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

Newsletter

Oregon State Bar Debtor-Creditor Section

Volume XXXIII, Number 3 Debtor-Creditor Section, Oregon State Bar Fall 2014

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COMMENTS FROM THE CHAIR

By M. Caroline Cantrell

It doesn't seem possible my term as section chair is nearly over. It has been a busy year and not a particularly easy one. However, because of the assistance of a team of very competent, hardworking committee members, it has been a successful one.

You may recall that my Comments in the Winter 2014 issue of the Newsletter touched on the economic impact of the decrease in bankruptcy filings, coupled with changes in exemptions and increased numbers of fee waivers, has had on many members of the section. The economy has not only negatively impacted section members; it has adversely affected the section's finances as well. We have gone through a long period of lower income and higher expenses. For the last few years, the Executive Committee has pulled from the section's reserves to the point that committee members became concerned about its financial stability. Thus the committee's primary focus has been on finding and implementing ways to improve the section's finances and replenishing its reserves while still meeting the needs of section members. I am pleased to report we are making progress.

Last year the section voted to increase membership fees from $25.00 to $35.00 bringing in approximately $5,315.00 additional income. This year the Executive Committee voted to hold the annual meeting and CLE at less expensive venues with fewer amenities for the next few years. As a result, the 2014 annual meeting and CLE was held at the William W. Knight Law Center in Eugene, rooms were reserved in a less expensive motel, the amount of food provided was reduced, and reservations were made at several local restaurants for a Dine-Around to give members an opportunity to socialize with friends and colleagues. The result was a decrease in the overall cost to section members and more revenue for the section's coffers. Next year the annual meeting and CLE will be held in the Portland Metro area at a similar venue with the goal, again, of being more affordable for section members and more profitable for the section.

In addition to seeking less expensive venues for our CLE and annual meeting, the Executive Committee has trimmed the funds allocated to the Pro Bono Clinics, the Executive Committee and most subcommittees. To reduce travel and accommodation expenses involved in attending committee meetings, we voted to hold the meetings at the Portland and Eugene bankruptcy courts with video and phone conferencing available for those unable to attend in person, and we limited reimbursement for expenses to one function per year per committee member.

Continued next page

As mentioned above, the 2014 Debtor-Creditor section CLE and annual meeting featuring the "Guess Who's Coming to Dinner?" Dine-Around was held in Eugene on October 24-25. Approximately 110 people attended and, based on the comments of the attendees, it was another huge success. Topics included: dealing with the unusual client; foreclosure mediation; cross-border and international issues; federal criminal law; employer/employee liabilities; insolvency and collections; case updates; federal exemptions; Oregon eCourt; the next generation of CM/ECF; and, state vs. federal rules of discovery. The presentations were informative and the forum was surprisingly intimate – it felt as if the classroom itself was encouraging audience participation. Law school nostalgia – it was nice. Thank you Teresa Pearson, Tom Stilley, the members of their joint annual meeting and CLE committees, and the presenters for a job well done.

At the section's annual meeting on Saturday, October 25, the members present elected the following officers and members-at-large for 2015:

Chair: David Hercher

Chair-Elect: Richard Parker

Past Chair: Caroline Cantrell

Treasurer: Clarke Balcom

Secretary: Justin Leonard

Members-at-large with terms ending 12/31/15:

Jason Ayres
Leslie Gordon
Vanessa Pancic
Natalie Scott
Britta Warren

New Executive Committee members-at-large with terms ending 12/31/16:

David Foraker
Joseph VanLeuven
C. Casey White
Timothy Solomon
Stephen Raher

Judge Dunn has volunteered to be the court's participant for 2015 and will hold a non-voting ex-officio position on the Executive Committee pursuant to a resolution recently passed by the Executive Committee.

The following departing members-at-large were thanked for their services over the past two years and presented with a commemorative gift: Stephen Arnot, David Paradis, Christopher Parnell, and Carolyn Wade. We again extend our deepest appreciation for their dedication and hard work. Special thanks go to Susan Ford, Past Chair, for the many years she has served on the Executive Committee. Her hard work, dedication, intellect and leadership skills have greatly contributed to the effectiveness of the Executive Committee.

Judge Dunn ended the annual meeting with a heartfelt tribute to Judge Perris, both personally and professionally, and announced a retirement dinner will be held in her honor on February 20, 2015 at the Multnomah Athletic Club in Portland. Additional information will be available later in the year. We hope you will join us in celebrating Liz's many accomplishments and contributions to our section and the legal community nationwide.

Debtor-Creditor Newsletter

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

Congratulations to Ann Chapman, who was presented with the William N. Stiles Award of Merit by Judge Perris for her innumerable contributions to the section. Her recognition is well-deserved.

Finally, I want to say I believe the entire community is truly saddened by the up-coming closure of the Lewis and Clark Law Clinic. The Clinic, under the direction of Dick Slottee, fulfilled a much-needed service by providing legal representation to low-income residents who would not otherwise have representation while giving law students valuable hands-on experience. A truly "win-win" situation.

The section's Bankruptcy Pro Bono Clinic relied heavily on Mr. Slottee and his students. Since 2007 Dick has taken 180 cases through the Bankruptcy Clinic. In addition, he has: provided written materials, organized speakers and participated in most, if not all, of the Bankruptcy Clinic CLEs; been instrumental in recruiting non-bankruptcy attorneys to volunteer at the Clinic; provided specialized training sessions for new attorneys; set up and moderated a listserv for Debtor-Creditor Bankruptcy Clinic volunteers; and made himself available to assist others in providing services to those in need. Even the announced intent to close the Lewis and Clark Law Clinic has not slowed Dick down; he is actively seeking other options to connect parties in need of representation to those in need of experience. Our hats are off to you, Mr. Slottee, for the incredible contribution you have made to our section and the community at large.

I truly appreciate the opportunity you have given me to serve on the Executive Committee for the past six years. To quote any of my many grandchildren, "It's been awesome!" I look forward to working with Dave and the other members of the committee as past chair next year. Thank you and may your lives be filled with wonder and amazement, good health and kindness.

WHAT DOES "SERVE" MEAN?

By David W. Hercher, Miller Nash LLP

"Serve," as used in the Federal Rules of Bankruptcy Procedure and Oregon Local Bankruptcy Rules, doesn't always refer to an obligation to serve a document in the manner and to the addresses required by Federal Rule of Bankruptcy Procedure 7004. In fact, "serve" has these three distinct meanings:

1. to serve, as required by FRBP 7004, a document in an adversary proceeding that must be served with a summons, including to transmit the complaint to the defendant and to transmit a third-party complaint to the third-party defendant, or a motion or application initiating a contested matter to the parties against whom relief is requested or who are otherwise entitled to receive the document;
2. to serve, as required by Federal Rule of Civil Procedure 5 (through FRBP 7005) or 5(b) (through FRBP 9014(b)), a document in an adversary proceeding or contested matter after the adversary proceeding or contested matter has begun; or
3. to transmit, but not serve under FRBP 7004, a document that neither initiates nor is filed in an adversary proceeding or a contested matter, including by mailing a notice governed by FRBP 2002.

Only by evaluating whether the document to be served is a request for relief under FRBP 9013 or 9014 can one determine the meaning of a particular use of "serve" in the FRBPs or LBRs. On October 1, 2014, the Oregon bankruptcy court posted on its website proposed changes to the LBRs and Local Bankruptcy Forms, several of which are designed to provide guidance regarding the use of "serve" in the LBRs.

Three Meanings of "Serve"

"Serve" meaning 1: to serve a complaint or document initiating a contested matter

FRBP 7004 requires service of an adversary-proceeding complaint and summons in accordance with that rule. FRCP 14(a)(1), applicable to adversary proceedings under FRBP 7014, imposes the same requirement to a third-party complaint and summons in an adversary proceeding.

FRBPs 9013 and 9014(a) and (b), read together, require that a motion or other request for an order

granting relief against one or more parties, other than a request made during a hearing or a motion that may be considered ex parte, be served in the manner required by FRBP 7004. Because the title of FRBP 9014 is “contested matters” and FRBP 9014(a) refers to a proceeding commenced by a request for relief as a “contested matter,” referring to a bankruptcy event as a contested matter is a shorthand way of saying that the document initiating the contested matter must be served under FRBP 7004.

Some FRBPs expressly require service of a document under FRBP 7004 or state that the document or the proceeding initiated by the document is governed by FRBP 9013 or 9014. For example, FRBP 1010(a) requires that an involuntary summons be served with a copy of the petition in the manner provided for service of a summons and complaint by FRBP 7004(a) or (b); FRBP 1017(f)(1) states that FRBP 9014 governs most proceedings to dismiss or suspend a case or convert a case to another chapter; and FRBP 1017(f)(2) requires that conversion or dismissal under 11 USC §1112(a), §1208(b), or §1307(b) be on motion served under FRBP 9013. In all those cases, service must be made under FRBP 7004.

Even if a contested matter is not addressed by an FRBP, much less one that expressly refers to FRBP 7004, 9013, or 9014, service is nonetheless required under FRBP 7004. For example, FRBP 1004 requires that, after filing an involuntary petition against a partnership (which initiates a contested matter), the petitioning partners or other petitioners send to or serve a copy of the petition on each general partner who is not a petitioner, and FRBP 1017(c) requires that notice of a hearing on the US Trustee’s motion to dismiss (which also initiates a contested matter) be served by the US Trustee on the debtor, the trustee, and other parties as the court directs; those documents either initiate or transmit notice of the initiation of a contested matter and thus must be served under FRBP 7004. Judge Alley has held that the general requirement of FRBP 7004 service of a document initiating a contested matter applies to a claim objection, even though FRBP 3007(a) requires that a claim objection be mailed or delivered. *In re Monk,* 2013 WL 4051864 (Bankr D Or Aug 9, 2013).

FRBP 9013 requires that every motion be served on the trustee or debtor-in-possession and on other entities specified by the FRBPs. Or, if service is not required or the entities to be served aren’t specified by the FRBPs, the motion must be served on the entities the court directs. (Read in conjunction with FRBP 9014(a) and (b), FRBP 9013 requires service under FRBP 7004.) Thus, the court may specify the entities that must be served with a motion if any FRBP governing the motion does not require service or does not specify the entities to be served.

Several LBRs require that documents initiating contested matters be served, and in some cases those LBRs require service on entities on which service is not specifically required by an FRBP. Those LBRs include:

1. LBR 1002-1(a)(3)(B)(ii) (attorney in fact filing petition for debtor must **serve** order to show cause why case should not be dismissed on debtor, trustee, US Trustee, and all creditors);
2. LBR 1004.1-1(b)(3) (next friend or guardian ad litem must **serve** motion to appoint and declaration on debtor, trustee, all creditors, US Trustee, any governmental entity from which debtor receives funds, debtor’s closest relative, and all persons to whom notice must be given under ORS 125.060);
3. LBR 1017-1 (motion to convert case, unless filed by debtor with statutory right to convert, must be **served** on debtor and any creditors’ committee);
4. LBR 1017-2(a) (motion to dismiss, unless filed by debtor with statutory right to dismiss, must be **served** on debtor and any creditors’ committee).

At least 14 other instances of “serve” in the LBRs require service of documents that initiate contested matters. Under FRBP 9013 and 9014, any document that initiates a contested matter must be served under FRBP 7004 – whether or not an LBR requires service.

Under FRBP 9013, if service of a document initiating a contested matter is not required by an FRBP or the entities to be served aren’t specified by the FRBPs, the court may determine the parties on whom the motion must be served. Thus, the court acted within its FRBP 9013 authority when, in 2013, it adopted LBR changes requiring service on “all creditors” in both LBR 1002-1(a)(3)(B)(ii) (attorney-in-fact’s show-cause order) and LBR 1004.1-1(b)(3) (motion to appoint next friend or guardian ad litem). It is a time-consuming and nontrivial task to determine FRBP 7004 service addresses even when dealing with a small subset of the body of creditors in a case (such as the 20 largest unsecured creditors, who must receive FRBP 7004 service of certain matters under FRBP 4001). But investigating and determining FRBP 7004 service addresses for the entire master mailing list would be a daunting undertaking that does not appear to be required by other LBRs or any FRBP.

The court's proposed 2014 LBR changes include a proposal to delete the LBR 1002-1(a)(3)(B)(ii) requirement that the attorney in fact serve the show-cause order. In addition, the section's Local Bankruptcy Rules and Forms Committee may consider whether to propose that FRBP 7004 service of the LBR 1004.1-1 appointment motion be required only for the listed entities other than "all creditors" and that mailing (without requiring that it also constitute service under FRBP 7004) suffice for transmitting that document to all creditors.

"Serve" meaning 2: to transmit a subsequent document in an adversary proceeding or contested matter

FRBPs 7005 and 9014(b) require that a document in an adversary proceeding transmitted after the complaint, and a document in a contested matter after the motion initiating the contested matter, be served in the manner required by FRCP 5, for adversary proceedings, and by FRCP 5(b), for contested matters.

Some FRBPs and LBRs require service of specific documents within a pending adversary proceeding or contested matter. FRBPs in that category include FRBP 1011(b), which requires that defenses and objections to an involuntary petition be served, and FRBP 9022(a), which requires the clerk to serve notice of entry of a judgment under FRCP 5(b). The following LBRs are in that category:

1. BR 9011-1(b)(2)(B) (movant for continuance of evidentiary hearing must **serve** notice of date, time, and location of continued hearing on all affected parties);
2. LBR 9013-1(d)(1) (expert's written report must be **served** on each opposing party);
3. LBR 9019-1(b)(1) (if parties cannot agree on mediator, each party must submit to judge, but not file, and **serve** on other mediation parties a list of four acceptable mediators);
4. LBR 9021-1(a)(4) (court may delegate to party lodging proposed order or judgment, or another party specifically designated by court, clerk's obligation under FRBP 9022(a) to **serve** order or judgment);
5. LBR 9021-1(c)(3) (objection to cost bill must be filed and **served**).

"Serve" meaning 3: to transmit a document outside an adversary proceeding or contested matter

Some FRBPs and LBRs require service of a document that is not a complaint, does not initiate a contested matter, and is not filed in an adversary proceeding or contested matter. FRBPs in that category include FRBP 1007(b)(2), which requires that a copy of the 11 USC §521 statement of intent be served on the trustee and on the creditors named in the statement, and FRBP 2015.1(a), which requires that notice that a health-care ombudsman's report under 11 USC §333(b)(2) will be served on the debtor, the trustee, all patients, and any creditors' committee or list of 20 largest unsecured creditors. LBRs in that category include:

1. LBR 1007-1(c)(2)(B) (copy of document providing details of expenses incurred under Family Violence Protection and Services Act must be **served** on US Trustee and trustee if case is under chapter 12 or 13);
2. LBR 1007-2(a)(2) (when **serving** notices, clerk may rely exclusively on master mailing list and any amendment thereto filed before **service**);
3. LBR 1007-2(b) (debtor must attach certificate of **service** to initial list of 20 largest unsecured creditors certifying that debtor separately provided US Trustee with copy of list and labels).

At least 24 other instances of "serve" in the LBRs require transmission of documents that don't initiate contested matters.

Two LBRs address both documents that initiate contested matters and those that don't:

1. LBR 2002-1(e) requires that an entity **serving** a notice pay all actual costs of **service**, and it permits an entity incurring **service** costs to apply for reimbursement under LBR 2016-1, unless reimbursement is prohibited under the Code or LBRs. LBR 2002-1 notices include notices of intent, which don't initiate contested matters, and notices of hearing on motions, which do.
2. LBR 2002-1(f) relieves the clerk of a duty to verify certificate of **service** information, but if the clerk receives certain notice of data entry by the clerk's office regarding a document **served** by the clerk, the clerk must correct the error and re-**serve** the document. Certificates of service appear both on documents that initiate contested matters, such as motions, and on those that don't, such as notices of intent.

A document that does not initiate a contested matter and is not filed in an adversary proceeding or contested matter need not be served under FRBP 7004 or FRCP 5 or 5(b). Indeed, for two reasons, FRBP 7004 service will often not satisfy a requirement to mail a document under FRBP 2002. First, a document governed by FRBP 2002 must be mailed to an entity's address determined under FRBP 2002(g). The FRBP 2002(g) address, which is most often the address that the debtor provides in schedules or lists it files, will often differ from the address to which a mailing under FRBP 7004 must be made — especially in the case of a document that must be transmitted to a corporation. Second, under FRBP 9001(8), a mailing required by FRBP 2002 must be by first-class mail, but a mailing to an insured depository institution under FRBP 7004(h) must be made by certified mail, which is probably not first-class mail.

Effect of multiple meanings of "serve"

Because "serve" is used in both the FRBPs and the LBRs more broadly than to refer only to service required by FRBP 7004 or FRCP 5 or 5(b), the obligation imposed by any particular requirement to serve a document can be understood only by determining whether the document in fact initiates a contested matter. That determination turns on application of the functional definitions in FRBPs 9013 and 9014 — does the document request relief against one or more parties? — as augmented by language of some FRBPs that expressly require service under FRBP 7004 or that state that the proceeding initiated by the document is governed by FRBP 9013 or 9014.

Transmitting Plans

Plans are hybrid documents, requiring noticing under FRBP 2002 as to all creditors but additional service under FRBP 7004 as to certain lienholders and executory-contract or unexpired-lease counterparties.

FRBPs addressing plan transmission

Under FRBPs 2002(b) and 3015(d), a chapter 12 or 13 plan or plan summary and notice of the hearing on confirmation of the plan must be mailed to all creditors. Under FRBPs 2002(b) and 3017(d), a chapter 11 plan or a court-approved plan summary, the approved disclosure statement, and notice of the deadline for filing objections and ballots and the hearing to consider confirmation of the plan must be mailed to — not served on under FRBP 7004 — all creditors.

Under FRBP 3015(f), an objection to confirmation of the plan initiates a contested matter and thus must be served under FRBP 7004.

LBRs addressing plan transmission

LBR 3015-2(b) requires that a chapter 12 or 13 debtor "serve" proposed plan amendments. Similarly, LBR 3017.1-1(a) requires that, in a chapter 11 small-business case, the debtor serve a copy of the plan and disclosure statement on the US Trustee, any creditors' committee, any involved taxing authority, secured creditors, and any entity requesting all notices.

In view of FRBP 3015(d)'s requirement to mail a chapter 12 or 13 plan, the filing and transmission of a plan don't generally initiate a contested matter, and the same should be the case for plan amendments. And in view of FRBP 3017(d)'s requirement to mail a chapter 11 plan, the filing and transmission of a chapter 11 plan also don't generally initiate a contested matter, and the same should be the case if the debtor is a small-business debtor. So chapter 12 and 13 plan amendments and chapter 11 small-business plans don't generally require FRBP 7004 service. Exceptions to the general rule, discussed below, apply to plans that are hybrid documents requiring FRBP 7004 service on certain entities but mailing to all creditors.

The Oregon bankruptcy court's online service guide includes specific instructions for serving chapter 12 and 13 plans, including addresses for serving the IRS if it is listed in plan paragraph 2(b)(1) or (2).

Plan provisions requiring FRBP 7004 service

The Oregon chapter 12 and 13 plan forms include the option for the debtor to move for valuation of collateral in both paragraphs 2(b)(1) and (2). LBFs 1200.05, 1300.14. The chapter 13 form (but not the chapter 12 form) also permits the debtor to seek avoidance of exemption-impairing liens in paragraphs 6(a) and (b). Collateral valuation (such as in connection with lien-stripping) and avoidance of exemption-impairing liens must be done by motion, hence the plan references in paragraphs 2(b)(1) and (2) and 6 to motions. FRBPs 3012, 4003(d).

Because motions are governed by FRBP 9014(a) and (b) and thus must be served under FRBP 7004, notwithstanding FRBP **3015(d), a creditor whose lien a plan seeks to value or avoid as exemption-impairing must be served under FRBP 7004 with the plan and confirmation-hearing notice.** *In re Stassi*, 2009 WL 3785570 (Bankr CD Ill Nov. 12, 2009); *In re Millspaugh*, 302 BR 90, 101-04 (Bankr D Idaho 2003) (FRBP 3012 valuation). But other secured and unsecured creditors and parties in interest affected by a plan need only receive notice, and need not be served under FRBP 7004.

As with chapter 12 and 13 plans (for the reasons set forth above), if a chapter 11 plan provides for collateral valuation or avoidance of exemption-impairing liens, the plan must also be served under FRBP 7004 on each creditor or counterparty directly affected by those provisions. And other secured and unsecured creditors and parties in interest affected by a plan need only be noticed.

Under FRBP 6006(a), a proceeding to assume, reject, or assign an executory contract or unexpired lease (365 motion) is governed by FRBP 9014 — unless it is done as part of a plan. Thus, under FRBP 6006(a), the inclusion of a 365 motion in a chapter 12 or 13 plan does not convert the plan to a proceeding governed by FRBP 9014, requiring FRBP 7004 service.

LBR 6006-1(b) requires that a chapter 12 or 13 plan containing a 365 motion be "served on all parties to the contract or lease." Although that LBR does not specify the manner in which service is required, the certificate of service to the chapter 13 plan requires that the individual transmitting the plan certify that the plan and notice of the confirmation hearing were served under FRBP 7004 on creditors and parties treated in paragraph 3, which lists executory contracts and unexpired leases to be assumed. In a parenthetical, the certificate instructions cite LBR 6006-1(b). No such provision appears in the certificate of service to the Oregon chapter 12 plan form (LBF #1200.05), and no LBR requires service of a chapter 11 plan on creditors affected by a 365 motion contained in the chapter 11 plan.

Two provisions of the court's proposed 2014 LBR and LBF changes would clarify requirements for service of a chapter 12 or 13 plan containing a 365 motion. First, the court has proposed that LBR 6006-1(b) be amended to expressly require that service of the plan (together with notice of any pending confirmation hearing) be "under FRBP 7004." Second, the court has proposed to replace the certificate of service to the chapter 12 plan form with one that is essentially identical to the chapter 13 plan's certificate of service.

FRBP 9029(a)(1) permits the court to adopt local rules that are consistent with acts of Congress and the FRBPs. Requiring FRBP 7004 service by adoption of an LBR appears to be consistent with acts of Congress and the FRBPs and thus permitted by FRBP 9029(a)(1) (even if, as in the case of LBR 6006-1(b), the LBR requires service of a document that does not initiate a contested matter). In the court's note to its proposed 2014 amendment to LBR 6006-1(b), the court affirmed that it has invoked its FRBP 9013 authority to require FRBP 7004 service of a chapter 12 or 13 plan that includes a 365 motion. A policy argument in favor of requiring FRBP 7004 service of a chapter 12 or 13 plan on counterparties to executory contracts or unexpired leases to be assumed is that FRBP 7004 service would reduce the likelihood of postconfirmation disputes over whether the counterparties received constitutionally sufficient notice of and opportunity to object to the plan.

2015 LBR Changes Regarding the Meaning of "Serve"

The court has requested that the LBR committee's 2015 proposed LBR changes include changes to each instance of "serve" to state whether the LBR requires that service be made under FRBP 7004 — *i.e.*, without regard to whether service under FRBP 7004 is required by the FRBPs themselves. Doing so would not solve the problem that "serve" is used more broadly in the FRBPs. But it would enable practitioners and parties reading the LBRs to more easily distinguish the types of document transmissions requiring the particular care mandated by FRBP 7004 and FRCP 5 from other types of document transmissions, which typically occur by mailing to the entities on the master mailing list and the automatic electronic transmission to ECF participants that occurs upon filing of a document.

Conclusion

To determine whether a document must be served under FRBP 7004, don't rely primarily on whether an FRBP or LBR requires that the document be "served." Instead, consider whether the document is a request for entry of an order initiating a contested matter under FRBPs 9013 and 9014(a). If so, FRBP 7004 service is required — even if no FRBP or LBR addresses the document.

Until the effective date of the court's proposed 2014 LBR changes (likely December 1, 2014), (1) treat LBR 1002-1(a)(3)(B)(ii) as requiring FRBP service on all creditors, or request relief from that requirement, and (2) treat the chapter 13 plan's certificate of service as though it were an LBR requiring FRBP 7004 service of a 365 motion contained in the plan. And until the court adopts any future amendment to LBR 1004.1-1(b)(3), treat that LBR as requiring FRBP 7004 service on all creditors, or request relief from that requirement.

All Debtor-Creditor Section members should feel free at any time to submit suggestions to, or volunteer to serve on, the LBR committee. Information about the committee's meeting schedule can be obtained from the section's website or from chair Christopher Coyle.

FINANCIAL RESOLUTION OF PARTNERSHIP DISPUTES

By Serena Morones, Morones Analytics[1]

Introduction

This article describes four financial issues unique to partnership disputes. Understanding these issues should help professional advisors find a reasonable financial resolution before the dispute bloats with professional fees and frustrates the clients. Identifying a particular partner's share of the partnership value can be an elusive and expensive process, due to the somewhat outdated legal and accounting concepts that apply to partnerships, including aspects of an aggregate theory of business ownership.

An aggregate theory of business ownership means that each partner is viewed as a separate business unit, operating alongside other partners for the purpose of mutually enhancing the overall business. This aggregate theory requires each partner's business activities to be separately accounted for through use of capital accounts, in order to understand each partner's relative share of the whole. The Revised Uniform Partnership Act (RUPA) modified the Uniform Partnership Act (UPA) to assume an entity theory rather than an aggregate theory in many areas, such as for identification of asset ownership. But in other areas, such as determination of a partner's share of capital ownership and allocation of assets upon dissolution, RUPA still reflects an aggregate theory.

A partnership agreement or dispute settlement agreement can override the principles that will be discussed in this article. Because many disputes result from lack of a clearly documented partnership agreement, however, the financial affairs of the partnership must be unwound by application of sound legal, accounting and valuation practices specifically applicable to partnerships.

I. Unique Partnership Issue One: Accounting with Capital Accounts

Before a partnership dispute is concluded, the capital accounts should be calculated to reflect the intended profit and capital sharing ratios of the partners. The final capital account balance should show a partner's final financial position (amount owed to the partner), notwithstanding any side agreements relating to financial settlements.

Why are capital accounts so important to a partnership dispute resolution? According to RUPA §807(b), a partner is entitled to a distribution equal to his positive capital account balance upon dissolution of the partnership. A partner's final capital account balance represents that partner's share of the overall net assets, if the assets were distributed to all the partners. Therefore, a partner's capital account balance has a direct bearing on the value of that partner's interest in the partnership.

RUPA §401 sets out the rules for calculating capital accounts. RUPA §807 sets out the rules for settlement of the partners' accounts upon dissolution and windup. This form of accounting follows the aggregate theory of business ownership rather than an entity theory, a difference that becomes important when determining the value of a partner's interest. Corporations do not utilize capital accounts.

The basic calculation of a partner's capital account is as follows:

  Initial capital contribution by the partner
+ Plus additional capital contributions by the partner
+ Plus the partner's share of profits
- Minus (distributions to the partner)
- Minus (the partner's share of losses)

= the partner's Capital Account Balance

An example illustrates the use of capital accounts to determine a proper financial settlement in a partnership dispute.

Jones Smith Partnership consists of two partners who decided to buy and operate an apartment building and share the profits 50/50. Jones and Smith each contributed $500,000 to purchase the building for $1,000,000. Assume for the sake of simplicity they had no mortgage. Smith volunteered to keep the books and bank accounts. Both partners agreed to participate in management.

Twenty years elapsed and the relationship deteriorated. Jones could not get Smith to disclose the accounting records despite repeated requests. Jones received distribution payments every year but believed there was more money to distribute, so he hired an attorney to dissolve the partnership and compel payment to Jones of his share of partnership assets.

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1 Morones Analytics provides business valuation, damage analysis and forensic accounting services. Visit www.moronesanalytics.com to learn about our services and our team of professional experts. Please email Serena Morones with questions or comments at serena@moronesanalytics.com.

Assume the following additional facts:

- The apartment building was recently sold with net proceeds of $2,000,000.
- Total taxable net income earned over the twenty years was equal to $1,400,000, not including income realized on the sale of the building.
- Cash distributions received by Jones over the twenty years amounted to $700,000.
- Smith says little cash is left in the bank account.
- Jones does not know how much money in distributions Smith paid himself because he has not been able to examine the accounting records.
- Jones knows that the sale of the building netted $2,000,000, and believes he should receive 50% or $1,000,000. Jones also knows that over the twenty years he received distributions equal to 50% of the taxable income of $1.4 million or $700,000.

On the surface, nothing looks wrong with Jones receiving $1 million in dissolution proceeds. But whether a $1 million payment to Jones is a fair financial resolution will be determined by examining the accounting records and calculating the capital accounts.

Jones's attorney hires a forensic CPA to conduct an accounting. The CPA discovers that the partnership deducted depreciation expense of $600,000 over the 20 years. Depreciation expense does not result in a cash payment; therefore cash flow generated by the apartment building was $600,000 higher than taxable income. The CPA also learns no cash is left in the partnership bank accounts. The CPA investigates further and discovers that Smith deposited rent payments into his own personal bank accounts and used those funds to pay for unrelated business and personal living expenses. The CPA concludes that Smith constructively received $1.3 million in cash distributions while Jones received only $700,000. Based on this additional information, what amount of money should go to Jones and how much to Smith?

Here are the resulting capital account balances based on the above illustration:

Jones-Smith 50-50 Partnership
Capital Account Analysis

	Jones	Smith	Total
Initial capital contribution	$500,000	$500,000	$1,000,000
Share of reported taxable income	$700,000	$700,000	$1,400,000
Cash distributions	($700,000)	($1,300,000)	($2,000,000)
Gain on sale of apt building	$800,000	$800,000	$1,600,000
Ending capital account balance	$1,300,000	$700,000	$2,000,000

(Gain on apartment sale of $1,600,000 equals the $2,000,000 sale proceeds minus basis of $400,000. Basis of $400,000 equals the $1,000,000 purchase price less $600,000 depreciation recognized over 20 years.)

Because upon dissolution Jones is due $1,300,000 and Smith is due $700,000, a $1,000,000 payment to Jones would not have been a fair resolution.

I have seen situations where legal counsel assumed a reasonable settlement would result from paying a pro-rata share of partnership asset value where in fact one partner's capital account had fallen out of balance due to improper financial management, necessitating an equalizing adjustment.

There are also business valuation implications. Business appraisers rely on assumptions provided to them, and many business appraisers are not CPAs with experience in partnership accounting. Attorneys involved in partnership disputes should select an appraiser who understands the impact of capital accounts – or make sure that a qualified CPA with partnership experience discusses the status of the capital accounts with the appraiser.

II. Unique Partnership Issue Two: Accounting for Partner Services

Accounting for partner services is unique to partnerships. Partners commonly agree to exchange services for their interests in a partnership, but don't know how to account for such agreements when the time comes to unwind partnership business affairs.

A. General Rule: No Partner Compensation

The general rule, prescribed by RUPA §401(h), is that "[a] partner is not entitled to remuneration

for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership." A common partnership scenario involves two or more individuals agreeing to expend effort to generate profit. Under this RUPA rule, the agreed profit sharing ratio amongst the partners represents the entire remuneration to the partners for effort expended on behalf of the partnership.

Therefore, unless the partners agreed to terms of compensation for services, a partnership accounting and final financial resolution should not include payment for services rendered by a partner.

B. Services Rendered In Exchange for a Partnership Interest

Sometimes a partner will negotiate the right to own a profit-sharing interest, a capital interest, or both in exchange for services rendered (a service exchange transaction). The correct accounting treatment for a service exchange transaction is essential to a financial resolution because these transactions affect all partners' capital accounts. The correct accounting for such transactions depends on whether the services are performed in exchange for a profit-sharing interest or a capital interest.

If services are exchanged for a profit-sharing interest only, no specific accounting is required upon formation of the partnership. When profits or losses are generated, the profits or losses are credited or debited, respectively, to the service partner's capital account according to the agreed profit-sharing ratio.

When services are exchanged for a capital interest, the service partner must recognize ordinary taxable income equal to the value of the capital account received and the partnership must credit the service partner's capital account in an amount equal to the value of the capital account that the service partner will own upon formation. The value of the capital account received by the service partner depends on whether or not the services resulted in the addition of a capital asset.

If the partner's contribution of services creates an asset for the partnership (for example, a company website), the value of the asset must be a debit to the partnership books and a credit to the service partner's capital account, representing the value of his capital contribution. A second entry may be required to adjust all the partner's capital accounts to the agreed capital-sharing ratio.

If the partner's contribution of services does not create an asset, the partnership credits the service partner's capital account with his pro-rata share of the partnership's total capital, and debits the nonservice partners' capital accounts for the value of capital shifted from the nonservice partners to the service partner.

There are many variations of agreements for partners to trade services for a partnership interest, in the form of either a profit or capital interest. The following examples illustrate proper accounting treatment under two scenarios where services are exchanged for a capital interest in a partnership.

1. Services Exchanged for Capital Interest – Service Creates an Asset

Partner Phillips develops a website in exchange for a 50% profit and capital interest in Phillips Jones Partnership, which will operate an e-commerce tax advice website. Partner Jones will contribute $100,000 of cash to fund working capital and other start-up expenses. The value of the e-commerce website is assumed to be a capital asset also worth $100,000. What is the proper accounting treatment by the partnership and what are the partner capital account balances upon formation, assuming the website is finished and contributed upon formation?

Account	Debit	Credit
Entry #1:Partner Jones		
Cash	$100,000	
Partner Capital-Jones		$100,000
Entry #1:Partner Phillips		
Website Asset	$100,000	
Partner Capital-Phillips		$100,000

In this example, the services rendered resulted in a capital asset, and Phillips must individually recognize $100,000 of ordinary income for having performed services in exchange for his partnership interest worth $100,000.

The opening balance sheet of the partnership would look like this:

Phillips Jones Partnership
Opening Balance Sheet

Cash	$100,000
Website	$100,000
Total Assets	***$200,000***
Liabilities	———
Partner Capital	
Jones Capital	$100,000
Phillips Capital	$100,000
Total Assets	***$200,000***

Total Liabilities and Capital **$200,000**

2. Services Exchanged for Capital Interest – Service Does Not Create an Asset

What is the correct accounting if the services provided do not create a capital asset of the partnership? Assume Phillips agrees to spend time networking and gaining potential clients before formation in exchange for a 50% profit and capital interest. In this scenario, the partnership credits Phillips's capital account with the value of the partnership capital he receives, and debits Jones's capital account by the value of the capital transferred to Phillips. Phillips individually recognizes $50,000 of ordinary income on his tax return.

Account	**Debit**	**Credit**
Entry #1:Partner Jones		
Cash	$100,000	
Partner Capital-Jones		$100,000
Entry #1:Partner Phillips		
Website Asset	$50,000	
Partner Capital-Phillips		$50,000

The opening partnership balance sheet for this scenario is as follows:

Phillips Jones Partnership
Opening Balance Sheet

Cash $100,000

Total Assets ***$200,000***

Liabilities .... ——————

Partner Capital
Jones Capital $50,000
Phillips Capital $50,000
Total Assets ***$100,000***

Total Liabilities and Capital **$100,000**

C. Guaranteed Payments to Partners

Many partnerships agree to compensate a partner for specific services performed, such as professional services offered to clients or administration of the partnership. Regular payments to partners for services rendered are called guaranteed payments. According to the Internal Revenue Code (IRC), 26 USC §707(c), a guaranteed payment is a fixed payment made by a partnership to a partner for services or use of capital regardless of whether there is partnership income or profit. Partnerships establish guaranteed payments to reduce the risk that a partner will spend time performing services and not receive an allocation of profits.

Guaranteed payments are deducted by the partnership as a business expense, in the same way as employee compensation. (Note, however, that employer payroll taxes are not paid on guaranteed payments. Partners pay self-employment taxes on income received as guaranteed payments.) Guaranteed payments therefore reduce the profits of a partnership. A guaranteed payment to a partner is not a distribution in the partner's capital account. Rather, it is reported as an expense by the partnership and as a separate category of income received by the partner on the partner's K-1.

D. Valuation Implications When There Is No Agreement for Partner Compensation

Business appraisers typically impute a market level of owner compensation into the expenses of a business to determine the fair market value of the business. How should a business appraiser treat owner compensation if the partnership does not have a compensation agreement and does not pay compensation to the partners, but instead distributes a share of partnership profits in exchange for services rendered?

The answer depends on the legal context of the valuation and standard of value applicable to the valuation. For example, if the legal context and standard of value require a Fair Market Value analysis, the appraiser should make a valuation adjustment to impute hypothetical market level compensation for services provided by the owners. This is because a hypothetical buyer is not presumed to maintain the partnership ownership structure and might operate the business as a C-Corp or S-Corp. Thus the hypothetical buyer would assume that market compensation must be paid to all individuals providing services to the business.

If, on the other hand, a legal claim provides for a measure of value that does not assume a hypothetical buyer and seller (for example, statutory Fair Value, Strategic Value, or a claim for lost profits), and no compensation has been paid and no compensation agreement is in place, an argument could be made that profits and corresponding value should be determined without imputing partner compensation. Whether this treatment is appropriate depends on the legal claims giving rise to the dispute and the facts and circumstances of the case.

III. Unique Partnership Issue Three: Identifying and Adjusting Personal Expenses

Partners in disputes often allege that one or more partners used partnership funds to pay personal expenses. Before a fair resolution of such a dispute can be reached, the parties must identify and adjust the personal expenses paid with partnership funds.

A. Authoritative Guidance Defining Valid Business Expenses

The two primary sources for the definition of a valid business expense are the IRC and Generally Accepted Accounting Principles (GAAP). These authorities also list types of expenses typically identified as personal, and prescribe correct accounting treatment for personal expenses.

1. IRC

IRC §162(a) provides:

> In general there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> (1) a reasonable allowance for salaries or other compensation for personal services actually rendered;
>
> (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and
>
> (3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

The key IRC phrase for evaluating a valid business expense is "ordinary and necessary," which IRS Publication 535 (available at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Deducting-Business-Expenses) defines as follows:

> An ordinary expense is one that is common and accepted in your trade or business. A necessary expense is one that is helpful and appropriate for your trade or business. An expense does not have to be indispensable to be considered necessary.

Some case law addresses the meaning of ordinary and necessary. *See, e.g., Welch v. Helvering,* 290 US 111 (1933) (interpreting ordinary and necessary); *Deputy v. duPont*, 308 US 488 (1939) (expanding on the meaning of ordinary); and *Jenkins v. Commissioner,* 55 TCM (CCH) 1215 (USTC 1988) (exploring the taxpayer's motive for making the expenditure). I find, however, that these decisions provide no brighter-line definition of ordinary and necessary than the IRC, but simply suggest the application of common sense to the facts and circumstances of each case.

I interpret an *ordinary* expense as one that could commonly be found in a similar business. I view a *necessary* expense as one that helps achieve the business mission. The process of applying these guidelines is subjective, but an experienced accounting professional can identify the patterns in business expenses (based on exposure to a significant number and variety of businesses), and make a reasoned decision about what types of expenses qualify as ordinary and necessary.

2. GAAP

The second authority for defining a business expense is GAAP. Financial Accounting Standards Board (FASB) Concepts Statement 6, at CONS6-2, defines ten interrelated elements directly related to measuring performance and status of an entity. One of these elements is Expenses, defined as "outflows or other using up of assets or incurrences of liabilities (or a combination of both) from delivering or producing goods, rendering services, or carrying out other activities that constitute the entity's ongoing major or central operations."

Logic could contrast "major or central" to minor or obscure and suggest that expenses with a minor or obscure contribution to operations would be considered non-business related. I view the "major or central" phrase from GAAP as communicating a similar concept as the IRC's "necessary."

B. Common Categories of Personal Expenses

Following are some of the most common examples of personal expenses we see improperly expensed through partnerships or other small businesses:

1. Automobile expenses: expensing all of the cost of a personal auto when the business doesn't use an automobile or when the auto is partially used for commuting or personal travel.
2. Credit card charges: charging all types of small personal purchases on company credit cards. We commonly see the entire credit card paid by the business and

insufficient accounting for personal charges on the card.

3. Charges at large retailers: buying both business and personal items from a large general retailer such as Costco or Amazon and expensing the whole purchase to the business.
4. Meals: expensing meals without substantiation.
5. Travel expense: expensing airfare, hotel and meals for family members or entirely personal trips.
6. Fitness or country club dues.
7. Personal telephone: expensing the entire cell phone family plan.
8. Personal home upkeep: paying home utility bills, maintenance expenses or housekeepers. If both business and home use the same utility service, detection of the personal portion can be difficult.
9. Professional services: expensing personal legal or accounting services, such as divorce attorneys.
10. Wages to family members: expensing payments to or personal expenses of family members who are not actually working.
11. Contractor payments: expensing payments made to contractors for home remodel or the improvement of other personal assets.

C. Substantiating Business Expenses

For a business expense to be deductible for tax purposes, the business must be able to substantiate the expense through documentation such as receipts, canceled checks, or bills. According to the IRS, documentary evidence ordinarily will be considered adequate if it shows the amount, date, place, and essential character of the expense. In addition, the business must generally provide a written statement of the business purpose of an expense. See IRS Publication 463 (2013) http://www.irs.gov/publications/p463/ch05.html. For example, a restaurant receipt is enough to substantiate a business meal if it has the name and location of the restaurant, the number of people served, the date and amount of the expense.

With the growing popularity of online purchases, more businesses pay for expenses with debit or credit cards. While card statements demonstrate that something was purchased, they alone do not adequately support deductibility as they do not show the essential character of the expense. Identification of only the vendor name, the amount and the date of transaction is not adequate to support deductibility. The business owner should keep the original email receipt that itemizes the products or services purchased, to satisfy the requirement for documentation of the essential character of the expense.

D. Accounting for Personal Expenses Paid by a Partnership

There are two options for accounting for personal expenses paid by a partnership on behalf of a partner (Partner P). The first is to account for the personal expense as a distribution to Partner P; the second is to record the expense as a loan to Partner P.

Treating the personal expense as a distribution to Partner P will reduce Partner P's capital account. If the expense was previously recorded as an expense of the business, the correcting journal entry would debit Partner P's capital account and credit the expense account where it was originally recorded. Because Partner P's capital account has been reduced, upon dissolution Partner P's proceeds of dissolution will be reduced by the amount of the personal expense that was recorded as a distribution – that is, Partner P repays the personal expense.

If the personal expenses are treated as a loan to Partner P, the correcting entry debits an asset called Loan from Partner P and credits the expense account where it was originally recorded. Either the partners could agree to establish loan repayment terms, or the loan could be repaid out of dissolution proceeds, reducing the proceeds to Partner P. Treating the expense as a loan may provide the partnership with an opportunity to calculate reasonable interest, to compensate the partnership for Partner P's use of partnership funds.

Under either accounting treatment, the correcting entry increases the income of the partnership. The corrected income is taken into account in determining final capital account balances and any business valuation.

IV. Unique Partnership Issue Four: Expenses Incurred by a Partner on Behalf of the Partnership

During the life of the partnership, one or more partners may have paid partnership expenses with personal funds and never sought a proper accounting for those expenditures until a dispute arose. All partnership expenses paid outside of regular partnership bank accounts must be identified

and correctly recorded before a final financial resolution. Some professional advisors believe that simply adjusting the final number up or down by the amount of these expenses will resolve the issue. This adjustment is often made incorrectly, however, as illustrated below.

A. Proper Accounting Treatment for Valid Business Expenses Paid Personally by a Partner

Assume that Jones is a 25% partner and spends $500 of his own money to buy office supplies for the partnership. There are two options to properly account for Jones's expenditures. One is to treat the expenses as a loan from Jones to the partnership; the other is to treat the expenses as a capital contribution by Jones to the partnership. Journal entries for the two options are as follows:

Account	Debit	Credit
Option #1:		
Office Supplies Expense	$500	
Loan from Partner Jones		$500
Option #2:		
Office Supplies Expense	$500	
Partner Capital-Jones		$500

B. The Net Effect to Partner Jones Is Not a Repayment of $500

It would be a mistake to assume that the remaining partners owe Jones a repayment of $500. Instead, Jones must also be allocated his proportionate share of the impact of the $500 expense on profits. As a result, his capital account is also reduced by his 25% share of $500.

I have seen this error made in a dispute resolution context, typically because these expenses were not entered into the books when they were incurred. The professional advisors erroneously believed the partnership should simply repay the amounts advanced by the partner.

The actual net effect of this hypothetical transaction to Jones is that the partnership owes Jones only $375 for incurring $500 of expenses on behalf of the partnership, as illustrated in the capital account analysis below.

	Jones	Smith	Wilson	Davis	Total
Beginning Capital Accounts Before Adjustment	$2,000	$2,000	$2,000	$2,000	$8,000
Add: Capital Contribution by Jones	$ 500				$ 500
Subtract: Decrease in Profits Due to Additional Expense	$(125)	$(125)	$(125)	$(125)	$(500)
Adjusted Capital Accounts	$2,375	$1,875	$1,875	$1,875	$8,000

The result would be the same if the $500 of expenses had been accounted for as a loan by Jones, not a capital contribution. The partnership would owe Jones $500; however Jones's capital account would decline by $125, netting Jones $375.

Conclusion

Understanding these four issues unique to partnership accounting will help professional service advisors reach fair financial settlements in partnership disputes.

REMEDIES FOR DEBTOR'S FAILURE TO PAY FOR COLLATERAL

By David B. Gray, Swensen & Gray

Sometimes a creditor does not obtain a reaffirmation agreement from the debtor but depends solely upon the debtor's goodwill and the lien rights in collateral retained by the debtor. What steps can the creditor take to collect on its debt? The following discussion assumes that, after discharge, the creditor has a valid lien or perfected security interest in collateral retained by the debtor, the debtor has ceased making payments and the collateral retained by the debtor has value.

The Bankruptcy Code does not impose a duty on a lienholder to assert its in rem rights before a debtor's discharge. *Farrey v. Sanderfoot,* 500 US 291, 297 (1991). After discharge, the creditor cannot pursue the debtor personally on the prebankruptcy debt, 11 USC §524(a)(2), but can demand payment for the balance due on the collateral. *In re Garske,* 287 BR 537 (9th Cir BAP 2002). The balance due is the amount due prepetition or the value of the collateral, whichever is less.

Post-discharge, the secured creditor may negotiate payment terms with a debtor if debtor wants to retain the collateral. *Arruda v. Sears, Roebuck & Co,* 310 F3d 13, 22 (1st Cir 2002). If the debtor believes the terms of the proposal are unfair, however, the debtor may ask the bankruptcy court to reopen the bankruptcy case to adjudicate the matter. *Id*.

If the creditor and debtor cannot agree upon the return of the collateral or payment of the balance

due, the creditor may resort to state court remedies to enforce its lien rights. These are *in rem* remedies if the debtor still holds the collateral. Replevin and foreclosure are the most common claims for a creditor to pursue. If a creditor exercises legitimate state court remedies in a harassing or coercive manner, however, it may violate the discharge injunction. *In re Paul,* 534 F3d 1303 (10th Cir 2008); *In re Pratt,* 462 F3d 14 (1st Cir 2006).

The most interesting question is what remedies are available to the creditor if the debtor sells the collateral post-discharge. If the debtor has sold the collateral, the creditor's *in rem* remedies as to the debtor are seriously impaired (though the creditor might be able to pursue the collateral from whoever purchased it from the debtor). But because the debtor's actions interfered with the creditor's property interests in the collateral, it is appropriate for the creditor to pursue a conversion claim against the debtor.

In the case of *In re Schlichtmann,* 375 BR 41 (Bankr D Mass 2007), the creditor held a promissory note from attorney Schlichtmann and the note was secured by a settlement fee to be paid to attorney Schlichtmann. Though the *Schlichtmann* court acknowledged that the personal debt evidenced by the promissory note was discharged in Schlichtmann's chapter 7 bankruptcy, that discharge did not affect the creditor's lien on the attorney settlement fees.

After his discharge, Schlichtmann disbursed the fee to himself and that triggered the creditor's claim for conversion. The court notes that the tort claim of conversion arose after the discharge, so even though it was an *in personam* remedy it was not subject to the discharge. *Id*. at 9697.

Oregon does not appear to have case law directly addressing the issue, but no case law suggests that Oregon would reject the reasoning of the *Schlichtmann* opinion.

NINTH CIRCUIT CASE NOTES

By Stephen A Raher, Perkins Coie LLP

GIVIN' UP THE FUNK (AND THE COPYRIGHT THEREIN): EXECUTING ON COPYRIGHT INTERESTS

Hendricks & Lewis PLLC v. Clinton
766 F3d 991 (9th Cir 2014)

Proving that Anna Nicole Smith isn't the only celebrity who can provide fodder for debtor-creditor law, musician George Clinton took his post-judgment execution dispute to court and lost.

Hendricks & Lewis (H&L) is a Seattle law firm that represented Clinton in a variety of matters. When Clinton walked away from a $1.8 million unpaid legal bill, H&L obtained a judgment and registered it in the Western District of Washington. Among Clinton's assets are copyright interests in certain master recordings of live performances by his band, Funkadelic. On H&L's motion, the district court appointed a receiver, authorizing him to collect revenues from the recordings and, as a last resort, sell the copyrights to satisfy the judgment.

On appeal, Clinton argued that his interest in the copyrights was not subject to execution. The Ninth Circuit disagreed. It began by noting that when a federal court conducts an execution proceeding, FRCP 69(a)(1) requires adherence to applicable state law unless a federal statute applies.

Clinton claimed that the Copyright Act protected his interest, but after analyzing the specific statutory provisions cited by Clinton, the court concluded that there was no such protection in this situation. Because no federal statute addressed the issue, the court turned to Washington law, which did not provide any exemptions for copyrights. Accordingly, Clinton's interest in the master recordings was subject to execution.

Although this case involves Washington law, it could be argued that the same result would be reached under Oregon law. In Clinton's case, the court relied on Washington Revised Code §6.17.090, which provides that "[a]ll property, real and personal, of the judgment debtor that is not exempted by law is liable to execution." In Oregon, ORS 18.345(1) provides that "[a]ll property . . . of the judgment debtor, shall be liable to an execution, except as provided in this section and in other statutes granting exemptions from execution."

THE EVER POPULAR FIRREA

Rundgren v. Washington Mutual Bank, FA
760 F3d 1056 (9th Cir 2014)

It's been a busy few months for litigious musicians in the Ninth Circuit. This case involves songwriter and producer Todd Rundgren, and his dispute with a mortgage lender.

When the FDIC is appointed as receiver of a failed bank, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) provides that the FDIC must give creditors and other claimants notice of the deadline by which to submit claims against the failed institution. The FDIC then examines and adjudicates the filed claims. Late claims are automatically disallowed, and FIRREA specifically strips federal courts of jurisdiction over claims that are not timely filed with the FDIC.

The Ninth Circuit affirmed the dismissal of Rundgren's lender liability claims against JPMorgan Chase (as successor to Washington Mutual) because the claims arose from Washington Mutual's activities and Rundgren had not filed an administrative claim with the FDIC after Washington Mutual was seized by its regulator.

A CAUTIONARY TALE FOR JUDGMENT CREDITORS OF FAILED BANKS

Meritage Homes of Nev. v. FDIC
753 F3d 819 (9th Cir 2014)

Speaking of FDIC receiverships, Meritage Homes was party to a contract, performance of which was guaranteed by First National Bank of Nevada. The primary obligor defaulted and First National was seized; the FDIC was appointed receiver.

Meritage filed an administrative claim that the FDIC denied. Having exhausted the administrative process, Meritage sued in federal court and obtained a default judgment against the FDIC (as receiver) and the primary obligor. The FDIC then sent Meritage a receiver's certificate for the full amount of the judgment and filed a satisfaction of judgment with the court. Meritage asked the court to amend the judgment and require payment in cash; the trial court denied the request and Meritage appealed.

The court of appeals affirmed, noting that Meritage's judgment arose from a breach committed by First National. As receiver, the FDIC had an obligation to orderly and equitably distribute First National's assets, and requiring the FDIC to satisfy a judgment in cash would unfairly place that judgment creditor ahead of other creditors.

COURT CLARIFIES TEST FOR NONDISCHARGEABLE TAX EVASION LIABILITIES

Hawkins v. Franchise Tax Bd. of Calif.
___ F3d ___, 2014 WL 4494845 (9th Cir. Sept 15, 2014)

As a result of his founding stake in Electronic Arts, Inc., William Hawkins was incredibly wealthy. In the mid-1990s Hawkins sold substantial amounts of stock, which produced sizeable capital gains. On the advice of his accountants at KPMG, Hawkins attempted to reduce his tax liability by engaging in a series of complex tax-shelter transactions.

The tax shelters eventually attracted the attention of the IRS and the California Franchise Tax Board. After an initial audit, the IRS assessed additional taxes and penalties of $16 million. Five years later, when Hawkins and his wife filed a chapter 11 petition, the unpaid federal and state tax debt had grown to a total of $30 million. The Hawkins' chapter 11 plan provided for certain asset sales, with proceeds going to pay a part of the tax claims. The plan preserved the parties' rights to litigate the dischargeability of the debtors' unpaid tax liabilities, and the debtors promptly filed an adversary proceeding seeking a declaration that any prepetition taxes left unpaid under the plan were dischargeable. The tax authorities argued that the taxes were not dischargeable under §523(a)(1)(C), which exempts tax debts "with respect to which the debtor . . . willfully attempted in any manner to evade or defeat such tax."

Addressing an issue of first impression in this circuit, the court of appeals took on the question of what constitutes "willful" evasion for purposes of §523(a)(1)(C). The tax authorities argued that the debtors' continued enjoyment of a lavish lifestyle after the additional taxes were assessed constituted evasion. The Ninth Circuit considered the text and context of the statute, the rule requiring narrow construction of exceptions to discharge, legislative history, case law from other circuits, and similar provisions in the Internal Revenue Code. Based on this thorough analysis, the majority determined that something more than just a lavish lifestyle is needed to prove evasion for purposes of §523(a)(1)(C).

Specifically, the court held that a tax agency must prove both that the debtor knowingly took actions that resulted in not paying tax liabilities, *and* that he took those actions with the specific intent of evading taxes. In so ruling, the court noted that merely proving the debtor's actions were committed intentionally is not enough without also showing that they were taken for the purpose of evading taxes.

Thus, even though the government had proven that the Hawkinses spent money on a lavish lifestyle (instead of using those funds to pay their taxes), to prevail on the dischargeability action the government would also have to prove that the debtors maintained their lifestyle for the purpose of evading taxes. The court remanded for further factfinding on the debtors' intent.

In dissent, Judge Rawlinson argued that the majority's holding "creates a circuit split and turns a blind eye to the shenanigans of the rich." 2014 WL 4494845 at *8.

BANKRUPTCY COURT HAS ARISING-IN JURISDICTION TO HEAR MALPRACTICE CLAIMS AGAINST ESTATE PROFESSIONAL

Schultze v. Chandler, 765 F3d 945 (9th Cir 2014)

Colusa Mushroom, Inc. was a mushroom grower that filed for chapter 11 protection after falling on hard times. Plaintiffs in this case were creditors of Colusa who served on the unsecured creditors' committee. The bankruptcy court confirmed a plan under which Colusa would sell its assets to a third party, Premier Mushroom, LP. Premier was to make a down payment and give a promissory note for the remainder of the purchase price. Premier's obligations under the note would be secured by a lien on certain real and personal property. Premier's note payments would be used to make plan distributions to unsecured creditors.

The sale closing was conducted by attorneys for Colusa and Premier; the committee's counsel was not involved. Colusa's attorney inadvertently neglected to perfect the bankruptcy estate's personal property lien. When Premier defaulted on its payment obligations and the plaintiffs discovered that the lien was not perfected, they filed a malpractice claim against the committee's attorney (Chandler) in state court. The Colusa bankruptcy case was reopened and converted to chapter 7, at which time Chandler removed the malpractice suit to bankruptcy court. The bankruptcy court denied the plaintiffs' motion to remand and dismissed the complaint for failure to state a claim. The Ninth Circuit affirmed.

Plaintiffs argued that the bankruptcy court lacked jurisdiction because their claim sounded in state tort law and the outcome of the suit would have no impact on administration of the estate. Disagreeing, the court of appeals held that the plaintiffs' suit was a core proceeding and the bankruptcy court had arising-in jurisdiction under 28 USC §1334(b). Postpetition suits against a court-appointed professional and pertaining to the professional's bankruptcy-related work are core proceedings, due to the court's "ability to police the fiduciaries" involved in a restructuring. 765 F3d at 949, *quoting In re Southmark Corp.*, 163 F3d 925, 932 (5th Cir 1999).

The court also noted that even if the plaintiffs' core claims were *Stern* claims, they had received the requisite Article III review because the district court conducted a *de novo* review of the bankruptcy court's ruling on appeal. 765 F3d at 948 n1.

As for the merits of the malpractice claim, the appellate panel agreed with the lower courts that Chandler owed duties to the committee, not the individual plaintiffs here, and those duties did not include ensuring perfection of the estate's security interest. Accordingly the plaintiffs' claims were properly dismissed.

BANKRUPTCY COURTS HAVE JURISDICTION TO ENTER FINAL JUDGMENT IN NONDISCHARGEABILITY ACTIONS

In re Deitz, 760 F3d 1038 (9th Cir 2014)

The debtor, Shawn Deitz, challenged the bankruptcy court's constitutional power to enter a final judgment liquidating a claim and declaring it nondischargeable. The BAP affirmed the bankruptcy court's final judgment and the Ninth Circuit agreed.

In September 2006, Wayne Ford and his wife signed a construction contract with Deitz, pursuant to which the Fords would pay $444,105 and Deitz would build them a new house. The Fords hired Deitz in part because of representations he made about his construction experience and military service. These representations were false, and at the time the contact was executed, Deitz's contractor license was suspended. The Fords paid Deitz a total of $511,800, yet Deitz only completed about 65% of the work and he failed to give the Fords a project accounting.

Deitz filed a chapter 7 petition, and scheduled the Fords as holders of an unsecured claim in an unknown amount. The Fords brought an adversary proceeding seeking a ruling that their claim was nondischargeable. The bankruptcy court conducted a trial and determined that the Fords held a $386,092.76 claim that was nondischargeable under §523(a)(2), (4), and (6).

Deitz appealed to the BAP, which affirmed in an opinion by Judge Pappas, with a concurrence by Judge Markell. *See In re Deitz*, 469 BR 11 (9th Cir BAP 2012). Deitz then appealed to the Ninth Circuit, which issued a two-page ruling adopting the majority BAP opinion as its own.

Before the BAP, Deitz conceded that the dischargeability proceeding was a core matter under 28 USC §157(b)(2)(I), but argued that under *Stern v. Marshall* the bankruptcy court lacked jurisdiction to liquidate the claim and enter a final money judgment. The BAP majority cited pre-*Stern* Ninth Circuit precedent that recognized the authority of a bankruptcy judge to both determine dischargeability *and* enter a final judgment liquidating the amount of the non-dischargeable debt. 760 F3d at 1048 (citing *In re Kennedy*, 108 F3d 1015 (9th Cir 1997)). The majority held that the ruling in *Kennedy* was still binding because it was not "clearly irreconcilable" with *Stern*. The BAP also reviewed the bankruptcy court's ruling on the merits and agreed with the lower court's finding of nondischargeability.

Judge Markell wrote separately, saying that while the determination of nondischargeability clearly "arises under" the Bankruptcy Code for purposes of 28 USC §1334, the entry of a money judgment for the amount of the nondischargeable debt appears to be an exercise of "related-to" jurisdiction. Judge Markell further expressed concern that because Dietz's case was a no-asset chapter 7, it wasn't clear that entry of a judgment in favor of the Fords had an impact on the estate, thus calling into question whether related-to jurisdiction was proper under the *Pacor* test. Ultimately Judge Markell concurred with the majority, stating that it was up to the Ninth Circuit Court of Appeals to decide whether to reexamine *Kennedy* and other pre-*Stern* precedent. By adopting the majority opinion, the court of appeals appears to have clarified these issues.

AUTOMATIC STAY DOES NOT PROTECT EXEMPT FUNDS

In re Mwangi
764 F3d 1168 (9th Cir 2014)

Nevada law provides that 75% of a debtor's "disposable earnings" (as defined in statute) are exempt from execution. When the Mwangis filed their chapter 7 petition, they had several deposit accounts with Wells Fargo. A few days after the petition date, the Mwangis filed an amended Schedule C, claiming an exemption in 75% of the balance of each bank account under Nevada's disposable earnings exemption. No party objected to the exemption.

Soon after the commencement of the bankruptcy case, Wells Fargo sent a letter to the chapter 7 trustee stating that it had placed an "administrative hold" on all the bank accounts, and the accounts would remain frozen until the trustee provided instructions or until 31 days after the date first scheduled for the meeting of creditors.

Debtors' counsel asked Wells Fargo to lift the hold as to the exempt funds, but Wells Fargo refused. The debtors then filed a motion alleging violation of the automatic stay. The bankruptcy court denied the motion, the BAP reversed, and on remand the bankruptcy court again denied the debtors' motion. The next appeal went to the district court, which affirmed. In an opinion addressing the metaphysics of exemptions and the automatic stay, the Ninth Circuit affirmed the district court.

Writing for a unanimous panel, Judge Bybee began by noting that under §362(a)(3) the automatic stay only protects property of the estate. As a general rule, exempt property immediately revests in the debtor and is *not* property of the estate. However there is an exception to this rule—if a statute "exempt[s] only a partial interest in an asset, the value of which may fluctuate during the pendency of the bankruptcy case," then the exempt portion of the asset remains property of the estate until administered in bankruptcy. 764 F3d at 1175 (citing *Schwab v. Reilly*, 560 US 770 (2010), and *In re Gebhart*, 621 F3d 1206 (9th Cir 2010)).

If the exempt funds here were governed by the *Schwab/Gebhart* exception, they would have remained estate property until administered or abandoned by the trustee; otherwise, they would have fallen under the general rule and automatically revested in the debtor 30 days after the exemption was claimed. *Id* at 1174 (citing FRBP 4003(b)(1); 11 USC §522(*l*)).

Even though the Nevada statute exempted a percentage of the debtors' disposable earnings, the Ninth Circuit (in a brief footnote) concluded that the *Schwab/Gebhart* exception did not apply because "the earnings are simply an amount of money. Thus the percentage of disposable earnings is best characterized as a portion of a divisible asset rather than an interest in an asset." *Id* at 1176 n3.

Because the general rule applied, the court concluded that the exempt funds revested in the debtors 30 days after the filing of their amended Schedule C. Before the funds revested, they were property of the estate and any claim for violation of the stay belonged to the trustee, not the debtors. After the funds revested in the debtors, they were no longer property of the estate and thus were not covered by the automatic stay. The court said that the appropriate remedy for any improper action by Wells Fargo would have been a breach of contract suit (presumably outside of bankruptcy court). *Id.* at 1177 n5.

CONSUMER CAN PROCEED WITH FDCPA CLAIMS DESPITE NON-RECEIPT OF COLLECTION LETTERS

Tourgeman v. Collins Financial Services, Inc.
755 F3d 1109 (9th Cir 2014)

David Tourgeman brought a class action against several defendants for violations of the Fair Debt Collections Practices Act (FDCPA). Tourgeman's claims arose from Collins Financial Services' attempts to collect a debt. Collins sent a series of letters that misidentified Tourgeman's original creditor, and eventually sued in state court. At all relevant times, Tourgeman lived in Mexico, but the letters were sent to his parents' house in California. Tourgeman admitted that he did not know of these letters until after he filed suit.

Collins challenged the claims by arguing that Tourgeman lacked standing and had not pled a valid claim under the FDCPA. The district court granted Collins's summary judgment motion. In a majority opinion written by district court judge Paul Friedman (sitting by designation), the Ninth Circuit reversed.

As to constitutional standing, the majority noted that when a plaintiff alleges a violation of a federal statutory right, he achieves Article III standing regardless of actual injury. It was not fatal that Tourgeman never received the letters that formed the basis of his complaint. Although he "could not have suffered any pecuniary loss or mental distress as the result of a letter that he did not encounter until months after it was sent . . . the injury he claims to have suffered was the violation of his right not to be the target of misleading debt collection communications." 755 F3d at 1116.

Turning to statutory standing, the court confronted the question of whether Tourgeman had pled a violation of the FDCPA's prohibition on "false, deceptive, or misleading representation[s] or means in connection with the collection of any debt." 15 USC §1692k(a). Collins's letter contained inaccurate information concerning the original creditor, but the letter was never received by the debtor — does this constitute a false or misleading representation? Looking at the larger context of the FDCPA and applying the maxim of liberally construing remedial statutes, the majority concluded that a false statement by a debt collector does violate the FDCPA regardless of whether the intended recipient actually receives the communication.

Having found that Tourgeman had standing, the court then addressed the merits of his FDCPA claims. Collins argued that the letters were not misleading because even though they misidentified the original creditor (and account number), they did correctly identify the purpose of the loan (the purchase of a Dell computer), and therefore contained enough information for Tourgeman to "intelligently respond." The majority disagreed, holding that "in the context of debt collection, the identity of a consumer's original creditor is a critical piece of information, and therefore its false identification in a dunning letter would be likely to mislead some consumers in a material way." 755 F3d at 1121.

Tourgeman also alleged that Collins's attorney sent a demand letter despite having had no "meaningful involvement" in evaluating the case. In his second claim, Tourgeman argued that this conduct violated the FDCPA's prohibition on "false representation[s] or implication[s] that any individual is an attorney or that any communication is from an attorney." 15 USC §1592e(3). Five circuits have held that this provision requires that a lawyer who signs a debt-collection letter must be "meaningfully involved" in the case. The Ninth Circuit declined to reach this issue because Tourgeman's first claim survived, and "violation of a single FDCPA provision is sufficient to establish liability." 755 F3d at 1125 (brackets and internal quotation marks omitted).

In a three-sentence dissent, Judge Farris stated that he would have affirmed.

BAP CASE NOTES

By Jesús Palomares, Miller Nash LLP

THE NINTH CIRCUIT BAP IS BOUND TO DES BRISAY'S CHOICE OF LAW RULES, ALBEIT RELUCTANTLY

In re Sterba, 516 BR 579 (9th Cir BAP 2014)

The issue here was whether to apply the statute of limitations of California, the forum state (four years), or of Ohio (six years) pursuant to the choice of law provision in a note for which a proof of claim had been filed. The bankruptcy court held that the note's provision controlled and Ohio law applied.

The BAP reversed. When bankruptcy courts exercise federal question jurisdiction pursuant to 28 USC §§1334 and 157(b)(2)(B), federal choice of law rules apply. The choice of law rules of the forum state generally are irrelevant in answering choice of law questions in federal question cases. But in 1981, the Ninth Circuit held that a standard contractual choice of law provision does not cover choice of law

questions involving statutes of limitations because the Restatement (Second) of Conflict of Laws generally characterizes statutes of limitations as procedural in nature and hence controlled by the forum state's laws. *Des Brisay v. Goldfield Corp.*, 637 F2d 680, 681 (9th Cir 1981). The Restatement was amended in 1988 to reflect intent to apply the same general conflict of law principles to statutes of limitations as are applied to "substantive" provisions of law.

The BAP noted that the 1988 amendment to Restatement §142 appears to "have undermined the rationale for *Des Brisay*'s holding." Ultimately, however, the BAP concluded that *Des Brisay* remained the binding precedent, which meant that the forum state's four-year limitations period applied and the proof of claim was time-barred.

RETROACTIVE RELIEF FROM STAY APPLIES TO PROPERTY ACQUIRED POSTPETITION

In re Cruz, 516 BR 594 (9th Cir BAP 2014)

Debtor was part of a foreclosure-avoidance scheme involving successive bankruptcy petitions and transfers of fractional interests in the subject real property (Property). Debtor filed a chapter 7 petition one month before he acquired a fractional interest in the Property. The Property owner executed and recorded a grant deed (Deed) to debtor about one hour before the Property was sold at a trustee's sale. The buyer at the trustee's sale (Buyer) had no knowledge of the Deed's existence at the time of sale. Debtor's petition was ultimately dismissed for failing to submit all required documents, but Buyer still filed a motion to annul the automatic stay to validate the sale or, in the alternative, to confirm that no stay was in effect at the time of the sale (Motion). Buyer also sought a finding that the debtor's petition was filed as part of a bad faith scheme to delay, hinder and defraud creditors under §362(d)(4).

The bankruptcy court granted the Motion and entered an order finding that the automatic stay never took effect as to the Property because debtor acquired his interest postpetition (MFR Order). The MFR Order also found that debtor's petition was part of a scheme to hinder, delay and defraud creditors. The court denied debtor's motion to reconsider the stay relief order (Reconsideration Order), and debtor appealed.

The BAP affirmed both bankruptcy court orders and rejected all debtor's arguments. The Property was not protected by the stay as property of the estate, but as (arguably) property of the debtor it was protected. After a case is dismissed, the court may annul the automatic stay for cause, thereby retroactively ratifying an act otherwise violating the stay. Considering numerous factors, principally the bad faith of the debtor and the Buyer's lack of knowledge of the bankruptcy, the BAP found that cause existed and the bankruptcy court properly annulled the stay. The BAP also upheld the Reconsideration Order because debtor failed to produce any "newly discovered" evidence.

LOCAL BANKRUPTCY COURT CASE NOTE

By Margot Seitz, Farleigh Wada Witt

LLC OPERATING AGREEMENT PROVISIONS RESTRICTING BANKRUPTCY FILING ARE UNENFORCEABLE

In re Bay Club Partners—472, LLC,
2014 WL 1796688 (May 6, 2014)

Debtor Bay Club Partners—472, LLC is a manager-managed Oregon limited liability company formed to acquire, renovate and operate a large apartment complex in Mesa, Arizona (the Property). In 2005, Bay Club borrowed $23,600,000 from a creditor to acquire the Property (secured by the same). After several loan modifications and a negotiation breakdown with the creditor, Bay Club received a notice of default. Shortly thereafter it filed a chapter 11 petition that was signed by its manager and was supported by a consent resolution approved by four of its members (representing 80% of membership interests). The creditor moved to dismiss the bankruptcy and was joined by Bay Club's dissenting member (the 20% owner). Both argued that (1) the manager was not authorized to file the petition without unanimous approval of Bay Club's members and (2) Bay Club's operating agreement prohibited the manager from filing for bankruptcy protection.

Judge Dunn analyzed the operating agreement and Oregon law and denied the motion to dismiss. The operating agreement contained an odd mix of provisions. It gave the manager extremely broad, "sole and exclusive authority" to manage Bay Street without requiring membership consent. However, it also prohibited Bay Street from filing for bankruptcy protection until the debt secured by the Property was paid in full. That provision had been added at the request of the lender. The bankruptcy court held that the provisions prohibiting Bay Street from filing for bankruptcy were unenforceable because they violated public policy under prevailing Ninth Circuit authority,

citing *In re Huang*, 275 F3d 1173, 1177 (9th Cir 2002); *In re Thorpe Insulation Co.*, 671 F3d 1011, 1026 (9th Cir 2012), and *In re Wank*, 505 BR 878, 887-88 (9th Cir BAP 2014). Because those provisions were unenforceable, the manager had authority to file the bankruptcy petition.

STATE COURT CASE NOTE

By Sherri Martinelli, Greene & Markley, P.C.

NO SUMMARY JUDGMENT ON TRUST DEED WITH INCONSISTENT PROPERTY DESCRIPTIONS

Yale Holdings, LLC v. Capital One Bank,
263 Or App 71 (2014)

A mansion and its grounds were located on three tax parcels that had been combined into a single tax lot. The trust deed securing a loan on the property contained two inconsistent descriptions of the property: the tax-parcel-number description covered the entirety of the property, but the metes-and-bounds description covered only the former Parcel 1.

On cross motions for summary judgment, the owner and the lender each argued that different descriptions unambiguously controlled. The trial court ruled in favor of the creditor, which had argued that the entirety of the property was encumbered.

The court of appeals reversed, stating that although a rational jury could infer that the trust deed was intended to encumber the entirety of the mansion and grounds, it wouldn't be "compelled" to find that the tax-parcel-number description was the right one. Although this was a logical conclusion, there was extrinsic evidence to support the proposition that the metes-and-bounds description was what the parties to the trust deed intended. Thus the trial court had erred in granting summary judgment.

CONSUMER COMMITTEE NOTES

MEETING OF MAY 8, 2014

By Theodore J. Piteo, Michael D. O'Brien & Associates, P.C.

The meeting started with Lee Hudson's farewell wish to attorney Bob Altman. May he enjoy his freedom!

The first announcement was from Jennifer Aspaas about Consumer Education and Training Services (CENTS), which offers credit counseling classes both pre- and post-bankruptcy. It also conducts debt-training classes in high schools and colleges. Its newest offering is the Senior Money Project, which aims at reducing senior scams like fake reverse mortgages, gold purchases, bank account fraud, estate planning fraud and identity theft. More details at Seniormoneyproject.org.

Pam Griffith of the US Trustee's Office announced the results of a district-wide audit of compliance with the LBF 5005-4e Electronic Filing Declaration. A power point of their findings is available from the UST's office. Random compliance audits will take place on a monthly basis. The UST's office suggests the following tips for compliance: (1) open your PDF and review it before filing to prevent date mismatch; (2) keep a complete packet with signatures until you do a final review at the end of the case; (3) be sure to include a summary of schedules with any changes or amendments to the forms; and (4) be sure to file a new electronic declaration page for all amended schedule updates.

Laura Donaldson discussed a decision on trustee compensation under §326: *In re Salgado-Nava*, 473 BR 911 (9th Cir BAP 2012). She advised bankruptcy attorneys handling PI claims assumed by the trustee to review the case.

Jeff Werstler from the local insolvency department of the IRS stated that pursuant to new rules, all referrals for IRS compliance issues would be sent to the US Attorney's office, then on to Washington, DC. Local counsel will no longer be involved in IRS matters before the bankruptcy court. We will likely start to see US Attorneys filing objections where the local counsel used to appear.

Charlene Hiss, Clerk of the Court, made several announcements:

1. New case supervisors have been assigned: Keri Miller and Courtney Dewall.

2. The filing fees for cases will increase on June 1; attorneys should review the Bankruptcy Court website for those increases.
3. The Official B3B fee waiver form has been updated and is available on the Bankruptcy Court website.
4. New local forms are being uploaded including:
   a. New chapter 13 plan form is mandatory for all cases filed after June 1, 2014.
   b. Modification of Plan – if modifying an old plan, be aware of number at the bottom of the Plan forms indicating their years. Old is 1300.05; new is 1300.14.
   c. New spacing and notice requirements on the chapter 13 plan form.
   d. New 1195 form for chapter 11 case completion.
   e. New bankruptcy filing statistics:
      i. Projected filings for 2014 of 993,000, down from 1.1 million in 2013;
      ii. Projected filings are expected to decrease by 6% for 2015 and 4% for 2016;
      iii. Bankruptcy Court staffing has decreased to 1988 levels – please be patient!

Dave Hercher, chair of the Local Rules Committee, announced that Willamette Law will write BAP decision reviews for immediate email notification as part of their Ninth Circuit Decision notification service.

Thank you to Vanden Bos & Chapman for the food.

MEETING OF JULY 10, 2014

By Catherine Yarnes, Todd Trierweiler & Associates

Roberta Bonogas and Russell Ngo from Banner Bank made a presentation to the group about financing new mortgage loans while in Chapter 13. The requirements are (1) at least one year of bankruptcy must have elapsed; (2) all plan payments must have been made on time; (3) borrowers/debtors must have written permission from the court to enter into the agreement; and (4) credit score must be at least 640.

There is no negative impact to the interest rate because of the bankruptcy. These are FHA loans with interest rates of anywhere from 4% to 4.25%. Banner Bank also offers refinancing of mortgages, though eligibility depends on payment history with previous lender.

Wayne Godare, Chapter 13 Trustee, will approve a refinancing request as long as the plan is not affected and the source of any down payment is reasonable. Furthermore, the impact to creditors and the need for the purchase will be important considerations.

Judge Brown reminded attorneys to notify the client if a matter is settled before the hearing, so the client does not call in and wait through the hearing docket for their case to be called.

Jack Fisher, attorney for the Chapter 13 Trustee, reminded attorneys to email the Trustee when contested matters have been resolved so that they do not attend hearings needlessly.

Judge Perris recommended that requests for court approval of a loan modification provide an explanation of the benefits of the modification, including how much was cured before the loan was modified and what the interest will be over that extended period of time. She also recommended negotiating for a better interest rate – banks get a credit for the amount they modify and they may be willing to negotiate the terms.

Jack Fisher informed the group that electronic installment payments would be available beginning July 14, 2014. He also offered the following reminders when using the new plan forms:

1. If there are extra paragraphs in the plan then you must check the box at the top to notify of the extraneous paragraphs. If not checked then you have to modify your plan because this is a notice issue.
2. Paragraph 7 has a commitment period box which must be checked.
3. Cramming interest rate is only allowed in paragraph 2(b)(1).

Theodore Piteo, member of the Local Rules Committee, announced that the Committee and the Federal Bar Association are putting together a guide for new admittees to the bar. Anyone who wants to participate, please call Dave Hercher or Theodore Piteo.

Thank you to Olsen Olsen and Daines for the food.

MEETING OF SEPTEMBER 11, 2014

By Laura Donaldson, Kuni Donaldson LLP

The meeting began with Kelly Brown and Richard Parker providing excellent food and wine to the

group. After everyone had grabbed a plate, Charlene Hiss described the bankruptcy court's new website at http://www.orb.uscourts.gov. The format of the site has changed making it more user friendly with easier access to information. The template is based on the national template, which saves money. Now local power outages will not take down the website. In designing the site, the judiciary tried for a standard feel while still customizing enough to say "We are Oregon." Court locations are prominently displayed on the home page, as are links for debtors, creditors and attorneys. A contact form will now take you directly to Portland or Eugene case administrators. The website contains pull down menus and revolving artwork provided by staff at the court. Comments or suggestions for future changes to the website should be directed to Charlene Hiss or Marianne.

Charlene spent some time showing everyone how to go through the website search functions and noted that you can use the search function to find specific forms. For example, typing "motion for relief from stay" using the search function gives you not only the LBF form, but FAQs, ecf procedures and cases involving relief from stay.

Dave Hercher advised that Chris Coyle is the new chair of the Local Rules Committee. The Local Rules and Forms Committee has made its annual proposal, which will be on the web for public comment – proposed changes to claim forms and relief forms and others are up and ready for comment.

Judge Dunn reported that filings are down nationally to 2007 levels. Oregon's decrease in case filings tracks the national level. There are changes on the benches in both Arizona and California. There is still a big volume of cases in LA due to an increase in appellate work.

Pam Griffith reported that their office has noted a decline in Chapter 13 filings and an increase in Chapter 7s, which they believe is attributable to allowance of the federal exemptions. She also reported Trustee Bob Ridgeway's retirement as of September 30.

Wayne Godare, Chapter 13 Trustee, provided a handout on his office's fees beginning October 1. The change in fee structure is also noted on his website at www.portland13.com. The change to the fees means that his office will not give back trustee fees on dismissal of a case. The moment the money comes in the door on a case, his fees will be taken. The statute actually calls for it to be done this way. All debtor attorneys will receive an email explaining the change. The Trustee percentage now is 5.25%.

As of this date, no decision had been made on who will replace Judge Perris and trustee Fred Long, Trustee.

The next meeting date is November 13, 2014. Alex Adams, Caroline Cantrell and George Senft will provide food.

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.

The Debtor-Creditor Newsletter Will Accept Camera-Ready Ads

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

Quarter page	$150
Half page	$250
Full page	$500

For information, contact: Deborah S. Guyol, *dguyol@aol.com*

Save the Dates

February 20, 2015
Retirement Dinner for Judge Perris
MAC, Portland

Late February or early March
Saturday Session
Location to be determined

March 5, 2015
Bankruptcy Clinic Judges' Reception
Portland Bankruptcy Court

May 1-2, 2015
NWBI – *Portland Marriott Downtown Waterfront*
Registration opens Dec. 1, 2014, at osbar.inreachce.com (search for NWB15)

September or October, 2015
Debtor-Creditor Section Annual Meeting and CLE
Portland Metro Area