



Elder Law Newsletter

Volume 12
Number 1
January 2009

Elder Law Section
Executive
Committee

Chair

Penny Davis
Portland

Chair-elect

Sylvia Sycamore
Eugene

Past Chair

Ryan E. Gibb
Salem

Secretary

J. Geoffrey Bernhardt
Portland

Treasurer

Brian Haggerty
Newport

Members

Jason C. Broesder
Medford

Susan Ford Burns
Portland

Don Blair Dickman
Eugene

Sam Friedenberg
Portland

Leslie Kay
Portland

Eric M. Kearney
Portland

Stephen R. Owen
Clackamas

Michael A. Schmidt
Aloha

Stephen Skipton
Eugene

Brian M. Thompson
Eugene

Whitney Yazzolino
Portland

New year brings budget challenges for DHS programs

By John Mullin

In an article I wrote for the Fall 2008 *Elder Law Newsletter* (“The DHS budget: how do seniors and people with disabilities fare?”), I noted that we were awaiting the Governor’s Recommended Budget (GRB). It arrived with the usual fanfare, including a press conference. Advocates were immediately concerned about reductions in the Department of Human Services (DHS), which amount to a cut of about \$750 million in state general funds (GF) over the Continuing Service Level (CSL) – the cost of continuing programs and agency funding, updated for caseload projections, inflation, etc. More precisely, the actual reductions in programs total \$634.2 million GF, with an additional loss of \$770.6 million in matching federal funds. Those are big numbers. And paradoxically, the DHS budget is also increased in the GRB for the “Healthy Kids” program and the increase in the Oregon Health Plan (OHP) standard.

The reaction

How do elders and people with disabilities fare in this budget put forward by the governor? The Campaign for Oregon’s Seniors and People with Disabilities (COSPD), a group made up of representatives from AARP, Area Agencies on Aging, Service Employees International Union, Oregon Health Care Association, and others released a statement December 1 that noted: “It was once said you can tell a lot ... [about] a government by how it treats its citizens in the dawn, twilight, and shadows of life ... Hopefully, the (GRB) for the next biennium ... isn’t an indication of just how poorly Oregon will meet this test of its government and character for the state’s seniors and people with disabilities.” Those are strong words. What are the facts?

The starting line

First of all, it is important to emphasize that the GRB is the starting line. Decision makers are keeping their eyes on the state of the economy and what that may mean for subsequent revenue forecasts. Senator Margaret Carter and Representative Peter Buckley, the co-chairs of the Joint Ways and Means Committee, will have a significant task ahead of them as the revenue hole grows. While the state economist predicts that the economic recovery will begin next year, he believes that growth will be slow until early 2010. Like any forecast, this could change rapidly, as most economists note that the economic situation we face is unprecedented. Federal action in January on a stimulus package could help the states with funding for infrastructure development and subsequent job development, further extension of unemployment benefits, food-stamp enhancements,

In this issue...

The economy

Effect on DHS budget	1
In the news.....	3
Foreclosures and elders	4
Tenants’ rights in foreclosures	7

Plus...

Resources	9
Elder law numbers	10

Budget challenges

Continued from page 1



John Mullin is a Legislative Advocate with the Oregon Law Center in the Portland office. Following his retirement as the long-standing director of Clackamas County Social Services, John came to the OLC in 2007. He has more than 30 years' experience in human service and advocacy work and is a current Co-Chair of the Human Services Coalition of Oregon.

and increases in the Federal Medical Assistance Percentage (FMAP).

Another way to think about this is to note that our budget in Oregon will be affected by what is passed at the federal level. It will also be affected by what Oregon lawmakers decide about raising revenue.

The Governor's Recommended Budget (GRB)

Although the GRB is supposed to balance with existing revenue, governors often add tax breaks and tax increases that are outside the framework of existing revenue. This was true for the GRB released on December 1, 2008.

The Governor states that he is "laser focused" on:

- Improving education
- Health care for all, beginning with kids and the increase in OHP Standard
- Creating jobs through investing in transportation and energy

One might be tempted to say that another kind of laser was pointed at human services, except for the major expansion of health care funded by an increase in provider taxes matched with federal Medicaid funds. Tobacco taxes (60 cent per pack increase, along with a 25 percent increase in the tax on other tobacco products) are targeted to go to the Public Health Department for obesity prevention, tobacco cessation, and grants to local public health programs. But overall, DHS is reduced by about 15 percent of what it would cost to maintain current services, including a 17 percent decrease in elder and disability services and a 17.6 percent hit in community mental health.

Specifics about the Seniors and People with Disabilities (SPD) budget

The GRB analysis always requires digging below the surface for facts. On December 12, 2008, SPD hosted a gathering to talk about the GRB. Some of the major reduction, which total \$234 million GF, include:

- Home care workers will have less training, and fewer will be covered by

health insurance (\$7.6 million)

- In-home programs will be reduced, totally eliminating services for clients who receive less than 80 hours of service (\$23.1 million)
- Nursing Facility (NF) allowable cost limits will be reduced (\$39 million)
- Cost-of-living adjustments for Aging and People with Disabilities providers and Developmental Disability providers will be further reduced (\$25.9 million)
- The state will shift from a 1915(c) waiver to a 1915(i) state plan (\$98.7 million)

This last item requires some explanation.

Oregon was granted waivers in the early 1980s to make it possible to spend Medicaid funding on Community Based Care (CBC) rather than simply paying for NF care, as was the common practice nationwide. The emphasis on CBC became known as the Oregon Model, supported by consumers and beneficial to taxpayers, as CBC is less expensive than NF care. Clients need to meet income standards of up to 300 percent of the Federal Supplemental Security Income (SSI) – currently \$2022 per month for an individual – and have impairment levels that meet NF levels of need.

The state plan (i) option became available with the passage of the Deficit Reduction Act of 2005, and allows states to redefine services with less stringent care requirements (less than NF). However, the income standard is lowered to 200 percent of SSI (currently \$1,348 per month for an individual). According to a chart produced by SPD, this change in eligibility would affect 4,267 current clients who would lose services. SPD will seek clarification on the issue of "grandfathering" from the Centers for Medicare and Medicaid (CMS) along with the following:

- Under what circumstances income cap trusts will be allowable under the (i) plan
- How spousal impoverishment protections are affected under the (i) plan
- Whether the clinical standard for NH care can be changed to be more restrictive than the current service priority levels (i.e., to require that consumers be more impaired to qualify)

Continued on page 3

Budget challenges

Continued from page 2

All in all, there are many questions about this proposed idea, and it's fair to say that advocates are quite concerned about the future of long term care in Oregon.

Meanwhile, the well-known Oregon Project Independence program (OPI) would shrink from its current biennial appropriation of \$12.6 million to \$7.4 million, funded entirely by the senior and disabled property tax deferral and the accumulated interest on that fund, thus zeroing out the fund in the next biennium. This cut in OPI is over and above the loss of \$234 million in GF noted above. Legislators often single out OPI as an innovative state intervention which pre-dated the waivers—a program that has always had broad-based bipartisan support for providing in-home services for those over the age of 60 who have impairments that limit their functioning. OPI clients cannot also receive Medicaid services, including OHP, so this program has been touted as a cost-effective preventive alternative to more intensive and expensive services. Despite the widespread support, OPI has continued to shrink since the 2001–03 biennium.

The much touted “Oregon Model” would not have much left to emulate if all these changes went into effect. According to an analysis released in December by COSPD, the long term care caseload would decline by from 26,092 (June 2008 actual) to 20,300 in the GRB—a loss of 5,792 service recipients. With regard to the economy, COSPD estimates almost 10,900 jobs would be lost and the net loss in economic activity would be a staggering \$588 million.

The challenge

Human Service advocates have a huge challenge in the upcoming session. Fortunately, many organizations and individuals are working together to make certain that the case for low-income and vulnerable Oregonians is heard. The Human Services Coalition of Oregon (HSCO) and the Oregon Center for Public Policy hosted a well-attended gathering on December 3: *Navigating Rough Seas: 2009 State and Federal Budget Advocacy Planning*. Among many excellent presentations, our keynote speaker was the incoming Speaker of the House, Representative Dave Hunt. He expressed caution—as did the governor—about the use of rainy day and education stability fund reserves. However, he also noted that he fully expected the legislature to pass Healthy Kids and OHP expansion, increase the corporate minimum tax, fund a transportation/infrastructure package, and work to ensure that we have the funding necessary to draw down as much federal Medicaid match as possible. He acknowledged the proposed cuts to DHS in the GRB, but noted that this is only the beginning of a long process, and he encouraged advocates to engage and help lawmakers understand the need. OLC, through its board-established priorities, will be there with our allies to rise to that challenge.

Predicting the economic climate ahead is a daunting task, but I look forward to getting to work on the challenges facing us in the 2009 legislative session. ■

In the news

Sunwest continues to struggle

Sunwest Management Inc. of Salem has sold 45 retirement facilities to an undisclosed private equity firm as the company attempts to restructure its debt.

Senior Resource Group, based in Solana Beach, California, has been retained to run the properties under the name LaVida Communities. Most of the sold properties had been financed by GE Healthcare Finance, which moved to foreclose on some of the Sunwest properties in July. The sale was part of an agreement with GE, which entered a forbearance agreement on additional properties it continues to hold. The sale leaves Sunwest with about 200 properties, including 13 in bankruptcy, around the United States.

Hamstreet & Associates, a Portland turnaround firm, assumed management of Sunwest in November. Sunwest's chief executive, Jon Harder, has resigned, and Curtis Brody has left the position of Chief Financial Officer. Harder filed personal bankruptcy December 31, 2008. ■

Good news for Social Security and Medicare recipients

In the midst of all the financial turmoil, Uncle Sam has some good news for elders in 2009. As of January, the 50 million Americans who receive Social Security benefits got a 5.8 percent cost-of-living raise, the largest since 1982.

In addition, for the first time in eight years, the Medicare Part B monthly premium (which covers doctor and outpatient services) did not increase. The Part B deductible also remains unchanged. ■

Dubious mortgage practices create problems for elders

By Hope Del Carlo, Attorney at Law



Hope Del Carlo is a staff attorney at the Oregon Law Center in Portland, who represents mortgage borrowers at risk of foreclosure. Her work is funded by the Institute for Foreclosure Legal Assistance.

The ongoing national foreclosure crisis affects all of us. Whatever our financial situation, we are losing home equity and investment income and feeling general economic malaise. But behind the business-page stories of hedge funds, credit default swaps, and market instability, there are people who are living even more intimately with the mortgage crisis: the homeowners threatened with foreclosure. Addie Polk—a 90-year-old widow from Akron, Ohio who shot herself inside her foreclosed home as law enforcement officials attempted to serve her with an eviction notice—is emblematic of the desperation felt by many of the homeowner victims of the foreclosure crisis, especially the elderly.

Though Oregon has not been as hard hit as Ohio, we have our own mortgage crisis. The Center for Responsible Lending has projected that more than 28,000 Oregon borrowers will lose their homes by the end of 2009. Many of those at risk are seniors. As of 2007, borrowers over 50 represented about 28 percent of all mortgage delinquencies.¹

Elders and abusive lending

Foreclosure is damaging to anyone, but it is especially harmful to the elderly, who are likely to live on fixed incomes and have less time to recoup losses. Unfortunately, elders have been some of the favorite targets of unscrupulous lenders because they often have substantial home equity acquired through years of hard work and financial discipline. As high-pressure sales people have learned, elders are also easy targets for financial exploitation because of the isolation and vulnerability that can accompany age.

The mortgage industry has made it easy for homeowners to convert home equity to cash, which is alluring to elders trying to meet rising costs of food, utilities, and medicine. The cash, however, comes at a high cost, especially if it involves predatory lending by unscrupulous mortgage brokers and lenders.

How we got here

The past decades have seen sweeping changes in consumer lending. Deregulation and the growth of mortgage-backed securities have fueled the rise of nontraditional adjustable-rate loans, many of which were poorly underwritten and are now in default. One of the notorious new breeds of loans is the hybrid adjustable rate mortgage (ARM) with a short-term fixed rate of two or three years followed by a high-rate adjustable term. Another common nontraditional loan is the “pay-option ARM,” an adjustable rate loan that allows the borrower to choose one of four payment amounts each month. The smallest of these options, which is the one many unsuspecting borrowers choose, is less than the amount of interest charged for a month; the remaining unpaid interest is then added to the loan balance. Pay-option ARMs are considered by many consumer advocates to be inherently deceptive due to this tendency to accrue more interest each month than the borrower is obligated to pay, leading to the growth, rather than reduction, of the loan’s principal balance over time (known as “negative amortization”).

In addition to untested types of mortgages, commissioned mortgage brokers aggressively marketed loans. Few people realize that in Oregon mortgage brokers and lenders have no legal duty to protect borrowers and operate instead in a system that rewards loan officers for selling loans that cost more, rather than rewarding them for serving their customers’ best interests. The payment of yield spread premiums, for example, is routine and legal; mortgage brokers are paid yield spread premiums by lenders for convincing a borrower to accept a loan that is more expensive than the borrower could qualify for with his or her credit score. Brokers have little stake in the affordability of a loan once it has closed, as loans are regularly funded by outside lenders or immediately sold by the broker to another holder, bundled, and converted into securities.

Continued on page 5

Mortgages *Continued from page 4*

Along with these changes in the market, a demographic shift has occurred. The percentage of Americans over 50 with mortgage debt increased from 34 percent in 1987 to 53 percent in 2007 (see AARP study cited in footnote 1). People who twenty years ago might have owned their homes free and clear now find themselves in a downward spiral of debt, with the prospect of homelessness looming.

How can an elder law attorney help?

Where fraud or other illegality is the cause of a borrower's mortgage default, attorneys may be able to assist elderly borrowers by asserting consumer claims and defenses. Some borrowers have legal claims against parties who originated their abusive home loans. Several factors determine whether a client might have legal claims that can be used as leverage to negotiate a solution.

There are two essential steps in assessing a client's mortgage-related legal problem. First, carefully review the closing documents for the loan, and any foreclosure-related correspondence. Second, interview your client (and any other witnesses to the transaction, especially in cases where the client's memory or perception may be called into question) and listen carefully to the facts surrounding the loan's origination.

Predatory loans present several features, usually in combination, that an advocate should watch for:

1. Repeated refinancing, or refinances that do not benefit the borrower. Most predatory loans made to the elderly are refinances that skim equity by charging enormous closing costs and fees that are rolled into the loan.
2. High interest rates or loan fees in comparison to prevailing market rates.
3. Loans made based on value of property, not the borrower's ability to pay with his or her income. Pay special attention to fabricated income streams, such as nonexistent businesses or jobs. (Of course, if your client was complicit in this kind of fraud, his or her claims are substantially weakened.)
4. Subprime loans made to naïve borrowers with good credit, who would have qualified for a prime loan. It may be necessary to consult with a trustworthy lending expert to determine the terms for which your client would have qualified. (Subprime loans were intended for borrowers with bad credit.)
5. Oppressive loan terms – including prepayment penalties which require a borrower to pay as much as six months' interest for the privilege of paying off the loan within two to five years of its origination, adjustable rate mortgages with high minimum rates and scheduled increases regardless of the fluctuation of the market, balloon payments, etc.
6. Abusive loan servicing: force-placed homeowner's insurance, payments lost or otherwise not credited by the lender, and outrageous collection and foreclosure practices.
7. Pressure: loans sold by phone or door-to-door solicitors that were not sought out by the borrower.

If any of the "red flags" that signal predatory lending are present in your client's loan, an expert review of the loan documents is warranted to determine whether any technical requirements of the consumer protection statutes were neglected. Resources exist to help you perform

this review on your own, such as the excellent practice manuals published by the National Consumer Law Center. The Consumer Law Section of the Oregon State Bar is another resource for connecting with experts in the mortgage lending field who can help you navigate your first predatory lending case.

Consumer claims in mortgage cases

Both state and federal statutes apply to mortgage cases.

One federal statute that applies to all consumer lending is the Truth in Lending Act (TILA) found at 15 USC § 1601, *et seq.* TILA is implemented by the Federal Reserve Board, which promulgates its implementing rule, Regulation Z, 12 CFR 226. TILA requires disclosure of the critical terms of consumer loans, and provides for damages and attorney fees if certain disclosures are given incorrectly.

TILA also provides borrowers with an unqualified three-day right to rescind refinanced mortgages, with minor exceptions (see 15 USC § 1635, *et seq.*). When material disclosures are improperly given, the right to rescind can extend up to three years from the consummation of the loan. TILA rescission is a powerful remedy for borrowers, because it essentially allows a borrower to unwind the loan, putting the parties back to the position they were in before its inception and voiding the security interest that would otherwise allow a lender to foreclose.

Another useful federal law is the Real Estate Settlement Procedures Act, or RESPA, 12 U.S.C. § 2605, *et seq.*, which prohibits the payment of unearned kickbacks in home lending transactions, and requires early disclosure of expected loan fees on a form known as the Good Faith Estimate. RESPA also regulates home loan servicing (the collection of payments and administration of escrow accounts) and requires servicers to respond to borrower inquiries.

Oregon law also provides some useful statutes for combating predatory lending. One statute not to use, however, is the Oregon Unlawful Trade Practices Act, ORS 646.605 to 646.652. Oregon courts have ruled that it does not apply to misrepresentations regarding loan terms. *Lamm v. Amfac Mortgage Corp.*, 44 Or App 203, 605 P2d 730 (1980); *Haeger v. Johnson*, 25 Or App 131, 548 P2d 532 (1976). The UTPA

Continued on page 6

Mortgages *Continued from page 5*

might apply to misrepresentations regarding services supplied in close connection with loans, such as mortgage broker services. *Cullen v. Investment Strategies, Inc.*, 139 Or App 119, 911 P2d 936 (1996), Sup. Ct. review denied.

A more useful Oregon statute is the Oregon Mortgage Lender Law, ORS 59.840 to 59.980. The statutory fraud provision at ORS 59.925 is strong and underutilized. Its relatively long three-year statute of limitations and fee-shifting provision make it an attractive alternative to common law fraud in cases against licensed and state-regulated mortgage industry personnel, including brokers. Similarly, the Oregon Elderly Persons and Disabled Persons Abuse Prevention Act, ORS 124 *et seq.*, provides a private right of action to elderly and disabled victims of abuse, including the types of deceptive lending fraud that can fit within the statute's definition of financial abuse. Although this statute has a powerful treble-damages provision and very long statute of limitations, its usefulness is limited by the fact that many financial institutions are exempt from coverage.

New law and the need for more change

During the February 2007 special legislative session, Oregon passed a new law that requires additional "plain language" disclosures to be delivered to borrowers in foreclosure.² New restrictions were also placed on foreclosure consultants – those who attempt to steal equity from borrowers in foreclosure through a variety of sale-leaseback, lending, and other schemes.

However, as the tragic scope and scale of the crisis has shown us, the existing regulatory framework is not sufficient. The new Oregon law does not prevent new unfair loans from being made. As nontraditional adjustable rate loans continue to slide inexorably into default, we need tougher state and federal laws. Large-scale loan modification systems are needed to stanch massive home loss, and re-regulation of the banking system could prevent the next generation's mortgage crisis. Mortgage brokers should have a duty to work for their customers, as do attorneys, realtors, and other professionals entrusted with highly technical tasks that can put a family's financial health at risk.

Until the regulatory framework changes catch up with the need, however, advocates who care are one of the few sources of help for borrowers threatened with foreclosure. HUD-approved housing counselors, who are skilled in negotiating loan modifications, can assist many borrowers. However, vulnerable borrowers who have been victimized by predatory lenders sometimes need the help of an attorney – especially the elderly and disabled, whose cases may involve issues of capacity and other complicating legal factors. This is an unprecedented time that calls for your special skills and enthusiasm. I encourage you to get involved with this effort by attending a consumer law CLE, joining the OSB's Consumer Law Section, or volunteering to handle a mortgage case for an elder on a pro bono basis. ■

Footnotes

1. According to a study by AARP Public Policy Institute, "A First Look at Older Americans and the Mortgage Crisis," available at http://assets.aarp.org/rgcenter/econ/i9_mortgage.pdf
2. A summary of the new law, HB 3630, is available at www.cbs.state.or.us/dfcs/ml/foreclosure/hb3630.html

Resources

Oregon Law Center will consider referrals of low-income homeowners whose cases are unlikely to be handled by the private bar because of a language barrier or disability. The center is especially interested in legal claims stemming from problems in origination (i.e., when the loan was made), especially those involving discrimination, inherently unfair loan terms, and improvident underwriting.

Department of Consumer and Business Services Mortgage Lending Web site: www.cbs.state.or.us/dfcs

Consumer Law in Oregon; OSB CLE publication, 1996, plus 2004 supplement

Oregon Dept. of Justice Financial Fraud/Consumer Protection Division Web site: www.doj.state.or.us/finfraud/index.shtml

Consumer Law Section, Oregon State Bar: <http://osbconsumerlaw.homestead.com/index.html>

National Consumer Law Center: www.consumerlaw.org

Help for tenants in properties undergoing foreclosure

By Craig P. Colby, Attorney at Law

With real estate foreclosures increasing, an elder law attorney may have clients who are tenants in buildings or houses undergoing foreclosure. There are some legal means to protect a tenant's rights in this situation.

The Residential Landlord and Tenant Act (RLTA) (ORS 90.310) says:

- (1) If at the time of the execution of a rental agreement for a dwelling unit in premises containing no more than four dwelling units the premises are subject to any of the following circumstances, the landlord shall disclose that circumstance to the tenant in writing before the execution of the rental agreement:
 - (a) Any outstanding notice of default under a trust deed, mortgage or contract of sale, or notice of trustee's sale under a trust deed;
 - (b) Any pending suit to foreclose a mortgage, trust deed or vendor's lien under a contract of sale;
 - (c) Any pending declaration of forfeiture or suit for specific performance of a contract of sale; or
 - (d) Any pending proceeding to foreclose a tax lien.
- (2) If the tenant moves as a result of a circumstance that the landlord failed to disclose as required by subsection (1) of this section, the tenant may recover twice the actual damages or twice the monthly rent, whichever is greater, and all prepaid rent, in addition to any other remedy that the law may provide.
- (3) This section shall not apply to premises managed by a court appointed receiver.
- (4) A manager who has complied with ORS 90.305 shall not be liable for damages under this section if the manager had no knowledge of the circumstances that gave rise to a duty of disclosure under subsection (1) of this section.

The break-off at four units assumes that buyers of multiple dwellings will want to keep the tenants. The reference in Subsection (4) to 90.305 absolves the resident manager and the

management company from liability as long as they have disclosed, "An owner of the premises or a person authorized to act for and on behalf of the owner for the purpose of service of process and receiving and receipting for notices and demands."

I've never heard of a suit brought under this section. I've turned down prospective clients because there would not be any real property to take a judgment lien against, and most likely the landlord is approaching insolvency. The reference, "other remedy that the law may provide," pertains to lease holders. They have claims for breach of lease and breach of the covenant of quiet enjoyment.

While a tenant still has a duty under the ORLTA to pay his or her rent, once a foreclosure is underway the landlord is not likely to refurbish, advertise, and show empty apartments to find replacement tenants. Nor is he likely to invest money and effort in a Forcible Entry and Detainer (FED) — a court action by a landlord against a tenant to remove the tenant from a rented dwelling. Tenants may thus be able to force the landlord to lower the rent. A lawyer who represents the tenant should consider a termination by tenant (ORS 90.427) with an offer of a new tenancy at lower rent or a claim under ORS 90.310 settled by lowering the rent. These maneuvers provide consideration for lowering the rent and protect the tenant from the (unlikely) rent suit later on.

A tenant acting without a lawyer could just start paying only half the rent. The landlord would probably suffer with half rather than spend money on an eviction.

Thirty days' notice as part of the foreclosure and ensuing FED

The foreclosure sale ends both the landlord's interest in the property and the tenancy rights of an occupant. ORS 86.755(4). The next subsection says:

- (5) The purchaser at the trustee's sale shall be entitled to possession of the property on the tenth day following the sale, and any persons remaining in possession after that day under any interest, except one prior to

Craig P. Colby's Portland practice focuses on residential landlord-tenant issues.

Continued on page 8

Help for tenants in foreclosures

Continued from page 7

the trust deed or created voluntarily by the grantor or a successor of the grantor, shall be deemed to be tenants at sufferance. All persons not holding under an interest prior to the trust deed may be removed from possession by following the procedures set out in ORS 105.105 to 105.168 or other applicable judicial procedure, provided that a person holding under an interest created voluntarily by the grantor or a successor of the grantor must first receive 30 days' written notice of the intent to remove that person served no earlier than 30 days before the date first set for the sale. Notices under this subsection shall be served by first class mail. "First class mail" for purposes of this section does not include certified or registered mail, or any other form of mail which may delay or hinder actual delivery of mail to the addressee.

A tenant will normally be "holding under an interest created voluntarily by the [borrower]," so the buyer can remove the tenant by eviction (ORS 105.105 onwards), ejectment (ORS 105.005 onwards), or maybe by some kind of injunction proceeding. There is some case law saying evictions may be used only against forcible entrants and rent-payers, but that case law cannot prevail against the explicit statutory authority to use the eviction procedure against former tenants who stay on after a foreclosure sale.

The buyer has a proof problem. The notice "shall" be mailed, but not by any means that will produce a receipt. On the other hand, the "person holding under an interest created voluntarily by the grantor ... must first receive 30 days' written notice." If the buyer mails the notice, the buyer can use the presumption of receipt at OEC 311(1)(q), but foreclosers have recently been sending the letter ahead of the sale. Foreclosers are often located in Washington and may not be available for trial, with the result that the buyer fails to prove mailing. Of course, it might be necessary for the defendant not to attend the trial to avoid being called to the stand to make unhelpful admissions. These cases are ripe for settlement.

Other defenses to the buyer's FED

The premise of the buyer's eviction action is that the property was validly foreclosed. *Option One Mortgage Corp. v. Wall*, 159 Or. App. 354, 977 P2d 408 (1999) held that that premise may be challenged. More specifically, *Option One* let a grantor defeat an FED on the ground that he had not been served with notice of the foreclosure sale. Now ORS 86.750(1) requires service on an "occupant" 120 days before the sale.

A tenant might claim not to have received such a notice (sort of an advance warning of risk) and thus not to be subject to the 30-day ouster. A problem with this position is that ORS 86.770(1) says the sale ends the rights of persons holding under anyone who did receive a requisite notice, and the landlord might have received notice. (In a multiple-unit building one of the other units might have received the notice.) I can't see bringing this defense myself; I mention it only in case my thoughts help somebody who flirts with the idea, too.

ORS chapter 105 repeatedly distinguishes between FED actions "if ORS chapter 90 applies to the dwelling unit" and actions if it doesn't. Chapter 90 applies to residential tenancies; that is, to dwelling units in which the parties have entered a landlord-tenant relationship. Obviously, a foreclosure buyer is not the landlord of the holdover occupant. By statute the buyer has "terminate[d]," ORS 90.770(1), the rights of the former landlord, not acquired them. *Barber v. Schenk*, 143 OrApp 472, 923 P2d 1278 (1996). However, since the filing fee for an eviction is \$150 cheaper when the RLTA applies, lots of buyers try to sneak a residential FED through. Even their lawyers have used dubious reasoning such as, "Those other evictions are commercial evictions, and this is a home, not a store."

Since the cheapskate buyer has filed an FED alleging that the RLTA applies, the buyer must prove the landlord-tenant relationship and prove service of an RLTA notice. The buyer will fail. Because the buyer has invoked the RLTA by filing the action, ORS 90.255 entitles the former tenant's lawyer to attorney fees. In *Dikeman v. Carla Properties, Ltd.*, 127 OrApp 53, 63, 871 P2d 474 (1994), the court said:

Defendant's cross-appeal challenges the trial court's ruling that '[t]he Landlord Tenant Act doesn't apply, so [defendant is] not entitled to attorney fees.' We agree with defendant that, having established that plaintiff was not entitled to recover against it under the RLTA, defendant was the 'prevailing party' on plaintiff's RLTA-based claim for relief and is entitled to attorney fees under that statute. ORS 90.255. See also [*Steininger v. Tosch*, 96 OrApp 493, 773 P2d 15 (1989) at 496]. The trial court erred in concluding otherwise.

The bad news is that it's only these cheapskate buyers who may owe attorney fees in the FEDs they file. There is no generalized right to fees in an FED. *Barber*, supra. ■

Resources for elder law attorneys

Upcoming events

Estate and Distribution Planning for Retirement Benefits *with Natalie Choate*

Oregon State Bar seminar

February 26, 2009

Oregon Convention Center, Portland

From nuts and bolts to the cutting edge, nationally recognized estate planning expert Natalie Choate will introduce you to everything you need to know to handle your estate planning clients' IRAs and other retirement plans.

www.osbarcle.org

Probate Primer

Oregon Law Institute seminar

March 13, 2009

Oregon Convention Center, Portland

Learn the basics or just update yourself on the probate process.

www.lclark.edu/org/oli/09_03_13.html

The Latest in Probate Practice

Oregon Law Institute seminar

March 13, 2009

Oregon Convention Center, Portland

A discussion on income tax issues for non-taxable estates, estate administration ethical issues, and invaluable tips from our panel of judges.

www.lclark.edu/org/oli/09_03_13.html

Bankruptcy Law for the Non-specialist

Oregon Law Institute seminar

March 20, 2009

Oregon Convention Center, Portland

Bankruptcy experts will take you step-by-step through the bankruptcy process. Plus, you'll learn how a bankruptcy filing will affect their other legal issues, including divorces, real estate transactions, personal injury claims, taxes, and more.

www.lclark.edu/org/oli/09_03_20.html

2009 NAELA Annual Meeting

March 31-April 5, 2009

Washington, D.C.

An array of CLE seminars and national speakers.

www.naela.org

OSB Elder Law Section "unCLE" Program May 15, 2009

Valley River Inn, Eugene

See box at right for information.

Updated publication

The Social Security Administration issued a new Programs Operations Manual System (POMS) section on the treatment of trusts, including special needs trusts. The title of the section is "SI 01120.200 Trusts -- General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act."

The new section can be found online at:

<https://secure.ssa.gov/apps10/poms.nsf/lnx0501120200!opendocument>

Elder Law Section Web site

www.osbar.org/sections/elder/elderlaw.html

The Web site has useful links for elder law practitioners, past issues of the *Elder Law Newsletter*, and current elder law numbers.

Elder Law Section electronic discussion list

All members of the Elder Law Section are automatically signed up on the list, but your participation is not mandatory.

How to use the discussion list

Send a message to all members of the Elder Law Section distribution list by addressing it to: eldlaw@lists.osbar.org. Replies are directed by default to the sender of the message *only*. If you wish to send a reply to the entire list, you must change the address to: eldlaw@lists.osbar.org, or you can choose "Reply to all." ■

Elder law unCLE program set for May 15

The Elder Law Section's popular "unCLE" program will once again provide elder law practitioners with the opportunity to get together for a day-long session of brainstorming, networking, and the exchange of ideas and forms.

There are no formal speakers; small group discussions are moderated by elder law attorneys willing to share their experiences. Topics cover the gamut of elder law practice, and despite its title, the Oregon State Bar approves continuing legal education credits for those who attend the program.

This year's unCLE program will be held on Friday, May 15, 2009, from 8:00 a.m. to 5:00 p.m., at the Valley River Inn, 1000 Valley River Way, Eugene, Oregon.

Attendance is limited to 75 Elder Law Section members, so register early by contacting the Oregon State Bar order desk at 800.452.8260, ext. 413 or 503.684.7413.

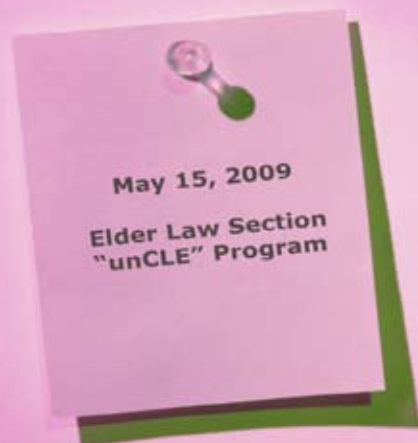
Take advantage of this chance to mix and mingle with your peers in the elder law community and discuss substantive issues and nuts-and-bolts practice issues. ■

Important elder law numbers

as of January 1, 2009

Supplemental Security Income (SSI) Benefit Standards	Eligible individual.....\$674/month Eligible couple\$1,011/month
Medicaid (Oregon)	Long term care income cap.....\$2,022/ month Community spouse minimum resource standard \$21,912 Community spouse maximum resource standard\$109,560 Community spouse minimum and maximum monthly allowance standards\$1,750/ month; \$2,739/ month Excess shelter allowance Amount above \$525/ month Food stamp utility allowance used to figure excess shelter allowance\$379/ month Personal needs allowance in nursing home\$30/ month Personal needs allowance in community-based care\$152/ month Room & board rate for community-based care facilities..... \$523.70/ month OSIP maintenance standard for person receiving in-home services..... \$675.70 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2008\$6,494/ month
Medicare	Part B premium \$96.40/ month* Part B deductible \$135/year Part A hospital deductible per spell of illness.....\$1,068 Part D premium: Varies according to plan chosen..... average is \$35/ month Skilled nursing facility co-insurance for days 21-100\$133.50/ day * A person whose income is more than \$85,000/year will pay a higher premium.

Save the date



Newsletter Board

The *Elder Law Newsletter* is published quarterly by the Oregon State Bar's Elder Law Section, Penny Davis, Chair. Statements of fact are the responsibility of the authors, and the opinions expressed do not imply endorsement by the Section.

Editor:

Carole Barkley carole424@aol.com; 503.224.0098

Advisory Board:

Prof. Leslie Harris, Chair lharris@law.uoregon.edu; 541.346.3840
 Dady K. Blake..... dady@q.com; 503.249.0502
 Hon. Claudia M. Burton claudia.m.burton@ojd.state.or.us; 503.378.4621
 Penny Davis..... penny@theelderlawfirm.com; 503.452.5050
 Brian Haggerty bhaggerty@newportlaw.com; 541.265.8888
 Phil Hingson phil@oregontrustattorney.com; 503.639.4800
 Leslie Kayleslie.kay@lasoregon.org; 503.224.4086
 Karen Knauerhase..... karen@knauerhaselaw.com; 503.228.0055
 Alexis Packer apacker@mind.net; 541.482.0570
 Daniel Robertson drobertson@allermorrison.com; 541.673.0171
 Prof. Bernard F. Vail..... vail@lclark.edu; 503.768.6656