IN BRIEF

OSB Professional Liability Fund

www.osbplf.org

Malpractice Prevention Education for Oregon Lawyers

Choosing a Strong Password

Recently, several highly publicized security breaches resulted in the theft of password databases containing from tens of thousands to millions of passwords. Some of these password collections have been publicly disclosed, and they provide a wealth of insight into the typical passwords chosen by consumers. It's not a pretty picture.

Based upon the analysis of these real-world passwords, there is general agreement in the IT security community that 98% of all passwords are woefully inadequate and can be cracked in short order with simple software and a $500 computer. The password collections also reveal that despite extensive reporting of the dangers, many people use the most obvious passwords (e.g., "password," "12345") that provide almost no protection. Also well documented is a thriving black market for lists of passwords (known as "rainbow lists") used by "brute force" hacking systems to speed up the cracking process by trying known or commonly used passwords first. Here's the bottom line. If you do not take reasonable care in selecting the passwords used to secure access to your confidential client information, it's like leaving your office door unlocked at night. In both cases, you are providing open access to your client files.

What is necessary to fulfill the duty of reasonable care in choosing passwords? The ABA and numerous Bar advisory committees have opined that a lawyer should use "strong" passwords. To start, this means having a password of at least eight characters, although longer passwords will generally be better. Obviously, use of any easy-to-guess derivations of your name, alma mater, phone number, zip code, street address, birth date, and so on, should be avoided. The more variation in letters, capitalization, numbers, punctuation marks, and symbols, the more secure your password is likely to be. It is also important to use different passwords (i.e., don't use the same password for all of your accounts), and definitely use unique passwords for "high security" sites and accounts. Consider using an encrypted password keeper application to manage all these passwords.

While randomly generated characters are generally the best choice for passwords, they are typically difficult to memorize. Common dictionary words, either with or without numbers, are easy to remember but also easy to crack. One way to find a compromise password that is hard to crack but easy to remember is to use a random password generator. If the password generator provides a password you find reasonably memorable, then you can test the strength of the password using Microsoft's secure password checker, which will indicate the strength of the proposed password but not retain a record of the password. If it is not strong enough, add symbols or punctuation marks until the tester indicates that it is "strong."

Another option is to construct a password phrase. Make up a phrase or short sentence and then use the first letter from each word as your password. Example: Taking a family vacation in summer of 2015 would become TAFVISO2015. The characters are random, but you can remember them because they stand for your phrase.

Dee Crocker
Retired PLF Practice Management Advisor

April 2015
Issue 125

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A Tribute to Dee Crocker

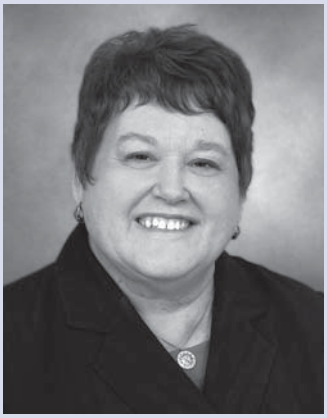
After 23 years of dedicated work, PLF practice management advisor Dee Crocker retired at the end of February 2015. Dee had over 30 years of experience in the legal field, including 14 years as a legal secretary, 3 years as a secretarial supervisor to over 50 legal secretaries, and 3 years as a law office manager. Her service extends from the local to the national. Having contributed countless hours to local and state legal secretarial associations, Dee is a past president of the National Association of Legal Secretaries of Oregon and a past member of the board of directors of NALS. She also served on the Practice Management Advisors/ State and Local Bar Outreach Committee of the ABA Law Practice Division.

Dee was a PLF Practice Management Advisor since January 1992. She provided confidential practice management assistance to hundreds of Oregon attorneys to reduce their risk of malpractice claims, enhance their enjoyment of practicing law, and improve their client relationships through clear communication and efficient delivery of legal services.

Throughout her work at the PLF, she wrote numerous articles for the PLF's *In Brief*, the Oregon State Bar *Bulletin*, and other law-related publications on a variety of practice management, technology, and malpractice avoidance topics. She also contributed to the development of hundreds of PLF practice aids. And for many years, Dee was a tireless resource to the OSB Sole and Small Firm Practitioners Listserv, posting a weekly "Tip of the Week."

Dee is a contributing author to *A Guide to Setting Up and Running Your Law Office; Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death;* and *A Guide to Setting Up and Using Your Lawyer Trust Account*, all published by the PLF.

In addition, Dee is the author of *The Office Policy Manual* and *The Office Procedures Manual*, published by the National Association of Legal Secretaries (NALS); *Basic Litigation Forms for Oregon Courts*, published by NALS of Oregon and endorsed by the Oregon State Bar; and *The Litigation Handbook for the Lawyer's Assistant*, published by West Publishing Company.



An avid fan of technology and innovation, Dee enjoyed and was instrumental in helping many attorneys decipher, choose, and implement the myriad technological options for their law firms. She maintained a software users resource list of lawyers willing to serve as resources for others.

Dee's contributions to the legal community and to lawyers and law office staff are enormous. Throughout her more than 23 years of work at the PLF, Dee helped over 3,000 law firms with office systems, answered over 10,000 phone calls, and presented hundreds of quality CLE programs. An engaging presenter, she developed the popular traveling CLE series, "Tips, Sites, and Gadgets," and spoke at countless other seminars and trainings all across the state. She reached lawyers at all stages of practice – from new lawyers setting up their practices to retiring lawyers closing their practices.

In recognition of her career and service to the profession, Dee was honored by the Oregon Chapter of the Association of Legal Administrators at the annual managing partner dinner in February. She was also honored by the PLF and lawyers around the state with a retirement party at the OSB Center.

On behalf of the legal professionals of Oregon, the staff of the Professional Liability Fund, and the PLF Board of Directors, we thank Dee for her extensive contributions and the extraordinary service she provided. We wish her many healthy and happy years ahead. We will miss Dee greatly.

A Message from Dee Crocker

The time has come for us to part and retirement is here. I will miss everyone and the best job in the state. It has been a great 23 years, and I have thoroughly enjoyed helping each of you. Wishing you all health and happiness.

Avoiding eCourt – Waivers and eFiling "Lawyer Buddies"

Delegating eFiling?

Whether you use an eFiling lawyer buddy (contract lawyer who tends to the eFiling responsibilities of the case) or a non-lawyer staff person, you have the right to give others access to your eFiling account.

On November 19, 2014, I co-presented the OSB-PLF CLE, "Oregon eCourt Update," with Daniel Parr from the Oregon Judicial Department (OJD). At that CLE, the following questions were posed:

Q: Should an assistant and the attorney be under the same registration, with the assistant designated as the administrator? Or should a legal assistant have a separate account?

A: In general, this decision is up to you. Your group should register as a firm or as a unit on the system, even if you are a solo practitioner. You can choose whom to assign as a firm administrator, and this can be multiple individuals. Some firms have chosen to have staff log into attorney accounts, and other firms have chosen to have staff set up accounts directly.

Q: Are there any ethical issues with having non-attorney staff handle filings?

A: Staff are permitted to assist with this process, and non-attorney staff are already eFiling on behalf of attorneys. Obviously, it is up to the attorney to review and supervise any work done by non-attorneys, and the attorney is responsible for the result.

While we did not explicitly receive a question about using a contract lawyer to handle eFilings, the result is the same – contract lawyers (eFiling lawyer buddies) are permitted to eFile on behalf of the attorney of record. As attorney of record, it is up to you to supervise your eFiling lawyer buddy, and you are responsible for the result. There are some other considerations, discussed below.

Avoiding eFiling

It's possible to avoid eFiling on "good cause" shown, with the court's permission. Any lawyer can apply for a waiver of the eFiling requirement. The waiver may apply to an existing (singular) case (UTCR 21.140(3)(a)(ii)) or all cases in a given judicial district for a specific period of time (UTCR 21.140(3)(a)(i)). Lawyers seek a waiver for an existing case by filing a motion and for all cases in a specific judicial district by filing a petition.

If the court grants a petition waiving the eFiling requirement in a specific judicial district, "the person obtaining the waiver must file a copy of the court's order in each case subject to the waiver; and include the words 'Exempt from eFiling per Waiver Granted [DATE]' in the caption of all documents conventionally filed during the duration of the waiver." (UTCR 21.140(3)(d) and (e))

eFiling Buddies

If you decide to use a contract lawyer to eFile your cases, follow these guidelines:

Put it in writing. As with all contract lawyering arrangements, document in writing the scope of the agreement, method of compensation, and other details. For assistance with establishing contract lawyering relationships, see the checklist and documents available from the Professional Liability Fund (PLF). On the PLF website, select Practice Management > Forms > Contract Lawyering.

Assess PLF coverage implications. If the eFiling lawyer buddy is claiming an exemption from PLF coverage, he or she cannot operate independently and "take over" eFiling responsibility. Contract lawyers who are exempt from coverage must function under PLF guidelines. (For details, visit the PLF website. Select Assessments & Exemptions > Exemptions, then "Law Clerk/Supervised Attorney Not Engaged in the Private Practice of Law.") Your eFiling lawyer buddy is likely to be safe if he or she restricts the role to that of an assistant or secretary: uploading documents at the attorney of record's direction, following the attorney of record's instructions in selecting a filing code, and so on. The more independent your eFiling lawyer buddy becomes, the more likely he or she could be viewed as acting beyond the scope of the PLF contract lawyering exemption. The simple workaround: your eFiling lawyer buddy (aka contract lawyer) can obtain PLF coverage for more freedom in executing eFiling duties.

Understand the acceptance/rejection process. As you define the scope of the eFiling lawyer buddy's responsibilities, consider who will be responsible for processing

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Free Conference Room Space in Downtown Portland

The Professional Liability Fund is offering Oregon lawyers free use of a conference room located at 520 SW Yamhill Street, Suite 1025, Portland, Oregon. To learn more details about this free conference room space and to reserve the space, go to the PLF website, www.osbplf.org, and click on Practice Management, then on Oregon Lawyers' Conference Room (OLCR).

Special thanks to the law firms of Jaqua & Wheatley and Perkins Coie for their donations of books for the OLCR library wall.

and responding to acceptance and rejection notices issued by Tylerhost.net (Oregon's eCourt vendor). For example, if the attorney of record eFiles a complaint on the day the statute runs and the filing is rejected, who will refile and seek relation back? Each time an eFiling lawyer buddy files a document for the attorney of record, he or she needs to be engaged and available to assist with the filing until an acceptance or rejection notice is issued. This can take up to a week. Add specific terms to the written contract lawyering agreement that address the eFiling lawyer buddy's responsibility in rejection situations. (Note: The attorney of record can instruct the eFiling lawyer buddy to add the attorney as a contact in order to receive acceptance/rejection notices generated by Tylerhost.net.)

Understand the court notice process. Some lawyers who are tempted to hire an eFiling lawyer buddy might be operating under the misconception that they can completely avoid all associated technology. However, court notices from the Oregon Judicial Department are sent only to the "filer," in this case, the attorney of record. The attorney of record is responsible for reviewing and acting upon court email on a timely basis.

Limit account access. By necessity, an eFiling lawyer buddy will need access to the attorney of record's eFiling account (Odyssey) operated by Tylerhost/Tyler Technologies. But this access can (and should be) limited in writing. The eFiling lawyer buddy should only use the attorney of record's eFiling account as needed, and at the express direction of the attorney of record.

Limit credit card access. Ideally, the attorney of record will create the eFiling (Odyssey) account and enter the credit card information needed for payment of filing fees. If the attorney of record needs assistance, he or she can call the Tyler Technologies support number and/or use the "GoToAssist" feature, allowing Tyler Technologies to take control of the attorney's computer to establish the account. This limits the eFiling lawyer buddy's access to the attorney of record's credit card account information. Once the credit card information is entered, the eFiling lawyer buddy simply selects the payment account to pay filing fees. If the eFiling account is configured properly, the eFiling lawyer buddy will not be able to see the credit card information. The attorney of record should be the "administrator." The eFiling lawyer buddy should be a "user." Support staff at Tyler Technologies can help attorneys of record set up accounts using these distinctions. For further protection, the attorney of record should dedicate a specific credit card to use in paying eFiling fees. By establishing a credit card solely for this purpose, it will be very easy to spot whether there is any inappropriate activity on the account. The only charges that should ever appear on the attorney of record's billing statement are filing fees payable to OJD.

Provide proper supervision. Regardless of how duties are divided, the real responsibility here still falls on the attorney of record. This scenario presumes that the eFiling lawyer buddy's role is to act only as a technical specialist. The attorney of record must be sure at all times that the eFiling lawyer buddy is doing his or her job. The eFiling lawyer buddy is not responsible for the content or accuracy of documents filed; nor is it the eFiling lawyer buddy's responsibility to monitor filing deadlines.

Be aware of ethics traps in determining compensation. The attorney of record can cover the cost of using the eFiling lawyer buddy out of his or her own pocket as a cost of doing business. If the attorney of record intends to bill clients for the eFiling lawyer buddy's services, the clients must consent. The attorney of record should update client fee agreements accordingly. (Beware the limitations of modifying a fee agreement midstream – see OSB Formal Opinion 2005-97.) Alternatively, the attorney of record could also barter services in exchange but should check in with OSB General Counsel about the ethics of such an arrangement. If the attorney of record plans to split fees with the eFiling lawyer buddy, the attorney must comply with the Oregon RPCs requiring disclosure and consent of the fee split to the client.

Beverly Michaelis
PLF Practice Management Advisor

eCourt Resources

- PLF Practice Aids – log in to PLF website, www.osbplf.org, select Practice Management > Forms > eCourt.
- "Nuts and Bolts of Oregon eCourt," Beverly Michaelis, *OSB Bulletin* (Feb/Mar 2015).

Updated *In Brief* Index Available Online

The index of *In Brief* articles through the most recent December 2014 issue is available online. To search or download the index, log on to the PLF's website at www.osbplf.org, select *In Brief* under Loss Prevention, and then select *In Brief* index. If you have questions, call Julie Weber at 503-639-6911 or 1-800-452-1639.

Tort Claims Against Tribal Casinos

Consider this scenario. A casino patron slips and falls on a wet floor outside the restroom of the casino, sustaining injuries. The casino patron consults a personal injury lawyer about representing the casino patron in a lawsuit against the casino. The casino is owned and operated by a federally recognized Indian tribe. The personal injury lawyer is not familiar with Indian law and hasn't practiced in tribal court before, but initially thinks it can't be that much different from Oregon law. The case seems relatively straightforward, so the lawyer considers taking the case. What issues should the lawyer consider before accepting the case?

A number of lawyers have encountered situations similar to this scenario and have made some common erroneous assumptions about lawsuits, in particular personal injury claims involving Indian tribes located within Oregon.

Common Misconceptions

The first common misconception is that Oregon law will apply to the claim and that it will be heard in Oregon state court. Customers who step into tribal casinos are usually unaware that they have entered a jurisdiction where Oregon law does not generally apply. Most tribes post a notice at the entrance to tribal lands and casinos stating that all persons who enter the premises are expressly consenting to tribal jurisdiction for all matters arising out of their presence there. Federally recognized Indian tribes – which are separate sovereigns under the U.S. Constitution – operate tribal casinos in Oregon. Thus, tribal courts – not state courts – have jurisdiction over injuries occurring on tribal lands. And tribal law – both substantive and procedural – governs tort claims arising in a tribal casino instead of state law.[1]

There are nine federally recognized Indian tribes in Oregon, each with its own tribal laws and tribal courts that operate according to the tribe's tribal laws and ordinances. In some instances, tribes have adopted a tribal tort claim law that provides a limited waiver of immunity for certain types of claims, including negligence claims against tribal casinos and other tribally owned businesses.[2]

Another common misconception is that tribal tort claim law has the same procedural and technical requirements as Oregon's tort claim statute. Personal injury lawyers may know that their clients must give the appropriate tribal entity or authority a tort claim notice that complies with tribal law. However, they may not be familiar with the particular tribal tort claim notice requirements of each tribe, and will be surprised to learn that there are substantial differences from Oregon's tort claim notice requirements. Tribal law generally interprets such requirements narrowly and strictly. For example, an attorney might find that the tribal tort claim notice requirements are different from Oregon's tort claim notice requirements – the tribe may have adopted a shorter time for the notice or the claim to be filed than Oregon or federal tort claim notices, and the notice or the claim must be filed with a specific person or position. Substantial compliance and/or actual notice may not suffice. Additionally, not all tribes may have their laws and ordinances published and accessible online, or have them available at county or law school law libraries. Thus, by the time the customer or lawyer is able to find a tribe's notice requirements, it may be too late.

It is impossible to generalize from one tribe to another. Each tribe is a separate sovereign and operates independently from other tribes – much like the laws of each state. There may be some federal laws, such as the Indian Civil Rights Act, 25 U.S.C. §1302, that apply generally to all tribes. You may be surprised to learn that being licensed to practice law in Oregon does not necessarily authorize you to practice in tribal court without first becoming a member of the tribe's bar or seeking permission to appear *pro hac vice* – just as you would have to gain admission to practice in other states' courts. At least one tribe in Oregon requires individuals to pass a tribal bar exam and be a member of the tribal bar before they will be permitted to practice in the tribal court.

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30th Anniversary of PLF Practice Management Advisor Program

The PLF is pleased to announce that its Practice Management Advisor Program has been serving Oregon lawyers for 30 years.

Contact our PMAs for free and confidential assistance with office systems.

- Sheila Blackford – sheilab@osbplf.org
- Hong Dao – hongd@osbplf.org
- Jennifer Meisberger – jenniferm@osbplf.org
- Beverly Michaelis – beverlym@osbplf.org

503.639.6911 • 1.800.452.1639

Many tribes allow non-attorney, but licensed, spokespersons to practice in tribal court. Most tribal courts have a roster available of persons authorized to appear in that tribal court.

Issues to Consider in Tort Claims

Since tribal laws and courts are all distinct entities, you should carefully consider whether or not you have the time and interest in learning tribal law and court procedures in order to handle a tort claim case against a tribal casino. In addition to the usual inquiries at the outset of a personal injury case, you should consider the following:

Where do you find the tort claim code? All the tribes in Oregon except the Cow Creek Band of Umpqua Indians and the Burns Paiute Tribe have made their tribal ordinances available online. See the sidebar accompanying this article for the websites. You should contact the Cow Creek Band of Umpqua Indians' tribal office to obtain its ordinances. You can contact Linda Beaver, Tribal Court Clerk for Burns Paiute Tribal Court, about obtaining copies of the Burns Paiute Tribe's ordinances.

How do you gain admission to practice in the tribal court? Do you need to be admitted before you even file the tort claim notice? How do you find out? You must review the applicable tribal law to determine whether you must be a member of a tribal court bar in order to file a tort claim notice. Or you may need to associate with a person licensed to practice in that court.

Whom do you sue? Indian tribes in Oregon operate a variety of businesses, including casinos, under different business structures created under tribal law. Each tribal

Websites of Federally Recognized Indian Tribes in Oregon

Nine federally recognized Indian tribes exist in Oregon at this time, and most of these tribes have posted their tribal laws online:

1 Burns Paiute Tribe, www.burnspaiute-nsn.gov (click on "Documents" to see the Tribal Code and Constitution)

2 Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, http://ctclusi.org (click on "Tribal Code", see Title 2, Chapter 2-7, regarding tort claims)

3 Coquille Indian Tribe, www.coquilletribe.org; www.coquilletribe.org/docbin/624TortClaimsOrdinance.pdf (Chapter 624, Tort Claims Ordinance)

4 Cow Creek Band of Umpqua Tribe of Indians, http://cowcreek.com

5 Confederated Tribes of Grand Ronde, www.grandronde.org (click on "Departments," and then on "Tribal Court")

6 Klamath Tribes, http://klamathtribes.org (click on "Tribal Links," then on "Tribal Courts," and then on "Tribal Laws")

7 Confederated Tribes of Siletz Indians, www.ctsi.nsn.us (click on "Government Listings," then on "Tribal Ordinances," and then on "Torts & Indian Civil Rights Act")

8 Confederated Tribes of the Umatilla Indian Reservation, http://ctuir.org (click on "About Us," then on "CTUIR Codes/Statutes/Laws," and then on "Tort Claims Code")

9 Confederated Tribes of Warm Springs, http://warmsprings.com (click on "Tribal Community," then on "Tribal Government," then on "Tribal Code Book," and then on "Chapter 205 Tort Claims")

Counsel is encouraged in every case to contact the tribal court for each tribe to obtain copies of all current applicable tribal laws, including the tort claim ordinance if applicable, and to learn the requirements to appear in tribal court. For example, most tribes have general statutes of limitations that apply to regular civil actions, but that may be different for tort claims against the tribal government.

tort claim law is different. Some, like the Federal Tort Claims Act, require suit against the tribe. Others only allow the tribal entity to be sued directly.

How much can you sue for? Generally, the tort claim limit for lawsuits against tribal casinos in Oregon varies; you must consult the tribe's tort claim statute. In many cases, the limit is the amount of insurance the tribe may have. Normally only the sovereign immunity of the entity, and not the tribe itself, is waived from suit under the ordinance.

To whom do you give the tort claim notice? Do you need to give notice to the tribal board secretary? the tribal chairperson? the casino corporation's CEO? the board chairperson? You must read the tribe's ordinances to determine whom to serve, how to serve, the exact language that must be in the notice, and the timeline for service.

Can you appeal? All of the tribes in Oregon have established some sort of appellate process. Most panels have some Oregon lawyers as members, as well as specially trained tribal court judges. Usually, an exhaustion-of-remedies requirement will apply to tribal lawsuits, so you will need to pursue the claim as far as you can in tribal court before seeking other recourse. Appeal is generally not available in state or federal court.

This list is not exhaustive and is offered as examples of issues a careful practitioner should consider prior to agreeing to accept a client with a claim against a tribally owned entity. At a minimum, a lawyer must become familiar with the laws of the particular tribe before accepting a case against a tribal-owned-and-operated entity, including a tribal casino. Below are several resources available to the lawyer trying to make a decision whether to accept a tribal personal injury case.

- Oregon State Bar's Indian Law Section
- Tribes' in-house counsel
- Experienced local counsel

Craig Dorsay
Lea Ann Easton
Dorsay & Easton, LLP

[1] This article addresses potential lawsuits against Indian tribes or tribal enterprises, such as tribal casinos, that share the tribe's general sovereign immunity from suit in state court. See *Chance v. Coquille Indian Tribe*, 327 Or. 318, 963 P.2d 638 (1998). Suits between individuals arising on Indian lands where one of the parties is Indian – not including tribal or casino employees acting within the scope of their authority – can be more complicated. A federal law enacted in 1953, known as Public Law 280, vested concurrent jurisdiction (along with preexisting tribal jurisdiction) in the state courts over such cases in some instances. See 28 U.S.C. §1360; *Bryan v. Itasca County*, 426 U.S. 373 (1976). But not all tribes or reservations in Oregon are subject to P.L. 280. See *N. Pac. Ins. Co. v. Switzler*, 143 Or.App. 223, 924 P.2d 839 (1996).

[2] Indian tribes operate tribal casinos pursuant to their inherent authority. Congress limited that authority by passing the Indian Gaming Regulatory Act (IGRA) in 1988, in which it required that tribes that wish to offer full casino gaming (known as "Class III" gaming) must enter into a Gaming Compact with the State in which they are located. Congress authorized certain topics to be included in such compacts, including jurisdiction over tort claims. The compacts between Indian tribes in Oregon and the State all contain a provision requiring the tribe to have a dispute resolution system for personal injury lawsuits, but do not specify what that system must be. All of the tribes in Oregon authorize jurisdiction over personal injury claims only in their own courts or systems.

Upcoming Seminars

The PLF sponsors a number of free or low-cost CLE programs for Oregon lawyers throughout the year. Check the Upcoming Seminars page on the PLF website, www.osbplf.org, for updated information. If you have questions, call Julie Weber in PLF CLE Resources at 503.639.6911 or 1.800.452.1639.

PLF Coverage Corner

Question: Does PLF coverage extend to work I do for members of my family?

Answer: Any legal work you do on behalf of your spouse, parent, stepparent, child, stepchild, sibling, or any member of your household is excluded from PLF coverage in Section V.11 of the PLF Claims Made Plan. This exclusion does not prevent you from doing legal work on behalf of these family members; rather, it excludes from coverage any claims for professional negligence arising from that work. Additionally, attorneys who maintain an exemption from coverage with the PLF are able to do legal work on behalf of these family members without purchasing coverage, since the legal work is excluded.

If you have specific questions about PLF coverage, please contact Emilee Preble or Jeff Crawford at 503.639.6911.

Can I Have a Do-Over?: Judicial Estoppel at the Crossroads of Bankruptcy and Personal Injury

This article examines two recent decisions from the Ninth Circuit Court of Appeals and their impact on the doctrine of judicial estoppel in the bankruptcy context. It follows up on an article from an earlier issue of *In Brief* (Feb. 2008). In that article, plaintiff's counsel was anxiously waiting to find out if his largest case was about to take a nosedive due to the doctrine of judicial estoppel. Bankruptcy counsel tried to save the day by amending the bankruptcy schedules to disclose the personal injury claim that was not included initially. Defense counsel was trying to figure out his next move when faced with the schedule amendment and the claim that he had violated the automatic stay.

Fast forward to the present, bankruptcy counsel was feeling confident that her client was in the clear. The discharge order had been entered, and the case trustee had been alerted to the interest in the personal injury claim in the event of a recovery.

Just then, plaintiff's counsel called in a panic. He had just received correspondence from defense counsel that provided a string of authority indicating that the schedule amendment was not enough to resolve the judicial estoppel issues. Plaintiff's counsel was stunned; it was just a mistake by his client that led to the claim being left off the initial bankruptcy schedules. Once again, his case seemed to be hanging by a thread.

Defense counsel felt relieved after sending his letter to plaintiff's counsel. His client could still prevail at summary judgment. He opened an email from the case trustee in the bankruptcy case, indicating that she had received his letter and was prepared to take action in the bankruptcy court to ensure that the claim was preserved for the benefit of creditors. She felt that the creditors had an interest to protect despite the debtor's mistake in scheduling.

Simply stated, judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001), citing *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). The doctrine is most frequently applied, in the bankruptcy context, when a debtor fails to schedule a claim against a third party, obtains a discharge, and then later pursues the claim.

In our example, the debtor apparently made a "mistake" in failing to list the claim in the bankruptcy schedules. There is also the rather innocent bystander in the case trustee, who is waiting in the wings to see if there is a potential recovery for the benefit of the creditors. Judicial estoppel is a powerful remedy for defense counsel to cut off liability for his or her client in this context and leave the debtor and her creditors with no means of recovery. In the case of an honest mistake in disclosure by the debtor, this can be a harsh result, particularly for creditors that had no role to play in the disclosure but stand to lose out on what could be the last means of payment for their claims.

This set of circumstances was directly addressed by the Ninth Circuit in two recent decisions. The first, *Ah Quin v. County of Kauai DOT*, involved a bankruptcy debtor who filed an employment discrimination lawsuit approximately six months before filing a Chapter 7 case. 733 F.3d 267 (9th Cir. 2013). The bankruptcy schedules filed by the debtor included no reference to the employment discrimination claim, and the debtor answered in the negative to questions about such claims at the meeting of creditors. The debtor ultimately received a discharge, and the bankruptcy court closed the case.

The debtor's lawyer in the employment discrimination case at some point became aware of the bankruptcy filing and alerted defendant's counsel at a settlement conference. Defendant's counsel urged dismissal of the employment discrimination case based on judicial estoppel. In response, the debtor's counsel worked quickly to have the bankruptcy case reopened and the discharge order set aside. Included in that effort were declarations from the debtor and bankruptcy counsel indicating that the failure to disclose the employment discrimination claim was a result of a misunderstanding by the debtor of her responsibilities and that the claim was never disclosed to bankruptcy counsel. The bankruptcy case was reopened, and the debtor filed amended schedules to list the claim.

The district court granted summary judgment for the defendant based on judicial estoppel. The Ninth Circuit Court of Appeals, for the first time, reviewed whether application of judicial estoppel is not warranted where the party's initial position was the product of "inadvertence or mistake." The Court found that inadvertence or mistake could provide a basis to withhold application of the doctrine and remanded the case to the district court. Key components of the Court's

findings were (1) the debtor reopened the case and amended her schedules to allow the bankruptcy court to process the claim; and (2) application of judicial estoppel based on a mistake would punish the debtor's creditors, who had no part in the initial failure of disclosure, and benefit the "alleged bad actor," the defendant.

Less than a year after the *Ah Quin* decision, the Ninth Circuit again took up the application of judicial estoppel in the bankruptcy context. In *Dzakula v. McHugh*, the Court encountered a very similar fact pattern. 746 F.3d 399 (9th Cir. 2014). The debtor had a pending employment discrimination claim at the time she filed Chapter 7 bankruptcy. The bankruptcy schedules did not list the discrimination claim. After the defendant in the discrimination case moved to dismiss based on judicial estoppel, the debtor amended her bankruptcy schedules to list the claim. After the schedule amendment, the bankruptcy court entered a discharge order and closed the case. Despite the amendment to the bankruptcy schedules, the district court dismissed the discrimination case on the defendant's motion based upon judicial estoppel.

This time, the Ninth Circuit reached a different result. Distinguishing the cases, the court highlighted that Ms. Dzakula did not present any evidence to the district court to suggest that the initial, false disclosure was the product of inadvertence or mistake. Instead, she relied on the schedule amendment by itself and that the *Ah Quin* holding would require an evidentiary hearing on the question of inadvertence or mistake. The Court held this was insufficient to permit any fact finder to conclude that the omission of the discrimination claim was because of inadvertence or a mistake. Key to this holding was the lack of "any explanation whatsoever as to why the pending action was not included on her schedules in the first place."

The *Ah Quin* and *Dzakula* decisions require attention to the details of the initial bankruptcy disclosure and a careful assessment of whether it was the product of mistake or inadvertence. Keep the following practice tips in mind when confronted with this scenario.

For bankruptcy counsel:

- Although *Dzakula* makes it clear that it is not sufficient to avoid application of judicial estoppel on its own, the bankruptcy schedules should be promptly amended to reflect the debtor's claim(s) against third parties.

- Work with your client and personal injury counsel to determine the reasons for the initial disclosure in the bankruptcy schedules. If it is truly the product of inadvertence or mistake, then the client should execute a declaration supporting the explanation for the omission in the original schedules.

PLF Practice Aids

The PLF has checklists and other practice aids for bankruptcy and personal injury. Log in to the PLF website at www.osbplf.org, click on Practice Management, then click on Forms.

- Inform the bankruptcy trustee in writing of the claim and have him or her retain the bankruptcy estate's interest in the claim and/or the proceeds of the claim. The Court in *Ah Quin* emphasized the possible harm to creditors as a reason for declining to apply judicial estoppel. Assisting the trustee would likely work to the debtor's benefit and potentially avoid the elimination of any recovery on the client's claim.

- Preserve the status quo in the bankruptcy case. Keeping the bankruptcy case open without entry of a discharge may prevent the application of judicial estoppel and give the bankruptcy court an opportunity to process the newly disclosed claim. If the discharge has been entered, counsel will need to evaluate if setting the discharge aside is necessary and/or prudent under the circumstances.

For personal injury counsel:

- Make a record to explain the omission of the claim from the bankruptcy schedules. The main distinction between *Ah Quin* and *Dzakula* was the record before the court. The plaintiff-debtor must make the proper showing to have the trial court consider whether the omission was due to inadvertence or mistake.

- Determine whether the current plaintiff is still the real party-in-interest for the claim. Once the bankruptcy trustee is notified of the claim, he or she may want to substitute in as the plaintiff in the litigation. Plaintiff's counsel may be asked to represent the trustee, which may present ethical considerations as well. Defendant's counsel wants to be sure that he or she is working with the person with the proper authority to bring and control the claim.

- Obtain any necessary relief from the Bankruptcy Court to allow the litigation to continue. Failure to do so could render any post-bankruptcy events void and could lead to sanctions for any damages.

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The author would like to thank Ann K. Chapman, of Vanden Bos & Chapman, LLP, for her contributions to this article.

Non-Judicial Foreclosures

Senate Bill 491, enacted in 2011, modified tenant protections in non-judicial foreclosures. These provisions sunsetted on January 1, 2015, in conjunction with the federal Protecting Tenants in Foreclosure Act, which terminated December 31, 2014.

Practitioners should update notices affected by the reversion to pre-SB 491 language, including the notice of default, notice of sale, and notice to residential tenants of change in ownership. These notices all contain language describing the rights of tenants. If you are relying on Stevens-Ness notice forms, verify that they have been updated.

In addition, new federal servicing rules for "federally related" mortgages have a number of steps that a servicer must go through before referring a matter for foreclosure. A good practice for the practitioner is to review 12 CFR 1024.41(f) and confirm that, if applicable, the rules have been followed before initiating a foreclosure. Also, if a loss mitigation application has been submitted during the foreclosure process, the foreclosure may not proceed to sale under some circumstances until certain steps have been taken. The practitioner should check with the client periodically during the process to make sure everything is a "go" before going to sale. Most residential loans are "federally related" mortgages.

Finally, the bill adds a warning about meth houses to the notice-of-sale language effective January 1, 2015.

The PLF Trust Deed Sale and Foreclosure Checklist has been updated to reflect these changes. The checklist is available on the PLF website, www.osbplf.org. Select Practice Management, then Forms.

Update courtesy of Patrick W. Wade, Hershner Hunter LLP.

PLF Board Positions

The Board of Directors of the Professional Liability Fund is looking for one lawyer and one public member to each serve a five-year term on the PLF Board of Directors beginning January 1, 2016. Directors attend approximately six one- to two-day board meetings per year, plus various committee meetings. Directors are also required to spend considerable time reading board materials between meetings and participating in telephone conference calls to discuss claims. PLF policies prohibit directors and their firms from prosecuting or defending claims against lawyers.

Interested persons should send a brief résumé by May 31, 2015, to Carol J. Bernick, Professional Liability Fund, PO Box 231600, Tigard, OR 97281-1600, or to carolb@osbplf.org.

Tips, Traps, and Resources

TAX/ESTATE PLANNING: Inquiry: Credit shelter trusts are funded with the maximum amount exempt from estate tax. Older wills with credit shelter trusts may now be overfunded; if so, and there is a death, the surviving spouse would lose the stepped-up basis on the property, and unintended tax consequences would follow. What should the lawyer do?

Answer: This is definitely a concern with older wills that provide for automatic funding of the credit shelter trust at the federal limit. It's time to update those wills. Two approaches lawyers could use are (1) craft a disclaimer trust in lieu of automatically funding the credit shelter trust so that the surviving spouse can make a determination based on the law then in effect and the size of the couple's estate at the first death; or (2) fund the credit shelter trust with the amount that can pass free of Oregon estate taxes rather than with the amount that can pass free of federal estate taxes. Which option makes sense for the particular clients will depend on the nuances of their estate plan.

TRUST ACCOUNTING: Don't make the mistake some attorneys have made regarding unintentional overdrafts. Scenario: A lawyer took a cashier's check and deposited it into the lawyer's IOLTA account at the same bank. The lawyer also wrote the client a check the same day. When the client deposited the check that very same day, the check was honored, but it created an overdraft. What happened? What lawyers need to know is that even a cashier's check written on the same bank that you deposit it into will NOT create instant "availability" of those funds the second you deposit them. The funds will not be available until the following day. Although it seems like the funds might be like "cash" and instantly available, because of potential fraud, banks do not actually make the funds legally available until the following day after deposit.

Thanks to Heather Guthrie, at Dunn Carney, and Richard Weill for their assistance with these tips.

Cases of Note

CORPORATIONS: In *Cortez v. Nacco Materials Handling Group*, 356 Or 254 (October 2, 2014), the Oregon Supreme Court interpreted ORS 63.165(1) and concluded that the 1999 amendments did not change the substance but instead confirmed the 1993 legislature's original intent. Unlike limited partners, members or managers who participate in or control the business of an LLC will not, as a result of those actions, be vicariously liable for the LLC's debts, obligations, or liabilities. However, a member or manager remains responsible for his or her acts or omissions to the extent those acts or omissions would be actionable against the member or manager if that person were acting in an individual capacity. (www.publications.ojd.state.or.us/docs/S060604.pdf)

HABEAS CORPUS/INDIAN LAW: In *Alvarez v. Tracy* (December 8, 2014), the Ninth Circuit Court of Appeals held that all tribal appellate court remedies must be exhausted before the court could exercise jurisdiction over a habeas corpus petition brought pursuant to the Indian Civil Rights Act, 25 USC§ 1303 (ICRA). The court found that the petitioner did not demonstrate that unavailability or futility of direct appeal excuses the exhaustion requirement or that the particular tribe's appeals process did not comply with the ICRA. (http://cdn.ca9.uscourts.gov/datastore/opinions/2014/12/08/12-15788.pdf)

FEDERAL TORT LAW/INDIAN LAW: In *Shirk v. United States* (December 8, 2014), the Ninth Circuit Court of Appeals considered a case of first impression in whether the United States may be held liable under the Federal Tort Claims Act (FTCA) for the off-reservation actions of two tribal police officers, that is whether the actions of the officers come within the ambit of the Indian Self-Determination and Education Assistance Act, triggering the FTCA waiver of U.S. sovereign immunity and subjecting the United States to potential tort liability. The Court created a new two-part test for the analysis: (1) courts must determine whether the alleged activity is encompassed by the relevant federal contract or agreement; and (2) courts must decide whether the allegedly tortious action fell within the scope of the tortfeasor's employment under state law. If both of the prongs are met, the employee's actions are covered by the FTCA; but a failure at either step was sufficient to defeat subject matter jurisdiction. The Court remanded for the parties and court to analyze and brief the issues using the new two-step framework created. (http://cdn.ca9.uscourts.gov/datastore/opinions/2014/12/08/10-17443.pdf)

CIVIL PROCEDURE: In *Kennedy v. Wheeler*, 356 Or 518 (December 11, 2014), the circuit court had held that the law did not require the same nine jurors to agree on the specific amounts of economic and noneconomic damages awarded and that the jurors' concurrence on causation and damages was sufficient, but the court of appeals reversed. The Oregon Supreme Court reversed the court of appeals and held that there was no logical inconsistency when the same nine out of twelve jurors do not agree on the specific amounts of economic and noneconomic damages awarded, and that the law does not require a jury to award any specific amount of economic or noneconomic damages as a prerequisite to entry of a valid judgment for a plaintiff. (www.publications.ojd.state.or.us/docs/S061836.pdf)

CONTRACT LAW: In *Bagley v. Mt. Bachelor*, 356 Or 543 (December 18, 2014), the Oregon Supreme Court held that enforcement of a ski area operator's exculpatory release of anticipatory negligence would be procedurally and substantively unconscionable when (1) there was substantial disparity in the parties' bargaining power; (2) the release was offered on a take-it-or-leave-it basis with no other meaningful choices; (3) a harsh and inequitable result would follow if defendant were immunized from liability in light of its superior ability to (a) guard against risk of harm to its patrons arising from its own negligence and (b) absorb and spread the costs associated with insuring against those risks; and (4) defendant's business premises are open to the general public virtually without restriction, many of whom avail themselves of its facilities. (www.publications.ojd.state.or.us/docs/S061821.pdf)

SECURITIES LAW: In *OPERF v. Apollo Group* (December 16, 2014), the Ninth Circuit Court of Appeals agreed with the Fourth Circuit and held that the heightened pleading standards of FRCP 9(b) (requiring that a party must state with particularity the circumstances constituting fraud or mistake) apply to all elements of a securities fraud action, including loss causation. (http://cdn.ca9.uscourts.gov/datastore/opinions/2014/12/16/12-16624.pdf)

TAX LAW: In *United States v. Kollman* (December 16, 2014), the Ninth Circuit Court of Appeals found that 26 USC 6330(e)(1) was ambiguous and concluded that a permissible construction was that the statute of limitations is tolled during the time during which a taxpayer could file an appeal to the Tax Court, even if the taxpayer does not actually file an appeal. Thus, the government's actions to reduce to judgment income tax assessments and foreclose on properties were not barred by the 10-year statute of limitations. (http://cdn.ca9.uscourts.gov/datastore/opinions/2014/12/16/10-36059.pdf)

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IN BRIEF

Published by the Professional Liability Fund

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Cases of Note

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CONSUMER LAW: In *Jesinoski v. Countrywide Home Loans, Inc.*, 574 US ___ (January 13, 2015), the U.S. Supreme Court held that, under the Truth in Lending Act, a borrower may exercise the right of rescission by providing written notice to his lender within the three-year period; the borrower does not need to file a lawsuit. (www.supremecourt.gov/opinions/14pdf/13-684_ba7d.pdf)

CRIMINAL LAW: In *State v. Sagdal*, 356 Or 639 (January 15, 2015), the Oregon Supreme Court held that the 1934 amendment to Article I, section 11 of the Oregon Constitution does not impose a constitutional requirement for a jury of 10 or more persons in criminal trials; rather, it provides that 10 members of a 12-person jury may render a verdict, except in first-degree murder cases. (www.publications.ojd.state.or.us/docs/S061846.pdf)

THANK YOU!

Thank you to the following individuals who have assisted with the update of out-of-cycle changes to our real property practice aids:

John H. Van Landingham IV
Lane County Legal Aid & Advocacy Center

Patrick W. Wade
Hershner Hunter LLP

Shannon Raye Martinez
Saalfeld Griggs PC

Kelly L. Harpster
Harpster Law LLC