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Judicial Spotlight: The Honorable Harlin D. Hale

WWCD: A Reminder That We All Have Pebbles to Share

By: *Amber M. Carson*

For nearly twenty years, the Honorable Harlin DeWayne "Cooter" Hale served as a bankruptcy judge in the Northern District of Texas. He would usually start his day earlier than anyone else on the fourteenth floor of the federal courthouse in Dallas, clad in what would become a signature bowtie, warmly greeting anyone he came across while walking to and settling in behind his desk in his chambers.

Serving as a bankruptcy judge is not a profession, but a calling. Bankruptcy can act as a balm on a debtor's fractured financial existence, and can provide real, incredibly positive change. But it can't solve all problems, all the time. Upholding the law can be difficult, even heart-wrenching at times. Ruling that a consumer debtor will not maintain the benefit of the automatic stay, for instance, all while knowing it means the loss of their home, could leave a pit in any person's stomach, but especially one as kindhearted as Judge Hale.

Through difficult hearings and successful confirmations, through monotonous dockets and unexpected lawyers' antics, Judge Hale's dedication to doing what is right was unwavering. Even more impressive is that his professional service and upstanding character persisted long after he hung up his black robe at the end of a long day's work.

During his retirement celebration this past June, Judge Hale's now-former hallmate, Bankruptcy Judge Michelle Larson (who began her term only two years ago) reflected: "What would Cooter do?" As a reminder to ask ourselves that question each day, Judge Larson handed out to attendees of Judge Hale's retirement celebration hundreds of bright purple bracelets, emblazoned in bright yellow with "WWCD" along with tiny bow ties.

Judge Larson giving a "WWCD" bracelet to Judge Hale at his retirement party in June.

We might not all refer to Judge Hale quite so informally, but we can all take his example and apply it to our own lives. While making a significant positive impact on our community can seem like an unattainable, painstaking, and overwhelming task, Judge Hale is living proof that prodigious actions can take small forms.

Although Judge Hale's natural enthusiasm for helping others led to the creation of the Bankruptcy Law Section's Young Lawyers Committee, the DFW Association of Young Bankruptcy Lawyers, the Starting Out Right CLE program, and countless other organizations and learning opportunities—rather sizeable projects—when asked to reflect on Judge Hale's impact, more modest acts come to mind. Memories of Judge Hale take the form of things like making an innocuous compliment about a pleading, an article, or a presentation; mentoring an attorney from across the bench by challenging that attorney to do her best work in his court; or extending an invitation to lunch or to observe a court hearing. Judge Hale's impact is striking, not just for (or even because of) his larger accomplishments, but in the way he touched lives through countless, every-day acts.

Judge Hale's most seemingly inconsequential actions—comments or emails that each took no more than a couple minutes to relay—are those that garnered the largest effect on the community. As lawyers, we can too easily find ourselves lost on a bullet train through a circuitous route of billable hours, firm obligations, and familial responsibilities. Finding the time to detour through acts of service to our legal community can seem impossible, even for the most hard-working and generous among us. Judge Hale's legacy proves, however, that lives can be improved by something as simple as an email or a kind word. We can all add that stop to our itinerary.

With purple bracelets in hand, Judge Larson concluded, "it's said that we create ripples in life—if that's true, Cooter, my friend, you have a never-ending pile of pebbles." Lest we forget, we don't need boulders to make a splash. We all have pebbles—may we not let them go to waste.

Author

Amber Carson is a partner-elect in the Corporate Restructuring & Bankruptcy group at Gray Reed in Dallas. Amber previously served as a judicial law clerk to Judge Hale and currently serves in several voluntary leadership roles, including Secretary of the Section.

LENDERS BEWARE YOUR CO-LENDERS:

A Review of Select Recent Up-Tier Transactions

By: *George R. Howard*
William L. Wallander
Matthew D. Struble
Adia D. Coley

Introduction

The rise of "lender on lender violence" has gained significant attention recently following the consummation of several aggressive "up-tier" transactions and related litigation. The "up-tier" strategy gets its name from financially-distressed companies negotiating with lenders holding a majority of bonds or term loans — to the exclusion of other similarly-situated minority lenders — to issue higher priority debt to the majority consenting lenders. This is implemented via amendments to the company's existing credit documents approved by the majority consenting lenders.

Minority non-consenting lenders have tried to argue that such transactions violate (i) various terms of the underlying credit documents and the sacred pro rata sharing and other rights of non-consenting lenders and (ii) the implied covenant of good faith and fair dealing. This article summarizes three recent transactions and accompanying litigation and discusses potential implications for debt markets and in- and out-of-court restructurings.

TriMark – The Waterfall Matters

TMK Hawk Parent, Corp. ("***TriMark***"), a leading distributor of food service equipment, completed an up-tier transaction in September 2020.[1] Among numerous amendments to the existing first lien credit agreement to permit the transaction, the no-action clause was materially amended in an attempt to prevent minority lenders from bringing suit to challenge the transaction.[2]

Despite this clause, certain of TriMark's minority lenders sued the company, its sponsors, and the majority consenting lenders for breach of contract, tortious interference, fraudulent transfer and breach of the implied covenant of good faith and fair dealing.[3] The company, majority consenting lenders and sponsors filed motions to dismiss.[4]

On August 16, 2021, Judge Joel Cohen of the Supreme Court of New York dismissed the tortious interference, fraudulent transfer and breach of implied covenant of good faith and fair dealing causes of action.[5] Judge Cohen, however, found that the no-action clause, as amended, was unenforceable, and that the up-tier transaction arguably required the consent of the minority lenders because the change to the definition of "Intercreditor Agreements" to include the new super-priority intercreditor agreement effectively modified the waterfall provision in the existing collateral agreement (a sacred right), which was prohibited without the consent of each lender.[6] Because this threw into question the validity of the overall amendment, the minority lenders' other breach of contract claims also survived the motion to dismiss.[7]

In January 2022, TriMark settled the suit by agreeing to exchange all pre-up-tier transaction first lien debt for superpriority second-out debt created in the up-tier transaction, which was *pari passu* with the consenting lenders' rolled up claims.[8]

Serta – The Implied Covenant of Good Faith and Fair Dealing Should be Weighed Further

In June 2020, Serta Simmons Bedding, LLC ("***Serta***") consummated its own up-tier transaction.[9] As with TriMark, the transaction required a majority of lenders to consent to a variety of amendments to the existing loan documents.[10] Certain objecting minority lenders filed lawsuits, first in an attempt to enjoin the transaction, and when that failed, for damages and injunctive relief, alleging among other things, breach of contract and breach of the implied covenant of good faith and fair dealing.[11]

A principal issue in dispute was whether the exchange of old term loans for new senior debt was permitted as an "open market" transaction under the existing credit agreement.[12] In March 2022, Judge Katherine Polk Failla of the United States District Court for the Southern District of New York denied Serta's motion to dismiss on the basis that the term "open market" was ambiguous as used in the credit agreement.[13] Further, while Judge Failla found that other amendments to the credit agreement did not directly change the pro rata sharing and waterfall provisions and were properly approved by a majority of lenders, she went on to hold that the plaintiffs' claim based on a breach of the implied covenant of good faith and fair dealing would survive because (i) it was pleaded in the alternative to the breach of contract claims and (ii) Serta "systematically combed through the credit agreement tweaking every provision that seemingly prevented it from issuing a senior tranche of debt, thereby transforming a previously impermissible transaction into a permissible one . . . ."[14] This stands in contrast to the TriMark decision where the court found there was no viable claim based on the implied covenant of good faith and fair dealing where the dispute turned entirely on whether or not the transaction was permitted under the credit agreement.[15] The Serta litigation is still ongoing.

TPC – Waterfall is Not Anti Subordination/Harmonizing 2/3 Majority Rights

Although not a classic "up-tier" transaction involving the exchange of old secured debt for new senior secured debt, the Delaware bankruptcy court in the bankruptcy case of TPC Group Inc. ("***TPC***") recently weighed in on similar issues raised in both *Serta* and *TriMark*.

Faced with numerous business challenges, TPC issued $204.5 million of new 10.875% notes secured by a senior lien on the same collateral that secured TPC's existing 10.5% notes.[16] This issuance required various amendments to the 10.5% notes indenture with the approval of a supermajority group of consenting noteholders (the "***Consenting Noteholders***") and entry into a new intercreditor agreement.[17] An agreement with the Consenting Noteholders subsequently was also a critical component of TPC's proposed restructuring, including proposed DIP financing from the Consenting Noteholders comprised of $85 million in new money commitments and a $283 million roll-up of the Consenting Noteholders' 10.875% notes (the "***Term DIP***").[18]

A flurry of litigation ensued with dissenting 10.5% noteholders (the

"***Dissenting Noteholders***"), including an objection to the proposed Term DIP based, in part, on the allegation that the roll-up was inappropriate because the 10.875% notes being rolled up should be (and should remain) junior in priority to the 10.5% notes.[19] This priority dispute had been brought in an adversary proceeding decided by the bankruptcy court on motions for summary judgment approximately 35 days after the petition date (and approximately 1 week before the scheduled hearing on final approval of the Term DIP).[20]

In the adversary proceeding, similar to both *Serta* and *TriMark*, the bankruptcy court first considered whether the Dissenting Noteholders' suit was barred by a no-action clause (and concluded it was not) before turning to whether the amendments to permit the issuance of the 10.875% notes required the consent of the Dissenting Noteholders.[21] The bankruptcy court, while acknowledging and discussing the court's reasoning in *TriMark*, concluded that the provision preventing changes to the waterfall without unanimous lender consent should not be read as the equivalent of an anti-subordination provision, particularly when "the inclusion of express anti-subordination clauses are sufficiently commonplace."[22] Further, the bankruptcy court reasoned that because the 10.5% notes indenture permitted a two-thirds majority to release all of the collateral, it would not make sense to read the indenture to prohibit the less drastic measure of lien subordination without the consent of all lenders.[23]

The Term DIP was subsequently approved on a final basis, and while the Dissenting Noteholders initially appealed the summary judgment decision, they voluntarily dismissed that appeal several weeks later.[24]

Potential Implications

Up-tier transactions have caused lenders to reconsider how to protect themselves from their co-lenders. Some have responded by inserting protective provisions in credit documents, such as requiring all lenders to consent to any amendments that would result in lower payment priority or lien subordination. Inclusion of similar provisions may be expected in both new issuances and amend/extend transactions, particularly if credit markets continue to tighten.

"Lender on lender" violence, however, likely will continue as sophisticated parties seek to protect their own interests. More litigation can be expected if economic conditions deteriorate and companies that have engaged in up-tier transactions end up in chapter 11. While the bankruptcy court in *TPC* has previewed one bankruptcy judge's view of a less aggressive form of transaction, it remains to be seen how other bankruptcy courts will rule on these issues. Finally, the resemblance of out-of-court up-tier transactions with roll-up DIP financing transactions is worth noting. Practitioners considering a roll-up DIP may consider the decisions in *TriMark*, *Serta* and *TPC* (among others) in evaluating potential arguments as to a roll-up DIP and amendments that may be required to prepetition credit documents.

Authors

George Howard (top left) and Bill Wallander (top right) are partners, and Matt Struble (bottom left) and Adia Coley (bottom right) are associates in Vinson & Elkins' Restructuring and Reorganization group.

[1] *Audax Credit Opportunities v. TMK Hawk Parent, Corp.*, No. 565123/2020, slip op. at 9 (N.Y. Sup. Ct. Aug. 16, 2021).

[2] *Id*. at 13.

[3] *Id*. at 5.

[4] *Id*.

[5] *Id*.

[6] *Id*. at 18−20 (discussing no-action provision); *Id*. at 25−27 (discussing the change to the definition of "Intercreditor Agreements"). .

[7] *Id*. at 27.

[8] Press Release, TriMark USA, *TriMark USA Announces Resolution of Litigation with Its Lenders* (Jan. 7, 2022), https://www.prnewswire.com/news-releases/trimark-usa-announces-resolution-of-litigation-with-its-lenders-301456561.html (last accessed Sept. 12, 2022).

[9] Press Release, Serta Simmons Bedding, *Serta Simmons Bedding Closes Previously Announced Deleveraging and Liquidity Enhancing Transaction* (June 22, 2020), https://sertasimmons.com/news/serta-simmons-bedding-closes-previously-announced-deleveraging-and-liquidity-enhancing-transaction/ (last accessed Sept. 12, 2022).

[10] *LCM XXII LTD., et al. v. Serta Simmons Bedding, LLC*, No. 21-03987, slip op. at 7−8 (S.D.N.Y. Mar. 29, 2022).

[11] *Id*. at 1; 9−10.

[12] *Id*. at 16−21.

[13] Section 9.05(g) of Serta's credit agreement allowed first-lien lenders to assign their rights under the agreement to Serta or its affiliates on a

non-pro rata basis through either a Dutch auction or an "open market purchase" for the purpose of retiring first-lien loans. *Id*. at 16.

[14] *Id*. at 40.

[15] *Compare Serta Simmons*, at 36−41 *with TMK Hawk Parent*, at 28−29.

[16] *Bayside Capital Inc, and Cerberus Capital Management, L.P. v. TPC Group Inc.*, No. 22-50372, slip op. at 9−11 (Bankr. Del. July 11, 2022) [Dkt. No. 72].

[17] *Id*.

[18] *Id*. at 11.

[19] *Id*.

[20] *Id.* at 12−14.

[21] *Id*. at 20.

[22] *Id*. at 24−25.

[23] *Id*. at 25.

[24] *See Bayside Capital Inc, and Cerberus Capital Management, L.P. v. TPC Group Inc.*, No. 22-0927 (D. Del. Aug. 5, 2022) [Dkt. No. 20].

Judicial Spotlight: The Honorable Scott W. Everett

By: *Jordan Chavez*

This year, Judge Scott W. Everett was appointed to serve on the bench for the United States Bankruptcy Court for the Northern District of Texas, Dallas Division. This article seeks to highlight Judge Everett and his career, accomplishments, and interests.

Education

Judge Everett was born and raised in Lakewood, Colorado. After high school, he attended the University of Colorado at Denver and graduated in 1992. Judge Everett took a year off after college to work and save for law school. In 1993, Judge Everett moved to Lubbock, Texas to attend Texas Tech University School of Law. Judge Everett became interested in bankruptcy law when he took Professor Dean Pawlowic's Creditors' Rights and Bankruptcy Course, which those who have taken the course know is one of the most, if not the most, challenging courses at Tech Law. Judge Everett was intrigued by the subject matter and realized that he wanted to be a bankruptcy attorney.

Once he decided on bankruptcy law, Judge Everett pursued a bankruptcy clerkship. He wanted to continue learning the subject matter and understand how it was put into practice in the courtroom.

King Clerkship

Judge Everett graduated from Tech Law in 1996 and began a clerkship with Judge Ronald B. King in San Antonio, Texas. Judge Everett enjoyed clerking for Judge King so much that he decided to ask Judge King if he could continue his clerkship for another year, and Judge King agreed. Judge Everett cherishes his time working with Judge King, and the two remain close friends today.

King and Everett, 1998

Judge King has often said that being a bankruptcy judge is the "best job in the world." After observing Judge King's candor and learning from him for two years, Judge Everett agreed – it was the best job in the world. During his time working for Judge King, Judge Everett made it his goal to work to become a bankruptcy judge.

"All of my 37 former law clerks swear that they were the best and the favorite law clerk of mine. Scott Everett was no different and he was tied with many others as the best and favorite. On his last day at work with me, he asked if he could go straight to being a bankruptcy judge. I told him it

doesn't work that way. But he proved to me every day that he was a nose to the grindstone worker who had an encyclopedic knowledge of bankruptcy law. Plus, he has the experience, collegiality, respect, and empathy that provide him with the perfect attributes to become a great judge."

- *Judge Ronald B. King*

On the last day of his clerkship, Judge King took the below photo of Judge Everett, perhaps to remind him to work hard and achieve his goals.

Judge Everett on his last day with Judge King, 1998

Haynes and Boone

After his clerkship with Judge King, Judge Everett started as an associate with Haynes and Boone, LLP in the Dallas office in 1998. He traveled often, particularly to Houston because, at the time, Haynes and Boone did not have a Houston restructuring group, but the restructuring work in Houston was certainly growing. Judge Everett's colleagues enjoyed working with him, and his kindness and integrity made a lasting impression on them.

"Judge Everett was always the consummate team player – the first to enter the fray on the most difficult projects and the last one to take personal credit for success. He also served as a role model and outstanding mentor, frequently dropping everything to help junior team members understand complex bankruptcy law concepts. Much of what I know about how to 'be a lawyer', I learned from Judge Everett."

- *Ian T. Peck*

"For 15 years, as a fellow associate and then a fellow partner, Judge Everett was one of my most important coworker mentors. Judge Everett made me a better lawyer as I observed his mastery of bankruptcy law, his dignity to others, and his humility. Judge Everett always injected some levity and a sense of calm to difficult and stressful work situations. This temperament will make him a great bankruptcy judge."

- *Eric Terry*

Judge Everett at a Haynes and Boone event with Eric Terry and Jason Barnes in 1999

While working at Haynes and Boone, Judge Everett also met his wife, Melissa. At the time, Melissa was working as a performer and ultimately became a Radio City Rockette. The two fell in love and married. Judge Everett is a family man – in fact, a big family man. Melissa and Judge Everett have five kids – Sam, Eli, Ailey, Jonah, and Lily. He loves spending time with his family and does so as often as possible.

Judge Everett worked as an associate at Haynes and Boone from 1998 to 2006 and made partner in January 2006. He learned a lot during that time. When asked about the most challenging part of private practice, Judge Everett explained that it was difficult to juggle everything. When times were busy and stressful, he often reminded himself of a quote from founding partner Mike Boone: "The practice of law is a marathon – not a sprint."

10th Circuit BAP

In 2015, Judge Everett had the opportunity to go work for the Tenth Circuit Bankruptcy Appellate Panel ("BAP") in his home state of Colorado. This opportunity sounded great, but it would require Judge Everett to be away from his family for several months while the kids finished the school year in Texas. After discussing it with Melissa, Judge Everett took the clerkship and began working for the Tenth Circuit BAP in February 2015. He enjoyed the job, but it was difficult being away from his family.

Mullin Clerkship

In September 2015, Judge Mark X. Mullin left Haynes and Boone to take the bench for the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division. Judge Everett and Judge Mullin worked well together at Haynes and Boone, so, when asked, Judge Everett returned to Texas to work as Judge Mullin's career law clerk. Judge Everett enjoyed working for Judge Mullin and felt that after practicing bankruptcy law for over seventeen years he was able to make more substantive contributions than when he was fresh out of law school.

The original Mullin chambers team:
Judge Everett, Karyn Rueter, Judge Mullin,
Scott Lawrence, and Jenny Calfee

Judge Everett's favorite part of clerking for Judge Mullin was the behind-the-scenes discussions about complex legal issues and preparing for hearings. Judge Everett clerked for Judge Mullin for five and a half years.

Judge Mullin and Judge Everett

"I am blessed for having had the opportunity to know and work alongside Scott Everett for over twenty-four years. He has all the characteristics you hope for in a professional colleague – smart, kind, funny, selfless, and filled with integrity. Scott makes work fun. But I am most blessed to call Scott my friend because of his character. He has life in proper perspective, and he excels as a husband, father, son, sibling, and friend – he truly is a mentor of mine in the game of life. The Northern District of Texas is blessed to have Judge Everett."

- *Judge Mark X. Mullin*

Return to the BAP

In 2021, Judge Everett was approached by a colleague about an opportunity to clerk for the Tenth Circuit Bankruptcy Appellate Panel again. This time, however, the clerkship opportunity was remote and would allow Judge Everett to work from Southlake, Texas and stay with his family. It was difficult to leave Judge Mullin, but Judge Everett decided to take the opportunity and began his remote position with the BAP in June 2021. He said his clerkship experiences have all helped him prepare for taking the bench, especially observing the judges he worked for and learning how they carefully made decisions.

Path to the Bench and Words of Wisdom

Throughout his career, Judge Everett applied for a bankruptcy judgeship several times. The application process is rather lengthy and time consuming, but Judge Everett continued applying and was selected to take the bench in June 2022 upon the retirement of Judge Harlin D. Hale. His advice to attorneys that hope to take the bench is to persevere. The process can be discouraging at times, but he encourages others to stick it out and keep applying.

When asked if he had other advice for attorneys in general, Judge Everett offered three pieces of wisdom:

"First, remember to honor the golden rule. The bankruptcy bar is small; treat others with kindness because your reputation follows you like a shadow. The single most important thing you can do is treat other attorneys, co-workers, and court staff with kindness and respect.

Second, try to become an expert in your field.

Third, Mike Boone always told us 'take care of yourself – don't run yourself into the ground or you will burn out.' He's right. Take time for yourself and for your family. Doing so will make you a better lawyer."

Hobbies and Interests

When Judge Everett is not working, he loves spending time with his family. He also enjoys collecting and restoring antique typewriters. He owns over 150 typewriters, many that have yet to be worked on. This hobby began when his son Sam was six. Sam enjoyed writing stories, and Judge Everett bought him a 1956 Smith Corona typewriter. Sam immediately took to it. The gentleman who sold Judge Everett the typewriter was a typewriter mechanic. The two became good friends, and the mechanic helped Judge Everett learn how to repair the antique typewriters. Now, each of his children have their own typewriter. Judge Everett's goal is to write an order on one of his typewriters. "Probably not a confirmation order," Judge

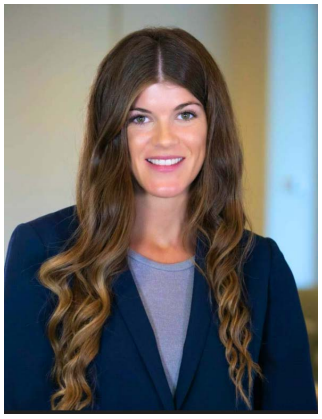
Everett joked. “Maybe I’ll do a *pro hac vice* order or something instead.”

Four of Judge Everett’s antique typewriters

Looking Ahead

Judge Everett said he has not had too many surprises so far since taking the bench, though a good portion of his chambers is under construction and has been since he started, which was a bit of a surprise. “I’m still learning the ropes, but I had the best two possible mentors, Judge King and Judge Mullin, and I’m so thankful for their guidance.”

Author



Jordan Chavez is a restructuring associate at Haynes and Boone, LLP in the Dallas office and serves as Chair of the Section’s Young Lawyers Committee and VP of Communications for the Section.

Supreme Court Spotlight

Siegel v. Fitzgerald: Occam's Razor Grazes Bankruptcy

By: *Heather M. Mathews and Bradley L. Drell*

For only the second time,[i] the U.S. Supreme Court has held that a law violates the uniformity requirement of the Bankruptcy Clause.[ii] In *Siegel v. Fitzgerald*,[iii] the Court unanimously invalidated Congress's enactment of a significant quarterly fee increase that exempted Chapter 11 debtors in Alabama and North Carolina.

While this rare review of the Clause by the high Court renders the decision historic, what the Court *did not* do has perhaps generated more discussion. The circumstances underlying the case are fairly straightforward, but were also decades in the making, and the Court left multiple questions unresolved.

A Tale of Two Systems

The story of *Siegel* is the story of Circuit City,[iv] whose bankruptcy begins somewhere in the middle of the salient history. In 2008, Circuit City filed for Chapter 11 bankruptcy in a U.S. Trustee district.[v] When its liquidation plan was confirmed in 2010, the maximum quarterly fee was $30,000.[vi] The case was still pending when Congress enacted a "temporary, but significant, increase" which raised the maximum quarterly fee to $250,000 in U.S. Trustee districts beginning on January 1, 2018.[vii]

The effect on the Circuit City bankruptcy was substantial. During the first three quarters of the increase in 2018, $632,542 in total quarterly fees were imposed, compared to $56,400 which would have been imposed under the prior schedule.[viii]

Meanwhile, debtors in North Carolina and Alabama, who are not under the U.S. Trustee program, continued to be governed by the pre-2017 Act fee schedule. The U.S. Trustee program has never been imposed in those states.

Instead, North Carolina and Alabama districts have a less-costly Bankruptcy Administrator program[ix] in which some administrative duties are assigned, but bankruptcy judges retain significant oversight.[x] The Bankruptcy Administrator program operates under the auspices of the Judiciary, while the U.S. Trustee program is under the Department of Justice.[xi] Importantly, the U.S. Trustee program is self-funded, but the Bankruptcy Administrator program receives funding through the Judiciary's general budget.[xii]

It is not surprising, then, that quarterly fees were not originally imposed in Bankruptcy Administrator districts. In fact, quarterly fees were not charged in those districts until the disparity was called into question by the U.S. Court of Appeals for the Ninth Circuit in *St. Angelo v. Victoria Farms, Inc*.[xiii] The Ninth Circuit's decision had no widespread legal effect, but prompted Congress to authorize the imposition of quarterly fees in Bankruptcy Administrator districts.[xiv]

When Congress authorized the quarterly fee imposition on Bankruptcy Administrator districts in 2000, the fee provision made applicable to these districts was merely permissive.[xv] For a few decades, all appeared well. Pursuant to a 2001 standing order, the Judicial Conference

matched U.S. Trustee fee increases from 2001 to 2017.[xvi]

The situation was ripe for an actionable misstep, however, and the 2017 Act served as the catalyst. The Judicial Conference, which then had discretion under § 1930(a)(7),[xvii] did not adopt the amended fee schedule until September 2018.[xviii] In a decision that appears to have been informed by concerns of sufficient notice and due process,[xix] the Judicial Conference not only delayed implementation until October 1, 2018, but also limited the increase to newly-filed cases.[xx]

A Unanimously Narrow Decision

Writing for the Court, Justice Sotomayor recognized a significant circuit split regarding the constitutionality of the fee disparity.[xxi] The Fourth Circuit below – itself divided – had concluded the "Bankruptcy Clause forbids only 'arbitrary' geographic differences," and rationalized that the increase in U.S. Trustee districts properly addressed that program's funding shortfall.[xxii] The high court unanimously disagreed.

The problem, the Court explained, stemmed "from Congress' own decision to create a dual bankruptcy system funded through different mechanisms in which only districts in two States could opt into the more favorable fee system for debtors."[xxiii] The Court nevertheless held "only that the uniformity requirement of the Bankruptcy Clause prohibits Congress from arbitrarily burdening only one set of debtors with a more onerous funding mechanism than that which applies to debtors in other States," without addressing the constitutionality of the dual systems.[xxiv]

Certainly, the decision may open the door to challenges by debtors who perceive disadvantageous treatment by virtue of the program. The Court recognized that the U.S. Trustee program had met resistance in North Carolina and Alabama[xxv] and districts in those states were "arbitrarily separated" by Congress.[xxvi] Thus, regardless of the nature of the grievance, the dichotomy may not withstand even a rational basis review.[xxvii]

Show Me the Money! (But How?)

Though the legal status of approximately $324 million in fees is in question,[xxviii] the Court left open the critical question of proper remedy. The *Siegel* petitioner sought refund, while the government argued for purely prospective relief (i.e., no tangible relief), or the collection of underpayments.[xxix] The Court remanded the case to the Fourth Circuit for determination of this issue.[xxx]

A refund of the overpayment as the proper remedy, at least as a general proposition, was not seriously questioned until recently. In an early case,[xxxi] in response to a claim of overpayment of $244,234,[xxxii] the government focused on substantive constitutional merits while reserving the right to dispute quarterly fee calculations.[xxxiii]

The government also previously acknowledged that the "Justice Department's appropriations statute authorizes refunds from the United States Trustee System Fund ("Fund") and then from appropriations."[xxxiv] At that time, the government indicated it "will draw on the Fund when all appeals conclude if the [Bankruptcy] Court's Order is affirmed and there is any overpayment."[xxxv] Its argument was then largely focused on the necessity of exhausting appeals and avoiding a re-calculation of fees.[xxxvi]

When the Supreme Court decided

Siegel, multiple petitions for certiorari were pending on the issue of the fee increase. Perhaps recognizing the significance of the remedy question, the Court vacated and remanded every circuit court decision it had reviewed to-date for consideration in light of *Siegel*.[xxxvii]

The Tenth Circuit has been the only court to rule following remand. It rejected the government's purely prospective-or-collection argument, reinstating its original opinion and reversing and remanding for refund of overpayment.[xxxviii] The Tenth Circuit's remand-for-refund ruling is, of course, limited to the debtors before that court.[xxxix] The ruling, however, is likely to guide lower courts in the circuit.

After remand of *Siegel*, the Fourth Circuit remanded the case to the U.S. Bankruptcy Court for the Eastern District of Virginia for consideration of remedy.[xl] The bankruptcy court issued a briefing schedule for an anticipated motion to dismiss,[xli] and the matter is pending.

Given the failure of the government's general remedy argument in the Tenth Circuit, case-specific objections may take on greater prominence. For example, before the bankruptcy court in *Siegel*, the government objected to a refund to the bankruptcy estate on the basis that "any such debt did not exist until after confirmation," and the bankruptcy estate had ceased to exist.[xlii] Further, the Supreme Court in its decision noted the argument of potential waiver,[xliii] though it is well-established that the failure to pay quarterly fees is a ground to convert or dismiss the case.[xliv] In any event, it appears the government intends to maintain and augment its remedy argument.

Questions of sovereign immunity may also receive heightened attention. Early in *Siegel*, the government noted the appropriations provision neither waived sovereign immunity nor provided a cause of action.[xlv] In post-remand briefing to the Tenth Circuit, the government briefly mentioned sovereign immunity,[xlvi] but the argument obviously did not prevail.

The waiver of sovereign immunity must be unequivocal.[xlvii] The Tucker Act, 28 U.S.C. § 1491(a)(1), and Little Tucker Act, 28 U.S.C. § 1346(a)(2), provide such waivers of sovereign immunity.[xlviii] These Acts apply to claims against the United States founded on "the Constitution, or any Act of Congress . . . or for liquidated or unliquidated damages in cases not sounding in tort."[xlix] The Little Tucker Act applies to such claims that do not exceed $10,000.[l]

Generally, the United States Court of Federal Claims has jurisdiction over Tucker Act claims, while the CFC and district courts have concurrent jurisdiction over Little Tucker Act claims.[li] Where concurrent jurisdiction exists between the CFC and district courts sitting in bankruptcy under 28 U.S.C. § 1334(b), courts disagree whether the Tucker Act waives sovereign immunity for suits pending outside the CFC.[lii]

Certainly, most parties that have pursued refunds have done so in their bankruptcy cases. At least one bankruptcy court, however, in its order dismissing the bankruptcy case, declined to retain jurisdiction over an adversary proceeding seeking recovery of excess fees.[liii] The debtor-plaintiff commenced its claim in district court, where the court held it was entitled to a refund of $595,849.[liv] The government raised sovereign immunity only in objection to the plaintiff's attorney fee claim,[lv] and the court agreed that portion was barred.[lvi] Otherwise, there was no discussion of sovereign immunity or jurisdiction.

The real-world effects of *Siegel* remain undetermined. It is possible that the remedy question will be resolved by the Supreme Court, and it appears likely that *Siegel* will generate more litigation than preceded it.

Authors

Heather Mathews and Brad Drell are shareholders at Gold, Weems, Bruser, Sues & Rundell in Alexandria, Louisiana.

[i] See *Railway Labor Executives' Assn. v. Gibbons*, 455 U.S. 457, 102 S.Ct. 1169 (1982).

[ii] U.S. Const. art. I, § 8, cl. 4.

[iii] 142 S.Ct. 1770 (2022). The authors filed an amicus brief with the Supreme Court in the case.

[iv] Alfred H. Siegel is trustee of the Circuit City Liquidating Trust.

[v] *Id.* at 1777.

[vi] *Id*.

[vii] *Id.* (citing Pub. L. 115–72, Div. B, 131 Stat. 1229 ("2017 Act")), codified at 28 U.S.C. § 1930(a)(6)(B) (2018).

[viii] *Id.* at 1778.

[ix] See *In re Buffets, L.L.C.*, 597 B.R. 588, 592-93 (Bankr. W.D. Tex. 2019); *In re Buffets, L.L.C.*, 979 F.3d 366, 383 (5th Cir. 2020) (Clement, J., dissenting) (noting "Alabama and North Carolina debtors get to use less-expensive Administrators").

[x] Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986) ("1986 Act"), § 302(d)(3)(I); Travis Sasser, "*Why Bankruptcy Judges in North Carolina Still Appoint Trustees*," Sasser Law Firm (Feb. 15, 2019), available at sasserbankruptcy.com/wpcontent/uploads/2019/05/Trustee-Appointment-in-NC-Bankruptcy-Travis Sasser.pdf

[xi] Indeed, U.S. Trustees in various regions have advocated for the constitutionality of the challenged fee disparity, with the Fifth Circuit considering the issue after the "[U.S.] Trustee appealed" the bankruptcy court decision in favor of the debtor. See *Buffets*, 979 F.3d at 372.

[xii] *Siegel*, 142 S.Ct. at 1776.

[xiii] *Id.* (citing *St. Angelo v. Victoria Farms, Inc*., 38 F.3d 1525, 1532–33 (9th Cir. 1994), *amended*, 46 F.3d 969 (1995)). The *St. Angelo* Court struck down section 317(a) of the Judicial Improvements Act of 1990 (discussed *infra*), which at the time, "guarantee[d] that creditors and debtors in the 48 other states are governed by a[] dissimilar, more costly bankruptcy system than members of the same groups in Alabama and North Carolina." 38 F.3d at 1533.

[xiv] See *Buffets*, 979 F.3d at 371, *overruled in part on other grounds*, 142 S.Ct. 1770 (2022).

[xv] Pub. L. No. 106-518, § 105, 114 Stat. 2410, 2412 (2000) ("2000 Act") (enacting 28 U.S.C. § 1930(a)(7)) (providing "the Judicial Conference of the United States *may* require the debtor in a case under chapter 11 to pay fees equal to those imposed" in Trustee Program districts).

[xvi] *Siegel*, 142 S.Ct. at 1777.

[xvii] See 2000 Act. In 2021, Congress amended this statute such "that the Judicial Conference 'shall require' imposition of fees in Administrator Program districts that are equal to those imposed in Trustee Program districts." *Id.* (citing Pub. L. 116–325, 134 Stat. 5088 and § 1930(a)(7)).

[xviii] *Siegel*, 142 S.Ct. at 1777.

[xix] Report of the Judicial Conference Committee on the Administration of the Bankruptcy System, Sept. 2018,

18-20 (reflecting concerns over the "substantial increase" and proper notice).

[xx] *Siegel*, 142 S.Ct. at 1777.

[xxi] *Id.* at 1778, n.1 (comparing circuit court decisions of *In re John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011 (10th Cir. 2021) (2017 Act is unconstitutional); *In re Clinton Nurseries, Inc*., 998 F.3d 56 (2d Cir. 2021) (same), with *In re Mosaic Mgmt. Group, Inc*., 22 F.4th 1291 (11th Cir. 2022) (2017 Act is constitutional); *In re Circuit City Stores, Inc*., 996 F.3d 156 (4th Cir. 2021) (same); *In re Buffets, LLC*, 979 F.3d 366 (5th Cir. 2020) (same)). The authors filed amicus briefs in the respective circuit courts in the matters of *John Q. Hammons*, *Mosaic*, and *Circuit City*.

[xxii] *In re Cir. City Stores, Inc*., 996 F.3d 156, 166 (4th Cir. 2021).

[xxiii] *Siegel*, 142 S.Ct. at 1782-83.

[xxiv] *Id*.

[xxv] *Id*. at 1776.

[xxvi] *Id*. at 1782.

[xxvii] A potential impediment is that which has plagued even the circuit courts: the question of judicial authority to address problems stemming from the systemic division, insofar as the solution addresses other jurisdictions. See *Buffets*, 979 F.3d at 384 (Clement, J., dissenting) (recognizing the Fifth Circuit has "no greater authority than our colleagues on the Ninth Circuit to remake the bankruptcy system," referring to *St. Angelo*, 38 F.3d 1525 (9th Cir. 1994)).

[xxviii] *Siegel*, S.Ct. No. 21-441, Fitzgerald (Acting U.S. Trustee) Resp. at 22 (S.Ct. Dec. 8, 2021).

[xxix] *Siegel*, S.Ct. No. 21-441, Fitzgerald (Acting U.S. Trustee) Br. at 16 (S.Ct. Mar. 28, 2022).

[xxx] *Siegel*, 142 S.Ct. at 1783.

[xxxi] *In re Life Partners Holdings, Inc*., 606 B.R. 277 (Bankr. N.D. Tex. 2019).

[xxxii] Motion to Determine Liability for Post-Confirmation U.S. Trustee's Quarterly Fees and to Partially Disgorge Trustee Quarterly Fees, *Life Partners*, Case 15-40289-mxm11, Doc. 4307 (Bkr. N.D. Tex. Feb. 19, 2019).

[xxxiii] U.S. Trustee's Objection, *Life Partners*, Case 15-40289-mxm11, Doc. 4348 (Bkr. N.D. Tex. Apr. 26, 2019).

[xxxiv] Motion to Dismiss Complaint or, in the Alternative, for a Stay, *Circuit City*, Adv. Pro. No. 19-03091-KRH, Doc. 5, p. 1 (Bkr. E.D.Va. Nov. 14, 2019).

[xxxv] *Id*.; see also p. 3 (stating the government "agreed to refund any overpayment if one is due upon the completion of the appellate process").

[xxxvi] See *id.*

[xxxvii] See *In re John Q. Hammons Fall 2006, LLC*, S.Ct. No. 21-1078 and *In re Mosaic Mgmt. Group, Inc., sub nom. Bast Amron LLP v. United States Trustee Region 21*, S.Ct. No. 21-1354.

[xxxviii] See *In re John Q. Hammons Fall 2006, LLC*, No. 20-3203, 2022 U.S. App. LEXIS 22859, at *6 (10th Cir. Aug. 15, 2022).

[xxxix] *In re John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011, 1026 (10th Cir. 2021).

[xl] Case No. 19-2240, Doc. 59 (4th Cir. July 20, 2022).

[xli] See *Siegel v. U.S. Trustee Program*, Adv. Pro. No. 19-03091-KRH, Doc. 41 (Bkr. E.D.Va. Aug. 31, 2022).

[xlii] Motion to Dismiss Complaint or, in the Alternative, for a Stay, *Circuit City*, Adv. Pro. No. 19-03091-KRH, Doc. 5, p. 4 (Bkr. E.D.Va. Nov. 14, 2019).

[xliii] *Siegel*, 142 S.Ct. at 1783.

[xliv] See *Brown v. Harrington* (*In re Brown*), Civil Action No. 21-11284-GAO, 2022 U.S. Dist. LEXIS 73690, at *9 (D. Mass. Apr. 22, 2022).

[xlv] Motion to Dismiss Complaint or, in the Alternative, for a Stay, *Circuit City*, Adv. Pro. No. 19-03091-KRH, Doc. 5, p. 1 (Bkr. E.D.Va. Nov. 14, 2019).

[xlvi] Supplemental Brief for Appellee, *John Q. Hammons*, Case No. 20-3203, Doc. 010110718183, p. 8 (10th Cir. July 29, 2022).

[xlvii] *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501 (1969).

[xlviii] See *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472, 123 S.Ct. 1126 (2003) (Tucker Act); *United States v. Bormes*, 568 U.S. 6, 9-10, 133 S.Ct. 12 (2012) (Little Tucker Act).

[xlix] 28 U.S.C. § 1491(a)(1) and 28 U.S.C. § 1346(a)(2).

[l] 28 U.S.C. § 1346(a)(2).

[li] See § 1491(a)(1) and § 1346(a)(2).

[lii] See *McGuire v. United States*, 97 Fed. Cl. 425, 428 (2011), recognizing disagreement between *Quality Tooling v. United States*, 47 F.3d 1569, 1575 (Fed. Cir. 1995) (divided panel holding that "[t]he Tucker Act waives the government's immunity from suit on its contracts in any court to which Congress grants

jurisdiction to hear the claim") and *McGuire v. United States*, 550 F.3d 903, 912 (9th Cir. 2008) (stating that "[w]e cannot agree that the Tucker Act generally waives sovereign immunity for suits outside the Court of Federal Claims").

[liii] Order, *In re USA Sales, Inc.*, Case 6:16-bk-14576-MW, Doc. 396 (Bkr. C.D. Cal. 11/15/19).

[liv] *USA Sales, Inc. v. Office of the United States Tr*., 532 F. Supp. 3d 921, 948 (C.D. Cal. 2021) (appeal pending).

[lv] Defendant's Opposition to Plaintiff's Motion for Summary Judgment, 5:19-cv-02133-JGB-KK, Doc. 31, Page ID 2392 (C.D. Cal. Aug. 28, 2020).

[lvi] 532 F. Supp. 3d at 947 (appeal pending).

Diversity, Equity, and Inclusion and Judicial Spotlight:

The Honorable Christopher M. López

By: *Re'Necia Sherald*

Re'Necia Sherald sat down with the Honorable Christopher M. López, United States Bankruptcy Judge for the Southern District of Texas for a Q&A regarding his background, judicial career, and advice to attorneys. Judge López was appointed to serve as a bankruptcy judge in August 2019. Before his appointment, Judge López was a member of the Business, Finance & Restructuring Group at Weil, Gotshal & Manges LLP for sixteen years. Judge López currently serves as a council member of the State Bar of Texas Bankruptcy Law Section, an advisor to the State Bar of Texas Young Lawyer Committee, a member of the Nominations Committee for the National Conference of Bankruptcy Judges, and a member of the National Bankruptcy Conference.

For people who don't know, you're a Houston transplant by way of New York. What brought you to Houston? I came to the University of Houston to compete on their track and field team. At UH, I was able to train with Carl Lewis and from there, I fell in love with the city of Houston.

What did you do after you graduated from UH? I always knew that I wanted to be a lawyer, but I also had other interests and I knew that I wanted to pursue those interests before I went to law school. After UH, I went to Yale Divinity School where I earned my master's degree in theology. Out of college, I always thought that at some point I would develop a Theology and Law course, comparing and contrasting concepts like justice and peace and what they mean. I may still do that one day.

After law school you started your career in private practice at Weil, can you tell us about your time there? What did you find most enjoyable about working at Weil? I enjoyed learning about new industries because in bankruptcy, every case is different. I also enjoyed working on very complicated cases and the intellectual challenge that came along with that. I most enjoyed working with the attorneys at Weil and attorneys across the aisle to hopefully reach a consensual resolution to a problem that will ultimately help a company reorganize and save jobs.

Describe your transition onto the bench. A lot of people don't know about the synergy between you and Judge Bohm. Could you tell us about that as well? Jeff Bohm was

my moot court coach for two years in law school while I competed in the Duberstein Competition.

Even though I started at Weil, I've always had an interest in public service. I never knew how it would manifest itself or whether I would be able to work in a public service space, but I was always very interested in public service. When the opportunity became available after Judge Bohm announced his retirement, I thought that might be an opportunity for me to serve the public in a unique way. I worked in private practice for sixteen years and I thought public service would be interesting, so I submitted my interest to become a judge to see where it would go, not knowing how it would turn out. I also knew that all of the predecessor judges worked very hard to make the Southern District what it is, and I thought that with my experience and background, I could potentially help keep that legacy going.

Since you've been on the bench, what types of cases or issues do you see that you find the most challenging or interesting? The most challenging cases for me are the individual cases. My duty is to follow the law and sometimes that means making difficult decisions for individuals and hearing stories of people who have gone through really difficult times. That's the most difficult part for me.

What can a lawyer appearing before you do to make your job easier? I take pleadings very seriously and spend a great amount of time preparing before a hearing. I still prepare for hearings like I did as a practitioner. Lawyers should make pleadings very plain and explain in the first few pages their need for relief or why their client opposes the relief requested. I look for that upfront. It will tailor the hearing. The clearer an attorney can articulate their position before they walk in, the better prepared I am to hear the arguments and engage with them at the hearing.

What advice do you have for young lawyers who will appear before you? The best advice I was ever given was to prepare for every hearing as if it were plan confirmation. Don't take any opportunity to appear in front of a judge lightly. Every time you appear in a meeting or in a hearing when your client is present, there is an opportunity to improve your reputation, not just within your firm but with the judge as well. It will help you develop long-term credibility with the judge.

What makes an outstanding bankruptcy lawyer? Outstanding bankruptcy lawyers are great explainers. Judges don't live with the issues the way lawyers do, so it's important for lawyers to clearly articulate what the issue is or highlight the importance of the facts as they relate to the issue.

What are some missteps you've observed lawyers make? What can lawyers do to improve? It all comes down to preparation. An outstanding bankruptcy lawyer is prepared to have a conversation with a judge. That lawyer may have prepared a script or a presentation but is willing to engage with the judge and sometimes that means going off script. Really good lawyers are active listeners.

Sometimes lawyers have lived with their issue for so long that they assume that every person who reads their pleading or listens to them understands all the facts of the case or the negotiations that have happened behind the scenes. It's okay to walk a judge through the background facts, and if the judge says that they're comfortable with the background, then you can proceed, but you should be ready to articulate relevant background.

I should leave a hearing knowing exactly what each lawyer thinks are the important takeaways. And if there's something *really* important, it should be clearly articulated.

Lawyers should also deal with cases that might be difficult for their position head on. Don't deal with difficulties in a footnote.

Generally speaking, I also think that judges (and law clerks) care far more about the legal arguments than puns or one-liners in the pleadings or oral argument.

Do you think about publishing opinions often? How do you decide whether to publish an opinion or issue a ruling from the bench? I don't think about that at all. There are some judges who are very prolific in their writing. If I think there is a case where I can contribute, I'll publish it, but if I can just answer the question before the parties who want an answer, I am going to do my very best to answer that question. I rule a lot from the bench on issues. There is no right or wrong way to do it. I don't think about writing decisions. I think about providing answers and sometimes that takes a written form and other times it takes a ruling from the bench. My job is to rule on issues that require it and I never know what form that will take.

What can people expect from you when you join the complex panel in January 2023? I think people should expect great consistency between the panel now and the panel in January 2023. Judge Isgur may have ways about certain things that I may not do the same as him, but I think in terms of process there will be remarkable consistency.

I practiced in this district, appeared before judges in complex cases, and appeared as a practitioner on the complex rules committee. I like the rules.

What is something about you that most people don't know? Several days a week around 5:15 a.m. I am in a boxing gym hitting the heavy bag or sometimes getting in the ring.

Author

Re'Necia Sherald is a restructuring associate at Haynes and Boone, LLP in the Houston office. Prior to joining Haynes and Boone, Re'Necia served as a Term Clerk to Judge López for two years.

BANKRUPTCY LAW SECTION
STATE BAR OF TEXAS

Upcoming Events and Announcements

- Join Lone Star Legal Aid and the Young Lawyers Committee on **Friday, October 21, 2022, at 3:00 p.m. (CT)** for Law Talk Friday – The Case for Pro Bono: Bankruptcy Matters with Judge Marvin Isgur and Attorney Eloise Guzman via Zoom and Facebook Live. You can register here.

- The Annual Southern District of Texas Bench Bar Conference will be held in Houston, Texas on **Tuesday, October 25, 2022** at the Ballroom at Bayou Place. You can register here.

- The Annual Eastern District of Texas Bench Bar Conference will be held in Plano, Texas **October 26 – 28, 2022** at the Dallas/Plano Marriott Hotel @ Legacy Town Center. You can register here.

- The 41st Annual Jay L. Westbrook Bankruptcy Conference taking place on **November 17–18, 2022** at the Austin Marriott Downtown. You can register here.

- The Young Lawyers Committee's annual YLC Reception at the Westbrook Conference is on **Thursday, November 17, 2022, at 8 p.m. (CT)** at Moonshine Grill, 303 Red River St., Austin, TX 78701. All Westbrook Conference attendees are welcome. You can RSVP here to assist with the headcount.

- The Elliott Cup Moot Court Competition will be held on **February 17–18, 2023** in Austin, Texas. Please contact Emily Shanks if you would like to volunteer to judge and/or bailiff.

- Would you like your article featured in the Bankruptcy Section Newsletter? Email Jordan Chavez and Jessica Hanzlik to submit your topic.

BANKRUPTCY LAW SECTION
STATE BAR OF TEXAS

2022 Bankruptcy Law Section Officers and Council

Frances Smith, Chair

Ross & Smith, PC

700 N. Pearl St., Suite 1610 Dallas, TX 75201

Tel: 214-377-7879

Tim Million, Immediate Past Chair- Council Member

Husch Blackwell, L.L.P.

600 Travis St., Suite 2350

Houston, TX 77002

Tel: 713-525-6221

David Eastlake, Treasurer

Baker Botts

910 Louisiana St.

Houston, TX 77002

Tel. 713-229-1397

2022 Bankruptcy Law Section Officers and Council

Sara M. Keith - Chair Elect

Shell Oil Company

150 N. Dairy Ashford Rd. WCK F0640-B

Houston, TX 77079

Tel. 832-337-4751

Layla Milligan, Historian

Bankruptcy & Collections Division

Office of the Attorney General

P.O. Box 12548

Austin, TX 78711-2548

Jameson J. Watts, Vice President - Public Education

Husch Blackwell LLP

111 Congress Ave, Suite 1400

Austin, TX 78701

Tel: 512-479-1179

2022 Bankruptcy Law Section Officers and Council

Jordan Chavez, Vice President - Communications & Publications and Chair of Young Lawyers Committee

Haynes and Boone

2323 Victory Ave, Suite 700

Dallas, TX 75219

Tel. 214-651-5453

Jessica Hanzlik, Vice President Communications & Publications

Vanhemelrijck Law Office, P.C.

1100 NW Loop 410, Suite 215

San Antonio, TX 78213

Tel. 210-804-1529

Katie Drell Grissel, Vice President - Business Division

Vinson & Elkins LLP

2001 Ross Ave, Suite 3900

Dallas, TX 75201

Tel. 214-220-7956

2022 Bankruptcy Law Section Officers and Council

Michael Cooley, Vice President - Professional Education

Reed Smith

2850 N. Harwood Street, Suite 1500

Dallas, TX 75201

Tel. 469-680-4200

Sean Flynn, Vice President - Consumer Division

The Law Offices of Sean T. Flynn PLLC

P.O. Box 81967

Austin, TX 78708

Tel. 512-640-3340

Amber Carson, Secretary

Gray Reed & McGraw LLP

1601 Elm Street, Suite 4600

Dallas, Texas 65201

Tel. 972-482-0337

2022 Bankruptcy Law Section Officers and Council

Catherine Curtis, Vice President - Diversity & Inclusion

Partner - Pulman, Cappuccio & Pullen LLP

P.O. Box 720788

McAllen, TX 78504

Tel. 956-467-1900 ext. 402

Todd Headden, Vice President - Membership

Hayward PLLC

901 Mopac Expressway South, Bldg 1, Suite 300

Austin, TX 78746

Tel. 737-881-7104

Amber Fly, Vice President - Law School Relations

Husch Blackwell LLP

111 Congress Ave., Suite 1400

Austin, TX 78701

2022 Bankruptcy Law Section Officers and Council

Emma Persson, Vice President - Law School Relations

O'Melveny & Meyers

2501 N. Harwood St.

Dallas, TX 75201

Tel. 972-360-1900

The Honorable Brenda Rhoades - At Large Council Member 1

United States Bankruptcy Court Northern District of Texas

660 North Central Expressway

Plano, Texas 75074

Bill Lively - At Large Council Member 2

WHL, PLLC

432 S. Bonner

Tyler, Texas 75702

Tel. 903-496-9389

2022 Bankruptcy Law Section Officers and Council

Kelli Norfleet - At Large Council Member 3

Haynes and Boone, LLP

1221 McKinney St., Suite 400

Houston, TX 77010

Tel. 713-547-2600

Maegan Quejada, At Large Council Member 4

Associate - Sidley Austin LLP

1000 Louisiana St, Suite 5900

Houston, TX 77002

Tel. 713-495-4618

Pat Kelly, Council Member

Patrick Kelley, P.C.

112 East Line Street, Suite 203

Tyler, TX 75702

Tel. 903-630-5151

2022 Bankruptcy Law Section Officers and Council

Simon Mayer - Council Member

Locke Lord

600 Travis, Suite 2800

Houston, TX 77002

Tel. 713-226-1507

The Honorable Christopher M. Lopez, Council Member

United States Bankruptcy Court

Southern District of Texas - Houston Division

515 Rusk Avenue

Houston, TX 77002

Sara Schultz, Council Member

Akin Gump Strauss Hauer & Feld, LLP

1700 Pacific Avenue, Suite 4100

Dallas, TX 75201-4675

Tel. 214-969-2800

2022 Bankruptcy Law Section Officers and Council

Callan Searcy, Council Member

Assistant Attorney General - Bankruptcy & Collections Division

Office of the Texas Attorney General

P.O. Box 12448 - MC 008

Austin, TX 78711-2548

Tel. 512-475-4861

Gregory S. Milligan, Non-Lawyer Member Advisor

Harney Partners

3800 N. Lamar Blvd. Suite 200

Austin, TX 78756

Tel. 512-892-0803