

**THE HARD WORK
YET TO BE DONE
DEI Committee**

**DENVER 2022
An Experience
of a Lifetime**

**THESE OLD
BOOTS
President's
Message**



COLLEGE COLUMNS

A MAGAZINE FOR AMERICAN COLLEGE OF BANKRUPTCY FELLOWS | MAY 2022



From the Chair

*Melissa S. Kibler, Accordion
Chair, American College of Bankruptcy*



Greetings to all our Fellows. To those over 230 Fellows who were able to join us in the shadow of the snow-covered mountains in Denver, it was wonderful to see you in person. To those who were not, I will recap a few highlights from the meeting and hope you will be able to join us at another event soon.

After networking at Circuit lunches, we kicked off the afternoon education program with a truly enlightening presentation entitled, “The Compelling Business Case for ESG and DEI – Why Adopting Firms Have a Competitive Advantage with Clients, Investors and Regulators.” Presented by members of our Select Commission on Diversity, Equity and Inclusion (the “DEI Commission”), the DEI Committee that will continue their work, and the amazing ESG/DEI team from Paul Weiss, their panel left me inspired and with the realization of how much more there is to learn about the principles of DEI and how to apply them in our lives and our profession. For those of you who missed it, this program was recorded and can be accessed [here](#) after logging into the College website, and also will be presented at subsequent events. I will return to DEI and recognizing all the hard work that has been done – and remains – at the close of this column.

As evening approached, we moved on to our capstone event – the inauguration of new Fellows. Set at the Denver Art Museum with its majestic atria and fluted glass facade providing sweeping views of downtown, the ceremony started with honoring Judge Eugene Wedoff (ret.) with the Distinguished Service Award, presented by Judge Elizabeth Perris (ret.). Judge Wedoff spoke eloquently about the “calls” he received at various points in his life, including calls to the profession and calls to service. He noted that, “...sometimes we get messages from other people—“calls,” if you will—causing us to undertake a job that we hadn’t anticipated...” He concluded by urging Fellows to heed the call to undertake pro bono bankruptcy appeals – to fill a need, advance a better interpretation of bankruptcy law and, in the process, receive personal rewards that often outweigh all else.

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From the Column...*ist*...

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



It was a pleasure to see so many of you in Denver at the ACB annual meeting! And so nice to be together again in person. We enjoyed lovely weather, a delightful venue, informative presentations, and an inspiring induction ceremony. Much of that inspiration came from the remarkable professionals

inducted as new Fellows this year and much of it came from the motivating remarks from our humble and beloved Judge Wedoff, on accepting his much deserved Distinguished Service Award. Read the Chair’s article for more details about this year’s ceremony and take a look at an engaging piece from one of this year’s inductees.

Thoughtful and thorough attention was directed this meeting to the important work of the DEI Commission. The College and the Commission developed a road map – a guide for our future efforts in this direction and a mindful discussion of important goals to be attained.

I also had the great pleasure of meeting and chatting with this year’s Distinguished Law Students’ honorees. Don’t miss Claudia Springer’s column introducing this terrific group of students. And one of those honorees treats us to a law student’s perspective of our gathering.

We welcomed new leadership to the College – and also the Board of Regents and the ACB Foundation. Check out our new President’s fun and uplifting column in this issue. You will also find important updates from the Foundation and the Board of Regents.

As always, we encourage your contributions to the Foundation, which helps the Pro Bono Committee fund good work throughout the country. If you’d like to know more about the grant recipients who benefit from our contributions, see the Pro Bono Committee article.

We appreciate your continued participation in our

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President's Message: These Old Boots

*Charles A. Beckham, Jr., Haynes and Boone, LLP
President, American College of Bankruptcy*



Hey, while I've got ya, let me take you for a journey in These Old Boots. Many of you know me but most of you don't. I want to take the opportunity of my first President's Message to introduce myself with a little

history of how I became a bankruptcy lawyer and what inspires me about the College and our profession.

I grew up out in the West Texas town of El Paso. El Paso is the Texas portrayed in movies and songs with desert, mountains, and tumbleweeds. Most folks need a pair of cowboy boots to protect against rattlesnakes and prickly pear cactus when they go walking around in the desert or to look fashionable when they walk to the courthouse. After graduating from law school in San Antonio and clerking for the federal district judge in Lubbock, I moved back home to El Paso to start the practice of law. I joined a great firm, Kemp, Smith, Duncan & Hammond, the largest law firm in El Paso and second oldest law firm in Texas. It was 1980; I joined as an associate in the litigation section (there was no bankruptcy section). In the early eighties, the Bankruptcy Code was new and fresh and the dust clouds of the Texas Oil Bust of the 1980s were building in West Texas. In November 1981, the partner who was about to become my boss walked into my office to tell me that I was no longer a litigation associate but a bankruptcy associate working for him. It was my first experience with Involuntary Bankruptcy. I freaked out.

One, I never took bankruptcy in law school and two, I didn't want to be a bankruptcy lawyer. It sounded dirty. Fortunately, within an hour, the litigation partner who I worked for (a future federal district judge) assured me that my bankruptcy assignment would be only temporary because this "bankruptcy bubble" would burst within six months and I would be back working for him. I felt relieved but still questioned why I had to live in this bankruptcy gap for six months.

A few days later, 81 year old Eugene Smith, the patriarch of Kemp Smith, strolled into my office and eased down into a chair. Mr. Smith came into the office every day, but he rarely walked the halls, and he never visited an associate's office. If Mr. Smith walked into an associate's office, it was serious business. Mr. Smith had been a crusty old trial lawyer for decades. Before that I assumed he had been a crusty young trial lawyer.

He started out by saying, "I heard you are going to be a bankruptcy lawyer." I nodded, "Yes sir," with a grimace on my face. He responded with, "Have I ever told you about my first bankruptcy?" He had not. Frankly, I was shocked that Mr. Smith had ever been involved in a bankruptcy. Mr. Smith was a storyteller and took a deep breath and started:

"It was 1929. The depression had just begun but the tentacles of impending doom were already reaching into far West Texas. A nice young man down the street owned a shoe shop and boot store. He shined shoes, repaired shoes, and made boots. He even had a couple of younger fellows working for him. I was one of his regular customers on Tuesdays for a 5-cent shoeshine. The



bootmaker explained to me that the depression had wiped out his business and he owed a bunch of money to the bank. He reluctantly told me that he needed to close his shop, layoff his two employees and go out of business. He didn't know what he would do next to support his family. I decided I would help him." Surprised, I said, "How?"

Mr. Smith continued: "Are you familiar with Texas exemption laws?" I was a little. I wasn't too far removed from studying for the Texas Bar Exam, but I didn't know where he was going. It wasn't long until I would learn more about Texas' very generous exemptions to protect property from claims by creditors. The lore is that the early Texas settlers who wrote the Texas Constitution came to Texas to escape their creditors in other states and wanted to protect their assets. Among the assets an individual may exempt from claims of creditors are a homestead, clothing, home furnishings, two horses, twelve head of cattle, two firearms (its Texas y'all) and the tools of their trade. "Well, the fella had none of these things except his bootmaking equipment," said Mr. Smith.

Mr. Smith filed bankruptcy for his friend. His friend emerged from bankruptcy with a discharge of his debts and the tools of his trade: his bootmaking tools. Mr. Smith said he did not charge the bootmaker for helping him out of a tough spot and hoped he would have a fresh start.

Mr. Smith got up quietly and before he walked out the door, he turned and asked me if I knew who his friend was? I said I had no idea. Mr. Smith smiled and said with a glint in his eye, "Well, the next time you slip on a pair of Tony Lama Boots, you might want to think about the benefits of bankruptcy."

Tony Lama boots have been worn for



decades by Presidents, Movie Stars, Country and Western Singers, Cowboys and Cowgirls, and from time to time, a lawyer or two. Following his bankruptcy, Tony Lama was able to rebuild his business, employ thousands of workers and make millions of boots. He is also an example that bankruptcy relief can give individuals and borrowers a path to recover from financial ruin.

From that day forward I knew that I could do some good as a bankruptcy professional and that I was joining a profession. As Fellows of the College, we all have that moment when we became dedicated to the Mission of the College, the Enhancement of Professionalism, Scholarship and Service in Bankruptcy Insolvency Law and Practice. I have been able to walk in These Old Boots for over forty years as a bankruptcy lawyer and I am honored to be President of the College. If you have a story to tell about how you became a bankruptcy professional and what inspires you, tell me yours? ¶

From the Foundation

*Jan Hayden, Baker Donelson Bearman Caldwell & Berkowitz, PC
Chair, American College of Bankruptcy Foundation*



Greetings from New Orleans! I have the pleasure of serving as the Chair of the American College of Bankruptcy Foundation for the next two years. When asked to take on this project, two thoughts crossed my mind. The first was how in the world am I going to be able to follow in the steps of Paul Harner? After all, under Paul's leadership the 2021 campaign raised a total of \$412,555, an

all-time Foundation record and outperforming the Foundation's budget by 65%. The result also exceeded our 2020 total of \$388,045 (the previous record) by \$24,510, or 6%. During Paul's four years of leadership, the Foundation fundraising efforts exceeded \$300,000 each year, finally topping that magic \$400,000 in total giving. In fact, as Norm Pernick, as our incoming Chair of the Pro Bono Committee ably reports here, we were able to give 46 programs grants totaling \$456,000. If that wasn't daunting enough, I pulled up the mission statement which reads:

"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. The Foundation provides support to pro bono legal service programs providing assistance to an increasingly diverse and evolving number of communities across the entire United States."

Now not only was I supposed to step into Paul's shoes but during this two year term, what could I do to help lead the Foundation to attaining those lofty goals? Fortunately for me, our meeting in Denver helped me begin to find the answers to both questions.

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From the Pro Bono Committee

*Norman L. Pernick, Cole Schotz, P.C.
Chair, Pro Bono Committee*



There is only one way to begin my first College Columns article as the new Chair of the Pro Bono Committee (the "PBC"), and that is to express my sincerest and deepest appreciation to Judge

Janet Bostwick for her amazing leadership and results over the past four years as Chair of the PBC. I also had the honor of serving as Judge Bostwick's Vice Chair during that period, which provided me with the opportunity to get a real behind-the-scenes look at how much time Judge Bostwick spent making sure the PBC discharged its responsibilities in an incredibly effective and efficient manner. Over her term, Judge Bostwick built on the wonderful efforts of the prior Chair, Jim Baillie. Under both of their tenures, the number and amount of grants grew dramatically, in no small part due to their efforts as well as of those PBC members who served, and our wonderful staff support. Judge Bostwick successfully restructured the PBC to effectively meet that increased workload. It is an honor to be asked to expand on the tremendous work that has been done to date, which will include implementing the College's diversity, equity and inclusion goals.-

Because of the generosity of the Fellows, in 2021 the College and Foundation awarded \$456,200 to 46 organizations, funding programs in 25 states plus the District of Columbia. With grant applications for 2022

funding due by June 1, the PBC will begin its work to review and recommend pro bono grants to be funded this year. Our grantees come from across the country, in every circuit, in cities large and small, as well as in rural areas. We fund programs designed to maximize the reach of our grantees by increasing volunteers and expanding and leveraging resources. Applications include requests to fund (1) pro bono clinics and volunteer attorney trainings to recruit additional volunteers, or expand the reach of volunteer attorneys, (2) self help desks and pro se clinics to assist those individuals who must navigate the process on their own, (3) development of training or informational videos to reach pro bono attorneys or potential clients, (4) software and hardware upgrades to enable remote connections to clients, and (5) community education and outreach, to provide individuals with needed information on debt and bankruptcy relief.

Support for access to justice is an important part of the mission of the Foundation and the College. On behalf of the PBC and our grantees, I thank the College, the Foundation and the Fellows, whose support and generosity make the grants possible. You have made the College and the Foundation, through the PBC, the largest private funder of pro bono programs in the country, and you have enabled us to provide a lifeline of assistance to the most vulnerable populations our grantees serve.

I would like to continue the tradition of sharing with you a few stories of clients you helped last year (client names have been

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The Hard Work Yet to Be Done

*Hon. Erithe Smith, C.D. California
Paul E. Harner, Sheppard Mullin LLP*



More than a year ago, our then-Chair Mark Bloom and then-President (now Chair) Melissa Kibler had the foresight and wonderful judgment to appoint a College-wide Diversity, Equity and Inclusion Commission. It was co-chaired, tirelessly, by Judges Laurel Isicoff and Jeffery Hopkins, and its reporter was the remarkable Professor Nancy Rapoport.



One of the many good reasons for Mark's and Melissa's establishment of the Commission was (and remains) that, like many longstanding and admirable professional organizations, the College was not yet sufficiently attentive to diversity and inclusion issues. What the Commission accomplished in a year is truly breathtaking, and we strongly urge you read its final report, linked here. What bears the most emphasis, however, is that the Commission was focused not on changing the College's "standards," or its fundamental missions, but instead on ensuring that diversity, equity and inclusion were appropriately a part of its basic functions, and how it carries out those functions. As with many such organizations, and to the fault of no one involved, they had not done that in the past.

On a more specific note, the Commission made several recommendations to the College Board that were adopted at our meeting in Denver, including that:

- All members of College and Foundation leadership (defined to include all officers, directors and Committee chairs of the College and Foundation, and all members of the Board of Regents), be required, on a self-reporting basis, to certify that they have undergone DEI training.
- All new Fellows, commencing with Class 33, be required, on a self-reporting basis, to certify within 12 months after induction that they have undergone DEI training.
- The Board encourages the Board of Regents to ensure that each Circuit Admission Council, the Judicial Fellows Nominating Committee, and International Fellows Nominating Committee have at least one member who qualifies or identifies as diverse (based on gender, race or sexual orientation).
- The Board directs the newly established DEI Committee to develop and present, at the earliest opportunity, a series of recommendations for adoption of a principle based on the "Rooney Rule" or "Mansfield Rule," to promote the identification and selection of diverse candidates as Fellows of the College.
- The Board has established a new Diversity, Equity and Inclusion Annual Award to be presented annually to one or more deserving individuals or an organization, selected each year by the DEI Committee and approved by the Board,



demonstrating extraordinary commitment to and achievements realized in diversity, equity and inclusion initiatives.

- The Board has acknowledged the recommendations of the DEI Commission that a Freshman Fellow Program be developed and has authorized the Executive Committee of the College to develop and implement, including by the appointment of the DEI Committee, a Freshman Fellow Program consistent with the recommendations in the Final Report of the DEI Commission.

- The Board also endorsed the following resolutions passed by the American College of Bankruptcy Foundation Board on March 31, 2022:

Resolved, that the Foundation aspires to the goal of at least 25% of the funds budgeted for grants and programs being allocated to support pro bono programs that support diverse communities and diversity, equity and inclusion initiatives consistent with the mission and by-laws of

the Foundation.

Resolved that the Executive Committee of the Foundation is directed (i) to work with the College Executive Committee and the Standing DEI Committee regarding the funding of diversity, equity and inclusion programs, such as pipeline programs, by the Foundation and (ii) to report to the Foundation Board before the fall 2022 meeting on such efforts, with recommendations as to how the Foundation should proceed.

- The Board also authorized the new DEI committee each year to select and submit to the Board for approval and action a "Bankruptcy Project" to propose to the Law Firm Antiracism Alliance, a collaboration among 290+ Alliance Firms "working together to help identify and dismantle systemic and structural racism in the law."

- And finally, the Board authorized the new DEI committee to develop a set of working principles for the College that further the objectives of the Commission's

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Big Shoes (Boots) to Fill Many Thanks to Charlie Beckham

*Patricia Redmond, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
Chair, Board of Regents*



As I begin my term as Chair of the Board of Regents, I am keenly aware of the critically important role that the Regents play in the College. As in the past, this year's Board of Regents is comprised of

outstanding insolvency professionals and, is also, the most diverse in the history of the College.

In Denver, the College inducted what Charlie Beckham characterized as "Classic Class 33". The Class represents the College's focus on diversity, equity and inclusion and with the assistance of the DEI Committee, will continue to improve in the future. Women represented approximately 22% of Class 33; not including our new International Fellows, approximately 22% of our new fellows have diverse backgrounds. A majority of the Class is under the age of 52. Class 33 also includes a high percentage of consumer-focused professionals. The class is comprised of 33 lawyers, 4 judges, 5 financial advisers and 3 international professionals. Class 33 also includes our first fellows from Puerto Rico and India. You may access additional information with respect to our new fellows by clicking [here](#).

Now that we are all home safely and hopefully healthy, it is time to restart the process of identifying and vetting new fellows for Class 34 to be inducted in March

of 2023. The Board of Regents will be meeting October 19, 2022 during the NCBJ in Orlando to nominate the Class 34 fellows. We are looking for the best and brightest insolvency professionals and academics. Whether your circuit is discussing candidates in person, by zoom meetings, or soliciting nominations from fellows, please remember that it is strictly confidential and candidates should not know they are being considered. Nominations are due to your Regent and Circuit Admissions Council by June 27, 2022.

As a result of resolutions passed by the Board at the Denver meeting and certain by-law changes, each of the Circuit Admissions Councils will include a member of the DEI Committee to implement the College's diversity equity and inclusion focus and help create the pipeline necessary to develop and mentor diverse insolvency professionals for potential fellowship in the College later in their career.

The time from nomination to selection is very busy. After the nomination packages are received by the Regent or Nominating Committee, the Circuit Admissions Council and the two (2) Nominating Committees review and vet each of the nominations. The vetting process includes reaching out to fellows who know the candidate or who have been involved in professional or case related activities with the candidate. Please respond to any inquiry and be involved in the nomination process. Your input is critical to identifying and choosing candidates who

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Doing the Splits

Clarity or Confusion - Navigating the Circuit Splits on the 1984 Amendment Addressing Unexpired Nonresidential Leases Under Section 365(d)(3)

*Annette W. Jarvis, Greenberg Traurig, LLP
Secretary, American College of Bankruptcy*



Section 365(d)(3) was added to the Bankruptcy Code in 1984 as part of the Bankruptcy Amendments and Federal Judgeship Act. As explained in the legislative history by Senator Hatch, this provision was added to ensure that landlords, who are in the unique position of being required to continue to perform after a bankruptcy filing due to the inability to evict the debtor tenant because of the automatic stay, receive current payment of rent in accordance with the governing lease without having to prove benefit to the estate under Section 503(b)(1). In relevant part, Section 365(d)(3) states:

The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

Meant to be a clarifying provision to require reciprocal performance from debtors in recognition of the inequitable position in which lessors are placed as a result of a bankruptcy filing, this clarification has opened the door to disagreement and circuit splits on the meaning of Section 365(d)(3) and its interaction with Section 503(b)(1).

The first question under Section 365(d)(3) on which the circuits disagree is interpreting what is meant by “obligations . . . arising from and after the order for relief under any unexpired lease of nonresidential real property” As discussed below, some Circuits apply a “Proration Rule,” which looks at when the obligations accrued, and other Circuits apply a “Performance Date Rule,” which considers when the obligations are due under the lease (regardless of when they accrued). Both sides of this split quote the legislative history to support policy arguments for their interpretation of the statutory language, and while coming to different results, both sides ironically argue the plain language of the statute. The Seventh Circuit was the first to weigh in on this piece of statutory interpretation in the case of *In re Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125 (7th Cir. 1998). Facing a tax obligation due under the lease after the order for relief was entered, notwithstanding the taxes all related to a pre-petition period, Judge Posner analyzed the statutory language and intent, determining that the taxes were, in fact, pre-petition claims not entitled to timely payment under Section 365(d)(3). The Seventh Circuit applied an economic analysis: “In economic terms, the prioritizing of post-petition debt enables the debtor (or trustee) to ignore sunk costs—treat bygones as bygones—and continue operating as long as the debtor’s business is yielding a net economic benefit.” *Id.* at 1127. Since the taxes related

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Fourth Circuit Moot Court

Paula S. Beran, Tavenner & Beran, PLC



The Thirtieth Annual ABI Duberstein Bankruptcy Moot Court Competition was held in New York on President's Day and the lead-up practice round session was hosted

by the ACB Education Committee for the DC and Fourth Circuit. The well-attended event was led by Chair Denise Neary. As always, it was a fantastic event. Held virtually again this year due to COVID, it proved to be a very productive day for all of the participating teams from Brooklyn Law School, Campbell University, George Washington, Howard Law, University of Maryland, and Suffolk University Law School. A huge debt of gratitude is extended to the stellar judges who gave their day off to facilitate these teams' growth, including Hon. Michelle Harner (Bankr. D. Md.), Hon. Elizabeth Gunn (Bankr. D.C.), Hon. Brian Kenney (Bankr. E.D.Va.), Hon. Klinette Kindred (Bankr. E.D.Va.), Hon. Pamela McAfee (Bankr. E.D. N.C.), and Hon. Maria Ellena Chavez-Ruark (Bankr. D. Md.). The winning team hailed from Campbell Law School and Howard University Law claimed the runner-up slot in the practice session. Howard University went



on to win the Duberstein competition. Emony Robertson from Howard University was awarded the Best Oralist prize for the second year in a row (and was also awarded Best Oralist at Duberstein). The Education Committee salutes all of the competitors, coaches, and judges and looks forward to another impactful competition in person next year! 🏆





DEI Committee Update



More than 80 Fellows logged in on May 10 to hear a report on the Select Commission on Diversity, Equity and Inclusion's ("DEI") final report and hear from the newly formed DEI Committee.

[View the Recording of the May 10th Presentation](#)

Please note the recording does not include the discussions held in the breakout sessions. The Paul Weiss DEI training session held in-person in Denver is referenced in the final report as well as in the May 10 session. If you would like to view that excellent and informative session, [please click here](#). For your reference, the final DEI report and the two referenced video links are all available on the College website AFTER logging in with your personal ID. Then go to the DEI tab under "Correspondence from DEI Commission."



An Experience of A Lifetime

Jay Ong, Munsch Hardt Kopf & Harr, P.C.



Having just returned from Denver and attending the American College of Bankruptcy's 2022 Induction ceremony for its Thirty-Third Class of Fellows, I am still processing

weekend an unforgettable experience of my professional lifetime. It also made for a grand and sorely needed opportunity to see and catch up with longtime friends from across the nation.

Perhaps by design, I am left incredibly humble in its wake, and full of renewed motivation to carry on the achievements of the Fellows who have come before me. For a career bankruptcy practitioner, I truly felt to be walking with giants in the field as I stood with my class Fellows and mingled through the conference and events, socializing and engaging in sophisticated discourse with the most accomplished, esteemed and like-minded members of my profession. I consider having obtained their recognition not only for professional expertise but also for consistent devotion to social justice and the advancement of humankind, to

what this unique experience means to me, as well as how best I might realize on my opportunities to contribute to the College. It certainly was a most affirming and unexpected professional experience. After practicing insolvency law for well in excess of twenty years, genuine surprises have become relatively rare encounters, but this induction process certainly qualifies.

My head still spins from what I now appreciate to be the clandestine nomination, vetting and approval procedures, the extensive time and commitment required of my gracious peers to devote their time and attention to this selfless process, the validation and deep appreciation that attends such a rare professional honor determined by my most respected colleagues, and from the wonderful, formal ceremony surrounded by family and friends (my wife, in particular, appreciated the opportunity to get me back into my tuxedo). These considerations all made the





be among the greatest of my personal accomplishments.

Of course, it's always nice to be recognized by respected friends and to meet professional contemporaries and potential allies – especially those who deeply share such principles and perspectives. I especially enjoyed the opportunity to share the experience with Abigail Emery, our Distinguished Law Student from the Fifth Circuit, who I've had the privilege of working with in connection with the Duberstein moot court competition, and to get to know her fellow Distinguished Law Students, who, as a group, appear poised to take over the World. Seeing my place among the multiple generations of legal scholars attending the conference struck me as a perfect example of the great wonderment of our great legal system, and bankruptcy

in particular. Viewed against it, individually, we are comparatively insignificant. And yet it depends on each and every one of us for its proper functioning and improvement. That we toil as stewards and guardians of this social framework is what makes our work meaningful.

I feel perhaps most grateful for the renewed vigor and dedication that I now feel. This experience has deeply affirmed the values that have guided my career and life, that I have the support of colleagues and comrades who undertook the time and effort to attend the induction and to provide me with the opportunity to work alongside them to elevate our legal system and seek to make lasting positive impacts on our families, friends, loved ones and society as a whole. 🏛️





Class 33 Induction Highlights

Denver, Colorado





SEE MORE CONTENT



VIDEO

Watch the the Distinguished Service Award Presentation and Class 33 Induction.



PHOTOS

View and download photos from the event. Enter your email address to view and download photos.



SPEECHES

Read Judge Perris and Judge Wedoff's inspiring messages.



The ACB Class of 2022 Distinguished Students

Claudia Springer, Novo Advisors



This year's class of Distinguished Students was once again truly exceptional. Winning students were first nominated by law schools in the circuits whose turn it was

to select a student most deserving of this prestigious award. This year the nominating Circuits were the Second, Fifth, Sixth, Seventh, Eighth and Tenth Circuits. Our committee members from those Circuits included Richard Seltzer, Kristi Johnson, Taft McKinstry, Cathy Steege, Charlie Coleman and Ken Cannon.

Congratulations to the winners of the 2022 Distinguished Students Award! And our thanks to Claudia Springer who led the effort. The 2022 Distinguished Students Award are as follows:

From the **Second Circuit: Ben Weissler**, who is a 3L at Columbia University Law School. Ben won the American Bankruptcy Law Journal prize in 2021 and the Best in Class award in Bankruptcy Law during the Fall of 2020. Ben's bankruptcy law professor called him an "extraordinary student" and only the second student in his 25 years of teaching who earned an A+ in both his bankruptcy and Commercial finance courses. Retired Judge Robert Gerber for whom Ben interned also applauded Ben's acumen. Ben's love of bankruptcy is driven by the fact that it is an interdisciplinary field combining aspects of litigation, transactional law and finance.

After graduating, Ben will be joining Davis Polk in NY. Ben's favorite hobby is his love of puzzles, including the New York Times crossword.

From the **Fifth Circuit: Abigail Emery** who is a 3L at The University of Texas School of Law. Abigail is the president of the Texas Business Law Society and a research assistant for Professor Angela Littwin on the issue of "coerced debt" and its effect on divorced women. Abigail served on the Duberstein Bankruptcy moot court team and was the best oral advocate in 2021. Professor Jay Westbrook shared that "Ms. Emery was in my classes last year in secured credit and bankruptcy. ...She is not only bright, but she works hard, always a winning combination." Professor Littwin noted that Abigail has "impressive analytical skills and tremendous coding skills." Abigail received glowing recommendations from Judge Marvin Isgur and Bill Wallander of Vinson & Elkins, for whom Abigail worked during the summer of 2021. Abigail enjoys bankruptcy because it combines aspects of litigation and transactional law. Abigail will be clerking for Judge Isgur in the Fall of 2022 and, after the clerkship, will join the Restructuring and Reorganization practice group at Vinson & Elkins. Abigail's hobby is baking, having been a professional baker during college and she is also a Shakespeare enthusiast.

From the **Sixth Circuit: Khalil Bryant** who is a 3L at Vanderbilt Law School.. Khalil's nominating professor, Yesha Yadav, noted that Khalil is a brilliant student who "stood



**Pictured left to right:
2nd Circuit: Benjamin Weissler, 7th Circuit: Kelby Roth,
8th Circuit: Renhua "Alex" Xuan, 6th Circuit: Khalil A. Bryant,
8th Circuit: Jonathan Francisco Garcia, 5th Circuit: Abigail Emery**

out among a class of exceptionally talented students" and consistently demonstrated hard work and detailed attention to his studies and academic success. During his bankruptcy course, Khalil examined aspects of the Brooks Brothers chapter 11 case and wrote a well-reasoned paper for which he received a high grade. Khalil is president of the Black Students Law Association and is a Dean's Scholar. He is also a member of the Vanderbilt University Steering Committee on Racial Inequalities and Injustices. Khalil served as mentor during the inaugural year of Vanderbilt's 1Levate Leadership Program and remains a leader of that mentoring initiative. Khalil has a passion for politics and became a political organizer in Philadelphia while doing his undergraduate work at Princeton University. After graduating, Khalil will be joining Haynes & Boone's Corporate Transactions Group. Khalil's

hobby is his interest in crypto currency which he writes about often in a blog.

From the **7th Circuit: Kelby Roth** who is a 3L at Chicago-Kent School of Law. Kelby is the President of the Bankruptcy, Insolvency and Restructuring Association. She is also a member of the Chicago-Kent Law Review where she serves as the Website and Social Media Coordinator. Her note for the law review focused on third party releases and will be published in the 2023 edition of the Law Review. Kelby is the Vice President of the Chicago-Kent Moot Court Honor Society and led the school's delegation at the Duberstein Bankruptcy Moot Court competition. She also received the CALL award (highest grade) during the Spring semester in 2021. Kelby won the First Prize in the Willis R. Tribler writing competition in 2021 and is a Kent legal scholar for

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Distinguished Students continued
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outstanding research. She is a research assistant for Professor Lori Andrews, researching the topic of discrimination in artificial intelligence hiring. She was a summer associate at Kirkland and Ellis in 2021, where she worked on a death penalty pro bono case, and will be joining that firm as an associate in 2022. Kelby's hobby is music and a love of opera.

From the **8th Circuit: Renhua (Alex) Xuan** who is a 3L at Washington University School of Law. Alex is a winner of the American Bankruptcy Law Journal prize for having the highest grade in his bankruptcy class. He is the staff editor of the Jurisprudence Review and a teaching assistant for Professor Daniel Keating for LLM Students and for Professor Danielle D'Onfro. He summered at Kirkland & Ellis in 2021 and will be joining that firm in 2022. As a first year student, Alex externed for 3 bankruptcy judges, Judges Charles Novack, Roger Efremsky and Judge William Lafferty. Judge Lafferty commended Mr. Xuan as being an "absolutely superb extern in our court, in every respect. Conceptually he grasped the basics of bankruptcy law (this was as a first year, prior to taking a bankruptcy course) because he grasped the "logic" of the Code in the broader sense of the overall statutory purpose of promoting an efficient and equitable liquidation or a fair and feasible reorganization." Alex grew up in China and came to the United States for college. At the University of Chicago, he majored in math and later taught math at the University of Montana. Alex loves classical music, chess and skiing.

From the **10th Circuit: Jonathan Francisco Garcia** who is a 2L at Brigham Young University J. Reuben

Clark School of Law and serves on the BYU Law Review as an associate editor of the law review. Jonathan is a recipient of the Wendy C. Archibald Meritorious Achievements and Distinguished Service Award and served as a judicial extern for the United States Bankruptcy Court for the District of Utah from May 2021 until August 2021. He is writing a law review note on whether defunct businesses are eligible to file subchapter V cases. Bankruptcy Judge Anderson commented that Jonathan has a passion for bankruptcy law and that "during his externship, Mr. Garcia took advantage of every learning opportunity that crossed his path. ... He chose to write about eligibility standards for Subchapter V bankruptcy cases, due to his keen interest in small business reorganization." Jonathan will be a summer associate at Wilson Soncini but hopes to clerk for a bankruptcy judge after graduation. Jonathan's interest in bankruptcy law flows from a family member who owned a small business that was compelled to seek relief under the Code. He thinks the SBRA is a great tool for small businesses who simply cannot afford chapter 11. Jonathan has a Master's degree in writing which he obtained prior to attending law school. He loves to ski and be with his family. ¶





From the Perspective of a Law Student

Abigail Emery



This year, I had the honor of being chosen as the Distinguished Student from the Fifth Circuit. Of everything I have been involved in and all the opportunities I have been fortunate

enough to have in law school, attending the annual meeting of the American College of Bankruptcy stands out. I knew that the bankruptcy community was close-knit but attending the events in Denver and getting to see some familiar faces and make some new friends exceeded expectations.

When I started law school three years ago, I had no idea what I wanted to do with my JD. As an English Literature major and former pastry chef, I had only a vague inkling of what bankruptcy meant – let alone any awareness of the professional community behind it. Once I developed the interest in pursuing a career in the field, the level of mentorship I received from practitioners and professors blew me away. My experience in Denver only amplified my perception of the bankruptcy community as one that fosters mentorship, camaraderie, and intellectual curiosity.

Seeing so many people I had met and learned from in different contexts (summer internships, networking events, moot court, school) all gathered in one place -- felt surreal. The experience was especially rewarding after spending two years mostly interacting with people virtually. At first it felt intimidating being surrounded by so many accomplished people who are recognized experts in their field, but everyone was so welcoming and interested to meet me and

the other students in attendance.

After speaking with my student-colleagues from other circuits, I know they agree and share my sentiments about what a unique experience it was to attend the conference as a student. From what I gather, bankruptcy is a niche interest to develop during law school. I loved getting to meet other students who are as interested in and excited as I am about starting a career in this field. We bonded over the thrill of meeting talented professionals and sitting in on expert panels on the latest issues and we walked away feeling we had met people we would be in touch with – if not work with directly – for our entire careers.

The circuit lunch was especially exciting because I got to meet practitioners from my home circuit, where I plan on staying after graduation. Meeting people from other circuits was wonderful, and I am sure I will cross paths with them in the future. But to those of us planning on practicing in the same circuit where we attended law school, the circuit lunches felt like a way for us to get a taste of what the practice and legal culture will be like in our home-base.

Things move quickly in law school, and there is seldom time to take a breath and enjoy what you accomplish. I imagine that practitioners are no stranger to feeling you are always looking ahead to the next thing. The induction ceremony in particular was a unique opportunity to slow down and take stock of how far you have already come. Attending the annual meeting of the American College of Bankruptcy as a student was a privilege and highlight of my experience in the legal community to date, and I thank the College for the opportunity to slow down and take stock. ¶



From the Chair continued from page 2

We continued with the induction of new Fellows. To stand on that stage and have the honor of reading the name of each person (after assiduously practicing the correct pronunciations, of course!) and recognizing this austere group of professionals was an experience not to be forgotten. We are all busy professionals, but at times there are moments when we should sit back and take stock, moments to celebrate accomplishments. The induction ceremony was one of these special moments when we as Fellows recognized the professional and personal excellence of our peers and invited them to work with us towards the enhancement of our practice in bankruptcy and insolvency.

Preceded by recognition of yet another outstanding group of Distinguished Law Students, our morning education panels again demonstrated the unparalleled expertise of our Fellows. We are fortunate to be part of a professional association that promotes discourse at the highest levels between all members of the profession – attorneys, judges, academics, financial advisors or other specialists in bankruptcy and insolvency. Our discussions of topics like gamesmanship in bankruptcy and third-party releases touched on matters that have the potential to shape the public perception – and the reality – of our profession in the years to come.

We closed the meeting with lunch following a brief social break for mimosas and Bloody Marys that was fitting for a Saturday morning and I suspect could become a fixture of future conferences. Among other things, our lunchtime agenda included thanking departing members of College and Foundation leadership and welcoming new ones. We are fortunate to have an exceptional group of professionals

who are willing to dedicate their time and talents to the endeavors of the College. I compliment the nominating committee and Board for their hard work and sagacity in selecting our new slate of leaders. [See the announcement here.](#)

One individual who we had the opportunity to thank for his service was Mark Bloom, the College's outgoing Chair. Mark has been a wonderful partner and friend these last two years, and a phenomenal leader of the College. Mark led us through an extraordinarily difficult and unprecedented time, as an organization and as global citizens. It was a time that called upon the skills of those in our profession in many ways and required us to revisit how we worked – in court, the office, the board room and elsewhere – and to reconsider whether our bankruptcy system was meeting the needs of its constituents. Mark handled both challenges and opportunities with grace, calm and wisdom, always with the best interests of the College foremost in his thinking. He never shied away from making the difficult decisions or the personal phone/ Zoom calls to communicate them, and never forgot to thank people who contributed to the College, both past and present. As someone who has served this organization in leadership capacities since becoming 11th Circuit Regent in 2003 – almost 20 years – Mark's fingerprints are on many of our institutional accomplishments.

Returning to the topic of DEI, let me start by adding my thanks to Judge Laurel Isicoff and Judge Jeff Hopkins for their truly invested and dedicated leadership of the DEI Commission over this past year, and to the entire Commission for the investment of time and effort, and for their willingness to tackle a difficult and important issue on behalf of the College,

continued on page 23



From the Chair continued from page 22

our industry and society at large. The names of each Commission member can be found [here](#). Their interim and final reports were exceptional – worthy of the stature of this organization and a testament to the forward-thinking Fellows of which it is comprised. The DEI Commission undeniably accomplished its mission: “To develop a comprehensive plan that instills mindfulness regarding all aspects of diversity, equity and inclusion, and actively promotes those values through the resources and endeavors of the College and Foundation.”

You will be hearing from the new DEI Committee headed by Judge Erithe Smith and Paul Harner, who have taken up the torch and will be working to truly institutionalize and realize the vision crafted by the DEI Commission. Their column describes in detail some of the resolutions passed by the Board as a result of the DEI Commission’s recommendations. At a high level, these actions incorporate advancement of DEI objectives into the mission statement of the College in the bylaws and embed members of the DEI Committee in the College’s leadership on the Executive Committee, Board of Regents and each Circuit Admissions Council and nominating committee. They provide for education on inclusive leadership and other topics that promote DEI, use our honorary capacity to establish a DEI annual award, pledge our financial resources to support DEI initiatives or diverse populations, and commit to active participation – and leadership – in efforts to advance DEI both within the College and the broader restructuring community.

We are at a historic moment as an organization. The work that our DEI Commission has done has the potential to be truly transformational. It is evident from looking at our new Fellows and



leadership and listening to conversations happening from the podium to the halls, that DEI principles – the mindfulness we are seeking – are already present and becoming ingrained in our decisions and our work. But much more remains to be done. We need your ongoing commitment and support in the days to come to ensure that the path the DEI Commission has laid out for us becomes a reality.

I will close by saying that I am so honored to serve as Chair of the College. To be given the opportunity to lead this incredible organization, among so many talented, capable leaders, is a privilege and a responsibility, one that I take very seriously. While I am the first financial advisor and second woman to hold this position, I am thrilled to be included among a number of firsts, including the first woman leading our Foundation, Jan Hayden, and the first woman leading the Board of Regents, Trish Redmond. Our profession is very special, unique I believe. The collegiality among the bench, bar, financial and other professionals makes this an industry where business contacts frequently become some of our closest friends; where we can openly discuss and debate points of law and practice. I’d work together to enhance our profession; and where the specialization of the law combined with the generalization of its application create a niche practice of

[continued on page 24](#)



From the Chair continued from page 23

which we are all fortunate to be a part. I look forward to working with our Fellows over the next two years – both as a steward of a

great organization and an agent of change for the future.

I hope you can join us in Orlando in October! ¶

Column . . . ist continued from page 3

newsletter and welcome your thoughts to help us all keep in touch. The various College Committees will continue to keep us all informed through their article updates.

Special thanks to Steven Berger for his years of editorial leadership and many enlightened contributions to the College Columns. If any of you would like to take over as our crossword puzzle developer, please let us know. I can't match Steven's talent for creating an engaging crossword.

Finally, please welcome Melanie

Cyganowski as new co-editor of the newsletter. Let us know of your ideas for future development of the College Columns. ¶



Big Shoes (Boots) to Fill from page 10

reflect the high standards of the College.

The College By-Laws provide that the College honors those professionals who sustain performance in the practice of their profession and exemplify the highest standards of professionalism among bankruptcy specialists by granting them membership as Fellows. Those consist of bankruptcy professionals, including lawyers, judges, law professors, accountants, appraisers, auctioneers, officers of the government, officers of lending institutions, reorganizations, workout and liquidating specialists and others who are dedicated to the improvement of the bankruptcy process and the enhancement of the professional quality of, and public respect for the insolvency and bankruptcy practice. Membership is by invitation only.

Applications will be reviewed and

thoroughly vetted by the relevant circuit admissions councils and Nominating Committees between June 27 and August 29, 2022. Thereafter, the Circuits Admissions Councils and Nominating Committees will meet and determine which Candidates will be selected for submission to the Board of Regents. The Board of Regents will then meet on October 19, 2022 to make final decisions on the admissions of new fellows for the 34th Class of the College.

I know many of you have reached out to me already with questions and comments with respect to new fellows. I want to thank you for your interest and involvement in this vital process. My predecessor, Charlie Beckham, has consistently remarked that the selection of new fellows is among the most important functions of the College as the preeminent organization for insolvency professionals. ¶

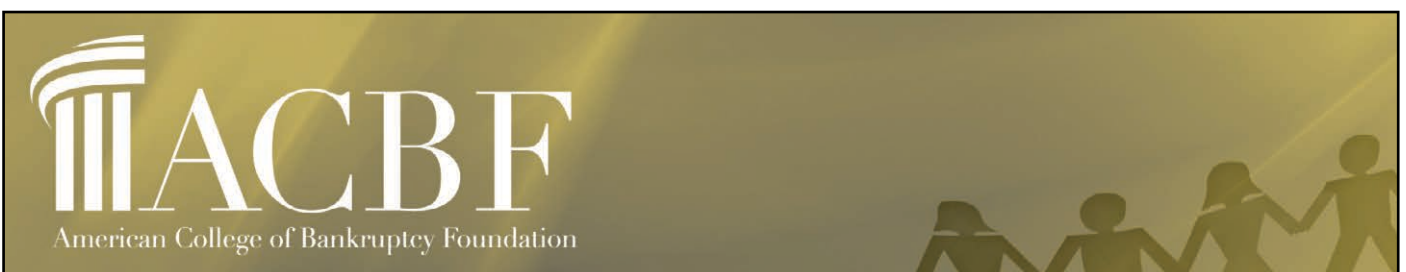


From the Foundation continued from page 6

First, I was reminded that none of us do good work on our own. After all, although Paul is a hard act to follow, we have a wonderful board ready to work hard to help us reach the next level of generosity from a group of Fellows who time and time again have risen to the challenge, each year seeming to outgive themselves. Who could ask for a better executive group than Vince Lazar, Lisa Schweitzer and Becky Roof? We also have seasoned board members agreeing to serve a second term and a batch of proven leaders joining us for their first term. Looking at this group of folks, it's clear that we are blessed with a board populated with good hearted and generous folks who will roll up their sleeves and get the work done. The Board will be helping to establish our fundraising goals and contact each one of you to raise the money that Norm and his committee will need to fund the projects you have read about in this issue of the Columns. I am confident that the Foundation and you, as Fellows of the College, will once again step up to fund these pro bono projects throughout the country. So don't worry, this is not the last you will hear from us on fundraising. We have only just begun!

I had kind of expected to have to mull over my second question. After all, the Foundation had each year outdone itself in

funding worthy pro bono projects, but was there more that our mission required of us? I was wrong, I didn't get much time to mull at all! My answer came quickly through the charge we as a College agreed to accept last month ... to adopt and implement the principles of diversity, equity, and inclusion our DEI Commission presented to us. What better way to execute on our broad mission, to promote the ends of justice through educational and charitable activities, than to work with other leaders in the College to promote DEI? Our board, upon hearing from the Commission, wanted to mindfully commit to including these principles as we execute our mission to promote justice through educational and charitable activities. The executive committee (I told you they were superstars!) committed then and there to use the time between our Denver meeting and our fall meeting in Orlando to first examine our current programs and processes and then prepare recommendations for our board to incorporate these principles into our grant giving and programming. Upon this writing, we have already commenced that work and we look forward to using this year to promote the mission and good works of the American College of Bankruptcy Foundation. So, stay tuned, the Board will be reporting back to you soon as to our progress. ¶





The Hard Work continued from page 9

final report to be submitted to the Board for approval and that, upon such approval, may be made available for voluntary adoption by Fellows and their firms as well as other individuals and organizations in the broader restructuring community.

Perhaps one of the most important initiatives of the Commission, which the new standing committee intends to implement, is a commitment to “pipeline” programs designed to encourage and support law students, lawyers and financial professionals from diverse backgrounds in pursuing careers in bankruptcy/insolvency. To that end, the College recently approved the recommendation of the Commission that it partner with Just the Beginning (JTB)—a pipeline organization to provide stipends to law students who will be interning with bankruptcy judges this summer through

JTB’s Summer Judicial Internship Diversity Project (SJIDP). The College is proud to be providing \$1,000 - \$3,000 stipends to six law students who will participate in internships with eight bankruptcy judges around the country and joins the NCBJ, IWIRC and other organizations in supporting the worthy efforts of the SJIDP.

These are truly huge steps for the College and its Fellows that could not have been anticipated even a year ago. We are delighted and humbled to be the first Co-Chairs of the DEI Committee who will succeed the Commission, and we have identified a wonderful group of committee members, with the College leadership’s approval, who have agreed to devote their time to the mission. Now the hard work continues! ¶

Pro Bono continued from page 7

changed to protect their privacy):

- “The impact of our work is perhaps best conveyed through client experiences. Jeremy, a client we represented over the past several years, is the son of a Guyanese immigrant who came to the US in the 1980s to raise his family. In 2004 Jeremy’s father bought his first home. Unfortunately, the loan was predatory. Mortgage payments increased regularly, eventually reaching \$5,000 a month. As the foreclosure proceeding began, Jeremy’s father reached out to a company advertising its ability to save homes from foreclosure. That too was a scam, as Jeremy’s father signed the deed over to the company while receiving no compensation. After Jeremy became his father’s legal guardian, he was contacted by

a U.S. Attorney who advised him to speak to a lawyer. Jeremy reached out to Brooklyn A and we represented him and helped get his family’s home back. Jeremy’s father recently passed away, but Jeremy will continue to not only contribute to the community his father lived in, but build intergenerational wealth.” Brooklyn Legal Services Corporation A 2/25/22 Grant Report.

- “John is a 60 year old single individual living in Newark, California. He initially came to one of our ‘introduction to bankruptcy’ clinics back in late 2019. At the clinic, he met with one of our volunteer attorneys who provided all the necessary information to help John get started with the filing process. Unfortunately, he was not

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Pro Bono continued from 26

able to get this going right away as he was in temporary housing at the time and then became homeless for seven months after that. In addition, he has major health issues and has not been able to work full-time for several years. With a limited monthly income of \$894, John has struggled to cover living expenses. This caused him to rely heavily on the use of credit cards to pay for rent, food, necessities and other purchases. He incurred over \$64,000 in credit card debt. It was extremely unlikely that he would ever be able to pay off this debt as his living expenses still exceeded his income. He just kept making the charges knowing that we would not be able to make the payments but felt like he had no other option. John soon started getting more letters and phone calls from collection agencies.

After seeing that his situation was only worsening, John decided to contact us again in May 2021. He informed us that he was now ready to move forward with the bankruptcy. We put him in touch with a volunteer attorney who then helped John gather the information and documents necessary to prepare the bankruptcy forms. The volunteer attorney also provided instructions for filing the forms, completing the two required

online credit counseling courses and for how to prepare for the 341 meeting. After successfully completing all these steps, John later received a full discharge of his debts. He is no longer receiving calls from collection agencies. He can finally focus on getting his life and finances back on track.” Legal Access Alameda 2022 Grant Report.

- “After hearing one of our presentations on financial exploitation and relationship scams, our client Mary sought out resources we provided, including our Facebook live video relationship scams. Mary found the resource so helpful, she brought it back to her women’s group and showed it to them to encourage safe practices while online dating. Mary is one example of an older adult who helped us further the reach of this program and she is an agent for positive change in her community.” Maryland Volunteer Lawyers Service 3/11/22 Grant Report.

If you are aware of a worthy program that is not a current grant recipient, please encourage them to submit an application on or before June 1. Thank you again for your generosity and for enabling us to be able to make a difference in so many lives. 🙏





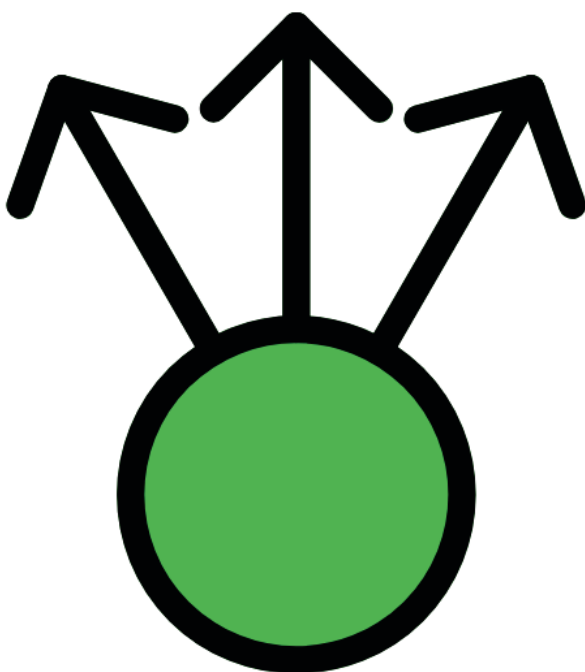
Splits continued from page 11

to the pre-petition period, the Seventh Circuit noted that this situation “is thus no different from its debts to trade creditors for supplies that it bought [prepetition] but never paid for.” *Id.* Recognizing that section 365(d)(3) relieved the landlord from having to meet the “actual, necessary” requirement of Section 503(b)(1) to enable the landlord “to collect the rent fixed in the lease,” the Seventh Circuit found that Congress did not intend to go beyond this narrow exception “and thus [gave] no indication that it meant to give landlords favored treatment for any class of prepetition debts.” *Id.* at 1128. In so deciding, the Seventh Circuit essentially defined “obligations” to be paid under Section 365(d)(3) as akin to “claims” under the Bankruptcy Code, with only post-petition claims entitled to priority payment under this section. This decision marked the beginning of the “Proration Rule,” which looks at whether the amounts due under the lease are in fact post-petition debts entitled to priority.

However, lest Handy Andy makes the Proration Rule look too easy, the Seventh Circuit had to backtrack a bit on this rule in *HA-LO Industries, Inc. V. CenterPoint Properties Trust*, 342 F.3d 794 (7th Cir. 2003). The question in *HA-LO Industries* was whether the rent due on the first day of the month for the entire month had to be paid when the lease was rejected in the bankruptcy case on the second day of the month. In distinguishing its own earlier decision, the Seventh Circuit referred to the tax claims in *Handy Andy* as prepetition claims which were “sunk costs” while the post-petition rent claim arose entirely post-petition and was “a charge for the consumption of a resource during the administration of the case,” making the entire amount payable under Section 365(d)(3). *Id.* at 799 (quoting *In re Comdisco, Inc.*, 272 B.R. 671, 674–75 (Bankr. N.D. Ill. 2002)).

In a case involving the payment of rents, which also included taxes, the Tenth Circuit *B.A.P.* likewise followed the Seventh Circuit’s Proration Rule as “better-reasoned” and “more consistent with the legislative purpose underlying § 365(d)(3)’s enactment” in *El Paso Props. Corp. v. Gonzales (In re Furr’s Supermarkets, Inc.)*, 283 B.R. 60, 68 (B.A.P. 10th Cir. 2002). The court reasoned that if claims accrued prepetition were to be paid as administrative claims, Congress “would have enacted conforming amendments to sections 503 and 507 along with the amendment to § 365(d).” *Id.* at 69. Rather, the court held that “lease obligations ‘arise’ under § 365(d)(3) as the obligations accrue, not simply when they are billed, and that the debtor or trustee is required to pay only those lease obligations that accrue after the Conversion Date and prior to the date of rejection or assumption.” *Id.* at 70.

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The Splits coninuted from page 28

The alternative interpretation of this statutory language creating the circuit split on this issue was explained by the Third Circuit in *In re Montgomery Ward Holding Corp.*, 268 F.3d 205 (3rd Cir. 2001), yet another case dealing with taxes on leased premises that had accrued prior to the bankruptcy filing but were due under the lease after the filing. Rejecting the suggestion that “obligation” should be defined or interpreted as a “claim” under the Bankruptcy Code, the Third Circuit pointed out that Congress chose to use “obligation” rather than “claim,” that an “obligation” can arise before “the tenant is obligated to perform,” and that a reinterpreting of “obligation” as “claim” “would render section 365(d)(3) superfluous.” *Id.* at 209. Rather, the Third Circuit determined that “the most straightforward understanding of an obligation is something that one is legally required to perform under the terms of the lease and that such an obligation arises when one becomes legally obligated to perform,” making it “the terms of the lease that determine the obligation and when it arose.” *Id.* 209–10. Acknowledging that proration was a pre-Code practice, the court explained: “It seems clear to us, however, that Congress enacted § 365(d)(3) for the purpose of altering a pre-Code practice that had created a problem for landlords of non-residential property.” *Id.* at 211. As such, the debtor’s obligation under the lease to reimburse the lessor for tax payments that arose after the bankruptcy filing must be paid as a post-order obligation under Section 365(d)(3). Likewise, the Sixth Circuit, in *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986 (6th Cir. 2000), found the debtor liable for rent for the entire month under section 365(d)(3) when the debtor

rejected the lease after the first date of the month the advance rental payment was due. Noting that the “purpose of § 365(d) is to ‘prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate,’” and recognizing that the debtor was in control of the timing of the rejection, the court did not find the result inequitable. *Id.* at 989. This became known as the “Performance Date Rule.”

The Eighth Circuit also adopted the Performance Date Rule in *In re Burival*, 406 B.R. 548 (B.A.P. 8th Cir. 2009). This case involved a crop lease payment required twice a year where one of the payments was due two days after the orders for relief were entered. The payment “was attributable to the growing season which ended pre-petition,” *id.* at 550, but applying the Performance Date Rule, the Eighth Circuit found that “the Landlord was entitled to payment of the entire post-petition rent payment under 11 U.S.C. § 365(d)(3) as an administrative expense claim.” *Id.* at 550. Describing the Performance Date Test as a “bright-line test,” the court took the position that “if a rent payment is due during the post-petition, pre-rejection period, it must be paid pursuant to Section 365(d)(3).” *Id.* at 552. The Eighth Circuit found that language of Section 365(d)(3) “clear” and stated that “[w]here the language of a statute is clear, our job is to enforce the language according to its terms.” *Id.* at 553. Addressing the confusing interaction of Section 503(b)(1) with Section 365(d)(3), the court found that Section 365(d)(3) granted administrative expense status for covered claims without the need to prove benefit to the bankruptcy estate.

continued online



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1ST CIRCUIT



2ND CIRCUIT

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CONNECTICUT
VETERANS
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3RD CIRCUIT



4TH CIRCUIT



Financial Protection Law Center

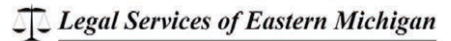


5TH CIRCUIT





6TH CIRCUIT



7TH CIRCUIT



Fund For Justice and Education



8TH CIRCUIT



9TH CIRCUIT

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STEP UP TO JUSTICE

11TH CIRCUIT





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The Foundation is off to a great start for the 2022 campaign.
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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 Michelle Foster, ACB Communications Director, at focus@amercol.org.

Ralph Brubaker was honored as the James H.M. Sprayregen Professor of Law at the University of Illinois College of Law.

Marc Cohen was promoted to full Colonel in the California Air National Guard.

Judge Laurel Isicoff was featured in a Law360 article, entitled "[Bankruptcy Judges In Florida Want To Be Put Out Of Business.](#)"

Melissa Kibler received Global M&A network's first DEI Award.

William "Bill" Lobel launched Distressed Capital Resources LLC, a national service dedicated to helping the owners of financially distressed businesses and real estate preserve their reputations and their assets by avoiding the damage of a chapter 11 bankruptcy.

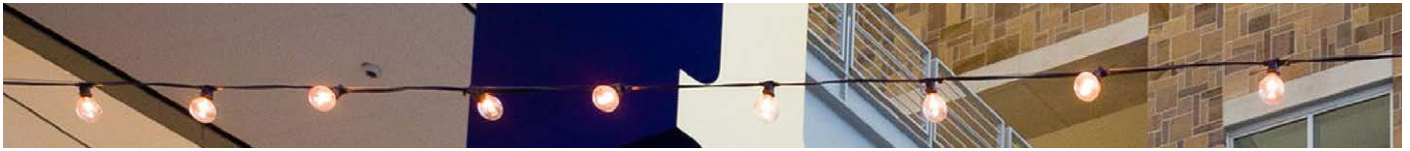
Dr. Luis Manuel C. Méjan published a book, "GPS CONCURSAL" under the Tirant Lo Blanch Editorial. The book is a practical guide through the Insolvency process in Mexico with schemes, summaries and a Thesaurus of the Mexican Insolvency Law (Ley de Concursos Mercantiles).

John Northen, a partner with Northen Blue, LLP in Chapel Hill, NC, was selected as one of the top 25 attorneys in the Raleigh, NC area and top 100 in the state in the 2022 North Carolina Super Lawyers. John is also ranked in Chambers and in Best Lawyers of America.

Bill Rochelle conducted a two-part oral history podcast with Sam Gerdano on Sam's career in bankruptcy. The first covers Sam's period as counsel to the Senate Judiciary Committee, including the enactment of chapter 12. The second podcast covers his career building the ABI and concludes with the passage of the Small Business Reorganization Act.

Brian Shaw was named as one of the Top 500 Bankruptcy & Restructuring Attorneys in the country by Lawdragon magazine.





Upcoming Events

5th and 10th Circuit Ethics Program in a Game Show Format July 29, 2022

SAVE THE DATE! THIS IS FAMILY FEUD! The Fifth Circuit Family Versus The Tenth Circuit Family Feud (And other games people play!) in Deer Valley, Utah. An Ethics Focused CLE Program in a Game Show Format.

6th Circuit Fellows Weekend - Save the Date! September 9, 2022

Horses & bourbon! Friday late afternoon (definitely with some bourbon), September 9 – Sunday, September 11 in Lexington, Ky, the heart of the Bluegrass. Please mark your calendar. Details to follow sometime shortly re hotel, activities, bourbon, horses, etc. Looking forward to seeing you all.

ACB Fall All-Fellows Luncheon and Meetings October 19, 2022

Please mark your calendar to join the College and Fellows for the All-Fellows Luncheon to be held in conjunction with NCBJ in Orlando at the World Center Marriott on October 19 at 12 p.m. Various leadership and committee meetings will be also be held. Looking forward to seeing you all.

[View the Tentative Schedule Here](#)



Email the Editors

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:

Deborah Langehennig, trustee@ch13austin.com
Melanie Cyganowski, mcyganowski@otterbourg.com

We value your input. Thank you!

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