



The
Advocate

Official Publication of the Idaho State Bar

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February 2007

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50 YEARS
1957 - 2007

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Section.



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Spink Butler, LLP is pleased to announce that Lauren Maiers Reynoldson has been named a Partner. Since joining the firm in 2004, Ms. Reynoldson has concentrated her practice in the areas of real estate and commercial transactions, advising and assisting clients on all aspects of real estate transactions, financing, title work, and land use. She also counsels clients on corporate and business law, commercial acquisitions and sales, leasing, loan negotiations, land use and development work, and is skilled in preparing all documentation necessary to bring commercial transactions to a close. Prior to joining the firm, Ms. Reynoldson was a Senior Attorney for Albertson's, Inc., handling real estate and commercial transactions throughout the country.



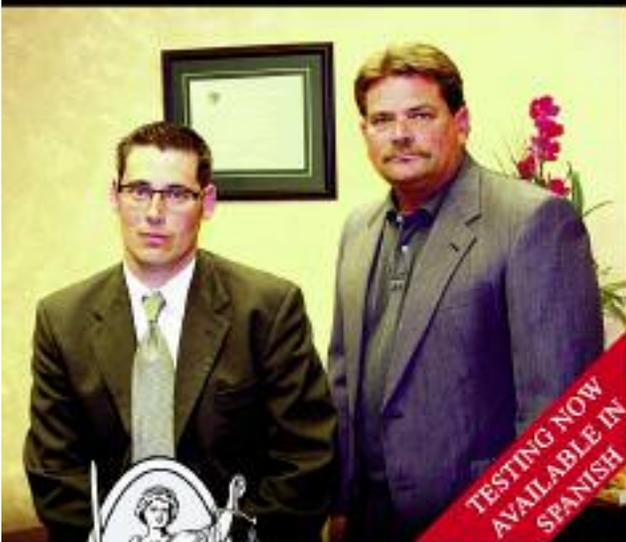
Lauren Maiers Reynoldson

Ms. Reynoldson received her undergraduate degree in design studies and urban planning from the University of Washington. She graduated *magna cum laude* from Gonzaga University School of Law in 1998, where she was Executive Editor of the *Gonzaga Law Review* and a regional finalist on Gonzaga's National Moot Court team.

Ms. Reynoldson understands the importance of giving back to her community, and she has been active in the service and leadership positions in Boise for many years. She has served on the Board of Directors for the Ronald McDonald House Charities of Idaho, Inc. since 2003, and is currently serving as the Board's Past President. She is also a member of the 2005-2007 Leadership Boise class. Recently, Ms. Reynoldson was named as one of the 2007 Women of the Year by the *Idaho Business Review*.

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Snow Branches—The picture was taken by Idaho attorney Lane E. Erickson; Racine, Olson, Nye, Budge, & Bailey, Chtd, Pocatello.

SECTION SPONSOR

This issue of *The Advocate* is sponsored by the Bankruptcy Section of the Idaho State Bar.



The Idaho Legal History Society and Spontaneous Productions present

The Gate on 16th Avenue **March 15-17, 2007**

In 1907, William "Big Bill" Haywood, secretary/treasurer of the Western Federation of Miners, was tried for conspiracy in the death of former Idaho Governor Frank Steunenberg. Clarence Darrow defended Haywood. Prosecutors included James H. Hawley and William Borah. Despite the testimony of Harry Orchard, who implicated Haywood and confessed to the killing, Haywood was acquitted.

The Gate on 16th Avenue, a play depicting this "Trial of the Century" will be presented **March 15 - 17**, at the Boise Little Theater, 100 East Fort Street, Boise.

This original play was written and directed by Mike Silva.

Tickets go on sale February 1

—all seats are reserved—

\$17.00

\$12.00 for students and seniors 62 +

A reception will be held Thursday, March 15th (opening night) at 6:30 p.m.

To purchase tickets:

Online: www.boiselittletheater.org -or- www.ticketleap.com

—or—

**Direct: Boise Little Theater Box Office
(208) 342-5104**



Boise Little Theater box office staffed
TWT, noon– 3:00 p.m. from Feb 1 to 19,
Mon-Sat, noon – 4:30 p.m. from Feb 19 to Mar 17
Off hours, leave voice message for a return call.

This play is made possible, in part, by the generous contributions from: Idaho Chapter of the Federal Bar Association, Mike Silva, Holland and Hart, Fourth District Bar Association, Hawley Troxell Ennis and Hawley, Ernest A. Hoidal, Esq., and a grant from Boise City Arts Commission.



JUDICIAL ELECTIONS, JUDICIAL INDEPENDENCE, JUDICIAL SURVEYS

THOMAS A. BANDUCCI



When I started practicing law in Idaho, judicial elections were few, and typically raised little controversy. Of late, that's changed.

Contested judicial elections in Idaho are more frequent these days. Although elections are a part of our democratic process, judicial elections can pose a risk to the independence of our judiciary.

I suspect that I would be "preaching to the choir" if I lingered on the point that our judiciary must be free to exercise their constitutional obligation to decide cases fairly and impartially. If this freedom is threatened, so that judges might "look over their shoulder" before making an unpopular decision, then the checks and balances built into our democratic system aren't working properly.

Popular voting for judicial positions has always posed the potential that judges could be elected (or voted off the bench) based on the popularity of their agenda or decisions. This is a risk inherent in the process. If judicial positions are an elected post, then we should expect that judicial campaigns will involve some dialogue on issues of social and political significance. How else will the voter choose? As in any political campaign, the voter is looking for the candidate who agrees with him on "the issues".

This is why (in practice) judicial elections present such a problem. The object of any election is, of course, to win. The electorate who decides the winner is not necessarily well versed on what makes a good judge and is more likely to be swayed by sound bites, anecdotes and well funded media campaigns. Candidates challenging incumbents often campaign on popular issues implicated by an incumbent's decisions. Moreover, campaigns invite contributors. Contributions can unlevel the playing field (between the well funded and not-so-well funded) and

create ethical concerns for parties and counsel who may later appear before the judge who accepted their campaign donation.

As attorneys we know that the criteria for selecting a good judge is not found in any popular agenda. The characteristics that best qualify any judicial candidate must include; integrity, experience, judicial temperament and legal ability. Unfortunately, these characteristics mean little (if anything) to many voters.

This presents a disturbing picture. An electorate that is not well educated on judicial qualifications is likely to vote for the best funded, most "popular" judicial candidate. Conversely, Idaho could stand to lose highly qualified judges who have rendered unpopular decisions or are unable to raise an adequate campaign treasury.

Such circumstances not only limit Idaho's chances of getting the best judges on the bench, they also create a chilling effect on incumbent judges who must make decisions which might be used against them in the next election.

Our Bar has a vested interest in educating voters on judicial qualifications and leveling the playing field between candidates so that judicial qualifications, not campaign funding, or campaigning on "hot button" issues, determines who gets elected. What we have done, thus far, is enact a resolution in 2003 (resolution 03-1) which established, implemented and administered surveys of judicial candidate qualifications in contested judicial elections. The preamble of the resolution recognized that

"An independent judiciary is essential if judges are to remain free to make difficult or unpopular decisions based on the law and not on the weight of public opinion; [likewise, where] judges are chosen through an election, it is imperative that members of the bar help to advise the electorate about

candidates' qualifications so that they make informed voting decisions."

The survey provides the bar with a potentially powerful voice in contested elections. The survey seeks statewide input from the bar on candidate qualifications for 1.) integrity and independence, 2.) knowledge and understanding of the law, 3.) judicial temperament and demeanor, and 4.) legal ability and experience. Survey results are released to the media before the judicial election as a means of communicating to the voting public those characteristics which the bar considers important in a judicial candidate.

The bar's message to the voting public through the survey is only as powerful as we make it. Weak survey response damages the credibility of the survey, as well as the bar's reputation as an involved player in the judicial election process.

The recently contested election in the Seventh Judicial District suggests we have room for improvement in this area: although about 47% of the lawyers from the 7th District (95) responded to the survey, only 201 attorneys (or roughly 5%) of the statewide bar memberships responded. How credible is a survey response that represents only 5% of potential responses? "Getting out the vote" on the judicial survey is clearly one of the challenges we have created for ourselves by implementing the survey.

Other legitimate questions may be raised about the effectiveness of the survey:

- Practically speaking, can the survey meet its intended objective of educating the voting public on judicial qualifications through publication of survey results?
- Are there better ways of leveling the playing field (ie educating the voting public), when a judicial

candidate chooses to campaign on a “popular” agenda?

- How do we prevent the survey from being used as a political tool by supporters of one candidate or another, i.e. “stuffing the ballot box”?

For now, the survey is what we’ve got. I suggest we use it, with the understanding that it is a tool intended to curb the impact of politicized (or popularized) judicial elections.

I know that the Commission and the State Bar’s Committee on Judicial Integrity and Judicial Independence are keeping a watchful eye on these matters. We invite your comments, concerns and criticisms.

Thomas A. Banducci is serving a six-month term as president and has been a Bar Commissioner representing the Fourth Judicial District since 2004. He is a partner in the Boise law firm, Greener Banducci Shoemaker. He was admitted to practice in Idaho in 1979, and specializes in litigating complex commercial disputes. He and his wife, Lori live in Boise with their three children, Andrea, Nina and Nick. If you have questions or comments please contact him by email: tbanducci@greenerlaw.com

MCLE EXTENSIONS

March 1, 2007 is the deadline for the MCLE extension to complete your MCLE requirements. Visit our website at www.idaho.gov/isb for information on upcoming courses, video/audio tapes and online courses. Contact the Membership Department at (208) 334-4500 or jhunt@isb.idaho.gov if you have any questions on MCLE compliance.

REINSTATEMENT

Darwin Overson has complied with the 2005 Idaho State Bar licensing requirements. On January 12, 2007, the Idaho Supreme Court issued an Order reinstating Darwin Overson to the practice of law in the State of Idaho. Inquiries about this matter may be directed to: Idaho State Bar, PO Box 895, Boise ID 83701, (208) 334-4500.

NEWSBRIEFS

LAW DAY—This year's theme is Liberty Under Law: Empowering Youth, Assuring Democracy. Please contact Tracie Guy at guyt@staff.abanet.org or 312/988-5734 if you need a 2007 Planning Guide for your district activities. The website address is www.lawday.org. If you would like to send out local press releases on your Law Day activities please contact Jeanne Barker by April 1, 2007. (208) 334-4500, or jbarker@isb.idaho.gov

LAP—The Idaho Lawyer Assistance Program (LAP) helps and supports lawyers who are experiencing problems associated with alcohol, drug and/or mental health issues. The program also focuses on educating legal professionals and their families and friends about the causes, effects and treat-

ment of alcohol and drug dependency, depression, and mental health problems. For further information, please contact the LAP by phone (208) 323-9555, or email: LAP@southworthassociates.net. John Southworth the LAP Program Coordinator, is available at (208) 891-4726.

MOCK TRIAL—The Snake River Valley Mock Trial has been changed. It will be Saturday, March 3, 8:00 a.m. - 5:00 p.m. at the Bonneville County Courthouse.

The Advocate—The January issue of The Advocate experienced a problem with labels at the mailing center. If you didn't receive a copy of the January issue and would like one, please contact Bob Strauser at (208) 334-4500 or rstrauser@isb.idaho.gov

RECIPROCAL

The following lawyers were admitted to the practice of law in Idaho through reciprocal admission.

Reciprocal Admission Applicants Admitted from December 1, 2006 to December 31, 2006)

Jeffrey Pat Heineman
Boise, ID
Creighton University
Admitted: 12/6/06

Edward George Johnson
Liberty Lake, WA
Gonzaga University
Admitted: 12/13/06

Angel Dawn Rains
Spokane, WA
Gonzaga University
Admitted: 12/12/06

COMING EVENTS

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.

DATES MAY CHANGE OR PROGRAMS MAY BE CANCELLED

FEBRUARY 2007

- 1 **Licensing Deadline**
- 6 – 13 ABA/NABE/NCBP/NCBF Midyear Meeting, Miami
- 19 **President's Day, Law Center Closed**
- 23 Idaho State Bar Board of Commissioners Meeting
- 26 – 28 Idaho State Bar: Bar Exam
Boise Centre on the Grove, Boise

MARCH 2007

- 1 **Final Licensing Deadline**
- 1 July Bar Exam
- First Applicant Deadline
- 15 – 17 ABA Bar Leadership Institute, Chicago
- 21 - 24 Western States Bar Conference
Hawaii

DISCIPLINE

RAYMUNDO G. PEÑA (Disbarment)

On December 13, 2006, the Idaho Supreme Court issued an Order of Disbarment disbaring Rupert lawyer Raymundo G. Peña from the practice of law in the State of Idaho. The Idaho Supreme Court's Order accepted the parties' stipulated resolution of a formal charge disciplinary proceeding filed by the Idaho State Bar whereby Mr. Peña agreed to the sanction of disbarment.

Of the thirty-seven counts of professional misconduct alleged against Mr. Peña by the Idaho State Bar, he admitted thirty-one counts and that his conduct violated the Idaho Rules of Professional Conduct.

Twelve of the admitted counts of misconduct involved Mr. Peña charging his clients unreasonable fees, failing to provide an accounting of fees upon reasonable request, failing to hold fees in trust or failing to remit fees belonging to clients, and/or failing to return unearned fees paid in advance upon termination of the representation in violation of Idaho Rules of Professional Conduct 1.5(a) [Unreasonable Fee], 1.5(f) [Failure to provide itemized accounting], 1.15(a) [A lawyer shall hold property of clients separate from the lawyer's own property], 1.15(b) [A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred], 1.15(c) [A lawyer shall promptly deliver to the client any funds that the client is entitled to receive], 1.16(d) [Failure to return unearned fees upon termination of representation], 8.4(c) [Conduct involving dishonesty, fraud, deceit or misrepresentation], and 8.4(d) [Conduct that is prejudicial to the administration of justice]. Several of these counts involved Mr. Peña taking attorneys' fees from clients, failing to perform the work for which he was hired, and failing to return the unearned fees.

Six of the admitted counts of misconduct involved Mr. Peña's failure to abide by his clients' decisions concerning the objectives of representation, failure to diligently pursue his clients' matters and his failure to keep his clients reasonably informed about the status of their cases and/or failure to respond to reasonable requests for information in violation of Idaho Rules of Professional Conduct 1.2(a) [A lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued], 1.3 [Diligence] and 1.4 [Communication].

Mr. Peña also admitted to two counts of entering into business transactions with criminal clients without fully disclosing or explaining the terms of the transaction in writing and/or illustrating to the clients that the terms of the transaction were fair and reasonable, for failing to provide his clients with the opportunity to seek the advice of independent counsel prior to entering into the transactions, and for failing to obtain his clients' consent to the terms of the transactions in writing in violation of Idaho Rule of Professional Conduct 1.8(a) [Conflict of Interest: Prohibited Transactions]. In one case, Mr. Peña offered to allow the clients to construct an addition to an existing residence in exchange for legal services in their criminal case, but failed to comply with the provisions of Rule 1.8(a). In another case, Mr. Peña accepted several items of personal property from a client in exchange for attorneys' fees, but again failed to comply with the provisions of Rule 1.8(a).

Mr. Peña admitted to one count of making a false statement of material fact to a tribunal in violation of Idaho Rules of Professional Conduct 3.3(a)(1) [A lawyer shall not knowingly make a false statement of material fact to a tribunal] and 8.4(c) [Conduct involving dishonesty, fraud, deceit or misrepresentation], with respect to his representation of a client in a worker's compensation matter and his failure to disclose to the Industrial Commission the total amount of attorneys' fees he had already received.

Mr. Peña also admitted to one count of engaging in the unauthorized practice of law in violation of Idaho Rules of Professional Conduct 5.5(a) [Unauthorized Practice of Law] and 8.4(d) [Conduct prejudicial to the administration of justice], and Idaho Bar Commission Rules 506(j)(1) and 506(j)(6), for failing to remove his "Peña Law Office" sign from the yard of his office until August 2006, five months after being placed on interim suspension by the Idaho Supreme Court, and for sending a fax after his interim suspension using a "Peña Law Office" cover sheet regarding a criminal case in which he had represented the defendant prior to his suspension.

Finally, Mr. Peña admitted to 15 counts of failing to respond to Bar Counsel's Office with respect to its inquiries into the grievances filed against him by clients in violation of Idaho Rule of Professional Conduct 8.1(b) [A lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority], and Idaho Bar Commission Rule 505(e) [Failure to respond to a request from Bar Counsel shall be grounds for imposition of sanctions].

The Idaho State Bar agreed to dismiss the remaining six counts, and based upon the parties' stipulation, the Idaho Supreme Court ordered that those counts be dismissed for the reason that either there was not clear and convincing evidence to prove those allegations and/or those allegations were the subject of ongoing and pending criminal proceedings against Mr. Peña.

Based upon the above admissions, the Idaho Supreme Court found that Mr. Peña violated the rules set forth in those admitted counts. The Court ordered that the disbarment be retroactive to February 28, 2006, the date of the Idaho Supreme Court's order placing Mr. Peña on interim suspension. The Court noted that the Client Assistance Fund had already authorized reimbursement payments to three of Mr. Peña's clients and directed the Idaho State Bar to send Client Assistance Fund forms to the remaining clients identified in the formal charge complaint whose grievances concern Mr. Peña's failure to return unearned fees or other funds. The Idaho Supreme Court further ordered that Mr. Peña must reimburse the Client Assistance Fund for all claims paid to his clients following a determination of dishonest conduct, as a condition of applying for readmission to the Idaho State Bar.

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

D. SCOTT SUMMER (Reinstatement)

On January 17, 2007, the Idaho Supreme Court issued an Order reinstating D. Scott Summer to the practice of law in the State of Idaho.

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



2006—THE IDAHO STATE BAR YEAR IN REVIEW

DIANE K. MINNICH



Another year has passed, a year with new projects and activities as well as the administration of the Bar's ongoing programs and operations. Below are the highlights of the Bar's work in 2006.

ADMISSIONS

RECIPROCAL ADMISSION—In response to resolution 05-2, the reciprocal admission rules were amended in October 2006 to permit reciprocity with other states that allow reciprocal admission under similar rules. The new rules have expanded the states that Idaho will accept reciprocal applicants to 24 states.

In 2006, 62 attorneys were admitted through the reciprocal admission process. Since the program began in October 2001, 303 attorneys have been admitted reciprocally.

BAR EXAM		
Years	Applicants	Pass Rate
2005	207	74%
2006	206	79%

LICENSING/MEMBERSHIP

As of December 2006, of the 4,880 lawyers licensed by the Idaho State Bar, 3,837 were active members, 166 judges, 41 house counsel members, 831 affiliate members, and 5 emeritus attorneys.

ISB MEMBERSHIP		
12/05	12/06	Change
4,709	4,880	3.7%

CLIENT ASSISTANCE FUND

In 2006, 17 CAF claims were opened and 11 cases were closed.

CLIENT ASSISTANCE FUND CLAIMS		
Year	Claims	Total Paid
2005	16	\$42,165
2006	17	\$ 1,990

DISCIPLINE

Seven formal charge cases were opened in 2006, 14 were closed. Of the 14 closed cases, 6 of the attorneys were either disbarred or resigned in lieu of discipline.

DISCIPLINE			
	2005	2006	Change
Phone Inquiries	1,343	1,038	-22.85
Grievances	344	448	30.30
Complaints Opened	185	125	-32.50
Ethics Questions Answered	1,490	1,414	- 5.10

FEE ARBITRATION

Fee arbitration cases filed were basically the same from 2005 to 2006 57 cases were opened in 2005, 55 were opened in 2006.

LAWYER REFERRAL SERVICE

About 37% of those individuals that receive a referral contact the attorney. The LRS continues to work closely with IVLP and other agencies to provide referrals for callers to attorneys and other appropriate services.

LAWYER REFERRAL SERVICE			
	2005	2006	Change
Calls	8,944	9,057	1.3%
Referrals	6,090	6,334	4.0%

ANNUAL MEETING

The 2006 Annual Meeting was held at the Sun Valley Resort. The meeting was well attended and enjoyed by the participants. The Commissioners and staff continue to consider how to alter the annual meeting so it appeals to more attorneys. Suggestions are always welcome.

ANNUAL MEETING			
	2005 Post Falls	2006 Sun Valley	Change
Total Attendees	286	333	16.5%
Attorneys Judges	165	197	19.4%

CASEMAKER

The Casemaker legal research library continues to offer a comprehensive, easily searchable, continually updated database of caselaw, statutes and regulations. The service is available to all ISB active members and judges. At the end of 2006, 25 state bar associations offered the service. Case law for all 50 states will be added by early 2007. To access Casemaker, go to the ISB website, www.idaho.gov/isb. Each eligible attorney received a password; your username is your Bar number. If you have any comments or recommendations for improving the Casemaker services, please contact me.

SECTIONS

The Sections of the Bar continue to actively assist their members with education, public service activities and opportunities to meet and work with attorneys that practice in similar areas. Section membership increased in 2006 from 2,281 to 2,385.

SURVEY OF JUDICIAL CANDIDATES IN CONTESTED JUDICIAL ELECTIONS

In 2003, the Bar membership passed a resolution that requested a survey be developed for use in contested judicial elections. The Bar and its Committee On Judicial Independence & Judicial Integrity determined that surveying Bar members regarding judicial candidates in contested elections, and disseminating the survey results to the public can help the electorate make informed voting decisions.

For the first time in 2006, ISB members were surveyed concerning qualifications of judicial candidates two contested elections, one in the First Judicial District and one in the Seventh Judicial District. Results were released to the candidates and then the media. The bar is in now reviewing the process to determine its effectiveness and how to proceed in future contested elections.

The work of the Bar is accomplished with the help of hundreds of volunteers each year. The Idaho legal community is committed to improving the profession and serving the public. Special thanks for the time, energy and expertise so many of you devote to serving the Bar.

WELCOME FROM THE COMMERCIAL LAW AND BANKRUPTCY SECTION

JIM SPINNER

Service, Spinner & Gray

The Commercial Law and Bankruptcy Section has been busy keeping up with the major changes in the law that occurred on October 17, 2005, when the Bankruptcy Abuse Prevention Consumer Protection Act became effective. This issue contains a number of articles that will be of interest not only to commercial law and bankruptcy practitioners, but pertain to a wide range of issues encountered in general practice areas and also touch on some of issues raised by the new Bankruptcy statute.

An article by Brad A. Goergen deals with the broad range of consumer credit laws and issues that can arise from those laws. Two articles, written by Randal J. French and Aaron J. Tolson respectively, explore the interactions between bankruptcy law and family law. Monte C. Gray's article highlights the possibilities of recharacterization of debt to equity outside of bankruptcy. Two authors review recent court decisions. Robert J. Maynes reviews the *Steinhaus* decision on whether "reinstatement" or "ride through" of collateral is still an option for consumer debtors in Idaho. Kelly A. Anthon takes a look at the *Wiebe* decision in Idaho which interprets Idaho's deed of trust statute. An

article on proofs of claim and frequently asked questions and issues faced by creditor clients in filing proofs of claim in a bankruptcy is offered by Jim Spinner.

We hope you find the following articles in this edition of *The Advocate*, written by fellow Bar members and commercial law and bankruptcy practitioners informative and helpful in your own practice. Please feel free to contact any member of the Board of Governors for the CLB Section with any suggestions or comments on how we might better serve our membership.

COMMERCIAL LAW AND BANKRUPTCY SECTION BOARD

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Jim Spinner, Pocatello; Board Member
Ray Barker, Coeur d'Alene; Board Member
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COMMERCIAL LAW AND BANKRUPTCY 25th Annual Seminar

February 15 - 17, 2007

Red Lion Templin's Resort
Post Falls, Idaho

Great Speakers
Timely Topics
Friday evening
reception and dinner

(12.5 CLE credits of which
1.25 is ethics)

THE ADVOCATE

REMEMBERING 50 YEARS

The following appeared in the Volume 1(4):1

1957 Bankruptcy Court Statistics Studied

The records of the Bankruptcy Court for the Calendar Year 1957 show an increase not only in the number of bankruptcies filed, but also in the liability or loss involved in the individual cases. The number of filings actually being referred to the Bankruptcy Court numbered 253 in 1956 and 319 in 1957 for an increase of about 25%. Viewed in another way, this represents about one filing for every court day.

There has also been a decided increase in the use of wage earner plans under Chapter XIII of the Bankruptcy Act, of which about 75% are making regular payments on their accounts. This is a rather commendable showing in the sense that many people who have been engulfed in financial difficulties are interested in paying their accounts rather than seeking a discharge through bankruptcy.

The pattern of bankruptcy in Idaho seems to follow the national trend. Business bankruptcy increased somewhat in 1957, as did bankruptcies among farmers or those engaged in farming activities.

It is difficult to pinpoint causation of the increase in bankruptcies, although a review of the files of the bankruptcies of individuals, rather than businesses, reveals that installment buying and poor management are common underlying factors. The ease of installment buying has encouraged individuals to obligate themselves for payments beyond their monthly income. Also a common obligation occurring in the individual bankruptcies is the number and size of doctor and hospital bills. These would appear in some cases to have been the insurmountable obligations which have lead to the filing of bankruptcy proceedings.

'JUST THE FACTS' ABOUT CONSUMER CREDIT LAWS

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Consumer credit violations are real. They are not theoretical, and neither is the damage they cause. Obviously, violations affect consumers, but they may also affect well-intentioned businesses trying to understand and abide by the Byzantine scheme of consumer credit regulations. These violations occur throughout the United States, including Idaho. Not surprisingly, examples of consumer credit violations are easy to find.

Of course, not all examples are equally instructive. The best way to illustrate a consumer credit violation is through an example that focuses on the facts—just the facts. For those readers who are also television aficionados, the phrase “just the facts” may trigger memories of the classic television show *Dragnet*, one of the best police dramas ever broadcast. Episodes were based on real crimes (long before networks advertised plots “ripped from the headlines”), and each episode began with the disclosure that “the story you are about to see is true. Only the names have been changed to protect the innocent.” Reliably, Detective Joe Friday would interview witnesses to aid in his investigations, and when the witnesses would stray from what he considered relevant, he would politely reign them in by clarifying that “all we want are the facts.”¹

Consider the following true story. Only the names have been changed to protect the innocent. These are the facts.

During the spring of 2006, a reasonably well-informed consumer, John Consumer, was shopping for a used vehicle in southwest Idaho. John scoured several used-car dealerships in his area, and finally found a vehicle that met his needs. After negotiating a price, the salesman asked John if he was interested in financing. John replied he had already arranged for financing through a bank, but the salesman insisted the dealership could broker better terms. John told the salesman the terms his bank had offered. After inquiring, the salesman told John that the dealership had located a reputable bank willing to provide an interest rate that was 0.0006% lower. John decided to accept the better offer.

While filling out the papers, John told the salesman he would like his wife’s name included on the title. Later, the salesman told John that because both his and his wife’s name would be on the title, John’s wife would also have to apply for credit. John explained his wife was a homemaker, and because she had no income, the loan would have to be based on John’s income alone. The salesman said he understood, but insisted both John and his wife apply for credit.

John told the salesman he was relatively certain the salesman was violating federal consumer-credit laws. The salesman suggested John take that up with the credit manager, who would finalize the sale and loan papers. So John repeated his concerns to the credit manager. The credit manager explained since both John’s and his wife’s name would be on the title, the banks required the dealership to fill out the loan papers for both spouses. As an alternative, the credit manager offered to change the form so only John’s name would be on the car title, and then redo

all of the other paperwork. John was skeptical banks would require the dealership to violate federal law, but realized arguing with the credit manager was futile. His only choices were not to buy the car or to look past the consumer credit violation.

As a matter of principal, John was reluctant to let the issue go. But John had already invested too much time shopping for a vehicle, and he had been at the dealership for some time. His wife could not keep their toddler corralled for too much longer. On the other hand, neither John nor his wife thought there was any realistic possibility that they would be prejudiced by jointly applying for credit. Because of this, and in the interest of time, they decided just to borrow the money jointly.

This story details a clear violation of the Equal Credit Opportunity Act and Federal Reserve Regulation B.² It also highlights the role that ignorance and inertia play in the world of consumer credit law. Presumably, the banks that dealt with the dealership did not know the dealership’s policies violated the ECOA, and the dealership likely did not realize this either. But at the same time, John’s protest that the dealership was violating federal consumer-credit laws essentially fell on deaf ears because the dealership was not willing to address the issue.

The lesson lawyers need to take away from John’s story is that violations of consumer credit laws are not uncommon. This should matter to all practitioners. If you are more likely to represent businesses and creditors, you must be familiar with these laws to counsel clients on how to comply. If you are more likely to represent consumers, you must be able to spot violations and understand what remedies are available.³ And even if your practice never involves these types of issues, you should have a general familiarity with consumer credit laws so you will know when to refer an existing client to an attorney with expertise in the area. To help, here are summaries of ten bodies of consumer credit law applicable to Idahoans.⁴

ONE—IDAHO CREDIT CODE

The ICC, Idaho Code § 28-41-101 *et seq.*, covers a broad range of transactions, although the bulk of its provisions apply only to consumer transactions.⁵ More specifically, the ICC applies to “regulated consumer credit transactions,” a statutorily-defined term. Basically, a regulated consumer credit transaction is (1) one entered into primarily for the consumer’s personal, family, or household use; (2) that involves a seller or creditor that regularly engages in such transactions; and (3) is payable in installments or includes a finance charge.

Beyond this general description, the breadth of the ICC makes it difficult to summarize. It is, therefore, important to read all of its provisions. The ICC addresses such varied topics as interest rates; finance and delinquency charges; prepayments; security interests; insurance; loan terms; attorney fees; and administrative enforcement. Examples of the ICC’s provisions include a limited prohibition on confessions of judgment, and a

prohibition on taking a security interest in real property when the loan principal is \$1,000 or less.⁶

The ICC also incorporates many provisions of federal consumer-credit laws, which are discussed below. Some of the incorporated provisions involve the remedies available for violations.⁷ But the ICC also has independent remedies available for its unique provisions. Specifically, certain violations of the ICC create civil liability, remediable by actual damages, statutory damages of between \$100 and \$1,000, and attorney fees.⁸

One interesting aspect of the ICC's incorporation of federal consumer-credit laws is the questions created by the incorporation. Is there an advantage for a plaintiff to plead a claim under state versus federal law? Which body of law offers a longer statute of limitations, or are they effectively the same? Does one body of law offer greater damages or additional defenses? Is the precedent in state and federal jurisdictions different on particular issues, and if so, does the difference militate against filing in a particular forum? Dealing with these types of questions adds yet another layer of difficulty to the already complex area of consumer credit regulation.

TWO—IDAHO RESIDENTIAL MORTGAGE PRACTICES ACT

The IRMPA is located at Idaho Code § 26-3101 *et seq.* Under the IRMPA, it is a felony to engage in mortgage lending or brokering activities without being licensed, subject to exceptions for certain persons and entities.⁹ The IRMPA goes on to regulate the types of fees that may be charged, and the practices of mortgage lenders, brokers, and loan originators.¹⁰ At the risk of leaving something out, the general types of practices that are prohibited are those involving the unjustified accrual of fees, dishonesty, fraud, or overreaching to the detriment of consumers. Consumers harmed by a violation of the IRMPA do not have any express statutory cause of action, but all licensed brokers, lenders, and loan originators must be bonded.¹¹ If a licensee violates the IRMPA or applicable federal law (e.g., the Real Estate Settlement Procedures Act, discussed below), the licensee's bond "shall be forfeited and paid by the surety to the state of Idaho for the benefit of any person so damaged."¹²

THREE—EQUAL CREDIT OPPORTUNITY ACT

The ECOA, in general terms, makes it unlawful for any creditor to discriminate against any credit applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, because a portion of the applicant's income derives from public assistance, or because the applicant has exercised rights under the Consumer Credit Protection Act.¹³ Regulation B (12 C.F.R. § 202) implements this general prohibition against credit discrimination.¹⁴ One important aspect of the ECOA is the requirement that creditors notify credit applicants of the creditors' decision on applications within thirty days of receiving the applications.¹⁵ If a creditor takes an adverse action (i.e., a denial or revocation of credit), the creditor must disclose the reasons for the adverse action.

In terms of remedies, 15 U.S.C. § 1691e addresses civil liability for violations of the ECOA. Violators may be liable for actual damages; plus statutory damages not to exceed \$10,000, or the lesser of \$500,000 or 1% per annum of the net worth of the

creditor in a class action; and attorney fees and costs. Aggrieved applicants may also seek equitable and declaratory relief.

FOUR—FAIR DEBT COLLECTION PRACTICES ACT

The FDCPA, 15 U.S.C. § 1692 *et seq.*, regulates the manner in which "debt collectors" go about collecting debts. These regulations include: restrictions on communications with any party to obtain information about a debtor's location; restrictions on communications with the debtor or third parties in general; a prohibition on harassing or abusive conduct; a prohibition on the use of false, deceptive, or misleading representations or means; and a prohibition on the use of unfair or unconscionable means. The FDCPA is applicable to lawyers, although it may not apply to all lawyers.¹⁶ Violations of the FDCPA are remediable by damages in the form of actual damages; "additional damages" (i.e., statutory damages) capped at \$1,000 for an individual claimant and the lesser of \$500,000 or 1% of the net worth of the debt collector in a class action; and attorney fees and costs.¹⁷

FIVE—TRUTH IN LENDING ACT

The TILA, 15 U.S.C. § 1601 *et seq.*, requires lenders to disclose specified information to borrowers. This information includes the "annual percentage rate" and "finance charge" for a particular credit transaction, and the TILA prescribes the methods for calculating these figures. The TILA also addresses disclosures that must be made in connection with credit cards and mortgages (including home equity lines of credit). There are various provisions dealing with open-end consumer-credit plans, open end consumer-credit plans secured by the consumer's principal dwelling, and transactions other than under an open end credit plan. The TILA also addresses credit billing and credit advertising. Although the TILA is quite comprehensive by itself, lengthy Regulation Z (12 C.F.R. § 226) adds additional details.

There are a number of different liability provisions under the TILA, but two deserve special attention. First, a knowing and willful violation of the TILA is a Class A misdemeanor, punishable by a \$5,000 fine and/or up to one year of imprisonment.¹⁸ Second, non-criminal violations are remediable with money damages that may include actual damages; attorney fees and costs; an amount equal to twice the finance charges and fees paid by the consumer; or some variation of these categories.¹⁹ In certain instances, the TILA provides minimum and maximum levels for statutory damages, and caps damages available in class actions.

SIX—TRUTH IN SAVINGS ACT

The TISA is located at 12 U.S.C. § 4301 *et seq.*, and is implemented through Regulation DD (12 C.F.R. § 230). TISA regulates the initial and ongoing disclosures that must be made to consumers in connection with various types of deposit accounts.²⁰ The disclosures focus primarily on fees and interest rate representations, and are aimed at enhancing economic stability and competition by establishing "uniformity in the disclosure of terms and conditions on which interest is paid and fees are assessed[.]"²¹

The TISA creates civil liability for depository institutions that fail to comply with the statutory or applicable regulatory requirements.²² With respect to money damages for violations, consumers may recover actual damages; attorney fees and costs; and

statutory damages of between \$100 and \$1,000 in individual actions, and the lesser of \$500,000 or 1% of the violator's net worth in class actions.

SEVEN—FAIR CREDIT REPORTING ACT

The FCRA and accompanying Regulations P and V (15 U.S.C. § 1681 *et seq.*, and 12 C.F.R. §§ 216, 222) regulate consumer credit information.

It is the policy of [the FCRA] to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner [that] is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.²³

More specifically, the FCRA addresses, among other things, the gathering of consumer credit information, what information may be gathered, who may request the information, permissible reasons for requesting a credit report, how credit reports may be used, procedures for disputing the accuracy of reported information, and dealing with identity theft. The FCRA also contains a requirement that a creditor notify a consumer if the creditor acts adversely to the consumer based on information in a credit report (e.g., denies an application for credit).²⁴

And penalties for certain FCRA violations have teeth. Knowingly and willfully obtaining a credit report under false pretenses is a Class E felony.²⁵ Willful noncompliance with the FCRA triggers civil liability, which, depending upon the nature of the violation, may be remediable by an award of actual damages (of at least \$100 but not more than \$1,000), attorney fees, and punitive damages.²⁶ Finally, negligent noncompliance is remediable by actual damages and attorney fees.²⁷

EIGHT—REAL ESTATE SETTLEMENT PROCEDURES ACT

The RESPA effectively applies to all, or nearly all, residential lending. The statutory provisions for the RESPA are located at 12 U.S.C. § 2601 *et seq.*, and it is implemented through Regulation X (12 C.F.R. §3500). As its name implies, the RESPA regulates the real estate settlement process. It does this by mandating uniformity in the procedures used and the information disclosed to consumers. The RESPA also targets loan servicing, escrow accounts, and the fees charged by professionals involved in real estate transactions. Regulation X includes examples of forms to be used in settling real estate transactions covered by the RESPA.²⁸

In contrast to several of the other consumer credit acts discussed above, remedies for RESPA violations differ depending upon the specific statute violated. For example, the damages available for a violation of the provisions for loan servicers and escrow account administrators are different from those available for a violation of the prohibition against kickbacks and unearned fees.²⁹ The penalties range from a fairly standard iteration of monetary damages for loan servicing violations (i.e., actual damages, statutory damages not to exceed \$1,000, and attorney fees), to criminal liability for offering or accepting a kickback for a referral or for accepting unearned fees.

NINE—CREDIT REPAIR ORGANIZATIONS ACT

The CROA, located at 15 U.S.C. § 1679 *et seq.*, regulates for-profit operations that assist consumers in improving their credit record. In general terms, credit repair organizations are prohibited from making false or misleading statements about a consumer's credit record, and from engaging in any fraudulent or deceptive practices. Additionally, credit repair agencies cannot accept any prepayment for services, must make particular disclosures to consumers, and may only provide services pursuant to written agreements that meet statutory criteria.³⁰

A consumer's waiver of rights under the CROA is unenforceable, as are any statutorily deficient service contracts.³¹ Violations of the CROA create civil liability, and available damages include the greater of actual damages or the amount paid to the credit repair organization; punitive damages; and attorney fees. In contrast to several other federal consumer-credit laws, there are no minimum or maximum levels for damages.³²

TEN—RESTRICTIONS ON GARNISHMENT

Although technically part of both the TILA and the Consumer Credit Protection Act, the group of statutes regulating garnishments deserves separate treatment. These statutes are located at 15 U.S.C. § 1671–1677. Garnishment statutes cap the amount of earnings subject to "garnishment," which is defined as any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.³³ There is also a prohibition against terminating an employee due to the employee's earnings "hav[ing] been subject to garnishment for any one indebtedness."³⁴

These federal statutes permit exemptions for states with substantially similar provisions.³⁵ But state laws that offer a higher level of protection to consumers are unaffected by the federal statutes.³⁶ Idaho has a garnishment cap that is substantially similar to the federal cap.³⁷

If you feel overwhelmed after having read through all this, imagine what the average consumer feels like trying to deal with a predatory lender or identity theft. Or imagine the frustration felt by small, local lenders when trying to synthesize all these regulations so their customers are treated fairly. These are exactly the types of situations where lawyers, armed with the right knowledge of consumer credit laws, can make a real difference. And that is a fact.

ENDNOTES

¹ Interestingly, there has been some attention devoted to debunking the myth that Detective Friday's line was "just the fact, ma'am." See <http://www.snopes.com/radiotv/tv/dragnet.htm>. Apparently, Detective Friday never said these exact words, which actually originated in a satire of *Dragnet*.

² The ECOA provides:

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction

(1) on the basis of race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract);

(2) because a portion of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised rights under the Consumer Credit Protection Act [15 USCS §§ 1601 *et seq.*].

15 U.S.C. § 1691(a). Under this general prohibition against credit discrimination, a creditor may take into account state laws that give the applicant's spouse an interest in collateral. See 12 C.F.R. § 202.6, Supp. I at ¶ 6(b)(8) (2006); 12 C.F.R. § 202.7(d)(4), Supp. I at ¶ 7(d)(4); 12 C.F.R. § 202.7(d)(4). But a creditor may not require a non-applicant spouse to sign a promissory note when the applicant is creditworthy by him or herself, and the creditor can have the non-applicant spouse sign other contracts (i.e., a security agreement) to protect its ability to reach the property being relied upon in the event of the death or default of the applicant. See *United States v. ITT Consumer Fin. Corp.*, 816 F.2d 487, 492 (9th Cir. 1987) ("If an applicant individually qualifies for the amount of a loan, a creditor is prohibited by [12 C.F.R. § 202.7(d)(1)] from requiring the signature of a spouse or other person as a condition of making the loan."); *Anderson v. United Finance Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982) (accepting an interpretation of the ECOA and Regulation B that the "spouse's signature cannot be required on the note, even if the property pledged to secure the loan is jointly owned. . . . A distinction must be made between a security agreement which pledges an interest in property, and a note which renders the signer personally liable on a loan.").

³ For an example of a relatively recent, local case involving an alleged consumer credit violation, see *In re Schweizer and Bennett*, Ch. 13 Case No. 05-03081, Mem. Decision (Bankr. D. Idaho Mar. 2, 2006) (dealing with a claim under the TILA).

⁴ There are many other laws that work in tandem with consumer credit laws, but which are beyond the scope of this article. For example, Idaho's Consumer Protection Act may address certain aspects of a consumer transaction not covered by the Idaho Credit Code. See, e.g., Idaho Code § 48-603(18). Similarly, on the federal level, there are multiple acts and regulations that further control lenders. See, e.g., 12 U.S.C. § 1951 *et seq.* (Bank Secrecy Act). Because of this pervasive, complex web of state and federal statutes and regulations, it is important for lawyers to have some knowledge of credit-related laws.

Further, the summaries in this article are just that. They omit vast amounts of detail, and in the field of regulatory compliance, details are everything. The summaries are meant to be a helpful starting point for further research.

⁵ Idaho Code § 28-41-204.

⁶ Idaho Code §§ 28-43-306, 309.

⁷ See Idaho Code §§ 43-401, 402 (creating criminal liability for certain willful and knowing violations that mirrors the criminal liability created by parallel federal law).

⁸ Idaho Code § 28-45-201.

⁹ Idaho Code § 26-3104.

¹⁰ Idaho Code §§ 26-3113, 3114.

¹¹ Idaho Code § 26-3110.

¹² *Id.* at § 26-3110(3).

¹³ 15 U.S.C. § 1691(a).

¹⁴ Determining the scope of consumer credit regulations requires some effort. For example, 15 U.S.C. § 1691b gives the Federal Reserve Board the authority to promulgate "regulations to carry out the purposes of [the ECOA.]" And 12 C.F.R. §§ 202.1(a) and 202.2(l) explain that Regulation B applies to all persons who, in the ordinary course of business, regularly participate in credit decisions, including setting the terms of the credit. This definition extends to assignees, transferees, or subrogees who also participate. Thus, the scope of Regulation B is quite broad.

In contrast, the Truth in Savings Act bifurcates regulatory responsibility. 12 U.S.C. § 4308 tasks the Federal Reserve with promulgating regulations to implement the TISA, and it has done so with Regulation DD. But 12 U.S.C. § 4311 effectively exempts credit unions from the scope of Regulation DD, and gives the National Credit Union Administration the authority to promulgate regulations to implement the TISA for credit unions. The NCUA has done this in its Regulation 707 (12 C.F.R. § 707).

These differences in the scope of consumer credit regulations illustrate the need for attention to detail in this area.

¹⁵ 15 U.S.C. § 1691(d).

¹⁶ *Compare Heintz v. Jenkins*, 514 U.S. 291 (1995) (holding lawyer was "debt collector" under the FDCPA because he regularly tried to obtain payment of consumer debts through legal proceedings), with *Camara v. Fleury*, 285 F. Supp. 2d 90 (D. Mass. 2003) (holding lawyer was not a debt collector under the FDCPA because only a small percentage of his practice involved debt collection).

¹⁷ 15 U.S.C. § 1692k.

¹⁸ See 15 U.S.C. § 1611 (prescribing criminal penalties for a TILA violation); 18 U.S.C. § 3559 (classifying federal crimes).

¹⁹ 15 U.S.C. § 1640.

²⁰ See 12 U.S.C. § 4313 (defining "account" for purposes of TISA).

²¹ 12 U.S.C. § 4301(a).

²² 12 U.S.C. § 4310; see also note 5, *supra*.

²³ 15 U.S.C. § 1681(b).

²⁴ 15 U.S.C. § 1681m.

²⁵ See 15 U.S.C. § 1681q (prescribing criminal penalties for a FCRA violation); 18 U.S.C. § 3559 (classifying federal crimes).

²⁶ 15 U.S.C. § 1681n.

²⁷ 15 U.S.C. § 1681o.

²⁸ See, e.g., 12 C.F.R. § 3500, App. C (illustrating a sample Good Faith Estimate form).

²⁹ *Compare* 12 U.S.C. § 2605(f) (providing damages for violations of the provisions for servicing mortgage loans and administration of escrow accounts), with 12 U.S.C. § 2607(d) (providing damages for violations of the provisions for kickbacks and unearned fees), and 12 U.S.C. § 2608 (providing damages for a seller that requires title insurance from a particular insurer).

³⁰ 15 U.S.C. §§ 1679b(b), 1679c, 1679d.

³¹ 15 U.S.C. § 1679f.

³² 15 U.S.C. § 1679g.

³³ 15 U.S.C. §§ 1672(c) (defining "garnishment"); 1673 (defining the maximum amount of earnings subject to garnishment).

³⁴ 15 U.S.C. § 1674.

³⁵ 15 U.S.C. § 1675.

³⁶ 15 U.S.C. § 1677.

³⁷ Idaho Code § 11-207.

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THE AUTOMATIC STAY IN BANKRUPTCY AND CONTEMPT PROCEEDINGS

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Surprisingly, a party to any form of litigation may occasionally fail to abide by an order of the court. As a result, contempt proceedings may arise in almost any litigation. When the offending party files bankruptcy or is in bankruptcy, the moving party should insure that its actions do not violate the automatic stay which comes into effect at the moment a bankruptcy petition is filed, pursuant to 11 U.S.C. § 362(a).

THE STAY IS A POWERFUL FORCE

Section 362(a)¹ stays the commencement or continuation of most acts against the debtor or property of the estate. It is self-executing, and effective upon the filing of the bankruptcy petition.² “The automatic stay sweeps broadly, enjoining the commencement or continuation of any judicial, administrative, or other proceedings against the debtor, enforcement of prior judgments, perfection of liens, and ‘any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case.’ 11 U.S.C. § 362(a)(6).”³

A willful violation of the stay protecting an individual debtor may result in an award of compensatory, punitive and emotional distress damages.⁴ A violation of the automatic stay is willful if a party knows of the bankruptcy filing and engages in any action prohibited in § 362(a), essentially any act against the debtor or property of the debtor or of the estate and does so intentionally.⁵ “Knowledge of the bankruptcy filing is the legal equivalent of knowledge of the automatic stay under § 362.”⁶ A specific subjective intent to violate the stay is not required.⁷ For all but a very unique set of circumstances,⁸ there is no good faith defense to a stay violation.⁹ “Not even a ‘good faith’ mistake of law or a ‘legitimate dispute’ as to legal rights relieve a willful violator of the consequences of his act.”¹⁰

With the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”),¹¹ Congress created a number of circumstances in which the existence of the stay is uncertain. For instance, for a debtor who files a bankruptcy, but has had one or more bankruptcy cases pending within the year preceding the new bankruptcy filing, the stay may be in effect, may come into effect for only thirty days, may not come into effect at all, or may be instituted or continued only on a timely and appropriate notice and a hearing.¹² The Ninth Circuit has held that a state court has jurisdiction to determine whether an action against the debtor comes within the scope of the stay.¹³ However, in the absence of an exception to the stay to make that determination, and in the face of the stay explicitly imposed on the “commencement or continuation of a judicial, administrative or other action or proceeding against the debtor,”¹⁴ pursuing that determination in front of the state court seems ill-advised.

Section 362(a) imposes an affirmative obligation to discontinue post-petition collection actions.¹⁵ Even actions taken before the petition is filed may lead to a violation of the stay, if the creditor fails to “maintain the status quo ante and to remediate acts taken in ignorance of the stay.”¹⁶ Creditor’s counsel can

also be found in violation of the stay for not properly responding to a debtor’s request to discontinue pre-petition actions which continue after a bankruptcy filing.¹⁷

“Exceptions to the automatic stay—even those relating to alimony, support, and maintenance—are construed narrowly to secure the broad grant of relief to the debtor.”¹⁸ “Section 362 expresses a policy preference in favor of the debtor and ‘Congress clearly intended the automatic stay to be quite broad.’”¹⁹ Courts have consistently stated that parties proceed at their peril if they take any action against a debtor without stay relief.²⁰

State courts may not modify the stay.²¹ A state court does have jurisdiction to determine whether an action against the debtor comes within the scope of the stay.²² However, the state court’s determination has no preclusive effect in the bankruptcy court.²³ If a bankruptcy court subsequently determines that the action was stayed, any action flowing from the state court’s determination to the contrary is void *ab initio*.²⁴

The language of Section 362(b) suggests that a creditor need not seek relief from the stay if an exception applies. For instance, in the absence of a specific injunction issued by the bankruptcy court, no bankruptcy court approval is needed before commencing criminal proceedings.²⁵ Pursuant to § 362(b)(2), a party may not need stay relief to modify a support order, for instance to reallocate tax exemption as part of child support.²⁶

But not all exceptions to the protection of the stay may be so clear.²⁷ For instance, if the status of claim as alimony, maintenance or support, as opposed to a claim for a debt owed as a property equalization, is unclear, proceeding without relief from the stay may well violate the stay.²⁸

The affirmative obligation to discontinue post-petition litigation for civil contempt was at issue in *In re Johnston*.²⁹ There, Parker, Johnston’s former spouse, filed a motion pre-petition asking that Johnston be held in contempt for nonpayment of spousal maintenance.³⁰ Parker sought to have Johnston incarcerated, and his law license and driver’s license revoked, until he purged himself of that contempt.³¹ Johnston filed a bankruptcy petition days before the hearing on Parker’s motion.³² Only after the hearing was underway, Johnston advised the state court that he had filed a personal bankruptcy.³³ Parker suggested continuing with the hearing, but only to determine the amount of the arrears on spousal maintenance and attorney’s fees. “Johnston apologized for ‘not knowing exactly what’s going on here’ and responded: ‘I object in the abstract to anything that would contravene the bankruptcy laws, but since I don’t know what those are, I can’t tell you what I’m objecting to.’”³⁴ The state court stated at that time that it would limit its decision to determining whether Johnston was in contempt, and take up the issue of sanctions at a later hearing.³⁵

Two months, later, the state court filed a minute entry which found Johnston in contempt, granted judgment in favor of Parker

for \$87,525.60, and, contrary to her statement at the hearing, ordered Johnston to pay the judgment by August 1, 2001.³⁶ The state court also ordered Johnston incarcerated, if he did not pay the judgment by a date certain, until payment was made.³⁷

By letter to the state court, Johnston asked the state court to vacate its minute entry order as a stay violation, stating that the bankruptcy code prevented Johnston from transferring assets to pay the arrearage.³⁸ Johnston asked Parker to take steps to vacate the minute entry order. Neither effort met with success.

Johnston filed an adversary proceeding in the bankruptcy court, alleging a violation of the stay and seeking appropriate damages from both Parker and her attorney, Sternberg. The bankruptcy court ultimately found the entry of the order violated the stay, because it ordered payment of the arrearage, without limiting the source of payment to non-estate assets, or even determining whether there were non-estate assets to use to pay the arrearage.³⁹ The bankruptcy court found, and the district court agreed, that the order effectively ordered the immediate liquidation of assets of the estate. However, the bankruptcy court concluded that Parker and Sternberg had not violated the stay, because they had no affirmative obligation to remedy the entry of the order. Johnston appealed. The district court reversed.

The bankruptcy court suggested that the entry of the order would not have violated the stay if the state court had limited its order to state only the amount of arrearage, or tailored its order to limit collection of the arrearage from non-estate property. The state court would then "have been acting within the § 362(b)(2)(B) exception to the automatic stay." However, this language is dicta. Because those were not the facts of the case, and were not argued by any party. Because the bankruptcy court has jurisdiction over the determination of claims against the estate,⁴⁰ the court's statement seems to be suspect.

The bankruptcy court found that Parker and Sternberg did not willfully violate the stay by virtue of the entry of the minute entry order.⁴¹ The district court affirmed on the basis that the findings of fact were not clearly erroneous, and supported the conclusion of law, that Parker had not acted intentionally with regard to the entry of the minute entry order.⁴² In affirming this finding of fact, the district court implied that had it been the trier of fact, it might have found the facts differently. The district court affirmed the finding of fact because, "As the Ninth Circuit has said, '[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must ... strike us as wrong with the force of a five-week-old unrefrigerated dead fish. [Citation omitted.]' That is not the case here."⁴³

The bankruptcy court found, and the district court affirmed, that the entry of the order was a surprise to both Johnston and Parker, and initiated solely by the state court.⁴⁴ However, the district court found that Parker and Sternberg had an affirmative obligation to stay or vacate the Minute Entry Order.⁴⁵ By not doing so, the district court held that they engaged in a willful violation of the stay, reversing the bankruptcy court.⁴⁶ It remanded for further proceedings, and for a determination of what if any damages were appropriate.

To avoid a possibility of liability for a stay violation, a creditor may seek a bankruptcy court order modifying, or granting relief from, the stay, pursuant to § 362(d), to allow the creditor to

commence or continue an action, including pending litigation, which is otherwise stayed by § 362(a).⁴⁷

FAMILY LAW EXCEPTIONS TO THE STAY

Section 362(b) provides for a number of exceptions to the automatic stay. Section 362(b)(2) provides exceptions as follows:

"The filing of a petition... does not operate as a stay:

* * * *

(2) under subsection (a)--

(A) of the commencement or continuation of a civil action or proceeding--

(I) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;....

Some of these exceptions would seem to be sufficiently safe that one could rely on them and proceed in state court without a bankruptcy court order. "[I]f the statutory command of the Bankruptcy Code is clear, we need look no further: It must be enforced according to its terms. Indeed, to do otherwise would insert phrases and concepts into the statute that simply are not there."⁴⁸

It seems unlikely that the bankruptcy court will care to address stay relief for a proceeding to establish paternity, or concerning child custody or modification, which is expected from the stay. However, there may well be an issue as to whether a proceeding for the establishment or modification of an order for domestic support may effectively be an attempt to collect a property settlement. The bankruptcy court has jurisdiction to determine whether an obligation is in the nature of support.⁴⁹ The court could find a stay violation if it were to determine, after the fact, that the result of a proceeding to establish or modify a domestic support obligation did not result in an obligation which

was actually in the nature of support, but simply allowed the enforcement of a claim arising out of a property settlement.⁵⁰

Given the possibility that a debtor in bankruptcy will seek sanctions for a violation of the stay relief, even with an otherwise apparent exception, stay relief may be the safer course. For instance, the Ninth Circuit has addressed the applicability of the § 362(b)(2)(A)(ii) where a former spouse sought to pursue an appeal from her dissolution judgment against the debtor, her former husband.⁵¹ She also sought stay relief to seek a modification of support to pay for uninsured extraordinary medical expenses stemming from the debtor's physical assault on her during the marriage. The bankruptcy court denied relief, and on appeal, the district court affirmed. On further appeal to the Ninth Circuit, the Court reversed and remanded, holding that the exception to the stay of §362(b)(2)(A)(ii), for modification of support, applied.

What is significant is that the bankruptcy court denied stay relief, and the district court affirmed. Had the former spouse initially relied on § 362(b)(2)(A)(ii), the bankruptcy court may well have found a willful stay violation and awarded sanctions. While the former spouse's course of action led her to an appearance before the Ninth Circuit, the alternative course may have led her to the same appearance attempting to overturn an adverse ruling and an award of actual damages, costs and attorney fees, and potentially punitive damages, on a stay violation. Even so, the Ninth Circuit stated that, to the extent that the modification of a support order entailed "claims that are not related to alimony, maintenance, or spousal support," stay relief should not be allowed. It directed the bankruptcy court to determine which aspects of the modification requested actually fit within the statutory exception to the stay.⁵²

As to the exceptions to the stay in § 362(b), and as to the possibility of contempt arising out of any proceeding that otherwise is not stayed, remember that "exceptions to the automatic stay—even those relating to alimony, support, and maintenance—are construed narrowly to secure the broad grant of relief to the debtor."

THE STAY AND CONTEMPT

Section 362(a) does not operate to stay "the commencement or continuation of a criminal action or proceeding against the debtor." § 362(b)(1). "Criminal contempt is a crime in the ordinary sense,"⁵³ and therefore falls within the exception to the stay provided in § 362(b)(1). Civil contempt does not fall within that exception.⁵⁴

Whether contempt is criminal or civil does not depend upon the nature of the lawsuit in which the contempt proceedings are brought. A civil contempt sanction can be imposed in a criminal case (e.g., imprisoning a recalcitrant witness until he testifies), and a criminal contempt sanction can be imposed in a civil case (e.g., imprisoning an individual who owes child support for thirty days for failing to pay the support previously ordered).⁵⁵

Whether contempt is criminal or civil depends upon the character of the sanction imposed. An unconditional penalty imposed for contempt "is criminal in nature because it is 'solely and exclusively punitive in nature.'"⁵⁶

"A penalty is unconditional if the contemnor cannot avoid any sanction by complying with the court order violated," even if the penalty "is suspended and the contemnor is placed on probation."⁵⁷ "If the contempt involves doing what the court ordered the contemnor not to do, the penalty can only be criminal."⁵⁸ The contemnor can not undo what he has done.⁵⁹ Incarceration for a determinate period, or imposition of a determinate fine payable to the court, but not to the complainant, is unconditional and criminal in nature.

If the contemnor can avoid a sanction by complying with the court's previous order, the penalty is conditional and the contempt is civil.⁶⁰ Even if the penalty is incarceration, if the incarceration ends when the contemnor complies with the court's previous order, the penalty is conditioned and the contempt is civil.⁶¹ A daily fine imposed until the contemnor complies with the court's previous order is civil in nature.⁶²

"[A] court could impose a civil contempt sanction only if the contemnor had the present ability to comply with the order violated."⁶³ That would seem to require the consideration of the contemnor's status in a bankruptcy proceeding. In a Chapter 7 bankruptcy proceeding, the debtor has no right to use non-exempt assets of the estate, and no right to use exempt assets unless and until the bankruptcy court says so. That is so because an exemption may be challenged, or an asset may have value above the exemption and any liens or security interests which encumber the asset. In other Chapters of the Bankruptcy Code, the debtor is prohibited from using assets of the estate, outside the ordinary course of business, without bankruptcy court authorization.⁶⁴ A sanction requiring the contemnor to comply with a previous order of the court requiring payment of debt allocated to the contemnor in a property settlement, where there are not sufficient assets outside of the estate to pay the debt allocated, or transferring property of the estate, violates the stay, and is therefore void *ab initio*.

A court could impose both a civil contempt sanction and a criminal contempt sanction in any action for contempt.⁶⁵ If so, the sanction is a criminal contempt penalty. However, whether or not any criminal penalty can be imposed "will depend on the rights granted to the alleged contemnor prior to the imposition of the sanction."⁶⁶

To impose a criminal penalty, the court must comply with constitutional protections including, *inter alia*, the right to notice that criminal sanctions are sought; to a public trial; and to a jury trial if the maximum penalty authorized by law, or actually imposed in consecutive sentences, exceeds six months incarceration.⁶⁷ The contemnor has a right to compulsory process; to the presumption of innocence and to the privilege against self-incrimination.⁶⁸ The burden of proof is beyond a reasonable doubt.⁶⁹

In the absence of these constitutional protections, arguably no criminal contempt sanction can properly be imposed. If the failure to provide appropriate constitutional protections means that no criminal contempt sanction could be imposed, the stay provided by § 362(b)(1) would not apply. In that situation, any contempt proceedings would likely be in violation of the stay.

CONCLUSION

The Bankruptcy Code provides broad protection of the debtor and the assets of the estate from the moment a bankruptcy petition is filed, in the form of the automatic stay of § 362(a). While the stay may not protect a debtor from criminal contempt, the party seeking contempt may put itself at risk by seeking criminal contempt sanctions only to have a court issue a sanction which a bankruptcy court determines is not excepted from the stay.

ENDNOTES

¹ All references are to Title 11, U.S.C. as amended, except as noted.

² *In re Gruntz*, 202 F.3d 1074, 1081-82 (9th Cir. 2000).

³ With the enactment of BAPCPA, Congress enacted additional exceptions to the stay that arise when a debtor has filed one or more bankruptcy petitions within one year before the date of filing of the current petition. § 362(c)(3), (4). *E.g. In re Murray*, 350 B.R. 408 (Bankr. S.D. Ohio 2006). The application of those provisions is beyond the scope of this article.

⁴ § 362(k)(1); *In re Dawson*, 390 F.3d 1139, 1146-1151 (9th Cir.2004), *cert. denied*, --- U.S. ---, 126 S.Ct. 397, 163 L.Ed.2d 275 (2005) (allowing emotional distress damages under § 362).

⁵ *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th Cir.1989).

⁶ *Havelock v. Taxel (In re Pace)*, 159 B.R. 890, 901 (9th Cir. BAP 1993), *vacated in part on other grounds, In re Pace*, 56 F.3d 1170 (9th Cir.1995).

⁷ *Pinkstaff v. United States (In re Pinkstaff)*, 974 F.2d 113, 115 (9th Cir.1992) (citation omitted).

⁸ See §362(k)(2), §362(h).

⁹ *Bloom*, 875 F.2d at 227; *Pace*, 159 B.R. at 901.

¹⁰ *Ramirez v. Fuselier (In re Ramirez)*, 183 B.R. 583, 589 (9th Cir. BAP 1995).

¹¹ Pub.L. No. 109-8, § 102(i), 119 Stat. 23, 34 (2005),

¹² § 362(c)(3) and (4).

¹³ *Lockyer v. Mirant Corporation*, 398 F. 3d 1098, 1106 (9th Cir. 2005).

¹⁴ § 362(a)(1).

¹⁵ *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1214 (9th Cir. 2002).

¹⁶ *In re Johnson*, 262 BR 831, 847 (Bankr. D. Idaho 2001) (Pappas, J.) (creditor's delay in directing sheriff to return property, lawfully seized pre-petition, for 28 days after notice of stay, was willful continuing violation of the stay) *quoting Franchise Tax Board v. Roberts (In re Roberts)*, 175 B.R. 339, 343 (9th Cir. BAP 1994); *In re Daniels*, 316 B.R. 342 (Bankr. D. Idaho 2004) (Pappas, J.); *In re Jacobson*, 03.2 IBCR 119 (Bankr. D. Idaho 2003) (Pappas, J.) (creditor's nine day delay in notifying the sheriff to release property seized pre-petition violated the stay).

¹⁷ See *Tsafaroff v. Taylor (In re Taylor)*, 884 F.2d 478, 483 n. 6 (9th Cir.1989) (allowing on remand for debtor to present evidence that creditor's attorney willfully violated the stay, thereby subjecting counsel to damages under § 362(h)).

¹⁸ *Stringer v. Huet*, 847 F.2d 549, 552 (9th Cir. 1988).

¹⁹ *Johnston v. Parker (In re Johnston)*, 321 B.R. 262, 285 (D. Az. 2005) *quoting Stringer*.

²⁰ *In re Ozenne*, 337 B. R. 214, 222 (9th Cir. BAP 2006).

²¹ *Gruntz*, 202 F.3d at 1087.

²² *Lockyer v. Mirant Corporation*, 398 F. 3d 1098, 1106 (9th Cir. 2005).

²³ *Id.*

²⁴ *Id.*

²⁵ *Gruntz*, 202 F.3d at 1087.

²⁶ *In re Davids*, 2002 WL 33939625 (Bankr. D. Idaho 2002) (Pappas, J.)

²⁷ *In re Winter*, 2002 WL 33939744 (Bankr. Idaho 2002) (Myers, J)

²⁸ *Id.*

²⁹ *Johnston v. Parker (In re Johnston)*, 321 B.R. 262, 285 (D. Az. 2005)

³⁰ 321 B. R. at 268.

³¹ *Id.*

³² *Id.* at 269.

³³ *Id.* at 269-270.

³⁴ *Id.* at 270.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 271.

³⁹ *Id.* at 279.

⁴⁰ 28 U. S. C. §157(b)(2)(B),

⁴¹ *Id.* at 281.

⁴² *Id. Hayes v. Woodford*, 301 F.3d 1054, 1067 n. 8 (9th Cir.2002).

⁴³ *Id.* at 282.

⁴⁴ *Id.*

⁴⁵ *Id.* at 282.

⁴⁶ *Id.* at 286.

⁴⁷ *In re Tactical Ordinance & Equipment Corp.*, 2005 WL 4705285, (Bankr. D. Idaho 2005) (Myers, C.J.) *citing In re Plumberex Specialty Products, Inc.*, 311 B.R. 551 (Bankr. C.D. Cal. 2004). *See also In re Leonard*, 231 B.R. 884 (E.D. Pa. 1999) (factors for determination of stay relief in a family law matter; denying stay relief to allow a civil contempt proceeding for failure to pay a property division).

⁴⁸ *Gruntz, supra* at 1086, *citing .United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

⁴⁹ *See e.g. In re Purviance*, 2005 WL 2178802 (Bankr. D. Idaho 2005) (Myers, C.J.) (determining whether an alleged order for support was actually in the nature of support in a dischargeability determination).

⁵⁰ As a result of BAPCPA, neither claims for domestic support obligations as defined in § 101(14A), § 523(a)(5), nor claims other than domestic support obligations owed to a spouse, former spouse to a spouse, former spouse, or child of the debtor which are "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;....” § 523(a)(15), are discharged in a Chapter 7 proceeding. However, the exception to the automatic stay provided in § 362(b)(2) does not apply to the latter.

⁵¹ *Allen v. Allen (in re Allen)*, 275 F.3d 1160 (9th Cir. 2002).

⁵² *Id.* at 1164.

⁵³ *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 861, 55 P.3d 304, 315 (2002), quoting *Bloom v. Illinois*, 391 U.S. 194, 201, 88 S.Ct. 1477, 1481, 20 L.Ed.2d 522 (1968),

⁵⁴ *In re Haas*, 2004 WL 3132027 (Bankr. E.D. Va.)

⁵⁵ *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 862, 55 P.3d 304, 316 (2002).

⁵⁶ *Id.* at 863, 55 P.3d at 317.

⁵⁷ *Id.*

⁵⁸ *Id.* at 864-5, 55 P.3d at 318-9.

⁵⁹ *Id.*

⁶⁰ *Id.* at 864, 55 P. 3d at 318.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 865, 55 P. 3d at 319.

⁶⁴ § 363(b)(1).

⁶⁵ *Id.* at 865, 55 P. 3d at 319, n. 10 and accompanying text.

⁶⁶ *Id.* at 864, 55 P. 3d at 318.

⁶⁷ 137 Idaho at 860-861, 55 P. 3d at 314-315.

⁶⁸ *Id.*

⁶⁹ *Id.*

ABOUT THE AUTHOR

Randy French is a partner in the firm of Bauer and French. He graduated from Boise State University in 1980 and the University of Idaho College of Law in December 1982, 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, in the U. S. Bankruptcy Court and the U. S. District Court for the District of Idaho, the Bankruptcy Appellate Panel, and the Ninth Circuit Court of Appeals. He has represented both debtors and creditors in consumer and business reorganizations and liquidations, and in adversary proceedings including issues involving dischargeability issues and contempt proceedings. He is also admitted to the United States Supreme Court.

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Trial Skills Training Program sponsored by the Litigation Section of the Idaho State Bar will be held on March 9-10 at the Boise Federal Court. This program is designed to give new attorneys an intensive two-day excursion into a trial from trial preparation to closing arguments. Check the ISB website for registration forms and details.



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THE INTERSECTION OF FAMILY LAW AND BANKRUPTCY

AARON J. TOLSON

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A bankruptcy filing creates many pitfalls for a family law practitioner. My first experience with this occurred several years ago when I represented a client who owed a substantial amount of child support. I advised the client that, based on my few months of experience, the judge would probably give the parties some time to try and resolve the child support obligation on a first contempt motion. I also advised the client that since he had filed for bankruptcy, the bankruptcy stay should prevent collection activities against his property until lifted. To my surprise, the judge ignored this argument, heard the evidence, and submitted an order for my client to be incarcerated for 30 days—effective immediately.

Luckily, after being incarcerated for a few hours my client was able to rapidly get the child support money that had previously been so hard to find. I still think the property issues involved should have triggered the stay and prevented the incarceration, but since my client did not want to appeal, it is not worth further mention. Hopefully newer attorneys can profit from my experience in advising clients who are delinquent in satisfying their child support obligations.

The new Bankruptcy Code that took effect in October 2005 contains language under 11 U.S.C. § 362 that further strengthens the right for collection of child support, and other related family obligations, regardless of a bankruptcy filing. Even so, you still need competent advice before proceeding, as Congress still exempts collection from a debtor's property that is subject to distribution by the bankruptcy trustee. (A call to the trustee assigned to the case would help you to make this determination.) The Code is clear that withholding of income for payment of a domestic support obligation is permitted and does not violate the stay, so you should feel safe in establishing the typical child support wage garnishment despite a filing.

At this point, you may be wondering what constitutes a domestic support obligation. 11 U.S.C. § 101 (14A) defines it precisely. The revised Code has substantially changed the scope of what the bankruptcy law deals with when it comes to what will be considered related to domestic relations. It now includes not only debts owed to a spouse, former spouse, or child, or such child's parent, legal guardian, or responsible relative, but also a Governmental unit. It also includes any debt that is in the nature of alimony, maintenance, or support, including any debt that is voluntarily assigned by the spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, for the purpose of collecting the debt.

In addition, the exceptions to the stay are expanded in 11 U.S.C. §362(b). Not only does the stay not preclude the establishment of paternity or for the establishment of a modification of an order for domestic support obligations, it also does not operate against child custody or visitation actions, domestic violence actions, and divorce actions generally, except to the extent that such a proceeding seeks to determine the division of proper-

ty that is property of the estate in bankruptcy. It does not protect the withholding of income, the suspension of a driver's license, a professional or occupational license, or a recreational license such as a hunter's license, the reporting of overdue support to consumer agency, the interception of a tax refund, or the enforcement of a medical obligation as under Medicaid.

OTHER IMPORTANT ISSUES

1. Domestic support obligations are now first in priority to be paid under 11 U.S.C. §507(a)(1), and a debtor likely cannot discharge a state obligation in bankruptcy court.
2. The trustee cannot avoid transfers to *bona fide* debt payments for domestic support obligations.
3. Under 11 U.S.C. §1328, a debtor can now discharge 11 U.S.C. §523 (a) (15) marital debts only under a Chapter 13 plan, upon successful completion of the final repayment.

REAL WORLD EXAMPLES

The following real world examples may be helpful in applying the new rules.

EXAMPLE A: A man comes to your office for help with regard to his family law matter. He and his girlfriend conceived a child out-of-wedlock, and the relationship did not work out. He is now faced with a \$10,000 bill from the State of Idaho for reimbursement of medical and birth costs (an obligation imposed by 11 U.S.C. § 523 (a)(15).) In the past, this debtor could have attempted to have this debt discharged as a non-priority debt. While this provision has not yet been thoroughly interpreted in the courts, it appears the new code prevents discharging this debt with an adversary proceeding. Under the new law, the Chapter 13 bankruptcy is the only option the debtor has to attempt to discharge this debt, and the debtor will have to pay whatever the debtor can afford in the plan towards satisfaction of this obligation.

EXAMPLE B: A client who is a medical doctor owes a large amount of child support, and he is going through some financial problems at his office. He comes to you for help with regard to a contempt motion brought by the state in an effort to collect the child support. There is no protection for the doctor from the automatic stay with regard to any action the state may take against his medical license. However, the client can sell his 4-wheelers and snowmobiles at market value to pay the child support and if the client falls into bankruptcy later the trustee will likely be unable to challenge that use of the debtor's resources.

EXAMPLE C: A client comes to you and says, "I obtained a decree in my divorce which divided our debts and gave me a child support judgment. My former spouse has filed a Chapter 7 bankruptcy. Can I get any of the amounts

owed?" Your client should immediately file a Proof of Claim with the court for any amount ordered under the decree at first opportunity, because 11 U.S.C. §523 (a) (5) obligations—"in the nature of alimony, maintenance, or support" will now be given a first priority in line for any amounts recovered by the trustee. An important point for family law practitioners is to make sure the judgment from state court specifically identifies the debt so that the bankruptcy court can determine the amount of the debt that is entitled to the first-place priority. In addition, your client may proceed against the former spouse for the non 11 U.S.C. §523 (A)(5) obligations, despite the Chapter 7 filing, with regard to obtaining any relief allowed without any potential violation of the stay, as long as you are not attempting to attach assets or money that are part of the bankruptcy estate.^{(1) (2)}

ENDNOTES

¹ Information obtained from the 2006 U.S. Court's District Conference, held in Pocatello, Idaho, October 12, 2006.

² Mini-Code, Special Redlined Edition, AWHFY, L.P., 3950 Doniphan, Suite E, El Paso, Texas 79922.

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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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RECHARACTERIZING DEBT TO EQUITY—NOT JUST FOR BANKRUPTCY

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An action for recharacterization of debt to equity requests that the court reclassify items structured as debt and treat them as an equity investment. In 2006, two additional Circuit Courts of Appeal weighed in on the issue of whether a cause of action for recharacterization of debt to equity exists in a bankruptcy context. Both circuit courts held that the general equity provisions of the Bankruptcy Code provide authority for the court to apply such a remedy.¹ Since the remedy is not one expressly afforded by statute, other than under the broad equitable powers of section 105 of the Bankruptcy Code, there may be a good argument that an action for recharacterization of debt to equity may be available outside the boundaries of bankruptcy.

NATURE OF THE CLAIM

A claim for recharacterization of debt to equity requests that the court place substance over form and “reclassify” cash or property advances structured as debt to treat them as an equity investment. In general, the court is asked to determine whether the parties called an instrument one thing, but intended to treat it as something else.² The parties’ intent can be inferred not only from the underlying documents themselves, but also from the parties’ actions and the economic reality surrounding the transactions involved.³

A typical situation giving rise to a recharacterization claim involves a company insider, like an owner, who contributes little or no capital investment and instead “lends” most or all of the money to the company. The owner then takes a security interest in the company’s collateral in an attempt to protect that collateral from the company’s creditors.

In such cases, a claim for recharacterization of debt to equity provides opportunities that do not exist under express equitable remedies like the remedy of equitable subordination under Section 510 of the Bankruptcy Code.⁴ Equitable subordination differs from recharacterization because it requires wrongful conduct on behalf of the entity being subordinated and only allows subordination to the extent of the harm caused by that wrongful conduct. Recharacterization, on the other hand, requires no element of wrongful conduct and simply “reclassifies” the entire debt as that of an equity investment. Creditors of the company who were not party to the recharacterization lawsuit may well receive the benefit of a reclassification of debt as equity.

FACTORS CONSIDERED

The recharacterization claim hinges on a finding that no “debt” really exists, regardless of structuring. Some courts have referred to this inquiry as not “recharacterizing” an advance, but rather *characterizing* its true character.⁵ In conducting the analysis, courts have developed a list of factors to be considered. These factors are adopted from non-bankruptcy case law involving similar determinations in the tax realm, and often include the following: (1) the names given to the instruments, if any, evidencing the indebtedness; (2) the presence or absence of a fixed maturity date and schedule of payments; (3) the presence or

absence of a fixed rate of interest and interest payments; (4) the source of repayments; (5) the adequacy or inadequacy of capitalization; (6) the identity of interest between the creditor and the stockholder; (7) the security, if any, for advances; (8) the corporation’s ability to obtain financing from outside institutions; (9) the extent to which the advances were subordinated to the claims of outside creditors; (10) the extent to which the advances were used to acquire capital assets; (11) the presence or absence of a sinking fund to provide repayments; (12) the failure of the debtor to repay on the due date or seek a postponement; (13) the right to enforce payment of principal and interest; (14) participation in management flowing as a result; (15) the status of the contribution in relation to regular corporate creditors; and, (16) the intent of the parties.⁶

None of these factors are by themselves dispositive, and their relative impact will vary based upon the facts of each case. In general, however, the factors focus on whether the transaction reflects the characteristics of an arm’s length loan transaction. The more the structured “loans” resemble the characteristics of a capital investment, the more likely it is that a recharacterization claim will prevail.

Any appellate review of a court’s finding that debt should be reclassified as equity is likely to be very limited. For example, in reviewing a lower court’s determination of whether or not a claim to reclassify debt as equity existed, the Third Circuit treated the determination as a question of fact, subject to review only for clear error.⁷

STATUS IN THE NINTH CIRCUIT

The use of the bankruptcy court’s equitable powers to determine whether or not a debt is an actual debt is not necessarily a new idea.⁸ However, as the rules governing bankruptcy became more and more statute driven, questions arose concerning the extent of the bankruptcy court’s equitable powers.

The Ninth Circuit Court of Appeals has yet to decide whether a claim for recharacterization of debt to equity is available under the general equity provisions of the Bankruptcy Code. In 1986, however, the Ninth Circuit Bankruptcy Appellate Panel reviewed the issue and held that, since a statutory remedy for equitable subordination exists that accomplishes nearly the same result, it would not recognize an equitable claim for recharacterization.⁹

Nevertheless, in the recent decade, the recharacterization claim has been gaining momentum. In June of 2006, the Fourth Circuit Court of Appeals issued an opinion recognizing the claim of recharacterization of debt to equity.¹⁰ Citing opinions from the Third, Sixth and Tenth Circuits, the Fourth Circuit noted: “[W]e join every other circuit that has considered the question.”¹¹

Thus, while there is authority from the Bankruptcy Appellate Panel against recognizing a cause of action for recharacterization, mounting authority from other circuit courts may support a good faith basis for pleading a recharacterization claim in the Ninth Circuit.

IMPACT ON BANKRUPTCY AND NON-BANKRUPTCY CASES

Does the recharacterization cause of action impact an attorney who does not generally practice in bankruptcy and has no desire to set foot in a bankruptcy court?

Yes. Recharacterization claims should be considered by any attorney who organizes business entities and represents closely held companies. Furthermore, since the basis of the claim arises out of the bankruptcy court's general equitable powers, any attorney representing a creditor may be able to assert a valid claim for recharacterization of debt to equity, even in a non-bankruptcy court setting.

Some attorneys counsel their clients never to contribute capital to a business they own but, instead, only to loan money to their companies. While this advice may address some of a client's concerns in certain circumstances, attorneys should always advise their clients to exercise caution in structuring their advances as capital contributions or loans. In particular, if a client wants the protection of a debt instrument for money advances, he or she will need to observe various requirements.

For example, in such cases, the company should be properly capitalized at its inception. Also, advances used to make large capital purchases are more likely to be considered equity investments than loans.

Promissory notes to insiders should be notarized, to remove the question of their original drafting. A fixed interest rate or established variable rate should also be included, and the debt instrument should have a fixed maturity date, because the absence of a maturity date weighs heavily against an instrument's classification as debt. Further, the conduct of the company in paying the obligation to an owner should be the same as its conduct in paying other creditors.

If the owner of a company seeks to transfer his or her own funds to the company because no other lender will do so, the efforts to obtain financing from arm's length lenders should be documented carefully and saved in a file. Courts have stated that the mere existence of a debt to an insider is not sufficient to support a claim of recharacterization. However, evidence may be necessary to show that the company exercised due diligence and sought to obtain a bona fide loan from third parties.

As indicated above, there appears to be a good faith basis for pleading a recharacterization claim in a Ninth Circuit bankruptcy court. In addition, however, there appears to be a good faith basis for bringing a similar claim in state court.

The cause of action for "recharacterization of debt to equity" arises from the general equitable powers of the bankruptcy court. State district courts also have equitable powers in order to promote fairness and justice. These same interests of fairness and justice to creditors should apply whether the company receiving the advance at issue is in bankruptcy or still solvent when litigation commences. Therefore, state courts may be willing to use their equitable powers to recognize a recharacterization claim.

CONCLUSION

Whether in bankruptcy or state court, as a practitioner facing a debtor company leveraged by its owners, you should consider the potential availability of an equitable remedy to recharacterize the owners' debt to equity. On the one hand, you may wish to use

recharacterization as a shield, understanding and applying its elements to structure a client's loans and business formations to withstand scrutiny. On the other hand, you may wish to use it as a sword, wielding the claim to pierce liens placed on the property of a debtor company. In either event, the growing acceptance of this cause of action means that it should be understood and considered by attorneys practicing both within and outside the realm of bankruptcy.

ENDNOTES

¹ *In re Official Committee of Unsecured Creditors for Dornier Aviation*, 453 F.3d 225 (4th Cir. 2006); *In re Submicron Systems Corp.*, 432 F.3d 438 (3rd Cir. 2006).

² *In re Submicron Systems Corp.*, 432 F.3d at 455-56.

³ *Id.*

⁴ 11 U.S.C. § 510.

⁵ *In re Georgetown Bldg. Assocs. Ltd. P'ship*, 240 B.R. 124, 137 (Bankr. D.D.C. 1999) ("The debt-versus-equity inquiry is not an exercise in recharacterizing a claim, but of characterizing the advance's true character.") (emphasis in original).

⁶ The 16 listed factors are a compilation of factors listed by the Third Circuit Court of Appeals in *Submicron*, 432 F.3d at 456. They include an 11-factor test taken from the Sixth Circuit decision in *Roth Steel Co. v. Comm'r*, 800 F.2d 625 (6th Cir. 1986), in the context of assessing tax liability, and adopted in the recharacterization context by *In re Autostyle Plastics*, 269 F.3d 726 (6th Cir. 2001). They also include a 13-factor test adopted by the Fifth and Eleventh Circuits in the tax context. See *Stinnett's Pontiac Serv., Inc. v. Comm'r*, 730 F.2d 634, 638 (11th Cir.1984) (citing *Estate of Mixon v. United States*, 464 F.2d 394, 402 (5th Cir.1972))

⁷ *In re Submicron Systems Corp.*, 432 F.3d at 457.

⁸ See *Pepper v. Litton*, 308 U.S. 295 (1939) (proper to disallow or subordinate salary claims of dominant and controlling stockholder of bankrupt corporation seeking to impair rights of another creditor).

⁹ *In re Pacific Express*, 69 B.R. 112 (9th Cir. BAP 1986).

¹⁰ *In re Official Committee of Unsecured Creditors for Dornier Aviation*, 453 F.3d 225, 233 (4th Cir. 2006).

¹¹ *Id.*

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“RIDE THROUGH,” BAPCPA AND THE IDAHO CREDIT ACT

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The passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) has resulted in significant upheaval for bankruptcy practitioners nationwide. One of the many aspects of the Bankruptcy Code that BAPCPA attempted to change was a bankruptcy debtor’s ability to retain collateral, typically a motor vehicle, provided that he¹ remained current with his monthly payments. This option has been referred to as “ride through,” “pay and drive,” “the fourth option,” and “pay and retain,” and is referred to in this article as “ride through.”²

As highlighted by the recent Idaho bankruptcy decision of *In re Steinhaus*, BAPCPA has not eliminated “ride through,” but instead leaves the future of “ride through” to the determination of the States. In Idaho, “ride through” will most likely continue to exist under the Idaho Credit Code³ due either to creditor acquiescence, Idaho state courts’ narrow interpretation of significant impairment, or both.

“RIDE THROUGH” UNDER THE IDAHO CREDIT CODE

The *Steinhaus* decision and the bankruptcy decisions around the country joining the *Steinhaus* line of reasoning have dealt with debtors’ attempts to use pre-BAPCPA “ride through” language on their statements of intention, instead of selecting one of the options available under BAPCPA. These attempts to exercise a fourth option unspecified in BAPCPA have generally proved futile as bankruptcy courts including *Steinhaus* have determined that the automatic bankruptcy stay as to the collateral was automatically lifted due to debtors’ noncompliance with the duties imposed by BAPCPA. However, these courts refused to order the debtors to turnover the collateral, instead leaving the creditors to pursue the collateral under state law in a state forum.⁴

In Idaho, a creditor’s right to repossess the collateral is subject to Idaho’s enactment of Article 9 of the Uniform Commercial Code (“Article 9”).⁵ Generally, Article 9 allows the parties to define acts or conditions of default in the parties’ agreement;⁶ however, Idaho Code § 28-9-201 expressly provides that secured transactions are “subject to any applicable rule of law which establishes a different rule for consumers.”⁷ More importantly, in the event of a conflict between Article 9 and the consumer protection statutes, the consumer protection statute controls.⁸

Idaho’s enactment of the Uniform Consumer Credit Code, enacted as the Idaho Credit Code,⁹ defines default more narrowly than Article 9. Recognizing that default is unilaterally defined by the creditor and in order to prevent abuse of this unilateral draftsmanship, Idaho Code § 28-45-107 expressly provides that the parties’ agreement with respect to the debtor’s default is only enforceable to the extent that “(1) The debtor fails to make a payment as required by the agreement; or (2) The prospect of payment, performance, or realization of collateral is significantly impaired” with the creditor bearing the burden of showing significant impairment.¹⁰

The *Steinhaus* Court, while highlighting this interaction between Article 9 and the Idaho Credit Code, refused to provide any advisory opinion defining significant impairment, particularly given that no Idaho appellate court has issued a decision addressing this issue. Not all bankruptcy courts have been as circumspect in addressing significant impairment. A Missouri bankruptcy court, *In re Riggs*, has suggested that it is unlikely that a creditor will be able to show significant impairment given the improved cash flow of a chapter 7 debtor due to the discharged debt.¹¹ On the other end of the spectrum, a pre-BAPCPA bankruptcy court decision, *In re Ward*,¹² argued that under Florida state law “a debtor’s failure to reaffirm would result in a material change to the contractual undertaking of the debtor when the loan was made” and a secured creditor may then be able to deem itself insecure and resort to its default repossession rights under Article 9. While *Ward* is correct as far as its limited consideration of default under Article 9 is concerned, the *Ward* court did not discuss any related consumer protection statutes. Notably, *Ward*’s silence is not due to judicial oversight, but rather a result of Florida’s Motor Vehicle Retail Sales Finance Act,¹³ which does not include a comparable provision to the Idaho Credit Code. *Riggs*, however, did deal with a comparable consumer protection statute.¹⁴

While the *Steinhaus* Court refused to predict how Idaho state courts would define significant impairment, the Court did direct us to a Kansas bankruptcy court decision, *In re Rowe*.¹⁵ The *Rowe* court, in turn, explained that where the Kansas Supreme Court had narrowly defined “significant impairment,” BAPCPA has no practical effect on “ride through.”¹⁶

The Kansas Supreme Court reached this narrow construction based, in part, on Kansas Comment 2, which is essentially the same as Comment 2 to Section 5.109 of the Uniform Consumer Credit Code. Comment 2 expressly states that significant impairment relates to “behavior of the consumer which endangers the prospect of a continuing relationship. It may be insolvency, illegal activity, or an impending removal of assets from the jurisdiction. There must, however, be circumstances present which significantly impair the relationship.”¹⁷

Focusing on this significant impairment to the debtor-creditor relationship language, Kansas has essentially adopted a totality of the circumstances approach which includes whether (1) the debtor is unwilling to communicate with the creditor, (2) the debtor has issued checks that were returned due to insufficient funds, (3) the debtor has indicated an intent to move out of state, (4) the debtor has failed to provide verification of a new address, (5) debtor’s (or cosigner’s) employment status is unknown or uncertain, (6) the debtor has changed payment arrangements, i.e. canceling automatic payments, (7) the debtor has expressed an intent to file bankruptcy, (8) the loan was at creditor’s lending policy upper limit and (9) the collateral is uninsured. “The factors in each case will vary,” and this is not a comprehensive list.¹⁸

As shown by the references to “bankruptcy” and “insolvency” in the above-listed factors, the Kansas state court decision did not deal with a “ride through” scenario where a debtor continued making payments post-bankruptcy.¹⁹ Such references in the above list and from Comment 2 beg the question of whether Idaho state courts will view a bankruptcy petition as a significant impairment without additional factors being present.

While Idaho courts have yet to define the scope of significant impairment, it is likely that Idaho will define it narrowly for the following reasons. First, the intent of Idaho Code § 28-45-107 is to protect consumer debtors from sophisticated creditors by preventing abuse of Article 9’s deference to the parties’ agreement. Idaho Code § 28-45-107(2) further protects the debtor by expressly placing the burden of showing significant impairment squarely on the creditor. Last, Comment 2 interprets significant impairment with a focus on whether debtor’s conduct creates a significant risk of discontinuing the debtor-creditor relationship.²⁰ In a “ride through” context a debtor’s continuing payments should outweigh any weight given to the bankruptcy petition. In short, Idaho courts will likely adopt Kansas’ totality of the circumstances approach where filing for bankruptcy will only be one of a myriad of factors.²¹ As such, “ride through” will continue to exist under the Idaho Credit Code with a factually driven, significant impairment analysis.

“RIDE THROUGH” WITH CREDITOR ACQUIESCENCE

If Idaho courts narrowly define significant impairment under the Idaho Credit Code, creditors may be better off allowing a debtor to “ride through.” Certainly a creditor should consider how much wrongful repossession may cost if the creditor is unable to show significant impairment, particularly if a debtor demands a jury trial.

Violations of the Idaho Credit Code entitle a debtor to receive all of his actual damages, a civil penalty of not more than a thousand dollars and his attorney’s fees and costs. In addition, despite the language of Article 9 that limits the remedy for violations of the Idaho Credit Code to the remedies provided in the Idaho Credit Code, such violations of the Idaho Credit Code may also be construed as independent violations of Article 9. In such cases, Article 9 allows the debtor, where the collateral is consumer goods, to recover the finance charges incurred in the transaction plus ten percent (10%) of the principal.²² Tort law further supplements Article 9’s remedy provisions and creditors may find themselves paying punitive damages under the proper circumstances.²³

Until the state courts begin to interpret the interplay between Article 9 and the Idaho Credit Code, whether these remedy provisions are exclusive or cumulative remains to be seen. However, given that the intent of Article 9 with regards to consumer-goods transactions is to “ensure that every noncompliance...results in liability, regardless of any injury that may have resulted” the potential for cumulative relief remains.²⁴ At worst, creditors will be paying debtor’s actual losses, the civil penalty, the credit service charges and ten percent (10%) of the principal; at best creditors may be able to force debtors to elect their remedy. Creditors may decide that the repossession gamble is simply not worth the risk.

THE CREDITOR’S SAFE HARBOR

Certainly there will be cases where the creditor feels repossession is the best option. While the Idaho Credit Code and Article 9 allow the creditor to use self-help repossession upon default provided there is no breach of the peace,²⁵ a creditor should take advantage of the Idaho Credit Code’s safe harbor provision. This safe harbor shields the creditor from liability if the creditor can show that its actions deemed to have violated the Idaho Credit Code were unintentional, resulted from a bona fide error and occurred despite maintaining reasonable procedures to avoid the error.²⁶

One statutory mechanism that would seem to fall within this safe harbor is a creditor’s use of Idaho’s claim and delivery statute.²⁷ While showing the court that it is entitled to possession of the debtor’s vehicle under this procedure, a creditor should also request a determination from the court that the debtor is in default under Idaho Code § 28-45-107(2)’s significant impairment language. If a creditor requests and receives a determination that a significant impairment exists, then the creditor’s violation was arguably unintentional and resulted from a bona fide error as it was pursuant to court order, and no additional procedure beyond the due process afforded by the claim and delivery statute should be required.

The advantages to the preemptive use of the claim and delivery statute include more than providing a safe harbor defense. It may provide creditors with additional claim and issue preclusion defenses. Practically speaking, debtors may waive their rights, particularly given the strong possibility that debtors will not have the financial means to protect themselves, nor perhaps the inclination to revisit the legal system so soon after their bankruptcy experience.²⁸

TWO FINAL BANKRUPTCY CONSIDERATIONS

In addition to the safe harbor provision under the Idaho Credit Code mentioned above, the Idaho Credit Code also provides that creditors may setoff the amount remaining on the debtor’s obligation when calculating the debtor’s damages.²⁹ A creditor using this right of setoff in defending an action brought by the debtor clearly violates the express language of 11 U.S.C. § 524(a)(2) which prohibits creditor action to “offset any such debt as a personal liability of the debtor.” A creditor using the Idaho Credit Code’s right of setoff will run afoul of the bankruptcy discharge by essentially asserting personal liability against the debtor.

Although the intent of this Article is to primarily focus on how Idaho state courts will address the inevitable issue of significant impairment under the Idaho Credit Code, both bankruptcy and non-bankruptcy practitioners need to be aware of the fact that in bankruptcy cases where debtors have attempted to timely reaffirm the debt and approval of the reaffirmation agreement has been denied through no fault of the debtor, several bankruptcy courts have found a *de facto* right to “ride through” under BAPCPA’s new language, particularly sections 521(d) and 362(h)(1)(B).³⁰ While it remains to be seen how Idaho bankruptcy courts will address similar situations, the plain language of 11 U.S.C. § 521(a)(2), § 521(a)(6), § 521(d) and § 362(h)(1)(B), which requires the debtor to timely take certain actions, suggests

that in cases of creditor overreaching and gamesmanship, a similar result allowing “ride through” will be reached.

Ironically, one bankruptcy court has noted that BAPCPA is a “consumer protection” act.³¹ Without BAPCPA’s dissembling title, the Idaho Credit Code is a consumer protection statute designed to protect consumers. As such, notwithstanding Congress’ attempt to eliminate “ride through” under BAPCPA, “ride through” in Idaho continues to exist.

ENDNOTES

¹ Nothing is intended by the use of a masculine pronoun beyond the desire to avoid the awkward construction of “he/she” throughout this article.

² *In re Steinhaus*, 349 B.R. 694, 700 n.8, 06.3 IBCR79, 80 n.8 (Bankr. D. Idaho 2006).

³ Idaho Code § 28-41-101 through § 28-49-107.

⁴ See *In re Ruona*, --- B.R. ---, 2006 WL 3040659 (Bankr. D.N.M. 2006) (granting relief from stay and denying debtor’s request for a finding that the *ipso facto* clause is unenforceable); *In re Steinhaus*, 349 B.R. 694, 06.3 IBCR 79 (Bankr. D. Idaho 2006); *In re Boring*, 346 B.R. 178 (Bankr. N.D.W. Va. 2006)(debtor’s inadequate statement of intention resulted in termination of the stay thirty days after petition date); *In re Rowe*, 342 B.R. 341 (Bankr. D. Kan. 2006)(debtor’s failure to elect either redemption or reaffirmation resulted in the stay being automatically lifted); and *In re Craker*, 337 B.R. 549 (Bankr. M.D.N.C. 2006)(debtor’s failure to select viable option on her statement of intention resulted in termination of the stay thirty days after the petition date).

⁵ Idaho Code § 28-9-101 *et seq.*

⁶ Idaho Code § 28-9-601, Official Comment 3 (“[T]his Article leaves to the agreement of the parties the circumstances giving rise to a default. This Article does not determine whether a secured party’s post-default conduct can constitute a waiver of default in the face of an agreement stating that such conduct shall not constitute a waiver. Rather, it continues to leave to the parties’ agreement, as supplemented by law other than this Article, the determination of whether a default has occurred or has been waived.”).

⁷ See Idaho Code § 28-9-201, Official Comment 3.

⁸ *Id.*

⁹ Idaho Code § 28-41-101 through § 28-49-107.

¹⁰ Idaho Code § 28-45-107. See also Uniform Consumer Credit Code § 5.109 (1974) Comment 1, from which Idaho Code § 28-45-107 is derived, which states:

One of the vital terms of every consumer credit agreement is that which sets forth the criteria which will constitute default. By its nature it is not a term that is agreed to by the parties but rather one that is dictated by the creditor. It is appropriate, therefore, that its content and implications be confined by the law so as to prevent abuse. This section is intended to accomplish that.

¹¹ 2006 WL 2990218 (Bankr. W.D. Mo. 2006). The *Riggs* court concluded that any *ipso facto* clause would only be enforceable if the creditor could satisfy the Missouri equivalent of the Idaho Credit Code, opining that it would be unlikely that a creditor could demonstrate a significant impairment of its prospect of

payment where a chapter 7 debtor will be more likely to make the post-petition payments. *Riggs*, however, failed to cite any Missouri appellate court decisions. Compare Mo. Stat. Ann. § 408.552 with Idaho Code § 28-45-107.

¹² 320 B.R. 760 (Bankr. M.D. Fl. 2005)(pre-BAPCPA).

¹³ Fl. Stat. Ann. § 520.01 *et seq.*

¹⁴ See Mo. Ann Stat. § 408.552.

¹⁵ 342 B.R. 341 (Bankr. D. Kan. 2006).

¹⁶ 342 B.R. at 351-52.

¹⁷ Uniform Consumer Credit Code § 5.109 (1974) Comment 2.

¹⁸ *Johnson County Auto Credit v. Green*, 277 Kan. 148, 156-57 (2004).

¹⁹ Interestingly, rather than leave interpretation of significant impairment to the courts Maine has enacted a statute similar to the Kansas statute and the Idaho Credit Code, which also includes an nonexclusive list of factors that “shall constitute a significant impairment[,]” most notably, “the commencement of any proceeding under any bankruptcy or insolvency laws” by the debtor. See Me. Rev. Stat. Ann. tit. 9-A § 5-109.

²⁰ Uniform Consumer Credit Code § 5.109 (1974) Comment 2.

²¹ Arguably a significant impairment analysis requires consideration of the parties’ relationship from its inception. If the creditor has extended a high-risk loan to a debtor of dubious creditworthiness with a lengthy term, upwards of 36 months, or if the creditor has been under secured for the majority of the loan, then arguably bankruptcy is not a significant impairment of the parties’ relationship as creditor accepted the risks inherent in this type of relationship.

²² Idaho Code § 28-9-625(c)(2).

²³ Idaho Code § 28-9-625 Official Comment 3.

²⁴ Idaho Code § 28-9-625 Official Comment 4.

²⁵ See Idaho Code § § 28-45-108 and 28-9-609.

²⁶ Idaho Code § 28-45-201(7).

²⁷ See Idaho Code § 8-301 *et seq.*

²⁸ As a result, state courts should be leery of entertaining precursory claim and delivery requests. State courts and creditors alike should remember that it is the creditor’s burden to show significant impairment under Idaho Code § 28-45-107(2). Accordingly, even in a claim and delivery context without a debtor’s participation, a court should consider whether the Idaho Credit Code applies.

²⁹ Idaho Code § 28-45-202.

³⁰ See *In re Riggs*, --- B.R. ---, 2006 WL 2990218 (Bankr. W.D. Mo. 2006)(denying approval of reaffirmation agreement due to oppressive terms and stating that creditor may repossess vehicle only if debtor defaults on payment or insurance, or creditor’s position has been significantly impaired under Mo. Ann Stat. § 408.552); *In re Hinson*, --- B.R. ---, 2006 WL 2720886 (Bankr. E.D.N.C. 2006)(Court denied debtor’s motion for contempt due to creditor’s refusal to reaffirm on the original contract terms; however, court found that debtor had satisfied the requirements of § 521(a)(2)(B) and § 362(h)(1)(B), thus provisions of § 521(d) were not triggered. The court found further that § 521(a)(6) was inapplicable based on the “allowed claim for the purchase price” language and creditor’s claim for solely the remaining balance not the purchase price.); and *In re Quintero*, --- B.R. ---, 2006

WL 1351623 (Bankr. N.D.Cal. 2006)(holding that creditor's failure to supply disclosures required by § 524(k) results in unenforceable reaffirmation agreement, approval denied, and creditor prohibited from repossessing the vehicle based on disapproval of reaffirmation agreement).

³¹ *In re Quintero*, --- B.R. ---, 2006 WL 1351623 (Bankr. N.D.Cal. 2006)(noting that "BAPCPA includes in its title the phrase 'consumer protection'").

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Robert Green Ingersoll, a controversial American lawyer of the 19th Century, once remarked: “A mortgage casts a shadow on the sunniest field.” For those who agree with Ingersoll’s sentiment, it would logically follow that a deed of trust “sets the sun” on that field. In comparison to a mortgage, using a deed of trust to secure the obligation of a debtor is, in many respects, more favorable to a creditor. Generally speaking, a deed of trust affords a creditor the right to nonjudicial foreclosure and a shorter 120-day period of cure,¹ as opposed to the need for a judicial foreclosure proceeding and the one-year post-foreclosure period of redemption available under a mortgage.²

Among attorneys in Idaho, there is a common belief that deeds of trusts are instruments available only to obtain security in parcels of forty acres or less and/or real property located within the bounds of an incorporated city or village at the time of conveyance. In fact, to a sophisticated creditor, these seeming limitations on the use of trust deeds may be of little consequence. As the United States Bankruptcy Court for the District of Idaho has held, with the inclusion of a few words, the apparent limitations on the use of trust deeds can be made to magically disappear.

Any Idaho attorney involved in deed of trust transactions should know these rules.

EMPTY LIMITATIONS

Idaho Code Section 45-1502(5) defines the real property that may be used in securing a debt under the Idaho Trust Deeds Act (the “Act”):

“Real property” means any right, title, interest and claim in and to real property owned by the grantor at the date of execution of the deed of trust or acquired thereafter by said grantor or his successors in interest. Provided, nevertheless, real property as so defined which may be transferred in trust under this act shall be limited to either (a) any real property located within an incorporated city or village at the time of the transfer, or (b) any real property not exceeding forty (40) acres, regardless of its location, and in either event where the trust deed states that the real property involved is within either of the above provisions, such statement shall be binding upon all parties and conclusive as to compliance with the provisions of this act relative to the power to make such transfer and trust and power of sale conferred in this act.

Although this language appears to set limitations on the acreage and location of parcels available for trust deed security, evidently, the final clause – “and in either event where the trust deed states that the real property involved is within either of the above provisions, such statement shall be binding upon all parties and conclusive as to compliance with the provisions of this act...” provides a mechanism to render such limitations meaningless. Based on this clause, many have argued that a deed of

trust may be used to obtain security in parcels of land *infinitely* larger than forty acres in size, and in *any* location, as long as the trust deed states (even falsely) that the land is forty acres or less or within an incorporated city or village. Courts have agreed.

Recently, the United States Bankruptcy Court, District of Idaho, considered these issues in the case of *In re Wiebe*.³ Prior to filing bankruptcy, debtors Chester and Patricia Wiebe obtained a loan for which they offered their rural eighty-acre farm as security. The consumer lender prepared and presented a deed of trust for the debtors’ signature that included a declaration that the parcel to be encumbered was “not more than twenty acres in area or the Property is located within an incorporated city or village.”⁴ The Wiebes signed the document. They subsequently defaulted on the loan, and their farm was sold at a trustee’s sale. In the ensuing Chapter 12 bankruptcy, the trustee’s sale purchaser sought a lift of stay from the bankruptcy court so as to obtain possession of the property. In response, the debtors argued that the statements included in the deed of trust were false, because the land involved was farmland, actually greater than forty acres, and not located in incorporated municipal boundaries. Accordingly, the debtors argued, the trustee’s sale was void and, rather than proceed with a trustee’s sale, the lienholder should have been required to foreclose as if the lien had been a mortgage.

The bankruptcy court disagreed, holding that a “fair reading” of the language of the code sustains the conclusion that a mere recital that the encumbered property is either less than forty acres in size or located within an incorporated city or village triggers eligibility for encumbrance by a deed of trust with a power of sale—even if that recital is false.⁵ The Court explained that the statute “includes no requirement that the statement be accurate, and provides no remedy for inaccuracies, whether accidental or intended.”⁶

In reaching this conclusion, the Court relied upon a prior bankruptcy opinion in *Bear Lake West, Inc. v. Stock*.^{vii} Addressing a different set of facts, the *Bear Lake West* Court similarly concluded that parcels in excess of the statutory acreage limitation of Section 45-1502(5) become eligible for encumbrance by deed of trust “if the parties merely state that the acreage limitation has been observed regardless of the true state of the facts.”⁸

ORIGINAL LEGISLATIVE INTENT

According to the *Wiebe* Court, Section 45-1502(5) appears to represent a “legislatively-created” mechanism through which consenting parties may include statements (even inaccurate statements) to circumvent, by deed of trust, the requirements of a judicial foreclosure action when securing debt with real property typically subject to a mortgage.⁹ On this point, the *Bear Lake West* Court agreed:

[T]he legislature enabled parties desiring to use the trust deed process to waive the protection of the mort-

gage and foreclosure process requiring only that they *allege* the acreage and location limitations were met even though such was not the case. Thus, it would appear that, regardless of form, Idaho law conceives of the trust deed process as merely a contractual alternative to a mortgage.¹⁰

In the *Wiebe* case, the creditor argued that the Legislature intended to allow parties to encumber large parcels of land using deeds of trust as a benefit to both creditor and debtor in cases where a lack of equity discourages a lender from utilizing a mortgage to secure a loan.¹¹ The ability to overcome judicial foreclosure restrictions, argued the creditor, helps all of the parties involved—the lender, who is more willing to lend under these favorable conditions, and the debtor, who could not obtain a loan where a mortgage would typically be required.

These arguments regarding legislative intent raise a number of questions. If the Legislature intended to give creditors and debtors the right contractually to circumvent a judicial foreclosure in favor of the trust deed process, why does the statute not simply say so? Furthermore, why would the Legislature *require* a false recital in a deed of trust in order to take advantage of any such right? Finally, why would the Legislature preclude parties who honestly and accurately describe a larger acreage size in a deed of trust from utilizing this ‘intended’ right to reap a contractual benefit?

A review of the legislative history of Idaho Code § 45-1502 yields very little help or explanation. It appears, however, that the use of deed of trust financing was initially meant to be limited. When the Legislature first passed legislation relating to the use of deeds of trust in March of 1957, it set forth the following reasons for doing so:

SECTION 1. DECLARATION OF POLICY. –

Whereas, the availability of more adequate *financing for home construction and business expansion* is essential to the development of the State of Idaho, and, Whereas such financing for real estate of *not more than* three acres is more available with little or no equity in the borrower and on amortization terms over a long period of years and by the use of deeds of trust as herein provided;

Now, Therefore, the use of deeds of trust of estates in real property of *not more than* three acres as hereinafter provided is hereby declared to be the public policy of the State of Idaho.¹²

Like many of Idaho’s public policies and statutes, this initial legislation was meant to protect agriculture and parcels of land used in farming. As stated in the *Bear Lake West* opinion: “The limitation on use of the trust deed process stems from the agricultural constituency of the Idaho Legislature; there is a manifest intent that the requirement of judicial foreclosure and the right of one year redemption be retained for farm-sized parcels not within the boundaries of incorporated areas.”¹³

Significantly, by increasing the ability to circumvent judicial foreclosure, the current interpretation of the Act appears to undermine the Legislature’s “manifest intent” to protect farm-sized parcels.

AMENDMENTS TO SECTION 45-1502

In 1967, the Legislature amended Section 45-1502(5) to increase the acreage limitation from “not more than three acres” to not more than twenty acres “more or less.” There is no clear record indicating why the Legislature included the “more or less” language in this amendment; however, it is reasonable to assume that it was included to prevent legal wrangling in situations where the parties discovered, after utilizing a deed of trust, that the actual parcel size was slightly more (*i.e.*, 20.3 acres) than recited in the executed security instrument.¹⁴ It is less reasonable to conclude that the “more or less” language was included to allow large tracts of land substantially “more” than twenty acres in size to be encumbered using a deed of trust.

As part of the 1967 amendments, the Legislature also added the controversial clause that proved to be pivotal in the *Wiebe* and *Bear Lake West* cases, *i.e.*, “where the trust deed states that the real property involved is within either of the above provisions, such statement shall be binding upon all parties and conclusive... relative to... the power of sale conferred... .” The debtors in the *Wiebe* case argued that the inclusion of this clause was meant to bind the parties to an agreement that the parcel was *within the limitation* set by the statute itself—not to provide a loophole which renders the limitation set by the Legislature meaningless. This interpretation would further support the supposition that the 1967 amendments were meant to reduce litigation over small variances in acreage size—not to create magic language making large tracts of farmland subject to exemption from the requirement of judicial foreclosure.

The Legislature removed the “more or less” language just a few years after it was inserted, perhaps recognizing the inherent problems in using such language when attempting to set a distinct *limitation* on the number of acres qualifying for deed of trust security arrangements.¹⁵ This modification by the Legislature clearly shows a desire to limit the size of a parcel that may be used to secure a debt under a deed of trust – not a desire to allow the acreage to be “more” than the statutory acreage limitation.

In 1967, the Legislature did not remove the clause that has now been interpreted to be a legislatively-created means of contractually escaping, even by false statement, the requirement of judicial foreclosure.

In 1998, the Act was again revised to increase the statutory limit to not more than forty acres. Again, no change was made to the final clause of Section 45-1502(5).

PRACTICAL IMPACT

The current interpretation of Idaho Code §45-1502(5) presents practical considerations and concerns for any Idaho attorney involved in real estate transactions.

First, debtors must be careful not to surrender their post-foreclosure redemption rights unknowingly. Debtors rarely prepare the security instruments used in encumbering their land, and only the most sophisticated debtor can explain the differences between a trustee’s sale and a judicial foreclosure. Creditors, on the other hand, typically prepare the security instruments used in their own lending, and they have a keen interest in being able to take possession of collateral quickly upon default. In light of

these facts, debtors are susceptible to having creditors take large parcels of land as loan collateral, even by false statements, without the requirement of a judicial foreclosure if the debtor fails to pay.

Second, practitioners should reexamine trustee's sale requirements set forth in the Idaho Code in light of the Act's current interpretation. Does a recital in a deed of trust that a parcel is significantly smaller than that described in a notice of sale create any legal claims? At a minimum, this scenario creates confusion for a potential buyer and it may discourage interested buyers who are misled by the deed of trust's inaccurate recital of acreage and/or location.

Third, attorneys should consider the impact of current statutory interpretation on potential buyers at a trustee's sale. Is a purchaser at a trustee's sale to assume, and have constructive notice, that any recital of location or acreage in a deed of trust may not be accurate? What are the legal ramifications, if any, for a buyer who, relying on the recital in a deed of trust that a certain parcel is within a municipal boundary, later discovers the recital was false? Finally, if a buyer at a trustee's sale knows the underlying deed of trust makes a false statement concerning the size or location of a parcel, does the purchaser risk the loss of any defense as a bona fide purchaser?

CONCLUSION

The Supreme Court of Idaho has yet to deal specifically with many of the issues presented by the current interpretation of the limitations set forth in Idaho Code § 45-1502(5). With many questions yet unanswered, it is prudent to proceed with caution. Some have suggested that the Idaho Legislature must become involved to "fix" what is perceived by many debtors' attorneys to be an unintended result of imprecise legislation. For now, however, it appears that one old legal maxim remains true when making and signing a deed of trust—*Agreement makes law*.

ENDNOTES

- ¹ Idaho Code §§ 45-1503, 45-1506, 45-1508.
- ² Idaho Code §§ 11-401, 11-402.
- ³ No. 06-40325 (Bankr. D. Idaho 2006).
- ⁴ At the time, the statute required that the parcel of land not exceed 20 acres. This limitation was later increased to 40 acres by a 1997 amendment.
- ⁵ *In re Wiebe*, No. 06-40325 (Bankr. D. Idaho Oct. 31, 2006) (Memorandum of Decision), at 5.
- ⁶ *Id.*
- ⁷ 36 B.R. 413 (Bankr. D. Idaho 1984).
- ⁸ *Id.* at 414-15.
- ⁹ *In re Wiebe*, No. 06-40325 (Bankr. D. Idaho Oct. 31, 2006) (Memorandum of Decision), at 5.
- ¹⁰ *Bear Lake West, Inc. v. Stock*, 36 B.R. 413, 415 (Bankr. D. Idaho 1984).
- ¹¹ See Response Memorandum filed by FRC Investment Trust dated September 8, 2006, *In re*
- ¹² *Wiebe*, No. 06-40325, at 3, citing *Roos v. Belcher*, 321 P.2d 213, 214 (1958).
- ¹³ 1957 Idaho Sess. Laws 181 (emphasis added).
- ¹⁴ *Bear Lake West, Inc. v. Stock*, 36 B.R. at 415.
- ¹⁵ See 1967 Idaho Sess. Laws 119.

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Save the Date

February 28, 2007

The Idaho Law Foundation is sponsoring a morning seminar on February 28, at the Law Center. The seminar will feature Witold "Vic" Walczak, Litigation Director for the Pennsylvania ACLU who will speak about his experience litigating *Kitzmiller v. Dover Area School District*, the first case challenging the teaching of "intelligent design" in public schools.



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A FEW WORDS ABOUT PROOFS OF CLAIM

JIM SPINNER

Service, Spinner & Gray

One trend seen as a bankruptcy practitioner, primarily representing Bankruptcy Trustees and creditors, regards submission of proofs of claim in Chapter 7, and to a certain extent, Chapter 13 cases. I have occasionally heard complaints from creditors that filing a proof of claim is a waste of time because there is little or no recovery of debt. With the advent of Electronic Case Filing (ECF), some creditors who are considered regular participants in bankruptcy, together with attorneys who practice in the bankruptcy area, use ECF to file proofs of claim and other pleadings and documents with the Bankruptcy Court. Perhaps the perception of ECF to other creditors, the change in the law,¹ and a perception that little recovery on a debt will occur, at least in part, has led to a trend where creditors are not filing proofs of claim. These creditors are unaware of the fact that there are a fair number of cases that result in 100-percent distribution to creditors who file claims, and more and more cases where there is a surplus in funds collected, which ultimately go back to the Debtors, a result one would not typically expect in a bankruptcy context. Idaho has routinely been one of the top states in the nation for collection of assets and distribution to creditors. It is an unfortunate circumstance when creditors, for whatever reason, are not filing claims in bankruptcy, and participating in a potentially substantial distribution. I would urge all members of the bar, in their representation of various clients, to explain to their clients who may find themselves involved in a bankruptcy proceeding, not to disregard the benefits of filing a proof of claim. With some basic information provided to these clients, they hopefully will reach a level of confidence to file a proof of claim in the bankruptcy. Some common questions raised and information sought include the following:

HOW DO I OBTAIN A PROOF OF CLAIM FORM?

In Idaho, the Bankruptcy Court has forms for filing proofs of claim in the various Federal Court venue sites located around the state. The forms are located on the District Court Website at www.id.uscourts.gov, by going into the menu item "Forms" and the submenu item "Bankruptcy" that takes you into a list of forms which include proof of claim forms under the "Miscellaneous" title. Proof of claim forms are provided for filing in cases that originate from the Boise venue, the Coeur d'Alene/Moscow venue, and the Pocatello/Twin Falls venue. The proof of claim form can be pulled up under any of those office listings in the Forms directory. The forms are interactive and can be filled in from the website and printed later. The proof of claim forms also have a list of instructions for completing the proof of claim form which make the forms fairly self-explanatory.

If your client signs the proof of claim form and wants to be notified if there is a problem with the claim, it is prudent to sign and print his/her name as indicated on the form, and list their title, if the creditor is a business entity, to establish the authority to receive notice directly. If an attorney files a notice of appear-

ance in the bankruptcy case for the creditor, such will establish the authority to receive notice on the client's behalf on a claim.

PROOF OF CLAIM: FILE: YES OR NO

I originally received a notice from the Bankruptcy Court indicating that I should not file a proof of claim but recently I received a notice from the Bankruptcy Court indicating that a proof of claim should be filed within a certain period of time. What does this all mean?

In Chapter 7 proceedings a case can be filed as a no asset case. This is a determination initially made by the Debtor or Debtor's attorney based on whether they anticipate assets being available for distribution. If all of a Debtor's assets are exempt and/or encumbered by a secured creditor, a petition is filed as a no asset case. In that event, the bankruptcy notice that goes out to creditors does not include a proof of claim form and indicates on its face that creditors should not file a proof of claim until otherwise directed. Once a Trustee gets involved in the case, the Trustee may locate assets to bring into the estate for the benefit of creditors. When that occurs, the Trustee will direct that a notice goes out to all parties who were listed in the bankruptcy proceeding, or filed a notice of appearance, indicating that assets have been collected and that proofs of claim should now be filed. If an asset notice is received, filing a proof of claim is important, because there is a clear indication from the Trustee that assets have been collected and a distribution is expected. The asset notice does not guarantee that your client will be paid, as there is a priority listing regarding payment of claims starting with administrative expenses of the Trustee, then certain priority creditors including claims under domestic support orders, other administrative claims, wage/employee claims, tax claims and then general unsecured creditors.² A creditor or counsel can check the claims register on the Bankruptcy Court website, identified above, to determine the mix of creditors. However, even when there are priority creditors ahead of your client's claim, it is still prudent to file a proof of claim because there still may be a distribution to general unsecured creditors.

In a Chapter 13, a proof of claim should be filed as the Debtor proposes a repayment plan that should address distribution to unsecured creditors. The test under the Bankruptcy Code in a Chapter 13 is that creditors receive as much in a Chapter 13 as the creditors would in a Chapter 7.³ There may or may not be a significant distribution to unsecured creditors, but a proof of claim is still wise to preserve your place in any distribution.

CAN YOU FILE A CLAIM AGAINST THE INDIVIDUAL DEBTOR ON THE CORPORATE DEBT?

The Debtor is a principal of a corporation that owes your client money. Can you file a claim against the individual debtor on the corporate debt? This issue comes up in bankruptcies where there is a business entity run by a Debtor who files bankruptcy, and the business entity has not filed a bankruptcy. Just as the law treats a corporation and limited liability company as a

separate entity from the Debtor, unless your client has a guarantee from the Debtor on the business debt, Trustees may object to claims that are filed against individuals on business debt.⁴ Under the Bankruptcy Code the term “claim” is generally defined as a right to payment whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, or some right to an equitable remedy if the breach gives right to payment.⁵ The term “debt” means liability on a claim,⁶ and “creditor” is defined as an entity that has a claim against the Debtor that arose at the time of or before the bankruptcy was filed.⁷ Just as the law treats individuals, corporations, and limited liability companies as all separate entities, the Bankruptcy Code is consistent in that distinction.⁸ Sometimes the distinction is blurred by the Debtor listing as a business name - the business which is actually a separate entity from the individual. An individual cannot file a joint petition for themselves and a business entity. The cases have to be separately filed, but both filings do not always occur. For creditors, the important distinction is to file a claim in the correct bankruptcy proceeding. If a Trustee believes the debt is really a debt against the business entity, or vice versa, an objection will be raised to the proof of claim. Of course, if your client has a personal guarantee from the individual on the business entity debt, you can file a claim on the guarantee. There is also the possibility of pursuing a claim against the Debtor by trying to pierce the corporate veil or other separateness of the entity if the entity was an alter ego of the Debtor. These legal issues go beyond filing a simple proof of claim, but the distinction needs to be considered. With partnerships, if a partner files an individual bankruptcy, the individual is most likely liable for the partnership debt and claims can be filed in the individual’s proceeding.

DO SEPARATE PROOFS OF CLAIM HAVE TO BE FILED FOR EACH DEBT OR CATEGORY OF DEBT?

If your client has several different debts with a Debtor, do separate proofs of claim have to be filed for each debt or category of debt? It is not uncommon for creditors to file multiple claims on debts—one claim listing an unsecured claim and perhaps another claim on a priority debt. Or a secured creditor has collateral that partially secures a debt and files both a secured and unsecured claim. The proof of claim forms found on the Bankruptcy Court website, identified above, contain instructions providing that one proof of claim can take into consideration the secured portion of the claim, unsecured portion of the claim, and any priority portions of the claim. If your client has multiple loans to a Debtor, those still can be addressed in one proof of claim form. To assist the Trustee in sorting through the claims, an itemization of the various claims should be generated and attached to the proof of claim form showing how the creditor arrived at the amount of the claim. Documentation supporting the various categories of the claim also needs to be attached to the proof of claim form to avoid objection by the Trustee. However, one proof of claim form can address unsecured debts, the secured debts, and the priority debts of a creditor. The only time a different proceeding is necessary for creditors is if the creditor has an administrative expense claim in the bankruptcy.

Then a proof of claim form can be filed, but a separate request for allowance of the administrative expense needs to be brought before the Bankruptcy Court. Such administrative expenses may consist of post-petition rents due a landlord of the Debtor, certain types of taxes, extension of credit in converted cases, for example from a Chapter 11 to a Chapter 7, professional fees, and actual necessary costs or expenses for preserving the estate after the bankruptcy is filed. Those types of administrative expenses have to be brought before the Court for approval, by notice and hearing.⁹

WHAT ARE SOME COMMON OBJECTIONS RAISED TO PROOFS OF CLAIM AND HOW SHOULD MY CLIENT RESPOND?

The Trustee in bankruptcy proceedings are parties charged to review the claims and raise objections to claims they conclude are either improper, deficient, or improperly filed in the bankruptcy proceeding.¹⁰ Other parties in interest can also object to claims, but the review primarily falls to the Trustee.

A common objection is that the claim filed is fully secured. If your client is fully secured and files a claim, the Trustee may object to the claim or at the very least, will not pay the claim from bankruptcy estate proceeds. If a claim is fully secured, the law presumes the creditor will protect its own interest through the security on its claim and is not entitled to receive any distribution from the bankruptcy estate. As such, if your client is secured, they will not receive a distribution. However, filing a claim is still important, as it preserves the claim. If, after filing, your client liquidates its security and has a deficiency amount remaining, an unsecured claim can be filed. In such an instance, an amended claim must be filed on the deficiency amount and the amended claim box on the proof of claim form should be checked, to avoid the claim being treated as a new, separate claim. There should be an itemization of the debt included, showing the beginning balance, less the amount received on the sale of collateral, plus costs incurred on the sale, with an ending balance owing. Documentation evidencing the deficiency upon liquidation of the collateral should be attached. In addition, the Trustee is a real party in interest in the collateral property, the same as the Debtor, and is entitled to statutory notice under the Uniform Commercial Code of any pending sale of collateral. Of course, relief from the automatic stay may have to be pursued before the collateral is released from the Bankruptcy Court, but even if stay relief is obtained, when the creditor moves to sell the property, if a deficiency claim is anticipated, and your client desires to maintain that deficiency claim to seek a distribution from the bankruptcy estate, notice of the sale of the collateral must be sent to the Trustee as well as the Debtor, as provided for in the Uniform Commercial Code. If the Trustee does not receive that notice, the Trustee has a basis to object to the deficiency claim based on lack of notice under the Uniform Commercial Code.

If your client has a claim for damages under a lease, future lease payments should be discounted to present value, less costs incurred to sell or release the leased property. The creditor must mitigate the future loss. A claim asserting an amount equal to the

sum of all remaining rent payments may draw an objection from the Trustee.¹¹

Other objections that Trustees routinely raise to claims involve failure of the creditor to properly document the debt which leads to the claim. Make sure that your client provides the loan documents and perhaps a payment history or at least an itemization of the balance owing on the debt(s) to attach to the proof of claim. The Trustee reviews those documents to make sure that the creditor is properly perfected on the collateral claimed. If your client is listed as a secured creditor, the Trustee will typically request security documents anyway in his review of the financial affairs of the Debtor. The proof of claim form has instructions on attaching supporting documentation on the debt(s), but creditors frequently do not attach supporting documentation, resulting in an objection from the Trustee.

Another objection that is typically raised is when a creditor files under the wrong category of debt. Creditors often believe their debt is entitled to priority status, when it is a general unsecured claim. The Trustee will review the documentation, and if it indicates that the claim is a general unsecured debt, a “conditional” objection may be raised, typically indicating that the claim should be disallowed as a priority claim but allowed as a general unsecured claim. In that instance, you need to review the facts and law to make sure you agree with the Trustee’s re-categorization of the claim. Priority claims are typically limited by dollar amount and time frames prior to filing, such as wages and contributions to employee benefit plans, but the priority rule should be reviewed to determine which portion is priority,¹² if any, and which portion would be a general unsecured claim.

Debts that are assigned should have a copy of the assignment attached to the proof of claim. If you represent a co-Debtor who had to pay the co-signed debt of a bankruptcy Debtor, the co-Debtor who has paid the debt, or has secured a claim of a creditor against the Debtor and thereafter pays such claim, is subrogated to the rights of such creditor to the extent of the payment.¹³ Of course, if the Debtor is actually the co-signer and your client received the consideration for the claim from the creditor, the claim would be objectionable.

Often a creditor can respond and resolve an objection by filing an amended claim, providing documentation to the Trustee, or agreeing to re-categorization of the debt. It is important to respond to an objection, if a response is warranted, within the time period provided in the objection. Otherwise, the Bankruptcy Court will enter an order disallowing the claim. A creditor on a disallowed claim can ask for reconsideration of the claim, which may be granted or denied at the discretion of the Court.¹⁴

IF MY CLIENT IS A SECURED CREDITOR AND THE TRUSTEE SELLS MY CLIENT’S COLLATERAL, HOW WILL THE DEBT GET PAID?

As set forth above, if a creditor files a claim as a fully secured creditor, the creditor will not receive a distribution from assets in the bankruptcy estate. An exception to that is if the Trustee feels there is equity in a creditor’s collateral and opts to liquidate the collateral. In that instance, the Trustee will work with the creditor on the liquidation of the collateral, and will pay the secured claim out of the proceeds of the sale. If there is an issue on

whether or not the collateral has equity for the estate, the Trustee may still attempt to liquidate the collateral to generate equity, and if the Trustee cannot generate equity, will release the collateral to the creditor. Closely related to this issue is whether or not interest and attorneys’ fees can be added to a claim. If a creditor is a fully secured creditor and has an equity cushion, reasonable attorneys’ fees and interest can be added to the claim.¹⁵ The reasonableness of the attorneys’ fees, as well as an interest rate that is inconsistent with the documentation on the loan or applicable law, can be challenged by the Trustee. If your client is an undersecured creditor where the collateral value does not equal the debt, attorneys’ fees and post-petition interest generally are not allowed.

MY CLIENT MISSED THE BAR DATE TO FILE A PROOF OF CLAIM, SHOULD A CLAIM STILL BE FILED?

If your client misses the bar date listed on the notice of bankruptcy or on an asset notice that is received, it is still prudent to file a proof of claim. In a Chapter 7, again there are a number of cases with surplus funds over timely allowed claims that could go to tardy claims. The untimeliness of the claim will move the priority of payment on the claim behind timely filed claims,¹⁶ but funds are frequently available for untimely claims in a Chapter 7, if the untimely claim is filed before distribution. The untimely claim should be filed as soon as possible to avoid further problems with the Trustee or other parties in interest and should have a “tardy” notation written on the proof of claim, if you agree it is tardy, to avoid an objection that it is tardy. If you know the filing of the claim is late, but think the claim should be allowed as timely because of lack of notice, or otherwise, such should be noted on the proof of claim. If the debt is not listed by the Debtor in the bankruptcy schedules, it is important to attach documentation to verify the debt.

IN A CHAPTER 13 PROCEEDING, DOES MY CLIENT’S PROOF OF CLAIM CONTROL OVER THE PROVISION IN A DEBTOR’S CHAPTER 13 PLAN OF REORGANIZATION?

Whether a creditor’s claim will control over a confirmed Chapter 13 Plan, if the amounts in the claim and Plan are different, was remedied by the form Chapter 13 Plan, which can also be found as a form on the Bankruptcy Court’s website. The form Chapter 13 Plan provides a provision that provides that the proposed treatment in the plan will determine the allowed value of a secured claim, with any balance of the claim being treated as an unsecured debt.¹⁷ As such, it is important for secured creditors in the Chapter 13 to review plans carefully to make sure the allowed value is the same as what they value their collateral. If not, a timely objection to the Chapter 13 Plan would be necessary to preserve and determine that issue.¹⁸

This is a cursory review of proofs of claim, and there are a number of other issues that are involved in creditor claims in the various chapters of bankruptcy. Hopefully this will act as a general checklist of questions your clients may have regarding claims and also make the point that it is always a good idea to file a proof of claim if claims are being accepted. And hopefully, your client can participate in distribution made from the bankruptcy estate.

ENDNOTES

¹ Since BAPCPA has gone into full effect, bankruptcy filings during the first three quarters of 2006 (January 1, 2006, to September 30, 2006) fell to 443,750 from 1,410,484 for the same period in 2005, according to data released by the administrative office of the U.S. Courts.

² For a complete list of priorities, see 11 U.S.C. § 507.

³ 11 U.S.C. § 1325(a)(4)

⁴ There may be exceptions if the business is dissolved and business assets are administered in the personal bankruptcy.

⁵ 11 U.S.C. § 101(5)

⁶ 11 U.S.C. § 101(12) and § 101(8) for "consumer debt."

⁷ 11 U.S.C. § 101(10)

⁸ 11 U.S.C. §§ 301, 302

⁹ 11 U.S.C. § 503

¹⁰ 11 U.S.C. § 704(a)(5); F.R.B.P. 3007

¹¹ *W.L. Scott, Inc. v. Madras Aerotech, Inc.* 103 Idaho 736, 742; 653 P.2d 791 (1982).

¹² 11 U.S.C. § 507

¹³ 11 U.S.C. § 509

¹⁴ F.R.B.P. 3008

¹⁵ 11 U.S.C. § 506(b)

¹⁶ 11 U.S.C. § 726

¹⁷ Form Chapter 13 Plan section 4.2.2

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FEBRUARY 2007 IDAHO STATE BAR EXAMINATION APPLICANTS

Listed below are the applicants who have applied to sit for the February 2007 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 16, 2007. Direct correspondence to: Admissions Director, Idaho State Bar, PO Box 895, Boise, ID, 83701.

Aric Ammaron Alley Woodward, OK <i>University of Oklahoma</i>	Susan Dian Centeno aka Susan Dian Kern Boise, ID <i>Seattle University</i>	Merritt Lynn Dublin Merritt Lynn Bingham Boise, ID <i>University of Arizona</i>	Clifton Niles Hilton Harty Clifton Niles Harty Boise, ID <i>Gonzaga University</i>	M. Laurie Litster Frost aka Laurie Litster aka Laurie Frost aka Martha L. Frost aka Joanne LaRelle Litster aka Martha LaRelle Litster Boise, ID <i>Brigham Young University</i>
Melissa Kay Aston Rupert, ID <i>Willamette University</i>	Andrew Rodney Choate Bargersville, IN <i>University of Dayton</i>	Sarah Catherine Cunningham aka Sarah Catherine Cunningham San Francisco, CA <i>University of California-Berkeley</i>	Pamela Treste Harvey aka Pamela Treste Fusco Victor, ID <i>Quinnipiac College</i>	
Nikki Rae Austin aka Nikki Rae Crose aka Nikki Rae Hylton aka Nikki Rae Hylton-Geib Meridian, ID <i>Arizona State University</i>	David Alan Christensen Star, ID <i>Brigham Young University</i>	John Michael Fedders Washington, DC <i>Catholic University of America</i>	Brian Dennis Holmberg Boise, ID <i>California Western School of Law</i>	Maja Markovic-Wolter aka Maja Markovic Boise, ID <i>University of Idaho</i>
Aaron Patrick Baldwin Boise, ID <i>University of Idaho</i>	David Christopher Cooper Boise, ID <i>University of Kansas</i>	David Michael Fogg Moscow, ID <i>University of Idaho</i>	Jennifer M. Honey aka Jennifer M. Anches Manhattan Beach, CA <i>McGeorge School of Law</i>	Maureen Ann Marshall Indianapolis, IN <i>University of Dayton</i>
Peter Geoffrey Hampden Barton Boise, ID <i>Harvard University</i>	Joseph Donald Cooper Sr. Fresno, CA <i>San Joaquin College of Law</i>	David Wendell Gadd Twin Falls, ID <i>University of Idaho</i>	Jason Lee Hudson Boise, ID <i>University of Colorado</i>	Andrew G. Martin Ontario, OR <i>Willamette University</i>
Tessa Jeanean Bennett Boise, ID <i>University of Idaho</i>	Danielle Miriam Dancho Boise, ID <i>Arizona State University</i>	Shawn Marie Glen Challis, ID <i>University of Montana</i>	John Christopher Hughes Boise, ID <i>California Western School of Law</i>	Keith W. Mason Boise, ID <i>Gonzaga University</i>
Gregg Palmer Benson Boise, ID <i>Gonzaga University</i>	Michael D Davidson Caldwell, ID <i>Gonzaga University</i>	Megan Rose Goicoechea Boise, ID <i>Seattle University</i>	Ann E. Jacquot aka Ann Doll aka Ann Chick Priest River, ID <i>University of San Diego</i>	Karen M. May Boise, ID <i>Boston College</i>
Delisa Marie Berhow aka Delisa Marie McCree aka Delisa Marie Griggs Coeur d'Alene, ID <i>Gonzaga University</i>	Jeffrey Phillip Dearing Boise, ID <i>University of Idaho</i>	Alison S. Graham Meridian, ID <i>University of Utah</i>	Darcy Ann James Riverside, CA <i>Chapman University School of Law</i>	W. Scott McNees Pennington, NJ <i>Rutgers University-Camden</i>
Scott Dale Blickenstaff Boise, ID <i>University of California-Hastings</i>	Joshua Bingham Decker Auburn, WA <i>University of Idaho</i>	Michael Christopher Grubbs Mesa, AZ <i>University of Arizona</i>	John Harold Lindquist Nampa, ID <i>University of Wisconsin</i>	John Chandler Meline Idaho Falls, ID <i>University of Texas at Austin</i>
Jeffrey Ray Boyle Boise, ID <i>University of Idaho</i>	Jennifer Schrack Dempsey aka Jennifer Rae Schrack Boise, ID <i>Loyola Marymount University-Los Angeles</i>	John Harold Gutke Las Vegas, NV <i>University of Oregon</i>		Ronald Dean Mesler Boise, ID <i>Thomas M. Cooley Law School</i>
Amanda Christine Campbell Boise, ID <i>University of Denver</i>	Brian David DiFonzo Ontario, OR <i>University of Oregon</i>	Laurel Inman Handley El Cajon, CA <i>California Western School of Law</i>		Daniel Charles Meyer Boise, ID <i>University of San Diego</i>

Shawn O'Dell Miller
Eagle, ID
Northern Illinois University

Lawrence Robert Milne
Del Mar, CA
Thomas Jefferson School of Law

Robert Alan Nauman
Boise, ID
California Western School of Law

Jason Shawn Nelson
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Stephen J. Nemeck
Coeur d'Alene, ID
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Vicki Dione Null-Carey
aka Vicki Dione Barr
aka Vicki Dione Null
Athol, ID
University of Idaho

Mark William Olson
Boise, ID
University of Oregon

Wendy Jo Olson
Boise, ID
Stanford University

Jeremi Lynn Ossman
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Michigan State University College of Law

Michael Anthony Pope
Boise, ID
McGeorge School of Law

Jarrold Lee Rickard
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University of Nevada - Las Vegas

Lupe Charles Rodriguez
Twin Falls, ID
University of Idaho

Angelo Luigi Rosa
Chubbuck, ID
American University

Todd Drake Rowe
Palmdale, CA
City University of New York

Monica Evangelina Salazar
aka Monica Evangelina Hernandez
Nampa, ID
University of California-Hastings

Leilla Donelle Sivey
aka Leilla Donelle Brooks
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Tran Jay Smith
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Michael Paul Spitzer
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Rutgers University-Camden

Roberta Lynn Stewart
aka Roberta Lynn Rusk
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Jared Bryant Stubbs
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Tim Alan Tarter
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Willamette University

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Commercial Law and Bankruptcy Section's 25th Annual Seminar. Red Lion Templin's Resort in Post Falls, Idaho February 15-17, 2007. 12.5 CLE credits of which 1.25 is ethics. Great speakers, timely topics and a Friday evening reception and dinner.

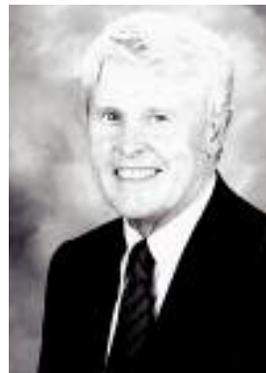
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Meredith Anne Taylor
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Mark Ryan Thompson
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Anna Ruth Trentadue
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John Carter Winters
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Amanda Claire Yen
Las Vegas, NV
*University of Nevada - Las
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**Angela Kristina Young-
Hermosillo**
aka Angela Kristina Young
aka Angela Kristina
Hermosillo
Saint Anthony, ID
University of Idaho

THE ADVOCATE

REMEMBERING 50 YEARS

The following appeared in the Volume 32(7):4

LAWYER REFERRAL GEMS

In 1988 the Bar received over 3500 phone calls seeking lawyer referrals. Following are some of the lighthearted, silly, or nonsensical things people say when looking for legal expertise.

INITIAL QUERY

Can you answer the question I am going to ask?
I'm getting married soon, and I need to know what's going to happen.

I WANT...

... a female attorney.
... a mean, aggressive male attorney that hates women.
... a young attorney that won't charge much.
... an old attorney who knows what he is doing.
... a mediocre attorney. A good one is too expensive and I don't want a bad one.
... an attorney with an 'r' in his name. This is a psychic thing.

FRACTURED TERMINOLOGY

I want a straining order.
I want to sue for definition of character.
I need an attorney with a free constellation.
I was served an edition notice.

SAY AGAIN

I need to sue 'cause I opened this pornographic magazine and saw four pictures of me in it.
I need an attorney fast. The police are on their way to my house.

PRO BONO

Is this the Poor Bono people?
I'm trying to get a hold of the Pro Nono people.
Is this the number for the Porno people? The ones that help poor people?



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IDAHO VOLUNTEER LAWYERS PROGRAM SPECIAL THANKS

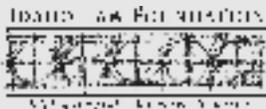
IVLP's **SPECIAL THANKS** this month focuses on attorneys who volunteered to represent IVLP eligible clients in family law, or other civil cases. Pamela Tarlow, Tracy Crane, and Lora Rainey Breene are three of our volunteers who's particularly praise-worthy efforts are representative of our IVLP volunteers.

Volunteer **Pamela Tarlow**, Office of Pamela J. Tarlow, donated 150 hours working through IVLP to assist a young woman ("S") who had approached her for *pro bono* service. "S" had some mental health problems and was living in a homeless shelter. "S's" mother was trying to get guardianship of her 7-year-old son, even though "S" was a committed parent and doing everything she possibly could to take care of the child. Ultimately, the court concluded it was in the best interest of the child to grant the guardianship, but Tarlow managed a creative solution to keep "S" in her child's life through a visitation agreement with the Guardian Ad Litem and the child's guardian.

IVLP hears from people whose personal situations are particularly egregious and for whom legal representation is particularly important. "W's" was just such a case: The couple had been separated for six years after a marriage filled with domestic violence and sexual abuse of the children. "W" had moved away from her abuser, but had not been able to afford to pay the expenses of a divorce and needed a volunteer attorney. Volunteer **Tracy Crane, Holland, & Hart, LLP** spent over 40 hours on the case obtaining a divorce for "W" and securing "W's" custody of her son.

In 1994, "B" came to IVLP seeking assistance in his deportation hearing. **Lora Rainey Breen** accepted the case and recently successfully closed it spending over 250 hours providing *pro bono* service over the course of several years. In her letter, she explains: "adding to the delay is the fact that this case was extremely convoluted and complex, involving numerous erroneous actions by INS and requiring several Department of Justice appeals over several years. I am happy to report that "B" finally received his green card a couple months ago. It was a long awaited and rewarding outcome. In my opinion, it was a case where justice truly did prevail despite a very long, uphill battle."

Ms. Rainey continued, "I want to thank IVLP for providing me with the opportunity to participate in such a challenging case. I also want IVLP to know how helpful the office of **Senator Larry Craig** was in reaching the ultimately successful outcome in this case. Senator Craig's staff here and in D.C. worked tirelessly with me over the last 12 years to see that justice was done in this matter."



Mock Trial Judges Needed For the Idaho Law Foundation's High School Mock Trial Competition* Regional Competition Schedule

North Idaho:

Nez Perce County Courthouse on Friday, March 2,
2007 from 1:00 - 9:00 p.m.

Treasure Valley:

Ada County Courthouse on Saturday, March 3,
2007 from 8:00 a.m. - 5:00 p.m.

Twin Falls:

Twin Falls County Courthouse on Saturday, March
3, 2007 from 8:00 a.m. - 5:00 p.m.

*Snake River Valley:

Bonneville County Courthouse on ~~Friday, March 2,~~
~~2007 from 1:00 - 9:00 p.m.~~

Saturday, March 3, 2007 from 8:00 a.m. - 5:00 p.m.

* Note Schedule Change. Interested judges and
lawyers can contact Carey Shoufler at cshoufler@isb.idaho.gov

BANKRUPTCY HELPLINE BANKRUPTCY ATTORNEYS NEEDED

The Idaho Volunteer Lawyers Program and the Commercial and Bankruptcy Law Section, with the assistance of a grant from the U. S. District and Bankruptcy Court, are establishing a Helpline to answer questions for *pro se* bankruptcy participants.

If you have expertise in bankruptcy law, the Helpline needs you. This is an easy way to provide *pro bono* service to help the public and the Court.

- You can return calls keeping your identity and your location confidential
- You can avoid forming an attorney/client relationship
- You can limit the time you commit to *pro bono* to fit your schedule
- You can help someone who really needs you

Please call Mary S. Hobson, Legal Director, Idaho Volunteer Lawyers Program at 334-4510, or send an email to mhobson@isb.state.gov to volunteer or to find out more.



IVLP HONOR ROLE

The Idaho Volunteer Lawyers Program extends special thanks to the following 162 attorneys who accepted or completed cases in family law, individual rights, immigration, consumer, wills, benefits or nonprofit corporation issues for IVLP applicants in 2006. The attorneys estimate that they contributed over 2,100 hours of pro bono services in the closed cases alone (IVLP counts donated hours at case closings only). The value of these contributions to the individuals and clients served by IVLP far exceeds the monetary value of the legal work..*

- Sam L Angell**—Moss, Cannon, Castleton, PA
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Nicholas M. Baran—Nicholas Baran, Attorney at Law
Lisa A. Barini-Garcia—Roy, Nielson, Barini-Garcia & Platts
Robert W. Bartlett II—Hailey
Stephen L. Beer—Beer & Cain
G. Philip Bernstein—Boise
Loren C. Bingham—Twin Falls
Bruce H. Birch—Birch Law Offices Chtd.
H. Ronald Bjorkman—Emmett
Brian R. Blender—Blender Law Office, P.C.
Richard C. Boardman—Perkins Coie, LLP
Stephanie J. Bonney—Moore Smith Buxton & Turcke, Chtd.
Eric J. Boyington—The Blaser Group
Kevin Charles Braley—Holland & Hart, LLP
Christopher D. Bray—Bray Law Office, Chtd.
Amanda A. Breen—Law Offices of Bennett, DeLoney & Noyes
Lora R. Breen—Boise
M. Sean Breen—Manweiler, Breen, Ball & Hancock, PLLC
Kimberly D. Brooks—Brooks Law, PC
Muriel M. Burke—Owens & Crandall, PLLC
Nancy L. Callahan—Law Offices of Nancy L. Callahan
Chad A. Campos—Campos Law
Jody P. Carpenter—Boise
Valerie Nicole Charles, Avoture Business & Property Law PLLC
John A. Church—John A. Church, Attorney at Law
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Tammy L. Crowley—The Law Office of Tammy Crowley
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R. George DeFord Jr.—DeFord Law, PC
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Cassandra G. Drescher—Law Office of Cassandra Gray Drescher
Michael W. Duggan—Duggan Legal Research & Writing
Sara D. Eddie—Portland
Bradford Scott Eidam, Boise
Carlton Reed Ericson—Naylor & Hales, PC
Patricia L. Evans—Orofino
Brian T. Fischenich—Holland & Hart, LLP
Lois K. Fletcher—Lois K. Fletcher, Attorney at Law
Kent W. Foster—Holden, Kidwell, Hahn & Crapo, PLLC
Jay R. Friedly—Hall, Friedly & Ward
William A. Fuhrman—Trout Jones Gledhill Fuhrman, PA
Wayne P. Fuller—Wayne P. Fuller
Laurie B. Gaffney—Laurie Baird Gaffney, Esq., PLLC
Patrick N. George—Racine, Olson, Nye, Budge & Bailey, Chtd.
Brad A. Goergen—Holland & Hart, LLP
Alan Charles Goodman—Goodman Law Office
Mark J. Guerry—Webb, Webb & Guerry
Kindra L. Hansen—OfficeMax Incorporated
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Stephen S. Hart—Hart Law Offices, P.C.
Lois W. Hart—Lois Hart, Lawyer
John Richard Hathaway—Orofino
Alan Herzfeld—Herzfeld & Piotrowski, LLP
Hon. George G. Hicks—Elmore County Magistrate Court (formerly of Hoagland, Dominick and Hicks)
Thomas B. High—Benoit, Alexander, Harwood, High & Valdez, LLP
Margaret B. Hinman—North Wind, Inc.
Craig D. Hobdey—Hobdey & Hobdey
Mary S. Hobson—Idaho Volunteer Lawyers Program (formerly Stoel Rives, LLP)
Mick Hodges—Hodges Law Office, PLLC
Dana L. Hofstetter—Hofstetter Law Office, LLC
Kevin B. Homer—Idaho Falls
Loren C. Ipsen—Elam & Burke, PA
Kent D. Jensen—Kent D. Jensen
David A. Johnson—Wright Wright & Johnson, PLLC
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Fonda L. Jovick—Paine, Hamblen, Coffin, Brooke & Miller, LLP
Charles Craig Just—Just Law Office
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James P. Kaufman—Ringert Clark, Chtd.
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Kelly D. Mallard—Mallard Law Office, PC
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Bernard W. McHugh—Elsaesser Jarzabek Anderson Marks Elliott & McHugh, Chtd.
Sharon L. McQuade—Grisham, Boise
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Manderson L. Miles Jr.—Knowlton & Miles, PLLC
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Michaelina B. Murphy—Murphy Law Office, PLLC
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Brian B. Peterson—Hall, Friedly & Ward
Kira D. Pfisterer—U.S. District Court (formerly Greener Banducci Shoemaker, PA)
Michelle R. Points—Nevin, Benjamin & McKay, LLP

Wendy M. Powell—Brooks Law, PC
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Kathryn Railsback—Law Office of Kathryn Railsback
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Lauren M. Reynoldson—Spink Butler, LLP
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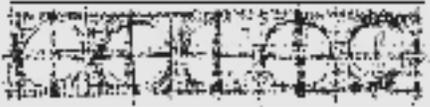
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COURT INFORMATION

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Chief Justice
Gerald F. Schroeder

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

2nd Amended - Regular Fall Terms for 2006

Boise..... December 1, 4, 6, and 8

Regular Spring Terms for 2007

Boise..... January 3, 5, 8, 10, and 12

Boise..... January 29, 31, and
February 2, 7, and 9

Boise (Twin Falls appeals)..... February 28, and
March 2, 7, and 9

Coeur d'Alene and Lewiston..... April 2, 3, 4, 5, and 6

Boise (Eastern Idaho appeals)..... May 2, 4, 7, 9, and 11

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2007 Spring Terms of the Idaho 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.

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

Chief Judge
Darrel R. Perry
Judges

Karen L. Lansing
Sergio A. Gutierrez

4th Amended - Regular Fall Terms for 2006

Boise.....December 5 and 7

Regular Spring Terms for 2007

BoiseJanuary 9, 11, 16, and 18

Boise.....February 6, 8, 13, and 15

Eastern Idaho.....March 12, 13, 14, 15, and 16

Northern Idaho.....April 9, 10, 11, 12, and 13

BoiseMay 8, 10, 15, and 17

Boise.....June 5, 7, 12, and 14

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2006 fall 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.

IDAHO SUPREME COURT ORAL ARGUMENT DATES As of January 10, 2007

Monday, January 29, 2007 – BOISE

8:50 a.m.	Sons & Daughters v. Idaho Lottery Commission	#32218
10:00 a.m.	State Tax Commission v. I R Trucking Trust	#32776
11:10 a.m.	State v. Jauhola	#27490/31435

Wednesday, January 31, 2007 – BOISE

8:50 a.m.	P O Ventures, Inc. v. Loucks Family Trust	#32551
10:00 a.m.	Grain Growers v. Liquidator	#31194
11:10 a.m.	Norton v. California Insurance Guarantee	#31558

Friday, February 2, 2007 – BOISE

8:50 a.m.	Dilulo v. Anderson & Wood	#32499
10:00 a.m.	Baird Oil Company v. State Tax Commission	#31668
11:10 a.m.	Stout v. Key Training Corporation	#32881

Wednesday, February 7, 2007 – BOISE

8:50 a.m.	Weeks v. Eastern Idaho Health Services	#32458
10:00 a.m.	Rammell v. Dept. of Agriculture	#32538
11:10 a.m.	Steiner v. Gilbert	#32322

Friday, February 9, 2007 – BOISE

8:50 a.m.	OPEN	
10:00 a.m.	Ticor Title Company v. Stanion	#32649
11:10 a.m.	Puckett v. Verska	#32571

IDAHO COURT OF APPEALS ORAL ARGUMENT DATES As of January 10, 2007

Thursday, February 8, 2007 – BOISE

9:00 a.m.	State v. Svetich	#32760
10:30 a.m.	State v. Kremer	#32029
1:30 p.m.	State v. Cortes	#32664

Tuesday, February 13, 2007 – BOISE

9:00 a.m.	State v. Landeros	#32758
10:30 a.m.	State v. Salois	#32822
1:30 p.m.	State v. Reynolds	#32374

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(UPDATE 10/01/07)

CIVIL APPEALS
SUBSTANTIVE LAW

1. Whether I.C. § 67-2345(1)(f) authorizes executive session for public officials to consider aspects of probable litigation, of which there is a general public awareness, without necessarily having an attorney in attendance.

State of Idaho v. Rick Yzaguirre
S.Ct. No. 33048
Supreme Court

SUMMARY JUDGMENT

1. Whether the trial court erred in granting summary judgment by finding there was no "meeting of the minds" and, thus, no contract between the Lindens and Chapins.

Frank Chapin v. Robert Linden, Jr.
S.Ct. No. 32946
Supreme Court

2. Whether summary judgment was improperly granted because the affidavit of Vernon Plott did not contain admissible evidence sufficient to support entry of judgment for Gem State Insurance Company.

Gem State Insurance v. Thomas Hutchison
S.Ct. No. 33141
Supreme Court

3. Whether the district court erred in granting summary judgment in favor of the Estate of Phillip Ashbaugh.

Jennifer K. Miller v. David Leo Hall
S.Ct. No. 32770
Court of Appeals

EVIDENCE

1. Was the Board's conclusion that Ater violated the provisions of the American Counseling Association Ethics Code supported by substantial evidence in the record?

Gail Ater v. Idaho Bureau of Occupational Licenses
S.Ct. 33143
Supreme Court

DIVORCE, CUSTODY, AND SUPPORT

1. Whether the court erred in terminating Doe's parental rights to his five natural children.

John Doe v. Dept. of Health & Welfare
S.Ct. 32972
Supreme Court

POST-CONVICTION RELIEF

1. Did the court err in finding Dutt had not supported his claims with a showing of admissible evidence and in dismissing his petition for post-conviction relief?

David Shawn Dutt v. State of Idaho
S.Ct. No. 32021
Court of Appeals

2. Should Hall's claim of ineffective assistance of trial counsel be remanded because there was an inherent conflict in having trial counsel litigate the claim that his own counsel was ineffective?

Robert Eugene Hall v. State of Idaho
S.Ct. No. 32817
Court of Appeals

3. Did the court err by summarily dismissing Harvey's petition for post-conviction relief and in finding there was no material issue of fact as to whether the time to file his petition should be equitably tolled?

Ben C. Harvey v. State of Idaho
S.Ct. No. 32802
Court of Appeals

4. Did the court err in denying Rios-Lopez's motion for new counsel without giving him notice of the hearing or an opportunity to be heard?

Elberto Rios-Lopez v. State of Idaho
S.Ct. No. 32269
Court of Appeals

5. Did the court err when it granted the state's motion for summary disposition without requested discovery or an evidentiary hearing?

Robin Row v. State of Idaho
S.Ct. No. 31962
Court of Appeals

6. Did the court err in denying Workman's request for the appointment of counsel to represent him in this post-conviction proceeding given that Workman's petition raised non-frivolous claims for relief?

Kenneth Workman v. State of Idaho
S.Ct. No. 33620
Court of Appeals

TORT

1. Did the district court err in ruling as a matter of law that DMV is immune from suit because its conduct was not grossly negligent or reckless, willful or wanton?

Camilla Cafferty v. Dept. of Transportation
S.Ct. No. 32534
Supreme Court

CRIMINAL APPEALS
PROCEDURE

1. Did the court err in denying Lopez's motion to dismiss based on his allegation of a violation of his right to speedy trial?

State of Idaho v. Miguel Angel Lopez
S.Ct. No. 32757
Court of Appeals

SEARCH AND SEIZURE –
SUPPRESSION OF EVIDENCE

1. Did the court correctly deny the motion to suppress because, even if there was an illegal seizure, the evidence was found during a search incident to arrest pursuant to a warrant which constituted an intervening circumstance dissipating the taint of any possible illegality?

State of Idaho v. Ronnie Dale Karlson
S.Ct. No. 32329
Court of Appeals

2. Did the court err in finding the search warrant was supported by probable cause and in denying Moreno's motion to suppress?

State of Idaho v. Roberto Moreno, Jr.
S.Ct. No. 32026
Court of Appeals

EVIDENCE

1. Did the court err in denying Lund's motion for mistrial and in finding the state did not present impermissible character evidence?

State of Idaho v. Alicia Lund
S.Ct. No. 32457
Court of Appeals

2. Did the district court abuse its discretion in excluding polygraph test results where those test results were not offered to prove Veenstra was truthful in his assertions of innocence but to provide the jury with some insight into what facts were known by Veenstra and the State at the time Veenstra left Idaho and thereby rebut the inference that he fled in order to escape punishment for his alleged crimes?

State of Idaho v. Albert Pete Veenstra
S.Ct. No. 32658
Court of Appeals

Summarized by:
Cathy Derden
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ON THE SPIRIT OF LIBERTY

YOUNG LAWYERS COLUMN

WESTON MEYRING

Idaho Court of Appeals

For nearly a decade, I ignored the call of the law—until the 2001 attack on our nation stirred within me the “spirit of liberty.” At the time, I was a 30-year old strategist for a Fortune 100 corporation. Giving up a comfortable and more lucrative career to become a lawyer was not in my five-year plan. But I felt that, at heart, my easy life was unjustifiably selfish. Accordingly, I enlisted in the first class to enter law school post-9/11.

At a similar time in our country’s history, Judge Learned Hand expressed to thousands of people gathered in Central Park what it means to be an American. He spoke of “the spirit of that America which lies hidden in some form in the aspirations of us all”—*the spirit of liberty*.¹

“The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interest alongside its own without bias... ”

Before this crowd, Judge Hand wondered out loud “whether we do not rest our hopes too much upon constitutions, upon laws and upon courts.” “These are false hopes,” he said. “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it... ”

Although laws, constitutions, and courts alone cannot save liberty, there is much to be learned by their faithful operation. Consider, for example, the judiciary, which earns its independence, and its reputation as the least dangerous branch, mainly on account of institutional self-restraint. As Justice Brandeis said, the “most important thing we do is not doing.”² Such “self-limitation,” noted Goethe, “is the first mark of the master.”³ The familiar judicial maxims of restraint thus serve to promote liberty by not thwarting the equally vital role of informed democracy.

Paradoxically, the “passive virtues”⁴ exemplified by the judiciary must be emulated by every citizen if we are to collectively activate the American spirit of liberty. Wise citizens seek to understand the minds of other men and women and weigh competing interests while not being too sure that the conclusions first reached are right.

Without this tempering spirit of liberty in mind, clerking or lawyering can be frustrating, especially to the young, impatient, idealistic graduate seeking within a short period to help remedy a vast array of injustice. Published opinions, for example, will seem restrained compared to earlier drafts, or to discussion at the judges’ conference, or to a judge’s probing questions at oral argument. It is helpful, however, to remember Chief Justice Traynor’s final analysis after many decades on the bench: “the primary obligation of a judge, at once conservative and creative, is to keep the inevitable evolution of the law on a rational course... The complacent captain in the armchair is not more of a danger than the pilot who would navigate with a clenched fist in the air instead of at the helm.”⁵

The spirit of liberty appropriately reminds us that “[t]he Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.”⁶ Simply stated, the spirit of liberty is not the sole responsibility of one branch of government. Nor can it be saved by relegation to ancient documents or government institutions. It is a pacemaker needed within every heart.

Today, there is an inordinate amount of pressure on the judiciary to solve society’s ills (followed by attacks on its independence



The Honorable Sergio A. Gutierrez of the Idaho Court of Appeals and his law clerk Wes Meyring in front of the Statehouse liberty bell.

when it does), as well as pressure on the rest of our justice system. This undermines the spirit of liberty by abdicating our responsibilities as Americans, and improvidently pushes our republic towards its breaking point.

Consequently, lawyers, while champions of rule by law, cannot merely be its officers inside the courthouse. “[Y]e have been called unto liberty; only use not liberty for an occasion to the flesh, but by love serve one another.”⁷ Put in a secular context, those words ring true to all Americans, wherever we are. As Cardozo urgently reminds, “The process of justice is never finished, but reproduces itself generation after generation, in ever-changing forms, and today, as in the past, it calls for the bravest and the best.”⁸

ENDNOTES

¹ Learned Hand, *The Spirit of Liberty*, Address at “I am an American Day” Ceremony in Central Park, N.Y. (May 21, 1944), reprinted in *HANDBOOK FOR JUDGES* 279, 279-81 (WILLIAMS & SAMPSON, EDS., 1984).

² HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 364 (6th ed. 1993).

³ Johann Wolfgang von Goethe, *Was Wir Bringen* (1802), quoted in ABRAHAM, *THE JUDICIAL PROCESS* at 348.

⁴ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, title of ch. 4 (1962), noted in ABRAHAM, *THE JUDICIAL PROCESS* at 347. Passiveness, of course, does not equate to indifference.

⁵ Roger J. Traynor, *The Limits of Judicial Creativity*, Murray Lecture at University of Iowa College of Law (March 31, 1977), reprinted in *HANDBOOK FOR JUDGES* at 155-56.

⁶ *Reynolds v. Sims*, 377 U.S. 533, 624-25 (1964) (Harlan, J., dissenting), quoted in ABRAHAM, *THE JUDICIAL PROCESS* at 345, 370.

⁷ Paul the Apostle, *Letter to the Galatians* 5:13.

⁸ Benjamin N. Cardozo, *The Game of the Law and Its Prizes*, Commencement Address at Albany Law School (June 10, 1925), reprinted in *HANDBOOK FOR JUDGES*

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Weston Meyring lives in Boise and is clerking until July 2007 for the Honorable Sergio A. Gutierrez of the Idaho Court of Appeals. Weston received his J.D., magna cum laude, from Gonzaga University School of Law, and his A.B. from Brown University. He wishes to thank the Thomas More Scholarship Program at Gonzaga University School of Law for its dedication to fostering in young lawyers a commitment to public service. The author may be reached at wmeyring@gmail.com

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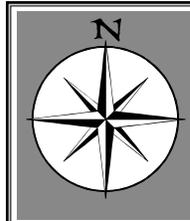
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Friday May 4, 2007 from 8:30
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If you still haven't paid your fees you must add a late fee payment – Active/House Counsel - \$50.00 or Affiliate/Emeritus - \$25.00 to your payment when you send it to the Bar. It must be physically received in our office by February 28, 2007. On March 1, 2007, the names of all attorneys who have not paid their 2007 licensing fees will be submitted to the Idaho Supreme Court for license cancellation. If you have questions please call the Membership Department (208) 334-4500 or astrause@isb.idaho.gov



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OF INTEREST

IN MEMORIAM

JOHN A. CHRISTENSEN 1954-2006

John A. Christensen, Caldwell died December 19, 2006 in Meridian of natural causes. He was born September 15, 1954 in Moscow, Idaho to Reuben J. and Ora LuDean Amundsen Christensen. He grew up and received his education in Moscow, graduating from Moscow High in 1972. John entered the University of Idaho for one year before going to Rochester, N.Y. for the LDS church. He then returned to the University of Idaho where he finished his undergraduate degree and then attended the University of Idaho College of Law and obtained his juris doctorate. He was married to Becky Louise Johnson in 1979. They have three children. During his career he worked in the public sector working with the Canyon county prosecutor office, most recently as Deputy Prosecuting Attorney. Music was a big part of his life. He loved singing and playing the guitar with his family and was especially fond of the Beatles. He had a marvelous sense of humor and enjoyed making people laugh. John is survived by his wife Becky, his three children, Anne of Henderson, Nevada Steven of Moscow, and Kasen of Caldwell; his parents of Meridian, sister Ruth Ann (Larry) Allred of Henderson, Nevada, and brother, Stephen (Linda) Christensen of Boise, as well as numerous nieces and nephews.

—RECOGNITION—

Steve Berenter, Kim Stanger, Ken Howell, Janine Sarti, Paula Kluksdal, Nick Taylor, and Lynnette Davis with **Hawley Troxell Ennis & Hawley LLP**, Boise joined with the members of the Association of Corporate Counsel Mountain West Chapter to celebrate the national "Make a Difference Day," a day of sharing created by *USA Weekend*, the weekly magazine of *USA Today*. It has become a national day of neighbors helping each other. The Hawley Troxell project was to repaint the dining room at Serena's House in Boise. Serena's House is operated by the Women's and Children's Alliance, and offers a safe haven to women and children victimized

by domestic and sexual violence. In Boise over 300 children a year move through their doors. Hawley Troxell contributed the paint as well as a number of volunteers to help paint the kitchen.

—ON THE MOVE—

M. Allyn Dingel, Jr., has retired from Elam & Burke, P.A. He practiced with the firm since 1967 as a trial practice lawyer. He is a Fellow of the American College of Trial Lawyers and received the Distinguished Lawyer of the Year Award from the Idaho State Bar in 2004.

Allyn will continue to practice in Boise. He can be reached at: M. Allyn Dingel Jr., Attorney at Law, 1020 W. Main, Ste. 400, Boise, Idaho 83702, (208) 333-8506, madlaw@cablone.net

Jason E. Prince, a Boise native and graduate of Notre Dame Law School, has joined the litigation practice group of Stoel Rives LLP. He will practice commercial and business litigation, with an emphasis on complex contractual disputes. He has represented clients in both federal and state courts in contracts, sales of goods, intellectual property, construction and land use.

Prince holds a bachelor's degree from Davidson College and a master's degree in land economy from Cambridge University. He has been a law clerk to Judge Susan H. Black of the U.S. Court of Appeals for the Eleventh Circuit, a deputy press secretary for a member of the Japanese House of Representatives, a legislative correspondent for U.S. Senator Mike Crapo and an intern at the Idaho Commission on Hispanic Affairs. Prince is a member of the USA Swimming International Relations Committee and is active in the Boise Metro Chamber of Commerce. He is admitted to practice in Idaho, the U.S. District Court for the District of Idaho and the U.S. Court of Appeals for the Eleventh Circuit.

Richard D. Campbell and Michael S. Bissell are pleased to announce the addition of their new partner, **Patrick J. Kirby** to the firm of Campbell, Bissell & Kirby, PLLC.

Mr. Kirby practices in the areas of labor and employment (management), employment benefits, commercial litigation, and insurance defense. He earned his B.S. degree in Business Economics from Marquette University in 1984. After serving as a Lieutenant in the U.S. Navy, he received his J.D. Degree, cum laude, from Gonzaga University Law School in 1993. He is admitted to practice in all State and Federal Courts in Washington and Idaho; the U.S. Ninth Circuit Court of Appeals; and the Supreme Court of the United States. He is a member of the Spokane County Bar Association, the Washington State Bar Association, and the Idaho State Bar Association. He can be reached at (509) 455-7100 and at pkirby@cbklawyers.com.

Sandra A. Meikle has opened Meikle Law Office, PLLC. A University of Idaho graduate, she has practiced in Boise for 13 years, litigating hundreds of cases in criminal, civil, and administrative forums. Recently, her work has included civil litigation, criminal defense, family law, and real estate. She also serves as an Administrative Hearing Officer, is a Certified Mediator, and will be teaching Real Estate Law and other courses for the Idaho Career Institute. Ms. Meikle's firm is located at 9199 Black Eagle Drive, Boise, Idaho 83709, and she can be reached at (208) 287-8446 and at sandy@meiklelawoffice.com.

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Workers Compensation Section Annual Seminar in Sun Valley on March 9, 2007. "Book your room now at the Sun Valley Resort by calling 1-800-786-8259. Tell the reservation operator that you are with the Idaho State Bar Workers Compensation Group to receive special room rates.

FEBRUARY/MARCH

Thursday - Saturday, February 15 – 17, 2007 at the Red Lion Templin's Hotel, Post Falls, Idaho

Annual Bankruptcy Seminar (12.5 CLE credits of which 1.25 is ethics credits)

Sponsored by the ISB Commercial Law and Bankruptcy Section

This is the 25th Annual Bankruptcy Section Seminar. This year's topics include update on the rule changes since the BAPCPA; perfection and treatment of security interests; U.S. Trustee's report; Small Business and Chapter 11 bankruptcies and a panel of bankruptcy judges. For room reservations at the Red Lion Templin's call (800) 733-5466.

Wednesday, February 21, 2007 from 8:30 - 9:30 a.m. (MT) at the Law Center, Boise

Obtaining Venture Capital for a Startup Business (1 CLE credit)

Sponsored by the ISB Young Lawyers Section

This CLE will discuss how to search for venture capital for a client starting a business, and some of the issues involved in negotiating the venture capital agreement.

Thursday, February 22, 2007 from 8:30 a.m. to 9:30 a.m. (MT) at the Law Center, Boise

Ethical Considerations in Personal Injury and Bankruptcy Cases (1 CLE ethics credit)

Sponsored by the ISB Professionalism and Ethics Section

This CLE will feature a panel discussion by practitioners on the ethical considerations when handling personal injury and bankruptcy cases.

Friday, February 23, 2007 from 8:30 a.m. - 4:30 p.m. (MT) at the Doubletree Riverside Hotel, Boise

Real Property Section 2007 Annual Seminar (CLE credits TBA)

Sponsored by the ISB Real Property Section

The Real Property Section of the Idaho State Bar will host their 2007 Annual CLE at the Doubletree Riverside Hotel in Boise. Watch your email for further details regarding topics and speakers.

Wednesday, February 28, 2007 from 8:30 a.m. to 10:00 a.m. (MT) at the Law Center, Boise

An Insider's Account Litigating Kitzmiller v. Dover Area School District (1.5 CLE Credits)

(The case which involved the teaching of intelligent design in public schools)

Sponsored by the Idaho Law Foundation

The seminar will feature Witold "Vic" Walczak, Litigation Director for the Pennsylvania ACLU who will speak about his experience litigating Kitzmiller v. Dover Area School District, the first case challenging the teaching of "intelligent design" in public schools.

Thursday, March 8, 2007 from 8:30 to 11:45 a.m. (MT) at the Law Center, Boise

Intellectual Property Due Diligence in Mergers and Acquisitions (CLE credits pending)

Sponsored by the ISB Intellectual Property Section

Join Mark Wittow and David Daggett, both from the Washington State law firm of K & L Gates, as they discuss intellectual property due diligence.

Friday, March 9, 2007 from 8:00 a.m. to 5:00 p.m. (MT) at the Sun Valley Resort, Sun Valley

Annual Workers Compensation Seminar

Sponsored by the Workers Compensation Section

Join the Workers Compensation Section for this year's important seminar on Workers Compensation law. The agenda will include hot topics and the most recent information on trends in the practice.

Friday - Saturday, March 9 & 10, 2007 from 8:00 a.m. to 5:00 p.m. (MT) at the Federal Court, Boise

Trial Skills Academy

Wednesday March 15, 2007 from 8:30 to 9:30 a.m. (MT) at the Law Center

Sale or Acquisition of a Small Business (1.0 CLE credit)

Sponsored by the Young Lawyers Section

This CLE will discuss the issues involved in negotiating and consummating the sale or acquisition of a small business. Featured speakers are Brian Hansen and Tobi Mott from Holland & Hart.

SAVE THESE DATES

April 18, 2007 from 8:30 to 9:30 a.m. (MT) at the Law Center

Negotiating a Real Estate Transaction, Sponsored by the ISB Young Lawyers Section

May 4, 2007 from 8:30 a.m. to 4:30 p.m. (MT) at the Boise Centre on the Grove

Practical Skills Seminar, Sponsored by the Idaho Law Foundation

May 7, 2007 from 8:30 a.m. to 4:30 p.m. (MT) at the Boise Centre on the Grove

Business and Corporate Law Section Annual Seminar, Sponsored by the ISB Business and Corporate Law Section

July 18-20, 2007 at the Boise Centre on the Grove

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