

Newsletter

Volume XXVI, Number 3 Debtor-Creditor Section, Oregon State Bar

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COMMENTS FROM THE CHAIR

By Stephen T. Tweet

Albert & Tweet, LLP

Since this is my last chance to address the membership via this bully pulpit, I thought I'd use the opportunity to rant about a few things à la Andy Rooney, and then pay homage to the homilies of my law partner. First the rant.

Life is complicated.

Why do our leaders attempt to legislate simplistic fixes to complicated issues? Invariably confusion, increased costs, and injustice result. As an example, one of the most controversial provisions of the "new" bankruptcy law is a strict mathematical "means test" to determine whether debtors are "abusing" chapter 7 and therefore not eligible for that relief. Prior to that change, determining substantial abuse was the job of bankruptcy court judges, who closely evaluated the debtor's unique circumstances. As noted by commentators, the means test ignores many causes of individual bankruptcies including job loss, family illness, and predatory lending. Although the results of the test can be challenged, that challenge can lead to costly litigation, driving such debtors further into debt and delaying the "fresh start" for which the Bankruptcy Code was created. In the end, what has been gained?

Protecting the unpopular.

The majority does not always rule. I am amazed, listening to what passes for debate nowadays, how frequently the first ten amendments to the Constitution are misunderstood. Commentators, talk show hosts, and writers of letters to the editor often express a desire to legislate away those rights and views. Many do not understand that the Bill of Rights exists to prevent the imposition of majority will over the unpopular, the unfortunate, the accused, the weak and the dissenter. Since those in the "majority" can become the "minority" as the societal winds change and the vagaries of life occur, the wisdom of those protections should be evident. As officers of the court, we should remind our fellow citizens of that fact now and again even at the risk of derision.

Okay, enough ranting. Now for a tribute to the wisdom of John Albert, who has been my law partner for over 20 years. While those of us who work with him daily chuckle at his quirky sayings and droll sense of humor, there is often hidden wisdom behind his words. Here are a few sayings from our very own "Poor Richard."

Continued next page

1. **Patience Pudding with “Wait and See” Sauce.**

This phrase means “when we rush we make mistakes,” which my staff has heard countless times. Don’t file that document unless it’s right. Haste only makes for a phone call to the “help desk” to delete whatever it was we just filed. Also think about your reply to that nasty email before you click “send.” If you have to ask your legal assistant whether “butt head” should be hyphenated, it is best to calm down and wait a while before completing that reply. We live in a world where food is “fast,” gratification is instant, and communication is immediate. What will be in the newspaper tomorrow will be online and on television today. Where once we had only the telephone and the United States Postal Service for our communication tools, we now have email, fax machines, couriers, overnight delivery services and e-filing. Some things can’t wait – but most can, and should.

2. **“I don’t think about things I don’t think about.”**

Not everything needs to be thought about and stressed over. My partner has the ability to compartmentalize and organize, and block out distractions. When meeting with a client, his attention and focus are totally on that client and that client’s business. In addition, he has an aptitude for streamlining the difficult cases, breaking down the whole and consolidating the issues into understandable pieces.

3. **“I can only do one thing first.”**

While our ILAs (indispensable legal assistants) pride themselves

on their multitasking abilities, a lawyer’s job is not to answer the phone while typing a brief and sending a fax. A lawyer is responsible for doggedly representing the client and the client’s interests. “I was too busy” or “sorry, I was confused” do nothing to placate the client whose work is mismanaged because the lawyer tried to do too many things at the same time.

THANK YOU.

I have been honored to serve as Chair of the Debtor-Creditor Executive Committee and to rub shoulders with men and women who take time from their busy practices to serve our Section and the Bar with distinction. Thank you for that opportunity.

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:

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

SECTION WEBSITE

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

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.

DELAWARE SIGNALS A DEATH KNELL FOR “DEEPENING INSOLVENCY”

By **Jeanette L. Thomas,**
Perkins Coie LLP

The Delaware Supreme Court recently issued a long-awaited decision on whether a cause of action asserting deepening insolvency exists under Delaware law. Sitting *en banc* and following oral argument, the Court held that there was no such cause of action under Delaware law. *Trenwick America Litigation Trust v. Billet*, 2007 WL 2317768 (Del. Aug. 14, 2007). The Court did not issue its own decision, but affirmed on the basis of the lengthy August 10, 2006, decision of the Delaware Chancery Court, *Trenwick America Litigation Trust v. Ernst & Young, LLP*, 906 A2d 168 (Del Ch 2006).

A Summary of the “Deepening Insolvency” Theory

The decision in *In re Global Service Group, LLC* defined deepening insolvency as a fraudulent prolongation of a corporation’s life beyond insolvency, resulting in damage to the corporation caused by increased debt. 316 BR 451, 456 (Bankr SDNY 2004) (quoting *Schacht v. Brown*, 711 F2d 1343, 1350 (7th Cir 1983)). Under the deepening insolvency theory, an insolvent corporation suffers a distinct and compensable injury when it continues to operate and incurs more debt after it becomes insolvent. Although originally a damages theory, the concept grew and a number of courts recognized it as an independent cause of action. See, e.g., *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F3d 340, 349-52 (3d Cir 2001) (construing Pennsylvania law); *In re Exide Technologies, Inc.*, 299 BR 732, 750-52 (Bankr D Del 2003) (construing Delaware law). Other courts, however, held that it was merely a damages remedy and not an independent action. See *In re Parmalat Securities Litigation*, 383 F Supp 2d 587, 601-02 (SDNY 2005) (dismissing deepening insolvency claim as duplicative where breach of fiduciary duty was also alleged), and *In re Greater Southeast Community Hospital Corp.*, 333 BR 506, 517 (Bankr DC 2005) (rejecting deepening insolvency as duplicative while allowing other related counts).

The *Trenwick* Facts

The facts in *Trenwick* were unusual. The primary defendants in the litigation were the directors of a publicly listed insurance holding company. Beginning

in 1998, the company grew through acquiring three different companies. As part of the last acquisition, the company became a Bermuda corporation for tax reasons. The holding company then reorganized its existing subsidiaries so that the top US subsidiary became the intermediate parent for the US operations. It also served as a guarantor for all of the holding company’s debt. At the time of the transaction the financial statements indicated that the top US subsidiary had a positive asset value of over \$200 million. *Trenwick*, 906 A2d at 172-73.

Unfortunately, thereafter the company’s fortunes changed. The claim exposure of the acquired companies was higher than estimated, and in 2003 the company was forced to liquidate its assets, and the holding company and the top US subsidiary filed bankruptcy. As part of the reorganization, a litigation trust was created for the purpose of pursuing all causes of action owned by the US subsidiary. The litigation trust sued the board of the holding company on the theory that the acquisition strategy it had adopted was unsound because it resulted in acquiring companies that had understated their potential claims exposure. *Id.*

The Chancery Court’s Decision in *Trenwick*

The Chancery Court opinion adopted by the Delaware Supreme Court explicitly held that Delaware law does not recognize a cause of action for deepening insolvency. In reaching his decision, Vice Chancellor Strine looked carefully at the underlying theory and other available causes of action and concluded that the deepening insolvency theory was incoherent.

Put simply, under Delaware law, deepening insolvency is no more of a cause of action when a firm is insolvent than a cause of action for shallowing profitability would be when a firm is solvent. Existing equitable causes of action for breach of fiduciary duty, and existing legal causes of action for fraud, fraudulent conveyance, and breach of contract are the appropriate means by which to challenge the actions of boards of insolvent corporations.

Trenwick, 906 A2d at 174.

In a strong show of support for directors and fiduciaries of corporations, Vice Chancellor Strine further held that

The general rule embraced by Delaware is the sound one. So long as directors are respectful of

the corporation's obligation to honor the legal rights of its creditors, they should be free to pursue in good faith profit for the corporation's equityholders. Even when the firm is insolvent, directors are free to pursue value maximizing strategies, while recognizing that the firm's creditors have become its residual claimants and the advancement of their best interests has become the firm's principal objective.

Id. at 174-75.

Vice Chancellor Strine found no basis in existing Delaware law to embrace the logical result of the deepening insolvency theory: that an insolvent company is required to terminate its operations rather than to try to improve its fortunes. Rather, so long as directors believe in good faith that there are strategies with the potential to change the corporation's fortunes, they are free to pursue those strategies without risk of liability

Id. at 204-05.

Court's Ruling Benefits Directors of Financially Troubled Delaware Corporations

The court's ruling comes at an opportune time as many predict that the economy is heading for a correction. It should give directors confidence that if they properly exercise their fiduciary duties they will not be held liable, even if the corporation is found to have gone further into debt as a result of their actions.

Although this decision binds only other Delaware courts and applies directly only to corporations organized under Delaware law, the significant role played by Delaware law in the realm of corporate governance will undoubtedly influence courts in other jurisdictions. Moreover, because many of the larger business bankruptcies are filed in Delaware, it is likely to signal an end to litigation of this nature in the Delaware Bankruptcy Court.

From a practical perspective, as with all decisions by boards of corporations that are struggling financially or in the zone of insolvency, the key will be for the directors to create a clear record of the alternatives they explored and the bases for their decisions. Directors of such companies would be wise to follow these guidelines when taking any action on behalf of the company:

- Make an independent decision on an informed basis with the best interests of the company and its various constituents in mind.
- Ensure that any objection to an action taken

by the board is recorded in the board minutes or otherwise documented in writing (*e.g.*, a letter to the board chairman).

- Record in writing all significant decisions of the board, including the board's investigation, discussion and decision-making processes.
- Actively engage the board in searching for solutions to the company's business and financial problems.
- Allow management to conduct the ordinary course business affairs of the company in a consistent manner, but under the general oversight of the board.

Similarly, directors should be careful not to let any of the following occur:

- The issuance of press releases, public statements or financial statements, projections or reports that are misleading or not fully accurate.
- Approval of any transactions between the company and any officer, director or major shareholder (or an entity in which an officer, director or major shareholder holds a material interest) without conducting an independent review of the proposed transaction and securing independent legal review if appropriate.
- Approval of the sale or other transfer of any significant company assets outside of the ordinary course of business without securing independent legal or financial review of the proposed transaction.
- Incurrence of liability for wages, payroll taxes, etc. that the company cannot reasonably expect to be paid in full when due.

Conclusion

With the *Trenwick* decision, the Delaware Supreme Court may have laid to rest the fear of liability for a deepening insolvency claim, at least for directors of Delaware corporations. But in doing so, the court put the focus squarely back on the performance of directors' fiduciary duties. Directors would be well advised to remember that fraud, fraudulent conveyance, and breach of contract remain appropriate means by which to challenge the actions of boards of insolvent corporations. The way for directors to avoid such claims is to faithfully carry out their fiduciary responsibilities.

PHANTOM INCOME AND PHANTOM GAINS: NO MONEY TO PAY TAX DUE ON CANCELLED DEBT OR CAPITAL GAINS

By **Heather Harriman Vogl**,
Greene & Markley, P.C.

Introduction

Few things dampen a debtor's fresh start or burden an already overburdened taxpayer more than accruing a new tax liability without having received the money being taxed. When a taxpayer disposes of property with greater value than the taxpayer's basis in property or for less than the secured debt on the property, the taxpayer can realize capital gain income, cancellation of debt (COD) income, or both, while at the same time not receiving enough money to pay the tax due upon sale. This article explores how to identify phantom income and phantom gains, and what you as a lawyer can do to help your clients minimize tax exposure resulting from sale of property.

Basics of Capital Gains and COD Income

Capital gains arise when property is sold for more than the taxpayer's adjusted basis. Voluntary sales and foreclosures can both produce gain. Gains that must be recognized for tax purposes can aptly be called "phantom" when secured creditors consume all of the proceeds of sale, leaving the taxpayer with no money to pay the capital gain tax. Capital gains are governed by Internal Revenue Code (IRC) §§61(a)(3), 1001, 1221 and 1222.

COD income can arise when a creditor forgives or cancels a debt. Under the notion that a taxpayer is enriched when he or she is relieved of a debt without having to pay it, the Revenue Code sometimes deems the cancelled debt to be income. COD, governed by IRC §§61(a)(12) and 108, can arise when a taxpayer disposes of property with more debt than the property's value. A taxpayer does not realize COD income until an event occurs that makes it reasonably clear that there will be no further payment on the debt (e.g., foreclosure without a deficiency judgment, bankruptcy discharge, settlement). The existence of co-obligors may make it more difficult to determine whether a debt-forgiveness event gives rise to COD income. As described below, the IRC relieves taxpayers from having to pay tax on COD in some circumstances.

However, taxpayers who are able to exclude COD from income must reduce other tax attributes. This concept of attribute reduction is a tricky but important aspect of COD.

Who Is the Taxpayer?

A critical issue relating to the tax consequences of sales of property is who will have to pay the tax. This depends upon whether the owner of the property is an individual, C corporation, S corporation, partnership or LLC. S corporations, partnerships and LLCs are all flow-through entities, meaning that the entity pays no tax and the owners each pay their own tax in proportion to their ownership interests. Thus, when one of these types of entities sells property, the owners pay the taxes. Individuals and C corporations generally pay their own tax. However, when an individual files chapter 7 or 11 bankruptcy, the bankruptcy estate can become liable for the tax resulting from the sale of property during the bankruptcy case. IRC §1398. Abandonment in an individual case can shift tax consequences arising from abandoned property from the estate back to the debtor.

Estimating the Tax Exposure

Estimating potential gain and COD is the first step in understanding your client's tax exposure. A rough estimate is helpful in determining whether a deeper analysis is appropriate. Assume that a piece of real property has a fair market value of \$300,000, secured debt of \$350,000 and an adjusted basis of \$260,000. Also assume the taxpayer disposes of the piece of property at fair market value. The capital gain is the amount realized from the sale of the property minus the adjusted basis, in this case, \$40,000 (\$300,000 minus \$260,000). The COD is the amount of secured debt on the property minus the amount realized from the sale of the property; the hypothetical taxpayer here could realize COD income of \$50,000 (\$350,000 minus \$300,000). Computing the tax that will become due also involves other factors (discussed below).

Factors Affecting Tax Due

The amount of tax a taxpayer ultimately must pay depends upon a number of factors, including: (1) the sale price of the property and the resulting disbursement to the creditor, (2) the taxpayer's tax attributes, and (3) the timing of the sale. An understanding of these factors can facilitate a sale strategy that lawfully reduces the tax due.

A. Sale Price

If the taxpayer cannot dispose of property at fair market value, exposure to phantom gains decreases, but exposure to COD income increases. Assume the same piece of property discussed above is sold for only \$250,000. The taxpayer's capital gain disappears because the sale price is less than the taxpayer's adjusted basis (\$250,000 sale price versus \$260,000 adjusted basis). The taxpayer's COD income increases, however, because the amount of the secured debt written off increases to \$100,000 (\$350,000 debt minus \$250,000 sale price).

B. Taxpayer's Tax Attributes

Tax attributes are characteristics of an item of property or a taxpayer's tax profile that affect how tax is computed. They include things like capital losses, net operating losses, the holding period and character of property, basis in property, credit carryovers, and other types of credits.

Taxpayers who can exclude gain may pay less tax where the sale yields higher gain and less COD income, whereas taxpayers who can exclude COD income may pay less tax where the sale yields more COD and less gain.

Gain Exclusions

Individuals may be able to exclude gain on their personal residences or use losses to offset gain.

COD Exclusions

Under IRC §§108(a) and (f), a taxpayer can exclude COD income under one of five statutory exceptions. The two most widely used are the bankruptcy and insolvency exceptions. The other three exceptions are qualified farm indebtedness, qualified real property business indebtedness and qualified student loan indebtedness.

The bankruptcy exception is fairly straightforward. Bankruptcy discharges provide a clear date upon which the debt was cancelled. All debts discharged through bankruptcy are excluded from income.

The insolvency exception allows the taxpayer to exclude COD income only up to the amount of the taxpayer's insolvency, which is determined by a balance sheet test the moment before the debt is forgiven. IRC §108(d)(3). For example, if the taxpayer has \$100,000 in assets and \$170,000 in liabilities, the taxpayer is insolvent by \$70,000. If the taxpayer receives a discharge of \$90,000 of debt (COD income), the

taxpayer can exclude \$70,000 of the COD income, but must report the remaining \$20,000 of COD as income and pay tax on it.

For partnerships and LLCs that have elected partnership tax treatment, solvency is tested at the partner/member level. IRC §108(d)(6). This means insolvent flow-through entities pass COD income to solvent owners, who cannot take advantage of the IRC §108 insolvency exception. Solvency of both C corporations and S corporations is tested at the corporate level. IRC §108(d)(7)(A).

Attribute Reduction

Typically, for every dollar of COD excluded from income, the taxpayer must reduce one dollar of other tax attributes. Credits are reduced by only 33-1/3 cents for every dollar of excluded COD. IRC §108(b)(3)(B). Section 108(b)(2) provides a specific order for applying attribute reduction. If the amount of the COD income uses up all of one tax attribute, the taxpayer must continue reducing his or her other tax attributes until the entire amount of the COD income is offset by the reduction in attributes. Attribute reduction occurs on the first day of the taxable year following the year of the COD. IRC §108(b)(4)(A). If the taxpayer does not have any attributes to reduce in the year following the COD, the obligation to reduce tax attributes does not carry into future tax years.

For example, assume a taxpayer receives a discharge of \$80,000 of debt in 2007, and assume the taxpayer has the following tax attributes: \$50,000 in net operating losses, no credits and no capital losses and \$75,000 basis in property. On January 1, 2008, the taxpayer must reduce (in this case eliminate) his \$50,000 net operating loss for 2008 and must reduce his basis in property by the remaining \$30,000 of COD. The adjusted basis does not get reported on the taxpayer's 2008 return unless the taxpayer sells the property in 2008. However, when the taxpayer eventually does sell the property and reports the sale on a tax return, the taxpayer must use the reduced basis.

Character of the Income or Loss: Ordinary Versus Capital

When getting ready to sell a client's piece of overburdened property, be aware that not all kinds of tax attributes can be used to offset all kinds of income. The IRC draws distinctions between ordinary income and losses and capital income (gains) and losses. For example, all taxpayers can use ordinary carryover losses to offset both ordinary income and capital gains and

all taxpayers can use capital carryover losses to offset capital gains. However, corporations cannot offset capital gains against ordinary income and individuals can use only \$3,000 of a capital loss carryover each year to offset ordinary income.

The IRC also provides different tax rates for ordinary income and capital income. For individuals, long-term capital gains (gains on property held for more than one year) are taxed at a maximum rate of 15%. COD income, by contrast, is "ordinary income" that is taxed at the taxpayer's tax rate based upon the taxpayer's tax bracket, which potentially could be as high as 35%. Corporations pay the same tax rate for capital gains and ordinary income, which currently carries a maximum rate of 39%.

C. Timing of the Sale

Taxpayers can often change the tax consequences of tax-rich property by changing the time when they dispose of it. Generally, a taxpayer who disposes of property before filing bankruptcy pays the least amount of tax because (1) the taxpayer is likely to be balance sheet insolvent before bankruptcy, thereby reducing or eliminating COD income, and (2) the taxpayer's tax attributes have not yet passed to a bankruptcy estate. *Caveat*: When an individual sells property before bankruptcy, he or she may need to do a short-year election (IRC §443) to avoid greater tax consequences.

A taxpayer who disposes of overburdened property during a bankruptcy case faces two possible scenarios: (1) in either entity or individual bankruptcies, the trustee sells the property during bankruptcy, or (2) in an individual bankruptcy, the bankruptcy trustee abandons the property back to the debtor because he or she spots phantom income or phantom gain problems. In the first scenario, the bankruptcy estate will pay the tax due. However, in the second scenario, the taxpayer will be responsible for payment of the tax. Whether the sale occurs before or after the discharge, even if the case is still pending, the taxpayer may be able to exclude or reduce COD income under either the insolvency exception (for sales before discharge) or the bankruptcy exception (for sales after discharge). Unfortunately, the bankruptcy estate will retain the taxpayer's tax attributes until the case is closed and the taxpayer could be left with no attributes or reduced attributes to offset capital gain.

A taxpayer who disposes of property in the year following his or her bankruptcy discharge could poten-

tially face larger tax consequences. The reason for the increased tax is usually attribute reduction. Remember, attribute reduction occurs on the first day of the year following the discharge of indebtedness. Thus, when the property is sold in the year following a bankruptcy discharge, the taxpayer has reduced or eliminated his or her tax attributes that otherwise could have offset the tax due.

Problems With Insolvent S Corporations, Partnerships and Partnership-Like LLCs

Think twice before taking S corporations, partnerships or partnership-like LLCs with overburdened property into bankruptcy. A nonbankruptcy liquidation may provide more control over the timing of property sales and the amount realized from those sales. Placing one of these entities into bankruptcy does not shield its owners from tax exposure since they are flow-through entities. Further, since solvency for purposes of IRC §108(a) is tested at the owner level, the owners may be personally solvent and, therefore, may not be able to exclude COD income arising from the sale of property that occurs during a bankruptcy proceeding. If the owners can control the sale price, there is less risk of COD income. If the owners can control the timing of the sale, they can make reasoned decisions as to how to maximize their individual tax attributes to offset gain.

Conclusion

When dealing with clients who plan to dispose of property they own, it is important to consider the tax consequences carefully. It is often possible to manipulate the timing of property disposition and the sale price to help minimize the client's tax consequences.

Retired Bankruptcy Judge Polly Higdon

died October 13 from liver cancer. Judge Higdon was appointed as a part-time judge for the United States Bankruptcy Court in Eugene on May 16, 1983. She was appointed as a full-time judge on December 1, 1983, following the retirement of Judge Clarence Luckey. Judge Higdon continued to serve in Eugene until January 1995, when she moved to the Portland office of the court. On September 1, 1997, she was appointed Chief Judge of the Oregon district and served until December 2, 1999, when she retired.

DISCHARGE OF STUDENT LOANS IN AND OUT OF BANKRUPTCY

By **Richard J. Parker**, Parker Bush & Lane
and **Stephen T. Tweet**, Albert & Tweet, LLP

The Problem

Student loans have long posed a serious obstacle for persons in financial distress. Over the years, discharge of student loan indebtedness has become more and more restrictive, beginning with a requirement in the 1978 Code that a federally insured student loan had to be in active repayment for 5 years before it was subject to discharge (increased to 7 years in 1990), and culminating in 1998 with the requirement that the debtor show that denial of discharge would constitute an undue hardship for the debtor. 11 USC §523 (a) (8). In the 9th Circuit and many others, the standards for hardship discharge had their origins in *In re Brunner*, 46 BR 752 (SDNY 1985), *aff'd*, 831 F2d 395 (2d Cir 1987), adopted by the 9th Circuit in *United Student Aid Funds, Inc. v. Pena*, 155 F3d 1108 (9th Cir 1998).

The *Brunner* test has 3 prongs: first, based on current income and expenses, the debtor cannot maintain a “minimal” standard of living for self and dependents if forced to repay the loan; second, additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the loan; and third, the debtor has made good faith efforts to repay the loan. The debtor bears the burden of proving each of the elements by a preponderance of the evidence. *Brunner*, 46 BR at 756.

The discharge problem is compounded by the fact that the statute of limitations on student loan debt was eliminated in 1991. *See* 20 USC §1091a. In fact, in most districts, this abolition of the statute of limitations was ruled to be retroactive – in effect reviving debts which were thought to have expired years or decades earlier. In addition, use of laches as a defense is limited and generally unavailing. Finally, although it is beyond the scope of this article, be aware that HEAL (Health Education Assistance Loans) have a much higher standard: denial of discharge will be upheld unless it is “unconscionable.”

Collection Tools

Financially distressed persons are confronted by a formidable arsenal of collection tools available to student loan collectors. In addition to intercepting federal

tax refunds, collectors can also submit “administrative wage garnishments” to employers of the debtors. These result in the turn-over of 15% of net wages without the need for filing of a court action. Further, retirement brings no relief: offsets can be applied to Social Security retirement benefits. Defenses to these actions are limited.

Non Bankruptcy Options

Confronted with a lifetime obligation and collection tools nearly as powerful as those available to the IRS, debtors have four options outside of bankruptcy.

First, debtors may seek temporary forbearance or deferral of their loan obligations, based on enrollment in school or financial hardship. However, the number of deferrals and forbearances is limited.

Second, debtors may seek one of several programs which restructure their debt. These include Consolidation, Graduated Repayment (GRP), Income Sensitive Repayment (ISRP), and Income Contingent Repayment (ICRP). Care should be exercised in the choice of options, particularly if spouses are considering consolidation of their separate obligations. This would make them jointly and severally liable for what had been distinct debts.

Third, discharge of student loan indebtedness is available if it can be shown that the debtor was subjected to any of a number of trade school abuses.

Finally, there are other statutory grounds for non-bankruptcy discharge of student loans: if the debtor can show that he or she was unable to benefit from the education received (for example, if the debtor is functionally illiterate), if the school that received the loan proceeds closed before the education was completed, or if the debtor becomes permanently and totally disabled (usually sufficiently so to qualify for Social Security Disability).

The Bankruptcy Option

If none of the nonbankruptcy remedies help, debtors may examine their bankruptcy option. However, to pursue this option, and as part of the *Brunner* test (good faith), the debtor must first have attempted to qualify for one of the programs mentioned above. *See Educational Credit Management Corp. v. DeGroot*, 339 BR 201 (D Or 2006), in which the court (following *In re Birrane*, 287 BR 490, 500 (9th Cir BAP 2002)) found that the debtor’s failure to explore or apply for the ICRP amounted to a lack of good faith.

An important side issue on the ICRP is that while a bankruptcy discharge, including a hardship discharge does not create a taxable event, a nonbankruptcy discharge potentially does. Considerable industry effort is now underway to lobby Congress for legislation removing the potential tax consequences from an ICRP student loan discharge. Assistance from the Internal Revenue Service is also being sought for a favorable revenue ruling on the issue.

Should the bankruptcy option be chosen, it is necessary to file an adversary proceeding. Most districts looking at the issue have ruled that simple provision of a hardship discharge in a chapter 13 plan is inadequate. It is not necessary that the bankruptcy case be open at the time of the decision to go forward. If the bankruptcy has been closed, it can be reopened for the express and limited purpose of filing the adversary proceeding. There is no time limit for such a reopening, but in most cases, the operative facts will be those in place at the time of the adversary filing or the trial of the adversary, not the facts at the time of the original bankruptcy petition.

It is also essential that before filing the adversary proceeding all possible defendants be determined so they can be served in accordance with the Bankruptcy Rules. The possible defendants include the original lender, any guarantors, any servicing agent, and any purchaser of the loan. *See generally In re Wedell*, 329 BR 59 (WD Wa 2005), which holds that the loan and the guarantee are two separate and distinct obligations.

Partial Discharge

Once the adversary proceeding is at issue, the outcome can be a negotiated settlement with the defendants, a total discharge, a denial of the hardship discharge, or now, a partial discharge. In *In re Carnduff*, 367 BR 120 (9th Cir BAP 2007), the BAP reversed a bankruptcy court judgment that the debtor's student loans (which exceeded \$350,000) could not be discharged because the debtor's earning capacity could potentially improve in the future. In reversing, the BAP announced:

We publish to emphasize that the bankruptcy court has the power to grant a partial discharge of student loans even when the debtor's earning capacity is expected to improve, if that improvement will be insufficient for the debtor to pay the full balance due without an undue hardship. However, in that event, the burden of proof remains with the debtor to establish undue

hardship as to any portion of the debt to be discharged.

367 BR at 123.

Other important cases that discuss partial discharge are *In re Saxman*, 325 F3d 1116 (9th Cir 2003), and *In re Myrvang*, 232 F3d 116 (9th Cir 2000).

Bankruptcy Discovery Issues

The debtor should be prepared for full-blown litigation, including extensive discovery (Requests for Production, Requests for Admissions, Interrogatories and depositions). The debtor should compile financial records for at least the past five years, including tax returns, W-2's and bank records. Debtors' counsel should obtain these records before filing the adversary action, as such preparation will facilitate settlement and tend to reduce the cost of the case. It also will help counsel frame the issues properly in the complaint.

Discovery from the plaintiff debtor should include verification of the necessary parties to the action, verification of payments made and balances due, and the accrual of collection charges and interest. In addition, a determination should be made of how often and for what amounts the loan or loans have been recapitalized. In essence, recapitalizing converts some of the accrued interest to principal, leading to compound interest. There are limits to how often this can be done.

Before deciding to file an adversary proceeding, counsel for the financially distressed should review both nonbankruptcy options and recent student loan discharge case law, as well as the current financial condition and future prospects of the debtor. Be aware that expert testimony may be required, including medical or vocational testimony. This is major litigation, always involving extensive discovery. It is also a heavily litigated, dynamic area of bankruptcy law and there are splits among the circuits on many issues. This means that up-to-the-minute research is critical and there is frequently room to make new arguments. The paradox is that a person who can afford the litigation may not be entitled to the relief, so many cases must be funded by non-liable relatives. Regardless, it is a necessary and rewarding area of bankruptcy law.

NINTH CIRCUIT CASE NOTES

By **Matthew A. Goldberg,**

K&L Gates

NICHOLS V. BIRDSELL,
491 F3d 987 (9th Cir 2007)

In this case of first impression, the Ninth Circuit held that tax overpayments a debtor has applied to the following year's tax liability by making an irrevocable election under the Internal Revenue Code (IRC) are property of the estate that must be turned over to the trustee.

Debtors were entitled to federal and state tax refunds. Instead of taking the refunds, the debtors elected under the IRC to apply the overpayments to their future tax liabilities. Debtors soon after filed for bankruptcy, and the trustee demanded that the debtors turn over the value of the tax refunds. The bankruptcy court granted the trustee's motion for summary judgment, concluding that the overpayments were property of the estate notwithstanding the irrevocable election under the IRC. The debtors appealed to the district court, which affirmed the bankruptcy court.

The Ninth Circuit affirmed. A property interest is not outside the reach of §541 "because it is novel or contingent or because enjoyment must be postponed." If the debtors had not made the election, the court reasoned, the funds would have been refunded to them and may well have been available to the trustee. The fact the election was irrevocable, the court held, does not change the §541 analysis, making the debtors liable to the trustee for the full amount of the overpayments.

IN RE ADBOX, INC.,
488 F3d 836 (9th Cir 2007)

In another case of first impression, trustee sued debtor's former financial backers to recover a preference. The preference defendants asserted a defense under the earmarking doctrine, whereby a third-party advances funds to the debtor subject to an agreement that the funds be used to pay a particular identified creditor. The defendants had not included anything about the earmarking defense in their answer, however. The trustee argued that the defendants had waived the defense by failing to plead it as an affirmative defense.

The Ninth Circuit rejected trustee's argument, holding that the earmarking doctrine is not an affirmative defense but rather a defense to a prima facie case of

a preference under §547(b). As a result, the ability to assert an earmarking defense cannot be waived by failing to plead it in an answer to a preference complaint.

The court clarified another point of procedure related to the earmarking doctrine by holding that the trustee bears the burden of proof of establishing that a transfer meets all the elements of a preference under §547(b). Only once this burden is met does the burden shift to the defendant to establish that the funds in question were earmarked. Here, the trustee had made out a prima facie case under §547(b) on summary judgment but the defendants could not raise a genuine issue of material fact as to whether funds they received prepetition had been earmarked pursuant to the debtor and the third-party source of the funds.

IN RE HARBIN,
486 F3d 510 (9th Cir 2007)

This case resolved two questions of first impression in the Ninth Circuit. First, the court held that a bankruptcy court considering the feasibility of a chapter 11 plan under §1129(a)(11) *must* evaluate the possible effects on feasibility of a debtor's ongoing litigation with a creditor, regardless of whether the litigation is pending in a trial or an appellate court. Second, the court held that a bankruptcy court may use its equitable powers, under certain narrowly defined conditions, to grant retroactive approval of a postpetition financing transaction under §364(c)(2).

The feasibility holding clarifies the Ninth Circuit's well-established requirement, from *In re Pizza of Hawaii*, 761 F2d 1374 (9th Cir 1985), that the bankruptcy court's duty to consider the effect on a plan's feasibility of a future adverse judgment against debtor in state court does not hinge on whether the state-court judgment is on appeal.

Sherman, a creditor, had filed a state action prepetition and obtained a large verdict against the debtor. Sherman had sold his law practice to another lawyer, Harbin. Sherman sued Harbin when Harbin stopped making the called-for \$5,000-per-month payments to Sherman with 6 years left to go on a ten-year contract. The jury awarded Sherman \$414,000 plus fees and costs and found Harbin personally liable, along with his professional corporation (PC). Harbin filed a chapter 7 case.

Postpetition, following relief from stay, the state court trial judge granted a judgment notwithstanding the verdict (JNOV) that Harbin was not personally liable. Harbin proceeded to file a motion to dismiss

his bankruptcy. When the bankruptcy court denied the motion, Harbin converted to chapter 11. In the interim, Sherman appealed the judgment in Harbin's favor.

While the state court case was still on appeal, over Sherman's objection, the bankruptcy court confirmed Harbin's plan, which provided for 100% payment to creditors but did not take into account the possibility that Sherman might prevail on appeal, making Harbin—and, thus, the bankruptcy estate—liable for the large state-court judgment in addition to the debts owed to the existing creditors.

Sherman appealed the confirmation of the plan to the district court. Meanwhile, the state court of appeals overturned the trial court's JNOV, reinstating debtor's liability. The district court took judicial notice of the state court reversal, concluded that the plan could no longer be considered feasible under §1129(a)(11), and remanded the case to the bankruptcy court. Sherman appealed the district court's decision.

The Ninth Circuit affirmed, finding that the bankruptcy court clearly erred by not considering the possible effect on Harbin's plan if the state court reversed the trial court's determination that Harbin was not personally liable. The bankruptcy court had partially based its decision not to consider the outcome of the state court appeal on the *Rooker-Feldman* doctrine, which prohibits a losing party in state court from having a district court review the state court judgment in lieu of, or in addition to, the state court system's own appellate process.

The Ninth Circuit rejected this reasoning, finding that *Rooker-Feldman* did not apply. The court stated that the bankruptcy court had jurisdiction to consider the possible outcome of the state court litigation, as part of its exclusive jurisdiction to determine the confirmability of a plan, a core matter under 28 USC §§157(2)(B) and (L). Moreover, the bankruptcy court was obliged under §1129(a)(11) to assess the possible effect of ongoing litigation involving the debtor on the feasibility of the debtor's proposed plan.

The Ninth Circuit's second holding clarifies the circumstances in which it is appropriate for the bankruptcy court to use its equitable powers under §105(a) to retroactively authorize transactions that normally require court approval *before* the transaction is consummated. Debtor's wife refinanced the home she owned with debtor during the bankruptcy. The refinancing lowered the debtor's mortgage payments and provided funds with which debtor's chapter 11 plan would be funded. The refinancing transaction,

however, had not received prior court approval under §364(c)(2), which is normally required before the debtor-in-possession may incur secured debt. Nonetheless, upon motion by debtor and the lender, and over Sherman's objection, the bankruptcy court approved the postpetition financing *nunc pro tunc* to the date of the refinancing. Sherman appealed this ruling as well.

Because §364(c)(2) does not, by its express terms, require the bankruptcy court to approve a postpetition financing transaction before the debt is incurred, the Ninth Circuit ruled that there was no facial inconsistency between the Code and the court's equitable powers. As a result, it was not an abuse of discretion for the bankruptcy court to retroactively approve the postpetition financing.

Being concerned about inviting "general non-observance of the prior authorization requirement," the court limited retroactive approval to situations in which "exceptional circumstances exist." 486 F3d at 522 (citation omitted). The court enunciated a four-part test for bankruptcy courts to use when determining whether to exercise their discretion to retroactively approve §364 transactions: 1) did the financing transaction benefit the estate; 2) has the creditor adequately explained its failure to seek pre-approval by the court; 3) was there full compliance with the requirements of §364(c)(2); and 4) do the circumstances of the case generally make *nunc pro tunc* approval an appropriate form of relief.

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BAP CASE NOTES

By Doug Pahl,
Perkins Coie LLP

Undisclosed Executory License Rides Through

In re JZ L.L.C., 371 BR 412 (9th Cir BAP 2007)

Before the petition date, JZ L.L.C. entered into an agreement under which it licensed Diamond Z to manufacture, promote and sell the Zehr HG 7000 horizontal grinder. Even though the license agreement was an executory contract when JZ filed its chapter 11 petition, JZ failed to disclose the contract in its schedules or in its plan and disclosure statement. The JZ plan of reorganization was simple, providing full payment over time to unsecured creditors. Property of the estate revested in JZ on the effective date of the plan. The plan included no change in legal form. Finally, the plan did not contain a provision assuming or rejecting all executory contracts not otherwise dealt with in the case.

Following plan confirmation and closure of the bankruptcy case, JZ sued Diamond Z in Idaho state court seeking declaratory relief and damages for Diamond Z's post-confirmation breach of the license agreement. The state court referred the matter to the bankruptcy court, which reopened the JZ bankruptcy case to hear the contested matter. JZ asked the bankruptcy court to confirm that the license agreement rode through the bankruptcy. Diamond Z asserted that JZ lacked standing and should be judicially estopped from enforcing the license agreement because it failed to mention it during the bankruptcy. The bankruptcy court agreed with JZ, concluding that the license agreement rode through the bankruptcy and that JZ had standing to bring the state court action. Diamond Z appealed.

The BAP affirmed. Although it disagreed with JZ's assertion that there was no obligation for it to schedule all executory contracts, the Panel concluded that license agreement rode through the bankruptcy case despite the failure to disclose. The Panel was influenced by Diamond Z's own failure, despite its knowledge of the chapter 11 case, to inform the court and creditors of the existence of the executory contract. Because JZ and Diamond Z engaged in negotiations regarding the license agreement before, during and after the bankruptcy, Diamond Z "was in a poor position to display the 'clean hands' necessary to invoke equity in order to exploit JZ's omission." In addition, making it clear that

Diamond Z did not speak for JZ's creditors, the Panel wondered aloud if any creditor had been harmed by the omission, particularly in light of JZ's full pay plan. "We think Diamond Z doth protest too much."

The BAP reviewed in detail the origins of the numerous requirements that debtors disclose executory contracts. It also cited decisions holding that debtors bear the risk of nondisclosure. JZ and Diamond Z hotly debated whether the executory contract was property of the estate. The Panel concluded that whether an asset was or was not property of the estate is a legal question for the court to address and was irrelevant to whether an executory contract must be disclosed. "In short, JZ has no conceivable excuse for not scheduling the License Agreement."

Section 554(d) of the Code provides that property that is unsecured and not otherwise administered is not abandoned to the debtor when the case is closed, "but rather remains property of the estate – forever." In a chapter 7 context, because the Bankruptcy Code does not authorize a chapter 7 debtor to control property of the estate after closing, "the chapter 7 estate after closing is a rudderless ship." The situation is different for chapter 11 debtors like JZ. Under §1141(b), upon the confirmation of a chapter 11 plan, all property of the estate, scheduled and unsecured, reverts in the debtor unless the court or the plan provide otherwise. The Panel concluded that the unsecured license agreement revested in JZ upon plan confirmation and that, unlike a chapter 7 debtor, JZ possessed standing to assert post confirmation claims against Diamond Z.

Finally, the Panel reviewed the origins, history and merits of the ride-through doctrine, which allows a contract to pass through the bankruptcy unaltered despite neither being assumed nor rejected under §365(a). It concluded that it would follow the First, Second and Fifth Circuits in recognizing the doctrine.

**The Hanging Paragraph Does Not Bar
Deficiency Claim**

In re Natalie Dionne Rodriguez, ___ BR ___ (9th Cir BAP
Aug 28, 2007)

Natalie Rodriguez purchased a vehicle within 910 days of filing her chapter 13 petition. In her plan, she proposed to surrender the vehicle to Wells Fargo in full satisfaction of its secured claim, citing the so-called hanging paragraph inserted by Congress at the end of §1325(a)(9). Over Wells Fargo's objection, the bankruptcy court concluded that surrender of the "910

vehicle" fully satisfied the underlying debt, following the majority rule, including *In re Pool*, 351 BR 747 (Bankr D Or 2006).

The BAP reversed. It read the hanging paragraph to preclude the application of §506 if "(1) the creditor has a purchase-money lien, (2) the debt was incurred within 910 days before the petition date, and (3) the collateral is a motor vehicle acquired by a debtor for his or her personal use." Although the parties agreed that each of the three conditions existed, they disagreed on whether the surrender of the vehicle extinguished Well Fargo's deficiency claim. The Panel noted that the majority of bankruptcy courts have concluded that the hanging paragraph eliminates a lender's deficiency claim, the position advanced by the debtor.

The majority view assumes that §506 "creates, defines and governs deficiency claims." The BAP disagreed, following the logic of the minority of courts that the source of the deficiency claim is contract rights under state law, not §506. Upon surrender of the vehicle, the estate no longer possesses an interest in the vehicle. The Panel concluded that eliminating the applicability of §506 simply leaves the parties to their contractual entitlements under state law, generally resulting in an unsecured deficiency claim in favor of the formerly secured creditor.

STATE COURT CASE NOTES

By Donald H. Grim,
Greene & Markley, P.C.

Attorney's Fee Claim Remained Justiciable After Substantive Claims Became Moot

Crandon Capital Partners v. Shelk, 342 Or 555,
157 P3d 176 (2007)

Shareholders of Willamette Industries, Inc. (Willamette), filed a derivative action against certain officers and directors of Willamette related to a take-over attempt by Weyerhaeuser Company. Prior to the entry of any judgment in the case, Willamette undertook actions which rendered the shareholders' substantive claims moot.

Plaintiffs amended their complaint, asserting an independent claim for attorney fees of \$24.25 million,

on the equitable ground that their action conferred a substantial benefit on the corporation and its shareholders. The trial court denied plaintiffs' claims for attorney fees and entered judgment for Willamette. The Court of Appeals agreed, concluding that once the plaintiffs' claims became moot, the trial court lacked jurisdiction to adjudicate the request for attorney fees.

The Oregon Supreme Court reversed. As a matter of first impression, it held that "plaintiffs' claim for attorney fees on the equitable ground that its actions conferred a substantial benefit on Willamette and its shareholders did not become moot simply because plaintiffs' substantive claims had become moot." The holding was limited to those attorney fee claims made under the rule permitting a plaintiff in a shareholder derivative case to recover fees if it has conferred a substantial benefit on the corporation or its shareholders.

Non-Reciprocal Arbitration Clause Not Per Se Unconscionable

Motsinger v. Lithia Rose-FT, Inc., 211 Or App 610, 156
P3d 156 (2007)

Plaintiff, a former employee, brought a wrongful termination action alleging sexual harassment. Defendant, based on an employment contract signed by plaintiff which included an arbitration clause, moved to abate the proceeding pending arbitration. The trial court denied defendant's petition, holding the arbitration agreement was unconscionable because the employer enjoyed a position of greater bargaining power and the agreement was not reciprocal. The agreement restricted employees to arbitration, but not the employer.

The doctrine of unconscionability does not relieve parties from all unfavorable terms resulting from unequal bargaining positions; it only relieves them from terms that are unreasonably favorable to the party with greater bargaining power. Courts must determine on a case-by-case basis whether, given an unequal bargaining position, the effect of an arbitration clause is so one-sided as to be unconscionable. In this case, even though plaintiff was restricted to arbitration while defendant was not, plaintiff remained entitled to all of the same remedies and most of the same procedural protections.

The Court of Appeals held that mere inequality in bargaining power, without more, is not enough to invalidate an arbitration clause on the basis of unconscionability. Furthermore, and as a matter of first impression, the court held that an arbitration

agreement is not substantively unconscionable simply because there is a lack of mutuality of obligation between the parties.

Not All Orders Must Be “Final” to Be Appealed

Bhattacharyya v. City of Tigard, 212 Or App 529, 159 P3d 320 (2007)

On complex procedural facts, petitioner appealed a Circuit Court order setting aside two earlier judgments but not ordering a new trial. On appeal, the Court noted a long line of cases, based on prior versions of ORS 19.205, which hold that orders setting aside judgments but not granting a new trial are not appealable because they are not final orders. Petitioner argued that ORS 19.205(3) permits review of any order that follows an entry of judgment and that affects a substantive right **regardless of whether the order grants a new trial.**

The Court of Appeals observed that under the 2003 amendments to ORS 19.205, subsection (3) requires only that an order be made in the action after entry of the general judgment and that it affect a substantial right. The court pointed out that word *final* is conspicuous by its absence and establishes legislative intent that amended ORS 19.205 render all orders entered into after a general judgment appealable so long as the order affects a substantial right.

CONSUMER COMMITTEE

By Aaron R. Varhola

The Consumer Bankruptcy Committee (also known as the Circle of Love) usually meets every other month on the third Thursday of the month in the 8th Floor conference room at the United States Bankruptcy Court – 1001 SW 5th Avenue, Portland, Oregon 97204. Our next meeting will be on Thursday, November 15 at 4:30 PM. The committee is chaired by Laura Donaldson, who can be reached at 503-241-4869 or laurad@vbcattorneys.com. To learn more about the Committee or to be added to the mailing list, please contact Ms. Donaldson.

July 26, 2007 Meeting

Chapter 13 Trustee Brian Lynch led off the meeting with an announcement about changes to the trustee’s

commission on chapter 13 plan payments. As of July 20, 2007, the trustee’s fee is 2.5 percent.

Mr. Lynch stated that all documents resolving objections to plan confirmation should be received in his office before noon on the Wednesday before the confirmation hearing; mail is not sufficient, since his office receives its mail late in the day.

As of August 1, chapter 13 motions to dismiss do not have a modified plan option. Debtors need to deal with current plan payments and the required “base” amount, as well as payments to secured creditors, in the plan. Modification of the plan will be dealt with separately from motions to dismiss.

As of September 1, the Chapter 13 Trustee’s office will ask for debtors’ bank statements for the period encompassing filing and the month before; copies will be due at or before the §341 meeting.

A case in Bend was discussed – Judge Perris ruled that a mobile home with no real property associated with it could be crammed down in ¶2(b)(1) of the chapter 13 plan.

Pamela Griffith of the US Trustee’s Office announced that Credit Counseling Centers of America is out of business.

Also, regarding the credit counseling and financial management course requirements, Judge Perris knows of debtors who thought they had completed the courses, but in actuality did not. Ms. Griffith’s office will inquire about this situation.

The US Trustee’s office wants to take action against filing of inappropriate secured debt allegations.

The US Trustee’s office is reevaluating whether asking for more debtor information for the means test is successful – this process will start in August involving at-or-near median-income debtors, debtors with non-filing spouses or partners, and business cases. Documentation currently requested includes tax returns, six months of pay advices, and one year of bank statements.

The US Trustee’s office will pay per the local rules for copying costs of providing documentation for debtor audits, if notified in advance of the costs.

Ms. Griffith said that the US Trustee’s Office will obtain documents from the panel trustees if debtors have already produced them to the trustees. Auditors are independent of the US Trustee’s office, and documents must be produced separately to them.

Ms. Griffith addressed concerns about chapter 7 trustees, including that some trustees do not appear on time for hearings. In future, chapter 7 trustees will be assigned more randomly, but batches of cases will be assigned to the same day. The system should have been implemented within a week of the meeting.

The Chapter 13 Trustee's Office will try to strike the hearing if a motion to dismiss has been resolved before the hearing.

Discussion continued about abusive creditors. Apparently Portfolio Recovery Services is selling discharged debts to other agencies. Concerns were also expressed about attempts to collect on debts resulting from identity theft or mortgage fraud.

Kelly Brown expressed his concern about filing scanned documents through the ECF system and submitting documents with an electronic /s/ signature

versus a scanned document with a debtor's actual written signature. Mr. Brown is concerned about whether he should keep the signature pages if he scanned the documents; Pamela Griffith noted that a court-filed document may not necessarily be identical to what the client signed. This issue will be brought up with the judges at the September 20 Circle of Love meeting.

2007 Annual Debtor-Creditor Section CLE Seminar

Date: Friday, November 9, 2007
Location: Benson Hotel, Portland, Oregon
Times: 8:30 am to 5:00 pm
 Annual Meeting & Lunch,
 Noon to 1:30 pm
Title: Behind the Scenes Look at Decision
 Making – Legislative and Judicial

Schedule:

8:00 – 8:30 **Registration**
 8:30 – 9:30 **Case Law Update**
 Speakers: Matt Goldberg, Doug Pahl,
 Donald Grim
 9:30 – 10:30 **2007 Oregon Legislative Session**
 Speakers: State Senator Vicki Walker &
 State Representative Andy Olson
 10:30 – 10:45 **Break**

10:45 – 12:00 **Individual Chapter 11 Bankruptcy Cases**
 Speakers: Gail B. Geiger, Loren S. Scott &
 Wilson C. Mulheim
 12:00 – 1:30 **Lunch and Annual Meeting**
 1:30 – 2:30 **Mortgage Loan Servicer Issues**
 Speakers: Kent Anderson & Matthew
 Cleaverly
 2:30 – 2:45 **Break**
 2:45 – 3:45 **Nonbankruptcy Alternatives
 in State Court**
 Speakers: Thomas W. Stilley, Mary Jo
 Heston and Tyrell B. Vance
 3:45 – 5:00 **Judicial Panel – The Making of
 a Decision**
 Speakers: Hon. Patricia C. Williams, Hon.
 Paul B. Snyder, Hon. Elizabeth L. Perris,
 Hon. Frank R. Alley
 5:00 – 6:00 **Reception**

OSB Debtor-Creditor Section Annual Meeting

The OSB Debtor-Creditor Section will hold its Annual Business Meeting on Friday, November 9, 2007, at noon at the Benson Hotel, Portland, Oregon. This annual meeting will occur during the Debtor-Creditor CLE and Annual meeting.

Proposed Slate for 2008:

Chair:	Teresa H. Pearson
Chair-Elect:	Thomas M. Renn
Past Chair:	Stephen T. Tweet
Secretary:	Patrick W. Wade
Treasurer:	Miles D. Monson

Members-At-Large (Terms Ending 12/31/09)

Laura L. Donaldson
Susan S. Ford
Thomas Huntsberger
Daniel H. Rosenhouse
Carolyn R. Smale

Members-At-Large (Terms Ending 12/31/08)

Linda Johannsen
Douglas Pahl
Hon. Albert E. Radcliffe
Brandy Sargent
Tara Schleicher

Additional nominations for any position may be made from the floor.

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