BANKRUPTCY LAW SECTION
STATE BAR OF TEXAS

Spring 2023 Newsletter

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In the Matter of: Tony M. Davis, Bankruptcy Judge.

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Memorandum Opinion

With the recent retirement of the Honorable Tony M. Davis, we reflect on his career as a lawyer and his tenure as a judge. In an opinion, Judge Davis once quipped "[a]s a lawyer, I liked multi-factor tests; I was spared the need to outline my brief. As a judge, now five years in, I still fail to see how they provide a reasoned basis for a decision."[1] As the authors do not seek to decide anything in this opinion (and really, should be recused),[2] they respectfully submit that a multi-factor test is appropriate for analyzing the life and career of Judge Davis.[3]

Socrates is credited with saying that "Four things belong to a judge: To hear courteously, To answer wisely, To consider soberly, And to decide impartially."[4] During a recent program hosted by the U.S. Courts, the panel judges gave further suggestions as to the attributes needed of a judge, such as curiosity, open-mindedness, trustworthiness, leadership, and a focus on preparedness.[5] Finally, Judge Richard Posner explained that "[a] good judge has several qualities: an ability to write clearly and persuasively, legal knowledge and experience, good judgment, a deep sense of fairness, and independence of mind."[6] From these we can distill six characteristics—or factors—that a judge should possess: (1) experience and knowledge; (2) curiosity; (3) preparation; (4) an ability to write clearly and persuasively; (5) leadership; and (6) impartiality.

Experience and Knowledge

> "Experience is by industry achiev'd,
> And perfected by the swift course of time."[7]

Judge Davis attended the University of Minnesota at Morris and graduated in 1980. He then went to the University of Virginia School of Law—a school he is most proud of, despite the recent first-round upset they suffered to Furman in the NCAA Tournament.[8] Upon graduating law school, he worked for Conner & Winters in Tulsa, Oklahoma, from 1983 to 1991. There he met his first two mentors, Jim Kincaid and Jim Ryan. The former taught the future judge how to speak to

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[1] *In re IO at Tech Ridge LP*, 646 B.R. 884 n.64 (Bankr. W.D. Tex. 2018) (Davis, J.).

[2] Jack and Maegan clerked for Judge Davis for the 2022-23 and 2017-18 terms, respectively.

[3] In a later interview with the authors, Judge Davis explained that he disliked using multi-factor tests as a balance or equation; he did, however, see their value as a storytelling device. *See generally In re Arabella Petroleum Co., LLC,* 647 B.R. 851 (Bankr. W.D. Tex. 2022) (Davis, J.).

[4] Justice Steven H. David, *Four Things: Socrates and the Indiana Judiciary*, 46 IND. L. REV. 871, 872 (2013).

[5] Panel Discussion at "Roadways to the Bench" Virtual Event (Apr. 3, 2023).

[6] HON. RICHARD POSNER, HOW JUDGES THINK 235 (HARV. PRESS 2009).

[7] WILLIAM SHAKESPEARE, THE GENTLEMEN OF VERONA act 1, sc. 3, l. 22-23.

[8] Michael DiRocco, *No. 13 Furman Deals No. 4 Virginia Another Early NCAA Tourney Exit*, ESPN (Mar. 16, 2023), https://www.espn.com/mens-college-basketball/story/_/id/35874027/no-13-furman-deals-no-4-virginia-another-early-ncaa-tourney-exit.

a judge, the latter taught him how to unpack a complex legal issue.[9]

Judge Davis eventually left Oklahoma for Texas and joined the Houston office of Baker Botts, where he remained until taking the bench in 2013.[10] At Baker Botts, Judge Davis met another mentor, Jack Kinzie, from whom he learned how to listen.[11] One of his first cases at the Texas firm, *Insilco,* was presided over by his future friend and colleague, the Honorable Ronald B. King. Although Judge Davis started out as third chair in *Insilco*, Judge King later noted that he "could see Tony's fingerprints all over the case because of the organization and preparation."[12]

At Judge Davis's retirement party, Judge King also explained how *Insilco*, which involved "hotly contested issues" and environmental claims,[13] foreshadowed Judge Davis's later work in the famous *ASARCO* case, which involved nearly $6.5 billion in environmental claims.[14] Judge Davis would later explain that working on *ASARCO* was one of the most formative periods of his career, during which he had to "use all the tools in the toolbox to succeed."[15] Judge Schmidt for the Bankruptcy Court for the Southern District of Texas, Galveston Division, had high praise for then-attorney Davis and the Baker Botts team:

> Debtors' counsel, led by Tony Davis with Baker Botts, initiated and ultimately set in place a procedure for pre-trial, discovery, mediation and trial schedule for the estimation of the environmental claims that would have resulted in Court orders or settlements in months instead of years even if all such claims had to be estimated to a final judgment. This incredible process required Debtors' counsel to prepare for multiple-tracked sites teams of environmental and bankruptcy lawyers toward mediation, trial or settlement of each site, yet coordinated such that overlapping legal issues, overlapping facts and experts, could be efficiently implemented.[16]

Around the time Judge Davis took the bench, Bill Stutts, Judge Davis's colleague at Baker Botts, affirmed Judge Davis's work ethic and knack for organization evidenced by his handling of the *ASARCO* case.[17] Mr. Stutts believes that the description is accurate today, and recently stated that Judge Davis's self-control, intelligence, and sense of responsibility are some of his defining characteristics.[18] Judge Davis's career isn't just impressive on paper; he has internalized all that experience, so when Judge Leif Clark stepped down in 2012, Judge Davis was ready for the next chapter in his life—one in

[9] Video Interview with the Hon. Tony M. Davis (Mar. 30, 2023).

[10] Stephen Sather, *Meet Judge Tony Davis*, A TEXAS BANKRUPTCY LAWYER'S BLOG (Apr. 1, 2013, 3: 11 PM), http://stevesathersbankruptcynews.blogspot.com/2013/04/meet-judge-tony-davis.html.

[11] Video Interview with the Hon. Tony M. Davis (Mar. 30, 2023).

[12] Interview with the Hon. Ronald B. King (Mar. 30, 2023).

[13] Hon. Ronald B. King, Remarks at the Retirement Party of Judge Davis (Jan. 13, 2023).

[14] Stephen Sather, *Meet Judge Tony Davis*, A TEXAS BANKRUPTCY LAWYER'S BLOG (Apr. 1, 2013, 3: 11 PM), http://stevesathersbankruptcynews.blogspot.com/2013/04/meet-judge-tony-davis.html.

[15] Video Interview with the Hon. Tony M. Davis (Mar. 30, 2023).

[16] *In re ASARCO, LLC*, 2011 Bankr. LEXIS 2880 at *26-27 (Bankr. S.D. Tex. 2011).

[17] Stephen Sather, *Meet Judge Davis (Expanded Version)*, A TEXAS BANKRUPTCY LAWYER'S BLOG (Jul. 11, 2013, 9:35 AM), http://stevesathersbankruptcynews.blogspot.com/2013/07/meet-judge-davis-expanded-version.html.

[18] Interview with Bill Stutts (Mar. 31, 2023).

service on the bench. Those characteristics that helped him shine as an attorney enabled him to face the new challenge of what Judge Davis would later call "the art of judging."[19] As Professor Jay Westbrook explained, "[t]he decision by Tony Davis to become a bankruptcy judge was an important example of the excellence that the bench has achieved in Texas and the whole country."[20]

Curiosity

"The true sign of intelligence is not knowledge but imagination. I have no special talent. I am only passionately curious."[21]

Many attorneys have prominent careers. Many attorneys have knowledge and experience. But as Judge Davis advised his clerks, you need to develop a broad skillset to be a great bankruptcy practitioner.[22] No doubt, Judge Davis's innate curiosity enabled that development. That curiosity was recognized by Judge Davis's colleagues at the bar and on the bench. Mr. Stutts described Judge Davis as a "voracious learner."[23] Judge Davis's fellow Austin bankruptcy judge, the Honorable H. Christopher Mott, depicted his friend and colleague as a classic "renaissance man" who has "wide interests and many areas of knowledge, ranging from history, Shakespeare, and art, to golf and college basketball, to name just a few."[24] In addition to sharing a library between their judicial chambers, Judge Davis and Judge Mott shared their personal libraries—trading books of expected mutual interest.[25]

As well as indicating intelligence, one study suggests that curiosity can increase our patience as well[26]—another attribute critical to success on the bench.[27] Another study reported data "showing that science curiosity promotes open-minded engagement with information that is contrary to individuals' political predispositions."[28] Perhaps that curiosity and open-mindedness (and not Judge Davis's single-digit handicap) were why Judge Mott always selected his colleague to be his partner in golf tournaments.[29]

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[19] Email from the Hon. Tony M. Davis to Jack Eiband and Sarah Wood (Oct. 22, 2022, 6:16 PM CST) (on file with authors).

[20] Email from Prof. Jay Westbrook, Univ. of Tex., to Maegan Quejada (Mar. 17, 2022, 1:18 PM CST) (on file with authors).

[21] Attributed to Albert Einstein; *see also* Tomas Chamorro-Premuzic, *Curiosity is as Important as Intelligence*, HARV. BUS. REV. (Aug. 27, 2014), https://hbr.org/2014/08/curiosity-is-as-important-as-intelligence ("Knowledge and expertise, much like experience, translate complex situations into familiar ones, so CQ [curiosity quotient] is the ultimate tool to produce simple solutions for complex problems.").

[22] Video Interview with the Hon. Tony M. Davis (Mar. 30, 2023).

[23] Stephen Sather, *Meet Judge Tony Davis*, A TEXAS BANKRUPTCY LAWYER'S BLOG (Apr. 1, 2013, 3: 11 PM), http://stevesathersbankruptcynews.blogspot.com/2013/04/meet-judge-tony-davis.html.

[24] Email from the Hon. H. Christopher Mott to Jack Eiband (Mar. 3, 2023, 11:04 AM CST) (on file with authors).

[25] Interview with the Hon. H. Christopher Mott (Mar. 3, 2023).

[26] David Robson, *Curiosity: The neglected trait that drives success*, BBC (Sept. 6, 2022), https://www.bbc.com/worklife/article/20220831-curiosity-the-neglected-trait-that-drives-success

[27] *See also* Proverbs 14:29 (New International Version) ("Whoever is patient has great understanding, but one who is quick-tempered displays folly.").

[28] Dan Kahan, et al., *Science Curiosity and Political Information Processing*, ADVANCES IN POLITICAL PSYCHOLOGY, Vol. 38, Suppl. 1, 2017.

[29] Interview with the Hon. H. Christopher Mott (Mar. 3, 2023).

Preparation

"He who is faithful in what is least is faithful also in much; and he who is unjust in what is least is unjust also in much."[30]

A key uncontested fact of Judge Davis's spanning career is that Judge Davis takes every obligation as seriously as the next. Judge King noted that the *Insilco* case was extremely well-organized and carried the hallmarks of Judge Davis's now-renowned preparation.[31] But the gravity and sobriety Judge Davis brought to *Insilco* and *ASARCO* was not limited to complex Chapter 11 cases; rather, as a judge and in his personal life, Judge Davis takes pride with and responsibility for everything he does, no matter how seemingly small.

Having spent his pre-judicial career as a business restructuring lawyer, Judge Davis acknowledged that one of the toughest challenges upon taking the bench was tackling the consumer dockets. He attributed hard work and preparation to his ability to overcome that challenge, to being "generally as prepared as you possibly could be."[32] This comment corroborated a statement by Mr. Stutts a decade earlier, that "by the time [Judge Davis] handles his first Chapter 13 hearing, he will have studied until he knows as much as or more than anyone else in the room."[33] Mr. Stutts was correct in his prediction. Part of the "general preparedness" Judge Davis later alluded to included his attending the Chapter 13 dockets of other judges in the Western and Southern Districts of Texas, as well as helping Judges Isgur and Gargotta with the Galveston Consumer Bankruptcy Seminar.[34]

An ability to answer wisely and write clearly and persuasively

"Writing is thinking. To write well is to think clearly. That's why it's so hard."[35]

Judge Davis takes pride in his writing. This is not only reflected in his opinions, but was a consistent takeaway by all of his clerks. Each left his tutelage a better writer, and each is more appreciative of the art and science of writing.

When asked which authors have influenced his own writing style, Judge Davis answered frankly: "All of them."[36] Judge Davis is an avid consumer of any good writing, ranging from legal to fantasy.[37] He testified that books that he had recently read include "Wolf Hall" by Hilary Mantel and "We Don't Know Ourselves: A Personal History of Modern Ireland" by Fintan O'Toole.[38] He also takes active steps to improve his writing, with yearly readings of Strunk & White. After mastering the Elements of Style, he recommends Steven Pinker's Sense of Style and Ross Guberman's books.

Sarah Wood, Judge Davis's career law clerk who worked alongside Judge Davis for his entire time on the bench, stated that if she had to pick, writing with Judge Davis was her favorite part of the job.[39] They still mourn that an opinion they

[30] Luke 16:10 (New King James)

[31] Interview with the Hon. Ronald B. King (Mar. 30, 2023).

[32] Video Interview with the Hon. Tony M. Davis (Mar. 30, 2023).

[33] Stephen Sather, *Meet Judge Tony Davis*, A TEXAS BANKRUPTCY LAWYER'S BLOG (Apr. 1, 2013, 3: 11 PM), http://stevesathersbankruptcynews.blogspot.com/2013/04/meet-judge-tony-davis.html.

[34] Video Interview with the Hon. Tony M. Davis (Mar. 30, 2023).

[35] Quote by David McCullough, historian.

[36] Video Interview with the Hon. Tony M. Davis (Mar. 30, 2023). Perhaps unsurprisingly, Judge Davis cited Chief Justice John Roberts and Justices Elena Kagan and Oliver Wendell Holmes as his favorite legal writers.

[37] *Id.*

[38] *Id.*

[39] Interview with Sarah Wood (Apr. 17, 2023).

wrote together will never be read because the parties settled right before it was signed. Still, at least they know (and one of the authors of this opinion can witness) that the opinion scored near 100% in BriefCatch, a brief/opinion writing tool designed by Ross Guberman that they used to refine their work.[40]

Leadership

"A judge is a leader whether he wants to be or not. He cannot escape responsibility in his jurisdiction, for setting the level of the administration of justice and of the practice of law."[41]

As mentioned, Judge Davis showed leadership as an attorney: he was thrown into the *Insilco* case roughly 15 days after its filing, yet the case had all the hallmarks of his work.[42] *ASARCO* was an even greater test of leadership, a crucible which required him to manage dozens of people.[43] But perhaps Judge Davis's greatest demonstrations of leadership came while on the bench, from where he helped spearhead the creation of the Larry E. Kelly Inn of Court and mentored dozens of young attorneys.

When asked about his efforts in helping start the bankruptcy Inn for Austin and San Antonio, Judge Davis humbly downplayed his contributions, stating simply that "there was a big pile of kindling and I just stuck a match and whoom—it exploded."[44] There is controverting evidence, however. Debbie Langehennig, stalwart of the Central Texas Bankruptcy Bar, explained that "Judge Davis was instrumental in the formation of the Hon. Larry E. Kelly Bankruptcy Inn of Court. We had discussed a bankruptcy Inn of Court for years but when he came to Austin, he encouraged us to finally get it done. We were able to rely on his experience with the Houston Inn as guidance for the launch of our program."[45] Ms. Langehennig also noted that Judge Davis later served a term as President of the Kelly Inn of Court.[46] Another influential LEK Inn member, Jay Ong, echoed Ms. Langehennig's comments: "It was Judge Davis's arrival in Austin that provided the final impetus enabling Judge King to realize on his long-held vision of a Central Texas bankruptcy Inn of Court. Judge Davis was always game to support the Inn in whatever capacity it demanded, whether that was service on the executive committee, as president, and even as a zealous and humorous performer in our first ever program, the Bankruptcy Dating Game."[47] Mr. Ong added that Judge Davis "was also a thoughtful leader and a champion of inclusiveness and diversity long before the rest of our society caught up with these virtues."[48]

"[I]f you see a turtle on a fence post, you know it had some help. The same can be said of lawyers and judges. When you happen upon a truly professional lawyer or judge, you can comfortably presume he or she is not self-made. Legal professionals did not master their craft without some help."[49] Regardless of the

[40] https://briefcatch.com/.

[41] Arch. M. Cantrall, *The Judge as a Leader: The Embodiment of the Ideal of Justice*, 45 AM. BAR. ASSOC. J. 339, 340 (April 1959).

[42] Interview with the Hon. Ronald B. King (Mar. 30, 2023).

[43] Video Interview with the Hon. Tony M. Davis (Mar. 30, 2023).

[44] *Id.*

[45] Email from Debbie Langehennig to Jack Eiband (Mar. 30, 2023, 12:30 pm CST) (on file with authors).

[46] *Id.*

[47] Email from Jay Ong to Jack Eiband (Mar. 30, 2023, 1:39 pm CST) (on file with authors).

[48] *Id.*

[49] The Hon. William C. Koch, Jr., President of the American Inns of Court 2018-2020, American Inn of Court Mentorship Page, https://www.innsofcourt.org/AIC/For_Members/Mentoring/AIC/Mentoring/Mentoring.aspx?hkey=a1ab9809-b5c3-4aaa-aef1-18c505b2fa00.

contested facts on Davis's involvement with the early Inn, the evidence shows that Judge Davis was a valuable mentor, particularly to his clerks. A recurring theme described by the Judge's clerks is that Judge Davis leads by example and seeks perfection, or at the very least, continual improvement.[50] The large number of term clerks who attended his retirement party further evidences Judge Davis's impact through mentorship. These former clerks came from Arizona, Kentucky, and all over Texas to cheer on their mentor and friend into his well-deserved retirement.

Impartiality, Open-Mindedness, and Independence of Mind

"Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order."[51]

Impartiality necessarily requires open-mindedness, so as not to be bogged down by one's own biases, experiences, or point of view, balanced by an independence of mind required to form one's own thoughtful opinion.

Impartiality also implicates ethics. While on the bench, Judge Davis demonstrated his commitment to ethics and ensured that there was not even a glimmer of any appearance of any impropriety. He strictly avoided any *ex parte* communications, including any phone calls to chambers. Some of his clerks and interns recall pop quizzes on ethics hypos. It requires no leap to believe that Judge Davis took measures to ensure impartiality—though it wasn't immediately comfortable. Judge Davis acknowledged that during his early days on the bench, it was somewhat awkward having his good friends and former colleagues argue in front of him.[52] But by putting aside initial discomfort, Judge Davis was able to focus on the issues and make impartial judgments.

As Judge Davis explained at his interview, a judge's job is to listen and decide—it's that simple.[53] And listen he did. Central to his preparation was reading and understanding the parties' arguments. Judge Davis reviewed each case cited and carefully parsed the arguments, consulted with his clerks on their views and understanding of the facts, all the while keeping an open mind as he formed his opinion. While he was thoroughly informed by the time he entered the courtroom, he kept an open mind so as to let the parties make their arguments before ultimately coming to a decision. Sometimes, after a hearing, Judge Davis would ask his clerks whether they were surprised by their ruling. And at times, they were.

Conclusion

"Indeed, it is difficult to know what to make of this or any other multi-factor test."[54]

We agree. Nonetheless, in addition to outlining the article for the authors, the multi-factor test of attributes that make a good

[50] *See, e.g.,* Statement of Prof. Chris Bradley (reflecting that Judge Davis's "curiosity and commitment to improvement are certainly some of his most distinguishing characteristics, and I find them very inspiring"); Statement of Sarah Wood ("One of the many things I will take with me from out years working together is to always be relentless in my pursuit of perfection."); Statement of Marissa Wiesen ("Great leaders inspire by example, and because he demanded perfection for himself, I wanted to make sure my work was perfect for him.").

[51] *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

[52] Video Interview with the Hon. Tony M. Davis (Mar. 30, 2023).

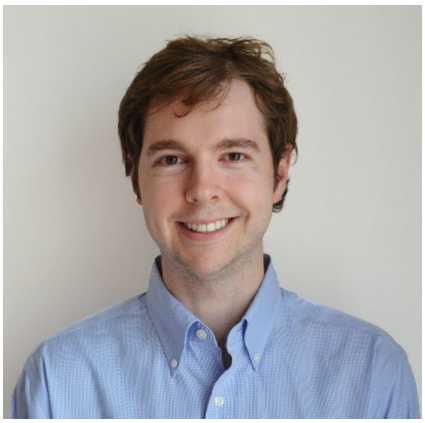
[53] *Id.*

[54] *In re IO at Tech Ridge LP*, 646 B.R. at 894.

judge gives insight into the life and career of the Honorable Tony M. Davis. In the authors' humble opinion, we believe that the factors weigh heavily in favor of finding that Judge Davis made a good judge. However, this matter is best left to one's own judgment. Accordingly, the matter is

REMANDED TO THE COURT OF PUBLIC OPINION.

Authors:



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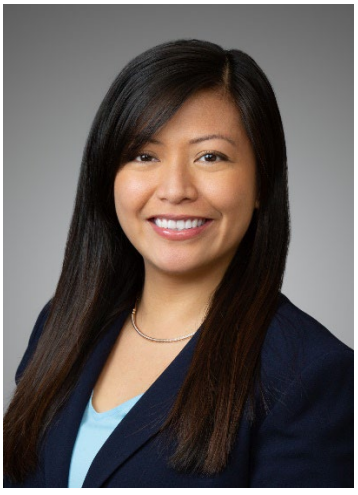

Maegan Quejada, is a Managing Associate at Sidley Austin LLP in Houston.

Financial Distress in the Fifth Circuit

By: Michael Wombacher

The Third Circuit's dismissal of LTL Management, LLC's ("LTL") bankruptcy case certainly attracted the attention of those curious about how courts will treat divisive mergers from financially healthy entities attempting to separate themselves from onslaughts of litigation. In the LTL decision, the court dismissed the bankruptcy case as a "bad faith" filing, holding that LTL was not in "financial distress."[i] The Third Circuit's focus on financial distress likely will play a major role in future cases.[ii] But what is financial distress? More importantly, what is financial distress here in the Fifth Circuit?

The Starting Point

The fountainhead of bad faith filings under Section 1112(b) in the Fifth Circuit is *In re Little Creek*, which was a case involving a single asset real estate ("SARE") debtor. Although the examples of bad faith in *Little Creek* are of little use in cases not involving SAREs, it does provide some key directives for courts in determining whether bad faith exists. First, the good faith of a debtor's filing depends on the court's "on-the-spot evaluation of the debtor's financial condition, motives, and the local financial realities."[iii] Second, although this does not immediately categorize a case as bad faith, the Fifth Circuit warns against "new debtor syndrome" which is creating or revitalizing a new entity on the eve of foreclosure.[iv] Finally, the Fifth Circuit advises debtors to avoid using the bankruptcy court as a "litigation tactic," which is filing merely to obtain an unfair litigation advantage.[v]

Financial Distress in Solvent Debtors

Outside of SARE cases, the biggest encounters bankruptcy courts in the Fifth Circuit had with the issue of financial distress in solvent debtors were *In re Roman Catholic Church of the Archdiocese of New Orleans*, *In re NRA of Am.*, and *In re Antelope Techs., Inc.*

In *In re Roman Catholic Church of the Archdiocese of New Orleans*, the Archdiocese of New Orleans (the "Archdiocese") filed for Chapter 11 relief in May 2020, due to operational and financial challenges that stemmed from defending a myriad of lawsuits alleging sexual abuse by clergy, and compounded by Covid-19.[vi] In July 2020, the Unsecured Creditors Committee filed a motion to dismiss pursuant to § 1112(b) arguing the case was filed in bad faith as the Archdiocese remained solvent and only pursued bankruptcy protection to gain a tactical advantage in the sexual abuse cases.[vii] The court found the Archdiocese was experiencing financial distress at the time it filed bankruptcy. The court focused on the balance sheet of the Archdiocese and found that, although the Archdiocese was solvent, its working capital had been declining for years. First, although the Archdiocese's assets had increased over the last ten years, this was largely due to "one-off" transactions, rather than from sustainable sources.[viii] Second, in June 2020, the beginning cash investments balance started at approximately $309 million, about $80 million more than in June 2011. But, after accounting for liabilities, deposits payable, funds held for others, and restricted funds, the Archdiocese's balance sheet actually showed a deficit of approximately $880,000. Finally,

the projected liability from the sexual abuse claims and the on-going issues due to Covid-19, significantly affected the Archdiocese's ability to raise new capital.

In *In re NRA of Am.*, the Court held differently when faced with a solvent debtor. In January 2021, the National Rifle Association of America ("NRA") filed for bankruptcy protection soon after an enforcement action seeking dissolution of the company was filed by the New York Attorney General ("NYAG").[ix] Shortly thereafter, multiple motions to dismiss were filed arguing the case was filed in bad faith as a means to avoid the dissolution action brought by the NYAG. The Unsecured Creditors Committee opposed dismissal. The court held the NRA had in fact filed its case in bad faith because the filing was to gain an unfair advantage in the state regulatory action rather than for a purpose intended by the Bankruptcy Code.[x] The NRA was "in its strongest financial condition in years" and possessed the funds to pay not only its debts but to defend and prosecute the litigation brought by the NYAG.[xi] Further, the NRA put forward no evidence analyzing the costs of litigation inside of bankruptcy versus outside of bankruptcy. As the NRA could not show any financial reason to file for bankruptcy it was apparent it filed merely to take the dissolution action off the table.[xii]

Timing of Filing

Debtors must file bankruptcy in response to financial distress rather than to avoid financial distress. In *In re Antelope Techs., Inc.*, the court found that Antelope Techs., Inc.'s ("Antelope") near-term capital needs were not so urgent as to warrant filing a Chapter 11 petition. Antelope filed in February 2007 shortly after a group of shareholders filed a derivative action against the company.[xiii] In January 2009, the bankruptcy court dismissed the case as it found the debtors filed to obtain leverage in the shareholder litigation and not "in response to a particular financial crisis."[xiv] Antelope unsuccessfully appealed the decision. The district court found several reasons why it was clear Antelope filed to obtain an unfair litigation advantage in the shareholder derivative action. First, the CEO of Antelope did not file the petition for Chapter 11 relief until more than two years after the board of directors authorized and directed the filing in 2004. This showed that Antelope was not experiencing financial distress at the time the board authorized the filing. Second, Antelope contended that it needed to file as IBM was attempting to terminate Antelope's license. However, Antelope provided no evidence that this issue was considered by the board of directors before authorizing the filing. In addition, Antelope acknowledged its license was secure in its disclosure statement. Finally, Antelope argued it needed to file in 2007, because the pending shareholder derivative action impeded it from attracting new capital. Yet, three months before filing, Antelope secured a $395,000 loan. Therefore, the Court held the filing was for obtaining an unfair litigation advantage, not because Antelope was financially distressed.[xv]

Summary

It comes as no surprise that courts in the Fifth Circuit, like the Third Circuit, require solvent debtors to show they face financial distress, particularly on their financial statements. But bankruptcy courts in the Fifth Circuit seem to attribute even greater weight than the Third Circuit on what financial and other records show, as opposed to the litigation threatening the debtor. To defeat motions to dismiss arguing lack of financial distress, solvent debtors should follow what the Archdiocese did in *In re*

Roman Catholic Church of the Archdiocese of New Orleans. Counsel for debtors must walk the court step-by-step through the debtor's financial statements (in particular the balance sheet and cash flow statements) and support the position that, even if the threatening litigation is not considered, the debtor still likely belongs in bankruptcy as the financial distress arguably either pre-dates or is independent of the threatening litigation. In cases of financial distress stemming from litigation, not only is the argument harder for solvent debtors, but the courts appear to require evidence that the damage from litigation has already occurred. This puts the debtor in a difficult situation of trying to determine the window between: (1) the amount of financial distress it takes to convince a court it belongs in bankruptcy; and (2) the amount of financial distress that will make it impossible to survive bankruptcy.

Author

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[i] *LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint (In re LTL Mgmt., LLC)*, 58 F.4th 738, 759-63 (3d Cir. 2023).

[ii] On April 4, 2023, LTL filed a second Chapter 11 petition committing $8.9 billion to fund a trust in hopes of resolving all current and future talc-related claims. LTL modified the funding agreements so that Johnson & Johnson is no longer a party to the funding agreement, and the support it provides in a separate agreement with Holdco is only available within LTL's bankruptcy. *See* Debtor's Statement Regarding Refiling of Chapter 11 Case at 2, 6-7, *In re LTL Mgmt., LLC*, No. 23-12825 [Dkt. 3] (Bankr. D.N.J. Apr. 4, 2023).

[iii] *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1072-73 (5th Cir. 1986).

[iv] *Id.* at 1073.

[v] *Id*.

[vi] *In re Roman Catholic Church of the Archdiocese of New Orleans*, 632 B.R. 593, 597-598 (E.D. La 2021).

[vii] *Id.* at 598.

[viii] *Id*. at 609.

[ix] *In re NRA of Am*., 628 B.R. 262, 267-68 (Bankr. N.D. Tex. 2021).

[x] *Id.* at 285.

[xi] *Id.* at 274, 285.

[xii] *Id.* at 285-86.

[xiii] *Antelope Techs., Inc. v. Lowe (In re Antelope Techs., Inc.)*, No. 07-31159-H3-11, 2010 U.S. Dist. LEXIS 73456, at *5 (S.D. Tex. 2010) (affirmed by *Antelope Techs., Inc. v. Lowe (In re Antelope Techs., Inc.)*, 431 F. App'x 272 (5th Cir. 2011).

[xiv] *Id.* at *7-9.

[xv] *Id.* at *17-24.

Spotlight on the Bench: The Honorable Michael Parker

By: Jessica Hanzlik and Aubrey L. Thomas[1]

Judge Michael Parker began his career in bankruptcy as many of us do — by kismet. Originally trained as a civil engineer, Judge Parker changed gears to pursue a career in law to provide a better balance between his obligations to work and to family. While taking Jay Westbrook's bankruptcy class in law school, Judge Parker experienced the same "epiphany" he experienced when he was learning physics; it just made sense. Similar to engineering, the law allowed Judge Parker to engage in a career helping clients solve problems. Doing so is not only something Judge Parker excels at but enjoys doing as well.

After law school, Judge Parker had the distinction of working as a law clerk to the Honorable Bankruptcy Judge Ronald B. King. In that role, Judge Parker was immersed in the study of bankruptcy law and began making connections with the local bankruptcy bar. Judge King remains Judge Parker's mentor, friend, and now colleague.

Following his clerkship, Judge Parker thrived in private practice, working for the law firm of Norton Rose Fulbright. It was not uncommon for Judge Parker to pop into another attorney's office to talk through a particularly thorny legal issue or, just as importantly, check in on how that partner's family was doing. Prior to taking the bench, Judge Michael Parker was known throughout the San Antonio bankruptcy bar as a skilled and thoughtful legal practitioner, and certainly a beloved colleague to his law partners.

Approximately one year into his tenure on the bankruptcy bench, Judge Parker is enjoying his transition. Judge Parker finds that he now has the time to focus on legal issues without the constraint of billable hours, client budgets, or competing client needs. He enjoys being able to truly "dive" into the legal issues presented in the cases before him. Judge Parker admits that his work can sometimes be isolating, and that he was saddened to have to step back from certain volunteer organizations for which he was passionate when he joined the bench. That said, Judge Parker is enjoying growing his already-existing relationships with his fellow judges for the Western District of Texas and building new relationships with other "baby judges" around the country.

Judge Parker views his role, in the most basic sense, as a "public service job." He understands that his decisions have a real impact on people's lives and, therefore, tries to ensure timely decisions, either written or oral. While not planning to surpass any records for the number of opinions written in the Western District, Judge Parker does provide a written opinion if he believes it will be of a benefit to the parties or the bar in general. For example, if the case is particularly contentious with the possibility of an appeal, Judge Parker prefers to issue a written opinion so that his findings of facts

[1] Any views expressed are those of the writers and do not necessarily represent the views of and should not be attributable to the United States Trustee Program or the U.S. Department of Justice.

and conclusions of law are clearly set forth on the record.

When asked if he has any "courtroom pet peeves," Judge Parker dismissed the label, responding "I wouldn't call them pet peeves, more like best practices" or "things lawyers do right." First, Judge Parker notes, make sure to present evidence to support your legal argument. Judge Parker noted with surprise that he has gone into several hearings anticipating that he would likely rule one way, but when the party fails to present evidence, he had no choice but to deny the requested relief. He notes that a good lawyer will be sure to link admissible evidence to each fact that needs to be established. To that end, thoughtfully preparing and filing a witness and exhibit list in anticipation of your hearing is critical, not only for notice purposes, but also as an exercise for the lawyer to ensure their proverbial ducks are in a row. A good practitioner will also go one step further and prepare a pretrial brief to serve as a roadmap for the Court during the hearing. As Judge Parker commented, "if you don't do it, my clerks do." Providing the judge what is needed to rule in your favor is critical.

Second, Judge Parker emphasized that civility and an ability for counsel to coordinate and cooperate — even when their clients have strong feelings about the "other side" — is one of the hallmarks of a good lawyer. Third, and perhaps even more important, a good lawyer cannot forget to communicate with the client prior to the hearing and prepare them for what to expect.

Last, Judge Parker noted that oral advocacy is often overlooked but incredibly important. One should not defend the indefensible, but instead gracefully concede the weak points. Know your evidence and be prepared with a response to your weakest point. Be able to articulate a response to your opponent's strongest argument. Doing so well requires practice and planning. And although many parts of an evidentiary hearing require a lawyer to be quick on their feet, one should always still come prepared with a strong summation for the case.

In terms of written skills, Judge Parker has but one word of advice — succinct.

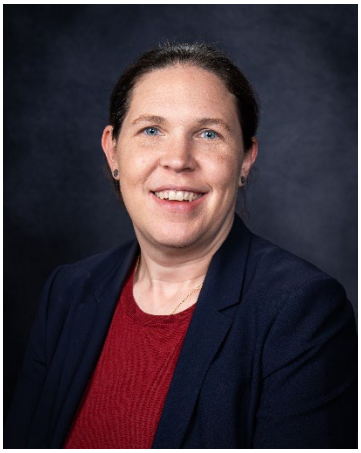
When Judge Parker is not on the bench, he likes to spend quiet time at home, as he and his wife have recently become "empty nesters." Now that the last of their five children have moved out of the family home, the Parkers enjoy visiting and spending quality time with each of their kids and their growing families.

Judge Parker gives the impression of a serious, thoughtful jurist, who approaches his work with reverence.[2] When asked if he has a hero, he responded that his "heroes have always been teachers" because he loved school. And if he were to have dinner with any historical figure throughout all of history, Judge Parker picked examples of those whose dedication and sacrifices shaped the world: Abe Lincoln, Oskar Schindler, and Nelson Mandela, to name a few. It seems poignant that a love of learning and dedication to work are qualities that Judge Parker admires, as those are the same

[2] Little known fact: Judge Parker also approaches his work without coffee. A true testament to his work ethic, Judge Parker has somehow never acquired a taste for the caffeinated drink of the gods that fuels most legal professionals.

qualities practitioners observe in him that contributed to his appointment to the bench. And those of us who appear in the Western District of Texas will surely benefit from those qualities in the cases over which Judge Parker presides for years to come.

Authors:



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The Fifth Circuit Clarifies Plan Modification Standard in *Highland Capital*

By: Bradley Foxman, Partner, Matthew Pyeatt, Senior Associate, Kristie Duchesne, Associate, and Eli Medina, Associate of Vinson & Elkins LLP

Introduction

Chapter 11 plans are increasingly complex documents that often represent heavily negotiated deals between distressed companies and their creditors. Funding concerns and other drivers often require debtors and their stakeholders to negotiate, document, and solicit votes on a chapter 11 plan before details regarding the plan's precise implementation mechanisms can be addressed and finalized. Occasionally, these details are decided even after a plan is confirmed. In formulating such mechanisms, debtors must remain mindful that any amendment that amounts to a "plan modification" to a chapter 11 plan that was previously confirmed by the bankruptcy court triggers the Bankruptcy Code's disclosure, solicitation, and confirmation requirements—recommencing the costly and time-consuming confirmation process the debtor just completed.

The Fifth Circuit in *Highland Capital* recently held that any changes that alter parties' rights, obligations, and expectations under the plan constitute a plan modification.[1] In particular, the Fifth Circuit reiterated that the central question is whether an amendment alters a fundamental bargained-for right won during plan negotiations, or is merely a detail to carry out the Plan's terms. *Highland Capital* serves a helpful reminder of the contours that define post-confirmation actions. This issue is particularly relevant to debtors given that a post-confirmation action that constitutes an inadvertent plan modification will require resolicitation of the plan, thereby extending time (and often limited) resources in chapter 11 proceedings.

Background

Highland Capital Management, L.P. (the "***Debtor***," or "***Highland***") commenced chapter 11 cases on October 16, 2019.[2] On February 22, 2021, the United States Bankruptcy Court for the Northern District of Texas (the "***Bankruptcy Court***") entered an order[3] (the "***Confirmation Order***") confirming Highland's chapter 11 plan (the "***Plan***").[4]

Among other things, the Plan provided for the creation of four entities: the reorganized debtor (the "***Reorganized Debtor***"), its sole general partner, and two trusts—the claimant trust (the "***Claimant Trust***") and the litigation sub-trust (the "***Litigation Sub-Trust***"), both of which would be collectively responsible for monetizing assets,

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1 *In re Highland Capital Management, L.P.*, No. 19-34054 (SGJ) (Bankr. N.D. Tex. 2019).

2 The case was originally filed in the United States Bankruptcy Court for the District of Delaware (No. 19-12239 (CSS) (Bankr. D. Del. 2019)), but was transferred to the United States Bankruptcy Court for the Northern District of Texas on December 4, 2019 (No. 19-34054 (SGJ) (Bankr. N.D. Tex. 2019)).

3 *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Dkt. No. 1943].

4 *Debtor's Fifth Amended Plan of Reorganization of Highland Capital* Management, *L.P.* [Dkt. No. 1808] (the "***Plan***").

distributing proceeds, and pursuing litigation claims. The Plan also contained several conditions precedent to becoming effective, including a condition that Highland shall obtain directors' and officers' ("***D&O***") insurance coverage acceptable to Highland, the official committee of unsecured creditors (the "***Committee***"), an oversight board (the "***Oversight Board***"), and the trustee of the Litigation Sub-Trust (the "***Litigation Trustee***").

Highland co-founder James Dondero ("***Dondero***") and other Highland-related entities appealed the Confirmation Order to the United States Court of Appeals for the Fifth Circuit (the "***Fifth Circuit***") challenging, among other things, the Plan's exculpation and injunction provisions.[5] In the interim, Highland was unable to obtain adequate D&O insurance at affordable premiums. Highland cited the appeal of the Confirmation Order and the expectation that litigation would continue beyond Plan confirmation as contributing factors to its inability to obtain acceptable D&O coverage.

Indemnity Sub-Trust

Without access to acceptable D&O insurance, Highland began exploring alternative ways to indemnify directors and officers. After consulting with the Committee and various advisors, Highland determined to create an indemnity sub-trust (the "***Indemnity Sub-Trust***"), which would secure indemnity obligations of the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor. The Indemnity Sub-Trust would be funded with $2.5 million in cash and a note in the amount of $22.5 million under which the Claimant Trust, the Litigation Trust, and the Reorganized Debtor would remain jointly and severally liable.

Indemnity Sub-Trust Motion

Highland filed a motion seeking authority to establish the Indemnity Sub-Trust (the "***Motion***"), arguing that it should be approved under section 363(b) of the Bankruptcy Code[6] as a valid exercise of its business judgment,[7] because creating the Indemnity Sub-Trust would allow Highland to waive its D&O insurance effective date

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[5] In September 2022, the Fifth Circuit concluded that the plan improperly exculpated certain non-debtors beyond the bankruptcy court's authority. *NexPoint Advisors, L.P. v. Highland Cap. Mgmt. L.P. (In re Highland Cap. Mgmt., L.P.)*, 48 F.4th 419, 426–27 (5th Cir. 2022) *petition for cert. filed*, No. 22-631 (U.S. Jan. 9, 2023), *and petition for cert. filed*, No. 22-669 (U.S. Jan. 20, 2023). In January 2023, two petitions for writs of certiori were filed asking the Supreme Court to review (1) the meaning and interpretation of section 524(e) and (2) the permissible scope of plan exculpations. As of the date of this publication, the Supreme Court has not granted either writ.

[6] Unless otherwise noted herein, all statutory references are to 11 U.S.C., *et seq*.

[7] *Motion for Entry of an Order (I) Authorizing (A) Creation of an Indemnity Subtrust and (B) Entry into an Indemnity Trust Agreement and (II) Granting Related Relief* [Dkt. No. 2491]. Section 363(b)(1) authorizes a debtor to "use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Courts in the Fifth Circuit have held that a debtor may use estate property outside the ordinary course of business if there is a good business reason for doing so. *See, e.g.*, *In re ASARCO, LLC*, 441 B.R. 813, 830 (Bankr. S.D. Tex. 2010) (outside of the ordinary course of business, "for the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors, and equity holders, there must be some articulated business justification for using, selling, or leasing the property") (quoting *In re Continental Air Lines*, 780 F.2d 1223, 1226 (5th Cir. 1986)), *aff'd*, 650 F.3d 593 (5th Cir. 2011). This business judgment standard is satisfied where the debtor can demonstrate "that the proposed course of action will be advantageous to the estate." *In re Pisces Energy, LLC*, 2009 Bankr. LEXIS 4709, at *18 (Bankr. S.D. Tex. Dec. 21, 2009).

condition precedent and allow the Plan to go effective.[8]

Objection

Certain parties[9] (collectively, the "***Objectors***") objected to the Motion, arguing that the Motion was an improper attempt to modify the Plan (the "***Objection***") because the Plan *required* Highland to obtain D&O insurance before the Plan could go effective.[10] According to the Objectors, if Highland cannot obtain such insurance, as it admitted it cannot, then it must resolicit votes on the modified plan pursuant to section 1127 before it can implement the Indemnity Sub-Trust."[11]

In further support of its characterization of the Indemnity Sub-Trust as a plan modification, the Objectors argued that the Plan contemplated the creation of only four entities—the Litigation Sub-Trust, Claimant Trust, the Reorganized Debtor, and its general partner—and the Indemnity Sub-Trust was not contemplated in the Plan.

The Bankruptcy Court overruled the Objection, concluding that, because the Plan contemplated reserves for indemnities, the Indemnity Sub-Trust did not constitute a modification under section 1127, and was a valid exercise of its business judgment, and consequently entered an order (the "***Order***") approving the Motion.[12] The District Court affirmed, teeing the issue up for the Fifth Circuit.[13]

Plan Modification

Section 1127(b) permits a debtor to modify its "plan at any time after confirmation of such plan and before substantial consummation of such plan" if, after notice and a hearing, the court "confirms such plan as modified, under section 1129."[14] A plan modification must comply with section 1125, which requires disclosing the proposed modification to claimholders and soliciting their votes.[15]

However, not all post-confirmation actions by a debtor constitute a plan modification. Within the Fifth Circuit, only changes that "alter the parties' rights, obligations, and expectations under the plan" constitute a modification.[16]

Fifth Circuit's Opinion[17]

On January 11, 2023, the Fifth Circuit affirmed the District Court on the merits.[18]

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[8] Specifically, Highland noted that the Indemnity Sub-Trust was simply a procedural mechanism to effectuate indemnification provisions already contemplated in the Plan, pointing to the reserves in the Plan and Claimant Trust Agreement.

[9] Dugaboy Investment Trust, James Dondero, NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P.

[10] *Objection to Motion for Entry of an Order (I) Authorizing (A) Creation of an Indemnity Subtrust and (B) Entry into an Indemnity Trust Agreement and (II) Granting Related Relief* [Dkt. No. 2563].

[11] *Id.* ¶ 20.

[12] *Order Approving the Debtor's Motion for Entry of an Order (I) Authorizing (A) Creation of an Indemnity Subtrust and (B) Entry into an Indemnity Trust Agreement and (II) Granting Related Relief* [Dkt. No. 2599].

[13] Appeal from the United States Bankruptcy Court for the Northern District of Texas at p. 5, *Highland Capital Management Fund Advisors, L.P. v. Highland Capital Management, L.P. (In re Highland Capital Management, L.P.)*, Civ. No. 3:21-CV-1895-D (N.D. Tex. Jan. 28, 2022) [Dkt. No. 44].

[14] 11 U.S.C. § 1127(b).

[15] 11 U.S.C. §§ 1125, 1127(c).

[16] *U.S. Brass Corp. v. Travelers Ins. Grp. (In re U.S. Brass Corp.)*, 301 F.3d 296, 309 (5th Cir. 2002).

[17] *Highland Capital Management Fund Advisors, L.P. v. Highland Capital Management, L.P. (In re Highland Capital Management, L.P.)*, 57 F.4th 494 (5th Cir. 2023).

[18] Notably, both the District Court and the Fifth Circuit concluded that HCMFA and Dugaboy lacked standing and dismissed their appeals, but

The Objectors raised three arguments in support of their claim that the Order altered their rights and expectations under the Plan:

1. the Order requires the Claimant Trust to indemnify more parties than the Plan contemplated;
2. creating an Indemnity Sub-Trust is different than establishing a reserve, and thus was not contemplated under the Plan; and
3. by filing the Motion, Highland necessarily admitted that it sought to modify the Plan.[19]

First, the Fifth Circuit noted that the Order required the Claimant Trust to indemnify the Reorganized Debtor's professionals, officers, and employees, which was not provided for under the Plan.[20] But the Fifth Circuit held that this change did not alter any party's rights or expectations because the Plan "approves of such asset sharing."[21] In particular, the Fifth Circuit noted that the Plan authorized the Claimant Trust to (i) withhold from distribution the funds necessary to pay costs associated with administering its duties; and (ii) make capital contributions, without limitations as to amount or purpose, to the Reorganized Debtor upon request from the Reorganized Debtor's general partner.[22] Additionally, the Plan required the Claimant Trust to exercise and perform the rights and duties arising from its role as the Reorganized Debtor's general partner, which included calling capital from the Claimant Trust to the Reorganized Debtor as necessary.[23] Therefore, the Fifth Circuit concluded, because the Plan contemplated the Claimant Trust contributing capital to the Reorganized Debtor, the Order does not alter creditors' rights on account of such contributions.

Second, the Fifth Circuit addressed the Objectors' argument that while the Plan contemplated establishing reserves, the Order's authorization of an Indemnity Sub-Trust far exceeded what was contemplated in the Plan, and that the use of the Indemnity Sub-Trust instead of the D&O insurance altered the parties' rights, obligations, and expectations under the Plan.

Focusing on the rights and obligations that the parties specifically bargained for and expected under the Plan, the Fifth Circuit found that "the record shows that securing funds for indemnification obligations was particularly important for agreement to the Plan."[24] The Fifth Circuit also pointed to Plan language and testimony in the Bankruptcy Court as evidence that indemnification generally (and not D&O insurance in particular) was the bargained-for right.

The Fifth Circuit noted that the Plan language authorized Highland to "reserve or retain any cash . . . reasonably necessary to meet claims and contingent liabilities," including indemnification obligations, but did not require the use of D&O insurance.[25] And although the Plan referenced D&O insurance, it was a waivable condition rather than a requirement. Thus, the Fifth Circuit found that the Plan language authorized the bargained-for indemnification in a broad

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both courts reached the merits because NexPoint possessed standing, but, because the standing analysis is not relevant to the plan modification standard, it is not discussed here.

[19] *Highland Capital Management Fund Advisors, L.P. v. Highland Capital Management, L.P. (In re Highland Capital Management, L.P.)*, 57 F.4th 494 (5th Cir. 2023).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 504.

[25] *Id.* at 503.

sense, but the "precise contours" of the mechanism to implement the right "was not clearly defined as part of the Plan—D&O insurance was one option, but it also more generally permitted the Claimant Trust to reserve funds for indemnification obligations."[26] Therefore, because the rights, obligations, and expectations under the Plan—i.e., indemnification—were not altered, the Indemnity Sub-Trust did not constitute a plan modification.

Third, the Fifth Circuit addressed the Objectors' argument that Highland's filing of the Motion, in and of itself, was an admission that the Indemnity Sub-Trust modifies the Plan, because it demonstrates the Highland's view that the requested relief is not authorized by the confirmed Plan.[27] The Fifth Circuit rejected this argument, finding satisfactory the Highland's explanation at the Bankruptcy Court hearing that proceeding by motion is not unusual during the period between confirmation and the effective date.[28]

Takeaways

Given that a plan modification requires a debtor to resolicit its plan, debtors are acutely incentivized to understand and avoid any unnecessary plan modifications. The Fifth Circuit's decision serves as a helpful reminder that any changes that alter a party's rights, obligations, and expectations under the plan constitute a plan modification. As such, debtors should take particular care in thinking through each substantive point in a plan and addressing implementation mechanisms appropriately.

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[26] *Id.* at 504.

[27] *Id.*

[28] *Id.*

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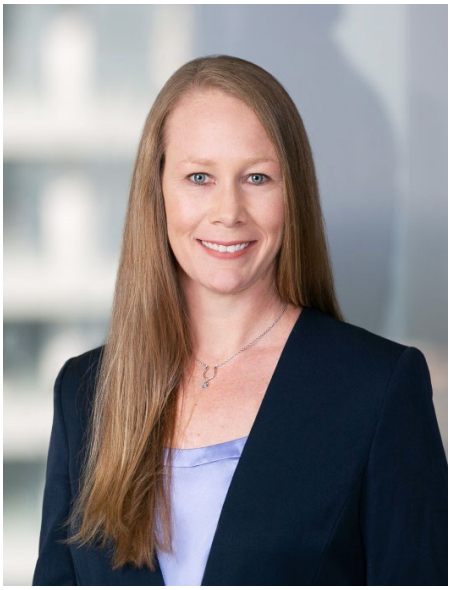

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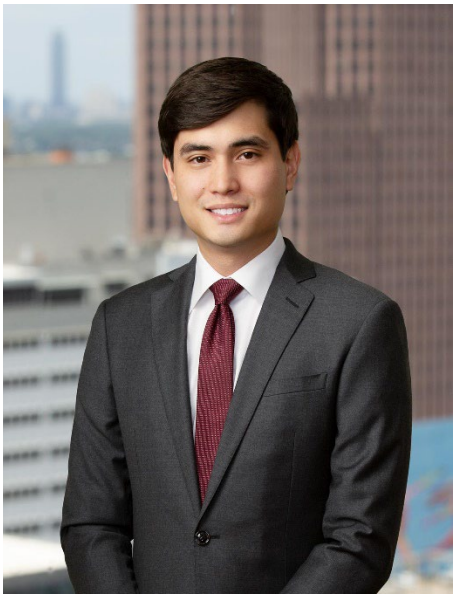
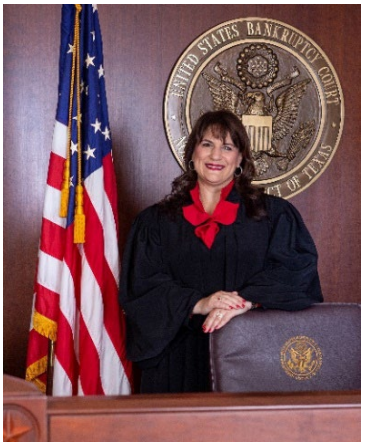


Eli Medina, Associate

Spotlight on the Bench: The Honorable Michelle V. Larson

By: *Parker Embry*

Judge Michelle V. Larson has a very serious job, but she constantly urges those around her to "not take life too seriously." Judge Larson was appointed to serve as a bankruptcy judge for the Northern District of Texas – Dallas Division on July 7, 2020. This article seeks to highlight Judge Larson and her career, accomplishments, and interests.



Education

Judge Michelle Larson, then Michelle VonSenden, was born and raised in Houma, Louisiana, southwest of New Orleans. Houma, in her own words, is about as south as you can get before hitting the Gulf. After high school, Judge Larson attended Nicholls State University in Thibodaux, Louisiana. She was the first member of her family to attend college, and she graduated as valedictorian, *summa cum laude*, with a B.S. in Accounting and a minor in English. She was also inducted into the Nicholls State Hall of Fame. She went on to get her Certified Public Accountant license immediately thereafter.

Judge Larson received her JD from Loyola University School of Law in New Orleans, Louisiana. She graduated *magna cum laude*. During law school, Judge Larson externed with the United States Bankruptcy Court for the Eastern District of Louisiana, for two bankruptcy judges, the Hon. Thomas M. Brahney III, and the Hon. Jerry A. Brown, both now deceased. It was there that Judge Larson discovered her love for bankruptcy. She also met and married fellow law student Demian Larson while attending law school. The two have been happily married for 27 years and have two children: Gage, a senior in high school, and Garrett, a junior at Indiana University.

Andrews Kurth

Upon graduation, Judge Larson moved up to Texas to practice at Andrews Kurth in Dallas. She appreciates this time in her career not only because of the lifelong friends she met upon joining the firm, but also because of the mentorship she received.

Specifically, Judge Larson finds herself lucky to have been trained by the late Deborah Schrier-Rape. Deborah, or "DSR" as she was known, taught her associates numerous lessons that Judge Larson still carries on today in training her own law clerks. She taught Judge Larson how to read a pleading from the top down, and she imparted the importance of knowing the local

rules and Bankruptcy Code like you wrote it yourself. In fact, DSR encouraged her to read each cover to cover every year. She taught Judge Larson to always anticipate an adversary's next steps, even if that meant drafting an appellee brief before the appellant had even filed its brief.

And lastly, but of no less importance, DSR imparted that your reputation precedes you. "Always fight fair and make sure that you leave a case with your professionalism and credibility unassailed. There were so many lessons that I learned from DSR about the substantive practice of law, about achieving success as a woman coming up in the legal profession, and eventually as a mother. I am extremely appreciative of her mentoring and credit her with instilling in me strong work ethic, fearlessness and humility."

> "No one has ever accused Judge Larson of being shy, which is a huge part of her charm and an integral part of her personality. On any given day, her colleagues would see (and hear) her laugh out loud and be joyful and gregarious. I miss her being on this side of the bench and having the opportunity to strategize with her on cases, workshop arguments and pleadings, or otherwise just banter about the law or about nothing at all. The only consolation of not being her 'forever colleague' is seeing her on the bench, and witnessing firsthand how happy she is, and knowing that she can impact for the good an even wider audience than when she was in practice. Her future is brighter than it ever was, and I could not be happier for her."
> - *Jason Brookner*

Weil, Gotshal & Manges

After 7 years at Andrews Kurth, Judge Larson moved over to the Dallas office of Weil, Gotshal & Manges. She considers her time at Weil equal parts challenging and career defining. She had the pleasure of working on some of the more complex chapter 11 cases in the nation while being surrounded on all sides by supremely talented, intelligent, and hard-working attorneys. No matter how hard everyone worked, she always appreciated the fact that "everyone was doing their level best to put out exceptional work product, because the expectation was nothing short of excellence. It was an honor to be part of Weil's proud bankruptcy tradition."

> "At Weil, Judge Larson was an invaluable member of the team. As an advocate and counselor, she possessed intelligence, practicality and unerring judgment. Clients and senior partners trusted her. I would not have wanted to handle cases like SemGroup, the Texas Rangers, and Crescent Resources without her. Judge Larson was a teacher and mentor to younger associates, not only on how to excel as a lawyer but how to succeed in life. And she was the glue that held the teams together, from the mail room workers to the legal assistants and paralegals, to junior attorneys and senior partners."
> - *Martin A. Sosland*

Forshey Prostok

In the summer of 2012, Judge Larson was tasked with opening the Dallas office of Forshey Prostok. After working in large firms for almost 20 years, Judge Larson considered this move to a bankruptcy boutique to be a breath of fresh air.

"Lean and mean, F&P taught me self-sufficiency. I learned about not only the *practice* of law, but the business of law, as well. Although a short stop in the broader body of my career, I am very appreciative for my time there and the warmth and generosity of spirit of F&P's esteemed founders and the broader firm."

Return to Andrews Kurth

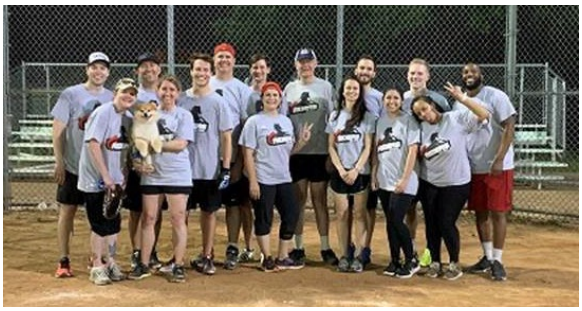
After a brief stint at Forshey, Judge Larson returned to practice at Andrews Kurth. Like the old Bon Jovi song, "Who Says You Can't Go Home", Judge Larson considered it an honor to return to AK as a partner.

Judge Larson appreciates her "homecoming" at AK for both allowing her to refine her practice and explore a deeper focus on Texas. She worked on some of her most difficult cases during this time in her career and credits this time period as instrumental in becoming the manager she is today.

> "Judge Larson is one of those rare individuals who possesses not only a keen intellect and quick wit but exudes warmth, humor and compassion. People are drawn to her like moths to a shining flame. From her first days at the firm, partners wanted her to work for them and other associates wanted to work with her. While in practice she worked on some of the most complex bankruptcy cases in the country and with some very challenging clients and opposing counsel. Nothing and no one seemed to phase her. I truly cannot imagine a better law partner, friend or bankruptcy judge. She is simply the best!"
> *– Robin Russell*

Carrington Coleman

Judge Larson joined Carrington, Coleman, Sloman & Blumenthal, LLP in late 2017 and was there until she joined the Bench in early July 2020. She looks back fondly at her few years at Carrington, and she would have made it her "forever firm" had there not been an opening to join the bankruptcy bench. Judge Larson considers Carrington a "unicorn" that has the intimate firm environment everyone longs to be a part of while also having the depth of practice that could stand toe to toe on any stage.



She always appreciated the camaraderie of the firm, and she was particularly fond of the firm's Friday happy hours nicknamed POETS: Put Off Everything, Tomorrow's Saturday (she cleaned that up a bit). These firmwide socials were another stitch in the fabric of what she considers makes Carrington special. "The firm truly embodies the spirit of its founders, with specific modelling of the character and professionalism of Jim Coleman. From the top down, one can only be impressed with their dedication to the practice of law, as well as their desire to hold on to what makes them unique."

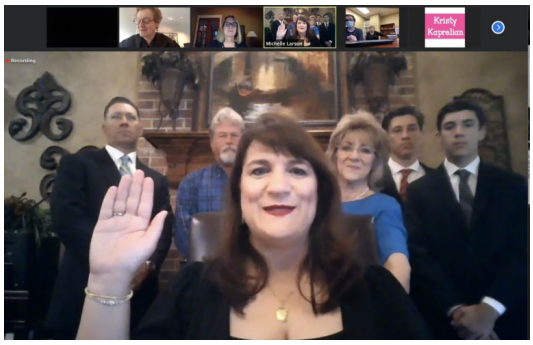
> "Judge Larson is widely and deservedly recognized as a terrific bankruptcy lawyer and subject matter expert. But that description leaves out the heart of what a terrific colleague she was. Always energized and upbeat, her can-do spirit combined with a terrific sense of humor elevates everyone around her as it draws them in."
> *- Monica Latin*

> "Judge Larson joining our Firm was, for me, a real breath of fresh air, reenforcing the team approach and sense of camaraderie in the areas of bankruptcy and restructuring law that CCSB has always stressed. Judge Larson never hesitated to share her honest points of view, but with a style that was both cordial and persuasive. I am so happy to have a jurist in the Northern District with her eminent skill set, but the fun, intellectual chemistry we

enjoyed with her is a rare thing and easy to miss."
- *Mike Sutherland*

Path to the Bench

Judge Larson did not set out in her career with the ultimate goal of becoming a bankruptcy judge, but she jumped at the opportunity upon Judge Barbara Houser's retirement because she thought she could be of service to the bankruptcy bar. She will never forget the day she was sworn in as a judge, particularly because it was virtual due to the ongoing Covid-19 Pandemic.



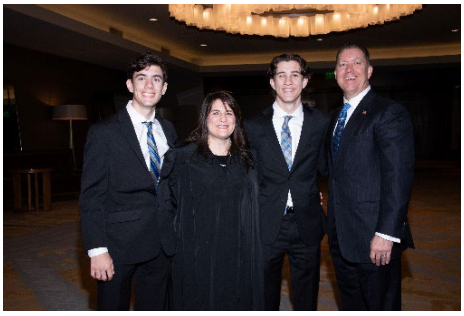
"I've said many times that I hoped to bring a diversity of experience that could be of service to the greater bar. I've represented debtors, trustees, committees, DIP lenders, buyers, liquidators and governmental entities, among others." She believes her experience in firms of all sizes, representing all types of constituencies in big and small cases throughout the country, as well as appeals up to the Supreme Court, gives her a heightened sense of objectivity. "Having approached cases from all sides during my legal career, I considered myself a consensus builder on the whole." It was this diversity of practice and emphasis on consensus building that she thought would best influence her approach to the "art of judging."

She considers herself profoundly influenced by the existing judges on the bankruptcy bench in the Northern District of Texas, as well her predecessors. She respects these judges and considers them mentors & friends, and she hopes to take little bits from each of them to shape who she wants to become as judge.

"Judge Larson is not just a colleague that I admire and respect but is an absolute joy to have working next door to me. She is a colleague who loves to visit, brainstorm, and support you and make you laugh when you are being too serious. Having her as a colleague has literally been good for my soul."
- *Chief Judge Stacey Jernigan*

Looking Forward

Judge Larson's focus is on service and growth. She believes that a bankruptcy judge must be a good servant and ambassador to the greater bankruptcy bar, and she aims to be just that. "I understand what challenges parties and their counsel are facing and hope that I can bring a common sense, practical approach to the bench. I work hard and truly hope to do an admirable job for the bar."



Additionally, Judge Larson hopes that along the way she can train law clerks that "are ready to hit the ground running when they join firms and rise to the top of the profession." She considers this mentorship of clerks to be an important part of her role as a judge. "So far, patting myself on the back on that front, I'm off to a smashing start! So bring on the Law Clerk Spartan Race!"

Lastly, she is focused on personal growth and the advancement of the profession. She is not the same judge that she was in 2020, and she aims to continue to grow with the position and "find the most efficient, fair, and streamlined approach to the management of my docket." As one of her favorite rappers, Tupac Shakur once said, "I want to grow. I want to be better. … You either evolve or you disappear."

Hobbies + Interests

When not on the bench, you can find Judge Larson attempting to keep up with her sons' busy baseball & debate schedules, watching old episodes of The Walking Dead, or just relaxing with her two pit bulls, Frankie & Xena. She also loves watching professional sports, action films, and crime dramas, and she is chock full of more than a little *Friends* and *The Office* trivia and quotes.

And, of course, she is a 40–year (and counting) fan of all things hop-hop music. She has even been known from time-to-time to make references to rap lyrics from the bench.

Author

Parker Embry serves as the second-year term law clerk to Judge Larson. He will join the Dallas office of Sidley Austin upon the completion of his clerkship next fall.

The 2023 Elliott Cup

By: Emily Shanks

The 2023 Elliott Cup competition took place on February 18 and 19 in Austin, Texas. Students competing in the competition examined the issues of third-party releases and discharge in a chapter 11, subchapter V case. Specifically, whether (1) a bankruptcy court has the authority to approve non-consensual releases of direct claims held by third parties against non-debtor affiliates as part of a chapter 11 reorganization plan, and (2) a corporate debtor under subchapter V of chapter 11 may discharge the types of debts specified in 11 U.S.C. § 523(a).

The preliminary and semi-final rounds of the competition took place at the University of Texas Law School, and the final round took place in Judge Mott's courtroom. Twelve teams competed from eight Fifth Circuit schools. The competitors were able to practice in a real competition setting, preparing them to compete in the national Duberstein competition in New York City. Teams from the University of Texas and Baylor faced off in the final round of the Elliott Cup, with the University of Texas team, comprised of John Conover, Grace Darrah, and Adam Schmidt, taking home the big Elliott Cup win.

The Elliott Cup team awards are as follows:

- First place team: University of Texas (John Conover, Grace Darrah, and Adam Schmidt)
- Second place team: Baylor (Amber John, Jacob King, and Paige Brown)
- Third place team: Baylor (Madeline Gay, Tansy Ackermann, and Casey Cooper)
- Third place team: Mississippi College (Shelby Parks, Kayla Coates, and Anna Claire Tucker)

The Individual awards are as follows:

- Best Oral Advocate: John Conover
- Second Place Best Oral Advocate: Amber John
- Third Place Best Oral Advocate: Madeline Gay

The Elliott Cup teams from the Fifth Circuit went on to compete at the Duberstein Competition in New York City. Impressively, six of the Fifth Circuit teams advanced to the octa-finals: Texas A&M, two Baylor teams, two University of Texas teams, and Ole Miss. Texas A&M and one of the Baylor teams advanced to the quarter finals. Baylor went on to win the entire Duberstein Competition, bringing the championship home to the Fifth Circuit!

Thank you to the volunteers who helped make the Elliott Cup possible. Due to the volunteers, coaches, and bankruptcy judges who graciously donate their time to the Elliott Cup competition each year, the competition continues to be a successful and valuable event that prepares the Fifth Circuit teams to be successful at the Duberstein competition. A special thanks to Judge Mott, Judge Morris, Judge Rodriguez, and Judge Parker for serving as semi-final and final round judges. And thank you to Judge Mott for allowing the use of his courtroom and courtroom security to host the final round.

Author:

Emily Shanks is currently serving as a term clerk for Judge Everett in the Northern District of Texas Dallas Division.

BANKRUPTCY LAW SECTION
STATE BAR OF TEXAS

Troop Movements

- Ashley Ellis is now the Director of Alumni Relations at SMU Law. Congrats, Ashley!
- Michael Fishel is a partner at King & Spalding in Houston as of January 2023. Congrats, Michael!
- Catherine Curtis is now special counsel at McGinnis Lochridge. Congrats, Catherine!
- Michael Wombacher completed his judicial clerkship with Judge Mott and is now a restructuring associate in the San Antonio office of Dykema Gossett PLLC. Congrats, Michael!

Announcements

- The Statewide Bankruptcy Bench Bar Conference will take place **June 4–June 6** in San Antonio, Texas at the J.W. Marriott Resort. We hope to see you all there! You may register here. Additional details are attached at the end of this newsletter.
- The 2023 National Conference of Bankruptcy Judges Annual Meeting ("NCBJ") will take place **October 11–14** at the J.W. Marriott in Austin, Texas. You may register here.
- NCBJ Trial Skills Workshop Applications are due **June 15**. The only requirements are less than 12 years of experience and a fee for the workshop. Additional details here.
- Would you like your article or troop movement featured in the Bankruptcy Section Newsletter? Email Jordan Chavez and Jessica Hanzlik to submit your topic or troop movement.

BANKRUPTCY LAW SECTION
STATE BAR OF TEXAS

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Ross, Smith & Binford, PC

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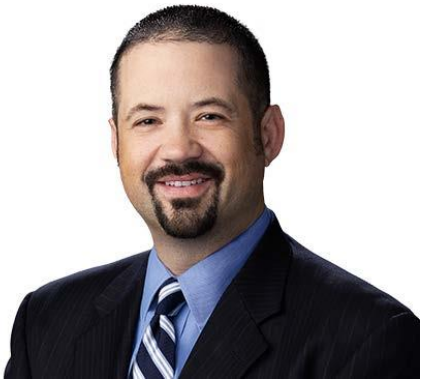

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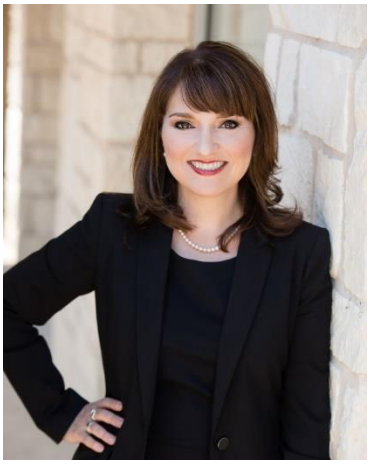

Layla Milligan, Historian

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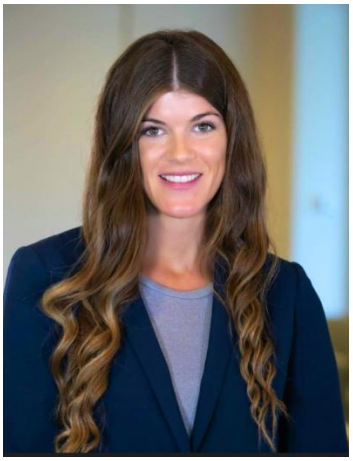

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Jessica Hanzlik, Vice President Communications & Publications

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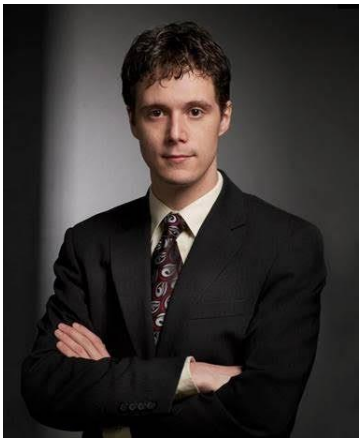

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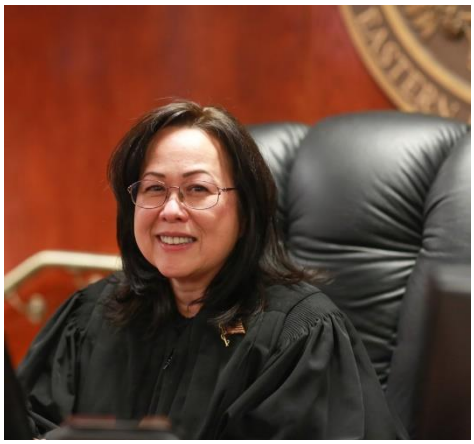
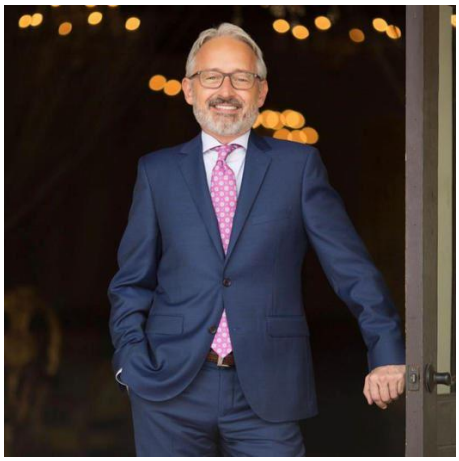


The Honorable Brenda Rhoades - At Large Council Member 1

United States Bankruptcy Court Northern District of Texas

660 North Central Expressway

Plano, Texas 75074



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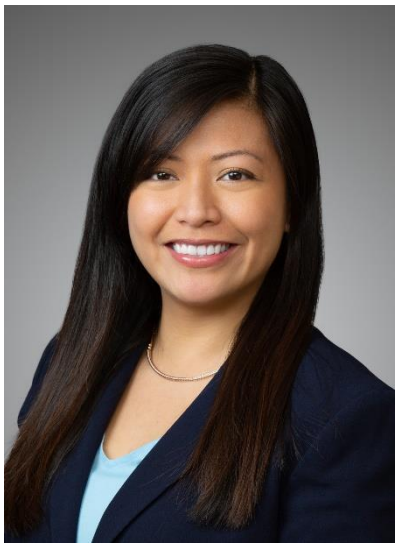

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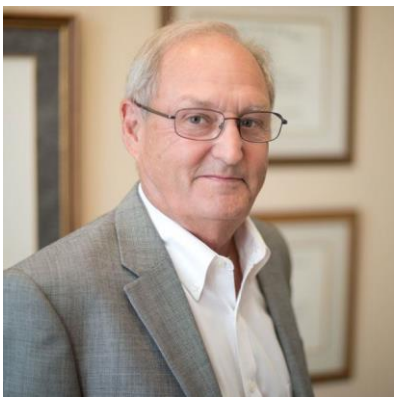

Pat Kelly, Council Member

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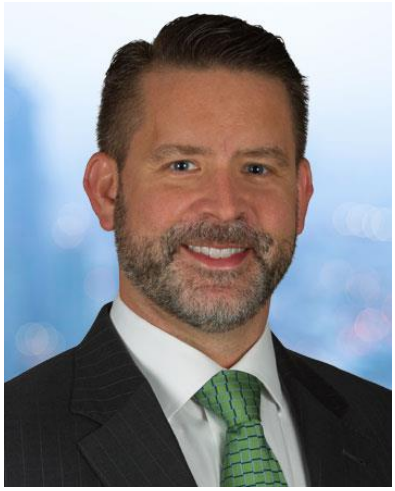

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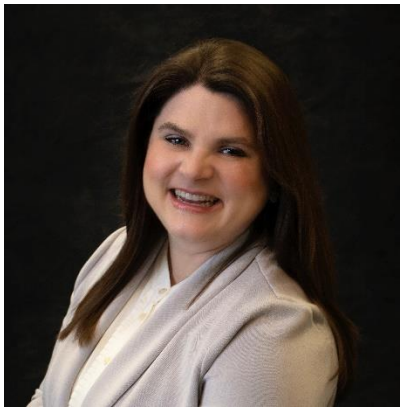

Callan Searcy, Council Member

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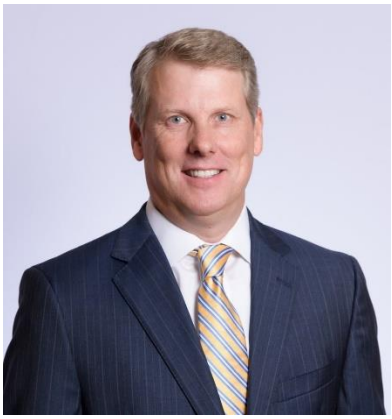

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Austin, TX 78756

Tel. 512-892-0803

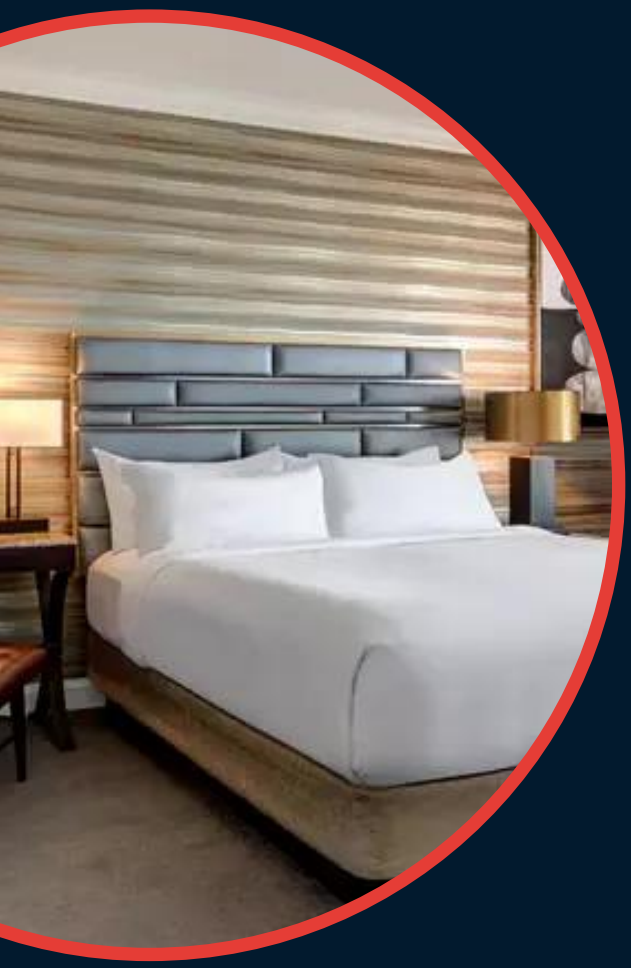
BANKRUPTCY
LAW SECTION
STATE BAR OF TEXAS

2023 BANKRUPTCY BENCH BAR CONFERENCE

June 4 - 6, 2023 | San Antonio, TX

CONFERENCE INFO

Course Directors: Frances Smith & Michael Cooley
Credit Hours: Pending



ACCOMMODATIONS

JW Marriott San Antonio
Hill Country Spa & Resort

Group Room Rate: $289/night

RESERVE YOUR ROOM NOW

HIGHLIGHTS

- Enlightening & Educational Presentations
- Annual Section Awards
- Judge Panels
- Breakout Rooms
- YLC Sponsored Monday Reception

Click HERE to register online today!

CONFERENCE AGENDA

SUNDAY, JUNE 4th

1:00 PM	**Golf and Spa Time** (The Canyons Golf Course, Lantana Spa) **Spa Reception** (The Bistro at the Spa – Lantana Spa)
5:30 - 8:00 PM	**Opening Reception & Registration** (Events Lawn 1 – JW Marriott)
8:30 PM	**Hospitality Suite Available**

MONDAY, JUNE 5th

7:00 - 8:00 AM	**Yoga Class** (Iris-Lily Room)
7:30 - 8:30 AM	**Breakfast**
8:30 - 8:45 AM	**Welcome, Technology Explanation, Calendar Overview** — *Michael Cooley*
8:45 - 10:00 AM	**Plenary Session — Recent Developments & Caselaw Update** Hon. Craig A. Gargotta, Hon. Brenda T. Rhoades, Deborah B. Langehennig, Liz Boydston
10:00 - 10:15 AM	**Break**
10:15 - 11:15 AM	**Plenary Session — Market Trends** Greg Milligan, Dr. Nathaniel Pattison, Nick Inman
11:15 - 12:15 PM	**Plenary Session — A Discussion on Allyship** Moderator – Rakhee Patel Hon. Harlin D. "Cooter" Hale (Ret.), Wande Elam, Travis Torrence
12:15 - 1:30 PM	**Box Lunch**
1:30 - 2:30 PM	**Plenary Session — Name That Tune (5th Circuit Version)** *Harmonize your knowledge of music with important non-bankruptcy Fifth Circuit cases every bankruptcy practitioner needs to know. Based on the 1950s game show. Live band and surprises guaranteed!* Moderator – Dick Clark (Todd Headden) Stevie Nicks (Jernigan, J., NDTX), Elton John (Mullin, J., NDTX), Willie Nelson (Mott, J., WDTX), Dirty 6th Street Band (Bach Norwood, Lisa Fancher, and special guests)
2:30 - 3:00 PM	**Break** *(transition to breakouts)*

CONFERENCE AGENDA

MONDAY, JUNE 5th

3:00 - 3:45 PM	**Business Breakout —** ***Talen Energy: Settlements, Releases, and Exculpations*** Zack Clement, Ryan Manns, Julie Harrison **Consumer Breakout — Sales and Appreciation in Chapter 13** Hon. Jeffrey P. Norman, Pam Bassel, Toni Townsend, Jessica Hanzlik
3:45 - 4:30 PM	**Business Breakout — Lender on Lender Violence** Hon. Michelle V. Larson, George Howard, Maegan Quejada, Sean Davis, Dawn Ragan **Consumer Breakout — Views and Impacts of Bankruptcy in Family Law** Hon. Tena Callahan (Ret.), Hon. Robert L. Jones, Catherine Curtis
4:30 - 6:00 PM	**Happy Hour** (Hospitality Suite)
6:00 PM	**SBOT Council Dinner** (Iris-Lily Room)
8:00 PM	**Young Lawyer Committee (YLC) Reception** (San Antonio Terrace) All Attendees Welcome
10:00 PM	**Hospitality Suite Open**

EXHIBIT SPACE AVAILABLE

$500 per table

*Please email **monique@planitsat.com** to reserve your exhibit space today.*

CONFERENCE AGENDA

TUESDAY, JUNE 6th

7:00 - 8:00 AM	**Run with the Judges** — *hosted by Judge Mott*
8:00 - 9:00 AM	**Breakfast**
9:00 - 10:00 AM	**Plenary Session — Best Practices in Removals, Withdrawals of Reference and Appeals** Hon. Lee Yeakel, Hon. Edward L. Morris, Michelle Shriro, Annmarie Chiarello
10:00 - 10:45 AM	**Plenary Session — Crypto Assets in Bankruptcy** Hon. Stacey G. C. Jernigan, Jordan Chavez, Amber Fly, Ron Satija
10:45 - 11:15 AM	**Break**
11:15 - 12:00 PM	**Business Breakout — Best Practices for Subchapter V Cramdown Plans** Brendon Singh, Trey Monsour, Frances Smith **Consumer Breakout — Bifurcated Fee Agreements** Hon. John W. Kolwe, Aubrey Thomas, Hal Lusky
12:00 - 1:00 PM	**Lunch —** *Bankruptcy Law Section Business Meeting and Awards* (Exhibit Hall C)
1:00 - 1:45 PM	**Business Breakout — Healthcare Cases, Practical Advice for Distressed Healthcare Businesses** Hon. Joshua P. Searcy, Anne Burns, Pat Kelly, Casey Roy **Consumer Breakout — Mortgages After CARES Act** Hon. Shad M. Robinson, Christy Heimer, Yoshie Valadez, David Peake
1:45 - 2:15 PM	**Break**
2:15 - 3:00 PM	**Great Debates** *Carson v Mayer*, Amber Carson and Simon Mayer *Shanks v Bourda*, Emily Shanks and Matthew Bourda
3:00 - 4:00 PM	**Wrap It Up with the Judges** Moderator – Hon. Ronald B. King (Ret.) Hon. Michael M. Parker, Hon. Michelle V. Larson, Hon. Shad M. Robinson, Hon. Scott W. Everett

GOLF TOURNAMENT

Sunday, June 4th | 1 PM

The Canyons Golf Course

$259 Canyons Course per player

Join your bankruptcy colleagues and judges at the 2023 Bankruptcy Bench Bar golf tournament! We will pair you up into teams of two for a scramble based on your handicap. Prizes will be awarded for the top 2 teams, longest drive, and closet to the pin.

What is your handicap?

- 0-10
- 11-20
- 20-30
- 30-40
- Handicap? Wait — let me Google that.

RELAX & UNWIND

Sunday, June 4th | 1 PM

Lantana Spa & Replenish Spa Bistro

$175 - facial or 1 hour massage

(includes gratuity & afternoon wine/cheese reception at Replenish Spa Bistro)

email Shane Kelly for appointments at shane.kelly@marriott.com

Relax in the rejuvenating Lantana Spa within just steps of your room! *Reservations must be made by **May 12, 2023**.* Only 40 spots are available.

THANK YOU SPONSORS!

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Mail to: Frances A. Smith, Ross, Smith & Binford PC
Attn: Bankruptcy Bench Bar Conference Registration

Plaza of the Americas, 700 North Pearl St., Suite 1610, Dallas, TX 75201

(Deadline for refund is May 19, 2023. Substitutions allowed.)

REGISTER ONLINE HERE

Name: _____ Firm: _____

Address: _____

Email: _____ Phone _____

District: _____ I prefer: Consumer Session _____Business Session_____

Please indicate your attendance at the following events:
Some events require additional fees. Social attendees may participate in events as noted below.

Registration:
_____ $475 Registration Fee (no charge for judges, law clerks, or speakers)

Receptions (Indicate number of attendees/guest):
_____ Sunday Evening Cocktail Welcome Reception (no charge)
_____ Monday Evening YLC Sponsored Reception (no charge)

Fun Run Event:
_____ Tuesday morning Run with the Judges (no charge)

Golf Tournament:
_____ Sunday afternoon _ Holes of Golf $259 per player
Handicap _____ Name of additional players and handicap: _____

Spa Treatments: *includes wine & cheese reception at Replenish Spa Bistro, 20% gratuity*
_____ Spa Treatments: indicate # of persons _____ and name of guest:_____

_____ $175 – 60 min massage
_____ $175 – 60 min facial Email Shane Kelly at shane.kelly@marriott.com to schedule your service.