

Filing Statistics

The Eastern District of Washington continues to show a dramatic increase in filings. Statistics were recently compiled comparing the first seven months of 2000 to the first seven months of 2001 for the six regions within the Eastern District of Washington. The figures suggest that on a percentage basis, when comparing last year's monthly figures to this year's monthly figures, all regions are showing exceptional gains in filings.

For example, the Richland area has averaged a 46% increase on a monthly basis (see Figure 1) when comparing the filings for January through July of 2000 to January through July of 2001. The Spokane area has increased on average by 13%; the Yakima Area has increased by an average of 26%; Wenatchee by 31%; Moses Lake by 21%; and the Pullman area has steadily increased from one Chapter 13 filing in November of 2000 to a peak of 33 total filings in March of 2001. Overall, filings are up approximately 27% in 2001, over 2000. This follows a 7% increase in 2000. While national filings dropped approximately 8% in 1999, filings in the Eastern District of Washington declined by less than 1% during that period.

From the Clerk

TWO POSITIONS ON STANDING ADVISORY COMMITTEE AVAILABLE

In 1997, the Court established a Standing Advisory Committee to serve as a method whereby the court could get input from the members concerning topics of mutual interest. This committee also serves as the Local Rules Committee, which is required in the local rules process. Some of the seats on this committee are ex-officio, and others are rotating. The General Order that established this committee is available for viewing on the courts website at www.waeb.uscourts.gov.

The committee meets three times each year: in the fall in Spokane, in the spring in Yakima and at the annual Bankruptcy Bar Seminar at Sun Mountain, usually in early June. The meetings generally require a full day's commitment by the members. Per diem expenses are available to be paid by the court.

This committee has become a vital part of the court's operation and the judges have found it to be an invaluable source of assistance. As a result of the activities of this committee and its sub-committees and working groups, many beneficial changes have been made.

Presently, two positions are available and need to be filled. They are the Creditor-Consumer and Debtor-Consumer positions which run for a period of two years, expiring June of 2003. If you would like to apply for either of these positions, you should send a letter to the Clerk of the Court at U.S. Bankruptcy Court, P. O. Box 2164, Spokane, WA 99210. The letter should contain some background information that you believe will be helpful to the judges, who make the appointments. Application letters should be received by the clerk no later than October 15.

All attorneys are encouraged to apply and participate.

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From the Clerk

CHANGES TO BANKRUPTCY COURT MISCELLANEOUS FEE SCHEDULE

Effective July 1, 2001, the Judicial Conference of the United States has mandated changes to the Miscellaneous Fee Schedule for services performed by clerks of Bankruptcy courts:

- **The Amendment Fee has been amended to clarify that amendments to matrices, or to the mailing list of creditors, should also generate the fee. By clearly applying this fee to the matrix or mailing list, a debtor would have an incentive to ensure that the matrix or mailing list is accurate at filing. The amount of the fee remains the same at \$20.**

- **For retrieval of a record from a Federal Records Center, National Archives or other storage location removed from the place of business of the court increases from \$25 to \$35.**
- For filing a petition ancillary to a foreign proceeding under 11 U.S.C. 304, the fee shall be the same amount as the fee for a case commenced under chapter 11 of title 11 as required by 28 U.S.C. 1930(a)(3); the fee is increased from \$500 to \$800.

The fees for electronic public access have been removed from the miscellaneous fee schedules and have been placed in a new Fee Schedule for Electronic Public Access, which states as follows:

- For usage of electronic access to court data via dial up service: sixty cents per minute. For public users obtaining information through a federal judiciary Internet site: seven cents per page.

The court may, for good cause, exempt persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. Attorneys of record and parties in a case (including pro se litigants) receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. No fee is owed under this provision until an account holder accrues charges of more than \$10 in a calendar year.

- For printing copies of any record or document accessed electronically at a public terminal in the courthouse: ten cents per page. This fee shall apply to services rendered on behalf of the United States if the record requested is remotely available through electronic access.

The court has not yet imposed the seven cents per page charge for information obtained through a federal judiciary Internet site since no method is yet available to the court for the collection of this fee; however, it is anticipated that the fee will begin to be collected once such a method is made available. It is anticipated that the court will exempt selected entities from this fee as permitted by the schedule.

ADJUSTMENT OF DOLLAR AMOUNTS IN BANKRUPTCY CODE

Automatic adjustments to the dollar amounts stated in various provisions in the Bankruptcy Code became effective on April 1, 2001. In the Bankruptcy Reform Act of 1994, Congress provided for the automatic adjustment of the dollar amounts at three-year intervals, beginning on April 1, 1998. The changes have applied to cases filed on or after April 1.

The revised dollar amounts affect: the eligibility of a debtor to file under chapter 13; certain maximum values of property that a debtor may claim as exempt; the maximum amount of certain claims entitled to priority; the minimum aggregate value of claims needed to commence an involuntary bankruptcy; and the value of "luxury goods" deemed to be nondischargeable.

The adjustments reflect changes in the Consumer Price Index for the three-year period ending December 31, 2000, rounded to the nearest \$25. The Judicial Conference published the changes on February 20, 2001, in volume 66, number 34 of the Federal Register at pages 10910-11, as required by 11 U.S.C. 104(b)(2).

Two of the official Bankruptcy Forms contain references to the affected dollar amounts. Accordingly, Official Form 6E, Schedule of Creditors Holding Claims Entitled to Priority and Official Form 10, Proof of Claim, were amended April 1, 2001.

The following list sets out the sections of the Bankruptcy Code in which dollar amounts will be adjusted and the changes:

From the Clerk cont'd

- Section 109(e), \$269,250 (each time it appears) changed to \$290,525
- Section 109(e), \$807,750 (each time it appears) changed to \$871,550
- Section 303(b)(1), \$10,775 changed to \$11,625
- Section 303(b)(2), \$10,775 changed to \$11,625
- Section 507(a)(3), \$4,300 changed to \$4,650
- Section 507(a)(4)(B)(1), \$4,300 changed to \$4,650
- Section 507(a)(5), \$4,300 changed to \$4,650
- Section 507(a)(6), \$1,950 changed to \$2,100
- Section 522(d)(1), \$16,150 changed to \$17,425
- Section 522(d)(2), \$2,575 changed to \$2,775
- Section 522(d)(3), \$425 changed to \$450
- Section 522(d)(3), \$8,625 changed to \$9,300
- Section 522(d)(4), \$1,075 changed to \$1,150
- Section 522(d)(5), \$850 changed to \$925
- Section 522(d)(5), \$8,075 changed to \$8,725
- Section 522(d)(6), \$1,625 changed to \$1,750
- Section 522(d)(8), \$8,625 changed to \$9,300
- Section 522(d)(11)(D), \$16,150 changed to \$17,425
- Section 523(a)(2)(C), \$1,075 (each time it appears) changed to \$1,150

TELEPHONE AVAILABLE FOR USE BY ATTORNEYS

There are telephones available for use by attorneys in both Yakima and Spokane. In Spokane the telephones are located in both of the attorney conference rooms (Room 321 and 341). In Yakima, the phone is located just inside the main doors to the Clerk's office, suite 200. These phones are provided by the court for the convenience of the attorneys and are to be used for local or credit card calls only.

TIPS ON FILING DOCUMENTS THAT ARE TO BE SCANNED

All documents that are filed with the court are immediately imaged by the use of high speed scanners. The process is a physical one that involves placing up to 25 documents in the feeder of the high speed scanner. The scanning is accomplished in a batch manner,

and does not require the operator to handle the documents individually. The operator does view a thumbnail presentation of the scanned documents as a quality control measure. The average operator scans some 400 pages each hour. Documents should be on letter size, (without tabs or other items that would extend the size of the paper), white paper of good quality with black ink, single-sided, and legible. Documents that do not meet these requirements cause considerable delays. LBR 9004-1 should be reviewed as it describes the general requirement of forms. It should be noted that it is preferable that paper clips be used in place of staples since they must be removed prior to scanning. Generally, paper documents that are filed are docketed within 24 hours of filing, and imaged within 36 hours.

FILE SIZE COUNTS

Downloading large files from the Internet is often difficult. Multi page documents can cause connection failure, server bandwidth problems, and routing errors, if they result in the file being too large. Due to considerations of user Internet connection via modem, the court will begin dividing large documents (over 50 pages) into more manageable pieces when scanned into RACER.

It would also be helpful if filers of multi page documents limit the number of pages to not more than 50. Inability to download files due to size can essentially result in the images not being available to those needing to view them.

NOTICE AND HEARING TIPS

It is estimated that one in every ten proposed ex parte orders presented for signature based on notice and hearing is returned unsigned for procedural deficiencies. Clerk Office review for procedural correctness discloses that the most common errors are:

1. **The failure to provide sufficient time for objections. The standard number of days required is 20 (LBR 2002-1); however, in certain matters the standard is deviated from, most notably, objection to proofs of claim is 30 days (LBR 3007-1); lift stays, abandonment and redemption are 12 days (LBR 4001-1,**

From the Clerk cont'd

6007-1 & 6008-1), lien avoidance and use of cash collateral are 15 days (LBR 4002-1 & 4003-2), extension of time to file required documents and notice by chapter 13 trustee to dismiss case for failure to file documents is 5 days (LBR 1007-1 & 2083-1), notice of intent to employ professional in chapter 11 cases is 7 days (LBR 2014-1), and taxation of costs is 1 day (LBR 7054-1).

In addition to the above times listed, FRBP 9006 also requires that if notice is provided by mail, then an additional three days are required, and that same rule also provides that if the prescribed period is less than eight days, then intermediate Saturdays, Sundays and Holidays are excluded from the computation. The notice may either indicate that objections need to be filed by a certain number of days from a given specific date, or as the national form on noticing suggests, a specific date is given. In either case, the correct amount of time for objections needs to be clearly provided.

2. Setting the date for objection from the date of mailing, then failing to mail in a timely manner. The court reviews the certificate of mailing to determine when an item was actually mailed. At times due to a delay in the mailing, an insufficient number of days are provided.
3. **Presenting an ex parte order when an objection has been filed, although the sending party may not have received a copy of the objection. It is suggested that prior to making the certificate of no objections, the court's website www.waeb.uscourts.gov be viewed. The standard used by the Clerk's office is that filed documents are docketed and appear on the RACER docket within 24 hours of filing, and are imaged within 36 hours.**
4. **Failure to provide required information in the notice. The Clerk's review includes reading the notice and motion to insure that information required by a rule is present. Rules should be reviewed to insure that all mandatory information is included. The administrative review does not analyze as to substance, only as to form. For instance, whether or not a statement is sufficient to overcome the prima facie effect of the proof of**

claim required by LBR 3007(a)(1)(C) is for judicial determination; however, it is an administrative matter if there is no statement.

5. Failure to provide proper service or notice to the required parties and in the proper manner. In contested matters, service pursuant to FRBP 7004 is required on parties in interest. In matters of notice, service pursuant to FRBP 2002 suffices.

The Notice and Hearing Tables are available from the Office of the Clerk or on the court's website at www.waeb.uscourts.gov. Access is obtained from the homepage menu under "Notice and Hearing Info."

MAILING OF CHAPTER 13 PLANS

LBR 2083-1 (c) (1) requires that the Chapter 13 trustee mail a copy of the Chapter 13 plan to all creditors, and sub-paragraph (2) of that rule requires the debtor to mail the plan if the plan is not filed within 15 days of the filing of the petition for relief. The Office of the Clerk has begun sending out copies of the Chapter 13 plans electronically, and thus it is not necessary for the trustee or the debtor to send out the plans. A proposed change to the local rule will reflect this change in practice.

This change only affects the original plan filed; amendments or modifications to the plan are required to be sent by the party filing the amendment or modification in accordance with LBR 2083-1(k).

FRBP 3015(b) requires a Chapter 13 plan be filed with the petition, or within 15 days thereafter. Any extension of the period must be requested in accordance with LBR 1007-1(a). Failure to file a plan as required may result in a notice of dismissal, generally given by the Chapter 13 trustee.

ELECTRONIC FILING

The Administrative Office of the United States Courts has developed a case management and electronic filing system, called CM/ECF, which is designed to replace the case management operating systems presently in use in bankruptcy courts throughout the nation, as well as allow for the electronic filing of documents. To date, nine Bankruptcy Courts are using the system, and the goal is that by 2004 this system will be available in all bankruptcy courts.

From the Clerk cont'd

Our court has not yet been selected by the Administrative Office to participate in this initiative, and it is not expected that we will be included until 2003. In the meantime, the Clerk's Office is actively exploring and adopting various methods for the electronic handling of documents and processes. These are all being done in a manner that is consistent with the eventual transition to CM/ECF. Some of those initiatives are:

The imaging project that was begun in 1997, permits the viewing of scanned documents filed with the court. This program has been one of the most used and effective of all programs. Presently the site receives approximately 7000 "hits" per day. It is available 24 hours a day, seven days a week.

The court's website at www.waeb.uscourts.gov is a source of considerable general information, such as local rules, interest on judgment tables, general orders, NOTES articles, etc. The court's local court menu, also accessible from the website, contains information for judicial calendars, first meeting dates, archives, master mailing lists, notice and hearing, bankruptcy forms, recent judicial opinions, etc.

The Office of Clerk and the Chapter 13 office have participated in a pilot program allowing the electronic filing of selected documents by that office. The program has been very successful and presently 40% of all documents filed by the Chapter 13 office are electronically filed; this accounts for 5 % of all of the documents filed by the Office of the Clerk.

Discharges and no asset closings in Chapter 7 cases, which account for approximately 6% of documents processed by the Clerk's Office, are completely processed electronically.

The Office of the Clerk intends in the very near future to work with the U.S. trustee's office, Chapter 7 trustees, and the IRS to develop the electronic transmission of documents and information.

COURT ESTABLISHES STANDARDS FOR ELECTRONIC FILING, SIGNING AND VERIFICATION OF DOCUMENTS

Effective March 1, 2001, the court adopted LBR 5005(d), which permits the filing, signing and verification of documents by electronic means so long as they are consistent with standards established by the

court. On June 26, 2001 the court signed a general order that established those standards. A copy of the general order and associated documents are printed at the end of this article.

The Chapter 13 office, in close cooperation with the Clerk's Office, participated in an electronic filing pilot project which was instrumental in the development of the standards. The project proved extremely successful, and the Chapter 13 office now files, signs and verifies the majority of its documents electronically. Court users are invited to contact the Clerk of the Court either by phone at 509-353-2404, extension 228, or by mail at P.O. Box 2164, Spokane, WA 99210 if they are interested in exploring this exciting option.

UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF WASHINGTON

GENERAL ORDER ESTABLISHING STANDARDS FOR THE ELECTRONIC FILING, SIGNING AND VERIFICATION OF DOCUMENTS

THE COURT by local rule having permitted the filing, signing and verification of documents by electronic means so long as they are consistent with standards established by the court;

NOW THEREFORE THE COURT hereby establishes the following standards for the electronic filing, signing and verification of documents:

That an entity desiring to electronically file documents execute and file with the Clerk of the Court an ELECTRONIC FILING STATEMENT AND REQUEST FOR AUTHORITY TO ELECTRONICALLY FILE DOCUMENTS (LF 5005A) in addition to an ELECTRONIC FILING METHODS AND PROCEDURES STATEMENT which describes the methods and procedures to be used by the entity for the electronic filing, signing and verification of documents;

That the entity file a LIST OF AUTHORIZED EMPLOYEES (LF 5005B), which shall contain the name, job title and electronic identification of each employee authorized to electronically file, sign or verify documents, and which list shall be amended as required;

Continued on Next Page

From the Clerk cont'd

That any employee authorized by the entity to file, sign or verify documents electronically shall execute and file with the Clerk of the Court an INDIVIDUAL ELECTRONIC FILING SIGNATURE AGREEMENT (LF 5005C);

That the Clerk of Court approve the ELECTRONIC FILING METHODS AND PROCEDURES STATEMENT to ensure that all areas of security, data quality, accountability and backup used by the entity to be in conformance with accepted industry standards and authorize the entity to electronically file documents;

IT IS FURTHER ORDERED that any document filed electronically in accordance with this order shall constitute a written paper in accordance with and for the purposes set out in FRBP 5005(a)(2); and

IT IS FURTHER ORDERED that the signature or verification of an authorized individual affixed electronically to an electronically filed document in accordance with this order shall constitute the signature of that individual for purposes of FRBP 9011 and 28 U.S.C. 1746.

Dated this ___ day of _____ 2001
s/Patricia C. Williams, Chief Judge
s/John A. Rossmeissl, Bankruptcy Judge
s/John M. Klobucher, Bankruptcy Judge

GENERAL ORDER ESTABLISHING STANDARDS FOR THE ELECTRONIC FILING SIGNING AND VERIFICATION OF DOCUMENTS

LF 5005A

UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF WASHINGTON ELECTRONIC FILING STATEMENT AND REQUEST FOR AUTHORITY TO ELECTRONICALLY FILE DOCUMENTS

The undersigned requests that:

_____ be authorized to electronically file documents and makes the following statement under penalty of perjury and in accordance with the GENERAL ORDER ESTABLISHING STANDARDS FOR THE ELECTRONIC

FILING, SIGNING AND VERIFICATION OF DOCUMENTS in support of this request:

(1) That the undersigned is:

(Name and Position)

2. That the ELECTRONIC FILING METHODS AND PROCEDURES STATEMENT has been submitted to the Clerk of the Court for review and approval and that all electronic filing, signing and verification will be done in accordance with that statement as approved;

3. That the LIST OF AUTHORIZED EMPLOYEES (LF 5005B) has been filed with the Clerk of the Court, and will be amended as necessary;

4. That each person authorized to file documents electronically will be required to complete and file with the Clerk of the Court an INDIVIDUAL ELECTRONIC FILING SIGNATURE AGREEMENT (LF 5005C) before that individual will be permitted to file, sign or verify any document electronically;

5. That the identification of authorized individuals on the electronically filed document will be in the following format: "John D. Doe /s/ JDD", and that by causing this identification to be electronically affixed to the document the authorized individual is identified as the individual who filed, signed or verified the document for purposes of 28 U.S.C. 1746 and FRBP 9011.

Dated _____

(Signature)

(Title)

From the Clerk cont'd

LF 5005B

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON
LIST OF AUTHORIZED EMPLOYEES**

The following is a list containing the names, job titles and electronic identification of each employee of:

_____ who is authorized by this office to electronically file, sign or verify documents:

NAME JOB TITLE IDENTIFICATION

Date: _____

(Signature)

(Title)

LF 5005BAMEND

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON
AMENDMENT TO
LIST OF AUTHORIZED EMPLOYEES**

The following additions, deletions and corrections are hereby made to the LIST OF AUTHORIZED EMPLOYEES previously submitted by

NAME JOB TITLE IDENTIFICATION

The following employees are added to the list:

The following employees are deleted from the list:

The following corrections are made to the list:

Date: _____

(Signature)

(Title)

LF 5005C

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON
INDIVIDUAL ELECTRONIC
FILING STATEMENT**

The undersigned makes the following statement under penalty of perjury:

1. That I am currently employed by

2. That I have read and understand the General Order Establishing Standards for the Electronic Filing, Signing and Verification of Documents and the Electronic Filing Methods and Procedures Statement of my employer;

3. That I understand by causing my identification to be electronically affixed to a document that is subsequently electronically filed in the United States Bankruptcy Court for the Eastern District of Washington using the Electronic Filing Methods and procedure utilized by my employer, I will be identified and be held responsible as the person who filed, signed or verified the document for purposes of 28 U.S.C. 1746 and FRBP 9011.

4. That my identifying electronic signature is:

_____/s/_____

Dated _____

Signature _____

Printed Name _____

Job Title _____

LF 5005D

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON
APPROVAL OF ELECTRONIC FILING
METHODS AND PROCEDURES
STATEMENT AND AUTHORIZATION TO
ELECTRONICALLY FILE DOCUMENTS**

The ELECTRONIC FILING METHODS AND PROCEDURES STATEMENT submitted by

_____ has been reviewed and is approved. The submitting

From the Clerk cont'd

office is authorized to electronically file documents using the methods and procedures set forth in the ELECTRONIC FILING METHODS AND PROCEDURES STATEMENT. Individual employees may only electronically file, sign or verify documents if they are listed on the LIST OF AUTHORIZED EMPLOYEES (LF5005B) or an AMENDMENT TO LIST OF AUTHORIZED EMPLOYEES (LF5005BAMEND) and have submitted to the Clerk of the Court an INDIVIDUAL ELECTRONIC FILING STATEMENT (LF 5005C).

Dated: _____

T.S. McGregor, Clerk of Court

DIGITAL AUDIO RECORDING

The U.S. Bankruptcy Court is purchasing a digital recording system. With this type of system, court hearings are recorded on a computer in real time. The system also provides for archiving and retrieving the record digitally. Digital recording will provide a simple, accurate way to link the log notes with the actual recording. Duplication of the recording will be quick, easy and inexpensive (as simple as making a copy of a CD). Storage will be enhanced, since a week's worth of hearings can be maintained on a CD, and quality will be improved over the current tape system. For cases recorded using this technology, the recording will be supplied by CD format, to those requesting a copy.

It is anticipated that with some in-house programming, the digital record will be linked to the RACER docket access system, so that an interested party can listen to a portion of a hearing simply by clicking on the appropriate docket entry.

For those users with MAC computers as opposed to PCs, there are various media players available on a freeware basis that will allow use by those with MACs.

The new system began testing in Judge Williams' court for phone hearings, the beginning of August.

NOTES ARTICLE FROM THE CHAPTER 13 TRUSTEE OFFICE

Summer is rapidly approaching and as summer draws near that means a change in seasons. Changes are also happening in the Chapter 13 Trustee's Office. The Trustee Office has begun Electronic Case Filing for certain documents, has changed the address for debtor monthly plan payments which are now sent directly to a lock box, and more changes are on the way.

The Chapter 13 Office would like to announce that the Feasibility Analysis Program is available to practicing attorneys and creditors free of charge. This software program comes to us under license from the Office of Rick A. Yarnall, Chapter 12 and 13 Trustee for the District of Oregon. His office has been offering this program to practitioners since 1999. We have been told and are happy to report to you that the program has been installed in more than 100 practicing Debtor Attorney Offices in the Portland area and in over 20 Creditors offices, most notably Bank Of America and Ford Motor Credit. Permission to distribute this program in the Eastern District of Washington was given to us in May of 2001.

The program was designed to aid and assist with checking the feasibility of Chapter 13 Cases prior to filing a case, prior to and after the 341 if changes are necessary, and after confirmation if a modification is necessary. These are just some of the uses for the program. The program will also print out amortization schedules for you, if you wish, to see how a particular claim is going to pay out and how long it will take. The program also prints out an overview of the entire case and if it does not pass the feasibility test, check boxes let you know it does not work. Those of you who were at the Sun Mountain seminar were able to see a quick presentation on the software. Upon request, the Trustee Office will schedule times to come to individual offices to install the Feasibility Program on PC's for those practitioners who are interested in acquiring the program. There is no cost for these services. Please contact Jon Wyss in our office at 509-7478481 Ext. 11 or email him at jonwyss@spokane13.org

Case Notes

<mailto:jonwys@spokane13.org>
to set up a scheduled time to have the program installed
or if you wish to learn more details about the software.

The Trustee Office has made some changes in procedures that may impact your office and we wanted to take some time to share these with you. The changes will take affect on August 1, 2001.

1.) The required language in the Adequate Protection Order will change as of August 1, 2001 to include the following language:

“a. Regular Mortgage payments on all liens to be paid by the Trustee will begin with the month of _____ and year of _____ (no sooner than the first plan payment); arrearages will be paid in accordance with the plan after confirmation.

b. Such payments will continue on a regular basis until confirmation of the plan or by further Order of the Court.

c. Attached is a payment coupon verifying the creditors correct account number and address. (If the debtor does not have a payment coupon or the correct account number, please provide the debtors social security number.)”

2.) The US Trustee Office has suggested that we no longer send out the ten (10) day courtesy letter when the case is about to close. The Chapter 13 Trustee has a website at www.13network.com <<http://www.13network.com/>> that attorneys, debtors and creditors can view free of charge to monitor their cases as to the approximate date the case may close. Therefore, effective August 1, 2001, the Trustee Office will no longer send this letter to the debtor’s attorneys.

3.) Also in an effort to streamline our operations, beginning August 1, 2001 the Trustee Office will no longer send out the courtesy notice of payment letter on cases that involve a Trustee Directive. This was apparently causing confusion to the debtors as a Trustee Directive was being issued and mailed to the debtor, debtor attorney, and employer and the Notice of Payment containing much of the same language was being sent to the debtor and attorney. The current process of sending out a notice of payment to debtors who have received

permission to make plan payments directly will not change as a Trustee Directive will not be issued.

4.) Also, we will no longer send out the courtesy 341 meeting hearing notice when the case is first filed. The 341 Notice mailed by the Court is the Official Notice and the Trustee was duplicating the efforts of the Court. This was also confusing to the debtors as they received both items, and on the RACER docket, it showed two 341 notice’s being sent. Therefore as of August 1, 2001, the Trustee Office will no longer send this notice to the debtor and debtor attorney.

5.) The Chapter 13 Trustee receives many requests per day to have copies of claims and various other documents that are available on the Court RACER site free of charge. As a courtesy the Trustee office has been calling up the claims or court docket printing out the requested item and then faxing such item to the party who requested it. Since the Court RACER docket is available to all practitioners and creditors thru the internet, the Trustee Office will no longer fax these items to the parties requesting the information. Instead you will be referred to the Court Racer site to retrieve the document off the Court web page found at www.waeb.uscourts.gov <<http://www.waeb.uscourts.gov/>>. Finally, please remember that our new mailing address for chapter 13 payments has changed to:

Daniel H. Brunner, Chapter 13 Trustee
PO Box 1003
Memphis, TN 38101-1003

Remember the only constant is change and with the Bankruptcy Reform Bill pending, more changes will come our way. We hope that this note is helpful and we look forward to working with the bar as all these changes are implemented. If anyone has any questions on these or other matters please give us a call.

Case Notes

BOFTO, BONNIE 00-03686-W13

ISSUE: TIMELINESS OF OBJECTION TO CHAPTER 13 PLAN

There are only two cases addressing the issue of an objection to plan which was filed before confirmation but after the deadline established in the local rules. *In re Ryan*, 160 B.R. 494 (N.Y. 1993) and *In re Duncan*, 245 B.R. 538 (Tenn. 2000). Neither decision is binding on this court and, under very similar facts, the decisions reach different conclusions. In both of the reported decisions, the confirmation hearing had been set and notice provided to creditors with the filing of the plan. In both decisions, an objection had been filed by another creditor or trustee necessitating a continuance of the confirmation hearing and the second untimely objection was filed prior to the continued confirmation hearing. In both decisions, the objection had been filed timely under the national rule B.R. 3015(f) as it had been filed prior to confirmation but was untimely under local rule.

Local Bankruptcy Rule 2083(i) requires an objection to confirmation be filed within 21 days after conclusion of the § 341 meeting, which in this case was July 13. Therefore, the objection needed to be filed by August 3. Local Rule 2083(i) alternatively allows objections to be filed 25 days after service of the plan. Since the plan was filed June 26 an objection was due by July 20. The local rule requires the later of the two dates, *i.e.*, August 3. Here, the creditor filed its objection on September 21. No timely objections by other parties had been filed.

B.R. 3015(f) requiring an objection to be filed before confirmation is a jurisdictional deadline but is later than the procedural deadline in the local rule. It is the court's discretion to enforce procedural deadlines. In this court, time limits and procedural requirements are normally strictly enforced against debtors and creditors. To ensure consistency and fairness in the Chapter 13 confirmation process, the deadline for filing objections to confirmation, *assuming no other party filed a timely objection preventing confirmation*, should be enforced. The objection is untimely and as the plan on its face appears confirmable, it should be confirmed.

FENDER & FENDER v. RICK A. HURD, No. A00-00111-W10

ISSUE: DISCHARGEABILITY OF ATTORNEYS FEES DUE TO FRAUD

Debtors filed a Chapter 13 bankruptcy on December 13, 1999. Included in their schedules was an unsecured debt to the plaintiff for unpaid legal bills. On March 27, 2000, debtors converted to a Chapter 7 and plaintiff filed a Complaint to determine dischargeability of the debt.

The debt in question arose from unpaid legal bills arising from a dishonored check written on May 19, 1999 in the amount of \$1,154.40. The amount owed at the time the dishonored check was written was \$2,895.69. Plaintiff alleged that the defendant procured legal services from plaintiff as a result of fraud and that the attorney fees were non-dischargeable according to 11 U.S.C. §523(a)(2)(A).

In a fraud case, the burden is on the creditor to show by a preponderance of the evidence that the debtor committed fraud. The creditor must prove each element of fraud by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 290 (1991). The elements of fraud are enumerated in *In Re Eashaj*, 87 F.3d 1082 (9th Cir. 1996). The issue in this case was whether or not the creditor had met its burden of proof on the element of fraudulent intent.

Fraudulent intent may be established by circumstantial evidence or by inferences drawn from a course of conduct. Thus, a court may look to all the surrounding facts and circumstances. *In Re Mereshian*, 200 B.R. 342, 346 (B.A.P. 9th Cir. 1996).

When the total circumstances were examined in this case, the court found that the plaintiff had failed in its burden of proof to establish that there was intent by the debtor to defraud. The court considered testimony that the debtor had not only paid almost half of the NSF check, after finding that his account had been closed, but the creditor himself had made the statement that the debtor should file for bankruptcy relief thereby acknowledging debtor's financial circumstances. An Order was entered dismissing plaintiff's complaint.

Case Notes cont'd

VALERIE HARTFIELD, No. 99-07415-W13

ISSUE: DISMISSAL OF CHAPTER 13 RE: BAD FAITH

This Chapter 13 involved a self-employed debtor who earned commissions. A Motion to Dismiss was filed on the basis of bad faith and failure to devote projected disposable income to the plan. There had been three amendments to the original Schedules "I" and "J" filed by the debtor and the court indicated that that created doubts as to the credibility of the debtor and the good faith in predicting future and reporting past income. After the evidentiary hearing, the court denied the Motion to Dismiss but enunciated certain standards to be applied in analyzing a self-employed debtor's projection of income and expenses.

If a debtor has not made an honest effort to project future income to the best of that debtor's ability, the debtor has not acted in good faith. This is to be determined at the time of confirmation and does not require the debtor to be infallible, but does require that projections of to predict gross and net income be based upon careful analysis, to the best of that individual's ability, of the factors which could significantly affect that income. The same is true of the debtor's projection of expenses. When a debtor is self-employed on a commission basis as is this debtor, the debtor must convince the court that the debtor will be devoting time, energy and skills to produce income consistent with the debtor's health, education, training and experience and personal circumstances. The debtor must have considered whatever factors in that debtor's circumstances which may affect his future net income such as the state of the particular industry or the need to update equipment. The debtor's projections should neither be overly optimistic nor inconsistent with prior actual income and expenses nor overly pessimistic.

KRISTEN E. FREY, NO. 00-05174-W13
BRIAN F. MASON, NO. 00-04033-W13

**ISSUE: CLASSIFICATION OF STUDENT LOANS
IN CHAPTER 13**

Continuing claims under 11 U.S.C. § 1322(b)(5) are subject to the Unfair Discrimination Test of 11 U.S.C. § 1322(b)(1).

The debtors proposed to classify unsecured student loan obligations as continuing claims and cure an arrearage during the term of the plan.

11 U.S.C. § 1322(a) provides that each claim of a particular type or class is to be treated the same as other claims of the same type or class. 11 U.S.C. § 1322(b)(1) provides that subject to the principles established in 11 U.S.C. § 1322(a), a separate class of unsecured claims may be established if that separate classification does not "discriminate unfairly". The subsection allows an exception to the similar treatment required for similar claims by 11 U.S.C. § 1322(a) if that dissimilar treatment is "fair". If it is unfair, it is prohibited by § 1322(b)(1).

Subsection 1322(b)(5) concerns either secured or unsecured claims "on which the last payment is due after the date on which final payment under the plan is due." 11 U.S.C. § 1322(b)(5) expressly allows debtors to pay "continuing claims" according to their terms and to cure arrearages.

The debtors argued that 11 U.S.C. § 1322(b)(1) does not apply to continuing claims as § 1322(b)(5) allows regular payments to be made and the arrearage cured during the term of the plan. As the Code allows such treatment of continuing claims, the debtors argued that this treatment is therefore "fair" discrimination. The Chapter 13 Trustee argued that although § 1322(b)(5) allows such treatment, such treatment must still meet the requirements of § 1322(b)(1) i.e., must be fair in the context of the specific Chapter 13 proceeding.

The Court determined that 11 U.S.C. § 1322 must be read as a whole. First, it restates a core bankruptcy principle that similar claims should be treated similarly. Second, § 1322(b)(1) provides an exception to that principle by allowing dissimilar treatment of similar claims if the dissimilar treatment is fair. This provision applies to all unsecured claims. Subsection (b)(5) then provides for dissimilar treatment of both secured and unsecured claims if such claims extend beyond the term of the plan. The Court observed that absent unusual circumstances, separate classification of unsecured claims under § 1322(b)(5) is meaningless except in the context of non-dischargeable debt, and allowing preferential treatment under § 1322(b)(5) of student loan obligations which happen to extend beyond the term of the plan would render

Case Notes cont'd

§ 1322(b)(1) superfluous. The Court further observed that permitting any classification under § 1322(b)(5) as exempt from the prohibition of unfair discrimination in § 1322(b)(1) is logically inconsistent when reading § 1322 as a whole, contrary to the principle of similar treatment found in § 1322(a), and inconsistent with Congressional intent. Finally, the Court concluded that effect can be given to § 1322(b)(5) by allowing Chapter 13 debtors to separately classify continuing claims subject to the unfair discrimination limitation found in § 1322(b)(1).

To determine whether the proposed separate classification unfairly discriminates, the Court applied the four part query that the Ninth Circuit developed: (1) whether the discrimination has a reasonable basis; (2) whether the debtor can carry out a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) whether the discrimination is directly related to the basis or rationale for the discrimination. Restating the last element, does the basis for the discrimination demand that this degree of differential treatment be imposed? *In re Wolf*, 22 B.R. 510 (B.A.P. 9th Cir. 1982).

The Court reasoned that, unlike many unsecured non-dischargeable debts such as criminal fines which are due in full when imposed or immediately thereafter, student loan obligations arise from a voluntary contract between the debtors and lenders and require periodic payments for many years. In situations involving criminal fines, the obligation is fully due and payable prior to the bankruptcy proceeding and debtors are invariably in default when the Chapter 13 is commenced. In situations involving long-term contract payments, the obligations may be fully mature long after completion of the Chapter 13 plan. Debtors may not be in default when the Chapter 13 is commenced. Forcing debtors to place the student loan obligations in a class with all other unsecured creditors would certainly be unfair to both the debtor and the student loan creditor. It could create a default in the non-dischargeable debt when none existed at the time of filing. Even with pre-petition default, debtor could owe more in student loans at the end of their plan than if they had elected Chapter 7 relief. It could accelerate payment of student loans. Prohibiting debtors from maintaining regular payments on student loan obligations during a Chapter 13 regardless of pre-

petition default would discourage such debtors from electing Chapter 13 proceedings. Since general unsecured creditors often benefit from a Chapter 13 proceeding, it is fair and reasonable to encourage the use of Chapter 13 by allowing debtors to maintain regular contract payments.

However, the court further reasoned that it is not fair and reasonable to allow the debtor to cure the arrearage on the student loans during the term of the plan. It places the debtor in a more favorable post-petition position by reducing the non-dischargeable debt, but does so at the expense of the general unsecured creditors. Debtors should not be penalized for electing Chapter 13 relief by an increase in the non-dischargeable debt nor should debtors be rewarded for defaulting pre-petition in their student loan obligations by allowing debtors to cure that default at the expense of unsecured creditors. Allowing defaults to be cured during the term of the plan unfairly increases the degree of discrimination between the general unsecured creditors and the student loan creditors. Therefore, the court finds that the proposed separate classification of student loan debt as a continuing claim is fair, but that providing for the curing of an arrearage during the term of the plan unfairly discriminates and is prohibited by 11 U.S.C. § 1322(b)(1).

This decision has been posted to the court's website and it should be reviewed in its entirety.

Editor's comment: the decisions in Frey and Mason appear to be consistent with Judge Rossmessl's decision in _____, which would probably allow the debtors to pay unsecured claims the amount they would be entitled to under a three year plan, and then have the debtors allow for the cure of the student loan default over a longer plan (3 to 5 years).

TRAVIS SHANE v. ELITE AUTO SALES, ET AL., No. A00-00077-W13

ISSUE: VIOLATION OF STAY FOR FAILURE TO RETURN COLLATERAL

This dispute involves an all too common scenario arising in consumer Chapter 13 proceedings. Typically, shortly before commencement of the bankruptcy, a creditor holding a security interest in a vehicle repossesses that vehicle for non-payment. The Chapter 13 is commenced

Case Notes cont'd

and the debtor's counsel contacts the creditor and notifies it of the filing and demands return of the vehicle. At this point, the secured creditor reacts in a variety of ways. Some immediately make the vehicle available to the debtor, some make it available within 24 - 48 hours, others wait several days and some file emergency motions to lift the stay. At its most simplistic, this dispute asks the court to determine just how long is "too long" for a secured creditor to retain the vehicle and what is the remedy if it is indeed held "too long."

Once the stay is imposed or the creditor learns of the bankruptcy proceeding, the creditor has a duty to restore the status quo by making the vehicle available to the debtor. A creditor is precluded from exercising control over property of the estate. § 362(a)(3).

This creditor refused to return the vehicle for 10 days after several communications from the attorney regarding the violation of the automatic stay. Creditors must make the vehicle available to the debtor within a reasonable amount of time. That reasonable period of time may vary depending on the facts of the case and, under the facts of this case, 10 days was unreasonable.

As this matter was heard pursuant to a summary judgment motion, the determination of actual damages must await trial at which time the debtor will have the burden of producing such evidence of any harm. Statutorily, attorney fees will be an element of the actual damages.

The determination of any punitive damages must also await trial when evidence will be presented regarding the defendant's reliance on advice of others and representations of the debtor made during the 10 days. Punitive damages are not available under § 362(h) unless actual damages have been incurred.

ISSUE: VIOLATION OF CONSUMER PROTECTION ACT ("CPA")

The defendant advertised for sale this 1978 Nova at a price of \$3,895 and then sold that vehicle to the defendant for a "cash price" of \$4,395. The difference between the advertised price and the cash price arose from the fact that at the time of the sale of the 1978 Nova the defendant owed \$2,000 to plaintiff arising from the previous purchase of a 1985 Camero from the plaintiff. Interpreting the facts most favorably to the non-moving party, at the time of the purchase the parties agreed that due to the \$2,000 obligation on the Camero, the purchase price of the Nova would be increased by \$500, \$1,000

would be the trade-in allowance on the Camero and \$500 of the balance on the Camero would be forgiven by the defendant. This resulted in the defendant paying sales tax on \$4,395 rather than \$3,895 and paying some increased interest on the balance due under the Conditional Sales Contract for the Nova.

R.C.W. 46.70 regarding motor vehicle dealers and R.C.W. 19.86, the CPA, are tied by R.C.W. 46.70.310 which provides any violation of the Motor Vehicle Dealer Act violates the CPA. W.A.C. 308-66-152 lists as an example of a false, deceptive or misleading act, the sale of a vehicle at a price greater than advertised.

The court held that defendant could have structured the purchase of the Nova and the modification of the obligation on the Camero in a manner which would not have effected the purchase price of the Nova. By choosing to structure the transaction in this manner, the defendant sold the Nova for more than the advertised price which violated the clear specific language of the administrative rules and violated the CPA.

In determining to award attorney fees and treble damages under the CPA, state courts rely upon many of the factors and circumstances which are relevant to Bankruptcy Court's discretionary determination of punitive damages under 11 U.S.C. § 362(h). Such an award had to await further evidence.

This decision has been posted to the court's website and it should be reviewed in its entirety.

DEBORAH J. SMITH, NO. 00-05504-W23

ISSUE: "STACKING" HOMESTEAD AND PROBATE STATE EXEMPTIONS

Debtor filed a Schedule "C" claiming exemptions based upon state law. The Schedule "C" exempted \$47,762.32 of equity in her family home pursuant to R.C.W. 6.13.030 and R.C.W. 11.54.070. The Chapter 13 Trustee timely objected on the basis that the exemption exceeded the amount allowed by state law, i.e., \$40,000.00 under R.C.W. 6.13.030. The debtor responded that she was claiming \$40,000.00 pursuant to R.C.W. 6.13.030 (homestead award) and an additional \$7,762.32 pursuant to R.C.W. 11.54.070 (probate award). That sum represented the total available equity based upon the estimated fair market value of the family home less encumbrances.

Case Notes cont'd

Debtor's primary argument for "stacking" the two state exemptions was that there is no provision in R.C.W. Chapter 6.13 that limits a debtor to only that homestead claim. Although there were no state court cases on point due to the relatively recent amendments to the two statutes at issue, there are numerous decisions under prior versions of those statutes which illustrate this state's policy concerning homestead exemptions and probate exemptions.

In a case distinguishable on its facts, the Washington Supreme Court addressed the issue of whether or not the legislature intended to grant a surviving spouse an unlimited homestead exemption. The court held that surplus equity of a homestead transferred to a widow as surviving spouse was subject to execution for judgment on community debt despite the probate decree that stated that the homestead became the widow's separate property. Aronson v. Murk, 67 Wash. 2d 1, 406 P.2d 607 (1965).

The difficulties arising from the application of both the homestead statute and the probate statute are readily apparent in In re Estate of Lyons, 83 Wash. 2d 105, 515 P.2d 1293 (1973). In Flickinger v. McGavick, 262 F.2d 593 (9th Cir. 1958), the probate court set aside the entire net estate to a widow, as the statute at that time referred to probate homesteads as "in lieu" of homesteads reasoning that "The clear policy of the Washington law is that one may not at the same time enjoy the protection afforded by an "in lieu" award and that afforded by a claim of homestead." Flickinger v. McGavick, at p. 595. Similarly, the court in In re Estate of Scheldt, 13 Wash. App. 570 (1975) found that R.C.W. 6.12 establishes a homestead which may be declared without reference to a probate. However, once a probate had been commenced, it was necessary to resort to the provisions of the Probate Code.

R.C.W. 11.54.020 provides that the amount of the "basic award" shall be the amount specified in R.C.W. 6.13.030(2) with regard to lands. That amount is \$40,000.00. It further provides that if the award is divided between a surviving spouse and the decedent's children who are not the children of the surviving spouse, the aggregate amount awarded to all claimants under this section shall be the amount specified in

R.C.W. 6.13.030(2) with respect to lands. Therefore, the statutory homestead limit found in R.C.W. 6.13.030 applies to probate awards and that homestead limit of \$40,000.00 cannot be "stacked" with an award of homestead under the Probate Code.

This decision has been posted to the court's website and it should be reviewed in its entirety.

LINN PATRICK THOMAS, ET AL. v. RICHARD THOMAS, A00-00174-W1E

ISSUE: AMENDMENT OF NONDISCHARGEABILITY COMPLAINT

In the late 1980's, defendant was the personal representative of his deceased brother's estate and the plaintiff is the beneficiary of that estate. On May 20, 1994, the trial court entered a judgment against the defendant in favor of plaintiff which was appealed to the State Supreme Court. On July 11, 1994, the defendant quit claimed his interest in the family home. On June 5, 1995, the North Dakota Supreme Court in its published opinion Matter of Thomas, 532 N.W.2d 676 (1995) held that the defendant had breached his fiduciary duty as personal representative. The plaintiff attempted to execute on the resulting money judgment on the real property. The Chapter 7 was commenced on May 20, 2000 and in the debtor's schedules the debtor stated he had no interest in the real property. Plaintiff timely filed its Complaint alleging that the 1994 quit claim was invalid and ineffective to transfer the debtor's interest in the real property. The Complaint states that the statement in the schedules was false and debtor knew it was false, thus this discharge should be denied under 11 U.S.C. § 727(a)(4). Plaintiff then sought leave to amend to add a cause of action under § 523(a)(4).

Amendments are to be liberally granted particularly in the context of complaints to determine non-dischargeability as the time frame to file such complaints is so short. Bankruptcy Rule 7015 requires amendment be allowed when justice so requires. One factor to be considered when determining whether to allow an amendment is the futility of

Case Notes cont'd

allowing the amendment. In order to apply that factor, it is necessary to examine the effect of allowing the amendment.

In the context of this proceeding, the Motion to Amend is essentially a question of whether plaintiff's cause of action under § 523(a)(4) would be timely. That cause of action, or any new cause of action, alleged in the Amended Complaint only relates back if the conduct in the new cause of action arose out of the conduct or transaction set forth in the original Complaint. Here, the original complaint alleged that the debtor's conduct in completing and signing under oath his Statement of Affairs in May, 2000, should deny him a discharge from all debt under § 727(a)(4). The new cause of action alleged under § 523(a)(4) is that the debtor's conduct in the late 1980's as personal representative of his brother's estate and his conduct in July of 1994 in granting the Quit Claim Deed should render this particular debt non-dischargeable. The factual allegations and the evidence to support the two different causes of action are not the same. Even assuming that the evidence regarding the § 523(a)(4) cause of action is undisputed or discovery is not necessary or that the issue could be resolved by summary judgment, BR 7015(c) requires that the conduct which gives rise to the original Complaint is the same as the conduct giving rise to the cause of action in the Amended Complaint.

Under BR 7015(c), the amendment of the Complaint to allege a violation of § 523(a)(4) would not relate back. The time has passed to file a Complaint raising that cause of action and any attempt to amend would be futile. *In re Magno*, 216 B.R. 34 (1997). The Motion to Amend the Complaint was denied and that decision was appealed to the District Court. The District Court entered its Order Denying Leave to Appeal and determined that the Bankruptcy Court's interlocutory order denying the plaintiff's Motion to Amend the Complaint did not involve a controlling question of law about which there is substantial ground for a difference of opinion because under the controlling law of this Circuit, the proposed amendment did not relate back to the original Complaint.

ROBERT WARMHOVEN, ET UX. v. ROBERT SNYDER, ET AL., No. A00-00225-W1B

ISSUE: COVENANT NOT TO COMPETE

The debtor purchased a restaurant in Stevens County and obtained a covenant not to compete from the prior owner. An adversary was commenced alleging that the prior owner had violated the covenant and requesting an injunction. The court held that a covenant not to compete, by definition, is a restraint of trade. Since restraints of trade are disfavored in the law, the burden is placed upon the plaintiff seeking to enforce the covenant not only to demonstrate that the agreement exists and was breached, but that the agreement is reasonably necessary to protect the plaintiff's business and reasonable as to its terms.

The terms of the covenant must be reasonable as to the time, i.e., the period for which the restraint is in effect; reasonable as to its limits, i.e., the geographic area in which the restraint occurred; and reasonable as to its scope, i.e., the type of activities restrained. The particular covenant restrained the defendant from competing in any restaurant or food catering business similar to that of plaintiff or from participating in the ownership or operation of any such business as an owner or employee. The term was 7 years from June, 1995, and the geographic area was 100 miles from the plaintiff's restaurant.

Based upon the facts of the case, the court found a breach of the covenant. The defendant's motivation in breaching the covenant was irrelevant. The competition occurred between 11 and 15 miles from the plaintiff's restaurant. Both were located in Stevens County which is sparsely populated and customers for both restaurants were drawn from the Colville valley. The 7 year term was reasonable even though the purchase price was payable over 5 years and had been paid. The scope of activities restricted was reasonable and included the activities undertaken by the defendant even though he received no compensation. Therefore, an Order Granting Permanent Injunction was entered.

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