

STATE BAR OF TEXAS  
**BANKRUPTCY LAW SECTION**  
**NEWSLETTER**

*Winter 2006*

*Vol. 4, No. 1*

*Texas Bankruptcy Moot Court Competition –  
The Elliott Cup*

The Bankruptcy Law Section of the State Bar is sponsoring the first annual Texas Bankruptcy Moot Court Competition for the Elliott Cup. The Texas competition is named in honor of the late Joseph C. Elliott, U.S. Bankruptcy Judge for the Western District of Texas.

The Elliott Cup event is for teams from Texas law schools that are registered to compete in the national Duberstein Bankruptcy Moot Court Competition this spring. All Texas law schools are invited to compete for the Elliott Cup. It is anticipated that teams from the University of Houston, South Texas, Texas Southern, University of Texas, Texas Tech and SMU will participate.

This year, the Elliott Cup competition will be held on Saturday, February 25, 2006, at the University of Texas School of Law in Austin, Texas. Preliminary rounds will start at 9:00 a.m. and the final round will start at 3:30 p.m. A traveling trophy (the Elliott Cup) will be awarded to the first place team, and awards will be given to the second place team and to the best oral advocate. A welcoming cocktail reception will be held on Friday night, February 24, from 6:00 p.m. to 8:00 p.m., at the offices of Brown McCarroll, LLP (111 Congress Avenue, Suite 1400, Austin, Texas) and an awards dinner will follow the competition on Saturday night, February 25, 2006.

If you are interested in serving as a judge for the Elliott Cup competition or have any questions regarding the event, please contact H. Christopher Mott of Gordon & Mott P.C. in El Paso, Texas, by telephone at 915.545.0888 or by e-mail at cmott@gordonmottpc.com.

See page 5 for more about the late Joseph C. Elliott, former United States Bankruptcy Judge for the Western District of Texas.

***Inside in this Issue . . .***

<b>Call for Articles .....</b>	<b>2</b>
<b>Bankruptcy Law Section Listserve Rules of Protocol .....</b>	<b>3</b>
<b>State Bar Party at the NCBJ .....</b>	<b>4</b>
<b>International Law Bankruptcy Seminar in Greece.....</b>	<b>4</b>
<b>Pre-Trial Litigation Program .....</b>	<b>4</b>
<b>Calendar of Events .....</b>	<b>5</b>
<b>Joseph C. Elliott.....</b>	<b>5</b>
<b>Judicial Estoppel in Bankruptcy .....</b>	<b>6</b>
<b>BAPCPA Primer .....</b>	<b>7</b>
<b>Troop Movements .....</b>	<b>8</b>

## **CALL FOR ARTICLES AND CALENDAR EVENTS**

The **STATE BAR OF TEXAS BANKRUPTCY LAW SECTION** is dedicated to providing Texas practitioners, judges, and academics with comprehensive, reliable, and practical coverage of the evolving field of bankruptcy law. We are currently reviewing articles for upcoming publications. We welcome your submissions for potential publication. In addition, please send us any information regarding upcoming bankruptcy-related meetings and/or CLE events for inclusion in the newsletter calendar, as well as any items for our "Troop Movements" section.

If you are interested in submitting an article to be considered for publication or to calendar an event, please either e-mail your submission to **kourtney.lyda@haynesboone.com** or mail it to the following address:

Kourtney P. Lyda  
Haynes and Boone, L.L.P.  
1221 McKinney, Suite 2100  
Houston, Texas 77010  
Telephone: (713) 547-2590  
Facsimile: (713) 236-5687

Please format your submission in Microsoft Word. Citations should conform to the most recent version of the Bluebook, the Texas Rules of Form, and the Manual on Usage, Style & Editing.

Should you have any questions, please visit our website at **<http://txbankruptcylawsection.com>**. We look forward to reviewing your submissions for potential publication in the next **STATE BAR OF TEXAS BANKRUPTCY LAW SECTION NEWSLETTER**.

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# Bankruptcy Law Section Listserve Rules of Protocol

As most of you know, the State Bar of Texas Bankruptcy Law Section ("Section") has set up a listserv program for its members. This device is intended to facilitate communication from the Section to its members and also from member to member regarding issues pertinent to the Section. The Section has encourages its members to use the listserv to (i) float ideas about pending legal issues which are relevant to their cases; and (ii) alert members to significant new court opinions or pertinent changes in applicable rules.

The following rules of protocol have been established to help ensure that the listserv remains a positive benefit of being a member of the Section:

1. **Advertisements.** The listserv should not be used for advertisements of any nature. If an individual member of the Section would like to advertise his or her services, treatises or other products, then please contact either Elizabeth Guffy (eguffy@deweyballantine.com) or Kourtney Lyda (Kourtney.Lyda@haynesboone.com) about placing an advertisement for a fee in the next edition of the newsletter.

2. **Job Vacancies.** The listserv should not be used to seek employment or to seek to hire professionals in the bankruptcy arena. Instead, the Section is currently working with the State Bar to set up a webpage on the Section's website that will be devoted to employment opportunities for bankruptcy professionals. The website address is [www.txbankruptcylawsection.com](http://www.txbankruptcylawsection.com). If you have an interest in this type of service on our website, please send an e-mail directly to Tom Howley at [Tom.Howley@haynesboone.com](mailto:Tom.Howley@haynesboone.com).

3. **General Background.** The main address for the listserv is [texbk-1@mailman.io.com](mailto:texbk-1@mailman.io.com). If you send an e-mail to this address, it goes to approximately 1,000 attorneys across the state. If you reply to the original sender and push "reply to all," your reply will be sent to all recipients of the

original e-mail--1000 attorneys. **In other words, any time that [texbk-1@mailman.io.com](mailto:texbk-1@mailman.io.com) is in the "to" box when you send your e-mail (whether it is an original e-mail or a reply), it will go to everyone.** Please take a moment to think about whether your reply is intended to be sent only to the person who wrote the original e-mail or if you really want your reply to be sent to all members of the Section. Please identify yourself, your firm, and your e-mail address in the signature block of your e-mail when using the listserv. This will assist attorneys who want to reply only to the sender of the e-mail.

4. **Specialty Listserves.** There are two other listserv addresses that you may find useful as well--one for consumer attorneys and one for business attorneys. If your e-mail is intended primarily for consumer bankruptcy attorneys, you may want to use the consumer listserv, which is [consumer-1@mailman.io.com](mailto:consumer-1@mailman.io.com). Likewise, if your e-mail is intended primarily for business bankruptcy attorneys, you may want to use the business listserv, which is [business-1@mailman.io.com](mailto:business-1@mailman.io.com). Otherwise, you can use the general listserv address to reach the entire Section. If you are not sure whether you are subscribed to the consumer and/or business listserv, please send an e-mail to Kathy Casarez at the State Bar. Kathy can be reached at [kcasarez@texasbar.com](mailto:kcasarez@texasbar.com), and she can subscribe you to either of the specialty listserv addresses.

5. **Subscribing or Unsubscribing to the Listserv.** If at any time you would like to add an e-mail address or remove an e-mail address from the listserv, please send a message to Kathy Casarez and she will take care of that for you. Also, Kathy can turn off delivery to your e-mail address temporarily if you're going on vacation. Just don't forget to let her know when you want delivery to resume.

We would request that all members of the Section adhere to these rules of protocol. Thank you.

## *Pre-Trial Litigation Program*

The Bankruptcy Law Section and the University of Texas is again sponsoring the ***Bankruptcy Litigation: Advanced Pre-Trial Practice and Procedure Workshop***. The program will be held at the InterContinental Stephen F. Austin Hotel in Austin, Texas on February 2-3, 2006. This year, the entire program will be built around a fact pattern which will be circulated in advance to all registrants. 12.5 hours of CLE is available with 2.25 hours of ethics credit. If you have any questions, please feel free to Deborah Williamson at [dwilliamson@coxsmith.com](mailto:dwilliamson@coxsmith.com).

### *State Bar Party at the NCBJ*

Members of the SBOT Bankruptcy Law Section entertained a *few* friends on November 3rd during the National Conference of Bankruptcy Judges. To be exact, 913 friends and colleagues from around the country arrived at San Antonio's historic Sunset Station for an evening of fun and a taste of Texas hospitality.

Mother Nature cooperated to provide a perfect Fall evening under the stars where guests enjoyed good food, drink and great entertainment. The Indubitable Equivalents, the ABI's in-house band, provided the music that started the fun. Still Crazy, featuring Judges Leif Clark, Richard Schmidt and Paul Bonapfel, took their turn on stage to the delight of all. Throughout the evening, while some guests mixed and mingled, others took to the dance floor, which was not cleared until the final strains were played.

Besides great food, drink and music, numerous guests won some fabulous door prizes provided by very generous law firms.

Months of planning and organization contributed to the success of the event, directed by section president Charlie Beckham (Haynes and Boone, LLP) and spearheaded by committee members Ray Battaglia (Oppenheimer, Blend, Harrison & Tate), Russ Munsch (Munsch Hardt Kopf & Harr), Berry Spears (Winstead, Sechrest & Minick), Eric Terry (Haynes and Boone LLP) and Deborah Williamson (Cox Smith Matthews). All those involved in the planning and organization greatly appreciate the firms that generously contributed to make the event not only possible, but a great success!

### *Seats Still Available for the International Law Bankruptcy Seminar to be held in Greece*

The State Bar of Texas Bankruptcy Law Section will hold its Third Annual International Bankruptcy Law Seminar in Greece on March 14-21, 2006. The Hon. Barbara J. Houser, Bankruptcy Judge for the Northern District of Texas, Dallas Division, the Hon. Richard Schmidt, Bankruptcy Judge for the Southern District of Texas, Corpus Christi Division, and the Hon. Leif Clark, Bankruptcy Judge for the Western District of Texas, San Antonio Division will be in attendance to serve as moderators and attendance monitors. The Hon. Larry Kelly, Bankruptcy Judge for the Western District of Texas, San Antonio Division will also be attendance. We will be applying to the State Bar of Texas for 15 hours of CLE credit, including at least 3.0 hours of ethics.

The cost to attend the program is \$2200, based on double occupancy. If you have any questions or for more information, contact **Julianne Parker at 214.520.9901**. Mail deposits and reservation forms to:

**Julianne M. Parker, Chairperson  
International Seminar Committee  
SBOT Bankruptcy Law Section  
3303 Lee Parkway, Suite 305  
Dallas, Texas 75219**

## 2006 BANKRUPTCY SECTION CALENDAR OF EVENTS

### JANUARY

**Event: Rocky Mountain Bankruptcy Conference**

**Date: January 26-28, 2006**

**Location: Westin Tabor Center, Denver, CO**

### FEBRUARY

**Event: Bankruptcy Litigation: Advanced Pre-trial Practice and Procedure Workshop**

**Date: February 2-3, 2006**

**Location: Austin, Texas**

*www.utcle@mail.law.utexas.edu* or call  
(512) 475-6700

### MAY

**Event: Nuts and Bolts of Business Bankruptcy 2006 (live)**

**Date: - May 10, 2006**

**Location: Austin, Texas**

Call 800-204-2222 (x1574) to Register

**Event: Advanced Business Bankruptcy Course 2006 (live)**

**Date: May 11-12, 2006**

**Location: Austin, Texas**

Call 800-204-2222 (x1574) to Register

### Joseph C. Elliott (1942-2000)

*by Ronald Hornberger*

Teacher, mentor, comrade, and, most of all, friend. Joseph C. Elliott was a valued member of our firm from late in 1986 until he left this world in July of 2000. With the unwavering belief that in a past life he was a member of the French Royalty, he refused to be hurried from this life before the first celebration of the French holiday, Bastille Day, in the new millennium!

Joe was born in Lewiston, Montana, where his father, "big Joe," a young doctor, and mother, Peggy, had settled. Opportunities in the practice of medicine led the young Elliott family to Houston, where Joe grew up. After having spent the decade of the 60's in New Orleans (allegedly attending college and law school at Tulane University), Joe worked in politics for a time before taking a clerkship with "John H." (U.S. District Judge John H. Wood, Jr.) in 1971. That clerkship took Joe to San Antonio, and he embraced the city as his own. After his clerkship, he worked for the firm of Sawtelle, Goode, Davidson and Troilo.

In 1975 Joe began his eleven years as United States Bankruptcy Judge for San Antonio, dedicated it seemed at times to terrorizing us all. He served on the bankruptcy bench with distinction until his departure 1986, at which time he was Chief Bankruptcy Judge of the Western District of Texas. Soon after taking the bench, Joe fell heir to what was then the largest corporate bankruptcy filing ever, Corco. His opinion on the venue issue in that case, affirmed by the 5<sup>th</sup> Circuit, is still good law and should be a starting point for any analysis of venue issues in a bankruptcy case. He was, thankfully, a frequent speaker at numerous seminars and bar events, covering bankruptcy, ethics and procedure. He was a Fellow of the Texas Bar Foundation, listed in bankruptcy in Best Lawyers in America and the proud holder of the highest rating from Martindale-Hubbell, Inc.

As a practitioner after his retirement from the bench, Joe represented both secured and unsecured creditors, debtors, and trustees in cases under chapters 7, 11 and 13 of the Bankruptcy Code. He also appeared in numerous cases as an expert witness. For about the last five years of his practice, he also served successfully as a mediator. One of his last mediations involved a complex case in bankruptcy court that no one, not even the judge in the case, thought had any chance at all of settling. Joe, of course, cajoled, threatened, and sweet-talked all parties into a settlement.

Joe wasn't with us nearly long enough. We miss him.

# Judicial Estoppel in Bankruptcy

by Deborah Langehennig

Judicial estoppel is intended to protect the judicial process by preventing parties from taking conflicting positions in litigation. In the 5<sup>th</sup> Circuit, the key cases on the use of judicial estoppel in bankruptcy are *In re Superior Crewboats*, 374 F.3d 330 (5<sup>th</sup> Cir. 2004), and *In re Coastal Plains, Inc.* 179 F.3d 197 (5<sup>th</sup> Cir. 1999). In *Superior Crewboats*, the circuit court overturned a district court decision declining to prevent a debtor/plaintiff from commencing a personal injury suit a year after converting his chapter 13 case to chapter 7, when he had not disclosed the lawsuit as an asset. In *Coastal Plains*, the tortious interference claim brought by the debtor's successor against an unsecured creditor survived the asserted defense of judicial estoppel. The court found that the claim did not relate back to the original complaint because it was based on a different transaction than the earlier claims. The precedents established in these two cases have been followed by Judge Bohm in his recent decision, *In re Walker*, 323 B.R. 188 (Bankr. S.D. Tex. 2005).

## ***How Does Judicial Estoppel Arise in a Bankruptcy Case?***

*Coastal Plains* and *Superior Crewboats* established three essential elements for a judicial estoppel. The first element provides that a "party is judicially estopped only if its position is clearly inconsistent with the previous one."<sup>1</sup> Following the Fifth Circuit's application of this principle in *Superior Crewboats*, Judge Bohm held in *Walker* that failure to list an asset is the same as stating that the asset does not exist.<sup>2</sup> Thus, a later assertion to another court that the cause of action does exist is inconsistent with the prior statement.

The second element requires that "the court must have accepted the previous position."<sup>3</sup> The Court in *Superior Crewboats* stated that "adoption does not require a formal judgment; rather, it only requires 'that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition.'"<sup>4</sup> Detrimental reliance is not a necessary element. "[B]ecause judicial estoppel is designed to protect the judicial system, not the litigants, detrimental reliance by the party opponent is not required."<sup>5</sup>

The third and final element in a judicial estoppel is that "the non-disclosure must not have been inadvertent."<sup>6</sup> If there is no motive for nondisclosure, it is likely to have been inadvertent.<sup>7</sup> The typical motive is for the debtor obtain a discharge without paying creditors full and later enjoy all of his recovery in litigation free of any creditor's claim. If, however, he has obtained approval of a chapter 13 plan that provides for creditors to be paid in full, there is no motive for nondisclosure. Nondisclosure would also be inadvertent if the debtor was truly unaware of existence of the cause of action.

In recent decision, the 5<sup>th</sup> Circuit affirmed a lower court's decision barring a debtor's employment discrimination case she did not list as an asset in her bankruptcy filing.<sup>8</sup> Since the debtor was aware of her claim (she was actively involved in litigation of the discrimination case before and during the bankruptcy case), the court inferred that the nondisclosure was intentional.<sup>9</sup>

The failure of debtor's counsel to advise the debtor concerning the obligation to disclosure will not save the debtor from judicial

estoppel. "The Debtor's reliance on her attorney . . . relieves her neither of her affirmative duty to disclose nor of the diligence required to ensure the Court that her sworn statements remain true."<sup>10</sup> The debtor has a continuing duty to ensure the accuracy of the schedules.

In the chapter 11 context, the bankruptcy court for the Northern District of Texas held that the defendant overstated the reach of the doctrine of judicial estoppel.<sup>11</sup> The debtor filed a fraudulent transfer claim against multiple defendants, following approval of its disclosure statement and confirmation of the chapter 11 plan. The disclosure statement revealed potential litigation and the investigation of potential claims against entities based on their relationship with the debtor prior to the bankruptcy filing. The plan expressly reserved all claims, rights and causes of action against one of the defendants, including payments or transfers made to or for the benefit of third persons. The plan transferred those causes of action to a litigation trust for later adjudication and provided that the confirmation of the plan would have no preclusive effect. The bankruptcy court, in its written decision, concluded that the claim against the defendant had been disclosed, even though this particular related defendant was not expressly named.

The court pointed out that, at the time of the disclosure statement hearing, the debtor requested that the court make a finding concerning the adequacy of the information in the disclosure statement. Therefore, the debtor did not induce the court to accept a position inconsistent with the prosecution of the claims. Judicial estoppel therefore did not bar later

litigation of the fraudulent transfer claims.

### ***Can a Debtor Avoid Judicial Estoppel by Curing the Deficiency?***

This raises the question of whether the debtor can cure a deficiency in the schedules to defeat a defense of judicial estoppel and allow the cause of action to proceed. It appears that the debtor can cure the omission by amending the schedules, but only before the defense has been raised. Once an estoppel defense has been raised, courts have found that “allowing [the debtor] to back-up, reopen the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing personal assets only if he is caught concealing them.”<sup>12</sup>

*Superior Crewboats* also held that judicial estoppel will bar both the debtor and the trustee from pursuing a cause of action. Not all jurisdictions hold that a trustee should be barred by the debtor’s omission.<sup>13</sup> However, the 5<sup>th</sup> Circuit and many other court find that accurate and complete disclosure in the schedules is more important than a potential recovery and distribution for the benefit of creditors. “It goes without saying that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims.”<sup>14</sup>

<sup>1</sup>*In re Superior Crewboats*, 374 F.3d at 335; see also *In re Walker*, 323 B.R. at 195.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>*In re Superior Crewboats*, 374 F.3d at 335, quoting *In re Coastal Plains*, 179 F.3d at 206.

<sup>5</sup>*Id.* at 334.

<sup>6</sup>*In re Superior Crewboats*, 374 F.3d at 335; see also *In re Walker*, 323 B.R. at 195.

<sup>7</sup>*Wolfolk v. Tackett*, 526 S.E.2d 436 (Ga. App. 1999).

<sup>8</sup>*Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598 (5<sup>th</sup> Cir. 2005).

<sup>9</sup>*Id.*

<sup>10</sup>*Walker*, 323 B.R. at 196, citing *In re Sholdra*, 249 F.3d 380 (5<sup>th</sup> Cir. 2001).

<sup>11</sup>*In re LJM2 Co-Investment, L.P.*, 327 B.R. 786 (Bankr. N.D. Tex. 2005)

<sup>12</sup>*In re Superior Crewboats*, 374 F.3d at 336, quoting *Burnes v. Aeroplex, Inc.*, 291 F.3d 1288 (11<sup>th</sup> Cir. 2002).

<sup>13</sup>*In re Barger*, 279 B.R. 900 (Bankr. N.D. Ga. 2002).

<sup>14</sup>*In re Coastal Plains, Inc.*, 179 F.3d 197, 207-09 (5<sup>th</sup> Cir. 1999).

## **BAPCPA Primer**

For those who are still looking for guidance under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), you might consider subscribing to *The American Bankruptcy Law Journal* (which you can do on line at [www.ablj.org](http://www.ablj.org)) to get the equivalent of a BAPCPA primer, put together by some of the best minds on the subject. *The American Bankruptcy Law Journal*, a *Quarterly Journal of the National Conference of Bankruptcy Judges*, has always been a good source of discussion of timely bankruptcy topics. The two current issues (Volume 79, issues 2 and 3) contain a number of articles specifically addressing issues raised by BAPCPA. Among the authors and subjects included in those two issues are **Judge Eugene Wedoff** addressing the operation of the means test in new § 707, **Erwin Chemerinsky** identifying constitutional questions that arise under BAPCPA, **Rich Levin & Alesia Ranney-Marinelli** considering new issues confronting chapter 11 debtor’s counsel, **Tom Carson & Jennifer Hayes** on the small business chapter 11 amendments, **Jay Westbrook** shedding light on Chapter 15, **Rhett Campbell** explaining the effect of the new provisions relating to financial markets contracts, **Hank Hildebrand** describing the changes to the chapter 13 landscape, **Sam Crocker & Robert Waldschmidt** doing the same for chapter 7, **Catherine Vance & Corinne Cooper** on new concepts of attorney liability under BAPCPA, **Henry Sommer** providing very practical pointers on representing consumer debtors with the new amendments in place, **Margaret Howard** on changes regarding exemptions, **William Brown** detailing changes in the availability and scope of the debtor’s discharge, **Lisa A. Napoli** examining the not-so-automatic stay in consumer cases, **David Wheeler & Douglas Wedge** reviewing the changes in the reaffirmation process, **Ricardo Kilpatrick** providing a perspective from the consumer creditor’s perch, and **Susan Jensen** recounting the history that led to the passage of BAPCPA. We are happy to bring this excellent publication to the attention of our members who may not be familiar with the caliber of its authors and articles.

In addition to subscribing on-line, you can also contact Chris Molick, Executive Director, National Conference of Bankruptcy Judges, 235 Secret Cove Dr., Lexington, South Carolina, 29072. The cost of the subscription is \$55.00, and credit card orders are accepted.

## **Troop Movements**

**Elizabeth Guffy** has moved to the Austin office of **Dewey Ballantine LLP**, Frost Bank Tower, 401 Congress, Suite 3200, Austin, Texas 78701, telephone: (512) 226-0450; facsimile: (512) 226-0333. Her e-mail remains the same.

**Keith Miles Aurzada** formerly with Akin, Gump, Strauss, Hauer & Feld, LLP has joined the Dallas office of **Hance Scarborough Wright Ginsberg & Brusilow**. Keith can be contacted at The Elm Place Building, 1401 Elm Street, Suite 4750, Dallas, Texas, 75202, telephone: (214) 651-6511, e-mail: kaurzada@hswgb.com

**Berry Spears** formerly of Winstead Sechrest & Minick, P.C. has joined the Austin office of Fulbright & Jaworski, LLP located at 600 Congress Avenue, Suite 2400, Austin, TX 78701-2978.

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