

STATE BAR OF TEXAS
BANKRUPTCY LAW SECTION
NEWSLETTER

Fall 2004 **Vol. 2., No. 2**

**A LETTER FROM THE CHAIR:
CHARLES A. BECKHAM, JR.**

WHEW!!

The Bankruptcy Law Section of the State Bar of Texas grew in its first year of infancy from zero to eight hundred members. Creation of the Section went from being an idea a few short years ago to an organization with programs, projects and a real future. Congratulations to all of you. You made it happen and you will make it grow this year and in the years to come.

Robert E. Wilson has retired as our first Chair of the Section and I have picked up his playbook for where we need to take the Section. We have amended the Section By-Laws to create some more officer positions and elected leadership to fulfill the purposes of the Section.

The Section has already started working this year. The Section held its first member service event in Las Vegas

on September 10, 2004 at the ABI Southwest Conference. Approximately sixty (60) Section members attended a reception sponsored by Xroads, Inc. at the Bellagio Hotel. The Section thanks Xroads, Inc. for sponsoring the reception.

Now all we need is for you to volunteer to work on Section programs, projects or committees. The organizational chart on page 3 of this newsletter tells you about the programs, projects and committees the Section will have this year. If you see something you would like to participate in, please let me know and I will get you involved. My e-mail address is beckhamc@haynesboone.com. We can make the Section great and provide a service to the bar and the public through a better understanding of bankruptcy law. I look forward to working with you this year!

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CALL FOR ARTICLES, CALENDAR EVENTS AND TROOP MOVEMENTS

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
c/o Haynes and Boone, LLP
One Houston Center
1221 McKinney St., Suite 2100
Houston, Texas 77010-2007

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**.

THE GOLD STAR

At the request of one of our readers, the State Bar of Texas Bankruptcy Law Section Newsletter is beginning "The Gold Star" section of the Newsletter in which a practitioner can nominate another practitioner for "going above and beyond the call of service." If you would have a "Gold Star" contribution, please forward it to the Editor. This edition's "Gold Star" contribution comes from Deborah Williamson of San Antonio who writes:

"I was in court recently waiting for a contentious discovery fight to finish. Before Judge Lynn took up my matter, there was a brief hearing relating to substitution of counsel. James Curtis, a prominent consumer bankruptcy attorney, was participating telephonically and explaining that he had found substitute counsel for his client. Now, substitute counsel is not unusual, particularly where the client in question is extremely demanding, often unpleasant and not paying his lawyer. Mr. Curtis apparently had the perfect out - his health was not going to let him prepare for and participate in a trial scheduled in the next few months. However, rather than using his "get out of jail free" card - this distinguished member of practice went to considerable time and effort and used his personal relationships to find substitute counsel.

A small thing and one probably not appreciated by the client. However, this commitment to doing the 'right thing' made me proud to be a bankruptcy attorney."

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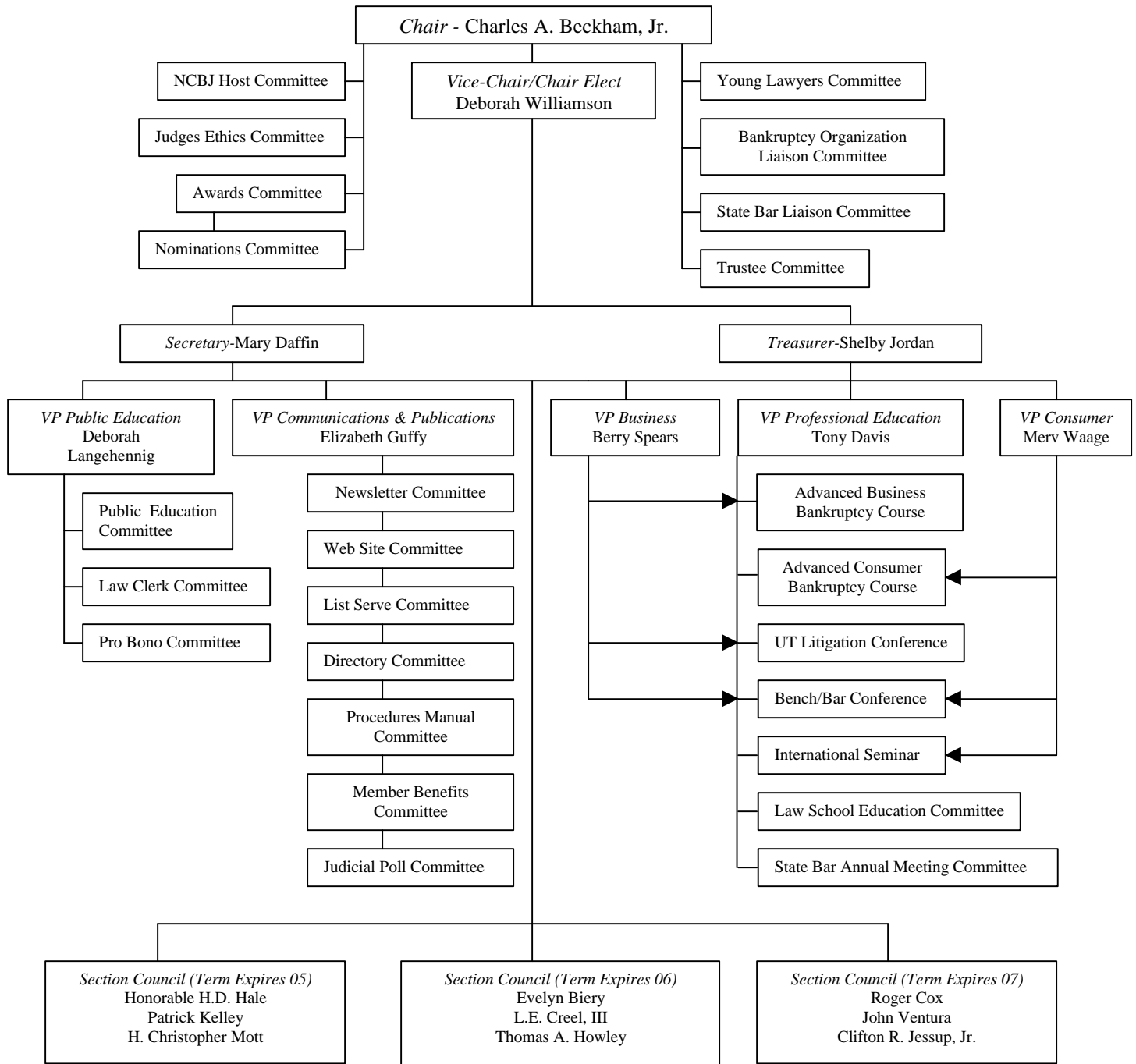
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STATE BAR OF TEXAS / BANKRUPTCY LAW SECTION



AND DURING THE INQUISITION, HOW MANY WITCHES

by Danielle Copes, Robin Phelan, Amy Walters*

There's a whole new kind of inquisitor out there. Instead of searching for witches to burn, it combs the corporate corridors of America looking for the next Worldcom or Enron to punish, all in the name of saving innocent investors and shareholder victims. While claiming to save the innocents, and punish the heretics, this instrument of righteousness throws commercial law into the dungeon and manipulates what's left to commit legal extortion. Who is this instrument of alleged justice? The SEC aided by its enforcer, the (In) Justice Department.

Thanks to a little something called Sarbanes-Oxley, the SEC is now able to push shareholders ahead of unsecured creditors in the bankruptcy priority scheme. Under the Bankruptcy Code, and the normal dictates of commercial law, unsecured creditors are to be paid before the shareholders. Because assets are typically depleted before the unsecured creditors can be paid in full, it is not uncommon for shareholders to receive little, if anything, in a typical bankruptcy distribution. However, that is an investment risk of which shareholders are well aware. Even defrauded shareholders are specifically subordinated pursuant to §510(b) of the Bankruptcy Code. Due to high-profile cases like Worldcom and Enron, where investors lost billions of fictitious dollars in the blink of an eye, the SEC is now using Sarbanes-Oxley to make sure the shareholders get paid-- all at the expense of creditors. In effect, the SEC is strong-arming debtors into paying shareholders more than they are due at the expense of unsecured creditors.

In *S.E.C. v. WorldCom, Inc.*, 273 F. Supp. 2d 431 (S.D.N.Y. 2003), the SEC levied a civil penalty against the company for "massive" accounting fraud. *See id.* at 431. In its order approving a proposed settlement of the SEC's claim, the district court commented that the SEC sought "not just to impose penalties but to . . . obtain some modest, if inadequate, recompense for those shareholder victims who would otherwise recover nothing whatsoever from the company itself." *Id.* at 432-33. Invoking a *non sequitur*, the court recognized that a penalty based primarily on the amount of loss to shareholders "might arguably run afoul of the provisions of the Bankruptcy Code that

subordinate shareholder claims below all others," therefore, the penalty must be limited to "the amount that the company has gained from its fraud." *Id.* at 434. Because the \$2.25 billion penalty initially imposed was less than the estimated \$200 billion loss to shareholders, the penalty was not considered restitution.

Although the SEC filed the claim on its own behalf, and would receive any penalties paid, the court held that § 308(a) of the Sarbanes-Oxley Act permits the SEC "to pay any penalty it recovers to the shareholder victims rather than to the U.S. Treasury." *Id.* (discussing Sarbanes-Oxley Act of 2002, § 308(a), Pub. L. No. 107-204, 116 Stat. 745 (2002)). However, because the court determined that the SEC's claim is a governmental claim and not a shareholder claim, it is treated as a general unsecured claim and does not "give shareholders a greater priority in bankruptcy than they previously enjoyed." *WorldCom*, 273 F. Supp. 2d at 434.

In assessing its penalty, it is rumored that the SEC took into consideration the price paid by distressed debt investors and threatened criminal indictment of Worldcom effectively destroying the debtor, which depends upon governmental franchises for its operations. The justification of the SEC for its position is that someone (or something) must be punished and that it is irrelevant that the human beings that engaged in the questionable conduct are "long time gone".¹ The fact that a corporation is a piece of paper filed in the office of the Secretary of State somehow escapes the SEC. A corporation can no more be punished than can a piece of literature, or a work of art. A corporation is a **legal fiction**. It is neither moral, nor immoral. It feels neither pain nor remorse. Likewise, it does not feel pride, or joy. It acts only through humans. To punish a corporation is only to punish its legal constituents such as creditors, employees or shareholders. This undeniable fact somehow seems to escape the SEC and the (In) Justice Department.

In a recent case, the SEC sued another debtor in federal district court for violations of the Securities Act of 1933, the Securities Exchange Act of 1934, and numerous federal regulations. Because the

debtor had filed for Chapter 11 bankruptcy, the SEC also filed its complaint as a Proof of Claim with the bankruptcy court presiding over the Chapter 11 case. The complaint alleges that the debtor fraudulently omitted bank debts from its financial statements and then misled the public and shareholders regarding these off-balance sheet liabilities. In addition, the SEC claimed that the debtor misstated the company's performance and fraudulently concealed internal dealings. Although the complaint does not allege a specific dollar amount in damages, it does request that the court order the other defendants to disgorge the profits they received, plus interest, as a result of their alleged securities fraud. In addition, the SEC seeks to recover money penalties.

In this case, the SEC does not ask for relief based on the estimated amount of loss to shareholders, but instead asks that the debtor repay the amount it received as a result of the alleged fraud. According to the court's holding in *WorldCom*, such disgorgement would fall within the penalty limits and would not violate either the Bankruptcy Code or applicable securities laws. *See WorldCom*, 273 F. Supp. 2d at 434 (citing *S.E.C. v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997)). In addition, Sarbanes-Oxley gives the SEC the authority to compensate the debtor's aggrieved shareholders with any penalties it recovers. Based on the holding in *WorldCom*, this distribution would not violate the bankruptcy priority scheme despite the fact that it would result in the shareholders receiving more than they would otherwise receive under the debtor's Chapter 11 plan. *See id.*

Although the cases are similar, it is worth noting that *WorldCom* involved a "negotiated" settlement between the SEC and the interested parties. *See id.* at 435. As a result of the negotiations, the court approved a discounted settlement of \$750 million instead of the assessed \$2.25 billion penalty. *See id.* Moreover, the Official Committee of Unsecured Creditors of WorldCom, Inc. approved the district court settlement and agreed to endorse it before the bankruptcy court. *See id.* at 435-36. The district court stated

(continued on page 5)

(continued from page 4)

that the SEC requested and received the unsecured creditors' approval in order to show that the agreed upon penalty was "consistent with the best interests of the creditors." *Id.* at 435.ⁱⁱ There were objections to the settlement, however, which the court briefly mentioned, but the committee nonetheless endorsed the proposal. *See id.* It had no choice. The SEC could have destroyed the business of the debtor.

In addition to *WorldCom*, the SEC may use US Supreme Court precedent to argue that the penalty imposed against the debtor is a true penalty and not impermissible restitution. In *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, the Supreme Court defined a penalty as "punishment for an unlawful act or omission." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 226 (1996). In *CF&I*, the Government levied a 10% "excise tax" against CF&I for failing to make certain minimum contributions to its pension plans. *See id.* at 215-16. Although the Internal Revenue Service filed a claim against CF&I's bankruptcy estate to recover the "excise tax," the Court held that because the IRS imposed the "tax" in response to CF&I's plan funding deficiency, which constitutes an ERISA violation, the "tax" was actually a penalty. *See id.* at 216-17, 224, 226 ("[A] tax is an enforced contribution to provide for the support of the government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act." (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931))). Because the Court determined that the "tax" was really a penalty, it was not entitled to priority status and was to be treated as a general unsecured claim. *See id.* at 226.

Although several lower courts have held that penalties may be subordinated in a Chapter 11 caseⁱⁱⁱ, and non pecuniary penalties are statutorily subordinated in a Chapter 7 case^{iv}, in *WorldCom*, the court stated, "Under the bankruptcy laws, the Commission's penalty claim is treated as simply another claim by one of many unsecured creditors." *WorldCom*, 273 F. Supp. 2d at 434.

Although other creditors may receive less as a result of the SEC's penalty

claim, it appears that an argument for equitable subordination would have difficulty prevailing. Section § 510(c)(1) allows the court to equitably "subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim . . ." 11 U.S.C. § 510(c)(1) (2004). In *CF&I*, the Supreme Court determined that the IRS penalty was not subject to equitable subordination under § 510(c) "because categorical subordination at the same level of generality assumed by Congress in establishing relative priorities among creditors [is] tantamount to a legislative act and therefore [is] outside the scope of any leeway under § 510(c) for judicial development of the equitable subordination doctrine." *CF&I*, 518 U.S. at 229 (citing *United States v. Noland*, 517 U.S. 535, 543 (1996)). Thus, the court apparently lacks the authority to equitably subordinate the SEC's claim just because it is a governmental penalty that may result in the shareholder receiving more and other creditors receiving less. The court would have to use another basis for equitably subordinating the SEC claim, but in light of *CF&I* and *WorldCom*, the availability of an alternative legal basis to support equitable subordination would seem to rest on the argument that §1129(a)(7) requires that each creditor receive at least as much in a Chapter 11 plan as the creditor would have received in a Chapter 7 case. Merging this with the statutory subordination of penalties in §726(a)(4) some courts have concluded that penalties may be subordinated in Chapter 11 cases.^v

This situation should leave a bad taste in the mouth of anyone even remotely familiar with the Bankruptcy Code and commercial law, but it appears that there is some legal basis for the SEC's claim against the debtor: (1) the claim constitutes a penalty for alleged securities fraud; and (2) the SEC does not seek actual restitution of shareholder loss. Under Sarbanes-Oxley, the SEC may then distribute any penalties received to the debtor's aggrieved shareholders, and this distribution will not run afoul of the Bankruptcy Code because the SEC is the claimant, not the shareholders. Although this argument facially appears legal, it is doubtlessly unreasonable and unfair and may be attacked as a claim subject to

subordination under §510(b) as a claim arising from rescission of a purchase or sale of a security or damages arising from the purchase or sale of a security. The SEC should not be able to use Sarbanes-Oxley to ignore the Bankruptcy Code and commercial law and extort money from unsecured creditors. But in light of questionable decisions like *Worldcom*, it looks like we are stuck with this wolf in pious clothing.

* The authors all spend the majority of their waking hours at Haynes and Boone, except for Ms. Copes, who is still a law student at St. Mary's University School of Law.

ⁱ Even airhead performers understand the concept of "Long Time Gone".

ⁱⁱ It's normally consistent with the best interests of the bank teller to hand over the money while staring at the muzzle of an Uzi.

ⁱⁱⁱ *See e.g., In the Matter of Virtual Network Services Corporation*, 902 F.2d 1246 (7th Cir. 1990)(upholding the subordination of IRS's non-pecuniary loss tax penalty claims to those of other unsecured creditors, even though the IRS had done nothing inequitable); *Schultz Broadway Inn v. United States*, 912 F.2d 230 (8th Cir. 1990)(subordinating tax penalty without misconduct). However, it is important to note that those findings become questionable in light of the Supreme Court's subsequent reversal of two cases in which bankruptcy courts equitably subordinated federal tax penalties. *See United States v. Noland*, 517 U.S. 535 (1996), *rev'g* 48 F.3d 210 (6th Cir. 1995); *United States v. Reorganiaed CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996), *rev'g* 53 F.3d 1155 (10th Cir. 1995). The Supreme Court unanimously held that the bankruptcy court's exercise of its power of equitable subordination must not have the "inevitable result" of equitably subordinating "every tax penalty." *Noland*, 517 U.S. at 539-43; *see also Reorganized CF & I Fabricators*, 518 U.S. at 228-29.

^{iv} Section 726(a)(4) subordinates any allowed claim, "whether secured or unsecured, for any . . . penalty . . . or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such . . . penalty . . . or damages are not compensating for actual pecuniary loss suffered by the holder of such claim," to certain other claims.

^v *See In re Independent. Ref. Corp.*, 65 B.R. 622, 626 n.3 (Bankr. S.D. Tex. 1986); *In re Cassis Bistro, Inc.*, 188 B.R. 472, 475 (Bankr. S.D. Fla. 1995); *Copeland Enterprises, Inc.*, 133 B.R. 837, 842 (W.D. Tex. 1991); *In re New York Med. Group*, 265 B.R. 408 (Bankr. S.D.N.Y. 2001).

FALL 2004 BANKRUPTCY SECTION CALENDAR OF EVENTS

OCTOBER

October 6, 2004 5:00 p.m.

- **Event Name:** **Dallas County Bar Association** Retirement Event for Judge Harold C. Abramson

Location: Dallas,
Belo Mansion

Phone: (214) 220-7400

October 18, 2004 at 12:00 p.m.

- **Event Name:** **Tarrant County (Ft. Worth) Bar Association** Bankruptcy Law Section Meeting and CLE

Location: Fort Worth
Petroleum Club

Phone: (817) 338-4092

October 27, 2004 at 12:00 p.m.

- **Event Name:** **Houston Bar Association**, Brown Bag with the Bankruptcy Judges

Location: Houston Club

Phone: (713) 759-1133

NOVEMBER

November 3, 2004 5:00 p.m.

- **Event Name:** **Dallas County Bar Association** Prepackaged Plans – Track or Trap?

Location: Dallas, Belo Mansion

Phone: (214) 220-7400

November 17, 2004 12:00 p.m.

- **Event Name:** **Houston Bar Association**, Bankruptcy reform and the future of the economy

Location: Houston Club

Phone: (713) 759-1133

November 17, 2004 12:00 p.m.

- **Event Name:** **Emerging Trends in Bankruptcy and Bankruptcy Litigation in Texas**

Location: The Melrose Hotel, Dallas Texas

www.lorman.com

November 18-19, 2004

- **Event Name:** **23rd Annual UT Bankruptcy Conference**

Location: Four Seasons Hotel, Austin, Texas

Phone: (512) 475-6700

DECEMBER

December 1, 2004 5:00 p.m.

- **Event Name:** **Dallas County Bar Association** Best Practices and Pet Peeves—Judges Panel

Location: Dallas,
Belo Mansion

Phone: (214) 220-7400

TROOP MOVEMENTS

Charles E. Long has joined the Houston office of Stumpf Craddock Massey & Pulman

John P. Melko has finally seen the light and returned to Houston after a sojourn in North Carolina. He has joined Gardere Wynne Sewell LLP as a partner in their Houston office.

William R. Greendyke, formerly bankruptcy judge for the Southern District of Texas, has joined Fulbright & Jaworski LLP as a partner in their Houston office.

Judy Elkin has relocated from the Dallas office of Haynes and Boone, LLP to that firm's New York office.

The firm of **Floyd Jones Rios Wahrlich** has merged with the firm of **Munsch Hardt Kopf & Harr P.C.**, becoming that firm's Houston office.

David R. Jones has joined the firm of Porter & Hedges, LLP.

Clifton Jessup, Jr. and **Bruce White**, formerly partners in the Dallas office of Patton Boggs LLP, have become partners in the Dallas office of Greenberg Traurig LLP. Associates **Vickie Driver**, **Bryan Elwood**, and **William Medford** joined them in that move.

James Wade Holt, formerly law clerk to the Hon. William R. Greendyke, has become an associate in the Houston office of Jackson Walker LLP.

Joshua Wolfshohl, formerly law clerk to the Hon. Wesley W. Steen, has become an associate with the Houston firm of Porter & Hedges, LLP.

The Austin office of Winstead Sechrest & Minick P.C. has relocated to 401 Congress Avenue, Suite 2100, Austin, Texas 78701. The telephone and fax numbers remain the same.

HOUSTON BANKRUPTCY PRACTITIONERS **FORM HONORABLE ARTHUR L. MOLLER/** **DAVID B. FOLTZ, JR. AMERICAN INN OF COURT**

The Honorable Arthur L. Moller/David B. Foltz, Jr. American Inn of Court was recently organized by Houston bankruptcy practitioners. The Inn is a specialized American Inn of Court for bankruptcy practitioners in the Houston metropolitan area. The Inn includes practitioners across the broad spectrum of consumer and commercial bankruptcy law as well as practitioners in all types of bankruptcy practice, from small and large firms to in-house counsel and government attorneys.

The Moller/Foltz Inn is named for The Honorable Arthur L. Moller, a former bankruptcy judge in the Southern District of Texas, and David B. Foltz, Jr., a distinguished bankruptcy practitioner and mentor. The purpose of the American Inns of Court is to raise the standards of the legal profession. Each Inn is composed of judges, experienced lawyers and law professors, as well as less experienced lawyers and law students. Participation in The Moller/Foltz Inn allows each member to enhance the professional and ethical quality of his or her bankruptcy practice in the community. In addition, The Moller/Foltz Inn will strive to strengthen the bankruptcy bar and facilitate communication between the bench and the bar.

There are four levels of Inn membership. The first level of membership consists of the Masters of the Inn, who are bankruptcy practitioners with more than fifteen years experience, judges and law professors. The second level of membership consists of the Barristers, who are practitioners of bankruptcy law for more than five years but not more than fifteen years. The third level of membership consists of the Associates, who are practitioners of bankruptcy law for five years or less. The fourth level of membership consists of Pupils, who are third year law students interested in bankruptcy law.

One of the key aspects of the American Inns of Court system is the participation by members of each Inn. In the Inn, members are assigned to teams. Each team is responsible for the

formulation and presentation of an Inn program during the year. In the team setting, members have the opportunity to work with, not only attorneys from different law firms but also attorneys who practice the different disciplines of bankruptcy law, i.e., consumer or commercial. The team setting also allows less experienced attorneys to interact with and learn from more experienced attorneys.

The Moller/Foltz Inn had an exciting start on May 26, 2004, when the first meeting of the membership was held. Over 65 members were present at the Houston Club for the presentation of the Ceremonial Charter by American Inn of Court Fifth Circuit Trustee Michael McConnell. The Honorable Carolyn King, Fifth Circuit Judge, made the opening presentation. Swing Harre, Director of Chapter Relations from National, spoke to the members of the new Inn regarding the responsibilities and opportunities for the new Inn. Tom Henderson made a visual presentation on the lives of Judge Moller and David Foltz. The Honorable Karen K. Brown, United States Bankruptcy Judge, and Evelyn Biery, the first president of the Moller/Foltz Inn, also spoke. With over 100 members, the Inn is looking forward to its first program year.

On September 28, 2004, Team 7 presented "Twenty-Five Things You Need To Know To Practice in the Southern District of Texas (Jeopardy Style)" to the Inn. The dinner program was held at the Junior League Tea Room and was well attended.

The officers of The Moller/Foltz Inn include Evelyn Biery, President; Charles Beckham, President-Elect; Joseph Epstein, Secretary; Mark Davis, Treasurer; Thomas Henderson, Historian/Librarian; and The Honorable Karen K. Brown, Counselor. Elaine McAnelly and Robert Hohenberger are co-administrators of the Moller/Foltz Inn.

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