

THE BKGG BULLETIN



Dessert Company Gets A Pie in the Face and BKGG Clients Get A Sweet Deal

BKGG Successfully Defends Clients From Lawsuit, And Actually Recovers \$110,000 From the Plaintiff Who Initiated the Lawsuit.

After working for several years as a corporate chef and salesperson for his employer Balboa Dessert Company, a BKGG client decided he wanted to take a chance and start his own dessert company. He resigned his position at Balboa Dessert Company, teamed up with another fellow BKGG client, and these two entrepreneurs formed the company known today as Newport Dessert Company.

However, not long after the entrepreneurs began their new venture, Balboa Dessert Company filed a lawsuit against them and their fledgling dessert company, claiming that they had wrongfully interfered with Balboa Dessert Company's relationships with its customers and allegedly infringed on Balboa Dessert Company's trademarks.

BKGG aggressively defended the Newport Dessert Company owners and their company, and filed a cross-complaint against Balboa Dessert Company. After researching the applicable law and conducting precise discovery which exposed Balboa Dessert Company's lawsuit as baseless, BKGG filed a motion for summary judgment.

However, the Court never had the opportunity to rule upon BKGG's motion. Balboa Dessert Company, likely knowing it could not successfully oppose BKGG's motion for summary judgment, instead offered to pay \$110,000 to Newport Dessert Company and its owners to resolve the very lawsuit that Balboa Dessert Company had initiated against BKGG's clients approximately one year earlier. BKGG's clients accepted Balboa Dessert Company's settlement offer, and Newport Dessert Company continues to successfully operate today serving up their popular Sour Cream Apple Cobbler Bars and other decadent desserts to high-end restaurant chains such as PF Chang's China Bistro.

BKGG was happy to be able to protect its clients and their new venture, and wish Newport Dessert Company continued "sweet" success in the future!

New Faces

BKGG welcomes David A. Gerlt an associate with the firm primarily focusing on business transactions and real estate matters. Mr. Gerlt has performed the role of outside corporate counsel for his clients, advising with regard to entity formation, contracts, board of directors and shareholder issues, as well as other corporate matters.



Mr. Gerlt was born in Seattle, Washington and graduated from Principia College in Elsah, Illinois with a degree in Economics. He attended the University of the Pacific, McGeorge School of Law, where he was a member of the Traynor Honor Society. After graduating from law school in 1997, Mr. Gerlt practiced as a civil litigator for three years. While with his prior firm of Cummins & White, he transitioned into a transactional practice which has been greatly aided by his prior litigation experience.

Mr. Gerlt is admitted to practice in the State of California. When not practicing law, Mr. Gerlt enjoys sailing, hiking and spending time with his family.

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Considerations for Borrowers with Real Property Valued Less Than Loan Balance

As property values continue to slide all over the nation, an increasing number of people are discovering that they owe significantly more on their home than what it is worth. A question naturally arises: "Should I walk away from the home?" The following are some considerations one should make in answering the question.

First, whether one simply stops paying the mortgage thereby precipitating a foreclosure, obtains an agreement from the lender to accept the property in lieu of foreclosure ("deed in lieu of foreclosure") or gets the lender to accept a payment of less than what it is owed from a purchaser of the home ("short sale"), the first concern should be to consider the impact on the borrower's credit. Foreclosure is considered the most damaging of the three options because the borrower essentially refuses to take responsibility for debt, whereas in the latter two scenarios the borrower works with the lender to minimize the lender's losses. Regardless of which road is taken, the borrower will wind up with damaged credit that will inhibit obtaining credit for up to seven years or possibly longer.

There is some good news however. There are two laws that will help borrowers who are unable or unwilling to payoff their home loans. The first is a California State law commonly known as an "anti-deficiency law" which is contained in CCP Section 580(b). The law essentially prevents a lender from suing a borrower for the lender's losses or "deficiency" provided the loan was for the purchase of an owner-occupied home (it does not include home-equity lines of credit or refinancings), the home is less than 5 units, and is not an investment property or a vacation home. Also, regardless of the type of property or loan, if the lender chooses to foreclose under a deed of trust using the power of sale contained in the deed of trust rather than obtaining a court judgment through a "judicial foreclosure," then the lender is limited to the proceeds it receives from the sale and cannot seek the deficiency amount from the borrower. In situations where there will be a large deficiency and a borrower owns a property not protected by the anti-deficiency law, the borrower would be best served concentrating his or her energies in negotiating a short sale or a deed in lieu of foreclosure rather than risking a judicial foreclosure.



When a property is foreclosed, subject to a short sale or deed in lieu of foreclosure, a lender reports the amount of the deficiency to the IRS as "debt forgiveness" and the buyer is required to pay taxes as ordinary income. Congress passed the Mortgage Forgiveness Debt Relief Act of 2007, which was signed into law in December 2007. The Act permits borrowers who received "debt forgiveness" in the years 2007, 2008 or 2009 to not have to pay the income tax on the amount forgiven, provided the loan was on the borrower's principal residence with a balance of less than \$2 million (the limit is \$1 million for a married person filing a separate return). The debt must have been used to buy, build or substantially improve the taxpayer's principal residence and must have been secured by that residence. Debt used to refinance qualifying debt is also eligible for the exclusion, but only up to the amount of the old mortgage principal, just before the refinancing.

Please contact David Gerlt at (949) 975-7500 or dgerlt@bkgglaw.com if you would like to discuss, or would like assistance with, any of the issues raised in this article.

Watch Out for Scam Notices and Save Yourself Money

Corpgate, a registered agent company, is sending out Statements of Information with Corpgate's information filled in as the registered agent. Corpgate charges \$49 per year for a service that BKGGL already provides its clients for free. Also, Corpgate is an unknown entity that may or may not forward critical notices and lawsuits.

For more information on Statements of Information, contact Gregory Clement at gclement@bkgglaw.com or 949-975-7500.

Financial Elder Abuse: A broad statutory basis for the recovery of attorney's fees for California Residents 65 and over.

The California Elder Abuse and Dependent Adult Civil Protection Act (California Welfare & Institutions Code Section 15600 et seq.) is commonly known for the protection of California residents 65 and over from physical abuse and neglect. However, it also provides for protection from financial abuse.

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Bankruptcy Will Not Protect Debtors From Reprehensible Conduct

In today's bear market, more business owners are turning to bankruptcy to save them from their legal problems. This has required some of our corporate clients who have sued these business owners to analyze the practicality of recovering any real money through the formal legal process. What many of our clients are surprised to hear is that grounds exist to prevent these bankrupting parties from discharging certain debts in bankruptcy. What this means for our clients is that they may still be able to collect what is owed from a bankrupting defendant even after the defendant has filed for bankruptcy.

In the business context, filing for bankruptcy will not discharge debt that resulted from fraud, a breach of a fiduciary duty or intentional, malicious behavior. Where this type of behavior exists, the victimized creditor files an adversary complaint in the debtor's bankruptcy proceeding. No civil lawsuit can be instituted, and the Bankruptcy Court determines the merits of the creditor's complaint. The discovery rules are more relaxed, and the debtor is forced to defend the complaint without access to any of the assets of his or her estate – this means that mounting a defense to the complaint must come entirely from non-bankruptcy sources, such as friends, family or exempt property, like pensions or retirement accounts.

The most common ground our clients have used to prevent the dischargeability of debt is the breach of fiduciary duties by officers or directors of a corporation. Officers and directors owe fiduciary duties to the corporation, its shareholders and even its creditors. Therefore, our clients have prevented the dischargeability of debt where they have shown that officers or directors have gained personal benefits at the expense of the corporations, their shareholders or their creditors.

Our clients have also avoided the dischargeability of debt by asserting that the debt resulted from intentional, willful and malicious conduct by the debtor. A simple breach of contract does not satisfy this standard, but breaches of contracts where our clients have shown an intentional breach, accompanied by willful and malicious tortious conduct, have prevented debtors from discharging their debts. This has been the case where debtors have stolen money or other property, contract rights and even copyrights from our clients.

In short, where debt has been incurred by way of reprehensible conduct, bankruptcy laws will not protect the debtor from his or her obligation to repay the victimized creditor.

Please contact Casey Young at (949) 975-7500 or cyoung@bkgglaw.com if you would like to discuss, or would like assistance with, any of the issues raised in this article.

Team BKGG Plays for a Good Cause

On May 10, 2008 BKGG fielded a stellar team in the Active OC Charity Softball Tournament held at Heritage Park in Irvine. Our team made through the preliminary rounds before being eliminated in the quarterfinals. But more importantly, the tournament raised more than \$3,000 for two local nonprofits – Canyon Acres and Laura’s House. Canyon Acres (<http://www.canyonacres.org>) is an organization that treats and restores hope to young children who have been severely abused, neglected and emotionally troubled. Laura’s House (<http://www.laurashouse.org>) is dedicated to changing social beliefs, attitudes and the behaviors that perpetuate domestic violence while creating a safe space in which to empower individuals and families affected by abuse. BKGG is proud to have participated and to have supported this event and these fantastic charities.



(continued from page 3) Financial Elder Abuse

Financial abuse occurs when a person or entity takes, appropriates or retains real or personal property of a person 65 and over to a wrongful use or with intent to defraud, or both. Liability for financial abuse also attaches to anyone that assists in the taking.

Financial elder abuse statutes are appealing for a Plaintiff because of the heightened remedies available and the ability to apply them broadly.

For example, attorney’s fees are more attainable under financial elder abuse law because they can be recovered by establishing the occurrence of financial abuse through the lower evidentiary standard of “a preponderance of the evidence.” In addition, attorney’s fees under financial elder abuse law are only available to a prevailing plaintiff, not a prevailing defendant.

Moreover, the statutory definition of financial abuse lends itself to broad application. In fact, BKGG has applied financial elder abuse with great results in a number of instances with vastly different factual scenarios. For example, BKGG recently obtained a multi-million dollar attorney’s fees award based upon financial elder abuse against a Defendant who embezzled millions from multiple corporate entities as well as a California resident over 65. Also, BKGG recently brought suit on behalf of an 88 year old widow for financial elder abuse in connection with the fraudulent transfer of two real properties. The case is postured for a quick resolution due in no small part to the viable threat of attorney’s fees provided for by the financial elder abuse statutes.

These are just two examples of how financial elder abuse can be applied. In simple terms, whenever there is a fraudulent taking of the property of a person 65 years old and over, California financial elder abuse law is an extremely potent tool in recovering the property plus attorney’s fees against not only those who actually benefited, but from those who merely assisted.

Please contact Zachary Smith at (949) 975-7500 or zsmith@bkgglaw.com if you would like to discuss, or would like assistance with, any of the issues raised in this article.



The BKGG Bulletin is Published By:

Burkhalter Kessler Goodman & George LLP

2020 Main Street

Suite 600

Irvine, CA 92614

Attn: Alton G. Burkhalter

949.975.7500

949.975.7501 fax

340 North Westlake Blvd.

Suite 110

Westlake Village, CA 91362

Attn: William C. George

805.373.1500

805.373.1503 fax

www.bkgglaw.com

Burkhalter Kessler Goodman & George LLP (BKGG) specializes in providing legal support for small to medium size businesses and high net worth individuals. With almost a century of combined legal experience, the firm also provides outstanding representation for our clients in other critical aspects of their business, such as acquisitions and sales of businesses and real estate, intellectual property matters, employment issues and consumer disputes. BKGG provides comprehensive estate planning services through our State Bar certified Estate Planning specialist.

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