest, as set forth in *United States v. Playboy Entertainment Group, Inc.*, 529 US 803 (2000). The Government countered that the new Act was only an "ethical regulation" subject to a more lenient standard: the restriction must serve a state's "legitimate interest in regulating the activity in question," and impose only "narrow and necessary limitations" on lawyers' speech. *Gentile v. State Bar of Nevada*, 501 US 1030 (1991). Although skeptical that §526(a)(4) constituted an "ethical regulation," the Texas court found it did not matter because the statute was not drafted narrowly enough to pass either test.

One purpose of BAPCPA, according to the court, was to remedy abuses in the bankruptcy system, including a debtor who intentionally takes on more debt prior to filing a petition with the purpose of discharging it. Rather than closing loopholes or imposing sanctions for such conduct, however, Congress enacted §526(a)(4) as a "prophylactic rule" forbidding attorneys from advising their clients to take on additional debt in anticipation of bankruptcy. The court found this restriction overbroad, in that it prevents lawyers from advising clients to take actions that are lawful, and even in some instances, financially prudent:

[S]ection 526(a)(4) prevents lawyers from advising clients to take actions that are lawful, even under BAPCPA. Moreover, taking on additional debt "in

contemplation" of bankruptcy does not necessarily constitute abuse. . . . [I]t seems quite possible that sometimes taking on more debt could be the most financially prudent option for someone considering bankruptcy. That situation could be the case when: (1) refinancing at a lower rate to reduce payments and forestall or even prevent entering bankruptcy, or (2) taking on secured debt such as a loan on an automobile that would survive bankruptcy and also enable the debtor to continue to get to work and make payments. Thus, section 526(a)(4) prevents lawyers from giving clients their best advice.

347 BR at 24.

The court found that such restrictions could deprive courts, as well as clients, of good counsel, by preventing lawyers from presenting options to their clients and ultimately the court. Thus, §526(a)(4) was over inclusive in that (1) it prevents lawyers from advising clients to take lawful actions; and (2) it extends beyond abuse to prevent advice to take prudent actions. The court held it facially unconstitutional.

Judge Hogan adopted the reasoning of the *Hersh* decision and applied it to the Oregon case:

This reasoning is persuasive. The regulation is not sufficiently narrow to achieve the legitimate interest of preventing abuse in the bankruptcy system as it also ensnares advice regarding lawful actions in contemplation of bankruptcy that benefit the debtor and creditors. I agree with the *Hersch* [sic] court that section 526(a)(4) is overly restrictive in violation of the First Amendment.

SECTION 527 CHALLENGES FAIL

The Texas court rejected Ms. Hersh's assertion that §527 disclosure requirements were unconstitutional. Looking to Supreme Court decisions on compelled disclosures by professionals of factual information about services provided, the court noted that requirements which advance a substantial government interest, and which do not unduly burden the relationship, were permissible. See *Planned Parenthood of Southeast Penn. v. Casey*, 505 US 833 (1992). Section 527 provides a sufficiently compelling government interest (making sure clients are informed of certain general information before filing a bankruptcy) and imposes a reasonable burden. The court was not convinced by Hersh's argument that the provision compels disclosure of false or misleading information (such as requiring a disclosure that a client "will have to pay a filing fee" when there are provisions for waiver or deferral of filing fees), because such generalized statements may be explained or clarified

by an attorney. The required disclosures did not act as a barrier to potential clients seeking relief and were a “sufficiently benign and narrow” means of ensuring client awareness.

Judge Hogan once again found the *Hersh* court’s analysis persuasive and adopted its reasoning in concluding that §527 passed constitutional muster.

SECTION 528 ADVERTISING REQUIREMENTS NOT UNCONSTITUTIONAL

Judge Hogan rejected the challenge to the §528 requirement that consumer bankruptcy attorneys advertise themselves as “debt relief agencies” that “help people file for bankruptcy relief under the Code.” The court found that the law met the four-prong intermediate scrutiny test for commercial speech set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 US 557, 100 SCt 2343, 65 LEd2d 341 (1980). (The *Hersh* court dealt with the §528 claim in a footnote, plaintiff having failed to respond to the government’s argument on the issue. 347 BR at 22 n.2.)

The required advertising was not illegal or misleading and therefore the law satisfied the first prong of the *Central Hudson* test. The legislative history established that §528 was intended to “[p]revent deceptive and fraudulent advertising practices by debt relief agencies.” 151 CONG. REC. H2063-01, 2066 (2005). Preventing fraud is a substantial governmental interest and therefore the second prong of *Central Hudson* was satisfied. Addressing the third prong - which requires the provision to directly advance the government’s asserted interest - the court found that §528 does not prohibit consumer bankruptcy attorneys from identifying themselves as both bankruptcy attorneys and “debt relief agencies” in advertisements. “Thus, the forced inclusion of ‘debt relief agencies’ in advertisements gives consumers more accurate information to better determine what type of debt relief agency they may require.” The argument about non-bankruptcy attorneys also failed because §528 allows a statement of a “substantially similar” meaning to be used in place of “We help people file for bankruptcy relief under the Code.” Determining whether a statement was substantially similar would require a case-by-case determination, so a facial challenge was inappropriate.

In addressing the final prong of the test, the court found that the challenged provisions only require debt relief agencies to insert a two-line admonition into certain advertisements. Although there may be better ways to prevent deceptive advertising, §528 applies

to most consumer bankruptcy attorneys while not applying to non-consumer-bankruptcy attorneys. Thus, the court concluded that §528 met the requirement that it be narrowly drawn to protect consumer debtors from deceptive advertising. The court granted the Government’s motion to dismiss this claim.

Judge Hogan dismissed the facial challenges to BAPCPA as vague and arbitrary because the plaintiffs lacked standing. Without an “as applied” challenge, the court concluded that the undefined terms in the new statute that related to exemptions could be interpreted in a way that did not render them unconstitutionally vague or capricious.

UNRESOLVED ISSUES REMAIN FOR ANOTHER DAY

While Judge Hogan and the *Hersh* court did strike a portion of §526’s limitations on free speech, they stopped short of holding unconstitutional the remaining “debt relief agency” provisions. Judge Hogan concluded that plaintiffs were seeking an advisory opinion as to what they can and cannot do under the BAPCPA. He said: “The concerns plaintiffs present with respect to BAPCPA are legitimate and will have to be addressed at some point, but that time will only be appropriate with a fully-realized as-applied challenge.” Given the requirement of actual injury to perfect standing, the next case will not be ripe for adjudication until state or federal agencies start imposing penalties on attorneys for violation of the “debt relief agency” restrictions.

SECTION WEBSITE

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

The Debtor-Creditor Newsletter will accept camera-ready display ads

Advertising will be limited to those entities which provide goods and services to section members. Cost and ad sizes are:

Quarter page	\$150
Half page	\$250
Full page	\$450

For information, write: **Deborah S. Guyol**
5161 NE Wistaria Drive, Portland, Oregon 97213

C.A.R.E. PROGRAM

By Laura Walker

Cable Huston Benedict Haagensen & Lloyd LLP

The Debtor-Creditor Section has a committee that participates in the Credit Abuse Resistance Education (CARE) program, which was founded by Judge John Ninfo of Rochester, New York. Information on the program is available on the web site, www.careprogram.us.

Since March 2006, the Oregon CARE chapter has made over 30 presentations at 15 different high schools. There were presentations to multiple classes at some schools, so the program reached over 600 students.

I would like to acknowledge and thank everyone who made a presentation to Oregon students last year. (See table below for the presentations.)

We hope the program will grow from year to year and eventually reach all or a majority of high school seniors in Oregon. The CARE Program is currently contacting Oregon schools to schedule presentations for the 2006-2007 school year. If you have students in high school or you are interested in making a presentation to high school students about responsible use of credit cards, please contact Laura Walker at 503-224-3092 or email lwalker@chbh.com for the Portland metro area and Northern Oregon, or Becky Kamitsuka at 541-465-6330 or email becky.kamitsuka@usdoj.gov for Eugene or Southern Oregon. We will add your name to the volunteer list and coordinate with as many volunteers as possible during the 2006-2007 school year.

High School	Presentation Date	No. of Presentations	Speakers
Aloha High School	March 1, 2006	4	Dan Rosenhouse & Judge Brown
Cottage Grove High School	May 8, 2006	3	Gail Geiger & Albert Radcliffe
Dayton High School	February 23, 2006	1	Mark Bierly & Judge Perris
Grant High School	January 9, 2006	2	Gary Scharff & Judge Dunn
Grant High School	January 13, 2006	2	Gary Scharff & Judge Dunn
Home School Students	June 2, 2006	1	Judge Brown & Dan Rosenhouse
Jefferson High School	June 6, 2006	5	Todd Trierweiler & Judge Brown
Jesuit High School	March 20, 2006	4	Gary Scharff & Judge Perris
Jesuit High School	April 6, 2006	3	Gary Scharff & David Hercher
Lifegate Christian School	May 18, 2006		Julia Manela & Gabriela Sanchez
McMinnville High School	February 28, 2006	1	Mark Bierly & Judge Perris
North Eugene High School	May 22, 2006	1	Ron Sticka & Jim Files
Roosevelt High School	May 10, 2005	2	Judge Perris & Ann Chapman
Sheldon High School	May 11, 2006	1	Judge Radcliffe & Becky Kamitsuka
Springfield High School	July 17, 2006	1	Jim Files & Robin Church
Sunset High School	March 17, 2006		Judge Dunn & Cathy Travis
Thurston High School	May 1, 2006	2	Kent Anderson & Nancy Radcliffe
Willamette High School	May 25, 2006	3	Gail Geiger & Ron Sticka

NINTH CIRCUIT CASE NOTES

By Matthew A. Goldberg
Preston Gates & Ellis, LLP

TEST FOR DISCHARGEABILITY OF
STUDENT LOAN

In re Nys, 446 F3d 938 (9th Cir 2006)

Debtor brought an adversary proceeding against one of her creditors to determine the dischargeability of \$85,000 in student loans. The 51-year-old debtor earned \$40,000 annually, and had monthly net income of \$2,299 and monthly expenses of \$2,295. The bankruptcy court found the student-loan debt nondischargeable, stating that debtor had failed to prove “undue hardship” under §523(a)(8).

The bankruptcy appellate panel reversed and remanded, ruling that the bankruptcy court had applied the wrong legal standard by requiring exceptional circumstances beyond debtor’s present inability to pay and the likelihood that her financial condition would not improve in the future.

The Ninth Circuit affirmed, holding there is no requirement under §523(a)(8) that a debtor must prove serious illness, disability, or other circumstances to set her apart from ordinary debtors. The test, the court stated, is whether the debtor can pay off the loans, now and in the future, without falling below a minimal standard of living. The bankruptcy court, on remand, must also consider whether the debtor had made a good-faith effort to repay her student loans.

RETIREMENT CONTRIBUTIONS –
REASONABLY NECESSARY EXPENSES?

Hebbring v. US Trustee ___ F3d ___, 2006 WL 2589429
(9th Cir 2006)

Chapter 7 debtor was 33 years old and earned \$49,000 per year. In calculating her monthly net income, debtor excluded a monthly pre-tax deduction of \$232 for a 401(k) plan and a monthly after-tax deduction of \$81 for a retirement bond. At the time of the bankruptcy, debtor had accumulated \$6,289 in retirement savings. The US Trustee moved to dismiss debtor’s case for substantial abuse under §707(b), contending that the payments toward retirement should be included in debtor’s monthly net income. If the payments were so included, the debtor would have been able to repay 100% of her unsecured debts over three years.

The bankruptcy court granted the motion to dismiss, and the US District Court in Nevada affirmed. The Ninth Circuit affirmed the district court on the grounds that the bankruptcy court’s refusal to find the retirement

deductions reasonably necessary for debtor’s support was not clearly in error. The court emphasized, however, that there is no *per se* rule against voluntary retirement-plan contributions being considered reasonably necessary expenses. Rather, the bankruptcy court must assess the status of retirement contributions on a case-by-case basis. Though debtor’s age and earnings militated against including the contributions in her monthly expenses, the court suggested that the result could well be different for older debtors with little or no savings.

BAP CASE NOTES

By Doug Pahl
Perkins Coie LLP

DOUBLE NEGATIVE – NO
NONDISCHARGEABILITY ACTION FOLLOWING
AVOIDED EMBEZZLEMENT SETTLEMENT

In re Laizure, ___ BR ___, 2006 WL 2615530 (9th Cir BAP)

Before his bankruptcy, the debtor served as the CFO and controller for Busseto Foods, Inc. (“BFI”) After terminating the debtor, BFI uncovered evidence that he had embezzled significant sums. The debtor and BFI entered into an agreement for the debtor to repay certain amounts to BFI in exchange for a comprehensive release. In June 2005, the debtor made the final payment of \$38,833.70 to BFI and obtained the release.

Within ninety days, the debtor filed a chapter 7 petition. The trustee sought repayment of the \$38,833.70 payment as a preference. BFI agreed to repay \$34,000 and filed a resulting claim against the debtor’s estate pursuant to §502(h). BFI also filed a nondischargeability action under §524(a)(4).

The debtor moved to dismiss the nondischargeability complaint on the ground that there was no debt to BFI on the petition date and that §502(h) gives rise only to a claim against the estate and does not revive a personal claim against the debtor. The bankruptcy court agreed and dismissed BFI’s complaint.

On appeal, the BAP affirmed. BFI had again relied on §502(h), which provides: “A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.” BFI cited in support *In re Hackney*, 93 BR 213 (Bankr ND Cal 1988), which holds that a creditor who settles a preference claim is entitled to reinstatement of its nondischargeability claim against the debtor. The *Hackney* court, finding the language of §502(h) ambiguous, looked to the underlying policies

of a limited fresh start advanced by Congress when it included the nondischargeability provisions in the Code. These policies, according to the *Hackney* court, supported revival of nondischargeability claims against the debtor under §502(h). BFI also relied on the Code's broad definition of "claim" in support of its position that it possessed at least a contingent claim on the petition date. Finally, BFI cited *Archer v. Warner*, 538 US 314 (2003), for the proposition that a settlement agreement does not transform a nondischargeable debt into a dischargeable contract debt.

The BAP rejected the *Hackney* court's analytical approach, reasoning that there was no need to explore the legislative policies behind the Code's nondischargeability provisions because §502(h) could be interpreted according to its plain meaning. While the statute revives claims against the estate, it does not revive claims against the debtor, and therefore provides no basis for recreation of nondischargeability rights in BFI. The BAP also concluded that the Code's broad definition of claim provided no assistance to BFI, citing the discharge language contained in § 727(b).

DO-OVER RIGHTS - CHAPTER 13 DEBTOR ENTITLED TO A CHANCE TO FIX PLAN

In re Nelson, 343 BR 671 (9th Cir BAP 2006)

The pro se chapter 13 debtor scheduled unsecured claims of \$324,382 and proposed a plan in which she committed to pay \$50 per month for 36 months based on monthly income of \$1,208 and expenses of \$1,158. The trustee objected to confirmation asserting ineligibility and lack of good faith. The trustee argued that the debtor was ineligible for chapter 13 because her debts exceeded the \$307,675 statutory limit for unsecured nonpriority debt, the debtor was ineligible. The trustee also argued that the proposed plan payments were insufficient and therefore the debtor lacked good faith. One factor cited by the trustee related to the debtor's bankruptcy three years earlier. That chapter 7 case concluded with a settlement in which the debtor waived discharge under §727(a)(10). According to the trustee, these nondischarged debts suggested a larger payment to creditors was appropriate.

The bankruptcy court agreed that the payments contemplated by the plan were too small to permit confirmation. "[I]n the 20 years I've been on the bench I've approved such small payments maybe four or five times for very extenuating circumstances, like somebody under a serious disability." The court also noted that the debtor had her "discharge denied in a chapter 7 case. That means all your debts are nondischargeable. Having lost your discharge, you can't come in and try to use a Chapter 13 and for \$1800 to buy it back."

The bankruptcy court denied confirmation and dismissed the case with no mention of providing the debtor an opportunity to submit a revised plan. The BAP reversed. It concluded that the bankruptcy court erred by failing to apply the correct two-step statutory analysis for dismissal or conversion. Section 1307(c) provides for the dismissal or conversion of a case, "whichever is in the best interests of creditors and the estate, for cause." The statute provides a nonexclusive list of factors that suggest cause, including §1307(c)(5): "denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or modification of a plan." (Emphasis added.)

The BAP addressed the conjunction "and," and concluded that §1307(c)(5) requires "the court [to] afford a debtor an opportunity to propose a new or modified plan following the denial of plan confirmation." Here, although the debtor did not formally request additional time to submit a modified plan, the bankruptcy court erred by not affording the debtor an opportunity to do so.

LOCAL BANKRUPTCY COURT

By Matthew A. Goldberg
Preston Gates & Ellis, LLP

VEHICLE OWNERSHIP EXPENSE

In re Carlin, ___ BR ___, 2006 WL 2398750
(Bankr D Or 2006)

The Chapter 13 Trustee and the US Trustee objected to confirmation of the debtor's plan on the ground that the plan failed to apply all of debtor's disposable income to his unsecured debt for a period of five years. Although he owned his 1996 Cadillac free and clear, debtor claimed both an ownership expense and an operating expense when determining his Current Monthly Income ("CMI"). Debtor's CMI exceeded the applicable median income for the State of Oregon. Accordingly, for purposes of calculating his disposable income, debtor was allowed the same expenses provided by the chapter 7 "means test," which determines whether a presumption of substantial abuse arises. Included among these allowed expenses is an IRS-determined transportation expense, comprising an "ownership cost" and an "operating cost."

The court agreed with the objecting trustees, and held that the applicable IRS guidelines allow an ownership expense only when there is a monthly car payment on a loan or lease. Because the plain language of the IRS standard turns on the existence of a car payment, the court said it would deny confirmation of the plan unless debtor adjusted his disposable income figure to include the claimed ownership expense.

STATE COURT CASE NOTES

By Heather Harriman Vogl
(With the assistance of Donald H. Grim)
Greene & Markley, P.C.

NOTICE OF APPEAL PROPERLY SERVED

Gadda v. Gadda
341 Or 1, 136 P3d 1099 (2006)

Husband's appellate attorney mailed notice of appeal to wife's former attorney, who in turn mailed a copy to wife's appellate attorney. Wife moved to dismiss for failure to properly serve the notice of appeal. The court of appeals granted wife's motion and dismissed for lack of jurisdiction based on the failed service.

The supreme court reversed. It explored the service requirements for a notice of appeal. ORS 19.270 provides that service as provided in ORS 19.240(2)(a) is a jurisdictional requirement. ORS 19.240(2)(a) states, "the appeal shall be taken by *causing* a notice of appeal" to be served on all parties who have appeared in the proceeding. Here, even though husband mistakenly mailed the notice of appeal to wife's former attorney, that action resulted in the notice arriving at the proper place (wife's appellate attorney) within the required time. Thus, the husband's act of mailing caused delivery of the notice of appeal to wife's attorney.

PAY ATTENTION! – ONLY SEVEN DAYS TO OBJECT TO ATTORNEY FEES IN ARBITRATION

Webster v. Harmon
205 Or App 196, 134 P3d 1012 (2006)

Arbitrator filed an arbitration award, including attorney fees. Relying on the 14-day period in which to file an exception to attorney fees provided by ORCP 68 C(4), the defendant filed his objection on the 13th day after the filing of the arbitration award. Reversing the circuit court, the court of appeals held that ORS 36.425(6), rather than ORCP 68 C(4), controls the procedure for objecting to attorney fee awards that are made by an arbitrator. Thus, a non-prevailing party must file exceptions to an attorney fee award made by an arbitrator within seven days after the arbitrator files the award in the trial court.

"CLAIMS" ARE NOT "DEFENSES"

Nixon v. Cascade Health Services, Inc.
205 Or App 232, 134 P3d 1027 (2006)

Plaintiff in a medical malpractice action signed a settlement agreement which precluded all future "claims and demands, actions and causes of actions, damages" against the medical center. When the medical center (defendant) later sought payment for unpaid medical bills not addressed in the settlement agreement, plaintiff attempted to raise negligence as an affirmative defense. The trial court granted defendant's motion for summary judgment, agreeing the language of the settlement agreement unambiguously precluded such a defense.

The court of appeals reversed, concluding that language barring "claims" does not unambiguously encompass "defenses." Furthermore, "claim" does not mean "defense" and if defendant had intended to preclude affirmative defenses, it could presumably have done so.

NO SUA SPONTE AWARDS

C.A.M. Concepts, Inc. v. Gwyn
206 Or App 122, 136 P3d 60 (2006)

On complex facts, plaintiff alleged claims for declaratory judgment, breach of contract, breach of warranty, and assumpsit. After rejecting each of plaintiff's claims, the trial court, sua sponte, awarded plaintiff damages for unjust enrichment, a claim plaintiff neither pleaded nor proved. In reversing and remanding, the court of appeals concluded that a court cannot fashion remedies (even for equitable relief) that were not advanced by the parties.

HOA NOT THE PROPER PARTY IN INTEREST

Quail Hollow West Owner's Assn. v. Brownstone Quail Hollow, LLC
206 Or App 321, 136 P3d 1139 (2006)

Plaintiff, an association of townhouse owners, claimed damages from developers and builders of the townhouses based on defective construction. The trial court observed the difference between "who fixes it" and "who pays for it": although the association would be required to fix the damage caused by the defective construction, the individual townhouse owners ultimately must pay any charges beyond the potential damage award. Therefore, the association was not within the class of parties that would be benefited or injured by a judgment in the case and was not a real party in interest. The court of appeals affirmed.

DISMISSAL IS APPROPRIATE DISCOVERY SANCTION

Asato v. Dunn

206 Or App 753, 138 P3d 914 (2006)

In consolidated cases, plaintiffs ignored the trial court's order compelling production of documents that could have contained evidence essential to defendants' affirmative defenses. The trial court dismissed plaintiff's claims as a discovery violation sanction, without considering lesser sanctions. The Court of Appeals affirmed, concluding that the importance of discoverable documents that support defendants' affirmative defenses is sufficient reason for dismissal as a sanction. Lesser sanctions could not have cured the violation, so the trial court did not abuse its discretion.

CONSUMER COMMITTEE

By Kathryn E. Eaton
M. Caroline Cantrell & Assoc PC

The Consumer Bankruptcy Committee usually meets every other month on the third Thursday of the month in the bankruptcy court's 8th floor conference room at 1001 SW Fifth Avenue, Portland Oregon 97204. The next two meetings will be held on the third Wednesdays of the month, however. Our next meeting will be November 15th at 4:30 p.m. The Committee is chaired by Laura Donaldson, who can be reached at 503-241-4869 or laura@vbcattorneys.com. To learn more about the Committee or to be added to the mailing list, please contact Kathryn Eaton at 503-236-9211 or keaton@bankruptcyoregon.com.

Minutes from the Consumer Bankruptcy Committee meetings in May, July and September 2006 are summarized below.

MAY 18, 2006

Brian Lynch, Portland Chapter 13 Trustee, announced that the required financial management classes are now being offered for Portland chapter 13 cases through his office. Classes are held on the day of the §341(a) meeting between 11:30 a.m. and 1:30 p.m., and on the last Friday of each month from noon to 2:00 p.m. Classes are free of charge. For now, the class is offered in English only. Please let Mr. Lynch know of any feedback about the class.

The Chapter 13 Trustee encourages brokers, agents and debtors to review new information on his website about refinances and sales. The Trustee's office will now collect fees on mortgage arrearage claims paid through a sale or refinance.

Mr. Lynch said that his office takes a very broad view of what constitutes income for the means test. Tax refunds or funds received from a debtor's 401(k) program will be considered income. However, if this creates a spike in income during the six months prior to filing, the Trustee may not object if disposable income is calculated based on actual income rather than CMI, because CMI is not projected income.

Todd Trierweiler's office has rented space in the Gus Solomon Courthouse to provide computers for chapter 7 debtors to obtain their financial management certificates. The office will be staffed so that debtors can ask questions and then fax the certificates directly to the attorney's office for filing. If you have any questions about this service, contact Todd Trierweiler at toddtr@bankruptcylawctr.com.

Judge Brown reviewed the process of signing electronic orders. The process can take a number of days, so if you need an order signed quickly due to exigent circumstances, please call the judge's judicial assistant.

Bob Vanden Bos announced that some of his clients have had their Wells Fargo accounts seized regardless of whether the clients owe a debt to Wells Fargo. Debtors' counsel should be on the lookout for actions such as these.

Oregon Department of Revenue will no longer send Proofs of Claim to debtors' counsel.

JULY 20, 2006

Jim Penney from Royal Moore Auto Center was present to discuss the purchase of cars in chapter 13 and chapter 7 cases. He observed that the price allowed for cars in a chapter 13 has been \$10,000 for at least the last 13 years and that it is becoming increasingly difficult to find a reliable car for that amount. He hopes the allowed amount can be raised to around \$14,000. In the near future, he will expand his access to over 400 banks for easier financing. In chapter 7, he can finance a car the day after the §341(a) meeting, but at a high interest rate. The average interest rate is 17%. The down payment on most purchases is 10% in cash or trade.

Pam Griffith from the U.S. Trustee's office addressed the issue of attorney fees in chapter 7 cases. Her office has noticed a number of chapter 7 cases in which little or no fees were paid up front, and she questions whether this is permissible under *In re Hines*, 147 F.3d 1185 (CA 1998). When little or no money is taken up front, practitioners are charging postpetition for prepetition services. The U.S. Trustee's office may raise this issue and start looking more carefully at prepetition fees.

Ms. Griffith noted that it is helpful to have documentation in your file at the hearing especially about the debtor's last six months of income.

The US Trustee does not object to a debtor listing future payments on secured debt on the B22A form even if a debtor is surrendering the collateral. Counsel may wish to refer to *In Re Walker*, WL 1314125 (2006). This case out of Georgia is specifically limited to the issue of claiming a contractually due obligation on collateral that the debtor intends to surrender. In addition, Judge Dunn has issued his ruling in *In re Oliver* (6/29/06), in which he considered whether language in §707(b)(2) allows a debtor to include on the B22C form all secured obligations contractually due on the petition date, even if the debtor decides post-petition in a chapter 13 to surrender the collateral. Judge Dunn held that a debtor is allowed to include all contractually due obligations as of the petition date. The text of this opinion can be found on PACER as well as on the bankruptcy court website, www.orb.uscourts.gov.

The US Trustee's position has been that a debtor could claim as part of the household only those persons the debtor does or could claim as dependents for tax purposes. This position may change, and in future the UST may not contest a household size which includes those who are not dependents if they can arguably be considered part of the household. This would be a shift toward looking at the household as an economic unit.

As of October 1, the Chapter 13 Trustee's office will have undergone a restructuring and they will no longer have pre-con and post-con departments. Instead they will have a legal department to deal with issues typically handled preconfirmation, and the case administrator will handle most post-confirmation issues. There will be four case administrators in the office.

The Oregon Department of Revenue currently takes 8-15 weeks to process a paper-filed return. An audit adds 6-8 weeks before they even know the return is in the system. If the return is more than a year old or there are multiple filings, the process can take even longer. If debtor's counsel knows that a return was recently filed and the ODR sends a notice that returns need to be filed, debtor's counsel should let ODR know the taxes have been filed and are being processed. The ODR accepts electronic filings only for the current tax year.

It is the position of both the US Trustee's office and the Chapter 13 Trustee's office that tax refunds do not need to be included on the B22 form.

At this point, creditors are not objecting to receiving unequal monthly payments in paragraph 2(b)(1) on the form plan for chapter 13 cases. If they do not object, Ninth Circuit case law says that they have consented to their treatment.

Debtors' attorneys report some problems when using paragraph 2(b)(2) to deal with mortgage arrearage. Creditors' attorneys have been concerned that their arrearage claim would be limited by creditor consent

even when the arrearage amount is listed in the estimated column. The arrearage amount can be changed easily in the Order Confirming Plan, however, it is causing unnecessary objections by the secured creditors. The Chapter 13 Trustee's Office confirmed that they use the claim amount to determine the amount paid on the arrearage and not the amount listed in paragraph 2(b)(1) or 2(b)(2). If there continue to be no objections, the Chapter 13 Trustee recommends using paragraph 2(b)(1) when possible.

Some creditors are considering asserting that the credit counseling classes debtors complete prior to filing are not adequate even though the credit counselor is on an "approved" list, and attempting to get the case dismissed.

If debtor's counsel asks for an extension of time to file a consumer credit counseling certificate, it is imperative that they provide specific information explaining why the client needed more time. The extension must be requested before the filing and it must explain the exigent circumstances surrounding the failure to meet this requirement prior to filing.

SEPTEMBER 21, 2006

Suzanne Marx, Judge Brown's Judicial Assistant, announced that the Association of Bankruptcy Judicial Assistants is sponsoring two education programs for paralegals and legal assistants. The first is a Bankruptcy Certification Training seminar on October 30-31, 2006, and the second is an Advanced Bankruptcy Seminar on November 1, 2006. Both seminars will be held in Portland at the Embassy Suites Hotel. For more information, contact Suzanne Marx at 503-326-1592 or visit the ABJA website at www.abja.org.

Brian Lynch, Chapter 13 Trustee, announced that trustee fees are 7.5% as of October 2006.

Attorneys need to be aware that for means-test proposes Oregon median incomes are changing effective October 1, 2006. Median income is increasing for families of 1, 2 and 4 but decreasing for families of 3.

The Portland Chapter 13 Trustee's office has been reorganized. Post confirmation, cases will be handled by case administrators for all matters except modified plans and tax returns. Email for all post-confirmation issues should still be sent through postcon@portland13.com.

The Chapter 13 Trustee's office is increasing enforcement of the requirement to file tax returns during the life of the chapter 13 plan. Debtors will receive letters reminding them to file their returns and submit copies to the trustee. The trustee may move to dismiss the case of a debtor who fails to respond. Mr. Lynch is trying to help debtors get into the habit of filing and paying their taxes when due.

Mr. Lynch discussed what happens to untimely filed claims when the debtor files an amended Schedule F after the claims bar date. If a creditor calls his office and quickly files a claim, the claim will be allowed. The onus is still on debtor's counsel to get the claim allowed. Also, bear in mind that getting the claim allowed does not necessarily mean it is dischargeable.

If a motion for relief on certain property has been granted, the trustee's office generally will not continue to pay other creditors who had a lien on that property. If another (lien) creditor objects and states that there is an agreement between the chapter 13 debtor and the creditor to continue paying on the claim, the trustee's office will withdraw its objection to the claim. Again, debtor's counsel needs to be aware of this practice and monitor such claims actions.

The IRS and a chapter 7 trustee discussed the validity of estimated tax claims. The IRS files them when returns have not been filed, but some chapter 7 trustees have objected. Both parties agreed that the debtors need to file missing returns so that the amount of the claims can be ascertained.

Chapter 7 trustees are still struggling to get all the documents required under BAPCPA. Debtors and debtors' counsels should refer to the Debtor-Creditor section website for a list of requirements and due dates.

Todd Trierweiler brought up a problem which arises when the registered agent for a creditor changes and modified plans or supplemental fee applications must be served. The court has been issuing orders to re-serve the documents and to file a change of address for the creditor, but debtors' attorneys cannot change a creditor's address after a proof of claim has been filed. Judge Brown will bring this issue up at the next judges' meeting for discussion.

Mr. Trierweiler also raised the issue of increasing the no-look fee in chapter 13s. A small committee has been formed to gather data and make a proposal to the judges for review.

Judge Brown discussed a recent decision about cars surrendered in chapter 13 cases. The creditor is not allowed to file an unsecured claim for any deficiency. The car loan is treated as fully secured by the surrendered vehicle. (This decision, *In re Pool*, No. 306-30965-tmb13 (Sept. 26, 2006), can be found on the bankruptcy court website, www.orb.uscourts.gov).

Pam Griffith announced that debtor audits by the UST's office will begin for cases filed after October 20, 2006. Debtors' attorneys will receive a letter shortly after the case has been filed stating that the case has been selected for audit and requesting certain documents from the file.

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