

EASTERN WASHINGTON BANKRUPTCY NOTES

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Tenth Annual Bankruptcy Seminar & Retreat

The 10th Annual Bankruptcy Seminar and Retreat will be held on June 8–10, 2000 at Sun Mountain Lodge, Winthrop, Washington. This year's program will feature Professor Lawrence P. King of New York University School of Law and Editor of *Collier on Bankruptcy*. On Friday, Professor King will discuss the new Rules of Bankruptcy Procedure that became effective last December. This will be followed by a review of the impact on bankruptcy practice that will be caused by additional pending rules that will become effective later this year. On Saturday, Professor King will present a case law update of recent bankruptcy decisions.

Other segments of the program will feature: an ethics panel, which includes Barry Altoff of the WSBA disciplinary office; a panel comprised of Magistrate Judge Lonnie Suko, Bonnie Charney, and Jim Craven explaining the mediation process and how it can be used to resolve disputes arising in bankruptcy cases; a preview by Professor Frank Smith of the Amended UCC Article 9 that will become effective in July 2001. Other participants in this program include Justice Richard Guy, Judge Patricia Williams, Judge John Rossmeissl, Judge John Klobucher, Ted McGregor, Jake Miller, Ford Elsaesser, Fred Corbit, Gary Farrell, and Jean Campbell.

As always, the firm of Hurley, Lara and Adams will host the 72-hour hospitality suite. Sign up now while space is still available.

Warden Hanel Memorial Scholarship

The Bankruptcy Bar for the Eastern District of Washington is in the process of committing \$5,000, payable in annual \$1,000 increments, to a Gonzaga Law School scholarship in memory of our former bankruptcy judge, Warden Hanel. A student will be selected each year to receive the scholarship. The student will in turn be expected to serve as an extern for the Spokane Bankruptcy Court for one semester of that school year. The details are still being worked out with Judge Williams, Dean Clute and the Bar Board of Directors. Nancy Isserlis and John Powers are spearheading the effort. The first scholarship will be awarded, hopefully, for the 2000-01 school year.

Spring Seminar Successful

The bankruptcy seminar for chapter 7 and 13 practitioners was held in Yakima on March 22nd, and Spokane on March 23rd. 110 signed up for the Spokane session and 50+ registered for the Yakima session. We are very grateful for the presenters, an extensive and talented list. Thank you to Jan Armstrong, Thomas Bassett, Beverly Benka, Donald Boyd, Daniel Brunner, John Campbell, Gary Farrell, Mary Ellen Gaffney-Brown, William Hames, Joseph Harkrader, James Hurley, Dillon Jackson, Metiner Kimel, Ian Ledlin, Elizabeth McBride, Theodore McGregor, Robert D. Miller, Jr., John D. Munding, Robert J. Reynolds, the Honorable John A. Rossmeissl, and the Honorable Patricia C. Williams. The Seminar was approved for 7 continuing legal education credits, one of which is an ethics credit.

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Prove-Up Confirmation Policy Changed

*Contributed by Tap Menard,
Law Clerk for Judge John A. Rossmeissl*

Judge Rossmeissl has taken steps to bring practice and procedure regarding uncontested confirmations in Chapters 11 and 12 back to where it was few years ago. Over time the presentations made in support of these confirmations have become more and more streamlined and succinct. As a result, Judge Rossmeissl became concerned that an adequate record in support of confirmation was not being built. Starting in November, Judge Rossmeissl started requiring more detailed presentations in support of confirmation. Also, the plan proponent must now submit findings of fact and conclusions of law separately from the confirmation order.

The Debtor's Supporting Affidavit

The Court's practice of hearing uncontested Chapter 11 or 12 confirmations by telephone will continue. To utilize this procedure the debtor must file and serve a supporting affidavit in advance of the hearing. The debtor should serve the affidavit on the court, the United States Trustee (in a Ch. 11), the Ch. 12 Trustee (in a Ch. 12), and anyone else who will be participating in the hearing. The affiant must be present at the hearing and capable of being put under oath.

The change which practitioners need to be aware of relates to the composition of the supporting affidavit. The debtor's supporting affidavit must allege sufficient facts to demonstrate that the standards for confirmation found in 11 U.S.C. §1129 and 11 U.S.C. §1225 are present. The goal is to have the affidavit recite facts specific to the case and not merely repeat the language of the statute with a conclusory tag line that the requirements are met. For example, when addressing feasibility the affidavit should discuss how the debtor is going to accomplish the objectives of the plan. This can be demonstrated in part by attaching projected budgets and cash flows to the affidavit as exhibits. The Chapter 7 liquidation test can be established by attaching the liquidation analysis to the affidavit. On the other hand the Court recognizes that there are not specific facts which will support the element that the plan is not proposed by any means not forbidden by law. This element is proven by the totality of the circumstances.

The affidavit should also identify any objections that were filed and how they were resolved. As objections are resolved, the objecting creditors need to file written withdrawals of their objections. In the alternative they can sign off on the confirmation order. It is not sufficient to simply allege in the affidavit that the objection has been resolved.

Submit Findings and Conclusions Separately from Confirmation Order

The debtor needs to present to the Court an order of confirmation and a separate findings of fact and conclusions of law. The basis for this requirement is Federal Rule of Bankruptcy Procedure 9021. This rule, sometime referred to as the separate order rule, requires that every order entered in a contested or adversary proceeding be set forth in a separate document. The committee notes to Rule 9014 state that whenever there is an actual dispute other than in an adversary proceeding that the dispute is a contested matter. Clearly confirmations fall within this rubric. The reason for rule 9021 is to eliminate uncertainty as to whether an opinion or memorandum is a judgement and thus appealable. The confirmation order needs to simply state that based upon the findings of fact and conclusions of law the plan is confirmed.

File Pleadings in Advance of Hearing

The debtor's affidavit, the findings and conclusions and the confirmation order need to be filed at least a day in advance of the hearing. The preferred procedure is to have the necessary pleadings filed and delivered to chambers several days in advance of the hearing. Judge Rossmeissl and his staff review all of these pleadings as well as the case file prior to the hearing. This review cannot be accomplished when the pleadings are submitted to chambers an hour or two prior to the hearing. If you wait, the necessary pleadings may not get to the Judge and this may cause confirmation to be delayed. Chambers has a fax machine. The number is (509) 454-5636. When you are filing a pleading within a few days of the hearing, please fax a copy to chambers. Do not rely upon filing the pleading with the Clerks office. The pleading may not be delivered to chambers in time for the hearing. This principal applies to all hearings not just confirmations.

From the Clerk

Statistics

In calendar year 1999, there were 7,787 cases filed in the Eastern District of Washington, which were eight fewer than the 7,795 cases filed in 1998. For the first three months of 2000, filings have increased approximately 8% over the first three months of 1999. It is interesting to note that in March of this year 842 cases were filed, which is the greatest number of cases ever filed in one month in the history of the court. Perhaps of greater interest is the change in filings in the various chapters. In 1998, 82% of the cases filed were in Chapter 7, 17% were in Chapter 13, whereas in 1999 the percentages were 78% for Chapter 7 and 21% for Chapter 13. The remaining 1% for each of those years were the Chapter 11 and 12 cases filed. In 1998, 52 chapter 11's were filed and in 1999 the figure dropped to 37 cases; as for Chapter 12 cases, seven were filed in 1998 and 14 in 1999.

The change in filing patterns in the district relating to where Chapter 13 cases are filed is even more interesting. In 1998, of the 1,331 chapter 13 cases filed, 613 were filed in the Spokane area, and 718 were filed outside that area. In 1999, of the 1,656 cases filed, 693 were filed in the Spokane area, and the remaining 963 were filed elsewhere. Also, the number of Chapter 13 cases filed in Yakima has increased sharply; in 1998 the number was 514, and in 1999 it was 726.

In response to this change, judicial assignments to Chapter 13 cases were changed in September of 1999. Since that time, only Chapter 13 cases filed in Yakima are assigned to Judge Rossmeissl; those cases where the debtor resides in the Spokane, Moses Lake, Wenatchee or Tri-Cities areas are assigned to Judge Williams. This change has resulted in a more equal distribution of cases between the two judges.

Nationally, case filings are on the decline. For the period from July 1, 1997 to June 30, 1998 1,429,211 cases were filed; for the same period 1998 to 1999, the total was 1,390,733, a decrease of 2.7%. In the Eastern District, filings for these periods were 7,435 and 7,760 respectively, an increase of 4.2%.

Chambers Copies

LBR 9073-1(e)(2) requires that if a document intended to be considered by the court in connection with a scheduled hearing is filed less than seven days prior to the hearing, then a "chambers" copy of that document must be provided to the appropriate chambers. Such copies may be delivered in a variety of ways; hand delivery, mail, or FAX, however, it should be noted that delivery of a "chambers" copy does not constitute "filing." Filing is described in LBR 5005-1(a). Although chambers may permit the use of FAX machines for providing chambers copies, the filing of documents by FAX is only permitted by the FAX Filing order, which involves the use of a court approved FAX filing service. If a document is "filed" more than seven days prior to hearing, a chambers copy is not required. Chambers

copies should be clearly identified as "chambers copy," and it is helpful if the date and time of the hearing is noted on the face of the document.

Judicial Calendars on the Internet

An improvement to the publishing of court calendars has been recently introduced to allow for dynamic, up-to-the-minute viewing of the calendars, as opposed to the week in advance format previously used. Essentially, the calendar is published in what can be termed as a "live" mode; that is as the calendar is updated, those updates are immediately available for viewing on the court's website at www.waeb.uscourts.gov. The search selections are location, judge assigned, chapter involved, case number, attorney name and range of dates.

Access to Closed Cases

Approximately four months after a case is closed, the file is sent to the Federal Records Center in Seattle (FRC) for storage. Records are accessed by the FRC by means of an accession and location number. Accession and location numbers are now available over the court's website, and thus now a party desiring to access a record may deal directly with the FRC.

Retrieval of records from the archives can be accomplished in two separate fashions, depending on the needs and the desires of the requesting party:

Retrieval of the actual file itself is initiated by a request to the Office of the Clerk. Once requested, the record will be sent to the Office of the Clerk where designated, either Spokane or Yakima. The cost for this service is \$25 payable in advance.

The archives will make a copy of pre-selected portions of the record, or the entire record as needed and send it directly to the requesting party for a cost of \$.50 (50 cents) per page. Using the accession and location number available over the website, the requesting party can deal directly with the FRC. The phone number of FRC is 206-526-6501.

A third option for accessing records information in both open and closed cases is by viewing or printing the image of the document over the court's web site. All documents filed in cases filed after January 1, 1997 have been imaged; additionally, all documents filed after mid-1998 are also imaged, without regard to when the case itself was filed, and as time permits, documents in pending cases filed before 1997 are being imaged.

RACER Classes Offered

The court conducts regular classes on how to access the court's website and particularly how to use RACER (Rapid Access to Court Electronic Records). The classes are

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From the Clerk cont'd

conducted every first Tuesday of the month, from 1:30 p.m. to 2:30 p.m. in the court's computer training room in Spokane. To register for the class, which is offered at no charge, please call 353-2404, extension 225.

Amendments to Schedule of Creditors

LBR 1009-1(a) provides that when a schedule is amended to add creditors, the amendment needs to be accompanied by a matrix listing only the additional creditors. If such a matrix is not provided, the additional creditors may not be added to the Master Mailing List (MML). It should also be noted, that if the notice of meeting of creditors has already been sent, which occurs approximately three days following the filing of the petition, the party adding creditors is required to send a copy of the notice of meeting of creditors to the added creditors.

Objections to Proofs of Claims

Close attention to amended LBR 3007-1 is required. The two most common errors that prevent consideration of proposed orders on objections to proofs of claim are:

Service of the objection is not pursuant to FRBP 7004. This occurs most often where the claimant is a governmental unit FRBP 7004(b)(4) or (6), a corporation or partnership FRBP 7004(b)(3), or an FDIC insured institution FRBP 7004(h).

The objection does not contain an affidavit or unsworn declaration under penalty of perjury that clearly sets forth the basis of the objection sufficient to overcome the prima facie effect of the proof of claim pursuant to FRBP 3001(f).

Changes to Rules Adopted by Court

Proposed changes to rules that were published in the last issue of NOTES have all been adopted by the court effective March 1, 2000, and are summarized below. The full text of the changes are available for viewing on the court's web site at www.waeb.uscourts.gov.

LBR 2016-1 Compensation of Professionals introduces a Prescribed Form Order that is required to have the endorsement of the reviewing trustee. It should also be noted that the use of local forms is required for the application itself and supporting documents.

LBR 3001-1 Claims & Equity Security Interests was modified to eliminate the requirement that a copy in addition to the original proof of claim be filed in Chapter 12 and 13 cases.

LBR 3007-1 Claims - Objections now requires that certain specific information be included with an objection. The change also makes clear that an objection to a proof of claim is a contested matter governed by FRBP 9014, and that service of the objection must be in accordance with FRBP 7004. The change also provides for but

does not require, a response to an objection by the claimant.

LBR 3012-1 Valuation of Security clarifies that a valuation motion may be by a separate motion or may be joined with an objection to a proof of claim, but that if such joinder is done, the notice requirements of both this rule and LBR 3007-1 must be met.

LBR 4003-1 Lien Avoidance was amended to make clear that notice and hearing procedures described in LBR 2002-1 are required to be used in lien avoidance under 11 USC 522(f). It should be noted, however, that the notice is required to be served on the lien creditor as required by FRBP 7004, which is the same as is required for service of a summons and complaint in Adversary Proceedings.

LBR 9018-1 Secret, Confidential, Scandalous, or Defamatory Matter is a new rule that provides a procedure for motions to seal documents containing secret, confidential, scandalous or defamatory information. This rule was considered to be needed now that filed documents are immediately upon filing available for viewing over the Internet via the court's website.

Certificate of No Pending Objection Required for Ex Parte Orders

LBR 2002-1 is the local rule that generally describes the procedure for notice and hearing. Sub-division (e) of that rule provides for the ex parte signing of orders based on notice and hearing where no objections are pending. A common error that occurs is found where an objection is withdrawn or a related order is endorsed by an objecting party, but no certificate of "pending" objections is filed to support the entry of the ex parte order. The certificate that is required by LBR 2002(e) is not that there were no objections, but rather that "no objections are pending." Once an objecting party either endorses the related order or withdraws the objection, that objection is no longer pending. However, that in itself does not satisfy the "certificate of no pending objections" required by the rule.

Proposed New Local Rule Concerning Reopening Cases

On the recommendation of the Court's Standing Advisory Committee following its last meeting, the judges of the Bankruptcy Court have approved the adoption of a local rule concerning re-opening cases. The proposed rule is printed below and is also available for viewing over the court's website at www.waeb.uscourts.gov, for the purpose of allowing public comment. The comment period ends May 31, 2000. Comments should be in writing and sent to: Clerk of Court, U.S. Bankruptcy Court, Eastern District of Washington, P.O. Box 2164, Spokane WA 99210.

From the Clerk cont'd

Rule 5010-1 Reopening Cases

(a) A motion to reopen a case may be presented ex parte, shall not be joined with a request for any other relief, except for the appointment of a trustee, and shall be accompanied by:

- (1) a statement explaining why the case needs to be opened; and
- (2) the appropriate filing fee, or a statement as to why a fee is not required.

(b) Before taking any action in a closed case that requires notice and hearing to the MML, that is governed by FRBP 9014, or that may require further administration, the party taking the action shall cause the case to be reopened.

(c) A request for the appointment of a trustee in a reopened case shall be supported by a statement as to why a trustee should be appointed.

(d) A case shall be reopened to further administer matters involving property of the estate.

Related Provisions:

FRBP 5010	Reopening Cases
FRBP 9014	Contested Matters
11 U.S.C. 350	Closing and Reopening Cases
11 U.S.C. 541	Property of the Estate
28 U.S.C. 1930	Bankruptcy Fees

Clerk's Note:

11 U.S.C. 350(b) provides authority for the reopening of a case to administer assets, accord relief to the debtor or for other cause. FRBP 5010 provides general guidance relating to the reopening of cases, however, it does provide for a specific procedure. The proposed local rule allows that the motion to reopen is ex parte, but requires a statement addressing the necessity to reopen, and requires the requisite filing fee to be paid with the motion, unless the moving party states authority for non payment of the fee, as set forth in 28 U.S.C. 1930(b), miscellaneous fee (9). The rule also would prohibit a party taking any action in a closed case that requires notice and hearing to the MML, is governed by FRBP 9014 or that would require further administration of the estate, and further requires the party taking the action to cause the case to be reopened. It is also required that if the moving party wishes to have a trustee appointed in the reopened case, the motion must contain a supporting statement. The motion to reopen may not be joined with any other motion, other than the appointment of a trustee. In re Menk 241 B.R. 896 provides an excellent discussion of various issues concerning the reopening of cases.

Standing Advisory Committee Meets

The court's Standing Advisory Committee met on March 21, 2000 in Yakima. A variety of matters were discussed and the minutes of that meeting are available over the court's website at www.waeb.uscourts.gov. The standing committee was established in 1997 and has proved a most valuable and effective forum for the interchange of ideas and concerns between the court and its various users. Anyone wishing to serve on the committee is encouraged to express his or her interest by notifying the Clerk of the Court at P.O. Box 2164,

Spokane WA 99210. Three of the five non-standing seats are due to expire in June of 2000. One is the Chapter 7 panel trustee seat, now held by Bruce Boyden, another is the Creditor/Business seat now held by John Powers, and the third is the Debtor/Business now held by Jim Hurley.

Voluntary Mediation Program Adopted by Court

Following recommendation by the Court's Standing Advisory Committee the court has by General Order established a voluntary mediation program. Mediation is becoming a very popular and effective alternate method of resolving disputes. Although not as much used in a bankruptcy setting as other places, it is being used with great success by some bankruptcy courts, and steadily becoming better accepted.

The design of the program was largely the work of the Adversary Dispute Resolution (ADR) Sub-committee composed of Chief Judge Williams, Bonnie Charney, Jean Campbell, Jim Hurley, Tom Bassett, and Ted McGregor. The program will become effective upon the establishment of a "Panel of Mediators." This panel is expected to be formed in June of this year, as soon as the applicants complete a short orientation training session. Thus far 25 individuals have applied to be placed on the panel. A copy of the General Order along with procedural forms are available over the court's website at www.waeb.uscourts.gov. Anyone wishing to be appointed to the panel is invited and encouraged to submit an application form, also available over the website or from the Clerk's Office.

Save a Tree: Conformed Copies

LBR 5005-1(b) provides that a party filing a document who desires a conformed copy of the document shall provide such copy along with the document to be filed, and if the return is to be by mail, provide a self-addressed and stamped envelope. If the purpose of the conformed copy is to have some evidence in the attorney's file that the document was received and filed, that purpose may more efficiently and economically be served by the attorney accessing the case over the court's website, and ascertaining that fact by viewing the docket itself. A conformed copy only serves as evidence that the item was received by the Clerk, accessing the website provides information that the item not only was received, but that it was filed and docketed correctly. The standard used by the court for docketing items is 24 hours after filing, and at which time the electronic docket will display the docket entry. Another 24 hours following docketing, the image of the document is available for viewing.

Notice Under 2002 or Service Under 9014

FRBP 2002 generally addresses various requirements for notices to parties in interest. Subdivision (g) of the rule describes the addressing of the notices. LBR 2002-1 is the local rule counterpart to the federal rule. Notices under 2002 are mailed to the various parties in interest, and by LBR 2002(d) deemed appropriate if "mailed to all entities on a Master Mailing List or Limited Mailing List" prepared by the Clerk within twenty (20)

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From the Clerk cont'd

days of the notice. In a general sense, matters covered by this rule are those set out in the rule itself, but will also include items covered by FRBP 9013. These items are by and large all items that are not included in 7001 as adversary proceedings or FRBP 9014 as contested matters.

Service required for both Adversary Proceedings and Contested Matters is as required in FRBP 7004. FRBP 7004(b) allows Service by First Class Mail, however, close attention must be paid to the character of the entity served since the requirements are somewhat varied. For instance, service in an Adversary Proceeding or a Contested Matter of a corporation required that it be addressed "to the attention of an officer, a managing agent or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." Most Contested Matters are identified either in the Federal rule or the Local rule; for instance FRBP 3020 (b) states "An objection to confirmation is governed by Rule 9014," or LBR 4003-1(c) which states, "Service of the notice on the lien creditor shall be in accordance with FRBP 7004."

The court reviews proposed orders presented on an ex parte basis for compliance with the notice and service requirements of Federal and Local Rule 2002 and Federal Rule 7004. If compliance is not found the proposed order is returned to the presenting party.

The most common reasons for the return of proposed orders in Contested Matters are:

- Failure to mail to the attention of an officer, managing agent or general agent in the case of a corporation;

- Failure to serve the U.S. Attorney, the Attorney General and the agency involved where an agency of the United States is involved; and

- Failure to serve the attorney for the debtor where the debtor in a pending case is involved.

Other common reasons for return of proposed orders is failure to use a MML updated within twenty days of notice where it is required, not providing sufficient time for objections.

Ten-Day Stay of Certain Orders Imposed by Federal Rules

Orders confirming Chapter 9 and 11 Plans (FRBP 3020(e), granting relief from the automatic stay (FRBP 4001(a)(3), authorizing the use, sale or lease of property, other than cash collateral (FRBP 6004(g), and authorizing the trustee to assign an executory contract or unexpired lease (FRBP 6006(d), are stayed until expiration of ten days after the entry of the order, unless the court orders otherwise. The court will generally only consider such a request after notice and hearing. A party desiring that the ten day stay not be imposed, may include the request as a part of the principal notice itself. A somewhat similar procedure is authorized by LBR 2002-1(c)(2), in a case where a moving party desires that the time for making objections be shortened. If the order does not specifically address the ten day stay, the order is stayed for the ten days.

Ch. 13 Trustee's Corner

The Chapter 13 Trustee is filing motions to dismiss in all cases in which in the plan and/or schedules are not filed with the petition or within 15 days after the petition is filed (assuming that the debtor has not received an order extending the time within which to file these documents). The Trustee has been setting and taking these motions to hearing even if the plan and schedules are subsequently filed. Judge Williams has created what she refers to as her "\$100 Club." In effect, every lawyer who does not timely file the plan and/or schedules has been getting one free bite, a caution from the Judge to be more timely in the future and an invitation to join the "\$100 Club" which becomes mandatory if the same lawyer appears before her again on the same issue without good cause. Well, everyone can now stop the pushing and shoving to get to the front of the line and be the charter member of the Club because that honor has already been bestowed on one of Spokane's finest.

In mid-March Denny Colvin of Yakima, Eric Bakke of Wenatchee, Ted McGregor and Dan Brunner presented a mini-seminar to members of the Grant, Douglas and Chelan county bars. The purpose was to try to make as many members of the bar as possible aware of the benefits of Chapter 13. There were 53 registered attendees at that seminar which speaks very highly of their interest in this very important and growing area of bankruptcy law. It is our intention, on an as-yet-unidentified date, to put on a more detailed seminar to explain more of the "how to's" of Chapter 13. Given the interest at the initial ground breaking seminar, I anticipate that there will be continued high interest.

As many lawyers are already aware, we have modified the manner in which motions to dismiss for non-payment are set for hearing and heard by the court. In the past the Trustee operated purely on the basis of notice and hearing; that is, a motion to dismiss and notice of the motion was sent to the debtor and the debtor's lawyer. If an objection was filed, the matter was set for hearing; if no objection was filed, an ex parte order was submitted. In order to streamline the process, we now file the motion to dismiss, set the matter for hearing at the same time and send notice of the hearing. This has the added advantage to the debtors of not requiring any action on their part other than appearing at the appointed hour. If the debtor chooses not to object to the motion to dismiss for non-payment, the debtor simply need not appear for the hearing and an order of dismissal will be entered. On the other hand, if the debtor does choose to oppose the motion, all that is required is the debtor's appearance. In our experience, most of the motions never make it to hearing because the debtors either bring their plans current by making a payment to the Trustee or deal with the delinquency in some other fashion. We believe this new process will be more efficient.

Daniel Brunner, Ch. 13 Trustee

Case Notes

From Judge Williams:

In re Paul McCarthy, No. 99-07063-W13

Bank of America's Motion to Lift Stay and Objection to Confirmation.

The Bank repossessed a 1993 Chevrolet Blazer on November 17, 1999. The debtor filed his Chapter 13 on November 29, 1999, and in the plan proposed to pay the alleged fair market value of the vehicle in monthly payments over the life of the plan. The creditor objected and argued that the property of the estate was not the vehicle itself but only the right to redeem after repossession. As state law redemption requires a lump sum payment, the Bank argued that the plan could not propose to pay that redemption obligation in installments.

The court ruled that repossession did not deprive the debtor of all interest in the property but only was the first step in a process which would ultimately have done so. Since that process was not completed prior to filing, the debtor retained an interest in the vehicle and the vehicle was property of the estate.

The Bank cited *In Re Braker*, 125 B.R. 798 (Bankr. 9th Cir. Or. 1991) for the proposition that 11 U.S.C. § 1322(b)(3) which allows curing of a default is inapplicable when the only right under state law is to make a lump sum redemption payment. Also considered was *State, Acting By and Through Director of the Dept. of Veteran's Affairs v. Hurt (In re Hurt)*, 158 B.R. 154 (Bankr. 9th Cir. Or. 1993) which contains a discussion of the various "cutoff points" for cure under 11 U.S.C. § 1322(b)(5). That case and the *Braker* decision involved real estate which the court distinguished from a situation involving personal property and the right to redeem under R.C.W. 62A.9-506. The court held that 11 U.S.C. § 1322(b)(3) and (5) modify rights otherwise held by creditors under state law. Default can be cured "within a reasonable time" which allows installment payments. The Code limits creditors' rights in many ways, such as limiting a secured claim to the value of the collateral rather than the entire debt. The Code also limits creditors' rights to receive the redemption amount in a lump sum. Consequently, the Motion to Lift Stay was denied and the debtor could pay the amount of the secured claim over the life of the plan. Questions concerning the amount of the allowed secured claim and adequacy of proposed monthly payments were reserved for the confirmation process.

This decision can be reviewed more closely on the Bankruptcy Court's web page.

In re Lewis Schumaker, No. 99-01039-W13

Issue: Mortgage holder's Motion to Lift Stay in Chapter 13 for post-petition arrearages.

The debtors filed their Chapter 13 bankruptcy petition and plan on February 23, 1999. Their next payment to Goodrich & Pennington Mortgage Fund, Inc. (GPI), their mortgage holder, was due March 1, 1999. The plan provided for payments to GPI to be made through the plan. Pursuant to 11 U.S.C. § 1326, the debtors made their first plan payment on March 22, 1999.

Eastern District of Washington Local Bankruptcy Rule 2083-1(f)(1) requires that if the mortgage is in default post-petition mortgage payments be made through the Trustee. The debtors, therefore, included the March 1, 1999, payment to GPI in their first plan payment. The Trustee may pay pre-confirmation the mortgage pursuant to an adequate protection order. The Trustee sent payments to GPI in May, after entry of an adequate protection order. Thus, although debtors made plan payments timely and the Trustee disbursed pre-confirmation, there was approximately a two-month delay before GPI started receiving post-petition payments.

On May 20, 1999, GPI moved for relief from the automatic stay for cause, arguing that the time needed for the Trustee to get into a position to disburse payments placed the debtors chronically one to two months delinquent on the post-petition mortgage payments. The Chapter 13 Plan had, as of then, not been before the court for confirmation. The bankruptcy court denied GPI's motion.

GPI appealed to the BAP which in an unpublished opinion affirmed and held it was not an abuse of discretion to deny the motion to lift the stay. Although argued by GPI, the BAP did not reach the issue of whether post-petition arrearage payments can be cured through the plan. The Fifth and Eleventh Circuits have held that post-petition arrearages can be cured through a plan. *Mendoza v. Temple Inland Mortgage*, 111 F.3d 1264 (5th Cir. 1997) and *Green Tree Acceptance v. Hoggle*, 12 F.3d 1008 (11th Cir. 1994).

In re Jackie E. Stephens, No. 97-06242-W11

Bad Faith Dismissal

This decision is on the web site for the Bankruptcy Court for the Eastern District of Washington. As it involves an allegation of bad faith filing, it is fact-intensive and the facts, as well as the published cases relied upon, are set forth in the full decision.

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Case Notes *cont'd*

Issue: Did cause exist to dismiss the proceeding?

The court held that cause for dismissal does not require a finding of malice or evil intent on the part of the debtor. Rather, if the bankruptcy was filed for a purpose other than that sanctioned by the Bankruptcy Code cause exists to dismiss. *Marsch*, 36 F.3d 825 contains the Ninth Circuit rule that if the purpose of the filing was not consistent with the purpose and spirit of the Code, then cause exists to dismiss the proceeding. Once the movant establishes the existence of a genuine issue concerning the debtor's lack of good faith, the debtor then bears the burden of proving good faith by a preponderance of the evidence.

In this case many of the allegedly wrongful acts occurred more than two years before the commencement of the proceeding. Even though a debtor may have a history of engaging in improper conduct, the debtor may change that course of conduct and commence a bankruptcy proceeding and successfully reorganize. The past improper conduct is, however, relevant in considering the debtor's purpose in commencing the bankruptcy and the likelihood of a successful reorganization. In order to determine whether the true purpose of the proceeding is to reorganize a financially distressed business, the pre-petition and post-petition operation of the business must be examined. The greatest emphasis should be placed upon events and conditions immediately before and during the bankruptcy proceeding.

***In re Carl M. VanEtten*, No. 99-01962-W13**

This decision is on the web site for the Bankruptcy Court of the Eastern District of Washington.

Issue: Must tax refunds be devoted to a Chapter 13 plan when past due child support is paid under the plan?

In this case, the debtor owed significant past due child support which was to be paid under the plan and the Trustee objected to confirmation as the debtor did not devote future income tax refunds to the funding of the plan. The Trustee argued that both federal and state public policy favors the enforcement and collection of

past due child support if allowed to confirm plans which did not devote refunds to plan funding.

The court determined that the Tax Refund Interception Program is simply a device to collect a debt and, like many debt collection devices, it is preempted by the Bankruptcy Code. By its terms, 26 U.S.C. § 6402 did not render the Bankruptcy Code inapplicable to the program so the determination of whether tax refunds must be devoted to plan funding is purely one of analysis under the Code.

11 U.S.C. § 1325 (b)(1)(B) requires that all "projected disposable income" be devoted to the plan. The Trustee has the burden of presenting some evidence that any refund is "projected." There must be a case-by-case analysis to determine whether a particular debtor is likely to receive a refund. Evidence may be in the form of a Schedule "I" which demonstrates withholding in excess of standard deductions, a history of such refunds, copies of wage statements or other information. However, a requirement that any debtor with past due child support devote future tax refunds to the plan would be a requirement to devote "actual" disposable income rather than "projected" disposable income. Such a result is contrary to *Anderson*, 21 F.3d 355 which disapproved a Trustee's requirement that each Chapter 13 debtor agree to devote "actual" disposable income to fund a plan.

***In re Mary Kathryn Sanowski*, No. 98-07547-W1R**

Stay of State Court Order

The state court entered an order determining the ownership interest in garnished funds on December 8, 1998. The order required the debtor to take certain action by January 8, 1999 and stated that if such action were not taken, "... then this order shall become final." The issue before the Bankruptcy Court was whether or not the debtor's filing a Chapter 7 after the entry of the state court order but before the order, by its terms, was to become final, stayed the effect of that order. The action to be taken prior to the order becoming final was the controversy of certain of the state court's findings

recognized in the Tax Refund Interception Program 26 U.S.C. § 6402(c) in which the state government identifies those who owe past due child support and the IRS intercepts any federal tax refund and sends it to the state to apply toward the past due child support. The Trustee argued that debtors would be able to avoid their obligation to devote income tax refunds to payment of

On December 17, 1998, the debtor commenced a Chapter 7, but took no action to contest the calculations as provided by the state court order. 11 U.S.C. § 108(b)(2) allows the Chapter 7 Trustee an additional 60 days to take the action under the order, i.e. file a pleading with the state court.

The Chapter 7 Trustee took no action by March 8, 1999. For that reason the state court's order became

Case Notes *cont'd*

final according to its terms on January 8, 1999. The Bankruptcy Court held in a Memorandum Decision filed on January 27, 2000 that the order became final irrespective of the filing of the intervening bankruptcy and the estate was bound by its terms.

U.S. Trustee V. Charles B. Foster, No. A98-00226-W1R

Issue: Whether the U.S. Trustee's Complaint to Revoke Debtor's Discharge for Fraud was timely and, if so, did debtor commit fraud?

The Chapter 7 was commenced on July 24, 1997 with the deadline to file objections to discharge on October 26, 1997. As no objections were filed, on October 29, 1997 the discharge was entered and on October 30, 1997 the case was closed. This Complaint was filed December 24, 1997 seeking to revoke the debtor's discharge pursuant to 11 U.S.C. § 727(d)(1). That section provides that upon the request of the U.S. Trustee, the court may revoke a discharge if the discharge was obtained through fraud of the debtor and the "requesting party did not know of such fraud until after the granting of the discharge."

The witness who was the former girlfriend of the debtor testified that in "early October" she wrote to the U.S. Trustee regarding the debtor's failure to list assets on his schedules. The letter was dated October 7, 1997 and she testified she thought it was mailed that day but was not certain. At some later unspecified date, she met with the U.S. Trustee and furnished additional information concerning the debtor's assets and the information in the letter. The letter was not introduced into evidence but it was undisputed that the letter essentially contained an allegation that the debtor had not listed all his assets on his schedules.

The court held that as the lack of knowledge of the fraud is a prerequisite to filing the Complaint, the burden of proof on the issue of knowledge is on the party filing the Complaint. Although no Ninth Circuit decision is directly on point, this is consistent with *Bowman*, 173 B.R. 922 (B.A.P. 9th Cir. 1994) and *Dietz*, 914 F.2d 161 (9th Cir. 1990).

The U.S. Trustee received a written allegation that the debtor had omitted assets within a few days of October 7, 1997, more than two weeks before the deadline to object to discharge. Undoubtedly, the U.S. Trustee regularly receives communications from creditors or interested parties which, if true, indicate fraud may exist. Undoubtedly, the U.S. Trustee needs a reasonable opportunity to investigate such allegation

to determine if there is any factual basis to the allegation. If unable to conduct the investigation before expiration of the deadline, the U.S. Trustee may always file a motion requesting the deadline be extended. As the U.S. Trustee did not produce any evidence that he was unable to diligently investigate or unable to file a motion to extend time, and as the U.S. Trustee has the burden of producing such evidence, the court determined that the Complaint was untimely.

Huffine v. California State University-Chico, et al., No. A97-0012-W1B

Dixie L. Carter v. Alaska Commission On Post-Secondary Education, et al., No. A99-00085-W1B

Issue: Does the doctrine of sovereign immunity require dismissal of the defendant state entities who hold student loan obligations of the debtors?

***Huffine v. California State University-Chico, et al.,* No. A97-0012-W1B**

A Chapter 7 was filed by debtors Huffine in 1997 alleging that student loan obligations owed to Washington State University, Educational Credit Management and Northwest Educational Loan Association should be discharged for undue hardship. After extensive discovery, the other two defendants agreed to the entry of an order discharging the obligations due them as the debtor had been certified as permanently totally disabled. Defendant WSU filed a Motion to Dismiss on the basis of sovereign immunity. It was not disputed that WSU is an arm of the state for sovereign immunity purposes.

The written decision entered March 10, 2000 has been sent to West Publishing and posted on the court's website. Essentially, the court determined that an arm of the state may waive the defense of sovereign immunity by accepting federal funds if the receipt is clearly conditioned upon a waiver of sovereign immunity. Relying on *Premo v. Martin*, 119 F.3d 764 (9th Cir. Cal. 1997), the court concluded that the language of the federal statute need not expressly state sovereign immunity is waived if the federally funded program established by the statute, when considered as an entirety, overwhelmingly implies a waiver. Not only the language of the statute but the regulations governing the program and the contract between the

Continued on Next Page

Case Notes *cont'd*

state agency and the federal agency administering the program must be reviewed.

The Tenth Circuit in *Innes v. Kansas State Univ.*, 184 F.3d 1275 (10th Cir. Kan. 1999) had considered the exact contract and federal regulation at issue. The Tenth Circuit had concluded that the language of the Student Loan Participation Agreement and the regulations read as a whole expressed unequivocal intent to waive sovereign immunity if the state agency elected to participate in the student loan program. The holding of the Tenth Circuit was adopted in this case and the court held that WSU by electing to participate in the particular student loan program had waived sovereign immunity and should not be dismissed.

Dixie Carter v. Alaska Commission on Post-Secondary Education, et al., No. A99-00085-W1B

The court's unpublished opinion in this case has been posted to the website. In this case, the Chapter 7 debtor sought to discharge a student loan on the basis of undue hardship and the Alaska Commission on Post-Secondary Education requested it be dismissed on the basis of sovereign immunity. Again, there was no dispute that the defendant was an arm of the state for sovereign immunity purposes.

In this case, the court granted the Motion to Dismiss. The student loan at issue was not part of the federal student loan program and no federal funds were involved.

Editor acknowledges with gratitude the work of Judge Williams, Law Clerk Julie Hirsch, and Dee Sindlinger in preparing this synopsis.

From Judge Klobucher:

In re Mike's Painting, No. 96-01317-K11 (Bkrcty. E.D. Wash. 2000)

In re Mike's Painting involved the allocation of the debtor's arbitration award amongst several administrative claimants and secured creditors who asserted a claim against those funds.

The debtor is a professional painting company who filed for protection under Chapter 7. Because of the discovery of and recovery of assets for the estate, the case was subsequently converted to a Chapter 11. The primary asset of the estate was a chose action against a general contractor, which was pursued by the debtor in possession.

The Court approved the employment of an attorney by the estate in order to pursue this claim and approved a contingency fee agreement. At the time of this approval, the general contractor admitted owing the plaintiff debtor approximately \$65,000, which was put into a trust account. This amount in trust was not to be distributed for the payment of attorney fees in the litigation. The debtor was successful in arbitration and received an award that was less than the total administrative claims against the estate.

The debtor's attorney filed an application for approval of his fees & costs. The costs of litigation were allowed as an administrative expense as they were not contested. The Court further held that the attorney's fees for lead counsel were not entitled to surcharge the security interests of the secured creditors for amounts which those parties would undoubtedly have recovered otherwise (*In re Modern Mix, Inc.*, 18 BR 746 Bankr. S.D. Ala. 1982). The Court also ruled that the allowed contingency fee would be calculated from the actual cash received by the estate in the litigation proper, not by any amounts paid by the defendant on behalf of the plaintiff, which had been deducted by the arbitration panel when deciding the amount of the award.

The second administrative expense the Court considered was that of an attorney who also worked on the case as a construction litigation specialist. This second attorney was not experienced in practice before the Bankruptcy Court and relied on lead counsel to obtain any necessary approval for his joinder. In fact he acted as lead counsel in the presentation of the debtors case in arbitration. The administrative expense that he sought was not in addition to lead counsel's, but was seeking merely to share in the fees awarded to lead counsel. Because he was a professional person as defined by the code, nunc pro tunc approval of his employment was necessary. Lead counsel asserted that the construction specialist was merely acting as another attorney in his firm. The Court declined to adopt that reasoning, finding instead that the excusable neglect existed on the part of the construction specialist and as such nunc pro tunc approval was proper (*In re BES Concrete Products*, 93 F.R. 228 (E.D. Calif. 1988); *In re Kroeger Properties*, 57 B.R. 821 (BAP 9th Cir. 1986). The Court based its holding on the following facts: the neglect in question was not on the part of the attorney construction specialist, there was no suggestion of a conflict of interest, the benefit bestowed on the estate, the loss that

Case Notes *cont'd*

would be suffered by the applicant if approval were denied and the fact that there would be no economic loss to the estate by such approval.

The third administrative expense that raised legal issues was that of a business & construction consultant who was hired by the debtor principal pre-petition. He was never hired by either the lead counsel or consulting counsel and at no time was the Court's approval of his employment sought or approved. He submitted an application for approval of an administrative expense for his fees and also sought to surcharge the secured creditor's interests under both the "common fund" doctrine & § 506(c) of the Code. The Court, recognizing that the 9th Circuit has ruled in favor of allowing persons other than trustees to utilize § 506(c) to surcharge secured creditors' interests [*In re Palomar Truck Corp.*, 951 F.2d 229 (9th Cir. 1991); *In re Debbie Reynolds Hotel & Casino*, 1999 WL 709985 (9th Cir. BAP (Nev.))], also recognized that if the services that he performed were those of a professional person, his employment must be approved under § 330. The applicant argued that he was not in fact a professional person, as "business & construction consultants" are not listed in the statute. Despite this, the Court held that

his participation went beyond mere consultation. In examining his application, testimony, the magnitude of the fee requested and the consultants own assertion that his participation was the "compelling factor in the award obtained," the Court found that he acted as a professional person & denied his request for nunc pro tunc approval. Responding to the consultants claim that he relied on lead counsel to get his approval, the Court held that one could not properly rely on casual statements such as "I've got you covered" to support an application for nunc pro tunc employment.

The defendant general contractor in the arbitration also asserted a claim in the arbitration funds for its attorney fees on appeal. The Court held that they could not surcharge the secured creditor's interests under § 503(b) pursuant to *Abercrombie v. Hayden Corp.*, 139 F.3d 755 (9th Cir. 1998) in which the 9th Circuit held that costs arising out of litigation of a pre-petition contract were not entitled to administrative expense treatment. The Court recognized that they may be able to recover under a theory of recoupment however and reserved this issue for briefing and argument by counsel if they so chose.

The remainder of the funds was distributed to the two secured claimants.

BAP Set Guidelines for Awarding Attorney Fees in Dischargeability Cases

By Ian Ledlin

The 1998 U.S. Supreme Court decision of *Cohen v. De La Cruz*¹ created new risks for a debtor facing an objection to discharge of a debt. In *Cohen*, the landlord/debtor had defrauded tenants through violation of rent control laws, which provided an award of attorney fees against miscreant landlords. The Supreme Court determined that the attorney fees incurred in prosecuting the discharge action were part of the debt, and were also excepted from discharge.

In *In re Hung Tan Pham*, 245 B.R. 370 (9th Cir. BAP 2000), the BAP answered the question of whether an award of attorney fees applied to an objection to discharge based upon credit card fraud. Pham's scam involved paying off his credit card balances with NSF checks, then using the check processing delay to make new charges on the cards shortly before filing his bankruptcy. The Bankruptcy Court found the debts nondischargeable. Although the cardmember agree-

ments contained an attorney fee clause for legal costs of collection in the event of default, the Court apportioned all of the attorney time to prosecuting the dischargeability action and declined the creditor's request to apply *Cohen* and award attorney fees.

The BAP made an analysis of pre- and post-*Cohen* decisions relating to the award of attorney fees in fraud cases. It distinguished between litigation to recover on the underlying contract and litigation to determine the nondischargeability of the debt. It observed that, under California law, that an action on fraud does not permit recovery of attorney fees. It went on to note, however, that the California Supreme Court has concluded that there is a contractual right to recover attorney fees in a tort action given appropriate language in the attorney fee provision of the contract. The BAP remanded the case to the Bankruptcy Court for a determination of whether the successful creditor could recover attorney fees in a non-bankruptcy court.

¹523 U.S. 213 (1998)

Bankruptcy Bar Board Elections

As happens every year, positions for the Bankruptcy Bar Board are up for election. This year, Spokane Position No. 2, At-large position No. 1 and Tri-Cities, Walla Walla, Moses Lake and Wenatchee position No. 2 are open. Ballots have been mailed, and we will announce the results at Sun Mountain, the site of a regularly scheduled meeting of the Bar.

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New Editor

On May 3rd, 2000, the Board of Directors for the Bankruptcy Bar of the Eastern District of Washington unanimously and enthusiastically voted to appoint Metiner Kimel as the new editor of Notes. He has assumed his new position and would welcome contributions for the next edition. He can be reached at:

Metiner Kimel, Attorney
Velikanje, Moore and Shore, Inc. PS
405 E. Lincoln Ave., P.O. Box C2550
Yakima, WA 98901
Phone: (509) 248-6030 Fax: (509) 453-6880
E-Mail: Mkimel@VMSLAW.Com

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