



BANKRUPTCY LAW

Section Newsletter

September 2014 — Volume 13 • No. 1

IN THIS ISSUE

Tribute to Michelle Annette Mendez	1
Letter from the Chair	3
Letter from the Editor	4
The Southern District of Texas Bench Bar Conference Held June 19-20, 2014 in Corpus Christi	4
Circuit Split on Fees Defending Fee Applications	6
<i>In re Frost</i> , 744 F3d 384 (5th Cir. 2014 – The Dollars vs. Dirt Case).....	7
11th Annual International Bankruptcy Law Seminar – Nice, France, April 2014	8
Chief Judge Houser to Receive the Norton Judicial Excellence Award	9
33rd Annual Jay L. Westbrook Bankruptcy Conference	9
Calendar of Events.....	10
Troop Movement	11

Tribute to Michelle Annette Mendez



As many of you are aware, on April 25, 2014 we lost our dear friend and section chair Michelle Mendez. So much has been written about her early passing that we wanted to write about her life, her love, and the great things she did for our section and others.

Born November 15, 1961 in Clarksburg, West Virginia, Michelle came from a caring home in a humble setting. She played in the muddy yard with her dog and worked in the family chicken business. Michelle is known to have raised chickens in her Dallas backyard and started a 4-H group in Dallas to allow her daughters to share the experience. Michelle never forgot where she came from, and her deep sense of humility and service was a standard that we all appreciated. Michelle gave of herself freely and with a commitment that can only be described as a genuine love for those she served.

Michelle's family, Luis R. Atilas, M.D., and their two beautiful daughters, Amelia Nicole and Elena Marie were the driving force of her life. Michelle never tired of talking about her girls and was very involved in all they did. Luis was the treasure that she found far away, and Luis joined Michelle for life coming with her to America from the Dominican Republic.

Michelle was a great friend to many. She always made time to visit with friends with an open ear and big heart. Michelle was great fun to be with and her presence always made events better. Michelle had a grand way of reaching people because she genuinely cared about them. She was always fair, firm when needed, and with a touch that made things right.

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Tribute to Michelle Annette Mendez
Continued from page <None>.

Michelle had a true passion for life and giving to others. She was dedicated to her many charities, including St. Monica Catholic School, North Dallas Shared Ministries, Sammons Center for the Arts, and Ursuline Academy. Of the numerous activities at St. Monica, Michelle is perhaps best known for her love and leadership of their Autumnfest festival.

Michelle was the 2013-2014 chair of the State Bar of Texas Bankruptcy Section. She also has chaired the Research Fellows of the Center for American and International Law and is a long-standing member of the President's Research Council of the University of Texas Southwestern Medical Center. She was a Dallas Bar Foundation Fellow and recipient of the Robert B. Wilson Distinguished Service Award from the State Bar of Texas Bankruptcy Law Section. Michelle was also a Master of the American Inns of Court, John C. Ford Inn.

During her distinguished legal career Michelle was an active participant in numerous professional associations, including: the American Bankruptcy Association; State Bar of Texas, Bankruptcy Law Section, Chair and Treasurer; Dallas Bar Association, Commercial Law and Bankruptcy Section, Chair; Texas Accountants and Lawyers for the Arts; Turnaround Management Association; International Women's Insolvency and Restructuring Confederation; Women's Finance Exchange; and The Center for American and International Research Fellow and Chair.

Michelle practiced law as a commercial bankruptcy and litigation attorney for 25 years, most recently as a partner with Conley, Rosenberg, Mendez & Brenneise, LLP. Prior to becoming a partner at Conley, Rosenberg, Mendez & Brenneise, LLP, Michelle practiced law in the Dallas offices of Hunton & Williams LLP, Jenkins & Gilchrist, P.C., Greenberg Traurig LLP, and as a partner with Bell Nunnally & Martin LLP. She joined Hutcheson & Grundy LLP as an associate upon graduation from The George Washington University Law School.

Michelle attended Sophia University in Tokyo, Japan and graduated magna cum laude as a Mary Katharine Babb Randolph Memorial Scholar from The University of Charleston.

Michelle was a leader, a lawyer, a mother, a wife, a giver, and a getter, and perhaps most important for us who knew her, Michelle was a sincere and caring friend, a light in this world, and she is greatly missed.





A MESSAGE FROM YOUR CHAIR

Dear Members of the Bankruptcy Law Section:

We dedicate this issue of the Section Newsletter to our Past Chair Michelle Mendez. Michelle was a major force in the Section since its inception. Although she will be missed, many of her efforts will be felt for years to come. As an example, we begin this year a series of one day CLE Seminars around the State. Courses will be held in El Paso, Lubbock and Lufkin. Announcements of dates will be forthcoming on the Listserv. The Section is underwriting these events in order to keep the price low, but the quality high.

Several other CLE events are planned for this year. They are listed in the Calendar of Events contained in this Newsletter and on our website. The year will end with the premier event in the State, the Section's Bench Bar Conference, to be held in Bastrop in late May.

This Newsletter was made possible because of the efforts of Kay Walker. Many of you know her as the lawyer who has made me look good for the many years as my law clerk. She is the best editor that I know and that is why I asked her to help put out this Newsletter.

Thanks also to Bill Wallander and Lyla Milligan for their assistance in making the sudden transition from Chair Elect to Chair.

Finally, I want to plug the University of Texas Law School 33rd Annual Jay Westbrook Bankruptcy Conference which will be held November 20 - 21 in Austin. Many of you who attended the event in the past perhaps remember that I used to perform bankruptcy rock and roll selections at the Thursday luncheon. Well, we're putting the Band back together one last time. The Young Lawyers Committee (YLC) will sponsor a party on Thursday evening at the Brass House. My Band will play classic rock and a few Bankruptcy favorites. I would love to have a big crowd. See you there!

Best Regards,
Judge Richard S. Schmidt
Chair, Bankruptcy Law Section

LETTER FROM THE EDITOR



I appreciate the opportunity to serve as your temporary editor. In my attempt to get a newsletter out asap, my comments will be short. As career law clerk to Judge Richard Schmidt for the past 23 years, the next 12 months will be bittersweet. We never know what the future holds, and that is particularly true for me this year. Those of you who practice in front of Judge Schmidt know what a great judge he is – smart, patient, practical, even handed. Those qualities do not change when he leaves the bench and arrives in chambers. Thank you Judge Schmidt, what a wonderful ride it's been. In keeping with that theme, stay tuned for news on next summer's statewide bench/bar conference at Lost Pines in Bastrop, where we will officially say "goodbye" to Judge Schmidt.

Sincerely yours,
Kay B. Walker, Editor (*pro hac vice*)

The Southern District of Texas Bench Bar Conference Held June 19-20, 2014 in Corpus Christi

The Southern District of Texas Bench Bar Conference was held this summer in Corpus Christi, Texas. Many distinguished judges and speakers attended and gave outstanding presentations. The highlight of the conference was the luncheon presentation honoring Judge Richard Schmidt, at which time Chief Judge Carl Stewart, Fifth Circuit Court of Appeals, regaled the crowd with stories about Judge Schmidt. The social event of the conference, and another highlight, was the gathering for a Hooks game at Whataburger field, where Judge Schmidt threw out the first pitch.

The Bankruptcy Section of the State Bar provided financial support for all four district bench/bar conferences this year and plans to continue its support.



Judge Schmidt preparing to throw the first pitch.



Chief Judge Carl E. Stewart, Kay Walker, and Judge Richard Schmidt at the Thursday luncheon.



Judges Schmidt, Jones, Bohm, and Isgur enjoying a night at the ball park.

CIRCUIT SPLIT ON FEES DEFENDING FEE APPLICATIONS

By: Cliff Carlson

Law Clerk to the Honorable Marvin Isgur

Baker Botts LLP, the law firm that litigated the largest fraudulent transfer judgment in Chapter 11 history, has filed a petition for writ of certiorari asking the Supreme Court of the United States to resolve a split among federal appellate courts whether it may recover the costs it incurred defending its fee application against the debtor's objection. *Baker Botts LLP et al. v. Asarco LLC*, 751 F.3d 291 (5th Cir. 2014), *petition for cert. filed*, 2014 WL 3735731 (U.S. July 29, 2014) (No. 14-103).

Section 330(a) of the Bankruptcy Code grants discretion to bankruptcy judges to award "reasonable compensation for actual, necessary services rendered by" an attorney or other professional employed by the estate. 11 U.S.C. § 330(a)(1). Before compensation may be awarded, the Code requires professionals to complete a detailed fee application, to which any party in interest may object. Section 330(a)(6) provides that *preparation* of such fee application is compensable. 11 U.S.C. § 330(a)(6). The issue is whether *defending* the fee application is compensable under § 330. The Fifth Circuit and the Ninth Circuit have reached opposite conclusions. In *In re Asarco*, the Fifth Circuit held that "[s]ection 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." *In re Asarco, L.L.C.*, 751 F.3d 291, 299 (5th Cir. 2014). The Ninth Circuit held that bankruptcy judges may award compensation for the defense of a fee application, at least when the defense is meritorious and successful. *In re Smith*, 317 F.3d 918, 928-29 (9th Cir. 2002).

In re Asarco

Asarco LLC, a copper mining, smelting, and refining company, filed for bankruptcy in 2005 because of cash flow deficiencies, environmental liabilities, and tax and labor problems. *Asarco, supra*. Baker Botts and Jordan Hyden Womble Culbreth Holzer served as counsel to Asarco during its Chapter 11 bankruptcy. These two law firms commenced a fraudulent transfer action on Asarco's behalf and recovered a judgment valued between \$7 and \$10 billion, which ultimately resulted in a reorganization plan that paid creditors' claims in full. The bankruptcy court awarded Baker Botts \$113 million in core fees, a \$4 million enhancement fee for their unusually successful fraudulent transfer litigation, and \$5 million to cover the fees and expenses incurred defending its fee claims. The district court affirmed the fee enhancement and agreed that the fees incurred to defend the firms' core fees were compensable but held that the fees incurred in pursuit of enhancements were not compensable. The Fifth Circuit affirmed the awards of fee enhancements but reversed the awards of fees for litigating the firms' fee applications.

The Fifth Circuit held that fees for the defense of a fee application are not reasonably likely to benefit the estate or necessary to case administration. *In re ASARCO, L.L.C.*, 751 F.3d 291, 299 (5th Cir. 2014). The Court reasoned that in the absence of explicit statutory guidance, requiring professionals to defend their fee applications is a fair cost of doing business in the bankruptcy context. *Id.* at 301.

Southern District of Texas

Until the Supreme Court of the United States resolves the circuit split, bankruptcy courts in the Fifth Circuit are bound by *Asarco*.

The bankruptcy court in the Southern District of Texas has recently issued two opinions interpreting *Asarco*. In *Nwokedi*, the bankruptcy court allowed counsel to collect fees incurred for appearing at an uncontested fee application hearing. *In re Nwokedi*, 2014 WL 4199106 (Bankr. S.D. Tex. 2014). The court reasoned that "[b]ecause [counsel's] initial fee application was uncontested, these fees do not relate to the *defense* of her fee application." *Id.*

In the second case, *Rodriguez*, the bankruptcy court allowed counsel to recover a portion of her fees related to the defense of a fee application. *In re Rodriguez*, 2014 WL 4230821 (Bankr. S.D. Tex. 2014). The court found that the Fifth Circuit's holding in *Asarco* was not applicable because counsel was entitled to fees under § 105, not under § 330. In *Rodriguez*, counsel represented chapter 13 debtors in connection with a class action lawsuit against Countrywide Home Loans, Inc. The bankruptcy court ultimately held that compensating plaintiffs' counsel for legal fees was an appropriate remedy for Countrywide's violation of Bankruptcy Rule 2016(a) and the court's orders confirming plaintiff's chapter 13 plan.

Continued on page 12.

Show Me the Money: Fifth Circuit Rethinks Pro-Snax Rule in *Barron & Newburger, P.C. v. Texas Skyline, Limited, et al.* (Matter of Woerner)

By: Tyson Attaway

University of Mississippi School of Law, May 2015

Judicial Intern to the Honorable Harlin D. Hale, Summer 2014

U.S. Bankruptcy Judge, N.D. Texas

(tattaway@go.olemiss.edu)

In July 2014, the Fifth Circuit rendered its opinion in *Barron & Newburger, P.C., v. Texas Skyline, Limited, et al.* (Matter of Woerner), 2014 WL 3443653 (5th Cir. 2014), which dealt with a bankruptcy court's order reducing the fees a debtor's counsel received under 11 U.S.C. § 330. Barron and Newburger ("B & N") represented the debtor which initially filed a voluntary petition under Chapter 11 of the Bankruptcy Code. When the case was later converted to Chapter 7, B & N's services ended. B & N subsequently filed an application for fees in excess of \$130,000, but the bankruptcy court allowed only approximately \$20,000 and disallowed the remainder. Citing *In re Pro-Snax Distributors, Inc.*, 157 F.3d 414 (5th Cir. 1998), the bankruptcy court explained that, for a service to be compensable under § 330, fee applicants must prove that the service resulted in an "identifiable, tangible, and material benefit to the estate." The court denied most of the fees because of B & N's lack of success and lack of identifiable benefit. The district court affirmed. On appeal, B & N argued that the bankruptcy court misapplied Fifth Circuit precedent and 11 U.S.C. § 330 in reducing its fees. The Fifth Circuit affirmed the decision of the bankruptcy court, but was somewhat begrudged that it was forced to rely on the controversial *Pro-Snax* standard. Accordingly, Judge Edward C. Prado wrote a special concurrence, joined by the other judges on the panel, denouncing the *Pro-Snax* standard and urging reconsideration by the Fifth Circuit sitting *en banc*.

Judge Prado's concurrence finds *Pro-Snax* to be misguided for three reasons: it conflicts with the language and legislative history of § 330; it diverges from the decisions of other circuits; and it sowed confusion in the circuit. *Barron, supra*. First, Section 330 constrains a bankruptcy court's discretion to determine the amount of fees by requiring the court to "take into account" a set of listed factors, including "whether the services were necessary to the administration of, or beneficial at the time at which the service rendered." 11 U.S.C. § 330(a)(3)(C); *Barron, supra*. at *8. Further, a court must disallow any compensation when "the services were not reasonably likely to benefit the estate..." 11 U.S.C. § 330(a)(4)(A)(ii)(I). Thus, contrary to the *Pro-Snax* standard, a court under the statute may compensate an attorney for services that are "are reasonably likely to benefit the estate" and adjudge that reasonableness "at the time at which the service was rendered." Second, other circuits, including the Second, Third, and Ninth Circuits rejected the actual benefit test required by *Pro-Snax*. See, *In re Ames Department Stores, Inc.*, 76 F.3d 66 (2d Cir. 1996); *abrogated on other grounds by Lamie v. U.S. Tr.*, 540 U.S. 526 (2004) (opted to use reasonably likely to benefit the estate standard rather than actual benefit); *In re Top Grade Sausage, Inc.* 227 F.3d 123 (3d Cir. 2000); *abrogated on other grounds by Lamie v. U.S. Tr.*, 540 U.S. 526 (rejected *Pro-Snax* approach but departed from the statute by imposing a heightened standard and hindsight evaluation); *In re Smith*, 317 F.3d 918 (9th Cir. 2002) (held that § 330(a)(4)(A) superseded its past precedent that required the services provided be of actual benefit to the estate). Finally, Judge Prado discussed multiple cases in which the Fifth Circuit's district and bankruptcy courts interpreted *Pro-Snax* differently, leading him to conclude that the differing approaches evidences the necessity of "squaring [Pro-Snax] with the statute." *Barron, supra*. at *9.

Given the rarity of an appellate panel unanimously joining in a special concurrence, the case of *Barron & Newburger, P.C. v. Texas Skyline Limited* is certainly one to keep an eye on. Hopefully, the court of appeals will accept Judge Prado's plea for an *en banc* review so that compensation for bankruptcy professionals in the Fifth Circuit will comport with statutory law and other circuits.

IN RE FROST, 744 F3D 384

(5th CIR. 2014 – THE DOLLARS VS. DIRT CASE)

Eduardo V. Rodriguez, Managing Attorney Rio Grande Valley, Malaise Law Firm

Introduction

Texas law provides broad protection for homesteads. The law exempts homesteads from seizure or encumbrance in all but a narrow range of circumstances, and caps homesteads in size but not in value. TEX. PROP. CODE ANN. §§ 41.001, 41.002. In addition to the homestead itself, Texas protects the proceeds of a homestead sale—but only for a limited time. Proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale. TEX. PROP. CODE ANN. § 41.001(c). The proceeds lose their exemption after six months, unless they are reinvested in another exempt Texas homestead. The rule is referred to as the “Texas Proceeds Rule.” The *Frost* case is one involving the proceeds of the sale of a homestead which came before United States Bankruptcy Judge Ronald King on a Section 522(c) issue. The facts of the case are as follows:

Procedural History

On November 30, 2009 the Debtor filed a voluntary chapter 13 proceeding. Although the applicable commitment period was 36 months, the Debtor filed a 51 month plan. Schedule A listed his homestead valued at \$257,000.00 with a secured lien of \$100,000.00. The First Meeting of Creditors was scheduled for January 13, 2010 and was eventually concluded on January 28, 2010. Thereafter, on March 3, 2010 the Debtor filed a Motion To Sell his Home Free And Clear of Liens in the amount of \$200,000.00. By this time, all exemptions were allowed pursuant to F.R.B.P. 4003(b) as no objections were lodged against the Debtor.

On March 23, 2010, the Trustee filed her Objection to the Debtor's Motion to Sell. In her Objection, the Trustee basically stated that the Debtor's Motion to Sell was not clear on how the net proceeds in the amount of \$81,000.00 were going to be used after the sale closed and funded. The Debtor simply stated that the proceeds would be paid into the Trustee's Office. The Trustee requested that the proceeds be used to increase the Debtor's Plan base. The Debtor listed General Unsecured Claims in the amount of \$55,000.00 and the Plan proposed a 1% dividend to same. On July 1, 2010, the Bankruptcy Court granted the Motion authorizing the sale of the homestead and ordered the Debtor to deposit all of the proceeds with the Chapter 13 Trustee's office pending further orders of the Court. On November 21, 2010, the Debtor then filed an Amended Plan shortening the term to 36 months and the 1% dividend to the General Unsecured Class remained the same.

On December 13, 2010 the Court issued its order on an objection to a secured claim filed by a creditor resulting in an additional Allowed General Unsecured claim in the amount of \$27,000.00. On December 15, 2010, The Trustee filed her objection to the Amended Plan asking the Court to rule on her objection to the exemption of the sale proceeds. January 3, 2011, the Court entered an interim Order authorizing the Trustee to release \$40,000.00 to the Debtor and to retain the remaining \$41,000.00 pending further Orders of the Court. The Court reasoned that the \$41,000.00 would be just enough to fund a 100% Plan.

Bankruptcy Court's Order

On May 11, 2011 the Court concluded that the net sale proceeds of \$81,000.00 would be exempt for six months commencing January 27, 2011 and remain exempt if reinvested into another homestead. However, the Court discovered that the Debtor had already spent \$23,000.00 and could no longer reinvest this amount into another homestead and therefore held that the \$23,000.00 was property of the estate and Ordered that the Plan base be increased by that amount and that the Trustee reserve the remaining amounts pending expiration of the 6 month period. Debtor appealed to the District Court.

Continued on page 12.

11th ANNUAL INTERNATIONAL BANKRUPTCY LAW SEMINAR – NICE, FRANCE, APRIL 2014

The Eleventh Annual International Bankruptcy Law Seminar was held April 2 through April 9, 2014 in Nice, France. Judges, lawyers, bankruptcy professionals, and their families from across the state came together to enjoy a week of leisure, learning and luxury along the French Riviera. The seminar was chaired by Bryan and Megan Fears, of Fears Nachawati Law Firm. Bryan and Megan worked tirelessly to make sure attendees arrived safely and planned multiple events to ensure everyone enjoyed the trip.

The seminar featured a Judge's panel and several speakers including Roy Spitz, a local attorney from Nice who spoke about France's insolvency laws. During the lecture, Mr. Spitz outlined one difference with respect to France's consumer bankruptcy law in comparison to U.S. bankruptcy law—business insolvency employees are given preference over creditors. Following the insolvency law presentation, June Mann treated everyone to a lecture regarding celebrity bankruptcies and discussed which historical figures have filed for bankruptcy. Judges King, Schmidt, and Jones were featured in a Judge's panel and provided insight on many of the presentations. Additionally, Janet Northrup, Pamela Johnson, Riecke Baumann, Herman Lusky, Mitchell Ayer, Evelyn Breithaupt, Mitchell Ayer, and William Kunofsky spoke on topics ranging from Ethics and Tax Issues to Expert Witnesses.

The seminar proved to be a great networking and social event, bringing together practitioners and their spouses from all over Texas. Attendees included attorneys from large and small firms, business and consumer practices, creditor and debtor attorneys, as well as trustees and Judges.

The trip was not just time spent in the classroom, but included trips and tours across the French Riviera. There was a bus and walking tour of the City of Nice, where participants were shown the marvelous coastal views from high in the mountains and then guided on a stroll through the town center to enjoy the shopping, art and architecture.

Highlights included a tour of Eze and Monaco where participants observed the daily operations of a perfume factory and walked the streets where the Monaco Formula One Grand Prix race takes place. Participants also spent a full day in Antibes, Cannes and St.-Paul-de-Vence, seeing the sites of the famous Cannes film festival as well as the Picasso museum and Antibes market. All the while participants enjoyed the wine, cuisine, and shopping offered by the beautiful French Riviera.

By all accounts, this trip was a resounding success! A special thank you is due to all speakers for the substantial time and effort that was put into preparing their papers and presentations. Stay tuned for details about next year's trip to exotic Bali.



More fun at the speakers dinner



Judy Robbins, U.S. Trustee and friends enjoying the speakers dinner



Lunch at Monte Carlo



On the road to Monte Carlo

Chief Judge Houser to Receive the Norton Judicial Excellence Award



Chief Judge Barbara J. Houser will receive the Norton Award for Judicial Excellence at the Annual Meeting of the National Conference of Bankruptcy Judges (NCBJ). This award is given annually to a bankruptcy judge, based upon a career of lifetime achievement, who has distinguished herself as an educator, writer, or scholar. Judge Houser certainly meets all of these criteria. Texas bankruptcy lawyers know of her scholarly opinions and thoughtful CLE presentations. She is also a contributing editor to *Collier on Bankruptcy* and has taught *Creditors' Rights* as a Visiting Professor at the SMU Dedman School of Law. She is a fellow of the American College of Bankruptcy, a conferee of The National Bankruptcy Conference and a member of the Board of Directors of the American Bankruptcy Institute. She currently serves on the Judicial Conference Committee on the Administration of the Bankruptcy System and is a member of the faculty that the Federal Judicial Center selected to teach new bankruptcy judges.

In conjunction with



**33rd Annual Jay L. Westbrook
Bankruptcy Conference**

**DON'T MISS IT!!!!
YOUNG LAWYERS COMMITTEE PARTY
THURSDAY, NOVEMBER 20, 2014, 8-11 p.m.**

The Brass House
115 San Jacinto Blvd.
Austin, Texas

**Featuring:
Judge Richard Schmidt and his Band
In their Final Performance**

Food, drinks, fun!

Calendar of Upcoming Events

Sept. 4-6, 2014	ABI Southwest Bankruptcy Conference Las Vegas, Nevada
Sept. 11-13	ABI CARE Conference Four Seasons Hotel & Resort, Dallas, Texas
Sept. 29-30	TMA Annual Conference Toronto, Canada
Oct. 1, 2014	TMA Annual Conference Toronto, Canada
Oct. 8-11	NCBJ Chicago, Illinois
Nov. 20-21, 2014	Westbrook Conference – UTCLE Austin, Texas
Dec., 4-6, 2014	ABI Winter Leadership Conference La Quinta, California
Feb. 18, 2015	Nuts and Bolts of Bankruptcy – Bankruptcy Law Section State Bar of Texas Houston, Texas
Feb. 19-20	Advanced Business & Consumer Bankruptcy Course Bankruptcy Law Section State Bar of Texas, Houston, Texas
Feb. 25-27	VALCON Las Vegas, Nevada
March 12-21 2015	Bankruptcy Section State Bar of Texas, International Seminar, Bali, Indonesia
April 16-19, 2015	ABI's Annual Spring Meeting Washington, DC
May 27-29, 2015	Bankruptcy Section State Bar of Texas, Bench Bar Conference, Bastrop, Texas

Troop Movement

Eric Van Horn has joined Vanacour Schuler Zarin, Dallas, as partner.

Tim Springer is completing his clerkship with Judge Lynn and will be joining Norton Rose Fulbright.

Christopher Bradley is completing his clerkship with Judge Davis and will join Hohmann, Taube & Summers (Austin).

Jordan Lewis will begin his term clerkship with Judge Hale and Stephen Manz of Haynes and Boone will join Judge Hale's chambers as a career law clerk.

Anabel King has joined Shapiro Schwartz LLP.

Hershel R. Chapin has joined Weinstein, Pinson & Riley, P.S. as Managing Attorney.

Jessica Voyce left Baker Botts to dedicate her work to a West Dallas-based non-profit organization.

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.

Please visit our website: <http://www.txbankruptcylawsection.com/>.

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Circuit Split on Fees Defending Fee Applications
Continued from page 5.

In *Asarco*, the Fifth Circuit recognized that under certain fee-shifting statutes, counsel's time spent litigating a fee award is often compensable. The bankruptcy court reasoned that the basis for awarding fees in *Rodriguez* was akin to the equitable bases for awarding fees under other fee-shifting statutes. The court pointed out that fee-shifting statutes in the civil rights context allow for recovery of such fees in order to create an incentive for financially disadvantaged plaintiffs to obtain legal redress. Based on this logic, the bankruptcy court awarded a portion of counsel's fees for defense of her fee application as an equitable remedy under § 105.

*Editor's Note: The Bankruptcy Section filed an *amicus curiae* brief urging the Supreme court to resolve the split of circuits.

In re Frost, 744 F3d 384 (5th Cir. 2014 -The Dollars vs. Dirt Case
Continued from page 7.

Appeal To The U.S. District Court

The following were the issues on appeal:

1. Whether the bankruptcy court erred in finding that the homestead sale proceeds not reinvested in a homestead within 6 months from the date of sale lose their exempt status.
2. Whether the court erred in finding that the homestead sale proceeds not reinvested in a homestead after 6 months were property of the estate under 11 U.S.C. §541.
3. Whether the court erred in finding that the homestead sale proceeds not reinvested in a homestead after 6 months were property of the estate under 11 U.S.C. §1306.
4. Whether the court erred in holding that the Debtor's use of \$23,000.00 for purposes other than reinvestment in a homestead caused that amount of proceeds to lose its exempt status, and increased the base plan.
5. Whether the court erred in sustaining the Trustee's Objection to the Motion To Sell Real Property Free & Clear of All Liens and Interests.

U.S. District Court's Ruling

On July 10, 2012 the District Court affirmed the Bankruptcy Court's ruling. The Court observed that the Debtor argued that *Schwab v. Reilly*, 560 U.S. 770, 130 S. Ct. 2652 (2010) applied and under *Schwab*, it was the value of the dollars that was exempt, not the property. The District Court dismissed the argument stating that unlike in *Schwab*, the Debtor here used the more generous State Exemptions and the Court had to look to the State law to determine the extent of the homestead exemption rights. The Court held that the Texas Statutes do not exempt interests in property but the property itself. TEXAS PROPERTY CODE §41.01. The matter was appealed to the Fifth Circuit.

The Fifth Circuit Opinion

On March 5, 2014 the Fifth Circuit affirmed the District Court. In a short nine page opinion the Fifth Circuit affirmed the District Court. The Court noted that the Debtor argued that the Court's ruling clashed with *section 522(c)* which states that "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." 11 U.S.C. §522(c); *In re Frost*, 744 F.3d 384 (5th Cir. 2014).

Continued on page 13.

In re Frost, 744 F3d 384 (5th Cir. 2014) - *The Dollars vs. Dirt Case*
Continued from page 13.

The Zibman Argument

The Court held that the Debtor's argument that exemptions are fixed as they appear on the date of the bankruptcy filing is foreclosed by *Matter of Zibman*, 268 F.3d 298 (5th Cir. 2001). In *Zibman*, the Court observed, that the debtors sold their homestead 3 months prior to filing bankruptcy and never reinvested the proceeds in a homestead. When the six month exemption period expired the Trustee challenged the debtor's exemptions. The Court held that ". . .the six month limit on the exemption was an integral feature of the Texas law applicable on the date of the filing and that this essential element of the exemption must continue in effect even during the pendency of a bankruptcy case." *Id.* at 301. In *Frost*, the Court restated its holding in *Zibman*, noting that "[o]nce Frost sold his homestead, the essential character of the homestead changed from "homestead" to "proceeds", placing it under section 41.001(c)'s six month exemption. Because he did not reinvest those proceeds within that time period, they are removed from the protection of Texas bankruptcy law and no longer exempt from the estate." *Frost, supra.* at 387.

Frost then argued that its case was distinguishable from *Zibman* in that Section 522(c) protects property exempted under this section both during and after the bankruptcy. The Debtor argued that while the *Zibman* proceeds were temporarily exempted, the Frost homestead exemption was a permanent exemption which was permanently removed from the estate. The Fifth Circuit dismissed the debtor's temporal argument stating simply that "the sale of the homestead voided the homestead exemption, regardless of whether the sale occurred pre or post petition." *Id.* at 388. This interpretation, stated the Fifth Circuit, "gives effect to both the fact that the homestead exemption is in place at the petition filing date and that the state's law remains equally enforceable with regard to those in bankruptcy and non-bankruptcy." *Id.*

The First & Eleventh Circuit Opinions Argument

Relying on 11 U.S.C. §522(c) the debtor argued that the First and Eleventh Circuit courts opined that the voluntary post-petition sale of the debtor's homestead did not render the proceeds estate property available to satisfy the pre-petition debts because property exempted on the date of filing is permanently immunized and withdrawn from the estate. *Frost, supra.* at 389 . Upon first blush the Circuit opinions seem to support the debtor's argument that exempt proceeds are exempt under 522(c) even after a voluntary post-petition sale of the homestead. However, upon a closer look, the Court noted that the state law in the two circuits ". . .exempted a monetized interest in equity where as in Texas the Frost's interest in his homestead changed from an unconditionally exempted interest in the real property itself to a conditionally exempted interest in the monetized proceeds from the sale of that property." *Id.* at 389. Essentially, adopting the Debtor's argument of the "snapshot" rule would require the Fifth Circuit to reject its holding in *Zibman*, i.e. allowing the proceeds of a sale of a home to be exempted indefinitely despite the 6 month limitation imposed by State law.

The Schwab v. Reilly Argument

As a last ditch effort, Frost argued that even if *Zibman* did apply, the Supreme Court's holding in *Schwab* protects his monetary interest and preempts Texas' limitation on exempting his property. If you will recall, the debtor Reilly listed assets on schedules B and C and claimed the maximum statutory exemptions allowed. Trustee Schwab did not object. When Schwab moved to auction the assets Reilly argued that it was the assets themselves, not the statutorily mandated maximum value of the exemption and that Schwab waived his right to challenge those exemptions. Schwab of course argued that Schedule C only exempted the value assigned to the debtor's interest in the property not the entire value of the asset itself. The Supreme Court ruled for Schwab stating that "the exemption applied to the debtor's interest – up to a specified dollar amount – in the assets described in the category, not to the assets themselves." *Id.* at 782.

Still, Frost argued that exempt is exempt and that because he claimed as exempt the full amount of equity in his homestead – that equity was exempt under the logic of *Schwab* and cannot become nonexempt be it dirt or dollars. *Frost, supra.* at 390 . The Court was not persuaded. The Court noted that the property exempted in *Schwab* was fundamentally different from that in the present case. The Court said that "[b]ecause the property exempted in that case was a monetary interest in a certain category of property – not [in] the assets themselves – it makes sense that the debtor's interest would be limited to the value of his claimed exemption and bound by its Schedule C representations." *Id.* In contrast, the property in Frost is real property with no limitation in dollar amount on its value. Finally, focusing on the language contained in Section 522(d), the Court stated that it is the property itself, not its monetary value, that is protected under Texas law and "exempted under this section." *Id.* at 391.