EASTERN WASHINGTON BANKRUPTCY NOTES
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Sun Mountain As Our Continuing Venue?

Over the course of the last few years, many of you have expressed a desire to continue holding our Annual Seminar and Retreat at Sun Mountain in Winthrop. Others, however, have expressed interest in moving or varying the location of the event to take advantage of a change of scenery or a closer venue. In order to be considerate to our members and their requests, the Bankruptcy Board has been discussing the option of alternating the seminar yearly between Sun Mountain and locations closer to Spokane. The Annual Seminar and Retreat is a fantastic and valuable opportunity to spend time with other bankruptcy practitioners, court and trustee personnel, and members of the judiciary, while also learning about topics relevant to our respective practices and earning CLE credits. It is our hope that a closer, more affordable option may spur more attendance from local practitioners.

As a bit of background, Sun Mountain has been the gathering place for our Bankruptcy Bar every June for over twenty-five years and was selected as an approximate half way point for individuals coming from Seattle and the members of the Eastern District of Washington Bankruptcy Bar. So far we have had suggestions including the Coeur d'Alene Resort and any of the historic Davenport Hotel locations in downtown Spokane, Washington. Both have been proposed as good meeting facilities with easy access to all, i.e. close enough for travel, but still a short distance from our respective offices. If any others have suggestions, we are open to discussion. We need our members' assistance and we want to hear from you. As such we have created a poll to help us decide the future of our Annual Seminar and Retreat. The link to the poll is https://www.surveymonkey.com/r/G8RKMVW. Please complete the survey within thirty days. Your input is invaluable and will help the Executive Board for the Eastern District of Washington Bankruptcy Bar better plan for the future. We look forward to hearing from you.

Inside...

SAVE THE DATE!

June 15-16, 2018

for the

28th ANNUAL BANKRUPTCY SEMINAR AND RETREAT

Sun Mountain Lodge, Winthrop, Washington

Accommodations can be arranged at:
https://www.sunmountainlodge.com/ or at 1-800-572-0493

When making reservations with Sun Mountain Lodge, mention that you are part of the bankruptcy seminar group.

Shortening Patience

By Kristopher P. Morton, Student,
Gonzaga University School of Law

L. Warden Hanel
Clerk for the Honorable Frederick P. Corbit

Federal Rule of Bankruptcy Procedure 9006(c) authorizes a court to reduce the time required for notice on a range of matters for "cause shown." However, all too often these motions to shorten time are not related to "cause shown," and instead are caused by movant's own delay. Another troubling trend exists when practitioners file motions to shorten time, not because of any emergency, but simply as a matter of course. Prudence dictates careful consideration as to whether the relief requested is actually warranted.

These problematic trends are not limited to other parts of the country. They exist right here in our District. As a recent example, Judge Corbit recently denied counsel's ninth motion to shorten time, politely reminding counsel that, "shortening time should be the exception, not the rule."

The time periods established by the Federal Rules of Bankruptcy Procedure ("FRBP") and local rules have been thoughtfully crafted to protect parties' due process rights: "[the rules] are the result of months, if not years, of significant work and analysis by some of the country's and this state's most experienced lawyers and judges, drawing on their years of practice, court decisions, and due process." As a result, the time periods established for notice should be treated with great deference. A motion to shorten time should consider and address the potential prejudice to parties otherwise entitled to the full notice period because "[t]he principle victim whenever the court grants an expedited hearing[or motion to shorten time are] the due process rights of affected creditors and parties in interest."

Accordingly, practitioners filing motions to shorten time should be sure to adequately explain the "cause" that justifies a departure from the notice periods established by rule. Simply put, practitioners' lack of diligence and bad habits do not justify a deviation from the standard notice periods established by the FRBP or local rules.

At the same time, courts should carefully scrutinize motions to shorten time to ensure the alleged "cause" actually justifies a departure from the notice periods established by rule. For example, the Tenth Circuit instructs bankruptcy courts "to review ex parte motions to reduce the notice period carefully to be certain that there is, indeed, good cause for the handicap to the respondents and the court's infomation-gathering capacity that is likely to result." This increased scrutiny makes sense because a material change to the notice period, assuming notice is received at all, hinders the interests of any party opposing the motion while benefitting the movant alone.

In sum, practitioners should explain to the Court why "cause" exists before asking the court to deviate from carefully devised notice periods. Clearly, in this District, Judge Corbit has provided his expectations for counsel appearing in front of him -- "Shortening time should be the exception, not the rule." A practitioner who abuses the Court's trust by repeatedly requesting shortened time without actual cause and when no emergency exists, jeopardizes his or her reputation with the court, puts his or her client's interests at risk, and impacts the due process rights of the parties entitled to notice.

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[1] Fed. R. Bank. P. 9006(c)(1).

[2] *In re Villareal,* 160 B.R. 786, 787 (Bankr. W.D. Tex. 1993) ("The pleading purports to describe a real emergency, and begs the court's intervention to prevent an injustice. In truth, however, there never would have been an emergency had debtors but filed their motion to sell in mid-August."); Official Comm. of Disputed Litig. Creditors v. McDonald Invest., Inc., 42 B.R. 981, 987 (N.D. Tex. 1984) ("Any 'emergency' was brought on solely by the dalliance of debtors' counsel and it was an abuse of discretion for the bankruptcy court to shorten the notice period to only 20 hours."); In re Schindler, No. 09-71199-ast, 2011 Bankr. LEXIS 1208, at *4-7 (Bankr. E.D.N.Y. Mar. 21, 2011) ("The fundamental problem here is that Debtor has created an emergency for herself and the Court. Debtor's lack of diligence and lack of regard for the Confirmation Order have placed Debtor in a situation where she may lose a short sale of her Property, which she admittedly has been seeking 'for some time,' because she purportedly 'did not realize that Court approval was required to consummate the sale.'").

[3] *See, e.g., In re A.H. Coombs, LLC,* No. 16-25559, 2016 Bankr. LEXIS 4443 (Bankr. D. Utah Dec. 22, 2016) (denying an order to shorten time after the debtor had filed six previous motions to shorten time and the debtor failed to show cause justifying shortening time).

[4] Order Denying Motion to Shorten Time RE: Second Amended Notice of Trustee's Sale of Property Free and Clear of Liens at 1, In re Blodgett, No. 16-03520 (Bankr. E.D. Wash. Jan. 31, 2018), vacated, Order Granting Trustee's Motion for Reconsideration and Order Shortening Time, In re Blodgett, No. 16-03520 (Bankr. E.D. Wash. Feb. 1, 2018). *In re A.H. Coombs,* LLC, 2016 Bankr. LEXIS 4443, at *5.

[5] *In re Villareal,* 160 B.R. 786, 788 (Bankr. W.D. Tex. 1993).

[6] *In re Gledhill,* 76 F.3d 1070, 1084 (10th Cir. 1996) (quoting In re Hester, 899 F.2d 361, 364 n.3 (5th Cir. 1990) (abrogation on other grounds recognized by In re El Paso Elec. Co., 77 F.3d 793 (5th Cir. 1996)).

[7] *In re Hester,* 899 F.2d at 364 n.3 (discussing FRBP 9006(c) and the reduction of notice periods, stating "even when notice is received, the time required for preparation of an adequate response is virtually lost, all to the benefit of the movant and to the severe detriment of any party in interest taking a position adverse to that of the movant").

[8] Order Denying Motion to Shorten Time RE: Second Amended Notice of Trustee's Sale of Property Free and Clear of Liens at 1, *In re Blodgett,* No. 16-03520 (Bankr. E.D. Wash. Jan. 31, 2018), vacated, Order Granting Trustee's Motion for Reconsideration and Order Shortening Time, *In re Blodgett,* No. 16-03520 (Bankr. E.D. Wash. Feb. 1, 2018).

ERISA Qualified Plans, Exclude or Exempt from Bankruptcy Estate?

Lisa McBride, Spokane

A client received a letter from the Internal Revenue Service several months after her discharge. The missive claimed that a $26,000.00 tax from her 2012 Individual 1040 survived the bankruptcy pursuant to a lien upon her retirement plan. She was advised that the IRS could collect the lesser of the tax or the current value of the exempt or abandoned property to which the lien attached. We had listed the retirement plan which qualified under the Employee Retirement Income Security Act of 1974 (ERISA) in schedule B and claimed that asset as exempt.

The first question was- What lien? We could not find one of record. Under Internal Revenue Code 6321, a "secret" or statutory lien is created when an assessment has been made and the taxpayer is notified but refuses or neglects to pay. The debtor had been on a payment plan and there had never been any declaration of a recorded lien or Notice of Federal Tax Lien (NFTL). Even though the tax was from 2012 and otherwise dischargeable, the "secret lien" was being asserted.

The next question was whether the secret statutory lien survived the discharge and remained attached to the retirement. Code section 506(d) provides that where "a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." The secret lien is not secured as to the exempt ERISA because no NFTL was recorded. We were safe. It was agreed that the debt was discharged.

A different outcome would have occurred if we had excluded the retirement from the bankruptcy estate as the Code allows. Where the ERISA is excluded, the lien would not be void regardless of whether a pre-petition Notice of Federal Tax Lien has been filed or there is only the secret or statutory lien.

The attachment of the lien to excluded property by the IRS does not entitle the IRS to file a secured claim in the case. Section 506(a) requires a secured claim to be against property of the estate. A lien on excluded property does not secure a claim against the debtor and is not subject to any lien avoidance when the case closes.

On the Internal Revenue Service website, www.irs.gov, instructions provided to agents for the collection of taxes in bankruptcy cases include the following:

5.9.2.10.1.1 Exempt or Excluded Property

... 2. Cases Filed in the 9th Circuit. If the debtor filed bankruptcy in the 9th Circuit and listed excluded property as exempt on bankruptcy Schedule C, Property Claimed as Exempt, refer the case to Area Counsel for guidance on how to proceed in the case.... In the 9th Circuit, claiming excluded property as exempt may impair the Service's ability to collect dischargeable taxes from the excluded property when there was no valid NFTL filed prior to the petition date. No action is required when the Service does not intend to pursue collection of the dischargeable liabilities from the excluded property after the bankruptcy discharge. (See IRM 5.9.17.4 Exempt, Abandoned or Excluded Property (EAEP), and related susbsections for information on exempt and excluded property.)

3. Valid NFTL Survives Discharge. If the service has properly filed a pre-petition NFTL, and the NFTL is still valid (e.g., refiled correctly, if applicable), the NFTL survives the bankruptcy discharge (11USC § 522(c)(2)(B). Thus, the Service may collect discharged taxes from property that is exempt from the estate if a valid NFTL was filed pre-petition.

Caution:

The service must follow established collection procedures while ensuring the provisions of the Bankruptcy Code are not violated.

4. Statutory Lien. The Service's statutory lien survives the bankruptcy when there are abandoned or excluded assets to which the lien attaches. A NFTL is not required to pursue collection from the abandoned or excluded assets after the bankruptcy discharge. See IRM 5.9.17.4.2(1). Collection Determination for additional information.

An ERISA qualified plan does not have to be included in the bankruptcy estate of the debtor. The

bankruptcy estate is created by the filing of a petition and certain property is excluded. The ERISA anti-alienation clause fits the exclusion found under 11 USC § 541(c)(2) - a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title." In In re Conner, 73 F. 3d 258 (9th Cir. 1996), the trustee in a chapter 7 claimed the ERISA qualified plan as part of the bankruptcy estate because the debtor retained control and access. Both the Bankruptcy Appellate Panel and the United States Court of Appeals for the Ninth Circuit emphasized the anti-alienation provision of ERISA as sufficient to exclude the asset from the estate.

In Patterson v. Shumate, 504 U.S. 753, 760 (1992), Section 541 of the Code was read to allow a choice - "permit[s] a debtor to exclude an interest in an ERISA-qualified retirement plan from his bankruptcy estate.". The ninth circuit in Rains v. Flinn, 428 F.3d 893, 905-906 (9th Cir. 2005) concluded that the Patterson Court's ruling allows the debtor to voluntarily exclude the asset from the estate but does not mandate the exclusion. Rains also concluded that "unlike liens on exempt assets, liens on pre-petition assets that are not included in the bankruptcy estate (i.e., excluded property) are not affected by the bankruptcy proceeding."

Claim the retirement exempt. Do not even mention that you are aware that the asset can be excluded from the debtor's estate. Debtor's attorney in Stuart A. Gross v Commissioner of the Internal Revenue, No. 12-72279 United States Court of Appeals, Ninth Circuit 2014, claimed the ERISA qualified plan as exempt but added, "This is an ERISA Qualified Pension Plan which is not property of the estate but in an abundance of caution has been listed herein and exempted." This was stated both in the Schedule B and again in Schedule C. The short ruling said that by saying both that the asset was exempt and excluded created an ambiguity in the schedules and any such conflicting term is construed against the debtor. Gross' ERISA plan was not part of his bankruptcy estate so the proceedings did not affect the IRS 6321 lien. The tax court was affirmed in finding that the IRS could levy that asset.

A statutory or "secret" tax lien will attach to excluded but NOT exempt property. A tax lien survives the discharge and attaches to exempt property if the IRS has properly filed a pre-petition Notice of Federal Tax Lien and it remains valid.

Notes from the President

David A. Kazemba, Overcast Law Offices, PS

It was has been a wonderful year for the Eastern District of Washington Bankruptcy Bar Association. We have a lot to be proud of this year. First, congratulations to Kristopher Morton as the L. Warden Hanel Clerk for the Honorable Frederick P. Corbit. As a former L. Warden Hanel Scholarship recipient, I thoroughly enjoyed my time externing in the bankruptcy court with Judge Rossmeissel. We appreciate the externs for their service to our district and the court. We have had a history of exceptional L. Warden Hanel Scholarship recipients; one of the pet projects I have for down the road is putting together a page on our website that is dedicated to the history and recognition of these individuals. Second, Notes is back! Although dependent on content, look for your copy (either digital or in hard copy) to be delivered as often as I can put it out! I am always looking for new content so if you would like to get published, please let me know. Third, ewbankruptcybar.com is live and is ready for its members to register. We will be uploading CLE materials and Notes publications as they become available. Fourth and finally, our CLEs! We had a phenomenal turnout at our Fall Seminar. We had record attendance and some great speakers. Additionally, if it is not on your calendars already, please join us for the Annual Seminar and Retreat at Sun Mountain on June 15-16, 2018. As always, it is a wonderful opportunity to meet with other practitioners, staff, and the Court. I would love to hear from all of you about thoughts and ideas to attract new members. If you have suggestions or comments, please do not hesitate to get in touch with me at dkazemba@overcastlaw.com. See you at Sun Mountain!

Trustee's Corner

Mike Todd,
Staff Attorney for the Chapter 13 Trustee's Office

The new local form plan became effective for use in this District on December 1, 2017. It appears to have been implemented by the practitioners in the Eastern District of Washington in a very timely and consistent manner. The Trustee has received very little negative feedback on the form or content. As always, we urge counsel to carefully read the new plan to understand not only the Trustee's position on certain issues, but also the requirements of the form based upon its plain language.

One issue to note is the requirement relating to plans containing "Nonstandard Provisions". Pursuant to the language of Parts 1 and 8, if the plan contains "Nonstandard Provisions" the box must be marked under Part 1, and the provision must be set forth in Part 8. The form clearly states in Part 8 that "ANY NONSTANDARD PROVISION INCLUDED ELSEWHERE IN THE PLAN IS VOID." As always, the Trustee will continue to bring concerns related to this issue to the practitioner's and Court's attention whenever appropriate.

Another issue to note involves the annual tax return request letters sent out by the Trustee's office. We recently sent an email to all attorneys with active cases advising that the annual tax return request letter would soon be mailed out. Our practice is to send these letters directly to the debtors, unless counsel has requested otherwise. Some practitioners have already asked that we send the letters directly to their office. For any practitioners that have not already made this request of the Trustee but would like to have the letters routed through their offices, please let our office know. For those wondering why we send these letters, the Trustee has a statutory duty to monitor and review the debtors' disposable income during the term of the Plan. Obtaining and reviewing these tax returns in a timely manner allows us to better address this statutory obligation.

The Trustee requests the annual remittance of tax returns in all above median cases, business cases and select below median cases. This request is made pursuant to 11 USC 521(f). While the statute provides for the filing of copies of returns with the court, the Trustee is requesting they be provided directly to this office pursuant to LBR 4002-1. The annual letter goes out in early March, and requests receipt of the tax returns by May 31st of each year. We recognize not every debtor will file their return by April 15th and some may obtain extensions from the IRS. In that event, simply send us evidence of the extension no later than May 31st and the case will be calendared accordingly. As most extensions are granted through October 15th of that same year, the Trustee expects to receive all requested returns no later than November 15th. In the event the returns or respective extensions are not received by May 31st, the Trustee will coordinate dates and times to conduct a 2004 Examination of your clients.

We understand that obtaining documents from clients and reviewing the items provided takes time and can be difficult in some cases. Please do not hesitate to contact the Trustee's office if there is something we can do to assist you.

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Finance Report

BANKRUPTCY BAR ASSOCIATION

Summary of Checking Account Transactions

1/1/2018 through 3/23/2018

INCOME

2018 Lawyer membership	2,835.00
2018 Support membership	200.00
TOTAL INCOME	3,035.00

EXPENSES

Member Solicitation	29.66
Scholarship	1,000.00
TOTAL EXPENSES	1,029.66
OVERALL TOTAL	**2,005.34**

Checking Account Book Balance:
March 23, 2018: $8,531.62

Checking Account Bank Balance:
February 28, 2018: $9,510.23

Savings Account Bank Balance:
February 28, 2018: $12,749.08

Total Funds on Deposit: $22, 259.31

2018 Lawyer Member Count
March 23, 2018: 92

2018 Support Member Count
March 23, 2018: 8

Total Member Count
September 30, 2017: 100

2017 Lawyer Member Count 121
2017 Support Member Count 16
2017 Total Member Count 137