We had roughly 270 members last year and expect to have about the same this year although your Board of Directors continues to discuss who our constituent body should be and what our goals or mission should be. We are a group of consumer lawyers, of which roughly 50 to 60% are highly experienced in the area. We have a few creditor-only attorneys and a few trustees and continue to discuss whether the membership should be limited somehow to consumer debtor attorneys only.

We voted not to raise the annual fees for the third straight year, that is $185 for the membership and $65 for the annual dinner. People I speak to are typically surprised, if not shocked, that our programs are free to members including the materials. I am certain we could easily charge $1,000 for the eight programs we give each year. We are able to do them without charge largely because Southwestern Law School does not charge us for the use of their facilities and because we have small “administration costs,” i.e., a part-time administrator, Linda Righi who has done a great job, costs for maintenance of the website and listserve, and some minor accounting costs.

Our mission then is to provide top learning programs.
to our members and an opportunity to share our knowledge and experience with each other. Our programs are exceptional in my opinion; we present our judges, our trustees, our experienced practitioners to discuss our problems. This year we expect to present programs on chapter 13 issues, the new California Homeowner Protection Act, litigation and chapter 7 issues. We have invited the Bankruptcy Appellate Panel to make a presentation, not so much on what the BAP does but on legal issues that we are dealing with everyday. We will try to get a national speaker to do a program this summer. We continue to seek input from our members about what other programs might be useful in the future.

Our mission also includes providing (and monitoring) the listserve to give our members a place to get information and answers from colleagues. We have discussed perhaps having more than one listserve so that the “opportunities” are more easily available to us. We are working on a listserve protocol so that everyone knows (including us) what the parameters of posting are.

We continue to discuss expanding our mission without changing its core. We have considered getting involved in appeals, communicating more with the U.S. Trustee, the Court Clerk, various rules committees etc. Your suggestions are welcome.

I am exceedingly proud to be a member of the cdcbaa.

In my 32 years of practice, I have not been a member of any group that really felt like “us,” like my “peeps,” like people I can confide in who know what I’m talking about and care. The fact that the judges and trustees and other experts immediately agree without reservation to take part in our programs confirms our status as a meaningful group.

Say hi if you see me around. Thanks. Jon Hayes.

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**Lien Stripping Unpaid HOA Assessments and Fees**

By: Steven R. Fox  emails@foxlaw.com

&  Daniel Park

**Introduction:**

In today’s economy, condominium, co-op, and homeowners’ associations (“HOA”) face more and more unpaid assessments and fees. Debtors cannot or do not pay the assessments and fees and on occasion file for relief under the Bankruptcy Code. This article approaches lien stripping of association liens from the HOA’s perspective.

For the purpose of discussion, suppose the following illustrative facts. The Bad Luck Homeowners Association (“Association”) is a California non-profit mutual benefit corporation, organized and existing under the laws of the State of California as a homeowners association as defined by the laws of California. The Bad Luck Condominium consists of 100 units governed by the Association’s bylaws and Declaration of Covenants, Conditions, and Restrictions ("CC&Rs"). Derek Debtor purchased a condominium unit for $100,000 within the Bad Luck condominium project and accepted a deed subject to the Association’s bylaws and CC&Rs. Both the bylaws and CC&Rs permit the Association to assess a share of expenses against each unit owner in proportionate liability (the “assessment”). The bylaws and CC&Rs also provide that the Association shall have a lien against the affected unit from the time the Assessment becomes due.

In financial distress, Derek Debtor stopped paying his assessments. As a result, the Association, pursuant to applicable California law, recorded a Notice of Delinquent Assessment for $10,000. The condominium unit is encumbered by a mortgage lien of $100,000 and priority tax liens of approximately $20,000. The
Association initiated a non-judicial foreclose process on the condominium unit. Shortly after issuing a Notice of Default, Derek Debtor filed a voluntary petition for relief under Chapter 13.

As of the petition filing date, Derek Debtor’s principal residence, the condominium unit, was underwater. The parties agree that there is no equity in the condominium unit onto which the Association’s lien is to attach. Debtor plans to remain in the property. In his Chapter 13 case, Debtor files a motion under 11 U.S.C. §506 and §522(f) to strip or avoid the Association’s lien contending it attaches to no equity.

**Discussion:**

A Chapter 13 debtor who is keeping his property may attempt to “cram down” the amount of an association’s lien for unpaid prepetition fees under 11 U.S.C. §506 or, in the alternative, avoid the association’s lien entirely pursuant to 11 U.S.C. §522(f).

The statutory basis for “stripping off” a lien arises from the combination of 11 U.S.C. §§ 506(a) and (d) . First, by operation of §506(a) an undersecured creditor’s allowed claim is bifurcated into secured and unsecured portions. Then, pursuant to §506(d) the lien securing the claim is voided to the extent that it is not an allowed secured claim, effectively stripping the lien “off” to that extent.

A Chapter 13 debtor may strip a lien that a creditor asserts on the debtor’s principal residence despite the anti-modification clause of 11 U.S.C. §1322(b)(2) if the lien is wholly unsecured. **Zimmer v. PSB Lending Corporation (In re Zimmer),** 313 F.3d 1220, 1226-27 (9th Cir.2002); **Lam v. Investors Thrift (In re Lam),** 211 B.R. 36, 41 (9th Cir. B.A.P. 1997). **Zimmer** and **Lam** conclude that by operation of §506(a), a wholly unsecured junior deed of trust is a contract claim with no security interest in the debtor’s principal residence and therefore may be voided. In other words, they would conclude that a wholly unsecured mortgage has no remaining rights in a debtor’s principal residence. If a debtor can establish that none of an association’s lien attaches to equity in their condominium unit, he may be able to strip off the Association’s lien entirely.

With HOA liens, however, they may not be strippable. With actions under §506, HOAs can prevail under the theory that its right to payment for the assessment liens are property rights and not contract rights. Outside of California, courts are split in authority regarding the treatment of HOA’s assessments. Some courts hold that a HOA’s right to payment is based on a contract theory, and thus is a prepetition debt. See, e.g. **In re Rosteck,** 899 F.2d 694, 697 (7th Cir. 1990); **Matter of Wasp,** 137 B.R. 71, 73 (Bankr. M.D. Fla. 1992).

Other courts have held that HOA assessments are nondischargeable, postpetition debts that arise from a covenant running with the land. See e.g., **In re Hall,** 454 B.R. 230, 236-37 (Bankr. N.D. Ga. 2011) (finding the debtor’s obligation to pay assessments as “a function of owning the land with which the covenant runs”); **In re Guillebeaux,** 361 B.R. 87 (Bankr. M.D. N.C. 2007) (finding that homeowners’ association assessments were post-petition debts for the purposes of being considered an administrative expense claim); **In re Rosenfeld,** 23 F.3d 833, 836-37 (4th Cir. 1994) (finding debtor’s obligation to pay assessments arose from his continued post-petition ownership of the property and not from a pre-petition contractual obligation); **In re Lenz,** 90 B.R. 458, 460 (Bankr. D. Colo. 1988) (granting administrative priority to association assessments). Cases on both sides of the split of authority look to state law in order to determine whether assessments are contractual obligations or covenants running with the land. See, e.g., **Rosenfeld,** 23 F.3d at 837.

California law, which governs the treatment of the HOA’s assessment lien, treat the HOA lien as a covenant running with the land and not as a contractual obligation. That is, an HOA’s CC&Rs are covenants that run with the land and the assessment lien arising from the CC&Rs are inseparable from the property. California Civil Code §1354(a) states in part: “The covenants and restrictions in the [homeowner association] declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development.” Cal. Civ. Code §1354(a). This means that rights and liabilities set out in CC&Rs constitute covenants running with the land and they are incident to the ownership of part of the development. Each party who takes title to a part of the development takes that title subject to the terms of the CC&Rs. The CC&Rs existed before the owners took title to the property and will likely continue after the debtors cease being the owners of the property. HOA liens arise out of the CC&Rs and the Civil Code, and are not based on a contract as was the case in **Zimmer** and **Lam** opinions.
§1354(a) specifically provides a basis for a California court to treat an association’s assessment lien differently. CC&Rs run with the land.

As an alternative to §506, Derek Debtor is also moving to avoid the Association’s lien under §522(f). §522(f) allows a debtor to avoid a judicial lien to the extent that it impairs an allowed exemption. In this situation, the exemption which is being impaired is a homestead exemption. In order to prevail under §522(f), Derek Debtor must show: (1) that he has an interest in the homestead property; (2) he is entitled to a homestead exemption; (3) the association’s asserted lien impairs that exemption; and (4) the lien is judicial rather than statutory. 11 U.S.C. §522(f); See In re Morgan, 149 B.R. 147, 151 (9th Cir. BAP 1993).

If the Association’s lien impairs the homestead exemption, a §522(f) argument turns on the issue of whether the lien asserted by the Association is statutory or judicial in nature. If the lien is statutory, a debtor cannot meet the fourth element of the Morgan test and §522(f) is inapplicable. If the lien is judicial, the lien is avoidable. Under the Bankruptcy Code, a “judicial lien” is defined as a “lien obtained by judgment, levy, sequestration, or other legal or equitable process of proceeding.” 11 U.S.C. §101(36). A “statutory lien” is defined as a lien arising “solely by force of a statute on specified circumstances or conditions...” 11 U.S.C. §101(53).

A HOA’s assessment is governed under California Civil Code §§1366-1367. An assessment becomes a debt of the owner when the assessment is levied by the association. Cal. Civ. Code, § 1367.1(a). The debt is only a personal obligation of the owner, however, until the community association records a `notice of delinquent assessment' against the owner’s interest in the development. Recording this notice creates a lien and gives the association a security interest in the unit against which the assessment was imposed. See, Cal. Civ. Code, § 1367(d). A lien is not a debt but acts as security for payment of a debt or other obligation. Cal. Civ. Code, § 2872. The debt is the assessment, which is secured by the assessment lien. An assessment lien may be enforced “in any manner permitted by law,” including judicial foreclosure and non-judicial foreclosure. Cal. Civ. Code, § 1367(e).

Under the statutory language of the Civil Code, the Association is automatically granted a lien when it records a notice of delinquent assessment against the owner’s
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**Hernan Vera, Hon. Peter Carroll, & Keith Higginbotham**

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interest in the property. The Association also may enforce it by any manner permitted by law, including non-judicial foreclosure. Therefore, the Association’s lien arises under the provisions of the Civil Code and falls within the definition of 11 U.S.C. §101(53).

Thus, whether under §506 or §522(f), Derek Debtor will not be able to strip the Association’s lien.

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Representing Immigrant Hispanic Debtors in Bankruptcy in the Central District of California

By: Mark E. Brenner
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“Never try to change [another’s culture]. Try, instead, to work with what you’ve got.”
-Peter Drucker

According to the present U.S. Trustee for District 16, Peter Anderson, more than seventy percent of the debtors who request interpreter services were for Spanish Speakers. Also in August 2012 forty-three percent of filers were Hispanic surname. Whether you market yourself to Hispanic clients or not, sooner or later you will probably have the chance to represent a person of Hispanic origin. When that day comes, you will need to be sensitive to certain characteristics of the Hispanic culture that challenge us as attorneys to zealously represent our clients to the best of our ability.

Speak to a man in a language he understands and it goes to his head. Speak to him in his own language, and goes to his heart.
–Nelson Mandela

Being able to communicate in the clients’ own language gives the lawyer a distinct advantage over other practitioners and facilitates the creation of a strong attorney/client bond with the client. If foreign languages are not your forte, do not fret. A trusted assistant, secretary or paralegal can take the information from the client in Spanish. However, the information should be verified by the attorney with the client and the assistant. Using high school Spanish will help build a bond of trust with the client and increase the chances of future referrals.

In either case, the practitioner will need to provide the client with a properly drafted version of the retainer agreement in Spanish. If the terms of representation have been discussed in Spanish with the attorney or the assistant, §1632 of the California Civil Code requires the client be given a Spanish translation of the retainer agreement before signing the document in English.

What a Country!

While many countries have bankruptcy laws, they are dramatically different than the “fresh start” concept which is at the core of the U.S. Bankruptcy Code. Until quite recently, the European bankruptcy laws did not even contain a provision for a discharge, and in many Latin American countries, while bankruptcy exists for corporations, relief for individuals is hampered by a social stigma attached to seeking debt relief. Illustrative of this point is the following story. A creditor attempted to collected a debt years ago when the debtor resided in Mexico. After defaulting on the payment of the dining room set he purchased from a local department store, the store hired an off duty policeman to appear at the debtor’s residence, armed and in full uniform, and demand payment. Payment was not made but the terrified debtor immediately returned the furniture to the seller.

It is understandable, then, that members of this ethnic group are trepidatious when contemplating filing for bankruptcy in the U.S. Unlike the client born and raised in the U.S., the Hispanic client must be reassured at every turn that the insolvency laws of the U.S. are different than in the home country and that if he participates as an “honest but unfortunate debtor” he will attain the discharge from his debts.

Not a Citizen? No Problem

Clients in the process of legalizing their immigration status, whether in the permanent residency petition or the application for citizenship, are hesitant to seek relief from their debts in the bankruptcy court. Since Hispanic clients have been culturally conditioned to think of bankruptcy as something morally wrong, in their minds they equate the filing for relief with a crime of moral turpitude, which can be a bar to obtaining permanent residency and even citizenship. See 8 U.S.C. §1227. Thus, the differences between debt relief in other countries and in the U.S. under the Bankruptcy Code should be fully

explained to put the client at ease with the process.

What’s in a Name?

In the Hispanic culture “last names” are not used. Rather, each individual is identified on birth records by two surnames, the first is the father’s first surname and the second is the first surname of the mother. Thus, if your name is Juan García Rodríguez, it is immediately known that his last name is García and his mother’s last name is Rodríguez. Since the U.S. culture considers the “last name used” as the identifying surname, at the client interview, the tendency might be to address Juan as Mr. Rodriguez, when in truth, the proper form of address would be Mr. García.

The practitioner should be mindful of this cultural difference in identifying the client for the Bankruptcy Court. The tendency to put Rodriguez in the surname window of the preparation software should be avoided, opting instead for the clients true last name, in this case García. Then, in the section for “other names used” all the possible variations should be stated to avoid any doubt as to the identity of the filer. Another solution would be to hyphenate the client’s two surnames, as in Juan García-Rodríguez. The denomination Juan G. Rodriguez should be avoided unless it appears on official government documents. It is important to be as complete as possible and add as many variations of the name and surname as have ever been used because, as former trustee David A. Hagen puts it, “The more information on the petition means fewer the questions at the 341a hearing.”

Out of Sight, out of Mind

If an Hispanic debtor mistakenly omits an asset located in his/her home country, it usually is for innocent reasons, whether because the Hispanic immigrant client considers his life in “the old country” to be past history, or he generally forgot he/she owns the asset. The client may not even consider as “property” that uninhabited, small plot of land outside the city in his homeland that a deceased relative may have left in a will. In other instances the attorney may simply assume that, just because the client immigrated to U.S., he has nothing to go back to.

In order to avoid any embarrassment later in the case, the Hispanic client should be asked the same question at the initial interview and steps should be taken to insure the property is exempt. Chances are the value of the foreign property might not significantly affect the bankruptcy estate. Home values in other countries are usually less than here, or the cost of selling and marketing a foreign asset are not be worth the expense to a trustee.

“Be intolerant of ignorance and understanding of illiteracy.”
–Maya Angelou

Illiteracy. Literacy rates among Latin America countries vary greatly, but it is safe to conclude that they are lower than in the U.S. This fact makes it more likely that a practitioner will be hired by someone unable to read in his own language and, by extension, unable to read English. If the practitioner suspects this may be the case, it may be prudent to have important documents read to the client in Spanish. Some trustee’s do ask non-English speakers if the petition was “read” and “explained” to them.

Social Security: 000-00-001

The code does not require a debtor to have a social security number in order to file for relief. Nevertheless, the official forms ask for it. If the client does not have one, he should have applied for individual tax identification number or ITIN, which can be obtained from the Internal Revenue Service. If a petition for the client without a number is filed, the debtor will be asked to sign a declaration about the lack of a social security number which should state that he/she only has a ITIN.

Social Security: 000-00-002

Previously used Social Security Number. This

situation presents a dilemma for the bankruptcy debtor’s bar. Some Hispanic clients who have successfully immigrated to the U.S. did so after having purchased a social security number from unofficial sources. Once legal residency is obtained, the old social security number is discarded for the new, official one. Chapter 7 trustees routinely ask Hispanic debtors at the 341a meetings if they have ever used another social security number. Some more discreetly ask if the number on the petition is the one given to them by the Social Security Administration, thus avoiding the issue of whether a previous number was used to obtain credit.

Great care should be taken, and perhaps a consultation with a criminal attorney is in order, before disclosing the previous number, if at all. While the applicable statutes of limitation may have run, steps should be taken not to subject the client to prosecution for having purchased a false social security number in the past. (see Table above) In addition, if the false social security number was indeed used to obtain credit, and the debts resulting from the use of that credit are sought to be discharged, the information may subject the debtor to an adversary proceeding under 11 U.S.C. §523(a)(2)(A), or subject the case to be dismissed as a filing in bad faith. The client should be informed of these risks before filing for relief.

That’s Not My Real Property

Bare legal title. Often the debtor is listed as an owner on the real property of another, usually because the debtor had good credit and bought the property in his name, but a family member is the one who made the down payment and has made all the subsequent payments. Sometimes the client is on title because elderly parents deeded the property to the debtor some years ago to reduce their net worth in order to qualify for state medical aid, or the parents put the debtor on title to the property, along with debtor’s siblings, as part of an estate plan.6

This practice creates a delicate issue in the client’s case. If the asset has substantial equity it may become part of the estate. If it is thoughtlessly transferred out of the future debtor’s ownership before the case is filed, it may be the focus of one of the trustee’s broad avoidance powers found in the code.7 However, the problem that can be deflated by disclosure and explanation on the petition.

Trustees consider a variety of factors in determining whether to bring the asset into the estate. In determining whether the debtor merely has bare legal title, Chapter 7 trustee Amy Goldman offers insight into what some of the factors are. For example, she asks, who put the money in for purchase of the asset, who is making the monthly payments, and who is deducting the interest payment on income taxes? Trustee Diane Weil adds other considerations such as, who is listed as a beneficiary on the fire insurance policy and who is listed on the county tax records? If it can be established that third parties have strong equitable claims to the property, and that the trustee would have to bring a costly adversary proceeding to avoid the transfer, under the business judgment rule cited above, the property would likely be abandoned by the trustee. The key is to disclose as many of those equitable interests at the petition level in order to discourage elevated monetary and emotional costs to the client later on.

6. The same practice is sometimes seen with bank accounts.

According to the Department of Justice, some of the penalties for having used a false social security card are:

<table>
<thead>
<tr>
<th>Charge</th>
<th>Federal Prison Sentence</th>
<th>Maximum Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Using false documents to be employed</td>
<td>10 years without parole</td>
<td>$250,000</td>
</tr>
<tr>
<td>Making a false statement on an I-9</td>
<td>5 years without parole</td>
<td>$250,000</td>
</tr>
<tr>
<td>Misusing a Social Security number</td>
<td>5 years without parole</td>
<td>$250,000</td>
</tr>
<tr>
<td>Making a false claim of resident alien status</td>
<td>5 years without parole</td>
<td>$250,000</td>
</tr>
<tr>
<td>Using false documents with intent to defraud the United States</td>
<td>15 years without parole</td>
<td>$250,000</td>
</tr>
<tr>
<td>Possession of false United States documents</td>
<td>15 years without parole</td>
<td>$250,000</td>
</tr>
<tr>
<td>Aggravated identity theft</td>
<td>Mandatory 2 years; runs consecutively to any other sentence</td>
<td>$250,000</td>
</tr>
</tbody>
</table>
Silver Hills Country Club v. Sobieski, 55 Cal.2d 811, 814 (1961). This is the classic case defining securities in California.

Thus, in California, virtually any promissory note involving a commercial venture may constitute the sale of a security, particularly where it is coupled with an equity interest, or other unusual or special terms. So, if a debtor enters into a written promissory note with his friend borrowing $100,000 promising to pay him back with interest from the proceeds of his new business venture and then fails to repay, he could be liable for a security violation. The reason is that even though the promissory note is not technically a sale of stock and it is exempt from registration, the promissory note can be deemed to be a security in light of California’s anti-fraud securities provisions. Because of California securities laws and because of the relationship between the debtor and the friend, the debtor would have been required to provide detailed disclosures to the friend about the risks and likelihood of success of his new venture which is effectively providing his friend with a prospectus on his business venture.

If the debtor’s venture fails and he then files for bankruptcy, his friend could sue him in bankruptcy court, federal or state court for nondischargeability pursuant to 11 U.S.C. §523(a)(19) based on securities violations or securities fraud. The success of the case will depend upon what disclosures were actually given to the friend and whether the court that hears the case determined the promissory note to be a security or not.

11 U.S.C. §523(a)(19) was enacted in 2002 as part of the Sarbanes-Oxley Act. The Act sought to prevent the discharge of a debt arising out of judgment or a settlement involving securities fraud and other securities violations. The goal of §523(a)(19) was to obviate the need by the government, or private securities plaintiffs, to re-litigate securities violations in the bankruptcy court once there has been a determination that a defendant had been found guilty of securities violations and to treat such a judgment as a judgment for fraud.

11 U.S.C. §523(a)(19) consists of two subsections that except from discharge a debt for:

(A) (i) the violation of any of the Federal securities

8. Common law marriage is recognized only in the following states: Alabama, Colorado, District of Columbia, Iowa, Kansas, Montana, New Hampshire (for inheritance purposes only), Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah.

Navigating Securities Laws to Avoid Creating Nondischargable Debts

By: Stella A Havkin
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In California, a security is broadly defined in §25019 of the Corporations Code. Securities include promissory notes. Further, an investment contract is a catchall security designed to encompass any financial device, however, ingenious:

“Section 25008 [the predecessor to § 25019] defines a security broadly to protect the public against spurious schemes, however ingeniously devised, to attract risk capital. (People v. Syde, 37 Cal.2d 765, 768.) To effectuate this purpose the courts look through form to substance.”
nondischargeability complaint based on §523(a)(2), (4) and (6), is not subject to the sixty days statute of limitations following the §341(a) meeting of creditors. Rather, a complaint against a debtor can be filed long after the sixty days statute of limitations period has passed and can be brought in either the bankruptcy court, district court or state court so long as the respective four or five year state or federal statute of limitations has not expired.

In addition, recently, the California Court of Appeal in Hellum v. Breyer, 2011 WL 1631662 (Cal. App. 1st Dist. Apr. 29, 2011), held that even outside directors and officers who participate in a corporation’s board of directors can be held liable for security violations such as the failure to register securities or provide required disclosures to investors of promissory notes under the presumptive liability which is regardless of whether the particular director actually exercised control over the corporation. The only limitation is that the officer or director could prove that he or she did not have knowledge of the facts giving rise to the alleged liability.

Why should you attend? That’s simple:

* It’s for a wonderful tax deductible cause. Proceeds benefit Public Counsel’s Debtor Assistance Program. The Tournament has now generated over $110,000.00 in its four year history, including over $32,000.00 in 2012. Our goal is to raise over $50,000.00 in 2013, which is the approximate equivalent of one full-time salaried attorney. Help us reach our goal!

* It’s a ton of fun. We design the golf tournament to be a blast for all caliber of players. Never picked up a golf club in your life before, other than perhaps in anger? No problem. We try hard make certain that each foursome has the ideal blend of ability. “A” players are teamed together, and “B” players are teamed together.

* Even if you don’t care to play golf and tennis, come at a reduced price to the dinner and silent auction! Also a blast, especially with a hosted bar.

* You don’t have to be a debtors’ attorney to come and have a good time. Creditors’ attorneys are not only welcome, but encouraged to come as well. We promise we won’t make fun of you.

* Be seen! Every tournament, we get a few more Central District judges and trustees to attend. It’s an excellent opportunity to hang in a social setting with the professionals you usually only see in court.

* The 2012 tournament was held on October 1 on the assumption that the weather would be cool...but it turned out to be the hottest day of the year. So this year we moved it up to September 30...therefore much less likely to be as hot as October 1.
Court further held that outside directors who just had the “power to direct control” and who did not necessarily exercise such power could be still be liable for securities violations. Practically speaking, this means that if your debtor was asked by his friend to serve on an advisory board of directors of his friend’s new corporation and the friend obtains investment money through promissory notes from other friends, your debtor by virtue of his position on the board could wind up liable for a myriad of securities violations perpetrated by the friend who was equally ignorant of securities requirements in California. Ultimately, if your debtor winds up in the bankruptcy court, his conduct of merely doing a good deed of serving on the board of directors of his friend’s corporation could result in a non-dischargeable debt under Section 523(a)(19) owed to the friends’ other investors. The moral of this case is that you should advise your clients to be careful of serving on any board of directors in California unless the client is prepared to monitor the transactions of the corporation and then, if the client does monitor the activities, he or she could still wind up liable because the client would then have presumptive knowledge of the lack of compliance with securities laws or have the power to direct the corporation to comply with securities requirements.

However, liability under §529(a)(19) in the Ninth Circuit is limited to the debtor who actually perpetrated the security violation. In re Sherman, 09-55580 (9th Cir.), In Sherman, the appellant was represented by the President of our association, M. Jonathan Hayes. The case involved Richard Sherman, an attorney, who had represented several defendants being sued by the SEC in connection with the issuance of stock and various securities violations. As part of the enforcement proceeding, a receiver was appointed who issued an order requiring Sherman to disgorge money that he had received but had not earned in a contingency case in excess of $500,000. Sherman filed for Chapter 7 bankruptcy and filed an adversary proceeding seeking declaratory relief that the debt to the SEC had been discharged under 11 U.S.C. §727 notwithstanding the §523(a)(19)’s discharge exception. The Bankruptcy Court hearing the adversary proceeding granted summary judgment for Sherman and held that SEC’s disgorgement order did not arise from a violation of securities laws and that §523(a)(19) only applied to wrongdoers and not persons who are simply found to owe a debt which the SEC is authorized to enforce. SEC appealed to the District court which reversed holding that the broad goal of the Sarbanes-Oxley Act of protecting investors would be frustrated if the SEC were to be limited in its ability to seek disgorgement of ill-gotten gains. Sherman appealed. The sole issue on appeal was whether Sherman’s debt arising from the disgorgement order could be discharged under 11 U.S.C. §727 or whether it fell under the exception to discharge created by Section 523(a)(19).

The Ninth Circuit affirming the Bankruptcy Court’s ruling held that to have a debt excepted from discharge under 523(a)(19), the debt must arise from a securities violation and the debtor himself must be responsible for the securities violation. A debtor who may have received funds derived from a securities violation and against whom a disgorgement order had been issued remains able to discharge the debt arising from such a disgorgement order.

However, regardless of the limits set forth in Sherman
because of California’s broad definitions of what constitutes a security and the presumptive liability of an officer/director of a corporation for securities violations, when meeting with potential debtors it is wise to ask them questions as to what boards they have sat on even in a voluntary capacity and whether they have been involved in any capacity of loaning money to other people or entities.

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**Pro Hac Vice in a Mega Case**

**By: Sheldon J. Eskin**

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Our firm was recently retained to represent a shopping center located in Los Angeles County. The client is a shopping center as defined under 11 U.S.C. §365 is a “Lessor” in a Chapter 11 Mega Case filed in the United States Bankruptcy Court Southern District of New York in front of the Honorable Judge Stuart M. Bernstein.

Since we are only licensed to practice in California and since we did not think it was in the best interest of our client to obtain local counsel because California state issues are involved with respect to the lease as well as the Federal issues that arise in the Bankruptcy action. We had to figure out how to become admitted to practice in another jurisdiction. For purposes of this article, I am using the procedures of the Southern District of New York. When you are seeking admission in another jurisdiction, review and follow the Local Rules specific to that Court.

We first reviewed the court’s website for the Bankruptcy Court for the Southern District of New York. The Instructions for Pro Hac Vice Admission and the Attorney Password Application-Live System are located on the website. By calling the New York Court, I was able to obtain information on how to expedite my application for the Attorney Password. The instructions informed me of the following:

1. The Motion For Admission to Practice, Pro Hac Vice in Southern District of New York is on a Mandatory Form. It is the most efficient way to do so in order to make sure all the requirements are met. The Motion can be filed electronically once an attorney password is obtained. Otherwise, if the motion is filed conventionally, a diskette or a CD must be included. Further, the Motion must include the client’s role in the case i.e. in our case “Lessor” in the above-referenced case.

2. In the Motion, you must also certify that you are a member in good standing of the State Bar and if applicable, the Bar for the U.S. District Court Central District of California.

3. The filing fee is a $200.00 fee in each case or adversary proceeding and for each attorney seeking admission which is due at the time of the filing of the motion.

4. You must furnish Chambers with a Courtesy Copy of the Motion and Proposed Order. When submitting the courtesy copy to the judge’s chambers, include a diskette or CD containing the proposed order in Word or WordPerfect format.

5. Where an attorney is seeking Pro Hac vice admission has also submitted an application for password to the Court’s CM/ECF system, the Court will issue a password. The password should not be used for filing documents in any case or adversary proceeding other than the case or adversary proceeding for which admission was granted, unless the password holder applies for-and is granted-Pro Hac Vice admission in the new case or adversary proceeding. However, an attorney who already holds a CM/ECF password - based on a prior Pro Hac Vice admission - may use it to file a Motion for Pro Hac Vice admission to pay the $200.00 fee (with a credit card while on ECF) in a new case or adversary proceeding; no other filing should be made in the new case or adversary proceeding until the motion is granted.

Further, pursuant to New York Local Rule 2090-1(f), the requirement that attorneys be admitted to practice in the District Court (SDNY) or seek Pro Hac Vice admission in the Bankruptcy Court does not apply to the following:

1. The filing of a proof of claim or interest; and
2. an appearance by a child support creditor or creditor’s representative.

The next form that must be filed is the Electronic Case File System Attorney Application - Live System by submitting your application. The forms for a motion and accompanying order may be found on the Court’s web site.
As a condition for receiving a password, you must provide the following information: Your firm Tax ID#, your address, and phone number, Fax number and E-mail address. Also that you have read and understand the following:

a. You will employ the Electronic Case File System for cases filed in the United States Bankruptcy Court for the Southern District of New York.
b. You will meet all hardware and software requirements promulgated by the Court for system use,
d. The use of your password constitutes your signature on the document being submitted.
e. In as much as the combination of your identification with your password constitutes your signature, you agree to protect and secure the confidentiality of your password. If you have any reason to believe your password has been compromised, it is your responsibility to immediately notify the court in writing and to immediately inform the court of any change in your firm affiliation, address, telephone, fax or e-mail addresses and to update your personal profile.
f. The issuance of a password to you constitutes a waiver of conventional service pursuant to the Court’s General Order #399.
g. Notwithstanding letter (f) herein with respect to service of documents filed electronically, if you are required to serve the United States and agencies, corporations or officers, you need to fully comply with Rule 2002(j) and 7004(b)(4),(5) and (6) of the Federal Rules of Bankruptcy Procedure and Rule 4(i) and (j) of the Federal Rules of Civil Procedure.
h. You must also review General Order #399 Re: Electronic Case Filing Procedure dealing with documents submitted electronically that have lengthy exhibits etc.

The most important of all is to promptly pay all filing fees via the Internet or to the Court Clerk’ Office in accordance with 28 U.S.C. 1930 or any other applicable provision or provisions, including, if applicable, the fee due upon the signing of any order to appear Pro Hac Vice otherwise the process is delayed.

The Attorney Password Application must be signed by

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Contact Stella Havkin for details and availability.

havkinlaw@earthlink.net
the Attorney Applicant and Notarized.

After I completed all the required documents above, I submitted my package with a cover letter listing all documents including the filing fee, CD containing the Motion For Admission to practice Pro Hac Vice (pdf), Order Granting Admission to Practice Pro Hac Vice, (Word), Electronic Case File System, Attorney Password Application-Live Scan for the Clerk’s office (pdf) Also enclosed was the Chambers Courtesy copy.

Generally, when filing for admission to practice Pro Hac Vice in any Court always check the Court’s web site for their specific requirements, follow all Court Rules and if you have questions the Courts Help Desk can be a great source of information.

Layout by Desmond Hayes: dh@desmondhayes.com

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Nancy Clark

Budget Committee:
Tom Ure

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You do not have to be a Board Member to join a committee. If you are interested in joining a committee, please contact the Chairman. Your participation will be welcome.
2013 Membership

I hereby apply for membership in the cdcbaa, Central District Consumer Bankruptcy Attorneys Association, a nonprofit association, for calendar year 2013. I understand the basic goals of the organization are to: address issues and concerns which affect consumer bankruptcy attorneys and their clients in the Central District of California; and to provide educational and networking opportunities for attorneys who primarily represent consumer bankruptcy debtors. As a condition of membership, I declare as follows:

1. I am a duly-licensed attorney presently authorized to practice law in the Central District of California;
2. I am interested in consumer debtor practice; and
3. I support the basic goals of the cdcbaa as outlined above.

I understand the cdcbaa is incorporated as a 501(c)(6) nonprofit organization and that a portion of my dues will not be deductible as a business expense because cdcbaa advocates within California for legislation on behalf of consumer debtors.

The 2013 calendar year membership fee is $250.00, and includes one ticket to the Calvin Ashland Awards Dinner

Name: ____________________________
Bar Number: ________________________
Firm: ______________________________
Address: ____________________________
Telephone: __________________________
Fax: ________________________________
E-Mail: ______________________________
Website URL: _________________________

Signature: ____________________________

Membership Fee: $250.00
Please make checks payable to: cdcbaa

Mail this completed form and application fee to:

ccdbaa
Attn: Administrator
P.O Box #712824
Los Angeles, CA 90071-7824
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Firm: [Firm]
Address: [Address]
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