

# Newsletter

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

Fall 2008

## HIGHLIGHTS

- 1 **Comments from the Chair**  
*By Teresa H. Pearson*
- 2 **Courts Expand Deference to Nonbankruptcy Law Following Supreme Court's Decision in *Travelers***  
*By Tara Schleicher*
- 4 **Student Loan Discharge Potpourri**  
*By Stephen T. Tweet*
- 5 **Ninth Circuit Case Notes**  
*By Matthew A. Goldberg*
- 7 **BAP Case Note**  
*By Chris Parnell*
- 8 **District of Oregon Case Note**  
*By Donald H. Grim*
- 8 **Bankruptcy Court Case Notes**  
*By Donald H. Grim*
- 9 **State Court Case Notes**  
*By Donald H. Grim*
- 10 **Consumer Committee Report**  
*By Aaron R. Varhola*

## COMMENTS FROM THE CHAIR

**By Teresa H. Pearson**

Miller Nash LLP

As I write this, I've just returned from the Debtor-Creditor Section's annual meeting. It was great to see so many friends and colleagues there at Salishan! As the program progressed and I looked around the room, I was reminded of the many varieties of lawyers the Section serves. I saw solo practitioners and big firm lawyers, in-house counsel and public-interest lawyers, judges and government lawyers, trustees and tax lawyers, litigators and business lawyers who rarely go to court. The program covered state law issues and federal bankruptcy issues, new cases, new statutes, and new court rules. Speakers addressed consumer topics and business topics, from both the debtor's and creditor's point of view. I commend the CLE and Annual Meeting Committees for providing something useful for everyone.

But it isn't only the CLE and Annual Meeting Committees that reach out to the various constituencies of our Section. To the extent they can consistent with their purpose, our committees all work hard to meet the widely divergent needs of our members. For example, our Consumer Law Committee (fondly called the Circle of Love) may primarily serve the lawyers involved in consumer cases, but in doing so brings together debtor's counsel, creditor's counsel, trustees, judges and tax lawyers—all with the goal of improving the way the system operates for everyone. Our Legislative Committee is focused on law improvement legislation for debtor-creditor lawyers. The bar has a policy that it cannot take political positions on legislation. Therefore, the Legislative Committee must carefully

navigate among the various interests of attorneys for debtors and creditors. Regardless of the clients a lawyer serves, we can all recognize that it benefits everyone when the law is clear and user-friendly, when parties know what to expect and how to proceed. The Legislative Committee welcomes section members from all backgrounds and areas of practice to assist in proposing and evaluating new legislation.

Our New Lawyer's Committee is geared especially toward helping the next generation of debtor-creditor lawyers learn the practice of law. While many members are from smaller offices or are solo practitioners, new lawyers from large private firms and the US Trustee's office are also active in helping the committee succeed.

The value of the Newsletter to your own practice, whatever that may be, speaks for itself. You are reading this now, aren't you?

The Pro Bono Committee serves consumer debtors without the means to afford legal services. The Public Education Committee provides outreach to Oregonians about the availability and options for bankruptcy. Section lawyers who assist the Pro Bono Committee and the Public Education Committee come from many different backgrounds, but all share the goal of making justice accessible.

The Section's website aims to be a resource on all aspects of debtor-creditor practice in Oregon. It contains links to sites of interest to Section members, as well as information about what is going on in the Section. If there is something you would like to see added to the web-

*Continued next page*

site, please email [info@osb-dc.org](mailto:info@osb-dc.org).

And I would be remiss not to mention the CARE Program. The CARE Committee truly brings together all segments of the bar (and even some nonlawyers) to teach kids about how debt works. To participate, all you need is a common-sense attitude and a basic understanding of debtor-creditor relationships. At the Annual Meeting CLE, I was privileged to help honor the many

individuals who have helped educate literally thousands of high school students on the risks of taking on debt.

The Section benefits when members from all backgrounds and practices work together for the common goal of improving the practice of debtor-creditor law in Oregon. If you would like to get involved with a committee or other work for the Section, please email me at [Teresa.Pearson@millernash.com](mailto:Teresa.Pearson@millernash.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 231935, Tigard, OR 97281-1935.

### EDITOR-IN-CHIEF

Deborah S. Guyol

### EDITORIAL BOARD

Susan T. Alterman  
Hon. Randall L. Dunn  
David Foraker  
David B. Gray  
S. Ward Greene  
Lee M. Hess  
Linda Johannsen  
Wendell G. Kusnerus  
Justin Leonard  
Carla McClurg  
Richard J. Parker  
Christopher Parnell  
Teresa H. Pearson  
Brandy A. Sargent  
Tara J. Schleicher  
Joseph M. VanLeuven  
Britta Warren

### NEWSLETTER SUBCOMMITTEE LIAISON

Teresa H. Pearson

### OSB LIAISON

Karen D. Lee

### BOARD OF BAR GOVERNORS LIAISON

S. Ward Greene

### SECTION OFFICERS

Teresa H. Pearson, *Chair*  
Thomas M. Renn, *Chair-Elect*  
Miles D. Monson, *Treasurer*  
Patrick Whelan Wade, *Secretary*  
Stephen T. Tweet, *Immediate Past Chair*

### EXECUTIVE COMMITTEE

#### Terms Expiring 2008

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

#### Terms Expiring 2009

Laura Donaldson  
Susan Ford  
Thomas Huntsberger  
Daniel Rosenhouse  
Carolyn Smale

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

## COURTS EXPAND DEFERENCE TO NONBANKRUPTCY LAW FOLLOWING SUPREME COURT'S DECISION IN *TRAVELERS*

By **Tara Schleicher**

Farleigh Wada Witt PC

In *General Electric Capital Corporation v. Future Media Productions, Inc.*, 536 F3d 969 (9th Cir 2008), the Ninth Circuit Court of Appeals held that oversecured creditors whose claims are paid from the proceeds of a §363 sale are entitled to default interest pursuant to their state law contractual rights. In doing so, the court stated it was correcting a misapplication of the rule it announced in *Entz-White Lumber & Supply, Inc. v. Great Western Bank & Trust*, 850 F2d 1338, 1342 (9th Cir 1988): that an oversecured creditor was **not** entitled to default interest where its claim was paid in full under the terms of a **chapter 11 plan**. In *Future Media*, the Ninth Circuit relied heavily on the Supreme Court's decision in *Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co.*, 127 S Ct 1199 (2007).

### The Facts of *Future Media*

Pursuant to a Loan and Security Agreement (Loan Agreement), the debtor obtained a \$10.5 million, 42-month term loan, as well as a \$5 million revolving line of credit from General Electric Capital Corp. (GECC). Interest was at one rate before default (predefault rate) and at an additional 2% per annum after default (default rate). The Loan Agreement, governed by New York law, also obligated debtor to pay attorneys' fees and costs incurred

by GECC in connection with any dispute relating to the Loan Agreement.

On March 31, 2005, an event of default occurred and the loans began to bear interest at the default rate. Debtor concluded that an orderly liquidation of its assets would best serve its interests and those of its creditors, and filed chapter 11 in February 2006. At that point, debtor conceded it owed GECC about \$5.4 million dollars in principal and interest under the Loan Agreement. Ultimately, debtor sold its assets in a §363 sale that produced over \$7.6 million in proceeds, and GECC was paid over \$5.7 million pursuant to a cash collateral order. The Official Committee of Unsecured Creditors (the Committee) asked the bankruptcy court for a determination of the interest rate applicable to GECC's secured claim.

The Committee argued that the pre-default rate rather than the default rate was proper, and that GECC should return the amount it had collected over the pre-default rate (the default rate differential) in the amount of \$164,995. GECC opposed this motion and sought attorneys' fees, costs, and expenses in connection with this aspect of the controversy.

The bankruptcy court concluded that GECC was entitled to interest only at the pre-default rate and ordered GECC

to return the default rate differential to debtor. The court denied GECC's request for attorneys' fees and costs on the ground that GECC was not the prevailing party.

The Ninth Circuit reversed the bankruptcy court, citing as the beginning point for its analysis the general premise recently announced by the Supreme Court in *Travelers*: that a creditor's entitlement in bankruptcy arises from the underlying substantive law creating the debtor's obligations, subject only to any qualifying or contrary provisions of the Bankruptcy Code. The Ninth Circuit concluded, "We read *Travelers* to mean the default rate should be enforced, subject only to the substantive law governing the loan agreement, unless a provision of the Bankruptcy Code provides otherwise." 536 F3d at 973.

### Clarification of *Entz-White* Ruling

The bankruptcy court's ruling relied on *Entz-White*, 850 F2d 1338. The Ninth Circuit in reversing clarified its holding in that case and distinguished the facts of *Future Media*. It began with §1124 of the Code and noted that:

A creditor's claim is considered "impaired" for purposes of voting on a Chapter 11 plan unless the plan leaves the creditor's legal, equitable, and contractual rights unaltered, or the debtor "cures" any default that occurred prior to or during the bankruptcy case. . . . We have explained that the provision allowing "cures" under §1124(2)(A) "authorizes a plan to nullify all consequences of default, including avoidance of default penalties such as higher interest."

563 F3d at 973 (emphasis in original) (citing *Southeast Co.*, 868 F2d at 338 (quoting *Entz-White*, 850 F2d at 1342)). Under the Supreme Court's *Travelers* decision, the cure allowed by §1124(2)(A) is a "qualified or contrary provision" that trumps state law. In contrast, §363, at issue in *Future Media*, does not contain such a provision.

The Committee pointed to two prior cases in which a bankruptcy court and the BAP held that a debtor cured defaults in the context of §363 sales, thus avoiding the imposition of default interest on creditors's claims. *In re 433 South Beverly Drive*, 117 BR 563 (Bankr CD Cal 1990); *In re Casa Blanca Project Lenders, L.P.*, 196 BR 140 (9th Cir BAP 1996). The Ninth Circuit held that those decisions

departed from and improperly extended our holding in *Entz-White*. Each court transposed the concept of "cure" from §1124 and §365 into 11 USC §363. . . . The problem with that transposition is that the text of §363 does not mention "cure" and the procedures set out in that section do not implicate the concept of "cure." In short, there is no "cure" of events of default, de facto or otherwise, in the context of an asset sale.

536 F3d at 974.

Outside the context of a plan of reorganization, the Ninth Circuit found no qualifying or contrary provision of the Bankruptcy Code barring the recovery of default interest.

Thus the rule announced in *Future Media* is that outside of a plan, "the bankruptcy court should apply a presumption of allowability for the contracted for default rate, 'provided that the rate is not unenforceable under applicable nonbankruptcy law.'" 536 F3d at 974 (citing 4 *Collier on Bankruptcy* ¶506.04[2][b][ii]). The court remanded to the bankruptcy court "for a proper determination of the applicable interest rate" and to "determine if an award of attorneys' fees is proper." 536 F3d at 975.

### SNTL Decision

The Supreme Court in *Travelers* left open the question of whether other bankruptcy principles preclude the addition of postpetition attorney fees to the allowable amount of an unsecured claim. 127 S Ct at 1207-1208. The Ninth Circuit BAP in *Centre Insurance Co. v. SNTL Corp.*, 380 BR 204 (9th Cir BAP 2007), addressed that unanswered question, holding that an unsecured creditor may include postpetition attorneys' fees in its proof of claim. *But see* "Interpreting Bankruptcy Code Sections 502 and 506: Post-petition Attorneys' Fees in a Post-*Travelers* World," 15 *ABI Law Review* 611 (2007) (other bankruptcy principles do preclude adding postpetition attorneys' fees to unsecured claims).

The BAP, in compliance with the strict statutory construction approach used by the Supreme Court in *Travelers*, examined §502 (relating to the allowance of claims) and §506 (relating to claims of secured creditors), and held that nothing in the text of those sections disallowed such fees to unsecured creditors. *Id.* at 221. Refusing to reconcile conflicting policy considerations relating to disallowing postpetition attorneys' fees, the Panel stated, "[I]t is the province of Congress to correct statutory dysfunctions and to resolve difficult policy questions embedded in the statute." *Id.* at 222.

### Conclusion

The Ninth Circuit's decision in *Future Media* supports an oversecured creditor's right to recover default interest in bankruptcy under a strict construction of the Bankruptcy Code. The BAP's decision in *SNTL* supports postpetition attorneys' fees for unsecured creditors. Both decisions demonstrate a new willingness to strictly interpret the text of the Bankruptcy Code and defer to nonbankruptcy substantive law in the absence of express contrary provisions of the Code, consistent with the Supreme Court's decision in *Travelers*.

### SECTION WEBSITE

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

## STUDENT LOAN DISCHARGE POTPOURRI

By **Stephen T. Tweet**

Albert & Tweet LLP

This article is a follow-up to a recent newsletter article by Richard Parker and me (Debtor-Creditor Newsletter, Fall 2007). My intent here is to review the basics, discuss a new development or two, and offer a few practice tips.

### The Basics

Government guaranteed student loans can only be discharged in bankruptcy if excepting the debt from discharge will impose an “undue hardship” on the debtor and the debtor’s dependents. 11 USC §523(a)(8). The Ninth Circuit Court of Appeals prescribed the test for dischargeability under §523(a)(8) in *In re Pena*, 155 F3d 1108, 1112 (9<sup>th</sup> Cir 1998), in which it adopted the three-part test of *In re Brunner*, 831 F2d 395 (2d Cir 1987). See also *In re Rosen*, 179 BR 935, 940 (Bankr D Or 1995).

Under *Brunner*, student loans are dischargeable only if:

1. The debtor cannot, based on current income and expenses, maintain a “minimal” standard of living for [herself or her] dependants if forced to repay the loan;
2. Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and
3. 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. *In re DeGroot*, 339 BR 201, 207 (D Or 2006).

Courts have developed demanding standards for each of *Brunner’s* three prongs. See, e.g., *In re DeGroot*, *id* at 207-15, for a summary and application of the three *Brunner* prongs.

### Recent Developments

#### A. 9<sup>th</sup> Circuit

##### 1. *Brunner’s* Second Prong

In *In re Nys*, 446 F3d 938 (9<sup>th</sup> Cir 2006), the question before the court was what kind of “additional circumstances” the debtor must prove to satisfy *Brunner’s* second prong. The lender argued that the debtor must prove “exceptional circumstances” beyond the mere inability to pay – such as disability or unyielding poverty. However, the *Nys* court held that the circumstances need be “exceptional” only in the sense that they demonstrate that the debtor would not be “able to maintain a minimal standard of living” now and throughout the repayment period if forced to repay the loan. *Id.* at 946. The 9<sup>th</sup> Circuit affirmed the BAP opinion, which had concluded that “additional circumstances” under

*Brunner* “need not be ‘exceptional,’ except in the sense that they are tenacious and demonstrate insurmountable barriers to the debtor’s financial recovery.” *In re Nys*, 308 BR 436, 446 (9<sup>th</sup> Cir BAP 2004).

#### 2. Partial Discharge

Does a court have the right to discharge a portion of a student loan if it finds that the debtor has the ability to pay some but not all of it? In *In re Saxman*, 325 F3d 1168, 1173-74 (9<sup>th</sup> Cir 2003), the court said yes. It rejected the “all or nothing” approach to nondischargeability of student loan debt. The *Saxman* court held that bankruptcy courts have the equitable power to discharge a percentage of a student loan so long as all three prongs of the *Brunner* test are met as to the portion of debt to be discharged. See also *In re Carnduff*, 367 BR 120, 128 (9<sup>th</sup> Cir BAP 2007), applying *Saxman*.

#### B. Private Loan Discharge

BAPCPA expanded the nondischargeability provisions of §523(a)(8) by adding subparagraph (B), which applies the “undue hardship” standard to “any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.” §523(a)(8)(B).

Generally, a “qualified education loan” means a loan used to pay the cost of attendance including tuition, fees, books, supplies, and transportation. Not much case law exists on this new provision. (*But see In re Rogers*, 374 BR 510, 515 (Bankr EDNY 2007), for an analysis of the section.) One “heads up” to the practitioner is that these “private label” loans are also not eligible for Ford Program (see below) consolidation since they are not government guaranteed.

### Tips

#### A. The Ford Program

The third prong of the *Brunner* test requires that the debtor make a “good faith” effort to repay the loan. Most courts have interpreted this prong to require that the debtor provide proof that he or she has utilized or applied for alternative repayment programs. One such program that has received significant court attention is the Department of Education’s Income Contingent Repayment Plan (ICRP) available through the William Ford Program. See 34 CFR §685 *et seq.* The Ford Program website (which includes an online loan calculator) is found at [www.ed.gov/DirectLoan](http://www.ed.gov/DirectLoan). Under ICRP, repayment is over a maximum of 25 years and is based upon adjusted gross income earned by the debtor in excess of the applicable poverty standards for the debtor’s family size. Payment is adjusted annually. Any student loan debt that is not paid at the end of the 25-year repayment period is discharged. One concern about ICRP is that debt discharged at the end of the payment plan will be treated as income and therefore taxable to the debtor. In an attempt to circumvent this issue, a number of courts (including our own) have entered judgments stating that any student loan obligation consolidated under ICRP but not paid after suc-

successful completion of the program is deemed discharged in the bankruptcy case. Again, *see DeGroot*, 339 BR at 215, for a discussion of ICRP's importance.

### B. Name the Guarantors

If you file an adversary proceeding to discharge a government guaranteed student loan it is critical to join both the lender and guarantor. If judgment is taken against the lender only and not the guarantor, the judgment is ineffective to discharge the student loan debt. *See, e.g., In re Wedell*, 329 BR 59 (WD Wa 2005). Admittedly, finding and naming proper parties can be a challenge in student loan litigation, but having "all of the sticks in the bundle" before the court is essential.

### C. Nonbankruptcy Administrative Discharge

Two administrative student loan discharge provisions which are sometimes of assistance to practitioners as an alternative to litigation are the "total and permanent disability program" and the "closed school" discharge. The total and permanent disability program is found at 34 CFR §682.402(c). It provides for a conditional discharge of the borrower's student loans if the borrower is totally and permanently disabled. "Total and permanent disability" is defined as a condition of a person who is unable to work and earn money because of an injury or ailment that is expected to continue indefinitely or result in death. The disability must be certified by the debtor's physician. The application form is relatively simple and should be considered as an alternative to litigation, if the facts fit.

The closed school discharge, 34 CFR §682.402(d), is available if a borrower could not complete the program of study for which the loan was intended because the school closed while the borrower was in attendance or within 90 days after the borrower withdrew from the school. The borrower must also have completed the course of study at another school.

that the debtors violated the automatic stay and that the sale was void, though the court granted an equitable lien to the lender for the amount of its loan to the bona fide purchaser.

The BAP reversed. It held that the automatic stay does not prohibit a debtor from voluntarily transferring an interest in property of the estate postpetition. According to the BAP, the remedy for the trustee would have been to avoid the transfer under §549, but in this case he could not do so because he failed to record the petition. Under §549(c), the trustee cannot avoid a postpetition transfer of real property under §549(a) to a good faith purchaser unless the trustee records the petition. The trustee appealed.

The Ninth Circuit affirmed, holding that federal law does not preempt California's statute protecting bona fide purchasers of real property against a prior unrecorded interest. Here, the prior unrecorded transfer was the transfer of title to the house from the debtors to their bankruptcy estate by operation of law upon filing of their bankruptcy petition. The court emphasized that the trustee could have protected the estate by recording the petition. The court further affirmed the BAP's holding that §362(a) is not meant to apply to actions by debtors, but to protect debtors from creditors racing to the courthouse to take actions against the estate. The section intended to protect creditors from actions by the debtors during the bankruptcy is §549, unavailable here because the trustee failed to record the petition.

### DIMINUTION OF THE ESTATE NOT A REQUIREMENT FOR AVOIDING A POSTPETITION TRANSFER UNDER §549

*In re Straightline Investments, Inc.*, 525 F3d 870 (9th Cir 2008)

Debtor operated a commercial sawmill. Following the filing of its chapter 11 petition, debtor filed a motion seeking to borrow up to \$500,000 from one of its creditors under §364(c). The bankruptcy court allowed the debtor to borrow only \$100,000. It specifically denied requests for additional amounts, including loans secured by the debtor's accounts receivable. Notwithstanding the court's order, the debtor subsequently entered into a factoring agreement whereby the factor paid the debtor about \$186,000 for debtor's accounts receivable with face value of about \$200,000. The factor collected only \$163,000 on the accounts receivable. After conversion of the case to chapter 7, the trustee prevailed in a §549 action to avoid the transfer of the accounts receivable as an impermissible postpetition transfer. The BAP affirmed.

On appeal, the Ninth Circuit affirmed, rejecting the factor's argument that the transfer was not avoidable because it did not diminish the estate. Resolving what it called an "open question in this circuit," the court declined to expand the "diminution of the estate" doctrine from its established application under §§547 and 548 to the realm of §549. Although the primary purpose of §549 is to allow the trustee to avoid postpetition transfers that deplete the estate, the

## NINTH CIRCUIT CASE NOTES

By **Matthew Goldberg**

K&L Gates

### AUTOMATIC STAY DOES NOT PROHIBIT POSTPETITION TRANSFERS OF ESTATE PROPERTY BY DEBTORS

*In re Tippett* \_\_\_ F3d \_\_\_ (9th Cir 2008), 2008 WL 4070690

Debtors lived in their home when they filed a chapter 7 petition in 2001. The trustee told the debtors that he intended to sell their residence, which had equity in excess of the claimed exemption. Debtors eventually received a discharge. In April 2003, without authority or disclosure, the debtors sold the house, which had not been abandoned by the trustee, to a bona fide purchaser. The trustee sued to recover the sale proceeds and quiet title. The bankruptcy court found

*Continued next page*

court stated, a showing that the transfer did, in fact, deplete the estate is not required to avoid a transfer under §549. Section 549 requires that the plaintiff prove **only** that the transfer took place postpetition and was not authorized by the Bankruptcy Code or the bankruptcy court.

The court also rejected the factor's argument that the transfer of the accounts receivable was protected from avoidance under §549 because it was made in the ordinary course of business under §363(c). Because the bankruptcy court had previously been asked to rule on the possibility of the debtor using its accounts as collateral for a DIP loan, and had denied the request, creditors would reasonably expect to receive notice of any attempt to transfer the receivables, taking the transfer out of the realm of §363(c), which allows for disposition of estate property without the need for notice and a hearing.

**INTENTIONAL BREACH OF CONTRACT  
CANNOT GIVE RISE TO A NONDISCHARGEABLE  
DEBT UNDER §523(A)(6) IN THE ABSENCE  
OF CONDUCT AMOUNTING TO A TORT  
UNDER STATE LAW**

*Lockerby v. Sierra*, 535 F3d 1038 (2008)

Sierra, an attorney, was sued by a former client, Lockerby, then entered into a settlement agreement whereby Lockerby would receive 50% of the attorney's fees from four of Sierra's pending personal injury cases. After making the agreement with Lockerby, Sierra decided that Lockerby's malpractice claim lacked merit and that he would intentionally breach the agreement. Sierra then filed a petition under chapter 7. Lockerby sued in bankruptcy court to have his claim based on Sierra's breach of the settlement agreement declared nondischargeable under §523(a)(4) and (6).

The bankruptcy court concluded that the claim failed under §523(a)(4) because the parties were not in a fiduciary relationship **with respect to the settlement agreement**, but ruled the debt nondischargeable under §523(a)(6) as arising from "willful and malicious injury" because of Sierra's subjective intent to harm Lockerby by breaching the settlement agreement. The district court affirmed.

On appeal, the Ninth Circuit reversed and remanded, holding that an intentional breach of contract cannot give rise to nondischargeability under §523(a)(6) unless it is accompanied by conduct that constitutes a tort under state law. The court relied on its decision in *In re Jercich*, 238 F3d 1202 (9th Cir 2001), for the correct analysis of a §523(a)(6) nondischargeability claim in a breach of contract setting. The two-part inquiry involves asking whether (1) debtor's conduct was tortious under applicable state law; and (2) debtor's conduct was willful and malicious.

The court rejected Lockerby's argument that conduct is tortious under §523(a)(6) whenever injury is intended or is substantially likely to occur. Instead, the standard is whether debtor's conduct actually constitutes a tort under state law.

The court noted that the public policy goal of providing debtors with a fresh start would be impeded if the debt resulting from any intentional breach of contract that is substantially certain to injure the nonbreaching party could be rendered nondischargeable as willful and malicious. Such a result is inconsistent not only with the notion of a fresh start, but also with the concept of efficient breach, which is built into our system of contract law.

**NINTH CIRCUIT ADOPTS STANDARD FOR  
REMOVAL OF A TRUSTEE UNDER §324**

*In re AFI Holding, Inc.*, 530 F3d 832 (9th Cir 2008)

Dye was appointed chapter 11 trustee in the case of Ponzi-scheme debtor AFI. In connection with her appointment, Dye filed a Declaration of Disinterestedness, in which she disclosed that she had, 3 years before the bankruptcy filing, represented an individual who sought to withdraw funds he had invested in a limited partnership affiliated with the debtor. Dye stated that though she had been in an adverse relationship to the debtor entity, she had not learned anything as a result of her prior representation that would put her in a conflicted position as trustee. What Dye failed to disclose was that she had been the personal bankruptcy attorney for Meister, who was employed by AFI at the time he filed for bankruptcy and who later became AFI's CFO. Dye also failed to disclose that the AFI investor she had previously represented was Meister's domestic partner, Eriksen, whom Meister had referred to Dye to represent Eriksen in his attempt to withdraw money from AFI.

When the AFI chapter 11 was converted to chapter 7, Dye was appointed trustee without objection. As chapter 7 trustee, Dye initiated litigation to recover about \$10 million from more than 150 parties who had received payments as part of the Ponzi scheme. Dye decided not to sue, however, either Eriksen, the investor she had earlier represented (who had in fact recovered money from the debtor) or Meister, the debtor's CFO whom she had previously taken through personal bankruptcy. Dye decided that any claims against Eriksen had been released as part of the settlement she had orchestrated between Eriksen and the debtor and that any claims against Meister for alleged wrongdoing were time-barred and had expired prepetition.

During discovery in the adversary proceedings, information came out regarding Dye's prior representation of Meister and Meister's connection to Eriksen. In response, Dye supplemented her Declaration of Disinterestedness to belatedly disclose her relationship with Meister, and Meister's relationship to Eriksen and the debtor. Dye claimed that the failure to disclose had been inadvertent.

A group of AFI investors filed a motion to remove Dye as trustee under §324. They alleged that she was not disinterested, had failed to disclose material facts revealing a conflict of interest, and had caused harm to the estate by choosing not to pursue claims against Meister and Eriksen. The US Trustee joined Dye in opposing the motion, main-

taining that Dye's decisions about not suing Meister and Eriksen should be protected by the business judgment rule and that Dye's inadvertent failure to disclose was not cause for removal under §324.

The bankruptcy court disagreed. It found Dye not to be disinterested based on her having an interest materially adverse to the interests of the estate, and removed her as trustee for cause. The BAP affirmed. Noting that the Ninth Circuit had yet to adopt a formal standard for removal of a trustee due to conflict of interest under §324, the BAP reviewed three approaches used by courts nationally in making such determinations. The first approach is to remove a trustee only when there is actual injury to the estate or fraud. The second approach is per se disqualification if an individual is determined not to be disinterested, without analyzing the effect of any such disinterestedness on the estate. The third approach applies a full panoply of events and elements test to determine whether a conflict of interest is materially adverse to the estate and creditors such that removal would be warranted.

The BAP adopted the "totality of the circumstances" test to affirm the bankruptcy court's removal of Dye. At the time Dye formed relationships with Meister and Eriksen, they were insiders of the debtor. Dye was in an adversarial position with respect to AFI when she represented Eriksen in his settlement with AFI. These facts were sufficient to create the appearance of impropriety, which itself is sufficient for a finding of lack of disinterestedness and thus cause to remove Dye under §324. The appearance of impropriety, the BAP noted, "tends to create disharmony and lack of confidence among the creditor body." 355 BR 139, 154. The BAP also gave weight to Dye's lack of disclosure, which, although she claimed it to be inadvertent, was not remedied by Dye for four years, and even then not until litigation related to the bankruptcy brought to light the previously undisclosed facts.

In this case of first impression, the Ninth Circuit praised the BAP's analysis and adopted it as the court's own. Though the issue of whether Dye was entitled to fees for the time she served as trustee before her removal was not before the court, the court did state that the fact that there was no clear standard in the Ninth Circuit for removal under §324 either when Dye filed her Declaration of Disinterestedness or when she was removed by the bankruptcy court would properly be a factor for the bankruptcy court to consider when it heard the issue of fees on remand.

### **"PROJECTED DISPOSABLE INCOME" EXPLAINED**

*In re Kagenveama*, 541 F3d 868 (9<sup>th</sup> Cir 2008)

The facts and holding of this decision on whether a chapter 13 plan satisfies §1325 are briefly noted in this issue's Consumer Committee Report.

## BAP CASE NOTE

**By Chris Parnell**

Farleigh Wada Witt

### **SOME BANKRUPTCY ASSET SALES NO LONGER FREE AND CLEAR**

*In re PW, LLC*, 391 BR 25 (9<sup>th</sup> Cir BAP 2008)

In *PW, LLC*, the Bankruptcy Appellate Panel curtailed a debtor's ability to sell assets free and clear of a junior lien outside the reorganization plan context. The issue on appeal was whether §363(f) permits a secured creditor to credit bid its debt for less than the aggregate value of all liens and purchase estate property free and clear of valid, nonconsenting junior liens. In a significant decision, the BAP held that it does not.

The debtor owned a large parcel of land in Burbank, California. The land was subject to a \$40 million first lien held by a hedge fund, and a second lien of \$2.5 million held by another creditor. Relying on §363(f)(5), the bankruptcy court affirmed the sale of the property to the senior lender (which credit-bid its claim as the stalking horse) free and clear of the second lien. The junior lienholder appealed.

The BAP ruled that neither §363(f)(3) nor §363(f)(5) supported the bankruptcy court's decision to strip off the second lien. The court noted that §363(f)(5) refers to a legal or equitable proceeding in which the lienholder could be compelled to take less than the value of the claim secured by the interest. The issue is not the amount of payment, but the existence of a qualifying proceeding:

The question is thus whether there is an available type or form of legal or equitable proceeding in which a court could compel [creditor] to release its lien for payment of an amount that was less than full value of [creditor's] claim. Neither the Trustee nor [debtor] has directed us to any such proceeding under nonbankruptcy law, and the bankruptcy court made no such finding.

391 BR at 45-46.

The BAP remanded to the bankruptcy court to determine whether a qualifying proceeding exists under nonbankruptcy law that would enable the court to strip the junior lien and allow the sale free and clear. Judge Markell acknowledged in the opinion that this interpretation leads to a relatively small role for §363(f)(5), but noted that such a narrow reading is appropriate given the other justifications for sales free and clear under §363(f), and considering the larger context of the Code.

With regard to the inapplicability of §363(f)(3), the BAP rejected the line of cases that import a broader §506(a) analysis into §363(f). The court noted the distinct language in the two sections, and held that §363(f)(3) is implicated only in cases where the sale price is more than the face amount of

all liens on the asset. The BAP joined those courts that hold that §363(f)(3) does not authorize a sale free and clear of a lienholder's interest if the price is equal to or less than the aggregate amount of all claims held by creditors holding an interest in the property.

The opinion is also notable for its holding that the appeal had not been rendered equitably or statutorily moot by the change of circumstances or the absence of a stay pending appeal. The court wrote:

An appeal is not equitably moot as to lien-stripping under §363(f) if reversing the lien-stripping raises neither the issue of complexity nor the issue of negative impact on third parties. That is the case here, and we hold that the lien-stripping aspect of the Sale Order is not equitably moot.

391 BR at 34. Thus, while the appeal as to the **sale** to the first creditor may be equitably moot, the **lien-stripping** issue was not moot because the court could attach the second lien to the property transferred to the senior creditor. Finally, the BAP held that the appellate review protection of §363(m) does not by its terms apply to lien stripping under §363(f).

## DISTRICT OF OREGON CASE NOTE

**By Donald H. Grim**  
Greene & Markley PC

### US TRUSTEE'S USE OF IRS STANDARDS TO EVALUATE DEBTOR'S EXPENSES IS SUBSTANTIALLY JUSTIFIED

*Lorenz v US Trustee*, 2008 WL 2329210 (D Or 2008)

The consumer debtor appealed the bankruptcy court's order denying attorney fees incurred in defending the UST's motion to dismiss, pursuant to the Equal Access to Justice Act. Debtor, with between \$500,000 and a million dollars in business debt, filed for chapter 7 bankruptcy. His wife, who contributed substantial amounts to the household income, did not file with him. At the time of filing his petition, debtor earned \$52,000 per year working for his brother.

Debtor and his wife were living on 14 acres, in a home with an \$800,000 mortgage. Debtor intended to retain the home, his horse, four late model vehicles on which he owed substantial amounts of money, a horse trailer with a live-in compartment, and a John Deere tractor. His wife intended to keep her nine horses.

Pointing to debtor's extravagant lifestyle, the UST moved to dismiss for abuse under §707(b)(3), arguing that this was not the type of debtor to whom Congress intended to provide a fresh start. To determine abuse, the court considers "(A) whether the debtor filed the petition in bad faith; or (B) [whether] the totality of the circumstances . . . of the

debtor's situation demonstrates abuse." The UST argued that if debtor's expenses were limited to IRS standards, more than \$596 per month would be available for creditors. Moreover, if both debtor and debtor's wife were limited to the IRS standards, the amount available to creditors would exceed \$2,656.

The bankruptcy court, declining the UST's suggestion, calculated the debtor's reasonable expenses by projecting mortgage payments and taxes based on a median-priced home in the Portland area. Using the median-priced home as a measure, debtor did not have sufficient income to make meaningful payments to creditors. While denying the motion to dismiss, the bankruptcy court found the UST's position was substantially justified, precluding debtor's claim for attorney fees under the Equal Access to Justice Act. The District Court affirmed.

## BANKRUPTCY COURT CASE NOTES

**By Donald H. Grim**  
Greene & Markley PC

### RELIEF FROM FILING MEANS TEST POSSIBLE IN CASE CONVERTED FROM CHAPTER 13

*In re Kellett and In re Corbin*, 379 BR 332  
(Bankr D Or 2007)

The debtor in each case filed a voluntary petition under chapter 13 and later converted to chapter 7. Both debtors argued they were not required to file Form B22A "Statement of Current Monthly Income and Means Test Calculation," in their converted cases because §707(b)(1) of the Code does not apply to cases converted to chapter 7 but only to cases initially filed under chapter 7: "a case **filed** by an individual debtor **under this Chapter**[" (Emphasis added.) The United States Trustee and the court disagreed.

The court concluded that the phrase "a case filed" is broad enough to include cases filed under other chapters and later converted to chapter 7. Accordingly, debtors in cases converted from chapter 13 to chapter 7 are **generally** required to prepare and file Form B22A. The court held, however, that under appropriate circumstances the requirement could be waived, and should be waived here. The UST had been alerted by debtors' motions, was on notice of the need to investigate debtors' financial circumstances, and the deadline for objections had passed.

### NEGATIVE EQUITY IS NOT PMSI – IN OREGON

*In re Johnson*, 380 BR 236 (Bankr D Or 2007)

The "hanging paragraph" of §1325(a)(5) prevents debtors from applying a cramdown procedure to vehicles purchased within 910 days prior to filing a bankruptcy petition, providing certain criteria are met. Courts do not agree on whether

this provision prevents cramdown of the negative equity carried into a transaction by the consumer's trade-in vehicle.

One group of courts addressing this issue holds that a creditor's purchase money security interest (PMSI) encompasses all components of a new vehicle purchase, including the negative equity in the trade-in. The second group holds that certain components of the financing, including the trade-in's negative equity, are not included in the PMSI.

The latter group is further divided on how to address the "partial" PMSI created by financing negative equity. Some courts follow a "dual-status" rule whereby the actual money used to purchase the vehicle retains its purchase money characteristics, while the negative equity, treated as non-purchase money, is subject to cramdown. Other courts follow a "transformation rule" whereby the purchase money characteristics of the entire transaction are lost – transformed into a non-purchase money security interest.

The court here held that financed negative equity (of a trade-in) is not a purchase money obligation under Oregon law. "Because a debt must be a purchase money obligation in order to give rise to a PMSI, a security interest based on a debt arising from financed negative equity, paying off antecedent debt, cannot be a PMSI." The court, following the dual-status rule, held that protection of the Hanging Paragraph applied only to the purchase money portion of the creditor's claim, preventing cramdown as to only that portion of the claim.

### **PERIODIC PAYMENTS MUST BE IN EQUAL MONTHLY AMOUNTS**

*In re Sanchez*, 384 BR 574 (Bankr D Or 2008)

Debtor's chapter 13 plan proposed to pay a "910 claim" creditor, one secured by a PMSI in debtor's motor vehicle purchased within 910 days of filing, as follows: equal adequate protection payments of \$50 per month until debtor's attorney's fees were paid in full, and thereafter, \$250 per month until the creditor was paid in full. The court held that the plan violated chapter 13's "equal monthly payment" requirement and could not be confirmed.

BAPCPA added provisions to the Bankruptcy Code to prevent debtors from back-loading payments to creditors in certain situations. In chapter 13, when a debtor proposes to pay a secured claim by way of "periodic payments," those payments must be in equal monthly amounts. §1325(a)(5)(B)(iii)(I). In addition, such payments must be in an amount sufficient to provide the creditor adequate protection during the period of the plan, where the debt's security is personal property. §1325(a)(5)(B)(iii)(II).

The court noted, but did not follow, a slight majority view permitting adequate protection payments in one amount followed by equal monthly payments of a higher amount. The majority view, observed the court, allows a chapter 13 plan to pay debtor's attorney on an expedited basis. Payment to debtor's attorney may be a "salutary

goal," but it is not supported by the language of the statute. In chapter 13, administrative expense claimants are entitled to be paid concurrently with, rather than before, non-administrative claims. §§507(a)(2); 1326(b)(1).

## **STATE COURT CASE NOTES**

**By Donald H. Grim**  
Greene & Markley PC

### **ETHICS CHARGES IN BANKRUPTCY PROCEEDING DISMISSED**

*In re Conduct of Cobb*, 345 Or 106, 190 P3d 1217 (2008)

The attorney (Attorney) first represented partnerships (Investors) which had invested in a tax avoidance enterprise. Later, for a limited period of time and for a limited purpose, he also represented the tax avoidance enterprise itself (MLP). (The facts of this case, discussed immediately below, are substantially abbreviated.)

Attorney's representation of Investors began in 1994, not surprisingly in a matter involving the IRS, and continued thereafter. In 1997, a separate group of investors filed involuntary petitions in bankruptcy for MLP. (An entity related to MLP had already initiated a chapter 11 proceeding.) MLP's counsel retained Attorney, as local counsel in Oregon, to assist MLP in attempting to dismiss the involuntary chapter 7 proceeding. Attorney agreed to the representation, believing that MLP's interests were aligned with those of Investors.

When the court issued an order for relief against MLP, Attorney, at the request of MLP and considering the potential conflict of interest, moved to withdraw as counsel for MLP. The bankruptcy judge denied Attorney's motion. Attorney wrote a letter to MLP and MLP's independent attorneys, advising them of the potential conflict of interest, and seeking their advice. Four and one-half months later, Attorney again moved to withdraw, citing his belief that the bankruptcy case would continue, and conflicts of interest would inevitably arise. Approximately one month later, the bankruptcy court granted Attorney's motion to withdraw as attorney for MLP. However, the bankruptcy estate had waived all conflicts posed by Attorney's continued representation of Investors. Attorney thereafter wrote to Investors seeking and obtaining their consent to his continued representation.

The Bar initiated this lawyer disciplinary proceeding. Two members of the three-member trial panel of the Disciplinary Board ruled that Attorney engaged in misrepresentation, dishonesty, and conduct prejudicial to the administration of justice, and violated his duty to call upon a client to rectify its fraud. The disciplinary Board panel unanimously rejected the Bar's conflict-of-interest charges. The Bar appealed.

The Supreme Court of Oregon, following a detailed analysis of each claim, dismissed the complaint in its entirety.

*Continued next page*

### AWARD OF ATTORNEY FEES WITHOUT EXPLANATION CONSTITUTES REVERSIBLE ERROR

*Hale v. Klemp*, 220 Or App 27, 184 P3d 1185 (2008)

Plaintiffs sued for trespass resulting from defendants' application of chemical herbicides next to plaintiff's organic farm. Defendants raised the affirmative defense of statutory immunity under ORS 30.930(4) and ORS 30.938. After plaintiffs voluntarily dismissed their claim, defendants moved for attorney fees as prevailing parties. Over plaintiff's objections, the court awarded defendants the full amount of the fees requested. The court did not, however, issue findings as to the reasonableness of the amount of the attorney fee awards.

The appeals court observed that a court must consider a number of statutory factors to determine the reasonableness of an attorney fee request, and is further obligated to make express findings as to the basis for its decision. First, a trial court **shall consider** at least eight factors in determining **whether** to make a discretionary award of attorney fees pursuant to a statute. ORS 20.075(1) (emphasis added). Secondly, whether or not the attorney fees requested are discretionary, when determining the **amount** of an award, the court **shall consider** all of the foregoing factors together with an additional eight, which include the reasonableness of the hourly rate and the time expended. ORS 20.075(2) (emphasis added). Lastly, the trial court must identify all of the relevant facts and legal criteria on which it relied in awarding attorney fees. *McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 185, 188, 957 P2d 1200 (1998).

The trial court in this case did not provide an explanation either for how it disposed of plaintiffs' objections or for how it decided that defendants' attorney fees were reasonable. Such an omission constituted reversible error.

### ORDER SETTING ASIDE DEFAULT JUDGMENT IS APPEALABLE

*Mary Ebel Johnson PC v Elmore*, 221 Or App 166, 189 P3d 35 (2008)

Plaintiff filed this action for approximately \$15,500 in unpaid attorney fees. When defendant did not answer within 30 days, plaintiff served on defendant a 10-day notice of intent to seek an order of default. Defendant's attorney responded, stating that a response would be filed within 10 days. On the ninth day, defendant's attorney tendered a settlement offer that included a copy of an answer and counterclaims which defendant would wait 7 days to file so that plaintiff could consider the settlement. Defendant did not seek an extension of time to file an answer.

Plaintiff did not reply to defendant's offer, but instead, pursued an *ex parte* order of default, without disclosing to the court defendant's outstanding settlement offer and unfiled answer. The trial court entered an order and judgment of default. Defendant moved to set aside the default order, based in part on mistake, inadvertence, surprise, or

excusable neglect under ORCP 71 B(1). Finding no evidence of prejudice to plaintiff, the court set aside the default judgment. Plaintiff appealed, and defendant moved to dismiss the appeal, arguing that the court's ruling was not appealable under ORS 19.205.

Appeals are no longer limited to **final orders** affecting a substantial right. "An order . . . after a general judgment is entered and that affects a substantial right, . . . may be appealed in the same manner as provided . . . for judgments. ORS 19.205(3). An order affects a substantial right if the right is something that is due to a person by just claim, legal guarantee, or moral principle[.]" *Bhattacharyya v. City of Tigard*, 212 OrApp 529, 535, 159 P3d 320 (2007).

The appeals court here observed that the order setting aside the default judgment affected a substantial right because in order to pursue her claim to judgment, plaintiff must incur the cost of litigation. Therefore, the order setting aside the default judgment is appealable. The court of appeals affirmed the trial court's setting aside of the default judgment.

## CONSUMER COMMITTEE REPORT

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 8<sup>th</sup> Floor conference room at the United States Bankruptcy Court, 1001 SW 5<sup>th</sup> Avenue, Portland, Oregon 97204. Our next meeting will be on November 13, 2008, at 4:30 pm. The committee is chaired by Laura Donaldson, who can be reached at 503-277-3004 or [laura@kunidonaldson.com](mailto:laura@kunidonaldson.com). To learn more about the Committee or to be added to the mailing list, please contact Ms. Donaldson.

### June 19, 2008 Meeting

Pamela Griffith of the US Trustee's Office announced Operation Malicious Mortgage, the crackdown on mortgage fraud by the US Attorney. Three or four debtors in Oregon bankruptcy cases have been indicted for mortgage fraud.

Griffith said there has only been one debtor audit since the US Trustee's Office resumed debtor audits, and that only one in 1000 debtors will be audited.

Local Bankruptcy Form 1305 (the attorney fee disclosure form) asks if there is a written fee agreement for payment of attorney fees in chapter 13. Counsel for debtors must attach a copy of the written fee agreement.

Cary Gluesenkamp reported on the National Association of Consumer Bankruptcy Attorneys (NACBA) convention. Twelve of the 39 Oregon NACBA members were among the 1500 attendees. At the convention, Judge Perris spoke on current case law. There is a multi-million dollar industry in which discharged debt is sold. The purchaser tries to collect it when a debtor later attempts to buy a house or car, if the debt is not noted as discharged on the credit report. The

2009 and 2010 NACBA conventions will be in Chicago and San Francisco, respectively. One benefit of NACBA membership is free access to the Fastcase legal research service.

Chapter 13 Trustee Brian Lynch discussed the holdings of the recent *Kagenveama* decision, 541 F3d 868 (9<sup>th</sup> Cir 2008): (1) "projected disposable income" (§1325(b)(1)(B)) means "disposable income" as defined in §1325(b)(2), projected over the "applicable commitment period"; (2) the "applicable commitment period" (§1325(b)(1)(B)) is a temporal concept (based not on the amount of money to be paid but on the number of months the law mandates for the plan); and (3) if projected disposable income is zero or negative, the "applicable commitment period" is irrelevant. The debtor's disposable income in *Kagenveama* was a negative number, but she proposed voluntary payments of \$1,000 per month for 36 months. The bankruptcy court and the 9<sup>th</sup> Circuit rejected the *Kagenveama* trustee's argument that a 60-month plan should be required because of the debtor's above-average income.

Lynch noted that §1329 is the modification statute, and that if income changes from the current monthly income (CMI), debtors can modify the plan, increase or decrease the payments or plan period, or specify a shorter commitment period.

Lynch said the analysis in *In re Demonica*, 345 BR 895 (Bankr ND Ill 2006), has been discontinued, and that Wayne Godare's online calculator will do the math for feasibility issues.

The Chapter 13 Trustee will scrutinize the Current Monthly Income (CMI) and Form B22C, and will object to claimed expenses for surrendered property, but will not oppose surrendering a car and buying another one. Ann Chapman cited *In re Oliver*, 2006 WL 2086691 (Bankr D Or 2006), to argue that expenses related to surrendered items on Form B22C should be allowed.

The Chapter 13 Trustee will look at Schedule J for expenses, and go with what is listed if it seems reasonable, but will take exception to large secured payments and "toys" like boats, personal watercraft, ATVs, and motorcycles.

Discussion of various chapter 13 situations ensued, and the Trustee said that chapter 13 cases with only attorney's fees being paid in the plan tend to indicate bad faith, and that a separate, preferred classification for nondischargeable, nonpriority debts is precluded by *In re Smallberger*, 157 BR 472 (Bankr D Or 1993), *aff'd*, 170 BR 707 (D Or 1994).

Wayne Godare of the Chapter 13 Trustee's Office stated that the IRS standards change periodically, and counsel should keep current with the standards. At the §341(a) meeting a form is given to debtor's counsel comparing the trustee's and debtor's numbers for the "best interest" test of what amount must be paid to unsecured creditors.

The 6<sup>th</sup> Circuit BAP decision *In re Davis*, 386 BR 182 (6<sup>th</sup> Cir BAP 2008), held that if a mobile home qualifies as personal property (not real property) under state law, debts secured by the mobile home may be crammed down.

The Chapter 13 Trustee's Office will issue a standard language paragraph for cramdown of negative equity on vehicle loans under the hanging paragraph.

The IRS is considering filing motions to lift the automatic stay to collect nondischargeable tax debt by levying on nonexempt property.

## September 11, 2008 Meeting

Judge Perris reported that the chapter 13 miscellaneous matters day will be on the Meet Me line effective January 1, 2009, and that adjourned chapter 13 phone confirmation hearings will be held at 1:30 pm on Thursdays.

Judge Brown reminded us that the standard language on attorneys' fee applications in chapter 13 cases has not changed, and that language added to the approved application form needs to be emphasized. The court is looking for an appropriate font and format for text added to the application by the court when signing the order.

Chapter 13 Trustee Brian Lynch announced the chapter 13 administration fee will be 7.5% as of October, and disbursement will take place on the 23<sup>rd</sup> or 24<sup>th</sup> of the month.

Lynch also said his office will closely examine short sales of real property. Investors have been bypassing his office in purchasing property from debtors. In the future the debtor will have to make a case to the court for why a short sale is in the debtor's best interest. Judge Perris agreed with this approach.

After *In re Kagenveama*, the Chapter 13 Trustee's Office is not likely to approve added plan language that expands on the holding of *Kagenveama*, other than provisions for payment of not less than a stated total amount rather than payments for a fixed time period. Lynch believes that such a plan can be modified up or down based on circumstances of the debtor under §1329(a).

Lynch will look at *In re Oliver*, 2006 WL 2086691 (monthly payments on surrendered items or avoided liens may be deducted in calculating disposable income) in the wake of *Kagenveama*.

The Chapter 13 Trustee's Office will not object to payment of claims after relief from stay has been granted, and step payments should not be put in the wage orders sent to employers; the Chapter 13 Trustee's Office is supposed to watch for the step-up in payments over the life of the plan.

Todd Trierweiler informed attendees about possible claims by a homeowner's association for post-petition fees from the time of the bankruptcy filing up until the home is surrendered or foreclosed.

Kelly Brown asked Brian Lynch what should be done when someone is inaccurate with their tax withholdings on the B22 form - Lynch replied that the proper amount is what the debtor **should** be withholding.

The next meeting will be Thursday, November 13, 2008, at 4:30 pm. All consumer bankruptcy practitioners, trustees, judges, and others interested are welcome.

Oregon State Bar  
Debtor-Creditor Section  
16037 SW Boones Ferry Rd  
PO Box 231935  
Tigard, OR 97281-1935

Presorted Standard  
US Postage  
**PAID**  
Portland, OR  
Permit No. 341



*22nd Annual*  
**Northwest  
Bankruptcy  
Institute**

**Dirty Debt—Dealing with Real Estate  
Issues Inside and Outside of Bankruptcy**

*Cosponsored by the Debtor-Creditor Section of the  
Oregon State Bar and the Creditor-Debtor Section of  
the Washington State Bar Association*

**Friday, April 10 &  
Saturday, April 11, 2009**

**Hilton Vancouver Washington**

*www.osbarcle.org*  
**OSB CLE Service Center: (503) 431-6413  
or toll-free in Oregon (800) 452-8260, ext. 413**