Oregon State Bar Debtor-Creditor Section

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

Newsletter

Volume XXVIII, Number 3 Debtor-Creditor Section, Oregon State Bar Fall 2009

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COMMENTS FROM THE CHAIR

By Thomas M. Renn

This newsletter is the last one that you will receive in a hard-copy version sent through the U.S. mail. Beginning with our next newsletter, we have decided to change to electronic delivery of the newsletter. This decision reflects both the cost-cutting benefits of electronic delivery and the changing habits of attorneys in this electronic age. The newsletter format will remain the same; it will be available in a version you can print from your own computer. We will continue to send printed copies to those without internet access. One of your Section member benefits is the newsletter, and we remain committed to producing a quality product for you. We keep back issues of the newsletter on our website in the members-only section: http://osb dc.org/secure/ membersonly.htm. Please let me know if you have trouble accessing this password-protected portion of the website. Your user id and password remain the same as before.

When you read this, we will have completed our Annual Meeting and CLE program in Eugene at the University of Oregon School of Law. The Annual Meeting Committee and the CLE Committee continue to do a superb job with that event. If you would like to help with the planning for next year's event in Portland, or if you have other ideas about possible Section CLE programs, please contact Teresa Pearson or Susan Ford. This year at our Annual Meeting, the Section presented our William N. Stiles Award of Merit for significant contributions to the Section and its members to Dick Slottee, who joins our twelve prior Award recipients. The large award plaque with the names of all honorees will be on display on the 8th Floor of the Bankruptcy Court. Special thanks to Sussman Shank for covering the costs related to the upgrade of the plaque including the new name plates.

At last February's Saturday Session, we identified a number of goals to improve the practice of bankruptcy law and have since created action plans to address the goals. The Section membership has worked with the Court, the US Trustee's office, and the trustees to implement the action plans. We created a committee to draft guidelines, including possible rules and forms, for chapter 11 §363 sales of assets. The committee members – Teresa Pearson, Tom Huntsberger, Judge Frank Alley, Judge Randy Dunn, David Foraker, Vivienne Popperl, and Jeanette Thomas – have worked through several drafts and will soon have one ready to discuss. Please contact any of the committees members if you would like to review and comment on the guidelines..

We also have a group of Section members working on issues that will be helpful to new lawyers as well as to others in our practice areas. Laura Donaldson chairs this group, which is both gathering information and creating resource lists for referrals, contact information, chapter 11 resources, materials with practice tips, and other reference tools. Once collected, we will post the information on the Section's website (www.osb-dc.org) and make it available in other forums including links from the bankruptcy court's website. If you have any suggestions or would like to help with this project, please contact Laura Donaldson.

As part of that effort, we are working on a bankruptcy supplement to the

Continued next page

Federal Bar Association's handbook on federal judges. The handbook contains detailed information on practice and procedures specific to the individual federal judges. We are currently modifying the questions for the judges so that they are tailored to bankruptcy practice. Once complete, the supplement will be available either with the federal judges' handbook or as a separate book. We are also working more closely with the Federal Bar Association in other areas such as new lawyers and continuing legal education. We expect to continue this work into next year and the future. If you are interested in working with the Federal Bar Association, please let me know.

The Section's other committees continue to do great work for the Section. Those committees and their chairs are as follows: Annual Meeting – Gabi Sanchez; Continuing Legal Education – Brandy Sargent; Consumer Bankruptcy – Laura Donaldson; Legislative – David Hercher; Newsletter – Debbie Guyol; Northwest Bankruptcy Institute – Hon. Trish Brown, John Durkheimer, Carolyn Wade; Pro Bono Clinic – Valerie Tomasi; Saturday Session – Tara Schleicher, Loren Scott; CARE Program – Laura Walker, Becky Kamitsuka; Website – Tom Renn; and Public Education – Hon. Albert Radcliffe. You can find out more about the committees on the Section website. Please contact the chair of any committee if you would like to be more involved with its work. Thanks to the committee chairs and members and to the members of the Executive Committee for all of their hard work during this past year. There is always new work to be done, and you are welcome to join the committees at any time during the year.

My term as Section Chair ends at the end of this calendar year. It has been a busy and a rewarding year for me. Thank you for the opportunity to serve and for your faith in me. I have met and worked with many outstanding members of our Section and the Bar, and I hope to continue our work in the future.

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NOTICE

ELECTRONIC NEWSLETTER DISTRIBUTION

This is the last issue of the Newsletter that will be mailed to you as a paper copy. The Executive Committee of the Debtor-Creditor Section has decided to distribute future issues of the Newsletter electronically. The Committee made this decision only after giving the question much thought and seeking input from Section members.

Beginning with the Winter 2010 issue, the Newsletter will be distributed electronically in printable format.

Because the Oregon State Bar email service does not allow for attachments, each section member with an email address on file with the Bar will receive an email notification with a link to a pdf version of the current Newsletter, which can be printed or saved to a computer. The pdf file will look the same as the Newsletter you currently receive by mail.

All issues of the Newsletter are available in the members-only section of our website: http://osb-dc.org/secure/membersonly.htm.

Debtor-Creditor Newsletter

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

THE *IN PARI DELICTO* DOCTRINE: A DEFENSE OF ENORMOUS POTENTIAL SIGNIFICANCE TO THIRD-PARTY PROFESSIONALS PROVIDING SERVICES TO INSOLVENT/BANKRUPT COMPANIES

By Matthew A. Goldberg, Kell Alterman & Runstein, LLP

The doctrine of *in pari delicto*, Latin for "in equal fault," has become an increasingly common component of bankruptcy litigation in which trustees and unsecured creditors' committees, among others, seek to recover damages from third-party professionals—including attorneys—who provided prepetition services to insolvent or financially troubled entities. This article provides an overview of the doctrine, including its elements and exceptions, with examples drawn from a few recent appellate decisions.

Procedurally, *in pari delicto* (hereinafter IPD) is raised as an affirmative defense to claims asserted by, for example, a bankruptcy trustee against a law firm for harms allegedly caused by the defendant to the debtor entity before its bankruptcy filing. The law firm defendant, in this example, would raise IPD as an affirmative defense based on the principle that the plaintiff trustee should be prohibited from recovering damages because of the wrongdoing of the prepetition debtor itself.

This example highlights two essentials of the IPD defense in the bankruptcy context: (1) the harmed entity must have contributed to causing the harm it suffered; and (2) the entity's culpability will be imputed to the actual plaintiff in the lawsuit, i.e., the bankruptcy trustee.

The latter essential – the imputation of the prepetition entity's wrongdoing to the trustee – derives from the principle that, under §541, "the trustee stands in the shoes of the debtor and can take no greater rights than the debtor [itself] had." *Mosier v. Callister, Nebecker & McCullough*, 546 F3d 1271, 1275 (10th Cir 2008) (citation omitted). Section 541 also prevents the trustee from avoiding a defense that could have been raised against the debtor outside of bankruptcy. *Id.* (citation omitted).

The debtor's contribution to the prepetition harm it suffered is at the heart of the IPD doctrine. To successfully raise IPD as a defense, a defendant must demonstrate: (1) that plaintiff was "an active, voluntary participant in the unlawful activity that is the subject of the suit"; and (2) that plaintiff's wrongdoing must have been "at least substantially equal to that of the defendant." *BrandAid Marketing Corp. v. Biss*, 462 F3d 216, 218 (2d Cir 2006) (citations omitted).

A Closer Look: A Successful Invocation of the IPD Defense

In the *Mosier* case, the defendant law firm successfully invoked IPD as a defense to bar the trustee's claims against the law firm, which included malpractice, breach of fiduciary duty and fraud.

Debtor was a nonprofit corporation that provided a fitness program to school districts as part of an arrangement whereby the districts initially would outlay funds for fitness equipment but would ostensibly receive those funds back from debtor over the life of the program. In reality, the "program" was a Ponzi scheme: any funds repaid to the districts came from the contributions of other districts that had signed up for the program more recently. *See Mosier*, 546 F3d at 1273.

During its operating period, debtor was advised by two law firms successively. The first firm, not named as a defendant in the trustee's suit, "repeatedly warned" debtor that it risked losing its tax-exempt status and could face civil and criminal penalties. The first firm provided this advice to debtor's CEO, Chairman, and various members of debtor's board of directors. *Id.* at 1273-74.

Debtor then sought the advice of a second law firm, the one the trustee sued. It was undisputed that the second firm never warned debtor of its potential liability for operating a Ponzi scheme. *Id.* at 1274. Unsurprisingly, debtor's unsustainable scheme led debtor into insolvency and then bankruptcy. The trustee sued the second law firm in state court for failing to advise debtor that its "business model" was an illegal Ponzi scheme.

The defendant law firm removed the case to federal district court and in a motion for summary judgment argued that IPD barred the trustee from bringing the claims against the firm. The district court agreed, ruling, as a matter of law, that "any wrongdoing on behalf of the Defendants was substantially less than that of [debtor]." As a result, the court continued, "the Trustee, standing in the shoes of [debtor], is barred from bringing this action under the doctrine of [IPD]." *Mosier v. Callister*, Nebecker & McCullough, 2007 WL 2973264 at *3 (D. Utah October 9, 2007).

Mosier on Appeal: The Adverse Interest Exception

The Adverse Interest Exception (hereinafter AIE) is the main exception to the IPD defense. To qualify for the AIE, the trustee must prove that the bad acts of individual directors, officers and/or shareholders should not be imputed to the debtor company because the corporate agents acted in their own self-interest and not for the benefit of the debtor. See, e.g., *Thabault v. PriceWaterhouseCoopers*, LLP, 541 F3d 512, 527 (3d Cir 2008) (citation omitted).

The trustee in *Mosier* appealed the district court's ruling barring the trustee's claims on the basis of IPD to the Tenth Circuit. The trustee argued on appeal that the AIE should

have applied because the debtor's CEO and Chairman had acted to further their own self-interests rather than to benefit the debtor nonprofit corporation.

The Tenth Circuit rejected this argument, affirming the district court, for two reasons. First, the court found that the debtor had in fact benefitted from the conduct of the CEO and Chairman, including having its nonprofit status illegally perpetuated. Second, the court noted that the CEO and Chairman were not alone in directing debtor's misconduct, specifically noting a board meeting at which seven directors in addition to the CEO and Chairman were present to hear the opinion of debtor's first law firm that the company's activities might well be illegal. Under these circumstances, the court reasoned, the AIE was not available.

Another Closer Look: A Successful Use of the Adverse Interest Exception

(and Introducing the Sole Actor Exception to the Adverse Interest Exception)

In the *Thabault* case, plaintiff was Vermont's insurance commissioner. The state had taken over a failing insurance company and was pursuing claims on its behalf. Plaintiff sued the CEO of the failed company for fraud and breach of fiduciary duty, alleging that he benefitted personally at the expense of the company. Plaintiff also sued the predecessor to accounting firm PriceWaterhouseCoopers ("PWC") for negligent auditing practices, among other claims. A jury trial in New Jersey's US District Court resulted in a $183 million verdict against PWC. *Thabault*, 541 F3d at 515-18.

On appeal to the Third Circuit, PWC argued that the CEO's behavior should be imputed to the company, which would bar the commissioner's claims under IPD. The court recognized that since the CEO's conduct allowed the company "to continue past the point of insolvency, his actions cannot be deemed to have benefitted the corporation." *Id.* at 529. Accordingly, the AIE did apply, allowing the commissioner to overcome the IPD defense.

PWC argued, in spite of this, that the court should apply the so-called Sole Actor Exception (SAE) exception to the AIE. Under the SAE, the conduct of a sole, controlling shareholder may be imputed to the company, even if the shareholder's actions benefitted the shareholder and not the company – a situation that would otherwise implicate the AIE. *Id*.

The company's CEO was not the sole shareholder, however. Though he was the owner, along with his wife, of 65% of the company's stock, the remainder was publicly held. This, the court held, was sufficient to defeat application of the SAE to the AIE, resulting in affirmance of the district court's ruling that the CEO's actions could not be imputed to the company for the purposes of PWC using IPD to defeat the claims against it – *i.e.*, PWC was stuck with the $183 million verdict. *Id.*; *see* 541 F3d at 518.

Conclusion

As with any doctrine where there are exceptions to exceptions to the doctrine's application, attempting to utilize the IPD doctrine can be a convoluted and unpredictable affair – especially because, as illustrated above, IPD-related inquiries are often extremely fact-intensive. That said, the doctrine is here to stay and, in today's economic climate of ever diminishing deep pockets, is one we are likely to see arise in increasing numbers of insolvency- and bankruptcy-related lawsuits.

One final note: Based on my research, the Ninth Circuit does not appear to have addressed IPD head-on as have the Second, Third, and Tenth Circuits, along with a few others. I predict, however, that it is only a question of when and not if.

RETIREMENT PLANS AT RISK OF SEIZURE

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

Bankruptcy practitioners should be aware of a new threat to their clients' exempt retirement accounts. When three elements – (1) qualified retirement accounts, (2) dischargeable federal taxes, and (3) unrecorded federal tax liens – come together in a bankruptcy proceeding, the Internal Revenue Service ("IRS") has a new approach to collecting tax liabilities.

On August 25, 2006, the IRS Office of Chief Counsel quietly released Chief Counsel Advisory ("CCA") 200634012, 2006 WL 2460482, to IRS offices nationwide – and thus placed the retirement plans of thousands of taxpayers at new risk of IRS seizure. The CCA asserts a continuing IRS interest in ERISA-qualified retirement plans of post-bankruptcy debtors, regardless of whether the IRS filed a notice of federal tax lien before the bankruptcy petition. The IRS's reasoning is that retirement plans are excluded from the bankruptcy estate as a matter of law. Therefore a "secret" IRS lien is not affected by the bankruptcy proceeding. Bankruptcy practitioners must consider the IRS's position when they advise debtors having both (1) unpaid federal tax liabilities, and (2) ERISA-qualified retirement plans.

PRELIMINARY EXPLANATIONS

a. Federal Tax Liens

Federal tax liens arise as a matter of law when a tax is assessed and goes unpaid. IRC §6322. Such liens attach to all of the taxpayer's "property and rights to property, whether real or personal." IRC §6321. The lien continues until the liability is satisfied or the statute of limitations on collection expires. IRC §6322. It is well established that a debtor's retirement plan is not protected post-discharge, from a **filed** federal tax lien. *See In re Isom*, 901 F2d 744 (9th Cir 1990). Valid **filed** tax liens, if attached to a taxpayer's property before the date of the bankruptcy petition, survive discharge and may be enforced postpetition. *Id.*

b. Exempt Versus Excluded Property

When a debtor files a bankruptcy petition, a bankruptcy estate is created made up of "all legal or equitable interests of the debtor in property as of the commencement of the case." Bankruptcy Code (the "Code") §541(a). (Statutory references herein are to the Code unless otherwise noted.) Certain property of the debtor may be **exempted** from the bankruptcy estate. §522. Exempt property first enters the bankruptcy estate and is later removed from it. In contrast, property **excluded** from the bankruptcy estate never enters the estate in the first place. §541(b).

c. IRS's Position

The IRS argues that under *Patterson v. Shumate*, 504 US 753 (1992), retirement accounts are automatically **excluded** (not exempted) from the bankruptcy estate. Because excluded property never enters the bankruptcy estate, the Code's avoidance powers do not affect the unperfected tax liens attached to those accounts. "Since excluded property never becomes property of the estate it never becomes subject to the trustee's power to avoid statutory tax liens or the debtor's power to avoid statutory liens by exempting the property from the bankruptcy estate." CCA 200634012. "Accordingly, a tax lien which attaches to the excluded property before the taxpayer files a petition in bankruptcy is unaffected by the bankruptcy action and the IRS may proceed to enforce either its statutory tax lien, or its tax lien secured by a filing of a Notice of Federal Tax Lien, against that property." *Id.*

In my opinion, the IRS's analysis is wrong.

DISCUSSION

a. Retirement Plans May Be Exempted from Bankruptcy Estate

Both federal and state statutes allow retirement accounts to be exempted, rather than excluded, from the bankruptcy estate. First, retirement accounts may be exempted to the extent those funds are "exempt from taxation under §401 . . . of the Internal Revenue Code of 1986." §522(b)(3)(C). Second, that same category of retirement funds may also be a federal exemption under §522(d)(12). Third, Oregon statutes describe retirement plans that may be exempt from the bankruptcy estate as, "a pension plan and trust, including a profit sharing plan, that is described in sections . . . 401(k), . . . of the Internal Revenue Code." ORS 18.358(2)(d)(A).

1. Exemption Statutes Apply Without Regard to §541

Section 522(b)(1) unambiguously provides that the exemptions in §522 apply regardless of anything to the contrary in §541: "**Notwithstanding section 541** of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph 2 or, in the alternative, paragraph (3) of this subsection." (Emphasis added.)

The phrase "Notwithstanding section 541" shows clear congressional intent that §522(b) may apply to the listed property regardless of §541. To contend otherwise ignores the plain language of the statute. Further, retirement funds may be exempted "to the extent that those funds are in a fund or account that is exempt from taxation under section 401 . . . of the Internal Revenue Code of 1986." §522(b)(3)(C) (emphasis added). Reading §§522(b)(1) and §522(b)(3)(C) together compels the conclusion that individual debtors may exempt qualified retirement accounts from their bankruptcy estates. The same logic applies to state exemptions.

2. Debtors Are Entitled to at Least One Federal Exemption for Retirement Accounts

All individual debtors may apply a federal exemption to certain retirement plans, whether or not the debtor resides in an opt-out state. §522(b)(3)(C). *Collier on Bankruptcy* explains why:

> To expand the protection of certain tax-exempt retirement plans, Congress created as part of the 2005 Act a category of exemption rights that may be exercised by the debtor even if the debtor's state has opted out of the federal exemption scheme. In addition to exemptions under the laws of the debtor's state, the debtor is entitled to exempt under section 522(b)(3)(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code.

4 *Collier on Bankruptcy* ¶522.10[8] (15th ed. rev. 2006).

The IRS's position would render §522(b)(3)(C) superfluous as to 401(k) retirement plans. This is so because, according to the IRS, ERISA-qualified 401(k) plans are excluded under §541(c), and unavailable to the estate for exemption. Congress would not have provided the §522(b)(3)(C) exemption only to render it meaningless with §541(c), however. Congress must have intended that 401(k) plans may be exempted from the estate.

3. Retirement Plans May Be Either Exempted or Excluded from the Bankruptcy Estate

A 401(k) retirement plan that is exempt from taxation and ERISA-qualified fits squarely within the descriptions provided for **exempt** property in §522(b)(3)(c), §522(d)(12), and ORS 18.358(2)(d)(A). It may also fit the description of **excluded** property in §541(c)(2). The right of debtors to either exempt or exclude retirement accounts from their bankruptcy estate avoids conflict between these sections. Further, to the extent a conflict might exist between the exclusionary language of §541(c)(2) and the exempt ing language of §522(b)(3)(C), the exempting language of §522(b)(3)(C) should prevail. This is so because §522(b)(3)(C) is the later and more specific statute, and a later more specific statute should control over an earlier more general statute. *See, e.g., United States v. Romani*, 523 US 517, 530 (1998).

4. Congress Created a Presumption of Exemption For Retirement Plans

BAPCPA amended §522 to provide a presumption that certain qualifying retirement funds are exempt from the bankruptcy estate. Section 522(b)(4)(A) provides:

> (4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:
>
> (A) If the retirement funds are in a retirement fund that has received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, **those funds shall be presumed to be exempt from the estate.**

(Emphasis added.) It is inconceivable that Congress would have created a federal exemption for opt-out states, and a presumption of **exemption**, for property that is excluded from the estate as a matter of law.

b. *Patterson* Does Not Support the IRS's Position

Nothing in *Patterson* holds that, as the IRS contends, ERISA-qualified retirement plans **must** be excluded from the estate. Rather, "[A] debtor's interest in an ERISA-qualified pension plan **may** be excluded from the property of the bankruptcy estate pursuant to section 541(c)(2)." *Patterson v. Shumate*, 504 US at 765 (emphasis added). In fact, the Court in Patterson consistently used the word "may" throughout its opinion. The word "may" means that the debtor's exclusion of an ERISA-qualified retirement plan is a choice, not a requirement.

In addition, the *Patterson* Court made numerous references to retirement accounts that could qualify as either exempt or excluded. The fact that ERISA-qualified retirement plans may be excluded pursuant to §541(c)(2) does not render §522(d)(10)(E) superfluous. *Id.* at 762. "[S]ection 522(d)(10)(E) exempts from the bankruptcy estate a much broader category of interests than §541(c)(2) excludes." *Id.* "Even those courts that would have limited §541(c)(2) to state law acknowledge the breadth of the §522(d)(10)(E) exemption." *Id.* at 763 n.6. Significantly, footnote 6 to the opinion acknowledged that §522(d)(10)(E) exempts both qualified and unqualified pension plans and that the exemption applies to non-ERISA plans as well as qualified ERISA plans. Such references show the Court was well aware that retirement accounts may qualify to be either exempt or excluded from the bankruptcy estate.

Whether to exclude or exempt an ERISA-qualified retirement plan from the bankruptcy estate is a decision for the debtor. The Ninth Circuit has so held: "The exclusion [of an ERISA-qualified retirement plan subject to section 541(c)(2)] is permissive rather than mandatory . . . ." *In re Rains*, 428 F3d 893, 905 (9th Cir 2005) (citing *Patterson*, 504 US at 765). The Ninth Circuit BAP followed the *Rains* holding in *In re Cogliano*, 355 BR 792, 801 (9th Cir BAP 2006): "[T]he Ninth Circuit made clear in *In re Rains* . . . that exclusion of a debtor's interest in an ERISA-qualified plan is permissive, not mandatory."

The notion that all ERISA-qualified retirement plans are automatically excluded from a bankruptcy estate and therefore beyond the reach of the Code's lien avoidance powers is inconsistent with controlling authority. A debtor may choose to exempt, rather than exclude, retirement funds from his or her estate. Exempt property is protected from recovery by the trustee and creditors under the Code. It should be equally clear that when a debtor chooses to exempt rather than exclude a retirement account, unperfected tax liens upon such property are extinguished when the tax liability is discharged by §522(b)(2)(C).

c. Unfiled IRS Tax Liens May Be Discharged In Chapter 7

Section 522(c) governs the treatment of exempt property within and after a bankruptcy case. It provides: "Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case, except – . . . (2) a debt secured by a lien that is – . . . (B) a tax lien, notice of which is properly filed . . . ."

In other words, federal tax lien notices must be filed before the petition date to avoid a discharge as to exempt property. The unavoidable reverse implication is that exempt property is freed from unperfected liens after discharge.

The IRS agrees with this proposition: "[A] debtor may avoid a statutory tax lien on his exempt property by exempting the property from the estate, but he may not avoid a tax lien where a Notice of Federal Tax Lien has been filed." IRS CCA 200634012.

d. The IRS's Position Ignores Congressional Intent

Congress has consistently expressed its intent that retirement funds be protected in bankruptcy. Such concern was noted in *Patterson*: "Our holding also gives full and appropriate effect to ERISA's goal of protecting pension benefits." 504 US at 764. Further, "This Court has described that goal as one of ensuring that 'if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it.'" *Id.* at 764-765, (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 US 359, 375 (1980)).

"If exceptions to this policy are to be made, it is for Congress to undertake that task." *Id.* at 765 (quoting *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 US 365, 376 (1990)). Congress has not done so. It is ironic that the IRS relies on the holding of *Patterson* to circumvent the very protection acknowledged by the Court in that case.

CONCLUSION

The IRS's position ignores the plain meaning of several statutes, and the underlying Congressional intent to protect retirement funds in bankruptcy. While the IRS does stand in

a different position than other creditors, it is not entitled to ignore protections that Congress expressly provided. Plainly stated, the Code allows retirement plans to be exempted from a bankruptcy estate. Once exempted, the retirement accounts become subject to the provisions of §522(b)(2)(C) and are protected, after discharge, from unfiled federal tax liens.

NINTH CIRCUIT CASE NOTES

By Ivy B. Grey, Davis Wright Tremaine LLP

LIABILITY FOR GUARANTY REVIVED WHEN CREDITOR LOSES OR PAYS A SETTLEMENT IN A PREFERENTIAL TRANSFER CASE

In re SNTL Corporation, 571 F3d 826 (9th Cir 2009)

In a per curiam opinion, the Ninth Circuit Court of Appeals adopted the Ninth Circuit BAP opinion as its own. The BAP answered yes to two questions: (1) May an unsecured creditor include attorneys' fees incurred postpetition but arising from a prepetition contract as part of its unsecured claim; and (2) Is a debtor-guarantor's previously released liability of a third party's obligation revived when the creditor compromises a preference action against it?

Debtor had guaranteed its affiliates' obligations to creditor. The affiliates defaulted. A settlement agreement among affiliates, debtor, and creditor provided that creditor would receive $164 million to satisfy a $180 million obligation and debtor would be released from its guaranties. The agreement included a provision revoking the release if the settlement payments were found to be voidable or preferential transfers. Debtor and its affiliates filed bankruptcy; the trustee brought a preference action against creditor; and creditor returned $110 million to settle the preference action. Creditor then claimed debtor's liability under the guaranties was revived.

The BAP agreed with dicta in a Tenth Circuit case that "guarantors must make good on their guaranties following avoidance of payments previously made by their principal debtors." *Lowrey v. Mfrs. Hanover Leasing Corp.*, 6 F3d 701, 704 (10th Cir 1993). The BAP also followed the reasoning of a Sixth Circuit decision in *Wallace Hardware Co., Inc. v. Abrams*, 223 F3d 382, 408-09 (6th Cir 2000), that when the "obligee returns a payment as part of a settlement preference avoidance action, the guarantor is not discharged of his obligation to pay the debt" and that the preference action is not a voluntary return of funds. The BAP found that this approach economically and judicially efficient.

The trustee argued that the attorney fee claim was not allowable because creditor invoked prepetition remedies postpetition. The BAP disagreed, holding that creditor had a prepetition contingent claim and that, though the removal of the contingency occurred postpetition, this claim should not be disallowed merely because of timing. "It is well-established that a claim is ripe as an allowable claim in a bankruptcy proceeding even if it is a cause of action that has not yet accrued," citing *Cool Fuel, Inc., v. Bd. of Equalization*, 210 F3d 999, 1007 (9th Cir 2000), so long as the claimant can reasonably contemplate the claim's existence. *Id.*

The Ninth Circuit follows this "fair contemplation" test for determining when a claim accrues. Since the creditor clearly contemplated the revival of the debtor's guarantee by providing for it in its settlement agreement, the claim for attorneys' fees is allowable.

It had been established bankruptcy law that creditors could not recover attorneys' fees for litigating issues particular to bankruptcy law. The US Supreme Court reversed this line of cases, leading to a disagreement among circuits on the narrower question of whether an unsecured creditor could recover attorneys' fees incurred postpetition. The majority of courts hold that an unsecured creditor cannot assert these claims because §506(b) and §502(b) disallow them.

The BAP rejected the majority view and ruled that the text of §506(b) does not limit unsecured claims; rather, §506(b) merely defines the portion of the claims to have secured status. Section 506(b) is irrelevant to the allowability inquiry.

Section 502(b) determines allowability. The Bankruptcy Code broadly defines a claim to include unliquidated, unmatured claims that may be estimated. "So long as the right to collect the fees existed pre-petition, the fact that the fees were actually incurred during the post-petition period is not relevant to the determination of whether the creditor has an allowable pre-petition claim for the fees." *In re New Power Co.*, 313 BR 496 (Bankr ND Ga 2004). Thus the claim for attorneys' fees could not be disallowed on the basis of these statutes. The case was remanded to the bankruptcy court for a determination of whether other grounds existed for disallowing the attorney fee claim.

ASSIGNEE OF DEBT HAS SAME RIGHTS AS ORIGINAL CREDITOR IN NONDISCHARGEABILITY CLAIM

In re Boyajian, 564 F3d 1088 (9th Cir 2009)

Creditor brought an adversary proceeding against chapter 7 debtors seeking a declaration that the judgment debt owed was nondischargeable under §523(a)(2)(B)(iii) as having been obtained by a materially false written financial statement. Creditor was not the original lender, but the assignee of the judgment.

The bankruptcy court granted summary judgment to debtors, reasoning that creditor itself had not relied on debtors' financial statements. The BAP reversed, ruling that §523(a)(2)(B)(iii) allows an assignee to stand in the shoes of its assignor to pursue an exception to discharge based on the

assignor's reliance on a materially false financial statement. The Ninth Circuit affirmed the BAP's ruling and remanded.

Analyzing both the text of the statute and the Congressional intent, the court found that Congress intended the laws of assignment to remain applicable in the bankruptcy context. The Court rejected the Debtors' argument that the middleman analysis in *General Electric Capital Corp. v. Bui*, 188 BR 274 (Bankr ND Cal 1995), should apply because an assignee does not have the same relationship to a debtor as a downstream purchaser. Further, a rule that an assignee has no recourse against a debtor would allow dishonest debtors to "receive a discharge through the fortuity that their creditor chose to assign the debt."

ATTORNEY FEES AND COSTS MAY NOT BE AWARDED DIRECTLY AGAINST PLAINTIFF'S ATTORNEY FOR HARASSING OR FRIVOLOUS FDCPA SUIT

Hyde v. Midland Credit Management, Inc., 567 F3d 1137 (9th Cir 2009)

The trial court held plaintiff and plaintiff's attorney jointly and severally liable for the attorney fees and costs of prevailing defendant in a Fair Debt Collection Practices Act case. The basis for the award was 15 USC §1692k(a)(3), which provides for an award of attorneys' fees and costs to defendant in an action brought in bad faith and for the purpose of harassment.

Plaintiff's attorney appealed and the Ninth Circuit reversed. Having no pertinent FDCPA legislative history to turn to, and no cases on point in this circuit, it turned to the fee-shifting provision in the False Claims Act, which Congress "borrowed" for the similar FDCPA provision. That provision has been held not to allow fee awards against attorneys. The court further noted the general presumption that an attorney is not liable for fees unless such liability is clearly spelled out in the statute.

REPAYMENT OF DEBTOR'S 401K IS NOT REPAYMENT OF SECURED DEBT AND IS PRESUMPTIVELY ABUSIVE

In re Egebjerg, 574 F3d 1045 (9th Cir 2009)

Chapter 7 debtor claimed that payments on a loan from his 401(k) account constituted either "monthly payment on account of secured debts" or "[o]ther [n]ecessary [e]xpense" that could be deducted for purposes of calculating his disposable monthly income. The bankruptcy court ruled that the 401(k) loan was a "secured debt" that could be deducted from income, but dismissed the petition on the totality of the circumstances for abuse under §707(b)(3).

The debtor appealed directly to the Ninth Circuit, which affirmed the bankruptcy court's dismissal while rejecting its reasoning. The Ninth Circuit rejected the bankruptcy court's conclusion that the repayments were payments on a "secured debt." Rather, it agreed with the "vast majority" of courts that have held a "debtor's obligation to repay a loan from his or her retirement account is not a 'debt' under the Bankruptcy Code," because the debt is essentially a debt to himself or herself. 574 F3d at 1049.

In ruling that this repayment was also not an "other necessary" expense and therefore allowable, the court said both that the payments were not necessary (debtor could ask the 401(k) administrator to treat the loan as an early withdrawal) and that they "are simply not of the same kind and character" as expenses allowed by the IRS. 574 F3d at 1052. The court also rejected the bankruptcy court's "special circumstances" reasoning – that the 401(k) loan repayment could be included because debtor was approaching retirement age and would need the retirement funds to protect his future health and welfare. Because the debtor did not rebut the presumption of abuse under §707(b)(2), it was not necessary to resort to the §707(b)(3) totality of circumstances analysis.

CREDIT CARD COMPANY DISCLOSURE IS INEFFECTIVE UNDER TILA IF BURIED IN FINE PRINT BEARING NO CONSPICUOUS RELATIONSHIP TO FINANCE CHARGES

Barrer v. Chase Bank USA, N.A., 569 F3d 1106 (9th Cir 2009)

Borrowers brought class action suit against Chase, alleging that the credit card agreement with amendment did not provide adequate disclosure under the Truth in Lending Act (TILA). Specifically, borrowers claimed that Chase did not adequately disclose its ability to engage in "adverse action repricing" – that is, raising the interest rate based on information on a customer's credit report rather than on events of default under the agreement. The US District Court for the District of Oregon granted Chase's motion to dismiss and borrowers appealed.

The Ninth Circuit reversed. It agreed with Chase that it had disclosed the events that would trigger a higher interest-rate in its credit agreement in compliance with TILA and that it was not necessary to list every possible factor because the factors determining creditworthiness were infinite and ever-changing. The court found that Chase had failed to make the disclosure clearly and conspicuously, however. The Finance Terms section outlining the interest rate was sufficient, but the other reasons for raising the interest rate were hidden in fine print, "five dense pages" after the Finance Terms section, and were not referred to in the Finance Terms section. They were therefore insufficiently conspicuous. Because Chase could not show that as a matter of law it had made clear and conspicuous disclosure of the interest rates it could use, borrowers stated a claim under TILA and could proceed with their case. Judge Graber dissented in part, writing that she would have found Chase's disclosures substantively inadequate as well as insufficiently clear and conspicuous.

MARRIAGE DISSOLUTION ORDER CONCLUSIVELY ESTABLISHES REASONABLY EQUIVALENT VALUE DEFEATING TRUSTEE'S FRAUDULENT TRANSFER CLAIM

In re Bledsoe, 569 F3d 1106 (9th Cir 2009)

In the marital dissolution of debtor and defendant, a default judgment divided the marital assets largely in favor of defendant. Debtor later filed for bankruptcy. The trustee sought to avoid the transfer made pursuant to the dissolution judgment on a constructive fraud theory under both §544 and §548 of the Code. That is, he argued that the unequal distribution of assets was a fraudulent transfer under both state and federal law because the debtor failed to receive reasonably equivalent value for her share of the assets.

The bankruptcy court and district court both rejected the trustee's claims, and the Ninth Circuit affirmed. The trustee did not bring any claims for extrinsic fraud, and Oregon law requires extrinsic fraud for a collateral attack on a judgment. Further, the dissolution judgment conclusively established reasonably equivalent value, so the transfer could not be reversed under federal law. Judge O'Scannlain concurred in the result but disagreed with the majority's analysis of the §548 claim.

BAP CASE NOTE

By Chris Parnell, Farleigh Wada Witt

SURETY WITH CONTINGENT CLAIM AGAINST DEBTOR HAS STANDING TO SEEK RELIEF FROM AUTOMATIC STAY

In re Kronemyer, 405 BR 915 (9th Cir BAP 2009)

Debtor was a court-appointed guardian until 2003. After termination of his guardianship, the successor conservator filed objections to debtor's final accounting and a surcharge request. It also filed a criminal complaint against debtor, which resulted in a criminal conviction and a restitution order. Debtor then filed a chapter 11 petition that was converted into a chapter 7. The estate for which he had acted as a guardian did not file a proof of claim, but the surety that had issued two fiduciary bonds did, based on its potential liability to the estate. The surety then moved for relief from stay to proceed on its surcharge request.

The bankruptcy court granted relief from the stay and the debtor appealed, asserting that the surety (which had a contingent claim against the debtor) lacked standing to bring the motion, particularly since the beneficiary of the suretyship had not filed a proof of claim in the bankruptcy case.

The BAP affirmed. It agreed with the bankruptcy court that because the surety had a claim against the debtor, the surety was a creditor under §101 of the Code – even though the claim was contingent as of the petition date and the date of the motion for relief from stay. Its status as creditor meant the surety had standing as a party in interest. The BAP rejected debtor's focus on whether the surety's contingent claim was allowed or disallowed as not relevant to the issue of standing.

STATE COURT CASE NOTES

By Jessica L. Shoup, Greene & Markley, PC

FORMER CLIENT'S CONTRACT AND TORT CLAIMS AGAINST ATTORNEY SUBJECT TO CLAIM PRECLUSION

G.B. v. Morey, 229 Or App 605, 215 P3d 879 (2009)

Attorney represented Former Client in a civil lawsuit. Former Client fired Attorney shortly before Former Client's case settled. Attorney sued Former Client to foreclose on a lien for attorney fees under the parties' contingent fee agreement. Former Client denied liability for Attorney's fees and asserted 15 affirmative defenses but no counterclaims. The court granted Attorney's motion for summary judgment. It held that Attorney had substantially performed his duties under the contract and awarded him his full attorney fees and interest on his lien claim. The court also noted it lacked jurisdiction over any ethical claims, and dismissed them without prejudice.

Former Client then sued Attorney, alleging contract and tort claims arising from Attorney's representation of Former Client. Former Client pleaded the same matters and relied on the same facts it had pleaded as affirmative defenses in the attorney fee action. Attorney moved for summary judgment based on claim preclusion. The doctrine of claim preclusion forecloses a party that has litigated a claim against another from further litigation on that claim on any ground or theory of relief that the party could have litigated in the first instance. Former Client argued that because there are no compulsory counterclaims in Oregon, claim preclusion should not apply. The court agreed Oregon has no compulsory counterclaims, but noted an exception when matters are pleaded originally as defenses and are used in a later case as a basis for affirmative relief.

The court affirmed the grant of Attorney's motion for summary judgment and held Former Client was precluded from relitigating the claims.

ATTORNEY FEES AWARDED TO PREVAILING PARTY ON EACH CLAIM

Rogers v. RGIS, LLP, 229 Or App 580, 213 P3d 583 (2009)

Former Employee sued Employer alleging violations of wage and hour laws. Employee prevailed on a couple of her claims and obtained a general judgment for $2,630.00. The circuit court dismissed the remaining claims. Each party sought attorney fees. The court awarded Employee $880 in attorney fees and Employer $180,854.09 in attorney fees. Both parties appealed. The Court of Appeals affirmed: each party was entitled to attorney fees on the claims in which it had prevailed, all fees awarded were reasonable, and there was no abuse of discretion.

The court held that Employee had not complied with ORCP 68 in that although the case involved multiple claims Employee had not provided a sufficiently detailed statement of fees to determine the time spent on each claim. The trial court's award of $880 (one-third of Employee's damage award) based on the attorney fee agreement was reasonable. Employer had prevailed on all ORS chapter 653 claims raised by Employee and could seek an award of attorney fees.

Employee argued that Employer was not entitled to attorney fees because it had not prevailed in the whole action. The court disagreed, noting that pursuant to ORS 20.077, "Attorney fees are to be awarded on a claim-by-claim basis." The prevailing party is the party who receives a favorable judgment on the claim. In actions involving multiple claims, ORS 20.077 requires that the court "determine the prevailing party on each claim and award attorney fees accordingly." 229 Or App at 585 (citing *Robert Camel Contracting, Inc. v. Krautscheid*, 205 Or App 498, 503, 134 P3d 1065 (2006), and *Beggs v. Hart*, 221 Or App 528, 537, 191 P3d 747 (2008).

CONSUMER BANKRUPTCY COMMITTEE

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. The next meeting will be held on November 19. The committee is chaired by Laura Donaldson, who can be reached at 503-227-2004 or laura@kunidonaldson.com. To learn more about the Committee or to be added to the mailing list, please contact Ms. Donaldson.

MEETING OF JUNE 4, 2009

By Laura Donaldson, Kuni Donaldson LLP

Judge Perris and Brian Lynch, Chapter 13 Trustee, spoke of the need for a clear and straightforward path to mortgage modification in chapter 7 and chapter 13 cases. A committee was formed and it met on May 29, 2009, to discuss how the bankruptcy bar could both identify impediments to voluntary mortgage modifications and create procedures to streamline modifications in bankruptcy cases.

The impediments discussed in chapter 7 were: (a) when do trustees want to be involved in the process; (b) when is the property no longer property of the estate (abandonment); and (c) reaffirmation agreement and automatic stay issues. In chapter 13, the impediments discussed were: (a) the automatic stay (are stipulated orders necessary to grant relief just for the purpose of loan modifications); (b) are loan modifications "new debt" for purposes of Paragraph 2 of the Order Confirming Plan (incurring obligations or encumbering property without the trustee's consent); (c) the necessity for plan modifications if mortgage arrears are removed from a plan and wrapped into a new loan, possibly providing debtors with more disposable income; and (d) whether a modification entered into during a chapter 13 case is enforceable post-bankruptcy and if so, what formalities are necessary.

The committee discussed streamlining the process to make it akin to nonjudicial relief from stay procedures, where the forms would clearly state whether relief had been granted and whether the trustee had objected to liquidation of property. How to efficiently provide notice and reduce costs in bankruptcy were discussed. Members of the bar were encouraged to provide additional ideas to the committee on ways to reduce costs to debtors and creditors in processing loan modifications in bankruptcy.

Brian Lynch spoke about how the new translation services were working at §341(a) meetings. Previously, Debtors would bring relatives to assist in translating questions at these hearings. The translation services provide a neutral approach to questions in both chapter 7 and chapter 13 cases. Pam Griffith of the US Trustee's office reported that these services have had positive feedback from chapter 7 trustees and the debtors' bar as well.

Brian raised concerns about redaction of materials on tax returns submitted to his office via email. He urged counsel to remember to redact the return properly on all pages as required by the Code. He also reminded debtors' counsel to follow up with their clients who have not provided his office with prior year tax filings as required; if they do not, his office will move to dismiss for noncompliance. He then discussed sale/refinance provisions to complete chapter 13 plans. Many plans that reach their 60 month completion date rely on sale/refinance provisions to complete, but homes have lost value due to the market crash. Brian urged the debtors' bar to pay attention to these cases and start early to help their clients meet plan completion requirements.

Pam Griffith reported that the US Trustee's office is reviewing mortgage servicer proofs of claim and plans to pursue any servicer that does not have a copy of the note securing its claim, or that has made other statements in the

proof of claim without support. Pam suggested that this could have some impact on debtors' lawyers, whose clients may need to confirm information about payments, etc., and suggested it would be helpful for debtors' lawyers to work as liaisons with the US Trustee's office and report any questionable claims that they receive.

The meeting concluded with Richard Parker's report on the NACBA convention and upcoming events that the group is sponsoring. Student loan treatment as a secured debt payment in chapter 13 was also discussed based upon the recent Ninth Circuit opinion in *In re Coleman*, 560 F3d 1000 (9th Cir 2009).

MEETING OF SEPTEMBER 17, 2009

By Rosemary McIntosh,
Todd Trierweiler & Associates

Resource Committee

Laura Donaldson is looking for volunteers to participate in a support system for new lawyers. Wayne Godare of the Chapter 13 Trustee's Office is inundated with calls and questions. The idea is to create a designated list of people to whom new (or new to bankruptcy) practitioners can go for advice or questions. This list will be posted on the Debtor-Creditor Section website. Ann Chapman suggested that the Trustee's office offer classes for people getting into chapter 13 practice and educate on a collective basis rather than individually. Todd Trierweiler mentioned the education seminars (next set for November 14 and 16) at the pro bono clinic. Those interested can come in for two hours and work with a mentor. Please volunteer.

Original Signatures

Judge Dunn reported that in at least one situation, the attorney for the debtor may have electronically filed the Statement of Financial Affairs (SOFA) and schedules without obtaining original signatures. Obtaining original signatures is important to the attorney's reputation and the consequences of failing to do so are severe. Pam Griffith clarified that the original signature for anything signed under penalty of perjury (including amended schedules) or a declaration must be kept for 10 years. The document the debtor signed must match the document that was filed (date, etc.). Ann Chapman said the only time her office transmits unsigned documents is where they seek post-confirmation modifications of a chapter 13 plan. Once approved by the trustee, the amended plan is uploaded for filing with an original signature.

U.S. District Court Historical Society Board

Judge Brown announced that she is on the US District Court Historical Society Board. She doesn't believe there has ever been a debtor-creditor lawyer on the board. There will be board openings this fall. If anyone is interested, let Judge Brown know. The Board offers free CLEs, is responsible for historical documents, provides oral history reports, and puts on lectures about famous Oregon cases, among other things. This is a great way to interact with District Court and Circuit Court judges.

Recent 9th Circuit Decision - *In re Dumont*

Judge Dunn spoke about *In re Dumont*, 581 F3d 1104 (9th Cir 2009), which recently came down. It was a 2-to-1 decision ruling that ride-through does not exist post-BAPCPA. You may still have state law rights independent of bankruptcy law, however.

Judge Dunn also mentioned that the question of what happens when a debtor enters into a reaffirmation agreement, the court does not approve it and debtor's attorney does not sign off on it, is still open, with no opinion at the Circuit or BAP level in the Ninth Circuit. He believes there are some Bankruptcy Court decisions outside of the Ninth Circuit. For a summary of this case, you may visit Andy Toth-Fejel's website: www.blsforattorneys.com.

Lien Stripping: Contested Matter or Adversary Proceeding?

Ann Chapman requested clarification from the judges on whether avoiding second or third mortgages can be done as contested matters or adversary proceedings. Judge Dunn said attorneys in Bend have been doing this by adversary proceeding. Judge Perris said the same. Judge Snyder is doing both.

Judge Dunn is comfortable with the default procedure if the creditor doesn't respond within the mandated time period. The consensus is that it can be done by motion so long as proper notice is provided.

General advice: Whether filed as an adversary proceeding or contested matter, understand that it is not effective until discharge. If the case is dismissed the lien survives. Also, make sure you clear up all real property records. Once the order is granted, it must be recorded with the county. Otherwise, you won't get clear title for the client.

Mortgage Modifications

General Order 09-3 was entered and forms were promulgated to help debtors modify mortgage loans during the pendency of bankruptcy. One impediment to modification in chapter 7 is that the property remains property of the estate. Under the new procedure, anyone who wants to object to the trustee abandoning the debtor's principal residence must do so at least five days before the §341(a) meeting. If no one objects, then either the debtor or the mortgage creditor can ask for abandonment at or after the 341. One must include in the order that the parties are working out a loan modification on a voluntary basis. If voluntary on both sides it will not constitute a violation of the automatic stay.

Tom Renn added that providing documentation and notifying the trustee in advance of the §341 meeting will

allow the trustee to sign off at the 341. The Trustee will not have to wait 20 days or send notice to the clerk's office. Abandonment is effective when filed with bankruptcy court.

In a chapter 13, mortgage modification requires trustee consent. Wayne Godare said the Chapter 13 Trustee's office gets many requests for post-confirmation modifications. The concern is that scammers take advantage of debtors. Some companies charge $3,000 to $4,000, when the modification ought to be done at no charge. Further, if debtors spend money on mortgage modification, the questions of where the money came from and whether there is more money that could be distributed to creditors arise. Wayne added that approval now must be in the order confirming the chapter 13 plan. If you have problems getting the modification approved, these may be the reasons. Appropriate requests are approved quickly - within a day or so.

Judge Perris pointed out that arrearages that were to be paid through the plan may now be tacked on to the end of the mortgage, thereby changing the structure of the plan.

Laura Donaldson asked about the three-month trial periods offered by many companies. Laura's concern is debtors who seek to modify mortgage loans as a result of a drop in income. If the plan is modified before what the loan modification will accomplish is known, the client could incur more cost, especially if the plan must be modified again later. Wayne Godare said any drastic change in the monthly mortgage payment could have adverse effects on the plan, so his office likes to be kept informed. Again, additional money could be freed up to distribute to creditors. Also, the plan may need modifying if there is a substantial decrease in mortgage payment.

Todd Trierweiler recommended Clear Point, originally a consumer counseling outfit in Portland. They modify loans free of charge and will walk people through the process.

Judge Dunn said, as a practical matter, since the creditor seems to lose the first two sets of documents sent, it is best to create a paper trail. Prepare a transmittal letter showing when and where you sent the documents. Then if the court later has questions, you are able to put the onus where it belongs, on the creditor.

Todd Trierweiler mentioned that the main reason for the new procedure is to put creditors at ease – a so-called "comfort order" whereby creditors can continue with the modification process even though clients are in an active bankruptcy case. Creditors' concerns about stay violations are abated and trustees are not required to go through the long process of abandonment.

Redaction of Confidential Information

Wayne Godare said his office still receives many documents containing SSNs and names of minors via mail and email. Such information sent via email is most problematic because it is "out there." Should you transmit such information, you will get a curt letter or email in response. Watch not only for the first and second pages of tax returns but also attached schedules.

Tom Renn added that the same thing happens with chapter 7 cases, but trustees do not always notify offenders. The same issue come up in claims audits – creditors attach personal and confidential info. The clerk will not protect the information. If you want it protected, you must file an amended claim and request that the original be redacted or sealed.

Pamela Griffith is addressing the claims issue and will send a letter to the offender. This happens often with hospitals and credit unions. Anyone who represents this type of creditor should make them aware of the issue.

Chris Coyle from Vanden Bos & Chapman added that ODR tax returns have a bar code which makes it easy to decipher personal information. You also need to redact this bar code.

National Association of Chapter 13 Trustees Academy

Wayne Godare suggested that those interested should become members at $275 per year. The website has features such as the chapter 13 of the day. To sign up or get more information, go online to www.considerchapter13.org

Chapter 7 Trustee Panel

Pamela Griffith announced upcoming changes to the panel. Michael Grassmueck resigned; he will not take new cases but will continue to administer his current caseload. Amy Mitchell is off rotation through the end of this year. She will also continue to administer her current caseload. Bob Morrow will retire and take his last rotation at the end of December; he will continue to administer his caseload as of that time. He is the longest-serving standing chapter 7 trustee. Details of a retirement celebration will be announced at a later date.

Circle of Love CLE?

Kelly Brown proposed that CLE credits be offered for Circle of Love meetings because of the value of the discussions and materials. He suggested that we form a three-person committee to, among other things, determine what the Oregon State Bar would require in terms of written materials. Volunteers should contact Kelly. Tom Renn reminded us that are plenty of credits are available at the Debtor-Creditor Section's annual meeting.

Federal Judges Handbook

Laura Donaldson and Margot Lutzenhiser are working on this manual. Tom Renn is also involved. The supplement will talk about what our bankruptcy judges would like to see in the courtroom – for example, courtroom etiquette. Volunteers are needed to help formulate questions for the judges.

Meet-Me Line

Judge Brown is irritated with the system. Her main complaints are background noise such as barking dogs, trains, and birds; and Muzak that plays on hold. We were reminded that this system is a convenience for us and we must treat it as though we are in court; the same rules of decorum apply. We should remind our clients of the same. Second, Judge Brown now offers meet-me line confirmation hearings for both the morning and afternoon sessions for those who have an order confirming plan in the chapter 13 trustee's hands the day before the scheduled hearing date. Keep in mind that the trustee delivers OCPs to the Court mid-morning on Wednesdays. If you submit your OCP after that time, you should assume that you will be required to be in court.

Federal Bar Association

Tom Renn mentioned that not many of us actually belong to the FBA. It holds a monthly luncheon series at the University Club which started September 17. It would be beneficial for us to get to know other federal judges. If you are interested in helping with any of the overlap issues, such as CLEs and the federal judges handbook, or to otherwise connect with the federal bar, let Tom know.

Thanks to Bret Knutson, Ian Wallace, Leah Hudson, and Jeff Totten for providing food and refreshments for today's meeting.

You Too Can Be An Author

If you would like to write an article, or would like to read an article on a particular topic, please contact:

Deborah S. Guyol

5161 NE Wistaria Drive, Portland, Oregon 97213
Tel: 503-284-6951 / Email: Dguyol@aol.com

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.

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

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

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

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

CARE COMMITTEE REPORT

The Debtor-Creditor Section launched a local chapter of the CARE (Credit Abuse Resistance Education) program in 2006. The program, founded by Judge John Ninfo of the US Bankruptcy Court in Rochester, New York, provides education on credit cards to high school students. Additional information on the program is available at www.careprogram.us.

During the 2008-2009 school year, committee volunteers and bankruptcy judges made presentations to over 3,023 students in approximately 80 classes at 27 locations, detailed in the chart below.

The CARE committee held receptions in Portland and Eugene to acknowledge the volunteers who have contributed to the success of the program. The Portland reception was held on May 27, 2009, at the US Bankruptcy Court. The Eugene reception was held on May 21, 2009, at the Oregon Electric Station. Each volunteer received a plaque in appreciation of the time and energy devoted to the program. We would especially like to thank the circuit court judges who participated in the program, Charles Carson, Debra Vogt and Charles Zennache´.

The CARE program continues to expand. We try to add new schools each year and increase the number of students who hear the presentation. We maintain a list of volunteers and contact them as needed to meet the requests from schools. If you would like to become a CARE volunteer, contact Laura Walker in Portland at 503-224-3092, email lwalker@cablehuston.com, or Becky Kamitsuka in Eugene at 541-465-6330, email becky.kamitsuka@usdoj.gov.

High School	Date	No. of Presentations/Students	Speaker(s)
Portland Area:			
Canby High School	02/25/09	6 classes / 60 students	Judge Brown & Mike Blaskowsky
Clackamas Middle College	11/13/08	2 classes / 35 students	Valerie Tomasi & Dan Rosenhouse
Cleveland High School	06/05/09	1 class / 12 students	Vivienne Popperl
Coffee Creek Correctional Institution	06/30/09	1 class / 39 students	Judge Perris & Gary Scharff
Grant High School	01/23/09	1 class / 30 students	Cathy Travis & Gary Scharff
Jefferson High School	05/20/09 05/21/09	1 class / 18 students 3 classes / 45 students	Judge Dunn, Dan Rosenhouse & Brad Brown
Jesuit High School	02/09/09	1 class / 275 students	Gary Scharff
Lakeridge High School	05/29/09	1 class / 20 students	Judge Perris & Russ Garrett
LaSalle High School	12/08/08	1 class / 100 students	Gary Scharff & Judge Perris
Merlo Station High School	11/14/08 05/29/09	1 class / 20 students 1 class / 15 students	Judge Brown, Richard Anderson & Dan Rosenhouse
OES	02/05/09	1 class / 80 students	Dan Rosenhouse & Judge Dunn
Tigard High School	12/03/08 12/04/08	2 classes / 60 students 2 classes / 65 students	Cathy Travis & Debbie Guyol Carla McClurg & Debbie Guyol
Tualatin High School	10/27/08 10/28/08	3 classes / 105 students 2 classes / 60 students	Jack Fisher & Gary Scharff Brian Lynch, Michael Connelly,
	03/30/09 03/31/09	3 classes / 150 students 2 classes / 60 students	Martin Meyers, Carla McClurg, Laura Walker, Matt Arbaugh & Cathy Travis
Vancouver Unitarian Church	10/19/08	1 class / 20 students	Judge Brown & Gary Scharff

High School	Date	No. of Presentations/Students	Speaker(s)
Eugene Area:			
Churchill High School	02/11/09 02/13/09	1 class / 225 students 1 class / 225 students	Judge Radcliffe, Judge Carlson & Becky Kamitsuka
Crow High School	12/02/08	2 classes / 45 students	Judge Carlson & Don Churnside
Junction City High School	11/05/08	1 class / 30 students	Judge Carlson, Judge Vogt & Becky Kamitsuka
Newbridge High School	04/29/09	4 classes / 60 students	Judge Alley, Matthew Sutton & Bob Swierk
North Eugene High School	11/12/08 03/17/09 04/14/09	1 class / 100 students 3 classes / 90 students 2 classes / 60 students	Gail Geiger, Kim Covington, Julia Manela, Stephen Behrends, Jim Files, Cassie Kellog, Ron Stick & Megan Livermore
Roseburg High School	04/17/09	1 class / 40 students	Kim Covington
Sheldon High School	09/22/08 10/20/08	1 class / 18 students 1 class / 18 students	Judge Radcliffe & Becky Kamitsuka
Springfield High School	09/23/08 02/27/09 10/14/08 10/16/08 10/24/08	3 classes / 100 students 3 classes / 90 students 3 classes / 100 students 2 classes / 60 students 1 class / 30 students	Jim Files, Robin Church, Megan Livermore, Molly Caulk, Judge Carlson, Judge Zennache', Gail Geiger, Kim Covington, Judge Radcliffe, Nancy Radcliffe & Robert Russell
South Eugene High School	10/15/08	3 classes / 120 students	Nancy Radcliffe & Robert Russell
Sprague High School	10/24/08	1 class / 27 students	Lars Olsen
St. Mary's High School	05/1/09 05/27/09	1 class / 28 students 1 class / 28 students	Judge Alley, Matthew Sutton & Bob Swierk
Thurston High School	02/12/09	1 class / 100 students	Robert Russell & Nancy Radcliffe
Willamette High School	11/25/08 11/26/08 04/29/09 05/21/09	3 classes / 100 students 2 classes / 55 students 1 class / 37 students	Gail Geiger & Jim Files

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