

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

*Winter 2005*

*Vol. 3., No. 1*

**2<sup>ND</sup> ANNUAL INTERNATIONAL BANKRUPTCY  
LAW SEMINAR IS A SELL OUT!!**

The Bankruptcy Law Section's 2<sup>nd</sup> Annual International Bankruptcy Law Seminar has completely sold out. In fact, it has oversold. When it was initially advertised, the seminar was limited to 100 participants on a first-come, first-served basis. However, additional seats became available and we were able to reserve them immediately. These additional seats allowed a total of 178 people to sign up to attend the seminar, which is scheduled for March 8 through 16, 2005, in Rome and Florence, Italy. The number of attendees has tripled from last year's 1<sup>st</sup> International Bankruptcy Law Seminar, which was held in Paris, France. As was the case last year, many Section members will be accompanied on the trip by spouses, children, parents, and friends.

Three separate travel groups have been arranged--one from Houston, which will be returning from Florence, one from Dallas, which will also be returning from Florence, and a second one from Dallas, which will be returning from Venice. The cost of the trip is \$1543. This price includes airfare on Lufthansa Airlines from DFW or Houston, four nights at the Hotel Quirinale (a four-star hotel in Rome), three nights at the Grand Hotel Baglioni (a four-and-a-half star hotel in Florence), motorcoach transfers between Rome and Florence, airport transfers, the seminar, buffet breakfast daily, and a welcome reception. Fifty people from the Dallas area will then add on three nights in Venice at the Hotel Canneragio Residenza. The Bankruptcy Law Section does not approach this seminar from the standpoint of a fundraiser, but instead views it as a benefit of membership in the Section, and for that reason is committed to keeping the fees for this and future international seminars as low as possible.

The Hon. Steven A. Felsenthal, Chief Judge of the United States Bankruptcy Court for the Northern District of Texas, the Hon. Karen K. Brown, Chief Judge of the United States Bankruptcy Court for the Southern District of Texas, the Hon. Harlin D. Hale, Judge of the United States Bankruptcy Court for the Northern District of Texas, and the Hon. Scott A. Beauchamp, Associate Judge of the 301<sup>st</sup> District Court, Dallas County, Texas, have agreed to attend the seminar

and serve as moderators and attendance monitors. The Bankruptcy Law Section would like to extend its appreciation to Judge and Mrs. Felsenthal, Judge and Mr. Brown, Judge and Mrs. Hale, and Judge Beauchamp for their tremendous contribution to the anticipated success of this seminar.

Several optional tours have been arranged for participants, including tours to Ancient Ostia, the Roman Forum and Coliseum, the Vatican and St. Peter's Basilica, Pompeii and Sorrento, the Leaning Tower of Pisa, the Uffizi Gallery, and the Tuscany Wine Country. The biggest selling optional tour is the Tuscany Wine Tour, with two-thirds of the attendees opting to attend. *(continued on page 2)*

**INSIDE THIS ISSUE . . .**

2 <sup>ND</sup> Annual International Bankruptcy Law Seminar is a Sell Out .....	1
Call for Articles, Calendar Events and Troop Movements .....	2
No Cake for You: The Fifth Circuit Extends Judicial Estoppel to Bankruptcy Trustees .....	3
Two New Bankruptcy Judges Appointed in Texas .....	5
Calendar of Events .....	6
Troop Movements .....	6
The Gold Star .....	7
Bankruptcy Litigation Workshop at UT a Success .....	7

*(continued from page 1)*

The International Seminar Committee has applied to the State Bar of Texas for 16.5 hours of continuing legal education credit, including 4.5 hours of ethics. Speakers include St. Clair Newbern, George McElreath, Victoria Tutterrow, Bonnie Johnson Page, Sandra Steinberg, Christian Sternat, Charles Chesnutt, Gerrit Pronske, Hon. Harlin Hale, Arnaldo Cavazos, James J.S. Johnson, Donald Totusek, Rodney Poirot, Herman Lusky, Julie Koenig, Rodney Tow, Janet Northrup, Peter Weston, Vicki McCarthy, Bettie McCarthy, Charles Fielder, Hon. Steven A. Felsenthal, Hon. Karen K. Brown, Hon. Scott Beauchamp, Robert Wilson, Janna Countryman, Tim Truman, and Diane Reed. The Committee was also fortunate to have as a speaker Giorgio Cherubini, a Rome insolvency expert and former president of INSOL Europe, who will speak about Italian bankruptcy and insolvency laws and procedures. The Bankruptcy Law Section wishes to acknowledge the tremendous work performed by all of the speakers at the seminar. Our speakers expend substantial time and effort in preparing and presenting their papers and the only compensation received by them is a \$50 reduction in the cost of the trip and an invitation to a speakers' dinner.

The Bankruptcy Law Section has already begun planning its 3d Annual International Bankruptcy Law Seminar, which will most likely take place in March 2006 in Greece. We anticipate spending two or three nights in Athens, then boarding a ship for a cruise of the Greek Isles. Limited numbers of seats will be available, so sign up early!!! Details and prices will be announced in March 2005

### **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  
1 Houston Center  
1221 McKinney, Suite 2100  
Houston, Texas 77010

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**.

### **OFFICERS AND COUNCIL MEMBERS OF THE BANKRUPTCY LAW SECTION**

**Charles A. Beckham, Jr.**  
*Chairman*  
Haynes and Boone, LLP

**Deborah D. Williamson**  
*Vice Chair/ Chairman-Elect*  
Cox & Smith Incorporated

**Mary Daffin**  
*Secretary*  
Barrett, Burke, Wilson, Castle, Daffin &  
Frappier, LLP

**Shelby Jordan**  
*Treasurer*  
Jordan, Hyden, Womble & Culbreth

**Tony Davis**  
*Vice-President Professional Education*  
Baker Botts LLP

**Berry Spears**  
*Vice-President Business Bankruptcy*  
Winstead Sechrest & Minick, P.C.

**Merv Waage**  
*Vice-President Consumer Bankruptcy*  
Waage & Waage, LLP

**Deborah Langehennig**  
*Vice-President Public Education*  
Chapter 13 Trustee, W.D. Tex.

**Elizabeth M. Guffy**  
*Vice-President Communications &  
Publications*  
Dewey Ballantine LLP

#### **Council Members**

**Evelyn Biery**  
Fulbright & Jaworski, LLP

**Roger Cox**  
Sanders Baker

**L.E. Creel, III**  
Creel, Sussman & Moore, LLP

**Hon. Harlin D. Hale**  
United States Bankruptcy Court

**Tom Howley**  
Haynes and Boone, LLP

**Patrick Kelley**  
Ireland, Carroll & Kelley, PC

**H. Christopher Mott**  
Gordon & Mott, P.C.

**Clifton R. Jessup, Jr.**  
Greenburg Traurig, LLP

**John Ventura**  
Law Offices of John Ventura, P.C.

# No Cake for You: The Fifth Circuit Extends Judicial Estoppel to Bankruptcy Trustees

by Hon. Harlin D. Hale & Bendel Carr, Jr.<sup>i</sup>

## Introduction

Judicial estoppel, a common law doctrine, arises when a party represents to a court any position, and subsequently takes an adverse, inconsistent position in another proceeding. The doctrine prevents litigants from playing “fast and loose” with courts and making a mockery of the judicial system.<sup>ii</sup> Adopting conflicting positions at the convenience of litigants is abhorred by courts because it allows parties to “have their cake, and eat it too.”<sup>iii</sup>

Bankruptcy cases can present somewhat unique opportunities in which the doctrine of judicial estoppel can arise. For example, judicial estoppel can arise in a debtor’s initial filings with the bankruptcy court. Debtors must list all their assets on the initial petition, schedules, and statement of affairs. Such disclosure is presented as a sworn representation to the court, and the bankruptcy judge and the parties in interest rely upon such representations.<sup>iv</sup> Judicial estoppel may arise from the schedules, which require the listing of any claim or cause of action the debtor holds at the time of filing. A debtor who knowingly omits from his bankruptcy filings a claim or cause of action, and subsequently pursues that action has taken inconsistent positions. Thus, judicial estoppel may preclude the debtor’s pursuing the claim. Importantly, after a recent decision of the Fifth Circuit, this preclusion could extend to the trustee and the bankruptcy estate.

A prominent case on judicial estoppel arising in a bankruptcy context is *In re Coastal Plains, Inc.*<sup>v</sup> In that case, the Fifth Circuit identified the three main elements of judicial estoppel as: the party is judicially estopped only if its position is clearly inconsistent with the previous one; the court must have accepted the previous position; and the non-disclosure must not have been inadvertent.<sup>vi</sup> Recently the Fifth Circuit revisited judicial estoppel and, relying on *Coastal Plains*, made clear that judicial estoppel can preclude even the trustee from bringing the unsecured cause of action.<sup>vii</sup>

## *In re Superior Crewboats*<sup>viii</sup>

### *Factual and procedural background*

Arthur Hudspeath was allegedly injured while disembarking from the Stacey D, a Superior Crewboats vessel, in August 1999. He and his wife filed a Chapter 13 bankruptcy petition in the Eastern District of Louisiana a little more than a year later. The Hudspeaths’ schedules represented that they had no pending or potential lawsuits.<sup>ix</sup> However, on January 18, 2001, they filed a lawsuit against Superior in state court, based on Mr. Hudspeath’s injury.<sup>x</sup>

The Hudspeaths’ Chapter 13 case was converted to Chapter 7 in May 2001, and a trustee was appointed. In July 2001, at the creditors meeting in the converted case, Mrs. Hudspeath told the trustee about the claim against Superior, but she represented that it was barred by Louisiana’s one-year prescriptive period for tort

claims.<sup>xi</sup> Neither of the debtors revealed they had requested service of process in the injury suit just a month earlier.<sup>xii</sup>

Shortly after the debtors revealed the existence of the claim, the Chapter 7 trustee filed a disclaimer and abandonment concerning the suit.<sup>xiii</sup> Thereafter, on October 1, 2001, the bankruptcy court granted the debtors’ discharge and closed the Chapter 7 case as a “no asset” case.<sup>xiv</sup>

On July 31, 2002 Superior Crewboats informed the Chapter 7 trustee that the debtors were continuing the litigation of the prepetition claim. On August 28 (two days after the applicable three-year statute of limitations had run), the trustee moved to reopen the Hudspeaths’ bankruptcy case. The debtors then amended their schedules filed with the bankruptcy court, Superior Crewboats moved to dismiss the litigation, and the Chapter 7 trustee moved to be substituted for the Hudspeaths as plaintiff in their tort case against Superior. The district court denied Superior’s motion to dismiss.<sup>xv</sup>

### *Rationale and holding*

The Fifth Circuit set out the three required elements for judicial estoppel. The first requirement, inconsistent opinions in different proceedings, was disposed of rather easily by the court. The court relied on its earlier *Coastal Plains* opinion, holding that debtors in bankruptcy have an express affirmative duty to disclose even unliquidated and contingent claims and that this

duty of disclosure is continuous.<sup>xvi</sup> The court went on to say that the Hudspeaths' failure to list the claim was "tantamount" to a representation by the debtors that no such claim existed.<sup>xvii</sup> Thus the first prong of judicial estoppel, inconsistent positions, was satisfied.

The court addressed the second prong of judicial estoppel almost as succinctly. It held that the trustee's abandonment of the claim and the bankruptcy court's issuance of the Hudspeaths' discharge and closing the Chapter 7 case as a "no asset" case satisfied the element of the court adopting the prior inconsistent position.<sup>xviii</sup> According to the appeals court, the adoption need not be a part of a formal judgment.<sup>xix</sup>

Finally, the court addressed the third prong of judicial estoppel, the requirement of non-inadvertence. Citing *Coastal Plains*, the court noted that a "debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claim or has no motive for their concealment."<sup>xx</sup> The court noted that, having filed suit against Superior, the Hudspeaths certainly had knowledge of the claim. Their alleged confusion over the limitations period did not "evinced a lack of knowledge" sufficient to excuse them.<sup>xxi</sup> Finally, the court pointed out that the Hudspeaths had the requisite motivation to conceal the claim as they "would certainly reap a windfall had they been able to recover on the undisclosed claim without having disclosed it to the creditors."<sup>xxii</sup>

The court concluded "that judicial estoppel barred the personal injury suit as a matter of law."<sup>xxiii</sup> The Hudspeaths were not allowed to re-open their bankruptcy case to amend their schedules, and the matter was remanded to the district court with instructions to dismiss

the Hudspeaths' claim against Superior.

Most of court's discussion in *Superior Crewboats* focused on the ability of the *debtors* to bring the action and only tangentially addresses the ability of the *trustee* to bring it. However, the fact that the court was extending the holding of judicial estoppel to the trustee is clear. The court specifically held that the trustee's motion to substitute for the Hudspeaths as plaintiff was moot in light of the ruling that the claim was barred by judicial estoppel and dismissed the suit.<sup>xxiv</sup>

The result in *Superior* seems rather harsh on the trustee, the estate, and creditors, and perhaps unduly merciful on Superior, the alleged tortfeasor. However, judicial estoppel is intended to protect the judicial process alone and not the litigants. Hence, neither protection of tortfeasors nor injustice to creditors are factors the Fifth Circuit considers when applying judicial estoppel.

### Conclusion

In the Fifth Circuit, a debtor's dereliction of the duty to disclose may invoke judicial estoppel, and such invocation may extend to the trustee and the bankruptcy estate, regardless of fault of the trustee or the effect on the creditors. If judicial estoppel applies, the debtor does not get to "have his cake and eat it too," and trustees and creditors may get no cake either.<sup>xxv</sup>

<sup>i</sup> Judge Hale is a Bankruptcy Judge for the Northern District of Texas; Bendel Carr is a second year student at the Paul M. Hebert Law Center on the LSU Campus, who has served as an extern for Judge Hale.

<sup>ii</sup> *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (5<sup>th</sup> Cir. 1999).

<sup>iii</sup> *MV Stacey D v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 333 (5<sup>th</sup> Cir. 2004).

<sup>iv</sup> For example, the listing of no assets on a Chapter 7 petition or schedules will likely give rise to the closing of the bankruptcy as a "no-asset" case and the discharge of the debtor.

<sup>v</sup> 179 F.3d 197 (5<sup>th</sup> Cir. 1999).

<sup>vi</sup> 179 F.3d at 206.

<sup>vii</sup> *MV Stacey D v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330 (5<sup>th</sup> Cir. 2004).

<sup>viii</sup> *Id.*

<sup>ix</sup> 374 F.3d at 333.

<sup>x</sup> *Id.*

<sup>xi</sup> Debtor informed creditors that the suit had prescribed based on a belief that the action was governed by Louisiana's one-year prescription for torts. The action is governed by maritime law and the correct prescription is three years. 374 F.3d at 333 n.1.

<sup>xii</sup> 374 F.3d at 333.

<sup>xiii</sup> *Id.*

<sup>xiv</sup> 374 F.3d at 333-34.

<sup>xv</sup> 374 F.3d at 334.

<sup>xvi</sup> 374 F.3d at 335.

<sup>xviii</sup> *Id.*

<sup>xix</sup> *Id.*

<sup>xx</sup> *Id.* The rationale for this should be prescription does not preclude the claim but only provides for an affirmative defense that must be raised.

<sup>xxi</sup> *Id.*

<sup>xxii</sup> 374 F.3d at 336.

<sup>xxiii</sup> *Id.*

<sup>xxiv</sup> *Id.*

<sup>xxv</sup> 374 F.3d at 333.

# Troop Movements

**The Honorable Russell F. Nelms** was appointed to the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division. His investiture was held on February 10, 2005 at the Eldon B. Mahon United States Courthouse with a reception following at the Petroleum Club in Fort Worth.

**Patrick Autry**, formerly with Matthews & Branscomb, has joined Plunkett & Gibson, Inc. in San Antonio

**C. Daniel Roberts & Associates, P.C.** has relocated to the Wolf-Roberts House, 1602 East Cesar Chavez Street, Austin, Texas 78702. All telephone and fax numbers will remain the same.

**Holly M. Anderson** and **Matthew Ray Reed** have joined the Houston office of Thompson & Knight as associates.

**The Honorable Jeffrey Bohm** was appointed to the United States Bankruptcy Court for the Southern District of Texas, Houston Division. Judge Bohm's investiture was held on January 27, 2005, at the Bob Casey United States Courthouse, with a reception following at the City Club in Houston..

**Hughes, Watters & Askanase LLP** have moved their offices to Three Allen Center, 333 Clay, 29th Floor, Houston, Texas 77002. All telephone numbers will remain the same.

## SAVE THE DATE

**BANKRUPTCY BENCH/ BAR CONFERENCE.....** The Bankruptcy Law Section of the State Bar of Texas is offering its first Bench/Bar Conference June 1-3, 2005 at the Westin La Cantera Resort in San Antonio. The planning committee has a commitment that 16 of the state's 18 bankruptcy judges will attend. Brochures will be available on the Bankruptcy Law Section's listserve and website at the end of February. Because of the format and the limited meeting space at the resort, attendance will be limited to the first 240 to register, to be divided equally between the four districts. The format for the program includes breakout sessions on consumer and commercial topics, roundtable discussions and numerous panels with judges and experienced practitioners. The committee is also planning social events for attendees, including an opening reception, a Riverwalk dinner, golf, tennis, spa services, a 5k fun run and a hospitality suite at the resort. The luncheon speaker on Thursday will be Judge Edward Prado of the 5th Circuit Court of Appeals.

**NATIONAL CONFERENCE OF BANKRUPTCY JUDGES.....**The Seventy Ninth Annual N.C.B.J. Meeting will be held in San Antonio on November 2 through 5, 2005. Be on the look for more information.

## 2005 BANKRUPTCY SECTION CALENDAR OF EVENTS

### FEBRUARY

February 22, 2005 at 5 pm

- **Event Name:** *San Antonio Bankruptcy Section Bar Meeting* (held the fourth Tuesday of each month)

**Location:** San Antonio  
Country Club

**Phone:** (210)342-3121

February 25, 2005 (All Day)

- **Event Name:** *Houston Bar Association Bankruptcy Institute*

**Location:** South Texas  
College of Law

**Phone:** (713) 759-1133

February 28, 2005 at 12:00 pm

- **Event Name:** *Tarrant County (Ft. Worth) Bar Association Bankruptcy Law Section Meeting and CLE* (held the third Monday of each month)

**Location:** Fort Worth Petroleum Club

**Phone:** (817) 338-4092

### MARCH

March 2, 2005 5:00 p.m.

- **Event Name:** *Dallas County Bar Association Meeting* (held the first Monday of each month)

**Location:** Dallas,  
Belo Mansion

**Phone:** (214) 220-7400

March 30, 2005 at 12:00 p.m.

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

**Location:** Houston Club

**Phone:** (713) 759-1133

### APRIL

April 1, 2005

- **Event Name:** *Best Practices in Chapter 11 Bankruptcy Cases*

**Location:** Plano, Texas

**Phone:** (972) 244-3400

### MAY

May 11, 2005

- **Event Name:** *Bankruptcy Boot Camp*

**Location:** Four Seasons: Austin, Texas

**Phone:** (800) 204-2222 (x1574)

May 12-13, 2005

- **Event Name:** *Advanced Business Bankruptcy Course*

**Location:** Four Seasons: Austin, Texas

**Phone:** (800) 204-2222 (x1574)

May 19-20, 2005

- **Event Name:** *Collections and Creditors' Rights*

**Location:** Houston, Texas

**Phone:** (800) 204-2222 (x1574)

**THE STATE BAR  
OF TEXAS  
BANKRUPTCY SECTION  
SINCERELY THANKS  
THE MEDLEH GROUP  
FOR THEIR  
SPONSORSHIP OF OUR  
BANKRUPTCY SECTION  
NEWSLETTER....**

for more information about  
The MedLeh Group,  
see [www.themedlehgroup.com](http://www.themedlehgroup.com)  
or contact Wes Davis  
at (832) 325-4418

## **PRO BONO**

With consumer bankruptcy filings in the United States rising to an all time high, many debtors who file or who need to file bankruptcy cases cannot afford counsel to commence those cases. Bankruptcy Practitioners can assist these individuals with just a small commitment of time.

The Bankruptcy Section is forming a Pro Bono Committee to develop pro bono programs for Texas bankruptcy practitioners. Pro bono services are a valuable resource to the community for those unable to afford competent legal assistance. If you are interested in serving on the committee, please contact Debbie Langehennig at [trustee@ch13austin.com](mailto:trustee@ch13austin.com) or (512) 916-9162.

## **Bankruptcy Litigation Workshop at UT a Success**

For the second year in a row, the Bankruptcy Law Section co-sponsored the Advanced Pre-Trial Practice and Procedure Workshop ,a special seminar at the University of Texas Law School.

This year's seminar was held in the courtroom of the law school on January 20 and 21 and was well attended.

The workshop is a little different than most legal seminars. First, the seminar focuses solely upon pretrial aspects of an adversary proceeding or contested matter. Also, the faculty is encouraged to experiment in the presentations. For example, the programs tend to be more participation and less presentation. This year the program included distribution of a seminar fact pattern to registrants before arrival, actual oral argument, video and a question and answer session with sitting judges.

Lawyers and professionals from all over Texas attended, as well as judges from each of the four districts. A networking lunch and a cocktail hour were provided to the participants on the first day.

The participants' feedback to the planning committee on the presentations and the materials has been good. They indicate that the attendees enjoyed the seminar's interactive format, its more informal and practical approach, and the presenters' thorough presentation.

For those of you who have not attended this seminar before, we encourage you to watch for information about the 2006 session. This is a very practical and entertaining way to add to your CLE hours.

## EDITORS

### **Editor-in-Chief**

Elizabeth M. Guffy  
DEWEY BALLANTINE L.L.P.  
700 Louisiana, Suite 1900  
Houston, Texas 77002  
Telephone: (713) 445-1564  
Facsimile: (713) 445-1533  
eguffy@deweyballantine.com

### **Co-Editor**

Kourtney P. Lyda  
Haynes and Boone, L.L.P.  
1000 Louisiana, Suite 4300  
Houston, Texas 77002  
Telephone: (713) 547-2590  
Facsimile: (713) 236-5687  
Kourtney.Lyda@haynesboone.com

State Bar of Texas  
Bankruptcy Law Section  
c/o Haynes and Boone, LLP  
1000 Louisiana, Ste. 4300  
Houston, Texas 77002

Postage  
Here

Affix Address Label Here