

The

Advocate

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Commercial Law and Bankruptcy Section



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On the Cover: The photo was taken at the City Creek, west of Pocatello by attorney Lane Erickson. He is a partner with the law firm of Racine, Olson, Nye, Budge & Bailey, Chartered in Pocatello.

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Setting Goals

Hon. Rick Carnaroli

A goal is defined as an end or final purpose; the end to which a design tends or which a person aims to reach or accomplish. Goals should be distinguished from dreams, which are more abstract and prone to imagination or fancy.



It is a New Year with opportunities for new beginnings. So, what are your goals for the coming year? Have you recently taken a few moments to look at your current situation and set some goals for yourself? If not, don't worry. There is still time.

Recently, I was skimming through a book by New York Yankee Hall of Famer Yogi Berra. Yogi had spoken and written about the topic of setting goals. In one chapter he wrote, "If you don't know where you're going, you might not get there."

That statement struck a nerve with me as I'd been feeling like, beyond the workday, I had very little control over my days. I asked myself, "Where am I going these days?" With that thought, I began to think of setting some goals to gain a little more control of my time away from the job.

Ever feel like there are just not enough hours in a day? That's me. At work, I have my focus and control. The same goes for my work on the Bar Commission. However, I feel more and more pressed for time when I'm away from work, like I am getting less done than I can or should at home, with family and friends, in the community, and for myself.

At home, the projects are gathering dust. My Dad was a carpenter and handyman. The idea of hiring the small jobs that need to be done around the house is not appealing. On the weekends, I used to recreate more often with my family and friends. I used to exercise. I used to read a lot.

It just seems like every day has become a race: to work, to meetings, to my children's events, and back home, only to do it all again the next day. The sense of feeling rushed diminishes my enjoyment of the people and events that I do enjoy.

Do you too, hurry here and there, pushing the last minute out to the last second, managing brush fires all along the way? I wonder if you do? I know that you as members of the Bar are just as busy, if not more so than I. The practice of law is demanding. If you could find a way to make your life a little easier and a little more enjoyable, I'm sure you would.

I've never been someone who uses lists. I shop without a list, and I generally plan my day and prioritize what I do in my head, reacting to the moment and folding my plans and priorities into the day as it develops. Of late, this approach is not working for me and leaves many things incomplete or untouched at the end of the day. I decided to bite the bullet and make a list of goals for 2006.

It was a pretty long list! It contained ideas about completing projects at home, finding more time for my children, becoming involved in something new in our community, exercising more, and doing the things I used to enjoy with some regularity. I looked at the list and was immediately discouraged. How could I realistically achieve so many goals? I needed to reduce the list.

Each time I took a run through the list, it became smaller. One goal seemed to naturally include the next. In the end, one goal emerged.... My goal for 2006 is simply to be more organized. To that end I'm going to:

- 1) list and prioritize my home projects and check them off as they are completed.
- 2) make an appointment with myself, blocking out time for snowshoeing and skiing with my children this winter. Maybe we'll just play a little one-on-one basketball, or throw a baseball or softball for a little while.
- 3) schedule some exercise into my day.
- 4) find a good book so read a chapter before bed to unwind at the end of the day.

I've always thought of goal setting as a way to achieve long-term goals. Until now, I had not thought of setting goals for daily living. Perhaps an evaluation of your short-term goals is worth a moment's thought too. Wish my new day planner and me some luck!

HON. RICK CARNAROLI succeeded Deb Kristensen as president of the Idaho State Bar Board of Commissioners in July 2005. He is serving a twelve month term as president and has been a Bar commissioner representing the 6th and 7th Districts since 2003. He received his BA from Pacific University in 1980 and his JD from Willamette University College of Law in 1985. Rick was admitted to the Idaho State Bar in 1985. He was later admitted to practice in the United States Court of Appeals for the Ninth Circuit in 1993 and in the Supreme Court of the United States in 1999. Rick engaged in litigation practice in both the private and public sectors before taking the bench in October 2004 as a magistrate judge in Bannock County. He is the third member of the judiciary to serve on the Board of Commissioners.

To contact President Carnaroli: 208-236-7322 or ricket@co.bannock.id.us

ABA President Michael S. Greco issued the following statement concerning the ruling of the U.S. Court of Appeals for the District of Columbia Circuit on applicability of Gramm-Leach Bliley Act to the Legal Profession: The Court of Appeals for the DC Circuit today affirmed the ABA's view that a federal privacy law aimed at financial institutions does not cover the legal profession. As the court stated, "the regulation of the practice of law is traditionally the province of the states." This ruling underscores that for more than two centuries we have rightly relied on state supreme courts to exercise responsibility for oversight in order to protect and safeguard the confidentiality of attorney-client communications and the public interest.

ABA Pro Bono and Public Service Best Practices Resource Guide: The ABA Commission on the Renaissance of Idealism in the Legal Profession was created to develop policies and practices that help lawyers strike a better balance in their lives and law practices, allowing them to perform public service, volunteer legal assistance to those in need, help improve their communities and find greater fulfillment in their careers. To this end the Commission has developed an online database of over 160 successful pro bono and public service program models from all practice areas. It was created to foster workplace policies and practices that enable lawyers to do more pro bono and public service. It may be searched online by keyword and by three categories: initiative type, practice setting, and partnership typed. The guide is available at www.abanet.org/renaissance

Farewell Reception: Please join us to honor Dana Weatherby, Director of Continuing Education, for her 15 years of dedicated service to the Bar. The reception will be January 12, 2006, 4:30-6:30 at the Law Center. Please RSVP to (208) 334-4500.

Idaho Court Administrative Rules (I.C.A.R.) – Cameras in the Courtroom - An amendment to I.C.A.R. 45, 46a and 46b – Cameras in the Courtroom was signed December 6, 2005 and effective December 15, 2005. Updates to the I.C.A.R. can be found at court's website – www.isc.idaho.gov/rules

2005 Bankruptcy Act Resources - A new bankruptcy law took effect October 17, 2005. Information about it, including new and revised forms and guidance on who is exempt from having to pay filing fees, is available online – www.uscourts.gov/news

Law and Policy Institutions Guide - Organized and designed with the research needs of legal professionals, law students, consultants, authors, and the public in mind, the Law and Policy Institutions Guide serves as a comprehensive repository of legal resources, law articles, legal practice information, as well as legislative and judicial resources for U.S. and international legal professionals. You can search the guide using either keyword or concept method. Enclose in quotes if using concept method. Search the entire site or select a category you would like to search. Website is www.lpig.org

Terri Muse has been selected as the new Legal Education Director for the Idaho State Bar and Idaho Law Foundation, Inc. She recently served as part-time assistant Bar Counsel for the Bar and as a Case Manager for the Idaho Volunteer Lawyers Program.

The National Association of Consumer Bankruptcy Attorneys (NACBA) announced today that Brad Botes, an Alabama bankruptcy attorney, will serve as its new executive director. Established in 1992, NACBA is the only organization dedicated to serving the interests of consumer bankruptcy attorneys and protecting the rights of consumer debtors in need of bankruptcy relief. NACBA serves more than 3,500 members in all 50 states and Puerto Rico. He has been a member of NACBA since its inception in 1992 and has served on its Board of Directors since 2004. Before his selection Mr. Botes was a practicing bankruptcy attorney and principal in each of the Bond & Botes consumer law offices located in Alabama, Mississippi, Florida and Tennessee. Mr. Botes received his undergraduate degree from the University of North Alabama and his J.D. from Cumberland School of Law at Samford University.

Idaho Law Foundation Receives Generous Contributions

IDAHO LAW FOUNDATION



Helping the profession serve the public

Since the fundraising year began on July 1, the Idaho Law Foundation has received over 150 contributions, raising nearly \$15,000. These donations include a very generous grant of \$1,000 from the Walter & Leona Dufresne Fund in the Idaho Community Foundation and a contribution of \$3,533.34 from the Friends of the Court, Inc. These funds will help support the work of the Idaho Volunteer Lawyers Program. Additionally, ILF received \$1,000 from the Idaho Association of Defense Counsel for the Foundation's Endowment Fund.

The Idaho Law Foundation would like to thank those who have contributed for their generous gifts and remind those who have not yet made their donations that the Licensing Campaign will continue through the end of February. ILF encourages attorneys to give at a level meaningful to them through a designation on the 2006 Licensing Form or by filling out and returning the pledge card received in the mail in early December.

If you have any questions, please contact, Carey Shoufler, ILF Fund Development Manager, at 208.334.4500 or cshoufler@isb.idaho.gov.



2005 Resolutions – The Results

Diane K. Minnich

The Idaho State Bar membership considered three resolutions during the 2005 resolution process. All of the resolutions were approved by the membership. The voting results are reported here along with and explanation of what will now happen with each resolution.

05-1 Mandatory Disclosure of Professional Liability Insurance: This resolution, which was submitted by the Board of Commissioners, proposes amendments to the Idaho Bar Commission Rules to require lawyers to certify to the Idaho State Bar as a part of licensing each year whether or not they have professional liability insurance. The proposed rule changes will be submitted to the Idaho Supreme Court for its consideration. If the Supreme Court approves the rules, Idaho attorneys will be required, as a part of 2007 licensing, to indicate whether they carry professional liability insurance.

05-2 Reciprocal Admission: Twin Falls attorney Brian Harper submitted this resolution proposing that the Idaho State Bar draft amendments to the Idaho Bar Commission Rules that would set forth the framework to allow the Idaho State Bar to have reciprocity with all other states that allow reciprocal admission. Proposed rules will be drafted, reviewed and approved by the Board of Commissioners, then submitted to the Idaho Supreme Court for its consideration. If the Supreme Court approves the rules, expanded reciprocal admission should be available by fall 2006. Currently, more than 30 states allow for some form of admission on motion.

05-3 Uniform Limited Partnership Act: The Business and Corporate Law Section of the Bar is recommending the adoption by the Idaho Legislature of the Uniform Partnership Act in the form of

the 2005 Idaho Senate Bill 1041 as amended (the bill, with amendments, was included in the resolution voter pamphlet.) Section representatives will inform the legislature that Idaho bar members voted to recommend the proposed legislation as well as comment on and answer questions about the legislation.

The Board of Commissioners and staff that traveled around the state on the “roadshow,” as we affectionately call it, had another year of interesting and enjoyable visits to the seven district bar meetings. We appreciate the opportunity to meet with lawyers throughout Idaho and discuss issues of concern to the bar. Thanks to those of you that attended the meetings. It is always a pleasure to join you to honor colleagues and to visit with friends and acquaintances.

2005 Resolution Vote Tally

District		1st	2nd	3rd	4th	5th	6th	7th	OSA*	Total	
Members eligible to vote		385	211	200	1673	292	188	315	620	3884	
% of total membership		10%	5%	5%	43%	8%	5%	8%	16%	100%	
Members voting		124	93	47	455	107	97	130	102	1155	
% of members voting		32%	44%	24%	27%	37%	52%	41%	16%	30%	
Number in attendance		32	58	18	130	38	50	41	0	367	
% in attendance		8%	27%	9%	8%	13%	27%	13%	0%	9%	
1-Mandatory	For	75	57	26	303	72	59	59	63	714	63%
Disclosure	Agains	48	36	21	139	35	37	70	38	424	37%
	Total	123	93	47	442	107	96	129	101	1138	
2-Reciprocity	For	93	78	37	375	84	80	107	81	935	81%
	Agains	31	15	11	79	21	18	23	20	218	19%
	Total	124	93	48	454	105	98	130	101	1153	
3-Limited Partnership	For	106	80	36	377	88	93	120	87	987	94%
Act	Agains	8	4	6	22	5	3	6	7	61	6%
	Total	114	84	42	399	93	96	126	94	1048	

DISCIPLINE

SCOTT A. EVERARD

(Suspension)

On December 6, 2005, the Idaho Supreme Court issued its Remittitur that ordered the Opinion of Court announced September 23, 2005, final. That Opinion concluded that Mr. Everard was suspended from the practice of law in Idaho for a period of 180 days, commencing on the date of the Opinion.

The Idaho Supreme Court Opinion concluded this attorney reciprocal discipline case. Mr. Everard was disbarred in Washington by Order of the Washington Supreme Court on December 12, 2000. The Idaho State Bar commenced a reciprocal disciplinary case against Mr. Everard on April 22, 2003. On July 1, 2003, a full day show cause hearing was conducted. Following that hearing, the Hearing Committee of the Professional Conduct Board concluded that under Idaho Bar Commission Rule 513(e)(1), Mr. Everard was afforded due process in Washington. On May 30, 2004, the Hearing Committee denied Mr. Everard's Motion to Dismiss and/or Summary Judgment.

A second show cause hearing was conducted on May 17, 2004, to address the extent of the final disposition to be imposed in Idaho. On June 16, 2004, the Hearing Committee issued its Recommended Imposition of Sanction, recommending that Mr. Everard be suspended from the practice of law for 180 days, to run concurrently with the sanction of disbarment imposed upon Mr. Everard in Washington. On September 13, 2004, Mr. Everard filed his Notice of Objection and requested review by the Idaho Supreme Court under Idaho Bar Commission Rule 511(n).

The Idaho Supreme Court affirmed the findings of the Professional Conduct Board in its September 23, 2005 Opinion. The Idaho Supreme Court concluded that the Idaho Professional Conduct Board had jurisdiction to recommend findings of fact and a sanction to the Idaho Supreme Court; that Mr. Everard was not denied due process of law in the Washington disciplinary proceedings; that Mr. Everard was not denied due process by the delay in commencing reciprocal proceedings against him in Idaho; and that the appropriate sanction was suspension from the practice of law in Idaho for a period of 180 days, commencing on the date of the Opinion. The Court's Remittitur awarded costs in the amount of \$3,206.40 to the Idaho State Bar.

The Idaho Supreme Court's Opinion is 2005 Opinion No. 102, 2005 Slip Opinion 30978, filed on September 23, 2005. The Remittitur ordering the Opinion final was issued on December 6, 2005.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

MCLE Extension

If you did not complete your MCLE requirements by your December 31, 2005 deadline, you can get an extension until March 1, 2006 to obtain the extra credits you need. Send a written request and \$50 MCLE extension fee to the Membership Department. Remember the licensing deadline is still February 1, 2006 and the rest of your licensing must be physically received in the Idaho State Bar office by that date to avoid the late fee. Courses taken to complete your MCLE requirements will be counted on previous reporting period. The final licensing deadline is March 1, 2006. Your MCLE requirements must be completed by that date. Please contact the Membership Department at (208) 334-4500 or astrouser@isb.idaho.gov if you have any questions.

RECIPROCAL ADMISSION

The Idaho Supreme Court approved rules submitted by the Bar that allow reciprocal admission with Oregon, Washington, Utah and Wyoming (Idaho Bar Commission Rule 204A). Under these rules, certain Idaho, Washington, Oregon, Utah and Wyoming lawyers can apply to be admitted to practice in the other states without having to take additional bar exams. The following lawyers were admitted to the practice of law in Idaho.

Reciprocal Admission

Applicants Admitted

(from November 1, 2005,
to November 30, 2005)

Fiona Allison Crinks Kennedy

Athol, ID

Gonzaga University

Admitted: 11/4/05

William Wright Morgan

Salem, OR

Willamette University

Admitted: 11/16/05

Commercial Law and Bankruptcy Section

Dick Greenwood
Greenwood Law Office

The Commercial Law and Bankruptcy Section is the oldest practice section of the Idaho State Bar.¹ It was organized at the State Bar Convention at Sun Valley, held in July 1982. The actual charter was adopted the following October. Originally, the Section was simply called the “Bankruptcy Section.” The name change to include “Commercial Law” came later. The Section has had a lively and interesting history, and continues to be a valuable resource to Idaho bankruptcy practitioners.

Before December 1979, the practice of bankruptcy law was limited to a fairly small part of the bar. Bankruptcy seldom touched the awareness, let alone the lives, of the everyday citizen. But that started to change when the Bankruptcy Code of 1978 became effective in December 1979.

The Bankruptcy Code’s replacement of the Bankruptcy Act was a sea change in the commercial world. The new Code was a complete rewrite of the existing bankruptcy statutes. There were certain fundamental principles and concepts carried over from existing law, but the rewrite was so extensive that the bankruptcy bench and bar were writing on a clean slate much of the time. Judges and lawyers struggled to give real-world effect to the sometimes-obtuse words and organization of the Bankruptcy Code. The national economy was in the doldrums at the time (anyone remember stagflation?) and the number of bankruptcy filings soared nationwide.

With the increase in filings came an increase in the number bankruptcy practitioners. Suddenly, law firms that had not been involved in a bankruptcy case for years found their clients embroiled in matters in bankruptcy court. Commercial law firms added bankruptcy lawyers or whole bankruptcy departments to their rosters. Now bankruptcy law had an impact on more of the clients of the general practitioner in a small town or a small office.

The changes meant learning new rules to ensure the adequate representation of either debtors or creditors. In the early 1980s, mandatory continuing legal education was a relatively new phenomenon. The Idaho State Bar and Law Foundation had long been sponsoring voluntary continuing legal education, but the multitude of courses now available did not exist 25 years ago. Idaho had one seminar devoted to the new Bankruptcy Code, and that seminar came two months after the effective date of the new law. Bankruptcy lawyers either traveled out of state for continuing education, or studied on their own and flew by the seat of their pants. Many of us drew upon the knowledge of the relatively few experienced bankruptcy lawyers practicing at the time.

According to legend, formation of the practice section was first suggested by then Idaho Chief Bankruptcy Judge Merlin Young. His encouragement and gentle persuasion, if there can be such a thing as gentle persuasion from a federal judge, not only inspired the formation of the section, but also provided guidance in its formative years. At the risk of overlooking someone (for which I apologize in advance), the founding fathers of the section

were a group of dedicated, mostly young, lawyers who recognized the need for an organization to foster professionalism and collegiality among the members of the bar practicing bankruptcy law. These included such familiar names as Jim (now Judge) Pappas, Larry Prince (now with Holland and Hart in Boise), Mike Southcombe (now with Elam and Burke in Boise), Tom Ambrose (now a professor of law at Lewis and Clark Law School in Portland), and Wayne Sweney (now with Lukins and Annis in Coeur d’Alene).

In February 1983, the Section had its first seminar and annual meeting at the Shore Lodge in McCall. A few brave souls pledged their credit cards for the facility reservation, talked up the seminar to all of their friends, and crossed their fingers in hopes that there would be sufficient attendance to cover the cost. Presidents’ Day weekend was chosen because it followed the Winter Carnival. Consequently, the owners of the Lodge were open to negotiation on price. That event started a tradition that lasted until well into the 1990s of having the annual seminar on Presidents’ Day weekend at McCall. It also started the tradition of inviting nationally recognized bankruptcy judges and eminent practitioners to serve as faculty, along with local talent. A few years later the section held its first fall seminar at the then newly renovated Coeur d’Alene Resort. Once again the leaders of the section, also including such notables as Bart Davis and Ford Elsaesser, leveraged the meager assets of the fledgling section to sponsor a regional seminar. The first Coeur d’Alene seminar had over 400 attendees from Idaho, Oregon, Washington, and Montana. For about 10 years the Section sponsored two seminars a year, the annual meeting and seminar in McCall, and a second seminar in Coeur d’Alene. As time passed and competition for the seminar dollar increased, it became apparent that there was not sufficient demand to financially support two seminars a year. The section scaled back to one seminar a year alternating between northern Idaho and southern Idaho. That pattern continues to the present time.

During the years of dual seminars, the Section prospered financially. It’s safe to say the attendance at Section-sponsored seminars was higher than for any similar events held in Idaho. It was during these years that the Great Rift developed between the Section and its parent organization, the Idaho State Bar. The exact details of the dispute are lost in the mists of time. Some say the trouble was caused by a bottle of wine purchased at dinner and paid for by the Section. (The expense of the wine and the dinner has grown to heroic proportions with the passage of time and retelling, and the legend of that infamous “\$200 bottle of wine” may never die.) There were those who insisted the funds used to purchase the wine were not rightly those of the Bar and thus the Bar had no say so long as the Section membership was content. Others say the dispute was caused by money and who was entitled to control it. At any rate, the Section continued to prosper under the aegis of the Idaho State Bar.

Along the way, the name of the Section was changed from the "Bankruptcy Section" to the "Commercial Law and Bankruptcy Section." This was intended to better reflect the nature of the practice of the membership. Unlike the lawyers in larger, more urbanized states, the bankruptcy practitioner in Idaho seldom limits the practice solely to bankruptcy law. Most Section members that regularly practice bankruptcy law also regularly engage in other aspects of commercial law. The name change allows us to proudly tell the world we do more than bankruptcy.

The Section is run by a governing council balanced in geography and practice focus. Of the seven council members, two are from northern Idaho, two are from eastern/southern Idaho, and three are from southwestern (Boise valley) Idaho. Balance is also maintained between those who practice mostly on the debtor side of the table and those who represent mostly creditors.

The Section's activities are not limited to just its annual seminar. A quarterly newsletter is published for members to keep abreast of recent developments. The newsletter carries the occasional opinion piece as well. Among other projects in the past, the section sponsored a bankruptcy library for the Court in Pocatello and Coeur d'Alene. In the days before the Internet and CD-ROM on the ubiquitous laptop, bankruptcy research was actually done with books containing pages printed on paper. Bankruptcy judges sat frequently in Pocatello and Coeur d'Alene, but there were limited resources for the court and the practitioners. The Section also developed and presented an educational program to state trial judges. It was a well received program and much appreciated by the state bench. When significant changes are made to the bankruptcy laws, the Section provides additional seminars for its membership. Most recently, the Section sponsored seminars in Boise, Coeur d'Alene, and Pocatello to educate lawyers throughout the state about the latest bankruptcy reform. The Section is also currently busy with a project to develop credit-education curriculum suitable for use in high school. This program involves creating written materials as well as a video presentation consistent with Board of Education requirements to help teachers in the classroom educate students about the responsible use of credit.

The active and ongoing support of the bankruptcy bench is a boon to the Idaho practitioner and Section member. In Idaho, the newest member of the bar can put questions to the judge (rather than the other way around) at the annual seminar, then converse one-on-one with the judges and more seasoned members of the bar at the social hour that follows. This is not a luxury typically enjoyed by lawyers condemned to practice in the more populous states or other fields of the law.

The Section governing council also serves as a liaison with the bankruptcy bench. Beginning with Judge Young, bankruptcy judges have historically been very supportive of the Section. In addition to teaching at the annual seminar, the judges use their connections in the wider bankruptcy world to obtain participation of national quality speakers at the seminars. Somehow they convince these folks to travel to the remote outpost of Idaho in exchange for a plane ticket, hotel room, and a couple of meals. In the past this has included Judge Keith Lundin from Tennessee, a nationally recognized authority in Chapter 13; Judge Barry Russell from California, the original author of the leading treatise on bankruptcy evidence; Judge Wedoff from Chicago, who is presently presiding over the United Airlines bankruptcy; and Sam

Gerdano, the executive director of the American Bankruptcy Institute. One of the most popular features of the annual seminars for the past 20 years or so has been the judges' panel. The judges' panel was originally instituted with the aid of then Chief Bankruptcy Judge Hagan. The judges in attendance at the seminar take questions from attendees, which is always entertaining and educational.

In turn, our bankruptcy judges take input, through meetings with the Section's governing council, regarding concerns of the practitioners in general. At the same time, if the judges have a concern about something affecting the practice generally, they frequently will advise the governing council and ask that the concerns be made known to the bankruptcy bar. For example, the current credit-education project has its origins in a subtle hint from the bench in one of these meetings. And the judges draw upon the section for such things as the local rules committee.

As with any arena where lawyers are regularly on opposite sides of a legal divide, there is the occasional flare-up, but for the most part, collegiality reigns outside the courtroom. Unlike some areas of practice, the bankruptcy bar in Idaho has not yet broken into armed camps that are barely on speaking terms with one another. It is my belief that the Section helps enormously in this regard. The leaders of the Sections and the bench encourage professionalism in the conduct of cases and courtesy in the course of litigation. Not all areas of practice or the country are so lucky.

Bankruptcy law has come to resemble tax law in many respects. Not only is the Bankruptcy Code filled with innumerable cross-references and its own jargon, but it also gets increasingly complex with every congressional effort at reform and simplification. It touches and influences nearly all other areas of practice. Whether the lawyer specializes in personal injury, business transactions, domestic relations, real estate, or intellectual property, an awareness of the potential impact of someone's bankruptcy on the client's case or transaction is required for competent representation. The Commercial Law and Bankruptcy Section is here to help. Even if you do not regularly practice in bankruptcy court, we invite you to attend our seminars to maintain an awareness of how bankruptcy may affect your case. Meet our members and shake hands with the judges at the annual dinner. Come join us. Section membership gets you the newsletter and a discount at the seminar to boot.

The following articles by Section members provide news, summaries and insights into the ever-developing field of bankruptcy law.

ABOUT THE AUTHOR

RICHARD D. GREENWOOD has practiced law in Twin Falls since being admitted to the bar in 1977. He has been a member of the Commercial Law and Bankruptcy Section since its founding and is the current Chairman of the governing council of the Section.

Endnote

1 What follows is one person's opinions and recollection of past events. It is based mostly on failing memory and hearsay. It should not be confused with historical fact.

How to Become a Debt Relief Agency... BY MISTAKE

Ben Slaughter
Elam & Burke, PA

Imagine this: you get a call one day from a woman who tells you her ex-husband has just filed for bankruptcy, and she wants to know how it will affect her. You tell her you are not necessarily a bankruptcy specialist, but you believe there is a provision in the Bankruptcy Code that would prevent her former spouse from being able to discharge any of the divorce debts. Under the plain language of the amendments to the Bankruptcy Code (the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ["BAPCPA"]), the woman is an "assisted person" and you most likely have rendered "bankruptcy assistance." As such, you (and possibly your firm) may have just become a "debt relief agency" and subjected yourself to the mandates of Bankruptcy Code Sections 526–528.

Sections 526–528 require "debt relief agencies" who render "bankruptcy assistance" to enter written contracts with "assisted persons," disclose the extent of services provided and fees charged, and disclose clearly and conspicuously in all advertising that their services contemplate bankruptcy. Debt relief agencies are required to provide to all "assisted persons" a detailed written notice of the disclosure requirements of the Code, the obligation of accuracy and truthfulness on those disclosures, and that a failure to comply with those requirements carries potential civil and criminal sanctions. They are also required to advise the "assisted person" that the person may proceed *pro se*, hire an attorney, or hire a bankruptcy petition preparer, and that only attorneys and not petition preparers can render legal advice. Finally, debt relief agencies are required to provide the "assisted person" with information on how to value assets, how to complete bankruptcy schedules, and how to determine what property is exempt. Debt relief agencies are prohibited from failing to provide the services they contracted to provide, counseling any person to make false statements, or advising the person "to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer..." Section 526(c) creates civil liability for a violation of the duties enumerated.

Although attorneys are not expressly included in the Bankruptcy Code's definition of "debt relief agencies," the language is broad enough on its face to include attorneys and the reference to "providing legal representation" suggests that attorneys are covered. Indeed during the months since the passage of BAPCPA, considerable analysis of all its provisions has been undertaken by the academic and legal community to educate the public, attorneys, and the judiciary of its content, scope, and meaning. Commentary relating to these provisions appears to assume or at least raise the specter that as of October 17, 2005, attorneys come within the scope of Bankruptcy Code Sections 101(12A), 526, 527, and 528.

If these commentators are correct, a new layer of regulation will be imposed on all attorneys, and evaluations of new risks and liabilities will preoccupy them as they strive to represent their

clients, comply with existing state regulations of their practice, learn the new substantive and procedural mandates of this new law, and adhere to an additional set of professional standards.

Many commentators feel the debt relief agency provisions were simply poorly drafted and not intended to include attorneys. However, some commentators believe the broad language was not a mistake, and that Congress in fact intended for the debt relief agency provisions to apply to attorneys. For example, Catherine E. Vance and Corinne Cooper drafted an article on this subject titled *Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law*, accusing Congress of "declaring war on bankruptcy attorneys[.]" while protecting bankruptcy petition preparers and credit counseling agencies.¹ Their article picks apart the statutory language of each of the provisions and lays out a good argument that Congress intended to have the debt-relief-agency provisions include attorneys. They point out the irony in protecting petition preparers and credit counseling agencies when those groups have a reputation of "preying on the financially vulnerable[.]"

It is uncertain how the United States Bankruptcy Court for the District of Idaho is going to react to this new phenomenon in the BAPCPA. It is quite possible that the issue will never arise. However, the mere possibility that attorneys will be included in the debt relief agency provisions is scary enough to cause many attorneys to change their internal policies for handling bankruptcy questions from clients. The dispute has caused Chief United States Bankruptcy Judge Lamar W. Davis, Jr., of the Southern District of Georgia to, *sua sponte*, issue an Order ruling "that attorneys regularly admitted to the Bar of [that] Court or those admitted *pro hac vice* are not covered by the provisions of the Code regulating debt relief agencies, ... and are excused from compliance with any of those requirements or provisions, so long as their activities fall within the scope of the practice of law and do not constitute a separate commercial enterprise."² Although the effect of Judge Davis' order may be desirable, it appears to be more of an advisory opinion. Practitioners may not feel comfortable until an actual case arises and a similar ruling is rendered on the merits. The people who will most likely be affected by the concerns raised by these new provisions will be the very people who need the help the most - the debtors. As expressed by Robert Evans, Director of the American Bar Association Office of Governmental Affairs, in a letter to members of the Senate prior to voting on the BAPCPA, "these provisions will strongly discourage attorneys and law firms from providing essential pro bono bankruptcy services to the very debtors who need them the most."

Perhaps the most disturbing aspect of this potential pitfall created by the BAPCPA is that many lawyers who do not practice bankruptcy law may not be aware of these new provisions and could very well find themselves being deemed debt relief agencies without ever knowing what a "debt relief agency" is.

ABOUT THE AUTHOR

BEN SLAUGHTER earned his B.S. degree from the University of Utah in 1996, and his J.D. at the University of Idaho, College of Law in 2000. After graduating from law school, Ben served as a law clerk to the Honorable Terry L. Myers, Bankruptcy Judge for the District of Idaho. He is now an associate at Elam & Burke, PA, in Boise, Idaho.

Endnotes

2 *In re: Attorneys at Law and Debt Relief Agencies*, (Bankr. S.D. Ga., Oct. 17, 2005), available at <http://www.gasb.uscourts.gov/usbc/LWOrder.pdf>.



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Highlighted Changes to the Automatic Stay Under the Revised Bankruptcy Code

Sheila R. Schwager

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On April 20, 2005, President Bush signed into law the Reform Legislation entitled the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" ("Revised Code"). This is the most substantial revision of bankruptcy law since the 1978 Bankruptcy Code was enacted. The Revised Code has significantly changed how the "automatic stay" affects "domestic support obligations," tax liens, and real property; when the stay comes into existence; and the application of the stay to secured claims.

The automatic stay provision of the Bankruptcy Code is set forth in section 362.¹ It provides that the filing of a petition in bankruptcy operates to stay certain actions. For example, the automatic stay precludes creditors from sending demand letters, continuing collection actions, repossessing collateral, and continuing litigation against the debtor.² This automatic stay applies to "all entities" and, prior to recent amendments, it became effective automatically in every bankruptcy case filed. The "automatic" stay is one of the fundamental protections afforded to debtors. It was included in the Bankruptcy Code to give debtors a breathing spell from creditors during which they could attempt to structure a plan to repay their debts or arrange for relief from the financial pressures that drove them into bankruptcy. The automatic stay was also included in the Bankruptcy Code to protect creditors. Without it, creditors who acted first could obtain payment on their claims in preference to, and to the detriment of, other creditors. The Bankruptcy Code was designed not only to give the honest, but unfortunate, debtor a fresh start, but also to provide an orderly rehabilitation or liquidation procedure under which similarly situated creditors could be treated equally.

Domestic Support Obligations

Domestic Support Obligations have obtained a special status under the Revised Code. Section 101(14A) of the Bankruptcy Code defines a Domestic Support Obligation as a debt owed to or recoverable by a spouse, exspouse, child, child's parent, legal guardian, responsible relative, or governmental unit ("Covered Parties") that is in the nature of alimony, maintenance, or support. The debt needs to be established or subject to establishment by a separation agreement, divorce decree, or property settlement agreement, an order of a court, or a determination by a governmental unit in accordance with applicable nonbankruptcy law.³ It cannot be assigned to a nongovernmental unit unless the assignment was voluntarily made by the Covered Parties.

The automatic stay does not apply with respect to the withholding of income that is property of the bankruptcy estate or property of the debtor for the payment of a Domestic Support Obligation accruing either before or after the filing, so long as such obligation meets the definition of Domestic Support Obligation, even where such obligation has been assigned to a governmental unit.⁴ The automatic stay is not applicable to the suspension of a driver's, professional, occupational, or recreation license, which is

effective upon the nonpayment of Domestic Support Obligations.⁵ It also does not apply to the interception of tax refunds for the purpose of collecting Domestic Support Obligations.⁶

Exceptions Related to Tax Liens and Real Property

The automatic stay does not impair the creation or perfection of a statutory lien for *ad valorem* taxes on personal property or taxes upon real property when the taxes become due after the filing of the petition.⁷ Nor does it halt the withholding of income from a debtor's wages in order to repay a loan incurred by a debtor from the debtor's retirement or pension account.⁸ The automatic stay will not prevent the setoff of a prepetition tax refund against a prepetition tax liability.⁹

The automatic stay does not apply in any action to enforce a lien against real property if the petition was filed by an ineligible debtor, made ineligible by virtue of a prior dismissal (Section 109(g)), or where such a filing was made in violation of a court order that prohibited the filing.¹⁰

Leases

If a landlord has obtained a judgment for possession of residential property prior to the filing of the petition, the automatic stay will not apply to prevent the continuation of an eviction or unlawful detainer action 30 days after the filing of the petition.¹¹ There are exceptions to this scenario. If the debtor files a "Certification" under penalty of perjury that:

- under nonbankruptcy law the debtor is permitted to cure the monetary default after the judgment for possession was entered;
- the debtor deposits the next 30 days' rent; and
- ^a within 30 days cures the entire monetary default (and files a certification),
- then the automatic stay is not terminated under Sections 362(b)(22) or 362(l).

The failure of a debtor to file the Certification results in an automatic termination of the stay and the court clerk is obligated to forward to the landlord notice of the debtor's failure to file the Certification.¹² Lessors are provided with a procedure to object to the accuracy of the debtor's Certification.¹³

If the debtor files a Certification, in order to get the stay lifted, the landlord would file an Objection to the debtor's Certification or file a regular motion for relief from the automatic stay, pursuant to the terms of the Revised Code and the local bankruptcy rules.¹⁴ If the landlord objects to the debtor's Certification, the court must then hold a hearing within ten days of the objection.¹⁵

If a landlord filed a Certification that a debtor's continued presence in leased residential property endangers the property or that there is illegal use of controlled substances on the property, the

automatic stay will not be effective fifteen days after the landlord files and serves the Certification.¹⁶ If the debtor objects to the landlord's Certification, a hearing then must be held within ten days.¹⁷

The automatic stay relating to leases and secured creditors expires 30 days after the filing of a case if the debtor had been in another case within one year and that prior case had been dismissed. The court can extend the stay, upon motion and after a hearing that must be completed within 30 days after the filing, at which hearing the court must determine if the filing of the second case is in good faith.¹⁸ There is a presumption of a lack of good faith if:

- the debtor had been in more than one prior case within the year; and
- the debtor failed to file documents in an earlier dismissed case; or
- failed to pay adequate protection; or
- failed to perform under a confirmed plan; or
- there was not a substantial change in the debtor's circumstances since the last dismissed case; or
- any other reason exists to conclude the debtor could not successfully complete a bankruptcy this time.¹⁹

No Automatic Stay

No automatic stay arises at all if the debtor filed a case and was a debtor in two cases within the previous year. In such a situation, upon request of any party, the court can enter an order confirming that no stay is in effect. Within 30 days of the filing of the petition, any party can request the court to impose a stay if the party demonstrates that the filing is in good faith.²⁰

The court may grant *in rem* relief from the automatic stay as to real property, thus precluding the application of the automatic stay in any subsequent bankruptcy case, if the bankruptcy was filed as part of a scheme to hinder, delay or defraud creditors, which also included the unauthorized transfer of the real estate or involved multiple bankruptcy filings.²¹ Relief from the automatic stay will be effective against real property for a period of two years in any subsequent case, following entry of an order under Section 362(d)(4).²² The order needs to be recorded in the real property records.

Secured Claims

The stay terminates as to a secured claim on personal property if the debtor fails to file a statement of intent in a timely fashion within 30 days after filing of the petition for relief under the Bankruptcy Code (or the date of the creditors' meeting, whichever is earlier), or fails to take action to implement a statement of intent within 30 days after the meeting of creditors.²³ The statement of intent must inform the creditor whether the debtor intends to surrender the collateral or reaffirm the debt. Creditors are protected from the imposition of punitive sanctions if the creditor acts in a good faith belief that the automatic stay has been terminated due to the failure of a debtor to perform his or her statement of intent.²⁴

New subsection (h) refers to Section 521(a)(2) for the time within which the debtor must carry out the statement of intent. Section 521(a)(2) reduced the time for the debtor to carry out those choices to 30 days. However, new subsection 521(a)(6)

retains 45 days as the trigger for automatic termination of the stay when the debtor fails to act on the statement of intent as to purchase-money collateral. This difference may cause confusion and litigation.

There is a savings clause in Section 362(h)(1)(B): If the secured creditor does not agree to the reaffirmation proposed by the debtor, the stay does not automatically terminate; presumably, the creditor would then have to move for stay relief. Section 362(h)(2) provides that subparagraph (1)'s termination of the stay does not apply if the court finds on the trustee's motion that the property has value for the bankruptcy estate. The court may order adequate protection to the secured creditor and surrender of the collateral to the trustee. If the court does not grant the trustee's motion, which must be filed before the expiration of the Section 521(a)(2) time for the debtor to file a statement of intent and to carry out that statement (a maximum total of 60 days from the meeting of creditors), the automatic stay terminates upon conclusion of the hearing on the trustee's motion. This implies that termination is automatic and does not require an order. Final resolution of a motion for relief from the stay must be rendered within 60 days of the request.²⁵

Conclusion

The Revised Code adds several provisions to the Bankruptcy Code that in many instances will shift the basic nature of the Section 362 stay from that of an automatic application to that of an automatic termination. In other instances, the Section 362 stay will no longer be an automatic one that goes into effect whenever a bankruptcy case is filed. For a majority of the individual debtors who initiate only one bankruptcy case in their life to deal with unforeseen catastrophic events, these new provisions should have little effect. For abusive bankruptcy filers who initiate successive bankruptcy cases solely to delay creditors, these new provisions should have a significant impact and help to deter such abuse. For those individual debtors who fall somewhere in between, these provisions will add to the hurdles that must be overcome to obtain relief under the Bankruptcy Code.

ABOUT THE AUTHOR

SHEILA R. SCHWAGER, a partner of Hawley Troxell Ennis & Hawley, LLP was admitted to the Bar in 1994 and graduated from the University of Idaho (B.S., cum laude, 1991; J.D., summa cum laude, 1994). Her practice focuses on Creditors Rights and Bankruptcy including the representation of consumer and commercial lenders involving the Uniform Commercial Code, both federal and state lending laws, defense of lender liability claims, and bankruptcy representation. Ms. Schwager was elected in 2001 to the Governing Council of the Bankruptcy Commercial Law Section of the Idaho State Bar, a seven year term, and is an appointed member of the United States Bankruptcy Court Advisory Committee on local rules. She conducts pro bona services for the Idaho State Bar, including acting as an arbitrator for attorney fee disputes. Ms. Schwager is a recipient of an Idaho business Review's Accomplished Under 40 award and Twin 2005 recipient.

Endnotes

- 1 11 U.S.C. § 362.
- 2 11 U.S.C. § 362(a).
- 3 11 U.S.C. § 101(14A).
- 4 11 U.S.C. § 362(b)(2)(C).

- 5 11 U.S.C. § 362(b)(2)(D).
- 6 11 U.S.C. § 362(b)(2)(F).
- 7 11 U.S.C. § 362(b)(18).
- 8 11 U.S.C. § 362(b)(19).
- 9 11 U.S.C. § 362(b)(26).
- 10 11 U.S.C. § 362(b)(21).
- 11 11 U.S.C. § 362(b)(22).
- 12 11 U.S.C. § 362(l)(4).
- 13 11 U.S.C. § 362(l)(3).
- 14 Debtors who reside in rental property where there is a judgment for possession entered prepetition, must affirmatively disclose that fact. 11 U.S.C. § 362(l)(4).
- 15 11 U.S.C. § 362(l).
- 16 11 U.S.C. § 362(b)(23).
- 17 11 U.S.C. § 362(m).
- 18 11 U.S.C. § 362(c)(3).
- 19 11 U.S.C. § 362(c)(3).
- 20 11 U.S.C. § 362(c)(4).
- 21 11 U.S.C. §§ 362(d)(4) and 362(b)(20).
- 22 11 U.S.C. § 362(b)(20).
- 23 11 U.S.C. § 362(h).
- 24 11 U.S.C. § 362(k)(2).
- 25 11 U.S.C. § 362(e)(2).

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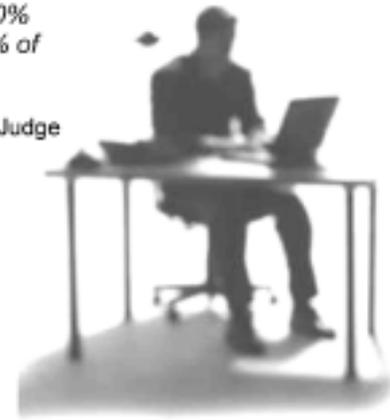
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The Post-Reform Bankruptcy Code: Is it just a pig in a dress?

Brad A. Goergen
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As one federal judge is fond of saying, “[y]ou can put a dress on a pig, but at the end of the day, it’s still a pig.”¹ Looking past the amusing imagery, the wisdom in that expression is important: The fundamental essence of a thing may remain the same despite other significant changes.

Congress significantly changed the Bankruptcy Code by passing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), which President Bush signed on April 20, 2005. The magnitude of these changes is dramatic, and some practitioners chose to stop practicing bankruptcy law as a result.²

These observations prompt a necessary question. Has the fundamental nature of a bankruptcy practice changed because of BAPCPA? Doubtlessly, many bankruptcy lawyers have already asked themselves this question. Unfortunately, most of the literature on BAPCPA focuses on what is new and different. But for all of those who have come to know and love Title 11 of the United States Code, and even for those who only deal with it because they have to, there may be some comfort in knowing that the fundamentals have not changed.

Basic Steps

Three basic steps will continue to be invaluable to those who deal with bankruptcy issues, although there may be some new pitfalls to avoid. Indeed, these are the same three steps lawyers have been hearing about since law school: 1) start with statutes and rules, 2) look for decisional authority interpreting the statutes and rules, and 3) consider other sources. By focusing on these fundamentals, practitioners will be able to appreciate that the post-reform Bankruptcy Code is just a pig in a dress, which, at the end of the day, is still just a pig (i.e., a title of the United States Code that can be understood and applied using traditional lawyering skills).

Statute and Rules—The language

As the Supreme Court has repeatedly instructed, when faced with an issue of bankruptcy law, the correct place to start is with the text of the Code itself.³ This is especially true now that so much of the Code has been changed. Even the experienced bankruptcy practitioner cannot rely on his or her pre-reform knowledge of statutory provisions.

For example, consider the automatic stay, one of the most ubiquitous facets of bankruptcy law. Prior to BAPCPA, 11 U.S.C. § 362(b) of the Code identified eighteen exceptions to the automatic stay. Now there are twenty-eight. In addition, § 362 contains several new provisions that condition the applicability of the stay upon a debtor’s compliance with other Code provisions and a debtor’s history of filing for bankruptcy relief. Obviously, there is no adequate substitute for actually reading the “new” Code. Fortunately, several commercial vendors offer “red line” versions, and these are particularly helpful in targeting the changes.

There is also a timing complication with BAPCPA’s statutory changes. A few of the new provisions took effect on April 20, 2005, the majority took effect on October 17, 2005, and a few will take effect later. Generally, BAPCPA’s provisions apply to cases and proceedings filed on or after October 17, 2005. But some provisions apply to cases and proceedings filed on or after April 20; some apply to cases and proceedings filed after April 20, but not to cases or proceedings pending on April 20; and some provisions are subject to other effective dates. Thus, knowing what the applicable law is with respect to a particular matter presents a challenge of its own.

Along with the statutory changes, there are new rules implementing the Bankruptcy Code. On October 14, 2005, the U.S. Bankruptcy Court for the District of Idaho adopted “Interim Rules,” which are a set of transitional rules designed specifically for BAPCPA. The Interim Rules apply to cases and proceedings subject to BAPCPA. Local rules, to the extent they are not inconsistent with the Interim Rules, still apply. For pending cases and proceedings not subject to BAPCPA, the Federal Rules of Bankruptcy Procedure and Local Rules will still apply. Ultimately, the national and local rule-making bodies will promulgate permanent versions to deal with the post-reform Code, but until then, practitioners must deal with multiple sets of rules.⁴

Case law—Interpretation

After practitioners familiarize themselves with all of the new language in the Code, Rules, and Local Rules, they must consult applicable court decisions.

BAPCPA will make the task of identifying valid decisional law even more difficult. Generally speaking, BAPCPA has created three categories of court decisions. First, there are the non-existent decisions. With the addition of so much statutory language, practitioners may not be able to find any court decisions on point because there may not be any. The downside here is a lack of authority to cite in arguments and briefs; the up side is that lawyers will be unencumbered by existing decisions when crafting their arguments. In this category, tempered creativity and persuasive advocacy will be crucial.

Second, there are decisions that are no longer valid. Here, the recent Ninth Circuit Court of Appeals decision in *Price v. United States Trustee* jumps to mind.⁵ The *Price* court dealt with, among other things, what constituted “substantial abuse” under the pre-reform version of 11 U.S.C. § 707(b). *Price* reiterated that the ability to fund a chapter 13 plan is just one factor among many that a bankruptcy court should consider in a substantial-abuse analysis, albeit the most important factor. Post-reform, § 707(b) allows for dismissal upon a finding of “abuse.” Moreover, the statute details when a presumption of abuse arises and incorporates a complex “means test” in the analysis. In light of these revisions, *Price* may well be overruled by statute.

This second category presents the greatest hazard for those unaware of BAPCPA's changes.

Third, there are decisions whose substantive holdings are still controlling. In some instances, these decisions may be difficult to identify because of non-substantive changes to the Code or Rules. 11 U.S.C. § 523(a)(8) offers a good example. Prior to BAPCPA, in general terms, § 523(a)(8) protected certain student-loan creditors from having debtors' obligations to them discharged in bankruptcy. But, in an exception to this protection, a discharge was possible if the repayment would cause an "undue hardship" for the debtor. In *United Student Aid Funds, Inc. v. Pena* (*In re Pena*), the Ninth Circuit adopted the three-part *Brunner*-test to identify when an undue hardship existed.⁶ BAPCPA's changes to § 523(a)(8) have expanded the types of student-loan debts that are subject to the general exception from discharge, but a debtor may still seek a discharge if repayment represents an undue hardship. Despite the expanded scope of § 523(a)(8) and the restructuring of some of the statutory language, presumably the *Brunner*-test will still define what constitutes an undue hardship.⁷ Thus, *Pena* and its progeny are likely still controlling authority.

In contrast to the second category of decisions, this third category of decisions presents the greatest hazard to all lawyers, unwary or not. Differentiating between court decisions whose holdings have survived in whole or in part and those whose holdings have been overruled by statute will require all of a lawyer's analytical skills.

Other Sources

When the text of a statute is not clear, when the federal rules and local rules do not offer any clarity, and when court decisions give no guidance, lawyers have no choice but to turn to the nebulous world of "other sources." Treatises, law reviews, magazines, and Internet websites have been and will certainly continue to address the whole range of BAPCPA and other bankruptcy issues. The more interesting "other source" is legislative history. Prior to bankruptcy reform, its role was accepted, even though criticized.⁸ Unfortunately, using the legislative history of BAPCPA may prove controversial.

In one of the first reported decisions applying BAPCPA provisions, the bankruptcy court in *In re McNabb* explained why "[l]egislative history is virtually useless as an aid to understanding the language and intent of BAPCPA."⁹ The *In re McNabb* decision is,

despite its view, a good reference to the sources of legislative history for BAPCPA. But perhaps the conclusion in *In re McNabb* is right.

Consider some of the challenges of deciphering BAPCPA's meaning through its legislative history. The ideas that form BAPCPA were conceived at least by 1997, and variations of BAPCPA were introduced in Congress prior to its 109th session. Should any legislative materials from before the 109th session matter? And what about the 109th session itself? There were over one hundred amendments to BAPCPA that were withdrawn or rejected in the Senate alone. What effect do these failed amendments have on the meaning of BAPCPA? At least one commentator has already identified an anomaly between two BAPCPA provisions and attributed it to legislative "oversight."¹⁰ Another possible (and more cynical) explanation for some of the incongruities between some of BAPCPA's provisions is that the political coalition favoring its passage could not withstand any amendments, even intelligent ones.¹¹ Either way, BAPCPA's legislative history may well be a misleading and inaccurate indicator of what Congress meant or understood in passing BAPCPA.

In short, dealing with BAPCPA will require a substantial effort by lawyers. Fortunately, our basic lawyering skills will go a long way towards our success in adapting to the reformed Bankruptcy Code.

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Endnotes

- 1 *Satsky v. United States*, 993 F. Supp. 1027, 1030 n.6 (S.D. Tex. 1998) (Kent, J.); see also *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668, 671 (S.D. Tex. 2001) (Kent, J.) ("But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.")
- 2 Terry Carter, *The Exodus Begins, Lawyers Wonder Whether Chapter 7 Will Be a Viable Practice Area Under New Law*, ABA Journal, June 2005, at 12, 12.
- 3 See, e.g., *Lamie v. United States Tr.*, 124 S. Ct. 1023, 1030 (2004) (citing Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000), for the proposition that statutory interpretation must begin with the text of the statute).
- 4 For more information on the bankruptcy rules in this District, visit the U.S. Bankruptcy Court's website at <http://www.id.uscourts.gov>.
- 5 353 F.3d 1135 (2004).
- 6 155 F.3d 1108, 1112 (9th Cir. 1998).
- 7 For more on student loan discharges, and partial discharges in particular, see Brad A. Goergen, *Saxman, the Brunner-test, and Partial Discharges in the Ninth Circuit: Implementing the New Paradigm*, Norton Bankruptcy Law Advisor, Jan. 2005, at 8, 8-14.
- 8 Compare *Lamie*, 124 S. Ct. at 1033 (using legislative history to support textual analysis), with *Koons Buick Pontiac GMC Inc. v. Nigh*, 125 S. Ct. 460, 474-75 (2004) (Scalia, J., dissenting) (criticizing the value of legislative history).
- 9 *In re McNabb*, 326 B.R. 785, 789 (Bankr. D. Ariz. 2005).
- 10 Katherine M. Porter, *Phantom Farmers: Chapter 12 of the Bankruptcy Code*, 79 Am. Bankr. L.J. 729, 735 (2005) (discussing the different eligibility requirement for family farmers and family fishermen under Chapter 12).
- 11 For a frank, although not especially kind, discussion of the principles underlying BAPCPA, see Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, American Bankruptcy Institute Journal, Sept. 2005, at 1.



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The Impact of the New Bankruptcy Law on Divorce, Property Settlements, and the Allocation of Debt in Divorce

Randy French
Bauer & French

In April 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").¹ That change will have a significant impact for family law practitioners as well as bankruptcy lawyers.

With respect to how debts in the nature of "alimony," "maintenance," or "child support" are treated for purposes of receiving a discharge in bankruptcy, the BAPCPA has changed the terminology, but not the substantive treatment, for such debts. Before the BAPCPA, the Bankruptcy Code excepted from discharge any debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record[.]"² After the BAPCPA, Section 523(a)(5) excepts from discharge any debt owed "for a domestic support obligation." The Bankruptcy Code now states:

The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is-

(A) owed to or recoverable by-

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of-

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.³

These sections are in the conjunctive; a debt must meet all of these requirements to fall within the definition of "domestic support obligation." Domestic support obligations will not be discharged in a chapter 7 or in a chapter 13 case.⁴

Additionally, Congress has eliminated any right to discharge other obligations owed to a spouse, former spouse, or child of a debtor in bankruptcy. Before the enactment of the BAPCPA, Section 523(a)(15) provided, in general terms, that a marital debt other than the kind described in Section 523(a)(5) (i.e., a proper-

ty settlement, property equalization payment, or other similar debt) would not be discharged unless:

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

Before the BAPCPA, a creditor holding a claim had the initial burden of proving that the debt was one under §523(a)(15). If the creditor prevailed, and the court determined that a debt came within the reach of §523(a)(15), the debtor had two affirmative defenses he or she might use to obtain the discharge of such debts—the "ability to pay" test and the "balance of the harms" test.⁵

Under the BAPCPA, Section 523(a)(15) still excludes the same types of debts from discharge, but there are no "ability to pay" or "balance of the harms" exceptions. Congress has done away with both of these affirmative defenses. If the debt otherwise comes within the meaning of §523(a)(15), it is nondischargeable.⁶

Another difference brought about by the BAPCPA concerns whether a former spouse⁷ must affirmatively act to keep a marital debt from being discharged. Before the BAPCPA, a former spouse of the debtor had to file an adversary proceeding (a separate complaint in bankruptcy court) to seek a nondischargeability judgment on a Section 523(a)(15) claim. Section 523("c") mandated that certain debts would be discharged unless, "on request of a creditor to whom such debt is owed, after notice and a hearing, the court determines such debt to be excepted from discharge." If the former spouse did not pursue the claim, then it was discharged.

In the BAPCPA, Congress removed from Section 523(c) the exception to discharge contained in §523(a)(15). By doing so, Section 523(a)(15) joins those other exceptions to discharge in Section 523(a), which are excepted from discharge without the need for a creditor taking any action. Whether the former spouse wants to exclude those debts from discharge or not, and whether he or she continues to have any liability on those debts, the debtor may not discharge his or her liability on those claims in a chapter 7 case. The creditors who hold claims against a debtor and the former spouse, including holders of loans secured by a second deed of trust on a home subject to a first deed of trust, holders of credit card debt and holders of claims for deficiencies on car loans, all would seem to have all of the rights under state law that they would have had if neither spouse had filed a bankruptcy.

The full reach of Section 523(a)(15) remains to be determined. The previous version of Section 523(a)(15) excluded from discharge debts "incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement,

divorce decree or other order” to the extent that the affirmative defenses identified above did not apply. That language has consistently been read, implicitly if not explicitly, to include both a debt for a property equalization payment (to pay one party for the equity in assets allocated to another party), as well as debt that long pre-existed the divorce or separation, but was allocated to a spouse in a divorce coupled with a hold harmless clause.⁸

In the BAPCPA, Congress added the phrase “to a spouse, former spouse, or child of the debtor” to define the debt that was excluded from discharge. The question that seems to remain is whether the addition of the phrase “to the former spouse of the debtor” limits the reach of Section 523(a)(15), and if so, how.

“[W]here ... the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms.’”⁹

Section 523(a) begins with the phrase “[a] discharge under section 727 ... does not discharge an individual debtor from any debt ... ” The term “debt” is defined as liability on a claim.¹⁰ A “claim” is defined as “a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured ... ”¹¹

In *In re Gibson*, 219 B.R. 195, 201-205 (6th Cir. BAP 1998), the court held that the term “claim” included a debt owed to a third party and allocated to Gibson in a separation agreement, which was incorporated into a divorce decree, neither of which contained “hold harmless” language or other indemnification language. It also appeared that the creditor/former spouse had not made any payments on the claim owed to the third party, and was not attempting to collect on a theory of reimbursement or contribution.¹²

In *re Montgomery*, 310 B.R. 169, 176-77 (Bankr. C.D. Cal. 2004), addressed the issue of whether there existed in pre-BAPCPA Section 523(a)(15) a direct pay requirement. Holding that the critical issue was the nature of the debt, not the payee, *Montgomery* joined those courts holding that a debt owed to a third party and not to the former spouse of the debtor, but allocated in a divorce decree and subject to a hold harmless provision, was a new debt incurred in a divorce decree and owed directly to the former spouse.

Did Congress address the direct pay question analyzed in *Gibson*, *Montgomery* and cases cited in each? With the BAPCPA, Congress has limited the debts included within the ambit of Section 523(a)(15) to those debts “to a spouse, former spouse, or child of the debtor.” Because this limitation comes after the word “debt,” perhaps Congress did narrow the broad definition of debt, and claim, with the BAPCPA. However, if a divorce decree or separation agreement allocates debt to one spouse without any direct obligation language, does the argument remain that the allocation of debt to one spouse creates a direct obligation to the other spouse to pay the debt? Does it make a difference if the other spouse has paid some or all of the debt allocated, and has a right to reimbursement under state law or the terms of the divorce decree or separation agreement?

If Congress has limited the exception to discharge to those debts actually owing directly to a former spouse, family law practitioners should think through the consequences. Assuming that only debts allocated in a divorce decree that are owed directly to the former spouse are now excepted from discharge, the family law practitioner needs to carefully consider how to structure the

division of debt in a divorce decree. Any debt not owing directly to the former spouse will be discharged in a debtor’s chapter 7 bankruptcy case, without regard to the debtor’s future potential to pay or the harm that it may do to the former spouse. Any debt owing directly to the former spouse will never be discharged in a chapter 7 case, under any set of circumstances.

From a divorce and bankruptcy planning perspective, this may impact the valuation of assets made in divorce proceedings. To the extent that, because of high valuations of assets that one party receives, a commensurate level of debt in the form of an award to equalize the distribution of property is also allocated to that party, Section 523(a)(15) may make the debt allocated non-dischargeable. If a former spouse gives up a significant value of assets to a spouse who becomes a debtor in bankruptcy, conditioned upon the allocation of debt owed to a third party, to the debtor-spouse those assets may be converted into exempt assets, or may go down in value, and the debtor may discharge his or her liability, leaving the former spouse facing liability. If, in hindsight, the value assigned to the assets was overly optimistic, or if the assets were depreciating in value, or in the case of going business concerns, subject to business or economic conditions beyond the party’s control, a party may find himself or herself liable on debt without the asset value he or she anticipated to satisfy that debt.

Let there be no question about the result of the BAPCPA. Congress has imposed harsh consequences that may be felt by either or both parties to a divorce decree. Whether debt is or is not discharged does not depend upon the relative impact on each of the parties to the divorce, but whether a debt is discharged may impose a significant burden on the party left facing the debt. Those former spouses who are jointly liable on debt owed to third parties and who decline to file their own bankruptcy case may find themselves the subject of collection efforts, in spite of an allocation of debt to the debtor spouse. If their reluctance is because they have non-exempt assets that they wanted to keep, or wages that could be garnished, to provide necessary support for the former spouse or the parties’ children, those non-exempt assets or wages may be at risk.

The result that ultimately does flow from Section 523(a)(15) will also apply in chapter 11 cases (mainly used for business reorganization, but also available for individuals) and chapter 12 cases (providing relief for “family farmers”). Discharges flowing from Section 1141(d) and Section 1228 do not discharge a debt excepted from discharge under Section 523. A discharge entered in a chapter 13 case, pursuant to Section 1328(a), does discharge an individual from debts under Section 523(a)(15), and some but not all other parts of Section 523. However, a discharge entered under Section 1328(a) does not discharge any debt under Section 523(5).

CONCLUSION

Taking the language of Section 523(a)(15) at face value, debts owed to third parties, but not directly to a former spouse, will be discharged in a chapter 7 bankruptcy, without regard to any considerations present previously. Likewise, Congress has decided that obligations owed directly to a former spouse will not be discharged in a chapter 7 case, again without regard to any circumstances that may previously have impacted that determination. Family law practitioners should consider this impact in structuring divorce decrees for their clients in the future.¹³

ABOUT THE AUTHOR

RANDY FRENCH is a partner in the firm of Bauer and French. He graduated from the University of Idaho College of Law, and was admitted to the Idaho State Bar in 1983. He clerked for the Hon. Jesse R. Walters, then the Chief Judge of the Idaho Court of Appeals, and for the Hon. Alfred C. Hagan, U.S. Bankruptcy Judge for the District of Idaho. He practices in the areas of bankruptcy and commercial litigation. He is also admitted to the Ninth Circuit Court of Appeals and the U. S. Supreme Court.

Endnotes

1 Pub. L. No. 109-8, § 102(i), 119 Stat. 23, 34 (2005).

2 11 U.S.C. § 523(a)(5).

3 11 U.S.C. §101 (14A) (2005).

4 11 U.S.C. §§ 523(a)(5), 1328(a)(2).

5 11 U.S.C. § 523(a)(15(A) and (B).

6 "A discharge under section 727 . . . does not discharge an individual debtor from any debt—to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit[.] 11 U.S.C. § 523(a)(15).

7 For ease of reference, the term "former spouse" will refer to and include "spouse, former spouse, or child" and "divorce decree" will refer to and include "separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement."

8 *In re Snow*, 232 F.3d 1018 (9th Cir. 2000); *Renfrow v. Draper*, 232 F.3d 688 (9th Cir. 2000); *In re Montgomery*, 310 B.R. 169, 176 (Bankr. C.D. Cal. 2004); *In Re Pino* 268 B.R. 483 (Bankr. W.D. Tex. 2001).

9 *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 194, 61 L. Ed. 442 (1917), quoted in *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989); *Bonner Mall P'ship v. U.S. Bancorp Mortgage Co. (In re Bonner Mall P'ship)*, 2 F.3d 899 (9th Cir. 1993).

10 11 U.S.C. §101(12).

11 11 U.S.C. § 101(5).

12 See also *In re Montgomery*, 310 B.R. 169, 176 (Bankr. C.D. Cal. 2004) (citing cases on each side of the issue whether debts owing to third parties or not subject to indemnification or hold harmless language fall within the ambit of § 523(a)(15)); *In re Pierce*, 323 B.R. 21 (Bankr. D. Conn. 2005) (citing cases for the same reason).

13 This article does not address the impact of *Twin Falls Bank and Trust v. Holley*, 111 Idaho 349, 723 P. 2d 893 (1986) and *Lowry v Ireland Bank*, 116 Idaho 708, 779 P. 2d 22 (Ct. App. 1989) ("The mere fact that her husband borrowed the money would not impose personal liability upon her as a spouse. Idaho's community property laws do not displace fundamental principles governing individual liability for a debt. Rather, they simply affect the property to which creditors may look for satisfaction of the debt.").

ALTERNATIVE DISPUTE RESOLUTION

Merlyn W. Clark

Mr. Clark serves as a private hearing officer, federal court discovery master, neutral arbitrator and mediator. He has successfully conducted more than 500 mediations. He received the designation of Certified Professional Mediator from the Idaho Mediation Association in 1995. Mr. Clark is a fellow of the American College of Civil Trial Mediators. He is a member of the National Rosters of Commercial Arbitrators and Mediators and the Employment Arbitrators and Mediators of the American Arbitration Association and the National Panel of Arbitrators and Mediators for the National Arbitration Forum. Mr. Clark is also on the roster of mediators for the United States District Court of Idaho and all the Idaho State Courts.

Mr. Clark served as an Adjunct Instructor of Negotiation and Settlement Advocacy at The Straus Institute For Dispute Resolution, Pepperdine University School of Law in 2000. He has served as an Adjunct Instructor at the University of Idaho College of Law on Trial Advocacy Skills, Negotiation Skills, and Mediation Advocacy Skills. He has lectured on evidence law at the Magistrate Judges Institute, and the District Judges Institute annually since 1992.

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Guardians ad Litem: Your Presence Can Mean the Future to These Children

Susan G. Hazelton,
Executive Director, Family Advocate Program, Inc.

*"The Family Advocate Program works to keep abused children out of danger and in safe homes, while partnering with parents to build strong families."
Family Advocate Program Mission*

In 2004, there were over 700 abused and neglected children in Ada County who benefited from an extraordinary group of 100 attorneys who worked pro bono for the 4th District Court Appointed Special Advocate program (CASA).

For each case referred to CASA, the program assigns a volunteer attorney to partner with the volunteer Guardian ad Litem assigned to the case. Without this generosity, this program, and most importantly the children, would be without service. "We don't tell lawyer jokes at our office," says Tina Freckleton, program manager for CASA. "We know what big hearts these attorneys have and we are so grateful to have them joining us in our fight to keep children safe."

CASA volunteer attorneys are an important part of the team, serving the program in a variety of ways:

- Attorneys assist volunteer Guardians and CASA professional staff at all court hearings, including pretrial conferences, review hearings, permanency hearings, termination hearings, and adjudicatory hearings.
- In some cases the Guardian is asked to testify on behalf of the child's best interest. The CASA attorney will help prepare the Guardian for testimony.
- CASA staff also support child victims when they must testify in criminal court. If criminal charges are filed against the parents, CASA volunteers and their CASA attorney follow the criminal proceedings to help support the needs of the child.
- If a child must go through the juvenile court system, CASA volunteers and their attorneys will support them during the process.

The latest *Facts, Figures, and Trends* publication from the Idaho Department of Health and Welfare shows that in 2004 there were 8,583 child protection referrals with more than 1,100 substantiated cases of neglect or abuse. The number of substantiated cases increased by more than 25% over 2003. The number of children referred to 4th District CASA by the courts has increased by 45% over the past five years.

The goal of the CASA program is to accept *all* children referred by the court regardless of race, gender, disability, religion, or ethnicity. One of the most disturbing facts is that 50% of the children referred are under the age of six, the most vulnerable members of our society and the least able to defend themselves or speak on their own behalf. Children who have been placed in foster care are, by definition, indigent. They have no economic

resources whatsoever. In fact, when they are removed from their homes, they often leave with their few possessions stored in plastic garbage bags.

While the majority of attorneys who volunteer do so out of a heartfelt desire to serve children, they might not realize that their service brings long term benefits to the community. Children who are victims of abuse and neglect can pose a significant threat to the health and safety of the community. Research shows that abused children fare poorly in school and in later life:

- In school they exhibit poor initiative, poor language skills and other developmental delays, a disproportionate amount of incompetence and failure, and inappropriate behavior in peer and adult relationships.
- They are at increased risks for smoking, alcoholism, drug abuse, depression, eating disorders, suicide attempts; multiple sexual partners, and severe obesity.
- Abused or neglected children are 53% more likely to be arrested as juveniles and 38% more likely to be arrested for violent crime.
- A study of convicted murderers reports 83.8% suffered severe physical and emotional abuse and 32.2% were sexually violated as children (Blake, 1995).
- Within two to four years of leaving foster care, only 54% of teens had completed high school, fewer than half were employed, 25% had been homeless, 30% had no access to health care, and 60% of the young women had given birth.

It may not be in your home, or on your block, but child abuse is a problem that affects the entire community. When a child suffers, we all suffer. While the thought of harming a child, or anyone for that matter, is incomprehensible, it is important that we work to mitigate not only the pain the children feel, but also the long-term effects child abuse has on our community.

Clearly, the attorneys who assist with the CASA program understand that child abuse prevention is likely to have a "pay-back curve" that extends over a long period of time, with much of the savings occurring when the child becomes a healthy, productive, and non-violent citizen.

Please volunteer through the Idaho Volunteer Lawyers Program to join the team that speaks up for the child in Child Protective Act placement procedures. CASA programs in Districts 1, 4, 6, and 7 use volunteer attorneys to represent trained, lay Guardians ad Litem. Call today to be a part of the team that safeguards the rights of minor victims of child abuse and neglect.

Contact Carol Craighill, IVLP, at 334-4510 or 1-800-221-3295 or ccraighill@isb.idaho.gov

ABOUT THE AUTHOR

SUSAN HAZELTON is the Executive Director of the Family Advocate Program. She began her career in non-profit management in 1989 with the Girl Scouts of Silver Sage Council. In January 2000, she took over leadership of the Family Advocate Program. She has a Masters in Education from the University of Idaho. The Family Advocate Program is a private non-profit agency. For twenty-six years, Family Advocate Program has successfully served Treasure Valley families and children through its two major programs: the 4th District CASA program and the Families First parent education and support program.

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LETTERS TO THE EDITOR

What a Long, Strange Trip It's Been

November 1, 2005

As I sit here on the morning of the last day I will spend in Iraq, I reflect on the countless experiences I have had since June 2004, when I left home on this adventure. For instance, I recall the two month's worth of intense training that the military effectively "crammed" into five months (Ft. Bliss, Texas and Ft. Polk, Louisiana – June through October 2004); training such as land navigation, hand-to-hand combat, convoy operations, identification of explosives, and basic words, phrases, customs, and religious tenets that would prove useful in Iraq. These were subjects for which law school didn't necessarily prepare me. What a strange trip.



Home in time for the holidays!

I recall looking back as I boarded the plane in Louisiana on the evening of November 27, 2004, and seeing the long, seemingly endless line of soldiers with body armor, Kevlar helmets and weapons shaking the hands of Gov. Kempthorne, Paul Revere, and the numerous Idaho Military personnel who saw us off. I remember wondering what the future held for all of us. Then there was the desolate and dusty environment of Kuwait, where the camels roam freely and sand is everywhere, and my apprehension as the C130 landed in Kirkuk, Iraq, my new home for the next year. What a long trip.

I recall the sad day when the 116th lost its first soldier; the historic day when Iraq had its first free election in decades and the day Iraqis voted to adopt a constitution; my trip to Tikrit where I stayed in a palace on the Tigris River; the unique legal issues presented by concepts such as "Rules of Engagement" and "Escalation of Force;" the stories of American and Iraqi sacrifices and heroism; and, so many other events, activities, and people along the way. Sometimes time would fly, and then there were times when it seemed the trip would never end. It is hard to believe that when we board the plane tomorrow, the end of the trip will be close at hand.

November 17, 2005

The last two weeks have seen a lot of travel: Camp Victory, Kuwait; Shannon, Ireland; Ft. Lewis, Washington; and, finally, Boise. As I sit here at home on my first day back, I continue to reflect on the memories of the last year and a half – some fond, some not so fond. I will be forever grateful for the support and well-wishes sent to me along the way and the opportunity to work with such high-caliber people and to know them as my friends. For those of us who took this journey, I'm sure the unique personal and professional challenges encountered will continue to shape our lives for many years to come and I am certain we have all learned invaluable lessons from the experience.

December 15, 2005

But for now, there's one final, very important lesson to be learned: there's no place like home.

Major Lora Rainey Breen
Deputy Staff Judge Advocate
116th Brigade Combat Team



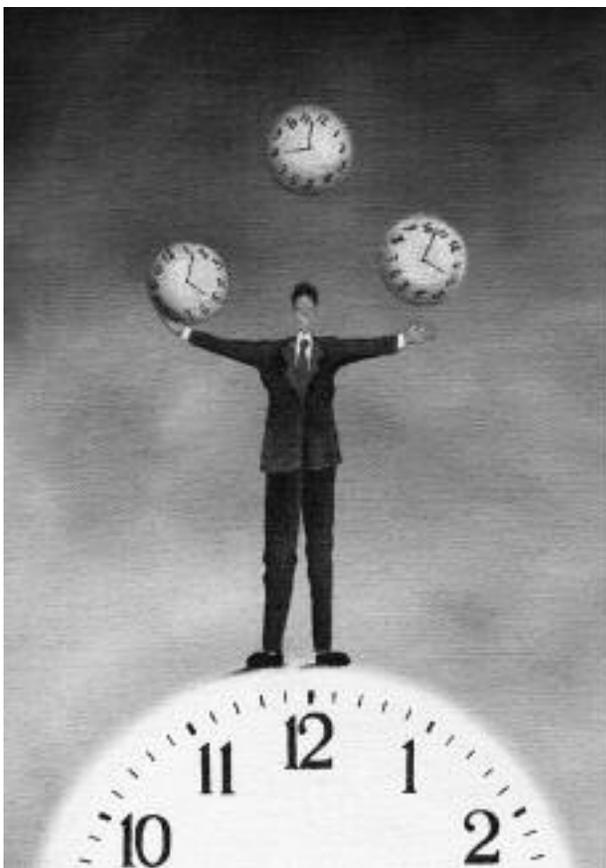
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IVLP SPECIAL THANKS

The Idaho Volunteer Lawyers Program would like to extend special thanks to the following volunteer attorneys who have provided pro bono advice and consultation assistance during 2005. These volunteer attorneys spent time at either their local Senior Center or thought another community-based organization serving low-income people. The attorney provided answered legal questions and provided brief advice and consultation to seniors or low-income people.

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OFFICIAL NOTICE

COURT OF APPEALS OF IDAHO

Chief Judge
Darrel R. Perry

Judges
Karen L. Lansing
Sergio A. Gutierrez

Regular Spring Terms for 2006

BoiseJanuary 10, 12, 17 and 19
BoiseFebruary 2, 14, and 27
Eastern IdahoMarch 13, 14, 15,
16 and 17
MoscowApril 10, 11, 12, 13 and 14
BoiseMay 9, 11, 16 and 18
BoiseJune 6, 8, 13 and 15

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2006 spring terms of the Court of Appeals, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE

SUPREME COURT OF IDAHO

Chief Justice
Gerald F. Schroeder

Justices
Linda Copple Trout
Daniel T. Eismann
Roger S. Burdick
Jim Jones

Regular Spring Terms for 2006

BoiseJanuary 4, 6, 9, 11 and 13
BoiseFebruary 1, 3, 6, 8 and 10
Boise (Twin Falls appeals).....March 1, 3, 6,
8 and 10
Coeur d'AleneApril 3, 4 and 5
Lewiston.....April 6 and 7
Boise (Eastern Idaho appeals)May 1,
3, 5, 8 and 10

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2006 Spring Terms of the Supreme Court, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court

Oral Argument Dates
As of December 16, 2005

Boise Term

Wednesday, January 4, 2006

8:50 a.m. VACATED
10:00 a.m. Comstock LLC v. Keybank Nat'l Assoc. #31265/31478
11:10 a.m. Edmunds v. St. Alphonsus #30862

Friday, January 6, 2006

8:50 a.m. State v. Henage #31205
10:00 a.m. Sadiku v. AATronics #31295
11:10 a.m. Beach Lateral Water v. Harrison #31339

Monday, January 9, 2006

8:50 a.m. Dept. of H & W v. Doe #31563
10:00 a.m. State v. Knighton #31611
11:10 a.m. Idaho Press Club v. Legislature #31667

Wednesday, January 11, 2006

8:50 a.m. Clark v. Idaho Truss #31378
10:00 a.m. Cheung v. Pena #31371
11:10 a.m. Desilet v. Glass Doctor #31972

Friday, January 13, 2006

8:50 a.m. State v. Mercer #32430
10:00 a.m. Leavitt v. Crawford #31350
11:10 a.m. Hogg v. Wolske #30818

Idaho Court of Appeals

Oral Argument Dates
As of December 16, 2005

Boise Term

JANUARY

Tuesday, January 10, 2006

9:00 a.m. State v. Wurdemann #30438
10:30 a.m. State v. Harvey #30608

Thursday, January 12, 2006

9:00 a.m. Lieurance-Ross v. Ross #31594
10:30 a.m. State v. Cogswell #31146
1:30 p.m. State v. Lawson #30851

FEBRUARY

Thursday, February 2, 2006

9:00 a.m. Smith v. Wolff #31800
10:30 a.m. State v. Lewis #31684
1:30 p.m. State v. Hanson #31257

Tuesday, February 14, 2006

9:00 a.m. State v. Ojeda-Soto #31242
10:30 a.m. State v. Rodriguez #31575
1:30 p.m. State v. Field #31113/31114

Monday, February 27, 2006

9:00 a.m. State v. Powell #31156
10:30 a.m. State v. Jenkins #31683
1:30 p.m. State v. Irwin #30866/31200

Financial Institutions Approved by the Idaho State Bar to Act as Depositories for Attorney Trust Accounts

In accordance with Idaho Bar Commission Rule 302(a)(2)(C) the Idaho State Bar annually publishes a list of financial institutions acting as depositories for trust accounts that have consented to provide notification to Bar Counsel in the event any properly payable instrument is presented against an attorney trust account containing funds insufficient to honor the instrument in full, irrespective of whether the instrument is honored. The following financial institutions have agreed to report this information to the Bar Counsel as of December 1, 2005.

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Bank of Idaho

Bank of the West

Banner Bank

Citizens Community Bank

Clearwater Credit Union

D.L. Evans Bank

Farmers and Merchants State Bank

Farmers National Bank

First Bank of Idaho

FirstBank Northwest

First Federal Savings Bank
of Twin Falls

Home Federal

Idaho Banking Company

Idaho Central Credit Union

Idaho Independent Bank

Inland Northwest Bank

Intermountain Community Bank

Ireland Bank

Kamiah Community Credit Union

Key Bank of Idaho

Lewiston State Bank

Magic Valley Bank

Merrill Lynch

Mountain West Bank

Panhandle State Bank

Pend Oreille Bank

Piper Jaffrey Inc.

Scenic Falls Credit Union

Sterling Savings Bank

Syringa Bank

Twin River National Bank

US Bank

Washington Federal Savings

Washington Mutual

Washington Trust Bank

Wells Fargo Bank

Western Bank

Zions First National Bank

Licensing Deadline is February 1, 2006

The 2006 licensing deadline is February 1, 2006. Your payment and forms must be physically received in the Idaho State Bar office by deadline to avoid the late fee. Postmark dates do not qualify. If your licensing is going to be late, be sure to include the appropriate late fee: Active, Out of State Active and House Counsel - \$50; Affiliate and Emeritus - \$25. The final licensing deadline is March 1, 2006.

Contact the Membership Department at (208) 334-4500 or astrouser@isb.idaho.gov if you have any questions.

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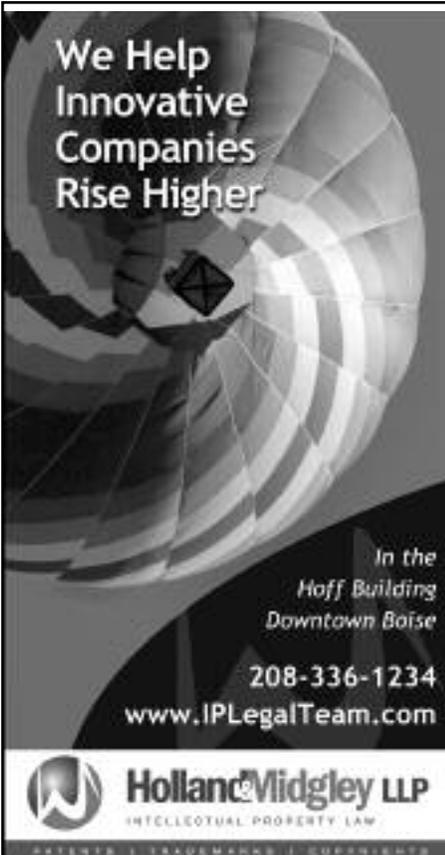
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MCLE Extension

If you did not complete your MCLE requirements by your December 31, 2005 deadline, you can get an extension until March 1, 2006 to obtain the extra credits you need. Send a written request and \$50 MCLE extension fee to the Membership Department. Remember the licensing deadline is still February 1, 2006 and the rest of your licensing must be physically received in the Idaho State Bar office by that date to avoid the late fee. Courses taken to complete your MCLE requirements will be counted on previous reporting period. The final licensing deadline is March 1, 2006. Your MCLE requirements must be completed by that date. Please contact the Membership Department at (208)334-4500 or astrauser@isb.idaho.gov if you have any questions.

High School Mock Trial Judges Needed

Idaho High School Mock Trial Competition
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Law Related Education

Regional Competitions
7:30 a.m. – 4:00 p.m.

- ◆ North Idaho Regional (Coeur d'Alene) February 25, 2006
- ◆ Magic Valley Regional (Twin Falls) February 25, 2006
- ◆ Treasure Valley Regional (Boise) March 4, 2006
- ◆ Snake River Valley Regional (Idaho Falls) March 4, 2006

State Competition
March 14, 2006
3:30 p.m.-10:00 p.m.
Location - Boise

Judges and lawyers, as soon as you know which competition you would like to judge please contact Becky Jensen at bjensen@isb.idaho.gov or (208) 334-4500.

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Tom Murawski

U.S. District and Bankruptcy Courts

Mandatory Electronic Filing

Electronic Case Filing (ECF) has been used very successfully by the Bar since we went live earlier this year. In the Bankruptcy Court, over 80% of the documents have been filed electronically. In the District Court more than 65% of all eligible documents have been filed in ECF. Starting in January, parties may file District Court complaints in ECF.

Beginning January 1, 2006, ECF will become mandatory. Pursuant to General Order #187, unless otherwise ordered by the Court for good cause shown, attorneys filing pleadings or other documents with the District or Bankruptcy Court must use the Electronic Case Filing System (ECF).

Training on District Court Credit Card Module

The credit card module for District Court electronic filing using Pay.gov is expected to be activated by January 1, 2006. The District Court module is almost identical to the Bankruptcy system, with the exception that District Court users must pay at the time of filing, whereas in the Bankruptcy version, users have the option either to "pay now" or "continue filing." If you have not yet had experience with case openings using this online credit card payment system, the Court will be holding a voluntary training session on this topic. If you or a representative from your law firm is interested in attending, please contact Suzi Butler at (208) 334-9208 or e-mail suzi_butler@id.uscourts.gov.

New Lawyer Representative Appointed

Deb Kristensen was appointed to a three-year term as a lawyer representative for the United States District & Bankruptcy Courts for the District of Idaho, joining current lawyer representatives Ron Kerl and Keith Roark. Deb Kristensen is a partner in the firm of Givens Pursley LLP in Boise, Idaho.

Deb has served as the President of the Idaho State Bar, as a Commissioner on the Idaho State Bar's Board of Commissioners,

was a founding member of several Media and Court Committees and has also served on various civic and community Boards. Deb has published more than fifty articles and is a frequent speaker for media and legal associations. In addition, Ms. Kristensen was the recipient of the 2005 Kate Feltham Award, which is awarded to individuals who have made an extraordinary effort to promote equal rights and opportunities for women and minorities within the legal profession of Idaho.

Typical duties of the lawyer representative position include: serving as the representative of the bar to advance opinions and suggestions for improvement; assisting the Court in the implementation of new programs or procedures; serving on court committees; and developing curriculum for training programs.

Amendments to Federal Rules of Procedure

The following amendments to the Federal Rules of Procedure became effective on December 1, 2005:

Federal Rules of Civil Procedure: **Rule 6** (Time); **Rule 27** (Depositions before action or pending appeal; Rule 45 (Subpoena); and Admiralty Rules B & C.

Federal Rules of Criminal Procedure: **Rule 12.2** (Notice of an Insanity Defense; Mental Examination); **Rule 29** (Motion for a Judgment of Acquittal); **Rule 32.1** (Revoking or Modifying Probation or Supervised Release); **Rule 33** (New Trial); **Rule 34** (Arresting Judgment); **Rule 45** (Computing and Extending Time) and **Rule 59** (Matters Before a Magistrate Judge)

Federal Rules of Bankruptcy Procedure: **Rule 1007** (Lists, Schedules and Statements; Time Limits); **Rule 2002** (Notice to Creditors, Equity Security Holders, United States, and United States Trustee); **Rule 3004** (Filing of Claims by Debtor or Trustee); **Rule 3005** (Filing of Claim, Acceptance, or Rejection by Guarantor, Surety, Indorser, or Other Codebtor); **Rule 7004** (Process; Service of Summons; Complaint); **Rule 9001**

(General Definitions); **Rule 9006** (Time); and **Rule 9036** (Notice by Electronic Transmission). To review the summary or full-text version go to our website at www.id.uscourts.gov.

Bankruptcy Local Rules Revisions

In addition to the Interim Bankruptcy Rules, adopted in connection with the implementation of the Bankruptcy Reform Act on October 17, 2005, certain revisions were made to the following Bankruptcy Local Rules. These become effective on January 1, 2006. **Rule 2002.4**—Filing and Confirmation of Chapter 12 Plan; **Rule 2002.5**—Filing and Confirmation of Chapter 13 Plan; **Rule 2016.1**—Chapter 13 Representation and Compensation; **Rule 4008.1**—Reaffirmations; **Rule 9004.1**—Form of Orders; **Rule 9010.1**—Attorneys; **Rule 9024.1**—Amendments to Judgments or Orders (new); **Rule 9034.1**—Transmittal of Documents to United States Trustee; Appendix II—**Model Retention Agreement**.

The Bankruptcy Local Rules Committee continues to do an excellent job. Current members include: Larry Prince, Chair; Chief Bankruptcy Judge Terry Myers, Bankruptcy Judge Jim Pappas, Sheila Schwager, Barry Zimmerman, Daniel Green, John Munding, Jeffrey Howe, Ken Anderson, Derrick O'Neill, Fred Cooper, Cameron Burke, and Suzanne Hickok.

Record-Setting Bankruptcy Filings

Bankruptcy courts across the country experienced record filings just prior to the implementation of the Bankruptcy Reform Act on October 17, 2005. In the District of Idaho, during the first sixteen days of October there were 3,553 bankruptcy filings, compared to only 376 for the same time frame last year.



TOM MURAWSKI is an Administrative Analyst for the U.S. District and Bankruptcy Courts. Mr. Murawski has J.D. and masters in Judicial Administration.

February 2006
Idaho State Bar Examination Applicants
(as of December 16, 2005)

Listed below are the applicants who have applied to sit for the February 2006 Bar Examination. The Board of Commissioners publishes the names of these applicants for your review and requests any information of a material nature concerning moral character and fitness of an applicant be brought to the attention of the Board of Commissioners in a signed letter by February 10, 2006. Direct correspondence to: Admissions Director, Idaho State Bar, PO Box 895, Boise, ID 83701.

Douglas Gregg Abenroth
Burley, ID
Willamette University

Gregory Patrick Arakawa
Benicia, CA
Southwestern University

Merideth Colleen Arnold
aka Merideth Colleen Arnold Bigler
Donnelly, ID
Northeastern University

Melissa Kay Aston
Burley, ID
Willamette University

Shawn Parker Bailey
Boise, ID
Brigham Young University

Ruel Melvin Barrus
Meridian, ID
Arizona State University

Robert A. Bartlett
St. Maries, ID
University of Idaho

Stephanie Bennett
aka Stephanie Portela
Meridian, ID
Thomas Jefferson School of Law

Heidi Bode
Boise, ID
Franklin Pierce Law Center

Tessie Anan Buttram
Lawton, IA
Creighton University

Timothy Sol Callender
Boise, ID
University of San Diego

Matthew Martin Chakoian
Seattle, WA
Drake University

David Alan Christensen
Bishop, CA
Brigham Young University

Sean Jeffrey Coletti
Twin Falls, ID
University of Connecticut

Cleve Byrd Colson
Pocatello, ID
University of Idaho

David Christopher Cooper
Boise, ID
University of Kansas

Michael D Davidson
Caldwell, ID
Gonzaga University

Juniper L. Davis
Moscow, ID
Lewis and Clark College

Luke Waldron Davis
Moscow, ID
University of Idaho

Kristen Aynn Denker
aka Kristen Aynn Buckley
Boise, ID
John Marshall Law School

Merritt Lynn Dublin
Boise, ID
University of Arizona

Melissa Anne Finocchio
aka Melissa Finocchio Burdekin
Boise, ID
Santa Clara University

Marcus Lee Fontenot
Ville Platte, LA
Loyola University-New Orleans

Jack W. Fuller
Lewiston, ID
Michigan State University College of Law

Deborah Alison Gates
San Francisco, CA
Santa Clara University

Shelby Christine George
aka Shelby Christine Harrell
Nashville, TN
University of California-Hastings

Amanda Jean Glenn
Fresno, CA
University of Idaho

Eric Richard Glover
Boise, ID
Gonzaga University

Bernadette Marie Gomez
aka Bernadette Marie Curtis
Salt Lake City, UT
University of Utah

Theodore William Graham
Hailey, ID
Stanford University

Helaman Scott Hancock
Coeur d'Alene, ID
University of Idaho

Rusty Breck Hansen
Chubbuck, ID
University of Idaho

Paul Martin Harrigan
Santa Cruz, CA
Stanford University

Amy Suzanna Hart
Boise, ID
Hamline University

Jeffrey Pat Heineman
Boise, ID
Creighton University

Nathan Joel Henkes
Idaho Falls, ID
University of Wyoming

Kevin Price Holt
Coeur d'Alene, ID
University of Idaho

Lesla Ann Hutnak
aka Lesla Ann Sutton
Boise, ID
University of California-Berkeley

Jason Dell Hymas
Veradale, WA
University of Idaho

Michael Shawn Jacques

Spokane, WA
Gonzaga University

Darcy Ann James

Moreno, CA
Chapman University School of Law

Dena Camille James

aka Dena Foshee
Las Vegas, NV
Brigham Young University

Steven Carl Johnson

Eagle, ID
University of Southern California

Kara Patrice Keating-Stuart

Ketchum, ID
University of San Diego

Damian W Kidd

Provo, UT
University of Idaho

Heidi Katrina Koonce

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University of Idaho

Tyler James Larsen

Mountain Home, ID
Widener University

Naomi Marie Leiserowitz

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Arthur Bruce Macomber

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University of California-Hastings

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aka Pamela Beth Hawkins
aka Pamela Beth Maseley
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Linsey Elene Mattison

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aka Virginia Ann McNulty
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James David White

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University of Utah

Sandra Rae Willman

aka Sandra Goldberg
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Lance Douglas Wilson

Martinez, CA
Brigham Young University

Susan Ray Wilson

aka Susan Ray McElroy
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The photo on the cover is by attorney Lane Erickson, a partner with the law firm Racine, Olson, Nye, Budge & Bailey, Chtd., Pocatello. Mr. Erickson is a contributing cover artist for *The Advocate*. The photograph was taken at the City Creek, west of Pocatello. It is of a natural ice formation on the creek. A frigid cold snap occurred before all of the leaves had fallen off the trees surrounding the creek. If you would like information about this photo, or to see other photos he has taken you can email him at lve@racinelaw.net.

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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(UPDATE 12/01/05)

CIVIL APPEALS
PROCEDURE

1. Whether the court abused its discretion in dismissing the complaint for failure to file within the two-year limitation of I.C. § 6-911.

Travis Hauschulz v.
Department of Corrections
S. Ct. No. 31631
Court of Appeals

ATTORNEY FEES

1. Whether the court erred in reversing the decision of the Idaho State Board of Medicine ordering costs and attorney's fees against Dr. Haw.

Tarek L. Haw, M.D. v.
Idaho Board of Medicine
S. Ct. No. 31862
Supreme Court

TAX CASES

1. Did the district court err as a matter of law when it reversed the Tax Commission and concluded the Pit 9 contract was not a long-term construction contract for Idaho income tax purposes, when the district court failed to consider the provisions of Internal Revenue Code Section 460, which governs the definition and treatment of long-term contracts for federal income tax purposes, and the district court's characterization of the contract is contrary to the provisions of Internal Revenue Code Section 460?

Lockheed Martin v. State Tax Commission
S. Ct. No. 32022
Supreme Court

2. Are low income housing tax credits intangible real property rights and privileges as defined by I.C. § 63-201 (18), or are they more akin to intangible personal property described in I.C. § 63-602L?

Payette County v. Brandon Bay
S. Ct. No. 31910
Supreme Court

SUBSTANTIVE LAW

1. Did the court err in finding that the 2004 determination by the Idaho Dept. of Agriculture that there exist no economically viable alternatives to burning as a means of disposing of Kentucky bluegrass stubble in northern Idaho was not arbitrary, capricious, and an abuse of discretion?

American Lung Association of Idaho/Nevada v.
Idaho Dept. of Agriculture
S. Ct. No. 31842
Supreme Court

2. Whether the district court misconstrued and misapplied the duty to warn standard in I.C. § 33-512B regarding "direct evidence of suicidal tendencies".

Russell Carrier v.
Lake Pend Orielle School Dist.
S. Ct. No. 31812
Supreme Court

3. As to the mediated settlement of the boundary dispute, was there a mutual mistake of fact and law as to the interest of Hess in the property?

John Goodman v.
Sallie Lothrop
S. Ct. No. 31292
Supreme Court

4. Did the district court err in concluding the ISDA, pursuant to a Public Records Act request, must produce documents that it does not have in its possession, does not own or maintain, and over which it does not have custody or control?

Idaho Conservation League, Inc. v.
Idaho Dept. of Agriculture
S. Ct. No. 31751
Supreme Court

5. Did the court err by invalidating the local improvement ordinance when the 30 day period for challenges had lapsed long before this action commenced, resulting in a conclusive presumption of validity and an express bar to any contest questioning validity?

T. Patton Mann v.
The Granite Reeder Water
S. Ct. No. 31587
Supreme Court

SUMMARY JUDGMENT

1. Whether the district court erred in holding a credit bid complies with the requirement of sale set forth in Title 45 Chapter 15 Idaho Code.

Federal Home Loan v. Gary Appel
S. Ct. No. 31760
Supreme Court

2. Whether the trial court erred by failing to make findings of fact to identify the inferences drawn or rejected and to identify the evidentiary facts upon which his decision is based

Ralph Fullerton v. Henry B. Griswold
S. Ct. No. 31775
Supreme Court

3. Whether there is evidence the defendants negligently performed their duties toward Tegan Rees pursuant to the Child Protective Act.

Justin James Rees v.
Idaho Dept of Health & Welfare
S. Ct. No. 31632
Supreme Court

4. Whether the existence of material issues of fact precluded the district court from entering summary judgment in favor of Thunderbird and against Thirsty's on Thirsty's claim for tortious interference with contract

Thirsty's v. Thunderbird Lubrications
S. Ct. No. 31743
Supreme Court

POST-CONVICTION RELIEF

1. Did the state's motion for summary dismissal of the ineffective assistance of counsel claims provide Alvarez with sufficient notice of the grounds subsequently relied upon by the district court in its dismissal order?

Rojelio Alvarez v. State of Idaho
S. Ct. No. 31338
Court of Appeals

2. Was the court's summary dismissal of the petition error because it was premised partially upon factual findings with no basis whatsoever in the record?

Armando Arambula v. State of Idaho
S. Ct. No. 31347
Court of Appeals

3. Whether the district court erred by summarily dismissing the petition for post-conviction relief without giving 20 days notice where the state's motion for summary dismissal did not provide sufficient particulars of alleged deficiencies in the petition.

Thomas B. Atkinson v. State of Idaho
S. Ct. 31576
Court of Appeals

4. Did the court err in summarily dismissing Blong's petition for post-conviction relief and in finding that it contained only bare, conclusory and/or procedurally defaulted claims?

Ronald Blong v. State of Idaho
S. Ct. No. 30293/31032
Court of Appeals

5. Did the court err in finding the petition was time barred, was a successive petition and was frivolous?

Gilbert Flores v. State of Idaho
S. Ct. No. 31767
Court of Appeals

6. Did the district court err when it granted the State's motion to dismiss on grounds other than the grounds articulated in the state's motion?

Stephen Lockwood v. State of Idaho
S. Ct. No. 31359
Court of Appeals

7. Did the court err in finding that McCurdy had failed to state any valid post-conviction claims such that counsel should be appointed?

Mike McCurdy v. State of Idaho
S. Ct. No. 31420
Court of Appeals

8. Was the court's notice of intent to dismiss legally insufficient as the court made factual findings without indicating it was taking judicial notice of or relying on the record of the underlying criminal case, thus denying Valdez an opportunity to file an adequate response to the court's notice?

James Valdez v. State of Idaho
S. Ct. No. 31036
Court of Appeals

INSTRUCTIONS

1. Whether the court erred in failing to give Plaintiff's requested jury instruction No. 16, addressing a contractor's standard of care for constructing the Central Park Townhome Condominiums.

Craig Johnson Construction, L.L.C. v. Floyd Town Architects, P.A.
S. Ct. No. 31448
Supreme Court

HABEAS CORPUS

1. Whether the appellant's participation in recommended programs for offenders creates an enforceable expectation of release on parole.

Richard A. Wells v. Idaho Commission of Pardon and Parole
S. Ct. No. 31855
Court of Appeals

INSURANCE

1. Whether Farmers' Insurance policy clearly, precisely and specifically excluded Jim Armstrong from underinsured motorist coverage.

James C. Armstrong v. Farmers Insurance
S. Ct. No. 31715
Supreme Court

DAMAGES

1. Whether the statutory cap in existence at the time of the Horners' causes of action arose, found at I.C. § 6-6103 (2002), should have been applied to the non-economic damages awarded by the jury prior to determining Sani-Top's share of the damages.

Virgil Horner v. Sani-Top, Inc.
S. Ct. No. 31588
Supreme Court

CRIMINAL APPEALS

PLEAS

1. Did the court abuse its discretion in denying Arthur's motion to withdraw his *Alford* plea?

State of Idaho v. William Arthur
S. Ct. No. 31470
Court of Appeals

2. Can Hanes be bound by a plea agreement that he never signed, thus indicating that he never personally accepted the agreement or had notice of its provisions as required by due process?

State of Idaho v. Richard Hanes
S. Ct. No. 30675
Court of Appeals

3. Did the state violate the terms of the plea agreement thereby entitling Mayers to a new sentencing hearing in front of a different judge?

State of Idaho v. Shane Mayers
S. Ct. No. 31546
Court of Appeals

4. Did the State breach the plea agreement when it presented arguments highlighting what it perceived to be the aggravated nature of Tillitson's case?

State of Idaho v. Johnny Tillitson
S. Ct. No. 31779
Court of Appeals

SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE

1. Did the officer possess a reasonable articulable suspicion that Hanson was armed and dangerous so as to support a search of Hanson's vehicle?

State of Idaho v. David Hanson
S. Ct. No. 31257
Court of Appeals

2. Did the court err in granting Huffstutler's motion to suppress when, applying the correct legal standards to the facts established at the preliminary and suppression hearings, it is clear that the limited, lawful detention which occurred when Officer Arend briefly retained Huffstutler's driver's license ended when Huffstutler's license was returned to him?

State of Idaho v. Erick Huffstutler
S. Ct. No. 31821
Court of Appeals

3. Did the district court err by holding that a police officer during the course of a traffic stop must secure either the driver's consent or a search warrant before the officer can open a vehicle door to order the driver hiding on the back seat floor to get out of the vehicle?

State of Idaho v. Leanna Irwin
S. Ct. No. 30866
Court of Appeals

4. Did the officers have a reasonable, objective suspicion that Jaborra was driving under the influence of drugs such that they could extend the stop and investigate further?

State of Idaho v. Jake Jaborra
S. Ct. No. 31710
Court of Appeals

5. Whether the court erred in denying Jenkins' motion to suppress evidence gathered with a warrantless entry into his home.

State of Idaho v. William Jenkins
S. Ct. No. 31683
Court of Appeals

6. Did the court err in finding the state had a duty to preserve the recording of Lewis's statement and in suppressing the statement due to the lost recording?

State of Idaho v. Jon J. Lewis
S. Ct. No. 31684
Court of Appeals

7. Did the court err in finding the stop of Ojeda-Soto's vehicle was supported by reasonable suspicion and in denying Ojeda-Soto's motion to suppress?

State of Idaho v. Santiago Ojeda-Soto
S. Ct. No. 31242
Court of Appeals

8. Did the court err in denying Powell's motion to suppress evidence seized from her purse?

State of Idaho v. Susan Marie Powell
S. Ct. No. 31156
Court of Appeals

9. Did the court err in failing to suppress evidence found on Winn's person after a police encounter with Winn while he was parked in a lot in the early morning hours?

State of Idaho v. Christopher Aaron Winn
S. Ct. No. 31513
Court of Appeals

SUBSTANTIVE LAW

1. Did the court err in granting Drake's motion for dismissal of his withheld judgment when the record shows he had a probation violation in 1993 and thus did not comply with the conditions of probation at all times as required by I.C. § 19-2604?

State of Idaho v. Steven Drake
S. Ct. No. 31438
Court of Appeals

2. Did the magistrate court err by failing to examine the defendant's individual conduct as applied to the core circumstances to which the trespassing statute, I.C. § 18-7008(8) applies?

State of Idaho v. John Paul Jones, Jr.
S. Ct. No. 31697
Court of Appeals

3. Did the court err in ruling Rodriguez breached his cooperation agreement with the state?

State of Idaho v. Robert Rodriguez
S. Ct. No. 31363/31395
Court of Appeals

4. Did the court err in dismissing Warnke's appeal as Warnke had escaped and was a fugitive during the pendency of the appeal?

State of Idaho v. Timothy Warnke
S. Ct. No. 31705
Court of Appeals

EVIDENCE

1. Did the court abuse its discretion when it allowed the jury to consider inadmissible hearsay of Borrego's alleged plea of *nolo contendere* to felony attempted second degree burglary in violation of I.R.E. 803(22) during the persistent violator enhancement trial?

State of Idaho v. Ronald Borrego
S. Ct. No. 30973/31035
Court of Appeals

2. Did the court err in failing to grant a judgment of acquittal or new trial on the ground that improper evidence by way of foundation was placed before the jury as to whether or not Christiansen was telling the truth?

State of Idaho v. Eric L. Christiansen
S. Ct. No. 31449
Court of Appeals

INSTRUCTIONS

1. Did the court err in instructing the jury on the elements of possession of a controlled substance, as the jury instructions diminished the state's burden by omitting any *mens rea* element, essentially instructing the jury that possession of a controlled substance is a strict liability offense?

State of Idaho v. Anthony Thompson
S. Ct. No. 31305
Court of Appeals

RESTITUTION

1. Did the court abuse its discretion by ordering Parker to pay the victim's attorney's fees incurred as a result of the victim's choice to file a civil suit against Parker, and were those fees an economic loss resulting from Parker's criminal conduct?

State of Idaho v. Stacey Lynn Parker
S. Ct. No. 31405
Court of Appeals

PROCEDURE

1. Did the court err when it denied Jones' motion for a continuance because a conflict had arisen between Jones and his attorney and Jones had insufficient time to prepare for trial?

State of Idaho v. Michael Anthony Jones
S. Ct. No. 31474
Court of Appeals

ADMINISTRATIVE APPEALS INDUSTRIAL COMMISSION

1. Did the Idaho Industrial Commission err in failing to address the significance of previous Lump Sum Settlement Agreements signed by Clark and his attorney and Idaho Truss's attorney, relating to permanent partial disability under either a collateral estoppel or judicial estoppel theory?

John Clark v. Idaho Truss
S. Ct. No. 31378
Supreme Court

2. Was the employee's discharge for misconduct under Section 72-1366(5) of the Idaho Employment Security Law?

Philip P. Desilet v. Glass Doctor
S. Ct. No. 31972
Supreme Court

Summarized by:
Cathy Derden
Supreme Court Staff Attorney
(208) 334-3867

-In Memoriam-
Stewart A. Morris
 1944 – 2005

Stewart A. Morris passed away on September 14, 2005 in Boise, after a short illness. He was born on February 4, 1944 to Dr. Judson Morris and Thelma Morris in Los Angeles. The Morris family moved to Boise in 1946. He graduated from Borah High School in 1962. He received his J. D. from the University of Idaho College of Law in 1969. After graduation he worked as deputy attorney general for the state of Idaho and later entered private practice.

He is survived by his wife of 43 years, Linda and his two sons, Jeff and Greg, and five grandchildren. He is also survived by his sisters, Barbara Nickelsen and Kathy Petet and his brother Steve.

-Recognition-



James B. Alderman has recently been named partner at Batt & Fisher. Mr. Alderman will continue his practice in the areas of corporate law and company counseling, mergers and acquisitions and securities law.



John McGown, Jr., has been honored by the Idaho chapter of the Association of Fundraising Professionals for his charitable work with the Southwestern Idaho Planned Giving Council. Mr. McGown is of counsel to Hawley Troxell Ennis & Hawley LLP.

“**John McGown** has brought his professional expertise to help countless individuals and organizations better their communities through charitable giving,” said Richard Cooke, president of the council, in nominating him for the award.

Mr. McGown is also a certified public accountant. He served as editor of the “Tax Thoughts” column in *The Advocate* for 20 years. **Mr. McGown** has a bachelor’s degree from the University of Kentucky, a law degree from the University of Colorado and an advanced law degree in taxation from the University of Denver.

Susan M. Graham, Graham Law Office, P.A., has been awarded the Accredited Investment Fiduciary designation from the Center for Fiduciary Studies, a nationally recognized training organization for fiduciaries.

Hugh O’Riordan, Givens Pursley LLP, has been named to the National Research Council Board on Earth Sciences and Resources’ committee to assess the performance of engineered barriers. The focus of this committee will be to study and develop an improved framework for assessing surface and subsurface-engineered barriers for land disposal, heap leach ore treatment and other applications.

Mr. O’Riordan is a graduate of the University of Arizona School of Law and has a master of law in environmental law from George Washington University. He previously served on the National Research Council Board on Radioactive Waste Management’s committee on remediation of buried and tank waste. His practice at Givens Pursley emphasizes administrative, environmental and natural resource law focusing on resolving environmental disputes with state and federal agencies.

Dale Higer, Stoel Rives LLP, has been named to a Division Chairmanship in the National Conference of Commissioners on Uniform State Laws (NCCUSL). **Mr. Higer** serves as a liaison between several NCCUSL drafting and study committees and NCCUSL’s Executive Committee. NCCUSL researches, drafts and promotes enactment of uniform state laws in areas where uniformity is desirable and practical. Its members consist of lawyer-legislators, attorneys in private practice, state and federal judges, law professors and legislative staff attorneys.



Bobbi K. Dominick, of counsel to the firm Gjording and Fouser, was inducted a Fellow of the American Academy of Appellate Lawyers. The membership of this group is limited to the top 500 Appellate lawyers in the United States, five of them in Idaho. The two-day induction ceremony in Washington, DC included an address by US Supreme Court

Justice Sandra Day O’Connor and a private reception with Chief Justice John Roberts.

Beverly B. Bistline is the 2005 recipient of the Idaho State University’s William J. Bartz Award. The Bartz Award recognizes continued support and development of ISU through personal actions, participation in university affairs and financial support.

Ms. Bistline’s most recent gifts to ISU established the Beverly B. Bistline Thrust Theatre. In 1998, Bistline established the Bistline Foundation, which provides grant money for ISU students and other local groups and individuals to further education, provide community entertainment and promote opportunities for local artists. She had previously established the F. M. and Beverly B. Bistline Scholarships, the first full-academic scholarships at ISU for students planning to enter law school. The F. M. Bistline Memorial Scholarship, named for her late father, a prominent local attorney, is for a young man, and the Beverly B. Bistline Scholarship is for a young woman. Both go to students studying political science who aspire to attend law school and become involved in politics.

Ms. Bistline received the honorary Doctor of Laws degree from ISU at 2000 Commencement. She received a certificate in art from the University of Idaho and a B.A. degree from the University of Idaho. **Ms. Bistline** joined the US Navy as a WAVE during World War II. She then returned west to attend the University of Utah College of Law, receiving a juris doctor degree under the G. I. Bill. She earned a certificate in tax law from the University of Southern California and worked for legal firms in Los Angeles and San Francisco. She returned to Pocatello in 1969 after the death of her father and took up his legal practice, retiring in 1996. She was elected to the 43rd Idaho Legislature in 1974 from District 33 as a Democrat, and served on the joint House and Senate Finance-Appropriations and Judiciary, Rules and Administrations Committees.

-On The Move-



Christine E. Nicholas has joined Batt & Fisher, LLP. Ms. Nicholas was formerly Associate General Counsel—Finance and Corporate Affairs and Assistant Secretary of J.R. Simplot Company. Her practice is concentrated in the areas of real estate, mergers and acquisitions, finance and corporate law.

Phil E. De Angeli has been appointed Idaho State Counsel to First American Title Insurance Company. Mr. De Angeli graduated from Boise State University and the University of Oregon School of Law and was a partner with Jones, Gledhill, Hess, Fuhrman & Eiden P.A. for six years preceding this appointment. He can be reached at pdeangeli@firstam.com.



Paul A. Boice has returned from Iraq to resume the practice of law in the Boise offices of Meuleman Mollerup LLP. He will focus his practice in the areas of business law, wills, trusts and probate.

Mr. Boice was deployed with the Idaho Army Guard 116th Brigade Combat Team as Trial Counsel for the Office of the Staff

Judge Advocate. The mission of the BCT included promoting stability and providing support to the emerging democratic government in Iraq. He can be reached at 208-342-6066, or by email at boice@lawidaho.com.

Tyler J. Henderson and **Joel A. Flake Jr.** have joined Moffatt Thomas as associates.

Mr. Henderson graduated from Gonzaga University School of Law in 1999. His practice will focus primarily on entity formation, mergers and acquisitions, commercial lending, real estate and general business.

Mr. Flake is a member of the firm's litigation practice group and will focus on commercial litigation in the state and federal courts. Before joining Moffatt Thomas, Mr. Flake served for two years as law clerk to Magistrate Judge Larry M. Boyle.



JoEllen Warren, has joined the law firm of Meuleman Mollerup LLP as a paralegal for the firm's real estate practice. She most recently worked as legal administrator and legal assistant for both in-house legal counsel and law firms providing legal services in association with commercial real estate transactions, business formations, and cor-

porate Initial Public Offerings. She has worked in banking industry administering trust accounts, and analyzing public and private loan transactions.

Ms. Warren completed her undergraduate studies at the University of Wisconsin, and holds a Masters Degree in Leadership Development from the University of Minnesota. She can be reached at Meuleman Mollerup at (208) 342-6066.

Joshua J. Sears has joined Foley Freeman Borton, PLLC as an associate. Mr. Sears received his bachelor's degree from Albertson College and his law degree from the University of Idaho. His practice is concentrated in the areas of bankruptcy, real estate development, family law and general civil litigation.

-Announcement-

BLSA, the association for legal professionals will hold its monthly educational meeting on **Tuesday, January 17, 2006** at 5:30 pm. The education topic will be **How to read and Understand Medical Records**. The meeting will be held in the U.S. Bank Building, 2nd floor, 101 S. Capitol Blvd., Boise, Idaho. For more information and to RSVP, please contact Bert Barton, PLS at 385-5372.

CONTINUING LEGAL EDUCATION

ISB Commercial Law & Bankruptcy Annual Seminar

February 16-18, 2006
Coeur d'Alene Resort

A few of the topics planned for this important seminar include

- Update on the 2005 Revised Bankruptcy Code
- Prepetition sanctions, contempt penalties and punitive damages
- PMSI, reclamation rights, Stay relief the famous (infamous?) Judges' Panel and much more.

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Increase your comfort level next time you find yourself in federal court by participating in an interactive presentation addressing motion practice in federal court. So popular at this past July ISB Annual Meeting, our premier faculty has consented to presenting again.

You'll learn how to avoid the ten most common discovery mistakes made by both plaintiffs and defendants in federal court. Participate and watch as discovery motions are argued and listen as **U.S. Magistrate Judge Mikel H. Williams** rules on the motions and explains his reasoning. Then, follow the same case and enjoy the interactive presentation as **U.S. Chief District Judge B. Lynn Winmill** provides specific guidance on how to present oral argument as either the moving

party or the opposing party during dispositive motions.

Finally, you will glean new understanding about federal jury trials and the directive of the Jury Trial Improvement Committee and the survey results regarding how to improve jury trial practices in the Federal Courts.



ISB Real Property Section Annual Seminar

February 24
Centre on the Grove, Boise

Calendar now to attend this important seminar that serves to bring both specialists as well as general practitioners up to date. The agenda will include hot topics and the most recent information on trends in the practice.

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Office suites available near Canyon Co. Courthouse. Located on the corner of Main and Kimbal St., the suite sizes in this attractive office building range from 250 to 716 square feet. For additional information, contact Susan Wishney @ (208)426-9540 or (208)861-5206.

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COMING EVENTS

1/06 – 2/28/06

These dates include Bar and Foundation meetings, seminars, and other important dates. All meetings will be at the **Law Center in Boise** unless otherwise indicated. **Dates might change or programs may be cancelled.** The ISB website contains current information on CLEs. If you don't have access to the Internet please call (208) 334-4500 for current information.

January 2006

(DATES MAY CHANGE OR PROGRAMS MAY BE CANCELLED)

2 ISB/ILF Office Closed for New Year's Day Holiday

3 The Advocate Deadline

4 Idaho Partners Against Domestic Violence Meeting

6 February 2006 Bar Exam Reexam Deadline

12 Farwell Reception for Dana Weatherby

13 ISB Board of Commissioners Meeting

13 Idaho Volunteer Lawyers Program Policy Council Meeting, Boise Cascade

16 ISB/ILF Office Closed for Martin Luther King/Human Rights Day

18 The Advocate Editorial Advisory Board

20 CLE: Government & Public Sector Lawyers

20 Idaho Law Foundation Board of Directors Meeting

23 Law Related Education Committee Meeting

24 Practice Section Council Meeting

25 Alternative Dispute Resolution Council Meeting

25 CLE: Environmental and Natural Resources Law Section, Boise

27 CLE: Law Practice Management Section

February 2006

(DATES MAY CHANGE OR PROGRAMS MAY BE CANCELLED)

1 The Advocate Deadline

1 Licensing Deadline

1 Public Information Committee Meeting

2 CLE: Young Lawyers

8 CLE: Professionalism & Ethics

15 The Advocate Editorial Advisory Board

16-18 CLE: Commercial Law & Bankruptcy Seminar, Coeur d'Alene

20 ISB/ILF Office Closed for President's Day

20-22 February 2006 Bar Exam, Boise centre on the Grove

23 Familiarity Breeds Comfort... Federal Court, Boise

24 ISB Board of Commissioners Meeting

24 CLE: Real Property Section, Boise, Centre on the Grove

For Continuing Legal Education schedules check the
Idaho State Bar website. www.idaho.gov/isb

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