Ipso Jure

Volume 28, Number 3
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A publication of the Geauga County Bar Association
Edited by Paul A. Newman, Esq.
Susan Proboski, Assistant Editor/Designer

First Friday CLE Programs

All programs will be at the Chardon City Council Chambers and be catered by Beans.

7/11 - James Caywood -Update on Mortgage Practices

8/1 - Jonathan Blakely - Representing the Financially Distressed Business Owner

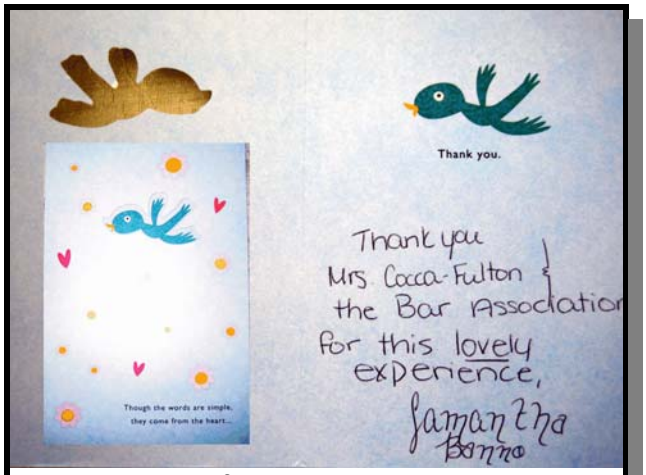
9/5 - Jeffrey Fanger - TBA

10/3 - Magistrate Dan Bond - Municipal Law Update

11/7 - Dennis Ibold - TBA

12/5 - Procrastinator's Seminar

Reservation forms will be sent soon. All programs will start at 8:30 a.m. and run 2 hours for 2.0 credits except for the 12/5 program, which will go until 11:00 a.m. for 2.5 credits, pending Ohio Supreme Court Approval. Cost will be $40 each or $200 for the entire series.



Thank you note from our First Place Poster Contest Winner

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Note from the Social committee

Mark your calendars for these events:

Secretaries Luncheon: July 23: Promising to spoil & pamper your assistant

Annual Bar Association Dinner: October 18: Guaranteed to be fun, entertaining, and relaxing

Christmas Party: December 11: Chardon VFW 4:30-7:00.

President's Column

Robert E. Zulandt, Esq.

A Book Review and More

Recently there has been controversy in the news of disputes between the Geauga County Commissioners and the Chardon Municipal Court over funding. While, after extensive discussion, your Executive Committee has determined that the Bar Association will not comment on this matter individual members are free to comment if they desire.

I call your attention to the Ohio Rules of Professional Conduct. The Preamble to those Rules, in Section 5, states

Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjustified criticism. Although a lawyer, as a citizen, has a right to criticize such officials, the lawyer should do so with restraint and avoid intemperate statements that tend to lessen public confidence in the legal system. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

While we, as attorneys, get upset at times with a judge's decision or treatment of ourselves or our clients we should be cognizant of the weight our opinions hold with the clients and the public about our court system. If we express a lack of faith in the judge or system, who else will appreciate its necessity or come to its support? We need to guard our comments and be advocates not just of, but for, our judges and judicial system; otherwise we destroy our own house.

The reason that the Bar Association has not spoken out regarding the current dispute between the Commissioners and Chardon Municipal Court is primarily because it is about money and political in nature. However, intemperate comments by politicians should not be taken lightly, particularly if the public's confidence in the Court is undermined.

We also have a responsibility to our judicial officers to assist them in this area so that integrity and independence of the office is preserved. If it is perceived that a judge is not being patient, dignified or courteous to litigants, witnesses, jurors, lawyers or others, is it not our responsibility to assist in correcting that situation? It is easy to gripe about things, but we have a larger responsibility.

Members of the Prosecutor's Office enjoying the Maple Festival

The Geauga Bar Association has a Courts Committee which maintains a liaison with the various courts and can discretely take your concerns to the judge. We have also instituted an evaluation process that has been initiated by the State Bar Association and adopted by this Bar Association to evaluate our judges' performance in various categories. I am sad to say when we first sent out evaluations last year they didn't produce enough response to be worthwhile to take before the individual judges and/or magistrates. Judges are insulated from criticism to a large extent and word doesn't get to them as to what they may need to change or improve upon. (Who judges the judges?) It is our responsibility to involve ourselves

in the evaluation process and not ignore it when asked to assist. Your comments are confidential and if you are afraid of reprisals your fears are false. Quit complaining and do something. It is your duty.

On another note, your Bar Association has framed a very nice bicentennial map of Geauga County for Judge Burt's Court. He sent a very nice thank you and asked bar members to contact Joann Monaco at 279-2018 if they have any artwork to donate or lend for display in the courthouse.

11TH District Court of Appeals Decisions

Linda Ireland, Court Paralegal

On September 21, 2007, in Bacon v. Fowlers Mill Inn, 11th Dist. No. 2007-G-2753, 2007-Ohio-4958, the appellant arrived at the appellee's restaurant on a cold, wintery evening. As he drove into the parking lot, he observed it was covered in ice and placed his truck into four-wheel drive. He proceeded to park his vehicle; however, the manager

Paul Newman, David Jevnikar, and Cindy DeMarco all provided photographs for this issue

of the establishment told appellant not to park in his selected spot. The manager expressed a concern that, if appellant parked there (on a slope) he could slide into another driver (or vice versa). The manager directed the appellant to a different parking place. After parking, the appellant exited his vehicle and commented to himself that the parking lot was slippery. Notwithstanding his appraisal, he decided to "shuffle" across the lot. After several steps, the appellant slipped and fell. The appellant filed a negligence action. The trial court eventually awarded summary judgment in the appellee's favor. On appeal,

Caterina Cocca-Fulton & Debbie Hofstetter with Poster Contest Winners Samantha Banno & Harold Norsic

the Eleventh Appellate District held the trial court did not err in its determination that the ice on the parking lot was a natural accumulation which was open and obvious. The court also overruled the appellant's challenge to the trial court's decision to deny his claim for punitive damages. The reviewing court ruled that because the record did not support the appellant's underlying negligence claim (and failed to establish the requisite actual malice to support a claim for punitive damages) he is not entitled to damages, whether general or punitive, as a matter of law.

On November 21, 2007, in Bolden v. Bolden, 11th Dist. No. 2006-G-2736, 2007-Ohio-6249, the wife filed a complaint for divorce in October of 2005. The divorce trial occurred over two days. The parties stipulated to all marital assets and debt. The issues contested were the property division and spousal support. The husband appealed the orders of the court. After considering the husband's arguments, the Eleventh District Court of Appeals held the trial court considered all relevant factors in arriving at the amount of spousal amount. Moreover, the court further concluded the amount was not excessive under the circumstances of this case. Further, the reviewing court determined the trial court did not err when offset the differences in the parties' retirement benefits against credit card debts, cash, and equity in the marital residence. Nor did the court err in awarding wife the cash and assets it did. However, the court pointed out that the trial court erroneously considered a non-marital debt belonging to the wife in dividing the marital assets. The appellate court corrected the error, modified the trial court's judgment, and affirmed the order as modified. On cross-appeal, wife also assigned several errors for the appellate court's consideration. First, the court determined the trial court did not err in failing to offset the present value of the parties' social security benefits against marital assets in its division of property. The appellate court further determined the trial court did not abuse its discretion in failing to find wife had a separate interest in the marital home. Finally, the court held the trial court did not err in ordering the sale of the marital home.

Geauga County Sheriff's Office Detective Joe Keough opened and closed Law Day playing bagpipes

Bickers v. Western & Southern Life Ins. Co.:

Further Guidance and Interpretation of Coolidge v. Riverdale Local School District Decision

Carly A. Ibold, Esq., Petersen & Ibold

Police Prosecutor Jim Gillette with members of Geauga County's Law Enforcement Agencies

Since the Supreme Court issued its decision in Coolidge v. Riverdale Local School District there has been an overwhelming amount of controversy regarding the true application of the law set forth by the Court. The Ohio Supreme Court's most recent decision rendered in Bickers v.

Municipal Court Clerk Vicki Dailey and Judge Hassett with the winning poster

Western & Southern Life Ins. Co. has definitely provided new limitations on the scope of Coolidge.

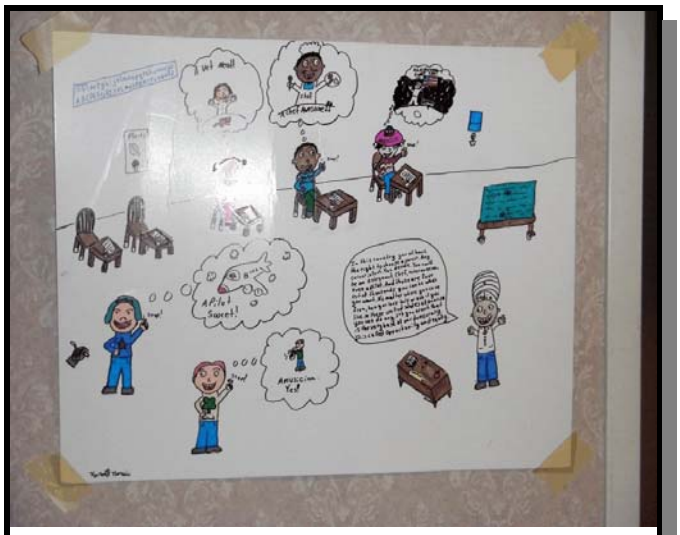
Coolidge involved a continuing contract teacher who had been physically assaulted by one of her students, which caused her to be on medical leave and receive temporary total disability (TTD) benefits for over a year. The school board subsequently voted to terminate her contract on the grounds that she exhausted all available leave and was unable to fulfill the requirements of her employment contract. The board determined that "absence without leave" constituted "other good and just cause" under Ohio Revised Code Section 3319.16 and thereby provided sufficient grounds for her termination.

The teacher filed a lawsuit against her employer claiming that her discharge was against public policy as set forth in Ohio Revised Code Section 4123.90, which prohibits employers from taking retaliatory action against employees who file workers' compensation claims, and Ohio Revised Code Section 4123.56, which provides TTD benefits to employees who cannot return to work as a result of their injury.

The Supreme Court in Coolidge rendered a decision that changed the way employers could terminate absent, injured employees. The Court determined that:

"In our opinion, the policy of protection embodied in the Workers' Compensation Act can be effectuated only if an employer is not permitted to discharge an employee for being absent from work due to an allowed injury for which the employee is receiving TTD compensation. We hold, therefore, that an employee who is receiving TTD compensation pursuant to R.C. 4123.56 may not be discharged solely on the basis of absenteeism or inability to work, when the absence or inability to work is directly related to an allowed condition."

As a direct result of the Coolidge decision, employers were prohibited from discharging employees who were injured and unable to work due to a compensable work-related accident. Up until this decision was rendered, employers had the ability to terminate workers' compensation claimants pursuant to a neutral attendance policy. Hence, the concept of "at-will" employment – an employer can terminate employees for essentially any reason or no reason at all. After Coolidge, employers were required to



Harold Norsic's winning poster

maintain workers' compensation claimants as employees, regardless of their absence, or else be in direct violation of the law set out by Coolidge.

Employers and their representatives were up in arms about the Coolidge decision. Coolidge had

fundamentally expanded the public policy exception to the employment-at-will doctrine. It seemed that Coolidge provided workers' compensation claimants with impenetrable job security - that is, until the Supreme Court rendered its most recent decision in Bickers v. Western & Southern Life Ins. Co.

The claimant in Bickers sustained a work-related accident which resulted in intermittent periods of collecting TTD benefits. Bickers was subsequently terminated by the employer during one of those periods. Bickers filed a complaint for wrongful discharge against her employer and relied on the ruling set forth in Coolidge to support her claim. When the case reached the Supreme Court, the Court examined the boundaries of the decision in Coolidge and decided to "determine whether the tort of wrongful discharge in violation of public policy applies to a non-retaliatory discharge of an injured worker receiving workers' compensation benefits."

The Supreme Court ultimately found that the holding in Coolidge did not apply to the facts contained in Bickers.

The Supreme Court found that the Court in Coolidge decided a very specific issue. The Court explained:

"Specifically, the Coolidge court held that judicial inquiry is warranted into whether an employer acted contrary to public policy when it discharged an employee when R.C. 3319.16 is implicated. As a result, the holding in Coolidge is confined to considerations of whether "good and just cause" supported the termination of an employee protected under R.C. 3319.16."

Judge Mary Jane Trapp, Sheriff Dan McClelland, and Mike Judy discuss the new SORN requirements

Ohio Revised Code Section 3319.16 deals with the termination of contracts held by teachers with the board of education. The Supreme Court in Bickers determined that Coolidge did not create a cause of action for a claimant who is terminated for non-discriminatory reasons during periods of receiving TTD (i.e. employee absenteeism for more than seven consecutive days). Instead, the Court concluded that Coolidge only determined that "absenteeism" was not considered "other good and just cause" under Ohio Revised Code Section

Chardon Councilwoman Mary Bramstedt, Eileen Noon Miller and Carolyn Paschke

3319.16. Because the injured worker in Bickers was not a contract teacher under Ohio Revised Code Section 3319.16, she was not entitled to the protections afforded in Coolidge. The Court further went on to say:

"Should the policy choice be to deny employers the exercise of their employment at-will prerogative and require them to hold open the jobs of injured employees for indefinite periods of time, then employers will be burdened with employees unable to perform the work for which they were hired and an inability to obtain permanent replacements. This resolution would be particularly onerous on small employers with few employees, who lack the ability to shift the duties of an injured employee to other employees."

Apparently, the Court did not feel that it had the right to require employers (big or small) to maintain a staff of employees who could not work. The Court found that interpreting Coolidge otherwise would ultimately tread on the sole purpose of making Ohio an "at-will"

employment state.

The Bickers Court further stated in its opinion that it was the duty of the legislature, not the judiciary, to determine the policy between employers and employees in the workers' compensation system. The Court did not want to impose common-law

Kevin & Nancy O'Reilly and Debbie Elias

principles of wrongful discharge in the workers compensation arena and that a remedy for such discharge must be found in workers compensation statutes. The Court determined that since the claimant in Bickers did not assert a statutory retaliatory discharge claim, she failed to state a claim for which relief could be granted.

Given the foregoing, it seems that Bickers diluted the effects of the Coolidge decision and reaffirmed Ohio as an "at-will" employment state.

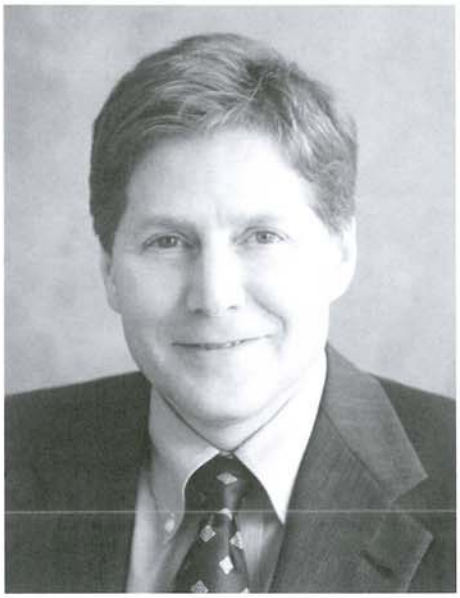
However, it is important to note that the Bickers decision will most likely be challenged in the near future. As the dissent in Bickers pointed out, neither the text nor underlying logic of Coolidge implies that its application is limited to only "good and just cause" for termination under R.C. 3319.16. Given this, the decision in Coolidge should apply to all workers compensation claimants.

Based on the foregoing, it is important to inform your clients that they can be terminated from employment while receiving temporary total disability as long as the termination is for a non-discriminatory purpose, i.e. excessive absenteeism. However, because of the overall impact of the Coolidge decision, I also inform my clients that employers are still leery to terminate workers who are receiving temporary total disability.

Many of my clients express concern when they cannot immediately return to work, which is completely understandable given the overall negativity associated with filing a workers' compensation claim. I inform my clients that one of the best things they can do is have a "wait and see" attitude. I attempt to ease the anxiety by suggesting that you cannot control what could happen. You can only control your actions if termination does happen. I inform my clients that if he/she is terminated, I will look at the overall nature of the termination to determine its merit; and if the termination was pursuant to a neutral employment policy, we will brainstorm other options of obtaining compensation while looking for employment. In most cases, the injured worker will be entitled to some other benefit provided by the Bureau of Workers' Compensation or other state funded program. These other benefits might include non-working wage loss or vocational rehabilitation.

In conclusion, it is best to keep the holding in Bickers in mind when advising injured workers of an employer's right to terminate employment while receiving temporary total disability compensation. However, this may change in the near future. I will certainly keep you posted.

Middlefield Police Chief Joseph Stehlik and Marie Shipek nominated Lt. Mike Fabian, the 2008 Law Enforcement Officer of the Year



Michael G. Ibold
1955-2008

Michael G. Ibold, age 52, died on April 11, 2008, at his home from complications from a rare degenerative brain disease.

He lived in Chardon Township with his wife, Polly and their four children, Mickey, Danny, Tommy and Brigid.

Michael was the third of three sons of George and Rosemary Ibold, deceased, and is also survived by his brothers, Dennis, Charles and William.

Michael G. Ibold received a Bachelor of Arts Degree in Business Administration from Wittenberg University in 1977 and received his J.D. Degree from Cleveland State University College of Law in 1980.

Since his graduation from law school in 1980 until his retirement on June 15, 2006, he practiced with Petersen & Ibold. During that time, he contributed greatly to the growth and success of Petersen & Ibold. More importantly, he was our friend.

The many clients that Michael represented in his more than 25 years of practice, his friends and co-workers at the law firm miss him very much.

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Review of "The Curmudgeon's Guide to Practicing Law"

Judge Mary Jane Trapp

Do you have a new lawyer in your family or firm? If so, present them with a copy of a little book published by the ABA's Section of Litigation authored by Jones Day litigator, Mark Herrmann. Using humor and candid observations, Mr. Herrmann gives concrete examples of how to succeed or fail as a lawyer in any setting. His advice covers topics ranging from writing memos and briefs, what law school did not teach, effective oral argument techniques, taking depositions, billing techniques, practice building, and professional manners. Do not be misled by the Jones Day background into thinking that this book is just for big firm lawyers. Mr. Herrmann's broad resume includes a stint in a small firm in San Francisco before his move to Jones Day in Cleveland, and it is obvious from the following excerpts that he has spent many hours in the trenches.

Joe Weiss reading the Law Day Program

"What They Didn't Tell You in Law School" about Pretrial Activity

"Moot court spreads other misconceptions, too…in moot court, the entire game is refereed. Not so in real court, my young friends. Litigation these days means pretrial activity, and pretrial activity means discovery, and discovery means no referees in the room. It's two-year-olds flinging mashed potatoes at each other. It's you and the sociopath, *mano a mano*..." His seasoned advice makes sense. "[R]esist becoming the reflexive ney-sayer. Try making horse trades with opposing counsel…Being reasonable can protect your sanity and save your client money."

Just as the 1L student was never far from a law dictionary, the new lawyer needs **"The Curmudgeon's Law Dictionary"** in order to appreciate many terms of art of our profession, such as:

"**Business Development**: Playing golf with old college buddies. As in: 'Of course, I charged the firm for my business development trip in Scotland.'"

"**Judges, appointed**: A judicial system designed to thwart the will of the people."

"**Judges, elected**: A judicial system designed to respond to the people's current whims."

As an appellate judge, here are a few of my favorite entries:

"**Cf**: A legal signal used to introduce a case. The signal…indicates that no authority whatsoever supports the stated proposition. The following case is not remotely on point, but is the best the author could do."

"**Review, abuse of discretion**: A standard of review that permits trial courts to make whatever mistakes they like." And to be fair,

"**Review, de novo**: A standard of review that permits appellate courts to make whatever mistakes they like."

One of my favorite chapters of the book is "**The Curmudgeon on Couth**" because it addresses the most common pet peeves regarding professional etiquette. Our business increasingly relies on voice mail, and how many times have you been forced to replay this message: "We are in an absolute emergency. Please call me as soon as possible. My

number is two-one-twoninehtreesi-flugelmeyer." You are now forced to replay the message three or four times just to understand the call back number left by a cadence-impaired attorney who obviously was not a quarterback in high school!

Ed Brice with Law Day speakers Jeff Gamso and Tim Grendell

Finally, Mr. Herrmann's secretary wrote the first draft of the chapter entitled **"The Curmudgeonly Secretary",** and should be required reading for all lawyers. Her tips seem obvious but bear repeating.

"Tell me about your cases; the more I know, the more intelligently I'll be able to do my job";

"I should know where to find you, and whether to interrupt you";

"I'm your professional assistant; don't expect me to be your personal assistant"; and finally,

"Proofread everything repeatedly, and don't let your assistant get away with any careless errors. Eventually, it will become clear that you're a compulsive nutcase who insists on perfection, and your assistant will make sure everything's right. In fact, he or she will probably turn into a compulsive nutcase too. Eureka!"

This little book is packed with sage advice and will have you laughing while you are learning. For ordering information, visit www.ababooks.org or call 1-800-285-2221.

Can I Continue to Contribute to or Re-pay a Loan on My Retirement?

Robin Stanley, Esq., Petersen & Ibold

The answer to this question may depend on whether you are in a Chapter 7 or Chapter 13 bankruptcy.

In determining whether a Chapter 7 debtor is eligible for a discharge, the debtor must pass the means test. In Eisen v. Thompson, 370 B.R. 762 (N.D. Ohio 2007), the court concluded that retirement plan loans are neither debts nor secured debts under the bankruptcy code and cannot be subtracted from the current monthly income of a debtor under 707 (b)(2)(A)(iii). Therefore, a 401(k) loan cannot be subtracted from the means test and the amount that the debtor continues to pay on the loan is part of the debtor's disposable income and is available to be paid to creditors.

Debtors have argued that if their re-payment of the retirement loan is stopped, they will be forced to suffer tax penalties for the early distribution. Judge Speer found that "there is no reason why the existence of a tax penalty should mitigate against abuse; a tax penalty is simply one of the inherent risks which one assumes when taking a loan against a 401(k) account." In re Gonzalez, 378 B.R. 168 (N.D. Ohio 2007). Thus, generally, a debtor may not re-pay a retirement loan in a Chapter 7 case.

Lynne Day, Carly Ibold and Karen Hummel

As for contributions to a retirement plan under Chapter 7, at least three judges have held that such contributions are not allowed. In determining whether the totality of the circumstance of a debtor's financial situation demonstrates abuse pursuant to Section 707(b)(3), a court should consider if a debtor

has the ability to pay his unsecured debt through a Chapter 13 plan. Factors that the court may consider is the debtor's ability to repay debts out of future earnings, whether the debtor enjoys a stable source of income, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private sources, and whether expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. A debtor that is near retirement age or in poor health and has no other savings may be allowed to contribute to a 401K. See In re Mills, 246 B.R. 395, 401-02 (Bankr.S.D.Cal.2000).

Auburn Career Center's famous Black Forest Cherry Cake

The judges have held that it is improper for payments towards a future retirement savings plan to be made from disposable income that should be used to pay pre-existing creditors. In re Woody, 494 F.3d 939, 952 (10th Cir. 2007). Contributions to a 401(k) plan are not necessary for the maintenance and support of Debtors or their dependants. "When looking to a debtor's "need" in a 707(b) action, the Sixth Circuit Court of Appeals has set forth the precedent that "a debtor's voluntary remuneration to a retirement account, whether by contribution or the repayment of a loan, cannot be excluded from a debtor's disposable income." The reasoning for this is straightforward: it would be unfair to the creditors to allow the Debtors in the present case to commit part of their earnings to the payment of their own retirement fund while at the same time paying their creditors less than a 100% dividend." In re Glenn, 3 B.R.835, 831 (N.D. Ohio 2006). Therefore, the funds spent on the pay-back of a retirement loan and the funds contributed to a retirement account will be counted as available resources for creditors in a Chapter 7 case.

Chapter 13, however, is different. If you are in a Chapter 13 bankruptcy, mandatory retirement contributions may be excluded from disposable income.

Additionally, the amount necessary to repay a 401(k) loan must be taken into consideration when calculating disposable income in a Chapter 13 case because 11 U.S.C. 1322(f) expressly excludes amounts required to repay a loan from a qualified retirement plan in the Chapter 13 context. Section 1322(f) is clear: any amounts required to repay a 401(k) loan shall not constitute disposable income under Section 1325. However, only the amounts required to repay the debtor's 401(k) loan (or other retirement plan) are excluded. While a Chapter 13 plan may not materially alter the repayment of a 401(k) loan, if a loan is paid off within the commitment period of a Chapter 13 case, the trustee has the ability to direct the newly available funds to the creditors. Therefore, once the 401(k) loan is repaid, the additional available funds will be used to partially repay the creditors.

Unfortunately for a Chapter 7 debtor, the courts have consistently held that Section 1322(f) is limited in its applicability to those debtors seeking relief under Chapter 13. If a debtor wishes to avail the benefits of Section 1322(f) and repay a retirement loan, he or she must file a Chapter 13 case.

Law Day 2008 was very well attended

County Law Library Funding

The Board of Trustees of The Law Library

An amendment has been introduced into House Bill 562 regarding the County Law Library. This legislation is a radical change from the current library operations. It was crafted by the Task Force on Law Libraries, which was created after House Bill 66 removed county support for law libraries in 2005. Should this new language pass, the county law library will continue to exist as an entity under control of the County Commissioners. The current board will be phased out and the new five member board will be appointed by (1 each) the Common Pleas Judges, the Municipal Court Judge, County Prosecutor, and (2 appointments) the County Commissioners. The library will submit a budget to the county in order to receive the fine money, which remains unchanged. The library will coordinate all legal purchases for county offices. The county will provide space and utilities.

The Law Library Board of trustees worked through the lobbyist to obtain changes to the amendment to seek more input on the board appointments, have the law librarian paid from county funds, and keep the retained earnings fund. Unfortunately, there was a split between the libraries seeking modification of the harsher ramifications of existing law. The County Commissioners Associations of Ohio remained an implacable foe.

There are many nuances to the bill. If you would like a copy, please contact Susan at 440.279.2087 or gcll@nls.net.

Maple Festival Officials are hoping for better weather next year by starting the events on the last Thursday in April, rather than the week after Easter.

Ipso Jure

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