



**CREDITORS' RIGHTS AND REMEDIES
INSIDE AND OUTSIDE BANKRUPTCY**

Catherine S. Travis

Lane Powell Spears Lubersky LLP
601 SW Second Avenue, Suite 2100
Portland, Oregon 97204-3158

Tel: (503) 778-2100

Fax: (503) 778-2200

E-mail: travisc@lanepowell.com

TABLE OF CONTENTS

	PAGE
I. Remedies of Secured Creditor Under Oregon Law	1
A. Real Property Options.....	1
1. Selection of Options	1
2. Judicial Foreclosure.....	1
3. Non-Judicial Trustee’s Sale	1
B. Personal Property Options.....	2
1. Selection of Options	2
2. Judicial Foreclosure.....	2
3. Self-Help Repossession of Personal Property.....	2
4. Disposition of Personal Property	2
a. Public or Private Sale	2
b. Retention of Collateral in Satisfaction of Debt.....	3
5. Demand for Payment of Accounts.....	3
6. Setoff.....	4
C. Provisional Process	4
1. Receivership.....	4
2. Claim and Delivery (Replevin)	4
3. Temporary Restraining Order/Preliminary Injunctions	4
4. Bonds.....	5
D. Workout.....	5
II. Remedies of Unsecured Creditor Under Oregon Law	5
A. Suit on Note, Guaranty, Contract, etc.....	5
B. Provisional Process	5
1. Attachment	5
2. Garnishment.....	5
3. Temporary Restraining Order/Preliminary Injunctions	6
4. Bonds.....	6
III. Post-Judgment Procedures Under Oregon Law.....	6
A. Execution/Sale	6
B. Garnishment.....	7
C. Supplementary Proceedings.....	7
1. Interrogatories.....	7
2. Judgment Debtor Examinations.....	8
IV. Workout/Settlement Considerations	9
A. Deed in Lieu of Foreclosure	9
B. Surrender of Collateral	9
C. Confession of Judgment	9
D. Stipulated Judgment.....	9
E. Forbearance/Extension Agreements	10
1. Important Key Terms.....	10
a. Releases	10
b. Protection from Effect of Bankruptcy Filing	10

	c. Affirmance of Loan Documents.....	10
	d. Financial Covenants and Reporting.....	10
	e. Acknowledgment of Guarantors	10
	2. Special Statutory Requirements	10
V.	Practical Considerations	11
	A. Statutory Exemptions	11
	B. Statute of Limitations	11
	C. Judgment Liens	11
	D. Effect of Bankruptcy Stay	11
	E. Mandatory Arbitration and Mediation	11
	F. Involuntary Bankruptcy Option.....	12
VI.	Bankruptcy	12
	A. Introduction.....	12
	B. Types of Bankruptcy.....	12
	1. Chapter 7 Liquidation	12
	2. Chapters 11, 12, 13.....	13
	a. Chapter 11	13
	b. Chapter 13	13
	c. Chapter 12	13
	C. Effect of Commencement of Bankruptcy Case	13
	1. Commencement.....	13
	2. The Estate	13
	3. The Automatic Stay	13
	D. The Bankruptcy Estate.....	14
	1. Property of the Estate.....	14
	2. Powers	14
	3. Turnover	14
	4. Exemptions	14
	E. Automatic Stay - § 362.....	14
	1. Effect of Stay	14
	2. Exceptions to Stay	15
	3. Duration of Stay	15
	4. Effect of Stay on Co-Debtors	15
	5. Effect of Stay on Debtor or Trustee	16
	6. Violation of Stay	16
	7. Foreclosure and Repossession.....	16
	8. Relief From Automatic Stay	16
	F. Types of Creditors.....	17
	1. Secured Creditors	17
	a. Determination of Secured Claim	17
	b. Entitlement to Interest and Attorney Fees	18
	c. Secured Creditor’s Rights in Bankruptcy	18
	2. Unsecured Creditors.....	19
	a. Priority Unsecured Creditors	19
	b. Unsecured Creditor’s Rights in Bankruptcy.....	19
	c. Unsecured Creditors with Contract or Lease Claims	20

G.	Executory Contracts and Unexpired Leases	20
1.	Executory Contracts	20
2.	Unexpired Leases	21
3.	Time Within Which to Assume or Reject	21
4.	Rejection	21
5.	Assumption	21
6.	Executory Contracts and Unexpired Leases Not Subject to Assumption	22
7.	“Ipso Facto” Clauses (Termination Clauses)	22
H.	First Steps to Prepare for the Case	22
1.	Review Court’s Notice of Case Filing.....	22
2.	Review Schedules and Statement of Affairs	23
3.	File Notice of Appearance and Request for Notices	23
4.	Attend Creditors’ Meeting or Case Management Conference	23
5.	Filing and Establishing A Proof Of Claim.....	24
I.	Perspective from the Viewpoint of Creditor As Defendant in Bankruptcy Litigation.....	25
1.	Preferences.....	25
2.	Fraudulent Conveyances	25
3.	Unrecorded Transfers	26
4.	Bankruptcy Litigation	26
J.	Discharge	26
1.	Effect of Discharge	26
2.	Exceptions to Discharge	26
a.	Section 523(a)(2), (4) and (6) Exceptions to Discharge.....	26
b.	Other Exceptions to Discharge	27
3.	Denial of Discharge	27

ATTACHMENTS

**Judicial Foreclosure – Oregon
Non-Judicial Foreclosure – Oregon
Oregon Exemptions**

CREDITORS' RIGHTS AND REMEDIES

INSIDE AND OUTSIDE BANKRUPTCY

I. Remedies of Secured Creditor Under Oregon Law

A. Real Property Options.

1. Selection of Options. A deed of trust may be foreclosed either judicially or by a non-judicial trustee's sale. A mortgage may only be foreclosed judicially. The primary advantage of proceeding non-judicially is that non-judicial foreclosures are usually less expensive and faster than judicial foreclosures. An uncontested non-judicial foreclosure takes a minimum of 120 days in Oregon from the date of the underlying service or recording of a notice of default to the date of sale. Depending on the congestion in the county court where it is filed and that court's propensity to grant summary judgment motions, a judicial foreclosure may take more than a year to litigate. Another advantage in a non-judicial foreclosure is that there is no right of redemption after the sale, regardless of whether the property is residential or commercial. The greatest disadvantage of a non-judicial sale is that the grantor has the statutory right to cure the current default any time up to five days before the sale without demonstrating any ability to pay prospectively, so that the secured creditor may face serial defaults, foreclosures and cures; whereas a secured creditor who accelerates the debt and judicially forecloses can require payment of the entire accelerated debt. Another disadvantage in a non-judicial foreclosure is that there is no deficiency judgment available against the grantor or guarantors on the trust deed, as opposed to a judicial foreclosure where a deficiency judgment may be available where the trust deed is not a residential trust deed.

2. Judicial Foreclosure. A judicial foreclosure of a trust deed essentially follows the same procedures as a judicial foreclosure of a mortgage. The primary difference is that a creditor may not obtain a deficiency judgment if the trust deed being foreclosed is a "residential trust deed." A judicial foreclosure is commenced by filing a complaint in any county where all or part of the real property is located. The prayer in a foreclosure complaint should request the entry of judgment and decree of foreclosure against the debtor-defendants, that lender's lien be declared prior to all claims or interests of any defendants, that such lien be foreclosed by appropriate sheriff's sale procedures, and that the sheriff be directed to distribute the sale proceeds pursuant to statute. *Note: See separate attachment for judicial foreclosure procedures in Oregon.*

3. Non-Judicial Trustee's Sale. A secured creditor may not foreclose a trust deed non-judicially if an action has already been instituted to recover any part of the debt, unless the action has been dismissed. *Note: See separate attachment for non-judicial foreclosure procedures in Oregon.*

A. Personal Property Options

1. Selection of Options. Although judicial action will take longer and cost more than self-help repossession, it provides the lender with certain advantages: (a) it offers a forum for managing and determining the claims of competing creditors; (b) the involvement of the court and sheriff ensures that any sale of the collateral will be “commercially reasonable;” (c) judgment for any deficiency is available; and (d) the price received at a non-collusive, regularly conducted foreclosure sale constitutes “reasonably equivalent value” if later attacked as a fraudulent transfer. However, if there are no competing creditors for the subject collateral, self-help repossession and disposition of the collateral or, where applicable, demand for payment of accounts, may be the better options. If the value of the collateral approximates or exceeds the debt, retention of the collateral in full satisfaction of the debt may be the best option. Revised Article 9 also provides that collateral may be retained in partial satisfaction of the debt.

2. Judicial Foreclosure. Filing and pursuing a complaint for judicial foreclosure will result in a judicial decree of foreclosure, followed by a sheriff’s sale of the collateral. *Note: See separate attachment of judicial foreclosure procedures in Oregon.*

3. Self-Help Repossession of Personal Property. The right to self-help repossession is governed by ORS 79.0601-79.0627. In taking possession, the secured creditor may proceed without judicial action only if this can be done without breach of the peace. Any continuation of repossession after the debtor objects may result in judgment against the creditor for conversion. The most prudent course is for the lender to request permission to pick up the collateral.

4. Disposition of Personal Property.

a. Public or Private Sale. After the secured creditor has repossessed its collateral, the creditor may sell, lease or otherwise dispose of the collateral in a “commercially reasonable” manner. ORS 79.0610. It is the secured creditor’s responsibility to arrange all aspects of the sale, and every aspect of the sale must satisfy the “commercially reasonable” standard. The creditor must give reasonable notice to the debtor of the time and place of any public sale, and reasonable notice of the time after which any private sale is made. Notice to other secured parties is also required if notice is requested. The secured creditor may not purchase at private sale unless the collateral is of a type customarily sold in a recognized market or is of a type that is the subject of widely distributed standard price quotations. At a public sale, the secured creditor has the unqualified right to purchase the collateral.

- (1) Prior to sale (public or private), a secured creditor should:
 - (a) Not hold the collateral for a lengthy period of time or use the collateral;
 - (b) Provide for reasonable time and location for viewing and inspection of collateral prior to sale;

- (c) Circulate notice of sale in pertinent newspapers, magazines or trade journals; and
 - (d) Provide as much notice as is reasonably possible to debtor, co-makers, guarantors and other secured parties. In no event should notice be less than 10 days.
- (2) The proceeds of sale must be applied in the following order:
- (a) Reasonable expenses of retaking, holding and preparing collateral for sale, including attorney fees;
 - (b) Satisfaction of debt owed to the secured creditor;
 - (c) Satisfaction of debt owed to subordinate security interest holders (if written notice of demand is received before distribution of the proceeds); and
 - (d) Any surplus to debtor.

If the sale is of accounts or chattel paper, the debtor is entitled to any surplus or liable for any deficiency only if the security agreement so provides.

b. Retention of Collateral in Satisfaction of Debt

(1) This remedy allows the secured creditor who has obtained possession of the collateral (by self-help or claim and delivery) to retain the collateral in whole or partial satisfaction of the outstanding debt. ORS 79.0620. However, the secured creditor may not use this remedy where the collateral is consumer goods and the debtor has paid less than 60% of the cash price (PMSI) or 60% of the loan (for other security interest) unless the debtor, after default, signed a statement renouncing or modifying the debtor's rights. To use this remedy, the secured creditor must send written notice of the proposed retention of collateral to the debtor and to other secured parties who send written notice of a claim of an interest in the collateral. Although not required by law, it is advisable to send notice by both first class mail and certified mail, return receipt requested, and to send notice to known junior lien creditors.

(2) If the secured party receives objection in writing within 21 days after the notice was sent, the secured party must dispose of the collateral in accordance with the public or private sale procedures specified in ORS 79.0610. See Section B.4.a above. In the absence of objection, the secured creditor may retain the collateral in satisfaction of the debt.

5. Demand for Payment of Accounts. Upon default, the secured creditor whose collateral includes accounts, may demand that account debtors or the obligor on an instrument pay the creditor directly the amounts that they owe to the debtor. ORS 79.0607

6. Setoff. Upon default, a creditor has the equitable right to setoff monies it may owe its debtor against monies owed by the debtor. Notice of the creditor's exercise of its setoff right may be given contemporaneously with the actual exercise of the right.

B. Provisional Process

Provisional process for a secured creditor generally means receiverships, claim and delivery, temporary restraining orders, preliminary injunctions, or any other legal or equitable prejudgment remedies that enable the lender to take possession or control of or to restrain use or disposition of property in which the debtor claims an interest. Generally, the two key elements that must be alleged and shown to obtain any form of provisional process are: (1) detailed facts justifying the issuance of provisional process; and (2) no reasonable probability that the defendant debtor can establish a successful defense on the underlying claim.

1. Receivership. A receiver is an officer appointed by a court to take charge of property during the pendency of a judicial or non-judicial foreclosure proceeding. The receiver is responsible for managing and disposing of the property as the court may direct. The right to appointment of a receiver is governed by statute and/or court rule. *See, for example*, ORS 86.010 and ORS 86.735(4)(a). Under Oregon case law, if the creditor holds a security interest in rents and profits and the contract language allows the appointment of a receiver, then, by that fact alone, a court may appoint a receiver in the foreclosure. If a creditor holds a security interest in rents and profits but the mortgage or trust deed lacks language authorizing the appointment of a receiver upon default, a court may appoint a receiver if the creditor shows that its right to the property and the rents and profits is probable and the property or rents and profits are in danger of being lost, removed, or materially injured or impaired. ORCP 80.B(1). A request for the appointment of a receiver is initiated by filing a Complaint and "Show Cause" motion with a supporting affidavit.

2. Claim and Delivery (Replevin). Claim and delivery is a form of provisional process awarding immediate possession of personal property to a secured creditor who has filed a Complaint to recover possession. The right to a replevin order is governed by statute and/or rule. ORCP 85. A replevin action is initiated by filing a "Show Cause" motion and an affidavit that satisfies the requirements of the statute or rule. If at the time of the show cause hearing the time for a response by the defendant has run and he has not raised a defense (30 days in Oregon), the judge may, in addition to entering an order for possession, enter a final default judgment awarding possession of the property to the secured creditor. ORCP 69. Additionally, under Oregon law if more than 30 days have elapsed since the date the sheriff takes possession of the property, then the secured creditor may dismiss the action and instead proceed with the non-judicial remedies of private or public sale. ORCP 85.E.

3. Temporary Restraining Order/Preliminary Injunctions. Upon notice and hearing, a temporary restraining order and/or preliminary injunction may be allowed when it appears the party against whom a judgment is sought is doing, threatens, or is about to do, some act in violation of the rights of the other party concerning the subject matter of the action that may render a judgment ineffectual. Moreover, a temporary restraining order may be issued, without notice, if the party seeking the order also shows that immediate and irreparable injury,

loss, or damage will result before the adverse party or his/her attorney can be heard in opposition. A temporary restraining order issued without notice has a limited duration of 10 days. A temporary restraining order is initiated by a motion to show cause and supporting affidavit. The affidavit must state the particular acts sought to be restrained. Generally, a preliminary injunction hearing will be scheduled shortly after any hearing for a temporary restraining order. A creditor requesting a preliminary injunction hearing must be fully prepared to try its case when the request for an injunction is made, because a court may order trial on the merits to be advanced and consolidated with the preliminary injunction hearing. Even if consolidation is not ordered, evidence received at a preliminary injunction hearing becomes part of the record for trial. ORCP 79, 83.

4. Bonds. Before an order granting provisional process becomes effective, the creditor must give security (bond or other form of security) in an amount that the court deems proper for payment of costs, damages, and attorney fees as may be incurred by a debtor who is wrongly damaged by provisional process. ORCP 82A.

C. Workout

See Section IV. below.

II. Remedies of Unsecured Creditor Under Oregon Law

A. Suit on Note, Guaranty, Contract, etc.

An action on a note, guaranty, or contract is commenced by filing a complaint (1) in the county and state specified in the section of the loan documents designating the governing law and/or selecting the jurisdiction, or (2) where the defendant debtor is otherwise located. *Note: see separate attachment on judicial foreclosure for procedures through judgment and Section III. below for post-judgment procedures.*

B. Provisional Process

Provisional process for an unsecured creditor generally means attachment, garnishment, temporary restraining orders, preliminary injunctions, or any other legal or equitable prejudgment remedies that enable the lender to take possession or control of, to restrain use or disposition of, or fix a lien upon, property in which the debtor claims an interest.

1. Attachment. Attachment is the procedure by which an unsecured creditor obtains a judicial lien on the defendant debtor's real or personal property prior to judgment. *See* ORCP 81A(1). Attachment is available only in limited situations and should not be used unless a favorable judgment is virtually certain. *See* ORCP 84A(2). To obtain attachment, a creditor must follow all the steps and procedures provided by statute and rule. ORCP 83 and 84.

2. Garnishment. Prejudgment garnishment is the procedure by which an unsecured plaintiff may reach the defendant debtor's tangible or intangible personal property that is in the possession, control, or custody of a third person (the garnishee). *See* ORCP 84D(2)(b). The sole

procedure for obtaining prejudgment garnishment is by writ of garnishment. *See* ORS 18.600 to 18.850.

3. Temporary Restraining Order/Preliminary Injunctions. *See* Section I.C.3 above.

4. Bonds. *See* Section I.C.4 above.

III. Post-Judgment Procedures Under Oregon Law

A. Execution/Sale

Execution is the means by which a judgment is enforced against nonexempt property in the possession of the judgment debtor. After entry of judgment, the judgment creditor can cause the court clerk to issue a writ of execution directing the sheriff to seize property of the judgment debtor in his/her possession. The writ of execution is obtained from the clerk of the court that issued the judgment either through the use of a praecipe (“request”) or simply presenting the writ to the clerk, depending on the procedures of the subject court. The clerk issues the writ of execution to the sheriff and the judgment creditor delivers the writ to the sheriff. The sheriff will usually need to receive the following:

1. Writ of execution;
2. Instructions to the sheriff identifying the asset and its location;
3. A check for the sheriff’s fee sufficient to permit seizure and sale;
4. Any necessary bond; and
5. Sufficient notices of exempt property and claim forms.

If the judgment is for money damages, the sheriff then sells the asset and pays the proceeds to the clerk of the court, which in turn pays the proceeds to the judgment creditor. Notice of sale of personal property must be posted in three public places in the county where the sale is to be held, and must be sent to the judgment debtor by registered mail or certified mail, return receipt requested. ORS 18.532. Notice of a personal property sale must be given at least 10 days before the sale by posting notice in three public places in the county where the sale is to take place and sending the notice to the judgment debtor by registered or certified mail at the judgment debtor’s last known post office address or residence. ORS 18.532(1). Notice of sale of real property (i) must be published in a newspaper of general circulation in the county where the sale is to be held for four successive weeks, with the last publication at least one week prior to the sale; and (ii) must be sent to the judgment debtor by first class and by registered or certified mail at the judgment debtor’s last known post office address or residence. ORS 18.532(2). There is no redemption right following a sheriff’s sale of personal property, nor is a confirmation of sale required. A sheriff’s sale of real property must be confirmed by order of the court. In Oregon, the order of confirmation can be obtained 10 days after the sheriff’s return of the execution if no objection has been filed. ORS 18.548(1). An order of confirmation amounts to a conclusive determination of the regularity of the sale. ORS 18.548(4). A sheriff’s sale of real property consisting of a leasehold interest of less than two years’ unexpired term is not subject to redemption; all other real property may be redeemed. ORS 18.565. In Oregon, a

lien creditor may redeem the real property within 60 days after the date of the sheriff's sale; the judgment debtor may redeem the real property at any time within 180 days after the date of the sheriff's sale. ORS 18.572 and ORS 18.582. The purchaser of the real property, from the date of sale until a resale or redemption, is entitled to possession of the property, unless the property is in the possession of a tenant holding under an unexpired lease, in which event the purchaser shall be entitled to receive from such tenant the rents or the value of the use and occupation of the property. ORS 18.594.

B. Garnishment

A writ of garnishment is the procedure by which a judgment creditor, whose judgment requires the payment of money, may reach the personal property of the judgment debtor in the possession, control or custody of someone other than the judgment debtor, or debts or other obligations owed by a third party to the judgment debtor. In Oregon, writs of garnishment may be issued by either the clerk of the court having original jurisdiction over the judgment or by an attorney for the judgment creditor. ORS 18.635. Except for continuing wage garnishments, an Oregon writ of garnishment is valid for 60 days following its issuance. ORS 18.625(2) and 18.609(1). After a writ of garnishment is delivered to the garnishee, the garnishor must mail or deliver to a non-corporate debtor a copy of the writ and a notice of exemptions. A writ of garnishment issued to an employer may serve as a continuing garnishment of wages (for a 90-day period). ORS 18.625(2). The continuing wage garnishment reaches only earnings and non-exempt wages owing and accruing to the judgment debtor. Multiple continuing wage garnishments are satisfied or paid in a first-in-time priority during their applicable term, measured from the delivery date of each writ. ORS 18.627.

C. Supplementary Proceedings

Supplementary proceedings provide a judgment creditor with statutory procedures to discover assets of the debtor to satisfy the judgment.

1. Interrogatories. At any time after judgment, the judgment creditor may serve the judgment debtor with written interrogatories concerning the judgment debtor's property and financial affairs. These interrogatories may be served personally in the same manner as a summons or by any form of mail addressed to the judgment debtor and requesting a receipt. ORS 18.270(1). The debtor has 20 days after receipt to answer under oath and return the original interrogatories to the judgment creditor or his attorney. ORS 18.270(2). In Oregon, interrogatories must include a warning to the judgment debtor that failure to answer truthfully subjects the judgment debtor to the penalties for false swearing contained in ORS 162.075 and for contempt of court as provided in ORS 33.015-155. Failure to comply with the interrogatories request is an indirect contempt of court permitting the judgment creditor to seek relief under ORS 33.015-155.

ADVANTAGES	DISADVANTAGES
<ul style="list-style-type: none"> • Save attorney time in court appearances to obtain the order for oral examination and in traveling to and conducting the examination. • Answers obtained in an interrogatory may be more accurate than answers obtained in an oral examination because the debtor has more opportunity to search records and give exact answers. 	<ul style="list-style-type: none"> • Attorney does not see and talk with judgment debtor. • Attorney cannot immediately follow up on incomplete or non-responsive answers. • Attorney cannot move for immediate application of discovered property toward satisfaction of judgment as during oral examination.

2. Judgment Debtor Examinations.

a. A motion for examination of the judgment debtor can be filed with either the court in which the judgment was entered or any circuit or district court for the county in which the judgment debtor resides or in which the principal place of employment of the judgment debtor is located.

b. The motion must be supported by either (1) return of service of an unsatisfied execution, (2) proof of service on the judgment debtor of a notice of demand to pay the judgment within 10 days or (3) a garnishee response that does not fully satisfy the judgment. ORS 18.265(1). Service of a notice of demand must be made in the same manner as the service of summons or by any form of mail addressed to the judgment debtor and requesting a receipt. An affidavit is required only when notice of demand was served by mail, and then only to prove service. A copy of the notice of the demand must be attached to the affidavit.

c. The motion, proposed order, and any affidavit are presented to the court, often *ex parte* unless a restraining order is also requested, and the judge signs the order. Then a certified service copy of the motion and affidavit and a certified copy of the original order, along with the service copy of the order, are delivered to the process server to be served on the judgment debtor.

d. Some courts regularly schedule the days and times for judgment debtor examinations. Other courts will either provide the attorney inquiring by phone with a date and time for hearing or require the form of order to be submitted first and the court then fills in the date and time.

e. An order for judgment debtor examination should always include language ordering the debtor to bring certain requested documents to the examination, e.g., tax returns, check registers, checkbooks, and canceled checks. The order may also include a restraining order. To be included in the order, these options must be specifically requested in the motion.

f. If the debtor fails to appear at the scheduled examination, the judgment creditor can request that an arrest warrant be issued. ORS 33.075. Generally, a court will not issue an arrest warrant unless either the court finds that the judgment debtor cannot be personally served; or the judgment creditor first moves for and obtains a new order directing the judgment debtor to appear, but the debtor still has not appeared.

IV. Workout/Settlement Considerations

A. Deed in Lieu of Foreclosure

A secured creditor may take a deed in lieu of foreclosure (also known as an estoppel deed) in full or partial settlement of a pending or threatened judicial or non-judicial foreclosure proceeding on real property. Advantages to the secured creditor include avoidance of litigation costs and the delays of litigation. An important issue in deciding to take a deed in lieu of foreclosure in settlement of a foreclosure action is the nature and existence of junior liens or claims against the property. A foreclosure eliminates those liens, whereas a deed from the debtor does not. The creditor can solve this problem by including a “non-merger” clause in the deed in lieu of foreclosure to prevent merger of the title conveyed by the deed with the lien of the prior recorded mortgage or trust deed, which in turn will allow the creditor to foreclose any junior lien holders later.

B. Surrender of Collateral

The secured creditor may take its personal property collateral in full or partial settlement of the debt owed by its debtor. Advantages to the creditor include avoidance of litigation costs and delays. As with deeds in lieu of foreclosure, the nature and existence of junior liens or claims against the property must be considered. A foreclosure eliminates those liens, whereas acceptance of the collateral is subject to those liens. *Note: See Section I.B.4.b. above for discussion concerning retention of collateral in satisfaction of debt.*

C. Confession of Judgment

The debtor may agree to give the creditor a confession of judgment without action pursuant to ORCP 73. Sometimes this is combined with a covenant not to execute under which the creditor agrees not to commence collection on the judgment as long as required payments are made. The confession of judgment may also contain a claim and delivery order for possession of personal property collateral. This option is not available for consumer transactions.

D. Stipulated Judgment

As an alternative to a Confession of Judgment, a creditor may accept a stipulated judgment. Stipulated judgments are available for consumer transactions. Obtaining a stipulated judgment avoids the costs and uncertainty of a trial. A stipulated decree of foreclosure is also an option to be considered in a judicial foreclosure proceeding where time can be saved by avoiding the need for hearings on possible objections.

E. Forbearance/Extension Agreements

These kinds of agreements require the creditor to forbear from exercising its rights against the debtor and its assets so long as the debtor is complying with the workout terms of the agreement. The terms can range from partial or complete liquidation to a pay down plan.

1. Important Key Terms.

a. Releases. The workout agreement should contain a provision under which the debtor and any guarantors release the creditor from any liability for any claims based on any agreement, act, or omission of the creditor.

b. Protection from Effect of Bankruptcy Filing. It is important to include a provision that protects the creditor in the event a bankruptcy is filed by the debtor. For example:

Effect of Bankruptcy Code. In the event any payment or transfer received by Creditor under or in connection with this Agreement shall be deemed by final order of a court to have been a voidable preference under the bankruptcy laws of the United States, or a court otherwise declares that Creditor is not entitled to retain any such payment or transfer for any reason, the obligations hereunder will not be considered to have been released or satisfied. Those obligations, in that event, will be deemed to be valid and enforceable obligations in the amounts contractually owing as of the date of payment or transfer just as if such payment or transfer had never been made.

c. Affirmance of Loan Documents. The workout agreement should affirm that all contracts and related documents and instruments remain in full force and effect.

d. Financial Covenants and Reporting. Payment terms and reporting requirements should be included in all workout agreements.

e. Acknowledgment of Guarantors. The workout agreement should contain a provision stating that the guarantors acknowledge the debt and workout agreement and the guarantors should be required to sign the workout agreement.

2. Special Statutory Requirements. In Oregon, all loan documents (including workout agreements) must contain the following language underlined and in bold capital letters in order to take advantage of the special Statute of Frauds protection provided by ORS 41.580(3)(a):

**UNDER OREGON LAW, MOST AGREEMENTS,
PROMISES AND COMMITMENTS MADE CONCERNING
LOANS AND OTHER CREDIT EXTENSIONS WHICH ARE**

NOT FOR PERSONAL, FAMILY OR HOUSEHOLD PURPOSES OR SECURED SOLELY BY BORROWER'S RESIDENCE, MUST BE IN WRITING, EXPRESS CONSIDERATION AND BE SIGNED BY LENDER TO BE ENFORCEABLE.

V. Practical Considerations

A. Statutory Exemptions

See separate attachment for Oregon Exemption Scheme.

B. Statute of Limitations

Action on a contract or note must be filed by no later than six years from the default date.

C. Judgment Liens

The lien effect of a judgment is a valuable means of obtaining recovery of many judgments that would otherwise probably not be collectable. After the clerk docketed a judgment in the court's judgment docket, a certified copy of the judgment or a lien abstract may be prepared and filed in any other county. The docketing of a lien abstract or certified copy of the judgment in that county has the effect of creating a lien on the judgment debtor's real property located in that county. A judgment expires 10 years after it is entered, unless it is renewed, on motion, before expiration of the 10 years by the court in which the judgment was docketed.

D. Effect of Bankruptcy Stay

A bankruptcy filing by the debtor creates an automatic stay against any action or enforcement of any judgment against the debtor and also against any judicial or non-judicial action to enforce a lien against the debtor's property. Generally, the stay is terminated or modified by the Bankruptcy Court after motion, notice, and a hearing. In Oregon, a creditor may obtain non-judicial relief from stay through the trustee with the debtor's consent without a judicial action. Following relief from stay, a non-judicial trustee's sale proceeding in Oregon may be resumed by sending a special "Amended Notice of Sale" within 30 days after entry of the order granting relief from stay. ORS 86.755(6).

For further discussion, see Section VI.E. below.

E. Mandatory Arbitration and Mediation

Most Oregon circuit courts have mandatory arbitration programs. If all parties have appeared in the case, the court must refer the matter to arbitration if the only relief claimed is recovery of money or damages and no parties' claim exceeds \$25,000 in circuit court (or \$50,000 depending on the court). ORS 36.400 and 36.405(1). However, the presiding judge has the authority to exempt an action from arbitration or, for "good cause," remove an action from

further arbitration proceedings. ORS 36.405(2). In Oregon, parties who have participated in a court-established mediation program cannot be required to participate in mandatory arbitration. ORS 36.405(3). The Oregon Bankruptcy Court instituted a formal, but still voluntary, mediation program under which all litigants are urged to consider mediation or other settlement options.

F. Involuntary Bankruptcy Option

The option of filing an involuntary bankruptcy petition against a debtor in default should be considered only in rare circumstances after appropriate due diligence. The creditor may be the sole petitioning creditor if the borrower has fewer than 12 creditors, but two other creditors must be found to join in the petition if the borrower has 12 creditors or more. In either case, the petitioning creditor(s) must hold non-contingent unsecured claims that are not subject to bona fide dispute and aggregate at least \$11,625.00. Unless there is already a state court custodian in place, the petitioning creditor(s) must show that the debtor is generally not paying its debts as they become due. Failure to make this showing subjects the petitioning creditor(s) to paying the debtor's costs and attorneys fees and, if found to be in bad faith, compensatory and punitive damages. To avoid this latter result, the creditor should conduct some minimum due diligence before filing (consult with other creditors, order credit reports, etc.). Involuntary bankruptcy is usually only attractive where the creditor has reason to believe preferential and/or fraudulent transfers have been made by the debtor and such a filing is the best (and maybe only) way to recover some of the debt owed.

For further discussion regarding Bankruptcy, see Section 6 below.

VI. Bankruptcy

A. Introduction

The Bankruptcy Code, "the Code," (Title 11 of the United States Code) contains the substantive law relating to the commencement of a bankruptcy proceeding and the related rights, liabilities and responsibilities of the parties. Most of the procedural detail, however, was left for the United States Supreme Court to supply pursuant to its rule-making power. These rules are contained in the Bankruptcy Rules (or B.R.'s). Local rules of procedure have been adopted by the District Court of Oregon and are contained in the Local Rules (or L.R.'s). The Bankruptcy Court, as a unit of the District Court, has adopted Local Bankruptcy Rules (L.B.R.'s).

Chapters 1, 3 and 5 of the Code contain provisions common to all bankruptcy proceedings. Chapters 7, 9, 11, 12 and 13 relate to specific types of proceedings.

The statutory provisions relating to the scope of bankruptcy jurisdiction, the function of the Bankruptcy Court and venue are contained in Title 28 United States Code.

B. Types of Bankruptcy

The basic types of bankruptcy are liquidation and rehabilitation.

1. Chapter 7 Liquidation. In a Chapter 7 liquidation, the trustee marshals the debtor's non-exempt property, converts that property to cash and distributes the cash to creditors pursuant to a statutory distribution scheme. *See* 11 USC § 726. The debtor is required to give up all non-exempt property he or she owns at the time of the bankruptcy filing in hope of obtaining

a discharge. Discharge releases the debtor from any further personal liability for most pre-bankruptcy debts. The liens held by secured creditors are not, however, affected unless specific avoidance action is taken. *See* 11 USC §§ 502, 506. The majority of bankruptcy cases are in Chapter 7.

2. Chapters 11, 12, 13. These chapters deal with debtor rehabilitation in which the creditors normally look to the future earnings of the debtor, not the property of the debtor at the time of the bankruptcy filing, to satisfy their claims. The debtor generally retains its assets and makes payments to creditors, usually from post-petition earnings or profits, pursuant to a court-approved plan. Each chapter has its eligibility limitations.

a. Chapter 11. Reorganization under Chapter 11 is normally used by business enterprises. (Actually, Chapter 11 is available to any “person” eligible for relief, but most Chapter 11 cases involve some kind of business.) “Persons” who may become debtors under Chapter 11 include individuals, corporations and partnerships.

b. Chapter 13. A Chapter 13 reorganization may only be commenced by “an individual with regular income,” 11 USC § 101(30), and only if that person has unsecured debts of less than \$290,525 and secured debts of less than \$871,550, 11 USC § 109(e).

c. Chapter 12. Chapter 12 was enacted to provide for “Family Farmer” reorganizations. In order to qualify for Chapter 12, the debtor must have been involved in a “farming operation,” the debtor’s aggregate debt must not exceed \$1,500,000, more than 50% of the debtor’s income must have come from a “farming operation” and more than 80% of the debt must have arisen from a “farming operation.” 11 USC §§ 109(f), 101(18), (19) and (20).

C. Effect of Commencement of Bankruptcy Case

1. Commencement. A bankruptcy case is commenced by the filing of a petition with the court. BR 1002(a); 1003(a), (e). In general, it may be either voluntary or involuntary. Cases under Chapters 12 and 13 may be filed as only voluntary cases. Cases under Chapter 7 and 11 can be filed either voluntarily (by the debtor) or involuntarily (by creditors). *See* 11 USC §§ 301, 303.

The commencement of a bankruptcy case creates a bankruptcy estate and automatically operates as a stay against most debt collection, including lien enforcement. Both of these consequences will be discussed in detail below.

2. The Estate. The estate created when a bankruptcy petition is filed includes everything owned by the debtor plus all other property which the trustee has the power to recover for the estate. 11 USC § 541. In a case under Chapter 7 (liquidation), the trustee controls the estate. In a case under Chapter 11, the debtor, unless replaced by a trustee, remains in possession (the debtor is thereafter referred to as the debtor-in-possession). In a case under either Chapter 12 or Chapter 13, the debtor retains property which is not disposed of pursuant to the plan and the Chapter 12 or Chapter 13 trustee administers payments under the plan.

3. The Automatic Stay. Once a bankruptcy petition is filed, a creditor is stayed or restrained from taking any further action against the debtor or the estate to collect its claim or enforce its lien. 11 USC § 362.

D. The Bankruptcy Estate

1. Property of the Estate. Section 541 defines “property” of the estate to include all legal or equitable interests which the debtor may have in property as of the date of commencement of the case. These legal and equitable interests are generally defined by state law. This would include all interest of the debtor or the debtor’s spouse in community property under sole, equal or joint management and control of the debtor, any property recovered for the estate by the trustee under 11 USC §§ 543, 544, 545, 547, 548, 549, 500, 553 or 723 and any interest in property preserved for the benefit of, or ordered transferred to, the estate under 11 USC §§ 510(c) or 551.

In addition to property owned by the debtor at the time a petition is filed, the estate also includes certain after-acquired property. This would include an interest in property acquired under bequest, inheritance, property settlement agreement with a spouse or settlement on a life insurance policy within 180 days after the filing of the petition. 11 USC § 541(a)(7).

2. Powers. A power a debtor may exercise solely for another entity will not be part of the estate 11 USC (§ 541(b)), and if the debtor holds the legal title to, but NOT the equitable interest in property, only the legal title will become property of the estate. 11 USC § 541(d).

3. Turnover. Section 542(a) requires anyone holding property of the estate on the date of the filing of the petition, or property that the trustee may use, sell or lease under 11 USC § 363, to deliver it to the trustee (unless the property is of inconsequential value or benefit to the estate). A party is entitled to protection of its interest in the property turned over. *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). Although 11 USC § 543 requires a custodian appointed before the bankruptcy case (usually a receiver) to deliver to the trustee and to account for property that has come into its possession, it also allows protection of the custodian by providing for compensation for services rendered as well as for costs and expenses. 11 USC § 543(c).

4. Exemptions. The Bankruptcy Code contains provisions designed to allow debtors to retain certain property free from the claims of creditors in order to assure the debtor and the debtor’s dependents a minimal standard of living and a “fresh start.” These provisions allow the debtor to “exempt” certain property from the estate, notwithstanding the inclusive breadth of 11 USC § 541. 11 USC § 522.

Section 522(b) permits individual states to “opt out” of the federal list of exemptions and Oregon has done so. ORS 18.300. In Oregon, an individual may only claim those exemptions allowed by Oregon law (and certain non-bankruptcy federal exemptions). The most common exemptions under Oregon law can be found in Chapter 18.

Property properly claimed as exempt by a debtor is normally free from any claims of unsecured creditors, as well as the estate. In most cases, however, the claimed exemptions are subordinate to the interests of secured creditors.

E. Automatic Stay - § 362

1. Effect of Stay. The automatic stay, which takes effect upon the filing of a bankruptcy petition under any chapter (11 USC § 362(a)), suspends all litigation and collection/foreclosure activities which fall within either of the two categories below.

a. Acts against the debtor which could have been commenced before the commencement of the bankruptcy case. 11 USC §§ 362(a)(1), (2), (5), (6) and (7).

b. Acts to obtain possession or control of property of the estate, regardless of whether the action could have been commenced before the commencement of the bankruptcy case. 11 USC §§ 362(a)(3) and (4).

Examples of the actions affected by the automatic stay include:

c. The commencement or continuation of any action against the debtor to recover a claim arising prior to the petition;

d. Lien enforcement/foreclosure 11 USC (§ 362(b)(2));

e. Creation or perfection of liens (but *see* 11 USC § 362(b)(3) and § 546 for exceptions;

f. F.E.D. actions;

g. Garnishment proceedings; and

h. Any other pre-judgment provisional process or post-judgment collection activity.

2. Exceptions to Stay. There are a few common exceptions to the automatic stay. These include:

a. Criminal proceedings (11 USC § 362(b)(1));

b. Proceedings to collect alimony, maintenance or support from property that is not property of the estate (11 USC § 362(b)(2));

c. Acts to perfect liens within a grace period allowed under state or federal law whereby the date of perfection relates back to defeat the bankruptcy trustee's avoiding power (11 USC § 362(b)(3));

d. Litigation by a governmental unit to enforce its police or regulatory powers (such as enforcement of zoning or environmental laws) (11 USC § 362(b)(4) and (5));

e. The issuance, by a governmental unit, of a notice of tax deficiency to the debtor (§ 362(b)(9)). *Note: This list is not intended to be exhaustive.*

3. Duration of Stay. If relief has not previously been granted, the stay continues until the property is no longer part of the estate. 11 USC § 362(c)(1).

The stay continues, in any case, until the court grants relief from the stay or the earlier of dismissal of the bankruptcy case, the closure of the bankruptcy case or the time a discharge in bankruptcy is granted or denied. Once a discharge is obtained, however, the debtor may rely on the protections afforded by the discharge. 11 USC §§ 524, 1141, 1328 and 1228.

4. Effect of Stay on Co-Debtors. The stay does not prevent a creditor from pursuing collection activities against a bankrupt's co-debtor who is not in bankruptcy (e.g., a surety, a co-maker or a guarantor, except as prohibited by the co-debtor stay in Chapters 12 and 13).

Section 1301 and 1201 of the Code restrain a creditor from attempting to collect a debt from a co-debtor of a Chapter 12 or 13 debtor if the debt is a consumer debt and the co-debtor is not in the credit business.

This co-debtor stay automatically terminates when the case is closed, dismissed or converted to Chapter 7 or 11.

5. Effect of Stay on Debtor or Trustee. The stay does not prevent a debtor or trustee from filing or pursuing litigation or collection/foreclosure activities against others.

6. Violation of Stay. All acts in violation of the stay are void and a nullity. If the violation is willful, the creditor may be held liable for actual damages, including costs and attorneys' fees and, in appropriate circumstances, punitive damages.

7. Foreclosure and Repossession. All steps in the foreclosure process, including foreclosure sales that are in process, must be suspended until relief from the stay is granted or the property is no longer property of the estate. If a foreclosure sale has occurred prior to the filing, leaving the debtor with unexpired redemption rights, then the rights of the parties may depend upon the bankruptcy chapter in which the case is pending.

a. If the case is a Chapter 7 or Chapter 11 proceeding, then the right of redemption belongs to the estate. The trustee or debtor may redeem the property within the later of 60 days after the bankruptcy filing or the actual expiration date of the redemption period as if no bankruptcy had been filed. 11 USC § 108(b)(2). *In re Petersen*, 42 Bankr. 39 (Bankr. D. Or. 1984).

b. If the case is under Chapter 13 (and probably Chapter 12), the debtor is allowed to cure a default even after a foreclosure sale if unexpired redemption rights exist. The property may be retained if the debtor pays the arrearages that triggered the foreclosure proceeding from the plan payments within a reasonable time and pays the regular installments as provided for in the original mortgage or debt agreement. In effect, the state redemption period is no longer in effect and the loan may be reinstated if the debtor's plan provides for these payments. 11 USC § 1322(b)(5). *In re Ivory*, 32 Bankr. 788 (Bankr. D. Or. 1983).

8. Relief From Automatic Stay.

a. By granting relief from the stay, the bankruptcy court allows resumption or initiation of foreclosure/collection proceedings directed against assets of the estate or the debtor.

b. Grounds for Relief. A party may request relief from the automatic stay in two different situations. First, for cause, including lack of adequate protection. 11 USC § 362(d)(1). Second, relief may be granted if the debtor/trustee has no equity in the property and the property is not necessary for the debtor's effective reorganization in a Chapter 11, 12 or 13 case. 11 USC § 362(d)(2). This last element of the second test is only applicable in Chapter 11, 12 and 13.

c. Requests for relief from stay are handled by motion. See B.R. 4001 and 9014. *See also* L.B.R. 4001, L.B.R. 9014-2.

d. The Code requires that a request for relief from the automatic stay be heard on an expedited basis. 11 USC § 362(e) and (f). After the creditor files a motion for relief from the automatic stay, if the debtor/trustee wishes to oppose relief, he/she must file a response

within 14 days of the mailing of the original motion for relief. A hearing must be held within 30 days after filing of the motion for relief where there is opposition. If there is no opposition, relief may be granted on an expedited basis or relief will be automatically allowed at the end of 30 days. 11 USC § 362(c).

e. The burden of proof is on the moving creditor to prove that the debtor/trustee has no equity in the property. This will require that the movant present evidence relevant to value, the amount owing, as well as the validity of the creditor's lien.

The debtor/trustee must prove everything else in dispute, including that the property is necessary for effective reorganization and that the creditor is adequately protected. 11 USC § 362(g)(2). **Note: L.B.R. 4001 requires the use of a notice of motion form or a response form regarding motions for relief.**

f. Nature of Relief Regarding Acts Against Property of the Estate. If there is no equity and the property is not necessary for effective reorganization, the court will allow the moving creditor to pursue foreclosure/collection proceedings against the property only (i.e., usually no deficiency judgments are allowed). The order lifting the stay does nothing more than allow the creditor to pursue its non-bankruptcy legal remedies. The order is not usually a determination of the merits of the creditor's claim.

If there is no equity, but the property is necessary for the debtor's Chapter 11, 12 or 13 effective reorganization, the court may allow the debtor to keep the property where adequate protection is provided to compensate the creditor for actual deterioration of the collateral and the consequences of delay. The U.S. Supreme Court has ruled that an undersecured creditor cannot recover for lost opportunity costs (interest) as an element of adequate protection. *United States Association v. Timbers of Inwood Forest Associates, Inc.*, 484 U.S. 365, 108 S.Ct.626, L. Ed. 2d 740 (1988).

F. Types of Creditors

1. Secured Creditors. The Bankruptcy Code does not define *secured creditor*. Rather, the Bankruptcy Code classifies creditors according to the type of claim they hold. The rules governing to what extent a creditor has a secured claim are set forth in 11 USC §506.

a. Determination of Secured Claim Section 506(a) provides that the allowed claim of a creditor that is secured by a lien or that is subject to an offset under 11 USC §553 is a secured claim to the extent of the value of the creditor's interest in the collateral owned by the debtor or to the extent of the amount subject to offset. Unless otherwise agreed to, the value of the collateral is determined by the court in a valuation hearing. The value of the collateral is determined in light of the purpose of the valuation and the proposed use of the collateral.

If the value of the creditor's collateral is less than the amount of its claim as of the date of the petition, the creditor has two claims: a secured claim equal to the value of the collateral, and an unsecured claim for the balance of the total claim. For example, if a creditor has a claim of \$15,000 and has a security interest in property worth \$10,000, the creditor has a secured claim of \$10,000 and an unsecured claim of \$5,000. Generally, each claim is independent and can be treated differently under the Code.

When the secured claim arises from an offset, the key variables are the relative obligations owed by and between the debtor and the creditor. If the debtor owes the creditor

\$10,000 but the creditor owes the debtor \$15,000, and the requirements for an offset under 11 USC §553 are satisfied, the creditor has a secured claim in the amount of \$10,000 but remains obligated to pay the estate the balance of \$5,000. If the debtor owed the creditor \$15,000 and the creditor owed the debtor \$10,000, the creditor has a secured claim of \$10,000 and an unsecured claim of \$5,000.

b. Entitlement to Interest and Attorney Fees If the value of the creditor's collateral is greater than the creditor's claim, then the creditor is "oversecured." An oversecured creditor whose security interest is consensual in nature is entitled to add to its secured claim its post-petition interest and reasonable attorney fees, costs, or charges permitted under the agreement up to the value of the collateral. 11 USC §506(b). Thus, if the creditor's claim is \$15,000 and its collateral is valued at \$20,000, the creditor is able to add to its secured claim the post-petition interest accruing on the claim and reasonable attorney fees and costs up to \$5,000, for a total of \$20,000. If post-petition interest and costs accrue to total a claim of \$25,000, the creditor has a secured claim of only \$20,000, and is not entitled to recover the remaining \$5,000 of its post-petition interest and costs. *See, e.g., In re Sherwood Square Associates*, 87 BR 388, 391 (Bankr. D. Md. 1988) (when claim at filing was approximately \$4.5 million, post-petition interest and late charges totaled \$1.1 million, and collateral was worth \$5 million, secured claim was \$5 million and balance of post-petition interest was not allowed). *See also, In re Casa Blanca Project Lenders, L.P.*, 196 B.R. 140, 142 n 5 (BAP 9th Cir. 1996). Under bankruptcy law, a secured creditor has a constitutionally protected right to receive at least the value of its collateral. *See, Wright v. Union Central Life Ins. Co.*, 311 U.S. 273 (1940).

If the amount of the creditor's claim is more than the value of the creditor's collateral securing the claim, the creditor is considered "undersecured." An undersecured creditor may not add post-petition interest and charges to its secured claim. 11 USC §506(b); *see generally, United Savings Assn. v. Timbers of Inwood Forest*, 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed.2d 740 (1988). Consequently, if the creditor's claim in the above example is \$20,000 but its collateral is worth \$15,000, the creditor is not able to add to its secured claim post-petition interest and attorney fees. The creditor may, however, be able to add attorney fees and costs of \$5,000 to its unsecured claim.

c. Secured Creditor's Rights in Bankruptcy The secured creditor's weapons in a bankruptcy include the following:

- (1) Automatic prohibition against the debtor's use of cash collateral (11 USC § 363(c)(2));
- (2) The right to request a limitation on the use of its collateral if its interest is not being adequately protected (11 USC §§ 361(m) 363(e));
- (3) The right to request relief from the automatic stay (11 USC §362(d)-(e); F.R.B.P. 4001(d); L.B.R. 4001);
- (4) The right to request appointment of a trustee or examiner in a Chapter 11 case (11 USC §1104);
- (5) The right to request dismissal or conversion in a Chapter 11 case (11 USC §§1112, 1307, 1208);
- (6) The right to vote against the plan of reorganization in a Chapter 11 case (11 USC §1126);

(7) The right to object to confirmation of the plan in Chapter 11, 12 and 13 cases (11 USC §§1128(b), 1325(a)(5), 1225(a)(5)); and

(8) The right to propose its own plan in a Chapter 11 case (11 USC §1121(c)).

2. Unsecured Creditors. An unsecured creditor is a creditor who has no security for repayment of its claim, or has a deficiency claim because the value of any collateral held for repayment of the debt is insufficient to pay the entire debt. Unsecured creditors' claims will be paid only and to the extent funds remain after secured creditors have received the proceeds of sale from their collateral or through litigation, either with creditors or other parties. To the extent funds are available, the first unsecured creditors to get paid are the holders of administrative claims which are claims for services or goods provided to the bankruptcy estate after the filing of the case. Thus, the trustee's fees and the fees of any attorneys, accountants, auctioneers or appraisers hired by the trustee will be paid as a first charge on any unencumbered assets of the estate. *See* 11 USC §§ 507(a) and 503(b). In addition, any other persons who have furnished goods or services to the bankruptcy estate will also be categorized as holders of administrative claims and share equal priority.

a. Priority Unsecured Creditors. After payment of administrative claims, the next category of unsecured creditors who will receive payment are holders of priority claims:

1. Claims for wages or salaries, including vacation and severance pay which have been earned within 90 days prior to the filing of the bankruptcy case up to \$4,650 per individual.

2. Contributions to employee benefit plans up to \$4,650 per employee less any amount paid as a wage claim.

3. Claims of grain growers and fishermen to the extent of \$4,650 per individual.

4. Consumer deposits up to \$2,000 per individual for consumer goods not delivered or provided.

5. Claims owed to a spouse, former spouse or child for alimony, maintenance or child support.

6. Unsecured tax claims.

7. Claims owed to the Federal Deposit Insurance Corporation or Resolution Trust Corporation arising out of a commitment to maintain the capital of an insured depository institution.

After all priority claims have been paid in full, the balance of the funds will thereafter be distributed to the general unsecured creditors. If for some strange reason there are funds left over after paying all unsecured claims, together with interest, the debtor (or shareholders of a corporation) would receive the balance of the funds. Each class is paid in full before the next class receives any funds. If there is not enough money in a particular class to pay the class in full, creditors in that class share pro rata.

b. Unsecured Creditor's Rights in Bankruptcy. An unsecured creditor has some of the same rights as a secured creditor in a bankruptcy including the right to request appointment of a trustee or examiner, the right to request case dismissal or conversion, and the right to vote against and object to plan confirmation or to propose a creditor's plan. An unsecured creditor also has the right to propose a modified plan in a Chapter 13 case. *See*

11 USC § 1329(a). In addition, an unsecured creditor has a limited right to reclaim goods sold to the debtor or to stop the transit of the goods. *See* 11 USC §546(c).

If the debtor is an individual, the unsecured creditor also has the right to object to the debtor's discharge (11 USC § 727) or to seek a determination that the debt owed to the creditor is not dischargeable (11 USC § 523). The secured creditor is not precluded from the same right to object to discharge or dischargeability, but as a practical matter rarely does if it is fully or nearly fully secured because it is easier to collect from its collateral.

c. Unsecured Creditors with Contract or Lease Claims. A non-debtor party to an executory contract or unexpired lease generally has the same rights as other unsecured creditors. In addition, a non-debtor party has the right to request a limitation on the use of the property subject to the executory contract or unexpired lease (11 USC §363(b)); the right to request the court to fix the time within which an executory contract or unexpired lease must be assumed or rejected (11 USC §365(d)(2)); the right to seek an administrative expense claim under certain circumstances (11 USC §503(b)(1)(A)); and, if the executory contract or unexpired lease is assumed, the right to insist that all defaults be cured, that compensation for damages suffered as a result of the debtor's default be paid, and that adequate assurance of future performance under the contract or lease be provided (11 USC §365(b)).

For further discussion, see Section G. below

G. Executory Contracts and Unexpired Leases

After the filing of a petition in bankruptcy, the debtor may have certain ongoing obligations or contracts which either need to be assumed (continued) or rejected (terminated) by the estate. 11 USC § 365 contains provisions relating to the rejection or assumption of these contractual and other obligations.

Under Section 365, if the trustee or Chapter 11 debtor-in-possession assumes an executory contract or an unexpired lease, the estate will take over the rights and responsibilities of the debtor for the performance and completion of the contract. If, on the other hand, the contract or lease is rejected, the estate no longer has any obligations, nor any rights under the contract.

The purpose of Section 365 is to require some affirmative action by the trustee or debtor in possession with regard to the contract or lease within a specified period of time, and to make it subject to certain conditions.

1. Executory Contracts. The Bankruptcy Code does not define the term *executory contract*. Thus, it has been left to the court to give meaning to that term.

The Ninth Circuit has determined that an executory contract within the meaning of 11 USC § 365 describes a contract in which the obligations of both parties under the contract are so far unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse performance by the other. *In re Wegner*, 839 F.2d 533, 536 (9th Cir. 1988); *In re Robert L. Helms Const. & Development Co.*, 139 F. 3d 702, 705 (9th Cir. 1998). *See In re Coast Trading Co.*, 744 F2d 686, 692 (9th Cir. 12984). Whether the parties have any remaining obligations under the contract, and whether failure of one party to perform its remaining obligations would give rise to a material breach of the contract, are questions of state contract law. *In re Wegner, supra; In re Texscan Corp.*, 976 F.2d 1269, 1272 (9th Cir. 1992).

The Ninth Circuit's test requires courts to look not only at what the parties originally contracted to perform, but also at what obligations remain to be performed as of the date of the filing of the bankruptcy. If one party has completed all its contractual obligations as of the filing, the contract is no longer "executory."

2. Unexpired Leases. The question surrounding unexpired leases is whether the lease is a true lease or a financing lease. A document denominated "lease" may, in fact, be a security agreement. True leases are treated under Section 365, whereas *de facto* sales transactions are dealt with as secured claims. There are numerous cases distinguishing between the two kinds of leases.

If the lease is a true lease, then the debtor's only choice is to assume it *in toto* or reject it. If it is a financing equipment lease, i.e., a security agreement, the debtor can modify the lease terms.

3. Time Within Which to Assume or Reject. In a Chapter 7 case, the trustee must assume or reject an executory contract or unexpired lease of residential real property or personal property of the debtor within 60 days after the filing of the bankruptcy petition, or it is automatically deemed rejected.

In reorganization cases under Chapters 11, 12 or 13, the trustee may assume or reject an executory contracts or unexpired leases of residential real property or personal property of the debtor any time before confirmation of or as part of the plan of reorganization, unless the court orders otherwise.

Leases of non-residential real property are treated differently. 11 USC §§ 365(d)(3) and (4) provide that the trustee shall timely perform all the obligations of the debtor until the lease is assumed or rejected.

4. Rejection. The rejection of an executory contract or unexpired lease is deemed a termination by the debtor (and a breach of the contract) and relieves the other contracting party of any further performance under the agreement. The non-debtor party has an unsecured claim for damages (resulting from the breach) against the estate and may submit a proof of claim for such damages.

5. Assumption. When the contract is assumed, the non-debtor party must continue to perform its obligations under the contract or cause a breach of contract.

If the executory contract or unexpired lease is not in default, the assuming trustee or debtor-in-possession merely takes over all the rights and obligations of the debtor and continues performance under the original agreement.

If, on the other hand, the agreement is in default at the time of the filing of the petition, or the time when assumption is sought, 11 USC § 365(b)(1) allows the trustee or debtor-in-possession to assume the agreement but only if the assuming party: (1) cures, or provides adequate assurance that he will cure the default, (2) compensates the other party for any actual pecuniary loss resulting from the default, and (3) provides adequate assurance of future performance under the contract or lease.

6. Executory Contracts and Unexpired Leases Not Subject to Assumption. Section 365(c) provides exceptions to the types of executory contracts and unexpired leases which can be assumed under the Bankruptcy Code. These are personal service contracts, contracts to make a loan, extend other debt financing or financial accommodations to the debtor or a lease of non-residential real property which has been terminated under applicable non-bankruptcy law prior to the filing of the bankruptcy petition.

7. “Ipso Facto” Clauses (Termination Clauses)

The Code renders contractual provisions unenforceable if they provide that a default can be based upon the insolvency or financial condition of the debtor, the commencement of a bankruptcy case or the appointment of a receiver. 11 USC § 365(c)(2).

H. First Steps to Prepare for the Case

After learning of a bankruptcy filing, counsel for a creditor should try to learn as much as possible about the debtor’s filing, the creditor’s claim, and the creditor’s collateral, if the creditor is secured. This entails reviewing the court’s Notice of Commencement of Case, the debtor’s bankruptcy petition, schedules and statement of affairs, and the creditor’s file on the debtor. To effectively monitor and evaluate the case, counsel should also file a notice of appearance and request that he or she receive all notices in the case. Counsel should also consider attending the §341(a) creditors’ meeting set by the court. 11 USC §341(a). In a Chapter 11 case, counsel should consider attending the first management conference and the initial cash collateral hearings in the case.

Taking these steps will not only help counsel in determining what immediate action should be taken on behalf of a creditor, but also aid counsel in assessing the long-term consequence of the bankruptcy filing. If the case is filed under Chapter 11, 12, or 13, does the debtor have a realistic chance of reorganizing? Is management competent? How does the recovery from an immediate liquidation compare with the delays and expense of an effort to reorganize?

If a creditor is unsecured, what are the prospects for recovery? The existence of significant priority debts or heavily encumbered assets may mean that recovery will be unlikely or minimal. If there appears to be some equity in the assets, counsel may be able to make a rough estimate of the possible recovery.

The long-term issues facing a party to an unexpired lease or executory contract with the debtor are whether the party wants the trustee or the debtor in possession (DIP) to assume or reject the contract or lease, and if the trustee or DIP is to assume, what conditions must be satisfied to allow assumption under 11 USC §365(a) and (b).

1. Review Court’s Notice of Case Filing. After a bankruptcy petition is filed, the court issues a Notice of Commencement of Case to all creditors and interested parties listed in the debtor’s mailing matrix filed with the petition. This notice contains important information and deadlines. The front of this notice states the case name and number, the date of filing, the debtor’s address, the name, address, and telephone number of the debtor’s counsel, and the trustee appointed to the case, if any. The notice also informs parties about the effect of the stay imposed on filing, and sets the date, time, and location of the meeting of creditors and the deadline for filing a proof of claim in the case (unless the case is a no-asset case). If the case is an asset case, a proof-of-claim form for the creditor is included with the notice. When the debtor

is an individual, the notice also states the deadline for filing actions to determine the dischargeability of certain debts and objecting to the debtor's discharge.

2. Review Schedules and Statement of Affairs. Counsel should obtain a copy of the debtor's bankruptcy petition, schedules, and statement of affairs, either from the debtor's counsel, the court or on-line through PACER. A review of the schedules will reveal whether the debtor and the creditor agree on the amount of the claim held by the creditor, the status of the claim as secured or unsecured, and whether the debtor considers the claim to be liquidated, non-contingent, and undisputed. The schedules also reveal the extent and type of debt burden facing the debtor and the assets available to satisfy existing debt. The statement of affairs provides useful information concerning the debtor's past transactions, sometimes revealing the existence of pre-petition transfers that may be avoidable.

PRACTICE TIP: The schedules and statement of affairs and all pleadings and documents filed with the court may be reviewed at the bankruptcy court in Portland or Eugene, depending on the county of the debtor's residence, or on-line through PACER. The bankruptcy court provides a public photocopier for 15 cents per page. The clerk will also respond to a written request for the necessary copies if a check is included with the request and the request includes a self-addressed and stamped 9-by-12-inch envelope. Court charges include a search fee of \$15 plus 50 cents per page for copies. To obtain copies of the complete schedules, submit a check not to exceed a specified amount, such as \$25.

CAVEAT: Remember that the information contained in the schedules may not be reliable. The debtor's valuations may be overly optimistic. On the other hand, the debtor may have made pre-petition transfers that may be recoverable to generate additional assets for the estate.

3. File Notice of Appearance and Request for Notices. To stay informed of significant post-petition transactions and events in the case, counsel should file with the court and serve on the debtor, the trustee (if applicable), and any primary creditors and their respective counsel a notice of appearance and request to receive all notices filed in the case. F.R.B.P. 2002(g). It is also advisable to check the court's case docket sheet periodically to assure that all important notices have been received and to track any other events that may be relevant in the case. This can be done on-line using PACER.

4. Attend Creditors' Meeting or Case Management Conference. To complete its initial case evaluation and to monitor the case, creditor's counsel should consider attending the meeting of creditors held pursuant to 11 USC §341 (a). Alternatively, the creditor or its representative may attend and report to counsel concerning the information disclosed at the meeting. In a Chapter 11 case, creditor's counsel should also consider attending the case management conference or the first interim and final cash collateral hearings in the case, or both.

The §341 (a) meeting of creditors is conducted by a panel trustee in cases under Chapters 7, 12, and 13 or by a representative of the United States Trustee's office in Chapter 11 cases. It is generally held 30 to 45 days after the petition is filed. Notice of the meeting is mailed to creditors and other interested parties who are listed in the schedules or mailing matrix filed with the bankruptcy petition.

At the meeting, the trustee or the United States Trustee's representative places the debtor under oath and examines the debtor by asking a series of questions, usually relating to the assets and liabilities listed in the schedules and to any pre-petition payments disclosed in the statement of affairs. The meeting is tape-recorded.

After the trustee or the United States Trustee's representative completes the examination of the debtor, the meeting is open to questions from creditors or other interested parties in attendance. For most consumer cases, the court schedules four to six meetings per hour, which allows only 10 to 15 minutes for each case. For some business cases, up to one hour is allocated. Time is extremely limited and questions from creditors should focus primarily on potential assets involved in the bankruptcy estate and any potentially preferential or fraudulent prepetition transfers to other parties. It is generally inappropriate to ask about disputed matters, contested litigation or concerns that are applicable to only a particular creditor. Questions of general interest to all creditors are appropriate.

If creditor's counsel does not attend the creditors' meeting or learns of the bankruptcy after the meeting has already occurred, a copy of the tape recording may be obtained from the clerk at no charge by sending a blank cassette tape to the United States Trustee with a written request including the name of the debtor, the case number, and the date and time of the meeting. The United States Trustee's office maintains the tapes for two years. Therefore, a tape should be requested during that time frame. The United States Trustee's address is either:

Office of the United States Trustee
620 S.W. Main, Room 213
Portland, OR 97205

or

Office of the United States Trustee
211 E. 7th Street, #221
Eugene, OR 97401

In a Chapter 11 case, some Oregon bankruptcy judges set a case management conference shortly after the case is filed for which the court usually requires detailed financial information and projections from the debtor in possession. Reviewing these submissions and attending the hearing can be quite informative for creditor's counsel. Attendance at the initial cash collateral hearings in a Chapter 11 case can also provide important information concerning the prospects of the case.

5. Filing and Establishing A Proof Of Claim. Except in a few limited circumstances, a creditor should always file a proof of claim. In Chapter 9 and 11 cases when the claim is accurately listed on the schedules and is not designated as unliquidated, contingent or disputed, then a proof of claim is deemed to be filed under 11 USC §501. *See* 11 USC §1111(a); FRBP 3003(b)(1). Even if a debtor has accurately listed the creditor's claim, the debtor may later amend the schedules or the case may be converted. Therefore, the better policy is for the creditor to file a proof of claim in all cases, and generally as soon as possible.

The claim should include all accrued principal, interest, costs, late charges, and attorney fees owing as of the date of the filing. If the claim is based on a written document or instrument and/or the creditor claims a security interest, a copy of the document or instrument must be filed with the proof of claim. FRBP 3001(c)-(d); LBR 3001-I.C-D.

By filing a proof of claim, a creditor may waive its right to a jury trial in an adversary proceeding to avoid a preferential or fraudulent transfer. *See, Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed.2d 26 (1989). Consequently, before filing a proof of claim, creditor's counsel should analyze the possibility that his or her client may have received a preferential or fraudulent transfer. If so, counsel should advise the client that by filing a proof of claim, the client will be waiving its right to a jury trial if such an avoidance action is brought.

If a secured creditor elects not to file a proof of claim, the creditor will not lose its lien rights against its collateral unless some affirmative action is taken to avoid the lien. *See* 11 USC §506(d)(2); *In re Eakin*, 153 B.R. 59, 60 (Bankr. D. Idaho 1993) (“[v]alid, perfected liens survive a discharge regardless of whether a proof of claim is filed”). Confirmation of a plan may affect the lien rights.

I. Perspective from the Viewpoint of Creditor As Defendant in Bankruptcy Litigation

Upon filing of a bankruptcy case, an estate is created which includes all claims the debtor may have had at the time of filing of the case in bankruptcy. *See Langenkamp v. C.A. Culp*, 498 U.S. 42, 111 S. Ct. 330 (1990). Thus, the filing of a Proof of Claim is deemed to be a submission to the bankruptcy court's jurisdiction. A bankruptcy trustee is given the authority and power to prosecute any claim debtor had when it filed its bankruptcy case. 11 USC § 541.

In addition, a bankruptcy trustee is given certain special powers referred to as the “strong arm powers” to recover property or money from the bankruptcy estate. These causes of action are designed to bring property back into the estate, either in its physical form or in cash. Under certain circumstances, Congress has deemed the retention of money or property by creditors to be inimicable to the Congressional policy of promoting equality of distribution among creditors of the same class. Examples of these causes of action are:

1. Preferences. A preference is any payment, or other transfer of the debtor's property, made to a creditor on account of an antecedent debt within 90 days of the filing of the debtor's bankruptcy case which was made while the debtor was insolvent and which would allow the creditor to receive more than the creditor would have received in the Chapter 7 case if the payment had not been made. *See* 11 USC § 547(b). For the purpose of determining when a transfer occurs, a payment by check is determined to have occurred when the debtor's bank honors the check and the date of the check is irrelevant. Under bankruptcy law, the debtor is presumed to have been solvent during the 90 days prior to its filing and it is up to the creditor to rebut that presumption. 11 USC § 547(f). Although there are various defenses available to the recovery of a preference, the creditor may not raise his unpaid claim as a defense. These defenses are set forth in 11 USC § 547(c) and include payments made in the “ordinary course of business,” contemporaneous exchanges and providing the debtor with additional goods or services after the receipt of any preferential transfer. The trustee or Chapter 11 debtor have the burden to prove the Section 547(b) elements of a preference, except for the 90-day presumption of insolvency. The recipient of an alleged preferential payment has the burden of proof on the Section 547(c) statutory exceptions to preference.

2. Fraudulent Conveyances. The trustee can avoid any transfer of property the debtor made within one year prior to the filing of the debtor's bankruptcy case if the debtor made the transfer with actual intent to defraud, hinder or delay creditors, regardless if the debtor was solvent at the time of the transfer. 11 USC § 548(a)(1)(A). The trustee can also avoid transfers for less than reasonably equivalent value made while the debtor was insolvent within this same

one year period. 11 USC § 548(a)(1)(B). In addition, 11 USC § 544(b) incorporates state law with regard to avoidance of transfers. In Oregon, this means that the provisions of state fraudulent conveyance law may be used in a bankruptcy case to recover voidable transfers. For most situations, the reachback period under Oregon law is four years. See ORS 95.200, *et. seq.*

3. Unrecorded Transfers. The trustee may also recover property which the debtor may have transferred under circumstances where the transferee has never taken the proper steps to record the transfer in the proper public offices. This is designed to allow the trustee to recover “secret transactions” which the debtor may have made, but which have not been disclosed in the public records. See 11 USC § 544 where the trustee is given the power of a “*bona fide*” purchaser of real property and lien creditor under state law. Thus, if a creditor receives a transfer of property, even in good faith, it is incumbent to ensure that any mortgage or deed is promptly recorded in the correct office.

4. Bankruptcy Litigation. The commencement of a lawsuit against the defendant in a bankruptcy case requires the issuance of a summons and a complaint very similar to what happens in state or other federal court litigation. However, in bankruptcy litigation, the defendant may be served by regular United States mail. Often this is confusing even to experienced entities which expect that until they are “officially” served by a process server, anything they receive in the mail is of no consequence. This is a big mistake because under bankruptcy rules, service by mail is effective upon the date of mailing and unless an answer is filed by the date indicated in the summons, a default judgment may be entered against the defendant.

It is also important to note that service of process in bankruptcy can be effected nationwide. There is no requirement that the trustee must come to the state of Oregon to sue a defendant who resides in this state, even if the bankruptcy case is pending Florida. Except under extreme circumstances, almost all bankruptcy litigation occurs in the bankruptcy court where the bankruptcy case is filed. Thus, for example, if the bankruptcy case is filed in Florida and a creditor living in the state of Oregon has received a preference, the trustee will commence the lawsuit in the United States Bankruptcy Court in Florida and simply serve the summons and complaint by mail upon the defendant in the state of Oregon. As with lawsuits filed in non-bankruptcy courts, unless a timely response is made, a default may be entered and the trustee will obtain the relief sought in the complaint without the necessity of further proceedings.

J. Discharge

1. Effect of Discharge.

A discharge in a case under the Bankruptcy Code operates as a permanent injunction against the commencement or continuation of any act to hold the debtor personally liable for any pre-petition debt. 11 USC § 524. Perfected liens that have not been set aside during the case remain on the debtor’s property.

2. Exceptions to Discharge. 11 USC § 523(a) lists ten exceptions to discharge for certain kinds of individual debts which are non-dischargeable even though the debtor receives an overall discharge of the remaining obligations.

a. Section 523(a)(2), (4) and (6) Exceptions to Discharge. The Bankruptcy Court has exclusive jurisdiction over three of the discharge exceptions: subsections (2), (4) and (6). A complaint for a determination of the dischargeability of a debt which may qualify as an

exception under these three subsections must be filed within 60 days from the date set for the meeting of creditors. These exceptions do not apply to Chapter 13 cases.

1. The Fraud or False Financial Statement Exception. A claim for money property or services obtained by fraud or false representations or pretense is non-dischargeable. 11 USC § 523(a)(2).

2. The Defalcation, Embezzlement or Larceny Exception. A claim arising from the debtor's fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny is non-dischargeable. 11 USC § 523(a)(4).

3. The Willful and Malicious Injury Exception. A claim arising from the debtor's willful and malicious actions which result in personal injury to another or destruction or conversion of property is non-dischargeable. 11 USC § 523(a)(6).

b. Other Exceptions to Discharge. The Bankruptcy Court has concurrent jurisdiction over all the other Section 523(a) exceptions to discharge which include: most taxes, certain unscheduled debts, claims for child support, alimony or maintenance, certain educational loans and drunk driving debts. Complaints to determine the dischargeability of these debts may be filed at any time.

3. Denial of Discharge. 11 USC § 727 sets forth a number of situations in which a debtor will not obtain a discharge of any of its debts including: transfer or concealment of property with intent to defraud, knowingly and fraudulently making a false oath, failure to explain satisfactorily the loss of assets, refusal to obey court order.

JUDICIAL FORECLOSURE - OREGON

<u>PROCEDURE</u>	<u>RESPONSIBLE PARTY</u>	<u>WHEN</u>	<u>COMMENTS</u>
Complaint	Creditor	Upon default.	Check documents for any required pre-filing notice. Advisable to give 10-days notice even where no notice is required by documents.
Service of Summons & Complaint	Creditor	Any time after action is commenced.	No deadline for service, but Court may dismiss an action for lack of prosecution.
Answer or Other Response [ORCP 15. A]	Debtor and other defendants	30 days after service of complaint.	
Discovery	All parties	Any time after service of complaint.	Oregon doesn't generally allow interrogatories.
Summary Judgment [ORCP 47]	Creditor	No earlier than 20 days after commencement of action; no later than 45 days before trial. [ORCP 47.B & 47.C]	
Response to Summary Judgment	Debtor and other defendants	20 days. [ORCP 47. C]	
Reply to Response to Summary Judgment	Creditor	5 days. [ORCP 47. C]	
Trial	All parties	Generally within 12 months.	State Court Administrator monitors county courts for compliance.
Judgments [ORCP 67]	Creditor		
Application for Attorney Fees, Costs and Disbursements	Creditor	Within 14 days of entry of judgment [ORCP 68.C(4)]	
Praeipce for Writ of Execution	Creditor	After the judgment has been docketed.	
Delivery of Writ of Execution on Sheriff	Clerk	After the writ has been issued.	The writ of execution is valid for only 60 days after receipt by the sheriff. [ORS 18.492]
Sheriff sends Notice of Sale to Judgment Debtor by First Class and Registered or Certified Mail	Sheriff	Before first publication of notice of sale.	
Publication of Notice of Sale in	Sheriff	4 times for 4 successive	

<u>PROCEDURE</u>	<u>RESPONSIBLE PARTY</u>	<u>WHEN</u>	<u>COMMENTS</u>
County Newspaper		weeks, with the last publication at least 1 week prior to sale date. [ORS 18.532]	
Sheriff's Sale	Sheriff		All sales by auction between 9:00 a.m. and 4:00 p.m. Creditor may bid in up to the amount of its judgment [ORS 18.538]. Sheriff can adjourn sale for no more than one week unless judgment creditor agrees to a longer period not to exceed 30 days after original writ of execution is returnable. [ORS 18.542] Unless a tenant holds the property under an unexpired lease (in which case the tenant shall pay rent), the purchaser is entitled to possession from the date of sale until a resale or redemption. [ORS 18.594]
Delivery of Certificate of Sale to Successful Bidder	Sheriff	At the time of sale. [ORS 18.562]	
Filing of Return of Sale	Sheriff	No later than 60 days after sheriff receives writ. [ORS 18.492]	
Motion to Confirm Sale	Creditor	10 days from filing of return of sale. [ORS 18.548(1)]	
Redemption	Mortgagor, judgment debtor, and junior lien creditors	Debtor - within 180 days of sale. [ORS 18.582] Junior lienholders — within 60 days of sale. [ORS 18.572]	If the property is redeemed by a junior lien creditor, any other lien creditor may again redeem it within 60 days from date of the last redemption. [ORS 18.578] Notice of redemption must be given to purchaser not less than 2 days nor more than 30 days prior to redemption. [ORS 18.585(1)] Redemption must take place at the time and place specified in the notice by paying the redemption price to the sheriff. [ORS 18.585(1)]
Delivery of Sheriff's Deed	Sheriff	After all redemption periods have expired. [ORS 18.598]	

NON-JUDICIAL TRUSTEE'S FORECLOSURE SALE - OREGON

<u>PROCEDURE</u>	<u>RESPONSIBLE PARTY</u>	<u>WHEN</u>	<u>COMMENTS</u>
Record Notice of Default in Real Property Records where Property located. [ORS 86.745]	Beneficiary or trustee	Upon default.	
Cure Defaults Stated in Notice of Default	Grantor	Up until 5 days before sale date.	Debtor must pay delinquent payments and defaults owing under trust deed, including trustee and attorney fees. Cure reinstates trust deed's original terms. [ORS 86.753]
Serve Notice of Sale by (i) Both First Class & Certified Mail, Return Receipt Requested, Upon Grantor, All Successors-In-Interest and Lien Holders of Record or Known and Any Person Requesting Notice [ORS 86.740]; and (ii) Upon Any Occupant(s) of the Property by Personal Service. [ORS 86.750]	Trustee	At least 120 days before sale date.	
Publish Notice of Sale in General Circulation Newspaper in County Where Property Located Once a Week for 4 Successive Weeks. [ORS 86.750]	Trustee	Last publication more than 20 days before sale date.	
Record Affidavit of Mailing, Proof of Service (if any), and Affidavit of Publication of Notice of Sale. [ORS 86.750(3)] An Affidavit of Non-Military Status Should Also be Recorded.	Trustee	On or before the sale date.	

<u>PROCEDURE</u>	<u>RESPONSIBLE PARTY</u>	<u>WHEN</u>	<u>COMMENTS</u>
Send Notice of Sale to IRS if Title Company Discovers Any Tax Liens	Trustee	More than 25 days before sale date.	
IF GRANTOR FAILS TO CURE BY FIVE DAYS BEFORE SALE			
SALE (at the Place Designated in the Notice of Sale). [ORS 86.755]	Trustee	At the time designated in the notice of sale.	The sale may be postponed (by announcement at sale date and time) for one or more periods totaling not more than 180 days from original sale date. [ORS 86.755(2)] Bankruptcy stays sale. Within 30 days after relief from stay, a creditor must serve an amended notice of sale. The amended notice of sale must be served and published (if publication not yet completed) no less than 20 days before the amended sale date. [ORS 86.755(6) - (7)]
Proceeds Disbursed (Applied First to Costs, Then to Debt, Then to Inferior Liens, With Surplus to Grantor)	Trustee	Immediately after sale.	
Deliver Trustee's Deed and Purchaser Entitled to Possession of Property	Trustee	10 days after sale.	

OREGON

State Exemptions as Enacted Through all 2003 Legislation

DISCUSSION

Oregon has enacted legislation “opting out” of the federal bankruptcy exemptions. **ORS 18.300.** Therefore, Oregon bankruptcy debtors are only permitted to exempt property under state law or federal law other than 11 USC § 522(d).

CHECKLIST OF STATE EXEMPTIONS

The following exemptions are available to Oregon debtors under Oregon law:

Alimony, Support and Separate Maintenance

Exempt to the extent reasonably necessary for support. ORS 18.345(1)(i)

Bank Deposits

Funds that are exempt under Oregon law remain exempt when deposited in a bank, as long as the exempt funds are identifiable and do not exceed \$7,500. ORS 18.348

Cemeteries and Burial Funds

Lands of cemetery or crematory organizations are exempt; burial lots are exempt. ORS 65.870 and
ORS 65.855

Claims for Negligence and Tortious Conduct

Debtor may exempt up to \$10,000 on account of personal bodily injury; debtor may also exempt compensation for loss of future earnings to the extent reasonably necessary for support. ORS 18.345(1)(j)

Crime Victims’ Compensation

Exempt. ORS 18.345(1)(j) and
ORS 147.325

Fraternal Benefit Society Benefits

Exempt before and after payment. ORS 748.207

Homestead or Residential Property

Debtor may exempt \$25,000 in a residence; if two members of a household are debtors whose interests in the homestead are subject to execution, the combined homestead exemptions may not exceed \$33,000; a homestead outside a town or city cannot exceed 160 acres; a homestead within a town or city cannot exceed one block; proceeds of the sale of the homestead are exempt for one year if debtor intends to use them to purchase another homestead; the homestead is subject to certain liens. ORS 18.395;
ORS 18.402;
ORS 18.428

Debtor may exempt \$23,000 in a mobile home and land used as a residence; if two members of a household are debtors whose interest in the mobile home and land homestead are subject to execution, the combined mobile home and land homestead exemptions may not exceed \$30,000.

Insurance

The beneficiary is entitled to life insurance proceeds as against the debts of the insured; the cash surrender value of a life insurance policy is exempt in the insured's bankruptcy; but life insurance purchased in defraud of creditors is not exempt; the proceeds of group life insurance are exempt; \$500 a month in benefits under an annuity are exempt, if not obtained in defraud of creditors; health insurance proceeds are exempt.

ORS 743.046;
ORS 743.047;
ORS 743.049;
ORS 743.050

Miscellaneous Benefits

Civil defense and disaster relief; funds deposited as bail.

ORS 22.050 and
ORS 401.405

Motor Vehicles

Debtor may exempt \$1,700 in any motor vehicle.

ORS 18.345(1)(d)

Pension and Retirement Benefits

IRAs and tax-qualified employee pension plans are presumed to be spendthrift trusts and are exempt; such interests are not exempt from child support obligations.

ORS 18.358

Permits and License Interests

Liquor licenses are inalienable.

ORS 471.292(g)-(i)

Personal Property

Debtor may exempt \$600 in books, pictures, and musical instruments; \$1,800 in wearing apparel, jewelry, and other personal items; \$1,000 in animals, poultry, and a 60-day supply of animal feed; \$3,000 in household goods; a 60-day supply of fuel and provisions for debtor's family; all health aids; and \$400, which can be applied toward any personal property but which cannot be used to increase another exemption. Debtor may also exempt a rifle or shotgun and one pistol, the combined value of which may not exceed \$1,000.

ORS 18.345(1);
ORS 18.362

Prisoners' Property

Benefits for injured prison inmates are exempt.

ORS 655.530

Public Assistance

Medical assistance, old-age assistance, aid to the disabled, aid to the blind, public assistance, and vocational rehabilitation are exempt.

ORS 344.580;
ORS 411.760;
ORS 412.115;
ORS 412.610;
ORS 413.130: and
ORS 414.095

Savings Plans

Wages withheld in an Employees' Bond Savings Account are exempt.

ORS 292.070

Tenancies by the Entirety

Tenancies by the entirety are non-exempt but subject to the rights of a non-debtor spouse.

ORS 108.090;
Gano v. Ohmart,
121 Or. 116, 254 P.
203 (1927)

Trade Implements

\$3,000 in trade implements are exempt.

ORS 18.345(1)(c)

Unemployment Compensation

Exempt except as respect to claims for child support.

ORS 657.855

Workers' Compensation

Exempt except as respect to claims for child support.

ORS 656.234