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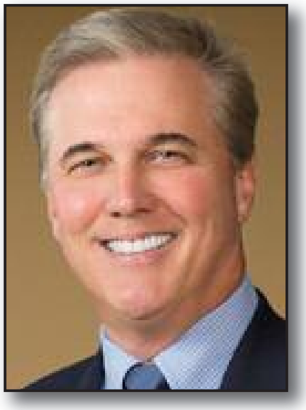
A MESSAGE FROM YOUR CHAIR



William "Bill" Wallander

Your Bankruptcy Section has had another productive year for our membership, and those who benefit from the educational and pro bono support we provide. In addition to our advanced bankruptcy programs, this Fall we will be sponsoring a seminar on forensic finance, a topic of important to our commercial practitioners. Our newsletter continues to provide useful information and updates on bankruptcy law. We continue our support of legal aid clinics, and we have been fortunate to have strong financial support from many of member firms, thanks so much for that. Our support of our networking efforts and our young bankruptcy lawyers continues. Our membership has remained strong with both lawyer and non-lawyer members. I am grateful to have had the opportunity to serve the Section. I am confident that our incoming Officers and Council will continue our work to continue our mission to (1) promote the study of bankruptcy law, (2) study and report on laws and decisions as they may affect the rights of parties in the bankruptcy process, and (3) provide a forum for members of the legal and financial communities interested in bankruptcy law, and (4) facilitate the provision of pro bono legal services directly by Section members or through qualified legal aid organizations.

Best regards,

Bill Wallander
Bankruptcy Section Chair

Judge Michael Lynn (briefly) Retires, Leaving Behind Storied Legacy, and Returns to Practice

By: Bakhtawar Khan, 2015 spring extern to the Hon. Harlin D. Hale (Bankr. N.D. Tex.)
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Bankruptcy Judge Michael Lynn of the Northern District of Texas, Fort Worth Division retired in the fall of 2015 after fourteen years on the bench, leaving a long legacy as a public servant, scholar, teacher, and mentor.

Long before he became a pillar of the Dallas-Fort Worth bankruptcy bar, Judge Lynn was born and raised in a suburb outside of Chicago, Illinois. He attended Lawrence University in Appleton, Wisconsin, where he graduated with honors in 1965. In 1966, he entered Columbia Law School in New York to pursue his law degree.

After completing his first year of law school, Judge Lynn decided to join the Navy and serve his country during the height of the Vietnam War. He served as an officer aboard the USS Cochrane, which patrolled the coast of Vietnam from 1968 to 1970. When he re-enrolled at Columbia Law School, he also enlisted with the US Navy Reserves, thus continuing to serve even as he completed his legal education. In 1972, he received his Juris Doctorate from Columbia Law School as a Harlan Fisk Stone Scholar.

After earning his law degree, Judge Lynn decided to move to Dallas to begin his legal career. He began work in private practice at Rochelle, King & Balzersen, a Dallas firm focused on corporate reorganization. During the course of his legal career he earned a reputation for diligence, critical thinking, and excellence as a lawyer. Then in 2001, he was appointed to the bench of the United States Bankruptcy Court for the Northern District of Texas. Judge Lynn says that he has loved his fourteen years on the bench. However, like other judges who left behind a good law practice, Judge Lynn has missed the charm of "designing a strategy and helping a client out."

Having spent time in both New York and Chicago, Judge Lynn is often asked which city he prefers. He says that each city has its own charms, and picking one over the other would be too difficult. On the other hand, there is no contest as to his favorite baseball team: the New York Yankees.

Of course, Judge Lynn will always be remembered for his connection to a baseball team closer to home. On May 24, 2010, Texas Rangers Baseball Partners filed for chapter 11 bankruptcy. As the presiding judge over the case, Judge Lynn became quite familiar with his local ball club. Indeed, Major League Baseball and the Texas Rangers spent quite a bit of time within the "friendly confines" of his court.

Unfortunately, the case almost ruined baseball for the longtime fan of the game. Judge Lynn says that, after dealing with the Rangers' bankruptcy, he was "done" with baseball for quite some time. The way the case was argued, the intransigence of the parties, and the publicity of the case all contributed to this result. Looking back, he has decided that "the Rangers do baseball better than bankruptcy." It is probably better that way.

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Profile of the Honorable Mark X. Mullin U.S. Bankruptcy Judge for the Northern District of Texas, Fort Worth Division

By: Zachary B. Tobolowsky, Spring 2017 candidate for Juris Doctor, SMU Dedman School of Law

2015 Judicial Extern to the Hon. Harlin D. Hale,

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Mark X. Mullin was appointed and sworn in as bankruptcy judge for the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division. Judge Mullin was a partner in the Dallas, TX office of Haynes and Boone, LLP, where he practiced bankruptcy, business restructuring, and insolvency litigation. He filled the vacancy created when Judge D. Michael Lynn retired.

The youngest of four, Judge Mullin was born and raised in Rapid City, South Dakota. Having spent his youth looking up to his father, a successful solo practitioner who practiced law into his late 80s, he grew up knowing he wanted to be a lawyer. In 1975, he left the Mount Rushmore State to attend Creighton University, where he graduated in 1979 with a B.S.,B.A. degree in Accounting. His plan was to apply to law school right out of college.

However, after receiving offers from the nation's top accounting firms, Judge Mullin's father advised him otherwise. His father regretted not obtaining a business background before becoming a lawyer, and encouraged him to seize the opportunities now being afforded him. Heeding his father's wisdom, he became licensed as a CPA and accepted a job with Peat Marwick in Omaha, Nebraska. A couple of years later, "on a whim," Judge Mullin and six of his colleagues requested a transfer to the firm's Dallas office. The request was granted, and he decided to move south. This decision proved quite meaningful, as it was during his time in Dallas that he met his wife, now of 31 years, Holly.

In 1983, Judge Mullin turned the page on his accounting career and enrolled at St. Mary's University School of Law. While in law school, he served as an editor of the St. Mary's Law Journal, and accepted a summer clerkship with Haynes & Boone. After earning his Juris Doctor in 1986, he joined the prominent law firm as an associate. At the time, he was really not sure whether he wanted to do transactional work or become a litigator, but he was drawn to bankruptcy because he felt that it offered "the best of both worlds." He ultimately found himself inspired by the likes of Robin Phelan and Robert Albergotti, the two Haynes & Boone attorneys who had conducted his very first interview during law school and who insisted that his accounting background would be uniquely valuable in bankruptcy law. In his words, "I am very fortunate that I had the opportunity to begin my legal career with such outstanding and well-respected bankruptcy lawyers, both of whom I still consider my mentors 30 years later."

Judge Mullin spent the next 30 years in Haynes & Boone's renowned bankruptcy section, where he has earned an exceptional reputation for successfully representing clients in complex bankruptcy-related matters such as financial restructuring, workouts, negotiations, and litigation. He was a reliable counselor and advocate for the entire spectrum of parties in bankruptcy, representing corporate debtors, secured and unsecured creditors, creditor committees, interested parties, and trustees. Thus, as a judge, he brings with him a broad range of expertise stemming gained from his experiences in a number of high-stakes cases involving a wide range of diverse industries and subject matter.

Beyond his accomplishments in the courtroom, Judge Mullin had long demonstrated his commitment to both the law and the legal community. He has held numerous leadership positions through the years in both local and national legal organizations, serving as president of the Dallas Bar Association's Bankruptcy Section, president and founding member of the Hon. John C. Ford American Inn of Court (he currently serves as a member of the Executive Committee), and Education Director and co-chair of the American Bankruptcy Institute's Secured Credit Committee. He has likewise spent considerable time and effort writing and speaking before legal organizations state-wide and across the country, sharing his insights on restructuring, workout issues, and

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Could *Sabine* Push Texas Gathering Agreements into the Ravine?

New York Bankruptcy court to decide whether gas gathering agreements contain covenants that run with the land under texas law.

By: John E. Mitchell & Amy M. Leitch, Akerman LLP[1]

Currently pending before the United States Bankruptcy Court for the Southern District of New York is the Chapter 11 case of *Sabine Oil & Gas Corp.*, Case No. 15-11835 (SCC) (jointly administered). In September 2015, Sabine Oil & Gas Corporation ("Sabine") and affiliates (collectively, "Debtors") filed a motion to reject certain executory contracts with two midstream gatherers: Nordheim Eagle Ford Gathering, LLC ("Nordheim") and HPIP Gonzalez, LLC ("HPIP"). Nordheim objected to the motion claiming that the Debtors did not meet the business judgment standard in rejecting its contract because the agreements at issue contain covenants that run with the land that the Debtors will not be able to avoid.[2] After extensive briefing, the Court held a hearing on the motion earlier this month. Sources report that the judge said she was "inclined" to allow rejection. Depending on the grounds for the ruling, the Court's opinion could have a lasting impact on existing gathering agreements as well as how gathering agreements are negotiated in the future. As Nordheim points out in its briefing, midstream gathers invest in gathering projects based on the expectation that the covenants in their agreements run with the land and bind successors and assigns.

Under the gas and condensate gathering agreements at issue, Sabine dedicated its entire supply of natural gas and condensate produced in a certain area in DeWitt County, Texas, to Nordheim. More specifically, the dedications in the agreements provide that Sabine:

> Dedicates for gathering under this Agreement, and shall deliver or cause to be delivered . . . all [gas/condensate] produced and saved on or after the Effective Date . . . to the extent such [gas/condensate] is attributable to the Interests within the Dedicated Area now owned, leased or hereafter acquired by [Sabine and its] successors or assigns.

[Doc. 410 ¶ 21 (quoting agreements).] The "Interests" are defined as "any right, title, or interest in lands and the right to produce oil and/or Gas therefrom, whether arising from fee ownership, leasehold ownership, or arising from any pooling, utilization, or communization of any of the foregoing rights." [Doc. 410 ¶ 29 (quoting agreements).] The agreements obligate Sabine to deliver an annual minimum volume of gas and condensate to Nordheim or pay Nordheim a deficiency fee if the volume commitment cannot be met. Sabine seeks to reject the agreement and plans to utilize an alternative gatherer to provide the gathering services at market rates and with no minimum volume obligations.

Under Texas law, a covenant runs with the land when (1) there is privity of estate,[3] (2) the covenant touches and concerns the land, (3) it "relates to a thing in existence or specifically binds the parties and their assigns," (4) the original parties intend it to run with the land, and (5) there is notice of the burden to the successor to the contract.[4]

The parties dispute whether there is privity of estate, that the subject covenants touch and concern the land, and the parties' intent. The main arguments are summarized below.

1 John Mitchell is a partner in the Dallas, Texas office of Akerman LLP. Amy Leitch is an associate in the Jacksonville, Florida office of Akerman LLP. Both specialize in bankruptcies and restructurings and can be reached at john.mitchell@akerman.com and amy.leitch@akerman.com, respectively.

2 This summary focuses on the arguments presented by Nordheim rather than HPIP as Nordheim's briefing is more comprehensive on the subject of this article and the Debtors claim the agreement with HPIP was terminated before filing.

3 Nordheim apparently contends that privity of estate is not a required element.

4 *Inwood N. Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987).

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Bankruptcy Before the Supreme Court: Review of 2015 Decisions and 2016 Issues to Watch

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I. INTRODUCTION

2015 was a significant year in the history of bankruptcy jurisprudence, as the United States Supreme Court handed down five important opinions in six bankruptcy cases. The nation's highest court aspired to resolve issues including: i) whether after conversion to Chapter 7 from Chapter 13, the Chapter 13 trustee should distribute funds already collected under the Chapter 13 plan to the creditors or to the debtor; ii) the scope of lien-stripping; iii) whether the denial of a plan of reorganization is a final order eligible for appeal; iv) whether attorneys can collect fees for defending their fees against challenge; and v) whether parties to a bankruptcy proceeding can waive their personal Constitutional rights to adjudication of a matter by a federal district judge such that the matter may be resolved by a bankruptcy judge instead. Since the close of the summer session, lower courts around the country have attempted to understand the implications of the opinions and to apply the Court's wisdom on a day-to-day basis.

Adding to this, the end of 2015 saw the rise of two more questions for the Supreme Court to resolve in 2016. As discussed below, the first question is whether a debtor can engage in "actual fraud" without making a false representation, such that the debtor's discharge could be denied under 11 U.S.C. § 523(a)(2)(A). The second is whether Chapter 9 of the Bankruptcy Code preempts a Puerto Rican statute that creates a mechanism for the Commonwealth's public utilities to restructure their debts, despite the fact that Chapter 9 does not apply to the U.S. territory. While these seem like very technical questions, they are also very important. The first has been the subject of a circuit split, while the second strikes to the heart of Puerto Rico's long-standing internal tension between sovereignty and statehood. After reviewing recent cases demonstrating how courts are currently trying to apply the Supreme Court's holdings of 2015, this article also explains the history and current issues at play in the two new cases granted certiorari.

II. A REVIEW OF THE 2015 DECISIONS

Waiver and Consent

Wellness Int'l Network, Ltd. v. Sharif, 135 S.Ct. 1932 (2015)

Years of uncertainty for bankruptcy practitioners created by the Supreme Court's decision in *Stern v. Marshall*[1] were brought to a bit of a rest after the Court's opinion in *Wellness Int'l Network, Ltd. v. Sharif*.[2] The Court found that Article III, § 1 of the United States Constitution permits bankruptcy judges to adjudicate *Stern* claims with the parties' knowing and voluntary consent, either express or implied.[3] The 6-3 decision handed down on May 26, 2015 resolved a dispute over whether a bankruptcy court could determine that assets held by a trust for the benefit of a debtor were in fact property of the estate.[4]

The debtor had argued to the Seventh Circuit that—despite the language in § 541 of the Bankruptcy Code[5]—the bankruptcy court presiding over his case lacked constitutional authority to declare that assets held in a trust within the debtor's control were property of his estate. The Seventh Circuit agreed that the bankruptcy court did not have constitutional authority to make property determinations under state law.[6] The Seventh Circuit held that the debtor could not have waived his constitutional objection to the court's judicial power, since the ability of bankruptcy courts to wield judicial power implicates non-waivable separation of powers principles.[7] The Seventh Circuit relied on the holding in *Stern*[8] which found 28 U.S.C. § 157(b)(2)(C) to be unconstitutional, inasmuch as it permits a bankruptcy court to enter final judgment on a state counterclaim.

1 *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011).
2 *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015).
3 *Id.* at 1937.
4 *Id.*
5 All references to the "Bankruptcy Code" refer to Title 11 of the United States Code.
6 *Sharif*, 727 F.3d 751, 762-63 (7th Cir. 2013).
7 *Id.* at 771.
8 131 S. Ct. at 2608.

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Mediation in Bankruptcy Cases

By: Judge Craig A. Gargotta, W.D. Texas

The Bankruptcy Section hosted its first "Mediation in Bankruptcy" seminar in Austin on September 11th. Barbara Barron of Barron and Newburger, along with Chief Bankruptcy Judge Jeff Bohm (S.D. Texas), originated the idea and the format of the program. Professor Michael Schless, a mediator himself and professor of law at UT Law School, assisted in the formulation of the topics. Both Ms. Barron and Judge Bohm suggested that a program centered on educating attorneys about mediation, and, educating attorneys to be mediators, would benefit the bankruptcy bar at large. As a result, the day long program was divided into two segments; one focused on the mediation process itself and the other focused on mediation training for bankruptcy attorneys.

The morning session included plenary sessions on optimizing the success in mediation and a discussion on whether all mediations are the same. Each session included a sitting bankruptcy judge and attorney or professor of law. Judge Harlin Hale (N.D. Texas) along with Professor Schless, considered whether every bankruptcy case should be mediated; and, if so, what counsel should do to enhance the prospects of a case being successfully mediated. Judge Hale and Professor Schless emphasized the need to have precise settlement agreements that evidence the intent and agreement of the parties.

The second plenary session included a discussion by Judge Marvin Isgur (S.D. Texas) and Rakhee Patel of Schackelford, Melton, McKinley & Norton, LLP, regarding what bankruptcy matters are good candidates for mediation. Also, the panelists engaged in a candid discussion if bankruptcy cases are different than other civil matters for mediation and how mediation impacts a pending case.

A breakout session then included two panels consisting of Chief Judge Ronald King (W.D. Texas), newly appointed Judge Eduardo Rodriguez (S.D. Texas), and renown Austin attorney Michael Baumer; along with a second panel consisting of Judge David Jones (S.D. Texas) along with noted arbitrators and mediators Sylvia Mayer and Steve Lemmon of Husch Blackwell LLP. These panel sessions included observations from judges who have served as mediators and their attorney counterparts who have participated in mediations. The panelists discussed experiences with mediation and how mediations have affected their clients as litigants in court. The panelists also discussed the challenges of having parties agreeing to mediation and then adhering to the terms of settlement.

Possibly the highlight of the program was a point and counterpoint discussion between Steven Sather of Barron and Newburger and Chief Judge Bohm as to the usage of mediation in bankruptcy. Mr. Sather ably articulated the virtues of mediation while Judge Bohn offered practical insights as to why mediation may not be all that beneficial in bankruptcy in that bankruptcy is inherently a type of practice where settlements are routine. Both speakers also addressed whether using sitting bankruptcy judges promotes or diminishes the mediation process. The program concluded with Professor Schless providing training on how to be a mediator and then Judge Leif Clark (retired) conducting a mediation skit illustrating how mediation works. While the skit was humorous in nature, the skit did highlight many of the practical considerations of how mediation works and provided some insights on how to conclude mediation successfully.

Review of the 2015 Biennial Bankruptcy Bench/Bar Conference

By: Sara M. Keith (Johnson DeLuca Kurisky & Gould, P.C.; Houston, Texas)

The Bankruptcy Law Section held its Biennial Bench Bar Conference on May 27,-29 2015 at the Hyatt Lost Pines Resort and Spa just south of Austin, Texas. The coursework began on Thursday morning after several registrants participated in a fun run with the judges.

The first session was a case law update with panelists Judge Richard Schmidt, Judge Michael D. Lynn, Judge Cecelia G. Morris, Janet Northrup, and William J. Rochelle. The topics included the right to jury trial if a creditor filed a proof of claim, whether or not a denial of lift stay motion is appealable, the long-awaited reversal of the *Pro-Snax* hindsight test, homestead in interests, and the U.S. Bankruptcy Code trumps the F.D.C.P.A. to name just a few.

The second session was a lively one on bankruptcy mediation with panelists Judge Jeff Bohm, Judge Alan Trust, Jay Ong, retired Judge Leif Clark and Rhakee Patel. This exciting panel discussed Judge Bohm's recent *Cody Smith* opinion and whether or not mediators are considered professionals under Section 327. This hot panel hotly debated the purpose of mediation in bankruptcy and how such professionals can be employed, if necessary. There was also a divided discussion on whether or not sitting judges can serve as mediators in current cases.

The next session was presented by a professional troup that tours Texas putting on ethics presentations. Assisted by Lee Cusenbary, Judge Russell Nelms, Judge Bill Parker and Judge Richard Schmidt, the group presented in musical format about ethics set in the mystical time of Camelot. With princesses, knights, fairies, and lawyers the presentation was as informative as it was entertaining. Who knew that Judges Schmidt, Nelms and Parker had fantastic singing voices!

At the lunch break there was the presentation of Section awards and the official meeting in which the new slate of section officers were elected. The afternoon was split with both consumer and business breakout sessions.

<u>Business Sessions:</u>

The first business session was about the current status of Oil and Gas Restructurings led by panelists Judge Tony Davis, David Bennett, Hugh Tucker and Mike Boone. The panelists shared their insights regarding near-term pressure points, current trends, and actions creditors can take to mitigate risks and maximize value. One option creditors can use to protect themselves is to obtain and perfect security interests and/or liens. It remains to be seen how the volatility of the Oil and Gas market will affect restructuring professionals.

The second session was about what is hot and trendy in debt and equity financing. Panelists Judge David R. Jones, Sarah Schultz, Monica S. Blacker and Bryan Lastrapes discussed the current status of asset based loans (ABL) and reserve based loans (RBL). Currently, RBL's are cheap but have pretty strict terms and many limits. The knowledgeable panel also discussed the current use of make-whole clauses and cramdown including the formula and market tests. The panel advises to do a lien search prior to filing for bankruptcy protection.

The third sessions discussed reasonably equivalent value and related issues in complex deal structures. The panel included Judge Craig A. Gargotta, Elia O. Columbus, and Kell C. Mercer. The panel began by discussing the *Janvey v. Golf Channel* case. They further discussed, that not knowing about a Ponzi scheme was no defense thus in a Ponzi scheme the creditor will lose under TUFTA but not necessarily under Section 548(c). They also discussed in depth the recent *Tousa* case.

The final business session discussed the future of chapter 11 with experienced panelists Judge Barbara Houser and Deborah Williamson. The panel discussed topics and issues that are currently under review with the rule advisory committee. They discussed issues with middle market cases and how there is no committee usually and thus the secured lender tends to have a "vice grip" on the debtor. Additional issues like the assignment for the benefit of creditors, a new type of case called a SME or Small/Medium Enterprise where the debtor is not publicly traded and has less than $10 Million in assets/liabilities with no committee requirement and no mandatory deadlines and allowing pre and post equity to retain their interests. Finally, they discussed avoiding powers and appointment of chapter 11 trustees.

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ELLIOTT CUP 2016

By: Brendan Hammond, The University of Texas School of Law

The Annual Fifth Circuit Elliott Cup Moot Court Competition was held at the University of Texas School of Law on February 19th and 20th. The competition takes its name from the Honorable Joseph Elliott, former Chief Bankruptcy Judge for the Western District of Texas. The Elliott Cup is sponsored each year by the Bankruptcy Section of the State Bar of Texas, Special thanks to Tom Rice (assisted by Nicole Hay) who coordinates the Elliott Cup year after year.

Eleven law school teams representing six law schools from around the Fifth Circuit participated in the Elliott Cup, including the University of Texas School of Law, SMU Dedman School of Law, Baylor University School of Law, Texas Tech University School of Law, Mississippi College School of Law, Thurgood Marshall University School of Law. The team from the University of Texas School of Law—composed of Mr. Daniel Hatoum and Ms. Hannah Roblyer; coached by Ms. Debbie Langehennig, Mr. Jay Ong, Mr. Brian Cumings, and Mr. David Shank—won the 2016 Elliott Cup. Ms. Audrey Leeder, Ms. Meredith Borschow and Mr. Barrett Armbruster from the SMU Dedman School of Law, coached by Mr. Omar Alaniz, Ms. Elizabeth Boydston and Mr. Tim Springer, were the runners up. Mr. Armbruster also won the Best Oral Advocate award.

The final round judges for this year's Elliott Cup were three wonderful jurists from the state of Texas, Bankruptcy Judge Christopher Mott from the Western District of Texas, Bankruptcy Judge Eduardo V. Rodriguez from the Southern District of Texas and Bankruptcy Judge Harlin "Cooter" Hale from the Northern District of Texas. The Elliott Cup relies upon the support of attorneys willing to volunteer their time and effort to judge the preliminary rounds of the competition. Thank you.

The Elliott Cup serves as a non-affiliated forerunner to the Annual ABI Duberstein Bankruptcy Moot Court Competition held at St. John's School of Law in New York in March. The fact pattern and preliminary briefing for the two competitions are identical and teams must be registered for the Duberstein Competition to compete for the Elliott Cup. That Elliott Cup participants argue before and receive feedback from prominent bankruptcy practitioners and judges is responsible, at least in part, for the excellent performance of the Elliott Cup teams at the national competition.

1st Place UT with Coaches

Best Oral Adovcate SMU Barret Armbruster

ELLIOTT CUP 2016

1st Place UT

2nd Place SMU

3rd Place UT and SMU

SMU Team Makes History at Duberstein National Competition

By: Luciana Milano, SMU Dedman School of Law

The Southern Methodist University Dedman School of Law made history at the 24th Annual Duberstein Bankruptcy Moot Court Competition held in New York. The team consisting of Angela Oliver, Allison Stewart, and Luciana Milano was the first in the competition's history to win the national championship back to back. Omar Alaniz (Baker Botts), Liz Boydston (Norton Rose Fulbright), and Tim Springer (Norton Rose Fulbright) coached the SMU teams. With this win, SMU has won three of last four national Duberstein competitions.

Texas was well represented at Duberstein. Two University of Texas teams (coached by Debbie Langehennig and Jay Ong), two Baylor teams (coached by Deborah Perry and Professor Larry Bates), a Texas Tech team (coached by Lisa Lambert, Professor Dean Pawlowic, and Professor Sally Henry), and both SMU teams emerged as the top 16 of the 50 teams competing. Elliot Cup champions Daniel Hatoum and Hannah Roblyer from UT advanced to the semi-finals and squared off with the SMU team in an exciting Elliot Cup rematch. Hannah impressively received the competition's highest individual honor: Best Oral Advocate. Daniel also received an Outstanding Advocacy Award. SMU's Angela Oliver and Barret Armbruster similarly received an Outstanding Advocacy Award. Together SMU and UT took four of the five outstanding speaker awards from the over 100 students competing. Baylor University received an Outstanding Brief award.

The Duberstein competition is sponsored by the St. John's University School of Law and the American Bankruptcy Institute. This year's prompt dealt with the scope of the bankruptcy court's "related to" jurisdiction post-chapter 11 confirmation and the enforceability of a free and clear sale order on unnoticed creditors. In the final round of the competition, the winning team presented arguments before an esteemed panel of judges: Hon. Edward Prado (5th Circuit); Hon. N. Randy Smith (9th Circuit); Hon. Cecelia G. Morris, Chief Bankruptcy Judge (SDNY); and Hon. Carla E. Craig, Chief Bankruptcy Judge (EDNY). The national champions were announced on the final day of the competition at an awards gala attended by more than 1,000 bankruptcy judges and practitioners.

Hannah Roblyer of UT - Best Oral Advocate

SMU 1st Place

SMU Team

Final Round SMU and UNLV with Judges

Trusting the Trustee: Full Disclosures Allow Fifth Circuit to Uphold Discharge in *In re Packer*

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The Fifth Circuit Court of Appeals reiterated its standard for denial of discharge under 11 U.S.C. § 727(a), giving deference to the bankruptcy court's ruling. *In Judgment Factors, L.L.C. v. Packer* (*In re* Packer), the Fifth Circuit held that the party objecting to the discharge had failed to show the requisite fraudulent behavior that was mandatory for a denial of discharge under section 727(a). In doing so, the court emphasized the actions that must occur for a debtor to be denied a discharge and simultaneously highlighted its approach to a section 727(a) proceeding.

In the mid-2000s, Athol Packer ("Debtor") formed a residential development LLC with Henry Allen and David Allen ("Allen Partners"). Both parties guaranteed a bank loan to get the company off of the ground, a maneuver that backfired when the company proved unsuccessful. After the bank foreclosed on the real property of the LLC, it obtained a deficiency judgment against the Debtor and the Allen Partners in the amount of $5.9 million. Piggy-backing off of the misfortune, the spouses of the Allen Partners formed Judgment Factors, L.L.C., which acquired the deficiency judgment from the bank. When Judgment Factors pursued the Debtor personally, he voluntarily filed for bankruptcy relief under Chapter 7.

Judgment Factors filed an adversary proceeding to prevent entry of the Chapter 7 discharge, specifically objecting to the discharge based on falsity and fraud under sections 727(a)(2)(A), (a)(3), (a)(4)(A), and (a)(5). The creditors presented an "alter ego" theory to pierce the corporate veil of entities owned by the Debtor, asserting that he should have listed the assets of his other entities in his bankruptcy schedules (because these entities were his "alter egos") and that the Bankruptcy Court should determine that these assets were subject to the claims of his creditors. The Bankruptcy Court dismissed the alter ego complaint and granted summary judgment in favor of the debtor, going through a lengthy analysis of the requisite elements for denying a discharge under §727(a). The district court affirmed the decision.

On appeal, the Fifth Circuit quickly dismissed the alter ego and veil piercing theories. For a creditor to pursue an alter ego claim against a bankruptcy debtor, the claim had to be colorable, brought on behalf of the estate, and the Trustee must have unjustifiably refused to pursue the claim. Even then, the ultimate decision was at the discretion of the Bankruptcy Court. Judgment Factors lacked standing because it failed to provide any evidence of the above-mentioned elements, and therefore, was precluded from seeking a judicial determination that any of the entities the Debtor owned were his alter egos. As a result, these alter ego theories were only factors to be weighed in the non-dischargeability claim.

The Fifth Circuit then methodologically analyzed each provision alleged under section 727(a), emphasizing that a court shall grant the debtor a discharge unless the debtor engages in specific actions that are statutorily enumerated. The first allegation focused on section 727(a)(2)(A), in which a creditor prevailed only if it proved: (1) a transfer of property; (2) belonging to the debtor; (3) within one year of the filing of the petition; (4) with intent to hinder, delay, or defraud a creditor or officer of the estate. Judgment Factor's argument centered on the Debtor's use of his single-member LLC's bank account to pay his personal expenses and the existence of four contracts signed by that LLC and its clients as evidence of concealing the Debtor's assets from creditors within the corporate entity. As the Debtor disclosed the existence of, and his interest in, the single-member LLC and no evidence was put forth to prove that the contract payments were property of the Debtor or the contracts were a means to conceal assets, the Fifth Circuit found that no "intent to hinder, delay, or defraud" existed. The record also lacked evidence of a transfer of property belonging to the Debtor within one year of the filing of the petition date, and thus, no error occurred in granting summary judgment with regards to the section 727(a)(2)(A) claim.

The next claim fell under section 727(a)(3), which denied a discharge if the Debtor has destroyed or failed to keep records from which his financial condition may be ascertained. Judgment Factors again relied on the aforementioned contracts, claiming that non-disclosure of their existence could warrant a denial of discharge under this provision. Because the single-member LLC entering the contracts was a separate legal entity, there was no obligation to disclose records relating to the contracts. The

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Same Picture, Different Story: *In re Colliau* and 522(o) and (p) Limitations on Homestead Exemptions

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The Bankruptcy Court addressed two homestead questions in this case. The first focused on the interaction of 522(o) and 522(p), and whether the two sections should be read in conjunction or independently. The second centered on the snapshot rule and its application with respect to waiting for appreciation of the property.

In this instance, homestead property was purchased within 1,215 days of bankruptcy and therefore subject to 522(p) cap of $311,350. As valued on the petition date, however, because of an $11,156 reduction under 522(o)[1], the homestead value was below the cap.

In oral argument, the court employed the sections in conjunction to create a cap deduction. The $311,350 cap was reduced by the $11,156. This was then subtracted from the value of the property to determine the estate's leftover interest. This calculated interest was determined to be less than the $16,000 needed for maintenance of the estate.[2] Thus, the estate's interest was canceled out.

In the later analysis, however, the Bankruptcy Court instead read the sections independently, and the equity going to the Debtors was reduced by $11,156. Here, instead, the costs of maintaining the estate were not taken into consideration in favor of the Debtors. The Bankruptcy Court allowed the estate to realize the $11,156, plus any additional equity above the 522(p) cap, by placing an equitable lien on the house. The Bankruptcy Court relied on *In re Cipolla*[3] to determine that section 105(a) gave it general authority to impose such a lien. Without addressing the Texas proceeds rule, the Bankruptcy Court gave the debtors 90 days to satisfy the lien and avoid a forced sale.

The second homestead issue centered on the snapshot rule, which directs that the exemption status of an asset is fixed as of the petition date. The Bankruptcy Court applied this rule to refuse to allow the trustee to wait and see whether the property value would appreciate enough to exceed the exemption cap and, upon sale, provide funds to the estate. Since the homestead, after objection to the exemption, was valued below the 522(p) limit on the petition date, the bankruptcy estate had no interest in the homestead property.[4] Therefore, the homestead property was exempt and removed from the estate, making it irrelevant whether the property appreciated above the cap.[5] In reaching this result, the Bankruptcy Court distinguished the facts in *Schwab v. Reilly*, where the trustee did not object to the exemption, but it was later determined that the value of the homestead exceeded the section 522(p) cap.

1 The $11,156 was spent on improvements made to the homestead but it was spent with intent to hinder, delay, or defraud creditors, thus reducing the value.

2 This maintenance cost, although seemingly critical to the estate's recovery, is minimally explained in the opinion.

3 The court relied on Judge Gargotta's opinion in *In re Cipolla* for use of section 105(a) to "authorize courts to issue any order … that is necessary or appropriate to carry out the provisions of this title." *In re Colliau*, No. 15-11166-TMD, 2016 WL 3049562, at *3 (Bankr. W.D. Tex. May 20, 2016).

4 In a footnote, the Bankruptcy Court explained that the $11,156 interest of the estate that resulted from application from section 522(o) did not create an interest in the homestead property but rather a right to payment by the estate. *See id.* at n. 11 (citing *In re Presto*, 376 B.R. 554, 600 (Bankr. S.D. Tex. 2007)).

5 In making this determination, the Bankruptcy Court agreed with Judge Isgur's holding in *In re Ayobami*, where he stated "when a debtor claims '100% of fair market value' in an asset subject to an exemption cap, later increases in value inure to the debtor's benefit, and not to the benefit of the state." No. 15-35488, 2016 WL 828743 at *2 (Bankr. S.D. Tex. March 2, 2016).

6 *Schwab v. Reilly*, 560 U.S. 770, 775-76 (2010).

A Refreshing View on a *Frost-y* Ruling
Romo v. Montemayor (In re Montemayor)

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Debtor filed a voluntary petition for relief under chapter 7. Debtor claimed the homestead exemption and neither the trustee nor any party in interest filed an objection to the Debtor's claimed homestead exemption. Debtor was granted his Motion for Authority to Sell Homestead, and in fact sold the homestead. Debtor used half of the proceeds to purchase a lot on which he intended to construct a new home. Debtor also expended more proceeds in an effort to clean the lot and get the lot ready for construction. Trustee filed two motions to extend the time to object to discharge, which caused Debtor to lose the loan for construction. The loan for construction of the house was contingent upon the discharge. Because Debtor was unable to receive the loan, he could not afford to construct the new house and failed to invest all of his proceeds into another household within the six month period under the Texas Property Code.[1]

In the opinion, Judge Rodriguez meticulously developed the historical precedent for homestead proceeds, differentiating and distinguishing every case from the case at hand. Judge Rodriguez opined that in *Frost*, the controlling case in the Fifth Circuit, the "distributed proceeds were exempted, but, pursuant to the chapter 13 plan, remained property of the estate, having not fully revested in the debtor, until the point at which the temporal exemption expired."[2] At the moment the exemption lapsed, the bankruptcy estate recaptured the distributed proceeds."[3] Judge Rodriguez distinguished this from the present chapter 7 case, emphasizing that section 1327(b)[4] permitted the retention in the bankruptcy estate to occur.

Based on this analysis, Judge Rodriguez concluded that the homestead exemption became final when the trustee failed to file a timely objection. Because the homestead exemption was final, the homestead was withdrawn from the chapter 7 estate and the proceeds exempt from pre-petition liability under section 522(c).[5] Judge Rodriguez confined his ruling to pre-petition creditors, in that post-petition creditors would be successful as Debtor violated the requirements of the Texas Property Code.

1 Tex. Prop. Code § 41.001(c).

2 *In re Montemayor*, 547, B.R. 684, 712 (Bankr. S.D. Tex. 2016).

3 "Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case."

4 "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."

5 Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case.

6 Tex. Prop. Code § 41.001(c).

Summary of Bankruptcy Now and Future, 2016 Seminar Presented by the Fifth Circuit Fellows of the American College of Bankruptcy

By: Jesse Moore, Dykema Cox Smith, Austin, TX
with contributions by Megan N. Young, Law Clerk to the Honorable Craig A. Gargotta, United States Bankruptcy Court for the Western District of Texas

Fun was had by all at the "Bankruptcy Now and Future" seminar presented by the Fifth Circuit Fellows of American College of Bankruptcy in Austin, Texas on April 1 and 2, 2016. The discussions were lively, the food was good, and the jokes all garnered laughter, funny or not.

Abi Commission Recommednations Debate Panel

The April Fool's Day kick-off for the seminar occurred at a well-attended reception at the Austin offices of Norton Rose Fulbright. Fellows Norton Rose Fulbright partner Toby Gerber, Standing Chapter 13 Trustee Deborah Langehennig, Becky Roof of AlixPartners and William Snyder of Deloitte, and Norton Rose Fulbright marketing event coordinator Crystal Wallingford worked hard in putting together and raising funds for the entire seminar, including the reception, which had Austin's famous urban bat colony venturing out to supper from the Congress Avenue bridge below as a finale.

Oil and Gas Panel 1

The morning session treated attendees to a unique "debate-style" presentation from panelists Craig Goldblatt, Edwin E. Smith, Jay L. Westbrook, Bettina M. Whyte and Deborah D. Williamson with moderator, The Honorable Marvin J. Isgur. The panel covered the ABI Commission Report's proposals on three topics: (1) use of the "Countryman" definition of executory contracts rather than the "Functional approach"; (2) enforceability of intercreditor agreements and their effect on availability of post-petition financing; and (3) use of the "foreclosure value" rather than "going concern value" or "liquidation value" in determining the amount of adequate protection. After rounds of argument, responses, questions and counter-arguments, electronic votes submitted by the audience determined the persuasiveness of the arguments on each resolution.

Oil and Gas Panel 2

The afternoon sessions were comprised of two distinguished panels discussing selected topics in oil and gas bankruptcies. The first panel, moderated by The Honorable Harlin D. Hale, lead an in-depth discussion of the challenges presented when viewing the financial stability of midstream and upstream companies together. Panelists Charles Beckham, Becky Roof, Robin Russell and Bill Wallander examined the effect of Gathering and Processing Agreements in bankruptcy and the possibility of dual (or dueling) bankruptcy filings. The second panel, moderated by Mr. Bill Greendyke, discussed current market trends in the oil patch, looked at results in recent oil and gas bankruptcy filings and provided a "watchlist" for future industry filings. Panelists Jan M. Hayden, Louis M. Phillips and Lou Strubeck led the audience through a lively discussion of use of § 363 sales v. the plan and auction processes. The panel

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Calendar of Upcoming Events

June 23-24	**State Bar of Texas Advanced Business Bankruptcy Conference** Austin
July 14-15	**UT Law's 12th Annual Consumer Bankruptcy Practice** Moody Gardens, Galveston
September 8-10	**ABI's 24th Annual Southwest Bankruptcy Conference** Four Seasons Hotel, Las Vegas
September 9	**Forensic Finance: Better Bankruptcies Through Better Numbers** AT&T Executive Education & Conference Center, Austin
November 17-18	**35th Annual Jay L. Westbrook Bankruptcy Conference** Four Seasons Hotel, Austin

Troop Movement and Mergers

The attorneys formerly at the Austin litigation and bankruptcy boutique firm of Taube Summers joined the Nashville-based firm of Waller Lansden Dortch & Davis. The attorneys who have moved to Waller include **Eric J. Taube, Mark C. Taylor, Morris D. Weiss, Christopher G. Bradley,** and **Cleveland R. Burke**.

Annmarie Chiarello (graduate of The University of Texas School of Law) joined Winstead PC (Dallas)

Elio O. Columbus (formerly of Winstead PC) joined Haynes and Boone LLP (Dallas)

Michael P. Cooley (formerly of Akin Gump) joined Bryan Cave (Dallas)

Matthew T. Ferris (formerly of Winstead PC) joined Haynes and Boone LLP (Dallas)

John Leininger (formerly of Bryan Cave) joined Shapiro Bieging Barber Otteson LLP (Dallas)

John E. Mitchell (formerly of Baker & McKenzie) joined Akerman LLP (Dallas)

J. Frasher Murphy (formerly of Winstead PC) joined Haynes and Boone LLP (Dallas)

David W. Parham (formerly of Baker & McKenzie) joined Akerman LLP (Dallas)

Jason M. Rudd (formerly of Diamond McCarthy LLP) joined Wick Phillips LLP (Dallas)

Raymond J. Urbanik (formerly of Munsch Hardt) joined Barnes & Thornburg LLP (Dallas)

Judge Michael Lynn (briefly) retires, leaving behind storied legacy, and returns to practice
Continued from page 2.

As a bankruptcy judge, Judge Lynn dedicated himself to helping the debtors and creditors who have walked into his courtroom. He presided over many high-profile bankruptcies, such as Pilgrim's Pride, Mirant, and of course, Texas Rangers Baseball Partners. He was mindful of the general public and understands that, for many individuals, a bankruptcy proceeding may be the only time they come in contact with the federal judiciary. Some of these cases involve unpleasant circumstances, such as when someone has to be put out of their home. Yet, while such events come with the territory of being a bankruptcy judge, Judge Lynn always tried to ensure that anybody who walks into his courtroom has a positive experience.

Judge Lynn's contributions to the legal community stretch far beyond the bounds of his bench. He regularly hired externs and clerks, welcoming them into his chambers and considering their perspectives and opinions. He often opened up his home for social events with his staff and in support of the local bar. He dedicated much of his time in getting to know young attorneys and law students, and has mentored more than his share over the years. In recognition of how he has shaped so many young lawyers' careers and legal minds through his constant contributions, both the Dallas Association of Young Lawyers and the Tarrant County Young Lawyers Association honored Judge Lynn with their respective 2015 Outstanding Young Mentor Award.

Judge Lynn also enjoyed teaching as a guest lecturer at the Southern Methodist University Dedman School of Law. He believes in the value of case studies, and uses them often to teach students about reorganization in Chapter 11 and 13 cases. He found the Texas Rangers bankruptcy case particularly noteworthy, and even encouraged a colleague of his to teach a class on that case at SMU. Judge Lynn likes to interact with his students, watching them absorb the wealth of information he delivers in his lectures. For any student in his classes, he has one bit of advice: "be prepared" in case he decides to exercise the Socratic Method.

In his free time, Judge Lynn enjoys reading and spending time with his three dogs. After his term, Judge Lynn indulged in reading and planned to pursue writing. His retirement, however, did not last long, as he recently returned to practice joining the Fort Worth office of Shannon, Gracey, Ratliff and Miller, LLP.

Profile of the Honorable Mark X. Mullin U.S. Bankruptcy Judge for the Northern District of Texas, Fort Worth Division
Continued from page 3.

other bankruptcy-related subjects. He has often been recognized by publications such as Chambers & Partners, Texas Super Lawyers, and Best Lawyers as one of the best bankruptcy lawyers around. Perhaps because of this, he was selected in 2010 by the Hon. John C. Ford American Inn of Court as its honoree to be inducted into the DFW Serjeants of the Inn.

Judge Mullins aspirations to become a judge began early in his career. With bankruptcy law being a very active practice at the time, he was in the courtroom on what felt like a daily basis. He recalls that he consistently found himself thinking, "if I were a judge, how would I rule in this case?" It became clear that becoming a judge was something he felt strongly about pursuing. When the time was right, he determined to do just that, and is truly grateful that his day has finally come, saying that he is "very happy and very blessed to have been given this opportunity."

Judge Mullin believes that the DFW bankruptcy bar is one of the best in the country. He ascribes much of what he has learned to working with and going up against his peers. What he emphasizes most, however, are the lessons gathered by way of his countless appearances before the roster of "truly outstanding bankruptcy judges in the Northern District." He says that, "what's really going to benefit me the most is the fact that I have been able to observe how such excellent judges handle their dockets, their hearings, and tough situations. I have learned so much from them just by observation—which has certainly been a valuable experience as a lawyer—but now being able to have each of them as resource who I can call and bounce ideas and issues off of is going to be very, very helpful." In practice, he appeared before judges across the entire country, but as he puts it: "this bench is second to none."

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Profile of the Honorable Mark X. Mullin U.S. Bankruptcy Judge for the Northern District of Texas, Fort Worth Division
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Outside of the law, Judge Mullin enjoys sports. This passion dates back to his youth, when he played everything from football to basketball to—most importantly—baseball. For a long time he felt destined to be a professional baseball player. It was only three years ago that he finally conceded that pro baseball may not be his future.

Judge Mullin and his wife Holly have "two terrific kids" who are also married and live in the area. After more than three happy decades of marriage, he says that the whole family remains very close. As the judges of his life decisions, he is pleased to confirm that his family has given him their whole-hearted stamp of approval – "they are very happy for me."

Could Sabine Push Texas Gathering Agreements into the Ravine?
Continued from page 4.

Privity of Estate

No conveyance of an interest in property. The Debtors argue that privity of estate cannot be found unless one party grants, sells, or otherwise conveys an interest in property to which the covenant attaches. The Debtors claim that the agreements at issue clearly state that Sabine is not transferring any title in the subject mineral estate to Nordheim. The Debtors also argue there is no grant or sale language (*e.g.*, granted, bargained, sold, conveyed) evidencing a conveyance.

Nordheim states horizontal privity exists because Sabine conveyed a surface parcel to Nordheim for the purpose of constructing the gathering facilities necessary to transport Sabine's gas. The parties report that the warranty deed evidencing the conveyance was dated March 11, 2014, and the gathering agreements were entered into on January 23, 2014. Nordheim contends the conveyance of the surface parcel was made in conjunction with the gathering agreements and was part of the same transaction and thus, the burden of the covenants in the gathering agreements runs to Sabine's mineral estate. Nordheim also argues that the privity exists because Sabine transferred its interest of transporting gas and condensate and its interest of determining the price for transportation of the gas and condensate to Nordheim. Finally, Nordheim contends that even if privity does not exist, the court should still enforce the covenants as equitable servitudes that bind successors and assigns based on the circumstances.

Even if there is conveyance language, Sabine had no power to convey the interest because Sabine did not own it. The Debtors further argue that the mineral interests at issue are actually owned by debtor Sabine South Texas LLC, a subsidiary of Sabine, which is not a party to the agreements. Sabine claims it did not have the power to convey an interest in a mineral estate it does not own. Moreover, because Sabine South Texas LLC did not convey any of its interest to Sabine, there is no privity.

Nordheim claims vertical privity exists because Sabine South Texas LLC is a wholly-owned subsidiary of Sabine. Accordingly, Sabine had the authority to (and did) bind Sabine South Texas LLC under the gathering agreements.

Touches and Concerns the Land

The Debtors claim that the covenants do not touch and concern the land because the acreage dedication addresses personal covenants. The Debtors contend that the gathering agreements merely give Nordheim the right to gather gas and condensate produced from the mineral interests. This right, Nordheim argues, is a right to perform a service, which is a personal covenant as opposed to a covenant affecting real property. As a result, there is no direct impact on the land and thus, the covenant does not touch and concern the land.

Nordheim argues the covenants touch and concern the land because they meet the two tests utilized by Texas courts in determining whether a covenant touches and concerns the property interest at issue. Nordheim states the first test, which involves a benefit/burden analysis, is met because Sabine's Interests are burdened by the terms of the gathering agreements and Nordheim's surface parcel is more valuable as a result of the covenants. Nordheim claims the burden is the dedication of hydrocarbons to Nordheim and the transportation fee owed under the agreements. Nordheim reasons that the impact on Sabine's property rights in the Interests are demonstrated by Sabine's attempt to reject the agreements. The gatherer also claims the second test, which analyzes the impact of the covenant on the property value, is met. Nordheim contends the value of the Interests fluctuate

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Could Sabine Push Texas Gathering Agreements into the Ravine?
Continued from page 17.

depending on the market rates of gas, condensate, and transportation. Nordheim also states the inability to transfer the gas at issue in a manner of Sabine's choosing (a right Sabine gave up with the dedication) makes the Interests less valuable.

Intent

Sabine asserts the language of the agreements expressly disclaim any intent to convey an interest in property. Moreover, there is no grant or sale language in the agreements that could serve as evidence of an intent to convey.

Nordheim contends that intent is demonstrated by the fact that the gathering agreements state they are to run with the land and bind successors and assigns.

Conclusion?

Actually, there is no conclusion to be written, at least not yet. Current and future debtors will either be able to reject gathering agreements or be required to include them in their restructuring and sale plans. The Bankruptcy Court in *Sabine* has yet to decide, but the ruling will have a profound impact on how gathering agreements are treated in the steady flow of energy Chapter 11's that is sure to continue.

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.

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.

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Bankruptcy Before the Supreme Court: Review of 2015 Decisions and 2016 Issues to Watch
Continued From Page 5.

The Supreme Court in *Sharif* disagreed with the Seventh Circuit's reliance, holding that litigants may waive their right to an Article III court if they knowingly and voluntarily consent to adjudication by a bankruptcy judge; and such a waiver may be implied by the actions of a litigant, so long as consent is knowing and voluntary.[9] The Court lauded the labors of non-Article III courts, noting that, but for bankruptcy and magistrate judges handling the volume of cases that would otherwise need to be resolved by district courts, the federal judicial process would "grind to a halt."[10] The Court decided that just as Congress has the authority to place the full share of the judiciary's labor on Article III judges and increase the number of district judgeships, Congress may also supplement "the capacity of district courts through the able assistance of bankruptcy judges."[11] Because bankruptcy judges are subject to control by the Article III courts, and because their authority stems from Article III courts, the Supreme Court decided that they "[pose] no threat to the separation of powers."[12]

The Court supported its holding with other cases where parties consented to have non-Article III judges enter final decisions in order to resolve disputes.[13] The Court also leaned on its prior holding in *Commodity Futures Trading Commission v. Schor*, where it upheld over challenge a regulation by a federal agency allowing it to hear state-law counterclaims.[14] The Supreme Court in *Schor* had noted that: "[a]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried."[15] In that case the Court had decided that a litigant could waive his personal right to an Article III court to the extent that the structural principle of checks and balances was not compromised. However, the Court had also warned: "to the extent that this structural principle is implicated in a given case"—but only to that extent—"the parties cannot by consent cure the constitutional difficulty…."[16]

In *Sharif*, the Court reiterated the importance of a litigant's consent.[17] The entitlement to an Article III adjudicator is a "personal right" and thus "subject to waiver."[18] The Court noted that Article III does serve the structural purpose of preventing congressional attempts to transfer jurisdiction to non-Article III courts, which would weaken these courts whose authority is vested in the Constitution.[19] But the Court decided that the separation of powers is not offended so long as Article III courts retain supervisory authority over the process.[20]

The Court also found that valid consent to adjudication by a bankruptcy court need not be express. The Court in *Sharif* pointed out that there is no such Constitutional requirement, and that the relevant statute—28 U.S.C. § 157—states that a bankruptcy court must only obtain "the consent" of all parties before hearing and determining a non-core claim.[21] Moreover, a requirement of express consent would contradict the Court's decision in *Roell v. Withrow*[22] finding that "the Article III right is substantially honored" by permitting waiver based on "actions rather than words."[23] The majority in *Sharif* determined that the implied consent standard in *Roell* supplies the appropriate rule for adjudication by bankruptcy courts. However, a litigant's consent must still be knowing and voluntary, and the key inquiry is whether the litigant voluntarily appeared to try the case before a non-Article III adjudicator after being made aware of both the need for consent and the right to refuse it.[24]

The *Sharif* decision, along with last year's decision in *Executive Benefits Insurance Agency v. Arkison*,[25] reaffirms the role of bankruptcy judges and their authority to decide a broad array of matters common in bankruptcy. However, some courts have

9 *Sharif*, 135 S. Ct. at 1942 (2015).
10 *Id.* at 1939.
11 *Id.* at 1946.
12 *Id.*
13 *Id.* at 1942 (citing *Thornton v. Carson*, 7 Cranch 596, 597 (1813)).
14 *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).
15 *Sharif*, 135 S. Ct. at 1942.
16 *Id.* (citing 478 U.S. at 850–851).
17 *Id.* at 1942 (also citing as illustration *Gomez v. United States*, 490 U.S. 858 (1989); *Peretz v. United States*, 501 U.S. 923 (1991)).
18 *Schor*, 478 U.S. at 848.
19 *Id.* at 1944 (citing Schor, 478 U.S. at 850).
20 *Id.*
21 28 U.S.C. § 157(c)(2).
22 *Roell v. Withrow*, 538 U.S. 580 (2003).
23 *Sharif*, 135 S.Ct. at 1948.
24 *Id.* (citing *Roell*, 538 U.S. at 588, n. 5 ("notification of the right to refuse" adjudication by a non-Article III court "is a prerequisite to any inference of consent")).
25 *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014).

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Bankruptcy Before the Supreme Court: Review of 2015 Decisions and 2016 Issues to Watch
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given significance to the fact that the Supreme Court in *Sharif* remanded the case back to the Seventh Circuit to determine whether or not the debtor gave implied consent, as well as whether the debtor forfeited his Stern objection by failing to present the argument in the lower courts.[26]

The Ninth Circuit recently took up this issue in the case of *Bastidas v. Chappell*.[27] There, the Ninth Circuit found it necessary for non-Article III judges to warn litigants on the record that they have the right to object to such adjudication. Based on this example, one can suppose that there are many courts questioning how exactly to determine the bounds of whether, how, and when a party forfeits the right to object to adjudication by a non-Article III judge.

Just seventeen days after the *Sharif* decision was entered, the District of Columbia Circuit issued an opinion in the case of *Al Bahlul v. U.S.* that thoroughly analyzed the Supreme Court's reasoning as to whether Congress had encroached upon Article III's judicial power by authorizing military commissions to try purely domestic crimes of indicted terrorists.[28] In that case the defendant was found guilty of charges related to terrorism, including conspiracy to commit war crimes.[29] The defendant argued that the jurisdiction of law of war military commissions is limited to offenses under the international law of war, and thus Congress encroached upon the Article III judicial power by authorizing Executive Branch tribunals to try purely domestic crimes such as inchoate conspiracy.[30] The government maintained that the Article III challenge was forfeited, since the argument was not raised at trial before the military commission.[31] The District of Columbia Circuit found that the Supreme Court in *Sharif* had addressed the distinction between the waivability of the individual right to Article III adjudication and the structural component of Article III § 1, and concluded that only the former was waivable.[32]

The *Sharif* opinion has also found more straightforward applications. For instance, in the case of *In re TPG Troy, LLC*, the Second Circuit used the Supreme Court's opinion to simply foreclose an argument that creditors were entitled to a jury trial on the issue of awarding attorneys' fees and costs.[33] The creditors had argued that the bankruptcy court lacked the constitutional authority to deem their jury demand waived, but the court of appeals easily concluded that the creditors knowingly and voluntarily consented based on their testimony in open court.[34] This holding has likewise been duplicated in several other circuits applying Sharif to resolve matters of consent.[35]

Fees for Defending Fees

Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158 (2015)

On June 15, 2015, the Supreme Court handed down its decision in *Baker Botts L.L.P. v. ASARCO LLC*.[36] The Court resolved whether 11 U.S.C. § 330(a) permits an award of compensation for the costs professionals bear to defend their fee applications in bankruptcy.[37] The Fifth Circuit had previously held that a bankruptcy court is prohibited by the "American Rule" from awarding fees to a prevailing party absent statutory authority, contractual authorization, or special circumstances.[38] On appeal, appellants argued that the Bankruptcy Code grants bankruptcy courts broad discretion to award professional compensation, displacing the American Rule.[39]

26 *Id.* at 1949.
27 *E.g. Bastidas v. Chappell*, 791 F.3d 1155, 1161 (9th Cir. 2015).
28 *Al Bahlul v. United States*, 792 F.3d 1, 4 (D.C. Cir. 2015).
29 *Id.* at 3.
30 *Id.*
31 *Id.*
32 *Id.* at 5 (citing *Sharif*, 135 S.Ct. at 1942-44).
33 I*n re TPG Troy, LLC,* ___ F.3d ___, No. 14-1010-BK, 2015 WL 4220619, at *3 (2d Cir. July 14, 2015).
34 *Id.* at *4.
35 *E.g., Marvin H. v. Morehead,* ___ F.3d ___, No. 14-2618, 2015 WL 4731360, at *2 (7th Cir. Aug. 11, 2015); *In re Gonzalez*, ___ F.3d ___, No. 14-1562, 2015 WL 4597594, at *3 (1st Cir. July 31, 2015)
36 *Baker Botts L.L.P. v. ASARCO LLC,* 135 S. Ct. 2158 (2015).
37 *See Baker Botts, L.L.P. v. ASARCO, L.L.C.*, 135 S. Ct. 44 (2014).
38 *ASARCO, L.L.C. v. Baker Botts, L.L.P. (In re ASARCO, L.L.C.)*, 751 F.3d 291, 302 (5th Cir.).
39 *See Brief for Petitioners, ASARCO L.L.C. v. Baker Botts, L.L.P. (In re ASARCO)*, No. 14-103, 2014 WL 6845689 at *15-41 (U.S. Appellate Brief Dec. 3, 2014).

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Bankruptcy Before the Supreme Court: Review of 2015 Decisions and 2016 Issues to Watch
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The Supreme Court affirmed the Fifth Circuit's decision, however, emphasizing that Congress did not expressly depart from the American Rule[40] to permit compensation for fee litigation by professionals hired to assist trustees in bankruptcy proceedings.[41] The Court pointed out that the bankruptcy court was perfectly within the bounds of 11 U.S.C. § 330(a)(1) when it ordered the debtor to pay roughly $120 million in attorneys' fees during the bankruptcy, but not when it shifted the costs of adversary litigation during the fee dispute.[42] The Bankruptcy Code only provides "reasonable compensation" for "actual, necessary services rendered" in service of the estate administrator.[43] Time spent litigating a fee application against the administrator of a bankruptcy estate, the Court decided, cannot be fairly described as labor performed for that administrator.

In the course of this interpretation, the Court looked to the legislative intent to limit compensation to "services rendered" in light of other provisions of the Bankruptcy Code that are explicitly cost-shifting in nature. The Court suggested 11 U.S.C. § 110(i) as an example of such a cost-shifting provision in the Code, requiring bankruptcy petition preparers to pay the debtor reasonable attorneys' fees and costs in damages.[44] The Court therefore refused to find that Congress departed from the American Rule in § 330(a)(1) with respect to fee-defense litigation.

After the Supreme Court's decision, a major question remains whether judges can still make an award of attorneys' fees pursuant to their discretionary powers so long as it does not conflict directly with a provision of the Bankruptcy Code. Just prior to the *Baker Botts* decision, in the case of *In re Saldana*,[45] a bankruptcy court in the Northern District of Texas awarded reasonable and necessary attorneys' fees as a form of sanction, relying upon the Supreme Court's language in *Law v. Siegel*.[46] Reading the *Siegel* decision in conjunction with the *Baker Botts* decision would seem to still allow for that result, but the issue remains to be tried.

A bankruptcy court for the Western District of Michigan, in the case of *In re Huepenbecker*, expressed a dour view of the *Baker Botts* decision when faced with an unfortunate set of circumstances.[47] An attorney before the court, employed in the small Chapter 12 case, was forced to defend his $6,625 fee application at the cost of around $2,000.[48] When the attorney prevailed, the bankruptcy court, believing itself constrained by the *Baker Botts* opinion, declined to reimburse the attorney for the defense of his fee application.[49] In holding thus, the court voiced that it could not "turn a blind eye to the impact that Baker Botts will have on the members of the bar whose livelihood depends on the approval of fees under § 330.[50] The court predicted that the case portended of worse hardship to come for estate professionals and debtors' counsel in Chapter 12 and 13 cases.[51]

Appealing the Denial of a Chapter 13 Plan

Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1692 (2015)

On May 4, 2015, the United States Supreme Court issued its opinion in *Bullard v. Blue Hills Bank*.[52] The Court considered whether a bankruptcy court's order denying confirmation of a debtor's proposed Chapter 13 bankruptcy plan is a final order that the debtor may immediately appeal pursuant to 28 U.S.C. §§ 158(a)(2) and (d)(1). It held that denial of a Chapter 13 plan is not a final order for purposes of an immediate appeal.

The Supreme Court's decision was unanimous, relying heavily upon the language in the prior decision of *Howard Delivery Services, Inc. v. Zurich American Insurance Co.*,[53] which states, "Congress has long provided that orders in bankruptcy cases may

40 "The so-called American Rule governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *F. D. Rich Co. v. U. S. for Use of Indus. Lumber Co.*, 417 U.S. 116, 126 (1974).

41 *ASARCO, L.L.C.*, No. 14-103, 2015 WL 2473336 at *5.

42 *Id.*

43 *Id.*

44 *Id.* at *6.

45 *In re Saldana*, Case No. 13-34861-sgj-7, 531 B.R. 141 (Bankr. N.D. Tex. May 22, 2015).

46 134 S.Ct. 1188, 1198 (2015) (noting that the court "may … possess … sanctioning authority under either § 105 or its inherent powers.").

47 *In re Huepenbecker*, Case No. 12-02269, 2015 Bankr. LEXIS 2352 (Bankr. W.D. Mich. July 13, 2015).

48 *Id.* at *2.

49 *Id.* at *4.

50 *Id.* at *8.

51 *Id.*

52 *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015).

53 *Howard Delivery Services, Inc. v. Zurich American Insurance Co.* 547 U.S. 651, 657, n. 3 (2006).

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be immediately appealed if they *finally* dispose of discrete disputes within the larger case."[54] Chief Justice John Roberts wrote that the Court's task is one of defining the scope of such discrete disputes, or "proceedings." The Court disagreed with the notion that a bankruptcy court conducts a *separate* proceeding each time it reviews a bankruptcy plan proposal, and that an order denying a plan thus concludes the proceeding. Rather, the Court accepted the view that plan confirmation involves a *full* process of considering plans, concluding only upon the confirmation of a plan or upon the dismissal of the case, both of which change the rights and obligations of the parties.[55]

The debtor in the case had argued that failure to find the denial of a plan to be a final order subject to appeal would not only "insulate a host of potential legal errors from review and harm debtors," but also saddle them with unappealing alternatives to review.[56] These options— the debtor contended—would be unnecessarily detrimental to a debtor who is already short on funds. The Chief Justice conceded that these were "good points," and thus debtors would surely find their options "unappealing."[57] Nevertheless, the Court asserted that in the litigation system certain incorrect rulings were—as suggested in *Digital Equipment Corp.*[58]—"only imperfectly reparable" by the appellate process.[59] The Court found this prospect tolerable due to its confidence "that bankruptcy courts, like trial courts in ordinary litigation, rule correctly most of the time."[60] Concluding the opinion, the Court opined that a debtor's rights to review would still be adequately protected following the Court's ruling, since a denied plan might be appealed through an interlocutory appeal under circumstances set forth in 28 U.S.C. §§ 158(a)(3), 158(d)(2), and 1292.[61]

Following *Bullard* the denial of confirmation of a Chapter 13 plan is not a final one for purposes of appeal. Debtors now find themselves in a "heads I win, tails you lose" situation in cases where approval of the debtor's plan comes down to the court's interpretation of a contested area of the law. While the creditor can still appeal immediately should it find the approval of a debtor's confirmation plan objectionable, the debtor cannot do the same when a plan is denied. This gives creditors significant negotiating leverage in plan confirmation proceedings.[62]

The holding in *Bullard* likely applies to Chapter 11 cases as well, since Chief Justice Roberts suggested in the opinion itself that "the same rule applies in Chapter 11."[63] However, a direct application of *Bullard* has yet to be tried with regard to a Chapter 11 plan on which confirmation was denied.

In the meantime, at least one court has found the *Bullard* opinion insightful for its explanation of "bankruptcy jurisdiction," or the application of 28 U.S.C. § 158(a)(1) to bankruptcy. The Northern District of Illinois in the case of *Wolf v. FirstMerit Bank, N.A.*[64] entered an opinion that focused on the part of the *Bullard* stating that the "rules are different in bankruptcy ... orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case."[65] As a result of this distinction and the application of Bankruptcy Rule 8004(d), the district court determined that *Bullard* actually describes an authority to grant interlocutory appeals in bankruptcy more permissively than outside of bankruptcy, since the normal judicial goals of finality and efficiency that come with the final judgment rule usually deter the grant of interlocutory appeals.[66] It may be interesting to see if other courts agree with this analysis.

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54 *Bullard*, 135 S. Ct. at 1692.
55 *Id.* at 1693.
56 Petition for Certiorari, Case No. 14-116, at 18 (U.S. July 30, 2014).
57 135 S.Ct. at 1695. Pun intended, apparently.
58 *Digital Equipment Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 872 (1994).
59 *Bullard*, 135 S.Ct. at 1695.
60 *Id.*
61 *Id.* at 1696.
62 Charles J. Tabb, *"It Ain't Over Till It's Over": Supreme Court Holds That Denial of Confirmation of a Plan is Not an Appealable Final Order* (http://s3.amazonaws.com/abi-org/Newsroom/Headlines/Tabb_Bullard_analysis.pdf accessed June 19, 2015).
63 *Bullard*, 135 S. Ct. at 1693 (emphasis added).
64 *Wolf v. FirstMerit Bank, N.A.*, 535 B.R. 772 (N.D. Ill. 2015).
65 *Id.* at 775 (*citing Bullard*, 135 S. Ct. at 1691-92).
66 *Wolf*, 535 B.R. at 776.

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Where Undistributed Plan Money Goes Post-Conversion

Harris v. Viegelahn, 135 S. Ct. 1829 (2015)

The Supreme Court in *Harris v. Viegelahn*[67] settled a circuit split over the disposition of accumulated postpetition wages upon a debtor's conversion from Chapter 13 to Chapter 7. The thirty-year old division revolved around whether, when a debtor's postpetition earnings remain in the hands of a Chapter 13 trustee at the time of a debtor's conversion, the trustee must return the undistributed wages to the debtor or disburse the funds to creditors.[68] A unanimous Supreme Court held that post-petition wages not yet distributed by a Chapter 13 trustee must be returned to the debtor upon a good-faith conversion to Chapter 7.

The debtor in the case had successfully converted from Chapter 13 to Chapter 7.[69] He then sought to have the Chapter 13 trustee turn over post-petition wages in her possession that had yet to be distributed to creditors as of the date of the conversion.[70] Notwithstanding conversion, the Chapter 13 trustee distributed the wages to creditors. When the bankruptcy court ordered the trustee to refund the money to the debtor, the trustee appealed.[71]

The district court affirmed the bankruptcy court, but the Fifth Circuit reversed both lower courts and remanded the case to the district court.[72] The Fifth Circuit pointed out that there is no provision requiring that undistributed payments made pursuant to a confirmed Chapter 13 plan be returned to the debtor upon conversion.[73] Thus, the court allowed the trustee to distribute cash she had received to the creditors pursuant to the plan. The Fifth Circuit acknowledged that its decision was in conflict with the Third Circuit, which had held that "undistributed plan payments held by a Chapter 13 trustee at the time of conversion must be returned to the debtor absent bad faith."[74]

The Supreme Court reversed the Fifth Circuit and established that "postpetition wages held by a Chapter 13 trustee at the time the case is converted to Chapter 7 ... must be returned to the debtor."[75] The opinion discussed the distinctions between Chapter 7 and Chapter 13: "a Chapter 7 estate does not include the wages a debtor earns or the assets he acquires *after* the bankruptcy filing," whereas the Chapter 13 estate from which creditors may be paid includes both the debtor's property at the time of his petition, and any wages acquired after filing.[76] Justice Ginsburg explained how this can create confusion during a conversion, as the existing case continues, but without effecting a change in the filing date of the petition.[77]

The Court ruled that Chapter 13 provisions "ceased to apply once the case was converted to Chapter 7."[78] In rejecting the claim that the confirmed plan gave creditors a vested right to the debtor's wages, the Court noted that there is simply no bankruptcy statute that designates debtors' wages or property as belonging to creditors. In sum, continuing payments pursuant to the defunct Chapter 13 plan is not authorized.[79]

The Bankruptcy Court for the District of New Mexico found quick application of the *Viegelahn* opinion in the case of *In re Beauregard*.[80] The court had to consider whether the Chapter 13 trustee could pay administrative expense claimants after conversion to Chapter 7, or to instead return all funds collected but not distributed back to the debtors.[81] Applying *Viegelahn* on all fours, the court came to a simple but predictable answer: "No." The Chapter 13 trustee had to return all the funds to the debtors.[82]

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67 *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015).
68 *Viegelahn v. Harris (In re Harris)*, 757 F.3d 468, 470 (5th Cir. 2014).
69 *Id.* at 471.
70 *Id.*
71 *Id.* at 472.
72 *Id.* at 481.
73 *Id.* at 473.
74 *In re Michael*, 699 F.3d 305 (3d Cir. 2012).
75 *Viegelahn*, 135 S. Ct. at 1837.
76 *Id.* at 1835 (citing 11 U.S.C. §§ 541(a)(1) and 1306(a)).
77 *Id.* at 1836.
78 *Id.* at 1838 (citing §§ 1327(a), 1326(a)(2)).
79 *Id.* at 1839. The Court noted that terminated Chapter 13 trustees have two post-conversion duties under F.R.B.P. 1019(4) & 1019(5): to turn over records and assets to the Chapter 7 trustee and to file a report with the U.S. trustee.
80 *In re Beauregard*, 533 B.R. 826 (Bankr. D. N.M. 2015).
81 *Id.* at 828.
82 *Id.* at 831.

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A more interesting result was effected in the case of *In re Sowell*.[83] There, the debtor's attorney agreed to accept the "no look" sum of $2,500 for his pre-confirmation services in the debtor's Chapter 13 case. As is customary, counsel agreed to have the entirety of the fees paid through the plan. However, no plan was confirmed and the case was converted to Chapter 7. At the time the Chapter 13 trustee had funds on hand of $1,855.03, which the debtor's counsel wished to have turned over to him upon conversion. The bankruptcy court, applying *Viegelahn*, found that it would be "inappropriate for any order regarding this fee application to contain a provision that the funds remaining in the hands of the Chapter 13 trustee be paid to [the debtor's attorney]."[84]

Lien-Stripping Second Liens

Bank of Am., N.A. v. Caulkett, 135 S. Ct. 1995 (2015)

On June 1, 2015, the Supreme Court decided *Bank of America, N.A. v. Caulkett*,[85] holding unanimously that a Chapter 7 debtor could not void a junior mortgage lien under 11 U.S.C. § 506(d), where the outstanding debt on a senior mortgage lien on the same property is greater than the present value of the collateral. This resolved two consolidated cases involving lien stripping: *Bank of Am., N.A. v. Caulkett*[86] and *Bank of Am., N.A. v. Toledo-Cardona*.[87] Each of the debtors had two mortgage liens on their individual homes for which Bank of America (the "bank," or "petitioner") held the junior lien. For its part, the bank's liens were completely underwater, as the value of the senior liens on each of the properties was greater than the present market value of the homes. In both proceedings the debtors moved to "strip off," or void, the junior liens under 11 U.S.C. § 506(d), which states that, "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void."[88] The bankruptcy court, and in turn, the district court, granted the debtors' motions. The Eleventh Circuit affirmed.[89]

However, the Supreme Court had previously ruled in *Dewsnup v. Timm* against a similar interpretation of § 506.[90] The Court had held that § 506(d) does not permit a debtor to void a lien securing an allowed claim, and required that the term "allowed secured claim" in § 506(d) should not be read as having the same meaning as that in § 506(a). Instead, for purposes of § 506(d), a claim is first evaluated by whether it is "allowed," and second, whether it is "secured."[91] While *Dewsnup* addressed a situation where the debtor wanted a "strip down," most circuits ruled thereafter that the decision was also applicable to "strip offs." The Eleventh Circuit had stood as the lone dissenting view in this respect.[92]

The Supreme Court struck down the Eleventh Circuit's unique interpretation. While both sides conceded that the bank's claims were "allowed" under §§ 502(a) and (b), they disagreed whether the claims were "secured" for purposes of § 506(d). Justice Clarence Thomas, delivering the opinion of the Court, decided that plain language of the Code would lead one to believe that the bank's claims were *not* secured.[93] However, because of the *Dewsnup* construction of the term "secured claim" as used in § 506(d), the Court's analysis was foreclosed.[94] The function of § 506(d) has thus been reduced to "voiding a lien whenever a claim secured by the lien itself has not been allowed."[95] Because *Dewsnup* interpreted "secured claim" in § 506(d) to encompass any claim "secured by a lien and ... fully allowed pursuant to § 502," the bank's junior liens in the cases of *Caulkett* and *Toledo-Cardona* could not be voided under the *Dewsnup* definition of "allowed secured claim."[96]

On July 16, 2015, the Eleventh Circuit issued its opinion in the case of *Bank of Am Bank, N.A. v. Waits (In re Waits)*[97] using the guidelines set forth by the Supreme Court's decision in Caulkett. The Waits case featured almost identical facts to *Caulkett*

83 *In re Sowell,* 535 B.R. 824 (Bankr. D. Minn. 2015).
84 *Id.* at 827.
85 *Bank of Am., N.A. v. Caulkett,* 135 S. Ct. 1995 (2015).
86 No. 13-1421, 2014 WL 2207208 (U.S. Nov. 17, 2014).
87 No. 14-163, 2014 WL 3965212 (U.S. Nov. 17, 2014).
88 11 U.S.C. § 506(d).
89 *Bank of Am., NA v. Caulkett (In re Caulkett)*, 566 Fed. App'x. 879 (11th Cir, Mem. Op.); *Bank of Am., NA v. Toledo-Cardona (In re Toledo-Cardona),* 556 F. App'x 911 (11th Cir. 2014).
90 *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992).
91 *Id.* at 415.
92 *McNeal v. GMAC Mortgage, LLC,* 735 F.3d 1263, 1265 (11th Cir. 2012).
93 135 S. Ct. at 1998.
94 135 S. Ct. at 1999.
95 *Id.* (quoting *Dewsnup* at 416).
96 *Id.* (quoting *Dewsnup* 502 U.S. at 417).
97 *Bank of Am Bank, N.A. v. Waits (In re Waits),* 793 F.3d 1267 (11th Cir. 2015) (mem).

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and *Toledo-Cardona*, and so it is not surprising that Bank of America moved for summary reversal based on the Supreme Court's decision.[98] However, the Eleventh Circuit denied the motion. Perhaps out of compassion, the court of appeals remanded the case back to the lower courts for proceedings consistent with the Supreme Court's decision.

Other debtors have not been so fortunate. After *Caulkett* the Court issued dozens of decisions in quick succession vacating the judgments of the Eleventh Circuit not in line with the *Dewsnup* opinion.[99] Future debtors facing the same predicament can only hope that a case may soon land before the Supreme Court that challenges the *Dewsnup* definition of "secured claim."

III. CASES GRANTED CERTIORARI FOR 2016

Fraud without Misrepresentation?

Husky Int'l Elecs., Inc. v. Ritz (In re Ritz), 787 F.3d 312, 314 (5th Cir. 2015),
cert. granted 2015 U.S. LEXIS 7036 (U.S. Nov. 6, 2015)

On November 6, 2015, the Supreme Court granted certiorari to hear the appeal in the proceeding of *Husky Int'l Elecs., Inc. v. Ritz* in the *In re Ritz* bankruptcy.[100] The case was filed in the Southern District of Texas and the appeal takes issue with the holding of the United States Fifth Circuit Court of Appeals. At issue is whether a party may object to a debtor's discharge under 11 U.S.C. § 523(a)(2)(A) on a showing of "actual fraud" that does not include a "false representation." The Fifth Circuit held that a party may not, thus the basis for the appeal.

The facts of *Husky* are as follows: Husky International Electronics, Inc. sold and delivered goods to the debtor's company, but the debtor's company failed to pay for the goods. Instead, the debtor transferred millions of dollars to other entities he owned and/or controlled. Husky International Electronics, Inc. sued the debtor personally for what his company failed to pay, precipitating the debtor's filing of a chapter 7 petition with the bankruptcy court in 2010. Husky International Electronics, Inc. then pursued the debtor in bankruptcy, initiating an adversary proceeding to challenge the dischargeability of the debt.

Judge Jeff Bohm, presiding over the bankruptcy court, entered an order finding that the plaintiff had failed to establish any liability against the debtor.[101] Key to Judge Bohm's assessment was the fact that the record was "wholly devoid of any [false] representation made by the [debtor]."[102] The court analyzed the elements of actual fraud under Texas law, which requires a representation.[103] Since no representation was made, the court concluded that a common law fraud cause of action must fail and thus the plaintiffs could not prevail under 11 U.S.C. § 523(a)(2)(A).

On appeal, the district court affirmed the bankruptcy court's decision, holding that actual fraud under § 523(a)(2)(A) requires a misrepresentation.[104] The Fifth Circuit likewise agreed, holding that "a representation is a necessary prerequisite for a showing of actual fraud" and thus that § 523(a)(2)(A) could not bar the dischargeability of a debt without it.[105] Along the way the court of appeals admitted that it was parting ways with the reasoning in the prevailing case on the subject, *McClellan v. Cantrell*,[106] issued in 2000 by the Seventh Circuit Court of Appeals. In that case, the Seventh Circuit had determined that actual fraud is not limited to misrepresentations and misleading omissions, but could also include fraudulent conveyances through which a debtor *intends* to hinder the creditor.[107] In support of its position, *McClellan* points to the fact that § 523(a)(2)(A) includes the phrase "false representation" in addition to "actual fraud", which—assuming the words are not redundant—would indicate that the terms are not identical and that the meaning of actual fraud must be broader.[108]

98 *See id.*
99 *E.g., Bank of Am., N.A. v. Glaspie,* 135 S. Ct. 2856 (2015); *Bank of Am., N.A. v. Madden,* 135 S. Ct. 2857 (2015); *Bank of Am., N.A. v. Brown,* 135 S. Ct. 2857 (2015).
100 *Husky Int'l Elecs., Inc. v. Ritz (In re Ritz),* 787 F.3d 312, 314 (5th Cir. 2015), cert. granted 2015 U.S. LEXIS 7036 (U.S. Nov. 6, 2015).
101 *Husky Int'l Elecs., Inc. v. Ritz (In re Ritz),* 459 B.R. 623, 627 (Bankr. S.D. Tex. 2011).
102 *Id.* at 633.
103 *Id.* (applying *Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter,* 607 F.3d 1029, 1032-33 (5th Cir. 2010)(citing for Texas law elements *Ernst & Young L.L.P. v. Pac. Mut. Life Ins. Co.,* 51 S.W.3d 573, 577 (Tex. 2001)).
104 *Husky Int'l Elecs., Inc. v. Ritz (In re Ritz),* 513 B.R. 510, 539 (S.D. Tex. 2014).
105 *Husky Int'l Elecs., Inc. v. Ritz (In re Ritz)*, 787 F.3d 312, 321 (5th Cir. 2015).
106 *McClellan v. Cantrell,* 217 F.3d 890 (7th Cir. 2000).
107 *Id.* at 893-894.
108 *Id.* at 893.

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The Fifth Circuit dismissed this latter argument by pointing out that other parts of the Bankruptcy Code explicitly encompass fraudulent transfers and conveyances.[109] As a result, the Supreme Court is left to resolve the split between the circuits. To complicate matters, the First Circuit Court of Appeals released its opinion in *Sauer Inc. v. Lawson*[110] just a few weeks later, in which it joined the reasoning of the Seventh Circuit in *McClellan* and ruled that fraudulent conveyances were sufficient to constitute "actual fraud" under 11 U.S.C. § 523(a)(2)(A). A petition for certiorari was filed on July 24th, 2015 in that case.

Restructuring the Commonwealth

Franklin Cal. Tax-Free Trust v. Puerto Rico, 805 F.3d 322 (1st Cir. 2015),
cert. granted 2015 U.S. LEXIS 7676 (U.S. Dec. 4, 2015)[111]

Rather uncommon in recent memory is the amount of attention focused on the Commonwealth of Puerto Rico. Because of its unique nature as a large territory of the United States undergoing significant financial stress at the present, the bankruptcy issues presented are quite novel and may be of lasting significance. The case of *Franklin Cal. Tax-Free Trust v. Puerto Rico*[112] began in the United States District Court for the District of Puerto Rico before Judge Francisco Besosa as the plaintiffs sought a declaratory judgment that the Puerto Rico Public Corporation Debt Enforcement and Recovery Act (the "Recovery Act") was unconstitutional.[113] All seemed fine until Judge Besosa agreed that the Recovery Act is void pursuant to the Supremacy Clause of the United States Constitution.

As background, the plaintiffs own a significant portion of the Puerto Rico Electric Power Authority ("PREPA") pursuant to bonds issued under the Puerto Rican PREPA Authority Act. Under the PREPA Authority Act, the Commonwealth of Puerto Rico expressly pledged to bondholders that it would not limit or alter the rights or powers related to the PREPA bonds until all bonds and related interest were fully met and discharged.1[114] Puerto Rico was thereby on the hook for the obligation of PREPA to its bondholders. PREPA then entered into a trust agreement with U.S. Bank National Association (the "Trust Agreement"), under which PREPA became contractually obligated to promptly pay principal and interest on the plaintiffs' bonds. As collateral, PREPA pledged its present and future revenues and promised not to create a lien equal or senior to the plaintiffs' lien. Finally, the Trust Agreement allowed acceleration upon the occurrence of an event of default, including a proceeding for the purpose adjusting the claims of creditors such as the plaintiffs pursuant to any federal or Commonwealth statute afterwards enacted.[115]

On June 25, 2014, the congress of the Commonwealth of Puerto Rico approved the Recovery Act, under which PREPA could restructure its debt.[116] The Recovery Act is modeled after Chapter 9 of the Bankruptcy Code. The difference is that the Bankruptcy Code expressly prohibits Puerto Rican municipalities and other state entities from seeking debt adjustment under Chapter 9.[117]

In their complaint for declaratory relief against Puerto Rico and its officials, the plaintiffs sought to have the court declare that the Recovery Act in its entirety is preempted by the Bankruptcy Code. After analyzing the factors to determine whether the Recovery Act was expressly preempted by 11 U.S.C. § 903 of the bankruptcy code, the Court found it was not a close case.[118] The Court determined that the text and legislative history of § 903(1) provide direct evidence that the clear and manifest purpose of Congress was to preempt state laws that prescribe a method of composition of municipal indebtedness that binds nonconsenting creditors, and to explicitly include Puerto Rico laws in this preempted arena.[119] Therefore, the court found itself bound to find the Recovery Act unconstitutional pursuant to the Supremacy Clause of the United States Constitution.[120]

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109 *Husky,* 787 F.3d at 320.
110 *Sauer Inc. v. Lawson (In re Lawson),* 791 F.3d 214 (2015)
111 Consolidated with *Acosta-Febo v. Franklin Cal. Tax-Free Trust,* 2015 U.S. LEXIS 7679 (U.S. Dec. 4, 2015).
112 *Franklin Cal. Tax-Free Trust v. Puerto Rico,* 805 F.3d 322 (1st Cir. 2015), cert. granted 2015 U.S. LEXIS 7676 (U.S. Dec. 4, 2015).
113 *Franklin Cal. Tax-Free Tr. v. Puerto Rico,* 85 F. Supp. 3d 577, 583 (D.P.R. 2015).
114 *P.R. Laws Ann. Tit.* 22 §§ 91-239 (May 1941).
115 *Franklin Ca. Tax-Free Tr.,* 85 F. Supp. 3d at 583.
116 *Id.* at 584.
117 *See* 11 U.S.C. § 101(52), which indicates that the term "State" includes the District of Columbia and Puerto Rico, except for the purpose of defining of who may be a debtor of Chapter 9 of the Bankruptcy Code.
118 *Franklin Ca. Tax-Free Tr.,* 85 F. Supp. 3d at 601.
119 *Id.*
120 *Id.*

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On appeal, the First Circuit Court of Appeals affirmed, holding that § 903(1) preempts the Recovery Act.[121] The court of appeals opined that if Puerto Rico needed debt relief under Chapter 9, it should turn to the United States Congress for recourse, which legislative body has preserved to itself the power to authorize Puerto Rican municipalities to seek Chapter 9 bankruptcy relief.[122] The Commonwealth of Puerto Rico then appealed to the United States Supreme Court, which granted certiorari on December 4th of this year.[123]

Though the cases involve approximately $2 billion for which Puerto Rico is responsible wrapped up in PREPA, the issue of whether Puerto Rican entities may use Chapter 9 ultimately affects $22 billion of the approximately $70 billion owed by the Commonwealth of Puerto Rico.[124] As it is, Puerto Rico itself is on the brink of not paying its debts as they come due. While the analyses of both the First Circuit and the district court are likely correct, there is some hope that the Supreme Court may find a work-around due to the national importance of the matter. In the meantime, there is some concern that Puerto Rico may begin defaulting on its debts as of January 1st, 2016.1[25]

IV. CONCLUSION

The implications of the 2015 bankruptcy opinions of the Supreme Court are still developing. Already, we have seen some unexpected consequences, such as the use of the *Bullard* opinion to *expand* the use of interlocutory appeals in bankruptcy, as well as some that were more predictable, such as the use of the *Baker Botts* decision as a weapon against bankruptcy professionals. It also goes without saying that the endorsement of bankruptcy jurisdiction by consent of the parties set forth in *Sharif* may be the most important and positive of the decisions for bankruptcy bars nationally.

Just as these cases are being incorporated into practice, two new issues will likely be taken up by the Supreme Court this year. The first issue, relating to dischargeability, will determine the definition of "actual fraud", and will surely make significant impact upon the futures of many debtors either way the Supreme Court comes down. The second issue is purely practical, and determines how to restructure the debts of a national commonwealth consisting of 3.5 million Americans. Both are certainly bankruptcy issues to watch as they play out on the big stage.

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121 *Franklin Cal. Tax-Free Tr.*, 805 F.3d at 325.

122 *Id.* The First Circuit pointed to the fact that Puerto Rico is seeking this exact relief pursuant to the Puerto Rico Chapter 9 Uniformity Act of 2015, H.R. 870, 114th Cong. (2015). According to a December 9th, 2015 article in Examiner.com, neither this bill nor any of the other iterations of it have much support from either Republicans or Democrats, nor stand much chance of ever being passed. *If Congress won't help you, they will spin you.* Michael Vass. Dec. 9, 2015 Examiner.com (http://www.examiner.com/article/if-congress-won-t-help-you-they-will-spin-you accessed on Dec. 30, 2015).

123 *Franklin Cal. Tax-Free Tr. v. Puerto Rico,* No. 15-233, 2015 U.S. LEXIS 7676 (U.S. Dec. 4, 2015).

124 *Puerto Rico Gets Supreme Court Review on Debt Restructuring,* Greg Stohr and Michelle Kaske, Dec. 4, 2015 Bloomberg Politics (http://www.bloomberg.com/politics/articles/2015-12-04/puerto-rico-gets-u-s-high-court-hearing-on-debt-restructuring accessed on Dec. 30, 2015).

125 *Puerto Rico risks creditor ire by hijacking money earmarked for bond payments,* Nick Brown and Megan Davies, Dec. 11, 2015 Reuters.com (http://www.reuters.com/article/us-usa-puertorico-debt-idUSKBN0TS00S20151211 accessed on Dec. 30, 2015).

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Consumer Sessions:

The first consumer breakout session discussed the issues presented when bankruptcy and family courts collide. Judges Ronald B. King, Don W. Minton, and Letitia Z. Paul discussed the numerous issues involved, and focused specifically on domestic support obligations and the issues they present in bankruptcy.

The second session featured Judge Harlin D. Hale, Judge Marvin P. Isgur, Judge Ronald B. King, and Caroline Neerman who discussed the impact of recent case law involving homestead exemptions, as well as the difficulties presented by non-filing spouses. The panel also covered other state law precedents and their impact on consumer bankruptcy cases.

The third consumer session covered Bankruptcy Rule 3002.1 and the legal issues presented. Judge Stacey G.C. Jernigan, Tom Powers, and Alice Whitten discussed case law involving the rule and the interpretation of Section 1322(b)(5), waiver of compliance with the rule, and payment change notices.

The final consumer session featured Judge Robert Summerhays, Jonnie Patterson, and Miriam Goott who discussed consumer bankruptcy claims litigation. The panel discussed the steps and requirements for objecting to proofs of claims filed by buyers of debt and the additional hoops that must be jumped through in order to obtain a shifting of fees.

Thursday Evening Dinner Honoring Judge Schmidt

Thursday ended with a cocktail reception followed by an elegant dinner honoring retiring Judge Richard S. Schmidt and his many years of excellent service to the bench and his advancement of bankruptcy in Texas. Afterwards, the Young Lawyers Committee hosted a party that included a photo-booth and many nostalgic neon and light-up items. All who attended had a wonderful time.

Friday began with those early risers enjoying a bike ride with the Judges across the beautiful Lost Pines property. After breakfast the morning began with G. Eric Bromstead Jr. presenting on Supreme Court Cases Every Bankruptcy Lawyer should know. His engaging presentation included recitations on seminal cases dealing with consent, the 5th Amendment and Bankruptcy, secured creditors and value of collateral in credit bidding, advice to clients prior to filing for bankruptcy protection, the ability to wipe out liens, exceptions to discharge, automatic stay, and the controversial cramdown rates of interest in chapter 13 cases.

The second session Friday morning included an interesting Q&A panel with young lawyers Liz Boydston, Sean Davis and Josh Searcy asking Judge Robert L. Jones, Judge H. Christopher Mott, Judge Brenda T. Rhoades, and Judge Alan Trust tough questions. Much of the questions centered on best practices of lawyers in the courtroom, what issues irk the Judges the most, how to effectively put on evidence, being honest to the bench, and tips on writing effective motions. This engaging panel provided numerous insights useful for all practitioners.

The final session of the conference was an entertaining and interactive presentation by Mike Rubin on Social Media for Judges and Lawyers. Rubin used comical examples to explain the tricks and issues with posting or using social media including Facebook, Twitter and many other mediums. He finished his charming presentation with a song incorporating all of his lessons in less than five minutes!

After the conference ended many participants enjoyed playing in the golf tournament or having spa treatments.

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Bankruptcy Mediation Panel

Case Law Update Panel

Oil and Gas Restructurings Panel

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Angela Offerman presenting Katie Grissell with the Romina Mulloy-Bossio Achievement Award

Bill Wallander presenting Judge Schmidt with Banco Rotto Award

Judge Schmidt presenting Layla Milligan with Robert B. Wilson Distinguished Service Award

Judge Hale presenting Judge Rhoades with the John C. Akard Community Service Award

Judge Schmidt and Janet Northrup presenting Marcy Kurtz with the Pro Bono Service Award

Byrnie Bass presenting Debbie Langehennig with the Michelle A. Mendez Award of Excellence

Judge Schmidt presenting Kay Walker with the Chair's Special Recognition Award

Scamalot Ethics Presentation

Trusting the Trustee: Full Disclosures Allow Fifth Circuit To Uphold Discharge in In re Packer
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Debtor's only obligation was to disclose his interest in the entity, which he adequately disclosed. Nothing in the record convinced the Fifth Circuit that the Debtor had failed to provide sufficient written evidence of his financial condition. The section 727(a)(3) claim was quickly disregarded, as there was no evidence that the debtor "failed to keep or preserve" financial records "from which financial condition[s] . . . might be ascertained."

Last, the Fifth Circuit looked at section 727(a)(4)(A), which stated, "a court shall grant the debtor a discharge, unless . . . the debtor knowingly and fraudulently, in or in connection with the case . . . made a false oath or account." Under well-established Fifth Circuit Precedent, to prevail on a claim under this subsection, an objecting plaintiff (a creditor or the trustee) must prove by a preponderance of the evidence that: (1) the debtor made a . . . statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement was material to the bankruptcy case. *Cadle Co. v. Duncan (In re Duncan)*, 562 F.3d 688, 695 (5th Cir. 2009) (per curiam). Although Judgment Factors pointed to several instances that they claimed constituted false oaths, the Bankruptcy Court's conclusion was given deference– the Debtor did not make any statements with "fraudulent intent" nor were any of the alleged statements "material to the bankruptcy case." Without an actual intent to deceive or a reckless indifference to the truth, evidenced by the debtor's willingness to disclose information to the Trustee, the Fifth Circuit deemed summary judgment the appropriate ruling in regards to the section 727(a)(4)(A) claim.

All in all, the bankruptcy court's decision to grant summary judgment in favor of the debtor was affirmed. It is worthy to note that this result would have differed, most likely on each claim, had Judgment Factor's alter ego theories prevailed. *In re Packer* showcases the Fifth Circuit's deference to bankruptcy court decisions, and further highlights a strict interpretation of section 727(a). Under the Fifth Circuit's approach, the debtor must engage in the *specific actions* that are statutorily enumerated. If the elements are not proved, the discharge will be granted. The party objecting the discharge must rely on specific subsections of section 727(a), and must put forth evidence that falls under one of the relevant provisions. It appears that deference will be given to the debtor and that creditors bear the heavy burden of showing inappropriate behavior—a fitting burden considering the harsh results in denying a discharge.

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also focused on a number of issues likely to be implicated in oil and gas restructurings, such as debt-for-equity swaps, sales, asset venue, leases, joint operating agreements, royalty owner liens, plugging and abandonment issues, and covenants running with the land.

Panel 1: A Debate on ABI Commission Recommendations

The business portion of the seminar commenced the next morning at the new J.W. Marriott hotel in downtown Austin. Opening remarks were provided by the Hon. Chief Judge Barbara J. Houser (N.D. Texas), chair of the seminar.

A series of short and friendly debates and regarding three recommendations from the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 followed. The Hon. Marvin Isgur (S.D. Texas) moderated this panel of Fellows, which included Commission members Bettina Whyte (Bettina Whyte Consultants) and Deborah Williamson (Dykema Cox Smith) plus Craig Goldblatt (Wilmer Hale), Edwin Smith (Morgan Lewis & Bockius) and Professor Jay Westbrook (University of Texas School of Law).

As part of this panel, Judge Isgur electronically polled audience members on each issue both before and after each debate topic to see how their views changed. The exact results of this poll have either been lost by one of the authors of this article or destroyed to protect the innocent. The tempo was up-beat, thanks to the moderator's strict yet cordial enforcement of time limits.

The first topic addressed whether "executory contract" should be defined and, if so, how. The Commission has endorsed the "Countryman" definition of an executory contract, which has been adopted in some form or fashion by the majority of courts. This received some well-reasoned and thoughtful critiques from Professor Westbrook, who has extensively researched the subject. He discussed the inconsistencies arising from the Countryman approach and advocated a functional approach, which looks at the burdens and benefits to the estate from a contract in determining whether it is executory. While Professor Westbrook's pitch was well-received, concerns about increased uncertainty from implementing a new standard seemed to win support for Commission's support of the status quo.

Plan voting and inter-creditor agreements were the next debate topic. The Commission takes the position that limits should be placed on the enforceability of inter-creditor agreements that restrict chapter 11 plan voting. The audience initially favored this reform by a slight margin. Mr. Goldblatt, who has made significant contributions to a lengthy response to the Commissions' report published by the Loan Syndication and Trading Association, seemed to win the debate by swinging the audience to undecided (or confused).

The final debate topic considered the Commission's proposals to reduce or redefine a secured creditor's right to adequate protection. Generally speaking, the Commission proposes changing the standard for determining whether a lienholder's interest is adequately protected to consider (and then protect) the value that the lienholder would achieve through foreclosure. Building on the prior topic, this debate expanded into a rather fascinating policy discussion about the overall purposes and effects of secured credit and the bankruptcy system. The audience, which may have been getting hungry, ended up voting by a small plurality to retain the current understanding of adequate protection.

The overall polling results may indicate an "if ain't broke, don't fix it" mentality among practitioners. Perhaps the Texan-heavy audience would have expressed more enthusiasm for other reforms, such as venue selection.

Panel 2: *Energytec* and its Progeny

After a delicious lunch, the second panel of the day commenced. The Hon. Harlin Hale (N.D. Texas) moderated a panel on *Energytec* and its progeny, featuring Fellows Charles Beckham (Haynes & Boone), Becky Roof (AlixPartners), Robin Russell (Andrews Kurth), and Bill Wallander (Vinson & Elkins).

The panel began by providing some overall economic context: in short, oilfield services are becoming more expensive and less integrated due to the changing nature of American mineral production. As a result of this, standalone midstream companies

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with lots of debt and no producing assets have become more common. In a typical (and simplified) arrangement, the midstream companies build the pipeline on the producer's land and in exchange receive profitable long-term gathering and processing agreements (GPAs) obligating the producers to use (and pay for) the pipeline, thereby enabling the midstream companies to recover their investments.

It appears some of those enviably happy-go-lucky transactional attorneys had decided that these GPAs would be viewed as covenants running with the land, and therefore relatively immune in a producer's bankruptcy, instead of executory contracts that could be rejected or stripped from the underlying producing assets through a § 363 sale or plan confirmation, leaving the midstream company with a measly unsecured claim. After all, if GPA says it is a "covenant running with the land," or a "dedication," then what else is there to decide?

Plenty, according to the panel and the recent court cases they discussed. In *Newco Energy v. Energytec Inc. (In re Energytec Inc.)*, 739 F.3d 215 (5th Cir. 2013), the Fifth Circuit did agree that a GPA-like agreement was a covenant running with the land under applicable state law, but nevertheless remanded to the trial court for a determination about whether the pipeline could be sold free and clear of the agreement under § 363(f)(5). In *In re Sabine Oil & Gas Corp.*, No. 15-11835, 2016 WL 890299, __ B.R. __ (Bankr. S.D.N.Y. Mar. 8, 2016), the court indicated that the executory contract portions of a GPA could be rejected, and made a preliminary finding that the GPA does not run with the land under Texas law, but also noted that this question was not procedurally ripe for a final determination. The panel also discussed an ongoing dispute in *In re Quicksilver*, No. 15-10585 (Bankr. D. Del.) about attempts to sell a pipeline free and clear of a GPA.

The panel concluded by presciently predicting that most of these disputes would be consensually settled. The costs of delays, the risks of shut-in termination of leases, the need for future gathering and processing services, and the uncertainties regarding what rights a mid-stream company may retain post-rejection all weigh in favor of compromise. The Quicksilver dispute settled the next week; it is unfortunate that this panel did not provide lottery picks to the audience.

Panel 3: Bad News from the Oil Patch

The final panel for the seminar discussed broader issues relating to oil and gas bankruptcy cases. The panelists were Fellows Jan Hayden (Baker, Donelson, Bearman, Caldwell & Berkowitz), Louis Phillips (Kelly, Hart, & Pitre), and Lou Strubeck (Norton Rose Fulbright). Bill Greendyke of Norton Rose Fulbright moderated.

The panel continued the discussion about how technological and operational changes in the oil and gas industry have resulted in financial changes and new restructuring challenges. Equipment has become more expensive and becomes obsolete faster. This necessitates increased debt loads, which has been facilitated by alluring mezzanine financing and reserve-based lending. The general consensus was that increased filings are coming: commodity price hedging and some "extend and pretend" banking practices have helped keep creditors at bay, but this borrowed time may be running out.

In light of this forecast, the panel highlighted a number of new and old issues that need to be considered in such cases. Intellectual property issues, and attendant questions about assignment and assumption, have become more common thanks to increasingly sophisticated exploration techniques, such as seismic data. Regulatory issues were discussed—the usual concerns about plugging and abandonment liabilities were reviewed, and newer problems with off-shore regulation, especially post-Deepwater Horizon bonding requirements, were also examined. The panel concluded by discussing the pros and cons of asset sales and the best practices for approaching a sale process. The general consensus seems to be that oil and gas restructuring cases are more challenging than ever.

All in all, the seminar was a hit. Bankruptcy lawyers and their fellow travelers thankfully both enjoy socializing with each other and enjoy the sort of thoughtful, intellectually stimulating discussions that this seminar exemplified. Sincere appreciation is due to the moderators, panelists, and numerous other people whose time and hard work made the seminar such a success.