Contra Costa Lawyer Online

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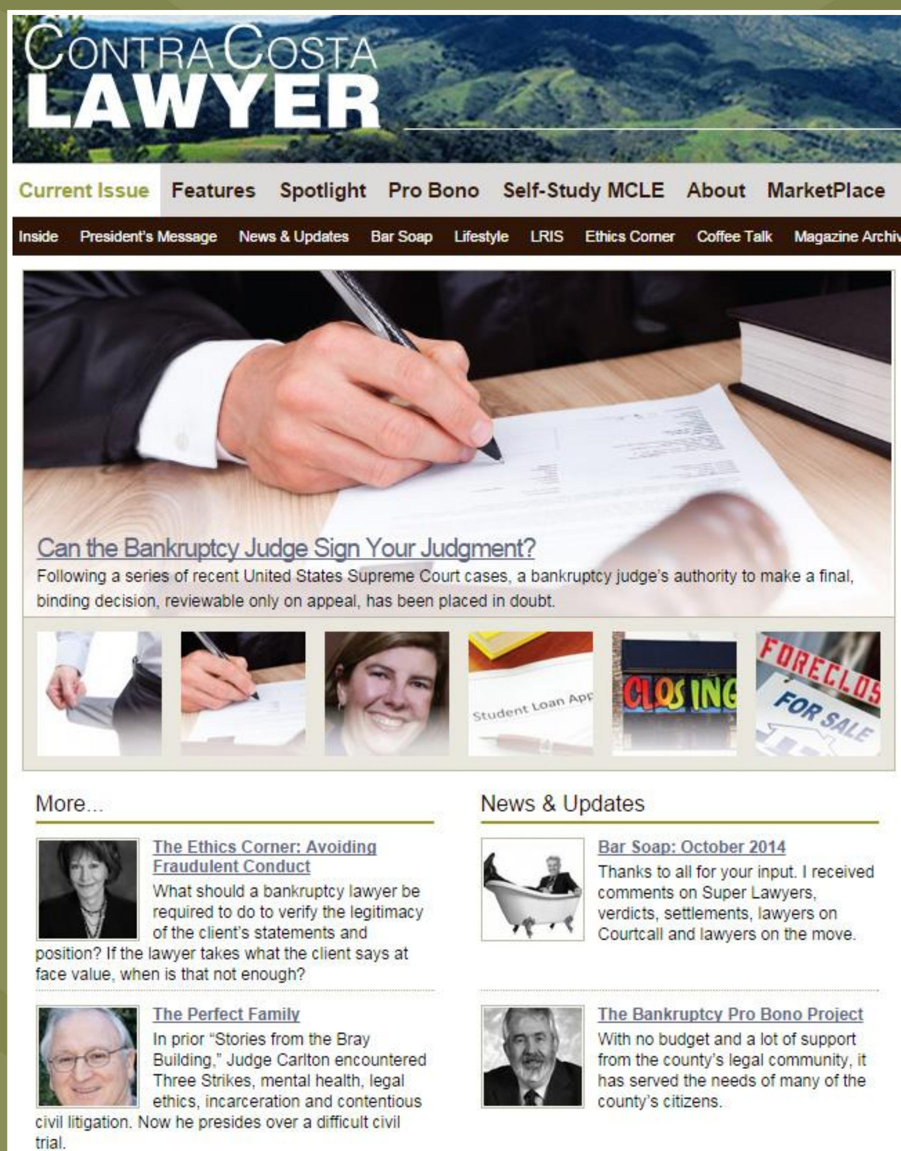

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA), published 12 times a year - in six print and 12 online issues.

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Guest Editor's Column, October 2014

Wednesday, October 01, 2014

This month's Contra Costa Lawyer is dedicated to bankruptcy and litigation. As many of you undoubtedly know through experience, these two areas of law do not always exist entirely independently, but interact with each other in many and varied ways. This intersection, of bankruptcy and litigation, is a big part of what we are focusing on this month.

To paraphrase a popular series of commercials … sometimes you are at the corner of "I have a great case I am working on," and "Oh no! My client just filed bankruptcy!" What do you do? You open up **David Schuricht's** article, for starters. There is a lot to consider, from how you will get paid for the work you have already done, to whether you can continue representing your client without permission, and this article can help you get organized.

You may find yourself needing the bankruptcy judge to enter a judgment for your litigated case. Can you do that? **Corrine Bielejeski's** article takes a close look at this question (Spoiler … the answer is more complicated than it seems—read more to find out why).

An interview that should be of interest to both bankruptcy attorneys and litigators who might find themselves in Bankruptcy Court (with a client, of course), is **David Arietta's** interview with Martha Bronitsky, the Chapter 13 standing trustee who oversees every Chapter 13 case filed in the Oakland Division of the Northern District of California Bankruptcy Court. In addition to giving you insight into her background and the way her office works, Ms. Bronitsky offers tidbits of advice to both bankruptcy attorneys who practice with her office regularly AND to state court attorneys who might find themselves working with her office for the first time.

There is a new movement to make higher education more affordable. U.S. News even did a ranking of colleges based on "value" this year (http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/best-value). This new look at the value of college has taken place in an era of increasingly burdensome student loans. One question that many people are asking is whether those loans are dischargeable in bankruptcy and, if so, how does one go about doing that? **Scott Jordan's** article addresses this question.

What happens when your client is the landlord of a commercial building and his tenants file bankruptcy? What are your rights as the landlord? Who owns the real property located on the premises? These are just some of the questions **Vahishta Falahatil** considers in her article on commercial leases and bankruptcy.

Next, **Steve Knuppel** takes a look at the ability of a guarantor to invoke the sham guarantee and a creditor's ability, in essence, to obtain a deficiency judgment notwithstanding the California anti-deficiency rules.

We continue our focus on bankruptcy issues, in both our Pro Bono Spotlight and in our Ethics Corner. In the Pro Bono Spotlight, **Alan Ramos** tells us about the Bankruptcy Pro Bono Project here in Contra Costa County: How it started, how it has grown and how it continues to help the residents of the county. Meanwhile, **Carol Langford** looks at the question of exactly how much (and what kind of) advice we can give our clients in bankruptcy (particularly advice about asset protection) without violating our ethical duties against advising clients to commit fraudulent acts.

Not all litigation intersects with bankruptcy. Sometimes a litigated case is just a litigated case, and so we have articles focusing on various aspects of litigation.

Construction defect is a large area of litigation. What, exactly, are the homeowners' remedies when discovering a construction defect that has not caused actual damage to the property (even if it may have caused economic damages)? What about where the defect has caused actual damages? Is the homeowner limited to the remedies set out in SB 800 (construction defect)? **Brian Seibel** takes a look at this question and recent developments around SB 800.

With the improvements in the economy and recovery in our real estate markets, more people are getting back to having equity in their homes. Unfortunately, that good news comes with bad—more equity means more equity stripping, particularly among the elderly. **Craig Nevin** takes a closer look at this issue and offers a host of possible remedies for those who may have been victimized.

Practicing in Northern California is very different than practicing in Southern California, for many reasons. One of those reasons is the “LA Stip.” Although it is used in Southern California regularly, it is not something used in Northern California practice. Have you ever wondered about this difference? If so, make sure to read “The Real Story about the LA Stip" by **Wendy Graves**, where she explains the history of the LA Stip and discusses why it is used in Southern California litigation practice.

Now that we have just filled our minds with all of this wonderful substance, maybe it’s time to read something a little less heavy. Want to be “in the know” with what is going on with our local attorneys? **Matt Guichard** has another installment of Bar Soap that is just filled with news and happenings.

Maybe you prefer some good fiction? We are proud to publish another installment of the Judge Carlton stories by **Justice Marchiano (Ret)**. “The Perfect Family” takes a look at a wrongful death action in which everything is not as perfect as it may seem at first.

Last, but not least, a big THANK YOU to our two guest editors this month, **Marlene Weinstein** and **Craig Nevin**, who both gave generously of their time and expertise to make this issue happen.

Marlene G. Weinstein is a sole practitioner whose practice is devoted exclusively to Bankruptcy Law representing debtors, creditors and Chapter 7 trustees. She has also recently been appointed as a Chapter 7 panel trustee. She believes pre-bankruptcy planning is important and that it can sometimes be used as an effective tool in negotiations between parties involved in non-bankruptcy disputes. Marlene often works with her clients in conjunction with their family law, tax, litigation and other non-bankruptcy attorneys. Her office is in Walnut Creek and she can be reached at (925) 472-0800.

Formerly Associate General Counsel for a major real estate developer in Irvine, for over 25 years, ***Craig Nevin*** has provided litigation and transactional counsel to owners, developers, financial institutions, contractors, subcontractors and other companies in complex business, real estate, construction and development related matters. He has presented numerous seminars concerning real estate, construction, development, sales and mortgages, as well as litigation management and avoidance. Mr. Nevin is on the Board of Directors and current Chair of Contra Costa Senior Legal Services and on the Advisory Board of Directors of The Law Center.

What to Do if Your Civil Litigation Client Files Bankruptcy

Wednesday, October 01, 2014

You’re a litigator representing a plaintiff or a defendant in a lawsuit in Superior Court. One day, you learn that your client, either in *propia persona* or through other counsel, has filed a bankruptcy petition. What should you do? The answer depends partly on whether your client is a plaintiff (or cross-complainant) or a defendant (or cross-defendant) in the lawsuit, although some considerations are common to both situations, and in either case, the answer definitely ***is not*** to continue with the litigation as though nothing has changed. Here are some pointers:

Impact of the Automatic Stay

If you represent a defendant or cross-defendant who has filed bankruptcy, chances are that the litigation (or the part in which your client is a defendant) is stayed by the bankruptcy filing. See 11 U.S.C § 362[1] respecting the scope and effect of the “automatic stay,” including the (relatively few) exceptions to its applicability. If your case is stayed, you should file and serve a notice of stay (explaining that the case is stayed by your client’s bankruptcy) in the court where the litigation is pending.

Unless your case fits within one of the exceptions, the automatic stay prohibits the prosecution of the action against the defendant debtor until the stay terminates or the bankruptcy court makes an order granting “relief from stay” that permits the action to proceed. Unless the plaintiff’s claim is nondischargeable,[2] if your client eventually receives a bankruptcy discharge, the discharge *permanently* enjoins the plaintiff from continuing or commencing an action to recover the claim from your debtor client as a personal liability.[3]

What if the plaintiff obtains an order “granting relief from stay” from the bankruptcy court, allowing the plaintiff to continue prosecuting the litigation in state court? If that happens and you are going to continue as debtor’s counsel in the litigation, then you’ll want to pay attention to the points discussed below, especially the points about getting your employment approved by, and your fees and other charges allowed by, the bankruptcy court.

Causes of Action that Become Property of the Bankruptcy Estate

If your client is a plaintiff or cross-complainant, you need to be aware that: (1) the automatic stay does *not* stay a proceeding that was initiated by the debtor;[4] and (2) the cause of action you have been prosecuting is now, in all likelihood, property of the bankruptcy estate.[5]

When you have been representing the debtor in prosecuting a cause of action that now has become property of the debtor's bankruptcy estate, it is a good idea (particularly if your client is in *pro per* in the bankruptcy case) to remind your client that the cause of action needs to be scheduled (listed) as an asset on Schedule B (a list of the debtor's personal property) in the bankruptcy case.

While the existence of the lawsuit will certainly come to light if the bankruptcy court is asked to approve your employment for the purpose of prosecuting it (see below), some debtors may not realize that the cause of action is an asset that needs to be scheduled as such in the bankruptcy—and the failure to schedule an asset can come back to bite a debtor who might assume, after a Chapter 7 case is closed without the cause of action in question having been "administered" by the trustee, that the lawsuit again belongs to him or her.

If the cause of action bears fruit later and wasn't scheduled, the trustee may be able to take it (or its proceeds) even long after the bankruptcy case is closed. In some cases, judicial estoppel has been successfully asserted as a defense to a claim after a debtor's failure to schedule it in the bankruptcy case.

Need for Approval of Counsel's Employment and Compensation

The employment (or retention) of an attorney to represent the bankruptcy estate (i.e., to represent a Chapter 7 bankruptcy trustee, a Chapter 13 debtor or a Chapter 11 debtor-in-possession or trustee[6]) in state court generally requires the bankruptcy court's approval.[7] If you represent a plaintiff who has filed bankruptcy, you'll probably want to contact the bankruptcy estate's representative (the trustee in a Chapter 7 case or in a Chapter 11 case where a trustee has been appointed; and the debtor—your client—or, better yet, your client's bankruptcy counsel, in a Chapter 13 case or in a Chapter 11 where there is no trustee), to find out whether the bankruptcy estate wishes to retain you as counsel to continue to prosecute the lawsuit in state court.

If you *delay* in applying to the bankruptcy court for approval of your retention by the bankruptcy estate, you will be "at risk" of not getting paid for any legal services you may provide between the time the bankruptcy petition was filed and the time your employment is approved. If you fail to get bankruptcy court approval, you probably won't be paid for your services, at least not by the bankruptcy estate.

In addition, in most situations, your charges (both fees and expense reimbursement) must be approved by the bankruptcy court before you can be paid.[8] This means that an application for compensation will have to be filed and set for hearing in the bankruptcy court and that you will be entitled to receive payment only to the extent your application is approved.[9]

Extension of Deadlines

Respecting deadlines, you should know that federal bankruptcy law (Code § 108) extends certain deadlines for the trustee (or—in a Chapter 13 case or in a Chapter 11 where no trustee has been appointed—the debtor) to file any pleading, notice or demand in a state court action, provided the relevant deadline did not expire before the bankruptcy petition was filed.

Removal to the Bankruptcy Court

Federal law confers upon state court litigants the right to remove to federal court (in practice, this usually means to the bankruptcy court, which is an "arm" of the district court) most civil actions "related to" a bankruptcy case.[10] If the debtor in a bankruptcy case is a party to state court litigation, it's a safe bet that the litigation is "related to" the bankruptcy and is a candidate for removal.[11] Whether to remove a cause of action or resist removal by an adverse party, can, of course, be an important tactical question involving a number of factors.

Need for Approval of Settlements

Don't forget that when you are representing an estate representative, any settlement or compromise will need to be approved by the bankruptcy court before it will bind your client.[12] Be sure to make the adverse party aware of this when you are involved in settlement negotiations, and always include a term in the settlement agreement making the settlement contingent on bankruptcy court approval.

Accounts Receivable for Prepetition Legal Services

Finally, if you have unpaid billings based on services you provided before the bankruptcy was filed, don't forget that the automatic stay applies to you, the same as to any other creditor. Once your client has filed a bankruptcy petition, you can't demand that the debtor bring your billings for prepetition fees current. You may be able to keep the funds in your trust account depending on when the funds were deposited and when the fees to be paid were incurred.

You may want to file a timely proof of claim in the bankruptcy case for the amount of your outstanding prepetition charges if you want to receive a distribution from the estate, but there are some potentially adverse consequences of doing so.[13]

Finally, unless the debtor voluntarily enters into a reaffirmation agreement with you that complies with the strict requirements of Code § 524(c) & (d), your client's debt to you for pre-filing services will very likely be discharged if your client receives a discharge in the bankruptcy case–even if you continue to provide services to your client after the bankruptcy case is closed.

While all of these issues deserve further discussion, it is hoped that this article will put you on the right path toward determining what you should do when your litigation client morphs into a bankruptcy debtor.

David Schuricht is a partner in the Walnut Creek law firm of Katzen & Schuricht, where his practice focuses on bankruptcy law. Mr. Schuricht is a 1974 graduate of Boalt Hall School of Law, and he has been actively practicing in California for nearly 40 years.

[1] Unless otherwise indicated, all subsequent statutory references in this article are to Title 11 of the United States Code ("Code").

[2] See Code § 523 & 1328.

[3] Code § 524(a).

[4] *Brown v. Armstrong*, 949 F.2d 1007 (8th C. 1991).

[5] See Code § 541.

[6] Chapter 9 (municipality) and Chapter 12 (family farmer) bankruptcy cases are relatively rare (at least, with respect to Chapter 12, in our area), so they aren't further mentioned in this article.

[7] Code § 327.

[8] Code § 330.

[9] *Id*. FRBP 2016.

[10] See 28 U.S.C. §§ 1334 & 1452.

[11] *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002, ftnt. 11 (4th C. 1986) questioned on other grounds in Chord Assocs., LLC vs. Protech 2003-D. LLC 2010 U.S. Dist. LEXIS 28465 (E.D.N.Y. 2010); LSM Hotel, LLC vs. Serhan (In re LSM Hotel, LLC), 2011 Bankr. LEXIS 635 (B.C.S.D. Cal. 2011).

[12] See Federal Rule of Bankruptcy Procedure ("FRBP") 9019.

[13] See FRBP 3002 & 3003.

Can the Bankruptcy Judge Sign Your Judgment?

Wednesday, October 01, 2014

Congratulations! The bankruptcy judge just signed an order in your client's favor after a hard-fought adversary proceeding. After calling your client, you celebrate and put your feet up. At least, that's what you did in the old days. Now, you worry.

Following a series of recent United States Supreme Court cases, a bankruptcy judge's authority to make a final, binding decision, reviewable only on appeal, has been placed in doubt. This article will explain the issues, update you on the case law, and provide some suggestions going forward.

Let's start at the beginning. Congress set bankruptcy judges apart by only giving them limited authority. 28 U.S.C. §157 delineates when a bankruptcy judge can enter orders (core) and when matters have to be sent to the District Court instead (non-core). As a practical matter, though, parties often consented to stay in the Bankruptcy Court, even when a District Court judge could have heard the matter.[1] District Court judges also favored bankruptcy matters staying with the bankruptcy judges, issuing general orders and rules placing these cases squarely before their colleagues.

Stern v. Marshall

Then came *Stern v. Marshall*, 564 U.S. __, 131 S.Ct. 2594 (2011). One litigant, not liking the bankruptcy judge's ruling, argued that the judge lacked the authority to enter a final binding order.[2] In a five to four decision, the Supreme Court agreed with him. It held that while Congress clearly gave bankruptcy judges the authority to hear the matter, that statute was not enough.[3] Article III of the Constitution put that authority solely in the hands of District Court judges who, unlike bankruptcy judges, enjoy lifetime appointments and wage guarantees.[4]

Worried that the opinion could sound like bankruptcy judges had no authority at all, Chief Justice Roberts narrowly tailored the holding to say that bankruptcy judges lack the authority to enter final orders only where a "state law counterclaim … is not resolved in the process of ruling on a creditor's proof of claim."[5] Narrow holding or not, this case still caused a huge guessing game over judicial authority. Eventually a consensus was reached. The Supreme Court had limited its decision to a particular type of claim, now dubbed *Stern* claims, so everything else could continue as normal. For those *Stern* claims, local rules were promulgated to clear up the confusion.

However, these rules did not completely clear up the picture. For example, what were *Stern* claims? If a bankruptcy judge thought a case involved *Stern* claims, should the bankruptcy judge issue findings of fact and conclusions of law, like he or she did for non-core cases, or simply send those cases on to the District Court? Also, if both parties consent to a bankruptcy judge entering a final order on a *Stern* claim, does that cure the constitutional problem?

Executive Benefits aka In re: Bellingham

Mindful of these open questions, the Supreme Court took on the case of *Executive Benefits Insurance Agency v. Arkison, Chapter 7 Trustee of Estate of Bellingham Insurance Agency*, also known in bankruptcy circles as *In re: Bellingham*.[6] Executive Benefits argued that the Bankruptcy Court lacked the authority to hear the trustee's fraudulent conveyance action, as it was a *Stern* claim. It also argued that the District Court's de novo review of the bankruptcy judge's order did not cure the initial deficiency.[7] The Supreme Court disagreed.

On June 9, 2014, a unanimous Supreme Court declared that bankruptcy judges could treat *Stern* claims like non-core proceedings—hearing cases and issuing findings of fact and conclusions of law for review and entry of final order by the District Court.[8] It also ruled that *de novo* review by the District Court saved the order, even if it wasn't technically a finding of fact initially sent over for the District Court judge's review and signature.[9]

Our local judges must be psychic, as this is exactly what they provided for in District Court General Order 24: "The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution."[10]

Now it is clear that bankruptcy judges can hear these matters, even if the District Court may have to sign off on them. It also appears that *de novo* review by the District Court will cure an authority deficiency. I can hear you asking about the first question that *Executive Benefits* raised, about whether fraudulent conveyance claims are *Stern* claims. Justice Thomas brushed past that saying "the Court of Appeals held, and we assume without deciding, that the fraudulent conveyance claims in this case are *Stern* claims."[11] He also stated that the court would come back to the consent issue.[12]

Wellness International

With those questions remaining, the Supreme Court has accepted *Wellness International Network v. Sharif*, case number 13-935, for review this term. Certiorari was granted on July 1, 2014, with the petitioners' brief due September 9, 2014, and respondent's brief due November 19, 2014. As of the date this article was written, a date had not yet been set for oral argument. Wellness International should decide the question of consent, both explicit and implied, when the court hears it. It may also further define *Stern* claims.

So what does this mean for you and your client? The good news is yes, the bankruptcy judge can hear your case. If it's a core proceeding, the District Court would prefer if you allowed the bankruptcy judge to hear the case and issue findings of fact, but you can always file a request for withdrawal of reference to have the District Court hear it.[13]

What if both parties consent to have the bankruptcy judge hear a *Stern* claim? That's still unclear, but in footnote 8 of the *Executive Benefits* decision, the court indicated it was not interested in "dramatically alter[ing] the division of responsibility set by Congress."[14] I will go on the record as saying actual consent grants bankruptcy judges constitutional authority, since they already have subject-matter jurisdiction. However, there is a split in the Circuits, so we'll have to wait another year to see if I'm right.

Corrine Bielejeski is the owner of East Bay Bankruptcy Law, which received a Best of Antioch 2014 award from the Antioch Chamber of Commerce. She clerked for the Hon. Edward D. Jellen in the Oakland Bankruptcy Court, before entering private practice. She is a Past Co-Chair of the Bankruptcy Court's Bench-Bar Liaison Committee and invites the bar to contact her with any problems or suggestions that can be brought to the court's attention. Corrine can be reached at (925) 752-1826.

[1] §157(c)(2).

[2] *Id.* at 2601.

[3] *Id.* at 2608.

[4] *Id.* at 2601

[5] *Id.* at 2620.

[6] *In re: Bellingham,* 573 U.S. __, 134 S.Ct. 2165 (2014).

[7] *Id.* at 2175.

[8] *Id.*

[9] *Id.*

[10] Gen. Order 24, §1.01 (c).

[11] *Id.* at 2174.

[12] *Id.* at 2170 n.4.

[13] See 28 U.S.C. § 157(d), F.R.B.P. 5011, and Local Rule 5011-2. If you have a particularly contentious opposing party, you might want to start with that.

[14] 134 S.Ct. at 2173.

An Interview with Chapter 13 Trustee Martha Bronitsky

Wednesday, October 01, 2014

David Arietta, Chair of CCCBA's Bankruptcy Law Section, met up with Martha G. Bronitsky to discuss her role serving as the Chapter 13 Standing Trustee for 20 years for the United States Bankruptcy Court, Northern District of California, Oakland Division. She is responsible for all aspects of administering Chapter 13 cases filed in the Oakland Bankruptcy Court. She has an office in Pleasanton, has 31 employees and oversees the operation of an office that disburses approximately $40 million to creditors annually.

Bronitsky attended Los Gatos High School in Los Gatos, California, and went on to attend college at UCLA. After graduation, she received her law degree from the University of Maryland, Baltimore.

Tell us about your legal career before you became trustee.

I started off handling misdemeanor jury and court trials at the San Mateo County District Attorney's Office. After a few years, I took on the challenge of becoming in-house legal counsel for Home Savings of America. I was hired to be lead counsel for all bankruptcy matters in the Northern and Eastern districts of California. It was there that I first became exposed to the bankruptcy field from the creditor's perspective. I dealt with a lot of relief from stay matters and represented Home Savings in various bankruptcy cases. I was also litigation counsel on various matters in state and federal courts in Northern California.

So how did you end up being a Chapter 13 Trustee?

A local attorney encouraged me to apply, as there was a vacancy due to the death of Paul Wolfe, the then-Chapter 13 Trustee. The U.S. Trustee's Office reviewed approximately 400 applications and interviewed around 40 applicants. Fortunately, I was selected and started my position in June 1995. Devin Durham-Berk also started as a Chapter 13 Trustee around that time, but in the San Jose Division. We both received a lot of helpful mentoring from David Burchard, Chapter 13 Trustee, San Francisco Division, and Kathleen A. Leavitt, Chapter 13 Trustee, Las Vegas.

This year is your twentieth year as a bankruptcy trustee. Can you highlight any interesting situations that you have dealt with?

I remember one case early on. It was about 18 months after confirmation and the debtor filed a motion to modify the Chapter 13 plan. I discovered that the debtor was hiding income, and filed an objection. I prevailed at trial and got the case dismissed with a bar to future filings. At trial, the debtor's attorney mentioned that the trustee never asked about income at the meeting of creditors, to which Judge Jellen responded that bankruptcy is not a game of "hide the football."

How do you spend a typical day as trustee?

It depends, as I oversee two staff attorneys, four paralegals, and the rest of the staff. I review matters set for confirmation hearing. My staff prepares for confirmation hearings two weeks before and then I review the case one week before the hearing. We also have two meetings of creditors per month, which are prepped in a similar fashion. Either I or one of my staff attorneys handle the meetings of creditors. I hold regular meetings with my attorneys, paralegals and case managers, and once a quarter with all my staff. A lot of time is spent dealing with day-to-day issues and questions that come up on cases. There are two things that I do every morning—the first is to review the bank records and verify what checks cleared, and the second is to review the filed notices of mortgage payment changes.

Can you give any advice to bankruptcy attorneys whose cases your office regularly deals with and who appear in court with you?

Two words: "calendar management." The less you touch the file, the more money you will make. My office provides attorneys with a punch-list of things to do in every Chapter 13 case well before the meeting of creditors. Too often, attorneys wait until the last minute to resolve issues that could have been timely addressed. The same thing applies to confirmation hearings. Many matters can be resolved and taken off calendar well before the hearing date. There is a lot of work triggered on our end when there are continued meetings of creditors and matters set for confirmation. Additional advice would be to interview and scope out your clients. Not every client is suitable for a Chapter 13 bankruptcy. A client has had to have hit rock bottom and be on the upswing. Certain situations are a recipe for disaster.

Can you give any advice to state court attorneys who sometimes end up in bankruptcy court?

In state court, you normally run into different attorneys in an assortment of counties and departments. In bankruptcy court, you will be in front of the same judges and normally see the same attorneys in court. The worse thing to say is, "I do not know bankruptcy law." You can read the Bankruptcy Code and the local rules. Be polite with the judges and the trustees. You can ask questions and there are discovery tools available. Remember that the "pie" is only so big; your client is not the only one who is owed money. If you get into a jam, consult with a bankruptcy attorney.

Can you name some of your particular pet peeves? What common mistakes do you routinely see and what is particularly bothersome to you?

Attorneys who are non-responsive. My office sends out emails and notices on a regular basis and there are those who fail to respond. We put a lot of work into moving cases along, so we expect some measure of cooperation. Also, do not have your clients call us on matters that could have been dealt with by their attorney's office. It just takes up a lot of my staff's time.

You have been a bankruptcy trustee since well before the major changes to the bankruptcy law in 2005. In your view, how has BAPCPA impacted our local Chapter 13 practice?

It has added a lot of paperwork, but ultimately people are still able to file for bankruptcy relief. The means test did not turn out as Congress thought it would. Since the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was passed, practicing in the bankruptcy field has been a lot more exciting. We are routinely exploring the limits of the Bankruptcy Code including the means test. I have dealt with several appeals that make my job all the more interesting.

How is the new model Chapter 13 Plan working out?

The old plan was too vague and caused problems for us when dispersing on claims. The new plan gives us more certainty. It is easier for my office now to know when and how much to pay on a claim. Parts of the plan still have to be flushed out. There are provisions that will have to be litigated and we have one on appeal right now.

Outside of being a busy Chapter 13 trustee, what do you like to do?

My husband and I like to travel. I am a member of Rotary International. We have done several Rotarian-sponsored trips to China, Mexico and South Africa, delivering wheelchairs to those in need. We are also season ticket holders for the Giants, plus we enjoy attending Cal football games.

Last question: What have you learned from being a trustee?

File your tax returns, make your mortgage payments and forget about payday loans.

David A. Arietta is a certified specialist bankruptcy attorney with an office in Walnut Creek. He is a graduate of King Hall School of Law, U.C., Davis. His practice specializes in representing debtors and creditors in Chapters 7, 11, and 13.

Recent Developments in Student Loans and Bankruptcy

Wednesday, October 01, 2014

Student loan debt is a growing concern in the American public psyche. About 68 percent of all students borrow money from either the federal government or private lenders to cover the costs of tuition, room and board.[1] As of July 2013, the total outstanding student loan debt in the United States was $1.1 trillion and growing.[2]

Student loan debt has grown nearly 300 percent in the last eight years.[3] The current default rate is 14 percent.[4] Student loan debt will almost certainly continue to grow. As many bankruptcy attorneys will attest, we are seeing more and more potential clients with student loans. Unfortunately, our ability to help is limited.

The internet is full of stories about how people are drowning in their student loan debt. Just the other day, I read a story about how a California couple were having trouble paying their deceased daughter's $200,000 student loans. For this couple, relief is possible, depending on the category into which the loan falls. Is the loan a federally backed loan or is it from a private lender? Was the loan for the cost of education, including tuition, room and board, and books? Or was the money used for non-educational purposes? A debtor with federal loans is more likely to have options, while very little relief is available for private loans. But what can be done where relief is not available through the lender?

Bankruptcy offers debtors the opportunity to obtain relief from most types of debt, mostly credit card, business, tax and mortgage debt. The debtor must show his or her income is insufficient to pay all debts, even over time. Unfortunately, student loan debt is not treated like most debt, and debtors must prove that it would be an "undue hardship" to repay student loan debt, a much higher standard to meet.

Student Loans and Bankruptcy

Prior to 1998, student loans were generally dischargeable in bankruptcy, under the right circumstances. However, in 1998, Congress made federally backed student loans virtually non-dischargeable and, in 2005, did the same for private student loans.

The United States Bankruptcy Code, 11 U.S.C. §523(a) provides that bankruptcy "does not discharge an individual debtor from any debt — (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and debtor's dependents, for (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other education loan that is a qualified education loan. …"

The attack against the presumption begins with the debtor filing an adversary proceeding in his or her bankruptcy case, claiming the debtor will suffer an "undue hardship" if forced to pay all or a portion of the student loan debt. Congress has not defined "undue hardship," leaving the issue to the bankruptcy courts based on the facts of each case.

Undue Hardship

The courts have generally adopted the *Brunner Test*, a three-pronged test requiring the debtor to prove by a preponderance of the evidence:

“(1) that the debtor cannot maintain, based on current income and expenses, a "minimal standard of living … if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.”[5]

"The debtor has the burden to prove all three prongs of the *Brunner* test. If the debtor fails to prove any one of the three prongs then the loan will not be discharged."[6]

Minimal Standard of Living

The debtor must show that he cannot maintain a minimal standard of living based on current income versus current expenses. The court must make a factual determination that the debtor "has no present ability to maintain a minimal standard of living if forced to repay his loans."[7] Courts have discretion to determine the reasonableness of the debtor's expenses.[8] This test is proved by the schedules the debtor files at the commencement of the bankruptcy case and is usually the reason the debtor files bankruptcy in the first place.

Additional Circumstances

The second prong requires the debtor to prove through additional circumstance that his or her hardship will persist and that the "circumstances [are] more compelling than that of an ordinary person in debt."[9] "Additional circumstances" include, but are not limited to:

- Serious mental or physical disability which prevents employment or advancement.
- The debtor's obligation to care for dependents.
- Lack of, or severely limited or poor quality of education.
- Lack of usable or marketable job skills.
- Underemployment.
- Maximized income potential, and no other lucrative job skills.
- Limited number of work years remaining.
- Age or other factors that prevent retraining or relocation.
- Lack of assets, whether or not exempt, which could be used to pay the loan.
- Potentially increasing expenses.
- Lack of better financial options elsewhere.

In a recent case, *In re Lilly*, Adv. Proc. No. 11-90470-CL, (Bankr. S.D.Cal. 2013), Lilly was a 55-year-old debtor with approximately $276,370 in student loan debt. Lilly was denied a discharge because the judge perceived that Lilly could earn more income based on his several graduate degrees, including a juris doctor degree. Lilly had never worked as a lawyer and his work history did not support such a finding, but nevertheless the judge believed, rightly or wrongly, it could happen.

Good Faith

The third prong of the *Brunner* test, "good faith," requires the debtor to show that the debtor has made appropriate efforts to repay the loan by maximizing income and minimizing expenses, and to negotiate an affordable repayment plan.[10] The cases generally require a showing by the debtor that he or she has made a reasonable attempt to repay the debt. However, in a recent case, a judge granted a discharge, concluding that the debtor met her burden of proof of "good-faith" even though she had never made a payment towards her $40,098 student loan debt.[11]

Partial Discharge

As the student loan issue becomes more prevalent in the news and in court, the courts may be slowly shifting towards the consumer. While the courts may not be willing to fully discharge student loan debts just yet, they are allowing partial discharges with more frequency. The debtor still needs to prove "undue hardship" under *Brunner,* but can now show that he or she cannot pay the entire debt over a reasonable period of time. A debtor who refuses to accept the lender's settlement offers and repayment options may still be eligible for partial discharge.[12]

Federal Repayment Options

Debtors with federally backed loans have options, outside of bankruptcy.

Those with multiple loans can apply to consolidate their loans through the Department of Education's Direct Consolidation Loan program. The Public Service Loan Forgiveness program gives a debtor a chance to have student loans forgiven if the student chooses a public service profession. If the debtor has trouble making the standard payments, they have options including the Income-Based Repayment Plan (IBR), the Pay as You Earn Repayment Plan, the Income-Contingent Repayment Plan and the Income-Sensitive Repayment Plan. A good source for details of each plan can be found at https://studentaid.ed.gov/repay-loans/understand/plans.

Private Repayment Options

Debtors with private student loans are at the mercy of the private lender. A lender may agree to a forbearance, but the debt will continue to accrue interest and possibly add on fees and other charges. Generally though, debtors are forced to take their chances in court and must prove "undue hardship" for relief.

Our society places a premium on a higher education. Students are increasingly forced to borrow to pay for it. Students are graduating with substantial debt and faced with years of making payments. Congress has chosen to make student loan debt virtually impossible to discharge in bankruptcy. We can debate the effect student loan debt has on our economy. Logic, however, dictates that student loan debtors will be forced to put off buying a new home or car in lieu of paying off their student debt. Perhaps Congress should reconsider its position before we all begin to suffer from the burdens of student loan debt.

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[1] National Center of Education Statistics, Digest of Education Statistics, http://nces.ed.gov, U.S. Department of Education (2014).

[2] Student Loan Debt Statistics, http://statisticbrain.com (2014).

[3] Shocking Student Debt Statistics, http://fastweb.com (2014).

[4] *Id.*, includes all loans with at least one past due payment.

[5] *In re Brunner*, 831 F.2d 395 (2nd Cir. 1987).

[6] *In re Carnduff*, 367 B.R. 120, 127 (9th Cir. BAP 2007) citing *In re Nys*, 308 B.R. 436, 441-42 (9th Cir. BAP 2004, aff'd 446 F.3d 938 (9th Cir. 2006).

[7] *In re Mason*, 315 B.R. 554, 560 (9th Cir. BAP 2004).

[8] *In re Pena*, 155 F.3d 1108 (9th Cir. 1998).

[9] *Nys*, 308 B.R. at 444.

[10] *In re Jorgensen*, 479 B.R. 79, 89 n.4 (9th Cir. BAP 2012).

[11] *In re Roth*, 490 B.R. 908 (9th Cir. BAP 2013).

[12] See *In re Hedlund*, 718 F.3d 848 (9th Cir. OR 2013).

Commercial Tenants Who File Bankruptcy

Wednesday, October 01, 2014

Your client is a commercial landlord, whose tenant just filed bankruptcy. He calls you in a state of panic wondering the impact the bankruptcy has on his commercial lease with the now-bankrupt tenant.

You find out the following information from the landlord:

The tenant entered into a commercial lease as an individual but operated his business through a corporation. Although this situation may not occur when dealing with big box tenants, it may when dealing with mom-and-pop tenants. Upon execution of the lease, the tenant established a corporation and purchased equipment necessary to operate his business through the corporation. The tenant owns the corporate stocks, while the corporation owns the equipment. The business is unsuccessful, and the tenant, as an individual, is forced to file bankruptcy. In the bankruptcy proceeding, the tenant lists the lease as part of his assets. What happens to the lease in the bankruptcy proceeding?

Upon filing of a bankruptcy, all assets of the bankrupt tenant, including any existing nonresidential leases entered into by the tenant, become the property of the bankruptcy estate.[1] 11 U.S.C § 365(a) grants the bankruptcy trustee or debtor in possession the power to either assume an unexpired nonresidential lease, assume the lease and then assign it, or reject the lease altogether. 11 U.S.C § 365(a) aims at "relieving the debtor of burdensome performance obligations while it is trying to recover financially."[2] Only an "unexpired" lease is subject to 11 U.S.C § 365. If the commercial lease expires on its own terms or is terminated under California law before the tenant files bankruptcy, then the trustee or the debtor in possession cannot assume the lease as it is not the property of the estate.[3]

Moreover, 11 U.S.C. § 365(d)(3) requires either the trustee or debtor in possession to make timely payments of all amounts due under the lease during the assumption or rejection period. If the lease is unexpired at the time of the bankruptcy filing, the trustee or debtor in possession has 120 days after the order for relief or the date of entry of the plan confirmation order, whichever date is earlier, to either assume or reject the lease.[4] Any assumption or rejection of the lease is subject to court approval, and the court may extend the 120-day time period on a motion for cause.[5] If the trustee or debtor in possession does not act within this period, the lease is deemed rejected.[6]

The bankruptcy estate is not subject to the terms of the lease unless the trustee expressly assumes the lease. Once the lease is assumed, it will remain in force as the property of the estate thereby obligating either the trustee or the debtor in possession to act in accordance with the lease provisions. Importantly, once the lease is assumed, the landlord's rights becomes an administrative claim with priority amongst the sea of creditor claims.[7] Also, upon assumption, the trustee or debtor in possession may assign the lease to a third party "only if adequate assurance of future performance by the assignee of such ... lease is provided."[8]

The trustee or debtor in possession may reject the lease during the 120-day time period. By rejecting the lease, the trustee or debtor in possession is relieved of any contractual obligations; however, the lease is deemed breached and the landlord is entitled to damages.[9] The landlord's damages do not have priority and is treated like any other unsecured creditor claim. In many occasions, even if the landlord files an administrative claim, the estate has no assets to collect on and, as a result, the landlord is left with no recourse.

During this entire process, there is an automatic stay in place that prevents the landlord from unilaterally terminating the lease prior to expiration of the assumption or rejection period.[10] This means that until the automatic stay is lifted, the landlord cannot initiate an unlawful detainer action for the tenant's failure to pay rent or initiate a property abandonment proceeding pursuant to California Civil Code section 1993, et seq.

After explaining the above procedures to the landlord, the question remains: What happens to the equipment owned by the corporation but left on the premises? Until the corporation files for bankruptcy, the landlord has very little recourse. The landlord may file a motion in Bankruptcy Court and bring this issue before the judge for determination. The landlord may also request the trustee to seek an order pursuant to 11 U.S.C. §554(a) abandoning the corporate stocks. Once the corporate stocks are abandoned back to the debtor, the landlord may begin negotiating with the tenant for removal of the equipment from the premises.

In the end, any course of action employed by the landlord will take time and a considerable amount of money since the fundamental purpose of bankruptcy laws are to protect the debtor tenant and not, necessarily, the landlord.

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[1] 11 U.S.C § 541.

[2] In re Pomona Valley Med. Grp., Inc., 476 F.3d 665, 672 (9th Cir. 2007).

[3] 11 U.S.C §§ 365(c)(3), 362(b)(10), 541(b)(2); In re Windmill Farms, Inc., 841 F.2d 1467, 1469 (9th Cir. 1988). A bankruptcy termination clause is generally unenforceable and, as a result, the landlord cannot claim termination of the lease based on such a clause alone. *See* 11. U.S.C. § 365(e)(1).

[4] 11 U.S.C § 365(d)(4).

[5] 11 U.S.C §§ 365(a), 365(d)(4).

[6] 11 U.S.C § 365(d)(4).

[7] 11 USC §§ 503(b), 507(a)(1), (2).

[8] 11 U.S.C. §§ 365(f), 365(f)(2)(B).

[9] 11 U.S.C §§ 365(g), 502(b)(6).

[10] 11 U.S.C. § 362(a).

Sham Guaranty Defense and the Effect of Lawlor

Wednesday, October 01, 2014

Although the real estate market has improved significantly since the greatest depths of the economic downturn, the market is very local and foreclosures continue to occur. When a foreclosure sale fails to generate enough money to pay the loan, the borrower is usually protected by statute from a deficiency judgment. However, if there is a guarantor, he or she typically does not enjoy these same protections. Yet under the right facts, the guarantor might be able to assert the sham guaranty defense.

A deficiency judgment (a judgment for the remaining loan balance after the proceeds from a foreclosure sale are applied) is prohibited when there is a non-judicial foreclosure or when the debt was incurred for purchase money.[1] Borrowers cannot waive anti-deficiency protections.[2] Whether anti-deficiency protections could, in theory, apply to guarantors is beyond the scope of this article. However, in practice they do not, because the law allows guarantors to waive anti-deficiency protections.[3] As a matter of standard practice, lenders require guarantors to sign sweeping waivers of anti-deficiency protections (among other defenses).

Consequences for guarantors can be severe. While the guarantor may view himself or herself as secondarily liable for the debt, lenders often view the guarantor as the primary source of recovery, because the guarantor has significantly less protection than the borrower/primary obligor. This anomalous situation is discussed thoroughly in "Guaranties in California Trust Deed Financing—How did 'Secondarily Liable' Parties End Up With All of the Liability? (Part 1)", by Charles A. Hansen, CEB Real Estate Law Reporter, July 2014.

The inequities can be further exacerbated by the fact that the lender is often the only bidder at the foreclosure sale and obtains the foreclosed property for far below its value. If the lender can then obtain a judgment for the entire "shortfall" from a guarantor that it believes is sufficiently solvent, rather than hoping for the highest possible sale price, the lender might come out well ahead by the sale price being low. It could both obtain the property at a steep discount *and* recoup the full balance of the loan from the guarantor.[4]

However, only a "true guarantor" can waive anti-deficiency protections.[5] Thus, a defendant can assert the sham guaranty defense, i.e., that he or she is really the primary obligor, and that the lender is merely attempting to subvert unwaivable anti-deficiency protections. For example, if a general partnership incurred debt to purchase real property and a general partner was asked to guarantee the debt, the sham guaranty defense could be invoked. The general partner is already liable for the debts of the general partnership and there is no purpose in having the general partner sign as a guarantor other than to do an end-run around anti-deficiency protections.[6]

Likewise, where a trustee of a revocable trust signed a guaranty related to the revocable trust's purchase of property, the trustee was personally liable under the law applicable at that time. Therefore, the guaranty provided by the trustee was held to be a sham guaranty.[7]

The sham guaranty defense also has been applied to entities such as LLCs and corporations, but the analysis becomes more involved. In *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, rather than the borrower being a general partnership, as originally intended, the lender required the defendants to create a limited partnership with a wholly owned corporation as general partner, with the defendants signing as guarantors. While the lender obtained extensive financial information from the defendants and some of their related entities, it did not obtain any financial information from the "borrower."

The court in *River Bank* ruled that the defendants raised a triable issue of fact as to whether the loan had been structured by the lender to subvert anti-deficiency protections.[8] The *River Bank* court further noted that it was not "conclusive … that the general partner in this case was a long-standing corporation that adhered to all formalities."[9] Thus, the sham guaranty defense was applied while stopping short of finding the borrower and the guarantors legally identical.

One of the most recent sham guaranty defense cases is *California Bank and Trust v. Lawlor* (2013) 222 Cal.App.4th 625. In *Lawlor*, the appellants/guarantors asserted the sham guaranty defense in an effort to avoid liability for a deficiency judgment, by pointing out that the guarantors owned and controlled the entities who were the named borrowers, that one of those entities was created for the purpose of holding title to the real property and that the lender had requested and relied upon extensive financial information from the guarantors; the *Lawlor* court rejected the sham guaranty defense under the facts of that case.

The extent of *Lawlor's* impact, if any, is yet to be determined. As of this writing, it has not been cited in any published opinion. Some have suggested that "[t]he moral of [*Lawlor*] is that a court will not allow individuals who have chosen to structure their borrowing through separate entities to assert a 'sham guaranty' defense'"[10] or that lenders can avoid the defense by requiring financial statements and tax returns from borrowers, even if they are recently created entities.[11]

However, it seems unlikely that requesting financial information from a newly created "borrower" will provide an absolute shield. If the information provided is devoid of meaningful content (due to a lack of financial history), the fact that the lender nonetheless decided to lend purportedly based upon such documentation might itself be probative to show that the lender is engaged in a ruse. As for the notion that the sham guaranty defense is unavailable where the borrowing is structured around separate entities, that notion is at odds with existing cases.[12]

While *Lawlor* seems to be applying a standard of "no legal separation" for application of the sham guaranty defense, none of the cases cited by *Lawlor* use that phrase. The cases have spoken of "significant" or "substantial" identity between borrower and guarantor, but have not required absolute identity.[13]

Lawlor, a 4th District Court of Appeals case, does not overrule any precedent. Also, the *Lawlor* opinion makes repeated reference to the defendants' failure to come forward with evidence to support its arguments, e.g., that the defendants failed to challenge evidentiary objections excluding all of their evidence, that "Defendants failed to offer any evidence," showing a unity of interest with the primary obligor, showing that the lender was involved with selecting the entities or required any particular loan structure, and "offer[ed] no evidence to show [the lender] did not also require financial information regarding [the nominal borrowers]."[14]

Thus, arguably, *Lawlor* does not mean that one *cannot* prove the sham guaranty defense if the defendants borrow through separate entities or if the lender requests financial records from the nominal borrower—rather it could mean simply that the defendants in *Lawlor* failed to marshal the evidence to prove their defense. We will have to await future cases to see if *Lawlor* is given any effect beyond its own facts.

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[1] California Code of Civil Procedure §§580b and 580d. Borrowers are also protected by the One Action Rule and Security First Rule (CCP §726). In the interest of brevity, reference to these rules is omitted in the remainder of this article.

[2] *Freedland v. Greco* (1955) 45 Cal.2d 462, 467.

[3] California Civil Code §2856(a)(3).

[4] See "The Real Deal" by Robert M. Heller, Big News for Small Firms Magazine, April/May 2010, page 17.

[5] *Torrey Pines Bank v. Hoffman* (1991) 231 Cal.App.3d 308, 321.

[6] *Riddle v. Lushing* (1962) 203 Cal.App.2d 831.

[7] See *Torrey Pines Bank*, above.

[8] *Id*. at 1423.

[9] *Id.*

[10] "California Court Rejects 'Sham Guaranty' Defense; Enforce Guaranty" by Bill S. Shiber, http://www.titleescrowfile.com/, February 7, 2014.

[11] "Don't Get Shammed", by Bob Benjy, Quarterly Prophets: Frandzel Robin Bloom & Csato, L.C. Legal Newsletter, Spring 2014, Volume 8, No. 1.

[12] See *River Bank*, above; see *Union Bank v. Brummell* (1969) 269 Cal.App.2d 836, 838 (sham guaranty defense sustained even where "defendants were unable ultimately to prove their unity of interest").

[13] See *Torrey Pines*, above; see *Trust One Mortgage Corp. v. Invest America Mortg.* (2005) 134 Cal.App.4th 1302, 1312.

[14] *Lawlor*, 222 Cal.App.4th at 637-641.

California's "Right to Repair Act" Is Not the Exclusive Remedy for ...

Wednesday, October 01, 2014

In 2000, the California Supreme Court in *Aas v. Superior Court* (2000) 24 Cal. 4th 627, 636, 101 Cal. Rptr. 2d 718, decided that homeowners who had purchased defectively constructed homes could not recover damages on a claim of negligence against the builder of defective homes, where those defects had not yet caused either actual property damage or personal injury.

The *Aas c*ourt reasoned that although "tort law provides a remedy for a construction defect that causes property damage or personal injury," in actions for negligence, no recovery is allowed for economic loss alone. The Court explained that while "any construction defect can diminish the value of a house" such depreciation was an "economic loss," not compensable under a negligence cause of action.[1]

In response, in 2002, the Legislature enacted "The Right to Repair Act," California Civil Code §895 et seq., commonly referred to in the construction industry as "SB 800." All new residential construction sold after January 1, 2003, would be required to comply with its provisions, including a set of building standards pertaining to new residential construction.

SB 800 specifically provided that it would henceforth apply to "***any*** action seeking recovery of damages arising out of or related to deficiencies";[2] and that "Except as provided in this title, ***no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed***."[3] Indicating the broad sweep of SB 800, the legislative history made it clear that:

"This bill would make major changes to the substance and process of the law governing construction defects. It is the product of extended negotiations between various interested parties. Among other things, the bill seeks to respond to concerns expressed by builders and insurers over the costs associated with construction defect litigation, as well as concerns expressed by homeowners and their advocates over the effects of a recent Supreme Court decision that held that defects must cause actual damage prior to being actionable in tort. SB 800 was designed to alleviate the *Aas* Court's requirement that homeowners could not initiate litigation against the builders to correct negligently constructed homes prior to the homeowners actually experiencing physical damage to the home or injury to their persons."[4]

In place of *Aas*, SB 800 provided that a violation of its statutory building standards would now be actionable *even if the defects had not caused actual damage to property*. SB 800 provided an intricate pre-litigation, non-adversarial procedure that would allow homeowners to notify the "builder," (as defined in the act, and to some extent a general contractor and others) of the claimed defects, and allow them to seek repairs without having to initiate litigation.

In exchange, it provided the builders with an opportunity to repair construction defects before homeowners were permitted to initiate such litigation. SB 800 set forth 45 different standards of construction in seven categories and specified different statutes of limitations for the various home components, ranging from one to 10 years. The new limitation periods were intended to realistically reflect how long those components could be expected to meet the standards.

Prior to SB 800, the statute of limitations for these type of claims would have generally fallen under either the four-year statute of limitations for "patent" deficiencies (Code of Civil Procedure §337.1), or the 10-year statute of limitations for "latent" defects (Code of Civil Procedure§337.15).

Because of: (1) the previous holding in *Aas;* (2) the detailed legislative response; (3) the broad and inclusive language of SB 800's legislative history; and (4) the express language of the statute itself regarding its applicability to "***any*** action," it was thought that the procedures set forth in SB 800 were now intended to be *the exclusive remedy* for obtaining repairs from, and/or damages against, a builder, regardless of whether the loss resulted from actual physical damage to the property *or* whether the defects had only resulted in economic loss.

Instead, the fairly recent decision in *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC*, 219 Cal. App. 4th 98(Cal. App. 4th Dist.2013), examined the act and its legislative history and, somewhat surprisingly, *narrowly* construed SB 800, concluding that the act does **not** provide the exclusive remedy for any such actions and specifically does **not** limit or preclude common law claims for damages for construction defects that have caused property damage.

In *Liberty Mutual*, a homeowner purchased a newly constructed home in late 2004, from Brookfield Crystal Cove LLC. In January 2008, a sprinkler system pipe burst causing water damage. Pursuant to SB 800's detailed list of periods of limitations for the various home components, the statute of limitations for bringing a claim for "plumbing system defects" was four years from the close of escrow. Pursuant to the SB 800 procedures, the builder ultimately repaired the damage while the homeowner moved into a hotel for several months.

The homeowner's insurance carrier, Liberty Mutual, paid for the hotel and other relocation expenses, and in August 2011, well after SB 800's four-year limitations period for plumbing system defects had expired, filed a complaint in subrogation against Brookfield to recover those expenses. Brookfield demurred to the complaint on the grounds that the claim was time-barred under SB 800's four-year limitation.

Despite the language of the statute that its limitation periods applied to "any action," Liberty Mutual, standing in the shoes of the homeowner, argued that SB 800 was not the exclusive remedy for homeowners, and that homeowners could still also assert common law construction defect claims. The trial court ruled in favor of Brookfield, finding that Liberty Mutual's complaint was time-barred under SB 800's shortened four-year limitations period for plumbing defects. Liberty Mutual appealed.

The appellate court held that Liberty Mutual's complaint was, in fact, not time-barred because SB 800 “does not eliminate a property owner's common law rights and remedies, otherwise recognized by law, where, as here, actual damage has occurred.[5] Despite the broad and plain statutory language, the court narrowly interpreted SB 800 stating that it was enacted solely to provide remedies where, although no actual property damage had occurred, construction defects had negatively affected the economic value of a home.

Relying heavily on the legislative history of SB 800, and less so on the actual words of the statute, the court held that “the legislative history shows that the legislation was intended to grant statutory rights in cases where construction defects caused economic damage; the Act did nothing to limit claims for actual property damage.”[6] The court also cited the continued existence and validity of Code of Civil Procedure §§ 337.1 and 337.15 (governing statutes of limitations for construction defect claims at common law), reasoning that since the limitations period for those claims were still in effect, the causes of action relating to those limitation periods must also still be valid.

Finally, the court noted the *lack* of any legislative history to the effect that SB 800 was intended *to include* claims of actual property damage and therefore concluded that the *absence* of any intent to include such claims could only meant that SB 800 was *not* intended to be the exclusive remedy for those claims.

The effect of the *Liberty Mutual* decision is to make clear that homeowners faced with construction defect claims that have resulted *in actual property damage* now have (and always have had) *alternative* remedies for pursuing those construction defect claims. They can either pursue the pre-litigation, non-adversarial procedure whereby they timely provide notice of the nature of the construction defects to the builder and allow the builder the opportunity to repair those defects; *or* they can initiate common law adversarial tort causes of action without the necessity of going through the SB 800 procedure.

Further, in those cases where the shorter SB 800 statute of limitations apply to the particular defective home component, homeowners may still be able to take advantage of the longer statutes of limitations provided in Code of Civil Procedure §337.1 (four-year statute for “patent’ defects) or Code of Civl Procedure § 337.15 (10-year statute of limitations for “latent” defects).

Finally, in those cases where the only damages that have resulted (so far) from the construction defects are strictly economic losses, homeowners will continue to have a right to pursue those claims provided they follow the pre-litigation non-adversarial “right to repair” provisions of SB 800.

[1] *Aas v. Superior Court* at page 636.

[2] Civil Code § 896 (emphasis added).

[3] Civil Code § 943 (emphasis added).

[4] Sen. Judiciary Com., Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, pp. 1, 4, italics added; see Assem. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 26, 2002, p. 3.

[5] *Liberty Mutual,supra* at 101.

[6] *Liberty Mutual*, *supra* at 104.

Equity (and Equity Stripping) is Back

Wednesday, October 01, 2014

In our September 2013, Real Estate Edition, we noted the end of the Great Recession. Signs of economic recovery were and are everywhere, construction is booming and we are seeing multiple, non-contingent offers on real estate. Equity is back.

Now the bad news: In the past year, we have seen a surge in equity stripping, elder financial abuse and fraudulent foreclosure consultant schemes. As Contra Costa County Deputy District Attorney, Ken McCormick, said recently, "The 'Foreclosure Hawks' are smelling equity and are back in action!" It is time to get the word out: Equity stripping is back.

Foreclosure consultants specifically target homeowners who are in foreclosure. Monthly, throughout the state, there are thousands of letters written to homeowners facing foreclosure. These letters, and related advertising, contain promises that a company can "help" homeowners by discussing their options to "stop" the foreclosure. Thereafter, in both verbal promises and written "endorsements," these operators pose as experts in helping with various options to prevent foreclosure, having lawyers on staff that can prevent foreclosure and the like.

These communications are intended to and often do develop a sense of relief and trust in the very companies that are aiming to steal a homeowner's equity. Many of these schemes are designed to specifically target ill, elderly and less-sophisticated homeowners.

The good news is that there are a number of laws designed to protect homeowners from this conduct, including California's equity-stripping prevention and elder financial-abuse statutes.

First, in enacting Elder Financial Abuse protections, the California Legislature specifically recognized that "elders and dependent adults may be subjected to abuse, neglect or abandonment and that California has a responsibility to protect these persons [and that] these persons are more subject to risks of abuse."[1] "The impact of the aging process itself, the onset of illness and extreme loneliness are common factors present in the population, rendering elders vulnerable to victimization."[2]

The Elder Financial Abuse provisions are one of the many remedies available to senior victims of equity-stripping schemes. Others protections, some of which are discussed below, include breaches of Civil Code Sections 2945 and 1695 pertaining to foreclosure consultants and home equity sales contracts, breaches of fiduciary duties, fraudulent, unlawful and unfair business practices, unlawful practices under *Civ. Code* §1770, and remedies available under *Civ. Code* §3345. All of these remedies are cumulative.

With regard to elder financial abuse claims, the broad definition of elder financial abuse makes EADACPA applicable to a wide range of conduct and causes of action, including fraud, constructive fraud and conversion, punishing any person or entity that "takes, secretes, appropriates, obtains or retains real or personal property of an elder or dependant adult [either] for a wrongful purpose or with intent to defraud."[3] Punishment under EADACPA is triggered when it includes the taking or obtaining of "… any property right, **including by means of an agreement.** …"[4]

The elder financial abuse protection statutes empower the courts to award not only special damages, but also attorneys' fees and punitive damages, especially in circumstances like those being employed, in order to: (1) protect seniors and dependant adults; (2) to prevent this conduct from being repeated; (3) to punish the wrongdoers; and (4) to make the protected senior whole. The Legislature has been clear that all assumptions must be made in favor of the protected senior or dependant adult. The same is true of the elder victims' right to recover attorneys fees.[5] The law is clear that when a plaintiff prevails and proves by a preponderance of evidence that defendants committed elder financial abuse, the court must award attorneys' fees and costs in addition to all other remedies authorized and provided by law.

The next law that comes into play is the Home Equity Sales Contract Act, *Civil Code* §1695, et seq. (HESCA). The California Legislature has found that homeowners whose homes are in foreclosure are often defrauded by home equity purchasers who induce them—especially the poor, elderly and financially unsophisticated—to sell their home for a fraction of their market value. The intent of the statute is: (1) to safeguard the public against deceit and financial hardship; (2) to ensure fair dealing in sales and purchases of homes in foreclosure; (3) to prohibit representations that mislead; and (4) to preserve and protect home equities for homeowners in the state.

Some of the most frequent violations of HESCA include real estate agents not being associated with real estate brokers as required. Additionally, many "Equity Purchase Agreements" violate §1695.13, by failing to include the total consideration to be given by the equity purchaser, failing to include the complete terms of payment including any services of any nature which the equity-purchaser represents he or she will perform before or after the sale, and by taking unconscionable advantage of the homeowner, in violation of §1695.13.

As mentioned, some of these companies target homeowners in foreclosure, purportedly to discuss multiple "foreclosure options," and then advise the homeowner to enter into an Equity Purchase Agreement. The defendants thereby assume an even higher duty and a fiduciary duty. Often, legal title to the property is transferred along with the sole discretion in making improvements, and a result is that many defendants breach their fiduciary duty by forcing sellers to pay even higher real estate commissions and title and escrow fees because they are often based on the new "improved" value of the property.

In short, while these operators profess to be experts in saving equity, they are stealing equity. Under both HESCA and the Foreclosure Consultant Act, many "Equity Purchase Agreements" can be and are sometimes voided. As a result, the homeowner is arguably not required to split any profit whatsoever with defendants acting in violation of the statutes.

In recent cases litigated, this author has heard defendants claim they will be protected by self-serving statements, usually in fine print, that they are not a "foreclosure consultant." However, courts are aware that this is simply one of the worst kinds of bait-and-switch: After advertising multiple options available to "help" and "rescue" homeowners in foreclosure, the homeowner is advised that the only type of help the defendant can and will give them is an Equity Purchase Agreement. As a result, they attempt to claim they are not required to register with the Attorney General and provide a bond—which is required of foreclosure consultants due to the proliferation of fraud in these transactions.

A 2009 press release from the California Attorney General, discussing the motivation behind requiring registration of foreclosure consultants, stated: “California is awash with con artists who prey on vulnerable families facing foreclosure … By forcing foreclosure consultants to submit detailed information to my office and post a $100,000 bond, this registry will help bring long-overdue transparency to this shadowy world.”

Success in many of these cases depends on how quickly an attorney takes action. Often, the foreclosure consultant has or is attempting to sell the property to a bona-fide purchaser. However, if there is evidence of the Equity Purchase Agreement or continuing use of the property by the victim, the purchaser can be prevented from establishing bona-fide purchaser status.

Research often develops that the client is not the only victim of this scam by the same defendant—and there are sometimes similar cases pending against the same defendants in the same court to be brought to the court’s attention. As such, the homeowner is authorized by *Business & Professions Code* § 17203 to bring representative claims on behalf of others who have been similarly aggrieved. Pre-judgment writ of attachment is also a way to change the momentum of the case.

The elder abuse statutes are without question a remedy intended to punish or deter similar behavior. Defendants in these cases can and should be informed that there is a real possibility of a recovery for a victim’s pain and suffering, in addition to special damages, punitive damages and attorneys’ fees. Moreover, damages, including punitive damages, are subject to trebling pursuant to *Civil Code* § 3345.

Some defendants in these cases may initially hide under what they believe is a protective layer of multiple entities, or may engage in conveyances which clearly are an attempt to delay or defraud creditors. Often, the defendants’ threat is that the plaintiff better settle for something now, or the defendants will be able to evade paying a judgment against them. From prior experience in litigating against attempts at “debt-avoidance,” however, this author has seen that this game can end favorably for the victim and with disastrous results for the defendants.

Formerly Associate General Counsel for a major real estate developer in Irvine, for over 25 years, ***Craig Nevin*** has provided litigation and transactional counsel to owners, developers, financial institutions, contractors, subcontractors and other companies in complex business, real estate, construction and development related matters. He has presented numerous seminars concerning real estate, construction, development, sales and mortgages, as well as litigation management and avoidance. Mr. Nevin is on the Board of Directors and current Chair of Contra Costa Senior Legal Services and on the Advisory Board of Directors of The Law Center.

[1] *Welfare & Institutions Code* §§ 15600(a)-(c), The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA).

[2] California Elder Law Litigation (Cal CEB 2003) §6.1.

[3] *Welfare & Institutions Code* §15610.30(a).

[4] *Welfare & Institutions Code* §15610.30(a) and §15610.30 (c) (emphasis added).

[5] *Welfare & Institutions Code* §§ 15657.5(a),(c),(d).

The Real Story About the LA Stip

Wednesday, October 01, 2014

One of the biggest differences between Southern California and Northern California is the use of the “LA Stip,” as it's called. Southern California attorneys regularly use it; Northern California attorneys don't.

"We are going to relieve the court reporter of her duty. We're going to have the original transcript sent to your attorney. She will make it available to you for your review. You will have 30 days to make changes and let your attorney know. Upon receipt of the transcript, please sign it under penalty of perjury. She will let me know within two weeks of receiving your changes and notify me. She will also maintain custody of the original and produce it for trial or upon reasonable request. If it's lost or stolen, a certified copy can be used in its place."

Why don't Northern California attorneys use it? They like to follow the CCP Code, they don't like to relieve the reporters of their duties, and they want custody of their originals.

So how did the LA Stip get started? I was fortunate enough during my days as newsletter editor for the Deposition Reporters Association to interview Stuart Simien, CSR #1568 (similar to attorney's bar numbers, this CSR number is very low; they are well over 11,000 now).

Stuart said, "In the days preceding the change to CCP 2025(e), all the attorneys at a deposition had to sign a written stipulation that was attached to the deposition—not even as an exhibit—but it was attached because it allowed the deposition to go forward." Court reporters had to carry around blank forms for the attorneys to sign, and most depositions were taken by stipulation in those days, whereas now they are by notice. The attorneys, when they concluded the deposition, would ask, "Any Notary?" And everyone else would confirm, "Any Notary." This meant that the deposition could be signed before any notary public, not just the notary or court reporter who had sworn in the witness.

As late as the 1980s, I remember witnesses coming to our office in San Francisco to read and sign the transcript. In Los Angeles, this could involve hours of travel. Since LA is so spread out, the court reporting firms had to make deals with other reporting firms to send the original to them for the deponent to read and sign.

The first change occurred when the California Court Reporters Association legislative side had someone put in a bill to change 2025(e). That required a stipulation from all attorneys in the State of California, and the attorneys didn't know what to say, so the reporters wrote the stipulation and gave it to their clients, who started to use it. The original stipulation stated that the original could be sent to the attorney representing the deponent. If they didn't stipulate to that, then the attorney representing the other side would not stipulate to it when their client's deposition was taken.

Stuart said, "The stipulation for all of California was part of Section 2025 of the Code of

Civil Procedure, and it had nothing to do with 8211.5 of the Government Code ... The attorneys didn't even know what to do for a stipulation." As he recalls, the stipulation for LA was written by reporters and given out to their clients. "They just about use it as it was given to them back 25 or 30 years ago."

The stipulation was not just an LA stipulation, but a statewide stipulation. But because then-Gov. Jerry Brown would not increase rates for reporters, 8211.5 of the Government Code was done away with, which was the section that set out the "no less than" in a county having a population of over five million, and the whole state was then on the same page.

The Northern California reporters decided not to let the attorneys stipulate so they could try to make up for years of lower rates, and that has continued to this day. Hence, a stip in LA and no stip in Northern California.

Fortunately, CCP Code Section 2025 has been modified and fixed over the years, so there is no longer a need for the stipulation.

Whenever I have asked any attorney from LA why they do the stip, the answer is the same: “I don't know why. That's just the way we have always done it.”

What this has lead to for LA attorneys is higher prices, because when the witness' attorney gets the original, they usually don't order a copy. Basically, the ordering attorney is paying for a free copy for their adversary. That's why LA rates are more than 20 percent higher than Northern California prices. In Northern California, everyone bears the cost of their own litigation.

Which is confusing, because LA attorneys are known to be less accommodating to the other side. Yet they provide the other side a free copy. Go figure.

Wendy Graves has been a freelance court reporter for 30 years, has served as the newsletter editor for the DRA, one of our statewide court reporter’s associations, and is Managing Reporter at Certified Reporting Services in Martinez.

Bar Soap: October 2014

Wednesday, October 01, 2014

My, my, had I known I could get responses by giving a grammar lesson, I would have done it years ago. Thanks to all for your input. I received comments on Super Lawyers, verdicts, settlements, lawyers on Courtcall and lawyers on the move.

Speaking of lawyers on the move, I see that **Peter Langley** has opened a new office in Walnut Creek. For many years, Peter was right around the corner from the courthouse in Martinez at Gordon, Watrous, Ryan, Langley, Bruno and Paltenghi. I understand the old firm has dissolved and the members have spread out all over the county (or retired).

Chastity A. Schults, formerly of Youngman & Ericsson, has announced the formation of her new firm, in the Walnut Creek or Lafayette area.

Ross Pytlik is now Of Counsel at Louie & Jimenez, LLP.

I saw **Jim Hazard** in the building the other day. He announced to me that he was no longer practicing law. Sorry to hear that, as he is a very fine lawyer and mediator. I heard from another source that his firm is moving back to Walnut Creek. No idea if there is a connection.

Diddo Clark has announced she is now an Attorney at Law, Office of Diddo Clark.

One of my partners at Ropers Majeski, **Allen Anderson**, has left that firm, and is now a partner at Arent Fox, LLP. His dad, **Don Anderson**, is a long time Contra Costa lawyer.

Congratulations to all, and best of luck in your new adventures!

Speaking of congratulations and a very fond farewell, **Lisa Reep** has retired as Executive Director of the Contra Costa County Bar Association. Hard to believe it has been 20 years since she came on board. She will be missed.

Speaking of executive directors of the Bar Association, I have been in contact with our former Executive Director **Susan McKean**. She spent 10 years at the helm, then moved home to the Midwest. So between the two of them, that is 30 years as the executive director of a local bar association. I bet there are not many bar associations in the state who can claim that. We must be doing something right.

The 2014 Super Lawyers list is out. Many of our Contra Costa attorneys are listed. Congratulations to all who made it this year, both first timers and repeats. As in the past, if you report it to me, I will list your name in the next column. Get that? Nobody reported to me yet, except for me. I did see my name again.

Our local bench has been a bit like the Giants and the A's; not at full strength because team members on the DL. I'm happy to see our **Presiding Judge Barry Goode** back on the streets of Martinez. Walking is good for the body and spirit, particularly if one has had a run-in with a horse. **Judge Craddick** is also back in her usual place in the courthouse managing our complex cases and the ex parte calendar; a thankless task in my view.

Speaking of sad and thankless tasks, I all too often lately must mention the passing of one or more members of the Bar Association. A longtime member of the CCCBA, **Lawrence Kaplan**, died on August 23, 2014, after a brief illness. A University of Chicago undergrad and a UC Hastings law school grad, Larry was a wonderful man and a very fine criminal defense lawyer. He was admitted to practice in California in 1969.

Lloyd W. McCormick was another of the "tall trees" in the practice of law. He was a UC Berkeley and Boalt School of Law graduate. He practiced at the same firm for his entire legal career: McCutchen, Doyle, Brown & Enersen (Now Bingham McCutchen). Lloyd passed away on August 28, 2014. You might recognize the last name, as Lloyd's son, Ken McCormick, is a longtime Contra Costa County Deputy District Attorney, and a member of the CCCBA.

I saw a recent article in the newspaper about our **DA Mark Peterson**. Nice article. Thinking about the DA's office, I am often asked "What is the status of the Gressett case?" I have no firsthand knowledge, but I know it is set for trial in federal court. In looking at PACER, I saw that trial is set for May 4, 2015, in San Francisco before the **Hon. Edward M. Chen**.

Our own **Harvey Sohnen** reported a very interesting settlement his firm obtained as Plaintiff's counsel in a class action matter. Nice of Harvey to report a case to me, as he is the one who came up with the name of my "Bar Soap" column. I don't think he is the one who put my picture in the bath tub. I am still trying to find out who thought of that.

At any rate, *Brooks, et al v. U.S. Bank*, was filed in Contra Costa and removed to U.S. District Court, in the Northern District of California, Case No. c-12-4935EMC. Plaintiffs were represented by **Harvey Sohnen** and **Patricia Kelly** of Sohnen & Kelly in Orinda, along with **Eve Cervantez** of Altshuler Berzon of San Francisco. U.S. Bank was represented by **Joan Fife** of Winston & Strawn.

Named Plaintiff Brooks was a former employee of U.S. Bank at a branch located in a supermarket in Brentwood, Contra Costa County. She was required to stand at the teller counter all day while performing her duties. She brought a class action on behalf of U.S. Bank employees at California in-store locations, such as the supermarket where she worked, who were required to spend their work days standing.

She asserted that such practices violate California wage orders requiring suitable seating for employees when the nature of the work allows it, and she asserted a failure to provide rest breaks. The case settled on behalf of the class of 2,689 persons, in the gross amount of $1.9 million. It appears the case is the first case resolved for a large class on a "suitable seating" claim. Nice result, Harvey and Patricia.

Not sure anyone has noticed, but all Contra Costa deputy sheriffs are now wearing the mandatory black uniform. That means all our court bailiffs, too. Say goodbye to the old tan uniforms; it's a good look. They changed the patrol cars to black and white, and now the uniforms.

Okay, so the next grammar lesson: "Each one of the litigants HAS appeared," not HAVE appeared. Remember, each is singular. The verb then applies to each one, not to the litigants.

Now does everyone know the assignment? Right, report interesting settlements and trial verdicts, report if you have been named a Super Lawyer, report if you have moved or joined a new firm, then just report. Contact me by email with all your reports and rumors at mguichard@gtplawyers.com.

The Ethics Corner: Avoiding Fraudulent Conduct

Wednesday, October 01, 2014

What is most important—what you say, how you say it or whether you should say it at all? That is, what should an attorney tell a client who may want more than advice—perhaps active assistance— in what may be fraudulent conduct? And when does a lawyer know for certain that a client is using advice for a fraudulent purpose? This issue comes up from time to time in a bankruptcy lawyer's practice where the client wants asset protection that may cross the line.

Interestingly enough, each recent decade seems to have had its own scandal involving a client using a lawyer—sometimes with his active assistance—in defrauding people. In the early 2000s, it was Enron. In the 1990s, it was the Lincoln Savings and Loan debacle where the lawyers actively mislead the Office of Thrift Supervision. In the 1980s, it was the Kaye Scholer matter and the OPM Leasing case, where the Singer, Hunter lawyers turned a blind eye to the company accountant and his lawyer, who gave Singer a memo outlining the fraud. Why did Singer ignore the memo? Because they "didn't want it and didn't want to know what was in it."[1]

We start with Rule of Professional Conduct 3-210, which states that "A member shall not advise the violation of any law, rule or ruling of a tribunal unless the member believes in good faith that such law, rule or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule or ruling of a tribunal."

But that Rule begs the question because it does not actually address the practical issue involved in providing legal advice; i.e. the difference between "presenting an analysis of legal aspects of questionable conduct" and "recommending the means by which a crime or fraud might be committed with impunity" (ABA Model Rule 1.2 comment 9).

We also have Business & Professions Code section 6068 (d), which broadly states that a lawyer must "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge, or any judicial officer by an artifice or false statement of fact or law."

ABA Rule 1.2 does give more guidance; it states that "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

It also says in comment 10 that "A lawyer may not continue assisting a client in conduct the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from representation of the client in the matter." It's true that the ABA Rules are not the Rules that govern California lawyers. However, courts can look to them for guidance where the California Rules do not specifically address a particular issue.

I was the lead drafter of California Formal Opinion 1996-146, which addresses the issue of making misrepresentations to the public (and it could apply to the court). The Opinion asked the following question: May a lawyer for a subdivision developer, knowing that substandard plumbing materials have been used by a subcontractor, write a letter to homeowners saying "The warranty in your contract means that [developer] has promised that all materials, including plumbing lines, meet plans and specifications, including all code requirements. The warranty speaks for itself."

While strictly true, and while the lawyer does not represent the original malfeasant, the letter clearly seems to mislead. The Opinion concludes that the lawyer *may not* write such a letter: "A lawyer acts unethically where she assists in a commission of a fraud by implying facts or circumstances that are not true in a context that is likely to be misleading."

What should a bankruptcy lawyer be required to do to verify the legitimacy of the client's statements and position? Should some investigation be required, such as one might do before filing a complaint to avoid a Rule 11 attack? If the lawyer takes what the client says at face value, when is that not enough?

In ABA Revised Formal Opinion 346, the ABA analyzed the role of a lawyer in rendering an opinion on the propriety of a tax shelter. It stated that: "The lawyer who accepts as true the facts which the promoter tells him, when the lawyer should know that a future inquiry would disclose that the facts are untrue, also gives a false opinion. It has been said that lawyer cannot escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen."

Similarly, in *FDIC v. O'Melveny & Myers*, (9th Cir. 1992) 969 F.2d 744, the FDIC sued O'Melveny for its willful blindness after they had done the due diligence to confirm the accuracy of a savings and loan's private placement statements. The 9th Circuit held that while a law firm had no obligation to "ferret out fraud," it did have to undertake a "reasonable independent investigation" into whether the fraud existed.[2] While the Supreme Court reversed the case on other grounds, the law on law firm fraud is still sound.

Bottom line, bankruptcy lawyers? If you lie down with dogs, you get up with fleas.

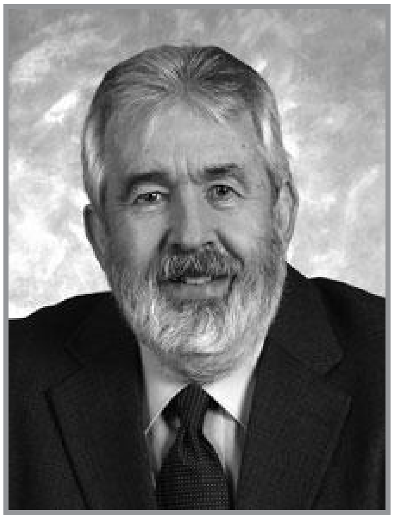
Carol M. Langford is lawyer who specializes in ethics and attorney conduct matters including representing clients before the State Bar. She is also a lecturer in law at U.C. Berkeley Boalt Hall School of Law and the past Chair of the California State Bar ethics committee.

[1] Ethics and the Law: A Case History, N.Y. Times, Jan. 9th 1983, Stuart Taylor Jr.

[2] Id. at 756.

The Bankruptcy Pro Bono Project

Wednesday, October 01, 2014



The Bankruptcy Pro Bono Project (BPBP) is a joint venture of the Contra Costa County Bar Association, The United States Bankruptcy Court for the Northern District of California and The Law Center. The BPBP was initially proposed in 2008 by the Bench-Bar Liaison Committee for the United States Bankruptcy Court for the Northern District of California. In 2009, BPBP clinics were opened in Alameda County, Contra Costa County, Santa Clara County and San Francisco.

The Clinic customarily has two components: A group presentation by one volunteer attorney and one-on-one consultations provided by other volunteer attorneys. During the group presentation, the attendees are given an overview of the remedies available in Bankruptcy Court and of the general process that takes place after a bankruptcy petition is filed. Time permitting, one-on-one consultations are provided to those attendees who request them. Some of those seeking a consultation are in the midst of litigation with a creditor. When there are few attendees, the group presentation is sometimes dispensed with and each attendee is given an individual consultation.

The Contra Costa County Clinic originally operated at JFK University and in 2011, the Clinic moved to the offices of the Contra Costa County Bar Association. The Clinic first opened on June 11, 2009, and had three attorneys, three non-attorney volunteers and no other people in attendance. Since that very humble and somewhat quiet beginning, the Clinic has enjoyed a measure of success. The Clinic has averaged 8.5 people in 2009, 19.6 in 2010, 10.3 in 2011 and 9.7 in 2013 (the last year for which statistics are available). In total, more than 1,000 people have been served by the Clinic.

A West County clinic opened on August 29, 2011, and had four attorneys, two non-attorney volunteers and 11 people in attendance. The West County clinic averaged 8 people in 2011, 10.2 people in 2012 and 3.8 in 2013. In total, the West County clinic has served nearly 200 people in just over two years. The West County clinic was closed in 2014, as there did not appear to be a need for the second clinic (when you operate a bankruptcy clinic, you truly hope to work yourself out of business).

The following are additional comments from the non-attorney volunteer clinic coordinator, David Kam: “Many debtors and creditors have been assisted at the consumer level as well as people with a variety of other issues from all over the Bay Area. This program has also allowed attendees to get assistance beyond the clinic, if they cannot afford an attorney. New attorneys to bankruptcy have also appreciated this forum to learn and assist people.”

All in all, the BPBP has been a success. With no budget and a lot of support from the county’s legal community, it has served the needs of many of the county’s citizens. Much of the thanks need to go to the efforts of the many attorneys who staff the clinic and especially David Schuricht, who has not only staffed the clinic on many evenings, he has handled all of the scheduling since the first day. The BPBP is truly a Contra Costa County legal community success story.

Alan E. Ramos is the managing partner of the law firm of Steele, George, Schofield & Ramos, LLP. The focus of Alan's legal practice is Bankruptcy and Probate. He also represents plaintiffs in Elder Financial Abuse cases and he acts as a neutral in Mediation.

The Perfect Family

Wednesday, October 01, 2014

In prior ",” Judge Carlton encountered Three Strikes, mental health, legal ethics, incarceration and contentious civil litigation. Now he presides over a difficult civil trial. Stories from the Bray Buildingtop.contentBuilder.createInlineImage(document, 14000, "http://colowww.sharedbook.com/proxy/serve/is/article/?url=http%3A%2F%2Fcolowww.sharedbook.com%2Fserve%2Fis%2Fretrieve%2F%3Furl%3Dhttp%253A%252F%252Fcclawyer.cccba.org%252Fwp-content%252Fuploads%252F2014%252F01%252FMarchiano_Justice_James_web.jpg", 0, 0, "", "CCLawyer", "", "right", "", "sb_api_scriptId_14000", "http://cclawyer.cccba.org/wp-content/uploads/2014/01/Marchiano_Justice_James_web.jpg", "", "alignright wp-image-7645");

Nothing worked. Not the parents' pleas. Not the entreaties of the police. Not the failed Taser. And so Robert Anthony Whitney II lay dead on the floor in his parents' home. All of the rooms were in meticulous order except the family room, where Robert ignored the officers' commands and charged at them with a cinderblock used to support a bookshelf. The Taser struck him first, but did not stop him. Then two shots from the police handguns did. The parents did not understand how the officers could fire at their son. Their grief was boundless and inescapable, and led to a wrongful death suit for excessive police force in Department 47 of the Bray Courts Building, where a Contra Costa Times reporter followed the case.

Judge Raymond Carlton shifted in his chair, adjusted his bifocals, and looked over at the jury while listening to the plaintiffs' attorney's opening statement about the remarkable Whitney family. Plaintiff Colonel Robert Anthony Whitney, an honors graduate from West Point, was an 80-year-old retired army band director, still able to stand perfectly tall, shoulders back, commanding respect. He was highly decorated, served with distinction in Vietnam, led a military band in Grenada and Kuwait, and directed the army band at several presidential inaugurations. He was devoted to Audrey, his wife of 56 years, who was the ideal military officer's spouse: A gracious, refined woman, perfectly coiffed and dressed. For their golden years, they retired to quiet Kensington, with its panoramic views and imposing homes for U.C. Berkeley professors and other professionals. They looked and acted how proper people would look and act.

Two years before, their 52-year-old son, Robert Whitney II, joined his parents in Kensington, leaving his job as a senior accountant for San Bernardino County, to become the family chauffeur and grocery shopper, since his parents could no longer drive. Neighbors rarely saw him because he stayed in the house, constantly tending to his parents' needs like a caring son honoring his father and mother.

Robert suffered from bouts of anxiety that darkened his spirit. On a fall afternoon, after reading the mail, he turned up the volume of classical music playing in the family room and paced the floor. He became uncharacteristically angry, threatening, and could not be calmed. Colonel Whitney, in desperation, called 911 for help. When the officers arrived, the parents quietly went to the front yard to explain what was happening and told them about Robert's anxiety. They explained that they had good medical coverage and would assist in having him seen at an emergency room if that would help.

Two officers went into the family room to assess the situation. Robert told them to leave and refused to talk with them. When the officers approached him, Robert picked up a cinderblock, did not heed the officer's commands, and headed toward them, yelling at them to leave him alone. Futile negotiations ceased. The Taser failed. Impulsive shots reverberated in the room.

The frantic parents did not understand why deadly force was used when the purpose of their call was for life-giving assistance. Qualified law enforcement experts were prepared to testify the use of deadly force was below acceptable police standards. The parents' loss of society, comfort and companionship of their only son was immeasurable and irreplaceable. The totality of the evidence would support substantial damages, at least in the high six figures, for Colonel and Mrs. Whitney.

Defense attorney Daniel Freeman reserved his opening statement until the commencement of the defense case. He was at a disadvantage because the insurer for the officers restricted his discovery to minimize legal fees. Freeman needed to test the waters. The defendants' insurance company allowed Freeman to take depositions of the parents, subpoena the bare bones salary records from San Bernardino County, subpoena the decedent's medical records from Blue Cross/Anthem, hire an investigator to interview the neighbors and hire a defense expert, but little more. Freeman sensed there was more to the case than a loving son shot by overreacting officers. But micromanaging by a cost conscious claims person, who thought the case was defensible, prevented him from developing the complete picture.

Mrs. Whitney, in an appealing, elegant manner, testified how close she was to her son and how thoughtful he was. Cross-examination produced little for the defense. Colonel Whitney, in an authoritative tone, told the life story of Robert Jr., the story of a devoted, trouble-free care provider, except for his recent anxiety. He spoke with pride about their ideal life together. He described his only son as gentle, quiet and thoughtful. Just as he testified in his deposition, he explained to the jury how Robert gave up his career to care for them. The court recessed for the day, with cross-examination of Colonel Whitney set for the morning. The case was progressing well for the plaintiffs.

Insurance defense work is competitive, with insurance companies trying to shrink legal fees by threatening to send their business to other firms with cheaper hourly rates. Freeman felt trapped in a procrustean bed as he struggled to satisfy insurance company demands. He returned to his office to work on the case with his paralegal assistant, who computer generated 8-by-10-inch scene photos of the family room into enlarged virtual room size depictions.

A defense attorney's seasoned sixth sense urged Freeman to carefully scan the chaotic room. As they surveyed the enlargement from several angles, the legal assistant noticed in a corner an envelope with a law office return address in Riverside, California. The opened envelope was addressed to Robert Whitney, Jr., with a postmark two days before the shooting. The same sixth sense caused Freeman to look in Martindale and Hubbell for information about the attorney, Robert M. Graves, a USC Law School graduate, specializing in white-collar criminal defense work, in a three-person firm in Riverside.

Freeman called attorney Graves to ask him about his involvement with the decedent. Graves had been representing Robert Whitney Jr. in a criminal matter in San Bernardino County, had lost track of his client, and only located him shortly before his death. He would not discuss anything further.

Freeman googled the Press Enterprise newspaper for San Bernardino County, searched in the archives for Robert Anthony Whitney II, and found a 2 ½-year-old story of misappropriated funds in the Auditor's Office and an ongoing investigation into widespread employee misconduct. The information was like an unexpected, plot-altering *deus ex machina* in an ancient Greek play. Now Robert's reclusive lifestyle made sense, as did his parents' cautious conversations with their neighbors about Robert. Now Robert's inexplicable confrontation with the officers became clear. Most tellingly, the proper colonel and his wife likely lied in their depositions when they testified that Robert took a leave from his job to care for them, and when they said they knew of no past misconduct in his life. Under a seemingly impeccable veneer lay a flawed family image.

That night, Daniel Freeman wrestled with how to play the new cards in his hand. The colonel served his country nobly for years and did not want the taint of impropriety touching the family name. He forced the issue by bringing the lawsuit that attacked the officers' judgment and integrity. Freeman also reflected on Judge Carlton's reputation as a no-nonsense jurist with an ability to settle difficult cases. Pulling together the juggling ideas, Freeman determined his course of action.

Early in the morning, Freeman called plaintiffs' counsel to inform him something dramatic had been discovered in the case, and he wanted to meet in chambers with Judge Carlton at 8:30 am before resuming the trial. Freeman's legal assistant called Judge Carlton's clerk to arrange the meeting. Freeman called the insurance claims person to obtain permission for using the information to try to resolve the case. The insurance company disliked protracted, costly, uncertain litigation.

The three-way conference in chambers began with nervous anticipation. Freeman explained how he uncovered some potentially devastating information directly implicating the credibility of Colonel Whitney. Freeman asked plaintiffs' counsel if he could briefly discuss ex parte the issue with Judge Carlton, and then Judge Carlton would confer with plaintiff's counsel about his assessment of the new development. Plaintiff's counsel, knowing and trusting Judge Carlton, stipulated to the unusual process.

Freeman told Judge Carlton about the results of his sleuthing: How the colonel covered up his son's purported misdeeds, and provided a safe house for his miscreant son. The carefully constructed family image was about to be tarnished in a devastating cross-examination that would force Colonel Whitney to admit that he lied. The Whitney name and legacy stood to be destroyed by a contrived lie in a brief moment, ruining a lifetime of remarkable achievements.

Judge Raymond Carlton, drawing on 22 years' experience on the bench, instinctively knew what to do. He met with plaintiffs' counsel, who did not know about Robert Jr.'s past in San Bernardino. Seizing the opportunity to minimize losses for everyone, Judge Carlton offered to meet with the colonel and his wife with their attorney to explain the dire consequences of the new information and explore the possibility of their dismissing the lawsuit in return for a waiver of court costs by each side. Plaintiffs' counsel conferred with his clients for a long time and returned ashen-faced. Then they all met with Judge Carlton.

Carlton spent time praising Colonel Whitney for his years of distinguished service, complimented their long, devoted marriage and understood the desire to protect their son, but emphasized the crippling effect the cover-up would have on their case. The lie haunted the case. Judge Carlton explained at the end of the trial he would instruct the jury with Instruction 107: “If you decide a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness has said.” He also reminded them the media would likely spread the news far and wide regardless of the outcome. The decision on how to proceed was theirs.

As their lawyer counseled them in a quiet hallway, the judge’s words percolated in the recesses of Colonel Whitney’s head like pulsating sounds that he could not ignore. Colonel Whitney and Audrey, crestfallen and embarrassed, understood the ramifications and agreed to dismiss the case.

Judge Carlton told Freeman to persuade the insurance company to waive court costs. Freeman made a quick call. The parties and counsel went into the courtroom and put the terms of the settlement on the record. Then Judge Carlton called for the jury and thanked the members for their time, only explaining the matter was resolved.

Judge Raymond Carlton hung up his robe, adjusted his bow tie, and looked on his desk at the syllabus for the Trial Practice course he taught at law school. One of the chapters began with an apt quote from Proverbs, Chapter 18, Verse 17: “The man who pleads his case first seems to be in the right. Then his opponent comes and puts him to the test.”

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Wednesday, October 01, 2014

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Lisa Reep’s Retirement Party [photos]

Wednesday, October 01, 2014

On September 19, 2014, we helped Lisa Reep celebrate her retirement after 20 years of service to our Bar Association as the Executive Director.

Below are photos from the event, and you can check out more on our Facebook page.

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Coffee Talk: What is your favorite local restaurant and why?

Wednesday, October 01, 2014

Without question, my favorite local coffee spot is Catahoula Coffee in Richmond. The coffee is roasted on the premises—so the wonderful smell of roasting coffee pervades the place—and is always fresh and delicious. The "Mexi-Mocha" is the best I've had—great coffee flavor, dark chocolate, cinnamon and not too sweet. The employees are always friendly and accommodating. I've had several casual business meetings there. The vibe is a wonderful West County blend of business and arty, relaxed, not in your face—and NO attitude!

Karen Juster Hecht

Massimo on Locust Street in Walnut Creek. Always friendly service. Great ciabatta bread and olive oil dippings. Every entrée is great. Good atmosphere for social or business meetings.

Wayne V.R. Smith

My favorite (and my wife's) is Casa Orinda [in Orinda]. It has been around forever, and the old-time casual atmosphere if very pleasant to us. The service is always prompt and always polite, and the fried chicken is the best we have ever tasted. We also like Pasta Primavera [in Walnut Creek]. The service is sometimes inconsistent, but the food is always freshly prepared and hot when it gets to the table. The portions are huge, leaving enough for another meal.

Paul E. Nord

As a West County resident, I'm particularly fond of Elevation 66 in El Cerrito. It's our local brewpub but also serves fare that makes foodies happy. They do a riff on grill cheese sandwiches that shifts every week, serve up a lovely tuna tartar salad, and make great fries and chips. "The 66," as we call it in our house, is also the best place to watch a baseball game if you can't actually make it to the park. They are loyal to A's and the Giants. On the beer front, I'm particularly fond of the smooth Esther Stout, which is relatively light on the palate.

Jean K. Hyams, Levy Vinick Burrell Hyams LLP

The Baltic in Point Richmond, near our offices. Why? Excellent German food reasonably priced, nice outdoor patio, comfortable low-key vibe, easy parking and great fresh imported German beer on tap!

Ann Harding Battin, Esq., Tenax Law Group, P.C.

My favorite local restaurant is Vic Stewarts in Walnut Creek. John Herrington did this right. The food is excellent, perfectly prepared, the service is a delight and I enjoy the private train car setting for intimate dinners.

Ken D. Little, Little & Saputo

I love Yanni's Taverna in Danville. It hits the sweet spot between having a nice ambience and great food on the one hand, and being relaxed and affordable on the other hand (so I can go there all of the time!). It has a nice patio and a wine list too.

Steven T. Knuppel, Esq., Law Offices of Steven T. Knuppel

My favorite restaurant is Va de Vi in Walnut Creek. They offer small plates and "flights" of wine at reasonable prices. Some of the delish food includes beet salad, lamb meatballs and the profiteroles dessert is to die for! It can get pricey if you order many plates and wine flights.

Lorraine M. Walsh, Law Office of Lorraine M. Walsh

Katy's Kreek at 1680 Locust St. in Walnut Creek. The food is good and the prices reasonable. The service is fast when you are in a time crunch, but they allow you to linger to finish your meeting with clients and/or colleagues. Better yet, they know some of my preferences as soon as I sit down.

Kenneth P. Strongman

Although it is hard to answer this question (e.g., some days I prefer Thai food, some other days just a pizza), I have to say that I love 54 Mint in Concord. Great atmosphere and excellent food.

Jose F. Vergara, Law Office of Jose F. Vergara

I love Sunol Ridge Restaurant and Bar on Locust in downtown Walnut Creek. During one visit, I tried the fish tacos with jicama orange slaw. On another visit, I enjoyed their thick slices of NY Steak. For dessert, I tried the chocolate-stuffed doughnut holes. One word for that—wow! Everything was delicious. The beer selection is vast and cocktails, especially the Bloody Marys, are awesome. The outdoor patio provides a warm and welcoming atmosphere and added to the great food experience. I highly recommend this place—believe me, you won’t be disappointed.

SamanthaSepehr, Steele, George, Schofield, and Ramos, LLP

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