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 XXIX, Number 2 Debtor-Creditor Section, Oregon State Bar Spring 2010

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COMMENTS FROM THE CHAIR

GIVING LAWFUL AID AND PROTECTION

By Miles D. Monson
Anderson & Monson, PC

Passports are interesting documents. They allow individuals to prove identity and provide for passage in foreign lands. If you want to know the history of passports you can turn to the modern source of all knowledge - Wikipedia. The Wikipedia entry for passports states that one of the earliest known references to something serving as a passport is in the Hebrew Bible. In Nehemiah 2:7-9, attributed to the time of the Persian Empire in about 450 BC, Nehemiah, an official serving King Artaxerxes I of Persia, asked for leave to travel to Judea, and the King granted him leave and gave him a letter "to the governors beyond the river" requesting safe passage for him as he traveled through their lands. Much later, King Henry V of England is credited with having invented what some consider the first true passport as a means of helping his subjects prove who they were in foreign lands.

In passports issued by the Secretary of State of the United States of America, the Secretary "hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection."

Have you ever noticed the quotations and excerpts written in your passport? The following are printed in passports issued by the US Secretary of State. See how many you can match to the author or source document. Answers appear on page 2.

1. WE THE PEOPLE Of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

2. The principle of free governments adheres to the American soil. It is bedded in it, immovable as its mountains.

3. This is a new nation, based on a mighty continent, of boundless possibilities.

4. The cause of freedom is not the cause of a race or a sect, a party or a class – it is the cause of humankind, the very birthright of humanity.

5. We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.

6. We have a great dream. It started way back in 1776, and God grant that America will be true to her dream.

7. Let us raise a standard to which the wise and honest can repair.

8. Whatever America hopes to bring to pass in the world must first come to pass in the heart of America.

9. For this is what America is all about. It is the uncrossed desert and the unclimbed ridge. It is the star that is not reached and the harvest sleeping in the unplowed ground. Is our world gone? We say "Farewell." Is a new world com-

Continued next page

ing? We welcome it - and we will bend it to the hopes of man.

10. May God continue the unity of our country as the railroad unites the two great oceans of the world.

11. We send thanks to all the Animal life in the world. They have many things to teach us as people. We are glad they are still here and we hope it will always be so.

12. Every generation has the obligation to free men's minds for a look at new worlds . . . to look out from a higher plateau than the last generation.

13. . . . And that government of the people, by the people, for the people, shall not perish from the earth.

14. O say does that star spangled banner yet wave O'er the land of the free and the home of the brave.

15. Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, in order to assure the survival and the success of liberty.

A. Inscribed on the Golden Spike, Promontory Point, 1869

B. George Washington

C. Anna Julia Cooper

D. Except from the Declaration of Independence

E. Abraham Lincoln

F. Lyndon B. Johnson

G. Excerpt from the Constitution of the United States of America

H. Martin Luther King, Jr.

I. John F. Kennedy

J. Excerpt from the Thanksgiving Address, Mohawk version

K. Ellison S. Onizuka

L. Daniel Webster

M. Dwight D. Eisenhower

N. Excerpt from The Star Spangled Banner

O. Theodore Roosevelt

Let me know how many you matched without aid! I believe that the lawyers in the Debtor-Creditor Section have deeply held views about such concepts as liberty and freedom, welfare and the pursuit of happiness. You are the lawyers ready to assist others to get on with their lives without delay or hindrance. When you see a need, you reach out and give all lawful aid and protection.

Key:

1:G; 2:L; 3:O; 4:C; 5:D; 6:H; 7:B; 8:M; 9:F; 10:A; 11:J; 12:K; 13:E; 14:N; 15:I

THE MEANS TEST IN THE NINTH CIRCUIT

By Rosemary Zook and Britta Warren
Todd Trierweiler & Associates

As young attorneys, we had the privilege of attending our first National Association of Consumer Bankruptcy Attorney (NACBA) convention in San Francisco this spring. Of the numerous lectures and presentations we attended, one topic proved especially relevant for discussion: the means test found in 11 USC §§707(b) and 1325(b). Is there a way to harmonize the static, mechanical statutory language of the means test with the fluid, unpredictable nature of the financial state of many debtors on the eve of bankruptcy? In this article we discuss current Ninth Circuit case law on the nuances of the means test and its application in both chapter 13 and chapter 7 cases.

The Means Test and Chapter 13 - Backward or Forward Looking?

Section 1325(b) dictates the distribution to unsecured creditors in chapter 13 cases. Section 1325(b)(2) defines disposable income as currently monthly income

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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.

minus reasonable necessary expenses. In the case of *In re Smith*, 418 BR 359 (9th Cir BAP 2010), the court discussed whether a debtor who plans to surrender collateral after filing can take a deduction for the secured loan payments contractually due in the means test. The BAP reversed the bankruptcy court and held that §1325(b)(2) serves as an independent test from §1325(b)(3) in the determination of amounts reasonable and necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor. The court clarified that the statute must be read sequentially: if an expense has been determined by the debtor to be not actually reasonable and necessary, the analysis stops because there is no "amount" to be determined under §707(b)(2) as required in §1325(b)(3). If the expense has been determined to be reasonably necessary, §1325(b)(3) requires the court to compute the amount under §707(b)(2). 418 BR at 368.

This analysis allows postpetition events to be considered in determining whether expenses are reasonably necessary for the maintenance and support of debtors or their dependents. Phantom payments for the surrendered item are per se not necessary for the debtor's support and maintenance. The same analysis applies to junior liens that will be stripped. *See In re Martinez,* 418 BR 347 (9th Cir BAP 2009). There is an open question as to analysis if a debtor attempts to strip a junior lien and is unsuccessful, especially if this occurs post-confirmation.

In re Wiegand, 386 BR 238 (9th Cir BAP 2008), clarified that a chapter 13 debtor can use §1325(b)(2) to deduct necessary business expenses notwithstanding that §§1325(b)(3) and 707(b)(2) do not specifically enumerate such expenses. *Wiegand* held that business expenses should be deducted when calculating "disposable income," not in the initial determination of "current monthly income" under §101(10A). The court reasoned the plain language of the statute demonstrates that "current monthly income" does not incorporate Tax Code concepts of taxable income. Instead, Congress placed specific reference to business expenses in §1325(b)(2) so the reduction for business expenses occurs after the applicable commitment period has been determined. 386 BR at 242. The decision has a significant impact on business debtors who will be placed in a five-year rather than a three-year plan.

The *Smith* court clarified that *In re Kagenveama*, 541 F3d 868 (9th Cir 2008), was not binding precedent with respect to the calculation of expenses under §§1325(b)(2) and 1325(b)(3). "We apply the words of the statute even though doing so leaves us with a backward looking definition of projected disposable income (because of *Kagenveama*) and a definition of expenses which (because of the plain wording of the statute) takes into account financial realities occurring post-petition and incorporated into a debtor's chapter 13 plan." 418 BR at 368. In *Kagenveama* the Ninth Circuit held a debtor's "projected disposable income" for purposes of §1325(b)(1)(B) is the debtor's "disposable income" as defined in §1325(b)(2) projected out over the applicable commitment period. 541 F3d at 1282. The Ninth Circuit relied on the plain meaning of the statute to determine that the word "projected" is a modifier of "disposable income" thus making the terms synonymous. Under *Kagenveama* "projected disposable income" is backward looking.

The Ninth Circuit's approach may be modified after the Supreme Court publishes its opinion in *In re Lanning*, 545 F3d 1269 (10th Cir 2008), *cert. granted*, 130 S Ct 487 (Nov. 2, 2009), later this summer. In *Lanning* the bankruptcy court held that current monthly income is the presumptive starting point for determining income for "projected disposable income" purposes but is subject to a showing of a change in circumstances. Under this approach "projected" implies a forward-looking concept of "disposable income" such that future changes in the debtors's financial circumstances can be accounted for in the means test. The Supreme Court will decide "[w]hether, in calculating the debtor's 'projected disposable income' during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period." *Id.*

The Means Test and Chapter 7 - Consumer v. Non-Consumer Debt and the Presumption of Abuse

Section 707(b) allows for dismissal or conversion of a chapter 7 case filed by a debtor whose debts are primarily consumer debts if it is found that the granting of relief would constitute an abuse. A debtor whose debts are **not** primarily consumer debts, however, is **not** subject to the potential abuse analysis and is **not** required to complete the means test. Thus the meaning of the phrase "primarily consumer debts" is crucial.

The Ninth Circuit dealt with this issue in *In re Kelly,* 841 F2d 908 (9th Cir 1988). According to the *Kelly* court, "primarily" means "for the most part." *Id.* at 913, *citing Webster's Ninth New Collegiate Dictionary* 934 (1984). Thus, when "the most part" – *i.e.*, more than half – of the dollar amount owed is consumer debt, the statutory threshold is passed. In so deciding, the Ninth Circuit adopted a simplistic, plain meaning approach. Other courts require an evaluation of both the amount of the debt and the number of debts. *See, e.g., In re Booth*, 858 F2d 1051, 1055 (5th Cir 1988).

The *Kelly* court next turned to the meaning of the term "consumer debt." The Code defines "consumer debt" as "debt incurred by an individual primarily for a personal, family, or household purpose." §101(8). "Debt" means "liability on a claim," §101(12), and "claim," in turn, is broadly defined as any "right to payment, whether or not such right is ... secured, or unsecured." §101(5)(A). (Citations to the Code today; at the time of *Kelly*, the definitions were found in subsections (7), (11) and (4)(A), respectively.) A literal reading of the Code's simple language leads to the conclusion that consumer debt includes secured debt. The debtors in *Kelly* went one step further and argued that **all** debts secured by real property are automatically considered

non-consumer debts. 841 F2d at 912. The *Kelly* court held that while secured debt is not automatically excluded from consumer debt, it is not automatically included either. The court held that one must look to the purpose of the debt in determining whether it falls within the statutory definition, and concluded that a first mortgage lien assumed in purchasing a homestead, a home equity line of credit incurred for home improvements and the repayment of credit card debts all fall squarely within the Code's definition of consumer debts. *Id.* at 913. It is difficult to conceive of any expenditure that serves a "family ... or household purpose" more directly than does the purchase of a home and the making of improvements thereon.

In cases where it is clear that the debtor's debts consist of primarily consumer debts, the debtor is required to complete the means test analysis. Section 707(b)(2) allows the US Trustee to move for dismissal where a statutory means test demonstrates a presumption of abuse. In determining whether an abuse exists, one must ascertain what is income that will be considered in the presumed abuse analysis. The court in *In re Blausey*, 552 F3d 1124 (9th Cir 2009), discussed this issue. In *Blausey*, the bankruptcy court had held that the $4,000 per month in disability insurance benefits that Mrs. Blausey received from her private insurer should have been included in the Blauseys' current monthly income (CMI) for the statutory means test. With the benefits included, the Blauseys' CMI was high enough to trigger the presumption of abuse. The Ninth Circuit agreed and affirmed the bankruptcy court's decision.

CMI is "the average monthly income from all sources that the debtor receives, without regard to whether such income is taxable income," including "any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor or the debtor's dependents." §101(10A)(A), (B). The statute excludes three types of payments from CMI: "benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism . . . or domestic terrorism . . . on account of their status as victims of such terrorism." §101(10A)(B). The Bankruptcy Code does not define "income." *See generally* §101.

The Blauseys argued that "income" in the definition of CMI should be consistent with "gross income" as defined in the Internal Revenue Code, which states, "Gross income means all income from whatever source derived. . . ." 26 USC §61(a). "Gross income," however, expressly does not include "amounts received through accident or health insurance . . . for personal injuries or sickness (other than amounts received by an employee, to the extent that such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer.)" 26 USC §104(a)(3). *See* 552 F3d at 1132. The Blauseys argued that Mrs. Blausey's private disability insurance benefits, which were not attributable to contributions by her employer, were not "gross income" under the Internal Revenue Code. The Blauseys reasoned that if the benefits are not included in gross income under the Internal Revenue Code, they likewise should not be included when calculating CMI. *Id.*

As in *In re Weigand*, the court concluded that the plain language of the Bankruptcy Code does not support this interpretation. *Id. See also Lamie v. U.S. Trustee*, 540 US 526 (2004). The *Lamie* court opined, "It is well established that when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Id.* at 534 (internal quotation marks omitted). The phrase "without regard to whether such income is taxable income" in §101(10A)(A) reflects Congress's judgment that the Internal Revenue Code's method of determining taxable income does not apply to the Bankruptcy Code's calculation of CMI. Moreover, Congress did not expressly import by reference the Internal Revenue Code definition.

In addition, the statute specifically excludes certain payments, such as Social Security payments and payments to victims of war crimes and terrorism, from CMI. §101(10A)(B). The general rule of statutory construction is that the enumeration of specific exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. *See* 2A *Sutherland Statutory Construction* §47:23. The statute makes several specific exclusions from CMI but does not specifically exclude private disability insurance benefits. This indicates that Congress meant for the benefits to be included in CMI.

Conclusion

The application of the statutory language of the means test to debtors' financial condition has proved to be complicated and irregular. The means test will continue to generate questions that courts will have to answer to the best of their ability. Admittedly, the Ninth Circuit has attempted to engage in a "holistic approach" to statutory interpretation of the means test that "strives to implement the policies behind the enactment of the [BAPCPA] and harmonize the provisions of the Code." *In re Wiegand*, 386 BR at 241, citing *In re Hough*, 239 BR 412, 414 (9th Cir BAP 1999).

One such policy concern behind BAPCPA was to encourage chapter 13 over chapter 7 filings. However, strict adherence to the language of the means test may force many debtors into a chapter 13 only to be confronted with an unaffordable, unrealistic payment structure. The Supreme Court in *In re Lanning* may provide a universal answer to the question whether factors not enumerated in the statute can be considered in computing disposable monthly income to order to increase the success rate in chapter 13. *Lanning* may also allow bankruptcy courts to again consider the "totality of circumstances" when determining the correct chapter for eligibility.

DEALING WITH BANKRUPTCY'S 180 DAY DRAGNET

By Donald H. Grim
Greene & Markley, PC

INTRODUCTION

Chapter 7 debtors with elderly or seriously ill parents often face an uncomfortable situation: property received by bequest, devise, or inheritance within 180 days after the bankruptcy petition date becomes property of the estate. §541(a)(5)(A). This article addresses some situations when such property transfers **do not** become property of the bankruptcy estate.

DISCUSSION

1. Disclaimer

A chapter 7 debtor may disclaim property received via probate or trust, so long as the disclaimer is made prepetition and is effective under state law. If these requirements are met, disclaimed property passes as if the disclaimant never had an interest in the disclaimed property. *See In re Nistler*, 259 BR 723 (Bankr D Or 2001). In Oregon, when a debtor disclaims an interest in a will, the interest passes according to other terms of the will. ORS 105.633(2)(b). If the will does not provide for the disposition of disclaimed property or if the decedent died intestate, the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution. (ORS 112.025, 112.035, and 112.045 govern distribution of a decedent's property in the case of intestacy.)

The requirements of a valid disclaimer must be strictly observed. A disclaimer must: (1) be in writing; (2) make a clear declaration of disclaimer; (3) describe the interest being disclaimed; (4) be signed by the disclaimant; and (5) be delivered or filed in the manner provided in ORS 105.642. ORS 105.629(3).

In bankruptcy, prepetition disclaimers are treated as if the disclaimant never had an interest in the disclaimed property. In re Costas, 555 F3d 790 (9th Cir 2009). Such disclaimers are not regarded as fraudulent transfers because the property interest never vested in the debtor. *Id.*

Postpetition disclaimers are invalid because the debtor's right to disclaim is a property interest which passes to the trustee upon the petition filing. *In re Schmidt*, 362 BR 318, 323-24 (Bankr WD Texas 2007). Further, disclaimers are not effective against interests of the federal government that arise under the Internal Revenue Code. *Drye v. United States*, 528 US 49 (1999).

2. Spendthrift Trust

As a general rule, a beneficial interest in a trust that contains a valid spendthrift provision does not become property of the estate pursuant to §541(a)(5)(A). *See* §541(c)(2) (restrictions on transfer valid under state law are enforceable in bankruptcy). Several decisions applying the law to spendthrift trusts also delineate the limits of the rule.

In *In re Finley*, 286 BR 163 (Bankr WD Wa 2002), the debtor's beneficial interest in a trust with a valid spendthrift provision was fully vested **on** the bankruptcy petition date, but no portion of it had accrued and was "ready for distribution to the beneficiaries." *Id.* at 166. Because under Washington law, "only the portion of the trust that has accrued and is ready for distribution to the beneficiary is subject to distribution is subject to seizure," *id*, the trust corpus did not become property of the estate pursuant to §541(c)(2).

The debtor's interest in an irrevocable trust with a valid spendthrift provision vested shortly **after** the petition date in *In re Neuton*, 922 F2d 1379 (9th Cir 1990). The court held that to the extent a trust is protected by a spendthrift clause as of the petition date, it is beyond the reach of the estate. California law, however, protects only 75% of a beneficiary's interest in a spendthrift trust. *Id.* at 1383. And there is an exception to the "unprotected 25%" exception – the trust is protected as to "any amount that the court determines is necessary for the support of the beneficiary and all the persons the beneficiary is required to support." *Id.* at 1384, quoting Cal Probate Code §15306.5. Thus the bankruptcy court on remand had to consider the issue of income necessary to support debtor and his dependents. *Id.* at 1385.

The court addressed additional issues relating to spendthrift trusts in *In re Coumbe*, 304 BR 378 (9th Cir BAP 2003). The first issue was whether the debtor was the sole trustee and beneficiary of the trust, which would have rendered the spendthrift provision invalid under Arizona law. The court ruled that because the debtor's children were secondary beneficiaries, the debtor was not the sole beneficiary; therefore the trust was a valid spendthrift trust and debtor's interest was excluded from the estate under §541(c)(2). 304 BR at 383.

While the debtor's interest in the trust corpus in *In re Coumbe* did not become estate property, the court held that trust **income** distributions to the debtor during the 180 days post-petition "clearly fall within the provisions of §541(a)(5)(A)." *Id.* at 386. The Coumbe court followed the majority of courts that have held "an income distribution from a testamentary spendthrift trust constitutes a 'bequest' within the meaning of §541(a)(5)(A) and therefore is property of the estate." *Id.* at 384. Distributions from the trust corpus remained outside of the estate. *Id.* at 386.

A Minnesota decision analyzed the situation differently and held that the debtor's interest in an apparent testamentary trust that vested within 180 days post-petition was **not** received by devise, bequest or inheritance, even though the trust was funded via a pour-over provision of a will in probate. *In re Katusky*, 372 BR 910 (Bankr D Minn 2007). Rather, the court held, debtor's interest "at all times was as beneficiary of the inter vivos trust." *Id.* at 911. While the trust

may have received a testamentary disposition, the debtor did not. The court held, however, that the debtor's contingent interest in the trust as of the date of filing would have been property of the estate within the scope of §541(a) **but for** the valid spendthrift provision. *Id.* Only the spendthrift provision prevented the debtor's contingent interest in the trust corpus from becoming estate property.

The reasoning in *Katusky* is contrary to that of a Ninth Circuit BAP decision, *In re Schmitt*, 215 BR 417 (9th Cir BAP 1997), which held that under either Oregon or California law, an interest in a revocable trust held as of the petition date is **not** a property right of the debtor regardless of whether it contains a valid spendthrift provision.

3. **Inter Vivos Trust**

A property interest in an inter vivos trust that vests within 180 days postpetition is not received via bequest, devise, or inheritance and thus does not become property of the estate under §541(a)(5)(A). "'[I]ncome distributions derived from an intervivos trust do not fit within' the definition of §541(a)(5)(A) and therefore escape 'the pale of the 180 day dragnet.'" Neuton, 922 F2d at 1384 n.6 (citing *Newman v. Magill*, 99 BR 881, 884-85 (CD Ill 1989); see also *In re Spencer*, 306 BR 328 (Bankr CD Cal 2004) (California courts recognize that an inter vivos trust does not constitute a testamentary disposition); but see *In re Katusky*, supra.

CONCLUSION

Although cases on this topic are fact intensive and occasionally less than clear, I believe the following conclusions can be drawn:

1. Property transferred by will, probate, intestacy, payment or transfer on death provisions, or testamentary trust (generally) is deemed transferred by bequest, devise, or inheritance for purposes of the 180 day dragnet. §541(a)(5)(A). Such property becomes property of the bankruptcy estate - unless another Code provision provides an exception.

2. If a debtor disclaims a property interest received prepetition via probate or trust, and the disclaimer is effective under state law, the disclaimed property does not become property of the estate.

3. A debtor's beneficial interest in a trust subject to a valid spendthrift provision, which vests within 180 days post-petition, is not property of the estate. §541(c)(2). State law on spendthrift trusts determines whether and how much of the trust is excluded from the estate.

4. Income distributions within 180 days of the petition from a trust with a valid spendthrift provision are property of the estate.

5. A property interest in a valid inter vivos trust that vests within 180 days of the petition is deemed not transferred by bequest, devise, or inheritance. Accordingly, such interests are not subject to the 180 day dragnet. §541(a)(5)(A).

NEW LAW ON FORECLOSURE AND MORTGAGE MODIFICATION

Three bills passed in Oregon's short 2010 legislative session amended ORS 86.745, 86.750, 90.300, 86.770 and section 3, chapter 864 of Oregon Laws 2009. Summaries of the bills follow.

SB 1013 and HB 3610

By Patrick Wade
Hershner Hunter LLP

SB 1013 amends ORS 86.745, 86.750, and 90.300 with respect to tenant protections in nonjudicial foreclosures. The changes, which require that trustees use a **new form of notice of sale** (NOS), were effective upon passage (the bill was signed by the governor on **March 4, 2010**), except that the new form of NOS is not required until (but may be used before) **June 30, 2010**.

In Section 1, the bill amends ORS 86.745 to clarify that the NOS needs to include a "Notice to Tenants" only when the property includes one or more dwelling units, as defined in ORS 90.100, and that that form of NOS is to be addressed only to **residential** tenants.

Section 2 of the bill changes the content of the "Notice to Tenants" in ORS 86.745. The changes are more of form than of substance, and attempt to make tenant issues more clear. It addresses federal and state law notice requirements, advises the tenant about setting off a security deposit, and describes the relationship between the tenant and the new owner. That relationship does not become one of landlord and tenant unless, as provided in ORS 86.755(8), the new owner accepts rent, signs a rental agreement, or does not notify the tenant in writing of termination within 30 days after the foreclosure sale. If the purchaser avoids becoming a landlord under this statute, presumably the purchaser is not under an obligation to maintain the premises or to comply with other requirements placed on residential landlords. The notice advises the tenant of the right to set off a security deposit against accruing rent, but specifies that the new owner is not responsible for returning a security deposit which is not set off.

Section 3 of the bill amends ORS 86.750 in some minor grammatical matters, and specifies that the "Notice to Tenants" does not have to be included in the published version of the NOS. (Section 4 of the bill contains the same changes but coordinates with the sunset provisions of chapter 864 of Oregon Laws 2009.)

Section Website

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

Section 5 of the bill amends ORS 90.300 to make stylistic changes, and coordinates the section with ORS 86.755(8), which deals with the purchaser's liability or lack thereof for return of security deposits.

HB 3610 amends ORS 86.750 and provisions of HB 3004 of the 2009 session (chapter 864) relating to mortgage modification. It was signed by the governor on March 10, 2010, and becomes effective on the 91st day after adjournment. The adjournment date was February 25, 2010, so the effective date is May 27, 2010.

HB 3004 of 2009 requires the beneficiary in a nonjudicial foreclosure to have processed a mortgage modification request, if one is made, before going to sale. This bill further amends HB 3004 by requiring that the beneficiary provide certain information to the borrower if a mortgage modification is denied.

Section 1 of HB 3610 amends Section 3, chapter 864, Oregon Laws 2009. If the modification request is denied, the beneficiary or its agent must provide an explanation of how the beneficiary calculated that the grantor was not eligible for a modification. A beneficiary complies with that explanation requirement if the beneficiary supplies the grantor with the information specified in a borrower notice in Supplemental Directive 09-08 of the Treasury Department under the Helping Families Save Their Homes Act of 2009, P.L. 111-22. See https://www.hmpadmin.com/portal/docs/hamp_servicer/sd0908.pdf

The description in the affidavit of compliance of how the beneficiary complied with Section 3, chapter 864, must state that the beneficiary provided the grantor that information.

The exception in Section 3, chapter 864, for beneficiaries who determine in good faith that the grantor is not eligible for loan modification now requires that notice of that decision be in writing and include the basis for the determination, including the reasons why the grantor was not eligible.

Section 2 of the bill amends ORS 86.750. First, it makes the same stylistic changes that are made in SB 1013. But more importantly, it changes the requirements for recording proof of compliance with the non-judicial foreclosure procedures. The trustee now must record the affidavits of the ORS 86.737 notice, mailing, service, service attempts, and publication at or before the time of the sale. Furthermore, the affidavit of compliance with the loan modification request process must now be recorded not later than five days before the sale. (Section 3 of the bill contains these changes, but coordinated with the sunset provisions of chapter 864, Oregon Laws 2009.)

HB 3656

By Mark Comstock
Garrett Hemann Robertson PC

This bill amends ORS 86.770 to clarify the termination of rights after a foreclosure sale of all who were sent notice of sale, and adds new provisions which provide that no deficiency claim or judgment is available after a residential foreclosure for instruments created by the same or an affiliated creditor in the same transaction with some exceptions.

Section 1 of the bill corrects a provision of HB 3004 of 2009 to clarify that under ORS 86.770(1) a trustee sale forecloses and terminates an interest in the property of anyone who held an inferior interest and was given notice. HB 3004 of 2009 appeared to require proof of **receipt** of a notice of sale.

Section 1 also adds new language to ORS 86.770(2)(a) to clarify that no deficiency is allowed after a trustee's sale or judicial foreclosure of residential property, except as to other property, another instrument, or as to a guarantor or by a guarantor against the grantor, and the provisions of ORS 86.770(2)(b) are satisfied.

The bill also adds new language to ORS 86.770(2)(b) to provide that no deficiency is allowed after a trustee's sale or judicial foreclosure, if the deficiency claim is based on a note, bond, or other obligation secured by the foreclosed residential trust deed, created on the same day or in the same transaction, and owed to the same beneficiary or an affiliate of the beneficiary that foreclosed another instrument describing the same residential property.

The new language is intended to address the "80/20 loan" situation, in which the primary debt (the 80%) and residential trust deed are foreclosed, but a second note (the 20%) and trust deed given for the remaining debt as part of the same transaction to secure the balance of the purchase are pursued for a deficiency judgment. Any second proceeding based on an instrument originally issued to the same or an affiliated lender (an undefined term), either judicial or nonjudicial and without regard to the order of foreclosure (*i.e.*, foreclose the second trust deed first, which arguably leaves the first unaffected), is barred. This new language leaves available an action by an unaffiliated lender to recover on the second instrument or contract.

Section 2 provides that the amendments to ORS 86.770 apply to any instrument securing a residential trust deed, whether created before or after the effective date (March 10, 2010), except that the provisions created by amendment to ORS 86.770(2)(a) are effective to an action for a deficiency brought on or after August 4, 2009.

2010 BANKRUPTCY COURT SATURDAY SESSION

By Jeanette L. Thomas
Perkins Coie LLP

This year's Saturday Session was held on March 6, 2010, at the Salem Conference Center. The Saturday Session allows bankruptcy practitioners, bankruptcy judges, representatives from the US Trustee's office and trustees to engage in an open dialogue designed to improve the administration and efficiency of the bankruptcy courts. This year's session was well attended and very productive. The following topics were discussed: (1) an update on action items from last year's session, (2) a breakout discussion on the Local Bankruptcy Rules and Forms, (3) a panel discussion on the use of mediation in bankruptcy cases, and (4) a discussion of ways to improve communications between attorneys and case administrators.

1. Update on 2009 Action Items

Miles Monson reported on the tremendous follow-up on items from the 2009 Saturday Session. For example, a committee to consider adoption of §363 sale guidelines was formed shortly after the Saturday Session, met a number of times, and drafted guidelines that were adopted and became effective on March 8, 2010. Another successful item was the creation of a mentoring list. The list can be found at the Section's website under the Attorney Resources heading – look for "Bankruptcy Resource List." Progress was also made on additional items: the Chapter 7 Document Request List, Tips and Tricks for New Lawyers and the Judges' Handbook.

2. Local Bankruptcy Court Rules and Forms

In an effort to improve the efficient administration of the courts and the practice of law, the Bankruptcy Court, under the direction of Chief Judge Elizabeth Perris and with the agreement of Charlene Hiss, the newly appointed Clerk of the Bankruptcy Court, decided that amendments to local rules and forms will take place only once a year rather than sporadically.The hope is that the rules can be reviewed and streamlined to address problems that practitioners have reported.

To jumpstart this process, the participants at each table were asked to discuss areas of the rules and forms that could use clarification or improvement. The result was a comprehensive list of rules and forms that participants felt could use revision. A comprehensive list of the suggested changes was compiled; the reinvigorated Rules Committee will review them and suggest changes to the Court Clerk and the bankruptcy judges for adoption.

3. Mediation Panel Discussion

The substantive panel discussion for this year's Saturday Session was mediation in bankruptcy cases. While it appears that parties use the settlement judges more frequently, bankruptcy professionals lag behind their peers in the use of professional mediators to resolve disputes. The panel members were Susan Hammer, Magistrate Thomas Coffin and Judge Frank Alley, each of whom gave an individual presentation and responded to questions from the audience.

Susan Hammer addressed the role of the mediator in developing a mediation process designed to produce maximum results. This requires the mediator to become familiar with the parties and their particular issues to determine what form of mediation would be the most effective. Ms. Hammer also addressed the advantages of using professional mediators: their professional training, their flexible schedules and ability to travel (in contrast to the schedules of settlement judges), and their experience.

Magistrate Coffin focused on his approaches to mediation. In his experience, mediations generally fall into two categories. In one the main issue is the value of the release – that is, what the defendant is willing to pay to be free of future liability. To Judge Coffin, this situation is much like negotiating the purchase price of a house. In the second category, the parties may agree on the relative value of the case but disagree on the risk each faces. In this instance, the mediator's role is to help the parties assess the percentage risk of an adverse outcome, the likely damages and the cost to litigate. The result of this calculation will lead to the settlement value.

Judge Alley spoke about common problems he finds in mediation. First is timing of the agreement to mediate. Often the parties will agree to mediation either too early – i.e., before the facts are developed sufficiently for the parties to understand their risks and to evaluate the damages – or too late, when the parties are too far down the litigation path. Second, Judge Alley finds that many parties view mediation as an informal trial and seek to "win." Mediation, however, is not about winning but about reaching a settlement without the cost in time and money of litigation. Third, many parties are too focused on the incremental offers and match the other party's offer percentage by percentage. This generally slows down the process. Fourth, many parties go into the mediation with a complete lack of trust of the other party. If one party to mediation assumes the other party is lying or is less than truthful about the issues, no resolution is likely. Finally, in many instances the attorneys fail to understand what really drives a settlement and focus solely on monetary issues. In Judge Alley's experience, nonmonetary items are often as important as monetary ones.

4. Improving Communications

In the final session of the morning, attorneys and the Clerk of the Court considered ways to improve communications. The Clerk's office stressed the importance of timely responses from attorneys and a lively discussion followed on reasonable response times and the best methods for reaching attorneys. Some attorneys prefer email communications while others prefer a telephone call. Given the hectic

schedules of many attorneys, communicating exclusively by one means, either phone or email, may not provide optimal results.

The discussion also revealed some little-known facts, such as that the last two digits of a case number determine the case administrator. Additionally, the 800 help number will connect callers with the Clerk's office in Eugene, not in Portland. If your case is a Portland case, you may want to leave a message for the case administrator directly. Finally, we learned there are differences between how things are handled in Eugene and how they are handled in Portland. While an exhaustive list of the differences was not presented, lawyers who do not regularly practice in one city or the other may want to double-check the procedures before filing or appearing in court there.

US SUPREME COURT CASE NOTES

By Jessica L. Shoup
Greene & Markley, PC

A CHAPTER 13 CONFIRMATION ORDER DISCHARGING STUDENT LOAN DEBTS IS ENFORCEABLE ABSENT AN ADVERSARY PROCEEDING IF CREDITOR HAD NOTICE

United States Aid Funds, Inc. v. Espinosa,
130 SCt 1367 (2010)

Debtor's chapter 13 plan proposed to pay the entire principal amount of $13,250 in student loans over five years and discharge the interest. Debtor did not file an adversary proceeding to determine dischargeability of the student loans, and the student loan creditor did not object to this failure. Further, the creditor received notice of the plan and failed to object to confirmation. The chapter 13 trustee sent the student loan creditor notice that it would be paid as listed in the plan, although the creditor had submitted a proof of claim for both principal and interest.

Debtor completed his chapter 13 plan payments and received a discharge under the terms of the plan. Three years later, the student loan creditor attempted to collect the unpaid interest. Debtor asked the bankruptcy court to enforce the discharge order. The creditor opposed the debtor's motion claiming that (1) the confirmation order was void because discharge of student loan interest requires a finding of undue hardship through an adversary proceeding, and (2) its due process rights had been violated by the debtor's failure to serve a summons and complaint for an adversary proceeding.

The Court ruled in debtor's favor. Although the Bankruptcy Court's failure to find undue hardship was erroneous, legal error does not make a judgment void. The court noted that a judgment is "void" within the meaning of FRCP 60(b)(4) "only in the rare instance where [the] judgment is premised on a jurisdictional error or violation of due process that deprives the party of notice or the opportunity to be heard." The Court held the creditor's claims did not fall within either category. The statutory requirement of an adversary proceeding to discharge student debt is "not a limit on the bankruptcy court's jurisdiction"; similarly, procedural rules relating to adversary proceedings are not jurisdictional. Further, because the creditor had received actual notice of the filing and contents of debtor's plan, its due process rights had been "more than satisfied."

ATTORNEYS WHO PROVIDE BANKRUPTCY ASSISTANCE ARE DEBT RELIEF AGENCIES

Milavetz, Gallop & Milavetz PA v. United States,
130 SCt 1324 (2010)

A law firm, its president, an attorney within the firm, and two of the firm's clients collectively filed a suit seeking declaratory relief. They argued that attorneys are not "debt relief agencies" as that term is used in BAPCPA. In the alternative, they argued that §§526(a)(4) and 528(a)(4) and (b)(2), which restrict the activities of debt relief agencies, are unconstitutional as applied to attorneys. The Court disagreed with both arguments.

The Court first held that attorneys who provide bankruptcy assistance (including advice) to assisted persons are debt relief agencies subject to the provisions of BAPCPA. A debt relief agency is any person who provides any bankruptcy assistance to an assisted person in return for payment. §101(12A). The Court found that both the plain language of this provision and its context support including attorneys within the definition.

The Court then held that the debt relief agency provisions are not unconstitutionally overbroad as applied to attorneys. Section 526(a)(4) does not prohibit "any discussion of the advantages, disadvantages, or legality of incurring more debt," as plaintiffs argued, but only "advising a debtor to incur more debt when the impelling reason for the advice is the anticipation of bankruptcy."

Finally, the Court rejected the plaintiffs' challenge to the disclosure requirements of §528(a)(4) and (b)(2). It held that attorneys are subject to those requirements and that such requirements are constitutional.

9TH CIRCUIT CASE NOTES

By Ivy B. Grey
Davis Wright Tremaine LLP

SCHEDULES FILED CONCURRENTLY WITH PETITIONS DO NOT GIVE NOTICE OF AN UNRECORDED SECURITY INTEREST SUFFICIENT TO DEFEAT A TRUSTEE'S BONA FIDE PURCHASER STATUS

In re Deuel, 594 F3d 1073 (9th Cir 2010)

This case addressed whether a trustee in bankruptcy could defeat an unrecorded deed of trust using its strong arm powers under §544(a)(3) when the debtor's petition and schedules were filed simultaneously. The issue was whether the fact of electronic filing, which made the schedules listing the deed of trust known at the time of the filing, changed the rule that the court must look to the trustee's *hypothetical* knowledge "as of the commencement of the case." The court ruled that it did not.

Debtors refinanced their home loan twice to take advantage of rising real estate values. On the third loan (second given by Chase), Chase filed the reconveyance but neglected to record the new lien. Two years later, the debtors voluntarily filed for chapter 7. By filing electronically, the debtors uploaded the schedules at the same time as the petition and provided notice of the lien at that time. But the court reasoned that allowing the simultaneously filed schedules to defeat a hypothetical bona fide purchaser would "condition the trustee's strong arm power on whether [the schedules] are filed earlier than they need to be." Such a holding would allow concurrent filing to thwart the policy of pro-rata distribution by allowing schedules to control and improve certain creditors' priority positions. Further, the hypothetical approach must control because §544 "says that the strong arm power exists 'without regard to any knowledge of the trustee.'"

The court also rejected Chase's argument that its current lien should be treated as equitably subordinated to its earlier lien since it used the money from the refinancing to pay off the previous loan. Because the prior lien was discharged and the debt was paid, equitable subordination was inapplicable. Additionally, using equitable subordination in this context would work an injustice against the rights of others.

APPROPRIATE REMEDY WHEN SECURITY INTEREST IS AVOIDED IS RETURN OF PROPERTY IF VALUE OF THE PROPERTY IS NOT READILY ASCERTAINABLE

In re Taylor, 599 F3d 880 (9th Cir 2010)

Debtors bought a car and granted the lender a security interest in it. The lender perfected its security interest 21 days later, which was timely under state law, but one day late under the Code. Because the lender perfected late, the bankruptcy court ruled that the trustee could avoid the conveyance of the security interest as a preferential transfer. The BAP and Ninth Circuit affirmed.

The question the Ninth Circuit addressed at length in this opinion was the appropriate remedy when a security interest is voided. Section 550(a) gives the court discretion to choose either to (1) award the actual property or (2) award the value of the property. The bankruptcy court here found that awarding the actual property (by cancelling the security interest) would be insufficient because the value of the car had diminished and the debtors had already made payments which the creditor had not returned. Therefore it awarded the estate the value of the security interest at the time of the purchase of the car.

The Ninth Circuit held that while the bankruptcy court had discretion to choose this remedy, it erred in this case because the value of the security could not be ascertained. Given that fact, the "only available remedy is to return to the estate the property, i.e., the security interest, and not the value of the property." 599 F3d at 893.

STATE COURT JUDGMENT HAS PRECLUSIVE EFFECT RENDERING DEBT NONDISCHARGEABLE EVEN IF THE COURT DID NOT MAKE SPECIFIC FINDINGS OF WILLFUL OR MALICIOUS INJURY

In re Ormsby, 591 F3d 1199 (9th Cir 2010)

A state court found that debtor had converted and misappropriated property belonging to creditor title company. After a judgment was entered against him, debtor filed bankruptcy and attempted to discharge his judgment debt. Creditor title company objected to the discharge and prevailed at the bankruptcy court and district court levels. On appeal, the debtor claimed he was entitled to discharge because the state court had made no factual findings of his willful or malicious intent. The Ninth Circuit affirmed, holding the debt was nondischargeable under either §523(a)(4) or §523(a)(6).

"For purposes of section 523(a)(4), a bankruptcy court is not bound by the state law definition of larceny but, rather, may follow federal common law, which defines larceny as a 'felonious taking of another's personal property with intent to convert it or deprive the owner of the same,'" 591 F3d at 1205, quoting 4 *Collier on Bankruptcy* ¶523.10[2] (15th ed.

rev. 2008). The court noted that the totality of the circumstances as described in the state court's findings of fact made debtor's fraudulent conduct clear.

Turning to §523(a)(6), the court held that the facts found by the state court showed debtor's conduct to be both willful and malicious. These findings in state court were sufficient to establish nondischargeability under §523(a)(6).

WHEN EXECUTING ON A JUDGMENT ON INTERNET DOMAIN NAMES, PROCEED IN THE STATE OF THE REGISTRY OR REGISTRAR

Office Depot, Inc. v. Zuccarini, 596 F3d 696 (9th Cir 2010)

Office Depot obtained a judgment against Zuccarini for cybersquatting under the Anticybersquatting Consumer Protection Act of 1999 (ACPA) and assigned the judgment to DS Holdings (DSH) for collection. Since the registry company holding most of the domain names was located in the Northern District of California, DSH registered the judgment in that district. At first, DSH attempted to force a turnover of certain domain names from third parties. When this failed, DSH sought to appoint a receiver to sell the domain names at a public auction. The receivership was granted. Zuccarini appealed, arguing that the Northern District of California was not a proper place to levy upon his domain names. The Ninth Circuit affirmed.

At issue was type two *quasi in rem* jurisdiction (attachment jurisdiction) used to levy on intangible property. California state law "says nothing specific about the location of domain names" for such jurisdition. The ACPA provides for jurisdiction over domain names in the judicial district of the "domain name registrar, domain name registry, or other name domain name authority." While this language was not controlling, taken together with the practicalities involved in bringing suit to execute judgments against owners of domain names, the court concluded that domain names were located where the registry was located for the purpose of asserting *quasi in rem* jurisdiction. However, the court said that location of the registrar would also be acceptable.

ATTORNEY DISCIPLINARY COSTS ARE NOT DISCHARGEABLE UNDER CALIFORNIA LAW

In re Findley, 593 F3d 1048 (9th Cir 2010)

The court held debts arising from an attorney disciplinary action could not be discharged under chapter 7. The issue was whether the costs were compensatory or intended to work as a fine.

The debtor, an attorney, was suspended from the practice of law for violations of rules of professional conduct. The California State Bar assessed a $14,054.94 fee to cover the cost of the disciplinary action. An earlier decision had held that attorney disciplinary costs were dischargeable because the costs were compensatory rather than in the nature of a fine. The legislature responded to that decision by amending the law on attorney discipline to state that costs assessed are "penalties." The court held this amendment was "sufficient to render attorney discipline costs imposed by the California State Bar Court non-dischargeable in bankruptcy pursuant to 11 USC §523(a)(7)."

BAP CASE NOTES

By Chris Parnell
Farleigh Wada Witt

BANKRUPTCY COURT MUST ARTICULATE CLEAR STANDARDS FOR DIRECT PLAN PAYMENTS

In re Giesbrecht, ___ BR ___, 2010 WL 1956618 (9th Cir BAP 2010)

In *Giesbrecht*, the BAP held that a debtor has no absolute right to make payments directly to a creditor on an unimpaired claim pursuant to a chapter 13 plan, but that the bankruptcy court erred when it failed to articulate clear standards for when such direct payment was permissible.

Debtors filed a chapter 13 plan that proposed to pay a bank creditor direct monthly payments on the original payment terms, and further proposed to pay the other creditors' semi-monthly payments to the chapter 13 trustee. The trustee objected to plan confirmation because of the direct payments to the bank, and contended that the payments must be made through the plan in order to comply with §1322(a)(1). The trustee further argued that it was local practice in the Western District of Washington to make all payments through the plan. Debtors asserted that nothing in §§1322 or 1326 required that all debts be paid through the plan, and that In re Lopez, 372 BR 40 (9th Cir BAP 2007, *aff'd and adopted by* 550 F3d 1202 (9th Cir 2008), permits direct payments of unimpaired claims. The bankruptcy court denied confirmation of the plan because of the direct payments to the bank.

The BAP held that neither the Bankruptcy Code nor *Lopez* required that all plan payments be made through the trustee, and that therefore a chapter 13 debtor may pay a creditor directly. The court further held, however, that debtors do not have an absolute right to pay creditors directly, and that the bankruptcy court has discretion to determine when direct payments are appropriate based on factors such as policy reasons and local rules or guidelines. The BAP observed that while some bankruptcy courts have enacted local rules defining the parameters of what payments will be allowed to be made directly to creditors, the Western District of Washington has no such published guidelines. Since the debtors had no notice of the standard used by the bankruptcy court to require direct payments, the BAP held that the

court abused its discretion in denying the plan. It remanded to the bankruptcy court with instructions to enter an order confirming the plan.

BANKRUPTCY COURT HAS HEIGHTENED DUTY TO SCRUTINIZE SALE OF CLAIMS TO DEFENDANT

In re Fitzgerald, ___ BR ___, 2010 WL 1655861 (9th Cir BAP 2010)

The bankruptcy court approved a trustee's sale to a defendant of the estate's claims against that defendant, but failed to observe its "heightened duty" to make the required independent analysis and evaluation of the proposed sale. The BAP reversed the sale order, finding that the court had applied an incorrect legal standard by failing to apply the standards set forth in *In re Lahijani*, 325 BR 282 (9th Cir BAP 2005), and *In re A&C Props.*, 784 F2d 1377 (9th Cir 1986).

A chapter 7 trustee sought to sell certain state court claims owned by the estate against a defendant to that same defendant, asserting simply that the sale would obviate the need to prosecute them. He did not offer any analysis of the claims' value or the costs of litigation, or seek a "good faith" finding under §363(m). The high bidder at auction was the defendant; the only other bidder was debtor's life partner. The bankruptcy court approved the sale and further found that the purchaser was a "good faith" purchaser. Debtor appealed the sale order, asserting that the "good faith" finding was in error.

The BAP noted that trustees often sell claims to defendants, but that under *Lahijani* situations with constrained competition – such as when defendant and plaintiff are the only bidders – warrant more scrutiny. Where, as here, the trustee offered no analysis of the value of the claims or why the price was fair and reasonable in his business judgment, and the court made no such finding, the inquiry clearly fell short of the standard. Further, the "fair and equitable" settlement standard in *A&C Properties* for compromises under Rule 9019 requires consideration of factors including probability of success in litigation and the paramount interests of creditors. The court did not make findings on any of the *A&C* factors, which provided additional grounds for reversal.

STATE COURT CASE NOTE

By Sean C. Currie
Greene & Markley, PC

ORCP 64 RIGIDLY APPLIED

McCollum v. Kmart Corporation
347 Or 707, 226 P3d 703 (2010)

The Oregon Supreme Court held that a letter opinion does not constitute an order, and that a letter opinion itself does not become effective until it is reduced to an order. The court reiterated the holding in *Ryerse v. Haddock*, 337 Or 273, 95 P3d 1120 (2004) (motion for new trial is "determined" at time order is entered in register). Finally, the court held that, after the 55 days provided by ORCP 64 F(1), a trial court is deprived of the power to make a *nunc pro tunc* order that would purport to grant a new trial at a time when it was not so entered.

Plaintiff brought a personal injury action against defendant. After a jury returned a verdict for defendant, the trial court entered judgment for defendant. Plaintiff timely moved for a new trial. The trial court signed and filed an order granting plaintiff's motion for new trial, as well as a letter opinion addressed to counsel for the parties. On the second page of the letter opinion, the letter stated, "Enclosed is a conformed copy of the Court's Order Allowing New Trial," and included the notation "enclosure" in a footer.

The trial court administrator entered the letter opinion into the court register on a day that was 54 days after the entry of judgment, but did not enter the order granting the new trial until 59 days after the entry of judgment. The defendant filed a notice of appeal from the order granting plaintiff a new trial. Plaintiff neither appealed nor cross-appealed.

The Court of Appeals initially dismissed the appeal, noting that the motion for new trial was deemed denied as a matter of law on the 56th day after the entry of judgment, because the motion had not been determined within 55 days after the entry of judgment, as required by ORCP 64 F. Plaintiff filed a petition for reconsideration.

The Court of Appeals granted the petition and concluded that the order granting a new trial was timely entered within 55 days of the date of judgment, because the trial court's letter opinion "effectively incorporated the order" and therefore "itself constituted an order granting the motion for a new trial." *McCollum v. Kmart Corp.*, 214 Or App 367, 370, 165 P3d 372 (2007). On the merits of the appeal, the Court of Appeals concluded that the trial court had lacked adequate grounds to grant a new trial, and that the order therefore should be reversed and remanded with instructions to reinstate the verdict. *McCollum v. Kmart Corp.*, 228 Or App 101, 207 P3d 1200 (2009).

In a unanimous opinion by Justice Linder, the Supreme Court vacated the decisions of the Court of Appeals and the circuit court. The court held that, as a factual matter, **a letter opinion does not incorporate the order or otherwise purport to be the order, and as a legal matter, a letter opinion itself does not become effective until it is reduced to an order**. For those reasons, it disagreed with the Court of Appeals that the letter opinion was an order and that the trial court's action on the motion was timely.

The court noted that it had considered many of plaintiff's legal and practical arguments in *Ryerse*. The court also rejected plaintiff's suggestion that the appropriate remedy should be to allow the trial court to make a *nunc pro tunc* order. After the 55 days provided by ORCP 64 F(1), the court explained, a trial court is deprived of the power to act. Because at that point the motion has conclusively been deemed denied, the Court of Appeals could not "reach the merits of the trial court's order granting plaintiff a new trial."

CONSUMER COMMITTEE REPORT

March 11 Meeting

By Britta Warren
Todd Trierweiler & Associates

Brian Lynch began the meeting by discussing the economics of the Chapter 13 Trusteeship. Chapter 13 Trustees are independent contractors hired by the Department of Justice. To fund the Trustees' operating costs, a percentage of all funds distributed to creditors in chapter 13 plans are paid to the Chapter 13 Trustees. The US Trustee must approve each Chapter 13 Trustee's budget. Income is fixed – if the Trustee receives additional revenue, he is allowed to keep only 25% for anticipated costs; the rest must be turned over to government. The Trustee lowers his fee percentage to avoid accumulating additional revenue.

Mr. Lynch offered some additional statistics: (1) his case load for 2009 was 4,910 and (2) the disbursements to creditors last year were the lowest since 2004. Mr. Lynch also announced the inception of attorney fee electronic fund transfers. Anyone interested in receiving electronic payments for those hard-earned fees should contact the Trustee's office.

Wayne Godare encouraged debtors' attorneys to utilize the feasibility program when preparing chapter 13 plans. The Trustee's office routinely offers training sessions on the feasibility program (most recently on April 9, 2010). If you need access to the program, which was recently taken offline, please contact the Chapter 13 Trustee's office.

The remainder of the meeting focused on the recent Supreme Court ruling, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S Ct 1324 (2010), which holds that attorneys are "debt relief agencies" under BAPCPA and addresses the scope and validity of 11 USC §526(a)(4). In a unanimous opinion, the Supreme Court ruled that §526(a)(4) is not an unconstitutional restriction on free speech, but is limited in its application to "misconduct designed to manipulate the protections of the bankruptcy system." The Court found that the underlying congressional intent in adopting the provision was to proscribe actions that threaten to harm debtors or creditors. It drew a distinction between advice to a client to take on additional debt for abusive purposes and "reasonable financial advice."

The members present discussed the practicalities of applying the ruling and the uncertainty it presents for debtors' attorneys. Is it permissible to advise debtors to incur a debt in response to an incentive created by the Bankruptcy Code? For instance, can attorneys advise debtors to purchase a vehicle prior to filing bankruptcy to pass the means test? Is this a valid, independent reason to incur more debt?

Refreshments were provided by Rich Parker, Kelly Brown and Caroline Cantrell. Many thanks.

May 13 Meeting

By Rosemary Zook
Todd Trierweiler & Associates

Pam Griffith from the US Trustee's office kicked off the meeting by announcing that Wayne Godare will be the new Chapter 13 Trustee and Virginia Burdette will cover the entire state as the Chapter 12 Trustee. Brian Lynch announced that effective May 31, 2010, he will no longer be the Chapter 13 Trustee. He will start his new position as a judge in Tacoma, Washington, on June 1. Brian thanked the Portland area bar and judges.

Brian also announced that since revenues have increased, the Chapter 13 Trustee's office will reduce its fees from 8¾% to 5¼%.

Sally Leisure spoke about refinancing homes in chapter 13. Generally, before the refinance discussion can begin, the debtor must have made twelve regular chapter 13 plan payments and twelve timely mortgage payments. If the debtor has missed a plan payment or a mortgage payment, refinance might not be an option.

Another issue faced by debtors contemplating a refinance in chapter 13 is a declining credit score. While in bankruptcy, debtors generally have little or no credit activity, which can lead to a declining credit score. To combat this problem, the debtor may consider obtaining a secured credit card and making timely payments. For this to affect the credit score, the debtor needs to leave a small balance owing each month.

Sally recommended that debtors monitor their credit report, starting about 90 days after confirmation, to assure that items are properly reported.

Brian Lynch announced that the Treasury Department has issued Supplemental Directives regarding the Home Affordable Modification Program (HAMP), which explain the procedures for mortgage loan servicers. The new Directives technically apply only to non-FNMA (Federal National Mortgage Association) and non-FHLMC (Federal Home Loan Mortgage Corporation) securitized loans, but there are virtually identical regulations for FNMA and FHLMC loans. The HAMP program directives were originally issued in 2009 (Supplemental Directives 09-01 through 09-08). In 2010, the Treasury Department issued Supplemental Directives 10-01 and 10-02. Both bring major changes to the HAMP mortgage modification process. The latter has provisions for mortgagees applying for a HAMP modification when in bankruptcy. Servicers are now required to consider debtors in bankruptcy for HAMP modifications on the same terms as applicants who are not in bankruptcy. For more information, please refer to www.hmpadmin.com/portal/docs/hamp_servicer/sd1002.pdf.

Brian Lynch announced that starting June 1, 2010, HAMP (Home Affordable Modification Program) will not offer trial loan modifications before determining whether an applicant qualifies. All applicants must go through the application process. The trial period begins only after the application is approved. If payments are made in a timely manner during the trial period, the applicant is finally approved. There will also be guidelines for response times, etc. For more information, see regulations 10-01 and 10-02.

Jeffrey Werstler from the IRS addressed the problem of nondischargeable tax liabilities. The IRS assumed, when the law changed in 1997, that debtors' attorneys would wait to file the client's case until the appropriate period of time had passed, so that any tax liability would either be dischargeable (at least 3 years old, filed at least 2 years before bankruptcy, and assessed at least 240 days before bankruptcy) or priority (filed and assessed at least 240 days before bankruptcy). In practice, waiting may not be possible due to foreclosure or garnishment issues. When a bankruptcy is filed and the tax liability is determined to be nonpriority, unsecured and nondischargeable, the IRS will begin collection attempts when the automatic stay terminates. The liability at that point may be much greater than when the bankruptcy case was filed, since interest continues to accrue during the pendency of the bankruptcy. Penalties and interest on penalties are dischargeable but interest is not.

Jeffrey pointed out that the IRS is also pursuing debtors who have attempted to evade tax liability. This issue is problematic for both debtors and debtors' attorneys because tax evasion might not be evident at time the bankruptcy case is filed. Taxes that appear to meet the requirements for dischargeability may not be dischargeable due to attempted tax evasion. The IRS does not have to litigate and can come back years later to collect the debt. The IRS looks for specific patterns of behavior when analyzing for tax evasion: for example, a debtor has several years of unpaid tax debt, has failed to make payments on the debt, has made payments on other consumer debts, and has generally lived above his or her means. For more information, *see Toti v. United States*, 24 F3d 806 (6th Cir 1994).

The next Circle of Love meeting is tentatively set for August 12, 2010, at 4:30 at the U.S. Bankruptcy Court, 1001 SW Fifth, Suite 700, Portland, Oregon. The Meet Me line is available for those who cannot attend in person.

Thanks to the Chapter 13 Trustee's Office for providing food and beverages at the May 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

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