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

Newsletter

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COMMENTS FROM THE CHAIR

By Jonathan E. Cohen
Outgoing Chair, Bullivant Houser Bailey PC

"Professionalism – the conduct, aims or qualities that characterize or mark a profession or a professional person."

Meriam-Webster's Collegiate Dictionary, **www.m-w.com**.

In an earlier edition of this newsletter I asked for volunteers to write articles on professionalism for publication in the newsletter. Then I asked myself, "What does 'professionalism' really mean?" I naturally turned to the dictionary for a hint. The definition, broken down into some, not all, of its component parts, led to these questions:

• What are the aims that characterize our profession, and who establishes those aims?

• What are the qualities that mark our profession, and from whose perspective are those qualities drawn?

• What is desirable conduct within our profession?

The aims set forth in the Oregon State Bar Statement of Professionalism include:

• Sensitively and fairly serving the best interests of our clients and the public;

• Fostering respect and trust among lawyers and between lawyers and the public;

• Promoting the efficient resolution of disputes;

• Simplifying transactions;

• Making the practice of law more enjoyable and satisfying;

• Endeavoring to increase our participation in pro bono activities;

• Helping lawyers recognize their obligation to make legal services available to all members of society; and

• Supporting activities that educate the public about legal processes and the legal system.

Disciplinary Rule 7-101(A)(1) tells us that it is okay if, while zealously representing our clients, we "acced[e] to reasonable requests of opposing counsel which do not prejudice the rights of the lawyer's client, ... [are] punctual in fulfilling all professional commitments, ... [avoid] offensive tactics, or ... [treat] with courtesy and consideration all persons involved in the legal process."

It is the legal profession itself that establishes, and has established, the aims of the profession. Although outside forces such as clients and the general public influence the profession, ultimately lawyers are responsible for setting the goals that define professionalism. In my opinion, the goals have been well stated. Achieving and maintaining these goals remains the ongoing responsibility of all lawyers.

What qualities mark our profession? The answer to that question depends on who you ask. If you ask most lawyers, they will point to the positive traits of the legal profession: resolving disputes, educating the public, performing charitable activities, and representing clients pro bono. Some members of the general public or the news media say there are few good qualities to the legal profession, and point to the publicized occasions where the characteristics of certain lawyers cast a negative light on all lawyers. Many people say that they don't really think about lawyers until

they need one. In any event, the conduct of individual lawyers highlights the positive and negative qualities of the profession. Lawyers displaying the positive qualities of the profession will cast a bright light on all lawyers. Those lawyers failing to act in accordance with the stated goals of the profession will cast a negative light. It is up to each of us to do our part, and to encourage others, to uphold our stated goals.

Does our conduct show that we are displaying and maintaining our professionalism? In most cases we do not fall short. In my experience, the lawyers with whom I work in all facets of my practice, whether in my office or on the other side of a transaction or lawsuit, display high levels of professionalism. Unfortunately, the few lawyers who do not display the good qualities of professionalism often do so at a time or in a place that attracts public scrutiny. The news media, television shows, and movies often portray the actions of lawyers in a fashion that has the general public thinking, even for a moment, that the worst possible conduct is the norm in the profession. It has proven to be a tough perception to overcome.

So you ask, "Jon, what is your point?" Take the next step. While most of us naturally apply the principles of professionalism—by directly teaching younger lawyers in our firms, or by setting a good example when interacting with others lawyer in particular transactions or cases—we need to go out to the public and demonstrate the good qualities of our profession. Our individual adherence to the principles of professionalism will help keep the practice of law a pleasant vocation. The more we praise ourselves, privately and publicly, individually and through organized legal associations, for demonstrating our professionalism, the easier it will be to persuade the public that only a few unprofessional members of the bar create a majority of the negative stories about lawyers.

For many lawyers, maintaining our standards of professionalism is a routine part of our practice. I encourage everyone to make the extra effort actively to promote our goals and demonstrate to the community the good qualities that characterize our profession and our professionals.

You Too Can Be An Author

If you would like to write an article, or would like to read an article on a particular topic, please write to:

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111 SW 5th Ave., Ste. 3500
Portland, Oregon 97204

Your letter should include the topic for the article and indicate whether you are willing to be the author.

Debtor-Creditor Newsletter

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The purpose of this publication is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities.

Representing the Immigrant Client in Bankruptcy

By Joanne Reisman
Attorney at Law

(Note: This article draws from the author's practice experience, which involves Hispanic clients. While many of these observations apply to other categories of immigrants, keep in mind that Hispanic immigrants face unique issues. This is reflected in the following recommendations.)

Many immigrants enter this country illegally, fleeing war, poverty and corruption. The purchase of false papers, including green cards and social security cards, is necessary to seek employment, and thus very common.

As these immigrant workers acquire economic means, they also acquire credit cards and engage in other forms of credit and installment purchasing. Many are naive as to how credit works and do not have sufficient education to be savvy consumers. New immigrants are also often targeted for higher than normal interest rates because they don't have established credit. Finding themselves buried in debt, they seek legal assistance.

To represent these immigrants effectively, it is critical to establish trust. Many of these immigrants come from poor countries where corruption and abuse of legal authority is common and attorneys may be seen as part of this problem. In addition, they fear that someone they deal with here will report them to the immigration authorities and they will be deported. One of the most important aspects of gaining trust is that the attorney or a staff member must communicate fluently with them in their native language. (It is not enough to have someone who took high school Spanish and can fumble through a polite conversation.) Many of these immigrants may not know about or understand our concept of attorney/client confidentiality. Taking the time to explain this to the immigrant client before starting to discuss the case will often minimize communication barriers.

ABILITY OF NON-CITIZEN OR ALIEN TO FILE FOR BANKRUPTCY

Section 109(a) of the Bankruptcy Code allows a person who resides in the United States, is domiciled here, does business here, or has property here, to file bankruptcy. However, the debtor's status as a foreign citizen may affect how some bankruptcy laws apply to the debtor. For example, several cases in the Fifth Circuit Court of Appeals have denied the use of the homestead exemption for Florida property where the debtor's immigration status was not permanent and the debtor therefore could not demonstrate any intent to reside permanently in the United States. None of the local Oregon practitioners contacted by this author reported any issues arising from an immigrant's status in consumer bankruptcy cases.

Bankruptcy Rule 1005 requires the debtor to list the debtor's social security number and all other names used by the debtor within six years before bankruptcy in the caption of the petition. These requirements, seemingly easy for United States citizens, can pose special challenges for the immigrant client.

HISPANIC NAMES AND SURNAMES

Hispanics typically have two surnames. The first last name is the father's family name, and the second last name is the mother's paternal family name. As people in the United States typically use the father's paternal last name for legal identification, the correct last name would then be the first of the two last names. For example: David Espinoza Rodriguez. The last name of David's father is Espinoza and is technically the legal name equivalent to the last names called for on our legal forms. Some practitioners just put down both last names (such as "Espinoza-Rodriguez"), which is acceptable because it gives both last names for notification purposes. The use of Rodriguez alone would be inadequate. (One way to remember this is by thinking of the very last name as the one that can "drop off" the end, leaving the next to the last name—the more permanent paternal name—when it is passed to the children and joined with their mother's paternal or maiden name. So if David Espinoza Rodriguez marries Lourdes Jimenez Garcia, their children will use the last names "Espinoza Jimenez.")

Husbands and wives have different last names. The wife does not take the husband's name at marriage but continues to use the family names of her father and mother. The bankruptcy court will require proof of marriage pursuant to Local Rule 1002-1, which requires joint debtors with different surnames to attach a certificate of marriage, or an affidavit detailing the pertinent information regarding the marriage and why they were unable to obtain and attach a copy of the marriage certificate, to the petition. Often debtors will have a non-certified copy of their marriage certificate in their possession. Although the rule does not specifically so state, the marriage certificate needs to be translated into English and an affidavit of the debtors certifying that the copy is a true copy and that the translation is accurate must be attached. (A separate affidavit for the translator can also be added certifying the accuracy of the translation, but it is not necessary.) A sample affidavit is included at the end of this article.

The confusion over Hispanic names in our system may also complicate searches for records. When obtaining records, if the custodian states that no records have been found under the paternal last name,

be sure to ask the attendant to search by the mother's maiden name which is often used as the last name for filing data.

The use of false documents for employment often leads to the use of the associated false names for commercial transactions. It is important to ask the client if they have used other names and list these on the bankruptcy forms. All names should be listed on the bankruptcy petition—false names, the mother's paternal last name, and any other names should be listed under the category of "All Other Names used by the Debtor in the last 6 years."

SOCIAL SECURITY NUMBERS

It is especially important to find out if the client is using a false social security number. Winning the client's confidence is important to finding this out. It is a good idea to ask twice—the first time, just ask if there is a number, and the second time, try to verify if the number given is a legitimate number. Since the lawyer does not want to offend those immigrant clients who have proudly obtained legitimacy the best way to introduce the subject is to say: "I'm sorry but I need to ask you something—I don't mean to offend you, but is the number you just gave me a real number or is it "chocolaté" or fake, because I realize that some people obtain fake numbers to work. If this is not a real number it will be discovered when we file the bankruptcy, and I have a better way to solve the problem if you don't have a real number." Reassure the client that anything they tell you is privileged and confidential and that you don't participate in reporting illegal immigrants to the immigration service.

The bankruptcy rules require the debtor to list the debtor's actual social security number. There does not appear to be a requirement to list all other social security numbers linked to or used by the defendant. While listing the number may be advisable to disclose all useful information relating to the debtor's financial transactions, such disclosure may expose the client to criminal prosecution for obtaining and using a false social security number. If the practitioner believes that listing the number is indicated (for example, in a case where there are assets available for distribution to creditors and creditors will need to use the number to identify the debtor in order to file proofs of claim), the number can be disclosed without harming the client. The practitioner can do this by attaching a separate sheet to the petition, listing the number and stating that this number, while not belonging to the debtor, may be associated with the debtor in some financial records. This avoids a judicial admission of misuse. In a no-asset case, the practitioner may be better off not raising the issue voluntarily as the rights of the creditor are not going to be impacted.

TAX ISSUES

Clients that do not have a social security number can file a bankruptcy once they have obtained a proper tax identification number. Tax identification numbers are available from the Internal Revenue Service to anyone that needs to report taxable income, without regard to their immigration status or their legal right to work. It is best to refer the client to a bilingual accountant who can handle the application process. The process usually takes four to eight weeks, although sometimes correspondence from the Internal Revenue Service requesting further information may delay the process. The cost is minimal - a $15.00 fee to the Internal Revenue Service, and approximately $25.00 to the accountant.

To apply for a tax identification number, the client will need a birth certificate and photo identification (preferably an Oregon identification card). Copies are acceptable as long as the copies are certified by a notary as true copies. While clients are working on this, they can also apply for tax identification numbers for their dependents. The applications for dependents require a birth certificate and copies of school records for each child under age 18. The fact that the client and the other parent are divorced does not affect the process. Technically, tax identification numbers are only available for dependents living in Mexico and Canada, but the Internal Revenue Service has been routinely approving and issuing tax identification numbers for dependents living in many other countries. Once the tax identification number is issued, the client can start claiming the dependents as additional exemptions to reduce their withholding.

Some immigrants may be able to claim outstanding tax refunds, and bankruptcy trustees may require tax returns claiming refunds to be filed. Because many immigrants (particularly those who do not have valid social security numbers) are not aware that they can file tax returns, they may have neglected to do so for years. Some may have many children or may be supporting parents and siblings back in their home country. They could claim multiple dependents, which may lead to significant refunds. If the bankruptcy filing can be postponed, it might be wise to educate these immigrants on how to collect tax refunds. On the other hand, many immigrants are victims of poor tax advice. These immigrants may have filed returns taking unauthorized deductions or claiming too many exemptions. They may owe taxes and not be aware of it.

GIFTS OR LOANS TO RELATIVES

Many immigrants send money out of the country to support family members. The practitioner needs to question the client carefully to determine if this money needs to be disclosed in section 7 of the statement of financial affairs as a gift, in section 10 of the

statement of financial affairs as an "other transfer," or in the budget in schedule J as a support payment. The practitioner should also determine if the recipients should be listed as dependents on schedule I - "current income of the individual debtor(s)". To make this determination, the practitioner should check to see if the payments have been made as part of a long established pattern, for example, a set amount every month. This would indicate that the payments are support, not gifts. If uncertain, the practitioner can list the payments under section 7 or section 10 of the statement of financial affairs, label them as support payments, and indicate the debtor's family relationship to the recipient.

In a chapter 7 case, the trustee can pursue the transfer and try to recover it via legal actions in the foreign jurisdiction. Seeking to recover funds in a foreign jurisdiction is usually too difficult and expensive, and trustees rarely do so, particularly when the amount at issue is small. The trustee can only object to the discharge of the debtor if the transfer was made to hinder or defraud a creditor. In a chapter 13 case, if the trustee determines that the transfer was a preference, the client may have to pay an amount into the plan equivalent to the amount transferred.

FOREIGN ASSETS

While the legal process to recover money or property in foreign jurisdictions is often cost- and time-prohibitive for the trustee, it is still important to question the immigrant client and make sure that all foreign properties and assets are listed in the bankruptcy schedules. Many immigrants have mentally written off properties left behind in troubled countries and will not automatically put this information down. The practitioner should specifically ask about these properties. Other countries may have unique forms of property ownership that need to be clarified. For example, in Mexico there are co-op arrangements for buying property, where each of the co-owners has the right to a certain amount of land on which to build a home or to farm, but cannot sell their property interest.

IMMIGRATION ISSUES

Immigration practitioners agree that filing bankruptcy does not directly and adversely affect an immigrant's immigration status. Filing bankruptcy does not constitute an act of moral turpitude nor does it establish that the new immigrant has become a public charge. There are no questions on the immigration forms that require disclosure of a bankruptcy, nor is bankruptcy a deportable offense. Similarly, immigrants are not required to disclose their immigration status on the bankruptcy papers.

Nonetheless, many immigration officials processing immigration applications do not view bankruptcies favorably. Therefore, the client should be counseled not to volunteer information about the bankruptcy. Of course, the client will need to answer honestly if asked a direct question.

Immigrants sometimes use sham marriages with citizens of the United States to obtain working papers. While this does not directly affect the bankruptcy process, the practitioner should be aware that clients may be reluctant to discuss matters relating to their marriages, i.e. assets or debts, because of fears that any admissions to the attorney could be reported to the immigration authorities and will effect the client's immigration application. It is critical to establishing trust to elicit complete information.

The author gives special thanks to Bob Altman, Richard Parker, Phil Hornick, and Jose Louis Monteblanco, for their assistance with this article.

Form: Sample Affidavit Certifying Translation and Authenticity of Marriage Certificate:

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

In re Espinoza/Jimenez)
) Case No.______________________
)
) DECLARATION UNDER PENALTY
) OF PERJURY RE: CERTIFICATE OF
) MARRIAGE OF DEBTORS

The undersigned debtors certify under the penalty of perjury that the attached is a true copy of the original marriage certificate from Mexico of the debtors, in Spanish, and attached to this is an English translation of the marriage certificate as received from the debtors from Carlos Segovia, a qualified translator, which debtors believe to be a true and accurate translation thereof.

DATED: ____________________________

____
Signature: Lourdes Jimenez Garcia

____
Signature: David Espinoza Rodriguez

Reclamation Rights: The Practicalities of a Seller's Right to Reclaim Its Goods

By Heather E. Carey
Greene & Markley, P.C.

A seller's right to reclaim its goods once it learns of a buyer's insolvency can be a very useful tool. Both Oregon's version of Article 2 of the Uniform Commercial Code ("UCC") and the Bankruptcy Code provide specific requirements for proper exercise of reclamation rights. This article explores what those requirements are, the effect of events intervening between delivery of goods and reclamation, the priorities between a reclaiming seller and other parties, and the powers of the bankruptcy trustee against a reclaiming seller.

I. Reclamation Under Oregon UCC (ORS ch. 72)

Four provisions of Oregon's version of the UCC are available to the creditor seeking to reclaim goods: (1) ORS 72.7050 (UCC § 2-705), (2) ORS 72.7020 (UCC § 2-702), (3) ORS 72.5070 (UCC § 2-507), and (4) ORS 72.5110 (UCC § 2-511). ORS 72.7050 allows a seller to stop delivery of goods in transit. ORS 72.7020 allows the seller to reclaim delivered goods if the seller satisfies certain requirements. ORS 72.5070 and 72.5110 allow the seller to reclaim its goods in cash-only sales.

A. Stopping Delivery of Goods in Transit (ORS 72.7050)

The first major power a seller may exercise to reclaim its goods is the power to stop delivery while the goods are still in transit after the seller learns of the buyer's insolvency. ORS 72.7050 provides as follows:

"(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent as provided in ORS 72.7020 and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until

(a) Receipt of the goods by the buyer; or

(b) Acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) Such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or . . . .

(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

. . . .

(d) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor."

ORS 72.7050. UCC § 2-705 is identical to ORS 72.7050.

Thus, in a contract for the sale of goods on credit, if a seller learns of a buyer's insolvency, the seller may stop delivery of goods that have already been shipped but have not yet reached the buyer. ORS 72.7050. Insolvency, as defined by ORS 71.2010(23), means that an entity has ceased paying its debts in the ordinary course of business, cannot pay its debts as they become due, or is insolvent within the meaning of the Bankruptcy Code, which states that an entity is insolvent if its liabilities exceed its assets. 11 USC § 101(32).

Stopping delivery in transit carries with it issues concerning subpurchasers, ***i.e.***, those entities to which the buyer has already resold the seller's goods. Consider the following scenarios: Buyer One and Seller enter into a contract for the sale of goods wherein Seller is to ship the goods to Buyer One's place of business. Buyer One then contracts with Buyer Two (the subpurchaser) for the sale of the same goods. Subsequently, (1) Buyer One contacts Seller and tells Seller to ship the goods directly to Buyer Two, or (2) Buyer One contacts the carrier and tells the carrier to reroute the shipment to Buyer Two's warehouse.

In ***Butts v. Rosboro Lumber Co. (In re Summit Creek Plywood Co., Inc.***), 29 UCC Rep Serv 860 (D Or 1980), the district court considered the first scenario. In that case, the court held that although Buyer One contacted Seller and told Seller to ship the goods directly to Buyer Two, it was not a reshipment within the meaning of ORS 72.5070 depriving Seller of the right to reclaim the goods, as against Buyer One. ***Id.*** at 866. In ***Butts v. Glendale Plywood Co.***, 710 F2d 504 (9th Cir 1983), the court of appeals considered the second scenario. Specifically, while the goods were in transit, Buyer One sold its interest in the goods to Buyer Two and Buyer One contacted the carrier to tell it to ship the goods to Buyer Two instead. There, the court held that rerouting the shipment from Buyer One to Buyer Two without the knowledge of the Seller constituted a reshipment under § 2-705(2)(c), terminating Sellers' right to stop shipment. ***Id.*** at 505.

An important consideration under ORS 72.7050 is the reclaiming seller's rights against third parties, such as good faith purchasers or secured creditors with after-acquired property clauses. In ***Ramco Steel v. Kesler (In re Murdock Mach & Eng'g Co. of Utah)***, 620 F2d 767 (10th Cir 1980), the court of appeals explained that under UCC § 2-705, the seller's right to stop delivery of goods is superior to all other parties until the buyer receives the goods. The court further distinguished the right to stop delivery of goods in transit (UCC § 2-705) from the right to reclaim delivered goods (UCC § 2-702(2)), stating that it found "a significant difference of treatment between the seller's right to reclaim goods that an insolvent buyer has already received . . . , and the seller's right of stoppage with respect to goods not yet received by the buyer . . . . The seller's right to reclaim

goods in the buyer's possession is expressly made subject to 'the rights of a buyer in ordinary course or other good faith purchaser . . . .'" ***Murdock***, 620 F2d at 773-74. In contrast, UCC § 2-705 (the seller's right to stop delivery) does not mention the rights of good faith purchasers. ***Id.*** Given this reasoning, it is unlikely that secured creditors with after-acquired property clauses, who would ordinarily take the place of a good faith purchaser, could supersede the reclaiming seller's right to stop delivery of goods in transit.

It is essential to remember that the seller's right to stop delivery under ORS 72.7050 applies only if the buyer has not yet received the goods. ***See Stumbo v. Paul B. Hult Lumber Co.***, 251 Or 20, 35-36 444 P2d 564, 571-572 (1968). If the goods have already been delivered to the buyer, the seller may attempt to reclaim its goods under ORS 72.7020.

B. Reclaiming Goods After Delivery (ORS 72.7020)

ORS 72.7020 is the primary source of law for reclamation of goods, but applies only after the buyer or subpurchaser has received the goods. The section's purpose is to provide sellers with the statutory equivalent to the common law remedy of rescission. ***In re Telemart Enters., Inc.***, 524 F2d 761 (9th Cir 1975). Official Comment 2 to UCC § 2-702 states that "any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller."

ORS 72.7020 provides that where a seller learns of a buyer's insolvency, the seller may: (1) refuse to deliver the goods; (2) stop delivery of the goods under ORS 72.7050; or (3) reclaim goods already delivered. Specifically, ORS 72.7020 states, in pertinent part, as follows:

"(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under ORS 72.7050.

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. . . .

(3) The seller's right to reclaim . . . is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under ORS 72.7030. Successful reclamation of goods excludes all other remedies."

Although the plain language of ORS 72.7020(1) provides that the section only applies to cash sales, the court in ***Collingwood Grain, Inc. v. Coast Trading Co., Inc. (In re Coast Trading Co., Inc.)***, 744 F2d 686 (9th Cir 1984) held that the UCC's counterpart to ORS 72.7020 may also be applied to cash sales. ***Id.*** at 756 (relying on UCC § 2-507 Official Comment 3 (1976)).

ORS 72.7020 requires the seller/creditor to make a demand to the buyer before the seller can reclaim the goods. Although the plain language of ORS 72.7020 does not require that the demand be made in writing, a demand should always be made in writing by both first class mail and certified mail, return receipt requested. In the case of a corporate buyer, the mailing should be sent to the registered agent of the corporation, as listed in the records of the corporation division of the corporation's home state. The mailing should also be made in the same manner to any person to whom the contract requires notices to be given. The only express requirements concerning the demand are the time limitations contained in subsection (2).

1. Time Limits for Reclaiming Goods

There are three different time limits that may apply to making a reclamation demand. ORS 72.7020(2).

a. Ten-day Reclamation Period

The general rule is that the seller has ten days within which to make its demand. The ten-day period of reclamation is calculated from the date the buyer receives the goods. ORS 72.7020(2) ("***within*** ten days after the ***receipt***") (emphasis added); UCC § 2-103(1)(c) (defining "'receipt' of goods" as "taking physical possession of them"); ***see also*** UCC § 2-702 Official Comment 2 ("The ten-day limitation period operates from the time of receipt of the goods."); ***Butts v. Bendix Forest Products Corp. (In re Summit Creek Plywood Co. Inc.)***, 27 BR 209, 214 (Bankr D Or 1982) ("The right of reclamation provided by ORS 72.7020 arises upon receipt of the goods by the buyer.").

If the contract provides that the goods will be shipped to the buyer F.O.B. buyer's place of business, the proper date to begin counting the ten-day period is the date the goods actually arrive at the buyer's place of business. For example, if the seller shipped the goods to buyer on August 28, 2001, and buyer received the goods on September 3, 2001, the ten-day period does not begin to run until September 3, 2001. Thus, the seller need not make its demand for reclamation until September 12, 2001 (ten calendar days from the date the buyer received the goods).

If, however, the contract between the buyer and seller specifies that the goods will be delivered F.O.B. Seller's warehouse, the time to begin calculation is when the buyer picks up the goods. For example, if the seller makes the goods available to the buyer at the seller's warehouse on August 15, 2001, and the buyer comes to pick up the goods on September 3, 2001, the ten-day period begins to run on September 3, 2001. Seller has until September 12, 2001 to make its reclamation demand. ***See, Dopps v. Coast Trading Co. Inc. (In re Coast Trading Co., Inc.)***, 31 BR 667, 668 (Bankr D Or 1982) (acknowledging the admission of the parties that the ten-day reclamation period started to run from the date buyer picked up the goods from the seller's location, without regard to when the goods reached the buyer's storage facility).

Several questions arise as to the proper calculation of the 10-day reclamation period. First, does the 10-day limitation apply to calendar or business days? The UCC does not

specify. Given the uncertainty, sellers should assume that calendar days apply. Thus, if the buyer received the goods on September 1, 2001, the seller has until September 10, 2001, to make its reclamation demand.

Second, should the seller count the first and last day of the periods or should it begin counting on the day after the period begins? In other words, if the buyer receives the goods at 5:58 p.m. (the end of the business day) on September 3rd, should it begin counting the ten-day period as of September 3rd or September 4th? After reaching the tenth day in the ten-day period, should the seller make its demand on that tenth day or does it have until the next day? The UCC does not provide definitive answers to these questions. To be safe, sellers should count the period as follows: day one of the reclamation period begins on the date the buyer receives the goods (in our scenario, September 3, 2001), and the seller's reclamation demand must be dated and postmarked by September 12, 2001. In bankruptcy, a seller should refer to Bankruptcy Rule 9006(a) for answers to these questions, which states that the first day should not be counted.

b. Beyond the ten-day Reclamation Period

One exception to the general ten-day time period applies where the buyer presented the seller with a written misrepresentation as to the buyer's solvency. ORS 72.7020(2) states that the ten-day reclamation period does not apply if the buyer made a written misrepresentation as to the buyer's solvency within three months of delivery of the goods. ORS 72.7020(2); ***see also*** JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 32-11, at 302 (4th ed. 1995). Although ORS 72.7020(2) does not specify the length of time permitted for reclamation, the courts would likely employ a test of reasonableness as to whether the seller's demand was timely.

In order for the creditor to utilize this longer period of time, there must have been "(1) a written (2) misrepresentation of solvency (3) made within three months of delivery (4) to the particular creditor who is attempting to rescind the contract." ***Potts v. Mand Carpet Mills (In re Bel Air Carpets, Inc.)***, 452 F2d 1210 (9th Cir 1971). The court of appeals concluded that the policy supporting UCC § 2-702 "requires that the written misrepresentation be presented, not dated, within the three-month period." ***Potts***, 752 F2d at 1212. The Official Comment to UCC § 2-702(2), however, provides that "[t]o fall within the exception [to the ten-day limitation period] the statement of solvency must be in writing, addressed to the particular seller and <u>dated</u> within three months of delivery." (Emphasis added.) The court in ***Potts*** recognized the conflict between its conclusion and the UCC's Official Comment but stated that any misrepresentation by the buyer as to its solvency is <u>made</u> when the misrepresentation is <u>given</u> to the seller, regardless of what time period the written statement of financial condition purports to represent. ***See id.*** at 1213.

c. Reclamation Period in Bankruptcy

Another exception to the general ten-day time period applies where the buyer files bankruptcy before the expiration of the original ten-day period. After the bankruptcy petition is filed, the seller has twenty days from the date the buyer received the goods to make its demand for reclamation. 11 USC § 546(c)(1)(B).

A prudent seller should make its demand as soon as it obtains notice of the buyer's insolvency or bankruptcy. Although making a demand for goods to which the seller is arguably not entitled is not harmful, failing to make a timely demand is lethal to a seller's reclamation rights.

2. <u>Priority Issues Relating to Reclamation</u>

The first major obstacle in any creditor's attempt to reclaim its goods is other creditors. ORS 72.7020(3) provides that the seller's right to reclaim its goods is subject to the rights of a buyer in the ordinary course and other good faith purchasers. The secured party with the after-acquired property clause becomes a good faith purchaser who wins a priority battle over the seller's right to reclamation. ***Evans Products Co. v. Jorgensen***, 245 Or. 362, 372, 421 P2d 978, 983 (1966). Generally, secured creditors holding a perfected security interest with an after-acquired property clause have a perfected security interest in goods (usually inventory) once the goods reach the debtor's place of business. ***See generally*** ORS 79.2040. Since the seller's right to reclaim the goods under ORS 72.7020 does not arise until the buyer has received the goods, the reclaiming seller takes subject to any secured creditors with perfected security interests in after-acquired property.

In ***Bendix***, 27 BR at 212, the bankruptcy court held that the "holder of a prior perfected security interest in future acquired inventory has priority over a reclaiming seller." In ***Collingwood Grain***, 744 F2d at 690-91, the court of appeals held that a seller's reclamation rights are subordinate to a secured creditor. In ***Stumbo***, 251 Or at 35 n. 10, 444 P2d at ___, the court noted in ***dicta*** that a secured party's rights in goods subject to reclamation will ordinarily have priority over a reclaiming seller's rights. All these courts reasoned that because a secured creditor in most instances qualifies as a good faith purchaser for value, the secured party qualifies for the higher priority afforded by ORS 72.7020(3).

The consequence of this line of cases is that, practically speaking, the secured creditor with the after-acquired property clause always wins in a priority battle with a reclaiming seller. White and Summers suggest that subsection (3) should be re-drafted to elevate the seller over the secured creditor. WHITE & SUMMERS, § 32-11, p. 305. In the meantime, a seller seeking possession of its goods despite the claim of a secured creditor may choose to pay the secured creditor the value of the secured creditor's lien in order to obtain possession of the goods. COLLIER ON BANKRUPTCY, ¶ 546.04[2][a][ii].

A reclaiming seller may prevail over a secured party with

an after-acquired property clause if the secured party did not act in good faith. For example, in ***American Food Purveyors, Inc.***, 17 UCC Rep Serv 436 (Bankr ND Ga 1974), the court found that the secured creditor had an ongoing relationship with the buyer/debtor and that shortly before the debtor filed bankruptcy, the secured creditor knew of the debtor's precarious financial situation. The court held that the seller's right of reclamation prevailed over the secured creditor because the creditor failed to police the debtor, had knowledge of the debtor's imminent bankruptcy and did not notify the seller. ***Id.*** at 443-44.

Reclaiming sellers must also be wary of subsequent purchasers. Under ORS 72.7020(3), subsequent purchasers of goods may have priority over a reclaiming seller. ***Kerr Pacific Milling Corp. v. Coast Trading Co. Inc. (In re Coast Trading Co., Inc.)***, 31 BR 663 (Bankr D Or 1982), involved the creditor's use of ORS 72.7020 to reclaim its goods. The bankruptcy court held that a subsequent purchaser became both a buyer in the ordinary course and a purchaser in good faith once the goods were delivered to the purchaser, operating to cut off the seller's rights of reclamation. ***Id.*** at 665. "Where a party bases its right to goods solely upon its status as a transferee of a nonnegotiable bill of lading it takes the goods with the same rights as the transferor and is not a good faith purchaser." ***Kerr Pacific Milling***, 31 BR at 665.

If the buyer has already resold the goods before the seller learns of the buyer's default, the seller may not "reclaim" the proceeds of the sale between the buyer and the purchaser. ***Collingwood Grain,*** 744 F2d at 691. In ***Dopps,*** the bankruptcy court cited a New York case, wherein the court held that a seller cannot reclaim proceeds and reasoned that it would be difficult, at best, to try to parse out a debtor's monies to determine which monies resulted from the sale of a particular seller's goods. ***Dopps***, 31 BR at 669. This reasoning appears to leave room for the argument that accounts receivable are different than proceeds, and that accounts receivable are subject to a seller's right of reclamation. However, on appeal in ***Collingwood Grain***, the court of appeals employed a different analysis. The court reasoned that many other cases have held that a seller has no right in the proceeds of his goods and that ORS 72.7020 contemplates only the reclamation of goods and does not contemplate the reclamation of anything else. Thus, the court of appeals appears to have rejected the argument that accounts receivable can be reclaimed.

3. Oregon's Lien Creditor Language of ORS 72.7020

In addition to secured parties and subsequent purchasers, sellers also must worry about bankruptcy trustees. Oregon has retained the phrase "or lien creditor" in its version of UCC § 2-702(3). Oregon's retention of the phrase puts it in the minority of states. After article two of the UCC was amended in 1966, twenty four states (including Washington) deleted the "lien creditor" language from their versions of UCC § 2-702. These states deleted the phrase in order to resolve the problem that the "lien creditor" language made the seller's right of reclamation "almost entirely illusory." § 2-702, Editorial Bd. Cmt. on 1966 Amend.

There are no cases in either the Oregon courts or the federal courts interpreting Oregon's "lien creditor" provision. However, in ***Ray-O-Vac v. Daylin, Inc. (In re Daylin, Inc.)***, 596 F2d 853 (9th Cir. 1979), the court of appeals ruled on the interpretation of the "lien creditor" language of Alabama, Georgia, Indiana and Texas. ***Id.*** at 855-56. In ***Daylin***, drawing on the reasoning of ***Telemart***, 524 F2d at 765, the court held that only a good faith purchaser can terminate a seller's right of reclamation. ***Daylin,*** 596 F2d at 856. In ***Telemart***, the court of appeals stated that § 2-702 "authorizes the exact equivalent of the common law remedy of rescission." ***Telemart,*** 524 F2d at 765. Further, the trustee in bankruptcy is not a good faith purchaser, but merely a lien creditor. ***Id.***; ***see also*** 11 USC § 544(a). Thus, the court concluded that the trustee in bankruptcy, as a lien creditor, cannot usurp the seller's reclamation rights. The court "recognize[d] that the effect of [its] holding is to treat the words 'or lien creditor' as mere surplusage," but went on to hold that the seller in that case could reclaim the goods it shipped to Alabama, Georgia, Indiana and Texas. ***Daylin***, 596 F2d at 856.

There are several reasons that ***Daylin*** is persuasive authority for the argument that a trustee in bankruptcy does not have the power, as a lien creditor under 11 USC § 544(a), to terminate a seller's right to reclaim its goods. First, given the history of UCC § 2-702(3) and the fact that many states have removed the "or lien creditor" language in response to trustees' attempts to supersede sellers' right to reclamation, the Ninth Circuit's interpretation has merit. Second, White and Summers assert that UCC § 2-702 was drafted in an attempt to resolve priority conflicts with trustees in bankruptcy who relied on the "lien creditor" language to assert superpriority under the predecessor to Bankruptcy Code § 544(a). WHITE & SUMMERS, § 32-11, at 302. White and Summers further assert that "[g]enerally the seller defeats the trustee under section 546." WHITE & SUMMERS, § 32-11, at 303. Finally, because the plain language of 11 USC § 546(c) limits the trustee's avoiding powers as granted in § 544(a) (which puts the trustee in the place of a hypothetical lien creditor), the Ninth Circuit's decision appears to harmonize ORS 72.7020(3) and Bankruptcy Code §546(c). ***See also*** COLLIER, ¶ 546.04[1].

C. Cash Contracts for the Sale of Goods (ORS 72.5070 and ORS 72.5110)

ORS 72.5070(2) and 72.5110 allow reclamation in cash-only sales. ORS 72.5070(2) provides that "[w]here payment is due and demanded on the delivery to the buyer of goods or documents of title, the right of the buyer as against the seller to retain or dispose of them is conditional upon the buyer's making the payment due." ***See also*** COLLIER, ¶ 546.04[2][a] ("In the case of cash sales, applicable law may

be a state's adaptation of section 2-507(2) of the Uniform Commercial Code * * *."). By reference to ORS 72.7020, ORS 72.5070(2) implicitly provides for reclamation: "[t]he provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here." UCC § 2-507(2), cmt. 3. However, neither the express language of UCC § 2-507(2) nor its official comments discuss whether the other requirements and exceptions of § 2-702 apply. For example, there is no indication whether a demand under § 2-507(2) must be in writing. Despite the plain language of § 2-507(2), some courts have declined to apply the time limits of § 2-702(2) to cash sales. WHITE & SUMMERS, § 32-11, at 308-09.

ORS 72.5110 provides that "[u]nless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete delivery. * * * (3) Subject to * * * ORS 73.0310 * * *, payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment." Although there are no comments or case authorities explaining the plain language of ORS 72.5110, its frequent use in conjunction with ORS 72.5070 as a means of reclaiming goods indicates that the limitations of ORS 72.7020 apply as much to ORS 72.5110 as they do to ORS 72.5070(2).

II. Reclamation Under the Bankruptcy Code (11 USC § 546(c))

Once a buyer files bankruptcy, 11 USC § 546(c) provides "the exclusive reclamation remedy." COLLIER, ¶ 546.04[2]. Section 546(c) permits a seller to exercise all statutory or common law rights of reclamation. ***Collingwood Grain***, 744 F2d at 689. Section § 546(c) provides the following:

"(c) * * * the rights and powers of a trustee under section 544(a), 545, 547, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but –

(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods –

(A) before 10 days after receipt of such goods by the debtor; or

(B) if such 10-day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor; and

(2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court –

(A) grants [the seller an administrative priority]; or

(B) secures such claim by a lien." 11 USC § 546(c).[1]

The seller only obtains a right to reclamation under § 546(c) if the debtor is insolvent at the time the debtor received the goods. The standards for insolvency under the bankruptcy code are stricter than under Oregon law or the UCC, requiring the buyer's liabilities to exceed its assets. COLLIER, ¶ 546.04[2][b][ii]. 11 USC § 546(c) places additional requirements on a reclaiming seller's right to reclamation beyond those of ORS 72.7020(2). The most notable difference between ORS 72.7020(2) and the right of reclamation under 11 USC § 546(c) is that section 546(c) requires a ***written*** demand, whereas an oral demand is sufficient under ORS 72.7020. DAVID G. EPSTEIN, ET AL., BANKRUPTCY, § 6-66, at 150-51 (1992).

A creditor is not entitled to the benefits of 11 USC § 546(c)(2) until several things occur: (a) under state law, the creditor possesses a statutory or common law right to reclaim the goods; (b) the creditor makes a timely written demand for reclamation; and (c) the bankruptcy court denies the creditor's right to reclamation as against the interests of the bankruptcy estate. ***Collingwood Grain***, 744 F2d at 692; ***see also*** COLLIER, ¶ 546.04[2][a]-[2][a][i] (stating that seller bears the burden of proving it has met the requirements of 11 USC § 546(c) and that: (1) the goods were in the debtor's possession when the seller made the demand and (2) that the goods are identifiable, i.e., not commingled). "The right to an administrative priority is therefore in lieu of, not in addition to, any right to reclaim." ***Collingwood Grain***, 744 F2d at 692.

In ***Dopps***, 31 BR at 670, the court gave a good synopsis of how 11 USC § 546(c) operates:

"Section 546(c) gives a seller only a right to reclaim the goods. If the goods are still in the hands of the buyer at the time of reclamation and there is no intervening right of a secured creditor that would be superior to the seller's rights, the court must permit reclamation, unless the court finds that such goods are needed for the reorganization of the debtor and grants the seller instead an administrative expense priority or a lien on assets of the debtor to provide it adequate protection for its claim. If the buyer, before reclamation, has already sold the goods to a good faith purchaser for value, there is nothing to reclaim as the seller cannot demand a return of the goods from the ultimate purchaser. Since the seller has no right to the goods, he has no right to receive something in lieu of the goods." ***Id.*** at 670; ***see also*** COLLIER, ¶ 546.04[3] (stating that the court has "remedial discretion" to deny a seller's claim of reclamation if the goods are necessary to the debtor's reorganization).

A seller cannot reclaim proceeds, as that term is strictly defined, under § 546(c). However, assuming the seller made his demand within the proper time limit, the seller may be able to obtain the proceeds of a resale through its right to either an administrative priority or a lien. ***Dopps***, 31 BR at 668 (providing that if the seller makes a timely demand for reclamation and the buyer fails to return the goods, the seller may receive the "market value of [the goods] on the date reclamation demand was received, subject, of course, to the intervening claim" of any good faith purchasers or buyers in the ordinary course); ***United States v. Westside Bank***, 732 F2d 1258 (5th Cir 1984) (recognizing the seller's

right to proceeds in limited circumstances). *Cf. Collingwood Grain,* 744 F2d at 691 (stating that if the buyer has already turned around and sold the goods before the seller learns of the buyer's default, the seller may not "reclaim" the proceeds of the sale between the buyer and the subpurchaser).

A. Calculating the 20-Day Reclamation Period Under § 546(c)

If the debtor files bankruptcy before the expiration of the 10-day period of reclamation provided in ORS 72.7020, Bankruptcy Code § 546(c)(1)(B) gives the seller a total of 20 days to make a demand for reclamation. ***See also***, COLLIER ON BANKRUPTCY ¶ 546.04[2] (Lawrence P. King ed., 15th ed. 1999). Like the time limits of ORS 72.7020, this 20-day period also begins to run when the buyer receives the goods. The following examples illustrate the calculation of the 20-day period under § 546(c).

1. Assume F.O.B. Buyer's place of business. Seller ships goods on August 28, 2001. Buyer receives the goods on September 1, 2001. Buyer files bankruptcy on September 5, 2001. (Notice that Buyer filed bankruptcy within the original ten-day period (September 1st until September 10th) provided in the UCC). Seller now has twenty days from the date Buyer received the goods to make its demand for reclamation. In other words, Seller has until September 20, 2001, to make a demand for reclamation of the goods Buyer picked up on September 1.

2. Assume F.O.B. Seller's warehouse. Seller makes goods available to Buyer on August 20, 2001. Buyer picks up goods on September 1, 2001. Buyer files bankruptcy on September 3, 2001. Seller has twenty days from the date Buyer picked up the goods to make its demand for reclamation. Thus, Seller has until September 20, 2001, to make a demand for reclamation.

3. Assume F.O.B. Buyer's place of business. Seller ships one load of goods on August 28, 2001, and another load of goods on August 31, 2001. On September 1, 2001, Buyer receives the first shipment. On September 2, 2001, Buyer receives the second shipment. Buyer files bankruptcy on September 8, 2001. (Notice that Buyer filed bankruptcy within the ten-day limit as to both shipments of goods). Seller does not receive notice of Buyer's bankruptcy until September 10, 2001. The date that Seller receives notice is irrelevant for purposes of calculating the demand period. The important dates are still the date Buyer received the goods and the date of the bankruptcy filing. Thus, as to the August 28th shipment received by buyer on September 1, Seller must make a demand by September 20, 2001. As to the August 31st shipment received by Buyer on September 2, Seller must make a demand by September 21, 2001.

4. Assume F.O.B. Buyer's place of business. Seller ships goods on August 24, 2001. Seller ships another load of goods on August 31, 2001. On August 29, 2001, Buyer receives the August 24, 2001, shipment. On September 3, 2001, Buyer receives the August 31st shipment. Buyer files bankruptcy on September 10, 2001. (Notice that Buyer filed bankruptcy within the ten-day limit as to the August 31st shipment but not as to the August 24th shipment). ***As yet, Seller has made no demand for return of its goods.*** Seller receives notice of Buyer's bankruptcy on September 11, 2001. Seller has no right to reclamation of the August 24th shipment because Buyer did not file bankruptcy within ten days of receiving Seller's goods. However, as to the August 31st shipment received by Buyer on September 3, Seller may still make a demand by September 22, 2001.

5. Assume F.O.B. Buyer's place of business. Seller ships goods on August 24, 2001. Seller ships another load of goods on August 29, 2001. On August 29, 2001, Buyer receives the August 24, 2001, shipment. On September 3, 2001, Buyer receives the August 29, 2001, shipment. On August 30, 2001, having learned of Buyer's insolvency, Seller makes a demand for return of the August 24th shipment, but fails to make a demand for the August 29th shipment. Buyer files bankruptcy on September 6, 2001. Seller receives notice of Buyer's bankruptcy on September 8, 2001. Seller has already made a timely reclamation demand as to the August 24th shipment. As to the August 29th shipment, Seller has until September 22, 2001, to make its reclamation demand for the goods received by Buyer on September 3.

In scenario number 5, notice that Seller made a reclamation demand for the first shipment before Buyer filed bankruptcy. Neither the Bankruptcy Code nor the UCC state that Seller must make a second reclamation demand for that shipment after Buyer files bankruptcy. It is probably unnecessary for Seller to make another demand for the first shipment once Buyer files bankruptcy, as long as the initial demand was timely and in writing. Rather, the bankruptcy court will do one of three things: (1) accept Seller's prebankruptcy demand and order return of the goods; (2) grant Seller an administrative priority claim for the market value of the unreturned goods; or (3) grant Seller a lien for the market value of the goods not returned. Note, however, that it would still be necessary for Seller to make a demand for the second shipment by September 22nd as stated in scenario number five above.

Another interesting scenario arises when a seller, because it has not received notice, ships goods to a buyer after the buyer has filed bankruptcy. The question becomes whether the seller retains its right to reclaim the property. Because the shipment of goods occurred after the filing of the bankruptcy petition, the goods are property of the bankruptcy estate. 11 USC § 541(a)(7). The plain language of § 546(c) does not limit reclamation rights to goods shipped before bankruptcy. Rather, the statute merely requires that demand be made within 10 days of receipt of the goods by the buyer/debtor. Although the goods are property of the estate, a seller need not obtain relief from the automatic stay of § 362(a). ***See, e.g., Cowles Tool***

Company v. Production Steel, Inc., (In re Production Steel Inc.), 21 BR 951, 953-54 (Bankr MD Tenn 1982). Thus, as long as the seller issues a written demand within 10 days after the buyer receives the goods, the seller can reclaim the goods. Practically speaking, however, if the buyer/debtor files a Chapter 7, the trustee will simply send the goods back to the seller.

B. The Trustee's Avoidance Powers

Where the seller has failed to meet the explicit requirements of 11 USC § 546(c), the trustee's avoidance powers are superior to a seller's right to reclaim goods. Consider the following hypothetical: Seller delivered goods to Buyer on two separate dates, August 6 and August 16, 2001. Seller learned of Buyer's insolvency when Buyer telephoned Seller and told Seller to come retrieve its goods. Seller went to Buyer's place of business to reclaim its goods on August 17, 2001, which is 11 days after the first delivery and one day after the second delivery.

1. Validity of Reclamation under State Law (ORS 72.7020)

ORS 72.7020(2) requires a reclaiming seller to make a demand for return of its goods within ten days of delivery. In ***Bendix***, the bankruptcy court explained the demand requirement by reference to the definition of notice in ORS 71.2010(26), which "merely requires that the person giving the notice take such steps as may be reasonably required to inform the [debtor of reclamation]." ***Id.***, 27 BR at 214. The demand "should be sufficient if it reflects an intention on the part of the seller to rescind the sale." ***Id.*** Thus, under ORS 72.7020 and ***Bendix***, actual repossession of the goods is sufficient demand because the debtor's notification of its insolvency and request that Seller retrieve its product obviated the need for an actual demand.

ORS 72.7020 further requires that the demand for reclamation be made within 10 days of delivery of the goods. Consequently, even if Seller made a demand by actually repossessing its goods, Seller did not, as to the first shipment, make that demand within the time limits of the ORS 72.7020. In this hypothetical, Seller delivered goods on August 6 and 16, 2001. On August 17, 2001, the debtor called Seller to notify it that Seller should come retrieve its goods; Seller actually repossessed its goods on the same day (August 17, 2001). The telephone call and repossession, as to the first delivery, occurred on the 11th day – outside the 10-day window for reclamation. Consequently, Seller has no reclamation rights under ORS 72.7020 as to the delivery on August 6, 2001.

2. Validity of Reclamation Under Bankruptcy Code § 546(c)

Assuming for the moment that Seller satisfied the state law requirements for reclamation, Seller's reclamation fails under Bankruptcy Code § 546(c). 11 USC § 546(c) places additional requirements on a reclaiming seller's right to reclamation beyond those of ORS 72.7020(2). The most notable difference between ORS 72.7020(2) and the right of reclamation under 11 USC § 546(c) is that § 546(c) requires a ***written*** demand, whereas an oral demand is sufficient under ORS 72.7020. ***See*** 11 USC § 546(c); DAVID G. EPSTEIN, ET AL., § 6-66, at 150-51 (1992).

The principal effect of § 546(c) is to shield sellers who comply with the requirements of § 546(c) from the trustee's avoidance powers under §§ 544(a), 545, 547, and 549. David Epstein explains:

"If the seller has satisfied the two sets of federal requirements for reclamation that are contained in section 546(c), and in the first instance has met state-law requirements, the result is not that the seller has a clear right to reclaim. Rather, the result is only that her right to reclaim is protected by the immunity clause of section 546(c), * * * shielding the seller's right to reclaim only from the trustee's avoiding powers under sections 544(a), 545, 547 and 549. The right can still be challenged by the trustee asserting other avoiding powers, most notably sections 544(b) and 548." DAVID G. EPSTEIN, ET AL., § 6-65, at 146-47.

There are two divergent views as what happens when the seller meets the requirements of ORS 72.7020(2) but fails to satisfy the requirements of § 546(c). The majority view holds that when a debtor is in bankruptcy, the exclusive method for a seller to reclaim its goods is to comply with the specific requirements of § 546(c)(1). The minority view holds that where a seller has met the reclamation requirements of state law before the intervention of bankruptcy, the seller need not then make a written demand.

3. The Majority View: Failure to Meet Specific Requirements of 11 USC § 546(c) is Fatal to a Seller's Reclamation Rights

According to a majority of the courts, when a debtor is in bankruptcy, the exclusive method for a seller to reclaim its goods is to comply with the specific requirements of § 546(c)(1). Practically, the majority position means that a seller who makes only an oral demand surrenders any right to reclaim in bankruptcy. ***Barry v. Shrader Holding Co., Inc.*** (***In re M.P.G., Inc.***), 222 BR 862, 864 (Bankr WD Ark 1998).

The plain language of the statute, which provides that "a seller ***may not reclaim*** any such goods ***unless*** such seller ***demands in writing*** the return of the goods supports this view, § 546(c)(1) (emphasis added). The Ninth Circuit has stated that the demand must be in writing to be given effect in bankruptcy. ***Collingwood Grain,*** 744 F2d at 689 (9th Cir 1984). In addition, the "overwhelming majority of jurisdictions have held that '§ 546(c) provides the exclusive remedy for a seller who seeks to reclaim goods from a debtor in bankruptcy.'" ***Oakland Gin Co. v. Marlow*** (***In re The Julien Co.***), 44 F3d 426, 432 (6th Cir. 1995); ***see also Flav-O-Rich, Inc. v. Rawson Food Service, Inc.*** (***In re Rawson Food Service, Inc.***), 846 F2d 1343, 1346 (11th Cir 1988); ***In re M.P.G., Inc.***, 222 BR at 864; ***Chemical-Ways Corp. v. Page*** (***In re Dynamic Tech. Corp.***), 106 BR 994, 1003 (Bankr D Minn 1989) (stating that "the seller's right to reclamation provided by section 2-702 of the Uniform Commercial Code is

recognized in bankruptcy proceedings ***only to the extent provided in Section 546(c)*** of the Bankruptcy Code" and including an exhaustive list of precedent for the majority approach and a detailed exploration of the reasons and support therefor); ***Roberts v. L.T.S., Inc.*** (***In re L.T.S., Inc.***), 32 BR 907, 908 (Bankr D Id 1983).

In the present hypothetical, where Seller has already taken possession of its material, the trustee may use his avoiding powers to recover either the goods themselves or the value thereof.

4. <u>The Minority View: Satisfaction of State Law Reclamation Requirements is Sufficient Despite Explicit Written Demand Requirement of § 546(c)</u>

The minority approach holds that a seller who has, prepetition, satisfied state law requirements for reclamation but failed to meet the technical requirements of § 546(c) nevertheless has the right to reclaim. More specifically, a court cannot retroactively apply § 546(c)'s requirement of a written demand once a seller/creditor has complied with state law reclamation requirements. There only appear to be two decisions that follow the minority rule: ***United Beef Packers v. Lee*** (***In re A.G.S. Food Systems, Inc.***), 14 BR 27 (Bankr D SC 1980) and ***Farmers Rice Milling Co., Inc. v. Hawkins*** (***In re Bearhouse, Inc.***), 84 BR 552 (Bankr WD Ark 1988).

Both ***In re A.G.S.*** and ***In re Bearhouse*** recognize that to the extent reclamation is available to a seller that has satisfied state law reclamation requirements but failed to comply with 11 USC § 546(c), it is subject to the trustee's avoidance powers. "The failure to make a demand in writing does not preclude the seller from reclaiming the goods. Rather, it merely opens the reclamation to an attack by the trustee under the specified avoiding powers including the 'strong-arm clause' of § 544(a)." ***A.G.S.***, 14 BR at 29; ***see also Bearhouse***, 84 BR at 560 ("[F]ailure to make written demand as required by Section 546(c), results only in [the seller's] right to reclaim being subject to the avoiding powers of the trustee.").

Thus, even under the minority approach, the trustee wins. As in other preference actions, the trustee may recover the property itself or, if the court so orders, the value thereof. 11 USC § 550(a). Additionally, the Seller is not entitled to an administrative priority or a lien under § 546(c)(2) because the statute specifically requires the seller to comply with the written demand requirement of § 546(c)(1) in order to avail itself of subsection (2)'s advantages. Thus, where Seller failed to send Buyer (debtor) a written reclamation demand, Seller may not avail itself of the benefits of subsection (2) if the trustee prevails in an avoidance action, and the trustee may recover the full value of the goods, without any concessions to Seller. ***See also*** COLLIER ¶ 546.04[3].

In sum, where a creditor's prepetition reclamation fails to comply with the written demand requirement of 11 USC § 546(c), any reclamation constitutes a preferential transfer, subject to the trustee's avoiding powers. As such, the trustee is entitled to recover, through a preference avoidance action, the value of the reclaimed goods on the date of reclamation.

III. <u>Conclusion</u>

Needless to say, reclamation, under both ORS 72.7020 and 11 USC § 546(c), is an imperfect remedy. Sellers need to be aware that the right to reclamation is not exclusive; it is subject to the claims of good faith purchasers, buyers in the ordinary course, secured creditors with an after-acquired property clause, and the avoidance powers of the bankruptcy trustee.

Endnote

[1] Congress is currently working on legislation to revise the Bankruptcy Code. If the changes go through in their present form, § 546(c) will be modified as follows:

"(c)(1) * * * the rights and powers of a trustee under section 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, not later than 45 days after the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods —-

(A) not later than 45 days after the date of receipt of such goods by the debtor; or

(B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

(2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(7)."

The import of this revision is that a demand for reclamation would need to be made within 45 days after the debtor receives the goods or 20 days after commencement of the case, whichever is earlier.

NINTH CIRCUIT CASE NOTES

By Karl E. Hausafus
Preston Gates & Ellis, LLP

NINTH CIRCUIT ADOPTS "LOGICAL RELATIONSHIP" TEST IN DETERMINING WAIVER OF SOVEREIGN IMMUNITY UNDER § 106

In re Lazar, 237 F3d 967 (9th Cir 2001)

Chapter 7 trustee became the holder of 20 claims filed by the debtor with the California State Water Resources Control Board for corrective actions taken in response to unauthorized releases of hazardous materials. The claims were denied based upon the debtor's prior misconduct. The trustee responded by filing adversaries against the Board and the State Fund responsible for funding claim disbursements. The trustee argued that the Board and the State Fund had waived their Eleventh Amendment immunity because other state agencies had filed claims in the bankruptcy case. The bankruptcy court held that the State of California waived its sovereign immunity by filing proofs of claim. On appeal, the district court held that the State Fund was not an arm of the state capable of invoking sovereign immunity.

The Ninth Circuit held that both the Board and the State Fund were arms of the state, and that when a state or an "arm of the state" files a proof of claim in a bankruptcy proceeding, the state waives its Eleventh Amendment immunity with regard to claims of the bankruptcy estate that arise from the same transaction or occurrence as the state's claim. The Court applied the "logical relationship test" of Fed R Civ P 13(a) to determine whether a claim arises from the "same transaction or occurrence."

FORMER EMPLOYEE'S JUDGMENT FOR NONPAYMENT OF WAGES EXCEPTED FROM DISCHARGE UNDER § 523(a)(6)

In re Jercich, 238 F3d 1202 (9th Cir 2001)

Prior to filing bankruptcy, debtor refused to pay Petralia for commissions due under an employment contract. Petralia prevailed in a state action for recovery of unpaid wages, waiting time penalties under a California statute, and punitive damages. Petralia then sought to have the state court judgment excepted from the debtor's discharge under § 523(a)(6). The bankruptcy court held in favor of the debtor, and the BAP affirmed.

The Ninth Circuit found in favor of the employee. The court held that, to be excepted from discharge under § 523(a)(6), a breach of contract must be accompanied by some form of "tortious conduct" that gives rise to a "willful and malicious injury." Here, the conduct was considered tortious based upon California's labor code and the fundamental public policy of paying wages to employees promptly. The court held that the willful injury requirement is met when it is established that the debtor had a subjective motive to inflict the injury *or* that the debtor believed that injury was substantially certain to occur as a result of his conduct. A malicious injury involves: 1) a wrongful act; 2) done intentionally; 3) which necessarily causes injury; and 4) is done without just cause or excuse. These tests were satisfied in the present case because the debtor knew he owed the wages and that injury to Petralia was substantially certain to occur if the wages were not paid. The debtor had the clear ability to pay the wages but chose not to, and instead used the money for his own benefit. In so holding, the Court rejected the BAP's additional requirement that the conduct must be considered tortious outside of a contractual relationship.

NINTH CIRCUIT ADOPTS BROAD INTERPRETATION OF SECTION 510(b)

In re Betacom of Phoenix, Inc, 240 F3d 823 (9th Cir 2001)

Betacom, Inc. entered into a prepetition merger agreement with the debtor. Under the terms of the merger agreement, Betacom's shareholders were to receive stock in the debtor, and the debtor assumed obligations of Betacom that were personally guaranteed by its shareholders. The merger never closed, and the shareholders failed to receive their stock in the debtor. The shareholders commenced suit in federal district court for breach of the merger agreement. The debtor later filed bankruptcy and sought mandatory subordination of the shareholders' claims under section 510(b). The bankruptcy court ordered that the claims be subordinated. The district court reversed and held that an actual sale was required to trigger section 510(b).

The shareholders argued that section 510(b) only applies to claims for securities fraud, that it did not apply to their claim since they never enjoyed the "rights and privileges" of stock ownership, and that there had never been an actual sale or purchase of securities that could trigger mandatory subordination. In reversing the district court and subordinating the shareholders' claims, the Ninth Circuit adopted a broad interpretation of section 510(b). The court held that section 510(b) is not limited to claims for securities fraud, and that neither physical possession of the stock nor an actual sale were required for application of section 510(b). The court based its reasoning on the dissimilar risk and return expectations of shareholders and creditors, and upon the reliance of creditors on the equity cushion provided by shareholder invest-

ment. The court held that an "actual" sale is not required to trigger application of section 510(b), because even if an investor never receives the promised shares, the investor entered into the investment with greater financial expectations than the creditor.

AWARD OF ATTORNEY FEES TO DEBTOR WITH PRO BONO ATTORNEY UPHELD IN 523(a)(2)(A) ACTION.

In re Hunt, 238 F3d 1098 (9th Cir 2001)

First Card pursued a nondischargeability claim under section 523(a)(2)(A) for fraud. The debtor prevailed and was awarded attorney fees under 523(d). First Card appealed. The BAP affirmed. The Ninth Circuit held that an attorney fee award is reviewed for abuse of discretion. The creditor bears the burden of proving that its position is substantially justified, and here, the court held that unsupported allegations in a creditor's pleadings are insufficient to carry that burden. Furthermore, the court held that the pro bono representation of the debtor did not qualify as "special circumstances" that would make such an award unjust under 523(d). The purpose of awarding attorney fees is to deter creditors from bringing frivolous challenges to discharge. This purpose would be defeated if a pro bono debtor could not be awarded fees. The court avoided the question of whether the debtor was required to request attorney fees in his pleadings, finding that although a request for attorney fees was not included in the answer, the debtor did request fees in his pretrial conference statement. This statement was incorporated by reference in the bankruptcy court's pretrial order, and the pretrial order has the effect of amending the pleadings.

TERMINATION OF MANAGEMENT RIGHTS DUE TO DEBTOR'S SALE OF BUILDING HELD TO BE DE FACTO ANTI-ASSIGNMENT CLAUSE

In re Crow Winthrop Operating Partnership, 241 F3d 1121 (9th Cir 2001)

The debtor operated its headquarters in a building it owned, but an affiliated company owned the underlying real property. Pursuant to the terms of a prepetition settlement agreement, the debtor was allowed to manage the common areas and parking in exchange for a monthly payment to the affiliate. The settlement agreement provided that the management provisions would terminate if there were a change in ownership of the headquarters. The debtor later filed for bankruptcy, and an approved reorganization plan transferred ownership of the headquarters to Jamboree. The affiliated company then notified Jamboree that the parking and management provisions of the settlement agreement were terminated pursuant to the change in ownership provision. Jamboree challenged the termination as an anti-assignment clause under section 365(f). The bankruptcy court found for Jamboree, and the district court affirmed.

The Ninth Circuit also affirmed. The affiliate argued that neither the settlement agreement nor the parking and management rights terminated "because of" the assignment. Rather, the parking and management rights were terminated only after the debtor ceased owning the headquarters. The Ninth Circuit looked beyond the literal wording of the contractual provision, and held that the provision acted as a de facto anti-assignment clause in violation of section 365(f). The parking and management rights under the settlement agreement were interwoven with the rights of the owner of the headquarters, and without these rights, the debtor could not realize the full value of its assets.

KNOWING COLLECTION OF UNREASONABLE FEE FROM DEBTOR VIOLATES THE AUTOMATIC STAY

In re Sanchez, 241 F3d 1148 (9th Cir 2001)

Chapter 7 debtor reopened her case and moved to hold her attorney in contempt for violating the automatic stay by collecting attorney fees for postpetition services under the terms of a deferred payment arrangement. The bankruptcy court found the attorney fees were unreasonably high, and that the attorney did not violate the automatic stay. The bankruptcy court required the attorney to refund the unreasonable portion of the attorney fees. The district court affirmed.

The Ninth Circuit acknowledged its previous decisions holding that attorney fees for pre-petition services are dischargeable as prepetition debt regardless of when payment is due, whereas attorney fees for postpetition legal services are not dischargeable. Here, the court held that the collection of fees that the debtor's attorney knows to be unreasonable constitutes a violation of the automatic stay. There is no violation of the stay where the attorney could not have known that the

THE PORTLAND OFFICE OF THE U.S. TRUSTEE HAS MOVED

Effective November 26, 2001, the Portland United States Trustee's Office moved to new space at the Gus Solomon Courthouse. The new mailing address for the office is: Office of the United States Trustee, 620 S.W. Main St., Room 213, Portland, OR 97205. First meetings of creditors in Chapter 7, 11, and 12 cases will be held in Room 223. Telephone, fax numbers, and e-mail addresses remain the same.

amount of fees actually collected would turn out to be more than the bankruptcy court later would determine to be reasonable. However, where the discrepancy between the fee charged and the fee later determined to be reasonable is great enough that the debtor's attorney should have known that the fee charged was unreasonable, sanctions might be appropriate. The attorney's position as both lawyer and creditor did not give rise to a conflict of interest that would warrant the denial of all legal fees.

ERISA PLAN FIDUCIARIES HELD TO BE FIDUCIARIES UNDER SECTION 523(A)(4)

In re Hemmeter, 242 F3d 1186 (9th Cir 2001)

Debtor was a member of the Board of Directors of a publicly-held engineering and construction company that filed for Chapter 11. The board was a named fiduciary of the company's Employee Stock Ownership Plan. After the company's bankruptcy, the plan beneficiary filed a class action lawsuit seeking recovery of retirement account losses allegedly resulting from breaches of fiduciary duties in connection with the administration of the plan. The class representatives filed an adversary proceeding in the debtor's case seeking nondischargeability of their claims based upon an allegation of defalcation while acting in a fiduciary capacity under § 523(a)(4). The bankruptcy court granted the debtor's motion to dismiss for failure to state a claim, and the district court affirmed.

The Ninth Circuit held that fiduciary relationships imposed by statute will cause the debtor to be considered a fiduciary under § 523(a)(4) if the statute: 1) defines the trust res; 2) identifies the fiduciary's fund management duties; and 3) imposes obligations on the fiduciary prior to the alleged wrongdoing. The court found that ERISA satisfies the traditional requirements for a statutory fiduciary, and that ERISA fiduciaries qualify as fiduciaries under § 523(a)(4). However, the finding of fiduciary status does not end the inquiry. The court held that the alleged breach of duty by the debtor did not amount to a "defalcation while acting in a fiduciary capacity." The essence of defalcation in the context of § 523(a)(4) is a failure to produce funds entrusted to a fiduciary. This concept does not embrace the normal acts within the business judgment of the fiduciary that, however flawed, do not involve failure to account for or produce a beneficiary's funds. Because the ESOP specifically authorized the fiduciaries to invest in the company's stock, there was no failure to produce funds where the value of the stock had merely crashed.

WOMBATS

A new networking/mentoring group for women bankruptcy attorneys has been formed. The group plans to meet on an informal basis approximately every other month to discuss issues of interest to women bankruptcy practitioners. The meetings for 2002 are scheduled for the following dates: January 23, 2002; March 13, 2002; May 22, 2002; September 25, 2002; and November 27, 2002.

Each of the meetings will begin approximately 11:45 a.m. and end approximately 1:15 p.m. The meetings will be held at the 8th floor conference room at the bankruptcy court in Portland unless special notice is given regarding an alternate location. Members in the Eugene area can participate by videoconference from the bankruptcy court in Eugene.

A coordinator will be designated for each meeting. Anyone with recent case law developments or other issues for discussion should contact the meeting coordinator with details. Approximately one week before the next meeting, the coordinator will circulate an agenda with discussion topics for the next meeting. If you have not received notice of prior meetings and would like to be added to the mailing list for this group, please send your name, address, and email address (if available) to Laura Walker, 1001 S.W. Fifth Ave., Suite 2000, Portland, Oregon 97204. (Email: lwalker@chbh.com)

FEDERAL COURTS HAVE THE FINAL AUTHORITY TO DETERMINE SCOPE AND APPLICABILITY OF THE AUTOMATIC STAY

In re Dunbar, 245 F3d 1058 (9th Cir 2001)

Homeowners contracted with the debtor to install a concrete driveway, porch, and patio. Approximately two years later, the debtor's work failed and the homeowners filed a complaint with the California Contractors' State License Board. However, the debtor had since commenced a chapter 13 case. The debtor responded to the complaint with a letter to the administrative law judge, asserting the proceeding was subject to the automatic stay. The ALJ held that the bankruptcy filing did not preclude the state agency's disciplinary review of the debtor's actions as a state licensee, which it viewed as a state agency's enforcement of its police or regulatory powers, excepted from the automatic stay under § 362(b)(4). The ALJ held in favor of the homeowners. The debtor then commenced a proceeding in the bankruptcy court to prevent the agency from enforcing its order revoking the debtor's contractor's license. The bankruptcy court concluded that the ALJ's determination of the automatic stay's applicability was binding under principles of collateral estoppel and that the court was precluded

from reexamining the issue. The BAP vacated and remanded.

The Ninth Circuit held that Congress granted the federal courts the final authority to determine the scope and applicability of the automatic stay. Actions taken in violation of the automatic stay are void *ab initio*. As such, any action taken by a state court or state administrative agency in violation of the automatic stay is void, and the bankruptcy court is not required to extend full faith and credit to them. In matters involving the automatic stay, a bankruptcy court is not bound by principles of res judicata, collateral estoppel, or the *Rooker-Feldman* doctrine.

LIKELIHOOD OF INCREASED EARNINGS IN NEAR FUTURE PRECLUDES DISCHARGE OF STUDENT LOANS

In re Rifino, 245 F3d 1083 (9th Cir 2001)

Chapter 7 debtor commenced an adversary proceeding seeking an undue hardship discharge of her student loan obligations under section 523(a)(8). The bankruptcy court found in favor of the debtor and discharged the student loan obligations. The district court reversed.

In affirming the district court's ruling, the Ninth Circuit reaffirmed its holding in *In re Pena*, 155 F3d 1108 (9th Cir 1998). The Ninth Circuit has adopted a three-part test to determine undue hardship in the context of section 523(a)(8). To obtain a discharge of a student loan, the debtor must prove: 1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; 2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and 3) the debtor has made good faith efforts to repay the loans. While the first prong was satisfied in this case, the debtor failed to establish that the circumstances were likely to persist for a significant portion of the repayment period. There was testimony in the bankruptcy court showing that the debtor's potential earnings were likely to increase significantly in a few years due to the typical salary structure in the debtor's field of employment.

SANCTIONS ARISING FROM PROCEDURAL MATTERS ARE CONTROLLED BY FEDERAL, NOT STATE, LAW

In re Larry's Apartment, LLC, 249 F3d 832 (9th Cir 2001)

The bankruptcy court found that a part owner of the debtor had violated the automatic stay and breached his fiduciary duty to the debtor. The court awarded attorney fees to the debtor based upon two Arizona statutes – one providing for a discretionary award of attorney fees in contract cases, and the other providing for discretionary sanctions. The district court affirmed.

After finding that the underlying action was not based upon a contract, and the first state statute was inapplicable, the Ninth Circuit held that state law should not be applied in determining sanctions for misconduct by a party to litigation. Federal courts sitting in diversity cases apply state law to decide whether to allow attorney fees when those fees are related to the substance of the case. However, when fees are based upon misconduct by an attorney or party, the matter is procedural and federal law providing for sanctions applies.

DEFAULT JUDGMENT MAY HAVE PRECLUSIVE EFFECT IN NONDISCHARGEABILITY PROCEEDING UNDER 523(A)(6)

In re Baldwin, 249 F3d 912 (9th Cir 2001)

Kilpatrick sued the debtor and others in California Superior Court for an intentional tort. The debtor participated in initial discovery but later allowed a default to be taken against him. The debtor filed chapter 7. Kilpatrick sought to have his debt declared nondischargeable under section 523(a)(6). The bankruptcy court granted Kilpartrick's motion for summary judgment based upon the state court judgment, and the BAP affirmed.

In affirming, the Ninth Circuit held that under the Full Faith and Credit Act, the preclusive effect of a state court judgment in a subsequent bankruptcy proceeding is determined by the preclusion law of the state in which the judgment was issued. Under California law, collateral estoppel is applied only if five threshold requirements are met: 1) the issue sought to be precluded must be identical to that decided in a former proceeding; 2) it must have been actually litigated in the former proceeding; 3) it must have been necessarily decided in the former proceeding; 4) the decision in the former proceeding must be final and on the merits; and 5) the party against whom the preclusion is sought must be the same as, or in privity with, the party to the former proceeding. Although the default judgment contained no explicit findings, because Kilpatrick's sole claim against the debtor was that the debtor intended to cause him injury, the state court could not have granted judgment to Kilpatrick unless it found that the debtor had intentionally caused injury. Therefore, the issue of intent was actually litigated and necessarily decided.

DEFAULT JUDGMENT HAD NO PRECLUSIVE EFFECT IN NONDISCHARGEABILITY PROCEEDING UNDER SECTION 523(a)(2)(A)

In re Harmon, 250 F3d 1240 (9th Cir 2001)

Creditor brought state court action against debtor and others alleging conversion and contract violations. All defendants defaulted. The state court entered default judgments and an order providing for a rescission of the contracts and the underlying partnership agreement. The debtor filed chapter 11 thereafter, and the creditor sought to have his debt declared nondischargeable under section 523(a)(2)(A). The bankruptcy court granted the creditor's motion for summary judgment, declaring the debt nondischargeable based upon the state default judgment. The district court affirmed.

As noted in ***Baldwin***, under California law, collateral estoppel is applied only if five threshold requirements are met. However, in this case, the court found that the issue of the debtor's allegedly fraudulent contract was never "actually litigated" or "necessarily decided" in the default judgment. In contrast with its decision in ***Baldwin***, the court stated that the principle that a defaulting defendant is presumed to admit all the facts which are well pleaded in the complaint should be limited. Preclusion occurs only where the record shows an express finding upon the allegation for which preclusion is sought. Because there were no express findings regarding fraud, the court could not conclude that the state court considered and decided the issue. The state court could have entered a default judgment without finding that the debtor had committed fraud. The issue was not actually litigated, was not necessarily decided, and the state judgment did not have a preclusive affect.

DEBTOR'S CHAPTER 13 ELIGIBILITY UNDER SECTION 109(e) IS DETERMINED BY THE ORIGINAL SCHEDULES AS OF THE PETITION DATE

In re Scovis, 249 F3d 975 (9th Cir 2001)

Henrichsen objected to confirmation of joint debtors' chapter 13 plan, asserting that debtors failed to meet the eligibility requirements of 11 USC § 109(e). The bankruptcy court confirmed the plan, holding that Henrichsen's lien was partially secured by the debtors' home, notwithstanding the existence of a prior deed of trust and the debtors' homestead exemption. The BAP determined that the homestead exemption rendered Henrichsen's claim completely unsecured but considered the decrease in the debtors' unsecured debt due to postpetition payments. Although the BAP remanded for further factual determination, the Ninth Circuit took Henrichsen's appeal.

The Ninth Circuit held that a debtor's eligibility for Chapter 13 must be determined by the debtor's schedules, checking only to see if the schedules were made in good faith. The unsecured portion of an undersecured debt is counted as unsecured for purposes of section 109(e). Where a claim is secured only by a lien that is avoidable by a declared exemption, the entire claim is unsecured for purposes of section 109(e). Because eligibility is determined as of the petition date, ordinary events occurring after the filing do not affect eligibility, and the BAP erred in considering the debtors' post-petition payments. The court therefore found that the debtors' unsecured debt exceeded the statutory limit.

AWARD OF COSTS IN ATTORNEY DISCIPLINARY PROCEEDING HELD DISCHARGEABLE

In re Taggart, 249 F3d 987 (9th Cir 2001)

Debtor, an attorney, was disciplined by the California State Bar. California law required the California Supreme Court to order the debtor to pay the costs of his disciplinary proceedings. The debtor filed chapter 7, and the Bar asserted that the debt was nondischargeable under section 523(a)(7). The bankruptcy court granted the Bar's motion for summary judgment, holding that the Bar is a governmental entity and that the costs imposed were a penalty or fine. The BAP affirmed.

The debtor argued that the basis of the Bar's debt was a California statute dealing with costs, rather than a separate statute addressing monetary sanctions. Therefore the debt was compensation for the Bar's expenses, not a fine or penalty. The Ninth Circuit agreed. In overturning the BAP, the court examined the statutory process for disciplinary proceedings, and the legislative history of the statute requiring the imposition of costs. The Court held that the statutory scheme was designed to reimburse the Bar for expenses incurred in disciplinary hearings. Sanctions under the second California statute were described as "monetary sanctions," and were not dependent upon any expenditure by the Bar for their imposition. Given the specif-

2002 ANNUAL MEETING

Plan your holiday shopping in Portland next year! The Executive Committee of the Oregon Debtor-Creditor Section has decided to hold the 2002 annual meeting in Portland, in connection with an all-day bankruptcy CLE, in early December 2002. Further details will be announced as they are made available.

ic statutory scheme of California, these costs were not fines, penalties or forfeitures, but were rather compensation for actual pecuniary loss, and therefore were dischargeable.

IRA'S EXEMPTION UNDER STATE LAW DEPENDENT UPON WHETHER IT WAS DESIGNED AND USED PRINCIPALLY FOR RETIREMENT PURPOSES

In re Dudley, 249 F3d 1170 (9th Cir 2001)

The debtors withdrew approximately $107,000 for ordinary living expenses from their IRA. The bankruptcy court denied debtors a state law exemption for their IRA, because the IRA was not "designed and used for retirement purposes" as required by California law. The district court affirmed.

The Ninth Circuit held that, although an IRA must be designed and used for retirement purposes to qualify as a private retirement plan under California law, the bankruptcy court erred in failing to consider whether the IRA was designed and used ***principally*** for retirement purposes, as opposed to ***solely*** for retirement purposes. The mere withdrawal of money from an IRA for non-retirement purposes does not automatically disqualify debtors from claiming the amount remaining as exempt under state law. In determining whether an IRA has been designed and used "principally" for retirement purposes, the court considered the following factors: 1) the purpose of the withdrawals from the IRA; 2) whether the applicable procedures for withdrawals were followed; 3) the frequency of the withdrawals; 4) whether the withdrawals were used to shield or hide funds from creditors or the bankruptcy court; and 5) whether the withdrawals diminished the assets in the IRA to such an extent that the majority of assets were no longer being used for long-term retirement purposes.

NEW DEBTOR-CREDITOR SECTION BOARD AND EXECUTIVE COMMITTEE MEMBERS

Chair:	Ann K. Chapman
Chair-elect:	Gary U. Scharff
Treasurer:	Carolyn G. Wade
Secretary:	Peter C. McKittrick
Members:	Ronald C. Becker
	Dennis M. Paterson III
	Laura J. Walker
	John W. Weil
	Stephen T. Tweet

BAP CASE NOTES

By Tara J. Schleicher
Farleigh Wada & Witt PC

PRIOR STATE COURT JUDGMENT MUST MAKE FINDINGS REGARDING INDIVIDUAL DEBTOR'S CONDUCT BEFORE IT CAN BE USED AGAINST DEBTOR IN NONDISCHARGEABILITY ACTION

In re Tobin, 258 BR 199 (9th Cir BAP 2001)

Debtor was the president of a closely-held corporation. Creditor obtained a state court judgment against the debtor and the corporation for promissory fraud. The debtor was held liable as an alter ego of the corporation. The state court made no findings regarding the debtor's individual conduct. The debtor filed chapter 7 and the creditor sought to declare the debt nondischargeable under 11 U.S.C. § 523(a)(2)(A), which excepts debts for fraud and false representations. The bankruptcy court granted summary judgment in favor of the creditor, holding that the state court judgment had collateral estoppel effect and satisfied all of the elements of section 523(a)(2)(A). The BAP agreed that the state court findings should be given collateral estoppel effect, but reversed because the state court made no findings regarding whether the debtor himself had made any misrepresentations. The panel noted that it was not deciding whether participation in a fraudulent scheme, without more, would suffice for purposes of a nondischargeability action under section 523(a)(2)(A).

TRUSTEE MAY CORRECT ADMINISTRATIVE ERROR REGARDING CONCLUSION OF MEETING OF CREDITORS WHEN NO JUDICIAL ACTION IS TAKEN IN RELIANCE ON ERROR AND THERE IS NO PREJUDICE TO DEBTOR

In re Clark, 262 BR 508 (9th Cir BAP 2001)

At the first meeting of creditors, the trustee announced that the meeting would be continued to August 5 as a "holding date," and that the meeting would be further continued to another date in September. At the August 5 meeting, the trustee failed to continue the meeting on the record. On August 6, the trustee filed a worksheet indicating that the meeting was concluded. Upon realizing his mistake, the trustee filed an amended worksheet and served the debtor with a notice of the continued meeting for September 16. In all there were seven (7) dates for the meeting, which concluded in December, 1999. In January of 2000, a creditor filed an objection to claim of exemption. The debtor claimed the objection was untimely based on his contention that the meeting of creditors concluded on August 5, 1999.

The bankruptcy court agreed with the debtor, hold-

ing, in part, that the trustee failed to announce the continuation of the meeting on the record at the August 5 meeting. The BAP reversed and held that a creditor's meeting may be continued when the continued date is announced within a reasonable time after the meeting has occurred. Additionally, the BAP held that the trustee could correct his own administrative error where no judicial action had been taken in reliance on the erroneous worksheet and where the debtor was not prejudiced by reliance on the erroneous worksheet.

UNSCHEDULED CREDITOR CAN REOPEN CASE AND FILE NONDISCHARGEABILITY ACTION FOR FRAUD

In re Staffer, 262 BR 80 (9th Cir BAP 2001)

A creditor commenced an action against the debtor in Canada, seeking damages for fraud. While the action was pending, the debtor filed chapter 7. Debtor failed to schedule the creditor. After the debtor received his discharge and the case was closed, the creditor obtained a judgment against the debtor in the Canadian court. The creditor commenced an action in the state court seeking to enforce the Canadian judgment. The state court stayed the action to allow the bankruptcy court to assess the enforceability of the judgment.

The creditor filed a motion in the bankruptcy court to reopen the debtor's case and to file a nondischargeability action under 11 U.S.C. § 523(a)(3)(B). A discharge under § 727 does not discharge a debtor from a debt subject to § 523(a)(2)(A) that was not scheduled in time to permit the timely filing of a proof of claim or a timely request for dischargeability, unless the creditor had notice or actual knowledge of the case in time to make a timely filing or request. The BAP held that the time for filing a complaint for nondischargeability was governed by Fed R Bankr P 4007(b), which allows filing at any time.

STATE'S ACTION TO ENFORCE ITS CONSUMER PROTECTION LAWS WAS EXEMPT FROM THE AUTOMATIC STAY

In re First Alliance Mortgage Company, 263 BR 99 (9th Cir BAP 2001)

State filed a motion for a determination that its state court action against the debtor under state's consumer protection act was not subject to the automatic stay. In its state court action, the state sought injunctive relief, civil penalties, attorney fees, and restitution. State sought relief from stay to prosecute the state court action to a money judgment, but not to enforce such judgment. The bankruptcy court granted state relief from stay regarding the injunctive relief sought in the state court proceeding, but denied relief from stay regarding any monetary judgment.

The BAP reversed, holding that the state's actions met both the pecuniary purpose and public policy tests of 11 U.S.C. § 362(b)(4). Under the pecuniary purpose test, the court must determine whether the government's action relates primarily to the protection of the government's interest in the debtor's property or to matters of public safety and welfare. The public policy test distinguishes between governmental actions that effectuate public policy and those that adjudicate private rights. The BAP concluded that the civil penalties and attorney fees sought by the state for consumer fraud met both of those tests. The BAP also concluded that the restitution claim was not subject to the stay because it was a part of the state's consumer protection remedies, was for a public purpose, and was not solely for the pecuniary gain of individual citizens. However, the enforcement and collection of any such judgment for restitution would be subject to the automatic stay.

TESTIMONY FROM MESSENGER THAT HE FILED COMPLAINT IN DROP BOX IS SUFFICIENT EVIDENCE TO REBUT PRESUMPTION THAT THE CLERK'S FILE STAMP ACCURATELY RECORDS WHEN COMPLAINT WAS FILED

In re Bryan, 261 BR 240 (9th Cir 2001)

Creditor filed a nondischargeability action against debtor. Upon the debtor's motion for summary judgment, the court dismissed the action as untimely. The deadline for filing the complaint was March 7, 2000. The creditor filed a declaration of the messenger, in which the messenger swore he put the complaint in the drop box at 4:25 p.m. on March 7, 2000. The clerk of the court processed the complaint and marked it as filed at 8:26 a.m. on March 8, 2000.

The BAP reversed the dismissal of the creditor's complaint. First, the BAP noted that the creditor's complaint would be deemed filed at the time it was actually placed in the drop box. The panel recognized the "clerk's date stamp presumption," which provides that the date the clerk marks on papers is presumed to be an accurate representation of when the papers were actually filed. However, if a reasonable person could conclude that the rebuttal evidence submitted against that presumption might be true, a question of fact arises that must be decided on the evidence. The BAP held that the messenger's declaration rebutted the presumption and there was a question of fact regarding when the document was in fact filed.

ISSUANCE OF SUBPOENA AND SUBSEQUENT MOTION TO COMPEL DID NOT VIOLATE AUTOMATIC STAY

In re Cain, 262 BR 499 (9th Cir BAP 2001)

Creditor filed a state court action against debtor, alleging fraud and other claims. Debtor then filed a chapter 13 case. Creditor amended her state court complaint to add debtor's husband as a defendant. Debtor's husband had not filed bankruptcy and was not protected by the automatic stay of § 362 or by the co-debtor stay of § 1301. Creditor issued a third-party subpoena upon the debtor to appear as a deposition witness in the creditor's case against the debtor's husband. Debtor ignored that subpoena and three subsequent similar subpoenas from creditor. Creditor then filed a motion in state court to compel debtor to comply with the subpoenas, and requested sanctions against the debtor. The bankruptcy court held that the issuance of the subpoenas and the motion to compel constituted violations of the automatic stay, and entered an order requiring the creditor to pay approximately $11,000 to the debtor in damages.

The BAP reversed, holding that the issuance of the subpoenas to seek discovery in the creditor's case against the husband did not violate the automatic stay. The BAP also held that the motion to compel, in which the creditor sought sanctions against the debtor, did not violate the automatic stay because it involved the debtor's post-petition conduct. The panel noted that the creditor could not and did not attempt to collect such a judgment from estate property without first obtaining relief from the stay.

DEBTOR MUST HAVE SUBJECTIVE BELIEF THAT HIS CONDUCT WAS SUBSTANTIALLY CERTAIN TO RESULT IN INJURY BEFORE SUCH CONDUCT CAN BE "WILLFUL AND MALICIOUS"

In re Su, 259 BR 909 (9th Cir BAP 2001)

Debtor was driving a passenger van at approximately 37 miles per hour in a 25 mile per hour zone in downtown San Francisco when he ran a red light and crashed into another motor vehicle. After colliding with the other vehicle, the debtor's van struck and severely injured creditor, who was a pedestrian in the crosswalk. Following a jury verdict in an action for negligence brought by the creditor against the debtor, the debtor filed chapter 7. Creditor then filed a nondischargeability action against debtor under 11 U.S.C. § 523(a)(6) for willful and malicious injury. The bankruptcy court held that there was objective substantial certainty that the debtor's conduct would result in injury to the creditor in the collision.

The debtor appealed, contending that the correct standard under § 523(a)(6) is whether the debtor subjectively believed that his conduct was substantially certain to result in injury. The BAP agreed. The BAP also held that the bankruptcy court erred in collapsing the willful and malicious prongs of the action. The malicious injury requirement is a separate determination from the willful requirement. The malicious injury prong requires the creditor to show: (1) a wrongful act; (2) done intentionally; (3) which necessarily causes the injury; and (4) is done without just cause and excuse.

ONLY SPOUSES, FORMER SPOUSES, OR DEPENDENTS OF DEBTOR MAY OBTAIN JUDGMENT FOR NONDISCHARGEABILITY UNDER 11 USC § 523(A)(15)

In re Dollaga, 260 BR 493 (9th Cir BAP 2001)

Attorney who represented the debtor pre-petition in a marital dissolution proceeding sought a determination that the unpaid balance of her fees was nondischargeable under 11 USC § 523(a)(15). The BAP held that the attorney lacked standing to sue under § 523(a)(15). The panel looked at the legislative history, noting that the legislature meant to apply the exception to discharge only to debts incurred in a divorce or separation that are owed to a spouse or former spouse or dependent and can be asserted only by another party to the divorce or separation. The panel emphasized that it was not presented with, nor did it decide, the issue of whether a creditor has standing under § 523(a)(15) where the non-debtor spouse or children are liable on the creditor's claim.

TRUSTEE CANNOT AVOID THE 30-DAY DEADLINE TO OBJECT TO EXEMPTIONS BY FAILING TO CONCLUDE 341(A) MEETINGS

In re Blethen, 259 BR 153 (9th Cir BAP 2001)

Trustee filed a "Trustee's Worksheet on § 341(a) Meeting Chapter 7" that did not set forth the date of any continued meeting, and did not state that the 341(a) meeting had not been concluded. The worksheet was not served on the debtor. The trustee filed an objection to debtor's exemptions seven months after the meeting of creditors and five months after the debtor had filed an amended schedule of exemptions. The bankruptcy court found that the practice of the trustee was to "generally continue" 341(a) meetings without specifying a date and time for the continued meeting, and to file a worksheet indicating that the meeting had not been concluded. The trustee conceded that his goal in so doing was to avoid the 30-day deadline to object to exemptions. The bankruptcy court held that if no specific continuance date is set, the meeting is deemed concluded on the day the meeting was last scheduled. The bankruptcy court held trustee's objection untimely. The BAP affirmed.

PAYMENTS TO SECURED CREDITOR ON INTERESTS IN RECREATIONAL VEHICLES HELD PREFERENTIAL

In re Jan Weilert R.V., Inc., 258 BR 1 (9th Cir BAP 2001)

Chapter 7 debtor was a seller of recreational vehicles. When a used vehicle was traded in, the debtor would sell it and use the sale proceeds to pay off the secured loan on the vehicle. In the 90 days prior to filing, the debtor made two payments to a secured creditor on two different vehicles. The trustee sought to recover those payments as preferences. The secured creditor argued that the payments were made within the ordinary course of business under 11 USC § 547(c)(2)(C).

The first payment at issue was made 91 days after trade-in and 21 days after receipt of funds from the third party purchaser. The second payment was made 51 days after trade-in and 41 days after receipt of funds from the third party purchaser. The bankruptcy court found that the objective standard for the ordinary course of business in that industry was for the dealer to pay off the lienholder within 45 days of trade-in or within 20 days of receipt of funds from the third party purchaser. The BAP affirmed the bankruptcy court's decision that the payments at issue fell outside those standards and, thus, were not subject to the ordinary course of business defense. However, the panel criticized the bankruptcy court for formulating and describing a "reasonable creditor" standard, describing the practices in which a reasonable creditor should engage.

LOCAL BANKRUPTCY CASE NOTES

By Karl Hausafus
Preston Gates & Ellis, LLP

TIMELY DISCLAIMER PREVENTS DEBTOR FROM ACQUIRING INTEREST IN INHERITANCE

In re Nistler, 259 BR 723 (Bankr D Or 2001)

The debtor executed a timely disclaimer of his rights to receive property as a beneficiary of a will. One month after mailing the disclaimer, the debtor and his wife filed for Chapter 7. The trustee sought to avoid the disclaimer as a transfer under section 548. In *In re Bright*, 241 BR 664 (9th Cir BAP 1999), the BAP had previously held that a debtor's disclaimer of inheritance under a will is not a transfer of an "interest of the debtor in property." The primary question before the court was whether the U.S. Supreme Court's decision in *Drye v US*, 528 US 49, 120 SCt 474 (1999) indirectly overruled *Bright*. In *Drye*, the Supreme Court held that such a disclaimer was ineffective in preventing a debtor's federal tax liens from attaching to disclaimed property. The *Drye* Court had held that the Internal Revenue Service is a "super creditor" entitled to rights above and beyond the rights of other creditors of a disclaiming heir.

Although the trustee argued that the *Drye* opinion was not limited to cases involving federal tax liens, Judge Brown held that *Drye* was not applicable in this case. Under state law, disclaimers relate back for all purposes to the date of death of the decedent. Therefore, Judge Brown held that the debtor never possessed an interest in the inheritance, and the disclaimer could not be a fraudulent transfer of such interest.

14 DAY DELAY IN PERFECTING SECURITY INTEREST HELD SUBSTANTIALLY CONTEMPORANEOUS

In re Moon, 262 BR 97 (Bankr D Or 2001)

Debtor financed the lease of his vehicle with creditor. At the end of the lease term, debtor exercised his option to purchase the vehicle, and creditor financed the purchase. However, creditor did not transfer the title until 14 days after the purchase. Later that same month, the debtor filed chapter 7. The trustee sought to avoid the transfer of the security interest under section 547.

Judge Radcliffe held that the enabling loan defense set forth in 11 USC § 547(c)(3) was not applicable, because the loan did not enable the debtor to acquire the vehicle (the debtor already had possession under the lease), but was instead used to satisfy a preexisting loan. The creditor also argued that the transaction was protected by the contemporaneous exchange defense of section 547(c)(1). The trustee argued that section 547(e)(2)(A) prohibits a creditor from using the contemporaneous exchange defense unless it perfects its security interest within 10 days after the transfer. Judge Radcliffe held that section 547(e)(2)(A) addresses when a transfer is made for purposes of determining whether it falls with the preference period, and does not preclude use of a 20 day grace period for enabling loan transactions. The court relied upon *In re Marino*, 193 BR 907 (9th Cir BAP 1996), *aff'd*, 117 F3d 1425 (9th Cir 1997), which held that the determination of whether a transfer is "substantially contemporaneous" is done using a case-by-case inquiry into all relevant circumstances. Here, the court decided that, based upon the complexity of the transaction, the 14 day delay in perfection was reasonable, and the transaction was substantially contemporaneous.

INCORRECT, INCOMPLETE, AND AMBIGUOUS LANGUAGE IN SECURITY AGREEMENT RENDERED IT UNENFORCEABLE

In re Stein, 261 BR 680 (Bankr D Or 2001)

Debtor attempted to grant his criminal attorney a security interest in $1.2 million that had been interpled into state court pending resolution of a dispute with his previous attorney. Criminal attorney received a cash retainer for immediate services, with an additional $300,000 non-refundable retainer secured by the interpled funds. Debtor later filed for Chapter 11 while criminal proceedings were pending. Trustee eventually obtained judgment for the $1.2 million, and plaintiff brought this adversary proceeding to enforce the security interest in the funds.

Judge Dunn held that the terms of the documents constituting the security agreement were so ambiguous, incomplete, and erroneous that they did not create an enforceable security interest. Specifically, the court found that the amount secured, the scope of services, and the time period for performing services were unclear. In addition, the security agreement merely stated that UCC-1 financing statements had been executed granting a security interest in the funds. However, the standard form UCC-1 financing statement contains no language granting a security interest. The court also held that plaintiffs could not prevail on two alternative grounds. First, the court found that a $300,000 fee for approximately $32,000 of work was excessive, and second, the transfer of the security interest constituted a fraudulent conveyance under section 548(a)(1)(B).

PRESUMPTION EXISTS IN FAVOR OF SETOFF

In re Silver Eagle Co., 262 BR 534 (Bankr D Or 2001)

IRS sought relief from the automatic stay to set off its claim, which included prepetition tax penalties, against the tax refund owed to the estate. The trustee objected to the motion to the extent that the IRS sought to set off the tax penalties. Judge Perris allowed the motion.

The trustee argued the penalties were for non-pecuniary loss, and that recovery of these penalties would be at the expense of other unsecured creditors who sought recovery for real pecuniary losses. The trustee asked the court to exercise its equitable power under section 105(a) and deny the requested setoff based upon the bankruptcy code's unfavorable treatment of non-pecuniary loss penalties under sections 724(a) and 726(a)(4). Judge Perris found that a presumption exists in favor of enforcing setoffs, and that nothing in the facts of this case provided sufficient basis for the court to exercise its discretion and overcome the presumption. Specifically, the court decided that the trustee was advocating the adoption of a rule that would be inconsistent with the statutory scheme set forth in section 553. 11 USC § 553 states that "this title" does not affect any right of a creditor to offset. The court stated that "this title" includes sections 724 and 726. If Congress had wanted to deny a right to setoff for debts of the type specified under sections 724 or 726, it would have done so specifically in section 553(a).

SUPREME COURT CASE NOTES

By Teresa H. Pearson
Miller Nash LLP

ANSWER MUST BE FILED AT THE SAME TIME AS (AND NO LATER THAN) MOTION FOR RELIEF FROM DEFAULT JUDGMENT

Duvall v. McLeod, 331 Or 675, 21 P3d 88 (2001)

Plaintiff took a default judgment against defendant. Defendant later moved to set the default judgment aside under ORCP 71B. Defendant did not submit her proposed answer along with her motion, but instead submitted it after the trial judge heard the motion. The trial court set aside the default judgment, and the court of appeals affirmed. On review, the Supreme Court held that the trial court erred as a matter of law when it set aside the default judgment, because the defendant did not submit her answer with her motion, and the trial court did not have the authority to waive the requirement for filing the answer at the time the motion was filed.

COURT OF APPEALS CASE NOTES

By Teresa H. Pearson
Miller Nash LLP

DEFAULT JUDGMENT AGAINST CORPORATION SET ASIDE DUE TO EXCUSABLE NEGLECT OF SOLE SHAREHOLDER SUFFERING FROM MENTAL ILLNESS

National Mortgage Co. v. Robert C. Wyatt, Inc., 173 Or App 16, 20 P3d 216 (2001)

Defendant, a corporation, borrowed money from plaintiff's assignor and secured the loan with real property. After the loan was made, the sole shareholder of defendant died and left his ownership interest in the corporation to his former wife. The former wife's father managed the property for a few years as representative of the decedent's estate (including entering into a lease of the real property to a third party while the property was still subject to the security interest), and then turned over control of the corporation to the former wife. Due to progressively worsening mental

illness, the former wife was unable to manage her own affairs or the affairs of the corporation. The corporate formalities were not followed and no new directors were appointed. The corporation failed to make its payments to the plaintiff for the real property and the plaintiff obtained possession of the real property through a nonjudicial foreclosure. This adversely affected the lease.

The plaintiff then took an assignment of claims from the third party tenant and filed a lawsuit against the defendant corporation for breach of the lease. The plaintiff served the former wife (as sole shareholder), a former officer of the company, and the lawyer who had been appointed registered agent of the defendant corporation (without his knowledge or consent). The plaintiff took a default judgment against the corporation and sold the corporation's remaining real property at a sheriff's sale. After the former wife was judged incompetent by a California court, her brother stepped in to manage her affairs, including her control of the defendant. He filed a motion to set aside the default judgment and sheriff's sale on the basis of excusable neglect. The trial court denied the motion. The Court of Appeals reversed on appeal, holding that as sole shareholder the former wife was the only person with authority to respond to the complaint, and that her incapacity due to mental illness was sufficient ground to overturn the default judgment on the basis of excusable neglect.

OPPRESSED MINORITY SHAREHOLDER RECOVERS HIS PRO RATA SHARE OF GOING CONCERN VALUE OF CORPORATION WITHOUT DISCOUNTS

Hayes v. Olmsted & Assocs., Inc., 173 Or App 259, 21 P2d 178 (2001)

Plaintiff, a minority shareholder, sued the corporation and majority shareholders for oppression. The trial court found oppressive conduct and awarded the minority shareholder the value of his shares under the formula propounded by the defendants. This formula was based on testimony of the corporation's executive committee members, and reflected the terms of a stock purchase agreement between the corporation and its shareholders. This value reflected a balancing of the shareholder's individual interests against the corporation's interest in establishing a price that would not unduly burden the corporation. On de novo review, the Court of Appeals agreed that the minority shareholder had been oppressed, but reversed on the question of the stock's value. The Court of Appeals adopted the valuation theory of the minority shareholder's expert witness and held that the oppressed minority shareholder was entitled to recover his pro rata share of the going concern value of the corporation without any discounts.

NO MAXIMUM TIME LIMIT ON LANDLORD'S RIGHT TO ENTER PREMISES AFTER GIVING STATUTORY NOTICE UNDER THE RESIDENTIAL LANDLORD AND TENANT ACT

Resources Northwest, Inc. v. Rau, 173 Or App 500, 22 P3d 1238 (2001)

Landlord decided to start charging tenants for water and sewer usage, and sent two notices to its tenants that its agent would be installing water meters and billing the tenants directly. The water meters were installed. Some of the tenants then complained about the charges and refused to allow the agent's meter readers access to their premises. As a result, the landlord decided to increase the rent instead of having its agent bill the tenants separately for water and sewer. Two of the tenants refused to pay the increased rent, and the landlord filed an action for forcible entry and detainer (FED) based on the failure to pay rent. The tenants counterclaimed, asserting violations of the Residential Landlord and Tenant Act (RLTA). The tenants argued that ORS 90.322 required landlord to give 24 hour minimum notice of its intent to enter, and that a maximum time limit should be inferred. The trial court rejected this argument, holding that there is no maximum time limit in the RLTA and refusing to infer one. The trial court held for the plaintiff on both the FED and the counterclaims, and the Court of Appeals affirmed.

PLAINTIFF CANNOT RECOVER ON CLAIM NOT PLEADED IN COMPLAINT

Northwest Marketing Corp. v. Fore-ward Investments, Inc., 173 Or App 508, 22 P3d 1230 (2001)

Plaintiff and defendant had an ongoing contractual relationship where plaintiff marketed and sold mobile homes to be placed on lots leased from defendant. Plaintiff asserted that defendant breached the contract, after which plaintiff refused further performance and filed a complaint to recover future lost profits. At trial, plaintiff put on testimony about some partial commissions that defendant did not pay plaintiff on matters that were in process at the time plaintiff refused further performance. At closing argument, plaintiff asserted a right to recover those commissions. The trial court found for plaintiff on the partial commissions, but rejected plaintiff's right to future lost profits. The Court of Appeals reversed the award of the commissions, holding that they were not pleaded in the complaint and not tried by the consent of the parties.

STIPULATED JUDGMENT IS NOT APPEALABLE

***Thompson v. State Farm Mut. Automobile Ins. Co.*,**
174 Or App 208, 25 P3d 387 (2001)

The trial court decided a dispute regarding underinsured motorist coverage on the parties' motions for summary judgment. The parties then submitted a stipulated judgment reflecting the court's decision in defendant's favor. Plaintiff then appealed. The Court of Appeals held that it did not have jurisdiction to review a stipulated judgment and dismissed the appeal.

WRITING CREATED BEFORE AGREEMENT IS FORMED SATISFIES THE STATUTE OF FRAUDS

***Lang v. Oregon-Idaho Annual Conference of the United Methodist Church*,**
173 Or App 389, 21 P3d 1116 (2001)

Defendant owned property that plaintiff wanted to purchase. Plaintiff and defendant exchanged numerous offers and counteroffers. In May 1998, defendant set forth in writing the terms on which it would sell the property. Although that offer expired, it was later renewed on October 6, 1998. On October 9, plaintiff orally told defendant it would accept those terms. However, a few days later, defendant received a better offer from a third party and was no longer willing to sell to plaintiff on those terms. Plaintiff sued for specific performance. Defendant asserted several affirmative defenses, but not the statute of frauds. Defendant filed a motion for summary judgment, which the trial court granted. The Court of Appeals reversed and remanded, holding that a writing need not be contemporaneous with the agreement to satisfy the statute of frauds. Therefore, the writing prepared in May 1998 could satisfy the statute of frauds, even though plaintiff orally accepted those terms.

PLAINTIFF CAN NAME RECALCITRANT JOINT PAYEE AS DEFENDANT WHEN NECESSARY TO ENFORCE PROMISSORY NOTE

***Piatt v. Medford Highlands, LLC*,**
173 Or App 409, 22 P3d 767 (2001)

Plaintiff and Sauls conveyed real property to defendant Medford Highlands, taking back a promissory note secured by a trust deed for the unpaid portion of the purchase price. The trust deed provided that the debt would be accelerated if Medford Highlands made any attempt to convey the property without first receiving prior written consent from plaintiff or Sauls. Medford Highlands stopped making payments on the promissory note and then conveyed the property to a corporation of which Sauls was the primary shareholder. Several months later, Medford Highlands told plaintiff of the transfer. Plaintiff then sued Medford Highlands to enforce the note and foreclose the trust deed. Sauls refused to join with plaintiff in the lawsuit, so plaintiff named Sauls as a defendant. Both parties moved for summary judgment. Defendants argued that ORS 73.0110(4) requires that all payees of a promissory note must consent in order to enforce an instrument payable jointly to all of them. Plaintiff argued that the statute only required that all payees be joined in the action, and if a payee did not consent, it could be named as a defendant. The trial court agreed with plaintiff's interpretation of the statute and held for plaintiff. The Court of Appeals affirmed.

SEMINAR CALENDAR

JANUARY, 2002

24 & 25 Corporate Restructuring & High Yield Debt; New York, NY; SRI

30 Emerging Issues in Workouts & Bankruptcies: What You Need to Know Now!; New York, NY; PLI

31 & February 1 Revised Article 9 of the Uniform Commercial Code, Scottsdale, AZ; ALI-ABA

31-February 2 Seventh Annual Rocky Mountain Bankruptcy Conference, Denver, CO; ABI

FEBRUARY, 2002

20 & 21 Distressed Debt: Navigating through the Restructuring and Bankruptcy Process to Profitability, New York, NY; IIR

26 How to Get Results in Collection of Delinquent Debts in Oregon, Portland, OR; NBI

MARCH, 2002

4 Emerging Issues in Workouts & Bankruptcies: What You Need to Know Now!; San Francisco, CA; PLI

3-6 Norton Bankruptcy Litigation Institute I, Park City, UT; NIBL

7 & 8 Healthcare Transactions 2002: Successful Strategies for Mergers, Acquisitions & Restructuring the Healthcare Industry, Chicago, IL; RAM

8 10th Annual Bankruptcy Battleground West, Los Angeles, CA; ABI

14-16 The 35th Annual Uniform Commercial Code Institute, San Francisco, CA; UCCI

18-21 Short Course on Consumer Law, Palm Springs, CA; CCFL

APRIL, 2002

11-14 Norton Bankruptcy Litigation Institute II, Las Vegas, NV, NIBL

18-21 ABI Annual Spring Meeting, Washington, D.C., ABI

18-20 The 35th Annual Uniform Commercial Code Institute, Chicago, IL, UCCI

26-27 Northwest Bankruptcy Institute, Portland, OR; OSB

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