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# COLLEGE COLUMNS

A MAGAZINE FOR AMERICAN COLLEGE OF BANKRUPTCY FELLOWS | DEC 2019



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## From the Chair Headed to Denver for the 2022 Annual Meeting

Marc A. Levinson, Orrick, Herrington & Sutcliffe LLP



The College held its first twenty-nine Annual Meetings/Induction Ceremonies in Washington, DC., which also will be the site of the 2020 and 2021 events. Last March, Class 30 was inducted at the Hotel Del Coronado in San Diego. Shortly thereafter, we circulated a poll that asked, among other things, how interested Fellows would be in having the College explore an alternative to DC for the 2022 events. Over 250 Fellows responded to the poll – a very high response rate. Almost 40% said that they would be extremely interested in exploring a non-DC location, and 37% said that they were interested in the College doing so. Only 15% voted against moving from DC.

With that in mind, leadership asked Shari Bedker and her team to explore alternatives to DC, keeping in mind the same criteria we used prior to selecting San Diego several years ago, namely: (1) an iconic location for the Induction Ceremony; (2) space for the education session, for the College and Foundation board meetings and for all of the various committee meetings; (3) cost and quality of the hotel rooms; and (4) a nearby airport to which there are nonstop flights from across the country and hopefully, the world.

The search team carefully explored several options, but the search came down to two – Denver and Phoenix. At its meeting on October 30, the board selected Denver, and Shari is in the process of making the bookings. The conference hotel will be the historic Brown Palace. Here’s a quote from the hotel’s [website](#):

*Built in 1892, the [Brown Palace]... has been a four-star and Four Diamond hotel since 1977. At the heart of the boutique hotel is the atrium lobby, soaring eight stories above the ground floor and crowned by a beautifully detailed stained-glass skylight. Dramatic Florentine arches surround the atrium, and intricate wrought iron panels decorate six stories of balconies. Timeless elegance and modern amenities best describe our luxury hotel in Denver. Each of our guest rooms includes a 42-inch HDTV, Wi-Fi, and Keurig® coffee maker. The bathrooms feature Carrera marble countertops, sophisticated silver fixtures and rain shower heads that tap water from an artesian well.*

[\*continued on page 8\*](#)



# From the Colum...nist.....

Deborah Langehennig, Chapter 13 Trustee  
Co-Editor, College Columns




Welcome to our end of 2019 edition of College Columns, an issue packed with interesting articles from our Fellows. Be sure to read the three articles submitted by and about previous Distinguished Law Students -- Where Are They Now? They have contributed thoughtful updates about their professional journeys to date and how their selection for this honor has impacted and enhanced their careers. We

also have an interview article about our Scholar in Residence, Susan Block-Lieb of Fordham University, where she discusses her recent research and upcoming article.

Take a look at Judge Brown's informative summary of the ABI Consumer Bankruptcy Commission's report and the recommendations from the Commission. As these changes to consumer bankruptcy law are discussed and implemented, we might anticipate significant changes to the consumer bankruptcy practice and a corresponding effect on consumer debtors and creditors.

Bankruptcy trustees and consumer specialists should be sure to review the announcement from Marc Levinson regarding a new policy for reduced dues. For the puzzle and/or trivia enthusiast, we include another crossword and trivia quiz themed, as you may guess, with clues about bankruptcy history and the activities of the College.

As 2019 draws to a close, we encourage your consideration of a contribution to the Foundation, which helps the Pro Bono Committee fund good work throughout the country. We also appreciate your continued participation in our newsletter, as your articles help us all keep in touch between meetings. We wish the Columns to continue as an open forum for discussion of significant events in the bankruptcy world and for reports of noteworthy meetings, activities and opportunities for College Fellows.

Enjoy a wonderful holiday season and I hope to see you all in D.C. in the spring! 

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## Giving Thanks

Mark D. Bloom, Greenberg Traurig, LLP  
President, American College of Bankruptcy



Every year as I write my column for the December edition of *College Columns* I find myself starting off with the phrase, "Hard to believe . . ." This year I confess that I'm a bit late to the task, and since it's the morning after Thanksgiving and we have a refrigerator full of leftovers here at home it's easier to believe that once again we are coming to the end of another year, and once again we all have much to be thankful for.

I count among those many blessings the opportunity I have to serve in the leadership of this dynamic organization. In the 21 years since my induction in Class IX I've witnessed spectacular growth in the College – not just in terms of membership numbers, but in the activities of the College and the contribution that it makes to the good and welfare of the profession.

- I'm thankful for the growth in the number (and quality!) of Circuit Education programs over the years, and have been enriched within the past two years by attending the programs conducted in the Fifth, Seventh, Ninth and Tenth Circuits; hopefully before the College is done with me I'll get to attend at least one program or event in every Circuit.
- I'm thankful for the incredible ramp-up of participation and acceleration of activity in so many committees of the College, new and old. The reports submitted to the Board for our Spring and Fall meetings reflect this increased activity on so many fronts, made possible through the efforts of an increasing number of Fellows who have taken the opportunity to get involved in our work.
- I'm particularly thankful for the enormous growth of the Foundation and the unparalleled work of its Pro Bono Committee,

in soliciting, evaluating and funding a steadily increasing amount of grant dollars to pro bono consumer legal services organizations across the country (and this year even in . . . never mind, that's in Paul Harner's column, and by the way, Paul continues to do an exceptional job as Chair of the Foundation, along with Judge Janet Bostwick as Chair of the Pro Bono Committee!).

- I'm thankful for the great Fall Meeting that we had this year in Washington, D.C., including a highly productive Board meeting, highest turnout at a Fall Fellows Luncheon in our history, and an afternoon of well-attended committee meetings.
- And (never one to let an opportunity for a natural segue pass by), I'm thankful for the 261 Fellows whose 110 professional firms supported the College's Patrons & Sponsors Program in 2019!

**2019 Patrons & Sponsors Program.** Through the generous support of 110 professional firms, we closed out the 2019 Program with \$288,000 from 30 Sustaining Patrons, 21 Patrons, 55 Sponsors and 4 Supporters. While we gained back some of the fall-off and managed healthy increases over the 95 firms and \$272,500 total from 2018, we still fell just a bit short of our goal of \$294,000. So conservatively we've maintained that same \$294,000 goal for 2020, but already are mobilizing our dedicated group of Patrons & Sponsors volunteers in the hope of exceeding that goal by at least 10%. And with \$201,750 pledged for 2020 as of December 6, 2019 we're 2/3 of the way there, but we need your firm to support the Program that each year provides fully 50% of our annual operating budget – including the educational programs, international law course and national bankruptcy archives projects that distinguish the College in the bankruptcy and insolvency community.

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## 31 for 31!

Stephen D. Lerner, Squire Patton Boggs (US) LLP  
Chair, Board of Regents



The Board of Regents recently met during NCBJ in Washington, D.C. to consider the election of new Fellows. The meeting was the culmination of more than 7 month's work by 100+ Fellows led by our Regents and the Chairs of our Nominating Committees. The nominating process

began shortly after the March 2019 induction weekend in sunny San Diego. I am delighted to say that the process resulted in invitations being offered to 31 professionals to enter the College as our 31st Class of Fellows – the symmetry of "31" is purely coincidental. Our new Fellows will be inducted at the Annual Meeting on March 13, 2020 back in our nation's capital.

**DIVERSE CLASS:** The Board of Regents, the Circuit Admissions Councils, the Judicial Nominating Committee and the International Nominating Committee again were keenly focused on adding more diversity and youth to our ranks. And, I am happy to report that our new Fellows will indeed improve the diversity of the College (an effort that I hope will be continued for many years to come). Women represent 32% of the Class (compared to 21% overall within the College), three new Fellows are African-American and a majority of the Class is under the age of 54. Unofficially, I believe that there are more consumer-focused professionals in this Class than ever before, and, recognizing that diversity comes in many flavors, we admitted perhaps the oldest Fellow ever at age 77. The Class is comprised of 24 lawyers, 3 judges, 3 law professors, 1 financial advisor and 2 are international. Our international invitees are from China and the United Kingdom. You may access the complete list of invitees by clicking [here](#).

**THE PROCESS:** The nominations process is demanding and is designed to ensure that our new Fellows are of the highest caliber and more than satisfy the rigorous standards mandated by our bylaws and tradition. We require excellence in their professional service, the utmost in professionalism and integrity and a strong commitment to supporting their professional, civic, religious and/or charitable communities. This year's invitees clearly represent the best and brightest within the bankruptcy and restructuring profession. You will learn more about them at the induction ceremony.

Every year, as you might imagine, there are candidates who are nominated but are not approved by the Board of Regents. Our day long discussion is thoughtful and thorough and there is usually a healthy exchange of views about each candidate. As I complete my two year term as Chair of the Board of Regents, I would observe that the level of diligence and care taken by the Regents and Nominating Committee chairs was exceptionally high which has led to greater diversity and an extremely well-qualified group of new Fellows.

**COLLECTIVE EFFORT:** I want to extend my sincere gratitude to all of the Regents and Nominating Committee Chairs (and the members of the Circuit Councils and Nominating Committees) for their tireless efforts and commitment to this process. They provided an exceptional list of candidates for consideration. The Regents are: Michael Goldberg (1st), James Bromley (2nd), David Stratton (3rd), Douglas Foley (4th), Lisa Futrell (5th), Michael Coury (6th), Jamie Sprayregen (7th), Michael Stewart (8th), Thomas Patterson (9th), Kenneth Cannon (10th) and Patricia Redmond (11th). Our Regents-at-Large are Professor Ingrid Hillinger, Judge Jeffery Hopkins and Cynthia Nelson. The Chairs of the Judicial and International Nominating Committees are Michael Baxter and Steven Kargman, respectively.

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## A Collective Mission Demanding Generous Commitments

Paul E. Harner, Ballard Spahr LLP  
Chair, ACB Foundation

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*"The American College of Bankruptcy Foundation was established to promote the ends of justice through educational and charitable activities. Its missions, focused in the areas of bankruptcy and insolvency, are: sponsorship and encouragement of legal research, publications and forums; establishment of scholarships; providing for the collection and maintenance of data and documents for scholarly research; and fostering the institution and maintenance of legal aid facilities for the indigent."*

**- American College of Bankruptcy Foundation Mission Statement**



The College determined long ago that service and charitable contributions were not only appropriate, but indeed necessary, corollaries of its core purpose of recognizing distinguished, longstanding achievement in the bankruptcy and restructuring community. Who in a better position, for example, to identify and address the localized needs of the indigent for legal help in navigating the bankruptcy system than various of

the profession's acknowledged leaders? Hence the establishment and ongoing work of the American College of Bankruptcy Foundation.

The concept underlying that hard work could not be more straightforward. The Foundation raises funds from our Fellows and then distributes them to bankruptcy-related, *pro bono* legal services providers in the form of annual grants totaling nearly half a million dollars. Our Pro Bono Committee awards funds based on an exhaustive review of grant applications, directing funds where it thinks most needed and useful. In 2019, the Foundation made a total of 50 grants averaging approximately \$9,500 each, including the Michael L. Cook Extraordinary Grant, which is awarded each year to "a legal services organization that offers an innovative and exemplary approach to a previously underserved area of need."

Over the longer term, the Foundation has become by far the largest financial supporter of bankruptcy-related *pro bono* services in the country, distributing well over \$4 million to *pro bono* legal services organizations.

Demand nonetheless far outpaces our resources. The Pro Bono Committee annually receives a far larger number of worthy applications for assistance than it can possibly grant. Likewise, although we have been fortunate and, in recent years, have been able to accommodate modest annual increases in our total grants, the Foundation still receives insufficient donations to fully fund

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## From the Pro Bono Committee

Hon. Janet E. Bostwick, U.S. Bankruptcy Court  
Chair, Pro Bono Committee



At the College lunch this fall in Washington, Nakia Matthews of the DC Bar Pro Bono Center shared with Fellows the impact our grants have on their clients. The Pro Bono Center is the largest provider of free bankruptcy legal representation in the

District of Columbia, focusing on the recruitment and training of volunteers to assist their low-income clients. Over the past 10 years, with support from Foundation grants, the Pro Bono Center recruited 432 volunteers and assisted more than 445 clients. Ms. Matthews thanked the Foundation for its support, which is the only dedicated source for the bankruptcy clinic. She shared the story of Mr. Daniel, a client whose wages had been garnished, preventing him from providing for his two children. A pro bono volunteer from the clinic assisted Mr. Daniel in filing bankruptcy and obtaining a fresh start. Another client, Ms. Davis, needed her car for ongoing cancer treatments. As a result of her medical issues, Ms. Davis had more than \$60,000 in debt. With the assistance of a pro bono volunteer, Ms. Davis filed bankruptcy and discharged her debt, enabling her to focus on her health issues.

The stories shared by Ms. Matthews are just a small snapshot of their work, and the impact of our grants. As the Center explained in its grant application:

*"Because our clients are living on such low-incomes – at or below 200% of the federal poverty guidelines – bankruptcy has a tremendous impact, allowing clients to avoid crushing wage garnishments that could render them homeless and unable to meet their families' most basic needs. Income preservation is often the goal for clients*

*who are unable to work because of a disability but may be facing a reduction in their already minimal public benefits due to past overpayments or tax debts. For many of our clients, their indebtedness impedes their most diligent efforts to obtain employment or housing, and bankruptcy has proven a valuable tool for addressing these barriers to self-sufficiency."*

The DC Bar Pro Bono Center is one of 50 grantees that received funds this year. As in the past, members of the Pro Bono Committee spent considerable time and effort to review the 56 grant requests seeking more than \$589,000. After approval by the Foundation and College Boards, the Pro Bono Committee awarded \$472,330 to organizations in 22 different states plus the District of Columbia and the territories of the Northern Mariana Islands and Guam. The organizations include grantees in large metropolitan areas such as New York City and Los Angeles, as well as grantees in smaller cities such as Flint, MI and Buffalo, NY. Several grantees provide services for large or rural areas, such as Mid-Shore Pro Bono in Easton, MD, which covers 8 counties in Maryland, or Legal Services of North Dakota in Bismarck, ND, which provides services across the state of North Dakota. The proposed awards include grants to eight grantees that have not previously received a grant from the Foundation.

The grantees are usually local bankruptcy pro bono programs formed by or supported by the bankruptcy bar and bankruptcy judges in that locale. The programs reflect a variety of ways to expand services. Some grantees provide for training and recruitment of additional volunteers to take on pro bono cases. Other applicants request support for self-help or pro se clinics to educate and advise unrepresented individuals in bankruptcy court. Or grantees

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***From The Chair***  
***continued from page 2***

Note that it mentions nothing about the 42-inch HDTV's turning on at 3:00 a.m., a service which the Hotel Del Coronado provided us at no extra charge.

The rates at the Brown Palace are very favorable compared to DC and San Diego, and better yet, the Holiday Inn Express next door, which is connected by a covered walkway, is operated by the same management company, and the room rates there are even more attractive. The Induction Ceremony will be held at the Denver Art Institute, a 10-12 minute walk from the two hotels. Plus, the hotels are close to all manner of restaurants and law firms such that sites for the Circuit luncheons the day of the Induction Ceremony will be easily accessible. Finally, the light rail from DIA is inexpensive and efficient, and takes you to Union Station, which is about a mile from the hotels.

The board considered whether the Denver weather should tilt us toward Phoenix – where the hotel was much more expensive (due to the annual spring training invasion of baseball fans) and was far from the city – but the fact is that Denver and DIA know how to deal with the cold and snow should we hit a cold front, and research revealed that more flights are canceled in the DC area than at DIA at that time of year. However, as a modicum of insurance, the Induction Ceremony will be held on Friday, April 1 – yes, I know – rather than in the second week of March. As best as we can tell, that date does not conflict with any holidays or school vacations.

More details to follow, but in the meantime, please calendar the date.

## **Important Information Regarding The Reduction of Fees and Dues**

While I hope that you became a Fellow of the College to take advantage of its educational programs and to spend time with first rate insolvency professionals from across the country and around the world, I realize that networking at ACB events and during telephonic committee meetings also can lead to business referrals. However, such business development is irrelevant to Fellows who spend most of their time representing consumer debtors or serving as chapter 7 or 13 trustees. Those professionals are important members of the College community, and their service on various committees, including the Foundation's Pro Bono Committee, is invaluable.

In early November, about a week after the College Class of 2020 was selected by the Board of Regents, a longtime Fellow (whose practice does not include consumer matters) suggested that the College revisit the cost of induction and the annual dues for consumer debtor and trustee professionals. The request was prompted by the current \$900 induction fee and the \$400 annual dues - which are a burden on many such professionals. A reduction would not be extraordinary because the induction fees and dues for academics, judges and other government employees have been much lower for years.

After fully airing the issue, the Executive Committee voted to lower the induction fee for such professionals to \$300 and the annual dues to \$150 (both of which are greater than what academics, judges and other government employees are charged). The new structure will take effect on January 1, 2020, meaning that the induction fee reduction will impact those individuals who will be inducted in March, and the dues reduction will impact all Fellows who qualify. Those eligible are professionals whose practice is substantially the representation of consumer debtors and whose firm is comprised of five or fewer professionals. The reduction also applies to chapter 7 and chapter 13 trustees in firms of five or fewer professionals.

Shari and her staff will be reaching out to the 1 to 3 members of the Class of 2020 who may qualify. Fellows previously inducted who believe that they qualify should email Shari at [sbedker@amercol.org](mailto:sbedker@amercol.org) to request the reduction. ¶





*The Brown Palace, Denver, Colorado*

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***From The President  
continued from page 4***

As a reminder, the annual participation levels for professional firms are as follows:

- Sustaining Patron -- \$5,000 (as in 2018 we had 30 Sustaining Patrons in 2019)
- Patron -- \$2,500 (21 in 2019, down from 25 in 2018)
- Sponsor -- \$1,500 (55 in 2019, up from 40 in 2018)
- Supporter (new category introduced in 2019 for firms with 5 or fewer professionals) -- \$750.

Participation is almost effortless: Just visit the College website (a great source of information about all of our programs!) at [www.americancollegeofbankruptcy.com](http://www.americancollegeofbankruptcy.com), click on the first tab, "About," and then on the fifth link in the dropdown menu for "Patrons & Sponsors"; the tab will open to a page with a link to "[Download the 2020 Patron Sponsor Commitment Form](#)," which can be filled out online and returned by email to Jenny Cudahy at [jcudahy@amercol.org](mailto:jcudahy@amercol.org). Once you've done that your firm has made a pledge for 2020 – and we promise that we won't forget to follow up on the funding!

In the Spring of 2020 and again in 2021 we are back again in Washington, DC for our Annual Meeting. As reported by our Chair Marc Levinson we have another "field trip" planned for 2022. And as I close out with the hope to see even higher turnouts at all of these meetings, I am reminded of the aspect of the College for which I am most thankful of all: the many wonderful people and professionals I've met and friendships I've formed with so many of our Fellows from all over the world, as the number and involvement of our US and International Fellows continues to increase.

On behalf of the College and my own family, I wish you and your families a joyful 2019 holiday season and a happy and healthy new year for 2020. 🍷



## An Interview with Scholar-in-Residence Susan Block-Lieb

Steven N. Berger, Engelman Berger, P.C.  
Co-Editor, College Columns



*Professor Susan Block-Lieb, a College fellow and the Cooper Family Chair of Urban Legal Studies at Fordham University, NY, became the College's Scholar - in - Residence this fall, and took the time from her very busy schedule to discuss her new role and current issues with the Columns at NCBJ 2019:*

**C:** *Welcome to the position of Scholar in Residence of the College. You were inducted as a fellow in 2003...tell us about your NEW Role.*

**SBL:** I was honored to be asked by College leaders to serve in this prestigious position. I'm cognizant of the fact that I am the first woman to serve in this position, and want to make the most of it. It's a great opportunity to re-engage with practitioners from my current academic position.

**C:** *Your CV on the Fordham website includes 17 impressive pages of your work in the insolvency area. You practiced at Skadden and Latham & Watkins for several years. How does that practice experience inform your work today?*

**SBL:** My private practice experiences provided a window into chapter 11 practices that aren't readily apparent to academics and others in academia. This background has been invaluable to provide context for understanding what my students and I can read in the public record. For example, my case work had a focus on airline reorganizations. Those cases had a rich interface of labor law and bankruptcy law, downward spiraling cash flows, gargantuan sunk costs, and other dynamics that the case law doesn't make clear. As a young practitioner, I enjoyed interacting with management to learn about finance and business issues and they interface with the law. I once flew on a People's Express flight on the eve of their filing with a C-level

executive who ditched me wheels-up to go undercover as a flight attendant and get direct feedback from the passengers onboard. It was an early lesson on the importance of researching both deeply and broadly on issues.

**C:** *How did you transition from practice to academia?*

**SBL:** I started as a law clerk for Bankruptcy Judge Joel Lewittes in the Southern District -- a great experience that was cut short when the judge retired in the aftermath of the Supreme Court's case in *Marathon*. After that, I had the opportunity to work in the Judiciary Committee in the House of Representative during their consideration of the 1984 Amendments to the Bankruptcy Code. I also had a solid foundation from my years in practice at Skadden during the 1980s; after teaching for a while, I reengaged with chapter 11 practices and practitioners, working "of counsel" at Latham in the early 2000s. I was fortunate to have some great mentors along the way: my father-in-law, Dick Lieb; J.J. White and Frank Kennedy during law school; after I graduated, Larry King, Michael Cook at Skadden, and Bob Rosenberg at Latham, Mike Sigal, Don Bernstein, Burt Lifland and Chris Redmond while observing at UNCITRAL.

**C:** *Fast forward to your decades of work in law school education. Do you see any trends that have enhanced legal education or to the contrary been obstacles in advancing legal education?*

**SBL:** The trend in legal education has been to push faculty to modernize teaching methods which has included a number of innovations of the years -- providing students more frequent feedback has been one focus. The model of one exam at the end of the year has given way to more opportunities for midyear feedback. We have also seen an increase in use of technology to gather data from students. In addition, the trend is to lessen the historical focus on litigation and



increase the focus on transactional work and on exposure to more practical skills such as interpretation of statutory codes and applicable rules, contract drafting, negotiation and so on. I have also seen ebbs and flows in students' interest in bankruptcy law. Students often choose their practice interests in reaction to current events; for example, after the events of the Great Recession, there was more interest in bankruptcy and financial law.

**C:** *It appears you have a strong interest in bankruptcy jurisdiction...what trends do you see as challenges for the bankruptcy bar in that area?*

**SBL:** Part of my interest stems from the fact that my bankruptcy court clerkship and position at the House Judiciary Committee happened to coincide with the *Marathon* decision and Congress's efforts to salvage bankruptcy practice after *Marathon*, so I was immediately immersed in these issues. The topic remains interesting to me. The Supreme Court's focus on Article III was not readily predictable and still hasn't produced a cohesive and settled body of law. With a current trend toward challenges to the constitutionality of the administrative state, we may see Supreme Court jurisprudence that continues to narrow bankruptcy court jurisdiction. I hope not, but I wouldn't be surprised.

**C:** *You have also done extensive work over the years in two other areas – cross-border international issues and challenges to consumer credit regulation. On the international side, what trends or issues will be center-stage in the next few years?*

**SBL:** My focus here has been to evaluate and study the role of international organizations in formulating international law and legislation on issues surrounding debt and financial decision making. In our book, *Global Lawmakers, International Organizations in the Crafting of World Markets*, Terence Halliday and I explore the role of the United Nations lawmaking efforts. Notably, Chapter 15 of the Bankruptcy Code, now adopted in about 45 nations, emerged in part from the UN's work through its Commission on International Trade Law (UNCITRAL). As the legislation is applied and interpreted by the

courts in the 45 countries that have adopted UNICTRAL's Model Law on cross-border insolvency, the trail will be fascinating to keep track of.

**C:** *On the consumer side, you are working on a new article about a common law implied warranty of fitness for ordinary purposes. Can you explain?*

**SBL:** Yes, this draft, written with Ted Janger of Brooklyn Law School, is mostly a thought experiment. But not wholly. Because the American Law Institute (ALI) is working on a new Restatement of Consumer Contracts, we view the interplay of consumer financial protection through common law and regulation as more than just an academic interest. Janger and I assess boilerplate provisions in consumer finance contracts from the perspective of contract law, but quickly conclude that the tenets of contract law are deeply problematic when applied to contracts of adhesion. Because consumers don't and really can't negotiate over contract terms to protect themselves, Janger and I turn to the doctrines of implied obligations of good faith and implied warranties for help with consumer protection. Exploring these common law concepts – sounding as much in tort as in contract law – allows us in this draft article to explore the foundations of such protection; in future work, we plan to turn back to the subject of consumer financial protection through regulation.

**C:** *We appreciate the breadth of your interest in many facets of bankruptcy law and look forward to your input and impact on College discourse. Are there any thoughts you would like to leave our Fellows with as you start this new role for the College?*

**SBL:** Only that I'm excited to interact with the finest bankruptcy minds and look forward to interaction whether at conferences, programs or by email. I'm genuinely interested in knowing what issues practitioners are facing. I am sure that I am going to learn as much or more from acting in this new role as I may add as teacher or educator. ¶

**31 for 31!**  
**continued from page 5**

My thanks, as well, to all of the many other Fellows who participated as nominators, sponsors and supporting letter writers. Each of you can take pride in knowing that you contributed to perpetuate the highest ideals of the College by ensuring that we admit Fellows worthy of our lofty standards. It has been an honor and pleasure to help guide this process for two years and I am ready to pass the torch to our next Chair. I certainly hope you are planning to come to attend the Induction Weekend next March where you will have the opportunity to welcome our new Fellows personally. ¶



**From the Pro Bono Committee**  
**continued from page 7**

seek funding for tools to expand their ability to serve clients and volunteers, such as bankruptcy software programs, preparation of how-to videos, or website integration tools. With a few rare exceptions, the grants do not fund direct services to clients (although the grants may support the administrative aspect of running and coordinating volunteer and pro bono efforts.)

The grantees included Montana Legal Services Association (MLSA) which received \$15,000 as the recipient of the Michael L. Cook Extraordinary Grant. The Foundation established the Cook Grant for a program that is "such an innovative and exemplary approach to a previously under-served area of need as to justify an extraordinary grant in excess of the grant limits customarily applied by the Foundation." MLSA applied for funding in order to expand the MLSA File-Your-Own-Bankruptcy Project to the more rural and underserved areas of the state including seven Native American reservations. The program assists pro se debtors, providing review and advice by attorneys before filing. As part of the project, MLSA will send a staff attorney and paralegal to each rural area or reservation in order to provide intake, training and counseling for pro se filers.

On behalf of the Pro Bono Committee, I thank the Fellows, the College and the Foundation, who enable us to make these grants. Along with the other members of the Committee, I have the privilege to hear the stories from our other grantees of the difference your contributions make. My own personal thanks to all the members of the Committee for their hard work, and to Carole McNamara for her invaluable assistance for the Committee's work. ¶



## Doing the Splits: Circuit Splits Under the Bankruptcy Code

Annette W. Jarvis, Dorsey & Whitney LLP

### ***To Release or Not To Release - Non-Consensual Third Party Releases in Chapter 11 Plans***

The circuit split on the issue of the propriety and ability of bankruptcy courts to grant non-consensual third party releases in Chapter 11 plans of reorganization is long standing and deeply divided. Five circuits (the Second, Fourth, Sixth, Seventh, and Eleventh Circuits) allow non-consensual third party releases in Chapter 11 plans. See *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying)*, 780 F.3d 1070 (11th Cir. 2015); *Airadigm Communs., Inc. v. FCC (In re Airadigm Communs., Inc.)*, 519 F.3d 640 (7th Cir. 2008); *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136 (2d Cir. 2005); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648 (6th Cir. 2002); *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir. 1989). Three circuits (the Fifth, Ninth, and Tenth Circuits) have held that the Bankruptcy Code does not allow the bankruptcy court to order non-consensual third party releases in confirmed Chapter 11 plans. See *Bank of N.Y. Tr. Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009); *Resorts Int'l v. Lowenschuss (in Re Lowenschuss)*, 67 F.3d 1394 (9th Cir. 1995); *In re W. Real Estate Fund*, 922 F.2d 592 (10th Cir. 1990); *In re American Hardwoods*, 885 F.2d 621 (9th Cir. 1989). While acknowledging the circuit split, the Third Circuit has avoided taking sides to date, finding the evidence in the case seeking third party releases did not support a permanent injunction even if it followed the majority view. See *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203 (3d Cir. 2000). The D.C. Circuit has not addressed the issue head on, but has indirectly favored the minority view in the context of equal treatment of creditors under Section 1123(a)(4). See *In re AOV Industries, Inc. et al.*, 792 F.2d 1140 (D.C. Cir. 1986). The complexity of this circuit split includes differing statutory interpretations, vastly different fact patterns on each side of the split, and fact intensive requirements from circuits allowing non-consensual releases.

The Fourth Circuit decided *Menard-Sanford v. Mabey (In re A.H. Robins Co.)* in June of 1989, affirming confirmation of a plan of reorganization resolving thousands of mass tort claims that included a permanent injunction preventing third party suits against the Company's settling insurer, its directors, and attorneys for the insurer and the directors. Only a few months later, in September of that same year, the Ninth Circuit, in

[continued on page 14](#)



### [Doing the Splits](#) [continued from page 13](#)

*In re American Hardwoods*—a very different Chapter 11 case involving a dispute between a plywood manufacturer and its lender—held that the bankruptcy court lacked the power to enjoin the lender from enforcing its claim against third party guarantors. In both cases, as the injunction proposed was permanent, the circuit courts analyzed the injunctions as tantamount to non-consensual third party releases.

At the center of this circuit split is the reach of the bankruptcy court's equitable powers under Section 105(a) as the same may be limited by Section 524(e). Section 105(a) gives the bankruptcy court the power to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." Section 524(e) states that a "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Thus, the crux of the split is whether Section 524(e) prevents the bankruptcy court from using its equitable powers under Section 105(a) to discharge the liability of a third party who may also be liable for the debtor's debt.

The facts of the *Robins* case were compelling, as the Ninth Circuit acknowledged in the *American Hardwoods* case. The funds contributed by the debtor's insurer and the debtor itself were substantial. The plan was accepted by 94% of the claimants voting for the Plan, which included the injunction. The plan provided for payment in full of all claimants, and the injunction only affected about 1.5% of the claimants. The evidence that was presented demonstrated that the injunction was essential for the success of the reorganization because that reorganization depended on the settling insurer and the debtor being free of indirect claims on either the insurance policies or as a result of indemnity or contribution claims. The Fourth Circuit characterized the permanent injunction in *Robins* as tantamount to a "channel [ing]" order which enforced a "marshaling of assets." Section 524(e) is distinguished as not precluding the release and discharge of a third

party when that release has been accepted and confirmed as part of a plan of reorganization.

Recognizing *Robins* as presenting "unusual facts" which were not present in *American Hardwoods*, the Ninth Circuit took a more literal reading of the two apparently conflicting statutory provisions. It determined that "[w]hile endowing the court with general equitable powers, Section 105 does not authorize relief inconsistent with more specific law." *In re Am. Hardwoods*, 885 F.2d 621, 625 (9th Cir. 1989). The Ninth Circuit then interpreted Section 524 (e) to specifically proscribe non-consensual third party releases as a limitation on the bankruptcy court's equitable powers, finding that the permanent injunction requested fell "squarely within the definition of a discharge in Section 524(a)(2)" and therefore could not be authorized. *Id.* at 626.

The circuit courts lining up with *Robins* are all "unusual" cases. Further, the circuits aligned with *Robins* only allow non-consensual third party releases after very specific and extensive factual findings in what they describe as "rare" cases. The Eleventh Circuit in *Seaside Eng'g & Surveying* allowed third party releases where the technical expertise of the principals was an irreplaceable part of the future success of the reorganized company, the complaining parties were paid in full under the plan, and in a situation in which "such an order [was] fair and equitable under all the facts and circumstances." *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying)*, 780 F.3d 1070, 1078 (11th Cir. 2015). It noted that the "inquiry is fact intensive to the extreme." *Id.* at 1079.

The Sixth Circuit in *Dow Corning*, a mass tort case like *Robins*, quantified factors to define if "unusual circumstances" exist that would allow third party releases: (1) identity of interests between debtor and third party; (2) non-debtor contribution of substantial assets to the reorganization; (3) a finding that the injunction is essential to the reorganization; (4) overwhelming creditor support for the plan; (5) payment in full of creditors affected by the injunction under the plan; (6) an opportunity for non-settling claimants to recover in full; and



(7) specific findings to support the bankruptcy court's conclusions. *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002). Addressing the Section 524(e) and Section 105(a) interface, the Sixth Circuit finds that interpreting Section 105(a) as not being limited by Section 524(e) reinforces the Bankruptcy Code's allowing bankruptcy courts "considerable discretion to approve plans of reorganization." *Id.* at 657.

The Fourth Circuit in *Behrmann v. Nat'l Heritage Found., Inc.*, 663 F.3d 704 (4th Cir. 2011), a case involving a non-profit public charity that administered funds from more than 9,000 donors, held that "nondebtor releases are appropriate only in very limited circumstances" and remanded the case to the bankruptcy court because its "ultimate decision to grant equitable relief lacks adequate factual support." *Id.* at 711-712. Such factual support required "specific factual findings explaining why" the third party releases were essential and otherwise met the stringent requirements articulated in *Dow Corning*. *Id.* at 713.

In *Airadigm*, the Seventh Circuit interprets Section 524(e) not as a limitation on the equitable powers of the bankruptcy court granted under Section 101(a), but as a "saving clause" meant so that it "preserves rights that might otherwise be construed as lost after the reorganization." *Airadigm Communs., Inc. v. FCC (In re Airadigm Communs., Inc.)*, 519 F.3d 640, 656 (7th Cir. 2008). Finding the release of the plan financier to be very narrow and the financier's involvement essential for the reorganization, the Seventh Circuit affirmed the third-party release.

Finally, the Second Circuit in *Metromedia* defended the granting of third party releases when, along with a finding that the third party was "important to the Plan," there has been "substantial consideration" given. *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005). Finding the the bankruptcy court's findings to be "insufficient" to support the granting of third party releases, including that a substantial contribution alone cannot justify third-party releases, the Second Circuit noted that third

party releases cannot be granted without finding "truly unusual circumstances." *Id.* at 143. In this case, despite the standard for third party releases not having been met, the circuit court nonetheless upheld plan confirmation based on equitable mootness.

The cases following *American Hardwoods* are based on a different statutory interpretation, but are also not "unusual." The Tenth Circuit in *In re W. Real Estate Fund*, 922 F.2d 592 (10th Cir. 1990), held that "while a temporary injunction... may be warranted during the pendency of this bankruptcy proceeding" to facilitate a reorganization, *id.* at 601, "the stay may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the non-debtor from its own liability to the creditor." *Id.* at 601-602. The debt at issue involved fees that could be collected from a third party in state court. Noting that while Section 524(a) "affords broad benefits to the debtor," section 524(e) does not extend those benefits to third parties because "Congress did not intend to extend such benefits to third party bystanders." *Id.* at 600.

In *Lowenschuss*, the addition of Section 524(g) providing for injunctions in asbestos cases under specific circumstances was discussed in the context of the statutory interface between Section 105(a) and 524(e). The Ninth Circuit, in affirming its decision in *American Hardwoods*, explained:

The numerous requirements of section 524(g) make it clear that this subsection constitutes a narrow rule specifically designed to apply in asbestos cases only, where there is a trust mechanism and the debtor can prove, among other things, that it is likely to be subject to future asbestos claims. . . . That Congress provided explicit authority to bankruptcy courts to issue injunctions in favor of the third parties in an extremely limited class of cases reimburses the conclusion that section 524(e) denies such authority in other, non-asbestos, cases.

*Resorts Int'l v. Lowenschuss (in Re Lowenschuss)*, 67 F.3d 1394, 1402 n.6 (9th Cir. 1995).

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## Doing the Splits continued from page 15

Finally, in the *Pacific Lumber Company* case, the Fifth Circuit, in reviewing the legality of the plan exculpation and release clauses, held:

We see little equitable about protecting the released non-debtors from negligence suits arising out of the reorganization. In a variety of contexts, this court has held that Section 524(e) only releases the debtor, not co-liable third parties. These cases seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions.

*Bank of N.Y. Tr. Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009) (citations omitted.). The Fifth Circuit relied on the addition of Section 524 (g) as suggesting that "non-debtor releases are most appropriate as a method to channel mass claims towards a specific pool of assets." *Id.* In denying the third party releases, the court noted that the third parties being released are not guarantors, sureties or insurers, but that "the essential function of the exculpation clause here is to absolve the released parties from any negligent conduct that occurred during the course of the bankruptcy," which, as such parties were non-debtor third parties, were not intended to be included in the fresh start provided debtors in Section 524. *Id.* at 252.

While not addressing the issue of third party releases in plans of reorganization, the D.C. Circuit in *In re AOV Indus.*, did appear to recognize the impropriety of requiring non-consensual third party releases in determining that a supplier received unequal treatment under Section 1123(a)(4) when it was required to release claims against guarantors to receive the same distribution as other similarly classified creditors.

Avoiding having to decide which side to take in this circuit split, the Third Circuit in *In re Continental Airlines*, a case involving numerous shareholder lawsuits against former officers and directors, concluded that:

[T]he provision in the Continental Debtors' plan releasing and permanently enjoining Plaintiffs' lawsuits against the non-debtor D&O defendants does not pass muster under even the most flexible tests for the validity of non-debtor releases. The hallmarks of permissible non-consensual releases—fairness, necessity to the reorganization and specific factual findings to support these conclusions—are all absent here. . . . Under these circumstances, the release and permanent injunction amount to nothing more than a lockstep discharge of non-debtor liability and fall squarely into the section 524(e) prohibition.

*Gillman v. Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 214, 217 (3d Cir. 2000)

With the First and the Eighth Circuits still to weigh in, there appears to be sharp disagreement on the issues of statutory interpretation between the majority and minority views of the circuits while the circuits allowing third party releases limit them to cases with "truly unusual circumstances" where "the inquiry is fact intensive to the extreme," creating a somewhat murky standard. Maybe it is finally time for the Supreme Court to end a thirty-year circuit split. ¶

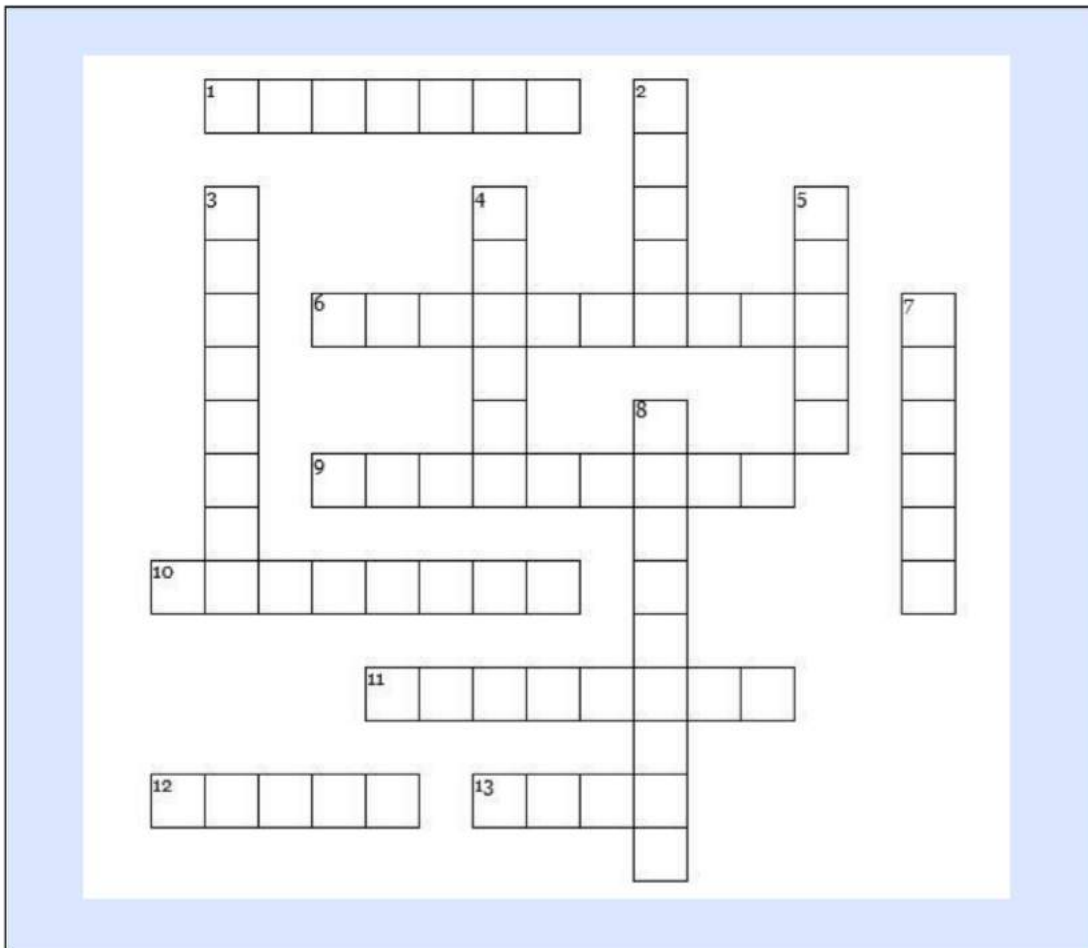


Annette represents banks, financial institutions, and numerous other parties nationwide in resolving concerns related to Chapter 11 bankruptcy cases and out-of-court workouts. She is a member of her firm's Management Committee and the Partner-in-Charge of the Transactions Practice Groups at Dorsey.





## Columns XWords



### Across

1. Supreme Guest at 2019 NCBJ
6. A strong \_\_\_\_\_ (College Charitable Arm)
9. Number of New Fellows matches Installation Class Year
10. ACB Pro Bono Chair now on Bench
11. Name re Recent College Archives Enhancement
12. Not easy to dismiss this case
13. Pro Bono Grant Application Deadline Month

### Down

2. Installation Hotel 2020 is Grand
3. NCBJ 2020 City
4. Installation City 2022
5. Broken \_\_\_\_\_
7. Fellows Block-Lieb, Freeman and Boswell
8. Not appointed in new Small Business Reorg

***Answer key found on page 30.***



# Report of American Bankruptcy Institute's Commission on Consumer Bankruptcy

*William Houston Brown, U.S. Bankruptcy Judge, Retired and Co-Chair of the Commission*



On April 11, 2019, the American Bankruptcy Institute ("ABI") released the Final Report of its Commission on Consumer Bankruptcy ("Commission"), and that Report is available at [www.abi.org/Consumercommission](http://www.abi.org/Consumercommission). The

Commission was created in December 2016 to research and recommend improvements to the consumer bankruptcy system. ABI's charge to the Consumer Commission was to make recommendations that could be implemented within the Bankruptcy Code's existing structure. Therefore, the Commission did not undertake wholesale changes to the Bankruptcy Code, but the Commission's Final Report does include some recommendations for amendments to both the Code and the Bankruptcy Rules designed to make the consumer bankruptcy system more accessible and efficient for both financially struggling Americans and the professionals who serve them. After soliciting public feedback, Commission members identified nearly 50 discrete issues for study and divided these issues among three advisory committees: Chapter 7, Chapter 13, and Case Administration and Estate.

The commissioners and committee members were composed of 52 bankruptcy professionals, representing all diverse stakeholders in the bankruptcy system. The Commission's membership included several Fellows of the American College of Bankruptcy, including its co-chairs, retired Bankruptcy Judges Elizabeth L. Perris and William Houston Brown. Other Fellows on the Commission are Retired Bankruptcy Judges Eugene Wedoff and David W. Houston III, Rudy J. Cerone, Samuel J. Gerdano, Henry E. Hildebrand, III, Richardo I. Kilpatrick,

Professor Bruce A. Markell, Ronald L. Peterson, and John Rao. The Commission's Reporter, Professor Robert M. Lawless is also a Fellow, and some of the three committees' members are also Fellows. A full listing of the Commissioners and committee members is part of the Commission's Final Report.

Some of the significant issues addressed in the Final Report include:

- Racial justice in bankruptcy
- Student loans in bankruptcy
- Bankruptcy rule improvements
- Chapter 7 trustee compensation
- Remedies for discharge violation
- Protection of interests in collateral repossessed pre-petition
- Chapter 7 and 13 attorneys' fees
- Attorney competency and remedying lawyer misconduct
- Credit counseling and the financial management course
- Means test revisions and interpretations
- Chapter 13 debt limits
- Reserve fund in chapter 13 cases

As examples from the Report, the student loan recommendations included legislative revisions, best interpretation of current law by the courts, and administrative improvements by the Department of Education and servicers of student loans. Because the Department of Education requested public comment on possible changes to its administrative procedures before the Commission's Report was final, the Commission decided to submit its recommendations for administrative improvements prior to the release of the full Report. Illustrations of the scope of the issues related to student loans include the Commission's recommendation that the current undue hardship test for potential discharge of student loans be construed by the courts



as looking primarily to whether a debtor had acted in bad faith in failing to make loan payments before filing bankruptcy. Another “best interpretations” recommendation was that student loans be subject to separate classification in Chapter 13 plans so that debtors might be able to pay some part of such debts in their plans. On the legislative level, the recommendations included that Congress should allow discharge of student loans under the pre-1987 “seven-year rule;” in other words, if a debtor has been unable to repay the debt within seven years of when it first became payable, the debt should be dischargeable without necessity of proving undue hardship. Prior to the seven-year period, the undue hardship test would still apply. Other legislative recommendations included that section 523(a) (8) of the Bankruptcy Code should only apply to student loans made, guaranteed or insured by a governmental unit, with nongovernmental loans given no protection from discharge.

Other Chapter 13 recommendations included increasing the debt limit for Chapter 13 relief to three million dollars and eliminating the distinction between secured and unsecured debt, and that the limit would apply to each debtor in a joint filing. The Commission encouraged courts to allow plans to create a reserve fund in a reasonable amount, so that debtor who incur an emergency expense would have some ability to pay the expense without impairing ongoing plan payments.

Racial justice in bankruptcy has received attention in the press and academic studies, illustrating that African Americans are both disproportionately more likely to file Chapter 13 and less likely to obtain discharge than debtors of other races, and the Commission encouraged several actions to ensure that all individuals have equal access to justice in the bankruptcy system.

The Commission also submitted suggested changes to Federal Rule of Bankruptcy Procedure 3002.1 prior to the release of the Final Report, because the Commission was aware that the National Association of Chapter 13 Trustees (“NACTT”) was submitting similar changes to the Advisory Committee on Bankruptcy Rules, and that Committee is currently studying both the Commission’s and NACTT’s recommendations

for that Rule. Other Rule proposals are found throughout the Commission’s Final Report.

The Commissioners sought to reach consensus on the various issues found in the Final Report, but consensus was not always possible. For example, the Commission could not agree on a single solution to the current difficulties of payment of fees faced by attorneys representing debtors in need of Chapter 7 relief, but the Report suggests alternatives that Congress should consider.

The Report does not necessarily represent the views of any individual member of a committee or the Commission; rather, the Report describes a deliberative process in which difficult issues were fully examined, discussed and then considered in formulation of the Commission’s recommendations.

In seminar presentations subsequent to the release of the Final Report in April, a frequent question is related to expectations of actions that may be taken on the various recommendations found in the Report. Activity is occurring on various levels. Commissioners have testified before congressional committees on some of the recommendations contained in the Report, such as student loan issues, Chapter 7 trustee compensation, and in support of the HAVEN Act and other protections for veterans. Several proposed changes to the Federal Rules of Bankruptcy Procedure were part of the Report’s recommendations, and the Advisory Committee on Bankruptcy Rules is currently considering some of those proposals, including changes to Bankruptcy Rule 3002.1. One or more of the Commission’s recommendations have been cited in court opinions, and references to the Report by various courts is expected to continue. As with ABI’s Chapter 11 Commission, immediate adoption by Congress, courts or administrative agencies of the Consumer Commission’s report was never expected; instead, the Commission saw its work as part of a law-reform contribution to long-term improvements in the consumer bankruptcy system. As that process continues, the Final Report itself is an excellent research tool, thanks to the outstanding work of the Commission’s Reporter, Professor Robert M. Lawless of the University of Illinois College of Law. ¶



## Focus on Fellows

We invite all Fellows to submit information about awards, news, and/or recent publications. Member highlights will be published on a bi-monthly basis to all Fellows through email or the College Columns as appropriate. If you have news about yourself or a colleague, please send announcements to Carole McNamara, ACB Communications Director, at [focus@amercol.org](mailto:focus@amercol.org).

**Jay Bender** (Bradley Arant Boult Cummings LLP) has received the inaugural Service to Veterans Award from the American Bankruptcy Institute (ABI) for his pivotal role in drafting and helping to turn into law the "Honoring American Veterans in Extreme Need Act of 2019" (HAVEN Act; H.R. 2938). The award recognizes an ABI member who has contributed to the betterment of the lives of veterans during the past year. Jay was formally recognized at the ABI-co-sponsored Hon. Steven W. Rhodes Consumer Bankruptcy Conference in suburban Detroit on Veterans Day, Nov. 11.

Bernstein-Burkley announced the firm's expansion to Cleveland, Ohio. The new office is now open under the direction of **Harry W. Greenfield** and Jeffrey C. Toole. Both partners joined the firm's Bankruptcy & Restructuring practice group. Harry will focus on corporate bankruptcy and restructuring involving receiverships, mechanic's liens, collection actions, foreclosure actions, lease defaults, and Uniform Commercial Code issues.

**David S. Rubin** will join the offices of Butler Snow. Butler Snow is expanding its Baton Rouge, LA office as Kantrow Spaht Weaver & Blitzer merges with Butler Snow on January 1, 2020.

**Jason Watson** has joined Morris, Manning & Martin, LLP as "of counsel" in the Creditors' Rights & Bankruptcy practice. Watson represents secured lenders and special servicers in large bankruptcy matters including workouts, Chapter 11 cases and creditor rights-related litigation. He also advises borrowers on practical ways of navigating distressed situations, including sales, liquidations and bankruptcy proceedings. He has experience in a broad range of industries including hospitality, construction, retailing and food service. He has done extensive work on the debtor side of transactions, and hopes to utilize those skills as well. ¶





## Say What? The National Bankruptcy Archives "Quotes"

Francis X. Buckley, Jr., Thompson Coburn LLP  
Bankruptcy History Committee Chair



The National Bankruptcy Archives is pleased to announce the receipt of the late George Treister's work papers as a result of the generous donation by his son, Dana. The collection includes case notes, lecture outlines and other personal writings by Mr. Treister over

the course of his long and prominent career as one of the preeminent scholars in bankruptcy law. Mr. Treister presented numerous programs on bankruptcy law developments, including programs for bankruptcy judges at the Federal Judicial Center which helped promote the fundamental development of modern bankruptcy law jurisprudence. The Archives will examine and catalogue the materials for inclusion in its ever-expanding collection. Mr. Treister's papers should be available for use by the public sometime next year.

For more information about the National Bankruptcy Archives, please visit: <https://www.law.upenn.edu/library/archives/bankruptcy/>



## Bankruptcy History Trivia Questions

1) During his interview by Judge Randy Newsome, what retired bankruptcy judge stated that bankruptcy practice in New York in the late 1930's was a "disgrace" because it was controlled by "the rings"?

- A. Basil Coutrakon
- B. Conrad Cyr
- C. Asa Herzog
- D. Conrad Duberstein

2) As a first year law student at Yale, George Treister was taught by what preeminent bankruptcy scholar, who stated in his oral history interview that George "almost drove me crazy" because after most classes he would politely correct erroneous statements made during the day's lecture?

- A. Frank Kennedy
- B. Charles Seligson
- C. Lawrence King
- D. Vern Countryman

3) In 1965, what United States Senator wrote each bankruptcy referee asking their opinions about the effectiveness of the current bankruptcy laws to handle another financial crisis such as the Great Depression?

*[This is considered by some the genesis of the efforts to revamp modern bankruptcy law, culminating in the enactment of the Bankruptcy Code.]*

- A. Quinton Burdick
- B. Everett Dirksen
- C. Margaret Chase Smith
- D. Sam Ervin

[Click here to see the answers](#)



## Musings from the Tenth Circuit - Education and Opera in Santa Fe

Hon. Robert H. Jacobvitz, U.S. Bankruptcy Court



What could be better than gathering in historic Santa Fe, New Mexico in late August to experience art, opera, beautiful skies, and fellowship with kindred bankruptcy spirits – and on top of that to gain knowledge

of important matters such as the Cannabis Conundrum blocking the door to the wonderful world of bankruptcy!

On Friday, August 23, 2019 the Tenth Circuit Chapter of the American College of Bankruptcy hosted a one-day, educational program. Attendees came from the 1st, 2nd, 5th, 6th, 9th, and 11th Circuits, as did insolvency professionals from Canada and Mexico. In addition to the Cannabis Conundrum, we learned about cross border insolvencies, the import of the Supreme Court's recent decision in *Mission Product* on rejection of executory contracts, and the utility of examiners, receivers, and CROs.

After exhausting our minds with these intellectual treats, and following cocktail hour, we were on track to retreat to Restaurant Martín for dinner, or so we thought. Have you ever experienced that sinking feeling of learning at 4:30 pm that your dinner reservation for 40 people later that same evening was made for the wrong night? Well, no need to fear if ACB Fellow Charles Beckham is at hand. Serendipitously, many years earlier Charles had averted disaster for restaurateur Martín, who then was chief chef at Restaurant Geronimo in Santa Fe. Charles had advised chef Martín not to invest several hundred thousand dollars in the restaurant. Restaurant Geronimo later found itself to be the principal asset in a chapter 11 case. Paying it forward, Martín's wife worked some magic and the group dined at Restaurant Martín that night after all.

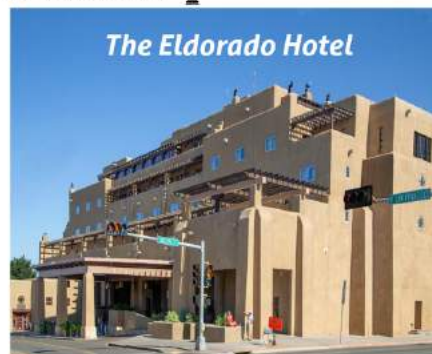
On Saturday, some folks drove up to Los Alamos for a tour while others enjoyed

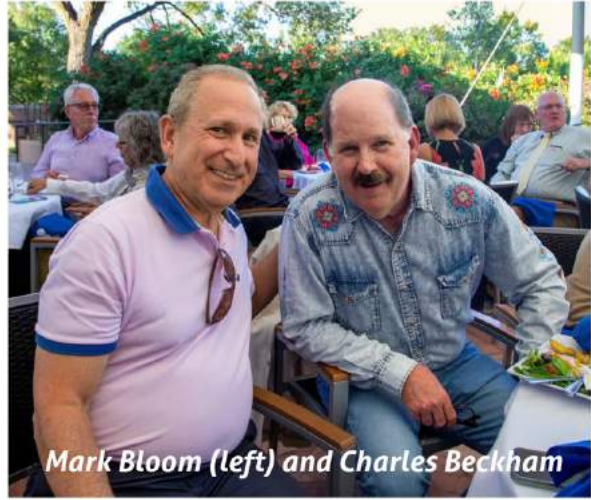
experiencing Meow Wolf, an immersive interactive art installation located in a former Santa Fe bowling alley. The photo that looks like a Native American pueblo is actually the Eldorado Hotel where the ACB held the program.

About 50 of us went to the Santa Fe opera Saturday night for dinner on the opera grounds, to hear a short lecture before the opera, and to see *La Bohème*, an opera in four acts by Giacomo Puccini. As an aside, Louis Puccini, a descendant of Giacomo Puccini, is a retired New Mexico bankruptcy judge. The dinner was in a beautiful mountainous setting and gave us the opportunity to socialize further with guests of the College.

Of course, I had to take a picture of ACB Fellow Charles Beckham, who saved the day on Friday. As luck would have it, Charles was sitting next to ACB President Mark Bloom, shown together in one of the pictures. The other photos you see are of the opera building, the dinner area at the opera, and ACB guests at the dinner. If you look closely, you will see retired Bankruptcy Judge Charles Case in a plaid shirt in the upper left of the ACB guests at the dinner photo. Chuck now makes Santa Fe his home.

ACB Fellows Judge Elizabeth Brown, Charles Beckham, Mark Craige, Paul Fish and Annette Jarvis and ACB Communications Director Carole McNamara deserve our thanks for putting together such a wonderful weekend of education and fun. 🏛️





*Mark Bloom (left) and Charles Beckham*



*The Santa Fe Opera House*





## Where Are They Now? ACB Distinguished Law Students



**John D. Beck  
(2010, 5th Circuit)**

It is no exaggeration that my life and legal career were drastically altered by the American College of Bankruptcy honoring me as its "Outstanding Law Student for the Fifth Circuit" in 2010.

Prior to receiving the award, I had assumed I would practice corporate law in Dallas. I certainly never imagined I would ever practice law outside of Texas. Upon learning I was selected for the honor, I was most excited about a free trip to Washington D.C. for the American College of Bankruptcy's annual conference and the opportunity to attend its event at the U.S. Supreme Court building. Naively, I never viewed the conference as an opportunity to forge a career in business restructuring.

At the conference, I was invited to attend an intimate dinner of Texas restructuring professionals. All members of the American College of Bankruptcy. At that dinner I was fortuitously seated next to a Texas bankruptcy legend, Bob Albergotti, but was blissfully unaware of Bob's stature in the bankruptcy community. We talked throughout dinner and I shared with him that I was not actually planning to practice bankruptcy law after graduation. As we parted for the night, he handed me his business card and said, "Give me a call if you ever change your mind and want to be a bankruptcy attorney at Haynes and Boone."

Later that year, I was serving as law clerk to the Honorable Phil Johnson of the Texas Supreme Court and was increasingly becoming more interested in litigation and therefore questioning my corporate law path even more. I decided to explore Bob's offer to practice bankruptcy law, which I viewed as a hybrid practice allowing me to also have exposure to litigation. He responded to me quickly and

within a week I travelled from Austin to Dallas to interview with the bankruptcy group at Haynes and Boone, thinking I was vying for an associate position in their Dallas office. The interviews went well, and I quickly understood that the Haynes and Boone bankruptcy group was highly accomplished and would be immensely fun to work with.

The next day I received an offer to join their group, but with one major caveat that took me by surprise. They had an urgent need for bankruptcy associates in their New York office and wanted me to relocate and take the New York bar exam in a few short months. I had never aspired to work in New York and had passed on a summer offer from the Dallas office of a New York based firm because of its reputation for sending associates to New York. Nevertheless, the chance to live and practice bankruptcy law in New York was as enticing as it was daunting. I decided to take a chance and moved to New York City without knowing a single person when I arrived. It proved to be the greatest decision I have made to date. Haynes and Boone New York was a great place to start my legal career and many of my colleagues there are still some of my closest friends to this day.

After 4 years at Haynes and Boone, I was ready for a new challenge and began to explore other opportunities. I ultimately decided to join Hogan Lovells, where I still remain today. I was instantly attracted to the complex client base and work at Hogan Lovells, as well as the opportunity to practice in a truly global firm with nearly 50 offices all over the world. It was clear to me that the practice group and the firm had bold ambitions for the future of the restructuring group and that I could play a role in its evolution. It has been 5 years and the group has doubled in size both at the partner and associate level, and we are taking on ever increasingly complex, high profile and interesting matters.

Looking back, it seems like such an inevitable





path but it all began with attending the annual conference of the American College of Bankruptcy. I look forward to many more years practicing bankruptcy law, and I'm excited to see what other surprises the future may bring.

---

**Lacey Rochester  
(2012, 5th Circuit)**

The International Women's Insolvency and Restructuring Confederation (IWIRC), the premier international, networking and professional growth organization for women in the restructuring and insolvency industry, recently announced that it has awarded Lacey Rochester its 2019 Rising Star Award. Lacey, chosen among five semi-finalists, was recognized during a luncheon at IWIRC's Twenty-Sixth Annual Fall Conference in Washington, DC on October 30, 2019.

Lacey is an associate with the firm of Baker Donelson and has been a member of the IWIRC Louisiana Network since 2012. She focuses her practice on creditors' rights and regularly represents financial institutions, oil and gas companies, and other secured and unsecured creditors in federal, state, and bankruptcy court. Lacey serves as Events Chair for the Louisiana Network. As one of her nominators noted, "Lacey has shown tremendous dedication to IWIRC over the past several years. She has been instrumental in executing key events that help the Louisiana Network demonstrate its commitment to the connection, promotion, and success of women in the insolvency and restructuring professions worldwide. We think that [Lacey] is a go-getter, a hard worker and is truly enthusiastic about IWIRC and its mission- and that she is the perfect example of an IWIRC Rising Star."



**Khaled Tarazi  
(2015, 9th Circuit)**

Throughout the annual meeting, I joined in numerous social and educational activities with Fellows from the Ninth Circuit and across the country. All of the Fellows I met were welcoming and generous with their time and advice, and I was able to develop lasting relationships through these interactions, particularly with Fellows from the Phoenix market where I went on to practice. After graduation, I spent three years working at Allen Barnes & Jones PLC, a bankruptcy boutique in Phoenix, where I focused primarily on commercial and individual chapter 11 work. In June 2018, I joined the Restructuring & Insolvency Group at Bryan Cave Leighton Paisner LLP, where I focus on distressed business situations, including workouts and chapter 11 restructurings.

I am grateful to the College for the experience I had as the Distinguished Bankruptcy Law Student, and I look forward to continuing to build a rewarding career of my own in the practice of bankruptcy.



*Lacey with ACB Fellow and Foundation Director Jan Hayden*





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**Hon. Lloyd King**  
Class 7  
October 17, 2019

### **Say What?**

#### ***Answers to the Oral History Quiz Questions found on [page 21](#)***

- 1. Judge Asa Herzog—source: oral interview by Judge Randy Newsome**
- 2. Prof. Vern Countryman--source: oral interview by Judge Randy Newsome**
- 3. Sen. Quinton Burdick—source: [Bankruptcy Courts: From Anonymity to Respect. March 2012](#) **



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As of November 15, 2019, 180 Fellows have donated over \$143,000 to the American College of Bankruptcy Foundation. The current list of contributors can be found below. As we always hope for 100% participation by our Fellows, please consider helping us to surpass our 2019 goal of \$325,000. You may make a Foundation donation at anytime—simply visit [www.amercol.org](http://www.amercol.org) to access the online donation form. Thank you for your support!

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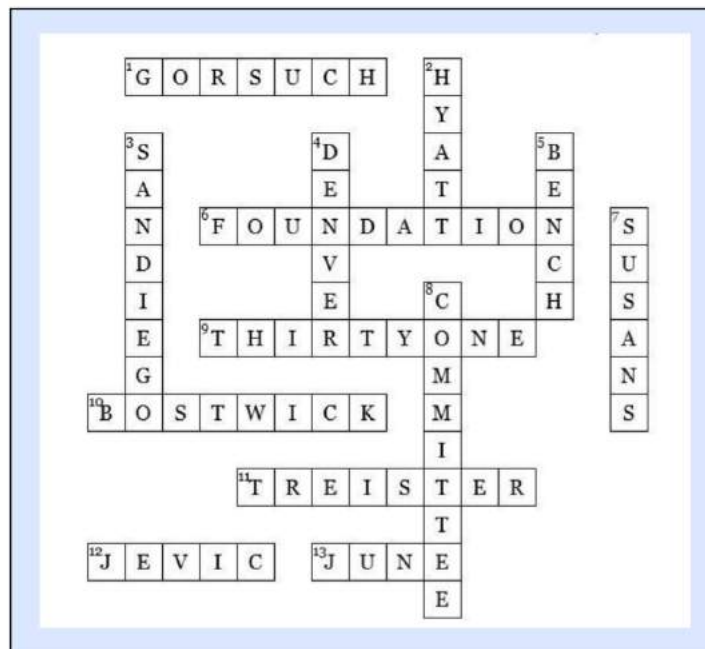
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**Columns XWords**  
**Answer Key from page 17**





**A Collective Mission**  
**continued from page 6**

those grants and relies on an annual subsidy from the College to remain “on budget.”

The Foundation’s ability to fulfill its worthy mission thus depends *entirely on you*. I continue to be so gratified by your past generosity. In 2018, your contributions to the Foundation broke the \$300,000 mark for the third consecutive year, setting a new all-time record of \$328,489. But we can and must do even better in 2019 and beyond.

**For 2019, our College-wide goal for total Foundation gifts is \$330,000.** It is a high bar, but one we can clear with your help. As of this writing, we remained less than half of the way there. And as you read this column, you either have heard or shortly will hear directly from me or another Foundation officer or director asking that you please make a renewed, increased, or (best of all) new annual gift to support our *pro bono* mission.

Please include the American College of Bankruptcy Foundation in your year-end charitable giving plans. Although we obviously leave the appropriate level of that giving to each Fellow, we also ask you, if you are an hourly rate professional, to consider contributing at least the dollar equivalent of one hour of your valuable time, or joining our “Four Figure Club” of Fellows donating at least \$1,000 to the Foundation.

Whether you have already made your annual contribution to the Foundation or will be doing so before year-end, THANK YOU for your support of those most in need of help in the system.

**Ad Hoc Endowment Task Force** Good management of your generously donated funds, as well as your annual dues and other revenues, not only requires prudent decision-making regarding grants and other expenditures, but also careful stewardship of funds held at various points by the College and the Foundation. To that end, the College board of directors established an Ad Hoc Endowment Task Force to review and make recommendations regarding the prudent investment, and other guidelines for disposition, of the more than \$1.5 million in reserves

accumulated by the College and the Foundation over prior years, as well as any additional such funds that may become available in the future.

Based on the Task Force’s final report, the College and the Foundation appointed a joint committee that recommended the establishment of three new funds: an “operating reserve” holding, for unanticipated operational needs, 33% of the College’s and 50% of the Foundation’s annually budgeted expenses; a “special purpose reserve” holding the amount of budgeted grants to be made in any given year by the Foundation; and a “quasi-endowment fund” intended to produce return on the investment of all other reserved funds, rather than to fund current operations or grants. That joint committee also recommended the adoption of a policy statement regarding the use and investment of each of the three funds and the establishment of a standing Investment Committee to direct and monitor, with the assistance of an outside, professional investment advisor, the investment of all reserved amounts.

The details of those policies are beyond the scope of this column, but the general consensus of the leadership of the College and the Foundation was and remains that the two “reserve” funds should continue to be invested in highly liquid, low-risk “money market” or other similar funds, and that the “quasi-endowment” funds should be invested in a mix of longer-term, growth-oriented, but nonetheless appropriately conservative equity and debt securities, as well as cash and cash equivalents.

This step, taken only after extensive work and hard deliberation, is an important component of ensuring the long-term financial health of the College and Foundation – and ensuring that both can continue to do their important work in the bankruptcy and restructuring community. Please feel free to contact Melissa Kibler, the Treasurer of the College, Marti Kopacz, the Treasurer of the Foundation, or me for further details, or if you have any other questions.

Happy Holidays to all.



## **Register today!**

Please join the American College of Bankruptcy in Washington, DC as we welcome our Class 31 Fellows.

Meetings will be held at the Grand Hyatt Washington, 1000 H Street NW, Washington, DC. To make your hotel reservations, [click here](#) or call 202-582-1234 and ask for the American College of Bankruptcy block of rooms. The special rate of \$279/night expires February 11, 2020 or when the block is full, whichever occurs first.

The Friday evening Induction Ceremony will be held at the Donald W. Reynolds Center for American Art and Portraiture's Kogod Courtyard.

[Click here to register!](#)

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We are constantly adding content to the *Columns* and making other updates. If you have input on what you would like to see here, please email us at:

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