STATE BAR OF TEXAS
BANKRUPTCY LAW SECTION
NEWSLETTER

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A MESSAGE FROM YOUR CHAIR

As we begin the new Bar year, we can reflect on how much our Bankruptcy Section has grown and accomplished in its relatively few years of existence. Starting literally from scratch and now with almost 1400 members, the Bankruptcy Section's programs and lawyers have reached many groups inside and outside the State of Texas, including law school and high school students, law clerks, restructuring professionals, and young bankruptcy lawyers.

For example, hundreds of high school students were introduced to personal financial management through the Section's MoneyWise Program (www.savewisely.com), which continues to expand. At the law school level, twelve teams from six law schools in the Fifth Circuit participated in the Section's annual Elliott Cup Bankruptcy Moot Court Competition. This year the competition was held at Texas Tech School of Law, and a SMU Law School team won first place, with second place going to a University of Texas School of Law team. At the judiciary level, the Section conducted a training and education program for incoming law clerks for bankruptcy judges. At the restructuring professional's level, the Section expanded its reach through a non-lawyer membership initiative, designed to welcome financial advisory professionals to join the Section. The Section's Young Bankruptcy Lawyers Committee gained considerable traction and membership this year, made valuable contributions to many of the Section's projects, and will be able to guide the Section in years to come.

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Judicial Profile of The Honorable Frank R. Monroe, Bankruptcy Judge of the Western District of Texas – Austin Division

By: Layla Elzner and Eric M. Van Horn

Western District of Texas Bankruptcy Judge Frank R. Monroe's dream job was to replace Mickey Mantle in the New York Yankees' outfield. Aside from that aspiration, Judge Monroe had no real concept of what he wanted to do. Instead, as he describes, "things just happened."

So, what encouraged Monroe to study law in the first place? "I was at Vanderbilt in 1966 – in the middle of the Vietnam War. I failed my draft physical, so it was either go to work or law school. And law school was better than work." And why did Monroe decide to attend The University of Texas School of Law? "It was the cheapest to attend at only $100 per semester, including books." And with that, Frank Monroe started down a path that would lead him to an extremely successful career in bankruptcy law, both as a practitioner and a judge.

After completing law school at The University of Texas in 1969, Monroe, who initially planned to begin his legal career with the Office of the Attorney General, was serendipitously invited to a dinner party with then United States Bankruptcy Judge Arthur Moller who encouraged Monroe to contact one of the founders of a small, new firm specializing in bankruptcy, a lawyer named Mickey Sheinfeld. Shortly thereafter, notwithstanding his lack of bankruptcy knowledge and experience, Monroe became the fifth lawyer at Sheinfeld, Maley & Kay. Monroe

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ROBES WITHOUT STRIPES

By: Alan S. Trust, United States Bankruptcy Judge, Eastern District of New York

After several years of pursuing my goal of serving as a federal bankruptcy judge, I was blessed with my appointment to the bench in New York. I had no particular expectations about differences I would experience from practice in Texas. Having been born, raised and educated in New York, and having been a frequent visitor after moving to Texas, I had no concerns about language impediments. Ya'll became you, negative notice became presentment, continuance became adjournment, but, all in all, the nature of the practice and the practitioners varied far less than some may have anticipated.

My greatest adjustment has been to my role, and my approach to my role. How can I best channel my years of experience as an advocate into becoming a neutral decision maker? As we are approaching pre-season training camps, I can draw a beginning analogy from football. At the most basic level, I have gone from being the quarterback for my client to being the referee.[1] According to the official NFL rulebook, the referee has "General oversight and control of game. Gives signals for all fouls and is final authority for rule interpretations." My role on the field of play now is essentially to observe and control the proceedings, make sure the rules are enforced, and keep charge of the clock. When I make a mistake, the offended side can throw a challenge flag and "go to the booth" for review.

Of course, as with many general comparisons, the analogy is not complete. Unlike the referee, I have solemnly promised to "administer justice without respect to persons, and do equal right to the poor and to the rich." How do I best find the truth given that we work in an advocate based system of justice? Should I ask the witness questions about the facts when the witness has testified to how hard he ran down the field and, after cross examination, I still have not heard whether he was in or out of bounds? Do I ask the lawyers probing questions about their theories and arguments, particularly where the lawyer is throwing a six yard pass when she needs fifteen to stay on the field? Or, in the worst extreme, if the defensive team does not move at all after the ball is snapped, do I ask if they know the game is afoot?

As a practitioner for nearly 24 years, there were four things I always valued in a trial judge: someone who read my papers in advance, was attentive as I aired my client's grievances or defended their actions, cared about the outcome of the dispute, and made decisions expeditiously. Having assumed the awesome responsibilities of my position, I hope to deliver what I always wanted to receive. The key, to me, is to find the right balance, as I endeavor to faithfully discharge the awesome responsibilities of my position. That is what I have sworn to do. That is what I hope to do, to do consistently, and to do well.

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[1] The irony of this analogy is not lost on me, given the history of bankruptcy judges as formerly being referees.

2009 BANKRUPTCY BENCH/BAR CONFERENCE REVIEW

By: Eric M. Van Horn with contributions from Debra L. Innocenti and Joshua P. Searcy – all members of the Young Lawyers Committee[1]

The Bankruptcy Law Section held its Biennial Bench/Bar Conference on June 17-19, 2009 at the Westin Stonebriar Resort located north of Dallas in Frisco, Texas. The conference was conceived six years ago as the brain-child of several sitting bankruptcy judges with the goal of sharing information and getting to know each other better in a casual atmosphere. The first biennial conference was held in 2005. Bill Wallander (Dallas) and Byrn "Byrnie" Bass, Jr. (Lubbock) served as this year's course directors and were guided by the other 17 members of the conference's planning committee.[2]

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

The conference officially kicked off on the evening of Wednesday, June 17th with the opening night reception. Following Thursday morning's Fun Run, coursework began and concluded Friday afternoon in time for attendees to participate in the golf tournament, a cycling ride, and spa treatments.

OFFICIAL BUSINESS & AWARDS

Outgoing Chair **Berry D. Spears** (Austin), before officially passing leadership of the Section to our new Chair, **H. Christopher "Chris" Mott** (El Paso), provided an update on the Section's health, led the attendees in voting on the proposed slate of new executive council members, and presented our Section's special awards for outstanding service.

Official Business

Berry Spears provided attendees with a report on the Section's health. He reported that the Section continued to grow during the last year, and our membership and accomplishments continue to impress the State Bar of Texas given that the Section has only existed for seven years. Berry Spears also reported that the Section was financially healthy and that it is happy to consider proposals for initiatives (like MoneyWise, the Section's public education initiative) that could benefit from the Section's support.

A slate of new council members was proposed by motion, seconded, and approved by the Section. Congratulations to our new council members: **Byrn Bass, Jr.** (Lubbock) – Vice Chair & Chair Elect; **Thomas A. Howley** (Houston) – Vice-President of Business Bankruptcy; **Timothy A. Million** (Houston) – Vice President of Communications & Publications; **Michelle A. Mendez** (Dallas) – Treasurer; **Elizabeth M. Guffy** (Houston) – Secretary; **Michael G. Kelly** (Odessa) – Council Member for Byrn Bass' unexpired term; and the following as Council Members for three year terms: **Judith Ross** (Dallas), **John P. Melko** (Dallas), and **Layla D. Elzner** (Austin).

Service Awards

The Banco Rotto Award. This award is presented to a Texas bankruptcy legend who has had a lasting impact on the development of the Texas bankruptcy practice.

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"Banco Rotto" is Italian for "broken bench" and is the earliest phrase that is associated with the concept of bankruptcy, and is the phrase from which our English term "bankruptcy" is derived. Just as we can trace the origins of bankruptcy to this phrase, the Bankruptcy Law Section honors the recipients of the Banco Rotto award for their contributions to, and their lasting impact on, the bankruptcy profession. The **Honorable Bill H. Brister** (retired - Dallas) received this year's award for his outstanding service, leadership, and accomplishments as a bankruptcy practitioner, judge, and member of the bankruptcy profession.

After graduating from The University of Texas School of Law in 1958, Judge Brister was a successful trial attorney. In 1970 Judge Brister began his 15 year service as a federal judge, first as a Magistrate Judge, then as a Bankruptcy Judge for the Northern District of Texas from 1979-1985. Judge Brister served on the bankruptcy bench during the enactment of the new Bankruptcy Code, and he authored more than 100 published opinions which helped develop and establish a new body of law under the Bankruptcy Code. After his service on the bench, Judge Brister chaired the largest bankruptcy section in the Southwestern United States at Winstead, McGuire, Sechrest & Minick P.C. After retiring from Winstead, Judge Brister has continued to utilize his expertise as an effective mediator in all aspects of bankruptcy matters. Among his many other accolades, Judge Brister is a Fellow of the American College of Bankruptcy.

Judge Brister honorably served the bankruptcy profession as a judge, attorney, and mediator; and his contributions continue to have an impact on our profession today.

The Bankruptcy Law Section was proud to recognize Judge Brister's significant contributions to the bankruptcy profession and his impact on the development of bankruptcy law within the State of Texas (and nationally) by awarding him the Bankruptcy Law Section's highest and most distinguished award, the Banco Rotto Award.

The John C. Akard Community Service Award: This year the Bankruptcy Law Section established an award to honor current/former practitioners for outstanding achievement and service in the field of bankruptcy. This award has been named in honor of, and its first recipient is, the **Honorable John C. Akard** (retired- Lubbock) in recognition of his longstanding and tireless dedication to our profession in the field of Consumer Bankruptcy Law. Along the way, Judge Akard was an accomplished lawyer, judge, and dedicated advocate for those who could rarely speak for themselves.

Judge Akard graduated from The University of Texas School of Law in 1957 and founded the El Paso law firm bearing his name, Akard & Kirk, where he practiced bankruptcy law. Judge Akard served the bankruptcy community for approximately 25 years as the Chapter 13 Trustee in the El Paso and Midland-Odessa Divisions of the Western District of Texas. In 1986 Judge Akard took the bankruptcy bench and served for 14 years in the Northern District of Texas, covering the Amarillo, Abiliene and San Angelo Divisions. Judge Akard's devotion to serving the bankruptcy profession continued after he retired in 2000 when he served as a recalled judge in the District of Delaware, the District of Maryland, and the Western and Southern Districts of Texas. Judge Akard served the bankruptcy and legal profession in many other ways, including as a professor at The University of Texas at El Paso, as the Honorary President of the National Association of Chapter 13 Trustees (1999), and as a member of the Bankruptcy Advisory Commission to the Texas Board of Legal Specialization. His achievements and service have previously been recognized by admission into the first class of the American College of Bankruptcy, and by the creation of the John C. Akard Endowed Scholarship at the Texas Tech University School of Law and the John C. Akard Endowed Lectureship at The University of Texas School of Law. Even today, Judge Akard continues his dedicated service to the bankruptcy profession and is involved in a variety of other community activities and service.

The Bankruptcy Law Section was honored to establish The John C. Akard Community Service Award, and name, as its first recipient, the Honorable John C. Akard, in recognition of his dedication and contributions to the bankruptcy profession.

The Robert B. Wilson Distinguished Service Award: This prestigious award, named in honor of Robert B. Wilson, the first chair of the State Bar of Texas Bankruptcy Law Section, is presented "in deep gratitude for tireless efforts and unceasing dedication and service to the Bankruptcy Law Section of the State Bar of Texas" and was awarded this year to **Michelle A. Mendez** (Dallas). Among her many other activities, Berry Spears noted Michelle's dedicated, behind the scenes efforts on many of the Section's major initiatives, including spearheading the planning of many important aspects of this year's successful Bench/Bar conference.

Outstanding Service Award: This award is presented annually to a member of the bankruptcy bar who is selected for his or her outstanding service to the Bankruptcy Law Section. This year's recipient, **Thomas A. Howley** (Houston), was noted for his longstanding tenure on the Council, his repeated service as the Section's outgoing Treasurer and for always going "above and beyond" his duties in the completion of the Section's tasks and initiatives.

Incoming Chair Award: Berry Spears' last official act as Chair was to present **Chris Mott** (El Paso) with this award in honor of Chris assuming our Section's leadership role for the next year Congratulations Chris, we all look forward to an exciting year with you as our Chair.

Outgoing Chair Award: Chris Mott's first official act as Chair was to present **Berry Spears** with this award for Berry's year of service as our Section's leader. The Section is grateful for Berry's dedicated and diligent hard work as our Chair.

Special Event Awards

A number of judges and lawyers received awards for participating in the Thursday morning fun-run and Friday afternoon golf tournament and bike ride.[3]

Fun Run: Fastest Judge – **Judge Schmidt**; Second Fastest Judge – **Judge King**; Wisest Running Judge – **Judge Hale**; Fastest Lawyer – **Randy Williams**; Fastest Woman Lawyer – **Kristi Richter**; Lawyer Running Closest to a Judge – **Allen DeBard;** Slowest Running Lawyer – **Brad O'Dell**; and Fastest (Talking) Non-Running Lawyer – **Harry Perrin**.

Golf Tournament: Tournament Winners – **Dan Lain, Keith Aurzada, John Leininger, and Joel Krystinik**; Closest to the Pin – **Tom Howley**; Ladies Longest Drive – **Janet Casciato-Northrup**.

Bike Ride: **Judge Schmidt** won the "Iron Man" award and **Judge Nelms** won the Most Valuable Cyclist.

Last, but not least, **Judge Houser** (pictured with the running award winners on page 3) won the award for being the ***Best Hula Dancing Judge*** during Friday's dinner. Upon receiving the award, she exclaimed

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CONSUMER CORNER:
ASSIGNED AD VALOREM TAX CLAIMS IN CHAPTER 13

By: Michael Baumer, Law Office of Michael Baumer, Austin, Texas

Chapter 13 debtors whose taxes are not escrowed will occasionally resort to one of the property tax payment services which pay the taxes and take an assignment of the taxing entity's claim. The upside for the taxing authority: they get their money faster without incurring collection costs. The upside for the debtor: they get to pay the taxes over a longer period of time without incurring collection costs. The downside for the debtor: taxing authorities can only charge 12% interest while tax assignees can charge 18%. If the debtor pays the claim over a longer period of time at 18% interest, they end up paying far more interest. (Actually, the best case for the debtor is for the mortgage company to pay the taxes. That way, the debtor can pay back the mortgage company at no interest.)

BAPCPA added new Section 511 which provides: "If any provision of this title requires the payment of interest on a tax claim... the rate of interest shall be the rate determined under applicable bankruptcy law." It is significant that Section 511 does not define "tax claim."

There have been a recent spate of opinions on this issue starting with Judge Lynn in *In re Davis*, 352 B.R. 651 (Bankr.N.D.Tex.2006). Judge Lynn held that the claim of a creditor which paid the ad valorem tax claim prior to filing of the Chapter 13 and held a transfer of the tax lien was a "tax claim" under Section 511 and so was entitled to receive its contractual rate of interest in a Chapter 13. The important point here is the anti-modification provision of Section 1322(b)(2) which provides that a debtor may modify the rights of holders of secured claims "other than a claim secured only by a security interest in real property that is the debtor's principal residence."

In *In re Sheffield*, 390 B.R. 302 (Bankr.S.D.Tex.2008), Judge Isgur went into a more detailed analysis and concluded that although the private company assignee of a taxing authority held a "tax lien", it did not hold a "tax claim", disagreeing with Judge Lynn.

Section 101(51) defines a security interest as a "lien created by an agreement." Ad valorem tax liens are created by state law, not by any agreement. In most of these cases, the tax assignee takes a transfer of the taxing authority's lien, but they also have the debtor execute a note and deed of trust. As Judge Isgur explains, the lien is not created by the agreement, but arises by operation of state law. In order to obtain an assignment of the tax lien, the taxes must be paid by the assignee. When the taxes are paid, there is no longer any "tax claim." A new claim arose under the promissory note executed by the debtor. That claim may have resulted from payment of taxes, but it was not a "tax claim." Judge Isgur makes the further point that the tax assignee did not purchase the taxing authority's claim - it paid the claim. Judge Isgur concludes: "A state taxing authority may assign its tax claims if state law so provides. Hypothetically, a state could authorize the sale of its tax receivables to a third party. That third-party assignee would presumably be protected by Sec. 511, But, that is not the structure that this State has chosen for the private collection of its property taxes."

Approximately one month later, Judge Bohm followed *Sheffield* in *In re Prevo*, 393 B.R. 464 (Bankr.S.D.Tex.2008). Judge Bohm provides some discussion of the Kentucky and Pennsylvania tax statutes to contrast them with the language of the Texas statute and clarify the issue.

Judge Isgur revisited the issue in January 2009 in *In re Kizzee-Jordan*, 399 B.R. 817 (Bankr.S.D.Tex.2009). In *Kizzee-Jordan*, the tax assignee took another approach arguing that Sheffield was inconsistent with the Supreme Court's opinion in *Johnson v. Home State Bank*, 501 U.S. 78 (1991) and the Sixth Circuit's opinion in *Glance v. Carroll*, 487 F.3r 317 (6th Cir.2007). Neither of those opinions have any relevance to the disposition of this issue and Judge Isgur so concluded. (In short order.) [Judge Isgur confirmed this conclusion again a month later in *In re Sotto*, 2009 WL 260957 (Bankr.S.D.Tex.2009).]

I have not found any opinions in the Eastern or Western Districts or by any other judges in the Northern or Southern Districts.

Assuming that 511 does not apply to "tax liens" as opposed to "tax claims", the appropriate rate of interest for tax assignees in Chapter 13 would be the *Till* "prime plus" approach. FYI, the interest rates confirmed in *Sheffiled, Prevo, Kizzee-Jordan* and *Sotto* were 12%, 8.25%, 8.5%, and 7, respectively. (As a debtor's attorney, I like the downward trend in rates.)

I would guess that we will see the tax assignee lobby try to get the legislature to "fix" this "defect" in the tax statutes, but until then, your Chapter 13 plans should pay *Till* interest, not the contract rate of 15% or 18%.

CHAPTER 11 PRACTICE: REVISIONS TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 6003

By Blake Waggoner (bwaggone@mail. smu.edu), third year JD/MBA student, SMU Dedman School of Law, Extern to The Honorable Harlin Hale, United States Bankruptcy Judge

In a Chapter 11 case, the debtor-in-possession (DIP) often seeks entry of orders during the case's first days that are necessary for continued business operations so that the company may transition smoothly into bankruptcy. The debtor's motions for first-day requests frequently include: retaining professionals, paying employees, providing adequate assurances to utility providers, using cash collateral, obtaining postpetition financing, maintaining cash management systems, and paying critical vendors. The new revisions to Federal Rule of Bankruptcy Procedure 6003 (Rule 6003), which became effective in December 2007, address the court's granting of interim and final relief for motions and applications made during the first 20 days after a case's filing. Rule 6003 may change the way courts and practitioners approach the first days of a bankruptcy case.

Rule 6003

The rule states that a court should not grant relief for: (a) the retention of professionals; (b) the use, sale, lease, or incurrence of obligations of property of the estate, including the payment of all or part of a prepetition claim; and (c) the assumption or assignment of executory contracts or unexpired leases. However, a court may grant relief if it necessary to avoid immediate and irreparable harm.

Rule 6003's Rationale

Except under rare circumstances, the rule's rationale is that the 20 day bar on interim and final motions enables a creditors' committee to be formed, to hire counsel, and to prepare comments on the debtor's requests. The rule also provides sufficient time for other creditors and parties-in-interest to react to the debtor's filing. Rule 6003's proponents argue that the immediate and irreparable harm exception keeps the company's going concern value intact, benefits the estate, and does not compromise any ultimate objectives by parties-in-interest who had little or no notice of the first-day motions. Also, the rule prevents excessive use of first-day motions. However, critics note that decisions made early in a case are difficult to revisit once the case develops.

Interpretation of Rule 6003

Because courts usually simply enter or decline emergency orders without giving rationales, precedent on first-day motions and orders are extremely limited.

The "Immediate and Irreparable Harm" Standard

The Advisory Notes for Rule 6003 state that the "necessary to avoid immediate and irreparable harm" standard is derived from Rule 4001(b)(2) and (c)(2) and that the decisions under Rule 4001 should provide guidance for the standard's application. Rule 4001(b)(2) states that cash collateral may be used only to the extent necessary to avoid immediate and irreparable harm to the estate. For example, if a debtor is faced with an upcoming employee payroll, Rule 4001(b)(2) is interpreted to mean that a court may authorize only the amount necessary to meet the payroll. The rationale is that the company would collapse if its employees are not paid because they would not return to work. Rule 4001(c)(2) states that courts may authorize credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

However, the "necessary to avoid immediate and irreparable harm" standard raises at least two pending issues. First, what is the extent of proof required to establish the right to relief under Rule 6003? Second, is it enough for a debtor to show what wages and critical vendors should be paid on a macro level, or must the debtor specifically show why each employee and vendor should be paid?

Rule 6003(a) - Applications to Employ Professionals

In 2008, in *First NLC*, a Florida Bankruptcy Court held that it had the authority under Rule 6003(a) to grant interim relief for DIP corporations' and LLCs' requests to employ legal counsel during the first 20 days of a Chapter 11 case.

The DIP filed a motion to employ legal counsel under Rule 6003(a) during the case's first 20 days. Because of the 2007 revision to Rule 6003, the issues of first impression before the court were (1) whether the court had the authority to grant interim relief under Rule 6003 and (2) whether the case's facts met the immediate and irreparable harm standard necessary to warrant the granting of relief.

First, the court held that it had the authority to grant interim relief because nothing in the rule precluded it from entering interim orders.

Next, the court granted the employment because it found that doing otherwise would immediately and irreparably harm the estate. The court's inference was based on the testimony of the company's chief restructuring officer. The officer stated that the legal counsel was needed because many important legal decisions must to be made during a case's first 20 days. In addition, the officer stated that during his lengthy career he had never encountered a case in which the debtor was not represented by legal counsel. The court also granted the employment of the legal counsel because corporations and LLCs are prohibited from appearing *pro se*.

Because of a lack of precedent, the court used *Collier on Bankruptcy* for guidance. Collier states that there is no reason to use Rule 6003 for the employment of professionals so long as the court 1) allows for full compensation of professionals who are not officially retained by court order during the first 20 days or 2) fairly compensates professionals who unexpectedly are not retained after the first 20 days.

However, the Court found Collier's process ill-advised and unnecessary. The judge noted a flaw in Collier's logic because Collier overlooks that counsel may not be paid if its employment is not first approved by the court under 11 USC § 327. Thus, if a professional's employment were not approved at the final hearing, the court first would have to go through the process of approving

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CASE LAW UPDATE

SUPREME COURT ALLOWS STATES TO SUE NATIONAL BANKS FOR UNFAIR LENDING

By Adam Block and Leigh Leshin, associates at Pulman, Cappuccio, Pullen & Benson, LLP in San Antonio, Texas.

The U.S. Supreme Court recently upheld state authority to enforce fair-lending laws against national banks in *Cuomo v. The Clearing House Association, LLC*, No. 08-453, 557 U.S. ___ (June 29, 2009)[1]. Justice Scalia, who wrote the majority opinion joined by Justices Stevens, Ginsberg, and Breyer, based the majority's reasoning on the precepts of administrative law.

The Petitioner in *Cuomo*, the New York Attorney General's office, sent letters "in lieu of subpoena" requesting information to several national banks seeking information about the banks' lending practices. *Cuomo* at 1. Respondents, the Clearing House Association (a banking trade group) and the Office of the Comptroller of the Currency (OCC) (the federal regulatory agency which oversees certain national banks), sued to enjoin the requests. *Id.* A provision of the National Bank Act of 1924, protects national banks from the exercise of "visitorial powers" except as authorized under Federal law or as "vested in the Courts of Justice." 12 U.S.C. § 484 (West 2009). The Court explored common law history including Blackstone, and also cited *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (1819), to explain that the phrase "visitorial powers" refers to the right to oversee corporate affairs,[2] not the state's power to enforce laws. *Cuomo* at 3-9. The Clearing House Association and the OCC argued that a federal regulation interpreting the term "visitorial powers" (see 12 CFR §7.4000) also prohibited the exercise by the New York Attorney General of his power to enforce state laws over national banks. *Cuomo* at 1-2.

The Supreme Court applied the administrative law framework of *Chevron v. Nat'l Resources Defense Council*, 467 U.S. 837 (1984), finding that the OCC's regulation and interpretation of the National Bank Act were too broad. *See Cuomo* at 3.

The New York Attorney General's investigation of fair-lending law violations, the Court explained, was not an exercise of the visitorial power, but rather an attempt to enforce state law. *Id.* at 9-11. The Court found that the OCC regulation was too broad because it attempted to interpret law enforcement activities as the exercise of visitorial power. *Id.* at 14-15. While affirming the state's right to bring suit to enforce fair lending laws, the Court refused to enforce the Attorney General's letters "in lieu of subpoena", *Id.* at 9, and affirmed the lower court's holding "as applied to the threatened issuance of executive subpoenas." *Id.* at 15. But the Court vacated the lower court's decision "insofar as it prohibits the Attorney General from bringing judicial enforcement actions." *Id.*

A dissent by Justice Thomas, joined by Justices Roberts, Kennedy, and Alito, asserted that the OCC regulation was an appropriate interpretation of the National Bank Act. They would have held that the visitorial power here at issue was closer to law enforcement than the majority opinion allowed.

Professor Robert M. Lawless of the University of Illinois College of Law noted that while the majority opinion upholds the state's right to enforce its laws against national banks, it could increase litigation by refusing to uphold the Attorney General's letters in lieu of subpoena. *See* Bob Lawless, *Who Loses in Cuomo v. Clearing House?*, CREDITSLIPS, June 30, 2009, http://www.creditslips.org/creditslips/2009/06/who-loses-in-cuomo-v-clearing-house.html#more. "Might the default position of the state attorneys general not have to be 'sue first, subpoena later'?" asked Lawless. "If the effect of *Cuomo* is to compel the state attorneys general to sue in order to enforce state consumer law against the national banks, the banks might come to regret what they asked for." *Id.*

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[1] Citations hereafter are to the Court's slip opinion which is available at: http://www.supremecourtus.gov/opinions/08pdf/08-453.pdf.

[2] The last time the Texas Supreme Court discussed "visitorial powers" was in an opinion about the efforts of the Trustees of Rice University to reform the school's trust instrument which provided "that the institution should be for white citizens and that it should be free of tuition for all students." *See Coffee v. Wm. Marsh Rice University*, 403 S.W.2d 340 (Tex. 1966).

SUPREME COURT GRANTS WRIT ON THE SCOPE OF RULE 4003's 30-DAY OBJECTION REQUIREMENT

By Jana M. Atchley (jana.atchley@gmail.com), second year law student, University of Texas School of Law, Extern to the Honorable Harlin D. Hale, U.S. Bankruptcy Judge for the Northern District of Texas .com)

On April 27, 2009, the United States Supreme Court granted a petition for writ of certiorari in *Schwab v. Reilly* (Docket No. 08-538), 2009 WL 1107924. The Court will quiet the conflict in the Courts of Appeals regarding whether a Chapter 7 trustee who fails to file an objection to a debtor's exemption of personal property within the 30-day deadline prescribed by F.R.B.P. 4003(b) may, after later learning that the property's value is greater than the amount claimed in the exemption, move to sell the property and recover the difference between the exempted amount and the actual value of the property.

Specifically, the Court granted certiorari on two questions. Question 1 asked: "When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, is the exemption limited to the specific amount claimed, or do the numbers being equal operate to 'fully exempt' the asset, regardless of its true value?" Question 2 asked: "When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, must a trustee who wishes to sell the asset object to the exemption within the thirty-day period of Rule 4003, even though the amount claimed as exempt and the type of property are within the exemption statute?"

FACTS

Debtor, a cook running a one-person catering business, filed a Chapter 7 bankruptcy petition, listing as personal property certain "business equipment" with a value of $10,718 on Schedule B. *In re Reilly*, 534 F.3d 173, 174 (3d Cir. 2008). Fed. R. Bankr. P. 1007(b)(1). This equipment was also claimed as exempt on Schedule

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UPCOMING EVENTS

August 13-14, 2009	5th Annual Consumer Bankruptcy Practice Conference, Galveston, Texas at Moody Gardens: Information available at: http://www.utcle.org/conference_overview.php?conferenceid=833
September 17-18, 2009	Advanced Consumer Bankruptcy Course 2009, Houston, Texas at the Crown Plaza Hotel: Information available at www.texasbarcle.com
September 30, 2009	Nuts & Bolts of Business Bankruptcy (held in conjunction with the Advanced Business Bankruptcy Course), Houston, Texas at the Norris CityCentre Houston: Information available at www.texasbarcle.com
October 1-2, 2009	Advanced Business Bankruptcy Course 2009, Houston, Texas at the Norris CityCentre Houston: Information available at www.texasbarcle.com
November 19-20, 2009	Jay L. Westbrook Bankruptcy Conference, Austin, Texas at the Four Seasons Hotel: Information available at http://www.utcle.org/conference_overview.php?conferenceid=862

LOCAL EVENTS

Dallas

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

Fort Worth - Tarrant County

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

San Antonio

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

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

CALL FOR ARTICLES AND ANNOUNCEMENTS

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

If you are interested in submitting an article to be considered for publication or to calendar an event, please either e-mail your submission to a member of the Editorial Staff at tmillion@munsch.com, chufft@velaw.com or eborrego@whc.net or send your submission by regular mail (addresses on page 7).

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

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

Case law Update:

Straightening out "the vortex": In Faulkner v. Kornman, Northern District of Texas Bankruptcy Court applies more detailed rules for avoidance action structuring

By H. Robert Chapin (bchapin@gmail.com), intern for the Honorable Harlin D. Hale, U.S. Bankruptcy Judge for the Northern District of Texas, third year law student, Louisiana State University Paul M. Hebert Law Center

Avoidance actions frequently arise out of complex fact patterns and can involve a cast of thousands. One May 2009 bankruptcy opinion should come as a breath of fresh air to actual and potential parties in the Northern District—from pathologically calculating defendants to overwhelmed Trustees relying on little more than hunches.

In *Dennis Faulkner v. Gary M. Kornman, et al.* (*In re The Heritage Organization, L.L.C.*), 2009 WL 1349209; No. 06-3377-BJH (Bankr.N.D.Tex. May 11, 2009), Chief Judge Barbara J. Houser set forth an analysis destined to add more clarity and depth to the litigation of avoidance disputes. In this 118-page memorandum opinion, the Court synthesized most of the Fifth Circuit's precedents for how parties can assemble avoidance action claims and defenses, with a few twists. The Court also made use of other jurisdictions' interpretations to this end.

This adversary proceeding arose out of the reorganization of Heritage, whose sole operation was selling risky tax strategies to wealthy individuals. Heritage consisted of a vast network of owners and investors – many of whom shared common ownership under Kornman, who was also Heritage's CEO. Heritage cooked up a complicated tax avoidance strategy involving client money. The jig was up when the IRS began auditing Heritage clients—the tax shelter turned out to be a tax evasion scheme. Heritage lost numerous clients and consequently foundered, even while taking on some new clients for the same illegitimate business. The scheme became a scam. All the while, huge amounts of Heritage's money changed hands in numerous distributions. Kornman's constellation of businesses was the primary beneficiary of these distributions. This operation continued for a few years until Heritage filed for Chapter 11 bankruptcy.

This article will focus on some of the interesting nuances of the Court's evidence standards as applied to the merits of the avoidance actions under the Texas Uniform Fraudulent Transfer Act ("Texas UFTA") Tex. Bus. & Com. Code Ann. § 24.005 (Vernon 2002 & Supp.2008), and under 11 U.S.C. § 547(b).

The Texas UFTA Action

The plain language of the Texas UFTA statute omits detailed evidentiary requirements. *Faulkner v. Kornman,* 2009 WL 1349209 at *14-15. For a Texas UFTA action to prevail, the Trustee must prove, by a preponderance of evidence, defendants' "actual intent to hinder, delay, or defraud *any* creditor" accompanied the transfer(s). Tex Bus. & Com. Code § 24.005(a)(1). Since direct evidence of actual intent is difficult to prove, it may be established by circumstantial evidence based on the § 24.005(b) language "consideration may be given…." *Faulkner v. Kornman,* 2009 WL 1349209 at *12. Circumstantial factors of "actual intent" are known as "badges of actual fraud" and examples are set forth in § 24.005(b). *Id.* at *7.

The first gem in this opinion is its straightforward reading of the ambiguous Texas UFTA claim doctrine. Direct evidence of actual fraud *cannot* fall under the "badges" or inferences rubric; direct evidence simply *is* or *isn't*. *E.g.*, *id.* at *7, *12, *15. Direct evidence of actual fraud also carries no special weight when compared to circumstantial evidence because the only relevant weight here is satisfying the preponderance burden by the totality of the evidence. *Id.* at *12. The Court made another clarifying point by adopting the Eighth Circuit's framework for a jury instruction in *Kelly v. Armstrong* for the defendants' evidentiary requirements. *Id.* (citing 141 F.3d 799, 802-03 (8th Cir. 1998)). According to this rubric, the Trustee must prove multiple badges in order to shift the burden to defendants to prove by a preponderance of evidence a "legitimate supervening purpose." *Id.* at *13.

Modifying enumerated badges

The Texas UFTA statute contains an illustrative list of badges of fraud. Tex Bus. & Com. Code § 24.005(b) (noting "other factors"). The Court in *Faulkner v. Kornman* broke new ground in its broad application of one enumerated badge—namely, that the "debtor was threatened with [a] [law]suit." *Id.* Although there was no evidence in the record to show the debtor was explicitly threatened with any legal action for a significant portion of the reachback period, the Court concluded that the Trustee could avoid transactions dating back to the maximum limits of the reachback period. *Faulkner v. Kornman,* 2009 WL 1349209 at *19-20. The Court reasoned that a constructive lawsuit threat had existed since the beginning of the reachback period because of evidence of IRS letters, angry client correspondence, knowledge about clients' lawsuits, investor demand letters, a heated employment dispute, and letters of advice from counsel about statutes of limitation. *Id.* The Court also inferred that Heritage had received constructive lawsuit threats during the transfer period based on Heritage's knowledge of actual client threats made prior to that period. *Id.* at *20. The Court added to this mix evidence of actual lawsuit threats made during a late part of the transfer period. *Id.*

Modifying un-enumerated badges

The Court also expounded Texas UFTA's "other factors" language by modifying, and possibly even defining novel, un-enumerated badges of fraud. Under the Fifth Circuit's pre-existing "cumulative effect of [a] course of conduct" category, the Court flexibly encompassed specific facts including the debtor's questionable transactions and communications involving: its law firm, its clients and former employees who subsequently became disgruntled, and its officers who consisted entirely of yes-men. *Id.* at *21-22. The Court made another inference of fraudulent intent for defendants by incorporating a Ninth Circuit badge based on the

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"[e]at your heart out Marvin Isgur!" Thanks to all of the judges for being great sports and entertaining everyone. This performance alone made the entire conference worth the registration fee!

Congratulations to all of the award recipients for their service, athletic achievements, and dancing abilities.

PRESENTATION SUMMARIES

Legal Ethics: The conference presentations started with a bang as legal humorist **Sean Carter** (Phoenix) entertained attendees with his Ten Commandments for Avoiding Ethical Problems as a Lawyer. Through humorous stories and examples, Sean provided an entertaining presentation that qualified for CLE ethics credits.

Status of the Congressional Fix: The University of Texas McCombs School of Business professor **Michael Brandl** (Austin) kept attendees laughing as he informed the audience with a boisterous, energetic and opinionated presentation about Congress' attempts to fix the economic crisis. Prof. Brandl (expressing his own views, and not those of McCombs) provided a history of our country's boom/bust cycles, the events leading up to the economic crisis, and an analysis of Congress' attempts to fix it. The bottom line from this presentation: don't miss a chance to see Prof. Brandl in action.

What Judges Wished Attorneys Knew: **Judge Houser** (Dallas), **Judge Isgur** (Houston), and **Judge King** (San Antonio) began their presentation off-topic by explaining the important new change in how deadlines will be counted under the new Federal Rules of Civil Procedure beginning December 1, 2009 and how calculating deadlines will be made easier by the new rules. Then they explained the several things they wished attorneys knew including how the courts and clerks' offices handle various matters, like scheduling expedited hearings. Judges also wished that attorneys announced accurate time estimates for hearings that include time for opposing counsel's argument. Last, they warned against pestering their staff or members of the clerks' offices; especially the courtroom deputies who schedule matters. If you have an urgent matter, email the courtroom deputy (the best way to contact them, especially if they are in court) and only leave one voicemail message per day.

What Attorneys Wished Judges Knew: **Judith Ross** (Dallas) moderated a discussion with **Chris Mott** (El Paso), **Janet Casciato-Northrup** (Houston), and **Ron Stadtmueller** (Tyler) about what lawyers wished their judges knew or wished they would do, including: enforcing time estimates on other counsels' presentations; remembering that delays in ruling and being late to court costs clients money; and that ruling on a new issue may resolve several other similar cases.

War Stories from Them that Survived: Retired judges **Bill Brister** (Dallas), **John Flowers** (Dallas), **Larry Kelly** (Waco), along with **Joel Kay** (Houston; co-founder of Sheinfeld, Maley & Kay) entertained the troops with stories from their days on the bench and in practice, and explained how significantly the enactment of the Code in 1978 changed the practice. As demonstrable evidence of the changes in technology since he practiced, Joel Kay held up a yellow paper and asked if anyone recognized it. No one did. It was a carbon copy. And Judge Kelly, now practicing again, told the story of being in Nevada bankruptcy court and being asked by the judge to appear when he had not yet been admitted. After disclosing this, the judge admitted him on the spot and told him to file a *pro hac vice* application, to which Kelly exclaimed: "But Judge, that will cost $175." The courtroom exploded with laughter.

Case Law Update: **Judge Gargotta** (Austin) and **Judge Rhodes** (Plano) took attendees through new cases including the significance of a new Supreme Court decision in a non-bankruptcy case that appears to have heightened the pleading standard in Rule 8 of the FRCP (*Aschcroft v. Iqbal*, 129 S.Ct. 1937 (May 18, 2009)). The judges also highlighted a number of bankruptcy cases going to the Supreme Court including *Milavetz, allop & Milavetz, P.A. v. United United States*, 541 F.3d 785 (8th Cir. 2008) (whether BAPCPA provision is an unconstitutional restriction of free speech); and *Espinosa v. United Student Aid Funds, Inc.*, 545 F.3d 1113, as amended at 553 F.3d 1193 (9th Cir. 2008) (whether a Chapter 13 plan can discharge student loans). The presentation concluded with a discussion of a number of mainly consumer cases from the Fifth Circuit and other appellate courts.

General Counsel Panel: **Michelle Mendez** (Dallas) moderated an impressive panel of general counsel that included **Charles Matthews** (Exxon-Dallas), **Tony Bangs** (Nieman Marcus-Dallas), and **Gary Kennedy** (American Airlines-Dallas). They shared tips on good/bad ways to market to in-house counsel, how companies choose their counsel, what

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Revisions to Federal Rule of Bankruptcy Procedure 6003

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the employment to the filing date. Second, the court would then allow for compensation for the work performed. Then, the court would have to deny approval of the professional's further employment.

RULE 6003(b) - MOTIONS TO USE, LEASE, OR SELL PROPERTY

Rule 6003(b) prohibits relief for a debtor to use, lease, or sell property during the case's first 20 days. The provision's purpose is "to prevent the premature payment of money that will be difficult to recoup once paid prior to a fair opportunity for other interested parties to be heard." The rule does not apply to motions to authorize the use of cash collateral and DIP financing which are covered in Rule 4001.

The rule covers motions to sell assets of the estate. In most cases, an order cannot be approved during the first 20 days. However, court may grant relief if it finds the sale is necessary to avoid immediate and irreparable harm. An example would be a company that would expire if assets of its estate were not sold quickly.

"It is generally accepted that a DIP cannot pay prepetition debts without a court order." Under Rule 6003(b), any attempt by the debtor to pay prepetition debt must generally wait 20 days until the court can consider it. In rare instances, the lack of payment of a prepetition debt within 20 days will cause immediate and irreparable harm to the estate so as to require a Rule 6003 exemptions.

Frequently, "a debtor's vendors will insist that they be paid their prepetition debt before the vendors will ship their goods which may be critically necessary for a debtor's continued operations." Before the adoption of Rule 6003(b), courts had frequently granted these critical vendor motions without carefully scrutinizing whether the payments were critical. Under Rule 6003(b), however, critical vendor motions should not be considered until 20 days after the filing unless 1) the vendor needs the payment so critically and so immediately that he cannot wait the 20 day period and 2) the debtor establishes the necessity for making the extraordinary payment so early in the case.

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C in the same amount. *Id.* Schwab, the Chapter 7 trustee, did not file an objection to this exemption, but later procured an appraisal of the equipment which valued the property at $17,200, a $6,482 difference from the claimed value. *Id.*

In response to the appraisal, Schwab filed a motion to sell the property, desiring the difference in the price claimed and the appraised value to be included in the bankruptcy estate. *Id.*

HOLDING

The Third Circuit affirmed the judgment of the bankruptcy court and the district court, denying the trustee's motion to sell the business equipment. *Id.* at 178. It grounded its decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), where the Supreme Court found that a trustee could not object to an exemption after the mandated F.R.B.P. 4003(b) 30-day period. *Id.* at 176. In *Taylor*, the debtor listed the value of the proceeds of a pending lawsuit as "unknown," signaling to the court that the debtor desired to exempt the entire amount, and thus the trustee was not allowed to include the eventual award, which was greater than the attorney's estimate, in the bankruptcy estate. *Taylor*, 503 U.S. at 640-641.

In *Taylor*, the Court rejected the argument of the trustee, which was similar to that of Schwab, that an objection pursuant to the time limit in F.R.B.P. 4003(b) is only required where the validity of the exemption is challenged. *Id.* at 642. The *Schwab* court found that where only the valuation was at issue, even where the amount of the exemption is not objectionable on its face, and thus giving the trustee reason to know that the value of the item might be uncertain, an objection in compliance with the 30-day limitation is still required. *Reilly*, 534 F.3d at 177-178. In reaching this result, the appeals court noted, as did the Supreme Court in *Taylor*, that the deadlines produce finality and that trustees have the power to object or request an extension of the 30-day exemption deadline if they are uncertain as to the debtor's exemption valuation. *Id.* at 177.

OTHER CIRCUITS' TREATMENT

This question is ripe for Supreme Court resolution, as the Circuit Courts' decisions vary in treatment of this issue. While the Eighth and Ninth Circuits have ruled on this issue somewhat inconsistently with the Third Circuit's decision in *Schwab*, the Sixth and Eleventh Circuits' decisions agree with *Schwab* that wherever a debtor intends to exempt the entire amount of certain property and the trustee does not enter a timely objection, the asset is completely exempt regardless of later valuations of the asset. *Reilly*, 534 F.3d at 178-180.

In *Hyman*, the Ninth Circuit allowed a trustee's motion to sell a house, finding the debtor had not exempted the entirety of the property because the debtor had valued the house at $415,000 and only listed $45,000 as their homestead exemption amount. *Hyman v. Plotkin*, 967 F.2d 1316, 1318-1319 (9th Cir. 1992). This case is distinguishable from *Schwab*, because the exemption amount and the valuation amount of the property were not identical.

The Eighth Circuit in *Wick* found the debtor, by valuing certain stock options as "unknown," was only entitled to the exemption of the legal limit of $3,925, instead of the actual value after the options were exercised of $97,200. *In re Wick*, 276 F.3d 412, 414-416 (8th Cir. 2002). Unlike the Third Circuit in *Schwab* and the Supreme Court in *Taylor*, the Eighth Circuit found evidence in the record indicating the debtor only intended to exempt a portion of the options' value, not the entire value of the option. *Id.* at 416-417. Thus, the Eighth and Third Circuits disagree as to whether *Taylor* should be interpreted to mean that whenever a debtor's valuation and exemption amount are identical with respect to certain property, the entirety of the property should be exempted.

FUTURE IMPACT

At its core, this dispute asks if the debtor or the trustee should bear the burden of uncertain asset valuations.

Opponents of the Schwab decision argue that placing a strict burden on trustees to object within the 30-day period, even where they have no reason to suspect the asset is undervalued, would cause incentives for debtors to undervalue their assets in hopes that trustees would not enter timely objections, thus allowing them to exempt more than the legal amount. *Reilly*, 534 F.3d at 176. Furthermore, this would cause trustees to routinely object whenever an asset's valuation and exemption amounts are identical, wasting judicial resources. *Id.*

While the *Schwab* court concedes that the decision might provide incentives to debtor trickery, it contends that this risk is outweighed by other bankruptcy laws in place to punish bad faith debtor behavior, as the Supreme Court emphasized in *Taylor*, and by the Bankruptcy Code's promise of a fresh start to allow debtors to confidently use exempted assets without fear of an untimely objection and liquidation. *Id.* at 177, 180. In addition, one might argue that the problem of debtor trickery was at least partially assuaged by the 2008 addition of F.R.B.P. 4003(b)(2), allowing an extended one year objection period where the trustee can show the debtor fraudulently asserted the claim of exemption, which might be shown in cases where the debtor grossly undervalues the property.

Should debtors, already in financial turmoil, be required to pay to appraise property they wish to exempt, or else bear the risk that the law will not protect their sentimental attachment to the property, requiring it be sold in order to recoup the difference? Or, should the court bear the cost of the likely increase in trustee objections and the risk of debtor dishonesty? As the issue of exempted property arises very commonly in bankruptcy cases, the High Court's decision will have pervasive impact.

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proved a quick study, winning his first trial while flying "solo" in McAllen three months into his career (recalling that "it was nerve-racking"), and gaining the confidence of Judge Moller, who frequently appointed him as a bankruptcy receiver.

At the time, there was only a small community of bankruptcy attorneys practicing throughout the State of Texas, and fewer than 20 attorneys practicing bankruptcy law in Houston. "I think I could name every one of them!" Monroe recalls. But while the legal community was small, the practice of bankruptcy law was growing by leaps and bounds, leading to the passage of the Bankruptcy Reform Act of 1978, which Monroe recalls was referred to as the "Bankruptcy Lawyers Retirement Act" by Bill Rochelle – referring to the impending boom in the bankruptcy practice.

The practice at Sheinfeld, Maley & Kay grew quickly, and Monroe became a partner in just three years. He fondly remembers the great pool of "tremendously talented" attorneys at the firm, including some who he personally recruited. One notable recruit included Barbara Houser, whom Monroe sought to run Sheinfeld's Dallas office. Monroe handled many cases over the years, including representing Alfie's Fish & Chips, Hannah's Pies, the receiver in Wheatheart Cattle Company (which involved gun wielding cattle owners who repossessed their livestock from the debtor's feed lot), the Bank Group in Amarex (a deep gas driller in Oklahoma City, Oklahoma), and the receiver for Mrs. Archer Parr who filed Chapter 11 in order to shield her assets from Judge Archer Parr of Duval County where she was embroiled in a heated divorce proceeding and where she had been jailed for contempt of court, just to name a few. After working as managing partner for three years, Monroe was ready for a change, and his interest in becoming a bankruptcy judge piqued. He applied for judgeships in Austin and Beaumont, and was appointed for the Austin division.

After attending Judges School in Washington, D.C. (which was held in the Blair House), Monroe recalled the advice Judge Larry Kelly (then Chief Bankruptcy Judge of the Western District) gave him for his first day on the bench. "Kelly told me to figure out what I was going to say because everyone would be looking at me to start and if I had nothing to say, people might wonder if I knew what I was doing. Then he took a two week vacation and gave me his docket," Judge Monroe remembers with a laugh. Monroe enjoyed the view from the bench and found it to be a great educational experience. Other benefits to his judicial position included not having clients ("which is nice"), and not having to keep time records. "Oh, and people return my calls," he added. But he attested that there were still stressful moments, such as presiding over a 3-day trial related to a sexual harassment claim in which the alleged culprit represented himself. And there were such notable cases as those involving the land developer Gary Bradley, eccentric land owner Hatsy Heep Shaffer, El Paso Electric Co., Church's and Popeye's Fried Chicken Restaurants, and others. Dealing with pro se debtors and parties was one of the more difficult issues for Judge Monroe as well, and he frequently advised them to seek assistance from an attorney. And while he was never really concerned for his safety, Monroe recalled a time when a debtor, for whom the case was not proceeding very well, stated that he (the debtor) knew where the judge and trustee lived. Judge Monroe advised the debtor "not to poke around my house because you may meet Mr. Smith and Mr. Wesson."

Monroe recalls moments of great levity as well. Thinking of funnier moments over the years, Judge Monroe remembers an ex-husband leaving the courtroom after a hearing, grousing that the result he received in bankruptcy court was the same that he got in the divorce. Judge Monroe laughed, recalling the gentleman grumbling that "she got the goldmine, and I got the shaft." To which Monroe remembers replying from the bench, "And I'm sure you aren't alone in that feeling."

Judge Monroe has had several notable opinions published during his tenure as a bankruptcy judge, particularly in recent years the *In re Sosa* opinion, in which he criticized Congress and the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. But while noting that the law was not perfect ("it is written in such unusual prose, some of which has no direct meaning that is discernable"), he reflects that "lawyers will find a way to make the law work – no matter how it is written. Lawyers make the system work." And he says while there will always be a case that may not seem fair, he always applies the law. "Sometimes it's easy," he states, "and sometimes it's hard." And as for appeals of his opinions? "I love it! I want to know if I'm wrong," Monroe responds. He recalled advice by United States District Judge Sam Sparks, "to remember that if you get reversed, it doesn't mean you were wrong; it is just another person's opinion."

After 20 years on the bench, Judge Monroe retired on April 30, 2009. He decided to retire from the bench for many of the same reasons that led him to the bench, namely that he was ready for something different. As Judge Monroe embarks on the next chapter of his professional and personal life, he says that what he will miss most is the job as a whole. "The experience has been so positive – the people I work with are top of the line. They will bend over backwards to make you look good." As for advice for his fellow judges, he encourages them to "be who you are" and keep a good sense of humor. He also suggests that judges try to remember what it was like to practice law, and to try to be more understanding than going with their first impulse in difficult situations – advice sure to be appreciated by all attorneys appearing before the court.

And his advice to those entering into the practice of law? "Are you sure this is what you want to do?" he laughingly asks, but suggests more seriously that young attorneys should be sure to live a balanced lifestyle. "Don't assume that making a lot of money will make you happy," he reflects.

So, what are Judge Monroe's plans for the future? "I don't really have any plans, but I doubt I will be an astronaut, rodeo cowboy, or pro golfer." He further mused that maybe he could be a cable television news commentator on bankruptcy issues, or even a television bankruptcy judge. "The show could be called 'American Debtor'," he joked. One thing is for sure, however, Judge Monroe will not be taking a rest. He cited as the reason to remain active his belief that "when you stop doing things, you die." Well, so long as "things just happen" for Judge Monroe in retirement the same as they did during his legal career, then he can plan on being busy for a long time, maybe even on cable television. Stay tuned!

*__Editor's Note__: "Judicial Profiles" is a new addition to the newsletter and will be regularly featured in forthcoming issues. Profiles will be authored by members of the Young Lawyers Committee of the Bankruptcy Section. Judge Frank R. Monroe (Bankr. W.D. Tex. – Austin), who retired on April 30, 2009, was the first judge profiled as part of this project.

A Message From Your Chair

(Continued from page 1)

The Section's newsletter continued as a professional level publication, and provided multiple educational articles, announcements and other materials to its members. The Section improved its website, which includes a calendar of events for members and interested parties (www.texasbar.com/bankruptcy). The Section also coordinated and assisted with multiple bankruptcy seminars across the State as well as abroad, and just completed its third Statewide Bench-Bar Bankruptcy Conference in June 2009, which was a huge success.

At our recent Section Annual Meeting held at the Statewide Bench-Bar, we elected new Council officers and members for those whose terms had expired. We are fortunate to continue to have a very strong group of leaders for our Section that are dedicated to its success:

Council Officers

H. Christopher Mott, Chair
Berry Spears, Immediate Past Chair
Byrn Bass, Vice Chair & Chair Elect
Tom Howley, Vice President Business Division
Mary Daffin, Vice President Consumer Division
Hon. Harlin D. Hale, Vice President Professional Education
Mark Andrews, Vice President Law School Relations
Tim Million, Vice President Communications & Publications
Beth Smith, Vice President Public Education
Elizabeth Guffy, Secretary
Michelle Mendez, Treasurer
Albert S. Conly, Non-Lawyer Liaison

Council Members

Judy Ross	Hon. Bill Parker	Dana Ehrlich
John Melko	Behrooz Vida	Johnie Patterson
Layla Elzner	Demetra Liggins	Michael Kelly

The Section is also grateful to the outgoing officers and members of the Council (whose terms have recently expired) for their years of dedication and hard work for the Section –Debbie Langehennig, Clifton Jessup, Julianne Parker, John Mitchell, James Prince, and Lydia Protopapas. Our past success and promising future is also the direct result of the efforts of former Chairs of the Section -- Berry Spears, Debbie Langehennig, Deborah Williamson, Charlie Beckham, and Robert Wilson.

These are only a few of our highlighted Section activities and some of the individuals involved. The entire Section and its membership should be proud of the important work that has and will be done. The Section could not have succeeded to the degree that it has without your help. We welcome your input and participation. Regardless of whether you are a new lawyer that has just joined the Section, or a lawyer with more than a few years of experience under your belt, we want your ideas, participation, and input. If you are interested in getting involved in one or more of the Section's projects or activities, feel free to contact me or any of the other Council officers and members. After all this is YOUR Section and the success of the Section can truly be measured only by our collective ability to meet your needs and the needs of our community.

Revisions to Federal Rule of Bankruptcy Procedure 6003

(Continued from page 10)

RULE 6003(c) - MOTIONS TO ASSUME OR ASSIGN EXECUTORY CONTRACTS OR UNEXPIRED LEASE

Under Rule 6003(c), a DIP cannot obtain relief to assume or assign executory contracts or unexpired leases for 20 days after filing unless immediate or irreparable harm would occur so as to justify relief.

Impact of the New Revisions to Rule 6003

Courts and practitioners have found difficulty in applying the strictly drafted revisions to Rule 6003. *First NLC* is currently the only case that explains a court's rationale regarding when it would grant a Rule 6003(a) Application for the Employment of Professionals. Courts outside the Eleventh Circuit may consider using *First NLC* for guidance on similar issues. Additional case law will be useful in further understanding how to apply the revised rule.

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[1] 10 Collier on Bankruptcy, ¶ 6003.01 (15th ed., Lawrence King eds., 2008); Jay Alix et al., Financial Handbook for Bankruptcy Professionals, § 6.34 (2d ed. 2008).
[2] Alix, Financial Handbook for Bankruptcy Professionals, at § 6.34.
[3] Fed. R. Bankr. P. 6003.
[4] *Id.*; Collier on Bankruptcy, at ¶ 6003.01.
[5] Collier on Bankruptcy, at ¶ 6003.02[1].
[6] Alix, Financial Handbook for Bankruptcy Professionals, at § 6.34.
[7] David Stratton & Hannah McCollum, *New FRBP 6003: More Questions than Answers*, 30 Am. Bankr. Inst. J. 47 (2008).
[8] Alix, Financial Handbook for Bankruptcy Professionals, at § 6.34.
[9] Collier on Bankruptcy, at ¶ 6003.01[1].
[10] Fed. R. Bankr. P. 6003.
[11] Fed R. Bankr. P. 4001(b)(2).
[12] William L. Norton, Norton Bankruptcy Law and Practice Bankruptcy Rules, Rule 4001(b)(2) (2nd ed. 2007-2008).
[13] Fed R. Bankr. P. 4001(c)(2).
[14] Stratton, *New FRBP 6003: More Questions than Answers* at 48.
[15] *In re First NCL Fin. Servs.*, LLC, 382 B.R. 547, 549-50 (Bankr. S.D. FL 2008).
[16] *Id.* at 549.
[17] *Id.*
[18] *Id.* at 549-50.
[19] *Id.* at 550; *see* Collier on Bankruptcy, at ¶ 6003.02[2].
[20] Fed R. Bankr. P. 6003(b)
[21] Collier on Bankruptcy, at ¶ 6003.02[3].
[22] *Id.* at ¶ 6003.02[3][a]; Fed R. Bankr. P. 4001(b)(2) and (c)(2).
[23] Collier on Bankruptcy, at ¶ 6003.02[3][b]; Fed R. Bankr. P. 6003(b)
[24] Collier on Bankruptcy, at ¶ 6003.02[3][b].
[25] *Id.* at ¶ 6003.02[3][c][i] and *see Official Committee of Equity Security Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987).
[26] Collier on Bankruptcy, at ¶ 6003.02[3]; Fed R. Bankr. P. 6003(b).
[27] Collier on Bankruptcy, at ¶ 6003.02[3][c][i].
[28] *Id.*; Fed R. Bankr. P. 6003(b).
[29] Collier on Bankruptcy, at ¶ 6003.02[4]; Fed R. Bankr. P. 6003(c).

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they like firms to offer, what they don't like about firms, and what they would like to see firms do differently.

What's Hot in Business Bankruptcy: **Judge Schmidt** (Corpus Christi) led a panel comprised of **Jack Kinzie** (Dallas), **Eric Taube** (Austin), **Rhett Campbell** (Houston), and **Pat Kelly** (Tyler) that discussed many issues relating to the general theme of how to have a successful reorganization. The panel shared statistics showing the success rate of chapter 11 cases, and covered other timely topics including Chrysler's 363 sale, fiduciary duties in bankruptcy, and plan mediation with an analysis of the benefits and administrative burdens of having a sitting judge mediate pending controversies.

Sharpening Litigation Skills in Consumer Cases: **Dick Harris** (Abilene), **Scott Ritcheson** (Tyler), **Brian Rogers** (Victoria), and **Elizabeth Smith** (San Antonio), shared their considerable knowledge of the special problems and concerns of litigation in consumer bankruptcy. From the importance of trial preparation on a consumer client budget to the many ways to use a 341 meeting to your client's advantage, the speakers provided a session which was interesting and informative.

Solving Mortgage Problems in Chapter 13: **Janna Ward Clarke** (Fort Worth), **Michael Kelly** (Odessa), **Gordon Mosley** (Tyler), and **Johnie Patterson** (Houston), together outlined possible pitfalls and practical tips for dealing with mortgage companies in Chapter 13. The speakers explained the critical importance or mortgage companies, and debated the advantages and disadvantages of wage orders and requiring mortgage payments to be paid through the Chapter 13 Trustee. Altogether a valuable session for anyone practicing in Chapter 13 cases.

Consumer Discharge Issues: **Judge Keith M. Lundin** of the Middle District of Tennessee informed and enlightened attending attorneys with an entertaining and original presentation concerning the theory of consumer discharge law under the Bankruptcy Code. Using the examples from all old and new case decisions, including the Supreme Court's recent decision in *Travelers Indemnity v. Bailey*, Judge Lundin provided the attorneys present with much to consider in future consumer cases.

The Lawyer and the Media: **Bill Rochelle** (New York City), a former bankruptcy lawyer and now editor-at-large for Bloomberg News, offered some practical advice to bankruptcy lawyers on increasing their media exposure. His central lesson was for attorneys to be aware of what reporters want: interesting, understandable and timely news stories. That means emailing three-sentence pitches with interesting quotes on the same day the event happens—in other words, no week-old press releases filled with legalese. Rochelle emphasized that a good quote was gold. As an example, he shared his famous United Airlines quote that went viral in 2005: "Creditors are so eager to get it over with that they would have voted for the plan if UAL were offering a ham sandwich." An ability to provide interesting and timely quotes will earn an attorney a solid spot in a reporter's Rolodex.

District Breakout Sessions: Judges and lawyers broke out by district to discuss important local issues including amending each district's local rules as a result of the change in calculating deadlines that will go into effect on December 1, 2009 pursuant to the new Federal Rules of Civil Procedure.

Events

The special events began Wednesday with the opening night reception, followed by Thursday morning's fun run. After the first day's presentations, attendees enjoyed a reception honoring the Section's new non-attorney members.[5] Many attendees enjoyed the Hawaiian themed evening in casual beach attire complete with leis. A fire dancer wowed the crowd before dinner, and during dinner, luau dancers entertained the audience with traditional hula dancing. The highlight of the evening by far was the gracious participation by our judges in a hula dance that they learned on the spot. After dinner, all attendees were invited to an evening party hosted by the Young Lawyers Committee at a trendy bar outside of the resort where young and experienced practitioners mingled into the night.[6] After the presentations concluded on Friday, attendees enjoyed golf, cycling, and spa treatments.

Special Thanks

The conference was an outstanding success and concluded on Friday evening following the afternoon events. Special thanks to all of our bankruptcy judges who participated, the planning committee for an enjoyable and educational conference, all of the generous conference sponsors, Anne Garza and Terri Ramirez – the helpful and courteous conference staff, and the U.S. Marshals.

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[1] Special thanks to **Debbie Langehennig** (Austin) for supporting and facilitating this new young lawyer initiative; and to **Berry Spears** (Austin), **Chris Mott** (El Paso) and **Michelle Mendez** (Dallas) who, along with Debbie Langehennig, provided helpful information, guidance, and comments to this review.

[2] To view the members of the planning committee, the conference's many generous sponsors, and entire course program, please see the conference brochure on the Section's website: http://www.texasbar.com/bankruptcy/2009BenchBar.pdf.

[3] No awards were given to participants in Friday's spa treatment event.

[4] If you want to know the detailed secrets of how to reel in business from general counsel, find someone who attended this presentation and take him/her to lunch (probably several times).

[5] If you know of a non-attorney bankruptcy professional who would like to join the Section, please refer them to the Section's website where there is a link to the enrollment form.

[6] Thanks to **Omar Alaniz** (Dallas) and **Vickie Driver** (Dallas) for organizing this fun event.

General Counsel Panel (l-r): Gary Kennedy (American Airlines), Charles Matthews (Exxon), Tony Bangs (Nieman Marcus) & Michelle Mendez (moderator)

Chapter 11 Panel (l-r): Pat Kelly, Rhett Campbell, Eric Taube, Jack Kinzie & Judge Schmidt

Judge King with his wife and former law clerks at the Thursday evening reception (l-r): Susan Womble (06-07), Michael Parker (93-95), Cindy King, Judge King & Harlin Womble

Judy Ross, Judge Nelms, Claire Hale & Judge Hale at the Thursday evening reception

Current chair and former chairs (l-r) Chris Mott, Debbie Langehennig, and Berry Spears

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defendants' failure to produce any solid evidence to rebut the "cumulative effects of [a] course of conduct" badge. *Id.* at *23. Applying a badge from the Southern District Bankruptcy Court, the Court also found a "pattern of sharp dealing" (i.e. self-dealing) in the debtor's activities because of its freezing out of clients and investors from agreed-upon information and distributions. *Id.* at *25 (citing *In re Sissom*, 366 B.R. 677, 700-701 (Bankr.S.D.Tex.2007)).

The Court made new inferences under another of the Fifth Circuit's badges: "The entire pattern of [debtor's] conduct." *Id.* Acts of misrepresentation, active concealment, and bad faith seem to fall under this residual category. For example, a misleading private placement memorandum provided to investors gave rise to an independent badge of questionable/unfair conduct. *Id.* The debtor's singling out of a particular investor for exclusion both from distributions and from listing as a *potential* creditor in bankruptcy filing paperwork supported another inference under this category. *Id.* at *24. Other sources of inference for intent under the "entire pattern" badge included the debtor's not informing clients about IRS investigations, and making affirmative assurances that the IRS would not investigate them. *Id.*

A new badge for hush money payments

Lastly, the Court found an independent badge of fraudulent intent based on an excluded claimant's attempt to recover its investment during the reachback period, and based on testimony that the purpose of the distributions to specific creditors was to keep up appearances of propriety. *Id.* at *16. The Court drew an analogy to a case wherein a New York Bankruptcy Court inferred fraudulent intent from a debtor's transferring funds merely to "buy time by keeping claimants happy" while continuing fraudulent conduct. *Id.* at *16-17 (citing *In re Bayou Group, LLC*, 372 B.R. 661, 663 (Bankr.S.D.N.Y.2007)).

Affirmative defenses

- The court additionally provided more certainty to the elements of proving whether or not there was a legitimate business purpose. The Court identified at least four specific kinds of defenses:
- A (legal) tax-saving purpose (from Seventh Circuit and Federal Circuit) (*Id.* at *13, *28-31.),
- An innocent act of bankruptcy planning (from Ninth Circuit and Minnesota Bankruptcy Court) (*Id.* at *13, *22.),
- Obligatory transfers (*Id.* at *18, *26-27.), and
- Otherwise innocent transfers (from Ninth Circuit and North Carolina Bankruptcy Court) (*Id.* at *13, *23, *57).

While this laundry list should be handy for both defendants and Trustees alike for organizing their parries and thrusts, parties should keep in mind that the Bankruptcy Court is the sole finder of fact of the weight and credibility of evidence. *Id.* at *13.

The Court made another interesting analytical wrinkle in how it addressed the different kinds of potential business purposes. The Court took on defendants' tax and obligatory transfers arguments using a shotgun approach – by addressing the overarching issue of whether there could have been a legitimate business purpose *at all* for the debtor's behavior. Although it wasn't dispositive in this case, the Court's ability to zoom-out and consider the debtor's general business purpose demonstrates that courts have an additional arrow in their quiver for granting the Trustee relief. This common-sense approach minimizes the risk of defendants end-running the analysis by citing specific legitimate business purposes. For instance, defendants cited a Northern District Bankruptcy Court case that held for defendants on the basis of a tax purpose. *Id.* at *29 (citing *Pher Partners v. Womble* (*In re Womble*), 289 B.R. 836, 855 Bankr.N.D.Tex.2003), aff'd 299 B.R. 810 (N.D.Tex.2003)). Instead of saying the analysis was inapposite, the Court engaged *Womble's* analysis, but distinguished it because of the absence of the following evidence about the debtor:

- Standard business practices (whether these practices ought be firm-specific or industry-wide was not clear),
- Arms' length transactions,
- Contemporaneous documents supporting the appropriateness of distributions, and
- Receiving something in consideration for distributions (whether or not this factor is supposed to parallel "reasonably equivalent value" standards or "payment on antecedent debt" standards is unclear).

Id. Although these factors are still a bit fuzzy, they appear applicable to any kind of "legitimate business purpose" argument, not just to the "legitimate tax purpose" defense. Thus, these four factors might make potentially onerous proof requirements for both Trustees and defendants in the future!

The Preferential Transfer Action

The Court's decision as to the preference action ultimately came down to the issue of whether or not the debtor could rebut a presumption of insolvency during the 90-day preference period. *Id.* at *42. Of particular note to practitioners is how the Court approached the Fifth Circuit's solvency analysis framework by incorporating specific examples of sufficient and insufficient evidence of solvency from the Eighth Circuit. The reason for this alteration was that Fifth Circuit cases had only identified certain kinds of speculative (i.e. insufficient) evidence of solvency, namely:

- Expert testimony that a potential purchaser would have said the debtor was solvent at the time. *Id.* at *40 (citing *In re Gasmark Ltd.*, 158 F.3d at 315-17).
- Third party memos stating that the debtor was making positive return on investment. *Id.* (citing *In re Gasmark Ltd.*, 158 F.3d at 315-17).
- Investment banker's letter noting that the debtor's equity had positive value in a particular market. *Id.* (citing *In re Gasmark Ltd.*, 158 F.3d at 315-17).
- Income statement showing positive operating income and small net loss in expenditures during the reachback period. *Id.* (citing *Cage v. Baker Hughes Oilfield Operations, Inc.* (*In re Ramba, Inc.*), 416 F.3d 394 (5th Cir.2005)).

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- Income statements showing positive balance sheets for periods of time prior to the transfer date. *Id.* (citing *Cage v. Baker Hughes Oilfield Operations, Inc.* (*In re Ramba, Inc.*), 416 F.3d 394 (5th Cir.2005)).

The Court added helpful boundaries to this rubric by adopting the Eighth Circuit's finding that sufficient evidence of debtor "solvency" includes financial statements showing positive net worth; although, unaudited financial statements and statements are insufficient, and financial statements offered by preference defendant are insufficient *per se. Id.* at *41 (citing *Jones Truck Lines, Inc. v. Full Serv. Leasing Corp.*, 83 F.3d 253, 258 (8th Cir.1996); *Katz v. Wells* (*In re Wallace's Bookstores, Inc.*), 316 B.R. 254, 259 (Bankr .E.D.Ky.2004)).

GOING FORWARD

Faulkner v. Kornman will have widespread value as an instructive and elaborative primer for Trustees and transferees on how to wed complex facts with the basic evidentiary requirements of avoidance actions. In a moment of candor, a bookkeeper and witness in the case testified that the multitude of interwoven relationships among the creditors and debtor constituted an insoluble "vortex." *Id.* at *22, n.30. Too often in avoidance action scenarios, the intricate vortex of transactions and relationships can thwart judges and parties alike. Fortunately for everyone involved in these actions, Chief Judge Houser's opinion offers an approach that logically divides circumstantial evidence gathering into more discrete, judicially manageable pieces, all within the plain language and spirit of the Texas UFTA statute and Bankruptcy Code § 547 (b).

The consequences of the opinion's contributions to lucidity will likely manifest in more efficient judicial economy because pleadings can occur with more specificity. The opinion also encourages increased settlements between transferees and Trustees due to the increased certainty of what constitutes a *prima facie* claim and/or defense. The more organized the proof is on both sides of the avoidance action proceeding, the less wading through facts the judge has to do. The bottom line—the parties bear the burden of straightening out the vortex.

YOUNG LAWYERS COMMITTEE

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

The Committee's leadership has recently changed, and will be led by **Brian Rogers** of Victoria as Chair (brogers@rogersdavis.com); **Joshua Searcy** of Longview as Vice-Chair (joshsearcy@jrsearcylaw.com); and **Layla Elzner** of Austin as Secretary (layla@ch13austin.com).

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

Liaison - Public Education - Omar Alaniz (Dallas)
Liaison - Business Division - Jermaine Watson (Dallas)
Liaison - Non-Lawyer Outreach - Vanessa Gonzalez (Austin)
Liaison - Professional Education - Sara Patterson (Houston)
Liaison - Law School Relations - Jennifer Parks (San Antonio)
Liaison - Communications - Eric Van Horn (Dallas)
Liaison - Consumer Division - Sonja Sims (San Antonio)