STATE BAR OF TEXAS
BANKRUPTCY LAW SECTION
NEWSLETTER

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JUDICIAL PROFILE OF THE HONORABLE WESLEY W. STEEN

By: Sara M. Keith; Okin Adam & Kilmer LLP , Houston (skeith@oakllp.com)

Judge Wesley W. Steen has honorably served as a United States Bankruptcy Judge for the Southern District of Texas for over thirteen years. He will leave the bench on January 17, 2011 for the second time—this time for himself and his family. In light of his impending retirement, this profile is intended to serve as a glimpse into the life of the man behind the robe.

Judge Steen has had many fascinating work experiences that most that have appeared before him would not imagine. For example, during his final two years of high school he was a United States House of Representatives Page in Washington, D.C. where his job was to retrieve committee reports for bills scheduled to be heard that day and one day he picked up reports on a historic bill—the Civil Rights Act. After attending the University of Virginia and earning a degree in English, he proudly served in the United States Navy for over three and a half years. Judge Steen flew the Grumman E-2 Hawkeye which served as the Navy's all-weather aircraft carrier that was equipped to provide strike control and early warnings during the Vietnam War. Unfortunately, due to his need for eyeglasses, he was not able to pilot the aircraft but was able to fly as the air traffic control and strike control operator. To this day Judge Steen is amazed that the U.S. Navy actually paid him to fly aircraft. He recalled his parachute survival training where he had to float in a small raft in the Gulf of Mexico with nothing but a paddle and await rescue. The entire time he thought, "Wow, they are paying me for this, how incredible!" When the Navy had to reduce its forces he volunteered to go home a little early.

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A MESSAGE FROM YOUR CHAIR: OUT AMONGST 'EM

BY: BYRNIE BASS, BANKRUPTCY CHAIR

Everyone ought to get hit in the head with a golf ball at least once. It is a learning experience.

During a tournament three or four April's ago at our Lubbock Country Club, our group putted out on #15, drove our carts over to #16 tee, got out of the carts, and were in the process of pulling clubs to tee off. I heard someone yell "fore", and then I heard a sound like a ball-peen hammer hitting the side of a lunch pail. The golf ball was the hammer, and my head was the lunch pail. Felt it, too. Hurt like hell. A guy back in the middle of #15 apparently yanked his second shot pretty good, and it hit me on the fly. Blood everywhere (about two towels worth). Well, they drove me to the pro shop where, after being looked over, everyone surmised that maybe the bleeding had already stopped, or at least almost had. Competitor that I am, I had them drive me back out to #16 where the boys and I finished the round. We did not win money. I bled a little more.

The experience lead me to several observations and conclusions:

1. "Fore" really does mean "fore". Golf ball on the way.

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Review and Photographs of The 29th Annual Jay L. Westbrook Banrkuptcy Conference

By: Eric M. Van Horn, Rochelle McCullough LLP, Dallas (evanhorn@romclawyers.com) with contributions from Layla D. Milligan, Office of Deborah B. Langehennig, Chapter 13 Trustee, Austin; and Joshua P. Searcy , Searcy & Searcy P.C., Longview.

The University of Texas CLE held the 29th Annual Jay L. Westbrook Bankruptcy Conference on November 18-19, 2010 at the Four Seasons Resort & Spa in Austin, Texas. **Henry J. Kaim, Hon. John C. Akard, Eveyn H. Biery, and J. Michael Sutherland** served as this year's presiding officers and were guided by the members of the conference's planning committee.

The conference featured speakers from throughout Texas and across the country, and was widely attended by several hundred, including many of our Texas bankruptcy judges and many of our new non-lawyer bankruptcy professionals. With its fantastic line up of speakers, presentations, and networking opportunities, the conference was a great success. For those in the Section who were unable to attend, below (courtesy of members of the Young Lawyers Committee) are summaries and pictures of presentations and events.

Presentation Summaries

Opening Remarks: **Michael J. Esposito** (Austin) opened the conference by commenting on the inclusiveness of the bankruptcy bar as reflected by its mix of young and experienced practitioners. He also recognized The UT School of Law's Duberstein Bankruptcy Moot Court Team for its unprecedented first and second place finishes at the annual national competition and its winning of the Best Brief award.

Recent Developments: The conference began with a survey of important case law developments from around the country moderated by **Prof. Jay L. Westbrook** (Austin), and presented by R. **Bryn (Byrnie) Bass, Jr.** (Lubbock), **Evelyn H. Biery** (Houston), **Deborah B. Langehennig** (Austin), and **Deborah D. Williamson** (San Antonio). The panel highlighted many significant bankruptcy and non-bankruptcy cases that will impact both consumer and business practices including: *the Supreme Court's decisions in Schwab v. Reilly,* and *Espinoza; Wilborn v. Wells Fargo Bank* (5th Cir. 2010); *Reed v. City of Arlington* (5th Cir. 2010); *Tax Ease Funding, L.P. v. Thompson* (5th Cir. 2010); *In re* Gebhart (9th Cir. 2010); *U.S. v. Holstein* (7th Cir. 2010); *In re Project Orange Associates, L.LC* (Bankr. S.D.N.Y. 2010); *In re American Safety Razor Company, LLC* (Bankr. D. Del. 2010); *In re Boston Generating, LLC* (Bankr. S.D.N.Y. 2010); *In re Thompson Publishing, Holding Co., Inc.* (Bankr. D. Del. 2010); and *In re Blue Pine Group, Inc.* (Bankr. D. Nev. 2010). The panel also previewed the *Marshall v. Stern* case to be argued before the Supreme Court involving core jurisdiction and compulsory counterclaims in state law.

The panel also noted a few cases that only bankruptcy professionals could find interesting or humorous. For example, Prof. Westbrook mentioned a discharge case involving a debtor who lost an arbitration and retaliated by taking out 150 magazine subscriptions in the opposing party's name.

Lifetime Achievement Award to Mickey Sheinfeld: On behalf of UT Law and the conference committee, **Jerry McDaniel** presented **Mickey Sheinfeld** (Houston) with a lifetime achievement award. Mr. McDaniel noted Mr. Sheinfeld's many contributions to the practice and how he is regarded as the dean of the bankruptcy bar. Mr. McDaniel recounted stories highlighting Mr. Sheinfeld's civility as practicing lawyer, how he personalized the practice of law, and his dedication to the practice as the chairman of the Texas Board of Legal Specialization's Bankruptcy Commission and as an adjunct instructor at UT Law. He also noted the many distinguished lawyers and judges influenced by Mr. Sheinfeld who were alumni from the firm he co-founded. Mr. Sheinfeld received a standing ovation from the conference attendees.

After the Sale: Presented by **Jason G. Cohen** (Houston) and **Duston Kenneth McFaul** (Houston), this panel discussed what happens after a 363 sale is approved, including appeal and mootness issues as recently addressed by the Fifth Circuit's *In re Pacific Lumber Company* case. They also covered what happens if the sale does not close and re-opening auctions.

Tenant-in-Common Real Estate Cases: Moderated by **Henry J. Kaim**, panelists **Charles R. Gibbs** (Dallas), **Clifton R. Jessup, Jr.** (Dallas), and **Edward L. Ripley** (Houston) discussed the many issues that arise in TIC bankruptcy cases including filing and automatic stay issues, tips for creditors and lenders about describing all TICs in a foreclosure posting, and how section 1124 requires payment of default interest in the Fifth Circuit.

Economy at a Crossroads: Crisis, Response and Recovery: **Blake Hastings** of the Federal Reserve Bank of Dallas (San Antonio branch) described the beginnings of the economic downturn, the Fed's response and considerations for the future. Mr. Hastings explained why there were not more foreclosures and the potential need for a floor stabilizer if foreclosures increase.

Banks, Financial Regulations and Credit Markets: Economist **Prof. Michael W. Brandl** (Austin – McCombs School of Business) gave an informative and entertaining presentation on the current and future state of financial market regulations and their impact on the economy. Prof. Brandl discussed the misalignment of financial market incentives, and past bailouts of financial systems in other countries. He also argued that the legislative response in the U.S. addressed only the symptoms of the crisis instead of the causes. Prof. Brandl concluded with remarks about changes needed in the U.S. and its businesses, like refocusing on long term management goals instead of short term profits.

Business Track Presentations

Getting In: 328/330 Compensation Issues: **Michael P. Cooley (Dallas)** discussed issues surrounding the pre-approval of alternative billing arrangements under section 328 for attorneys, bankers, and other professionals. He highlighted the risks and benefits of retention under section 328, and provided a set of best practices and important cases for these issues.

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Westbrook Conference Photos

Recent Developments Panel (l-r):
Eveyln Biery, Deborah Williamson, Jay Westbrook, Debbie Langehennig, and Brynie Bass

Lifetime Achievement Award (l-r)
Jerry McDaniel (presenter)
Mickey Sheinfeld (recipient)

Judges Panel (l-r):
Hon. Brenda T. Rhoads, Hon. Arthur J. Gonzalez, and Hon. Leif M. Clark

Economy at a Crossroads
Blake Hastings

Receiverships Panel Panel (l-r):
Joseph Wielebinski, Holland O'Neil, Hon. Harlin D. Hale, and William Stutts Langehennig, and Brynie Bass

Insolvency Forensics (l-r):
Ralph Janvey and David Phelps

Banks, Financial Regulations, and Credit Markets
Prof. Michael W. Brandl

After the Sale (l-r)
Duston K. McFaul and Jason G. Cohen

Consumer Bankruptcy Presenters (l-r))
Layla Milligan, Jeffrey Fleming,
Elizabeth Smith, and Joshua Searcy

Tenants in Common Panel (l-r)
Henry Kaim, Clifton Jessup,
Charles Gibbs and Edward Ripley

Fifth Circuit Case Law Update

Help Wanted: The Muddled State of Judicial Estoppel in Bankruptcy Proceedings

By: Brandon T. Darden, Judicial Extern to the Hon. Harlin D. Hale and third-year law student at the SMU Dedman School of Law.

The United States Court of Appeals for the Fifth Circuit recently issued an opinion in *Reed v. City of Arlington* that perhaps complicates the doctrine of judicial estoppel in bankruptcy proceedings. *See* No. 08-11098, 2010 WL 3585375, at *1 (5th Cir. Sept. 16, 2010). The court addressed whether judicial estoppel could prevent the debtor and his bankruptcy trustee from collecting a judgment against the City of Arlington when the debtor failed to disclose the judgment in his bankruptcy filings and statements. *Id*. Relying on a need to protect "the integrity of the judicial process," the court held that the debtor and his successor in interest, the Trustee, were both judicially estopped from collecting the judgment because equity no longer favored continuing the litigation. *Id*.

Background: Deception in Disclosure Statements

Kim Lubke ("Lubke"), a former firefighter for the city of Arlington, Texas ("the City") sued the City under the Family Medical Leave Act ("FMLA") in the United States District Court for the Northern District of Texas. *Id*. at *1. In April of 2004, the jury awarded Lubke over $1,000,000 in damages and fees, an award which the City appealed. *Id*. While the appeal was pending, Lubke and his wife filed a voluntary Chapter 7 bankruptcy petition, but failed to mention the bankruptcy to his attorney in the FMLA case. *Id*. Also, Lubke compounded his deception and violated bankruptcy law by not listing the FMLA judgment and other nonexempt property on his schedule of assets and by omitting the judgment from all of his sworn statements and filings. *Id*. Based on these schedules and representations, the bankruptcy court declared the Lubke's bankruptcy to be a "no-asset" case. The Trustee, Diane Reed ("Reed"), closed the case, discharging the Lubkes from their approximately $300,000 in credit card debt. *Id*.

Meanwhile, a Fifth Circuit panel heard oral arguments on the City's appeal of the FMLA case and in June of 2006 issued an opinion that affirmed the verdict, but remanded the case back to the district court to recalculate damages. *Id*. During settlement negotiations between Lubke and the City, in which the City offered Lubke a Rule 68 judgment of $580,000, Lubke informed his FMLA attorney of the bankruptcy, who then notified Reed's counsel. *Id*. The bankruptcy court, at the urging of Reed and Lubke, reopened the case in August and Reed attempted to accept the City's Rule 68 offer; even going so far as to file a motion substituting herself for Lubke in the district court. *Id*. Although the appeal divested the district court of jurisdiction, it still granted Reed's motion. *Id*. Once the City learned of the bankruptcy, it sought a take-nothing judgment against Lubke in a supplement to its petition for rehearing, arguing that he was judicially estopped from collecting the judgment based on his failure to record it in his bankruptcy case. *Id*.

The bankruptcy court revoked Lubke's discharge after agreeing with Reed not to make findings of fraud. *Id*. The Fifth Circuit denied the City's petition for rehearing, but did remand the case to the district court to recalculate damages again and rule on the City's claim of judicial estoppel. *Id*. On remand, the district court reasoned that the elements of judicial estoppel were met for Lubke but not for Reed, and it ratified its previous order substituting Reed for Lubke. *Id*. Reed could continue to pursue Lubke's judgment against the City, which the court believed was now property of the estate, because a take-nothing judgment would harm Lubke's creditors. *Id. at *2. The district court crafted what the Fifth Circuit saw as "a novel remedy for judicial estoppel" and ordered the City to pay the whole FMLA judgment to Reed, but said any remaining funds must be returned to the City to prevent Lubke from receiving anything not distributed to his creditors. Id. at *1-2. The City appealed the ruling on judicial estoppel and each side clung to the court's prior inconsistent decisions that supported their position. Id. at *2.* While the court also awarded additional attorney's fees and reduced the amount of damages, the appellate court's ruling on the first question eliminated any need to address these remaining issues. *Id*. at *1.

Analysis: From Mosaic to Mud

The Fifth Circuit reviewed the district court's decision under an abuse of discretion standard and held that the "erroneous application of the governing legal principles" constituted an abuse. *Id*. at *2. Judicial estoppel, while not "rigidly defined," is based on equity and the Supreme Court uses three factors to govern its decision whether or not to apply the doctrine: (1) whether a party's later position is clearly inconsistent with its position in a prior case; (2) whether the party succeeded in persuading the first court to accept its position, thereby creating the perception that either the first or the second court was misled; and (3) whether the party arguing the inconsistency gained an unfair advantage or created an unfair detriment on the opposing party. *Id*. The Fifth Circuit routinely applied these factors in bankruptcy cases; however, the court admitted the disparate rulings have created "a mosaic." *Id*. at *3.

The court discussed three cases evincing its conflicting application of judicial estoppel. The first, *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197 (5th Cir. 1999), held that a debtor's successor was judicially estopped from upholding a judgment it obtained by pursuing an undisclosed claim against the debtor's estate outside of bankruptcy. *Id*. In the second case, *In re Superior Crewboats Inc.*, 374 F.3d 330 (5th Cir. 2004), a debtor told her bankruptcy trustee that her claim against Superior Crewboats was prescribed, but still filed suit against the company while in bankruptcy and did not disclose the suit. *Id*. The court ruled that judicial estoppel prevented the debtor from pursuing this suit and the trustee's attempt to substitute in as the plaintiff was ruled moot. *Id*. Finally, in *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380 (5th Cir. 2008), the court distinguished the above two cases and refused to apply judicial estoppel, even though there was "intentional concealment and duplicitous conduct in the bankruptcy court," in a case involving a tort claim that the debtor did not disclose to a trustee because "equity favors the Trustee." *Id*.

One panel of the Fifth Circuit cannot overrule another panel's decision, so without en banc harmonization, the court needed to reconcile the cases. *Id*. To do this, the court noted that judicial estoppel is still applicable to litigation claims undisclosed in a bankruptcy case

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CHAPTER 11 CASE UPDATE: EMPLOYING PRE-PREPETITION CREDITOR PROFESSIONALS

By: Jennifer L. Branson, Judicial Extern to the Hon. Harlin D. Hale. Fourth-year law and business student at Southern Methodist University (jlbranson@smu.edu).

A recent bankruptcy case in the Fort Worth Division of the U.S. Bankruptcy Court for the Northern District of Texas may change the way debtors and their lawyers think about pre-petition professionals. In *In re Klaas Talsma*, the court addressed whether or not Sections 327 and 1107 of the Bankruptcy Code allow a debtor in possession to employ a professional without the professional waiving his claim for his prepetition work for the debtor. *In re Klaas Talsma*, Nos. 10-43790-DML-11, 10-43791-DML-11, 10-43792-DML-11, 2010 WL 3724796 (Bankr. N.D. Tex. Sept. 17, 2010). Adopting the minority view, the court allowed the employment without a waiver of the prepetition claims.

BACKGROUND:

The case involved the Chapter 11 filings of three related dairy farming entities (the "Debtors"). Boucher, Morgan, and Young, P.C. ("BMY"), one of the few accounting firms in the area, had performed routine accounting work for the Debtors prior to the Chapter 11 filings. The Debtors sought to have BMY continue its work. However, BMY was also one of the largest creditors of both Talsma and Frisia Farms and was "owed a combined total of $11,700" by the Debtors. The U.S. Trustee (the "UST") argued that BMY could continue to be employed only if it waived its prepetition claims, which is the argument that the majority of courts have followed. Both the Debtors and the UST based their arguments on the interplay of Section 1107(b) and Section 327(a) of the Bankruptcy Code.

THE CODE:

Section 327(a) of the Code "establishes the eligibility of professionals for employment by a trustee." It allows professionals to be employed to assist the trustee, with court approval, if they are "disinterested persons." Section 101(14)(A) states that a disinterested person is not a creditor. Furthermore, the Code's restrictions governing a trustee generally apply when the estate is managed by a debtor in possession under Chapter 11.

Section 1107(b) changes the requirements of Section 327(a), though: "notwithstanding Section 327(a) of this title, a person is not disqualified for employment under Section 327 of this title by a debtor in possession solely" because of his pre-petition employment. The court recognized that the case law looking at the interplay between the two sections is not uniform, but it chose to take the minority view, which allows the debtor in possession to employ a creditor "so long as the professional's prepetition claim arose from prior professional work from the debtor."

MODES OF INTERPRETATION:

The court used several methods of statutory construction to reach its conclusion. First, it looked at the plain meaning of the Code provision, suggesting that by emphasizing "solely," the majority of courts have concluded that Section 327(a) provides only a very limited exception, essentially saying that a professional is not *per se* disqualified from post-petition employment just because of his pre-petition employment: however, if he was owed any money as a result of that pre-petition employment, he was disqualified. The court found, however, that the words of Section 1107(b) "do not preclude a construction extending its exemption to the necessary consequences of prepetition employment," in other words, payment.

The court next analyzed the purpose of the Code provision, suggesting that "for the words 'notwithstanding Section 327(a) of this title' to have any effect, Section 1107(b) must do more than exempt professionals from disqualification based on just the act of prepetition employment by the debtor." If Congress only wanted an exemption to apply to prepetition employment of the debtor, the introductory clause would not be needed. Furthermore, even if a provision of the Code is "susceptible to two constructions, one of which permits and the other of which prohibits the exercise of the debtor's authority in a fashion consistent with the efficient and economical administration of the estate, the permissive reading is to be preferred."

The court also suggested that the possibility that a prepetition professional would be found to be an insider was "an additional reason to read Section 1107(b) as abrogating the requirement that a professional be disinterested to the extent the professional's non-disinterestedness is a necessary result of prepetition employment by the debtor." The court realized that "obviously, many of a debtor's prepetition professionals will have an insider's knowledge of and influence over the debtor," and to disallow all prepetition professionals was clearly not the intention of Congress.

The court next analyzed the history of the debtor in possession role and the disinterestedness requirement, noting that under Chapter X of the Bankruptcy Act, the trustee and his professionals had to be disinterested, but under Chapter XI of the Act, which applied to debtors in possession, there was no such requirement.

The court then asserted three public policy reasons in favor of holding the minority view. First, allowing the debtor the choice of professionals gives the debtor control of the bankruptcy progress and keeps administrative expenses low. Second, if the court were to disallow employment of a professional with creditor status, a debtor might be motivated to pay its professionals in full prior to filing the bankruptcy proceeding, whereas " a debtor about to file bankruptcy should conserve its cash for use postpetition." Third, if a professional were to be paid on the eve of a bankruptcy, he might receive a preference, a very "troubling conflict."

Finally, the court noted that the precedents cited by the UST in support of the majority construction were factually distinguishable because "typically, the relationship between the debtor and professional was more than a simple debtor-unsecured creditor relationship." *See, e.g. Childress v. Middleton Arms, L..P. (In re Middleton*

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ANNOUNCEMENT FOR THE SIXTH ANNUAL TEXAS/FIFTH CIRCUIT ELLIOTT CUP BANKRUPTCY MOOT COURT COMPETITION

EXPERIENCED BANKRUPTCY LAWYERS SOUGHT AS JUDGES FOR ELLIOTT CUP

The Bankruptcy Section is seeking experienced bankruptcy lawyers to serve as judges for the sixth annual Texas/Fifth Circuit Bankruptcy Moot Court Event for the 2011 Elliott Cup. The event is sponsored by the Bankruptcy Section of the State Bar of Texas, and is named in honor of the late Joseph C. Elliott, U.S. Bankruptcy Judge for the Western District of Texas. The Elliott Cup event includes law schools throughout the Fifth Circuit. The Elliott Cup event is designed to serve as a formal practice competition for law school teams that will compete in the National Duberstein Moot Court Competition at St. John's University School of Law in New York City.

This year, the Elliott Cup event will be held on Saturday, February 19, 2011, at the University of Texas School of Law, 727 E. Dean Keeton Street, Austin, Texas 78705. Lawyers will need to be at the School of Law by *8:30 a.m. on Saturday, February 19, 2011* to judge the rounds, which should be completed by 1:00 p.m. that day. Scoring for the Elliott Cup event will be based solely on oral argument. Lawyers will be requested to score each competitor and provide constructive input to the teams following each preliminary round. A trophy (the Elliott Cup) will be awarded to the first place team, and awards given to the second place team and best oral advocate.

Participating lawyers are also invited to attend the Team Dinner, where awards will be presented (to be held that Saturday night, February 19) and a Welcoming Cocktail Reception (to be held on Friday night, February 18, from 6:00 p.m. to 8:00 p.m.).

Please consider participating in this event for the benefit of future bankruptcy lawyers in the State of Texas and the Fifth Circuit.

If you are willing to serve as a judge for the 2011 Elliott Cup, please mark your calendar with the date of February 19, 2011, and provide your name, phone number, and email address to the Elliott Cup Chairperson:

Mark E. Andrews
Cox Smith Matthews Incorporated
1201 Elm Street, Suite 3300
Dallas TX 75270
Telephone: 214-698-7819
email: mandrews@coxsmith.com

Upcoming Events

January 19, 2011	**Farewell dinner for the Hon. Wesley W. Steen, at Brennan's of Houston, 3300 Smith Street at 6:00 p.m. Space is limited and tickets are $100 payable to "HBA Bankruptcy Section" to Randy Williams of Thompson & Knight LLP (333 Clay Street, Suite 3300, Houston, TX 77002). Contact Chris Johnson (cjohnson@mckoolsmith.com) or Randy Williams (randy.williams@tklaw.com).**
January 20, 2011	**ACG — DFW: 2011 Economic Forum, at Belo Mansion, Dallas, 2101 Ross Avenue, Dallas Texas 75201 from 2:30 p.m. - 7:00 p.m.**
January 28, 2011	**Starting Out Right [Dallas Program]; Earle Cabell Building, United States Courthouse (Judge Harlin D. Hale's Courtroom) for the a.m. session; and Carrington, Coleman, Sloman & Blumenthal, L.L.P. for the p.m. session.**
January 28, 2011	**Houston Association of Young Bankruptcy Lawyers—Hosts a Hockey Night at Toyota Center, 1510 Polk Street, Houston, Texas 77002 at 5:30 p.m. Please contact Jason Cohen (Jason.Cohen@bgllp.com) for details.**
February 10, 2011	**CFA—Southwest Chapter Happy Hour, at Idle Rich Pub, 2614 McKinney Avenue, Dallas, Texas 75204 at 5:00 p.m.**
February 19, 2011	**Sixth Annual Texas/Fifth Circuit Elliott Cup Bankruptcy Moot Court Competition; The University of Texas School of Law, Austin, Texas.**
February 23-25, 2011	**VALCON 2011, Four Seasons Hotel, Las Vegas, Nevada.**
May 23-25, 2011	**State Bar of Texas Bankruptcy Bench Bar; Horseshoe Bay Resort, Horseshoe Bay, Texas.**

LOCAL EVENTS

Dallas:
The Dallas Bar Association Bankruptcy and Commercial Law Section normally meets the first Wednesday of each month at the Belo Mansion. Social begins at 5 p.m. with program beginning at 5:30 p.m.

Fort Worth - Tarrant County:
Bankruptcy Section - monthly CLE luncheon meetings on the third Monday of each month to its members. Contact - Marilyn Garner at (817) 462-4075 or marilyndgarner@flashwave.com. Meetings are normally held at the Ft. Worth Petroleum Club.

San Antonio:
The San Antonio Bankruptcy Bar Association meets on the 4th Tuesday of every month at the San Antonio Country Club. Social begins at 5 p.m. with program beginning at 5:30 p.m. Participants receive 1 hour CLE .

A Brown Bag lunch with Judge Clark, Judge King, the Bankruptcy Clerk, and members of the Bankruptcy Bar is held quarterly at the Adrian Spears Judicial Training Center.

Houston:
The last Friday of each month from 7:30 to 9:00 Judge Bohm and the Moller/Foltz Inn of Court present the Issues in Chapter 11 Program in Judge Bohm's Courtroom. The program is available to all lawyers (Inn membership is not required). CLE credit and donuts provided. For more information or to RSVP, please contact Liz Freeman (efreeman@porterhedges.com).

Members of HAYBL are invited for monthly "Chamber Chats" with Judge Bohm and a special guest. Eight monthly spaces available and HAYBL membership required. For more information, contact Allison Byman (Allison.Byman@tklaw.com).

Members of HACBA are invited for monthly "Chamber Chats" with Judge Bohm and a special guest. Eight monthly spaces available and HACBA membership required. For more information, contact Pam Stewart (plsatty@swbell.net).

Troop Movement

Jason B. Binford (formerly of Haynes and Boone, LLP) joined Kane Russell Coleman & Logan PC in Dallas as an associate.

Brooke B. Chadeayne (formerly of Nathan Sommers Jacobs, a Professional Corporation) joined Locke Lorde Bissell & Liddell LLP in Houston as an associate.

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Young Lawyers Committee

The Young Lawyers Committee for the Bankruptcy Section is a group of motivated young attorneys from across the State who have volunteered their time and talent. The purpose of the Committee is to increase the involvement of and integrate young lawyers on a State-wide basis into the Section at all levels, promote participation of young lawyers in seminars and events at all stages, and raise the visibility of our young lawyers by assisting them in professional networking and promoting professional development on a State wide basis. The Committee holds monthly conference calls on the second Wednesday of each month, and has a variety of exciting opportunities for young bankruptcy professionals to be involved. If you are interested in joining, please contact one of the Committee's new officers below.

The Committee's leadership has recently changed, and will be led by Joshua Searcy of Longview as Chair (joshsearcy@jsearcylaw.com); Jermaine Watson of Dallas as Vice-Chair (jwatson@coxsmith.com); and Layla Milligan of Austin as Secretary (layla@ch13austin.com).

The Committee's new Liaisons to the respective Section's Vice-Presidents are:

Liaison - Public Education - Omar Alaniz (Dallas)

Liaison - Business Division - Russell Perry (Dallas)

Liaison - Non-Lawyer Outreach - Vanessa Gonzalez (Lubbock)

Liaison - Professional Education - Sara Keith (Houston)

Liaison - Law School Relations - Debra Innocenti (San Antonio)

Liaison - Communications - Eric Van Horn (Dallas)

Liaison - Consumer Division - Sonja Sims (San Antonio)

CALL FOR ARTICLES AND ANNOUNCEMENTS

The **State Bar of Texas Bankruptcy Law Section** is dedicated to providing Texas practitioners, judges, and academics with comprehensive, reliable, and practical coverage of the evolving field of bankruptcy law. We are constantly reviewing articles for upcoming publications. We welcome your submissions for potential publication. In addition, please send us any information regarding upcoming bankruptcy-related meetings and/or CLE events for inclusion in the newsletter calendar, as well as any items for our "Troop Movements" section (changes in practices).

If you are interested in submitting an article to be considered for publication or to calendar an event, please either e-mail your submission to a member of the Editorial Staff at **tmillion@munsch.com, evanhorn@romclawyers.com** or **eborrego@whc.net** or send your submission by regular mail (addresses on page 8).

Please format your submission in Microsoft Word. Citations should conform to the most recent version of the Bluebook, the Texas Rules of Form, and the Manual on Usage, Style & Editing.

Should you have any questions, please visit our website at **http://txbankruptcylawsection.com**.

JUDICIAL PROFILE OF THE HONORABLE WESLEY W. STEEN

(Continued from page 1)

In less than two weeks, Judge Steen went from an aircraft carrier in the Mediterranean to a classroom at Louisiana State University. Unlike many first-year law students, Judge Steen found his law school professors less intimidating than his classmates did; somehow the embarrassment of giving the wrong answer in class did not compare with the terror of taking off and landing aboard aircraft carriers or the responsibilities of controlling Navy fighters and bombers while defending the carrier from surprise attack. His decision to become a lawyer was a matter of knowing his strengths and weaknesses and then choosing a career that matched. If Judge Steen could have been a pilot he surely would have. Fortunately, for the Texas and Louisiana bankruptcy bars, he embarked on a legal career.

After graduating from LSU, Judge Steen focused his practice in tax, ERISA, and estate planning in Baton Rouge for what was then considered a large law firm of approximately twenty lawyers. His path to bankruptcy was one of circumstance. One day, a potential new bank client came into his law firm and asked a partner if there was anyone in the firm who handled bankruptcy cases. In those days clients, especially bank clients, rarely switched law firms as they were very loyal. So, when presented with the opportunity to gain the bank as the firm's client, without missing a beat, the partner stated that Judge Steen was the firm's bankruptcy law specialist, even though he had never handled a single bankruptcy case. While in Baton Rouge, he became a part-time Bankruptcy Judge for one and a half to two years and then served full time. After serving two years of his fourteen-year appointment as a bankruptcy judge and after much prodding by friends in the Houston area, he resigned and began his private practice in Houston at a firm now known as Winstead PC. He practiced bankruptcy law for over ten years in Houston before returning to the bench for the Southern District of Texas as a bankruptcy judge in September of 1997. Beginning on June 1, 2007, Judge Steen served as the Chief Bankruptcy Judge for the Bankruptcy Court of the Southern District of Texas before voluntarily resigning from the post on May 12, 2009. Judge Steen has also served as President of the American Bankruptcy Institute, a national organization for bankruptcy lawyers, judges and other restructuring professionals. While president he created a case competition for financial restructuring practitioners, similar to moot court competitions for law students.

Judge Steen enjoys analyzing problems and strives to reach the right answer under the law which has served him well while on the bench. He prefers analyzing and researching legal issues without having to worry about clients and billing or having to deal with using the law to reach the result needed for his client. To him, the most interesting cases he has had are those that involve Ponzi-schemes. Judge Steen is always amazed when sophisticated investors—who should know better—lose their money to such schemes and it still shocks him with the frequency with which such occurs.

With an enjoyment for the bench, Judge Steen is retiring after his many years of distinguished service because, as he put it, he has worked all his life since the early 1960's and thinks it is time for him to enjoy his other passions and pursuits—not because of any health reasons as rumored. Judge Steen admires Thomas Jefferson, as any good University of Virginia alumnus would, and much like him, Judge Steen is a man of varied pursuits and passions. His greatest passion is for flying and Judge Steen enjoys piloting his Piper Saratoga and put his talent to good use by using it to travel among the cities in his current circuit of Houston, Laredo, and Victoria. In fact, Judge Steen frequently uses his talent to fly other Judges in the Southern District of Texas bankruptcy bench as well as his law clerks to events or hearings, of course only if they are willing passengers. Aside from flying, Judge Steen enjoys photography, reading novels, and traveling. In fact, he and his wife have a lengthy cruise booked immediately following his retirement that will take them from China to Italy and many places in between. Though Judge Steen has been able to travel while serving on the bench, as any bankruptcy judge could tell you, a judge never really gets "away" and even while on vacation has to sign orders and conduct court business. A life-long learner and explorer, Judge Steen looks forward to planting a vegetable garden, reading the entire newspaper every morning, and perhaps taking some community college courses in physics or other science subjects.

Judge Steen believes that practicing law is one of the hardest jobs and that it is even harder for a bankruptcy lawyer because, typically, he/she is constantly looking for business as he/she does not, or should not, have many repeat clients. Judge Steen feels that the most important factors to being a happy and successful lawyer are who you work with, the philosophy of the firm, and its atmosphere.

In considering advice he would give to young lawyers, Judge Steen noted that the legal climate has changed drastically during his career. When he began practicing law, a twenty-lawyer firm was considered "big" and clients were fiercely loyal. When he took the bench in the mid-nineties, being a lawyer was still a "profession" and lawyers were very collegial with each other. Today, he sees great competition for clients as clients change firms frequently and there is more distrust and less collegiality among those in the profession. Nevertheless, Judge Steen believes that a great lawyer should start with the highest ethical principles and a commitment to the ideals of the practice. He suggests that, this way, you can always be internally satisfied that you "did the right thing" in your career. Judge Steen especially cautions young lawyers that once you lose your reputation for ethics and professionalism it is very difficult to overcome, if you even can. While the profession grows and grows, he notes that collegiality is almost becoming extinct as getting to know your fellow lawyers and having relationships with them is harder and harder to do as firms get bigger and bigger and you less often see the same lawyers in your practice over and over again. In light of the above, he stresses that while ethics and ideals are not glamorous or flashy, you will feel comfortable at night knowing that you did not cut corners or break any rules. Further, he mentioned that lawyers who like to bend the ethical and professional rules will eventually be brought down. So, being an ethical lawyer is less risky in the end.

A pilot at heart, if Judge Steen could have flown for a living, he surely would have. Fortuitously, he was able to grace the bankruptcy bar in Texas with a high regard for ethical standards and professionalism for over twenty years. As a final word to young lawyers, Judge Steen wishes you the best of luck. He says that will be thinking about you as he sits on the ship balcony drinking a glass of wine looking out at the sunset, while not having to log into the court computer system to check in on his cases for the first time in a long time. Wesley Steen is more than just a judge; he is an officer of the US Navy, a family man, a pilot, and explorer. The Texas bankruptcy bar will greatly miss this hard-working and dedicated judge.

OUT AMONGST 'EM

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2. "Fore" also means "duck"! When you hear the word, then by God, take cover.

3. A lawyer getting hit on the head with a golf ball arouses about as much sympathy as Osama Bin Laden with a case of prostate cancer. The boys back on the south side of the pro shop by the scoreboard who had already finished play thought that was about the funniest thing they had ever seen or heard. Laughed their better half's off. "Lawyer got hit on the head with a golf ball. Ha ha ha!" "He got hit where it would hurt the least. Ha ha ha!" Very funny, fellas.

All of us have had successes and failures in and out of Court and have been figuratively hit in the head with a verdict or ruling when we weren't looking for it. But in the long run, we have all lived to participate, as they say, another day, in the practice of bankruptcy law which, for my money, has to be the best and most fun law there is to practice. With that, I shamelessly promote membership in and the work of our Bankruptcy Section.

Subject to final approval by the State Bar Board of Directors, your Section Council voted to amend our bylaws to create a new officer position, that being the position of Vice President - Membership. The officer holding this position will have no duties other than to update our membership list from Bar year to Bar year and come up with ways of not only keeping but attracting new members to the Section. They say our Section is the fastest growing Section of the State Bar.

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Staying In: Disinterested/Contingency Fees: Former bankruptcy judge and **Frank R. Monroe** (Austin – Bankr. W.D. Tex) and **Patricia B. Tomasco** (Austin) provided an overview of retainers, payment methods and contingencies with an analysis of how to determine whether a professional is disinterested. Issues discussed included attorneys as creditors and whether contingency fee agreements are executory contracts.

Getting Paid: State of Fee Applications: **The Hon. Leif M. Clark** (Bankr W.D. Tex – San Antonio) moderated a "spirited" discussion between **Omar J. Alaniz** (Dallas) and **Charles A. Beckham, Jr.** (Houston) about the standards for receiving compensation including the *Johnson* factors, lodestar analysis and the impact of the Fifth Circuit's *Pro-Snax* decision. The panel provided an excellent discussion on the difficulties arising from the Fifth Circuit's use of a civil rights case (*Johnson)* for awarding fees in bankruptcy instead of using probate law cases as they relate to common funds. The panel concluded by discussing whether the defense of final fee applications are compensable from the estate and the impact of the Supreme Court's recent decision in *Perdue* on fee enhancements.

CONSUMER TRACK PRESENTATIONS

Guardianship as an Alternative to Filing: **Linda C. Goehrs** (Houston) presented an interesting discussion of what a guardianship is and how to put a guardianship in place, as well as noticing and statutory issues, and issues involving creditors, both secured and unsecured. Ms. Goehrs discussed insolvent guardianships, and attorney fee claims related to guardianships as well.

The Final Discharge: Probate and Bankruptcy: **Michael J. O'Connor** (San Antonio) discussed how property of the estate, case administration and the discharge are affected by the debtor's death as impacted by the Supreme Court's *Marshall v. Marshall* decision, Bankruptcy Rule 1016, and Bankruptcy Code Section 541.

Adequate Assurance for Utilities: In this presentation **Elizabeth G. Smith** (Houston) provided an overview and explanation of the meaning and operation of 11 U.S.C. § 366. An often overlooked and misunderstood topic, particularly for consumer attorneys who may not have regular experience with § 366, Smith expertly and concisely explained the rights of utilities and debtors with respect to each other upon a bankruptcy filing.

Projected Disposable Income: Which Way Do We Look?: **Jeffry M. Fleming** (Addison) and **Layla D. Milligan** (Austin) discussed pre- and post-BAPCPA cases that address the issue of projected disposable income, and discussed the Supreme Court's decision of *Hamilton v. Lanning*, including the dissent by Justice Scalia. Mr. Fleming and Ms. Milligan also discussed how cases currently before the Supreme Court may have an impact on the issue of projected disposable income as well.

Milavetz/Debt Relief Agents: The Supreme Court's recent decision in *Milavetz vs. United States* clarified the debt relief agency provisions of 11 U.S.C. §§ 526, 527, 528, and 101(12A). **Joshua P. Searcy** (Longview) presented an explanation of the Court's decision, its practical meaning and application for consumer attorneys, and an overview of lower court decisions interpreting the debt relief agency provisions which led to the Supreme Court's decision.

The John C. Akard Distinguished Lecture: **Sean Hagan** (Washington, D.C.), General Counsel and Director of the Legal Department at the International Monetary Fund, provided an in depth discussion of the European debt crisis and how it is similar and different to the Asian debt crisis. Similarities included a general lack of confidence in the market; the establishment of legal frameworks to support reorganization of viable businesses and liquidation of non-viable ones; and the use by governments of special state powers where the government is the debtor. Primary differences highlighted include that the European crisis involved debt denominated in foreign currency and that it is now recognized that governments need to play a robust role in large financial crisis, whereas in Asia, the principal of moral hazard prevented public money from being used for private debt crises. Mr. Hagan emphasized the importance of needing to first stabilize a financial crisis through soft bank capitalization before beginning work-outs in order to promote predictability, especially in emerging markets.

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29TH ANNUAL JAY L. WESTBROOK BANRKUPTCY CONFERENCE

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FRIDAY PRESENTATIONS

Finality: **Mary K. Viegelahn** (San Antonio) explained how the Supreme Court's recent decision in *Schwab* impacted consumer debtors' exemptions, and how the Court's recent decision in *Espinoza* could affect confirmation of Chapter 13 plans.

Issues with the Non-Filing Spouse: **Michael Baumer** (Austin) discussed issues involved in consumer cases where one spouse does not file, including how to account for the non-filing spouse's income, the community property discharge of debts, and automatic stay as it applies to a co-debtor.

Recent Legislative Developments and Rule Changes: **Samuel J. Gerdano** (Alexandria, VA), the always entertaining and informative executive director of the ABI, gave an update from D.C. about recent important legislation including the newly created Consumer Financial Protection Bureau, its broad powers, rule making authority pursuant to the *Chevron* deference, and its independent litigation authority. Mr. Gerdano highlighted that the CFPB's early targets might be student loan and credit card lenders. Mr. Gerdano then donned a "Too Big To Fail" hat given to him by Harvey Miller (see picture in newsletter), during his explanation of the recent legislation creating a Resolution Authority for companies posing systemic risk.

Valuation Snapshot: **Berry D. Spears** (Houston) provided practice tips for valuation issues and a comprehensive paper on valuation case law. Mr. Spears highlighted how courts have recently combined three traditional valuation approaches (income, sales, and cost) into a "weighted" approach, and how an expert in *Tousa* used a creative approach that combined enterprise value with others to determine "observable market value."

Insolvency Forensics: Untangling the Disaster: **Ralph S. Janvy** (Dallas), receiver appointed in the R. Allen Stanford case, and **David Phelps** (Dallas), explained how a court appointed officer reconstructs the failed enterprise and its history , and identifies forensic concerns, assets and cash flows, debt and equity positions, while addressing the interests of creditors, investors, and third parties.

Receiverships: Moderated by the **Hon. DeWayne (Cooter) Hale** (Bankr. N.D. Tex. – Dallas), **Holland Neff O'Neil** (Dallas), **William F. Stutts, Jr. (**Austin) and **Joseph J. Wielebinski, Jr.** (Dallas) compared chapter 11 cases (debtor focused and governed by statute) with receivership proceedings (investor focused, case by case rules), state court and federal court receiverships, and receiverships in Ponzi scheme cases. The panel discussed the recent *Provident Royalties* case Judge Hale presided over and the unique issues presented when both chapter 11 and receivership cases are commenced for the same company, and how the courts and practitioners solved difficult problems with a practical approach. For example, the parties developed a protocol modeled after chapter 15 to govern and guide the bankruptcy and receivership cases.

Judges Panel: The **Hon. Leif M. Clark** (Bankr W.D. Tex. – San Antonio) moderated this panel featuring **Hon. Arthur J. Gonzalez** (Bankr. S.D.N.Y.), **Hon. Brenda T. Rhoades** (Bankr. E.D. Tex – Plano), and **Hon. Christopher S. Sontchi** (Bankr. D. Del.), who provided his views by e-mail. Topics covered included first day motions, DIP financing orders, and fee applications. Judge Gonzalez provided his unique insight into certain aspects of large cases he presided over including fee issues in *Enron* and *WorldCom*, and a "behind the scenes" look into how the *Chrysler* opinion was written, while confessing that he is still confused what the Supreme Court did when it vacated the 2nd Circuit's opinion in *Chrysler*.

I Wish I May, I Wish I Might . . . File Chapter 11 Tonight: Authorization and D&O Considerations When Filing Chapter 11: **Syliva A. Mayer** (Houston) and **J. Michael Sutherland** (Dallas) discussed important considerations when preparing to file bankruptcy remote entities, limited partnerships, and limited liability corporations, including organizational document restrictions and D&O insurance concerns. Ms. Mayer discussed issues arising out of the *General Growth Properties* decision, and the Delaware Chancery Court's recent *CML V, LLC v. Bax* decision. Mr. Sutherland highlighted issues to be aware of in claims made policies and wasting policies, and the Fifth Circuit's recent enforcement of the personal profit exclusion in the *PinkMonkey.com* case.

***Competing Claims in Oil and Gas Bankruptcy Litigation*: Meghan E. Bishop** (San Antonio) and **Kenneth Green** (Houston) discussed the unique issues in oil and gas cases, including recent cases involving lien property disputes, competing claims to joint interest billings and production proceeds, and sale of oil and gas properties in bankruptcy. Some of the specific topics covered included Texas and Oklahoma mineral lien laws and issues regarding recording mortgages for secured lenders.

Credit Bidding: **Demetra L. Liggins** (Houston)**, James D. Decker** (New York City), and **Peter Young** (Chicago) concluded the conference by addressing issues and recent developments regarding credit bidding in bankruptcy asset sales and recent important cases and their impact on debtors and creditors, and credit bidding rights.

EVENTS

In addition to Thursday evening's reception after the presentations and the conference's speaker's dinner, the Bankruptcy Section's Young Lawyers' Committee hosed its fourth annual evening reception and invited all attorneys to attendees to The Cedar Door—an Austin institution conveniently located near the Four Seasons where young and experienced practitioners and non-lawyers, including a few judges and many of the conference's speakers, mingled into the night. Special thanks to the events sponsors: the **Bankruptcy Law Section**; **Bridge Associates LLC**, **Conway MacKenzie, Inc.; Harney Management Partners, LLC**; and **Lain, Faulkner & Co., P.C.**

FIFTH CIRCUIT CASE LAW UPDATE: JUDICIAL ESTOPPEL IN BANKRUPTCY PROCEEDINGS

(Continued from page 4)

and the established elements of judicial estoppel will remain; however, the "lowest common denominator" in the analysis is a fact specific consideration of the judicial estoppel claim. *Id*. In the present case, the district court's factual basis for applying judicial estoppel, which Reed did not challenge on appeal, undeniably established that Lubke's fraudulent conduct was not "inadvertent" and satisfied the required elements. *Id*. at *4. However, the district court followed *Kane* and refused to apply judicial estoppel to Reed under the belief that Reed's inability to pursue the judgment would harm the estate's creditors and that she had not engaged in contradictory behavior like Lubke. *Id*.

CONCLUSION: ABANDON ALL HOPE YE WHO HAVE CLAIMS

The Fifth Circuit held that the district court erred in not applying judicial estoppel to Reed. *Id*. Reed, as Lubke's successor in interest, acquired his claim "with all of its attributes" including the possibility of judicial estoppel based on Lubke's inconsistent conduct. *Id*. The district court's attempt at "splitting the baby" to prohibit Lubke from profiting from the judgment while potentially allowing the creditors to do so, was not "an acceptable substitute for a thorough review of the effects of the misconduct." *Id*.

At this point, the court believed the "balance of harms" weighed in favor of ending the litigation. *Id*. Only 1/6th of the original creditors timely refilled when the case reopened and their claims were subject to the large priority administrative expenses of Lubke's FMLA trial attorney and the Trustee, whose claim continued to grow. *Id*. Additionally, the untimely filers had a slim chance of any recovery and most creditors already turned to other means of collection. *Id*. The court did not believe equity justified ignoring Lubke's abuse of the court system to benefit his attorneys, both of which already received "some payment." *Id*.

The court's holding that judicial estoppel applies to both the debtor and the Trustee and prevents either of them from pursing the litigation does not provide much clarity for practitioners within the circuit. With arguments existing to support either the application of judicial estoppel because of inconsistent conduct or deny it based on equity, the status of the doctrine is currently unclear. The not so subtle reference to the need for en banc harmonization makes it likely that this issue will be before the Fifth Circuit again in the near future.

CHAPTER 11 CASE UPDATE: EMPLOYING PRE-PREPETITION CREDITOR PROFESSIONALS

(Continued from page 5)

Arms, L.P.), 934 F.2d 723 (6th Cir. 1991). The court stated that the cases that "bar retention of a professional s*olely* because the professional holds a general unsecured claim are few in number" and are not binding. *See, e.g. U.S. Trustee v. Price Waterhouse*, 19 F.3d 138, 141 (3d Cir. 1994).

CONCLUSION:

Accordingly, the court held that BMY could be employed by the debtor in possession so long as the claim resulted solely from the prepetition employment. Since the record indicated that the claim did so arise, the court found that the employment was permissible. This decision undoubtedly gives debtors in possession more control and flexibility in the way they choose their professionals and manage their bankruptcies.