



Welcome to the 23rd Class of Fellows

G. Christopher Meyer, Chair, Board of Regents



▲ 23rd Class of the American College of Bankruptcy at the Supreme Court, Washington, D.C., March 16, 2012.

Each year when May arrives, it brings with it a sense of renewal and new life as plants and flowers burst forth to usher in the season. In much that same way, this time of year brings with it a sense of renewal for the College. A new class of Fellows has just been inducted and we now begin the nomination process once again.

On March 16, 2012, the College inducted 36 new Fellows as members of the 23rd class. The class comprised two judges, three law professors, five financial advisors, and 26 lawyers. As with the classes before them, the Fellows in the 23rd class demonstrated an impressive record of professional accomplishments. They also exemplified a sustained commitment to service of both the practice and the community. At the Induction ceremonies, Mike Cook outlined for those present our new Fellows' involvements in assisting groups such as indigent consumer debtors, disabled veterans, AIDS/HIV sufferers and handicapped children, to name but a few. We can all be justly proud to add the members of Class 23 as Fellows.


Now, as spring becomes summer, we turn

again to the annual task of identifying worthy candidates for induction as members of Class 24. The College, like any similar organization, depends on its ability to continue to identify and attract new Fellows worthy of induction. Nomination materials have been recently distributed to you, together with information on the timetable for the nomination process. Please take some time to consider candidates who you feel are worthy to be named Fellows. Discuss those ideas with other Fellows in your Circuit and with your Circuit Regent. And then please submit your nominations by the June 15 deadline. Regular nominations go to the Regent for the Circuit in which the nominee is primarily located. Their names are listed on the College website. International nominations should be submitted to Bob Rosenberg, the Chair of the International Fellows Nominating Committee. Judicial nominations should be submitted to Jim Garrity, the Chair of the Judicial Nominations Committee.

We appreciate the investment of your time and effort toward making the College a richer, stronger and more diverse organization. We will look forward to



▲ Patrick A. Murphy receiving the Distinguished Service Award from Harvey R. Miller.

your input on candidates for selection as part of another strong new class of College Fellows. 

Distinguished Service Award to Patrick A. Murphy presented by Harvey R. Miller

By: Grant T. Stein, Co-Editor

The 2012 Distinguished Service Award was presented to Patrick A. Murphy by Harvey R. Miller. Patrick Murphy, age 73, has had a stellar career as an example of all to which we aspire in our profession as lawyers and restructuring professionals.

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In This Issue

Among the excellent articles in this edition, there are two important memorial articles on the passing of Judge Alexander L. Paskay that merit reading as they capture the essence of one of the greats in our profession.

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Chair's Column

D.J. (Jan) Baker, *Chair*



▲ D.J. (Jan) Baker

2012 promises to be another great year for the College. Our March Induction Ceremony was spectacular and filled the Supreme Court beyond even its large capacity. The event began with Harvey Miller's introduction of Pat Murphy, this year's recipient of the Distinguished Service Award. Harvey – himself a past recipient of the Award – reminded us in his introduction why Pat was such a worthy recipient: he has been a towering figure in American bankruptcy law for decades, both as a brilliant practitioner and a thoughtful scholar, excelling in teaching, writing and bar-related activities, while also finding time for family, friends, and years of public service. Pat's acceptance speech and Harvey's introduction are both posted on the College website; click on the "News" tab, and then click on the box marked "Distinguished Service Award."

Presentation of the Distinguished Award was followed by induction of 36 new Fellows into the College. Their backgrounds and accomplishments in both the private and public sectors extended over the entire scope of the restructuring field, and we are all delighted and honored to have them join us. They are yet another outstanding class of inductees, and we look for great things from them in the College in years to come.

The only problem with this year's ceremony was that, once again, we had a long waiting list of Fellows who wanted to attend but who could not be accommodated! For a while, we were in the enviable position of generally being able to admit all inductees, guests and Fellows who wanted to attend, but the number of Fellows that we have had to turn away has grown steadily over the past five years. This year, we reached our all-time record for ticket requests, with the result that, once again, dozens of Fellows could not be admitted. As a result, the Board of Directors of the College determined with great regret at our March Board meeting that we have simply outgrown the Supreme Court as a venue for the induction ceremony and must move to a new location before next year.

Accordingly, at the March meeting, an
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President's Column

Michael L. Cook, *President*



▲ Michael L. Cook

The College is in great shape, thanks to the leadership of former chairs Paul Singer and David Heiman over the past five years. We want to continue building on their most important projects in the next year.

Pro Bono. This program has grown dramatically under Committee chair Larry Coppel, making the College and the Foundation probably the single largest funder of free legal services to indigent consumer debtors in the country. We have funded new and existing projects in almost every state. Over the next year, we not only want to continue this kind of funding, but also to focus on new projects in unserved locations. Another goal is to streamline the administration of the funding process and research other new funding opportunities.

Education. The College's Education Committee, led by Vice President Rick Mikels, will continue to provide high-level education programs for Fellows and others (e.g., high-school literacy programs). Quality programs will continue at semi-annual Fellows' meetings and at the Circuit level. In addition, the Committee will work with the Best Practices and Circuit Review Committees in continuing to provide Fellows with excellent resource materials on such topics as equity committees, asset sales, financial reporting for public companies and debtor compensation programs. In the works is a Best Practices report on creditors' committees.

Professional History. Judge Diane Sigmund will continue to develop the College's impressive bankruptcy archives at the University of Pennsylvania, detailing the history of insolvency professionals and their legacy to our country. This committee's oral history project, for example, contains riveting interviews with giants in our profession, including academics, judges and practitioners. We intend to make all of these materials (recordings, transcripts) even more accessible to Fellows over the coming year.

Ad Hoc Venue Committee. The College's directors formed a special Ad Hoc committee to explore a more accessible hotel and venue for our annual induction ceremony next year. The Committee
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Ten Years of Distinguished Bankruptcy Law Students!

Berry Spears, Chair, Distinguished Law Student Committee



▲ Berry Spears

The Distinguished Bankruptcy Law Students Program, now in its tenth year, continues to flourish, having received more nominations for Distinguished Law Students than ever before. The College's goal for this Program is to honor and encourage law students who have demonstrated an interest in and aptitude for the field of bankruptcy law. Our collective hope and expectation is that by participating in the activities of the College, and meeting and interacting with many of the bankruptcy leaders from all over the world, these students will be more likely, once they graduate, to continue their work in our chosen field.

The selections of distinguished students were made by the Circuit Council in each Circuit. The respective Circuit Councils considered one or more of the following criteria: (i) academic achievement in bankruptcy (or bankruptcy-related) courses; (ii) publication of articles or notes on bankruptcy-related topics; (iii) research assistant to a bankruptcy law professor; (iv) participation in bankruptcy-related legal aid or pro bono programs/clinics assisting the poor or economically disadvantaged; and (v) other relevant information.

This year, the Committee identified and recognized distinguished students from law schools in each of the Fifth, Sixth, Seventh, Eighth and Tenth Circuits. These distinguished students traveled to Washington, D.C. as the College's guests at the March Annual Meeting. They also participated in all the Annual Meeting activities, including a well-attended reception with the College's leadership held in their honor. Indeed, this year our Distinguished Bankruptcy Law Students enthusiastically embraced their exposure to and the ability to network with nationally-recognized academics, practitioners and judges.

The recipients of the College's 2012 Distinguished Bankruptcy Law Students honors were the following students:

Fifth Circuit – **Lacey E. Rochester**, a third year student at Loyola University New Orleans College of Law, was the distinguished student selected in the Fifth Circuit. Having graduated with honors from LSU, at Loyola, Lacey was on the Law Review and wrote both her Law



▲ (Left to right) David Paul Mann, Lacey Rochester, Berry Spears, Erin Hawkes, Justin Bernbrock, and Clark Collings.

Review Case Note and her Comment on bankruptcy-related topics. In addition, she spent innumerable hours as a member of the Loyola Bankruptcy Moot Court team, earning a number of honors at the national Duberstein moot court competition. Upon graduation, Lacey has accepted a position as a judicial law clerk for the Honorable Wendy L. Hagenau in Atlanta.

Sixth Circuit – The Sixth Circuit Selection Committee tapped **David P. Mann** of The University of Toledo College of Law as its Distinguished Bankruptcy Law Student. David received his B.A., magna cum laude, from The University of Toledo, and while in law school, he was Assistant Managing Editor of the Law Review and was awarded Best Oralist and was a member of the Best Team in the 39th Annual Charles A. Fornoff Intracollege Moot Court Competition. Upon graduation, David will be joining the law firm of Marshall & Melhorn, L.L.C. as a business litigation associate.

Seventh Circuit – **Justin Bernbrock**, a United States Navy combat veteran of Operation Iraqi Freedom and Operation Enduring Freedom (Afghanistan), was selected as the Distinguished Law Student for the Seventh Circuit. Justin is a May 2012 graduate of the University of Illinois College of Law and served as an extern to the Honorable Eugene R. Wedoff. Justin also participated in the Duberstein Moot Court Competition, placing third overall. After graduation, Justin has accepted a position with Kirkland & Ellis.

Eighth Circuit – **Erin K. Hawkes** received her B.A., magna cum laude, from the University of Arkansas and is a May 2012 graduate of the University of Arkansas School of Law. Erin was on the Dean's List every semester and also served as a judicial extern for the Honorable Ben T. Barry, United States Bankruptcy Court for the Western District of Arkansas in Fayetteville.

Tenth Circuit – A second year law student from the University of Utah S.J. Quincey College of Law was determined to be the Distinguished Bankruptcy Law Student in the Tenth Circuit. **Clark Collings** served on the Law Review and was awarded the Outstanding Achievement Award for his work in his bankruptcy law course and served as an extern for the Presiding Judge of the Utah Court of Appeals.

Each one of these distinguished students clearly exemplify the high ideals of the College. On behalf of the College, we salute each of them as they embark on what will surely be successful legal careers and wish only the best for each of them.

Finally, the Committee appreciates the hard work, time and effort of its members who led the selection process this year. In particular, the Committee would like to recognize Charles Coleman, Jan Hayden, Mona Burton, David Leta, Reginald Jackson, and Catherine Steege for their assistance and participation in another year of this successful program. 🏛️

NCBJ Next Generation Program Thriving!

Hon. Joan Feeney (D. Mass.) and Hon. Judi Fitzgerald (W.D. Pa.),
Judicial Committee



▲ Hon. Joan Feeney



▲ Hon. Judi Fitzgerald

Thanks to a grant from the American College of Bankruptcy Foundation, the National Conference of Bankruptcy Judges ("NCBJ") is expanding the Next Generation ("Next Gen") program at the 86th annual NCBJ in San Diego from October 24 to 27, 2012. As the name suggests, Next Gen provides up-and-coming leaders of the next generation of bankruptcy practitioners an opportunity to meet and learn from the members of the NCBJ and seasoned bankruptcy professionals, many of whom are Fellows of the American College of Bankruptcy. The NCBJ's purpose in establishing Next Gen is to recognize young bankruptcy lawyers who have shown the potential to distinguish themselves in future years as respected members of the bankruptcy bar.

The inaugural class of Next Gen was such a great success last year in Tampa, Florida, that the NCBJ decided to increase the number of professionals who can attend Next Gen at the 2012 conference. Participants in the inaugural class raved about the program, expressing praise for the opportunity to be mentored by judges and to build relationships with other members of their class. The judges who

Next Gen provides leaders of the next generation of bankruptcy practitioners an opportunity to meet and learn from seasoned bankruptcy professionals.

participated in the first program also appreciated the opportunity to meet with young lawyers and hear their views on the practical issues that face practitioners in a changing legal culture. The success of the project in its first year has resulted in preliminary plans for a Class One reunion. A special NCBJ Committee, chaired by Judi, has organized the program for the second class. The committee includes other College Fellows Hon. Joy Flowers Conti, Hon.

Laurel Isicoff and attorneys Jo-Ann Brighton, Chris Meyer, and Victor Vilaplana. The College Foundation generously approved the committee's application for funds to make the expansion happen.

In its second year, Next Gen presents a unique opportunity for up to 40 bankruptcy lawyers who have been in practice for five to ten years to attend special events on the afternoon of Wednesday, October 24, at the NCBJ's annual conference. For two hours, the Next Gen 2012 class will interact with more than a dozen prominent United States bankruptcy judges and a number of distinguished Article III judges from across the nation in a roundtable format. The chance to discuss practice tips and traps for the unwary with judges who are willing to candidly share their views on best practices is a once-in-a-lifetime opportunity for a young lawyer. The next day, there will be a behind-the-scenes tour of the historic courthouse in San Diego hosted by local judges. Afterwards, a number of local professional associations are hosting a networking reception featuring two prominent local bankruptcy professionals who will share their insights on winning and servicing clients. Scholarship funds and registration waivers will be available to qualified candidates.

Law firms, government agencies and bankruptcy judges are invited to nominate young attorneys under their supervision who deserve the special recognition of acceptance to the NCBJ NextGen program. The criteria for admission are set forth in the NextGen link on the NCBJ website www.ncbj.org. A prospective program participant must: have five to ten years of experience practicing law; devote at least fifty percent of his/her practice to bankruptcy cases; demonstrate legal excellence in the practice of bankruptcy law; display a serious commitment to principles of civility, ethics and professionalism; and show commitment to the continued educational development of bankruptcy professionals and to professional activities that will benefit the public, members of the bar and the court system. Only one attorney from any single law firm or agency may participate. The cost of the participant's attendance at the NCBJ must be borne by the participant, but no additional cost will be incurred to attend the Next Generation events. Qualified nominees will be

selected as participants on a first-come, first-served basis. NCBJ registration fee waivers and grants to defray part of the cost (up to 50% of eligible expenses, not to exceed \$1500) are available to the first five eligible applicants. To qualify for a grant, an applicant must earn less than \$75,000 gross income per annum. A grant request attesting to the qualifications must accompany the nomination. Nominations will begin on May 8, 2012, at 12:00 noon Eastern time and will be accepted also on a first-come first-served basis.

Participation in Next Gen will serve young lawyers well as they progress in your firm's practice. The NCBJ is grateful for the support of the Fellows and the American College of Bankruptcy Foundation in making this valuable program a success! 🏛️

Coming Soon, A College Original Production: The Formative Years of the U.S. Trustee Program!

Hon. Diane Sigmund, Chair, Archives Committee



▲ Hon. Diane Sigmund

Kudos to First Circuit Fellow Rick Levine for conceiving and organizing a program for the National Bankruptcy Archives on the early and formative years of the United States Trustee program.

The panel consists of Rick, the first Director of the Executive Office for United States Trustees; Irving Picard, former U.S. Trustee (S.D.N.Y.); and Frank Dicello, former U.S. Trustee (D.C. and E.D.Va.). The moderator will be Hon. Jean K. FitzSimon (Bankr. E.D. Pa.), former acting U.S. Trustee in Chicago. The session will include the initial reactions of various constituencies to the U.S. Trustee program: Bankruptcy Judges, practitioners, the AO, the Department of Justice (in which the program is housed), and the U.S. Trustees themselves.

The program is being taped by Penn Video on May 29, 2012, and after editing will be posted on the Archives website for remote viewing in mid-July. You will also be able to find the link on the College website homepage under the "College Sponsored Reports and Publications" section. 🏛️

Bankruptcy Jurisdiction – It is Not a Joking Matter

Fifth Circuit Fellows Seminar – April 27 and 28 in San Antonio

By Debbie Langehennig, Chapter 13 Trustee



▲ Debbie Langehennig Bankruptcy practitioners and judges from Texas, Louisiana, Mississippi, Illinois and Tennessee gathered in San Antonio during Fiesta Week to discuss timely topics related to jurisdiction and lack of jurisdiction at the American College of Bankruptcy Fifth Circuit Fellows seminar. The seminar opened with a Reception and Fellows Dinner on Friday, April 27, and attendees who arrived early in the Alamo City were able to catch the Battle of the Flowers parade. Charles A. Beckham, Jr., the Fifth Circuit Regent, welcomed attendees on Saturday, April 28. The seminar opened with a discussion of *Stern v. Marshall* – panelists included Judge Neil Olack, Bill Greendyke, Patrick Vance and James Sprayregen. "Since its release, a maelstrom of opinions and articles have been written about the scope of *Stern*, ranging in tone from "much ado about nothing" to "the end of the bankruptcy world as we know it." *In re BankUnited Financial Corp.*, 462 B.R. 885 (Bankr. S.D. Fla. 2011). Panelists discussed only a few of the 417 decisions they found citing to the *Stern* decision and noted that the National Rules Committee has begun meetings to discuss rulemaking to address issues raised by the decision, specifically whether "consent" might be effective to confer jurisdiction appropriately.

The second panel was moderated by Chief Judge Ronald B. King, with panelists Louis Phillips, Deborah Williamson, Bettina Whyte and Douglas Draper. On the topic of Post-Confirmation Jurisdiction, discussion ranged on issues such as clarity and specificity in retention clauses in a plan, properly transferring reserved causes of action to the reorganized entity and the conundrum of how to reserve claims that might be asserted against professionals. There was much discussion on drafting recommendations to avoid issues with proper retention and judicial estoppel claims. The consensus: as in real estate, so too in post-confirmation jurisdiction-- "location matters."

Cross-Border Jurisdiction and related issues were thoroughly covered by Zack Clement, Judge Leif Clark, Robin Phelan, Alfredo Perez and Becky Roof, with emphasis on the extraterritorial effect

of an insolvency proceeding in a foreign country and the extent to which a foreign representative can participate in a U.S. proceeding. There are tensions surrounding the determination of COMI – "center of main interest"--as a surrogate for whose law will control in insolvency proceedings and also inherent conflicts in laws of one jurisdiction which may be "manifestly contrary to public policy" in another jurisdiction, such as waiver of attorney-client privilege.

The final panel, Professor Jay Westbrook, Professor Ronald Mann, Rhett Campbell and Harry Perrin, led an interesting discussion on derivatives, beginning with a march through the Bankruptcy

Code to highlight the many statutory provisions regarding the special treatment of derivatives in bankruptcy cases. The panel concurred that the statute removes bankruptcy court discretion and elevates form over substance in protecting special parties and contracts. The discussion then focused on the safe harbor provisions found in Section 546(e) and recent decisions construing those provisions.

Although downtown San Antonio was busy during Fiesta Week, the timing of the seminar allowed attendees the unique opportunity to view parades, attend parties and sample margaritas and great Mexican food. The intimate seminar format encouraged audience discussion on advanced topics, and the participant feedback was very positive for an outstanding program, knowledgeable speakers and an excellent venue. 🏛️



▲ (Left to right) Charlie Beckham, Hon. Leif Clark, Alfredo Perez, Zack Clement, Becky Roof, and Robin Phelan at the Fifth Circuit Fellows Seminar.

Pro Bono Committee Awards Record Number of Grants

By: Lawrence D. Coppel, Pro Bono Committee Chair



▲ Lawrence D. Coppel Due to cutbacks in funding to legal services organizations that serve the poor, and the greater need for bankruptcy services due to the economic downturn, the Pro Bono Committee received an unprecedented number of grant applications in 2011. It approved 36 of 50 grant requests and awarded a total of \$262,834 to legal services organizations located in 19 states and the District of Columbia. By comparison, in 2010, the Committee awarded 19

grants that totaled \$142,906.

These grants are being used to fund pro bono bankruptcy services to the poor via bankruptcy clinics, bankruptcy attorney referral panels, bankruptcy workshops, legal hotlines, CLE training programs, hardware and software bankruptcy programs and videos on debtor's rights and responsibilities.

Deadline for 2012 Grants.

The deadline for 2012 grant applications is July 1, 2012. Grant application forms and the Committee's criteria may be accessed at www.acbfoundation.org. 🏛️

Mexican Insolvency Law: Lessons Learned the Hard Way from Recent Cases

The developments of the Vitro case have taught hard lessons to those involved in it. The Vitro case has seen litigators on both sides of the U.S.-Mexico border shoot their best legal arguments and the ultimate fate of their clients is still undecided, particularly as regards the bondholders. A brief description of the key issues follows.



By: Agustín Berdeja-Prieto

Presumption of Insolvency

Under Mexican law, not every Merchant is entitled to the protection afforded by the Commercial Insolvency Law (*Ley de Concursos Mercantiles*) ("LCM"). Only those Merchants who have demonstrated that they are "insolvent" as this term is specifically defined by the LCM may become a "debtor". (Id. articles 9, 10, 11, 13, and 339 for "pre-packaged plans"). In general, an insolvency proceeding may take place when a Merchant incurs in a general default of its obligations and this fact is verified and agreed to by an insolvency examiner (*visitador*), or following the Merchant's statement under oath that it has fallen or is imminent that it will fall within the categories contemplated in articles 10 and 11 of the LCM.

Regulation of Cross-Border Insolvencies

The LCM, promulgated in 2000, contains a whole section regarding "cooperation in international proceedings": Title Twelfth. Title Twelfth is divided in 5 Chapters, with a total of 34 detailed provisions. Title Twelfth is modeled after the UNCITRAL Model Law on Cross-Border Insolvency.

Issues Arising Under Mexican Law

Background of the Vitro Case

Between Dec '08-Dec '09 through various financial transactions, arguably lacking in substance, Vitro increased its debt towards its subsidiaries from approx. \$1 billion Mex. Cy. to approx. \$22'275 billion Mex. Cy., an amount greater than what it owed to its unrelated (*bona fide*) creditors. [U.S.\$ 1.9 billion vs. U.S.\$1.7 billion]. It also increased its investment in subsidiaries from approx. \$8 billion Mex. Cy. to \$32 billion Mex. Cy. Before it filed for reorganization on December 13, 2010, it had defaulted in the payment of approx. U.S.\$293 MM in

derivative contracts and in interest payments on bonds maturing in 2012, 2013 and 2017, triggering a default of approx. U.S.\$1.5 billion in debt held by banks and noteholders around the world.

On November 1st, 3 and 5 of 2009, Vitro entered into an "Intercompany Lock-up and Plan Support Agreement" with some of its most important subsidiaries. Before and during the period prior to Vitro filing for reorganization in Mexico (December 13, 2010 under *Concurso Mercantil Exp. No.: 38/2010-IV*), according to many creditors Vitro "manipulated" its finances to ensure that it would qualify for a prepackaged reorganization by using intercompany debt. According to many creditors, what Vitro did with its controlled companies had no financial substance or support and brought no benefit to Vitro or its subsidiaries.

Subordination

Under the trust indenture, the 2013 noteholders have preference for payment in the event of the issuer's insolvency, in this case a *concurso*, and have the right to vote for the inter-company debt, namely debt of or to subsidiaries and other companies controlled by Vitro. The issuer's obligations under the trust indenture, including its obligation to pay principal and interest, are guaranteed by the Guarantors in an absolute, unconditional, irrevocable and joint manner. Finally, payment of such debt is subordinated to the payment of the 2013 Notes, which is also subject to the approval of the restructure plan by the noteholders. The Trustee states that because of these features the 2013 noteholders should be considered to have a special privilege under New York law. In their opinion, they should be ranked as creditors with special privilege in the *concurso* and therefore be paid before unsecured creditors are paid.

Generally, subordination is a matter of contractual law. Article 78 of the Commercial Code includes the principle that *pacta sunt servanda* ("agreements must be kept"). On the other hand, the LCM contemplates that "creditors with a spe-

cial privilege" comprise all those creditors that, under the Commercial Code or related statutes, have a special privilege or right of retention. This category of creditors includes commission agents (see article 306 of the Commercial Code), merchandise vendors, (Id. article 386) and carriers. (See article 2662 of the Federal Civil Code).

Assuming that the subordination, the existence of upstream guaranties and the right to vote for the inter-company debt holders are valid under foreign law, could this justify the treatment of the noteholders as creditors other than unsecured creditors under Mexican law? In the presence of an express and complete provision, can the ranking and priority of a creditor be determined contractually? Are the noteholders entitled to be treated as "creditors with a special privilege" in the Mexican *concurso*?

Who Should be Recognized as a Creditor?

The 2013 trust indenture is governed by its own provisions and by the the 1939 Trust Indenture Act (TIA) §11.07 of the 2013 trust indenture establishes that in the event of a conflict between the provisions of TIA and those of the trust indenture, the former will prevail. Under §317a of TIA, the Trustee is authorized to claim in its own name and as Trustee payment of any due and payable principal and interest. Finally, §4.09 of the trust indenture gives the Trustee the exclusive power to file for recognition any claim of the 2013 noteholders and to distribute any proceeds amongst these.

Under §4.06 of the 2013 trust indenture, with limited exceptions the Trustee is empowered on an *exclusive* basis to undertake any action as shall be necessary to protect the rights of the noteholders and to collect on any amounts due under the 2013 trust indenture.

Despite the foregoing and other information supporting the notion that the Trustee was exclusively authorized to file a claim in the Vitro *concurso* on behalf of the 2013 noteholders, these filed successfully for recognition on their own, independently from the Trustee.

Legal Treatment of Intercompany Debt

Under article 339-II of the LCM, an application for reorganization with a prepackaged plan must be accepted by the court whenever signed by the Merchant and by "holders of at least 40% of its debt". The bankruptcy court dismissed Vitro's initial filing on grounds that included the disqualification of the intercompany debt as part

of the required 40% threshold. On appeal, Vitro prevailed as the upper court said that voting rights pertaining to intercompany debt should be an issue for consideration at a later stage of the process, namely once a final reorganization plan was voted upon pursuant to articles 157-161 of the LCM.

Counsel to the noteholders argued that Vitro was controlling the concurso proceedings through its subsidiaries as it controlled the actions of the latter. (There has been only one corporate will). However, the Mexican judge did not agree with this notion.

Counsel to the noteholders, on appeal, demanded that Vitro's subsidiaries not be recognized (or be disallowed) as creditors and that they be excluded from the judgment on recognition, ranking and priority of credits (*sentencia de reconocimiento, graduación y prelación de créditos*) in their entirety. The appeal court reaffirmed the bankruptcy court's decision.

Scope of the Stay in the U.S.A.

In the U.S., as a result of the Automatic Stay. ... all entities are automatically and immediately precluded from (i) commencing or continuing lawsuits or other proceedings that were or could have been instituted prepetition, (ii) recovering prepetition claims against the debtor, ... (v) any act to create, perfect or enforce liens against property of the estate, ... Note that the automatic stay does not, by its terms, protect guarantors from collection efforts. ... [See Ranney-Marinelli, Alesia, Issues Arising Under United States Bankruptcy Law, (February 2009), presented at the American Bar Association, Spring Meeting 2009, Business Law Section, Vancouver, B.C., Canada, Commercial Financial Services Committee, Panel: "Hands Across the Borders - Comparative Insolvency Regimes in the United States, Canada and Mexico"].

Scope of the Stay under the LCM

Note that the official insolvency and ensuing protection of a debtor do not per se reach out to its controlled companies. These must file for protection and prove that they are insolvent as well in order to be protected by a reorganization judgment. (*Id.* articles 4-II, 15).

Generally, as of the date of the reorganization judgment and until completion of the reorganization stage, no attachment or enforcement order shall be granted against any assets or rights of the Merchant. (*Id.* article 65).

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ACB Foundation-The Bar Has Been Set!

R. Patrick Vance, ACB Foundation Chair



▲ R. Patrick Vance

I want to personally thank all of you who responded to the Foundation's goal to achieve 100% participation in our year end fundraising campaign. The First Circuit set the bar incredibly high during 2010 by cajoling all of its Fellows to make a contribution to the Foundation. The challenge to match that perfect performance was issued to all of the circuits in 2011 and to no one's surprise, the First Circuit did a repeat.

The genius behind the First Circuit's plan to reach its goal is to make clear that we want everyone to contribute. No contribution is too small or too great. We believe that once a Fellow is committed to give, the Foundation will become a personal priority.

Although no other circuit met the 100% participation goal, the efforts led by Foundation board members and other Fellows brought many positive results. For instance, the Fifth Circuit doubled its 2010 participation level. 58% of its Fellows made contributions. The Second, Third, Seventh, Ninth and Eleventh Circuits all saw more than 50% of their Fellows reach into their pockets. Overall, College Fellow participa-

President's Column

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has done its work and will report to the Board shortly.

Foundation. The Foundation, under the new leadership of Pat Vance, is focusing on enhancing its fundraising for the College's pro bono effort. Joel Ohlgren, the past Foundation chair, directed the Foundation's 2011 effort to increase dramatically both the participation level of giving by Fellows, and the total amount of gifts. In the First Circuit alone, 100% of the Fellows contributed to the Foundation during 2011. The Foundation's donation receipts also increased by more than 50% from the prior year.

Patrons and Sponsors. The College's officers and directors will be making a concentrated effort this coming year to improve this essential program. Patrons and Sponsors provide at least 48% of the College's annual budget that supports pro bono, education and the College's other meaningful projects.

tion increased from 28% in 2010 to 50% in 2011. The Foundation realized \$141,722 in 2011 compared to 2010's \$81,570.

With higher participation, more dollars came to the Foundation than ever before to support its projects. The pro bono work of the Foundation was the primary beneficiary of your generosity. Larry Coppel, the chair of the Pro Bono Committee, describes in his column how the dollars and cents have been distributed. Needless to say, your board is not going to be satisfied with a 50% participation rate.

As I take over as chair of the Foundation, I want to acknowledge the hard work, leadership and vision of Joel R. Ohlgren, who has served as chair for the past four years. Our Foundation continues to mature and Joel's steady hand has insured that we are going forward. I also want to thank Larry Peitzman and Patricia Redmond for their service as they pass the baton as Treasurer and Secretary respectively to Tom Lumsden and Jim Baillie. Thanks also to Alan Kornberg whose term on the board has expired. And finally, a big welcome to Claudia Springer, Dan Murray and Lisa Donahue who have graciously agreed to serve on the Board. Your Foundation is looking forward to a successful 2012 campaign which can only be possible with your continued support. 🏛️

Mentoring/Orientation: We met with new Fellows at the D.C. meeting this past March, explained the College's activities, solicited their preferences, followed up with them, and put them together with Committee chairs.

We will report in the next issue on our actual progress this year. We welcome your input on how we can and should improve the College's projects. This partial list of goals for the coming year shows how the College differs from a trade organization: it gives back to our community. We appreciate your commitment. 🏛️



Honorable Alexander L. Paskay: A Remembrance of a Legal Giant

Robert A. Soriano, Greenberg Traurig LLP, Tampa, FL



▲ Alexander L. Paskay

The bankruptcy field and the American College of Bankruptcy suffered a great loss with the recent passing of Chief Judge Emeritus Alexander L. Paskay. He was a legal giant, whose career spanned and shaped the modern bankruptcy era, but whose life was larger still.

The facts of his life are impressive enough, but do not do full justice to the man. He was born in 1922 in Mohács, Hungary, a small city on the Danube River, close to the then Yugoslavia, now Serbia, border. His father was an attorney who was active in politics and elected district attorney. At 14, Judge Paskay was doing title searches in the summers. He had a live-in German governess, who taught him one of five languages he spoke.

He graduated with a Doctor of Jurisprudence from the University of Budapest Law School in June 1944 and briefly worked as an arts critic for an anti-Nazi newspaper, which closed in October 1944 when the Germans installed a Hungarian Nazi government.

In November, he and other young Hungarian men were commandeered by the German army and (literally) marched from Budapest to Slovakia to Austria to Prague. From there they were transported by train to Berlin just as the Russians began shelling that city, so they were sent to a camp on the Dutch border to dig defense lines against the advancing Allied armies. Judge Paskay was the only prisoner in the camp who spoke German, and he learned that the Germans were loading foreign prisoners on ships that were then sunk in the Baltic Sea. "When I heard about that stuff, I said: this cruise I'm not going to go on. Forget about it." So he and seven friends started walking to the front, traveling at night. Eventually, they met up with British forces, and Judge Paskay, who spoke English, became the aide-de-camp to a captain in charge of second-echelon war criminals in Hamburg.

Around this time, the Hungarian government came under Communist control, and Judge Paskay's parents sent him a message telling him not to come home. Because of quotas, it was difficult to get to the United States, so Judge Paskay

looked into going to Brazil to be a sheep herder (he was rejected for that position) and to Australia to work on building the transcontinental railroad. But the Red Cross found a long-lost relative who lived in Miami, and in September 1949 Paskay went via a ship to New Orleans and then by train to Miami, where he moved in with his uncle and aunt.

The day after he arrived in Miami, he met 20-year old Rose Mazzaglia. A year later they were married and remained so for 62 years. They had two sons, Rick and Steve.

After arriving in Miami Judge Paskay had a variety of jobs, including selling vacuum cleaners and working at a drive-in laundry. In 1952 he became a U.S. citizen and in 1955 began attending night classes at The University of Miami Law School while he continued to work. He graduated in 1958, but initially was not permitted to take the bar exam because, according to the bar examiners, the European higher education system did not equate to a college degree. Eventually his Hungarian degree was approved as an equivalent and he took and passed the bar.

After passing the bar Judge Paskay obtained a clerkship with U.S. District Judge Joseph Lieb, who at the time was assigned all bankruptcy appeals in his district, and developed a keen interest in that area of the law. His knowledge of the history of bankruptcy law was encyclopedic. When the position of bankruptcy referee for the Middle District of Florida opened, he sought and obtained it. He was sworn in on July 1, 1963, and continued to serve until December 2011.

During his career, Judge Paskay served as Chairman of the Bankruptcy Committee of the Florida Bar and on the Board of Governors of the National Conference of Bankruptcy Judges. He also served as Vice President and was on the Board of Directors of the American Bankruptcy Institute and a faculty member on many of the programs sponsored by the ABI. Judge Paskay was a fellow of the American College of Bankruptcy, inducted into its original class. He is the author of nearly 2000 published legal opinions and publications and books, including: "Creditor's Rights," "Handbook for Trustees and Receivers." He was a contributing author of the "14th Edition of Collier on Bankruptcy," and he was a principal

contributing editor of "Norton Bankruptcy Law and Practice."

In 1979 Judge Paskay was appointed by U.S. Supreme Court Chief Justice Burger to the Advisory Committee on Bankruptcy Rules and Practice and served on that committee until 1984. Thereafter he was appointed to serve on the Task Force of the Administrative Office of U.S. Courts charged with the revision of the official Bankruptcy Forms.

After the fall of communism in Eastern Europe and Asia, Judge Paskay was appointed by the U.S. Government to lecture on bankruptcy law in the newly emerging liberated countries of Russia, Slovakia and Albania. He was instrumental in guiding those emerging democracies in the concepts and protections needed in their bankruptcy laws being written at that time. He sponsored and participated in numerous seminars overseas.

Judge Paskay was an Adjunct Professor of Law at Stetson University College of Law since 1973. Since 1976 he was the Chairman of the annual Alexander L. Paskay Seminar on Bankruptcy Law and Practice sponsored by the Stetson University College of Law and the American Bankruptcy Institute. Since 2005 Stetson University has awarded the Alexander L. Paskay Endowment Scholarship to many of its most notable graduates. He was inducted into that school's Hall of Fame in 2007.

As I said earlier, the facts of Judge Paskay's life, as interesting as they are, do not do justice to the man. I first met him in 1984 when I was contemplating a move from New York to Tampa. The firm that I was considering joining took me to a cocktail reception at Judge Paskay's annual bankruptcy seminar, which at that time was held at the Don CeSar Hotel on the Gulf of Mexico. I was introduced to him at poolside. He was wearing an ascot and, with his silver hair combed back and his aristocratic bearing, he looked and sounded like a European count. He cut quite the figure.

When I decided to move to Tampa, Mike Cook, who was a frequent speaker at Judge Paskay's seminars, was kind enough to write a letter of introduction for me. In my first hearing before him, he initiated me in the ways of his courtroom, taking obvious pleasure in pressing me on the issues and explaining with a smile and a twinkle in his eye that this is how he liked to do things in his courtroom.

And his courtroom was a remarkable place. As a youth, Judge Paskay loved the theater, and I think he brought that love

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In Memory of Hon. Alexander L. Paskay

On May 5, 2012, Judge Paul M. Glenn delivered a eulogy at the funeral for the Hon. Alexander L. Paskay, age 89. Judge Paskay was an extraordinary person and jurist who left a deep legacy. Judge Glenn's comments elegantly capture some of the essence of our esteemed Fellow.

**Eulogy in Memory and Honor
of Alexander L. Paskay
November 5, 1922—April 27, 2012
Sacred Heart Catholic Church
Tampa, Florida**

May 5, 2012

Remarks by Judge Paul M. Glenn

Strong

Smart

Decisive

Direct

This is the person you saw

Intelligent

Academic

Humorous

Sensitive

Competitive

This is the person you got to know

A leader

A teacher

An author

A man who made a National and International impact

A devoted husband and father

This is the person he was

He was a remarkable man.

In his poem *Ithaca*, the Greek poet Constantine Cavafy wrote:

*When you set out
on your journey...
Pray that the road is long,
Full of adventure, and full
of knowledge...*

Alexander L. Paskay's journey began on November 5, 1922, 89 years ago, in Mohacs, a town in southern Hungary. This was a very different time and a very different world.

His early years were full of adventure and knowledge. He did well in school, learned languages, played sports—even went to see the 1936 Olympic Games in Berlin.

He went to Law School in Budapest. He had many talents, and while in law school he also wrote for a newspaper, acted in theater, and played sports.

Bright, well-rounded, and well-liked—every door was open for him.

Cavafy continues:

*Do not fear the...
...Cyclops and the
angry Poseidon...*

Judge Paskay's strength and character were forged in 1944, when he was 22 years old. Germany invaded Hungary. Hungarian men were rounded up and marched toward the Austrian border to dig trenches for the German soldiers. Young Alexander and a few of his friends escaped the German guards, traveled by night and hid by day, and reached the Allied forces. Because of his knowledge of languages, he served as an interpreter for the Allied Forces.

His goal was then to come to the United States. With some difficulty, he located an uncle who lived in Miami. With more difficulty, he was able to board a troop ship with 1200 others. He traveled by ship to New Orleans and by train to Miami.

Cavafy continues:

*Pray that the summer
mornings are many, when,
with such pleasure,
with such joy,
You will enter ports seen
for the first time*

When he arrived in Miami he was greeted by his Uncle and his uncle's wife.

On his first day in Miami he looked for jobs, and found a job as a sweeper and salesman at an Army-Navy store.

"On my second day" he wrote in the notes for his oral history for the Court, "I was greeted by my uncle's neighbor, who lived across the street, with a bottle of home-made wine. He introduced his daughter [and] she helped me... since I was not familiar with the typical American expressions."

And that daughter, Rose, was his dream. He proposed to her two weeks later. She gave it some thought, and they were married a year later. Steve was born

in 1952 and Rick was born in 1955.

In the 1950s he worked full time, attended law school at the University of Miami at night, and graduated third in his class in 1958.

After law school he was selected to be a law clerk for U.S. District Judge Joseph Lieb. When Judge Lieb moved to take the bench in Tampa, Alexander Paskay moved with him.

And in 1963, at his request, Judge Paskay was appointed as a Bankruptcy Referee in the Middle District of Florida.

Ithaca continues:

*Visit many Egyptian cities,
to learn [and to teach
with] the scholars;...
And do not hurry the
voyage at all;
It is better to let it last
for many years...*

And this began the phase of his life where he became a person of national and international importance.

He was the leader of our Bankruptcy Court in the Middle District of Florida for almost 50 years, as the Court grew from 448 cases to 8 judges and over 60,000 cases in a year.

And in that almost 50 years, he not only led our Court, but he led and assisted with the development of the Bankruptcy and commercial laws in the United States and internationally.

Everywhere we go in the Bankruptcy world, when people learn that we are from Florida, they always ask about Judge Paskay.

And when you went into his chambers, you would understand why he was so widely known and highly regarded.

On his bookshelves were casebooks and textbooks and treatises.

-He was one of the most prolific writers among the Bankruptcy Judges in the Country. Westlaw has over 1,800 of his decisions on its website. Also, he wrote or contributed to numerous handbooks and treatises.

-His many opinions and treatises provide a foundation and significant guidance for the interpretation and application of the Bankruptcy and commercial laws, and they add to the common law of our land.

continued on page 10

Alexander L. Paskay*continued from page 9*

On the walls of his office were diplomas and certificates, and letters from Congressmen.

-He testified before Congress as Congress considered the adoption of the Bankruptcy Code.

-Then he was appointed by the Chief Justice to the Advisory Committee on the Bankruptcy Rules and Practice.

-And after his service on the Rules Committee, he was appointed to the Task Force for the revision of the Bankruptcy Forms.

Also on the walls were accolades and thanks from national organizations.

-In 1982 Judge Paskay joined with others to organize the American Bankruptcy Institute, that is now a major national organization for the education of all of the Bankruptcy lawyers in the country.

-He was one of the early Board members and was instrumental in the early years of the National Conference of Bankruptcy Judges, the professional association for all of the Bankruptcy Judges in the Country.

-And in 1990 he was honored as a Fellow of the American College of Bankruptcy, and inducted into its original class at the Supreme Court of the United States.

Also on the shelves was the textbook that he had written for the courses that he taught.

-He taught bankruptcy courses to law students at Stetson Law School since 1973. Many of his students are now successful lawyers and are here today.

-He organized and chaired Stetson's annual bankruptcy seminar for attorneys and bankruptcy professionals for over 30 years, and was honored by Stetson and the American Bankruptcy Institute when the seminar was named "The Alexander L. Paskay Seminar on Bankruptcy Law and Practice."

-He organized and conducted international bankruptcy symposiums with the sponsorship of Stetson in Hungary, Italy, Germany, and Canada.

-Internationally, he has made presentations to the International Association of Jurists and to the World Jurist Association.

-And in 2007 he was inducted onto the Stetson University College of Law Hall of Fame.

When you were in his courtroom, you saw a man who loved challenges and debate—who raised questions to test the breadth and depth of your knowledge, and of his own knowledge—a competitor who loved best those who could keep up with him.

And after the debate, regardless of the responses, you saw a man who cherished fairness and equity. He was fair to the law, and fair to the parties. And on both legal and non-legal matters, he was a person with a strong sense of right and wrong—a strong sense of fairness and equity.

And you also saw his sense of humor and perspective. Every time I saw Judge Paskay he had something light to add, whether or not there was something serious to discuss.

And finally, you saw the deep sense of importance he had for his family. He endured at first hand the ravages of World War II, and witnessed families torn apart, lives destroyed, and the blind inequities of war. This contributed to his lasting devotion to fairness, principles of equity, and family.

Rose is a wonderful person—gracious and thoughtful—and an understanding wife. She often traveled with Judge Paskay, and she is also known nationally. Their successful sons, Steve and Rick, have seen and have learned the importance of hard work and the success it brings.

To cap his achievements, in 2007 he received two of the highest awards for professionals in the fields of bankruptcy law:

-The William L. Norton, Jr. Judicial Excellence Award, presented by Thomson/West publisher and the American

Bankruptcy Institute, for a Judge with a career of lifetime achievement; and -The Lawrence P. King Award for Excellence in the Field of Bankruptcy, presented by the Commercial Law League of America, that recognizes a lawyer, judge, teacher or legislator.

Very few people have had as great an influence on as many people in this country as has Judge Paskay.

So that is my portrait of Judge Paskay. The initial sketch from my first meeting with him was filled in with colors over the years; and the colors are not dabs of pastels, but the canvas is full and the colors are bold and deep and rich.

Cavafy concludes:

*...anchor at the island
when you are old,
Rich with all you have
gained [and given to us]
along the way.*

The life of Alexander L. Paskay was an incredible life of ability, challenge, and achievement. It was the life of a man who began his journey in Hungary, experienced the ravages of war, came to America with only his dreams and aspirations, made national and international contributions to the laws, and ended his life as a legend.

His passing is truly the end of an Era. 🏛️

Alexander L. Paskay*continued from page 8*

into the courtroom. He was often dramatic and flamboyant. He had a piercing mind and enjoyed the intellectual combat of litigation. He probed and prodded and expected and encouraged litigants before him to defend their positions with vigor; you had to be on your game. Like a roller coaster ride, appearing before him was sometimes fun, sometimes frightening, and usually exciting.

Just about everyone who has appeared before Judge Paskay has a favorite story to tell. My favorite is not one in which I participated, but was retold to me by one of my colleagues. Judge Paskay always wanted to get to the heart of a matter quickly

and frequently took over an attorney's direct or cross examination of a witness. On one occasion, the witness was a German man who had difficulty understanding English. Judge Paskay then engaged in a fairly lengthy question and answer with the witness in German. No one else in the courtroom, including the court reporter, knew what was being said. Afterward, Judge Paskay looked up and with a smile asked "Any follow-up?"

He was a unique jurist and human being. He touched so many lives in a positive way. He will be impossible to replace and will be greatly missed. 🏛️

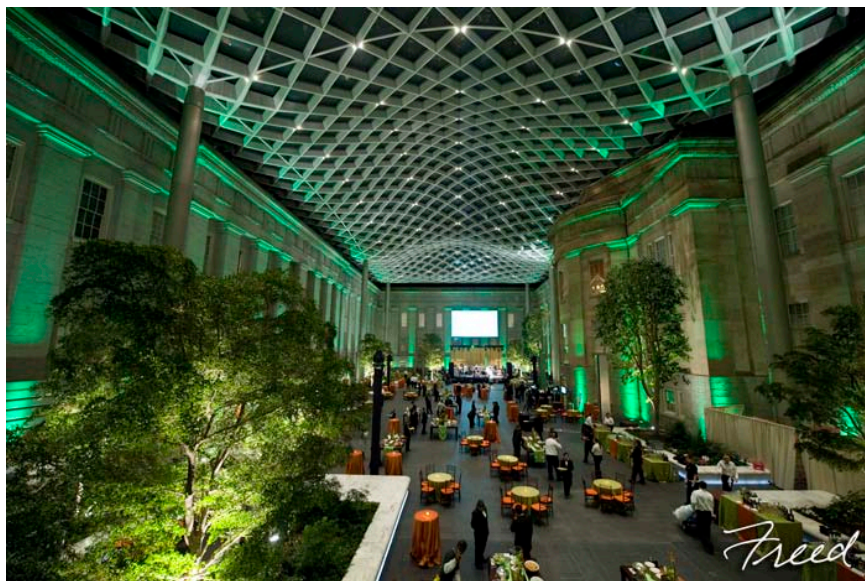
¹ From an interview that is part of the University of Florida Samuel Proctor Oral History Program.

You Spoke, We Listened!

As much as the Fellows and the Board have enjoyed having the U.S. Supreme Court as the site of the Induction Ceremony for many years, it became clear in March that the College has outgrown the Court and the Mayflower Hotel. Paul Singer requested volunteers at the March board meeting for a venue search committee to be chaired by D.C. resident Bill Perlstein. The committee of Bill Perlstein, Michael Cook, Chris Meyer, Mark Bloom, Berry Spears and Shari Bedker met in Washington, D.C., on April 9 to view two hotels and five venues that were pre-screened to meet our needs with the appropriate austerity, room to grow and fit within our budget. We are pleased to announce that the decision was unanimous among the committee and reported and approved by Chair, Jan Baker. The venue will be...

The Donald W. Reynolds Center for American Art and Portraiture in the museum's courtyard!

This is a beautiful open space with room for the induction and a reception for up to 600 people. The museum is located at 8th and F Streets, NW, so we looked for a hotel within walking distance to the museum. The conference hotel will be the D.C. Renaissance (999 9th Street NW), which is a 4 block walk from the museum along a street that is open only to pedestrians. We will have shuttle bus service for those who may not want to walk or



▲ The courtyard of the Donald W. Reynolds Center for American Art and Portraiture.

in case of inclement weather. The added benefit of having the induction at the museum is that the museum is open to the public until 7:00 p.m., so attendees will be encouraged to arrive early and go through the museum at their leisure, with the ceremony being at 7:15 p.m. and reception from 8:15 p.m.-9:00 p.m. Since we will be on a different area of the city from in the past, we hope that firms with offices in the 8th street area will think about offering their firms for the circuit lunches on Friday, March 15. We will have some different offerings for the "About Town Dining" for the evening also!

For those who want to plan ahead and make their reservations at the hotel, please call (202) 898-9000 and ask for the "American College of Bankruptcy" block of rooms. The available room rate is \$219 per night until February 21, 2013 or the block is full, whichever occurs first.

Save the Date!

24th Class of the
American College of Bankruptcy,
March 14-16, 2013!

Chair's Column

continued from page 2

Ad Hoc Venue Committee was appointed to consider and select alternatives. It was chaired by our Washington/New York Fellow Bill Perlstein, and included Fellows Mark Bloom, Mike Cook, Chris Meyer, and Barry Spears, together with our Executive Director, Shari Bedker. The Venue Committee visited a variety of possible Washington locations in April, and, after an extensive review of alternatives, unanimously concluded that the most attractive venue would be the Smithsonian American Art Museum. Our Executive Director, Shari Bedker, has described in this issue of College Columns the venue and the process by which it was selected – it will clearly be a wonderful space for our 2013 induction ceremony. As shown in the picture that follows, it is a majestic space, and large enough to accommodate comfortably the induction ceremony.


On other fronts, we have what could be called a "good news – other news" prob-

lem. The good news is that the activities of the College are vibrant, strong and ongoing, thanks to the efforts and dedication of dozens of Fellows serving on multiple committees and to the great leadership of our past two Chairs, Paul Singer and David Heiman. Our pro bono program, for example, has grown to the point that we now believe that the College gives more money to support pro bono bankruptcy programs than any other group in the United States. While in 2006 we approved 14 grants totaling \$50,000.00, by 2011 the College awarded 36 grants totaling \$262,834.00. These grants and what they accomplish are something in which we can all take enormous pride, and, as you will see from the article by Larry Coppel, the Chair of the Pro Bono Committee, the grants go to enormously deserving programs.

Grant requests continue to flood in, however, and we need to increase our ability to provide support for them. Accordingly, we are making a major effort in 2012 to enhance contributions both to the College's Foundation and to our Patrons and Spon-

sors Program, which provide the funding for all of our pro bono efforts. Pat Vance, the Chair of the Foundation, is working with the members of the Foundation's Board to determine how we can grow the Foundation, while Mike Cook, our President, is chairing a Patrons and Sponsors Committee that is seeking to enhance law firm support of the College. The Board of Directors is committed to continuing to fund our pro bono programs, as well as the other activities of the College, but in order to do that, the College needs the continued strong support of its members.

The College continues to have numerous opportunities for Fellows to get involved. If there is something that you think you might like to do, let one of the members of the Board of Directors or Board of Regents or one of the Chairs of a College Committee know about your interest. The Fellows who get the most out of the College are those who put the most into it.

We look forward to having a great meeting in San Diego this fall and hope to see as many Fellows as possible there. 

Educational Program Spring 2012



By Cecily A. Dumas,
Co-Editor

The Educational Program at the March Meeting presented the opportunity to hear distinguished panelists addressing timely topics. The ABA Electronic Discovery (ESI) in Bankruptcy Working Group presented its *Interim Report on Electronic Discovery (ESI) Issues in Bankruptcy Cases* dated March 15, 2012. The Working Group is chaired by Richard L. Wasserman, of Venable LLP, and consists of twenty-five distinguished jurists, academics and practitioners in the bankruptcy and litigation fields. The Working Group, having acknowledged the extensive work of the Sedona Conference on electronic discovery issues, developed particularized guidance on issues concerning electronically stored information (ESI) in connection with bankruptcy cases. Comments on the draft Guidelines are welcomed and should be directed to the Working Group through Mr. Wasserman, Venable LLP, 750 East Pratt Street, Suite 900, Baltimore, Maryland, 21202; e-mail address: rlwasserman@venable.com; telephone 410-244-7505.

An abstract entitled *Private Equity and the Resolution of Financial Distress* was prepared by Edie Hotchkiss, Wallace E. Carroll School of Management, at Boston College, David C. Smith, McIntire School of Commerce, at the University of Virginia, and Per Strömberg, Institute of Financial Research (SIFR), at the Stockholm School of Economics. The authors analyzed the role of private equity firms in the restructuring of financially distressed firms. After examining the private equity ownership of 2,156 firms which obtained leveraged loan financing between 1997 and 2010, the authors found that PE-backed firms were no more likely to default during this period than other firms with similar leverage characteristics. But defaulting firms that are private equity backed spend less time in financial distress and are more likely to survive as an independent reorganized company versus being sold to a strategic buyer or liquidated. Copies of the abstract may be obtained by contacting Shari Bedker, Executive Director of the College, by e-mail at sbedker@amercol.org.

Prof. Edward Morrison, the Harvey R. Miller Professor of Law and Economics

at Columbia University, prepared a paper entitled *Health Shocks and Household Financial Fragility: Evidence from Automobile Crashes and Consumer Bankruptcy*, with Arpit Gupta, also of Columbia University, and Lenora M. Olson, Lawrence J. Cook and Heather Keenan, of the University of Utah Medical School. The paper assesses the importance of adverse health shocks as triggers of consumer bankruptcy filings, and may provide critical empirical data in the ongoing development of national health care policies as well as studies of the causes of consumer bankruptcies.



▲ Spring Education Program at the Mayflower Hotel.

Survey Seeks Comments on Chapter 15 Cases

College Columns: International Note



Bruce Leonard,
Chair, International
Committee

The International Committee of the College is proceeding with its survey of experience with cases under Chapter 15 of the Bankruptcy Code. As everyone will recall, Chapter 15 is the adoption of the UNCITRAL *Model Law on Cross-Border Insolvency* which has also been adopted in 18 other countries.

The International Committee Chapter 15 Survey will be circulated to all Fellows and is intended to draw on everyone's experiences with cases under Chapter 15, and with international cases generally, to determine if changes in the structure and operation of Chapter 15 are necessary or would be beneficial to practice in international cases. UNCITRAL is also conducting a review of the operation of the

Judge Houser, Judge Ambro and Judge Drain presented a lively Judges Roundtable. Their topic was dealing with the unexpected with a focus on how judges think. Among other areas covered was an approach to analysis focusing on the text and structure of a statute, as well as the consequences of an interpretation both in your factual scenario and other fact patterns, and the fairness of the statutory interpretation and result.

Once again, Rich Levin, of Cravath, Swaine & Moore LLP, New York, New York, together with Prof. Douglas Baird, of the University of Chicago Law School, and James L. Bromley, of Cleary Gottlieb Steen & Hamilton LLP, presented the invaluable Developments Educational Panel materials covering significant cases from each circuit reported from July 2011 through January 2012. The discussion ranged from *Jefferson County* and the Section 543 ruling, *Tribune's* Section 1129(a)(10) analysis, *Chemtura* and claims estimation, to *SW Boston Hotel Venture* and transfer of voting rights under intercreditor agreements. 🏛️

Model Law on Cross-Border Insolvency, and the results and findings in the College's survey may be of interest and value to UNCITRAL in its consideration of the *Model Law*.

We would ask everyone who has had experience with Chapter 15 cases to take a few minutes to complete the survey. The results of the survey will be reported to all Fellows of the College and, as part of the Survey, we would appreciate comments generally on the operation of Chapter 15 and ways in which practice and procedure under Chapter 15 can or should be improved. We appreciate the interest and support of all Fellows in this very important international initiative for the College.

For those Fellows of the College who are involved in international cases or have an interest in the international area, please join the International Committee and participate in the Committee's other projects and initiatives. To join, simply indicate your interest in joining the Committee to our Executive Director, Shari Bedker. We appreciate everyone's interest in the College's international initiatives and projects. 🏛️


ACB Partners with NCBJ on Chapter 15 Educational Program

The Honorable Nancy C. Dreher

The National Conference of Bankruptcy Judges will be held this year in San Diego, California, on October 24-27, 2012. A "blockbuster" educational program is in the works. Seventeen NCBJ programs are planned (as well as many others presented by groups with which the NCBJ has liaison relationships). The Conference is hoping to register 2000 or more of the cream of the crop of bankruptcy insolvency professionals for the program.

Well over a year ago, with the encouragement of the Board, Bruce Leonard, Chair of the International Committee of the College, met with the incoming President of the NCBJ, College Fellow Joan N. Feeney, to discuss a possible program that would tap the College's deep strengths in the international insolvency arena. With the assistance of College Fellows Sid Brooks and Rich Levin, Bruce formulated a proposal for a program that was accepted by the NCBJ Education Committee for the San Diego meeting.

The program is entitled "Coming to America . . . Broke; Chapter 15, Plain and Fancy." It will be presented on Friday, October 26, commencing at 11:30 A.M. in the Marriott Hall Ballroom, North Tower. The panelists, all College Fellows, are most highly regarded in the field of international insolvency; Bruce Leonard, as moderator, and Dan Glosband, Allan Gropper, and Jay Westbrook, as panelists. They will be discussing, among other topics, some basics of Chapter 15 (the "Plain") as well as the very non-basic subjects of recognition, center of main interests, and relief and limitations on relief obtainable in Chapter 15 (the "Fancy"), all with an eye toward recent and important case development on these subjects. College Fellows are encouraged to register for the NCBJ, which just keeps getting better each year and is recognized as a premier education and networking opportunity, and are especially encouraged to attend the Chapter 15 program, not only to learn from the pros, but also to cheer on this effort by the College to cooperate with the NCBJ in the educational programming arena.

Many thanks to Bruce, Sid, Rich, Jay, Dan and Allan for their efforts. 

Straight Talk from Stern Vern in the College's Archives

Provided courtesy of The National Bankruptcy Archives

Vern Countryman (1917-1999), Royall Professor of Law at Harvard Law School, taught there from 1963 through 1987. At his death in 1999, the school's dean described Countryman as "the dominant presence in commercial law..." According to a memorial note in the *Harvard Gazette*, the "chain-smoking, crew-cutted Countryman was a demanding teacher." 'Stern Vern' worked and believed others should work hard," one of his colleagues told the *Gazette*.

We practitioners knew Countryman to be one of the nation's three leading bankruptcy scholars (with Frank Kennedy of Michigan and Lawrence P. King of NYU) from 1960 through 1990. We regularly used his 1974 bankruptcy casebook as a valuable reference. Courts still cite his seminal law review articles on executory contracts and the use of state law in bankruptcy cases.

Countryman the man was direct, clear and unpretentious. Former Judge Randall Newsome interviewed Countryman on June 2, 1995, after he had retired, for the College's oral history project now housed at the University of Pennsylvania. The following excerpts from the taped interview show the value of the College's archives and, more importantly, give us a true sense of this extraordinary man.

Countryman's Birthplace

"Newsome: how many people were in Roundup, {Montana} when you were born there [on May 13, 1917]?"

Countryman - well, I don't know. I don't remember when I was born."

Countryman's Youth in Longview, Washington

"That's where I grew up [from the age of 8] until I went away to college... It was pretty much a company town... It was sort of dull, it really was.

"I was the oldest [of 4 boys]... My parents kept wanting a girl, and you see what happened to them. They got 4 boys."

Ethnic Background and Religion

"Oh, we never knew for sure. We were sort of airedales, I guess." [When asked about religious affiliation]: "None."

Growing Up During the Depression

"We had a 3/4 acre plot right on the outskirts of town, and we raised beans, tomatoes, and chickens, God knows what. Always seemed to have enough to eat. We didn't have anything for spending money or much for clothes."

Why He Went to the University of Washington for College and Law School


"It was cheaper... I didn't go look [elsewhere]. Looks were not important, it was the cost to get there.

[Parents] didn't give me any [support for school.] My dad gave me a dollar one time while I was in high school. I remember that very well -- he must have been feeling real [f]lush... [H]e didn't see much point to [college]. This was entirely my mother's idea...

I didn't decide I wanted to go to law school until my second year in college... So at first I didn't know what the hell I was doing there...

[To support myself, I] worked in the library... At least I didn't starve to death, and I'm still here.

I read a lot [during high school and college]... I liked mostly history and biographies, and I still do."

Want to hear the rest of the interview in Vern Countryman's own voice? Visit the Archives website from www.amercol.org, click on the "University of Pennsylvania National Bankruptcy Archives" on the homepage, then go to "digital collections". We will also publish the rest of the interview in the December 2012 issue of the *College Columns*-stay tuned... 



Mexican Insolvency Law

continued from page 7

Acts In Fraud Of Creditors

What rights did Vitro's creditors have under Mexican law to nullify the Intercompany Lock-up and Plan Support Agreement and other accounting moves of Vitro and its subsidiaries?

Prepetition-Rome. Federal Civil Code And Mexico City Civil Code

Mexican law incorporates a remedy that is similar (and dates back) to Roman law's *actio Pauliana*, "an action to rescind a transaction (such as alienation of property) that an [insolvent] debtor made to deceive the debtor's creditors". See article 2163 of the Federal Civil Code and the Mexico City Civil Code, respectively.

General Remedy Available Under The LCM-Prepetition

Under article 113 of the LCM, "All actions made to defraud creditors shall be null and void vis-à-vis the Estate..."

It is noteworthy that, in contrast with the language of the Federal Civil Code, article 113 of the LCM does not require that the acts give rise to the debtor's insolvency in order to be annulable. Instead, the LCM lists specific types of behavior or acts that are considered or might be deemed to be fraudulent.

Preference Risk To Creditors

Apparently, under U.S. bankruptcy law all payments and transfers of property made in the 90 (ninety) days before the bankruptcy filing can be reclaimed by the debtor and those assets are then equitably distributed to all creditors. It is a 1 (one)-year period for insiders. Mexican law does not have this concept.

In Mexico, the avoidance period is 270 (two hundred and seventy) calendar days prior to the reorganization judgment. (See article 112 of the LCM). At the request of the mediator, the intervenors or any creditor, the judge is empowered to set a prior avoidance date, provided that the request is filed before the judgment on recognition, ranking and priority of credits is issued. Judges are not inclined to extend this term.

Conclusion

Any lender and trustee doing business with a Mexican borrower or issuer should review its standard documentation to enhance its binding effect and enforceability. While the LCM is in need of some changes and the Mexican judiciary requires bet-

ter training in connection with insolvency matters, foreign banks and trustees can learn a few important lessons from the Vitro case.

"Better to prevent than to regret", as the saying goes in Mexico. 🏛️

Distinguished Service Award

continued from page 1

Harvey Miller noted that at the time of his first contact with Pat in the early 1970s, Pat's position was as Senior Legal Counsel at Bank of America. Apropos of his future induction into the College, he had written an article that had caught Harvey's eye. Harvey noted that when they first met, Pat's appearance was that of the usual early 1970s San Francisco stereotype. He described it as follows: "His hair was almost shoulder-length and flying in all directions, and he carried the oldest, most scruffy briefcase I had ever seen." He listened to Pat and the legendary Peter Coogan (See *College Columns* December 2008) debate esoteric issues of the UCC at what Harvey considered was the highest level of sophistication.

Pat ultimately left Bank of America and started his own firm. Harvey was sued, along with Mike Cook, in connection with the *W.T. Grant* case. Harvey noted that the amount in dispute was \$475, and given the gravity of the situation, they hired Pat Murphy to represent them which, in Harvey's view, helped launch Pat's successful career in private practice.

Harvey indicated that the structure of bankruptcy is to facilitate negotiation and ultimately consensus, at least among reasonable persons. He said that Pat understood this intuitively and applied it in his legal practice.

Pat was responsible for PLI CLE programs on secured transactions and structured finance, and plan confirmations. His list of case files is a *Who's Who* of cases including Memorex, Eastern Airlines, Morrison Knudsen Corporation, Evans Products, America West Airlines, Spreckels Corp., Dow Corning, FoxMeyer Drugs, Washington International Group (Morrison Knudsen redux) and the Orange County Chapter 9 bankruptcy. Pat served as counsel to one of the creditors' committees in Orange County. The Committee was a compendium of different interests to which Pat explained that the successful strategy in the case would require a combination of negotiation and politics, and, on that basis, was hired as

counsel for the Committee.

Harvey Miller explained that *Courage, Tolerance, and Perseverance* are the three words that best describe Pat Murphy. The courage to reach out and find new solutions in complex situations – tolerance for the views of others – and perseverance in pursuing a resolution of a problem.

Pat is a graduate of Williams College and a 1965 graduate of Boalt Hall School of Law of the University of California. He was a member of the First Class of the College in 1990. Pat was a member of the National Bankruptcy Conference and a major contributor to the development of the legislation that became the Bankruptcy Reform Act of 1978. He has been married for many years to his wife Gail, and they raised two sons, Alexander and Scott. Pat and Gail have always given freely of their time and efforts to civic affairs to improve the world in which we live and the San Francisco community in particular.

Pat Murphy responded to the presentation by Harvey Miller by thanking his long-time partners in the practice of law. He thanked in particular two who have passed on, Peter Coogan and Barney Shapiro, and his long-time partners Margaret Sheneman, Randy Rogers and Kip Maly. Pat noted that he liked many aspects of bankruptcy law when he was first exposed to it: the relative rapidity of resolution of the issues raised in bankruptcy disputes, the nature of the process, and the quality and experience of the judges. He recalled a situation where he sought a determination of non-dischargeability of a debt on the basis of receipt of a false financial statement. After a side bar from the bankruptcy judge, who focused on whether it was a net crop lease payable only from the crop proceeds and questioned the underwriting process of the bank that would sign such a lease, the parties worked the case out with the debtor disclosing where he had hidden his tractor.

Pat commented on the rise of women in the profession, and indicated that path still had a long way to be traveled. He also discussed the importance of continuing legal education as a vehicle for growth of the professionals giving the program. He noted that Peter Coogan would not prepare questions and answers with panelists before the program, and he considered a comment from Professor Coogan after an unrehearsed response, to the effect that "you are beginning to understand this" as a special memory and highlight of his career. 🏛️

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