STATE BAR of TEXAS

BANKRUPTCY LAW Section Newsletter

July 2012 — Volume 11 • No. 2

IN THIS ISSUE

A MESSAGE FROM YOUR OUTGOING CHAIR

Dear Section Members,

As my term ends as chairman, maybe you are thinking of President Ford's quote, "Our long national nightmare is over." I hope not!

Seriously, I've enjoyed serving the section this year as chairman. It was a good year.

This year confirmed what I knew all along – Texas has the best bankruptcy judges, lawyers and other insolvency professionals in the country.

According to the state bar, our section is one of the largest. It also is one of the most active.

This year we have sponsored Moneywise, webcasts, advanced seminars, the Elliott Cup, an international seminar in China, and a webinar on valuation.

Our young lawyers continue to amaze with their level of participation. Our non lawyer members stepped up their involvement and membership numbers this year; they are an important part of our group.

Next year Tom Howley of Houston will chair the section. It may take him a year to undo the damage I caused. I hope he enjoys it as much as I have.

Judge Harlin DeWayne "Cooter" Hale

A MESSAGE FROM YOUR CHAIR

Dear Section Members,

I am very honored and privileged to serve as the 2012-2013 President of this very active section. I thought I would take this opportunity to acknowledge all of those who have served in the capacity as President before me. It is truly a remarkable group of talented individuals. The section was only founded in 2003, but it is no surprise with our past leadership that our section has grown to today's juggernaut with over 1,500 members comprising one of the most active and rewarding sections within the State Bar of Texas. We owe a debt of gratitude to all of our past presidents:

Robert Wilson, Lubbock, Texas, 2003-2004;
Charlie Beckham, Houston, Texas, 2004-2006;
Deborah Williamson, San Antonio, Texas, 2006-2007;
Debbie Langehennig, Austin, Texas, 2007-2008;
Berry Spears, Austin, Texas, 2008-2009;
The Honorable Christopher Mott, El Paso, Texas (now presiding in Austin), 2009-2010;
Byrnie Bass, Lubbock, Texas, 2010-2011; and
The Honorable Harlin Hale, Dallas, Texas, 2011-2012.

Luckily, our current council is also filled with an ambitious and energetic collection of folks who are focused on the section's best interests. We look forward to providing great value to both consumer and business oriented practitioners over the next year.

If you have any suggestions or ideas on how to improve the section, feel free to reach out to me or anyone on the council. In the meantime, if you run into any of our past presidents, please thank them for helping to build such a dynamic and robust section for our membership base. Enjoy the rest of your summer.

Sincerely,

Tom A. Howley
President, Bankruptcy Law Section

30th Annual
Advanced Business Bankruptcy Course
Cosponsored by the State Bar of Texas Bankruptcy Law Section

MCLE Credit: 11.5 hrs (including **2 hrs of ethics**) which applies to the Texas Board of Legal Specialization in **Bankruptcy Law**

Houston – Live Presentation
September 13–14, 2012
Westin Oaks Hotel (713-960-8100)
Register now and save $50! Section members save $75!

If you have any questions or would like to register by phone, please call 800-204-2222, ext 1574.

An outstanding faculty of highly-regarded judges and leading practitioners has been carefully selected to bring business bankruptcy practitioners up to date on the latest case law, emerging trends and issues including:

- **The Economy** – presented by Mark Andrews, Adam Dunayer, Peter Kaufman, and William Snyder
- **General Counsel Panel: What They Look for when Hiring Outside Counsel** – presented by Charles Gibbs, Jeffrey Hasell, Thomas Kurz, Mark Mathews, and Deborah Midanek
- **Surfing the Web and the Web Surfing You** – presented by John Browning and W. Mac Schwartz
- **Small Business Bankruptcies** – presented by David Langston, Theresa Mobley, and Judy Robbins
- **The Other Chapters: Chapter 9 and Chapter 15** – presented by Gregory Gordon and Dean Swick
- **Plus Keynote Speakers**: Paul Begala, *Political Analyst and Commentator, CNN* and *Columnist, Newsweek and the Daily Beast* and Houston Mayor Annise Parker

Your registration includes coffee, pastries and lunch each day, Thursday evening social, convenient access to powerstrips in the meeting room, and early adjournment on Friday for easier travel. Plus, the course materials are optionally available on a USB drive (search all articles at once!).

COME A DAY EARLY TO ATTEND THE ONLY PRESENTATION OF

Bankruptcy 101

MCLE Credit: 5.75 hrs (including .5 hr of ethics) which applies to the Texas Board of Legal Specialization in Bankruptcy Law.

Houston – Live Presentation
September 12, 2012
Westin Oaks Hotel

Register for these programs and you may access the streaming videos of the speeches for up to a year and the digital course materials for several years. You'll find them at **TexasBarCLE.com** within 6-8 weeks after the live program, under **Your Online Classroom/Free Classes from Seminars You've Attended**. (You'll need to log in as a registered user of the site to access this feature).

TexasBarCLE
CONTINUING LEGAL EDUCATION

REPORT FROM THE SECTION'S ANNUAL MEETING HELD IN CONJUNCTION WITH THE STATE BAR OF TEXAS ANNUAL MEETING

The State Bar's Annual Meeting took place June 14-15 in Houston, Texas. Attendees were faced with the difficult choice of selecting a few of numerous terrific programs to attend. Thursday's choices included everything from "60 Apps in 60 Minutes: A Survey of the Most Useful Legal Apps for Lawyers" to the Business Law Section's "Hiring from Competition." For litigation attorneys, there were notable programs like, "Mediate, Arbitrate or Litigate: What would Lincoln Do?" Also featured was a luncheon in recognition of James A. Baker, III.

On Thursday evening, the Bankruptcy Section hosted a happy hour at The Grove Restaurant. The event was well attended by both bankruptcy practitioners and judges.

On Friday morning, the Bankruptcy Section offered several CLE programs that provided case law updates highlights in the areas of business, advisory and consultants, and consumer bankruptcy.

Eli O. Columbus (Winstead PC – Dallas) and **Sean B. Davis** (Winstead PC – Houston) provided an extensive overview of recent business bankruptcy issues including cram-down interest rate rulings, credit bid rights in plan sales, structured dismissals, third party releases, *Stern v. Marshall* avoidance litigation cases, and retaining causes of action under a plan.

Albert S. Conly (FTI Consulting, Inc. – Dallas) and **Gregory S. Milligan** (Harney Management Partners – Austin) served on the first all financial professional CLE panel at a Bankruptcy Law Section seminar and provided an update on financial advisory and consultants' bankruptcy issues, including the issues related to establishing post-confirmation trusts, retaining causes of action, communicating with creditors post-confirmation, and distributing funds.

Julie A. Mann and **David Aaron DeSoto** (Mann Law Firm, PLLC – Houston) and **Ken Thomas** (Office of William E. Heitkamp, Chapter 13 Trustee – Houston) discussed current trends and recent developments in consumer bankruptcy, including the impact of the mortgage crisis on bankruptcy practice, mortgage proofs of claim, new forms and rules for the mortgage industry, *Espinosa*, and the binding effect of a chapter 13 plan confirmation, and the impacts of *Stern v. Marshall*, and predictions for the rest of 2012 and beyond.

At the conclusion of the CLE programs, the Bankruptcy Section held its annual meeting. The **Honorable Harlin DeWayne "Cooter" Hale** led the meeting and provided the membership with an update on the Section's activities during the previous year. In addition, the Section elected its new officers and council members. Finally, congratulations are in order for the following individuals who received awards and accolades at the annual meeting: the **Honorable John C. Akard** recipient of the

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Award Recipients
Judge Parker, Judge Hale, Layla Milligan, Tom Rice, Mark Andrews, Judge Akard, Byrnie Bass, Jr., Tom Howley, and Jermaine Watson

PAYING TO PLAY THE QUIET GAME: IT PAYS TO BE QUIET, OR DOES IT?

By: Trinitee G. Green, Judicial Extern to the Honorable Harlin D. Hale and graduating law student at SMU Dedman School of Law (tggreen@smu.edu)

Overview

In *Waldron v. Adams & Reese, L.L.P. (In re Am. Int'l Refinery, Inc.)*, 11-30462, 2012 U.S. App. LEXIS 6367 (5th Cir. Mar. 29, 2012), the Fifth Circuit recently affirmed a bankruptcy court's decision to sanction counsel for failing to make certain disclosures. According to the Trustee, disgorgement of one hundred percent of attorney's fees was required because the debtors' counsel ("A&R") was not disinterested. *Id.* at *2. Despite acknowledging that A&R's conduct was questionable, the Fifth Circuit upheld the bankruptcy court's finding that no disqualifying interest was created by such conduct. *Id.* at *9-20. Furthermore, the Fifth Circuit did not agree that the bankruptcy court had abused its discretion by limiting the sanction to disgorgement of only a portion of the attorney's fees. *Id.* at *21-24.

Procedural History

This case is an adversary proceeding that arose in a Chapter 11 bankruptcy of the following debtors: American International Petroleum Company ("AIPC") and American International Refinery, Inc. ("AIRI"). *Id.* at *1. The District Court for the Western District of Louisiana affirmed the bankruptcy court's decision, and the Fifth Circuit affirmed the district court's judgment. *Id.*

Facts

Pre-Bankruptcy

American International Petroleum Kazakhstan ("AIPK"), a wholly owned subsidiary of AIPC, sold eighty-five percent of its interest in a gas concession. *Id.* at *2. The gas concession was known as "License 1551," and it was, indirectly, one of AIPC's principal assets. *Id.* In fact, AIPK received approximately $5 million in exchange for the interest sold. *Id.* A large amount of those funds were used to pay the wages and benefits of AIPC's officers. *Id.* Prior to the sale of License 1551, one of AIPC's creditors, GCA Strategic Investment Fund Limited ("GCA"), executed an agreement with AIPC in connection with the sale of License 1551. *Id.* at *3. Specifically, GCA agreed to release a security interest it held in AIPK's shares, so long as certain conditions were met, in exchange for the assignment of dividends to be received. *Id.* The named conditions were never satisfied and the assignment of dividends did not occur. *Id.* Nevertheless, the sale of License 1551 took place. *Id.* Sometime thereafter, but before the bankruptcy petition was filed, A&R drafted a dividend assignment agreement between GCA and AIPC. *Id.* The agreement was executed after the petition was filed, but it was backdated to the date that License 1551 was sold. *Id.* In early 2004, AIPC engaged A&R to assist in its restructuring, which involved negotiations of a "lock-up agreement" with GCA. *Id.* at *4. The lock-up agreement was never fully executed and the final bankruptcy plan was not based on its terms. *Id.*

Post-Bankruptcy

In fall 2004, AIRI and AIPC filed for bankruptcy and A&R continued to represent them as bankruptcy counsel. *Id.* AIPC lacked the funds to pay A&R's retainer, so it collected funds from GCA on behalf of one of its wholly owned subsidiaries. *Id.* at *4-5. However, GCA wired A&R the money owed to AIPC's subsidiary, instead of transferring it directly to AIPC or its subsidiary. *Id.* at *5. At the time of the bankruptcy, GCA was one of the debtors' largest creditors. *Id.* at *2. Nevertheless, A&R never disclosed the source of its retainer in any of the compensation applications it filed with the court. *Id.* at *5. Also, the Equity Security Holders Committee (EC) objected to various bankruptcy plans filed by the debtors because the plans treated GCA's secured claims too favorably. *Id.* By March 2006, the EC and GCA reached a settlement that was confirmed by the bankruptcy court. *Id.* It provided for payment of all secured and unsecured claims, as well as a distribution to equity holders. *Id.* Neither AIPC nor A&R were involved in negotiating the terms of this final settlement. *Id.*

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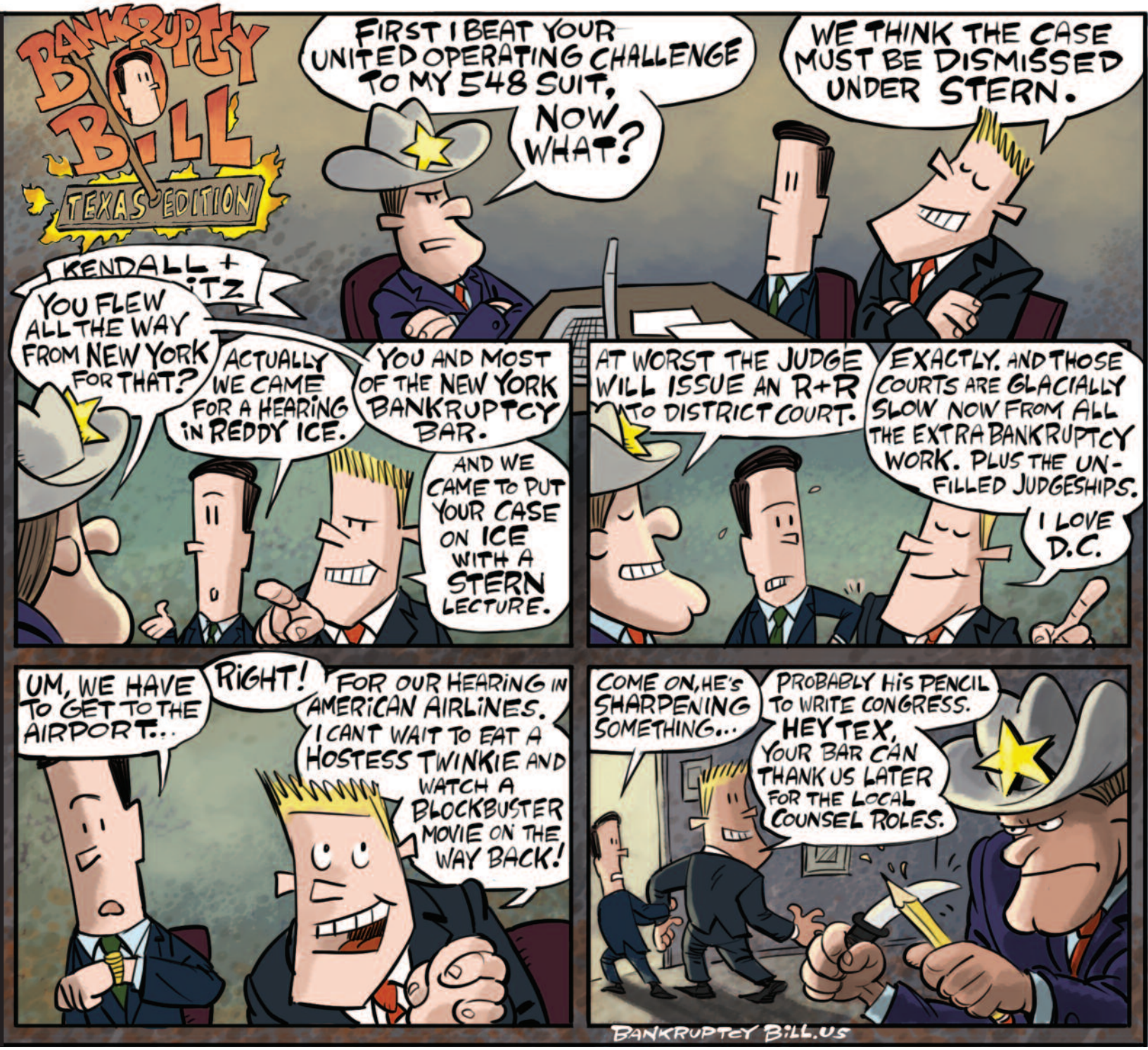
BANKRUPTCY BILL



Fees Awarded Under *Pro-Snax* in Case Converted to Chapter 7

By: Julian P. Vasek, Associate with Rochelle McCullough LLP, Dallas
(jvasek@romclawyers.com)

On April 25, Judge Lynn issued his opinion in *In re Broughton Ltd.* P'shp, Case No. 10-42327-DML11, 2012 Bankr. LEXIS 1814 (Bankr. N.D. Tex. April 25, 2012). In *Broughton*, the debtor sought to employ Cotton Schmidt & Abbott (the "Firm") as special counsel to negotiate the sale of twenty-two pieces of real property. The Court approved the employment, and the work was primarily done by Randall Schmidt ("Schmidt"). But Schmidt's negotiations ultimately proved fruitless. As a result, the case was converted to a case under chapter 7. When the Firm applied to the Court for compensation, the United States Trustee ("UST") objected under *Andrews & Kurth, L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414 (5th Cir. 1998).

The Court first noted that Pro-Snax is viewed as requiring a retrospective analysis of the services provided and whether they confirmed an "identifiable, tangible, and material benefit to the estate," but that courts interpreting Pro-Snax "have adopted differing views of what type of retrospective analysis should be employed and have disagreed whether a prospective analysis may be considered in determining whether Pro-Snax is satisfied." Broughton, 2012 Bankr. LEXIS 1814 at *7-10, n.5 (citing and summarizing several cases demonstrating the differing views).

Early in the opinion, the Court held that "'the services [of the firm] were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of [the bankruptcy case].'" *Broughton*, 2012 Bankr. LEXIS 1814 at *10-11 (quoting, with alterations, 11 U.S.C. § 330(a)(3)(c)). Having determined that Schmidt and the Firm met the prospective requirement set by the Code, the Court turned to the retrospective analysis mandated by *Pro-Snax*. But considering that "[r]equiring an after-the-fact evaluation . . . has been generally rejected by courts of other circuits," *id.* at *16, the Court sought to perform its retrospective analysis in a way that minimized the difference in outcome between circuits. *Id.*

In order to achieve this goal, the Court looked to two possible sources for direction. First, the Court discussed *In re Melp, Ltd.*, 179 B.R. 636 (E.D. Mo. 1995), which was the only case the Fifth Circuit cited when it held in *Pro-Snax* that a professional's work must provide an identifiable, tangible, and material benefit to the estate. Second, the Court looked to Judge Jane Boyle's decision in *Kaye v. Hughes & Luce, LLP (In re Gadzooks, Inc.)*, No. 3:06-CV-01863-B, 2007 U.S. Dist. LEXIS 50929 (N.D. Tex. July 13, 2007).

The *Melp* court identified three factors to consider when determining whether a lawyer had provided an identifiable, tangible, and material benefit to the estate: (1) whether the debtor's attorney's actions duplicated the duties of the trustee or the trustee's counsel under 11 U.S.C. § 1106; (2) whether the services have in fact, obstructed or impeded administration of the estate; and (3) whether the debtor's attorney's actions are consistent with the debtor's duties under 11 U.S.C. § 521. *Broughton*, 2012 Bankr. LEXIS 1814 at *25.

With respect to the first factor, the Court concluded that the relevant question is not whether the attorney's work duplicated work a later-appointed trustee's counsel might hypothetically do. The question is "whether the actual work performed by a debtor's counsel duplicated work done or about to be done by the trustee or the trustee's counsel." *Id.* at *27. The Court found that the trustee did not do the same work as the Firm. The Court also found that the Firm's work did not obstruct or impede the administration of the estate.

With respect to the second *Melp* factor, the Court concluded the Firm's work did not obstruct or impede the administration of the estate, and that the Firm's efforts were directed by the estate representative. Id. at *28.

With respect to the third *Melp* factor, the Court concluded that the reference to the debtor's duties under section 521 "does not constitute a limit on that for which a professional working for a debtor in possession may be compensated." *Id.* at *29. Instead, courts need only determine that the efforts of the professional are not inconsistent with section 521. *Id.* The Firm's work was found to be consistent with section 521.

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Review of the Annual Fifth Circuit Elliott Cup Moot Court Competition

By: Thomas Rice, Cox Smith Matthews, Inc., (trice@coxsmith.com)

On February 24th and 25th, the Annual Fifth Circuit Elliott Cup Moot Court Competition sponsored by the Texas State Bar Bankruptcy Section – and named in Honor of the Honorable Joseph Elliott, former Chief Bankruptcy Judge for the Western District of Texas – was held at the Fifth Circuit Court of Appeals in New Orleans, Louisiana. Seventeen law school teams representing nine law schools from around the Fifth Circuit attended the Elliott Cup. The team of Ms. Morgan Harkins and Mr. Hunter Oliver from the Baylor Law School was the winning team for this year's Elliott Cup competition, with coaches Ms. Kathy Serr and Mr. William Drabble. The Best Oral Advocate was awarded to Betsey Turley from the Mississippi College School of Law.

In addition to the awards typically presented at the Elliott Cup, the Federal Bar Association Bankruptcy Section agreed to present the winning law school with a cash award of $2,500. The award was presented to Baylor Law School by Ashley L. Belleau from the law firm of Montgomery Barnett, LLP.

The Elliott Cup serves as a run-up to the Annual National Duberstein Bankruptcy Moot Court Competition held at St. John's School of Law in New York in March. Elliott Cup teams have historically posted excellent results at the national competition and this year was no different, as the team of Mr. Brian Cumings and Mr. Eric Werlinger from the University of Texas School of Law was the winning team for this year's Duberstein Bankruptcy Moot Court Competition, with coaches Ms. Debbie Langehennig, Chapter 13 Trustee and Mr. Jay Ong of Munsch Hardt Kopf & Harr, P.C.. The Best Oral Advocate Honor was awarded to Mr. Hunter Oliver from the Baylor Law School. For each of the past four years, the Best Oral Advocate Award from the Duberstein Bankruptcy Moot Court Competition has gone to an Elliott Cup competitor. Additionally, in each of those years, three out of the four Outstanding Oral Advocate awards have been given to students that competed in the Elliott Cup. Many thanks to the numerous judges and attorneys involved in this year's events for the benefit of aspiring young bankruptcy lawyers.

First Place from Baylor School of Law
Morgan Harkins (Baylor University), Thomas Rice (Cox Smith San Antonio, TX), and Hunter Oliver (Baylor University)

Second Place Team from Mississippi College of Law
Mackin Johnson (Mississippi College), Betsey Turley (Mississippi College), Thomas Rice (Cox Smith San Antonio) and Brad Shaw (Mississippi College)

Third Place Teams from SMU
Scott Dickerson (SMU Dedman School of Law), Amber Chambers (SMU Dedman School of Law), John Sokatch (SMU Dedman School of Law), Thomas Rice (Cox Smith San Antonio, Texas), Tim Springer (SMU Dedman School of Law), Max Antony (SMU Dedman School of Law), and Blair Green (SMU Dedman School of Law)

First Place Oral Advocate Betsey Turley

Baylor Law School Special Awards
Hunter Oliver (Baylor University), Morgan Harkins (Baylor University), Matthew Greenberg (Baylor University), and Ashley Belleau (Montgomery Barnett New Orleans, LA)

Liz Boydston (Fulbright & Jaworski Dallas, Texas), Scott Dickerson (SMU Dedman School of Law), John Sokatch (SMU Dedman School of Law), Max Antony (SMU Dedman School of Law), Amber Chambers (SMU Dedman School of Law), Tim Springer (SMU Dedman School of Law), Blair Green (SMU Dedman School of Law), and Omar Alaniz (Baker Botts Dallas, Texas)

Playing the Field: Death Penalty Sanction Invoked by Bankruptcy Court

By: Travis James Cox, Judicial Extern to the Honorable Harlin D. Hale and second-year law student at the Baylor Sheila & Walter Umphrey Law Center (Travis_Cox1@baylor.edu)

Introduction

In a rare imposition of a death penalty sanction, a Dallas bankruptcy court ended a five-year adversary proceeding based upon the serious and improper actions of the creditor and its counsel, when it was revealed to the court that the creditor was paying the same firm to represent both sides (the company as creditor and the bankruptcy trustee). Accordingly, the court dismissed the action with prejudice. *The Cadle Co. v. Brunswick Homes L.L.C. (In re Moore)*, 2012 WL 1415513 (Bankr. N.D. Tex. 2012), *available at* http://www.txnb.uscourts.gov/opinions/pdf/2006-3417-240.pdf.

Background

In 2005, The Cadle Company ("Cadle") purchased claims and judgments against James Moore ("Moore"). A Dallas law firm (the "Law Firm") handled prepetition collection efforts on behalf of Cadle, culminating in a veil piercing action filed in 2005 (the "VP Action"). A year later, Moore filed chapter 7 bankruptcy. In light of the bankruptcy proceeding, the VP Action was assigned to the chapter 7 trustee (the "Trustee"). Realizing he would need assistance to pursue the VP Action, the Trustee engaged the Law Firm on a contingency basis, with an acknowledgement that the Law Firm could request an administrative expense claim for expenses and fees at the conclusion of the veil piercing action. The prepetition fees incurred by the Law Firm were to be handled by Cadle filing a proof of claim in the chapter 7 case. In accordance with Bankruptcy Rule 2014, the Trustee filed an application (the "Application") with the bankruptcy court in August of 2006 seeking authority to employ the Law Firm as special litigation counsel.

However, three days after filing the Application, the Law Firm, on behalf of Cadle, filed an objection to Moore's discharge under section 11 U.S.C. § 727 (the "Discharge Adversary"). At an October hearing on the Application, the Law Firm failed to disclose its representation of Cadle in the Discharge Adversary to the bankruptcy court. This was the first of several failures to disclose by the Law Firm.

By letter dated November 6, 2006 (the "2006 Agreement"), Cadle agreed to pay the Law Firm's fees related to the prosecution of the VP Action, as well as fees related to representing Cadle in the bankruptcy case and the Discharge Adversary. If successful in the VP Action, the Law Firm would request its contingency fee as an administrative expense of the bankruptcy estate, and upon payment reimburse Cadle for fees and expenses Cadle actually paid to the Law Firm in connection with the VP Action. Of particular importance is the fact that the 2006 Agreement was not disclosed to the court until August of 2011.

In 2007, during the trial of the Discharge Adversary, the Law Firm filed a motion to withdraw as special counsel. The Law Firm sought to withdraw because Cadle, contrary to the 2006 Agreement, refused to fund the Law Firm's expenses related to the VP Action. This was the first time the Court learned of the existence of the 2006 Agreement. However, the 2006 Agreement was not produced to the Court until August of 2011. The motion to withdraw was ultimately denied.. However, the court noted that the failure to disclose the 2006 Agreement and the "bad smell" of the situation because Cadle would have obtained what it wanted, denial of discharge, while not fulfilling its alleged obligations under the 2006 Agreement. Accordingly, the court invited the Law Firm to return with evidence of the 2006 Agreement and evidence that the court was made aware of and approved the 2006 Agreement. In fact, the Court suggested that if such evidence was produced that it might require Cadle to fund the litigation. However, neither Cadle nor the Law Firm provided the 2006 Agreement to the court in 2007.

In January 2008, the Trustee settled VP Action for $37,500. Shortly thereafter, Cadle, with a new attorney, filed an objection to the settlement, stating they would pay $50,000 for the claims. At an evidentiary hearing on the objection, it came to light for the first time that Cadle was paying the Law Firm's legal fees for prosecuting the VP Action. However, the testimony was not clear as to what Cadle had or had not been paying the Law Firm for prosecuting the VP Action. Ultimately, the bankruptcy court overruled the objection,

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Texas Law Schools Flourish at Annual Conrad B. Duberstein National Bankruptcy Moot Court Competition

By: Jay Ong, Munsch Hardt Kopf & Harr, P.C., (jong@munsch.com)

Professor Jay L. Westbrook, Debbie Langehennig, Chapter 13 Trustee, Zachary Popovich, Eric Werlinger, Brian Cumings, Gabriel Markoff, and Jay Ong

Students from Texas law schools continued their run of great success at the 20th Annual Conrad B. Duberstein National Bankruptcy Moot Court Competition, held at St. John's University in Queens, New York, March 9–12, 2012. The University of Texas, Baylor University, University of Houston, St. Mary's University, Texas Southern University, Southern Methodist University, and Texas Tech law schools attended the competition, featuring a field of fifty-four teams from law schools across the country.

The University of Texas School of Law and University of Houston Law Center each advanced two teams to the elimination (Octofinals) rounds of competition, while one team from each of Texas Tech School of Law and SMU School of Law also advanced to the Octofinals. Both UT teams, as well as the Texas Tech team and one of the UH teams, also advanced to the Quarterfinals round. Ultimately, UT won First Place at the competition and garnered an additional Outstanding Advocate recognition (B. Cumings). UH received Outstanding Brief recognition, while Baylor won the Best Advocate award (H. Oliver), as well as also receiving an additional Outstanding Advocate recognition (M. Harkins).

The annual Duberstein Competition involves a substantial commitment from students, who undertake fact pattern analysis and brief writing beginning in December. Students from these Texas law schools also attended the Elliot Cup regional competition held this year in New Orleans, Louisiana, at the Federal District Court and Fifth Circuit Court of Appeals.

This year's fact pattern involved the current "hot button" issues of the limits of bankruptcy court jurisdiction in light of the United States Supreme Court's recent decision in the case of *Stern v. Marshall*, as well as the availability of good faith and equitable defenses to avoidance actions by the bankruptcy estate seeking to recover post-petition transfers.

The competitions rely heavily upon local bankruptcy judges, practitioners and professionals, who graciously contribute their time to assist in training and mentoring the teams.

Bankruptcy Jurisdiction – It is Not a Joking Matter – A Review of the American College of Bankruptcy 5th Circuit Fellows Seminar – April 27 & 28 in San Antonio

By: Debbie Langehennig, Chapter 13 Trustee

Judge Neil Olack of S.D. Miss, Bill Greendyke, Patrick Vance, and James Sprayregen

Judge Ronald King, Louis Phillips, Deborah Williamson, Bettina Whyte, and Douglas Draper

Judge Leif Clark, Alfredo Perez, Zack Clement, Becky Roof, and Robin Phelan

Bankruptcy practitioners and judges from Texas, Louisiana, Mississippi, Illinois and Tennessee gathered in San Antonio during Fiesta Week to discuss timely topics related to bankruptcy court jurisdiction or the lack thereof, at the American College of Bankruptcy Fifth Circuit Fellows seminar. The seminar opened with a reception and Fellows Dinner on Friday, April 27 and attendees who arrived early in the Alamo City were able to catch the Battle of the Flowers Parade. Charles A. Beckham, Jr., the American College Fifth Circuit Regent, welcomed attendees on Saturday, April 28. The seminar opened with a discussion of *Stern v. Marshall* – panelists included Judge Neil Olack, Bill Greendyke, Patrick Vance and James Sprayregen. "Since its release, a maelstrom of opinions and articles have been written about the scope of *Stern*, ranging in tone from 'much ado about nothing' to 'the end of the bankruptcy world as we know it.'" *In re BankUnited Financial Corp.*, 462 B.R. 885 (Bankr. S.D. Fla. 2011). Panelists discussed only a few of the 417 decisions they found citing to the Stern decision and also noted that the National Rules Committee has begun meetings to discuss rulemaking to address issues raised by the decision, specifically whether "consent" might be effective to confer jurisdiction appropriately.

The second panel was moderated by Chief Judge Ronald B. King, with panelists Louis Phillips, Deborah Williamson, Bettina Whyte and Douglas Draper. On the topic of Post-Confirmation Jurisdiction, the discussion covered a wide range of issues including clarity and specificity in retention clauses in a plan, properly transferring reserved causes of action to the reorganized entity, and the conundrum of how to reserve claims that might be asserted against professionals. There was much discussion on drafting recommendations to avoid issues with proper retention and judicial estoppel claims. The consensus: as in real estate, so too in post-confirmation jurisdiction – "location matters."

Cross-Border Jurisdiction and related issues were thoroughly covered by Zack Clement, Judge Leif Clark, Robin Phelan, Alfredo Perez and Becky Roof, with emphasis on the extraterritorial effect of an insolvency proceeding in a foreign country and the extent to which a foreign representative can participate in a U.S. proceeding. There are tensions surrounding the determination of COMI – "center of main interest" – as a surrogate for whose law will control in insolvency proceedings and also inherent conflicts in laws of one jurisdiction which may be "manifestly contrary to public policy" in another jurisdiction, such as waiver of attorney-client privilege.

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Review of Starting Out Right Conference in Austin, Texas

By: Vanessa E. Gonzalez (vgonzalez10@bloomberg.net)

The Young Lawyers Committee held the Starting Out Right Conference on April 13, 2012 at the Homer J. Thornberry Federal Judicial Building in Austin, Texas. **Omar J. Alaniz** (Dallas) and **Francis Smith** (Dallas) served as presiding officers and were assisted by members of the conference's planning committee.[1]

Starting Out Right, a program sponsored by the Section, is aimed at providing insight on topics likely to be encountered by bankruptcy attorneys in their first through third years of practice. The conference featured speakers from throughout Texas, including many Texas bankruptcy judges and was attended by over forty-five bankruptcy professionals from Austin and the surrounding areas. **Cara Kelly** (Austin), Associate at Munsch Hardt Kopf & Harr, P.C., exclaimed that she "enjoyed hearing directly from the bankruptcy judges across Texas and prominent local bankruptcy attorneys. It was a great opportunity to ask questions, gain personal insights, tips and advice from the esteemed bench and bar." For those members of the Section who were unable to attend, below are summaries of the presentations of the conference.

Presentation Summaries

Judge Parker

Bankruptcy Basics: The Honorable Bill Parker (Bankr. E.D. Tex.—Beaumont, Lufkin, Marshall and Tyler) opened the conference with an entertaining overview of the bankruptcy process, the waterfall of distribution to creditors, and the overall policy goals of the bankruptcy system. Judge Parker discussed the Chapter 11 process at great detail from the filing of the petition for relief through the entry of the final decree.

Exemptions and Lien Avoidance: Layla Milligan (Austin) provided an overview of exemptions afforded to individual debtors under state law or federal exemptions, pursuant to Sections 522(b) and 522(d). Ms. Milligan discussed several notable bankruptcy cases which provide that domicile and residence are not the same, as applied to the proposition that if the debtor has been a domiciliary in Texas for over 730 days prior to filing, the debtor may elect either federal or state exemptions including: *Camp v. Ingalls* (In re Camp), 631 F.3d 757 (5th Cir. 2011) and *In re Arredondo-Smith*, 436 B.R. 412 (Bankr. W.D. Tex. 2010). **The Honorable Craig A. Gargotta** (Bankr. W.D. Tex.—Austin) explained the various ways to avoid certain transfers of property of the estate pursuant to Chapter 5 of the Bankruptcy Code.

Layla Milligan

10 Important Deadlines You Don't Want to Miss: Michael Baumer (Austin) and **Omar J. Alaniz** (Dallas) provided an overview of important deadlines in Chapter 13 Cases and Chapter 11 Cases. With respect to Chapter 13 cases, Mr. Baumer discussed deadlines, including, but not limited to: filing schedules, filing a list of creditors, the first meeting of creditors, and the bar date for filing proofs of claim. In the Chapter 11 cases context, Mr. Alaniz discussed deadlines, including, but not limited to: filing schedules and statement of financial affairs, filing proofs of claim, making a Section 1111(b) election and providing adequate assurance to utility companies.

Omar Alaniz

Objections to Claims: Michael Baumer (Austin) explained common objections to proofs of claims, such as failure to produce documentation supporting the claim, and provided practice tips to overcome the same. Mr. Baumer also provided an overview of the claims objections process.

1 The planning committee was comprised as follows: Judge Craig Gargotta, Judge Harlin D. Hale, Judge Marvin Isgur, Omar J. Alaniz, Debra Innocenti, Deborah B. Langehenning, Sara Keith, Marc F. Salitore, Beth Smith, and Frances Smith.

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We Need a Change to Our Local Rules

By: John E. Mitchell, Vinson & Elkins LLP (jmitchell@velaw.com)

I've never read the novel C*atch 22*,[1] but I know what the title means. According to **Dictionary.com**, a "catch 22" is a frustrating situation in which one is trapped by contradictory regulations or conditions. Likely unbeknownst to most bankruptcy professionals in Texas, where to remove a proceeding based upon both bankruptcy and another form of federal jurisdiction can be a "catch 22," but a simple rule change can fix this problem.

We bankruptcy lawyers are all quite familiar with the provisions of Title 28 of the United States Code, particularly those governing bankruptcy jurisdiction and removal of proceedings. 28 U.S.C. § 1334(b) provides that federal district courts have "original jurisdiction of all civil proceedings . . . arising in or related to cases under title 11." Proceedings subject to bankruptcy jurisdiction are removable under 28 U.S.C. § 1452(a) as "a party may remove any claim or cause of action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." 28 U.S.C. § 157(a), in turn, authorizes the district courts to refer proceedings to the bankruptcy courts: "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."

In Texas, the district courts have done just that. Each district has issued a standing order of reference, referring all proceedings arising in or related to Title 11 to the bankruptcy courts for that particular district.[2] Under the local bankruptcy rules for the Northern District and the Western District, notices of removal must be filed with the clerk for the bankruptcy court, not the district court. Rule 9027-1(a) of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas requires that "[a] removed claim or cause of action related to a bankruptcy case ***shall*** be filed in the bankruptcy court as an adversary proceeding . . ." (emphasis added).[3] Thus, when removing a proceeding arising in or related to a case under Title 11, removal papers are to be filed with the bankruptcy clerk.

28 U.S.C. § 1334 is hardly the only basis for federal jurisdiction; for example, diversity jurisdiction can exist under 28 U.S.C. § 1332(a). When removing under diversity jurisdiction, 28 U.S.C. § 1446(a) requires defendants to file in the "district court of the United States for the district and division within which such action is pending a notice of removal . . . ." The notice of removal must be filed within 30 days of service or receipt of the complaint.[4]

Seems simple enough. If you are removing under bankruptcy jurisdiction, file your notice of removal with the bankruptcy clerk. If you are removing under other forms of federal jurisdiction, file your notice of removal with the district clerk. In fact, Rule 9027(b)(1) of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Western District of Texas states that "[a] notice of removal grounded on any ***other*** federal provision (e.g., diversity of citizenship) shall be filed with the Clerk of the District Court."

But what if you believe you have bankruptcy ***and*** another form of federal jurisdiction? Where do you file your notice of removal? And how do you insure that the alternative ground of federal jurisdiction will be considered if the initial ground is denied? Do you violate a local rule and standing order of reference (whose authority is provided for by statute) and remove a bankruptcy related proceeding to district court? Or do you potentially violate 28 U.S.C. § 1446(a) and remove the proceeding to bankruptcy court, gambling that the bankruptcy court will agree that removal under other forms of federal jurisdiction to

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1 Joseph Heller, CATCH 22 (Simon & Schuster, 1961).

2 General Order of Reference, Gen. Order No. 2005-6 (S.D. Tex. 2005); Order of Reference of Bankruptcy Cases and Proceedings *Nunc Pro Tunc,* Order No. 84-01 (W.D. Tex. 1984); Order of Reference of Bankruptcy Cases and Proceedings *Nunc Pro Tunc* (E.D. Tex. 1984); Order of Reference of Bankruptcy Cases and Proceedings *Nunc Pro Tunc*, Misc. Order No. 33 (N.D. Tex. 1984); Order of Reference of Bankruptcy Cases and Proceedings *Nunc Pro Tunc* (E.D. Tex. 1984).

3 *See also* Rule 9027(b)(1) of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Western District of Texas ("A notice of removal pursuant to 28 U.S.C. § 1452(a) ***shall*** be filed with the Clerk of the Bankruptcy Court.") (emphasis added).

4 28 U.S.C. § 1446(b)(1).

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Review of the 5th Circuit Bench-Bar Bankruptcy Conference

By: Joshua W. Wolfshohl, Porter Hedges, LLP, (jwolfshohl@porterhedges.com)

The Center for American and International Law held the first ever 5th Circuit Bench-Bar Conference at The Royal Sonesta Hotel in New Orleans, Louisiana on February 22-24, 2012. The conference was co-chaired by The Honorable Jeff Bohm (Southern District of Texas, Houston Division), The Honorable Robert Summerhays (Western District of Louisiana, Lafayette) and Jan M. Hayden (New Orleans) and was attended by more than fifteen other bankruptcy judges from throughout the Fifth Circuit as well as three judges from the Fifth Circuit Court of Appeals and over 150 bankruptcy professionals.

The conference included general sessions as well as concurrent Chapter 11 and Chapter 13 workshops. The workshop sessions were presented in a unique format, dividing attendees into breakout groups and allowing for increased interaction between the audience and faculty.

In addition to superb sessions (discussed below) and course materials, the conference hosted enjoyable social events, including receptions on both Wednesday and Thursday night at the Royal Sonesta Hotel and a very well-attended dinner at Commander's Palace on Thursday night.

With great participation and commendable efforts by the co-chairs and faculty members, the conference was ran very smoothly and was, by all accounts, a huge success.

Presentation Summaries

Plenary Sessions

The first Plenary Session, "Judges' Expectations," included a judges panel of The Honorable Judge David R. Jones (The Southern District of Texas, Houston Division), The Honorable Judge Christopher Mott (The Western District of Texas, Austin Division) and The Honorable Judge Katharine M. Samson (The Southern District of Mississippi). Billy Patrick (New Orleans) acted as the moderator. The session served as an opportunity for the panel judges to address expectations, nuances and practical considerations for prosecuting cases in three different districts in the Fifth Circuit.

The second Plenary Session, "Economic Outlook" was hosted by Kenneth Robinson, a Senior Economist and Policy Advisor with the Federal Reserve Bank of Dallas. This session piqued the interests of conference attendees, providing a comparative analysis of various economic indicators during the last decade as well as a review of economic recovery in the wake of prior recessions dating back to World War II. The presentation also explored federal policy initiatives and their prospective impact on the economy in 2012 and the coming years.

The third Plenary Session, "Ethics and Professional Responsibility," was an interactive session hosted by The Honorable Judge Douglas D. Dodd (The Middle District of Louisiana), The Honorable Judge Harlin D. "Cooter" Hale (The Northern District of Texas) and The Honorable Judge David W. Houston, III (The Northern District of Mississippi). During the session, the panel judges posed hypothetical scenarios to the audience and invited answers as well as interactive commentary.

The fourth Plenary Session, "Effective Briefings and Presentations to the 5th Circuit," included a panel of two Fifth Circuit Court of Appeals Judges, The Honorable W. Eugene Davis and The Honorable Leslie H. Southwick, and was moderated by The Honorable Harlin D. "Cooter" Hale (The Northern District of Texas). This session addressed helpful tips for both practitioners and bankruptcy judges in handling bankruptcy appellate issues.

Breakout Sessions

Business Bankruptcy Track

The "Post-Confirmation Jurisdiction" breakout session was led by The Honorable Judge Barbara Houser (The Northern District of Texas), The Honorable Judge Brenda Rhodes (The Eastern District of Texas), Louis Phillips (Baton Rouge), Steven

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Review of NACTT's Annual Convention 2011

By: Lloyd T. Kraus, Staff Attorney at the Office of the Chapter 13 Standing Trustee for the Eastern District of Texas

In the shadow of Space Mountain, the National Association of Chapter 13 Trustees (NACTT) held its 46th Annual Convention from August 3-6 in Anaheim, California. The Conference consisted of discussion panels led by a nationwide array of Bankruptcy Judges, Chapter 13 Trustees, staff attorneys, leading legal scholars and private practitioners. Though there were numerous topics addressed, this article will attempt to briefly relay the most poignant and reoccurring themes.

U.S. Trustee's Prosecution of Mortgage Fraud

Clifford White, the Director for the Executive Office for U.S. Trustees, recounted the successful resolution of the U.S. Trustee's litigation against Countrywide Home Loans for numerous violations against bankruptcy debtors. The U.S. Trustee continues to pursue consumer protection actions against mortgage servicing companies for alleged bankruptcy crimes, including inflation of mortgage claims, failing to properly credit debtors' accounts with payments made and failing to notify debtors of extra charges added to mortgage bills. Mr. White noted that these violations are often documented and included in proofs of claim filed in bankruptcy cases, and strongly encouraged any debtor or debtor's attorney to report suspected abuses to the appropriate Trustee.

Updated Demographic Studies Reveal Minimal Statistical Impact of BAPCPA

Jean Braucher, professor of law at the University of Arizona, John Rao with the National Consumer Law Center, and William T. Rule, Senior Economist in the Administrative Office of the U.S. Courts presented a demographic update of Chapter 13 debtors since the passage of BAPCPA. The panel showcased data related to significant BAPCPA objectives, which included (1) reducing consumer bankruptcy filings, (2) mandating consumer debtors file Chapter 13, and (3) "encouraging" maximum-term Chapter 13 repayment plans. The data presented (available through 2007) showed that BAPCPA had not yielded the expected results.

The panel asserted that BAPCPA had not produced a sustained decrease in consumer bankruptcy filings. Their data confirmed that bankruptcy filings decreased by approximately 50% immediately after BAPCPA became effective. However, as of 2010, bankruptcy filings overall had returned to pre-BAPCPA levels, though Chapter 13 filings were still slightly lower than pre-BAPCPA levels.

The data further showed that certain BAPCPA provisions requiring consumer debtors to file Chapter 13 and maximize plan payments[1] had minimal impact on the chapter consumer debtors filed under. From October 2005 to June 2007, only 27% of Chapter 13 debtors were "above-median," thus indicating that 73% of the post-BAPCPA Chapter 13 debtors were not forced into Chapter 13 by the means test. Furthermore, fewer than 1% of cases originally filed as a Chapter 7 were presumed abusive per the Means Test and converted to Chapter 13.

A very relevant side note: Chapter 13 Plans currently have a 33% completion rate. The remainder are either dismissed or converted to Chapter 7 or 11. The panel acknowledged that more of BAPCPA's effects would be known as more data became available, but the "success" of the new law was very much uncertain. The panel did agree, however, that BAPCPA had done nothing to increase any given Chapter 13 Plan's success rate.

Disposable Income Questions after Lanning and Ransom

The conference featured numerous seminars on the application of the Supreme Court's *Lanning* and *Ransom* decisions. Lower courts' interpretations of these holdings produced diverse determinations of disposable income from district to district, and a subject of lively debate among Chapter 13 Trustees.

1 Specifically "means testing"

Continued on page 27.

An Update on DAYBL Activities

By: John Middleton, Haynes and Boone, LLP (john.middleton@haynesboone.com)

Founded in 2005 by young bankruptcy attorneys in Dallas, the DFW Association of Young Bankruptcy Lawyers ("DAYBL") begins its eighth year in 2012. Following the vision of its founding members, DAYBL provides a unique opportunity for young bankruptcy professionals in the Dallas-Fort Worth area to get involved in the bankruptcy community and join their colleagues for networking, education and fellowship. Members meet for monthly happy hours, as well as attend other special events and CLEs. John Middleton of Haynes and Boone LLP serves as DAYBL's president in 2012, and Rachael Smiley of Gardere Wynne Sewell LLP is DAYBL's president-elect for 2013.

DAYBL had an outstanding year in 2011, with many well-attended events, including a special reception at the Adolphus Hotel in Dallas recognizing the Honorable Stacey G. C. Jernigan's five years of service on the bench for the United States Bankruptcy Court for the Northern District of Texas. This summer, DAYBL is pleased to recognize the Honorable Harlin D. Hale's ten years of service with that same court at another special event in July 2012.

DAYBL strongly encourages non-lawyer financial professionals to get involved as members and attend events. In 2011, DAYBL held its first-ever event focused on financial professionals: a CLE panel discussion entitled "*Best Practices in Financial Advisor Fee Applications and Current Issues in Success Fees and Fee Enhancement Requests*," with panelists Louis Robichaux of Deloitte Financial Advisory Services, Martin Sosland of Weil, Gotshal & Manges LLP, the Honorable Harlin D. Hale of the United States Bankruptcy Court for the Northern District of Texas, and moderators Kelly McDonald of Weil, Gotshal & Manges LLP and John Kane of Kane Russell Coleman & Logan PC. The panel presentation was followed by a happy hour at Dee Lincoln's Tasting Room in uptown Dallas. A second financial professionals event will be held in September 2012.

In addition to providing educational opportunities for its members in 2011, DAYBL also continued its practice of reaching out to groups outside of the bankruptcy bar to educate them about bankruptcy law and finance. DAYBL sponsored panel presentations on the practice of bankruptcy law at Southern Methodist University and Texas Wesleyan University Schools of Law in October 2011, and is planning similar panels for the 2012 school year. DAYBL members also served as volunteers in the Moneywise program, which was developed by the State Bar of Texas to educate high school students about financial responsibility and related topics, including credit card management, savings, fraud and responsibly handling debt. As in years past, in May 2011, DAYBL members gave their time and insight about personal finance to graduating students at Duncanville High School, and DAYBL is planning another local Moneywise event for fall 2012.

The premier event on DAYBL's calendar is its annual Casino Night. For five years, DAYBL has hosted a night of blackjack, poker, craps, and other casino games, drinks and appetizers, and a silent auction, with attendance by bankruptcy professionals throughout the DFW area. This event is open to all bankruptcy professionals, and the proceeds from the Casino Night are given in support of a local charity. The fifth annual Casino Night was hosted by Haynes and Boone, LLP in October 2011, and the great turnout and successful silent auction enabled DAYBL to donate $3,000 to the Dallas Volunteer Attorney Program. Be on the lookout for information regarding this year's Casino Night, which is planned for October 25, 2012.

DAYBL is also honored to welcome our Bankruptcy Judges from Dallas and Fort Worth to all of our events, as well as any senior members of the bankruptcy and restructuring community who are interested in mentoring and networking with young bankruptcy professionals. For information regarding DAYBL memberships, sponsorships, or activities, please contact John Middleton at john.middleton@haynesboone.com or Rachael Smiley at rsmiley@gardere.com.

Member Publications

Debbie Langehennig "Moving in the Right Direction: *Reed v. City of Arlington*" – Norton Bankruptcy Law Advisor, January 2012

Debbie Langehennig *and* **Stephen Manz** "To Infinity and Beyond: Exploring the Reach of the Automatic Stay" – ABI Journal, December/January 2012.

"Erik" Weiting Hsu "Recognizing Impaired Accepting Class of Secured Tax Claims" – ABI Journal, May 2012.

William L. Medford "Disbanding Committees upon Chapter 11 Trustee Appointment: Do Unsecured Creditors Lose Their Voice?" – ABI Journal, May 2012.

Thomas Rice *and* **Aaron M. Kaufman** "Benchnotes" – ABI Journal, May 2012.

Eric M. Van Horn (with Scott K. Brown) "The Chapter 8 Humor Bankruptcy Super PAC" – ABI Journal, May 2012.

Troop Movement

Johnathan C. Bolton (formerly of Fulbright & Jaworski, L.L.P., Houston) joined Goodsill Anderson Quinn & Stifel in Honolulu Hawaii

Allison Byman (newly appointed chapter 7 panel trustee in Houston) joined Hughes Watters Askanase LLP as Of Counsel

Sara Keith (formerly of Okin, Adams & Kilmer, LLP) joined Johnson DeLuca & Gould, P.C. in Houston.

William L. Medford (formerly of Greenberg Traurig, LLP) joined Quilling, Selander, Lownds, Winslett & Moser, P.C. in Dallas.

M. Jermaine Watson (formerly of Cox Smith Matthews, Inc.) co-founded Roberts, Watson & Davis , P.C. in Dallas

Eric M. Van Horn (formerly of Rochelle McCullough, LLP) joined Wick Phillips Gould & Martin, LLP in Dallas

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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 or events. We also invite any announcements for our "Troop Movement" section.

If you would like an article or event to be considered for publication please send it by email to **tmillion@munsch.com**, **eric.vanhorn@wickphillips.com**, or **rkingrey@gardere.com**.

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

Please visit our website: **http://www.txbankruptcylawsection.com/**.

Calendar of Upcoming Events

Aug. 9–10, 2012	**U.T. Law Consumer Bankruptcy Practice** Moody Gardens – Galveston, Texas
Sept. 13–14, 2012	**State Bar of Texas Annual Advanced Business Bankruptcy** Westin Oaks – Houston, Texas
Sept. 13–15, 2012	**ABI Southwest Bank Conference/Complex Financial Restructuring Program** Four Seasons – Las Vegas, Nevada
Oct. 18, 2012	**ABI International Insolvency & Restructuring Symposium** Rome, Italy
Nov. 8–9, 2012	**31st Annual Jay L. Westbrook Bankruptcy Center** Four Seasons – Austin, Texas

Report From The Section's Annual Meeting Held in Conjunction with the State Bar of Texas Annual Meeting
Continued from page 4.

Banco Rotto Award; the **Honorable Bill G. Parker** recipient of the **John C. Akard Community Service Award**; **Mark Andrews** and **Tom Rice** recipients of the **Robert B. Wilson Distinguished Service Award**; the **Honorable Richard S. Schmidt** the recipient of the **Outstanding Service Award**; **Tom Black** the recipient of the **Pro Bono Service Award**; and the lovely **Layla D. Milligan** recipient of the **Romina L. Mulloy-Bossio Achievement Award**.

Last but certainly not least, the **Honorable Harlin DeWayne "Cooter" Hale** was presented with the **Outgoing Chair Award**. The Section would like to thank Judge Hale for all of his hard work this past year while serving as the Chair.

Congrats to all!

Tom Howley presenting Judge Schmidt with the Outstanding Service Award

Mark Andrews and Tom Rice recipients of the Robert B. Wilson Distinguished Service Award presented by Judge Hale

Judge Akard attending Annual Meeting

Byrnie Bass presenting Judge Akard with the Banco Roto Award

Judge Brown presenting Tom Black with the Pro Bono Service Award

Layla Milligan receiving the Romina L. Mulloy-Bassio Achievement Award from Jermaine Watson

Judge Hale receiving Outgoing Chair Award from Tom Howley

Judge Hale, Judge Brown, and Joe Epstein at Cocktail Reception

Demetra Liggins and Eli Columbus at Cocktail Reception

Judge Parker attending Annual Meeting

Judge Parker receiving Akard Award presented by Judge Hale

Tom Rice, Eli Columbus, and Eric Van Horn at Cocktail Reception

Judge Hale, Courtney Lauer, and Judge Isgur at Cocktail Reception

Elizabeth Guffy, Tom Henderson, and Beth Smith at Cocktail Reception

Paying To Play The Quiet Game: It Pays To Be Quiet, Or Does It?
Continued from page 5.

The Trustee filed the instant adversary proceeding in September 2006 and subsequently sought to amend the complaint to add the following claims: fraud, fraudulent inducement, conspiracy, and breach of duty. *Id.* at *6. The bankruptcy court permitted the Trustee to amend only with respect to the claim for breach of duty, but the claim was ultimately dismissed. *Id.* Therefore, the only claim to be heard at trial was the disgorgement claim. *Id.* After a three day trial, the bankruptcy court ruled, finding that 1) A&R did not have a disqualifying adverse interest, 2) A&R failed to make adequate disclosures of its connections to the debtors and to GCA, and 3) a disgorgement of $135,000 was a proper sanction for the disclosure violations. *Id.* at *7.

On Appeal

After the district court upheld the bankruptcy court's decision, the Trustee asked the Fifth Circuit to reverse because 1) A&R was not disinterested, and 2) all fees should have been disgorged because A&R was not disinterested. Rejecting both arguments, the Fifth Circuit affirmed the district court's judgment. *Id.*

1) Whether A&R had a disqualifying interest?

To show that A&R was not disinterested, the Trustee pointed out that 1) GCA paid A&R's retainer, 2) A&R had a relationship with GCA, and 3) A&R advised AIPC how to characterize payments made to its officers just months before the bankruptcy petition was filed. *Id.* at *9. The first two grounds relate to A&R's link to GCA, as opposed to A&R's prior connections to the debtors, so the Fifth Circuit considered them together. *Id.* at *11. It determined that neither ground supported the position that "A&R's loyalty to the debtors was compromised." *Id.* at *17. Finally, the Fifth Circuit considered and rejected the last ground raised by the Trustee. *Id.* at *18-20.

With respect to the first ground, which the Court described as "[t]he most troubling aspect of A&R's relationship to GCA," the Fifth Circuit rejected the "per se disqualification" approach taken by other courts. *Id.* at *11-12. Instead, it adopted the "totality of the circumstances" approach for deciding whether payment of a retainer by a third party constitutes a disqualifying interest. *Id.* at *12. Under that approach, the circumstances surrounding the payment must be considered before deciding whether a disqualifying interest exists. *Id.* Therefore, the Circuit Court analyzed each allegation that A&R's conduct demonstrated a sense of loyalty to GCA. *Id.* at *13. It began its analysis by dismissing the Trustee's first argument that A&R's role in negotiating a lock-up agreement pre-petition showed loyalty to GCA, explaining that it is "common" for a debtor's counsel to help its client negotiate pre-petition agreements with creditors. *Id.* at *14. Next, the Fifth Circuit analyzed the Trustee's argument that A&R believed it had to treat GCA favorably because of the retainer payment. *Id.* Despite acknowledging that there was some evidence in the record to show that A&R had discussed submitting plans that were in favor of GCA, the Court found that there were other ways to interpret that same evidence. *Id.* For example, it could have been that A&R was aware that in order to get a plan confirmed it would need GCA to support the plan. Unwilling to "second guess [the] factual judgment" of the bankruptcy court, the Fifth Circuit found no clear error with respect to its factual finding. *Id.* at *15. For similar reasons, the Fifth Circuit rejected the Trustee's argument that A&R's loyalty to GCA was evidenced by its decision against litigating GCA's secured claims. *Id.* at *16. Continuing its analysis of the first two grounds raised by the Trustee, the Fifth Circuit next addressed what it found to be the most "suspicious" evidence: a motion for relief from stay that was drafted by A&R on behalf of GCA. *Id.* Relying on the testimony of lead counsel, the bankruptcy court found that A&R's decision to draft the motion was strategically motivated, and the Fifth Circuit ruled that such a finding was not clearly erroneous. *Id.* at *16-17. The Court suggested that the outcome might have been different if there had been evidence that A&R had either engaged in conduct that conflicted with the interests of the estate or advised the debtors in order to protect CGA. *Id.* at *18 (distinguishing *Waldron* from *In re West Delta Oil Co.*, 432 F.3d 347 (5th Cir. 2005), where the Circuit Court found the debtor's counsel had a disqualifying adverse interest). Finally, the Fifth Circuit considered the third ground supporting the Trustee's position, which hinged on A&R's representation of the debtors in the sale of License 1551. *Id.* The Fifth Circuit found it significant that A&R advised AIPC on the accounting treatment of payments made to its officers with the funds earned in the sale of License 1551. *Id.* at *19. To the contrary, the bankruptcy court found that A&R's role in the transaction was nothing more than that of a neutral escrow agent. *Id.* Although the Fifth Circuit did not completely agree with the bankruptcy court, it ultimately determined that no "disqualifying" conflict had been created. *Id.* at *20. In response to the Trustee's argument concerning payments made to AIPC's officers and directors that "may have been avoidable since they were made close in time to the bankruptcy filing," the Circuit Court noted that there was no positive evidence of an impermissible basis for not avoiding the payments. *Id.* Specifically, it explained that "the Trustee points

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to no evidence in the record indicating that A&R's advice on the treatment of these claims was clouded." *Id*. On the other hand, the record included the following evidence of a permissible basis for not avoiding the payments: A&R believed that disputing the claims would have been more costly to the estate than beneficial. *Id*. Therefore, the Fifth Circuit concluded that A&R's pre-petition interactions with the debtors proved "insufficient to constitute a disqualifying interest." *Id*.

2) Whether all of A&R's fees should have been disgorged?

The bankruptcy court sanctioned A&R for the failure to make certain disclosures as required by Bankruptcy Rule of Procedure 2014(a), but the Trustee did not agree with the court's ruling. *Id*. at *21. Although A&R was awarded nearly $688,000 in attorneys' fees alone, the bankruptcy court sanctioned A&R with a disgorgement of $135,000. *Id*. at *1, *5. In other words, A&R lost about twenty percent of the fees its attorney's fees. *Id*. at *21. The Trustee asserted that one hundred percent of those fees should have been disgorged because the failure to disclose was intentional, relying on the fact that A&R failed to make the proper disclosure at least three different times. *Id*. at *23. Notwithstanding the fact that A&R had several opportunities to disclose and failed to do so, there was evidence to support A&R's position that the errors were a result of negligence. *Id*. Because the bankruptcy court's factual findings were reasonable based on the evidence in the record, the Fifth Circuit upheld its decision to order disgorgement of only a portion of the attorneys' fees. *Id*. at *24.

Paying to Play the Quiet Game

Waldron is an important reminder that debtors' attorneys must disclose any and all potential conflicts to the bankruptcy court. According to Bankruptcy Rule of Procedure 2014(a), even when relationships to the parties of interest do not constitute a disqualifying interest, the relationships must still be disclosed. Otherwise, courts may sanction debtors' attorneys by disgorgement of *all* attorneys' fees. Therefore, an applicant's failure to disclose its connections to debtors, creditors, or other parties in interest can be very costly. As *Waldron* demonstrates, disclosure errors need not be intentional to result in sanctions. The lesson to be learned is simple: Debtors' attorneys who want to keep their fees must cautiously disclose all connections, no matter how

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Fees Awarded Under Pro-Snax in Case Converted to Chapter 7
Continued from page 7.

The Court then read *Gadzooks* to stand for the proposition that services will benefit the estate if they are actual and necessary, as required by section 330(a)(1)(A). *Id*. at *30. But actual, necessary expenses do not always enhance a debtor's estate monetarily. For example, torts committed by a trustee in carrying out his or her duties give rise to an administrative expense claim. *Id*. at *32 (citing *Reading Co. v. Brown*, 391 U.S. 471 (1968)). Furthermore, "[s]uccess cannot be a prerequisite to compensation outside of a contingency arrangement. Rather, the conclusion that a professional was justifiably pursuing a legitimate, realizable goal of the fiduciary client should be enough benefit to the estate to satisfy *Pro-Snax*." *Id*. at *34.

The Court ultimately held that "a professional provides an 'identifiable, tangible and material benefit' to a bankruptcy estate within the meaning of *Pro-Snax* through assisting the estate representative in administering an asset of the estate, whether or not the effect of administration of the asset is enhancement of the estate, so long as the professional's services are performed at the direction of the estate representative and the estate representative is acting in accordance with the Code and its sound business judgment." *Id*. at *34-35.

Based on its analysis of *Pro-Snax, Melp,* and *Gadzooks*, the Court determined that the Firm should be compensated. Despite the fact that the Firm's work did not produce a monetary benefit for the estate, the Firm acted in accordance with the Code, and the Firm performed the task for which it was retained, the pursuit of which was within the debtor's sound business judgment. Having done so, the Firm provided a benefit to the estate within the meaning of *Pro-Snax*.

Playing the Field: Death Penalty Sanction Invoked by Bankruptcy Court
Continued from page 9.

The decision was eventually appealed to the Fifth Circuit, and it was later uncovered that Cadle had paid the Law Firm's invoices related to its representation of the Trustee between the dates of October 23, 2006 and February 12, 2009, without any sort of disclosure to the court. Moreover, for more than a year of this period Cadle's interests were directly adverse to the Trustee's.

Oral argument before the Fifth Circuit was set for March 2, 2010. Initially at least, the same Law Firm attorney that had represented the Trustee continued to represent the Trustee in the Fifth Circuit appeal (*i.e.* during the briefing). However, the day before oral argument, but six weeks after oral arguments were scheduled, the attorney left the Law Firm and joined another firm. As a result, the Law Firm sent a first year bankruptcy associate to present oral arguments to the Fifth Circuit. Unsurprisingly, the Fifth Circuit reversed the district and bankruptcy courts, remanding the issue to the bankruptcy court with instructions that an auction be conducted. *The Cadle Company v. Mims* (*In re* Moore), 608 F.3d 253 (5th Cir. 2010).

Ultimately, Cadle won the auction with a bid of $41,500 (only $4,000 more than the three year old settlement, which the court noted was "[a] marvelous result? Hardly." *In re* Moore, 2012 WL 1415513, at *13). At a sale hearing on April 11, 2011, the same attorney that abandoned the Trustee just prior to the Fifth Circuit oral argument appeared in court seeking a continuance of the VP Action. The Trustee stated to the court he had not instructed the attorney to file any additional motions in the action. Later in April, a Cadle representative testified that it has paid the Law Firm $92,000 in fees and expenses for its efforts to represent the Trustee in the VP Action.

After hearing the testimony at the hearing on April 11, 2011, the defendants in the VP Action (commenced in 2005) filed a motion to dismiss the VP Action for abuse of judicial process on the grounds that the fact that Cadle was paying both sides' lawyers' fees in litigation in which it was a party, was a manifest abuse of the judicial system and that it created the appearance of impropriety to taint the entirety of the proceedings.

The Motion to Dismiss

Over the course of three days in August, September, and October of 2011, the bankruptcy court held hearings to consider the motion to dismiss. The court had concerns about what Cadle had paid the Law Firm since its retention as special counsel to the Trustee in 2007. As well as the fact that the Law Firm never amended its special employment application or filed documents to alleviate the court's initial concerns, including those related to the 2006 Agreement.

During the course of the hearings on the motion to dismiss, the Trustee testified that once he was aware of the odd arrangement (the 2006 Agreement) between Cadle and the Law Firm, he instructed his attorney to amend the Application and disclose to the court how the Law Firm was paid $60,000 by Cadle for representing the Trustee (in violation of the order approving the Application). Despite these instructions from the Trustee, the Law Firm never amended the Application. Additional testimony revealed that Cadle paid $92,000 to the Law Firm (for representing the Trustee) and simultaneously paid invoices to the Law Firm while the Trustee was adverse to Cadle.

As for the 'timely' move by the Trustee's attorney to a new firm, witness testimony led the court to conclude the Fifth Circuit oral argument was treated like a 'hot potato' and passed, without consulting the Trustee, to a first-year associate. The court based this primarily on the surrounding circumstances and the fact all the attorneys in the case were vying for Cadle's business (*i.e.* none of them wanted to argue against Cadle at the Fifth Circuit for fear of it negatively impacting their ability to continue to get Cadle's business). The court was not moved by the Law Firm's explanation, calling the attorney's testimony "amazingly cavalier" and "devoid of regret." The court also found the attorney's testimony that the Trustee was always aware of the terms of the 2006 Agreement, not at all credible. To which the court directly asked if any written evidence of the same existed, and the attorney responded in the negative stating that he recalled several conversations with the Trustee discussing the matter. The court found it inexplicable that the details of the 2006 Agreement, by which Cadle was agreeing to pay the Law Firm for representing the Trustee, who it might (and did) become hostile to, did not appear anywhere in writing – not to the Trustee, and not disclosed to the court.

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Playing the Field: Death Penalty Sanction Invoked by Bankruptcy Court
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Outcome

In reaching its decision, the court found Cadle and the Law Firm had violated Bankruptcy Code section 327 and Bankruptcy Rule 2014 by failing to disclose the fact that Cadle had (or intended to) paid the Law Firm for representing the Trustee. But to the court, these transgressions were more than a simple nondisclosures.

The court found that the Law Firm committed a breach of attorney-client privilege (sending the Trustee's bills containing privileged information to Cadle), failed to follow client instructions (reusing to amend the Application to disclose the 2006 Agreement), failed to represent their client in a competent way, and recklessly disregarded their duties. *See* Tex. Disciplinary R. Prof'l conduct 1.01(b)(c), *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A (West 2005) (Texas State bar art. X, § 9). The court also determined that the Law Firm had conflicted loyalties and ultimately sided on keeping a favored client happy.

However the Law Firm had not acted alone and the court found that Cadle was not without blame. After all, Cadle was a sophisticated business party and failed twice to testify about the arrangement with the Law Firm.

The death penalty sanction is extraordinary and should not be used lightly by courts. However, short of the death penalty, there was no satisfactory remedy for the blatant disregard of the Bankruptcy Code and Rules by Cadle and the Law Firm. Bankruptcy Code section 328 was not appealing because the Law Firm had not, and likely would not, file a fee application in the case. Additionally, the Law Firm was not paid from the bankruptcy estate itself. While the court considered disgorgement it was found to be unappealing as it would only serve to punish one and not both wrongdoers. After all, ordering the Law Firm to repay the fees and expenses it billed to Cadle would only punish the Law Firm and actually provide a reward to Cadle for it bad actions.

Ultimately, the court ruled these nondisclosures and indifferences tainted the entire adversary proceeding, forcing the court to throw the proceeding out with prejudice under 11 U.S.C. § 105(a) (allowing a court to issue necessary and appropriate orders to carry out the Bankruptcy Code).

The opinion is already garnering some attention as a required read for bankruptcy and ethics. Steve Sather, *Death Penalty Sanctions Applied in Case of Double-Dealing Attorneys*, A TEXAS BANKRUPTCY LAWYER'S BLOG (Apr. 24, 2012) **http://stevesathersbankruptcynews.blogspot.com/**

Bankruptcy Jurisdiction – It is Not a Joking Matter – A Review of the American College of Bankruptcy 5th Circuit Fellows Seminar – April 27 & 28 in San Antonio
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Professor Jay Westbrook, Professor Ronald Mann of Columbia, Harry Perrin, and Rhett Campbell

The final panel, Professor Jay Westbrook, Professor Ronald Mann, Rhett Campbell and Harry Perrin, led an interesting discussion on Derivatives, beginning with a march through the Bankruptcy Code to highlight the many statutory provisions regarding the special treatment of derivatives in bankruptcy cases. The panel concurred that the statute removes bankruptcy court discretion and elevates form over substance in protecting special parties and contracts. The discussion then focused on the safe harbor provisions found in Section 546(e) and recent decisions construing those provisions.

Although downtown San Antonio was busy during Fiesta Week, the timing of the seminar allowed attendees the unique opportunity to view parades, attend parties and sample margaritas and great Mexican food. The intimate seminar format encouraged audience discussion on advanced topics and the participant feedback was very positive for an outstanding program, knowledgeable speakers, and an excellent venue.

Review of Starting Out Right Conference in Austin, Texas
Continued from page 12.

Evidence: the **Honorable Marvin Isgur** (Bankr. S.D. Tex.—Houston), the **Honorable Harlin D. Hale** (Bankr. N.D. Tex.—Dallas), and **Michael Baumer** (Austin), through various entertaining and informative skits, explained the probative value of various documents commonly used by bankruptcy practitioners, including a Zillow appraisal obtained on the internet, and objections met in attempting to introduce the same into evidence.

How to Communicate with Clients: Ken Keeling (Houston) provided and informative luncheon presentation, which included practice tips to ensure that Chapter 13 clients are aware of deadlines, the importance of full disclosure of assets, important payment requirements and certain permissible banking practices. **Francis Smith** (Dallas) discussed proper methods for communicating with clients, such as responding to an e-mail within twenty-four hours of receipt thereof.

Numbers for Lawyers: the **Honorable Marvin Isgur** (Bankr. S. D. Tex.—Houston) provided an entertaining presentation on loan amortization, the difference betwixt debits and credits, and the types of internal accounts related to the same. Judge Isgur provided a similarly entertaining and informative overview of balance sheets and income statements.

What's the Plan? (Business Breakout): Jay Ong (Austin) and the **Honorable Harlin D. Hale** (Bankr. N.D. Tex.—Dallas) discussed Chapter 11 plans and disclosure statements, generally. The discussion also included a primer on "adequate information" for approval of a disclosure statement pursuant to Section 1125, proper classification of creditors pursuant to Section 1122, and the importance of filing voting tabulation results of the plan prior to the confirmation hearing.

Consumer Breakout: Deborah Langehennig (Austin) and **Brendetta A. Scott** (Houston) explained various practice tips for filing Chapter 13 plans of reorganization, such as filing a plan that is less than 3 or 5 years, pursuant to Section 1325(b)(3)(B). Ms. Langehennig and Ms. Scott highlighted recent case law on *res judicata* including: *In re Fistee*, 455 B.R 177 (B.A.P. 8th Cir. 2011), *Viegelah v. Essex,* 452 B.R. 195 (W.D. Tex. 2011), *In re King*, 2011 WL 4458921 (Bankr. N.D. Tex. 2011), and *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Ms. Langehennig discussed the importance of following up with Chapter 13 clients to ensure compliance with bankruptcy court orders, drafting a plan that complies with the local rules, including proper form, and communicating with objecting parties.

The afternoon breakout sessions covered other pertinent issues in consumer and business bankruptcy. For consumer practitioners, the **Honorable Marvin Isgur** (Bankr. S. D. Tex.—Houston), the **Honorable Craig A. Gargotta** (Bankr. W.D Tex.—Austin), the **Honorable Christopher Mott** (Bankr. W.D. Tex.—Austin), **Deborah Langehennig** (Austin), **Eric Taube** (Austin), **Ron Satija** (Austin) and **Michael Baumer** (Austin) rounded out the presentations with a round table discussion of issues for consumer debtors.

Finally, the **Honorable Harlin D. Hale** (Bankr. N.D. Tex.—Dallas), the **Honorable Bill Parker** (Bankr. E.D. Tex.—Beaumont, Lufkin, Marshall and Tyler) and **Patty Tomasco** (Austin) ended the presentations with a round table discussion of a myriad of issues that arise throughout the Chapter 11 process.

Ron Satija (Austin), Deborah Langehennig (Austin), Judge Marvin Isgur, Judge Christopher Mott, Patty Tomasco (Austin), Michael Baumer (Austin), Eric Taube (Austin), Judge Craig A. Gargotta, Judge Bill Parker, and Judge Harlin D. Hale

Judge Parker, Judge Mott, Layla Milligan, and Michael Baumer

We Need a Change to Our Local Rules
Continued from page 13.

the bankruptcy court is proper (even though there is no local rule or procedure for doing so)? Indeed, 28 U.S.C. § 151 refers to bankruptcy courts as a "unit of the district court," although as the *Stern* decision cautioned, "bankruptcy courts are adjuncts of no one."[5]

Hence, the "catch 22."

Many practitioners might simply posit that if two forms of federal jurisdiction exist, file the notice of removal with the district court as that is the safest course to follow. After all, 28 U.S.C. §§ 1334 and 1452 provide for removal to the district court, and it is only a local rule and standing order that provide for referral to and filing in the bankruptcy court. But remember that the authority vested in the district courts to refer matters to the bankruptcy courts is ***also*** based upon federal statute.[6] Further, courts certainly expect that their standing orders and local rules will be complied with. The case of *In re Biglari Import & Export, Inc*, is an example of what can happen.[7] There, the defendants sought removal pursuant to 28 U.S.C. § 1441 and filed (or attempted to file) the notice of removal with the district court. The district court clerk *refused* to accept the removal because the plaintiff was a debtor in bankruptcy, and thus, removal *had* to be filed in the bankruptcy court. The defendants were concerned, however, about filing a removal pursuant to § 1441 in bankruptcy court, but did so anyway in the face of the clerk's refusal, to ensure the removal was timely.[8]

The bankruptcy court first attempted to remand the case, and the defendants sought reconsideration. Ultimately, the bankruptcy court realized the jurisdictional problems associated with filing a removal pursuant to both 28 U.S.C. § 1441 and 28 U.S.C. § 1452. Because there was no procedure for the bankruptcy court to transfer the proceeding to district court, the bankruptcy court decided, on equitable grounds, to keep the proceeding. The bankruptcy court held the following:

> The outcome of this court's ruling on the remand issue should, to the extent possible, attempt to preserve the rights the parties thought they had (i.e., the defendants' right to an impartial federal forum and the plaintiff's right to a jury trial). That, after all, is a significant equitable consideration which ought to influence this court's ruling under § 1452(b). By retaining rather than remanding this case, the court preserves for the parties their opportunity to petition the district court to withdraw the reference on timely motion, preserving thereby the parties' constitutional entitlement to a jury trial as well. There is no guarantee, of course, that the district court will in fact grant a motion to withdraw the reference, but the defendants should not be denied at least the opportunity to get the matter back before that forum. If this court were to remand this case back to state court, removal will not again be possible, and this court will only have compounded the error committed by the district clerk in failing to accept the original removal under § 1441 in the first place.[9]

The bankruptcy court recognized this "catch 22" and that if remanded, there was a high probability that the defendants could not "re-remove" to district court. But the bankruptcy court also recognized that there is no mechanism in place to "transfer" a proceeding to the district court, if the proceeding is removed on both 28 U.S.C. § 1334 and 28 U.S.C. § 1331 jurisdiction, and the bankruptcy court determines that 28 U.S.C. § 1334 jurisdiction is inapplicable.[10]

Fast forward to the present, and our bankruptcy judges are still grappling with the same issues. For example, in *Fisher v. JPMorgan Chase Bank, N.A.* (*In re Fort Worth Osteopathic Hospital, Inc.*), the bankruptcy court for the Northern District, Fort Worth Division, concluded that it had "serious doubts" that it had jurisdiction pursuant to 28 U.S.C. § 1334, and even if it

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5 "[A] bankruptcy court can no more be deemed a mere 'adjunct' of the district court than a district court can be deemed an 'adjunct' of the court of appeals." *Stern v. Marshall*, 564 U.S. ___, 131 S. Ct. 2594, 2619 (2011).
6 28 U.S.C. § 157(a).
7 142 B.R. 777 (Bankr. W.D. Tex. 1992).
8 Arguably, Fed. R. Civ. P. 5(d)(4) and electronic filing would prevent this from happening again.
9 *Id*. at 784-85.
10 Perhaps the Western District's Local Rule 9027(b)(3) attempted to fix this issue, but it really does not. As currently written, the rule contemplates an "either/or" situation, not a situation where two forms of federal jurisdiction exist.

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We Need a Change to Our Local Rules
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did, the court certainly did not have jurisdiction pursuant to 28 U.S.C. § 1441.[11] By not having the statutory authority to exercise diversity jurisdiction, the bankruptcy court also held that it did not have jurisdiction to determine if diversity jurisdiction in the federal courts exists at all.[12] The bankruptcy court therefore decided to transfer the proceeding to the district court for consideration of the motion to remand related to other forms of federal jurisdiction.[13] But in its ruling, the court pondered whether in filing the notice of removal with the bankruptcy court, the removing parties had *forfeited* their right to seek removal to the district court:

> The court notes that removal of the Adversary, despite the reference in 28 U.S.C. 1452(a) to removal 'to the district court,' in accordance with local practice was directly to the clerk of the bankruptcy court. Because removal of a case under 28 U.S.C. § 1441 must be 'to the district court of the United States for the district . . . where [the] action is pending,' it is not clear that removal has actually been accomplished by Defendant under section 1441.[14]

In the Dallas Division, the bankruptcy courts appear split over whether removal directly to the bankruptcy court is proper when multiple forms of jurisdiction exist. In *Principal Life Ins. Co. et al v. JPMorgan Chase Bank, N.A., et al* (*In re Brook Mays Music Co.*), an adversary proceeding was removed directly to the bankruptcy court under both bankruptcy and diversity jurisdiction.[15] The bankruptcy court never questioned that removal was proper, instead recognizing that because diversity jurisdiction also existed, "[t]he action is going to be in federal court one way or another."[16] However, in *Segner v. Sinclair Oil & Gas Co.*, the defendants also removed a proceeding to the bankruptcy court, citing jurisdiction under both 28 U.S.C. § 1331 and 28 U.S.C. § 1334.[17] In defending against a motion to remand, the defendants urged the court to transfer the proceeding to the district court or otherwise recommend withdrawal of the reference, should the bankruptcy court determine that bankruptcy jurisdiction did not exist. Instead, the bankruptcy court remanded, and invited the litigants to "re-remove" to the district court, should they so desire. But as the *Biglari* court cautioned, re-removal in these circumstances may not be possible.[18]

Fortunately, the fix is quite simple. Our four Texas districts simply need to modify the respective local rules for proceedings removed under both bankruptcy and other forms of asserted federal jurisdiction. The proceedings should be removed to the district court, and if necessary, the litigants can move for referral to the bankruptcy court for consideration of 28 U.S.C. § 1334 jurisdiction. Alternatively, the rules could direct the litigants to remove to bankruptcy court under the authority of § 157(a), and the corresponding standing order of reference, and if no § 1334 jurisdiction exists (or, if remand or abstention is otherwise appropriate), the bankruptcy court can recommend withdrawal of the reference from the district court for further analysis of other forms of federal jurisdiction.

Federal courts always strive to decide issues on the merits, not on procedural technicalities. As the Fifth Circuit has said, "The Federal Rules are diametrically opposed to a tyranny of technicality and endeavor to decide cases on the merits."[19] Hopefully we can get this procedural "catch 22" fixed.[20]

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11 406 B.R. 741, 745, 748 (Bankr. N.D. Tex. 2009).
12 *Id.* at 748.
13 *Id.* at 749.
14 *Id.* at 748 n.13.
15 363 B.R. 801 (Bankr. N.D. Tex. 2007).
16 *Id.* at 817.
17 Adv. No. 11-03451 (Bankr. N.D. Tex. 2011)
18 The issue was never litigated as the parties ultimately agreed to proceed in the district court.
19 *See Amberg v. Federal Deposit Ins. Corp.*, 934 F.2d 681, 686 (5th Cir. 1991).
20 And … maybe now I'll read the novel.

Review of the 5th Circuit Bench-Bar Bankruptcy Conference
Continued from page 14.

Rosenblatt (Ridgeland, MS) and William Wallander (Dallas). The session included a timely discussion of jurisdictional issues faced in the wake of the Fifth Circuit's *United Operating, LLC* decision and the Supreme Court's *Stern v. Marshall* decision. During the session, the panel discussed recent cases interpreting both landmark decisions as well as the decisions' impact on the bankruptcy practice.

The "Professional Responsibility and Ethics" breakout session was led by The Honorable Judge Douglas D. Dodd (The Middle District of Louisiana), The Honorable Judge Harlin D. "Cooter" Hale (The Northern District of Texas), Bob Byrd (Biloxi, MS), Nan Eitel (Washington, D.C.), Jan Hayden (New Orleans) and Michelle Mendez (Dallas). This session drew perhaps the most audience participation as it focused on the U.S. Trustee's proposed new fee guidelines in large chapter 11 cases. The session proved to be a productive forum for discussion amongst judges, practitioners and the U.S. Trustee's office regarding the new guidelines and their impact on the bankruptcy practice.

The "Best Practices" breakout session was led by The Honorable Judge Jeff Bohm (The Southern District of Texas), The Honorable Judge Jerry A. Brown (The Eastern District of Louisiana), The Honorable David Houston (The Northern District of Mississippi), Stephen A. Youngman (Dallas), Courtney S. Lauer (Houston) and Michaela C. Crocker (Dallas). This session focused on first-day pleadings and practices, financing/cash collateral issues, section 363 sale procedures and the judge's expectations during the beginning stages of chapter 11 cases.

Consumer Bankruptcy Track

The "Mortgages and Mortgage-related Best Practices" breakout session was led by The Honorable Judge Marvin Isgur (The Southern District of Texas), The Honorable Judge Elizabeth Magner (The Eastern District of Louisiana), The Honorable Judge Robert Summerhays (The Western District of Louisiana), Terre Vardaman (Brandon, MS), Lisa Cockrell (Houston), Debbie Langehennig (Austin) and Keith Rodriguez (Lafayette). This session focused on the new proof of claim official form and amended rules regarding information required to be attached to mortgage-based proofs of claim, including (among other things) loan history, an itemized statement of interest, fees, expenses and charges and the cure amount on the petition date.

The "Additional Chapter 13 Issues" breakout session was led by The Honorable Judge Ronald King (The Western District of Texas), The Honorable Judge Richard Schmidt (The Southern District of Texas), Jerry Breaux (Lake Charles, LA.) and Jeff Collier (Jackson, MS.). This session focused on judicial estoppel, res judicata, standing and the preservation of causes of action in consumer bankruptcy cases.

Review of NACTT's Annual Convention 2011
Continued from page 15.

Numerous panels discussed and debated issues raised by these holdings that might occupy a 2L Creditors' Rights class for weeks and cause a prudent practitioner to lose sleep at night. For example, Bankruptcy Courts have issued varying and often conflicting opinions as to what constitutes a *Lanning-esqe* "known or virtually certain" change in income or expenses. But when does the change have to be known? How certain is virtually certain? Once a finding has been made that such a change has occurred, does the disposable income calculation require an amended CMI, or is CMI disregarded in favor of the bottom line of Schedule I & J?

Ransom produced similar challenges. Granted, the Court provided one bright-line rule: if a debtor does not owe a debt on an automobile, that debtor is not entitled to vehicle ownership deduction on CMI. However, that one certainty has bred abundant uncertainty. Does the holding only apply to car expenses? Is it bad faith for a debtor to incur automobile debt on a "junk car" to obtain the CMI deduction? Do actual expenses on Schedule J limit the deductions allowed on CMI? Do IRS standard deductions limit the amounts of certain expenses on Schedule J? Does the logic of *Ransom* also apply to mortgage/rent expense deduction where debtors own their home free and clear or live with relatives rent free?

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Review of NACTT's Annual Convention 2011
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The one conclusion NACTT's numerous panels on the subject could draw was that the holdings in *Lanning* and *Ransom* provided no unifying rule for disposable income determination. Instead, a debtor's disposable income calculation will likely vary from district to district, much as it did prior to the Court's holdings.

Quick Hits

- The conference featured a panel that discussed ethical issues involving a Trustee's use of Facebook and other social media outlets to obtain information on a debtor's assets. Some of the more "cutting edge" districts are considering asking debtors to log-in to and allow the Trustee to browse through their Facebook pages at 341(a) meetings.

- Before presenting their annual case update (always a crowd favorite), Judge Keith Lundin, Judge William Brown and Hank Hildebrand, Chapter 13 Trustee, led a Bankruptcy Trivia Challenge. Correct answers were rewarded with Tennessee treats, including Goo-Goo Clusters, Moon Pies, and of course, small bottles of Jack Daniels.

- Though the conference officially had a "Beach Boys" theme, it quickly assumed the title "Trustees and Tierras" as the heartwarming parental-education program "Toddlers and Tierras" was filming literally across the hall from the meeting rooms.[2]

2 Anyone who has actually seen this program will know that the terms "heartwarming" and "education" are used quite liberally in this context.