PROFESSIONAL LIABILITY FUND
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MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

IN BRIEF

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TIME TRAPS IN BAPCPA

The new Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) contains many timeline and time frame changes in addition to many substantive changes. These changes in timelines and time frames can result in dismissal of the case, loss of the automatic stay, or denial of discharge. The number of deadlines has also increased, with over a dozen major timelines and numerous minor ones now applicable to a Chapter 7 or Chapter 13. Although the following is not a complete list of all timelines or deadlines, it is offered as a practice aid with some of the more important deadlines that currently apply.

In addition to the statutory changes, the new national interim bankruptcy rules (IBR) and the local bankruptcy rules (LBR) have also changed. (See www.orb.uscourts.gov for additional information, including General Order #05-1.) The IBR and LBR changes that override the statute are highlighted in ***bold*** and ***italics***.

PRE-FILING CONSIDERATIONS

EVENT	TIME	STATUTE
Notice to clients of legal requirements	Within 3 days of offering bankruptcy services	527(a) & 527(b)
Retainer contract	Within 5 business days of providing bankruptcy assistance	528(a)
Budget and credit counseling certificate	File with petition	109(h) & 521(b)
Educational IRA disclosure	File with petition	521(c)
Payment advances - proof of last 60 days' income	File with petition ***Serve on UST - not to be filed***	521(a)(1)(A)(iv) ***LBR 1007-4***
Statement of reasonably anticipated increases in income over the 12 months after filing of the petition	File with petition	521(a)(1)(A)(vi)

TIME TRAPS IN BAPCPA - *CONTINUED*

LOSS OF AUTOMATIC STAY

EVENT	TIME	STATUTE
Failure to perform intent regarding redemption or reaffirmation	45 days after 341(a) meeting	521(a)(2)(C)(6) & 362(h)
Expiration of automatic stay	60 days after filing of motion for relief	362(e)(2)
Motion to impose stay when case does not have an automatic stay	If needed	362(c)(4)
Motion to extend stay in case in which a prior case was pending in the past year	Within 30 days of filing ***Within 10 days of filing***	362(c)(3) ***LBR 4001***

DISMISSAL

Providing 4 years of tax returns to Ch 13 trustee	By 341(a) meeting	1308
Providing latest tax return to Ch 7 Trustee	7 days before 341(a) meeting	521(g)
Providing latest tax return to creditors	***15 days before 341(a) meeting; If requested - 7 days before the meeting***	***IBR 4002(c)(4)***
Providing post-petition tax returns to any party in interest	On request at time of filing with tax agency	521(f)

NON-DISCHARGE OR NON-CONFIRMATION OF PLAN

Certificate of completion of personal financial management course	Before discharge ***within 45 days of 341(a) meeting***	1328(g) & 727(a)(11) ***IBR 4004(c)(1)(h)***
Certificate regarding payment of domestic support obligations	Before confirmation	1328(a)(8)
Certificate regarding payment of domestic support obligations	Before discharge ***By last plan payment***	1328(a) ***IBR 4004(c)(1)(h)***

There are also deadlines applicable to creditors that are not included in the above list, including filing of complaints under section 523(a) – now allowed in Chapter 13 and Chapter 7 cases. The deadline is the same for both chapters, requiring complaints to be filed no later than 60 days after the date first set for the 341(a) meeting. In addition, if a debtor requests a hardship discharge under section 1328(b), the court must set a time to file objections under section 523(a)(6).

Failure to comply with required timelines requires mandatory dismissal under several of the sections. While some sections allow for extensions of time to be granted by the Trustee or the court, others provide for no discretion.

There will be many more developments in this area of law over the next weeks and months as the various new sections and rules are interpreted. Practitioners should watch for future legislation making technical corrections and also for computer software that may be available on the market, such as products from Best-Case or EZ-File. Additional resources include the members' section of the National Association of Consumer Bankruptcy Attorneys (NACBA) Web page and member list serve (offering practice tips as well as samples of required notices and retainer agreements), the National Consumer Law Center (NCLC), and information and resources listed in the June 2005 ***In Brief*** article on the New Bankruptcy Act. (See www.osbplf.org.)

Our thanks to Richard J. Parker, Parker Bush & Lane, PC, and to Cary A. Gluesenkamp, for their assistance with this article.

IN BRIEF

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Tax Trap: Priority Treatment of Tax Claims in Bankruptcy Court

Under 11 U.S.C. §507(a)(8) of the Bankruptcy Code, a tax claim is entitled to priority treatment if it is owed to a governmental unit for a tax on income for a pre-petition tax year for which a return was due within three years of the filing of the bankruptcy petition. The three-year period is referred to as the "lookback" period.

In 2005, 11 U.S.C. §507(a)(8) was amended, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), by the addition of an "Unnumbered Paragraph," which provides:

"An otherwise applicable time period specified in this paragraph shall be suspended for . . . any time during which the stay of proceedings was in effect in a prior case under this title . . . plus 90 days."

The author of this article was recently involved in a case with the following chronology:

- August 15, 2005 – Filing deadline on debtor's tax year ending December 31, 2004 (Note: extension deadlines may vary)
- July 20, 2007 – First Chapter 13 petition filed
- August 20, 2007 – First Chapter 13 dismissed, 31 days after filing
- August 15, 2008 – Three years from filing deadline for 2004 taxes
- September 26, 2008 – Second Chapter 13 petition filed

In the second Chapter 13, the IRS filed an unsecured priority claim for the tax period ending December 31, 2004. Our position was that this claim should be classified as an unsecured general claim. The resolution of the dispute depended on the court's interpretation of the Unnumbered Paragraph of §507(a)(8).

If the phrase "plus 90 days" in the Unnumbered Paragraph was interpreted to add 90 days to the "three-year rule" when a prior bankruptcy case is filed, in addition to the time period during which the automatic stay was in effect with respect to the prior case, then the IRS claim for 2004 taxes would be an unsecured priority claim. On the other hand, if the phrase "plus 90 days" was interpreted as suspending the expiration of the three-year period during a prior case, plus 90 days, then the IRS claim for 2004 taxes would be an unsecured general claim.

We argued that the second interpretation reflects a better reading of the development of the law in this area. We pointed out that before BAPCPA was enacted, courts were presented with arguments that prior bankruptcy cases – during which the IRS could not file a lien or collect a tax – should not affect the running of the "three-year rule." Two lines of cases developed in response to these arguments.

In the Ninth Circuit, 11 U.S.C. §108(c) of the Bankruptcy Code regarding Extensions of Time was used to incorporate Internal Revenue Code §6503, resulting in the rule that in the circumstances described above, the three-year time frame would not expire during the prior case, nor would it expire for six months afterwards. *See In re West*, 5 F.3d 423 (9th Cir. 1993) and the cases cited therein, including *Brickley v. United States*

(In re Brickley), 70 B.R. 113 (9th Cir. 1986), and *see United States v. Deitz (In re Deitz)*, 116 B.R. 792, 794 (D.Col.1990).

The other line of cases used the principle of equitable tolling, culminating in the United States Supreme Court decision in *Young v. U.S.*, 535 U.S. 43 (2002), in which the Court held that, under equitable principles, a prior bankruptcy case will toll the "three-year rule."

In 2005, after a five-year legislative history, BAPCPA was enacted, resulting in the Unnumbered Paragraph. We argued that the Unnumbered Paragraph was intended to codify the equitable tolling rule of the *Young* case. Congressional Report on H.R. 2415, 146 Cong. Rec. at 511715; Report to Accompany S. 256:

"Though the statute is silent, the Supreme Court in *Young v. United States*, 535 U.S. 93 [sic 43] (2002), held that the three-year period is tolled during the pendency of a previous bankruptcy case. Section 705 amends Section 507(a)(8) of the Bankruptcy Code to codify the rule tolling priority periods during the pendency of a previous bankruptcy case, during the three year or 240 day period together with an additional 90 days."

We argued that, under the doctrine of equitable tolling, the goal is to protect the rights of parties but not to expand them.

Finally, we argued that by a proper reading of the Unnumbered Paragraph, if the three-year time period had not run when a prior bankruptcy case was filed, then such period would run the later of 90 days after the end of the prior bankruptcy case or the full three-year period. This interpretation allows the three-year rule to remain intact. Further, this interpretation fulfills the purpose of the legislation – to allow the IRS time to secure its claim or otherwise collect the debt.

The Oregon bankruptcy judge who presided over our case thought our arguments had appeal but concluded they ran afoul of the plain language of the statute.

The judge stated that the Unnumbered Paragraph provides that an otherwise applicable time period specified in this paragraph shall be suspended for any time during which the stay of proceedings was in effect in a prior case plus 90 days. The judge concluded that the lookback period ceases to run during the time that a debtor is in bankruptcy plus 90 days.

Given this decision, it is important to keep in mind that the phrase "plus 90 days" in the Unnumbered Paragraph adds 90 days to the three-year rule when a prior bankruptcy is filed, in addition to the time period during which the automatic stay was in effect during the prior case.

(Note: The rule discussed in this article does not change the rule in *In re West*, cited above, that the three-year time frame does not expire during the prior case, nor for six months afterward.)

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Thanks to David B. Mills for his assistance with this article.

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Proposed Changes to Federal Time Computation Rules

On March 26, 2009, the Supreme Court of the United States approved proposed amendments on the computation of time under the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure. The principal simplifying change to the time computation rules in the proposed amendments is a "days are days" approach to computing all time periods in each set of rules, counting intermediate weekend days and holidays. Under the present rules, intermediate weekend days and holidays are sometimes counted and sometimes not. To further simplify time computation, most periods shorter than 30 days are changed to multiples of 7 days (7, 14, 21, or 28 days) so that deadlines will usually fall on weekdays. The proposed amendments add clarity by addressing forward and backward counting periods and addressing concepts raised by electronic filing, such as the "inaccessibility" of the clerk's office and when does a day "end." These amendments replace the inconsistent and often unclear approach of the existing rules. The specific rules for which time computation changes are proposed include:

- Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41;
- Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033;
- Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, and 81;
- Supplemental Rules B, C, and G; and Illustrative Civil Forms 3, 4, and 60; and
- Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases.

The amendments to the time computation rules will be transmitted to Congress in accordance with the Rules Enabling Act and will take effect on December 1, 2009, unless Congress enacts legislation to reject, modify, or defer the amendments. Congress has not taken such action very frequently in the past, so the rules are expected to go into effect as written on December 1, 2009. The amendments may be accessed at **www.uscourts.gov/rules/supct0309.html.**

The Local Rules for the United States District Court for the District of Oregon are expected to change to conform to these new changes, as well as to conform to earlier changes made to the Federal Rules of Civil Procedure. The changes to the Local Rules are currently expected to go into effect on or around December 1, 2009. More detail on the time computation rule changes in the Federal Rules of Civil Procedure and the Local Rules for the District of Oregon will be given in the November issue of *In Brief.*

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Thanks to James L. Hiller, of Hitt Hiller Monfils Williams LLP, for his assistance with this article.

TEN ESSENTIALS EVERY LAWYER NEEDS TO KNOW ABOUT E-FILING AND E-NOTICES IN OREGON'S FEDERAL DISTRICT COURT

Laura Brennan and Kathryn Mary Pratt

Oregon lawyers who do not regularly practice in Oregon's federal courts have recently been surprised by the fact that the use of the Court's Case Management / Electronic Case File (CM/ECF) System for the electronic submission of documents is now mandatory, and some have had trouble navigating its requirements. Many attorneys are surprised to learn that the District of Oregon Court no longer sends them any paper copies of notices, orders or judgments. These are now served electronically through e-mail notification messages. This will pose problems for attorneys who do not regularly check their e-mail to determine if notices from the Court have been received or documents from other parties have been filed.

The case initiation process (the filing of a complaint or notice of removal) does continue in the conventional manner so that the court can assign a case number, judge, issue process, etc. See Local Rule 100.4(a). All other submissions, unless otherwise specified in the rules, are to be filed electronically. Attorneys failing to electronically file when it is required are sent a stern warning from the Court. A deficiency notice is filed and becomes a part of the docket in that case. The Court may exercise its power to sanction parties who fail to follow the Local Rules with regard to electronic filing. Therefore, attorneys should not solely rely on the Clerk's Office or Court to advise them or warn them of violations of Local Rule 100 relating to e-filing through the CM/ECF system. It is important to understand the duties you have with regard to electronic notices and filing, especially if you do not frequently practice in the US District Court for the District of Oregon.

This article is intended to cover the fundamental responsibilities of a lawyer practicing in the District of Oregon as relating to the CM/ECF system. The technical requirements for using the system are detailed in the Court's CM/ECF User Manual, which can be found at http://ord.uscourts.gov/ECF/CMECFHomePage.htm.

1. LOCAL RULE 100 IS THE RULE THAT GOVERNS ELECTRONIC FILING IN THE US DISTRICT COURT FOR THE DISTRICT OF OREGON.

•Attorneys are advised to read Local Rule 100 in its entirety. Criminal practitioners may refer to Criminal Local Rule 3001, but it merely states that unless otherwise directed by the Court, the provisions of Local Rule 100 apply to all criminal cases pending on or after March 1, 2004.

•Rules and policies may be different in other districts. While other federal courts use the CM/ECF software, their rules, practices and policies may be different for filing deadlines, judge copy requirements, etc. If you also practice in other federal courts, you are advised to contact that Clerk's Office to inquire about specific filing guidelines.

2. ALL LAWYERS ADMITTED TO PRACTICE IN THE DISTRICT OF OREGON MUST BECOME REGISTERED USERS ON THE CM/ECF SYSTEM AND MUST ALSO HAVE A PACER LOGIN AND PASSWORD.

•There is a difference between registration for the Court's CM/ECF system and registration for a PACER account. Registration with the Court's CM/ECF system and use of those logins and passwords allow an attorney access to the system for the purpose of electronically filing documents and for maintenance of their CM/ECF User Account.

•PACER is the electronic access service of the United States Judiciary that allows users to obtain case information (run reports and queries, view docket sheets and electronically filed documents) from all federal courts. Following registration with the PACER Service Center, the user will be sent a separate login and password for those purposes.

•Contact and other information for the PACER Service Center:
PACER Service Center
P.O. Box 780549
San Antonio, TX 78278-0549
1-800-676-6856
E-mail: PACER@psc.uscourts.gov
Internet site: http://pacer.psc.uscourts.gov

•There is no initial cost for registering with PACER. However, the Judicial Conference has set a fee of eight cents per page (with a $2.40/30 page cap, except transcripts) for querying, viewing or downloading electronic case information, documents, or reports via the Internet.

•Where to find details about CM/ECF:
The CM/ECF project page site for the US District Court for the District of Oregon is found at http://www.ord.uscourts.gov/ECF/CMECFHomePage.htm.

•E-mail Account Requirement for a CM/ECF Registered User: To become a "registered user" all lawyers admitted to practice must maintain a current e-mail account "sufficient to receive services of electronic filings and court notices." See Local Rule 100.2.

•Newly admitted attorneys to the Oregon Federal Bar will be concurrently registered in CM/ECF. Notification of an attorney's CM/ECF logins and passwords will be sent via e-mail to the attorney shortly following their general admissions ceremony.

•Pro Hac Vice Attorneys: Attorneys granted permission to be admitted *pro hac vice* will also be concurrently registered in CM/ECF and will be sent their logins and passwords via e-mail.

•Unregistered Attorneys: Those attorneys who may have missed previous registration drives may submit the Attorney Account Registration Form found at http://www.ord.uscourts.gov/ECF/CMECFHomePage.htm.

•Lost or forgotten logins or passwords: Registered attorneys who have lost or forgotten their CM/ECF logins and passwords should visit the CM/ECF project page at: http://www.ord.uscourts.gov/ECF/CMECFHomePage.htm and click on the link for CM/ECF Login and Password Help. For PACER logins and passwords, contact the PACER Service Center.

•Exemptions from the registered user requirement are difficult to obtain. To obtain an exemption, an attorney must apply to the assigned judge in a particular case and show that they are without access to automation or the Internet and demonstrate "good cause." See Local Rule 100.2(d)(1).

•Conventional filing by an exempt attorney: Even if an attorney is exempt from e-filing, that attorney must include a CD-ROM or diskette with every conventional filing containing a text searchable PDF version of those papers to be filed with the Court. See Local Rule 100.2(d)(2).

3. ONCE YOU REGISTER, YOU CONSENT TO BE SERVED ELECTRONICALLY FOR ALL NOTICES FROM THE COURT AND OTHER USERS EXCEPT SERVICE UNDER Fed. R. Civ. P. 4, 4.1, AND 45.

•Registered users will no longer be served conventionally. If a registered user appears in an action, the user is "deemed to consent to electronic service of all electronically filed documents by the Court or other registered users who have appeared in the action." See Fed. R. Civ. P. 5(b)(2)(D). This means that, except for service of summons (Fed. R. Civ. P. 4), subpoenas, (Fed. R. Civ. P. 45) or other process (Fed. R. Civ. P. 4.1), once you register, you will not receive paper versions of electronically filed documents from the Court or from another registered user. See Fed. R. Civ. P. 5(b)(2)(D).

•Judgments are no longer mailed conventionally. In accordance with Fed. R. Civ. P. 5(b) and 77(d), on June 1, 2006, the Clerk's Office discontinued mailing a paper copy of electronically filed judgments to registered users who have been successfully served via the CM/ECF system.

4. YOU ARE RESPONSIBLE FOR ENSURING THAT NOTICES FROM THE CM/ECF SYSTEM REACH YOU.

•You have a duty to advise the court of any change in address and maintain your CM/ECF User Account information. Local Rule 83.10(a) states that an attorney has the duty to advise the court of a change of address, including a change of their e-mail address. Local Rule 83.10(b) provides that such notice must be filed in pleading form and served on all parties to any pending action, or case on appeal. Commensurate with the filing of a notice of change of address, the attorney must also update his/her CM/ECF User Account. Instructions for maintaining this account are found at: http://www.ord.uscourts.gov/ECF/2005Manual/Section15Atty.htm.

•Verify that the CM/ECF systems messages are not "Spam". User Manual §6.4 provides that all registered users must verify that the e-mail notification messages from the address:info@ord.uscourts.gov(or from webmaster@teo.uscourts.gov for those users who have opted to receive summary e-mail messages) are not considered "Spam" and consequently blocked or quarantined by their e-mail service provider. Be sure that these web addresses and/or domains are marked as "safe" in your junk mail filter.

•Verify that e-mail provider will transmit failure or error messages. User Manual §6.4 provides that all registered users must verify that their e-mail service provider has a strict policy of transmitting a failure or error message back to the sender if there is a delay or problem in transmittal of an e-mail message.

•Court monitoring of failure messages is limited. As a courtesy in the District of Oregon, the Court monitors message failures, but does not respond to auto reply messages, or transient failure messages, like delay messages. The User Manual provides in §6.4(b) that recipients may be contacted if the Court receives a delivery failure message to complete notification and correct case records so that future messages may be successfully transmitted. The User Manual §6.6 also provides that the Clerk's Office may attempt to resend messages when delivery of an e-mail notification fails and/or contact opposing counsel to complete service in the conventional manner.

•E-mail failures may be noted on the case docket. A notation may be made on the case docket if the delivery to an attorney fails and court staff is unable to contact that attorney or co-counsel of record. See User Manual §6.6(f).

5. YOU ARE RESPONSIBLE FOR KEEPING COUNSEL OF RECORD INFORMATION CURRENT.

•Change of Address or Law Firm: If an attorney leaves your firm and there are District of Oregon cases in which he/she is displayed as counsel of record, as co-counsel, you need to file the proper notice with the Court (like a Notice of Withdrawal or Notice of Substitution of Counsel) so that counsel information is kept current. See Local Rule 83.11.

6. ELECTRONICALLY FILED ORDERS HAVE THE SAME FORCE AND EFFECT AS IF THEY WERE IN PAPER FORM.

•Orders of the Court: An order or other court-issued document filed electronically without the original signature of a judge or clerk has the same force and effect as if the judge or clerk had signed a paper copy of the order and it had been entered on the docket in a conventional manner. See Local Rule 100.9.

•Text Only Orders: Orders may be issued as "text only" entries on the docket, without an attached document. See Local Rule 100.9.

7. ATTACHMENTS AND EXHIBITS ARE FILED ELECTRONICALLY, WITH SOME EXCEPTIONS.

•Mandatory Electronic Filing became effective on September 1, 2006. The Court and all registered users are required to electronically file all pleadings, documents and other papers in all pending civil and criminal cases, unless otherwise specified by the rules or further order of the Court. See Local Rule 100.1.

•Case Initiation Exception: Initial case papers must still be filed conventionally. These filings, however, must be accompanied by a text searchable PDF version of every paper, including scanned versions of related state court documents in removal actions, on a CD-ROM or diskette. See Local Rule 100.4.

•Demonstrative or Oversized Exhibits Exception: There is an exception for demonstrative or oversized exhibits and these may be filed conventionally. See Local Rule 100.4(c)(3).

•Trial Exhibits Exception: These documents are to be delivered or submitted as ordered by the assigned judge. See Local Rule 100.4(c)(4).

•Sealed and In-Camera Documents Exception: Attorneys must file sealed and in-camera documents conventionally. See Local Rules 3.9, 3.10, 10.3 and Local Rule 100.4(e)(2).

•Individual Consent to Jurisdiction Before a United States Magistrate Exception: These documents must be filed conventionally. See Local Rule 100.4(e)(3).

•Social Security Administrative Record Exception: Currently, Social Security Administrative Records are filed conventionally. See Local Rule 100.4(e)(4).

•Administrative Records: Other types of administrative records, like APA, IDEA, ERISA and INS administrative records, may be conventionally filed and served without prior court approval. See Local Rule 100.4(f).

•HIPAA Protected Information Exception: Documents containing individually identifiable HIPAA protected information must be filed conventionally. See Local Rule 100.4(e)(5).

•Excerpt of Record Rule: The Court requires that only those excerpts of referenced documents that are directly germane to the matter be electronically filed. If a registered user files excerpts, it is without prejudice to the right to timely file additional excerpts or the complete document. See Local Rule 100.4(c)(2).

• Notices of Appeal: Notices of Appeal may be filed electronically, but any required fee must be paid to the District Court within 3 days from the date of electronic filing. See Local Rule 100.4(d).

8. ATTORNEYS MUST DELIVER A JUDGE'S COPY OF CERTAIN ELECTRONICALLY FILED DOCUMENTS TO THE COURT CLERK WITHIN 3 DAYS AFTER ELECTRONIC FILING.

•Civil Cases: Local Rule 100.4(b)(1) imposes this requirement on all dispositive motions, motions for injunctive relief, and any documents in excess of 5 pages.

•Criminal Cases: Local Rule 100.4(b)(2) imposes this requirement on all motions in limine, motions to dismiss, suppression motions, and any documents in excess of 5 pages.

9. YOU ARE RESPONSIBLE FOR MAKING SURE ELECTRONIC SERVICE ON THE COURT AND OTHER PARTIES IS PERFECTED.

•Effective Completion of Service: Electronic service is complete upon transmission, however, electronic service isn't considered "effective service" if the serving party learns that the filing did not reach the person to be served. See Local Rule 100.7(a)(1).

•Confirmation Receipt: The Notice of Electronic Filing (NEF) generated by the system may be used as the confirmation of service upon all of the parties who were served electronically and to satisfy the notice requirements of Fed. R. Civ. P. 5(b) and 77(d). See Local Rule 100.7(a)(1).

•Notice of Electronic Filing: Except for a document filed under seal, the Notice of Electronic Filing (NEF) generated by the CM/ECF system includes: a hyperlink to the electronic filing; the filing date and time; the name(s) of every registered user and secondary addressee to whom the notice was transmitted; and the names of every case participant who was not sent electronic notice of the filing. Those individuals whose names fall below this line and are not sent notice electronically are to be conventionally served.

•Failure of Electronic Service: If electronic service fails for a particular party, the registered user must then serve the document conventionally and file a certificate of service with the Clerk's Office. See Local Rule 100.7(b)(2). This rule also applies to documents filed conventionally because they are under seal. See Local Rules 100.7(b)(1) and (3).

10. THERE IS HELP IN GETTING UP TO SPEED ON THE CM/ECF SYSTEM.

•CM/ECF User Manual: Electronic filing requirements are described in detail in the CM/ECF User's Manual at http://www.ord.uscourts.gov/ECF/CMECFHomePage.htm. This manual contains a lot of the technical information attorneys need to use the system, like hardware, and software requirements, login information, instructions for completing transactions on the system, and other important information. From time to time, this manual is updated to conform to the evolving CM/ECF system software releases or new court procedures. Notice of updates will be posted on the Court's Web site at: http://www.ord.uscourts.gov.

•On-line Tutorial: The Court offers an on-line tutorial for newly registered users and their staff at http://www.ord.uscourts.gov/ecf/Tutorial/index.html. No login or password is required to access this tutorial.

•Clerk's Office Assistance: Your new best friend is the docket clerk and/or courtroom deputy clerk associated with your case. If you have any questions about electronic filing, event selection or filing errors and corrections, start by contacting the docket clerk for the judge associated with the case. The name of that person is found on the Case Assignment Notice. Alternatively, you may call the Divisional Office Intake Counter, and the clerk will assist in directing your call. For Portland cases call 503-326-8008 (civil) or 503-326-8003 (criminal). For Eugene cases call 541-431-4100, and for Medford cases call 541-608-8777.

Electronic filings may be made at any time, however, Clerk's Office staff may only be available to assist you during normal business hours so you may wish to plan accordingly.

•Internet On-line Help: Users may also send general questions about the CM/ECF system via e-mail to info@ord.uscourts.gov. Caution: This address may NOT be used for filing any pleadings, documents, or for sending any other official correspondence to the Court.

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Fios White Paper

Working Through the Practical Implications of the Amended Federal Rules of Civil Procedure

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Executive Summary

After more than five years of discussion and public comment, new amendments to the Federal Rules of Civil Procedure (FRCP) are scheduled to take effect on December 1, 2006. New language in six Federal Rules—rules 16, 26, 33, 34, 37 and 45—requires attorneys to pay specific attention to electronic discovery issues—or, in the vocabulary of the new rules, "discovery of electronically stored information (ESI)." The exact language of these amended rules has been widely broadcast through lectures, articles and outreach efforts by the Federal Judicial Committee itself, but the precise practical impact of these rules are just beginning to be tested as judges are already beginning to apply these new standards. Even without a history of opinions and orders, the plain language of the amended rules suggests that a number of common discovery practices and strategies need to be reviewed and updated in light of the new standards.

Talk Is Cheap...And Is Now Required

In public comments regarding the initial revisions to the Federal Rules that were drafted, members of the Civil Rules Advisory Committee repeatedly stated that they were frustrated by counsel's inability to discuss electronic discovery issues, much less agree on any logistical details, absent affirmative intervention by the courts. One intentional result of amended language in FRCP Rules 16 and 26 is to force counsel to raise the topic of ESI and its potential relevance in "meet and confer" sessions in advance of a scheduling conference with the court. Discussing ESI does not mean that it will always be relevant to a dispute—it remains possible that some disputes may involve little if any ESI. However, to the extent that counsel can agree on ESI and the repositories in which it is stored that may be relevant—or irrelevant—to the dispute, parties will have a clearer, common understanding as to their respective preservation obligations.

Given the contentious nature of litigation, it remains likely that opposing parties will still have difficulty reaching an agreement on some (or many) details about the production of ESI. For example, practitioners and judges alike have commented that many litigants are unlikely to agree on the format in which ESI is produced, at least initially. While a large body of commentary has suggested that ESI should be produced in its "native format" to provide the most complete evidence, current technology doesn't effectively allow for the redaction of privileged or confidential information without changing the native files and the underlying metadata. Somewhat similarly, native files cannot be effectively Bates-numbered at the page level, since the same file may display different page breaks

depending on the hardware and software used to review or print it out. These and other difficulties associated with managing native files persuaded the Advisory Committee to avoid requiring native file production. Instead, Rules 34 and 45 acknowledge the potential value of producing files in native format but require only that ESI be produced in a format that is "reasonably usable."

Past experience has shown that the "reasonably usable" standard can vary significantly depending on the specific matter. The amended rules seek to reduce the number of disputes that necessitate judicial intervention by requiring parties to specify their positions early in the process as adjusting collection, production, and review procedures can become increasingly difficult as time passes.

FRCP Rule 26(f) will now require parties to discuss all electronic discovery issues prior to the scheduling conference (which must take place 120 days after the litigation action is filed). This initial "meet and confer" must take place at least 21 days prior to the scheduling conference. Ideally, an agreement on all of the issues, including production format, can be memorialized as part of the Court's FRCP Rule 16 scheduling order. In addition to these initial ground rules, FRCP Rules 34 and 45 both strongly suggest that the requesting party specify the format in which it would like to receive ESI. To the extent that the requesting party does not specify a preferred format, or if the producing party disagrees with the request, the producing party must explicitly state in its response how it proposes to produce the ESI. The net result is that more information regarding ESI issues must be discussed early in the case, so parties can resolve production format issues directly—or so the court can quickly appraise the situation and provide a ruling.

Know What You Have, Know What You Want

Recent cases have highlighted the serious consequences of mishandling ESI in civil litigation. The Morgan Stanley decision (Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005)), in which ESI issues led to a record $1.45 billion jury verdict, is only one of several high-visibility cases where ESI mismanagement caused great damage to a litigant's case. The amended rules have addressed this demonstrable lack of understanding on the part of outside counsel as to their client's ESI and its relevance to specific litigation matters. The rules have been amended, in part, to avoid Morgan Stanley-like situations, where the case was decided without fully reaching its merits. The Federal Rules will now require greater due

diligence in preparing initial disclosures and in responding to interrogatories and requests for production. ESI will need to be discussed as part of party disclosures or responses made pursuant to amended FRCP Rules 26, 33 and 34.

Under the amended Federal Rules, counsel will have an obligation to begin due diligence regarding a client's ESI early in the case. Initial disclosures pursuant to Rule 26 will be required to explicitly reference any sources of ESI that a client may use in support of its claims or defenses. While this certainly does not approach a requirement that a client must disclose all its ESI, the net effect remains quite powerful. If a company is reliant on internal e-mail messages to demonstrate it was acting appropriately, a company's e-mail repositories and any associated e-mail archiving systems will need to be disclosed. If the company also relied on internal documents or a customer relationship management (CRM) database to explain its action, the client's files and database servers will also need to be disclosed. Ultimately, it is entirely likely that most corporate data repositories will need to be listed in the initial disclosures. Why? Parties may not be able to complete the detailed analysis, required so early on in the case, as to the specific workstations, servers and archived media that contain all potentially relevant ESI. Should the initial disclosure fail to include a repository that emerges later in the process, a party could face severe sanctions.

The initial disclosure of potential persons (custodians) with discoverable information must include substantive fact witnesses, as well as IT directors and records managers who control how corporate ESI is stored, accessed and deleted. While no specific language in the amended rules speaks to this point, it seems likely that courts will encourage this practice as the fastest way to share information about ESI and to demonstrate that good faith measures are taken to preserve potentially relevant ESI pursuant to the case. In addition, counsel may want to take proactive measures to ensure that their organization can authenticate the ESI, so it can be used as substantive evidence in court.

Burden Remains a Crucial Part of Assessing E-Discovery Requests

Corporations and supporting outside counsel have resisted discovery requests for decades, if not centuries, on grounds that the material sought by the requesting party is irrelevant or unduly burdensome with limited benefit to the requesting party. Discovery of ESI has been a major battleground for undue burden arguments, with mixed results. Different judges—in the same jurisdiction—have looked at similar fact patterns and have

reached seemingly contradictory conclusions about the true effort required to obtain certain types of ESI.

The primary challenge in consistently measuring burden lies in the fact that ESI comes in many formats and is not typically centrally managed. ESI can be found on a variety of repositories and data stores throughout a global company, such as workstations, file servers, back-up tapes, e-mail archiving systems, content management systems, and personal storage devices, such as PDAs, personal laptops and voice mail systems. Additionally, companies normally have closets full of old or broken computer equipment, leftover backup tapes from earlier systems that can no longer be read, and any number of employee-created CDs, floppy disks and flash drives. The effort required to harvest usable ESI from each of these types of media can vary dramatically.

A second challenge in measuring burden is that parties may be situated very differently though possess roughly the same amount of ESI. For example, a small company being sued for $100,000 in damages may be forced to spend upwards of $250,000 to restore ESI and have its attorneys review the contents for privilege or relevance. Most would agree that such a company should be entitled to seek relief from this type of request. However, if the producing party is a large, global company facing a $100 million lawsuit, courts may be more inclined to view this discovery request as appropriate to the scope of the case, even if the producing party i able to demonstrate why the discovery sought is irrelevant to the matter at hand.

Amended FRCP Rule 26 (as well as the parallel provisions to Rule 45 that governs subpoenas) seeks to provide more specific guidance regarding "undue burden" to both courts and litigants. FRCP Rule 26(b)(2)(B) will now permit a party to resist a request for ESI by demonstrating that it is "not reasonably accessible." With this argument, a party may not have to produce the electronic evidence; however it does not relieve its obligation to preserve this material. Potentially relevant ESI must be preserved until the requesting party releases its interest or some other event releases this material from litigation hold status. In addition, a requesting party is entitled to challenge a "non-accessible" classification and move for its production in a motion to compel.

Courts and commentators alike have reached a number of preliminary conclusions about FRCP Rule 26's new "not reasonably accessible" language. Active data, such as e-mail messages presently stored on mail servers, seems to be generally regarded as presumptively accessible. ESI that is stored offline, particularly materials stored on backup tapes or on obsolete media, is likely to qualify as "not reasonably accessible" in

many cases. In addition to this new standard, a party can still resist the production of accessible data by arguing why the requested data is not relevant to the matter or is unduly burdensome to produce. These and other traditional criteria for relief remain available under FRCP Rule 26, as well as within the inherent power and discretion of the courts.

Can You Dock In The Safe Harbor?

Another trend that is becoming increasingly common is for requesting parties to try and determine how quickly litigation hold procedures were initiated once litigation was either reasonably anticipated or initiated. By doing so, the requesting party can try to ascertain whether the defendant failed to preserve relevant ESI before it was altered, overwritten or otherwise destroyed. Often, this effort is designed to reveal the gaps between when a company received the notice of litigation and when preservation notices were distributed throughout the organization. Requesting parties can try and use this gap analysis—which may be as little as a few days or as long as several months—as the factual predicate for spoliation of evidence motions and requests for sanctions.

Newly added FRCP Rule 37(f) seeks to provide important guidance regarding the destruction of ESI. Large quantities of corporate data is overwritten or destroyed every day in the ordinary course of business. Users routinely delete e-mail messages to reclaim space in overflowing in-boxes. Reports and memos are updated as new information is received. Voice mail messages expire after a fixed number of days. Employee data directories are purged from corporate networks after individuals leave the company. Virtually all companies reuse backup media on a scheduled basis to ensure the most recent snapshot from which systems can be restored in the event of a catastrophic failure. Each of these activities designed to preserve or destroy corporate data, in the absence of a legal requirement (e.g., litigation hold), is completely legitimate and are appropriate business functions. Companies should not be penalized for engaging in good-faith business practices.

FRCP Rule 37(f) states, very simply, "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as the result of routine, good-faith operation of an electronic information system."

At first blush, this direct language appears to significantly limit the circumstances in which a spoliation motion will be able to be brought. However, in the real world, many mid-size and large companies are often named as parties in multiple, overlapping lawsuits. As a result, these organizations may be limited in the extent to which they are eligible for the new "safe harbor" rule, as some of the data repositories (such as backup tapes) will constantly be subject to litigation holds. New technology, such as e-mail archiving and document management systems, may make it possible to exert greater control over ESI, opening greater possibility of automated electronic document management and deletion. Present opinion of many commentators and scholars is that FRCP Rule 37(f) is likely to provide only limited protection to most companies that might seek to invoke it. Litigation and corporate attorneys, as well as judges, will carefully be watching opinions that define the standard around Rule 37(f).

Judges Still Control the Discovery Process

It's certainly possible to imagine that electronic discovery practices will be transformed as a result of the increased communication requirements and new burdensomeness tests in the amended Federal Rules. However, it's also important to remember that the rules do not carry the weight of law, and no amendment to the rules will change the substantive law of a jurisdiction. Questions of legal privilege, for example, will remain controlled by local jurisprudence. Even though the amendments to FRCP Rules 16 and 26 encourage parties to discuss non-traditional ways of preserving privilege as one way of reducing the transactional cost of collecting and reviewing ESI, opening the door to alternatives is not the same as requiring litigants to walk through it.

Even more important, the Federal Rules remain guidelines—but only guidelines—that can be applied with great discretion by trial courts. Trial courts, so long as they have a reasonable basis for their decisions, retain considerable power to manage the discovery process as is most appropriate to a matter. If the court finds that the ESI is relevant, it can order its production even if it is admittedly "not reasonably accessible" and expensive to collect and process. Similarly, courts will have the last word as to whether a contested production of ESI is being made in a "reasonably useful" format. In addition, the official commentary to FRCP Rule 37(f) makes it clear that courts are entitled to vigorously examine the "good faith" nature of any destruction of ESI and whether organizations can take advantage of any safe harbor protection. In the end, amended Federal Rules of Civil Procedure or not, practitioners will still have to persuade a court as to the reasonableness of their positions.

APPENDIX A:

Federal Rules of Civil Procedure

Amended Rules & Realities

Rule	Description	Purpose	Reality
Rule 16 (b)	Allows the court to establish rules around disclosure, privilege, methods and work product prior to electronic discovery commencing	Save court and attorney time by pre-establishing rules & process for managing discovery	Legal must understand IT environment for all federal cases within first 120 days, more motion practice around ED very early in case; court order higher stakes than party agreement
Rule 26 (a)	Adds "electronically stored information" (ESI) as own category	Remove ambiguity around the words "document" and "data compilations"	No more wriggle room for instant messaging, voice over IP, databases, PDA's
Rule 26 (b)(2)	Sets up two-tier discovery for accessible and inaccessible data; provides procedures for cost shifting on inaccessible data	Remove uncertainty about who pays for requests for restoring backup tapes, forensics; make sure Zubulake remains a one-circuit precedent	Will require more work and costs for defendants very early in a case to account for the backups and what data is on them; codifies Zubulake for entire US
Rule 26 (b)(5)	Clarifies procedures when privileged ESI is inadvertently sent over to the requesting party (retrieval of that information)	To allow "clawback" of privileged information; allow parties to push the cost of review to the requestor	Still huge risks involved; will not be able to capture/ retrieve all sensitive data (e.g. trade secrets and other IP), embarrassing emails, waiver of privilege for other cases
Rule 26 (f)	Requires all parties to sit down together before discovery begins to agree on some form of protocol	Rule encourages uniformity, structure and more predictable motion practice	Opportunity to shift preservation costs if prepared for these discussions; otherwise opportunity to get painted into a corner
Rule 33 (d)	Includes ESI as part of the business records related to interrogatories	To reduce time spent gathering and analyzing data to answer interrogatories	Can provide transaction detail in electronic form in answer to interrogatories; may need to provide direct access or decent tools
Rule 34 (b)	Establishes protocols for how documents are produced to requesting parties	Stop arguments about the form of production, decide early to save costs	Requesting party gets to choose form of production; most advantageous form is native files which are more difficult to review and have potentially damaging metadata or track changes
Rule 37 (f)	Provides "safe harbor" when electronic evidence is lost and unrecoverable as a matter of regular business processes	Help calm fears (and avoid sanctions) when data is lost or overwritten in the normal course of business (gut Zubulake)	Puts GC on notice to ensure litigation holds and data destruction policies are legally defensible; hard to prove without third-party validation (codifies Zubulake)
Rule 45	Subpoenas to produce documents includes ESI	Clarifies rules for subpoenas to ensure consistency	No more arguing whether ESI is a "document"
Form 35	Standardizes discovery agreements	Avoid downstream delays and motion practice around discovery	Automatic reminder to include ESI where it is often overlooked

APPENDIX B:

Meet & Confer Checklist

Following are steps designed to help counsel more effectively negotiate the scope of electronic discovery at an FRCP Rule 26(f) Meet & Confer conference:

Step #1: Complaint Served

- ❑ Document date complaint was received
- ❑ Identify potentially relevant custodians

Step #2: Litigation Hold/Preservation Process

- ❑ IT, legal & records management meet and confer on litigation hold strategy
- ❑ Issue litigation hold order to all custodians
- ❑ Re-confirm that all appropriate destruction policies have been suspended
- ❑ Identify IT owner for evidence preservation effort ("most knowledgeable" person)
- ❑ Meet with key custodians to ensure compliance with legal hold
- ❑ Collect & preserve potentially relevant evidence (in place or in secure evidence repository)

Step #3: Early Case Planning

- ❑ Gather existing documentation & assign tasks for mandatory disclosure
- ❑ Collect & review subset of key custodians/tapes
- ❑ Test search term, sampling and other culling strategies
- ❑ Extrapolate findings to determine potential costs and timeline implications of your own strategies and for those requests that may be presented at the Meet and Confer

Step #4: Early Discussions

- ❑ Formulate a cost-effective, yet fair scope of discovery:
  - ❑ # of relevant custodians
  - ❑ File types & locations
  - ❑ Accessible vs. inaccessible ESI
  - ❑ Format of production
- ❑ Reasonable timeframe
- ❑ Create a record of good faith and cooperation
- ❑ Maximize cost shifting opportunities
- ❑ Solidify preservation, privilege and reduction strategies

Step #5: The Initial Meeting

- ❑ Bring with you:
  - ❑ Content map
  - ❑ Budgeting information
  - ❑ All back-up documentation
  - ❑ Expert who is knowledgeable about the entire electronic discovery process
  - ❑ Blank calendar for on-site planning
- ❑ Have some low exposure, low cost items to use during the negotiation
- ❑ Control your own destiny, if you can, by coming to an agreement
- ❑ Promise only what you are certain you can deliver

About Fios, Inc.

Managing Evidence from Creation to Litigation

Serving the legal community since 1999, Fios® Inc. is committed to helping clients reduce the costs, risks and time associated with electronic discovery. Fios' discovery management, evidence collection, data processing, document review and production services are based on an in-depth knowledge of litigation and information technology. These services are specifically designed to help clients legally and efficiently collect and prepare data for review by outside counsel and production to the requesting party.

As a tier-1 provider, Fios offers a full range of professional consulting services to help clients become "litigation ready" and better prepared for current and future matters, as well as the new amendments to the Federal Rules of Civil Procedure. From overall assessments and process improvements to matter-specific guidance on collections or review strategies, Fios experts help clients bring greater management controls and predictability to the process.

More information on Fios' end-to-end electronic discovery and consulting services can be found by visiting www.fiosinc.com or by calling TOLL-FREE at 877-700-3467.

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THE TAX CHANGES TO THE BANKRUPTCY CODE

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made more than 20 changes to the treatment of taxes in bankruptcy cases. One of the tax changes works in favor of debtors – section 1222(a)(2)(A) now relieves Chapter 12 debtors from priority status for capital gain tax liabilities arising from the sale of farm assets. The majority of the changes, however, favor taxing authorities, by restricting a debtor's discharge rights, compelling compliance with return filing and tax payment requirements, and increasing the amounts taxing authorities can recover in bankruptcy.

The primary changes to tax treatment may be described as follows:

1. Tolling Rule for Priority Status. New language at the end of Bankruptcy Code section 507(a)(8) tolls the three-year and 240-day periods for determining priority of a tax liability when collection of the liability was stayed by the debtor's involvement in a prior bankruptcy case or a collection due process appeal under Internal Revenue Code sections 6320 or 6330. The three- or 240-day periods do not run during the duration of the stay, and the pertinent priority period is extended by 90 days. The filing of an offer in compromise during the 240-day period continues to toll that period under section 507(a)(8)(A)(ii) and extends the 240-day period by an additional 30 days.

2. Tax Exceptions to the Superdischarge in Chapter 13 and Corporate Chapter 11 Cases. Amendments to section 1141(d) now exempt tax liabilities associated with fraud or a willful attempt to evade or defeat the tax. These liabilities are no longer subject to the superdischarge granted to corporations in Chapter 11. No similar language compels exemption from discharge for a partnership or limited liability company. The superdischarge granted to debtors in Chapter 13 under section 1328(a) no longer eliminates: (1) liabilities associated with fraud or a willful attempt to evade or defeat the tax, (2) the trust fund portion of employment tax liabilities or other tax liabilities that have a withholding requirement, or (3) taxes associated with a period for which the debtor failed to file a return or filed the return late on a date less than two years prior to the petition date.

3. Mandatory Compliance with Postpetition Return Filing and Tax Payment Requirements. Small business debtors in Chapter 11 are required to remain current on postpetition tax obligations and timely file all postpetition returns. Section 1116(b). If a small business debtor defaults on a postpetition tax obligation and fails to cure the default within the time prescribed by statute, the court must dismiss the case or convert it to a proceeding under Chapter 7, unless it is established that conversion or dismissal is not in the best interests of the estate. Throughout all chapters of bankruptcy, section 521(j) allows taxing authorities to obtain dismissal or conversion of a debtor's case if the debtor defaults on a postpetition return filing and does not cure it within 90 days after the taxing authority moved for conversion or dismissal.

Referred to in the June 2006 issue, page 12

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4. Mandatory Filing of Prior Four Years of Tax Returns in Chapter 13 Cases. Under new section 1308(a), Chapter 13 debtors who failed to file any prepetition tax returns that became due within four years prior to the petition date must file all such returns before the 341 meeting. The debtor can obtain a maximum of 150 additional days to file the returns. *Id.* If he or she fails to do so, the court is required to dismiss the case or convert it a case under Chapter 7, whichever is in the best interests of the estate.

5. Capital Gain Relief for Sales of Farm Assets in Chapter 12. Section 1222(a)(2) eliminates priority status for income tax liabilities arising from the disposition of farm assets, thereby allowing farmers who must dispose of capital-gain-rich property to confirm and complete liquidating plans without full payment of gains taxes arising from the sales. Gains taxes not paid under the plan may be discharged.

6. Statutory Interest Rate Required with Tax Claims. New section 511 requires use of the interest rate dictated by the pertinent tax laws whenever interest must be paid on a tax claim. In reorganization cases, the debtor must provide in the plan for payment of the interest rate in effect on the date of confirmation.

7. Income Tax Accounting in Individual Chapter 7 and 11 Cases. Section 346 of the Bankruptcy Code – which dictates the accounting rules for individuals in Chapters 7 and 11 with state and local income taxes – has been revised to eliminate differences with the accounting rules provided for federal tax purposes under Internal Revenue Code section 1398. New section 1115 of the Bankruptcy Code, however, makes postpetition earnings of an individual debtor in Chapter 11 property of the estate, possibly shifting the income tax consequences of any such postpetition earnings from the debtor to the estate. A number of problems may arise for the debtor if this is the case.

8. Mandatory Disclosure of Return Filed for Most Recent Year Prior to Bankruptcy at 341 Meeting. Section 521(e)(2)(A) requires all debtors in bankruptcy to provide the Trustee, not less than seven days prior to the 341 meeting, with a copy of the income tax return (or a transcript reflecting that return) for the most recent tax year for which the debtor the debtor filed. The debtor's case must be dismissed if the debtor fails to timely produce the return, unless the debtor establishes that the failure was due to circumstances beyond the debtor's control.

9. The Definition of "Return." Language added at the end of section 523(a)(1) now defines "returns" as documents that qualify as returns under applicable non-bankruptcy law or final orders of courts of competent jurisdiction on the amount of tax due. Within the Ninth Circuit and most other circuits, to be a return, a document must (1) be executed under penalties of perjury; (2) contain sufficient financial information for a tax to be computed; and (3) be filed in a good faith effort to declare a tax liability. *See, e.g., In re Hatton*, 220 F3d 1057 (9th Cir. 2002). "Substitutes for returns" and assessments that occur in the absence of the debtor's filing of an actual return accordingly do not qualify as returns for purposes of the nondischargeability provisions of section 523(a)(1)(B)).

10. Minimum Payment Requirements for Tax Claims in Chapter 11. Under amendments to section 1129(a)(9), Chapter 11 priority tax liabilities must receive treatment at least as favorable as the most favored class of unsecured claims, with the exception of administrative convenience claims. Secured tax claims that would be entitled to priority if they were unsecured must also be paid within five years of the petition date and receive treatment at least as favorable as all general unsecured claims.

11. Mandatory Discussion of Tax Consequences in Chapter 11 Disclosure Statements. Disclosure statements in Chapter 11 cases must contain a sufficient discussion of the tax consequences of the plan for a hypothetical investor to make informed decisions about acceptance or rejection. Section 1125(a)(1).

12. Stay Relief for Refund Offsets. New section 362(b)(26) allows taxing authorities to offset prepetition refunds against prepetition tax liabilities, unless there is a dispute about the amount of tax due, or unless the Trustee wishes to use the refund and establishes that it can be adequately protected.

13. Restrictions to Subordination of Tax Liens in Chapter 7 Cases. Ad valorem taxes are no longer subject to subordination in Chapter 7 cases under section 724. Secured claims for other forms of tax cannot be subordinated unless the Trustee marshals proceeds from unsecured assets of the estate and collects fees and expenses incurred in liquidation from the proceeds of the pertinent assets. Section

724(f). In cases that were converted to Chapter 7 from a reorganization proceeding, secured tax claims are not subordinated to administrative expenses incurred during the reorganization proceeding unless they are claims for wages, salaries, commissions, or contributions to an employee benefit plan. *Id.* and section 724(b)(2).

14. Restricted Jurisdiction for Redetermination of Property Tax Assessments. Under an amendment to section 505(a), the bankruptcy court may not redetermine the amount of an ad valorem tax after expiration of the period designated by the pertinent tax laws for contesting the assessment.

15. Addresses for Prompt Determination Requests. Section 505(b)(1)(A) allows taxing authorities to designate an address with the clerk of the court for the filing of prompt determination requests for postpetition tax liabilities under section 505(b)(2). Debtors or trustees who fail to send a prompt determination request to the designated address will not obtain the safe harbor benefits provided by that section.

16. No Stay of Tax Litigation for Postpetition Tax Periods. Section 362(a)(8) has been amended to exempt U.S. Tax Court proceedings from the automatic stay if the litigation involves a postpetition tax liability.

The language of many of the tax amendments is less than precise, and Congress' intent with some of the new provisions is less than completely clear. Bankruptcy practitioners should review the language of the tax amendments carefully, with the understanding that the tax amendments will require development in the courts over the next few years.

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CREDITORS' COUNSEL CAN'T IGNORE THE BANKRUPTCY BILL

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As most Oregon practitioners are probably aware, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Bankruptcy Bill") (also affectionately referred to by many as "BARF"—Bankruptcy Abuse Reform Fiasco) mainly affects debtors filing petitions under chapters 7 and 13. Creditors' counsel may be breathing a sigh of relief—after all, they do not need to calculate median income or schedule "credit counseling" for their clients. This does not mean creditors' counsel can ignore the Bankruptcy Bill, however. In addition to some debtor-specific provisions that can affect a client (for example new §502(k), which allows a creditor's claim for unsecured consumer debt to be reduced by up to 20% if the creditor fails to agree to an "alternative repayment schedule" proposed by a credit counseling agency), there are also provisions that directly affect creditors. This article highlights some of those provisions. References herein to sections of the current Bankruptcy Code are simply to §___. References to the as yet uncodified Bankruptcy Bill are styled "Bankruptcy Bill §___."

PREFERENCE REFORM

Creditor practitioners have become accustomed to boilerplate preference complaints where the amount demanded is so little and the costs of defense are so high that the only cost-effective option is to settle. One reason for this state of affairs is that arguably the best defense available to creditors—the "ordinary course of business" defense of §547(c)(2)—can be difficult to prove and rarely supports the (relatively) less expensive option of a motion for summary judgment. *See* Charles Jordan Tabb, "Panglossian Preference Paradigm?," 5 *Am. Bankr. Inst. L. Rev.* 407, 418 (Winter 1997) ("many smaller cases simply settle, often splitting the difference, with little regard to the merits of the case"). Section 547(c)(2) currently provides a creditor with a defense to a preference complaint if the creditor proves that the transfer was "(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and (C) made according to ordinary business terms." *In re Kaypro*, 218 F.3d 1070, 1073 (9th Cir. 2000). Under the Bankruptcy Bill, this section will make the defense available if the creditor can prove that the debt was incurred in the ordinary course of business between the debtor and the transferee and the payment was either made in the ordinary course of business of the debtor and the transferee or was made according to ordinary business terms. Bankruptcy Bill §409.

Another change to preference law has to do with the so-called "DePrizio Problem." In *Levit v. Ingersoll Rand Financial Corporation*, 874 F.2d 1186, 1200-01 (7th Cir. 1989), the court held that the "look back" period for preference recovery was one year, not 90 days, for payments made to creditors which benefited an insider. *DePrizio* involved a so-called "triangular preference" where the debtor construction company made payments to secured lenders on loans that had been guaranteed by insiders. *See* Richard C. Josephson, "The DePrizio Override," 4 *Bus. L. Today* 40 (May/June 1995). The court based its holding on the interplay between then existing §547 and §550. Section 547 allowed the avoidance of payments for the benefit of insiders up to one year prepetition; §550 authorized recovery from the initial transferee—the lender. *DePrizio*, 874 F.2d at 1195-1201.

The Bankruptcy Reform Act of 1994 tried to overturn *DePrizio* by amending §550 to provide that "the trustee may not recover under subsection (a) from a transferee that is not an insider." §550(c)(2). The "DePrizio Fix" worked for the most part. However, a local case, *In re Williams*, 234 BR 801 (Bankr D Or 1999), pointed out the continuing problem. In *Williams*, two debtors had granted a security interest in their mobile home to a lender. The lender perfected within the 90-day preference period. The trustee in the debtors' subsequent bankruptcy tried to avoid the lien. The lender argued that §550 would not allow such a result, because the lender was not an insider. The trustee argued that he did not have to recover anything pursuant to §550, only to avoid the lien under §547. The court agreed. *See* John C. Murray, "DePrizio Lives (in a Mobile Home in Oregon)," 18 *Am. Bankr. Inst. J.* 14 (Oct. 1999).

Amended §547(i) provides:

> If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided

> under this section only with respect to the creditor that is an insider.

Bankruptcy Bill §1213. We can all hope this puts an end to the *DePrizio* problem.

Amended §547(c)(8) also provides that "in a case filed by a debtor whose debts are not primarily consumer debts" (*i.e.*, business bankruptcies) payments cannot be avoided if the "value of all property that constitutes or is affected by such transfer is less than $5,000." Bankruptcy Bill §409.

Section 549, dealing with postpetition "preferences," has been amended to overrule the holding in *In re McConville*, 110 F3d 47 (9th Cir 1997). In *McConville*, a lender without knowledge of a bankruptcy made a postpetition mortgage loan to the debtor. The court held that the "good faith purchaser" provisions of §549(c) did not protect the lender because the granting of a lien on property was not a "transfer of property." *Id.* at 49. Amended §549(c) uses the phrase "transfer of an interest in real property." Bankruptcy Bill §1214.

Finally, the venue rules of 28 USC §1409(b) have been changed to provide that venue in an adversary proceeding seeking to recover a consumer debt of less than $15,000 or a nonconsumer debt of less than $10,000 is appropriate only in the district where the defendant resides. Bankruptcy Bill §410. While this may sound good in theory, remember that venue can be waived. Plaintiffs could still theoretically file in the bankruptcy court and wait for a defendant to raise the venue argument.

LEASING ISSUES

Counsel representing nonresidential retail landlords may be pleased to learn that the Bankruptcy Bill has eliminated the seemingly endless motions to extend time to assume or reject leases. Currently under §365(d)(4) nonresidential leases of real property are deemed rejected unless the trustee assumes within 60 days or the court, for cause, extends the 60-day period. This provision has led some debtors to file motions to extend on their petition date. (In the *K-Mart* case, the debtor even tried to extend that time past confirmation.) New §365(d)(4) will make the lease deemed rejected on the earlier of (i) 120 days after the order for relief, or (ii) confirmation of the plan. The debtor will be allowed to extend that time for 90 days, for cause, and any subsequent extensions may be granted only with the prior written consent of the landlord. Bankruptcy Bill §404.

At the recent Northwest Bankruptcy Institute, Professor Klee posited that this provision has the potential to drastically alter the course of retail bankruptcies, with some debtors going so far as to engineer an involuntary petition in order to operate in the gap period, since the 120 days does not begin to run until entry of the order for relief. Most commercial landlords, particularly in a less than stellar economy, are happy to keep the tenant unless they have a replacement tenant or the debtor is not current on its postpetition obligations. Retail landlords get especially very nervous close to the fall back-to-school season and Christmas. Faced with the possibility of a "dark" store during those periods, landlords may be willing to cut a deal on extension. Another possibility is that commercial landlords (and retail landlords in particular) could use their new veto as leverage against some of the more odious debtor tendencies. For example, a landlord could agree to several extensions of time to assume or reject on the condition that, if the lease is rejected, no going-out-of-business sale be held at the store.

Softening the blow to the debtor of §365(d)(4) is amended §502(b)(7), which provides that if a lease is assumed by the debtor and subsequently rejected, the landlord's damages are limited to:

> monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor.

Bankruptcy Bill §445. Any excess balance would be a capped, unsecured §502(b)(6) claim. Prior to this change, if a debtor assumed a lease and then rejected it, the full amount of the landlord's damages over the term of the lease was an administrative priority claim.

A related change addresses nonmonetary defaults. The Ninth Circuit in *In re Claremont Acquisition Corp.*, 113 F3d 1029 (1997), held that debtors could not assume and assign an executory contract because they were unable to cure a nonmonetary default. In *Claremont* the debtors operated automobile dealerships under a franchise agreement. Two weeks before filing for bankruptcy, the debtors closed their dealerships in violation of their franchise agreements. As the Ninth Circuit noted, this event of default is a "'historical fact' and, by definition, cannot be cured." *Id.* at 1033. Debtors' assets were sold and the debtors attempted to assume and assign the franchise agreements. Pointing to current §365(b)(2)(D), the debtors claimed that they could not be required to cure a

nonmonetary default. General Motors ("GM") argued that the section meant debtors could not be required to cure any penalties arising from a nonmonetary default. *Id.* The Ninth Circuit found GM's construction of §365(b)(2)(D) more reasonable, grammatical, and in line with legislative history. *Id.* at 1034. The court therefore held that because the debtors could not cure their failure to operate, they could not assume and assign their franchise agreements. *Id.*

As amended, §365(b)(1)(A) provides that nonmonetary defaults of nonresidential real property leases do not have to be cured:

> if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease.

Bankruptcy Bill §328. The landlord will, however, be entitled to assert "pecuniary losses resulting from such default." *Id.*

Nonmonetary defaults of executory contracts and personal property leases are not treated similarly. Under amended §365(b)(2)(D), *Claremont* is still good law with respect to all executory contracts and leases except real property leases covered by §365(b)(1)(A).

PROTECTION FOR WAREHOUSEMEN'S LIENS

New §546(i) provides that warehouseman's liens cannot be avoided. Bankruptcy Bill §406. Section 546(i)(2) provides that the exception should be applied in a manner consistent with any state statute similar to UCC §7-209. Oregon has codified §7-209 at ORS 77.2090. That section gives a warehouseman a lien against the bailor for goods covered by a warehouse receipt for storage and other charges (except for money advances and interest, which are governed by ORS ch. 79). *See* ORS 77.2090(1), (2). This type of lien requires no filings or statutory notice procedures; it is perfected so long as a proper warehouse receipt has been issued. Note that the warehouseman can also create a so-called "spreading lien" by including statutory language related to "other goods" when the stored goods rotate. For a primer on the requirements for a valid warehouseman's lien, particularly on rotating goods, *see In Re Julien Co.*, 136 BR 765 (Bankr WD Tenn 1992).

EXPANDED RECLAMATION RIGHTS.

The Bankruptcy Bill expands the rights of suppliers of goods to seek reclamation of goods delivered to a debtor during the period before bankruptcy. The amendments also strengthen the position of suppliers with respect to other unsecured creditors. Bankruptcy Bill §1227.

Currently a seller of goods can reclaim goods received by the (insolvent) debtor in the ordinary course within 10 days after receipt of the goods. §546(c). The reclamation claim must be valid under applicable nonbankruptcy law (typically UCC §2-702) and the seller must satisfy additional requirements. The UCC has relatively stringent tests for reclaiming goods. For example, the seller must establish that the goods were still held by the debtor in their original form when the reclamation demand was made; or, the reclamation demand must identify the goods sought to be reclaimed with reasonable specificity. Generally, any demand for reclamation is junior and subject to a lien on inventory, cutting off many trade creditors' reclamation claims. Section 546(c) also limits reclamation rights. It provides that in lieu of actually taking back the goods, the court may provide the reclamation creditor with an administrative priority or a lien. Debtors often provide early in their cases that any valid reclamation claims will be given administrative priority, and disputes about whether or not the claim is valid are put off. The result may be litigation over the validity of reclamation claims and compromise of the seller's rights.

The Bankruptcy Bill extends the time period in which a trade creditor can make a demand, thereby expanding the universe of goods that can be reclaimed. The supplier of goods will have 45 days after delivery in the ordinary course to an insolvent debtor to make a reclamation demand. Bankruptcy Bill §1227(a). Also, the requirement that the reclamation claim be valid under the UCC is removed. Suppliers will not have to worry about whether the goods were still in the debtor's possession or in their original form, or whether the demand was made with sufficient particularity. However, the demand is still subject to the prior rights of a secured creditor with a security interest in the goods supplied. *Id.*

The amendments leave some reclamation questions unanswered. Currently, §546(c)(2) specifically provides that if the court denies the creditor the right to physically reclaim the goods, the creditor is to be granted either a lien or an administrative priority. The amendments have stricken this language, making it unclear whether the creditor can only retake the goods or whether the court can still grant valid reclamation claims an administrative priority or lien. The amendments do provide that reclamation is in addition to the right under §503(b) to

receive an administrative expense priority for goods delivered 20 days prebankruptcy; so presumably, reclamation creditors who supplied goods during this timeframe will receive an administrative priority under both §503 and §546(c). But the remedy for suppliers during the 20 to 45 days prebankruptcy is not clear.

EXPANDED RIGHTS FOR UTILITIES

The Bankruptcy Bill gives utility companies the power to alter, refuse, or discontinue utility service to a debtor without having to obtain relief from the automatic stay or court approval. Bankruptcy Bill §417. As a result of these changes, chapter 11 debtors must work out a mutually agreeable form of assurance within the first 30 days of the case to avoid termination by the utility companies.

Currently, utility companies are barred from discontinuing or altering service to a debtor unless within 20 days after the date of the order for relief, the debtor furnishes "adequate assurance of payment" either in the form of a deposit or other security. §366. Adequate assurance is typically given in the form of an administrative expense priority.

Amended §366 defines the term "assurance of payment." It includes a cash deposit, letter of credit, certificate of deposit, surety bond, prepayment of utility consumption, or another form of security. Bankruptcy Bill §417. The administrative expense priority that utility companies are now given is no longer listed as an acceptable form of adequate assurance. The utility company can alter, refuse or discontinue utility service to a chapter 11 debtor if during the 30 days beginning from the petition date the utility does not receive adequate assurance "satisfactory" to the utility. In deciding whether the assurance of payment is adequate, the court may not consider the absence of security before the petition date, the timely payments by the debtor for service prepeition, or the availability of an administrative expense priority. Further, a utility can offset a security deposit without notice or court order. *Id.*

The Bankruptcy Bill does not require that the utility seek court approval before terminating service in accordance with the new provision, and as amended §366 will arguably eliminate the need to seek relief from the automatic stay before terminating service.

CONCLUSION

This article is intended only to highlight some provisions of the Bankruptcy Bill that may affect creditors. You should refer to the full Bankruptcy Bill or a new edition of the Bankruptcy Code to determine what sections affect your clients.

WHAT BANKRUPTCY ATTORNEYS NEED TO KNOW ABOUT THE NEW BANKRUPTCY RULES & FORMS

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INTRODUCTION

Along with new bankruptcy code provisions come new bankruptcy rules and forms. After the adoption of BAPCPA, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States began to formulate these new rules and forms. The Judicial Conference of the United States has approved new official bankruptcy forms, which must be used (with appropriate modifications as needed). **FRBP 9009**. Under the Rules Enabling Act, 28 USC §§2071-2077, it usually takes three years formally to adopt new bankruptcy rules. Because there was insufficient time to enact new bankruptcy rules before BAPCPA went into effect, the Rules Committee has promulgated proposed interim rules, with the idea that the bankruptcy courts can adopt the interim rules by general order, and that those interim rules will apply until such time as the new rules can be officially enacted.

In **General Order 05-1**, the Oregon bankruptcy court adopted the national interim rules, and made substantial changes to its Local Bankruptcy Rules. Some of the new rules in General Order 05-1 apply to cases filed before October 17, 2005, some apply to cases filed after that date, and some apply to all cases. In addition to rule changes, the Oregon bankruptcy court made a number of changes to its Local Bankruptcy Forms to accommodate BAPCPA. General Order 05-1 and the new LBFs can be found on the Oregon bankruptcy court's website at *www.orb.uscourts.gov*.

The Rules Committee took a minimalist approach, making changes to the rules and forms only where absolutely necessary to comply with BAPCPA. Professor Jeffrey W. Morris, the Reporter for the Advisory Committee on Bankruptcy Rules, has written a helpful memorandum that summarizes by category the changes to the new rules. This memorandum, dated August 5, 2005, is published at *www.uscourts.gov/rules/BK_Reporter_Memo.pdf*. Clean and redline versions of the rules that have changed are also available at *www.uscourts.gov/rules*. Notwithstanding this minimalist approach, there are significant changes of which practitioners should be aware. Some highlights from the new rules follow.

SIGNIFICANT CHANGES TO CONSUMER RULES

Under BAPCPA, it is now possible for a debtor to file a chapter 7 bankruptcy case in forma pauperis, without payment of a filing fee. **FRBP 1006** was amended to provide a procedure for obtaining fee waivers. New **Official Form 3B** is the application a debtor can use to ask to waive the filing fee.

A number of rules relate to the requirement that the debtor provide additional information under BAPCPA. **FRBP 1007** has been amended to require debtors to file certain financial records, a statement of current monthly income, and documents relating to credit counseling required by BAPCPA with the court. However, the amendments to **LBR 1007** clarify that, in Oregon, some of these documents must only be served on the US Trustee and the case trustee, and not filed with the court. New **Official Form 22** is the debtor's statement of current monthly income (the "means test" form), and new **Official Form 23** is the debtor's certification of completion of its postpetition credit counseling requirement. There is a new **LBF 525** that debtors in chapter 12 and 13 cases must use to certify the status of payments on their domestic support obligations. Amendments to **FRBP 4002** set forth the rules for a creditor's request for copies of tax returns from the debtor, and **General Order 05-1** contains further rules on the procedures for such requests. Amendments to **FRBP 4008** relate to the debtor's requirement to provide additional information before a reaffirmation agreement can be approved.

Several new rules implement the BAPCPA changes relating to dismissal and conversion of cases, and withholding the debtor's discharge until specific requirements have been met. **FRBP 1017** has been amended to clarify the rules for dismissal or conversion of a chapter 7 case for abuse under §707(b). **FRBP 4004** provides that the clerk cannot issue a discharge if the debtor has not filed its certificate of completion of its postpetition credit counseling requirement, or if a reaffirmation agreement presumed to be an undue hardship is pending.

Additional changes to the rules require the clerk to provide new notices. **FRBP 4006** now requires the clerk to notify parties in interest if the case is closed without entry of the discharge. New **FRBP 5008** requires the clerk to notify creditors when the presumption of abuse has arisen under §707(b), or if the debtor has failed to file information from which the presumption of abuse can be discerned within 10 days after the petition is filed. Amendments to **FRBP 2002** require the clerk to give notice about the presumption of abuse to the debtor, all creditors, and indenture trustees.

Oregon now has new form plans for chapters 12 and 13. LBF 1200.5 and 1300.5. One very significant change under the new form plans is that the debtor may propose treatment that is allowed only if a creditor consents, and the creditor's failure to object to the proposed plan will be deemed to be consent.

SIGNIFICANT CHANGES TO BUSINESS RULES

BAPCPA imposes a number of new requirements on small business debtors in chapter 11, but it also allows those small business debtors to take advantage of a streamlined plan process. Amendments to **FRBP 1020** set forth the procedures for identifying the debtor as a small business debtor, and the mechanisms for resolving disputes about characterization of the debtor. **Official Form 1** (the petition) has been amended to allow the chapter 11 debtor to check a box if it designates itself a small business debtor. **FRBP 9006** has been amended to recognize BAPCPA's restriction on the bankruptcy court's ability to extend the time for a small business debtor to file its schedules and statements of affairs. The bankruptcy court may conditionally approve a disclosure statement in a small business case pursuant to amendments to FRBP 3017.1. **FRBP 3016** has been amended to recognize that a plan may provide adequate information to replace a disclosure statement altogether in a small business case. Amendments to **FRBP 2002**, however, require 25 days notice to parties in interest before the court can make a final determination that a small business debtor's plan does not require a separate disclosure statement.

Changes to BAPCPA make it easier for chapter 11 debtors seeking approval of prepackaged plans. Amendments to **FRBP 2003(a)** implement new §341(e), pursuant to which a party in interest can ask that the §341 meeting of creditors not occur in the case of a debtor who is seeking approval of a prepackaged bankruptcy plan.

Under BAPCPA, individual debtors in chapter 11 may modify their plans after confirmation. Amendments to **FRBP 3019** provide procedures for such modifications.

SIGNIFICANT CHANGES TO GENERALLY APPLICABLE RULES

BAPCPA amended §506 to require that personal property collateral be valued at replacement value. **Official Form 6** has been modified so that the schedules no longer require the debtor to list assets at market value. The schedules no longer specify what type of valuation the debtor must use in its schedules.

BAPCPA amended §548 to allow the trustee to go back two years to recover fraudulent transfers, rather than just one year, and to go back ten years to recover a debtor's transfers to a self-settled asset protection trust. **Official Form 7** has been modified so that question 10 on the statement of financial affairs requires debtor to disclose all transfers within 2 years before the petition date, and all transfers to a self-settled asset protection trust within 10 years before the petition date.

A number of changes to the rules are intended to protect the rights of foreign creditors. BAPCPA provides that any notice or procedure shall provide creditors with foreign addresses with such additional time as is reasonable to respond or to file a proof of claim. §1514(d). Amendments to **FRBP 2002** permit the court (sua sponte or on motion of a party in interest) to enlarge the time for foreign creditors to respond to notices or to file claims, and/or to require notices to go by additional means (e.g., email). Amendments to **FRBP 3002** provide that if notice of the deadline to file proof of claim was mailed to a creditor at a foreign address, the creditor can move for a 60-day extension. **Official Form 9** (notice of commencement of case) has been modified to notify foreign creditors of these rights.

BAPCPA provides that a trustee can sell personally identifiable information only if it is consistent with debtor's stated privacy policy or if the trustee obtains court approval after a hearing at which a consumer privacy ombudsman can appear and be heard. §363(b)(1). Amendments to **FRBP 2002(c)(1)** require notice of a sale or lease under §363 of personally identifiable information to state whether the sale is consistent with a policy prohibiting the transfer of that information. Amendments to **FRBP 6004** require that a motion under §362 to sell or lease personally identifiable information must include a request for a consumer privacy ombudsman, and set forth procedures for appointment of the consumer privacy ombudsman.

Direct appeals from the bankruptcy court to the circuit court of appeals are now allowed under BAPCPA. Amendments to **FRBP 8001** set forth the procedure for obtaining a certification from the bankruptcy court to allow the direct appeal. **FRBP 8003** is amended to clarify the effect of certification when leave to appeal is required under 28 USC §158(a) before the appeal may proceed.

NEW RULES FOR HEALTH CARE BANKRUPTCY CASES

BAPCPA requires appointment of a patient care ombudsman to look out for the interests of patients in health care bankruptcy cases. New **FRBP 1021** sets forth procedures for identifying the debtor as a health care business, and amendments to **FRBP 2007.2** set forth procedures for appointment of the patient care ombudsman.

Official Form 1 (the petition) now allows the debtor to check a box if it designates itself a health care business. **New FRBP 2015.1** provides rules implementing the ombudsman's duty to report on quality of patient care. **New FRBP 2015.2** provides the procedures the debtor must follow to give notice before transferring patients when closing a health care facility. **New FRBP 6011** describes the procedures a trustee must follow to give notice (by publication and mail) before disposing of patient records.

CONCLUSION

Extensive changes to the bankruptcy code in BAPCPA have led to significant changes in both federal and local bankruptcy rules and forms. In addition to the changes described above, there are other changes that will undoubtedly affect the practice of bankruptcy law in Oregon. A careful reading of all the new rules and forms is essential!