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BOULDER COUNTY BAR NEWSLETTER

NOVEMBER 2013

PROTECTING YOUR CIVIL COURT SETTLEMENT FROM BANKRUPTCY PREFERENCE

By Cynthia T. Kennedy

Most civil litigation settles. As a lawyer, you often get your fees out of that settlement if the cash is coming to your client. But what if the other side files for bankruptcy during the preference period? Can the settlement be undone? Imagine having a client call up some three years later saying he's received a Complaint in Preference from a bankruptcy he was never noticed on. Imagine they are asking for a return of a $60,000 settlement. This is a real case. The case involved an insider (the Debtor had misused a power of attorney, mortgaged his parents' home, absconded with the proceeds and was being sued by the mother's guardian). The Debtor had borrowed money to settle the case and had wired it to the creditor/guardian attorney's account. The attorney had taken his fee and written a trust account check to the client/guardian for the difference. Is the settlement a preference subject to being avoided by the trustee? Is the attorney a transferee with liability to return the fees he received? Does this result in a judgment against client/guardian for what was received? Including the attorney fee? Could it have been structured to prevent this possibility? I hope to answer those

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2013 ANNUAL JUDGES DINNER THURSDAY, NOVEMBER 7
5:30 Cocktails 6:15 Dinner at The Academy in Boulder

$55 PER PERSON
www.boulder-bar.org/calendar and go to November 7
303.440.4758

BOULDER COUNTY BAR FOUNDATION AWARDS $26,000 IN GRANTS TO BOULDER COUNTY LEGAL PROGRAMS

The Boulder County Bar Foundation is the fundraising and granting arm of the Association. Its mission is to raise funds to support legally related organizations and programs in Boulder County. The Foundation raises money from the membership of the Fellows, who are members of the bar association. Each Fellow make a commitment to pay an annual contribution of $150 over ten years to ensure the growth of the corpus so grants can be awarded. This year the funding amounts has risen greatly due to support from the BCBA and the growth of investments with Raymond James and Sacha Millstone.

Without the support of our Fellow memberships we could not continue to support the worthy organizations in our community. We are very proud of the difference our contributions make so that these programs will continue

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CALENDAR OF EVENTS

Pre-registration is required for all BCBA CLE programs. Register by e-mailing sarah@boulder-bar.org, or pay online with a credit card at www.boulder-bar.org/calendar.

Tuesday, November 5
Bar Media Committee
Noon at the Boulder Justice Training room (west)

November 6
Boulder IDC location change!
ALL future meetings will be at Chautauqua Dining Hall

Thursday, November 7
PARALEGALS
Thinking of Embezzling…Think Again!
A discussion on white collar crimes
Presenter: Boulder District Attorney Investigator, Mark Husmann
Noon @ Caplan & Earnest
Lunch $11

Friday, November 8
AVAILABILITY OF LEGAL SERVICES
Monthly Roundtable
Noon @ BCLS

Tuesday, November 12
IN-HOUSE COUNSEL
Recent Developments and Recurring Issues in Ethics for In-House Counsel
Presenter: Jack Tanner
Noon @ Faegre Baker Daniels
1 Ethics CLE $20, $10 new/young lawyers
$11 Lunch

Tuesday, November 12
EMPLOYMENT
New Frontiers of the Colorado Anti-Discrimination Act
Presenter: Patricia Bellac
Noon @ Caplan & Earnest
$20 CLE, $10 new/young lawyers
$11 Lunch

Wednesday, November 13
SOLO/SMALL FIRM
Monthly Happy Hour
5:30 @ Conor O'Neill's

Thursday, November 14
INTELLECTUAL PROPERTY
ICANN, UDRP and WIPO: Deciphering the Alphabet Soup of Domain Name Dispute Resolution
Presenter: Justin Konrad
Noon @ Hutchinson Black & Cook
$20 CLE, $10 new/young lawyers
$11 Lunch

Tuesday, November 19
Business Section
Presenter: Craig Small
Marijuana Business Representation: The Regulatory Labyrinth
Noon at Hutchinson Black Cook
$20 CLE, $10 New/Young Lawyer
Lunch $11

Wednesday, November 20
TAX, ESTATE PLANNING & PROBATE
Will the Tax Tail Still Wag the Estate Planning Dog?
Presenter: Tom Stover
Noon @ Hutchinson Black & Cook
$20 CLE, $10 New/Young Lawyers
$11 Lunch

Thursday, November 21
BANKRUPTCY
Roundtable Luncheon
Noon @ Agave Bistro
RSVP to sarah@boulder-bar.org

Thursday, November 21
REAL ESTATE/NATURAL RESOURCES
Updates on Tax Benefits for Conservation Easements
Presenter: Ariel Steele and Melissa Arnold
Noon @ Faegre Baker Daniels, $20 CLE
$10 New/Young Lawyer, Lunch $11

Friday, November 22
IMMIGRATION
Roundtable Discussion
8:30 a.m. @ Broadway Suites 3rd Floor

Friday, November 22
IN-HOUSE COUNSEL
Monthly Roundtable
Noon @ UCAR
RSVP to sarah@boulder-bar.org

November 21-22
2013 Annual Level I Collaborative Law Training
One and ½ day training designed to introduce you to effective collaborative practice
12 CLE credits (2.4 Ethics)
Presented by the Colorado Collaborative Divorce Professionals
Contact Erika for more details - 303.831.0808 or Info@ColoradoCollaborativeDivorceProfessionals.com

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supporting the Boulder community with their legal needs. The Grant Committee met in September to decide what organizations should receive support from the Foundation. They are: Boulder County Legal Services, Blue Sky Bridge Child Advocacy Program, Boulder High School Mock Trial Program, Collaborative Community Focus Reentry Program, El Comite of Longmont, Immigrant Legal Center of Boulder County, SAFE Shelter of St. Vrain Valley, St. Vrain Family Center, Voices for Children, and YWCA co-parenting Divorce program. The grants this year have totalled $26,000, which we feel will make a significant difference for all these programs. Of course, there are more that request our support and hopefully we can consider doing more next year. BUT we need your help and support by becoming a Fellow and member of the Foundation. New Fellows can join by making a commitment to give $150 per year for ten years. After that time, a Fellow has fulfilled their obligation and becomes a Life Fellow. Many continue to support the Foundation with an annual contribution making them Sustaining Life Fellows. Some Fellows have continued to reach higher levels of giving to become Life Benefactor Fellows ($2500 -$5000) If you would like to help and become a Foundation Fellow, please call Christine at the bar offices, 303.440.4758 and she will forward an invitation letter to you.

The current Foundation Trustees are Sonny Flowers, Anton Dworak, Joan Norman, Karl Kumli, Rich Irvin, Seth Benezra, Bob Lanham, Ruth Becker and David Archuleta.

Congratulations to the Trustees of the Foundation and all those Fellows for your continued support that bring access to justice and support of quality legal services, helping to provide legal education and supporting all these efforts that will make a positive image of lawyers for our community.

BANKRUPTCY PREFERENCE *(continued from page 1)*

questions in this article, and to provide some advice as to how to anticipate and possibly avoid a settlement becoming a bankruptcy "preference."

Preferences

"It is the ultimate aim of the preference law in the Bankruptcy Code to insure that all creditors receive an equal distribution from the available assets of the debtor."[1] Section 547 is intended to prevent an insider from taking advantage of a debtor by "obtaining more favorable repayment of the debt at the expense of the debtor's other creditors."[2] The Trustee bears the burden of proving the elements of a preferential transfer or fraudulent transfer by a preponderance of the evidence.[3] The defendant has the burden on any affirmative defenses .[4]

The Trustee's Strong Arm Power

The discussion begins with a brief description of the powers of a trustee in bankruptcy, 11 U.S.C. §101 *et seq*. (the "Bankruptcy Code"). 11 USC §547 is what we call the "Preference" Section. It provides that a trustee in bankruptcy may:

avoid any transfer of an interest of the debtor in property—
(1) to or for the benefit of a creditor
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made:
(3) made while the debtor was insolvent;
(4)made: (A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if—
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Liability of Transferees of Avoided Transfer

The Preference Section only provides for "avoidance" of a transfer. 11 U.S.C. §550 is the provision which provides that:
…[T]o the extent that a transfer is avoided under section …547…, the trustee may recover for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
(2) any immediate or mediate transferee of such initial transferee.

"Mere conduits" are ignored for the purpose of the analysis.[5] In the case described in this article, the attorney is the actual initial transferee, and could be vulnerable to a suit. With regard to the lion's share of the funds, he would be seen as a "mere conduit" and those funds would fall under "the entity for whose benefit such transfer was made." Arguably, even the fees portion was made for the benefit of the client, to pay that client's debt. The client remains liable under section (1) for the full amount.

DEFENSES

Statute of Limitations

The Trustee has two years from the date of filing of the bankruptcy to file the Complaint in Preference. 11 U.S.C. §546(1)(A). This may be extended by up to a year if the Debtor files under one chapter and the case is converted leading to a trustee appointment (the usual case is a Chapter 11 or 13 converted to a Chapter 7) during the initial two year period. *Id at (1)(B)*.

Statute of Limitations on a 550 Claim

A trustee has one year after the avoidance of the transfer to commence an action against the transferee recipients. 11 U.S.C. §550(f).

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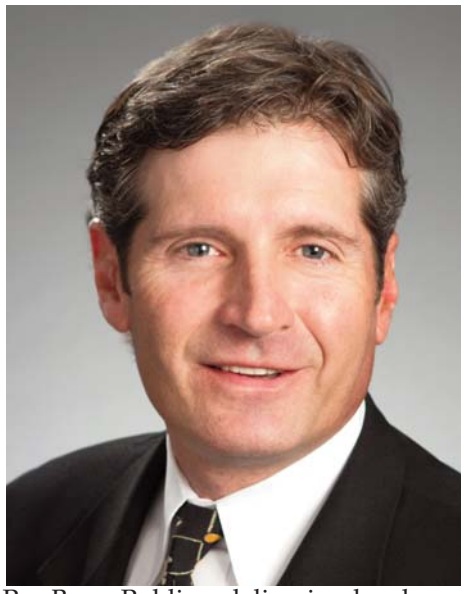
PRESIDENT'S PAGE

By Judson Hite



Pro Bono Publico: delivering legal services without expectation of compensation, for the public good. We are good, but can do better.

Recall that RPC Rule 6.1 requires each Colorado licensed attorney to provide legal services to those unable to pay, and states each attorney should aspire to volunteer 50 hours of pro bono services per year.

We are also encouraged by the Rule to contribute financial assistance to organizations delivering pro bono legal services in addition to volunteering our own time.

We receive an incentive from the Supreme Court's Board on Continuing Legal Education which allows you to claim up to nine CLE credits in a three-year reporting period at the rate of one CLE credit for every five billable-equivalent hours of pro bono service. See, CLE Board Form 8.

The Director of Colorado Legal Services reports that 14% of Colorado residents live below the federal poverty level. That's 726,320 persons. The CLS statistics reveal that the poor include: 29% of households headed by women; nearly 30% of Colorado African Americans; 27% of residents identifying themselves as American Indian; 25% Hispanic or Latino residents; and 20% of households that include a person with a disability.

We obviously have a broad and diverse pool of prospective clients who cannot afford legal services.

CLS is supported by federal, state and private grants, and in turn supports 14 regional offices. The federal budget, including sequestration, leaves a sizeable need for supplemented funding. Over the last two years, the Colorado Supreme Court has directed $750,000 from attorney registration fees to support CLS programs. Shrinking interest on COLTAF accounts also helps defray CLS operation costs.

In Boulder, our Bar Association has a long relationship with the local CLS office, run as Boulder County Legal Services. BCLS functions with highly skilled staff that handles cases in-house, refers cases out to private attorneys, provides pro-se assistance for family law litigants, and coordinates a volunteer mediation program.

The Boulder Bar helps maintain the private attorney referral list for BCLS, and has a separate list of "lo-bono" attorneys willing to work at reduced fee. We also directly raise money for pro bono assistance funding. Our February fete (presently entitled "Food Wine Jazz Art") benefits the

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LAWYER ANNOUNCEMENTS

FJGG Frascona Joiner Goodman & Greenstein PC
ATTORNEYS AT LAW

is pleased to announce that

Jonathan H. Sargent

has become a Shareholder with the firm.

Mr. Sargent will continue to practice
Real Estate, Corporations and Securities.

4750 Table Mesa Drive
Boulder, CO 80305
303-494-3000 **www.frascona.com**

HutchinsonBlackandCook
Attorneys at Law

Is Pleased to Welcome

Thomas J. Scott

As an associate with the firm

Tom's practice will focus on
business transactions and
general civil litigation.

921 Walnut Street | Suite 200
Boulder, CO 80302
Telephone 303.442.6514 | Fax 303.442.6593

www.hbcboulder.com

Please join us in welcoming our new Partner

JUDSON C. HITE
jchite@gdjlegal.com

**whose practice in real estate and corporate transactions,
land use, construction, and commercial litigation
is a complement to ours.**

**Our Firm continues to focus on insurance defense and coverage,
general liability, business and real estate transactions &
commercial litigation.**

Grund, Dagner & Jung, P.C.
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Telephone 303.83.0.7770 **gdjlegal.com**
6630 Gunpark Road, Suite 212
Boulder, Colorado 80301
Fax 303.830.2313

WILL YOU MAKE THE CALL?

Before I got involved with the Legal Aid Foundation, I confess that I let my voice mail answer some of the Foundation's annual fundraising phone calls. That was before I understood the very real need in our community and in our state for Colorado Legal Services (CLS). CLS is the only agency in Colorado that provides free civil legal services to indigent clients in every Colorado county. The most recent Census Bureau survey indicates that there are now more than 880,000 Coloradans who are income-eligible for legal aid. Due to decreased funding in the last several years, however, there are only 47 legal aid lawyers statewide to serve that population. By comparison, there are 410 public defenders in the state to serve indigent Coloradans in the criminal justice system.

CLS served 10,898 low-income clients in 2012, stretching its limited resources through the use of technology, pro se materials, self-help programs, clinics and pro bono programs. Priority is given to individuals with legal issues that threaten the basic necessities such as adequate income, food, shelter, utilities, medical care, and freedom from domestic violence and abuse. Priority is also given to at risk populations, including the elderly and those who are physically and mentally disabled. But there are so many more people in need and CLS is the place of last resort for low income families, the disabled, and seniors who are facing serious civil legal problems that they cannot solve on their own.

The disparity between those in need and the number of legal aid lawyers available to help them is obvious and overwhelming. With individual and firm donations, members of the Boulder County Bar Association can change that! Through our donations to the Legal Aid Foundation we can provide much needed funding for CLS and make a meaningful difference in the lives of others.

So, as you consider your end-of-year giving, will you answer the call to support legal aid services in Colorado? The Boulder chapter of the Legal Aid Foundation will be making fundraising phone calls on December 17 and we would love to talk to you about making a gift to the Legal Aid Foundation.

Better yet, will you make the call? The Legal Aid Foundation is participating in the statewide Colorado Gives Day initiative again this year. Contributions may be made on Tuesday, December 10, 2013 or scheduled beforehand at www.legalaidfoundation.org. The value of your contribution on Colorado Gives Day will be increased by the FirstBank Incentive Fund and the waiver of all credit card fees. Please consider helping the Legal Aid Foundation maximize access to civil legal assistance for low-income Coloradans by making a Colorado Gives Day gift.

Submitted by Heidi Potter, partner at Berg, Hill, Greenleaf & Ruscitti LLP in Boulder.

LEGAL AID FOUNDATION OF COLORADO

The **Boulder County Campaign for Justice** raised over $120,000 this year to provide civil legal assistance for low-income individuals and families. Thank you to all who contributed, especially the law firms and individuals listed below who gave most generously. Law firms in bold gave at the leadership level of $400 per lawyer in the firm.

$5,000 +

Berg Hill Greenleaf & Ruscitti
Caplan and Earnest
Faegre Baker Daniels
Holland & Hart
Hutchinson Black and Cook
Lyons Gaddis Kahn Hall Jeffers Dworak & Grant

$2,000 - $4,999

Johnson & Repucci
PackardDierking
Shoemaker Ghiselli & Schwartz
Vranesh and Raisch

$1,000 - $1,999

Christopher R & Margot Brauchli
James L & Katrina Carpenter
Connolly Rosania & Lofstedt
Dietze & Davis
Frank & Jean Dubofsky
Christopher & Heather Ford
Garlin Driscoll
Johnson Brennan & Klein
Christopher M Leh & Natalie Hanlon-Leh
David N & Roberta A Levin
M Brooke McKinley & Andrew Johnson
James R & Kathy A Montgomery
Jane Cadell Paddison PC
Purvis Gray
Stevens Littman Biddison Tharp & Weinberg

$500 - $999

Patricia A Butler
Gerald A Caplan
The Gstalder Louisville Law Group
Catherine M Heckel
Michael & Susan Kranzdorf
McElroy Meyer Walker & Condon
Miller & Harrison
Quick Law Group
Jon Sirkis LLC
Trine & Metcalf

$300 - $499

Anonymous
Christopher Ash
Marilyn Averill
Paul M Bierbaum Jr
Neal S Cohen
Richard B Collins & Judith L Reid
Cooper Tanis & Cohen
Carol Glassman
Steven W Kelly
Kingsbery Johnson & Love
Mark T Langston
Robert E Lanham
Simon Mole & Brenda Schick
Richard C Nehls
William D Neighbors
Joan M Norman
Michael & Michelle Rafik
Sarah J Schneider
Tod J Smith & Jerilyn DeCoteau
Helen R Stone
Tienken & Associates

Special thanks to the 2012-13 Boulder County Campaign Committee: Chris Ford (Co-Chair), Pat Carrigan (Co-Chair), Joyce Bergmann, Paul Bierbaum, Ellen Cadette, Neal Cohen, Scott Culley, Carmen Danielson, David Driscoll, Lew Harstead, Jeff Kahn, Bill Kowalski, Chris Leh, Steve Meyrich, Mike Miner, Rich Nehls, Heidi Potter, Jeff Quick, Michelle Rafik, Mike Rafik, Giovanni Ruscitti, Rick Samson, and Helen Stone.

www.legalaidfoundation.org

BANKRUPTCY PREFERENCE *(continued from page 4)*

Usually a trustee will bring the 547 and 550 claims together, but should discovery in the 547 case reveal additional transferees, this can add another year to the analysis.

Solvency

A successful preference case requires that the Debtor be insolvent at the time of the transfer. Insolvency is presumed within the 90 days prior to the filing. 11 U.S.C. §547(f). However, solvency after the 90 day period is the burden of the trustee. "Insolvency" in the context of preferences is a balance sheet analysis[6] But, let's face it, most entities or people who are being sued and find their way to bankruptcy are not "solvent." Nevertheless, the larger burden of proof placed on the trustee may make for easier settlement. In the context of settlement, one might request "proof" of solvency.

Payment under $600 or $5850 in a Business Case

Transfers under $600 in a consumer bankruptcy case and $5,850 in a business bankruptcy case are exempt by statute. 11 U.S.C.§547(c)(8) and (9). So, if you are approached by a trustee in a small case, check the Voluntary Petition. There is a box called "Nature of Debts," and even though the Debtor may be an individual, if his debts primarily relate to a failed business, this box will be checked, and the larger exempt amount will apply. If you are owed $600, accept $599 or 5,849 in a business case. If you suspect a subsequent filing, accept the lower amount as payment in full.

Contemporaneous Exchange for New Value

The Code provides that a transfer made as a contemporaneous exchange for new value will not be subject to avoidance as a preference 11 U.S.C.§547(C)(1). The Bankruptcy Code itself defines "new value" narrowly to include only "money or money's worth in goods, services, or new credit…" It specifically excludes, "an obligation substituted for an existing obligation." 11 U.S.C.§547(a)(2). By definition, if you are settling a case which has been in litigation, you have an "antecedent" debt, and the courts have consistently refused to find a settlement to be a contemporaneous exchange for new value, even if the settling party is forgiving some or all of the claims.[7]

Ordinary Course of Business

If one can prove the payment was made in the ordinary course of business or according to ordinary business terms, this will be a defense. 11 USC §547(c) (2). However, no settlement is ever in the ordinary course.

Heightened Defense of Immediate or Mediate Transferees

The "immediate or mediate" transferees in section (2) are given a separate defense if they can prove they paid, "value" that includes "satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided. 11 U.S.C. §550(b)(1). Thus, the determination that the first recipient was a "mere conduit" can change the statutory nature of the ultimate beneficiary. Because of the broad language in 550(a)(1) including the "entity for whose benefit such transfer was made," the recipient of the "deal" is usually under the stricter defenses.

The "Ear Marking Doctrine"

The earmarking doctrine is a case law anomaly based on the analysis of a situation where the Debtor borrows funds to affect a settlement. If one thinks of the situation from a balance sheet basis, if a Debtor is borrowing funds from one party to satisfy the claim of an existing creditor, there is no change in the Debtor's financial statement. Thus, one prong of the earmarking doctrine in all reported cases is that there be a lack of diminution to the estate. The Debtor's liabilities remain the same; he has merely exchanged one debt for another. A second prong looks to the control exerted by the Debtor as to the use of the funds.[8] If he simply takes out a new loan and there is no

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PRESIDENTS PAGE *(continued from page 5)*

Legal Aid Foundation of Colorado through ticket sales, art sales, donations, and sponsorships.

The BCBA Availability of Legal Services Section meets monthly to address the needs and delivery of legal services to low income residents in the county, and our membership supports the activities of the Access to Justice Committee for the 20th Judicial District, devoted to expanding and improving justice to all county residents.

We do a lot. BUT, the annual BCLS luncheon does not recognize enough local attorneys providing 50 hours of pro bono services over the past year. Luckily several of us provide much more than 50 hours of service. Hopefully many of us are providing services off the grid.

I am sometimes tempted to categorize written-down or uncollectable fees as pro bono work, but that would miss the spirit and technicality of Rule 6.1: those are not truly clients of limited means. Similarly, providing a free consult through client intake does not meet a pro bono obligation. Nor does simply paying money over to pro bono organizations meet the test … albeit that financial assistance is greatly needed and appreciated. Keep it flowing.

No, you need to dive in and put your malpractice at risk - figuratively. We are obligated to take on actual problems of persons who cannot afford our services, and see those problems through to resolution. Yep, a redistribution of power, through the privilege of practice.

So start small or join an organization already advocating for justice. For instance, the local Klein-Frank Foundation fights human trafficking. Your skills with immigration or juvenile justice matters could be put to use ending modern slavery.

There are landlord-tenant and foreclosure assistance issues that require real estate attorneys, consumer debt and collection matters that some UCC-training could help, bankruptcies, elder issues with probate implications, Medicaid and indigent child public benefit consulting needs, as well as needs for family law and domestic violence assistance.

The next quarterly "Longmont Law Clinic" takes place November 19, 2013. For two hours you could help provide general information and advice on criminal law, collections, fair housing, employment, personal injury, immigration or social security matters.

Or contact Erika Martinez, Pro Bono Coordinator for BCLS (303-449-7575); the Immigrant Legal Center (303-444-1522); or the Bar Offices (303-440-4758), and find out how to volunteer for the Klein Legal Assistance Clinic for the Homeless (KLACH). Take a referral case from these organizations.

It is important that we give back to the profession. Pro bono service is an obligation, and an honor. Get your hands wet. There are deserving people who need your skills.

BANKRUPTCY PREFERENCE *(continued from page 8)*

written designation as to the proceeds, the doctrine will not apply.

A settlement can be intentionally structured to fall within this doctrine. The best case scenario has the new creditor pay the obligation/settlement directly.[9] Absent this, it is necessary to have some written acknowledgment by the new creditor directing its payment to the specific debt. Unfortunately in the case discussed in this article, the funds had been paid to the Debtor, moved through his account, and on to the settlement. Additionally, the new loan exceeded the settlement amount, making it more difficult to prove that the funds were indeed properly "earmarked."[10]

Non-Dischargeability is Not A Defense

The Bankruptcy Code provides for certain debts to be exempt from a bankruptcy discharge. Certain of these debts require the creditor to bring an action within 90 days of the filing. 11 U.S.C. §523(a). For example, debts based on fraud, breach of fiduciary duty and malicious and willful injury come under this section. *Id.*

In our example case, had the case not settled, the client/guardian would have brought such an action given that the basis for the debt was breach of fiduciary duty (misuse of the power of attorney). In large cases where fraud was rampant, such as the Bernard L. Madoff Investment

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PRO BONO PAGE

Pro Bono Referrals
Thirteen cases were referred during the month of September. Thank you to the following attorneys:

Justin Dituri
Christina Ebner
Daniel Flynn
Christopher Jeffers
Ronald Jung
Ozzie Mendoza
Gary Merenstein
Karen Radakovich
Alexis Taylor
Chris Tomchuck
Bruce Warren

Thank you to the following attorneys who accepted a mediation case in September:
Todd Stahly

Pro Se Program Volunteers
Mary Louise Edwards
Lenore Fox
Tucker Katz
Michael Morphew
Craig Small

BCAP Volunteers

The following attorneys accepted pro bono referrals for the Boulder County AIDS Project in September:
Paul Bierbaum
Karen Burns

PRO BONO CORNER

Interested in a Pro Bono case? Please call Erika at 303-449-2197. CLE credits available for pro bono service.

Boulder County Bar Association Professionalism Committee On-Call Schedule

November 4	Steve Meyrich	303.440.8238
November 11	Helen Stone	303.442.0802
Nov. 18	Curt Rautenstraus	303.666.8576
November 25	Lee Strickler	303.443.6690

BANKRUPTCY PREFERENCE *(continued from page 10)*

Securities, LLC case, the deadline for filing such claims was expressly extended to accommodate any claim arising in the future as a result of the trustee's successful pursuit of an avoidance action to 30 days after any judgment on a preference claim. Participant creditors in bankruptcy proceedings under Chapter 11 can negotiate for such protections.

In the case at hand, because of the settlement, the estate was not notified of the bankruptcy and lost its opportunity to timely file a non-dischargeability complaint. The claims deadline in the bankruptcy case had also passed.

Equities May be Considered
While not technical defenses, the inequity caused by these two factors was instrumental in negotiating a reasonable settlement of the Preference Case itself. Trustees have limited budgets for prosecution of cases, and are not immune to the equities.

Protection Language in a Settlement Agreement

Real Property/ the Deed in Lieu
When releasing a debtor's obligation on a promissory note in exchange for a return of collateral, real or personal, to avoid a situation where the Trustee perceives there was equity in the collateral and wishes to avoid the transfer, it is prudent to include language in any deed in lieu that provides for the original security interest or deed of trust to remain in place for 95 days (to clear the preference period) and for the full indebtedness to spring back into place should the transfer be avoided.

Unsecured Settlement—Springing Clause

Similarly, a "springing clause" may be incorporated in any settlement which would provide for the full amount of any debt compromised in a settlement to return to its full amount should the debtor file for bankruptcy or find himself in an involuntary bankruptcy.

CONCLUSION
In the rush to settle, in the heat of mediation where these settlements often take place, it is easy to forget that the settlement itself may not be the end of the road. It is wise to be aware of the possibility of a third party trustee looking at the settlement in years to come. Things to do to minimize the threat of a future finding of "preference" include the strategies above: (1) arrange for funds from the source and directed by the source if coming from a third party; (2) require "proof" of solvency; (3) include language to provide a compromised claim "springs back" in the event of a bankruptcy; (4) hope there is no bankruptcy filing; (5) don't panic if there is—hire counsel or negotiate with the trustee's counsel. Remember, a preference suit is just another lawsuit to be settled.

Cynthia T. Kennedy is a solo practitioner in Lafayette at the Kennedy Law Firm. Her telephone is (303) 604-1600.

1.In re *Perma Pacific Properties*, 983 F.2d 964, 968 (10th Cir. 1992).
2. *Seiter v. Wedow (In re Tankersley)*, 382 B.R. 522, 525 (Bankr. D. Kan 2008).
11 U.S.C.§547(g); *Sender v. Johnson (In re Hedged Investment Associates, Inc*.)
4. 11 U.S.C.§547(g); *Clark v. Balcor Real Estate Finance*, Inc. (In re Meredith Hoffman Partners).
5. In re *Kaiser Steel Corp*., 105 B.R. 639 (Bankr. D. Colo. 1989).
6. In re *CSI Enterprises, Inc*., 220 B.R. 687 (Bkrtcy.D.Colo. 1998)
The Code defines "insolvent" to mean, with respect to an entity, "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation...." 11 U.S.C. § 101(32)(A). The House and Senate Reports from the Reform Act of 1978 explain that this definition of insolvency is "the traditional bankruptcy balance sheet test of insolvency." Norton Bankruptcy Rules Pamphlet 1997-1998 Edition, 5. 1citing H.R.Rep. No. 595, 95th Cong, 1st Sess 312 (1977); S.Rep. No. 989, 95th Cong, 2d Sess 25 (1978).
7. In re *Adam Aircraft Industries,* Inc., 08-11751 MER citing to Peltz v. New Age Consulting Servs., Inc., 279 B.R. 99 (Bankr. D.Del. 2002) (release given in settlement of state court litigation did not provide any new value for purposes of an exception to preference recovery).
8. *Marshall v. FIA Card Services*, 550 F. 3rd 1251 (2008).
9. Note that the Tenth Circuit has held that a debtor who never physically possessed funds from one credit card used to pay another nevertheless "controlled" and "directed" the payment from one credit card to pay the antecedent debt, limiting the "earmarking doctrine" to a case where the lender required the funds be used for a particular purpose. The Tenth Circuit also held that since the loan proceeds had been "tapped" they became property of the estate and their use diminished the pool available for creditors. *See* Marshall v. FIA Card Services, 550 F. 3rd 1251 (2008).
10. Beckerman, Lisa G. and Stark, Robert J., *Structuring Workout Settlements Premised On the Earmarking Doctrine,* California Bankruptcy Journal, Vol. 26, No. 2, 2002 edition.

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