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Judge Terry Myers	1
Jury Verdicts	6
Ninth Circuit Split	7
Chapter News	8
Ninth Circuit Decisions	9
Membership	13
Note of Thanks	14

# Federal Bar Association Idaho Chapter

VOLUME 1, ISSUE 1

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## Changes in the Code and at the Court

Students of economic history know that change, rather than stasis, is a hallmark of American bankruptcy law. However that comes as rather small comfort when facing the sort of upheaval in policy, procedure and substantive law encountered this past year.



**Chief Judge  
Terry L. Myers  
Bankruptcy Court  
District of Idaho**

On April 20, 2005, President Bush signed the Bankruptcy Abuse Prevention and Con-

sumer Protection Act ("BAPCPA").<sup>1</sup> Following over eight years of debate<sup>2</sup> and millions of dollars in campaign contributions and lobbying investment,<sup>3</sup> this legislation ran over 500 pages, with fifteen separate titles and over 200 sections. It impacts virtually every aspect of bankruptcy practice.

Though certain BAPCPA provisions were immediately effective, the vast majority of the changes

continued on page 2

## Effort to Split the Ninth Circuit Fails

By Larry Westberg, FBA National Delegate

As most federal practitioners know, one of the hottest topics pertaining to our federal courts is whether or not to split the Ninth Circuit. Just last December, the United States House and Senate conferees removed the provision for splitting the Ninth Circuit, which was part of the House version of the deficit reduction bill. The split had been proposed by the House Judiciary Committee led by Chairman, F. James Sensenbrenner, (R-Wis). It would have created a 12th circuit composed of Arizona, Nevada, Montana, Idaho, Washington, and Alaska, leaving the Ninth Circuit with California, Hawaii, Guam and the Marianna Islands. The House version linked the split with the creation of 93 additional federal judgeships. These would have included 12 circuit judgeships, 56 district judgeships, and 25 bankruptcy judgeships. Significantly, one of the new district judgeships would have been created for Idaho.

continued on page 7

## Changes in the Code and the Court (continued)

were to go into effect 180 days after the President's execution. Thus October 17, 2005, loomed as one of the most seismic dates in the history of American bankruptcy law, rivaling the effective date of the Bankruptcy Reform Act of 1978.<sup>4</sup>

To some, a lag time of 180 days would seem ample. To those inside the system, it was ludicrously short.

Most lawyers were generally aware of the sweeping scope of the reform proposals. But they had seen similar legislation rise and fall over many years without enactment.<sup>5</sup> Many had ceased trying to become expert in the minutiae of the proposed bills since it was uncertain if the effort would be worthwhile. That 2005 would be the year, and this the bill, wasn't a cinch. But in late 2004 and very early 2005, passage began to look more and more certain.

Those who started deep and close reading and analysis of BAPCPA were challenged by the number and complexity of its changes. The devil indeed was in the details, and the details were many. Unfortunately, the details were often in densely worded, arguably inconsistent, and sometimes indecipherable new provisions.

And worse, though BAPCPA substantially altered both major and minor aspects of daily bankruptcy practice, Congress' approach left much of the heavy lifting to others – the courts, the Administrative Office of the U.S. Courts (the "AO"), the U.S. Trustee, and the federal rule-making apparatus under the aegis of the Supreme Court.

For example, the Federal Rules of Bankruptcy Procedure, which serve a critical role, were in several ways rendered obsolete or inapplicable by BAPCPA. Other BAPCPA provisions made new implementing rules absolutely necessary. But amendment of the Rules before October 17 could not occur given the deliberate, usually three year, federal rule-making processes.

National committees, groups of judges and lawyers, and the AO all strove to quickly understand the procedural changes BAPCPA expressly or impliedly required, and to figure out what was needed to implement them. When concerns arose that each District might idiosyncratically adapt its practice to what it saw in BAPCPA, leading if not to a national nightmare then at least to something less than the "uniform Laws on the subject of Bankruptcies" envisioned in the Constitution,<sup>6</sup> proposed changes to the Federal Rules of Bankruptcy Procedure called "Interim Rules" were prepared, and local bankruptcy courts – including the District of Idaho – adopted them by General Order<sup>7</sup> so as to deal with some of the more pressing problems.<sup>8</sup>

It wasn't just a question of rules. Over 1,500,000 new cases had been filed in the nation's bankruptcy courts in 2004, and in each there were dozens if not hundreds of pages of documents. To be sure, most of the bankruptcy courts had, at some point during the preceding several years, gone "paperless" in one of the bankruptcy system's last waves of conversion.<sup>9</sup> Paperless didn't mean, however, that bankruptcies were any less document intensive.

## Changes in the Code and the Court (continued)

Those documents – schedules, statements and other materials – are at the heart of bankruptcy administration. Their required filing triggers innumerable and varying deadlines that must be tracked and enforced. This is, of course, a highly computerized process given the volume of cases filed, and the ripple effect any one document's filing or absence could have on other matters. Though Congress evidently didn't appreciate it, what BAPCPA required was a complete review and revision of all the hundreds of detailed policies and procedures used in the administration of cases, and a substantial rewriting of the programs that controlled how the bankruptcy courts did their work.

Our court's technical staff is sophisticated and talented. Rewriting programs is something they do well. They could not do so, however, until the court decided how to construe and implement the myriad changes BAPCPA required. This is not an easy task.

Just how procedures needed to change was decidedly unclear. The Interim Rules, and new national forms (which could be promulgated without the three-year lag that applied to the Rules) were finalized only shortly before BAPCPA's effective date.<sup>10</sup> And even with Interim Rules and new forms in place, practical problems abounded: Was the absence of form "X" or disclosure "Y" or certification "Z" a curable defect? When? What was the consequence of failure to cure? How were the deadlines and deficiencies to be monitored? Who was to raise a question of noncompliance?<sup>11</sup>

The issues were and are complicated by the intricately interwoven but often irreconcilable provisions of the enactment. Even for an area of law where competing policies abound,<sup>12</sup> BAPCPA can be extraordinarily confusing. Though certain themes are discernable upon even a cursory review of BAPCPA, they are not invariably followed. In some provisions, just which (or what) policy or goal is intended to be served is not at all clear. Though in some cases this may have been intentional, in many others it appears a result of exceedingly poor draftsmanship.<sup>13</sup>

Observers and commentators have not been at all kind to Congress when reviewing what was passed. One, an editor of a well-respected bankruptcy law treatise, lambasted the "atrocious drafting" and also characterized a signature BAPCPA provision – the "means test" – as "a construct of which Rube Goldberg would be proud."<sup>14</sup> Even judges, in attempting to construe and apply the new provisions, have expressed concern and frustration with the long-winded but inexact and confusing language, and the complex and often confounding structure of the new law.<sup>15</sup>

So, in preparing for the October 17 implementation, there was a need for courts to invest a huge amount of time and effort to parse the language of BAPCPA and its "hundreds of provisions, exceptions, qualifications and requirements . . . along with a host of uncodified duties and pronouncements,"<sup>16</sup> to determine how it might alter the existing and already complex processes of bankruptcy liquidations and reorganizations, to predict how the Code changes might ultimately be construed (without, of course, handcuffing the judges) and, as best possible given the abstract nature of the exercise, to accommodate the new law.

# Changes in the Code and the Court (continued)

At the very same time, the courts had to administer thousands of already pending pre-BAPCPA cases<sup>17</sup> – as well as all the new cases that would be filed before October 17. Given the increased burdens placed on consumers filing under BAPCPA, it was universally accepted that filings would increase as October 17 approached and individuals<sup>18</sup> attempted to beat the clock. No one accurately predicted the magnitude.<sup>19</sup>

In the two-month period from July 1 to August 30, 2005, 1,706 new cases were opened in Idaho. We had a total of 1,564 new cases filed in the same period in 2004, and this growth was not particularly exceptional. But in September, 2005, after mainstream news media noted the impending change in the law and the increased cost and difficulty of filing, things changed. That month, the number of new cases jumped to 1,383, an increase of 83% over the 760 cases filed in September, 2004.

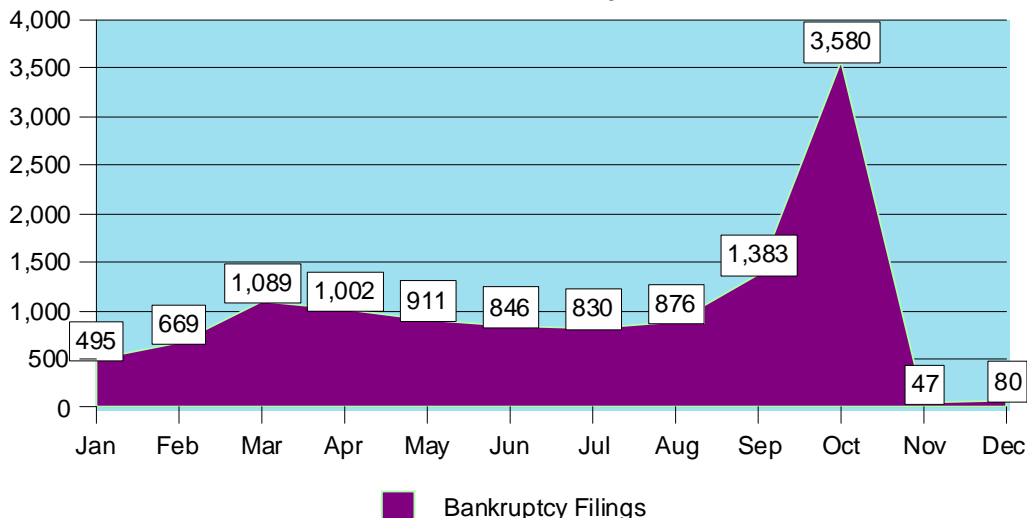
Then, from October 1 to October 16, bankruptcy filings throughout the nation went through the roof (or, more literally, down the hall, out the door, and around the block). Courts put on extra staffing at public counters and behind the scenes where petitions filed electronically or through the mails were first handled. Courts’ clerks worked overtime to handle the load.<sup>20</sup>

In Idaho, 3,553 cases were filed in the first two weeks of October, 2005. In the prior year, only 376 cases were filed in the same period of time. To put these 3,553 cases in further context, one might note that in all of 2004 a total of 9,297 cases were filed. So, in just these two weeks of October 2005, enough cases were filed to equal over 38% of the filings for the entire preceding year.<sup>21</sup>

The change in filings after October 17 was equally breathtaking. After BAPCPA went into effect, only 27 more cases were filed in Idaho the entire balance of October. In November, only 47 cases were filed, far different from the 695 filed in November, 2004. In December, 2005, 80 cases were filed, compared to 772 in December of 2004.

## 2005 Bankruptcy Filings - District of Idaho

For the 12 Month Period Ending December 31



## Changes in the Code and the Court (continued)

In full, the total of 11,808 cases filed in 2005 in Idaho set a new record, beating by 2,511 the 9,297 cases filed in 2004. Just when we might see a return to historical filing levels and patterns remains to be seen. Some BAPCPA proponents expect and project that they will never return to pre-2005 levels because the Act will prevent bankruptcy “abuse” and encourage alternate approaches to dealing with debt.<sup>22</sup> Others believe that the “reform” measures are simply punitive and fail to address underlying economic realities, and feel that filings will quickly return to “normal.”<sup>23</sup>

As noted, the new provisions enacted in BAPCPA are extensive and complicated. It is beyond the scope of this article to attempt to address them. However, there is a wealth of analysis available, such as the volumes of the American Bankruptcy Law Journal, published by the National Conference of Bankruptcy Judges, cited in the endnotes. Also, the January, 2006 issue of *The Advocate* published by the Idaho State Bar contains several articles analyzing various aspects of BAPCPA by members of the I.S.B.’s Commercial Law and Bankruptcy Section. I would highly recommend these sources as a starting point for those interested in further understanding what has happened, and what will or might yet change.

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1. Pub. L. No. 109-8, 199 Stat. 23 (2005).
2. The National Bankruptcy Review Commission was created by Congress in 1994. In charging the NBRC to closely review the statute, Congress had pronounced itself “generally satisfied with the basic framework established in the current Bankruptcy Code” and directed to NBRC “not [to] disturb the fundamental tenets of current law.” The NBRC complied, returning a 1,300 page report to Congress on October 20, 1997 entitled “Bankruptcy: The Next Twenty Years” which made more than 170 detailed and focused recommendations to “restore balance” to the Code by carefully addressing discrete issues. Several commissioners issued “dissents” from specific recommendations, notably commissioner Hon. Edith Jones of the 5th Circuit (now that Circuit’s Chief Judge) who wrote some 225 pages of dissent. The NBRC minority views galvanized creditor interests, and many of their suggestions – including the oft-debated “means test” for consumer filings – found their way into proposed legislation from 1997 forward despite rejection by the NBRC as a whole. *See, e.g.,* Hon. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231 (2005). Congress’ comfort with the basic structure of the Code clearly changed between its charge to the NBRC in 1994 and its passage of BAPCPA in 2005.

endnotes continued on page 15

# Jury Verdicts, District of Idaho



Magistrate Judge  
Mikel H. Williams  
District of Idaho

**Goff v. Washington County**  
CV-03-268-S-MHW  
Judge Williams, November 2005

**Economic Damages for Goff  
Against Defendant Patterson:  
200,000  
Plaintiff Goff: Non-economic  
Damages \$50,000**

**For Plaintiff: Julie Klein Fischer  
and John Kormanik  
WHITE PETERSON**

**For Defendant: Bruce Castleton  
and Kirtlan G. Naylor  
NAYLOR & HALES**

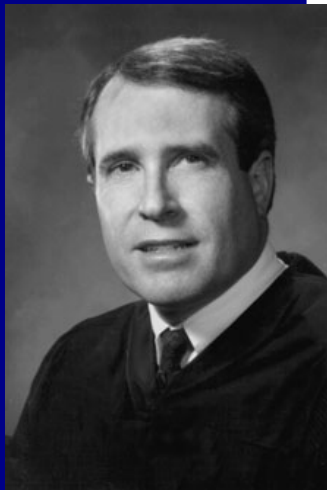
**United States v. L-Von Krosigk**  
CR-05-168-S-BLW  
Judge Shubb, November, 2005

**Guilty—3 Counts Mail Fraud,  
13 Counts Mailing Threatening  
Communications**

**For the Government:  
Wendy Olson  
Assistant United States Attorney**

**Mr. L-Von Krosigk, in Pro Per**

**Sentencing—47 months and  
\$183,115.22 in Restitution, plus  
\$1,600 Special Assessment**



Chief Judge  
B. Lynn Winmill  
District of Idaho

**Ward v. Sorrento Lactalis**  
CV-04-06-S-BLW  
Judge Winmill, September 2005  
Wrongful Termination Case

**Emotional Distress Damages  
for Plaintiff Ward Against  
Defendant Sorrento—\$400,000**

**Plaintiff Ward—Economic  
damages \$800,000\***

**For Plaintiff: John Kormanik  
Julie Klein Fischer and  
T. Guy Hallam, Jr.  
WHITE PETERSON**

**For Defendant: Candy W. Dale  
and Scott R. Learned  
HALL FARLEY OBERRECHT  
& BLANTON**

**\* New Trial is Proceeding  
on Economic Damages**

**United States v. Grigg**  
CR-05-74-S-BLW  
Judge Winmill, November 2005

**Guilty—Possession of a Machine-  
gun not registered to him in the  
National Firearms Registration  
and Transfer Record**

**For the Government:  
Aaron N. Lucoff  
Assistant United States Attorney**

**For the Defendant:  
Thomas Monaghan  
Office of the Federal Defender**

**Note: Sentencing in this matter is  
set on March 20, 2006 at 9:30 a.m.  
at the James A. McClure Federal  
Building and U.S. Courthouse in  
Boise, Idaho.**

## **Ninth Circuit Split** (continued from page 1)

The U.S. Department of Justice supported the split; however, the FBA and influential political leaders, such as California's two U.S. Senators and Governor, opposed the split. The Idaho Chapter of the FBA took no position. Rather, it attempted, unsuccessfully, to de-link the split and creation of Idaho's judgeship. Unfortunately, Chairman Sensenbrenner appears to have taken the position that, until the Ninth Circuit is split, his committee will not authorize any additional judgeships. Thus, we can be certain that the effort to split the Ninth Circuit is not a dead issue, but will remain a "hot button" item along with the need to create additional judgeships.

Certainly, with or without a split in the Ninth Circuit, a strong case can be made for a third district judgeship in Idaho. The last Idaho judgeship was created more than a half-century ago in 1954. Judge Fred M. Taylor was appointed to that position by President Eisenhower. Since then, the federal court caseload has increased dramatically.

Many examples come to mind; however, a quick look at the growth in the U.S. Attorney's Office alone illustrates the point. In 1968 there were only three Assistant U.S. Attorneys, all located in Boise. Today, the U.S. Attorney's Office for the District of Idaho, employs more than two dozen Assistant U.S. Attorneys, and in addition to the Boise office, it maintains field offices in Coeur d'Alene and Pocatello. Moreover, a number of Special Assistant United States Attorneys employed by federal agencies, and U.S. Department of Justice lawyers also bring and defend cases in federal district court. While this is but one example of the growth in federal court practice in the District of Idaho, the U.S. Court Clerk's Office has assembled a wealth of additional information that supports the need for a third judgeship.

The Government Relations Committee of the Federal Bar Association is currently reviewing court security, cameras in the courtroom, sentencing guidelines, and judicial compensation legislation. Those interested in these topics — or any other topics of interest to federal court practitioners — are welcome to contact the FBA, or me, for more information.

The Federal Bar Association is a grassroots organization. We need your energy, ideas, and enthusiasm — I strongly encourage your participation.

Larry Westberg is immediate past President of the Idaho Chapter of the FBA, is currently the Chapter's Delegate to the Federal Bar Association, and in 2005 was appointed to the Government Relations Committee by FBA President Robyn J. Spalter.

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# News by Chapter President Ted Creason

Welcome to the first edition of your chapter's newsletter. The Idaho Chapter of the Federal Bar Association was chartered on October 5, 2004. We are now 99 strong and growing.

We on the Executive Committee are confident we'll continue to improve the value of your membership, not only through this newsletter, but also through valuable programs designed to address issues of importance to each of you. By joining the local chapter of the FBA, you'll learn how to use the electronic court filing systems used nationally and keep abreast of current case law, and changes in the Local Rules.

This newsletter represents your chapter's effort to provide you with information that will be helpful to you in your practice, and suggest ways and means available to you if you wish to have a voice or lend a hand in making our federal courts the best that they can be. Perhaps something you see, or hope to see in this newsletter, will inspire you to share your ideas. We welcome articles

that you've written and would like published.

The Executive Committee of the local chapter of the FBA has identified important strategies and programs in an effort to take full advantage of the credibility and other tangible and intangible resources of the Federal Bar Association. The Idaho Chapter is already a functional, dynamic organization. By our charter, we are connected to the premier nationwide bar association devoted exclusively to the practice and jurisprudence of federal law and the vitality of the United States federal court system. Our chapter is hosting an FBA seminar to include FBA members and judges from Utah, Wyoming, Montana, and Idaho. There will be more information coming to you, but mark your calendars for September 22 and 23 for a gathering of colleagues and judges in Sun Valley.

Idaho needs a strong chapter of the FBA to (1) provide access for its members to current and accurate information about the federal courts, national legislation and policy affecting federal courts; (2) develop an informed position on issues of interest to the lawyers who practice in fed-

eral court; (3) communicate its position and help to educate legislators and policymakers; (4) help support our judges, law clerks, and court staff, especially in the challenges they undertake to educate the bar and the citizenry about the charter and mission of the federal courts; and (5) assist all law students who have an interest in working in one capacity or another in the federal court system.

In the information age, being connected takes little more than a click of the mouse. Buy by joining the FBA, you'll be able to meet fellow federal practitioners, as well as members of the federal judiciary.

With your help and support, Idaho's chapter can and will do all of these things. We look forward to hearing from you!

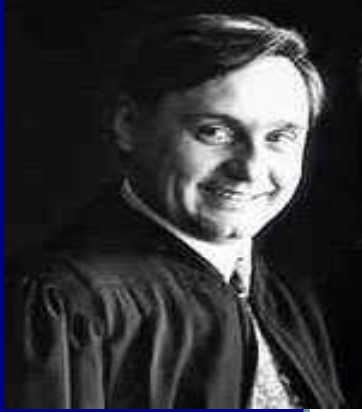
## FBA Local Chapter

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## RECENT CRIMINAL DECISIONS—NINTH CIRCUIT



Judge Alex Kozinski  
Ninth Circuit  
Court of Appeals

**United States v. Bailan-Santana**, 429 F.3d 1258 (Dec. 6, 2005) (C.D. CA), Judges Canby, Kozinski, and Rawlinson (dissenting). Non-English speaking defendant executed a jury waiver form written in English. At defendant's plea colloquy, his defense attorney, who represented himself to be fluent in both English and Spanish, told the district court he had accurately and completely translated the form for his client. The district court, through a translator, asked the defendant whether he was waiving his jury rights but engaged in no further colloquy. Held: District court was required to conduct colloquy with Spanish speaking defendant to ensure that defendant's waiver of right to a jury trial was voluntary. Without either a colloquy or proof of an accurately translated waiver form, reversal was required. Judge Rawlinson dissented, arguing that there was nothing in the record to suggest that there was anything wrong with the translation of the waiver form.



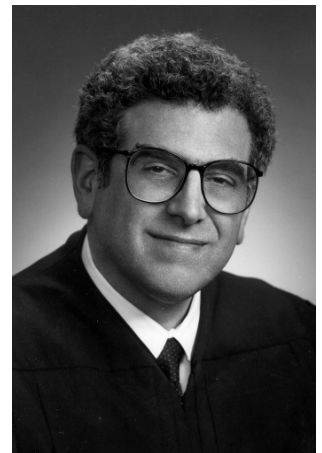
Judge Richard  
Tallman  
Ninth Circuit  
Court of Appeals

**United States v. Monzon**, 429 F.3d 1268 (Dec. 7, 2005)(W.D. Wash.) Judges Tashima, Paez, and Callahan (dissenting). At the defendant's Federal Rule of Criminal Procedure Rule 11 plea hearing, the defendant, although pleading guilty to possessing a firearm in connection with a drug trafficking offense, denied that the firearm found in his bedroom, where his heroin stash and thousands of dollars in cash were also found, was possessed in connection with his drug trafficking. Instead he said that he had gotten a good deal on the gun and liked the weapon. Thus, the allegation that the firearm was possessed in connection with a drug trafficking offense was struck from the factual basis of the plea. The district court, nonetheless, accepted the plea to the gun possession count. Held: on plain error review, the district court's error in failing to determine that there was a factual basis for the defendant's plea of guilty affected defendant's substantial rights and required reversal.

**United States v. Hernandez-Hernandez**, 431 F.3d 1212, 2005 WL 3440815 (Dec. 16, 2005)(E.D. WA) Judges Tallman, Gould, Kleinfeld (concurring in part, dissenting in part). Held: Prior convictions need not be charged in the indictment or proven to a jury beyond a reasonable doubt to enhance sentence; and defendant's prior felony conviction for false imprisonment was a "crime of violence" for purposes of applying that specific offense characteristic in the illegal re-entry guideline. Under the Court's modified categorical approach, the district court properly relied on the stipulated facts contained in the defendant's state court motion to set aside the false imprisonment conviction, which had served as the factual basis for the guilty plea and clearly established that the crime involved violence.

**United States v. Southwell, 432 F.3d 1050, 2005 WL 3556911 (Dec. 30, 2005)(E.D. WA), Judges Alarcón, Kozinski, Kleinfeld. Defendant, who had contended that he was not guilty by reason of insanity, was convicted of malicious use of a fire to damage property. District court instructed jury that if it found that the government had proven all of the elements beyond a reasonable doubt, it should find the defendant guilty, if it found that the government had not proven all of the elements beyond a reasonable doubt, it should find the defendant “not guilty,” and if it found that the government had proven all of the elements beyond a reasonable doubt, but unanimously found that the defendant had proven by clear and convincing evidence that he was insane, they were to find the defendant “not guilty by reason of insanity.” During the deliberations, the jury sent out a note stating that while it had unanimously concluded that the defendant had committed the offense beyond a reasonable doubt, it was not unanimous whether he was sane. The defense requested that the district court instruct the jurors that they could not convict if they could not agree on the insanity defense, but the district court refused to give any other instruction. Held: District court’s refusal to answer jury question as to whether they could convict defendant if they did not agree unanimously that defendant was sane or insane violated defendant’s constitutional right to unanimous jury verdict. Reversed and remanded.**

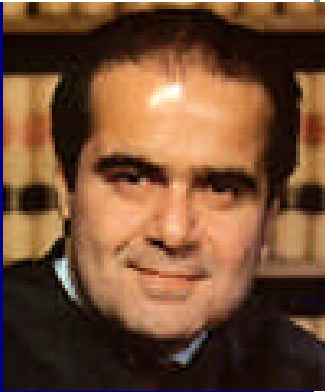
**United States v. Menyweather, 431 F.3d 692, 2005 WL 3440800 (Dec. 16, 2005) (C.D. CA). Judges Graber, Hawkins, Kleinfeld (dissenting). After two remands, district court again sentenced former U.S. Attorney’s Office employee who pled guilty to mail fraud based on unauthorized use of government credit cards for personal purchases of between \$350,000 and \$500,000 to probation. Held: Downward departures based on diminished capacity and extraordinary family circumstances were not abuses of discretion. In its first post-*Booker* foray into reasonableness analysis, the Ninth Circuit found the sentence to be reasonable. Judge Kleinfeld dissented, stating that the majority’s abuse of discretion review amounted to no review at all and expressing, in part, frustration that the district court kept imposing the same sentence despite repeated remands. He observed that “our review authority may be more rather less important than it was before, to prevent idiosyncrasy from altogether overtaking sentencing consistency. A sentence like the one in this case is just the sort of red flag that makes legislators wonder whether the courts need mandatory minimum sentences to assure protection of the public.”**



**Judge Andrew J. Kleinfeld, Ninth Circuit (dissenting)**

*“Does 40 days to serve on weekends ‘reflect the seriousness of the offense’ of a trusted employee engaging in a long running and elaborate scheme and cover-up in which she stole over \$435,000? Obviously not.”*

## CIVIL DECISIONS—U.S. SUPREME COURT AND NINTH CIRCUIT



Associate Justice  
Antonin Scalia  
United States  
Supreme Court

**United States v. Georgia**, 126 S. Ct. 877, 2006 WL 43973 (Jan. 10, 2006). **Justice Scalia**, writing for an unanimous Court, Stevens and Ginsburg (concurring). Petitioner, a paraplegic, sued respondent state defendants, and others, challenging the conditions of his confinement in a Georgia prison, *inter alia*, 42 U.S.C. § 1983 and Title II of the Americans with Disabilities Act of 1990. The United States Federal District Court dismissed the § 1983 claims because Petitioner's allegations were vague, and granted respondents' summary judgment on the Title II money damages claims because they were barred by state sovereign immunity. The United States intervened on appeal. The Eleventh Circuit affirmed the District Court's Title II ruling, but reversed the § 1983 ruling. The Supreme Court granted certiorari to decide the validity of Title II's abrogation of state sovereign immunity. Held: insofar as Title II creates a private cause of action for damages against States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.



Judge Margaret  
McKeown  
Ninth Circuit  
Court of Appeals

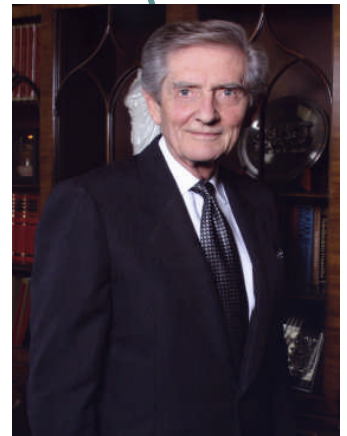
**In re: RainTree Health Corp.**, 431 F.3d 685 (Dec. 14, 2005) (C.A. AZ). Judges B. Fletcher, **Gibson**, Berzon. The district court reversed the bankruptcy court's summary judgment in an adversary proceeding brought to recover Medicare overpayments for cost reimbursement paid to the new operator of a nursing home previously operated by the bankruptcy debtor. New operator appealed. Held: The panel reversed the district court's judgment. The panel held that 11 U.S.C. § 541(a), describing what comprises property of the bankruptcy estate, did not address the issue of the existence and scope of the debtor's interest in the Medicare payment. The panel held that under a Medicare regulation the new operator's lease of the nursing home facility and its assumption of the debtor's Medicare provider agreement made it subject to the same statutory and regulatory conditions to which the debtor had been subject, including provisions for over- and under-payments. Nonetheless, under Arizona contract law, the nursing home transfer agreement provided that the debtor retained its interest in the Medicare funds. The panel remanded with direction that the bankruptcy court's summary judgment in favor of the owner of the property of the bankruptcy estate be reinstated.

**Tuazon v. R.J. Reynolds**, 04-35618 (Jan. 11, 2006) (W.D. WA), Westlaw cite 2006 WL 51186, Judges Cudahy, (7th Cir.), Nelson, **McKeown**. The Plaintiff (Wash. resident), alleges that his chronic lung disorder is attributable to the tobacco company's conduct. The tobacco company is a North Carolina-based corporation that has operated in Washington; but Plaintiff was diagnosed with lung cancer in 2003 in his native Philippines, and brought his action after establishing residency in Washington state. Held: The district court properly exercised personal jurisdiction over the out-of-state defendant tobacco company, and the district court did not abuse its discretion in determining that the public and private factors favor Washington as the forum. Specifically, Washington's

jurisdictional statute conferred jurisdiction over the tobacco company, where the company's activities in Washington constituted "doing business" within the meaning of Washington's service of process statute. The exercise of jurisdiction comports with federal due process requirements. Contrary to the district court's conclusion, the tobacco company did satisfy its burden to demonstrate the existence of an adequate alternative forum in the Philippines. In conclusion, the tobacco company did not meet its burden to overcome the Plaintiff's choice of Washington as the forum for his lawsuit.

Judge Clifford J. Wallace  
Ninth Circuit Court  
of Appeals (below)

Stanley v. Trustees of the California State University, 04-15134 (New Case), (Jan. 11, 2006) (E.D. CA). Judges Wallace, Trott, Rymer. Plaintiff brought her action pursuant to 42 U.S.C. § 1983, Title IX (20 U.S.C. § 1681) and California state law claims against the Trustees of the California State University and individual University officials, alleging that her professor and faculty advisor sexually harassed her. Held: The panel affirmed the district court's judgment on the pleadings based upon statute of limitations and state sovereign immunity grounds. The panel held that the Title IX claim was subject to California's personal injury statute of limitations. The panel also held that the state law claims were barred by sovereign immunity, that 28 U.S.C. § 1367 does not abrogate state sovereign immunity for supplemental state law claims, and that California did not consent to suit by passing the Unruh Civil Rights Act, Cal. Civ. Code §§ 51-53.



United States v. Willis, 431 F.3d 709 (Dec. 19, 2005) (C.A. 9, Nev.) Judges Kozinski, Bybee, W. Fletcher (dissenting). The district court's denial of a motion to suppress evidence and conviction pursuant to a conditional guilty plea to being a felon in possession of a firearm was proper. Held: Officers' detention of the defendant came within the scope of a valid traffic stop because one officer had at least reasonable suspicion — if not probable cause — to stop the defendant for violating the traffic laws. The panel observed that under *Whren v. United States*, 517 U.S. 806 (1996), it cannot second-guess the reasons for the officers' stop, and that since law enforcement could have relied on the traffic violation as a justification for stopping the defendant, the stop was valid under *Whren*. Once the officers stopped the defendant, they could, within reason, search the area and question the defendant about weapons for their own safety. Additionally, once the defendant informed the officers that he was carrying a firearm, the officers were entitled to seize the firearm in order to avoid any possibility that the defendant would use it against them, given the information available to the officers at the time. Judge W. Fletcher dissented for two independent reasons: (1) Law enforcement did not present "specific, articulable facts" to support his contention that there was reasonable suspicion that the defendant had violated the traffic laws, and thereby to justify a traffic stop under *Whren*; and (2) the stop at issue was anything but "run-of-the-mine" and does therefore, does not qualify as a traffic stop under *Whren*.

## Update on Chapter Membership by Richard Fields

We're doing well, but we should really sell more of our fellow lawyers on membership in the new Idaho chapter of the Federal Bar Association. The benefits far outweigh the cost. And, non-members are missing some great programs!

As of November 30, 2005—the latest available official figures—the Idaho chapter had 99 members. That's very good for a barely one-year-old organization in a state with only about 3,900 active state Bar members.

While we're substantially outnumbered by urban areas such as the Los Angeles, New Orleans and Tampa Bay chapters, we compare favorably in member-to-total-bar membership ratio with others in the Ninth Circuit, which has the most FBA members (2,811) of any of the federal circuits. (Interestingly, the the Fifth Circuit (2,784) is the only other circuit even close.)

Every one of Idaho's seven state judicial districts is represented in our chapter membership. However, not surprisingly, most of the members come from the cities where the Court sits -Boise, Pocatello, the Coeur d'Alene region and Moscow/Lewiston. The Idaho Falls/Rexburg and Magic Valley areas appear to me to be under-represented, and, as nearly as I can tell, the entire Third Judicial District has only one FBA member.



**Richard C. Fields**  
**Membership Chair**  
**FBA Local Chapter**

On the positive side, we appear to be living up to Chief Judge Winmill's hope that chapter membership would include practitioners from all facets of federal practice. From my own very informal analysis of the names on the official membership list, it appears, for example, that the civil litigators are about evenly split between those who most often represent plaintiffs and those who are primarily defendants' lawyers. There are also reasonable numbers of criminal defense lawyers, prosecutors, and bankruptcy practitioners. As expected, the federal district judges, federal magistrates, and bankruptcy judges are all active members, and we have a respectable smattering of in-house corporate counsel, government agency lawyers, and educators.

An argument can be made that we already have a good representation of those Idaho lawyers who are most frequently in federal court and that they (or we) are the lawyers who most need this organization, to keep current on new trends and developments and to become better acquainted with those with similar interests whom they may see most often in practice. However, I can also argue that FBA membership is of equal benefit to the occasional federal practitioner. He or she may in fact have a more urgent need for the "inside information" that naturally flows from membership.

Visit the FBA national website, [www.fedbar.org](http://www.fedbar.org), it will give you capsule descriptions of the myriad of benefits available. (Among my favorites are THE FEDERAL LAWYER, the informative monthly magazine, and the vast array of continuing legal education opportunities.) Also found on the website are the dues structure, ranging from \$60 a year for public sector lawyers with less than five years experience (\$75 for new private sector practitioners) to \$150 a year for private sector lawyers in practice 11 years or more (\$115 public sector); a list of some 20 practice area sections and career divisions, plus a downloadable application form.

I am always available to talk about the Federal Bar and our local chapter.

Yearly Calendar  
POINT

MEMO

## *UPCOMING EVENTS*

**September 22 and 23, 2006  
Sun Valley, Idaho**

**MULTI-STATE  
FBA PROGRAM  
including Local Chapters of Idaho,  
Montana, Utah, and Wyoming**

**Mark your calendars —  
more details to come!**

## *NOTE OF THANKS!*

*Special appreciation to  
Dave Cooper and Beau Ward  
Certified Public Accountants  
of the CPA Firm  
Cooper Norman  
for their generosity in  
preparing the Chapter's  
501(c)(6) application.*

*Thank you both very much!*

## Changes in the Code and the Court (continued from page 5)

3. Reports of just how much was spent vary, but most indicate tens of millions of dollars *yearly* came from creditor interests in the form of direct political contributions and lobbyist expense during the multi-year effort to obtain passage of the reform legislation. One public interest organization indicates finance and credit card companies contributed more than \$8.2 million in the 2004 election cycle alone and that the primary banking industry lobby contributed another \$2.2 million that same year. The Christian Science Monitor noted a total of \$29 million as coming from “financial institutions” in the same period though, of course, bankruptcy reform was not the sole issue on their legislative agenda. It is hard to reconcile all the various reported figures. Still, it is clear that the flow of money in support of the reform legislation was staggering. And it is similarly clear that contributions went to members of both parties, and BAPCPA was passed with bipartisan support.
4. The 1978 Reform Act became effective on October 1, 1979, and restructured not just the Bankruptcy Code but also the bankruptcy courts. Though amended on a serial basis, with major changes in 1984, 1986 and 1994, the basic form of the Code remained intact.
5. Differences between Senate and House versions proved difficult to overcome. At times, these differences were less of economic philosophy or bankruptcy policy than of other political concerns – including even abortion rights, which were implicated by the question of nondischargeability of judgments entered against abortion clinic protestors. In December, 2000, both houses of Congress came to an agreement on the legislation, but it was pocket vetoed by President Clinton. *See generally* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention Consumer Protection Act of 2005*, 70 AM. BANKR. L.J. 485 (2005).
6. U.S. CONST., Art. I, § 8, cl. 4. *See Cent. Virginia Cmty. Coll. v. Katz*, No. 04-885, 2006 WL 151985 (Jan. 23, 2006) (a fascinating 5-4 decision of the United States Supreme Court discussing and construing the bankruptcy clause in its historical context).
7. *See* General Order No. 199 (October 14, 2005); *see also* General Order No. 204 (January 5, 2006) (adopting a preliminary revised model chapter 13 plan).
8. This District’s Advisory Committee on Local Bankruptcy Rules has commenced the process of adapting local rules and forms to BAPCPA. Though able to respond more quickly than its national counterparts, the LBR Committee has determined it best to proceed cautiously. It clearly has much hard work left before it.

## Changes in the Code and the Court (continued)

9. Delaying implementation was an intentional decision, designed in part to learn from the experiences of the other courts. Moreover, because adoption of the national CM/ECF system would require that PACER (Public Access to Court Electronic Records) fees be charged, delay preserved for as long as possible the unlimited free Internet access to imaged bankruptcy files we had provided for years.
10. The forms, and the general order with links to the Interim Rules, are available on the court's website at [www.id.uscourts.gov](http://www.id.uscourts.gov).
11. Courts have taken many different approaches to such thorny problems, and most have yet to resolve several important issues. Actual experience in cases filed under BAPCPA will prove invaluable to courts in attempting to make the right decisions. As I've previously observed regarding BAPCPA implementation, we're in a marathon, not a sprint.
12. On the one hand, bankruptcy law is a debt collection system benefiting creditors by creating a single comprehensive venue and establishing rules of priority and distribution of limited assets among all of a debtor's creditors. On the other, it is a system of debtor relief and renewal, marked by a discharge of debt and an economic "fresh start." As one author stated in a work addressing bankruptcy in the late 1700's and early 1800's:

The fundamental dilemma of bankruptcy law has always been whether it is about death or rebirth. Is it a system for picking a debtor's bones in a more orderly fashion? Or is it an economic and social safety net that allows debtors to return to the world? The fact that it is both has never slowed debate that it should be primarily one or the other.

BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 255 (Harvard Univ. Press 2002). That these two fundamental policies are often in conflict is not surprising, and examples of line-drawing – some rough and others of finer distinction and degree – can be found throughout the Code.

13. We are, of course, not at liberty to simply rewrite ungrammatical or otherwise poorly drafted laws in the context or guise of construction, even if doing so will further an evident legislative purpose. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004).
14. Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under The "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"*, 79 AM. BANKR. L.J. 191 at 191, 193 (2005). Sommer is an Editor in Chief of *COLLIER ON BANKRUPTCY* (15th ed. rev. 2005).

## Changes in the Code and the Court (continued)

15. See, e.g., *In re Paschal*, No. 05-06133-5-ATS (Bankr. E.D.N.C. Jan. 6, 2006) (“In an Act in which head-scratching opportunities abound for both attorneys and judges alike [the subject section] stands out. It uses [an] amorphous phrase . . . a total of four times in short order and raises questions about the meaning of [other words]. The language of the statute is susceptible to conflicting interpretations, and if read literally, would apply to virtually no cases at all. In sum, it’s a puzzler.”). I noted in *In re Rodriguez*, No. 05-05694-TLM, 2005 WL 3676825, at \*4 (Bankr. D. Idaho Dec. 9, 2005), that in BAPCPA “it is hard to tell whether terminology is used with active intention or sloppy inattention.” With only a few exceptions, see, e.g., *In re Sosa*, No. 05-20097-FM, 2005 WL 3627817 (Bankr. W.D. Tex. Dec. 22, 2005), judicial comment even when pointed has generally been more restrained than that found in law review articles and similar fora (including numerous blogs), and appropriately so. Judges poorly serve their oath of office or the public by belittling the laws they construe and apply (though critique and criticism when attempting to interpret such laws, if measured, can be appropriate especially if provided for the benefit of appellate court review or possible future Congressional action).
16. Melissa B. Jacoby, *Ripple or Revolution: the Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 170-71 (2005).
17. For example, at the end of April, 2005, this court had 5,402 pending liquidation cases and 2,984 cases pending under the three reorganization chapters (11, 12 and 13) of the Code. In addition to these 8,386 cases, there also were pending 187 adversary proceedings (lawsuits on discrete issues within a bankruptcy case). Idaho was then, and remains, 10th in the country in terms of per capita bankruptcy filings.
18. Many of the notorious changes, such as the means test, credit counseling as a precondition of filing, and financial education as a precondition for discharge, apply to “individuals” and not business entities. However, BAPCPA also makes substantial changes in how businesses are treated, in both “small business” and large chapter 11 cases. That Northwest Airlines, Delta Airlines, Delphi Corp. and hundreds of smaller companies decided to file before October 17 was no coincidence.
19. Those underestimating the surge included the credit card and banking industry, the primary backer of reform. Multiple news articles have noted the billions in charge-offs, above reserves, required due to the unexpected magnitude of pre-BAPCPA filings. As examples, MBNA’s public filings show a \$764,000,000 “restructuring” charge related to BAPCPA. (MBNA’s filings with the SEC, investor reports, and press releases are accessible through [www.mbna.com](http://www.mbna.com)). J.P. Morgan Chase, the nation’s third largest bank, reported \$650,000,000 in pre-tax net loan losses and reversals of revenue related to increased bankruptcies, and \$575,000,000 in bankruptcy-related charge-offs. (Filings, investor reports and press releases accessible through

## Changes in the Code and the Court (continued)

www.jpmorganchase.com). On January 23, 2006, both TheStreet.com and Bloomberg.com reported that Bank of America, the second-largest U.S. Bank, suffered \$524,000,000 in charge-offs attributable to the surge in bankruptcy filings.

20. The court in Idaho worked around the clock on the last weekend before Monday, October 17, not just to handle the rising flood of new pre-BAPCPA cases, but also to install, test, and implement the software needed to handle cases under BAPCPA. The performance of court employees under the direction of Court Executive Cameron Burke and his managers, on this weekend and indeed throughout the period from April's enactment through October's implementation, was nothing short of exceptional. Additional credit for surviving the transition goes to the bar, most of whom were proactive in getting filings in before the last minute and understanding while coping with the fully-loaded systems they encountered; the hard-working trustees in the District who assumed the burden of administering the cases after opening; and the lawyers and staff at the U.S. Trustee, an office with critical roles in both pre- and post-BAPCPA bankruptcy administration.
21. The experience throughout the country was consistent. For example, the first two weeks of October found 27,074 cases filed in the Central District of California, the nation's largest, compared to 2,292 for the same period in 2004. (On Friday, October 14, that district set an all-time record with 7,766 petitions. It had only 225 on the same date in 2004.) Over 600,000 cases were filed nationwide in October, 2005, compared to a total of 130,679 for the same month in 2004. Total filings in the United States for the year 2005 were over 2,000,000 compared to 1,553,000 in 2004.
22. BAPCPA advocates note disincentives to filing such as limits on the existence, extent or duration of the automatic stay, increased grounds for nondischargeability, and longer periods between successive discharges. These advocates also claim that mandatory credit and budget counseling before filing is allowed, and required financial education before receiving a discharge and existing bankruptcy should eventually reduce filings.
23. Armed with data and analysis that indicate most bankruptcies are triggered by job loss, divorce, uninsured medical expense and similar factors, opponents of BAPCPA argue that nothing in the legislation addressed any of the true causes for the majority of filings but instead focused on what they believe is only a small portion of cases, perhaps 10%, where debtors have an ability to pay some or all debts but file for chapter 7 relief, or are otherwise gaming the bankruptcy system.

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