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cdcbaa

Central District Consumer Bankruptcy Attorney Association

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From the President

By: Louis J. Esbin
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As I am writing this, my third article as president of the Central District Consumer Bankruptcy Attorneys Association, I am humbled by the thought that 232 years ago courageous men stood firm to their convictions and penned their signatures to the Declaration of Independence. And now, we are on the verge of nominating presidential nominations. Will the next president be the next Herbert Hoover or FDR or Ike? No doubt, he will be wrestling with an economy reeling from the uncontrolled spending of the last 25 years. But will he have the wisdom of the Founding Father, who, straining under the Articles of Confederation, found the courage to enact in 1789 the United States Constitution. As we all know, Article 1, Section 8, Clause 4 provides: "Congress shall have the power . . . to establish an . . . uniform Laws on the subject of Bankruptcies throughout the United States."

Between being granted the power to enact Bankruptcy Laws, five times, since 1800, Congress passed, repealed or amended, uniform Laws on the subject of Bankruptcies. The first enacted in 1800 was repealed in 1803, amid allegations of excessive costs and corruption. One complaint was that bankruptcy courts were inaccessible. Subsequent enactment was usually prompted by economic "panics." A second set was passed in 1841 following the panics of 1837 and 1839, and repealed for the same reasons as were the first. A third set, during the ill-fated presidency of Andrew Johnson, was enacted in 1867 following the Panic of 1857 and the economic ravages following the Civil War. Eleven years later, it was repealed.

Between 1881 and 1898 various lobbying groups formed in an attempt to persuade Congress to enact uniform Laws on Bankruptcies, including the National Convention of Boards of Trade and the National Convention of Representatives of Commercial Bodies. After 17 years of trying, in 1898, what is generally referred to as the "Act" was passed, and was amended in 1933-34 in response to the depression of the 1930's, allowing for railroad, corporate and individual reorganizations. And, of course in 1978, under the guidance of our 2006 Lawyer of the Year, Kenneth Klee, the 1898 Act was replaced by the "Code." From 1978 the Code went through the Marathon crisis and the 1994 Amendments. After at least 10 years of attacks, the credit issuer lobby gained the favor of Congress to pass the more radical 2005 Amendments prompted by allegations of excessive costs and corruption, but not economic distress or panic.

And, so, fittingly, on the eve of July 4th 2008, the Dow Jones Industrial Average was officially declared in the midst of a Bear Market, having lost over 20% of its value. From our last Newsletter a barrel of oil has increased from $119 to over $145, resulting in a gallon of regular gas to be sold on average at $4.69 in the Los Angeles-Long Beach-Santa Ana Metropolitan Statistical Area. According to the government, half a million American lost their jobs in the first six months of this year, jumping the highest percentage in 20 years in May. The jobless rate stood at 5.5% and a total of 8.5 million as of June. As of July 2008 the Consumer Price Index increased by 5.7%. And, similar statistics are emerging from the 30 countries that make up the Organization for Economic Development and Cooperation (OECD), including 23 European countries, the United States, Australia, Canada, Japan and Mexico. But, undoubtedly, those statistics do not include or account for the underemployed or the self employed!

In "response," the President's Economic Stimulus Package was passed, giving many Americans $300 each to spend to prop up the sagging economy. Many paid their credit cards, bought food or paid for a month of gas to commute to work. Congress passed laws that relieved borrowers from tax liability on the discharge of debt following foreclosures; but the debt must have been purchase money. Unfortunately, most Americans refinanced several times from October 2001 through August 2007, borrowing their way out of debt and their purchase money borrower status.

There was talk about Congress considering legislation that would allow Bankruptcy judges to modify certain subprime loans, but instead a Freddie-Fannie bailout bill was passed that was touted as providing consumers possible relief with the consent of lenders. The likelihood that Congress will act following the summer recess and before the November election is as likely as ... well you can finish the clichÇ. And, on July 8th the California legislature passed legislation that modified the California foreclosure statute, requiring lenders to attempt to give borrowers on residential property "a call" to find out what is wrong that payments could not be made. If they did anything, they added more confusion and no relief!

Now, we as consumer bankruptcy lawyers know that there currently exists statutory authority and case law from which we can fashion a remedy that would allow many of our clients to retain property and preserve long term wealth. Whereas our legislators speak about relief, we know there are already laws in place so that neighborhoods and lives can be preserved, accomplishing the intent of these legislative bodies to slow the march of foreclosures.

As our July MCLE program touched upon, loans not secured solely by the debtor's principal residence may be modified. But, can the principal residential mortgage ever be modified? For those cases where the secured debt falls below the Chapter 13 jurisdictional limits, 11 U.S.C. 1322(b)(2), and the case law throughout the country, should be carefully examined along with the entirety of the loan documents that give rise to the "debt." Similar statutory authority is located in 11 U.S.C. 1129(b)(2).

Many of us refer to the process as lien stripping or a Lam motion. But, it is more than just seeking a determination from the court of the value of real property for the purpose of depriving a second or third deed of trust of payments because they are wholly undersecured. Whether a lien can be removed from title merely by a motion or must be done through an adversary proceeding is an open debate, both between judges within the District, but around the country. My preference is a hybrid - a motion to value so that payments can be stopped, followed after confirmation and the passage of time and substantial consummation by an adversary proceeding to avoid the lien. See, Fed.R.Bankr.P. 7001.

But, that being said, the issue of modifying loans secured not solely by the debtor's principal residence goes beyond the Lam motion. It requires an understanding of California mortgage and deed of trust practice (See, CEB Guide) and the intricacies of standard FNMA and MERS deeds of trust, as well as commercial law. It also takes a bit of moxie and lawyering!

Start with the stated intent of the California legislature and Congress to assist consumers facing foreclosure. Recognize the hollowness of the legislation. Consider that those same lenders that made "no look," "breadth on the mirror," or "liar loans," may also have taken more than the debtor's principal residence as collateral. Now take the position that those lenders must not get a "free pass" to the anti-modification provisions of section 1322. Look at the facts in your client's case; for example, has the principal residence been granted or pledged to secure a commercial loan? A more aggressive argument would be that by taking the tax and insurance escrow account as collateral in the event of default the lender has more than the debtor's principal residence as collateral, and therefore, the loan may be modified. So too, if the debtor has many (more than one) properties with the same lenders, are there cross collateral provisions?

Even though a lender's consent is required for a loan modification outside of bankruptcy, is it also arguable that a court can, through a notice and opportunity to be heard (11 U.S.C. 102) force a loan modification upon a lender secured by the debtor's principal residence? Would that not effectuate the legislative intent to avoid foreclosures? What if a debtor qualifies following confirmation for a refinancing that is insufficient to satisfy the loan of the first lender whose loan under Lam could not be modified? Can a bankruptcy court fashion a remedy? How will know if we do not ask!

We, as consumer bankruptcy lawyers, must not hesitate to step up to the challenge. It is our right, our duty, to effectuate results that provide for our clients, our neighborhoods and our community the preservation of families, lives and a return to a lifestyle and an economy based upon "needing" and "affording," and not just "liking" and "wanting" satisfied by credit.

Credit Counseling Pitfalls to Avoid

By: Rick Curry
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If you read the legislative history of BAPCPA it is clear that the major thrust of the credit counseling requirement was to insure that potential debtors considered bankruptcy alternatives before they decided to file. The implicit conclusion was that many debtor attorneys encouraged clients to file for bankruptcy even though a non-bankruptcy option would have served the client better. Consumer attorneys know, this only happened on rare occasions, but true or not this is the conclusion creditor groups lobbying for BAPCPA sold to Congress.

The challenge for debtor attorneys is how to assist clients to comply with the counseling and debtor education requirements with the least amount of hassle and in a manner in which the burden on your clients and on your staff is minimized. The rules are very specific with very little flexibility. Basically counseling must be done before the filing or the client must be able to prove that they dili-

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The So. Cal Bankruptcy Inns of Court will be hosting a series of meetings this year, with the second meeting beginning on:

November 18, 2008
6:30 for reception and 7:00 for dinner

McCormick & Schmicks
633 West Fifth Street, 4th Floor
Los Angeles, CA 90071

The Inn is scheduled to meet six times this year
10/14/08, 11/18/08, 3/10/09, 4/21/09, 6/16/09

$350.00, for the year
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Invitations have been mailed out, if you did not receive yours, please contact:
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gently attempted to obtain counseling for five days before filing, but counseling was not available. The notion of an emergency filing being the basis for an extension is simply a fiction in most districts and relying on such a theory is like playing Russian roulette. The down side is far too great for the client and for the attorney who embarks on such a strategy. In the Central District the Court has taken a more reasoned and flexible approach, however in many districts even within the 9th Circuit the approach is much more stringent.

Several basic principles can help you avoid problems.

1. Develop a relationship with a credit counseling provider that is accessible and responsive to your needs. If you have an emergency will they help you?

2. Make sure you understand the agency's procedures and when the counseling is considered complete. Providers that utilize the Internet to provide the briefing are required by the EOUST to have a counselor speak with the client before the counseling is complete. The time of completion is the time that the client speaks with the counselor. That is reflected on the Certificate of Completion issued by the provider using the EOUST certificate generation system.

3. Once counseling is complete you may file immediately even if you do not have the certificate in hand. Simply check box 2 on Exhibit D. However make sure the client has actually completed counseling and not simply completed the online briefing. Better to be safe than sorry and to avoid doing a lot of legal work for free to correct a mistake that could have been easily avoided.

4. Credit Counseling agencies are not required to prepare debt management plans, but if a debt management plan is prepared it must be attached to the EOUST issued certificate of completion. Most Credit Counseling Agencies offer debt management plans, but if you do not need such a plan then look for an agency that does not prepare such plans.

5. For internet providers it is important that clients be available for the follow up telephone

call and make an effort to complete the budget form. If you have done a budget for them it would be a good idea to give the client a copy to use as a guide.

Communication is the key to avoiding problems and to making sure your clients get the service they need and deserve.

In a future article we will deal with the history and politics and the involvement of the creditor groups that support and sponsor many of the CCC agencies.

> [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.
>
> Chief Justice John Marshall
> Sturges v. Crowninshield, 17 U.S. 122 (1819)

Income Contingent Repayment Plans for Student Loan Debtors

By: Catherine E. Bauer
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The United States Department of Education, William D. Ford Federal Direct Loan Program ("Direct Loan"), offers various repayment options for student loan debtors. One of these is the Income Contingent Repayment Plan (the "ICR" plan). Essentially, once a student loan debtor is on an ICR plan, monthly payments are calculated on the basis of adjusted gross income, family size, and total amount of Direct Loan debt. This can give student loan debtors the flexibility and breathing room they need during difficult times.

Many bankruptcy attorneys do not realize that their clients may qualify for ICR plans, so they file complaints requesting that their clients' government-owned student loans be discharged pursuant to section 523(a)(8). In the Second, Third, Fourth, Six, Seventh, and Ninth Circuits, this means they need to satisfy the so-called "Brunner Test" for student loan dischargeability set forth in Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987), the leading case on student loan dischargeability.

Under Brunner, the court is to consider: (1) the debtor's current level of income and expenses, and determine whether a minimal standard of living can be maintained by the debtor and the dependents of the debtor if the debtor is required to repay the loans; (2) whether there are additional circumstances suggesting that the debtor's current financial condition is likely to continue for a significant portion of the repayment period; and (3) whether the debtor has made a good faith attempt to repay the loans.

It is worth noting that the legislative history of the 1998 changes to section 523(a)(8), makes clear that Congress intended undue hardship claims to be considered in light of "the availability of various options to increase the affordability of student loan debt, including deferment, forbearance, cancellation and extended, graduated, income-contingent and income-sensitive repayment options." H.Rep. No. 750, 105th Cong. 2d Sess. 408 (1998).

ICR plans can give student loan debtors the type of income-contingent and income-sensitive payment options they may need during trying times. In fact, if a student loan debtor's income is less than or equal to the poverty level for his or her family size, the monthly payment under an ICR plan is zero.

As another example, at an interest rate of 4.06% for a student loan debtor with an adjusted gross income of $30,000, a family size of one, and Direct Loan debt of $15,000, his or her beginning monthly payment would be approximately $106.79, with a repayment period of approximately fourteen years. Or, at the same interest rate, for a married couple with a family size of two, an adjusted gross income of $25,000, and combined Direct Loan debt of $15,000, monthly payments would be approximately $91.57, with a repayment period of approximately seventeen years.

Direct Loan provides a handy calculator for approximating ICR plan payments. The calculator is located http://www.ed.gov/offices/OSFAP/DirectLoan/calc.html.

The maximum repayment period under an ICR plan is twenty-five years. If a debtor makes payments under an ICR plan for twenty-five years, and there are still amounts left owing, those unpaid amounts are forgiven. Of course, there may be tax consequences as a result of this forgiveness.

More information on ICR plans and other Direct Loan repayment options can be found at www.ed.gov/DirectLoan or by calling 1-800-848-0979.

Catherine Bauer: Assistant United States Attorney, Central District of California. The opinions stated are those of the author and not those of the Department of Justice or the United States Attorney's Office.

Update from the Southern California Inn of the Court

By: Brett Curlee
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What are you doing to improve our profession? The Southern California Bankruptcy Inn of Court and its members are taking this bull by the horns. Dedicated to improving professionalism, civility, and legal scholarship, the Inn is getting its year off to a great start! This year the membership is broken down into seven teams. We originally planned to have six meeting this year, but have added a seventh in February which will be a joint meeting with the Intellectual Property Inn of Court. More on this to come.

Jon Hayes and pupilage team 3 kicked off the year with the first program "Name That Supreme Court Case" to see which team could guess the names of the most Supreme Court cases on bankruptcy issues based on clues given by Team 3. Team 1 led by Judge Robert Kwan swept the board on Supreme Court bankruptcy tax issues, but Team 4 led by Byron Moldo and Jill Sturtevant pulled off the win in sudden death overtime against Team 5 led by Dennis McGoldrick and Peter Lively. Nice job Teams 4 and 5!

Our next meeting is schedules for November 18, 2008 starting at 6:30 p.m. By popular demand, Team 2's program will be "The Day After"-The Nuclear Mortgage Meltdown. This program will provide a comprehensive legal and economic picture of the status of housing market including, mortgages, foreclosures, and refi's from the prospective of bankers, borrowers, lawyers, builders, and title companies one year into the recession. This will be your opportunity to get insights from all the players at ground zero of the mortgage industry, lawyers, bankers, builders,

Calvin Ashland Awards Dinner

to honor our Judge of the Year:
The Honorable Geraldine Mund

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Award will be presented by prior Calvin Ashland Judge of the year, Samuel L. Bufford

November 6, 2008
6:00 for Reception and no-host bar
7:00 for Dinner and Awards Presentation

Marriott Hotel Grand Ballroom
333 South Figueroa Street
Los Angeles, CA 90071

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$70 Judicial & Government Officials

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and mortgage experts, and how they believe the economy will drive change in the practice of bankruptcy and bankruptcy law.

Lastly, the Irish are coming! Dennis McGoldrick's new law clerk, Ronan Duggan, will be joining the Inn. Welcome Ronan! Ronan is a barrister of law from Dublin Ireland who is in his third year of practice. Ronan is currently studying to pass the California bar exam in February, and will then join his American brethren in the practice of bankruptcy law. Ronan is a member of the King's Inn of Court, one of the oldest Inn's in the British Commonwealth. Ronan will be sharing his stories of the Irish Inn and its traditions and helping us to establish some of our own. Hint: Ronan is pretty adamant about the wig! So we hope to see you all at the next Inn meeting at McCormick & Schmicks on November 18, 2008.

If you wish to join, please call Cynthia Meza at (818) 242-1100 for more information.

Discharge Analysis

By: Peter Lively
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11 U.S.C. § 727. Discharge

(a) The court shall grant the debtor a discharge [order], unless-

(8) the debtor has been granted a discharge under this section, under 1141 of this title, or under section 13, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least-

(A) 100 percent of the allowed unsecured claims in such case;

or

(B)(I) 70 percent of such claims; and

(ii) the plan was proposed in good faith, and was debtor's best efforts;

11 U.S.C. § 1141. Effect of confirmation.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan-

(A) discharges the debtor from any debt that arose before the date of such confirmation...

(3) The confirmation of a plan does not discharge a debtor if-

('C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

11 U.S.C. § 1328(f). Discharge

Notwithstanding subsections (a) and (b), the court shall not grant a discharge [order] of all debts provided for in the plan or disallowed under second 502, if the debtor has received a discharge [order]-

(1) in a case filed under chapter 7, 11, 12 of this title during the 4-year period preceding the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such [?] order.

***See Chart**

Reconciling Discharge Under 727 and 1328 after Kagenveama

The United States Court of Appeals for the Ninth Circuit recently held that there is no applicable commitment period for above-median-income debtors with zero projected disposable income following strict statutory interpretation of 11 U.S.C. § 1325(b) and using form B22C to determine projected disposable income without reference to bankruptcy schedules I and J. In re Kagenveama, 527 F.3d) 990 (9th Cir. 2008); followed by In re Zahn, 526 F.3d 1140 (8th Cir. 2008).

Kagenveama leaves open for interpretation whether chapter 13 plans of less than 36 months paying less than 100% to class five (allowed general unsecured creditor's claims) are confirmable. Taking the concept of a less than 36 month commitment period to its limit (as the number of months of proposed payments approaches zero), highlights the disparity between the discharge provided under 727 and 1328.

There lies the rub or paradox: how does one reconcile the more favorable chapter 13 discharge in a shorter than 24 month plan (which allows the debtor a subsequent chapter 13 discharge after 2 years and a subsequent chapter 7 discharge after 6 years) with the less favorable chapter 7 discharge (which allows the debtor a subsequent chapter 13 discharge only after 4 years and a subsequent chapter 7 discharge only after 8 years)? The answer appears to be that the shortest chapter 13 plan duration, when class five (allowed general unsecured creditor's claims) is paid less than 100%, must be at least 24 months.

First Case	***Second Case***
Chapter 7 or 11 Discharge	**Chapter 7 or 11 Discharge;** Shall not be granted if a prior discharge order was entered in a Chapter 13 case filed within the prior 8 years before the filing date of the Chapter 7 or 11.
Chapter 7 or 11 Discharge	**Chapter 13 Discharge;** Shall not be granted if a prior discharge order was entered in a Chapter 7 or 11 filed within the prior 4 years before the filing date of the Chapter 13 petition.
Chapter 13 Discharge	**Chapter 7 or 11 Discharge; No time limits**
* Plan paid 100% to Class 5 or 70% or more with good faith and best efforts.	**Chapter 13 same as if paid less than 70%.** *[Perhaps contemplated prior chapter 13 plan would have lasted at least 2 years? Otherwise gives no incentive to chapter 13 debtor to pay more than 70% in plan of 2 years or less]*
Chapter 13 Discharge * Plan paid less than 70%	**Chapter 7 or 11 Discharge;** Shall not be granted if a prior discharge order was entered in a Chapter 13 case filed within the prior 6 years from the filing date of the Chapter 7 or 11.
	Chapter 13 Discharge; Shall not be granted if a prior discharge order was entered in a Chapter 13 case filed within the 2 years before the filing date of the second case, or alternatively, a much sooner date, 2 years before the contemplated entry of the discharge order in the second case.

Note: The date on which a debtor is entitled to a second discharge order in the second chapter 13 case may turn on the statutory interpretation of phase "such order" under 11 U.S.C. § 1328(f)(2) and an interpretation of whether (1) "such order" modifies the "discharge order" referenced in the main text of 11 U.S.C. § 1328(f) or alternatively (2) modifies the "order for relief under this chapter" under 11 U.S.C. § 1328(f)(1).

Scenario I: Chapter 13 debtor's plan pays between 70% to 100% to class five.

The more favorable chapter 13 discharge provides a proper incentive to elect chapter 13 over chapter 7. This debtor is rightfully rewarded with the ability to obtain a future discharge sooner where a vast majority of his debt was previously paid.

As a practical matter, the debtor will likely take two years or more to complete payments.

Scenario II: Below-median-income debtor elects chapter 13 debtor's plan pays less than 70% to class five.

No presumption of abuse under B22A would have existed and the election of chapter 13 would likely be based upon debtor's desire to reinstate secured debt arrearage or pay prior tax debt, etc.

As a practical matter, the debtor will likely take two years or more to complete payments.

Scenario III: Above-median-income debtor passes the B22A Means Test without a presumption of abuse and elects chapter 13.

The analysis is essentially the same as Scenario II.

Scenario IV: Above-median-income debtor fails the B22A Means Test and has positive projected disposable income under B22C.

The plan must be 60 months unless 100% of allowed general unsecured claims can be paid sooner, due to the applicable commitment period requirement of 11 U.S.C. § 1325(b)(4). In re Kagenveama.

As a practical matter, the debtor will likely take two years or more to complete payments.

Scenario V: Above-median-income debtor fails the B22A Means Test causing a presumption of abuse for the debtor to receive a chapter 7 discharge, but the debtor also has a zero or negative B22C projected disposable income.

Here, Kagenveama holds that since there is no projected disposable income, strictly interpreting the code and using the current version of Form B22C, there is no applicable commitment period.

This debtor receives a chapter 13 discharge in less than 60 months without paying 100% to the allowed general unsecured creditors.

Pursuant to 11 U.S.C. § 1328(f) and 11 U.S.C. § 727(a)(9), respectively, the debtor becomes eligible for subsequent chapter 13 discharge within two years or less (See Note above) and chapter 7 discharge within six years (two years sooner than if debtor had received a chapter 7 discharge).

In light of Kagenveama, a consistent reading of the Bankruptcy Code appears to require that under Scenario V, the debtor's plan duration needs to be no less than two years so that the discharge provisions provided under 11 U.S.C. § 1328(f) and 11 U.S.C. § 727(a)(9) are not in conflict.

cdcbaa Calendar

November 6, 2008: Calvin Ashland Awards Dinner

November 18, 2008: Inn of the Court

January 25, 2009: Meeting

February 21, 2009: Meeting

March 10, 2009: Inn of the Court

March 21, 2009: Meeting

April 18, 2009: Meeting

April 21, 2009: Inn of the Court

May 29 - 31, 2009: NACBA Conevntion, Chicago

June 16, 2009: Inn of the Court

June 20, 2009: Meeting

July 18, 2009: Meeting

September 19, 2009: Meeting

October 17, 2009: Meeting

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Central District Consumer Bankruptcy Attorneys Association

Advancing the interests of Consumer Bankruptcy Practice in the Central District of California

I hereby apply for membership in the *cdcbaa*, Central District Consumer Bankruptcy Attorneys Association, a nonprofit association, for the **calendar year 2009**. I understand the basic goals of the organization are to: address the 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 the consumer debtors.

Please Complete Reverse Side.

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Central District of California Bankruptcy Attorneys' Association

Newsletter Volume 1, Issue 5, November 2008

Name: ______________________ Bar Number: ______________

Firm: ______________________________________

Address: ______________________________________

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Email: ______________ Web Address: ______________

Signature: ______________________________________

One year membership fee: $150.00; Make Check payable to: *cdcbaa*

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