FOOTHILLS BAR ASSOCIATION
OF SAN DIEGO COUNTY
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APRIL 2018

NEWSLETTER

Board Votes To Issue MCLE Credits To Members Only

By William Hannosh, Esq., President

On March 20, 2018, the Foothills Bar Association's board of directors passed a decree that, beginning June 1, 2018, only current members of the association will be given certificates of compliance after attending a Minimum Continuing Legal Education (MCLE) class or seminar. In turn, those who are not current members of the Foothills Bar Association may attend MCLE presentations, but will not be issued certificates of compliance.

The new rule will cover every section and committee of the Foothills Bar Association this coming June.

Historically, MCLEs were charged to non-members at $10.00 per class or seminar. The new "certificate-to-members-only" rule is necessitated by a judicial, court-wide policy that fees cannot be sought or received within a courthouse. Juxtaposed with the judicial policy is the fact that among all the bar associations in San Diego county, the Foothills Bar Association's annual membership fee of $65.00 is actually the lowest. In addition, the committee heads have been planning and presenting some of the most intriguing MCLE classes (many of which have been interdisciplinary) so that, for instance, a criminal defense attorney and family law attorney can attend the same MCLE on evidence or the hearsay rule to equally benefit in a professional capacity, even though their practice areas are different.

Upcoming Events Calendar

April 12
Estate Planning and Probate Section
12:15 – 1:15 p.m.
Law Office of Nancy Kaupp Ewin, Esq.
8166 La Mesa Blvd., La Mesa
Topic: TBA
Speaker: TBA

April 17
Family Law Section
12:00 - 1:15 p.m.
East County Court, Dept. 5
250 E. Main Street, El Cajon
Topic: Discovery in Family Law
Speaker: David Beavans, Esq.

April 19
Criminal Law Section
12:00 - 1:10 p.m.
East County Court, Dept. 10
250 E. Main Street, El Cajon
Topic: Effects of Immigration Issues in Criminal Cases
Speaker: Jacob J. Sapochnick, Esq.

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The Foothills Bar Association will continue to issue reminders about the new rule between now and June 1, 2018. The obvious hope and intention is that attorneys or other professionals who have benefited from attending FBA MCLEs will also see the utility in joining our organization for just $65.00 per year. Newer attorneys who have been practicing for one year or less are still offered a one-time, free membership.

Omitted Creditor in a Bankruptcy Case: Now What?

By Cheryl L. Stengel, Esq.

Most attorneys have experienced the effect of a bankruptcy filing by an opposing party (perhaps even a former client) – all collection actions come to a screeching halt due to the automatic stay. But, what happens when your creditor client was not listed in the debtor's now-concluded bankruptcy case and thus, had no notice of it? Is this a technical loophole for the creditor or is it irrelevant? That depends.

It is not unusual for a debtor to inadvertently overlook a creditor when preparing the bankruptcy schedules. This is common when debts are "old" and the debtor has stopped receiving collection notices, so the debt has been forgotten. It also occurs when the creditor has a non-institutional debt that is generally not reported to the credit bureaus. That includes business debt guarantees, former landlords, medical bills, payday lenders, and individuals. But, it is also possible that the creditor was intentionally not disclosed in the case. That may have been due to the creditor's knowledge of assets or "dirt" on the debtor, fear that the creditor would cause trouble in the case, or simply embarrassment.

The prevailing view on this issue in the Ninth Circuit is that a debt that was inadvertently omitted in a "no asset" case is discharged, just the same as the scheduled debts. *See*, *Beezley v. California Land Title Co. (In re Beezley)*, 994 F.2d 1433 (9th Cir. 1993). The vast majority of individual Chapter 7 cases are "no asset", which simply means that there were no assets for the bankruptcy trustee to liquidate and distribute to creditors. The rationale is that if there were no assets for creditor distribution, then the creditor was not prejudiced by the debtor's failure to schedule. In other words, the old idiom, "no harm, no foul". The "discharge injunction" would apply to prohibit collection efforts by the unscheduled creditor in this instance. Continued attempts to enforce collection after being notified of the discharge may result in the Bankruptcy Court issuing sanctions against the creditor.

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The defense of the discharge injunction cannot be waived. The debtor will not be barred from raising this defense under equitable estoppel or laches, even at a late stage. For example, where a post-discharge judgment was entered on a prepetition debt, without the creditor's knowledge of the bankruptcy, the judgment is still void even if the debtor failed to raise the discharge defense. *In re Gurrola*, 328 B.R. 158 (9th Cir. B.A.P. 2005). In the *Gurrola* case, the debtor allowed a collection lawsuit to proceed through litigation for over two years after his Chapter 7 "no asset" case was discharged. He never raised his bankruptcy discharge until the judgment debtor examination. The Ninth Circuit Bankruptcy Appellate Panel noted that, "the debtor was amazingly ignorant of the legal consequences of his bankruptcy discharge," however, the discharge can never be waived on equitable grounds.

What about the unlisted creditor in a Chapter 7 "asset" case? Where the debtor's case had assets that were liquidated by the trustee, the debt owed to an unscheduled creditor, who otherwise had no notice of the bankruptcy, will not be discharged. The rationale is that the creditor was unable to receive its share of the distribution in the bankruptcy and thus, was prejudiced. The unlisted creditor may seek to collect the debt on the basis that it was not discharged in the case. The court docket will indicate whether there was an asset distribution in the case.

The outcome is also different where the omitted debt was incurred by the debtor's "bad" conduct. Under 11 U.S.C. §523, certain debts are excepted from discharge, including debts obtained by fraud or other intentional, tortious conduct, including embezzlement, fiduciary violations, and acts causing "willful and malicious injury." If a creditor wishes to challenge the dischargeability of its debt, the objection is due about 90 days after the bankruptcy was filed. But, what about the unscheduled creditor who has no knowledge of the objection deadline? In that situation, the creditor has an important remedy under 11 U.S.C. §523(a)(3). If the omitted creditor would have had a valid basis to file a nondischargeability complaint in the debtor's case, then the debt was not discharged. In that instance, the omitted creditor is permitted to file a nondischargeability complaint at any time for a ruling on the debt's nondischargeability. *In re Staffer*, 306 F.3d 967 (9th Cir. 2002).

Tenant Exercises Option, Gets "Rent Free" Bonus

By Keith Jones, Esq.

Commercial leases frequently grant a tenant the right to extend the expiration date, but rarely do they grant a tenant the right to purchase the premises. A recent appellate case exposed a benefit favoring the tenant that parties often overlook when a tenant exercised its option to purchase the premises. The landlord did not dispute at trial that the tenant had exercised the option. The tenant filed its lawsuit for specific performance to require the landlord to sell the property for $320,000 as determined by the tenant's appraiser. Not surprisingly, the landlord cross-complained seeking to compel the tenant to buy the property for $1,615,000 as determined by the landlord's appraiser.

The lease provision in dispute could have been more precise since it set the price for the tenant to purchase the property at the fair market value based on an appraisal without saying who would obtain an appraisal. Nor did the lease provide a procedure to determine how an appraiser would be selected. The tenant exercised the option in August 2011 but trial didn't begin until mid-September 2014, over three years later. Out of an abundance of caution, the tenant continued to pay rent the entire time since the lease also stated that the tenant could only exercise the option to purchase if it wasn't in default under the lease.

The trial court appointed an independent appraiser pursuant to the Evidence Code who estimated the property's fair market value at $789,000 as of August 2011. The court-appointed appraiser added that the property's value also had a 'bonus rent' component of $3,375 per month, a considerable amount given the three-plus year period from the exercise of the option to the time of trial. Based on the new appraisal, the trial court determined the property's fair market value to be $889,854.

The tenant argued in closing that it should be entitled to a rent credit against the purchase price because it would not have had to pay three years' worth of rent if the landlord had complied with the tenant's exercise of the option in August 2011. The trial court disagreed on the basis that the option wasn't enforceable until the value had been fixed. The trial court ruled for specific performance to compel the landlord to convey the property to the tenant for the $889,854 appraisal amount.

The tenant appealed, claiming it was entitled to an offset against the purchase price for the rent paid pending the litigation. The appellate court agreed, noting that the lease was silent as to whether rent would be due after the tenant exercised the option to purchase until the purchase was actually consummated. Under such circumstances, the landlord-tenant relationship terminated when the tenant exercised the option to purchase the property and automatically transformed the parties' agreement into a contract of purchase and sale.

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The appellate court further reasoned that the transformation in the form of the parties' relationship to buyer and seller had the effect of placing the tenant in the new position as buyer in possession of the property. Since the lease did not require the tenant to continue paying rent until consummation of the purchase after exercising the option, the termination of the landlord-tenant relationship also terminated the tenant's obligation to pay rent. The fact that the tenant continued to pay rent not only prevented any claim by the landlord that a default under the lease rendered the option void, but it also protected the tenant's rights under the lease, in the event that the trial court determined the option had not been properly exercised.

Lastly, the appellate court rejected the trial court's finding that no offset to rent was due because the option wasn't enforceable until the trial court decided the sales price. Rather, the fact that each party pursued specific enforcement of the option at their respective prices established that the option had been properly exercised in August 2011, at which time the rent ceased to be due.

The landlord did obtain a small victory on the appeal since it was arguably entitled to the purchase proceeds in a reasonable time after the option was exercised to allow time for the property to be transferred. Consequently, the landlord could recover any interest and other compensation that could have been received on those funds. The appellate court remanded the case to the trial court to determine the rent setoff for the tenant's benefit, and the interest and other compensation due to the landlord for loss of use of sales proceeds subject to determining what would have been a reasonable closing date for the sale.

One of the key issues on remand raises the likelihood of more real estate expert testimony, namely when would the deal have closed. Why wouldn't we be surprised if, on retrial, the landlord and tenant argue for closing periods that vary widely like their initial fair market value appraisals? Regardless of the length of the closing period, the tenant still benefited from the "free rent" bonus commencing when it exercised the option to purchase.

Notices

Looking for Speakers for Future FBA Civil Litigation Section Meetings:

If you have a litigation topic you would like to present at an upcoming Civil Litigation Section MCLE meeting, please contact Section Co-Chairs Steven Banks at: sbanks@krigerlawfirm.com or 619-589-8800, or Christopher Hayes at cjhayes@cox.net or 619-846-0183.

Foothills Bar Association Notice of Board Meeting:

The Foothills Bar Association Board of Directors generally meets on the third Tuesday of each month. The next meeting will be on April 17, 2018 at the Law & Mediation Firm of Klueck & Hoppes, APC., 7777 Alvarado Road, Suite 413, La Mesa, CA 91942 beginning at 4:45 p.m. If you want your voice to be heard in policy discussion and upcoming event planning or would simply like to learn more about the organization, your attendance is welcome.

The Family Court needs settlement conference judges. Please volunteer and share your expertise. Contact Kelly Fabros at 619-456-4065 or Kelly.Fabros@SDCourt.CA.Gov.

FOOTHILLS BAR ASSOCIATION OF SAN DIEGO COUNTY

Service, Professionalism, Collegiality

FOOTHILLS BAR ASSOCIATION FAMILY LAW SECTION MEETING

Tuesday, April 17, 2018
12:00 pm – 1:15 pm

LOCATION:

East County Court House – Department 5
250 East Main Street, El Cajon, CA 92020

TOPIC:

"Discovery in Family Law Cases"

SPEAKER:

David Beavens, CFLS

THIS EVENT IS FREE FOR MEMBERS OF THE FOOTHILLS BAR ASSOCIATION

****Civil and Criminal Law practitioners are also welcome to attend this Family Law Section MCLE****

This presentation qualifies for one unit (1.0 credit hour) toward California Minimum Continuing Legal Education (MCLE).

For questions, please contact Amy E. West, CFLS at (619) 448-6500 or Amy@familylawsandiego.com

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Vice President	Koryn Sheppard	koryn@FamilyLawSanDiego.com	619-448-6500
Treasurer	Glen Honig	glen@FamilyLawSanDiego.com	619-315-9962
Secretary	Andrea Schneider	andreaattorney@gmail.com	619-518-0476
Immediate Past President: Traci Hoppes		traci@FamilyLawSanDiego.com	619-448-6500

DIRECTORS

Christopher Hayes	cjhayes@cox.net	619-846-0183
Mark Krasner	mkrasner@bkflaw.com	858-551-2440
Steven Banks	sbanks@krigerlawfirm.com	619-589-8800
Kate Iwanami	kmiwa2013@gmail.com	619-551-4900
Jeremy Elias	ESQ@JHElias.com	619-843-8546
George de la Flor (Alternate Director)	gldelaflor@cs.com	619-246-9544

REPRESENTATIVES

Garrison "Bud" Klueck, SDCBA, East County Liaison, San Diego County Bar Association
Garrison@FamilyLawSanDiego.com 619-588-2064

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SUBMISSIONS

Your submissions are welcome! Send articles, letters, flyers, and other non-advertising submissions to Cheryl Stengel at clstengel@outook.com.

ADDRESS CHANGES

Send change of address or telephone number to Bradley Schuber at bschuber@krigerlawfirm.com

Foothills Bar Association
P.O. Box 1077
El Cajon, CA 92022

Addressee Name
4321 First Street
Anytown, State 54321