

# EASTERN WASHINGTON BANKRUPTCY NOTES

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## Changes to Ch. 13 Form

The form Chapter 13 plan, available on the court's website at [http://www.uscourts.gov](#) has been changed to clarify how the payment of attorney fees will be made should the debtor not make a full plan payment. Sub-section III A 1 c now provides that if insufficient monies have been paid, attorney fees will be subordinated to continuing, executory contract/unexpired leases, secured and arrearage/default claims, but paid before all others. The section does, however, provide opportunity for the attorney fees to be less subordinated. The section also contains language that none of the provisions in that section would bar a creditor from seeking other relief should a full plan payment not be made.

Another change was to move the Executory Contracts and Unexpired Lease category up from subsection III A 4 to section III A 3, and to move the Secured Claims from sub-section III A 3 down to sub-section 4. The effect of this change would be that, if due to a less than full payment, and the trustee did not have sufficient funds to pay all categories, claims filed under executory contracts and unexpired leases would be paid before those filed under the secured claims section.

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## Ch. 13 Confirmation Denied as Plan Funds Only Fee

*By Judge Klobucher*

Several Chapter 13 cases were on before the court for uncontested confirmation hearings. Included in the plans before the Court were proposed flat fees in amounts varying from \$1,500 to \$2,000. Upon review of the cases, the following common facts were evident:

The cases were \$50/month payment cases, having total base amounts of \$1,800. There were no secured, priority, separate class or other types of claims which might make the cases more complicated nor had there been any contested hearings or motions defended.

In light of the absence of elements which might typically require attorney time, and the fact that the entire sum of payments would be dedicated solely to the payment of attorney's fees rather than to unsecured creditors, the Court declined to confirm the cases unless the fees were reduced or were applied for on an hourly basis.

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# Changes to Separate Classification in Ch. 13

By Tap Menard

The scope of permissible Chapter 13 plan provisions dealing with separate classification of criminal fines was recently reexamined by Judge Rossmiechl in *In re Gallipo*, 282 BR 917, (Bankr E.D. Wash 2002). After *In re Games*, 213 BR 773 (Bankr E.D. Wash 1997) and *In re Ponce*, 218 BR 571 (Bankr E.D. Wash 1998) a number of Chapter 13 plans have proposed to separately classify non-dischargeable criminal traffic fines. These plans were designed to ensure that the debtors retained their drivers licenses after discharges were entered.

Under *Ponce* and *Games*, in order to separately classify a criminal traffic fine the debtor needs to propose to pay the general unsecured creditors the equivalent of what they would receive in a 36 month non-discriminatory plan. The life of the plan is extended to pay the separately classified claims in full. The plan proposed in *Gallipo* departed from this pattern.

In *Gallipo*, the Debtor filed a petition on May 4, 2000. In her schedules she listed no secured debt and unsecured non-priority debt of \$16,895.00. Her assets were limited to personal property valued at \$1,635.83 and she reported net take home income of \$1,250.00. The plan proposed to pay \$50.00 per month for 60 months. The plan separately classified four criminal traffic fines totaling \$1,642.00. Further, the plan separately classified three shoplifting fines totaling \$1,150.00. The plan provided that the criminal traffic fines would be paid in full prior to payment of the criminal shoplifting fines. Only \$158.00 of the criminal shoplifting fines would be paid through the plan.

The affidavit in support of the separate classification stated that it was necessary to separately classify the traffic fines in order for the debtor to retain her license. Separate classification of the shoplifting fines was justified by a fear of incarceration if not paid.

*Gallipo's* plan did not propose to pay anything to the unsecured creditors. This departure from the standard plan structure seen after *Ponce* and *Games* caused Judge Rossmiechl to examine the plan in light of Ninth Circuit precedents on unfair discrimination. The test for unfair discrimination is set forth in *In re Wolff*, 22 B.R. 510 (9<sup>th</sup> Cir. BAP1982).

The first prong of the *Wolfe* test is whether there is a reasonable basis for the discrimination. Judge Rossmiechl

concluded that separate classification of the traffic fines was reasonable in light of the debtors desire to retain her drivers license post discharge. No reasonable basis was found to separately classify the shoplifting fines. The plan would only pay 13.7% of these fines and payment would not occur until the last months of the plan. While it might be technically true that the debtor could be incarcerated for failure to pay there was no credible evidence that the debtor faced a likelihood of incarceration or that the proposed plan would diminish that likelihood. Further, the non-dischargeability of the shoplifting fines alone is not a sufficient basis for separate classification. *In re Sperna*, 173 B.R. 654 (9<sup>th</sup> Cir. BAP 1994)

The plan met the second prong of the *Wolff* test because it did not appear that the debtor could carry out a plan without discrimination. Since the debtor had no non-exempt assets unsecured creditors would get no distribution in a Chapter 7. A 60 month non-discriminatory plan would result in a very small reduction in the criminal fines and the debtor would lose her drivers licence upon completion of the plan.

The third prong of the *Wolff* test is whether the discrimination is proposed in good faith. The court applied the applicable factors for determining good faith outlined in *In re Warren*, 89 B.R. 87 (9<sup>th</sup> Cir. BAP 1988). The court concluded that the discrimination related to the criminal traffic fines was proposed in good faith. The same could not be said for the shoplifting fines.

The fourth prong of the *Wolff* test asks whether the degree of discrimination is directly related to the basis or rationale of the discrimination. The basis for the discrimination in connection with the traffic fines is retention of driving privileges post discharge. Without the discrimination the debtor would receive nothing in the Chapter 13 that a Chapter 7 would not provide. Therefore, the court concluded that the plan met the fourth prong of the *Wolff* test with regard to the traffic fines. The plan did not meet the fourth prong with regard to the shoplifting fines.

Confirmation of the plan was denied because of the failure of the separate classification of shoplifting fines to meet all four prongs of the *Wolff* test. While, the proposed plan was not confirmed, the opinion indicates Judge Rossmiechl's willingness to consider plans of this nature, provided that they meet the *Wolfe* test.

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# From the Clerk

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## Unclaimed Funds

Section 347 of the Bankruptcy Code provides that 90 days after the final distribution in Chapter 7, 12 and 13 cases the trustee shall stop payment on all checks remaining unpaid, and tender the monies into court. FRBP 3011 requires the trustee to file a list of all known names, addresses and amounts owed relating to the tendered funds. These "unclaimed" funds are able to be paid to the rightful owner upon proper application. Access the court's web site and click on "Unclaimed Funds" to obtain the names and addresses of parties to whom money remains unpaid as well as detailed information and forms to assist in recovery of unpaid fund.

## Statistics

For the period from January through October, 2002, there were 8501 petitions for relief filed. This is a decrease of 94 cases as compared to the same period in 2001. Chapter 7s accounted for 75% of the total filings, Chapter 13s were approximately 24% of the filings, and Chapters 11 and 12 were 1% of the total through October of 2002. Regionally or across the district for October, Spokane had 38.2% of the overall cases filed, Yakima had 26.7%, Richland 18.2%, Wenatchee 7.9%, Moses Lake 7.3%, and Pullman had 1.8%. It is anticipated that for the year 2002, filings will again exceed 10,000.

## New Rules

Three new local rules became effective October 15, 2002. LBR 1017-2 provides information concerning the conversion of a Chapter 11 case to a case under Chapter 12 or 13. LBR 7041-1 provides that an adversary proceeding objecting to the granting of a discharge or for the revocation of a discharge may not be dismissed at any party's instance without 20 days' notice and hearing to the case trustee, United States trustee and the Master Mailing List of the related case. LBR 9014-1 provides that disclosure requirements of FRCP 26 that are made applicable to Adversary Proceedings by FRBP 9014, generally do not apply in contested matters unless by express order of the court. Local Rules are accessible over the court's web site at [www.waeb.uscourts.gov](http://www.waeb.uscourts.gov).

## Local Rule 5005-2 Abrogated

LBR 5005-2 has been abrogated effective January 1, 2003. This eliminates the requirement that any copies be included with original petitions for relief. This rule was largely made possible by the availability of the images of the petitions over the court's web site, and by being able to deliver the copies by other means when required. If a person filing a petition wants a conformed copy of the petition, then a copy and a self-addressed and stamped envelope needs to be provided. However, parties may want to consider if the copy is necessary in light of the fact that the image of petitions filed are viewable over the web, 24 hours after filing. Another reason for the abrogation of the rule is in anticipation of the implementation of the national electronic filing (ECF) initiative being introduced to federal courts, which is expected to be in our district in late 2003.

## Creditors Lists On Disks

On September 16, 2002 the format for the matrix required by LBR 1007-2 was changed from a paper format to an electronic format, namely a 3.5 inch floppy diskette. Included in this issue are the Matrix Format Guidelines. It is very important that these guidelines be followed closely, anyone who has questions about the guidelines should contact this office at 509-353-2404, extension 201, for assistance. Since its implementation, approximately 80% of all matrices have been submitted by floppy disk. Using this method to create the Master Mailing List has resulted in greater accuracy, speed and efficiency.

The matrix is required to be submitted with the petition, even in the case of a so called "front page" filing. Once the matrix is received it is then used by the clerk's office in creating the master mailing list (MML) as described in LBR 2002-1(d)(1)(A). Changes to the MML are discussed in LBR2002-1(d)(1)(C), and Local Form 2002-1 (Master Mailing List Change Form) should be used, a copy of which is available from the court's web site. Once the MML is created, the matrix is used only for historical purposes and changes to it would have no effect.

A person submitting a matrix who wishes to ensure that the information on the disk has been properly and completely input into the court's data base may view an image of the information contained on the disk as well as the related MML, from the court's web site. The court takes great care in insuring that the information contained on the disk is accurately transferred onto the court's data base, however, the court does not compare that data to a paper copy if one is submitted. Special attention should be paid in providing identifying information on the disk itself, including the debtor's last name and the attorney's name as a minimum. The use of sticky labels should be avoided. If the submitting party wants the disk returned, a self addressed stamped envelope or other return information is required. For those who file in the office, the disks can be retrieved from the office.

## Electronic Initiatives

The court in cooperation with the Chapter 13 office has developed a method for the electronic filing of documents by that office and also for electronically receiving imaged documents filed with the clerk's office. In addition, the court internally has introduced a program called E-Docs, which is the electronic signing of various orders. Almost all of the notices given by the court are now electronically sent to the Bankruptcy Noticing Center (BNC) who, then in turn, provides mail out copies, or some form of electronic notice where requested under the EBN concept, as required and directed. As a result of these initiatives, the "paper file" maintained by the clerk is no longer the complete file; the only "complete" file is the "non-paper," or electronic file. The electronic file is available for viewing and printing over the court's web site at [www.waeb.uscourts.gov](http://www.waeb.uscourts.gov).

In June 2002, there were 21,108 documents filed with the court, of these, 4963, or 24% were filed electronically. In September 2002, of the 22,566 documents filed, 7,066, or

# From the Clerk cont'd

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31% were filed electronically. Between 40% and 50% of all documents filed are in Chapter 13 cases; in September 2002, approximately 40% of all documents in Chapter 13 cases were filed electronically.

## Name On Checks

The court issues receipts for approximately \$9,000 of funds received each day. These funds are in the form of cash, credit cards and checks. In order for these funds to be receipted and credited properly please note specific identification such as case number, debtor name and if appropriate, the purpose of the payment on the face of checks.

## Better Identity Of Items In Various Pleadings

Proper identification of documents is an important part of ensuring documents are processed correctly. Care should be taken that the caption and the case number are correct, that all pleadings, including proposed orders are signed as required by FRBP 9011 and LBR 9004-1 with the name of the signatory typed beneath the signature, that the signature page of a proposed order includes a portion of the text of the document, and that an abbreviated name of the paper appear at the left side of the bottom of the paper.

## 9014 Service Tips

FRBP 9014 requires that service in contested matters is to be in the manner provided for service of a summons and complaint by Rule 7004. FRBP 7004(a) permits service in the manner of FRCP 4(a), and 7004(b) permits service by First Class Mail. Almost all service in bankruptcy is accomplished by mail. Subsections (1) through (10) provide specific direction as to various entities if mail is selected as the form of service.

When an order is presented following notice and hearing where there has been no objection or response, the court reviews the process used for procedural correctness. The review on service is very similar to that used for review of defaults in adversary proceedings. If the service has not been in accordance with FRBP 7004, the proposed order is returned until proper service has been effected. Service on corporations, partnerships or other unincorporated associations must be made as set out in sub-section (3), upon the United States or other governmental entities as provided for under sub-sections (4),(5), and (6) and upon the debtor as provided for under sub-section (9).

*Editor's note: Service upon a debtor under 7004(b)(9) also requires that the debtor's counsel be served with the pleading, if the debtor is represented by counsel in the bankruptcy case.*

Sub-section (h) provides special rules for service on FDIC Insured Depository Institutions. In processing proposed orders it is, at times, unclear whether or not the entity served falls within this category. In presenting the certificate of service, it would be helpful for the presenting party to clearly state the status of entity served, *i.e.*, "ABC Bank, an FDIC insured institution," or "ABC Financial, a non-FDIC insured institution."

Another issue that arises is where an entity being served is

known to be represented by an attorney, such as a debtor seeking to avoid a judicial lien under 11 USC 522 (f) where the judgment creditor was represented by an attorney. As with original process, service on the attorney is generally not proper service.

## Matrix Format Guidelines

Pursuant to LBR 1007-2, a matrix containing the names and address of the debtors, their attorney and all the creditors and equity security holders shall accompany each voluntary petition. The format of the matrix is an electronic format on 3.5-inch floppy diskette, and not in paper format. If a matrix is submitted in both disk and paper, the disk shall be controlling. IBM PC formatted 3.5-inch floppy diskette.

ASCII text file. File must have a .txt file extension.

Name file with debtor's last name, *i.e.*, SMITH.TXT

One case per diskette.

Diskettes submitted to the clerk's office should be scanned prior to submission using an updated version of an anti-virus software.

Name and Address Standards:

Names & Addresses are to be positioned in a single column.

Creditor name & address shall not exceed four lines, maximum 34 characters per line.

First line - name of addressee. If creditor is an individual list the last name first, *i.e.*, Doe, John; Doe, Dr John

Second & third lines - Attention, c/o, street address and/or Post Office box address

Fourth/last line - city, state, 5 or 9 digit zip code. The standard two letter abbreviation without punctuation is to be used for the state, *i.e.*, WA, ID etc.

Space three lines after the last line of the address and the first line of the next creditor.

Creditor entries need not be alphabetized.

List creditor once, even if there are multiple accounts.

Do not include account numbers on the mailing list.

### Fax Filing:

If utilizing a fax filing service pursuant to the General Order on fax filings, submit matrix in paper format with petition.

Mail diskette to clerk's office the same day the petition is filed by the fax filing service.

Change to master mailing list (MML) (LBR 2002-1 (d)(1)(c)):

Submit in paper format.

List only the names and addresses of additional creditors. See Name & Address Standards.

Local Form 2002-1. Matrix Format Guidelines

Page 2 Instructions for saving list of creditors to diskette:

If using third party petition software package:

Save the creditors to a formatted diskette.

Name the file with the debtor's last name and the extension ".txt" (*i.e.*, smith.txt).

Close the software program and open the word processing program.

Open the debtor specific .txt file and ensure that the mailing list complies with the Name and Address Standards (page 1):

*Continued on Next Page*

# Defaulting to Standard Note Provisions

By Patrick Hussey

The 9th Circuit recently issued a decision, *In Re Crystal Properties, Ltd., L.P.*, 268 F.3d 743 (9th Cir. 2001), which again shows that "standard" language can produce unpleasant surprises. The litigation involved a lender's entitlement to default interest under a secured promissory note. The note at issue contained the following typical clause:

Should default be made in any payment provided for in this note, ... at the option of the holder hereof and without notice or demand, the entire balance of principal and accrued interest then remaining unpaid shall become immediately due and payable, and thereafter bear interest, until paid in full, at the increased rate of five percent (5%) per annum over and above the rate contracted for herein. No delay or omission on the part of the holder hereof in exercising any right hereunder, ... shall operate as a waiver of such right or any other right under this note....

After the loan went into default, the lender's predecessor notified the borrower that the loan was in default and that the default interest rate would apply. Negotiations ensued and ultimately were unsuccessful. The borrower filed Chapter 11. In the Chapter 11, the lender's claim for default interest from and after the date of default was contested and also the lender's claim to collect default interest from and after the maturity date of the loan was contested.

The 9th Circuit first determined that under the note language, "the entire balance of principal and accrued interest then remaining" becomes immediately due and payable "at the option of the holder." The right to

accelerate the unpaid debt is therefore at the lender's option. The language provides that if this option is exercised the note bears from that point an increased default interest. The Court ruled that the use of the word "thereafter" can only mean that the default interest rate does not become effective unless the holder of the note exercises its option to accelerate. It then further concluded that both state and federal courts have made clear the "unquestionable" principle that, even when the terms of a note do not require notice or demand as a prerequisite to accelerating a note, the holder must take affirmative action to notify the debtor that it intends to accelerate. In other words, the language in the above paragraph "without notice or demand" is not legally effective. The words "without notice or demand" do not alter the requirement that the holder of the note must carry out some unequivocal affirmative act to exercise its option to accelerate. In this case, the lender had not taken such affirmative action and therefore was not entitled to default interest.

The 9th Circuit also rejected the lender's contention that it was entitled to default interest from and after maturity. It ruled that the default interest provision contemplates that default interest will be payable only if the lender elects to accelerate and the full principal balance becomes due prior to the maturity date. After the maturity date, there is no debt to accelerate.

It was suggested by the Court that the lender could have easily drafted a provision which triggered the default interest provision either upon maturity or acceleration. It gave a litany of examples from reported decisions. All essentially provide that default interest automatically kicks in upon any default in payment or upon failure to pay upon maturity.

## From the Clerk cont'd

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Choose the "Save As" function in your word processing software. In most software programs there will be a box that indicates the format of the document (*i.e.*, Word Document, WordPerfect 6/7/8/9/10). This box is located under the name of the file. Click on the drop-down arrow and select either ASCII DOS Text, Plain DOS Text or Text Only. These are the only formats that will be accepted.

Save file in correct format.

Label diskette with debtor's last name and attorney name. Do not use sticky labels that may detach from diskette:

If not using third party software package:

Open word processing program and enter the creditor list in

accordance with the Name and Address Standards (page 1).

Choose the "Save As" function in your word processing software. Name the file with the debtor's last name and the extension ".txt" (*i.e.*, "smith.txt"). In most software programs there will be a box that indicates the format of the document (*i.e.* Word Document, WordPerfect 6/7/8/9/10). This box is located under the name of the file. Click on the drop-down arrow and select either ASCII DOS Text, Plain DOS Text or Text Only. These are the only formats that will be accepted.

Save file in correct format. Save creditors to a formatted diskette. Label diskette with debtor's last name and attorney name. Do not use sticky labels that may detach from diskette.

# Case Notes

## Todd G. and Tina Kennedy, No. 02-03464-W1G

The issue is whether a lien arising from the entry of a consent judgment is a judicial lien subject to avoidance under 11 U.S.C. § 522(f)(1).

Under Washington state law, a lien commences or affixes to the real estate from the time of the entry of the judgment. R.C.W. 4.56.190 and 200. The provisions of § 522(f) do not render the entry of the judgment void, rather it renders avoidable the fixing of the lien which arises from the entry of the judgment. The judgment itself remains a valid final determination of liability and a liquidation of the amount due.

The lien which affixes upon entry of a consent judgment is the same lien which would affix upon entry of a judgment rendered after a contested trial on liability. The lien arises not from the consent of the involved parties but from the exercise of judicial power. It is not a security interest or lien created by agreement under § 101(50), but a judicial lien under § 101(36). The fact that the parties agreed to the entry of the underlying judgment does not change the character of the resulting lien.

## Kory D. Kimball v. John R. Henkel, et ux, No. A01-00197-W1B

This adversary sought to prevent discharge of a debt for fraud or defalcation while in a fiduciary capacity.

Plaintiff was the nephew of the debtor who was the son of Violet. Violet intended to give plaintiff nephew the benefit of her home equity upon her death and a vehicle. This intention was discussed by all the family members. The primary motivation of the family members was to avoid probate and attorney fees. Through a friend of the family, the debtor accessed computer software for testamentary dispositions which would "avoid probate." The defendant and the family friend utilized a Living Trust, a Power of Attorney, and Will form off the software and modified the forms. Collectively, the forms intended to and did provide that \$10,000 (the debtor's estimate of the equity in the house) and the vehicle were bequeathed to the plaintiff with the residue of assets bequeathed to the debtor. Plaintiff did receive the vehicle upon Violet's death.

Before Violet's death the debtor used the Power of Attorney and conveyed the house to the Living Trust. After Violet's death, the debtor, pursuant to his position as trustee of the living trust, refinanced the house on two occasions and ultimately quit claimed the house to himself. Debtor received all the proceeds from the refinancing and eventual sale of the house. Although debtor rented the house and also allowed his 18 year old son to live in it, no rental proceeds were distributed to plaintiff. No other cash assets existed. No funds were given to the plaintiff. Nor did the defendant after Violet's death ever communicate with the plaintiff as debtor was angered by the plaintiff's relocation to Oregon.

The testamentary documents, although ambiguous as to certain provisions, were sufficient to create an express and technical trust under state law. They placed the debtor in a fiduciary relationship with the plaintiff. The debtor breached

that fiduciary relationship. The obligation to pay \$10,000 was not discharged.

## Steven C. and Judy Leppell, No. 01- 04896-W53

Is an accountant required to obtain an order approving employment and to file an application to approve compensation in a Chapter 13?

11 U.S.C. § 327 is the starting point to review compensation of professionals. Section 327(a) provides that the Trustee may employ a professional to *assist the Trustee*. For example, the Trustee may employ a special counsel on a specific case to assist the Trustee in administering an asset. This subsection does not apply here as the accountant was employed by the debtor to *assist the debtor* in preparing and filing tax returns. Subsections (b) and (c) do not apply in Chapter 13s. Subsection (e) only applies to attorneys. 11 U.S.C. § 327 does not require either employment or application to approve compensation for accountants in a Chapter 13 under the circumstances of this case.

Section 328 refers to compensation of professional persons. It states that it applies to persons employed under § 1103 and in certain situations under § 327 which, as just stated, do not apply in this case.

Section 503(b) states a court shall approve administrative expenses after notice and hearing under certain circumstances. Professional persons are referenced in subsection (b)(4) but that subsection only relates to professionals who provide services to creditors which assist the estate as allowed in subsection (b)(3). Accordingly, § 503(b) does not apply in this situation.

Section 330(a) requires an application be filed to approve compensation paid to professionals employment under 11 U.S.C. § 327 or § 1103. Again, since 11 U.S.C. § 327 and § 1103 do not apply in this proceeding, there is no requirement that this accountant's employment be approved. The conclusion is that no Code provision requires the approval of an accountant by separate application for compensation in a Chapter 13 where the accountant is preparing and filing tax returns for the debtor.

LRB 2014 requires an application to approve employment of a professional by a debtor-in-possession, a Trustee or a Creditors' Committee. A Chapter 13 debtor is not a debtor-in-possession so there is no requirement under the local rules that an accountant's employment be approved in a Chapter 13. LBR 2016 is captioned "Compensation of Professional Persons," but nothing in that rule requires an application to approve employment, it relates only to payment of compensation. It refers to employment of a professional by a debtor-in-possession or a Trustee or a Creditors' Committee.

There is no Ninth Circuit (or indeed any circuit decisions) on point nor any trial court decision in the Ninth Circuit which directly addresses this situation. *In re Steinar Pedersen*, 229 B.R. 445 (E.D. Cal. 1999) does conclude that no application to approve employment is necessary for an attorney in a Chapter 13.

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# Case Notes *cont'd*

In circumstances where an accountant is employed by the debtor to prepare and file tax returns, the proper procedure to obtain compensation from the estate is the procedure followed here, i.e., the filing of a Proof of Claim as an administrative expense allowing the Trustee an opportunity to object. If an objection is filed, there would then be a hearing on the merits.

## Dan and Bonnie Schill, No. 01-01342-W13

This case presented the question of whether hypothetical costs of sale should be considered when determining if an inferior lien on a Chapter 13 debtor's home is totally unsecured.

In this case, assuming the highest value of \$100,000, there would be some equity which would secure the lien of Litton Loan Servicing. If hypothetical costs of sale (typically 10% of price in this area) were deducted in determining market value, there would be no value above the first lien. Therefore, pursuant to *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993) and *In re Lam*, 211 B.R. 36 (B.A.P. 9<sup>th</sup> Cir. 1997), Litton Loan Servicing's lien could be stripped if it is determined to be totally unsecured. To determine if costs of sale should be deducted in making this determination, the court relied upon *In re Taffi*, 96 F.3d 1190 (1996). *Taffi* involved a federal tax lien on a Chapter 11 debtor's home. The debtor proposed to retain the home. Although the reference to Chapter 13 debtors is dicta, the court's holding at page 1192 of the opinion determined that hypothetical costs of sale should not be deducted in determining fair market value.

When a Chapter 11 debtor intends to retain property subject to a lien, the purpose of a valuation under 11 U.S.C. § 506(a) is not to determine the amount the creditor would receive if it hypothetically had to foreclose and sell the collateral. Neither the foreclosure value nor the costs of repossession are to be considered because no foreclosure is intended. Instead, when the proposed use of the property is continued retention by the debtor, the purpose of the valuation is to determine how much the creditor will receive for the debtor's continued possession. Hypothetical sales costs are not to be considered because no sale is intended.

Under 11 U.S.C. § 1322(b)(2), the rationale of *Taffi* would apply. The debtor in this case proposed to retain the home. Under such circumstances hypothetical costs of sale should not be deducted to determine the amount of a secured claim under 11 U.S.C. § 506(a) or the rights of a holder of a lien under 11 U.S.C. § 1322(b)(2). If the home has any value to which Litton Loan Servicing's lien rights attach, Litton Loan Servicing allowed secured claim must be treated in accordance with 11 U.S.C. § 1322(b)(2).

## Spokane Sports Bar, No. 02-01608-W11

A Lease Agreement was entered into on June 1, 1990 between Leiphman and debtor's predecessor which provided for a 10-year term ending on the last day of May, 2000. The lease also provided that in the event of a "holdover" after

termination, if the lessors elect to accept rent, only a month-to-month tenancy would be created and not a tenancy for any longer period. No written or oral extension of the lease occurred, although the debtor continued to occupy the premises during all of 2000 and 2001 and paid rent erratically. The lease no longer existed when the Chapter 11 proceeding was commenced on February 27, 2002 and cannot constitute property of the estate under 11 U.S.C. § 541(b)(2). The lease had terminated by its terms and the landlord's Notice to Terminate Tenancy delivered pre-petition and stating it would be effective February 28, 2002 was a termination of the month-to-month tenancy.

Swenson, in November of 2001, had entered into an agreement to purchase the property from the landlord which agreement was subject to several contingencies. The closing date for the transaction was postponed to meet the contingencies which were never met and the sale was never closed. The debtor alleged that it and Swenson had orally agreed to a lease terminating July 30, 2002. Swenson admitted discussions to that effect had occurred but denied any agreement was ever reached as the sale was never closed.

The debtor argued that Swenson, as a vendee-in-possession, was authorized to enter into a binding oral lease with the debtor. The debtor points to the fact that Swenson advertised for tenants and had performed construction and remodeling work on the premises. While this created some ambiguity in Swenson's authority, the sale of the property to Swenson never closed. Entering into an agreement to purchase with closing contingent upon certain conditions did not authorize Swenson to enter into any oral or written lease for the property.

The debtor argued that 11 U.S.C. § 362(b)(10) only excepts from the automatic stay acts taken by lessors under a lease with a *stated term*. Since a month-to-month tenancy is not a lease for a stated term it does not fit into the exception provided by 11 U.S.C. § 362(b)(10) and thus the automatic stay protects the debtor.

The Landlord argued that since termination of leases for a stated term are exempted from the automatic stay, after expiration of a lease, the continued tenancy is also exempt by the automatic stay. That argument is contrary to the language of the Code and would result in different treatment of debtors in the same position, i.e., those debtors who had an expired lease followed by a holdover month-to-month tenancy and debtors who had always occupied property under a month-to-month tenancy. A month-to-month tenancy under Washington law has no stated term. R.C.W. 59.04. It is merely the right to occupy the premises with that right terminable upon 30 days notice by either party. A month-to-month tenancy does not fall within the scope of 11 U.S.C. § 362(b)(10) as it is subject to termination at any time, subject only to 30 days notice.

In this case, the Notice to Terminate the tenancy was served on January 15, 2002, effective February 28, 2002. 11 U.S.C. § 362(a)(1) states that the automatic stay does not toll the running of time under a contract nor a statutory time period. As of the commencement of bankruptcy, on February 27, 2002, the debtor under state law only had the right of occupancy for one day. This constituted cause to lift the automatic stay to allow landlord to exercise its state law rights.

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