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 XXXIII, Number 2 Debtor-Creditor Section, Oregon State Bar Spring 2014

HIGHLIGHTS

1. **Comments from the Chair**
By M. Caroline Cantrell

4. **Enforcing Money Judgments Across the United States-Canada Border**
By John Sullivan, James Baumgartner, Britta Warren and Sean Foote

9. **Saturday Session**
By Laura Donaldson, Kuni Donaldson

13. **Repossessor Beware: Oregon Supreme Court Affirms BOLI Decision Requiring Creditor to Reimburse Wage Security Fund for Unpaid Wages Owed by Debtor**
By Jeanne Sinnott, Miller Nash LLP

14. **Selecting Clients and Managing Client Expectations**
By Ann K. Chapman, Vanden Bos & Chapman

18. **Ninth Circuit Case Notes**
By Stephen Raher, Perkins Coie

21. **BAP Case Notes**
By Jesús Palomares, Miller Nash LLP

22. **Local Bankruptcy Court Case Notes**
By Margot Seitz, Farleigh Wada Witt

23. **State Court Case Notes**
By Sherri Martinelli, Greene & Markley, PC

COMMENTS FROM THE CHAIR

By M. Caroline Cantrell

It is mid-year and the Section continues to buzz. **Saturday Session** was held Saturday, March 1st at the Salem Conference Center. The organizers, Loren Scott, Judge Dunn, and Charlene Hiss, did a fantastic job. For a full report, see page 9.

The Pro Bono Clinic's Annual CLE and Judges Reception were held on March 13th. The hour long CLE was a primer on state and federal bankruptcy exemptions with emphasis on choosing the exemptions most advantageous for the client. The CLE was followed by the Judges Reception for Pro Bono volunteer attorneys complete with food, beverages, a heartfelt "thank you" from the judges to all volunteers, and an opportunity to socialize with colleagues. The event was well done and enjoyable.

The 27th NW Bankruptcy Institute was held at The Grand Hyatt Seattle on April 25th and 26th with approximately 240 in attendance. The program was organized by the NWBI Committee and beautifully orchestrated by Karen Lee, Kes Joerg and Kelly Dilbeck of the Oregon State Bar. Topics included: using experts in bankruptcy litigation; §363 sales; deciphering tax transcripts and determining dischargeability of taxes; individual debtors and nondebtor limited liability companies; recent developments in chapter 13; student loans; post-petition financing; agricultural bankruptcies; and mediation – topped off with Judge Perris sharing her chapter 9 experiences and photography. I especially enjoyed the Law Clerks panel. The members gave insight to what happens behind the scene and, frankly, I have always wondered where that "tone" in some opinions comes from. **The 28th Annual NWBI will be held May 1-2, 2015, at the Portland Marriott Downtown**.

In reviewing prior years' (lots of them) Comments from the Chair and attending the Annual Meeting and CLE, I noted the underlying theme is seeking volunteers for the Section's committees. I have often wondered what the Section's committees do and how much of a commitment is required of the members, so I did a little research. This is what I learned:

Pro Bono Committee: The Pro Bono Clinic coordinates with Legal Aid Services of Oregon to provide legal services to individuals who could not otherwise afford to get the legal advice they need. The Portland Committee meets several times a year, usually in the fall, to update materials, plan a CLE for volunteer attorneys, and solicit volunteers for the upcoming year. Maya Crawford, Supervising Attorney for the Volunteer Lawyers Project of the Portland Regional Office of Legal Aid Services of Oregon, conducts the meetings. Under her supervision, 12 bankruptcy clinics, with 12 to 15 volunteer attorneys each, are presented in the Portland metropolitan area each year. LASO employees interview, screen and assign applicants to each

Continued next page

clinic. Volunteer attorneys conduct an hour-long class explaining chapter 7, mentor other attorneys and meet with and agree to represent applicants on a pro-bono basis. In 2013, the Portland Clinic opened 367 cases, slightly down from the 419 cases opened in 2012.

The Bend and Eugene Pro Bono clinics operate on a referral basis. Applicants are screened by the Legal Aid Clinic and referred directly to volunteer attorneys for pro bono representation. The Bend Clinic opened 22 cases in 2013, and the Eugene Clinic opened 12 with an additional nine waiting to be referred.

Annual Meeting and CLE Committees: The Annual Meeting and CLE Committees work hand-in-hand to plan and arrange for the Section's Annual Meeting and CLE. The members meet approximately every two weeks from March through June. They discuss and select topics for the program; identify and secure speakers; and choose and contract for the meeting facilities, catering and hotel rooms if required. They schedule the program, design the brochure, handle the registration, arrange the cocktail reception and dinner, and plan the entertainment. This year the Annual Meeting will be held on October 24th and 25th at the University of Oregon Law School. The topics have not yet been finalized, and the Committee will continue to meet until all CLE topics have been identified and the speakers secured.

NWBI Committee: The NWBI is co-sponsored by the Washington State Bar Association Creditor Debtor Rights Section and the Oregon State Bar Debtor-Creditor Section, working with the OSB CLE Seminars Department. The program planning committee consists of members of the OSB, the WSB, and Karen Lee, the Section's OSB liaison. That Committee meets every two or three weeks from July through November to plan the Institute. It develops a list of useful topics, with a balance between plenary and breakout sessions in business and consumer areas. Once the topics are decided, the members select speakers from the Oregon and Washington Bars and, possibly, a specialist from out of the region. Members contact the speakers, and draft and finalize the schedule. The OSB CLE Seminars Department is responsible for the logistics of the NWBI, which includes contracting with a venue, facilitating planning calls, ordering catering and A/V equipment, and having staff onsite during the institute to ensure efficient execution of the program events. When the Planning Committee has confirmed the speakers, the CLE Seminars Department becomes the point of contact for all speaker communications, from collecting and collating course materials, to booking travel reservations, following up with copies of the institute evaluations and providing tokens of appreciation.

Saturday Session Committee: Saturday Session was developed to promote an exchange of views on problems and potential improvements in the Oregon bankruptcy system. To encourage meaningful dialog, the number of Session attendants has previously been limited; this year the policy changed, and attendance is no longer limited to one lawyer per firm. The Committee includes at least one practitioner from the Section, a judge and the clerk of the court. Members typically meet by phone four or five times between October and the date of the event in early spring. They select the date, location, topics, and speakers; make the arrangements for the facility and catering; handle all communications with the bar for the event; collect the registration forms and fees; and, when appropriate, obtain CLE credit.

Debtor-Creditor Newsletter

The Debtor-Creditor Newsletter is published three times a year by the Debtor-Creditor Section, Oregon State Bar, P.O. Box 231935, Tigard, OR 97281-1935.

Local Rules Committee: The Local Rules Committee reviews and recommends to the court changes to the Local Bankruptcy Rules and Forms to bring them into compliance with federal rules or changes in law. This last year, the Committee worked with the court on the new chapter 13 plan. The Committee is currently exploring: (1) whether, and to what extent, the court should require a creditor to provide payment-history information with a motion for relief from stay; (2) the relationship of the Local Rules to the Local Bankruptcy Rules; and (3) the proof of claim objection process, including revising the option to base an objection solely on the absence of attached supporting documentation. The Committee is also looking at working with the Federal Bar Association to assist with or encourage a nascent project to solicit information from the bankruptcy judges about ways in which practice before them differs from judge to judge.

Legislative Committee: Members of the Legislation Committee meet primarily before and during a legislative session to review pending bills that relate to the interests of the Section. The Committee tracks the bills as they progress through state legislative committee and both houses. Members may talk with sponsors to see why the proposal is being made, and may make suggestions to modify the bill for clarity. Occasionally, the Committee asks the Executive Committee to support or oppose a pending bill. Also on occasion, the Committee may, with the agreement of the Executive Committee, propose legislation. During a special session there may be 10 to 15 bills to monitor; during a busy session, the Committee may review 50 or more bills.

Consumer Bankruptcy Committee: The Consumer Bankruptcy Committee organizes and conducts an informal meeting every other month from 4:00 to 5:30 in the Portland and Eugene Court conference rooms. The meeting, fondly referred to as the "Circle of Love," is video-conferenced between the two courts and teleconferenced for those outside the conference rooms. The goal is to promote open discussion on issues affecting consumer bankruptcy practice between the bench, bar and trustees.

Website Committee: The Debtor-Creditor Website Committee updates and maintains the Section's website by posting the names, contacts information and meeting dates for the Section's committees, bankruptcy court opinions as soon as they are published, announcements of interest to the Section and the Debtor-Creditor Newsletter.

Newsletter Committee: The Newsletter Committee consists of the Editor-in-Chief and the Editorial Board. All of the members are nerds who truly enjoy research and writing. They get together three times a year to multi-task: proofread articles going to print for grammar, style and accuracy; discuss obscure legal issues for future articles; and hunt for poor unsuspecting souls to write articles on their obscure legal issues. Once they complete their task, they turn the responsibility of collecting the articles for publication over to the Editor-in-Chief. The Editor-in-Chief issues her first "gentle" reminder of the deadline for the articles several weeks before the desired publication date. All parties hear the reminder but fail to act. The Editor-in-Chief then issues a "Written Notice of Deadline for Newsletter Article." The authors, knowing there is no specific deadline because the Newsletters are published "Spring," "Fall," and "Winter" in a state where only "Summer" and "Rain" exist, pay little attention to the Editor-in-Chief's "Written Notice." It is only when "Spring" turns into "OMG! AM I EVER GOING TO GET THIS DONE" that they finally heed the Editor-in-Chief's justifiable screeching. Finally the Editor-in-Chief checks cites and starts to edit. Sick to death of the whole mess, she turns the articles over to the Editorial Board who, by that time, has forgotten the obscure legal issues it so proudly assigned and is now wondering why it is wasting its time proofreading such ridiculous topics "for grammar, style and accuracy."

CARE Program Committee (Portland and Eugene): Members of the CARE Program Committee organize and present educational programs on the responsible use of credit to high school students throughout Oregon. Presentations are often done in teams using materials prepared and routinely updated by Committee members. The Eugene Committee has been successful in working with schools giving several presentations each year. The Portland Committee has established connections at the Tigard and Beaverton Jesuit High Schools; otherwise, it is struggling to find teachers willing to participate in the program. It would welcome contact information at other schools to enable it to continue.

New Lawyers Committee: The New Lawyers Committee provides networking opportunities, CLE programs, and resource information for members of the Section new to the practice of debtor-creditor law. The Committee holds after-work social get-togethers to discuss debtor-creditor related topics.

Award of Merit Committee: The Award of Merit Committee consists of all past chairs of the Section. The members seek out persons deserving of special recognition for extraordinary contributions in the debtor-creditor area. The names of the recipients of the Award of Merit are on the Award plaque at the Portland Bankruptcy Court.

Donation Requests Committee: The Donation Requests Committee addresses donation requests that come to the Section and makes decisions regarding the requests in conformance with the policy adopted by the Executive Committee.

Federal Bar Association Committee: The Chair of the Executive Committee is generally the sole member of the Federal Bar Association Committee with the sole task of attending the FBA Section meetings to represent the bankruptcy bar at the FBA level.

Nominating Committee: Sixty days before the Section's annual meeting, the Executive Committee appoints a Nominating Committee to nominate next year's Executive Committee positions. The Nominating Committee consists of three persons who are members of the Section, at least one of whom is not a member of the Executive Committee. Thirty days before the annual meeting, the Nominating Committee reports to the Chair one nomination for each position. The Nominating Committee's report must be distributed to Section Members along with the time, date, and location of the Section's annual meeting.

Although the goal of this article is to be informative with no solicitation, I cannot forgo the opportunity to say new people and new ideas are always welcomed by the committees. The names, contact information and meeting dates for the various committees are posted on the Debtor-Creditor Section website: http://www.osb-dc.org/index.php

Stay safe and have a wonderful summer.

ENFORCING MONEY JUDGMENTS ACROSS THE UNITED STATES-CANADA BORDER

By John Sullivan, James Baumgartner, Britta Warren and Sean Foote

Trade in goods and services between the United States (U.S.) and Canada exceeds $710 billion dollars per annum. It is the largest bilateral trade relationship in the world. For forty-three states in the U.S., Canada represents its first or second largest export destination. Similarly, the U.S. is the largest export destination for all ten Canadian provinces. In 2012, for example, Canada bought more U.S. exports ($292.4 billion) than the top five nations of the European Union combined ($191.1 billion, from Germany, United Kingdom, France, Netherlands and Italy).[1]

This extent of cross-border trade is possible, in part, because commercial laws are substantially similar in each country and business relationships based on them will feel familiar to the parties. Nonetheless, a cross-border business deal can go bad. When that happens, a party seeking redress will have to consider whether to initiate litigation against the foreign party in its own country or in the foreign country of the other party. Many factors may cause a plaintiff to sue in its home forum, including: the comfort and familiarity of the process and tribunals of its home jurisdiction, as well as the belief that the defendant will choose to settle, or will have local exigible assets in any event.

If the party seeking redress chooses to sue the foreign party in its home country and prevails, it may nonetheless be confronted with a deficiency of assets in its home country to satisfy the money judgment. (Because most business-related disputes are reduced to a money judgment, this article focuses on the enforcement of money judgments. Other forms of relief, such as injunctions, are not addressed.) In that case, the party who obtained the money judgment will have questions with respect to enforcing its hard-won rights in the other party's country. This article addresses the situation that Canadians will face when they seek to enforce a Canadian money judgment in the U.S., and that Americans will face when they seek to enforce a U.S. money judgment in Canada.

I. Recognition and Enforcement of Canadian Money Judgments in the U.S.

Before a Canadian-based judgment can be enforced in the U.S., it must be "recognized." A Canadian creditor may be surprised to learn that no single set of rules controls this recognition and its rights may vary from state to state.

Nearly 120 years ago, the U.S. Supreme Court in *Hilton v. Guyot,* 159 US 113 (1895), established the minimum, but not the complete, criteria for recognizing foreign-country judgments in the U.S. Each state can apply varying standards beyond those minimum requirements. In 1962, the Uniform Foreign-Country Money Judgments Recognition Act (the Act)[2] was proposed in an effort to establish consistency in the criteria and processes for enforcing foreign-country[3] money judgments in the U.S. A total of thirty-two states in the U.S. originally adopted that law. Non-money judgments, such as divorce, support or other domestic relations judgments, and some judgments reduced to specific sums, such as judgments for taxes, penalties or fines, are expressly excluded from the coverage of the Act. In 2005 the Commission adopted a revised version of the Act. Eighteen states and the District of Columbia have adopted the 2005 version[4] and fifteen have retained the 1962 version.[5] The remaining seventeen states have not adopted either version.[6]

The Canadian judgment creditor's first task is to determine in which U.S. forum it will attempt to have its judgment recognized. That choice may be dictated by the location of the U.S. judgment debtor or its assets. But the Canadian judgment creditor will have greater certainty if it can select a forum that has adopted the Act, preferably the 2005 version, which clarifies a few issues under the 1962 version.

When initiating an action for recognition in the U.S., the Canadian judgment creditor has two forums to consider: state or federal court. Typically, each state jurisdiction has one or more levels of courts (*e.g.*, district, circuit, or superior court) which can be distinguished by amounts in controversy and subject matter jurisdiction (*e.g.,* real estate foreclosure, probate, small claims). Because of the nuances of each locality, the particular jurisdiction must be reviewed prior to initiating the recognition action in state court. In all U.S. states, there is at least one U.S. District Court. However, federal jurisdiction is limited to either (1) disputes arising under federal law or (2) disputes involving diversity of citizenship, which requires that the plaintiff be a resident of a different state or country than the defendant, and the amount in controversy must exceed $75,000.[7]

Once the Canadian judgment creditor determines the appropriate jurisdiction, the recognition action is initiated in the same manner as an original proceeding would be initiated in that court. However, unlike an original lawsuit on the underlying dispute, the issues in a recognition action are limited to whether the Canadian judgment satisfies the criteria for recognition.

Under the Act, the initial burden of proof is on the Canadian judgment creditor to show that the Act applies to its judgment. In states that have adopted a version of the Act, the U.S. court will recognize an applicable Canadian judgment, except in limited circumstances. In states that have not enacted either version of the Act, there is no set rule that a foreign-country judgment must be recognized. Instead, the Canadian judgment creditor will be subject to the court's interpretation and application of the common law derived from *Hilton v. Guyot.* There are both mandatory and permissive grounds on which a U.S. court may deny recognition. The U.S. judgment debtor bears the burden of proof[8] on these nonrecognition issues.

A. Mandatory Grounds for Denial of Recognition

A U.S. court must deny recognition if the judgment resulted from a judicial system that lacks due process and impartial tribunals, or if the issuing court lacked subject matter jurisdiction over the dispute or personal jurisdiction over the U.S. defendant. Recognition of the Canadian judgment cannot be denied due to lack of personal jurisdiction if the U.S. defendant was personally served in Canada, voluntarily appeared in the proceedings (except for limited protected purposes), agreed to Canadian jurisdiction of the dispute prior to initiation of proceedings, or maintained a business office in Canada and the underlying dispute arose from business conducted out of that office.

B. Permissive Grounds for Denial of Recognition

A U.S. court may, but is not required to, deny recognition if: (1) the U.S. defendant did not receive adequate notice of the foreign-country action to allow a timely defense of the underlying case; (2) the judgment was obtained by fraud, preventing the U.S. defendant from fairly presenting its case as a defendant; (3) the judgment is repugnant to the public policy of the particular state or the U.S. government; (4) the judgment conflicts with another final conclusive judgment; (5) the judgment conflicts with the parties' expressed agreement to submit the dispute to another decision maker or tribunal; (6) in those cases where personal jurisdiction was based exclusively on service of process in the foreign country, the forum was seriously inconvenient to the U.S. defendant; (7) there is substantial doubt regarding the foreign court's integrity; or (8) the specific proceedings were not compatible with U.S. due process. Careful drafting of the parties' agreement can address several of the issues that otherwise might give rise to a collateral attack on the recognition of a judgment. Counsel should consider stipulations to personal jurisdiction and appropriate tribunals, and include provisions addressing inconvenient forums, confirm subject matter jurisdiction and agree upon the appropriate means for service of process.

These mandatory and permissive grounds for non-recognition echo U.S. common-law on the subject and the U.S. Supreme Court's decision in *Hilton*. Although the U.S. judgment debtor does not have the opportunity to re-litigate the underlying dispute, the Act does require a U.S. court to look behind a foreign-country judgment to evaluate the law and judicial system under which the judgment was issued.

Mere procedural differences, including differing evidentiary rules or even the absence of a jury trial available in the U.S., are not enough to support non-recognition.[9] Rather, the relevant inquiry is whether there was a full and fair opportunity for an impartial judicial decision following a course of regular proceedings in the foreign country. *Hilton*, 159 U.S. at 202. Given the similarities between Canadian and U.S. judicial systems, a money judgment duly issued by a Canadian court should withstand most collateral attacks.

Once a Canadian judgment is recognized, it is entitled to the full faith and credit of the U.S. laws. It will be conclusive on the subject matter between the parties. A Canadian judgment creditor may use all means available to any U.S. judgment creditor to enforce and collect the recognized judgment. In addition, the recognized judgment may then be registered and enforced in other U.S. states as a foreign judgment under the Uniform Enforcement of Foreign Judgments Act.[10]

II. Recognition and Enforcement of U.S. Money Judgments in Canada

Once an American crosses the 49th parallel into Canada, Article IV of the U.S. Constitution (Full Faith and Credit) no longer applies. The good news, however, is Canadian courts generally will recognize and enforce an American money judgment, without re-litigating the merits – regardless of whether it is a state or federal court. U.S. judgments are prima facie enforceable under Canadian common law, by means of the *Morguard* Principle, which takes its name from the decision of the Supreme Court of Canada in *Morguard Investments v. De Savoye* [1990] 3 SCR 1077. For certain states and provinces (*e.g.*, enforcing an Oregon judgment in B.C.), there is a statutory option: reciprocal enforcement of judgments legislation.

A. Enforcing U.S. Judgments in Canada by Means of the *Morguard* Principle

Traditionally, the Canadian approach to U.S. judgments was one of prima facie unenforcability. The 1908 decision of *Emanual v. Symon,* [1908] 1 KB 302 (English Court of Appeal), provided that a foreign judgment would be recognized only if the defendant was a resident of the foreign state, voluntarily appeared in the foreign state action, or contracted to submit to the jurisdiction of the foreign state.

Canada's decisive break with *Emanual v. Symon* occurred with the 1990 decision of the Supreme Court of Canada (SCC) in *Morguard Investments v. De Savoye*. *Morguard* involved an Alberta judgment in B.C. that would not have been enforceable under the traditional *Emanual v. Symon* test. However the SCC rejected that restrictive approach and held the Alberta judgment was enforceable, without the need to relitigate the merits. In so deciding, the SCC gave us the *Morguard* Principle, which is that "the courts in one [Canadian] province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province . . . so long as that court has properly, or appropriately, exercised jurisdiction in the action." *Id*. at 1102. Three years later the B.C. Court of Appeal extended the *Morguard* Principle to a U.S. judgment. In *Moses v. Shore Boat Builders,* (1993) 83 BCLR (2d) 177 (CA), the Court of Appeal held, on the basis of *Morguard*, that an Alaskan judgment was prima facie enforceable in B.C. The SCC followed this approach in 2003 in *Beals v. Saldanha,* [2003] 3 SCR 416., holding that a Florida judgment was prima facie enforceable in Ontario. It is now uncontroversial that courts throughout Canada apply the *Morguard* Principle to U.S. judgments. *See, e.g., Beals v. Saldanha,* (2001) 54 OR (3d) 641 (Ontario Court of Appeal). Not every U.S. judgment will be enforced in Canada. In *Morguard*, the SCC stated that "fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction." *Morguard*, ¶41. A Canadian court will thus refuse to enforce in two circumstances: (1) the U.S. court did not properly have jurisdiction; (2) specific defenses apply, going to the fairness of the U.S. process (*e.g.,* breach of natural justice or fraud on the U.S. court). Each of these will be examined in turn.

1. Jurisdictional Problems

If the U.S. court did not properly have jurisdiction – according to Canadian conflicts of laws rules – then its judgment will not be enforceable in Canada. The test for jurisdiction set out in *Morguard* was whether there was a "real and substantial connection" between the action and the territory of the court that granted the original judgment. *Morguard*, ¶¶51 – 52.

Four Canadian provinces have passed a version of the Model Court Jurisdiction and Proceedings Transfer Act (CJPTA), which codifies rules of jurisdiction. These are British Columbia, Saskatchewan, Nova Scotia, and Prince Edward Island.[11] The CJPTA is largely uniform across the four provinces. Section 3(e) reiterates the "real and substantial connection" test. Section 10 provides a non-exhaustive list of factors which are presumed to establish a "real and substantial connection," such as claims to property within a jurisdiction, contracts predominantly performed within a jurisdiction, and torts committed within the jurisdiction, among many others.

Although Ontario, Quebec, and several other Canadian jurisdictions have not adopted the CJPTA, the law is similar in those jurisdictions in light of the 2012 SCC decision in *Van Breda v. Village Resorts Ltd.,* 2012 SCC 17. In this decision, the SCC aligned the common law with the statutory developments in B.C. and other provinces. The issue in *Van Breda* was whether Ontario residents injured at a resort in Cuba could sue in Ontario, or would have to bring action in Cuba. In allowing suit to be brought in Ontario, the SCC commented on the relevance of certain factors for tort claims:

a. "The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor." *Id*. at ¶86.

b. "On the other hand, a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office)." *Id.*

c. "Carrying on business in the jurisdiction may also be considered an appropriate connecting factor" (though a virtual, "e-trade" presence by itself may not be enough). *Id*. at ¶87.

d. "The situs of the tort is clearly an appropriate connecting factor." *Id*. at ¶88.

e. A presumptive effect "cannot be accorded to" the connecting factor of where damage is sustained. *Id*. at ¶89.

2. Specific Defenses

Along with lack of jurisdiction, a small number of specific defenses can stop a U.S. judgment from being enforced in Canada. The principal defenses are: fraud on the U.S. Court; public policy; and breach of natural justice. The trend in Canadian law has been in favor of recognizing U.S. judgments. Thus, all of these defenses are narrowly construed.

For example, the fraud defense is limited to "fraud on the court," such that an allegation of "fraud on the merits" cannot be raised to stop enforcement of a U.S. judgment. In other words, the fraud in question must be an "extrinsic" fraud – not a fraud committed in the underlying dealings between the parties, but a fraud committed in the course of the foreign proceeding, that had the effect of denying to the defendant a fair and adequate opportunity to present its case to the foreign court. An example would be where a plaintiff submitted a fraudulent proof of service to the foreign court in circumstances where the defendant was in fact unaware of the proceeding.

Although a foreign judgment will not be applied if it stands for a proposition that is contrary to the public policy of Canada, this does not mean that U.S. judgments will be denied simply because they are based upon substantive law that differs from Canadian law. For the public policy defense to apply, the foreign judgment must be contrary to Canadian "essential morality" – that is, fundamentally inconsistent with the Canadian system of justice. *See, e.g., U.S.A. v. Ivey,* (1995) 130 DLR (4th) 674 (OSCJ), *aff'd,* (1996) 30 OR (3d) 370 (OCA); *Old North State Brewing Co. v. Newlands,* (1998) 58 BCLR (3d) 144 (CA); *Beals v. Saldanha, supra.* Some authorities maintain that part of the "public policy" defense is that Canadian courts will not recognize a foreign judgment where so doing would involve the Canadian court in the enforcement of the "penal," "revenue" or "other public laws" of another nation. *See, e.g, Lane & Baltser v. Estonian State Cargo & Steamship Line,* [1949] SCR 530, where the SCC refused to enforce an order from the Estonian Soviet Socialist Republic, and *U.S.A. v. Ivey, supra.*

The other defenses are similarly narrowly construed. A successful defense for breach of natural justice requires a "fundamental flaw" in the foreign proceedings, as "mere irregularities" will not suffice. *See, e.g., National American Insurance Co. v. Leong,* (1996) 49 CPC (3d) 246 (BCSC), and *U.S.A. v. Ivey, supra.* Defendants can also delay matters by requiring that the American judgment be "final" (the American court that rendered it no longer has the power to rescind or vary it in any way), and by obtaining a stay of proceedings or execution pending appeals in the U.S. *See*, e.g., Rule 19-3(9) of the BC Supreme Court Civil Rules.

B. Enforcing U.S. Judgments in Canada by means of Reciprocal Enforcement of Judgments Legislation

Depending on the jurisdictions involved, U.S. judgment creditors may be able to utilize reciprocal enforcement of judgments legislation. This legislation exists in all Canadian provinces except Québec. In B.C., for example, under the Court Order Enforcement Act, RSBC 1996 c. 78 (COEA), the money judgments of the following states can be statutorily enforced: Washington, Oregon, California, Alaska, Colorado and Idaho (the Reciprocating States).[12]

For judgments from Reciprocating States, the COEA process provides an expedited, summary process for enforcing a U.S. money judgment. For example, to enforce a U.S. judgment under the common law in B.C., the U.S. judgment creditor would have to file a notice of civil claim, and await the defendant's response to civil claim. See B.C. Supreme Court Civil Rules 9-6(2) and 9-7(2)(a). Depending on the defenses raised, the American judgment creditor would then proceed to either summary judgment, summary trial, or a full trial in the B.C. Supreme Court. By contrast, if the judgment is from a Reciprocating State[13], the American judgment creditor can apply for registration of the U.S. judgment on the basis of either a petition or a requisition. *See* COEA §29, B.C. Supreme Court Civil Rule 19-3(2) and 17-1(1). If the judgment debtor was personally served with the process in the Reciprocating State, or appeared and defended in the Reciprocating State (and no appeal is pending, or the appeal has been dismissed), then the American judgment creditor can apply for registration without notice to the judgment debtor.[14] *See* COEA, §29(2). In simple cases of enforcing money judgments where the defendant participated in the process of the Reciprocating State, and no potential issues with respect to fraud on the court, breach of natural justice or breach of Canadian public policy arise, it will be faster and cheaper to utilize the COEA process than the common law.

Once registered under the COEA process, the judgment has the same force and effect as if it were a judgment of the B.C. Supreme Court given on the date of registration. The U.S. judgment creditor will be able to pursue execution proceedings upon it in B.C. without any impairment by virtue of its foreign origins.

However, there are limitations and defenses. Specifically, the B.C Supreme Court will not register a judgment from a Reciprocating State if:

- it is more than 10 years old, COEA §29(1);
- the American court acted without jurisdiction under B.C.'s conflict of law rules, COEA §29(6)(a);
- the defendant, being a person who was neither carrying on business nor ordinarily resident in the Reciprocating State, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court, COEA §29(6)(b);
- the defendant was not duly served with the process of the American court and did not appear (notwithstanding residence in the Reciprocating State, nor an agreement to submit to the jurisdiction of the court of the Reciprocating State), COEA §29(6)(c);
- the judgment was obtained by fraud, COEA §29(6)(d);
- an appeal is pending or the time in which an appeal may be taken has not expired, COEA §29(6)(e);
- the judgment was based on a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the B.C. court, COEA §29(6)(f); or
- the defendant would have a good defense if an action were brought on the judgment (*i.e.*, if an action were brought under the common law *Morguard* Principle). COEA §29(6)(g).

Footnotes

1. For these and other basic facts relating to the enormous trading relationship between Canada and the U.S. *see The Economist*, "The Americas," March 15-21, 2013, page 33; the Canadian Government's "Foreign Affairs, Trade and Development Canada," http://www.international.gc.ca/international/index.aspx?lang=eng ; and the U.S. Census Department's "Top Trading Partners – December 2012," http://www.census.gov/foreign-trade/top/dst/2012/12/balance.html, which records that in 2012 the U.S. imported $324.2 billion worth of goods from Canada and exported $292.4 billion worth of goods to Canada. By comparison, U.S. exports to the top five U.S. trade member states of the European Union in 2012 amounted to only $191.1 billion, or $101.3 billion less than U.S. exports to Canada.
2. The Act was promulgated by the National Conference of Commissioners on Uniform State Laws (Commission), which has no legislative authority. The Commission periodically drafts and revises uniform laws to be considered for adoption by the various states.

3. Confusion often occurs in the U.S. between "foreign judgments," which arise in other U.S. states and are entitled to full faith and credit under the U.S. Constitution, and "foreign-country judgments," which arise in countries outside the U.S., but which must be specifically recognized to be enforceable. This confusion is compounded by two similarly named acts – the "Uniform Enforcement of Foreign Judgments Act" and the "Uniform Foreign-Country Money Judgments Recognition Act" – that relate to sister-state judgments or foreign-country judgments, respectively.
4. The following states enacted the 2005 version of the Act: California, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Washington. Adoption legislation for the 2005 version is pending in three other states as of February 1, 2014 (Massachusetts, Mississippi, and Virginia). *See* http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country Money Judgments Recognition Act.
5. Alaska, Connecticut, Florida, Georgia, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas and Virginia have retained the 1962 version of the Act.
6. Arizona, Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, New Hampshire, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.
7. Federal jurisdiction for foreign-country judgment recognition is beyond the scope of this article. Generally, when jurisdiction is based on diversity of citizenship, U.S. District Courts apply the recognition requirements of the underlying state law. However, for cases involving federal subject matter jurisdiction (unusual in trade disputes), there is no definitive source of law. Instead, the federal courts look to the principles set forth in *Hilton v. Guyot* and the *Restatement (Second) Conflict of Law.*
8. These expressed shifting burdens of proof are one way the 2005 version has clarified the 1962 version of the Act.
9. "The [Uniform Foreign-Country Money Judgment] Recognition Act and the common law principles it encapsulates are motivated by an interest to *provide for* the enforcement of foreign judgments, not to prevent them." *Chevron Corp. v. Naranjo*, 667 F3d 232, 241 (2nd Cir 2012) (emphasis in original). Procedures need not meet all the intricacies of the complex concept of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense. *See Society of Lloyd's v. Ashenden*, 233 F3d 473 (7th Cir 2000).
10. See note 3 above. The Uniform Enforcement of Foreign Judgments Act has been adopted in 48 states. California adopted its own act to deal with sister-state judgments and legislation to adopt the Uniform Enforcement of Foreign Judgments Act is pending in Massachusetts.
11. *See Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c. 28; *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c. C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d session), c. 2*; Court Jurisdiction and Proceedings Transfer Act*, SPEI 1997, c. 61; *Court Jurisdiction and Proceedings Transfer Act*, SYT 2000, c. 7; Black, Vaughan, Stephen Pitel and Michael Sobkin, "Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act," 2012, Toronto: Thomson Reuters. Prince Edward Island has not yet proclaimed the law in force.
12. The COEA requires each foreign state to be separately declared a reciprocating state. COEA §37(1) ("Where the Lieutenant Governor in Council is satisfied that reciprocal provisions will be made by a state in or outside of Canada for the enforcement of judgments given by the Province, he may by order declare it to be a reciprocating stat for this Part."). Oregon's adoption of the Act, discussed *supra*, met this requirement so that Oregon is among one of the states that enjoys reciprocating state status under the COEA.
13. A variety of other, non-U.S. jurisdictions are reciprocating states for this purpose as well, including any Canadian Province other than Québec, many Australian jurisdictions, Germany, and Austria. *See* "Jurisdictions Declared to be Reciprocating for the purposes of this Act," *British Columbia Annual Practice*, p. 1398. With respect to the United Kingdom, *see also* Part 4 of the COEA, and Schedule 4 to the COEA.
14. Note that in the case of a without-notice registration of a U.S. judgment, the judgment debtor will be given a 30-day period in which she or he can apply to set the registration of the U.S. judgment aside, before execution can proceed – COEA §§29, 33, and 34. The judgment debtor can apply to set aside the registration on the basis of any of the grounds set out in §29(6).

SATURDAY SESSION

By Laura Donaldson, Kuni Donaldson

Do you have a gripe with the judges or with inconsistencies in courtroom procedures? Need clarity on service rules or discovery deadlines in contested matters versus adversary proceedings? Feel like an answer from one judge won't necessarily be the answer you get from another? Want to change that situation? Why not attend Saturday Session and have your voice heard?! You have questions, Saturday Session has answers.

Saturday Session is a forum that allows the free speaking of minds on issues relevant to the bankruptcy bar's everyday practice. It is a time to learn about what is and is not working in the courts, from court practices, procedures and rule changes to practitioners' concerns about judicial fairness or conduct. This event has the ear of Portland and Eugene judges, all of whom make a point to attend.

This year's session was held on March 1, 2014. Judge Randall Dunn, Loren Scott, and Charlene Hiss planned the program. Before the session, surveys were sent to section members requesting input on issues that trouble them in their practice. Items discussed at the session were diverse, ranging from service issues in chapter 11 to concerns about judges who formulate opinions on matters before entering the courtroom.

Caroline Cantrell, Section Chair, began the session with an update on section members and financials. The section is currently losing money. The Executive Committee's goal is to cut expenses and increase income through increased membership and CLE attendance. For 2014, there are 668 regular members; 113 of 2013's regular members did not renew. Caroline discussed the Northwest Bankruptcy Institute scheduled for April 25-26, 2014, in Seattle. An unforeseen boycott will affect this venue. After examining cost, planners concluded that changing venues at this late date would be too costly, so the event will continue as planned.

Richard Parker, liaison for the National Association of Consumer Bankruptcy Attorneys encouraged attendance at the April NACBA convention in New York. NACBA's next event is in Chicago in 2015. He encouraged debtors' lawyers to check out the benefits of NACBA including access to the large group of lawyers with a focus on debtor practice.

Judge Alley and his clerk, Marianne, discussed the current challenges of court administration. Judge Alley praised the court clerks for the quality of their leadership given the recent cutbacks, and noted their commitment to making attorneys' lives easier. He encouraged attorneys to remember that clerks are doing the work of many folks who have retired or whose jobs were eliminated. He addressed the storm that caused the court's power failures and CMECF filing issues. The court is migrating to a San Diego centralized server, which has a better back-up system in case of power failures. All work product and information will now be directed to that server to prevent limited functionality of the court in future severe weather. The downside is that all websites require uniformity, so all of Judge Trish Brown's recent work on the existing website will be lost through adoption of the central template. Although this move will save the courts money, Judge Brown noted that with the migration, the full text of court opinions will not be searchable as they are now. However, summaries will still be searchable.

Judge Alley discussed the attacks on the national judicial intranet system, known as dedicated denial of service attacks. These attacks infect computers and institutions with inquiries that flood the system so legitimate users cannot get in. A big reminder to practitioners: The *Anwar v. Johnson* case, 720 F3d 1183 (9th Cir 2013), says the courts will enforce deadlines embedded in national rules or statutes. In *Anwar,* a secretary had trouble converting a file to pdf and finally succeeded in filing one hour beyond the deadline. The court held the deadline was blown. The court's ruling reminds us if you miss a statute of limitations due to the court systems being unavailable, it will not be a defense allowing reconsideration. The judges concurred that the moral of the *Anwar* case is: don't wait until the last minute to file your case or response.

Judge Alley also announced the retirement of Judge Elizabeth Perris in January 2015. The formal announcement will be posted to the court's website. He discussed the long and intricate process an applicant for a vacancy goes through, from the initial application to the final interview in San Francisco. The Section will miss Judge Perris and we all wish her a very enjoyable retirement. She has earned it!

Marianne (Judge Alley's clerk) discussed the judiciary's cost containment strategies, including space reduction at the court and new fees for §363(f) sales and transfer of claims, which started last year. There are proposed fee increases beginning 6/1/14: adversary complaint fee increases from $293 to $350; administrative fees for filing a bankruptcy petition or dividing a joint case increase from $46 to $75 for chapters 7, 12 and 13, and from $46 to $550 for chapters 9, 11 and 15. Live ECF training has been eliminated, but there will be future modules on the court website for ECF training. The dedicated ECF helpline is gone, but once a case is filed a case administrator for that particular case can answer questions. For general questions, email is available. See the court's website for further details. Multnomah County Circuit Court will start a new ECF filing program in May 2014, and the bankruptcy court will generate income by renting space for ECF training to the judges and staff of that court who are new to efiling.

Pam Griffith of the United States Trustee's (UST) office is back in Portland after spending over a year in Washington. Due to budget constraints, many individuals in the UST office are wearing different hats. The UST office has announced that to the extent "marriage," "husband and wife" and similar terms are used in bankruptcy, they can apply to same-sex couples. The national website has more information. http://www.justice.gov/ust/ Creditor enforcement efforts continue. Abuses are still being seen despite the National Mortgage Settlement. The UST is still gathering information that lenders are not complying. Non-settling mortgage servicers are being investigated, and proof of claim monitoring continues. The goal is for everyone to comply with the Code.

Pam reported two major settlements – with Capital One and Citi. Capital One filed claims in bankruptcy cases for debts previously discharged, and Citi filed proofs of claim with personally identifying debtor information (full social security numbers, birth dates, etc.). Keep the UST informed of any items you see that fit within these fact patterns, as they continue to monitor the cases.

Implementation of the new UST fee in chapter 11 cases began in November for cases of at least $50 million in assets and $50 million in debt. Most people thought this change would not affect Oregon. As it turns out, Oregon had one of the first cases to meet this mark.

Pam discussed UST ethics referrals and attorney sanction motions related to attorney signatures when filing petitions or documents via ECF. The UST position is that an attorney must see the wet signature of the clients and that documents filed with the court must match that which was signed by the client. Pam has addressed this issue at Circle of Love meetings on many occasions. Upon her return to Portland, she decided to randomly check two §341(a) dockets, one for chapter 7 and one for chapter 13. One case was picked from each attorney on the dockets for those days. The results were not pleasing – for 31 different attorneys, 36.67% of the cases had issues. In the worst cases, the clients had not signed the documents in the attorney file. Based on the findings, these audits will continue.

Judge Perris does not like the wet signature requirement: the requirement to retain paper copies is burdensome, and the IRS doesn't require a wet signature. She notes the problem is that part of the process is electronic, part is paper. What is the correct way to deal with evidentiary issues? Lawyers could have addressed this issue in the now-published alternative proposals to the national rules requiring retention of paper copies but slept on their rights. The UST does not want to eliminate the requirement for paper copies. Judge Dunn noted potential problems for practitioners when the state bar rules require a wet signature but the local bankruptcy rules do not, citing an unpublished Northern District of California case.

Dave Hercher, Steven Arnot, and Andrea Breinholt of the local rules committee discussed changes in the local rules and the interim Chapter 13 plan. A handout of the selected rule and form changes drafted by Christopher Coyle was published in the Winter 2014 issue of this Newsletter. This has been a collaborative effort between the judges and the rules committee. Rule 7008-1 and 7012-1 were discussed in light of the *Bellingham* case, 702 F3d 553 (9th Cir 2012), pending final decision. In *Bellingham*, the question was whether a party can waive a right to entry of a final order where the court lacked authority to enter the final order in line with *Stern*. On Rule 9020, Judge Alley reminded us that damages in contempt motions will be denied if not pled with particularity. Rule 9013-1 generated discussion on deadlines to file responses to motions: how does a person get notice if the objection deadline runs from the proposed filing date versus the service date? The concern was that pro se parties might not be aware of the filing date (*e.g.*, on relief from stay motions). The claim objection process, objections to exemptions, and renewed attention to service concerns in light of *Monk*, 2013 WL 4051864 (Bankr D Or), were also discussed.

The new chapter 13 plan form, to be utilized until the national form is required, was discussed. Changes are intended to make it easier to read, understand and complete. Andrea Brienholt discussed the changes and the provisions that mirror the national plan form. She discussed formatting, substance, and the certificate of service, revamped with an eye towards user friendliness. The check boxes are here to stay.

An open discussion took place on 16 issues raised by the survey. The liveliest discussions were on (1) the role of local counsel in chapter 11 cases, (2) periodic payments of professional fees in chapter 11, (3) discovery cutoff dates in scheduling orders, (4) decisionmaking by judges prior to listening to oral argument and (5) the possibility of raising the allowable fee attorneys charge for preparing chapter 13 fee applications.

Role of Local Counsel: Judge Dunn noted that the District Court is firm on this issue—local counsel must have meaningful participation in the case. Our bankruptcy judges, however, are fairly flexible. The issues arose in a recent case where local counsel was instructed not to read ECF filings because a major national firm was handling the litigation. As a result of this instruction, local counsel did not read an ECF notice of a sale of assets. The assets were sold, and creditor objected stating no notice. The question was whether there was a failure of due process (service). Court says no, debtor served everyone properly. Both Judge Alley and Dave Hercher agreed that NEF alone is not adequate service. Lawyers'duties are defined by court rules and state law. Judge Alley said that in a pro hac vice case, local counsel is generally excused if out-of-state opposing counsel is attending because it is generally a matter of cost. From a PLF standpoint, Johnston Mitchell pointed out that it is local counsel's responsibility to handle and manage the case and be familiar with the local rules. Judge Dunn noted that when there is more than one attorney, it is difficult to judge the reasonableness of fees.

Periodic Payment of Professional Fees: The issue arose in the context of submission of orders. The requirement is that the case be sufficiently complex to trigger the ability to get an interim compensation order based upon *In re Knudsen Corp*, 84 BR 668 (9th Cir BAP 1988). Loren Scott argued that all chapter 11s are large and complex. One chapter 11 case can make or break a smaller firm if interim compensation is denied. The complexity of the matter should be viewed in the eyes of the debtor and debtor's counsel. The issue is consistency. Some attorneys in the UST office allow the orders without issue while others want to litigate. Judge Alley felt the issue is left to judicial discretion. The rule provides 21 days for the UST to review the compensation request. Pam Griffith said the UST wants 21 days on every order.

Discovery Cutoff Dates in Scheduling Orders: Judges are inconsistent in how they handle deadlines. Judge Alley doesn't like to micromanage. Although a discovery date is on the scheduling order, it is routinely not followed. Judge Dunn holds an initial pretrial conference and asks the parties how much time they need and holds the parties to that date. Judges Perris and Brown both have a scheduling order that says the discovery cutoff date is 14 days before trial. Judge Renn allows the continued exchange of discovery beyond the discovery deadline. The judges recognize that perfect uniformity is not possible, but don't want to subject the bar to five different sets of rules either.

Judges voiced their frustration with misplaced optimism by practitioners as to timelines for trial in contested matters versus adversary proceedings. Contested matters are much harder to schedule and don't routinely have Rule 26 orders. Judge Alley suggested practitioners alert the judge about discovery issues, but understands the reluctance to write a letter to the judge. Justin Leonard proposed the following when having an issue with discovery: (1) Prepare a Motion for a Scheduling Order and (2) request the court convert the case from a contested matter to an adversary proceeding. The judges were open to this suggestion.

Decisionmaking by Judges Prior to Listening to Facts and Argument: Caroline Cantrell commented that many practitioners feel the judges come to the bench with their minds made up. This practice prevents clients from having their day in court and at times is disrespectful. Judge Dunn began by stating to the extent any judge does not address a practitioner with respect due to a bad day or some other reason, he sincerely apologies. He acknowledged the talent of the Oregon bar and their professionalism. To the extent the judges appear to have their minds made up as they come to the bench, in a sense they do. Judges prepare for each case, and the issues are not new to them – they have all been around for quite some time. However, he encouraged attorneys to stick to their guns and make their arguments. Judge Perris asked if it would be helpful to clients to see a judge acknowledge the facts are a, b, and c, and once facts are agreed on, the judge can rule. The suggestion was well received. Judge Alley agreed that judges will be predisposed to a ruling because they are prepared. You want your judge prepared but the issue should be open for discussion.

Charges for Chapter 13 Fee Applications: Judge Perris dislikes this fee. Preparation of fee applications is not bankruptcy work; it is a request for compensation. Judge Brown felt it unfair that the fee hasn't been raised in a number of years, and more is allowed in chapter 11 proceedings. Kent Anderson noted that, unlike for clients outside of bankruptcy, he must review and revise his entries (so as not to breach attorney client privilege) due to the public nature of the fee application postings. Most attorneys spend more than $35 worth of time reviewing their applications. The judges stated that until practitioners really make a beef about this (Judge Brown was rallying the cause) the dollar figure will remain the same.

CONCLUSION

If you have suggestions to any of the issues discussed or have views of your own, you are encouraged to convey them to the rules committee or one of our judges. Be heard: consider attending a Saturday session. The judges have set this time aside to exchange ideas and express concerns about our judicial system with people who can make a difference, and you are one of them. If you didn't get the opportunity to participate this year, consider it for next year. It's worth one Saturday.

REPOSSESSOR BEWARE: OREGON SUPREME COURT AFFIRMS BOLI DECISION REQUIRING CREDITOR TO REIMBURSE WAGE SECURITY FUND FOR UNPAID WAGES OWED BY DEBTOR

By Jeanne Sinnott, Miller Nash LLP

In *Blachana, LLC v. Bureau of Labor & Indus.*, 354 Or 676 (2014), the Oregon Supreme Court affirmed the decision of the Bureau of Labor & Industries (BOLI) that required a restaurant owner to reimburse the state Wage Security Fund for unpaid wages owed by the previous owner. The current owner had acquired the business through repossession, was unrelated to the previous owner, and had never employed the unpaid employees.

Since 1940, five different owners had operated a bar and restaurant in North Portland referred to as the Portsmouth Club. In 2005, CP Underhill, LLC (CPU) owned the business, which at the time consisted of a bar, the Portsmouth Club, and a restaurant, Mama's BBQ. In February 2005, CPU sold the business to NW Sportsbar Inc. (NW). Under the purchase and sale agreement, NW paid $50,000 for inventory and $285,000 for goodwill. CPU also leased the building to NW under a five-year lease agreement. NW became the authorized representative of the assumed business name Portsmouth Club, which had been registered with the Oregon Corporation Division since 1988.

NW operated the business under the names Portsmouth Club and Anchor Grill from March 2005 until May 2006. By May 2006, NW was three months behind in payments to CPU. The parties entered into a Surrender and Release Agreement, and NW surrendered the business and premises to CPU in exchange for CPU's releasing NW from its obligations. About a week later, CPU's owner, Janet Penner, registered Blachana, LLC with the Oregon Corporation Division and listed its assumed business name as Penner's Portsmouth Club. In June 2006, Blachana reopened the business. Initially, Penner's Portsmouth Club did not operate a restaurant, but by May 2007, the Club offered food and drinks and providing live music as entertainment under the name Portsmouth Pizza and Pub.

Around this time, an employee of NW filed a wage claim with BOLI. The BOLI investigator called the telephone number provided for NW and each time Chris Penner (Janet's son and co-owner of Blachana) answered the phone by saying "Portsmouth Club." BOLI was ultimately unable to locate the owner of NW and authorized payment of the wages from the Wage Security Fund. BOLI then sought repayment from Blachana for the unpaid wages plus a 25 percent penalty. BOLI reasoned that Blachana was a "successor to the business" of NW, even though Blachana was not affiliated with NW.

The Oregon Court of Appeals reversed, holding that Blachana was not the "legal successor" to NW, in part because Blachana could not be held liable for NW's debts and liabilities under common law successor liability doctrines. The Supreme Court reversed the Oregon Court of Appeals and affirmed BOLI. In reaching its decision, the Supreme Court examined the statutory language of the Wage Security Fund statute, which provides that an "employer" includes "any successor to the business of any employer." ORS 652.310(1). The phrase "successor to the business" is not defined in the statute; the Supreme Court recognized that the phrase was "inexact," but upheld BOLI's position that the phrase includes successors that conduct "essentially the same business as conducted by the predecessor." To determine this, BOLI established a non-exclusive list of factors, which the Supreme Court held were reasonable: (1) the identity of the business, (2) its location, (3) the lapse of time between the previous operation and the new operation, (4) whether the same or substantially the same workforce was employed, (5) whether the same product was manufactured or the same services were offered, and (6) whether the same machinery, equipment, or methods of production were used.

In *Blachana*, BOLI concluded that five of six factors were present. The businesses operated under similar names and used the same phone number. They operated in the same location. Fewer than 50 days had elapsed between the closing of NW's business and the opening of Blachana's business. Both businesses offered the same type of product or services. The businesses used substantially the same equipment and had similar vendors. The only factor missing was the "same workforce." The Supreme Court deferred to BOLI's interpretation, noting that Blachana never articulated any specific criticism of the factors and that BOLI had been using the same factors to analyze successor liability under the Wage Security Fund since 1987.

Blachana does not expand general rules of successor liability because it applies only in the context of the Wage Security Fund statute. Regardless, the decision could have unintended consequences in the debtor-creditor context (and beyond) in light of the potential liability in connection with loans secured by an operating business with employees. Assuming $4,000 per unpaid employee, plus penalties, plus the potential for attorney fees and costs, this liability could be significant.

Consider a lender that makes a loan secured by a restaurant in a great location; the restaurant is functional but is owned by a borrower in financial distress. The lender's decision whether to repossess the restaurant and operate it as a going concern or liquidate, might be made with *Blachana* in mind. The lender might be unwilling to operate the business and might instead foreclose, auctioning the used equipment for bargain basement prices while the property remains unused and empty pending any redemption period and sale. In that case, the borrower could end up with a higher deficiency judgment and the bank could recoup less of its loan while the employees of the otherwise functional business would most certainly lose their jobs.

Or consider a financially troubled business owner who seeks to avoid foreclosure by selling her successful Mexican restaurant to pay off her loan. Would the buyer who hopes to avoid Wage Security Fund liability be required to reopen the restaurant as a Chinese restaurant? Or as a paint store? Would he be required to replace the entire workforce even though the current workforce is well-trained and deserving of their jobs? Would the buyer need to sell the existing restaurant equipment and purchase new equipment to avoid running afoul of the "same equipment" factor? Regardless of what steps the buyer must take to avoid liability, the business will most certainly fetch a lower price in light of *Blachana* – a result that is not good for the distressed business owner or the lender in a short sale transaction.

Blachana could also have negative implications for a landlord-creditor. Suppose a landlord leased its building to the successful Mexican restaurant and repossesses the restaurant under a landlord's lien. Will the landlord be required to completely remodel the restaurant before it leases it to another tenant? Will it have to limit the type of business that can be operated in the space to protect the successor tenant from liability for the previous tenant's unpaid wages? Although the landlord may not be liable for the unpaid wages, it may have to discount the lease to account for unknown liabilities associated with its previous tenant.

In a consensual sale context, a buyer may be able to minimize risk through a seller's indemnification (or even a bond or deposit held during the wage claim period). Such precautions, however, could be unavailable or worthless in the debtor-creditor context, where the seller is a borrower in distress and the buyer is a creditor repossessing its collateral. And such precautions would certainly reduce the value of any business, and, notably, none of the buyer's savings would be passed on to the Wage Security Fund.

SELECTING CLIENTS AND MANAGING CLIENT EXPECTATIONS

By Ann K. Chapman, Vanden Bos & Chapman

If you look back after a difficult representation, you can often pick out red flags that should have warned of trouble ahead. Younger lawyers, anxious to bring in a new client, any new client, often ignore these signals. Sometimes, it is only after an upsetting experience – which may involve the PLF – that you realize you should have turned down the representation in the first place. You are not obligated to work for every client who shows up in your office; you do have the right to say no.

Here are some matters to consider before you agree to represent a client, and tips for managing those you agree to represent.

I. Client Selection

A. Competency to Handle the Matter

Ask yourself what exactly the representation would involve. After the initial meeting with the client, do you need more information to decide whether you can help this person? What would the additional information be? Would the client be prejudiced if you need more time to decide whether you are qualified to represent them? Should you refer the client on now?

If you don't have experience handling this type of matter, do you think you can develop expertise as the representation unfolds? Will you have adequate time to devote to this matter, discounting learning time appropriately, given other client commitments? Are you prepared to be honest with the client about your past experience and need to develop further, and let them decide if they want to hire you under those circumstances?

PRACTICE TIP – Whenever possible, meet your client before you agree to take on a matter. Clients need to be as committed to their case as you are; it is never a good sign if a client is unwilling to treat their legal matter with the seriousness that requires a face-to-face meeting. If it is inconvenient for them to deal with the matter, particularly at the beginning, when they may be feeling the most pressure, the representation can be difficult.

B. Capacity to Handle the Matter, Given Other Commitments

Once you determine, after consultation with the client, that you are competent to handle the matter and the client is willing to hire you, you need to consider how the representation fits with your existing commitments.

Does the client need help immediately? Would you neglect other commitments if you take on the representation? Can you renegotiate those other commitments to take on the new representation? If others in your office are needed to assist you, are they available to help you?

C. Fee Arrangements

Do you have any idea how much it might cost to adequately represent this client? Can the client pay what you believe the case will ultimately cost? Can the client pay enough up front, given your commitment to meet office expenses? What kind of fee arrangement can you make with the client? Would "carrying the client" from a fee standpoint introduce more risk into the representation than you are comfortable with? Is the client shocked at how much you estimate the case would cost to pursue – complaining before they hire you, after you have explained in detail what is involved, how many hours it would take and why you think it will cost that much?

Does the client have experience working with lawyers? What has that experience been? Are they motivated by anger or greed, or driven by economic considerations? Have they failed to pay lawyers they hired in the past? Do they disparage lawyers that have represented them in the past? Be alert for these signs that you should decline this representation.

D. Client Attitude & Presentation

How well did the client prepare for the meeting? Did they remember to bring their paperwork, and to physically hand it to you? If they are unprepared, what is the explanation? Do you sense a client fishing for free advice with no intention of hiring you – milking you for as much information as possible, asking complicated questions, but fully intending to do the work themselves (and blame you if they get it wrong)?

Does the client unduly flatter you (remember Eddie Haskell of "Leave it to Beaver") in an effort to persuade you to take on a matter you are vaguely uncomfortable about? Is the client accused of fraudulent or dishonest actions? By whom and for what? Does the client take any responsibility for creating the legal situation they find themselves in?

E. Use Your Intuition

What does your gut tell you about whether you can work with this person? Do you trust the client? Are there inconsistencies in what they say? Do they suggest dishonest actions – *e.g.*, "how will they know I have a grand piano worth thousands?" (Your response – "I know, and I won't help you perpetrate a fraud on the court.") Are there emotional issues that require professional help? If they need hand holding, can they afford to pay for it? Are they rude to your staff? Are they demanding? Do they have unrealistic expectations?

II. Managing Client Expectations

A. Fees and Payment

It is important at the start to educate the client about how your financial relationship works. You do the work, they pay you – not you do the work, they fail to pay! (Many bankruptcy clients do not have a functional relationship with money.) Make it clear at your first meeting that if they retain you they must return the written fee agreement (that you are required to provide at your first meeting with them) and must pay a retainer before work begins. Help them put the horse before the cart. Our office requires the retainer to be in the form of a cashier's check or money order; we do not accept checks for retainers, except in rare instances under appropriate circumstances, nor do we accept credit cards.

After the retainer is received, keep the client informed about the additional funds you will need from them and when. Don't assume they remember. Treat this like any other part of the case. Do not be afraid to clarify your fee arrangement, and be as matter-of-fact about it as possible. Many young lawyers don't know how to have these conversations with their clients and make it unduly awkward. You have a right to be paid for your services; don't send any other message. On the other hand, don't be overly focused on fee arrangements. Plan to discount fees under some circumstances, including (1) if the client falls on especially hard times; and (2) you lack experience providing an estimated fee – or doing the actual work – with the result that the fee is higher than it would have been if you were more experienced.

If the fee ends up being more than you estimated due to circumstances unforeseen at the beginning of the case, bring the issue up as soon it becomes apparent, so there are no surprises. Communicate, communicate, communicate. People just want to know where they stand.

Emphasize to clients that you will send a bill each month showing time you spent and payments made. (Once you file a chapter 13, be sure to note the billing statement is provided "for information only.")

If a client with funds in trust decides not to proceed, refund any balance owed after payment of your fees as promptly as possible. Make clear to the client that any questions about the bill should be addressed to you, and that if the case is hourly, there is no charge for discussing the bill.

Clarify fee arrangements with clients at a high point in the case (after a successful §341(a) meeting, for example), not after they have ignored your bill for months. Offer to renegotiate payment arrangements with clients who have trouble making payments. Be friendly if you have to follow up about payments to your office, never hostile. Do not turn your clients over to a collection agency or sue them for fees. Let go of unpaid fees without hostility and with a sense of graciousness. What goes around will come around.

B. Strategies for Emotionally Needy Clients

All our bankruptcy clients are dealing with the "emotional" part of their bankruptcy whether they realize it or not (unless they are Vulcans). Assume your clients are ashamed and embarrassed to be facing bankruptcy; assume they are frightened, unsure, in need of guidance and support. Make sure they know you are on their side, even as you set boundaries around fees or remind them yet again to get you the documents you need. Sometimes addressing emotional issues directly works best. "I know it must be scary to face the loss of your house, but I can help you get through this." Give clients credit for what they do well ("these documents are so thorough, thank you!"). Always treat your client with the utmost dignity; never be condescending.

On the other hand, don't be afraid to tell clients the truth about their legal position, for fear you will scare them. Honesty is the best approach if the truth is presented gently and reassuringly.

Maintain professional distance from clients but don't be cold. You are the CEO of their legal situation, so stay neutral and manage its course. Don't let the client's emotions steer the boat.

Warn your staff about especially demanding or emotionally overloaded clients so they will be especially helpful and warm with these folks. Real kindness can disarm even the most difficult person. Teach your staff to be respectful of clients but still set firm boundaries with those that are rude and demanding. Your staff should also keep you advised of matters the client may not tell you about – for example, "What do I do with that emerald ring I got from Aunt May worth thousands? Can I put it in my safety deposit box and not tell anybody?"

Teach staff and clients about the difference between administrative assistance and legal advice. Your staff must learn to make this distinction; your clients often don't understand the difference.

C. Maintain Effective Communication with Clients

1. Respond Quickly. In the age of email, client expectations about the speed of response are amplified. Scan emails often and respond to them quickly even if only to advise the client you will respond fully later. Then respond later – when you say you will!

Return phone calls within a day if possible. If you know you won't be able to return a call that day, have your staff schedule a "phone conference" when the client calls. This practice avoids phone tag, and clients like knowing when you will talk to them, rather than hoping they won't miss your return call. Treat the phone conference like any other meeting. Lawyers rarely miss things that show up as events on their calendars; this strategy can help you avoid a long list of calls you need to return, invariably to someone's voice mail box instead of to them. The objective is to serve clients and keep them informed.

Copy clients on nearly every email, as you would with a letter. (There may be some exceptions to this general rule.) Clients pay you to work for them; let them see what you are doing. They are less likely to complain about their bills if they are informed of a matter as it progresses.

2. Guide Them. You are the guide through your clients' legal situations. Explain what is likely to happen next in their case so they know what to expect. Use your judgment to determine the best way to do this – by email, by letter, by phone, in person.

Don't talk in tongues! Without being condescending, lay things out as simply as you can. Don't over complicate things. Lay out the choices and make a recommendation. The goal is not to turn your client into a lawyer. Freely discuss the options as warranted. Some clients want to talk about everything multiple times and twice on Sundays. Others want you to decide for them! Be sure you confirm in writing, even by email, critical decisions made by the client in the case.

Warn them of what is likely to happen if they take one fork in the road or another. Be sure not to make the client the tactician. You should be in charge of strategy decisions; they should be in control of settlement decisions only. You are in charge of getting them to the fork in the road; once you get them there, they decide which fork to take, with your guidance.

Guidance that you provide about what will happen – that resonates with a client's experience later in the case – builds trust in you.

3. Don't Disparage Opposing Counsel or Opposing Party. While it may be tempting to clue a client into the fact that he is facing the trustee or opposing counsel from Hades, it is better to simply suggest that person is "demanding," or "tough," or "relentless," than to demonize them. Maintain your objectivity, independence and professionalism. Encourage clients to focus on what they can do rather than what the other party is doing.

4. Document Your Authority. For your protection and for purposes of clarification, always document settlement authority. Try to allow the client time to consider the options; ideally send an email outlining the choices.

D. Establish Office Procedures and Rigorously Adhere to Them.

1. Training. Train your staff – and yourself – to document where any given project is in the case, at any given time. If your computers are networked and everyone has access to the electronic file, there is no reason why each person can't make notes on the network of conversations with the client, significant emails and the status of pending projects. If you are unavailable, your staff should be able to review the electronic file and understand what is pending and where the case stands.

This practice saves time for everyone, saves money for the client and impresses the client when you are unavailable but a staff person can give them an update.

Docketing things properly is critical. Create a system where two people separately docket an event, in independent systems. Remember that the lawyer is the person ultimately responsible for confirming that notices are docketed correctly.

2. Allow Adequate Lead Time – Assuming Something Else Will Come Up – and Use Standard Protocols. Using strict protocols is essential to managing your time and calendar in this age of constant stimulation. Using your memory to keep track of everything is a strategy for a bygone era. Emails, voice mails, phone calls, faxes, letters, people dropping by your office, client meetings, hearings – how do you keep it all straight? I highly recommend the simple approach presented in *Getting Things Done*, by David Allen, to process the information coming at you from all directions all day long.

For example, instead of using your email box as a storage unit for things you have to do, have a daily goal of achieving the "white screen," which occurs when emails are to zero! Fight for that white screen every day; it will enhance your productivity and keep the "drag" out of your practice. Don't look at the same emails over and over again, thinking "I have to do this, I have to do that." Implement a system that allows you to review the email critically for any action required by you, capture that action if it can't be completed right away in a separate system, and then file the email!

Fight the temptation to ignore an email for more than one day; the better approach is to acknowledge receipt of the email within one day of receiving it and deal with it as quickly as you can.

3. Enter Your Time as You Complete the Work. The worst task in the world is to go back and "capture your time." Invariably, some days just come at you too fast and you are in reaction mode all day, with virtually no time to keep track of what you're doing, as it happens. But don't let yourself get behind more than one day on your timekeeping, if you are doing hourly work. Not only will you miss time, but you won't truly know how long it took to draft that email unless you noted the time as you went along.

Conclusion

Remember the goal is to serve the client. Ask yourself, what would it be like to be the client dealing with me as their lawyer? Most people just want to know where they stand, what they are supposed to do and what is likely to happen next. They want to feel someone (hopefully, you the lawyer!) is in control of their case. They often feel things are out of control when they come to see you; don't exacerbate this feeling by failing to manage the case in a prompt and courteous fashion. If you need help from other members of your office, ask for it.

Save thank you notes from clients. Thank your staff – they are the ones that make the place run. Remember what a grand privilege it is to be a lawyer, always, and act accordingly. Help people believe in the legal system and, one client at a time, help restore honor to the legal profession. Lawyers who do this well will have fewer claims against them; people don't want to go after someone they like and respect. Most people are forgiving if you admit you may have missed something. The PLF is your friend. If you think you've made a mistake call them. They really have your best interests at heart and are there to help.

NINTH CIRCUIT CASE NOTES

By Stephen Raher, Perkins Coie

ATTORNEY-FEE AWARD UPHELD FOR STAY VIOLATION, *STERNBERG* DISTINGUISHED

In re Schwartz-Tallard, 2014 WL 1465698, ___ F3d ___ (9th Cir)

Section 362(k)(1) allows individual debtors to recover "actual damages, including attorneys' fees" that result from a willful violation of the automatic stay. In 2010, the Ninth Circuit held that once a violation of the stay has ended, attorney fees incurred in pursuit of a damage award are not recoverable under §362(k). *Sternberg v. Johnston*, 595 F3d 937, 947 (9th Cir 2010). In this case, the BAP affirmed an award of attorney fees to Irene Schwartz-Tallard, distinguishing *Sternberg* in the process. *In re Schwartz-Tallard*, 473 BR 340 (9th Cir BAP 2012). The Court of Appeals affirmed over a lengthy and vehement dissent.

Schwartz-Tallard filed a chapter 13 petition in 2007 and at all relevant times she remained current on her mortgage. America's Servicing Company (ASC) moved for relief from stay, mistakenly claiming the debtor had missed two payments. Schwartz-Tallard did not receive notice of the hearing and the bankruptcy court granted ASC's motion. At a hearing on May 13, 2009, the court orally granted the debtor's motion to reinstate the automatic stay. ASC did not attend the May 13 hearing, but the debtor notified the servicer of the ruling the following day. One week later, ASC sold Schwartz-Tallard's house at a nonjudicial foreclosure sale. 473 BR at 343.

After the foreclosure, the bankruptcy court concluded that ASC had willfully violated the stay. The court awarded damages (including attorney fees) and ordered ASC to reconvey the property to the debtor. ASC appealed to the district court on March 2, 2010, and reconveyed the property the next day. The district court remanded to the bankruptcy court for determination of fees actually charged or approved. The Court of Appeals opinion here deals with Schwartz-Tallard's claim for attorney fees related to the district court appellate proceedings.

The Court of Appeals opinion begins with a summary of the facts in *Sternberg*, which involved a state-court order in favor of the debtor's ex-wife. After he obtained a declaration from the bankruptcy court that the state-court order was unenforceable, the debtor sought damages via an adversary proceeding. *Sternberg* holds that the declaration invalidating the state-court order ended the stay violation, and therefore the fees subsequently incurred to obtain damages were not recoverable under §362(k).

The BAP upheld Schwartz-Tallard's fee award because (borrowing language from *Sternberg*), the debtor had used the automatic stay as a "shield, not a sword." 473 BR at 349. In other words, Schwartz-Tallard only pursued litigation that was necessary to remedy ASC's violation of the automatic stay. Although the fees in question were incurred after ASC reconveyed the property, ASC's appeal challenged the bankruptcy court's holding that ASC had violated the stay. According to the BAP, "an appeal by a stay violator, which requires a bankruptcy debtor to continue to participate in litigation to defend her stay and properly awarded stay-enforcement damages, deprives the debtor of the benefits of her automatic stay," and thus fees are properly awarded under *Sternberg*. *Id.*

The Ninth Circuit's opinion largely recites the BAP's reasoning and affirms the result; however, much ink is spilled over the BAP's single citation to *In re Walsh*, 219 BR 873 (9th Cir BAP 1998). In a footnote, the BAP acknowledged that part of *Walsh*'s holding was rejected in *Sternberg*, but went on to say that "*Sternberg* did not invalidate *Walsh*'s finding that damages incurred on appeal are actual damages directly resulting from the stay violation itself." 473 BR at 350, n12. Writing for the majority of the Ninth Circuit panel, District Judge Huck of the Southern District of Florida (sitting by designation) states that *Walsh* is not good law, and that the Court of Appeals did not rely on *Walsh* in reaching its decision. 2014 WL 1465698 at *4, n3. In an unusually harsh dissent, Judge Wallace states that the BAP should not have cited *Walsh*, and laments that "[t]he implications of such cavalier disregard by the BAP for its subordinate status within the federal judiciary are far-ranging, and merit much greater attention than the majority bestows on them." *Id* at *4 (Wallace, J., dissenting).

In his dissent, Judge Wallace argues that the facts of Schwartz-Tallard's case are squarely within the scope of *Sternberg*, and that the debtor should not have recovered any fees incurred after the property was reconveyed. After critiquing the majority's reasoning, Judge Wallace recites the history of BAP jurisdiction and notes that although he "do[es] not contend that the BAP is consistently ignoring our opinions," the citation to *Walsh* "is an attack on Article III of the Constitution" and "raises serious threats to the separation of powers." *Id.* at *15-16.

COURT CLARIFIES THE CITIZENSHIP OF NATIONAL BANKS FOR PURPOSES OF DIVERSITY JURISDICTION

Rouse v. Wachovia Mortg., FSB, 747 F3d 707 (9th Cir 2014)

Congress established national banks in 1863. The current statute governing such banks' citizenship for jurisdictional purposes was enacted in 1948. Nonetheless, the precise rules governing banks and diversity jurisdiction are still subject to dispute.

National banks are not incorporated under state law, but instead are chartered by the Comptroller of the Currency. Section 1348 of title 28 provides that for purposes of federal court jurisdiction, national banks are "deemed citizens of the States in which they are respectively located." In 2006, the Supreme Court ruled that under §1348, national banks are not citizens of every state in which they operate. *Wachovia Bank, N.A. v. Schmidt*, 546 US 303, 306-307 (2006). Specifically, *Wachovia Bank* ruled that the defendant bank was a citizen of the state in which its "main office" was located.

When the Comptroller issues a bank charter, the charter must designate the bank's main office, but the main office is not necessarily the bank's principal place of business. Under the general diversity statute, a corporation is a "dual citizen" of both its state of incorporation and the state where it has its principal place of business. 28 USC §1332(c)(1). Because the defendant in *Wachovia Bank* had its main office and principal place of business in the same state, the Supreme Court did not address whether national banks are also subject to dual citizenship.

The plaintiffs in *Rouse* are citizens of California who sued Wells Fargo (a national bank and the parent of Wachovia Mortgage) in California state court. Wells Fargo's principal place of business is in San Francisco, but its main office is in South Dakota. Wells Fargo removed the case to federal court under diversity jurisdiction. The district court concluded that Wells Fargo was a citizen of both California and South Dakota, and remanded the case for lack of complete diversity.

In reversing, the Ninth Circuit conducted an extensive review of the history of national banks and federal court jurisdiction. Legislative chronology was critical to the majority's reasoning. Congress amended the general diversity statute in 1958 to provide for dual citizenship of corporations. Because §1348 was enacted ten years earlier, the majority did not feel it was appropriate to assume the Congress intended to apply dual citizenship to national banks.

Dissenting, Judge Gould argued that legislative history demonstrates that Congress has long been concerned with "jurisdictional parity" between state-chartered corporations and national banks, and thus banks should be subject to the same dual citizenship rules that apply to garden-variety business entities.

SEALING JUDICIAL RECORDS REQUIRES A SHOWING OF "COMPELLING REASONS"

Oliner v. Kontrabecki, 745 F3d 1024 (9th Cir 2014)

Chapter 11 trustee Aron Oliner sued John Kontrabecki, an officer of the debtor, and the parties eventually settled their dispute. Pursuant to the settlement agreement, they jointly requested that all records relating to the proceeding be sealed. The district court (sitting as an appellate court under 28 USC §158) denied the sealing request, stating that records may only be sealed for a "compelling reason," and no such reason was present in this case.

On appeal, Kontrabecki argued that the district court should have applied the less stringent "good cause" standard that governs requests to seal private materials unearthed during discovery and previously sealed discovery attached to a non-dispositive motion. According to Kontrabecki, because the matter settled and the court did not make any rulings on the merits, the sealing request should have been governed by the good-cause standard.

Even though the matter settled, the Court of Appeals stressed the fact that the parties sought to seal the entire record (including the district court's opinion), thus depriving the public of access to the court's basis for adjudication. Accordingly, the panel unanimous held that the district court correctly applied the compelling-reason standard. Because the sealing request was motivated simply by a desire "to avoid embarrassment or annoyance to Kontrabecki and to prevent an undue burden on his professional endeavors," there was no compelling reason, and the request was properly denied. 2014 WL 1088254 at *2.

ATTEMPT TO COLLECT FORECLOSURE FEES VIOLATES SCRA

Brewster v. Sun Trust Mortg., 742 F3d 876 (9th Cir 2014)

Lieutenant Colonel Christopher Brewster is a member of the Marine Corps Reserve. At various times between 2008 and 2011 he was called to active duty, and during one of these periods he failed to make required mortgage payments. His mortgage servicer began foreclosure proceedings. The servicer subsequently rescinded the notice of default, but did not remove various foreclosure-related fees from the account. Servicing of the loan was then transferred to Nationstar, which actively pursued collection of the fees during a period of Brewster's active duty.

Brewster sued for violations of the Servicemembers Civil Relief Act (SCRA). The district court dismissed Brewster's complaint for failure to state a claim. At issue was whether the fees fell within the statute's restrictions on "sale, foreclosure, or seizure of property." 50 USC app. §533(c). The Court of Appeals reversed. It began by noting that the policy underlying the SCRA requires a broad reading of the statute. It concluded that because the statute differentiates between sale, seizure, and foreclosure, a "foreclosure must mean more than just a sale or seizure." 742 F3d at 879. Accordingly, Nationstar's attempt to collect fees assessed in connection with the foreclosure proceeding were within the scope of the statutory prohibition. Thus, even though Nationstar waived the fees (after Brewster filed suit), he had properly pled a violation of the SCRA.

REPORTING OF INACCURATE INFORMATION IS ACTIONABLE UNDER FCRA, EVEN IF THE PLAINTIFF DOES NOT PLEAD ACTUAL INJURY

Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014)

Thomas Robins filed a putative class action against the data aggregation website Spokeo for publishing inaccurate information in violation of the Fair Credit Reporting Act (FCRA). Not only did Robins's complaint contain "sparse" allegations of injury, but the inaccurate information arguably portrayed Robins as *more* creditworthy than he actually is, describing him "as holding a graduate degree and as wealthy, both of which are alleged to be untrue." 742 F3d at 411.

Spokeo moved to dismiss for lack of subject-matter jurisdiction, arguing that Robbins did not suffer an injury-in-fact, and thus lacked standing. The district court dismissed the complaint, but the Ninth Circuit reversed, holding that a *willful* violation of FCRA constitutes sufficient injury to confer standing.

BANKRUPTCY DOES NOT "ENCUMBER" FUNDS FOR PURPOSES OF RESPONSIBLE PERSON PENALTY

Nakano v. U.S., 742 F3d 1208 (9th Cir 2014)

The responsible person penalty created by 26 USC §6672, often ensnares business owners who fail to pay employee withholding taxes to the IRS. But the same penalty also covers other types of taxes, including airline passenger excise taxes. National Airlines (National) filed a chapter 11 petition in 2000, owing $1.8 million in passenger excise taxes that it was supposed to hold in trust and pay to the IRS on a quarterly basis. Although National filed excise taxes for future quarters, it did not actually pay the taxes, and by January 2002, when the case converted to chapter 7, National owed $11.5 million in unpaid excise taxes. Raymond Nakano was the chief financial officer of National, and the IRS assessed him personally for the unpaid taxes under §6672.

Nakano advanced two losing arguments on appeal, one of which is relevant to bankruptcy practitioners. Liability under §6672 requires a willful failure to pay covered taxes. The Eighth Circuit has held that a failure to pay taxes is not willful when the only available funds are "encumbered." *Elmore v. U.S.*, 843 F2d 1128, 1133-34 (8th Cir 1988). For purposes of the *Elmore* test, funds are encumbered only where "the taxpayer is legally obligated to use the funds for a purpose other than satisfying the preexisting . . . tax liability and if that legal obligation is superior to the interest of the IRS in the funds." *Honey v. U.S.*, 963 F2d 1083, 1090 (8th Cir 1992).

Nakano argued that §503(b)(1)(A) required postpetition operating expenses to be paid ahead of excise taxes, which are described in §503(b)(1)(B). The Ninth Circuit rejected this reading, holding that the administrative expenses listed in §503(b)(1) receive equal priority, and thus post-petition taxes are on equal footing with other operating expenses. 742 F3d at 1212.

CALIFORNIA DEBTOR LACKS STANDING TO CHALLENGE VIOLATIONS OF POOLING AND SERVICING AGREEMENT

In re Davies, 2014 WL 1152800 (9th Cir) (unpublished)

Although the ruling is based on California law, this opinion may be of interest to lawyers who litigate issues relating to mortgage securitization. Enforcement and administration of securitized loans is delegated to loan servicers, whose rights and obligations are largely governed by pooling and servicing agreements (PSAs). Borrowers in litigation often discover that servicers have not complied with provisions in the governing PSA, but it is still unsettled whether borrowers have standing to complain of such violations when they are not parties to the PSA.

The debtor Brian Davies brought a six-count adversary proceeding against Deutsche Bank, seeking to quiet title to his mortgaged property. The bankruptcy court granted Deutsche Bank's motion for judgment on the pleadings and the BAP affirmed.

In its brief affirmance, the Ninth Circuit noted that the debtor challenged several violations of the governing PSA. Although the panel admitted that "California courts have divided over this issue," it nonetheless expressed its belief that the California Supreme Court would, if confronted with the issue, hold that the debtor lacked standing to complain of such violations. 2014 WL 1152800 at *2. In support of this conclusion, the panel cited several California cases. Despite the fact that most PSAs contain New York choice-of-law provisions, the court did not discuss relevant New York law, nor did it specify what law governed the PSA in this case.

I am not aware of any Oregon state-court cases addressing borrower standing to enforce a PSA.

BAP CASE NOTES

By Jesús Palomares, Miller Nash LLP

IN CHAPTER 13, LATE-FILED PROOFS OF CLAIM CANNOT RELATE BACK TO A DEBTOR'S SCHEDULES

In re Barker, 2014 WL 1273765 (9th Cir BAP) (Unpublished)

The chapter 13 debtor properly scheduled creditor's claims. Creditor was properly served with notice of the deadline but did not file a proof of claim (POC) by the bar date. Debtor filed and modified her plan, which was ultimately approved by the trustee. Afterward, creditor filed formal POCs, to which the trustee objected on the basis that they were untimely. Creditor argued to the bankruptcy court that the POCs should be allowed because a disgruntled employee had failed to timely file them, and that debtor's schedules, which listed creditor's loans, constituted an informal POC. Thus, according to creditor, the late-filed POCs should relate back to the informal, scheduled claims. The bankruptcy court rejected this argument. It ruled that it had no discretion to allow a late-filed POC in a chapter 13 case and that debtor's scheduling of creditor's debt did not constitute an informal POC because creditor had not made a written demand to hold debtor liable for the debts. Creditor appealed.

The BAP affirmed. In chapter 13, a POC is timely filed if it is filed no more than 90 days after the first date set for the meeting of creditors, and is generally disallowed if it is untimely. Under the "Informal Proof of Claim" doctrine, a creditor must submit a writing that states an explicit demand showing the nature and amount of the claim against the estate, and evidence intent to hold the debtor liable. Here, the writing relied on by creditor – debtor's Schedules D and F – was not a statement or writing by the creditor. Further, the schedules did not show creditor's intent to hold debtor liable – they were filed by the debtor. Creditor also argued that debtor's schedules constituted informal POCs because BR 3004 allows debtor to file a POC on behalf of creditor. The BAP distinguished BR 3004 from the Informal Proof of Claim doctrine: BR 3004 filings must occur after the POC bar date, whereas debtor's schedules are always filed before the POC bar date. Therefore, BR 3004 could not apply to creditor's scenario. Otherwise, the BAP added, all late POCs could relate back to a debtor's schedules and leave BR 3002 without any meaning.

ATTORNEY SANCTIONED FOR FAILURE TO OBTAIN OR RETAIN ORIGINAL SIGNATURES FROM DEBTOR

In re Singh, 2014 WL 842102 (9th Cir BAP) (Unpublished)

Debtor retained attorney to file his chapter 13 petition, paying attorney a $2,000 retainer. Debtor authorized his parents to oversee the case with attorney while debtor was away for work. Attorney was instructed to communicate with debtor's parents about the case. Attorney, however, filed debtor's petition, schedules, plan, and all other related documents without debtor's authorization or original signature. Attorney also filed amended plans and responded to trustee's motion to dismiss without conferring with debtor or his parents. Attorney then filed an amended fee disclosure seeking an additional $5,500 in fees. Debtor replaced attorney as counsel and filed a motion seeking the return of attorney's fees, arguing that attorney failed to timely file documents, did not communicate with debtor's parents about the case, filed unnecessary objections and plans, and filed documents without debtor's consent or signature. The bankruptcy court granted debtor's motion and imposed sanctions against attorney under §105 and the court's local rules for failing to obtain debtor's original signatures on the bankruptcy documents. Attorney appealed the sanctions order.

The BAP affirmed, but relied on local bankruptcy rules rather than §105. Bankruptcy courts generally have the authority to sanction attorneys under their §105 civil contempt authority and their inherent authority to sanction a broad range of conduct, including improper litigation tactics, bad faith, or acting for oppressive reasons. Inherent sanction authority requires finding bad faith or willful misconduct.

Here, the attorney did not violate a specific order that warned him of sanctions for noncompliance, nor did the bankruptcy court find bad faith or willful misconduct. Attorney did, however, violate LBR 5005-2(c), requiring original signed documents to support electronic filings, which in turn authorized sanctions under local rule 9011-1 (Federal Rule 9011(c)).

UNDER EITHER BANKRUPTCY OR STATE LAW, A HOLD HARMLESS OBLIGATION GAVE RISE TO NONDISCHARGEABLE DEBT TO EX-WIFE

In re Francis, 505 BR 914 (9th Cir BAP 2014)

Debtor filed a chapter 7 petition and listed his ex-spouse as an unsecured creditor with a contingent, unliquidated, and disputed debt arising from a divorce judgment in which debtor agreed to take over and hold creditor harmless from certain liabilities, including credit card debts. The divorce agreement also waived spousal support for each party. Debtor filed an adversary proceeding seeking a determination that the credit card debts were not excepted from discharge under §523(a)(15). Creditor answered and won a summary judgment ruling that the credit card debt was nondischargeable. Debtor appealed and the BAP affirmed.

Section 523(a)(15) excepts from discharge debts owed to spouses, former spouses, or children of the debtor that are incurred in the course of a divorce or separation agreement. The nondebtor ex-spouse must establish that (1) the debt is not a support obligation under §523(a)(5), and (2) the debt was incurred by the debtor in a divorce or separation or related agreement. Moreover, §523(a)(15) does not require that the debt obligation incurred in the divorce agreement be payable to the ex-spouse.

The divorce agreement at issue expressly stated that there was no support obligation to either party and stated that debtor was taking over the credit card debt. While debtor admitted that his ex-spouse had indeed paid the credit card debt, he argued that the divorce agreement lacked certain indemnity language that was required under state contract law, and that such third-party liabilities were subject to discharge without such language. The BAP rejected this argument, finding that state law applied an implied indemnity obligation to such contracts. A concurring opinion stated that the decision was actually based on the state law at issue, but agreed on the outcome.

LOCAL BANKRUPTCY COURT CASE NOTES

By Margot Seitz, Farleigh Wada Witt

CUTTING SHORT SALES SHORT, OR SILENCE MEANS NO: FAILURE TO APPEAR IS NOT "CONSENT"

In re Smith, 2014 WL 738784 (Bankr D Or)

Judge Alley's opinion in *In re Smith* is a clear departure from a trend to allow trustees to sell property free and clear of liens without paying lien holders in full. *See, e.g., In re Jolan,* 403 BR 866 (Bankr WD Wash 2009). In *Smith,* the chapter 7 trustee moved to sell a piece of real property free and clear of all liens for $68,500. The costs of sale would have been $5,110 with an additional allocation of $787 for insurance and taxes. Bank of America had a first mortgage of $178,825; the proposed §363 sale, free and clear of all liens, would have paid $62,602.65 to BofA. Judge Alley denied the motion.

The motion relied on §363(f)(2), (3) and (5). Subsection (2) provides that a debtor may sell property free and clear of liens if lienholders "consent" to the sale. Here, the trustee noticed the sale and BofA failed to appear or object; the trustee argued that this silence amounted to "consent," citing *FutureSource, LLC v. Reuters Ltd.,* 312 F3d 281 (7th Cir 2002). The court found that line of case law unpersuasive and held that §363(f)(2) requires actual, as opposed to implied, consent. This reading is consistent with the decision in *In re East Airport Dev., LLC,* 443 BR 823 (9th Cir BAP 2011).

Next, the court considered whether §363(f)(3) authorized the sale. Quoting *In re PW, LLC,* 391 BR 25, 41 (9th Cir BAP 2008), the court stated that "§363(f)(3) does not authorize the sale free and clear of a lienholder's interest if the price of the estate property is equal to or less than the amount of all claims held by creditors who hold a lien or security interest in the property being sold." Where BofA's secured claim was $178,835 and the proposed sale price was well below that figure, §363(f)(3) was not a basis for approval.

Last, and perhaps most notably, the court analyzed §363(f)(5), which provides that property may be sold free and clear of a lien if the lienholder "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." The trustee urged the court to take an expansive view and argued that BofA could have been compelled to accept a money satisfaction in various foreclosure sales, UCC sales, or in condemnation proceedings. Accepting similar arguments, some bankruptcy courts have allowed trustees to conduct short sales. *See In re Jolan,* 403 BR 866.

Judge Alley did not. He held this expansive view is inconsistent with Ninth Circuit and other persuasive case law. The pertinent question is not whether there is a "hypothetical" proceeding where BofA could be compelled to accept a money satisfaction. Rather, the question is whether there is a proceeding where the *trustee* could compel such a result. For instance, if the trustee here brought a foreclosure action against BofA, he would stand in the shoes of a hypothetical junior lien creditor and could not compel BofA to accept a money judgment.

TIMING IS EVERYTHING – COUNTY TAX JUDGMENT PRECLUDES DEBTORS FROM CURING THROUGH CHAPTER 13 PLAN

In re Pineda, 2014 WL 1576855 (Bankr D Or)

The *Pineda* opinion provides a clear overview of the process Oregon counties use to foreclose real property tax liens. Debtors filed a chapter 13 case on September 20, 2013. Before that, the debtors accrued several years of unpaid property taxes amounting to approximately $25,350. The debtors' chapter 13 plan sought to "cure" their default in a foreclosure judgment obtained by Washington County using §1322(b)(3). They proposed paying the County's secured claim with 16% interest over the life of a 36-month plan by making relatively small ($150) monthly payments for the first 20 months and paying the remaining debt with a combination of increased plan payments ("all available funds after attorneys fees") and proceeds from a future sale or refinance.

The County objected on the basis that it had obtained a judgment and decree foreclosing its tax lien on or about October 14, 2011. Unlike foreclosure actions initiated by private lenders, a separate foreclosure sale is not required to transfer title to a taxing authority. Once a foreclosure judgment is entered and a two-year redemption period has run, the County tax collector is statutorily directed to execute a deed, transferring title of the subject property to the County. In this case, the two-year redemption period had not yet run as of the petition date.

Judge Dunn concluded that §108(b) extended the debtors' redemption period by 60 days after the order for relief, but the debtors were unable to pay the entire debt during that extended time period. As a matter of statute, the County was entitled to record a deed to the property upon the expiration of the redemption period. Section 1322(c) did not apply as proposed in the debtors' plan because it allows debtors to cure only "until such residence is sold at a foreclosure sale." The fact that the County had not yet recorded a deed did not make a difference. The Ninth Circuit has held that recording a deed following a tax sale is a pure ministerial act that is not precluded by the stay. *See In re Pettit*, 217 F3d 1072, 1080 (9th Cir 2000). Judge Radcliffe's decision in *In re Southern Or. Mort, Inc,* 143 BR 569 (Bankr D Or 1992), is contrary to this opinion but, as Judge Dunn pointed out, it was decided before *Pettit.*

STATE COURT CASE NOTES

By Sherri Martinelli, Greene & Markley, PC

DIFFERENT TESTS FOR VENUE AND JURISDICTION

Kohring v. Ballard, 355 Or 297 (2014)

Richard and Kerstin Kohring sued Ballard for medical malpractice in Multnomah County. Ballard moved to change venue to Clackamas County, arguing that, among other reasons, he did not conduct "regular, sustained business activity" in Multnomah County as required by ORS 14.080(2). ORS 14.080(2) provides that venue is proper wherever a defendant engages in "regular, sustained business activity." The Kohrings argued that Ballard's solicitation and advertising to patients in the "Portland area" did constitute regular business activity in accordance with the statute. The trial court agreed and denied Ballard's motion to change venue.

Ballard petitioned the Oregon Supreme Court for a writ of mandamus to grant his motion to change venue. The Court first noted that while the federal tests for jurisdiction and venue are the same, they are not the same in Oregon, where they must be treated as two distinct questions. Second, the court held that the phrase "regular, sustained business activity" in ORS 14.080(2), Oregon's venue statute, requires a "regular and systematic flow" of products or services into Multnomah County. The court found that Ballard did not conduct "regular, sustained business activity" in Multnomah County. Specifically, the mere advertisement of services by Ballard in the "Portland area" (which could include any of a number of counties) did not amount to "sustained" business activities as required by the statute.

The court issued a peremptory writ of mandamus ordering the trial court to grant Ballard's motion to change venue.

JUDGMENT CREDITOR REMEDIES

Merrill Lynch Commercial Finance Corp. v. Hemstreet, 261 Or App 220 (2014)

Defendants Mark Hemstreet and Shilo Management appealed from a trial court decision rejecting their challenge to a writ of garnishment obtained by plaintiff, a successor in interest to Merrill Lynch. The writ of garnishment stemmed from a multi-million dollar loan made by Merrill Lynch secured by a financial asset security agreement and supported by defendant Hemstreet's personal guaranty. The loan was restructured twice after Shilo defaulted, and in the first restructure, trust deeds on real property were added as security. In the second restructure, Shilo agreed to a confession of judgment that included a money judgment in excess of $5.5 million and provisions foreclosing Merrill Lynch's lien on four of the properties used as collateral. The confession of judgment was entered after default in 2011. In 2012, the trial court issued writs of execution for sale on three of the properties. Thereafter, plaintiff issued writs of garnishment to various banks and corporate entities.

Shilo and Hemstreet sought a ruling that, pursuant to ORS 88.060(2), any real property must be sold before other assets are garnished. They argued that the statute created a "mandatory condition precedent to the enforcement of the judgment of foreclosure of a mortgage or a trust deed: a specific deficiency must remain after the foreclosure sale." Plaintiff argued that they were entitled to enforce money judgments and those judgments were not encumbered by ORS 88.060(2), because the provision does not limit a creditor's remedies.

The trial court agreed with plaintiff, and the court of appeals affirmed. In determining whether ORS 88.060(2) required that a deficiency be established prior to the enforcement of any writ of garnishment, the court of appeals first noted that – if the confessed judgment were simply a money judgment and did not include the foreclosure provisions – plaintiff would be entitled to pursue garnishment pursuant to ORS chapter 18 including ORS 18.605(1)(a). The court then considered whether the judgments of foreclosure changed the analysis. It rejected defendants' contention that ORS 88.060(2) limits remedies like garnishment to only the circumstances set forth in 88.060(2). Specifically, it concluded that the reference to "the judgment," in the first sentence of ORS 88.060(2), was a reference to a particular set of circumstances – "when a deficiency remains after a foreclosure sale and the creditor is entitled to collect that deficiency because of the debtor's personal liability for the debt – and authorizes a creditor to enforce the judgment 'by execution as in ordinary cases' when those circumstances exist." Thus when a creditor has a judgment that includes both a money judgment and a foreclosure judgment, ORS 88.060(2) does not limit the remedies otherwise available to the creditor.

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.