Oregon Business Lawyer

Oregon State Bar Business Law Section Newsletter • December 2019

Distressed Small Businesses Have New Bankruptcy Option

By Arnold H. Wuhrman, The Wuhrman Law Office

In August 2019, President Trump signed the Small Business Reorganization Act of 2019 (SBRA). The act, passed with bipartisan support, adds a Subchapter V (§ 1181–§ 1195) to Chapter 11 of the Bankruptcy Code. The enactment of Subchapter V, which takes effect on February 20, 2020, is being hailed as a dramatic improvement in the way in which small businesses may reorganize their financial affairs in bankruptcy.

Between 1898 and 2005, Congress enacted numerous legislative schemes designed to provide companies in distress with the ability to reorganize their affairs and remain in business, while not being allowed to inflict inordinate pain upon their creditors. (See Harner, Michelle M., "Final Report of the [American Bankruptcy Institute] Commission to Study the Reform of Chapter 11" (2014), ABI Commission Report, at 8–9.) Congress's various designs ultimately evolved into what is now known as Chapter 11 reorganization, named for its statutory foundation: Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 et seq.).

In this Issue

Articles

Business Law Section News

Despite no fewer than five major revisions to Chapter 11 (and its pre-1978 predecessor, Chapter XI) in the preceding 70+ years, by the time of the subsidence of the Great Recession in 2010, large swaths of bankruptcy commentators, practitioners, legislators, and the judiciary generally agreed that Chapter 11 was not a workable solution for many companies. "Small business enterprises" (SBEs)—companies that are not publicly traded, have relatively small capitalization (a few million dollars or less), and employ relatively small workforces (anywhere from fewer than 100 to a few thousand employees)—have especially had a hard time succeeding in Chapter 11. (ABI Commission Report, at 276, 279.) As one commentator noted, "Chapter 11 is now viewed as too slow and too costly for the majority of middle-market companies to do anything other than sell its (sic) going-concern assets [under court supervision] or to simply liquidate the company . . . [usually] almost exclusively for the sole benefit of the secured lender." (Written statement of Daniel Dooley: ASM Field Hearing Before the ABI Comm'n to Study the Reform of Chapter 11, at 2–3, Apr. 19, 2013, quoted in ABI Commission Report at 277, n. 986.)

As a practitioner of Chapter 11 for more than thirty years, I have seen firsthand the obstacles to success for small, closely held businesses trying to reorganize in Chapter 11: significant legal cost (from the mid-five figures to the low-six figures), complicated procedures, and the inherently adversarial nature of the process. It is with cautious optimism, therefore, that I am greeting the arrival into law of this new variant of Chapter 11 designed especially for SBEs (defined in the law as those with less than $2,725,625 in debts).

Continued on page 2

Arnold H. (Arnie) Wuhrman is a tax and bankruptcy attorney. He has been involved in bankruptcy work on behalf of debtors, creditors, and trustees since graduating from UCLA School of Law in 1985.

A member of the state bars of California, Illinois, Indiana, Oklahoma, and Oregon, Arnie has been involved in Chapter 11 cases all over the United States. He currently works as a solo practitioner in Lake Oswego.

He can be reached at 951.304-3720 or arnold@wuhrmanlaw.com.

So exactly what improvements does the SBRA make? Here are some highlights:

1. **Expedites the plan consideration process, and givies the debtor the sole right to file a plan.** In its current form, Chapter 11 contains certain provisions designed to encourage quick formulation and approval of a plan of reorganization by a Chapter 11 filer, but it does not require as much. Furthermore, current Chapter 11 allows, after a time, parties other than the debtor to file competing plans of reorganization. It is not unusual, therefore, for Chapter 11 cases to take many months, if not a few years, just to get to the plan proposal stage, let alone confirmation (approval) and consummation of the plan. In contrast, under the new Subchapter V, § 1188 and § 1189 mandate the holding of a status conference before the court no later than sixty days after a case's filing date, and the proposal of a plan of reorganization no later than ninety days after the case's filing date. In other words, in a Subchapter V case, the reorganizing debtor must "get on with it"—either show that a reorganization is feasible right away, or have its case promptly terminated. On the other hand, § 1189(a) allows only the debtor to propose a plan in a Subchapter V case, so the debtor may concentrate on putting its best plan forward without simultaneously having to defend against "hostile" plan proposals from other parties.

2. **Creates an alternative to onerous, and potentially manipulative, voting processes.** One of the central facets of the existing Chapter 11 framework is the requirement that the creditor body assent, in part or in full, to a plan of reorganization. Specifically, a plan of reorganization must place creditors and interest holders of the debtor into voting classes, and at least one such class must approve of a plan by affirmative vote before it may be approved by the bankruptcy court. 11 U.S.C. § 1126, § 1129(a). In practice, this often leads to attempts to "gerrymander" classes so that "friendly" creditors may be segregated from more antagonistic creditors when it comes to voting on a plan, even if there is little or no economic justification for such distinctions. Under the new § 1191 of Subchapter V, while a debtor will still be required to seek an affirmative vote by the creditor body in favor of a plan, the debtor may also obtain confirmation of the plan by the bankruptcy court even in the absence of such creditor assent. To do so, the debtor must pledge to the plan all of its available surplus income for a minimum period—three to five years—after confirmation of the plan. This is a significant change from prior law, and it potentially results in a dramatic change in the bargaining power of the parties involved in Chapter 11 SBE cases.

3. **Does away with the "disclosure statement."** In current Chapter 11 practice, a reorganizing debtor not only must come up with a plan for righting itself financially, but must also provide a written disclosure statement about its plan that provides "information of a kind, and in sufficient detail…that would enable…a hypothetical investor of the relevant class to make an informed judgment about the plan.…" 11 U.S.C. § 1125. Furthermore, votes in favor of a plan typically may not be solicited until the disclosure statement's sufficiency is first approved by the bankruptcy court—a requirement that often takes a number of attempts to achieve (current law does provide for an alternative method in the case of SBEs—having the bankruptcy court "conditionally approve" the disclosure statement for early circulation to the creditor body—but this procedure still leaves open the risk that a disclosure statement will be disapproved after the fact, negating much of the work done by the reorganizing debtor up to that time). Under the new § 1190 of Subchapter V, the separate disclosure statement is eliminated in favor of a brief history of the business operations of the debtor, a liquidation analysis, and projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization being included in the plan of reorganization itself. This conflation of the process should significantly reduce costly and protracted litigation in Subchapter V cases.

Continued on page 3

 Continued from page 2

The changes made by the Small Business Reorganization Act are designed to make bankruptcy reorganization truly useful and practically available to Small Business Enterprises.

4. **Abrogates the "absolute priority rule."** For the past eighty years, America's insolvency laws have included a prohibition—initially imposed by the Supreme Court in *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U.S. 106, 60 S.Ct. 1, 84 L.Ed. 110 (1939), and later legislated in 11 U.S.C. § 1129(b)(2)(B)—against equity holders of a reorganizing company retaining their interests in the reorganized company post-reorganization unless: (a) all unsecured creditor classes affirmatively agree to such, or (b) all unsecured creditors are paid the full amount of their claims before equity holders retain any interest in the reorganized enterprise. In practice, this so-called "absolute priority rule" has hindered many a distressed company's reorganization, because those who have the most incentive to reorganize the business—its current equity holders—are unable or unwilling to undertake the daunting task of making sure that all creditors are paid in full, no matter how much time and effort must be expended to make that happen (if it is even feasible at all). Subchapter V eliminates this high hurdle and replaces it with more manageable standards—i.e., (a) the debtor's plan must provide for payment to all creditors of at least what they would get were the reorganizing company to be liquidated, and (b) the debtor must devote all of its surplus income to the plan for the required three-to-five-year period after confirmation of the plan. See, § 1129(a)(7), § 1181(a) and § 1191(b).

5. **Employs an experienced panel of Subchapter V trustees.** Existing Chapter 11 practice has as one of its core principles that, in the main, the bankruptcy debtor should steer its own reorganization, aided by its own counsel, and occasionally a committee of creditors appointed by the government to serve as a board of advisors to assist it in the process. As is noted in the ABI Commission Report, however, it is not unusual to find smaller Chapter 11 cases filed by "companies that have less experienced management teams, relatively smaller pools of assets and liabilities, relatively smaller revenue streams, challenges with understanding the nature of their financial issues or the potential tools available to help them address those issues, and vested equity owners who likely either founded the company or help manage the company." *ABI Commission Report*, at 285. In other words, merely continuing the management status quo in an SBE case may not be sufficient to address the enterprise's challenges. Subchapter V, therefore, calls for every case to involve a Subchapter V trustee—selected and appointed by the Justice Department, with both understanding of the bankruptcy process and demonstrated business skill—to monitor and guide the Subchapter V filer through the process, and to report to the bankruptcy court on the success of the reorganizing debtor's efforts. 11 U.S.C. § 1183. Much as is now done by standing trustees in Chapter 12 and 13 cases (special types of bankruptcy cases that allow for the adjustment of debts of family farmers, fishermen, and individual consumers), a Subchapter V trustee will not steer the entire process, but he or she will make sure that the reorganizing debtor meets minimum financial requirements and moves toward emerging from the protection of the bankruptcy system as quickly and feasibly as possible.

Subchapter V is a dramatic departure from what is now "normal" Chapter 11 practice. The changes made by the SBRA are designed to make bankruptcy reorganization truly useful and practically available to SBEs. While there is still much to be worked out in the day-to-day practice of Subchapter V, its introduction invites optimism for easier and more successful rehabilitation of distressed small businesses than has been available until now. ◆

An Introduction to Receiverships

By Stephanie Davidson and Colin Andries, Black Helterline LLP

Stephanie Davidson is an associate in the business group at Black Helterline LLP in Portland. Stephanie advises clients on business transactions, mergers and acquisitions, corporate finance, and cannabis industry regulation.

Colin Andries is of counsel at Black Helterline LLP in Portland, where he focuses on general civil litigation. A seasoned trial attorney helping clients succeed inside and outside the courtroom, he specializes in landlord/tenant law and post-judgment collections, but also advises clients on real estate and land use issues.

Although we all hope that our clients will have happy and harmonious business relationships, every business attorney must be prepared to assist clients through financial difficulty, management disputes, or other disruptions. Receiverships can be a useful tool for business attorneys who wind up counseling distressed businesses.

What is a Receivership?

A receivership is an equitable remedy that can be prescribed by a court, and is available in both federal and state matters. A receiver is a neutral third party appointed by a court to manage and preserve certain property. A receiver can be appointed in a variety of arenas, but in the business context, receiverships are used in three main areas:

(1) to safeguard a business's assets for creditors, especially if they have lost faith in the business's management;

(2) to manage and liquidate an insolvent business's assets; or

(3) to "keep the ship afloat" during a breakdown in relations among a business's owners (e.g., while they litigate their differences).

Receiverships are distinguishable from bankruptcy relief. While a receivership can be a feature of some bankruptcy proceedings, these separate forms of relief do not always coexist, and receiverships can occur independent of any bankruptcy proceeding. These two forms of relief are governed by different statutes, and have different characteristics. (These differences could be the subject of a standalone article and are not discussed here.)

A Brief History of Receiverships Under Oregon State Law

Receiverships are now governed by the Oregon Receivership Code, which is codified as ORS Chapter 37 (the Code). The Code is the result of a coordinated multi-year effort by several members of Oregon's legal community to streamline and clarify the rules that apply to receiverships in Oregon. The Oregon legislature enacted the Code in 2017, and it became effective on January 1, 2018. Prior to that date, receiverships in Oregon were governed by the Oregon Rules of Civil Procedure and a confusing patchwork of statutes. Between January 1, 2018, when the Code became effective, and early September 2019, Oregon circuit courts created fewer than twenty receiverships. Because the Code is so new, Oregon appellate courts have not yet opined on any part of the Code.

Benefits of a Receivership

Receiverships offer several benefits to business owners. First, minority owners can expect more transparency and greater access to information about the receivership estate. ORS 37.200 requires receivers to file monthly reports with the appointing court. Further, all business owners will receive greater assurance that third parties (i.e., the court and the receiver) will safeguard the receivership estate and preserve the status quo. If the management of the business is not effectively running it, a skilled receiver might actually be able to make the business more profitable.

These characteristics also benefit creditors. Generally speaking, from a creditor's point of view, the appointment of a receiver will increase the likelihood that the business will be able to repay its debts.

There are additional benefits for marijuana and hemp industry businesses. Due to marijuana's classification as a controlled substance under the federal Controlled Substances Act (CSA)—codified at 21 USC § 801–§ 971—bankruptcy relief is not available to marijuana businesses. In one case originating in Colorado, a bankruptcy court even denied bankruptcy relief to a family of hydroponics equipment companies based on its commercial relationships with businesses that cultivate marijuana. See Order, *In re Way to Grow, Inc.*, 597 BR 111 (Bankr D Co 2018) (No. 379). It is not yet clear whether bankruptcy relief is available to hemp industry businesses. Congress did recently remove hemp from the CSA's definitions of "marihuana" [sic] and tetrahydrocannabinol (THC) (i.e., Congress made clear that hemp and hemp derivatives are not controlled substances under the CSA). 2018 Farm Bill, Pub L No 115-334, § 12619, 132 Stat 4490, 5018 (2018); see also *id*. § 10113 at 4908 (defining *hemp*). Regardless, we have yet to see a hemp business successfully use federal bankruptcy courts to obtain bankruptcy relief.

Continued on page 5

A receivership can be very expensive, and may not be a feasible option for an insolvent business.

Similarly, some collection remedies that involve local law enforcement may be unavailable to creditors of marijuana and hemp businesses. County sheriff offices may be reluctant or unwilling to take possession of a debtor's inventory or cash, due to marijuana's classification as a controlled substance under the CSA. These offices may have similar policies with respect to hemp, even though hemp is no longer a controlled substance under the CSA. These policy decisions will vary by law-enforcement agency. Therefore, a creditor seeking to collect against assets that include marijuana or hemp may not be able to rely on assistance from law enforcement in his or her collection efforts. In contrast, a receiver is an individual or party that can be authorized by the Oregon Liquor Control Commission (OLCC) to operate an OLCC-licensed recreational marijuana business (i.e., possess marijuana or its cash proceeds). See OAR 845-025-1260.

For these reasons, a receivership may be a useful tool for creditors who are invested in marijuana or hemp-industry businesses. Nevertheless, it is interesting to note that only one of the receiverships initiated in Oregon since the Code became effective involves a marijuana business.

Drawbacks of a Receivership

Receiverships are not a panacea for either business owners or creditors. If a court appoints a receiver to oversee a business, its owners will cede control of the business to the receiver. The extent of the powers and duties delegated to a receiver will vary. They could be limited (e.g., the power to safeguard a specific asset) or broad (e.g., the power to take any and all action necessary to manage and control the business). A passive investor may be comfortable transferring control from an errant manager to a court-appointed receiver, whereas a hands-on business owner may view this arrangement as disadvantageous.

In exchange for the receiver's services, the company and its owners are required to pay the receiver's fees. Generally speaking, these fees will depend on the skills and qualifications of the selected receiver, the simplicity or complexity of the case, and the number of hours the receiver must invest in his or her receivership duties. It may also be necessary to pay the fees of professionals who are engaged to assist the receiver (e.g., lawyers, forensic accountants, and managers). The owners of the business may also have their own legal counsel. A receivership can be very expensive, and may not be a feasible option for an insolvent firm.

A couple of active Oregon receivership matters are illustrative. In one complex receivership, in only seven months the receiver and its legal counsel together accrued more than $639,000 in fees and expenses. See *Rowell v. Underwood* (17CV39016: Multnomah County Circuit Court, filed Sept. 11, 2017). This receiver, an entity, is working to turn an unprofitable agricultural business profitable. It has a good track record of successfully operating agricultural businesses as receiver, and its staff appears to be skilled in management, finance, accounting, and marketing. This receiver billed its staff time at $150 to $350 per hour. In contrast, in another relatively simple receivership matter, the court authorized the parties to compensate the receiver for his time at a rate of $200 per hour. See *Martin v. Gassaway* (18CV31866: Washington County Circuit Court, filed July 23, 2018). This receivership estate consisted of a sole Greater Swiss Mountain Dog named Cicely, and the receiver's duties were limited to caring for and breeding the subject animal.

Creditors must recognize that their two-party negotiation with the debtor becomes a lot more complex if a court appoints a receiver. A receivership is not a route to immediate repayment of debt. A receiver is not obligated to pursue a resolution for any one creditor on any particular timeline. The Code actually provides certain timelines that will apply when a receivership is initiated: pursuant to ORS 37.330, a receiver must notify creditors of the receiver's appointment, which takes a minimum of two weeks; and, pursuant to ORS 37.350, certain creditors are provided with up to 180 days to submit claims. The receiver will not distribute the assets of the receivership during this time.

After this point, the receiver may need to obtain the appointing court's prior approval to make a decision or pursue a particular outcome (e.g., the sale of an asset). This process takes additional time. If there are multiple creditors, it may take longer to navigate any disputes that arise.

Continued on page 6

Before a receivership is seriously considered, the parties should assess the benefits and drawbacks of this particular form of relief.

Creditors should also be aware that ORS 37.370 gives certain creditor claims priority over other creditor claims. Unsecured creditors are very low on this list—senior only to claims of the owners of the property that is subject to the receivership estate.

As Coos Bay attorney Steve Wilgers wrote in an affidavit submitted to the court in *Bussmann v. Bussmann Brothers* (18CV18224: Coos County Circuit Court, filed May 7, 2018), the pending matter was "the most time consuming, complex blend of tax, business, and unyielding parties that [he had] ever been involved in." Involved parties should plan for a receivership to take a minimum of six months to initiate and set up before the appointed receiver can take any meaningful action. After this point, involved parties should not expect immediate resolution of their issues.

Initiating a Receivership

If you represent a distressed business, first consider proactive communication with your client's creditors. In many cases, creditors can be flexible and repayment terms can be negotiated. However, a receivership can be a tool that may provide your client with the protection or relief needed. Before a receivership is seriously considered, the parties should assess the benefits and drawbacks of this particular form of relief, including the cost of the receivership, and whether that cost is justified or can be reasonably borne by the receivership estate.

If you determine that a receivership is worth pursuing, first review the Code. The Code contains detailed provisions regarding the initiation and termination of receivership, and everything that happens to the receivership estate while it is subject to the receivership.

A party who seeks the appointment of a receiver can request such relief by filing a motion with the court, if that party is already involved in an active litigation matter. Alternatively, if the party is not involved in an active litigation matter, he or she can initiate litigation by filing a complaint in a court of competent jurisdiction and request the appointment of a receiver in its prayer for relief. A creditor may use these processes to petition a court to initiate a receivership, or a court may initiate a receivership sua sponte.

When a court does issue an order creating a receivership (regardless of how the court was moved to do so), the scope of the receivership, the scope of the receiver's duties and powers, and the goal of the receivership will be governed by the Code and defined by court order: the receiver serves subject to the court's supervision and authority.

The parties should carefully consider who will be appointed as receiver. ORS 37.070 contains essentially no minimum qualifications and only three disqualifications. Any person may serve as a receiver, except for:

(1) an entity that is not authorized to conduct business in Oregon;

(2) a person who has been convicted of a crime involving moral turpitude; and

(3) unless expressly authorized by statute, a county sheriff. ORS 37.070.

The parties should carefully consider the qualities, skill, and experience they desire in a receiver, considering their circumstances and the desired outcome of the receivership. Ultimately, the court will select and appoint the receiver. However, affected parties do have the opportunity to nominate a receiver by motion. In the motion, the party would set out the nominated receiver's qualifications, and request that the court appoint that person or entity to be the receiver.

Conclusion

Although receiverships were available prior to 2018, the enactment and codification of the Code has made the receivership remedy more accessible to debtors and creditors alike. While receiverships can be costly and time-consuming, they can be an effective tool for the right parties in the right circumstances. As a result, business lawyers should be aware of receiverships as an option, and be able to explain benefits and drawbacks to their clients. ◆

Oregon's New Corporate Activity Tax

By Valerie Sasaki, Samuels Yoelin Kantor LLP

Valerie Sasaki is a partner at Samuels Yoelin Kantor LLP in Portland. She specializes in jurisdictional tax consulting, working closely with Fortune 50 companies involved in audits before the Oregon or Washington Departments of Revenue. She also works with business owners on tax, business, and estate planning issues in Oregon and Southwest Washington.

Valerie is a graduate of the University of Oregon School of Law, and earned a Master of Taxation Laws from the University of Washington School of Law.

She is the current Chair of the Business Law Section.

For several years, there has been a national state-tax trend away from taxes based on net income and toward gross-receipts taxes. In addition to perceived simplicity and tax-base stability, states have embraced gross-receipts taxes because they are not subject to the nexus safe harbor of Public Law 86-272, which prohibits a state from imposing a tax based on net income when a taxpayer's only activity in the jurisdiction is the solicitation of sales of tangible personal property. Although Washington State's Business and Occupation Tax was adopted in 1933, it was Ohio's 2005 adoption of that state's Commercial Activity Tax that started the recent trend. In 2008, Texas followed suit with the Texas Tax on Taxable Margin. Going into the 2019 legislative session, only Delaware, Ohio, Texas, Nevada, and Washington had statewide gross-receipts taxes. The 2019 Oregon legislature passed House Bill 3427, which Governor Brown signed into law on May 16, 2019. This bill created Oregon's Corporate Activity Tax (CAT).

The CAT is in effect for all periods starting on or after January 1, 2020. The first return will be due April 15, 2021. However, estimated payments must be made on or before the last day of January, April, July, and October for the prior calendar quarter. In year one, there will be no penalties or interest for under-reporting if at least 80% of the balance due is paid to the Department of Revenue.

The math for how we calculate the tax is pretty simple:

- First, calculate gross receipts sourced to Oregon. For example, two million dollars.
- Second, calculate the total allowable deduction. The deduction is 35% of the greater of cost inputs or allowable labor costs. Calculate Oregon apportionment of the deduction. Then confirm the deduction does not exceed 95% of taxpayer's commercial activity in Oregon. If you have one million dollars in expenses, this would be $350,000.
- Third, calculate the CAT Tax Base. (First step minus second step) This results in a person's total commercial activity. Subtract the exemption of $1,000,000 from the total commercial activity. $2,000,000 – 350,000 is $1,650,000. Subtracting the exemption would be $650,000.
- Finally, calculate tax at $250 + 0.57% (.0057) of the CAT tax base. In this example, $3,955 ($250 plus $3,705).

For purposes of the CAT, the definitions employed in the bill are critical. Person, for example, is broadly defined to include corporations, individuals, joint ventures, LLCs (including single-member LLCs), partnerships, and trusts. Excluded from the definition of person subject to tax is any person with less than $750,000 in commercial activity unless he or she is part of a larger "unitary group." A discussion of the case law and various factors that go into a unitary group analysis are beyond the scope of this article. Suffice to say that most unitary groups are composed of entities that are functionally and operationally integrated with the common goal of providing goods or services. Early conversations with the Department of Revenue in focus groups with affected taxpayers and professionals indicate that the metrics used to evaluate a unitary group for corporate franchise (income) tax purposes will be used to evaluate whether a group of taxpayers are unitary for CAT purposes. Bear in mind, however, that the definition of person is broader than corporation, so taxpayers used to filing non-corporate, unitary entities on a separate basis may be surprised when their tax attributes are combined into a single unitary group.

Certain taxpayers will not be subject to the tax. These include public charities, some cooperatives, governmental entities, certain hospitals and healthcare facilities, and any person with commercial activity less than $1 million (other than a person in a unitary group with greater unitary income).

Continued on page 8

Corporate Activity Tax *Continued from page 7*

The nexus thresholds were intentionally drawn to cast a wide net. Bearing in mind that the constitutional standard for taxability is that a person has substantial nexus with the jurisdiction, the CAT drafts have stated that a person will have substantial nexus if he or she:

(1) uses capital in the state;

(2) holds a certificate of existence or authorization to do business in the state;

(3) has "bright line" nexus; or

(4) has nexus such that the state can require them to remit the CAT (i.e., everything that is constitutionally permissible).

The "bright line" nexus thresholds are very low. A person will be deemed to have taxable nexus with Oregon for purposes of the CAT if he or she has property in Oregon with an original cost greater than $50,000, payroll in Oregon of greater than $50,000, the commercial activity in Oregon is greater than $750,000, if 25% of the property, payroll, or commercial activity occurs in Oregon; or if the person is a resident of Oregon or is domiciled in Oregon for corporate, commercial, or other business purposes. The drafters have explicitly said that PL86-272 does not apply, which gives us a good idea about why they drafted things the way they did. However, the legislative intent is not constitutionally dispositive, so we may see litigation in this area. There is no exemption for foreign sellers that lack a U.S. permanent establishment. (In general, U.S. income tax treaties define a U.S. permanent establishment to include a fixed place of business in the United States through which the foreign enterprise carries on its business.) This may be an issue in situations that involve royalties for use of intangible assets in Oregon.

The definitional problems will be writ large when we advise clients on estimated tax payments. The average non-Oregon taxpayer may not reasonably expect to have tax nexus with Oregon. If a taxpayer has not historically had nexus with Oregon (possibly because he or she has been sitting in the PL86-272 safe harbor), the person may not realize that there is a tax nexus for CAT purposes. Therefore, the taxpayer may miss the 80% estimated payment safe harbor because he or she did not realize that the Oregon tax now applies.

This is a relatively unique problem, because almost all the other states that have adopted a gross receipts tax (with the sole exception of Delaware) have a sales tax, which was not historically PL86-272 protected. Combined with the analysis that companies have been doing following the Supreme Court decision in *South Dakota v. Wayfair, Inc.*, my expectation is that taxpayers are going to be more prepared to expect to have gross receipts nexus with states that impose a sales tax.

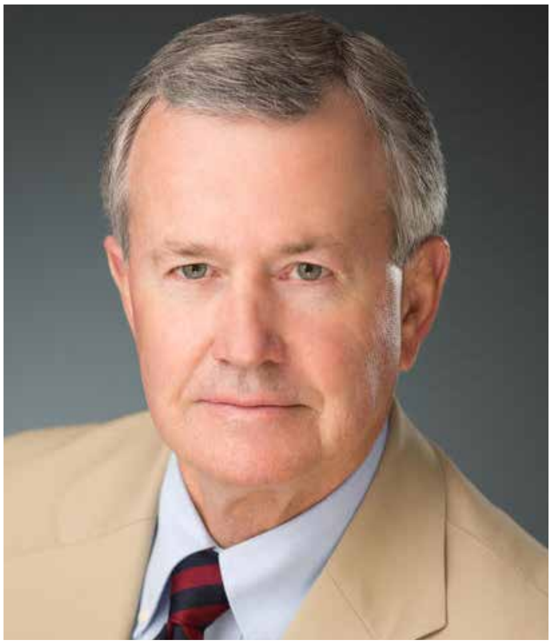
In addition to a broad definition of nexus, the definition of what constitutes commercial activity subject to tax is very broad and will include more than a taxpayer's sales. Taxpayers who are accustomed to the net-income-tax model are used to calculating their sales for apportionment purposes. However, commercial activity for purposes of the CAT is the total amount realized by a person, arising from transactions and activity in the regular course of a person's trade or business, without deduction for expenses incurred by the trade or business. The legislature attempted to mitigate the impact of this broad definition on lower-income consumers by passing House Bill 2164, which excludes sale of groceries and other items from the definition of commercial activity. However, the legislature specifically excluded cannabinoid edibles and marijuana seeds from the definition of groceries. Other transactions that were excluded from the definition of commercial activity included certain transactions with or for agricultural cooperatives; intercompany transactions between members of a unitary group; interest and dividend income (unless received by a financial institution); sales of Internal Revenue Code (IRC) Sections 1221 and 1231 assets; and sales to Oregon wholesalers to the extent the wholesalers certify the property will be sold outside Oregon. The last exclusion bears mentioning because it specifically mirrors standard provisions involved in a retail sales tax. I have written elsewhere about Oregon's torturous path towards a retail sales and use tax regime, and I do wonder whether the implementation of the CAT will build the infrastructure necessary for Oregon to implement that tax type in the future.

The question of whether a particular receipt is sourced to Oregon appears to be interpreted under general historic sourcing rules, and throwback rules apply (i.e., sourcing a sale to Oregon when it wouldn't be taxed elsewhere to avoid "nowhere" sales).

The Department of Revenue has been tasked with the job of implementing this new tax system. To that end, it has had a series of listening sessions around the state in person and by telephone. They have set up a page on their website that contains answers to certain frequently asked questions. Those answers have been refined as they have heard stakeholder concerns in the listening sessions. The website also contains draft regulations.

There are still a lot of questions that have not been answered and situations that remain to be addressed. Stay tuned and watch this newsletter for updates. ◆

Ron Greenman receives 2019 James B. Castles Leadership Award



Ronald Greenman

Ronald Greenman, a partner at Tonkon Torp LLP, is the 2019 recipient of the James B. Castles Leadership Award. The award was established in 1998 to recognize an Oregon lawyer for excellence in the practice of business law, professionalism among fellow business lawyers, and outstanding community leadership. It is the highest recognition the Business Law Section can bestow on one of its members.

Over the course of 45 years, Ron has not only provided excellent legal service, but he has also served as an example of what it means to be committed to our community.

Ron joined the Oregon State Bar in 1978 when he began working at Tonkon Torp as one of its earliest attorneys. A highly respected business lawyer, Ron has built a practice that emphasizes securities, finance, corporate acquisitions and leveraged buyouts, and counseling companies through the stages of growth. His business clients have included national and international corporations, as well as small and large family-owned operations.

Ron is a founding and current board member of the Lawyers' Campaign for Equal Justice (CEJ), which was established in 1991 by Oregon attorneys to improve the well-being of all Oregonians by supporting equal access to civil legal services. He has served in several roles to support CEJ, including as treasurer and as chair of its large-firm committee.

Ron has also been an active speaker at OSB CLE functions focused on corporate and finance matters.

For four years, Ron served on the board of directors for the Oregon Law Foundation, supporting its mission to help fund organizations that provide legal services to people of lesser means, promote diversity in the legal profession, and educate the public about the law.

To help cultivate future generations of business law professionals, Ron joined the Business Law Advisory Council of the University of Oregon School of Law, and has established an endowment that will support business law curriculum at the law school.

In addition to providing leadership and guidance to the business law profession, Ron has provided service to our community at large. He served on the board of trustees for Pacific University for 15 years, and was a long-standing board member for the Tri-County Youth Services Consortium, an umbrella organization focused on providing services to at-risk youth. Ron has also served on the finance committees for both the Arlington Club and Waverley Country Club.

From the beginning of his career, Ron has practiced law with the highest level of integrity and made meaningful contributions to the legal profession and the Oregon community. ◆

Oregon State Bar Business Law Section

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business-law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.

Articles in this newsletter are for informational purposes only, and not for the purpose of providing legal advice. The opinions expressed in this newsletter are the opinions of the individual authors and may not reflect the opinions of the Oregon State Bar Business Law Section or any attorney other than the author Comments can be sent to the editor at carole424@aol.com.

Law-student Scholarship Recipients

We are happy to announce that the Business Law Section has awarded $1,000 scholarships to three exceptional students, who were chosen from a pool of 16 qualified applicants.

Rachel Timmins: 2L at Lewis & Clark

Rachel is the president of the Business Law Society at Lewis and Clark, has completed legal externships at Adidas and Immix Law Group, has excellent law school grades (top 10%), and is a peer mentor for incoming law students.

She hopes to practice business law in Oregon after graduation.

Taylor Gersch: 2L at University of Oregon

Taylor, a first-generation college graduate, received her B.A. and M.B.A. in business administration with excellent grades (4.0 in both cases) while serving as the co-captain of the women's soccer team at Saint Martin's University in Lacey, Washington. She has also volunteered extensively.

After graduating from law school, Taylor seeks to practice business law in the context of small business, because she grew up assisting her family's small businesses.

Alexandra Hutchinson: 3L at Willamette University

Alexandra has completed a legal externship at the Willamette Business Law Clinic, is president of Willamette's Business Law Society, is a fellow at the Willamette Business Lawyering Institute, and will receive a business-law certificate upon graduation.

Alexandra has received strong grades in law school and hopes to practice at a corporate law firm before becoming an in-house lawyer for a medium-sized Portland company.

Thanks to New Business Lawyer Subcommittee members Joe Cerne at Lane Powell (who incidentally received the section's scholarship in 2017) and Cody Gregg at Stoel Rives for their help in reviewing the applications. ◆

Annual Meeting of the Section

The annual meeting of the Business Law Section was held on November 8, 2019, at the Multnomah Athletic Club in Portland. The following Section members were elected to Executive Committee positions.

Officers (terms ending December 31, 2020)
Chair: Genevieve AuYeung Kiley
Chair-Elect: Jeffrey S. Tarr
Past Chair: Valerie H. Sasaki
Secretary: Anne Arathoon
Treasurer: Kara Ellis Tatman

Members at Large (terms ending December 31, 2021)
William J. Goodling
Brian Jolly (new to the committee)
Matt Larson (new to the committee)
Emily M. Maass
Jennifer Nicholls
David G. Post

Members previously elected to the Executive Committee and continuing through December 31, 2020:
James K. Hein
Benjamin M. Kearney
Charmin B. Shiely
Tyler John Volm

New Executive Committee members

Brian Jolly
Farleigh Wada Witt, Portland

Matt Larson
Hathaway Larson, Portland

Scholarship recipients

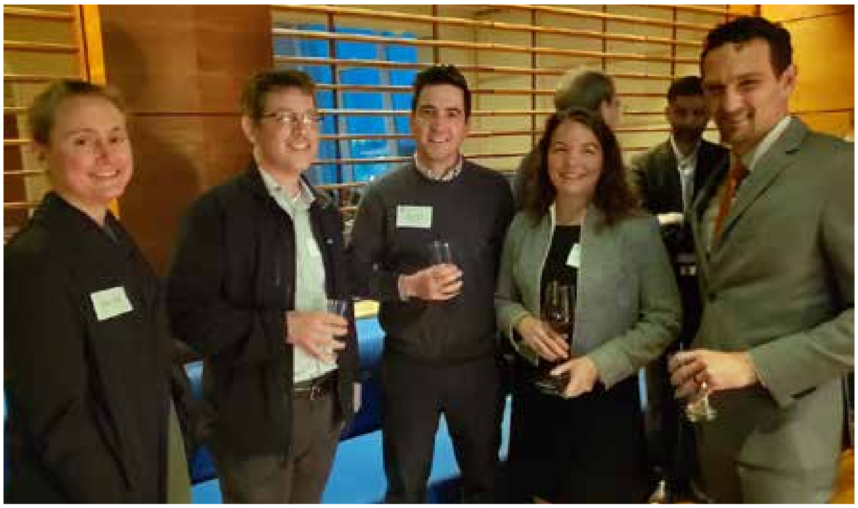
WIll Goodling, Chair of the New Business Lawyer Subcommittee, with two of the three scholarship winners: Rachel Timmins (L) and Taylor Gersch (R)

James B. Castles Leadership Award

Dave Ludwig congratulates Ron Greenman, recipient of the award given in recognition of his service to the law profession and the community.

Business Lawyers Join CPAs for Social Event

The Business Law Section and Oregon Society of Certified Public Accountants co-hosted their annual social on November 13, 2019, and welcomed more than 45 attendees to Departure Lounge for an evening of socializing and networking. This year's event was boosted by participation of the young professionals on each side.



Photos: Tonna Hollis, Director of Member Services & Professional Development,Oregon Society of CPAs

Job Postings

Duffy Kekel LLP, a 13-attorney Portland boutique law firm focused on estate planning and administration, business, tax, and real estate advice seeks a qualified candidate to fill an associate position. The ideal candidate will have the following qualifications:

- Minimum 7 years of experience working with business entities, including business transactions, real estate leases and acquisitions, and general business matters
- Exceptional academic credentials
- Strong written and interpersonal communication skills
- Oregon and Washington bar admission

The ideal candidate will also have a desire to actively market and develop his or her practice, in addition to supporting the firm's existing client base.

We offer an exceptional work environment and an outstanding community and professional reputation. We value our firm culture, which is collaborative, friendly, and respectful.

Qualified candidates should submit cover letter and resume to Desiree Shestakofsky, dshestakofsky@duffykekel.com.

Chenoweth Law Group wants to add an experienced litigation attorney to our team. This full-time position will work with our existing clients to provide litigation services related to business, real estate, and trust and estate disputes. Candidates should be licensed to practice in Oregon (Washington a plus); have at least five years of litigation experience, including business, real estate, and trust/estate disputes; excellent skills in client relations, advocacy, research, writing, and legal analysis; ability to work independently and within a team environment; and a sense of humor. This is a unique opportunity for the right candidate to join a growing, mid-size downtown Portland law firm with a fun, team-oriented culture that offers competitive salary and benefits. For consideration, please send a resume and cover letter stating why this position is for you to careers@chenowethlaw.com.

Campaign for Equal Justice
29th Annual Awards Luncheon
Thursday, February 20, 2020/12:00–1:15 p.m.
Sentinel Hotel, 614 SW 11th Ave., Portland
More information

Rose Law Firm, P.C. is proud to offer big-firm value with small-firm service. Our team of 7+ attorneys focuses on providing holistic business ownership transitions solutions for the owners of closely-held middle market businesses, in addition to representing clients in a range of complex corporate, financing, and securities matters—both litigation and transactions.

We are seeking an attorney with 7+ years of experience in any or all the following areas:

- Corporate
- Mergers & Acquisitions
- Corporate Finance
- Tax
- Equity-based compensation
- Real Estate

The ideal candidate would have experience in Delaware corporate law, convertible promissory notes, mezzanine debt, pre-emptive rights, reverse triangular mergers, waterfall provisions in LLC Agreements, complex change of control provisions, fully-diluted conversions, cumulative voting, investor rights agreements, call options, drag-along/tag-along, lock-up periods, registration rights agreements, etc.. We are seeking an attorney who can manage a file from start to finish, including communicating with the client regarding the scope of services, negotiating with opposing parties, preparing deal documents, managing other lawyers and staff, and closing the transaction.

We offer competitive wages and benefits—health, dental, vision, and life insurance, 401(k)—and can be flexible with billable hours goals and schedule. To apply, send cover letter, resume and references to Laura Worley, lworley@rose-law.com. For more details, please review https://rose-law.com/careers.com.

Buckley Law, a full-service law firm in Lake Oswego, is looking to add a shareholder to the Business & Estate Planning group. Our talented team provides excellent client service through leveraging knowledge and experience. If you are dedicated to client service and delivering superior legal services, we would like to talk with you.

The ideal attorney will have 8+ years of experience in estate planning and tax. LL.M. is preferred, but not required.

For consideration, please send a cover email and C.V. to resumes@buckley-law.com.

CLE Programs

Federal Legislative Update
Friday, December 27, 2019/12:00–1:15 p.m.
Red Star Tavern, 503 SW Alder St., Portland
Click to register

Creating an Innovation Program for Dummies
Wednesday, January 8, 2020/12:00–1:00 p.m.
WeWork Pioneer Place; 700 SW Fifth Ave., Fourth Floor, Portland
Click to register

International Tax Update
Wednesday, January 22, 2020/12:00–1:15 p.m.
Red Star Tavern, 503 SW Alder St., Portland
Click to register